CYCLOPEDIA

OF

LAW AND PROCEDURE

WILLIAM MACK, LL.D.
EDITOR-IN-CHIEF

VOLUME XXXIII

NEW YORK
THE AMERICAN LAW BOOK COMPANY
LONDON: BUTTERWORTH & CO., 12 BELL YARD
1909

J. B. LYON COMPANY
PRINTERS AND BINDERS
ALBANY, N. Y.

To

CHARLES WALTER DUMONT

more than to any other man is due the existence of the Cyclopedia of Law and Procedure. His was the idea; his was the plan; and his has been the business ability and energetic management, as organizer and president of The American Law Book Company, which have made possible the successful publication of these volumes, which are therefore respectfully dedicated to him.

William Mack.

TABLE OF TITLES, EDITORS, AND CONTRIBUTORS

CITE THIS VOLUME

33 Cyc.

FOLLOWED BY PAGE.

RAILROADS

By James A. Gwyn * and Henry H. Skyles †

* Author of "Escheat," 16 Cyc. 537; "Estates," 16 Cyc. 595; "Ferries," 19 Cyc. 491; "Juries," 24 Cyc. 82. Joint author of "Easements," 14 Cyc. 1134; "Forcible Entry and Detainer," 19 Cyc. 1108.

† Author of "Fires," 19 Cyc. 977; "Fish and Game," 19 Cyc. 986; "Fornication," 19 Cyc. 1433; "Improvements," 22 Cyc. 1; "Informations in Civil Cases," 22 Cyc. 716; "Joint Tenancy," 23 Cyc. 482; "Liens," 25 Cyc. 655. Joint author of "Gaming," 20 Cyc. 873; and of a treatise on the "Law of Agency."

CROSS-REFERENCES

For Matters Relating to:
Condemnation Proceedings, see EMINENT DOMAIN, 15 Cyc. 543.
Constitutionality of Legislation Affecting Railroads, see CONSTITUTIONAL LAW, 8 Cyc. 695.
Corporation generally, see CORPORATIONS, 10 Cyc. 1.
Interstate Commerce, see COMMERCE, 7 Cyc. 407.
Railroad Company:
As Common Carrier, see CARRIERS, 6 Cyc. 352.
As Employer, see MASTER AND SERVANT, 26 Cyc. 941.
Street Railroad see STREET RAILROADS.
Taxation of Railroad in General, see TAXATION.

I. DEFINITION, NATURE, AND REGULATION.*

A. Definition and Nature — 1. DEFINITION — a. Of Railroad.[1] A railroad has been defined as a road specially laid out and graded, having parallel rails of iron or steel for the wheels of carriages or cars, drawn by steam or other motive power, to run upon.[2] The terms "railroad" and "railway" are used interchange-

1. **Lateral or branch roads** see *infra*, IV, B, 2, b.
Street railroads see STREET RAILROADS.

2. Rapalje & L. L. Dict. [*quoted* in Peoria, etc., R. Co. *v.* Tamplin, 156 Ill. 285, 294, 40 N. E. 960].
Other definitions are: "A graded road or way on which rails of iron or steel are laid for the wheels of cars to run upon, carrying heavy loads, usually propelled by steam." Funk *v.* St. Paul City R. Co., 61 Minn. 435, 437, 63 N. W. 1099, 52 Am. St. Rep. 608, 29 L. R. A. 208.
"A road graded and having rails of iron or other material for the wheels of railroad cars to run upon." Bouvier L. Dict. [*quoted* in State *v.* Wiggins Ferry Co., 208 Mo. 622, 641].
"A road or way on which iron rails are laid for wheels to run on, for the conveyance of heavy loads in vehicles." Webster Dict. [*quoted* in Dinsmore *v.* Racine, etc., R. Co., 12 Wis. 649, 657].
"A way upon which trains pass by means of rails." Doughty *v.* Firbank, 10 Q. B. D. 358, 359, 48 J. P. 55, 52 L. J. Q. B. 480, 48 L. T. Rep. N. S. 530.
"The legal signification of the term 'railroad' is not only a road or way on which iron rails are laid, but a road as incident to the possession or ownership of which important franchises and rights affecting the

* By James A. Gwyn.

ably and are ordinarily regarded as synonymous,[3] unless the connection in which they are used shows that a distinction as to the character of the road is intended,[4] although more commonly the term "railroad" is used with reference to ordinary commercial railroads, and the word "railway" in connection with the word "street" to designate street railways.[5] The term "railroad" has no definite and precise signification either as to the character of the road,[6] or the width, character, or amount of the structure, land, or property included.[7] This must be determined from the connection in which the term is used,[8] the proper construction, purpose, and intention of the statute,[9] or of the contract, instrument, or conveyance in which it appears.[10] The term "railroad" is broad enough to include street railroads,[11] and may, or may not, according to the purpose and intention of the statutes;[12] but standing alone it usually refers to ordinary commercial railroads

public are attached." Gibbs *v.* Drew, 16 Fla. 147, 149, 26 Am. Rep. 700.

3. *Georgia.*— Davis *v.* State, 105 Ga. 808, 23 S. E. 158.

Minnesota.— State *v.* Brin, 30 Minn. 522, 16 N. W. 406.

Pennsylvania.— Old Colony Trust Co. *v.* Allentown, etc., Rapid Transit Co., 192 Pa. St. 596, 44 Atl. 319; Millevale Borough *v.* Evergreen R. Co., 131 Pa. St. 1, 18 Atl. 993, 7 L. R. A. 369; Hestonville, etc., R. Co. *v.* Philadelphia, 89 Pa. St. 210.

Texas.— Houston, etc., R. Co. *v.* Weaver, (Civ. App. 1897) 41 S. W. 846.

United States.— Massachusetts L. & T. Co. *v.* Hamilton, 88 Fed. 588, 32 C. C. A. 46.

The terms are treated as synonymous in the application of statutes referring in terms to the one or the other (Millevale Borough *v.* Evergreen R. Co., 121 Pa. St. 1, 18 Atl. 993, 7 L. R. A. 369; Hestonville, etc., R. Co. *v.* Philadelphia, 89 Pa. St. 210) and as affecting questions of variance between pleadings and proof (Davis *v.* State, 105 Ga. 808, 32 S. E. 158; State *v.* Brin, 30 Minn. 522, 16 N. W. 406) or between a summons and complaint (Central, etc., R. Co. *v.* Morris, 68 Tex. 49, 3 S. W. 457; Galveston, etc., R. Co. *v.* Donahue, 56 Tex. 166).

A distinction which has been suggested as proper and useful is that "the word railroad . . . should be confined to the highway in which the railway is laid, and the word railway to the rails when laid," but the court also said that "we all know, however, that in common parlance these words are used interchangeably." Munkers *v.* Kansas City, etc., R. Co., 60 Mo. 334, 338.

4. Gyger *v.* Philadelphia City R. Co., 136 Pa. St. 96, 20 Atl. 339.

5. Louisville, etc., R. Co. *v.* Louisville City R. Co., 2 Duv. (Ky.) 175; Scott *v.* Farmers, etc., Bank, 97 Tex. 31, 75 S. W. 7, 104 Am. St. Rep. 835.

6. Bloxham *v.* Consumers' Electric Light, etc., Co., 36 Fla. 519, 18 So. 444, 51 Am. St. Rep. 44, 29 L. R. A. 507; Riggs *v.* St. Francois County R. Co., 120 Mo. App. 335, 96 S. W. 707; Massachusetts L. & T. R. Co. *v.* Hamilton, 88 Fed. 588, 32 C. C. A. 46.

"The term 'railroad,' as employed in our general legislation, relates to institutions of a quasi-public character; to highways or roads constructed by the authority of the state, with fixed metallic rails upon which public carriers may propel their carriages or cars speedily in the transportation of passengers and freight. Any way or road having these characteristics is a railroad. It is the mode of construction and chartered use, and not the motive power that determines the character of a railroad." McCleary *v.* Babcock, 169 Ind. 228, 235, 82 N. E. 453.

7. St. Louis, etc., R. Co. *v.* Postal Tel. Co., 173 Ill. 508, 51 N. E. 382; Lake Superior, etc., R. Co. *v.* U. S., 93 U. S. 442, 23 L. ed. 965.

8. Bloxham *v.* Consumers' Electric Light, etc., Co., 36 Fla. 519, 18 So. 444, 51 Am. St. Rep. 44, 29 L. R. A. 507; Riggs *v.* St. Francois County R. Co., 120 Mo. App. 335, 96 S. W. 707.

9. Bloxham *v.* Consumers' Electric Light, etc., Co., 36 Fla. 519, 18 So. 444, 51 Am. St. Rep. 44, 29 L. R. A. 507; Holland *v.* Lynn, etc., R. Co., 144 Mass. 425, 11 N. E. 674; Funk *v.* St. Paul City R. Co., 61 Minn. 435, 63 N. W. 1099, 52 Am. St. Rep. 608, 29 L. R. A. 208; Massachusetts L. & T. Co. *v.* Hamilton, 88 Fed. 588, 32 C. C. A. 46.

10. Peoria, etc., R. Co. *v.* Tamplin, 156 Ill. 285, 40 N. E. 960; Munkers *v.* Kansas City, etc., R. Co., 60 Mo. 334.

11. Bloxham *v.* Consumers' Electric Light, etc., Co., 36 Fla. 519, 18 So. 444, 51 Am. St. Rep. 44, 29 L. R. A. 507; Shreveport Traction Co. *v.* Kansas City, etc., R. Co., 119 La. 759, 44 So. 457; Massachusetts L. & T. Co. *v.* Hamilton, 88 Fed. 588, 32 C. C. A. 46.

12. Bloxham *v.* Consumers' Electric Light, etc., Co., 36 Fla. 519, 18 So. 444, 51 Am. St. Rep. 44, 29 L. R. A. 507; Holland *v.* Lynn, etc., R. Co., 144 Mass. 425, 11 N. E. 674; Funk *v.* St. Paul City R. Co., 61 Minn. 435, 63 N. W. 1099, 52 Am. St. Rep. 608, 24 L. R. A. 208; Massachusetts L. & T. Co. *v.* Hamilton, 88 Fed. 588, 32 C. C. A. 46.

In Pennsylvania it is held that either the word "railroad" or the word "railway" which are used interchangeably and regarded as synonymous will be held to apply to both steam railroads and street railroads unless there appears from the title of the act its purpose or context, something to indicate that a particular kind of road is intended. Philadelphia *v.* Philadelphia Traction Co., 206 Pa. St. 35, 55 Atl. 762.

for the transportation of both freight and passengers,[13] which in their main purposes and functions are essentially different from street railroads,[14] and it is the former class only to which this article applies.[15] Whether a road is properly a railroad does not depend entirely upon its length;[16] its location, course, or direction;[17] the kind of motive power used;[18] its position with reference to the surface of the ground;[19] the character of its traffic;[20] or whether it is owned by a railroad company.[21] The term "railroad" may be so used as to mean the completed road ready for use as distinguished from a merely graded roadway or partly constructed railroad,[22] or from a franchise to construct a railroad.[23] The term may also be used to designate merely the track or road-bed upon which the rails are laid;[24] or it may include the entire right of way;[25] or it may refer merely to the road-bed or right of way with its superstructure exclusive of rolling stock and other property;[26] or it may include various kinds of property both real and personal,[27] and so may

13. Louisville, etc., R. Co. *v.* Louisville City R. Co., 2 Duv. (Ky.) 175; State *v.* Duluth Gas, etc., Co., 76 Minn. 96, 78 N. W. 1032, 57 L. R. A. 63; Funk *v.* St. Paul City R. Co., 61 Minn. 435, 63 N. W. 1099, 52 Am. St. Rep. 608, 29 L. R. A. 208; Scott *v.* Farmers, etc., Bank, 97 Tex. 31, 75 S. W. 7, 104 Am. St. Rep. 835; Massachusetts L. & T. Co. *v.* Hamilton, 88 Fed. 588, 32 C. C. A. 46.

14. State *v.* Duluth Gas, etc., Co., 76 Minn. 96, 78 N. W. 1032, 57 L. R. A. 63.

The distinction between ordinary commercial railroads and street railroads is clearly defined in following cases: Bloxham *v.* Consumers' Electric Light, etc., Co., 36 Fla. 519, 18 So. 444, 51 Am. St. Rep. 44, 29 L. R. A. 507; Louisville, etc., R. Co. *v.* Louisville City R. Co., 2 Duv. (Ky.) 175; Massachusetts L. & T. Co. *v.* Hamilton, 88 Fed. 588, 32 C. C. A. 46.

It is difficult in some cases, owing to the fact that street railway companies have been gradually extending the sphere and character of their operations, to determine in what class a particular road belongs, but it does not obliterate the inherent difference between the main purposes and functions of the two classes. State *v.* Duluth Gas, etc., Co., 76 Minn. 96, 78 N. W. 1032, 57 L. R. A. 63.

15. Street railroads see STREET RAILROADS.

16. *Georgia.*— Bridwell *v.* Gate City Terminal Co., 127 Ga. 520, 56 S. E. 624, 10 L. R. A. N. S. 909.

Kansas.— State *v.* Martin, 51 Kan. 462, 33 Pac. 9.

Minnesota.— State *v.* Eleventh Judicial Dist. Ct., 54 Minn. 34, 55 N. W. 816.

Missouri.—State *v.* Wiggins Ferry Co., 208 Mo. 622, 106 S. W. 1005.

New Jersey.— National Docks, etc., R. Co. *v.* State, 53 N. J. L. 217, 21 Atl. 570, 26 Am. St. Rep. 421.

Pennsylvania.—Sparks *v.* Philadelphia, etc., R. Co., 212 Pa. St. 105, 61 Atl. 881.

17. Bridwell *v.* Gate City Terminal Co., 127 Ga. 520, 56 S. E. 624, 10 L. R. A. 909; Collier *v.* Union R. Co., 113 Tenn. 96, 83 S. W. 155.

18. McCleary *v.* Babcock, 169 Ind. 228, 82 N. E. 453; Massachusetts L. & T. Co. *v.* Hamilton, 88 Fed. 588, 32 C. C. A. 46.

19. Lieberman *v.* Chicago, etc., R. Co. 141 Ill. 140, 30 N. E. 544; Beekman *v.* Brooklyn, etc., R. Co., 89 Hun (N. Y.) 14, 35 N. Y. Suppl. 84; Sparks *v.* Philadelphia, etc., R. Co., 212 Pa. St. 105, 61 Atl. 881.

20. Collier *v.* Union R. Co., 113 Tenn. 96, 83 S. W. 155, holding that if required to do a general railroad business both as to freight and passengers, the fact that the principal part of the business of the road will be the transfer of loaded and empty cars from one railroad to another, and that passengers may rarely if ever pass over the line, does not deprive it of its character as a railroad.

21. State *v.* Wiggins Ferry Co., 208 Mo. 622, 106 S. W. 1005; Doughty *v.* Firhank, 10 Q. B. D. 358, 48 J. P. 55, 52 L. J. Q. B. 480, 48 L. T. Rep. N. S. 530.

22. Troy, etc., R. Co. *v.* Boston, etc., R. Co., 86 N. Y. 107; Manice *v.* Hudson River R. Co., 3 Duer (N. Y.) 426; Miller *v.* Rutland, etc., R. Co., 36 Vt. 452.

23. Wood *v.* Bedford, etc., R. Co., 8 Phila. (Pa.) 94.

24. Peoria, etc., R. Co. *v.* Tamplin, 156 Ill. 285, 40 N. E. 960; Chicago, etc., R. Co. *v.* Eisert, 127 Ind. 156, 26 N. E. 759.

25. St. Louis, etc., R. Co. *v.* Postal Tel. Co., 173 Ill. 508, 51 N. E. 382; Com. *v.* Haverhill, 7 Allen (Mass.) 523; Nashville, etc., R. Co. *v.* Anthony, 1 Lea (Tenn.) 516; Union Pac. R. Co. *v.* Cook, 98 Fed. 281, 39 C. C. A. 86.

26. Beardsley *v.* Ontario Bank, 31 Barb. (N. Y.) 619; Lake Shore, etc., R. Co. *v.* U. S., 93 U. S. 442, 23 L. ed. 965.

A grant by the government of land in aid of a railroad providing that "said railroad shall be, and remain, a public highway for the use of the government of the United States, free from all toll or other charge, for the transportation of any property or troops of the United States" grants to the government only a free use of the track and not of the company's engines, cars, and equipment, and does not entitle the government to require the company to transport its troops or property without charge for the transportation. Lake Superior, etc., R. Co. *v.* U. S., 93 U. S. 442, 23 L. ed. 965.

27. Atchison, etc., R. Co. *v.* Kansas City, etc., R. Co., 67 Kan. 569, 70 Pac. 939, 73 Pac. 899; Knevals *v.* Flor'da Cent., etc., R. Co., 66 Fed. 224, 13 C. C. A. 410; Chamberlain *v.* Walter, 60 Fed. 788.

include all the lands, depots, shops, buildings, structures, and appurtenances incidental to the operation of the road and the transaction of the business of the company.[28] The term "railroad" is also sometimes used as meaning railroad company,[29] but properly speaking there is a clear distinction between the terms "railroad" and "railroad company."[30]

b. Of Railroad Company. A railroad company has been defined as the corporation which lays out, constructs, maintains, or operates a railroad operated by steam power,[31] although the term "railroad company" does not necessarily import a corporation,[32] or that its road shall be operated by steam as a motive power,[33] nor is it essential to the idea of a railroad company that it should both construct and operate a railroad,[34] or that it should own rolling stock.[35] The determination as to whether a particular company is to be regarded as a railroad company or within the application of statutes relating in terms to such companies should be governed chiefly by the fact of engaging in the railroad business,[36] and not by the name of the company,[37] or the primary purpose for which it was incor-

"In common parlance, a railway consists of 'the road' and 'the rolling stock.' The former includes everything that is immovable or affixed to the soil,— such as station-houses, round-houses, platforms, water-tanks and machine-shops." U. S. *v.* Chaplin, 31 Fed. 890, 895, 12 Sawy. 605.

28. *Connecticut.*—State *v.* Railroad Com'rs, 56 Conn. 308, 15 Atl. 756.

Kansas.— Atchison, etc., R. Co. *v.* Kansas City, etc., R. Co., 67 Kan. 569, 70 Pac. 939, 73 Pac. 899.

Maine.— State *v.* Canadian Pac. R. Co., 100 Me. 202, 60 Atl. 901.

New Mexico.— U. S. Trust Co. *v.* Territory, 8 N. M. 673, 47 Pac. 725.

United States.— U. S. *v.* Denver, etc., R. Co., 151 U. S. 1, 14 S. Ct. 11, 37 L. ed. 975; Rock Creek Tp. *v.* Strong, 96 U. S. 271, 24 L. ed. 815; U. S. *v.* Chaplin, 31 Fed. 890, 12 Sawy. 605.

Property not included.— Dwelling-houses and lots for the accommodation of the employees of the railroad company are not necessary appendages of a railroad or of a transportation business, and do not fall within an exemption from taxation. State *v.* Mansfield Tp., 23 N. J. L. 510, 57 Am. Dec. 409.

The phrase "road with its appendages" has been held, under a statute relating to taxation, to mean simply the road and such appendages as depots, car-houses, shops, and other realty, and not to include the equipment, cars, engines, and other personal property. State Treasurer *v.* Somerville, etc., R. Co., 28 N. J. L. 21.

29. Calhoun *v.* Memphis, etc., R. Co., 4 Fed. Cas. No. 2,309, 2 Flipp. 442, 8 Reporter 395.

30. International, etc., R. Co. *v.* Anderson County, 59 Tex. 654, 664, where the court said: "The words 'railroad company' do not mean the same thing as the word 'railroad.' The former may exist without the latter, and even the latter without the former. The one applies to the agency which may construct or own; the other to the thing constructed or owned."

Under the Arkansas statute providing that "All railroads . . . shall be responsible for all damages to persons and property done or caused by the running of trains," the word "railroads" does not mean railroad companies, but the roads owned or operated by them, and a judgment against the lessee of a railroad may be enforced by seizure and sale of the leased road. Little Rock, etc., R. Co. *v.* Daniels, 68 Ark. 171, 56 S. W. 874.

Railroad company defined see *infra*, I, A, 1, b.

31. Holland *v.* Lynn, etc., R. Co., 144 Mass. 425, 427, 11 N. E. 674.

Other definitions are: "A railroad corporation is an artificial person, created by positive law, and invested with franchises involving specific powers and privileges, conferring some of the attributes of sovereignty, to be exercised primarily for the benefits and advantages of the public." Bradley *v.* Ohio River, etc., R. Co., 78 Fed. 387, 389.

The term "railroad company" "applies to the agency which may construct or own" a railroad. International, etc., R. Co. *v.* Anderson County, 59 Tex. 654, 664.

32. State *v.* Mead, 27 Vt. 722.

In their popular sense the words "railroad corporations" are used "as denoting any party engaged in the operation of railroads." Union Pac. R. Co. *v.* De Busk, 12 Colo. 294, 304, 20 Pac. 752, 13 Am. St. Rep. 221, 3 L. R. A. 350.

33. Howley *v.* Central Valley R. Co., 213 Pa. St. 36, 62 Atl. 109, 2 L. R. A. N. S. 138; Sparks *v.* Philadelphia, etc., R. Co., 212 Pa. St. 105, 61 Atl. 881.

Motive power see, generally, *infra*, VI, L.

34. Davenport First Nat. Bank *v.* Davies, 43 Iowa 424, 433, where the court said: "That there can be a railroad company which does nothing but construct the road, and a railroad company which does nothing but operate the constructed road, cannot be doubted. It is not essential to the idea of a railroad company that it should both construct and operate a railway."

35. State *v.* Wiggins Ferry, Co., 208 Mo. 622, 106 S. W. 1005.

36. Bridwell *v.* Gate City Terminal Co., 127 Ga. 520, 56 S. E. 624, 10 L. R. A. N. S. 909; Union Trust Co. *v.* Kendall, 20 Kan. 515.

37. Bridwell *v.* Gate City Terminal Co., 127

porated,[38] or the right or title by which the property is held,[39] and as used in a statute relating to taxation the terms "railroad company" or "railroad corporation" should be construed as designating the character of the property rather than of its ownership.[40] So certain statutes applicable in terms to railroad companies or railroad corporations have been held to apply to a receiver operating a railroad,[41] or a mortgagee or trustee under a mortgage in possession,[42] or to a trust company operating a road for the benefit of bondholders.[43] A company authorized to construct and operate a railroad for the transportation of persons and property is none the less a railroad company because also authorized to conduct some other business, as that of a coal, mining, or manufacturing company;[44] and, although incorporated primarily for some other purpose, if it is also authorized to and does construct and operate a railroad, not only for the transportation of its own product but as a public railway for the conveyance of freight and passengers, it is a railroad company;[45] but a company incorporated as a lumber company, with authority to construct tram roads or railroads and operate locomotives thereon in connection with and for the purposes of its own business, and without any authority to conduct a transportation business for the public generally, is not a railroad company,[46] nor is a union depot company a railroad company.[47]

2. Nature and Status — a. Of Railroad. Railroads may properly be termed public highways,[48] whether constructed by the government itself or by the agency of corporations or individuals under legislative authority,[49] and in some jurisdic-

Ga. 520, 56 S. E. 624, 10 L. R. A. N. S. 909, where the court said that if it were a question of doubt as to what was the real character of a corporation, its name might be considered as having some evidential bearing upon the question, but that the fact that a company is called a "terminal company" cannot change its character if it is a railroad company within the meaning of the law.

38. Union Trust Co. *v.* Kendall, 20 Kan. 515; Kentucky Imp. Co. *v.* Slack, 100 U. S. 648, 25 L. ed. 609.

39. Union Trust Co. *v.* Kendall, 20 Kan. 515.

40. Dubuque *v.* Chicago, etc., R. Co., 47 Iowa 196; State *v.* Wiggins Ferry Co., 208 Mo. 622, 106 S. W. 1005.

41. Wall *v.* Platt, 169 Mass. 398, 48 N. E. 270, holding that a receiver is within the application of a statute making "every railroad corporation" liable for damages by fire communicated by its locomotives.

Penal statutes are strictly construed, and the term "railway company" as used in a statute prescribing a penalty for discrimination in freight rates by railroad companies does not include a receiver operating a railroad. Bonner *v.* Franklin Co-operative Assoc., 4 Tex. Civ. App. 166, 23 S. W. 317.

42. Daniels *v.* Hart, 118 Mass. 543, holding that a trustee under a mortgage who is in possession and operating a railroad is within the application of the statute making every "railroad corporation" liable for damages by fire communicated by locomotives.

43. Union Trust Co. *v.* Kendall, 20 Kan. 515, holding that such trust company is within the application of a statute making "every railway company or corporation" liable for injuries to stock.

44. Randolph County *v.* Post, 93 U. S. 502, 23 L. ed. 957.

45. Kentucky Imp. Co. *v.* Slack, 100 U. S. 648, 25 L. ed. 609, holding that such a company is a railroad company within the application of a statute relating to taxation.

46. Ellington *v.* Beaver Dam Lumber Co., 93 Ga. 53, 19 S. E. 21, holding further that at least in so far as its own employees are concerned this fact is not altered because on some occasions the company did transport passengers and freight for hire.

47. People *v.* Cheeseman, 7 Colo. 376, 3 Pac. 716, holding that a corporation organized for the purpose of building and maintaining a union depot for railroads in a certain city and constructing such lines of railroad within the city limits as may be necessary for the accommodation and use of railroads making such city a point for the delivery of freight and passengers is not an ordinary railroad company.

48. Chicago, etc., R. Co. *v.* Chicago, 140 Ill. 309, 29 N. E. 1109; White River Turnpike Co. *v.* Vermont Cent. R. Co., 21 Vt. 590; Cherokee Nation *v.* Southern Kansas R. Co., 135 U. S. 641, 10 S. Ct. 965, 34 L. ed. 295; Olcott *v.* Fond du Lac County, 16 Wall. (U. S.) 678, 21 L. ed. 382.

A railroad constructed and used for private purposes exclusively would not be a public highway even in the sense that the term is applied to railroad companies (see Murch *v.* Concord R. Corp., 29 N. H. 9, 61 Am. Dec. 631); and a constitutional provision that railroads are hereby declared to be public highways and shall be free to all persons for the transportation of their persons and property under such regulations as may be prescribed by law, does not apply to a private switch from a railroad to coal lands not owned by the railroad company and for the private use of the owner of such lands (Koelle *v.* Knecht, 99 Ill. 396).

49. Olcott *v.* Fond du Lac County, 16 Wall. (U. S.) 678, 21 L. ed. 382.

tions are expressly declared to be such by constitutional or charter provisions.[50] A railroad is not, however, a highway in the same sense as a wagon road,[51] and is not a thoroughfare which may be used by pedestrians,[52] nor is it a highway in the sense that the public may use upon it their own vehicles, cars, or motive power as upon a turnpike or canal,[53] although this seems to have been the early conception of the character of a railroad;[54] but as to their purpose, which is the transportation of persons and property for the general public, they are distinctly highways,[55] and they are none the less such because tolls or fares are charged for transportation,[56] or because the public may not use upon them their own cars or motive power.[57]

b. Of Railroad Company. Railroad companies as to their exact status have been said to be in a class by themselves,[58] being neither strictly private nor strictly public corporations.[59] They are, technically speaking, private corporations,[60] as distinguished from municipal or other strictly public corporations,[61] while on the other hand they are essentially different from strictly private corporations,[62] and,

50. Toledo, etc., R. Co. *v.* Pence, 68 Ill. 524; Kansas City, etc., R. Co. *v.* Louisiana Western R. Co., 116 La. 178, 40 So. 627, 5 L. R. A. N. S. 512; Hyde *v.* Missouri Pac. R. Co., 110 Mo. 272, 19 S. W. 483; McLucas *v.* St. Joseph, etc., R. Co., 67 Nebr. 603, 93 N. W. 928, 97 N. W. 312.

Tracks included.—A constitutional provision declaring all railroads to be public highways and all railroad companies common carriers applies not only to the main tracks but all subsidiary tracks used for the purposes of railroad traffic. Kansas City, etc., R. Co. *v.* Louisiana Western R. Co., 116 La. 178, 40 So. 627, 5 L. R. A. N. S. 512.

51. Toledo, etc., R. Co. *v.* Pence, 68 Ill. 524.

Railroads are not common highways in the sense that they are under the control and management of municipalities (Sun Printing, etc., Assoc. *v.* New York, 152 N. Y. 257, 46 N. E. 499, 37 L. R. A. 788 [*affirming* 8 N. Y. App. Div. 230, 40 N. Y. Suppl. 607]); and a railroad track is not a public highway within the application of a statute making it a misdemeanor to use abusive, insulting, or vulgar language "upon the public highway" (Comer *v.* State, 62 Ala. 320).

52. Hyde *v.* Missouri Pac. R. Co., 110 Mo. 272, 19 S. W. 483.

53. Toledo, etc., R. Co. *v.* Pence, 68 Ill. 524; Beekman *v.* Saratoga, etc., R. Co., 3 Paige (N. Y.) 45, 22 Am. Dec. 679.

54. See Western New York, etc., R. Co. *v.* Buffalo, etc., R. Co., 193 Pa. St. 127, 44 Atl. 242; Camblos *v.* Philadelphia, etc., R. Co., 4 Brewst. (Pa.) 563; Thorne *v.* Taw Vale R., etc., Co., 13 Beav. 10, 51 Eng. Reprint 4.

In Pennsylvania the act of 1834 authorized individuals to place their own cars upon the Columbia and Philadelphia railroad and attach them to the motive power belonging to the state for transportation (Miller *v.* Canal Com'rs, 21 Pa. St. 23); Pennsylvania R. Co. *v.* Canal Com'rs, 21 Pa. St. 9); and under the charter of the Pennsylvania railroad company, Pa. Laws (1846), the road was made a public highway which might be used by persons owning their own cars, the company furnishing the motive power (Trunick *v.* Smith, 63 Pa. St. 18); and in a recent case it is said that the statutes show "the survival as late as 1849 of the primitive conception of a railroad as simply an improved highway," such as a toll-road on which persons might use their own carriages, subject to the payment of toll and getting their motive power from the company (see Western New York, etc., Co. *v.* Buffalo, etc., R. Co., 193 Pa. St. 127, 142, 44 Atl. 242).

55. Sun Printing, etc., Assoc. *v.* New York, 152 N. Y. 257, 46 N. E. 499, 37 L. R. A. 788 [*affirming* 8 N. Y. App. Div. 230, 40 N. Y. Suppl. 607]; Olcott *v.* Fond du Lac County, 16 Wall. (U. S.) 678, 21 L. ed. 382.

56. Sun Printing, etc., Assoc. *v.* New York, 152 N. Y. 257, 46 N. E. 499, 37 L. R. A. 788 [*affirming* 8 N. Y. App. Div. 230, 40 N. Y. Suppl. 607].

57. Beekman *v.* Saratoga, etc., R. Co., 3 Paige (N. Y.) 45, 22 Am. Dec. 679; Olcott *v.* Fond du Lac County, 16 Wall. (U. S.) 678, 21 L. ed. 382.

58. Talcott *v.* Pine Grove Tp., 23 Fed. Cas. No. 13,735, 1 Flipp. 120 [*affirmed* in 19 Wall. 666, 22 L. ed. 227].

59. Leavenworth County Com'rs *v.* Miller, 7 Kan. 479, 12 Am. Rep. 425; Swan *v.* Williams, 2 Mich. 427.

60. *Illinois.*— Wabash River *v.* Houston, 71 Ill. 318.

Massachusetts.—Hale *v.* Hampshire County Com'rs, 137 Mass. 111.

New York.— Waterloo Presb. Soc. *v.* Auburn, etc., R. Co., 3 Hill 567.

Pennsylvania.— Pierce *v.* Com., 104 Pa. St. 150; Timlow *v.* Philadelphia, etc., R. Co., 99 Pa. St. 284; Lippincott *v.* Mine Hill, etc., R. Co., 2 Leg. Chron. 337.

United States.— Adams *v.* Boston, etc., R. Co., 1 Fed. Cas. No. 47, Holmes 30, 4 Nat. Bankr. Reg. 314.

See 41 Cent. Dig. tit. "Railroads," § 4.

61. Wabash River *v.* Houston, 71 Ill. 318; Leavenworth County Com'rs *v.* Miller, 7 Kan. 479, 12 Am. Rep. 425.

62. Leavenworth County Com'rs *v.* Miller, 7 Kan. 479, 12 Am. Rep. 425; Swan *v.* Williams, 2 Mich. 427; Talcott *v.* Pine Grove Tp., 23 Fed. Cas. No. 13,735, 1 Flipp. 120 [*affirmed* in 19 Wall. 666, 22 L. ed. 227].

owing to the character of their functions, the powers with which they are invested, and the duties which they owe to the public,[63] they are usually termed quasi-public corporations.[64]

B. Right to Construct and Operate Railroad — 1. In General. The right to construct, maintain, and operate a railroad and receive tolls or fare for the transportation of freight and passengers is a franchise which can be exercised only by legislative authority;[65] but while, as a matter of common knowledge, practically all railroads are now operated through the agency of corporations,[66] they need not necessarily be so operated but the right may be conferred upon individuals,[67] or unincorporated associations of individuals,[68] or in the absence of any constitutional restriction the right may be conferred upon a municipal corporation.[69] The unauthorized construction of a railroad may be enjoined by a company having a legal right to construct a railroad upon the same location,[70] or another railroad company or property-owner who will be injured thereby.[71]

2. Determination as to Necessity For Road. In some jurisdictions it is required

The object of undertaking these enterprises is probably always the private emolument of the incorporators, but it is none the less true that the object of the government in creating them is public utility, and it is the object designed by the legislature rather than that sought by the company which determines the character of the corporation. Swan *v.* Williams, 2 Mich. 427.

63. Stewart *v.* Erie, etc., Transp. Co., 17 Minn. 372; Chicago, etc., R. Co. *v.* Wabash, etc., R. Co., 61 Fed. 993, 9 C. C. A. 659.

64. Leavenworth County Com'rs *v.* Miller, 7 Kan. 479, 12 Am. Rep. 425; Stewart *v.* Erie, etc., Transp. Co., 17 Minn. 372; Chicago, etc., R. Co. *v.* Wabash, etc., R. Co., 61 Fed. 993, 9 C. C. A. 659; McCoy *v.* Cincinnati, etc., R. Co., 13 Fed. 3; Talcott *v.* Pine Grove Tp., 23 Fed. Cas. No. 13,755, 1 Flipp. 120 [*affirmed* in 19 Wall. 666, 22 L. ed. 227].

It has been said to be a misnomer to attach even the name "quasi-public corporation" to a railroad company, since while its road may be called a quasi-public highway the company itself is a private corporation and nothing more. Pierce *v.* Com., 104 Pa. St. 150.

65. Blake *v.* Winona, etc., R. Co., 19 Minn. 418, 18 Am. Rep. 345; New Jersey Cent. R. Co. *v.* Pennsylvania R. Co., 31 N. J. Eq. 475 [*reversed* on other grounds in 32 N. J. Eq. 755]; Talcott *v.* Pine Grove Tp., 23 Fed. Cas. No. 13,735, 1 Flipp. 120 [*affirmed* in 19 Wall. 666, 22 L. ed. 227].

Ownership of right of way.— It has been stated that while legislative authority is necessary in order to condemn private property for railroad purposes, yet if a private person owned or could procure without condemnation proceedings the land necessary, he might, without legislative authority, construct and operate a railroad and receive compensation or tolls for its use. See Moran *v.* Ross, 79 Cal. 159, 21 Pac. 547; Chicago, etc., R. Co. *v.* Dunbar, 95 Ill. 571.

A land and mining company authorized to hold land and mine the same and to construct a railroad or railroads from any of its land to connect with any railroad or navigable stream, cannot build a railroad independent of its own lands for the mere accommodation of the public and for the pecuniary profit arising from general travel. Warren, etc., R. Co. *v.* Clarion Land, etc., Co., 54 Pa. St. 28.

Opening line for traffic.— The English statute of 5 & 6 Vict. c. 55, provided that a railroad company could not open a line of railway or a portion thereof without notice to the board of trade so that it might be duly inspected (Atty.-Gen. *v.* Great Western R. Co., L. R. 7 Ch. 767); and the board was authorized to order the opening for traffic to be postponed upon a report by its officers or inspectors that an opening of the line would be dangerous to the public by reason of the incompleteness of the work (Atty.-Gen. *v.* Great Western R. Co., 4 Ch. D. 735, 46 L. J. Ch. 192, 35 L. T. Rep. N. S. 921, 25 Wkly. Rep. 330); and the violation of such an order would be restrained by injunction at the suit of the attorney-general without reference to the facts upon which the order was based (Atty.-Gen. *v.* Oxford, etc., R. Co., 2 Wkly. Rep. 330).

66. See Union Pac. R. Co. *v.* De Busk, 12 Colo. 294, 20 Pac. 752, 13 Am. St. Rep. 221, 3 L. R. A. 350.

67. Moran *v.* Ross, 79 Cal. 159, 21 Pac. 547; New York, etc., R. Co. *v.* Forty-Second St., etc., R. Co., 50 Barb. (N. Y.) 309, 32 How. Pr. 481. See also Blake *v.* Winona, etc., R. Co., 19 Minn. 418, 18 Am. Rep. 345.

The power to exercise the right of eminent domain may be conferred by the state upon private individuals (see Eminent Domain, 15 Cyc. 575), provided the road for which the land is to be condemned is not for private use (see Eminent Domain, 15 Cyc. 591).

68. Moran *v.* Ross, 79 Cal. 159, 21 Pac. 547.

69. Sun Printing, etc., Assoc. *v.* New York, 152 N. Y. 257, 46 N. E. 499, 37 L. R. A. 788 [*affirming* 8 N. Y. App. Div. 230, 40 N. Y. Suppl. 607]; Walker *v.* Cincinnati, etc., R. Co., 21 Ohio St. 14, 8 Am. Rep. 24.

70. Warren, etc., R. Co. *v.* Clarion Land, etc., Co., 54 Pa. St. 28.

71. New Jersey Cent. R. Co. *v.* Pennsylvania R. Co., 31 N. J. Eq. 475 [*reversed* on other grounds in 32 N. J. Eq. 755].

as a condition precedent to the exercise of the powers conferred upon railroad companies and the beginning of the construction of the road that it shall be determined by some tribunal designated for that purpose, whether the public convenience and necessity require the construction of the road proposed.[72] In New York this decision is made by the board of railroad commissioners,[73] and upon such application it is the duty of the commissioners to inquire into the prior proceedings to ascertain and determine whether the company is of a character such as the law recognizes and to which it is required that the certificate should be granted, and if it is not the certificate should be refused.[74] The commissioners are not to determine merely whether the public convenience and necessity require any railroad between the points in question, but are to make their decision with reference to the specific road proposed in the articles of incorporation;[75] and while the statute authorizes a finding that only a part of the proposed road is necessary, and the issuing of a certificate for the construction of that part,[76] the decision must be made with reference to the particular route proposed, and the commissioners cannot issue a certificate on condition that the road shall be constructed upon a different route;[77] and if on the hearing the company asks for permission to construct upon a route different from that proposed in the articles of incorporation, the certificate should be denied.[78] Priority of organization does not give a particular company any right to such certificate as against another company desiring to construct a road between the same points;[79] and where rival companies make application at the same time the commissioners have jurisdiction to decide whether a certificate shall be issued to both or only to one, and if only to one, to which one.[80] Whether the public convenience and necessity requires the construction of the proposed road is a question of fact depending upon a great variety of facts and circumstances;[81] but if such necessity is shown

72. Milford, etc., R. Co.'s Petition, 68 N. H. 570, 36 Atl. 545; People *v.* Railroad Com'rs, 160 N. Y. 202, 54 N. E. 697 [*affirming* 40 N. Y. App. Div. 559, 58 N. Y. Suppl. 94]; People *v.* Railroad Com'rs, 92 N. Y. App. Div. 126, 87 N. Y. Suppl. 334; People *v.* Railroad Com'rs, 4 N. Y. App. Div. 259, 38 N. Y. Suppl. 528, 861.

The object of the requirement is to restrict the building of railroads not actually needed in order to protect not only existing railroads but also citizens from investing in alluring but profitless enterprises. Matter of Amsterdam, etc., R. Co., 86 Hun (N. Y.) 578, 33 N. Y. Suppl. 1009.

In New Hampshire the decision is made by the board of railroad commissioners or by three referees appointed by the court, and the provision that they shall "find and report the facts bearing upon the petition" contemplates that they shall find whether the public good requires the proposed road and not merely evidential facts from which the court can determine that question. Milford, etc., R. Co.'s Petition, 68 N. H. 570, 36 Atl. 545.

The refusal of the legislature to grant a charter for a railroad on the ground that the public good did not require it does not bar the applicants from petitioning for a determination of that question, under N. H. Pub. St. c. 156. Milford, etc., R. Co.'s Petition, 68 N. H. 347, 44 Atl. 483.

73. See People *v.* Railroad Com'rs, 92 N. Y. App. Div. 126, 87 N. Y. Suppl. 334; and cases cited *supra*, note 72.

74. People *v.* Railroad Com'rs, 105 N. Y. App. Div. 273, 93 N. Y. Suppl. 584 (where the certificate of incorporation was invalid because not properly acknowledged); Matter of Kings, etc., R. Co., 6 N. Y. App. Div. 241, 39 N. Y. Suppl. 1004 (where the incorporation was invalid because ten per cent of the capital stock had not been paid in in cash as required by law).

Publication of articles of association.— Where the articles of association of a railroad company were published in the counties in which the proposed road extended for three weeks before any hearing was had upon an application to the railroad commissioners for a certificate of public necessity, such publication was sufficient. People *v.* Railroad Com'rs, 101 N. Y. App. Div. 251, 91 N. Y. Suppl. 977 [*affirmed* in 184 N. Y. 563, 76 N. E. 110].

75. People *v.* Railroad Com'rs, 4 N. Y. App. Div. 259, 38 N. Y. Suppl. 528, 861.

76. See People *v.* Railroad Com'rs, 92 N. Y. App. Div. 126, 87 N. Y. Suppl. 334.

77. People *v.* Railroad Com'rs, 92 N. Y. App. Div. 126, 87 N. Y. Suppl. 334.

78. Matter of Ticonderoga Union Terminal R. Co., 116 N. Y. App. Div. 56, 101 N. Y. Suppl. 107.

79. People *v.* Railroad Com'rs, 81 N. Y. App. Div. 237, 81 N. Y. Suppl. 26 [*affirmed* in 176 N. Y. 577, 68 N. E. 1123]; People *v.* Railroad Com'rs, 4 N. Y. App. Div. 259, 38 N. Y. Suppl. 528, 861; Matter of Depew, etc., R. Co., 92 Hun (N. Y.) 406, 36 N. Y. Suppl. 991.

80. People *v.* Railroad Com'rs, 4 N. Y. App. Div. 259, 38 N. Y. Suppl. 528, 861.

81. People *v.* Railroad Com'rs, 81 N. Y.

a certificate should not be denied because of a doubt as to whether the road would be a paying one,[82] nor is the fact that there is already adequate provision for through traffic sufficient reason for denying such certificate to another company, if there is not adequate provision for local traffic.[83] The commissioners have a very wide discretion in determining what evidence they will or will not hear on such applications.[84] The decision of railroad commissioners as to whether the proposed road is necessary is the exercise of a judicial function which may be reviewed on certiorari;[85] but their decision will not be reversed unless it clearly appears to have been based upon erroneous legal principles or is contrary to the clear weight of evidence.[86] The statute also provides in cases where the certificate is refused for a certification of the record made before the commissioners and an application to the appellate division of the supreme court, who may in their discretion order the commissioners to issue the certificate.[87] This proceeding applies only where the certificate is refused,[88] and has been held to be not in the nature of a review of the decision of an inferior tribunal where the burden is upon the petitioner to show affirmatively that the commission erred, but in the nature of an original application to be decided by the court upon the record made before the commissioners or upon such further evidence as the court may deem necessary,[89] the decision of the court as to matters of law being reviewable by the

App. Div. 242, 81 N. Y. Suppl. 20 [*affirmed* in 175 N. Y. 516, 67 N. E. 1088].

Sufficiency of showing as to necessity.— The following cases the facts of which it is impracticable to set out at length are illustrative as to what facts and circumstances are sufficient to show a necessity for the construction of a proposed railroad and authorize the issuing of a certificate to that effect (*In re* Rochester, etc., Traction Co., 118 N. Y. App. Div. 521, 102 N. Y. Suppl. 1112; People *v.* Railroad Com'rs, 99 N. Y. App. Div. 85, 91 N. Y. Suppl. 375; People *v.* Railroad Com'rs, 53 N. Y. App. Div. 61, 65 N. Y. Suppl. 597 [*affirmed* in 164 N. Y. 572, 58 N. E. 1091]; Matter of Long Lake R. Co., 11 N. Y. App. Div. 233, 42 N. Y. Suppl. 125); or are insufficient for such purpose so that the certificate should be denied (People *v.* Railroad Com'rs, 160 N. Y. 202, 54 N. E. 697 [*affirming* 40 N. Y. App. Div. 559, 58 N. Y. Suppl. 94]; People *v.* Railroad Com'rs, 124 N. Y. App. Div. 47, 108 N. Y. Suppl. 288 [*affirmed* in 192 N. Y. 47, 84 N. E. 583]; People *v.* Railroad Com'rs, 103 N. Y. App. Div. 123, 93 N. Y. Suppl. 58 [*affirmed* in 184 N. Y. 575, 77 N. E. 1194]; People *v.* Railroad Com'rs, 95 N. Y. App. Div. 38, 88 N. Y. Suppl. 522; Matter of Auburn, etc., R. Co., 37 N. Y. App. Div. 162, 55 N. Y. Suppl. 895; Matter of Kings, etc., R. Co., 6 N. Y. App. Div. 241, 39 N. Y. Suppl. 1004; Matter of Amsterdam, etc., R. Co., 86 Hun (N. Y.) 578, 33 N. Y. Suppl. 1009; Matter of New Hamburgh, etc., R. Co., 76 Hun (N. Y.) 76, 27 N. Y. Suppl. 664).

82. Matter of Ticonderoga Union Terminal R. Co., 116 N. Y. App. Div. 56, 101 N. Y. Suppl. 107.

83. Matter of Rochester, etc., Traction Co., 118 N. Y. App. Div. 521, 102 N. Y. Suppl. 1112.

84. People *v.* Railroad Com'rs, 81 N. Y. App. Div. 237, 81 N. Y. Suppl. 26 [*affirmed* in 176 N. Y. 577, 68 N. E. 1123], holding that their discretion is much broader than that permitted to a court where the parties have a right to insist upon the strict rules of evidence being administered, and that unless it appears that the commissioners have utterly misconceived the real inquiry before them they should be at liberty to reject such evidence as they do not care to hear.

85. People *v.* Railroad Com'rs, 160 N. Y. 202, 54 N. E. 697 [*affirming* 40 N. Y. App. Div. 559, 58 N. Y. Suppl. 94].

Evidence to be returned.— The commissioners should return all the evidence taken before them material to the question as to whether the public convenience and necessity require the proposed road, but not matters which they may have heard but which are foreign to this question, such as statements made to them in regard to the financial backing of the company or its ability to complete the road. People *v.* Railroad Com'rs, 76 N. Y. App. Div. 302, 79 N. Y. Suppl. 1143 [*affirming* 39 Misc. 1, 78 N. Y. Suppl. 750].

86. People *v.* Railroad Com'rs, 53 N. Y. App. Div. 61, 65 N. Y. Suppl. 597 [*affirmed* in 164 N. Y. 572, 58 N. E. 1091]; Matter of Auburn, etc., R. Co., 37 N. Y. App. Div. 162, 55 N. Y. Suppl. 895; Matter of Kings, etc., R. Co., 6 N. Y. App. Div. 241, 39 N. Y. Suppl. 1004.

87. Matter of Rochester, etc., Traction Co., 118 N. Y. App. Div. 521, 102 N. Y. Suppl. 1112; Matter of Depew, etc., R. Co., 92 Hun (N. Y.) 406, 36 N. Y. Suppl. 991; Matter of New Hamburgh, etc., R. Co., 76 Hun (N. Y.) 76, 27 N. Y. Suppl. 664.

88. Matter of Depew, etc., R. Co., 92 Hun (N. Y.) 406, 36 N. Y. Suppl. 991, holding that on such a proceeding instituted by a company whose application was refused, the court cannot consider and determine the propriety of the action of the commissioners in granting a certificate to a rival company.

89. Matter of Rochester, etc., Traction Co., 118 N. Y. App. Div. 521, 102 N. Y. Suppl. 1112. See also *In re* Wood, 181 N. Y. 93, 73 N. E. 561, 34 N. Y. Civ. Proc. 127 [*affirming*

court of appeals, it being a final order in a special proceeding and therefore reviewable as a matter of right.[90]

3. License Fees and Taxes.[91] The business of railroad companies is one which may properly be subjected to the payment of an occupation privilege or license-tax,[92] which is a tax for the license or privilege of doing business as distinguished from a tax on property,[93] and the fact that the property of a railroad company is taxed on an *ad valorem* basis will not prevent the requirement of a privilege or license-tax,[94] nor will an exemption from *ad valorem* taxation exempt the company from privilege taxation.[95] In the absence of any constitutional restriction such a tax may be imposed by the legislature itself,[96] or the legislature may delegate such power to a municipal corporation.[97] Pursuant to such authority a license-tax for doing business within their limits may be imposed by a county,[98] or a city;[99] and although a railroad company is compelled by its charter or statute to operate its road through and do business in a certain city, it may still be required

99 N. Y. App. Div. 334, 91 N. Y. Suppl. 225]. *Contra*, Matter of New Hamburgh, etc., R. Co., 76 Hun (N. Y.) 76, 27 N. Y. Suppl. 664.

90. *In re* Wood, 181 N. Y. 93, 73 N. E. 561, 34 N. Y. Civ. Proc. 127 [*affirming* 99 N. Y. App. Div. 334, 91 N. Y. Suppl. 225].

91. Organization tax see *infra*, II, D.

Assessment of railroad property for public improvements see Municipal Corporations, 28 Cyc. 1118.

Licenses in general see Licenses, 25 Cyc. 593.

Taxation in general see Taxation.

Taxation by municipal corporations see Municipal Corporations, 28 Cyc. 1682.

92. Knoxville, etc., R. Co. *v.* Harris, 99 Tenn. 684, 43 S. W. 115, 53 L. R. A. 921; Norfolk, etc., R. Co. *v.* Suffolk, 103 Va. 498, 49 S. E. 658.

As interference with interstate commerce see Commerce, 7 Cyc. 482, 484.

93. Anniston *v.* Southern R. Co., 112 Ala. 557, 20 So. 915; Knoxville, etc., R. Co. *v.* Harris, 99 Tenn. 684, 43 S. W. 115, 53 L. R. A. 921.

94. Norfolk, etc., R. Co. *v.* Suffolk, 103 Va. 498, 49 S. E. 658.

95. Knoxville, etc., R. Co. *v.* Harris, 99 Tenn. 684, 43 S. W. 115, 53 L. R. A. 921.

96. Florida Cent., etc., R. Co. *v.* Columbia, 54 S. C. 266, 32 S. E. 408; Knoxville, etc., R. Co. *v.* Harris, 99 Tenn. 684, 43 S. W. 115, 53 L. R. A. 921; State *v.* Chicago, etc., R. Co., 132 Wis. 364, 112 N. W. 522; State *v.* Chicago, etc., R. Co., 132 Wis. 345, 112 N. W. 515.

Enforcement of payment.— Under a statute approved Nov. 12, 1889, imposing a license-tax on railroad companies for sleeping cars drawn over their roads, and providing that if it is not paid before the first day of October in each year execution may issue against the company, a company cannot be in default under the statute prior to Oct. 1, 1890, and an execution issued prior thereto for failure to pay the license-tax for 1889 is void. Wright *v.* Central R., etc., Co., 85 Ga. 649, 11 S. E. 1031.

A company using the track of another company under a lease or traffic contract is liable for such a tax. Jefferson County *v.* Commonwealth Bd. of Valuation, etc., 117 Ky. 531, 78 S. W. 443, 25 Ky. L. Rep. 1637.

97. Nashville, etc., R. Co. *v.* Attalla, 118 Ala. 362, 24 So. 450; York *v.* Chicago, etc., R. Co., 56 Nebr. 572, 76 N. W. 1065; Florida Cent., etc., R. Co. *v.* Columbia, 54 S. C. 266, 32 S. E. 408; Norfolk, etc., R. Co. *v.* Suffolk, 103 Va. 498, 49 S. E. 658. See also, generally, Licenses, 25 Cyc. 600.

98. Santa Clara County *v.* Southern Pac. R. Co., 66 Cal. 642, 6 Pac. 744.

99. *Alabama.*—Anniston *v.* Southern R. Co., 112 Ala. 557, 20 So. 915.

California.— Los Angeles *v.* Southern Pac. R. Co., 61 Cal. 59.

Louisiana.— New Orleans *v.* New Orleans, etc., R. Co., 40 La. Ann. 587, 4 So. 512.

Nebraska.— York *v.* Chicago, etc., R. Co., 56 Nebr. 572, 76 N. W. 1065.

South Carolina.— Florida Cent., etc., R. Co. *v.* Columbia, 54 S. C. 266, 32 S. E. 408.

Virginia.— Norfolk, etc., R. Co. *v.* Suffolk, 103 Va. 498, 49 S. E. 658.

Canada.— Canadian Pac. R. Co. *v.* Quebec, 30 Can. Sup. Ct. 73 [*affirming* 8 Quebec Q. B. 246].

See 41 Cent. Dig. tit. "Railroads," § 9.

Statutory authority.— The operation of a railroad is a "business" within the application of a statute authorizing the imposition of a license-tax (New Orleans *v.* New Orleans, etc., R. Co., 40 La. Ann. 587, 4 So. 512); and authority to impose a license-tax upon "any business or avocation . . . within the limits of the city" includes the business of operating a railroad and does not require that it should be carried on exclusively within the city (Florida Cent., etc., R. Co. *v.* Columbia, 54 S. C. 266, 32 S. E. 408).

Separate taxes for different lines.— Under an ordinance requiring every railroad company to pay a certain license-tax "for each main line of railroad" used by it within the city, a company operating two main lines formerly belonging to different companies must pay a separate tax for each line (Anniston *v.* Southern R. Co., 112 Ala. 557, 20 So. 915); but where a railroad company owns and operates two connecting lines under individual names but under one management, and having but one agent in the city into which both run, the company is liable for only one occupa-

to take out a license for so doing and pay a license-tax therefor.[1] A municipal corporation may also require a license-tax as a police regulation;[2] but while a municipality may be authorized by statute to impose a license-tax for purposes of revenue,[3] it cannot impose a license-tax for purposes of revenue as a police regulation or under a general power to license and regulate,[4] although if the sum required is a reasonable charge for a license as a police regulation, its incidental operation as increasing the receipts of the city treasury will not invalidate it.[5] A railroad company may become liable for the payment of a license-fee by constructing its road under a municipal consent required by statute and granted subject to the condition of paying such fee;[6] but in such case the obligation rests in contract and in an action to enforce the same the statute of limitations may be pleaded.[7] Where by statute railroad companies are divided into different classes, and a privilege tax imposed varying according to the classification of the roads to be made by the railroad commissioners, the making of such classification is a condition precedent to the right to collect the tax,[8] and the commissioners cannot make a back classification so as to subject a railroad company to an additional privilege tax for past years for which it would not be liable under the former classification.[9]

C. Regulation and Control — 1. Power to Regulate and Control.[10] There is a very important distinction between public and private corporations with respect to governmental control;[11] and the unlimited right of control which the state may exercise over strictly public corporations does not apply to railroad companies,[12] which in this regard are to be considered as private corporations whose charters constitute contracts with the state which the legislature cannot violate.[13] But since railroad companies are created by the state for quasi-public purposes and are thereby affected by a public interest, the legislature may to the extent of such interest regulate and control them except in so far as it is restricted by the contract obligation imposed by the charter or statute under which the companies are incorporated,[14] and subject of course to the constitutional restric-

tion tax, under an ordinance requiring every corporation to pay a license-tax for carrying on business (Southern R. Co. *v.* Greenville, 45 S. C. 602, 23 S. E. 952).

1. Florida Cent., etc., R. Co. *v.* Columbia, 54 S. C. 266, 32 S. E. 408; Norfolk, etc., R. Co. *v.* Suffolk, 103 Va. 498, 49 S. E. 658.

2. See Johnson *v.* Philadelphia, 60 Pa. St. 445; and, generally, Municipal Corporations, 28 Cyc. 745.

3. San Jose *v.* San Jose, etc., R. Co., 53 Cal. 475.

4. North Hudson County R. Co. *v.* Hoboken, 41 N. J. L. 71; New York *v.* Third Ave. R. Co., 33 N. Y. 42; New York *v.* Second Ave. R. Co., 32 N. Y. 261 [*affirming* 34 Barb. 41]. See also, generally, Municipal Corporations, 28 Cyc. 749.

5. Johnson *v.* Philadelphia, 60 Pa. St. 445.

6. Jersey City *v.* Jersey City, etc., R. Co., 41 N. J. L. 360, 57 Atl. 445.

7. Jersey City *v.* Jersey City, etc., R. Co., 71 N. J. L. 367, 59 Atl. 15.

8. Gulf, etc., R. Co. *v.* Adams, 83 Miss. 306, 36 So. 144.

9. Gulf, etc., R. Co. *v.* Adams, 85 Miss. 772, 38 So. 348.

10. Constitutionality of statutes imposing regulations in regard to railroads see Constitutional Law, 8 Cyc. 871, 874, 972, 1069, 1099, 1116.

Validity of regulations as to rates and charges see Constitutional Law, 8 Cyc. 874, 900, 969, 970, 1066, 1067, 1117–1119.

11. See Constitutional Law, 8 Cyc. 966; Corporations, 10 Cyc. 157.

12. Tinsman *v.* Belvidere Delaware R. Co., 26 N. J. L. 148, 69 Am. Dec. 565.

13. Tinsman *v.* Belvidere Delaware R. Co., 26 N. J. L. 148, 69 Am. Dec. 565; Whiting *v.* Sheboygan, etc., R. Co., 25 Wis. 167, 3 Am. Rep. 30.

14. *Kansas.*— State *v.* Missouri Pac. R. Co., 76 Kan. 467, 92 Pac. 606.

Minnesota.— Jacobson *v.* Wisconsin, etc., R. Co., 71 Minn. 519, 74 N. W. 893, 70 Am. St. Rep. 358, 40 L. R. A. 389; Blake *v.* Winona, etc., R. Co., 19 Minn. 418, 18 Am. Rep. 345.

New York.— Beekman *v.* Saratoga, etc., R. Co., 3 Paige 45, 22 Am. Dec. 679.

North Carolina.— Efland *v.* Southern R. Co., 146 N. C. 135, 59 S. E. 355.

United States.— Georgia R., etc., Co. *v.* Smith, 128 U. S. 174, 9 S. Ct. 47, 32 L. ed. 377; Illinois Cent. R. Co. *v.* Illinois, 108 U. S. 541, 2 S. Ct. 839, 27 L. ed. 818; Ruggles *v.* Illinois, 108 U. S. 526, 2 S. Ct. 832, 27 L. ed. 812; Chicago, etc., R. Co. *v.* Cutts, 94 U. S. 155, 24 L. ed. 94 [*affirming* 5 Fed. Cas. No. 2,666]; McCoy *v.* Cincinnati, etc., R. Co., 13 Fed. 3.

See 41 Cent. Dig. tit. "Railroads," § 5.

tions against the impairment of vested rights,[15] denial of the equal protection of the laws,[16] or due process of law.[17] Railroad charters are also taken subject to any constitutional provisions existing at the time authorizing the alteration or repeal of railroad charters,[18] or authorizing the legislature to pass laws prescribing certain regulations,[19] and subject to existing general laws relating to railroad companies.[20] Many regulations may also be sustained under a power expressly reserved to the legislature to repeal, alter, or amend the charter of the company,[21] or under the general police power of the state.[22] The legislature may exercise its power of regulation through the instrumentality of some inferior tribunal, such as a railroad or corporation commission,[23] or it may delegate to municipal corporations the power of making regulations as to matters within their corporate limits.[24]

2. Judicial Supervision. In some cases particular courts are invested by

In Canada railroads declared to be works for the general advantage of Canada are under the control of the dominion legislature (Grand Trunk R. Co. *v.* Hamilton Radial Electric R. Co., 29 Ont. 143); and a railroad declared by a dominion act to be of this character, although incorporated under an act of a provincial legislature, is thereby removed from the provincial authority as if it had been originally incorporated by the Dominion of Canada (Atty.-Gen. *v.* Vancouver, etc., R. Co., 9 Brit. Col. 338); but such a declaration must be made with reference to a particular road by name, and in the absence of such declaration if the road is located entirely within a particular province it is under the control of that province (Garneau *v.* Quebec, etc., R. Co., 12 Quebec K. B. 205); and it is also held that while the dominion legislature has the exclusive right to make regulations in regard to the construction, repair, and alteration of railroads subject to its control, a regulation not affecting the structure of a railroad but merely requiring the company to keep railroad ditches cleaned out so as to prevent the overflow of lands is one which it is competent for a provincial legislature to make (Canadian Pac. R. Co. *v.* Notre Dame Parish, [1899] A. C. 367, 68 L. J. P. C. 54, 80 L. T. Rep. N. S. 434).

15. Louisville, etc., R. Co. *v.* Tennessee R. Commission, 19 Fed. 679. See also, generally, Constitutional Law, 8 Cyc. 894 *et seq.*

16. Chicago, etc., R. Co. *v.* Minnesota, 134 U. S. 418, 10 S. Ct. 462, 702, 33 L. ed. 970 [*reversing* 38 Minn. 281, 37 N. W. 782]; Louisville, etc., R. Co. *v.* Tennessee R. Commission, 19 Fed. 679. See also, generally, Constitutional Law, 8 Cyc. 1066.

17. Chicago, etc., R. Co. *v.* Minnesota, 134 U. S. 418, 10 S. Ct. 462, 702, 33 L. ed. 970 [*reversing* 38 Minn. 281, 37 N. W. 782]; Clyde *v.* Richmond, etc., R. Co., 57 Fed. 436; Louisville, etc., R. Co. *v.* Tennessee R. Commission, 19 Fed. 679. See also, generally, Constitutional Law, 8 Cyc. 1116, 1117.

18. Peik *v.* Chicago, etc., R. Co., 94 U. S. 164, 24 L. ed. 97 [*affirming* 19 Fed. Cas. No. 11,138, 6 Biss. 177].

19. Wellman *v.* Chicago, etc., R. Co., 83 Mich. 592, 47 N. W. 489.

20. Cincinnati, etc., R. Co. *v.* Connersville, (Ind. 1908) 83 N. E. 503. See also Iron R. Co. *v.* Lawrence Furnace Co., 49 Ohio St. 102, 30 N. E. 616.

21. Com. *v.* Eastern R. Co., 103 Mass. 254, 4 Am. Rep. 555; U. S. *v.* Western Union Tel. Co., 50 Fed. 28 [*reversed* in 59 Fed. 813, 8 C. C. A. 282 (*reversed* in 160 U. S. 1, 16 S. Ct. 190, 40 Fed. 319)].

Extent of power of legislature.— Under a reservation of the right to alter, amend, or repeal charters see Constitutional Law, 8 Cyc. 964.

Under an act of congress providing that a railroad company aided by the government should pay to government directors of the company a *per diem* compensation to be fixed by the company, and their actual traveling expenses, and reserving a right to alter, amend, or repeal the act, a later act fixing ten dollars per day as their compensation and ten cents for each mile of travel is a reasonable regulation which may legally be made. Brewer *v.* Union Pac. R. Co., 31 Hun (N. Y.) 545 [*affirmed* in 101 N. Y. 647].

22. *Florida.*— State *v.* Atlantic Coast Line R. Co., 53 Fla. 650, 44 So. 213, 13 L. R. A. N. S. 320.

Illinois.— Cleveland, etc., R. Co. *v.* People, 175 Ill. 359, 51 N. E. 842.

Indiana.— Cincinnati, etc., R. Co. *v.* Connersville, 170 Ind. 316, 83 N. E. 503.

Vermont.— Thorpe *v.* Rutland, etc., R. Co., 27 Vt. 140, 62 Am. Dec. 625.

Wisconsin.— Chicago, etc., R. Co. *v.* Milwaukee, 97 Wis. 418, 72 N. W. 1118.

United States.— Missouri *v.* Kansas City, etc., R. Co., 32 Fed. 722.

See 41 Cent. Dig. tit. "Railroads," § 5.

Validity of particular regulations affecting railroad companies as a proper exercise of the police power of the state see Constitutional Law, 8 Cyc. 871, 874.

Operation of road.—Most of the police regulations involve the question of the public safety and relate more particularly to the operation of the road and are treated in a subsequent section of this article. See *infra*, X, B, 1, a.

23. See *infra*, I, C, 3, a.

24. Chicago, etc., R. Co. *v.* State, 47 Nebr. 549, 66 N. W. 624, 53 Am. St. Rep. 557, 41 L. R. A. 481. See also, generally, Constitutional Law, 8 Cyc. 839, 866.

statute with jurisdiction to make certain regulations in regard to railroads,[25] or to enforce the orders of some other tribunal, such as a railroad or corporation commission.[26] In the absence of statute the courts cannot impose upon railroad companies duties not required of them by law;[27] but in case of a failure to perform the duties which they do owe to the public the courts may, at the instance of the proper parties or public authorities, intervene to compel the performance of such duties.[28] While the state has a right to institute proceedings to forfeit the charter or annul the corporation for failure to perform its public duties,[29] it is not thereby precluded from the right to invoke the powers of the courts to compel a performance of such duties.[30] Where there is a clear legal duty its performance may be enforced by mandamus,[31] whether such duty is imposed in express terms or by implication from the general nature of the duties of such companies,[32] unless there is some other adequate remedy for the enforcement of such duty,[33] or in a proper case such relief may be afforded by courts of equity.[34] The exercise of purely discretionary powers on the part of railroad companies cannot be controlled or interfered with by the courts unless manifestly abused.[35]

3. Regulation by Commissioners or Other Public Officers — a. In General.[36] The power of the legislature to create such bodies as railroad or corporation commissions and through them to exercise its power of regulation over railroads has been repeatedly sustained,[37] subject to the limitations that they cannot be invested

25. *In re* Atlantic Highlands, etc., R. Co., (N. J. 1896) 35 Atl. 387; People *v.* Northern Cent. R. Co., 164 N. Y. 289, 58 N. E. 138; Pennsylvania R. Co. *v.* Braddock Electric R. Co., 152 Pa. St. 116, 25 Atl. 780; *In re* Railroad Com'rs, 79 Vt. 266, 65 Atl. 82.

Jurisdiction and powers of courts: To require establishment of stations see *infra*, IV, G, 1. To authorize the crossing of streets and highways by railroads see *infra*, VI, D, 1, a. To regulate mode of crossing other railroads see *infra*, VI, C, 3, b.

26. See *infra*, I, C, 3, e.

27. *Alabama.*— Nashville, etc., R. Co. *v.* State, 137 Ala. 439, 34 So. 401.

Louisiana.— State *v.* Kansas City, etc., R. Co., 51 La. Ann. 200, 25 So. 126.

North Carolina.— Atlantic Express Co. *v.* Wilmington, etc., R. Co., 111 N. C. 463, 16 S. E. 393, 32 Am. St. Rep. 805, 18 L. R. A. 393.

Virginia.—Chesapeake, etc., R. Co. *v.* Com., 105 Va. 297, 54 S. E. 331.

United States.— Northern Pac. R. Co. *v.* Washington Territory, 142 U. S. 492, 12 S. Ct. 283, 35 L. ed. 1092 [*reversing* 3 Wash. Terr. 303, 13 Pac. 604].

See 41 Cent. Dig. tit. "Railroads," § 11.

28. State *v.* Atlantic Coast Line R. Co., 53 Fla. 650, 44 So. 213, 13 L. R. A. N. S. 320; People *v.* New York, etc., R. Co., 28 Hun (N. Y.) 543; McCoy *v.* Cincinnati, etc., R. Co., 13 Fed. 3.

29. See *infra*, II, J, 2.

30. People *v.* New York Cent., etc., R. Co., 28 Hun (N. Y.) 543.

31. State *v.* New Haven, etc., Co., 37 Conn. 153; State *v.* Atlantic Coast Line Co., 53 Fla. 650, 44 So. 213, 13 L. R. A. N. S. 320; People *v.* Chicago, etc., R. Co., 130 Ill. 175, 22 N. E. 857; State *v.* Northern Pac. R. Co., 90 Minn. 277, 96 N. W. 81. See also, generally, Mandamus, 26 Cyc. 365.

32. State *v.* Atlantic Coast Line R. Co., 53 Fla. 650, 44 So. 213, 13 L. R. A. N. S. 320; People *v.* New York Cent., etc., R. Co., 28 Hun (N. Y.) 543.

33. State *v.* Atlantic Coast Line R. Co., 53 Fla. 650, 44 So. 213, 13 L. R. A. N. S. 320.

34. McCoy *v.* Cincinnati, etc., R. Co., 13 Fed. 3.

35. Georgia R., etc., Co. *v.* Maddox, 116 Ga. 64, 42 S. E. 315; Fall River Iron Works Co. *v.* Old Colony, etc., R. Co., 5 Allen (Mass.) 221; Park's Appeal, 64 Pa. St. 137; Memphis, etc., R. Co. *v.* Union R. Co., 116 Tenn. 500, 95 S. W. 1019.

Widening roadway.— Under the Pennsylvania statute authorizing railroad companies to widen their roadways "whenever in the opinion of the board of directors the same may be necessary to secure the safety of persons or property and increase the facilities of traffic thereon," the question as to the time and mode of such widening is one exclusively for the board of directors and not subject to review by the court except when exercised corruptly or capriciously. Lodge *v.* R. Co., 1 Leg. Gaz. (Pa.) 131.

36. Interstate commerce commission see Commerce, 7 Cyc. 485 *et seq.*

37. *Florida.*— Storrs *v.* Pensacola, etc., R. Co., 29 Fla. 617, 11 So. 226; McWhorter *v.* Pensacola, etc., R. Co., 24 Fla. 417, 5 So. 129, 12 Am. St. Rep. 220, 2 L. R. A. 504.

Georgia.— Georgia R. Co. *v.* Smith, 70 Ga. 694.

Illinois.— People *v.* Chicago, etc., R. Co., 223 Ill. 581, 79 N. E. 144; Chicago, etc., R. Co. *v.* Jones, 149 Ill. 361, 37 N. E. 247, 41 Am. St. Rep. 278, 24 L. R. A. 141.

Kansas.— State *v.* Missouri Pac. R. Co., 76 Kan. 467, 92 Pac. 606.

Louisiana.— Morgan's Louisiana, etc., R. Co. *v.* Railroad Commission, 109 La. 247, 33 So. 214.

Maine.— Railroad Commission *v.* Portland, etc., R. Co., 63 Me. 269, 18 Am. Rep. 208.

with strictly legislative,[38] or judicial powers,[39] and that their powers and proceedings must be within the constitutional restrictions relating to due process of law, and equal protection of the laws,[40] and that a state cannot authorize a railroad commission to regulate interstate commerce.[41] So a railroad commission legally constituted is an administrative body,[42] and not legislative,[43] or a court,[44] although they do in some cases exercise some functions of a judicial character,[45] nor are their decisions judgments in the ordinary sense of the term.[46] So also an order

North Carolina.— Corporation Commission *v.* Seaboard Air Line R. Co., 140 N. C. 239, 53 S. E. 941; Corporation Commission *v.* Atlantic Coast Line R. Co., 139 N. C. 126, 51 S. E. 793; Atlantic Express Co. *v.* Wilmington, etc., R. Co., 111 N. C. 463, 16 S. E. 393, 32 Am. St. Rep. 865, 18 L. R. A. 393.

United States.— Reagan *v.* Farmers' L. & T. Co., 154 U. S. 362, 14 S. Ct. 1047, 38 L. ed. 1014; Stone *v.* Farmers L. & T. Assoc., 116 U. S. 307, 6 S. Ct. 334, 388, 29 L. ed. 636.

See 41 Cent. Dig. tit. "Railroads," § 13. See also, generally, CONSTITUTIONAL LAW, 8 Cyc. 834.

In Canada the Railway Act of 1903 established a board of railway commissioners which is invested with the powers and duties previously exercised by the railway committee of the privy council. Canadian Pac. R. Co. *v.* Grand Trunk R. Co., 12 Ont. L. Rep. 320.

38. Georgia R. Co. *v.* Smith, 70 Ga. 694; State *v.* Great Northern R. Co., 100 Minn. 445, 111 N. W. 289, 10 L. R. A. N. S. 250.

39. Chicago, etc., R. Co. *v.* Minnesota, 134 U. S. 418, 10 S. Ct. 462, 702, 33 L. ed. 970 [*reversing* 38 Minn. 281, 37 N. W. 782]. See also, generally, CONSTITUTIONAL LAW, 8 Cyc. 809, 858.

40. Chicago, etc., R. Co. *v.* Minnesota, 134 U. S. 418, 10 S. Ct. 462, 702, 33 L. ed. 970 [*reversing* 38 Minn. 281, 37 N. W. 782]; Mercantile Trust Co. *v.* Texas, etc., R. Co., 51 Fed. 529; Louisville, etc., R. Co. *v.* Tennessee R. Com'rs, 19 Fed. 679.

41. Mobile, etc., R. Co. *v.* Sessions, 28 Fed. 592.

The Illinois statute requiring all railroad companies doing business within the state to make annual reports to the railroad and warehouse commission applies to foreign railroad companies engaged in interstate commerce as well as domestic companies, and the act is not in conflict with the provisions of the federal constitution or laws relating to interstate commerce. People *v.* Chicago, etc., R. Co., 223 Ill. 581, 79 N. E. 144.

42. *Connecticut.*—State *v.* New Haven, etc., R. Co., 43 Conn. 351.

Illinois.— Chicago, etc., R. Co. *v.* Jones, 149 Ill. 361, 37 N. E. 247, 41 Am. St. Rep. 278, 24 L. R. A. 141.

Kansas.— State *v.* Missouri Pac. R. Co., 76 Kan. 467, 92 Pac. 606.

Louisiana.— Morgans, etc., R. Co. *v.* Railroad Commission, 109 La. 247, 33 So. 214.

Minnesota.— State *v.* Great Northern R. Co., 100 Minn. 445, 111 N. W. 289, 10 L. R. A. N. S. 250.

North Carolina.— State *v.* Wilson, 121 N. C. 425, 28 S. E. 554.

United States.— Reagan *v.* Farmers' L. & T. Co., 154 U. S. 362, 14 S. Ct. 1047, 38 L. ed. 1014.

See 41 Cent. Dig. tit. "Railroads," § 13.

43. Storrs *v.* Pensacola, etc., R. Co., 29 Fla. 617, 11 So. 226; Georgia R. Co. *v.* Smith, 70 Ga. 694; Chicago, etc., R. Co. *v.* Jones, 149 Ill. 361, 37 N. E. 247, 41 Am. St. Rep. 278, 24 L. R. A. 141; Atlantic Express Co. *v.* Wilmington, etc., R. Co., 111 N. C. 463, 16 S. E. 393, 32 Am. St. Rep. 805, 18 L. R. A. 393.

44. State *v.* New Haven, etc., Co., 43 Conn. 351; Chicago, etc., R. Co. *v.* Railroad Com'rs, 38 Ind. App. 439, 78 N. E. 338, 79 N. E. 520; People *v.* Railroad Com'rs, 158 N. Y. 421, 53 N. E. 163 [*affirming* 32 N. Y. App. Div. 158, 52 N. Y. Suppl. 901]; Mississippi R. Commission *v.* Illinois Cent. R. Co., 203 U. S. 335, 27 S. Ct. 90, 51 L. ed. 209.

In North Carolina the railroad commission was by the statute of 1891 made a court of record, but it is held to be merely an administrative and not a judicial court, somewhat like a board of county commissioners (State *v.* Wilmington, etc., R. Co., 122 N. C. 877, 29 S. E. 334); and that the object of the act, which added nothing to the powers and duties of the commission, was merely to give authenticity to its records and proceedings (State *v.* Wilson, 121 N. C. 425, 28 S. E. 554).

The Pacific Railway Commission is not a judicial body and possesses no judicial powers under the acts of congress of March 3, 1887 (24 U. S. St. at L. 488), creating it, and can determine no rights of the government or the corporations whose affairs it is appointed to investigate. *In re* Pacific R. Commission, 32 Fed. 241, 12 Sawy. 559.

45. State *v.* New Haven, etc., Co., 43 Conn. 351; Chicago, etc., R. Co. *v.* Railroad Com'rs, 38 Ind. App. 439, 78 N. E. 338, 79 N. E. 520; People *v.* Railroad Com'rs, 158 N. Y. 421, 53 N. E. 163 [*affirming* 32 N. Y. App. Div. 158, 52 N. Y. Suppl. 901].

46. State *v.* New Haven, etc., Co., 43 Conn. 351 (holding that since a decision of the railroad commissions granting a railroad company permission to discontinue a station is not a judgment, a statute requiring the company to restore it is not void as an attempt to annul or reverse a judgment of a judicial tribunal); State *v.* Mason City, etc., R. Co., 85 Iowa 516, 52 N. W. 490 (holding that an order of the board of railroad commissioners is not a judgment or conclusion which binds the parties, but merely the basis of an action wherein the rights of the parties are

of a permissive character made by railroad commissioners is not a contract which will bind the state with regard to future legislation.[47] The powers and duties of railroad commissioners vary to such an extent under the statutes of the different jurisdictions that any enumeration thereof based upon the decided cases would be impracticable, and the statutes should be consulted;[48] but it may be stated as

investigated and determined by the prescribed rules of judicial inquiry).

47. State *v.* New Haven, etc., Co., 43 Conn. 351, holding that an order of the railroad commissioners permitting the discontinuance of a station upon certain conditions does not constitute a contract with the state which will prevent the legislature from subsequently requiring it to be reëstablished.

48. See the statutes of the different states; and the following cases:

Alabama.— State *v.* Nashville, etc., R. Co., (1905) 39 So. 984; Nashville, etc., R. Co. *v.* State, 137 Ala. 439, 34 So. 401.

Iowa.— State *v.* Mason City, etc., R. Co., 85 Iowa 516, 52 N. W. 490.

Kansas.— State *v.* Missouri Pac. R. Co., 76 Kan. 467, 92 Pac. 606.

Louisiana.— Railroad Commission *v.* Kansas City Southern R. Co., 111 La. 133, 35 So. 487; Morgan's Louisiana, etc., R., etc., Co. *v.* Railroad Commission, 109 La. 247, 33 So. 214.

Massachusetts.— Providence, etc., R. Co. *v.* Norwich, etc., R. Co., 138 Mass. 277.

Mississippi.— State *v.* Yazoo, etc., R. Co., 87 Miss. 679, 40 So. 263.

Nebraska.— State *v.* Fremont, etc., R. Co., 22 Nebr. 313, 35 N. W. 118.

North Carolina.— Corporation Com'rs *v.* Seaboard Air Line R. Co., 140 N. C. 239, 52 S. E. 941; Corporation Commission *v.* Atlantic Coast Line R. Co., 139 N. C. 126, 51 S. E. 793; Atlantic Express Co. *v.* Wilmington, etc., R. Co., 111 N. C. 463, 16 S. E. 393, 32 Am. St. Rep. 805, 18 L. R. A. 393.

Oregon.— Railroad Com'rs *v.* Oregon R., etc., Co., 17 Oreg. 65, 19 Pac. 702, 2 L. R. A. 195.

Texas.— International, etc., R. Co. *v.* Railroad Com'rs, 99 Tex. 332, 89 S. W. 961 [*affirming* (Civ. App. 1905) 86 S. W. 16].

Virginia.— Louisville, etc., R. Co. *v.* Interstate R. Co., 107 Va. 225, 57 S. E. 654.

England.— Didcot, etc., R. Co. *v.* Great Western R. Co., [1897] 1 Q. B. 33, 66 L. J. Q. B. 33, 75 L. T. Rep. N. S. 401, 45 Wkly. Rep. 282; Reg. *v.* Railway Com'rs, 22 Q. B. D. 642, 53 J. P. 533, 58 L. J. Q. B. 233, 60 L. T. Rep. N. S. 606, 6 R. & Can. Tr. Cas. 108, 37 Wkly. Rep. 446; Reg. *v.* Midland R. Co., 19 Q. B. D. 540, 51 J. P. 550, 56 L. J. Q. B. 585, 57 L. T. Rep. N. S. 619, 5 R. & Can. Tr. Cas. 267, 36 Wkly. Rep. 270; South-Eastern R. Co. *v.* Railway Com'rs, 6 Q. B. D. 586, 45 J. P. 388, 50 L. J. Q. B. 201, 44 L. T. Rep. N. S. 203; Toomer *v.* London, etc., R. Co., 2 Ex. D. 450, 47 L. J. Exch. 276, 37 L. T. Rep. N. S. 161, 26 Wkly. Rep. 31; Cowan *v.* North British R. Co., 11 R. & Can. Tr. Cas. 96; Pidcock *v.* Manchester, etc., R. Co., 9 R. & Can. Tr. Cas. 45; Solway Junction R. Co. *v.* Caledonian R. Co., 8 R. & Can. Tr. Cas. 177.

Canada.— Canadian Northern R. Co. *v.* Robinson, 37 Can. Sup. Ct. 541.

See 41 Cent. Dig. tit. "Railroads," § 13.

Companies and persons subject to regulation.— It has been held that a constitutional provision providing for a railroad commission for the regulation and control of "railroad and other transportation companies" applies to all persons engaged in transportation, whether as corporations or individuals (Moran *v.* Ross, 79 Cal. 159, 21 Pac. 547); but that a statute which in express terms gives railroad commissioners jurisdiction over "railroads operated by steam" by implication denies their power over railroads operated by electricity (Kansas City, etc., R. Co. *v.* Railroad Com'rs, 73 Kan. 168, 84 Pac. 755).

Classification of freight.— Under the Missouri statute providing for the appointment of railroad commissions and the division of freights into certain classes, and fixing of maximum rates at so much per "car load" for each class, where the commissioners construed the term "car load" in the light of existing usage to mean ten tons instead of all that a car could safely carry, it was held that such construction, being reasonable and just, would be upheld, especially where it had been so long acted upon as to have become a rule. Pugh *v.* Kansas City, etc., R. Co., 118 Mo. 506, 24 S. W. 440; Ross *v.* Kansas City, etc., R. Co., 111 Mo. 18, 19 S. W. 541.

Powers with respect to particular matters. — Powers of railroad commissioners with regard to determining necessity for railroad see *supra*, I, B, 2. With regard to stations see *infra*, IV, G, 4. Rights in and use of road or property of one company by another company see *infra*, V, J, 4. Crossings of one railroad by another railroad see *infra*, VI, C, 3, a. Crossings of highways by railroads see *infra*, VI, D, 6, a. Abolition or removal of grade crossings see *infra*, VI, D, 6, c. Connections and facilities for transfers between different railroads see *infra*, X, B, 3, d. Regulation of rates and charges for transportation see the following cases: Storrs *v.* Pensacola, etc., R. Co., 29 Fla. 617, 11 So. 226; Georgia R., etc., Co. *v.* Smith, 70 Ga. 694; Chicago, etc., R. Co. *v.* Jones, 149 Ill. 361, 37 N. E. 247, 41 Am. St. Rep. 278, 24 L. R. A. 141; State *v.* Chicago, etc., R. Co., 90 Iowa 594, 58 N. W. 1060; State *v.* Chicago, etc., R. Co., 40 Minn. 267, 41 N. W. 1047, 12 Am. St. Rep. 730, 3 L. R. A. 238; State *v.* Fremont, etc., R. Co., 23 Nebr. 117, 36 N. W. 305; State *v.* Fremont, etc., R. Co., 22 Nebr. 313, 35 N. W. 118; Merrill *v.* Boston, etc., R. Co., 63 N. H. 259; Chicago, etc., R. Co. *v.* Minnesota, 134 U. S. 418, 10 S. Ct. 462, 702, 33 L. ed. 870 [*reversing* 38 Minn. 281, 37 N. W. 782]; Winsor Coal Co. *v.* Chicago, etc., R.

a general rule that since such bodies are statutory tribunals of limited jurisdiction,[49] they can exercise only such powers as they are authorized to exercise by the statutes,[50] and that state railroad commissioners have no jurisdiction over interstate commerce.[51] So also the province and duty of railroad commissioners is to make regulations affecting the interests and safety of the public,[52] and they cannot determine controversies or enforce contracts of a private character between railroad companies and individuals,[53] while on the other hand railroad companies cannot by contracting with other railroad companies or persons restrict the power of railroad commissioners to make orders within their jurisdiction affecting the interests of the public.[54] Under some statutes or with respect to certain matters the powers and duties of railroad commissioners are merely advisory.[55] It has been held that as to matters within the jurisdiction of the railroad commissioners action on their part is necessary, before resort can be had to other adversary proceedings against the railroad company;[56] but the rule is otherwise where the

Co., 52 Fed. 716; Chicago, etc., R. Co. *v.* Dey, 38 Fed. 656; Mansion House Assoc. *v.* London, etc., R. Co., [1896] 1 Q. B. 273, 65 L. J. Q. B. 209, 74 L. T. Rep. N. S. 463, 9 R. & Can. Tr. Cas. 174; Reg. *v.* Railway Com'rs, 22 Q. B. D. 642, 53 J. P. 533, 58 L. J. Q. B. 233, 60 L. T. Rep. N. S. 606, 6 R. & Can. Tr. Cas. 108, 37 Wkly. Rep. 446; Great Western R. Co. *v.* Central Wales, etc., Junction R. Co., 10 Q. B. D. 231, 52 L. J. Q. B. 211, 48 L. T. Rep. N. S. 234, 315, 4 R. & Can. Tr. Cas. 110, 31 Wkly. Rep. 321; Great Western R. Co. *v.* Railway Com'rs, 7 Q. B. D. 182, 46 J. P. 35, 50 L. J. Q. B. 483, 45 L. T. Rep. N. S. 206, 29 Wkly. Rep. 901; Watson *v.* Midland R. Co., 9 R. & Can. Tr. Cas. 90. Power of railway and canal commissioners under the Railway and Canal Traffic Act of 1894, § 4, to hear and determine disputes between railroad companies and shippers and to grant an allowance or rebate see Vickers *v.* Midland R. Co., 87 L. T. Rep. N. S. 665, 11 R. & Can. Tr. Cas. 249; Crompton *v.* Lancashire, etc., R. Co., 11 R. & Can. Tr. Cas. 285; Cowan *v.* North British R. Co., 11 R. & Can. Tr. Cas. 271; Gilstrap *v.* Great Northern R. Co., 11 R. & Can. Tr. Cas. 265; Girardot *v.* Great Eastern R. Co., 11 R. & Can. Tr. Cas. 244; Huntington *v.* Lancashire, etc., R. Co., 17 T. L. R. 458, 11 R. & Can. Tr. Cas. 237.

49. Eastern R. Co. *v.* Concord, etc., R. Co., 47 N. H. 108; State *v.* Chicago, etc., R. Co., 16 S. D. 517, 94 N. W. 406.

50. *Alabama.*— Nashville, etc., R. Co. *v.* State, 137 Ala. 439, 34 So. 401.

Mississippi.— State *v.* Yazoo, etc., R. Co., 87 Miss. 679, 40 So. 263.

Nebraska.— State *v.* Fremont, etc., R. Co., 23 Nebr. 117, 36 N. W. 305.

New Hampshire.— Merrill *v.* Boston, etc., R. Co., 63 N. H. 259; Eastern R. Co. *v.* Concord, etc., R. Co., 47 N. H. 108.

North Carolina.— Atlantic Express Co. *v.* Wilmington, etc., R. Co., 111 N. C. 463, 16 S. E. 393, 32 Am. St. Rep. 805, 18 L. R. A. 393.

Oregon.— Railroad Com'rs *v.* Oregon R., etc., Co., 17 Oreg. 65, 19 Pac. 702, 2 L. R. A. 195.

South Carolina.— Railroad Com'rs *v.* Columbia, etc., R. Co., 26 S. C. 353, 2 S. E. 127.

England.— Reg. *v.* Railway Com'rs, 22 Q. B. D. 642, 53 J. P. 533, 58 L. J. Q. B. 233, 60 L. T. Rep. N. S. 606, 6 R. & Can. Tr. Cas. 108, 37 Wkly. Rep. 446; Great Western R. Co. *v.* Waterford, etc., R. Co., 17 Ch. D. 493, 50 L. J. Ch. 513, 44 L. T. Rep. N. S. 723, 29 Wkly. Rep. 826; Great Western R. Co. *v.* Halesowen R. Co., 52 L. J. Q. B. 473, 48 L. T. Rep. N. S. 710, 4 R. & Can. Tr. Cas. 224; Cowan *v.* North British R. Co., 11 R. & Can. Tr. Cas. 96.

See 41 Cent. Dig. tit. "Railroads," § 13.

The railway committee of the privy council under the former Canadian statute could exercise only such powers as were conferred upon it by the statute. Grand Trunk R. Co. *v.* Toronto, 32 Ont. 120.

Railway and dock company.— Railway commissioners have no jurisdiction to determine complaints against a railway and dock company for any inequality of dues levied in respect to a dock forming a distinct part of their undertaking, although such company be also owners of other docks not distinct from but connected with their railway. East India, etc., Dock Co. *v.* Shaw, etc., Co., 39 Ch. D. 524, 57 L. J. Ch. 1038, 60 L. T. Rep. N. S. 142, 6 R. & Can. Tr. Cas. 94.

51. State *v.* Chicago, etc., R. Co., 40 Minn. 267, 41 N. W. 1047, 12 Am. St. Rep. 730, 3 L. R. A. 238; Sternberger *v.* Cape Fear, etc., R. Co., 29 S. C. 510, 7 S. E. 836, 2 L. R. A. 105; Mobile, etc., R. Co. *v.* Sessions, 28 Fed. 592; Louisville, etc., R. Co. *v.* Tennessee R. Commission, 19 Fed. 679.

Exclusive power of congress to regulate interstate commerce see COMMERCE, 7 Cyc. 420–422.

52. Toronto *v.* Grand Trunk R. Co., 4 Can. R. Cas. 62.

53. People *v.* Railroad Com'rs, 158 N. Y. 421, 53 N. E. 163 [*affirming* 32 N. Y. App. Div. 158, 52 N. Y. Suppl. 901]; Toronto *v.* Grand Trunk R. Co., 4 Can. R. Cas. 62.

54. Niagara, etc., R. Co. *v.* Grand Trunk R. Co., 3 Can. R. Cas. 256.

55. Nashville, etc., R. Co. *v.* State, 137 Ala. 439, 34 So. 401; State *v.* Missouri Pac. R. Co., 55 Kan. 708, 41 Pac. 964, 49 Am. St. Rep. 278, 29 L. R. A. 444; State *v.* Kansas Cent. R. Co., 47 Kan. 497, 28 Pac. 208.

56. State *v.* Chicago, etc., R. Co., 19 Nebr.

statute in regard to the railroad commission provides that the remedies provided thereby shall not limit or exclude any other remedies existing by virtue of other statutes or common law.[57]

b. Qualifications, Appointment, and Removal. The legislature may prescribe the qualifications for office of railroad commissioners,[58] and in particular cases it seems that the general rule in regard to such public officers [59] would disqualify a railroad commissioner from passing upon questions in which he was personally interested.[60] The mode of electing or appointing railroad commissioners and their term of office is regulated by the statutes,[61] and under a statute providing that the railroad commissioners shall hold office for a certain term "and until their successors are elected and qualified," a failure of the legislature to elect a successor at the expiration of the term of office of a railroad commissioner does not create a vacancy in the office.[62] Where the office of railroad commissioners is of legislative origin, the legislature may reserve the right of removal,[63] and may confer upon the governor the right of suspending a railroad commissioner from office.[64] Under a statute authorizing an executive council to remove railroad commissioners at any time and elect others to fill the vacancy, the exercise of such power is discretionary and cannot be prevented or interfered with by the courts,[65] and a statute authorizing the governor without judicial proceedings to suspend a railroad commissioner who becomes interested in a railroad, and report such fact and the reasons therefor to the legislature for final action, is not unconstitutional as denying such commissioner the equal protection of the laws or depriving him of property without due process of law.[66]

c. Salaries, Assistants, and Expenses. The statutes in some cases provide that the salaries of railroad commissioners shall be paid in the same manner as those of other state officers,[67] or that their salaries and expenses shall be borne by the several railroad companies,[68] and also provide for the appointment of

476, 27 N. W. 434; People *v.* Brooklyn Heights R. Co., 172 N. Y. 90, 64 N. E. 788 [*affirming* 69 N. Y. App. Div. 549, 75 N. Y. Suppl. 202]; Grand Trunk R. Co. *v.* Perrault, 36 Can. Sup. Ct. 671.

57. Missouri Pac. R. Co. *v.* State, 69 Kan. 552, 77 Pac. 286, holding that under such a provision an application for mandamus to compel a railroad company to restore a highway to its former condition may be maintained without any previous action or order in regard thereto by the railroad commissioners.

58. State *v.* Wilson, 121 N. C. 425, 28 S. E. 554. See also, generally, OFFICERS, 29 Cyc. 1375.

59. See OFFICERS, 29 Cyc. 1435.

60. Southern Pac. Co. *v.* California R. Com'rs, 78 Fed. 236, holding, however, that the interest of one of the commissioners as a shipper of grain will not invalidate a rate regulation which was adopted by a unanimous vote.

61. See the statutes of the several states; and the following cases: State *v.* Mitchell, 50 Kan. 289, 33 Pac. 104, 20 L. R. A. 306 (quoting Kansas statute of 1883, providing for the election of railroad commissioners by the executive council to hold office for three years from the date of election); Eddy *v.* Kincaid, 28 Oreg. 537, 41 Pac. 156, 655 (holding that the Oregon statute providing that the railroad commissioners shall be chosen biennially by the state legislature is not unconstitutional); Savage *v.* Pickard, 14 Lea (Tenn.) 46 (quoting the Tennessee statute of 1883, providing for the appointment of three competent persons as railroad commissioners by the governor of the state to hold office until Jan. 1, 1885).

62. Eddy *v.* Kincaid, 28 Oreg. 537, 41 Pac. 156, 655. See also, generally, OFFICERS, 29 Cyc. 1399, 1400.

63. State *v.* Wilson, 121 N. C. 425, 28 S. E. 554.

Removal of officers generally see OFFICERS, 29 Cyc. 1406 *et seq.*

64. State *v.* Wilson, 121 N. C. 425, 28 S. E. 554.

65. State *v.* Mitchell, 50 Kan. 289, 33 Pac. 104, 20 L. R. A. 306.

66. State *v.* Wilson, 121 N. C. 425, 28 S. E. 554.

67. Savage *v.* Pickard, 14 Lea (Tenn.) 46, holding that under a statute providing that the railroad commissioners shall receive a salary of two thousand dollars each, to be paid as the salaries of other state officers "unless restrained by law from the performance of their duties," their salaries did not cease upon the suing out of temporary injunctions at the instance of several railroad companies from performing their duties as far as those companies are concerned, and which had never been made perpetual by final decrees.

68. People *v.* Chapin, 106 N. Y. 265, 12 N. E. 595; Charlotte, etc., R. Co. *v.* Gibbes, 27 S. C. 385, 4 S. E. 49; Columbia, etc., R. Co. *v.* Gibbes, 24 S. C. 60.

certain secretaries, clerks, or assistants and the salaries which they are to receive.[69]

d. Procedure and Orders. As to matters within their jurisdiction railroad commissioners may act either upon the complaint of a person aggrieved or upon their own motion.[70] The procedure to be followed by the commissioners in the determination of questions of which they have jurisdiction is ordinarily regulated by the statutes and must be complied with;[71] but a power expressly conferred to hear and determine certain matters is not to be denied because all the details of procedure are not prescribed, since the commissioners have inherent power to make such rules not inconsistent with the law as are necessary to the exercise

Rule of apportionment.— Under a statute providing that the salaries and expenses of railroad commissioners shall be borne by the several railroad companies according to their means, to be apportioned one half in proportion to the net income and one half in proportion to "the length of the main track or tracks on road," the length, where there are two or more parallel tracks between two terminal points, is the distance between those points and not the number of miles of rail. People *v.* Chapin, 106 N. Y. 265, 12 N. E. 595.

69. State *v.* Clausen, 44 Wash. 437, 87 Pac. 498, holding that under a statute authorizing the commissioners to appoint a secretary and clerks and fix their salaries within certain limits, and also to employ such "experts as may be necessary to perform the duties that may be required of them," the commissioners also have power to fix the salary of such experts which in the absence of fraud cannot be reviewed.

In North Dakota the statute of 1889 providing for the appointment of a "secretary" for the commissioners at one thousand five hundred dollars a year is repealed by the statute of 1890, providing for a "clerk" for the railroad commissioners and fixing his salary at one thousand dollars a year, and repealing all previous laws in conflict with it. State *v.* Currie, 3 N. D. 310, 55 N. W. 858.

70. State *v.* Chicago, etc., R. Co., 86 Iowa 641, 53 N. W. 323.

In England in case of an increase of rates a complaint may be made to the railway commissioners by a trader's association without proof that there has been any complaint to the association by any particular traders or that the association represents individuals who are aggrieved. Mansion House Assoc. *v.* Great Western R. Co., [1895] 2 Q. B. 141, 64 L. J. Q. B. 434, 72 L. T. Rep. N. S. 523, 9 R. & Can. Tr. Cas. 58, 14 Reports 429.

Joinder of respondents.— Where a complaint is made under section 1 of the English Railway and Canal Traffic Act of 1894 that a rate increased by a railway company jointly with other railway companies is unreasonable, the complainant must join all the railway companies concerned as respondents. Mapperley Colliery Co. *v.* Midland R. Co., 65 L. J. Q. B. 272, 9 R. & Can. Tr. Cas. 147.

71. State *v.* Chicago, etc., R. Co., 90 Iowa 594, 58 N. W. 1060; State *v.* Chicago, etc., R. Co., 86 Iowa 641, 53 N. W. 323; State *v.* Chicago, etc., R. Co., 16 S. D. 517, 94 N. W. 406; *In re* Rutland R. Co., 79 Vt. 53, 64 Atl. 233.

Noticing and hearing.— Under the Iowa statute an order of railroad commissioners fixing a schedule of maximum rates, if it is a new and independent schedule and not merely a revision of a former schedule, is not binding unless the notice of intention to fix such rates was given as required by the statute (State *v.* Chicago, etc., R. Co., 90 Iowa 594, 58 N. W. 1060); and under the Vermont statute which provides by section 3987 for an investigation of the cause of a railroad accident by railroad commissioners on notice, and section 3989 as amended by the act of 1902, which declares that when, in the judgment of the commissioners, after investigation and hearing, on reasonable notice, it appears that any change in the manner of operating a railroad is reasonable and expedient to facilitate the public safety the commissioners shall order the same, it is held that where the commissioners gave notice of an investigation of an accident, under section 3987, but no notice was served that proceedings would be taken under section 3989, an order as to the mode of subsequently operating trains was without jurisdiction and void (*In re* Rutland R. Co., 79 Vt. 53, 64 Atl. 233).

Costs.— The railroad commissioners have no jurisdiction, under the English Regulation of Railways Act of 1873, to order a railway company, in whose favor they have decided upon an application to them against such company, to pay any costs to the unsuccessful applicant (Foster *v.* Great Western R. Co., 8 Q. B. D. 515, 51 L. J. Q. B. 233, 46 L. T. Rep. N. S. 74, 4 R. & Can. Tr. Cas. 58, 30 Wkly. Rep. 398); but under section 2 of the Railway and Canal Traffic Act of 1894, which provides that in proceedings before the commissioners other than disputes between two or more companies, the commissioners shall not have power to award costs on either side unless they are of the opinion that the claim or defense was frivolous and vexatious, it is held that this section applies only to costs of the case itself, and does not take away the power of the commissioners under section 19 of the Railway and Canal Traffic Act of 1888, to deal with the costs of and incidental to other proceedings, such as interlocutory applications (Rickett *v.* Midland R. Co., [1896] 1 Q. B. 260, 65 L. J. Q. B. 274, 9 R. & Can. Tr. Cas. 107).

of the powers conferred upon them.[72] The orders of the railroad commissioners must be definite and specific as to what is required to be done by the railroad company.[73]

e. Enforcement of Orders. Where an order of railroad commissioners is merely of a permissive character, authorizing a railroad company to do or refrain from some act, nothing further is necessary to make it effective;[74] but if it is of a mandatory character and is a valid order and has not been complied with, it may be enforced by the courts,[75] and usually the statutes make express provision as to the manner of enforcing such orders.[76] In the absence of other provision mandamus is a proper remedy to enforce valid orders of railroad commissioners.[77] The courts will not enforce an order which the commissioners had no authority to make,[78] or which under the circumstances of the particular case is unreasonable or unjust,[79] or involving a matter as to which the powers of the commissioners are merely advisory,[80] or where the order was based upon a complaint filed by some third person which did not state facts sufficient to justify the order.[81] On a proceeding by mandamus to enforce an order of the commissioners they must bring themselves within the terms of the statute and allege performance of any conditions precedent,[82] and the order itself must be definite and certain as to

72. Atlantic Express Co. *v.* Wilmington, etc., R. Co., 111 N. C. 463, 16 S. E. 393, 32 Am. St. Rep. 805, 18 L. R. A. 393.

73. State *v.* Chicago, etc., R. Co., 16 S. D. 517, 94 N. W. 406.

74. People *v.* Railroad Com'rs, 158 N. Y. 421, 53 N. E. 163 [*affirming* 32 N. Y. App. Div. 158, 52 N. Y. Suppl. 901].

75. Railroad Com'rs *v.* Portland, etc., R. Co., 63 Me. 269, 18 Am. Rep. 208; Railroad Com'rs *v.* Atlantic Coast Line R. Co., 71 S. C. 130, 50 S. E. 641.

76. Nashville, etc., R. Co. *v.* State, 137 Ala. 439, 34 So. 401; State *v.* Atlantic Coast Line R. Co., 53 Fla. 650, 44 So. 213, 13 L. R. A. N. S. 320; State *v.* Fremont, etc., R. Co., 22 Nebr. 313, 35 N. W. 118; People *v.* Brooklyn Heights R. Co., 172 N. Y. 90, 64 N. E. 788 [*affirming* 69 N. Y. App. Div. 549, 75 N. Y. Suppl. 202].

In Iowa the statute gives the district courts of the state jurisdiction to enforce orders and regulations made by the railroad commissioners affecting public rights, the proceeding to be by an equitable action (Smith *v.* Chicago, etc., R. Co., 86 Iowa 202, 53 N. W. 128; State *v.* Mason City, etc., R. Co., 85 Iowa 516, 52 N. W. 490); which is not to be instituted by the commissioners in their own names but in the name of the state and prosecuted by the attorney-general (State *v.* Chicago, etc., R. Co., 90 Iowa 594, 58 N. W. 1060; Smith *v.* Chicago, etc., R. Co., *supra*).

In Kansas the statute provides for the enforcement of orders of the railroad commissioners by mandamus. State *v.* Missouri Pac. R. Co., 76 Kan. 467, 92 Pac. 606.

In New York the statute of 1890 gives the supreme court at special term jurisdiction to enforce orders of the railroad commissioners by mandamus. People *v.* Delaware, etc., Canal Co., 32 N. Y. App. Div. 120, 52 N. Y. Suppl. 850 [*affirmed* in 165 N. Y. 362, 59 N. E. 138, and *distinguishing* People *v.* New York, etc., R. Co., 104 N. Y. 58, 9 N. E. 856, 58 Am. Rep. 484, decided prior to the enactment of this statute].

In South Carolina it was held that under Gen. St. § 1539, as amended by the act of 1882, the railroad commissioners could not maintain an action for the enforcement of their orders, but that the remedy was by an action for the penalty prescribed by the statute to be brought by the attorney-general in the name of the state upon the request of the railroad commissioners (Railroad Com'rs *v.* Columbia, etc., R. Co., 26 S. C. 353, 2 S. E. 127); but under Code (1902), § 2119, it is expressly provided that the orders of the railroad commissioners may be enforced by mandamus issued by a justice of the supreme court or circuit judge on application of the commissioners (Railroad Com'rs *v.* Atlantic Coast Line R. Co., 71 S. C. 130, 50 S. E. 641).

77. State *v.* Atlantic Coast Line R. Co., 48 Fla. 114, 37 So. 652; State *v.* Missouri Pac. R. Co., 76 Kan. 467, 92 Pac. 606; Railroad Com'rs *v.* Portland, etc., R. Co., 63 Me. 269, 18 Am. Rep. 208; State *v.* Fremont, etc., R. Co., 22 Nebr. 313, 35 N. W. 118. See also MANDAMUS, 26 Cyc. 372.

The existence of a different statutory remedy will not preclude the remedy by mandamus to enforce orders of railroad commissioners. State *v.* Fremont, etc., R. Co., 22 Nebr. 313, 35 N. W. 118.

78. Nashville, etc., R. Co. *v.* State, 137 Ala. 439, 34 So. 401; State *v.* Yazoo, etc., R. Co., 87 Miss. 679, 40 So. 263.

79. State *v.* Des Moines, etc., R. Co., 87 Iowa 644, 54 N. W. 461; State *v.* Chicago, etc., R. Co., 86 Iowa 304, 53 N. W. 253; State *v.* Yazoo, etc., R. Co., 87 Miss. 679, 40 So. 263.

80. Nashville, etc., R. Co. *v.* State, 137 Ala. 439, 34 So. 401; State *v.* Missouri Pac. R. Co., 55 Kan. 708, 41 Pac. 964, 49 Am. St. Rep. 278, 29 L. R. A. 444; State *v.* Kansas Cent. R. Co., 47 Kan. 497, 28 Pac. 208.

81. State *v.* Chicago, etc., R. Co., 86 Iowa 641, 53 N. W. 323.

82. State *v.* Chicago, etc., R. Co., 16 S. D. 517, 94 N. W. 406.

what the railroad company is required to do.[83] Under the Louisiana constitution railroad commissioners may impose a penalty for non-compliance with their orders and sue for its recovery.[84]

f. Judicial Interference With or Review of Orders. In some cases the statutes give a right of appeal from orders of railroad commissioners,[85] or authorize the railroad company to bring an action against the commissioners to have the regulation, order, or finding vacated,[86] with a right of appeal from the judgment there rendered to the supreme appellate court,[87] and the orders of railroad com-

83. State *v.* Chicago, etc., R. Co., 16 S. D. 517, 94 N. W. 406.

84. Railroad Com'rs *v.* Kansas City Southern R. Co., 111 La. 133, 35 So. 487.

85. Chicago, etc., R. Co. *v.* Railroad Com'rs, 38 Ind. App. 439, 78 N. E. 338, 79 N. E. 520; Corporation Com'rs *v.* Atlantic Coast Line R. Co., 139 N. C. 126, 51 S. E. 793; and cases cited *infra*, this note.

Under the Indiana statute of 1905, authorizing a railroad company to appeal directly to the appellate court from any "rate, classification, rule, charge, or general regulation" adopted by the railroad commission, no appeal lies directly to the appellate court from an order of the commission requiring the installation of an interlocking device at a crossing, but if any appeal may be taken it should be in the first instance to the circuit or superior court. Grand Rapids, etc., R. Co. *v.* Railroad Commission, 38 Ind. App. 657, 78 N. E. 358.

Under the Minnesota statute of 1887, it is held that the right of appeal given by section 15 does not apply to purely administrative orders made under section 10, relating to the manner of operating the road, but only to orders made under sections 13 and 14 upon the complaint of some person charging the company with a violation of duty resulting in damage or injury to him, and that as to orders of the former class objection can be made only by way of defense to an action brought to enforce them. Minneapolis, etc., R. Co. *v.* Railroad, etc., Com'rs, 44 Minn. 336, 46 N. W. 559.

In North Carolina the statute allows an appeal from the decision of the railroad commission to the superior court and from that court to the supreme court. The further provision of the statute authorizing an appeal from the railroad commission direct to the supreme court "where no exception is made to the facts as found by the commission" has been held to be in conflict with the provisions of the constitution. State *v.* Wilmington, etc., R. Co., 122 N. C. 877, 29 S. E. 334.

In England under the Regulation of Railways Act of 1873, it was provided that the railway commissioners should, in cases arising under certain sections, and might in all other proceedings, state a case in writing for the opinion of a superior court on questions of law, under which provision the commissioners might state a case arising under section 15, although the statute provided that their decision under that section should be binding on all courts and in all legal proceedings (Hall *v.* London, etc., R. Co., 15 Q. B. D. 505, 53 L. T. Rep. N. S. 345, 5 R. & Can. Tr. Cas. 28); and the Railway and Canal Traffic Act of 1888 provided for an appeal from the railway commissioners to a superior court on questions of law (North Eastern R. Co. *v.* North British R. Co., 10 R. & Can. Tr. Cas. 82).

In Canada the Railway Act of 1903 provides that the decision of the railroad commissioners as to matters of fact shall be binding and conclusive but authorizes an appeal to the supreme court on questions of law upon leave granted to appeal by the board or by a justice of the supreme court (Canadian Pac. R. Co. *v.* Grand Trunk R. Co., 12 Ont. L. Rep. 320); but it is held that no appeal can be taken from the order of a justice granting or refusing leave to appeal from the decision of the commissioners (Williams *v.* Grand Trunk R. Co., 36 Can. Sup. Ct. 321, 4 Can. R. Cas. 302).

Appeal as supersedeas.— The appeal from an order of the railroad commissioners to the superior court given by the Connecticut statute is an independent proceeding before the superior judge, and therefore the provision of the statute that the appeal shall operate as a supersedeas does not come into operation until the court takes jurisdiction of the appeal, and a decision by it that it has no jurisdiction thereof shows that there was no supersedeas. New York, etc., R. Co. *v.* Cockcroft, 49 Fed. 3.

Costs of appeal.— In England on an appeal from a decision of the railway commissioners, in a dispute other than between two or more companies, the court of appeals has power to give the costs of the appeal to the successful party, notwithstanding section 2 of the Railway and Canal Traffic Act of 1894. Mansion House Assoc. *v.* Great Western R. Co., [1895] 2 Q. B. 141, 64 L. J. Q. B. 434, 72 L. T. Rep. N. S. 523, 9 R. & Can. Tr. Cas. 58, 14 Reports 429.

86. See Railroad Com'rs *v.* Missouri Pac. R. Co., 71 Kan. 193, 80 Pac. 53; Morgan's Louisiana, etc., R. Co. *v.* Railroad Commission, 109 La. 247, 33 So. 214.

87. Railroad Com'rs *v.* Missouri Pac. R. Co., 71 Kan. 193, 80 Pac. 53 (holding that on the appeal to the supreme court that court cannot pass upon the weight and credibility of evidence as in an original proceeding); Morgan's Louisiana, etc., R. Co. *v.* Railroad Commission, 109 La. 247, 33 So. 214 (holding that on such appeal the supreme court acts as a judicial tribunal and not as a mere administrative board supervisory of the acts of the railroad commission).

missioners may also be reviewed on certiorari;[88] but on appeal the court will not reverse an order of the commissioners unless clearly erroneous.[89] So also in an action or proceeding to enforce an order of the railroad commissioners the court may inquire into whether the commissioners have exceeded their jurisdiction,[90] or whether the order of the commissioners is under the circumstances unreasonable or unjust,[91] and upon an affirmative finding in either case refuse to enforce the order.[92] Courts of equity also have jurisdiction to prevent illegal or improper acts on the part of the railroad commissioners,[93] and so a court of equity may enjoin proceedings or the enforcement of orders of railroad commissioners where they are acting under a statute which is unconstitutional,[94] or in making the order they have exceeded their jurisdiction,[95] or the order is under the circumstances unreasonable or unjust;[96] but in so doing the court cannot fix and determine what would be reasonable or enjoin the commissioners from making a different order,[97] and it is not a violation of an injunction against putting in force a certain schedule of rates for the commissioners to establish a different

88. Gulf, etc., R. Co. *v.* Adams, 85 Miss. 772, 38 So. 348; People *v.* Brooklyn Heights R. Co., 172 N. Y. 90, 64 N. E. 788 [*affirming* 69 N. Y. App. Div. 549, 75 N. Y. Suppl. 202]; People *v.* Railroad Com'rs, 158 N. Y. 421, 53 N. E. 163 [*affirming* 32 N. Y. App. Div. 158, 52 N. Y. Suppl. 901]. See also, generally, CERTIORARI, 6 Cyc. 750 *et seq.*

89. Jacobson *v.* Wisconsin, etc., R. Co., 71 Minn. 519, 74 N. W. 893, 70 Am. St. Rep. 358, 40 L. R. A. 389; International, etc., R. Co. *v.* Railroad Com'rs, (Tex. Civ. App. 1905) 86 S. W. 16 [*affirmed* in 99 Tex. 332, 89 S. W. 961]; Louisville, etc., R. Co. *v.* Interstate R. Co., 107 Va. 225, 57 S. E. 654.

The burden is upon the appellant to show that the order was unauthorized or improper. Jacobson *v.* Wisconsin, etc., R. Co., 71 Minn. 519, 74 N. W. 893, 70 Am. St. Rep. 358, 40 L. R. A. 389; Louisville, etc., R. Co. *v.* Interstate R. Co., 107 Va. 225, 57 S. E. 654.

90. Nashville, etc., R. Co. *v.* State, 137 Ala. 439, 34 So. 401.

91. State *v.* Chicago, etc., R. Co., 86 Iowa 304, 53 N. W. 253.

Under the Iowa statute on a proceeding in the district court to enforce an order of the railroad commissioners, the court, in passing upon the reasonableness of the order, acts only upon the record made before the commissioners, and the order cannot be sustained by showing that it is reasonable because of the existence of other grounds not presented to or considered by the commissioners. State *v.* Chicago, etc., R. Co., 86 Iowa 641, 53 N. W. 323; State *v.* Missouri Pac. R. Co., 76 Kan. 467, 92 Pac. 606.

92. See *supra*, I, C, 3, e.

93. Mississippi R. Commission *v.* Illinois Cent. R. Co., 203 U. S. 335, 27 S. Ct. 90, 51 L. ed. 209, holding further that a suit by a railroad company against a railroad commission is not a suit against the state, and that since a railroad commission is not a court an injunction granted by a federal court is not a stay of proceedings in a state court.

94. Farmers' Loan, etc., Co. *v.* Stone, 20 Fed. 270; Louisville, etc., R. Co. *v.* Tennessee R. Commission, 19 Fed. 679.

Who may sue.— Mortgage bondholders of certain railroads in Texas, alleging that the full interest on the bonds was not being paid or earned, that in most cases the earnings were insufficient to pay expenses, and that the companies were willing to meet their obligations but were prevented from exercising their discretion in making remunerative rates by the state railroad commissioners, under pain of the penalties prescribed by the Texas statute of 1891, show a sufficient interest to entitle them to maintain suits to enjoin the commission from putting into effect a schedule of rates and to restrain them and the attorney-general from suing for penalties or enforcing the act on the ground that it was in violation of the constitution of the United States. Mercantile Trust Co. *v.* Texas, etc., R. Co., 51 Fed. 529.

95. Mobile, etc., R. Co. *v.* Sessions, 28 Fed. 592; Reg. *v.* Railway Com'rs, 22 Q. B. D. 642, 53 J. P. 533, 58 L. J. Q. B. 233, 60 L. T. Rep. N. S. 606, 6 R. & Can. Tr. Cas. 108, 37 Wkly. Rep. 446.

The Thurman Act of May 7, 1878, 20 U. S. St. at L. 59 [U. S. Comp. St. (1901) p. 3570], gave to the United States government such a substantial interest in the revenues of the Union and Central Pacific Railroad companies as to authorize an intervention by the government, in a proceeding involving the validity of an order made by state railroad commissioners reducing the rates chargeable by one of such companies. Southern Pac. Co. *v.* California R. Com'rs, 71 Fed. 437.

96. Reagan *v.* Farmers' L. & T. Co., 154 U. S. 362, 14 S. Ct. 1047, 38 L. ed. 1014; Southern Pac. Co. *v.* California R. Com'rs, 78 Fed. 236; Chicago, etc., R. Co. *v.* Dey, 35 Fed. 866, 1 L. R. A. 744.

A preliminary injunction should not be granted to restrain the enforcement of a rate schedule alleged to be unreasonable, where the evidence is conflicting and the effect of such schedule is doubtful with a probability that it will prove compensatory, and the amount of business to be affected thereby is comparatively small. In such cases the courts may well wait for the test of experience to determine its reasonableness. Chicago, etc., R. Co. *v.* Dey, 38 Fed. 656.

97. Reagan *v.* Farmers' L. & T. Co., 154 U. S. 362, 14 S. Ct. 1047, 38 L. ed. 1014.

schedule.[98] A shipper does not stand in the same position as the railroad company and cannot enjoin railroad commissioners from putting into effect a new schedule of rates on the ground that it will injuriously affect him.[99]

II. FORMATION, POWERS, AND DISSOLUTION OF RAILROAD COMPANY.[1]*

A. Formation in General. A railroad company's right to corporate existence can be derived only from a legislative enactment,[2] or, in the territories within the jurisdiction of the United States, from an act of congress.[3] In the absence of a constitutional provision to the contrary, a railroad corporation may be created by a special act or charter.[4] But in some jurisdictions provision is made for the creation of railroad companies under general corporation or railroad laws,[5] and under the constitutions, or amendments thereof, in some of these jurisdictions, a railroad company can be created only under the general laws, and not by special statute.[6] But such a constitutional provision does not affect a company created, prior to its enactment, by special act.[7] Although a railroad company is created

98. Chicago, etc., R. Co. *v.* Dey, 38 Fed. 656.

99. Railroad Com'rs *v.* Symns Grocer Co., 53 Kan. 207, 35 Pac. 217.

1. **Consolidation of railroads** see *infra*, VII, E.

Collateral attack on validity of incorporation generally see CORPORATIONS, 10 Cyc. 256 *et seq.*

Incorporation in different states see CORPORATIONS, 10 Cyc. 1070.

2. Atkinson *v.* Marietta, etc., R. Co., 15 Ohio St. 21; Collier *v.* Union R. Co., 113 Tenn. 96, 83 S. W. 155; Griffin *v.* Clinton Line Extension R. Co., 11 Fed. Cas. No. 5,816.

Commissioners appointed under New York Rapid Transit Law (1875), c. 606, as distinguished from the general railroad laws to determine routes of steam railways have power to organize but a single company to operate all the railways whose construction they may authorize, and have no power to organize a separate corporation to operate each road. People *v.* Hoe, 20 Hun (N. Y.) 26.

3. People *v.* Central Pac. R. Co., 127 U. S. 1, 8 S. Ct. 1073, 32 L. ed. 150; Union Pac. R. Co. *v.* Lincoln County, 24 Fed. Cas. No. 14,378, 1 Dill. 314.

4. See Little Rock, etc., R. Co. *v.* Little Rock, etc., R. Co., 36 Ark. 663 (under the act of Jan. 12, 1853); Quinlan *v.* Houston, etc., R. Co., 89 Tex. 356, 34 S. W. 738 (construing Spec. Act, Nov. 5, 1866, incorporating the Waco Tap Railroad Company); Grand Junction R. Co. *v.* Peterborough County, 6 Ont. App. 339 [*reversing* 45 U. C. Q. B. 302, and *affirmed* in 8 Can. Super. Ct. 76].

Creation of corporations by special act or charters generally see CORPORATIONS, 10 Cyc. 201 *et seq.*

5. State *v.* Wapello County, 13 Iowa 388, holding that a railroad corporation in this state is not created by a special charter granted directly from the legislature but is a voluntary association, self-organized under a general incorporation act. And see the statutes of the several states.

Organization of corporations under general laws generally see CORPORATIONS, 10 Cyc. 219 *et seq.*

Construction of Wis. St. (1898) §§ 1862, 1863, providing for two distinct kinds of corporations: Street railway corporations, and electric or interurban railway corporations see Milwaukee Light, etc., Co. *v.* Milwaukee Northern R. Co., 132 Wis. 342, 112 N. W. 672; *In re* Milwaukee Light, etc., Co. *v.* Milwaukee Northern R. Co., 132 Wis. 313, 112 N. W. 663.

That a commercial steam railway will be only about three miles in length and will have a considerable part of its cars lying within the corporate limits of a city, and that it will connect with other steam railways at the outer terminus, does not prevent it from falling within the general laws for incorporating railroad companies. Volberg *v.* Gate City Terminal Co., 127 Ga. 537, 56 S. E. 991; Bridwell *v.* Gate City Terminal Co., 127 Ga. 520, 56 S. E. 624, 10 L. R. A. N. S. 909.

6. *Maine.*— Farnsworth *v.* Lime Rock R. Co., 83 Me. 440, 22 Atl. 373.

Minnesota.— First Div. St. Paul, etc., R. Co. *v.* Parcher, 14 Minn. 297.

New Jersey.— New Jersey Cent. R. Co. *v.* Pennsylvania R. Co., 31 N. J. Eq. 475 [*recersed* on other grounds in 32 N. J. Eq. 755].

Ohio.— Atkinson *v.* Marietta, etc., R. Co., 15 Ohio St. 21; State *v.* Roosa, 11 Ohio St. 16.

Wisconsin.— Atty.-Gen. *v.* Chicago, etc., R. Co., 35 Wis. 425.

United States.— Griffin *v.* Clinton Line Extension R. Co., 11 Fed. Cas. No. 5,816.

See 41 Cent. Dig. tit. "Railroads," §§ 26, 27. And see the statutes of the several states; and Stimson Am. St. Laws, § 441.

7. Farnsworth *v.* Lime Rock R. Co., 83 Me. 440, 22 Atl. 373 (although amended by special act afterward); First Div. St. Paul, etc., R. Co. *v.* Parcher, 14 Minn. 297.

* By Henry H. Skyles.

by special act, the general railroad laws apply thereto except so far as modified by the provisions of the special act.[8] General laws providing for the incorporation of railroad companies are to be liberally construed.[9] A general statute for the incorporation of railroad companies does not authorize the incorporation of such company for private purposes, but only where it is for the public good.[10] The right of corporate existence of a railroad company cannot be divided up and made applicable to the different divisions of the railroad.[11]

B. Incorporation, Organization, and Existence — 1. In General. In the absence of special statutory provisions, the formation and organization of a railroad company is governed by the rules regulating the organization of corporations generally.[12] In organizing and incorporating a railroad corporation, whether under a general or special statute, it is essential, in order that there may be a corporation *de jure* as distinguished from a corporation *de facto*,[13] that there should be at least a substantial compliance with all conditions precedent prescribed by the statute,[14] and the courts have no power to dispense with the statutory requirements or to supply statutory provisions, whatever may be the benefit, convenience, or necessity,[15] since what the statute requires to be done in order to complete the organization of a railroad company as a body politic is mandatory and essential, and unless they are all substantially done the charter is void and the incorpora-

In Ohio, the special act passed prior to the adoption of the constitution of 1851, authorizing commissioners therein named to open books, receive subscriptions to capital stock and thereupon to organize a railroad company under it, was not repealed by the act to create and regulate railroad companies passed May 1, 1852, as the latter act is by its terms limited to companies to be organized under its provisions and has no reference to the formation of companies under preëxisting laws except that existing corporations are authorized to accept certain of its provisions if they desire to do so, and contains no express repeal of former grants of corporate powers. State *v.* Roosa, 11 Ohio St. 16.

While the Missouri constitution of 1865 prohibited the creation of private corporations by special laws, the legislature could by special act amend a special charter previously enacted. St. Joseph, etc., R. Co. *v.* Shambaugh, 106 Mo. 557, 17 S. W. 581.

8. Mt. Pleasant Coal Co. *v.* Delaware, etc., R. Co., 6 Lack. Leg. News (Pa.) 1, construing act 1849.

9 Union R. Co. *v.* Canton R. Co., 105 Md. 12, 65 Atl. 409.

A railroad company organized under the Illinois General Railroad Act (Hurd Rev. St. (1905) p. 1564, c. 114) should be deemed a commercial railroad, notwithstanding its articles of incorporation called its line of railroad, to run through and between certain cities, a street railroad, as the statute under which it was organized would control as to its charter powers rather than the statements found in its charter as to the objects of its organization. Bradley Mfg. Co. *v.* Chicago, etc., Traction Co., 229 Ill. 170, 82 N. E. 210.

10. *In re* Pittsburg Transfer R. Co., 1 Pa. Co. Ct. 411, construing the act of April 4, 1868, and the acts supplemental thereto.

An application for a charter for a railroad to connect two manufacturing establishments is for a private rather than for a public use and properly refused. *In re* Pittsburg Transfer R. Co., 1 Pa. Co. Ct. 411.

11. State *v.* Morgan, 28 La. Ann. 482. And see, generally, Corporations, 10 Cyc. 1087.

12. See, generally, Corporations, 10 Cyc. 201 *et seq.*, 219 *et seq.*

13. **Distinction between corporation de jure and corporation de facto** generally see Corporations, 10 Cyc. 252 *et seq.*

14. Southern Kansas, etc., R. Co. *v.* Towner, 41 Kan. 72, 21 Pac. 221; Atkinson *v.* Marietta, etc., R. Co., 15 Ohio St. 21; Com. *v.* Central Pass. R. Co., 52 Pa. St. 506; Collier *v.* Union R. Co., 113 Tenn. 96, 83 S. W. 155.

Where the act of incorporation does not of and in itself confer corporate capacity but provides for the doing of certain things upon the doing of which the company shall become a body corporate, the performance of such things constitutes conditions precedent and until performed the company has no corporate existence. St. Joseph, etc., R. Co. *v.* Shambaugh, 106 Mo. 557, 17 S. W. 581.

Where the charter of a railroad company confers corporate powers in terms importing an immediate grant with a proviso "that said persons shall commence operations upon said road within two years after the passage of this act, and complete the same within five years," the requirements of such proviso are not conditions precedent to a corporate existence. Cheraw, etc., R. Co. *v.* Garland, 14 S. C. 63; Cheraw, etc., R. Co. *v.* White, 14 S. C. 51.

Where the form of the charter is prescribed that form must be followed. Collier *v.* Union R. Co., 113 Tenn. 96, 83 S. W. 155.

Where in the organization of a railroad company all the requirements of the charter are observed, although not in the order prescribed, the organization is sufficient. Eakright *v.* Logansport, etc., R. Co., 13 Ind. 404.

15. Collier *v.* Union R. Co., 113 Tenn. 96, 83 S. W. 155.

tion is incomplete.[16] Thus, in order that there may be a corporation *de jure*, there must be a substantial compliance with conditions precedent relative to the time within which the company must be organized,[17] and to the subscription and payment of capital stock,[18] and with provisions requiring that there shall be a minimum number of persons who may unite to form the corporation,[19] although it is not necessary that such corporators should be residents of and dwellers in the state.[20] But although there may have been some defects or irregularities in the organization of the company, these may be cured by a subsequent legislative enactment recognizing or authorizing its corporate existence.[21] A failure to comply with a condition subsequent in a statute creating or authorizing the incorporation of a railroad company does not affect the validity of its organization or its existence, although it may give the state the right to have its franchises forfeited.[22] Where a statute creates certain individuals a body corporate for the purpose of taking over the rights and franchises of an existing company, irregularities in the organization of the latter company are not necessarily fatal to its existence as the organization is but the creation of an agency by which it can act, and presupposes its existence,[23] and directions in the statute in regard to such organization are not conditions of its being, and not following them will at most work a forfeiture and enable the commonwealth to retake the franchises.[24] The existence of a railroad company, formed under general laws, ordinarily dates from the time of the filing of its charter.[25] Where a railroad company is not legally organized, proceedings may be commenced by the attorney-general by way of information for an injunction to restrain its incorporators and officers from making use of the name or exercising the powers of the company, so far as public interests are involved.[26]

2. Subscriptions to and Payment of Stock as Condition to Organization.[27] In the absence of a constitutional or statutory provision to that effect, neither a subscription of the entire amount of the capital stock nor of any portion or percentage thereof, is essential to the coming into existence of a railroad corporation.[28] Under some statutes, however, it is a prerequisite to the valid organization of a

16. Collier *v.* Union R. Co., 113 Tenn. 96, 83 S. W. 155.

17. Seaboard Air Line R. Co. *v.* Olive, 142 N. C. 257, 55 S. E. 263, holding, however, that the failure of a railroad company to organize under an act authorizing its organization within the time prescribed therein does not prevent a valid organization thereafter, unless a forfeiture has been declared in proceedings instituted by the state.

18. See *infra*, II, B, 2.

19. New Jersey Cent. R. Co. *v.* Pennsylvania R. Co., 31 N. J. Eq. 475 [*reversed* on other grounds in 32 N. J. Eq. 755]; Atlantic, etc., R. Co. *v.* Sullivant, 5 Ohio St. 276.

20. New Jersey Cent. R. Co. *v.* Pennsylvania R. Co., 31 N. J. Eq. 475 [*reversed* on other grounds in 32 N. J. Eq. 755].

21. People *v.* Mississippi, etc., R. Co., 14 Ill. 440; Cayuga Lake R. Co. *v.* Kyle, 64 N. Y. 185 [*affirming* 5 Thomps. & C. 659]; Smith *v.* Spencer, 12 U. C. C. P. 277. And see, generally, Corporations, 10 Cyc. 241, 242.

Illustration.— Thus an act of the legislature confirming an ordinance of a city granting permission to a railroad company chartered by special act to locate a track on and over certain streets within the city limits and authorizing the company to build a bridge over a river, the giving of which privileges had been accepted by the company, was a legislative recognition that the company then had a corporate existence and had taken corporate action in carrying out the purposes of its charter. McCartney *v.* Chicago, etc., R. Co., 112 Ill. 611. So where the state has sold a railroad company to individuals requiring them to form themselves into a corporation, and the legislature has in several subsequent acts recognized the existence of the corporation, its existence cannot be questioned by third parties and such recognition dispenses with other evidence of the fact. Atlantic, etc., R. Co. *v.* St. Louis, 66 Mo. 228 [*reversing* 3 Mo. App. 315].

22. See Cheraw, etc., R. Co. *v.* White, 14 S. C. 51; and *infra*, II, J, 2.

23. Com. *v.* Central Pass. R. Co., 52 Pa. St. 506.

24. Com. *v.* Central Pass. R. Co., 52 Pa. St. 506.

25. Chicago, etc., R. Co. *v.* Stafford County, 36 Kan. 121, 12 Pac. 593.

Existence under special act see *infra*, II, B, 5.

26. Atty.-Gen. *v.* Bergen, 29 Nova Scotia 135.

27. Subscription and payment of capital stock as a condition to organization of corporations in general see Corporations, 10 Cyc. 230, 232.

28. Waterford, etc., R. Co. *v.* Dalbiac, 6 Exch. 443, 20 L. J. Exch. 227, 5 R. & Can. Cas. 753, 4 Eng. L. & Eq. 455.

railroad company that shares to a certain amount shall be subscribed,[29] and a certain per cent be paid thereon in good faith.[30] It is not necessary under such statute that the per cent required be paid upon each subscription at the time of making the same or previous to the filing of the articles of association; but it is sufficient if the cash payments, by whomsoever made, amount in the aggregate to a sum equal to the required percentage of the required capital stock.[31] Subscriptions, within the meaning of such provisions, must be unconditional; and conditional subscriptions made before organization cannot be considered in determining whether the requisite amount of stock has been subscribed to authorize the organization.[32]

3. Articles of Incorporation and Charter. There must also be at least a substantial compliance with the requirement that the incorporators prepare and subscribe a certificate or articles of association or incorporation,[33] and acknowl-

29. Buffalo, etc., R. Co. *v.* Hatch, 20 N. Y. 157; Lake Ontario, etc., R. Co. *v.* Mason, 16 N. Y. 451; Kingston, etc., R. Co. *v.* Stroud, 132 N. C. 413, 43 S. E. 913. See also Moore *v.* Murphy, 11 U. C. C. P. 444.

30. Lake Ontario, etc., R. Co. *v.* Mason, 16 N. Y. 451; People *v.* Public Service Commission, 122 N. Y. App. Div. 283, 106 N. Y. Suppl. 968, construing Laws (1890), c. 565, § 59, as amended by Laws (1892), c. 676.

Under the North Carolina code which requires articles of association of a railroad company to state "the length of such road as near as may be," and section 1933, providing that such articles shall not be filed and recorded "until at least $1,000 of stock for every mile of proposed railroad is subscribed and five per cent thereon paid in good faith," articles stating the length of the proposed road as sixty miles and reporting only thirty-two thousand dollars of stock as subscribed and one thousand six hundred dollars paid in are void on their face. Kingston, etc., R. Co. *v.* Stroud, 132 N. C. 413, 43 S. E. 913.

A payment "in cash" within the meaning of a statute requiring a certain per cent of the amount of the subscription to be paid in cash before the articles of association can be filed is sufficiently complied with by giving to one of the directors, or other officer authorized to receive such payment, a certified check on a solvent bank which then holds funds belonging to the subscriber sufficient in amount to pay the check. People *v.* Stockton, etc., R. Co., 45 Cal. 306, 13 Am. Rep. 178; *In re* Staten Island Rapid Transit R. Co., 37 Hun (N. Y.) 422. So where the per cent required is deposited with a bank to the credit of the railroad company subject to be drawn out by check signed by the officers of the company, and the bank, although interested in the company, is absolutely responsible, it is a sufficient compliance with the statute requiring such payment in cash. Matter of Wood, 99 N. Y. App. Div. 334, 91 N. Y. Suppl. 225 [*affirmed* in 181 N. Y. 93, 73 N. E. 561, 34 N. Y. Civ. Proc. 127]. The treasurer of a company about to form a railroad corporation may receive from the subscribers payment of the ten per cent required by law to be paid to him in bank checks drawn by the subscribers and payable *in præsenti* provided they are drawn against a sufficient fund in the bank to pay the checks on presentation and the same are drawn in good faith and with no intention to evade the law. People *v.* Stockton, etc., R. Co., 45 Cal. 306, 13 Am. Rep. 178.

The 4th section of the New York Railroad Act requiring every subscriber to pay the ten per cent in money and forbidding the reception of any subscription without such payment relates exclusively to subscriptions for filling up the stock by means of new subscribers after the articles have been filed and the company has assumed an authorized corporate existence. Ogdensburgh, etc., R. Co. *v.* Frost, 21 Barb. (N. Y.) 541.

Under the Indiana general law of 1852, where an incipient organization has been effected and fifty thousand dollars or more of the capital stock subscribed and articles of association duly executed and a copy thereof filed in the office of the secretary of state, the company acquires a competent legal existence with all the rights and powers conferred upon it by that law. Hoagland *v.* Cincinnati, etc., R. Co., 18 Ind. 452.

31. Lake Ontario, etc., R. Co. *v.* Mason, 16 N. Y. 451; Ogdensburgh, etc., R. Co. *v.* Frost, 21 Barb. (N. Y.) 541; Spartenburg, etc., R. Co. *v.* Ezell, 14 S. C. 281.

32. Fairview R. Co. *v.* Spillman, 23 Oreg. 587, 32 Pac. 688.

33. See cases cited *infra*, this note.

Where a person in subscribing articles of association of a railroad company signs an incomplete paper in which the names of the directors are left blank, the instrument is incomplete and inoperative as against him; and where there is no implied consent upon his part to the insertion of the names of any persons as directors, the instrument is not made binding upon him by the insertion of such names without his consent. Dutchess, etc., R. Co. *v.* Mabbett, 58 N. Y. 397.

Seals.— In Ohio, it is essential to the creation of a railroad company that seals be annexed to the names of the incorporators subscribed to the certificate, which is required to be filed in the office of the secretary of state. Warner *v.* Callender, 20 Ohio St. 190; Atlantic, etc., R. Co. *v.* Sullivant, 5 Ohio St. 276; Griffin *v.* Clinton Line Extension R. Co., 11 Fed. Cas. No. 5,816.

Partnership.— The provision in the New York General Railroad Act requiring each subscriber to the articles of association to

edge, and support the same by affidavit,[34] and file the same, usually in the office of the secretary of state;[35] and with requirements relative to the registration of the charter.[36] There should also be a substantial compliance with the requirement that the certificate or articles of incorporation specify the object and purposes of the company,[37] the length of the road,[38] the name assumed by the company and by which it shall be known,[39] the names of the directors,[40] and other like matters.[41] The provisions of the certificate or articles of association or incor-

subscribe thereto "his name, place of residence and amount by whom subscribed" does not call for an individual personal subscription by all the members of a partnership firm. Ogdensburgh, etc., R. Co. *v.* Frost, 21 Barb. (N. Y.) 541. A subscription in the partnership name is a compliance with the act; especially where it appears that the subscription was made by one of the partners in the name of both, and the other subsequently ratified and confirmed it. Ogdensburgh, etc., R. Co. *v.* Frost, *supra*.

34. People *v.* Stockton, etc., R. Co., 45 Cal. 306, 13 Am. Rep. 178; People *v.* Railroad Com'rs, 75 N. Y. App. Div. 106, 77 N. Y. Suppl. 380, construing Laws (1890), c. 565, § 2, Laws (1892), c. 677, and Laws (1896), c. 547, in respect to the acknowledgment of such a certificate.

A certificate, the execution of which was defective because it was not properly signed and acknowledged, does not constitute the persons signing the same a corporation, and this objection may be raised by another railroad company in opposition to an application, made by the corporation attempted to be created by the certificate, to the railroad commissioners, for a certificate on the ground that public convenience and necessity require the building of its road. People *v.* Railroad Com'rs, 75 N. Y. App. Div. 106, 77 N. Y. Suppl. 380.

An incorporator of a railroad company has no power in his capacity as a notary public to take the acknowledgment of another incorporator to the certificate of incorporation, and an acknowledgment so taken is a nullity. People *v.* Railroad Com'rs, 105 N. Y. App. Div. 273, 93 N. Y. Suppl. 584.

An affidavit that there has been a bona fide subscription of a certain amount of the capital stock, and a payment of a certain per cent thereof, is required, in support of the articles or certificate of incorporation, under some statutes. People *v.* Stockton, etc., R. Co., 45 Cal. 306, 13 Am. Rep. 178 (construing St. (1861) p. 607); Buffalo, etc., R. Co. *v.* Hatch, 20 N. Y. 157, holding that the statement in such an affidavit that "ten per cent has been paid in cash on said subscription" is sufficient without adding that it was paid to the directors and in good faith. The affidavit of three directors that eighty-four thousand one hundred dollars has in good faith been subscribed to the capital stock, annexed and referring to the articles which state the termini of the road and that its length is about seventy-five miles is sufficient evidence that at least one thousand dollars of stock for every mile of road proposed is subscribed. Buffalo, etc., R. Co. *v.* Hatch, *supra*. A statute relating to the formation of a railroad company is substantially complied with where the only defect in the papers necessary to constitute a corporation is the omission of the words "in good faith" in that portion of the affidavit attached to the certificate relating to the payment of ten per cent. People *v.* Stockton, etc., R. Co., *supra*.

35. Kinston, etc., R. Co. *v.* Stroud, 132 N. C. 413, 43 S. E. 913, holding that the filing and recording by the secretary of state of the articles of association of a proposed railroad company, if not such as allowed by law, is a nullity.

Where the papers filed by which a railroad company is sought to be created are colorable, but so defective that in a proceeding on the part of the state against it it would for that reason be dissolved, yet by acts of user under such organization it becomes a corporation *de facto* as against a subscriber to its capital or other third persons. Buffalo, etc., R. Co. *v.* Cary, 26 N. Y. 75.

Parol evidence is admissible to show the date of the filing of the articles of association of a railroad company organized under Ind. Gen. St. (1852) in the office of the secretary of state. Johnson *v.* Crawfordsville, etc., R. Co., 11 Ind. 280.

36. Anderson *v.* Railroad Co., 91 Tenn. 44, 17 S. W. 803, construing the act of 1865, section 26, and holding that where a company is organized to run a railroad through several counties, the county where its charter has been registered shall be deemed to have been determined on as the location of the principal office, and holding a directors' and stockholders' meeting in another county will not change such fact.

37. Bay City Belt-Line R. Co. *v.* Hitchcock, 90 Mich. 533, 51 N. W. 808.

38. Buffalo, etc., R. Co. *v.* Hatch, 20 N. Y. 157 (holding that such provision in the Laws of 1850, chapter 140, requires only such proximate estimate of the proposed road as may be made in good faith without an actual survey and location thereof); Kinston, etc., R. Co. *v.* Stroud, 132 N. C. 413, 43 S. E. 913.

39. Atlantic, etc., R. Co. *v.* Sullivant, 5 Ohio St. 276.

40. Eakright *v.* Logansport, etc., R. Co., 13 Ind. 404.

Where the charter requires that the directors shall be named in the articles of association, such requirement is sufficiently complied with by adopting the articles at the time of electing the directors and such requirement is only directory. Eakright *v.* Logansport, etc., R. Co., 13 Ind. 404.

41. See the cases cited *infra*, this note.

poration of a railroad company organized under a general law constitute the charter of the company in so far as such provisions are authorized by the statute under which the company is formed,[42] and such charter is a contract, at least after interest has become vested under it, within the meaning of that clause of the United States constitution which prohibits a state from passing any law impairing the obligations of a contract.[43] The filing of the articles of incorporation or association is no part of such articles but is a fact separate from and independent of them.[44] The indorsement of such articles is not the filing thereof; at most it is no more than *prima facie* evidence of the time of the filing.[45] Under some statutes informalities or defects in the articles or certificate of incorporation may be cured by amendment.[46]

4. Specification of Termini and Principal Place of Business. There must also be a substantial compliance with the requirement that its charter or other certificate or articles of association or incorporation designate the proposed termini of the road,[47] and the county or counties, city or cities through which it will

Payments on stock.—A statutory requirement that the charter of a corporation must declare "the time when and the manner in which" payment on the stock subscribed shall be made is substantially complied with where the charter declares "that the stock shall be paid for in cash" at such times and in such amounts and with such notices to the subscribers as the managers and directors shall deem best for all parties in interest. New Orleans, etc., R. Co. *v.* Frank, 39 La. Ann. 707, 2 So. 310; Baltimore, etc., R. Co. *v.* Morgan's Louisiana, etc., R., etc., Co., 37 La. Ann. 883.

42. Chicago, etc., R. Co. *v.* Cutts, 94 U. S. 155, 24 L. ed. 94.

43. Smead *v.* Indianapolis, etc., R. Co., 11 Ind. 104; Chicago, etc., R. Co. *v.* Cutts, 94 U. S. 155, 24 L. ed. 94.

44. Johnson *v.* Crawfordsville, etc., R. Co., 11 Ind. 280.

45. Johnson *v.* Crawfordsville, etc., R. Co., 11 Ind. 280.

46. See the statutes of the several states. **N. Y. Gen. Corp. Law,** § 7 (Laws (1890), c. 565, as amended by Laws (1892), c. 676, and Laws (1895), c. 545), authorizing the filing of an amended certificate of incorporation correcting an informality or defect existing in the original or amended or supplemental certificate of incorporation does not authorize the filing by a railroad corporation of an amended certificate of incorporation which was intended to effect a change in the proposed route and terminus of the railroad, nor can such amended articles of incorporation be deemed a sufficient compliance with section 13 of the railroad law authorizing a railroad company to change its route, where it appears that the certificate of change, together with the survey and map, was not filed in the county clerk's office as required by this section. Matter of Riverhead, etc., R. Co., 36 N. Y. App. Div. 514, 55 N. Y. Suppl. 938.

47. *Illinois.*— Gillette *v.* Aurora R. Co., 228 Ill. 261, 81 N. E. 1005.

Indiana.— State *v.* Bailey, 19 Ind. 452; Eakright *v.* Logansport, etc., R. Co., 13 Ind. 404.

Maryland.—Piedmont, etc., R. Co. *v.* Speelman, 67 Md. 260, 10 Atl. 77, 293.

Nebraska.— Trester *v.* Missouri Pac. R. Co., 33 Nebr. 171, 49 N. W. 1110.

New Jersey.— Atty.-Gen. *v.* Delaware, etc., R. Co., 27 N. J. Eq. 631.

New York.— New York, etc., R. Co. *v.* O'Brien, 121 N. Y. App. Div. 819, 106 N. Y. Suppl. 909 [*affirmed* in 192 N. Y. 558, 85 N. E. 1113], holding that the provision in Laws (1850), c. 140, that the certificate of incorporation of a railroad shall state the places from which and to which the road is to be constructed, is satisfied by naming the towns, villages, or cities which are the termini of the road.

Ohio.— Callender *v.* Painesville, etc., R. Co., 11 Ohio St. 516; Atlantic, etc., R. Co. *v.* Sullivant, 5 Ohio St. 276.

Tennessee.— Collier *v.* Union R. Co., 113 Tenn. 96, 83 S. W. 155, construing Shannon's Code, § 2412.

West Virginia.— Deepwater R. Co. *v.* Lambert, 54 W. Va. 387, 46 S. E. 144.

A named station used in a railroad charter to designate a railroad's terminus should be held to mean a locality and not a fixed and definite point. Collier *v.* Union R. Co., 113 Tenn. 96, 83 S. W. 155.

In Wisconsin, under the statute of 1898, sections 1863, 1772, it has been held that to incorporate a suburban railway corporation under section 1863 it is not a prerequisite that the articles of incorporation designate the termini of the road, or that the cities, villages, or towns through which it is to run shall be named, but that articles of incorporation stating that the purpose of the incorporation is to construct and operate street railways in a city named elsewhere in the state, and to extend its lines into and through any village or town, sufficiently states its business or purpose to entitle it to incorporate as an interurban railway under that section. Milwaukee Light, etc., Co. *v.* Milwaukee Northern R. Co., 132 Wis. 342, 112 N. W. 672; Milwaukee Light, etc., Co. *v.* Milwaukee Northern R. Co., 132 Wis. 313, 112 N. W. 663.

Public character.— The articles of association of a railroad company must designate the termini of the road, such as cities, towns, or villages which shall indicate its public

pass,[48] and its principal place of business.[49] The requirement that the termini shall be specified in the articles of incorporation means only that the railroad shall have such termini definitely ascertained and fixed so as to indicate its general direction and location;[50] and where the law does not in terms require that the termini shall be at or in a town, village, or city, the statute is sufficiently complied with where the places or points of the termini are definitely designated and fixed.[51] As a general rule the charter of a commercial railroad, as distinguished from a street railroad, need not contain any description of the route, but only of the termini.[52] Its route may be generally, but need not be definitely, stated in the charter;[53] but the route of a commercial railroad through a city as well as that of a street railway, must be designated in its charter where the statute so requires, in order that it may obtain permission or concession from the city to occupy the streets over which it is intended to build the road.[54]

5. Acceptance of Charter. Where a railroad company is formed by a special charter, the incorporation is not complete until the charter is accepted by the corporators.[55] But in the absence of statutory requirements to that effect a formal acceptance is not required,[56] but acceptance may be implied from the circumstances,[57] as from the fact of its organization pursuant to the provisions of the

character, and an application for a charter for a railroad indicating its termini from a point on or near the premises of one manufacturing establishment to or near the premises of another manufacturing establishment in the same city indicates a private rather than a public use and the charter should be refused. *In re* Pittsburg Transfer R. Co., 1 Pa. Co. Ct. 411.

Branch lines.— Nebr. Comp. St. (1873) which requires the certificate of organization of a railroad company to state the names of the termini of the road and the county or counties through which the road shall pass applies only to the main line of the company; and hence it is not necessary for the certificate to specify the termini of branch lines or the counties through which they will pass. Trester *v.* Missouri Pac. R. Co., 33 Nebr. 171, 49 N. W. 1110.

"At or near."— A description in a statutory certificate of parties organizing as a railroad corporation of one terminus of their proposed road as "at or near" a place named in the certificate and on the line of a specified road terminating at that place is sufficiently certain. New Jersey Cent. R. Co. *v.* Pennsylvania R. Co., 31 N. J. Eq. 475 [*reversed* on other grounds in 32 N. J. Eq. 755]; Warner *v.* Callender, 20 Ohio St. 190. *Compare* Collier *v.* Union R. Co., 113 Tenn. 96, 83 S. W. 155.

48. Piedmont, etc., R. Co. *v.* Speelman, 67 Md. 260, 10 Atl. 77, 293; Callender *v.* Painesville, etc., R. Co., 11 Ohio St. 516; Atlantic, etc., R. Co. *v.* Sullivant, 5 Ohio St. 276.

The names of townships through which a proposed railroad is to be extended are not required to be set forth in the articles of incorporation under the corporation laws of Ohio (Rev. St. § 3237); the counties only are required to be mentioned and the naming of townships is mere surplusage, which fact does not limit the company to such townships nor prevent it from extending its road into other townships of counties named in the articles. Hayes *v.* Toledo R., etc., Co., 26 Ohio Cir. Ct. 395 [*affirmed* in 70 Ohio St. 425, 72 N. E. 1165].

49. Canon City, etc., R. Co. *v.* Denver, etc., R. Co., 5 Fed. Cas. No. 2,387 [*reversed* on other grounds in 99 U. S. 463, 25 L. ed. 438], holding that a certificate of incorporation designating the company's principal place of business, and setting forth that its principal business would be carried on in certain counties named, in which its line was to be located, is a substantial compliance with the Colorado act of 1876 (11th Sess. Laws, p. 41), requiring such a certificate to designate the principal office, and name of the county in which the principal business of the corporation is to be carried on.

50. Union R. Co. *v.* Canton R. Co., 105 Md. 12, 65 Atl. 409.

51. Union R. Co. *v.* Canton R. Co., 105 Md. 12, 65 Atl. 409.

52. Collier *v.* Union R. Co., 113 Tenn. 96, 83 S. W. 155.

53. Collier *v.* Union R. Co., 113 Tenn. 96, 83 S. W. 155.

54. Collier *v.* Union R. Co., 113 Tenn. 96, 83 S. W. 155.

55. Farnsworth *v.* Lime Rock R. Co., 83 Me. 440, 22 Atl. 373; Seaboard Air Line R. Co. *v.* Olive, 142 N. C. 257, 55 S. E. 263; Quinlan *v.* Houston, etc., R. Co., 89 Tex. 356, 34 S. W. 738. And see. generally, Corporations, 10 Cyc. 203.

Although the rights under a legislative charter may not be complete because of nonacceptance of the charter in the manner required by the statute, the state cannot treat the company as a mere trespasser on a right of way of public lands under a land grant, and as owing rent therefor. State *v.* New Orleans City, etc., R. Co., 104 La. 685, 29 So. 312.

56. Quinlan *v.* Houston, etc., R. Co., 89 Tex. 356, 34 S. W. 738.

57. Farnsworth *v.* Lime Rock R. Co., 83 Me. 440, 22 Atl. 373; Bangor, etc., R. Co. *v.* Smith, 47 Me. 34.

charter,[58] and without an organization there can be no acceptance.[59] A sufficient acceptance may also be inferred from the fact that the act creating it was passed at the request of the directors designated in the charter;[60] from the exercise of corporate powers or other unequivocal acts on the part of the company;[61] from the fact that the company had constructed and operated a part of its road;[62] or from the fact that the company afterward obtained amendments to its charter.[63] As a general rule, when a charter is granted, whether it be one of creation, or an amendment to a preëxisting charter, it must either be accepted or rejected as offered and without condition.[64] In accepting the privileges conferred by a charter, the railroad company will be required to perform all conditions imposed;[65] but if the charter confers corporate capacity without any conditions precedent, acceptance of the charter is all that need be shown to prove corporate existence.[66] It has been held that the acceptance of such a special act vesting designated persons with corporate powers and declaring them to be a corporation *eo instante* creates a corporation.[67]

C. Duration and Termination of Corporate Existence. The duration and termination of the corporate existence of a railroad company is usually governed by the terms of its charter, or of the statute under which it is incorporated.[68] Where the charter or governing statute fixes a definite period of time during which its corporate life shall continue, the corporation is *ipso facto* dissolved at the end of such period.[69] But in the absence of such limitation, a railroad company, like other corporations, may have the capacity of perpetual existence.[70] A railroad company may also cease to exist by voluntary surrender of its corporate franchises,[71] by a consolidation with other companies,[72] or by a forfeiture of its franchises being enforced by the state.[73] Under some statutes a railroad company may continue to exist as a corporate body for a specified period after its charter has expired or been annulled for the purpose of suing and being sued and

58. Seaboard Air Line R. Co. *v.* Olive, 142 N. C. 257, 55 S. E. 263; Quinlan *v.* Houston, etc., R. Co., 89 Tex. 356, 34 S. W. 738.

59. Quinlan *v.* Houston, etc., R. Co., 89 Tex. 356, 34 S. W. 738.

60. St. Joseph, etc., R. Co. *v.* Shambaugh, 106 Mo. 557, 17 S. W. 581.

61. Lyons *v.* Orange, etc., R. Co., 32 Md. 18; St. Joseph, etc., R. Co. *v.* Shambaugh, 106 Mo. 557, 17 S. W. 581.

Meeting of directors.—Acceptance of the charter of a corporation, if any is necessary where the charter creates a corporation *in præsenti* and appoints a board of directors, is sufficiently shown by the meeting and proceedings of the directors under the charter, although had without the limits of the state creating the corporation. Ohio, etc., R. Co. *v.* McPherson, 35 Mo. 13, 86 Am. Dec. 128.

62. St. Joseph, etc., R. Co. *v.* Shambaugh, 106 Mo. 557, 17 S. W. 581.

63. Farnsworth *v.* Lime Rock R. Co., 83 Me. 440, 22 Atl. 373.

64. Lyons *v.* Orange, etc., R. Co., 32 Md. 18.

65. Lyons *v.* Orange, etc., R. Co., 32 Md. 18.

66. Roosa *v.* St. Joseph, etc., R. Co., 114 Mo. 508, 21 S. W. 1124; St. Joseph, etc., R. Co. *v.* Shambaugh, 106 Mo. 557, 17 S. W. 581.

67. Little Rock, etc., R. Co. *v.* Little Rock, etc., R. Co., 36 Ark. 663.

68. See Roxbury *v.* Boston, etc., R. Corp., 6 Cush. (Mass.) 424.

69. Atlantic, etc., R. Co. *v.* Allen, 15 Fla. 637; People *v.* Anderson, etc., R. Co., 76 Cal. 190, 18 Pac. 308; New Orleans, etc., R. Co. *v.* New Orleans, 34 La. Ann. 429; La Grange, etc., R. Co. *v.* Rainey, 7 Coldw. (Tenn.) 420. See Roxbury *v.* Boston, etc., R. Co., 6 Cush. (Mass.) 424, holding that an act incorporating a railroad company with a proviso that after twenty years the commonwealth may, in a certain contingency, purchase the franchise of the road, the company is not, by virtue of such provision, expressly limited as to its duration, within the act of 1830, chapter 81 (Rev. St. c. 44, § 23) relating to the amendment of acts of incorporation.

70. See, generally, CORPORATIONS, 10 Cyc. 1271.

Where the corporate existence of a railroad company is by its original charter limited to fifty years, but by an amendatory act it is provided that at the expiration of each subsequent term of ten years the state shall have the right at its election to take all the property, etc., and if this election is not made within twelve months then the charter of the company shall be continued for another term of ten years, the company has a capacity of perpetual existence, unless the election to purchase is exercised. Davis *v.* Memphis, etc., R. Co., 87 Ala. 633, 6 So. 140.

71. See, generally, CORPORATIONS, 10 Cyc. 1299 *et seq.*; and *infra*, II, J, 2.

72. See *infra*, VII, E, 6, a.

73. See *infra*, II, J, 2.

closing up its business at the end of which period it ceases to exist entirely.[74] But the corporate existence of a railroad company, even when it has ceased entirely, may be revived by an act of the legislature;[75] or the corporate existence of one company may be continued by an act of the legislature into a new company under a new name.[76]

D. Organization Tax. Under some statutes, a railroad company is required, for the privilege of organization and doing business in the state, to pay, usually to the state treasurer, an organization tax consisting usually of a specified per cent upon the amount of the capital stock which the company is authorized to have,[77] and some of these statutes apply to foreign companies doing business in the state.[78] These statutes apply only where there is a creation or renewal of corporate powers,[79] as where the property and franchises of a railroad company are sold under foreclosure and a new company formed;[80] and do not apply where

74. Maine Short Line R. Co. *v.* Maine Cent. R. Co., 92 Me. 476, 43 Atl. 113; Ford *v.* Delta, etc., Land Co., 43 Fed. 181 [*affirmed* in 164 U. S. 662, 17 S. Ct. 230, 41 L. ed. 590].

75. See cases cited *infra*, this note.

Minn. Spec. Laws (1862), c. 19, which granted, transferred, and continued in certain persons named, and also designated by the name and style of the Winona and St. Peter Railroad Company all the rights, benefits, privileges, property, franchises, and interests of the Transit Railroad Company which had been previously acquired by the state, did not revive the Transit Railroad Company but transferred its franchises, etc., to the Winona and St. Peter Railroad Company. Hilbert *v.* Winona, etc., R. Co., 11 Minn. 246; Huff *v.* Winona, etc., R. Co., 11 Minn. 180. And for a similar construction of Laws (1862), c. 17, see Fitz *v.* Minnesota Cent. R. Co., 11 Minn. 414.

76. See Wilson *v.* Chesapeake, etc., R. Co., 21 Gratt. (Va.) 654, construing Sess. Acts (1866–1867), p. 705, c. 280, § 15.

77. See Opinion of Justices, 65 N. H. 673, 23 Atl. 620 (construing Gen. Laws, c. 13, § 5, in connection with Laws (1887), c. 304); Muehlenbeck *v.* Babylon, etc., R. Co., 26 Misc. (N. Y.) 136, 55 N. Y. Suppl. 1023; St. Louis Southwestern R. Co. *v.* Tod, 94 Tex. 632, 64 S. W. 778. And see the statutes of the several states.

Under N. Y. Laws (1886), c. 143, § 1, providing that "every joint-stock company or association incorporated by or under any general or special law of this state, having capital stock divided into shares, shall pay to the state treasurer for the use of the state, a tax of one-eighth of one per centum upon the amount of capital stock which said corporation . . . is authorized to have," and Laws (1869), c. 917, as amended by Laws (1881), c. 685, authorizing the consolidation of railroad companies organized under the laws of this or any other state, it has been held "that where two or more domestic corporations are so consolidated, the resulting entity may properly be said to be a corporation incorporated by and under a general and special law of this state" within the meaning of Laws (1886), requiring an organization tax and so subject to the tax imposed by said act; but where the consolidation is of a domestic corporation with a corporation of another state whose legislature has sanctioned such a consolidation as a new corporation, it owes its existence not to the state law alone but to the legislation of the two states, and is not liable to such tax. People *v.* Fitchburg R. Co., 129 N. Y. 654, 29 N. E. 959 [*reversing* 61 Hun 619, 15 N. Y. Suppl. 644]; People *v.* New York, etc., R. Co., 129 N. Y. 474, 29 N. E. 959, 15 L. R. A. 82 [*reversing* 61 Hun 66, 15 N. Y. Suppl. 635].

78. See cases cited *infra*, this note. But see State *v.* Tompkins, 48 S. C. 49, 25 S. E. 982.

Mo. Rev. St. (1889) § 1025 (Laws (1891), p. 75), providing that foreign corporations shall not be permitted to do or continue business in the state without paying on the proportion of the capital stock represented by their property or business in the state, incorporation taxes or fees equal to those required from similar domestic corporations, except that this shall not apply to railroad companies "which shall heretofore build their lines of railway into or through the state," applies to a foreign railroad corporation which had prior to 1891 merely constructed a part of its proposed road within the state. State *v.* Cook, 171 Mo. 348, 71 S. W. 829. But the above statute is to be considered in connection with Const. art. 10, § 21, and Rev. St. (1879) § 764, and such company is liable to the payment of the incorporation fee on that part of its capital stock employed in the state calculated on a basis of ten thousand dollars for each mile of road proposed by its charter to be constructed in the state, less the sum expended in the construction of that part of its road which was constructed before the enactment of Rev. St. (1899). State *v.* Cook, *supra*.

79. See Opinion of Justices, 65 N. H. 673, 23 Atl. 620.

The consolidation of three railroad companies is the formation of a new company within Mo. Const. art. 10, § 21, providing that no corporation shall be organized without the payment of certain fees on or before the filing of the articles of incorporation, although the three companies had previously paid the fees for their incorporation. State *v.* Lesueur, 145 Mo. 322, 46 S. W. 1075.

80. People *v.* Cook, 110 N. Y. 443, 18

there is merely a purchase of the property and franchises of one company by another company,[81] or where there is an amendment of a company's charter which does not increase its capital stock.[82]

E. Capital and Stock.[83] The capital and stock of a railroad company is governed by the rules regulating the capital and stock of corporations generally, except where there are special constitutional or statutory provisions regulating the same.[84] Under some statutes a railroad company is required to expend a certain per cent of its capital stock upon the road within a specified time.[85]

F. Reorganization.[86] In the absence of special statutory provisions otherwise, the reorganization of a railroad company is governed by the rules applicable to the reorganization of corporations in general.[87]

N. E. 113 [*affirming* 47 Hun 467, and *affirmed* in 148 U. S. 397, 13 S. Ct. 645, 37 L. ed. 498, 154 U. S. 512, 14 S. Ct. 1150, 38 L. ed. 1073].

Constitutionality.— N. Y. Act, April 16, 1886, c. 143, imposing such a tax on a company so organized, after the passage of the act, by purchasers who purchased at a foreclosure sale made before its passage, violates no contract of the state and is no violation of the constitution of the United States. People *v.* Cook, 154 U. S. 512, 14 S. Ct. 1150, 38 L. ed. 1073, 148 U. S. 397, 13 S. Ct. 645, 37 L. ed. 498 [*affirming* 110 N. Y. 443, 18 N. E. 113 (*affirming* 47 Hun 467)].

81. Opinion of the Justices, 65 N. H. 673, 23 Atl. 620.

82. St. Louis Southwestern R. Co. *v.* Tod, 94 Tex. 632, 64 S. W. 778, construing Rev. St. art. 2439.

83. Subscriptions to and payment of stock as condition to organization see *supra*, II, B, 2.

84. See, generally, CORPORATIONS, 10 Cyc. 364 *et seq.*

Power of railroad commissioners to authorize or prohibit the issuance of stock certificates or annul them when once issued and delivered see Davis *v.* San Antonio, etc., R. Co., 92 Tex. 642, 51 S. W. 324 [*reversing* (Civ. App. 1898) 44 S. W. 1012], construing Rev. St. art. 4585*g*.

Increase of capital stock see State *v.* Great Northern R. Co., 100 Minn. 445, 111 N. W. 289, 10 L. R. A. N. S. 250 (construing Rev. Laws (1905), § 2872); *In re* Chartiers Connecting R. Co., 1 Pa. Co. Ct. 270. And see, generally, CORPORATIONS, 10 Cyc. 538 *et seq.* Tenn. Act (1875), c. 142, § 5, providing that a corporation may by its by-laws fix the amount of capital stock, is restricted by section 6 which relates to railroad companies and the manner of increasing their capital and stock, and hence does not apply to a railroad corporation organized and operated under the latter section, the charter of which incorporated such section as a part thereof. Union R. Co. *v.* Sneed, 99 Tenn. 1, 41 S. W. 364, 47 S. W. 89.

Interest on stock.— Under Ky. Acts (1850–1851), c. 505, § 5, which provides that a certain railroad "shall allow to all subscribers and holders of stock under the company, interest on the same from the time of paying for said stock" up to the time of making the first dividend, interest did not begin to run on the stock from the date on which a county subscribing therefor issued bonds in payment thereof, but from the date of the delivery of the bonds to the company, although the bonds bore date anterior to their delivery. Louisville, etc., R. Co. *v.* Hart County, 116 Ky. 186, 75 S. W. 288, 77 S. W. 361, 25 Ky. L. Rep. 395.

Sale of lands taken for stock as required by Ind. Act (1852), § 2 (1 Rev. St. p. 427), as being a question of fact see Taber *v.* Cincinnati, etc., R. Co., 15 Ind. 459.

Payment for stock.— The provision of Ill. Const. art. 11, § 13, that no railroad company shall issue any stock or bonds except for money, labor, or property actually received and applied to the purposes for which such corporation was organized, and that all stock dividends and other fictitious increase of the capital stock of any such corporation shall be void, does not render invalid stock issued by a railroad company directly or indirectly in payment for the construction of its road; nor can a court hold it invalid on a determination that the consideration so received was not equal to the par value of the stock. Lake St. R. Co. *v.* Ziegler, 99 Fed. 114, 39 C. C. A. 431. And the issuance of stock by a railroad company in violation of such provision is *ultra vires*, and the stock void in the hands of all holders, and the company cannot maintain a suit against the person to whom it was issued to require an accounting for its proceeds. Lake St. R. Co. *v.* Ziegler, *supra*.

85. Thornburgh *v.* Newcastle, etc., R. Co., 14 Ind. 499 (holding also that it cannot be proved collaterally that the company has not expended the required per cent within the required time); Rio Grande Western R. Co. *v.* Telluride Power, etc., Co., 16 Utah 125, 51 Pac. 136 (holding Comp. Laws (1888), § 2358, requiring railroad companies building roads in that state to expend ten per cent of their capital stock within two years after filing their articles of incorporation, to apply to a consolidated company); Ontario, etc., R. Co. *v.* Canadian Pac. R. Co., 14 Ont. 432.

86. Reorganization by purchasing bondholders see *infra*, VIII, B, 15.

Reorganization by purchasers at foreclosure sale see *infra*, VIII, B, 16.

87. See, generally, CORPORATIONS, 10 Cyc. 281 *et seq.*

A bill of discovery will lie to compel a defendant railroad company organized by force

G. Stock-Holders and Subscriptions to Stock.[88] In the absence of special statutory provisions, the law applicable to corporations generally governs questions relative to the status, rights, and liabilities of stock-holders in railroad companies,[89] and subscriptions to stock therein.[90] Under some statutes the stock-holders of a railroad company are liable for all debts owing to laborers or servants for services performed for the company.[91] In the absence of any pro-

of statute, to disclose to a mortgage bondholder the plan of reorganization. Midland R. Co. *v.* Hitchcock, 24 N. J. Eq. 278.

Ascertaining liabilities of old company.— Where an agreement was entered into between a trust company and the holders of the various classes of mortgages on a railroad, by which the trust company, for the purpose of reorganizing the railroad company, was to obtain control of all the outstanding mortgages on the property, provide for the issue of new stock, ascertain what the floating debt of the old company and the expense of carrying out the plan of reorganization would be, and fix the amount to be paid by the stock-holders of the old company to enable it to take shares in the new corporation, the judgment of the trust company as to what should be taken into account in ascertaining such debt and liability to the old company, if honestly and fairly exercised upon any doubtful or disputed question, should not be reversed. Gernsheim *v.* Central Trust Co., 61 Hun (N. Y.) 625, 16 N. Y. Suppl. 127.

Laches.— The holder of an unliquidated claim of a railroad company will be held barred by laches from the right to charge a reorganized company succeeding to the property with liability thereon, on the ground that it issued bonds and stock to the old company, where with ample opportunity he neglected to assert such claim against the company until after the transaction had been completed and the bonds and stock delivered. Wenger *v.* Chicago, etc., R. Co., 105 Fed. 796.

88. **Consent of stock-holder:** To lease of road see *infra*, VII, C, 1, e. To consolidation of road see *infra*, VII, E, 2, e.

Right of original stock-holder to take stock after foreclosure see *infra*, VIII, B, 16, b.

Right of stock-holders: On lease of road see *infra*, VII, C, 4. On consolidation of road see *infra*, VII, E, 6, f. On purchase by bondholders at foreclosure sale see *infra*, VIII, B, 15, c.

Subscriptions in aid of road in general see *infra*, III, B.

89. See, generally, CORPORATIONS, 10 Cyc. 364 *et seq.*, 538 *et seq.*, 649 *et seq.*

Management of road.— The provision in the Union Pacific charter for government directors did not take the corporation out of the general rule, that except in cases where the charter imposes a limitation, the stock-holders are the proper parties to take final action in the management of the railroad's affairs. Union Pac. R. Co. *v.* Chicago, etc., R. Co., 163 U. S. 564, 16 S. Ct. 1173, 41 L. ed. 265. Under Ga. Civ. Code (1895), § 2163, conferring the management of the affairs of railroad companies on their boards of directors, where stock-holders attend the regular annual meeting of the stock-holders of a railroad company, they may transact the business of the meeting and elect officers, although a majority in interest or in number of the stock-holders are not present. Sylvania, etc., R. Co. *v.* Hoge, 129 Ga. 734, 59 S. E. 806.

Stock-holders in a railroad company are debtors to the company for any unpaid balance upon their subscriptions for stock, and are answerable as such debtors to the company upon a proceeding in aid of execution in the nature of a creditors' bill, and may be called to answer in the county in which the judgment debtor is lawfully proceeded against, although they may reside in a different county. Ewin *v.* Cincinnati, etc., R. Co., 2 Ohio Dec. (Reprint) 198. And see, generally, CORPORATIONS, 10 Cyc. 653 *et seq.*

90. See, generally, CORPORATIONS, 10 Cyc. 380 *et seq.*

Subscription to or purchase of stock by one railroad in another company see *infra*, VII, B, 1, c.

A breach of contract of subscription by either party renders him liable in damages to the other party. Scarce *v.* Indiana, etc., R. Co., 17 Ind. 193.

Mutuality of contract.— Where the commissioners appointed to receive subscriptions to the stock of a railroad company are empowered to reject such subscriptions before the organization of the company but do not do so, the contract entered into by subscribing for stock is sufficiently mutual to make it valid. Connecticut, etc., R. Co. *v.* Bailey, 24 Vt. 465, 58 Am. Dec. 181.

Power of commissioners appointed to take subscriptions, to give assurances as to the line of location that will be adopted for the road under the charter of the North Carolina Railroad Company see North Carolina R. Co. *v.* Leach, 49 N. C. 340.

91. Aikin *v.* Wasson, 24 N. Y. 482 (holding that a contractor for the construction of part of a railroad is not a laborer or servant within such a statute); Boutwell *v.* Townsend, 37 Barb. (N. Y.) 205, holding that section 102 of the General Railroad Act of 1850, rendering stock-holders of railroad companies liable for all debts owing to laborers or servants for services performed for the company, is intended to secure the daily earnings of the workmen and operatives of the road, and not the claims of all persons who performed labor and services for the company.

Pleading.—A complaint setting forth that a railroad company was indebted to plaintiffs for work, labor, and services done by them

vision in the railroad charter or governing statute to the contrary, stock subscriptions may be made payable upon such terms as are agreed upon between the corporation and the stock-holders.[92] A railroad company by receiving and expending county subscriptions of stock is estopped to deny that its charter authorized the company to take such subscriptions.[93] Where a person makes a valid subscription for the capital stock of a railroad company without being induced to do so by fraud, he assumes the risk of the value of the stock and cannot defend an action to recover the amount of the subscription by showing that the stock subscribed for is valueless.[94]

H. Officers and Agents[95] **— 1. In General.** Except in so far as they are regulated by special statutory or charter provisions, the law applicable to officers and agents of corporations in general covers questions relating to the directors,[96] and other officers and agents of a railroad company,[97] as in respect to what authority and powers may be exercised by the directors,[98] or may be exercised by the

must expressly show that the cause of action was due and owing to a laborer or servant of the company for services performed for the company. Boutwell *v.* Townsend, 37 Barb. (N. Y.) 205.

92. Portage County *v.* Wisconsin Cent. R. Co., 121 Mass. 460 (holding that a railroad company having under its charter a right to construct its road between two places by a circuitous route and intending to apply to the legislature for authority to construct a more direct route between these places may, before such authority is obtained or any location thereof is made, make a valid contract for a sale of its stock conditioned upon the building of the latter route); Cheraw, etc., R. Co. *v.* Garland, 14 S. C. 63; Montpelier, etc., R. Co. *v.* Langdon, 45 Vt. 137; Milwaukee, etc., R. Co. *v.* Field, 12 Wis. 340 (holding that a subscription for stock is not invalid because it contained conditions that it should not be payable until needed for the construction of a certain portion of the railroad, and that the amount paid should be applied solely to the construction of such portion of the road and should draw interest until a certain portion of the road should be completed. See also Port Whitby, etc., R. Co. *v.* Jones, 31 U. C. Q. B. 170.

Promise of a contract for the construction of the road as a consideration for a subscription see Bullivant *v.* Manning, 41 U. C. Q. B. 517; Wilson *v.* Ginty, 3 Ont. App. 124; Newman *v.* Ginty, 29 U. C. C. P. 34.

A railroad is not "finished" within the terms of a stock subscription note not maturing until its completion, so long as its cars are transferred across a river by ferry, pending the completion of a bridge contracted for. Garner *v.* Hall, 122 Ala. 221, 25 So. 187.

93. Mobile, etc., R. Co. *v.* Wisdom, 5 Heisk. (Tenn.) 125.

94. Lynch *v.* Eastern, etc., R. Co., 57 Wis. 430, 15 N. W. 743, 825.

95. **Mortgagees and trustees** see *infra*, VIII, A, 7, f.

Regulations as to employees see *infra*, X, B, 3, f.

Admissions by officers and agents as evidence see Evidence, 16 Cyc. 1021 *et seq.* And see Corporations, 10 Cyc. 947 *et seq.*

Authority of agent of railroad to receive goods for transportation see Carriers, 6 Cyc. 415.

Power of officer or agent to employ medical or surgical aid for injured person see Corporations, 10 Cyc. 926; Master and Servant, 26 Cyc. 1050; and, generally, Principal and Agent, 31 Cyc. 1399 *et seq.*

96. See, generally, Corporations, 10 Cyc. 736 *et seq.*

Qualification.— The employees of a freight despatch company are not for that reason alone ineligible to act as directors of a railroad company. Devou *v.* Cincinnati Interterminal R. Co., 29 Ohio Cir. Ct. 113.

The directors of a railroad company act as trustees for the public as well as for the company. Pueblo, etc., R. Co. *v.* Taylor, 6 Colo. 1, 45 Am. Rep. 512. And see Corporations, 10 Cyc. 789.

In 2 N. Y. Rev. St. p. 587, § 60, the provision fixing a penalty for the non-performance by "any public officer, body or board" of a public duty does not apply to the directors of a railroad company. People *v.* Rochester, etc., R. Co., 76 N. Y. 294.

97. See, generally, Corporations, 10 Cyc. 903 *et seq.*

Execution under Ga. Code, §§ 981, 996, against defaulting officers of the Western and Atlantic Railroad Company see Scofield *v.* Perkerson, 46 Ga. 325, 350.

98. See, generally, Corporations, 10 Cyc. 758 *et seq.*

Construction of road.— A railroad company is not bound by a contract for the construction of its roadway, by one of its directors without authority, even though he owns a majority of the stock of the company. Allemong *v.* Simmons, 124 Ind. 199, 23 N. E. 768. A contract of the managing director for construction "acting on behalf of the company" does not require the common seal of the company to render it binding on the company. Whitehead *v.* Buffalo, etc., R. Co., 7 Grant Ch. (U. C.) 351.

Appointment of agents.— The directors of a railroad company may appoint necessary officers and agents of the company and provide for the manner of their payment. Allen *v.* Ontario, etc., R. Co., 29 Ont. 510 (holding that the employment by provisional directors

president,[99] vice-president,[1] superintendent,[2] and other subordinate officers and

of an agent to do certain work on behalf of the company in advertising and promoting its undertaking is binding on the company); Falkiner *v.* Grand Junction R. Co., 4 Ont. 350. And see, generally, CORPORATIONS, 10 Cyc. 767. And the directors particularly have this power where they are authorized to do so by a special act. Reynolds *v.* Whitby R. Co., 26 Grant Ch. (U. C.) 519, holding that where a special act incorporating a railroad company enacted that the board of directors might "employ one or more of their number as paid director or directors" and by a resolution under seal of the company the board of directors appointed one of their number as a paid director or manager at a fixed salary, such director was entitled to recover the amount agreed upon for his services although under Gen. R. Act, C. S. C., c. 66, a director could not hold any office under the company. So also where the directors of a railroad company pass a by-law enacting that the salary of a solicitor of the company shall be so much per annum, the shareholders cannot by repealing the by-law undo the arrangement in respect to past services of the solicitor received by them. Falkiner *v.* Grand Junction R. Co., 4 Ont. 350. But the provisional directors of a railroad company, who have not the full power of directors elected by shareholders, cannot appoint one of their number, without his resigning from office, as provisional secretary and treasurer. Michie *v.* Erie, etc., R. Co., 26 U. C. C. P. 566.

Directors rightfully entitled to office, although not in actual possession thereof, may maintain against mere intruders an action for money had and received as fees. Howerton *v.* Tate, 70 N. C. 161.

99. See, generally, CORPORATIONS, 10 Cyc. 903 *et seq.*

Where by by-law the president is made the chief officer and head of the company and empowered to supervise all other officers and departments of the road in every respect, the president has authority to direct a consulting engineer who has been appointed by a resolution of the board of directors, to perform his services with reference to a contemplated extension of the line. Bogart *v.* New York, etc., R. Co., 118 N. Y. App. Div. 50, 102 N. Y. Suppl. 1093.

Construction of road.— The president of a railroad company has no power, by virtue of his office merely, to let a contract for the construction of its road. Griffith *v.* Chicago, etc., R. Co., 74 Iowa 85, 36 N. W. 901; Templin *v.* Chicago, etc., R. Co., 73 Iowa 548, 35 N. W. 634. See also Risley *v.* Indianapolis, etc., R. Co., 62 N. Y. 240 [*reversing* 1 Hun 202, 4 Thomps. & C. 13]. But where the railroad charter authorizes its president and directors to exercise all rights and powers necessary to the construction and repair of the road, they have power in their discretion to expend any part of the corporation's revenues for the reconstruction of the road. State *v.* Baltimore, etc., R. Co., 6 Gill (Md.) 363.

In Indiana under Burns Rev. St. (1894) §§ 5145, 5147 (Rev. St. (1881) §§ 3895, 3897) the president, vice-president, secretary, and treasurer of a railroad company selected by it through its board of directors and invested with ostensible authority are general officers and may make any contract within the scope of the corporation. Bedford Belt R. Co. *v.* McDonald, 17 Ind. App. 492, 46 N. E. 1022, 60 Am. St. Rep. 172.

Approval of directors.— The president of a railroad company under general authority to manage the business of the company subject to the approval and direction of the board of directors or its chairman or committee cannot lawfully fix the route and terminals of the road and proceed with condemnation proceedings without the approval of the directors. Volberg *v.* Gate City Terminal Co., 127 Ga. 537, 56 S. E. 991; Bridwell *v.* Gate City Terminal Co., 127 Ga. 520, 56 S. E. 624, 10 L. R. A. N. S. 909. And where a notice as to the commencement of a condemnation proceeding is given by the direction of the president without lawful authority, and the time has expired under its terms for the appointment of an assessor by the landowner, the directors cannot, by ratifying the act of the president, cause the ratification to relate back and give the notice the same effect that it would have had if it had been legal when given. Bridwell *v.* Gate City Terminal Co., 127 Ga. 520, 56 S. E. 624, 10 L. R. A. N. S. 909.

1. See, generally, CORPORATIONS, 10 Cyc. 922, 923.

Appointment of agent.— Under Tex Rev. St. (1879) art. 4131, providing that there shall be a president and such other subordinate officers as a railroad company by its by-laws may designate, who shall perform such duties of the corporation as its by-laws shall require, the first vice-president of a railroad company has no power to bind the company by a contract of employment except as expressly authorized by the by-laws. Missouri, etc., R. Co. *v.* Faulkner, 88 Tex. 649, 32 S. W. 883 [*reversing* (Civ. App. 1895) 31 S. W. 543]. And where a by-law provides that the first vice-president shall have general charge of the passenger and freight traffic and appoint and remove at pleasure the officers of those departments, and that is his sole source of authority, he has no power to appoint for a fixed period a general passenger and ticket agent whose duty it is to take entire charge of all passenger matters. Missouri, etc., R. Co. *v.* Faulkner, 88 Tex. 649, 32 S. W. 883 [*reversing* (Civ. App. 1895) 31 S. W. 543].

2. See cases cited *infra*, this note.

Fencing.— The general superintendent of a railroad company may make a binding contract for fencing the track. New Albany, etc., R. Co. *v.* Haskell, 11 Ind. 301.

Sale.— Under N. H. Gen. Laws, c. 148, § 3, vesting the power to alienate the property of a railroad company in its directors, a sale by a superintendent of a railroad without

agents of the company.[3] Thus the officers and directors of a railroad company cannot bind the company by mere parol declarations and promises to guarantee the bonds of another company;[4] nor can they bind the company to supervise the construction of a railroad for another company,[5] or make it be responsible for wasteful and extravagant expenses in connection therewith.[6] The conductor of a railway train has no authority, by virtue of his position merely, to employ servants or agents for the company.[7] But in emergencies, requiring additional service for the proper management, operation, or protection of his train, the conductor is invested by law and from necessity with an implied authority to employ such agents and servants, and for such time only as are required by the particular circumstances.[8]

authority from the directors is void. Bowen *v.* Mt. Washington R. Co., 62 N. H. 502.

Employment.— A division superintendent has no implied authority to bind the company by an agreement to give life employment to an employee of the company in settlement of a claim for personal injuries, and the fact that the injured employee is subsequently hired by the company's agent to perform services which he is capable of rendering is not sufficient to show a ratification by the company of an alleged contract continuing him permanently in its employ. Maxson *v.* Michigan Cent. R. Co., 117 Mich. 218, 75 N. W. 459.

Under Ga. Code, § 971, while the Western Atlantic Railroad Company was the property of the state, its superintendent had no power to make contracts involving more than three thousand dollars without the written approval of the governor. Tappan *v.* Western, etc., R. Co., 62 Ga. 198.

3. See, generally, CORPORATIONS, 10 Cyc. 933 *et seq.*

Cashier.— A cashier has no authority to release a debtor by substituting another in his place unless authorized to do so by the company's charter or by its by-laws. Clinton, etc., R. Co. *v.* Kernan, 10 Rob. (La.) 174.

The secretary of a railroad company has no power to bind the company by a contract to pay costs in order to avert a seizure of part of its property. Hamilton, etc., R. Co. *v.* Gore Bank, 20 Grant Ch. (U. C.) 190.

Claim agent.— The scope of the authority of a claim agent and assistant claim agent of a railroad company is not defined by law, and if put in issue in an action must be proved as a matter of fact, even though the conduct of the officials named may appear inexplicable except on the supposition that they have authority. St. Louis, etc., R. Co. *v.* Daugherty, 72 Kan. 678, 83 Pac. 821. But a railroad company is bound by the contracts made by its general claim agent where the person with whom he contracted had no knowledge of any limitation on his power. Southwest Missouri Electric R. Co. *v.* Missouri Pac. R. Co., 110 Mo. App. 300, 85 S. W. 966.

Where a general railroad attorney has power to employ local attorneys, he is a general agent, and his act of employing a local attorney at a yearly salary will be binding on the company, although he had private instructions to make no such contract, where the local attorney had no knowledge of such instructions. Cross *v.* Atchison, etc., R. Co., 141 Mo. 132, 42 S. W. 675.

A local station agent has no implied authority to hire one to carry mail between the station and post-office (Silver *v.* Missouri, etc., R. Co., 125 Mo. App. 402, 102 S. W. 621); nor can such an agent extend the liability of his company beyond its own line, unless authority therefor has been expressly conferred on him or may be implied from the course of business (Hoffman *v.* Cumberland Valley R. Co., 85 Md. 391, 37 Atl. 214). Nor is a station agent presumed to be an agent of the company to buy cotton. Summer *v.* Charlotte, etc., R. Co., 78 N. C. 289.

Laborer.— A railroad laborer cannot bind the company by a contract to construct cow gaps in the absence of any showing as to his authority. Kentucky Union R. Co. *v.* Forkner, 40 S. W. 462, 19 Ky. L. Rep. 378.

4. Dows *v.* Chicago, etc., R. Co., 7 Fed. Cas. No. 4,048.

5. Dows *v.* Chicago, etc., R. Co., 7 Fed. Cas. No. 4,048.

6. Dows *v.* Chicago, etc., R. Co., 7 Fed. Cas. No. 4,048.

7. Louisville, etc., R. Co. *v.* Ginley, 100 Tenn. 472, 45 S. W. 348.

8. Louisville, etc., R. Co. *v.* Ginley, 100 Tenn. 472, 45 S. W. 348.

Where the only regular brakeman on a train is absent, the conductor has authority to supply his place, and for the time being the person so engaged is an employee of the company. Fox *v.* Chicago, etc., R. Co., 86 Iowa 368, 53 N. W. 259, 17 L. R. A. 289.

Where a freight train engaged in switching "broke in two," and the rear portion, comprising several cars, was running backward, unattended, down grade, at such a rate of speed as to greatly imperil the detached cars by derailment at a switch, or by collision with stationary cars on the track, unless sooner arrested, there existed such an emergency as authorized and justified the conductor, in the absence of sufficient and available regular servants, to employ for the company any bystander to aid in arresting the cars. Louisville, etc., R. Co. *v.* Ginley, 100 Tenn. 472, 45 S. W. 348.

Whether, in the particular case, such emergency exists as to confer implied authority upon the conductor to employ servants for the company is a question of fact for the jury, and the appellate court will not disturb their decision, if it can be sustained by tak-

2. Rights and Liabilities. The above rules, in connection with the law of principal and agent,[9] also apply in determining the rights and liabilities of the various parties, growing out of acts or transactions for or with a railroad company, by its directors,[10] president,[11] and other officers and agents of a railroad company.[12] As a general rule all persons dealing with the officers and agents of a railroad company are charged with notice of the fact that they act under charters, general

ing as true that legitimate view of the evidence most favorable to the successful party. Louisville, etc., R. Co. *v.* Ginley, 100 Tenn. 472, 45 S. W. 348.

9. See, generally, Principal and Agent, 31 Cyc. 1430 *et seq.*

10. See, generally, Corporations, 10 Cyc. 787 *et seq.*

Redress for fraudulent acts on the part of the directors and managers of the Union Pacific Railroad Company in breach of their duty to the shareholders cannot be obtained in a suit brought by the United States under the act of March 3, 1873 (17 U. S. St. at L. 509), but must be obtained by a suit brought by the company or, if it refuses to sue, by the shareholders. U. S. *v.* Union Pac. R. Co., 28 Fed. Cas. No. 16,598, 11 Blatchf. 385 [*affirmed* in 98 U. S. 569, 25 L. ed. 143].

Directors as holders of bonds secured by a mortgage on the property of the road are entitled to the same rights as other creditors, where they have acted in good faith and for the best interests of the company. Claflin *v.* South Carolina R. Co., 8 Fed. 118, 4 Hughes 12.

Liability of director on personal bond given under an arrangement between him and another director to secure the payment of notes on which they raised money and advanced it to the company see Richardson *v.* Hadley, 117 Mass. 379.

Purchase of land.— Where a railroad director bought land from the owner thereof, after the latter had refused to give it to the company, and a project of changing the route of the road so as to cross such land had for that reason been abandoned, and the other directors repudiated at the time all participation in the purchase, declaring that he must consider it his personal purchase, which he agreed to, and afterward the route of the road was changed, as at first proposed, so as to cross this land and part of it was staked out for the use of the road at the price agreed upon, and in the several reports of the directors of outstanding liabilities for land damages such director's claim was included, such director could not be held to be a trustee of the remaining land for the company. Sandy River R. Co. *v.* Stubbs, 77 Me. 594, 2 Atl. 9.

Liability for debts.— Railroad directors authorized by N. H. Laws (1871), c. 83, to contract debts for construction and equipment are not liable under Gen. St. c. 135, § 5, for debts so contracted, although they exceed one-half the capital stock and assets. Niagara Bridge Works *v.* Jose, 59 N. H. 81. And see, generally, Corporations, 10 Cyc. 878 *et seq.*

11. See, generally, Corporations, 10 Cyc. 918 *et seq.*

Where the president of a railroad company enters into a secret partnership with railroad contractors for the construction of the road, no action can be maintained by him against his partners to enforce such contract. Macdonald *v.* Riordon, 30 Can. Sup. Ct. 619 [*affirming* 8 Quebec Q. B. 555].

An ex-president of a railroad company may claim as a *bona fide* purchaser of bonds, where he did not purchase such bonds while in office. Duncomb *v.* New York, etc., R. Co., 84 N. Y. 190.

12. See, generally, Corporations, 10 Cyc. 951 *et seq.*

A freight agent who was appointed by a railroad company under a printed contract by which agents who furnish a warehouse rent free to the company are entitled to retain certain charges cannot maintain an action for rent of a warehouse on an implied contract against the company, if he has retained such charges. Pennsylvania R. Co. *v.* Brisbin, 1 Walk. (Pa.) 67.

Assumpsit will lie against a conductor of a railroad to recover the amount of extra fares omitted to be collected by him from each person paying in the cars, although such neglect has occurred with the consent of the superintendent but without the knowledge of the directors. Concord R. Co. *v.* Clough, 49 N. H. 257. So assumpsit will also lie to recover of an agent profits made by him in buying and selling with like consent of the superintendent, but without the knowledge of the directors, joint tickets issued by other roads under a contract with the road employing him. Concord R. Co. *v.* Clough, *supra.*

Railroad police.—A policeman commissioned by the governor of the state upon the application of a railroad company under the Pennsylvania act of Feb. 27, 1865 (Pub. Laws (1865), p. 225), section 1, is a private officer and is not entitled to costs in a criminal prosecution from the county as if he were duly and legally elected a constable, but his compensation must be paid by the company, for which he has been appointed in such sum as may be agreed upon between them; but he may, however, receive proper compensation from the county for the service of subpœnas on witnesses. Hamlin *v.* Berks County, 8 Pa. Co. Ct. 462.

Torts.— A railroad company is liable for the act of a station agent charged with the duty of not allowing "bums" around the station, who, while plaintiff was asleep on a bench, poured benzine on the bench with the intent of firing said benzine "to have some fun with plaintiff," which benzine was fired, however, by another. Meade *v.* Chicago, etc., R. Co., 68 Mo. App. 92.

statutes, by-laws, or usages which more or less define the extent of their authority; and therefore such persons must in doubtful cases acquaint themselves with the extent of that authority; [13] but such persons are not bound to take notice of private instructions, if the agent has been put forward as a general agent.[14]

I. Franchises and Powers Generally [15] — **1. In General.** The franchises of a railroad corporation are rights or privileges which are essential to the operations of the corporation and without which its road and works would be of little value,[16] such as the franchise to run cars,[17] to appropriate earth and gravel for the bed of its road,[18] or water for its engines.[19] They are positive rights or privileges without the possession of which the road of the company could not be successfully worked.[20] Like other corporations, a railroad company possesses such powers only as are conferred upon it by its charter or governing statute, together with such powers as are necessary and incidental thereto; [21] and such a company cannot, except with the consent of the state, disable itself from the discharge of the functions, duties, and obligations which it has assumed, whether this be

13. Missouri, etc., R. Co. *v.* Faulkner, 88 Tex. 649, 32 S. W. 883 [*reversing* (Civ. App. 1895) 31 S. W. 543]; Langdon *v.* Vermont, etc., R. Co., 53 Vt. 228. And see, generally, Corporations, 10 Cyc. 940 *et seq.*

14. Cross *v.* Atchison, etc., R. Co., 141 Mo. 132, 42 S. W. 675; Southwest Missouri Electric R. Co. *v.* Missouri Pac. R. Co., 110 Mo. App. 300, 85 S. W. 966. And see, generally, Principal and Agent, 31 Cyc. 1327 *et seq.*

15. Power to acquire and hold land see *infra*, V, A.

Sales, leases, traffic contracts, and consolidation see *infra*, VII, B, C, D, E.

Indebtedness, securities, liens, and mortgages see *infra*, VIII.

Making and indorsing negotiable instruments see *infra*, VIII, A, 3.

Power to operate street railroads see Street Railroads.

16. Lawrence *v.* Morgan's Louisiana, etc., R., etc., Co., 39 La. Ann. 427, 2 So. 69, 4 Am. St. Rep. 265; Morgan *v.* Louisiana, 93 U. S. 217, 23 L. ed. 860.

Immunity from taxation is not one of such franchises. Morgan *v.* Louisiana, 93 U. S. 217, 23 L. ed. 860. And see, generally, Taxation.

17. Lawrence *v.* Morgan's Louisiana, etc., R., etc., Co., 39 La. Ann. 427, 2 So. 69, 4 Am. St. Rep. 265; Morgan *v.* Louisiana, 93 U. S. 217, 23 L. ed. 860.

18. Lawrence *v.* Morgan's Louisiana, etc., R., etc., Co., 39 La. Ann. 427, 2 So. 69, 4 Am. St. Rep. 265; Morgan *v.* Louisiana, 93 U. S. 217, 23 L. ed. 860.

19. Lawrence *v.* Morgan's Louisiana, etc., R., etc., Co., 39 La. Ann. 427, 2 So. 69, 4 Am. St. Rep. 265; Morgan *v.* Louisiana, 93 U. S. 217, 23 L. ed. 860.

20. Lawrence *v.* Morgan's Louisiana, etc., R., etc., Co., 39 La. Ann. 427, 2 So. 69, 4 Am. St. Rep. 265; Morgan *v.* Louisiana, 93 U. S. 217, 23 L. ed. 860.

21. Union Pac. R. Co. *v.* Chicago, etc., R. Co., 163 U. S. 564, 16 S. Ct. 1173, 41 L. ed. 265; Oregon R., etc., Co. *v.* Oregonian R. Co., 130 U. S. 1, 9 S. Ct. 409, 32 L. ed. 837 [*reversing* 23 Fed. 232, 10 Sawy. 464]; Great North West Cent. R. Co. *v.* Charlebois, [1889] A. C. 114, 68 L. J. P. C. 25, 79 L. T. Rep. N. S. 35 [*modifying* 26 Can. Sup. Ct. 221]; Atty.-Gen. *v.* Great Eastern R. Co., 5 App. Cas. 473, 44 J. P. 648, 49 L. J. Ch. 545, 42 L. T. Rep. N. S. 810, 28 Wkly. Rep. 769; Yorkshire R. Wagon Co. *v.* Maclure, 21 Ch. D. 309, 51 L. J. Ch. 857, 47 L. T. Rep. N. S. 290, 30 Wkly. Rep. 761; Atty.-Gen. *v.* Niagara Falls International Bridge Co., 20 Grant Ch. (U. C.) 34. And see, generally, Corporations, 10 Cyc. 1096 *et seq.*

Purchase of stock.—A railroad company organized under the laws of Ohio cannot purchase the stock of a mining company. Columbus, etc., R. Co. *v.* Burke, 10 Ohio Dec. (Reprint) 136, 19 Cinc. L. Bul. 27. And see, generally, Corporations, 10 Cyc. 1107.

Power to locate and construct a railroad, open books of subscription, etc., confers by implication the power to make all contracts and agreements as the execution and management of the work and the convenience and interests of the company in the construction of the road may require so far as the same are not forbidden by any restrictive clause. Scotland Western Bank *v.* Tallman, 17 Wis. 530.

In Iowa it is held that a railroad company formed under the general incorporation act is invested with the ordinary privileges and franchises which belong to other private joint stock companies. State *v.* Wapello County, 13 Iowa 388.

In New Jersey the act of March 17, 1870, granting certain powers and franchises to the Erie Railroad Company in connection with other railroads therein mentioned, although expressed in broad terms, does not allow the company to possess and enjoy the franchise of any company with which it does not unite. McGregor *v.* Erie R. Co., 35 N. J. L. 115.

Sale or pledge of note and mortgage.—Power to construct and maintain a railway and also "to make such covenants, contracts, and agreements with any person . . . as the execution and management of the work, and the convenience and interests of the company" might require, authorizes the company to sell a note and mortgage executed to it or pledge them as security for its own bonds. Uncas Nat. Bank *v.* Rith, 23 Wis. 339.

attempted by contract of lease, sale, or otherwise.[22] And, as in the case of other corporations, grants of franchises to railroads involving rights of the public are to be liberally construed in favor of the public, and strictly against the company.[23] Thus a railroad company is bound to apply all its moneys and property for the purposes directed and provided for by its charter or governing statute, and any application of or dealing with its corporate property in a manner not authorized is illegal and may be restrained in equity.[24] Thus it is improper and wrong for a railroad company to embark its funds in other railroad undertakings without authority to do so;[25] but it has been held not *ultra vires* for a railroad company whose road is in process of construction to apply penalties due from contractors in payment of interest on shares issued at the request of the contractors.[26]

2. Exclusive and Conflicting Grants. Where a grant of franchises to a railroad company is not in its terms exclusive, the legislature may subsequently grant the same or similar franchises to another company, although the latter greatly impairs the value of the former.[27] The legislature may, however, make its grant of franchises to a railroad company exclusive,[28] as for a limited period;[29] and

22. Gulf, etc., R. Co. *v.* Morris, 67 Tex. 692, 4 S. W. 156; Union Pac. R. Co. *v.* Chicago, etc., R. Co., 163 U. S. 564, 16 S. Ct. 1173, 41 L. ed. 265.

The general rule is that a contract by which a railroad company renders itself incapable of performing its duties to the public or attempts to absolve itself from those obligations without the consent of the state, or a contract made by a corporation beyond the scope of its powers, express or implied, on a proper construction of its charter, cannot be enforced, or rendered enforceable by the application of the doctrine of estoppel; but where the subject-matter of the contract is not foreign to the purposes for which the corporation is created, a contract embracing whatever may fairly be regarded as incidental to, or consequential upon, those things which the legislature has authorized, ought not, unless expressly prohibited, to be held by judicial construction to be *ultra vires*. Union Pac. R. Co. *v.* Chicago, etc., R. Co., 163 U. S. 564, 16 S. Ct. 1173, 41 L. ed. 265.

23. State *v.* St. Paul, etc., R. Co., 98 Minn. 380, 108 N. W. 261. And see, generally, Corporations, 10 Cyc. 1088 *et seq.*

24. Munt *v.* Shrewsbury, etc., R. Co., 13 Beav. 1, 15 Jur. 26, 20 L. J. Ch. 169, 51 Eng. Reprint 1; Salomons *v.* Laing, 12 Beav. 339, 14 Jur. 279, 471, 19 L. J. Ch. 225, 6 R. & Can. Cas. 289, 303; Bagshaw *v.* Eastern Union R. Co., 2 Hall & T. 201, 47 Eng. Reprint 1655, 14 Jur. 491, 19 L. J. Ch. 410, 2 Macn. & G. 389, 6 R. & Can. Cas. 169, 48 Eng. Ch. 389, 42 Eng. Reprint 151; Simpson *v.* Denison, 10 Hare 51, 16 Jur. 828, 44 Eng. Ch. 50, 68 Eng. Reprint 835; Vance *v.* East Lancashire R. Co., 3 Kay & J. 50, 69 Eng. Reprint 1018; Mathias *v.* Wilts, etc., Canal Nav. Co., 34 L. T. Rep. N. S. 346.

The inability of railroad companies under their charters to expend their funds in paying an award is no ground for setting aside the award. Matter of Barrie, 22 U. C. Q. B. 25.

25. Logan *v.* Courtown, 13 Beav. 22, 20 L. J. Ch. 347, 51 Eng. Reprint 9; Great Western R. Co. *v.* Preston, etc., R. Co., 17 U. C. Q. B. 477.

26. Alcoy, etc., R. Co. *v.* Greenhill, 79 L. T. Rep. N. S. 257.

27. *Florida.*— Florida, etc., R. Co. *v.* Pensacola, etc., R. Co., 10 Fla. 145.

Illinois.— East St. Louis Connecting R. Co. *v.* East St. Louis Union R. Co., 108 Ill. 265.

Maine.— State *v.* Noyes, 47 Me. 189.

Maryland.—Baltimore, etc., R. Co. *v.* State, 45 Md. 596.

New Jersey.— Raritan, etc., R. Co. *v.* Delaware, etc., Canal Co., 18 N. J. Eq. 546.

New York.— Thompson *v.* New York, etc., R. Co., 3 Sandf. Ch. 625.

See 41 Cent. Dig. tit. "Railroads," § 40. And see Constitutional Law, 8 Cyc. 966 *et seq.*

Illustration.—A clause in a railroad charter that "no person, body politic or corporate, shall in any way interfere with, molest, disturb, or injure any of the rights or privileges thereby granted, or that would be calculated to detract from or affect the profits of said corporation," does not relinquish the right of the state to charter any other company whose improvement would be in competition with said railroad company, nor the right to take the franchise of said company for the public use; but such clause restrains such other company from committing any unauthorized illegal injuries. Newcastle, etc., R. Co. *v.* Peru, etc., R. Co., 3 Ind. 464.

28. Pontchartrain R. Co. *v.* Orleans Nav. Co., 15 La. 404; Pennsylvania R. Co. *v.* National R. Co., 23 N. J. Eq. 441, holding that the franchise of the Camden and Amboy Railroad and Transportation Company to perfect an expeditious line of communication between the cities of Philadelphia and New York, and build across the state a railroad to be part of that line, is exclusive against all but the state.

29. Boston, etc., R. Corp. *v.* Salem, etc., R. Co., 2 Gray (Mass.) 1, holding that St. (1830) c. 4, incorporating the Boston and Lowell Corporation, and providing that no other railroad within thirty years should be authorized to be made leading from Boston, Charlestown, or Cambridge to Lowell, and allowing the legislature to regulate tolls to a

in such case the legislature cannot impair the obligation of the contract involved in the preceding exclusive grant by granting the same or similar franchises to another company;[30] nor can it grant to a railroad company franchises which impair rights and privileges previously granted to other corporations,[31] such as to a ferry company.[32] But this rule does not prevent subsequent grants which do not impair or prejudice the exclusive rights previously granted.[33]

3. Engaging in Other or Accessorial Business.[34] A railroad company may engage in any business authorized by its charter or governing statute,[35] and in any business that is incidental or auxiliary to the powers granted, and which may become necessary and expedient in the care and management of its main business.[36] Thus it has been held that in the absence of a legislative prohibition a railroad company may lease and maintain a summer hotel at its seaside terminus,[37] or engage in the accessorial business with horse-power, of collecting freight which is to be transported upon its own road, and delivering freight at the places of destination.[38] But it cannot engage in a business which is not specially authorized or incidental to the business for which it was created.[39]

certain extent, and purchase the franchise upon certain terms, confers upon the corporation the exclusive right for the period named.

30. Pennsylvania R. Co. *v.* Baltimore, etc., R. Co., 60 Md. 263.

31. Chicago, etc., R. Co. *v.* Louisville, etc., R. Co., 58 S. W. 799, 22 Ky. L. Rep. 658.

32. McRoberts *v.* Southern Minnesota R. Co., 18 Minn. 108 (construing Laws Extra Sess. (1857) c. 3, § 10); Aikin *v.* Western R. Corp., 20 N. Y. 370 [*reversing* 30 Barb. 305]. And see, generally, Ferries, 19 Cyc. 501.

33. *Georgia.*— Augusta, etc., R. Co. *v.* Augusta Southern R. Co., 96 Ga. 562, 23 S. E. 501.

Massachusetts.— Boston, etc., R. Corp. *v.* Boston, etc., R. Co., 5 Cush. 375.

Michigan.— Michigan Cent. R. Co. *v.* Michigan Southern R. Co., 4 Mich. 362.

Nevada.— Lake *v.* Virginia, etc., R. Co., 7 Nev. 294.

North Carolina.— McRee *v.* Wilmington, etc., R. Co., 47 N. C. 186.

United States.— Richmond, etc., R. Co. *v.* Louisa R. Co., 13 How. 71, 14 L. ed. 55.

See 41 Cent. Dig. tit. "Railroads," § 40.

New Jersey.— The act of 1832 and the supplementary act of 1854, entitled "An act relative to the Delaware and Raritan Canal and Camden and Amboy Railroad and Transportation Companies," granting certain privileges to these corporations, operates to protect from competition the through business from New York to Philadelphia, and not the business between the intermediate places and over any and every part of the route between these cities; the franchise being exclusive only in regard to passengers and merchandise transported over the entire route. Delaware, etc., Canal Co. *v.* Camden, etc., R. Co., 15 N. J. Eq. 13, 16 N. J. Eq. 321. And the fact that roads of other companies are being constructed and connected without lawful authority furnishes no ground of equitable relief at the instance of one of the above companies in the absence of a showing that such company's rights will be prejudiced. Delaware, etc., Canal Co. *v.* Camden, etc., R. Co., 15 N. J. Eq. 13.

34. **Contracts for control of other railroads or incidental facilities** see *infra*, VII, D.

Power to establish relief funds and hospitals for the benefit of sick and injured employees see Corporations, 10 Cyc. 1143.

35. See Rogers *v.* Oxford, etc., R. Co., 2 De G. & J. 662, 59 Eng. Ch. 662, 44 Eng. Reprint 1146, holding that where a railroad company is authorized by a private act to purchase a canal and to exercise all the rights, powers, and privileges which the canal company might before the sale have exercised under any statute relating to the canal, the railroad company after the purchase becomes a canal company and is entitled to avail itself of the powers given to canal companies.

36. Com. *v.* Philadelphia, etc., R. Co., 23 Pa. Super. Ct. 235; Jacksonville, etc., R. Co. *v.* Hooper, 160 U. S. 514, 16 S. Ct. 379, 40 L. ed. 515; Camblos *v.* Philadelphia, etc., R. Co., 4 Fed. Cas. No. 2,331, 4 Brewst. 563, 9 Phila. (Pa.) 411.

37. Jacksonville, etc., R. Co. *v.* Hooper, 160 U. S. 514, 16 S. Ct. 379, 40 L. ed. 515, holding that the laws of Florida do not render *ultra vires* a contract by a railroad company to lease a hotel at the terminus of its road situated on the beach, distant from any town.

Covenants to insure.—A company having power to lease a hotel may, in consideration of the lessor's obligation to rebuild in case the hotel should be destroyed, covenant to keep the premises insured. Jacksonville, etc., R. Co. *v.* Hooper, 160 U. S. 514, 16 S. Ct. 379, 40 L. ed. 515.

38. Camblos *v.* Philadelphia, etc., R. Co., 4 Fed. Cas. No. 2,331, 4 Brewst. 563, 39 Phila. (Pa.) 411.

39. Georgia Cent. R. Co. *v.* Collins, 40 Ga. 582; Macon *v.* Macon, etc., R. Co., 7 Ga. 221, holding that where a company is given by charter the exclusive right to transport produce, etc., over its road from one point to another, the charter does not give it the right to engage in transporting produce through the terminal city and across the bridge of a river from its depot to an-

Thus if not expressly authorized a railroad company cannot carry on an express business,[40] or operate stages from its termini to distant towns,[41] or act as a warehouseman of goods and merchandise not received by it under and from shipments over its road,[42] nor deal in notes or bills of exchange.[43] A railroad company may own and control steamboats for the purpose of transporting its freight and passengers across navigable waters on the line and constituting a part of its route, and those lying at the end of its road separating it from the ostensible and substantial termini of its route;[44] but unless expressly authorized it cannot run a steamboat on waters not connected with its termini and forming no part of its route.[45] Nor where authorized to operate a ferry for the transportation of its passengers and freight can it engage in a general ferry business, but

other depot for the accommodation of its customers.

Power to lay, build, and make a road includes the power to maintain and sustain it, which has reference to keeping it in repair, supplying it with machinery, and such like acts, but does not extend to projects for extending its business or schemes and enterprises not contemplated and expressed in clear and unambiguous terms. Georgia Cent. R. Co. *v.* Collins, 40 Ga. 582.

A railroad company may be restrained at the information of a relator from carrying on a trade not authorized by the act constituting the company. Atty.-Gen. *v.* Great Northern R. Co., 6 Jur. N. S. 1006, 29 L. J. Ch. 794, 2 L. T. Rep. N. S. 653, 8 Wkly. Rep. 556.

The question whether a railroad company can conduct the business of a market house cannot be raised by the former owner of the land on which the market house is located in an action for trespass against the company, but it can be raised only by the state or a stock-holder by quo warranto. Hilt *v.* Philadelphia, etc., R. Co., 43 Wkly. Notes Cas. (Pa.) 429.

40. Dinsmore *v.* Louisville, etc., R. Co., 2 Fed. 465, 2 Flipp. 672.

41. Hood *v.* New York, etc., R. Co., 22 Conn. 1. But see Buffett *v.* Troy, etc., R. Co., 40 N. Y. 168 [*affirming* 36 Barb. 420], holding that a company authorized to construct a railroad is estopped to deny the validity of a contract to transport a passenger by a stage line created by the directors from a village to one of the railroad stations, where the stage line has been run a long time without objection by the stockholders.

42. State *v.* Southern Pac. R. Co., 52 La. Ann. 1822, 28 So. 372. *Compare* Smith *v.* Nashua, etc., R. Co., 27 N. H. 86, 59 Am. Dec. 364, holding that, although no such express power is given to a railroad company it may contract and assume the liability of a depositary of goods which it has carried to the point of destination. And see, generally, CARRIERS, 6 Cyc. 454 *et seq.*

The storage of goods for hire in its warehouses by a railroad company is not incidental to its business, when it is made either under an express or implied special or general agreement with shippers or consignees either before or at the time of shipment or receipt of goods, that they should be received and held for storage or hire either for a fixed period or at the will of shippers and consignees. State *v.* Southern Pac. R. Co., 52 La. Ann. 1822, 28 So. 372.

License.—A railroad company is not authorized to receive, as being for purposes incidental to its business as a common carrier, a license under La. Act of 1886, No. 156, providing for the issuance of a license to a warehouseman, since the license granted thereunder contemplates a permanence in the storage received, which is inconsistent with the regular and legitimate business of a common carrier. State *v.* Southern Pac. R. Co., 52 La. Ann. 1822, 28 So. 372.

43. Goodrich *v.* Reynolds, 31 Ill. 490, 83 Am. Dec. 240, holding that a railroad company cannot, as a branch of its business, deal in notes and bills of exchange, but can only make such papers subservient to its general business.

44. Wheeler *v.* San Francisco, etc., R. Co., 31 Cal. 46, 89 Am. Dec. 147; Shawmut Bank *v.* Plattsburgh, etc., R. Co., 31 Vt. 491; Forrest *v.* Manchester, etc., R. Co., 30 Beav. 40, 7 Jur. N. S. 887, 4 L. T. Rep. N. S. 666, 9 Wkly. Rep. 818, 54 Eng. Reprint 803; South Wales R. Co. *v.* Redmond, 10 C. B. N. S. 675, 4 L. T. Rep. N. S. 619, 9 Wkly. Rep. 806, 100 E. C. L. 675.

45. Central R., etc., Co. *v.* Smith, 76 Ala. 572, 52 Am. Rep. 353; McRoberts *v.* Southern Minnesota R. Co., 18 Minn. 108; St. Joseph *v.* Saville, 39 Mo. 460; Hoagland *v.* Hannibal, etc., R. Co., 39 Mo. 451 (holding that a railroad company has no power unless conferred by its charter, nor have its officers or agents any authority by law, to run a line of steamers beyond the terminus of the road as part of the company's line of transportation); Starin *v.* New York, 42 Hun (N. Y. 549 [*reversed* on other grounds in 112 N. Y. 206, 19 N. E. 670] (holding that under the act of 1884, chapter 193, authorizing any railroad company incorporated under the New York law and with a terminus in New York harbor to purchase or lease steamboats and to operate a ferry over New York harbor to any point distant not more than ten miles from the terminus, a railroad company may not lease a ferry route having no connection with the terminus of its road). See also Colman *v.* Eastern Counties R. Co., 10 Beav. 1, 11 Jur. 74, 16 L. J. Ch. 73, 4 R. & Can. Cas. 513, 50 Eng. Reprint 481.

is limited to the conveyance of its own passengers and freight.[46] A steam railroad operating under a charter authorizing a steam railroad may be extended as a steam railroad, but cannot be extended as a street railroad.[47]

4. Charges For Transportation. It is one of the essential franchises of a railroad company that it have the vested right to demand and receive tolls or charges for the transportation of freight and passengers.[48] This right, however, is subject to the right of the state to regulate the rate of such charges by legislative enactment,[49] and although the legislature may give to the railroad company the power to fix such rates, this power authorizes it to make only reasonable charges,[50] and the limits of such power may be fixed by a subsequent statute,[51] and in many jurisdictions the legislature may fix the maximum rate that may be charged.[52] A charter giving a railroad company the exclusive right of transportation or conveyance of persons, merchandise, and produce, providing the charge shall not exceed a certain rate does not guarantee that the company shall always have right to charge the maximum rates named.[53]

J. Amendment, Revocation, or Forfeiture of Charter or Franchise and Dissolution[54] **— 1. Amendment or Revocation of Charter — a. In General.** In the absence of special statutory or constitutional provisions regulating such matters, the alteration or amendment of a charter of a railroad company is governed by the rules applicable to the alteration or amendment of corporate charters in general.[55] In accordance with those rules the state cannot, after a railroad charter has been accepted, make alterations or amendments of such charter, materially affecting rights thereunder, without the consent of the company,[56]

46. Fitch *v.* New Haven, etc., R. Co., 31 Conn. 38; McRoberts *v.* Southern Minnesota R. Co., 18 Minn. 108; Aikin *v.* Western R. Corp., 20 N. Y. 370 [*reversing* 30 Barb. 305]; The Maverick, 16 Fed. Cas. No. 9,316, 1 Sprague 23.

47. Cincinnati Incline Plane R. Co. *v.* Cincinnati, 5 Ohio S. & C. Pl. Dec. 562, 7 Ohio N. P. 541.

48. Lawrence *v.* Morgan's Louisiana, etc., R., etc., Co., 39 La. Ann. 427, 2 So. 69, 4 Am. St. Rep. 265; Blake *v.* Winona, etc., R. Co., 19 Minn. 418, 18 Am. Rep. 345; Morgan *v.* Louisiana, 93 U. S. 217, 23 L. ed. 860. And see Carriers, 6 Cyc. 491 *et seq.*, 547 *et seq.*

49. Blake *v.* Winona, etc., R. Co., 19 Minn. 418, 18 Am. Rep. 345. And see the statutes of the several states.

Granting a railroad a franchise between specified points on condition that only one fare shall be charged on said road has no application to charges made on other portions of the system of roads operated by the same company. Byars *v.* Bennington, etc., R. Co., 99 N. Y. App. Div. 34, 90 N. Y. Suppl. 736 [*affirmed* in 184 N. Y. 554, 76 N. E. 1090].

Charges for conveyance of timber and measurement of the timber see Great Western R. Co. *v.* Lowe, 11 R. & Can. Tr. Cas. 152.

50. Ruggles *v.* People, 91 Ill. 256.

U. S. Act, Feb. 24, 1871, authorizing the Union Pacific Railroad Company to levy tolls upon its Omaha bridge, and making it governed "for the use and protection of said bridge" by the act of July 25, 1866, which prohibited a bridge company to charge the government more than the rate per mile paid for transportation over the railroads leading to the bridge, does not apply to the rate to be paid by the government for transportation of its passengers over the Omaha bridge, since when the bridge was built it became subject to an act providing that transportation for the government should be at fair and reasonable rates, and not exceeding those paid by private parties for the same kind of service. Union Pac. R. Co. *v.* U. S., 20 Ct. Cl. 70.

Justification of increase of rates under the English Railroad and Canal Traffic Act (1894), § 1, see Black *v.* Caledonian R. Co., 11 R. & Can. Tr. Cas. 176, 18 T. L. R. 11; Smith *v.* London, etc., R. Co., 11 R. & Can. Tr. Cas. 156. To justify a permanent increase of rate, changes affecting only the temporary cost of working are not sufficient. Black *v.* Caledonian R. Co., *supra.*

Reduction of rate under English Railway and Canal Traffic Act of 1888, § 29, subs. 3, see *In re* Taff Vale R. Co., 11 R. & Can. Tr. Cas. 89.

51. Ruggles *v.* People, 91 Ill. 256; Blake *v.* Winona, etc., R. Co., 19 Minn. 418, 18 Am. Rep. 345.

52. See the statutes of the several states.

Constitutionality of statutes fixing maximum rates see Constitutional Law, 8 Cyc. 874 text and note 22, 969 text and note 65, 1066, 1116.

53. Georgia R. Co. *v.* Smith, 70 Ga. 694.

54. Removal or abandonment of stations see *infra*, IV, G, 3.

Abandonment of road or portion thereof as violation of duty to operate see *infra*, X, A, 1, b.

55. See, generally, Corporations, 10 Cyc. 206 *et seq.*

56. Cincinnati, etc., R. Co. *v.* Clifford, 113 Ind. 460, 15 N. E. 524; Smead *v.* Indianapolis, etc., R. Co., 11 Ind. 104.

unless the power to do so is expressly reserved either in the charter itself,[57] or in a general statute,[58] or constitutional provision,[59] or unless the amendment is made in the exercise of the police power of the state,[60] or in the exercise of the right of eminent domain;[61] and under a reserved power in a general statute a charter cannot be amended if the charter itself provides otherwise.[62] But until there has been an acceptance of the original charter, it is within the control of the legislature and may be amended or revoked at any time;[63] and where there is no organization of the company under the original act incorporating it, a subsequent amendment of such act is merely a revival of the right to form a corporation.[64] If the railroad company accepts its charter subject to such reserved power, it is bound by any reasonable alteration or amendment the legislature may see fit to make,[65] provided the amendment does not go beyond regulation, supervision, and control of the company;[66] and such power includes authority both to withdraw powers granted to the company,[67] and to confer new powers or duties on it and require their exercise.[68] Thus, within such rules, a railroad

57. State *v.* New Haven, etc., Co., 43 Conn. 351; Macdonald *v.* New York, etc., R. Co., 23 R. I. 558, 51 Atl. 578.

58. Snook *v.* Georgia Imp. Co., 83 Ga. 61, 9 S. E. 1104; McCandless *v.* Richmond, etc., R. Co., 38 S. C. 103, 13 S. E. 429, 18 L. R. A. 440.

A lease of the road does not affect the reserved right of the legislature to amend the charter of the railroad company. Worcester *v.* Norwich, etc., R. Co., 109 Mass. 103.

59. See Palmes *v.* Louisville, etc., R. Co., 19 Fla. 231.

Fla. Const. (1839) art. 13, § 2, providing that the legislature shall not alter an act of incorporation unless notice is published three months preceding the session at which the alteration is applied for, does not apply to railroads assisted by the state in furtherance of a system of internal improvements pursuant to Const. art. 11, § 2. Palmes *v.* Louisville, etc., R. Co., 19 Fla. 231.

A constitutional provision that charters under which organization shall not have taken place or which shall not have been in operation within a specified time from the time the constitution takes effect shall thereafter have no effect or validity does not apply to the charter of a railroad company which was in operation at the time the constitution took effect. Little Rock, etc., R. Co. *v.* Little Rock, etc., R. Co., 36 Ark. 663; McCartney *v.* Chicago, etc., R. Co., 112 Ill. 611, construing Const. (1870) art. 11, § 2.

60. See CORPORATIONS, 10 Cyc. 207 text and note 37.

61. See CORPORATIONS, 10 Cyc. 207 text and note 38.

A perfected railroad franchise, especially when followed by construction and operation, is a property right which cannot afterward be taken away or diminished either by a subsequent constitutional amendment or by legislative or municipal action except in the exercise of the police power or the right of eminent domain. Blume *v.* Interurban St. R. Co., 41 Misc. (N. Y.) 171, 83 N. Y. Suppl. 989.

62. Scotland County *v.* Missouri, etc., R. Co., 65 Mo. 123; Columbia, etc., R. Co. *v.* Gibbes, 24 S. C. 60, holding, however, that where a railroad company holding such charter is sold out under orders of the court and the purchasers form a new company under a general law permitting it in such cases, with all the rights, immunities, etc., possessed by the old company previous to the sale under its charter and amendments thereto and of other laws of the state, the new company becomes subject to all the laws on the statute book applicable to railroads at the date of its organization.

63. Pearsall *v.* Great Northern R. Co., 161 U. S. 646, 16 S. Ct. 705, 40 L. ed. 838 [*reversing* 73 Fed. 933].

Where the original and the amendatory acts are passed at the same session of the legislature with only a brief interval between, during which there is no acceptance of the provisions of the original act and no rights are acquired thereunder, the amendatory acts are valid. Cincinnati, etc., R. Co. *v.* Clifford, 113 Ind. 460, 15 N. E. 524.

64. Quinlan *v.* Houston, etc., R. Co., 82 Tex. 356, 34 S. W. 738.

65. Roxbury *v.* Boston, etc., R. Corp., 6 Cush. (Mass.) 424.

66. Chapman *v.* Mad River, etc., R. Co., 1 Ohio Dec. (Reprint) 565, 10 West. L. J. 399; Charlotte, etc., R. Co. *v.* Gibbes, 27 S. C. 385, 4 S. E. 49.

67. Central R., etc., Co. *v.* State, 54 Ga. 401; Worcester *v.* Norwich, etc., R. Co., 109 Mass. 103; Atty.-Gen. *v.* Chicago, etc., R. Co., 35 Wis. 425; Milwaukee, etc., R. Co. *v.* Field, 12 Wis. 340.

Compensation.—The Georgia act of 1840, incorporating the Union Branch Railroad Company, provide that in case of its repeal just compensation should be made to the company for its "work, investments and improvements" upon the road, and consequently after the enactment of the repealing act of 1847, it had a claim for the same upon the state. Union Branch R. Co. *v.* East Tennessee, etc., R. Co., 14 Ga. 327.

68. Worcester *v.* Norwich, etc., R. Co., 109 Mass. 103; Milwaukee, etc., R. Co. *v.* Field, 12 Wis. 340.

charter may be amended so as to give the company the right and power to extend its road over new and additional routes,[69] to change the termini,[70] or the name of the company;[71] or so as to require the company to change its route,[72] construct fences,[73] or carry intersecting highways over the railroad by means of bridges;[74] or so as to require the establishment or maintenance of a station at a particular place,[75] or that certain companies shall unite in a passenger depot and extend their tracks to the same,[76] or that the expenses of a railroad commission shall be paid by the railroad companies of the state.[77] An amended charter in order to be valid must comply with all statutory requirements,[78] although defects in an amendment may be cured by a subsequent statute.[79]

b. Acceptance of Amendment. As in the case of amendments to corporate charters in general, in order that the amendment may be binding on the company, it ordinarily must be consented to or accepted by the company,[80] unless the amend-

69. Collier *v.* Union R. Co., 113 Tenn. 96, 83 S. W. 155.

Extensions generally see *infra*, IV, C, 3.

A railroad company desiring to extend its line beyond that originally authorized should prepare and file supplemental and amended articles of incorporation which shall contain the essential requisites specified in the statute. Vollmer *v.* Schuylkill River East Side R. Co., 1 Pa. Co. Ct. 301.

70. Anderson *v.* Railroad Co., 91 Tenn. 44, 17 S. W. 803.

Change of termini generally see *infra*, IV, E, 1, c.

71. Milwaukee, etc., R. Co. *v.* Field, 12 Wis. 340.

72. Macon, etc., R. Co. *v.* Gibson, 85 Ga. 1, 11 S. E. 442, 21 Am. St. Rep. 135.

The insertion of a proviso in a railroad charter by way of amendment thereto that under certain conditions the road shall pass through a particular intermediate point is not void as being repugnant to the purview of the charter. Macon, etc., R. Co. *v.* Gibson, 85 Ga. 1, 11 S. E. 442, 21 Am. St. Rep. 135.

73. Durand *v.* New Haven, etc., Co., 42 Conn. 211, holding a general statute requiring all railroad companies to maintain fences along their roads, where running within the limits of any highway, to be an amendment of a charter which required only such construction of the road, with reference to the safety of travel upon a highway, as should be approved by a committee.

74. Montclair *v.* New York, etc., R. Co., 45 N. J. Eq. 436, 18 Atl. 242.

Mode of crossing highways generally see *infra*, VI, D, 2.

Abolition of grade crossings after construction of railroad see *infra*, VI, D, 5, b.

75. Com. *v.* Eastern R. Co., 103 Mass. 254, 4 Am. Rep. 555.

76. Worcester *v.* Norwich, etc., R. Co., 109 Mass. 103.

77. Charlotte, etc., R. Co. *v.* Gibbes, 27 S. C. 385, 4 S. E. 49; Columbia, etc., R. Co. *v.* Gibbes, 24 S. C. 60.

78. Anderson *v.* Railroad Co., 91 Tenn. 44, 17 S. W. 803, holding that where a charter is amended so as to change the starting point of a railroad, the change will not be effected unless such amendment is registered in the county where the charter was originally registered.

79. Tennessee Cent. R. Co. *v.* Campbell, 109 Tenn. 655, 73 S. W. 112, holding that an amendment to a railroad charter originally defective because acknowledged before a notary public is validated by the express provisions of Acts (1891), c. 118, amending Acts Extra Sess. (1890) c. 17.

80. State *v.* New Haven, etc., Co., 43 Conn. 351; Goodin *v.* Evans, 18 Ohio St. 150; Macdonald *v.* New York, etc., R. Co., 23 R. I. 558, 51 Atl. 578; Mulloy *v.* Nashville, etc., R. Co., 8 Lea (Tenn.) 427. And see, generally, CORPORATIONS, 10 Cyc. 208 *et seq.*

Acceptance held sufficient.— Under the Rhode Island act of June 23, 1836, section 2, amending the charter of the New York, etc., Railroad Company, providing that the company shall be liable to property-owners for all damages by fire communicated from its engines, and section 10 providing that the company may relocate its road provided it signifies in writing to the secretary of state its assent to the requirements of the amendment, a relocation of the road under such section sufficiently shows its acceptance of the amendment with all its liabilities. Macdonald *v.* New York, etc., R. Co., 23 R. I. 558, 51 Atl. 578. So where the charter of two railroad companies did not authorize a contract of lease to be made between them, but Comp. St. c. 26, § 66, did, the exercise of this power by the stock-holders in authorizing the contract at a meeting held for that purpose without any objection on the part of any one of them, is a sufficient ground for the presumption that the corporations as such had accepted such power as part of their organic law and that the stock-holders had all concurred in the action taken and assented thereto. Vermont, etc., R. Co. *v.* Vermont Cent. R. Co., 34 Vt. 1. Under Swan & C. St. Ohio, § 24, authorizing a railroad company organized in pursuance of law to lease or purchase connecting lines constructed by other companies, and section 71, providing that all companies now incorporated within this state and actually doing business may accept any provision of this act, railroad companies leasing their roads to other companies or taking leases of the roads of other companies are to be regarded as thereby accepting the provisions

ment is made in the exercise of the police power of the state.[81] And although there is no reserved power applicable to the particular railroad, as where it was organized before the passage of the statutory or constitutional provision reserving such power to the legislature, it may bring itself within a subsequent amendatory act by accepting or assenting to the same,[82] and that assent may be manifested in at least three ways: (1) By asking the legislature to make the amendment;[83] (2) by expressly accepting an amendment enacted without a request;[84] and (3) by acting upon and acquiescing in an amendment enacted without request.[85] Where the amendments are fundamental, radical, or vital,[86] as where they in fact constitute a separate and distinct charter, creating a new company,[87] the unanimous consent of the stock-holders to their acceptance is essential, and dissenting corporators, shareholders, or members are released, provided their dissent is given before the rights of third persons intervene.[88] But where the change or alteration is a trivial or immaterial one, unanimous consent is not required, nor are dissenting stock-holders released, where a majority thereof assent to the amendment.[89]

2. Forfeiture of Franchise and Dissolution in General.[90] The dissolution, forfeiture, and winding up of a railroad company is governed by the rules applicable to the dissolution and winding up of corporations in general except in so far as regulated by special constitutional, charter, or statutory provisions.[91] Thus it

of the statute and relinquishing all rights under their charters inconsistent with such provisions. Cincinnati, etc., R. Co. *v.* Cole, 29 Ohio St. 126, 23 Am. Rep. 729.

A resolution adopted by a unanimous vote of the stock-holders reciting that amendments to the charter of a railroad had been made and empowering the board of directors to take the action authorized by such amendment is such an acceptance and ratification of the amendment by the stock-holders as legally makes the amendment part of the charter of the company. Georgia R., etc., Co. *v.* Maddox, 116 Ga. 64, 42 S. E. 315.

A provision that "this act shall take effect at its passage" simply means that if duly accepted it shall thus take effect by relation; and such due acceptance of the act and the filing of an attested copy thereof with the secretary of state are required to give it effect. Hartford, etc., R. Co. *v.* Wagner, 73 Conn. 506, 48 Atl. 218.

81. State *v.* New Haven, etc., Co., 43 Conn. 351.

82. Smead *v.* Indianapolis, etc., R. Co., 11 Ind. 104.

Ala. Code (1896), § 1170, authorizing a domestic railroad company to contract for the operation of its road by a foreign company, etc., in providing that holders of a majority in value of the stock in each company must assent to the arrangement is for the benefit of the stock-holders, who may waive compliance therewith and who only may object to non-compliance; and hence in quo warranto proceedings to oust a foreign railroad company from the operation of a domestic road, the state may not object that the stock-holders of the domestic company which made such a contract with the foreign company did not give the assent required by such section. Louisville, etc., R. Co. *v.* State, (1907) 45 So. 296.

83. Smead *v.* Indianapolis, etc., R. Co., 11 Ind. 104.

84. Louisville, etc., R. Co. *v.* State, (Ala. 1907) 45 So. 296; Smead *v.* Indianapolis, etc., R. Co., 11 Ind. 104.

85. Louisville, etc., R. Co. *v.* State, (Ala. 1907) 45 So. 296; Smead *v.* Indianapolis, etc., R. Co., 11 Ind. 104.

Under Ala. Const. (1875) art. 14, § 25, permitting a railroad company chartered before the adoption of the article which subjects corporate charters to repeal or amendment to enjoy the benefit of future legislation by accepting the provisions of the article, no express or formal acceptance is necessary; and a railroad company chartered before such constitution by accepting the benefits of the code of 1896, sections 1170, 1171, enacted after the charter was granted, brings itself within such statute. Louisville, etc., R. Co. *v.* State, (1907) 45 So. 296.

86. Alexander *v.* Atlanta, etc., R. Co., 108 Ga. 151, 33 S. E. 866 (construing Civ. Code, §§ 1840, 2170); Snook *v.* Georgia Imp. Co., 83 Ga. 61, 9 S. E. 1104. See also, generally, Corporations, 10 Cyc. 208.

87. Youngblood *v.* Georgia Imp. Co., 83 Ga. 797, 10 S. E. 124; Snook *v.* Georgia Imp. Co., 83 Ga. 61, 9 S. E. 1104; Carlisle *v.* Terre Haute, etc., R. Co., 6 Ind. 316.

88. See, generally, Corporations, 10 Cyc. 208.

A change in the terminus of the road is a fundamental alteration which releases a subscriber to stock before the change is made, if made without his consent. Snook *v.* Georgia Imp. Co., 83 Ga. 61, 9 S. E. 1104.

89. See, generally, Corporations, 10 Cyc. 210 *et seq.*

90. Forfeiture of right of way or other interests in land see *infra*, V, L.

Consolidation as dissolving constituent companies see *infra*, VII, E, 6, a.

91. See, generally, Corporations, 10 Cyc. 1270 *et seq.*

The infidelity or misconduct of some or even of all the trustees or managers of a

may be ground for forfeiting the franchises and dissolving the company that it has made wilful and repeated misuse or non-use of its franchises with respect to matters which are of the essence of the contract between the company and the state,[92] as where it makes a material departure from the points designated in the charter for the location of the road,[93] or where the management makes discriminations clearly showing an intention to exclude from the benefits of the road all except its principal stock-holders for the purpose of preventing competition.[94] But where the misuser or non-user is in respect to a matter which is not a material condition which concerns the public, but is confined to the company, it is not ground for a forfeiture of the company's franchises.[95] And unless its charter so provides, a railroad company is not *ipso facto* dissolved by a mere misuser or non-user of its franchises, although such misuser or non-user may be sufficient ground for forfeiture by judicial proceeding.[96] Nor does an isolated case of non-user or misuser, which produces no injurious consequences to any one, and is not persisted in, entitle the state to demand a forfeiture of its charter;[97] nor is it ground for forfeiture that at some future time the company intends to neglect the performance of its full duty to the public;[98] or that the company has obtained a charter from another state;[99] or that it has purchased a street railway franchise from a city through whose streets a portion of its route passes.[1] A railroad company, like other corporations, may also be dissolved by reason of some act or omission on its part made a cause of forfeiture by its charter or governing statute,[2] as for a breach of some substantial condition subsequent prescribed in the charter or statute;[3] or it may be dissolved by a voluntary surrender of its franchises except in so far as its public duties may limit this power,[4] and the legislature may

railroad company affords no ground for taking away the rights of the shareholders who constitute the company, either by dissolving it or taking away its management and placing it in the hands of an officer of the court; but in such a case the principles of remedial or preventive justice go no further than to enjoin or forbid the misconduct, or remove the unfaithful officer. Belmont *v.* Erie R. Co., 52 Barb. (N. Y.) 637.

92. *Arkansas.*— Mississippi, etc., R. Co. *v.* Cross, 20 Ark. 443.

Maine.— Ulmer *v.* Lime Rock R. Co., 98 Me. 579, 57 Atl. 1001, 66 L. R. A. 387.

Mississippi.— Harris *v.* Mississippi Valley, etc., R. Co., 51 Miss. 602.

North Carolina.—Atty.-Gen. *v.* Petersburg, etc., R. Co., 28 N. C. 456.

Pennsylvania.— Com. *v.* New York, etc., R. Co., 10 Pa. Co. Ct. 129.

Texas.— East Line, etc., R. Co. *v.* State, 75 Tex. 434, 12 S. W. 690; State *v.* Rio Grande R. Co., 41 Tex. 217.

See 41 Cent. Lig. tit. "Railroads," § 63.

93. Mississippi, etc., R. Co. *v.* Cross, 20 Ark. 443.

94. Ulmer *v.* Lime Rock R. Co., 98 Me. 579, 57 Atl. 1001, 66 L. R. A. 387.

95. Harris *v.* Mississippi Valley, etc., R. Co., 51 Miss. 602.

96. Atty.-Gen. *v.* Superior, etc., R. Co., 93 Wis. 604, 67 N. W. 1138.

97. Com. *v.* New York, etc., R. Co., 10 Pa. Co. Ct. 129.

98. State *v.* Martin, 51 Kan. 462, 33 Pac. 9; Com. *v.* Pittsburg, etc., R. Co., 58 Pa. St. 26.

99. Com. *v.* Pittsburg, etc., R. Co., 58 Pa. St. 26.

1. Orleans, etc., R. Co. *v.* Jefferson, etc., R. Co., 51 La. Ann. 1605, 26 So. 278.

2. Louisiana, etc., R. Co. *v.* State, 75 Ark. 435, 88 S. W. 559; State *v.* Rio Grande R. Co., 41 Tex. 217.

Failure of the president or vice-president and the majority of the directors to reside in the state after June 19, 1858, was a ground for forfeiture of the charter and franchise under act of 1857. State *v.* Southern Pac. R. Co., 24 Tex. 80.

3. Brown *v.* Wyandotte, etc., R. Co., 68 Ark. 134, 56 S. W. 862; La Grange, etc., R. Co. *v.* Rainey, 7 Coldw. (Tenn.) 420.

4. Matter of New Platz, etc., R. Co., 27 Misc. (N. Y.) 451, 59 N. Y. Suppl. 247 [*affirmed* in 42 N. Y. App. Div. 622, 59 N. Y. Suppl. 1111]; Lauman *v.* Lebanon Valley R. Co., 30 Pa. St. 42, 72 Am. Dec. 685; Combes *v.* Keyes, 89 Wis. 297, 62 N. W. 89, 46 Am. St. Rep. 839, 27 L. R. A. 369, holding that where a railroad company has by judicial sales been divested of all its property and for twenty-six years thereafter has not owned any property or done any business or elected any officers or kept any office in the state, it has voluntarily surrendered its corporate franchise and ceased to exist. See also *In re* Exmouth Docks Co., L. R. 17 Eq. 181, 43 L. J. Ch. 110, 29 L. T. Rep. N. S. 573, 22 Wkly. Rep. 104. And see, generally, CORPORATIONS, 10 Cyc. 1299 *et seq.*

Costs.— On the dissolution of a railroad company in proceedings brought by its trustees, the cost of dissolution consisting of printing and advertising expenses and of attorney, referee, and stenographer's fees constitute a lien on the funds in the hands of the receivers prior to the first mortgage

release it from this limitation.[5] The voluntary dissolution of a railroad company is not a corporate act but the act of the members of the corporation;[6] and its officers in effecting such an arrangement act as trustees of the members, and not as corporate functionaries.[7]

3. Sale, Lease, or Other Transfer of Railroad. The mere lease,[8] sale,[9] or other transfer by a railroad company of all its property or of a portion thereof does not of itself work such a dissolution of the company as disables it from thereafter exercising its corporate powers or so as to relieve it from its debts and obligations;[10] and this is true in the case of a judicial sale;[11] but such a sale of all the corporate property may be deemed a dissolution of the company for the purpose of protecting and enforcing the rights of third parties;[12] and in case of a judicial sale of all the corporate property and franchises of the company the court may be justified in administering the assets of the company as if a legal dissolution had occurred.[13] Where, however, the sale or lease is accompanied by acts made a cause of forfeiture by statute,[14] or by acts or omissions which amount to a wilful misuser or non-user of the corporate franchises, it may constitute grounds on which the state may have a forfeiture declared.[15]

bondholders. Matter of New Paltz, etc., R. Co., 27 Misc. (N. Y.) 451, 59 N. Y. Suppl. 247 [*affirmed* in 42 N. Y. App. Div. 622, 59 N. Y. Suppl. 1111].

5. Lauman *v.* Lebanon Valley R. Co., 30 Pa. St. 42, 72 Am. Dec. 685.

6. Lauman *v.* Lebanon Valley R. Co., 30 Pa. St. 42, 72 Am. Dec. 685.

7. Lauman *v.* Lebanon Valley R. Co., 30 Pa. St. 42, 72 Am. Dec. 685.

8. State *v.* Omaha, etc., R., etc., Co., 91 Iowa 517, 60 N. W. 121; Troy, etc., R. Co. *v.* Kerr, 17 Barb. (N. Y.) 581; U. S. *v.* Little Miami, etc., R. Co., 1 Fed. 700.

9. Davis *v.* Memphis, etc., R. Co., 87 Ala. 633, 6 So. 140; Bruffett *v.* Great Western R. Co., 25 Ill. 353; State *v.* Rives, 27 N. C. 297.

Under Minn. Spec. Laws (1881), c. 228, authorizing the sale and conveyance by the St. Paul and Sioux City Railroad Company to another company named of all its railroads and the appurtenances thereof, and franchises and corporate rights necessary to the use of the property, but expressly excepting other franchises and powers which had been conferred on the company, such sale and conveyance and the consequent suspension by it of all its business as a railroad company does not operate as a forfeiture of its corporate franchises. State *v.* St. Paul, etc., R. Co., 35 Minn. 222, 28 N. W. 245.

10. Muscatine Western R. Co. *v.* Horton, 38 Iowa 33; Gulf, etc., R. Co. *v.* Morris, 67 Tex. 692, 4 S. W. 156; U. S. *v.* Little Miami, etc., R. Co., 1 Fed. 700.

11. Gulf, etc., R. Co. *v.* Morris, 67 Tex. 692, 4 S. W. 156.

Where under a decree of the United States court a company's railroad and all its rights, privileges, immunities, and franchises exclusive of those granted by the state are sold to satisfy a mortgage, and the legislature subsequently incorporates the purchasers and vests them with all the right, title, and interest in the property, possession, claims, and demands at law or in equity of, in, or to such road, with its appurtenances and with all the rights, powers, immunities, privileges, and franchises of the corporation, the act does not revoke the charter of the railroad company. Wilmington, etc., R. Co. *v.* Downward, (Del. 1888) 14 Atl. 720.

12. Davis *v.* Memphis, etc., R. Co., 87 Ala. 633, 6 So. 140.

13. Toledo, etc., R. Co. *v.* Continental Trust Co., 96 Fed. 784, 37 C. C. A. 587, 95 Fed. 497, 36 C. C. A. 155 [*modifying* 82 Fed. 642, and 86 Fed. 929].

A sale of a railroad in a proceeding to enforce a lien reserved to the state operates as a dissolution of the company since it totally destroys the end and object for which it was created. Moore *v.* Whitcomb, 48 Mo. 543.

14. See the cases cited *infra*, this note.

Ark. Acts (1901), p. 368, § 1 (Kirby Dig. § 1649), providing for a forfeiture on certain grounds of the franchise and all charter rights of any railroad in and to all railroad property, and the right to operate the same acquired by it under a lease not made in conformity with the statute governing the making of such leases, are applicable to a foreign railroad company operating in the state under a lease; and hence a suit against such company may be maintained under section 2 of such act providing for the enforcement of the forfeiture by information in the nature of quo warranto or other proper suit. Louisiana, etc., R. Co. *v.* State, 75 Ark. 435, 88 S. W. 559. This act, however, is not retrospective and does not apply to a lease made before its enactment. Louisiana, etc., R. Co. *v.* State, *supra*. And the fact that the company's right in the state authorizes a contract or lease cannot alter its status, as a contract made under a franchise cannot reach beyond the rights acquired by the franchise itself, and afford immunity from public duties. Louisiana, etc., R. Co. *v.* State, *supra*.

15. State *v.* Omaha, etc., R., etc., Co., 91 Iowa 517, 60 N. W. 121; State *v.* Minnesota Cent. R. Co., 36 Minn. 246, 30 N. W. 816.

When a railway company violates the constitution of the state by making a transfer and sale of its property and franchises in a

4. Construction and Maintenance of Road. In the absence of a charter or statutory provision to that effect the mere fact that a railroad company fails to begin construction or to complete its road within the time specified in its charter or governing statute does not of itself work a dissolution of the company,[16] although it may constitute ground for which a forfeiture may be declared in a direct proceeding by or on behalf of the state;[17] but the legislature may provide that such a failure will constitute a forfeiture or dissolution without the intervention of the courts or any action on the part of the state, and in some cases it has been so provided.[18] But even though the failure to construct within the time prescribed might have the legal effect to at once terminate the existence of the company, in the absence of evidence from which such failure could be inferred, the presumption of compliance must be indulged.[19] Under some statutes the forfeiture is restricted to that portion of the road which has not been constructed within the time limited.[20] The above rules also apply to a failure to comply with other

manner forbidden by that instrument, and afterwards wilfully persists for a long period in a non-user of its franchises, a cause for forfeiture of its franchises exists. East Line, etc., R. Co. *v.* State, 75 Tex. 434, 12 S. W. 690.

Where a company without authority of law leases its road to another company with all its rights, property, and franchises for a long period of time, it thereby abandons the operation of its road and is subject to forfeiture. State *v.* Atchison, etc., R. Co., 24 Nebr. 143, 38 N. W. 43, 8 Am. St. Rep. 164.

The acts of a domestic railroad company in surrendering possession, control, and use of its corporate property and franchises to a rival company under a lease in perpetuity, and in acquiescing in the destruction of a portion of its road and other property by the lessee in order to destroy competition, are sufficient grounds to authorize a forfeiture of its franchises and a dissolution of the company and a judgment of ouster against the lessee. Eel River R. Co. *v.* State, 155 Ind. 433, 57 N. E. 388.

16. Hughes *v.* Northern Pac. R. Co., 18 Fed. 106, 9 Sawy. 313.

17. *In re* Brooklyn El. R. Co., 125 N. Y. 434, 26 N. E. 474 [*affirming* 57 Hun 590, 11 N. Y. Suppl. 161]; *In re* Atty.-Gen., 2 N. Y. Suppl. 684 [*affirmed* in 50 Hun 511, 3 N. Y. Suppl. 464]; Com. *v.* New York, etc., R. Co., 10 Pa. Co. Ct. 129; State *v.* International, etc., R. Co., 57 Tex. 534; Vermont, etc., R. Co. *v.* Vermont Cent. R. Co., 34 Vt. 1.

18. *Minnesota.*— State *v.* St. Paul, etc., R. Co., 35 Minn. 222, 28 N. W. 245.

Missouri.— Ford *v.* Kansas City, etc., R. Co., 52 Mo. App. 439, construing Rev. St. (1889) § 2664.

New York.— Farnham *v.* Benedict, 107 N. Y. 159, 13 N. E. 784 [*reversing* 39 Hun 22]; Brooklyn Steam Transit Co. *v.* Brooklyn, 78 N. Y. 524 (construing Laws (1871), c. 940, and Laws (1873), c. 61, § 4); *In re* Brooklyn, etc., R. Co., 72 N. Y. 245; New York, etc., R. Co. *v.* O'Brien, 121 N. Y. App. Div. 819, 106 N. Y. Suppl. 909 [*affirmed* in 192 N. Y. 558, 85 N. E. 1113]; Nicoll *v.* New York, etc., R. Co., 1 Code Rep. 89 [*reversed* on other grounds in 12 Barb. 460 (*affirmed* in 12 N. Y. 121)].

Tennessee.— La Grange, etc., R. Co. *v.* Rainey, 7 Coldw. 420.

Texas.— Bywaters *v.* Paris, etc., R. Co., 73 Tex. 624, 11 S. W. 856 (construing Rev. St. art. 4278); Sulphur Springs, etc., R. Co. *v.* St. Louis, etc., R. Co., 2 Tex. Civ. App. 650, 22 S. W. 107, 23 S. W. 1012.

Virginia.— Silliman *v.* Fredericksburg, etc., R. Co., 27 Gratt. 119.

Canada.— Montreal Park, etc., R. Co. *v.* Chateauguay, etc., R. Co., 13 Quebec K. B. 256.

See 41 Cent. Dig. tit. "Railroads," § 65.

19. Chesapeake Beach R. Co. *v.* Washington, etc., R. Co., 23 App. Cas. (D. C.) 587.

20. Sulphur Springs, etc., R. Co. *v.* St. Louis, etc., R. Co., 2 Tex. Civ. App. 650, 22 S. W. 107, 23 S. W. 1012; Utah, etc., R. Co. *v.* Utah, etc., R. Co., 110 Fed. 879; Montreal Park, etc., R. Co. *v.* Chateauguay, etc., R. Co., 13 Quebec K. B. 256.

Under Minn. Spec. Laws (1864), c. 1, subs. 2, § 5, and Laws (1865), c. 15, § 4, attaching to the grant of franchises thereby made to a railroad company the condition that it shall construct and equip its road and branches within a fixed time, and that upon failure to do so all unbuilt portions thereof shall be absolutely forfeited, etc., such failure to construct one of its branches is not a cause of forfeiture of its corporate franchise, or of its franchises to maintain and operate the constructed portion of its road; but the forfeiture is restricted to the unbuilt portion. State *v.* St. Paul, etc., R. Co., 35 Minn. 222, 28 N. W. 245.

Tex. Rev. St. art. 4558, providing that any railroad company which shall fail to equip at least twenty miles of its right of way every year after the second of its incorporation until the whole is completed shall forfeit its corporate existence, and that its powers shall cease so far as relates to the portion of the road then unfinished, does not apply to a failure to occupy a short portion of a right of way granted in a street connecting with another line, the road having been built into the city along such street in due time after the grant. Denison *v.* St. Louis, etc., R. Co., 96 Tex. 233, 72 S. W. 161 [*affirming* 30 Tex. Civ. App. 474, 72 S. W. 201].

prescribed conditions as to construction.[21] Where the condition is that the company make an expenditure of a certain amount of its capital stock within a specified time, the fact that the company has granted to another company the privilege of laying tracks on parts of its route will not avail to retain its corporate existence without making the prescribed expenditures;[22] nor will a reservation of a right in the lessor to run cars over part of the track laid by the lessee on payment of the sum specified for such use avail to give the lessor the benefit of expenditures by the lessee.[23] Independently of statutory provisions, a railroad charter may be dissolved by reason of its wrongful misuse or non-use of its corporate powers relative to the construction of the road,[24] as where it delays for a long time to construct the line provided in its charter, and constructs a road wholly unsuited to the wants of the public.[25]

5. Suspension of Operation of Road or Business. Where a railroad company voluntarily abandons its road, and does or suffers to be done acts which destroy the end and objects for which it was incorporated, it is sufficient ground to authorize an annulment of its charter upon the suit of the state.[26] But unless the lapse of time is so long as to amount to an abandonment, a railroad company does not forfeit its charter by the suspension of its work and operations for a limited time,[27] especially where the project is not intended to be abandoned but the contemplated road is extended and built as soon as funds therefor are procured.[28] A railroad company, however, cannot incur a forfeiture at its own pleasure and in disregard of the rights of others; and the mere abandonment of the railroad and the removal of its track and its entire disuse is not enough to deprive the company of the privileges of its franchises or to absolve it from maintaining and keeping its road in repair.[29] Under some statutes a suspension of the maintenance and operation of the road for a specified time is ground for a forfeiture of the franchises;[30] but under such statutes a non-user for less than the specified period is no ground for a dissolution.[31] Under some statutes an abandonment of a part of its line operates

21. State *v.* Omaha, etc., R., etc., Co., 91 Iowa 517, 60 N. W. 121, holding that where a railroad company is granted power by a city to build tracks therein on condition that it shall conform to the street grades and shall pay for the paving between its tracks, its failure to comply with such conditions is not ground for declaring a forfeiture of its charter.

22. *In re* Brooklyn, etc., R. Co., 81 N. Y. 69.

23. *In re* Brooklyn, etc., R. Co., 81 N. Y. 69.

24. State *v.* Hazelton, etc., R. Co., 40 Ohio St. 504.

25. State *v.* Hazelton, etc., R. Co., 40 Ohio St. 504, holding that where a railroad company for five years fails to construct a line provided in its charter, but condemns private property and constructs a road wholly unsuited to the wants of the public, and for the benefit only of mines owned by the principal stock-holders of the road, it is a misuse of its corporate powers for which it may be dissolved.

26. People *v.* Pittsburgh R. Co., 53 Cal. 694, holding that where the stock-holders of a coal company incorporate a railroad company with articles declaring its purpose to be the transportation of freight and passengers, but the corporation refuses to run passenger cars, such refusal is ground for annulling the charter.

27. Com. *v.* New York, etc., Coal, etc., Co., 10 Pa. Co. Ct. 129; Collier *v.* Union R. Co., 113 Tenn. 96, 83 S. W. 155.

28. Collier *v.* Union R. Co., 113 Tenn. 96, 83 S. W. 155.

29. People *v.* Troy, etc., R. Co., 37 How. Pr. (N. Y.) 427.

30. State *v.* Minnesota Cent. R. Co., 36 Minn. 246, 30 N. W. 816 (construing Gen. St. (1878) c. 76, § 11); People *v.* Northern R. Co., 53 Barb. (N. Y.) 98 [*affirmed* in 42 N. Y. 217] (holding that the law providing for forfeiture of the charter of a railroad company which has suspended its ordinary and lawful business for more than a year admits of no excuse or explanation of such suspension); Atty.-Gen. *v.* Superior, etc., R. Co., 93 Wis. 604, 67 N. W. 1138.

Under Iowa Code, § 1079, which provides that a corporation shall cease to exist by the non-user of its franchise for two years at any time, a railroad company which was incorporated in 1883 and did not begin its road until 1886, but money was expended and continuous efforts were made during that time to procure additional means to construct it, did not lose its franchise by non-user. Young *v.* Webster City, etc., R. Co., 75 Iowa 140, 39 N. W. 234.

31. People *v.* Atlantic Ave. R. Co., 125 N. Y. 513, 26 N. E. 622 [*affirming* 57 Hun 378, 10 N. Y. Suppl. 907].

The omission of a railway company for five days to run its trains is not sufficient to authorize a forfeiture under N. Y. Code Civ.

to work a forfeiture of the entire line.[32] But it has been held that, where there is no such statute, it is no cause for forfeiture that the company discontinues unprofitable trains;[33] and it has also been held that a forfeiture will not be declared for a failure or refusal to run trains to a certain place, where there is no injury to the public and a forfeiture would not redress the grievance complained of.[34]

6. Waiver or Release of Forfeiture. The state may waive or lose its right to have the franchises of a railroad company forfeited,[35] as by enacting a statute, after the cause of forfeiture has arisen, recognizing the company and authorizing the construction or operation of the road,[36] or by extending the time for the completion of the road,[37] or by expressly releasing the company from the effect of a forfeiture, or reviving it;[38] or the state may waive such right by acquiescing, after the cause of forfeiture, for an unreasonable time in the construction and operation of the road.[39] A waiver on condition may be revoked upon a breach of the condition.[40]

7. Operation and Effect of Forfeiture. The operation and effect of a forfeiture of railroad franchises is ordinarily governed by the rules applicable to the dissolution of corporations in general, except in so far as it is regulated by

Proc. § 1785, providing for the dissolution of a corporation "where it has suspended its ordinary and lawful business for at least one year"; nor is such omission an "abuse of its powers" within the meaning of section 1798, which authorizes an action for dissolution for abuse of corporate powers. People *v.* Atlantic Ave. R. Co., 125 N. Y. 513, 26 N. E. 622 [*affirming* 57 Hun 378, 10 N. Y. Suppl. 907].

32. Brownell *v.* Old Colony R. Co., 164 Mass. 29, 41 N. E. 107, 49 Am. St. Rep. 442, 29 L. R. A. 169; People *v.* Albany, etc., R. Co., 24 N. Y. 261, 82 Am. Dec. 295.

33. Com. *v.* Fitchburg R. Co., 12 Gray (Mass.) 180.

34. Atty.-Gen. *v.* Erie, etc., R. Co., 55 Mich. 15, 20 N. W. 696, holding that the charter of a railroad company will not be declared forfeited for the failure and refusal to continue to run its trains into and use as a station a village not named as a station in the charter, although injury to the inhabitants of such village is thereby done, where such discontinuance is brought about by the use of another route by the lessee of the company to facilitate the transfer of passengers and freight to a through line of railroad, and the public at large are not injured.

35. Mississippi, etc., R. Co. *v.* Cross, 20 Ark. 443; State *v.* Minnesota Cent. R. Co., 36 Minn. 246, 30 N. W. 816; Montreal Park, etc., R. Co. *v.* Chateauguay, etc., R. Co., 13 Quebec K. B. 256.

36. *Illinois.*— People *v.* Mississippi, etc., R. Co., 14 Ill. 440.

Minnesota.— State *v.* Minnesota Cent. R. Co., 36 Minn. 246, 30 N. W. 816.

North Carolina.—Atty.-Gen. *v.* Petersburg, etc., R. Co., 28 N. C. 456.

Texas.— East Line, etc., R. Co. *v.* State, 75 Tex. 434, 12 S. W. 690.

Wisconsin.— Atty.-Gen. *v.* Superior, etc., R. Co., 93 Wis. 604, 67 N. W. 1138.

Canada.— Port Dover, etc., R. Co. *v.* Grey, 36 U. C. Q. B. 425; Toronto *v.* Crookshank, 4 U. C. Q. B. 309.

See 41 Cent. Dig. tit. "Railroads," § 67.

37. Brooklyn Steam Transit Co. *v.* Brooklyn, 78 N. Y. 524 (construing Laws (1879), c. 350); *In re* Brooklyn, etc., R. Co., 72 N. Y. 245; La Grange, etc., R. Co. *v.* Rainey, 7 Coldw. (Tenn.) 420; Bywaters *v.* Paris, etc., R. Co., 73 Tex. 624, 11 S. W. 856, construing Rev. St. art. 4278, Laws (1885), p. 54.

38. Mississippi, etc., R. Co. *v.* Cross, 20 Ark. 443; Brooklyn Steam Transit Co. *v.* Brooklyn, 78 N. Y. 524 (holding, however, that Laws (1875), c. 593, relieving from forfeiture railroad companies then in default for non-construction of their roads, does not apply to a railroad that was not in default at the time of the passage of that act); Com. *v.* Pittsburg, etc., R. Co., 58 Pa. St. 26 (construing the act of April 11, 1856).

Minnesota act of March 10, 1862, held not to revive certain railroad companies see Fitz *v.* Minnesota Cent. R. Co., 11 Minn. 414; Hilbert *v.* Winona, etc., R. Co., 11 Minn. 246; Huff *v.* Winona, etc., R. Co., 11 Minn. 180.

39. State *v.* Bailey, 19 Ind. 452 (holding that where the articles of association of a railroad company, defective in not specifying with certainty the terminus of its road, are properly filed in the office of the secretary of state, it is notice to the state of the defect and its right to take advantage thereof is lost by eight years of acquiescence without endeavoring to have the same amended); Brownell *v.* Old Colony R. Co., 164 Mass. 29, 41 N. E. 107, 49 Am. St. Rep. 442, 29 L. R. A. 169.

40. La Grange, etc., R. Co. *v.* Rainey, 7 Coldw. (Tenn.) 420, holding that where the legislature incorporates a railroad and thereafter extends the time in which to complete the road, provided the same is not sold and transferred to a certain party named, a sale of such road is a revocation of the waiver by the state of its right to enforce a forfeiture of the charter of the original road for failure to complete the road within the time specified in the act of incorporation.

special charter or statutory provisions.[41] Thus the forfeiture or dissolution of a railroad company operates to divest the officers of the company of all their powers as such,[42] except that under some statutes they may continue to exercise powers necessary to wind up the company.[43] And under some statutes the property rights of the company survive for the benefit of those who may have a right to or just claim against its assets.[44] It has been held that a railroad, although there has been a forfeiture or repeal of the company's charter remains a public highway subject to the management and control of the state.[45]

8. Proceedings For Forfeiture or Dissolution. Although under some statutes a railroad company's franchises may become *ipso facto* forfeited and the company dissolved by reason of its failure to comply with certain statutory conditions,[46] as a general rule a railroad company's right to corporate existence cannot be questioned in a collateral proceeding instituted by a private individual or corporation, but it may be deprived of its franchises and a dissolution decreed, only in a direct judicial proceeding, in the nature of a quo warranto, instituted by or on behalf of the state for that purpose;[47] and where a pleading in a collateral

41. See Silliman *v.* Fredericksburg, etc., R. Co., 27 Gratt. (Va.) 119; and, generally, Corporations, 10 Cyc. 1310 *et seq.*

42. Ford *v.* Kansas City, etc., R. Co., 52 Mo. App. 439.

43. Ford *v.* Kansas City, etc., R. Co., 52 Mo. App. 439.

44. Sulphur Springs, etc., R. Co. *v.* St. Louis, etc., R. Co., 2 Tex. Civ. App. 650, 22 S. W. 107, 23 S. W. 1012.

45. Erie, etc., R. Co. *v.* Casey, 26 Pa. St. 287.

46. See New York, etc., R. Co. *v.* Boston, etc., R. Co., 36 Conn. 196; Bywaters *v.* Paris, etc., R. Co., 73 Tex. 624, 11 S. W. 856; and the statutes of the several states.

The burden of proving such forfeiture is upon the party who asserts it and in the absence of evidence a forfeiture cannot be assumed. Edwards *v.* Missouri, etc., R. Co., 82 Mo. App. 96.

47. *Arkansas.*— Louisiana, etc., R. Co. *v.* State, 75 Ark. 435, 88 S. W. 559; Brown *v.* Wyandotte, etc., R. Co., 68 Ark. 134, 56 S. W. 862, holding that a ground of forfeiture cannot be taken advantage of in a proceeding by the company to condemn land.

Illinois.— Bruffett *v.* Great Western R. Co., 25 Ill. 353.

Indiana.— State *v.* Bailey, 19 Ind. 452. Under Rev. St. (1881) §§ 1131, 1132, it is provided that the mode of procedure to have declared a forfeiture of a railroad company's rights, privileges, and franchises is by information on the relation of the prosecuting attorney in the circuit court of the proper county. Logan *v.* Vernon, etc., R. Co., 90 Ind. 552.

Maine.— Ulmer *v.* Lime Rock R. Co., 98 Me. 579, 57 Atl. 1001, 66 L. R. A. 387.

Minnesota.— State *v.* Minnesota Cent. R. Co., 36 Minn. 246, 30 N. W. 816.

New York.— People *v.* Ulster, etc., R. Co., 128 N. Y. 240, 28 N. E. 635 [*affirming* 58 Hun 266, 12 N. Y. Suppl. 303, 54 Hun 639, 8 N. Y. Suppl. 149]; *In re* Brooklyn El. R. Co., 125 N. Y. 434, 26 N. E. 474 [*affirming* 57 Hun 590, 11 N. Y. Suppl. 161] (holding that the company cannot be attacked for a default by way of answer or defence in condemnation proceedings instituted by it); *In re* Atty.-Gen., 2 N. Y. Suppl. 684 [*affirmed* in 50 Hun 511, 3 N. Y. Suppl. 464].

Pennsylvania.— Philadelphia, etc., R. Co.'s Petition, 187 Pa. St. 123, 40 Atl. 967; Chestnut Hill, etc., R. Co. *v.* Conshohocken R. Co., 4 Pa. Dist. 12, 15 Pa. Co. Ct. 441.

Tennessee.— La Grange, etc., R. Co. *v.* Rainey, 7 Coldw. 420.

United States.— Utah, etc., R. Co. *v.* Utah, etc., R. Co., 110 Fed. 879.

Whether or not a railroad company has done or failed to do anything which would result in a forfeiture of its franchise can only be inquired into by a proceeding appropriate for that purpose, such as an information in the nature of quo warranto instituted by the proper authorities on behalf of the state. Ulmer *v.* Lime Rock R. Co., 98 Me. 579, 57 Atl. 1001, 66 L. R. A. 387.

But whether or not the company intends in good faith to carry out the declared objects of its organization cannot be inquired into in quo warranto proceedings. State *v.* Martin, 51 Kan. 462, 33 Pac. 9.

Pleading.— An information, filed by the attorney-general for the purpose of having the charter of a corporation declared to be forfeited, need not be expressed in technical language, but it must set out the substance of a good cause of forfeiture in its essential circumstances of time, place, and overt acts. Atty.-Gen. *v.* Petersburg, etc., R. Co., 28 N. C. 456. In proceedings by the state in the nature of a quo warranto against a domestic railroad company to declare a forfeiture of its franchises on the ground that it has ceased to engage in the business for which it was organized, and has surrendered its corporate property and franchises to a rival company in order to destroy competition, the information need not aver that the acts complained of were prohibited by statute, or that public injury resulted therefrom. Eel River R. Co. *v.* State, 155 Ind. 433, 57 N. E. 388.

Parties.— In a proceeding on the part of the state to forfeit the charter of a railway

proceeding seeks to set up the fact of such forfeiture, it must allege that the forfeiture has been judicially declared in a suit for that purpose.[48] Where, in proceedings by or on behalf of the state, facts clearly bring the case within the terms of the statute providing for a forfeiture, it is mandatory upon the court to declare a forfeiture.[49]

III. PUBLIC AID.*

A. In General [50] — **1. Requisites and Validity of Grants of Aid in General.** In order that a grant of public aid to a railroad company may be valid, it is requisite that all the requirements of the statute, ordinance, or constitution authorizing such aid be at least substantially complied with.[51] The fact that a railroad company is authorized to construct and operate a telegraph line in connection with and as incidental to the operation of its road will not invalidate a grant of public aid in the construction of the road.[52]

2. Indemnity or Security by Railroad Company. The constitutional or statutory provisions authorizing the granting of public aid to a railroad company usually provide that the municipality, county, or state granting such aid shall be entitled to security or indemnity for the credit loaned by it to the company, by indorsing or guaranteeing the bonds of the latter,[53] or by loaning bonds of the city, county, or state to the railroad company,[54] or for the repayment of advances made to the company,[55] the nature and character of the security required depending upon the terms of the particular statute. Thus, under the various statutes, this

company on account of a sale of its corporate franchises, rights, and privileges to a railway company chartered by another state, the purchasing company is not a necessary party. East Line, etc., R. Co. *v.* State, 75 Tex. 434, 12 S. W. 690.

48. Logan *v.* Vernon, etc., R. Co., 90 Ind. 552.

49. State *v.* Minnesota Cent. R. Co., 36 Minn. 246, 30 N. W. 816.

50. Grant of right of way or other interests in land see *infra*, V.

Loss or waiver of lien for public aid granted see *infra*, VIII, A, 6, c, (II).

Lien for public aid granted see *infra*, VIII, A, 6, h.

Foreclosure of lien for public aid granted see *infra*, VIII, B, 2, a.

Constitutionality of statute: Authorizing municipal aid to railroad see CONSTITUTIONAL LAW, 8 Cyc. 891. Authorizing railroad aid as an exercise of eminent domain or police power see EMINENT DOMAIN, 15 Cyc. 562. Restricting the right of a railroad company to receive public aid see CONSTITUTIONAL LAW, 8 Cyc. 972.

Constitutional guarantee: Against impairing obligation of contract by municipal corporation for aid to a railroad see CONSTITUTIONAL LAW, 8 Cyc. 948 note 93. Against impairment of vested right of railroad company to municipal aid see CONSTITUTIONAL LAW, 8 Cyc. 904. Against deprivation of property as applied to municipal aid to railroad see CONSTITUTIONAL LAW, 8 Cyc. 1104.

Extent, mode, and validity of exercise of power in granting aid to railroad: By counties see COUNTIES, 11 Cyc. 518 *et seq.*, 560. By municipal corporations see MUNICIPAL CORPORATIONS, 28 Cyc. 1553 *et seq.*, 1579. By state see STATES. By towns see TOWNS.

Grants of public lands in aid of railroads see PUBLIC LANDS, 32 Cyc. 937 *et seq.*

Retrospective operation of statute validating unauthorized aid to railroad see CONSTITUTIONAL LAW, 8 Cyc. 1024.

51. See People *v.* Logan County, 45 Ill. 162; Com. *v.* Allegheny County, 37 Pa. St. 237, holding railroad aid bonds issued in payment of a subscription by a county required to be made by an act of assembly on the recommendation of the county commissioners valid, although the officers of the railroad company were permitted to urge the recommendation at a meeting of the grand jury. And see COUNTIES, 11 Cyc. 420 *et seq.*; MUNICIPAL CORPORATIONS, 28 Cyc. 1559; STATES; TOWNS.

52. Snell *v.* Leonard, 55 Iowa 553, 8 N. W. 425.

53. Cunningham *v.* Macon, etc., R. Co., 6 Fed. Cas. No. 3,483, 3 Woods 418.

Appropriation of money raised.—A bond or security may be required of the railroad company, under some statutes, that the money raised upon the bonds of the company guaranteed by a city shall be appropriated to the construction of the road. Sinking Fund Com'rs *v.* Northern Bank, 1 Metc. (Ky.) 174, holding that such a provision in a statute confers a privilege to the city, and not an obligation upon it, to require such bond, and that a mortgage to the city is not vitiated by its failure to require the bond.

54. Raleigh, etc., Air-Line R. Co. *v.* Jenkins, 68 N. C. 499, 502; Cincinnati *v.* Morgan, 3 Wall. (U. S.) 275, 18 L. ed. 146.

55. Com. *v.* Williamstown, 156 Mass. 70, 40 N. E. 472.

* By Henry H. Skyles.

security has been required to be in the form of a mortgage or pledge of stock of the company,[56] a mortgage on the property of the railroad company,[57] or such other lien or security, real or personal, as the parties may mutually agree upon.[58]

3. Negotiation and Sale of Securities.[59] Where they are negotiable in form, a railroad company may negotiate and sell state, county, or municipal aid bonds or other securities, which it has received, the same as other like instruments,[60] and may guarantee such bonds or securities;[61] and may also negotiate and sell its own bonds indorsed by a state, county, or municipality.[62] The holders of such bonds or securities are entitled to all the rights, privileges, and immunities attaching to negotiable instruments, as against the state, county, or municipality.[63] Thus an innocent holder thereof is not affected by any fraud or mistake in their issue;[64] but a purchaser or holder who has notice, actual or constructive, of irregularities or informalities in the bonds or securities takes subject thereto,[65] and if the bonds are fraudulently issued, it is incumbent upon a holder thereof to show that he is

The Mississippi act of April 8, 1873, providing that certain advances from the state in aid of the Vicksburg & Nashville R. Co., should be made as portions of the road should be completed, entitled the legislature to judge of the sufficiency of the security at any time, and to require additional security from the company of any character even after the executive had ordered payment of one instalment of the advances, on a satisfactory showing that the company had become entitled to receive it. Hemmingway *v.* Vicksburg, etc., R. Co., 52 Miss. 16.

56. Cincinnati *v.* Morgan, 3 Wall. (U. S.) 275, 18 L. ed. 146.

57. Sinking Fund Com'rs *v.* Northern Bank, 1 Metc. (Ky.) 174; Com. *v.* Williamstown, 156 Mass. 70, 30 N. E. 472; Cunningham *v.* Macon, etc., R. Co., 6 Fed. Cas. No. 3,483, 3 Woods 418.

58. Cincinnati *v.* Morgan, 3 Wall. (U. S.) 275, 18 L. ed. 146.

59. Rights of holders of public aid bonds and securities generally see Counties, 11 Cyc. 565; Municipal Corporations, 28 Cyc. 1610; States; Towns.

60. Bartholomew County *v.* Bright, 18 Ind. 93 (holding that Local Acts (1849–1850), § 6, prohibiting a railroad company from selling its bonds at a greater discount than ten per cent did not restrain it from selling other bonds than its own at a greater discount); Chicago, etc., R. Co. *v.* Howard, 7 Wall. (U. S.) 392, 19 L. ed. 117; Evans *v.* Cleveland, etc., R. Co., 8 Fed. Cas. No. 4,557, 5 Phila. (Pa.) 512; Brock Tp. *v.* Toronto, etc., R. Co., 17 Grant Ch. (U. C.) 425.

61. Chicago, etc., R. Co. *v.* Howard, 7 Wall. (U. S.) 392, 19 L. ed. 117; Evans *v.* Cleveland, etc., R. Co., 8 Fed. Cas. No. 4,557, 5 Phila. (Pa.) 512, holding that a railroad company has power to guarantee punctual payment of coupons attached to municipal bonds issued in aid of such company. And see *infra*, VIII, A, 5.

62. State *v.* Cobb, 64 Ala. 127.

Numbers on bonds.—Ala. Act, Nov. 17, 1868, providing for the indorsement of certain railroad bonds, did not require that the bonds should be numbered, that they should be indorsed in numerical order, or that they should be sold or negotiated by the company in any particular order, and the numbers on several bonds did not indicate anything as to the time when they were issued or negotiated. State *v.* Cobb, 64 Ala. 127.

63. Curtis *v.* Butler County, 6 Fed. Cas. No. 3,500.

64. Gilman *v.* New Orleans, etc., R. Co., 72 Ala. 566 (holding that where a state indorses bonds of a railroad pursuant to a statute contemplating that the bonds shall be used only for the further construction of the road after the completion of the first twenty miles, but the company delivers them to the contractor in payment of the first twenty miles, the state is liable as an accommodation indorser to a *bona fide* holder for value in the usual course of business); State *v.* Cobb, 64 Ala. 127 (holding that where bonds indorsed by the state are negotiable and regular on their face, and recite in the indorsement a compliance by the company with the conditions of the statute, an innocent holder for value is not affected by any fraud or mistake in their overissue). *Compare* Com. *v.* Haupt, 10 Allen (Mass.) 38, holding that the state is entitled to recover against contractors for money had and received from the sale of an excess of scrip issued.

65. Gilman *v.* New Orleans, etc., R. Co., 72 Ala. 566, holding that the state is not liable on indorsed bonds as an accommodation indorser, while the bonds remain in the hands of any person chargeable with knowledge of the misapplication of the bonds in violation of statute.

Where negotiable county aid railroad bonds recite the act under which they were issued, the purchasers of such bonds are presumed to have notice of all provisions therein, and hence are presumed to know of a provision therein to the effect that the obligee of the railroad company has no authority to put them in circulation or sell them at less than their par value, and in case they were so issued, such holder can recover from the county only the amount which the railroad company receives for them. But where the bonds were first put out by the company at their par value, the fact that they were again received by the company at less than

a *bona fide* holder for value.[66] Scrip issued by a state, county, or municipality in aid of a railroad may be assigned by the company.[67] The company may also make a general assignment of its right to avail itself of a standing offer of public aid.[68]

4. Commissioners or Other Officers Having Control of Grant. The statutes providing for public aid to railroad companies usually place the control of the grant in a board of commissioners or certain other officers;[69] and the railroad company has no right to aid voted to it until such board or officers have acted in their favor,[70] as until after they have determined that all the statutory conditions have been complied with,[71] and made an appropriation or donation of the money voted,[72] which can be done only after it is collected.[73] Where the exercise of the board's power is dependent upon the performance of certain conditions by the railroad company, such board has no authority to act until such conditions have been performed.[74] Such commissioners or officers, while they continue to hold office, cannot transfer their official rights or divest themselves of their official duty;[75] and on the other hand, they cannot perform any official acts after they cease to hold office.[76] It is the duty of such commissioners to exchange or otherwise dispose of the capital stock of a railroad company received on subscription thereto, in the manner authorized by statute,[77] and to account for the proceeds thereof to the proper county, state, or municipal authorities.[78] Such commis-

par does not affect the right of a subsequent *bona fide* purchaser to recover upon them. Curtis *v.* Butler County, 6 Fed. Cas. No. 3,500.

66. Curtis *v.* Butler County, 6 Fed. Cas. No. 3,500.

67. Com. *v.* Haupt, 10 Allen (Mass.) 38.

68. State *v.* Hastings, 24 Minn. 78 (holding this to be true, although the company had not complied with certain terms and conditions upon which the offer was made, at the time of such assignment); Crogster *v.* Bayfield County, 99 Wis. 1, 74 N. W. 635, 77 N. W. 167 (holding that a county cannot avoid liability on bonds voted in aid of a railroad, "its successors and assigns," merely by reason of the assignment to another company of its interest in such bonds to be earned on completion of the road).

69. Demaree *v.* Bridges, 30 Ind. App. 131, 65 N. E. 601 (construing Burns Rev. St. (1901) §§ 5340, 5341, 5369); Biddlecom *v.* Newton, 13 Hun (N. Y.) 582 (power of issuing bonds in board of commissioners).

Power of determining compliance with conditions.— Minn. Spec. Laws (1889), c. 205, providing for municipal aid to a railroad company and that bonds issued pursuant thereto should be delivered by commissioners to the company upon the completion of the road, does not give the commissioners the power of determining conclusively the fact as to whether the conditions upon which the bonds were voted have been complied with. McManus *v.* Duluth, etc., R. Co., 51 Minn. 30, 52 N. W. 980.

70. Muscatine Western R. Co. *v.* Horton, 38 Iowa 33.

The rule that in the absence of malicious or fraudulent motives a judicial officer is not liable in damages for an erroneous application of the law is applicable to the quasi-judicial acts of township trustees in refusing to issue to a railroad company a certificate of compliance with conditions upon which a tax was voted in aid of the construction of the road, and the trustees are not liable in damages for such refusal unless they act wilfully or corruptly. Muscatine Western R. Co. *v.* Horton, 38 Iowa 33.

71. Demaree *v.* Bridges, 30 Ind. App. 131, 65 N. E. 601.

72. State *v.* Clinton County, 166 Ind. 162, 76 N. E. 986.

Appropriation necessary.— Railroad companies have no legal rights to subsidies levied and collected for their aid from townships under Ind. Act (1869), p. 292, until an appropriation thereof is made by the proper board of commissioners. State *v.* Clinton County, 166 Ind. 162, 76 N. E. 986.

73. State *v.* Clinton County, 166 Ind. 162, 76 N. E. 986.

74. Buffalo, etc., R. Co. *v.* Falconer, 103 U. S. 821, 26 L. ed. 471.

75. Biddlecom *v.* Newton, 13 Hun (N. Y.) 582.

76. Biddlecom *v.* Newton, 13 Hun (N. Y.) 582, holding an attempt to transfer bonds pending a writ of certiorari to review the proceedings appointing commissioners and which proceedings were afterward reversed and the application ordered dismissed, to be null and void.

77. People *v.* Edcy, 3 Lans. (N. Y.) 80; People *v.* Burnside, 3 Lans. (N. Y.) 74.

78. Griggs *v.* Griggs, 56 N. Y. 504 [*affirming* 66 Barb. 287], holding that in an action against railroad commissioners of a town to require them to account for moneys received by them on the sale of railroad stock belonging to the town, if it appears that the commissioners have retained a portion of the funds and have undertaken to appropriate it to their own use, they are properly chargeable with interest on the amount so retained.

An action for an accounting may be brought by the supervisor of a municipality in his

sioners may be removed by an order of the proper court for unlawful or wilful non-feasance in office.[79]

5. Revocation, Forfeiture, Termination, or Avoidance. Ordinarily the termination of a railroad's right to public aid granted to it is controlled by the terms of the statute authorizing or granting such aid.[80] A grant of public aid may be avoided, if procured by fraud or misrepresentation.[81] A railroad company may forfeit its right to taxes voted and collected if it does not claim the same within the prescribed time,[82] or if it fails to perform the conditions precedent, upon which the grant is made;[83] but such right is not forfeited by a temporary suspension of the work on the road,[84] or by an omission to make compensation to a landowner for land taken;[85] nor where the railroad company has expended money in construction on the faith of a voted tax is its right thereto taken away by a subsequent repeal of the statute authorizing the tax, although no levy is made until after the repeal;[86] nor where the road has been completed before the tax is levied will an omission to state in the levy the time when the road was to be completed defeat the tax.[87] And no parol contract, stipulation, or limitation can be set up to defeat a tax so voted,[88] except to establish fraud.[89] A public subscription once made in aid of a railroad is not invalidated by an amendment to its charter changing the name of the road,[90] or by any other change not a fundamental one.[91] Nor where a railroad company has substantially performed the conditions upon which it becomes entitled to certain bonds is its right to demand the bonds affected by its subsequent misconduct in operating the road.[92]

own name as supervisor, and it is not necessary for the continuance of the action that his successor be substituted as plaintiff. Griggs *v.* Griggs, 56 N. Y. 504 [*affirming* 66 Barb. 287].

79. People *v.* Eddy, 3 Lans. (N. Y.) 80; People *v.* Burnside, 3 Lans. (N. Y.) 74.

80. See West Branch Canal Co. *v.* Elmira, etc., R. Co., 55 Pa. St. 180, holding that where a state undertakes to pay to a railroad company yearly all tolls received on a canal belonging to the state with the proviso that the privilege shall cease if the net proceeds of the road, after defraying necessary expenses for motive power and superintendence, shall exceed six per cent per annum on the capital stock, the grant by its terms expires when the net receipts in any year after paying expenses are more than six per cent on the capital stock alone, although less than six per cent on the capital stock and funded debt.

81. Prettyman *v.* Tazewell County Sup'rs, 19 Ill. 406, 71 Am. Dec. 230; Muscatine Western R. Co. *v.* Horton, 38 Iowa 33; Sinnett *v.* Moles, 38 Iowa 25.

Estoppel.— That work on a railroad has been performed and money expended without objection from the taxpayers does not estop them from subsequently denying the validity of a tax voted to aid in its construction, on discovery that the vote had been procured by fraud. Sinnett *v.* Moles, 38 Iowa 25.

Misrepresentation.— Where the electors of a town vote for an issue of bonds to be used in the construction of a railroad, under representations by the officers of such railroad that it is to be entirely independent of a railroad previously constructed, and immediately after the election such officers voluntarily transfer the control of the road to the company owning the preëxisting road, there is such misrepresentation as will justify an injunction to restrain the proposed bond issue. Nash *v.* Baker, 37 Nebr. 713, 56 N. W. 376.

82. Cedar Rapids, etc., R. Co. *v.* Elseffer, 84 Iowa 510, 51 N. W. 27, two years under Act (1876), p. 110, § 7, and also holding that such statute was not repealed by Acts (1880), c. 192.

That the railroad company did not know that the money was in the treasury and that it erroneously believed the tax levy to be invalid does not relieve it from a forfeiture under such a statute. Cedar Rapids, etc., R. Co. *v.* Elseffer, 84 Iowa 510, 51 N. W. 27.

83. West Virginia, etc., R. Co. *v.* Harrison County Ct., 47 W. Va. 273, 34 S. E. 786. And see *infra*, III, C, 2.

84. Merrill *v.* Welsher, 50 Iowa 61.

Estoppel.— The company would not be estopped to collect the tax because it advised, when the work temporarily ceased, that the collection of the tax should be suspended. Merrill *v.* Welsher, 50 Iowa 61.

85. Manchester, etc., R. Co. *v.* Keene, 62 N. H. 81.

86. Cantillon *v.* Dubuque, etc., R. Co., 78 Iowa 48, 42 N. W. 613, 5 L. R. A. 776; Burges *v.* Mabin, 70 Iowa 633, 27 N. W. 464.

87. Burges *v.* Mabin, 70 Iowa 633, 27 N. W. 464.

88. Harwood *v.* Quinby, 44 Iowa 385; Muscatine Western R. Co. *v.* Horton, 38 Iowa 33.

89. Muscatine Western R. Co. *v.* Horton, 38 Iowa 33.

90. Reading *v.* Wedder, 66 Ill. 80; Chicago, etc., R. Co. *v.* Stafford County, 36 Kan. 121, 12 Pac. 593. And see Counties, 11 Cyc. 529 note 35.

91. See Reading *v.* Wedder, 66 Ill. 80.

92. Hodgman *v.* St. Paul, etc., R. Co., 23 Minn. 153.

6. Enforcement of Grants. Where all preliminary steps and conditions requisite to an issuance of bonds or collection of money voted in aid of a railroad company have been taken and the company has a clear right thereto, the usual remedy to enforce the performance of such grant is a writ of mandamus.[93] Where a bill in equity has been instituted to enjoin the issuance of such bonds, the railroad company may seek to enforce their issuance by a cross bill.[94] It has been held that where the granting of such aid is provided for by a municipal by-law, such by-law is in the nature of a contract with the railroad company, and that the latter can sue for and recover the bonus granted by an action of debt on the by-law.[95] A judgment creditor of a railroad company may proceed in equity to compel the company to assign its rights against a county or municipality which has subscribed to its stock;[96] but such creditor cannot proceed in equity to compel the county or municipality to issue its subscription bonds to him after the assignment, since the obligation to issue the bonds is merely statutory and not capable of being pleaded as a pure money indebtedness,[97] and the proper remedy in such case is by writ of mandamus.[98] Where a state holds railroad bonds issued in exchange for public aid granted, which bonds constitute a statutory lien on the road and the trustees of the bonds are merely the agents of the state, the state has such a direct interest in the road as will give it a standing in court when the public aid fund is brought into court to file an original bill to protect its interests.[99]

7. Grant of Aid by National Government.[1] Grants of public aid to railroad companies by loaning money or bonds, or granting public lands, have also been made upon certain conditions by the national government, through acts of congress, as in the case of the "Pacific Railroad Acts,"[2] the rights and liabilities of the parties thereunder being controlled by the terms of such acts.[3] Thus, under the "Pacific Railroad Acts," it has been held that the grants made by such acts to

93. See, generally, Mandamus, 26 Cyc. 303, 304.

Evidence.— Evidence of speeches made by officers of a railroad company at the time of an election to vote aid to it as being admissible in mandamus proceedings to compel the issuance of bonds see Illinois Midland R. Co. *v.* Barnett, 85 Ill. 313. The fact of the appropriation of a tax in aid of a railroad and of the corporate existence of the company may be shown by the record of the proceedings of the county board where the necessary jurisdiction appears. Caffyn *v.* State, 91 Ind. 324.

94. Chicago, etc., R. Co. *v.* Mallory, 101 Ill. 583.

The burden of proof is upon the railroad company asking the enforcement of the issuing of bonds, to show that the bonds were authorized to be issued by a vote of the people had pursuant to a law providing therefor. Chicago, etc., R. Co. *v.* Mallory, 101 Ill. 583.

95. Grand Junction R. Co. *v.* Peterborough County, 8 Can. Sup. Ct. 76 [*affirming* 6 Ont. App. 339].

96. Smith *v.* Bourbon County, 127 U. S. 105, 8 S. Ct. 1043, 32 L. ed. 73.

97. Smith *v.* Bourbon County, 127 U. S. 105, 8 S. Ct. 1043, 32 L. ed. 73, holding also that the equitable nature of the complainant's rights against the railroad company furnishes no ground for the support of such a bill in equity against the county.

98. Smith *v.* Bourbon County, 127 U. S. 105, 8 S. Ct. 1043, 32 L. ed. 73.

99. Florida *v.* Anderson, 91 U. S. 667, 23 L. ed. 290, holding that it is competent for a state in seeking equitable relief against citizens of another state for the protection of its interests to file an original bill.

1. **Compensation of land grant railroads for carrying mails** see Post-Office, 31 Cyc. 994.

2. 12 U. S. St. at L. 489; 13 U. S. St. at L. 356.

3. See the cases cited *infra*, this note; and notes 4–13.

Reports and accounts.— The act of congress of June 19, 1878 (U. S. Rev. St. Suppl. 194), requiring certain reports prescribed by the auditor of railroad accounts to be made by railroads to which the United States have granted any loan of credit or subsidy in bonds or lands or which have received from the United States lands granted to them to aid in the construction of their roads, does not apply to railroads which are incorporated by the several states and have received from them the grants of land made to such states to procure the construction of railroads. U. S. *v.* Chicago, etc., R. Co., 77 Fed. 732, 23 C. C. A. 430 [*affirming* 69 Fed. 89].

State corporations accepting the provisions of the Pacific railroad acts are subject to all the provisions thereof. Western Union Tel. Co. *v.* Union Pac. R. Co., 3 Fed. 721, 1 McCrary 581.

The act of congress of July 1, 1862, 12 U. S. St. at L. 489, incorporating the Union Pacific Railroad Company and pledging the support of the government, embodies in itself both

the Central Pacific Railroad Company were precisely the same in character and amount as those made to the Union Pacific;[4] that the Union Pacific was under an obligation to build and operate a telegraph line along its right of way,[5] and to transport mail, passengers, supplies, etc., for the government at a fair and reasonable rate not to exceed that paid by private parties for the same kind of service,[6] or at a certain per cent of the rates charged the general public,[7] a certain portion of such compensation to be applied on the government bonds and interest;[8] that a certain per cent of the net earnings of the road should be applied to the payment of bonds and interest;[9] that the United States has no claim against the stock-holders of the Central Pacific on account of the aid bonds issued to that company;[10] that under such acts the United States sustains two distinct relations to the Union Pacific Railroad Company, namely, that of the government creating it and exercising legislative and visitatorial powers, and that growing out of the contract contained in the charter and its amendment;[11] but that it did not thereby become a trustee vested with power to enforce the proper use of the property and franchises granted for the benefit of the public, since there were no *cestuis que trustent*.[12] Where a grant of public aid is made for the construction of a railroad, except as to such portion for which the construction has already been provided, the fact that the railroad company has contracted merely for the grading and fencing of a certain portion of the road does not disentitle it to such aid as to that portion.[13]

B. Private Subscriptions or Contributions[14] — **1. In General.** Public

a charter and a compact; and those provisions which bind the government to do something and cause distinct obligations upon it and make it take a financial part in the enterprise are something distinct from a charter and are to be liberally construed. Union Pac. R. Co. *v.* U. S., 10 Ct. Cl. 548.

4. U. S. *v.* Stanford, 69 Fed. 25 [*affirmed* in 161 U. S. 412, 16 S. Ct. 576, 40 L. ed. 751].

5. Western Union Tel. Co. *v.* Union Pac. R. Co., 3 Fed. 721, 1 McCrary 581, holding that, on the face of the acts of congress of 1862 and 1864, the obligation of the Union Pacific Railroad Company and its branches to build and operate for the public a telegraph line along its right of way was an obligation which they could not abandon.

6. Union Pac. R. Co. *v.* U. S., 20 Ct. Cl. 70, holding that, under the provision relating to the transfer of passengers for the government, the government is not entitled for local passengers to rates which the road receives in division with other companies for transportation over its own and other roads.

The roads are entitled only to the quantum meruit and not to a rate to be fixed in the first instance by the company within the limits prescribed. Union Pac. R. Co. *v.* U. S., 117 U. S. 355, 6 S. Ct. 772, 29 L. ed. 920.

7. U. S. *v.* Astoria, etc., R. Co., 131 Fed. 1006, holding that Act Cong. July 2, 1864, c. 217, § 11 (13 U. S. St. at L. 370), requiring land grant railroads to carry freight for the army at not exceeding fifty per cent of the tariff rates charged the general public, does not entitle the government to a reduced rate for the carriage of freight between two points by a railroad company which received no land grant, merely because its trains run for a part of the distance over the track of a land grant road.

8. Union Pac. R. Co. *v.* U. S., 10 Ct. Cl. 548, holding that under the acts of July 1, 1862, and July 2, 1864, providing that one half of such earnings shall be retained and applied on the bonds, if the earnings thus designated exceed the advances for interest on the bonds, the loss *ad interim* will be the company's; if they fall short of such advances, the loss will be on the government; and that in an action by a company for the remainder of its earnings, the government's demand for interest advanced on the fund must be asserted by a counter-claim in the nature of a cross action, and also that if the government could have augmented the company's earnings by furnishing more transportation, it cannot set up a counter-claim for interest advanced by it in such action.

9. See Union Pac. R. Co. *v.* U. S., 20 Ct. Cl. 70; and *infra*, III, C, 6, 7.

The words "necessary expenses in operating," within the meaning of the Thurman Act of 1878, § 1 (20 U. S. St. at L. 56) [U. S. Comp. St. (1901) p. 3569], defining the phrase "net earnings" as used in the act of 1862 extend to the expenses of operating the road in accordance with the demands of the business coming to it, but limit them to such as are conducive to that end and exclude those that are not. Union Pac. R. Co. *v.* U. S., 20 Ct. Cl. 70.

10. U. S. *v.* Stanford, 161 U. S. 412, 16 S. Ct. 576, 40 L. ed. 751 [*affirming* 69 Fed. 25].

11. U. S. *v.* Union Pac. R. Co., 98 U. S. 569, 25 L. ed. 143.

12. U. S. *v.* Union Pac. R. Co., 98 U. S. 569, 25 L. ed. 143 [*affirming* 28 Fed. Cas. No. 16,598, 11 Blatchf. 385]. See Hereford R. Co. *v.* Reg., 24 Can. Sup. Ct. 1.

13. McRae *v.* Toronto, etc., R. Co., 22 U. C. C. P. 1, construing 34 Vict. c. 2, § 3.

14. Subscriptions: In general see SUB-

aid may also be given to a proposed railroad or railroad extension by private voluntary subscriptions or contributions by individuals or corporations.[15] Such subscriptions or contributions are not affected by statutory provisions relating to subscriptions to stock.[16]

2. Requisites and Validity of Contracts. The requisites and validity of a contract of subscription in aid of a railroad company are governed by the rules regulating contracts generally,[17] and also by the general rules of agency when procured by an agent or committee.[18] Such voluntary subscriptions or contributions are usually made in consideration of the benefits that will accrue to the subscribers or contributors by the construction and operation of the railroad;[19] and are usually made, and held valid when so made, upon condition that the proposed railway be constructed and put in operation,[20] to a specified place

SCRIPTIONS. To corporate stock in general see CORPORATIONS, 10 Cyc. 380 *et seq.* To railroad stock see *supra*, II, B, 2.

15. See Wright *v.* Irwin, 35 Mich. 347.

16. Wright *v.* Irwin, 35 Mich. 347, holding that it is no defense to an action upon a note given as a voluntary contribution in aid of a proposed railroad to show that the municipal and individual aid and stock subscriptions to the road did not amount to a certain sum per mile, within the meaning of Comp. Laws (1891), § 2298, as such requirement is merely a qualification of the right to levy and collect assessments upon the stock subscribed.

17. See, generally, CONTRACTS, 9 Cyc. 213.

Substitution of contract.—Where a railroad company agrees to a subscription of a certain amount to build a depot in a certain place, and after part of the required sum has been subscribed the company notifies the subscribers that it requires, in lieu of such general subscription, assumption by two or three responsible persons of the payment of the sum required, and thereupon certain persons promise by parol to assume it, after which a canvass is made for further subscriptions, and subscriptions obtained for a larger sum, the subscribers intending to put such persons in funds, the persons assuming such payment are the contracting parties and they alone can be sued for a breach of the contract. Lamoille Valley R. Co. *v.* Marsh, 49 Vt. 37.

Release — void.—An arrangement between the officers of a railroad company and a portion of its subscribers that if the town in which they reside votes a certain amount for municipal aid, such subscribers, upon paying a certain per cent of their subscriptions, shall be released from the balance is in effect an agreement to release a portion of the subscribers without authority and is therefore void. Swartwout *v.* Michigan Air Line R. Co., 24 Mich. 389.

18. See, generally, PRINCIPAL AND AGENT, 31 Cyc. 1414 *et seq.*, 1566 *et seq.*, 1597 *et seq.*

Discretionary powers.— Where subscribers authorize their agents "to make and enter into a contract with said railroad company, in their discretion and upon such terms as they . . . may deem most for our interest," such agents are empowered to bind their principals to furnish depot grounds and right of way free of charge as a condition precedent to the performance of the contract by the company. Cedar Rapids, etc., R. Co. *v.* Stewart, 25 Iowa 115.

A committee or agents acting for subscribers offering money cannot go beyond their instructions; and where authorized to make a suitable contract with the company and to provide therein for the manner of collecting the subscriptions, and all other details as to the location of depots and whatever else may be of interest to the town in making the same, the committee has no power to make a contract binding the subscribers to procure and pay for the right of way, and to construct the grade, and binding the railroad company only in case the right of way should be obtained and the grade completed by persons who contracted with the railroad to do this in consideration of the subscriptions. Darnell *v.* Lyon, 85 Tex. 455, 22 S. W. 304, 960 [*affirming* (Civ. App. 1892) 19 S. W. 506]. A direction to an agent to subscribe a specified sum in aid of a railroad payable upon the location and erection of certain improvements at a given point does not authorize such subscription to be made payable on the "location" of the improvements there. Drover *v.* Evans, 59 Ind. 454.

Where a special agent, to whom a subscription in aid of a railroad has been intrusted to be delivered upon certain conditions, delivers it in disregard of his instructions, his principals, the subscribers, are not bound thereby. Saginaw, etc., R. Co. *v.* Chappell, 56 Mich. 190, 22 N. W. 278.

Ratification.— Where the incorporators of a railroad issue "freight receipts" obligating the company to transport freight or passengers in consideration of subscriptions used in the construction of the road, without authority, but such subscriptions are applied in payment of the company's construction contracts, and are subsequently ratified by its officers, they thereby become binding obligations on the company. Branson *v.* Oregonian R. Co., 10 Oreg. 278.

19. Chicago, etc., R. Co. *v.* Derkes, 103 Ind. 520, 3 N. E. 239.

20. Chicago, etc., R. Co. *v.* Derkes, 103 Ind. 520, 3 N. E. 239.

or along a specified route,[21] within a certain time,[22] or that a station be located at a specified point.[23] The fact that a company was organized to build the road at the time that the contract was made,[24] or that in the absence of such contract the road would have been built anyhow, will not defeat the promise.[25] Where a number of persons sign a subscription paper in aid of a railroad, the contract of each subscriber is usually several and distinct;[26] and a condition annexed to one subscriber's signature is in no wise affected by the fact that other subscribers annex different conditions to their signatures.[27]

3. Acceptance, Performance, and Breach of Conditions — a. In General. A contract of subscription becomes binding and the railroad company entitled to the money or other aid subscribed when, and only when, it has accepted the contract,[28] and at least substantially performed all the conditions precedent prescribed therein,[29] unless the performance of such conditions has been waived;[30]

21. Missouri Pac. R. Co. *v.* Tygard, 84 Mo. 263, 54 Am. Rep. 97; Miller *v.* Gulf, etc., R. Co., 65 Tex. 659.

Construction of contract.— Where a contract of subscription is made payable when the road shall be completed and in operation from a certain place to another specified place by a certain time, and it appears that there is a large township by the latter name containing about as much as forty ordinary townships, and a village of the same name which has a well-known existence, although not incorporated, the village and not the township of that name is meant in the condition. Ogden *v.* Kirby, 79 Ill. 555.

22. Missouri Pac. R. Co. *v.* Tygard, 84 Mo. 263, 54 Am. Rep. 97.

23. Missouri Pac. R. Co. *v.* Tygard, 84 Mo. 263, 54 Am. Rep. 97; Kennedy *v.* Cotton, 28 Barb. (N. Y.) 59 (holding that an agreement in consideration that a railroad company will construct a certain station, to pay fifty dollars to aid in its construction, imports a request to the company to construct the station and a compliance with such request is a sufficient consideration for the parties' undertaking); Miller *v.* Gulf, etc., R. Co., 65 Tex. 659.

24. Stevens *v.* Corbitt, 33 Mich. 458.

25. Stevens *v.* Corbitt, 33 Mich. 458.

26. Miller *v.* Preston, 4 N. M. 314, 17 Pac. 565; McFarland *v.* Lyon, 4 Tex. Civ. App. 586, 23 S. W. 554.

Several undertaking.—A subscription paper containing an offer to induce the construction, etc., of a railroad which contains the words, "We, the undersigned, hereby promise and agree," and a further provision that "each subscriber shall be liable only for the amount opposite his name" is a several obligation and each subscriber can be separately sued. Darnell *v.* Lyon, 85 Tex. 455, 22 S. W. 304, 960.

27. Miller *v.* Preston, 4 N. M. 314, 17 Pac. 565.

28. Smith *v.* Davidson, 45 Ind. 396; Northern Cent. Michigan, etc., R. Co. *v.* Eslow, 40 Mich. 222.

Demand of payment and suit for its recovery are not evidence of acceptance, where a subscription is otherwise invalid. Northern Cent. Michigan, etc., R. Co. *v.* Eslow, 40 Mich. 222.

29. Cook *v.* McNaughton, 128 Ind. 410, 24 N. E. 361, 28 N. E. 74; Chicago, etc., R. Co. *v.* Derkes, 103 Ind. 520, 3 N. E. 239; Michigan Midland, etc., R. Co. *v.* Bacon, 33 Mich. 466; Williams *v.* Ft. Worth, etc., R. Co., 82 Tex. 553, 18 S. W. 206; Miller *v.* Gulf, etc., R. Co., 65 Tex. 659.

Illustration.—An action may be maintained to recover a subscription to a railroad company, payable when the sum required to purchase a specified site for the depot is subscribed thereto, although a portion of such sum has been paid in without subscription. Springfield St. R. Co. *v.* Sleeper, 121 Mass. 29. The mere fact that the committee to whom the subscription list had been intrusted, with instructions to turn it over to the company whenever they became satisfied that the latter had complied with its conditions, did in fact deliver it in the exercise of their discretion, does not render the contract binding upon the subscriber. Davenport, etc., R. Co. *v.* O'Connor, 40 Iowa 477.

30. Crane *v.* Indiana, etc., R. Co., 59 Ind. 165, holding, however, that the fact that the complaint alleges that two dollars and fifty cents were paid on the contract without disclosing the circumstances under which the payment was made, is not sufficient as tending to show an admission of performance or waiver thereof.

Illustrations.— If, before the expiration of the time of performance, the subscriber says that he is satisfied with a modification of the contract and then promises payment notwithstanding the modification, it may be regarded by the company as a waiver of the conditions. Burlington, etc., R. Co. *v.* Whitney, 43 Iowa 113. Where a party agrees to subscribe to a grant of aid to a railroad company on condition that the road shall be constructed on a particular location and the company maintain a station at the town in which he lives, and afterward, before the construction of the road, agrees that he will pay the railroad company five hundred dollars in advance instead of the amount for which he would be liable under the original subscription contract, the latter agreement does not abrogate the former and does not constitute a waiver of the conditions contained therein. Texas, etc., R. Co. *v.* Fitch, 2 Tex. Unrep. Cas. 257.

and when it has made a demand therefor, where the contract so requires,[31] and has acted in good faith.[32] But ordinarily it is immaterial whether the conditions are performed by one company or another so long as there is a substantial performance.[33] Where there has been a sufficient performance on the part of the railroad company, the other parties to the contract cannot invoke the doctrine of *ultra vires* in defense, on the ground that the company had no power to make such contract,[34] or claim want or inadequacy of consideration to defeat the contract;[35] or otherwise withdraw the subscription.[36] Where the promise of aid is made to someone necessarily connected with or interested in the work being done for the benefit of the company that has begun or is about to undertake the work, then, upon completion of the work, or upon the performance of the conditions upon which the promise was made, the liability of the promisor becomes complete;[37] and in some cases where expense is incurred or an obligation created, upon the faith of such promise, a like liability will follow, the fair inference in such cases being that the work was done or the expense or liability incurred in reliance upon the promise.[38] But where the railroad company has failed to comply with the conditions or otherwise broken the subscription contract,[39] it cannot hold the subscribers liable thereon,[40] and it makes no difference that the latter have derived some benefit from the road as constructed.[41] But on the other hand the subscriber may thereupon withdraw his promise,[42] and treat the contract as terminated and sue on it for damages for the breach,[43] or treat it as rescinded and recover back the money he has advanced.[44] Under some statutes, where a railroad has been abandoned and no reasonable provision made for traffic between the points abandoned, those who have contributed to its construction are entitled to have their contributions refunded with interest;[45] or if rights of way have been granted in payment of the subscriptions, to have a reconveyance thereof.[46]

31. Miller *v.* Gulf, etc., R. Co., 65 Tex. 659.

32. Miller *v.* Gulf, etc., R. Co., 65 Tex. 659, holding that a railroad company cannot maintain an action against citizens of a town on their subscriptions in aid of a railroad, where it has not acted in good faith.

33. Toledo, etc., R. Co. *v.* Johnson, 55 Mich. 456, 21 N. W. 888.

34. Chicago, etc., R. Co. *v.* Derkes, 103 Ind. 520, 3 N. E. 239; Doherty *v.* Arkansas, etc., R. Co., 5 Indian Terr. 537, 82 S. W. 899, especially where the contract is within the general scope of the powers conferred upon the railroad company.

35. Chicago, etc., R. Co. *v.* Derkes, 103 Ind. 520, 3 N. E. 239; Wright *v.* Irwin, 35 Mich. 347.

36. Buchel *v.* Lott, (Tex. Civ. App. 1890) 15 S. W. 413.

37. Stevens *v.* Corbitt, 33 Mich. 458.

38. Stevens *v.* Corbitt, 33 Mich. 458.

39. Reusens *v.* Mexican Nat. Constr. Co., 22 Fed. 522, 23 Blatchf. 19.

40. Carlisle *v.* Terre Haute, etc., R. Co., 6 Ind. 316; Miller *v.* Gulf, etc., R. Co., 65 Tex. 659.

41. Carlisle *v.* Terre Haute, etc., R. Co., 6 Ind. 316.

42. Michigan Midland, etc., R. Co. *v.* Bacon, 33 Mich. 466.

43. Reusens *v.* Mexican Nat. Constr. Co., 22 Fed. 522, 23 Blatchf. 19.

44. Texas, etc., R. Co. *v.* Fitch, 2 Tex. Unrep. Cas. 257; Reusens *v.* Mexican Nat. Constr. Co., 22 Fed. 522, 23 Blatchf. 19.

45. Flint, etc., R. Co. *v.* Rich, 91 Mich. 293, 51 N. W. 1001, 105 Mich. 289, 63 N. W. 303, construing Pub. Act (1891), No. 125, in connection with Laws (1887), Act No. 275.

Prior to the passage of Mich. Act No. 125, Pub. Acts (1891), those who contributed to the construction of a railroad had no right of action against the company for abandoning and taking up its track. That act makes the taking up of the track unlawful, unless by virtue of proceedings in court, where a decree is to be granted only upon condition that the company pay back all moneys received as a bonus. Williams *v.* Flint, etc., R. Co., 116 Mich. 392, 74 N. W. 641. Where therefore after application made by the company for leave to abandon, a contributor files a petition, upon behalf of himself and such others as may choose to avail themselves of the proceeding, for the appointment of a time and place at which all parties who have contributed to the road may be notified to appear and prove the amount of their several contributions, and an order is entered thereon that all contributors shall prove their claims before a commissioner upon a certain day, which order is published, as directed by the court, in a county paper, contributors who fail to appear and make proof of their claims will be deemed to have waived their right to reimbursement. Williams *v.* Flint, etc., R. Co., *supra*.

46. *In re* Flint, etc., R. Co., 105 Mich. 289, 63 N. W. 303, holding that where contributors gave their notes, and afterward paid them by granting rights of way, the company should not, in refunding contributions on abandonment of the line, be compelled to re-

b. Construction, Maintenance, and Equipment. The above rules apply to conditions contained in a subscription contract relative to the construction, maintenance, and equipment of the road,[47] such as that within a reasonable or specified time, or on or before a specified date, the road shall be made ready for the operation of trains,[48] completed and in operation,[49] or be built and equipped,[50] to a certain place or between certain points,[51] and that a train of cars be run between

pay the notes, as the statute requires a reconveyance of the right of way.

47. See the cases cited *infra*, this note; and notes 48–59.

Non-compliance.—A condition that the company shall have completed its road to a certain place within a certain time, and that one half the grading between that point and the intersection of the proposed road with another road shall have been done, is not sufficiently performed by constructing its road between the point of intersection with the other at a specified time, without also constructing its road in the other direction. Burlington, etc., R. Co. *v.* Whitney, 43 Iowa 113. So a condition that the company complete and put in operation its railroad of standard gauge and steel rails is not sufficiently complied with where part of the road is not constructed with steel rails. Missouri Pac. R. Co. *v.* Levy, 17 Mo. App. 501.

Partial compliance.— Where a subscription is payable, one half if the road is graded to a certain point within a year and one half if completed to such point in two years, and the road is not graded in the year but is completed in two years, the latter half of the subscription only is collectable, since both provisions are conditions precedent to the payment and unless each is complied with, the company cannot recover the amount dependent on both. Johnson *v.* College Hill Narrow Gauge R. Co., 7 Ohio Dec. (Reprint) 466, 3 Cinc. L. Bul. 410.

48. Persinger *v.* Bevill, 31 Fla. 364, 12 So. 366.

49. See Courtright *v.* Deeds, 37 Iowa 503; Sickels *v.* Anderson, 63 Mich. 421, 30 N. W. 78; Toledo, etc., R. Co. *v.* Johnson, 55 Mich. 456, 21 N. W. 888.

Illustration.— Where the contract of subscription describes the road upon the completion of which the subscription is payable, the road described in the contract must be built and it is not sufficient that a railroad has been built. Low *v.* Studabaker, 110 Ind. 57, 10 N. E. 301. If a subscription is subject to a condition that a railroad shall be completed and in operation between two certain points by a day named, it will be sufficient to show performance of those conditions, and it is not necessary that the road should on that day furnish such facilities for receiving and discharging freight and passengers as could be expected of an established railroad, to make the party liable on his subscription. Ogden *v.* Kirby, 79 Ill. 555. And such a condition is not necessarily not performed, as a matter of law, from the fact that a depot was not built, and a station agent appointed for such place by the day named, and proof of such facts will not necessarily defeat a recovery by the company on the contract of subscription. Ogden *v.* Kirby, 79 Ill. 555.

Completion of the whole road is not a condition precedent where the subscription is made on the condition that the road shall be permanently located and constructed through a certain place, and also provides that the subscription shall be applied only toward paying the damages and expenses which shall be incurred in acquiring the right of way or lands therefor and depot grounds in a specified town. Berryman *v.* Cincinnati Southern R. Co., 14 Bush (Ky.) 755. So the fact that the road was not completed at the time stated does not release the obligor from payment where the subscription contract merely is to pay a sum of money when the cars of the company shall be run between designated points. Davis *v.* Cobban, 39 Iowa 392.

50. Paris, etc., R. Co. *v.* Henderson, 89 Ill. 86.

51. Burlington, etc., R. Co. *v.* Whitney, 43 Iowa 113.

Compliance.— A condition that the road shall be completed and put into operation to a certain town by a certain day is substantially complied with where the road is graded to the point by the appointed time, but is not fully completed until four months later, and in the meantime the company uses about a mile of another railroad in operating its road to such town. Missouri Pac. R. Co. *v.* Tygard, 84 Mo. 263, 54 Am. Rep. 97. So a condition that the road shall be completed to a certain village is sufficiently complied with when it is constructed to the suburbs of such village in such a manner as to bear daily trains to it carrying all the freight and travelers that offer, although some portion of the work is intended to be replaced with other and better material. O'Neal *v.* King, 48 N. C. 517.

Non-compliance.—A condition that the company shall "construct or secure a continuous line of railway," between certain points, contemplates that the company shall have the road under its own control covering the entire distance, and is not sufficiently complied with by constructing the road for part of the distance, and for the remainder using the road of another company under an arrangement which subordinates its use to that of the company owning the road. Brown *v.* Dibble, 65 Mich. 520, 32 N. W. 656. The leasing of a part of a railroad between two points is not a compliance with a contract to construct a road between said points, in consideration of a subscription in aid of the road. Lawrence *v.* Smith, 57 Iowa 701, 11 N. W. 674.

specified points.[52] A condition that the road shall be completed to a point within a stated time does not require the completion of the road to that point within such time in complete running order for carrying passengers and freight, but it is sufficient if the road be completed to such place so as to allow trains to be operated thereon and it appears that the company is engaged in the business of placing the track in condition for carrying passengers.[53] And a condition that the road shall be completed and put in operation is complied with when it is so far completed that it is used and operated for the transportation of persons and property,[54] and it is not essential thereto that the company building the road shall own the rolling stock by which it is operated.[55] A condition that the road shall be equipped means that it shall have thereon the necessary engines, cars, and other appliances for its ordinary use;[56] and a condition that it shall be running requires more than the passage of one train over the road, where it is in an unfinished state.[57] Where a party promises to contribute in aid of a proposed railroad, it may be implied as a condition in the absence of an express condition, that the road shall be constructed and operated;[58] and upon this being done within a reasonable time, where no time is fixed, the promise becomes operative and binding, and the party making it cannot thereafter repudiate it.[59]

c. Location of Road, Termini, and Stations. The same rules also apply to conditions relative to the location of the constructed road,[60] and termini, or stations.[61]

Law and fact.— When a railroad is to be regarded as completed and in operation to a given point is not a question of law, but purely one of fact, to be determined by the jury from the evidence. Ogden *v.* Kirby, 79 Ill. 555.

52. See Moore *v.* Campbell, 111 Ind. 328, 12 N. E. 495.

Compliance.— A condition that the road shall be constructed and a train running to within one mile of a specified place at a specified time is sufficiently complied with by building the road at the time named and locating a depot within one mile of such place and on the day specified running a passenger train to within two hundred yards of the depot. Chicago, etc., R. Co. *v.* Schewe, 45 Iowa 79. So a condition under which a note is payable ten days after cars shall be run to a stated place, provided they are so run within a specified time, is sufficiently complied with where the track is laid from one terminus to this point, within the time, and construction trains are moved daily, although it is not open to freights and passengers until some months after the time specified. Pontiac, etc., R. Co. *v.* King, 68 Mich. 111, 35 N. W. 705.

Non-compliance.— A condition under which a subscription is to be payable upon the arrival at D from I of the first train of cars over the proposed track is not sufficiently complied with where the road is built from D to within one and a half miles of I, but by a different route; and from that place the track of another road is used into I. Indianapolis, etc., R. Co. *v.* Holmes, 101 Ind. 348.

The completion of the whole road is not a condition precedent where the subscription is made payable after the first cars run over the road from one specified point to another, inside the contemplated termini. Gardner *v.* Walsh, 95 Mich. 505, 55 N. W. 355; Toledo, etc., R. Co. *v.* Johnson, 55 Mich. 456, 21 N. W. 888.

53. Jackson *v.* Stockbridge, 29 Tex. 394, 94 Am. Dec. 290.

54. Courtright *v.* Deeds, 37 Iowa 503; Tower *v.* Detroit, etc., R. Co., 34 Mich. 328.

55. Courtright *v.* Deeds, 37 Iowa 503.

56. Paris, etc., R. Co. *v.* Henderson, 89 Ill. 86.

57. Paris, etc., R. Co. *v.* Henderson, 89 Ill. 86.

58. Stevens *v.* Corbitt, 33 Mich. 458.

59. Stevens *v.* Corbitt, 33 Mich. 458.

60. Evansville, etc., R. Co. *v.* Wright, 38 Ind. 64; Davenport, etc., R. Co. *v.* O'Connor, 40 Iowa 477; Williams *v.* Ft. Worth, etc., R. Co., 82 Tex. 553, 18 S. W. 206.

Non-compliance.— A condition that the track "run on said Crane's east line" is not complied with by constructing it "upon, or near as practicable upon, the east line of the lands owned by" C, and at all points within fifty feet of said line. Crane *v.* Indiana, etc., R. Co., 59 Ind. 165.

Estoppel.— The makers of a note conditioned that the payee shall construct a railroad into a town are not estopped from canceling the same because they suffered it to build the road several miles from the town without protest. Gulf, etc., R. Co. *v.* Pittman, 4 Tex. Civ. App. 167, 23 S. W. 318.

Withdrawal of promise.— Where there is such a change in the location of the line of the road that it is apparent that the promisor will lose the advantages which he expected would accrue to him in building the road, he is warranted in withdrawing his promise. Michigan Midland, etc., R. Co. *v.* Bacon, 33 Mich. 466.

61. Carlisle *v.* Terre Haute, etc., R. Co., 6 Ind. 316; Texas, etc., R. Co. *v.* Fitch, 2 Tex. Unrep. Cas. 257.

Illustration.— Where a private donation is made to a railroad company payable "at

Where a railroad company has received from individuals payments of money, and in consideration thereof has engaged to lay out its road in a specified place and to allow them certain advantages in connection with the railroad, the company will not be allowed to change the line of its road or do by indirection what is equivalent thereto without compensation to such individuals.[62]

4. Rights and Remedies of Parties, Assignees, or Privies. Where the promise is to an existing company, its successors or assigns, the completion of the road by its successor, to whom it has assigned all its franchises and property, including such subscription, will enable the latter to enforce the promise in its own name,[63] unless the assignor company has not accepted or acted upon the contract.[64] But in the absence of such a provision, a new and independent company cannot recover upon such a contract unless the subscriber has consented to the change.[65] Interest on the subscription may be recovered if the amount subscribed is not paid at the proper time.[66] In an action on a subscription contract any competent evidence is admissible to explain the meaning of the contract and the conditions upon which it was made;[67] except that the parol evidence is not admissible to vary

any time within two years that said line of railway may be constructed" and operated between given points provided the depot at C is permanently located not farther east than the center of C such proviso is a condition precedent to the right of the company to collect the donation. Elder *v.* Bellaire, etc., R. Co., 1 Ohio Cir. Ct. 256, 1 Ohio Cir. Dec. 140.

Compliance.—A condition that the company shall build a depot, and open its road to a point within one mile of the post-office of a certain town, is substantially complied with by the building of a side-track which it operated as such, and a depot at a point within the distance stipulated, although the main track of the road is not within the distance. Cedar Falls, etc., R. Co. *v.* Rich, 33 Iowa 113. A condition that a depot shall be located within three quarters of a mile of the corporate limits of a certain town is complied with by locating a depot within that distance from the corporate limits, without regard to buildings or improvements, measuring by a straight line, although the side-track and switches are not. Courtwright *v.* Strickler, 37 Iowa 382.

Non-compliance.— A condition of payment when the road intersects with another at a specified point, and has been permanently located to and within the limits of such place with a station at the same, is not complied with by the construction of a road through the town, and of a depot just outside of its limits. Davenport, etc., R. Co. *v.* O'Connor, 40 Iowa 477. So a condition that at a specified time the company shall have its road completed, and have "erected a regular station for passengers and freight" at a specified place, is not complied with by erecting a small building at the place designated at which there is no side-track, no facilities for receiving or shipping freight, no ticket office, or station agent, and at which trains do not stop except when signaled. Port Huron, etc., R. Co. *v.* Richards, 90 Mich. 577, 51 N. W. 680.

A station for passengers and freight within the meaning of such a provision would include the usual and necessary incidents of a station for the convenience of passengers, and for the reception of freight intended to be shipped to and from such place. Port Huron, etc., R. Co. *v.* Richards, 90 Mich. 577, 51 N. W. 680.

Where the contract expressly provides that the grounds for a depot shall be selected by the company, one of the subscribers cannot, in the absence of fraud, defend an action for contribution of his share by showing that at the time he signed the contract it was the intention to establish the depot at a place more advantageous to him. Faires *v.* Cockerill, (Tex. Civ. App. 1895) 29 S. W. 669.

Line of measurement.— Where a contract for subscription to a railroad is made on the condition that it will locate its depot within a specified distance of a certain point, as a court-house, and nothing is said as to the manner of measurement, the distance is to be measured by a straight line and not by the traveled route. Missouri Pac. R. Co. *v.* Tygard, 84 Mo. 263, 54 Am. Rep. 97. See also Courtwright *v.* Strickler, 37 Iowa 382.

62. Chapman *v.* Mad River, etc., R. Co., 6 Ohio St. 119, 1 Ohio Dec. (Reprint) 565, 10 West. L. J. 399.

63. Smith *v.* Hollett, 34 Ind. 519; Michigan Midland, etc., R. Co. *v.* Bacon, 33 Mich. 466. See Smith *v.* Davidson, 45 Ind. 396.

A statement in the assignment by the railroad company that it had abandoned the construction of the road does not prevent a recovery by the assignee. Smith *v.* Hollett, 34 Ind. 519.

64. Smith *v.* Davidson, 45 Ind. 396; McFarland *v.* Lyon, 4 Tex. Civ. App. 586, 23 S. W. 554.

65. Van Buren Div., etc., R. Co. *v.* Lamphear, 54 Mich. 575, 20 N. W. 590.

66. Stevens *v.* Corbitt, 33 Mich. 458.

67. Lawrence *v.* Smith, 57 Iowa 701, 11 N. W. 674 (holding that in an action upon a subscription note conditioned to be binding upon the completion of a certain railroad, other subscription papers and statements of the road's agent are admissible to show that

the contract.[68] Persons who subscribe in aid of a railroad company are not, as regards each other, trustees of money raised thereby to carry out the contract, so as to require a complainant in an action by one for reimbursement for money paid in excess of his share to give a full account of the money so raised and the manner of its disbursement.[69] Where several persons agree to pay certain amounts to whomsoever will execute a bond to a railroad company to induce it to build through a certain place, and a number of the subscribers having executed the bond are compelled to pay more than their proportion of the bond through the default of others, the fact that some of the obligors were not original subscribers does not render an agreement between the overpaying obligors to *pro rate* the amount paid in excess of their proportion according to the subscription of each, invalid as against the original subscribers.[70]

C. Rights and Liabilities Under Grants of Public Aid — 1. In General. Railroad aid laws and contracts, since they impose a burden on the public and deprive owners of the full control and disposition of their property, should be strictly construed in favor of the rights of property.[71] Subject to such construction, the rights and liabilities arising out of a grant of public aid depend upon the terms of the particular statute or grant.[72] Where a subscription is duly made and accepted and all the conditions performed by the railroad company, it becomes a binding contract and the railroad company is entitled to the money or bonds,[73] to the exclusion of another road to which a subsequent subscription is made, although the latter road performs its conditions first;[74] and thereafter the legislature cannot by a subsequent statute forbid the issuance of the bonds or tax.[75] But until the subscription is actually made, there is no vested right in the railroad company,[76] and until then the legislature may alter the method by which such subscription is to be made without infringing any right.[77] Under some statutes a mere vote of the public to issue bonds or levy a tax in aid of a railroad is not sufficient to entitle the company to the aid voted, but there must also be an agreement between the company and the county or municipality, fixing the conditions on which the money or bonds are to be delivered.[78] Where the money is to be

it was to be built between certain points); Freeman *v.* Muth, 7 Ohio Dec. (Reprint) 555, 3 Cinc. L. Bul. 914.

68. Low *v.* Studabaker, 110 Ind. 57, 10 N. E. 301; Blair *v.* Buttolph, 72 Iowa 31, 33 N. W. 349; Freeman *v.* Muth, 7 Ohio Dec. (Reprint) 555, 3 Cinc. L. Bul. 914.

69. Faires *v.* Cockerill, (Tex. Civ. App. 1895) 29 S. W. 669.

70. Morris *v.* Davis, (Tex. Civ. App. 1895) 31 S. W. 850.

71. Demaree *v.* Johnson, 150 Ind. 419, 49 N. E. 1062, 50 N. E. 376.

72. See Hereford R. Co. *v.* Reg., 24 Can. Sup. Ct. 1; Eldon Tp. *v.* Toronto, etc., R. Co., 24 Grant Ch. (U. C.) 396, right of township to preferential bonds of railroad company.

Where the money is to be paid to the railroad company in instalments of a given amount, the last instalment should be paid when due notwithstanding it is less than such given amount. State *v.* Ashmore, 10 Rich. (S. C.) 248.

73. Chicago, etc., R. Co. *v.* Osage County, 38 Kan. 597, 16 Pac. 828; Red Rock *v.* Henry, 106 U. S. 596, 1 S. Ct. 434, 27 L. ed. 251.

Contract.— A petition for a municipal election to issue bonds in aid of a railroad and to take stock in return therefor, the notice of the election and an affirmative vote, upon the faith of which the money is expended and the railroad built, taken together constitute a contract between the railroad company and the municipality. People *v.* Holden, 82 Ill. 93.

74. Chicago, etc., R. Co. *v.* Osage County, 38 Kan. 597, 16 Pac. 828.

75. Red Rock *v.* Henry, 106 U. S. 596, 1 S. Ct. 434, 27 L. ed. 251.

76. State *v.* Garroutte, 67 Mo. 445.

77. State *v.* Garroutte, 67 Mo. 445.

78. Buffalo, etc., R. Co. *v.* Collins' Railroad Com'rs, 5 Hun (N. Y.) 485 (holding that there is no legal obligation upon a municipality to issue its bonds for stock in a railroad company, before subscription to the stock is made); Pope *v.* Lake County, 51 Fed. 769 (holding also that in Indiana the tax must be levied and collected). But see Augusta *v.* Maysville, etc., R. Co., 97 Ky. 145, 30 S. W. 1, 16 Ky. L. Rep. 890.

Until the tax is levied and collected and a legal and valid subscription has been made, no contract relation exists between the county or township and the railroad company; and there is nothing more than a proposition on the part of the public, which can only be made binding and effective by such mutual acceptance as gives rise to a contract. Pope *v.* Lake County, 51 Fed. 769.

paid over to the railroad company "when ordered by the court," the company has no lien on money collected but not ordered to be paid over, and until so ordered the money may be recalled from the agent holding it.[79] Where the treasurer of a railroad executes instruments in the form of advance receipts for taxes voted by a town in aid of the company, providing that they shall be receivable by the company from the county treasurer in payment of the aid voted, neither the railroad issuing them, nor the indorser thereof, is liable thereon until after a demand that they be received by the county treasurer in payment of the railroad tax, and his refusal so to receive them.[80] A tax voted in aid of a railroad company, after it has been collected by the proper officers, may be assigned by the company.[81] So where the right to assign has been unconditionally granted to a railroad company, the company may assign to private individuals its right to the avails of a tax voted in aid of the railroad, and such assignment is not an abandonment of the tax, and it is no concern of the town voting it or of the taxpayers whether such assignment has been with or without consideration.[82] The term "donation" as used in a statute authorizing municipal aid in the construction of railroads means an absolute gift or grant without any condition or consideration;[83] and where such donation is made on the condition or in consideration that the company perform certain acts, the donation is void and the company cannot enforce it, although it has performed such acts on the faith of the donation.[84]

2. Acceptance and Performance of Conditions — a. In General. Where a railroad company accepts[85] a grant or subscription of public aid it accepts it with all its terms and conditions,[86] and is estopped from asserting that such terms or conditions are void or unreasonable;[87] and in order that the company may become entitled to the aid granted, and compel the collection of the tax, or the issue of bonds, as the case may be, it must have at least substantially performed on its part all the conditions precedent on which the grant or subscription was made,[88]

Under Minn. Sp. Laws (1876), c. 55, a mere vote of a town does not entitle the railroad company to the issuance of the bonds voted; but the agreement between the company and such town, contemplated by section four of such act, fixing the conditions on which the bonds are to be delivered, is essential. State *v.* Roscoe, 25 Minn. 445. *Compare* State *v.* Lime, 23 Minn. 521, construing Sp. Laws (1869), c. 46.

79. Henry County *v.* Allen, 50 Mo. 231.

80. Lisle *v.* Iowa, etc., R. Co., 54 Iowa 499, 6 N. W. 696.

81. Manning *v.* Mathews, 70 Iowa 303, 30 N. W. 749; Merrill *v.* Welsher, 50 Iowa 61.

82. Arkansas Southern R. Co. *v.* Wilson, 118 La. 395, 42 So. 976.

83. Indiana North, etc., R. Co. *v.* Attica, 56 Ind. 476, construing 1 Rev. St. (1876) p. 299.

84. Indiana North, etc., R. Co. *v.* Attica, 56 Ind. 476, holding that where a city, under such a statute, makes a donation to a railroad company on the condition that the company shall maintain its shops in the city and that it shall refund to the city the money supplied if such shops are removed, the fact that the company has built its road on the faith of such conditional donation does not entitle it to enforce the engagement against the city.

85. Macon *v.* East Tennessee, etc., R. Co., 82 Ga. 501, 9 S. E. 1127, holding that the question of acceptance is usually one of fact for the jury.

86. West Virginia, etc., R. Co. *v.* Harrison County Ct., 47 W. Va. 273, 34 S. E. 786.

87. West Virginia, etc., R. Co. *v.* Harrison County Ct., 47 W. Va. 273, 34 S. E. 786; Haldimand County *v.* Hamilton, etc., R. Co., 27 U. C. C. P. 228.

88. *Illinois.*— People *v.* Holden, 91 Ill. 446.

Louisiana.— Atkins *v.* Shreveport, etc., R. Co., 106 La. 568, 31 So. 163; Guillory *v.* Avoyelles R. Co., 104 La. 11, 28 So. 899, holding that where the taxpayers of a parish vote to grant a tax in aid of a railroad enterprise, substantial compliance on the part of the grantee with the terms and conditions of the grant suffices to entitle it to its benefits.

Maine.— Bucksport, etc., R. Co. *v.* Brewer, 67 Me. 295.

Minnesota.— Birch Cooley *v.* Minneapolis First Nat. Bank, 86 Minn. 385, 90 N. W. 789; State *v.* Roscoe, 25 Minn. 445.

West Virginia.— West Virginia, etc., R. Co. *v.* Harrison County Ct., 47 W. Va. 273, 34 S. E. 786.

England.— Grand Junction, etc., R. Co. *v.* Peterborough, 13 App. Cas. 136 [*affirming* 13 Ont. App. 420].

Canada.— *In re* Hamilton, etc., R. Co., 39 U. C. Q. B. 93; *In re* Stratford, etc., R. Co., 38 U. C. Q. B. 112, 140.

See 41 Cent Dig. tit. "Railroads," § 88. And see Counties, 11 Cyc. 528 *et seq.*; Municipal Corporations, 28 Cyc. 1559 *et seq.*

Running boats.— Where a railroad company

unless the performance of such conditions has been waived,[89] or is sufficiently excused.[90] In determining whether such conditions have been complied with, the language used in the conditions should be considered according to its ordinary and popular meaning, that is, as it would be understood by the voters or public generally.[91] If the railroad company performs all the conditions precedent, there is a valid and binding obligation on the part of the municipality or county to collect and deliver the tax or to issue the bonds in accordance with the terms of the grant,[92] and this is true irrespective of the company's financial ability,[93] and although the company has issued its own bonds in excess of the statutory limit;[94] nor is the company's right to such aid affected by its non-compliance with additional conditions in a subsequent statute,[95] or by independent conditions which are to be performed after the company is entitled to the aid.[96] But, until the conditions have been performed, the court has no power to issue bonds under a subscription, and place them in the hands of a third party to be delivered to the

stipulates to run a line of tow boats in connection with its road in consideration of aid from a parish, it fails to earn the aid when it fails to perform the conditions. Atkins *v.* Shreveport, etc., R. Co., 106 La. 568, 31 So. 166. And a stipulation to operate tow boats with convenient barges in connection with its road for the benefit of a part of the parish living on a river front is not fulfilled by a contract with a boat already in the river and making regular trips. Atkins *v.* Shreveport, etc., R. Co., *supra*.

Where by agreement a town or municipality agrees to pass a by-law granting a bonus to a railroad company in aid of the construction of its road subject to the performance of certain specified conditions and such by-law as subsequently passed does not contain all the conditions of the agreement, title to the debentures for such bonus does not depend upon the prior performance of the conditions in the agreement not included in the by-law, but only upon the performance of those in the by-laws and where the latter have been complied with, the debenture should issue (Bickford *v.* Chatham, 16 Can. Sup. Ct. 235 [*affirming* 14 Ont. App. 32]); although such debenture should be withheld until the damages for non-performance of the conditions in the agreement are paid or secured (Bickford *v.* Chatham, *supra*). Specific performance is not an appropriate remedy in such a case as the municipality could only claim damages for non-performance and this may be disposed of by way of counter-claim in an action by the company to compel the delivery of the debentures. Bickford *v.* Chatham, *supra*.

89. Memphis, etc., R. Co. *v.* Thompson, 24 Kan. 170, facts held not to constitute waiver.

90. See State *v.* Daviess County Ct., 64 Mo. 30.

91. People *v.* Clayton, 88 Ill. 45.

92. Tennessee, etc., R. Co. *v.* Moore, 36 Ala. 371; State *v.* Lake City, 25 Minn. 404; State *v.* Lime, 23 Minn. 521.

Future conditions.—A railroad company that has complied with all the conditions precedent, stated in a by-law, to the issuing and delivery of debentures granted by a municipality, is entitled to the debentures free from any declaration on their face of conditions mentioned in the by-law to be performed in the future. St. Cesaire Parish *v.* McFarlane, 14 Can. Sup. Ct. 738 [*affirming* 2 Montreal Q. B. 160].

Estoppel.—Where bonds are issued with the proper recitals showing compliance with conditions upon which the subscription was made the state or county is estopped as against *bona fide* purchasers from asserting that its authorities acted wrongly in issuing the bonds. Columbus *v.* Dennison, 69 Fed. 58, 16 C. C. A. 125. And see, generally, MUNICIPAL CORPORATIONS, 28 Cyc. 1603.

93. Whitney *v.* Chicago, etc., R. Co., 133 Iowa 508, 110 N. W. 912, holding that where a tax is voted in aid of railroad construction under a notice providing that the tax should be paid on the road being put in operation between two certain points, the tax is earned when the road is in actual operation between those points, regardless of the financial ability of the company to extend it further.

94. Whitney *v.* Chicago, etc., R. Co., 133 Iowa 508, 110 N. W. 912.

95. Tennessee, etc., R. Co. *v.* Moore, 36 Ala. 371, construing Acts Feb. 17, 1854, Feb. 24, 1860.

Under Kan. Laws (1887), c. 183, which amended Act (1876), § 1, which authorized incorporated cities to subscribe in aid of railroads, providing that the total county, township, and municipal subscriptions did not exceed four thousand dollars per mile of road constructed in the county, by reducing the amount to two thousand dollars per mile, with a proviso that the amendment should not affect accrued rights or any aid voted or election pending prior thereto, the limitation of two thousand dollars per mile did not apply to a subscription which had been voted where the railroad company was engaged in constructing the road pursuant to the terms thereof prior to the amending act. Ætna L. Ins. Co. *v.* Burrton, 75 Fed. 962.

96. Zorger *v.* Rapids Tp., 36 Iowa 175, holding that the fact that the railroad company, prior to an election for taxation in aid of the road, caused to be published in a newspaper an agreement or proposition that it would, within a certain time, expend a sum

company on compliance, in advance of such compliance,[97] and the deposit in escrow does not enlarge the company's rights, or give it any vested rights in advance of compliance with the conditions.[98] Where the condition is that the subscription is not to be paid until the company shall run its first locomotive over the projected line of road between certain points, the running of the company's trains along the road of another company for a part of the distance under a lease from the latter, liable to be terminated by either party on notice, is not a substantial compliance,[99] although it would be otherwise if the performance was under a perpetual lease,[1] or a purchase.[2] Where the railroad company fails to fully perform the conditions precedent or otherwise breaks them in a material sense, the municipality or county granting the aid has a cause of action against the company on common-law principles to recover the money or bonds delivered to it, or the value thereof.[3]

b. Construction, Maintenance, and Equipment. In accordance with the above rules, a railroad company's right to taxes or bonds voted or subscribed in its aid depends upon whether or not it has sufficiently performed conditions precedent relative to the construction, maintenance, and equipment of the road,[4] as that within a given time,[5] and between designated points or to a designated place,[6] the road be constructed or completed and in operation,[7] in the manner speci-

named in the erection of machine shops, etc., and that the company did not expend the amount stated, does not invalidate the tax, nor authorize an injunction to restrain its collection, as such condition is an independent one, to be performed after the tax becomes due or might become due.

97. West Virginia, etc., R. Co. *v.* Harrison County Ct., 47 W. Va. 273, 34 S. E. 786.

98. West Virginia, etc., R. Co. *v.* Harrison County Ct., 47 W. Va. 273, 34 S. E. 786.

99. People *v.* Clayton, 88 Ill. 45.

1. People *v.* Clayton, 88 Ill. 45.

2. People *v.* Clayton, 88 Ill. 45.

3. See Hinckley *v.* Kettle River R. Co., 70 Minn. 105, 72 N. W. 835; Luther *v.* Wood, 19 Grant Ch. (U. C.) 348.

4. *In re* Canada Cent. R. Co., 35 U. C. Q. B. 390.

Not condition precedent.— Where the terms of the subscription in aid of the construction of a railroad contain a stipulation that the money shall be paid "in installments of five per cent so long as the work shall be in actual progress" and that if the railroad company shall fail to construct the road then the amount subscribed shall be paid on the same terms and conditions to any other company which will grade and tie a railroad between the points designated, the grading and tying are not conditions precedent to the payment of the subscription. Iowa Northern Cent. R. Co. *v.* Bliobenes, 41 Iowa 267. Under W. Va. Code (1891), c. 54, § 57, the provision that if a railroad company fails to construct its road according to its charter, subscriptions thereto shall be void, does not make the completion a condition precedent to the delivery of bonds under such subscriptions. Neale *v.* Wood County Ct., 43 W. Va. 90, 27 S. E. 370.

5. See *infra*, III, C, 2, c.

6. See People *v.* Clayton, 88 Ill. 45; Lamb *v.* Anderson, 54 Iowa 190, 3 N. W. 416, 6 N. W. 268; Shell *v.* Carter Tp., (Tenn. Ch. App. 1896) 42 S. W. 78 (construing Act (1887), c. 3, §§ 2, 11); Grattan Tp. *v.* Chilton, 97 Fed. 145, 38 C. C. A. 84.

Illustrations.— Where an ordinance authorizing the issue of municipal bonds to aid in the construction of a railroad provides that the bonds shall not be issued until the road is completed to a point of junction with a railroad leading to Milwaukee and Chicago, the words "a railroad leading to Milwaukee and Chicago" should not be restricted to a road whose line reaches to those places, but construed as embracing a road connected either directly or by the way of other railroads with one whose line reaches to those points. State *v.* Hastings, 24 Minn. 78. A condition that the road should be completed from the south line of the county of H by way of G to a connection with a named railroad sufficiently shows to what point the road should be completed before the tax becomes payable. Burges *v.* Mabin, 70 Iowa 633, 27 N. W. 464. Where the articles of incorporation of a railroad declare its object to be the acquisition, maintenance, and operation of a railroad from a certain point through other points to a particular point, the construction of the road to that point is necessary to entitle the company to a tax voted in aid of the railroad by that township. Lamb *v.* Anderson, 54 Iowa 190, 3 N. W. 416, 6 N. W. 268.

7. Portland, etc., R. Co. *v.* Hartford, 58 Me. 23; Townsend *v.* Lamb, 14 Nebr. 324, 15 N. W. 727; Pontiac County *v.* Ross, 17 Can. Sup. Ct. 406.

The word "built" as used in an agreement under which a tax is voted in aid of a railroad applies to a road so far progressed as to be in a condition to be operated, although not completed. Muscatine Western R. Co. *v.* Horton, 38 Iowa 33.

Second donation.— Where, after a donation is made, considerably more than such donation is expended upon the road, but it is yet

fied,[8] and that a depot or station be constructed and maintained at a specified place.[9] The road need not be perfect in every respect; but it must be so far completed that it may be properly and regularly used for the purpose of transporting freight and passengers,[10] and must be in as reasonably fit condition, and as safe and convenient for public use, as new roads usually are in similar localities.[11] In the absence of anything in the agreement or grant to the contrary, the road need not be constructed in any other manner or be of any other character than that which is contemplated by its charter, and is the usual and ordinary manner of other railroads under like circumstances,[12] and unless the terms of the grant describe the kind of road, the conditions thereof are complied with by constructing any road which is capable of doing the business of the country through which it passes, even though it be a narrow gauge road.[13] But a construction in such an incomplete and imperfect manner that the ordinary business of the company cannot be transacted thereon is not a sufficient compliance.[14] Where the condition is that the railroad company shall, within a given time, construct its road to a designated place, a construction of the road to that place is essential to entitle the company to the aid granted, and it has been held that the construction of the road for part of the distance, and the purchase of another line of road, thereby completing the connection to such place, is not a sufficient compliance.[15] But the better rule seems to be that where the road as completed accomplishes the

incomplete, and a second donation is made to aid in the construction, the subsequent completion of the road already laid is a sufficient construction within the meaning of the second donation. Barner *v.* Bayless, 134 Ind. 600, 33 N. E. 907, 34 N. E. 502.

8. Memphis, etc., R. Co. *v.* Thompson, 24 Kan. 170.

9. Townsend *v.* Lamb, 14 Nebr. 324, 15 N. W. 727; Bickford *v.* Chatham, 16 Can. Sup. Ct. 235 [*affirming* 14 Ont. App. 32].

Compliance.—Where a note given as a bonus to a railroad company stipulates that a part of the consideration is the continuous maintaining of a depot within the town by the company, and the company maintains for some months a freight and passenger depot in the town, and subsequently passenger traffic is transferred to the depot of another company in the town and the former depot is maintained as a freight depot, there is a compliance with the stipulation. Fayetteville Wagon, etc., Co. *v.* Kenefick Constr. Co., (Ark. 1905) 88 S. W. 1031. The construction of a well built building adapted to the purpose and sufficiently large for all present needs is a sufficient compliance with a condition precedent to the collection of a tax in aid of the railway, that it will build and permanently establish and maintain a freight and passenger depot. Whitney *v.* Chicago, etc., R. Co., 133 Iowa 508, 110 N. W. 912.

Non-compliance.— Where the company covenants to erect and maintain a permanent freight and passenger station at a specified point and shortly afterward the road is leased with notice of this agreement to defendant, who discontinues such depot as a regular station, having no officer of the company to sell tickets or make arrangements for discharging or receiving freight, but merely stopping there when there are any passengers to let down or be taken up, the erection of the station is not a fulfilment of the covenant. Wallace Tp. *v.* Great Western R. Co., 3 Ont. App. 44 [*affirming* 25 Grant Ch. (U. C.) 86]. A condition to construct a freight and passenger station with all necessary accommodations, connected by switches, sidings, or otherwise with the main road, is not complied with by the erection of a station building not used or intended to be used, and for which the proper officers, such as station-master, ticket agent, etc., are not appointed. Bickford *v.* Chatham, 16 Can. Sup. Ct. 235 [*affirming* 14 Ont. App. 32]. The words "all necessary accommodation" in such a condition require that grounds and yards sufficient for freight and passenger traffic in case the station is used shall be provided. Bickford *v.* Chatham, *supra*.

10. Brocaw *v.* Gibson County, 73 Ind. 543; De Graff *v.* St. Paul, etc., R. Co., 23 Minn. 144.

A condition that the road shall be "constructed and operated" to a depot at a certain place by a given time is sufficiently complied with by the construction of the road to the given point by the time specified and the continuous operation of it thereafter even though the road is not fully completed and the depot is only a temporary one and the service thereat not first class. Chicago, etc., R. Co. *v.* Shea, 67 Iowa 728, 25 N. W. 901.

11. Manchester, etc., R. Co. *v.* Keen, 62 N. H. 81.

12. Hodgman *v.* St. Paul, etc., R. Co., 23 Minn. 153.

13. Casady *v.* Lowry, 49 Iowa 523; Meader *v.* Lowry, 45 Iowa 684.

14. Cox *v.* Forest City, etc., R. Co., 66 Iowa 289, 22 N. W. 672.

15. Iowa, etc., R. Co. *v.* Schenck, 56 Iowa 628, 10 N. W. 215 (holding this to be true, although the constructed portion extends through the township in which the tax or

main purpose for which the aid was granted, in making connection between designated points, the fact that another road is purchased or used for an inconsiderable part of the distance does not forfeit the company's right to the aid.[16] In the absence of anything in the grant to the contrary, the maintenance and operation of the road during the life of the railroad company as fixed by its charter or articles of incorporation is ordinarily by clear implication, either a condition of or the consideration for the grant of aid, and if during that time the company abandons the operation of its road the municipality granting the aid has a right of action against it on common-law principles.[17] Where it is understood or agreed that the road may be built by the railroad company's assignee or successor it is not essential that the road be completed by the original company in order that the aid granted may be earned.[18]

c. Time For Commencement and Completion of Construction. In the absence of an express provision in the statute or grant specifying the time for the performance of the conditions relative to the construction of the road, the law implies a reasonable time;[19] and where there is an amendment to the charter of the company before the issue of bonds voted requiring the road to be completed within a specified time, such time will be regarded as the time within which the conditions must be performed.[20] But where the contract or grant expressly prescribes a time within which the road or a particular part thereof shall be commenced, or constructed, or completed, such time is of the essence of the contract and the company is entitled to the aid granted only upon its commencing the work of construction,[21] or constructing and completing the road,[22] within the time pre-

aid is voted); Meeker *v.* Ashley, 56 Iowa 188, 9 N. W. 124; Lamb *v.* Anderson, 54 Iowa 190, 3 N. W. 416, 6 N. W. 268.

16. Stockton, etc., R. Co. *v.* Stockton, 51 Cal. 328; People *v.* Holden, 82 Ill. 93; Chicago, etc., R. Co. *v.* Makepeace, 44 Kan. 676, 24 Pac. 1104; State *v.* Clark, 23 Minn. 422.

Purchase of narrow gauge road.— Where a special tax has been voted by a few wards in a parish in aid of the construction of a standard gauge railroad to traverse the state and connect with roads beyond its limits, the fact that the aided company buys a narrow gauge road already in existence covering an insignificant portion of the whole distance and converts it *pro tanto* into a standard gauge road to be built will not defeat the right of such company to the tax. Bradley-Ramsay Lumber Co. *v.* Perkins, 109 La. 317, 33 So. 351.

17. Hinckley *v.* Kettle River R. Co., 70 Minn. 105, 72 N. W. 835; St. Thomas *v.* Credit Valley R. Co., 15 Ont. 673.

18. Lynch *v.* Eastern, etc., R. Co., 57 Wis. 430, 15 N. W. 743, 825.

19. Green *v.* Dyersburg, 10 Fed. Cas. No. 5,756, 2 Flipp. 477.

Where there is no limit fixed in a contract by which a town subscribes to the stock of a railroad company within which the company shall complete its road, and no notice is given by the town that the aid will not be furnished if the road is not completed within a reasonable time, the company does not lose its right under the contract by lapse of time or statute of limitations. Lynch *v.* Eastern, etc., R. Co., 57 Wis. 430, 15 N. W. 743, 825.

20. Green *v.* Dyersburg, 10 Fed. Cas. No. 5,756, 2 Flipp. 477.

21. Sellers *v.* Beaver, 97 Ind. 111; Lowell *v.* Washington County R. Co., 90 Me. 80, 37 Atl. 869; Canada Atlantic R. Co. *v.* Ottawa, 12 Ont. App. 234 [*affirming* 8 Ont. 183, 201]; *In re* London, etc., R. Co., 36 U. C. Q. B. 93.

In Indiana, under 3 St. p. 389, § 18, providing that a railroad company to which grants of public aid have been made shall commence the construction of the road within one year from the time of the levy of the tax therefor, unless additional time has been given, the time for commencement begins one year from the time when the order levying the tax is made by the board of county commissioners and not from the time when the levy is placed on the tax duplicate. State *v.* Wheadon, 39 Ind. 520.

22. *Minnesota.*— McManus *v.* Duluth, etc., R. Co., 51 Minn. 30, 52 N. W. 980 (holding it to be a non-compliance where the road is not completed until two weeks after the time specified); De Graff *v.* St. Paul, etc., R. Co., 23 Minn. 144.

New Hampshire.— Manchester, etc., R. Co. *v.* Keene, 62 N. H. 81.

West Virginia.— West Virginia, etc., R. Co. *v.* Harrison County Ct., 47 W. Va. 273, 34 S. E. 786.

United States.— Grattan Tp. *v.* Chilton, 97 Fed. 145, 38 C. C. A. 84.

Canada.— Canada Atlantic R. Co. *v.* Ottawa, 12 Ont. App. 234 [*affirming* 8 Ont. 183, 201]; Luther *v.* Wood, 19 Grant Ch. (U. C.) 348; Brock Tp. *v.* Toronto, etc., R. Co., 17 Grant Ch. (U. C.) 425; *In re* Hamilton, etc., R. Co., 39 U. C. Q. B. 93.

See 41 Cent. Dig. tit. "Railroads," § 90.

Illustrations.— Where the provisions are that one half of the bonds shall be delivered when the first twelve miles of the road shall

scribed, and bonds issued to the company thereafter become void in the hands either of itself or of its agents;[23] and a court of equity will not relieve the company from the forfeiture,[24] unless the failure to comply with the conditions within the time specified is caused by the town, county, or municipality granting the aid.[25] Under some statutes the running of the period for the performance of such conditions is stayed during such time as performance is prevented by an injunction,[26] but such a statute is not retroactive.[27] Nor is a delay excusable which results from the company's negligence in taking the steps necessary to secure the right to cross the lines and road of another ompany;[28] and it has been held that a compliance with the conditions after the time specified is not excused by rains and floods which prevent a compliance by the designated time.[29] Commencement of

be completed, the other one half when the remainder of the road shall be completed, provided that the second half of the bonds shall never be delivered unless the road shall be completed before a certain date, upon the grading and bridging of the first twelve miles of the road, the company becomes entitled to the first instalment of the bonds, although such grading and bridging is not completed until after the date specified. State *v.* Lime, 23 Minn. 521. So where the subscription is that a certain amount of bonds shall be paid when the road is completed to E, another certain amount when completed to the J county line, and another amount when the branch is completed to N county, the company is entitled to the first instalment when the road is completed to E, although at that time it is manifestly impossible that the road can be completed within the time specified either to the J or U county lines. Shell *v.* Carter Tp., (Tenn. Ch. App. 1896) 42 S. W. 78. So where a subscription is on a condition that the road shall be completed to a certain point within twenty-four months from the date of the subscription, and after an election resulting in favor of the proposition, a resolution of the city council is passed on Aug. 15, 1901, directing the mayor to subscribe for the stock, but no subscription is actually made until April 15, 1902, the subscription is not completed until the latter date. From which date the time within which the railroad company is bound to complete its line begins to run, and not from the date of the pasage of the resolution. Red River Furnace Co. *v.* Tennessee Cent. R. Co., 113 Tenn. 697, 87 S. W. 1016.

Non-compliance.—A condition that the railroad company shall, within the time limited, complete its road ready for the passage of cars thereon into and through a certain town, is not complied with by completing the road into the town and to a point within five hundred feet from the outward boundary thereof, and not continuing the road out of the town until eighteen months after the expiration of the time limited. Birch Cooley *v.* Minneapolis First Nat. Bank, 86 Minn. 385, 90 N. W. 789.

Under Ind. Rev. St. (1881) §§ 4045, 4062, aid voted by a township to a railroad is forfeited by a non-compliance with the conditions expressed in the petition that the road shall be completed and a depot erected thereon by a certain date, and thereupon the township may vote aid to another railroad. Irwin *v.* Lowe, 89 Ind. 540.

Refunding.— Where the condition is that if the company shall fail to construct the road within the following year it will refund to the town certain money with interest, the company is bound to construct the road within the following year or refund. Chicago, etc., R. Co. *v.* Marseilles, 84 Ill. 145, 643.

Evidence that the company, after the date specified, shipped all of its heavy freight over another line under its control is admissible upon the issue as to whether it had fully constructed and equipped its road for the carriage of freight by a certain date. Hodgman *v.* St. Paul, etc., R. Co., 23 Minn. 153.

Mistake in record.— Where a town voted aid to a railroad provided that it build a road before a certain date, but the clerk failed to record such provision as to time, and the road was completed by a later date, a subsequent amendment of the record by inserting the condition as to time within which the road must be completed will not be allowed to defeat the railroad's claim. Sawyer *v.* Manchester, etc., R. Co., 62 N. H. 135, 13 Am. St. Rep. 541.

A reasonable limit of time for the completion of a railroad in a subscription is valid and is of the essence of the subscription and compliance with it is essential to entitle the company to the subscription. West Virginia, etc., R. Co. *v.* Harrison County Ct., 47 W. Va. 273, 34 S. E. 786.

A county court making a subscription to the construction of a railroad may insert a limit of time for its completion, or any terms and conditions reasonable and prudent to protect the public, not contravening anything in the vote of the people or in the statute. West Virginia, etc., R. Co. *v.* Harrison County Ct., 47 W. Va. 273, 34 S. E. 786.

23. Farnham *v.* Benedict, 107 N. Y. 159, 13 N. E. 784 [*reversing* 39 Hun 22].

24. West Virginia, etc., R. Co. *v.* Harrison County Ct., 47 W. Va. 273, 34 S. E. 786.

25. People *v.* Holden, 82 Ill. 93.

26. McManus *v.* Duluth, etc., R. Co., 51 Minn. 30, 52 N. W. 980.

27. McManus *v.* Duluth, etc., R. Co., 51 Minn. 30, 52 N. W. 980.

28. McManus *v.* Duluth, etc., R. Co., 51 Minn. 30, 52 N. W. 980.

29. Memphis, etc., R. Co. *v.* Thompson, 24 Kan. 170.

work upon the railroad within the meaning of such conditions relates to the time of the beginning of the work of construction,[30] and not to the acquiring of the right of way,[31] or letting contracts for the construction of the road.[32] Under some statutes the failure of a railroad company to commence work or complete the road within the specified time does not operate as a forfeiture of the aid voted unless there is a declaration of forfeiture by the proper board or officers and in the manner prescribed.[33]

d. Location of Road, Termini, Offices, and Stations. The above rules also apply to conditions relative to the location of the road,[34] its offices,[35] termini and stations,[36] and repair shops and roundhouses,[37] as that they shall be located within a certain distance of a designated point.[38] In accordance with such rules such conditions precedent must be complied with unless performance has been waived,[39] or unless the change in location is authorized by law,[40] or was contem-

30. State *v.* Wheadon, 39 Ind. 520.

31. State *v.* Wheadon, 39 Ind. 520.

32. State *v.* Wheadon, 39 Ind. 520.

33. Nixon *v.* Camphell, 106 Ind. 47, 4 N. E. 296, 7 N. E. 258; Marion County *v.* Center Tp., 105 Ind. 422, 2 N. E. 368, 7 N. E. 189 (construing Act (1873), p. 84, which repealed Act (1869), Spec. Sess. p. 22, and *criticizing* Indianapolis, etc., R. Co. *v.* Tyston County, 70 Ind. 385); Sellers *v.* Beaver, 97 Ind. 111. *Compare* State *v.* Wheadon, 39 Ind. 520, under the act of 1869. And see COUNTIES, 11 Cyc. 529 text and note 29.

34. See Winona *v.* Thompson, 24 Minn. 199; McRoberts *v.* Southern Minn. R. Co., 18 Minn. 108 (construing Spec. Laws (1864), c. 1); Oswego County Sav. Bank *v.* Genoa, 66 N. Y. App. Div. 330, 72 N. Y. Suppl. 786 [*affirming* 28 Misc. 71, 59 N. Y. Suppl. 829, and *affirmed* in 172 N. Y. 635, 65 N. E. 1120] (construing Laws (1871), c. 298); Platteville *v.* Galena, etc., R. Co., 43 Wis. 493; Pompton Tp. *v.* Cooper Union, 101 U. S. 196, 25 L. ed. 803; *In re* Stratford, etc., R. Co., 38 U. C. Q. B. 112, 140.

Non-compliance.—A condition that the road shall be constructed into and through a certain township is not complied with where no part of the road is built in such township. Midland Tp. *v.* Gage County, 37 Nebr. 582, 56 N. W. 317. Under Milliken & V. Code Tenn. § 1282, which provides that before an application can be made to a municipality to subscribe for railroad stock, the proposed road must have been surveyed and substantially located by designating the termini and approximating the general direction thereof and an estimate of the grading, embankment, and masonry made by an engineer under oath, filed with the application, a subscription voted by the municipality cannot be enforced, where the road is not constructed pursuant to the profile and estimates submitted with the application, although it is constructed on another route submitted with the same application, but without the profile and estimates. State *v.* Morristown, 93 Tenn. 239, 24 S. W. 13. A condition that the road be located satisfactorily to the selectmen of a certain town is not shown to have been sufficiently complied with by proof that the road was located wisely, prudently, and judiciously for the interest of the town without showing that the location was satisfactory to the selectmen. Buckport, etc., R. Co. *v.* Brewer, 67 Me. 295.

Condition subsequent.—A condition that the road shall be built through a town on the line as run by the engineer, with a suitable depot for the convenience of the public, is a condition subsequent and does not defeat an action for the amount subscribed, although it is not performed when the action is commenced. Belfast, etc., R. Co. *v.* Brooks, 60 Me. 568.

35. State *v.* Minneapolis, 32 Minn. 501, 21 N. W. 722 (non-compliance); Whitby *v.* Grand Trunk R. Co., 1 Ont. L. Rep. 480 [*reversing* 32 Ont. 99].

36. McGregor, etc., R. Co. *v.* Foley, 38 Iowa 588, holding that where a contract between a township and a railroad company makes certain money not payable until said company shall have erected a depot within one mile of the village of N in said N township, the words "N township" are merely descriptive, and it is a sufficient compliance if the depot is erected within one mile of the village.

37. Bradley-Ramsay Lumber Co. *v.* Perkins, 109 La. 317, 33 So. 351, holding that an agreement to the effect that the company will construct and maintain at a particular place its repair shop and roundhouse does not mean that it shall construct and maintain but one repair shop and one roundhouse on its line, and in such case the character of the repair shop and roundhouse called for by the contract is to be determined by the requirements of the road.

38. Whitney *v.* Chicago, etc., R. Co., 133 Iowa 508, 110 N. W. 912; State *v.* Daviess County Ct., 64 Mo. 30.

That the non-compliance was at the request of the inhabitants of a town is no excuse for non-compliance with a condition that the road be constructed within a certain distance of such town. State *v.* Daviess County Ct., 64 Mo. 30.

39. Bucksport, etc., R. Co. *v.* Brewer, 67 Me. 295 (holding that the silence of the inhabitants of a town cannot be construed as a waiver of the condition that the road shall be located satisfactorily to the selectmen); Stewart *v.* Little Miami R. Co., 14 Ohio 353.

40. Lowell *v.* Washington County R. Co.,

plated by the municipality or county when it made its subscription.[41] Where the road is completed and accomplishes the main purposes of the grant, in making connection between designated points, the fact that an inconsiderable change is made by the company in the route originally proposed, the original route being generally followed, does not forfeit the company's right to the aid,[42] such as alterations in the line of the road which do not change the terminal points, nor materially affect the general route;[43] and the fact that there is some deviation from the original route as set forth in the company's articles of incorporation does not effect a forfeiture where it does not appear that the location of the road upon such route is a condition upon which the aid is to be given.[44] Where it is apparent from the statutes authorizing public aid that the road should be constructed through a certain township or county as it was when the vote of the aid was taken, the right to such aid is forfeited by constructing the road through other territory,[45] although, subsequently to the vote, the township or county is enlarged by the annexation of the territory through which the road is built.[46] The survey of a line of a railroad before voting a tax to aid in its construction does not constitute a representation respecting the location of the line of the road, which is binding upon the company or upon which a taxpayer is authorized to rely;[47] and where at the time the proposition to grant aid is submitted to the voters there has been no location of the road, the fact that the road as subsequently located does not follow a route which may have been contemplated by the public does not affect the company's right to such aid.[48] But where at the time of submitting such proposition the route of such road was located, it will be presumed, in the absence of proof to the contrary, that such location was a part of the proposition;[49] and if after the vote is taken the location is materially changed to a route entirely different from the original one, the right to such aid will be presumed to have been abandoned.[50]

e. Amount or Value of Work Done. A condition that the aid granted shall not be delivered until an amount of work shall have been done on the railroad equal to the amount of the bonds[51] embraces not earth work alone, but all that

90 Me. 80, 37 Atl. 869, holding that an authorized change in the location of a railroad approved by the railroad commissioners does not release a county from its liability under its original subscription, and that a second subscription is unnecessary.

Where the road is actually built in accordance with the conditions of the subscription, the validity of bonds donated to the company under such subscription is not affected by the fact that by a subsequent act a change of route of the road is authorized which would leave the city off the line of the road. Columbus *v.* Dennison, 69 Fed. 58, 16 C. C. A. 125.

41. Lynch *v.* Eastern, etc., R. Co., 57 Wis. 430, 15 N. W. 743, 825.

42. Stockton, etc., R. Co. *v.* Stockton, 51 Cal. 328.

43. Marion County *v.* Center Tp., 105 Ind. 422, 2 N. E. 368, 7 N. E. 189, holding that where a railroad is constructed through the same counties, between the same terminal points, and upon the same general line as projected, it is not a material departure so as to work a forfeiture of township aid voted, although several towns on the line projected are left from five to twelve miles off the new line.

44. Cantillon *v.* Dubuque, etc., R. Co., 78 Iowa 48, 42 N. W. 613, 5 L. R. A. 776; Lowell *v.* Washington County R. Co., 90 Me. 80, 37 Atl. 869.

45. Alvis *v.* Whitney, 43 Ind. 83.

46. Alvis *v.* Whitney, 43 Ind. 83.

47. Merrill *v.* Welsher, 50 Iowa 61.

48. See Ravenswood, etc., R. Co. *v.* Ravenswood, 41 W. Va. 752, 41 S. E. 597, 56 Am. St. Rep. 906.

49. Ravenswood, etc., R. Co. *v.* Ravens wood, 41 W. Va. 752, 41 S. E. 597, 56 Am. St. Rep. 906.

50. Ravenswood, etc., R. Co. *v.* Ravenswood, 41 W. Va. 752, 41 S. E. 597, 56 Am. St. Rep. 906, holding this to be true, even though the authorities of the road should by leave obtain the privilege of running trains over the track of another road in full operation and extending through the municipality offering the aid on a different route and in a different direction.

51. People *v.* Waynesville, 88 Ill. 469, holding that building a railway through an incorporated town at a cost of forty-one thousand dollars is not a substantial compliance with a municipal subscription of fifty thousand dollars payable on a condition imposed in the railroad charter, that work shall be done on the road in the town or on such part of the line as the authorities of the town shall designate "equal in value to the amount" of the bonds.

enters into the construction of the road-bed complete for the transportation of cars.[52] But although the railroad company has not expended enough in a city or township to entitle it to the whole tax voted in aid of the road, it may be entitled to collect the part earned.[53]

f. Expenditure of Aid. Where the terms of the grant so prescribe, the money or other aid granted to a railroad company must be expended by the company in the manner prescribed,[54] and must be applied on that part of the road which the grant prescribes.[55] But unless the statute or grant so requires,[56] it is not necessary that it should be expended within the limits of the particular county or municipality granting it.[57]

g. Determination of Question of Performance. Under some statutes a certificate of the proper municipal or county board or officers that the railroad company has complied with the terms and conditions of the grant is essential before the money or bonds voted will be delivered to the railroad company,[58] and in the absence of fraud the decision of such board or officers is final.[59]

3. Agreements in Consideration of Grant of Aid. Agreements or contracts entered into between a county or municipality and a railroad company in support of a grant of public aid are regulated by the rules governing contracts generally,[60]

52. Illinois Midland R. Co. *v.* Barnett, 85 Ill. 313.

53. Casady *v.* Lowry, 49 Iowa 523.

54. Biddlecom *v.* Newton, 13 Hun (N. Y.) 582, payment of coupons.

Where the condition is that the money shall be expended "when found necessary," on work of the road within the county, in procuring the right of way, in grading and in necessary masonry for the road-bed, the railroad company is to determine what is necessary for the purposes named, and is at liberty to use the remainder for other purposes, acting in such matters as trustee, and being bound to exercise a reasonable judgment. Marion County *v.* Louisville, etc., R. Co., 78 S. W. 437, 25 Ky. L. Rep. 1600.

55. People *v.* Morgan, 65 Barb. (N. Y.) 473, 1 Thomps. & C. 101 [*reversed* on other grounds in 55 N. Y. 587]; Port Dover, etc., R. Co. *v.* Grey, 36 U. C. Q. B. 425.

56. Lamb *v.* Anderson, 54 Iowa 190, 3 N. W. 416, 6 N. W. 268; Merrill *v.* Welsher, 50 Iowa 61; Atchison, etc., R. Co. *v.* Phillips County, 25 Kan. 261; People *v.* Morgan, 65 Barb. (N. Y.) 473, 1 Thomps. & C. 101 [*reversed* on other grounds in 55 N. Y. 587].

57. Brocaw *v.* Gibson County, 73 Ind. 543.

58. Casady *v.* Lowry, 49 Iowa 523; Rome Bank *v.* Rome, 19 N. Y. 20, 75 Am. Dec. 272; Grand Junction, etc., R. Co. *v.* Peterborough, 15 App. Cas. 136 [*affirming* 13 Ont. App. 420].

Sufficiency.— A statutory provision that the township trustees shall, in order that a railroad company may obtain aid voted by the county, certify that the company has in all respects complied with the statutes is sufficiently complied with by a certificate that the company "has so complied with the act as to entitle it to draw" a certain sum. Casady *v.* Lowry, 49 Iowa 523.

Validity.—A certificate of township trustees that a railroad has been constructed as contemplated in the notice of a township election at which a vote was had in aid of the construction of the road is not invalidated by the mere fact that it was signed at a place outside of the township. Sioux City, etc., R. Co. *v.* Herron, 46 Iowa 701; Meader *v.* Lowry, 45 Iowa 684. That the certificate of compliance by the company with the conditions of the tax was not executed in accordance with any order of the trustees, made at a meeting thereof, has been held not to invalidate the tax where the certificate has been duly signed. Merrill *v.* Welsher, 50 Iowa 61.

59. Demaree *v.* Bridges, 30 Ind. App. 131, 65 N. E. 601; Lowell *v.* Washington County R. Co., 90 Me. 80, 37 Atl. 869, holding that under Spec. Act (1895), c. 91, authorizing a county to subscribe for stock in a railroad company and authorizing the county commissioners to pass upon the sufficiency of a guaranty required to be given by contractors for the faithful performance of their contract to build the road, the commissioners act judicially in approving the bond and their decision is final; the court having no authority in the absence of fraud to revise their judgment.

60. See Fayetteville Wagon, etc., Co. *v.* Kenefick Constr. Co., (Ark. 1905) 88 S. W. 1031; and, generally, Contracts, 9 Cyc. 213.

Consideration.— Under Wis. Rev. St. (1878) §§ 943–945, which provide that a proposition for railroad aid bonds shall be obligatory on both parties when accepted by the municipality, and that the bonds shall be deposited in escrow and shall not be delivered until the road is completed and in operation, the issuing of shares of its stock by a railroad company and depositing the same in escrow, and its agreement to construct a railroad in sections indicated in its proposal, is a good consideration for issuing and agreeing to pay the bonds so deposited. Crogster *v.* Bayfield County, 99 Wis. 1, 74 N. W. 635, 77 N. W. 167.

Severable contract.—Where a railroad company proposes to a county to construct a railroad in six distinct sections, and upon the completion of each section the county is then, or when the next succeeding section is

except in so far as they are regulated by special statutory provisions.[61] Where by agreement a county is to issue bonds in payment for stock in a railroad company, the county to receive for each bond as issued a certificate for the same amount of stock in the railroad company, the delivery of stock certificates is not a condition precedent to the issue or delivery of the bonds;[62] all that is necessary being a readiness and willingness to issue the certificates when the bonds are delivered.[63]

4. Right to Stock on Payment of Subscription.[64] There is a clear distinction between public appropriations in aid of a railroad company by way of donations and by way of taking stock in the company; and where such appropriation is made by way of taking stock, the railroad company has no right to demand the money or other aid as a donation,[65] but must exchange therefor stock of the company, in the manner and upon the terms prescribed by the grant or statute authorizing it,[66] and thereupon the county, municipality, or taxpayer becomes

completed, to deliver its bonds in return for an equal amount of stock, the contract is severable and not entire. Crogster *v.* Bayfield County, 99 Wis. 1, 74 N. W. 635, 77 N. W. 167.

Construction of several instruments.—Where a city issues bonds for the benefit of a railroad company and the company issues to the city an equal amount of its stock which it guarantees shall yield annual dividends of a certain per cent to be secured by rent under a lease of the property to another company, and the lessee guarantees to the lessor the payment of dividends, the contracts and lease should be construed as constituting only one contract. Marklove *v.* Utica, etc., R. Co., 48 Misc. (N. Y.) 258, 96 N. Y. Suppl. 795.

Guaranty of dividends.— Where a city issues bonds for the benefit of a railroad company, which issues stock to the city to the amount of the bonds, and contracts that the stock shall pay a certain annual dividend, the contract being secured by rentals under a lease to another railroad, a guaranty by the latter company of the payment of the dividends at a rate fixed is within the power of such company and valid, and where it has been acted upon for a considerable length of time, it can be enforced by the city, although it is not a party to the contract. Marklove *v.* Utica, etc., R. Co., 48 Misc. (N. Y.) 258, 96 N. Y. Suppl. 795. And upon a sale of stock by the city its transferee is entitled to the benefit of the guaranty contract. Marklove *v.* Utica, etc., R. Co., *supra*.

Avoidance.— Where the proposition submitted to a county contains a condition that, if the county becomes a stock-holder in the company, the township subscription is to be null and void, the latter is not avoided by the action of the company to enforce a pretended subscription of the county, which is invalid for want of power in the county to make. Atchison, etc., R. Co. *v.* Jefferson County, 21 Kan. 309.

61. See Crogster *v.* Bayfield County, 99 Wis. 1, 74 N. W. 635, 77 N. W. 167.

Under Wis. Rev. St. (1878) §§ 943–948, relating to the issue of municipal bonds to pay for a subscription to a railroad, and providing that there shall be "a definite proposition in writing" specifying when the bonds shall be delivered with reference to the time of the complete construction of such railroad, and within what time such road shall be constructed so as to be entitled to such bonds, and that no such bonds shall be delivered until the road shall have been completed and in operation by the passage of cars from one terminus to such points as the company shall have agreed to construct the same, a proposal to construct a railroad in six distinct sections, for which, upon the completion of each section or the next succeeding one, the county is to deliver its bonds in return for stock, is within the contemplation of such provisions. Crogster *v.* Bayfield County, 99 Wis. 1, 74 N. W. 635, 77 N. W. 167.

62. State *v.* Wapello County Judge, 9 Iowa 288.

63. State *v.* Wapello County Judge, 9 Iowa 288.

64. **Rights and liabilities of public owning railroad stock** see *supra*, II, G.

65. Hamilton County *v.* State, 115 Ind. 64, 4 N. E. 589, 17 N. E. 855.

66. Pittsburg, etc., R. Co. *v.* Allegheny County, 79 Pa. St. 210.

Under Ky. Acts (1851–1852), c. 429, § 15, which provides that a certain railroad shall, on the date of the first dividend, and thereafter on presentation and surrender at the company's office of tax receipts for taxes paid to defray interest on bonds given by a county in payment of corporate stock, issue to the holders of tax receipts stock for the same, and under Acts (1855–1856), c. 20, § 4, which declares that the holders of stock issued to such taxpayers shall be entitled to all the rights and privileges of stock-holders, except that such stock shall not bear interest, a taxpayer paying taxes to defray interest on county bonds issued in payment of corporate stock is entitled to an amount of stock equal to the tax receipt, together with all cash and stock dividends declared on such stock. Louisville, etc., R. Co. *v.* Hart County, 116 Ky. 186, 75 S. W. 288, 77 S. W. 361, 25 Ky. L. Rep. 395, 1152.

Time of delivery of bonds.— Evidence that counties as subscribers to stock in a railroad corporation frequently delivered their bonds in payment of stock subscriptions after the

a stock-holder of the company, entitled to the rights and privileges, and subject to the liabilities of such a stock-holder.[67] A provision in a railroad charter that a certain per cent of its stock shall be paid in cash does not apply to aid extended by a county to the construction of the railroad by an exchange of the bonds of the county for stock.[68]

5. Effect of Sale, Lease, or Consolidation of Road — a. In General. The general effect of sales, leases, or consolidations of railroads or railroad property is treated elsewhere in this article.[69] But where there has been a grant of public aid, the effect of such transfers upon the rights and liabilities of the parties in respect to such aid depend upon the terms of the particular statute or grant,[70] in connection with the instrument or proceedings under which the transfer is made.[71] Where the grant provides that the conditions precedent shall be com-

time the bonds bore date tends to overcome the presumption that bonds issued by a particular county in payment of stock subscribed by it were delivered to the corporation the day they were dated. Louisville, etc., R. Co. *v.* Hart County, 116 Ky. 186, 75 S. W. 288, 77 S. W. 361, 25 Ky. L. Rep. 395, 1152.

67. Pittsburg, etc., R. Co. *v.* Allegheny County, 79 Pa. St. 210.

Rights and liabilities: Of county as stock-holder see Counties, 11 Cyc. 530 *et seq.* Of municipal corporation as stock-holder see Municipal Corporations, 28 Cyc. 1560.

68. Austin *v.* Gulf, etc., R. Co., 45 Tex. 234.

69. **Rights and liabilities:** Of purchasers on sale of railroad see *infra*, VII, B, 4. Of lessor and lessee of railroad see *infra*, VII, C, 6.

Operation and effect of consolidation of railroad see *infra*, VII, E, 6.

70. See Washington, etc., R. Co. *v.* Lewis, 83 Va. 246, 2 S. E. 746; Toronto *v.* Ontario, etc., R. Co., 22 Ont. 344.

Transfer of railroad stock by town.— Where the railroad commissioners of a town that has issued railroad aid bonds and received stock of the company agree to transfer the stock to a second company to induce it to run and operate the first road, and subsequently the second company contracts for the lease of the first road, the contract reciting that the stock is to be transferred to the second company, to be held by it so long as it shall continue to perform the conditions of the lease, and that when it ceases so to do the stock shall be retransferred, the title passes subject to the provisions of the lease contract, although the commissioners transfer the stock absolutely (Mt. Morris *v.* Thomas, 158 N. Y. 450, 53 N. E. 214 [*affirming* 8 N. Y. App Div. 495, 40 N. Y. Suppl. 709]); and where there was no fraud and the transfer has been acquiesced in for a number of years, even though the transfer of the town's stock was unauthorized, a court of equity will be justified in refusing to grant to the town the relief of compelling the company to retransfer the stock or to account for the dividends received thereon (Mt. Morris *v.* Thomas, *supra*).

Under Tenn. Act, Dec. 21, 1870, which provides for the enforcement of the lien of the state on certain railroads, to which the credit of the state had been loaned in bonds, a purchaser of the state's interest in the railroad under a sale directed by the court should not be compelled to accept in payment of freight and passage tax certificates under Act (1851), c. 117, which provided that the taxpayers of the county subscribing to aid in the construction of the railroad should receive certificates which might be used in payment of freight or passage on the road. State *v.* Nashville, etc., R. Co., 7 Lea 15.

Statutory mortgage.— The Pacific railroad act of 1862 (12 U. S. St. at L. 489, §§ 5, 9), provided for a loan of government bonds to the Kansas Pacific Railroad Company and imposed on the road a statutory mortgage to secure the loan, and the act of March 3, 1869 (15 U. S. St. at L. 324, § 1), authorized said company to transfer to the Denver Pacific Railroad Company its right of way between Denver and Cheyenne, such portion of the line not having been completed, and "all the rights and privileges, subject to all the obligations, pertaining to said part of its line." It was held that the Denver road was not subject to the mortgage. Denver Pac. R. Co. *v.* U. S., 12 Ct. Cl. 237. And after the Kansas Pacific Railroad Company became consolidated with the Union Pacific Railroad, the act of May 7, 1878 (20 U. S. St. at L. 58 [U. S. Comp. St. (1901) p. 3569]), enacted two years before the consolidation, and providing for the retention by the United States of part of the earnings of certain roads, had no application to earnings of that part of the Union Pacific formerly belonging to the Kansas Pacific as such statute relates only to the Union and Central Pacific railroads. Union Pac. R. Co. *v.* U. S., 16 Ct. Cl. 353.

71. Morgan County *v.* Thomas, 76 Ill. 120, holding that where a trust deed executed by a railroad company, covering its road, franchises, and property, present and prospective, to secure the payment of its bonds, does not mention corporate subscriptions made to its capital stock, the purchasers thereunder acquire no claim to county bonds issued pursuant to a county subscription to the capital stock of the company.

Under Ind. Act (1869), Spec. Sess. p. 92, § 14, authorizing townships to aid a railroad company by taking stock therein, where the property of such company is sold on foreclosure and bought in by a new company, such new company cannot by mandamus compel the levy of a tax for the purpose of pay-

plied with by the grantee company, and it transfers to another company without doing so, the latter company is not entitled to the aid granted, although it complies with such conditions.[72] But where a railroad company to which a tax has been voted has, upon the faith thereof, constructed its road and put it in operation, it thereby becomes entitled to the tax, and this right is not forfeited by a subsequent alienation of the road to another company;[73] nor is it forfeited by a perpetual lease of the road made in good faith to another company;[74] and, after the collection and payment into the county treasury of the taxes voted, the county cannot set up the defense that the railroad company had sold and disposed of its property and franchises before the taxes became due,[75] although such defense might have been a good one for the taxpayers in resisting the payment of the tax;[76] and where such tax is expended in paying the ordinary county indebtedness, and loses its identity as a railroad aid fund, the county is liable for the amount to an assignee of the railroad company.[77] So where at the time a corporate subscription to a railroad company is voted, the law authorizes such company to purchase other roads connecting with it, the subsequent exercise of this power will not defeat the subscription so voted.[78] Where the aid has been earned by the original company, subsequent purchasers at a foreclosure sale or persons claiming under them are not bound by conditions or stipulations in the grant which do not constitute a charge on the property,[79] although it is otherwise where they constitute a charge upon the road or its earnings.[80] Where it is the object and purpose of a railroad company to build a road from a certain point to a certain other point and it causes a portion of its road to be built, and transfers the right to operate the part completed to another company, still retaining all its rights and franchises to the other portion of the road, there is not such a fundamental and radical change in the character of the original purpose and object of the company as to release a town from its subscription to the stock of the

ing them the amount voted to be paid for stock in the original company. Hamilton County *v.* State, 115 Ind. 64, 4 N. E. 589, 17 N. E. 855. And Rev. St. (1881) § 3945, providing that on the sale of a railroad under a mortgage the purchasers may form a corporation to operate the railroad, etc., and section 3947, providing that such corporation shall possess all the rights in respect to said railroad which were possessed by the corporation formerly owning it, and may assume any liabilities of the former corporation and make such adjustment and settlement with any stock-holder or creditor of the former corporation as may be deemed expedient, provided that all subscribers to the original stock of the company shall, by the acceptance of this act by the purchasers of any such railroad, be released from all their unpaid subscriptions, etc., although enacted before any law was in existence authorizing townships to vote aid to railroad companies, such statutes apply to a town subscribing to the stock of a railroad, and release such township from liability on its unpaid subscription. Hamilton County *v.* State, *supra*.

72. Midland Tp. *v.* Gage County Bd., 37 Nebr. 582, 56 N. W. 317.

73. Parsons *v.* Childs, 36 Iowa 108.

74. Chicago, etc., R. Co. *v.* Shea, 67 Iowa 728, 25 N. W. 901.

75. Merrill *v.* Marshall County, 74 Iowa 24, 36 N. W. 778.

76. Merrill *v.* Marshall County, 74 Iowa 24, 36 N. W. 778.

77. Merrill *v.* Marshall County, 74 Iowa 24, 36 N. W. 778.

78. Illinois Midland R. Co. *v.* Barnett, 85 Ill. 313.

79. People *v.* Louisville, etc., R. Co., 120 Ill. 48, 10 N. E. 657 (holding that the lessees of the purchaser of a consolidated railroad at a foreclosure sale are not bound by the stipulations in a contract between the county and the companies, binding them to stop all trains at the depot at the county-seat, although the consideration of the contract was the gift by the county to the companies of large sums of money, and the vote of the money by the people of the county was conditioned upon such accommodations); Elizabethtown *v.* Chesapeake, etc., R. Co., 94 Ky. 377, 22 S. W. 609, 15 Ky. L. Rep. 313; Tompkins *v.* Little Rock, etc., R. Co., 125 U. S. 109, 8 S. Ct. 762, 31 L. ed. 615 [*affirming* 18 Fed. 344, 5 McCrary 597].

80. See Tompkins *v.* Little Rock, etc., R. Co., 125 U. S. 109, 8 S. Ct. 762, 31 L. ed. 615 [*affirming* 18 Fed. 344, 5 McCrary 597].

Statutory lien.— Where by statute a county is authorized to issue its bonds in aid of a railroad, and by the same act a lien is created in favor of the county on the earnings of the road to the extent necessary to pay the interest on such bonds, on foreclosure and sale of the road on a subsequent mortgage the lien is enforceable not only against the fund in the hands of the receiver making the sale, but also against the purchaser under the decree, and whomsoever

company, although the town does not assent to such change,[81] and this is especially true where the town, at the time of the subscription, contemplated that a change would be made in the objects and purposes of the company.[82] Under statutes which give taxpayers an interest in the railroad property upon the payment of the tax voted in its aid, as by giving them a right to stock in the company, an absolute sale or its equivalent of the road before completion and after the taxes have been voted, works a forfeiture of the tax,[83] except where the transfer provides that stock of the new company, which is of equal or greater value than the stock of the old, shall be issued to taxpayers in return for the aid voted.[84] So where a tax is voted on condition that the road be built by a certain day, a sale of the road before its completion by the corporation in whose favor the tax was voted, with the reservation that the vendor shall complete the road-bed and collect the tax, will not defeat the right to the tax after the road is completed, although such sale amounts to a voluntary dissolution of the company.[85] Where, prior to the levy of a tax in aid of a railroad, the statute authorizing it is repealed, and the company in whose favor the tax was voted has not, prior to such repeal, expended any money in reliance upon the tax and has never constructed the road but has transferred it by a perpetual lease to another company which does construct it, there is no assignment or transfer of the tax to such other company and if it does not appear that the latter company constructed the road relying upon the tax, it is not entitled to have such tax collected.[86]

b. Consolidation or Merger. As a general rule the right granted to a railroad company by its charter to receive public subscriptions to its capital stock, payable in bonds, is a right and privilege that upon its consolidation with another company passes to the consolidated company;[87] and where a railroad company accepts a public subscription or donation upon certain conditions and afterward consolidates with other railway companies under articles requiring the new company to perform such conditions, such original company and each of the new companies which by means of the consolidation succeed to the ownership of the original road will thereby become bound to perform all the conditions so imposed.[88] Thus where at the time bonds or other aid is voted in favor of a railroad company, there is a general law authorizing the railroad company to consolidate or merge with other lines, such law must be considered as a silent factor in such contract of subscription, and a subsequent consolidation or merger of such company with another company will not release the municipality, county, or township, but will transfer its obligation to the new company,[89] except where there is an express

may hold the road or have the custody of its earnings. Ketcham *v.* St. Louis, etc., R. Co., 101 U. S. 306, 25 L. ed. 999 [*affirming* 14 Fed. Cas. No. 7,740, 4 Dill. 87].

81. Lynch *v.* Eastern, etc., R. Co., 57 Wis. 430, 15 N. W. 743, 825.

82. Lynch *v.* Eastern, etc., R. Co., 57 Wis. 430, 15 N. W. 743, 825.

83. State *v.* Iowa Cent. R. Co., 71 Iowa 410, 32 N. W. 409, 60 Am. Rep. 806; Blunt *v.* Carpenter, 68 Iowa 265, 26 N. W. 438; Manning *v.* Mathews, 66 Iowa 675, 24 N. W. 271.

84. Cantillon *v.* Dubuque, etc., R. Co., 78 Iowa 48, 42 N. W. 613, 5 L. R. A. 776, (1887) 35 N. W. 620.

85. Muscatine Western R. Co. *v.* Horton, 38 Iowa 33.

86. Barthel *v.* Meader, 72 Iowa 125, 33 N. W. 446.

87. Lewis *v.* Clarendon, 15 Fed. Cas. No. 8,320, 5 Dill. 229, 6 Reporter 609.

88. People *v.* Louisville, etc., R. Co., 120 Ill. 48, 10 N. E. 657.

89. *Illinois.*— Edwards *v.* People, 88 Ill. 340; Niantic Sav. Bank *v.* Douglas, 5 Ill. App. 579 [*affirmed* in 97 Ill. 228].

Indiana.— Scott *v.* Hansheer, 94 Ind. 1.

Kansas.— Atchison, etc., R. Co. *v.* Phillips County, 25 Kan. 261.

Texas.— Morrill *v.* Smith County, 89 Tex. 529, 36 S. W. 56.

United States.— Livingston County *v.* Portsmouth First Nat. Bank, 128 U. S. 102, 9 S. Ct. 18, 32 L. ed. 359; Chickaming Tp. *v.* Carpenter, 106 U. S. 663, 1 S. Ct. 620, 27 L. ed. 307; New Buffalo Tp. *v.* Cambria Iron Co., 105 U. S. 73, 26 L. ed. 1024; Menasha *v.* Hazard, 102 U. S. 81, 26 L. ed. 83; Wilson *v.* Salamanca Tp., 99 U. S. 499, 25 L. ed. 330; Henry County *v.* Nicolay, 95 U. S. 619, 24 L. ed. 394; East Lincoln *v.* Davenport, 94 U. S. 801, 24 L. ed. 322; Scotland County *v.* Thomas, 94 U. S. 682, 24 L. ed. 219; Pope *v.* Lake County, 51 Fed. 769.

See 41 Cent. Dig. tit. "Railroads," § 98.

Compare New Jersey Midland R. Co. *v.* Strait, 35 N. J. L. 322, holding that where,

provision to the contrary.[90] But where the aid granted is in return for stock of the company, a new company cannot assume any claim to the fund when it has not tendered its stock therefor, and has no stock which it may legally tender.[91] So where at the time of the consolidation there has been no subscription made to the old company or an acceptance by it, there is no vested right to the aid which will pass to the new company.[92] Where a city is authorized to issue bonds in aid of a named railroad company which by an act of the legislature becomes merged in a new company which is substantially the same as the old one, the city may vote to issue the bonds for the benefit of the new company and may deliver them to it.[93] Where county bonds issued in aid of a railroad recite an order of the county court directing their issuance to one railroad company while the bonds are made payable to another railroad company with which the former company has been consolidated, the bonds are invalid on their face.[94] Where a statute authorizes a town to subscribe a stated amount to each of two proposed railroads, their consolidation entitles the new company to the benefit only of such donation as the town could make to either of the former companies.[95]

6. Liability of Railroad Company For Interest on Securities. The liability of a railroad company for interest on securities issued or indorsed by a county, municipality, or state in its aid is controlled by the terms of the particular statute or grant.[96]

after a subscription for bonds of a corporation, the company, pursuant to legislative authority, consolidated with two other companies, the consolidated company could not recover on the subscription on tendering bonds issued by it.

Under Ind. Act, Jan. 30, 1873, which provides that there can only be a forfeiture when the county board, on a proper application, shall make an order canceling the donation, where a donation is voted to a railroad company, and a trust deed covering such donation is foreclosed, the bondholders buying in all the rights and property of the company, and forming a company which is afterward consolidated with another under a new name, the last named company having completed the work before a forfeiture is declared, is entitled to the money voted by the original company, it having been in the county treasury at the time of the foreclosure and sale. Marion County *v.* Center Tp., 105 Ind. 422, 2 N. E. 368, 7 N. E. 189.

A special tax voted in favor of a railroad company in aid of the construction by it of a certain railroad inures to the benefit of a company resulting from the consolidation of that company with another, and such consolidation has no effect on the legality of the tax. Vicksburg, etc., R. Co. *v.* Scott, 52 La. Ann. 512, 27 So. 137.

Where the vote contemplates the construction of the road which the consolidated company builds, there is no diversion from the purpose contemplated by the vote by the fact that the stock is subscribed and the bonds issued to the consolidated company. Livingston County *v.* Portsmouth First Nat. Bank, 128 U. S. 102, 9 S. Ct. 18, 32 L. ed. 359.

90. Grand Trunk R. Co. *v.* Halton County, 21 Can. Sup. Ct. 716 [*affirming* 19 Ont. App. 252].

91. Pope *v.* Lake County, 51 Fed. 769.

92. Wagner *v.* Meety, 69 Mo. 150; State *v.* Garroutte, 67 Mo. 445; Dix *v.* Shaver, 14 Hun (N. Y.) 392; Harshman *v.* Bates County, 92 U. S. 569, 23 L. ed. 747.

93. Savings Soc. *v.* New London, 29 Conn. 174.

94. Bates County *v.* Winters, 97 U. S. 83, 24 L. ed. 933.

95. Pana *v.* Lippincott, 2 Ill. App. 466 [*affirmed* in 92 Ill. 24].

96. See Tennessee, etc., R. Co. *v.* Moore, 36 Ala. 371 (construing the act of Feb. 17, 1854); Gibbes *v.* Greenville, etc., R. Co., 13 S. C. 228; and the statutes of the several states.

Under the Pacific Railroad Act (1862), § 6, providing for the issue of bonds by the government to pay for the construction of the road, requiring the company to pay the bonds at maturity, and to allow the government to retain compensation due the company for transportation and to apply it on the bonds "and interest," and to pay to the government five per cent of the net earnings to be applied on bonds "and interest," the company cannot be required to pay the interest before the maturity of the bonds. U. S. *v.* Union Pac. R. Co., 91 U. S. 72, 23 L. ed. 224. See also Union Pac. R. Co. *v.* U. S., 13 Ct. Cl. 401.

Estoppel.— Where a city corporation issued its bonds in aid of a railroad, taking a mortgage thereon as security, the railroad company agreeing to pay a certain rate of interest into the city treasury at certain times, and subsequently congress by the two acts of 1862 and 1864 (12 U. S. St. at L. 469; 13 U. S. St. at L. 284), imposed a tax of three per cent upon all sums of money due by railroad companies, requiring them to withhold such tax from their payments and providing that payment over to the United States should operate as a discharge from the creditors to the amount of the tax, etc.,

7. Payment or Redemption by Railroad Company of Securities. The payment or redemption by a railroad company of securities issued or indorsed by a state, county, or municipality in aid of a railroad is usually provided for by the statute or agreement authorizing or granting such aid;[97] and the time,[98] and mode, manner, and terms[99] of paying such securities or interest are governed by the terms of

and the company, after notifying the city and formally protesting against the collection of the tax, paid it, and withheld that amount from the interest it had agreed to pay into the city treasury, and the city neglected to test the legality of the tax after notice from the company of the demands made by the United States, it cannot recover the amount from the railroad company. Baltimore *v.* Baltimore, etc., R. Co., 10 Wall. (U. S.) 543, 19 L. ed. 1043.

97. See Mobile, etc., R. Co. *v.* State, 29 Ala. 573, holding that under the act of Jan. 12, 1856, providing for the renewal of a state loan to a railroad company, and the act of Feb. 14, 1856, providing that before extending any loan by virtue of the provisions of the act under which the application is made for a loan or extension, the company must accept the provisions of the act of Feb. 14, and providing as a condition of renewal that it must consent to a forfeiture of its charter in default of payment of the loan, the second statute applies to an application for an extension under the first.

98. See the cases cited *infra*, this note.

Under the act of congress of July 1, 1862, section 5, providing that the government bonds issued in favor of the Union Pacific Railroad Company are issued on condition "that said company shall pay such bonds at maturity" and that all compensation which shall be due to such company for services rendered for the government shall be applied to the payment of such bonds and interest, until the whole amount is fully paid, and under the act of July 2, 1864, providing that one half of the compensation due to such company for services performed for the government shall be retained and applied on such indebtedness, the railroad company is not required to pay the interest upon such bonds until the principal becomes due, and therefore the secretary of the treasury is not authorized to retain the whole of such compensation on the ground that matured interest on such bonds has not been paid by the railroad company. U. S. *v.* Union Pac. R. Co., 91 U. S. 72, 23 L. ed. 224.

Completion of road.— Within the meaning of the act of July 1, 1862, providing that the Union Pacific railroad shall make a payment of five per cent of its net earnings after the road is completed, the road was completed when it was reported, and the president of the United States accepted it as completed for the purpose of issuing the bonds provided for by said act, although the acceptance was provisional, and security was required that all deficiencies in construction should be supplied; and the company having obtained the bonds, and agreed in regard to the security, was estopped from denying that the road was then completed. U. S. *v.* Central Pac. R. Co., 99 U. S. 449, 25 L. ed. 287; Union Pac. R. Co. *v.* U. S., 99 U. S. 402, 25 L. ed. 274; Union Pac. R. Co. *v.* U. S., 13 Ct. Cl. 401, holding that the road was completed so as to render the company liable for the five per cent when the last section was reported on and the report accepted. And the president had no authority under the agreements with the company to fix a later date as the time when the road was completed. Union Pac. R. Co. *v.* U. S., 13 Ct. Cl. 401.

99. See Hannibal, etc., R. Co. *v.* Bartlett, 123 Mass. 15; Rolston *v.* Crittenden, 120 U. S. 390, 7 S. Ct. 599, 30 L. ed. 721 [*modifying* 10 Fed. 254, 3 McCrary 332] (holding that where, in pursuance of an act providing for the redemption by a railroad of state bonds issued in aid thereof, and in immediate expectation of payment, another act was passed directing that all moneys in the state treasury not otherwise required should be used to redeem state bonds as soon as due, and meanwhile be invested in state or United States bonds, an acceptance of money under the former act after the latter's passage bound the state to comply with its terms, and the amount payable, in order to save the state from loss, must be computed accordingly, and also that the payment must be in amount equal to the face value of the bonds, with accrued interest, and such further amount as would enable the state to cancel the amount of its outstanding indebtedness); U. S. *v.* Stanford, 69 Fed. 25 [*affirmed* in 161 U. S. 412, 16 S. Ct. 576, 40 L. ed. 751] (holding that the proviso in the act of congress of July 1, 1862, which provides that the issuance and delivery of the bonds shall constitute a first mortgage on the Union Pacific railroad and its appurtenances, and for forfeiture to the United States on default in payment of the bonds provided that this section shall not apply to any part of the road now constructed, when construed with section 6 of such statute providing that repayment may be made "wholly or in part in the same or in other bonds, treasury notes, or other evidences of debt against the United States" does not limit the United States in enforcing repayment to the road and its appurtenances).

Under the act of congress of May 7, 1878 (20 U. S. St. at L. 58 [U. S. Comp. St. (1901) p. 3570]), neither the debt of the Union Pacific Railroad Company nor that of the Central Pacific Railroad Company to the United States is paid by depositing and investing the sinking fund in the manner prescribed by such statute; and retaining in the fund the one half of the earnings for services rendered to the government by such companies respectively, which by the act of July 2, 1864, was to be paid them, does not

such statute or agreement. Even though there is no express covenant by the railroad company receiving such securities to repay the amount thereof, the law may imply from the statute and its acceptance an absolute promise for repayment.[1] But the city or county cannot be compelled to accept payment before maturity,[2] nor can the railroad company make the payment in a manner not contemplated by the statute.[3] Under some statutes, if a railroad company fails to pay such securities when due, the municipality or county issuing them may take possession of the road,[4] provided it does so in the manner prescribed by the statute.[5]

IV. LOCATION OF ROAD, TERMINI, AND STATIONS.*

A. Designation and Determination of Location — 1. In General. The location of a railroad consists in the selection and adoption of the particular line or route upon which it is to be constructed.[6] A mere survey is not a loca-

release the government from such payment; and although kept in the treasury, the fund is owned by those companies and they will be entitled to the securities whereof it consists which remain undisposed of when the debt chargeable upon it shall be paid. Union Pac. R. Co. *v.* U. S., 99 U. S. 700, 25 L. ed. 496. And under such act, section 2 (20 U. S. St. at L. 58 [U. S. Comp. St. (1901) p. 3569]), providing that "the whole amount of compensation which may from time to time be due to said several railroad companies respectively for services rendered for the government, shall be retained by the United States," etc., the government is entitled to retain payment only for services rendered over that portion of the road in the construction of which it has aided. U. S. *v.* Central Pac. R. Co., 118 U. S. 235, 6 S. Ct. 1038, 30 L. ed. 173; Union Pac. R. Co. *v.* U. S., 16 Ct. Cl. 353.

Under the act of July 1, 1862, section 6, the Kansas Pacific Railroad Company is not liable to the United States for five per cent of the net earnings of that portion of the road west of the one hundredth meridian (U. S. *v.* Kansas Pac. R. Co., 99 U. S. 455, 25 L. ed. 289), and hence the Denver Pacific Railway and Telegraph Company is not liable for a debt incurred by the Kansas Pacific Railroad Company on account of subsidy bonds; and although it is bound to perform the government service stipulated by the Pacific Railroad Acts at the rates therein prescribed, and is subject to their provisions so far as they are applicable to it, no part of the compensation due it for such services can be retained by the United States (U. S. *v.* Denver Pac. R., etc., Co., 99 U. S. 460, 25 L. ed. 291).

Under Fla. Int. Impr. Act, Jan. 6, 1855, §§ 2, 3, 12, the per cent which the railroad company or purchasers at a foreclosure sale must pay annually to the trustees of the sinking fund therein provided for is to be calculated upon the amount of bonds still uncanceled, and not upon the whole amount of the original issue. Vose *v.* Florida R. Co., 28 Fed. Cas. No. 17,007.

In North Carolina a railroad company may take up its bonds deposited with the public treasurer by substituting in lieu thereof coupon bonds of the state or other indebtedness of the state, except that the treasurer is not bound to accept in exchange any state bonds issued after the passage of the statute or ordinance authorizing such exchange (Raleigh, etc., Air-Line R. Co. *v.* Jenkins, 68 N. C. 502), nor is he bound to deliver railroad bonds in exchange for special tax bonds (Raleigh, etc., Air-Line R. Co. *v.* Jenkins, 68 N. C. 499).

Where a railroad company issues bonds to a city to secure the payment of city scrip of equal value that is delivered to the company at various times, and the statute authorizing the city loan provides that the payment of coupons on the scrip by the company shall require the city treasurer to cancel and surrender an equal amount of coupons on the bonds, and the company pays coupons when the scrip falls due and delivers the same to the city treasurer, this operates as a payment and cancellation of an equal amount of interest coupons on the bonds; and where upon a sale and reorganization of the road the city demands shares in the new company, it cannot make such demand for the amount which has been so paid and canceled. Lincoln Nat. Bank *v.* Portland, 82 Me. 99, 19 Atl. 102.

1. U. S. *v.* Stanford, 69 Fed. 25 [*affirmed* in 161 U. S. 412, 16 S. Ct. 576, 40 L. ed. 751], construing the act of congress of July 1, 1862, section 6 (12 U. S. St. at L. 489).

2. Portland *v.* Atlantic, etc., R. Co., 74 Me. 241.

3. Portland *v.* Atlantic, etc., R. Co., 74 Me. 241, construing the act of 1868, chapter 601.

4. Bath *v.* Miller, 51 Me. 341, construing St. (1869) c. 450, § 6.

5. Bath *v.* Miller, 51 Me. 341.

6. Williamsport, etc., R. Co. *v.* Philadelphia, etc., R. Co., 141 Pa. St. 407, 21 Atl. 645, 12 L. R. A. 220; Pittsburgh, etc., R. Co. *v.* Com., 101 Pa. St. 192; Chesapeake, etc., R. Co. *v.* Deepwater R. Co., 57 W. Va. 641, 50 S. E. 890.

The successive steps to complete the location and vest title to the right of way in the railroad company ordinarily are: (1) A

*By James A. Gwyn.

tion,[7] but to constitute a valid location there must be an adoption of a particular line or survey by the company itself,[8] and until it has done so it has no right to condemn lands,[9] nor has the landowner any right to recover damages as for a taking of his lands.[10] There is, however, a valid location whenever the railroad company has adopted a particular line or survey,[11] and filed a map or profile thereof if the statute so requires,[12] although actual construction is not begun until years afterward;[13] which location invests the railroad company with title as against third persons or rival companies.[14] As against the landowner such location invests the railroad company with an inchoate title which constitutes an encumbrance upon the title of the landowner,[15] and gives the company the right to proceed to condemn the lands,[16] and the landowner a right to recover damages,[17] although its title as against the landowner is not complete until compensation has been made or secured.[18]

2. Statutory and Charter Provisions. In the absence of any constitutional or charter restrictions as to the length or direction of a railroad, a railroad company may be authorized to construct a road lying entirely in one county,[19] or town or city,[20] or having a circular or polygonal route beginning and terminating at the same place;[21] and the legislature, under a power reserved to alter or amend the charter, may, after the road has been located but before it is constructed, limit a discretion previously vested in the company as to the selection of the route and require that it be located through a certain point.[22] In so far as the location of a road is regulated by a statutory or charter provision, the company

preliminary entry upon the lands of private owners for the purpose of exploration, which is made by surveyors and engineers, who run or mark out one or more experimental lines and report their work, with such maps and profiles as may be necessary, to the company. (2) The selection and adoption of a line or one of the lines so run as and for the location of the proposed road, which is done by the corporation itself and constitutes a fixed and definite location, and an appropriation of the land. (3) Payment to the owner for what is taken and the consequences of the taking or security that it shall be made when the amount due him is legally ascertained. Williamsport, etc., R. Co. *v.* Philadelphia, etc., R. Co., 141 Pa. St. 407, 21 Atl. 645, 12 L. R. A. 220.

7. Kaufman *v.* Pittsburg, etc., R. Co., 210 Pa. St. 440, 60 Atl. 2; Williamsport, etc., R. Co. *v.* Philadelphia, etc., R. Co., 141 Pa. St. 407, 21 Atl. 645, 12 L. R. A. 220; Milwaukee Light, etc., Co. *v.* Milwaukee Northern R. Co., 132 Wis. 313, 112 N. W. 663.

8. Kaufman *v.* Pittsburg, etc., R. Co., 210 Pa. St. 440, 60 Atl. 2; Williamsport, etc., R. Co. *v.* Philadelphia, etc., R. Co., 141 Pa. St. 407, 21 Atl. 645, 12 L. R. A. 220; Chesapeake, etc., R. Co. *v.* Deepwater R. Co., 57 W. Va. 641, 50 S. E. 890; Milwaukee Light, etc., Co. *v.* Milwaukee Northern R. Co., 132 Wis. 313, 112 N. W. 663.

A legal location of land by a railroad company must be a designation by a competent authority of a lien or route which is binding upon the company and which fixes its liability to the owner for damages whether construction follows or not. Arthur *v.* Pennsylvania R. Co., 27 Leg. Int. (Pa.) 237.

9. Williamsport, etc., R. Co. *v.* Philadelphia, etc., R. Co., 141 Pa. St. 407, 21 Atl. 645, 12 L. R. A. 220.

10. Kaufman *v.* Pittsburg, etc., R. Co., 210 Pa. St. 440, 60 Atl. 2.

11. Johnston *v.* Callery, 184 Pa. St. 146, 39 Atl. 73; Chesapeake, etc., R. Co. *v.* Deepwater R. Co., 57 W. Va. 641, 50 S. E. 890.

12. See *infra*, IV, D, 2.

13. Pittsburgh, etc., R. Co. *v.* Com., 101 Pa. St. 192.

14. Johnston *v.* Callery, 184 Pa. St. 146, 39 Atl. 73; Chesapeake, etc., R. Co. *v.* Deepwater R. Co., 57 W. Va. 641, 50 S. E. 890.

Conflicting locations see *infra*, IV, F, 1.

15. Johnston *v.* Callery, 184 Pa. St. 146, 39 Atl. 73.

16. Johnston *v.* Callery, 184 Pa. St. 146, 39 Atl. 73.

17. Davis *v.* Titusville, etc., R. Co., 114 Pa. St. 308, 6 Atl. 736; Pittsburgh, etc., R. Co. *v.* Com., 101 Pa. St. 192.

18. Johnston *v.* Callery, 184 Pa. St. 146, 39 Atl. 73; Williamsport, etc., R. Co. *v.* Philadelphia, etc., R. Co., 141 Pa. St. 407, 21 Atl. 645, 12 L. R. A. 220.

19. State *v.* Martin, 51 Kan. 462, 33 Pac. 9.

20. Long Branch Com'rs *v.* West End R. Co., 29 N. J. Eq. 566.

21. State *v.* Martin, 51 Kan. 462, 33 Pac. 9; Collier *v.* Union R. Co., 113 Tenn. 96, 83 S. W. 155.

22. Macon, etc., R. Co. *v.* Gibson, 85 Ga. 1, 11 S. E. 135, 21 Am. St. Rep. 135, holding that a statute is not unconstitutional which requires that in case the company locates its road through a certain county within five miles of a certain town, it shall locate it through such town, particularly where the additional cost is to be paid by the town; and further that this right of the

must comply therewith;[23] but indefinite terms of description as to the route or points along it, such as "at," "near," "at or near," and the like, should be so construed as to vest in the company a reasonable discretion as to the exact location,[24] and where the terminal points are fixed, indefinite terms of direction must be construed with reference thereto.[25] A provision authorizing a railroad company to construct a railroad "along" a river does not authorize the company to locate it in or upon the river,[26] but where the company is authorized to locate its road through certain towns it need not pass through such towns in the order named in the statute.[27] Under a charter provision authorizing a railroad company to construct its road on the most practicable route "passing near" a particular place, it may construct the road through such place;[28] and where two different routes are authorized the fact that a certain place is specified as a necessary intermediate point on one route does not necessarily prevent its being made an intermediate point on the other if the latter be adopted.[29] So also where a railroad company is authorized to construct a railroad between certain points, the route not being specifically designated, and to construct a lateral road from the main line to an intermediate point, it may construct the main line through such point if the location is made in good faith and does not show an abuse of discretion.[30] An authority to construct a double track road should be construed to mean two tracks essentially upon the same location to enable cars to run in opposite directions without detention or collision, and not two essentially different routes such as would be occupied by parallel roads.[31]

3. Discretion of Railroad Company.[32] Where the exact location of a railroad

legislature is not affected by the existence of executory construction contracts with respect to the route already selected.

23. Kansas City Interurban R. Co. *v.* Davis, 197 Mo. 669, 95 S. W. 881, 114 Am. St. Rep. 790; Stevens *v.* Erie R. Co., 21 N. J. Eq. 259; Com. *v.* Franklin Canal Co., 21 Pa. St. 117.

Sufficient compliance with statute.— Under a statute authorizing a railroad company to locate its road "commencing at some convenient point on the Norfolk County railroad . . . thence through the southerly part of Dedham; thence through or near the westerly part of the towns of Canton and Milton," a location commencing at a point on the Norfolk County railroad in South Dedham, and not departing from that road at once, but running northerly upon it for more than two miles, and then approaching within two hundred rods of the northwesterly corner of Canton, and running near the westerly boundary of Milton, is authorized by the statute. Boston, etc., R. Corp. *v.* Midland R. Co., 1 Gray (Mass.) 340. Under a statute authorizing the construction of a railroad in a city from a given point "extending by a curved line" to another specified point, passing over certain streets by suitable bridges, if the general course of the route selected is a curve, although a small portion thereof taken by itself is straight, the course is a curved line within the meaning and application of the statute. Worcester *v.* Railroad Com'rs, 113 Mass. 161.

Designation of townships in articles of incorporation.— The fact that the charter of a railroad company designates the townships through which it is to pass does not limit the railroad company thereto with respect to the county in which such townships are situated, since the mention of the townships being unnecessary, and not required by statute, and not serving any useful purpose, may be treated as surplusage and as wholly immaterial. Hayes *v.* Toledo R., etc., Co., 26 Ohio Cir. Ct. 395 [*affirmed* in 70 Ohio St. 425, 72 N. E. 1165].

24. Boston, etc., R. Corp. *v.* Midland R. Co., 1 Gray (Mass.) 340; Collier *v.* Union R. Co., 113 Tenn. 96, 83 S. W. 155.

Where the route is designated as passing "through or near" the westerly part of a certain town, a location within about two hundred rods of the westerly limits of such town is authorized. Boston, etc., R. Corp. *v.* Midland R. Co., 1 Gray (Mass.) 340.

25. Bridwell *v.* Gate City Terminal Co., 127 Ga. 520, 56 S. E. 624, 10 L. R. A. N. S. 909.

26. Stevens *v.* Erie R. Co., 21 N. J. Eq. 259, holding that the word "along" will not be construed as meaning "upon" unless the context clearly shows that it is used in the sense of "upon and along."

27. Com. *v.* Fitchburg R. Co., 8 Cush. (Mass.) 240.

28. Hill *v.* Southern R. Co., 67 S. C. 548, 46 S. E. 486.

29. State *v.* Wilton R. Co., 19 N. H. 521.

30. Bonaparte *v.* Camden, etc., R. Co., 3 Fed. Cas. No. 1,617, Baldw. 205.

31. People *v.* New York, etc., R. Co., 45 Barb. (N. Y.) 73, 26 How. Pr. 44, holding that this construction is particularly applicable where the right of granting to other persons or corporations an authority to construct parallel roads was expressly reserved to the legislature by the same statute.

32. Under statutory and charter provisions see *supra*, IV, A, 2.

is not prescribed by a statutory or charter provision, the location between the termini named or within the limits of the general description given rests in the discretion of the railroad company,[33] subject to any restrictions which a municipality may lawfully impose under statutory authority.[34]

4. Mode of Determination and Review. The final determination as to the location of a railroad must be the corporate act of the company itself,[35] and cannot be made by an engineer.[36] If the statute expressly provides by whom and in what manner the company shall act, the requirements must be complied with.[37] Ordinarily the location should be determined by the directors of the company,[38] but in the absence of a statute so requiring it has been held that the formal action of the directors of the company is not essential to a valid location.[39] In so far

33. *Illinois.*— Chicago, etc., R. Co. *v.* Dunbar, 100 Ill. 110.

Indiana.— Newcastle, etc., R. Co. *v.* Peru, etc., R. Co., 3 Ind. 464.

Massachusetts.— Fall River Iron Works Co. *v.* Old Colony, etc., R. Co., 5 Allen 221.

Minnesota.— Southern Minnesota R. Co. *v.* Stoddard, 6 Minn. 150.

Montana.—State *v.* Meagher County Tenth Judicial Dist. Ct., 34 Mont. 535, 88 Pac. 44, 115 Am. St. Rep. 540.

New York.— Hentz *v.* Long Island R. Co., 13 Barb. 646.

Ohio.— Walker *v.* Mad River, etc., R. Co., 8 Ohio 38; Baldwin *v.* Hillsborough, etc., R. Co., 1 Ohio Dec. (Reprint) 532, 10 West. L. J. 337.

Pennsylvania.— Frankford, etc., Turnpike Co. *v.* Philadelphia, etc., R. Co., 54 Pa. St. 345, 93 Am. Dec. 708.

Tennessee.— Tennessee Cent. R. Co. *v.* Campbell, 109 Tenn. 655, 73 S. W. 112.

See 41 Cent. Dig. tit. "Railroads," § 102.

Most direct route.— Where a railroad company is authorized to construct a road between two designated points, no intermediate point being named, and different routes between said points are equally feasible, the most direct will be deemed to have been contemplated, but where there is a difference in the feasibility of routes, a reasonable discretion must be allowed in the selection of the one to be followed. Newcastle, etc., R. Co. *v.* Peru, etc., R. Co., 3 Ind. 464.

All railroad charters which do not directly express the contrary must be taken to allow the exercise of such a discretion in the location of the route as is incident to an ordinary practical survey of the same, made with reference to the nature of the country to be passed over, and the obstacles to be encountered or avoided. Southern Minnesota R. Co. *v.* Stoddard, 6 Minn. 150.

Location across public lands or places.— A railroad company may, in locating its road between the points or along the route authorized, locate it across lands belonging to the state (Indiana Cent. R. Co. *v.* State, 3 Ind. 421); or across "public ground" under control of the legislature within an unincorporated town if not already appropriated to a particular public use or a public use with which such location would be inconsistent (Chicago, etc., R. Co. *v.* Joliet, 79 Ill. 25).

"Most expedient and advantageous" route. — Although a statute authorizes the road to be constructed between the terminal points "by such route as the said company shall deem most expedient and advantageous," this does not authorize the company in the location of the road to consult merely its own advantage but the advantage of the route as a route between the points designated must be considered. Com. *v.* Franklin Canal Co., 21 Pa. St. 117.

34. Chicago, etc., R. Co. *v.* Dunbar, 100 Ill. 110, holding, however, that the fact that a city has by statute the power to provide for the location of railroads within its limits is no limitation upon the right of the railroad company to determine the location of its road, in the absence of any provision by the city relating thereto.

35. Kaufman *v.* Pittsburg, etc., R. Co., 210 Pa. St. 440, 60 Atl. 2; Williamsport, etc., R. Co. *v.* Philadelphia, etc., R. Co., 141 Pa. St. 407, 21 Atl. 645, 12 L. R. A. 220; Chesapeake, etc., R. Co. *v.* Deepwater R. Co., 57 W. Va. 641, 50 S. E. 890.

36. Williamsport, etc., R. Co. *v.* Philadelphia, etc., R. Co., 141 Pa. St. 407, 21 Atl. 645, 12 L. R. A. 220.

37. Weidenfeld *v.* Sugar Run R. Co., 48 Fed. 615, holding that where the statute requires the location to be made by the president and directors of the company, the duty cannot be delegated to an executive committee appointed under the by-laws to have "a general supervision of the operations and policy of the company."

38. Kaufman *v.* Pittsburg, etc., R. Co., 210 Pa. St. 440, 60 Atl. 2; Williamsport, etc., R. Co. *v.* Philadelphia, etc., R. Co., 141 Pa. St. 407, 21 Atl. 645, 21 L. R. A. 220; Chesapeake, etc., R. Co. *v.* Deepwater R. Co., 57 W. Va. 641, 50 S. E. 890.

39. Tennessee Cent. R. Co. *v.* Campbell, 109 Tenn. 655, 73 S. W. 112, holding that, in the absence of any statutory requirement that the location shall be made by the directors of the company, a valid location may be made by its president upon the recommendation and advice of its general manager and engineers. *Compare* Bridwell *v.* Gate City Terminal Co., 127 Ga. 520, 56 S. E. 624, 10 L. R. A. N. S. 909, holding, however, that the directors may ratify and confirm a location which has been previously selected by the president.

as the location is discretionary with the railroad company,[40] the courts will not attempt to control or interfere with the exercise of such discretion unless it is clearly shown that it has been abused,[41] nor can persons whose lands may be taken or affected by the location selected object that a different route might have been adopted,[42] unless they are authorized by statute to make such objection and have the propriety of the location selected reviewed.[43] Under a statute providing that the location selected by the railroad company shall be approved by the court upon view of a jury, the company may waive its right to select the location in the first instance and permit the jury to do so.[44]

5. Contracts as to Location.[45] A railroad company may for a valuable consideration agree to locate its road within the authorized limits upon a particular route or through a particular place, provided the contract is made in good faith in the interest of the company, and no public rights or duties are thereby violated.[46] Such contracts are not void as against public policy,[47] and may be enforced by [48] or against[49] the railroad company, provided they are entered into by the proper

40. See *supra*, IV, A, 3.

41. *Massachusetts.*— Fall River Iron Works Co. *v.* Old Colony, etc., R. Co., 5 Allen 221.

New York.— Hentz *v.* Long Island, etc., R. Co., 13 Barb. 646.

Ohio.— Walker *v.* Mad River, etc., R. Co., 8 Ohio 38; Baldwin *v.* Hillsborough, etc., R. Co., 1 Ohio Dec. (Reprint) 532, 546, 10 West. L. J. 337, 356.

Tennessee.— Memphis, etc., R. Co. *v.* Union R. Co., 116 Tenn. 500, 95 S. W. 1019.

United States.—Bonaparte *v.* Camden, etc., R. Co., 3 Fed. Cas. No. 1,617, Baldw. 205.

See 41 Cent. Dig. tit. "Railroads," §§ 106, 107.

42. State *v.* Meagher County, 34 Mont. 535, 88 Pac. 44, 115 Am. St. Rep. 540; Hentz *v.* Long Island R. Co., 13 Barb. (N. Y.) 646; Walker *v.* Mad River, etc., R. Co., 8 Ohio 38; Memphis, etc., R. Co. *v.* Union R. Co., 116 Tenn. 500, 95 S. W. 1019.

43. Matter of Niagara Falls Hydraulic Power, etc., Co., 68 Hun (N. Y.) 391, 23 N. Y. Suppl. 31 [*affirmed* in 143 N. Y. 669, 39 N. E. 21].

In New York a railroad company must file a map of its proposed location and give notice thereof to all owners and occupants of lands through which it passes, who may within fifteen days thereafter apply to the court for the appointment of commissioners to consider the route proposed by the railroad company and the substitute therefor proposed by the petitioner and determine which shall be adopted (Matter of Niagara Falls Hydraulic Power, etc., Co., 68 Hun 391, 23 N. Y. Suppl. 31 [*affirmed* in 143 N. Y. 669, 39 N. E. 21]; Norton *v.* Wallkill Valley R. Co., 61 Barb. (N. Y.) 476, 42 How. Pr. 228); the proceedings under which statute are considered in a subsequent section (see *infra*, IV, E, 1, b).

44. *In re* Philadelphia, etc., R. Co., 6 Whart. (Pa.) 25, 36 Am. Dec. 202.

45. Conditions in contract for subscription to aid construction see *supra*, III, B, 3, c.

Conditions in conveyance of right of way see *infra*, V, G, 5.

Contracts as to location of stations see *infra*, IV, G, 2.

46. *Illinois.*— Pixley *v.* Gould, 13 Ill. App. 565.

Iowa.— Cedar Rapids, etc., R. Co. *v.* Spofford, 41 Iowa 292.

Kentucky.—Berryman *v.* Cincinnati Southern R. Co., 14 Bush 755.

Ohio.— Baltimore, etc., R. Co. *v.* Ralston, 41 Ohio St. 573.

Pennsylvania.— Cumberland Valley R. Co. *v.* Baab, 9 Watts 458, 36 Am. Dec. 132.

See 41 Cent. Dig. tit. "Railroads," § 105.

Construction of contract.— Where in consideration of certain grants and donations by a city a contract was entered into which recited that it was "the intention of the parties to the agreement, among other things, to secure to the city of Wheeling the practical benefits of the terminus of the Baltimore and Ohio Railroad, according to the provisions of said law," which law authorized the railroad company to construct branches without restriction as to location, the company having made such city the terminus of its road, is not precluded by the contract from constructing a branch connecting with another road at a point other than such city. Baltimore, etc., R. Co. *v.* Wheeling, 13 Gratt. (Va.) 40.

47. Pixley *v.* Gould, 13 Ill. App. 565; Cedar Rapids, etc., R. Co. *v.* Spafford, 41 Iowa 292; Berryman *v.* Cincinnati Southern R. Co., 14 Bush (Ky.) 755; Cumberland Valley R. Co. *v.* Baab, 9 Watts (Pa.) 458, 36 Am. Dec. 132. But see Dix *v.* Shaver, 14 Hun (N. Y.) 392.

Validity of contracts see, generally, Contracts, 9 Cyc. 498.

48. Cedar Rapids, etc., R. Co. *v.* Spafford, 41 Iowa 292; Berryman *v.* Cincinnati Southern R. Co., 14 Bush (Ky.) 755; Cumberland Valley R. Co. *v.* Baab, 9 Watts (Pa.) 458, 36 Am. Dec. 132.

49. Chapman *v.* Mad River, etc., R. Co., 1 Ohio Dec. (Reprint) 559, 10 West. L. J. 391.

Rights on breach of agreement.— If a railroad company fails to comply with the condition of a contract with a city requiring it to make the city the end of a division, the city may recover whatever is paid as a consideration for such condition. Missouri, etc., R. Co. *v.* Ft. Scott, 15 Kan. 435.

authorities.[50] Such a contract is, however, void if made by officers, agents, or directors of the company for their individual benefit,[51] and this without regard to the propriety of the route agreed upon or the effect of its selection upon the company or the public.[52] Where a railroad company has by a valid contract bound itself to a particular location it cannot subsequently change the same,[53] but the mere adoption of a particular route through a city after a controversy in respect thereto does not amount to a contract which will preclude the railroad company from subsequently, by legislative authority, changing the location,[54] nor will a specific contract for a particular location prevent the railroad company from subsequently exercising a power conferred upon it to make a shorter and cheaper route, provided the road already located pursuant to the contract is continued in use with proper facilities for traffic.[55]

6. Remedies and Proceedings. Where a railroad company is expressly required by a statutory or charter provision to locate its road so as to pass through a particular town or city, the citizens of such place have a special interest in the requirement which entitles them to sue in equity to compel compliance therewith.[56] The construction of a railroad upon an unauthorized location may also be enjoined at the suit of a person who will be specially injured thereby;[57] but if the railroad has already been constructed the court will not ordinarily enjoin the continued operation of trains thereon, which would result in inconvenience to the public, but will leave plaintiff to his action at law.[58] So also if the location of the road is not specifically designated by the statute or charter the company will not be enjoined at the suit of a private landowner from constructing its road upon the route selected unless it is clearly shown that the discretion of the company has been abused, but plaintiff will be left to his action at law.[59] The fact that a railroad company has violated a provision of its charter as to the location of its road cannot be set up by a subscriber to stock as a defense in an action by the company to recover the amount of the subscription.[60]

B. Parallel, Lateral, and Branch Roads — 1. Parallel Roads. The mere grant of a right to construct a railroad between certain points does not prevent the state from subsequently authorizing the construction of another parallel and competing line,[61] and no monopoly will be presumed to have been intended in the enactment of a general law for the formation of railroad companies.[62] So also where the statutes require as a condition precedent to the con-

50. Central Mills Co. *v.* New York, etc., R. Co., 127 Mass. 537, holding that an agreement as to the location of a railroad made by an officer or agent who was not authorized to make the same and without the knowledge or assent of the directors is not binding upon the company.

51. Linder *v.* Carpenter, 62 Ill. 309; Bestor *v.* Wathen, 60 Ill. 138; Holladay *v.* Davis, 5 Oreg. 40; Woodstock Iron Co. *v.* Richmond, etc., Extension Co., 129 U. S. 643, 9 S. Ct. 402, 32 L. ed. 819.

52. Bestor *v.* Wathen, 60 Ill. 138.

53. Chapman *v.* Mad River R. Co., 1 Ohio Dec. (Reprint) 559, 10 West. L. J. 391.

54. Milnor *v.* New Jersey R. Co., 17 Fed. Cas. No. 9,620, 3 Wall. appendix 782, 16 L. ed. appendix 1.

55. Chapman *v.* Mad River, etc., R. Co., 1 Ohio Dec. (Reprint) 565, 10 West. L. J. 399.

56. Macon, etc., R. Co. *v.* Gibson, 85 Ga. 1, 11 S. E. 442, 21 Am. St. Rep. 135.

57. Stevens *v.* Erie R. Co., 21 N. J. Eq. 259; Mason *v.* Brooklyn City, etc., R. Co., 35 Barb. (N. Y.) 373.

58. Stevens *v.* Erie R. Co., 21 N. J. Eq. 259.

59. Bonaparte *v.* Camden, etc., R. Co., 3 Fed. Cas. No. 1,617, Baldw. 205.

60. Mississippi, etc., R. Co. *v.* Cross, 20 Ark. 443, where the court said that the state might proceed to forfeit the franchises or the stock-holder might sue to enjoin the company from violating the provisions as to the route, or if the charter was amended so as to make a material change in the route he might be released from his subscription, but that a violation by the company of its charter could not be shown in defense to a collateral suit.

61. East St. Louis Connecting R. Co. *v.* East St. Louis Union R. Co., 108 Ill. 265; Lafayette Plankroad Co. *v.* New Albany, etc., R. Co., 13 Ind. 90, 74 Am. Dec. 246.

Neither company can claim damages merely upon the ground that the roads run parallel and mutually diminish the business of each other. Lafayette Plankroad Co. *v.* New Albany, etc., R. Co., 13 Ind. 90, 74 Am. Dec. 246.

62. East St. Louis Connecting R. Co. *v.* East St. Louis Union R. Co., 108 Ill. 265.

Exclusive and conflicting grants see *supra*, II, I, 2.

struction of a railroad that the railroad commissioners shall determine that the public convenience and necessity require it, the mere fact that it will be parallel to another railroad is not sufficient ground for refusing a certificate to this effect.[63] One railroad company may also, in the absence of any legislation to the contrary, be authorized to build a second railroad parallel with its own road.[64] In some cases the construction of parallel railroads within a certain distance of an existing railroad is prohibited by the charter of the first company,[65] or a general statute,[66] in which case a railroad company which has already constructed or located its road may enjoin another company from constructing a road within the limits prohibited by the statute;[67] but exclusive grants of this character will be construed strictly and not extended further than their terms require.[68]

2. Lateral or Branch Roads — a. In General.[69] While a railroad company has an implied authority to construct such switches, turnouts, and sidings as may be necessary for the proper operation of the road and conduct of its business,[70] it cannot construct lateral or branch roads without legislative authority.[71]

63. Matter of Rochester, etc., Traction Co., 118 N. Y. App. Div. 521, 102 N. Y. Suppl. 1112; People *v.* Railroad Com'rs, 53 N. Y. App. Div. 61, 65 N. Y. Suppl. 597 [*affirmed* in 164 N. Y. 572, 58 N. E. 1091].

64. Memphis, etc., R. Co. *v.* Union R. Co., 116 Tenn. 500, 95 S. W. 1019.

65. Augusta, etc., R. Co. *v.* Augusta Southern R. Co., 96 Ga. 562, 23 S. E. 501; Michigan Cent. R. Co. *v.* Michigan Southern R. Co., 4 Mich. 362, each, however, holding that the proposed road was not within the prohibition of the particular charter provision.

66. Bridwell *v.* Gate City Terminal Co., 127 Ga. 520, 56 S. E. 624, 10 L. R. A. N. S. 909. See also Macon, etc., R. Co., *v.* Macon, etc., R. Co., 86 Ga. 83, 13 S. E. 57.

The Georgia statute (Civ. Code, § 2176) provides that if a railroad is "already constructed or route selected and chartered" between certain points "the general direction and location" of a new railroad between such points shall be "at least ten miles from the railroad already constructed or laid out," except within ten miles from either terminus (Bridwell *v.* Gate City Terminal Co., 127 Ga. 520, 56 S. E. 624, 10 L. R. A. N. S. 909); but the statute applies only to railroads between the same terminal points and does not prevent the construction of a railroad parallel with a branch of another railroad and touching only one terminus of such branch (Hawkinsville, etc., R. Co. *v.* Waycross Air-Line R. Co., 114 Ga. 239, 39 S. E. 844); and it applies only to railroads chartered by the state to act as common carriers, and does not prevent a purely private corporation, such as a lumber company, from constructing a road upon its own land, for its own exclusive use, parallel with an existing railroad (Waycross Air-Line R. Co. *v.* Southern Pine Co., 111 Ga. 233, 36 S. E. 641); nor does the statute prevent the construction of a parallel road which is only about three miles in length, within ten miles of a railroad already constructed (Bridwell *v.* Gate City Terminal Co., *supra*).

67. Georgia Northern R. Co. *v.* Tifton, etc., R. Co., 109 Ga. 762, 35 S. E. 104.

68. Augusta, etc., R. Co. *v.* Augusta Southern R. Co., 96 Ga. 562, 23 S. E. 501; Michigan Cent. R. Co. *v.* Michigan Southern R. Co., 4 Mich. 362. See also Florida, etc., R. Co. *v.* Pensacola, etc., R. Co., 10 Fla. 145.

A statute providing that no railroad company shall have power to construct a railroad "parallel to the line" of a certain railroad will be construed as applying only to a road which is substantially parallel with the entire line of the railroad named and will not prevent the construction of a railroad between different points which may run parallel with only a part of such line. Wheelwright *v.* Com., 103 Va. 512, 49 S. E. 647.

69. Time for construction see *infra*, VI, A, 3, b.

70. See *infra*, VI, A, 2, b.

71. Lake Shore, etc., R. Co. *v.* Baltimore, etc., R. Co., 149 Ill. 272, 37 N. E. 91; Chicago, etc., R. Co. *v.* Wiltse, 116 Ill. 449, 6 N. E. 49; Baltimore, etc., Turnpike Co. *v.* Union R. Co., 35 Md. 224, 6 Am. St. Rep. 397; Philadelphia, etc., R. Co. *v.* Philadelphia, etc., R. Co., 1 Pa. Dist. 73; Biles *v.* Tacoma, etc., R. Co., 5 Wash. 509, 32 Pac. 211.

Statutes not authorizing construction.—A provision in the charter of a railroad company which authorizes "all railroad companies upon equal terms, to run their locomotives and cars over the tracks of" the railroad chartered does not authorize such company to construct lateral railroads in every direction connecting with other railroads (Baltimore, etc., Turnpike Co. *v.* Union R. Co., 35 Md. 224, 5 Am. St. Rep. 397); and a statute authorizing railroad, canal, and slack water navigation companies to straighten, widen, and otherwise improve their lines, and among other things to "make new feeders," does not authorize a railroad company to build branch railroads, as the words "new feeders" apply to canal companies only (Philadelphia, etc., R. Co. *v.* Philadelphia, etc., R. Co., 1 Pa. Dist. 73).

The fact that a company might have constructed its road through a certain place between its termini does not authorize it after it has located and constructed its line so as to pass more than a mile therefrom, to construct a branch from the road so located to such place. Brigham *v.* Agricultural Branch R. Co., 1 Allen (Mass.) 316.

Such authority is frequently granted by charter or general statutory provisions,[72] but when so granted, any conditions precedent to the exercise of the right must be complied with,[73] and any limitation as to the length, character, or location of such roads must be observed.[74] Except, however, in so far as expressly restricted, the railroad company has a broad discretion in determining not only the necessity

Incorporation of separate company.—Where a railroad company has no authority to condemn a right of way for a lateral line, there is no fraud upon landowners in its organizing another company of its own stock-holders with such authority, although it is the intention that the road when completed shall be leased to the parent company. Lower *v.* Chicago, etc., R. Co., 59 Iowa 563, 13 N. W. 718.

72. *Illinois.*— Newhall *v.* Galena, etc., R. Co., 14 Ill. 273.

Maryland.— Baltimore, etc., R. Co. *v.* Waters, 105 Md. 396, 66 Atl. 685, 12 L. R. A. N. S. 326.

Missouri.— Atlantic, etc., R. Co. *v.* St. Louis, etc., R. Co., 66 Mo. 228 [*reversing* 3 Mo. App. 315].

Pennsylvania.— Volmer's Appeal, 115 Pa. St. 166, 8 Atl. 223 [*affirming* 1 Pa. Co. Ct. 301].

Virginia.— Blanton *v.* Richmond, etc., R. Co., 86 Va. 618, 10 S. E. 925.

West Virginia.— Wheeling Bridge, etc., R. Co. *v.* Camden Consol. Oil Co., 35 W. Va. 205, 13 S. E. 369.

Canada.— Canadian Pac. R. Co. *v.* James Bay R. Co., 36 Can. Sup. Ct. 42.

See 41 Cent. Dig. tit. "Railroads," § 110.

Construction of statutes.— The Florida Internal Improvement Act, providing that no branch road from a certain railroad shall be made until a certain part of the main line is complete between two certain places, does not prohibit the construction of a branch road before the entire line of the main road is completed (Florida, etc., R. Co. *v.* Pensacola, etc., R. Co., 10 Fla. 145); and where a charter authorized a railroad company to maintain and operate a railroad already completed to Morgan City, and to continue the road from such place to Texas, and the power was given to construct such branch roads as the directors might deem necessary, the power to construct branch roads applies not only to the extension authorized, but also to the road already constructed. Morgan's Louisiana, etc., R. Co. *v.* Barton, 51 La. Ann. 1338, 36 So. 271.

Right of purchasing company.— Where a railroad company which is authorized by its charter to construct lateral or branch roads purchases another railroad under a statute providing that the purchasing company shall hold the same under the provisions of its own act of incorporation, the purchasing company may construct lateral or branch roads from the line purchased. Duncan *v.* Pennsylvania R. Co., 7 Wkly. Notes Cas. (Pa.) 551.

Subsequent impairment of right.— Where a railroad company is authorized by its charter to construct lateral or branch roads without restriction, and there is no power reserved to alter or repeal the charter, a subsequent statute prohibiting the construction of any railroad within a certain territory which is not required by the public interest generally, and therefore not within the police power, is unconstitutional. Baltimore, etc., R. Co. *v.* Waters, 105 Md. 396, 66 Atl. 685, 12 L. R. A. N. S. 326.

73. Biles *v.* Tacoma, etc., R. Co., 5 Wash. 509, 32 Pac. 211, where the statute provided that before building the branch road the company should by resolution of its directors, to be entered in the record of its proceedings, designate the route of such branch, and file a certified copy of such record in the office of the secretary of state.

But a condition incident to "extending" a railroad need not be complied with in order to authorize the construction of a branch road under a different statute which does not impose such condition. Vollmer *v.* Schuylkill River, etc., R. Co., 1 Pa. Co. Ct. 301 [*affirmed* in 115 Pa. St. 166, 8 Atl. 223].

Finding as to public convenience and necessity.— In Connecticut the statute requires as a condition to the construction of a branch road that it shall first be found by a judge of the superior court that the public convenience and necessity requires it (Shepaug Voting Trust Cases, 60 Conn. 553, 24 Atl. 32); but the statute does not apply to or abridge any special franchises previously granted for the construction of branch roads (Hartford, etc., R. Co. *v.* Wagner, 73 Conn. 506, 48 Atl. 218).

Necessity for resolution of stock-holders.— Under the Virginia statute of 1897–1898, providing that the directors of a railway company may construct branch roads not exceeding five miles each way in length, and under a resolution adopted in general meeting by a two-thirds vote of the stock-holders, may construct branch roads not exceeding twenty miles in length, the requirement to construct by resolution has no application where the branch road does not exceed five miles in length. Zircle *v.* Southern R. Co., 102 Va. 17, 45 S. E. 802, 102 Am. St. Rep. 805.

In Alabama the statute authorizes the construction of branch roads, but their construction must be first ordered by a resolution of the board of directors and then approved by a majority in value of the stock-holders. Arrington *v.* Savannah, etc., R. Co., 95 Ala. 434, 11 So. 7.

74. Works *v.* Junction R. Co., 30 Fed. Cas. No. 18,046, 5 McLean 425, holding that under an authority "to construct branched roads from the main route, to other towns or places in the several counties through which the road might pass," the entire branch must be within the limits of one county.

for the proposed branch, but also such matters as its location, length, direction, and termini,[75] which, unless manifestly abused, will not be interfered with by the courts,[76] or restrained at the instance of persons whose lands may be taken or affected thereby.[77] So where a railroad company is authorized to construct lateral or branch roads, it is, except in so far as restricted by statute, invested with the same power and authority as it possesses and can exercise in the construction of its main line,[78] including the power to acquire and condemn lands,[79] and subject to the same rules in regard to the occupation or use of streets and highways.[80] A railroad company authorized to construct a branch road may begin at a point remote from the main line,[81] provided it is the *bona fide* intention of the railroad company to continue it to a connection with the main line;[82] but a company authorized to construct a main line and certain branches cannot abandon the construction of the main line and retain the right to construct the branches,[83] and if authorized to construct only a particular branch it cannot construct any other.[84] A statute authorizing railroad companies to extend their lines upon certain conditions does not repeal or affect a previous statute authorizing the construction of branch roads.[85] Under the lateral railroad statutes of Pennsylvania private owners of lands, mills, quarries, mines, or lime-kilns, in the vicinity of any railroad, canal or slack water navigation are authorized to construct lateral railroads,[86] and to acquire wharves and landings where such roads connect with a canal or other navigation;[87] but such roads are only authorized in connection with a public improvement, railroad, or highway of some

75. Newhall *v.* Galena, etc., R. Co., 14 Ill. 273; Baltimore, etc., R. Co. *v.* Waters, 105 Md. 396, 66 Atl. 685, 12 L. R. A. N. S. 326; Price *v.* Pennsylvania R. Co., 209 Pa. St. 81, 58 Atl. 137; Volmer's Appeal, 115 Pa. St. 166, 8 Atl. 223 [*affirming* 1 Pa. Co. Ct. 301]; McAboy's Appeal, 107 Pa. St. 548; Pittsburgh *v.* Pennsylvania R. Co., 48 Pa. St. 355; Baltimore, etc., R. Co. *v.* Wheeling, 13 Gratt. (Va.) 40.

76. Newhall *v.* Galena, etc., R. Co., 14 Ill. 273; Price *v.* Pennsylvania R. Co., 209 Pa. St. 81, 58 Atl. 137; Pittsburgh *v.* Pennsylvania R. Co., 48 Pa. St. 355; Philadelphia, etc., R. Co. *v.* Philadelphia, etc., R. Co., 1 Pa. Dist. 73.

So long as the directors act in good faith in determining whether the construction of a branch line is advisable, their determination is conclusive and not subject to review by the court. Ulmer *v.* Lime Rock R. Co., 98 Me. 579, 57 Atl. 1001, 66 L. R. A. 387.

77. Baltimore, etc., R. Co. *v.* Waters, 105 Md. 396, 66 Atl. 685, 12 L. R. A. N. S. 326; Price *v.* Pennsylvania R. Co., 209 Pa. St. 81, 58 Atl. 137; Rudolph *v.* Pennsylvania, etc., R. Co., 166 Pa. St. 430, 31 Atl. 131; Volmer's Appeal, 115 Pa. St. 166, 8 Atl. 223 [*affirming* 1 Pa. Co. Ct. 301]; French *v.* Philadelphia, etc., R. Co., 13 Phila. (Pa.) 187.

Who may object.— Where a railroad company is expressly authorized to construct such branches "as it may deem necessary to increase its business and accommodate the trade and travel of the public," if the branch is not constructed in good faith for the purposes specified, the state, and not the individual over whose lands it is constructed, is the proper party to complain. Rudolph *v.* Pennsylvania, etc., R. Co., 166 Pa. St. 430, 31 Atl. 131.

If a railroad company has no right to construct a branch road, its construction may be enjoined at the suit of a person whose lands will be taken or injured thereby (Goelet *v.* Metropolitan Transit Co., 48 Hun (N. Y.) 520, 1 N. Y. Suppl. 74); or of a turnpike company whose road will be crossed by the proposed branch (Baltimore, etc., Turnpike Co. *v.* Union R. Co., 35 Md. 224, 6 Am. Rep. 397).

78. Pittsburgh *v.* Pennsylvania R. Co., 48 Pa. St. 355.

79. Newhall *v.* Galena, etc., R. Co., 14 Ill. 273; French *v.* Philadelphia, etc., R. Co., 13 Phila. (Pa.) 187.

Condemnation of property for lateral or branch roads see EMINENT DOMAIN, 15 Cyc. 500.

80. McAboy's Appeal, 107 Pa. St. 548.

81. St. Louis, etc., R. Co. *v.* Petty, 63 Ark. 94, 37 S. W. 300.

82. St. Louis, etc., R. Co. *v.* Petty, 57 Ark. 359, 21 S. W. 884, 20 L. R. A. 434.

83. Goelet *v.* Metropolitan Transit Co., 48 Hun (N. Y.) 520, 1 N. Y. Suppl. 74.

84. Boca, etc., R. Co. *v.* Sierra Valleys R. Co., 2 Cal. App. 546, 84 Pac. 298; Biles *v.* Tacoma, etc., R. Co., 5 Wash. 509, 32 Pac. 211.

85. Volmer's Appeal, 115 Pa. St. 166, 8 Atl. 223 [*affirming* 1 Pa. Co. Ct. 301].

86. Waddell's Appeal, 84 Pa. St. 90; Hays *v.* Risher, 32 Pa. St. 169; Shoenberger *v.* Mulhollan, 8 Pa. St. 134; Harvey *v.* Lloyd, 3 Pa. St. 331.

87. Hays *v.* Briggs, 74 Pa. St. 373 [*reversing* 3 Pittsb. 504], holding, however, that the "landing" contemplated by the statute is a place for loading and unloading boats, and not a harbor for them whether loaded or empty, and further, that under the statute a

description.[88] There is a similar English statute authorizing the construction of railroads leading to mines.[89] A contract on the part of a railroad company to build a branch or spur track from its main line to a mill or other private enterprise is not contrary to public policy.[90]

b. What Constitutes Lateral or Branch Road. A lateral railroad is an offshoot from a main line [91] proceeding from some point on such line between its termini,[92] and is but another name for a branch road.[93] The determination as to what is a branch road does not depend upon either its length or direction.[94] but the term implies the existence of a main line [95] and that the branch shall be constructed from some point thereon,[96] although a lateral or branch road may be constructed from a point on the main line in the same general direction as the main line.[97] So also a branch road may be constructed from one of the terminal points of the main line,[98] and extend in the same general direction so as to constitute in effect an extension thereof; [99] and the character of the road as a lateral or branch road is not affected by the fact that it will connect with the road of another company,[1] or with another road or branch of the same com-

landing cannot be allotted to a person desiring to build a lateral railroad where the owner in good faith requires the land for his own use.

88. Waddell's Appeal, 84 Pa. St. 90; Keeling *v.* Griffin, 56 Pa. St. 305.

89. Bishop *v.* North, 12 L. J. Exch. 362, 11 M. & W. 418, 3 R. & Can. Cas. 459, holding that under a statute authorizing the "owners or proprietors of any mines of coal" within certain parishes to make railways to convey their coals to a canal over the lands of any person or persons upon paying or tendering satisfaction for the damage occasioned, this power is not limited to persons who were proprietors at the time of the passage of the act but extends to other persons who have become so subsequently, and that such owners or proprietors are empowered to make railroads to be traversed by locomotive engines.

90. Butler *v.* Tifton, etc., R. Co., 121 Ga. 817, 49 S. E. 763.

Contract to maintain branch.— Where a branch road is constructed to a mine under a contract providing that the mine owner shall construct the substructure and the railroad company "maintain and operate" the branch, if a bridge constituting a part of such substructure is washed away, it is the duty of the railroad company, under its contract to "maintain," to reconstruct it, although under the contract it will be the property of the mine owner. Louisville, etc., R. Co. *v.* U. S. Iron Co., 118 Tenn. 194, 101 S. W. 414.

91. Baltimore, etc., R. Co. *v.* Waters, 105 Md. 396, 66 Atl. 685, 12 L. R. A. N. S. 326; Blanton *v.* Richmond, etc., R. Co., 86 Va. 618, 10 S. E. 925.

92. Newhall *v.* Galena, etc., R. Co., 14 Ill. 273; Baltimore, etc., R. Co. *v.* Waters, 105 Md. 396, 66 Atl. 685, 12 L. R. A. N. S. 326.

93. Newhall *v.* Galena, etc., R. Co., 14 Ill. 273. But see Florida, etc., R. Co. *v.* Pensacola, etc., R. Co., 10 Fla. 145.

94. McAboy's Appeal, 107 Pa. St. 548; Vollmer *v.* Schuylkill River East Side R. Co., 1 Pa. Co. Ct. 301 [*affirmed* in 115 Pa. St. 166, 8 Atl. 223].

An elevated track running from the original terminus of a railroad in a city, along a wharf, is a branch road. McAboy's Appeal, 107 Pa. St. 548.

A road running at right angles from the main line at an intermediate point between its termini is neither a lateral road nor an extension, but a branch road. Florida, etc., R. Co. *v.* Pensacola, etc., R. Co., 10 Fla. 145.

95. Goelet *v.* Metropolitan Transit Co., 48 Hun (N. Y.) 520, 1 N. Y. Suppl. 74; Biles *v.* Tacoma, etc., R. Co., 5 Wash. 509, 32 Pac. 211; Hodder *v.* Kentucky, etc., R. Co., 7 Fed. 793.

96. Biles *v.* Tacoma, etc., R. Co., 5 Wash. 509, 32 Pac. 211.

A disconnected road is an independent line and not a branch. A branch is an offshoot of the trunk, and cannot exist independently of it. St. Louis, etc., R. Co. *v.* Petty, 57 Ark. 359, 21 S. W. 884, 20 L. R. A. 434.

97. Atlantic, etc., R. Co. *v.* St. Louis, 66 Mo. 228 [*reversing* 3 Mo. App. 315]; Blanton *v.* Richmond, etc., R. Co., 86 Va. 618, 10 S. E. 925.

98. McAboy's Appeal, 107 Pa. St. 548; Western Pennsylvania R. Co.'s Appeal, 99 Pa. St. 155; Delabole Slate Co. *v.* Bangor, etc., R. Co., 6 North Am. Co. Rep. (Pa.) 337; Howard County *v.* Boonville Cent. Nat. Bank, 108 U. S. 314, 2 S. Ct. 689, 27 L. ed. 738.

99. Atlantic, etc., R. Co. *v.* St. Louis, 66 Mo. 228 [*reversing* 3 Mo. App. 315]; McAboy's Appeal, 107 Pa. St. 548; Western Pennsylvania R. Co.'s Appeal, 99 Pa. St. 155.

1. Baltimore, etc., R. Co. *v.* Waters, 105 Md. 396, 66 Atl. 685, 12 L. R. A. N. S. 326; Blanton *v.* Richmond, etc., R. Co., 86 Va. 618, 10 S. E. 925.

A branch need not run from a terminus of the main line when constructed to form a connection with another railroad. Baltimore etc., R. Co. *v.* Wheeling, 13 Gratt. (Va.) 40.

Under the New Jersey statute which expressly authorizes the construction of a branch road for the purpose of forming a connection with another road, the branch

pany,[2] or a union depot in the same city as one of its original termini.[3] A branch road may also, in the absence of any provision to the contrary, be constructed which is of greater length than the main line,[4] or a branch may be constructed from a branch, or two branches have a common stem leading to the main line, provided neither exceeds the length prescribed by statute from such main line.[5]

C. Termini, Connections, and Extensions — 1. Termini — a. In General. In the absence of any constitutional or statutory restrictions a railroad company may be authorized to construct a railroad having both of its termini in the same town, city, or village.[6] If the statute or charter under which a railroad is constructed specifies its termini, such provision must be complied with;[7] but where the legislature does not undertake definitely to fix the termini or one of the termini of a railroad, a reasonable discretion should be allowed the company as to the location,[8] which, unless clearly abused, will not be interfered with.[9] This rule applies where the terminus is designated by terms of indefinite description such as "at," "near," and the like,[10] or as being on a state or county line without fixing the

may be constructed in the form of a loop, leaving the main line on one side of the connection and returning to it on the other. Greenville, etc., R. Co. *v.* Grey, 62 N. J. Eq. 768, 48 Atl. 568 [*reversing* 59 N. J. Eq. 372, 46 Atl. 638].

2. Glick *v.* Baltimore, etc., R. Co., 19 D. C. 412; Baltimore, etc., R. Co. *v.* Waters, 105 Md. 396, 66 Atl. 685, 12 L. R. A. N. S. 326.

3. State *v.* St. Louis, etc., R. Co., 3 Mo. App. 180.

4. Volmer's Appeal, 115 Pa. St. 166, 8 Atl. 223 [*affirming* 1 Pa. Co. Ct. 301].

5. Wheeling Bridge, etc., Co. *v.* Camden Consolidated Oil Co., 35 W. Va. 205, 13 S. E. 369.

6. National Docks R. Co. *v.* New Jersey Cent. R. Co., 32 N. J. Eq. 755.

Under a statutory provision that the termini of the road shall be stated in the charter or articles of incorporation, it is not required that the termini shall be in different towns, cities, or villages, and a railroad company may be authorized to construct a road for the purpose of forming a connection between two other roads having both of its termini in the same town (Long Branch Com'rs *v.* West End R. Co., 29 N. J. Eq. 566); or to construct a road in a circular form having both of its termini in the same place (Collier *v.* Union R. Co., 113 Tenn. 96, 83 S. W. 155); and under a statute authorizing a railroad company to construct and operate a road between the points named in the articles of incorporation "commencing at or within, and extending to or into any city, village, town, or place named as a terminus," a road may be constructed having both of its terminal points within the same city (State *v.* Union Terminal R. Co., 72 Ohio St. 455, 74 N. E. 642).

7. Com. *v.* Franklin Canal Co., 21 Pa. St. 117; Union Pac. R. Co. *v.* Hall, 91 U. S. 343, 23 L. ed. 428 [*affirming* 28 Fed. Cas. No. 16,601, 4 Dill. 479].

Terminus on state line bounded by river.— Where the eastern terminus of a railroad is designated as a point "on the western boundary" of a certain state, and the legal boundary of the state is the mid-channel of a river between the state named and another state, the terminus must be on the shore of the river in the state named. Union Pac. R. Co. *v.* Hall, 91 U. S. 343, 23 L. ed. 428 [*affirming* 28 Fed. Cas. No. 16,601, 4 Dill. 479].

8. Fall River Iron Works Co. *v.* Old Colony, etc., R. Co., 5 Allen (Mass.) 221; Parke's Appeal, 64 Pa. St. 137; Northern Pac. R. Co. *v.* Doherty, 100 Wis. 39, 75 N. W. 1079.

9. Georgia R., etc., Co. *v.* Maddox, 116 Ga. 64, 42 S. E. 315; Fall River Iron Works Co. *v.* Old Colony, etc., R. Co., 5 Allen (Mass.) 221; Parke's Appeal, 64 Pa. St. 137; Northern Pac. R. Co. *v.* Doherty, 100 Wis. 39, 75 N. W. 1079.

10. *Georgia.*— Bridwell *v.* Gate City Terminal Co., 127 Ga. 520, 56 S. E. 624, 10 L. R. A. N. S. 909; Georgia R., etc., Co. *v.* Maddox, 116 Ga. 64, 43 S. E. 315.

Massachusetts.— Fall River Iron Works Co. *v.* Old Colony, etc., R. Co., 5 Allen 221.

North Carolina.— Purifoy *v.* Richmond, etc., R. Co., 108 N. C. 100, 12 S. E. 741.

Pennsylvania.— Parke's Appeal, 64 Pa. St. 137.

Tennessee.— Collier *v.* Union R. Co., 113 Tenn. 96, 83 S. W. 155.

See 41 Cent. Dig. tit. "Railroads," § 113.

Applications of rule.— Where a company is authorized to construct a road from a certain point to "a point on" a certain river "in or near" a certain city, the location of its terminus at a point on the river named and about three miles from the city named is authorized. Sherwood *v.* Atlantic, etc., R. Co., 94 Va. 291, 26 S. E. 943. A railroad company authorized to construct a road from a point "at or near" its present terminus may construct it by starting at a point two thousand four hundred and seventy-five feet from such terminus, where the existing conditions indicate that it thereby exercises a sound judgment, and such point need not be in any particular direction from the present terminus of the road. Fall River Iron Works Co. *v.* Old Colony, etc., R. Co., 5 Allen (Mass.) 221. Where one terminus is designated as such a point on another railroad "at" a certain city "as shall be found most practicable,"

particular point.[11] Where a railroad company is authorized to construct a road to one or the other of two cities named, it may select either of such places as its terminus.[12]

b. Construction Into Cities, Towns, and Villages. An authority to construct a railroad "to" or "from" a certain city, town, or village is not restricted to the corporate limits;[13] but authorizes the company to construct its road from a point within,[14] or to a point within the place named as a terminus,[15] particularly where the company is authorized by its charter to acquire property within such place;[16] and in the absence of any restriction, express or implied, the company may, so

the location of the terminus at a point on such railroad one thousand yards outside of the city limits and at the most practicable point is thereby authorized. Purifoy *v.* Richmond, etc., R. Co., 108 N. C. 100, 12 S. E. 741. Where the terminus of a railroad is designated by its charter as "a point on" a certain railroad, "at or near" a certain town, the selection of a point on the railroad one and one-half miles from the town is authorized. Parke's Appeal, 64 Pa. St. 137. Where the westerly terminus of a tunnel was defined as being on the "western shore of the Hudson River, and within or near Jersey City or Hoboken," the word "shore" is not used in its strictest sense as meaning land between the limits of high and low water, but in the popular sense as that Jersey City is built upon the western shore of the Hudson river. Morris, etc., R. Co. *v.* Hudson Tunnel R. Co., 38 N. J. L. 548. A charter provision authorizing a company to construct a railroad "to connect with any railroad constructed or to be constructed at any point on the northern boundary of Erie or Warren county" grants power to terminate the road at any point on the boundary the company may select, and does not limit the terminus to another railroad. Com. *v.* Cross Cut R. Co., 53 Pa. St. 62. Under a statute authorizing the construction of a railroad "beginning at a point on Lake Superior, in the state of Minnesota or Wisconsin" westward to "some point on Puget Sound," the point on Lake Superior at which the company is to start and which is to be the eastern terminus is left to the discretion of the company, and is not necessarily confined to a single point, and the company having touched at a point on Lake Superior does not transcend its powers by selecting its eastern terminus at another point further east. Northern Pac. R. Co. *v.* Doherty, 100 Wis. 39, 75 N. W. 1079. The words "at or near McGee station," when used in a railroad charter as a designation of one terminus of the railroad, should be held to mean a locality and not as having reference to a fixed and definite point. Collier *v.* Union R. Co., 113 Tenn. 96, 83 S. W. 155.

11. Com. *v.* Cross Cut R. Co., 53 Pa. St. 62.

12. Sherwood *v.* Atlantic, etc., R. Co., 94 Va. 291, 26 S. E. 943.

13. Georgia Cent. R. Co. *v.* Union Springs, etc., R. Co., 144 Ala. 639, 39 So. 473, 2 L. R. A. N. S. 144; Moses *v.* Pittsburgh, etc., R. Co., 21 Ill. 516; Tennessee, etc., R. Co. *v.* Adams, 3 Head (Tenn.) 596; Rio Grande R. Co. *v.* Brownsville, 45 Tex. 88. *Contra*, North Eastern R. Co. *v.* Payne, 8 Rich. (S. C.) 177.

In Pennsylvania railroad companies are expressly authorized by statute to extend their roads into any city, town, or village named in their charters as a terminal point, subject to the consent of the municipal authorities of incorporated cities as to the use of the streets, lanes, and alleys thereof. Western Pennsylvania R. Co.'s Appeal, 99 Pa. St. 155.

14. *Illinois.*— McCartney *v.* Chicago, etc., R. Co., 112 Ill. 611; Chicago, etc., R. Co. *v.* Chicago, etc., R. Co., 112 Ill. 589.

Pennsylvania.— Western Pennsylvania R. Co.'s Appeal, 99 Pa. St. 155.

Tennessee.— Tennessee, etc., R. Co. *v.* Adams, 3 Head 596.

United States.— Colorado, Eastern R. Co. *v.* Union Pac. R. Co., 41 Fed. 293.

Canada.— *In re* Bronson, 1 Ont. 415.

See 41 Cent. Dig. tit. "Railroads," § 114.

Contra.— North Eastern R. Co. *v.* Payne, 8 Rich. (S. C.) 177.

A difference in phraseology with regard to the different termini as "from" one city to "any point in" another city does not affect the application of the rule, and the company may construct its road from a point within the first city. McCartney *v.* Chicago, etc., R. Co., 112 Ill. 611.

15. Georgia Cent. R. Co. *v.* Union Springs, etc., R. Co., 144 Ala. 639, 39 So. 473, 2 L. R. A. N. S. 144; Waycross Air-Line R. Co. *v.* Offerman, etc., R. Co., 109 Ga. 827, 35 S. E. 275; Moses *v.* Pittsburgh, etc., R. Co., 21 Ill. 516; Rio Grande R. Co. *v.* Brownsville, 45 Tex. 88.

Occupancy of streets and public places.— While the legislature may authorize the construction and operation of a railroad through a city or town and upon its streets, even without the consent of the municipality, such authority must be conferred expressly or by necessary implication, and an authority to construct its road "to" a town or city does not authorize it arbitrarily to appropriate and occupy any street or public place which it may choose without regard to the injury or inconvenience which may result to the public or to private individuals. Ruttles *v.* Covington, 10 S. W. 644, 10 Ky. L. Rep. 766.

16. Moses *v.* Pittsburgh, etc., R. Co., 21 Ill. 516.

far as the state is concerned, fix its terminus at any point within such place.[17] A railroad company may also construct its road into a certain place where the charter designates its terminus as being "at," [18] or "at or near" such place; [19] and where a statute authorizes the construction of a railroad "between" two places, such places are not excluded and the road may be constructed into them.[20] Under a charter authorizing the construction of a railroad "to" or "from" a certain town or city, the company is not, however, obliged to construct its road into such place but may stop at the corporate limits,[21] or if it goes within the corporate limits is not obliged to establish its terminal at any particular point within such limits;[22] but when authorized to construct its road from a certain place it cannot stop at a point neither on nor within but entirely outside of the corporate limits.[23]

2. CONNECTIONS — a. With Other Railroads.[24] Where a railroad company is authorized to construct its road so as to connect with another railroad,[25] if the

17. *Georgia.*— Waycross Air-Line R. Co. *v.* Offerman, etc., R. Co., 109 Ga. 827, 35 S. E. 275.

Illinois.— Chicago, etc., R. Co. *v.* Chicago, etc., R. Co., 112 Ill. 589.

Missouri.— St. Louis, etc., R. Co. *v.* Hannibal Union Depot Co., 125 Mo. 82, 28 S. W. 483.

Pennsylvania.— Western Pennsylvania R. Co.'s Appeal, 99 Pa. St. 155.

United States.— Colorado Eastern R. Co. *v.* Union Pac. R. Co., 41 Fed. 293.

See 41 Cent. Dig. tit. "Railroads," § 114.

Crossing other railroad.—A railroad company authorized to cross any other railroad "at any point in its route" may cross another railroad to reach the point in a city selected by it as its terminal point, although it might have selected a different terminal in the city which would not have necessitated a crossing. Waycross Air-Line R. Co. *v.* Offerman, etc., R. Co., 109 Ga. 827, 35 S. E. 275.

Where a railroad is constructed by the state under a statute providing for its construction from one city to another, the fund commission having control of its construction may, in the absence of any express restriction, select the point within such city for the terminus of the road, and the acceptance of a donation of certain lots by the state will not bind it to locate the terminal thereon. Taylor *v.* Whitney, 5 Ill. 61.

18. Mason *v.* Brooklyn City, etc., R. Co., 35 Barb. (N. Y.) 373.

19. Mohawk Bridge Co. *v.* Utica, etc., R. Co., 6 Paige (N. Y.) 554; Ottawa *v.* Canada Atlantic R. Co., 33 Can. Sup. Ct. 376 [*affirming* 4 Ont. L. Rep. 56, 1 Ont. Wkly. Rep. 349 (*affirming* 2 Ont. L. Rep. 336)].

20. Morris, etc., R. Co. *v.* New Jersey Cent. R. Co., 31 N. J. L. 205.

21. People *v.* Louisville, etc., R. Co., (Ill. 1886) 5 N. E. 379. *Compare* Com. *v.* Erie, etc., R. Co., 27 Pa. St. 339, 67 Am. Dec. 471.

22. People *v.* Louisville, etc., R. Co., (Ill. 1886) 5 N. E. 379.

Town and village of same name.— Where a railroad company is authorized to construct its road "from Amherst" to a certain point, without specifying the village of Amherst, it may locate its terminus at any point within the town and outside of the village of Amherst. Hastings *v.* Amherst, etc., R. Co., 9 Cush. (Mass.) 596.

23. Com. *v.* Erie, etc., R. Co., 27 Pa. St. 339, 67 Am. Dec. 471, holding further that the location must be according to the corporate limits as they existed at the time of the act of incorporation, and that a construction from a point within the corporate limits as subsequently extended, which is entirely outside of the original limits as existing at the time of the act of incorporation, is not a compliance with the charter.

24. **Statutory provisions** in regard to connections and interchange of traffic and facilities for transfers see *infra*, X, B, 3, d.

25. See the cases cited *infra*, this note and notes 26–32.

Construction of statute.— Where by one section of the charter a railroad company is authorized to construct and use a railroad along a certain line "and to connect their railroad" with another, and by another section is empowered to purchase a railroad already laid on said line, the privilege to connect is given to "their railroad," and it is immaterial whether it is purchased or built. Cleveland, etc., R. Co. *v.* Erie, 27 Pa. St. 380. Where a statute authorizes a company to construct a railroad to connect with any railroad constructed or to be constructed at any point on the northern boundary of certain counties, the gauge of "said road" not to exceed a certain width, the reference is to the company incorporated and not to the road with which it may connect. Com. *v.* Cross Cut R. Co., 53 Pa. St. 62. Where a railroad company is authorized to connect its railroad with another railroad "legally authorized to come within the limits of Erie," any railroad actually located within such limits is legal within the meaning of the act so long as it is not removed by law, and its legal title to be where it is cannot be inquired into collaterally in a suit by the railroad company to enjoin the authorities of the municipality from interfering with such connection. Cleveland, etc., R. Co. *v.* Erie, 27 Pa. St. 380.

Abandonment of line designated as terminus.—A railroad company has a right to carry on its railroad according to the plan laid

statute or charter does not definitely specify the point of connection, a reasonable discretion should be allowed the company as to its selection,[26] which unless manifestly abused will not be interfered with,[27] as where the point of connection is indefinitely designated as "at" or "at or near" a certain place.[28] Under a general authority to connect with another railroad the connection need not be made in a city, town, or village;[29] but on the contrary an authority to connect with another railroad does not in the absence of express provision authorize a railroad company to construct its road through an incorporated city without the consent of the municipal authorities for the purpose of forming such a connection;[30] and a statute merely authorizing a municipality to permit connections between railroad companies within its limits merely invests it with a discretionary power and does not require that it should do so.[31] Where a railroad company is authorized to extend its road to any point in a certain county and to connect with any other railroad, if such county is on the border line of the state the company may connect with a road of another state at the state line.[32]

b. With Private Tracks or Switches.[33] In the absence of statute or agreement the owners of adjacent property have no right to connect private tracks or switches with a railroad without the consent of the railroad company.[34] Where the right to such a connection is secured by contract, the rights of the parties depend upon a proper construction of the agreement,[35] which must also be deemed to have been made subject to any existing statutes under which the company may be required to change or elevate the grades of its tracks in the interest of public safety or to abolish grade crossings,[36] and a personal agreement between a railroad company and a landowner, permitting such a connection, does not pass to a lessee of the property.[37] Under the constitutional and statutory provisions in some states, however, the owners of lands, mills, warehouses, mines, and the like have an absolute right to connect private tracks or switches with

down in its act, although a junction contemplated in the procuring of such act may be frustrated by the abandonment of the line with which it was the original intention of the company to unite. Clarence R. Co. *v.* Great North. of England, etc., R. Co., 6 Jur. 269, 2 R. & Can. Cas. 763.

26. Purifoy *v.* Richmond, etc., R. Co., 108 N. C. 100, 12 S. E. 741; Parke's Appeal, 64 Pa. St. 137.

27. Georgia R., etc., Co. *v.* Maddox, 116 Ga. 64, 42 S. E. 315; Parke's Appeal, 64 Pa. St. 137.

28. Georgia R., etc., Co. *v.* Maddox, 116 Ga. 64, 42 S. E. 315; Parke's Appeal, 64 Pa. St. 137.

Application of rule.—Authority to connect with another railroad "at" a certain city does not require that the connection should be made at a point within the city, but authorizes a connection at a point one thousand yards beyond the city limits (Purifoy *v.* Richmond, etc., R. Co., 108 N. C. 100, 12 S. E. 741); and where a railroad company is authorized to connect with another railroad "at or near" a certain town, the connection may be made at a point one and one-half miles from such town (Parke's Appeal, 64 Pa. St. 137).

29. Long Branch Com'rs *v.* West End R. Co., 29 N. J. Eq. 566.

30. Augusta *v.* Port Royal, etc., R. Co., 74 Ga. 658.

31. Augusta *v.* Port Royal, etc., R. Co., 74 Ga. 658.

32. Com. *v.* Pittsburg, etc., R. Co., 58 Pa. St. 26.

33. Duty to maintain and operate see *infra*, X, A, 1, c.

34. People *v.* Chicago, etc., R. Co., 57 Ill. 436. See also Vincent *v.* Chicago, etc., R. Co., 49 Ill. 33; Lancashire Brick, etc., Co. *v.* Lancashire, etc., R. Co., [1902] 1 K. B. 651, 71 L. J. K. B. 431, 86 L. T. Rep. N. S. 176, 11 R. & Can. Tr. Cas. 138, 18 T. L. R. 330.

Effect of custom.—Where it is sought to compel a railroad company to permit an individual to connect side-tracks with the road on the ground of an alleged custom among companies whose lines concentrate at the place indicated, the custom must be clearly shown to have existed so long as to have the force of law. People *v.* Chicago, etc., R. Co., 57 Ill. 436.

The mere occupancy and use of a switch connecting with a railroad for a period of seventeen years does not amount to an irrevocable license to use it for all time without compensation or control regardless of the public duties and business necessities of the company. Heyl *v.* Philadelphia, etc., R. Co., 51 Pa. St. 469 [*affirming* 6 Phila. 42].

35. Coe *v.* New Jersey Midland R. Co., 28 N. J. Eq. 100 [*affirmed* in 28 N. J. Eq. 593].

36. Swift *v.* Delaware, etc., R. Co., 66 N. J. L. 34, 57 Atl. 456.

37. People *v.* Chicago, etc., R. Co., 57 Ill. 436.

railroads in their vicinity,[38] which right cannot be defeated by any contract between the railroad company and a third party.[39]

3. Extensions.[40] A railroad company cannot, without legislative authority, extend its road beyond the termini originally authorized,[41] but the legislature may authorize it to do so,[42] and to construct an extension longer than the original

38. *Illinois.*— Chicago, etc., R. Co. *v.* Suffern, 129 Ill. 274, 21 N. E. 824 [*affirming* 27 Ill. App. 404].

Pennsylvania.— Reeser *v.* Philadelphia, etc., R. Co., 215 Pa. St. 136, 64 Atl. 376; Pittsburgh, etc., R. Co. *v.* Robinson, 95 Pa. St. 426.

Wisconsin.— Bartlett *v.* Chicago, etc., R. Co., 96 Wis. 335, 71 N. W. 598.

United States.— Olanta Coal Min. Co. *v.* Beech Creek R. Co., 144 Fed. 150.

England.— See Bell *v.* Midland R. Co., 10 C. B. N. S. 287, 7 Jur. N. S. 273, 30 L. J. C. P. 273, 4 L. T. Rep. N. S. 293, 9 Wkly. Rep. 612, 100 E. C. L. 287; Bell *v.* Midland R. Co., 3 De G. & J. 673, 60 Eng. Ch. 673, 44 Eng. Reprint 1429.

See 41 Cent. Dig. tit. "Railroads," § 118.

Obstruction of highway.—A statute providing that a railroad company shall not prevent any adjacent landowner from constructing a lateral road and connecting it with the railroad in such manner as not to interfere with its use does not authorize such an adjacent owner to lay railroad tracks upon a public highway. Com. *v.* Greyhill, 17 Pa. Super. Ct. 514.

Expense of interlocking device.— Where a landowner has a statutory right to a switch connection with a railroad, and the switch has been constructed and the connection made, if the railroad subsequently makes an alteration in its line and is required to put in an interlocking device at the point of connection, it must do so at its own expense and permit the owner of the switch to continue to use it as altered. Woodruff *v.* Brecon, etc., R. Co., 28 Ch. D. 190, 54 L. J. Ch. 620, 52 L. T. Rep. N. S. 69, 33 Wkly. Rep. 125.

Compelling company to restore connection. — Where a railway company has wrongfully taken up and removed the rails forming a connection between its line and a siding belonging to plaintiff, the company may be compelled by mandatory injunction at its own expense to restore the connection. Portway *v.* Colne Valley, etc., R. Co., 7 R. & Can. Tr. Cas. 102.

Under the English statutes it is held that the right given by section 76 of the Railways Clauses Consolidation Act of 1845 to the owner of lands adjoining a railway, to lay down collateral branches of railway and require the railway company to connect such branches with their railway, is not an absolute right apart from any question as to the mode of dealing with the connection, and that the statute does not confer any right to a connection for a mere private switch (Lancashire Brick, etc., Co. *v.* Lancashire, etc., R. Co., [1902] 1 K. B. 651, 71 L. J. K. B. 431, 86 L. T. Rep. N. S. 176, 11 R. & Can. Tr. Cas. 138, 18 T. L. R. 330); and the statute further provides that the railway company shall not be bound to make such connections in any place which they have set apart for a specified purpose with which such communication will interfere (Richard *v.* Great Western R. Co., 11 R. & Can. Tr. Cas. 133).

39. Reeser *v.* Philadelphia, etc., R. Co., 215 Pa. St. 136, 64 Atl. 376.

40. **Under power to build branch lines** see *supra*, IV, B, 2, h.

41. Greenwich, etc., R. Co. *v.* Greenwich, etc., Electric R. Co., 172 N. Y. 462, 65 N. E. 278 [*affirming* 75 N. Y. App. Div. 220, 78 N. Y. Suppl. 24].

42. Rice *v.* Rock Island, etc., R. Co., 21 Ill. 93; Cross *v.* Peach Bottom R. Co., 90 Pa. St. 392. See also *Ex p.* South Carolina R. Co., 2 Rich. (S. C.) 434, holding that under a legislative authority to extend a railroad the company has the same power to acquire lands of private individuals either by purchase or condemnation as for the construction of its original line.

Necessity for consent of stock-holders to amendments authorizing extensions of road see Corporations, 10 Cyc. 209, 211.

Construction of statutes.—A grant to a railroad company of the right to extend and unite with any other railroad in the state gives a general authority to extend to any other road it may select within the prescribed limits (Belleville, etc., R. Co. *v.* Gregory, 15 Ill. 20, 58 Am. Dec. 589); and a charter authorizing the construction of a railroad "to the place of shipping lumber" on a tide water river, gives the right of extending the road across the flats and over tide water to a point at which lumber may be conveniently shipped (Peavey *v.* Calais R. Co., 30 Me. 498).

Extension by municipal consent.— Where a railroad company is authorized with the permission of the authorities of a city to extend its road through such streets as the authorities "might from time to time permit," the power is a continuing one and not exhausted by a single grant of permission for a particular extension. People *v.* New York, etc., R. Co., 45 Barb. (N. Y.) 73, 26 How. Pr. 44.

Designation of termini.— If it be necessary for a statute authorizing an extension to designate its termini this is sufficiently done by a statute authorizing an extension from a given point to intersect another railroad at such point thereon as the company making the extension shall select. Newcastle, etc., R. Co. *v.* Peru, etc., R. Co., 3 Ind. 464.

Under the Tennessee statute of 1897 providing that corporations organized under the statute of 1875 or amendments thereto may

line;[43] and where the right to extend is given by the statute under which the company is incorporated no specific amendment of the charter is necessary to authorize an extension.[44] What is in effect an extension may also be made under an authority to construct branch roads,[45] and a power to extend a road beyond its original terminus includes the power to acquire the use of the road of another company beyond such point;[46] but a statute authorizing an alteration in the route or termini for the purpose of improving the line does not authorize an extension of the line beyond the one of the original termini.[47] Any requirements or conditions imposed by the statute authorizing the extension must be complied with.[48] Where a railroad company is authorized to extend its road, the extension must be from a point on the road already built and not a separate and independent road,[49] and the extension must be from one of the original termini and not a departure from an intermediate point,[50] and it must be substantially in the same general direction as the road already constructed.[51] So also where a railroad

amend their charters in the manner prescribed by such statute, which prescribes the form for an amendment for the purpose of obtaining power to construct a railroad "over the following routes, which are in addition to the route already granted to it by its charter," a railroad company may obtain the power to extend its road over new and additional routes by procuring an amendment to its charter describing such additional routes with reasonable particularity and giving the termini of each. Collier *v.* Union R. Co., 113 Tenn. 96, 83 S. W. 155.

43. Laconia St. R. Co.'s Petition, 71 N. H. 355, 52 Atl. 458, construing the provisions of the New Hampshire statutes as showing an intention on the part of the legislature to authorize the building of extensions and branches of such a nature as to change the original purposes of the corporation.

44. Florida Cent., etc., R. Co. *v.* Bell, 43 Fla. 359, 31 So. 259, holding that under the Florida statute of 1874, a railroad company may extend its line by a resolution of the board of directors, designating the route of the proposed extension in the manner prescribed and filing and recording the same in the office of the secretary of state, without any specific amendment of the charter or action on the part of the stock-holders of the company.

45. See *supra*, IV, B, 2, b.

46. Union Pac. R. Co. *v.* Mason City, etc., R. Co., 128 Fed. 230, 64 C. C. A. 348 [*affirming* 124 Fed. 409, and *affirmed* in 199 U. S. 160, 26 S. Ct. 19, 50 L. ed. 134].

47. Greenwich, etc., R. Co. *v.* Greenwich, etc., Electric R. Co., 172 N. Y. 462, 65 N. E. 278 [*affirming* 75 N. Y. App. Div. 220, 78 N. Y. Suppl. 24].

48. Brooklyn, etc., R. Co. *v.* Long Island R. Co., 72 N. Y. App. Div. 496, 76 N. Y. Suppl. 777, holding that where a railroad company incorporated under a statute requiring it to begin and complete its road within a certain period under penalty of forfeiting its corporate existence is authorized to construct an extension by a statute providing that the new grant shall be subject to all of the conditions of the act under which the company was organized, the conditions as to the time of beginning and completing the road apply to the extensions.

Filing certificate of location.— Under a statute authorizing a company to extend its road, provided that before so doing it shall file in the office of the secretary of state "a certificate stating the point at or near which such extension in this state shall commence and terminate," a certificate is sufficient which fixes one terminus at a specified point and the other at a point on the state line not definitely stated but which can be determined from the description given of the route of the extension. Deepwater R. Co. *v.* Lambert, 54 W. Va. 387, 46 S. E. 144.

49. Savannah, etc., R. Co. *v.* Shiels, 33 Ga. 601; Atty.-Gen. *v.* West Wisconsin R. Co., 36 Wis. 466.

Authority to extend a road "from any point" in a city to another specified point will be construed as meaning from any point within the city which is upon the road as already constructed. Savannah, etc., R. Co. *v.* Shiels, 33 Ga. 601.

50. Leverett *v.* Middle Georgia, etc., R. Co., 96 Ga. 385, 24 S. E. 154; People *v.* New York, etc., R. Co., 45 Barb. (N. Y.) 73, 26 How. Pr. 44; Atty.-Gen. *v.* West Wisconsin R. Co., 36 Wis. 466; Works *v.* Junction R. Co., 30 Fed. Cas. No. 18,046, 5 McLean 425.

A railroad company cannot "side-track" a town which was one of its original termini by constructing an extension from an intermediate point, leaving a part of the original line as a spur track from the new main line to such town. Leverett *v.* Middle Georgia, etc., R. Co., 96 Ga. 385, 24 S. E. 154.

If the company is expressly authorized to extend its road "from a point at or near the present terminus" of its track in a certain city, an extension starting at a point two thousand four hundred and seventy-five feet from the terminus of its track is not unauthorized. Fall River Iron Works Co. *v.* Old Colony, etc., R. Co., 5 Allen (Mass.) 221.

51. People *v.* New York, etc., R. Co., 45 Barb. (N. Y.) 73, 26 How. Pr. 44, holding that while the extension need not pursue

company is authorized to extend its road to a specified point, the statute will be construed as contemplating the most direct eligible route considered with reference to facility of construction;[52] but it is entirely within the discretion of the company as to where the work of construction shall begin,[53] provided it is upon the line authorized by the statute or charter.[54]

D. Survey or Record of Location — 1. Survey. A railroad company when authorized to lay out and construct a railroad may enter upon private property for the purpose of exploration and preliminary surveys, without being guilty of a trespass or actionable wrong,[55] and such entry and survey, if no unnecessary damage be done, does not constitute a taking of the property for which compensation must be made.[56] The company may make any number of experimental surveys at pleasure before finally locating its route,[57] but it has no right to institute experimental condemnation proceedings along the different surveys before making a final selection in order to ascertain which would be the cheapest route.[58]

2. Filing Map, Profile, or Record. It is frequently required by general statutes or charter provisions that a railroad company shall file a map, profile, or description of the location of its road in the counties through which it passes,[59]

the same precise direction as the portion of the road to which it is attached, it must have the same general direction and not a direction to opposite or widely divergent points of the compass.

52. Savannah, etc., R. Co. *v.* Shiels, 33 Ga. 601.

Feasibility of route.— If the routes between the points named in the statute as the termini of an extension are equally feasible, the most direct would be contemplated, but if there is a difference in their feasibility a reasonable discretion should be allowed the railroad company. Newcastle, etc., R. Co. *v.* Peru, etc., R. Co., 3 Ind. 464.

53. Cleveland, etc., R. Co. *v.* Speer, 56 Pa. St. 325, 94 Am. Dec. 84.

54. Com. *v.* Franklin Canal Co., 21 Pa. St. 117.

55. Burrow *v.* Terre Haute, etc., R. Co., 107 Ind. 432, 8 N. E. 167; Ward *v.* Toledo, etc., R. Co., 1 Ohio Dec. (Reprint) 553, 10 West. L. J. 365.

56. See Eminent Domain, 15 Cyc. 658.

57. Neal *v.* Pittsburgh, etc., R. Co., 2 Grant (Pa.) 137.

Effect of preliminary survey: As constituting a location see *supra*, IV, A, 1. As affecting right to change location see *infra*, IV, E, 1, a. In cases of conflicting locations see *infra*, IV, F, 1.

58. Neal *v.* Pittsburgh, etc., R. Co., 2 Grant (Pa.) 137.

59. *Indiana.*— Caffyn *v.* State, 91 Ind. 324.

Maine.— Nicholson *v.* Maine Cent. R. Co., 97 Me. 43, 53 Atl. 839.

Massachusetts.— Housatonic R. Co. *v.* Lee etc., R. Co., 118 Mass. 391; Hazen *v.* Boston, etc., R. Co., 2 Gray 574.

Michigan.— Toledo, etc., R. Co. *v.* East Saginaw, etc., R. Co., 72 Mich. 206, 40 N. W. 436.

Missouri.— Kansas City Interurban R. Co., *v.* Davis, 197 Mo. 669, 95 S. W. 881, 114 Am. St. Rep. 790.

New York.— Stephens *v.* New York, etc., R. Co., 175 N. Y. 72, 67 N. E. 119 [*reversing* 61 N. Y. App. Div. 612, 70 N. Y. Suppl. 1149].

West Virginia.— Chesapeake, etc., R. Co. *v.* Deepwater R. Co., 57 W. Va. 641, 50 S. E. 890.

See 41 Cent. Dig. tit. "Railroads," § 121.

Where the location is fixed by charter.— Under the New York statute which requires the filing of a map of the proposed location, and notice thereof to persons through whose land it passes, who may thereafter institute proceedings to have the location changed, it is held that if the location is fixed by the legislature so that it could not be changed at the instance of such landowners, it is not necessary to file the map or give the notice required by the statute. *In re* Coney Island, etc., R. Co., 12 Hun (N. Y.) 451.

Filing map of part of route.—A statute requiring a railroad company before constructing any part of its road to file a profile map in the office of the county clerk of the route intended to be adopted in that county is not satisfied by the filing of a map of a part or section of the route in the county. Kansas City Interurban R. Co. *v.* Davis, 197 Mo. 669, 95 S. W. 881, 114 Am. St. Rep. 790.

Effect of filing map.— Under the New York statute requiring a railroad company before constructing its road to file a map of its route, it is held that while the filing of the map and giving the notice required will constitute a prior right as against another railroad company or other corporation seeking to condemn the same property, it does not constitute any interest in or lien upon the land which will prevent the state itself from acquiring such location for a different public use without compensation to the railroad company. Adirondack R. Co. *v.* People, 176 U. S. 335, 20 S. Ct. 460, 44 L. ed. 492 [*affirming* 160 N. Y. 225, 54 N. E. 689 (*reversing* 39 N. Y. App. Div. 34, 56 N. Y. Suppl. 869)].

Effect of failure to record map.— The mere

or with the secretary of state,[60] or corporation commission;[61] and there are similar requirements in regard to branch roads,[62] extensions,[63] and changes of location.[64] Branches constituting a part of the proposed road and designated and surveyed at the same time as the main line may be included in the map filed of the survey thereof;[65] but where a railroad company is authorized to construct branches before or after the completion of its main line, a survey for a branch line need not be filed with the survey of the main line but may be filed separately.[66] The object of these requirements is to furnish permanent record evidence of the true and exact location and boundaries of the road,[67] and to fix and determine the

failure on the part of the railroad company to record in a certain county the maps of the lands taken by it, as required by statute, is not of itself fatal to a recovery by the company in an action of ejectment. Hannibal, etc., R. Co. *v.* Moore, 45 Mo. 443.

Under the English statutes a railroad company is required to deposit certain plans of its proposed road and cannot, without the consent of adjoining landowners, deviate therefrom further than the limits of deviation provided by the general statutes or special act (Beardmer *v.* London, etc., R. Co., 1 Hall & T. 161, 47 Eng. Reprint 1367, 13 Jur. 327, 18 L. J. Ch. 432, 1 Macn. & G. 112, 47 Eng. Ch. 112, 41 Eng. Reprint 1205, 5 R. & Can. Cas. 728; Wrigley *v.* Lancashire, etc., R. Co., 4 Giffard 352, 9 Jur. N. S. 710, 8 L. T. Rep. N. S. 267, 66 Eng. Reprint 742); which distance varies according to the nature of the locality, as where the road passes through a town (Elliott *v.* South Devon R. Co., 2 Exch. 725, 17 L. J. Exch. 262, 5 R. & Can. Cas. 500); the vertical deviation being measured not from the surface level but from the datum line (North British R. Co. *v.* Tod, 12 Cl. & F. 722, 10 Jur. 975, 4 R. & Can. Cas. 449, 8 Eng. Reprint 1595); and the lateral deviation from center to center of the authorized width of road-bed without regard to slopes and embankments (Doe *v.* Bristol, etc., R. Co., 9 L. J. Exch. 232, 6 M. & W. 320, 2 R. & Can. Cas. 75). Tunnels must be constructed at the place designated upon the plan without any deviation (Little *v.* Newport, etc., R. Co., 12 C. B. 752, 17 Jur. 209, 22 L. J. C. P. 39, 7 R. & Can. Cas. 280, 1 Wkly. Rep. 81, 74 E. C. L. 752); and where the road is constructed upon an arch or viaduct such arch or viaduct must be constructed not only at the place but in the particular manner and of the dimensions shown upon the plan deposited (Atty.-Gen. *v.* Tewkesbury, etc., R. Co., 1 De G. J. & S. 423, 9 Jur. N. S. 951, 32 L. J. Ch. 482, 8 L. T. Rep. N. S. 682, 66 Eng. Ch. 423, 46 Eng. Reprint 168). The restriction as to deviation applies only to the line of railroad itself (Doe *v.* North Staffordshire R. Co., 16 Q. B. 526, 15 Jur. 944, 20 L. J. Q. B. 249, 71 E. C. L. 526); and does not prevent the company from taking such other land as may be necessary for collateral purposes outside of the lines of deviation provided it is included in the plans and books of reference deposited (Finck *v.* London, etc., R. Co., 59 L. J. Ch. 458, 44 Ch. D. 330, 62 L. T. Rep. N. S. 881, 38 Wkly. Rep. 513; Doe *v.* North Staffordshire R. Co., *supra*); and land within the limits of deviation in the deposited plans but not actually taken in the first instance may be subsequently taken for the purposes of sidings (*In re* Yorkshire, etc., R. Co., 1 Jur. N. S. 975). An unauthorized deviation may be enjoined at the suit of a landowner (Wrigley *v.* Lancashire, etc., R. Co., 4 Giffard 352, 9 Jur. N. S. 710, 8 L. T. Rep. N. S. 267, 66 Eng. Reprint 742); provided he will sustain such special and substantial damage as to entitle him to such relief (Dover Harbour *v.* London, etc., R. Co., 3 De G. F. & J. 559, 7 Jur. N. S. 453, 30 L. J. Ch. 474, 4 L. T. Rep. N. S. 387, 9 Wkly. Rep. 523, 64 Eng. Ch. 559, 45 Eng. Reprint 995; Holyoake *v.* Shrewsbury, etc., R. Co., 5 R. & Can. Cas. 421); but the parties are bound by what is represented on plans deposited pursuant to orders of the house of parliament only in so far as they are incorporated in or referred to by the act (Beardmer *v.* London, etc., R. Co., 1 Hall & T. 161, 47 Eng. Reprint 1367, 13 Jur. 327, 18 L. J. Ch. 432, 1 Macn. & G. 112, 47 Eng. Ch. 112, 41 Eng. Reprint 1205, 5 R. & Can. Cas. 728; North British R. Co. *v.* Tod, 12 Cl. & F. 722, 10 Jur. 975, 4 R. & Can. Cas. 449, 8 Eng. Reprint 1595).

60. Mercer County Traction Co. *v.* United New Jersey R., etc., Co., 65 N. J. Eq. 574, 56 Atl. 897 [*reversed* on other grounds in 68 N. J. Eq. 715, 61 Atl. 461]; Chesapeake, etc., R. Co. *v.* Deepwater R. Co., 57 W. Va. 641, 50 S. E. 890.

61. See Fayetteville, etc., R. Co. *v.* Aberdeen, etc., R. Co., 142 N. C. 423, 55 S. E. 345.

62. Biles *v.* Tacoma, etc., R. Co., 5 Wash. 509, 32 Pac. 211.

Branch roads generally see *supra*, IV, B, 2.

63. See Mercer County Traction Co. *v.* United New Jersey R., etc., Co., 65 N. J. Eq. 574, 56 Atl. 597 [*reversed* on other grounds in 68 N. J. Eq. 715, 61 Atl. 461].

Extensions generally see *supra*, IV, C, 3.

64. Vail *v.* Morris, etc., R. Co., 21 N. J. L. 189; Matter of Riverhead, etc., R. Co., 36 N. Y. App. Div. 514, 55 N. Y. Suppl. 938.

Right to change location see *infra*, IV, E, 1.

65. Toledo, etc., R. Co. *v.* East Saginaw, etc., R. Co., 72 Mich. 206, 40 N. W. 436.

66. Greenville, etc., R. Co. *v.* Grey, 62 N. J. Eq. 768, 48 Atl. 568 [*affirming* 60 N. J. Eq. 153, 46 Atl. 636].

67. Hazen *v.* Boston, etc., R. Co., 2 Gray (Mass.) 574; Stephens *v.* New York, etc., R. Co., 175 N. Y. 72, 67 N. E. 119. See **also**

rights of the railroad company and others interested or affected by such location,[68] and the filing should be done by authority of the directors of the company.[69] Any express provisions of the statute as to what the map or location filed shall show must be complied with,[70] and in any case a mere general designation of the location is insufficient,[71] but the exact location and limits thereof must be shown.[72] A requirement that the company shall file a "survey" of its route does not necessarily require a map or profile but may be complied with by designating the location by words and figures,[73] but there must be sufficient data in some form from which the exact and true location may be ascertained.[74] Where a railroad company is required to file the "location" of its road, a definite reference in the written description to a map or plan is a part of the description and may be referred to to explain or make certain the terms of such description;[75] but not to modify or control the written description of the location,[76] and a map or plan not referred to in the written description cannot be used to supply defects therein.[77] So also the map filed cannot in any way control or modify the charter of the company and when the two conflict the latter must control.[78] It is not essential that the location when filed should bear any date;[79] and where the statute requires the location to be filed with the county commissioners "approved by them and

Grand Rapids, etc., R. Co. *v.* Cheseboro, 74 Mich. 466, 42 N. W. 66.

Under the New York statute one object of requiring the map to be filed is for the information of the owners and occupants of the land through which the proposed route passes who within a certain time after notice thereof may propose a different route and have a commission appointed to pass upon the merits of the routes proposed. New York, etc., R. Co. *v.* New York, etc., R. Co., 11 Abb. N. Cas. 386.

68. Hazen *v.* Boston, etc., R. Co., 2 Gray (Mass.) 574.

69. Northern Pac. R. Co. *v.* Doherty, 100 Wis. 39, 75 N. W. 1079, holding that where the president of a railroad company files with the secretary of the interior a map showing the proposed route of the road as provided in the act of incorporation, without authority of the board of directors, and the map is rejected by the secretary, it is a nullity. See also Nicholson *v.* Maine Cent. R. Co., 97 Me. 43, 53 Atl. 839, holding that if the president's communication accompanying the act of filing the location stating that he is acting by the authority of the directors is not sufficient evidence of his authority, it is immaterial where that board of directors and subsequent boards acquiesce in the action of the president for a period of nearly thirty years.

70. Housatonic R. Co. *v.* Lee, etc., R. Co., 118 Mass. 391; Mercer County Traction Co. *v.* United New Jersey, etc., R. Co., 65 N. J. Eq. 574, 56 Atl. 897 [*reversed* on other grounds in 68 N. J. Eq. 715, 61 Atl. 461].

71. Conver's Appeal, 18 Mich. 459.

It is not necessary to specify in the plans deposited by a railroad company the particular works which the company may propose to make upon the land to be taken. It is sufficient if the works are referred to generally. Weld *v.* South-Western R. Co., 32 Beav. 340, 19 Jur. N. S. 510, 33 L. J. Ch. 142, 8 L. T. Rep. N. S. 13, 1 New Rep. 415, 11 Wkly. Rep. 448, 55 Eng. Reprint 133.

72. Conver's Appeal, 18 Mich. 459; Stephens *v.* New York, etc., R. Co., 175 N. Y. 72, 67 N. E. 119.

Sufficiency of map.—A map on which the proposed road is marked by a single red line without any indication whether the line is the center or exterior line of the route, or of its width or of the amount of land to be taken, is insufficient (Stephens *v.* New York, etc., R. Co., 175 N. Y. 72, 67 N. E. 119; New York, etc., R. Co. *v.* New York, etc., R. Co., 11 Abb. N. Cas. (N. Y.) 386); but where the map filed shows the location of the center line of the track, it is not insufficient because it fails to state or show the gauge or width between the rails, where the charter provides for a standard gauge road the width of which is so well known that the courts and everyone else will take notice thereof (Bay City Belt-Line R. Co. *v.* Hitchcock, 90 Mich. 533, 51 N. W. 808); and where the map filed shows a single line running along a road, and a notice thereon states that the center line of the railroad track is eighteen feet from the westerly line of the road, it is sufficiently certain as to the location of the railroad and the land to be taken (*In re* Coney Island, etc., R. Co., 12 Hun (N. Y.) 451).

73. Atty.-Gen. *v.* Stevens, 1 N. J. Eq. 369, 22 Am. Dec. 526.

74. Conver's Appeal, 18 Mich. 459.

75. Grand Junction R., etc., Co. *v.* Middlesex County Com'rs, 14 Gray (Mass.) 553.

76. Hazen *v.* Boston, etc., R. Co., 2 Gray (Mass.) 574.

77. Housatonic R. Co. *v.* Lee, etc., R. Co., 118 Mass. 391.

78. Mason *v.* Brooklyn City, etc., R. Co., 35 Barb. (N. Y.) 373.

79. Nicholson *v.* Maine Cent. R. Co., 97 Me. 43, 53 Atl. 839, holding further that the subsequent insertion by mistake of an erroneous date cannot affect the validity of the filing as of the date when the location was actually filed.

recorded," the approval of the location need not be signed by the different members of the board, but it is sufficient if attested by the clerk who is the recording officer of the commissioners as a court.[80] Under some of the statutes the filing of the map and survey or location is a condition precedent to the right to institute condemnation proceedings,[81] and some of the statutes expressly require that it shall be done before any part of the road is constructed,[82] but under others it may be done after the road is constructed,[83] or located,[84] and is not an essential step in effecting a valid location.[85]

3. Evidence of Location. In order to prove that a location was made it is not necessary for the railroad company to produce the engineers who made the survey to tes ify to their work, but the plan or map of the survey is the best evidence of what was done.[88] In case of a controversy between rival companies as to priority of location, if there is no statute requiring a record of the location adopted, the action of the company must be proved by other evidence, but when proved it has the same effect as though it had been recorded and settles the date of appropriation and the exact location;[87] and where the statute requires a map to be filed but permits it to be done after the road is located, the filing of a map of its survey, if authorized by the company, while not conclusive is *prima facie* proof of its adoption a the location of the road.[88] The map or location filed by the railroad company pursuant to a statutory requirement is conclusive evidence against the railroad company as to what has been taken.[89] A certified copy of the record of the location of a railroad from the records of a town is admissible to prove the location;[90] and in a proceeding to enforce a tax in aid of a railroad, the permanent location of the road is sufficiently shown by the map and profile filed by it as required by statute, together with proof that the road has been actually constructed upon the line indicated thereon.[91]

E. Change or Abandonment of Location — 1. Change of Location — a. In General. While it has been stated as a general rule that after a railroad company has definitely adopted a particular location for its road it cannot change it without legislative authority,[92] the decisions are not uniform as to what con-

80. Nicholson *v.* Maine Cent. R. Co., 97 Me. 43, 53 Atl. 839.

81. See Eminent Domain, 15 Cyc. 817.

82. See Caffyn *v.* State, 91 Ind. 324; Kansas City Interurban R. Co. *v.* Davis, 197 Mo. 669, 95 S. W. 881, 114 Am. St. Rep. 790; Stephens *v.* New York, etc., R. Co., 175 N. Y. 72, 67 N. E. 119.

83. Fayetteville, etc., R. Co. *v.* Aberdeen, etc., R. Co., 142 N. C. 423, 55 S. E. 345.

84. Chesapeake, etc., R. Co. *v.* Deepwater R. Co., 57 W. Va. 641, 50 S. E. 890.

85. Fayetteville, etc., R. Co. *v.* Aberdeen, etc., R. Co., 142 N. C. 423, 55 S. E. 345; Chesapeake, etc., R. Co. *v.* Deepwater R. Co., 57 W. Va. 641, 50 S. E. 890.

86. Johnston *v.* Callery, 184 Pa. St. 146, 39 Atl. 73.

87. Williamsport, etc., R. Co. *v.* Philadelphia, etc., R. Co., 141 Pa. St. 407, 21 Atl. 645, 12 L. R. A. 220.

88. Chesapeake, etc., R. Co. *v.* Deepwater R. Co., 57 W. Va. 641, 50 S. E. 890.

89. Hazen *v.* Boston, etc., R. Co., 2 Gray (Mass.) 574, holding that if the company constructs its road outside of the limits of the location as filed, it is liable in trespass.

90. Hatch *v.* Vermont Cent. R. Co., 28 Vt. 142.

91. Caffyn *v.* State, 91 Ind. 324.

92. *Georgia.*— Brown *v.* Atlantic, etc., R. Co., 126 Ga. 248, 55 S. E. 24.

Illinois.— Cairo, etc., R. Co. *v.* Woodyard, 226 Ill. 331, 80 N. E. 882.

Mississippi.— Lusby *v.* Kansas City, etc., R. Co., 73 Miss. 360, 19 So. 239, 36 L. R. A. 501.

New York.— Erie R. Co. *v.* Steward, 170 N. Y. 172, 63 N. E. 118 [*affirming* 61 N. Y. App. Div. 480, 70 N. Y. Suppl. 698]; People *v.* New York, etc., R. Co., 45 Barb. 73, 26 How. Pr. 44; Mason *v.* Brooklyn City, etc., R. Co., 35 Barb. 373; Hudson, etc., Canal Co. *v.* New York, etc., R. Co., 9 Paige 323.

Ohio.— Little Miami R. Co. *v.* Naylor, 2 Ohio St. 235, 59 Am. Dec. 667; Moorhead *v.* Little Miami R. Co., 17 Ohio 340; Chapman *v.* Mad River, etc., R. Co., 1 Ohio Dec. (Reprint) 565, 10 West. L. J. 399.

Pennsylvania.— Neal *v.* Pittsburg, etc., R. Co., 2 Grant 137; Lippincott *v.* Mine Hill, etc., R. Co., 2 Leg. Chron. 310.

See 41 Cent. Dig. tit. "Railroads," § 123.

The effect of a designation by the directors of the line of the road is the same as if it had been specifically designated in the charter, and where the company has located the line between its terminal points it is concluded by that location and no change of route can thereafter be made without legislative authority. Erie R. Co. *v.* Steward, 170 N. Y. 172, 63 N. E. 118 [*affirming* 61 N. Y. App. Div. 480, 70 N. Y. Suppl. 698].

The successor of one railroad company can-

stitutes a location within the application of the rule.[93] A mere survey not adopted by the directors of the company is not a location which will prevent a subsequent survey and adoption of a different route,[94] and a mere shifting of the position of the tracks within the limits of the right of way is not a change of location.[95] So also if the first location as shown by the map filed is not such as is authorized by the charter of the company it cannot control the charter and will not prevent a second location which is so authorized,[96] and contracting for the construction of a road upon a particular route will not prevent the company from changing the route if it has never been actually adopted by the directors of the company in the manner prescribed.[97] The authorities are practically uniform to the effect that after the road has been located and actually constructed no change can be made without legislative authority,[98] even where the object of the change of location is to straighten curves and reduce grades, and if made would be a benefit to the public;[99] and while there is some conflict as to the right to change the location after it has been selected but before the road is constructed, the better rule would seem to be that after a particular location has been definitely adopted the company cannot, without legislative authority, change it merely from motives of convenience, expediency, or economy,[1] or to avoid an unsatisfactory assessment of damages;[2] but that such changes may be made as are necessary to correct errors in engineering or to avoid obstacles which would defeat or interfere with a proper construction of the road,[3] the railroad company being liable for the damages already actually sustained by landowners by reason of the prior location.[4] In some cases it has been held that no change can be made after the assessment of damages,[5] but that a change may be made after the adoption of a location and before the assessment;[6] and in others that it may be made after assess-

not change the location made by its predecessor without legislative authority. Brown *v.* Atlantic, etc., R. Co., 126 Ga. 248, 55 S. E. 24.

The construction of a connecting track between the line of one railroad and another for the purpose of exercising a right of passage over the latter road as secured by a lease is not a relocation of the main line of such road but is merely a side-track, the construction of which is included in the general power to build the road. Lake Shore, etc., R. Co. *v.* Baltimore, etc., R. Co., 149 Ill. 272, 37 N. E. 91.

93. See Williams *v.* Odessa, etc., R. Co., 7 Del. Ch. 303, 44 Atl. 821; Brown *v.* Atlantic, etc., R. Co., 126 Ga. 248, 55 S. E. 24.

94. Neal *v.* Pittsburgh, etc., R. Co., 2 Grant (Pa.) 137; Baldwin *v.* Hillsboro, etc., R. Co., 1 Ohio Dec. (Reprint) 546, 10 West. L. J. 356.

A resolution to locate on a particular survey may be reconsidered unless acts have been done giving rights under it and this may be done by the directors without any action on the part of the stock-holders of the company. Baldwin *v.* Hillshoro, etc., R. Co., 1 Ohio Dec. (Reprint) 546, 10 West. L. J. 356.

95. Chicago, etc., R. Co. *v.* Chicago, etc., R. Co., 211 Ill. 352, 71 N. E. 1017; Dougherty *v.* Wabash, etc., R. Co., 19 Mo. App. 419.

96. Mason *v.* Brooklyn City, etc., R. Co., 35 Barb. (N. Y.) 373.

97. Hudson, etc., Canal Co. *v.* New York, etc., R. Co., 9 Paige (N. Y.) 323; Baldwin *v.* Hillsboro, etc., R. Co., 1 Ohio Dec. (Reprint) 546, 10 West. L. J. 356.

98. Atlantic, etc., R. Co. *v.* Kirkland, 129 Ga. 552, 59 S. E. 220; Brown *v.* Atlantic, etc., R. Co., 126 Ga. 248, 55 S. E. 24; Leverett *v.* Middle Georgia, etc., R. Co., 96 Ga. 385, 24 S. E. 154; Cairo, etc., R. Co. *v.* Woodyard, 226 Ill. 331, 80 N. E. 882; State *v.* Mobile, etc., R. Co., 86 Miss. 172, 38 So. 732, 122 Am. St. Rep. 277; Lusby *v.* Kansas City, etc., R. Co., 73 Miss. 360, 19 So. 239, 36 L. R. A. 510 [*disapproving* Mississippi, etc., R. Co. *v.* Devaney, 42 Miss. 555, 2 Am. Rep. 608]; Little Miami R. Co. *v.* Naylor, 2 Ohio St. 235, 59 Am. Dec. 667; Moorhead *v.* Little Miami R. Co., 17 Ohio 340. *Compare Ex p.* South Carolina R. Co., 2 Rich. (S. C.) 434.

No matter how necessary the change of location may be it cannot be made after the road is constructed without legislative authority. Moorhead *v.* Little Miami R. Co., 17 Ohio 340.

99. Cairo, etc., R. Co. *v.* Woodyard, 226 Ill. 331, 80 N. E. 882.

1. Lusby *v.* Kansas City, etc., R. Co., 73 Miss. 360, 19 So. 235, 36 L. R. A. 510.

2. Beale *v.* Pennsylvania R. Co., 86 Pa. St. 509; Neal *v.* Pittsburgh, etc., R. Co., 31 Pa. St. 19. But see Gear *v.* Dubuque, etc., R. Co., 20 Iowa 523, 89 Am. Dec. 550.

3. Hagner *v.* Pennsylvania, etc., R. Co., 154 Pa. St. 475, 25 Atl. 1082.

4. Mahaska County R. Co. *v.* Des Moines Valley R. Co., 28 Iowa 437; Gear *v.* Dubuque, etc., R. Co., 20 Iowa 523, 89 Am. Dec. 550; Hagner *v.* Pennsylvania, etc., R. Co., 154 Pa. St. 475, 25 Atl. 1082.

5. Beale *v.* Pennsylvania R. Co., 86 Pa. St. 509; Neal *v.* Pittsburgh, etc., R. Co., 31 Pa. St. 19.

6. Hagner *v.* Pennsylvania St. R. Co., 154 Pa. St. 475, 25 Atl. 1082.

ment,[7] at any time before actual construction.[8] A railroad company may change the location of its road if expressly authorized to do so by a statutory or charter provision,[9] and the authority for such change need not be given in the charter or by an amendment thereto but may be given by a special enactment or general railroad law,[10] or it may be implied from a statute providing for the establishment and use of union depots.[11] Any conditions precedent imposed by the statute must be complied with,[12] and in some cases the statutes provide that changes of location within cities, towns, or villages shall not be made after the road is constructed without the consent of the municipal authorities.[13] Statutes authorizing changes in the location of railroads are strictly construed,[14] and if the authority is to change the location for certain causes or on certain conditions the right is limited accordingly.[15] So also a statute authorizing a change in the location

7. Williams *v.* Odessa, etc., R. Co., 7 Del. Ch. 303, 44 Atl. 821; Gear *v.* Dubuque, etc., R. Co., 20 Iowa 523, 89 Am. Dec. 550.

8. Mahaska County R. Co. *v.* Des Moines Valley R. Co., 28 Iowa 437; Gear *v.* Dubuque, etc., R. Co., 20 Iowa 523, 89 Am. Dec. 550.

9. Eel River, etc., R. Co. *v.* Field, 67 Cal. 429, 7 Pac. 814; Hewett *v.* St. Paul, etc., R. Co., 35 Minn. 226, 28 N. W. 255; *In re* New York, etc., R. Co., 88 N. Y. 279 [*affirming* 25 Hun 556]; Chapman *v.* Mad River, etc., R. Co., 1 Ohio Dec. (Reprint) 565, 10 West. L. J. 399.

Under a Massachusetts statute providing that any railroad company "after having taken land" for any portion of the road may vary the direction provided they do not locate any part thereof "without the limits prescribed by their act of incorporation," the filing of the location as required by statute is a taking of land, and the company may at any time within the time limited for the completion of the road file a new location which location need not be within the limits of the land previously taken but may be upon any route which the company was originally authorized to adopt between the designated termini. Boston, etc., R. Corp. *v.* Midland R. Co., 1 Gray (Mass.) 340.

Under the New York statute authorizing a railroad company by a vote of two thirds of its directors to change the location of the road a resolution adopting a new location through a specified county need not designate the exact line upon which the road is to be constructed. This may be done by subsequent proceedings. *In re* New York, etc., R. Co., 88 N. Y. 279 [*affirming* 25 Hun 556].

Under the Ohio statute authorizing the directors of a railroad to change the location or termini, but providing that no change shall be made which will involve the abandonment of the road either partly or completely constructed, it is held that where a company under its resolution for building a branch line had a discretion as to the location of its terminus and after building a track to certain mines established the terminal station about a mile from the end of such track that part of the track beyond the station was not a part of its line of road to which the statute applied but merely a spur or switch track. Mercantile Trust Co. *v.* Columbus, etc., R. Co., 90 Fed. 148.

Statute not authorizing change.— The general corporation law of New York providing for the correction of mistakes, informalities, and defects in articles of incorporation does not apply to amendments seeking to change the route of a railroad where no mistake in the original location is shown. Matter of Riverhead, etc., R. Co., 36 N. Y. App. Div. 514, 55 N. Y. Suppl. 938.

10. Dewey *v.* Atlantic Coast Line R. Co., 142 N. C. 392, 55 S. E. 292. See also McCartney *v.* Chicago, etc., R. Co., 112 Ill. 611.

11. Dewey *v.* Atlantic Coast Line R. Co., 142 N. C. 392, 55 S. E. 292.

12. Vail *v.* Morris, etc., R. Co., 21 N. J. L. 189 (holding that, under the New Jersey statute requiring that a change of location must be first approved by a suitable inspector, the certificate of whose appointment shall accompany the return of the alteration and be recorded with the secretary of state, any variation of the location as previously recorded is invalid if not accompanied by such certificate or recorded with the secretary of state); Matter of Riverhead, etc., R. Co., 36 N. Y. App. Div. 514, 55 N. Y. Suppl. 938 (holding that under the New York statute the filing of a certificate of the proposed change with a survey and map thereof in the office of the county clerk is an essential condition precedent which must be complied with).

13. Chattanooga, etc., R. Co. *v.* Warthen, 98 Ga. 599, 25 S. E. 988; North Missouri R. Co. *v.* Lackland, 25 Mo. 515; Erie R. Co. *v.* Steward, 170 N. Y. 172, 63 N. E. 118 [*affirming* 61 N. Y. App. Div. 480, 70 N. Y. Suppl. 698].

The North Carolina statute prohibiting changes in railroad routes in cities except with the sanction of a two-thirds vote of the aldermen is held to apply only where the railroad company of its own volition contemplates a change of route and not where the change is required by order of the corporation commission acting within its legislative authority. Dewey *v.* Atlantic Coast Line R. Co., 142 N. C. 392, 55 S. E. 292.

14. Brown *v.* Atlantic, etc., R. Co., 126 Ga. 248, 55 S. E. 24.

15. Brown *v.* Atlantic, etc., R. Co., 126 Ga. 248, 55 S. E. 24; Moorhead *v.* Little Miami R. Co., 17 Ohio 340; Works *v.* Junction R. Co., 30 Fed. Cas. No. 18,046, 5 McLean 425.

or route of a railroad does not authorize a change in the road after it has been constructed,[16] and a statute authorizing a railroad company after beginning the construction of its road to make all necessary changes in its course or direction does not authorize any change after the road is completed,[17] nor will a mere prohibition against making any change of location within a town or city after the road has been constructed impliedly authorize a change of location after construction at points outside of a town or city;[18] but where a railroad company is authorized to change the route of the road it seems that such change may be made at any time before construction,[19] and a change of location may be made after the road is constructed under an authority to change the location of and "reconstruct" the road,[20] or to acquire such lands as the company might find necessary for the site of the road "or to vary the plans thereof;"[21] and where a railroad company is authorized to change the location after construction a limitation upon the time for the completion of the construction of the road applies only to the original construction and will not prevent a relocation.[22] Where a change of location is authorized on account of difficulty of construction it may be made after the road has been partly constructed at any time before its construction is complete at the place where the change is made,[23] but not after the road is finally completed.[24]

b. On Application of Landowner. In New York the statute requires a railroad company to make and file a map or profile of the proposed location of its road and give notice thereof to every occupant of land through which the route passes;[25] and within fifteen days after such notice any owner or occupant of such lands aggrieved by the proposed location may apply to a justice of the supreme court for the appointment of commissioners to examine the route proposed by the railroad company and the substitute therefor suggested by the petitioner.[26] No owner or occupant can make the application except one whose lands have not been acquired by the railroad company and after the service on him of the notice provided for,[27] and the court cannot appoint the commission until the fifteen days allowed for the filing of such petitions has elapsed,[28] and all persons entitled to notice of the application have been served.[29] The justice to whom the appli-

16. Brown *v.* Atlantic, etc., R. Co., 126 Ga. 248, 55 S. E. 24; Little Miami R. Co. *v.* Naylor, 2 Ohio St. 235, 59 Am. Dec. 667; Moorhead *v.* Little Miami R. Co., 17 Ohio 340, in each of which cases the wording of the statute or the causes specified as authorizing the change was held to show a legislative intent that the change should be made only before the construction of the road.

17. State *v.* Mobile, etc., R. Co., 86 Miss. 172, 38 So. 732, 122 Am. St. Rep. 277.

18. Brown *v.* Atlantic, etc., R. Co., 126 Ga. 248, 55 S. E. 24.

19. Northern Missouri R. Co. *v.* Lackland, 25 Mo. 515, holding that the change may be made after instituting condemnation proceedings and before a final judgment therein.

20. Hewett *v.* St. Paul, etc., R. Co., 35 Minn. 226, 28 N. W. 255.

21. *Ex p.* South Carolina R. Co., 2 Rich. (S. C.) 434.

22. Hewett *v.* St. Paul, etc., R. Co., 35 Minn. 226, 28 N. W. 255.

23. Atkinson *v.* Marietta, etc., R. Co., 15 Ohio St. 21.

24. Moorhead *v.* Little Miami R. Co., 17 Ohio 340.

25. Matter of Niagara Falls Hydraulic Power, etc., Co., 68 Hun (N. Y.) 391, 23 N. Y. Suppl. 31 [*affirmed* in 143 N. Y. 669, 39 N. E. 21].

26. Matter of Niagara Falls Hydraulic Power, etc., Co., 68 Hun (N. Y.) 391, 23 N. Y. Suppl. 31 [*affirmed* in 143 N. Y. 669, 39 N. E. 21]; Norton *v.* Wallkill Valley R. Co., 61 Barb. (N. Y.) 476, 42 How. Pr. 228.

Form of petition.— The petition for the appointment of commissioners must set out the objections of the petitioner to the route selected by the railroad company (People *v.* Tubbs, 59 Barb. (N. Y.) 401 [*affirmed* in 49 N. Y. 356]); and must be accompanied with a map and profile of the route designated by the company and of the proposed alteration thereof (Matter of Niagara Falls Hydraulic Power, etc., Co., 68 Hun (N. Y.) 391, 23 N. Y. Suppl. 31 [*affirmed* in 143 N. Y. 669, 39 N. E. 21]).

27. People *v.* Tubbs, 59 Barb. (N. Y.) 401 [*affirmed* in 49 N. Y. 356].

28. *In re* Long Island R. Co., 45 N. Y. 364.

29. *In re* Long Island R. Co., 45 N. Y. 364; People *v.* Lockport, etc., R. Co., 13 Hun (N. Y.) 211.

Notice to railroad company.— Under the original statute of 1850 it was held that no notice to the railroad company was necessary of the application to appoint commissioners,

cation is made cannot pass upon the merits of the case but merely appoint the commission,[30] one of whom must be a civil engineer.[31] All owners and occupants of land to be affected by the proposed location, as well as the railroad company, are entitled to notice of the proceedings and an opportunity to be heard.[32] The commissioners can only adopt the route proposed by the railroad company or the substitute proposed by the objecting party, and cannot reject both and select a different route.[33] The statute contemplates that one commission shall hear and determine all objections to the proposed location within the county;[34] but if the appointment of the first commission was premature and unauthorized and its proceedings void, a second commission may be appointed.[35] On appeal from the decision of the commissioners, the appellate court can consider only questions of law,[36] and cannot substitute its judgment for that of the commission as to the merits of the proposed routes;[37] and if errors of law have been committed, all that the appellate court can do is to send back the report.[38] If it appears that the commissioners have gone beyond the scope of their powers their decision will be set aside.[39]

c. Change of Termini.[40] Where a railroad company has once selected and made valid location of its termini it cannot change the location without legislative authority,[41] and an authority to change the location of the route of the road applies only to the route between the termini and does not authorize a change of the termini;[42] but a railroad company on constructing its road to or into a place named as a terminus may temporarily use a particular point as a terminal without losing the right to establish its permanent terminal at a different point within such

but only of the subsequent proceedings before them (Matter of Hartman, 9 Abb. Pr. N. S. (N. Y.) 124); but that a copy of the petition for the appointment of commissioners should be served upon the company as a part of the notice of the hearing (People *v.* Tubbs, 59 Barb. (N. Y.) 401 [*affirmed* in 49 N. Y. 506]); but under the statute as since amended a notice to the company of the application for the appointment of commissioners is required (see Matter of Niagara Falls Hydraulic Power, etc., Co., 68 Hun (N. Y.) 391, 23 N. Y. Suppl. 31 [*affirmed* in 143 N. Y. 669, 39 N. E. 21]).

Service of notice.— The statutory notice on an application for a change of the proposed route of a railroad must be personally served. People *v.* Lockport, etc., R. Co., 13 Hun (N. Y.) 211.

30. Norton *v.* Wallkill Valley R. Co., 61 Barb. (N. Y.) 476, 42 How. Pr. 228.

31. Matter of Niagara Falls Hydraulic Power, etc., Co., 68 Hun (N. Y.) 391, 23 N. Y. Suppl. 31 [*affirmed* in 143 N. Y. 669, 39 N. E. 21]; Norton *v.* Wallkill Valley R. Co., 61 Barb. (N. Y.) 476, 42 How. Pr. 228.

No change can be made without the concurrence of the civil engineer. *In re* Lake Shore, etc., R. Co., 89 N. Y. 442.

32. People *v.* Tubbs, 49 N. Y. 356 [*affirming* 59 Barb. 401]; *In re* Long Island R. Co., 45 N. Y. 364; Norton *v.* Wallkill Valley R. Co., 63 Barb. (N. Y.) 77.

Lands affected.— Where the center line of the railroad as proposed to be changed will pass within twelve feet of the land of a certain owner and within twenty feet of his dwelling-house he is a person affected by the proposed alteration and is entitled to notice and an opportunity to be heard. Norton *v.* Wallkill Valley R. Co., 63 Barb. (N. Y.) 77.

33. Matter of Niagara Falls Hydraulic Power, etc., Co., 68 Hun (N. Y.) 391, 23 N. Y. Suppl. 31 [*affirmed* in 143 N. Y. 669, 39 N. E. 21], holding, however, that the action of the commissioners in affirming the route proposed by the company on condition that it should narrow the right of way from four rods to twenty feet is not a violation of the statute.

The commissioners are not limited to the lands of the petitioner in making the location, but may and should make such location beyond his lands as are necessitated by the changes thereon so as to preserve and complete the continuity of the line. People *v.* Tubbs, 49 N. Y. 356 [*affirming* 59 Barb. 401].

34. People *v.* Tubbs, 49 N. Y. 356 [*affirming* 59 Barb. 401]; *In re* Long Island R. Co., 45 N. Y. 364.

35. *In re* Long Island R. Co., 45 N. Y. 364.

36. *In re* New York, etc., R. Co., 99 N. Y. 388, 2 N. E. 35; *In re* Lake Shore, etc., R. Co., 89 N. Y. 442.

37. Matter of Niagara Falls Hydraulic Power, etc., Co., 68 Hun (N. Y.) 391, 23 N. Y. Suppl. 31 [*affirmed* in 143 N. Y. 669, 39 N. E. 21].

38. *In re* Lake Shore, etc., R. Co., 89 N. Y. 442.

39. People *v.* Tubbs, 59 Barb. (N. Y.) 401 [*affirmed* in 49 N. Y. 356].

40. **Extension of road** beyond original termini see *supra*, IV, C, 3.

41. People *v.* Louisville, etc., R. Co., 120 Ill. 48, 10 N. E. 657; State *v.* Northern Pac. R. Co., (Minn. 1903) 95 N. W. 297; Atty.-Gen. *v.* West Wisconsin R. Co., 36 Wis. 466.

42. Atty.-Gen. *v.* West Wisconsin R. Co., 36 Wis. 466.

place.[43] The company may change the location of its termini if expressly authorized by statute to do so,[44] and a change within a particular place may be impliedly authorized by a statute providing for the construction and use of union depots.[45]

2. Abandonment of Location.[46] In the absence of any statutory provision on the subject the question as to whether a railroad company has abandoned a particular location is largely one of intention,[47] and in the absence of other facts showing such intention a mere lapse of time without constructing a railroad upon the location adopted will not constitute an abandonment thereof;[48] but a railroad company authorized to construct a single road cannot have more than one location in full force at the same time,[49] and if a company which has adopted one location subsequently adopts another it thereby abandons the former;[50] and if a railroad company is given an alternative right to construct a single railroad upon one of several specified routes its adoption of one constitutes an abandonment of the others.[51] A railroad company incorporated to construct a road between certain points has no right to abandon a portion of the chartered route and construct only the remainder,[52] nor in the absence of statutory authority can a railroad company after constructing its road upon a particular location abandon it and reconstruct the road upon another.[53] A railroad company may abandon a portion of its road after it has been constructed if authorized by statute to do so,[54] provided it complies with any conditions imposed by the statute.[55] In some

43. Georgia Cent. R. Co. *v.* Union Springs, etc., R. Co., 144 Ala. 639, 39 So. 473, 2 L. R. A. N. S. 144; Colorado Eastern R. Co. *v.* Union Pacific R. Co., 41 Fed. 293.

44. Memphis, etc., R. Co. *v.* Union R. Co., 116 Tenn. 500, 95 S. W. 1019, holding that under an authority to "change either terminus of its line of railroad at any time before the final location of the same" a company which having started at one terminus and located and acquired the right of way for a part of its line but which has in no manner located the remainder of the line may change the other terminus.

45. State *v.* St. Louis, etc., R. Co., 3 Mo. App. 180; Dewey *v.* Atlantic Coast Line R. Co., 142 N. C. 392, 55 S. E. 292.

46. **Loss, abandonment, or forfeiture of right of way** or other interests in lands see *infra*, V, L.

47. Stannard *v.* Aurora, etc., R. Co., 220 Ill. 469, 77 N. E. 254; Townsend *v.* Michigan Cent. R. Co., 101 Fed. 757, 42 C. C. A. 570.

48. Stannard *v.* Aurora, etc., R. Co., 220 Ill. 469, 77 N. E. 254; Kansas City, etc., R. Co. *v.* Kansas City, etc., R. Co., 129 Mo. 62, 31 S. W. 451; Pittsburgh, etc., R. Co. *v.* Pittsburgh, etc., R. Co., 159 Pa. St. 331, 28 Atl. 155; Townsend *v.* Michigan Cent. R. Co., 101 Fed. 757, 42 C. C. A. 570.

A failure to keep the line staked after the survey and to begin construction for five years is not sufficient to establish an abandonment of the location. Pittsburgh, etc., R. Co. *v.* Pittsburgh, etc., R. Co., 159 Pa. St. 331, 28 Atl. 155.

49. Hagner *v.* Pennsylvania, etc., R. Co., 154 Pa. St. 475, 25 Atl. 1082.

50. Hagner *v.* Pennsylvania, etc., R. Co., 154 Pa. St. 475, 25 Atl. 1082; Stacey *v.* Vermont Cent. R. Co., 27 Vt. 39.

51. Louisville, etc., R. Co. *v.* Louisville City R. Co., 2 Duv. (Ky.) 175, holding that in such a case the railroad company cannot enjoin another company from subsequently adopting and constructing a railroad upon one of the routes abandoned or claim compensation for such use.

52. Kansas City Interurban R. Co. *v.* Davis, 197 Mo. 669, 95 S. W. 881, 114 Am. St. Rep. 790; Dumvile *v.* Birkenhead, etc., Junction R. Co., 12 Beav. 444, 50 Eng. Reprint 1130; Cohen *v.* Wilkinson, 12 Beav. 125, 138, 13 Jur. 641, 18 L. J. Ch. 378, 411, 5 R. & Can. Cas. 741, 50 Eng. Reprint 1008, 1013.

Remedies see *infra*, IV, E, 3.

53. Atlantic, etc., R. Co. *v.* Kirkland, 129 Ga. 552, 59 S. E. 220; Brown *v.* Atlantic, etc., R. Co., 126 Ga. 248, 55 S. E. 24; State *v.* Mobile, etc., R. Co., 86 Miss. 172, 38 So. 732, 122 Am. St. Rep. 277; Lusby *v.* Kansas City, etc., R. Co., 73 Mo. 360, 19 So. 239, 36 L. R. A. 510.

Right to change location see *supra*, IV, E, 1.

54. Northern R. Co. *v.* Manchester, etc., R. Co., 66 N. H. 560, 31 Atl. 17, where two railroad companies were authorized to unite their roads and to discontinue such portions of either as were unnecessary by reason of the union.

55. Williams *v.* Flint, etc., R. Co., 116 Mich. 392, 74 N. W. 641.

In Michigan the statute of 1891 provides that upon the abandonment of a road or portion thereof all parties who have contributed to the construction of the discontinued road shall be entitled to have refunded the amount of their contribution with interest (*In re* Flint, etc., R. Co., 105 Mich. 289, 63 N. W. 303; Flint, etc., R. Co. *v.* Rich, 91 Mich. 293, 51 N. W. 1001); and the statute not providing any method for ascertaining who are claimants and bringing them before the court it is held that while all claimants are entitled to notice and opportunity to be heard

jurisdictions railroad commissioners have jurisdiction to prevent a railroad company from abandoning a portion of its road,[56] but the enforcement of their orders by the court will depend upon whether under the circumstances they are equitable and just.[57]

3. Remedies and Proceedings.[58] A railroad company may be restrained by injunction from making an unauthorized change of location,[59] and any person who will sustain a special injury by such change which is of an irreparable character or cannot be adequately compensated in damages may maintain the suit.[60] Where a railroad company has made an unauthorized change of location it will be liable for a resulting injury to property caused by the new location, although such location does not actually touch plaintiff's property.[61] Where a location has been surveyed and adopted the question of abandonment can be raised only by the state and not by a rival company seeking to appropriate the same location.[62] Where a railroad company is authorized by statute to change its route it cannot be compelled to bridge or fill up a cut on the abandoned location if the statute authorizing the change did not impose such condition.[63] Where a company authorized to construct a certain line of railroad resolves to abandon a portion of the authorized route and construct a road only upon the remainder, a landowner may resist the condemnation of his land for such purpose,[64] or if done by the directors without the consent of the stock-holders the latter may sue to enjoin such action or the application of funds of the corporation to such purpose,[65]

notice by publication is sufficient and that claims must be seasonably presented for adjudication or be forever barred (Williams *v.* Flint, etc., R. Co., 116 Mich. 392, 74 N. W. 641).

56. Railroad Com'rs *v.* Kansas City Southern R. Co., 111 La. 133, 35 So. 487, holding that under the Louisiana constitution the railroad commission can prevent the removal or abandonment of a spur track already constructed and in which the public is interested but that in the particular case the track was not in such use as rendered it improper for the company under the circumstance to remove it.

57. State *v.* Des Moines, etc., R. Co., 84 Iowa 419, 51 N. W. 38, holding that where a railroad company having constructed a road into a certain place subsequently abandoned six miles of track and ran its trains into such place over a leased line running parallel with the track abandoned and the service so furnished was adequate and the cost of restoring and maintaining the abandoned track would be a great burden upon the company without substantial benefits to the public an order of the railroad commissioners for its restoration and maintenance was, under the circumstances, unreasonable and would not be enforced.

58. Application for change of location by a landowner and proceeding thereunder see *supra*, IV, E, 1, b.

59. Brown *v.* Atlantic, etc., R. Co., 126 Ga. 248, 55 S. E. 24.

60. Atlantic, etc., R. Co. *v.* Kirkland, 129 Ga. 552, 59 S. E. 220; Brown *v.* Atlantic, etc., R. Co., 126 Ga. 248, 55 S. E. 24.

The citizens of a town which was designated by the legislature as one of the objective points on the railroad may enjoin a change of location which would side-track the town, although the company leaves a spur track leading thereto from the main line as relocated. Leverett *v.* Middle Georgia, etc., R. Co., 96 Ga. 385, 24 S. E. 154.

61. Little Miami R. Co. *v.* Naylor, 2 Ohio St. 235, 59 Am. Dec. 667.

62. Pittsburgh, etc., R. Co. *v.* Pittsburgh, etc., R. Co., 159 Pa. St. 331, 28 Atl. 155.

63. Alabama, etc., R. Co. *v.* Brandon, (Miss. 1893) 14 So. 438.

64. Kansas City Interurban R. Co. *v.* Davis, 197 Mo. 669, 95 S. W. 881, 114 Am. St. Rep. 790.

65. Dumvile *v.* Birkenhead, etc., Junction R. Co., 12 Beav. 444, 50 Eng. Reprint 1130; Hodgson *v.* Powers, 12 Beav. 392, 529, 14 Jur. 906, 965, 19 L. J. Ch. 356, 418, 50 Eng. Reprint 1111, 1163; Cohen *v.* Wilkinson, 12 Beav. 125, 138, 13 Jur. 641, 18 L. J. Ch. 378, 411, 5 R. & Can. Cas. 741, 50 Eng. Reprint 1008, 1013.

Discretion of court.— If the work has been partly completed circumstances may be shown which will induce the court not to interfere by injunction (see Hodgson *v.* Powers, 12 Beav. 392, 529, 14 Jur. 906, 965, 19 L. J. Ch. 418, 50 Eng. Reprint 1111, 1163); or the court may properly refuse to interfere on the ground of acquiescence on the part of plaintiff (Graham *v.* Birkenfeld, 2 Hall & T. 450, 47 Eng. Reprint 1760, 14 Jur. 494, 24 L. J. Ch. 445, 2 Macn. & G. 147, 48 Eng. Ch. 146, 42 Eng. Reprint 57 [*modifying* 12 Beav. 460, 50 Eng. Reprint 1136]); and where, on the hearing of an application for injunction to restrain the construction of only a part of the road, it appeared that since the filing of the bill the whole undertaking had been abandoned, the court, while of the opinion that if the case had remained as it was at the time of filing the bill an injunction should have been granted, refused it on the ground that such relief was unnecessary by reason of the

unless such stock-holders have lost their right to equitable relief by laches or acquiescence.[66]

F. Conflicting Locations — 1. In General. In the case of conflicting grants of a specific location to different companies, the prior grant will control;[67] but if no specific route is granted to either of two companies, no right to any particular route accrues to either until it has determined upon a location.[68] In such cases where the exact route is to be selected by the company, the prior right will attach to that company which first definitely locates its line,[69] without regard to the dates of their respective charters,[70] or dates of entry upon the property or preliminary surveys or work of construction;[71] and in the absence of statutory regulations to the contrary, the first location belongs to the company which first defines and marks out its route and adopts the same for its permanent location by authoritative corporate action.[72] To constitute a valid location for such purpose a mere preliminary survey is not sufficient,[73] but there must be an adoption of a particular line or survey as a corporate act of the company itself;[74] and if after such survey but before its adoption another company surveys and adopts the same location, the latter company will acquire the prior right thereto.[75] While

alteration in the existing circumstances (Logan *v.* Courtown, 13 Beav. 22, 20 L. J. Ch. 347).

66. Graham *v.* Birkenhead, etc., R. Co., 2 Hall & T. 450, 47 Eng. Reprint 1760, 14 Jur. 494, 20 L. J. Ch. 445, 2 Macn. & G. 146, 48 Eng. Ch. 146, 42 Eng. Reprint 57.

67. See Chesapeake, etc., Canal Co. *v.* Baltimore, etc., R. Co., 4 Gill & J. (Md.) 1; Morris, etc., R. Co. *v.* Blair, 9 N. J. Eq. 635.

68. Morris, etc., R. Co. *v.* Blair, 9 N. J. Eq. 635.

69. *New Jersey.*— Morris, etc., R. Co. *v.* Blair, 9 N. J. Eq. 635.

New York.— Rochester, etc., R. Co. *v.* New York, etc., R. Co., 110 N. Y. 128, 17 N. E. 680 [*affirming* 44 Hun 206].

North Carolina.— Fayetteville St. R. Co. *v.* Aberdeen, etc., R. Co., 142 N. C. 423, 55 S. E. 345.

Pennsylvania.— Williamsport, etc., R. Co. *v.* Philadelphia, etc., R. Co., 141 Pa. St. 407, 21 Atl. 645, 12 L. R. A. 220.

Vermont.—Barre R. Co. *v.* Montpelier, etc., R. Co., 61 Vt. 1, 17 Atl. 923, 15 Am. St. Rep. 877, 4 L. R. A. 785.

West Virginia.— Chesapeake, etc., R. Co. *v.* Deepwater R. Co., 57 W. Va. 641, 50 S. E. 890.

Wisconsin.— Milwaukee Light, etc., Co. *v.* Milwaukee Northern R. Co., 132 Wis. 313, 112 N. W. 663.

United States.— Denver, etc., R. Co. *v.* Alling, 99 U. S. 463, 25 L. ed. 438; Atlanta, etc., R. Co. *v.* Southern R. Co., 131 Fed. 657, 66 C. C. A. 601; Utah, etc., R. Co. *v.* Utah, etc., R. Co., 110 Fed. 879; Sioux City, etc., R. Co. *v.* Chicago, etc., R. Co., 27 Fed. 770.

See 41 Cent. Dig. tit. "Railroads," § 127.

70. Morris, etc., R. Co. *v.* Blair, 9 N. J. Eq. 635; Milwaukee Light, etc., Co. *v.* Milwaukee Northern R. Co., 132 Wis. 313, 112 N. W. 663.

71. Atlanta, etc., R. Co. *v.* Southern R. Co., 131 Fed. 657, 66 C. C. A. 601; Utah, etc., R. Co. *v.* Utah, etc., R. Co., 110 Fed. 879.

72. *North Carolina.*— Fayetteville St. R. Co. *v.* Aberdeen R. Co., 142 N. C. 423, 55 S. E. 345.

Pennsylvania.— Pittsburgh, etc., R. Co. *v.* Pittsburgh, etc., R. Co., 159 Pa. St. 331, 28 Atl. 155; Williamsport, etc., R. Co. *v.* Philadelphia, etc., R. Co., 141 Pa. St. 407, 21 Atl. 645, 12 L. R. A. 220.

West Virginia.— Chesapeake, etc., R. Co. *v.* Deepwater R. Co., 57 W. Va. 641, 50 S. E. 890.

Wisconsin.— Milwaukee Light, etc., Co. *v.* Milwaukee Northern R. Co., 132 Wis. 313, 112 N. W. 663.

United States.— Utah, etc., R. Co. *v.* Utah, etc., R. Co., 110 Fed. 879.

See 41 Cent. Dig. tit. "Railroads," § 127.

73. Morris, etc., R. Co. *v.* Blair, 9 N. J. Eq. 635; Williamsport, etc., R. Co. *v.* Philadelphia, etc., R. Co., 141 Pa. St. 407, 21 Atl. 645, 12 L. R. A. 220.

74. Williamsport, etc., R. Co. *v.* Philadelphia, etc., R. Co., 141 Pa. St. 407, 21 Atl. 645, 12 L. R. A. 220; Chesapeake, etc., R. Co. *v.* Deepwater R. Co., 57 W. Va. 641, 50 S. E. 890; Milwaukee Light, etc. Co. *v.* Milwaukee Northern R. Co., 132 Wis. 313, 112 N. W. 663; Utah, etc., R. Co. *v.* Utah, etc., R. Co., 110 Fed. 879.

Location by improper authority.— Under a statute imposing upon the president and directors of a railroad company the duty of locating its road, this duty cannot be delegated, and a location made by an executive committee is void as against a subsequent location on the same ground made by the directors of another company. Weidenfeld *v.* Sugar Run R. Co., 48 Fed. 615.

A survey followed by actual occupancy for purposes of construction is a final appropriation of a right of way granted by an act of congress and is good as against a company making a subsequent survey and seeking to occupy the same location. Denver, etc., R. Co. *v.* Alling, 99 U. S. 463, 25 L. ed. 438.

75. Morris, etc., R. Co. *v.* Blair, 9 N. J. Eq. 635; Williamsport, etc., R. Co. *v.* Philadelphia, etc., R. Co., 141 Pa. St. 407, 21 Atl.

ordinarily the requisites of a valid location as against another company consist in a preliminary survey followed by its adoption by the railroad company,[76] it seems that if there is a definite line or survey marked out which may be adopted, it is not material when or by whom it was made;[77] and so it has been held that a company may without a survey by engineers acquire a valid location as against another company by staking out a line upon the abandoned road-bed of another company,[78] or by adopting a survey made by promoters for the benefit of the company prior to its incorporation.[79] Where the statute or charter requires a railroad company before constructing its road or instituting condemnation proceedings to file a map or survey of its route, that company acquires the prior right which first selects and adopts a location and files the map or survey required,[80] but if the statute authorizes this to be done after the road is located or constructed, it is not essential to a valid location.[81] The institution of condemnation proceedings or acquisition of title to the property is not essential to a location,[82] and where priority of right has been secured by priority of location

645, 12 L. R. A. 220; Milwaukee Northern R. Co. *v.* Milwaukee Northern R. Co., 132 Wis. 342, 112 N. W. 672; Milwaukee Light, etc., Co. *v.* Milwaukee Northern R. Co., 132 Wis. 313, 112 N. W. 663; Utah, etc., R. Co. *v.* Utah, etc., R. Co., 110 Fed. 879. But see Cumberland R. Co. *v.* Pine Mountain R. Co., 96 S. W. 199, 28 Ky. L. Rep. 574, holding that a company which has begun at the end of its line and is proceeding with its survey and acquiring by purchase and condemnation the land along the route surveyed, although without any express action on the part of its directors affirming the same, has a prior right to the location as against another company which with notice of what has been done starts at an intermediate point and makes a survey along the same route and adopts it by action of its directors.

76. Williamsport, etc., R. Co. *v.* Philadelphia, etc., R. Co., 141 Pa. St. 407, 21 Atl. 645, 12 L. R. A. 220.

77. Morris, etc., R. Co. *v.* Blair, 9 N. J. Eq. 635; Chesapeake, etc., R. Co. *v.* Deepwater R. Co., 57 W. Va. 641, 50 S. E. 890; Milwaukee Light, etc., Co. *v.* Milwaukee Northern R. Co., 132 Wis. 313, 112 N. W. 663.

78. Fayetteville St. R. Co. *v.* Aberdeen, etc., R. Co., 142 N. C. 423, 55 S. E. 345.

79. Chesapeake, etc., R. Co. *v.* Deepwater R. Co., 57 W. Va. 641, 50 S. E. 890; Milwaukee Light, etc., Co. *v.* Milwaukee Northern R. Co., 132 Wis. 313, 112 N. W. 663. *Compare* New Brighton, etc., R. Co. *v.* Pittsburgh, etc., R. Co., 105 Pa. St. 13.

But the adoption does not relate back to the date of the preliminary survey made by the promoters of the company, and if prior to its adoption another company surveys and adopts the same location, the latter will secure a prior right thereto. New Brighton, etc., R. Co. *v.* Pittsburgh, etc., R. Co., 105 Pa. St. 13.

80. Morris, etc., R. Co. *v.* Blair, 9 N. J. Eq. 635; Barre R. Co. *v.* Montpelier, etc., R. Co., 61 Vt. 1, 17 Atl. 923, 15 Am. St. Rep. 877, 4 L. R. A. 785.

A survey may be adopted before the map is made if the map is made subsequently and filed before another company has done so. Morris, etc., R. Co. *v.* Blair, 9 N. J. Eq. 635.

Under the New York statute it is held that the mere filing of a map of the proposed route does not constitute a valid location as against another company, since notice thereof must be given to occupants of the lands through which it passes, upon whose application within a certain time the location may be reviewed by commissioners and changed (New York, etc., R. Co. *v.* New York, etc., R. Co., 11 Abb. N. Cas. 386); but that where the company has made and filed a map and survey of the route it intends to adopt and has given the required notice and no change is made in the location so designated as the result of any proceedings instituted by any owner or occupant of lands affected, it thereby acquires a right to construct its road upon such location which is exclusive as against any other railroad company (Rochester, etc., R. Co. *v.* New York, etc., R. Co., 110 N. Y. 128, 17 N. E. 680 [*affirming* 44 Hun 206]).

Under the Kentucky statute which requires the filing of a map of the route it is held that where one company has begun at the end of its route and is proceeding in an orderly way surveying its line, a second company cannot with notice of what has been done begin at an intermediate point and race with the first company in continuing the survey, and by first filing its map of the survey made acquire a prior right to the location as against the first company. Cumberland R. Co. *v.* Pine Mountain R. Co., 96 S. W. 199, 28 Ky. L. Rep. 574.

81. Fayetteville St. R. Co. *v.* Aberdeen, 142 N. C. 423, 55 S. E. 345; Chesapeake, etc., R. Co. *v.* Deepwater R. Co., 57 W. Va. 641, 50 S. E. 890; Milwaukee, etc., R. Co. *v.* Milwaukee Mountain R. Co., 132 Wis. 313, 112 N. W. 663.

82. Titusville, etc., R. Co. *v.* Warren, etc., R. Co., 12 Phila. (Pa.) 642; Chesapeake, etc., R. Co. *v.* Deepwater R. Co., 57 W. Va. 641, 50 S. E. 890; Milwaukee Light, etc., Co. *v.* Milwaukee Northern R. Co., 132 Wis. 313, 112 N. W. 663.

it cannot be defeated by a rival company agreeing with the owners and purchasing the property,[83] or instituting condemnation proceedings in advance of such proceedings by the company first completing its location,[84] for while the location does not give title as against the landowner, it fixes the prior right as between companies to acquire such title.[85] If a railroad company has marked out the line of its location it need not as against a rival company be exact as to the width of the right of way or other matters of mere detail,[86] such as the marks for grades, slopes, cuts, and fills necessary for the actual construction of the road,[87] and where a company has surveyed, marked out, and adopted its location, it is not necessary that it should maintain the stakes and keep them in position in order to hold such location against another company.[88] A railroad company may also prior to a survey of its entire line locate and hold as against another company a particular section or portion thereof,[89] so long as it proceeds in good faith and with reasonable diligence in the prosecution of the work contemplated by its organization.[90]

2. Remedies and Proceedings. As a general rule a court of equity will not interfere to protect an unlocated or indefinite right of way,[91] and a company which has merely made a preliminary survey but never adopted the same has no standing in equity to enjoin another company from surveying and adopting the same location;[92] but when one railroad company by first making a valid location has secured a prior right thereto, another railroad company will be enjoined from interfering therewith,[93] notwithstanding the latter company has expended a large

83. *New Jersey.*— Morris, etc., R. Co. *v.* Blair, 9 N. J. Eq. 635.

North Carolina.— Fayetteville St. R. Co. *v.* Aberdeen, etc., R. Co., 142 N. C. 423, 55 S. E. 345.

Pennsylvania.— Titusville, etc., R. Co. *v.* Warren, etc., R. Co., 12 Phila. 642.

Vermont.—Barre R. Co. *v.* Montpelier, etc., R. Co., 61 Vt. 1, 17 Atl. 923, 15 Am. St. Rep. 877, 4 L. R. A. 785.

United States.— Sioux City, etc., R. Co. *v.* Chicago, etc., R. Co., 27 Fed. 770.

See 41 Cent. Dig. tit. "Railroads," § 127.

An unrecorded agreement by the owner made prior to the recording of the first company's survey, but of which such company had no notice, to convey the land to a second company, does not give the deed executed in pursuance thereof but executed subsequently to such recording of the survey any priority over the rights of the first company. Barre R. Co. *v.* Montpelier, etc., R. Co., 61 Vt. 1, 17 Atl. 923, 15 Am. St. Rep. 877, 4 L. R. A. 785.

The effect of a conveyance to a rival company is merely to put such company in the position of any other landowner and liable to have the lands purchased taken by the company first locating its route upon making compensation therefor. Morris, etc., R. Co. *v.* Blair, 9 N. J. Eq. 635; Sioux City, etc., R. Co. *v.* Chicago, etc., R. Co., 27 Fed. 770.

84. Fayetteville St. R. Co. *v.* Aberdeen, etc., R. Co., 142 N. C. 423, 55 S. E. 345; Milwaukee Light, etc., R. Co. *v.* Milwaukee-Northern R. Co., 132 Wis. 313, 112 N. W. 663; Atlanta, etc., R. Co. *v.* Southern R. Co., 131 Fed. 657, 66 C. C. A. 601.

85. Fayetteville St. R. Co. *v.* Aberdeen, etc., R. Co., 142 N. C. 423, 55 S. E. 345; Sioux City, etc., R. Co. *v.* Chicago, etc., R. Co., 27 Fed. 770.

86. Chesapeake, etc., R. Co. *v.* Deepwater R. Co., 57 W. Va. 641, 50 S. E. 890. See also Pittsburgh, etc., R. Co. *v.* Pittsburgh, etc., R. Co., 159 Pa. St. 331, 28 Atl. 155.

87. Titusville, etc., R. Co. *v.* Warren, etc., R. Co., 12 Phila. (Pa.) 642; Wilkesbarre, etc., R. Co. *v.* Danville, etc., R. Co., 29 Leg. Int. (Pa.) 373.

88. Pittsburgh, etc., R. Co. *v.* Pittsburgh, etc., R. Co., 159 Pa. St. 331, 28 Atl. 155.

89. Chesapeake, etc., R. Co. *v.* Deepwater R. Co., 57 W. Va. 641, 50 S. E. 890. See also Denver, etc., R. Co. *v.* Alling, 99 U. S. 463, 25 L. ed. 438.

To deny this right would give a short railroad an immense advantage over a long one and make the location of a long line a very difficult feat to perform if rival companies were disposed to **obstruct** the work by the location of short lines along the same route. Chesapeake, etc., R. Co. *v.* Deepwater R. Co., 57 W. Va. 641, 50 S. E. 890.

90. Chesapeake, etc., R. Co. *v.* Deepwater R. Co., 57 W. Va. 641, 50 S. E. 890.

91. Marion County Lumber Co. *v.* Tilghman Lumber Co., 75 S. C. 220, 55 S. E. 337.

92. Williamsport, etc., R. Co. *v.* Philadelphia, etc., R. Co., 141 Pa. St. 407, 21 Atl. 645, 12 L. R. A. 220.

93. *Kentucky.*— Cumberland R. Co. *v.* Pine Mountain R. Co., 96 S. W. 199, 28 Ky. L. Rep. 574.

New York.— Rochester, etc., R. Co. *v.* New York, etc., R. Co., 110 N. Y. 128, 17 N. E. 680 [*affirming* 44 Hun 206].

North Carolina.— Fayetteville St. R. Co. *v.* Aberdeen, etc., R. Co., 142 N. C. 423, 55 S. E. 345.

sum of money in grading.[94] Such cases are, however, governed by the general rules relating to the granting of injunctions,[95] and a preliminary injunction will not ordinarily be granted where the right of plaintiff is not clear, as where the validity of its location is in dispute,[96] and it does not appear that any great or irreparable injury can result from denying an injunction until final hearing.[97]

G. Stations — 1. Location and Establishment.[98] The legislature may require the establishment and maintenance of stations at particular places either under the police power,[99] or a power reserved to repeal, alter, or amend a railroad charter;[1] and where a railroad company is required by statute to establish such stations as "shall be necessary" the courts may determine the question of necessity and require the establishment of a station at any place where such necessity is shown to exist;[2] but in the absence of statute railroad companies have a large discretion as to the location of their stations,[3] and it has been held that in the absence of statute the courts cannot compel a railroad company to establish a station at a particular place.[4] In some cases, however, it is held that this discretion is not arbitrary but is to be exercised with due regard to the interests of both the company and the public,[5] and that the court may require the establishment

Pennsylvania.— Titusville, etc., R. Co. *v.* Warren, etc., R. Co., 12 Phila. 642.

United States.— Atlanta, etc., R. Co. *v.* Southern R. Co., 131 Fed. 657, 66 C. C. A. 601; Utah, etc., R. Co. *v.* Utah, etc., R. Co., 110 Fed. 879; Weidenfeld *v.* Sugar Run R. Co., 48 Fed. 615.

Canada.— Ontario, etc., R. Co. *v.* Canadian Pac. R. Co., 14 Ont. 432; Montreal Park, etc., R. Co. *v.* Chateauguay, etc., R. Co., 13 Quebec K. B. 256.

See 41 Cent. Dig. tit. "Railroads," § 129.

A stock-holder of a company having a prior right to a location may sue to enjoin its appropriation by a rival company, where the officers and directors of the company having such prior right wrongfully and by collusion with the other company refuse to resist such appropriation. Weidenfeld *v.* Sugar Run R. Co., 48 Fed. 615.

The lapse of a railroad company's construction powers by expiration of the time limited in its charter for the completion of the road before the road is completed will not, if it has once utilized its construction powers and still remains in the use of its constructed work or any part of it, prevent the company from suing to enjoin the construction of a road on its location by a rival company, since the forfeiture of its construction powers may be waived by the state and cannot be invoked by any individual or other railroad company. Montreal Park, etc., R. Co. *v.* Chateauguay, etc., R. Co., 13 Quebec K. B. 256.

94. Titusville, etc., R. Co. *v.* Warren, etc., R. Co., 12 Phila. 642.

95. Utah, etc., R. Co. *v.* Utah, etc., R. Co., 110 Fed. 879. See also, generally, Injunctions, 22 Cyc. 746 *et seq.*

96. Utah, etc., R. Co. *v.* Utah, etc., R. Co., 110 Fed. 879. See also Kanawha, etc., R. Co. *v.* Glen Jean, etc., R. Co., 45 W. Va. 119, 30 S. E. 86.

97. New York, etc., R. Co. *v.* New York, etc., R. Co., 11 Abb. N. Cas. (N. Y.) 386.

98. **Duty of constructing and maintaining station houses,** depots, waiting rooms, and other accommodations and facilities incident thereto see *infra*, X, A, 1, d; X, B, 3, a.

99. State *v.* Kansas City, etc., R. Co., 32 Fed. 722.

Limitation of power.— While the legislature undoubtedly has the power to require the establishment of a station at a particular place, it is equally true that the power must be exercised reasonably and with due regard to the rights of the company, and as the legislature cannot confiscate or deprive the company of its property it cannot require it to establish and maintain a station at a point where it could be done only at a loss, and where the public convenience and necessity do not require it. Louisiana, etc., R. Co. *v.* State, 85 Ark. 12, 106 S. W. 960.

1. Com. *v.* Eastern R. Co., 103 Mass. 254, 4 Am. Rep. 555.

2. State *v.* Republican Valley R. Co., 18 Nebr. 512, 26 N. W. 205.

3. Florida Cent. R. Co. *v.* State, 31 Fla. 482, 13 So. 103, 34 Am. St. Rep. 30, 20 L. R. A. 419; Chicago, etc., R. Co. *v.* People, 222 Ill. 396, 78 N. E. 784; Chicago, etc., R. Co. *v.* People, 152 Ill. 230, 38 N. E. 562, 26 L. R. A. 224; Chicago, etc., R. Co. *v.* State, 74 Nebr. 77, 103 N. W. 1087; Northern Pac. R. Co. *v.* Washington Territory, 142 U. S. 492, 12 S. Ct. 283, 35 L. ed. 1092 [*reversing* 3 Wash. Terr. 303, 13 Pac. 604].

The exact location of a station should always be left to the discretion of the railroad company, subject only to the condition that it shall be so located as to be reasonably subservient to the convenience of the public to be accommodated thereby. Florida, etc., R. Co. *v.* State, 31 Fla. 482, 13 So. 103, 34 Am. St. Rep. 30, 20 L. R. A. 419.

4. Nashville, etc., R. Co. *v.* State, 137 Ala. 439, 34 So. 401; State *v.* Kansas City, etc., R. Co., 51 La. Ann. 200, 25 So. 126; Northern Pac. R. Co. *v.* Washington Territory, 142 U. S. 492, 12 S. Ct. 283, 35 L. ed. 1092 [*reversing* 3 Wash. Terr. 303, 13 Pac. 604].

5. Chicago, etc., R. Co. *v.* People, 222 Ill. 396, 78 N. E. 784; People *v.* Chicago, etc., R. Co., 130 Ill. 175, 22 N. E. 857.

of a station at a place where a failure on the part of the railroad company to establish one shows a manifest disregard of its duties to the public,[6] but that this discretion unless clearly abused will not be interfered with by the courts.[7] A railroad company is not necessarily obliged to establish a station at every town or village through which the road passes,[8] or at a place constituting a suburb of another larger place at which it maintains a station,[9] or in case it establishes a station at a certain place to establish it within the corporate limits of such place.[10] In one jurisdiction the power to require the establishment of stations at particular places is expressly vested by statute in the supreme court;[11] and where the legislature has invested no other tribunal with the power of locating railroad stations, the supreme court may determine the location of a union depot which the public good requires.[12] A statute prohibiting any depot or station within a certain distance of a particular place is not violated by stopping trains and taking on or letting off passengers within the prohibited limits.[13]

2. Contracts as to Location or Maintenance.[14] In some cases the question as to the location or maintenance of stations at particular places is governed by contract;[15] but a railroad company should always be free to locate and relocate

The rule in regard to the location of stations has been stated as follows: "The company can not be compelled, on the one hand, to locate stations at points where the cost of maintaining them will exceed the profits resulting therefrom to the company, nor allowed, on the other hand, to locate them so far apart as to practically deny to communities on the line of the road reasonable access to its use." Mobile, etc., R. Co. *v.* People, 132 Ill. 559, 24 N. E. 643, 22 Am. St. Rep. 556.

6. People *v.* Chicago, etc., R. Co., 130 Ill. 175, 22 N. E. 857.

7. Florida, etc., R. Co. *v.* State, 31 Fla. 482, 13 So. 103, 34 Am. St. Rep. 30, 20 L. R. A. 419; Chicago, etc., R. Co. *v.* People, 222 Ill. 396, 78 N. E. 784; Chicago, etc., R. Co. *v.* People, 152 Ill. 230, 28 N. E. 562, 26 L. R. A. 224; State *v.* Des Moines, etc., R. Co., 87 Iowa 644, 54 N. W. 461; Chicago, etc., R. Co. *v.* State, 74 Nebr. 77, 103 N. W. 1087.

8. Chicago, etc., R. Co. *v.* People, 152 Ill. 230, 38 N. E. 562, 26 L. R. A. 224.

9. Chicago, etc., R. Co. *v.* People, 152 Ill. 230, 38 N. E. 562, 26 L. R. A. 224.

10. Chicago, etc., R. Co. *v.* People, 152 Ill. 230, 38 N. E. 562, 26 L. R. A. 224.

The location of a union depot at the terminus of an important and much frequented street, two hundred and ten feet from the corporate line, within four blocks of the former depot in the city and within the police jurisdiction of the city, the location being ordered by the corporation commission, will not be restrained at the instance of citizens and property-owners because of its being beyond the city limits. Dewey *v.* Atlantic Coast Line R. Co., 142 N. C. 392, 55 S. E. 292.

11. *In re* Railroad Com'rs, 79 Vt. 266, 65 Atl. 82.

12. Concord, etc., R. Co. *v.* Boston, etc., R. Co., 67 N. H. 464, 41 Atl. 263, in which case it was conceded that the public good required a union depot in a certain city and it was desired by all of the railroad companies concerned, but they were unable to agree as to its location.

13. Eaton College *v.* Great Western R. Co., 3 Jur. 163, 1 R. & Can. Cas. 200.

14. Conditions in contracts of subscription in aid of road see *supra*, III, B, 3, c.

Conditions in conveyance of right of way see *infra*, V, G, 5.

15. St. Louis, etc., R. Co. *v.* Crandell, 75 Ark. 89, 86 S. W. 855, 112 Am. St. Rep. 42; Houston, etc., R. Co. Co. *v.* Molloy, 64 Tex. 607.

Performance or breach of contract.—A contract to locate a depot at a certain place within six months from the date of the contract is complied with by staking off the ground, building a platform, and actually using the premises for depot purposes within the time limited, although the depot is not erected within such time. Waldron *v.* Marcier, 82 Ill. 550. Where a company agrees to locate a depot at the nearest practicable point within one mile of the court house the word "practicable" is not synonymous with "possible" and the company is only bound to locate it at the nearest point within one mile at which it can be done at a reasonable cost with reference to all the circumstances and the objects and purposes of the contract. Wooters *v.* International, etc., R. Co., 54 Tex. 294. A contract to establish a depot "at" a specified town is complied with by locating it at a convenient distance from the business portion of the town and is controlled more by the buildings composing the town than by the corporate limits as defined in the terms of the charter. Frey *v.* Ft. Worth, etc., R. Co., 6 Tex. Civ. App. 29, 24 S. W. 950. Where a railroad company enters into a contract agreeing not to "build or allow but one other depot between" certain points, a station at a coal bank where trains stop only to take or leave cars for purposes connected with this trade is not a "depot" within the meaning of the contract. Mahaska County R. Co. *v.* Des Moines Valley R. Co., 28 Iowa 437.

Stations constructed by one company on land of another.— Where defendant company constructs, under agreement with plaintiff, a depot building on plaintiff's land for the joint

its stations according as the interests and necessities of the public require,[16] and the validity of contracts relating thereto is governed by considerations of public policy.[17]

3. Relocation, Removal, or Abandonment. The rule previously stated in regard to changing the location of a railroad [18] does not apply to the power of locating and changing the location of stations,[19] which from its very nature is a continuing one,[20] and in the absence of statute the duty of maintaining or continuing stations at particular places is governed largely by the same principles as relate to their original establishment and location.[21] The company cannot consult merely its own convenience but must consider its duties to the public;[22] but the mere fact that a station has been maintained at a particular place will not prevent a change of location,[23] and a change may be made if it is done in good faith with due regard to the interests of both the company and the public, and the new location furnishes proper accommodation to the public,[24] or under similar circumstances a company having two stations in the same place may discontinue the use of one of them.[25] In such cases where no improper motive or abuse of discretion is shown, the courts will not attempt to interfere with its exercise,[26]

use of both companies and the business increases so that it is not adequate for both, plaintiff has the right to resume possession after giving defendant ample time to remove its building with the right reserved to defendant to expropriate land of plaintiff for its depot in accordance with the rights of all parties. McCormick *v.* Louisiana, etc., R. Co., 109 La. 764, 33 So. 762.

16. Florida Cent. R. Co. *v.* State, 31 Fla. 482, 13 So. 103, 34 Am. St. Rep. 30, 20 L. R. A. 419; Mobile, etc., R. Co. v. People, 132 Ill. 559, 24 N. E. 643, 22 Am. St. Rep. 556.

17. Butler *v.* Tifton, etc., R. Co., 121 Ga. 817, 49 S. E. 763; Louisville, etc., R. Co. *v.* Sumner, 106 Ind. 55, 5 N. E. 404, 55 Am. Rep. 719; Texas, etc., R. Co. *v.* Robards, 60 Tex. 545, 48 Am. Rep. 268.

Validity of contracts.— While there is a conflict of authority as to the validity and enforceability of contracts to locate and maintain stations at particular places, the weight of authority is that such contracts are not void *per se* and that they are enforceable so long as they do not conflict or interfere with the duties of the railroad company to the public, but that where the rights of the public conflict with those of the contracting party under his contract the latter must yield, and that such contracts must be deemed to have been made with reference to such a contingency. Atlantic, etc., R. Co. *v.* Camp, 130 Ga. 1, 60 S. E. 177, 15 L. R. A. N. S. 594. See also, generally, Contracts, 9 Cyc. 499.

18. See *supra*, IV, E, 1.

19. Chicago, etc., R. Co. *v.* People, 222 Ill. 396, 78 N. E. 784; Mobile, etc., R. Co. *v.* People, 132 Ill. 559, 24 N. E. 643, 22 Am. St. Rep. 556.

The power of election in the location of the line of a railroad results from the franchise granted by the charter to exercise the right of eminent domain, and is therefore totally different from the power of locating stations which from its nature is a continuing one. Mobile, etc., R. Co. *v.* People, 132 Ill. 559, 24 N. E. 643, 22 Am. St. Rep. 556 [*distinguishing* People *v.* Louisville, etc., R. Co., 120 Ill. 48, 10 N. E. 657].

20. Chicago, etc., R. Co. *v.* People, 222 Ill. 396, 78 N. E. 784.

21. Chicago, etc., R. Co. *v.* People, 222 Ill. 396, 78 N. E. 784; Mobile, etc., R. Co. *v.* People, 132 Ill. 559, 24 N. E. 643, 22 Am. St. Rep. 556; Chicago, etc., R. Co. *v.* State, 74 Nebr. 77, 103 N. W. 1087; Northern Pac. R. Co. *v.* Washington Territory, 142 U. S. 492, 12 S. Ct. 283, 35 L. ed. 1092 [*reversing* 3 Wash. Terr. 303, 13 Pac. 604].

The company cannot be compelled to maintain or continue a station at a point where the welfare of the company and of the community in general require that it should be changed to some other point. Mobile, etc., R. Co. *v.* People, 132 Ill. 559, 24 N. E. 643, 22 Am. St. Rep. 556.

22. State *v.* Northern Pac. R. Co., 90 Minn. 277, 96 N. W. 81, holding that if the company has established and maintained a station at a place where there is a proper demand for one, it should not be permitted to abandon it or so change its location as to deprive the public at the old location of proper accommodations.

23. Chicago, etc., R. Co. *v.* People, 222 Ill. 396, 78 N. E. 784.

24. Chicago, etc., R. Co. *v.* People, 222 Ill. 396, 78 N. E. 784; Mobile, etc., R. Co. *v.* People, 132 Ill. 559, 24 N. E. 643, 22 Am. St. Rep. 556; State *v.* Des Moines, etc., R. Co., 87 Iowa 644, 54 N. W. 461; State *v.* Alabama, etc., R. Co., 68 Miss. 653, 9 So. 469.

Equality in convenience and facilities at the new location is not necessarily essential in order to justify a change of location. Reasonableness and not equality is the proper test. Chicago, etc., R. Co. *v.* People, 222 Ill. 396, 78 N. E. 784.

25. Chicago, etc., R. Co. *v.* People, 222 Ill. 396, 78 N. E. 784.

26. Chicago, etc., R. Co. *v.* People, 222 Ill. 396, 78 N. E. 784; State *v.* Des Moines,

and although it appears that the original change of location was improper, the court will not require the reëstablishment of a station at its original location after conditions have so changed that the general public is better accommodated by the new location and the conditions do not warrant the maintenance of a station at both places.[27] The right to change the location of a station in a particular case cannot be controlled or prevented by contract,[28] or by the fact that private citizens in the expectation of the continuance of a station at a particular place have made donations of land or money to the railroad company,[29] or purchased property or established business enterprises in the vicinity of the original location.[30] In some cases the statutes prohibit the abandonment of a station without the consent of the railroad commissioners,[31] or the consent of the legislature;[32] but statutory provisions prohibiting the abandonment of a station without legislative authority and permitting a change of location with the permission of the railroad commissioners and the municipal authorities of the place where the station is located are not necessarily conflicting,[33] and it is not an abandonment of a station to change its location from one point to another in the same vicinity,[34] or to consolidate two stations in the same vicinity into one by relocating each at a single intermediate point, although the number of stations is thereby reduced.[35]

4. Powers and Proceedings of Railroad Commissioners. In some jurisdictions the regulation of questions relating to the establishment, location, maintenance, removal, or abandonment of stations is vested by statute to a greater or less extent in boards of railroad commissioners,[36] whose orders are reviewable by the

etc., R. Co., 87 Iowa 644, 54 N. W. 461; Chicago, etc., R. Co. *v.* State, 74 Nebr. 77, 103 N. W. 1087.

Agents at stations.—A railroad company will not be required to continue the service of a station agent at an unincorporated village of only forty persons, where the business does not justify the expense and the stoppage of trains is not discontinued, and there are other regular stations within a few miles of the place in question. Chicago, etc., R. Co. *v.* State, 74 Nebr. 77, 103 N. W. 1087.

27. Northern Pac. R. Co. *v.* Washington Territory, 142 U. S. 492, 12 S. Ct. 283, 35 L. ed. 1092 [*reversing* 3 Wash. Terr. 303, 13 Pac. 604].

28. Chicago, etc., R. Co. *v.* People, 222 Ill. 396, 78 N. E. 784; Mobile, etc., R. Co. *v.* People, 132 Ill. 559, 24 N. E. 643, 22 Am. St. Rep. 556.

29. Mobile, etc., R. Co. *v.* People, 132 Ill. 559, 24 N. E. 643, 22 Am. St. Rep. 556.

30. Chicago, etc., R. Co. *v.* People, 222 Ill. 396, 78 N. E. 784.

31. See *infra*, IV, G, 4.

32. Atty.-Gen. *v.* Eastern R. Co., 137 Mass. 45.

33. Cunningham *v.* Railroad Com'rs, 158 Mass. 104, 32 N. E. 959.

No general rule of law can be laid down applicable to all cases as to what change of a station will constitute an abandonment or a relocation. Every relocation of a station involves in one sense an abandonment of the old station, but it was not the intention of the legislature to prohibit all changes in the location of stations. Atty.-Gen. *v.* Eastern R. Co., 137 Mass. 45.

34. Atty.-Gen. *v.* Eastern R. Co., 137 Mass. 45.

35. Cunningham *v.* Railroad Com'rs, 158 Mass. 104, 32 N. E. 959.

36. See the statutes of the several states; and the following cases:

Alabama.— Nashville, etc., R. Co. *v.* State, 137 Ala. 439, 34 So. 401.

Louisiana.— Morgan's Louisiana, etc., R., etc., Co. *v.* Railroad Com'rs, 109 La. 247, 33 So. 214.

Mississippi.— State *v.* Yazoo, etc., R. Co., 87 Miss. 679, 40 So. 263; State *v.* Mobile, etc., R. Co., 86 Miss. 172, 38 So. 732, 122 Am. St. Rep. 277.

Nebraska.— State *v.* Chicago, etc., R. Co., 19 Nebr. 476, 27 N. W. 434.

New York.— People *v.* Railroad Com'rs, 158 N. Y. 421, 53 N. E. 163 [*affirming* 32 N. Y. App. Div. 158, 52 N. Y. Suppl. 901].

Vermont.— *In re* Railroad Com'rs, 79 Vt. 266, 65 Atl. 82.

England.— Southeastern R. Co. *v.* Railway Com'rs, 6 Q. B. D. 586, 45 J. P. 388, 50 L. J. Q. B. 201, 44 L. T. Rep. N. S. 203.

See 41 Cent. Dig. tit. "Railroads," § 136.

Necessity for action by railroad commissioners.— Where railroad commissioners are vested with jurisdiction of such matters, any person seeking to compel any action on the part of the railroad company in regard to the establishment, location, or change of stations must first secure the action of the railroad commissioners before the court will grant a mandamus. State *v.* Chicago, etc., R. Co., 19 Nebr. 476, 27 N. W. 434.

Designating location of new station.— Under the Mississippi statute depots must be located with due regard to the interests of the railroad company and the public convenience, and the railroad commission may designate the location of a new station in case the site selected by the railroad officials is inconvenient or inaccessible. State *v.* Mobile, etc., R. Co., 86 Miss. 172, 38 So. 732, 122 Am. St. Rep. 277.

courts,[37] but will not be reversed unless clearly erroneous.[38] The powers and duties of these commissioners vary according to the provisions of the different statutes, and they can make only such orders as they are authorized to make by the statute,[39] which as to matters in derogation of the common-law rights of railroad companies will be strictly construed.[40] In some cases the statutes expressly provide that a railroad company shall not abolish or abandon a station or one which has been maintained for a certain length of time without the consent of the railroad commissioners,[41] under which statutes the commissioners may authorize the discontinuance of a station,[42] or a change of location.[43] Railroad commissioners have no power or jurisdiction to enforce contracts between railroad companies and private individuals as to the maintenance of stations,[44] and on an application for permission to discontinue a station the existence of such contracts should not enter into or affect their determination.[45] So also on an

37. People *v.* Railroad Com'rs, 158 N. Y. 421, 53 N. E. 163 [*affirming* 32 N. Y. App. Div. 158, 52 N. Y. Suppl. 901].

38. Morgan's Louisiana, etc., R., etc., Co. *v.* Railroad Com'rs, 109 La. 247, 33 So. 214; People *v.* Railroad Com'rs, 32 N. Y. App. Div. 158, 52 N. Y. Suppl. 901 [*affirmed* in 158 N. Y. 421, 53 N. E. 163].

39. Nashville, etc., R. Co. *v.* State, 137 Ala. 439, 34 So. 401; State *v.* Yazoo, etc., R. Co., 87 Miss. 679, 40 So. 263; Railroad Com'rs *v.* Columbia, etc., R. Co., 26 S. C. 353, 2 S. E. 127; Southeastern R. Co. *v.* Railway Com'rs, 6 Q. B. D. 586, 45 J. P. 388, 50 L. J. Q. B. 201, 44 L. T. Rep. N. S. 203.

Powers of railroad commissioners.— Under the Alabama statutes prescribing the powers of railroad commissioners they have no power to require a railroad company to change the location of a station or to establish a station in a town of less than one thousand inhabitants, where the statute does not require the maintenance of a station. Nashville, etc., R. Co. *v.* State, 137 Ala. 439, 34 So. 401. The Mississippi statute authorizing the railroad commission to designate the location of any new station house where the site selected by the railroad company is inconvenient does not empower the commission to require a railroad company to maintain two separate depots for freight and for passengers in the same town. State *v.* Yazoo, etc., R. Co., 87 Miss. 679, 40 So. 263. Under the Vermont statutes the power of the railroad commissioners is limited to the making of additions, changes, and alterations in station buildings, where a station is already established, and the power of requiring the establishment of a station at a particular place is vested in the supreme court. *In re* Railroad Com'rs, 79 Vt. 266, 65 Atl. 82. Under the English statute the railway commissioners have no jurisdiction to order a railroad company to rebuild and reopen for passenger traffic a station which the company has lawfully closed and pulled down, the reasonable facilities for traffic which by section 2 of the Railway and Canal Traffic Act of 1854 a railway company is required to afford, having no application to stations that are not in use. Darlaston Local Bd. *v.* London, etc., R. Co., [1894] 2 Q. B. 694, 63 L. J. Q. B. 826, 71 L. T. Rep. N. S. 461, 8 R. & Can. Tr. Cas. 216, 9 Reports 712, 43 Wkly. Rep. 29 [*overruling* Winsford Local Bd. *v.* Cheshire Line Committee, 24 Q. B. D. 456, 59 L. J. Q. B. 372, 62 L. T. Rep. N. S. 268, 7 R. & Can. Tr. Cas. 72, 38 Wkly. Rep. 511].

40. State *v.* Yazoo, etc., R. Co., 87 Miss. 679, 40 So. 263.

41. State *v.* New Haven, etc., Co., 37 Conn. 153; State *v.* Mobile, etc., R. Co., 86 Miss. 172, 38 So. 732, 122 Am. St. Rep. 277; People *v.* Railroad Com'rs, 158 N. Y. 421, 53 N. E. 163 [*affirming* 32 N. Y. App. Div. 158, 52 N. Y. Suppl. 901].

What constitutes a station.— The word "station" as used in a statute forbidding a railroad company to abandon a station without the consent of the railroad commissioners does not apply to a mere platform at which certain trains sometimes stop to take on or leave passengers, but at which no office or agent is kept or tickets sold and which is not treated by the company as a station or designated as such upon its time-tables or lists of stations. State *v.* New Haven, etc., Co., 41 Conn. 134.

Changing the site of a depot from one place to another in the same town is not abolishing it within the meaning of a statute prohibiting the abolition or disuse of any depot when once established without the consent of the railroad commissioners. State *v.* Alabama, etc., R. Co., 68 Miss. 653, 9 So. 469.

Right of lessor to abolish station established by lessee.— Where on the expiration of a railroad lease the property reverts to the lessor, the latter is bound by the establishment of a station made by the lessee and cannot abandon such station except as provided by the statute with the approval of the railroad commissioners. State *v.* New Haven, etc., Co., 37 Conn. 153.

42. People *v.* Railroad Com'rs, 158 N. Y. 421, 53 N. E. 163 [*affirming* 32 N. Y. App. Div. 158, 52 N. Y. Suppl. 901].

43. Cunningham *v.* Railroad Com'rs, 158 Mass. 104, 32 N. E. 959; Atty.-Gen. *v.* Eastern R. Co., 137 Mass. 45.

44. People *v.* Railroad Com'rs, 158 N. Y. 421, 53 N. E. 163 [*affirming* 32 N. Y. App. Div. 158, 52 N. Y. Suppl. 901].

45. People *v.* Railroad Com'rs, 158 N. Y. 421, 53 N. E. 163 [*affirming* 32 N. Y. App. Div. 158, 52 N. Y. Suppl. 901].

application for permission to abandon a station the commissioners are only to determine the issue as to whether it shall be abandoned and cannot impose conditions.[46] The abandonment of a station with the consent of the railroad commissioners, as authorized by statute, and the construction of a new station at a different place, does not constitute a contract with the state which will prevent the legislature from subsequently requiring the reëstablishment of the station abandoned.[47] Where an order of the railroad commissioners is merely permissive to the company, nothing further is necessary to make it effective;[48] but if it is mandatory, requiring affirmative action on the part of the company, it may be enforced by the courts,[49] except as to matters concerning which the powers of the commissioners are merely advisory.[50] The courts will not enforce orders of the commissioners which are not within the powers conferred upon them,[51] or orders within the scope of their powers which under the circumstances of the particular case are unreasonable or unjust.[52]

5. Remedies and Proceedings. Where the right to such a relief is clear mandamus is a proper remedy to compel the railroad company to establish a station,[53] or to restore one which has been abandoned or removed from its former location,[54] as where abandoned without the consent of the railroad commissioners, as required by statute;[55] but in such cases the general rule applies that mandamus will not be granted unless the right to have the thing done which is sought is clearly established,[56] and the burden is upon the relator to prove a case authorizing the issuing of the writ.[57] So also mandamus will not be granted to enforce a private

46. Chester *v.* Connecticut Valley R. Co., 41 Conn. 348.

Order not objectionable as conditional.— Where a railroad company applies for permission to abandon two stations and establish a new station at an intermediate point, an order authorizing their abandonment when the new station is provided is not invalid as imposing a condition. State *v.* New Haven, etc., R. Co., 42 Conn. 56, holding that the provision as to the new station, although termed in the order a "condition," is merely a limitation as to the time when the order shall take effect.

47. State *v.* New Haven, etc., Co., 43 Conn. 351.

48. People *v.* Railroad Com'rs, 158 N. Y. 421, 53 N. E. 163 [*affirming* 32 N. Y. App. Div. 158, 52 N. Y. Suppl. 901].

49. People *v.* Delaware, etc., Canal Co., 32 N. Y. App. Div. 120, 52 N. Y. Suppl. 850 [*affirmed* in 165 N. Y. 362, 59 N. E. 138].

Under the South Carolina statute it is held that the railroad commissioners cannot maintain a suit to compel compliance with their orders, but that the remedy is by an action for the penalty prescribed by the statute, to be brought by the attorney-general upon the request of the railroad commissioners. Railroad Com'rs *v.* Columbia, etc., R. Co., 26 S. C. 353, 2 S. E. 127.

50. Nashville, etc., R. Co. *v.* State, 137 Ala. 439, 34 So. 401.

51. Nashville, etc., R. Co. *v.* State, 137 Ala. 439, 34 So. 401; State *v.* Yazoo, etc., R. Co., 87 Miss. 679, 40 So. 263.

52. State *v.* Des Moines, etc., R. Co., 87 Iowa 644, 54 N. W. 461; State *v.* Yazoo, etc., R. Co., 87 Miss. 679, 40 So. 263.

But an order is not unreasonable which requires the establishment of a station at a particular place where a demand for such station exists merely because the maintenance of that station will not be remunerative to the company, but regard should be had to the financial ability of the company in view of its entire business to establish and maintain such station. Morgan's Louisiana, etc., R., etc., Co. *v.* Railroad Com'rs, 109 La. 247, 33 So. 214.

53. People *v.* Chicago, etc., R. Co., 130 Ill. 175, 22 N. E. 857; State *v.* Republican Valley R. Co., 18 Nebr. 512, 26 N. W. 205, 17 Nebr. 647, 24 N. W. 329, 52 Am. St. Rep. 424.

54. State *v.* New Haven, etc., Co., 37 Conn. 153; State *v.* Northern Pac. R. Co., 90 Minn. 277, 96 N. W. 81.

55. State *v.* New Haven, etc., Co., 37 Conn. 153.

56. Chicago, etc., R. Co. *v.* People, 222 Ill. 396, 78 N. E. 784; Mobile, etc., R. Co. *v.* People, 132 Ill. 559, 24 N. E. 643, 22 Am. St. Rep. 556; State *v.* Kansas City, etc., R. Co., 51 La. Ann. 200, 25 So. 126; Chicago, etc., R. Co. *v.* State, 74 Nebr. 77, 103 N. W. 1087; Northern Pac. R. Co. *v.* Washington Territory, 142 U. S. 492, 12 S. Ct. 283, 35 L. ed. 1092 [*reversing* 3 Wash. Terr. 303, 18 Pac. 604]. See also, generally, Mandamus, 26 Cyc. 151.

A railroad company will not be required by mandamus, in the absence of statute, to establish new or additional stations where the cost of maintaining them would exceed the profits to the company, and the public is already reasonably provided for by the stations established. Chicago, etc., R. Co. *v.* People, 152 Ill. 230, 38 N. E. 562, 26 L. R. A. 224.

57. Mobile, etc., R. Co. *v.* People, 132 Ill. 559, 24 N. E. 643, 22 Am. St. Rep. 556.

contract relating to the establishment or maintenance of a station,[58] or to compel a railroad company to establish a station at a particular point within a certain town or city.[59] Where there is a valid contract in regard to the location or maintenance of a station an action may be maintained for damages for a breach thereof,[60] or to recover the value of the land conveyed as the consideration for the agreement.[61] But the specific performance of such contracts is discretionary with the court,[62] and performance will not be decreed when it will result in great hardship to the railroad company, without any considerable benefit to the other party,[63] or where the interests of the public would be prejudiced thereby,[64] or the terms of the contract are vague and indefinite.[65]

V. RIGHT OF WAY AND OTHER INTERESTS IN LAND.*

A. Capacity to Acquire and Hold Land — 1. IN GENERAL. In the absence of restrictions in its charter or governing statute a railroad company which is a properly going corporation [66] has power to acquire, hold, and use necessary real estate for the construction and maintenance of its road; [67] and generally this power is expressly given and regulated by statute.[68] This power is not exhausted

58. Florida, etc., R. Co. *v.* State, 31 Fla. 482, 13 So. 103, 34 Am. St. Rep. 30, 20 L. R. A. 419.

59. Florida, etc., R. Co. *v.* State, 31 Fla. 482, 13 So. 103, 34 Am. St. Rep. 30, 20 L. R. A. 419.

60. St. Louis, etc., R. Co. *v.* Crandell, 75 Ark. 89, 86 S. W. 855; Atlantic, etc., R. Co. *v.* Camp, 130 Ga. 1, 60 S. E. 177; Louisville, etc., R. Co. *v.* Sumner, 106 Ind. 55, 5 N. E. 404, 55 Am. St. Rep. 719; Texas, etc., R. Co. *v.* Robards, 60 Tex. 545, 48 Am. St. Rep. 268; Missouri, etc., R. Co. *v.* Daws, (Tex. Civ. App. 1896) 36 S. W. 497.

Measure of damages.— In an action by a landowner for breach of an agreement to build or maintain a station on or near his land the measure of damages is the difference between what the land would have been worth if the station had been built and what it is worth without the station (Louisville, etc., R. Co. *v.* Whipps, 87 S. W. 298, 27 Ky. L. Rep. 977; Brooklyn Hills Imp. Co. *v.* New York, etc., R. Co., 80 N. Y. App. Div. 508, 81 N. Y. Suppl. 187 [*affirmed* in 178 N. Y. 593, 70 N. E. 1096]); and if the evidence is conflicting and there is evidence that no actual damage has been sustained a verdict for nominal damages only will not be set aside as inadequate (Brooklyn Hills Imp. Co. *v.* N. Y., etc., R. Co., *supra*). When a person purchases land from a railroad company adjacent to its station under an agreement that the station shall be maintained at such place, he may, in case the station is removed, recover the depreciation in the value of his property and is entitled to show the diminution in rental value and injury to his hotel business but can recover only for such diminution as results from the removal of the station. Houston, etc., R. Co. *v.* Molloy, 64 Tex. 607.

Pleading.— In an action by a landowner for damages for failure to locate a station on plaintiff's land brought against the successor of the company with which the contract was made the complaint does not state a cause of action against defendant if it fails to allege any transaction with or acts establishing contractual relations between plaintiff and such company. Atlantic, etc., R. Co. *v.* Newman, 128 Ga. 281, 57 S. E. 514.

61. International, etc., R. Co. *v.* Dawson 62 Tex. 260.

62. Conger *v.* New York, etc., R. Co., 120 N. Y. 29, 23 N. E. 983.

63. Conger *v.* New York, etc., R. Co., 120 N. Y. 29, 23 N. E. 983.

64. Marsh *v.* Farbury, etc., R. Co., 64 Ill. 414, 16 Am. Rep. 564; Conger *v.* New York, etc., R. Co., 120 N. Y. 29, 23 N. E. 983.

65. Wilson *v.* Northampton, etc., Junction R. Co., L. R. 9 Ch. 279, 43 L. J. Ch. 503, 30 L. T. Rep. N. S. 147, 22 Wkly. Rep. 380.

66. Greenwood Lake, etc., R. Co. *v.* New York, etc., R. Co., 5 Silv. Sup. (N. Y.) 305, 8 N. Y. Suppl. 26 [*affirmed* in 134 N. Y. 335, 31 N. E. 874], holding that since a corporation organized under Gen. R. Act (2 Rev. St. 7th ed. p. 1569) ceases to exist within five years after its articles of association are filed, unless it begins the construction of its road, a grant to such a corporation ten years after its organization and before it has constructed any road conveys no title.

67. Blackburn *v.* Selma, etc., R. Co., 3 Fed. Cas. No. 1,467, 2 Flipp. 525; Reg. *v.* Smith, 43 U. C. Q. B. 369.

68. *Alabama.*— Georgia Pac. R. Co. *v.* Wilks, 86 Ala. 478, 6 So. 34, construing the act of March 8, 1876, which repealed the act of Dec. 29, 1868.

Illinois.— Lake St. El. R. Co. *v.* Carmichael, 184 Ill. 348, 56 N. E. 372 [*affirming* 82 Ill. App. 344].

New York.— Buffalo Pipe Line Co. *v.* New York, etc., R. Co., 10 Abb. N. Cas. 107, construing Laws (1850), c. 140, § 28, subd. 3, § 49.

* By Henry H. Skyles.

by the company's acquiring as much real estate as it at the time needs, but it may afterward acquire such additional property as its needs require.[69]

2. Foreign Railroad Companies. In accordance with the rules regulating the power of foreign or non-resident corporations generally, to acquire and hold land in another state,[70] a railroad company organized under the laws of one state may acquire and hold land for railroad purposes in another state, provided its charter and the governing laws of its state permit it to do so, and provided it is not prohibited from doing so by the laws of such other state.[71] This power, however, is subject to such conditions and restrictions as may be imposed by the laws of the latter state;[72] and a non-resident company may be prohibited from acquiring and holding land within the state unless it is specially authorized by the local legislature,[73] or becomes a corporation under the local laws.[74] But where a non-resident railroad company is not absolutely prohibited from acquiring and holding land within a state, but is required only to perform certain conditions, a conveyance to such a railroad company which has not complied with the statute is not void, but passes title as against the grantor and others, and can be attacked, if at all, only by the state;[75] and a title may be acquired by it by adverse posses-

Pennsylvania.— Jarden *v.* Philadelphia, etc., R. Co., 3 Whart. 502.

South Carolina.— South Carolina R. Co. *v.* Blake, 9 Rich. 228.

Texas.— Smail *v.* McMurphy, 11 Tex. Civ. App. 409, 32 S. W. 788.

See 41 Cent. Dig. tit. "Railroads," § 137.

Whether or not the limit of the amount of land that a railroad company may acquire for the construction and operation of its road has been overstepped is a proper subject of judicial investigation where the controversy before the court arises from an alleged encroachment by another railroad company; but every reasonable intendment must be made in favor of the corporation that was first to acquire title. Lake Shore, etc., R. Co. *v.* New York, etc., R. Co., 8 Fed. 858.

69. Chicago, etc., R. Co. *v.* Wilson, 17 Ill. 123 (holding that the power of acquiring land for work-shops is not exhausted by the apparent completion of the road if an increase of business demands more); South Carolina R. Co. *v.* Blake, 9 Rich. (S. C.) 228.

That a city grants a right of way in an alley to a railroad company does not prevent the company from acquiring by purchase a private right of way in addition thereto on lands adjoining the alley. Morgan *v.* Des Moines Union R. Co., 113 Iowa 561, 85 N. W. 902.

70. See, generally, Foreign Corporations, 19 Cyc. 1240 *et seq.*

71. Thompson *v.* Waters, 25 Mich. 214, 12 Am. Rep. 243; Myers *v.* McGavock, 39 Nebr. 843, 58 N. W. 522, 42 Am. St. Rep. 627; State *v.* Boston, etc., R. Co., 25 Vt. 433. But see Holbert *v.* St. Louis, etc., R. Co., 45 Iowa 23.

Real estate for debt.—A railroad company organized under the laws of the state of Indiana and competent to take the title to real estate therein in payment of or security for debts due it is competent to exercise the same powers in the state of Michigan, since the legislature of Michigan has not adopted any policy or enacted any statute which restricts the courts from applying the usual principles of comity to such corporation. Thompson *v.* Waters, 25 Mich. 214, 12 Am. Rep. 243.

Transfer by domestic to foreign company. — The fact that a railroad company, organized under the laws of one state and carrying on its business therein, has leased and transferred for the term of its corporate existence its road and business to a foreign railroad corporation, and that the latter has taken possession of the road and is managing and conducting the business thereof, does not prevent the domestic corporation from applying to acquire the title to lands necessary to be used in carrying on the business. *In re* New York, etc., R. Co., 35 Hun (N. Y.) 220 [*affirmed* in 99 N. Y. 12, 1 N. E. 27].

72. See Chattanooga, etc., R. Co. *v.* Evans, 66 Fed. 809, 14 C. C. A. 116.

73. Com. *v.* New York, etc., R. Co., 114 Pa. St. 340, 7 Atl. 756 (construing the act of April 26, 1855, section 5); New York, etc., R. Co. *v.* Young, 33 Pa. St. 175.

74. Chattanooga, etc., R. Co. *v.* Evans, 66 Fed. 809, 14 C. C. A. 116.

Under Nebr. Const. art. 11, § 8, no power of eminent domain or power to acquire a right of way or real estate for depot or other uses can be acquired by a foreign corporation unless it is organized as a corporation under the laws of Nebraska. Koenig *v.* Chicago, etc., R. Co., 27 Nebr. 699, 43 N. W. 423; Trester *v.* Missouri Pac. R. Co., 23 Nebr. 242, 36 N. W. 502; State *v.* Scott, 22 Nebr. 628, 36 N. W. 121.

75. Hanlon *v.* Union Pac. R. Co., 40 Nebr. 52, 58 N. W. 590; Chattanooga, etc., R. Co. *v.* Evans, 66 Fed. 809, 14 C. C. A. 116.

Under the Pennsylvania act of April 26, 1855, which forbids a foreign corporation to acquire and hold real estate, a deed of conveyance of land to such a company is not void but passes the title and a company may hold the land subject to the commonwealth's right of escheat. Hickory Farm Oil Co. *v.* Buffalo, etc., R. Co., 32 Fed. 22.

sion which will be good against all but the state.[76] But even where a non-resident company has power to hold land in the state, it cannot acquire it by eminent domain without the assent of the local legislature,[77] although this assent may be gathered by implication from a series of acts of the legislature.[78] A provision prohibiting a foreign corporation from acquiring land by condemnation proceedings does not prevent it from acquiring land by agreement with any citizen having the right to contract.[79]

3. Purposes For Which Land May Be Acquired.[80] Except in so far as restricted by its charter or governing statute,[81] a railroad company may acquire and hold such real estate as is reasonably necessary to enable it to carry out any purpose authorized by its charter; or in other words, it may acquire such real estate as is reasonably necessary to enable it to perform its corporate duties and functions in constructing and operating a railroad,[82] as for the construction of necessary appurtenances without which the road could not be successfully operated,[83] such as depot grounds and approaches,[84] freight platforms and warehouses,[85] car and engine houses,[86] water tanks,[87] repairing or work shops,[88] houses for bridge and switch tenders,[89] coal and wood yards;[90] or lands reasonably necessary to procure

76. Hanlon *v.* Union Pac. R. Co., 40 Nebr. 52, 58 N. W. 590.

77. Abbott *v.* New York, etc., R. Co., 145 Mass. 450, 15 N. E. 91; Gray *v.* St. Louis, etc., R. Co., 81 Mo. 126; St. Louis, etc., R. Co. *v.* Foltz, 52 Fed. 627. And see, generally, Eminent Domain, 15 Cyc. 573 *et seq.*

78. Abbott *v.* New York, etc., R. Co., 145 Mass. 450, 15 N. E. 91.

79. St. Louis, etc., R. Co. *v.* Foltz, 52 Fed. 627, construing Ark. Const. art. 12, § 11.

80. Purposes for which land may be taken by a railroad company by condemnation proceedings see Eminent Domain, 15 Cyc. 587 *et seq.*

81. Case *v.* Kelly, 133 U. S. 21, 10 S. Ct. 216, 33 L. ed. 513, holding that a railroad company cannot use lands for purposes not specified in the act of incorporation.

82. *Alabama.*—Morgan *v.* Donovan, 58 Ala. 241.

Connecticut.— Boston, etc., R. Co. *v.* Coffin, 50 Conn. 150.

Indiana.— Pfaff *v.* Terre Haute, etc., R. Co., 108 Ind. 144, 9 N. E. 93; Taber *v.* Cincinnati, etc., R. Co., 15 Ind. 459.

Missouri.— Pacific R. Co. *v.* Seely, 45 Mo. 212, 100 Am. Dec. 369.

United States.— Lake Shore, etc., R. Co. *v.* New York, etc., R. Co., 8 Fed. 858.

England.— Dodd *v.* Salisbury, etc., R. Co., 1 Giffard 158, 5 Jur. N. S. 782, 65 Eng. Reprint 867.

Canada.— *In re* Columbia, etc., R. Co., 8 Brit. Col. 415, for branch lines.

See 41 Cent. Dig. tit. "Railroads," § 139.

Presumption.— Under a provision that a railroad corporation may purchase such real estate as may be necessary for the construction of its road, it will be presumed that lands deeded to it are acquired for that purpose. Chouteau *v.* Missouri Pac. R. Co., 122 Mo. 375, 22 S. W. 458, 30 S. W. 299; Yates *v.* Van de Bogert, 56 N. Y. 526. The actual appropriation of land for such purposes by the successor of the company that acquired it, soon after such acquisition and continuously thereafter, affords a reasonable presumption that it was acquired for those purposes. Chouteau *v.* Missouri Pac. R. Co., *supra.* A railroad company, prior to the Indiana law of Jan. 20, 1852, authorizing railroad companies to receive lands in payment of subscriptions to stock, had no power primarily to acquire title to land other than for the immediate purposes of the road; and where defendants were estopped to deny that the company did acquire title to the land, it must be presumed that such title was acquired for such purposes. Taber *v.* Cincinnati, etc., R. Co., 15 Ind. 459.

83. Lawrence *v.* Morgan's Louisiana, etc., R., etc., Co., 39 La. Ann. 427, 2 So. 69, 4 Am. St. Rep. 265.

84. *Illinois.*— Carmody *v.* Chicago, etc., R. Co., 111 Ill. 69.

Missouri.— Hannibal, etc., R. Co. *v.* Muder, 49 Mo. 165.

Nevada.— Virginia, etc., R. Co. *v.* Elliott, 5 Nev. 358.

New Jersey.— State *v.* Mansfield Tp., 23 N. J. L. 510, 57 Am. Dec. 409.

New York.— New York, etc., R. Co. *v.* Kip, 46 N. Y. 546, 7 Am. Rep. 385.

North Carolina.— Hickory *v.* Southern R. Co., 137 N. C. 189, 49 S. E. 202, holding that taking title to land in trust for the purpose of a public square around a depot for the common use of both the railroad and the town is not *ultra vires.*

See 41 Cent. Dig. tit. "Railroads," § 139.

85. New York, etc., R. Co. *v.* Kip, 46 N. Y. 546, 7 Am. Rep. 385.

86. Hannibal, etc., R. Co. *v.* Muder, 49 Mo. 165; State *v.* Mansfield Tp., 23 N. J. L. 510, 57 Am. Dec. 409.

87. State *v.* Mansfield Tp., 23 N. J. L. 510, 57 Am. Dec. 409.

88. Low *v.* Galena, etc., R. Co., 18 Ill. 324 (paint shop); Chicago, etc., R. Co. *v.* Wilson, 17 Ill. 123; Hannibal, etc., R. Co. *v.* Muder, 49 Mo. 165.

89. State *v.* Mansfield Tp., 23 N. J. L. 510, 57 Am. Dec. 409.

90. State *v.* Mansfield Tp., 23 N. J. L. 510, 57 Am. Dec. 409.

materials or for the economical construction and maintenance of the road,[91] such as land for the purpose of getting cross ties and firewood,[92] or from which to obtain gravel to keep its road-bed in repair;[93] or real estate may be acquired and held even as security for debts.[94] And in the absence of statute otherwise it is ordinarily a question for the railroad company, when acting in good faith, to decide what lands are reasonably necessary for the purposes of its road,[95] except where the question arises in a proceeding by a creditor against the company, to subject lands which are superfluous or not necessary for the use of the company to the payment of his claim, in which case the court is the proper authority to determine this point.[96] But in the absence of a provision in the statute either general or special, a railroad company cannot acquire and hold real estate indefinitely without regard to the uses to be made of it.[97] It cannot acquire land for speculation only;[98] nor, unless authorized by statute, can it acquire lands which are a mere matter of convenience and not reasonably necessary to carry into effect some power for which it was created,[99] such as for the purpose of erecting dwelling-houses for employees,[1] or car or locomotive factories,[2] or for purposes of mining.[3]

B. Modes of Acquiring Land or Rights Therein[4] — 1. In General. As a general rule a railroad company may acquire real estate or an interest therein for the construction, maintenance, and operation of its road by grant,[5] or pur-

91. Overmyer *v.* Williams, 15 Ohio 26.

92. Mallett *v.* Simpson, 94 N. C. 37, 55 Am. Rep. 595.

93. Smail *v.* McMurphy, 11 Tex. Civ. App. 409, 32 S. W. 788. See Watson *v.* Northern R. Co., 5 Ont. 550.

94. Thompson *v.* Waters, 25 Mich. 214, 12 Am. Rep. 243; Blunt *v.* Walker, 11 Wis. 334, 78 Am. Dec. 709 (holding that a proviso in a railroad charter that it shall not hold, purchase, or deal in land other than that required for the location of the road does not prohibit it from exercising the power incident to all corporations of taking real securities for debts growing out of transactions within its general corporate powers); Blackburn *v.* Selma, etc., R. Co., 3 Fed. Cas. No. 1,467, 3 Flipp. 525.

95. Hull *v.* Kansas City, etc., R. Co., 70 Nebr. 756, 98 N. W. 47; Erie, etc., R. Co. *v.* Great Western R. Co., 19 Grant Ch. (U. C.) 43. And see, generally, Corporations, 10 Cyc. 636 *et seq.*

96. Erie, etc., R. Co. *v.* Great Western R. Co., 19 Grant Ch. (U. C.) 43.

97. Case *v.* Kelly, 133 U. S. 21, 10 S. Ct. 216, 33 L. ed. 513.

98. Pacific R. Co. *v.* Seely, 45 Mo. 212, 100 Am. Dec. 369. See Case *v.* Kelly, 133 U. S. 21, 10 S. Ct. 216, 33 L. ed. 513.

99. *Alabama.*— Wilks *v.* Georgia Pac. R. Co., 79 Ala. 180; Morgan *v.* Donovan, 58 Ala. 241.

Indian Territory.— Choctaw, etc., R. Co. *v.* Bond, 6 Indian Terr. 515, 98 S. W. 335.

Minnesota.— Olson *v.* St. Paul, etc., R. Co., 38 Minn. 419, 37 N. W. 953, holding that Act (1857), § 1, subd. 1, does not give a railroad company a right to dig a ditch three miles long at right angles to its track to carry off the water accumulating along the road-bed.

New Jersey.— State *v.* Mansfield Tp., 23 N. J. L. 510, 57 Am. Dec. 409.

Wisconsin.— Waldo *v.* Chicago, etc., R. Co., 14 Wis. 575.

England.— Dodd *v.* Salisbury, etc., R. Co., 1 Giffard 158, 5 Jur. N. S. 782, 65 Eng. Reprint 867; Eversfield *v.* Mid-Sussex R. Co., 1 Giffard 153, 65 Eng. Reprint 865 [*affirmed* in 3 De G. & J. 286, 5 Jur. N. S. 776, 28 L. J. Ch. 107, 7 Wkly. Rep. 102, 60 Eng. Ch. 286, 44 Eng. Reprint 1278], holding that a railroad company, under its compulsory powers, cannot acquire the fee simple in land for the mere purpose of excavating soil in order to construct an embankment.

See 41 Cent. Dig. tit. "Railroads," § 139.

1. State *v.* Mansfield Tp., 23 N. J. L. 510, 57 Am. Dec. 409.

2. State *v.* Mansfield Tp., 23 N. J. L. 510, 57 Am. Dec. 409.

3. Wilks *v.* Georgia Pac. R. Co., 79 Ala. 180; State *v.* Mansfield Tp., 23 N. J. L. 510, 57 Am. Dec. 409.

4. Modes by which corporations generally may acquire land see Corporations, 10 Cyc. 1126 *et seq.*

5. McClure *v.* Missouri River, etc., R. Co., 9 Kan. 373.

Grants of mining lands in aid of railroads see Mines and Minerals, 25 Cyc. 547.

Grant of public lands for right of way or in aid of railroad see Public Lands, 32 Cyc. 937 *et seq.*

A railroad right of way is an easement which can be acquired by grant, either from the owner or from the state through the exercise of the right of eminent domain. Clark *v.* Wabash R. Co., 132 Iowa 11, 109 N. W. 309.

Excess land.—An easement on land claimed to have been donated for railroad purposes in excess of the company's charter right of way will not be sustained where the land is not necessary for its proper operation and where the only evidence of the donation is a map made by one of the prior owners and the company's engineer, and it does not

chase,[6] or other contract;[7] by completing a road over the lands and thereby exposing the company to liability for compensation when such right and liability are provided by statute;[8] by a statutory dedication,[9] adverse possession or prescription,[10] or estoppel;[11] or by the exercise of the power of eminent domain.[12] Under some statutes a railroad company may receive a grant of land in advance of its organization, and after it has been organized, ratify and make it obligatory on the grantor.[13] A statute providing that companies incorporated to construct buildings and tracks for the use of railroad companies may acquire such rights of way as the railroad commissioners shall deem necessary does not apply to railroad companies; and hence the consent of the railroad commissioners is not necessary under such a statute to a railroad company's acquiring a right of way.[14] Where the provisions of a statute to authorize the formation of railroad companies, and to regulate the same as to the mode in which a company may acquire title to land for the purposes of its road, are inconsistent with the provisions of the charter of a company incorporated before its passage, such company may acquire title in the manner prescribed by its charter.[15]

2. Adverse Possession or Prescription. A railroad company may acquire an easement for a right of way, or other interests in land, by adverse possession or prescription,[16] by remaining in the adverse and uninterrupted possession of the

appear that the other owners assented to a donation outside of the right of way or that the company ever assumed any title or claim to such property until after suit brought to restrain encroachments on the right of way. Nashville, etc., R. Co. *v.* McReynolds, (Tenn. Ch. App. 1898) 48 S. W. 258.

6. McClure *v.* Missouri River, etc., R. Co., 9 Kan. 373; Beattie *v.* Carolina Cent. R. Co., 108 N. C. 425, 12 S. E. 913.

Purchase from another railroad company see Kansas City, etc., R. Co. *v.* Kansas City, etc., R. Co., 129 Mo. 62, 31 S. W. 451.

A railroad company authorized to build a bridge for its railroad across a river is authorized to buy for the same purpose a bridge, at or near the place, which is already built. Thompson *v.* New York, etc., R. Co., 3 Sandf. Ch. (N. Y.) 625.

Where a railroad contracts to buy land and is notified by third persons not to pay any money to its vendor and thereupon files a bill for payment into court and interpleader, and the decree adjudges the title to be in such vendor and orders the money paid to him, the company takes title by purchase and not by condemnation. Chamberlain *v.* Northeastern R. Co., 41 S. C. 399, 19 S. E. 743, 44 Am. St. Rep. 717, 25 L. R. A. 139.

7. Beattie *v.* Carolina Cent. R. Co., 108 N. C. 425, 12 S. E. 913; Scott *v.* Texas, etc., R. Co., 94 Fed. 340, 36 C. C. A. 282; St. Louis, etc., R. Co. *v.* Foltz, 52 Fed. 627.

Where the title under a contract is sufficient, the fact that the company did not for the statutory period adversely occupy its entire right of way is not material (Scott *v.* Texas, etc., R. Co., 94 Fed. 340, 36 C. C. A. 282); and evidence of a partial occupancy to show that there was not an adverse holding of the remainder is not admissible in a suit, which at its inception was one for damages for occupancy of the entire right of way in violation of the contract by which it was acquired (Scott *v.* Texas, etc., R. Co., *supra*).

Under lease.— Where a railroad company acquires no right to lay tracks in a projected street, shown on a plat of certain real estate, under a lease of a portion thereof authorizing the laying of tracks in another street, it can only acquire such right by condemnation or by agreement with the owners of the land. Northern Cent. R. Co. *v.* Canton Co., 104 Md. 682, 65 Atl. 337.

8. Beattie *v.* Carolina Cent. R. Co., 108 N. C. 425, 12 S. E. 913.

9. See Dedication, 13 Cyc. 448, 449.

But under a statute empowering a railroad company to take land by voluntary grant or by condemnation, it cannot acquire land by dedication. Minneapolis, etc., R. Co. *v.* Marble, 112 Mich. 4, 70 N. W. 319.

10. See *infra*, V, B, 2.

11. Indianapolis, etc., R. Co. *v.* Rayl, 69 Ind. 424; Matter of Rochester, etc., R. Co., 4 Silv. Sup. (N. Y.) 92, 7 N. Y. Suppl. 279. And see Estoppel, 16 Cyc. 768.

12. See Piedmont, etc., R. Co. *v.* Speelman, 67 Md. 260, 10 Atl. 77, 293; Beattie *v.* Carolina Cent. R. Co., 108 N. C. 425, 12 S. E. 913; and, generally, Eminent Domain, 15 Cyc. 543.

Resolutions.— Where the charter of a railroad company authorizes it to take land not exceeding a certain width for a right of way and land beyond that limit "which the directors shall, by resolution adopted by them, declare to be necessary for the use of said company," the resolution mentioned must be adopted at a meeting of the directors at which a quorum is present. Stringham *v.* Oshkosh, etc., R. Co., 33 Wis. 471.

13. Bravard *v.* Cincinnati, etc., R. Co., 115 Ind. 1, 17 N. E. 183.

14. Morgan *v.* Des Moines Union R. Co., 113 Iowa 561, 85 N. W. 902.

15. Clarkson *v.* Hudson River R. Co., 12 N. Y. 304.

16. Ohio River R. Co. *v.* Johnson, 50 W. Va. 499, 40 S. E. 407. And see, generally, Adverse Possession, 1 Cyc. 968.

premises, with color of title, for longer than the statutory period,[17] or for a long period of time, usually twenty years or more.[18] Thus an easement by prescription may be acquired by a railroad company by its adverse possession and continuous use of a strip of land for eighteen years as a right of way,[19] or by ten years' adverse occupancy and use.[20] But the erection, maintenance, and operation of a telegraph line by a railroad company does not constitute an appropriation of the strip of land between the poles and the line of the railroad so as to give the company title thereto after twenty years.[21]

3. Rights and Remedies of Private Owners. Where a railroad company seeks to appropriate land and fails to take all the necessary steps, the proper remedy of the owner for compensation and damages is, under some statutes, to compel an appropriation or condemnation;[22] and it has also been held that where a party having knowledge of the possession and use of land by a railroad company afterward takes a lease of coal beneath, his only remedy, if any, is under the statute for damages.[23] A landowner may maintain an injunction to restrain a railroad company from taking possession of his property without first having acquired the legal right to do so and without making compensation therefor;[24] or if a

17. Clark *v.* Wabash R. Co., 132 Iowa 11, 109 N. W. 309; Blair *v.* St. Louis, etc., R. Co., 24 Fed. 539. See Jessup *v.* Grand Trunk R. Co., 28 Grant Ch. (U. C.) 583. But see Narron *v.* Wilmington, etc., R. Co., 122 N. C. 856, 29 S. E. 358, 40 L. R. A. 415, holding that since a railroad company can obtain an easement for a right of way through the exercise of its right of eminent domain without the owner's grant or consent, it cannot obtain title to such right of way by prescription.

Possession and use of right of way must be adverse see Texas Western R. Co. *v.* Wilson, 83 Tex. 153, 18 S. W. 325. And the mere construction, maintenance, and occasional use by a railroad company, which has no conveyance of the land, of an ordinary railroad track across a platted street while it still remains unimproved and unfit for public use and before public convenience or necessity requires it to be opened and improved for use as a street does not constitute adverse possession as against the public. St. Paul, etc., R. Co. *v.* Duluth, 73 Minn. 270, 76 N. W. 35, 43 L. R. A. 433. Occupancy of land confined to the laying and use of tracks is not sufficient to establish adverse possession beyond the road-bed and track or necessary right of way. Brinker *v.* Union Pac., etc., R. Co., 11 Colo. App. 166, 55 Pac. 207.

Although a right of way of a certain width is not all occupied by tracks or any other structure, a right of way to that extent may be acquired by prescription where the character and extent of possession and acts of the railroad company considered with reference to the nature of railroads are such as clearly indicate an adverse claim to such right of way. Waggoner *v.* Wabash R. Co., 185 Ill. 154, 56 N. E. 1050.

Possession and use must be continuous see Texas Western R. Co. *v.* Wilson, 83 Tex. 153, 18 S. W. 325.

18. Fortune *v.* Chesapeake, etc., R. Co., 58 S. W. 711, 22 Ky. L. Rep. 749; McCutchen *v.* Texas, etc., R. Co., 118 La. 436, 43 So. 42; Louisville, etc., R. Co. *v.* Mossman, 90 Tenn. 157, 16 S. W. 64, 25 Am. St. Rep. 670; Louisville, etc., R. Co. *v.* Smith, 128 Fed. 1, 63 C. C. A. 1; Texas, etc., R. Co. *v.* Scott, 77 Fed. 726, 23 C. C. A. 424, 37 L. R. A. 179.

Purchasing from adverse holder.— Where a railroad company having the right of eminent domain takes land as a purchaser from one holding adverse possession, its title becomes good when the combined adverse possession of the railroad company and its grantor exceeds twenty-one years. Covert *v.* Pittsburg, etc., R. Co., 204 Pa. St. 341, 54 Atl. 170 [*reversing* 18 Pa. Super. Ct. 541].

19. Texas, etc., R. Co. *v.* Gaines, (Tex. Civ. App. 1894) 27 S. W. 266.

20. Welch *v.* Chicago, etc., R. Co., 19 Mo. App. 127.

21. Pittsburgh, etc., R. Co. *v.* Beck, 152 Ind. 421, 53 N. E. 439.

22. Hatry *v.* Painesville, etc., R. Co., 1 Ohio Cir. Ct. 426, 1 Ohio Cir. Dec. 238 [*affirmed* in 23 Cinc. L. Bul. 281], construing Rev. St. § 6448. See also Todd *v.* Meaford, 6 Ont. L. Rep. 469, 2 Ont. Wkly. Rep. 12,779; Clarke *v.* Grand Trunk R. Co., 35 U. C. Q. B. 57; Welland County *v.* Buffalo, etc., R. Co., 31 U. C. Q. B. 539 [*affirming* 30 U. C. Q. B. 147]; and, generally, Eminent Domain, 15 Cyc. 979 *et seq.*

Where the true owner was absent, and the railroad company, having a right by statute to take possession of the land, agreed to purchase the land for the purposes of its road, without arbitration, from the owner's brother, believing him to be, as he professed to be, the owner, and paid him the full value therefor, and was by him let into possession, the true owner cannot maintain ejectment, but must look to the company for compensation under the statutes. McLean *v.* Great Western R. Co., 33 U. C. Q. B. 198.

23. Philadelphia, etc., R. Co. *v.* Lawrence, 10 Phila. (Pa.) 604.

24. Collins *v.* Craig Shipbuilding Co., 27 Ohio Cir. Ct. 802; Lyon *v.* Green Bay, etc., R. Co., 42 Wis. 548; Diedrichs *v.* Northwestern Union R. Co., 33 Wis. 219. See, generally, Injunctions, 22 Cyc. 835; Emi-

conveyance has been obtained by fraud, he may maintain a suit in equity to have it canceled.[25]

C. Agreements, Licenses, and Implied Grants — 1. Agreements as to Right of Way or Use of Land in General. Agreements entered into by a railroad company in respect to the acquisition of land for a right of way or other railroad purposes and the rights and liabilities of the parties under such agreements are controlled by the rules regulating contracts generally,[26] including agreements to convey or secure conveyances to the railroad company,[27] and agreements

NENT DOMAIN, 15 Cyc. 989 text and notes 8 and 9.

Wis. Laws (1861), c. 175, providing that no injunction shall be granted to prevent the occupancy of land by a railroad company in certain cases applies only to cases where land has been actually occupied by the company with its tracks or depots and with either the express or implied consent of the owner; it does not apply to a case where the company entered by force against the owner's protest and commenced preparing the land as a road. Bohlman *v.* Green Bay, etc., R. Co., 30 Wis. 105.

It is no defense to an action to enjoin a railroad company from unlawfully continuing its possession and use of private property that the owner might tender a deed to, and demand compensation from, the company for the land in question. Collins *v.* Craig Shipbuilding Co., 27 Ohio Cir. Ct. 802.

25. Grundy *v.* Louisville, etc., R. Co., 98 Ky. 117, 32 S. W. 392, 17 Ky. L. Rep. 669, holding, however, that the landowner could not have the conveyance canceled merely because, after the right of way was procured, it was conveyed to another company pursuant to a previous agreement to construct the road, in consideration of a right of way through the county and a specified amount as a bonus. And see, generally, CANCELLATION OF INSTRUMENTS, 6 Cyc. 282.

26. St. Louis, etc., Electric R. Co. *v.* Van Hoorebeke, 191 Ill. 633, 61 N. E. 326; Choctaw, etc., R. Co. *v.* Bond, 6 Indian Terr. 515, 98 S. W. 335 (as to right to recover part of purchase-price retained on performance of contract); Semple *v.* Cleveland, etc., R. Co., 172 Pa. St. 369, 33 Atl. 564; Lippincott *v.* Mine Hill, etc., R. Co., 2 Leg. Chron. (Pa.) 310 (agreement that owner of land might mine coal beneath surface); Albert *v.* Tidewater R. Co., 107 Va. 256, 58 S. E. 575 (requiring the company to pay one hundred dollars per acre for new land acquired and to reconvey that portion of the old right of way not used). And see, generally, CONTRACTS, 9 Cyc. 213; VENDOR AND PURCHASER.

An agreement for a railroad right of way cannot rest partly in writing and partly in parol, and if so made the written contract supersedes the oral. Waldron *v.* Toledo, etc., R. Co., 55 Mich. 420, 21 N. W. 870.

Consent of tenant.—Where a proposed right of way extends through demised premises, the lessee is a necessary party to the negotiations and contracts leading up to the procurement of the right of way. Thompson *v.* Erie R. Co., 96 N. Y. App. Div. 539, 89 N. Y. Suppl. 92. But a railroad company building a road on another's land to a quarry thereon cannot justify under authority from a lessee who had only a license to quarry and a right of way to remove the rock. Snell *v.* Wasatch, etc., Valley R. Co., 3 Utah 192, 2 Pac. 193.

Presumption.— There is a presumption that a contract by a railroad company in obtaining a right of way was not intended to barter away its right to exercise any of its functions, such as the making of necessary improvements. Lilley *v.* Pittsburg, etc., R. Co., 213 Pa. St. 247, 62 Atl. 852.

An option contract to purchase a right of way is not waived by the mere fact that the railroad company continues its proceedings to condemn the right of way, after having obtained such contract from the legal owner of the premises. Starnes *v.* Milwaukee, etc., R. Co., 131 Wis. 85, 109 N. W. 100, 925, 111 N. W. 62.

A written contract which releases and quitclaims to certain persons, in consideration of benefits to accrue, a right of way for railroad purposes, in trust for a railroad company, is not a power of attorney, but it invests the persons named with an immediate right to the real estate described. Burrow *v.* Terre Haute, etc., R. Co., 107 Ind. 432, 8 N. E. 167.

27. *Illinois.*— Littlejohn *v.* Chicago, etc., R. Co., 219 Ill. 584, 76 N. E. 840; Turpin *v.* Baltimore, etc., R. Co., 105 Ill. 11.

Iowa.— Wetherell *v.* Brobst, 23 Iowa 586.

Michigan.— Wilson *v.* Muskegon, etc., R. Co., 132 Mich. 469, 93 N. W. 1059, holding that an instrument providing that the grantor for a consideration agrees to convey to defendant railroad company a strip across certain land described, on the request of the railroad company, at any time within a year from the date of the agreement, when construed in connection with Comp. Laws, § 6234, does not constitute a conveyance of a right of way across the land described, or give the railroad company a right of possession of such right of way as against a subsequent grantee, although the company has constructed its road over the line and maintained possession for several years.

New Jersey.— Huntington *v.* Headley, (Ch. 1898) 41 Atl. 670.

South Carolina.— Williams *v.* Oliver, Cheves 115.

Wisconsin.— Chicago, etc., R. Co. *v.* H. W. Wright Lumber Co., 123 Wis. 46, 100 N. W. 1034.

See 41 Cent. Dig. tit. "Railroads," § 147.

Right of entry.— A written agreement to sell land to a railroad company for a speci-

for the ascertainment and payment of compensation.[28] Such agreements to be valid must be for a sufficient consideration,[29] and must not be contrary to public

fied price within a certain time and a tender of the amount within such time and a refusal to accept it will not authorize the company to enter upon the land afterward and locate its road upon the same. Whitman *v.* Boston, etc., R. Co., 3 Allen (Mass.) 133. So where an owner of land agrees to convey to a railroad company within a specified time a right of way with the unrestricted right and privilege to enter on, locate, and construct a railroad, and the consideration for the contract is a nominal sum and the advantage of the location of the line through the owner's property, the company has no implied right to enter upon the land and build a railroad prior to the execution of the deed. Boring Lumber Co. *v.* Roots, 49 Oreg. 569, 90 Pac. 487.

Estate or interest.—An obligor in a bond to a railroad company to sell only such lands owned by him as shall be required for the road is not bound to convey any greater estate in the land than the company justly requires for its legitimate uses under its charter. Hill *v.* Western Vermont R. Co., 32 Vt. 68.

Where the agreement is prepared by the railroad company any doubt as to its true meaning should be construed adversely to the company, and not construed most favorably to the grantee under the general rule. Lockwood *v.* Ohio River R. Co., 103 Fed. 243, 43 C. C. A. 202.

Recordation.—A contract to convey a strip of land to a railroad for a right of way upon certain conditions is a contract relating to real estate within Hurd Rev. St. (1903) § 28, providing that deeds, mortgages, and other instruments relating to or affecting the title to real estate shall be recorded. Baltimore, etc., R. Co. *v.* Brubaker, 217 Ill. 462, 75 N. E. 523.

Where an owner of land agrees by parol with an agent of a railroad company, without knowing his principal, to sell certain land for a fixed sum, he is not estopped twenty months thereafter, to refuse on demand to convey the property to the company for the price named, although the price named is a reasonable one, and the one subsequently demanded by the owner is unreasonable and exorbitant. Weigold *v.* Pittsburg, etc., R. Co., 208 Pa. St. 81, 57 Atl. 188.

28. St. Paul, etc., R. Co. *v.* Murphy, 19 Minn. 500 (holding that where a railroad was built over certain land with the owner's consent and with the understanding that the question of damages should be settled after the road was built, the understanding was that in the absence of gift or purchase such damage should be determined by special statutory proceedings for condemnation); Lehigh Valley Terminal Co. *v.* Currie, 54 N. J. Eq. 84, 33 Atl. 824 [*affirmed* in 54 N. J. Eq. 700, 37 Atl. 1117].

An agreement providing for the assessment of damages for a right of way when the road shall be "located" requires the assessment to be made when the road-bed is located and constructed on the land, and not when the final line has been duly adopted by the directors. Hoffman *v.* Bloomsburg, etc., R. Co., 157 Pa. St. 174, 27 Atl. 564.

A railroad company may dispense with the assessment by commissioners of damages for laying its track over private property by promising to pay such damages; and the landowner may recover on the special promise. Plott *v.* Western North Carolina R. Co., 65 N. C. 74.

Time of payment.—Where a landowner agrees to refer to arbitrators the question of damages to be paid by the company for a right of way, and there is no express agreement that time shall be given for paying the damages, they must be paid before the right of way can vest in the company. Stewart *v.* Raymond R. Co., 7 Sm. & M. (Miss.) 568.

29. See Bell *v.* Southern Pac. R. Co., 144 Cal. 560, 77 Pac. 1124.

Prospective advantages, probable in their attainment, may be considered as well as the immediate benefit to be derived by the landowner from the construction of the road, in determining the reasonableness of a contract for the sale of a railroad right of way. Bell *v.* Southern Pac. R. Co., 144 Cal. 560, 77 Pac. 1124. Thus where a landowner, with a number of other landowners, agrees to donate land as a railroad right of way, and it appears that it is three and one-half miles from his residence to the nearest depot and that the new railroad is to provide a depot within a mile and a half, the necessary increase in the value of his land is a sufficient consideration for his agreement. Cadiz R. Co. *v.* Roach, 114 Ky. 934, 72 S. W. 280, 24 Ky. L. Rep. 1761.

Detriment to promisee.—The partial building of a railroad in reliance on a promise to donate a right of way is a sufficient detriment to the promisee to constitute a good consideration for the promise. Cadiz R. Co. *v.* Roach, 114 Ky. 934, 72 S. W. 280, 24 Ky. L. Rep. 1761. But a contract by a railroad company in consideration of a conveyance of a right of way to construct certain drains and sewers not rendered necessary by the construction of the road, and having no relation thereto, is void. Morgan *v.* Michigan Air-Line R. Co., 57 Mich. 430, 25 N. W. 161, 26 N. W. 865.

Release of groundless claim.—The desistence of a person from further opposition to the building of a railroad on certain land owned by the railroad company, but in possession of such person, is not a sufficient consideration for the company's agreement to pay him all damages which the county commissioners may assess for the building

policy.[30] Where a bond is given to a railroad company conditioned to secure land for a right of way and depot grounds, etc., it requires that a good title be secured and that the land be paid for by the obligor before the condition is performed.[31] In the absence of specific provisions in its charter to the contrary, the power of making or receiving contracts as to the right of way may be exercised by the president of the railroad company.[32]

2. License, Acquiescence, or Consent. In the absence of a statutory provision otherwise, a railroad company may also acquire a license to construct its right of way over, or otherwise use, lands by the consent of the owner or other person entitled to give such consent.[33] This consent may be express, and in writing,[34] or, unless a statute provides otherwise,[35] it may be implied from the acts of acquiescence on the part of the owner, as where with full knowledge on his part he

of the road. Botkin *v.* Livingston, 21 Kan. 232 [*overruling* Botkin *v.* Livingston, 16 Kan. 39].

Estoppel.— Where a landowner agrees to donate land to a railroad company for a right of way and thereafter the company commences work upon the road and grades the road-bed to a point near the grantor's land, and he then for the first time repudiates his grant, he is estopped from denying the obligations of his agreement on the ground that it was without consideration. Cadiz R. Co. *v.* Roach, 114 Ky. 934, 72 S. W. 280, 24 Ky. L. Rep. 1761.

30. Kettle River R. Co. *v.* Eastern R. Co., 41 Minn. 461, 43 N. W. 469, 6 L. R. A. 111 (holding that an agreement which, by its terms, gives an exclusive right of way to a railroad company in or through a certain tract of land in so far as it attempts to exclude other railroad corporations from acquiring a right of way over the same tract upon land not appropriated or acquired for its use, is against public policy and void); Lippincott *v.* Mine Hill, etc., R. Co., 2 Leg. Chron. (Pa.) 310 (holding, however, that where defendant railroad, in consideration of not paying damages for its right of way, agrees to permit the owner of adjoining land to mine coal under the road-bed providing that such owner, when ready to do so, shall give notice to defendant and defendant shall take proper care to secure its road or change its location, such agreement is not against public policy).

Not against public policy.—A contract to convey real estate to a railway company for the purpose of aiding it "in the construction, maintenance, and accommodation of its railway," provided it build a railway to a certain place, and locate its depot within a certain town, is not in contravention of public policy, or void. McClure *v.* Missouri River, etc., R. Co., 9 Kan. 373.

Discrimination toll to landowners.—A railroad company cannot contract with a landowner to lay a public switch over his land on condition that he be allowed to exact toll from shippers served by such switch, since the railroad company must so acquire its rights that it can impartially serve all of its customers; but public policy does not preclude the railroad company from contracting to construct a private switch on private land, and the landowner has a right to charge a rental for the privilege of passing over that part of the switch which is located on his land. Richards *v.* Ferguson Implement Co., 125 Mo. App. 428, 102 S. W. 606.

31. Frey *v.* Ft. Worth, etc., R. Co., 6 Tex. Civ. App. 29, 24 S. W. 950.

The construction of a depot is not a condition precedent to a railroad company's right to recover on a bond to secure a right of way and depot grounds for the company. Frey *v.* Ft. Worth, etc., R. Co., 6 Tex. Civ. App. 29, 24 S. W. 950.

32. Hickory *v.* Southern R. Co., 137 N. C. 189, 49 S. E. 202.

33. See Tutt *v.* Port Royal, etc., R. Co., 28 S. C. 388, 5 S. E. 831.

Under S. C. Gen. St. § 1550, providing that notice shall be given to the owner of land that a right of way is required, and for his consent thereto, the consent of a life-tenant in possession will pass a license in the right of way as against the remaindermen, the company holding by force of its charter and not of the owner's deed. Tutt *v.* Port Royal, etc., R. Co., 28 S. C. 388, 5 S. E. 831.

Over canal lands.— In New York, although Const. (1894) art. 7, § 8, prohibits the legislature from selling or leasing the Erie canal, yet under Laws (1894), c. 338, § 25, giving the superintendent of public works supervisory power over these lands and of any railroad within ten rods of the canal, a license may be given to a railroad company to construct its track and operate its cars upon such land under the direction of the state authorities. McCarty *v.* New York Cent., etc., R. Co., 73 N. Y. App. Div. 34, 76 N. Y. Suppl. 321.

In Maryland a right of way cannot be acquired by a mere license, but only in the mode authorized by statute, that is, by a deed executed and recorded. Baltimore, etc., R. Co. *v.* Algire, 63 Md. 319.

34. See Maginnis *v.* Knickerbocker Ice Co., 112 Wis. 385, 88 N. W. 300, 88 Am. St. Rep. 986, 69 L. R. A. 833.

35. Hetfield *v.* New Jersey Cent. R. Co., 29 N. J. L. 571 [*reversing* 29 N. J. L. 206], holding that where a railroad company is authorized to take land with the consent of the owner, the consent required must be a legal consent which can be evidenced only by writing.

permits or acquiesces in the railroad company's taking possession of his land and expending large sums of money in constructing its road-bed.[36] Where the license is given upon certain conditions the railroad company cannot compel specific performance of the license without performing such conditions.[37] A purchaser of land over which railroad tracks are in operation at the time of the sale is chargeable with notice of a license granted by the landowner to the railroad company to lay and operate such tracks.[38] But where a railroad company constructs its tracks upon land without a legal right to do so, as without filing a written location or presenting a plan, or paying or tendering damages or taking other proper steps, it cannot enter upon the land except as a trespasser,[39] even for the purpose of removing rails laid or structures placed upon the land,[40] unless the tracks or structures were constructed with the consent or acquiescence of the owner;[41] and even though such consent has been given by one who holds an equitable title to the land, as by a mortgagor in possession, it cannot avail as against one holding the legal title, such as a title derived from the foreclosure of the mortgage.[42]

3. Implied Grants. A grant to a railroad company of land for its right of way or other uses may be implied from the owner's permitting it to take possession and use the land for a long time.[43] But the mere fact that a railroad company has entered on land, constructed its road, and occupied it for several years raises no presumption that the owner has sold the right of way to the company.[44] Under some statutes the presumption of a conveyance to a railroad company arises from its taking possession and completing the road and the failure of the landowner to take steps to have his damages assessed within a specified time thereafter.[45]

36. Snyder *v.* Chicago, etc., R. Co., 112 Mo. 527, 20 S. W. 885; Coe *v.* New Jersey Midland R. Co., 28 N. J. Eq. 27.

Where there is a written agreement defining the rights of the parties, the doctrine that if a railroad company takes possession of land for a public way, the owner thereof not objecting, the latter will be presumed to have consented thereto and impliedly agreed to accept a just compensation therefor and consented to rely on the statutory method of obtaining the sum, has no application. Maginnis *v.* Knickerbocker Ice Co., 112 Wis. 385, 88 N. W. 300, 88 Am. St. Rep. 986, 69 L. R. A. 833.

37. Rome, etc., R. Co. *v.* Gleason, 42 N. Y. App. Div. 530, 59 N. Y. Suppl. 647.

38. Merchants' Union Barb-Wire Co. *v.* Chicago, etc., R. Co., 79 Iowa 613, 44 N. W. 900, holding that where a license is granted by a lot owner to a railroad company to lay and operate tracks on the street in front of his lots and the tracks are in operation when the lots are sold, the purchaser is charged with notice of the license.

39. Meriam *v.* Brown, 128 Mass. 391. But see Preston *v.* Sabine, etc., R. Co., 70 Tex. 375, 7 S. W. 825.

40. Meriam *v.* Brown, 128 Mass. 391.

41. Meriam *v.* Brown, 128 Mass. 391; Omaha Bridge, etc., R. Co. *v.* Whitney, 68 Nebr. 389, 94 N. W. 513, 99 N. W. 525, holding that where a company having no estate in land places upon it, with the consent of the owner, an embankment, ties, and rails, and uses such tracks without objection from the owner, it remains the property of the railroad company by an implied agreement.

42. Meriam *v.* Brown, 128 Mass. 391.

43. Paterson, etc., R. Co. *v.* Kamlah, 42 N. J. Eq. 93, 6 Atl. 444 [*affirmed* in 47 N. J. Eq. 331, 21 Atl. 954] (holding that where a company has been permitted by the owner of land to take possession of it for the purposes of its railroad and to occupy it accordingly, and with the necessary expenditure of money, adapt it to such uses, and has permitted it so to occupy it and use it for a long time, the facts are evidence of an agreement that the company should have the property upon making proper compensation); Cleveland, etc., R. Co. *v.* Reid, 6 Ohio S. & C. Pl. Dec. 273, 4 Ohio N. P. 127 (holding that where the owner of land permits a railroad to be constructed over it without objection, or large expenditures to be made upon the faith of his apparent acquiescence, he cannot then reclaim the land or enjoin its use by the railroad company, his only right being to compensation).

Where the terms of a grant are general or indefinite, its location and use by the grantee acquiesced in by the grantor will have the same legal effect as if it had been duly described under the terms of the grant. Cleveland, etc., R. Co. *v.* Reid, 6 Ohio S. & C. Pl. Dec. 273, 4 Ohio N. P. 127.

44. Toledo, etc., R. Co. *v.* Darst, 61 Ill. 231.

45. Seaboard Air Line R. Co. *v.* Olive, 142 N. C. 257, 55 S. E. 263 (construing Priv. Acts (1862–1863), c. 26, § 9); Hickory *v.* Southern R. Co., 137 N. C. 189, 49 S. E. 202.

Under N. C. Laws (1854–1855), c. 228, § 29, raising a presumption of title to its right of way in a railroad, unless the owner shall apply for an assessment of the value of the lands within two years after the location of the road, the burden of showing when the railroad was located and built is upon the

But this presumption does not arise where a deed from the owner of the land to the railroad company is made within such time.[46]

4. Persons Entitled to Benefit of Contract or Grant. Where an agreement between a landowner and a railroad company for the conveyance of a right of way has been acted upon and the railroad constructed, the provisions of the agreement are binding upon the landowner and his grantee with notice.[47] Where a railroad company appropriates land for its road-bed and track without the consent of the owner of the land and without condemning the land under its charter, the owner has a right of action upon an implied promise to pay for the value of the land.[48] But such right of action does not accrue to a subsequent purchaser, who was not the owner at the time of the appropriation;[49] nor can such purchaser sustain an action for the use and occupation of the right of way as on an implied promise to pay him therefor.[50] Where one of two tenants in common grants a right of way through their premises to a railroad company upon certian conditions, and the grantee enters but fails to fulfil the conditions, the granting tenant can recover for a breach of the contract,[51] and the other tenant, where the entry is without his consent, for the trespass.[52] The successor of a railroad company is entitled to the protection which the original company had under a contract with the landowner.[53] An assignee of an easement in railroad tracks has the same right to use the tracks as his assignor had.[54]

5. Rescission or Avoidance. Ordinarily a license to enter on land and construct and maintain tracks is revocable at the option of the licensor,[55] unless the

company claiming title to the lands by virtue of the statute. Hickory *v.* Southern R. Co., 137 N. C. 189, 49 S. E. 202. The location of a railroad within the meaning of such statute is its physical location by the laying of its track. Hickory *v.* Southern R. Co., *supra*. The railroad company acquires a valid title to its right of way as its track is completed under such statute. Purifoy *v.* Richmond, etc., R. Co., 108 N. C. 100, 12 S. E. 741.

46. Hickory *v.* Southern R. Co., 137 N. C. 189, 49 S. E. 202.

47. Waggoner *v.* Wabash R. Co., 185 Ill. 154, 56 N. E. 1050.

A purchaser of land with notice of a railroad company's right of way across the same cannot complain of laches of the railroad company, which has been waived by permitting the company to enter under a contract. Waggoner *v.* Wabash R. Co., 185 Ill. 154, 56 N. E. 1050.

48. McLendon *v.* Atlanta, etc., R. Co., 54 Ga. 293; Roberts *v.* Northern Pac. R. Co., 158 U. S. 1, 15 S. Ct. 756, 39 L. ed. 873.

49. McLendon *v.* Atlanta, etc., R. Co., 54 Ga. 293; Hatry *v.* Painesville, etc., R. Co., 1 Ohio Cir. Ct. 426, 1 Ohio Cir. Dec. 238 [*affirmed* in 23 Cinc. L. Bul. 281].

50. McLendon *v.* Atlanta, etc., R. Co., 54 Ga. 293.

51. Rush *v.* Burlington, etc., R. Co., 57 Iowa 201, 10 N. W. 628.

52. Rush *v.* Burlington, etc., R. Co., 57 Iowa 201, 10 N. W. 628.

53. New York, etc., R. Co. *v.* Stanley, 35 N. J. Eq. 283, holding that where the owners of land permit the construction of a railroad on the consideration of the company's building a depot thereon and running its trains according to certain arrangements, the successor of the company which originally constructed the road is entitled to protection against ejectment by the owners of the land brought on account of non-performance of the agreement, to the same extent as the original company would have been entitled to such protection.

54. Minneapolis Mill Co. *v.* Minneapolis, etc., R. Co., 55 Minn. 371, 57 N. W. 64.

55. Stratton *v.* Midland Terminal R. Co., 32 Colo. 493, 77 Pac. 247; Minneapolis, etc., R. Co. *v.* Marble, 112 Mich. 4, 70 N. W. 319 (holding that a parol license to a railroad company to enter upon land and construct its road is revocable at the will of the owner); Wood *v.* Michigan Air Line R. Co., 90 Mich. 334, 51 N. W. 263; Baker *v.* Chicago, etc., R. Co., 57 Mo. 265; Johanson *v.* Atlantic City R. Co., 73 N. J. L. 767, 64 Atl. 1061 (holding that where a railroad company builds its road on the land of another under a parol license from the owner, the latter may ordinarily revoke it at any time and sue to recover possession). And see, generally, Licenses, 25 Cyc. 645 *et seq.* But *compare* Ft. Worth, etc., R. Co. *v.* Sweatt, 20 Tex. Civ. App. 543, 50 S. W. 162, holding that the license to a railroad company which results when a landowner permits its line to be constructed without objection cannot be revoked after the track has been constructed, so long as it is used in the operation of the railroad.

Illustration.—A clause in a railroad charter authorizing a company to construct a road "in such direction as they shall deem best to connect with the termination of the city railroad" is a revocable license and not a contract which is infringed by the taking up of a portion of the track of the city railroad so as to prevent the connection. Southwark R. Co. *v.* Philadelphia, 47 Pa. St. 314. But where a railroad company

license is coupled with an interest or is necessary to the possession or enjoyment of a right or title arising from the act or contract of the person who creates the license,[56] or unless there is an agreement that the license shall continue for a definite period of time.[57] Where the license is granted on certain conditions and the railroad company fails to perform such conditions, the licensor may revoke the license.[58] The failure of a railroad company to perform conditions subsequent, however, contained in the agreement, furnishes no ground for the revocation of the license under which it entered and constructed its road, where complete indemnity in damages is recoverable therefor in an action at law,[59] and in such a case the landowner therefore cannot recover possession of the right of way or other land in an action of ejectment for the breach of such conditions.[60] But even where a party has a right to rescind a license for delay in the construction of a railroad, good faith would require him to give notice of such intention before the company takes possession of the land and constructs its road so that it may adopt another location or take proceedings to condemn before rendering itself otherwise liable.[61] Where a conveyance to a railroad company is made by persons not having proper authority, it may be afterward repudiated by persons having the authority to convey.[62]

6. Remedies of Landowner. Where a railroad company constructs its road over land to which it has acquired no requisite title by condemnation, conveyance, or license, express or implied, it is a mere trespasser and ejectment will lie against it.[63] And it has been held that the mere fact that an owner of land permits a railroad company to enter upon and construct its road without making compensation therefor does not estop the owner from maintaining an action of ejectment to recover possession of the property,[64] or from maintaining an injunc-

is informed by letter of the conditions under which it may lay its tracks through the lands of a person living on the line of the road and the company accepts the proposition and locates its road-bed accordingly but fails to comply with the condition, which was to open a certain street, the opening of such street is not a condition precedent to the right to locate the road and the proposition is not a license revocable at will. Wilmington, etc., R. Co. *v.* Battle, 66 N. C. 540. So where, after a city addition had been platted, but before the streets therein had been accepted, a railroad company was permitted by plaintiff's predecessors in title to lay a switch track on what subsequently became a street in such addition by acceptance by the city, which track was authorized by an act of the legislature, and subsequently by a city ordinance, the railroad's right to maintain the switch is not a mere license, revocable at the will of the licensor. Koch *v.* Kentucky, etc., R., etc., Co., 80 S. W. 1133, 26 Ky. L. Rep. 216.

56. Baker *v.* Chicago, etc., R. Co., 57 Mo. 265.

Where the railroad company enters into possession and expends money on the right of way under such an agreement, the agreement is not a naked license subject to be revoked at will by the grantors; and a deed to a third party, operating as a mortgage, executed after such possession by the company, does not operate as a revocation of such agreement. Illinois Southern R. Co. *v.* Borders, 201 Ill. 459, 66 N. E. 382.

57. See Stratton *v.* Midland Terminal R. Co., 32 Colo. 493, 77 Pac. 247.

58. Littlejohn *v.* Chicago, etc., R. Co., 219 Ill. 584, 76 N. E. 840.

Waiver.— The failure of a landowner who has licensed a company to build a railroad over his land under certain conditions and within a certain time, to declare a forfeiture of the license contract at the expiration of the time fixed for the performance is not a waiver of the right to insist upon a performance of the conditions at some future time, and in lieu of such performance to declare a forfeiture for non-performance. Littlejohn *v.* Chicago, etc., R. Co., 219 Ill. 584, 76 N. E. 840.

59. Morris *v.* Indianapolis, etc., R. Co., 76 Ill. 522.

60. Morris *v.* Indianapolis, etc., R. Co., 76 Ill. 522.

61. Ross *v.* Chicago, etc., R. Co., 77 Ill. 127.

62. Macon, etc., R. Co. *v.* Riggs, 87 Ga. 158, 13 S. E. 312, holding that a deed from certain members of a church who had no authority to make the same, purporting to convey to a railroad company a right of way over land belonging to the church, does not authorize the company to take such land for the purpose designated in the deed, where the transaction is afterward repudiated by the church and the consideration paid by the company is returned to it.

63. Denver, etc., R. Co. *v.* Arapahoe County School-Dist. No. 22, 14 Colo. 327, 23 Pac. 978; Dodd *v.* St. Louis, etc., R. Co., 108 Mo. 581, 18 S. W. 1117; Walker *v.* Chicago, etc., R. Co., 57 Mo. 275; Lyon *v.* Green Bay, etc., R. Co., 42 Wis. 548.

64. Conger *v.* Burlington, etc., R. Co., 41

tion to restrain the railroad company from using the right of way until compensation therefor is made.[65] By the weight of authority, however, if a landowner, knowing that a railroad company has entered upon his land and is engaged in constructing a road thereon, encourages or permits it to do so, he and subsequent purchasers from him will be estopped from maintaining either trespass [66] or ejectment to recover possession of the land; [67] nor can he maintain an injunction to restrain the company from using the road so constructed.[68] Acquiescence in the

Iowa 419; Allegheny Valley R. Co. *v.* Colwell, (Pa. 1888) 15 Atl. 927.

65. Hibbs *v.* Chicago, etc., R. Co., 39 Iowa 340; Coombs *v.* Salt Lake, etc., R. Co., 9 Utah 322, 34 Pac. 248. See also McNail *v.* Paducah, etc., R. Co., 3 Tenn. Cas. 580.

66. Pollard *v.* Maddox, 28 Ala. 321 (holding a landowner estopped from bringing trespass, although the instrument by which he had conveyed the right of way was inoperative as a deed); Roberts *v.* Northern Pac. R. Co., 158 U. S. 1, 15 S. Ct. 756, 39 L. ed. 873.

67. *Alabama.*— Hendrix *v.* Southern R. Co., 130 Ala. 205, 30 So. 596, 89 Am. St. Rep. 27.

Georgia.— Atlanta, etc., R. Co. *v.* Barker, 105 Ga. 534, 31 S. E. 452.

Illinois.— Ross *v.* Chicago, etc., R. Co., 77 Ill. 127.

Kansas.— Missouri Pac. R. Co. *v.* Gano, 47 Kan. 457, 28 Pac. 155.

Missouri.— Snyder *v.* Chicago, etc., R. Co., 112 Mo. 527, 20 S. W. 885; Dodd *v.* St. Louis, etc., R. Co., 108 Mo. 581, 18 S. W. 1117; Kanaga *v.* St. Louis, etc., R. Co., 76 Mo. 207; Baker *v.* Chicago, etc., R. Co., 57 Mo. 265; Provolt *v.* Chicago, etc., R. Co., 57 Mo. 256. *Compare* Walker *v.* Chicago, etc., R. Co., 57 Mo. 275.

Wisconsin.— Taylor *v.* Chicago, etc., R. Co., 63 Wis. 327, 24 N. W. 84.

United States.— Roberts *v.* Northern Pac. R. Co., 158 U. S. 1, 15 S. Ct. 756, 39 L. ed. 873; Pryzbylowicz *v.* Missouri River R. Co., 17 Fed. 492. 3 McCrary 586.

See 41 Cent. Dig. tit. "Railroads," § 151.

A county which has made a gift or donation of land to a railroad company, and which for years has stood by and permitted the company to construct its road and appurtenances, and has accepted from it large sums as taxes upon such land, would seem to be estopped from interfering with the possession of the company as to those parts of the land actually needed and used for railroad purposes, even though its original grant was made without authority. Roberts *v.* Northern Pac. R. Co., 158 U. S. 1, 15 S. Ct. 756, 39 L. ed. 873.

Illustrations.— Thus a landowner is estopped from maintaining ejectment against a railroad company, where he has never objected to an ordinance granting a right of way which was passed more than three years before the commencement of the action of ejectment, and has allowed the railroad company to construct its tracks, depots, etc., and operate its road without objection (Reichert *v.* St. Louis, etc., R. Co., 51 Ark. 491, 11 S. W. 696, 5 L. R. A. 183); where he permits a railroad under a parol license, to expend its money and build its road over his land, for a period of twenty years, during which the possession of the company has been open and continuous, even though he has received no compensation (Evansville, etc., R. Co. *v.* Nye, 113 Ind. 223, 15 N. E. 261); where he appears before commissioners appointed in a proceeding to condemn lands for a right of way, and endeavors to increase the amount of their finding, and also appears in court and objects to the award because it is insufficient, but makes no objection to the construction of the road, nor any attempt to prevent it (Gray *v.* St. Louis, etc., R. Co., 81 Mo. 126); where he conveys a portion of his land to a railroad company for the purpose of constructing a road-bed upon it, and with full knowledge permits the company to construct the road through other portions of his land also and allows sixteen years to elapse after the completion of the road before making any objection thereto (Dodd *v.* St. Louis, etc., R. Co., 108 Mo. 581, 18 S. W. 1117); or where he sees employees of a railroad company laying a track over his land, and does not forbid it, but negotiates with an agent of the company and on assurance of future compensation waives prepayment therefor and suffers the work to go on (Scarritt *v.* Kansas City, etc., R. Co., 127 Mo. 298, 29 S. W. 1024). But where lands are granted to a school-district to be used for school purposes and a railroad company, under a supposed license from its grantor, enters and begins constructing its road upon such land, and shortly afterward the school trustees protest that the school-district owns the land and attempts to settle the matter with the railroad company, and failing therein builds a fence around it and notifies the contractor not to enter, and the fence is torn down and the grading completed, there is no acquiescence by the school-district to estop it from bringing ejectment. Denver, etc., R. Co. *v.* School-Dist. No. 22, 14 Colo. 327, 23 Pac. 978.

Where a railroad company as assignee of a lease which authorizes the construction of a railroad track across the leased land and provides for forfeiture of the lease in default of the payment of rent, enters on the land and constructs its tracks thereon and afterward fails to pay rent, the lessor may maintain ejectment against it, although he acquiesces in the building of the track; and he is not restricted to an action for the value of the ground taken or for damages for breach of conditions of the lease or for a suit in equity to compel compliance with its terms. Avery *v.* Kansas City, etc., R. Co., 113 Mo. 561, 21 S. W. 90.

68. Mitchell *v.* New Orleans, etc., R. Co.,

building of a railroad, however, is not of itself sufficient to show that a landowner waived his right to be ultimately compensated for his land;[69] although in such a case the landowner will be restricted to an action for compensation by way of damages for the value of the land taken and for injuries done by the construction and operation of the road,[70] or he may maintain a suit for specific performance of the contract under which the entry was made.[71] *A fortiori* one afterward buying the lands from the owner with notice can neither maintain ejectment nor trespass against the company nor obtain affirmative relief against it.[72] But conduct which would estop the landowner will not necessarily estop a mortgagee or beneficiary under a deed of trust.[73] Where a railroad company has constructed its road with the consent of the owner but without paying therefor, the latter may seek his remedy in an ordinary action for damages,[74] or if the road has been transferred to another, the landowner may maintain an equitable action for damages against such transferee.[75] In those jurisdictions which hold that a right of way cannot be acquired by a mere license, an entry by a railroad under such a license is no defense to an action of trespass by the owner of the land.[76] Where a party seeks relief on a contract against a railroad company which necessarily implies a right of eminent domain in the company, he cannot, in the same suit, object to an additional taking of land on the ground that the company is not invested with such right.[77]

7. Remedies of Railroad Company. Where a railroad company has performed

41 La. Ann. 363, 6 So. 522; Baltimore, etc., R. Co. *v.* Strauss, 37 Md. 237; Goodin *v.* Cincinnati, etc., R. Co., 18 Ohio St. 169, 98 Am. Dec. 95; Coe *v.* Columbus, etc., R. Co., 10 Ohio St. 372, 17 Am. Dec. 518; Bell *v.* Ohio, etc., R. Co., 2 Pittsb. L. J. (Pa.) 42.

69. Hendrix *v.* Southern R. Co., 130 Ala. 205, 30 So. 596, 89 Am. St. Rep. 27.

70. *Indiana.*— Evansville, etc., R. Co. *v.* Nye, 113 Ind. 223, 15 N. E. 261.

Kansas.— Missouri Pac. R. Co. *v.* Gano, 47 Kan. 457, 28 Pac. 155.

Kentucky.— Louisville, etc., R. Co. *v.* Stephens, 14 Ky. L. Rep. 919.

Missouri.— Baker *v.* Chicago, etc., R. Co., 57 Mo. 265. See Ragan *v.* Kansas City, etc., R. Co., 111 Mo. 456, 20 S. W. 234.

Ohio.— Goodin *v.* Cincinnati, etc., Canal Co., 18 Ohio St. 169, 98 Am. Dec. 95.

United States.— Roberts *v.* Northern Pac. R. Co., 158 U. S. 1, 15 S. Ct. 756, 39 L. ed. 873.

See 41 Cent. Dig. tit. "Railroads," § 151.

71. Lane *v.* Pacific, etc., R. Co., 8 Ida. 230, 67 Pac. 656; Baker *v.* Chicago, etc., R. Co., 57 Mo. 265; Gloe *v.* Chicago, etc., R. Co., 65 Nebr. 680, 91 N. W. 547; Sanderson, etc., R. Co. *v.* Cockermouth, 2 Hall & T. 327, 19 L. J. Ch. 503, 47 Eng. Reprint 1708 [*affirming* 11 Beav. 497, 50 Eng. Reprint 909]; Paterson *v.* Buffalo, etc., R. Co., 17 Grant Ch. (U. C.) 521. And see, generally, Specific Performance.

72. Roberts *v.* Northern Pac. R. Co., 158 U. S. 1, 15 S. Ct. 756, 39 L. ed. 873.

Illustration.— Where one in possession of land under an executory contract for purchase quitclaims to a company a right of way thereon, and afterward assigns his interest under the contract, and after several mesne assignments the holder, knowing of the right of way deed and that the railroad has been run on such right of way nearly ten years without objection, takes a deed to the land, he cannot maintain ejectment against the company. Stratton *v.* Omaha, etc., R. Co., 37 Nebr. 477, 55 N. W. 1058.

73. Snyder *v.* Chicago, etc., R. Co., 112 Mo. 527, 20 S. W. 885.

74. Chicago, etc., R. Co. *v.* Hall, 135 Ind. 91, 34 N. E. 704, 23 L. R. A. 231; Le Roy, etc., R. Co. *v.* Small, 46 Kan. 300, 26 Pac. 695; Hatry *v.* Painesville, etc., R. Co., 1 Ohio Cir. Ct. 426, 1 Ohio Cir. Dec. 238 [*affirmed* in 23 Cinc. L. Bul. 281].

Abandonment of contract.— Where a contract made between a landowner and a railroad company in settlement of damages for a railroad right of way has been partially but not fully performed by the railroad company, and after the lapse of nearly fifteen years the contract is abandoned by the railroad company, the landowner may institute suit on the basis of a permanent appropriation of the land by the railroad company for railroad uses at that time, and recover damages as upon a proceeding by condemnation for such purpose. St. Louis, etc., R. Co. *v.* Yount, 67 Kan. 396, 73 Pac. 63.

Determination of damages.— Where a contract granting a railroad right of way and providing for the payment of damages is not fully performed by the railroad company and is abandoned, in an action for damages, it is proper to ask a judicial determination of the fact that the contract no longer measures the rights of the parties. St. Louis, etc., R. Co. *v.* Yount, 67 Kan. 396, 73 Pac. 63.

75. Chicago, etc., R. Co. *v.* Hall, 135 Ind. 91, 34 N. E. 704, 23 L. R. A. 231; New York, etc., R. Co. *v.* Stanley, 34 N. J. Eq. 55 [*affirmed* in 35 N. J. Eq. 283].

76. Baltimore, etc., R. Co. *v.* Algire, 63 Md. 319.

77. Coe *v.* Aiken, 61 Fed. 24.

its part of a contract for the purchase of land, it may maintain an action for specific performance against the landowner to compel a conveyance to it,[78] and to enjoin the prosecution of an action of ejectment for the possession of the land,[79] or it may maintain an action to quiet the title.[80]

D. Conveyances To or For Railroad Company[81] **— 1. Requisites and Validity.** The requisites and validity of a conveyance to a railroad company is ordinarily governed by the rules regulating conveyances generally, particularly those relating to conveyances to corporations.[82] Where a railroad company has complied with that part of a contract for a right of way which constitutes the substantial consideration, the equitable title to the property passes to it, although the whole consideration agreed upon has not been paid or performed.[83] A statute providing that streets, alleys, and public grounds so designated on a town plat, when properly certified, acknowledged, and recorded, shall operate as a convey-

78. Bell *v.* Southern Pac. R. Co., 144 Cal. 560, 77 Pac. 1124; St. Louis, etc., R. Co. *v.* Van Hoorebeke, 191 Ill. 633, 61 N. E. 326; Ross *v.* Chicago, etc., R. Co., 77 Ill. 127; Jackson *v.* Jessup, 5 Grant Ch. (U. C.) 524.

Defenses.— Where the state waives its right to forfeit a railroad company's charter, for failure to begin or complete the road within the time limited, such delay is no defense in an action against a third person to compel specific performance of his contract to the company. Ross *v.* Chicago, etc., R. Co., 77 Ill. 127.

Sufficiency of evidence as to the inducement for a contract for the sale of a railroad right of way see Bell *v.* Southern Pac. R. Co., 144 Cal. 560, 77 Pac. 1124.

79. St. Louis, etc., R. Co. *v.* Van Hoorebeke, 191 Ill. 633, 61 N. E. 326; Ross *v.* Chicago, etc., R. Co., 77 Ill. 127; Jackson *v.* Jessup, 5 Grant Ch. (U. C.) 524.

80. Cherokee, etc., R. Co. *v.* Renken, 77 Iowa 316, 42 N. W. 307.

Evidence.— Where on the issue whether defendant agreed to give a right of way to a railroad company, one of the company testifies that defendant told him before the construction of the road that he would not then sign a contract to give the right of way but would give it, and three others testify that defendant said he would give the right of way if the road was built and show that the securing of the right of way was a condition of the location of the road, and defendant unsupported by other evidence denies having made the promise, a judgment against defendant should be sustained. Cherokee, etc., R. Co. *v.* Renken, 77 Iowa 316, 42 N. W. 307.

81. **Conveyance or release by railroad company** see *infra*, V, K.

82. See, generally, Corporations, 10 Cyc. 1020 *et seq.*; Deeds, 13 Cyc. 505.

An unrecorded agreement by a landowner to relinquish to a railroad company a right of way through his lands in consideration of the advantage to be derived from the construction of the road does not vest the title to the right of way in the company, where it puts up a grade only, and then abandons work for twenty-five years; and the company cannot claim such title under a statute, providing that a railroad company shall not be barred of its real estate, right of way, easements, etc., "which may have been condemned or otherwise 'obtained'" by any statute of limitation or adverse occupancy. Beattie *v.* Carolina Cent. R. Co., 108 N. C. 425, 12 S. E. 913.

Mistake in grantee's name.— It is immaterial that the wrong corporation is named in the deed as the grantee, where defendant company accepts the deed and enjoys the land. Louisville, etc., R. Co. *v.* Power, 119 Ind. 269, 21 N. E. 751.

A title bond duly acknowledged and recorded, conveying a full and free right of way to a railroad company for railroad purposes without reservation, is a sufficient grant of such right of way. Ohio River R. Co. *v.* Johnson, 50 W. Va. 499, 40 S. E. 407.

A conveyance in fee to a railroad company authorized to acquire an easement only is valid until assailed in a direct proceeding by the government, and cannot be collaterally attacked by private persons. Askew *v.* Smith, 109 Wis. 532, 85 N. W. 512.

Invalid grant — equity.— Where a railroad company constructs its road in good faith on certain lands under a grant by persons without authority to make it, and subsequently the devisees of the owner of the land file a bill to compel the removal of the road, and the evidence shows that the real object of the bill is to compel defendant company to permit certain crossings of the railway necessary for the purpose of marketing coal underlying the land, and that the company has obligated itself to permit such crossing and the evidence also shows that the construction of the railroad has increased the value of the land and that a majority of the parties to the bill are estopped by their conduct, an injunction will be denied but the court will retain the bill to enforce the agreement of the railroad company as to the crossings. McClane *v.* McClane, 213 Pa. St. 286, 62 Atl. 861.

83. Matson *v.* Port Townsend Southern R. Co., 9 Wash. 449, 37 Pac. 705, holding that where a railroad company has complied with that part of a contract for a right of way which required it to construct its road within two years and it appears that the construction and operation of the road was the substantial consideration, the equitable title passes and is unaffected by the fact that it

ance in fee to the public, does not apply in favor of individuals or corporations, and hence a deed to a third person reserving a strip for railroad purposes according to a diagram showing the railroad company's name will not operate as a conveyance to the company or as a dedication.[84]

2. Persons Entitled to Convey. The owner of the land is ordinarily the proper person to convey it to a railroad company for a right of way or other purposes;[85] and this he may do notwithstanding he has previously leased rights thereon to a third person under a lease which conveys no interest in the land,[86] although the lessee is entitled to be protected in his rights.[87] Under some statutes a conveyance of land may be made to a railroad company by a tenant for life.[88] Where the charter of a railroad uses the word "owner," in providing for voluntary relinquishments of property for railroad purposes, such owner is the only party, with the exception of the curator of minors, with whom the company need treat in negotiating a purchase.[89]

3. Construction and Operation in General — a. Effect as Waiver of Damages. A conveyance of land to a railroad company for an agreed consideration presumptively embraces in such consideration all reasonably necessary damages to adjoining land, which have already been caused or which may be caused by the construction and maintenance of the road, and which might have been recovered in condemnation proceedings; and therefore in the absence of any showing to the contrary, such conveyance relieves the company from all liability for such damages,[90] and from other damages which the terms of the instrument or the attendant

has not paid a consideration of one dollar and the expenses of the deed of such right of way, as provided in the contract.

84. Illinois Cent. R. Co. *v.* Indiana, etc., R. Co., 85 Ill. 211.

85. See Ohio Oil Co. *v.* Toledo, etc., R. Co., 4 Ohio Cir. Ct. 210, 2 Ohio Cir. Dec. 505.

86. Ohio Oil Co. *v.* Toledo, etc., R. Co., 4 Ohio Cir. Ct. 210, 2 Ohio Cir. Dec. 505, holding that where a landowner grants a right to bore for oil and a right of way for access to the premises and reserves the right to farm the land and subsequently grants a right to operate a railroad across such land, the company is not obliged to condemn the lessee's right, since such a lease grants no interest in the land and the owner, notwithstanding the lease, can grant a right to operate a railroad across the same. See Olive *v.* Sabin, etc., R. Co., 11 Tex. Civ. App. 208, 33 S. W. 139.

87. Ohio Oil Co. *v.* Toledo, etc., R. Co., 4 Ohio Cir. Ct. 210, 2 Ohio Cir. Dec. 505.

88. See cases cited *infra*, this note.

Under Canadian statutes a conveyance of the fee simple of land required for the use of a railroad company may be made by a tenant for life, but the company is not warranted in paying him the full amount of the compensation agreed upon, but must pay to the remainderman or into court a portion of the purchase-money representing the remainderman's interest. Midland R. Co. *v.* Young, 22 Can. Sup. Ct. 190 [*affirming* 19 Ont. App. 265 (*affirming* 16 Ont. 738)] (construing C. S. C. c. 66, § 11, as amended by 24 Vict. c. 17, § 1); Owston *v.* Grand Trunk R. Co., 28 Grant Ch. (U. C.) 428, 431; Cameron *v.* Wigle, 24 Grant Ch. (U. C.) 8. *Compare Re* Dolsen, 13 Ont. Pr. 84, construing Can. Railroad Act, § 36, 51 Vict. c. 29.

89. Chouteau *v.* Missouri Pac. R. Co., 122 Mo. 375, 22 S. W. 458, 30 S. W. 299, holding that such a charter provision impliedly makes it unnecessary for the wife of an owner to join in the conveyance by reason of her inchoate right of dower, and that it makes no difference if the husband does not convey directly to the railroad company but by mesne conveyances.

90. *Illinois.*— St. Louis, etc., Electric R. Co. *v.* Van Hoorebeke, 191 Ill. 633, 61 N. E. 326; Chicago Sanitary Dist. *v.* Alderman, 113 Ill. App. 23; Atchison, etc., R. Co. *v.* Jones, 110 Ill. App. 626; Illinois Cent. R. Co. *v.* Anderson, 73 Ill. App. 621.

Kentucky.— Elizabethtown, etc., R. Co. *v.* Dillon, 7 Ky. L. Rep. 607.

Louisiana.— Kirk *v.* Kansas City, etc., R. Co., 51 La. Ann. 667, 25 So. 457, holding that claims which would have been within and would have gone to make up the original damages or compensation which would have been assessed against and paid by the railroad company as a condition precedent to the condemnation of a right of way in an expropriation proceeding, must be held to have been considered and included by the party as being within the consideration agreed upon when they balanced advantages and disadvantages.

Massachusetts.— Cassidy *v.* Old Colony R. Co., 141 Mass. 174, 5 N. E. 142.

Minnesota.— McCarty *v.* St. Paul, etc., R. Co., 31 Minn. 278, 17 N. W. 616.

Missouri.— Edwards *v.* Missouri, etc., R. Co., 82 Mo. App. 96.

Nebraska.— Moseley *v.* Chicago, etc., R. Co., 57 Nebr. 636, 78 N. W. 293.

New Jersey.— Perrine *v.* Pennsylvania R. Co., 72 N. J. L. 398, 61 Atl. 87.

New York.— Conabeer *v.* New York Cent.,

circumstances expressly or impliedly show to have been included in the compensation paid.[91] Such a conveyance, however, does not relieve the railroad company from liability for damages which are caused by its negligence in designing, constructing, and maintaining the road,[92] nor for damages resulting from improper encroachments upon land outside the right of way;[93] nor does it relieve the com-

etc., R. Co., 156 N. Y. 474, 51 N. E. 402 [*affirming* 84 Hun 34, 32 N. Y. Suppl. 6].

Pennsylvania.— North, etc., Branch R. Co. *v.* Swank, 105 Pa. St. 555, holding that if a landowner sells "the right of way" for a fixed sum all damages are supposed to be compensated by that sum unless otherwise expressly stipulated.

Vermont.— Norris *v.* Vermont Cent. R. Co., 28 Vt. 99.

United States.— Hodge *v.* Lehigh Valley R. Co., 39 Fed. 449, holding the company not liable to the former owner for damages arising from the operation of the road where it has exercised reasonable skill and judgment in designing and constructing such road.

Canada.— Wallace *v.* Grand Trunk R. Co., 16 U. C. Q. B. 551.

See 41 Cent. Dig. tit. "Railroads," § 155.

Illustrations.— Thus a person who grants land to a railroad company cannot recover damages caused to the rest of his land by structures necessary and incident to the railroad which he knew or had good reason to know would be built (Tinker *v.* Rockford, 137 Ill. 123, 27 N. E. 74 [*reversing* on other grounds 36 Ill. App. 460]); or damages caused by the maintenance and operation of a defective bridge constructed before the execution of the conveyance (McDonald *v.* Southern California R. Co., 101 Cal. 206, 35 Pac. 643, 646); or damages caused to a dwelling-house on the track by the careful blasting of rock in the construction of the road (Watts *v.* Norfolk, etc., R. Co., 39 W. Va. 196, 19 S. E. 521, 45 Am. St. Rep. 894, 23 L. R. A. 674); or damages occasioned by the removal of timber or other obstructions situated in the line of the designated right of way (Delsol *v.* Spokane, etc., R. Co., 4 Ida. 456, 40 Pac. 59; Houston, etc., R. Co. *v.* McKinney, 55 Tex. 176).

91. Alabama Midland R. Co. *v.* Williams, 92 Ala. 277, 9 So. 203 (holding, however, that a sale of a strip along one side of plaintiff's land extending from one street to another, to defendant as a right of way for a railroad did not include compensation for damages caused by excavating the land so that both street levels abutting on plaintiff's lot were cut down beneath the grade of defendant's road, so as to authorize an affirmative charge to be made by the court on defendant's behalf); St. Louis, etc., R. Co. *v.* Hurst, 14 Ill. App. 419.

Diversion of watercourse.— Where a grant of a right of way authorizes a railroad company to change a watercourse, the company is not liable for damages resulting from the change unless it be unnecessary or negligently or unskilfully made. St. Louis, etc., R. Co. *v.* Walbrink, 47 Ark. 330, 1 S. W. 545.

Unconditional grant.— Where a railroad company by a contract whereby plaintiff grants to it an unconditional right of way over his land obligates itself not to damage a spring thereon, it must be presumed that ditches and drains which produce injury thereto are necessary to the construction, and continue to be necessary for the maintenance of the road, and that any interference with them would be a violation of the unconditional grant of the right of way. Louisville, etc., R. Co. *v.* Goodin, 14 Ky. L. Rep. 622.

Change of grade.— Where the grade at which the road is to be built is not fixed by the contract, the railroad company may, without incurring liability for resulting damages not caused by negligence, change its grade from time to time as the exigencies of traffic and public necessity may require. Liedel *v.* Northern Pac. R. Co., 89 Minn. 284, 94 N. W. 877.

92. *Arkansas.*— St. Louis, etc., R. Co. *v.* Walbrink, 47 Ark. 330, 1 S. W. 545.

Georgia.— Chattanooga, etc., R. Co. *v.* Brown, 84 Ga. 256, 10 S. E. 730, holding that a railroad company is liable for damages to crops resulting from its tearing down a fence, although it has purchased the right of way over the land from the landlord of the owner of the crops.

Illinois.— Chicago Sanitary Dist. *v.* Alderman, 113 Ill. App. 23; Atchison, etc., R. Co. *v.* Jones, 110 Ill. App. 626; St. Louis, etc., R. Co. *v.* Hurst, 25 Ill. App. 98.

Indiana.— Roushlange *v.* Chicago, etc., R. Co., 115 Ind. 106, 17 N. E. 198.

Missouri.— Edwards *v.* Missouri, etc., R. Co., 82 Mo. App. 96.

United States.— Hodge *v.* Lehigh Valley R. Co., 39 Fed. 449.

Canada.— Miner *v.* Buffalo, etc., R. Co., 9 U. C. C. P. 280; Vanhorn *v.* Grand Trunk R. Co., 9 U. C. C. P. 264.

See 41 Cent. Dig. tit. "Railroads," § 155.

Illustrations.— Thus one who has conveyed a right of way to a railroad company may recover of such company for injury to his crops by the negligent building of its road so that surface water accumulates and is precipitated on his land (Jacksonville, etc., R. Co. *v.* Cox, 91 Ill. 500; Elizabethtown, etc., R. Co. *v.* Watts, 9 Ky. L. Rep. 289), even though he has allowed the company to dig a ditch on his premises which proves ineffectual (Jacksonville, etc., R. Co. *v.* Cox, *supra*). So such an owner may recover for injuries for deposits of rock by the company on the residue of his land, unless they are removed within a reasonable time. Watts *v.* Norfolk, etc., R. Co., 39 W. Va. 196, 19 S. E. 521, 45 Am. St. Rep. 894, 23 L. R. A. 674.

93. Roushlange *v.* Chicago, etc., R. Co., 115 Ind. 106, 17 N. E. 198.

pany from such damages as from the terms of the instrument are not to be presumed to have been in contemplation of the parties at the time of the sale,[94] or which were expressly reserved.[95]

b. Effect on Duty to Maintain Crossings, Fences, and Cattle-Guards. Upon the same principle a conveyance of a right of way relieves the railroad company from damages for additional fence building required,[96] and from the duty of constructing and maintaining stock gaps or bridges,[97] or private crossings,[98] unless such duty is imposed upon it by the conditions or stipulations contained in the conveyance,[99] or by statute.[1]

4. Location of Way or Land Conveyed. The rights of a railroad company under a contract to convey or a conveyance which describes the land conveyed in the terms of the location of the right of way depends upon the terms of the instrument as construed by the ordinary rules of construction for such instruments.[2] The terms of the contract may be such as to require a conveyance of

Damages to other land of the same owner distinct from and not connected with the land conveyed caused by acts of a railroad company not done on the land conveyed, although rendered necessary by its occupation, held not in contemplation of law to be considered as being included in the compensation agreed upon in such conveyance see Longworth *v.* Meriden, etc., R. Co., 61 Conn. 451, 23 Atl. 827.

94. Alabama Midland R. Co. *v.* Williams, 92 Ala. 277, 9 So. 203; St. Louis, etc., R. Co. *v.* Hurst, 14 Ill. App. 419; Perrine *v.* Pennsylvania R. Co., 72 N. J. L. 398, 61 Atl. 87, holding that the company is relieved from damages arising from the construction of the road upon the strip conveyed, but not such damages as result from work elsewhere constructed by the company for the general benefit of the railroad.

95. North, etc., Branch R. Co. *v.* Swank, 105 Pa. St. 555; Houston, etc., R. Co. *v.* McKinney, 55 Tex. 176.

96. St. Louis, etc., R. Co. *v.* Walbrink, 47 Ark. 330, 1 S. W. 545.

97. Cook *v.* North, etc., R. Co., 50 Ga. 211.

98. Gulf, etc., R. Co. *v.* Jones, 3 Tex. App. Civ. Cas. § 21.

99. Cook *v.* North, etc., R. Co., 50 Ga. 211. And see *infra*, V, G, 6.

1. Smith *v.* New York, etc., R. Co., 63 N. Y. 58 (construing Laws (1850), c. 140, § 44); Clark *v.* Rochester, etc., R. Co., 18 Barb. (N. Y.) 350.

Under N. H. Act (1850), c. 593, § 5, requiring a railroad company to make and maintain all necessary cattle-guards, cattle-passes and farm crossings for the safety and convenience of landowners along the side of the road, and providing that such provision shall not apply in any case where the company shall settle with the landowner in relation to such guards, passes, and crossings, a clause in a deed requiring "said corporation to fence the land and prepare a crossing with cattle guards, at the present travelled path, on a level with the track" is not a settlement between the parties in relation to such crossings. White *v.* Concord R. Co., 30 N. H. 188.

2. See the cases cited *infra*, this note.

Illustrations.— Under a grant to a railroad company of "the right to enter upon any land I own which lies on the line of such company's road . . . and the right to run in curves and around the line in the final construction of such railroad over said land, and to hold and use a strip thereof to be selected by the engineer . . . as long as may be necessary" the right is to be exercised at the final location of the road and cannot be exercised afterward. Warner *v.* Columbus, etc., R. Co., 39 Ohio St. 70. So a conveyance to a railroad company of a right of way eighty feet wide "which said eighty feet is to include . . . road on the west where said road is contiguous to said railroad" must be construed as including eighty feet measuring eastwardly from the west side of the road and including the whole road, although the grantor as an abutting property-owner had but a reversionary right in such road and such other rights as he would have in its use as a public way. Belmer *v.* Cincinnati, etc., R. Co., 9 Ohio Dec. (Reprint) 45, 10 Cinc. L. Bul. 232. So where a grant of a right of way calls for a certain fixed and determined center line, the construction of the track on either side of such center line will not shift it to the center of such track, and thus shift such right of way without the consent of the owner. Ohio River R. Co. *v.* Johnson, 50 W. Va. 499, 40 S. E. 407.

Uncertainty.— After the construction by a railroad company of its tracks across land, a conveyance to the company by the landowner of a "right of way" across the land without further description refers to the road as constructed and is not void for uncertainty. Olive v. Sabine, etc., R. Co., 11 Tex. Civ. App. 208, 33 S. W. 139.

Parol evidence.— Where a deed conveying a right of way to a railroad company fails to describe the exact situation of the land, parol evidence is admissible to assist in ascertaining the true location of the land conveyed; and such evidence is not governed by the rule relating to the reformation of written instruments by parol evidence of what occurred at the time of their execution. Pennsylvania R. Co. *v.* Pearsol, 173 Pa. St. 496, 34 Atl. 226, holding certain evidence sufficient to overcome the presumption that the center of

a right of way over a certain tract wherever the company may choose to establish its road;[3] or the instrument may convey only the land as it was located at the time of the conveyance.[4] But in the absence of any designation of the route in the deed, the occupancy of a particular route by the grantee company, with the grantor's consent, will identify and locate the route granted.[5]

E. Extent of Way or Land Acquired[6] **— 1. In General.** Where land for a right of way or other uses is conveyed to a railroad company, the extent of way or land acquired under such conveyance is ordinarily governed by a proper interpretation of the terms of the description or limitations employed in the instrument.[7] The ordinary signification of the term "right of way," when used to describe land which a railroad corporation owns or is entitled to use for railroad purposes, is the entire strip or tract it owns or is entitled to use for this purpose, and not any specific or limited part thereof upon which its main track or other specified improvements are located,[8] and includes lands and lots acquired for necessary side-tracks and turn-outs, and the improvements thereon in the way of coal sheds, freight houses, water-tanks, repair shops, roundhouses, and the

the right of way granted was the center of plaintiff's tract of land.

The location and use by the grantee acquiesced in by the grantor of a railroad right of way, the terms of the grant of which are general and indefinite, have the same legal effect as though it had been definitely described. Warner *v.* Columbus, etc., R. Co., 39 Ohio St. 70.

3. Chidester *v.* Springfield, etc., R. Co., 59 Ill. 87.

Right of company to select location.— Where the contract for a right of way releases a strip of land of a certain width through a certain tract of land, and nothing more definitely, it vests in the railroad company the right to select the particular location. Burrow *v.* Terre Haute, etc., R. Co., 107 Ind. 432, 8 N. E. 167.

4. Owensboro, etc., R. Co. *v.* Barker, 37 S. W. 848, 18 Ky. L. Rep. 706 (holding that where a railroad company had surveyed and marked a line through plaintiff's land, a conveyance to it of a strip of ground "lying along and including the established line of railway to be constructed by such company" referred only to the line as thus surveyed and not to a line that might be thereafter established); Hall *v.* Pickering, 40 Me. 548 (holding the company to have no right under the deed except in a strip of land originally surveyed and staked out); Wood *v.* Michigan Air Line R. Co., 90 Mich. 334, 51 N. W. 263; King *v.* Norfolk, etc., R. Co., 90 Va. 210, 17 S. E. 868.

5. Gaston *v.* Gainesville, etc., Electric R. Co., 120 Ga. 516, 48 S. E. 188.

6. **Acquisition under the power of eminent domain** see EMINENT DOMAIN, 15 Cyc. 636 *et seq.*

7. See Waycross Air-Line R. Co. *v.* Southern Pine Co., 111 Ga. 233, 36 S. E. 641; Lexington, etc., R. Co. *v.* Ormsby, 7 Dana (Ky.) 276; Louisville, etc., R. Co. *v.* Covington, etc., R., etc., Transfer, etc., Co., 58 S. W. 577, 22 Ky. L. Rep. 722; Northern Cent. R. Co. *v.* Canton Co., 104 Md. 682, 65 Atl. 337; Hughes *v.* Wellington, etc., R. Co., 119 N. C. 688, 25 S. E. 717.

The limits embraced in a conveyance of a right of way for a railroad are to be determined by the calls in the deed, and evidence is not admissible to extend the same by showing an actual survey of the boundary beyond the limits called for. Missouri, etc., R. Co. *v.* Anderson, 36 Tex. Civ. App. 121, 81 S. W. 781.

A conveyance of a right of way "as now located, to the terminus of the road," on, over, and along certain land, may be construed as conveying no title beyond the point on said land to which the right of way had been legally located by surveying and staking out the center line thereof for the purpose of constructing and operating the road, as required by statute, even though, for the convenience of the grantor, the company had, before such conveyance, extended, or permitted the grantor to extend, a spur track beyond the terminus to which the right of way had been so legally located. Schneider *v.* Knickerbocker Ice Co., 119 Wis. 171, 96 N. W. 542.

Additional land.— Where a right of way is granted "with right to use such additional land as may be necessary for the construction and maintenance" of the road, the necessity for taking additional land is to be determined by ordinary care in constructing the road. Gulf, etc., R. Co. *v.* Richards, 83 Tex. 203, 18 S. W. 611.

Improvements.—A road-bed or embankment built out of the soil, and with riprap for its protection, on which ties and rails are laid for use as a railway track, by a railroad company on the land of another, is not an improvement placed upon land in the nature of a trade fixture, but is a part of the land itself, and where there are no exceptions or reservations, will pass by a deed as does the real estate on which it is constructed. Omaha Bridge, etc., R. Co. *v.* Whitney, 68 Nebr. 399, 389, 99 N. W. 525, 94 N. W. 513.

8. Chicago, etc., R. Co. *v.* People, 98 Ill. 350; Pfaff *v.* Terre Haute, etc., R. Co., 108 Ind. 144, 9 N. E. 93; St. Louis, etc., R. Co. *v.* Wabash R. Co., 152 Fed. 849, 81 C. C. A. 643.

like;[9] and where the railroad company acquires the fee it is for the company, and not for the adjacent landowner, to determine how much land is reasonably necessary for depot grounds and right-of-way purposes.[10] But in the absence of a paper title or condemnation proceedings, or title by adverse possession, a railroad company is generally confined to the land actually taken and occupied by it;[11] and if it seeks to go beyond its previously occupied land, it must show title outside of its present occupancy, either by the record of condemnation proceedings, or the production of a deed or written muniments of title, or by proof showing the actual delivery of the land as ascertained by landmarks, fences, etc.[12] Thus a title to a right of way acquired by prescription by a railroad company is limited to so much of the strip as it actually used by adverse possession, and does not extend beyond its line of fence on either side of the roadway.[13] Under a contract to convey such lands as shall be required for the road, an owner is not bound to convey more land than the company fairly requires for its legitimate uses under its charter.[14]

2. Width of Right of Way. In probably most jurisdictions, the width of the strip of land which the railroad company may acquire for its right of way is expressly limited by statute.[15] Where in such jurisdictions there has been no conveyance or the conveyance of land to a railroad company does not specify the width of the land granted, the company may ordinarily occupy any width it chooses not exceeding that allowed by statute,[16] with this limitation in some jurisdictions, however, that it does not take more than is reasonably necessary for the convenient use and maintenance of the road in the customary mode;[17] and under some statutes it may acquire even more than the statutory width, when necessary for the successful operation of the road.[18] Under some statutes limiting the width of the land which a railroad company may acquire for a right of way, it is held that, in the absence of any showing to the contrary, the company's occupancy and use of a strip of land without a conveyance or under a conveyance which does not specify the width granted is presumed to be of the full width allowed by its charter or governing statute and not merely of the width actually

9. Pfaff *v.* Terre Haute, etc., R. Co., 108 Ind. 144, 9 N. E. 93.

10. Hull *v.* Kansas City, etc., R. Co., 70 Nebr. 756, 98 N. W. 47.

11. Hendrix *v.* Southern R. Co., 130 Ala. 205, 30 So. 596, 89 Am. St. Rep. 27; Chicago, etc., R. Co. *v.* Hoag, 90 Ill. 339; Illinois Cent. R. Co. *v.* Indiana, etc., R. Co., 85 Ill. 211 (holding that where a railway company constructs its track over the land of another, and erects buildings thereon, without any written evidence of title, and does not inclose the same, its possession will be limited to the ground actually occupied); Ryan *v.* Mississippi Valley, etc., R. Co., 62 Miss. 162; Goddard *v.* Philadelphia, etc., R. Co., 2 Del. Co. (Pa.) 337, 2 Lanc. L. Rev. 265.

Where a railroad company makes a cut through a hill, the presumption after thirty years is that it originally took possession of all the space occupied by the cut; but this possession is restricted to the space occupied by the original excavation, and does not widen with the enlargement of the excavation by the gradual washing in of the sides of the cut. Youree *v.* Vicksburg, etc., R. Co., 110 La. 791, 34 So. 779.

12. Goddard *v.* Philadelphia, etc., R. Co., 2 Del. Co. (Pa.) 337, 2 Lanc. L. Rev. 265.

13. Floyd *v.* Louisville, etc., R. Co., 80 S. W. 204, 23 Ky. L. Rep. 2147.

14. Hill *v.* Western Vermont R. Co., 32 Vt. 68.

15. See the statutes of the several states; and cases cited *infra*, this note and notes 16–24.

Lands for depots or side-tracks.— A charter authorizing a railroad company to take a strip of land not exceeding a certain width has reference to a right of way and has been held not to prohibit the company from acquiring more lands for depot grounds and side-tracks. Carmody *v.* Chicago, etc., R. Co., 111 Ill. 69. But under New Jersey Revision, p. 925, providing that any railroad constructed under this act shall not exceed one hundred feet in width, it has been held that the term "railroad" is not limited to the road-bed and tracks but includes all necessary appurtenances. New Jersey Cent. R. Co. *v.* Hudson Terminal R. Co., 46 N. J. L. 289.

16. Indianapolis, etc., R. Co. *v.* Rayl, 69 Ind. 424.

17. Nashville, etc., R. Co. *v.* Hammond, 104 Ala. 191, 15 So. 935; Morris, etc., R. Co. *v.* Bonnell, 34 N. J. L. 474; Day *v.* Atlantic, etc., R. Co., 41 Ohio St. 392; Nashville, etc., R. Co. *v.* Central Land Co., (Tenn. Ch. App. 1897) 48 S. W. 110.

18. Bubenzer *v.* Philadelphia, etc., R. Co., (Del. 1905) 61 Atl. 270, construing Corporation Act (1903) (22 Del. Laws c. 394) §§ 82, 91.

used.[19] Under other statutes, however, it is held in such cases that in the absence of proof that the company acquired the full statutory width, it will be presumed to have acquired only the strip occupied and used,[20] unless it has acquired title to an additional width by adverse occupancy,[21] or unless it has entered upon the land and occupied it under such circumstances that the owner is estopped from reclaiming possession.[22] Where the company has accepted a conveyance expressly limiting the right of way to a specified width, less than the statutory width, it cannot thereafter, in the absence of a further grant, claim a greater width.[23] A grant of so much and no more than the company could acquire under its right to condemn for a right of way is a grant of the statutory width, and not only of the land occupied.[24]

F. Title, Estate, or Interest Acquired[25] — **1. In General.** The interest

19. Hargis *v.* Kansas City, etc., R. Co., 100 Mo. 210, 13 S. W. 680; Nashville, etc., R. Co. *v.* McReynolds, (Tenn. Ch. App. 1898) 48 S. W. 258 (holding that where a company is empowered by its charter to obtain a right of way to the width of two hundred feet, it will be presumed in the absence of a contract restricting it, that the right of way acquired was of the charter width); Olive *v.* Sabine, etc., R. Co., 11 Tex. Civ. App. 208, 33 S. W. 139.

An entry and construction of a road without taking any steps to condemn the land will be regarded, in the absence of any showing to the contrary, as an appropriation of so much land as the law authorizes. Duck River Valley Narrow Gauge R. Co. *v.* Cochrane, 3 Lea (Tenn.) 478.

The presumption that a railroad company acquired the full statutory width, one hundred feet, is overcome by proof that a third person as grantee in a deed conveying land adjacent to the railroad right of way, erected a fence thirty feet from the center of the company's main track and occupied the land up to the fence for more than twenty-five years without objection from the company. Cedar Rapids Canning Co. *v.* Burlington, etc., R. Co., 120 Iowa 724, 95 N. W. 195.

20. Jones *v.* Nashville, etc., R. Co., 141 Ala. 388, 37 So. 677; Louisville, etc., R. Co. *v.* Smith, 141 Ala. 335, 37 So. 490 (holding that where a railroad company authorized by its charter to acquire land for the track of such road not to exceed one hundred and fifty feet wide built its road over the land by mere permission of the owner, the company acquired no rights in the land outside of the embankment of the road-bed); Nashville, etc., R. Co. *v.* Hammond, 104 Ala. 191, 15 So. 935; Ft. Wayne, etc., R. Co. *v.* Sherry, 126 Ind. 334, 25 N. E. 898, 10 L. R. A. 48 (holding that a deed to a railroad company of "the right of way for its railroad and the right to construct said railroad agreeably to, and in accordance with, the laws of the state" did not vest in the grantee title to land six rods in width, that being the quantity which the company could acquire under the statutes, but only the quantity actually taken and used by it); Omaha, etc., R. Co. *v.* Rickards, 38 Nebr. 847, 57 N. W. 739 (holding that where a railroad company takes possession of the real estate of another for a right of way without color of title, its rights acquired by prescription are limited to the land actually occupied); Leidigh *v.* Philadelphia, etc., R. Co., 215 Pa. St. 342, 64 Atl. 539; Philadelphia, etc., R. Co. *v.* Obert, 109 Pa. St. 193, 1 Atl. 398; Goddard *v.* Philadelphia, etc., R. Co., 2 Lanc. L. Rev. (Pa.) 265.

Boundaries.— Where there are no monuments upon the ground to indicate the boundaries of a railroad company's right of way and there is no survey on record or elsewhere to define such boundaries, the extent of the actual occupancy must determine the limits of the right of way. Zahn *v.* Pittsburgh, etc., R. Co., 184 Pa. St. 66, 39 Atl. 34.

21. Lake Erie, etc., R. Co. *v.* Michener, 117 Ind. 465, 20 N. E. 254.

22. Lake Erie, etc., R. Co. *v.* Michener, 117 Ind. 465, 20 N. E. 254; Prather *v.* Western Union Tel. Co., 89 Ind. 501, holding that where a railroad company constructs its road across the land of a certain owner and maintains it for nearly twenty years without instituting condemnation proceedings, or any objection or claim for damages being ever made by such owner, it thereby acquires title to a strip of the full width allowed by its charter.

Where a railroad company enters upon land with leave and license of the owner and constructs and runs its road on the faith of such license, it will be presumed as against one claiming under the licensor in the absence of any limitation to the contrary that the right of way thus acquired extended to the full statutory width. Campbell *v.* Indianapolis, etc., R. Co., 110 Ind. 490, 11 N. E. 482.

23. Lake Erie, etc., R. Co. *v.* Michener, 117 Ind. 465, 20 N. E. 254; Gray *v.* Burlington, etc., R. Co., 37 Iowa 119.

Estoppel to claim additional width see Joplin, etc., R. Co. *v.* Kansas City, etc., R. Co., 135 Mo. 549, 37 S. W. 540.

Where the contract as to the width of the right of way is general or ambiguous, the intention of the parties may be shown by parol evidence of their contemporaneous acts and declarations. Indianapolis, etc., R. Co. *v.* Reynolds, 116 Ind. 356, 19 N. E. 141.

24. Seaboard Air Line R. Co. *v.* Olive, 142 N. C. 257, 55 S. E. 263.

25. **Under conveyance from railroad** see *infra*, V, K, 2.

in a railroad right of way is ordinarily the same whether granted or condemned;[26] and while a railroad company, although created for a limited period, may acquire a fee simple in land by purchase,[27] unless restrained by a charter or statutory provision,[28] as a general rule the right which a rai'road acquires in lands purchased for its right of way amounts to an easement only,[29] and this is also generally true where the land is acquired without condemnation proceedings and without any contract with the owner,[30] as where it is acquired by adverse possession.[31] The easement acquired by a railroad company in its right of way is not an easement in the strict technical sense of the term, which is a right in common with the owner, but is rather in the nature of an interest in the land which continues in the railroad company as long as it uses the land for railroad purposes.[32]

2. Under Conveyance From Owner. Where there has been a grant or conveyance of land to a railroad company, the question as to what estate or interest is thereby acquired by the company must be determined from the intention of

Under condemnation proceedings see Eminent Domain, 15 Cyc. 1018 *et seq.*

26. St. Louis, etc., R. Co. *v.* Van Hoorebeke, 191 Ill. 633, 61 N. E. 326; Smith *v.* Hall, 103 Iowa 95, 72 N. W. 427; Shepard *v.* Suffolk, etc., R. Co., 140 N. C. 391, 53 S. E. 137; Harman *v.* Southern R. Co., 72 S. C. 228, 51 S. E. 689, holding that a deed granting to a railroad company a right of way with a right to use the earth, stone, and timber within the tracks for the construction or extension of the road conveys such rights as the railroad company would be presumed to have acquired under its charter granting it the right of eminent domain.

A conveyance of a strip of land to a railroad company, "for the term of fifty years, and so long thereafter as its charter shall continue," when the company has the capacity of perpetual existence, on default by the state to exercise a right of election to purchase its property, and also has power to condemn lands for a right of way under a writ of *ad quod damnum,* conveys the same interest and estate that would have been acquired by a judgment of condemnation under such writ. Davis *v.* Memphis, etc., R. Co., 87 Ala. 633, 6 So. 140.

27. Nicoll *v.* New York, etc., R. Co., 12 N. Y. 121 [*affirming* 12 Barb. 460]; Buffalo Pipe Line Co. *v.* New York, etc., R. Co., 10 Abb. N. Cas. (N. Y.) 107 (under Laws (1850), c. 140, § 28, subd. 3); Canada Midland R. Co. *v.* Young, 22 Can. Sup. Ct. 190 [*affirming* 19 Ont. App. 265] (holding that a tenant for life is authorized by Railroad Act, 24 Vict. c. 17, § 1, to convey to a railroad company in fee but that the company must pay to the remaindermen or in court the proportion of the purchase-money representing the remaindermen's interest).

A charter providing that when a company shall have procured the right of way "as hereinbefore provided they shall be seized in fee simple of the right of said land" is not in effect a conveyance of the land in fee simple. Cleveland, etc., R. Co. *v.* Coburn, 91 Ind. 557.

28. See the statutes of the several states. And see Smith *v.* Hall, 103 Iowa 95, 72 N. W. 427.

Under N. Y. Laws (1850), c. 140, § 28, subd. 3, and § 49, providing that a railroad company may purchase, hold, and use such real estate as may be necessary for the construction and maintenance of the road, such company has a fee simple for the purpose of alienation, although only a determinable fee for purposes of enjoyment. Buffalo Pipe Line Co. *v.* New York, etc., R. Co., 10 Abb. N. Cas. (N. Y.) 107.

29. Raleigh, etc., Air Line R. Co. *v.* Sturgeon, 120 N. C. 225, 26 S. E. 779.

30. Consumers' Gas Trust Co. *v.* American Plate Glass Co., 162 Ind. 393, 68 N. E. 1020; Boyce *v.* Missouri Pac. R. Co., 168 Mo. 583, 68 S. W. 920, 58 L. R. A. 442; Raleigh, etc., Air Line R. Co. *v.* Sturgeon, 120 N. C. 225, 26 S. E. 779; East Tennessee, etc., R. Co. *v.* Telford, 89 Tenn. 293, 14 S. W. 776, 10 L. R. A. 855, construing charter of East Tennessee, etc., R. Co., Act Jan. 27, 1848, § 23. See also Lawrence's Appeal, 78 Pa. St. 365.

A "right of way," in its legal and generally accepted meaning in reference to a railway, is a mere easement in the lands of others, obtained by lawful condemnation to public use, or by purchase. Uhl *v.* Ohio River R. Co., 51 W. Va. 106, 41 S. E. 340; Williams *v.* Western Union R. Co., 50 Wis. 71, 5 N. W. 482. The term "right of way" has also been defined as a servitude imposed as a burden on the land. Cincinnati, etc., R. Co. *v.* Wachter, 70 Ohio St. 113, 70 N. E. 974.

31. Capps *v.* Texas, etc., R. Co., 21 Tex. Civ. App. 84, 50 S. W. 643.

32. Boyce *v.* Missouri Pac. R. Co., 168 Mo. 583, 68 S. W. 920, 58 L. R. A. 442.

"The easement is not that spoken of in the old law books, but is peculiar to the use of a railroad, which is usually a permanent improvement, a perpetual highway of travel and commerce, and will rarely be abandoned by non-user. The exclusive use of the surface is acquired, and damages are assessed, on the theory that the easement will be perpetual; so that ordinarily the fee is of little or no value, unless the land is underlaid by quarry or mine." Smith *v.* Hall, 103 Iowa 95, 96, 72 N. W. 427.

the parties as shown by the whole instrument,[33] taken in connection with the railroad company's charter or governing statutes.[34] Thus where such appears to be the intention of the parties a fee in the land and not a mere easement will be conveyed,[35] although the instrument is entitled "deed of right of

33. *Alabama.*— Louisville, etc., R. Co. *v.* Boykin, 76 Ala. 560, held to pass freehold.
Indiana.—Cincinnati, etc., R. Co. *v.* Geisel, 119 Ind. 77, 21 N. E. 470.
Kentucky.— Floyd *v.* Louisville, etc., R. Co., 80 S. W. 204, 25 Ky. L. Rep. 2147 (such interest as the grantee at the time had in the land); Ballard *v.* Louisville, etc., R. Co., 5 S. W. 484, 9 Ky. L. Rep. 523.
New York.— Colgate *v.* New York Cent., etc., R. Co., 51 Misc. 503, 100 N. Y. Suppl. 650.
Tennessee.— McLemore *v.* Charleston, etc., R. Co., 111 Tenn. 639, 69 S. W. 338.
Virginia.— Hope *v.* Norfolk, etc., R. Co., 79 Va. 283, held to acquire life-tenant's rights only.
Canada.— See Massawippi Valley R. Co. *v.* Reed, 33 Can. Sup. Ct. 457; Reg. *v.* Smith, 43 U. C. Q. B. 369.
See 41 Cent. Dig. tit. "Railroads," § 163.

"Floating right."—A deed of a certain strip of land which may be hereafter established by said company for the route of their railroad, over and across certain described land, conveys a mere floating right, which can only be rendered effectual and made to operate as a conveyance of title to any part by the actual location of the route of the road across such tract of land; and until such location the title to the whole tract will remain in the grantor. Detroit, etc., R. Co. *v.* Forbes, 30 Mich. 165.

License.— An agreement to convey land to a railroad company providing it shall construct its road through a certain village within a given time and promising to deliver a deed when the road is complete and in operation prior to which time the railroad may enter on the premises for the purpose of constructing and operating its road is a mere license to the railroad to enter upon the land, construct its road, and operate its trains, and gives the railroad company a mere right to the possession of the land, and confers on it no title. Littlejohn *v.* Chicago, etc., R. Co., 219 Ill. 584, 76 N. E. 840.

Option.— Where a grant of a railroad right of way for a given period provides that the grantee after such period may retain the right of way as long as it desires upon the payment of a stipulated amount, it confers a mere option not affecting rights already given. Alderman *v.* Wilson, 71 S. C. 64, 50 S. E. 643.

Possession of a railway road-bed will be presumed in ejectment to have followed the title until the dispossession by defendant took place, where the railway tracks were on the land and plaintiff railway company claims under a series of deeds purporting to convey the property. Chesapeake Beach R. Co. *v.* Washington, etc., R. Co., 199 U. S. 247, 23 S. Ct. 25, 50 L. ed. 175 [*affirming* 23 App. Cas. (D. C.) 587].

Assignment to railroad.— Where a right of way for a railroad has been granted to a private individual without the power of appropriation, the railroad company succeeding to such right of way acquires no greater right than was held by him. Collins *v.* Craig Shipbuilding Co., 27 Ohio Cir. Ct. 802.

34. Indianapolis, etc., R. Co. *v.* Rayl, 69 Ind. 424. See also Her Majesty's Secretary of State *v.* Great Western R. Co., 13 Grant Ch. (U. C.) 503; Nelson *v.* Cook, 12 U. C. Q. B. 22.

The nature and quality of the interest taken and conferred is necessarily limited and fixed by the legislature, and whether only an easement or a full fee title is purely for its determination. Smith *v.* Hall, 103 Iowa 95, 72 N. W. 427.

35. Ballard *v.* Louisville, etc., R. Co., 5 S. W. 484, 9 Ky. L. Rep. 523; Breckinridge *v.* Delaware, etc., R. Co., (N. J. Ch. 1895) 33 Atl. 800 (holding that a conveyance by the words "give, grant, bargain, sell, convey and confirm" to a railroad company and its successors and assigns forever, etc., creates a fee); Yates *v.* Van de Bogert, 56 N. Y. 526; Buffalo Pipe Line Co. *v.* New York, etc., R. Co., 10 Abb. N. Cas. (N. Y.) 107; Philadelphia, etc., R. Co. *v.* Obert, 109 Pa. St. 193, 1 Atl. 398 (holding that a railroad takes a fee in its original location under a deed conveying all the land on which the said "railroad is located and about being constructed").

In England a railroad company purchasing land for the railroad acquires an absolute fee simple, but such fee simple is acquired solely for the purposes of constructing and using the railroad. Norton *v.* London, etc., R. Co., 9 Ch. D. 623, 47 L. J. Ch. 859, 39 L. T. Rep. N. S. 25, 27 Wkly. Rep. 352 [*affirmed* in 13 Ch. D. 268, 41 L. T. Rep. N. S. 429, 28 Wkly. Rep. 173].

A company receiving a warranty deed to a strip of land for its track acquires a title in fee subject at most to forfeiture for nonuser or misuser, and not a mere easement. Askew *v.* Smith, 109 Wis. 532, 85 N. W. 512.

Right of way across non-navigable stream. —Although the state has an easement in the bed of a non-navigable stream and its citizens may use such stream for the purposes of navigation, the abutting owners are possessed in fee to the middle of the stream, and a conveyance from them to a railroad company of a right of way across the stream transfers such fee to the company, and the use of the bed of the stream for a purpose not relating to navigation, such as the laying of pipes beneath the water, may be restrained by the railroad company as a

way";[36] and where land so conveyed is no longer needed for railroad purposes, the company may sell and convey the same.[37] Where a conveyance of the fee conveys for the uses and purposes of a railroad, it has been held that it creates a determinable fee and transfers the whole title from the grantor so long as the land is used for railroad purposes.[38] As a general rule, however, if the deed purports to convey only a right of way, it does not convey the land itself but the fee remains in the grantor, and the railroad company acquires a mere easement in perpetuity in the land, for railroad purposes,[39] although the conveyance is in the usual form of a full warranty deed.[40] The easement which a railroad company acquires under such conveyance is an interest which is absolute for the purposes for which the land is conveyed so long as it is used for those purposes, even though the language of the deed falls short of conveying the fee in the land.[41]

trespass. Buffalo Pipe Line Co. *v.* New York, etc., R. Co., 10 Abb. N. Cas. (N. Y.) 107.

If the conveyance is of the fee on condition, it amounts to a fee both in the surface and in regard to underlying coal or other minerals. Rice *v.* Clear Spring Coal Co., 186 Pa. St. 49, 40 Atl. 149.

36. Ballard *v.* Louisville, etc., R. Co., 5 S. W. 484, 9 Ky. L. Rep. 523.

37. Yates *v.* Van de Bogert, 56 N. Y. 526.

38. U. S. Pipe Line Co. *v.* Delaware, etc., R. Co., 62 N. J. L. 254, 41 Atl. 759, 42 L. R. A. 572; Buffalo Pipe Line Co. *v.* New York, etc., R. Co., 10 Abb. N. Cas. (N. Y.) 107.

39. *Alabama.*— Odum *v.* Rutledge, etc., R. Co., 94 Ala. 488, 10 So. 222.

Arkansas.— Graham *v.* St. Louis, etc., R. Co., 69 Ark. 562, 65 S. W. 1048, 66 S. W. 344.

Illinois.— Walker *v.* Illinois Cent. R. Co., 215 Ill. 610, 74 N. E. 812.

Indiana.—Smith *v.* Holloway, 124 Ind. 329, 24 N. E. 886; Cincinnati, etc., R. Co. *v.* Geisel, 119 Ind. 77, 21 N. E. 470; Douglas *v.* Thomas, 103 Ind. 187, 2 N. E. 563; Lake Erie, etc., R. Co. *v.* Zicbarth, 6 Ind. App. 228, 33 N. E. 256.

Iowa.— Vermilya *v.* Chicago, etc., R. Co., 66 Iowa 606, 24 N. W. 234, 55 Am. Rep. 279; Henry *v.* Dubuque, etc., R. Co., 2 Iowa 288.

Nebraska.— Blakely *v.* Chicago, etc., R. Co., 46 Nebr. 272, 64 N. W. 972.

Ohio.— Cincinnati, etc., R. Co. *v.* Wachter, 70 Ohio St. 113, 70 N. E. 974, holding that an instrument whereby the owner of a tract of land releases to a railroad company a right of way through the land, leaving a portion thereof on each side of the right of way, conveys an easement in the land for railroad purposes leaving the fee subject to such servitude in the grantor.

Pennsylvania.— Rice *v.* Clear Spring Coal Co., 186 Pa. St. 49, 40 Atl. 149. See Peach Bottom R. Co. *v.* McAlister, 11 York Leg. Rec. 75.

South Carolina.— Williams *v.* Oliver, Cheves, 115, holding that a written agreement by an owner of land, not under seal, with a railroad company that if it will build its road through or contiguous to his land he will convey to it a strip of a certain width with the right to clear the timber one hundred feet on each side thereof, and enter on and use the land without molestation for the purposes of its road, is an agreement to grant an easement for a right of way and not for a conveyance of a fee.

Tennessee.— McLemore *v.* Charleston, etc., R. Co., 111 Tenn. 639, 69 S. W. 338; Nashville, etc., R. Co. *v.* McReynolds, (Ch. App. 1898) 48 S. W. 258.

Washington.— Reichenbach *v.* Washington Short Line R. Co., 10 Wash. 357, 38 Pac. 1126.

West Virginia.— Uhl *v.* Ohio River R. Co., 51 W. Va. 106, 41 S. E. 340.

United States.—South Penn Oil Co. *v.* Calf Creek Oil, etc., Co., 140 Fed. 507; Lockwood *v.* Ohio River R. Co., 103 Fed. 243, 43 C. C. A. 202.

See 41 Cent. Dig. tit. "Railroads," § 163.

Illustrations.— Thus a contract to lease to a railroad company a right of way of an indefinite size and location, through certain lands, and agreeing to convey a strip of land by metes and bounds, by deed in fee simple, when desired, is a contract for the conveyance of an easement merely, and not for the fee in the strip. Ottumwa, etc., R. Co. *v.* McWilliams, 71 Iowa 164, 32 N. W. 315. A deed to a railroad company conveying "a free and perpetual right of entry, right of way and easement," etc., to and upon lands conveys the easement only and not the fee. Beasley *v.* Aberdeen, etc., R. Co., 145 N. C. 272, 59 S. E. 60 [*modified* and *affirmed* in 147 N. C. 362, 61 S. E. 453]. So where a railroad company, empowered by a charter to acquire a right of way of a certain width, acquires such right of way by donation, but limited to its actual needs, and reserving to the owners the title and right to cultivate the land up to the right of way actually occupied, it does not acquire an exclusive right of possession in a right of way of the width specified but an easement therein commensurate with its needs. Nashville, etc., R. Co. *v.* McReynolds, (Tenn. Ch. App. 1898) 48 S. W. 258.

40. Jones *v.* Van Bochove, 103 Mich. 98, 61 N. W. 342. But see Askew *v.* Smith, 109 Wis. 532, 85 N. W. 512.

41. Walker *v.* Illinois Cent. R. Co., 215 Ill. 610, 74 N. E. 812 (holding that a deed to a railroad company of a right of way for the purpose of constructing, maintaining,

Under some statutes a deed to a railroad company and its successors conveys an estate in fee if the grantor has such an estate, although no words of perpetuity are used.[42] Under other statutes, however, an easement only is conveyed, although the instrument purports to convey the fee.[43]

3. Rights in Adjoining Lands. The grant of a railroad right of way confers the right to make a reasonable use of the adjoining land, for the purposes expressed in the deed,[44] and for such other purposes as may be reasonably necessary for the enjoyment of the grant or license,[45] such as the widening and deepening of streams on adjoining land so as to secure the railroad and the adjoining land from damage by washing,[46] or the making of carefully constructed ditches and culverts for draining water from the right of way,[47] subject, however, to the limitation that it is done without negligence and unnecessary injury to the adjoining land.[48] But it does not give the company the right to use the adjoining land for purposes not expressed in the grant, nor reasonably necessary thereto.[49] Thus a grant "for all purposes connected with the construction, use, and occupation" of the right of way confers no right to take sand therefrom for the construction of a roundhouse without compensating the owner of the land therefor;[50] nor in the absence of agreement has the company a right to go outside its right of way and take sand or other material for the construction of its road;[51] nor has it the right to deposit large quantities of earth, rock, and waste matter from other portions of its right of way on land beyond the line of the slope or embankment contemplated by the owner's grant.[52] Where a railroad company in good faith, under a supposed charter or statutory authority, enters upon and uses adjoining

and operating a single or double track railroad, with all necessary appurtenances and for all uses and purposes connected with its construction, repair, or maintenance, etc., does not convey the fee to the strip but only the right to use it perpetually for right-of-way purposes); Junction R. Co. *v.* Ruggles, 7 Ohio St. 1 (holding that where a landowner grants a right of way to a railroad company organized under a charter in perpetuity, and the grant contains no limit as to time, the easement will be perpetual, unless terminated by release or abandonment).

42. Yates *v.* Van de Bogert, 56 N. Y. 526; Nicoll *v.* New York, etc., R. Co., 12 N. Y. 121 [*affirming* 12 Barb. 460]. See Norton *v.* London, etc., R. Co., 9 Ch. D. 623, 47 L. J. Ch. 859, 39 L. T. Rep. N. S. 25, 27 Wkly. Rep. 352 [*affirmed* in 13 Ch. D. 268, 41 L. T. Rep. N. S. 429, 28 Wkly. Rep. 173].

43. Chouteau *v.* Missouri Pac. R. Co., 122 Mo. 375, 22 S. W. 458, 30 S. W. 299, under Laws (1849), p. 219, and Laws (1851), p. 272.

44. Vermilya *v.* Chicago, etc., R. Co., 66 Iowa 606, 24 N. W. 234, 55 Am. Rep. 279.

45. Babcock *v.* Western R. Corp., 9 Metc. (Mass.) 553, 43 Am. Dec. 411.

46. Babcock *v.* Western R. Corp., 9 Metc. (Mass.) 553, 43 Am. Dec. 411.

47. Babcock *v.* Western R. Corp., 9 Metc. (Mass.) 553, 43 Am. Dec. 411; Parks *v.* Southern R. Co., 143 N. C. 289, 55 S. E. 701, 12 L. R. A. N. S. 680. But see Earhart *v.* Cowles, 122 Iowa 194, 97 N. W. 1085 (holding that a grant of a right of way to a company for its tracks does not carry, as incident thereto, any right on the part of the company to discharge on to the land surface water collected by it from drainage); Childers *v.* Louisville, etc., R. Co., 74 S. W. 241, 24 Ky. L. Rep. 2375.

48. Parks *v.* Southern R. Co., 143 N. C. 289, 55 S. E. 701, 12 L. R. A. N. S. 680. See McArthur *v.* Northern, etc., Junction R. Co., 17 Ont. App. 86 [*modifying* 15 Ont. 733].

49. McCord *v.* Doniphan Branch R. Co., 21 Mo. App. 92 (holding that a grant to a company of a right of way across land with the privilege of "borrowing or wasting earth in the construction or operation of the railway" does not give the right to waste the land outside of the right of way by heaping earth upon it); Gulf, etc., R. Co. *v.* Richards, 11 Tex. Civ. App. 95, 32 S. W. 96.

50. Vermilya *v.* Chicago, etc., R. Co., 66 Iowa 606, 24 N. W. 234, 55 Am. Rep. 279.

51. Hendler *v.* Lehigh Valley R. Co., 209 Pa. St. 256, 58 Atl. 486, 103 Am. St. Rep. 1005; Brock Tp. *v.* Toronto, etc., R. Co., 37 U. C. Q. B. 372; Pew *v.* Buffalo, etc., R. Co., 17 U. C. Q. B. 282.

Limitation of actions for damages so caused see Beard *v.* Credit Valley R. Co., 9 Ont. 616; Brock Tp. *v.* Toronto, etc., R. Co., 37 U. C. Q. B. 372.

52. Bigham *v.* Pittsburg Constr. Co., 29 Pa. Super. Ct. 86.

Trespass may be maintained by the owner in such a case, and in his action he may elect to treat the injury as permanent in its nature and ask that his entire damages be assessed accordingly. Bigham *v.* Pittsburg Constr. Co., 29 Pa. Super. Ct. 86. And in such action plaintiff may show what deposits were made for a change in the grade under a subsequent agreement, and that the deposit complained of was not made in the execution of the grade contemplated

land for the purpose of cutting timber, but without a right to do so, it will be liable for the actual damage sustained by the landowner,[53] but not for a statutory penalty of treble damages.[54] Under some statutes a railroad company or contractor may enter upon and use adjoining lands for temporary structures while constructing the road.[55]

4. Priority of Right.[56] Where a railroad company acquires title by purchase, it is governed by the same principles as private individuals, in acquiring title to the land and making improvements thereon.[57] The possession by a railroad company of its right of way is notice to all subsequent purchasers or encumbrancers of its rights in the premises.[58] The right or title of a railroad company in a right of way acquired by it is superior to that of a lessee of the land whose lease has expired, although such lessee purchases the land before the expiration of the lease, but after the grant of the right of way;[59] or to a lease made subsequent to its entry with the owner's consent;[60] or to a subsequent dedication of a part of the right of way for the purposes of a street;[61] or to subsequent purchasers with notice from the landowner.[62] But a private conveyance to a railroad company for a right of way conveys it subject to existing inchoate rights and liens.[63] It has been held that where the owner of the fee of land encumbered for purchase-money conveys a right of way over it to a railroad company which takes possession and constructs its road under such conveyance, the lienor can claim his full

when the original grant was made. Bigham *v.* Pittsburg Contsr. Co., *supra*.

Measure of damages.— In the absence of sufficient evidence relating to the depreciation in value of the land, the jury is to be instructed as to the measure of damages in such case that subject to their finding as to the relation of the part occupied by the deposit complained of to the rest of the lot, the cost of removing the material wrongfully deposited on the land and putting it in as good condition as if the railroad company's right as to the slope had not been exceeded would be the proper measure of damages, provided that such cost would not be greater than the value of the land injuriously affected, and that in the latter case the value of such land would be the measure. Bigham *v.* Pittsburg Constr. Co., 29 Pa. Super. Ct. 86.

53. Lindell *v.* Hannibal, etc., R. Co., 25 Mo. 550. See also McArthur *v.* Northern, etc., Junction R. Co., 17 Ont. App. 86 [*modifying* 15 Ont. 733].

54. Lindell *v.* Hannibal, etc., R. Co., 25 Mo. 550.

55. Lauderbrun *v.* Duffy, 2 Pa. St. 398.

Temporary tramway.— Where a railroad company proposes to take temporary possession of a piece of land adjoining its railroad in course of construction for the purpose of laying thereon a tramway for carrying materials for its new line, which materials could be brought by the high road, although at a greater expense, such temporary occupation is not "necessary for the construction" of the railway within the meaning of Railways Clauses Consolidation Act (1845), § 32. Morris *v.* Tottenham, etc., R. Co., [1892] 2 Ch. 47, 61 L. J. Ch. 215, 66 L. T. Rep. N. S. 585, 40 Wkly. Rep. 310.

56. Conflicting locations see *supra*, IV, F.

57. Fulkerson *v.* Taylor, 102 Va. 314, 46 S. E. 309.

58. Illinois Southern R. Co. *v.* Borders, 201 Ill. 459, 66 N. E. 382.

The actual possession by a railway company of a tract of land, under a verbal contract for a conveyance, to be made upon the performance of certain conditions, is notice to any subsequent purchaser from the party with whom the verbal contract was made, of all such rights as the company may have in the premises. Chicago, etc., R. Co. *v.* Boyd, 118 Ill. 73, 7 N. E. 487.

Entering upon and clearing the right of way and commencing grading and bridge work is such possession as to give notice of the company's rights in the premises to a subsequent grantee. Illinois Southern R. Co. *v.* Borders, 201 Ill. 459, 66 N. E. 382.

59. Olive *v.* Sabin, etc., R. Co., 11 Tex. Civ. App. 208, 33 S. W. 139, holding that where a lessor during the lease conveys a right of way across the land to a railroad company and the lessee erects buildings on the right of way, and afterward, before the expiration of the lease, purchases the land, the title of the company to the right of way after the expiration of the lease is superior to that of the lessee and that therefore it may compel the removal of the buildings.

60. Caststeel *v.* St. Louis, etc., R. Co., 81 Ark. 364, 99 S. W. 540.

61. Nalley *v.* Pennsylvania R. Co., 177 Pa. St. 117, 35 Atl. 638.

62. Alderman *v.* Wilson, 71 S. C. 64, 50 S. E. 643.

63. Farrow *v.* Nashville, etc., R. Co., 109 Ala. 448, 20 So. 303. See Harty *v.* Appleby, 19 Grant Ch. (U. C.) 205.

Adverse right of way.—A railroad company acquiring for a right of way land over which individuals exercise and claim a right of way adverse to and by recognition of the

compensation for the land appropriated, but he is not entitled to sell the land with the improvements thereon in satisfaction of his lien.[64] Where a railroad company has acquired a portion of its right of way by a defective title, of which it had constructive notice, the court may decree that the land be sold with the portion of the road-bed thereon to satisfy a judgment against the company's vendor.[65]

G. Exceptions, Reservations, Covenants, and Conditions — 1. Exceptions and Reservations.[66] A railroad company may accept a conveyance of land subject to certain exceptions or reservations contained therein, in accordance with the rules regulating exceptions or reservations in deeds generally.[67] If a company accepts and holds under such deed, it is bound by the exceptions or reservations contained therein,[68] not withstanding it has otherwise acquired an absolute right to use the lands.[69] Under such a grant the railroad company has title to the land subject to the exceptions or reservations specified, and is entitled to use and enjoy the land conveyed in all lawful ways not inconsistent with the rights excepted or reserved;[70] and on the other hand the grantor must exercise the

owner is chargeable with notice of the rights of the individuals. Cincinnati, etc., R. Co. *v.* Slaughter, 104 S. W. 293, 31 Ky. L. Rep. 894; Cincinnati Southern R. Co. *v.* Slaughter, 104 S. W. 291, 31 Ky. L. Rep. 913.

64. Gadsden First Nat. Bank *v.* Thompson, 116 Ala. 166, 22 So. 668. But see Flanary *v.* Kane, 102 Va. 547, 46 S. E. 312, 681.

A court of equity in which a suit is brought to enforce such lien has power to ascertain and decree the amount to be paid as damages or compensation. Gadsden First Nat. Bank *v.* Thompson, 116 Ala. 166, 22 So. 668.

65. Fulkerson *v.* Taylor, 102 Va. 314, 46 S. E. 309.

Waiver of defect in title.— If the value of land appropriated by a railroad company is submitted to arbitration and an award made and the company enters for the purposes of its road, its act in taking possession waives all right to object to a defect in the title, existing at the time a deed was tendered, but which was removed a few days afterward. Viele *v.* Troy, etc., R. Co., 20 N. Y. 184 [*affirming* 21 Barb. 381].

66. In agreements as to right of way or use of land see *supra*, V, C.

In conveyance from railroad company see *infra*, V, K, 3.

67. See Tift *v.* Savannah, etc., R. Co., 103 Ga. 580, 30 S. E. 266; Porter *v.* Kansas City, etc., R. Co., 103 Mo. App. 422, 77 S. W. 582; and, generally, Deeds, 13 Cyc. 672 *et seq.*

An exception may be created by words of reservation.— White *v.* New York, etc., R. Co., 156 Mass. 181, 30 N. E. 612.

The intention to except certain property included in the grant must be expressed in clear and certain terms. Littlejohn *v.* Chicago, etc., R. Co., 219 Ill. 584, 76 N. E. 840.

Whether, in a given case, the language in a deed shall be construed to create an exception or reservation will depend upon the situation of the property and the surrounding circumstances, in the absence of a declaration by the parties in the deed of their intention. White *v.* New York, etc., R. Co., 156 Mass. 181, 30 N. E. 612.

Right of way not excepted.—Where a property-owner authorizes a railroad company to enter upon a strip of land and construct its road thereon and promises to give a deed if the road shall be constructed and in operation within a certain time, a subsequent deed providing that the conveyance is made subject to the agreement for the right of way and including a reversionary right to the portion of the land used by the company in case it should give up its rights aforesaid, does not except from the grant the right of way Littlejohn *v.* Chicago, etc., R. Co., 219 Ill. 584, 76 N. E. 840.

An undertaking, to remove a barn and sheds, in consideration of the giving of a deed, cannot be construed to be an exception or reservation from the operation of the deed, in the absence of any showing of the actual location of the route of the railroad, or that it was so located as to include the ground where the barn and sheds stood; nor is such undertaking required to be in writing. Detroit, etc., R. Co. *v.* Forbes, 30 Mich. 165.

68. Silver Springs, etc., R. Co. *v.* Van Ness, 45 Fla. 559, 34 So. 884; White *v.* New York, etc., R. Co., 156 Mass. 181, 30 N. E. 612.

Notice.— A written notice to a railroad company to remove its right of way in accordance with an agreement in a deed giving the right is a sufficient notice under a clause of the deed to the effect that should the grantor desire to remove the right of way, the railroad company should, on notice, remove the tracks to adjoining land, where the company on receipt of the notice never requested a more specific one. Silver Springs, etc., R. Co. *v.* Van Ness, 45 Fla. 559, 34 So. 884.

69. White *v.* New York, etc., R. Co., 156 Mass. 181, 30 N. E. 612.

70. Matthews *v.* Delaware, etc., Canal Co., 20 Hun (N. Y.) 427.

Cannot interfere with reserved right.— A railroad company acquiring a right of way over a person's land subject to the reserved right of the landowner to a way over the railroad right of way cannot obstruct its right of way so as to materially interfere with the landowner's reserved right. Porter

rights reserved so as not to interfere with the railroad, unless the right to do so is reserved by express words or necessary implication.[71] Subject to these rules, grants have been made reserving an easement to the grantor,[72] such as to the use and occupancy of a spring or stream,[73] or the cultivation of the outside portion of the right of way,[74] or reserving a passway over and across the railroad.[75] It has been held that a reservation of the right to pass over property conveyed gives the grantor no right to pass over the railroad except at a definite place to be selected.[76] So a conveyance of land subject to all rights of way over said property does not include a portion of said track claimed by the railroad company as depot grounds.[77]

2. Covenants and Conditions in General. As a general rule a railroad company may accept a conveyance of land upon any conditions or covenants that are reasonable and possible to be performed,[78] which conditions and covenants are to be construed according to the rules regulating covenants and conditions in conveyances generally.[79] If the grant is upon conditions precedent, the company cannot claim title or assert any rights under the deed until such conditions have been performed.[80] Grants of land are also frequently made to a railroad company upon conditions subsequent, for a breach of which the grant may be defeated at the election of the grantor or his heirs or devisees.[81] No precise technical

v. Kansas City, etc., R. Co., 103 Mo. App. 422, 77 S. W. 582.

Defense.— The fact that the railroad company acquired a right of way over certain lands and paid for the value of the land acquired and the damages sustained to the remaining land constitutes no defense to a claim for damages growing out of the company's obstructing a right of way reserved to the landowner over the railroad right of way. Porter *v.* Kansas City, etc., R. Co., 103 Mo. App. 422, 77 S. W. 582.

71. Silver Springs, etc., R. Co. *v.* Van Ness, 45 Fla. 559, 34 So. 884.

72. Matthews *v.* Delaware, etc., Canal Co., 20 Hun (N. Y.) 427.

73. Smith *v.* Holloway, 124 Ind. 329, 24 N. E. 886; Matthews *v.* Delaware, etc., Canal Co., 20 Hun (N. Y.) 427; Galveston, etc., R. Co. *v.* Haas, (Tex. Civ. App. 1896) 37 S. W. 167.

74. Chicago, etc., R. Co. *v.* Wood, 30 Ind. App. 650, 66 N. E. 923.

75. Claflin *v.* Boston, etc., R. Co., 157 Mass. 489, 32 N. E. 659, 20 L. R. A. 638; White *v.* New York, etc., R. Co., 156 Mass. 181, 30 N. E. 612; Bean *v.* French, 140 Mass. 229, 3 N. E. 206; Porter *v.* Kansas City, etc., R. Co., 103 Mo. App. 422, 77 S. W. 582; Lakenan *v.* Hannibal, etc., R. Co., 36 Mo. App. 363.

76. Chesapeake, etc., R. Co. *v.* Richardson, 98 S. W. 1042, 30 Ky. L. Rep. 426.

77. Mead *v.* Illinois Cent. R. Co., 112 Iowa 291, 83 N. W. 979.

78. Taylor *v.* Florida East Coast R. Co., 54 Fla. 635, 45 So. 574, 16 L. R. A. N. S. 307; Hammond *v.* Port Royal, etc., R. Co., 15 S. C. 10, holding that public policy does not forbid a railroad corporation from accepting land for its road-bed upon such conditions.

79. See, generally, Deeds, 13 Cyc. 683 *et seq.*

As covenants running with the land see, generally, Covenants, 11 Cyc. 1080 *et seq.*

80. Littlejohn *v.* Chicago, etc., R. Co., 219 Ill. 584, 76 N. E. 840 (holding that where a property-owner agrees to convey land to a railroad company provided it shall construct and operate its road through a certain village within a certain time, the conditions of the conveyance are conditions precedent and the company cannot contend that it is seized of an estate upon conditions subsequent); New York, etc., R. Co. *v.* Providence, 16 R. I. 746, 19 Atl. 759 (holding that where a city grants to a railroad company certain depots and bridges on condition that it will fill in certain land, the filling of the land by the railroad company is a condition precedent to its right to occupy it).

Compromise agreement.—Where condemnation proceedings are compromised by an agreement providing that the landowner shall deed the land and that the railroad company shall, within one year, change the channel of a certain creek and shall, upon the opening of a certain street, erect a bridge in a stipulated manner, the building of the bridge is not a condition precedent to the passing of title and the failure to build it at the required time does not entitle the grantor to recover the land but merely gives him a right of action for damages. Bright *v.* Louisville, etc., R. Co., 87 S. W. 780, 27 Ky. L. Rep. 1052.

81. Lyman *v.* Suburban R. Co., 190 Ill. 320, 60 N. E. 515, 52 L. R. A. 645; Kenner *v.* American Contract Co., 9 Bush (Ky.) 202; Maison *v.* Montreal Park, etc., R. Co., 19 Quebec Super. Ct. 484.

Building embankment.— A grant to a railroad company on the condition that it will build and maintain a water-tight embankment or dam over a certain brook crossing the land conveyed as a part of its line of road, etc., is a condition subsequent. Underhill *v.* Saratoga, etc., R. Co., 20 Barb. (N. Y.) 455. *Compare* Chapin *v.* Harris, 8 Allen (Mass.) 594.

words are required to make a condition precedent or subsequent; it is always a question of the intention of the parties as construed from the terms of the instrument;[82] although conditions subsequent, especially when relied upon to work a forfeiture, must be created by express terms or clear implication,[83] and if it appears that during the time necessary for the performance of the condition it is not contemplated that the company shall be prevented from taking possession of the land or delayed in the construction of the road, it is a condition subsequent.[84] Thus grants have been made on a condition subsequent that the railroad company shall stop certain trains at a depot on the right of way granted,[85] or where such appears to be the intention of the parties from the provisions of the deed that if the land ceases to be used for railroad purposes it shall revert to the grantor,[86] and such condition is a continuing obligation which cannot be satisfied by the operation of the road on the land conveyed for a limited period only.[87] Such a condition does not require that the company shall at once use all parts of the land conveyed;[88] nor is a temporary non-user a breach of the condition.[89] The

82. Underhill *v.* Saratoga, etc., R. Co., 20 Barb. (N. Y.) 455.

83. Behlow *v.* Southern Pac. R. Co., 130 Cal. 16, 62 Pac. 295.

84. Underhill *v.* Saratoga, etc., R. Co., 20 Barb. (N. Y.) 455.

85. Taylor *v.* Florida East Coast R. Co., 54 Fla. 635, 45 So. 574, 16 L. R. A. N. S. 307; Gray *v.* Chicago, etc., R. Co., 189 Ill. 400, 59 N. E. 950; Burnett *v.* Great North of Scotland R. Co., 10 App. Cas. 147, 54 L. J. Q. B. 531, 53 L. T. Rep. N. S. 507.

Passenger train.—That a train carries milk as well as passengers does not deprive it of its character as a passenger train within a provision of a deed that passenger trains shall stop at a certain station. Gray *v.* Chicago, etc., R. Co., 189 Ill. 400, 59 N. E. 950.

Accommodation train.— Whether or not a train loses its character as an accommodation train within the meaning of such provision and becomes a through train by reason of the fact that it passes several stations without stopping before arriving at its destination is a question for the jury. Gray *v.* Chicago, etc., R. Co., 189 Ill. 400, 59 N. E. 950.

Continuing obligation.— A condition that the company should stop all its accommodation passenger trains at the point on the right of way where its passenger depot was then located on the premises, continues so long as the grantee holds and uses the land and is not a condition which may be satisfied by a performance for a number of years. Gray *v.* Chicago, etc., R. Co., 189 Ill. 400, 59 N. E. 950.

86. *Georgia.*— Moss *v.* Chappell, 126 Ga. 196, 54 S. E. 968.

Illinois.— Bonne *v.* Clark, 129 Ill. 466, 21 N. E. 850, 5 L. R. A. 276, holding that a grant for the purpose of building, constructing, maintaining and using thereon a railroad is on condition subsequent. *Compare* Noyes *v.* St. Louis, etc., R. Co., (1889) 21 N. E. 487.

Missouri.— Hannibal, etc., R. Co. *v.* Frowein, 163 Mo. 1, 63 S. W. 500.

Washington.—Mouat *v.* Seattle, etc., R. Co., 16 Wash. 84, 47 Pac. 233, holding that a general warranty deed to a railroad company containing a condition that in case the land shall cease to be used for railroad purposes, it shall revert to the grantors, their heirs and assigns, vests in the company an estate on a condition subsequent and not on a conditional limitation.

Wisconsin.— Horner *v.* Chicago, etc., R. Co., 38 Wis. 165.

The term "for railroad purposes only," as used in such a condition, means any railroad purpose, and the grantor cannot obtain a cancellation of the conveyance on the ground that it was understood that defendant would use the land in connection with a main line through the town where the land was situated and that the company had only built a branch. Mobile, etc., R. Co. *v.* Kamper, 88 Miss. 817, 41 So. 513.

Regularity of trains.— A condition subsequent in a deed to a railway company that, if the land conveyed is not used for railroad purposes only, it is to revert to the grantors, without limiting or defining the extent of the use, or the character or frequency of trains to be operated over it, is not broken by an irregular use of the land for railroad purposes, ranging from daily use to use at intervals of several months. Behlow *v.* Southern Pac. R. Co., 130 Cal. 16, 62 Pac. 295.

87. Taylor *v.* Florida East Coast R. Co., 54 Fla. 635, 45 So. 574, 16 L. R. A. N. S. 307; Lyman *v.* Suburban R. Co., 190 Ill. 320, 60 N. E. 515, 2 L. R. A. 645.

88. Graham *v.* St. Louis, etc., R. Co., 69 Ark. 562, 65 S. W. 1048, 66 S. W. 344, holding that where, in procuring the right of way for a road, depot grounds, etc., a railroad company purchased such right in a larger tract of land than it had immediate use for "to have and to hold . . . so long as said lands are used for the purpose of a railroad, and no longer," it did not lose its right to the land by permitting the grantor to use so much as the company was not using until the company should need it.

89. Hickox *v.* Chicago, etc., R. Co., 78 Mich. 615, 44 N. W. 143, 94 Mich. 237, 53 N. W. 1105; Mouat *v.* Seattle, etc., R. Co., 16 Wash. 84, 47 Pac. 233.

grant, however, may contain merely a covenant or limitation, a breach of which does not invalidate the deed but merely entitles the grantor to damages.[90] Thus a covenant in such a conveyance has been held to be created by a provision that the grantor and others shall have free passage on the trains of the road,[91] or that other railroads shall have the right to run a parallel track on or along the right of way.[92] Where the language used in the deed is ambiguous and may import a condition subsequent or a covenant, it will be construed to be the latter in preference to the former.[93]

3. Time For Construction of Road. In accordance with the above rules a proviso in a grant of a right of way that the road or a certain portion thereof shall be constructed and operated within a certain time, as construed from the language

90. Bain *v.* Parker, 77 Ark. 168, 90 S. W. 1000 (holding that a deed in consideration of the building of a railroad to be completed by a certain time does not impose as a condition subsequent to the grant that the railroad shall be completed by the date named, but merely imports a covenant by the grantee to complete the road by the date specified); Detroit Union R., etc., Co. *v.* Fort St. Union Depot Co., 128 Mich. 184, 87 N. W. 214; Hastings *v.* North Eastern R. Co., [1898] 2 Ch. 674, 63 J. P. 36, 65 L. J. Ch. 590, 78 L. T. Rep. N. S. 812, 47 Wkly. Rep. 59 [*affirmed* in [1899] 1 Ch. 656, 68 L. J. Ch. 315, 80 L. T. Rep. N. S. 217, 15 T. L. R. 247].

Dependent covenants.— A covenant in an agreement to convey a right of way to a railroad company to execute and acknowledge a deed to the company conveying the land in fee simple, being a dependent covenant and the estate or interest conveyed by the agreement being limited to an incorporeal hereditament, the operation of such covenant is necessarily restricted by the granting clause and cannot require the conveyance of a greater estate. Uhl *v.* Ohio River R. Co., 51 W. Va. 106, 41 S. E. 340; Lockwood *v.* Ohio River R. Co., 103 Fed. 243, 43 C. C. A. 202.

An obligation to use water from a spring on the grantor's land and pay him therefor by the month, given in consideration of a conveyance of a right of way, continues as long as the company uses the right of way, although it ceases to use the water. Howe *v.* Harding, 84 Tex. 74, 19 S. W. 363.

91. Dodge *v.* Boston, etc., R. Corp., 154 Mass. 299, 28 N. E. 243, 13 L. R. A. 318; Bettridge *v.* Great Western R. Co., 3 Grant Err. & App. (U. C.) 58.

A condition that the right of free passage should remain as long as the land and appurtenances described should be used as a railroad for railroad purposes is but a limitation on the road and does not perpetuate the right to the descendants of the grantor. Dodge *v.* Boston, etc., R. Corp., 154 Mass. 299, 28 N. E. 243, 13 L. R. A. 318.

The word "family" as used in a condition that the grantor and his family shall have free passage over the road on the cars of the company means those living in the grantor's house and under his management and does not extend so as to include the grantor's granddaughter or other members of the family who do not live with him. Dodge *v.* Boston, etc., R. Corp., 154 Mass. 299, 28 N. E. 243, 13 L. R. A. 318; Mitchell *v.* Cincinnati, etc., R. Co., 5 Ohio Dec. (Reprint) 488, 6 Am. L. Rec. 265. *Compare* Ruddick *v.* St. Louis, etc., R. Co., 116 Mo. 25, 22 S. W. 499, 38 Am. St. Rep. 570.

92. South, etc., R. Co. *v.* Highland Ave., etc., R. Co., 117 Ala. 395, 23 So. 973.

Compensation.—Such provision permits such use by another company without compensation. South, etc., R. Co. *v.* Highland Ave., etc., R. Co., 117 Ala. 395, 23 So. 973.

Such provision contemplates that the grantee may acquire the right to the exclusive use of all the right of way in case of sufficient growth of its business, so that in an action by another railroad company to enforce such provision, the bill of such other company, in order to have its right to construct thereon declared, should show that there is space on the right of way on which to build its track. South, etc., R. Co. *v.* Highland Ave., etc., R. Co., 117 Ala. 395, 23 So. 973.

Mere lapse of time and increase of business of the railroad to which a land company gives a right of way will not prevent the enforcement of a provision in the deed that any other railroad running into or through a certain city shall have the right to run a parallel track on or along the same right of way. South, etc., R. Co. *v.* Highland Ave., etc., R. Co., 117 Ala. 395, 23 So. 973.

Such provision may be enforced at the suit of another railroad company, although it was not in existence at the time the deed was made. South, etc., R. Co. *v.* Highland Ave., etc., R. Co., 117 Ala. 395, 23 So. 973.

93. *Arkansas.*— Bain *v.* Parker, 77 Ark. 168, 90 S. W. 1000.

Florida.— Silver Springs, etc., R. Co. *v.* Van Ness, 45 Fla. 559, 34 So. 884.

Michigan.— Waldron *v.* Toledo, etc., R. Co., 55 Mich. 420, 21 N. W. 870.

Minnesota.— Hamel *v.* Minneapolis, etc., R. Co., 97 Minn. 334, 107 N. W. 139.

Ohio.— Monnett *v.* Columbus, etc., R. Co., 26 Ohio Cir. Ct. 469.

A provision, as a further consideration of the grant, to place two stations at a location to be selected by the grantor, at which all trains must stop, is not a condition upon which the estate is granted, and is not available to defeat the estate created by the grant, but is merely a personal covenant on the part

employed, may be either a condition precedent,[94] or a condition subsequent,[95] or a mere covenant.[96] As a general rule a substantial compliance with such a condition is sufficient.[97] Thus where the grant is on a condition providing for a reversion to the grantor if work is not commenced on the road within a specified time, the construction and operation of any part of the road will satisfy the condition.[98] But where the provision is for a reversion on the grantee's failure to construct its road across the premises within a specified time, a completion of about one-half of the grading is not a substantial compliance with the condition.[99] Where the performance of such condition is dependent upon the grantor's selection of the route, the time specified does not begin to run against the company until the grantor has made such selection.[1] Where the grant provides that the right of way shall revert if the company ceases to use it as a railroad but specifies no time within which the road is to be constructed, there is an implied obligation on the part of the grantee to construct the road within a reasonable time.[2] Where the condition is that the license shall be void unless the road is constructed within a certain time, the licensor may enjoin the further extension of the road over the line after such time has elapsed.[3]

4. Mode of Construction in General. A grant may also be made upon condition that the road-bed be constructed and maintained in a particular mode,[4] such

of the grantee. Behlow *v.* Southern Pac. R. Co., 130 Cal. 16, 62 Pac. 295.

94. Peterson *v.* Atlantic, etc., R. Co., 120 Ga. 967, 48 S. E. 372, holding where the grant contains a provision that in consideration of a certain sum paid the grantor will give the company the exclusive privilege to build a railroad over lands owned by the grantor provided the railroad is built to the land by a certain date, the right of way is dependent upon the building of a railroad to the land by the time named in the deed and on a failure so to do the right to locate a right of way is lost.

95. Nicoll *v.* New York, etc., R. Co., 12 N. Y. 121 (holding that a conveyance on the condition that the company shall construct its railroad within the time prescribed by the act of incorporation is a grant on a condition subsequent and not precedent); Reichenbach *v.* Washington Short Line R. Co., 10 Wash. 357, 38 Pac. 1126 (holding that where a grant for so long as the land shall be used for the operation of a railroad provides that the grantee shall complete the road on or before Jan. 1, 1888, the agreement to build was a condition subsequent and not a mere covenant); Rannels *v.* Rowe, 145 Fed. 296, 74 C. C. A. 376.

A clause "this right of way to be exclusive for one year" as contained in a grant of land to a railroad company does not impose upon the company the duty of entering within a year under penalty of a reversion of the grant but merely gives to the company an exclusive right for one year to a way over the grantor's land, after which the grantor is at liberty to grant other rights of way to other companies. Virginia, etc., R. Co., *v.* Crow, 108 Tenn. 17, 64 S. W. 485.

A condition that the company shall construct a certain length of road within a given time, and on its failure to do so, that the granted estate shall revert to the grantor, is a condition subsequent, for breach of which the grantor may enter upon the land and repossess himself of it; and, in case of his doing so, the land is not subject to attachment thereafter for debts of the company, contracted while the land was in its possession. Schlesinger *v.* Kansas City, etc., R. Co., 152 U. S. 444, 14 S. Ct. 647, 38 L. ed. 507.

96. Bain *v.* Parker, 77 Ark. 168, 90 S. W. 1000; Krueger *v.* St. Louis, etc., R. Co., 185 Mo. 227, 84 S. W. 898, holding that a grant on condition that the construction of the road be fully completed and the road be in operation in or before the year 1900 is a covenant and not a condition.

97. Thomas *v.* Blue Ridge, etc., R. Co., 144 N. C. 729, 57 S. E. 523.

98. Lester *v.* Georgia, etc., R. Co., 90 Ga. 802, 17 S. E. 113.

99. Thomas *v.* Blue Ridge, etc., R. Co., 144 N. C. 729, 57 S. E. 523.

1. Waldron *v.* Toledo, etc., R. Co., 55 Mich. 420, 21 N. W. 870.

2. Pollock *v.* Maysville, etc., R. Co., 103 Ky. 34, 44 S. W. 359, 19 Ky. L. Rep. 1717, holding therefore that the right is forfeited by a delay of thirty-four years before constructing the road.

Where, besides great physical obstacles hindering the construction of a road, the company is also affected by a financial panic which was unforeseen at the time the contract for the right of way was made, the fact that two and one-half years is expended in building about five miles of road, the construction of which required a large expenditure, is not so unreasonable as to constitute a breach of a covenant to construct the line with reasonable speed. Bell *v.* Southern Pac. R. Co., 144 Cal. 560, 77 Pac. 1124.

3. Detroit, etc., Plank Road Co. *v.* Detroit Suburban R. Co., 103 Mich. 585, 61 N. E. 880; McDowell *v.* Blue Ridge, etc., R. Co., 144 N. C. 721, 57 S. E. 520.

4. Hills *v.* Boston, etc., R. Co., 18 N. H. 179 (holding, however, that a clause "said

as that it be so constructed as not to interfere with the landowner's water-power;[5] or that the company construct and maintain in a proper condition necessary culverts, drains, and ditches to carry off surplus water, and drain the adjoining land.[6] But where, in compliance with such condition or covenant, the company has constructed its road-bed so as to drain the land to the best advantage, it cannot afterward be compelled to change its road-bed because natural changes have made the drainage insufficient.[7] Where the diversion of a watercourse is expressly authorized by the terms of the deed of a right of way, the company is not liable for the consequential damages resulting therefrom unless the work is done negligently or the damage is unnecessary.[8] But such authority does not give the company a right to flood the grantor's land with the waters of streams which before did not touch it; and if the company has the right to bring such streams on the grantor's land, it must prepare a proper channel.[9]

5. Location of Road, Termini, and Stations. A railroad company may also accept a conveyance of land subject to a condition or covenant that it will locate its road, termini, or stations on the land conveyed,[10] and if there is any doubt as to the meaning of the terms employed in the grant as to the location of the right of way, it should be solved in favor of the grantee, particularly where the probabilities of the case favor such a conclusion.[11] Thus a covenant requiring a railroad company to erect a depot at a certain place in consideration of a grant of a right of way is a valid covenant for a breach of which the company will be liable in dam-

corporation to make us a culvert or pass for cattle to pass under said road" does not justify the company in digging a ditch on the adjoining land of the grantor to drain the passway); Unangst's Appeal, 55 Pa. St. 128; Jones *v.* Pittsburg, etc., R. Co., 11 Pa. Super. Ct. 202.

Interference with buildings.—A conveyance of land to a company for the purpose of constructing a railroad upon it, "provided the same does not interfere with buildings on said land," will be so construed as to prevent the construction of the road so near to the buildings as to endanger their safety or destroy their usefulness. Rathbone *v.* Tioga Nav. Co., 2 Watts & S. (Pa.) 74.

5. Unangst's Appeal, 55 Pa. St. 128.

6. Madden *v.* Cincinnati, etc., R. Co., 36 Ohio St. 46; Hammond *v.* Port Royal, etc., R. Co., 15 S. C. 10; Texas, etc., R. Co. *v.* Sutor, 56 Tex. 496; Mills *v.* Seattle, etc., R. Co., 10 Wash. 520, 39 Pac. 246. See Great North of Scotland R. Co. *v.* Fife, 82 L. T. Rep. N. S. 425, holding, however, that the obligation to preserve the drainage is not of unlimited duration, but is subject to the limitation prescribed by the Railway Clauses (Scotland) Act (1845), § 65.

A culvert or drain is duly provided by any structure or ditch that fairly accomplishes the purpose of drainage, although it is not an arched waterway of masonry. Oursler *v.* Baltimore, etc., R. Co., 60 Md. 358.

Damages.—A breach of such condition holds the company liable for damages approximately resulting from its failure to maintain sufficient ditches, but not for damages from an increased flow of water caused by the ditches from another railroad. Texas, etc., R. Co. *v.* Sutor, 56 Tex. 496.

7. Harrelson *v.* Kansas City, etc., R. Co., 151 Mo. 482, 52 S. W. 368.

One who contracts with a railroad company to construct its embankment and trestles on his land in a certain way, his purpose being to provide a way for leading off the natural waters of a branch, cannot afterward invoke the powers of an equity court to compel the company to remove the obstruction caused by the embankment and trestles constructed according to the contract, even though the natural elements have wrought such a change in the conditions as to cause the waters to overflow his lands. Harrelson *v.* Kansas City, etc., R. Co., 151 Mo. 482, 52 S. W. 368.

8. St. Louis, etc., R. Co. *v.* Walbrink, 47 Ark. 330, 1 S. W. 545; Oursler *v.* Baltimore, etc., R. Co., 60 Md. 358.

9. St. Louis, etc., R. Co. *v.* Harris, 47 Ark. 340, 1 S. W. 609; St. Louis, etc., R. Co. *v.* Ussery, (Ark. 1886) 1 S. W. 873.

10. See the cases cited *infra*, this note and notes 11-23.

Contracts as to location in general see *supra*, IV, A, 5.

A first-class station within the meaning of a covenant by a railroad company that it will use a certain piece of land purchased for a first-class station does not require that the company shall erect a larger station than had been used for many years, and which had not been objected to, and at which the passengers were not numerous, but it does require that the company shall stop at such station as many trains as stopped at other stations between the termini of the road, excepting mail, express, and special trains. Hood *v.* North Eastern R. Co., L. R. 5 Ch. 525, 23 L. T. Rep. N. S. 206, 18 Wkly. Rep. 473 [*affirming* L. R. 8 Eq. 666, 20 L. T. Rep. N. S. 970, 17 Wkly. Rep. 1085].

11. Kirby *v.* Wabash, etc., R. Co., 109 Ill. 412.

ages.[12] Where it appears from the terms of the condition that it was intended by the parties that if the land was not used for station purposes it should revert to the grantor, it is a condition subsequent for a breach of which the estate may be forfeited.[13] The character of the station to be maintained under such condition is to be determined by the needs of those who use it, and of the public, as construed in connection with the terms of the grant,[14] although a substantial compliance with such a condition or covenant is sufficient,[15] and no restriction or limitation will be enforced against the company which is not in the terms of the deed and which cannot fairly or necessarily be inferred from its terms.[16] Likewise a rail-

12. Georgia Southern R. Co. *v.* Reeves, 64 Ga. 492; Louisville, etc., R. Co. *v.* Moore, 106 Ind. 600, 5 N. E. 414; Louisville, etc., R. Co. *v.* Sumner, 106 Ind. 55, 5 N. E. 404, 55 Am. Rep. 719; Louisville, etc., R. Co. *v.* Baskett, 104 S. W. 695, 31 Ky. L. Rep. 1035; Ramsey *v.* Edgefield, etc., R. Co., 3 Tenn. Ch. 170.

13. Cleveland, etc., R. Co. *v.* Coburn, 91 Ind. 557 (holding that a conveyance of a right of way in consideration of the maintenance of a depot on land adjoining is a conveyance on condition subsequent); Close *v.* Burlington, etc., R. Co., 64 Iowa 149, 19 N. W. 886 (holding that a grant in consideration of one dollar "and the permanent location of a depot on the grounds conveyed" is on condition subsequent); Blanchard *v.* Detroit, etc., R. Co., 31 Mich. 42, 18 Am. Rep. 142; Hamel *v.* Minneapolis, etc., R. Co., 97 Minn. 334, 107 N. W. 139.

Not conditional estate.— A deed to a railroad company in consideration of its agreement to maintain a station thereon, and providing that the same shall be used only in connection with the railroad and its business does not create an estate on condition that a station shall be erected and maintained, and a failure to do so does not work a forfeiture where the property is used by the railroad company in its business and for no other purpose. Louisville, etc., R. Co. *v.* Baskett, 104 S. W. 695, 31 Ky. L. Rep. 1035.

14. Arkansas Cent. R. Co. *v.* Smith, 71 Ark. 189, 71 S. W. 947 (holding that a condition in a deed of a right of way reciting that "for and in consideration of a depot at Spring Hill," etc., is not fulfilled by merely building a side-track and stopping trains for the reception of passengers and freight, no building or platform being erected); Hamel *v.* Minneapolis, etc., R. Co., 97 Minn. 334, 107 N. W. 139; Caldwell *v.* East Broad Top R., etc., Co., 169 Pa. St. 99, 32 Atl. 85.

"Station purposes."— Where a right of way is conveyed by the owner of a farm with a strip of land for "station purposes," such term refers to a regularly operated railroad station at which business may be conducted by the railroad company as at its other stations. Hamel *v.* Minneapolis, etc., R. Co., 97 Minn. 334, 107 N. W. 139.

15. Vicksburg, etc., R. Co. *v.* Ragsdale, 54 Miss. 200; Pittsburg, etc., R. Co. *v.* Rose, 24 Ohio St. 219; Geauyeau *v.* Great Western R. Co., 3 Ont. 412 [*reversing* 25 Grant Ch. (U. C.) 62]; Schliehauf *v.* Canada Southern R. Co., 28 Grant Ch. (U. C.) 236.

Illustrations.— Thus a condition "that the said company shall make Chillicothe a station" is complied with by making Chillicothe a station, although the depot is located one quarter of a mile from the town plat. Jenkins *v.* Burlington, etc., R. Co., 29 Iowa 255. So a condition for the erection of a station, the character of which is not specified, is complied with by the erection of a board shed without the placing of an agent there, where it is in structure and management like most of the stations on the road. Caldwell *v.* East Broad Top R., etc., Co., 169 Pa. St. 99, 32 Atl. 85. But the erection of a small building called a depot for temporary purposes until the grantee could build a permanent structure is not a compliance with such a condition, and where neither the grantee nor the company which purchased its property and franchises have ever erected a permanent structure, the purchaser must respond in damages for the breach thereof. Ecton *v.* Lexington, etc., R. Co., 59 S. W. 864, 22 Ky. L. Rep. 1133.

Under Tex. Rev. St. (1895) arts. 4492, 4493, 4519, 4521, a railroad company under a conveyance in consideration of the establishment of a depot and side-tracks, upon the property deeded is required not only to maintain a depot building but to keep an agent there, and the grantor is entitled to recover damages for its failure so to do, although the operation of the station is unprofitable. Gulf, etc., R. Co. *v.* Martin, 38 Tex. Civ. App. 379, 86 S. W. 25. But under Rev. St. (1895) arts. 4376, 4367, a railroad company is free to change the location of its shops and offices when occasion so requires, notwithstanding the conveyance to the railroad company is in consideration of the location and perpetual maintenance of shops and offices on the land conveyed. Tyler *v.* St. Louis Southwestern R. Co., (Civ. App. 1905) 87 S. W. 238.

A railroad company is not bound to keep up a depot forever under such a conveyance, on the grantor's land; if it maintains it for a considerable length of time and until the company's interest and public convenience require its abandonment it is a substantial compliance with the covenant. Jeffersonville, etc., R. Co. *v.* Barbour, 89 Ind. 375; Texas, etc., R. Co. *v.* Scott, 77 Fed. 726, 23 C. C. A. 424, 37 L. R. A. 94; Jessup *v.* Grand Trunk R. Co., 7 Ont. App. 128 [*reversing* 28 Grant Ch. (U. C.) 583].

16. Southard *v.* New Jersey Cent. R. Co., 26 N. J. L. 13.

road company may agree to a provision in a deed that in consideration of a grant of certain land it will locate, construct, and operate its road over or through such land,[17] in substantial compliance with a specified or contemplated line,[18] although a substantial compliance with such condition is sufficient.[19] Where such provision is in the form of a covenant, its breach does not entitle the grantor to a cancellation of the deed but only to an action for damages.[20] Where the grant provides that the right of way shall be located by the chief engineer of the state, the boundary, as designated by him or by his assistant under his authority or direction, is binding on the grantor and his privies,[21] particularly where considerable time has been allowed to elapse after such location has been made.[22] Where under statutory authority a railroad has come into the control of the state, and it accepts lots as a donation for the purpose of erecting depots and turnouts thereon, the state does not obligate itself thereby to fix on such lots as a terminus, although if a terminus is erected elsewhere a reconveyance of the lots may be enforced.[23]

6. Crossings, Fences, and Cattle-Guards. Where a railroad company accepts a conveyance,[24] and occupies a right of way granted therein, it is bound by a covenant or condition imposed by the terms of the grant that it will erect and maintain a fence along its roadway upon the premises conveyed,[25] or construct and maintain cattle-guards or a private or farm crossing thereon;[26] and the rail-

17. Morrill *v.* Wabash, etc., R. Co., 96 Mo. 174, 9 S. W. 657; East Line, etc., R. Co. *v.* Garrett, 52 Tex. 133.

18. *Iowa.*— Crosbie *v.* Chicago, etc., R. Co., 62 Iowa 189, 17 N. W. 581, holding that no right of way can be claimed under such deed by a corporation running an independent line and in a different direction.

Missouri.— Jasper County El. R. Co. *v.* Curtis, 154 Mo. 10, 55 S. W. 222, construction so as to leave certain space between the right of way and the grantor's lands.

Ohio.— Chapman *v.* Mad River, etc., R. Co., 6 Ohio St. 119, holding that where a railroad company has received a donation of land in consideration of its placing its road in a specified place, it will not be allowed to change the line of its road or to do by indirection the equivalent thereto without compensating the donor.

Tennessee.— Knoxville, etc., R. Co. *v.* Beeler, 90 Tenn. 548, 18 S. W. 391.

Wisconsin.— Hutchinson *v.* Chicago, etc., R. Co., 37 Wis. 582.

See 41 Cent. Dig. tit. "Railroads," § 171.

19. Union Pac. R. Co. *v.* Cook, 98 Fed. 281, 39 C. C. A. 86.

20. Moseley *v.* Chicago, etc., R. Co., 57 Nebr. 636, 78 N. W. 293; Minard *v.* Delaware, etc., R. Co., 153 Fed. 578, 82 C. C. A. 586 [*affirming* 129 Fed. 60].

21. Dougherty *v.* Western, etc., R. Co., 53 Ga. 304.

22. Dougherty *v.* Western, etc., R. Co., 53 Ga. 304.

23. Taylor *v.* Whitney, 5 Ill. 61.

24. Pittsburgh, etc., R. Co. *v.* Wilson, 34 Ind. App. 324, 72 N. E. 666, holding the evidence to be sufficient to show the acceptance by a company of a conveyance of land for a right of way which contained a covenant to erect and maintain a farm crossing.

25. Louisville, etc., R. Co. *v.* Moore, 106 Ind. 600, 5 N. E. 413; Louisville, etc., R. Co. *v.* Sumner, 106 Ind. 55, 5 N. E. 404, 55 Am. Rep. 719; Hull *v.* Chicago, etc., R. Co., 65 Iowa 713, 22 N. W. 940.

26. *Illinois.*— Cleveland, etc., R. Co. *v.* Hobbie, 61 Ill. App. 396.

Indiana.— Lake Erie, etc., R. Co. *v.* Lee, 14 Ind. App. 328, 41 N. E. 1058, holding that where a deed of a right of way to a railroad company provides for a private way on the grantor's farm under the railroad, and the grantor has, with the consent of the company, elected to accept such way over and on a public highway, the company cannot close it without liability for damages.

Iowa.— Hull *v.* Chicago, etc., R. Co., 65 Iowa 713, 22 N. W. 940.

Kentucky.— Cincinnati Southern R. Co. *v.* Hudson, 88 Ky. 480, 11 S. W. 509, 10 Ky. L. Rep. 1043; Elizabethtown, etc., R. Co. *v.* Ford, 50 S. W. 1112, 21 Ky. L. Rep. 129.

Louisiana.— Eatman *v.* New Orleans Pac. R. Co., 35 La. Ann. 1018.

Michigan.— Stewart *v.* Cincinnati, etc., R. Co., 89 Mich. 315, 50 N. W. 852, 17 L. R. A. 539.

Missouri.— Gratz *v.* Highland Scenic R. Co., 165 Mo. 211, 65 N. W. 223; Baker *v.* Chicago, etc., R. Co., 57 Mo. 265; Stilwell *v.* St. Louis, etc., R. Co., 39 Mo. App. 221.

New York.— Aikin *v.* Albany, etc., R. Co., 26 Barb. 289.

Canada.— Canada Southern R. Co. *v.* Erwin, 13 Can. Sup. Ct. 162 [*reversing* 11 Ont. App. 306]; Canada Southern R. Co. *v.* Clouse, 13 Can. Sup. Ct. 139 [*reversing* 11 Ont. App. 287, which *modified* 4 Ont. 28].

See 41 Cent. Dig. tit. "Railroads," § 172.

"An adequate crossing" within the meaning of a conveyance with the proviso that the company shall construct such a crossing over the road is not complied with by the construction of a crossing with heavy slide gates as in such case the grantor is en-

road company cannot avoid this duty on the ground that, since the conveyance and reservation were made, it has made such changes in its tracks, etc., that the erection and maintenance of such crossing would be a great embarrassment to it in operating its road,[27] or on the ground that the building of the crossing at the particular place designated would be at a considerable expense;[28] nor can it exonerate itself from such duty by a statutory condemnation of the right of way.[29] Where the performance of such condition is dependent upon the grantor's selecting the places at which the crossings are to be erected, damages for a failure to perform such condition can be recovered only upon a showing that the grantor designated the places.[30] A covenant by a railroad company to erect and maintain a farm crossing or fences is one that runs with the land and is available for the protection of the grantor or his remote grantee against a company claiming under the conveyance,[31] and may be enforced against a grantee of the railroad com-

titled to an open crossing. Gray *v.* Burlington, etc., R. Co., 37 Iowa 119.

The filing of a location which contains no mention of the crossing and with no showing of an intention to abrogate the crossing does not extinguish the landowner's right to a crossing under a conveyance requiring the company to construct a suitable road crossing. Hamlin *v.* New York, etc., R. Co., 166 Mass. 462, 44 N. E. 444.

Right to covenant.— Where an agreement for the purchase of a right of way provides that the company shall construct and maintain a crossing over the right of way, the owner has a right to incorporate in his deed to the company a covenant that the grantee shall maintain a crossing for the grantor, his heirs and assigns. Hall *v.* Clearfield, etc., R. Co., 168 Pa. St. 64, 31 Atl. 940.

Whether a covenant contemplates the maintenance as well as the making of a crossing is to be determined from the nature of the subject-matter of the contract and the construction placed thereon by the parties. Pittsburgh, etc., R. Co. *v.* Wilson, 34 Ind. App. 324, 72 N. E. 666; Cameron *v.* Wellington, etc., R. Co., 28 Grant Ch. (U. C.) 327 [*reversing* 27 Grant Ch. (U. C.) 95], bound to maintain crossing, but not to keep it free from snow. Thus a covenant that the company will "make and maintain" a wire fence on both sides of the land conveyed and also make a farm crossing in pursuance of which the company does supply, maintain, and keep in repair a crossing for a number of years, obligates the company, not only to make but also to maintain the crossing. Pittsburgh, etc., R. Co. *v.* Wilson, 34 Ind. App. 324, 72 N. E. 666.

Duty to erect approaches.— A covenant in which the railroad company agrees to make a farm crossing imposes on it the duty of erecting approaches to the crossing. Pittsburgh, etc., R. Co. *v.* Wilson, 34 Ind. App. 324, 72 N. E. 666.

Farm crossing.— Where a strip through a farm is conveyed to a company for a right of way and the company covenants to provide the grantor with a convenient road crossing, and one of the severed portions of the farm is intersected by a road, but there is no method of egress from the other portion except over the railroad crossing and through the intersected portion of the road, a farm crossing only is meant, and the grantor and his grantees have a right to use it only for farm purposes. Speer *v.* Erie R. Co., (N. J. 1907) 65 Atl. 1024 [*reversing* 70 N. J. Eq. 318, 62 Atl. 943].

Where the sole condition in the conveyance is the establishment of an under crossing on the grantor's land, no action lies for damages caused by the construction of a station and switch near such crossing, whereby the traffic at that point is largely increased. Perry *v.* Lehigh Valley R. Co., 9 Misc. (N. Y.) 515, 30 N. Y. Suppl. 140.

Power of solicitor.— In treating with landowners for the right to cross their lands by a railroad, or in proceedings before arbitrators, the solicitor acting for the company at the arbitration is not qualified to enter into any special agreement binding the company to construct and maintain a crossing. Wood *v.* Hamilton, etc., R. Co., 25 Grant Ch. (U. C.) 135.

The word "necessary" within a provision requiring a railroad company to make such roads, ways, and slips for cattle as might be necessary must receive a reasonable interpretation, and has been held to mean "such roads, ways and slips for cattle, as might be necessary and proper for convenient communication between the severed portions" of the owner's land. Sanderson *v.* Cockermouth, etc., R. Co., 11 Beav. 497, 50 Eng. Reprint 909.

27. Cleveland, etc., R. Co. *v.* Hobbie, 61 Ill. App. 396.

28. Cincinnati Southern R. Co. *v.* Hudson, 88 Ky. 480, 11 S. W. 509, 10 Ky. L. Rep. 1043.

29. Gray *v.* Burlington, etc., R. Co., 37 Iowa 119; Stafford *v.* Big Sandy R. Co., 105 S. W. 389, 32 Ky. L. Rep. 154, condemning new right of way no defense.

30. Hull *v.* Chicago, etc., R. Co., 65 Iowa 713, 22 N. W. 940. But see Elizabethtown, etc., R. Co. *v.* Killen, 50 S. W. 1108, 21 Ky. L. Rep. 122.

31. Pittsburgh, etc., R. Co. *v.* Wilson, 34 Ind. App. 324, 72 N. E. 666; Lake Erie, etc., R. Co. *v.* Griffin, (Ind. App. 1899) 53 N. E. 1042; Elizabethtown, etc., R. Co. *v.* Killen, 50 S. W. 1108, 21 Ky. L. Rep. 122; Elizabethtown, etc., R. Co. *v.* Wright, 50

pany.[32] Unless the conveyance specifies the time within which such crossings, cattle-guards, or fences are to be constructed,[33] the company's duty is to comply with such duty within a reasonable time after it takes possession;[34] and if it fails to do so within the time specified or within a reasonable time, an action will lie against it for a breach thereof in which recovery may be had for the reasonable cost of erecting the fences or constructing the crossings or cattle-guards,[35] although plaintiff has not first done such work,[36] together with such damages as may have resulted up to the time of trial from the inconvenience of not having the fence or crossing,[37] and together with special damages caused, such as the value of cattle killed,[38] damage to crops, and the like.[39] It has also been held that the measure of damages in such a case is the difference in the rental value of the land.[40] In

S. W. 1105, 21 Ky. L. Rep. 128; Scowden *v.* Erie R. Co., 26 Pa. Super. Ct. 15.

Where under a covenant the grantee undertakes to maintain two passways over its road, and the grantor divides his land and sells the several parts to different persons, each of his vendees is entitled to the benefit of the covenant and may recover damages against the railroad company to the extent that his part of the land has been injured by the failure of the company to furnish the required passways. Elizabethtown, etc., R. Co. *v.* Killen, 50 S. W. 1108, 21 Ky. L. Rep. 122.

32. Kelly *v.* Nypano R. Co., 23 Pa. Co. Ct. 177 (holding that a grantee of a railroad company is bound to erect a fence under such a covenant, although there was no fence on the land at the time it took title); Edinburgh, etc., R. Co. *v.* Campbell, 9 L. T. Rep. N. S. 157, 4 Macq. H. L. 450.

33. Cincinnati, etc., R. Co. *v.* Harris, 61 Ind. 290 (holding that a conveyance in consideration that the company shall fence the road "in six months' time" does not oblige the company to fence until six months after the completion of the road); Baltimore, etc., R. Co. *v.* McClellan, 59 Ind. 440 (holding that the word "completion" within the meaning of a provision that the company shall make a conveyance along its roadway on such premises within a reasonable time after the completion of the road refers to that part of the road extending across the owner's land and not to the whole line of the railroad).

34. Indiana, etc., R. Co. *v.* Koons, 105 Ind. 507, 5 N. E. 549.

35. Louisville, etc., R. Co. *v.* Power, 119 Ind. 269, 21 N. E. 751; Louisville, etc., R. Co. *v.* Moore, 106 Ind. 600, 5 N. E. 413; Louisville, etc., R. Co. *v.* Sumner, 106 Ind. 55, 5 N. E. 404, 55 Am. Rep. 719; Indiana, etc., R. Co. *v.* Koons, 105 Ind. 507, 5 N. E. 549; Pittsburgh, etc., R. Co. *v.* Wilson, 34 Ind. App. 324, 72 N. E. 666; Cincinnati Southern R. Co. *v.* Hudson, 88 Ky. 480, 11 S. W. 509, 10 Ky. L. Rep. 1043; Stafford *v.* Big Sandy R. Co., 105 S. W. 389, 32 Ky. L. Rep. 154.

Leave to construct the crossing within a reasonable time may be granted by the court, in such a case, in lieu of paying plaintiff the amount that it would reasonably cost him to construct. Stafford *v.* Big Sandy R. Co., 105 S. W. 389, 32 Ky. L. Rep. 154.

36. Indiana, etc., R. Co. *v.* Koons, 105 Ind. 507, 5 N. E. 549; Pittsburgh, etc., R. Co. *v.* Wilson, 34 Ind. App. 324, 72 N. E. 666.

37. Pittsburgh, etc., R. Co. *v.* Wilson, 34 Ind. App. 324, 72 N. E. 666; Cincinnati Southern R. Co. *v.* Hudson, 88 Ky. 480, 11 S. W. 509, 10 Ky. L. Rep. 1043; Stafford *v.* Big Sandy R. Co., 105 S. W. 389, 32 Ky. L. Rep. 154.

38. Louisville, etc., R. Co. *v.* Power, 119 Ind. 269, 21 N. E. 751; Louisville, etc., R. Co. *v.* Moore, 106 Ind. 600, 5 N. E. 413; Louisville, etc., R. Co. *v.* Sumner, 106 Ind. 55, 5 N. E. 404, 55 Am. Rep. 719.

Injuries to animals generally by failure to fence see *infra*, X, H, 4.

39. Louisville, etc., R. Co. *v.* Power, 119 Ind. 269, 21 N. E. 751; Eatman *v.* New Orleans Pac. R. Co., 35 La. Ann. 1018.

The amount of damage in such case should be the value of the growing crop at the time of the breach of the covenant, to be established by the then existing facts, and the judgment of men applied to them, as if the inquiry had been made the day the crop was destroyed, without admitting proof of any after-occurring fact (Chicago, etc., R. Co. *v.* Ward, 16 Ill. 522); but in such a case it is proper to permit a party to prove what the crop would have been worth at its maturity, taking as the measure of damages the relative value of the growing crop for a series of antecedent years, to establish the value of the crop destroyed at the time of its destruction; or, what would a prudent man have given for the crop destroyed, at the time, provided he should have it secured from trespass, and have the right to cultivate and secure it (Chicago, etc., R. Co. *v.* Ward, *supra*); and it is also proper to show how much the land would yield each season, and the market value of the crops at harvest season, from which should be deducted the cost of tillage, harvesting, and marketing, to ascertain the true measure of damage (Chicago, etc., R. Co. *v.* Ward, *supra*).

40. Hull *v.* Chicago, etc., R. Co., 65 Iowa 713, 22 N. W. 940; Varner *v.* St. Louis, etc., R. Co., 55 Iowa 677, 8 N. W. 634.

The actual loss in rental value resulting from a breach of an agreement by a railroad company in consideration of a grant of a right of way to build and maintain a sufficient stock fence, although the only damage shown, is recoverable. Lake Erie,

order to sustain an action for compensatory damages against a railroad company for failure to build fences and cattle-guards in breach of covenants in its right-of-way grant, there must be an actual loss from such failure as its proximate cause.[41] A failure to make crossings and fences as agreed does not make a railroad company liable as a trespasser for running on the right of way secured from the landowner, for if liable at all it is liable on its agreement and not as a trespasser.[42]

7. Damages From Construction and Maintenance.[43] A stipulation in a grant to a railroad company releasing it from damages caused or to be caused by the location, construction, maintenance, and operation of the road, releases the company from liability for such damages as are a necessary result of the location, construction, maintenance, and operation of the road in a legal and proper manner;[44] and protects the company from liability to a subsequent purchaser of the land, with notice;[45] but it does not release the company from such damages as are the result of its negligence or unskilfulness.[46] A recital in a deed granting a right of way that the grantor has been fully paid for the damage done or which may be done to his property by the location and construction of the roadway does not preclude the grantor's right to have his damages assessed according to law, where the railroad company has not fulfilled a condition in the deed requiring it to complete the road within a specified time.[47] A release from damages arising "by reason of the location or construction" of a railroad does not release the grantor's right to a way of necessity across the land conveyed unless facts are shown which favor such a construction.[48]

8. Successors or Grantees of Parties to Grant. Notwithstanding a railroad company procures the premises indirectly through a third person employed by it, it is bound to perform all conditions and undertakings in the deed conveying such premises if it constructs and operates its road under such conveyance.[49] A successor of a railroad company is bound by all conditions and covenants in a

etc., R. Co. *v.* Griffin, (Ind. App. 1899) 53 N. E. 1042.

Evidence.— In an action for a violation by a railroad company of covenants, in a deed of a right of way, to provide the grantor with private ways over and under the railroad, evidence of what his land was worth without the crossings and what it would have been worth with them is admissible. Lake Erie, etc., R. Co. *v.* Lee, 14 Ind. App. 328, 41 N. E. 1058.

41. Douglass *v.* Ohio River R. Co., 51 W. Va. 523, 41 S. E. 911, holding that a railroad company is not liable in compensatory damages for breach of a covenant to construct cattle-guards where the landowner fences off his remaining land on both sides of the right of way and the land between such fences is not used for stock, and the division line between the land of the grantor and the adjoining owner is partly unfenced so as to allow cattle to pass from the adjoining land to the land occupied by the right of way, and it is not shown that cattle have passed along the railroad either way through the division line.

Compensatory damages cannot be recovered for breach of a covenant to fence the tracks where the land through which the railroad passes is used only for cropping, and no damages are shown otherwise than from the omission of the owner to graze stock on his land because of fear of possible injury thereto. Douglass *v.* Ohio River R. Co., 51 W. Va. 523, 41 S. E. 911.

42. Mt. Sterling Coal Road Co. *v.* Beatty, 4 Ky. L. Rep. 365.

43. **Effect of conveyance independent of stipulations** see *supra*, V, D, 3, a.

44. Burrow *v.* Terre Haute, etc., R. Co., 107 Ind. 432, 8 N. E. 167; McMinn *v.* Pittsburg, etc., R. Co., 147 Pa. St. 5, 23 Atl. 325; Updegrove *v.* Pennsylvania Schuylkill Valley R. Co., 132 Pa. St. 540, 19 Atl. 283, 7 L. R. A. 213, holding that such a release is a bar to a recovery for injuries caused by a ditch and culvert constructed by the railroad company on its right of way subsequently to the original location and construction of the road. See also Hoffeditz *v.* Southern Pennsylvania R., etc., Co., 129 Pa. St. 264, 18 Atl. 125.

45. Burrow *v.* Terre Haute, etc., R. Co., 107 Ind. 432, 8 N. E. 167.

46. McMinn *v.* Pittsburg, etc., R. Co., 147 Pa. St. 5, 23 Atl. 325; Spencer *v.* Hartford, etc., R. Co., 10 R. I. 14, holding that the fact that the grantor has released all claims for damages which might be awarded by commissioners will not preclude the recovery of damages caused to his land by the negligent or improper construction by the company of a bridge on the land conveyed.

47. Bredin *v.* Pittsburg, etc., R. Co., 165 Pa. St. 262, 31 Atl. 39.

48. New York, etc., R. Co. *v.* Railroad Com'rs, 162 Mass. 81, 38 N. E. 27.

49. Chattanooga, etc., R. Co. *v.* Davis, 89 Ga. 708, 15 S. E. 626, purchase through a construction company.

conveyance to the original company which run with the land,[50] such as a covenant to furnish the grantor with an annual pass and on condition that a failure to do so will work a forfeiture of the grant,[51] or a covenant to permanently maintain a depot upon the premises,[52] or to construct and maintain crossings or cattle-guards;[53] and such covenants are available to the heirs, grantees, or devisees of the original grantor.[54] But a succeeding company is not bound by a parol agreement with its predecessor, the consideration for which is a claim for damages which is not a lien on the land, where the burden imposed by the agreement is junior to a trust deed under which the succeeding company acquires title, and is not necessary for the proper construction and operation of the road;[55] nor is a subsequent purchaser from the grantor, bound by written agreements of which he had no notice, actual or constructive, at the time of the purchase.[56]

9. Excuses For Failure to Perform Conditions. Excuses for the non-performance or breach of conditions in a grant of land to a railroad company are governed by the rules regulating excuses for breaches of the performance of conditions in deeds generally.[57] Thus a railroad company cannot excuse its failure to perform conditions or covenants contained in a grant on the ground of financial embarrassment,[58] or on the ground that it concentrated its force on some other part of its line;[59] nor can it be released from the performance of such conditions by a city ordinance.[60]

10. Rights and Remedies of Parties[61] **— a. In General.** Where a railroad company fails to comply with the covenants or conditions upon which a grant was made to it, the proper remedy against it ordinarily is an action for the damages sustained by reason of the breach;[62] but in some cases a bill for a specific

50. Kenner *v.* American Contract Co., 9 Bush (Ky.) 202; Ruddick *v.* St. Louis, etc., R. Co., 116 Mo. 25, 22 S. W. 499, 38 Am. St. Rep. 570; Fortescue *v.* Lostwithiel, etc., R. Co., [1894] 3 Ch. 621, 64 L. J. Ch. 37, 71 L. T. Rep. N. S. 423, 8 Reports 664, 43 Wkly. Rep. 138.

51. Ruddick *v.* St. Louis, etc., R. Co., 116 Mo. 25, 22 S. W. 499, 38 Am. St. Rep. 570.

52. Georgia Southern R. Co. *v.* Reeves, 64 Ga. 492.

53. See *supra*, V, G, 6.

54. Ramsey *v.* Edgefield, etc., R. Co., 3 Tenn. Ch. 170, holding that where the deed provides that a depot shall be located on the lands, the heirs of a grantor may recover damages for failure to locate such depot.

As to construction and maintenance of fences, crossings, and cattle-guards see *supra*, V, G, 6.

55. Hunter *v.* Burlington, etc., R. Co., 76 Iowa 490, 41 N. W. 305.

56. Pittsburg, etc., R. Co. *v.* Bosworth, 46 Ohio St. 81, 18 N. E. 533, 2 L. R. A. 199 [*affirming* 1 Ohio Cir. Ct. 69, 1 Ohio Cir. Dec. 42].

An unrecorded written agreement by the grantor to fence the right of way on each side through his lands will not affect the right of a subsequent purchaser without notice of the agreement to require the company to fence its road in accordance with the statute (Rev. St. §§ 3224, 3225), where the purchase was made without actual or constructive notice of the existence of such agreement (Pittsburg, etc., R. Co. *v.* Bosworth, 46 Ohio St. 81, 18 N. E. 533, 2 L. R. A. 199 [*affirming* 1 Ohio Cir. Ct. 69, 1 Ohio Cir. Dec. 42]); since if such agreement is not recorded the mere use and occupation by the company and its successors for the purposes of the road will not constitute constructive notice of the agreement (Pittsburg, etc., R. Co. *v.* Bosworth, *supra*).

57. See, generally, Deeds, 17 Cyc. 1703 *et seq.*

Excuses for failure to perform condition as to fences, cattle-guards, and crossings see *supra*, V, G, 6.

58. New York, etc., R. Co. *v.* Providence, 16 R. I. 746, 19 Atl. 759.

59. McDowell *v.* Blue Ridge, etc., R. Co., 144 N. C. 721, 57 S. E. 520, holding that upon failure to perform the condition that its line of road shall be completed within five years, equity will not relieve against a forfeiture upon the ground that defendant, pursuant to a statute affecting its construction, concentrated its force on some other part of its line.

60. Lyman *v.* Suburban R. Co., 190 Ill. 320, 60 N. E. 515, 52 L. R. A. 645, holding that where a right of way over land in a certain town is granted to a railroad company on conditions subsequent requiring it to operate and maintain a road over such way, the town cannot release the company from the performance of such condition by ordinance.

61. Reformation of conveyance to the railroad company see Jewett *v.* Chicago, etc., R. Co., 45 Mo. App. 58; and, generally, Reformation of Instruments.

62. *California.*—Southern California R. Co. *v.* Slauson, 138 Cal. 342, 71 Pac. 352, 94 Am. St. Rep. 58, (1902) 68 Pac. 107.

performance of the condition or covenant may be maintained,[63] or an injunction issue to restrain the railroad company from breaking the covenants or conditions;[64] or in case of a breach of a condition subsequent, an action of ejectment may be maintained,[65] or proceedings may be instituted to recover the land or its value together with such other considerations as passed.[66] But the grantor cannot sue both for the land and for damages for its taking.[67] Where, through the representations of a railroad company's attorney, a grantor omits in his deed to reserve the privilege of having the company construct and maintain crossings in conformity to its charter, the company is estopped from setting up such deed as a defense to an action by the grantor for expenditures made by him in building a crossing upon the company's refusal to do so, as it was required by its charter to do.[68]

b. Damages.[69] As a general rule, the measure of damages for a breach of conditions or covenants by a railroad company is the actual damage sustained by the landowner by reason of such breach,[70] and this has been held in some cases

Florida.— Silver Springs, etc., R. Co. *v.* Van Ness, 45 Fla. 559, 34 So. 884.

Illinois.— Conger *v.* Chicago, etc., R. Co., 15 Ill. 366.

Indiana.— See Chicago, etc., R. Co. *v.* Hall, 135 Ind. 91, 34 N. E. 704, 23 L. R. A. 231.

Kansas.— Kansas Pac. R. Co. *v.* Hopkins, 18 Kan. 494.

Kentucky.— Bright *v.* Louisville, etc., R. Co., 87 S. W. 780, 27 Ky. L. Rep. 1052; Elizabethtown, etc., R. Co. *v.* Killen, (1899) 50 S. W. 1108.

Michigan.—Lane *v.* Michigan Traction Co., 135 Mich. 70, 97 N. W. 354.

Missouri.— Ruddick *v.* St. Louis, etc., R. Co., 116 Mo. 25, 22 S. W. 499, 38 Am. St. Rep. 570.

Nebraska.— Moscley *v.* Chicago, etc., R. Co., 57 Nebr. 636, 78 N. W. 293.

New York.— See Rich *v.* New York Cent., etc., R. Co., 87 N. Y. 382, 89 Hun 604, 34 N. Y. Suppl. 1146 [*affirmed* in 154 N. Y. 733, 49 N. E. 1103].

Texas.— Gulf, etc., R. Co. *v.* Dunman, 74 Tex. 265, 11 S. W. 1094; Gulf, etc., R. Co. *v.* Martin, 38 Tex. Civ. App. 379, 86 S. W. 25.

United States.— Minard *v.* Delaware, etc., R. Co., 153 Fed. 578, 82 C. C. A. 586 [*affirming* 139 Fed. 60].

See 41 Cent. Dig. tit. "Railroads," § 177.

Compare Close *v.* Burlington, etc., R. Co., 64 Iowa 149, 19 N. W. 886; Mills *v.* Seattle, etc., R. Co., 10 Wash. 520, 39 Pac. 246; Dickson *v.* Covert, 17 Grant Ch. (U. C.) 321.

63. Taylor *v.* Florida East Coast R. Co., 54 Fla. 635, 45 So. 574, 16 L. R. A. N. S. 307; Baltimore, etc., R. Co. *v.* Brubaker, 217 Ill. 462, 75 N. E. 523; Vicksburg, etc., R. Co. *v.* Ragsdale, 54 Miss. 200; Aikin *v.* Albany, etc., R. Co., 26 Barb. (N. Y.) 289. See also Fortescue *v.* Lostwithiel, etc., R. Co., [1894] 3 Ch. 621, 64 L. J. Ch. 37, 71 L. T. Rep. N. S. 423, 8 Reports 664, 43 Wkly. Rep. 138; Bettridge *v.* Great Western R. Co., 3 Grant Err. & App. (U. C.) 58. But see Close *v.* Burlington, etc., R. Co., 64 Iowa 149, 19 N. W. 886; Dickson *v.* Covert, 17 Grant Ch. (U. C.) 321.

Specific performance will not be decreed where it will result in great hardship and injustice to the railroad company without any considerable gain or utility to the grantor or where it will prejudice public interests. Speer *v.* Erie R. Co., 68 N. J. Eq. 615, 60 Atl. 197 [*reversing* 64 N. J. Eq. 601, 54 Atl. 539]; Conger *v.* New York, etc., R. Co., 120 N. Y. 29, 23 N. E. 983 [*affirming* 45 Hun 296] (refusal to decree specific performance of a condition to erect a depot and stop trains); Murdfeldt *v.* New York, etc., R. Co., 102 N. Y. 703, 7 N. E. 404 [*affirming* 34 Hun 632].

64. Lloyd *v.* London, etc., R. Co., 2 De G. J. & S. 568, 11 Jur. N. S. 380, 34 L. J. Ch. 401, 12 L. T. Rep. N. S. 363, 13 Wkly. Rep. 698, 67 Eng. Ch. 568, 46 Eng. Reprint 496.

65. See *infra*, V, L, 7.

66. Gulf, etc., R. Co. *v.* Dunman, 74 Tex. 265, 11 S. W. 1094; Tyler *v.* St. Louis Southwestern R. Co., (Tex. Civ. App. 1905) 87 S. W. 238.

67. Gulf, etc., R. Co. *v.* Dunman, 74 Tex. 265, 11 S. W. 1094.

68. Morris, etc., R. Co. *v.* Green, 15 N. J. Eq. 469.

69. Stipulations respecting damages see *supra*, V, G, 7.

For breach of covenant to construct fences, crossings, cattle-guards, etc., see *supra*, V, G, 6.

70. Louisville, etc., R. Co. *v.* Power, 119 Ind. 269, 21 N. E. 751; Louisville, etc., R. Co. *v.* Baskett, 104 S. W. 695, 31 Ky. L. Rep. 1035 (holding that the measure of damages for a failure to establish and maintain a station according to agreement, if it is eventually performed, is the benefit which the grantor would have derived therefrom to the time of performance); Donisthorpe *v.* Fremont, etc., R. Co., 30 Nebr. 142, 46 N. W. 240, 27 Am. St. Rep. 387; Gulf, etc., R. Co. *v.* Dunman, 74 Tex. 265, 11 S. W. 1094, 85 Tex. 176, 19 S. W. 1073.

The measure of damages for breach of an agreement to remove its track from a right of way to adjacent lands on written notice, if phosphate deposits should be found on the right of way and the grantors desire to remove them, is the value of the phosphates that

to be the difference in the rental value of the land before and after the breach.[71] Thus the measure of damages for a breach of a condition to erect a depot on the land conveyed is the actual value of the land and an amount equal to the depreciation of plaintiff's adjacent land, together with the amount in which the adjacent land would have been increased in value by the building of the depot,[72] with interest,[73] and without set-off for any enhancement occasioned by the building of the road.[74] So where a railroad company violates its contract in constructing and maintaining an insufficient culvert or ditches by reason of which adjacent land is flooded, the amount to which plaintiff is entitled is the actual damages sustained,[75] and the measure of actual damages to growing crops within this rule has been held to be the difference in value of such crops immediately before the injury and their value immediately after.[76] So the measure of damages for injury to plaintiff's unplanted ground would be the cost and expense of restoring the land to its former condition, and the loss occasioned by being deprived of the use of the same, with interest.[77]

H. Use of Land or Rights Acquired[78] — **1. In General.** As a general rule, land acquired by a railroad company for a right of way, either by condemnation or by purchase or grant from the owner, is the company's private property, although charged with a public use;[79] and unless restrained by the terms of the grant,[80] or by its charter or governing statute,[81] it may, in general, use the right

could not be mined without letting down the tracks or injury to the surface of the right of way. Silver Springs, etc., R. Co. *v.* Van Ness, 45 Fla. 559, 34 So. 884.

71. Louisville, etc., R. Co. *v.* Malott, 135 Ind. 113, 34 N. E. 709.

72. Louisville, etc., R. Co. *v.* Sumner, 106 Ind. 55, 5 N. E. 404, 55 Am. Rep. 719; Louisville, etc., R. Co. *v.* Neafus, 93 Ky. 53, 18 S. W. 1030, 13 Ky. L. Rep. 951; Louisville, etc., R. Co. *v.* Baskett, 104 S. W. 695, 31 Ky. L. Rep. 1035; New York, etc., R. Co. *v.* Stanley, 35 N. J. Eq. 283; Watterson *v.* Allegheny Valley R. Co., 74 Pa. St. 208.

73. New York, etc., R. Co. *v.* Stanley, 35 N. J. Eq. 283.

74. Louisville, etc., R. Co. *v.* Neafus, 93 Ky. 53, 18 S. W. 1030, 13 Ky. L. Rep. 951; Watterson *v.* Allegheny Valley R. Co., 74 Pa. St. 208.

75. Sabine, etc., R. Co. *v.* Joachimi, 58 Tex. 456; Texas, etc., R. Co. *v.* Sutor, 56 Tex. 496; Moorman *v.* Seattle, etc., R. Co., 8 Wash. 98, 35 Pac. 596.

76. Sabine, etc., R. Co. *v.* Joachimi, 58 Tex. 456. And see, generally, Damages, 13 Cyc. 153 *et seq.*

The inquiry as to the value of the crops is to be confined to the very time of the destroying flood and the very place where it occurred and should not extend to the date of the maturity of the crop, or to the place where it would usually find a market, nor can any account of loss or profits by a consequent delay in getting the crop to market enter into the estimate. Sabine, etc., R. Co. *v.* Joachimi, 58 Tex. 456.

77. Sabine, etc., R. Co. *v.* Joachimi, 58 Tex. 456.

78. Of land acquired by eminent domain see Eminent Domain, 15 Cyc. 1023, 1025.

Rights in and use of adjoining land by railroad company see *supra*, V, F, 3.

79. Elyton Land Co. *v.* South Alabama, etc., R. Co., 95 Ala. 631, 10 So. 270; Currie *v.* Natchez, etc., R. Co., 61 Miss. 725; Boston, etc., R. Co. *v.* Greenbush, 5 Lans. (N. Y.) 461 [*affirmed* in 52 N. Y. 510].

80. Elyton Land Co. *v.* South Alabama, etc., R. Co., 95 Ala. 631, 10 So. 270.

81. See Bostock *v.* North Staffordshire R. Co., 5 De G. & Sm. 584, 64 Eng. Reprint 1253, 2 Jur. N. S. 248, 25 L. J. Ch. 325, 3 Smale & G. 283, 65 Eng. Reprint 661, 4 Wkly. Rep 336. And see the statutes of the several states.

Tex. Rev. St. art. 4216, which forbids railroad companies to use or occupy any part of the right of way over which their respective roads pass for any other purpose than the construction and keeping in repair of their roads, and which is part of an act conferring on railroad companies the power to take and hold the fee in lands (arts. 4211, 4212) and providing (art. 4206) that the right of way acquired by condemnation shall not be so construed as to include the fee, does not apply to land owned by a railroad company in fee, although its road is built thereon. Calcasieu Lumber Co. *v.* Harris, 77 Tex. 18, 13 S. W. 453.

A deed of an easement for the purpose of constructing a tramway is not adequate, as a matter of law, for its use as a railroad dedicated to the public, under the law of public highways. Beasley *v.* Aberdeen, etc., R. Co., 145 N. C. 272, 59 S. E. 60 [*modified* and *affirmed* in 147 N. C. 362, 61 S. E. 453].

In North Carolina a deed to a company organized under Code (1883), art. 677, providing for the creation of corporations except for railroad purposes, which recites that the company contemplates "building a tram or railroad" and which grants to it a right of way on which to locate its "road . . . depots . . . etc., necessary . . . for . . . operating . . . said road," conveys only a right of way for

of way acquired, for any purpose incident to its business, which contributes to the safe and efficient construction, maintenance, and operation of the road and for which a right of way may be lawfully used,[82] and which does not materially interfere with the rights of property pertaining to the adjacent land;[83] and the right of way may be used by the company or its assigns for the purposes for which it was taken or granted even after the time limited by the charter of the company for its corporate existence has expired;[84] nor does the mere fact that the company has not occupied or made use of the right of way to its full width abridge such right.[85] Thus, unless restrained by statute or by the terms of the grant,[86] a railroad company may use land acquired by it for a right of way for the erection of a freight depot,[87] telegraph lines,[88] water-tanks,[89] necessary side-tracks and switches,[90] or turn-tables,[91] and other structures or buildings necessary or proper for the transaction of its ordinary business,[92] the making of cuts and embank-

a tramway, the word "railroad" meaning such a road as the company was authorized to construct, although in general use it signifies a road constructed of cross-ties on which iron rails are placed, dedicated to public use. Beasley *v.* Aberdeen, etc., R. Co., 145 N. C. 272, 59 S. E. 60 [*modified* and *affirmed* in 147 N. C. 362, 61 S. E. 453].

82. *Alabama.*— Nashville, etc., R. Co. *v.* Karthaus, 150 Ala. 633, 43 So. 791; Elyton Land Co. *v.* South Alabama, etc., R. Co., 95 Ala. 631, 10 So. 270.

Idaho.— Delsol *v.* Spokane, etc., R. Co., 4 Ida. 456, 40 Pac. 59.

Illinois.— Illinois Cent. R. Co. *v.* Anderson, 73 Ill. App. 621.

Pennsylvania.— Mt. Pleasant Coal Co. *v.* Delaware, etc., R. Co., 6 Lack. Leg. N. 1.

Texas.—Olive *v.* Sabin, etc., R. Co., 11 Tex. Civ. App. 208, 33 S. W. 139.

See 41 Cent. Dig. tit. "Railroads," § 179.

Well.— A railroad company to which is deeded "the right of way over and through the land for all purposes connected with the construction, use, and occupation of its railway" has the legal right to dig a well upon such right of way and to use the water supplied by percolation for railroad purposes, although such use may materially diminish the supply of water in a spring upon the grantor's land. Hougan *v.* Milwaukee, etc., R. Co., 35 Iowa 558, 14 Am. Rep. 502.

83. Elyton Land Co. *v.* South Alabama, etc., R. Co., 95 Ala. 631, 10 So. 270; Childers *v.* Louisville, etc., R. Co., 74 S. W. 241, 24 Ky. L. Rep. 2375; Ludlow *v.* Hudson River R. Co., 6 Lans. (N. Y.) 128.

Lateral support.— Where a railroad company makes excavations on its right of way without shoring up the sides in consequence of which the adjacent owner's lot caves into the excavation, such owner is entitled to recover damages without proof of negligence on the part of the railroad company. Mosier *v.* Oregon Nav. Co., 39 Oreg. 256, 64 Pac. 453, 87 Am. St. Rep. 652.

84. Henry *v.* Dubuque, etc., R. Co., 2 Iowa 288.

85. Waggoner *v.* Wabash R. Co., 185 Ill. 154, 56 N. E. 1050; Seaboard Air Line R. Co. *v.* Olive, 142 N. C. 257, 55 S. E. 263; Mt. Pleasant Coal Co. *v.* Delaware, etc., R. Co., 6 Lack. Leg. N. (Pa.) 1.

86. See *infra*, V, H, 2.

87. Elyton Land Co. *v.* South Alabama, etc., R. Co., 95 Ala. 631, 10 So. 270.

88. Hodges *v.* Western Union Tel. Co., 133 N. C. 225, 45 S. E. 572; Pennsylvania R. Co. *v.* Lilly Borough, 207 Pa. St. 180, 56 Atl. 412 (holding that where a railroad company has the right to construct a line of road over the land in a borough, on a bill by the company to restrain any interference by the borough with the construction of the line of telegraph poles, the purpose of the company in erecting the telegraph line is immaterial); Olive *v.* Sabin, etc., R. Co., 11 Tex. Civ. App. 208, 33 S. W. 139.

Permission to others to erect telegraph lines see *infra*, V, H, 4 text and notes 31–34.

89. Louisville, etc., R. Co. *v.* French, 100 Tenn. 209, 43 S. W. 771, 66 Am. St. Rep. 752.

90. Illinois Cent. R. Co. *v.* Anderson, 73 Ill. App. 621; East Tennessee, etc., R. Co. *v.* Telford, 89 Tenn. 293, 14 S. W. 776, 10 L. R. A. 855; Olive *v.* Sabin, etc., R. Co., 11 Tex. Civ. App. 208, 33 S. W. 139.

Under the act of congress of July 4, 1884, granting the Southern Kansas Railroad Company a right of way through the Indian Territory, the company has a right to maintain turnouts and sidings on the right of way through the territory as well as upon such grounds as have been specially granted for the purpose of stations and depot grounds. Southern Kansas R. Co. *v.* Oklahoma City, 12 Okla. 82, 69 Pac. 1050.

91. Illinois Cent. R. Co. *v.* Anderson, 73 Ill. App. 621.

92. *Alabama.*— Elyton Land Co. *v.* South Alabama, etc., R. Co., 95 Ala. 631, 10 So. 270.

Massachusetts.— Boston Gaslight Co. *v.* Old Colony, etc., R. Co., 14 Allen 444, holding that a railroad company may erect a building for the purposes of its business within the limits of its location, although a private way over the land on which the building stands is obstructed thereby; and Gen. St. c. 63, § 46, providing that if a railroad is laid across a turnpike road or other way, it shall be so made as not to obstruct the same, does not apply to such a case.

New York.— Townsend *v.* New York Cent.,

ments,[93] taking material for its necessary building purposes,[94] the inclosure of the track with fences,[95] and for otherwise keeping its premises in proper and safe condition for the prosecution of its business,[96] as by removing trees or other things placed or growing on the right of way which the company may deem necessary to remove to insure the safe management of its road,[97] changing the grade of the road and making other changes in the tracks, from time to time as the exigencies of traffic and public interest require,[98] although neither the railroad company nor its successor can afterward change the tracks so as to acquire other land of the grantor without compensation or so as to deprive him of his consideration under the original grant,[99] or so as to shut out those having a right to cross them.[1] In the exercise of its right to thus use its right of way a railroad company may

etc., R. Co., 56 Misc. 253, 106 N. Y. Suppl. 381.

Texas.— Olive *v.* Sabin, etc., R. Co., 11 Tex. Civ. App. 208, 33 S. W. 139.

England.— Dover Harbor *v.* South Eastern R. Co., 9 Hare 489, 21 L. J. Ch. 886, 41 Eng. Ch. 489, 68 Eng. Reprint 603, custom-house for the examination of the luggage of passengers.

See 41 Cent. Dig. tit. "Railroads," § 179.

Permission to others to erect buildings on right of way see *infra*, V, H, 4, text and note 30.

93. Olive *v.* Sabin, etc., R. Co., 11 Tex. Civ. App. 208, 33 S. W. 139.

94. Preston *v.* Dubuque, etc., R. Co., 11 Iowa 15 (holding that a railroad company has the right to take and remove only so much timber as may be necessary for the construction and repair of the road and its appurtenances); Olive *v.* Sabin, etc., R. Co., 11 Tex. Civ. App. 208, 33 S. W. 139.

Extent of use.— A railroad company may use, without further compensation, all suitable material except timber on the right of way which it has acquired for the construction of its road through the property of the landowner, whether such materials are above or below the grade of the road. Hendler *v.* Lehigh Valley R. Co., 209 Pa. St. 256, 58 Atl. 486, 103 Am. St. Rep. 1005. But this right to take materials extends no further as against the landowner than the boundaries of his own land which has been subjected to a servitude for the construction and maintenance of the railroad, and therefore does not extend for construction or maintenance through any other land. Hendler *v.* Lehigh Valley R. Co., *supra*. Where the railroad company takes material for its own use from a point outside of the limits of its right of way, it is liable to the landowner for the value thereof. Hendler *v.* Lehigh Valley R. Co., *supra*.

Statutory penalty.— A railroad company cannot be charged with the statutory penalty prescribed by a statute, providing that if any person or corporation shall take materials from the land of another without the consent of the owner, he shall be liable for double the value thereof, for taking common or mixed sand for grading from land over which it has the right of way. Hendler *v.* Lehigh Valley R. Co., 209 Pa. St. 256, 58 Atl. 486, 103 Am. St. Rep. 1005.

95. Olive *v.* Sabin, etc., R. Co., 11 Tex. Civ. App. 208, 33 S. W. 139.

The construction of a fenced lane across the right of way of a railroad company and beneath a bridge carrying the tracks, so as to provide a subway for the passage of live stock, is not so foreign to the purposes of a grant of land for railroad purposes that the grantor can complain thereof as an abandonment of the right of way granted or as a trespass upon his reversionary rights. Reichert *v.* Keller, 58 Nebr. 178, 78 N. W. 381.

96. Olive *v.* Sabin, etc., R. Co., 11 Tex. Civ. App. 208, 33 S. W. 139.

97. Brainard *v.* Clapp, 10 Cush. (Mass.) 6, 57 Am. Dec. 74 (holding that the proprietors of a railroad have a right to cut trees growing upon the strip of land which they have taken for their road, whether such trees are for shade, ornament, or fruit, or whether such cutting be at the time of laying out their track or afterward); Cairo, etc., R. Co. *v.* Brevoort, 62 Fed. 129, 25 L. R. A. 527; Booth *v.* McIntyre, 31 U. C. C. P. 183; Foran *v.* McIntyre, 45 U. C. Q. B. 288.

There is no burden of proof on the company to show, in its justification, that the trees are cut for the purposes of their road. Brainard *v.* Clapp, 10 Cush. (Mass.) 6, 57 Am. Dec. 74.

98. *Illinois.*— Kotz *v.* Illinois Cent. R. Co., 188 Ill. 578, 59 N. E. 240.

Massachusetts.— Cassidy *v.* Old Colony R. Co., 141 Mass. 174, 5 N. E. 142.

Minnesota.— Liedel *v.* Northern Pac. R. Co., 89 Minn. 284, 94 N. W. 877.

Montana.— Montana Ore Purchasing Co. *v.* Boston, etc., Min. Co., 20 Mont. 533, 22 Pac. 375.

New York.— Townsend *v.* New York Cent., etc., R. Co., 56 Misc. 253, 106 N. Y. Suppl. 381.

See 41 Cent. Dig. tit. "Railroads," § 179.

A landowner has no cause of action by reason of slight alterations of the grade of the track and roadway, making the approach to certain crossings on his land a trifle more difficult. Townsend *v.* New York Cent., etc., R. Co., 56 Misc. (N. Y.) 253, 106 N. Y. Suppl. 381.

99. Wysor *v.* Lake Erie, etc., R. Co., 143 Ind. 6, 42 N. E. 353.

1. Townsend *v.* New York Cent., etc., R. Co., 56 Misc. (N. Y.) 253, 106 N. Y. Suppl. 381.

abate a private nuisance on adjoining property,[2] as by trimming a hedge extending over and obstructing the right of way.[3] But as a general rule a railroad company has no right to make such use of the land acquired as is not incident to the construction, maintenance, and operation of the road,[4] such as the cutting of ice from its right of way for commercial purposes;[5] nor can it erect buildings, machinery, etc., not necessarily connected with the use of its franchise, within the limits of its right of way;[6] nor can it, without the owner's permission, remove stone or other material from the land, which are not used in the construction of the road;[7] nor can a railroad company erect stock pens on its right of way or make other improvements which in themselves would constitute a nuisance to persons residing in proximity to their location.[8]

2. Construction and Effect of Conveyance in General. Where one sells to a company a right of way through his property, it must be assumed, in the absence of express limitations or restrictions, that he contemplated such use as would render it practicable for the purposes for which it was intended, and therefore cannot complain unless the company has failed to exercise proper care to avoid unnecessary injury.[9] But where the conveyance contains words of restriction and limitation to the effect that the land granted shall be used only for certain specified purposes, it cannot be lawfully used by the company for other purposes.[10] Thus

2. Toledo, etc., R. Co. *v.* Green, 67 Ill. 199.

3. Toledo, etc., R. Co. *v.* Green, 67 Ill. 199, holding also that such act will not alone be presumed to establish a purchase.

4. Julien *v.* Woodsmall, 82 Ind. 568.

5. Julien *v.* Woodsmall, 82 Ind. 568.

6. Lance's Appeal, 55 Pa. St. 16, 93 Am. Dec. 722.

7. Nashville, etc., R. Co. *v.* Karthaus, 150 Ala. 633, 43 So. 791 (holding that the company has no right to excavate sand in the right of way or sell it); Chapin *v.* Sullivan R. Co., 39 N. H. 564, 75 Am. Dec. 237.

8. Missouri, etc., R. Co. *v.* Mott, 98 Tex. 91, 81 S. W. 285, 70 L. R. A. 579, under Rev. St. (1895) art. 4483.

A voluntary conveyance of lands to a railroad company for its right of way gives it no greater right in the matter of erecting buildings, stock-pens, etc., thereon to the detriment of other property than it would have acquired under a condemnation of the same. Missouri, etc., R. Co. *v.* Mott, 98 Tex. 91, 81 S. W. 285, 70 L. R. A. 579.

9. Elizabethtown, etc., R. Co. *v.* Dillon, 7 Ky. L. Rep. 607.

10. *Georgia.*— Georgia R., etc., Co. *v.* Macon, 86 Ga. 585, 13 S. E. 21, holding that a condition in a grant to a railroad company that the land should be used "for shops, depots and other conveniences and fixtures necessary for said company" is not complied with by a use of the land for the building and maintenance thereon of a track or tracks for the purpose of conveying freight cars to private parties or for the storage of cars or other like uses.

Louisiana.— Franklin, etc., R. Co. *v.* Monnot, 52 La. Ann. 1026, 27 So. 543.

Michigan.— Pontiac, etc., R. Co. *v.* Reed, 130 Mich. 661, 90 N. W. 658; Backus *v.* Detroit, etc., R. Co., 71 Mich. 645, 40 N. W. 60, holding that where the use of a railroad right of way is restricted to certain purposes, its more general use resulting in damages to the grantor is actionable.

New Jersey.— Breckinridge *v.* Delaware, etc., R. Co., (Ch. App. 1895) 33 Atl. 800.

New York.— Boston, etc., R. Co. *v.* Greenbush, 5 Lans. 461 [*affirmed* in 52 N. Y. 510].

England.— Bostock *v.* North Staffordshire, etc., R. Co., 5 De G. & Sm. 584, 64 Eng. Reprint 1253, 2 Jur. N. S. 248, 25 L. J. Ch. 325, 3 Smale & G. 283, 4 Wkly. Rep. 336, 65 Eng. Reprint 661.

See 41 Cent. Dig. tit. "Railroads," § 180.

Conditions in a deed to use the premises solely for purposes of a railroad depot and not to use other premises within a mile for similar purposes, or to erect any public house, or any other building except for the ordinary purposes of a railroad depot, and for accommodating, victualing, and lodging passengers and others, and for the sole accommodation of the railroad company, are not broken by selling refreshments and lodging passengers on the premises, or by permitting merchants in the village to load and unload their own goods upon their own premises on the line of the road. Southard *v.* New Jersey Cent. R. Co., 26 N. J. L. 13.

Use of side-track.— Where a contract between a mill-owner and a railroad company requires the latter to construct a side-track on the land of the former and entitles the mill owner to require the removal of the tracks at any time, but contains a clause authorizing the company to use the track for its own purposes as long as it does not interfere with or discommode the mill owner, the railroad company has the right to use the track for any purpose which does not discommode the mill owner as long as the latter allows the track to remain. Pontiac, etc., R. Co. *v.* Reed, 130 Mich. 661, 90 N. W. 658.

A right of way granted as subsidiary to mining rights cannot be used for the business of carrying passengers and freight generally. Bing *v.* Big Sandy, etc., R. Co., 63 W. Va. 345, 60 S. E. 140; Jackson *v.* Big Sandy, etc., R. Co., 63 W. Va. 18, 59 S. E. 749.

where the land is acquired for the passage of trains only, it cannot be lawfully used for switching and making up trains.[11] It has been held that the construction of a hotel or eating house on the land is a legitimate railroad purpose within the meaning of a grant for all legitimate railroad and depot purposes.[12] A grant absolute in form to a railroad company conveys all privileges and appurtenances, such as the privilege of drawing water from other portions of the grantor's land which were then in use as appurtenant to the land conveyed.[13]

3. Exclusiveness of Use. As a general rule a railroad company has practically the right to the uninterrupted and exclusive possession and control of the land between the lines of its location, necessary for conducting its business,[14] except where it is built on a public highway or over public crossings;[15] and the former owner has no right to occupy the land conveyed in any mode or for any purpose without the company's consent,[16] as for the purpose of cultivating crops on the right of way,[17] unless such rights or privileges are conceded by the company or reserved by the grantor;[18] and statutes have been passed to prevent encroachments upon the railroad right of way.[19] Nor can the owner of the fee so use his adjoining land as to interfere with the company's use of its right of way;[20] and a railroad

11. Backus *v.* Detroit, etc., R. Co., 71 Mich. 645, 40 N. W. 60.

In Texas, under Sayles Annot. St. (1897) arts. 4445, 4483, a grant of land to a railroad company to be used as a "right of way" authorizes the use of the land as a track only and not for the purposes of a switch yard. Missouri, etc., R. Co. *v.* Anderson, 36 Tex. Civ. App. 121, 81 S. W. 781. A mere conveyance of a right of way for a railroad over the grantor's land carries only such rights as would be acquired by condemnation under article 4445, and authorizes the construction thereon of main and necessary sidetracks, but not of machine or repair shops or switching yards. Missouri, etc., R. Co. *v.* Anderson, *supra.*

12. Abraham *v.* Oregon, etc., R. Co., 37 Oreg. 495, 60 Pac. 899, 82 Am. St. Rep. 779, 64 L. R. A. 391, 41 Oreg. 550, 69 Pac. 653.

Where land is granted to a railroad company for all legitimate railroad and depot purposes and a hotel and eating-house is erected on the land as an incident to the operation of the road, the fact that accommodations are granted to the general public apart from strictly railroad business does not render the use of the land repugnant to the grant (Abraham *v.* Oregon, etc., R. Co., 37 Oreg. 495, 60 Pac. 899, 82 Am. St. Rep. 779, 64 L. R. A. 391, 41 Oreg. 550, 69 Pac. 653); nor does the fact that there is another eating-house or hotel near by, ample to accommodate passengers and employees, render such use repugnant to the grant (Abraham *v.* Oregon, etc., R. Co., *supra*).

13. Vermont Cent. R. Co. *v.* Hills, 23 Vt 681.

14. *Kansas.*— Kansas, etc., R. Co. *v.* Burns, 70 Kan. 627, 79 Pac. 238; Atchison, etc., R. Co. *v.* Spaulding, 69 Kan. 431, 77 Pac. 106, 105 Am. St. Rep. 175, 66 L. R. A. 587.

Michigan.— Williams *v.* Michigan Cent. R. Co., 2 Mich. 259, 55 Am. Dec. 59.

Mississippi.— Paxton *v.* Yazoo, etc., R. Co., 76 Miss. 536, 24 So. 536; Wilmot *v.* Yazoo, etc., R. Co., 76 Miss. 374, 24 So. 701.

Missouri.— Boyce *v.* Missouri Pac. R. Co., 168 Mo. 583, 68 S. W. 920, 58 L. R. A. 442.

Nebraska.— Hull *v.* Kansas City, etc., R. Co., 70 Nebr. 756, 98 N. W. 47.

New York.— See Townsend *v.* New York Cent., etc., R. Co., 56 Misc. 253, 106 N. Y. Suppl. 381.

Pennsylvania.— New York, etc., R. Co. *v.* Skinner, 19 Pa. St. 298, 57 Am. Dec. 654; Philadelphia, etc., R. Co. *v.* Philadelphia, etc., R. Co., 6 Pa. Dist. 269.

Vermont.— Jackson *v.* Rutland, etc., R. Co., 25 Vt. 150, 60 Am. Dec. 246.

United States.— Cairo, etc., R. Co. *v.* Brevoort, 62 Fed. 129, 25 L. R. A. 527.

The road must be located and constructed before the right of way may be claimed to be exclusive. Goldsboro Lumber Co. *v.* Hines Bros. Lumber Co., 126 N. C. 254, 35 S. E. 458.

15. Atchison, etc., R. Co. *v.* Spaulding, 69 Kan. 431, 77 Pac. 106, 105 Am. St. Rep. 175, 66 L. R. A. 587. And see *infra*, V, I, 2, c.

16. Alton, etc., R. Co. *v.* Baugh, 14 Ill. 211 (holding that the landowner cannot build a cattle-guard across the road without the owner's consent); Jackson *v.* Rutland, etc., R. Co., 25 Vt. 150, 60 Am. Dec. 246.

17. Paxton *v.* Yazoo, etc., R. Co., 76 Miss. 536, 24 So. 536; Wilmot *v.* Yazoo, etc., R. Co., 76 Miss. 374, 24 So. 701.

18. Montana Ore Purchasing Co. *v.* Boston, etc., Min. Co., 20 Mont. 533, 22 Pac. 375.

19. Downing *v.* McFadden, 18 Pa. St. 334, construing the act of April 8, 1838, section 11, prohibiting the construction of any building on the banks or excavation of the Philadelphia and Columbia railroad without permission, under the authority of the canal commissioners.

20. Cairo, etc., R. Co. *v.* Brevoort, 62 Fed. 129, 25 L. R. A. 527, holding that a riparian proprietor who has conveyed to a railroad company his interest in land which could have been acquired by condemnation has no right to construct along a river bank over such right of way a levee which will raise the water flowing in the stream at times of

company will be protected by injunction against such interference without regard to the solvency of the persons interfering therewith.[21] In some jurisdictions, however, this rule is so modified as to permit the owner of the fee to enter on and use the land in any manner not inconsistent or interfering with its use by the railroad company,[22] as for agricultural purposes;[23] but this right of the owner of the fee does not extend to one who is not such owner or who does not claim under him.[24] Where a railroad company acquires the fee of lands for its tracks, it is entitled to enjoy, in the discharge of its duties as common carrier, the exclusive use and control of the right of way, relieved from any rights therein of adjoining owners to the same extent as a private person would be,[25] and there is no valid right in adjoining landowners or others to occupy as against the railroad company portions of the land not actually used by the company, and one attempting to take possession of such portion is a trespasser.[26] The fact that the road is constructed through a tunnel or archway does not impair this exclusive right or give the original owner any right to the ground above.[27]

4. Permitting Use by Third Persons. A railroad company may permit third persons to use a portion of its right of way or other lands for purposes not inconsistent with its charter or the terms of the grant, or contrary to public policy,[28] as

ordinary floods so as to endanger the banks or other structures of the railroad, and will also throw such water upon the land on the opposite side of the river, thereby subjecting the railroad company to suits for damages.

21. Seaboard Air Line R. Co. *v.* Olive, 142 N. C. 257, 55 S. E. 263.

The owner of coal lands over which a railroad company passes will be enjoined from working out the coal under the road-bed so as to cause the ground to subside and thus jeopardize the lives of passengers. Lippincott *v.* Mine Hill, etc., R. Co., 2 Leg. Chron. (Pa.) 310.

22. *Indiana.*— Smith *v.* Holloway, 124 Ind. 329, 24 N. E. 886, holding the grant not to affect the right of the grantor to the use of a stream of water flowing over the land.

Iowa.— Vermilya *v.* Chicago, etc., R. Co., 66 Iowa 606, 24 N. W. 334, 55 Am. Rep. 279, taking sand from right of way.

Kentucky.— Maysville, etc., R. Co. *v.* Beyersdorfer, 43 S. W. 254, 19 Ky. L. Rep. 1212, removal of stone.

Ohio.— Cincinnati, etc., R. Co. *v.* Wachter, 70 Ohio St. 113, 70 N. E. 974.

Tennessee.— East Tennessee, etc., R. Co. *v.* Telford, 89 Tenn. 293, 14 S. W. 776, 10 L. R. A. 855.

Texas.— Olive *v.* Sabin, etc., R. Co., 11 Tex. Civ. App. 208, 33 S. W. 139.

It is a question of fact and not of law whether the necessities of the railroad demand exclusive occupancy for its purposes and what use of the property by the owner is a detriment to or interference with the rights of the road. Smith *v.* Pittsburgh, etc., R. Co., 26 Ohio Cir. Ct. 44.

The erection of buildings on land over which a right of way has been conveyed to a railroad company by the owner in fee is inconsistent with the rights of the company, although it has no specific use to which it expects to put such land. Olive *v.* Sabin, etc., R. Co., 11 Tex. Civ. App. 208, 33 S. W. 139

23. Roberts *v.* Sioux City, etc., R. Co., 73 Nebr. 8, 102 N. W. 60, 2 L. R. A. N. S. 272.

24. Kansas, etc., R. Co. *v.* Burns, 70 Kan. 627, 79 Pac. 238.

25. Kotz *v.* Illinois Cent. R. Co., 188 Ill. 578, 59 N. E. 240; Junction R. Co. *v.* Boyd, 8 Phila. (Pa.) 224.

Light, air, etc.—A railroad right of way is not a public highway in the sense that an adjoining lot owner may have an easement of light, air, and view therein, and hence no damages are recoverable for an injury to the latter resulting from the elevation of the company's tracks. Kotz *v.* Illinois Cent. R. Co., 188 Ill. 578, 59 N. E. 240.

26. Junction R. Co. *v.* Boyd, 8 Phila. (Pa.) 224.

27. Junction R. Co. *v.* Boyd, 8 Phila. (Pa.) 224.

28. Grand Trunk R. Co. *v.* Richardson, 91 U. S. 454, 21 L. ed. 356; Foster *v.* London, etc., R. Co., [1895] 1 Q. B. 711, 64 L. J. Q. B. 65, 71 L. T. Rep. N. S. 855, 14 Reports 27, 43 Wkly. Rep. 116. See Consumers' Gas Trust Co. *v.* American Plate Glass Co., 162 Ind. 393, 68 N. E. 1020; Mt. Pleasant Coal Co. *v.* Delaware, etc., R. Co., 6 Lack. Leg. N. (Pa.) 1. *Compare* Wilczinski *v.* Louisville, etc., R. Co., 66 Miss. 595, 6 So. 709 (holding that the company cannot permit private individuals to erect a building on land in which to collect seed for shipment); Blakely *v.* Chicago, etc., R. Co., 34 Nebr. 284, 51 N. W. 767 (holding that where plaintiff conveys land of a certain width to a railroad company "its successors and assigns for a right of way and for operating its railroad only" and an assignee of the company conveys to another railroad company a certain portion of its right of way across plaintiff's land making two roads upon such right of way, the second railroad is an additional burden on the land for which plaintiff is entitled to recover); *Re* Metropolitan Dist. R. Co., 40 L. T. Rep. N. S. 482.

by permitting another railroad company to run its trains over the road,[29] or by permitting the erection of buildings or platforms thereon for convenience in delivering and receiving freight.[30] A railroad company may also consent or give a right to maintain a telegraph line anywhere within the limits of the right of way,[31] so far as such line is reasonably necessary for the operation of the road,[32] but it has been held that it cannot authorize the erection and maintenance of such a line for general commercial purposes;[33] nor can it grant the exclusive right to construct and maintain telegraph lines along its road to a single company.[34] Nor can a railroad company grant an easement along its right of way, for the purpose of laying water pipes, not intended to be used for purposes of the road.[35]

I. Rights in and Use of Highways and Public Places[36] — **1. In General — a. Legislative Grant or Authorization.** A railroad company has no absolute right to construct its road across or along public streets or highways, or other public places;[37] such right, if it exists at all, can be acquired only by virtue of a legislative enactment, either directly or indirectly,[38] even though the company

A lease of a portion of the right of way for business purposes with a view to securing freight is not contrary to public policy. Detroit *v.* C. H. Little Co., 146 Mich. 373, 109 N. W. 671.

Lease of refreshment rooms at a station to another, and covenant to stop certain trains thereat for the refreshment of passengers see Phillips *v.* Great Western R. Co., L. R. 7 Ch. 409, 41 L. J. Ch. 614, 26 L. T. Rep. N. S. 157, 20 Wkly. Rep. 562; Rigby *v.* Great Western R. Co., 1 Coop. t. Cott. 3, 10 Jur. 488, 4 R. & Can. Cas. 175, 47 Eng. Reprint 715.

Chapel.— Where part of an estate which is subsequently developed as a building estate has been compulsorily taken by a railroad company for the purposes of their undertaking, the temporary letting of a small portion of the lands not required for the immediate purposes of the railroad, for the erection of a chapel, is not an unreasonable user of the land nor inconsistent with the purposes for which the railroad company has been formed; and this would be the case even though it were shown that some damage was likely to accrue to the owners of the building estate from such a user. Onslow *v.* Manchester, etc., R. Co., 64 L. J. Ch. 355, 72 L. T. Rep. N. S. 256.

29. Holbert *v.* St. Louis, etc., R. Co., 38 Iowa 315. And see *infra*, V, J, 3.

30. Illinois Cent. R. Co. *v.* Wathen, 17 Ill. App. 582 (holding that a railroad company may permit its customers to erect elevators, corn-cribs, etc., which facilitate its business); Grand Trunk R. Co. *v.* Richardson, 91 U. S. 454, 23 L. ed. 356 (holding further that a license by the company to other parties is admissible to show its consent to the occupation of its premises in the case in question); Southern R. Co. *v.* Blunt, 155 Fed. 496 (holding that a contract by a railroad company, granting the right to another to build a platform on its right of way from which to load cotton for shipment over its lines on condition that the builder shall indemnify it for any loss or damage it may sustain by reason of such structure is not contrary to the public policy of Alabama).

Adverse possession.— Occupancy by an individual of parts of the right of way of a railroad with elevators and similar structures used in carrying on his business with the railroad company for convenience in handling his shipments is not adverse unless actual notice is brought home to the company or the conduct of the individual is such as to constitute such notice. Roberts *v.* Sioux City, etc., R. Co., 73 Nebr. 8, 102 N. W. 60, 2 L. R. A. N. S. 272. And in the absence of notice of an adverse claim the erection and maintenance of elevators on a right of way without express agreement will be regarded as with the license of the company and subject to its right to resume possession whenever necessary for its business. Roberts *v.* Sioux City, etc., R. Co., *supra*.

31. Prather *v.* Western Union Tel. Co., 89 Ind. 501.

32. Hodges *v.* Western Union Tel. Co., 133 N. C. 225, 45 S. E. 572.

33. Hodges *v.* Western Union Tel. Co., 133 N. C. 225, 45 S. E. 572.

34. Pacific Postal Tel. Cable Co. *v.* Western Union Tel. Co., 50 Fed. 493. *Contra*, Canadian Pac. R. Co. *v.* Western Union Tel. Co., 17 Can. Sup. Ct. 151.

35. Canada Southern R. Co. *v.* Niagara Falls, 22 Ont. 41.

36. **Plan and mode of construction** see *infra*, VI, B, 3.

Right to cross streets and highways see *infra*, VI, D, 1.

Duty of railroad to maintain highway as exonerating public from maintaining the same see STREETS AND HIGHWAYS.

Exercise of power of eminent domain see EMINENT DOMAIN, 15 Cyc. 587 *et seq.* 626 *et seq.*

37. Fort-St. Union Depot Co. *v.* State R. Crossing Bd., 81 Mich. 248, 45 N. W. 973.

38. *Georgia.*— Athens Terminal Co. *v.* Athens Foundry, etc., Works, 129 Ga. 393, 58 S. E. 981; Daly *v.* Georgia, etc., R. Co., 80 Ga. 793, 7 S. E. 146, 12 Am. St. Rep. 286, holding that a railroad company using steam power cannot lay its tracks longitudinally upon the streets of a town or city, without the sanction of the legislature. See also Atlantic, etc., R. Co. *v.* Mann, 43 Ga. 200.

owns the fee in the land in the public street or highway;[39] and this right or authority must be given, by the legislature, either in express terms or by necessary implication.[40] It may be given directly by the legislature, as by the charter of the railroad company or by a general statute,[41] without the consent of the municipal

Iowa.— Stanley *v.* Davenport, 54 Iowa 463, 2 N. W. 1064, 6 N. W. 706, 37 Am. Rep. 216, holding that Laws (1874), c. 47, providing that railway companies may "cross over or under" any highway with their railways, impliedly withdraws the power granted them by Code, § 1262, to occupy the streets of cities with their tracks.

Louisiana.— Hepting *v.* New Orleans Pac. R. Co., 36 La. Ann. 898.

Michigan.— Fort-St. Union Depot Co. *v.* State R. Crossing Bd., 81 Mich. 248, 45 N. W. 973.

New Jersey.— Newark *v.* Delaware, etc., R. Co., 42 N. J. Eq. 196, 7 Atl. 123; Morris, etc., R. Co. *v.* Newark, 10 N. J. Eq. 352.

New York.— Delaware, etc., R. Co. *v.* Buffalo, 158 N. Y. 266, 53 N. E. 44 [*affirming* 4 N. Y. App. Div. 562, 38 N. Y. Suppl. 510], 158 N. Y. 478, 53 N. E. 533; People *v.* Brooklyn, etc., R. Co., 89 N. Y. 75. The prohibition of the Railroad Act of 1892 (section 123) that "no such railroad" shall be constructed in or on certain streets does not apply to a railroad incorporated under the act of 1850, being, as a matter of context, limited to railroads incorporated under the rapid transit act. Beekman *v.* Brooklyn, etc., R. Co., 89 Hun 14, 35 N. Y. Suppl. 84.

Pennsylvania.— Pennsylvania R. Co.'s Appeal, 115 Pa. St. 514, 5 Atl. 872; *In re* Pennsylvania R. Co.'s Appeal, 93 Pa. St. 150; Danville, etc., R. Co. *v.* Com., 73 Pa. St. 29; Com. *v.* Erie, etc., R. Co., 27 Pa. St. 339, 67 Am. Dec. 471; Riley *v.* Pennsylvania Co., 32 Pa. Super. Ct. 579; Yost *v.* Philadelphia, etc., R. Co., 29 Leg. Int. 85.

Tennessee.— Mississippi, etc., R. Co. *v.* Wilson, 10 Heisk. 496.

See 41 Cent. Dig. tit. "Railroads," §§ 183, 184. And see MUNICIPAL CORPORATIONS, 28 Cyc. 868 text and note 58.

Power of legislature to authorize the laying of tracks across or along streets or highways see EMINENT DOMAIN, 15 Cyc. 626 *et seq.*

In Washington city a railroad company may use the streets only by act of congress. Glick *v.* Baltimore, etc., R. Co., 19 D. C. 412; Edmonds *v.* Baltimore, etc., R. Co., 114 U. S. 453, 5 S. Ct. 1098, 29 L. ed. 216.

Notwithstanding the forfeiture of the charter of a turnpike road company, yet when the road continues to be used as a public highway by the public, and has not been vacated by any legal proceedings, a railroad company cannot treat it as abandoned, and it cannot lay its tracks thereon without incurring the obligation imposed by law for the taking and occupying of a public highway. Railroad Co. *v.* Com., 1 Lanc. L. Rev. (Pa.) 310.

The legislature may authorize the building of a railroad across or lengthwise of streets or alleys of an incorporated town or city, and the right of occupancy of such streets or alleys by a railroad may be granted by special legislation, especially where the railroad enters such a town or city with the consent of the municipal authorities empowered to give such consent. Pepper *v.* Union R. Co., 113 Tenn. 53, 85 S. W. 864.

N. Y. Laws (1860), c. 10, prohibiting the laying of a railroad in any street of New York city except under authority and subject to restrictions thereafter granted, wherever the railroad shall commence or end, did not affect the right to construct a railroad on Long Island or under the East river. New York, etc., R. Co. *v.* O'Brien, 121 N. Y. App. Div. 819, 106 N. Y. Suppl. 909 [*affirmed* in 192 N. Y. 558, 85 N. E. 1113].

39. Western R. Co. *v.* Alabama Grand Trunk R. Co., 96 Ala. 272, 11 So. 483, 17 L. R. A. 474 (holding that conveyances to a railroad company of rights of way over and the fee in lands abutting on and included in a public road vests in such company no exclusive or other right to use said public road for railroad purposes, nor can it acquire such right without authority from the state); Stickle *v.* Morris, etc., R. Co., 19 N. J. Eq. 386 [*reversed* on other grounds in 20 N. J. Eq. 530].

40. Daly *v.* Georgia, etc., R. Co., 80 Ga. 793, 7 S. E. 146, 12 Am. St. Rep. 286; Springfield *v.* Connecticut River R. Co., 4 Cush. (Mass.) 63; Hoboken Land, etc., Co. *v.* Hoboken, 35 N. J. L. 205; Pennsylvania R. Co.'s Appeal, 115 Pa. St. 514, 5 Atl. 872; Cleveland, etc., R. Co. *v.* Speer, 56 Pa. St. 325, 94 Am. Dec. 84; Riley *v.* Pennsylvania Co., 32 Pa. Super. Ct. 579; Philadelphia, etc., R. Co.'s Appeal, 1 Montg. Co. Rep. (Pa.) 129.

Necessary implication may result either from the language of the act, or from its being shown by an application of the act to the subject-matter that the railroad cannot by reasonable intendment be laid in another line. Springfield *v.* Connecticut River R. Co., 4 Cush. (Mass.) 63.

Certainty required.— A permission to occupy a public street with railroad tracks must plainly appear, and not be left to be derived from doubtful implication, from the generality of the language used, which does not unmistakably manifest the intention to give such permission. Chicago, etc., R. Co. *v.* Chicago, 121 Ill. 176, 11 N. E. 907.

41. Athens Terminal Co. *v.* Athens Foundry, etc., Works, 129 Ga. 393, 58 S. E. 981; Morris, etc., R. Co. *v.* Newark, 10 N. J. Eq. 352 (holding that the legislature may authorize the concurrent use of a highway by a railroad and by the public, if it be for public benefit; and of that they are the judges); People *v.* Railroad Com'rs, 175

or other local authorities;[42] or certain state, county, or municipal boards or officers may be authorized to give such authority.[43] The legislature may discriminate and enact that railway tracks may be laid on streets in smaller cities if the municipal authorities deem it safe to grant such permission, while in more densely populated cities tracks may be laid only by direct authority of the legislature.[44]

b. Construction of Grants in General. Such a grant by the commonwealth or by a municipal corporation under authority derived from the commonwealth is to be taken most strongly against the railroad company, and nothing is to be taken by implication against the public, except what necessarily flows from the nature and terms of the grant;[45] and no legislation will be construed to take away public rights unless such purpose is plainly expressed.[46] The construction of such legislation, however, must be reasonable, and if a literal construction leads to a consequence which the legislature could not have intended, such literal construction cannot obtain.[47] Thus where a railroad company is empowered by charter to enter a city, this power of necessity gives the right to locate the road somewhere, and, if need be, upon a street or alley;[48] but authority under a general law, to cross, occupy, use, or change public roads gives a railroad company no authority to construct its road through streets, which are under the supervisory

N. Y. 516, 67 N. E. 1088 [*affirming* 81 N. Y. App. Div. 242, 81 N. Y. Suppl. 20] (construing Laws (1890), c. 565 [which repealed Laws (1875), c. 606; Laws (1880), c. 583; and Laws (1884), c. 252], as giving authority for the construction of railroads in New York city, without reference to Laws (1860), c. 10); Tennessee, etc., R. Co. *v.* Adams, 3 Head (Tenn.) 596. See Com. *v.* Boston, etc., R. Co., 3 Cush. (Mass.) 25.

New York Rapid Transit Act (Laws (1891), c. 4) applies only to roads to be built exclusively within New York city, and is not intended to exclude the application of Railroad Law (Laws (1890), p. 1082, c. 565) to the city. People *v.* Railroad Com'rs, 81 N. Y. App. Div. 242, 81 N. Y. Suppl. 20 [*affirmed* in 175 N. Y. 516, 67 N. E. 1088].

42. *In re* Prospect Park, etc., R. Co., 67 N. Y. 371 [*affirming* 8 Hun 30] (holding that, after the legislature has located a railroad on an avenue or highway, there is no necessity for notice and agreement with the commissioners of highways); Philadelphia *v.* River Front R. Co., 173 Pa. St. 334, 34 Atl. 60.

Under Iowa Revision, § 1321, a railroad company has a right, subject to proper equitable and police regulations, to pass over a street in a city without consent of the city authorities, and without previous payment to the city of the damages occasioned by such occupation. Hine *v.* Keokuk, etc., R. Co., 42 Iowa 636; Chicago, etc., R. Co. *v.* Newton, 36 Iowa 299.

43. State *v.* Cincinnati Cent. R. Co., 37 Ohio St. 157. And see *infra*, V, I, 1, c.

Ohio Rev. St. §§ 3283, 7691, authorizing railroad companies, when necessary in the location of their lines, to agree with public authorities upon the terms of occupation of public lands, streets, alleys, ways, or grant of any kind, and providing that the board of public works shall have charge of the public works of the state, with power to render useful, maintain, and protect the same, and to make improvements as they may think proper for such purposes, do not authorize a railroad company to agree with such board for the use by the former of the berme bank of a public canal for a right of way, in view of the policy of the state to foster canals, and of the fact that elsewhere the word "canal" is used wherever it is referred to in the statute, and especially where no absolute necessity is shown. State *v.* Cincinnati Cent. R. Co., 37 Ohio St. 157.

44. Burlington *v.* Pennsylvania R. Co., 56 N. J. Eq. 259, 38 Atl. 849 [*affirmed* in 58 N. J. Eq. 547, 43 Atl. 700].

45. Chicago Terminal Transfer Co. *v.* Chicago, 203 Ill. 576, 68 N. E. 99; Chicago, etc., R. Co. *v.* Quincy, 139 Ill. 355, 28 N. E. 1069; Pennsylvania Schuylkill Valley R. Co. *v.* Philadelphia, etc., R. Co., 157 Pa. St. 42, 27 Atl. 683; Burns *v.* Multnomah R. Co., 15 Fed. 177, 8 Sawy. 543.

Public carriers.— Statutes referring to the construction of railroads on public streets and highways embrace only railroads which act as public carriers and are of a public character. Bradley *v.* Pharr, 45 La. Ann. 426, 12 So. 618, 19 L. R. A. 647.

Land of educational institution.— Where the legislature has authorized a railroad company to construct a railroad between two designated points, it has a right to occupy any land, although purchased by the state for the use of a deaf and dumb educational institution, between those points on the authorized route, which may be necessary for their purposes. Indiana Cent. R. Co. *v.* State, 3 Ind. 421.

Right to place tracks on public levee under Minn. Sp. Laws (1872), c. 93, see St. Paul *v.* Chicago, etc., R. Co., 63 Minn. 330, 63 N. W. 267, 65 N. W. 649, 68 N. W. 458, 34 L. R. A. 184.

46. Newark *v.* Delaware, etc., R. Co., 42 N. J. Eq. 196, 7 Atl. 123.

47. People *v.* Craycroft, 111 Cal. 544, 44 Pac. 463.

48. Tennessee, etc., R. Co. *v.* Adams, 3 Head (Tenn.) 596.

control of the municipal authorities.[49] The right to construct tracks across or in streets, under a legislative authority, is not interfered with by a municipal power to regulate the use of locomotives within the city and to control the location of tracks.[50] So a statute requiring the sale of railroad franchises in the streets of a city to the highest bidder must be construed as applying only to cases of street railroads where *bona fide* competition is possible, and not to the extension of a steam railroad through the city *en route* between its termini, in which there can be no *bona fide* competition.[51] Authority to construct a railroad between designated points, the exact location along such route being left to the company's discretion, gives an implied authority to cross public highways which said route may intersect,[52] and such crossings cannot be prevented by municipal corporations through which the road is laid;[53] but it does not *prima facie* confer the right to occupy longitudinally streets or highways lying in the general route of the road,[54] as the right to so occupy streets and highways must be given to a railroad company expressly or by necessary implication.[55]

49. Columbus, etc., R. Co. *v.* Witherow, 82 Ala. 190, 3 So. 23, holding that under Code (1876), § 1782, the streets of an incorporated town being under the supervisory control of its municipal authorities, a railroad company can derive no license to construct its road through such streets by virtue of section 1842, conferring upon railroad companies the right to use and occupy public roads; the provisions of that section apply only to such public works or highways as are under the control of the board of county commissioners.

A charter giving authority to construct its road to and into a city, with power to cross any road or highway on the route, does not operate as a grant of a use of the city's streets for the purpose of the railroad, where the city authorities are vested with the exclusive control and regulation of the streets, etc. Chicago, etc., R. Co. *v.* Chicago, 121 Ill. 176, 11 N. E. 907.

50. *In re* Milwaukee Southern R. Co., 124 Wis. 490, 102 N. W. 401.

51. People *v.* Craycroft, 111 Cal. 544, 44 Pac. 463.

The consent of local authorities being obtained by plaintiff to the building of a railroad and a tunnel under the streets of New York, and having been confirmed by amendment, Laws (1892), p. 1450, c. 702, to § 16, c. 565, p. 1089, of the Railroad Law of 1890, the contention that plaintiff's franchise was invalid because the requirements of Laws (1886), p. 919, c. 642, providing that such franchises be sold at public auction, had not been satisfied, is untenable; that act having been repealed, by Railroad Law (Laws (1890), p. 1082, c. 565). New York, etc., R. Co. *v.* O'Brien, 50 Misc. (N. Y.) 13, 100 N. Y. Suppl. 316 [*affirmed* in 121 N. Y. App. Div. 819, 106 N. Y. Suppl. 909 (*affirmed* in 192 N. Y. 558, 85 N. E. 1113)].

52. Canton *v.* Canton Cotton Warehouse Co., 84 Miss. 268, 36 So. 266, 105 Am. St. Rep. 428, 65 L. R. A. 561; Thompson *v.* Ocean City R. Co., 60 N. J. L. 74, 36 Atl. 1087; Stickle *v.* Morris, etc., R. Co., 19 N. J. Eq. 386 [*reversed* on other grounds in 20 N. J. Eq. 530].

53. Canton *v.* Canton Cotton Warehouse Co., 84 Miss. 268, 36 So. 266, 105 Am. St. Rep. 428, 65 L. R. A. 561.

54. Davis *v.* East Tennessee, etc., R. Co., 87 Ga. 605, 13 S. E. 567 (holding that the charter of a railroad company, which authorizes it to construct its road between two given cities, and to connect with any other roads built into such cities, does not, by necessary implication, authorize the company to construct and operate its railroad longitudinally on the streets of such cities, in view of Code, § 719, which declares that public highways shall not be appropriated to railroads in the absence of express authority in their charters); Springfield *v.* Connecticut River R. Co., 4 Cush. (Mass.) 63; Thompson *v.* Ocean City R. Co., 60 N. J. L. 74, 36 Atl. 1087; Burlington *v.* Pennsylvania R. Co., 56 N. J. Eq. 259, 38 Atl. 849 [*affirmed* in 58 N. J. Eq. 547, 43 Atl. 700]; Pennsylvania R. Co.'s Appeal, 115 Pa. St. 514, 5 Atl. 872.

55. Atlantic, etc., R. Co. *v.* Mann, 43 Ga. 200; Springfield *v.* Connecticut River R. Co., 4 Cush. (Mass.) 63; Thompson *v.* Ocean City R. Co., 60 N. J. L. 74, 36 Atl. 1087; Cleveland, etc., R. Co. *v.* Speer, 56 Pa. St. 325, 94 Am. Dec. 84 (holding that where a railroad company had authority under its charter to continue its road through the borough of Manchester to Pittsburg on the most direct and least expensive route, it had authority to enter upon any particular street in such borough and construct its road, and make and maintain switches thereon); Philadelphia, etc., R. Co.'s Appeal, 2 Walk. (Pa.) 291.

If a railroad company be authorized to build a railroad by a straight line between two designated points, the right by implication is conferred to run upon, along, or across all the streets or roads which lie in the course of the line. Tennessee, etc., R. Co. *v.* Adams, 3 Head (Tenn.) 596.

A grant will not be implied to construct a railroad upon or along a highway, unless it be necessary for the route as authorized. Stickle *v.* Morris, etc., R. Co., 19 N. J. Eq. 386 [*reversed* on other grounds in 20 N. J. Eq. 530].

c. Grant or Consent by Municipal or Other Local Authorities. Authority to construct a railroad upon or along public streets and highways may be given by the legislature through municipal or other local authorities as its agents,[56] as by certain courts.[57] But the municipal or other authorities can grant or consent to such right or use only as the power to do so is given to them, either expressly or by necessary implication, by an act of the legislature,[58] and this consent or

56. Mobile *v.* Louisville, etc., R. Co., 84 Ala. 115, 4 So. 106, 5 Am. St. Rep. 342 (holding that a grant by a city ordinance to a railroad company, whose charter authorizes it to build its track "through any street or highway," of the right to build a track along a city street, is a franchise in the proper sense of the term, as the authority to exercise such right in fact comes from the legislature through the corporate authority of the city as agent of the state); Buswell *v.* Southern Pac. Co., 114 Cal. 445, 46 Pac. 291 (construing the act of May 20, 1861).

Lands "belonging to the people of this state, or to any of the counties or towns," which may be granted to railroads by the general assembly or the county or town officers, as provided in Act Nov. 25, 1849, § 26, has application only to lands which belong to the counties and towns as owners thereof, and not to lands in which they hold the nominal title only, for a prescribed public use, such as a street or highway. Pittsburg, etc., R. Co. *v.* Reich, 101 Ill. 157.

57. Texarkana, etc., R. Co. *v.* Texas, etc., R. Co., 28 Tex. Civ. App. 551, 67 S. W. 525, commissioners' court of a county.

An application to the court under N. Y. Laws (1890), c. 565, § 11, which prohibits the construction of a railroad on a village street without an order of the court on notice to the trustees of the village, should not be granted where the railroad company shows nothing in its favor and it is opposed by the village authorities. Matter of Keeseville, etc., R. Co., 116 N. Y. App. Div. 72, 101 N. Y. Suppl. 237.

County court.— When a railroad company enters upon and occupies a highway by permission of, and under contract with, the county court, its possession is not adverse to the public. Turney *v.* Southern Pac. Co., 44 Oreg. 280, 75 Pac. 144, 76 Pac. 1080.

58. *Alabama.*— Louisville, etc., R. Co. *v.* Mobile, etc., R. Co., 124 Ala. 162, 26 So. 895, holding an ordinance, under Acts (1894–1895), p. 382, § 4, granting a franchise to a railroad company, to construct its track on streets of the city to be void.

Georgia.— Savannah, etc., R. Co. *v.* Woodruff, 86 Ga. 94, 13 S. E. 156.

Illinois.— McCartney *v.* Chicago, etc., R. Co., 112 Ill. 611, holding that where a railroad company lays its track in a street of a city, having the right to construct a track for passenger cars only, the city, under article 5, cl. 90, § 62, of the general law, has no power afterward to grant the use of the track for the operation of freight cars upon it, except upon a petition of property-owners upon the street as required by the statute.

Minnesota.— St. Paul *v.* Chicago, etc., R. Co., 63 Minn. 330, 63 N. W. 267, 65 N. W. 649, 68 N. W. 458, 34 L. R. A. 184.

Missouri.— Atlantic, etc., R. Co. *v.* St. Louis, 66 Mo. 228 [*reversing* 3 Mo. App. 315].

Pennsylvania.— Philadelphia *v.* River Front R. Co., 173 Pa. St. 334, 34 Atl. 60.

See 41 Cent. Dig. tit. "Railroads," § 185. And see MUNICIPAL CORPORATIONS, 28 Cyc. 866 *et seq.*

Condemnation unnecessary.— Where a city vacates streets for the purpose of giving the land to a railroad company for depot purposes, in consideration of the company's abolishing certain grade crossings, the action of the city is not invalid because no steps were taken under a statute (Iowa Code, §§ 885, 886), declaring the proper proceedings for a city to pursue to condemn or purchase land to donate to a railroad company; the city having the land already, and the grant being made for a consideration. Spitzer *v.* Runyan, 113 Iowa 619, 85 N. W. 782.

In New York, under Railroad Laws (1890), c. 565, § 16, which took effect May 1, 1891, and embodied the Tunnel Act of 1880 (Laws (1880), c. 582), and corrected the unconstitutional feature thereof, allowing a substitute for the consent of the local authorities, but made provisions applicable only to corporations thereafter incorporated; and under Laws (1890), c. 565, § 181, providing that the repeal by it of prior laws specified including the act of 1880 should affect no right acquired prior to 1891; and section 16 of the laws of 1890 which was amended by Laws (1892), c. 702, and made retroactive so as to include corporations organized under the Laws (1850), c. 140, an ordinance adopted Dec. 31, 1890, permitting the construction of a tunnel under New York city streets, is valid. New York, etc., R. Co. *v.* O'Brien, 121 N. Y. App. Div. 819, 106 N. Y. Suppl. 909 [*affirmed* in 192 N. Y. 558, 85 N. E. 1113].

Consent of dock department.— Under N. Y. Laws (1870), c. 137, § 99, as amended by Laws (1871), c. 574, § 6, subd. 10, providing for the conveyance to New York city of certain land under water to be used for docks, etc., which was afterward made; and notwithstanding subdivision 2 and subsequent acts give the department of docks exclusive control of all wharf property belonging to the city, the title to such property being in the city and it having power to convey it in so far as it was not needed for docks, etc., permits given by the board of aldermen to a railroad to construct a tunnel under the land, the use being one which would not interfere with the use of the land for commerce, cannot be revoked after the railroad has acted on them and expended a large sum of money in

grant must be given or made in the manner prescribed,[59] although any doubt as to the existence of the right of a railroad company under its charter or municipal grant to lay its tracks in a municipality may be removed by a subsequent act of the legislature recognizing and ratifying such right.[60] Where it is provided that a railroad company shall obtain a grant from or the consent of certain local authorities before it can construct its road upon or along a city street or highway, such provision is in the nature of a condition precedent which must be complied with before the company can acquire a right to use the street or highway.[61]

constructing the tunnel, on the ground that the dock department's permission had not been obtained. New York, etc., R. Co. *v.* O'Brien, 121 N. Y. App. Div. 819, 106 N. Y. Suppl. 909 [*affirmed* in 192 N. Y. 538, 85 N. E. 1113].

59. See the cases cited *infra*, this note.

By resolution, ordinance, or by-law see Montreal St. R. Co. *v.* Montreal Terminal R. Co., 36 Can. Sup. Ct. 369; Liverpool, etc., R. Co. *v.* Liverpool, 33 Can. Sup. Ct. 180; Pembroke Tp. *v.* Canada Cent. R. Co., 3 Ont. 503; *In re* Day, 15 U. C. Q. B. 126; Reg. *v.* Grand Trunk R. Co., 15 U. C. Q. B. 121. Under Utah Rev. St. (1898) § 206, as amended by Sess. Laws (1901), p. 133, c. 124; and § 207, Rev. St. (1898), providing that the power of a city council to grant franchises to railroad companies to maintain tracks in a street can only be exercised by ordinance duly passed, or resolution or by-law, enacted in the same way, a resolution conferring the right, to be valid, must be passed in accordance with the formalities provided by law. Cereghino *v.* Oregon Short Line R. Co., 26 Utah 467, 73 Pac. 634, 99 Am. St. Rep. 843.

By vote see People *v.* Stanford, 77 Cal. 360, 18 Pac. 85, 19 Pac. 693, 2 L. R. A. 92 (construing the act of 1861 as amended by the act of May 6, 1862, requiring a two-thirds vote of the supervisors or common council of the city and county or city to entitle railroad companies to use the streets of municipal corporations); Savannah, etc., R. Co. *v.* Woodruff, 86 Ga. 94, 13 S. E. 156.

In Tennessee, where a commercial railroad is to pass over the streets of a city, the consent of the city must be obtained, and the route of the road must be defined, in order to obtain that consent. Collier *v.* Union R. Co., 113 Tenn. 96, 83 S. W. 155.

60. McCartney *v.* Chicago, etc., R. Co., 112 Ill. 611; Owensboro *v.* Owensboro, etc., R. Co., 40 S. W. 916, 19 Ky. L. Rep. 449, holding that where, after a railroad was constructed in a street of a city without authority, an ordinance was passed authorizing its construction, and subsequently legislative authority was conferred on the city to grant the power to construct railroads in its streets, and the city then passed an ordinance reciting the former ordinance and granting the company the right to construct double tracks under the same restrictions, the effect was to legalize the construction and operation of the railroad. See also Wetmore *v.* Story, 22 Barb. (N. Y.) 414, 3 Abb. Pr. 262.

61. *California.*— People *v.* Stanford, 77 Cal. 360, 18 Pac. 85, 19 Pac. 693, 2 L. R. A. 92.

Georgia.— Athens Terminal Co. *v.* Athens Foundry, etc., Works, 129 Ga. 393, 58 S. E. 981, holding that Civ. Code (1895), par. 5, confers on a railroad company incorporated under the general railroad law power to construct its track longitudinally in the streets of a city for lawful use with the written consent of the municipal authorities.

New York.— Delaware, etc., R. Co. *v.* Oswego, 92 N. Y. App. Div. 551, 86 N. Y. Suppl. 1027.

Pennsylvania.— Chester *v.* Baltimore, etc., R. Co., 217 Pa. St. 402, 66 Atl. 654; Pittsburg *v.* Pittsburg, etc., R. Co., 205 Pa. St. 13, 54 Atl. 468; Philadelphia *v.* River Front R. Co., 173 Pa. St. 334, 34 Atl. 60; Com. *v.* Central Pass. R. Co., 52 Pa. St. 506; Knickerbocker Ice Co. *v.* Philadelphia, etc., R. Co., 15 Phila. 48.

Rhode Island.— Taber *v.* New York, etc., R Co., 28 R. I. 269, 67 Atl. 9.

Tennessee.— Collier *v.* Union R. Co., 113 Tenn. 96, 83 S. W. 155; Tennessee Brewing Co. *v.* Union R. Co., 113 Tenn. 53, 85 S. W. 864.

Texas.— Galveston, etc., R. Co. *v.* Galveston, (Civ. App. 1896) 37 S. W. 27 [*reversed* on other grounds in 90 Tex. 398, 39 S. W. 96, 36 L. R. A. 33], holding that the provision of Rev. St. (1895) art. 4438, requiring the consent of the municipal authorities to authorize a railroad company to construct its road in the streets of a city, is a lawful and valid exercise of legislative power.

Canada.— Pembroke Tp. *v.* Canada Cent. R. Co., 3 Ont. 503. See also Toronto *v.* Metropolitan R. Co., 31 Ont. 367.

See 41 Cent. Dig. tit. "Railroads," § 185.

Repeal of statutes.— The provision of N. Y. Laws (1896), c. 825, that the commissioner of the department of city works of Brooklyn shall grant permits to open the surface of streets to all persons who may otherwise lawfully perform such work, did not repeal a city ordinance providing that no permit shall be granted to a railroad company for sidings, switches, or turnouts in the streets except upon consent of the common council, Irvine *v.* Atlantic Ave. R. Co., 23 N. Y. App. Div. 112, 48 N. Y. Suppl. 465. Pa. Act, April 4, 1868, § 12 (Pamphl. Laws 62), prohibiting the occupation of a street by a railway without municipal consent, is not repealed by Const. (1874) art. 17, § 1, providing that any association organized for that purpose shall have the right to construct a railroad between any points within the state, and connect at the state line with railroads of other states. Pittsburg *v.* Pittsburg, etc., R. Co., 205 Pa. St. 13, 54 Atl. 468.

Where general authority over streets is in the municipality, and there is no statutory provision authorizing a railroad company to use them, they cannot be subjected to the use of a railroad without the consent of the municipality.[62] Under some statutes consent of the local authorities is required only where the railroad is to be constructed along or lengthwise of a street or highway.[63] It has been held that a general power to control its streets is not sufficient to authorize a municipality to grant to a railroad company the privilege of laying its tracks along its streets;[64] but on the other hand it has been held that municipal corporations under their general powers have authority to grant railroad companies the right to lay their tracks longitudinally upon a street, provided the use does not destroy or unreasonably impair the street as a highway for the general public,[65] and that a general statutory power in a railroad company to construct its road upon or across any highway which it intersects does not give it a right to construct its road longitudinally on streets without the consent of the municipality or over its objection.[66] Under some statutes, if a city refuses a railroad company a right of way, the company may call upon certain state officers, such as the state engineer, to designate the streets it may use.[67] A railroad company may acquire the right to maintain and operate its road across city streets or other public grounds by prescription,[68] or the municipality may be estopped from objecting to such occupation.[69]

Independently of the limitations upon the power of municipal authorities to permit obstructions to be placed in streets by railroads, a railroad company cannot maintain a structure, elevated or otherwise, across a street, as against the municipality, in the absence of clear proof of consent on the part of the municipal authorities to the construction of the identical structure in question. Delaware, etc., R. Co. *v.* Buffalo, 158 N. Y. 266, 53 N. E. 44 [*affirming* 4 N. Y. App. Div. 562, 35 N. Y. Suppl. 510], 159 N. Y. 478, 53 N. E. 533.

Contract.— Since a railroad company has implied power to contract for its right of way, as one of the incidents necessary to carry out the purposes of the charter, an agreement by it with a municipality, whereby the railroad company, in consideration of being granted a right of way through the municipal streets, agrees to extend its road a certain distance beyond the municipality, is not *ultra vires*, although at the time the railroad company could procure the right of way through the municipality by application to the state engineer, who is, on receiving such application, required by statute to designate a route through the town. Indianola *v.* Gulf, etc., R. Co., 56 Tex. 594.

62. Donnaher *v.* State, 8 Sm. & M. (Miss.) 649; Morris, etc., R. Co. *v.* Newark, 10 N. J. Eq. 352.

63. Cook County *v.* Great Western R. Co., 119 Ill. 218, 10 N. E. 564, holding that under the Illinois General Railroad Act of 1872 (Rev. St. c. 114, § 20, par. 5), providing for the crossing and bordering of streams, highways, etc., by railroads, it is only in a case where the railroad is to be constructed along or lengthwise of a highway that the consent of the local authorities must first be obtained. And see the statutes of the several states.

64. Daly *v.* Georgia, etc., R. Co., 80 Ga. 793, 7 S. E. 146, 12 Am. St. Rep. 286; Tallon *v.* Hoboken, 60 N. J. L. 212, 37 Atl. 895 (holding that the power conferred upon the city of Hoboken by its charter, to regulate its streets, does not authorize it to permit the construction and operation of a railroad upon its streets by a corporation organized under the general railroad law); Thompson *v.* Ocean City R. Co., 60 N. J. L. 74, 36 Atl. 1087.

A legislative grant of authority to a city council "to permit the connection by common depots, tracks, or otherwise, of all railroads in said city, or any of them, upon such terms and conditions as may be fixed and agreed on between the city council and them," does not give to the municipal authorities the power to confer upon any railroad company using steam locomotives the right to construct and operate a railway longitudinally along and over the streets of the city. Augusta, etc., R. Co. *v.* Augusta, 100 Ga. 701, 28 S. E. 126.

65. New Castle *v.* Lake Erie, etc., R. Co., 155 Ind. 18, 57 N. E. 516.

66. New Castle *v.* Lake Erie, etc., R. Co., 155 Ind. 18, 57 N. E. 516.

67. Indianola *v.* Gulf, etc., R. Co., 56 Tex. 594, holding that where a railroad company has the right, in case a city refuses it a right of way, to call upon the state engineer to designate the streets it may use with a due regard to the commercial interests and convenience of the city, a contract by the company with the city, whereby it secures the right of way it desires by the execution of a bond to construct a portion of its road within a certain time, is not illegal.

68. New Castle *v.* Lake Erie, etc., R. Co., 155 Ind. 18, 57 N. E. 516, holding that a railway company's construction of its tracks in a street, and their continued and peaceable use for thirty years with the knowledge and acquiescence of the municipality, raise a conclusive presumption of a grant.

69. Chicago *v.* Union Stock-yards, etc., Co.,

d. Grant, Consent, or Remonstrance of Abutting Owners. Under some statutes, the assent of a certain proportion of the abutting owners must be given before the street in front of their properties can be used for railroad purposes.[70] As a general rule the fee of the land over which a public street or highway passes is in the abutting owner,[71] and ordinarily a railroad company cannot occupy such part of a street or highway without making compensation to him therefor;[72] and where a railroad has been constructed in the street or highway, without lawful authority, such owner may, notwithstanding the public interest in the operation of the road, recover his land, or otherwise dispute the right of the company to use it,[73] unless he has by his conduct estopped himself;[74] and the mere fact that he acquiesced in the building of the road until it was completed and put into operation does not amount to an estoppel.[75] But where a railroad company has rightfully built its road on a strip of land dedicated as a highway by the owner,

164 Ill. 224, 45 N. E. 430, 35 L. R. A. 281 (holding that a city is estopped to deny authority of a company to lay its tracks across streets where it has acquiesced for twenty years in such use of its streets, and has required the company to expend considerable sums in the improvement of the crossings, authorized it to construct depots, and passed many resolutions mentioning the tracks as established monuments, in fixing street grades, etc.); Chicago, etc., R. Co. *v.* Joliet, 79 Ill. 25; Pembroke Tp. *v.* Canada Cent. R. Co., 3 Ont. 503.

A town cannot be estopped by the act of its commissioners of highways in contracting to surrender a certain highway to a railroad company, although the latter has expended money in consequence of such surrender, when the commissioners had no authority to make such a contract, and this was known to the railroad company. Rice *v.* Chicago, etc., R. Co., 30 Ill. App. 481.

Notice.— Where the charter of a railroad company contemplates that the persons interested shall have notice of the application and opportunity to resist it, a grant cannot arise from the acquiescence of the council without such notice, and so ordinances requiring the erection of safety gates and the keeping of flagmen along tracks which have been constructed without authority do not operate as grants of rights of way. Klosterman *v.* Chesapeake, etc., R. Co., 56 S. W. 820, 22 Ky. L. Rep. 192.

70. Wetmore *v.* Story, 22 Barb. (N. Y.) 414, 3 Abb. Pr. 262; New York, etc., R. Co. *v.* O'Brien, 50 Misc. (N. Y.) 13, 100 N. Y. Suppl. 316 (holding that where, prior to constructing its tunnels in any street, road, or public place, plaintiff railroad company procured, as required by the statute then in force, consent of property-owners of one half in value of the property bounded on the line of such street or road, a contention that it should obtain the consent of the property-owners along every street on its route before constructing in any street is without weight); Wilkins *v.* Gaffney City, 54 S. C. 199, 32 S. E. 299 (holding that under Acts (1894), p. 1002, § 14, authorizing the town council of Gaffney city to close up, widen, or alter a street by condemnation in case the abutters refuse consent, the council has no authority to permit a railroad company to lay its tracks in a street, where consent was refused, without condemnation and compensation).

In Illinois, 1 Starr & C. Annot. St. p. 472, providing that the city council shall not grant the use of, or right to lay railway tracks in streets to any company, except on petition of owners of frontage, applies to natural persons seeking to lay railway tracks in the streets (Chicago Dock, etc., Co. *v.* Garrity, 115 Ill. 155, 3 N. E. 448), and a petition, under the statute, to a common council, for leave to construct a track along a public street, is sufficiently signed by owners of one half of the frontage of that part of the street to be used (Schuchert *v.* Wabash, etc., R. Co., 10 Ill. App. 397).

A statute requiring such assent to "any street or horse railroad company" does not apply to a regular steam railroad. Wiggins Ferry Co. *v.* East St. Louis Union R. Co., 107 Ill. 450, construing the charter of East St. Louis (1 Priv. Laws (1869), p. 904).

71. Louisville, etc., R. Co. *v.* Liebfried, 92 Ky. 407, 17 S. W. 870, 13 Ky. L. Rep. 645. And see MUNICIPAL CORPORATIONS, 28 Cyc. 845, 846.

72. Bond *v.* Pennsylvania Co., 171 Ill. 508, 49 N. E. 545 [*reversing* 69 Ill. App. 507]. But see Souch *v.* East London R. Co., L. R. 16 Eq. 108, 42 L. J. Ch. 477, 21 Wkly. Rep. 590. See also EMINENT DOMAIN, 15 Cyc. 672 *et seq.*

73. Louisville, etc., R. Co. *v.* Liebfried, 92 Ky. 407, 17 S. W. 870, 13 Ky. L. Rep. 645.

Sufficiency of owner's title.— The occupation of premises on the line of a highway for a period of twenty years or more without any paper title affords no presumption as a matter of law that the possessor's title extends beyond the limits of his actual possession or to the center of a highway, so as to permit him to dispute the right of a railroad company to construct its road in the street. Hatch *v.* Vermont Cent. R. Co., 28 Vt. 142.

74. Louisville, etc., R. Co. *v.* Liebfried, 92 Ky. 407, 17 S. W. 870, 13 Ky. L. Rep. 645; Wolfard *v.* Fisher, 48 Oreg. 479, 84 Pac. 850, 87 Pac. 530, 7 L. R. A. N. S. 991.

75. Louisville, etc., R. Co. *v.* Liebfried, 92 Ky. 407, 17 S. W. 870, 13 Ky. L. Rep. 645, holding that mere acquiescence in the construction and operation of a railroad in a

its use thereof cannot be prevented by the abutting owner because the part of the strip next to complainant's land was never actually used as a highway.[76] While an abutting owner is entitled to a right of ingress and egress to and from his property over the railroad right of way in a street or public highway,[77] he is not entitled to such right over a railroad on a strip of land which has never been dedicated and accepted as a highway, and which was unconditionally conveyed to the railroad company.[78] A conveyance to a railroad company by an abutting owner of a right of way over a highway or street in front of certain described premises is a grant only of the right of way in front of the premises described.[79] A grant by an abutting owner of a right of way through a street or highway over his land releases the company from any incidental damages, resulting from a reasonable use and operation of the road,[80] and such a grant is binding on subsequent grantees of the remaining property.[81] A release in the conveyance, of all damages sustained by the grantor by reason of the construction of the road on the street or highway, etc., is limited to the damages sustained by the construction and operation of the road in front of the premises described.[82]

e. Covenants and Conditions in Grants. A grant or consent to a railroad company to use a street or highway may be made on reasonable covenants or conditions, essential for the protection of the public, and if the railroad company accepts the grant the parties are bound thereby;[83] as in the case of conditions that compensation shall be paid for the use of the highway,[84] or that the company shall construct its road to a certain terminus,[85] or fix its terminus at a certain

public highway until it becomes a common carrier will not prevent the abutting owner from recovering possession of the highway as against the railroad company.

76. Southern Pac. R. Co. *v.* Ferris, 93 Cal. 263, 28 Pac. 828, 18 L. R. A. 510.

77. Fulton *v.* Short Route R. Transfer Co., 85 Ky. 640, 4 S. W. 332, 9 Ky. L. Rep. 291, 7 Am. St. Rep. 619. And see, generally, MUNICIPAL CORPORATIONS, 28 Cyc. 863 *et seq.*

78. Tapert *v.* Detroit, etc., R. Co., 50 Mich. 267, 15 N. W. 450.

79. McDonald *v.* Southern California R. Co., (Cal. 1895) 41 Pac. 812. See also Morrison *v.* St. Paul, etc., R. Co., 63 Minn. 75, 65 N. W. 141, 30 L. R. A. 546.

Filing a plat of the land showing streets and the right of way as not amounting to a conveyance of the right of way to the railroad company see Chicago, etc., R. Co. *v.* Council Bluffs, 109 Iowa 425, 80 N. W. 564.

80. Conabeer *v.* New York Cent., etc., R. Co., 156 N. Y. 474, 51 N. E. 402 [*affirming* 84 Hun 34, 32 N. Y. Suppl. 6].

Filling in street.—A deed from the owner of lots abutting on a street to a railroad company, granting a right of way along the street for the operation of the road, but not permitting the "unlawful operation" of the road, does not cover the filling in of the street above the established grade so as to interfere with ingress and egress to the grantor's lots. Conners *v.* Yazoo, etc., R. Co., 86 Miss. 356, 38 So. 320.

81. Hileman *v.* Chicago Great Western R. Co., 113 Iowa 591, 85 N. W. 800; Conabeer *v.* New York Cent., etc., R. Co., 156 N. Y. 474, 51 N. E. 402 [*affirming* 84 Hun 34, 32 N. Y. Suppl. 6]; Varwing *v.* Cleveland, etc., R. Co., 6 Ohio Cir. Ct. 439, 3 Ohio Cir. Dec. 528, holding that where a municipality gives defendant company authority to use as much of a street as may be necessary for its tracks and plaintiff's grantor, an abutting owner, releases defendant from all damages, for valuable consideration, for the use of said street plaintiff, a subsequent grantee, is bound by the prior deed of release of his grantor, and cannot enjoin defendant from laying other tracks, in such street when the necessities of its business require it.

82. McDonald *v.* Southern California R. Co., (Cal. 1895) 41 Pac. 812.

83. Fort-St. Union Depot Co. *v.* State R. Crossing Bd., 81 Mich. 248, 45 N. W. 973; Delaware, etc., R. Co. *v.* Oswego, 92 N. Y. App. Div. 551, 86 N. Y. Suppl. 1027 (holding that statutory provisions, requiring the consent of the city to the use of its streets for railroad purposes, empower the city to impose upon the railroad company in consideration of such consent any and all reasonable conditions); Pittsburg, etc., R. Co. *v.* Hood, 94 Fed. 618, 36 C. C. A. 423.

Breach of condition.—Where a municipality consents to the occupation of the streets by a railroad company upon condition, and the condition is broken, the railroad company is without authority to occupy or use the streets. Edwards *v.* Pittsburg Junction R. Co., 215 Pa. St. 597, 64 Atl. 798.

84. Salem, etc., R. Co. *v.* Essex County, 9 Allen (Mass.) 563, construing St. (1863) c. 97, and St. (1859) c. 122, § 2, as to the county commissioners' power of fixing the compensation to be paid.

85. Indianola *v.* Indianola R. Co., 2 Tex. Unrep. Cas. 337.

A bond given by a railroad company to a city, conditioned for the construction of a road to a certain terminus in consideration of a grant by the city of the right to use

place,[86] or construct a station at a certain point,[87] or that, if the company changes a public highway, it shall cause the same to be reconstructed,[88] or upon condition that the railroad company shall pave and grade the street and keep it in good order and condition.[89] The determination of such conditions or terms may be conferred upon courts, commissioners, or public boards.[90] Where the right is granted by the state, requiring the municipality to consent thereto, the municipality has authority, in granting such consent, to annex thereto such terms and conditions only as require the performance by the railroad company of those things which are within the power of the municipal corporation to regulate and enforce against a corporation or individual occupying such streets, such as the preservation of streets and crossings,[91] and it has no authority to attach a condition subsequent, a failure to comply with which will defeat the right granted by the state.[92] Under some statutes a railroad company is authorized to appropriate to its use only a public street or road which has been legally established.[93]

f. Conflicting or Exclusive Grants and Priority of Rights.[94] As between two railroad companies, having the right to extend their tracks in and through a certain street, the company which first actually takes possession of the street, by locating and constructing its tracks thereon, acquires the better right to the use of the street, to the exclusion of the right of the other company to interfere in any way with the construction and operation of its tracks.[95] But the occupancy by one company does not prevent an occupancy by another company under a subsequent grant where it does not interfere with or obstruct the first railroad in its right of passage under its prior grant and location,[96] as by a street railroad.[97]

certain streets, is not *ultra vires* as to the railroad company, and may be enforced against it. Indianola *v.* Indianola R. Co., 2 Tex. Unrep. Cas. 337.

86. New Orleans *v.* Texas, etc., R. Co., 171 U. S. 312, 18 S. Ct. 875, 43 L. ed. 178.

87. Bickford *v.* Chatham, 16 Can. Sup. Ct. 235.

88. Danville, etc., R. Co. *v.* Com., 73 Pa. St. 29, construing a railroad charter, requiring the company, upon changing a public road, to "cause the same to be reconstructed . . . in the most favorable location and in as perfect a manner as the original road," as not importing that the making of the new road shall precede the occupying of the old one. And see *infra*, VI, B, 3, b.

89. Delaware, etc., R. Co. *v.* Oswego, 92 N. Y. App. Div. 551, 86 N. Y. Suppl. 1027. And see *infra*, VI, B, 2.

90. See Fort-St. Union Depot Co. *v.* State R. Crossing Bd., 81 Mich. 248, 45 N. W. 973.

91. Galveston, etc., R. Co. *v.* Galveston, 91 Tex. 17, 39 S. W. 920, 36 L. R. A. 44, 90 Tex. 398, 39 S. W. 96 [*reversing* (Civ. App. 1896) 37 S. W. 27].

92. Galveston, etc., R. Co. *v.* Galveston, 91 Tex. 17, 39 S. W. 920, 36 L. R. A. 44, 90 Tex. 398, 39 S. W. 96 [*reversing* (Civ. App. 1896) 37 S. W. 27].

93. Burns *v.* Multnomah R. Co., 15 Fed. 177, 8 Sawy. 543, construing Oreg. Law 530.

94. **Conflicting grants or licenses by municipal corporations** generally see MUNICIPAL CORPORATIONS, 28 Cyc. 886.

95. Waterbury *v.* Dry Dock, etc., R. Co., 54 Barb. (N. Y.) 388, 32 How. Pr. 193 [*reversing* 30 How. Pr. 39].

96. Savannah, etc., R. Co. *v.* Coast-Line R. Co., 49 Ga. 202; Montreal Park, etc., R. Co. *v.* Chateauguay, etc., R. Co., 35 Can. Sup. Ct. 48. See also Philadelphia, etc., R. Co. *v.* Berks County R. Co., 2 Woodw. (Pa.) 361.

The occupancy of a street by a single track of a railroad company, continued for many years, under a grant of the right to occupy so much "as may be necessary" for its road, with no facts pointing to the necessity for more than one track at the time it made the appropriation, exhausts the power conferred by the grant; and hence another railroad company, under a subsequent grant from the city, has the right to also occupy the street with its track, where it does not interfere with or obstruct the first railroad in its right of passage under its prior grant and location. Pennsylvania, etc., R. Co. *v.* Philadelphia, etc., R. Co., 157 Pa. St. 42, 27 Atl. 683.

The existence of several sidings and turnouts which the latter road must cross, and the inevitable inconveniences arising therefrom, forms no obstacle to the grant or exercise of the franchise to or by such company. Philadelphia, etc., R. Co. *v.* Berks County R. Co., 2 Woodw. (Pa.) 361.

97. Atchison, etc., R. Co. *v.* General Electric R. Co., 112 Fed. 689, 50 C. C. A. 424.

Under the rules of decision in Illinois, authority given a steam railroad by a city to cross a street with its tracks confers no exclusive rights in such street; but the right granted is subordinate to the use of the street for ordinary street purposes, which include the operating of a street railroad thereon; and the railroad company is not entitled to damages because of the construction of a street railway along such street, on the ground of delay to its trains, and increased danger at the crossing, nor can it maintain a suit in equity for an injunction against

A grant to a railroad company to use certain streets does not give it the right to interfere with the tracks of a street railway company unless the necessity therefor is so absolute that without it the grant itself would be defeated;[98] and the necessity must also be a necessity that arises from the very nature of things over which the railroad company has no control, and not a necessity created by the company itself for its own convenience or for the sake of economy.[99] Although the proper county authorities may grant a railroad company the right to cross and use the road-bed of another railroad company along a public highway,[1] it cannot do so without compensation to the original company;[2] nor can it grant such right without the consent of the first company, where such company's road-bed is not on an established and opened public road.[3]

g. Occupation of Highway as a Nuisance. It is not a nuisance *per se* for a railroad company to construct and operate its road upon a public street or highway if it does so by authority of law, and in a skilful and careful manner.[4] But it is a public nuisance for a railroad company to construct and operate its road on a public street or highway without legislative authority, granted either directly or indirectly;[5] or it may constitute a nuisance for a railroad company to use the street or way in an unauthorized manner.[6]

h. Duration of Right.[7] Where the grant of a right to a railroad company to lay its tracks in public streets or highways is expressly limited to a definite

such use. Atchison, etc., R. Co. *v.* General Electric R. Co., 112 Fed. 689, 50 C. C. A. 424. And the railroad company has no standing in equity to attack the validity of an ordinance granting a franchise for a street railroad along such street, either on the ground of fraud or for want of power in the city council to pass it. Atchison, etc., R. Co. *v.* General Electric R. Co., *supra*.

98. Pennsylvania R. Co.'s Appeal, 93 Pa. St. 150.

99. Pennsylvania R. Co.'s Appeal, 93 Pa. St. 150.

1. See Cincinnati St. R. Co. *v.* Chattanooga Electric St. R. Co., 44 Fed. 470.

2. Cincinnati St. R. Co. *v.* Chattanooga Electric St. R. Co., 44 Fed. 470.

3. Cincinnati St. R. Co. *v.* Chattanooga Electric St. R. Co., 44 Fed. 470, holding also that the laying of the second road may be enjoined at the suit of the first company.

4. *Florida.*— Geiger *v.* Filor, 8 Fla. 325.

Illinois.— Chicago, etc., R. Co. *v.* Loeb, 118 Ill. 203, 8 N. E. 460, 59 Am. Rep. 341.

Iowa.— Hughes *v.* Mississippi, etc., R. Co., 12 Iowa 261; Milburn *v.* Cedar Rapids, 12 Iowa 246.

Missouri.— Randle *v.* Pacific R. Co., 65 Mo. 325.

New York.— Baxter *v.* Spuyten Duyvil, etc., R. Co., 61 Barb. 428, 11 Abb. Pr. N. S. 178; Drake *v.* Hudson River R. Co., 7 Barb. 508; Hodgkinson *v.* Long Island R. Co., 4 Edw. 411, tunnel under street.

Pennsylvania.— Danville, etc., R. Co. *v.* Com., 73 Pa. St. 29; Peterson *v.* Navy Yard, etc., R. Co., 5 Phila. 199; Faust *v.* Passenger R. Co., 3 Phila. 164.

United States.— Miller *v.* Long Island R. Co., 17 Fed. Cas. No. 9,580*a*, 10 Reporter 197.

See 41 Cent. Dig. tit. "Railroads," § 193.

5. *Alabama.*— Birmingham R. Light, etc., Co. *v.* Moran, 151 Ala. 187, 44 So. 152; Louisville, etc., R. Co. *v.* Mobile, etc., R. Co., 124 Ala. 162, 26 So. 895.

Missouri.— Sherlock *v.* Kansas City Belt R. Co., 142 Mo. 172, 43 S. W. 629, 64 Am. St. Rep. 551.

New Jersey.— Stickle *v.* Morris, etc., R. Co., 19 N. J. Eq. 386 [*reversed* on other grounds in 20 N. J. Eq. 530].

New York.— People *v.* New York, etc., R. Co., 45 Barb. 73, 26 How. Pr. 44.

Pennsylvania.—Edwards *v.* Pittsburg Junction R. Co., 215 Pa. St. 597, 64 Atl. 798; Riley *v.* Pennsylvania Co., 32 Pa. Super. Ct. 579.

United States.— Pittsburg, etc., R. Co. *v.* Hood, 94 Fed. 618, 36 C. C. A. 423.

See 41 Cent. Dig. tit. "Railroads," § 193.

When a railroad, authorized by its charter to be made at one place, is made at another, it is a mere nuisance on every highway it touches in its illegal course. Com. *v.* Erie, etc., R. Co., 27 Pa. St. 339, 67 Am. Dec. 471.

A railroad constructed in the streets of the city of New York under and by virtue of a resolution adopted by the board of assistants, in one year, and concurred in by the board of aldermen in another year, having no warrant for its commencement, and none for its continuance, is not only a public nuisance, but a public nuisance of which taxpayers and owners of property on the streets through which the rails are laid have a legal right to complain, as specially injurious to them in their ingress and egress to and from their places of business. Wetmore *v.* Story, 22 Barb. (N. Y.) 414, 3 Abb. Pr. 262.

A railroad constructed under an invalid act is a public nuisance. Astor *v.* New York Arcade R. Co., 3 N. Y. St. 188.

6. See *infra*, V, I, 2, f.

7. Revocation or forfeiture of grant of rights in highways or public places see *infra*, V, L, 4.

time, such right is terminated at the expiration of such time,[8] unless it again obtains the consent of the proper authorities; [9] and the mere fact that additional rights or enlarged powers are subsequently granted to the railroad company does not operate to extend the time specified, as in the absence of a clear intention in the later grant to supersede the prescribed time limit, the additional rights granted are presumed to be for the original time specified.[10]

i. Romedies By or Against Companies. An injunction will lie to restrain a railroad company from constructing and operating its road on a public street or highway without authority of law,[11] or to require its removal,[12] unless the party entitled to object has, by delay or other conduct, become estopped to enforce such remedy.[13] Such injunction may be maintained by the proper state, county, or municipal authorities,[14] or by an abutting owner, or other citizen who is or will be specially injured thereby,[15] even though he is not irreparably injured.[16] Or an abutting owner may in such a case maintain an action for damages, if he has

8. Augusta, etc., R. Co. *v.* Augusta, 100 Ga. 701, 28 S. E. 126; Chicago Terminal Transfer R. Co. *v.* Chicago, 203 Ill. 576, 68 N. E. 99; Chicago, etc., R. Co. *v.* Quincy, 136 Ill. 563, 27 N. E. 192, 29 Am. St. Rep. 334. And see, generally, MUNICIPAL CORPORATIONS, 28 Cyc. 875 *et seq.*

A perpetual easement in a street is not acquired by a railway company, with general railroad powers, laying tracks in a street under municipal authority granting it the right to operate a suburban passenger railway, but expressly limiting the privileges for a designated period. Chicago Terminal Transfer R. Co. *v.* Chicago, 203 Ill. 576, 68 N. E. 99.

9. Augusta, etc., R. Co. *v.* Augusta, 100 Ga. 701, 28 S. E. 126.

10. Chicago Terminal Transfer R. Co. *v.* Chicago, 203 Ill. 576, 68 N. E. 99.

11. State *v.* St. Louis, etc., R. Co., 86 Mo. 288; Baxter *v.* Spuyten Duyvil, etc., R. Co., 61 Barb. (N. Y.) 428, 11 Abb. Pr. N. S. 178. See also Morris, etc., R. Co. *v.* Stickle, 20 N. J. Eq. 530 [*reversing* 19 N. J. Eq. 386]; and, generally, MUNICIPAL CORPORATIONS, 28 Cyc. 899 *et seq.*

Operation of injunction.—An injunction restraining a railroad company from unlawfully laying its tracks in a street will not continue to operate after the company has acquired the right to do so. Mobile, etc., R. Co. *v.* Middleton, 139 Ala. 610, 36 So. 782.

12. Northern Cent. R. Co. *v.* Canton Co., 104 Md. 682, 65 Atl. 337, holding that where a railroad company lays tracks without authority on plaintiff's land in a street, a mandatory injunction requiring their removal may be issued.

13. State *v.* St. Louis, etc., R. Co., 86 Mo. 288; Wolfard *v.* Fisher, 48 Oreg. 479, 84 Pac. 850, 87 Pac. 530, 7 L. R. A. N. S. 991.

Where plaintiff stands by and allows a railroad company to construct a cut under a highway without taking any action to prevent it, further than notifying defendant of his objection, he is not entitled to an injunction to restrain the operation of the road through such cut. Planet Property, etc., Co. *v.* St. Louis, etc., R. Co., 115 Mo. 613, 22 S. W. 616.

Limitation.— While the limitation of five years in respect to an action for damages does not protect the company from liability for injury done to abutting property on a street in which it has built its road, yet by reason of the acquiescence of the city authorities and of the persons interested they cannot after such time enjoin the operation of the road, or require its removal. Klosterman *v.* Chesapeake, etc., R. Co., 56 S. W. 820, 22 Ky. L. Rep. 192.

14. See State *v.* St. Louis, etc., R. Co., 86 Mo. 288.

15. Birmingham R. Light, etc., Co. *v.* Moran, 151 Ala. 327, 44 So. 152; Louisville, etc., R. Co. *v.* Mobile, etc., R. Co., 124 Ala. 162, 26 So. 895; Edwards *v.* Pittsburg Junction R. Co., 215 Pa. St. 597, 64 Atl. 798; Pennsylvania R. Co.'s Appeal, 115 Pa. St. 514, 5 Atl. 872; Black *v.* Philadelphia, etc., R. Co., 58 Pa. St. 249 (holding that where a railroad track is on a public street, owners of property in the vicinity, to sustain a complaint for constructing and maintaining it, must establish that it is a public nuisance and that they have sustained special damage); Riley *v.* Pennsylvania Co., 32 Pa. Super. Ct. 579; Cereghino *v.* Oregon Short Line R. Co., 26 Utah 467, 73 Pac. 634, 99 Am. St. Rep. 843. See also Williams *v.* New York Cent. R. Co., 16 N. Y. 97, 69 Am. Dec. 651 [*reversing* 18 Barb. 222].

The general rule is that a railroad company occupying a public street without authority by legislative grant in clear words or by unavoidable implication, constitutes a public nuisance, and may be enjoined at the suit of a private citizen specially injured. Sherlock *v.* Kansas City Belt R. Co., 142 Mo. 172, 43 S. W. 629, 64 Am. St. Rep. 551.

On proof by a railway company that it is the owner of lots abutting on a certain street, and that such property will be injured by the unauthorized construction of a railroad on such street, it is entitled to an injunction; and it is no defense that such company itself operates a railway on such street without authority. Louisville, etc., R. Co. *v.* Mobile, etc., R. Co., 124 Ala. 162, 26 So. 895.

16. Pennsylvania R. Co.'s Appeal, 115 Pa. St. 514, 5 Atl. 872.

been specially injured.[17] But where the railroad company is rightfully occupying the street or highway, an abutting owner's proper remedy for special damages sustained by him is an action at law,[18] and an injunction will not lie, at his instance, to restrain the railroad company from using the street,[19] unless he receives or is threatened with such injury that an action at law would be an inadequate remedy,[20] as where the use of the railroad in the street becomes a nuisance, or the aggression proves to be permanent and without an adequate remedy at law;[21] but a strong case must be presented and the impending danger must be imminent and impressive, to justify the issuing of an injunction as a precautionary and preventive remedy.[22] Under some statutes an action may be maintained by certain officers, to sustain the rights of the public in and to any highway, and to enforce the performance of any duty enjoined upon a railroad company in relation to such highway,[23] and to recover damages or expenses sustained or which may be sustained by the town or city in consequence of any act or omission of a railroad company in violation of any law or condition in relation to such highway.[24] Whether a railroad company rightfully occupies a street or highway must be determined in a direct proceeding, and unless so raised the presumption is that it is in rightful occupancy thereof;[25] but the town or municipality in which the highway is situated may proceed in equity against the railroad company to ascertain whether the road's laying out and construction is or is not within the power granted to the company.[26] Where a company has lawfully laid its tracks through a street or highway, it may maintain an injunction to prevent the municipal authorities or others from tearing up or removing such tracks;[27] but an injunction is not the proper remedy to prevent a municipality from repealing orders granting assent to the occupation of the streets by the railroad company.[28] Mandamus

17. Hatch *v.* Vermont Cent. R. Co., 28 Vt. 142. And see, generally, MUNICIPAL CORPORATIONS, 28 Cyc. 904 *et seq.*

18. Whittaker *v.* Atlanta, etc., R. Co., 143 Fed. 583.

19. *Georgia.*— Burrus *v.* Columbus, 105 Ga. 42, 31 S. E. 124.

Illinois.— Walther *v.* Chicago, etc., R. Co., 215 Ill. 456, 74 N. E. 461 [*affirming* 117 Ill. App. 364]; Stetson *v.* Chicago, etc., R. Co., 75 Ill. 74.

Iowa.— Hughes *v.* Mississippi, etc., R. Co., 12 Iowa 261; Milburn *v.* Cedar Rapids, 12 Iowa 246.

Missouri.— Planet Property, etc., Co. *v.* St. Louis, etc., R. Co., 115 Mo. 613, 22 S. W. 616, holding that plaintiff had a complete and adequate remedy at law for the injury sustained and therefore could not maintain an injunction.

New York.— Drake *v.* Hudson R. Co., 7 Barb. 508; Hodgkinson *v.* Long Island R. Co., 4 Edw. 411.

Pennsylvania.— Peterson *v.* Navy Yard, etc., R. Co., 5 Phila. 199.

United States.— Whittaker *v.* Atlanta, etc., R. Co., 143 Fed. 583.

See 41 Cent. Dig. tit. "Railroads," § 192.

20. Peterson *v.* Navy Yard, etc., R. Co., 5 Phila. (Pa.) 199.

21. Drake *v.* Hudson River R. Co., 7 Barb. (N. Y.) 508.

22. Drake *v.* Hudson River R. Co., 7 Barb. (N. Y.) 508.

23. Palatine *v.* New York Cent., etc., R. Co., 22 N. Y. App. Div. 181, 47 N. Y. Suppl. 1024 (construing Laws (1890), c. 568, § 15); Barse *v.* Herkimer, etc., R. Co., 13 N. Y. St. 215 (construing Laws (1855), c. 255, and Laws (1850), c. 140, § 28, as amended by Laws (1880), c. 133, § 2).

24. Barse *v.* Herkimer, etc., R. Co., 13 N. Y. St. 215.

25. Glass *v.* Memphis, etc., R. Co., 94 Ala. 581, 10 So. 215, holding also that such question cannot be raised for the first time in an action for damages against the company for killing plaintiff's intestate.

In Illinois an abutting lot owner cannot enjoin the construction, pursuant to an ordinance, of a private switch to connect with a railroad. The validity of the ordinance can only be attacked by an officer acting in the name of the state. Coffeen *v.* Chicago, etc., R. Co., 84 Fed. 46, 28 C. C. A. 274.

26. Springfield *v.* Connecticut River R. Co., 4 Cush. (Mass.) 63, holding also that it is immaterial, in this respect, whether the way in question be a highway, properly so called, or a town way.

27. Southern Pac. R. Co. *v.* Ferris, 93 Cal. 263, 28 Pac. 828, 18 L. R. A. 510 (holding that where a railroad company has built its road, in accordance with Civ. Code, § 465, subd. 5, on a strip of land dedicated as a highway by the owner, it is entitled to an injunction to restrain the destruction of its track over such strip by a grantee of the land, who asserts ownership thereto because it was never actually used as a highway); Belington, etc., R. Co. *v.* Alston, 54 W. Va. 597, 46 S. E. 612.

28. Belington, etc., R. Co. *v.* Alston, 54 W. Va. 597, 46 S. E. 612.

will lie to compel the proper board or officers of the city to act upon the merits of the application of a steam railroad to extend its track through the streets of the city.[29]

2. NATURE AND EXTENT OF RIGHT OR USE — a. In General. The nature and extent of a railroad company's right to or use of a public street or highway, under a legislative or municipal grant, cannot be extended by construction beyond the reasonable meaning of the terms in which the grant is expressed;[30] and hence a railroad company has no right of way in streets or highways or other public places outside the terms of the grant by virtue of which it enters.[31] If the grant is in general terms, the company may lawfully occupy the street or highway to the extent of a reasonable necessity.[32] In the absence of express words granting

29. People *v.* Craycroft, 111 Cal. 544, 44 Pac. 463; Fort-St. Union Depot Co. *v.* State R. Crossing Bd., 81 Mich. 248, 45 N. W. 973.

Mandamus against railroad companies generally see MANDAMUS, 26 Cyc. 365 *et seq.*

Mandamus to municipal and other public corporations and officers generally see MANDAMUS, 26 Cyc. 249 *et seq.*

30. See Chicago, etc., R. Co. *v.* Eisert, 127 Ind. 156, 26 N. E. 759; Long *v.* Louisville, etc., R. Co., 89 Ky. 544, 13 S. W. 3, 14 S. W. 78, 11 Ky. L. Rep. 955; Story *v.* Jersey City, etc., R. Co., 16 N. J. Eq. 13, 84 Am. Dec. 134.

Illustrations.— Where an ordinance grants a railroad company the right to build its road in a street provided that the company shall grade the street, and that "the line of the railroad shall be located so as not to approach the sidewalk-curbstone nearer than fifteen feet," the words, "line of the railroad," do not mean the extreme limit, including ties and grade, or the center or thread of the track, but refer to the rails, they being the only part of the road raised above the grade of the street. Chicago, etc., R. Co. *v.* Eisert, 127 Ind. 156, 26 N. E. 759. Where a city ordinance grants a railroad company the right to construct its road "on, over, and along" certain alleys, and "along" the alley in question, "along" is synonymous with "on" and "over," and does not mean "by the side of." Heath *v.* Des Moines, etc., R. Co., 61 Iowa 11, 15 N. W. 573. An ordinance granting a railroad company permission to construct a track on H street does not limit the construction of the track to the "street," as distinguished from the "sidewalk." Knapp, etc., Co. *v.* St. Louis Transfer R. Co., 126 Mo. 26, 28 S. W. 627. Where a property-owner consents, in consideration of the location of the line of railroad in a street adjoining his premises, to its construction and operation, and agrees to execute a release, the extent of the right conferred on the railroad company to use the street depends on the circumstances existing at the time of the execution of the agreement. Stephens *v.* New York, etc., R. Co., 175 N. Y. 72, 67 N. E. 119.

Acceptance of grant.— Where a city ordinance granted a railroad the right to occupy a street for right-of-way purposes, and the company built on a portion of the street, and its successor in title assumed possession of the track, and extended the same, although not so far as the ordinance authorized, the city's grant of the whole street was accepted, including the portion on which no road was constructed. Denison, etc., R. Co. *v.* St. Louis, etc., R. Co., 96 Tex. 233, 72 S. W. 161 [*reversing* 30 Tex. Civ. App. 474, 72 S. W. 201].

Distance from curb.— Where an ordinance grants a railway company the right to lay a track along a river front, providing the inner rail of the track shall not be nearer the curb line of the sidewalk than forty feet, and thereafter the state constructs a levee in the street, and grants permission to the railway to put its tracks on the top of the levee, it cannot locate such track, without the consent of the city, so as to bring its inner rail less than forty feet from the curb line. Alexandria *v.* Morgan's Louisiana, etc., R., etc., Co., 109 La. 50, 33 So. 65.

31. Jones *v.* Erie, etc., R. Co., 169 Pa. St. 333, 32 Atl. 535, 47 Am. St. Rep. 916.

The acceptance by municipal authorities of a plat made for the purpose of widening a street does not confer greater powers on a railroad than it already possessed over a strip marked on the plat as the company's right of way, where such strip is wholly in the street as originally laid out and there is no vacation of any portion of the street by the municipal authorities. Chicago Terminal Transfer R. Co. *v.* Chicago, 203 Ill. 576, 68 N. E. 99.

32. Waysata *v.* Great Northern R. Co., 67 Minn. 385, 69 N. W. 1073; Long Branch Com'rs *v.* West End R. Co., 29 N. J. Eq. 566; Jones *v.* Erie, etc,. R. Co., 169 Pa. St. 333, 32 Atl. 535, 47 Am. St. Rep. 916, holding that in all cases where the grant to a railroad company is not in express words, a grant of an exclusive use in a street will be construed as a grant of so much only as is reasonably necessary for the purpose of passage.

The right in such case is limited to an occupation reasonably demanded by the transaction of the business contemplated; and where, by years of actual use in the business, it has been demonstrated what extent of occupancy is sufficient to accomplish the purpose of the grant, the extent of the use determines the extent of the grant. Pennsylvania Schuylkill Valley R. Co. *v.* Philadelphia, etc., R. Co., 157 Pa. St. 42, 27 Atl. 683.

Necessity.— Under a law which authorizes

a permanent easement, a grant only of a right to lay and use tracks in a street is not a grant of the street in fee or otherwise, but simply of the right to thus use the street, leaving in the grantor the title to the street, and the right of every other use which may be enjoyed consistently with the right granted,[33] and the rights of the public in such street will be paramount to those of the railroad company for all purposes other than transit.[34] A charter right of way along or upon "any street, highway, or turnpike in the state," etc., need not mention and designate the particular street in a city or town upon which the road is to be constructed.[35] But where the ordinance or other grant specifically names the streets that may be used by a railroad company, the company has no right to use other streets.[36] Any part of the street which the company has not occupied remains a part of the public highway until the company actually occupies it for the uses intended.[37]

b. Width of Right of Way.[38] A grant to a railroad company of the right to use a street or public highway gives it merely a right of way of such width as it appropriates and uses for the railroad, and not what it claims and contem-

a railroad company to construct its road along and over any public or private way, if it shall "be necessary," a practical, and not an absolute, necessity is intended; and the burden of proof would be upon the company to show this practical necessity, if questioned, when originally locating the line. Wayzata *v.* Great Northern R. Co., 67 Minn. 385, 69 N. W. 1073. But the necessity upon which the company acted when first establishing the line and when building the road is presumed to be continuous, and to exist, in proceedings instituted to compel a change of the track and its appurtenances. And in such proceedings, the burden is on the party demanding a change of the line to show not only that the original necessity no longer exists, but that there are substantial reasons for holding that the public interests demand the change. Wayzata *v.* Great Northern R. Co., *supra*.

N. Y. Laws (1890), c. 565, § 4, permitting a railroad company to construct its road "across, along, or upon" any highway, contemplates only a casual or incidental occupation and use of the highways, and does not authorize a company to build its entire railway along a highway between two villages. Burt *v.* Lima, etc., R. Co., 21 N. Y. Suppl. 482.

33. Chicago, etc., R. Co. *v.* Quincy, 139 Ill. 355, 28 N. E. 1069; State *v.* Atlantic, etc., R. Co., 141 N. C. 736, 53 S. E. 290; Tonkawa Milling Co. *v.* Tonkawa, 15 Okla. 672, 83 Pac. 915, holding that a town ordinance granting to a company the right to use its streets and alleys under St. (1893) § 1035, does not vacate such streets or alleys so as to allow the land to revert to the abutting landowner.

Perpetual easement.— Where an agreement for the improvement of a street confirmed by N. Y. Laws (1855), c. 475, provided that a railroad company should have the exclusive right to a strip therein forever, for railroad tracks and turnouts and the running of locomotives and cars thereon without interruption, but did not provide in terms what title the railroad company should take in the strip, it only acquired a perpetual right of way, which was all that was necessary to satisfy its use under the rule that only such powers and privileges are permitted to be granted to a railroad company as are expressly authorized or are necessary to accomplish the general purposes intended. *In re* Long Island R. Co., 189 N. Y. 428, 82 N. E. 443 [*affirming* 116 N. Y. App. Div. 928, 102 N. Y. Suppl. 1141].

34. Chicago, etc., R. Co. *v.* Quincy, 139 Ill. 355, 28 N. E. 1069.

35. Hepting *v.* New Orleans Pac. R. Co., 36 La. Ann. 898.

36. Chicago, etc., R. Co. *v.* Chicago, 121 Ill. 176, 11 N. E. 907.

A city ordinance, after a careful mention and specification of what streets might be used by a railroad company in which to lay down its tracks and side-tracks, contained a general clause giving authority also to lay down all such tracks "as may be necessary to the convenient use of any depot grounds said company may now own or hereafter acquire in the vicinity of or adjoining said line of road," without the specific mention of any streets. It was held that the general clause gave no authority in respect to the use of the streets, additional to those which had been specifically named in the preceding part of the ordinance. Chicago, etc., R. Co. *v.* Chicago, 121 Ill. 176, 11 N. E. 907. But a grant to a railroad company of a right to construct its road on a certain street is not violated by construction of the road over the crossing of that street with another street, since by a fair interpretation of the grant the tracks are not laid outside of the street. Knight *v.* Carrollton R. Co., 9 La. Ann. 284.

37. New York, etc., R. Co. *v.* Jackson, 15 N. Y. St. 167.

The company is not entitled to an injunction restraining a person from carrying on a business on that part of the street not yet taken, if he conducts himself in the usual and ordinary manner and under proper authorization from the city. New York, etc., R. Co. *v.* Jackson, 15 N. Y. St. 167.

38. Width of right of way generally see *supra*, V, E, 2.

plates;[39] and in the absence of express words to the contrary, it cannot occupy the whole width of the street to the exclusion of the public,[40] unless the whole width of the street or highway is reasonably necessary for its business,[41] and unless it provides for another highway to be used by the public in its place.[42] Where the company is authorized to occupy a strip of land in the street, not exceeding a certain width, it may elect to take less than that width, and by some plain and decisive act define the limits of the right of way so as to exclude whatever is unnecessary to the construction and operation of its line.[43]

c. Interference With Use by Public in General. In the absence of a clearly expressed intention to the contrary, the right given to a railway company to lay down and use tracks in a street or highway is not exclusive, but is subject to the right of the general public to also use such street or highway,[44] and the rights of

39. Pennsylvania, etc., R. Co. *v.* Philadelphia, etc., R. Co., 160 Pa. St. 232, 28 Atl. 771; Philadelphia, etc., R. Co. *v.* Berks County R. Co., 2 Woodw. (Pa.) 361.

40. Pennsylvania, etc., R. Co. *v.* Philadelphia, etc., R. Co., 160 Pa. St. 232, 28 Atl. 771 (holding that the act of March 20, 1860, authorizing a railroad company to build across and along such streets as should be deemed best, granted the company only so much of the streets to be occupied by it with the city's consent as it should actually appropriate and use, and not the whole width of them, to the exclusion of other railroads); Pennsylvania Schuylkill Valley R. Co. *v.* Philadelphia, etc., R. Co., 157 Pa. St. 42, 27 Atl. 683; Stroudsburg *v.* Wilkes-Barre, etc., R. Co., 2 Pa. Dist. 507, 12 Pa. Co. Ct. 395.

41. Pennsylvania Schuylkill Valley R. Co. *v.* Philadelphia, etc., R. Co., 157 Pa. St. 42, 27 Atl. 683.

42. Stroudsburg *v.* Wilkes-Barre, etc., R. Co., 2 Pa. Dist. 507, 12 Pa. Co. Ct. 395.

43. Jones *v.* Erie, etc., R. Co., 144 Pa. St. 629, 23 Atl. 251, 169 Pa. St. 333, 32 Atl. 535, 47 Am. St. Rep. 916.

Presumptions.— The presumption arising under the general railroad laws that a railroad company takes, when it enters by virtue of the right of eminent domain, the full breadth of sixty feet for its right of way, applies only where the entry is adverse, and on property subject to seizure or appropriation under the general laws, and not to an entry on a public street, whether made under the authority of the act of assembly incorporating the company, or by municipal consent. Jones *v.* Erie, etc., R. Co., 144 Pa. St. 629, 23 Atl. 251, 169 Pa. St. 333, 32 Atl. 535, 47 Am. St. Rep. 916. The presumption that a railroad company has taken the general width of its right of way as specified in the charter has no application to the surface of public streets, where the words of the charter express, with reference to such streets, nothing more than a right of way. Pennsylvania Schuylkill Valley R. Co. *v.* Philadelphia, etc., R. Co., 157 Pa. St. 42, 27 Atl. 683.

44. *Arkansas.*— St. Louis, etc., R. Co. *v.* Neely, 63 Ark. 636, 40 S. W. 130, 37 L. R. A. 616.

Illinois.— Chicago, etc., R. Co. *v.* Quincy, 136 Ill. 563, 27 N. E. 192, 29 Am. St. Rep. 334.

New York.— Delaware, etc., R. Co. *v.* Buffalo, 158 N. Y. 266, 53 N. E. 44 [*affirming* 4 N. Y. App. Div. 562, 38 N. Y. Suppl. 510], 158 N. Y. 478, 53 N. E. 533.

Ohio.— Lake Shore, etc., R. Co. *v.* Elyria, 14 Ohio Cir. Ct. 48, 7 Ohio Cir. Dec. 312.

Oregon.— Turney *v.* Southern Pac. Co., 44 Oreg. 280, 75 Pac. 144, 76 Pac. 1080.

Pennsylvania.— Jones *v.* Erie, etc., R. Co., 169 Pa. St. 333, 32 Atl. 535, 47 Am. St. Rep. 916.

Rhode Island.— Taber *v.* New York, etc., R. Co., 28 R. I. 269, 67 Atl. 9.

United States.— Atchison, etc., R. Co. *v.* General Electric R. Co., 112 Fed. 689, 50 C. C. A. 424.

See 41 Cent. Dig. tit. "Railroads," § 197. And see, generally, MUNICIPAL CORPORATIONS, 28 Cyc. 885 *et seq.*

Abandonment of street.— It is usually not the intention of the legislature, by a statute which authorizes public authorities controlling streets and highways to contract with railroad companies for the use of such streets and highways to a certain extent, that streets and highways should be abandoned and surrendered to railroads, and to deprive the public of the use of the same farther than is necessary. Chicago, etc., R. Co. *v.* Quincy, 136 Ill. 563, 27 N. E. 192, 29 Am. St. Rep. 334.

An order of the county court granting a railroad permission to use any part of the county road between designated points for its track, imposing on it the duty of repairing any damage caused by the construction of its road, requiring it to leave the highway in as good condition as before it began work, to construct and grade a twelve-foot roadway whenever it should occupy the then traveled road, and forbidding it to obstruct the road in any manner, does not give the company a right to the exclusive use of such road, or deprive the public of the right to use any part thereof, subject to the paramount right of the railroad to use its track for the operation of its road (Turney *v.* Southern Pac. Co., 44 Oreg. 280, 75 Pac. 144, 76 Pac. 1080); and a subsequent order, reciting the particulars in which the company has failed to comply with the first, adopting the first as the basis of the additional order, then proceeding to define more specifically the company's duties in the construction of the road, and

each therein must be exercised with due regard to the rights of the other,[45] unless an exclusive right is granted to the railroad company by the legislature, in clear and explicit terms or by necessary implication;[46] and the municipal authorities cannot grant or consent to an unreasonable or oppressive use of a street or highway.[47] Thus the right of a railroad company to cross or pass along a highway does not include the right to build permanent structures upon it, other than its tracks at the grade of the street, or to use it for a freight yard or any exclusive purpose; but it is limited to a reasonable use by crossing, passing, and repassing consistent with the earlier public right,[48] which must be exercised in such manner as not to unnecessarily or materially obstruct or interfere with those for whose benefit the way was originally laid out,[49] and so as not to unnecessarily obstruct

the condition in which it shall keep the traveled way during the progress or suspension of the work, does not enlarge the rights of the company, but imposes on it further restrictions and conditions (Turney *v.* Southern Pac. Co., *supra*).

The grant of the use of a street "as such railroad should deem it necessary and expedient" means such use as is reasonably necessary and expedient for the railroad, with due regard for the convenience of the public. Lake Shore, etc., R. Co. *v.* Elyria, 14 Ohio Cir. Ct. 48, 7 Ohio Cir. Dec. 312.

The provision of the charter of the city of Buffalo permitting the common council by a two-thirds vote to consent to the construction of a railroad across a street is not independent of the provisions of the General Railroad Act authorizing the construction of railroads, but the two statutes may be read together, and when so read they simply authorize a railroad to cross a street, but not necessarily in such a way as to obstruct its use or exclude the public right. Delaware, etc., R. Co. *v.* Buffalo, 158 N. Y. 266, 53 N. E. 44 [*affirming* 4 N. Y. App. Div. 562, 38 N. Y. Suppl. 510], 158 N. Y. 478, 53 N. E. 533.

45. St. Louis, etc., R. Co. *v.* Neely, 63 Ark. 636, 40 S. W. 130, 37 L. R. A. 616.

46. Morris, etc., R. Co. *v.* Newark, 10 N. J. Eq. 352 (holding that nothing but express legislative authority or necessary implication can authorize a corporate body having the control and supervision of the public highways to impair or interfere with the public enjoyment of them); Yost *v.* Philadelphia, etc., R. Co., 29 Leg. Int. (Pa.) 85; Cleveland *v.* Cleveland, etc., R. Co., 93 Fed. 113 [*reversed* on other grounds in 147 Fed. 171, 77 C. C. A. 467].

Power to close up street see Casgrain *v.* Atlantic, etc., R. Co., [1895] A. C. 282, 64 L. J. P. C. 88, 72 L. T. Rep. N. S. 369, 11 Reports 449; Atty.-Gen. *v.* Great Eastern R. Co., L. R. 6 H. L. 367, 22 Wkly. Rep. 281; Temple *v.* Flower, 41 L. J. Ch. 604, 26 L. T. Rep. N. S. 657, 20 Wkly. Rep. 587.

47. General Electric R. Co. *v.* Chicago, etc., R. Co., 184 Ill. 588, 56 N. E. 963 [*reversing* 84 Ill. App. 640]; Laviosa *v.* Chicago, etc., R. Co., McGloin (La.) 299; Cereghino *v.* Oregon Short Line R. Co., 26 Utah 467, 73 Pac. 634, 99 Am. St. Rep. 843. And see, generally, MUNICIPAL CORPORATIONS, 28 Cyc. 873 *et seq.*

The courts, although they will exercise it with extreme caution and reluctance, have the power to annul municipal legislation, when it is in its nature unreasonable or oppressive. Laviosa *v.* Chicago, etc., R. Co., McGloin (La.) 299.

A municipal corporation has no power to grant the use of an alley or street to a railroad company to lay its tracks therein, if the ordinary and reasonable effect of such a grant will be to prevent or unreasonably impede the passage of other vehicles belonging to abutting owners or other members of the public desiring to use such alley. Sherlock *v.* Kansas City Belt R. Co., 142 Mo. 172, 43 S. W. 629, 64 Am. St. Rep. 551; Brown *v.* Chicago Great Western R. Co., 137 Mo. 529, 38 S. W. 1099.

Presumption.— Where a city grants a license to construct a railroad in a public alley, the presumption is that it has due regard to the rights of the public and the abutting property-owners. Brown *v.* Chicago Great Western R. Co., 137 Mo. 529, 38 S. W. 1099.

48. Taber *v.* New York, etc., R. Co., 28 R. I. 269, 67 Atl. 9.

49. *Georgia.*—Atlantic, etc., R. Co. *v.* Montezuma, 122 Ga. 1, 49 S. E. 738.

Indiana.— Kelly *v.* Pittsburgh, etc., R. Co., 28 Ind. App. 457, 63 N. E. 233.

Louisiana.— Hepting *v.* New Orleans Pac. R. Co., 36 La. Ann. 898, holding that the company cannot construct its road through a street so as unnecessarily to impair the right of the public to the free use of such street, and inflict serious and unequal damage upon private property contiguous to the street.

Pennsylvania.— Jones *v.* Erie, etc., R. Co., 169 Pa. St. 333, 32 Atl. 535, 47 Am. St. Rep. 916.

Tennessee.— Pepper *v.* Union R. Co., 113 Tenn. 53, 85 S. W. 864.

Wisconsin.— Evans *v.* Chicago, etc., R. Co., 86 Wis. 597, 57 N. W. 354, 39 Am. St. Rep. 908; Bussian *v.* Milwaukee, etc., R. Co., 56 Wis. 325, 14 N. W. 452, holding that if a railroad company has the right to extend a switch track into the highway, it is bound to use such track in such a manner as not unnecessarily to interfere with public travel over such highway.

England.— London, etc., R. Co. *v.* Cooper, 2 R. & Can. Cas. 229.

See 41 Cent. Dig. tit. "Railroads," § 197.

or interfere with abutting property-owners in the enjoyment of their property rights, including the right of ingress and egress from their property to the street or highway;[50] and provision for the protection of the public generally or abutting owners in these rights is often made in railroad charters or by statute or ordinance.[51] The city may still improve and control such street, and adopt all needful rules and regulations for its management and use,[52] and may have the tracks moved from one part of the street to another.[53] A railroad company has no right, even under an ordinance purporting to authorize it to do so, to lay its track in a street which is so narrow that, if occupied by a railroad track, there would not be room for vehicles to pass.[54]

d. Mode and Extent of Use. Subject to the rule that the use of the street or highway to the public be not unnecessarily or materially impaired,[55] a grant of a right to lay and operate a railroad over streets or highways carries with it the right to make such use of the street or highway in constructing or operating the road, as is necessarily incident to the enjoyment of the original grant;[56] but it

Tunnel.— Where a railroad company is authorized by statute to build a tunnel under what had previously been a city street, which for twenty years had not been used for travel except by a trolley line, the railroad company has a right as against the city to put temporary supports in the street necessary for the furtherance of its project of building the tunnel without any interference or obstruction to public travel, regardless of the city's right to the street. Hoboken, etc., R. Co. *v.* Hoboken, (N. J. Ch. 1906) 64 Atl. 641.

Material impediment.— Where a railroad company proposes to occupy a public street in such a way as to force the public in passing along the street to use the track of the railroad for a distance of two hundred feet, there is such a material impediment to the "passage or transportation of persons or property along the same" within the meaning of the Pennsylvania act of Feb. 19, 1849, as will justify the court in continuing an injunction until the railroad company makes proper provision for the convenience of the public. Stroudsburg *v.* Wilkes-Barre, etc., R. Co., 2 Pa. Dist. 507, 12 Pa. Co. Ct. 395.

The permission granted to the authorities of the city of Buffalo by its charter, to give the requisite consent for railroads to cross the public streets, does not necessarily justify the maintenance of an elevated structure across a public street, when constructed in such a manner that a considerable portion of the highway is occupied by the abutments and other supports of the bridge, thereby obstructing the roadway below to such an extent as to impair its use by the traveling public. Delaware, etc., R. Co. *v.* Buffalo, 158 N. Y. 266, 53 N. E. 44 [*affirming* 4 N. Y. App. Div. 562, 38 N. Y. Suppl. 510], 158 N. Y. 478, 53 N. E. 533.

50. Tate *v.* Ohio, etc., R. Co., 7 Ind. 479; Evans *v.* Chicago, etc., R. Co., 86 Wis. 597, 57 N. W. 354, 39 Am. St. Rep. 908; Chicago, etc., R. Co. *v.* Leavenworth First M. E. Episcopal Church, 102 Fed. 85, 42 C. C. A. 178, 50 L. R. A. 488, holding that the erection by a railroad company of a water hydrant in a street immediately opposite the center of a church, and only thirty-five feet distant; and of a station on property on the opposite side of the street, so that the noises, odors, dust, and smoke incident to the stopping and starting of trains at both station and hydrant interfere with services in the church, and render the building unfit for the uses for which it was built, constitutes a private nuisance, which amounts in legal effect to a taking of the church property to the extent of the injury done thereto, for which the company may be required to make compensation; and it is no defense to an action for the recovery of such compensation that the structures built by the company are necessary for the operation of its road, or that its trains are operated in a careful and proper manner.

51. See Mobile *v.* Louisville, etc., R. Co., 84 Ala. 115, 4 So. 106, 5 Am. St. Rep. 342; Com. *v.* Erie, etc., R. Co., 27 Pa. St. 339, 67 Am. Dec. 471.

Application.—A provision in a charter of a railroad company that the railroad shall be so constructed as not to impede the use of roads applies not merely to laying the rails, but to the ordinary and proper use of the road. If such use causes an impediment, the charter is violated (Com. *v.* Erie, etc., R. Co., 27 Pa. St. 339, 67 Am. Dec. 471), and it is no justification for a violation of this proviso that the public have been more benefited than injured by the railroad (Com. *v.* Erie, etc., R. Co., *supra*).

52. Chicago, etc., R. Co. *v.* Quincy, 136 Ill. 563, 27 N. E. 192, 29 Am. St. Rep. 334.

53. Snyder *v.* Pennsylvania R. Co., 55 Pa. St. 340, holding that since a street belongs to the public for purposes of travel, the public has a right for its own convenience to remove to another part of the street railroad tracks which have been lawfully laid thereon; and a railroad company, acting by public authority, has the same right to make such removal without incurring liability for damages to an abutting owner.

54. Mobile, etc., R. Co. *v.* Middleton, 139 Ala. 610, 36 So. 782.

55. See *supra*, V, I, 2, c.

56. Drake *v.* Hudson River R. Co., 7 Barb. (N. Y.) 508.

Viaduct.— Where a city deeds a railroad company a strip of land in a street for the

cannot subject the street or highway to a new and independent servitude without further authority.[57] Where the right is to use the street for a single track to transport a particular commodity, the company cannot lay tracks for a general railroad business;[58] or where the right is intended for the passage of cars and engines, the street or highway cannot be used for depot purposes,[59] car houses,[60] or for a water tank;[61] nor can it cross a street at a grade different from that prescribed by statute.[62] The right to lay tracks through a city street necessarily implies the right to use such tracks in the mode ordinarily adopted by railroad companies, subject to reasonable regulations under the police power of the proper authorities.[63] The right to lay side-tracks and turnouts implies the right to use them for the transportation of goods to and from adjoining stores and warehouses;[64] and the grant of a right to cross highways in municipal corporations includes the right to lay along the right of way pipes to conduct water needed for locomotives, and the other needs attendant upon the operation of the road.[65] But it has been held that a railroad company has no right to use its main tracks or sidings in a city street for the storage of cars to be loaded or unloaded,[66] or as a depot for cars,[67] or for the general purpose of shifting cars and making up trains;[68] but in making or breaking up a train in a city station, the temporary

purpose of railroad tracks and turnouts, to be used and traveled over by cars and locomotives and otherwise, in the same manner as the tracks on land ceded by the company to the city, the company may construct a viaduct on such land to connect with an elevated railroad (Gallagher *v.* Keating, 27 Misc. (N. Y.) 131, 58 N. Y. Suppl. 366 [*affirmed* in 40 N. Y. App. Div. 81, 57 N. Y. Suppl. 632, 1123]. *Compare* Welde *v.* New York, etc., R. Co., 28 N. Y. App. Div. 379, 51 N. Y. Suppl. 290); and may also, by another viaduct, connect such viaduct with its freight yards, situated near such land (Gallagher *v.* Keating, *supra*).

57. Alabama, etc., R. Co. *v.* Inge, (Miss. 1897) 22 So. 294, holding that where a railway company claims the right to use a street by virtue of its having occupied it for forty years, it is confined to the character of its use during such period, and to the land actually occupied; and if it takes the street for a totally new and independent servitude, without lawful authority, and plaintiff is thereby damaged in his property rights, he can recover.

58. Riedinger *v.* Marquette, etc., R. Co., 62 Mich. 29, 28 N. W. 775.

59. Alabama, etc., R. Co. *v.* Inge, (Miss. 1897) 22 So. 294; Riley *v.* Pennsylvania Co., 32 Pa. Super. Ct. 579; Bussian *v.* Milwaukee, etc., R. Co., 56 Wis. 325, 14 N. W. 452. See also Oregon R. Co. *v.* Portland, 9 Oreg. 231.

Under Ohio Act Feb. 24, 1848, § 11, adopted by Pennsylvania by the act of April 11, 1849 (Pamphl. Laws 754), entitled, "An act to incorporate the Ohio and Pennsylvania Railroad Company," authorizing a railroad company, when necessary, to occupy a road or street on agreement with the public authorities as to manner, terms, and conditions, the Pennsylvania Company, the successor in title to the Ohio and Pennsylvania Railroad Company, has the right to occupy a street in a borough or township with the municipal consent, to the extent only of a width sufficient for its rails and ties, but not for passenger depots or freight houses. Riley *v.* Pennsylvania Co., 32 Pa. Super. Ct. 579.

60. Allegheny *v.* Ohio, etc., R. Co., 26 Pa. St. 355.

61. Chicago, etc., R. Co. *v.* Leavenworth First M. E. Church, 102 Fed. 85, 42 C. C. A. 178, 50 L. R. A. 488, holding that a grant to a railroad company of the right to "operate and maintain a railroad" on a public street does not carry by implication the right to erect and maintain a water tank in the street.

62. *In re* Bronson, 1 Ont. 415.

63. Mobile *v.* Louisville, etc., R. Co., 84 Ala. 115, 4 So. 106, 5 Am. St. Rep. 342.

64. Mobile *v.* Louisville, etc., R. Co., 84 Ala. 115, 4 So. 106, 5 Am. St. Rep. 342; Lake Shore, etc., R. Co. *v.* Wiley, 193 Pa. St. 496, 44 Atl. 583.

65. Canton *v.* Canton Cotton Warehouse Co., 84 Miss. 268, 36 So. 266, 105 Am. St. Rep. 428, 65 L. R. A. 561.

66. Glick *v.* Baltimore, etc., R. Co., 19 D. C. 412, 21 D. C. 363; Atlantic, etc., R. Co. *v.* Montezuma, 122 Ga. 1, 49 S. E. 738; Owensborough, etc., R. Co. *v.* Sutton, 13 S. W. 1086, 12 Ky. L. Rep. 247; Gahagan *v.* Boston, etc., R. Co., 1 Allen (Mass.) 187, 79 Am. Dec. 724. *Compare* Mobile *v.* Louisville, etc., R. Co., 84 Ala. 115, 4 So. 106, 5 Am. St. Rep. 342.

67. Owensborough, etc., R. Co. *v.* Sutton, 13 S. W. 1086, 12 Ky. L. Rep. 247; Allegheny *v.* Ohio, etc., R. Co., 26 Pa. St. 355. See also Atlantic, etc., R. Co. *v.* Montezuma, 122 Ga. 1, 49 S. E. 738.

68. Fitzgerald *v.* Baltimore, etc., R. Co., 19 D. C. 513; Glick *v.* Baltimore, etc., R. Co., 19 D. C. 412, 21 D. C. 363; Hopkins *v.* Baltimore, etc., R. Co., 6 Mackey (D. C.) 311; Atlantic, etc., R. Co. *v.* Montezuma, 122 Ga. 1, 49 S. E. 738; Owensborough, etc., R. Co. *v.* Sutton, 13 S. W. 1086, 12 Ky. L. Rep. 247.

Violation of ordinance.— The shifting of railroad cars in a city street for the making up of a train constitutes a violation of an ordinance providing that no engine or train

use by the railroad company occupying the station of an adjacent street may be necessary, and to that extent the authority to use the street grows out of the necessities of the case and is a necessary incident to the right to use the road and station;[69] and it also has a right to pass and repass over a highway in making up its trains and shifting its cars, provided this is done only to a reasonable extent and in a reasonable manner, without encroaching upon the rights of others who have an equal right to use it.[70]

e. Tracks, Side-Tracks, Switches, and Turnouts. Subject to the rules as to interference with public use,[71] a railroad company may, as a necessary incident to its right to construct and maintain its road, make a turnout in a street or highway to communicate with a depot, warehouse, or freight yard,[72] and when the necessities of the road require, it may construct and use in the street or highway additional tracks,[73] side-tracks, or switch-tracks,[74] and, if damages were assessed to the adjacent owners under the original grant, as under general proceedings of appropriation, it may construct such additional tracks, without paying additional damages.[75] The municipal authorities may under some statutes grant the right to con-

shall be stopped in any street, except at the foot of the same for the reception and delivery of freight. State *v.* Atlantic, etc., R. Co., 141 N. C. 736, 53 S. E. 290.

69. Glick *v.* Baltimore, etc., R. Co., 19 D. C. 412, 21 D. C. 363; Hopkins *v.* Baltimore, etc., R. Co., 6 Mackey (D. C.) 311.

70. Gahagan *v.* Boston, etc., R. Co., 1 Allen (Mass.) 187, 79 Am. Dec. 724.

71. See *supra*, V, I, 2, c.

72. Knight *v.* Carrollton R. Co., 9 La. Ann. 284; New Orleans, etc., R. Co. *v.* New Orleans Second Municipality, 1 La. Ann. 128 (holding that where the charter of a company authorizes it to establish a railway along a public street to a particular point, and to run a locomotive on the road, the company will be entitled to make a turnout from the main track to communicate with a depot erected by it near the terminus of the road, containing the machinery necessary for reversing the engine, etc., where no objection exists to the construction of a turnout at that particular point, subject, however, to the police power of the municipality, where it is so constructed and used as to interfere as little as possible with the free use of the public way); Gallagher *v.* Keating, 27 Misc. (N. Y.) 131, 58 N. Y. Suppl. 366 [*affirmed* in 40 N. Y. App. Div. 81, 57 N. Y. Suppl. 632, 1123]; Philadelphia *v.* River Front R. Co., 133 Pa. St. 134, 19 Atl. 356 (holding that a decree entered by consent which directed that the railroad company should lay "a single track only, without sidings for standing or passing trains," and should "at no time construct any such switches or turn-outs" on said streets, does not forbid the railroad company from construcing a turnout connecting its track with a warehouse).

73. Chicago, etc., R. Co. *v.* Eisert, 127 Ind. 156, 26 N. E. 759 (holding that a railroad company, which has located a single track along a city street under an ordinance granting it the right to construct its railroad along the street within certain limits, and under general proceedings of appropriation in which damages were assessed to adjacent landowners, is not restricted to one track, but has the right to construct additional tracks if required by its business, if there is sufficient room to do so within the prescribed limits); Newark *v.* New Jersey Cent. R. Co., (N. J. Ch. 1907) 67 Atl. 1009; Varwig *v.* Cleveland, etc., R. Co., 6 Ohio Cir. Ct. 439, 3 Ohio Cir. Dec. 528; Yost *v.* Philadelphia, etc., R. Co., 29 Leg. Int. (Pa.) 85.

Mich. Comp. Laws (1897), § 6234, authorizing a railroad company to construct its "road" upon or across a highway, relates to its main line tracks and necessary side-tracks in transporting passengers and freight, and does not authorize the construction of additional tracks, occupying about two hundred feet of the highway, for yard purposes, without the consent of the highway commissioners. Highway Com'rs *v.* Wabash R. Co., 148 Mich. 436, 111 N. W. 1090.

74. Hileman *v.* Chicago Great Western R. Co., 113 Iowa 591, 85 N. W. 800 (holding that a grant to a railway company of the right to construct and forever maintain and operate its road in a street in front of grantor's property, without any limitation as to the number of tracks, includes the right to any legitimate increase in the use of the street by the company for the operation of its road, including the right to maintain necessary side-tracks); Beaver Borough *v.* Beaver Valley R. Co., 217 Pa. St. 280, 66 Atl. 520 (holding that, where a railroad company has a right to maintain tracks in a street one hundred feet wide, it may construct a siding thereon if such siding does not unreasonably obstruct public travel); Houston *v.* Gulf, etc., R. Co., (Tex. Civ. App. 1896) 35 S. W. 74 (holding that under an ordinance granting a railroad company the right to construct and maintain its railway upon a certain street, said company has the right to construct its road on said street, and such additional switch tracks as may be convenient or necessary for the operation thereof, and such right is not restricted by a further provision authorizing it to construct on its right of way such tracks and buildings on its grounds as it may deem convenient or necessary).

75. Chicago, etc., R. Co. *v.* Eisert, 127 Ind. 156, 26 N. E. 759.

struct and operate such additional tracks and switches,[76] provided they are not to be used for private purposes only.[77] But municipal authority to construct a single track in a street confers no authority to construct a double track.[78] If the location or route of a proposed railroad is indefinitely described upon the map filed by the company and in the instrument executed by a property-owner conferring a right of way upon it, the track as established at the time of the grant of the right of way and with reference to the location of which the consent was given should be held unchangeable, and additional tracks, switches, or sidings cannot be constructed without the property-owner's permission or the acquisition of the right through statutory condemnation proceedings.[79] A railroad company entitled to maintain and operate a single track in the highway becomes a trespasser if, without permission of the wner or acquisition of the right to do so, it adds to its tracks by the construction of switches and sidings, and it is liable to be restrained in its operations and for the damages sustained.[80]

f. Mode and Extent of Use as Constituting a Nuisance. Where a railroad company is authorized to construct and operate a railroad on a public street or highway, it may constitute a public nuisance for it to do so in an unauthorized manner or for an unauthorized purpose,[81] as where it constructs and operates its road longitudinally on a street or highway without legislative authority,[82] or where it has authority to construct for passenger cars only, and it afterward without the proper authority uses the tracks for freight cars;[83] or it may constitute a nuisance for it to exercise the right to use the street or highway in such a manner as to improperly or unreasonably obstruct the public use thereof,[84] as by erecting a freight depot in the center of a town, causing the obstruction of streets by cars and rendering the streets dangerous,[85] or by using the street as a yard for switching and making up trains, thereby causing irreparable damage

76. Colorado Springs *v.* Colorado, etc., R. Co., 38 Colo. 107, 89 Pac. 820; Brown *v.* Chicago Great Western R. Co., 137 Mo. 529, 38 S. W. 1099, holding that since Const. art. 12, § 14, declares that all railways are "public highways, and all railroad companies common carriers," a city may authorize a switch track to be constructed in a public alley, on an established grade, for the purpose of connecting the adjoining property-owners with the main line.

Spur tracks.— Where, under Georgia Laws (1888), p. 146, incorporating a railroad company, it is granted the right by municipal authorities in 1905 to lay a spur track in the streets of a city, the right so granted may be exercised independently of the question whether the original charter right to lay spur tracks was exhausted with the first use. Bonner *v.* Milledgeville R. Co., 123 Ga. 115, 50 S. E. 973.

77. Brown *v.* Chicago Great Western R. Co., 137 Mo. 529, 38 S. W. 1099, holding that the mere fact that a railroad company limits the use of a switch track to the carriage of property does not make the use of the track private.

A city council cannot authorize a permanent switch track, for a private business only, along a street and across a sidewalk, from a steam railroad in the street, to the detriment of people residing on the street, and to the damage of their abutting property, the streets being dedicated to public use. Cereghino *v.* Oregon Short Line R. Co., 26 Utah 467, 73 Pac. 634, 99 Am. St. Rep. 843.

78. Klosterman *v.* Chesapeake, etc., R. Co., 56 S. W. 820, 22 Ky. L. Rep. 192, 114 Ky. 426, 71 S. W. 6, 24 Ky. L. Rep. 1183, 1233.

79. Stephens *v.* New York, etc., R. Co., 175 N. Y. 72, 67 N. E. 119.

80. Stephens *v.* New York, etc., R. Co., 175 N. Y. 72, 67 N. E. 119 [*reversing* 61 N. Y. App. Div. 612, 70 N. Y. Suppl. 1149].

81. McCartney *v.* Chicago, etc., R. Co., 112 Ill. 611; State *v.* Louisville, etc., R. Co., 86 Ind. 114; Dulaney *v.* Louisville, etc., R. Co., 100 Ky. 628, 38 S. W. 1050, 18 Ky. L. Rep. 1088.

A railroad company using for a terminal yard a portion of a street over which it has only a right of way is responsible for any nuisance, public or private, thereby created. Pennsylvania R. Co. *v.* Thompson, 45 N. J. Eq. 870, 14 Atl. 897, 19 Atl. 622; Pennsylvania R. Co. *v.* Angel, 41 N. J. Eq. 316, 7 Atl. 432, 56 Am. Rep. 1.

82. Burlington *v.* Pennsylvania R. Co., 56 N. J. Eq. 259, 38 Atl. 849 [*affirmed* in 58 N. J. Eq. 547, 43 Atl. 700]; Pittsburg, etc., R. Co. *v.* Hood, 94 Fed. 618, 36 C. C. A. 423.

83. McCartney *v.* Chicago, etc., R. Co., 112 Ill. 611.

84. State *v.* Louisville, etc., R. Co., 86 Ind. 114; Randle *v.* Pacific R. Co., 65 Mo. 325. And see *infra*, VI, B, 3, c.

Operation as nuisance see *infra*, X, A, 3, b.

Piling ties on the highway as a nuisance see Forsythe *v.* Canadian Pac. R. Co., 10 Ont. L. Rep. 73, 6 Ont. Wkly. Rep. 242.

85. Hickory *v.* Southern R. Co., 141 N. C. 716, 53 S. E. 955.

to the owners of adjoining property.[88] But a railroad company cannot be charged with maintaining a public nuisance where the obstruction caused by its tracks, switches, cars, etc., is no greater than is required by a reasonable use.[87] A switch-track which is part of a general railway system, and which is open to all persons for shipping purposes is a public utility, and does not constitute, when laid in a public street, a public nuisance *per se*,[88] although from its location and surroundings only a limited number of persons will have occasion to use it.[89]

g. Remedies By or Against Companies. Although a citizen cannot prevent the application of streets by a lawful authority to the use of a railroad company for a right of way,[90] he may insist that such streets be used in a manner not calculated to inflict unnecessary injury;[91] and if he is specially injured by an obstruction or other interference, caused without authority or by the negligence or carelessness of the railroad company, he may maintain an action for damages,[92] or if the injury is such that he has no adequate remedy at law, he may maintain an injunction to restrain the railroad company from doing the unauthorized or negligent acts which threaten the injury.[93] But equity will not enjoin a railroad company

86. Galveston, etc., R. Co. *v.* Miller, (Tex. Civ. App. 1906) 93 S. W. 177.

87. State *v.* Louisville, etc., R. Co., 86 Ind. 114; Drake *v.* Hudson River R. Co., 7 Barb. (N. Y.) 508.

Laying second track.— For a railroad company which has acquired the right to run through a city street to lay a second track is not necessarily a nuisance; but the circumstances of the case and actual hindrance to travel must be considered. Davis *v.* Chicago, etc., R. Co., 46 Iowa 389; Dulaney *v.* Louisville, etc., R. Co., 100 Ky. 628, 38 S. W. 1050, 18 Ky. L. Rep. 1088, holding that the maintenance of double railroad tracks or an unimproved street sixty feet wide will not support a suit for injunction or action for damages by the owners of unimproved abutting property, where twenty-one feet, inclusive of space to be occupied by sidewalks, is left on either side of the tracks. The mere imposition of more railway tracks, or the increased use of the tracks beyond what may originally have been thought probable, resulting from the location of defendant's depot on land acquired by it does not constitute a nuisance. Oklahoma City, etc., R. Co. *v.* Dunham, 39 Tex. Civ. App. 575, 88 S. W. 849.

The ordinary use of a railroad yard for the purpose of parking cars cannot be interfered with by assuming that it is a nuisance *per se*. State *v.* Marshall, 50 La. Ann. 1176, 24 So. 186.

88. Davis *v.* Baltimore, etc., R. Co., 102 Md. 371, 62 Atl. 572; Wolfard *v.* Fisher, 48 Oreg. 479, 84 Pac. 850, 87 Pac. 530, 7 L. R. A. N. S. 991; Stockdale *v.* Rio Grande Western R. Co., 28 Utah 201, 77 Pac. 849.

89. Stockdale *v.* Rio Grande Western R. Co., 28 Utah 201, 77 Pac. 849.

90. Laviosa *v.* Chicago, etc., R. Co., McGloin (La.) 299.

91. Laviosa *v.* Chicago, etc., R. Co., McGloin (La.) 299.

92. Cadle *v.* Muscatine Western R. Co., 44 Iowa 11 (holding that where a railroad company, acting under the authority of a statute or a municipal ordinance, negligently and carelessly appropriates a street, thereby unnecessarily increasing the injury to an adjoining property-owner, he may recover damages, not for the fact of the appropriation, but for the negligent and improper selection of the line on the street); Alabama, etc., R. Co. *v.* Inge, (Miss. 1897) 22 So. 294; Com. *v.* Erie, etc., R. Co., 27 Pa. St. 339, 67 Am. Dec. 471. See Day *v.* Grand Trunk R. Co., 5 U. C. C. P. 420.

A property-owner who has consented to the construction and operation of a single-track railroad in front of his premises may recover damages resulting from the operation by the railroad company of additional tracks without right, so far as such damages are separable from the injury consequent upon the operation of the single track. Stephens *v.* New York, etc., R. Co., 175 N. Y. 72, 67 N. E. 119 [*reversing* 61 N. Y. App. Div. 612, 70 N. Y. Suppl. 1149].

93. Bond *v.* Pennsylvania Co., 171 Ill. 508, 49 N. E. 545 [*reversing* 69 Ill. App. 507]; Roman *v.* Strauss, 10 Md. 89 (holding that a bill for injunction, alleging that an alley over which complainants are entitled to a right of way is the only reasonably convenient mode of reaching their property and place of business, the streets bounding thereon being already rendered nearly impassable by railroad tracks, and that defendants are about to obstruct this alley by laying a railroad track across it, by which complainants will be subject to irremediable damages, is sufficient to warrant the granting of an injunction to prevent such obstruction); Kemble *v.* Philadelphia, etc., R. Co., 140 Pa. St. 14, 21 Atl. 225.

Station.— Where an encroachment is about to be attempted, a citizen owning property on the opposite side of the street, whose light and view are interfered with, and whose right to use the street may be interfered with by increased travel in the future, and who has bought his property according to a plan of lots on which the street was indicated, has a standing in equity to enjoin the railroad company from encroaching on the street for station purposes. Riley *v.* Pennsylvania Co., 32 Pa. Super. Ct. 579.

Pleading.— An injunction will not be

from using a public street, at the instance of a private citizen, where he has an adequate remedy at law,[94] or where the injury is due merely to a proper use and operation of the road.[95] An injunction will lie at the instance of a railroad company to enjoin the enforcement of an ordinance which has for its purpose the destruction of the company's legally vested right to use a street for railroad purposes,[96] and to prevent the city authorities from tearing up its tracks.[97] Where a railroad company is unlawfully obstructing a street or highway, a writ of mandamus to compel it to remove its structures may be maintained by the city,[98] or by a private relator, suing as a citizen and taxpayer,[99] unless the city has, by its acts and conduct, estopped itself to assert its right to an unobstructed use of the street.[1] If an obstruction is caused by the negligence of the railroad company an indictment may lie.[2]

J. Rights in and Use of Road or Land of Another Railroad[3] —

1. Nature and Extent of Right or Use in General. As a general rule one railroad

granted restraining a railroad company from constructing its road in a public street, where there is no allegation that it is about to, or threatens to, obstruct the street. People *v.* New York, etc., R. Co., 45 Barb. (N. Y.) 73, 26 How. Pr. 44. The mere allegation of irreparable mischief from the acts complained of is not sufficient, but the facts must be stated to show that the apprehension of injury is well founded. People *v.* New York, etc., R. Co., *supra*.

Parties.— In an action against a railroad company to restrain it from extending its road in the city of New York, and to annul an ordinance of the common council granting permission to the company to extend its road, the city is a necessary and proper party, where the common council, on granting such permission, has reserved to the city ten per cent of the gross receipts from travel on the portion of the road to be extended. People *v.* New York, etc., R. Co., 45 Barb. (N. Y.) 73, 26 How. Pr. 44.

An abutting owner who must use a street as a means of access to his property has a special interest therein, which gives him a standing to invoke the aid of equity to prevent an unlawful obstruction of the street which other members of the general public have not. Riley *v.* Pennsylvania Co., 32 Pa. Super. Ct. 579; Pepper *v.* Union R. Co., 113 Tenn. 53, 85 S. W. 864.

94. Mills *v.* Parlin, 106 Ill. 60.

95. Conabeer *v.* New York Cent., etc., R. Co., 156 N. Y. 474, 51 N. E. 402 [*affirming* 84 Hun 34, 32 N. Y. Suppl. 6]. See Magee *v.* London, etc., R. Co., 6 Grant Ch. (U. C.) 170.

Where an abutting owner is bound by the consent of his grantor to the use by a railroad of a right of way over land which afterward becomes a public street, he cannot enjoin the construction of additional tracks, on the ground that they would constitute an additional burden, if it does not appear that the amount of traffic would be increased. Conabeer *v.* New York Cent., etc., R. Co., 156 N. Y. 474, 51 N. E. 402 [*affirming* 84 Hun 34, 32 N. Y. Suppl. 6].

96. Mobile *v.* Louisville, etc., R. Co., 84 Ala. 115, 4 So. 106, 5 Am. St. Rep. 342, holding that where a company is legally vested with the right to load and unload its freight cars on a city street, and the city attempts, by ordinance, to stop the exercise of the right, thus paralyzing the freight business of the company in the city, equity will interfere to protect the franchise.

A court of equity will not refuse to interfere by injunction in such a case for the reason that the attempted destruction of the franchise is accompanied by acts constituting personal trespasses, or for the reason that the ordinance is quasi-criminal in character. Mobile *v.* Louisville, etc., R. Co., 84 Ala. 115, 4 So. 106, 5 Am. St. Rep. 342.

97. Belington, etc., R. Co. *v.* Alston, 54 W. Va. 597, 46 S. E. 612.

98. People *v.* Rock Island, 215 Ill. 488, 74 N. E. 437, 106 Am. St. Rep. 179.

Mandamus to railroad companies generally see MANDAMUS, 26 Cyc. 365 *et seq.*

Discretion of court.— The fact that a railroad occupying a street with its tracks and buildings has left an unobstructed street sufficiently wide to fully accommodate public travel does not affect the legal rights of the public to the portion of the street occupied by the railroad, but is a circumstance to be considered by the court in exercising its discretion in granting or denying a writ of mandamus to compel the company to remove its structures from the street. People *v.* Rock Island, 215 Ill. 488, 74 N. E. 437, 106 Am. St. Rep. 179.

99. People *v.* Rock Island, 215 Ill. 488, 74 N. E. 437, 106 Am. St. Rep. 179.

An abutter, who, for a consideration, has granted to a company the right to use the street for railroad purposes, cannot, in his individual capacity, successfully maintain mandamus proceedings to compel the company to remove its structures from the street, but may, as a citizen, enforce by mandamus any right which the public has in the street, in which case his success in the proceeding is dependent on the continued existence of the public right. People *v.* Rock Island, 215 Ill. 488, 74 N. E. 437, 106 Am. St. Rep. 179.

1. People *v.* Rock Island, 215 Ill. 488, 74 N. E. 437, 106 Am. St. Rep. 179.

2. Com. *v.* Erie, etc., R. Co., 27 Pa. St. 339, 67 Am. Dec. 471. And see *infra*, VI, K.

3. **Conflicting locations** see *supra*, IV, F.

company cannot enter upon or use the tracks, depots, right of way, or other property of another railroad company without the latter's consent,[4] even though the act of the first company in building the track in question was *ultra vires*.[5] Such right, however, may be acquired by virtue of an agreement between the companies,[6] by virtue of a constitutional, statutory, or municipal regulation,[7] by virtue of a covenant in the original grant,[8] or by the exercise of the power of eminent domain.[9] The mere fact that a junior company locates its right of way over the land of an existing company and files an act or instrument of appropriation gives it no interest or right in the right of way or other real estate of the senior company.[10] In respect to lands, however, which the senior company has not devoted to public use, if the senior company permits the junior company to use such land, it cannot afterward restrain it from laying a side-track thereon within the limits of its right of way.[11] Where such right is acquired, the second company can only make such reasonable use of the road and other property as is necessary to effectuate the common object,[12] and has no right to so use it as to deprive the first company of its use.[13] A decree that a railroad company shall enjoy the joint and equal use of the right of way, tracks, side-tracks, switches, turn-tables, and other terminal facilities of another railroad between certain limits, entitles the former company to the joint use of the entire strip between the limits named, which the latter company had acquired to use for railroad purposes at the date of the decree;[14] and in the absence of proof of such a change of conditions since its entry as would render its enforcement unjust, the former company is entitled to the use of the entire strip and facilities;[15] but such a decree does not give the former company the right to the use of tracks, lines, or the facilities of the latter company outside of the limits of the strip owned by it at the date of the decree.[16]

2. Statutory or Municipal Regulations. Where the right to use another company's right of way, etc., is acquired by a municipal ordinance or constitutional or statutory provision, the rights of the railroad company thereunder are governed by a proper construction of the language used in the particular ordinance,[17] charter,

Right to cross other railroads see *infra*, VI, C.

4. See Texarkana, etc., R. Co. *v.* Texas, etc., R. Co., 28 Tex. Civ. App. 551, 67 S. W. 525.

Where a lumber company and a railroad company construct a spur track from the former's premises to the latter's line the former has no right to authorize a use of the spur by another railroad. Texarkana, etc., R. Co. *v.* Texas, etc., R. Co., 28 Tex. Civ. App. 551, 67 S. W. 525.

5. Texarkana, etc., R. Co. *v.* Texas, etc., R. Co., 28 Tex. Civ. App. 551, 67 S. W. 525.

That a switch was built by a railroad company without legislative authority does not give a mining company owning the land adjacent to such switch the right to use the same without permission of the railroad company. Coe *v.* New Jersey Midland R. Co., 28 N. J. Eq. 100 [*affirmed* in 28 N. J. Eq. 593].

6. Chicago, etc., R. Co. *v.* Cincinnati, etc., R. Co., 126 Ind. 513, 26 N. E. 204. And see *infra*, V, J, 3; VII, D.

7. Chicago, etc., R. Co. *v.* Cincinnati, etc., R. Co., 126 Ind. 513, 26 N. E. 204. And see *infra*, V, J, 2.

8. See *supra*, V, G, 2 text and note 92.

9. See Eminent Domain, 15 Cyc. 617 *et seq.*

10. Chicago, etc., R. Co. *v.* Cincinnati, etc., R. Co., 126 Ind. 513, 26 N. E. 204. See also Grand Junction R. Co. *v.* Midland R. Co., 7 Ont. App. 681.

11. Chicago, etc., R. Co. *v.* Cincinnati, etc., R. Co., 126 Ind. 513, 26 N. E. 204.

12. Lathrop *v.* Junction R. Co., 14 Phila. (Pa.) 438.

13. Lathrop *v.* Junction R. Co., 14 Phila. (Pa.) 438.

The right to use the "right of way" of another company includes the right to use the tracks, switches, turnouts, turn-tables, and other terminal facilities constructed on the right of way. Joy *v.* St. Louis, 138 U. S. 1, 11 S. Ct. 243, 34 L. ed. 843 [*affirming* 29 Fed. 546].

14. St. Louis, etc., R. Co. *v.* Wabash, etc., R. Co., 152 Fed. 849, 81 C. C. A. 643 [*reversing* 144 Fed. 476].

15. St. Louis, etc., R. Co. *v.* Wabash, etc., R. Co., 152 Fed. 849, 81 C. C. A. 643 [*reversing* 144 Fed. 476].

16. St. Louis, etc., R. Co. *v.* Wabash, etc., R. Co., 152 Fed. 849, 81 C. C. A. 643 [*reversing* 144 Fed. 476].

17. Capdevielle *v.* New Orleans, etc., R. Co., 110 La. 904, 34 So. 868, holding that the municipality of New Orleans has authority through the action of the city council to adopt an ordinance granting the right of use to a railroad company of designated

or other statutory provision,[18] or act of congress,[19] granting or permitting such right, and such provisions usually require that the second company shall pay a fixed or reasonable compensation for the use of the first company's road.[20] The right of one railroad company to locate on or use the road of another company within city limits may be acquired by virtue of an ordinance granting a right of way to such other company, as where the ordinance provides that the grantee's road within the city limits shall be open to all other railroad companies obtaining permission of the city;[21] and the right to use the tracks under such an ordinance is not affected by a further provision therein in regard to the method by which compensation shall be made by the second company.[22] Where a contract by a

tracks and to provide for permitting other railroads along these tracks on the same terms as those granted to the original company.

A covenant on the part of a railroad company in a grant of a right of way through a park to permit other railroads to use the right of way is binding on another company which, by the same instrument, acquires the right of way in common with the grantee "under the same terms and conditions as those imposed on such grantee." Joy *v.* St. Louis, 138 U. S. 1, 11 S. Ct. 243, 34 L. ed. 843 [*affirming* 29 Fed. 546].

18. Googins *v.* Boston, etc., R. Co., 155 Mass. 505, 30 N. E. 71 (holding that St. (1866) c. 278, § 3, which authorizes the Boston and Worcester Railroad Company to take the railroad property hereafter known as the Union Railroad and Grand Junction Railroad and to locate, construct, and maintain a railroad thereupon and thence upon and over any intervening land to whomsoever belonging, grants the right to take the land on which the railroad was built and not merely the prior company's title thereto); Providence, etc., R. Co. *v.* Norwich, etc., R. Co., 138 Mass. 277 (construing St. (1871) c. 343); Lowell, etc., R. Co. *v.* Boston, etc., R. Co., 7 Gray (Mass.) 27 (construing St. (1846) c. 157; St. (1855) c. 191); Boston, etc., R. Corp. *v.* Salem, etc., R. Co., 2 Gray (Mass.) 1 (construing St. (1852) c. 118); Greenville, etc., R. Co. *v.* Grey, 62 N. J. Eq. 768, 48 Atl. 568 [*reversing* 60 N. J. Eq. 153, 46 Atl. 636] (construing Gen. St. p. 2660, par. 83, and p. 2654, par. 61, as authorizing the construction and operation of more than one railroad upon the same surveyed route or location); Pennsylvania R. Co. *v.* Canal Com'rs, 21 Pa. St. 9 (construing the act of 1834 and the act of March, 1847, as not authorizing the Pennsylvania Railroad Company to use the tracks of the Columbia and Philadelphia railroad, which was a state railroad).

After-acquired road.—A reservation in the charter of a railroad company of a right to authorize other railroad corporations to enter upon and use the railroad extends to a branch railroad purchased from another corporation whose charter contained no such reservation, although the legislature, since the purchase, has enacted that the purchasing corporation "shall have all the powers and privileges, and be subject to all the duties, restrictions and liabilities" set forth in the charter of the purchased road. Lexington, etc., R. Co. *v.* Fitchburg R. Co., 14 Gray (Mass.) 266.

Mo. Rev. St. (1889) § 2742, which provides that where lands are condemned for depot purposes "any other railroad company shall have the right to use said depot grounds for depot purposes, with the necessary buildings, turnouts, sidings, switches and other conveniences in furtherance of said purpose" authorizes not only the construction of a union depot but also separate depots together with the sidings, switches, and other conveniences in furtherance of such purpose. Stevens *v.* St. Louis, etc., R. Co., 152 Mo. 212, 53 S. W. 1066.

Combination.— Under a statute (Mass. St. (1852) c. 118) authorizing such a right, railroad companies cannot combine their railroads so as to form one continuous line contrary to the rights conferred on them by their charters. Boston, etc., R. Corp. *v.* Salem, etc., R. Co., 2 Gray (Mass.) 1.

19. See Mason City, etc., R. Co. *v.* Union Pac. R. Co., 124 Fed. 409 [*affirmed* in 128 Fed. 230, 64 C. C. A. 348], construing Act Feb. 24, 1871, c. 67, and Act July 25, 1866, c. 246, as imposing upon the Union Pacific Railroad Company the duty of permitting other companies whose roads terminated at Council Bluffs or Omaha to use a bridge constructed over the Mississippi river at Quincy.

Act of congress of March 3, 1875, relating to the use of cañons, passes, and defiles by railroad companies, which provides that no company which locates its line through such place shall prevent any other company from the use and occupancy of the same cañon, pass, or defile for the purposes of its road in common with the road first located, means that where there is a cañon, pass, or defile so narrow as not to admit of the passage of two roads conveniently, it may be used by two or more railroads; but only in cases of necessity can one company go upon the right of way of another company for the purpose of building its road. Denver, etc., R. Co. *v.* Denver, etc., R. Co., 17 Fed. 867, 5 McCrary 443. See Denver, etc., R. Co. *v.* Alling, 99 U. S. 463, 25 L. ed. 438.

20. See Lowell, etc., R. Co. *v.* Boston, etc., R. Corp., 7 Gray (Mass.) 27; and cases cited *supra*, notes 17–19.

21. Chicago, etc., R. Co. *v.* Kansas City, etc., R. Co., 38 Fed. 58.

22. Chicago, etc., R. Co. *v.* Kansas City, etc., R. Co., 38 Fed. 58.

city with a railroad company permits it to construct its tracks through its streets on the condition that the company permit any other railroad company to use the tracks on paying a *pro rata* share of the cost of construction, all railroads which have a terminus in such city are entitled upon complying with the terms of the contract to use the tracks of the first company,[23] without regard to whether they are operating under foreign or domestic charters;[24] and if the contract places no limit on the time when other railroads may come in or on the number, a delay in making application during which other roads have come in is no ground for excluding an applicant,[25] unless it is shown that the road will be overburdened;[26] nor is it a ground for excluding an applicant that a portion of the tracks were built on private property,[27] or that the applicant by the terms of its charter can use only animal power when such applicant has for years used steam power with the sanction of the city.[28]

3. CONTRACTS AND AGREEMENTS BETWEEN RAILROAD COMPANIES. Where the right is acquired by agreement between the companies, the rights and liabilities of each thereunder is governed by the terms of such agreement.[29] A railroad company having a license from another company to use its right of way may do thereon any act which is necessary to the full enjoyment of the license, although the terms of the license must be strictly followed and cannot be extended or varied.[30] Although the contract between the companies may have been irregular, if the second company takes possession thereunder and expends large sums of money on the road to which the directors and stock-holders of the first company do not object, they are estopped from afterward denying the validity of the

23. Louisville, etc., R. Co. *v.* Mississippi, etc., R. Co., 92 Tenn. 681, 22 S. W. 920.

24. Louisville, etc., R. Co. *v.* Mississippi, etc., R. Co., 92 Tenn. 681, 22 S. W. 920.

25. Louisville, etc., R. Co. *v.* Mississippi, etc., R. Co., 92 Tenn. 681, 22 S. W. 920.

26. Louisville, etc., R. Co. *v.* Mississippi, etc., R. Co., 92 Tenn. 681, 22 S. W. 920.

27. Louisville, etc., R. Co. *v.* Mississippi, etc., R. Co., 92 Tenn. 681, 22 S. W. 920.

28. Louisville, etc., R. Co. *v.* Mississippi, etc., R. Co., 92 Tenn. 681, 22 S. W. 920.

29. Lathrop *v.* Junction R. Co., 14 Fed. Cas. No. 8,110, 9 Wkly. Notes Cas. (Pa.) 277.

The word "free" in a contract by which one railroad company, for a sufficient consideration, gives to another the "perpetual and free use of the right of way" and where no compensation is claimed until some years afterward, means free from compensation and not merely uninterrupted use. Alabama Great Southern R. Co. *v.* South Alabama, etc., R. Co., 84 Ala. 570, 3 So. 286, 5 Am. St. Rep. 401.

Joint interest.—An agreement to permit one railroad company to construct and maintain, at its own expense, a track through another's yard to connect with a side-track of such other, grants a joint interest in that part of the yard to be used by both in the interchange of business and each company has the right to use the connecting track for the purpose of interchanging freight and passengers and transfer of cars from one main track to the other; but neither company has the right to use it for any other purpose without the consent of the other. Louisville, etc., R. Co. *v.* Kentucky Midland R. Co., 95 Ky. 550, 26 S. W. 532, 16 Ky. L. Rep. 74.

Power to contract.— The provision of N. Y. Const. art. 3, § 18, prohibiting legislation authorizing the "construction or operation of a street railroad," except in the cases specified, is prospective in its operation, and had no reference to or effect upon previously existing laws. Accordingly it was held that said provision did not affect the provision of the Railroad Act of 1839 (Laws (1839), § 1, c. 218), authorizing railroad corporations to contract with other like corporations "for the use of their respective roads;" and that a contract between a railroad company which had acquired the right and had constructed and was operating a road over Atlantic avenue in the city of Brooklyn, and the defendant, by which the latter was authorized to run its trains over the road of the former on said street, was not forbidden by said constitutional provision. People *v.* Brooklyn, etc., R. Co., 89 N. Y. 75.

30. Augusta, etc., R. Co. *v.* Augusta Southern R. Co., 96 Ga. 562, 23 S. E. 501 (holding that a license to a company operating a narrow gauge railroad to use a right of way does not authorize the licensee to operate a standard gauge track over the road); Chicago, etc., R. Co. *v.* Cincinnati, etc., R. Co., 126 Ind. 513, 26 N. E. 204.

Side-tracks, etc.—An agreement by which one railroad company acquires the right to run its track over the right of way and track of another company on the grounds of the latter does not authorize the junior company in the absence of express stipulation to lay side-tracks, turnouts, or switches on the right of way or other grounds which the senior company had acquired for use in the discharge of its public duties, as such right in the junior company can be acquired only by mutual agreement between the two com-

agreement on the ground of irregularity.[31] Where a railroad company permits its charter to be used for purposes of condemnation of lands for another company's railroad and the latter locates its road, pays and takes title in its own name, the road is the property of the latter company; and if in such case any of the land condemned was paid for by the former company with its own funds which have not been repaid to it, the latter company is bound to refund such amount.[32]

4. Powers and Proceedings of Railroad Commissioners and Other Officers. Under some ordinances or statutes the power of regulating the details of the location and use of the track of one company by another is vested in certain officers or commissioners,[33] such as the power of fixing the rate of compensation to be paid by the second company.[34] Thus under some statutes, if the companies fail to agree upon the location and use of tracks for a right of way of one of the companies by the other, the power to determine such matter is placed in the railroad commissioners,[35] who may also establish reasonable regulations upon which the second company may use the tracks and right of way of the first company.[36]

5. Rights and Remedies of Parties. In a proper case an injunction may be issued to restrain one railroad company from unlawfully interfering with the right of way of another company.[37] Thus where a second company has a right

panies. Chicago, etc., R. Co. *v.* Cincinnati, etc., R. Co., 126 Ind. 513, 26 N. E. 204.

31. Mahaska County R. Co. *v.* Des Moines Valley R. Co., 28 Iowa 437.

32. Coe *v.* New Jersey Midland R. Co., 31 N. J. Eq. 105.

33. See Atty.-Gen. *v.* Fitchburg R. Co., 142 Mass. 40, 6 N. E. 854 (construing St. (1881) c. 230; St. (1880) c. 261); Gallagher *v.* Keating, 27 Misc. (N. Y.) 131, 58 N. Y. Suppl. 366 (construing Charter, §§ 524, 525).

Such regulations must be consistent with the contracts already in existence as to the management of the road, so far as the parties entitled to the benefit of such contracts are concerned. Atty.-Gen. *v.* Fitchburg R. Co., 142 Mass. 40, 6 N. E. 854.

An ordinance providing for the appointment of arbitrators to determine a controversy arising between any company to which the city may grant the use of the tracks and the railroad company to which the original grant was made gives the arbitrators authority to settle disagreements in matters of detail in which the municipality could have no great concern, except to the extent that the grantees may undertake to act in contravention of the city's interests; and under such an ordinance the city has a right, which cannot be denied, in organizing the board, and the right to be heard before the courts in regard to any management affording ground for complaint. Capdevielle *v.* New Orleans, etc., R. Co., 110 La. 904, 34 So. 868.

34. Concord, etc., R. Co. *v.* Boston, etc., R. Co., 68 N. H. 519, 39 Atl. 1073, construing Laws (1855), c. 1666, § 3; Laws (1858), c. 2125, § 2.

Where referees appointed on notice under N. H. Pub. St. c. 157, § 12, to determine all the unsettled claims relative to the use of the tracks of one railroad company by another and to determine the rates and terms for such use thereafter, report that the second company shall pay a certain rate, but fail to state whether that rate shall take effect from the date of the service of the notice or from the filing of the report, such report is sufficiently uncertain to require its recommitment to the referees for a specific finding on that point, since the determination of the rate to be paid from the time of the service of notice is a matter within the authority of the referees. Concord, etc., R. Co. *v.* Boston, etc., R. Co., 68 N. H. 519, 39 Atl. 1073.

Where, after the expiration of a judgment on an award fixing the rates of compensation, the parties continue to pay and receive rates as fixed, they will be bound by such rate so long as it is paid and received without objection, but on notice of an objection being served the implied contract existing between the parties is terminated, and the amount to be paid thereafter becomes a matter for legal adjudication under N. H. Pub. St. c. 157, § 12. Concord, etc., R. Co. *v.* Boston, etc., R. Co., 68 N. H. 519, 39 Atl. 1073.

35. Chicago, etc., R. Co. *v.* Cincinnati, etc., R. Co., 126 Ind. 513, 26 N. E. 204 (construing Rev. St. (1881) § 3903, subs. 6); Providence, etc., R. Co. *v.* Norwich, etc., R. Co., 138 Mass. 277.

36. Providence, etc., R. Co. *v.* Norwich, etc., R. Co., 138 Mass. 277.

37. Chicago, etc., R. Co. *v.* Cedar Rapids, etc., R. Co., 67 Iowa 324, 25 N. W. 264 (demurrer to answer overruled); Boston, etc., R. Corp. *v.* Salem, etc., R. Co., 2 Gray (Mass.) 1; Pennsylvania Schuylkill Valley R. Co. *v.* Philadelphia, etc., R. Co., 160 Pa. St. 232, 28 Atl. 771; Texarkana, etc., R. Co. *v.* Texas, etc., R. Co., 28 Tex. Civ. App. 551, 67 S. W. 525.

Laches.— The doctrine that an injunction will not be granted where the complainant has been guilty of laches applies with special force in a case where the construction of a railroad by one railroad company over the land of another railroad company is sought to be restrained by the latter. Pennsylvania R. Co.'s Appeal, 3 Walk. (Pa.) 454.

Defense.— In proceedings by a railroad company which operates a railroad on a cer-

in case of necessity to intrude upon the right of way of another company, the company having a prior right may enjoin intrusion thereon by the company until facts are shown making it necessary for such company to come on the right of way;[38] and in a suit for such injunction the second company may show such necessity and enforce its right to enter upon and use the right of way by a cross bill.[39] But the exercise of a later granted franchise will not be restrained unless its exercise will interfere with or obstruct the actual operation and exercise of the prior franchise;[40] and one railroad company will not be enjoined from constructing its road upon another railroad company's land which is not in actual use.[41] So where a railroad company has lost its right to occupy a certain route by consenting to its use by another road, it will be enjoined from interfering with such use;[42] nor can it afterward enjoin the latter company from using the land within the limits of its right of way.[43] Where several railroad companies agree to connect their termini in a city by a short connecting road and for that purpose organize a new corporation, a preliminary injunction may be granted to restrain such new corporation from declining or refusing to furnish motive power over its whole road to cars arriving over one of such connecting roads,[44] and to restrain one of the connecting companies from hindering or interfering with such performance.[45] But where the facts are in dispute a temporary injunction will not be granted to restrain a company in possession from doing acts which do not work such an injury as cannot be compensated or redressed by final judgment;[46] nor will a temporary injunction be granted in such case on the ground that the company in possession does not possess the franchise claimed.[47] So where the right of one railroad company under a municipal ordinance to use the road of another company within the city limits is doubtful, a court of equity will not grant a preliminary mandatory injunction to compel permission of such use.[48] Ejectment may be maintained by one railroad company to recover possession of a portion of its right of way from another railroad company, which is wrongfully withholding the same,[49] unless it is estopped to enforce such remedy, in which case its remedy is limited to an action to recover compensation therefor.[50] So in a proper case the second company may maintain a bill for specific performance of the deed or grant, under which it claims the right to use the first company's right of way.[51]

tain street to enjoin defendant from constructing a railroad on the same street, it is no defense that plaintiff obtained consent to construct its track on the said street by agreeing that it would permit its tracks to be crossed by those of defendant without requiring compensation. Louisville, etc., R. Co. *v.* Mobile, etc., R. Co., 124 Ala. 162, 26 So. 895.

38. Denver, etc., R. Co. *v.* Denver, etc., R. Co., 17 Fed. 867, 5 McCrary 443. See Denver, etc., R. Co. *v.* Alling, 99 U. S. 463, 25 L. ed. 438.

39. Denver, etc., R. Co. *v.* Denver, etc., R. Co., 17 Fed. 867, 5 McCrary 443.

40. Pennsylvania R. Co.'s Appeal, 3 Walk. (Pa.) 454.

41. Pennsylvania R. Co.'s Appeal, 3 Walk. (Pa.) 454.

42. Grey *v.* Greenville, etc., R. Co., 60 N. J. Eq. 153, 46 Atl. 636 [*reversed* in 62 N. J. Eq. 768, 48 Atl. 568, on the ground that the evidence did not establish a loss, by consent, by defendant of the right claimed and that the injunction therefore should be dissolved].

43. Chicago, etc., R. Co. *v.* Cincinnati, etc., R. Co., 126 Ind. 513, 26 N. E. 204, holding that where one railroad company has allowed another company to cross its land which was neither acquired nor used by it for any public use, it cannot afterward enjoin the latter company from laying a side-track thereon.

44. Lathrop *v.* Junction R. Co., 14 Fed. Cas. No. 8,110, 9 Wkly. Notes Cas. (Pa.) 277.

45. Lathrop *v.* Junction R. Co., 14 Fed. Cas. No. 8,110, 9 Wkly. Notes Cas. (Pa.) 277.

46. Troy, etc., R. Co. *v.* Boston, etc., R. Co., 13 Hun (N. Y.) 60.

47. Pennsylvania R. Co.'s Appeal, 3 Walk. (Pa.) 454.

48. Chicago, etc., R. Co. *v.* Kansas, etc., R. Co., 38 Fed. 58.

49. Tennessee, etc., R. Co. *v.* East Alabama R. Co., 75 Ala. 516, 51 Am. Rep. 475; Fresno St. R. Co. *v.* Southern Pac. R. Co., 135 Cal. 202, 67 Pac. 773. And see EJECTMENT, 15 Cyc. 25.

50. Fresno St. R. Co. *v.* Southern Pac. R. Co., 135 Cal. 202, 67 Pac. 773.

51. South Alabama, etc., R. Co. *v.* Highland, Ave., etc., R. Co., 117 Ala. 395, 23 So. 973.

K. Conveyances or Releases by Railroad Company [52] — **1. Power to Make and Validity of Conveyance or Release.** A railroad company may be authorized by its charter or governing statute to sell and convey its right of way or other interest in land or a portion thereof; [53] and may be authorized to make such a sale on credit,[54] subject to the power of the courts to control any attempted abuse of the power.[55] But a general authority to convey such real estate as may be necessary and expedient to carry into effect the objects of an incorporation does not authorize a transfer of real estate acquired and held for the exercise of the corporate franchise, without further legislative authority.[56] A railroad company may also be authorized to assign its interest in the right of way,[57] or to dedicate a portion of its land as a public highway.[58] A railroad company may also, within a reasonable time, withdraw from and release to the owner all or such part of its located right of way as is not necessary to the construction, maintenance, and operation of its road; and when this is done the owner has no claim

Pleading.—A bill to enforce a provision in deed of a right of way that "any other railroad running into or through the city of B. shall have the right to run a parallel track upon and along the same right of way" need not locate the place on the right of way where complainant seeks to lay its tracks. South Alabama, etc., R. Co. *v.* Highland Ave., etc., R. Co., 117 Ala. 395, 23 So. 973.

52. Conveyance to other railroads of right to use road see *supra*, V, J, 3.

Sale or transfer of railroad or franchise see *infra*, VII, A, B.

Effect of consolidation see *infra*, VII, E, 6, *g*.

Mortgages by railroad company see *infra*, VIII, A, 7.

53. People *v.* Illinois Cent. R. Co., 62 Ill. 510; Thomson *v.* New York, etc., R. Co., 3 Sandf. Ch. (N. Y.) 626, holding that where a railroad company is authorized to build a bridge, it also has power to sell the bridge. *Compare* Pratt *v.* Grand Trunk R. Co., 8 Ont. 499.

Under Ala. Code (1869), § 1170, providing that a railroad company may lease or purchase any part of any railroad constructed by any other company if its line be contiguous or connecting, a railroad company is authorized to convey to a connecting railroad company land acquired by the former for a right of way. Coyne *v.* Warrior Southern R. Co., 137 Ala. 553, 34 So. 1004.

A railroad company organized in Ohio may acquire title to land within the state for railroad purposes either by grant or proceedings in appropriation, and when the right of way is thus acquired and the company has constructed its road thereon, the same becomes such an interest in lands that without intent to abandon the same the company may sell to another company for like railroad purpose all or a part of the premises so acquired. Garlick *v.* Pittsburgh, etc., R. Co., 67 Ohio St. 223, 65 N. E. 896.

A right of way in an alley granted to a railroad company may be transferred by the company, although it has never used such alley for railroad purposes. Morgan *v.* Des Moines Union R. Co., 113 Iowa 561, 85 N. W. 902.

A statutory power to directors of a railroad company to transact all the business of the company and sell and convey real property with the right to complete a portion of the road and elect between different routes and termini authorizes them to sell a portion of the right of way in satisfaction of a mortgage debt. Donner *v.* Dayton, etc., R. Co., 1 Cinc. Super. Ct. (Ohio) 130.

Specific performance of a contract to convey railroad property subject to mortgage and distribution of proceeds see Long Dock Co. *v.* Morris, etc., R. Co., (N. J. Ch. 1887) 9 Atl. 194.

54. People *v.* Illinois Cent. R. Co., 62 Ill. 510, holding that under Sess. Laws (1854), c. 192, authorizing the Illinois Central Railroad Company to dispose of its land for such credit as it might deem expedient, a reasonable discretion was granted the company, and the credit could not be so extended as to postpone to an indefinite time the date of payment, nor should the price be so regulated as to prevent or unreasonably retard sales.

Under an authority to sell on credit the company should not permit purchasers to retain the purchase-money after maturity to evade the law or with a view of relief from taxation, but should use all usual and reasonable efforts to enforce collections without unnecessary harassment or rigorous oppression of the debtor (People *v.* Illinois Cent. R. Co., 62 Ill. 510); but an ordinary delay, not intended to further any bad or unlawful purpose, will not afford sufficient ground for awarding a writ of mandamus (People *v.* Illinois Cent. R. Co., *supra*).

55. People *v.* Illinois Cent. R. Co., 62 Ill. 510.

56. Kean *v.* Johnson, 9 N. J. Eq. 401; Coe *v.* Columbus, etc., R. Co., 10 Ohio St. 372, 75 Am. Dec. 518.

57. Arthur *v.* Commercial, etc., Bank, 9 Sm. & M. (Miss.) 394, 48 Am. Dec. 719.

58. People *v.* Eel River, etc., R. Co., 98 Cal. 665, 33 Pac. 728. And see, generally, Dedication, 13 Cyc. 449.

Where there is nothing in their charters to forbid it, railroad companies have power in connection with the owners in fee to dedicate for a public highway lands taken by them under their charters. Green *v.* Canaan, 29 Conn. 157.

against the company for the land so released.[59] Where a railroad charter provides that certain lands granted to it shall be sold at public auction, such sale may be enforced by mandamus.[60]

2. Title and Rights of Purchasers. A purchaser of railroad land under a valid conveyance acquires such title or interest as the company is capable of transferring, and which the conveyance was intended to transfer.[61] A grant and demise by one railroad corporation of all its property, real and personal, with all its privileges and franchises, to another, in perpetuity, is equivalent to an absolute conveyance.[62] In the absence of a statutory provision making a conveyance of real estate to a railroad company in excess of the amount allowed by law void, the company may convey an indefeasible title thereto to another.[63]

3. Reservation of Right of Way in Conveyance of Land. Where a conveyance of lands by a railroad company contains a reservation of a right of way, the construction and operation of the same must be determined from the entire instrument and other contemporaneous contracts which are a part of the same transaction, and viewed in the light of the surrounding facts and circumstances existing at the time the conveyance was made;[64] and this rule applies to a reservation for a branch railroad,[65] or of the use of certain track and depot facilities.[66] Such a reservation may operate in favor of companies or persons who have existing rights in the property at the time the conveyance is made;[67] but not in favor of a company or person who has no present right, legal or equitable, to the part

59. Flaten *v.* Moorhead City, 58 Minn. 324, 59 N. W. 1044; Jones *v.* Erie, etc., R. Co., 169 Pa. St. 333, 32 Atl. 535, 47 Am. St. Rep. 916.

A deed without reservation, to the owner of the land, operates as such a release. Flaten *v.* Moorhead City, 58 Minn. 324, 59 N. W. 1044.

60. People *v.* Illinois Cent. R. Co., 62 Ill. 510, holding that where a provision in the charter of a railroad company directing that all lands remaining unsold at the expiration of a certain period from the completion of the road and its branches shall be offered at public sales annually until the whole is disposed of imposes a duty in such vague and general terms that the court will not enforce it by mandamus without further legislation; but if the legislature should prescribe the terms of sale, and the mode in which it should be conducted, not inconsistent with the rights of the company, and make the direction plain and definite, the court would then act upon its requirements and enforce them.

61. See Chamberlain *v.* Northeastern R. Co., 41 S. C. 399, 19 S. E. 743, 996, 44 Am. St. Rep. 717, 25 L. R. A. 139.

A deed by a railroad company of land purchased by it in fee for a right of way is not void until so declared in a proceeding by the state, although the company has abandoned its purpose of using the land for a railroad. Chamberlain *v.* Northeastern R. Co., 41 S. C. 399, 19 S. E. 743, 996, 44 Am. St. Rep. 717, 25 L. R. A. 139.

The lack of congressional authority in a successive grantee of a railroad right of way lying in the District of Columbia to extend its lines into that district does not affect its title if the original grantor had such authority. Chesapeake Beach R. Co. *v.* Washington, etc., R. Co., 199 U. S. 247, 26 S. Ct. 25, 50 L. ed. 175 [*affirming* 23 App. Cas. (D. C.) 587].

62. Chicago, etc., R. Co. *v.* Boyd, 118 Ill. 73, 7 N. E. 487.

63. Fayette Land Co. *v.* Louisville, etc., R. Co., 93 Va. 274, 24 S. E. 1016, holding that Code (1887), § 1073, limiting the quantity of land to be held by railroads does not render void a conveyance in excess of such quantity, and that the company may, before proceedings are instituted by the state to revoke its privileges, convey an indefeasible title to another.

64. See Grennan *v.* McGregor, 78 Cal. 258, 20 Pac. 559; Illinois Cent. R. Co. *v.* Indiana, etc., R. Co., 85 Ill. 211; St. Paul Union Depot Co. *v.* St. Paul, etc., R. Co., 35 Minn. 320, 29 N. W. 140; Dunstan *v.* Northern Pac. R. Co., 2 N. D. 46, 49 N. W. 426 (holding that a reservation reserving and excepting a strip extending through the land conveyed, of a certain width on each side of the center line of the road or any of its branches, to be used for a right of way, covers one such strip only, and under such reservation the railroad company cannot claim a right of way both for its main line and branch line over the tract so conveyed); Biles *v.* Tacoma, etc., R. Co., 5 Wash. 509, 32 Pac. 211.

65. Grennan *v.* McGregor, 78 Cal. 258, 20 Pac. 559; Biles *v.* Tacoma, etc., R. Co., 5 Wash. 509, 32 Pac. 211, holding that where a charter of a railroad company empowers it to construct only one specified branch road, another road incorporated under the laws of a different state, although constructed and operated by the first road, is not a branch of such road within the meaning of such a reservation.

66. St. Paul Union Depot Co. *v.* St. Paul, etc., R. Co., 35 Minn. 320, 29 N. W. 140.

67. Illinois Cent. R. Co. *v.* Indiana, etc., R. Co., 85 Ill. 211.

reserved.[68] Where the reservation is merely of a right of way or easement in the land, the title to all the land conveyed vests in the grantee by virtue of the deed.[69]

L. Loss, Abandonment, or Forfeiture of Land or Rights[70] — **1. In General.** A railroad company's easement in its right of way or other land may be lost by abandonment or surrendered;[71] but where the land is conveyed to the railroad company in fee its title thereto is not lost by non-user or abandonment,[72] and damages for the right of way over the same cannot be recovered by one claiming title thereto by reversion on the ground of non-user.[73] That a railroad company has not completed its road within the time limited by its charter does not as to third persons affect its title to land acquired for a right of way, since only the state can take advantage of the default.[74] In the absence of statute otherwise, land acquired by a railroad company for a right of way or station purposes may also be lost by adverse possession.[75]

2. What Constitutes Abandonment. As a general rule, in order to constitute an abandonment of an easement in a right of way by a railroad company there must be a non-user accompanied by unequivocal and decisive acts on the part of the company, clearly showing an intention to abandon;[76] as where the non-

68. Illinois Cent. R. Co. *v.* Indiana, etc., R. Co., 85 Ill. 211; Carlson *v.* Duluth Short-Line R. Co., 38 Minn. 305, 37 N. W. 341; Dunstan *v.* Northern Pac. R. Co., 2 N. D. 46, 49 N. W. 426.

69. Biles *v.* Tacoma, etc., R. Co., 5 Wash. 509, 32 Pac. 211.

70. **Forfeiture of charter or franchise in general** see *supra*, II, J, 2.

Breach of conditions and liability for damages therefor see *supra*, V, G.

Abandonment of rights acquired by the exercise of the power of eminent domain see Eminent Domain, 15 Cyc. 1026 *et seq.*

71. McLemore *v.* Charleston, etc., R. Co., 111 Tenn. 639, 69 S. W. 338.

72. Watkins *v.* Iowa Cent. R. Co., 123 Iowa 390, 98 N. W. 910; Enfield Mfg. Co. *v.* Ward, 190 Mass. 314, 76 N. E. 1053.

73. Watkins *v.* Iowa Cent. R. Co., 123 Iowa 390, 98 N. W. 910.

74. Chicago, etc., R. Co. *v.* Wright, 153 Ill. 307, 38 N. E. 1062; Grand Junction R. Co. *v.* Midland R. Co., 7 Ont. App. 681.

75. See Maney *v.* Providence, etc., R. Co., 161 Mass. 283, 37 N. E. 164. And see, generally, Adverse Possession, 1 Cyc. 1120, 1121.

Twenty years' uninterrupted, open, adverse, and exclusive possession of a portion of a railroad company's right of way by a party claiming to own the same bars the right of the company therein. Donahue *v.* Illinois Cent. R. Co., 165 Ill. 640, 46 N. E. 714.

Possession not adverse.— The building on a railroad company's right of way of structures, which as used do not interfere with the use of the portion needed for the right of way, does not amount to such adverse possession as will defeat the company's rights under a contract by the original owner to convey it, or stop the running of limitations based on possession thereunder in its favor. Waggoner *v.* Wabash R. Co., 185 Ill. 154, 56 N. E. 1050. So where a railroad company fails to enter on and occupy the premises and the grantor fences up the property and remains in undisturbed possession thereof for over seven years, the grantor's possession is not adverse to the company so as to terminate its title. Virginia, etc., R. Co. *v.* Crow, 108 Tenn. 17, 64 S. W. 485. Where a deed to a company of a right of way reserves to the grantor a license to cultivate the outside twenty feet of the part conveyed, a subsequent occupation of such twenty feet by the owner of the adjoining property, in the absence of any showing to the contrary, will be presumed to be under the deed, and cannot therefore ripen into title by adverse possession. Chicago, etc., R. Co. *v.* Wood, 30 Ind. App. 650, 66 N. E. 923.

Under N. C. Revisal (1905), § 388 (Rev. Code, c. 65, § 23), providing that no railroad company shall be barred of or presumed to have conveyed any right of way which may have been condemned or otherwise obtained by any statute of limitation, or by any occupation of the same by any person, the possession by individuals of land covered by a railroad right of way cannot operate as a bar to or be the basis for any presumption of abandonment by the railroad company of its right of way. Seaboard Air Line R. Co. *v.* Oliver, 142 N. C. 257, 55 S. E. 263.

76. *Illinois.*— Stannard *v.* Aurora, etc., R. Co., 220 Ill. 469, 77 N. E. 254; Lyman *v.* Suburban R. Co., 190 Ill. 320, 60 N. E. 515, 52 L. R. A. 645; Durfee *v.* Peoria, etc., R. Co., 140 Ill. 435, 30 N. E. 686.

Massachusetts.— Enfield Mfg. Co. *v.* Ward, 190 Mass. 314, 76 N. E. 1053.

Michigan.— Jones *v.* Van Bochove, 103 Mich. 98, 61 N. W. 342.

Missouri.— Kansas City, etc., R. Co. *v.* Kansas City, etc., R. Co., 129 Mo. 62, 31 S. W. 451; Roanoke Inv. Co. *v.* Kansas City, etc., R. Co., 108 Mo. 50, 17 S. W. 1000; Missouri Pac. R. Co. *v.* Bradbury, 106 Mo. App. 450, 79 S. W. 966.

New York.—Roby *v.* New York Cent., etc.,

user is accompanied by acts which destroy the object for which the easement was created or the means of its enjoyment;[77] where the non-user is accompanied by adverse possession by the owner of the fee or others claiming under him;[78] or where the non-user is continued for a long time with no evidence of any intention to resume in the future.[79] But mere non-user or failure to occupy a right of way without other circumstances to show an abandonment or failure of the purpose for which the way was granted does not operate to divest the right of the railroad company to the easement;[80] and in the absence of statute, mere

R. Co., 142 N. Y. 176, 36 N. E. 1053 [*reversing* 65 Hun 532, 20 N. Y. Suppl. 551]; Delaware, etc., R. Co. *v.* Oswego, 92 N. Y. App. Div. 551, 86 N. Y. Suppl. 1027.

North Carolina.— Beattie *v.* Carolina Cent. R. Co., 108 N. C. 425, 12 S. E. 913.

United States.— Townsend *v.* Michigan Cent. R. Co., 101 Fed. 757, 42 C. C. A. 570.

See 41 Cent. Dig. tit. "Railroads," § 214.

That the trustees of a railroad pay no taxes on certain land belonging to the company, and do not know of its existence, and pay no attention to it, does not tend to prove an abandonment of such land by them or by the railroad company. Enfield Mfg. Co. *v.* Ward, 190 Mass. 314, 76 N. E. 1053.

77. Jones *v.* Van Bochove, 103 Mich. 98, 61 N. W. 342 (holding that evidence that a railroad was taken up, the rails and ties removed, fences taken away and a bridge which crossed an intersecting river torn down, all with a view of abandonment, is sufficient to show abandonment); Spring Brook R. Co. *v.* Spring Brook Water-Supply Co., 3 Lack. Leg. N. (Pa.) 90.

That a railroad company "ceased permanently" to use a right of way within the meaning of a grant may be shown by evidence that the right of way for a spur track to a coal mine was obtained for the railroad by the mine owners and that the mining was abandoned and that the right of way had not since been used for railroad purposes. McClain *v.* Chicago, etc., R. Co., 90 Iowa 646, 57 N. W. 594.

78. New York, etc., R. Co. *v.* Benedict, 169 Mass. 262, 47 N. E. 1027; Hannibal, etc., R. Co. *v.* Frowein, 163 Mo. 1, 63 S. W. 500; Kansas City, etc., R. Co. *v.* Kansas City, etc., R. Co., 129 Mo. 62, 31 S. W. 451; Roanoke Inv. Co. *v.* Kansas City, etc., R. Co., 108 Mo. 50, 17 S. W. 1000; Beattie *v.* Carolina Cent. R. Co., 108 N. C. 425, 12 S. E. 913.

79. Roby *v.* New York Cent., etc., R. Co., 142 N. Y. 176, 36 N. E. 1053 [*reversing* 65 Hun 532, 20 N. Y. Suppl. 551]; Townsend *v.* Michigan Cent. R. Co., 101 Fed. 757, 42 C. C. A. 570.

Withdrawal from the use of the premises persisted in for many years, with no evidence of an intention to resume in the future, or a motive to do so, is sufficient to prove an abandonment notwithstanding the company had obtained possession of a portion of the premises and had not intended to give up its possession thereof. Guss *v.* West Chester R. Co., 1 Chest. Co. Rep. (Pa.) 363.

80. *Arkansas.*— Memphis, etc., R. Co. *v.* Humphreys, 65 Ark. 631, 48 S. W. 86.

Illinois.— Durfee *v.* Peoria, etc., R. Co., 140 Ill. 435, 30 N. E. 686.

Iowa.— McClain *v.* Chicago, etc., R. Co., 90 Iowa 646, 57 N. W. 594; Barlow *v.* Chicago, etc., R. Co., 29 Iowa 276.

Michigan.— Jones *v.* Van Bochove, 103 Mich. 98, 61 N. W. 342.

Minnesota.— Gurney *v.* Minneapolis Union Elevator Co., 63 Minn. 70, 65 N. W. 336, 30 L. R. A. 534.

Missouri.— Kansas City, etc., R. Co. *v.* Kansas City, etc., R. Co., 129 Mo. 62, 31 S. W. 451; Roanoke Inv. Co. *v.* Kansas City, etc., R. Co., 108 Mo. 50, 17 S. W. 1000.

New York.— Conabeer *v.* New York Cent., etc., R. Co., 156 N. Y. 474, 51 N. E. 402 [*affirming* 84 Hun 34, 32 N. Y. Suppl. 6] (holding that a railroad company's mere failure to immediately use a grant for a right of way to its full extent is not a waiver or abandonment thereof); Roby *v.* New York Cent., etc., R. Co., 142 N. Y. 176, 36 N. E. 1053 [*reversing* 65 Hun 532, 20 N. Y. Suppl. 551].

North Carolina.— Beattie *v.* Carolina Cent. R. Co., 108 N. C. 425, 12 S. E. 913; Purifoy *v.* Richmond, etc., R. Co., 108 N. C. 100, 12 S. E. 741; Carolina Cent. R. Co. *v.* McCaskill, 94 N. C. 746.

Pennsylvania.— Hummel *v.* Cumberland Valley R. Co., 175 Pa. St. 537, 34 Atl. 848, holding that no abandonment of land appropriated by a railroad company for a right of way will be presumed from a non-user at the time of taking.

Vermont.— Rutland R. Co. *v.* Chaffee, 71 Vt. 84, 42 Atl. 984, 48 Atl. 699.

United States.— Townsend *v.* Michigan Cent. R. Co., 101 Fed. 757, 42 C. C. A. 570.

See 41 Cent. Dig. tit. "Railroads," § 214.

Illustrations.— Thus a railroad company has been held not to abandon its right of way by reason of non-user because of the construction of its track over another route, where it appears that such construction was necessitated by its inability to obtain possession of the right of way in dispute and was temporary only and without any intention to abandon its rights which were in litigation. Atlanta, etc., R. Co. *v.* Southern R. Co., 153 Fed. 122, 82 C. C. A. 256. So where a conveyance to the company provided that the grantor should have the right to use any portion of the land not required by the grantee for railroad purposes, the grantor to yield possession when the land might be

non-user for any length of time will not work an abandonment.[81] Nor is an abandonment created by the use of the right of way for an unauthorized purpose,[82] or by excessive use or misuse.[83] If the non-user is permanent, that is, without an intention to resume the use, it will constitute an abandonment without regard to the length of time the right of way has not been used.[84] Under some statutes a non-user for a specified period constitutes an abandonment regardless of the intention of the railroad company.[85]

3. Loss or Forfeiture For Breach of Conditions in Private Grant. A railroad company's easement in a certain piece or strip of land may also be lost or forfeited, and the land revert to the owner, by reason of the company's failure to comply with certain conditions subsequent contained in the grant or donation of the land,[86] as by abandoning the use of the land for the purposes for which it

needed by the company, a failure by the company for forty years thereafter to inclose, improve, or occupy a part of such land does not affect its rights in the land. King *v.* Norfolk, etc., R. Co., 90 Va. 210, 17 S. E. 868. So where a deed reserves to the grantor a license to cultivate the outside twenty feet of the land conveyed, the fact that the railroad company erected a fence excluding such twenty feet does not constitute an abandonment of such strip. Chicago, etc., R. Co. *v.* Wood, 30 Ind. App. 650, 66 N. E. 923.

Mere non-user for a period of five years of a portion of a strip of land over which a railroad company has laid its tracks by reason of obstructions caused by a landslide, the remaining part being used by it for storing cars, is not an abandonment of its easement in the strip. Scarritt *v.* Kansas City, etc., R. Co., 148 Mo. 676, 50 S. W. 905.

Where a grant of a right to build on a certain street is unconditional as to time, and for fourteen years such right of way for a distance of a block and a half is entirely unused, such delay will not necessarily and as a matter of law constitute an abandonment. Denison, etc., R. Co. *v.* St. Louis Southwestern R. Co., 96 Tex. 233, 72 S. W. 161 [*affirming* 30 Tex. Civ. App. 474, 72 S. W. 201].

Ceasing to operate trains.—A railroad company does not abandon the land on which it has constructed its track so as to entitle the owner to revoke its license by ceasing to operate freight or passenger trains over it, where it continues to use it for purposes incident to and connected with its business in operating the road. Ft. Worth, etc., R. Co. *v.* Sweatt, 20 Tex. Civ. App. 543, 50 S. W. 162.

The mere non-user of the entire width of the right of way does not cause the unused part to revert to the public, even though the public are allowed by the company to use it as a thoroughfare. Pennsylvania R. Co. *v.* Freeport, 138 Pa. St. 91, 20 Atl. 940.

A slight deflection from the route as specified and a failure to occupy a few feet of the specified land granted is not an abandonment. Dickson *v.* St. Louis, etc., R. Co., 168 Mo. 90, 67 S. W. 642.

81. McClain *v.* Chicago, etc., R. Co., 90 Iowa 646, 57 N. W. 594; Conabeer *v.* New York Cent., etc., R. Co., 156 N. Y. 474, 51 N. E. 402 [*affirming* 84 Hun 34, 32 N. Y. Suppl. 6].

82. Gurney *v.* Minneapolis Union Elevator Co., 63 Minn. 70, 65 N. W. 336, 30 L. R. A. 534; Roby *v.* New York Cent., etc., R. Co., 142 N. Y. 176, 36 N. E. 1053 [*reversing* 65 Hun 532, 20 N. Y. Suppl. 551].

83. Roby *v.* New York Cent., etc., R. Co., 142 N. Y. 176, 36 N. E. 1053 [*reversing* 65 Hun 532, 20 N. Y. Suppl. 551].

84. McClain *v.* Chicago, etc., R. Co., 90 Iowa 646, 57 N. W. 594.

85. See New York, etc., R. Co. *v.* Boston, etc., R. Co., 36 Conn. 196; Gill *v.* Chicago, etc., R. Co., 117 Iowa 278, 90 N. W. 606; McClain *v.* Chicago, etc., R. Co., 90 Iowa 646, 57 N. Y. 594; and the statutes of the several states.

Under Iowa Code (1873), § 1260, if the right of way shall not be used or operated for a period of eight years the land shall revert (Fernow *v.* Chicago, etc., R. Co., 75 Iowa 526, 39 N. W. 869); but nothing less than non-user for eight years will entitle the owner to take possession, and at any time within the eight years the railroad company may reënter upon the right of way for the purpose of rebuilding its road (Fernow *v.* Chicago, etc., R. Co., *supra*). And so where a railroad company acquires the right to lay its tracks in an alley and also purchases a right of way adjoining thereto on which it lays its tracks but does not use the alley for tracks for over eight years, such non-user does not constitute an abandonment of the right of way in the alley within the meaning of such statute. Morgan *v.* Des Moines Union R. Co., 113 Iowa 561, 85 N. W. 902.

86. Roanoke Inv. Co. *v.* Kansas City, etc., R. Co., 108 Mo. 50, 17 S. W. 1000; Munkers *v.* Kansas City, etc., R. Co., 60 Mo. 334; Thomas *v.* Blue Ridge, etc., R. Co., 144 N. C. 729, 57 S. E. 523; McDowell *v.* Blue Ridge, etc., R. Co., 144 N. C. 721, 57 S. E. 520, holding that where land is conveyed as a right of way upon the condition that it shall revert if the company shall fail for five years to construct a line of railroad over the ground, the grant is forfeited by such failure.

A conveyance for railroad purposes will not

was granted,[87] or by failing to comply with a condition providing for a reversion in the case railroad company fails to erect and maintain a depot on the premises,[88] or to use the property for other terminal purposes.[89] But where the property has been dedicated as a right of way by the owner, he cannot declare it forfeited for failure to comply with a condition subsequent,[90] although such breach of condition will give him a right of action for damages.[91] So an agree-

be set aside for non-performance where it appears that the land has continually been used for such purposes. Noyes *v.* St. Louis, etc., R. Co., (Ill. 1889) 21 N. E. 487.

Construction.—Conditions subsequent, especially when relied on to work a forfeiture, must be created by express terms or clear implication, and are to be construed strictly against a forfeiture which is not favored in law. Conditions providing for a forfeiture are to be construed liberally in favor of the holder of the estate, and strictly against an enforcement of the forfeiture. Behlow *v.* Southern Pac. R. Co., 130 Cal. 16, 62 Pac. 295.

Where a lease of land to a railroad company "so long as the same shall be used for railroad purposes" recites that the company "is now engaged in altering and improving the railroad depot" "for the purpose of more conveniently transacting the business of said company, and for the better accommodation of the public," the lease continues so long only as the land is used for "public" railroad purposes, and upon a conveyance of the land by the company to an individual and the use of it for private railroad purposes the lessor's successor in title may recover it. Kugel *v.* Painter, 166 Pa. St. 592, 31 Atl. 338.

The proviso in section 4 of the act of March 3, 1875 (18 U. S. St. at L. 482 [U. S. Comp. St. (1901) p. 1569]), granting right of way over the public lands to railroad companies, that, "if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road," is a condition subsequent, and the failure to complete the road within the time limited does not operate *ipso facto* as a revocation of the grant, but merely authorizes the government to forfeit it by judicial proceedings or by an act of congress resuming title to the lands. Utah, etc., R. Co. *v.* Utah, etc., R. Co., 110 Fed. 879.

87. McClain *v.* Chicago, etc., R. Co., 90 Iowa 646, 57 N. W. 594 (holding that Code, § 1260, providing that eight years' non-user of a railroad right of way shall work a reversion does not effect forfeiture for abandonment of use in accordance with the conditions of the deed); Harrison *v.* Lexington, etc., R. Co., 9 B. Mon. (Ky.) 470 (holding, however, that where land is conveyed to a railroad company on the condition that the land shall revert to the grantor on the abandonment of the road and the road is sold under mortgages to the state, and by the state and by new companies chartered for the purpose it is carried forward to completion, the grantor is not entitled to a reconveyance of his land as for an abandonment); Roanoke Inv. Co. *v.* Kansas City, etc., R. Co., 108 Mo. 50, 17 S. W. 1000.

A suspension of the use of the land for a railroad purpose does not *ipso facto* work a forfeiture under a conveyance which provides that the land is to be held for the uses and purposes of a railroad and no other purpose, since the deed merely defines the use. Buttery *v.* Rome, etc., R. Co., 14 N. Y. St. 131.

88. Little Rock, etc., R. Co. *v.* Birnie, 59 Ark. 66, 26 S. W. 528; Jeffersonville, etc., R. Co. *v.* Barbour, 89 Ind. 375; Indianapolis, etc., R. Co. *v.* Hood, 66 Ind. 580; Owensboro, etc., R. Co. *v.* Griffith, 92 Ky. 137, 17 S. W. 277; Horner *v.* Chicago, etc., R. Co., 38 Wis. 165.

Illustrations.—Thus on the removal of a depot from a lot, conveyed to a railroad company "in consideration of the permanent location and construction of the depot," the lot reverts to the grantor. Indianapolis, etc., R. Co. *v.* Hood, 66 Ind. 580. So where a conveyance contains the proviso that a depot shall be permanently located within a certain distance of a certain place, the failure of the company to locate the depot within such distance has the effect of defeating the estate vested by the deed. Taylor *v.* Cedar Rapids, etc., R. Co., 25 Iowa 371. So where a conveyance contains an express condition that the land granted shall be used as a passenger station and shall revert when it shall cease to be so used, a lease, after maintaining the station for a while, to another railroad company which has a station some distance away on other land, which uses that station and abandons that on the land conveyed, constitutes a breach of the condition, and causes the land to revert to the grantor. Howell *v.* Long Island R. Co., 37 Hun (N. Y.) 381. But where a deed conveys one parcel of land "only for depot and other railroad purposes" and another parcel adjoining the former "for a railroad" the first condition named in the deed has no application to the second parcel of land described, and the railroad company having constructed and maintained a railroad on such second parcel, its failure to use the first parcel for railroad purposes does not work a forfeiture of the second parcel. Horner *v.* Chicago, etc., R. Co., 38 Wis. 165.

89. Chute *v.* Washburn, 44 Minn. 312, 46 N. W. 555.

90. Texas, etc., R. Co. *v.* Sutor, 56 Tex. 496.

91. Texas, etc., R. Co. *v.* Sutor, 56 Tex. 496.

ment under which a railroad company acquires a grant of a right of way and whereby it agrees to pay without litigation for all stock of the grantor killed by it does not forfeit the grant for a failure to comply with such an agreement, where there is no condition therein that the right of way shall revert to the grantor in case of such non-compliance.[92] Ordinarily a breach of a condition subsequent in a deed to a railroad company can be taken advantage of to enforce a forfeiture only by the grantor, his heirs or devisees,[93] and not by a subsequent grantee of other lands from the original owner.[94]

4. Revocation or Forfeiture of Grant of Rights in Highways or Public Places. As a general rule a legislative or municipal grant to a railroad company of the right to use a public street or highway for railroad purposes is a franchise and as such cannot be revoked by the municipality,[95] after the grant is accepted,[96] at least not without reasonable notice to the company;[97] unless there is a constitutional or statutory provision prohibiting irrevocable grants of such privileges,[98] or unless authority to make such revocation is reserved by ordinance or statute.[99] In the absence of such authority, the fact that the manner in which the road is operated constitutes a public nuisance does not authorize a municipality to terminate the rights of the railroad company and compel the removal of its tracks as a means of abating the nuisance.[1] But the failure of the railroad company to comply with certain conditions in the grant may operate as a forfeiture of the franchise or privilege,[2] as where the estate granted is limited to exist so long

92. Beaumont Pasture Co. *v.* Sabine, etc., R. Co., (Tex. Civ. App. 1897) 41 S. W. 543.

93. Waggoner *v.* Wabash R. Co., 185 Ill. 154, 56 N. E. 1050; Boone *v.* Clark, 129 Ill. 466, 21 N. E. 850, 5 L. R. A. 276.

94. Boone *v.* Clark, 129 Ill. 466, 21 N. E. 850, 5 L. R. A. 276. But see Reichenbach *v.* Washington Short Line R. Co., 10 Wash. 357, 38 Pac. 1126.

95. *Alabama.*— Mobile *v.* Louisville, etc., R. Co., 84 Ala. 115, 4 So. 106, 5 Am. St. Rep. 342.

California.— Workman *v.* Southern Pac. R. Co., 129 Cal. 536, 62 Pac. 185, 316 (holding that an ordinance granting a right of way over a street to a railroad company which contains no limitation of time for the completion of a double track is not to be construed as a revocable license for such completion, on the ground that a single track was first completed and used under the ordinance); Arcata *v.* Arcata, etc., R. Co., 92 Cal. 639, 28 Pac. 676.

Louisiana.— Alexandria *v.* Morgan's Louisiana, etc., R., etc., Co., 109 La. 50, 33 So. 65, holding that a city which has granted a right of way over its streets to a railroad company has no power to adjudge a breach of the grant and deprive a railroad company of its vested rights by forfeiture, such power being judicial.

New York.— Delaware, etc., R. Co. *v.* Buffalo, 65 Hun 464, 20 N. Y. Suppl. 448.

Wisconsin.— Sinnott *v.* Chicago, etc., R. Co., 81 Wis. 95, 50 N. W. 1097.

United States.— Chicago, etc., R. Co. *v.* Minnesota Cent. R. Co., 14 Fed. 525, 4 McCrary 606.

See 41 Cent. Dig. tit. "Railroads," § 216. And see, generally, Municipal Corporations, 28 Cyc. 889 *et seq.*

96. Arcata *v.* Arcata, etc., R. Co., 92 Cal. 639, 28 Pac. 676; East St. Louis Union R. Co. *v.* East St. Louis, 39 Ill. App. 398; Rio Grande R. Co. *v.* Brownsville, 45 Tex. 88.

97. Alexandria *v.* Morgan's Louisiana, etc., R., etc., Co., 109 La. 50, 33 So. 65; Sinnott *v.* Chicago, etc., R. Co., 81 Wis. 95, 50 N. W. 1097, holding that where a company has laid its tracks in a city street as authorized by Laws (1872), c. 119, § 11, subd. 5, and has continuously used them for eighteen years, an order of the board of public works requiring their removal on twenty-five days' notice is beyond the authority of the board, although Laws (1874), c. 184, passed after the construction of the tracks, empowers the city council to "direct and control railroad tracks" within the city.

98. See Mobile *v.* Louisville, etc., R. Co., 84 Ala. 115, 4 So. 106, 5 Am. St. Rep. 342.

99. Medford, etc., R. Co. *v.* Somerville, 111 Mass. 232 (under St. (1864) c. 229, § 15); Troy *v.* Troy, etc., R. Co., 49 N. Y. 657; Delaware, etc., R. Co. *v.* Oswego, 92 N. Y. App. Div. 551, 86 N. Y. Suppl. 1027, holding that where a city grants a railroad company permission to lay its tracks in a certain street, and the resolution contains a condition that the consent may be revoked at the pleasure of the city, and the company lays its tracks by virtue of such permission, the city has a right at any time thereafter to revoke such permission.

1. Chicago *v.* Union Stock Yards Co., 164 Ill. 224, 45 N. E. 430, 35 L. R. A. 281.

2. Arcata *v.* Arcata, etc., R. Co., 92 Cal. 639, 28 Pac. 676; Galveston, etc., R. Co. *v.* Galveston, 90 Tex. 398, 39 S. W. 96, 36 L. R. A. 33 [*reversing* (Civ. App. 1896) 37 S. W. 27], 91 Tex. 17, 39 S. W. 920 (construing a municipal grant under St. (1895) arts. 4426, 4438); Pacific R. Co. *v.* Leaven-

only as such property shall be used for railroad purposes and the property is not appropriated to such purposes within a reasonable time;[3] and upon such failure or breach the municipality may reënter and take possession of the street and remove the railroad tracks.[4] But such a breach does not *ipso facto* terminate the company's right of way so as to entitle an abutting owner to maintain an action for damages, as for an unlawful occupation of the street.[5] Where the railroad company acquires its right to use the street directly from the legislature, the fact that it obtains a license from the city to build a track upon a street and that it subsequently tears up the track and surrenders possession to the city does not estop it from asserting its power to build on that street under the legislative grant.[6] The state or municipality only is entitled to enforce such a forfeiture.[7]

5. Rights of Parties or Privies on Abandonment.[8] Where a railroad company having an easement in land for a right of way or other railroad purposes abandons or forfeits the right to the same or a portion thereof, the title and right to the land abandoned or forfeited reverts and entitles a recovery thereof by the grantor,[9] or the then owner of the servient estate;[10] and even where the servient estate has been transferred to another, the abandoned or forfeited land reverts to the original grantor if the deed or grant expressly so provides, or the reversionary interest has not otherwise passed out of such grantor.[11] Under some statutes this reversion takes place without a reconveyance or order of court,[12] upon the owner's retaking possession of the property.[13] If the grantor who is in possession and control of the property in the *bona fide* belief that the company has abandoned the same conveys it to a *bona fide* purchaser, the railroad company is estopped

worth, 18 Fed. Cas. No. 10,649, 1 Dill. 393. And see, generally, Municipal Corporations, 28 Cyc. 892.

3. Macon *v.* East Tennessee, etc., R. Co., 82 Ga. 501, 9 S. E. 1127.

4. Pacific R. Co. *v.* Leavenworth, 18 Fed. Cas. No. 10,649, 1 Dill. 393.

5. Knight *v.* Kansas City, etc., R. Co., 70 Mo. 231.

6. Atlantic, etc., R. Co. *v.* St. Louis, 66 Mo. 228 [*reversing* 3 Mo. App. 315].

7. Denison, etc., R. Co. *v.* St. Louis Southwestern R. Co., 96 Tex. 233, 72 S. W. 161 [*affirming* 30 Tex. Civ. App. 474, 72 S. W. 201].

8. Enforcement of forfeiture generally see Deeds, 13 Cyc. 709 *et seq.*

9. Hamel *v.* Minneapolis, etc., R. Co., 97 Minn. 334, 107 N. W. 139; Mobile, etc., R. Co. *v.* Kamper, 88 Miss. 817, 41 So. 513 (holding that where land is conveyed to a railroad company for railroad purposes only and thereafter the company abandons some of the land, the grantor is entitled to recover that part of the land which the company has abandoned); Roby *v.* New York Cent., etc., R. Co., 142 N. Y. 176, 36 N. E. 1053 [*reversing* 65 Hun 532, 20 N. Y. Suppl. 551]; Griswold *v.* Minneapolis, etc., R. Co., 12 N. D. 435, 97 N. W. 538, 102 Am. St. Rep. 572.

10. Roanoke Inv. Co. *v.* Kansas City, etc., R. Co., 108 Mo. 50, 15 S. W. 1000; Missouri Pac. R. Co. *v.* Bradbury, 106 Mo. App. 450, 79 S. W. 966; McLemore *v.* Charleston, etc., R. Co., 111 Tenn. 639, 69 S. W. 338.

Such abandonment can only be taken advantage of by the owner of the fee and cannot avail a city which claims the land for public purposes through a dedication made by a lessee of the railroad company. Durham *v.* Southern R. Co., 121 Fed. 894.

Under Iowa Code (1873), § 2660, providing for the reversion of a railroad right of way to the owner of the tract from which it was taken, an abandoned right of way reverts to him who owns such tract at the time of the reversion, and not to him who owned it when the right of way was taken. Gill *v.* Chicago, etc., R. Co., 117 Iowa 278, 90 N. W. 606 (holding that the right of way reverts to the landowner under a deed to the company providing that the right of way shall revert to the grantor if the railroad company or its assignees cease permanently to use the road or abandon the same); Smith *v.* Hall, 103 Iowa 95, 72 N. W. 427.

11. Spencer *v.* Wabash R. Co., 132 Iowa 129, 109 N. W. 453 (holding that where a deed of a railroad right of way expressly provides that if the premises are not used for railroad purposes they shall revert and vest in the grantor of such deed, the fee in such right of way reverts to the grantor on the abandonment of the use by the railroad company, notwithstanding code section 2015, providing that if a railroad shall not be used or operated for eight years, the right of way, including the road-bed, shall revert to the "owner of the land from which said right of way was taken"); McLemore *v.* Charleston, etc., R. Co., 111 Tenn. 639, 69 S. W. 338.

12. Flint, etc., R. Co. *v.* Rich, 91 Mich. 293, 51 N. W. 1001, construing Laws (1887), No. 275.

13. Hannibal, etc., R. Co. *v.* Frowein, 163 Mo. 1, 63 S. W. 500; Schlesinger *v.* Kansas City, etc., R. Co., 152 U. S. 444, 14 S. Ct. 647, 38 L. ed. 507.

to assert any easement under its deed against such purchaser.[14] A reversion for an abandonment, however, does not take effect until there is an actual abandonment.[15] Where the company's occupation of the land is not illegal, its rails and other structures thereon do not become a part of the realty, and it should have a reasonable time in which to remove them, upon abandonment;[16] and the fact that the landowner has been allowed to take possession of the land embraced in the right of way and hold it for a term of years less than is required to extinguish the company's easement does not imply relinquishment by the company of its right to enter and remove its structures.[17] Under a Texas statute, although the railroad company forfeits its charter by non-construction of the road, its right of way does not revert to the grantors or vest in the state, but constitutes an asset of the company to be administered for the benefit of its creditors and shareholders on dissolution;[18] and another railroad company not connected with the old one has no right to take possession of the unfinished road and hold it as its own property.[19] Where under a contract to convey a strip of land containing a certain number of acres on each side of the right of way, the company so constructs its road as to leave a tract less than that number of acres on one side, it cannot claim an equivalent on the other side for what it has thus voluntarily abandoned.[20]

6. Rights of Successors of Railroad Company. Where a railroad company is not judicially dissolved, although it ceases to do business and its charter rights and privileges are exercised by another company, the latter succeeds to the rights of the former in the right of way.[21]

7. Rights and Remedies of Parties or Persons Interested. Except where there is a statutory provision expressly declaring a forfeiture for a failure to perform certain conditions in a grant,[22] or where the grantor is in possession,[23] no revestiture in the grantor or his heirs takes place until there has been a judicial declaration of the forfeiture in a suit instituted for that purpose,[24] and to cancel the deed

14. Lake Erie, etc., R. Co. *v.* Ziebarth, 6 Ind. App. 228, 33 N. E. 256.

15. Pennsylvania R. Co. *v.* Parke, 42 Pa. St. 31.

Notice of an intention to abandon is not such an abandonment. Pennsylvania R. Co. *v.* Parke, 42 Pa. St. 31.

16. McNair *v.* Rochester, etc., R. Co., 14 N. Y. Suppl. 39. See also Pennsylvania R. Co. *v.* Parke, 42 Pa. St. 31. But see Missouri Pac. R. Co. *v.* Bradbury, 106 Mo. App. 450, 79 S. W. 966.

Stone piers built by a railroad company as part of its road on land over which it has acquired a right of way do not, although firmly imbedded in the earth, become the property of the owner of the land, but may be removed by the company on its abandoning its purpose of completing the road. Wagner *v.* Cleveland, etc., R. Co., 22 Ohio St. 563, 10 Am. Rep. 770.

17. Wagner *v.* Cleveland, etc., R. Co., 22 Ohio St. 563, 10 Am. Rep. 770.

18. Sulphur Springs, etc., R. Co. *v.* St. Louis, etc., R. Co., 2 Tex. Civ. App. 650, 22 S. W. 107, 23 S. W. 1012, construing Rev. St. arts. 4206, 4278.

19. Sulphur Springs, etc., R. Co. *v.* St. Louis, etc., R. Co., 2 Tex. Civ. App. 650, 22 S. W. 107, 23 S. W. 1012.

20. Chidester *v.* Springfield, etc., R. Co., 59 Ill. 87.

21. Davis *v.* Memphis, etc., R. Co., 87 Ala. 633, 6 So. 140.

22. See Arcata *v.* Arcata, etc., R. Co., 92 Cal. 639, 28 Pac. 676.

23. Hannibal, etc., R. Co. *v.* Frowein, 163 Mo. 1, 63 S. W. 500.

24. Arcata *v.* Arcata, etc., R. Co., 92 Cal. 639, 28 Pac. 676; Close *v.* Burlington, etc., R. Co., 64 Iowa 149, 19 N. W. 886; Taylor *v* Cedar Rapids, etc., R. Co., 25 Iowa 371; Harrison *v.* Lexington, etc., R. Co., 9 B. Mon. (Ky.) 470.

Parties.— Where a grant by the legislature of a right to use a street for railroad purposes conditioned upon the consent of the city becomes subject to be terminated by reason of non-user, the proper party to reënter or bring suit for the premises is the city whether the limitation to the uses expressed be regarded as a special limitation strictly, or only as a condition subsequent. Macon *v.* East Tennessee, etc., R. Co., 82 Ga. 501, 9 S. E. 1127.

Pleading.—A complainant in an action to quiet title to land conveyed to a railroad company for railroad purposes for breach of condition cannot invoke a statute providing that lands occupied by a railroad company shall be forfeited to the original owners on failure to operate the road for six months where the complainant has not referred to the act in his complaint or shown any facts under which he can avail himself of such act. Behlow *v.* Southern Pac. R. Co., 130 Cal. 16, 62 Pac. 295. A complaint for forfeiture of a right of way granted on con-

as a cloud on the owner's title.[25] It is not necessary that the grantor should demand compliance with such condition before bringing suit;[26] but in some jurisdictions no action for the recovery of the land can be brought by the grantor until he has made entry upon the land after condition broken, or made claim, if entry is impossible,[27] except where he is already in possession.[28] Ordinarily equity will not interfere to set aside or forfeit a conveyance of a right of way to a railroad company for a breach of a condition subsequent;[29] but in such case the owner of the fee should resort to a court of law to recover the damages to which he is entitled by reason of the breach.[30] But, on the other hand, equity will not relieve against a proper forfeiture where there is no sufficient excuse for the breach or default,[31] and where there is nothing harsh or inequitable in its terms or enforcement.[32] Where there has been an abandonment or breach of conditions subsequent, the landowner may maintain ejectment for the recovery of his land.[33] The owner,

dition that the construction of the road be on a line designated, continuous operation of the road when constructed, establishment of stations at certain points and maintenance of the road in good condition, which alleges that the stations were not established, that the road on its completion was not operated continuously or at all, and that it has long since ceased to be operated and has not been kept in good condition but has been allowed to become wholly out of repair, and that there has been a total failure to comply with the conditions, sufficiently states, as against a general demurrer, the completion of the road and breaches of the conditions. Jones *v.* Los Angeles, etc., R. Co., (Cal. 1894) 37 Pac. 656.

Evidence is admissible in an action by a landowner to recover a right of way for nonuser that the road was originally built to reach certain coal mines which have been abandoned and that the coal company obtained the right of way. Gill *v.* Chicago, etc., R. Co., 117 Iowa 278, 90 N. W. 606.

25. Vicksburg, etc., R. Co. *v.* Ragsdale, 54 Miss. 200, holding also that on such a bill the question whether there has been an abandonment or forfeiture of the grant will be determined.

Pleading.— In an action to quiet title to land deeded to a railroad company on condition that it should revert to the grantors, their heirs and assigns, in case it should cease to be used for railroad purposes, where the complaint shows that the company entered and constructed its track but does not allege that the track had been removed, a general allegation that for four years or more it had ceased to use or occupy it for railroad purposes is insufficient to show a breach of conditions. Mouat *v.* Seattle, etc., R. Co., 16 Wash. 84, 47 Pac. 233.

26. Lyman *v.* Suburban R. Co., 190 Ill. 320, 60 N. E. 515, 52 L. R. A. 645.

27. Nicoll *v.* New York, etc., R. Co., 12 N. Y. 121 [*affirming* 12 Barb. 460]; Hammond *v.* Port Royal, etc., R. Co., 15 S. C. 10; Horner *v.* Chicago, etc., R. Co., 38 Wis. 165. See Boone *v.* Clark, 129 Ill. 466, 21 N. E. 850, 5 L. R. A. 276.

28. Taylor *v.* Cedar Rapids, etc., R. Co., 25 Iowa 371; Hannibal, etc., R. Co. *v.* Frowein, 163 Mo. 1, 63 S. W. 500.

Notice.— Where a railroad right of way is granted under condition that unless the company shall construct a line of railroad within five years the land shall revert without any obligation on the grantor's part to reënter before condition broken and the grantor remains in possession, if on forfeiture the grantors are required to do anything to revest the estate, it is sufficiently done by their notifying the company's contractor not to enter upon the land. Thomas *v.* Blue Ridge, etc., R. Co., 144 N. C. 729, 57 S. E. 523; McDowell *v.* Blue Ridge, etc., R. Co., 144 N. C. 721, 57 S. E. 520.

29. Savannah, etc., R. Co. *v.* Atkinson, 94 Ga. 780, 21 S. E. 1010 (holding, however, that where a conveyance contains a promise by the company to construct the road and states that the consideration is the benefits expected to accrue to the grantor, such grantor, on the company's failure to build the road and abandonment of the work, is entitled to cancellation of the deed and damages for the injury to his land); Stringer *v.* Keokuk, etc., R. Co., 59 Iowa 277, 13 N. W. 308 (holding that a conveyance of a right of way will not be set aside in equity simply because the grantor fails to perform an agreement in the deed to build a fence "before grading is done" where such grantee cannot be placed *in statu quo*.

Fraud.— The fact that a railroad company represented, when land for a right of way was deeded to it, that it had theretofore located its line of road over the land conveyed and would do certain things in the future, and subsequently abandoned the proposed route, is not ground for the cancellation of the deed in the absence of anything to show that such representations were falsely made. Stannard *v.* Aurora, etc., R. Co., 220 Ill. 469, 77 N. E. 254.

30. Stannard *v.* Aurora, etc., R. Co., 220 Ill. 469, 77 N. E. 254. And see *supra*, V, G, 10, a.

31. Thomas *v.* Blue Ridge, etc., R. Co., 144 N. C. 729, 57 S. E. 523; McDowell *v.* Blue Ridge, etc., R. Co., 144 N. C. 721, 57 S. E. 520.

32. McDowell *v.* Blue Ridge, etc., R. Co., 144 N. C. 721, 57 S. E. 520; Griswold *v.* Minneapolis, etc., R. Co., 12 N. D. 435, 97 N. W. 538, 102 Am. St. Rep. 572.

33. *Alabama.*— Tennessee, etc., R. Co. *v.* Taylor, 102 Ala. 224, 14 So. 379.

however, may, by his acts or conduct, waive or estop himself from enforcing a forfeiture,[34] as where he fails to reënter or assert some claim within a reasonable time after the breach of condition,[35] particularly where the railroad company is permitted to use and make valuable improvements on the land after the condition is broken.[36] In an action to enforce an abandonment or forfeiture for a breach of conditions, the question whether there has been such an abandonment or breach is generally for the jury to determine, from the facts of the particular case.[37]

VI. CONSTRUCTION, MAINTENANCE, AND EQUIPMENT.*

A. Authority and Duty of Railroad Company — 1. DUTY TO CONSTRUCT.[38]

A statute or charter which does not expressly require but merely authorizes the construction of a railroad does not impose any positive obligation upon the company to do so,[39] or to complete the entire line authorized after building a part of it,[40] and consequently the railroad company cannot be compelled to do

Mississippi.— Vicksburg, etc., R. Co. *v.* Ragsdale, 54 Miss. 200.

Missouri.— Ruddick *v.* St. Louis, etc., R. Co., 116 Mo. 25, 22 S. W. 499, 38 Am. St. Rep. 570; Baker *v.* Chicago, etc., R. Co., 57 Mo. 265.

New York.— Ludlow *v.* New York, etc., R. Co., 12 Barb. 440.

Pennsylvania.— Daubert *v.* Pennsylvania R. Co., 155 Pa. St. 178, 26 Atl. 108; Guss *v.* West Chester R. Co., 1 Chest. Co. Rep. 363.

See 41 Cent. Dig. tit. "Railroads," § 219.

Compare Hornback *v.* Cincinnati, etc., R. Co., 20 Ohio St. 81.

Equitable ejectment see Hall *v.* Clearfield, etc., R. Co., 168 Pa. St. 64, 31 Atl. 940.

Where the execution of a judgment of ejectment against a railroad company will operate harshly and seriously affect public interests, equity may suspend its execution for a period of time sufficient to enable it to prosecute condemnation proceedings. Griswold *v.* Minneapolis, etc., R. Co., 12 N. D. 435, 97 N. W. 538, 102 Am. St. Rep. 572.

34. Vicksburg, etc., R. Co. *v.* Ragsdale, 54 Miss. 200; Baker *v.* Chicago, etc., R. Co., 57 Mo. 265; Griswold *v.* Minneapolis, etc., R. Co., 12 N. D. 435, 97 N. W. 538, 102 Am. St. Rep. 572 (plaintiff held not to be estopped from asserting his right of possession by an action in the nature of ejectment); Hammond *v.* Port Royal, etc., R. Co., 15 S. C. 10 (holding that whether the grantor has waived his right to enforce a forfeiture is a question of intention depending upon the facts, and is properly submitted to the jury).

A deed of a right of way to a railroad company given to correct a prior deed therefor and expressly reserving to the grantor all rights under the former deed is not a waiver of an abandonment of the right of way by the company. Gill *v.* Chicago, etc., R. Co., 117 Iowa 278, 90 N. W. 606.

35. Bain *v.* Parker, 77 Ark. 168, 90 S. W. 1000; Kenner *v.* American Contract Co., 9 Bush (Ky.) 202.

36. Kenner *v.* American Contract Co., 9 Bush (Ky.) 202.

37. Tennessee, etc., R. Co. *v.* Taylor, 102 Ala. 224, 14 So. 379; Little Rock, etc., R. Co. *v.* Birnie, 59 Ark. 66, 26 S. W. 528; Hickox *v.* Chicago, etc., R. Co., 94 Mich. 237, 53 N. W. 1105; Ft. Worth, etc., R. Co. *v.* Sweatt, 20 Tex. Civ. App. 543, 50 S. W. 162.

38. Failure to construct as ground for forfeiture of franchise see *supra*, II, J, 4.

Duty to operate after construction see *infra*, X, A.

Accommodations and facilities at stations see *infra*, X, A, 1, d.

Train service and accommodations see *infra*, X, A, 1, e.

39. *Minnesota.*— State *v.* Southern Minnesota R. Co., 18 Minn. 40.

New York.— People *v.* Albany, etc., R. Co., 24 N. Y. 261, 82 Am. Dec. 295 [*affirming* 37 Barb. 216].

Virginia.— Sherwood *v.* Atlantic, etc., R. Co., 94 Va. 291, 26 S. E. 943.

United States.— State *v.* Southern Kansas R. Co., 24 Fed. 179; Farmers' Loan, etc., Co. *v.* Henning, 8 Fed. Cas. No. 4,666.

England.— York, etc., R. Co. *v.* Reg., 1 C. L. R. 119, 1 E. & B. 858, 17 Jur. 630, 22 L. J. Q. B. 225, 7 R. & Can. Cas. 459, 1 Wkly. Rep. 358, 72 E. C. L. 858 [*reversing* 1 E. & B. 178, 72 E. C. L. 178]; Great Western R. Co. *v.* Reg., 1 E. & B. 874, 1 Wkly. Rep. 358 note, 72 E. C. L. 874 [*reversing* 1 E. & B. 253, 72 E. C. L. 253]; Scottish North Eastern R. Co. *v.* Stewart, 5 Jur. N. S. 607, 3 Macq. H. L. 382, 7 Wkly. Rep. 458; Reg. *v.* Great Western R. Co., 62 L. J. Q. B. 572, 69 L. T. Rep. N. S. 572, 9 Reports 127.

See 41 Cent. Dig. tit. "Railroads," § 220.

Authority to construct a branch line imposes no obligation upon the railroad company to do so. Sherwood *v.* Atlantic, etc., R. Co., 94 Va. 291, 26 S. E. 943.

40. State *v.* Southern Minnesota R. Co., 18 Minn. 40; People *v.* Albany, etc., R. Co., 24 N. Y. 261, 82 Am. Dec. 295 [*affirming* 37 Barb. 216]; York, etc., R. Co. *v.* Reg., 1 C. L. R. 119, 1 E. & B. 858, 17 Jur. 630, 22 L. J. Q. B. 225, 7 R. & Can. Cas. 459, 1 Wkly. Rep. 358, 72 E. C. L. 858 [*reversing* 1 E. & B. 178, 72 E. C. L. 178].

In West Virginia under Code (1887), c. 54, § 66, a railroad company chartered under the general law of the state may complete and

* By James A. Gwyn.

so,[41] the only result of its failure to do so being a liability to a forfeiture of the rights and franchises conferred.[42] So also a statute authorizing a connection between different railroads for through transportation is permissive and not mandatory.[43] If the railroad company receives a grant of land from the state in consideration of the construction of a particular line of road, its acceptance constitutes a contract on the part of the railroad company which the state is entitled to enforce;[44] but the rule is otherwise where the land was never received and the right to receive it has been forfeited by a failure to construct or complete the road within the time limited,[45] and where the company was merely to receive land in instalments of a certain amount after the completion of any section of the road of a certain length, the completion of a part of the road and the receipt of the land to which it was thereby entitled imposes no obligation upon the company to complete the road, but the failure to do so merely forfeits the right to any further benefits under the grant.[46] The duty of constructing switches or sidings for the benefit of private persons may be imposed by contract.[47]

2. Authority to Construct — a. In General.[48] The right to condemn property for and to construct and operate a railroad is a franchise which can be exercised only by legislative authority.[49] Any conditions precedent to the commencement of the construction prescribed by statute or the charter of the company must be complied with,[50] and it is in some cases required as a prerequisite to the commencement of the work that the full capital stock shall be subscribed and a certain amount paid in or other arrangements made to insure the completion of the road,[51] or that the company shall deposit with the state treasurer a certain sum for each mile of the proposed road, the amount to be refunded in instalments as the work of construction progresses,[52] or that before beginning the

operate a part of its road and as to the part so completed and operated retain its corporate existence, franchises, and powers. Wheeling Bridge, etc., R. Co. *v.* Camden Consol. Oil Co., 35 W. Va. 205, 13 S. E. 369.

41. State *v.* Southern Minnesota R. Co., 18 Minn. 40; Sherwood *v.* Atlantic, etc., R. Co., 94 Va. 291, 26 S. E. 943; York, etc., R. Co. *v.* Reg., 1 C. L. R. 119, 1 E. & B. 858, 17 Jur. 630, 22 L. J. Q. B. 225, 7 R. & Can. Cas. 459, 1 Wkly. Rep. 358, 72 E. C. L. 858 [*reversing* 1 E. & B. 178, 72 E. C. L. 178]; Great Western R. Co. *v.* Reg., 1 E. & B. 874, 1 Wkly. Rep. 358 note, 72 E. C. L. 874 [*reversing* 1 E. & B. 253, 72 E. C. L. 253].

42. People *v.* Albany, etc., R. Co., 24 N. Y. 261, 82 Am. Dec. 295 [*affirming* 37 Barb. 216]; Farmers' L. & T. Co. *v.* Henning, 8 Fed. Cas. No. 4,666.

Forfeiture of franchise for failure to construct or complete road see *supra*, II, J, 4.

43. Richmond *v.* Dubuque, etc., R. Co., 33 Iowa 422.

44. Farmers' L. & T. Co. *v.* Henning, 8 Fed. Cas. No. 4,666.

45. Kansas *v.* Southern Kansas R. Co., 24 Fed. 179.

46. State *v.* Southern Minnesota R. Co., 18 Minn. 40; Kansas *v.* Southern Kansas R. Co., 24 Fed. 179.

47. Greene *v.* West Cheshire R. Co., L. R. 13 Eq. 44, 41 L. J. Ch. 17, 25 L. T. Rep. N. S. 409, 20 Wkly. Rep. 54.

Extent of duty.—An agreement to construct and maintain a siding does not bind the company to construct sheds or to keep one of its servants in attendance at the siding. Lytton *v.* Great Northern R. Co., 2 Jur. N. S. 436, 2 Kay & J. 394, 4 Wkly. Rep. 441, 69 Eng. Reprint 836.

Specific performance of contract see *infra*, VI, A, 4.

48. Right to construct lateral branch roads see *supra*, IV, B, 2, a.

49. Chicago, etc., R. Co. *v.* Dunbar, 95 Ill. 571; Blake *v.* Winona, etc., R. Co., 19 Minn. 418, 18 Am. Rep. 345. See also, generally, Franchises, 19 Cyc. 1459.

50. Astor *v.* New York Arcade R. Co., 48 Hun (N. Y.) 562, 1 N. Y. Suppl. 174 [*affirmed* in 113 N. Y. 93, 20 N. E. 594, 2 L. R. A. 789]; Bailey *v.* New York Arcade R. Co., 1 N. Y. Suppl. 304.

51. Astor *v.* New York Arcade R. Co., 48 Hun (N. Y.) 562, 1 N. Y. Suppl. 174 [*affirmed* in 113 N. Y. 93, 20 N. E. 594, 2 L. R. A. 789]; Bailey *v.* New York Arcade R. Co., 1 N. Y. Suppl. 304.

Condition dependent upon mode of construction.— Where a company has been authorized to construct a railroad and is afterward authorized by statute to construct it in sections of five miles each, provided it shall not commence the construction of any portion within a certain distance of one of its termini until all the stock is subscribed for and a certain proportion paid in, it is not obliged to have the stock subscribed for and such amount paid in as a condition precedent to constructing the whole road not in sections as authorized by the latter statute. Boston, etc., R. Corp. *v.* Midland R. Co., 1 Gray (Mass.) 340.

52. Wilson *v.* Swain, 60 N. J. L. 115, 36

work of construction it shall be determined by some tribunal designated for that purpose whether the public convenience and necessity require the construction of the proposed road.[53]

b. Switches and Sidings.[54] A railroad company may construct switches or side-tracks for the purpose of facilitating its operation upon any land which it may own or acquire the legal consent of the owner to use for such purpose if no public interest or private right is affected thereby,[55] and legislative authority to construct a railroad includes the right to construct such turnouts, sidings, and switches as are incident to the convenient and proper operation of the road.[56]

3. Time For Commencement or Completion of Construction — a. In General. In some cases there are statutory or charter provisions limiting the time within which the railroad company must begin or complete the construction of its road,[57] or requiring that it shall complete a certain number of miles each year;[58] and where the time for completion is so limited the company has no absolute right to extend its road beyond the point completed at the expiration of such time,[59] while under some of the statutes a failure to begin or complete the road within the time limited works a forfeiture of the corporate powers and franchises of the

Atl. 778, holding that a failure of the state treasurer to repay money so deposited in compliance with the New Jersey statute of 1879, upon proof that an equal sum has been expended in the construction of the road, is not excused by the fact that other persons claim a right to or interest in the deposit and that the duty being purely ministerial may be enforced by mandamus.

53. Milford, etc., R. Co.'s Petition, 68 N. H. 570, 36 Atl. 545; People *v.* Railroad Com'rs, 160 N. Y. 202, 54 N. E. 697 [*affirming* 40 N. Y. App. Div. 559, 58 N. Y. Suppl. 94]; Matter of Amsterdam, etc., R. Co., 86 Hun (N. Y.) 578, 33 N. Y. Suppl. 1009.

Determination as to necessity for road see *supra*, I, B, 2.

54. Lateral or branch roads as distinguished from switches and sidings see *supra*, IV, B, 2, a.

55. Bangor, etc., R. Co. *v.* Smith, 47 Me. 34.

56. Lake Shore, etc., R. Co. *v.* Baltimore, etc., R. Co., 149 Ill. 272, 37 N. E. 91; Black *v.* Philadelphia, etc., R. Co., 58 Pa. St. 249; Philadelphia, etc., R. Co. *v.* Williams, 54 Pa. St. 103.

Time for construction see *infra*, VI, A, 3, b.

What constitutes side-track.—A track connecting the road of one railroad company with that of another for the purpose of exercising a right of passage over the latter road as secured by a lease is not a branch line, but merely a side-track, the construction of which is included in the general power to build a road. Lake Shore, etc., R. Co. *v.* Baltimore, etc., R. Co., 149 Ill. 272, 37 N. E. 91.

Necessity for landowner's consent or condemnation.— Where the location of the proposed railroad is not definitely described upon the map filed or in the instrument executed by the property-owner conveying a right of way, the track as established at the time the grant is made is unchangeable and the company has no power to build additional tracks, switches, or sidings without the property-owner's consent or condemnation proceedings. Stephens *v.* New York, etc., R. Co., 175 N. Y. 72, 67 N. E. 119.

57. See the statutes of the several states; and the following cases:

California.— Arcata *v.* Arcata, etc., R. Co., 92 Cal. 639, 28 Pac. 676.

Connecticut.—Danbury, etc., R. Co. *v.* Wilson, 22 Conn. 435.

Maine.— Peavey *v.* Calais R. Co., 30 Me. 498.

New Jersey.— State *v.* Bergen Neck R. Co., 53 N. J. L. 108, 20 Atl. 762.

New York.— Farnham *v.* Benedict, 107 N. Y. 159, 13 N. E. 784 [*reversing* 39 Hun 22].

Canada.— Ontario, etc., R. Co. *v.* Canadian Pac. R. Co., 14 Ont. 432.

See 41 Cent. Dig. tit. "Railroads," § 223.

Statute construed.—A statutory provision that if the company shall not expend a certain amount of money upon the road within two years or if it shall not complete the road within four years, the rights, privileges, and powers of the company shall be null and void, is not an alternative requirement but requires that the company shall both expend the sum stated and complete the road within the periods respectively provided therefor. Danbury, etc., R. Co. *v.* Wilson, 22 Conn. 435.

If there is a bona fide beginning of the work of construction it is sufficient, although the company, owing to financial reasons but without any intention of abandoning the road, subsequently suspends work on its construction. Ontario, etc., R. Co. *v.* Canadian Pac. R. Co., 14 Ont. 432.

58. Madera R. Co. *v.* Raymond Granite Co., 3 Cal. App. 668, 87 Pac. 27, holding, however, that the California statute requiring that every railroad company after commencing construction shall complete five miles of road each year or forfeit the right to extend the road beyond the point then completed does not limit the right to construct a road to one not less than five miles in length.

59. Peavey *v.* Calais R. Co., 30 Me. 498.

company.[60] The time specified by a statute or charter for the commencement or completion of a railroad is not, however, irrevocable, but the legislature and the railroad company may by mutual consent change it at any time,[61] or the legislature may grant an extension of time;[62] but a statute granting an extension of time for the completion of any railroad not finished within the time originally limited does not extend the time originally limited for the commencement of its construction,[63] or have the effect of reviving a company whose corporate powers have already been forfeited at the time of the enactment of the statute,[64] nor does a general statute extending the time for the construction of railroads already in default apply so as to extend the time for constructing a railroad not then in default.[65] A contract between a railroad company and a landowner, by which the railroad company agrees to construct a bridge over its road at a certain point within a certain time after the completion of the road, imposes no obligation upon the company to complete the road within any particular time or within a reasonable time.[66]

b. Switches, Sidings, Branches, and Extensions. Statutory or charter provisions limiting the time for the construction of a railroad do not apply to the construction of sidings and switches;[67] but if the company has constructed its

60. Farnham *v.* Benedict, 107 N. Y. 159, 13 N. E. 784 [*reversing* 39 Hun 22].

Forfeiture of rights and franchises see *supra*, II, J, 4.

61. Ross *v.* Chicago, etc., R. Co., 77 Ill. 127.

62. Ross *v.* Chicago, etc., R. Co., 77 Ill. 127. See also Baltimore, etc., R. Co. *v.* Van Ness, 2 Fed. Cas. No. 830, 4 Cranch C. C. 595.

A statute is not unconstitutional as being a private or special law which extends the period for the completion of railroads for a certain number of years, because it only applies to railroad companies formed under the general railroad law, and of these only to those whose time for completion as originally limited would expire during a certain year. State *v.* Bergen Neck R. Co., 53 N. J. L. 108, 20 Atl. 762.

Under the New Jersey statute of 1887, granting a two years' extension of time for the completion of railroads whose original limit expired during that year, and the statute of 1889, granting a similar extension to roads whose time limit expired during the year of 1889, a railroad company is within the application of the latter statute and entitled to a second extension whose original time limit expired during the period prescribed by the first statute and was extended by that statute. State *v.* Bergen Neck R. Co., 53 N. J. L. 108, 20 Atl. 762.

Construction of statutes.— Where a railroad charter providing that the road "shall be completed within five years from the sanction of this Act" was subsequently amended by a provision that the former limitation is "replaced" by the following: "The railway shall be completed within seven years of the passing of this act," it was held that the new limitation did not run from the date of the amendment but from the date of the original statute, making an actual extension of only two years. Montreal, etc., R. Co. *v.* Chateauguay, etc., R. Co., 13 Quebec K. B. 256.

63. Farnham *v.* Benedict, 107 N. Y. 159, 13 N. E. 784 [*reversing* 39 Hun 22].

64. Farnham *v.* Benedict, 107 N. Y. 159, 13 N. E. 784 [*reversing* 39 Hun 22], holding that the New York statute of 1875, extending the time for the completion of unfinished railroads, does not revive a company whose corporate powers have been forfeited for failure to commence the construction of the road within the time originally limited.

The New York statute of 1879 extending the time for completing any unfinished railroad for the further period of two years expressly provided that it should not have the effect of reviving any corporation whose corporate powers had been forfeited for any cause. Sodus Bay, etc., R. Co. *v.* Lapham, 43 Hun 314, holding that the statute did not operate to extend the time of construction of a railroad where the company authorized to construct it had executed a mortgage on its rights and franchises which had been foreclosed and its rights and franchises sold, since such foreclosure terminated the corporate existence of the company and worked a forfeiture of its rights.

65. *In re* Brooklyn, etc., R. Co., 72 N. Y. 245.

66. St. Louis, etc., R. Co. *v.* Lurton, 72 Ill. 118.

67. Arcata *v.* Arcata, etc., R. Co., 92 Cal. 639, 28 Pac. 676; Pottsville Borough *v.* People's R. Co., 148 Pa. St. 175, 23 Atl. 900.

A charter provision requiring a railroad company "as soon as they conveniently can" to locate and construct the road and its appendages does not compel the company to exercise its whole authority in the very beginning or prevent the subsequent construction of such switches and sidings as may become necessary for the proper operation of the road. Philadelphia, etc., R. Co. *v.* Williams, 54 Pa. St. 103.

road within the time limited it may subsequently construct from time to time, such switches and sidings as may be necessary for the handling of its business or proper operation of the road.[68] So also the time limited for the construction of a railroad applies to the road as authorized by its charter and not to an extension authorized by a subsequent statute;[69] and where a railroad company authorized to build a particular line of road and limited as to the time of construction is also authorized to construct branch lines, the time limitation does not apply to the branch lines.[70] Where a company is authorized to construct two branches from different places converging at a certain point, it is immaterial which of such branches is constructed first.[71]

4. Remedies. Where a railroad company is legally bound to construct or complete a road it may be required by mandamus to do so,[72] and mandamus and not a suit in equity is the proper remedy;[73] but mandamus will not be granted unless a clear legal duty on the part of the railroad company to do so is shown.[74] If the railroad company has not complied with a statutory requirement which is a condition precedent to the commencement of the construction of its road, a person whose property will be injuriously affected thereby may enjoin the company from commencing the work of construction.[75] If a railroad company fails to commence or complete the construction of its road within the time limited by statute or its charter, the state alone can ordinarily take advantage of the failure and object to a continuation of the work of construction,[76] and such failure may be waived by the state and an extension of time granted.[77] In the absence of such an extension or after it has expired if the railroad company has not commenced the construction of its road a landowner may resist a subsequent condemnation of his land therefor,[78] or if partly completed he may resist any new condemnation of his property for extending the road beyond the point then completed;[79] but if the company before the expiration of such period has acquired the right of way he cannot prevent the company from continuing the construction of its road thereon after the time limited for its completion has expired.[80] So also if a landowner has agreed to convey a right of way before the expiration of the time limited, an extension of time for the construction of the road does not release him from his agreement.[81] A railroad company which has failed to complete its road

68. Pottsville Borough *v.* People's R. Co., 148 Pa. St. 175, 23 Atl. 900.

69. Hamilton *v.* New York, etc., R. Co., 9 Paige (N. Y.) 171.

70. Atlantic, etc., R. Co. *v.* St. Louis R. Co., 66 Mo. 228 [*reversing* 3 Mo. App. 315]; Pittsburgh, etc., R. Co. *v.* Pittsburgh, etc., R. Co., 159 Pa. St. 331, 28 Atl. 155; Blanton *v.* Richmond, etc., R. Co., 86 Va. 618, 10 S. E. 925; Canadian Pac. R. Co. *v.* James Bay R. Co., 36 Can. Sup. Ct. 42. *Compare* Newhall *v.* Galena, etc., R. Co., 14 Ill. 273, construing a particular limitation as including the branches as well as the main line, but holding that a subsequent extension of time for the construction of the road also applied to and extended the time for the construction of the branch.

Where the time is extended by statute for a certain period for the construction of a railroad "with one or more tracks, sidings, depots, and appurtenances," the word "appurtenances" does not include branches and the time limitation does not apply to their construction. Pittsburgh, etc., R. Co. *v.* Pittsburgh, etc., R. Co., 159 Pa. St. 331, 28 Atl. 155.

71. St. Louis, etc., R. Co. *v.* Petty, 63 Ark. 94, 37 S. W. 300.

72. Reg. *v.* York, etc., R. Co., 16 Q. B. 886, 20 L. J. Q. B. 503, 6 R. & Can. Cas. 648, 71 E. C. L. 886; Great Western R. Co. *v.* Reg., 2 Wkly. Rep. 54. See also, generally, MANDAMUS, 26 Cyc. 365.

73. Atty.-Gen. *v.* Birmingham, etc., Junction R. Co., 7 Eng. L. & Eq. 283.

74. State *v.* Southern Minnesota R. Co., 18 Minn. 40; Sherwood *v.* Atlantic, etc., R. Co., 94 Va. 291, 26 S. E. 943.

Duty to construct see *supra*, VI, A, 1.

75. Astor *v.* New York, etc., R. Co., 48 Hun (N. Y.) 562, 1 N. Y. Suppl. 174 [*affirmed* in 113 N. Y. 93, 20 N. E. 594, 2 L. R. A. 789].

76. Ross *v.* Chicago, etc., R. Co., 77 Ill. 127; Atlantic, etc., R. Co. *v.* St. Louis, etc., R. Co., 66 Mo. 228 [*reversing* 3 Mo. App. 315].

77. Ross *v.* Chicago, etc., R. Co., 77 Ill. 127.

78. *In re* Brooklyn, etc., R. Co., 72 N. Y. 245.

79. Peavey *v.* Calais R. Co., 30 Me. 498.

80. Atlantic R. Co. *v.* Chicago, etc., R. Co., 66 Mo. 228 [*reversing* 3 Mo. App. 315].

81. Ross *v.* Chicago, etc., R. Co., 77 Ill. 127.

within the time limited by statute will not ordinarily be enjoined at the suit of a stock-holder from completing it.[82] Where during the process of construction a controversy arises between a landowner and the company as to the true location of the road, which is a disputable question of fact depending upon parol testimony, the court will not grant a preliminary injunction restraining the construction of the road, but will require the company to give security for the damages which the landowner may sustain in case the decision upon final hearing is adverse to the railroad company.[83] Where a railroad company has by contract bound itself to construct and maintain a siding for the benefit of a landowner, a court of equity may compel specific performance of the contract; [84] or if the siding is constructed and subsequently removed by the company, the court may require it to be restored.[85]

B. Plan and Mode of Construction — 1. In General. In the absence of any statutory restriction or agreement a railroad company is not obliged to construct its track in the center of its right of way,[86] but may construct it upon any part of the right of way it may deem proper,[87] and after construction may subsequently change its location to any point within the limits of the right of way.[88] So also in the absence of any restriction as to how the track shall be constructed with reference to the surface of the ground, the company is not obliged to construct it upon the surface; [89] but may elevate its tracks whenever the character of the country makes it either convenient or necessary,[90] or it may construct the same under ground.[91] It is also discretionary with the railroad company, where it is authorized to construct a road between different points, as to where it will begin the work of construction;[92] and where a railroad company is authorized to cross a river by means of a bridge or ferry "as may be most convenient," the decision as to which is most convenient rests with the railroad company.[93]

2. Statutory and Municipal Regulations. Although a railroad company is authorized to lay its tracks upon public streets, its right to do so within corporate limits is subject to reasonable regulations imposed by the municipality,[94] but such regulations must be reasonable, [95] and cannot abridge or impair the rights

82. Ffookes *v.* London, etc., R. Co., 17 Jur. 365, 1 Smale & G. 142, 1 Wkly. Rep. 175, 65 Eng. Reprint 62.

83. Rainey *v.* Baltimore, etc., R. Co., 15 Fed. 767.

84. Greene *v.* West Cheshire R. Co., L. R. 13 Eq. 944, 41 L. J. Ch. 17, 25 L. T. Rep. N. S. 409, 20 Wkly. Rep. 54. See also Lytton *v.* Great Northern R. Co., 2 Jur. N. S. 436, 2 Kay & J. 394, 4 Wkly. Rep. 441, 69 Eng. Reprint 836.

85. Todd *v.* Midland Great Western R. Co., L. R. 9 Ir. 85.

86. Stark *v.* Sioux City, etc., R. Co., 43 Iowa 501; Ohio River, etc., R. Co. *v.* Johnson, 50 W. Va. 499, 40 S. E. 407.

But the location of the right of way cannot be shifted so as to make the track the center of the right of way by constructing the tracks to one side of the center line of the right of way as originally laid out. Ohio River, etc., R. Co. *v.* Johnson, 50 W. Va. 499, 40 S. E. 407.

87. Stark *v.* Sioux City, etc., R. Co., 43 Iowa 501; Munkers *v.* Kansas City, etc., R. Co., 60 Mo. 334; Dougherty *v.* Wabash, etc., R. Co., 19 Mo. App. 419; Ohio River, etc., R. Co. *v.* Johnson, 50 W. Va. 499, 40 S. E. 407.

A relinquishment of a right of way one hundred feet wide, providing that the railroad was to be located "on the section line" dividing two named sections of land, does not require that the track should be located precisely upon the section line, but if the right of way is located so as to embrace this section line, the track may be located anywhere within the limits of the right of way. Munkers *v.* Kansas City, etc., R. Co., 60 Mo. 334.

88. Dougherty *v.* Wabash, etc., R. Co., 19 Mo. App. 419.

89. Sparks *v.* Philadelphia, etc., R. Co., 212 Pa. St. 105, 61 Atl. 881.

90. Fulton *v.* Short Route R. Transfer Co., 85 Ky. 640, 4 S. W. 332, 9 Ky. L. Rep. 291, 7 Am. St. Rep. 619.

91. Sparks *v.* Philadelphia, etc., R. Co., 212 Pa. St. 105, 61 Atl. 881, holding further that this rule is not affected by the fact that, at the time of the enactment of the statute under which the road was constructed, underground construction was unknown and probably was not contemplated as a possibility.

92. Cleveland, etc., R. Co. *v.* Speer, 56 Pa. St. 325, 94 Am. Dec. 84.

93. Easton *v.* New York, etc., R. Co., 24 N. J. Eq. 49.

94. Pittsburg, etc., R. Co. *v.* Chicago, 159 Ill. 369, 42 N. E. 781.

95. Allen *v.* Jersey City, 53 N. J. L. 522, 22 Atl. 257.

and franchises of the railroad company as granted by the legislature,[96] and whenever a statute and an ordinance conflict the former must control.[97] So also where municipal consent for the construction of the railroad is necessary, the municipality may in granting it do so subject to reasonable conditions,[98] such as pertain to the mode of construction,[99] or the performance of certain acts on the part of the railroad company, such as grading, paving, and the like,[1] and a railroad company assenting to or constructing its road under an ordinance prescribing such conditions will be bound thereby;[2] but the municipality will also be bound by its part of the agreement in regard to the rights and privileges conferred if it had authority to make such agreement.[3]

3. Construction In or Along Streets and Highways — a. In General.[4] The right to construct a railroad on or along a street or highway gives the railroad company no right, in the absence of express provision, to destroy the same,[5] nor does municipal consent to the construction of a railroad in a street confer any right to obstruct the street;[6] but it is the duty of the railroad company to so construct its road as not unnecessarily to injure the street or highway or impair the rights of the public in its use,[7] and in some cases there are statutory or charter provisions to this effect,[8] or requiring that the street or highway shall be restored to its former state or such as not unnecessarily to have impaired its usefulness.[9] Where a railroad is constructed along a street it should ordinarily conform to the grade of the surface of the street;[10] but owing to the variations in the grade of many

If the municipality should act unreasonably and its authorities refuse any proper application of the railroad company without just and legal excuse, the proper remedy on the part of the railroad company would be mandamus and not a suit in equity to enjoin the municipal authorities. Pittsburg, etc., R. Co. *v.* Chicago, 159 Ill. 369, 42 N. E. 781.

96. Owensboro *v.* Owensboro, etc., R. Co., 40 S. W. 916, 19 Ky. L. Rep. 449; Allen *v.* Jersey City, 53 N. J. L. 522, 22 Atl. 257.

97. Oshkosh First Cong. Church *v.* Milwaukee, etc., R. Co., 77 Wis. 158, 45 N. W. 1086.

98. Moundsville *v.* Ohio River R. Co., 37 W. Va. 92, 16 S. E. 514, 20 L. R. A. 161.

99. Moundsville *v.* Ohio River R. Co., 37 W. Va. 92, 16 S. E. 514, 20 L. R. A. 161.

1. State *v.* New Orleans, etc., R. Co., 42 La. Ann. 11, 7 So. 84; Moundsville *v.* Ohio River R. Co., 37 W. Va. 92, 16 S. E. 514, 20 L. R. A. 161.

Particular requirement construed.—An obligation on the part of a railroad company to keep in good condition the streets through which its tracks pass does not oblige it to keep in repair the streets on each side of a neutral strip of land not used for street purposes on which the track is located. State *v.* New Orleans, etc., R. Co., 42 La. Ann. 550, 7 So. 606.

2. Moundsville *v.* Ohio River R. Co., 37 W. Va. 92, 16 S. E. 514, 20 L. R. A. 161.

Enforcement of obligations see *infra*, VI, B, 5.

3. Chicago, etc., R. Co. *v.* Quincy, 136 Ill. 489, 27 N. E. 232 [*reversing* 32 Ill. App. 377].

4. Right to construct and power of legislature to authorize such construction see *supra*, V, I; and, generally, Eminent Domain, 15 Cyc. 626.

5. Pepper *v.* Union R. Co., 113 Tenn. 53, 85 S. W. 864; Moundsville *v.* Ohio River R. Co., 37 W. Va. 92, 16 S. E. 514, 20 L. R. A. 161.

6. Tate *v.* Ohio, etc., R. Co., 7 Ind. 479; Pepper *v.* Union R. Co., 113 Tenn. 53, 85 S. W. 864.

7. State *v.* Hannibal, etc., R. Co., 86 Mo. 13; Com. *v.* Erie, etc., R. Co., 27 Pa. St. 339, 67 Am. Dec. 471.

8. Hepting *v.* New Orleans Pac. R. Co., 36 La. Ann. 898; State *v.* Hannibal, etc., R. Co., 86 Mo. 13; Com. *v.* Erie, etc., R. Co., 27 Pa. St. 339, 67 Am. Dec. 471; Com. *v.* Allegheny Valley R. Co., 14 Pa. Super. Ct. 336; Stroudsburg Borough *v.* Wilkesharre, etc., R. Co., 2 Pa. Dist. 507, 12 Pa. Co. Ct. 395; Pepper *v.* Union R. Co., 113 Tenn. 53, 85 S. W. 864.

Particular provisions construed.—A charter provision that a railroad must be so constructed "as not to impede or obstruct the free use of any public road, street," etc., does not prohibit the construction of a railroad in a street, but does prohibit any material or unnecessary obstruction thereof (Com. *v.* Erie, etc., R. Co., 27 Pa. St. 339, 67 Am. Dec. 471); and where a railroad company proposes to occupy a public highway in such manner as practically to require the public in passing along it to use the track of the railroad for a distance of two or three hundred feet, it materially impairs the passage thereon within the application of a statute requiring the road to be so constructed "as not to impede the passage or transportation of persons or property" along the highway (Stroudsburg Borough *v.* Wilkesharre, etc., R. Co., 2 Pa. Dist. 507, 12 Pa. Co. Ct. 395).

9. See *infra*, VI, B, 3, b.

10. Tate *v.* Ohio, etc., R. Co., 7 Ind. 479, holding that a railroad company has no

streets and the necessity of maintaining a uniform grade for the railroad, this is often impracticable, and in such case the railroad company may construct cuts and fills provided the use of the street is not unnecessarily interfered with.[11] Such necessary elevations and depressions of the track may be authorized by a municipality,[12] which, on the other hand, cannot impose such restrictions as to the grade of the railroad as will practically deprive the company of a statutory right to construct its road in the street;[13] and where a railroad is constructed to conform to the existing surface of a street which has not been graded to the established line, the railroad company should not be required to raise or lower its tracks to such line until the city has graded the street conformably thereto.[14] Where municipal consent is essential to the occupancy of a street by a railroad, such consent is also necessary for any subsequent material change in the mode of construction, such as a change in the grade of its tracks.[15] Where a railroad company is authorized to construct its road along a street it need not necessarily construct it in the middle of the street.[16]

b. Restoring and Maintaining Highway. Where a railroad company constructs its road upon a street or highway it is the duty of the company to restore the same to its former state or such as not unnecessarily to have impaired its usefulness.[17] This is a common-law duty;[18] but it is in some cases expressly imposed by statutory or charter provisions,[19] and a county, township, or municipality in which the highway is situated cannot release the company from this duty.[20] The requirement as to restoring streets and highways imports some physical impairment of the way itself and does not impose upon the railroad company the duty of removing all danger incident to the use of the railroad lawfully constructed parallel with and in close proximity to a highway,[21] or require the railroad company to construct fences or barriers in such cases between the highway and the railroad track,[22] nor is there any common-law duty to do so;[23] but a statute pro-

right, in the absence of express authority, to construct its road along a street upon an embankment four and a half feet high.

The grade line of a railroad is the surface of the earth-work upon which the ties are laid and not the top of the rails. Given *v.* Des Moines, 70 Iowa 637, 27 N. W. 803.

Where a right is granted by ordinance to a railroad company to construct its road over certain streets "on the grade of the city or such grade as may be agreed upon," the company is limited to the grade established by the city, in the absence of any agreement to the contrary. Slatten *v.* Des Moines Valley R. Co., 29 Iowa 148, 4 Am. Rep. 205.

11. Owensboro *v.* Owensboro, etc., R. Co., 40 S. W. 916, 19 Ky. L. Rep. 449; Arbenz *v.* Wheeling, etc., R. Co., 33 W. Va. 1, 10 S. E. 14, 5 L. R. A. 371.

Authority to construct a railroad "along or upon" a street does not limit the right to a construction upon the surface at a common level with the rest of the street. Arbenz *v.* Wheeling, etc., R. Co., 33 W. Va. 1, 10 S. E. 14, 5 L. R. A. 371.

12. Slatten *v.* Des Moines Valley R. Co., 29 Iowa 148, 4 Am. Rep. 205; Arbenz *v.* Wheeling, etc., R. Co., 33 W. Va. 1, 10 S. E. 14, 5 L. R. A. 371.

13. Owensboro *v.* Owensboro, etc., R. Co., 40 S. W. 916, 19 Ky. L. Rep. 449.

14. Given *v.* Des Moines, 70 Iowa 637, 27 N. W. 803.

15. Chester *v.* Baltimore, etc., R. Co., 217 Pa. St. 402, 66 Atl. 654.

16. Oshkosh First Cong. Church, etc. *v.* Milwaukee, etc., R. Co., 77 Wis. 158, 45 N. W. 1086.

17. Indianapolis, etc., R. Co. *v.* State, 37 Ind. 489; State *v.* Hannibal, etc., R. Co., 86 Mo. 13; Moundsville *v.* Ohio River R. Co., 37 W. Va. 92, 16 S. E. 514, 20 L. R. A. 161.

18. State *v.* Hannibal, etc., R. Co., 86 Mo. 13.

19. *Connecticut.*— State *v.* New Haven, etc., Co., 45 Conn. 331.

Louisiana.— Hepting *v.* New Orleans Pac. R. Co., 36 La. Ann. 898.

New York.— People *v.* Dutchess, etc., R. Co., 58 N. Y. 152.

West Virginia.— Moundsville *v.* Ohio River R. Co., 37 W. Va. 92, 16 S. E. 514, 20 L. R. A. 161.

Wisconsin.— Jamestown *v.* Chicago, etc., R. Co., 69 Wis. 648, 34 N. W. 728.

See 41 Cent. Dig. tit. "Railroads," § 231.

20. Snow *v.* Deerfield Tp., 78 Pa. St. 181.

21. State *v.* New Haven, etc., Co., 45 Conn. 331, holding further that this rule applies, although the right of way of the railroad slightly overlaps the right of way of the highway, if there is no disturbance of or interference with the traveled part of the highway, and the railroad is an obstruction only in the sense that it is calculated to frighten horses.

22. Coy *v.* Utica, etc., R. Co., 23 Barb. (N. Y.) 643 [*disapproving* Moshier *v.* Utica, etc., R. Co., 8 Barb. (N. Y.) 427].

23. Coy *v.* Utica, etc., R. Co., 23 Barb.

viding that if the company shall use or interfere with any road it shall make good the damage done thereto is not limited to cases where the railroad is actually constructed upon or across the highway.[24] So also the requirement does not contemplate that the highway shall be restored to its exact former state or its use in no degree impaired,[25] but only that there shall be no material and unnecessary impairment of its use;[26] but it does require that the highway shall be restored in such manner as not unnecessarily to impair its usefulness for ordinary travel,[27] and if the railroad is constructed upon and so as to destroy the use of the highway, the highway must be reconstructed upon a new location.[28] Where it is necessary to construct a new highway this must be done before the original highway is appropriated,[29] and any work of restoration must be done within a reasonable time.[30] The duty is also a continuing one and devolves upon a company succeeding to the rights and franchises of the company which constructed the road.[31]

c. Mode of Construction as Constituting Nuisance. The mere construction of a railroad, although in a street or highway, if done by lawful authority, is not a nuisance,[32] nor is a partial and temporary obstruction necessarily caused by and during the process of construction a nuisance which will be enjoined;[33] but the company may be guilty of maintaining a nuisance by reason of the negligent or improper manner of constructing or maintaining its road,[34] or failing to restore a street or highway to its former state as required by statute,[35] or to construct a new highway in the place of one destroyed by the construction of the railroad.[36]

4. Road-Bed and Tracks. It is the duty of a railroad company to construct its road-bed and tracks in a skilful manner and with suitable materials so as to make the road safe for travel,[37] and subsequently to keep the same in proper condition and repair;[38] but the company is not required, in order to make travel

(N. Y.) 643 [*disapproving* Moshier *v.* Utica, etc., R. Co., 8 Barb. (N. Y.) 427].

24. West Riding, etc., R. Co. *v.* Wakefield Local Bd. of Health, 5 B. & S. 478, 10 Jur. N. S. 1046, 33 L. J. M. C. 174, 12 Wkly. Rep. 1076, 117 E. C. L. 478, holding that a statute providing that if in constructing a railroad the company "shall use or interfere with any road" it shall from time to time "make good all damage done" to such road is not limited to cases where there is an actual occupation of the road by the railroad, but that it requires the company to repair any injury done to the highway by the extra traffic upon it caused by hauling materials over it for the construction of the railroad, and that such traffic need not be carried on by the servants of the company if it is for the purposes of the company.

25. Moundsville *v.* Ohio River R. Co., 37 W. Va. 92, 16 S. E. 514, 20 L. R. A. 161; Arbenz *v.* Wheeling, etc., R. Co., 33 W. Va. 1, 10 S. E. 14, 5 L. R. A. 371.

26. Arbenz *v.* Wheeling, etc., R. Co., 33 W. Va. 1, 10 S. E. 14, 5 L. R. A. 371.

27. Moundsville *v.* Ohio River R. Co., 37 W. Va. 92, 16 S. E. 514, 20 L. R. A. 161.

28. People *v.* Dutchess, etc., R. Co., 58 N. Y. 152; Com. *v.* Allegheny Valley R. Co., 14 Pa. Super. Ct. 336.

Location of new highway.— Where a railroad company pursuant to legislative authority has located its road upon a portion of a public highway, so as to destroy the same, and the commissioners having jurisdiction of the matter and acting without fraud have designated the location for the new way, and the railroad company has constructed the same, the court cannot, on an application for mandamus to compel the railroad company to restore the highway to its former usefulness, review the determination of the commissioners and prescribe a different route. Waterbury *v.* Hartford, etc., R. Co., 27 Conn. 146.

29. Atty.-Gen. *v.* Widnes R. Co., 30 L. T. Rep. N. S. 449, 22 Wkly. Rep. 607.

30. Jamestown *v.* Chicago, etc., R. Co., 69 Wis. 648, 34 N. W. 728.

31. Com. *v.* Allegheny Valley R. Co., 14 Pa. Super. Ct. 336.

32. See *supra*, V, I, 1, g.

33. Canton *v.* Canton Cotton Warehouse Co., 84 Miss. 268, 36 So. 266, 105 Am. St. Rep. 428, 65 L. R. A. 561.

34. Kelly *v.* Pittsburgh, etc., R. Co., 28 Ind. App. 457, 63 N. E. 233, 91 Am. St. Rep. 134; Haney *v.* Gulf, etc., R. Co., 3 Tex. App. Civ. Cas. § 278; Moundsville *v.* Ohio River R. Co., 37 W. Va. 92, 16 S. E. 514, 20 L. R. A. 161.

A slight variation in the surface of the street, caused by the laying of the railroad tracks thereon, and which leaves the passage free and unobstructed, does not constitute a nuisance. Drake *v.* Hudson River R. Co., 7 Barb. (N. Y.) 508.

35. Moundsville *v.* Ohio River R. Co., 37 W. Va. 92, 16 S. E. 514, 20 L. R. A. 161.

36. Com. *v.* Allegheny Valley R. Co., 14 Pa. Super. Ct. 336.

37. Florida R., etc., Co. *v.* Webster, 25 Fla. 394, 5 So. 714; Pittsburg, etc., R. Co. *v.* Thompson, 56 Ill. 138.

38. Florida R., etc., Co. *v.* Webster, 25 Fla. 394, 5 So. 714; Toledo, etc., R. Co. *v.*

upon the road entirely free from peril, to incur a degree of expense which would render the operation of the road impracticable.[39] Where a railroad is constructed under a statute expressly regulating the gauge the company must conform thereto and cannot subsequently alter the gauge of the road;[40] but if there is no statutory or charter provision or restriction as to the gauge the company may adopt such gauge as it may deem proper,[41] and may after the construction of the road change from the gauge originally adopted,[42] which change may be made without the consent of the municipality through the streets of which the road is constructed.[43] If authorized to construct a mixed gauge road consisting of a broad gauge throughout and also a narrow gauge for a part of the distance, the company may continue the narrow gauge throughout.[44] Where one of several connecting roads is required by statute to change its gauge to conform to that of the others, the latter may be required to contribute to the expense of the alteration.[45] What is a reasonable time for effecting and completing an authorized change of gauge depends upon the circumstances of the particular case.[46] The railroad company may also change the kind of rails upon its road.[47] A statutory or charter authority to use steam as a motive power and to carry freight and passengers authorizes the company to construct its track and road-bed in a manner suitable for the use of heavy cars and locomotive engines,[48] and to use the heavy "T" rails commonly used on steam railroads.[49]

5. Remedies. Where a railroad company fails to restore a street or highway to its former condition as required by statute, it may be compelled to do so by mandamus,[50] or by a suit in equity for a mandatory injunction,[51] and a town or

Conroy, 68 Ill. 560; Pittsburgh, etc., R. Co. *v.* Thompson 56 Ill. 138; Rutherford *v.* Shreveport, etc., R. Co., 41 La. Ann. 793, 6 So. 644; Libby *v.* Maine Cent. R. Co., 85 Me. 34, 26 Atl. 943, 20 L. R. A. 812.

39. Pittsburgh, etc., R. Co. *v.* Thompson, 56 Ill. 138.

40. Western New York, etc., R. Co. *v.* Buffalo, etc., R. Co., 193 Pa. St. 127, 44 Atl. 242; Walker *v.* Denver, 76 Fed. 670, 22 C. C. A. 470.

The Pennsylvania statute of 1875 divides railroads into two classes, subject to different conditions and with different powers, according to whether the gauge exceeds three feet in width, and a company constructing its road under this statute as a narrow gauge road cannot subsequently widen the gauge notwithstanding no injury to the public will result. Western New York, etc., R. Co. *v.* Buffalo, etc., R. Co., 193 Pa. St. 127, 44 Atl. 242.

41. State *v.* Richmond, etc., R. Co., 72 N. C. 634; Millvale *v.* Evergreen R. Co., 131 Pa. St. 1, 18 Atl. 993, 7 L. R. A. 369.

42. Denver, etc., R. Co. *v.* Domke, 11 Colo. 247, 17 Pac. 777; State *v.* Richmond, etc., R. Co., 72 N. C. 634; Millvale *v.* Evergreen R. Co., 131 Pa. St. 1, 18 Atl. 993, 7 L. R. A. 369.

An abutting lot owner in a city cannot enjoin a railroad company from changing the gauge of its road from a narrow to a standard gauge, where there is nothing in the ordinance authorizing the construction of the road as to the width of the gauge and no imputation of any fraud in regard to the procuring or enactment of the ordinance. Denver, etc., R. Co. *v.* Domke, 11 Colo. 247, 17 Pac. 777.

43. Millvale *v.* Evergreen R. Co., 131 Pa. St. 1, 18 Atl. 993, 7 L. R. A. 369.

But if the gauge is limited by the charter of the railroad company, the municipality may object to any change from that so prescribed, although the city ordinance granting the use of the street did not specify any gauge, since the charter and ordinance must be construed together. Walker *v.* Denver, 76 Fed. 670, 22 C. C. A. 470.

44. Great Western R. Co. *v.* Oxford, etc., R. Co., 3 De G. M. & G. 341, 52 Eng. Ch. 341, 43 Eng. Reprint 133 [*affirming* 5 De G. & Sm. 437, 16 Jur. 443, 64 Eng. Reprint 1188]; Beman *v.* Rufford, 15 Jur. 914, 20 L. J. Ch. 537, 1 Sim. N. S. 550, 40 Eng. Ch. 550, 61 Eng. Reprint 212.

45. Newry, etc., R. Co. *v.* Ulster R. Co., 8 De G. M. & G. 487, 2 Jur. N. S. 936, 4 Wkly. Rep. 211, 761, 57 Eng. Ch. 487, 44 Eng. Reprint 478, holding that where the statute provides for an apportionment of such expense by the railroad commissioners, if the commissioners in making their award have not exceeded their jurisdiction and no fraud or mistake is shown, a court of equity cannot review or set aside their award.

46. State *v.* Missouri Pac. R. Co., 80 Mo. 117.

47. Millvale *v.* Evergreen R. Co., 131 Pa. St. 1, 18 Atl. 993, 7 L. R. A. 369.

48. Millvale *v.* Evergreen R. Co., 131 Pa. St. 1, 18 Atl. 993, 7 L. R. A. 369.

49. Millvale *v.* Evergreen R. Co., 131 Pa. St. 1, 18 Atl. 993, 7 L. R. A. 369.

50. State *v.* Hannihal, etc., R. Co., 86 Mo. 13; People *v.* Dutchess, etc., R. Co., 58 N. Y. 152. See also, generally, MANDAMUS, 26 Cyc. 369.

51. Moundsville *v.* Ohio River R. Co., 37

municipality which is responsible for the condition of its streets and highways may maintain such suit.[52] So also a municipality may sue to enjoin a railroad company from obstructing a highway by making fences across it and to compel the removal of fences already constructed.[53] If the road is so constructed as to constitute a nuisance the company is liable to indictment,[54] or a suit in equity may be maintained to abate the nuisance,[55] or an individual who sustains a special injury therefrom may maintain a private action to recover his special damages or protect his rights.[56] Where in consideration of a grant by a municipality of the right to construct a railroad on a street, the railroad company assumes obligations in regard to the mode of construction or work to be done by it upon the streets so used, the performance of such duties may be enforced by a suit in equity,[57] or, pursuant to a statute so providing, by mandamus,[58] or the municipality may sue for damages for breach of the agreement.[59] A court of equity has no power at the instance of highway commissioners to enjoin the construction of a railroad on or along highways where such construction is authorized by statute.[60] With regard to the rights and remedies of abutting property-owners the general rule applies that equitable relief will not be granted where there is an adequate remedy at law.[61] An abutting lot owner cannot enjoin the mere construction of a railroad in a street on account of the incidental injury to his property where the company is proceeding under lawful authority,[62] nor can he enjoin the railroad company from constructing its road in a particular manner if the mode of construction is authorized by competent authority,[63] or the character and extent of the injury which may result is merely speculative.[64] So also if a railroad company has by lawful authority constructed its road in a street and is not restricted as to the

W. Va. 92, 16 S. E. 514, 20 L. R. A. 161; Jamestown *v.* Chicago, etc., R. Co., 69 Wis. 648, 34 N. W. 728.

52. Moundsville *v.* Ohio River R. Co., 37 W. Va. 92, 16 S. E. 514, 20 L. R. A. 161; Jamestown *v.* Chicago, etc., R. Co., 69 Wis. 648, 34 N. W. 728; Fenelon Falls *v.* Victoria R. Co., 29 Grant Ch. (U. C.) 4.

53. Gloucester Tp. *v.* Canada Atlantic R. Co., 3 Ont. L. R. 85, 1 Ont. Wkly. Rep. 18 [*affirmed* in 1 Ont. Wkly. Rep. 485].

54. Com. *v.* Allegheny Valley R. Co., 14 Pa. Super. Ct. 336. See also *infra*, VI, K, 2.

55. Moundsville, etc., R. Co. *v.* Ohio River R. Co., 37 W. Va. 92, 16 S. E. 514, 20 L. R. A. 161, holding further that the suit to abate the nuisance may be maintained by a municipality which is liable for the condition of its streets.

56. Kelly *v.* Pittsburgh, etc., R. Co., 28 Ind. App. 457, 63 N. E. 233; Haney *v.* Gulf, etc., R. Co., 3 Tex. App. Civ. Cas. § 278.

57. Moundsville, etc., R. Co. *v.* Ohio River R. Co., 37 W. Va. 92, 16 S. E. 514, 20 L. R. A. 161.

58. State *v.* New Orleans, etc., R. Co., 42 La. Ann. 550, 7 So. 606; State *v.* New Orleans, etc., R. Co., 42 La. Ann. 11, 7 So. 84. See also MANDAMUS, 26 Cyc. 165.

59. Cincinnati, etc., R. Co. *v.* Carthage, 36 Ohio St. 631, holding that where the railroad company binds itself to grade and gravel the streets used, the municipality may, on a failure of the company to do so within a reasonable time, maintain an action for damages, without any previous demand upon the company to perform its agreement, and recover the reasonable cost of doing or completing the work.

60. Baxter *v.* Spuyten Duyvil, etc., R. Co., 61 Barb. (N. Y.) 428, 11 Abb. Pr. N. S. 178.

61. Stetson *v.* Chicago, etc., R. Co., 75 Ill. 74; Fulton *v.* Short Route, etc., R. Co., 85 Ky. 640, 4 S. W. 332, 9 Ky. L. Rep. 291, 7 Am. St. Rep. 619; Arbenz *v.* Wheeling, etc., R. Co., 33 W. Va. 1, 10 S. E. 14, 5 L. R. A. 371.

The construction of an additional track in a street will not be enjoined on the ground that its construction will constitute a nuisance unless a very clear case for equitable relief is shown, since if a nuisance results the public has an adequate remedy by indictment and adjacent property-owners a remedy by action for damages for any special injury sustained. Morris, etc., R. Co. *v.* Prudden, 20 N. J. Eq. 530.

Enjoining contract.—An injunction will not be granted at the suit of abutting owners to prevent a railroad company from entering into a contract with the county commissioners whereby it is permitted to maintain its tracks in a street at a grade alleged to be illegal, the remedy if the contract be illegal being by mandamus to require the county commissioners to perform their duty as required by law. Dyer *v.* Cincinnati, etc., R. Co., 7 Ohio Cir. Ct. 255, 4 Ohio Cir. Dec. 584.

62. See *supra*, V, I, 1, i.

Right to enjoin where compensation is not paid in advance see EMINENT DOMAIN, 15 Cyc. 987 *et seq.*

63. Arbenz *v.* Wheeling, etc., R. Co., 33 W. Va. 1, 10 S. E. 14, 5 L. R. A. 371.

64. Fulton *v.* Short Route, etc., R. Co., 85 Ky. 640, 4 S. W. 332, 9 Ky. L. Rep. 291, 7 Am. St. Rep. 619.

gauge, an abutting lot owner cannot enjoin the company from subsequently widening the gauge.[65] If, however, the railroad company is proceeding in an unauthorized manner which will occasion a special injury for which there is no adequate remedy at law, the abutting landowner is entitled to an injunction,[66] unless he has lost his right to such relief by his laches or acquiescence,[67] or if the road has already been located upon the street so as to occasion an injury of this character, he may by a suit in equity compel the company to relocate its tracks.[68]

C. Crossing Other Railroads — 1. Right to Cross — a. In General. Railroad companies accept their charters and use their tracks subject to the power of the state to authorize the construction of other railroads across their tracks whenever the public welfare so requires,[69] and this right of crossing is not affected by the priority of charters or the location or construction of the roads thereunder,[70] by the comparative length or amount of traffic upon the respective roads,[71] or by the fact that the road crossed is in the hands of a receiver,[72] or that such company owns the title in fee to the property crossed;[73] nor is the right confined to the main tracks, but applies to the lateral and spur tracks and switches constituting a part of the system and necessary to enable the company properly to carry on its business.[74] The right of one railroad company to cross the tracks of another

65. Denver, etc., R. Co. *v.* Toohey, 15 Colo. 297, 25 Pac. 166; Denver, etc., R. Co. *v.* Barsaloux, 15 Colo. 290, 25 Pac. 165, 10 L. R. A. 89; Denver, etc., R. Co. *v.* Domke, 11 Colo. 247, 17 Pac. 777.

If the change imposes an additional servitude for which the abutting owner is entitled to compensation, his remedy is by an action for damages. Denver, etc., R. Co. *v.* Barsaloux, 15 Colo. 290, 25 Pac. 165, 10 L. R. A. 89.

66. *Alabama.*— Birmingham R. Light, etc., Co. *v.* Moran, 151 Ala. 187, 44 So. 152.

Indiana.— Chicago, etc., R. Co. *v.* Eisert, 127 Ind. 156, 26 N. E. 759.

Maryland.— Baltimore, etc., R. Co. *v.* Strauss, 37 Md. 237.

Michigan.— Riedinger *v.* Marquette, etc., R. Co., 62 Mich. 29, 28 N. W. 775.

Tennessee.— Pepper *v.* Union R. Co., 113 Tenn. 53, 85 S. W. 864.

Utah.— Stockdale *v.* Rio Grande Western R. Co., 28 Utah 201, 77 Pac. 849.

See 41 Cent. Dig. tit. "Railroads," § 233.

67. Baltimore, etc., R. Co. *v.* Strauss, 37 Md. 237; Kakeldy *v.* Columbia, etc., R. Co., 37 Wash. 675, 80 Pac. 205.

68. Hepting *v.* New Orleans Pac. R. Co., 36 La. Ann. 898.

69. *Illinois.*— East St. Louis Connecting R. Co. *v.* East St. Louis Union R. Co., 108 Ill. 265.

Missouri.— Kansas City, etc., R. Co. *v.* Kansas City, etc., R. Co., 118 Mo. 599, 24 S. W. 478.

Montana.— Butte, etc., R. Co. *v.* Montana Union R. Co., 16 Mont. 550, 41 Pac. 248.

New Jersey.— National Docks, etc., R. Co. *v.* State, 53 N. J. L. 217, 21 Atl. 570, 26 Am. St. Rep. 421.

New York.— Buffalo, etc., R. Co. *v.* New York, etc., R. Co., 72 Hun 587, 25 N. Y. Suppl. 155.

Ohio.— Lake Shore, etc., R. Co. *v.* Cincinnati, etc., R. Co., 30 Ohio St. 604.

Pennsylvania.— Pennsylvania, etc., R. Co. *v.* Philadelphia, etc., R. Co., 160 Pa. St. 277, 28 Atl. 784; Western Pennsylvania R. Co.'s Appeal, 99 Pa. St. 155.

South Carolina.— South Carolina R. Co. *v.* Columbia, etc., R. Co., 13 Rich. Eq. 339.

United States.— Chicago, etc., R. Co. *v.* Chicago, etc., R. Co., 5 Fed. Cas. No. 2,665, 6 Biss. 219.

See 41 Cent. Dig. tit. "Railroads," § 234.

The right of one railroad company to cross the track of another is as clear and undoubted as the right of the road first located to cross the land of the original owner. Lake Shore, etc., R. Co. *v.* Cincinnati, etc., R. Co., 30 Ohio St. 604.

A lateral railway may be constructed over an intervening railroad to reach a canal or river landing. Hays *v.* Briggs, 74 Pa. St. 373 [*reversing* 3 Pittsb. 504].

A railroad company cannot set up alleged rights of the state to defeat the *prima facie* right of another company to occupy a portion of a river shore for its road and thereby cross under the roadway of the first company. Pittsburgh, etc., R. Co. *v.* Pennsylvania R. Co., 39 Pittsb. Leg. J. N. S. (Pa.) 314.

70. Kansas City, etc., R. Co. *v.* Kansas City, etc., R. Co., 118 Mo. 599, 24 S. W. 478; Lake Shore, etc., R. Co. *v.* Cincinnati, etc., R. Co., 30 Ohio St. 604.

The right of way of one company prior to the construction of the road thereon may be crossed by another railroad upon making or securing proper compensation. Western Pennsylvania R. Co.'s Appeal, 99 Pa. St. 155.

71. Seattle, etc., R. Co. *v.* State, 7 Wash. 150, 34 Pac. 551, 38 Am. St. Rep. 866, 22 L. R. A. 217.

72. New Jersey Cent. R. Co. *v.* Pennsylvania R. Co., 31 N. J. Eq. 475 [*reversed* on other grounds in 32 N. J. Eq. 755].

73. Hornellsville El. R. Co. *v.* New York, etc., R. Co., 83 Hun (N. Y.) 407, 31 N. Y. Suppl. 745; Williams Valley R. Co. *v.* Lykens, etc., R. Co., 192 Pa. St. 552, 44 Atl. 46; Western Pennsylvania R. Co.'s Appeal, 99 Pa. St. 155.

74. East St. Louis Connecting R. Co. *v.*

is in many cases expressly provided for by constitutional, statutory, or charter provisions,[75] in which case the provisions must be followed,[76] and any conditions precedent complied with;[77] but the right to cross need not be conferred in express terms, as it will be implied from the right to construct a road between certain termini, where such crossing is necessary;[78] but where it is practicable to locate the second road without crossing the first it should not be permitted to cross and recross the first merely as a matter of convenience or economy in construction;[79] and even where the right to cross is conferred by statute it should not in the absence of unequivocal language be construed as conferring an absolute right to a crossing at the option of the company desiring to make it without regard to its necessity and the interests of the public.[80] One railroad company has no right to so cross the track of another as to deprive the latter of the use of the track or materially impair the exercise of its franchises;[81] but the inconvenience in

East St. Louis Union R. Co., 108 Ill. 265; Kansas City, etc., R. Co. *v.* Louisiana, etc., R. Co., 116 La. 178, 40 So. 627, 5 L. R. A. N. S. 512.

75. *Alabama.*—Alabama, etc., R. Co. *v.* South Alabama, etc., R. Co., 84 Ala. 570, 3 So. 286, 5 Am. St. Rep. 401.

Kentucky.— Elizabethtown, etc., R. Co. *v.* Ashland, etc., St. R. Co., 96 Ky. 347, 26 S. W. 181, 16 Ky. L. Rep. 42.

Louisiana.— Shreveport Traction Co. *v.* Kansas City, etc., R. Co., 119 La. 759, 44 So. 457.

Maryland.— Pennsylvania R. Co. *v.* Consolidation Coal Co., 55 Md. 158.

Missouri.— St. Louis Transfer R. Co. *v.* St. Louis Merchants' Bridge Terminal R. Co., 111 Mo. 666, 20 S. W. 319.

Montana.— Butte, etc., R. Co. *v.* Montana Union R. Co., 16 Mont. 504, 41 Pac. 232, 50 Am. St. Rep. 508, 31 L. R. A. 298.

New York.— Hornellsville El. R. Co. *v.* New York, etc., R. Co., 83 Hun 407, 31 N. Y. Suppl. 745; Buffalo, etc., R. Co. *v.* New York, etc., R. Co., 72 Hun 587, 25 N. Y. Suppl. 155.

Pennsylvania.— Pennsylvania, etc., R. Co. *v.* Philadelphia, etc., R. Co., 160 Pa. St. 277, 28 Atl. 784.

Virginia.— Norfolk, etc., R. Co. *v.* Tidewater R. Co., 105 Va. 129, 52 S. E. 852.

Washington.— Seattle, etc., R. Co. *v.* State, 7 Wash. 150, 34 Pac. 551, 38 Am. St. Rep. 866, 22 L. R. A. 217.

West Virginia.— Wellsburg, etc., R. Co. *v.* Panhandle Traction Co., 56 W. Va. 18, 48 S. E. 746.

Wisconsin.— *In re* Eastern Wisconsin R., etc., Co., 127 Wis. 641, 107 N. W. 496.

United States.— Arkansas, etc., R. Co. *v.* St. Louis, etc., R. Co., 103 Fed. 747.

Canada.— *In re* Buffalo, etc., R. Co., 14 U. C. Q. B. 397.

See 41 Cent. Dig. tit. "Railroads," § 234.

**Effect on mortgage lien.— Under the Alabama statute which provides that railroad companies may construct their roads so as to cross each other, the right of two railroad companies to make a crossing and to appropriate therefor a reasonably convenient portion of each other's right of way is paramount to a mortgage executed by one of the companies to secure its bonds, and the portion of right of way necessary for such crossing is excepted from the lien of the mortgage. Alabama, etc., R. Co. *v.* South Alabama, etc., R. Co., 84 Ala. 570, 3 So. 286, 5 Am. St. Rep. 401.

A mere constitutional provision, such as that of the Texas constitution, which provides that "every railroad company shall have the right with its road to intersect, connect with, or cross any other railroad," is not self-acting but requires appropriate supplementing legislation prescribing the regulation of its exercise. Missouri, etc., R. Co. *v.* Texas, etc., R. Co., 10 Fed. 497, 4 Woods 360.

76. Lake Shore, etc., R. Co. *v.* Cincinnati, etc., R. Co., 116 Ind. 578, 19 N. E. 440.

77. Lake Shore, etc., R. Co. *v.* Cincinnati, etc., R. Co., 116 Ind. 578, 19 N. E. 440.

Consent of company whose line is crossed. — Under a statute providing that a railroad company should not enter the lands of any person without the previous consent of the owner, and that in every case where the railroad should cross any other railroad the communication between the two roads in case of disagreement should be made in the manner directed by two engineers, one to be chosen by each party, and an umpire, the consent in writing of the owner of a railroad intended to be crossed by another railroad is necessary. Clarence R. Co. *v.* Great North of England R. Co., 4 Q. B. 46, 3 G. & D. 389, 7 Jur. 65, 12 L. J. Q. B. 145, 13 M. & W. 706, 3 R. & Can. Cas. 426, 45 E. C. L. 46.

78. Shreveport Traction Co. *v.* Kansas City, etc., R. Co., 119 La. 759, 44 So. 457; National Docks, etc., R. Co. *v.* State, 53 N. J. L. 217, 21 Atl. 570, 26 Am. St. Rep. 421; Perry County R. Extension Co. *v.* Newport, etc., R. Co., 150 Pa. St. 193, 24 Atl. 709, 30 Wkly. Notes Cas. (Pa.) 362; *In re* Buffalo, etc., R. Co., 14 U. C. Q. B. 397.

79. Perry County R. Extension Co. *v.* Newport, etc., R. Co., 150 Pa. St. 193, 24 Atl. 709; Seattle, etc., R. Co. *v.* State, 7 Wash. 150, 34 Pac. 551, 38 Am. St. Rep. 866, 22 L. R. A. 217.

80. *In re* St. Paul, etc., R. Co., 37 Minn. 164, 33 N. W. 701; Seattle, etc., R. Co. *v.* State, 7 Wash. 150, 34 Pac. 551, 38 Am. St. Rep. 866, 22 L. R. A. 217.

81. Kansas City, etc., R. Co. *v.* Kansas City, etc., R. Co., 118 Mo. 599, 24 S. W. 478; Seattle, etc., R. Co. *v.* State, 7 Wash. 150,

operation and the increased danger necessarily incident to the existence of the crossing is not such an impairment of the franchise,[82] nor is a crossing a use inconsistent with that for which the property is already appropriated,[83] and a crossing may be made, although it imposes some other special damage or inconvenience upon the company whose tracks are crossed,[84] provided it is not of such a character as to deprive such company of the ability fully and fairly to exercise its franchises and perform its duties, or that it cannot be adequately compensated in damages.[85] The right to cross the tracks of another railroad is also subject to the constitutional provisions against the taking of property for public use without making compensation therefor,[86] although the legislature may, in granting a charter to a railroad company without violating such provisions, impose as a condition that it shall allow other railroad companies to cross its tracks without compensation,[87] in which case if compensation is allowed by a subsequent statute the right is dependent upon the statute and not upon the constitutional provision.[88]

b. Street Railroads and Other Railroads Occupying Highways. The general rules and statutory provisions as to crossings previously stated[89] apply so as to authorize one railroad to cross another railroad located in or along a street or highway,[90] or to authorize a street railroad to cross a steam railroad so

34 Pac. 551, 38 Am. St. Rep. 866, 22 L. R. A. 217.

A temporary deprivation of the use of certain tracks of the company crossed during the process of constructing the crossing may be permitted when necessary, and such a necessity need not be absolute and exclusive of any possible method of constructing the crossing which would not cause such obstruction, regardless of the time, cost, and danger of the method which would have to be employed. National Docks, etc., R. Co. *v.* Pennsylvania R. Co., 54 N. J. Eq. 142, 33 Atl. 860 [*affirmed* in 55 N. J. Eq. 820, 41 Atl. 1116].

82. New York, etc., R. Co. *v.* Bridgeport Traction Co., 65 Conn. 410, 32 Atl. 953, 29 L. R. A. 367; Kansas City, etc., R. Co. *v.* Kansas City, etc., R. Co., 118 Mo. 599, 24 S. W. 478; Butte, etc., R. Co. *v.* Montana Union R. Co., 16 Mont. 504, 41 Pac. 232, 50 Am. St. Rep. 508, 31 L. R. A. 298.

83. Hornellsville El. R. Co. *v.* New York, etc., R. Co., 83 Hun (N. Y.) 407, 31 N. Y. Suppl. 745.

84. Kansas City, etc., R. Co. *v.* Kansas City, etc., R. Co., 118 Mo. 599, 24 S. W. 478 (where the crossing reduced the storage capacity of certain side-tracks about three fourths of a mile long by some sixty or seventy feet); Butte, etc., R. Co. *v.* Montana Union R. Co., 16 Mont. 550, 41 Pac. 248 (where the crossing necessitated a slight change of grade and curtailment of the storage tracks of the railroad crossed); National Docks, etc., R. Co. *v.* State, 53 N. J. L. 217, 21 Atl. 570, 26 Am. St. Rep. 421 (where the crossing necessitated a change in the car yard of the company whose tracks were crossed involving considerable expense in making the alteration and additional cost and danger in the future operation of the yard, but there was no other practicable place for crossing).

85. National Docks, etc., Co. *v.* State, 53 N. J. L. 217, 21 Atl. 570, 26 Am. St. Rep. 421.

86. Georgia, etc., R. Co. *v.* Columbus Southern R. Co., 89 Ga. 205, 15 S. E. 305; Chicago, etc., R. Co. *v.* Englewood Connecting R. Co., 115 Ill. 375, 4 N. E. 246, 56 Am. St. Rep. 173; St. Louis, etc., R. Co. *v.* Springfield, etc., R. Co., 96 Ill. 274; Chicago, etc., R. Co. *v.* Chicago, etc., R. Co., 15 Ill. App. 587; Wellsburg, etc., R. Co. *v.* Panhandle Traction Co., 56 W. Va. 18, 48 S. E. 746; Townsend *v.* Michigan Cent. R. Co., 101 Fed. 757, 42 C. C. A. 570. See also, generally, EMINENT DOMAIN, 15 Cyc. 669, 670.

The consent of the crossing board created by the Michigan statute, to the crossing by one railroad company of a right of way previously acquired by deed and owned by another company, confers no right upon the crossing company to make such crossing without either an agreement with the other company or acquiring a right of way over its property by condemnation proceedings. Townsend *v.* Michigan Cent. R. Co., 101 Fed. 757, 42 C. C. A. 570.

No damages can be recovered for crossing the projected line of a railroad company which at the time of the suit has not procured its right of way from the owner of the land or taken any steps to condemn it, or done any work at or over the point of intersection. St. Louis, etc., R. Co. *v.* Peach Orchard, etc., Co., 42 Ark. 249.

87. Buffalo, etc., R. Co. *v.* New York, etc., R. Co., 72 Hun (N. Y.) 587, 25 N. Y. Suppl. 155.

88. Buffalo, etc., R. Co. *v.* New York, etc., R. Co., 72 Hun (N. Y.) 587, 25 N. Y. Suppl. 155.

89. See *supra*, VI, C, 1, a.

90. St. Louis Transfer R. Co. *v.* St. Louis Merchants' Bridge Terminal R. Co., 111 Mo. 666, 20 S. W. 319; Pennsylvania Schuylkill Valley R. Co. *v.* Philadelphia, etc., R. Co., 160 Pa. St. 277, 28 Atl. 784.

The right of one railroad company to occupy a street cannot be raised by the other railroad company where the only issues relate to the right of one to cross the tracks of the

located,[91] or a steam railroad to cross a street railroad.[92] A railroad, although located in a street, has an easement which is subject only to the proper and ordinary use of the street by the public as a highway and which cannot be impaired by the crossing of another railroad without compensation;[93] but the rule is otherwise as to the crossing of a steam railroad by a street railroad, the latter being a proper use of the street which does not impose any additional servitude upon the rights of the steam railroad company for which compensation must be made,[94] whether the street railroad be operated by horse power, cable, or electricity.[95]

c. Agreement or Acquiescence. The right to cross the tracks of another railroad may be acquired by agreement between the companies as well as by legal proceedings pursuant to statutory authority;[96] but a contract giving one

other. Pennsylvania Schuylkill Valley R. Co. *v.* Philadelphia, etc., R. Co., 160 Pa. St. 277, 28 Atl. 784.

91. *Illinois.*— Chicago, etc., R. Co. *v.* West Chicago St. R. Co., 156 Ill. 255, 40 N. E. 1008, 29 L. R. A. 485 [*affirming* 54 Ill. App. 273].

Indiana.— Chicago, etc., R. Co. *v.* Whiting, etc., St. R. Co., 139 Ind. 297, 38 N. E. 604, 47 Am. St. Rep. 264, 26 L. R. A. 337.

Kentucky.— Elizabethtown, etc., R. Co. *v.* Ashland, etc., St. R. Co., 96 Ky. 347, 26 S. W. 181, 16 Ky. L. Rep. 42.

Louisiana.— Shreveport Traction Co. *v.* Kansas City, etc., R. Co., 119 La. 759, 44 So. 457.

Maryland.— Central Pass. R. Co. *v.* Philadelphia, etc., R. Co., 95 Md. 428, 52 Atl. 752.

New Jersey.— Morris, etc., R. Co. *v.* Newark Pass. R. Co., 51 N. J. Eq. 379, 29 Atl. 184 [*affirmed* in 52 N. J. Eq. 340, 31 Atl. 383].

New York.— Hornellsville El. R. Co. *v.* New York, etc., R. Co., 83 Hun 407, 31 N. Y. Suppl. 745; Buffalo, etc., R. Co. *v.* New York, etc., R. Co., 72 Hun 583, 25 N. Y. Suppl. 265.

Pennsylvania.— Du Bois Traction Pass. R. Co. *v.* Buffalo, etc., R. Co., 149 Pa. St. 1, 24 Atl. 179 [*affirming* 10 Pa. Co. Ct. 401]; Pennsylvania R. Co. *v.* Braddock Electric R. Co., 1 Pa. Dist. 626.

Texas.— Texas, etc., R. Co. *v.* Rosedale St. R. Co., 64 Tex. 80, 53 Am. Rep. 739.

See 41 Cent. Dig. tit. "Railroads," § 235.

Where a railroad is in the hands of a receiver the court will not refuse a street railroad company permission to cross the same except upon grave and controlling considerations. Stewart *v.* Wisconsin Cent. R. Co., 89 Fed. 617.

Place of crossing.—A street railroad has no right to construct its road across a steam railroad at a point other than the crossing of the street or highway, and this is equally true as to land held by the railroad company in fee. Trenton Cut-off R. Co. *v.* Newtown Electric St. R. Co., 8 Pa. Dist. 549.

92. Lynn, etc., R. Co. *v.* Boston, etc., R. Corp., 114 Mass. 88.

93. Chicago, etc., R. Co. *v.* Chicago, etc., R. Co., 15 Ill. App. 587. See also Georgia Midland, etc., R. Co. *v.* Columbus Southern R. Co., 89 Ga. 205, 15 S. E. 305.

94. *Illinois.*— Chicago, etc., R. Co. *v.* West Chicago St. R. Co., 156 Ill. 255, 40 N. E. 1088, 29 L. R. A. 485 [*affirming* 54 Ill. App. 273].

Indiana.— Chicago, etc., R. Co. *v.* Whiting, etc., St. R. Co., 139 Ind. 297, 38 N. E. 604, 47 Am. St. Rep. 264, 26 L. R. A. 337.

Kentucky.— Elizabethtown, etc., R. Co. *v.* Ashland, etc., St. R. Co., 96 Ky. 347, 26 S. W. 181, 16 Ky. L. Rep. 42.

Maryland.— Central Pass. R. Co. *v.* Philadelphia, etc., R. Co., 95 Md. 428, 52 Atl. 752.

Ohio.— Cleveland, etc., R. Co. *v.* Urbana, etc., R. Co., 26 Ohio Cir. Ct. 180.

Pennsylvania.— Du Bois Traction Pass. R. Co. *v.* Buffalo, etc., R. Co., 149 Pa. St. 1, 24 Atl. 179 [*affirming* 10 Pa. Co. Ct. 401].

Texas.— Texas, etc., R. Co. *v.* Rosedale St. R. Co., 64 Tex. 80, 53 Am. Rep. 739.

See 41 Cent. Dig. tit. "Railroads," § 235. See also, generally, EMINENT DOMAIN, 15 Cyc. 669, 670.

Under the New York statute relating to railroad crossings, and which is applicable to the crossing of a steam railroad by a street railroad, if a street railroad company desires to cross the tracks of a steam railroad company and the companies cannot agree as to the compensation, commissioners must be applied for to determine these questions as provided for by the statute. Port Richmond, etc., Electric R. Co. *v.* Staten Island Rapid Transit R. Co., 71 Hun (N. Y.) 179, 24 N. Y. Suppl. 566 [*affirmed* in 144 N. Y. 445, 39 N. E. 392]; People's R. Co. *v.* Syracuse, etc., R. Co., 51 Hun (N. Y.) 643, 6 N. Y. Suppl. 326, 22 Abb. N. Cas. 427.

95. Chicago, etc., R. Co. *v.* West Chicago St. R. Co., 156 Ill. 255, 40 N. E. 1088, 29 L. R. A. 485 [*affirming* 54 Ill. App. 273]; Du Bois Traction Pass. R. Co. *v.* Buffalo, etc., R. Co., 149 Pa. St. 1, 24 Atl. 179 [*affirming* 10 Pa. Co. Ct. 401].

96. *In re* Boston Hoosac Tunnel, etc., R. Co., 79 N. Y. 69; Hydell *v.* Toledo, etc., R. Co., 74 Ohio St. 138, 77 N. E. 1066.

Particular contract construed.— Where plaintiff railroad company contracted with defendant railroad company for a change of location of defendant's tracks in a street, giving plaintiff a right to construct its tracks therein and across defendant's tracks, the contract will not be construed, in the absence of any stipulation to the contrary, as preventing defendant company from maintaining spur tracks as they existed at the time of

railroad company the right to cross the tracks of another does not include the right to cross yards used for terminal purposes,[97] and a contract for a crossing will not be specifically enforced where plaintiff claims the right to cross at a place not contemplated by the parties and where it would greatly damage the other company.[98] Where the officers of one railroad company assent, although not in the form of a binding contract, to a grade crossing of their road by another company and permit the latter to expend large sums of money in constructing their road with reference to such crossing, they cannot afterward enjoin the latter from constructing such crossing and insist upon a crossing of a different character involving large additional expense;[99] but the fact that one railroad company is permitted to construct its road with the manifest intention of crossing another without objection by the latter constitutes no estoppel by acquiescence to a claim for damages;[1] nor does the fact that a railroad company permitted a street railroad company to cross its tracks for several months pending negotiations between the companies as to such crossing, which were subsequently broken off by the latter company, give such company any legal right to the use of the crossing.[2]

d. Injunction. A court of equity will enjoin one railroad company from crossing the tracks of another without any legal authority to do so,[3] or from crossing without first making compensation where there is a right to such compensation;[4] and conversely, where one railroad company has a right to cross and is proceeding in a lawful and proper manner, the court will enjoin the company whose tracks are crossed from interfering with the work of construction,[5] or from interfering with the crossing or its use after it is constructed.[6] If a crossing has been already

the contract and which would cross the main tracks of plaintiff's road. Atlantic, etc., R. Co. *v.* Atlantic Coast Line R. Co., 129 Ga. 44, 58 S. E. 465.

97. Delaware, etc., R. Co. *v.* Collector, 4 N. J. L. J. 247.

98. Coe *v.* New Jersey Midland R. Co., 31 N. J. Eq. 105.

99. Catawissa R. Co.'s Appeal, 2 Walk. (Pa.) 175.

1. Coe *v.* New Jersey Midland R. Co., 31 N. J. Eq. 105.

2. Port Richmond, etc., Electric R. Co. *v.* Staten Island Rapid Transit R. Co., 144 N. Y. 445, 39 N. E. 392 [*affirming* 71 Hun 179, 24 N. Y. Suppl. 566].

3. Chattanooga Terminal R. Co. *v.* Felton, 69 Fed. 273; Missouri, etc., R. Co. *v.* Texas, etc., R. Co., 10 Fed. 497.

Crossing incidental to unauthorized use of streets.— Where the only crossing sought to be made by a railroad company over the tracks of another in a street is incidental to laying its tracks along the street under a void ordinance, so that the construction of the road is a nuisance, an injunction restraining the nuisance at the instance of the other railroad company is not objectionable as a deprivation of the constitutional right to condemn a crossing. Mobile, etc., R. Co. *v.* Louisville, etc., R. Co., 142 Ala. 152, 37 So. 849.

4. Georgia Midland, etc., R. Co. *v.* Columbus Southern R. Co., 89 Ga. 205, 15 S. E. 305; Chicago, etc., R. Co. *v.* Chicago, etc., R. Co., 15 Ill. App. 587. But see New York, etc., R. Co. *v.* Forty-second St., etc., R. Co., 50 Barb. (N. Y.) 309, 32 How. Pr. 481, holding that, although there is a right to compensation, if the statute does not make the fixing and payment of such compensation a condition precedent to the crossing, an injunction will not lie to prevent the crossing, unless the company making it is insolvent or some special cause is shown.

5. Chicago, etc., R. Co. *v.* Whiting, etc., St. R. Co., 139 Ind. 297, 38 N. E. 604, 47 Am. St. Rep. 264, 26 L. R. A. 337; Du Bois Traction Pass. R. Co. *v.* Buffalo, etc., R. Co., 149 Pa. St. 1, 24 Atl. 179 [*affirming* 10 Pa. Co. Ct. 401].

A mandatory injunction will be granted compelling a railroad company to pull down walls which it has built in order to prevent another railroad company from crossing its line. Great North of England, etc., R. Co. *v.* Clarence R. Co., 1 Coll. 507, 3 R. & Can. Cas. 605, 28 Eng. Ch. 507, 63 Eng. Reprint 520.

6. Du Bois Traction Pass. R. Co. *v.* Buffalo, etc., R. Co., 149 Pa. St. 1, 24 Atl. 179 [*affirming* 10 Pa. Co. Ct. 401].

A preliminary injunction will be granted, restraining defendant from interfering with plaintiff company's crossing over defendant's road at grade until final hearing, determining whether it is reasonably practicable for plaintiff to cross otherwise than at grade. Moosic Mountain, etc., R. Co. *v.* Delaware, etc., R. Co., 10 Pa. Cas. 237, 13 Atl. 915 [*reversing* 4 C. Pl. 189].

Irrevocable license.— Where a manufacturing company constructed a tramway across railroad tracks in a street by permission of the railroad company and had expended money in reliance on such permission, so that the license had become irrevocable, it was held that the manufacturing company was entitled to an injunction restraining the railroad company from interfering with or

effected without authority and the company making it could not by legal proceedings acquire a right to the crossing in question, the court may not only enjoin its use but may compel its removal and the restoration of the road crossed to its original condition;[7] but if the company which has made the crossing might by proper proceedings acquire the right and has merely proceeded in an unauthorized manner, the court may, instead of enjoining its use unconditionally, require the company to conform to the legal requirements and make proper compensation, giving bond to comply with the order of the court.[8] Where a railroad company is proceeding in good faith with the construction of its road with apparent ability properly to perform the work of crossing another railroad, it will not be enjoined from so crossing merely because it has not yet secured a right of way over its entire route;[9] and where one railroad company is authorized to cross another below grade, provided the structures for crossing are approved by the railroad commissioners, the company whose location is crossed cannot after such approval has been granted alter the existing conditions and enjoin the other company from constructing the crossing as authorized.[10]

2. Place, Mode, and Expense of Crossing — a. In General. Where one railroad company crosses another, the crossing should be so located and constructed as not to inflict any unnecessary injury upon the road crossed;[11] and in some cases the statutes expressly provide that the place and manner of crossing shall be such as to inflict the least practicable injury upon the rights of the company whose road is crossed;[12] but while such provisions clearly recognize that the rights

removing the tramway, especially in view of the fact that the railroad company had refused to allow the tramway to be constructed in such a manner as would have prevented the delay of which it complained. Park Steel Co. *v.* Allegheny Valley R. Co., 213 Pa. St. 322, 62 Atl. 920.

7. Chattanooga Terminal R. Co. *v.* Felton, 69 Fed. 273.

8. Toledo, etc., R. Co. *v.* Detroit, etc., R. Co., 63 Mich. 645, 30 N. W. 595.

9. National Docks, etc., Junction Connecting R. Co. *v.* Pennsylvania R. Co., (N. J. Ch. 1895) 30 Atl. 1102.

10. Fitchburg R. Co. *v.* New Haven, etc., Co., 134 Mass. 547, holding that a railroad company cannot, after the plans for the crossing are approved, extend a siding so as to make a second track at the point of crossing and enjoin the other company from removing the second track and embankment on which it is constructed, proceeding in accordance with the approved plans, but that in such case it would be the duty of the company whose tracks are crossed to apply to the commissioners for a modification of their order of approval so as to conform to the new conditions.

11. State *v.* Dearing, 173 Mo. 492, 73 S. W. 485; West Jersey, etc., R. Co. *v.* Atlantic City, etc., R. Co., 65 N. J. Eq. 613, 56 Atl. 890; Seattle, etc., R. Co. *v.* State, 7 Wash. 150, 34 Pac. 551, 38 Am. St. Rep. 866, 22 L. R. A. 217.

12. *Indiana.*— Baltimore, etc., R. Co. *v.* Wabash, etc., R. Co., 31 Ind. App. 201, 67 N. E. 544.

Minnesota.— Winona, etc., R. Co. *v.* Chicago, etc., R. Co., 50 Minn. 300, 52 N. W. 657; *In re* Minneapolis, etc., R. Co., 39 Minn. 162, 39 N. W. 65.

New Jersey.— *In re* Atlantic Highlands, etc., R. Co., (Ch. 1896) 35 Atl. 387.

Ohio.— Wheeling, etc., R. Co. *v.* Toledo, etc., R. Co., 72 Ohio St. 368, 74 N. E. 209, 106 Am. St. Rep. 622.

Pennsylvania.— Smethport R. Co. *v.* Pittsburg, etc., R. Co., 203 Pa. St. 176, 52 Atl. 88; Pittsburg, etc., R. Co. *v.* Southwest Pennsylvania R. Co., 77 Pa. St. 173; Delaware, etc., Canal Co. *v.* Scranton, etc., Traction Co., 4 Pa. Dist. 287, 7 Kulp 509; Baltimore, etc., R. Co. *v.* Hanover, etc., R. Co., 13 Pa. Co. Ct. 291; Delaware, etc., R. Co. *v.* Wilkes-Barre, etc., R. Co., 11 Pa. Co. Ct. 165.

See 41 Cent. Dig. tit. "Railroads," § 240.

When statute not applicable.— The Pennsylvania statute of 1871, providing for the regulation of railroad crossings by the courts and authorizing them to define the mode of crossing which will inflict the least injury upon the rights of the company owning the road crossed, does not apply where the parties have already established a crossing and are using it. Park Steel Co. *v.* Allegheny Valley R. Co., 213 Pa. St. 322, 62 Atl. 920; Western New York, etc., R. Co. *v.* Buffalo, etc., R. Co., 193 Pa. St. 127, 44 Atl. 242.

The Illinois statute of 1889 provides that crossings shall be constructed "at such place and in such manner as will not unnecessarily impede or endanger the travel or transportation upon the railway so crossed." Malott *v.* Collinsville, etc., R. Co., 108 Fed. 313, 47 C. C. A. 345.

In Iowa the statute expressly provides that the crossing company "shall so construct its crossings as not unnecessarily to impede" the travel or transportation upon the road crossed. Chicago, etc., R. Co. *v.* Chicago, etc., R. Co., 91 Iowa 16, 58 N. W. 918; Humeston,

of the first occupant are superior to those of the second,[13] they do not require that there shall be no injury whatever to the rights of the road crossed,[14] or require the selection of the place and mode which will least injure the company crossed, without regard to the interests and necessities of the other company, which must also be considered and the question determined according to the circumstances of the particular case.[15] The provisions also apply only to direct interference with rights and not to consequential injury to interests, such as a diminution of traffic by competition.[16] It has been held, under a statute giving one railroad company the right to cross another at any point, that the crossing company may select the place and manner of crossing, subject only to the condition of paying the damages inflicted;[17] but on the contrary it has been held that the right of crossing cannot be exercised arbitrarily, without regard to the necessities of the case and the interests of the other company,[18] even though the statute confers the right to cross at any point,[19] and courts of equity have jurisdiction to regulate and restrain the manner of crossing so as to protect the rights of the parties and prevent the infliction of unnecessary injury upon the road crossed.[20] In determining the place and mode of crossing, consideration should be given to the future necessities of the company whose road is crossed,[21] and also to the rights and necessities of the public in the use of streets and highways upon which the roads may be located.[22] A statute giving the right to cross another railroad does not necessarily require that the crossing shall be at right angles,[23] and in the absence of statutory specification no rule can be stated to determine the exact size of the angle which should be permitted, each case depending upon what is reasonable and proper under its own circumstances;[24] but one company should not, in crossing, be permitted unnecessarily to obstruct the track of the other in a longitudinal

etc., R. Co. *v.* Chicago, etc., R. Co., 74 Iowa 554, 38 N. W. 413.

In Virginia Code (1904) provides that the crossings "shall be so located, constructed and operated as not to impair, impede or obstruct in any material degree the works and operations" of the road crossed. Norfolk, etc., R. Co. *v.* Tidewater R. Co., 105 Va. 129, 52 S. E. 852.

13. Smethport R. Co. *v.* Pittsburg, etc., R. Co., 203 Pa. St. 176, 52 Atl. 88; Pittsburg, etc., R. Co. *v.* Southwest Pennsylvania R. Co., 77 Pa. St. 173.

14. Philadelphia, etc., R. Co.'s Appeal, 2 Walk. (Pa.) 243, 1 Montg. Co. Rep. 141.

In case of an overhead crossing the crossing company may be permitted to place supporting iron pillars upon the right of way of the other company, where they would cause little injury or inconvenience and the cost of a single span bridge would be great. Philadelphia, etc., R. Co.'s Appeal, 2 Walk. (Pa.) 243, 1 Montg. Co. Rep. 141; Baltimore, etc., R. Co. *v.* Philadelphia, etc., R. Co., 17 Phila. (Pa.) 396.

15. *In re* Minneapolis, etc., R. Co., 39 Minn. 162, 39 N. W. 65; Philadelphia, etc., R. Co.'s Appeal, 2 Walk. (Pa.) 243, 1 Montg. Co. Rep. 141.

16. Pennsylvania R. Co. *v.* Greensburg, etc., R. Co., 176 Pa. St. 559, 35 Atl. 122, 36 L. R. A. 839.

17. Lake Shore, etc., R. Co. *v.* Chicago, etc., R. Co., 97 Ill. 506, where the court said that it was a sufficient safeguard against any oppressive exercise of such right that the crossing company was required to pay the full damages sustained by the other company by reason of the crossing, so that it would always be to the interest of the crossing company to cross at such place and in such manner as to inflict as little damages as possible.

18. Seattle, etc., R. Co. *v.* State, 7 Wash. 150, 34 Pac. 551, 38 Am. St. Rep. 866, 22 L. R. A. 217.

19. Seattle, etc., R. Co. *v.* State, 7 Wash. 150, 34 Pac. 551, 38 Am. St. Rep. 866, 22 L. R. A. 217.

20. West Jersey, etc., R. Co. *v.* Atlantic City, etc., R. Co., 65 N. J. Eq. 613, 56 Atl. 890; Chicago, etc., R. Co. *v.* Chicago, etc., R. Co., 5 Fed. Cas. No. 2,665, 6 Biss. 219.

Jurisdiction and powers of courts see *infra*, VI, C, 3, b.

21. Smethport R. Co. *v.* Pittsburg, etc., R. Co., 203 Pa. St. 176, 52 Atl. 88, holding that a crossing should not be allowed which will deprive the road crossed of three fourths of its sixty-foot right of way, it appearing that the future needs of such road will require two tracks and a large siding, although it has constructed but one track.

22. Pennsylvania R. Co. *v.* Conshohocken R. Co., 4 Pa. Dist. 12, 15 Pa. Co. Ct. 454; Seattle, etc., R. Co. *v.* State, 7 Wash. 150, 34 Pac. 551, 38 Am. St. Rep. 866, 22 L. R. A. 217.

23. Alabama, etc., R. Co. *v.* South Alabama, etc., R. Co., 84 Ala. 570, 3 So. 286, 5 Am. St. Rep. 401.

24. Alabama, etc., R. Co. *v.* South Alabama, etc., R. Co., 84 Ala. 570, 3 So. 286, 5 Am. St. Rep. 401, holding that a crossing

direction so as to impair the use of such road.[25] In some states the statutes provide that the crossing company may be required to interlock the crossing,[26] or to interlock the crossing to the satisfaction of the railroad commissioner.[27]

b. Agreement Between Companies. The companies may agree upon the place and manner of crossing,[28] and also as to how the crossing shall be used by them;[29] and where one company has assented to a crossing at a particular place and the other has constructed its road with reference thereto, the former should be held to be estopped to deny the necessity for the crossing or the propriety of the place agreed upon.[30]

c. Crossing At, Above, or Below Grade. It has been held that a railroad company having a right to cross the track of another has also the right to decide for itself whether it will cross the road of the other above or beneath its track or at grade;[31] but on the contrary it has been held that unless the manner of crossing is specifically designated by statute, it is subject to the control of a court of equity,[32] which may enjoin one company from crossing the other at grade,[33] and that even a statutory right to cross at grade does not give the crossing company any perverse and arbitrary right to do so, regardless of the rights of the other company and the safety of the public.[34] The state may, in the exercise of its police power, either authorize grade crossings,[35] or prohibit them,[36] whether the road is a steam

covering about four thousand feet of the track crossed was not, under the circumstances of the particular case, improper.

25. Seattle, etc., R. Co. *v.* State, 7 Wash. 150, 34 Pac. 551, 38 Am. St. Rep. 866, 22 L. R. A. 217.

26. Minneapolis, etc., R. Co. *v.* Gowrie, etc., R. Co., 123 Iowa 543, 99 N. W. 181; Minneapolis, etc., R. Co. *v.* Cedar Rapids, etc., R. Co., 114 Iowa 502, 87 N. W. 410.

27. Lake Shore, etc., R. Co. *v.* Cleveland, etc., R. Co., 7 Ohio S. & C. Pl. Dec. 558, 5 Ohio N. P. 83, holding that the requirement of the Ohio statute of 1896 that the company shall "interlock such crossing to the satisfaction of said commissioner" does not require an interlocking system, interlocking signals, or other safety devices, but merely contemplates such a connection as shall meet with the approval of the commissioner.

28. Baltimore, etc., R. Co. *v.* Wabash R. Co., 31 Ind. App. 201, 67 N. E. 544; Arkansas, etc., R. Co. *v.* St. Louis, etc., R. Co., 103 Fed. 747.

Agreement construed.— Where the companies agree to submit to certain commissioners whether the crossing shall be overhead or at grade, the commissioners may properly exclude any consideration of an under crossing as not being within the agreement, although such crossing is practicable. Baltimore, etc., R. Co. *v.* Wabash, etc., R. Co., 31 Ind. App. 201, 67 N. E. 544.

29. Cornwall, etc., R. Co.'s Appeal, 125 Pa. St. 232, 17 Atl. 427, 11 Am. St. Rep. 889, holding that a contract providing that "all engines and trains of the party of the first part shall have priority of passage over "all engines and trains of the party of the second part," applies to all trains, regardless of their class.

Consideration for agreement.—A contract between a steam railroad company and a street railroad company providing for a crossing by the latter of the tracks of the former, and providing that the trains of the steam railroad company shall have precedence at the crossing, and that the street railroad company shall be liable for all damages resulting from its failure to stop its cars before crossing, is not without consideration, although the street railroad company has a constitutional right to cross the tracks of the other, since it could not have exercised such right without making compensation. Owensboro City R. Co. *v.* Louisville, etc., R. Co., 94 S. W. 22, 29 Ky. L. Rep. 596.

30. Arkansas, etc., R. Co. *v.* St. Louis, etc., R. Co., 103 Fed. 747.

31. Jersey City, etc., R. Co. *v.* Central R. Co., 48 N. J. Eq. 379, 22 Atl. 728.

32. Chicago, etc., R. Co. *v.* Chicago, etc., R. Co., 91 Iowa 16, 58 N. W. 918; Humeston, etc., R. Co. *v.* Chicago, etc., R. Co., 74 Iowa 554, 38 N. W. 413; Chicago, etc., R. Co. *v.* Chicago, etc., R. Co., 5 Fed. Cas. No. 2,665, 6 Biss. 219.

Under the Iowa statute requiring that the crossing company "shall so construct its crossings as not unnecessarily to impede" the travel or transportation on the road crossed, if, under the circumstances of the case, such is the condition of the track and the grades at or near the point of intersection, that a grade crossing would unnecessarily obstruct the business of the road crossed, the court may properly enjoin the construction of a grade crossing. Chicago, etc., R. Co. *v.* Chicago, etc., R. Co., 91 Iowa 16, 58 N. W. 918; Humeston, etc., R. Co. *v.* Chicago, etc., R. Co., 74 Iowa 554, 38 N. W. 413.

33. See *infra*, VI, C, 2, e.

34. Pittsburg, etc., R. Co. *v.* Southwest Pennsylvania R. Co., 77 Pa. St. 173; Baltimore, etc., R. Co. *v.* Hanover, etc., R. Co., 13 Pa. Co. Ct. 291.

35. New York, etc., R. Co. *v.* Bridgeport Traction Co., 65 Conn. 410, 32 Atl. 953, 29 L. R. A. 367.

36. New York, etc., R. Co. *v.* Bridgeport

railroad or street railroad,[37] and a constitutional provision authorizing a crossing but not specifying its character does not secure any right to a crossing at grade.[38] Owing to the danger of collisions and necessary interference with the operation of the roads, grade crossings ought to be avoided when possible,[39] and in some jurisdictions the statutes, while not expressly prohibiting grade crossings,[40] provide that they shall not be permitted whenever it is reasonably practicable to construct a crossing of a different character;[41] but if, under the circumstances

Traction Co., 65 Conn. 410, 32 Atl. 953, 29 L. R. A. 367; Delaware, etc., Canal Co. *v.* Scranton, etc., Traction Co., 4 Pa. Dist. 287, 7 Kulp 509; Baltimore, etc., R. Co. *v.* Hanover, etc., R. Co., 13 Pa. Co. Ct. 291.

37. New York, etc., R. Co. *v.* Bridgeport Traction Co., 65 Conn. 410, 32 Atl. 953, 29 L. R. A. 367, holding, however, that where a general statute was enacted that no street railroad should thereafter be constructed across a steam railroad at grade, except upon application to and approval by the railroad commissioners, the act to take effect at a certain subsequent date, and after its enactment and before it took effect, a special statute was passed authorizing a street railroad company to cross a steam railroad company at grade, the special act was not affected by the general act, and that a grade crossing might be constructed without application to the railroad commissioners.

38. Kushequa R. Co. *v.* Pittsburg, etc., R. Co., 200 Pa. St. 526, 50 Atl. 169; Perry County R. Extension Co. *v.* Newport, etc., R. Co., 150 Pa. St. 193, 24 Atl. 709; Northern Cent. R. Co.'s Appeal, 103 Pa. St. 621; Pittsburg, etc., R. Co. *v.* Southwest Pennsylvania R. Co., 77 Pa. St. 173.

39. Chicago, etc., R. Co. *v.* Chicago, etc., R. Co., 91 Iowa 16, 58 N. W. 918; Altoona, etc., R. Co. *v.* Tyrone, etc., R. Co., 160 Pa. St. 623, 28 Atl. 997; Pennsylvania R. Co. *v.* Braddock Electric R. Co., 152 Pa. St. 116, 25 Atl. 780; Perry County R. Extension Co. *v.* Newport, etc., R. Co., 150 Pa. St. 193, 24 Atl. 709; Delaware, etc., Canal Co. *v.* Lackawanna St. R. Co., 3 Lack. Jur. (Pa.) 413.

The reason for discouraging grade crossings is not an exceptional regard for railroad property but is based upon considerations of public safety. Pennsylvania, etc., R. Co. *v.* Philadelphia, etc., R. Co., 160 Pa. St. 277, 28 Atl. 784.

40. Pennsylvania R. Co.'s Appeal, 116 Pa. St. 55, 8 Atl. 914.

41. Baltimore, etc., R. Co. *v.* Wabash R. Co., 31 Ind. App. 201, 67 N. E. 544; *In re* Atlantic Highlands, etc., Electric R. Co., (N. J. Ch. 1896) 35 Atl. 387; Wheeling, etc., R. Co. *v.* Toledo R., etc., Co., 72 Ohio St. 368, 74 N. E. 209; Altoona, etc., R. Co. *v.* Tyrone, etc., R. Co., 160 Pa. St. 623, 28 Atl. 997; Pennsylvania R. Co. *v.* Braddock Electric R. Co., 152 Pa. St. 116, 25 Atl. 780.

In Virginia Code (1904) declares it to be the policy of the state that railroads shall not cross at grade, and that all roads subsequently constructed shall in crossing another railroad pass above or beneath the existing road "wherever it is reasonably practicable and does not involve an unreasonable expense, all the circumstances of the case considered." Norfolk, etc., R. Co. *v.* Tidewater R. Co., 105 Va. 129, 52 S. E. 852.

The Michigan statute of 1883 provides that "in determining the manner of crossing the board shall always provide that one road shall pass over the other where the same can be done without injustice to either company." Toledo, etc., R. Co. *v.* Detroit, etc., R. Co., 62 Mich. 564, 29 N. W. 500, 4 Am. St. Rep. 875.

The practicability of avoiding grade crossings depends almost entirely upon the circumstances of each particular case, among the factors to be considered being the location and surroundings of the proposed crossing, the character of the roads and uses made and intended to be made of them, the increased cost of construction and expense of operation, the public safety and convenience, and the interest and convenience of the road intended to be crossed (Altoona, etc., R. Co. *v.* Tyrone, etc., R. Co., 160 Pa. St. 623, 28 Atl. 997; Northern Cent. R. Co.'s Appeal, 103 Pa. St. 621; Delaware, etc., Canal Co. *v.* Lackawanna Valley Traction Co., 2 Lack. Leg. N. (Pa.) 295); the question being whether a crossing other than at grade is reasonably practicable (Scranton, etc., Traction Co. *v.* Delaware, etc., Canal Co., 180 Pa. St. 636, 37 Atl. 122); which should be determined mainly by whether it is physically practicable and not by what it would cost the crossing company (Williams Valley R. Co. *v.* Lykens, etc., St. R. Co., 192 Pa. St. 552, 44 Atl. 46); and the court, in determining this question, will not consider the unsightliness of an overhead structure as of any consequence nor give weight to the fact that damages may have to be paid to the owners of private property by reason of the erection of such a structure (Pennsylvania R. Co. *v.* Warren St. R. Co., 188 Pa. St. 74, 41 Atl. 331); or that local sentiment is in favor of a grade crossing at the place in question (Baltimore, etc., R. Co. *v.* Butler Pass. R. Co., 207 Pa. St. 406, 56 Atl. 959); and in accordance with these principles it has been held in some cases that under the circumstances it was reasonably practicable to avoid a grade crossing (Baltimore, etc., R. Co. *v.* Butler Pass. Co., *supra*; Pittsburg Junction R. Co. *v.* Ft. Pitt St. Pass. R. Co., 192 Pa. St. 45, 43 Atl. 352; Scranton, etc., Traction Co. *v.* Delaware, etc., Canal Co., *supra*; Altoona, etc., R. Co. *v.* Tyrone, etc., R. Co., 160 Pa. St. 623, 28 Atl. 997; Pennsylvania R. Co. *v.* Braddock Electric R. Co., 152 Pa. St. 116, 25 Atl. 780 [*reversing* 1 Pa. Dist. 111, 126]; Pittsburg, etc., R. Co. *v.* Southwest Pennsylvania R.

of the particular case, a different mode of crossing is not possible or reasonably practicable, a grade crossing should be permitted;[42] and in some jurisdictions there is no statutory prohibition or discrimination against grade crossings.[43] A statute prohibiting grade crossings when practicable has been held applicable to the crossings of steam railroads by electric and street railroads,[44] and to apply to roads chartered before the passage of the act,[45] and under statutes authorizing them to cross at grade,[46] and it is further held that a statute subsequently enacted, authorizing street railroads to cross steam railroads at grade, is not intended to divest courts of equity of the power conferred by the prior statute to prevent grade crossings when practicable to do so.[47] In determining which is the crossing

Co., 77 Pa. St. 173; Delaware, etc., Canal Co. *v.* Scranton, etc., Traction Co., 4 Pa. Dist. 287, 7 Kulp 509); and in others that it was not reasonably practicable under the circumstances to avoid a grade crossing (*In re* Atlantic Highlands, etc., Electric R. Co., (N. J. Ch. 1896) 35 Atl. 387; Pennsylvania R. Co.'s Appeal, 116 Pa. St. 55, 8 Atl. 914; Northern Cent. R. Co.'s Appeal, 103 Pa. St. 621; Perkiomen R. Co. *v.* Collegeville Electric St. R. Co., 14 Montg. Co. Rep. (Pa.) 13).

Whether one company is authorized to maintain a road which it has already constructed and put in operation is not material as affecting the right of another company to cross it at grade, under the Pennsylvania statute of 1871. The road could only be removed at the suit of the state, and whether there rightfully or without warrant of law, it would be contrary to the policy of the statute to permit another road to cross it at grade. Carlisle, etc., R. Co. *v.* Philadelphia, etc., R. Co., 199 Pa. St. 532, 49 Atl. 305.

Changing crossing after construction.— The Indiana statute of 1903 provides that if any street railroad, interurban, or suburban railroad and a railroad company shall fail to agree to a change of any existing grade crossing to a crossing above or below grade, either company may by petition carry the subject to a circuit or superior court, "and if the court shall find that it is practicable" to change the grade crossing to one above or below grade it shall order that the change be made. Pittsburgh, etc., R. Co. *v.* Indianapolis, etc., Traction Co., 169 Ind. 634, 81 N. E. 487, holding, however, that the term "practicable" is not synonymous with possible, but implies a legal discretion and the exercise of judgment based upon the whole evidence of all the facts affecting the question of practicability within the usual and ordinary sense of the word.

42. New Castle, etc., R. Co. *v.* Delaware R. Co., 8 Del. Ch. 419, 68 Atl. 386; *In re* Atlantic Highlands, etc., Electric R. Co., (N. J. Ch. 1896) 35 Atl. 387; Pennsylvania R. Co.'s Appeal, 116 Pa. St. 55, 8 Atl. 914; Northern Cent. R. Co.'s Appeal, 103 Pa. St. 621; Norfolk, etc., R. Co. *v.* Tidewater R. Co., 105 Va. 129, 52 S. E. 852.

Imposing conditions as to use.— Where the court is authorized to regulate the character of crossings it may, when not practicable to avoid a grade crossing, authorize such a crossing and make whatever regulations may be necessary as to the use of the crossing and precautions against accidents. Trenton, etc., R. Co. *v.* Philadelphia, etc., R. Co., (N. J. Ch. 1899) 44 Atl. 853; *In re* Atlantic Highlands, etc., Electric R. Co., (N. J. Ch. 1896) 35 Atl. 387.

43. Wellsburg, etc., R. Co. *v.* Panhandle Traction Co., 56 W. Va. 18, 48 S. E. 746, holding, further, that in such cases a statutory provision that the work shall be so constructed as "not to impede the passage or transportation of persons or property along" the road crossed does not contemplate or prohibit the impediments merely incidental to a properly constructed grade crossing, and that the court having jurisdiction to determine the place and manner of crossing, may order such a crossing as under the circumstances is just and reasonable in view of the interests of the parties and the public welfare.

A federal court will not refuse permission to an electric road to cross at grade the tracks of a steam railroad in the hands of its receivers, where grade crossings by steam railroads are permitted by the authorities of of the state. Stewart *v.* Wisconsin Cent. R. Co., 89 Fed. 617.

44. Pittsburg Junction R. Co. *v.* Ft. Pitt St. Pass. R. Co., 192 Pa. St. 45, 43 Atl. 352; Pennsylvania R. Co. *v.* Braddock Electric R. Co., 152 Pa. St. 116, 25 Atl. 780; Pennsylvania R. Co. *v.* Conshohocken R. Co., 4 Pa. Dist. 12, 15 Pa. Co. Ct. 454; Baltimore, etc., R. Co. *v.* Hanover, etc., St. R. Co., 2 Pa. Dist. 774; Baltimore, etc., R. Co. *v.* Hanover, etc., St. R. Co., 13 Pa. Co. Ct. 291.

45. Pittsburg, etc., R. Co. *v.* Southwest Pennsylvania R. Co., 77 Pa. St. 173.

46. Perry County R. Extension Co. *v.* Newport, etc., R. Co., 150 Pa. St. 193, 24 Atl. 709; Pittsburg, etc., R. Co. *v.* Southwest Pennsylvania R. Co., 77 Pa. St. 173; Catawissa R. Co.'s Appeal, 2 Walk. (Pa.) 175.

The Pennsylvania statute of 1871, authorizing the court to prevent grade crossings when practicable, modifies the prior statute of 1868, authorizing grade crossings. Kushequa R. Co. *v.* Pittsburg, etc., R. Co., 200 Pa. St. 526, 50 Atl. 169; Perry County R. Extension Co. *v.* Newport, etc., R. Co., 150 Pa. St. 193, 24 Atl. 709.

47. Williams Valley R. Co. *v.* Lykens, etc., St. R. Co., 192 Pa. St. 552, 44 Atl. 46; Pennsylvania R. Co. *v.* Braddock Electric R. Co., 152 Pa. St. 116, 25 Atl. 780 [*reversing* 1 Pa. Dist. 111, 126]; Delaware, etc., Canal Co. *v.* Scranton, etc., Traction Co., 4 Pa. Dist.

company, the company which first surveys and stakes out its line and fixes and adopts its grade is entitled to construct its road on that grade, and the other company, although constructing its road first, must so construct it as to avoid a grade crossing if practicable to do so.[48] Where one railroad company crosses another by an overhead bridge it is not required to maintain tell-tales to warn trainmen of the latter road of the danger;[49] but where one railroad crosses another by a bridge not originally intended for railroad purposes, the latter company is entitled to demand that it shall be strengthened and made safe for such use.[50]

d. Expense of Crossing. Where one railroad crosses the track of another, it is ordinarily the duty of the crossing company at whose instance and for whose benefit the crossing is made to defray the entire expense of its construction in the first instance,[51] and subsequently to keep the crossing in repair,[52] unless the crossing is above or below grade,[53] and also to defray the expense of installing and maintaining whatever system of signals, safety devices, or precautions may be necessary for the public safety in the use of the crossing.[54] Where one railroad company has the right to cross the track of another, the latter has no right to dictate the terms upon which the crossing shall be made;[55] but it is competent

287, 7 Kulp 509; Delaware, etc., Canal Co. *v.* Lackawanna St. R. Co., 3 Lack. Jur. (Pa.) 413.

48. Kushequa R. Co. *v.* Pittsburg, etc., R. Co., 200 Pa. St. 526, 50 Atl. 169.

49. Neff *v.* New York Cent., etc., R. Co., 80 Hun (N. Y.) 394, 30 N. Y. Suppl. 323.

50. Pennsylvania R. Co. *v.* Greensburg, etc., Electric St. R. Co., 176 Pa. St. 559, 35 Atl. 122, 36 L. R. A. 839.

51. Central Pass. R. Co. *v.* Philadelphia, etc., R. Co., 95 Md. 428, 52 Atl. 752; West Jersey, etc., R. Co. *v.* Atlantic City, etc., Traction Co., 65 N. J. Eq. 613, 56 Atl. 890; Guelph, etc., R. Co. *v.* Guelph Radial R. Co., 5 Can. R. Cas. 180. See also Pennsylvania R. Co. *v.* Conshohocken R. Co., 4 Pa. Dist. 12, 15 Pa. Co. Ct. 454.

An exception to this rule may arise where a third interest intervenes, requiring a crossing of a particular character, to the necessity for which each of the roads contributes, in which case each should be required to contribute to the cost of constructing such crossing. Pennsylvania R. Co. *v.* Conshohocken R. Co., 4 Pa. Dist. 12, 15 Pa. Co. Ct. 454, holding that where a steam railroad constructed its road across a highway at grade, and a street railroad was subsequently constructed upon the highway and across the steam railroad, and an overhead crossing being practicable was required by statute, and a bridge crossing for the use of the street railway alone would obstruct the highway, so that it was necessary to construct a bridge which would accommodate both the street railway and the public travel on the highway, each company should contribute to the cost of constructing such a bridge.

A statute is unconstitutional which compels the company whose road is crossed to pay any part of the expense of making or constructing the crossing. Such company must be regarded as having accepted its charter upon condition that its road might be crossed upon being paid a reasonable compensation therefor but there can be no presumption that it ever consented to pay for the privilege of being thus injured. Toledo, etc., R. Co. *v.* Detroit, etc., R. Co., 62 Mich. 564, 29 N. W. 500, 4 Am. St. Rep. 875.

52. Central Pass. Co. *v.* Philadelphia, etc., R. Co., 95 Md. 428, 52 Atl. 752.

A statute requiring the company whose road is crossed to contribute to the cost of keeping the crossing in repair after it is constructed can only be justified by the necessities of the case, growing out of the fact that no repairs can be made at the point of crossing which will not extend to both tracks, and the extent of the expense to be borne by the company whose tracks are crossed should always be limited as near as may be to what would be necessary to keep its track in repair at the crossing had the same not been made. Toledo, etc., R. Co. *v.* Detroit, etc., R. Co., 62 Mich. 564, 29 N. W. 500, 4 Am. St. Rep. 875. But see Detroit, etc., R. Co. *v.* Railroad Com'r, 127 Mich. 219, 86 N. W. 842, 62 L. R. A. 149, holding that while the crossing company should be required to pay the original cost of construction, the legislature may properly provide for the apportionment between the companies of the cost of any appliances which may subsequently become necessary for the safety of the public by reason of the increased use of the crossing.

53. Chicago, etc., R. Co. *v.* Springfield, etc., R. Co., 67 Ill. 142, holding that if one road passes under the other the company owning it is not obliged to keep in repair the road above its own at the point of crossing, but that the expense of repairs imposed upon the company owning the overhead track by reason of such crossing should be considered in the estimate of damages.

54. West Jersey, etc., R. Co. *v.* Atlantic City, etc., Traction Co., 65 N. J. Eq. 613, 56 Atl. 890.

55. Arkansas, etc., R. Co. *v.* St. Louis, etc., R. Co., 103 Fed. 747, holding that the company whose road is crossed has no right to demand that the other company shall put in an interlocking plant, where such plant is not required by law.

for the companies to agree between themselves, both as to the payment of the cost of original construction,[56] and of subsequent maintenance and repairs,[57] and such contracts are valid and binding as between the parties.[58] Each company, however, owes a duty to the public as a common carrier to see that a grade crossing is kept in good repair and either may and should make such repairs as are necessary;[59] but the company making them may recover from the other company if as between the companies it was the duty of the latter to do so, either by reason of its being the company for whose benefit the crossing was made,[60] or its agreement to do so,[61] or it may recover the proportion due from the other company where such expense is imposed by statute upon the companies jointly.[62] In some cases the question of the expense incident to the construction or maintenance of crossings and crossing appliances or its apportionment between the companies is regulated by statute.[63] Where it is necessary to apportion any expense incident

56. Chicago, etc., R. Co. *v.* Joliet, etc., R. Co., 105 Ill. 388, 44 Am. Rep. 799; Hydell *v.* Toledo, etc., R. Co., 74 Ohio St. 138, 77 N. E. 1066; Seattle, etc., R. Co. *v.* State, 7 Wash. 150, 34 Pac. 551, 30 Am. St. Rep. 866, 22 L. R. A. 217.

57. Chicago, etc., R. Co. *v.* Joliet, etc., R. Co., 105 Ill. 388, 44 Am. Rep. 799; Hydell *v.* Toledo, etc., R. Co., 74 Ohio St. 138, 77 N. E. 1066.

58. Chicago, etc., R. Co. *v.* Joliet, etc., R. Co., 105 Ill. 388, 44 Am. Rep. 799; Hydell *v.* Toledo, etc., R. Co., 74 Ohio St. 138, 77 N. E. 1066.

59. Chicago, etc., R. Co. *v.* Joliet, etc., R. Co., 105 Ill. 388, 44 Am. Rep. 799.

60. Central Pass. R. Co. *v.* Philadelphia, etc., R. Co., 95 Md. 428, 52 Atl. 752.

61. Chicago, etc., R. Co. *v.* Joliet, etc., R. Co., 105 Ill. 388, 44 Am. Rep. 799.

62. Baltimore, etc., R. Co. *v.* Walker, 45 Ohio St. 577, 16 N. E. 475.

The Ohio statute (Rev. St. § 2593) requiring steam and street railroad companies whose tracks cross at grade to use crossing frogs of the most approved pattern and materials, and to keep the crossings in repair at the joint expense of the companies, applies to companies whose roads were built prior to the statute, and a steam railroad having put in such crossing frogs may recover from a street railroad company its proportion of the cost thereof. Cincinnati St. R. Co. *v.* Cincinnati, etc., R. Co., 1 Ohio S. & C. Pl. Dec. 542, 32 Cinc. L. Bul. 4.

63. Minneapolis, etc., R. Co. *v.* Gowrie, etc., R. Co., 123 Iowa 543, 99 N. W. 181; Baltimore, etc., R. Co. *v.* Walker, 45 Ohio St. 577, 16 N. E. 475; Lake Shore, etc., R. Co. *v.* Cincinnati, etc., R. Co., 30 Ohio St. 604.

Under the Iowa statute, providing that the crossing company may be compelled to interlock the crossing, the cost of installing the interlocking system must be paid by the crossing company (Minneapolis, etc., R. Co. *v.* Cedar Rapids, etc., R. Co., 114 Iowa 502, 87 N. W. 410); but the cost of maintaining and operating it may be apportioned between the companies (Minneapolis, etc., R. Co. *v.* Gowrie, etc., R. Co., 123 Iowa 543, 99 N. W. 181).

The Maine statute of 1895 authorizing the railroad commissioners to determine how railroad crossings shall be constructed and maintained authorizes them to apportion the expense between the companies, but does not require that they shall do so, and where the road crossed has been finished and the crossing is for the benefit of the crossing company, they may properly require it to pay the entire expense of its construction and maintenance. Maine Cent. R. Co. *v.* Waterville, etc., R. Co., 89 Me. 328, 36 Atl. 453.

Under Massachusetts special statute of 1892, providing for the abolition of certain grade crossings by the Old Colony Railroad Company at the expense of such company, and providing for its reimbursement by the commonwealth for a certain percentage of "the actual cost" of the alterations, the interest paid on money borrowed by the company to make the alterations is not a part of the "actual cost," for which it is entitled to reimbursement. *In re* Old Colony R. Co., 185 Mass. 160, 70 N. E. 62.

In Michigan, Howell Annot. St. § 3301, authorizing the railroad commissioner to compel the maintenance of flagmen, gates, or bridges at a crossing whenever the public safety requires it, provided that "the expense thereof shall be borne jointly, in equal proportions by the companies" (Fort-St. Union Depot Co. *v.* State R. Crossing Bd., 81 Mich. 248, 45 N. W. 973); but the statute of 1893, authorizing the railroad commissioners to require any changes and safeguards in existing crossings which they may deem necessary, provides for such an apportionment of the expense incident thereto as the commissioners may deem just and reasonable (Detroit, etc., R. Co. *v.* Railroad Com'rs, 127 Mich. 219, 86 N. W. 842, 62 L. R. A. 149).

In Ohio it is provided by statute that grade crossings shall be made, maintained, and kept in repair at the joint expense of the companies whose tracks cross (Baltimore, etc., R. Co. *v.* Walker, 45 Ohio St. 577, 16 N. E. 475; Lake Shore, etc., R. Co. *v.* Cincinnati, etc., R. Co., 30 Ohio St. 604); and the statute applies without regard to priority of location or construction (Lake Shore, etc., R. Co. *v.* Cincinnati, etc., R. Co., *supra*); and a company operating a road as lessee is an owner within the application of the statute (Baltimore, etc., R. Co. *v.* Walker, *supra*).

to the construction and maintenance of a crossing, the court or commissioners should consider and give effect to any existing contracts between the companies relative thereto.[64]

e. Injunction. A court of equity may enjoin one railroad company from exercising its right of crossing in an arbitrary and oppressive manner unnecessarily prejudicial to the rights of the other company,[65] and may enjoin the construction of a crossing at grade, where the statute provides that such crossings shall be prevented wherever it is practicable to do so,[66] or provides that the crossing shall be so constructed as not unnecessarily to impede the travel and transportation upon the road crossed, and a grade crossing would, under the circumstances, constitute an unnecessary interference therewith,[67] or in the absence of express statutory provision, where under the circumstances of the case a grade crossing is not necessary and would materially interfere with the operation of the road crossed.[68] A bill by one railroad company to enjoin another from crossing its track on a highway at grade will be dismissed upon the requisite authority for such a crossing being obtained from the county commissioners after the filing of the bill,[69] and the court will not require a trestle, constructed and used by the crossing company as a temporary substitute for a bridge, to be removed from property of the other company, which is not in actual use.[70]

3. Determination as to Necessity, Place, Mode, and Expense of Crossing — a. In General. The necessity for the crossing of one railroad by another is in some cases decided by the legislature itself,[71] and in others delegated to certain courts,[72] or boards or commissioners.[73] The statutes conferring the right to cross frequently provide that if the companies are unable to agree as to the compensation, place, and manner of crossing, these questions shall be determined in a certain manner,[74] which varies materially in the different jurisdictions but is

64. Grand Trunk Western R. Co. *v.* Hunt, 40 Ind. App. 168, 81 N. E. 524.

65. West Jersey, etc., R. Co. *v.* Atlantic City, etc., Traction Co., 65 N. J. Eq. 613, 56 Atl. 890; Chicago, etc., R. Co. *v.* Chicago, etc., R. Co., 5 Fed. Cas. No. 2,665, 6 Biss. 219.

But a street railway company occupying a street where the street crosses a steam railroad at grade will not be enjoined from constructing its road across the steam railroad at grade. Cleveland, etc., R. Co. *v.* Urbana, etc., R. Co., 26 Ohio Cir. Ct. 180.

66. Williams Valley R. Co. *v.* Lykens, etc., R. Co., 192 Pa. St. 552, 44 Atl. 46; Pennsylvania R. Co. *v.* Warren St. R. Co., 188 Pa. St. 74, 41 Atl. 331; Pennsylvania R. Co. *v.* Braddock Electric R. Co., 152 Pa. St. 116, 25 Atl. 780.

Where a railroad company has located but not constructed a branch across a public road, it may sue to enjoin a street railway company from constructing its road across such branch at grade until the rights of the parties at the crossing are adjusted. Ohio River Junction R. Co. *v.* Freedom, etc., R. Co., 204 Pa. St. 127, 53 Atl. 773.

67. Chicago, etc., R. Co. *v.* Chicago, etc., R. Co., 91 Iowa 16, 58 N. W. 918; Humeston, etc., R. Co. *v.* Chicago, etc., R. Co., 74 Iowa 554, 38 N. W. 413.

68. Chicago, etc., R. Co. *v.* Chicago, etc., R. Co., 5 Fed. Cas. No. 2,665, 6 Biss. 219.

69. Lynn, etc., R. Co. *v.* Boston, etc., R. Co., 114 Mass. 88.

70. Philadelphia R. Co.'s Appeal, 2 Walk. (Pa.) 243.

71. *In re* Eastern Wisconsin R., etc., Co., 127 Wis. 641, 107 N. W. 496.

72. State *v.* Hennepin County Dist. Ct., 35 Minn. 461, 29 N. W. 60.

73. Kansas City, etc., R. Co. *v.* Railroad Com'rs, 73 Kan. 168, 84 Pac. 755; Toledo, etc., R. Co. *v.* East Saginaw, etc., R. Co., 72 Mich. 206, 40 N. W. 436; Norfolk, etc., R. Co. *v.* Tidewater R. Co., 105 Va. 129, 52 S. E. 852.

74. *Indiana.*— Lake Shore, etc., R. Co. *v.* Cincinnati, etc., R. Co., 116 Ind. 578, 19 N. E. 440.

Missouri.— State *v.* Dearing, 173 Mo. 492, 73 S. W. 485; Kansas City, etc., R. Co. *v.* Kansas City, etc., R. Co., 118 Mo. 599, 24 S. W. 478.

Vermont.— Central Vermont R. Co. *v.* Woodstock R. Co., 50 Vt. 452.

Washington.— Seattle, etc., R. Co. *v.* State, 7 Wash. 150, 34 Pac. 551, 38 Am. St. Rep. 866, 22 L. R. A. 217.

Wisconsin.— *In re* Eastern Wisconsin R., etc., Co., 127 Wis. 641, 107 N. W. 496.

United States.— Arkansas, etc., R. Co. *v.* St. Louis, etc., R. Co., 103 Fed. 747.

See 41 Cent. Dig. tit. "Railroads," §§ 249, 250.

In New York the statute of 1897 authorizes railroad commissioners to determine the mode of crossing, but the statute does not repeal the act of 1890 in so far as it provides for the compensation and place of crossing to be determined by commissioners appointed by the court, or the act of 1893, which provides that the court may, pending such proceeding, authorize a temporary crossing (Oneonta, etc., R. Co. *v.* Cooperstown, etc., R. Co., 85 N. Y. App. Div. 284, 83 N. Y. Suppl. 307; Olean St. R. Co. *v.* Pennsylvania

usually by commissioners appointed by the court,[75] and under some it is held that an attempt and failure to agree is a necessary condition precedent to the right to invoke the legal proceeding provided for.[76] Under other statutes these questions are to be determined by railroad commissioners,[77] or

R. Co., 75 N. Y. App. Div. 412, 78 N. Y. Suppl. 113 [*affirmed* in 175 N. Y. 468, 67 N. E. 1086]); and the proper procedure under these different statutes would be to apply in the first instance for the appointment of commissioners by the court to determine the compensation and place of crossing and then to the railroad commissioners to determine the manner of crossing, and pending the decision of either or both the court may, under the act of 1893, authorize a temporary crossing (Olean St. R. Co. *v.* Pennsylvania, etc., R. Co., *supra*).

75. *Indiana.*— Lake Shore, etc., R. Co. *v.* Cincinnati, etc., R. Co., 116 Ind. 578, 19 N. E. 440.

Missouri.— State *v.* Dearing, 173 Mo. 492, 73 S. W. 485.

New York.— *In re* New York, etc., R. Co., 110 N. Y. 374, 18 N. E. 120 [*affirming* 44 Hun 215]; Buffalo, etc., R. Co. *v.* New York, etc., R. Co., 72 Hun 583, 25 N. Y. Suppl. 265; Boston, etc., R. Co. *v.* Troy, etc., R. Co., 58 How. Pr. 167.

Vermont.— Central Vermont R. Co. *v.* Woodstock R. Co., 50 Vt. 452.

Wisconsin.— *In re* Eastern Wisconsin R., etc., Co., 127 Wis. 641, 107 N. W. 496.

See 41 Cent. Dig. tit. "Railroads," §§ 249, 250.

Involving change of location.— Under the New York statute of 1850, providing in section 22 for the appointment of commissioners at the instance of any person aggrieved by the proposed location to consider a change of route, and in section 28, for the appointment of commissioners where one road desires to cross another, to determine the compensation, place, and manner of crossing, both questions may, in a controversy between two railroads as to a crossing, be decided under the latter provision and the proceeding should be so instituted. *In re* New York, etc., R. Co., 110 N. Y. 374, 18 N. E. 120 [*affirming* 44 Hun 215]; *In re* New York, etc., R. Co., 99 N. Y. 388, 2 N. E. 35; *In re* Lake Shore, etc., R. Co., 89 N. Y. 442. *Compare* Boston, etc., R. Co. *v.* Detroit, etc., R. Co., 58 How. Pr. (N. Y.) 167.

Under the Canadian statute of 14 & 15 Vict. c. 51, the place and mode of crossing and compensation to be paid were in case of disagreement determined by arbitrators appointed by the court, and the order of the court appointing arbitrators was not subject to review on appeal. *In re* Buffalo, etc., R. Co., 14 U. C. Q. B. 397.

76. Lake Shore, etc., R. Co. *v.* Cincinnati, etc., R. Co., 116 Ind. 578, 19 N. E. 440; Toledo, etc., R. Co. *v.* Detroit, etc., R. Co., 62 Mich. 564, 29 N. W. 500, 4 Am. St. Rep. 875; *In re* Boston Hoosac Tunnel, etc., R. Co., 79 N. Y. 69.

Three things must be embraced in the attempt to agree; namely, the compensation, the place, and the manner of crossing. Lake Shore, etc., R. Co. *v.* Cincinnati, etc., R. Co., 116 Ind. 578, 19 N. E. 440.

No particular act is required as an attempt to agree, and a written proposition by one company and the lapse of a month without any answer is sufficient to justify a finding that the companies were unable to agree. *In re* Eastern Wisconsin R., etc., Co., 127 Wis. 641, 107 N. W. 496.

77. *Kansas.*— Union Terminal R. Co. *v.* Railroad Com'rs, 54 Kan. 352, 38 Pac. 290.

Kentucky.— Chicago, etc., R. Co. *v.* Louisville, etc., R. Co., 58 S. W. 799, 22 Ky. L. Rep. 658.

Maine.— Boston, etc., R. Co. *v.* Saco Valley Electric R. Co., 98 Me. 78, 56 Atl. 202; Maine Cent. R. Co. *v.* Waterville, etc., R. Co., 89 Me. 328, 36 Atl. 453.

United States.— Malott *v.* Collinsville, etc., R. Co., 108 Fed. 313, 47 C. C. A. 345.

Canada.— James Bay R. Co. *v.* Grand Trunk R. Co., 37 Can. Sup. Ct. 372; Canadian Pac. R. Co. *v.* Grand Trunk R. Co., 12 Ont. L. R. 320, 7 Ont. Wkly. Rep. 814.

See 41 Cent. Dig. tit. "Railroads," §§ 249, 250.

The Kansas statute authorizing railroad commissioners to determine the necessity, place, and mode of crossing applies only to steam railroads and does not include an electric road, although it is authorized by its charter to use steam as a motive power (Kansas City R. Co. *v.* Railroad Com'rs, 73 Kan. 168, 84 Pac. 755); nor does the statute give the railroad commissioners jurisdiction to determine the rights of the companies, where one does not seek an ordinary crossing but seeks to appropriate to its exclusive use a portion of the right of way of the other (Atchison, etc., R. Co. *v.* Kansas City, etc., R. Co., 67 Kan. 569, 70 Pac. 939, 73 Pac. 899); and the railroad commissioners cannot grant a rehearing of a crossing application and alter the award and decision previously rendered by them (Union Terminal R. Co. *v.* Railroad Com'rs, 54 Kan. 352, 38 Pac. 290).

In New York the act of 1897 authorizes the railroad commissioners to determine the mode of crossing, but the compensation and place are still to be determined by commissioners appointed by the court, as provided for by the act of 1890. Oneonta, etc., R. Co. *v.* Cooperstown, etc., R. Co., 85 N. Y. App. Div. 284, 83 N. Y. Suppl. 307; Olean St. R. Co. *v.* Pennsylvania R. Co., 75 N. Y. App. Div. 412, 78 N. Y. Suppl. 113 [*affirmed* in 175 N. Y. 468, 67 N. E. 1086].

Modifying or making temporary decree.— The board of railroad commissioners have no authority to modify or change a decree once rendered by them for the construction and maintenance of a railroad crossing, except on

corporation commissioners,[78] or a board consisting of certain officers,[79] and under others the place and manner of crossing are to be determined by courts of equity or other designated courts,[80] and where the determination is by a court of equity the proper proceeding is by bill or petition in equity.[81] Where a special procedure relative to crossings is provided by statute, it must be followed,[82] and the general provisions as to acquiring property for railroad purposes or determining the rights of other property-owners are not applicable.[83]

b. Jurisdiction and Power of Courts. In some jurisdictions certain courts are authorized by statute to regulate the place and manner of crossing,[84] it being

a new application, notice, and hearing, nor can they, before appeal, make a temporary decree not purporting to represent their judgment in the premises, as for a temporary crossing at grade, until they shall definitely decide the permanent character of the crossing. Boston, etc., R. Co. *v.* Saco Valley Electric R. Co., 98 Me. 78, 56 Atl. 202.

In Indiana the railroad commission is invested by the act of 1905 with the authority previously exercised by the auditor-general in regard to the requiring of interlocking devices and the supervision of crossings. Grand Trunk Western R. Co. *v.* Hunt, 40 Ind. App. 168, 81 N. E. 524.

Imposing conditions.— The railroad commissioners in authorizing one railroad company to make a crossing under the tracks of another railroad may require that the masonry work of the under crossing shall be sufficient to allow the construction of an additional track on the line of the company whose track is crossed. James Bay R. Co. *v.* Grand Trunk R. Co., 37 Can. Sup. Ct. 372.

In Canada questions relating to the crossing of one railroad by another were formerly regulated by the railway committee of the privy council (Grand Trunk R. Co. *v.* Hamilton Radial Electric R. Co., 29 Ont. 143; Ottawa, etc., R. Co. *v.* Atlantic, etc., R. Co., 1 Can. R. Cas. 101); and in case of the crossing of a dominion railroad by a provincial railroad of Ontario, it was held necessary for the company desiring to effect the crossing to procure the approval of the commissioner of public works for Ontario as well as the approval of the railway committee of the privy council of the dominion (Credit Valley R. Co. *v.* Great Western R. Co., 25 Grant Ch. (U. C.) 507); but under the Railway Act of 1903 such questions are regulated by the railroad commissioners (Canadian Pac. R. Co. *v.* Grand Trunk R. Co., 12 Ont. L. Rep. 320, 7 Ont. Wkly. Rep. 814).

78. Norfolk, etc., R. Co. *v.* Tidewater R. Co., 105 Va. 129, 52 S. E. 852, citing Va. Code (1904), which authorizes the corporation commission to determine the necessity for and the place and mode of crossing, but leaves the compensation to be determined by the laws regulating the exercise of the right of eminent domain.

79. Toledo, etc., R. Co. *v.* Detroit, etc., R. Co., 62 Mich. 564, 29 N. W. 500, 4 Am. St. Rep. 875, citing the Michigan statute of 1883, which provides that if the companies cannot agree as to the manner of crossing the same shall be determined by a board consisting of the attorney-general, secretary of state, and commissioner of railroads.

80. See *infra*, VI, C, 3, b.

81. Philadelphia, etc., R. Co. *v.* Pennsylvania, etc., R. Co., 7 Pa. Co. Ct. 381.

82. *In re* New York, etc., R. Co., 110 N. Y. 374, 18 N. E. 120 [*affirming* 44 Hun 215]; Philadelphia, etc., R. Co. *v.* Pennsylvania Schuylkill Valley R. Co., 7 Pa. Co. Ct. 381; Central Vermont R. Co. *v.* Woodstock R. Co., 50 Vt. 452; Malott *v.* Collinsville, etc., R. Co., 108 Fed. 313, 47 C. C. A. 345.

83. Central Vermont R. Co. *v.* Woodstock R. Co., 50 Vt. 452.

84. *Delaware.*— New Castle, etc., R. Co. *v.* Delaware R. Co., 8 Del. Ch. 419, 68 Atl. 386.

Indiana.— Baltimore, etc., R. Co. *v.* Wabash R. Co., 31 Ind. App. 201, 67 N. E. 544.

Minnesota.— Winona, etc., R. Co. *v.* Chicago, etc., R. Co., 50 Minn. 300, 52 N. W. 657; State *v.* Hennepin County Dist. Ct., 35 Minn. 461, 29 N. W. 60.

New Jersey.— *In re* Atlantic Highlands, etc., R. Co., (Ch. 1896) 35 Atl. 387.

Ohio.— Wheeling, etc., R. Co. *v.* Toledo R., etc., Co., 72 Ohio St. 368, 74 N. E. 209, 106 Am. St. Rep. 622.

Pennsylvania.— Pennsylvania R. Co. *v.* Braddock Electric R. Co., 152 Pa. St. 116, 25 Atl. 780.

West Virginia.— Wellsburg, etc., R. Co. *v.* Panhandle Traction Co., 56 W. Va. 18, 48 S. E. 746.

See 41 Cent. Dig. tit. "Railroads," § 251.

The New Jersey statute of 1895, authorizing the chancellor to determine the place and manner of crossings, does not apply to crossings within city limits, but the chancellor has jurisdiction upon the ground that where two carriers have a right of common easement in a place, the mode of its use may be regulated by a court of equity, and in such cases the court, in determining the question, should be governed by the same considerations as if the application was made under the statute. Jersey City, etc., R. Co. *v.* New York, etc., R. Co., 62 N. J. Eq. 390, 53 Atl. 709.

The Ohio statute of 1902, authorizing the court of common pleas of the county where the crossing is located to determine the mode of crossing (see Wheeling, etc., R. Co. *v.* Toledo R., etc., Co., 72 Ohio St. 368, 74 N. E. 209, 106 Am. St. Rep. 622), applies only to

in some cases further provided that they shall do so in such manner as to cause as little injury as practicable to the company whose road is crossed,[85] and prevent grade crossings whenever it is practicable to do so;[86] but if a different mode of crossing is not practicable the court may permit a grade crossing.[87] So also unless the legislature has specifically designated the mode of crossing, a court of equity may, without express statutory authority, regulate and control the same so as to protect the rights of the companies and the public,[88] and may in a

a crossing of one steam railroad by another and not to crossings of a steam railroad by an electric road (Dayton, etc., R. Co. *v.* Dayton, etc., Traction Co., 26 Ohio Cir. Ct. 1).

85. *Indiana.*— Baltimore, etc., R. Co. *v.* Wabash R. Co., 31 Ind. App. 201, 67 N. E. 544.

Minnesota.— Winona, etc., R. Co. *v.* Chicago, etc., R. Co., 50 Minn. 300, 52 N. W. 657; *In re* Minneapolis, etc., R. Co., 39 Minn. 162, 39 N. W. 65.

New Jersey.— *In re* Atlantic Highlands, etc., R. Co., (Ch. 1896) 35 Atl. 387.

Ohio.— Wheeling, etc., R. Co. *v.* Toledo R., etc., Co., 72 Ohio St. 368, 74 N. E. 209, 106 Am. St. Rep. 622.

Pennsylvania.— Pittsburg, etc., R. Co. *v.* Southwestern Pennsylvania R. Co., 77 Pa. St. 173; Delaware, etc., R. Co. *v.* Wilkes-Barre, etc., R. Co., 11 Pa. Co. Ct. 165.

See 41 Cent. Dig. tit. "Railroads," § 251.

Construction and application of statutes see *supra*, VI, C, 2, a.

A threefold duty is imposed upon the court by the Pennsylvania statute of 1871: (1) To ascertain the mode of crossing which will do the least practicable injury to the road crossed; (2) to compel by its decree the adoption of that mode; and (3) to prevent by its process a crossing at grade if a different kind of crossing is reasonably practicable. Baltimore, etc., R. Co. *v.* Hanover, etc., St. R. Co., 13 Pa. Co. Ct. 291.

Safety devices at crossing.— Under the Minnesota statute of 1879, authorizing the court to "prescribe the location and the manner in which such crossing or connection shall be made so as to effect the purpose of the petitioning corporation, and at the same time do the least injury to the corporation whose property is taken," it may not only prescribe the place and character of the crossing but also require the petitioning company to do what seems reasonably practicable to make and keep the crossing safe for the trains of the other company and the public, and for that purpose may require it to construct and maintain an interlocking device to prevent collisions. Winona, etc., R. Co. *v.* Chicago, etc., R. Co., 50 Minn. 300, 52 N. W. 657.

86. Baltimore, etc., R. Co. *v.* Wabash R. Co., 31 Ind. App. 201, 67 N. E. 544; *In re* Atlantic Highlands, etc., R. Co., (N. J. Ch. 1896) 35 Atl. 387; Wheeling, etc., R. Co. *v.* Toledo R., etc., Co., 72 Ohio St. 368, 74 N. E. 209, 106 Am. St. Rep. 622; Altoona, etc., R. Co. *v.* Tyrone, etc., R. Co., 160 Pa. St. 623, 28 Atl. 997; Pennsylvania R. Co. *v.* Braddock Electric R. Co., 152 Pa. St. 116, 25 Atl. 780.

Construction and application of statutes see *supra*, VI, C, 2, c.

The power of the court to prevent grade crossings when practicable to do so, under the Pennsylvania statute of 1871, is not affected by the constitutional provision authorizing any railroad to cross any other railroad (Perry County R. Extension Co. *v.* Newport, etc., R. Co., 150 Pa. St. 193, 24 Atl. 709; Northern Cent. R. Co.'s Appeal, 103 Pa. St. 621); or by the subsequent statute of 1889, authorizing street railroads to cross steam railroads at grade (Williams Valley R. Co. *v.* Lykens, etc., St. R. Co., 192 Pa. St. 552, 44 Atl. 46; Pennsylvania R. Co. *v.* Braddock Electric R. Co., 152 Pa. St. 116, 25 Atl. 780 [*reversing* 1 Pa. Dist. 111, 126]).

Where the crossing company had already completed its road the court decreed that the company might be permitted to continue the use of the crossing already put in upon its agreeing to maintain watchmen at the crossings, stop trains before crossing, and pass over the crossings at a speed not exceeding four miles per hour. Philadelphia, etc., R. Co. *v.* Catawissa R. Co., 1 Walk. (Pa.) 81.

87. *In re* Atlantic Highlands, etc., R. Co., (N. J. Ch. 1896) 35 Atl. 387; Pennsylvania R. Co.'s Appeal, 116 Pa. St. 55, 8 Atl. 914.

In Delaware, where, under the General Corporation Law (22 Del. Laws, p. 815, c. 394), a railroad company is permitted by the court to construct its line across another railroad at grade, the decree will prescribe the specific method of construction and the appliances essential therefor, which with the attendance required for their operation will be at the expense of the company making the application. New Castle, etc., R. Co. *v.* Delaware R. Co., 8 Del. Ch. 419, 68 Atl. 386.

88. Chicago, etc., R. Co. *v.* Chicago, etc., R. Co., 91 Iowa 16, 58 N. W. 918; Humeston, etc., R. Co. *v.* Chicago, etc., R. Co., 74 Iowa 554, 38 N. W. 413; West Jersey, etc., R. Co. *v.* Atlantic City, etc., Traction Co., 65 N. J. Eq. 613, 56 Atl. 890; Chicago, etc., R. Co. *v.* Chicago, etc., R. Co., 5 Fed. Cas. No. 2,665, 6 Biss. 219.

Where the board of public works has merely authorized defendant to cross plaintiff's tracks, and defendant threatens to change the grade of one rail, which would render travel on plaintiff's road less safe and impede the speed of its through trains, the court may properly enjoin defendant from so interfering with plaintiff's grade and remand the parties to the board of public works to have the question at issue between

proper case enjoin one railroad company from crossing another at grade.[89] A court of equity also has jurisdiction specifically to enforce a contract between the companies as to how a crossing shall be used,[90] and where two railroad companies have a community of interest in the land on which they cross each other and disagree as to their respective rights, a court of equity will control and direct its use.[91] A court of equity having jurisdiction to prevent grade crossings may, on ordering a crossing of a different character, authorize the temporary use of a grade crossing for construction purposes,[92] but the time it may be used should be limited by the court.[93] A statute giving a court of equity power to determine the place and manner of crossing does not authorize it to condemn the property of the road crossed and fix the compensation, but the right to cross, unless the parties can agree, must be secured by proper proceedings at law.[94]

c. Powers and Proceedings of Commissioners. Under statutes providing for the appointment of commissioners to determine the compensation, place, and manner of crossing where the companies are unable to agree, the court will not on an application for the appointment of commissioners, pass upon any questions with regard to the crossing which it is the province of the commissioners to determine.[95] These statutes are held to confer upon the commissioners the power to determine all matters with respect to the crossing which would ordinarily be provided for by a contract or agreement between the companies in case they had been able to agree,[96] and not only to determine such matters as relate to the interests of the companies, but also those relating to the safety of the public.[97] The commissioners may provide as to the materials to be used,[98] and the right to determine the manner of crossing does not relate merely to the mechanical means and appliances to be used, but includes the manner of using the crossing and precautions against accidents.[99] The commissioners should go upon and view the premises where the crossing is located, but this fact need not be stated in their report.[1]

d. Notice, Pleading, and Evidence. In a proceeding by one railroad company to establish a crossing upon the road of another notice of the proceeding must be given to the latter company.[2] The petition must show a compliance with any statutory requirements and allege such facts as are necessary to show plaintiff's right to the crossing and to institute the proceedings therefor;[3] and so where

them determined. Southern R. Co. *v.* Washington, etc., R. Co., 102 Va. 483, 46 S. E. 784.

89. See *supra*, VI, C, 2, e.

90. Cornwall, etc., R. Co.'s Appeal, 125 Pa. St. 232, 17 Atl. 427, 11 Am. St. Rep. 889.

91. National Docks, etc., R. Co. *v.* Pennsylvania R. Co., (N. J. Ch. 1895) 30 Atl. 1102.

92. Smethport R. Co. *v.* Pittsburg, etc., R. Co., 203 Pa. St. 176, 52 Atl. 88.

93. Smethport R. Co. *v.* Pittsburg, etc., R. Co., 203 Pa. St. 176, 52 Atl. 88.

94. Wellsburg, etc., R. Co. *v.* Panhandle, etc., Traction Co., 56 W. Va. 18, 48 S. E. 746.

95. Buffalo, etc., R. Co. *v.* New York, etc., R. Co., 72 Hun (N. Y.) 583, 25 N. Y. Suppl. 265.

96. Chicago, etc., R. Co. *v.* Kansas City, etc., R. Co., 110 Mo. 510, 19 S. W. 826; *In re* Lockport, etc., R. Co., 19 Hun (N. Y.) 38.

97. *In re* Lockport, etc., R. Co., 19 Hun (N. Y.) 38.

98. Chicago, etc., R. Co. *v.* Kansas City, etc., R. Co., 110 Mo. 510, 19 S. W. 826.

99. *In re* Lockport, etc., R. Co., 19 Hun (N. Y.) 38, holding that the commissioners may determine such matters as whether trains shall come to a full stop before crossing and whether a flagman shall be employed, etc. But see Matter of Long Island Cent. R. Co., 1 Thomps. & C. (N. Y.) 419, holding that the commissioners cannot regulate the speed at which trains shall pass the crossing.

1. St. Louis Transfer R. Co. *v.* St. Louis, etc., R. Co., 100 Mo. 419, 13 S. W. 710.

2. Hornellsville Electric R. Co. *v.* New York, etc., R. Co., 83 Hun (N. Y.) 407, 31 N. Y. Suppl. 745, holding that a notice annexed to the petition, stating that the petition will be presented to the court at a certain time, is sufficient.

3. Lake Shore, etc., R. Co. *v.* Cincinnati, etc., R. Co., 116 Ind. 578, 19 N. E. 440.

Allegations held sufficient.—A petition under the Michigan statute for the appointment of commissioners, which states that it is necessary for the public use to cross the road of another company, and that the board of directors has determined that the taking is necessary to accommodate petitioner's tracks and develop the business along the line of its

an attempt and failure on the part of the companies to agree as to the compensation, place, and manner of crossing is a necessary condition precedent to the right to institute legal proceedings to determine the same, this fact must be alleged.[4] On an application to the court to define the place and manner of crossing, the petitioning company must show that it has a legal right to construct its road,[5] and where the statute provides that the crossing shall be so located as to inflict the least practicable injury upon the road crossed, the petitioning company must show such to be the case with reference to the proposed crossing,[6] and where the statute provides that grade crossings shall be prohibited whenever it is reasonably practicable to do so, it will be presumed that such a crossing may be avoided, and the burden is upon the petitioning company to show the contrary.[7]

e. Review. Where the compensation, place, and manner of crossing are determined by commissioners appointed by the court their decision is reviewable by the court,[8] not only as to the compensation awarded but also as to the place and manner of crossing,[9] and the decision of the trial court thereon is reviewable on appeal to the supreme court;[10] but it has been held that the order appointing the commissioners is not appealable.[11] An appeal may also be taken from the decision of railroad commissioners,[12] but their decision will not be altered or

road, is sufficient (Toledo, etc., R. Co. *v.* East Saginaw, etc., R. Co., 72 Mich. 206, 40 N. W. 436); and a petition under the New York statute for the appointment of commissioners to determine the compensation, place, and manner of crossing, which alleges that petitioner is a corporation, that the route of its road as laid out crosses the other road, that it desires to cross such road, specifying the place, that the two companies cannot agree upon the compensation for or place or manner of crossing, and that the requisite consent of property-owners and municipal authorities has been obtained, is sufficient (Oneonta, etc., R. Co. *v.* Cooperstown, etc., R. Co., 85 N. Y. App. Div. 284, 83 N. Y. Suppl. 307).

4. Lake Shore, etc., R. Co. *v.* Cincinnati, etc., R. Co., 116 Ind. 578, 19 N. E. 440; Toledo, etc., R. Co. *v.* Detroit, etc., R. Co., 62 Mich. 564, 29 N. W. 500, 4 Am. St. Rep. 875; *In re* Boston Hoosac Tunnel, etc., R. Co., 79 N. Y. 69.

5. Mercer County Traction Co. *v.* United New Jersey R., etc., Co., 68 N. J. Eq. 715, 61 Atl. 461 [*reversing* 65 N. J. Eq. 574, 56 Atl. 897].

6. Pittsburg, etc., R. Co. *v.* Southwestern Pennsylvania R. Co., 77 Pa. St. 173; Baltimore, etc., R. Co. *v.* Hanover, etc., R. Co., 2 Pa. Dist. 774.

7. Baltimore, etc., R. Co. *v.* Hanover, etc., St. R. Co., 2 Pa. Dist. 774; Moosic Mountain Coal Co. *v.* Delaware, etc., R. Co., 4 C. Pl. (Pa.) 189.

8. State *v.* Dearing, 173 Mo. 492, 73 S. W. 485; St. Louis Transfer R. Co. *v.* St. Louis, etc., R. Co., 100 Mo. 419, 13 S. W. 710; *In re* Boston Hoosac Tunnel, etc., Co., 79 N. Y. 64. See also *In re* Eastern Wisconsin R., etc., Co., 127 Wis. 641, 107 N. W. 496. But see *In re* New York, etc., R. Co., 99 N. Y. 388, 2 N. E. 35, holding that an appeal does not lie from a decision of the commissioners relating to the manner of crossing, upon a mere question of fact decided after hearing the testimony and inspecting the *locus in quo*.

9. State *v.* Dearing, 173 Mo. 492, 73 S. W. 485; St. Louis Transfer R. Co. *v.* St. Louis, etc., R. Co., 100 Mo. 419, 13 S. W. 710.

10. St. Louis Transfer R. Co. *v.* St. Louis, etc., R. Co., 100 Mo. 419, 13 S. W. 710, holding, however, that the supreme court cannot review the determination of the trial court on exceptions to the commissioners' report as to the question of damages, where no evidence on this question is preserved in the record.

11. Stillwater, etc., R. Co. *v.* Boston, etc., R. Co., 67 N. Y. App. Div. 367, 73 N. Y. Suppl. 744, holding that an order appointing commissioners under the New York statute, to determine the compensation, place, and manner of crossing is not a final order from which an appeal is authorized. But see *In re* Boston Hoosac Tunnel, etc., Co., 79 N. Y. 64; *In re* Eastern Wisconsin R., etc., Co., 127 Wis. 641, 107 N. W. 496.

12. Union Terminal R. Co. *v.* Railroad Com'rs, 54 Kan. 352, 38 Pac. 290, holding, however, that the decision of the commissioners is final and conclusive unless appealed from within the time limited.

Under the Indiana statute of 1897, authorizing railroad commissioners to require an interlocking device to be constructed and maintained at a crossing, it is held that no appeal from their decision will lie directly to the appellate court (Grand Rapids, etc., R. Co. *v.* Railroad Commission, 167 Ind. 214, 78 N. E. 981); but an appeal may be taken from their decision to the circuit or superior court (Grand Rapids, etc., R. Co. *v.* Railroad Commission, 38 Ind. App. 657, 78 N. E. 358); and from the decision of that court an appeal may be taken to the appellate court (Grand Trunk Western R. Co. *v.* Railroad Commission, 40 Ind. App. 168, 81 N. E. 524; Grand Rapids, etc., R. Co. *v.* Railroad Com-

reversed unless manifestly illegal or unjust.[13] Where the decision as to the place and manner of crossing is made by the court, the supreme court in reviewing the decision will only inquire as to legal errors or an abuse of discretion on the part of the trial court.[14] Where a railroad company is enjoined from constructing a grade crossing and subsequently constructs an overhead crossing at the place in question, it waives any right to a grade crossing and the question of its right to such crossing will not be considered on appeal.[15] An objection to a proceeding to fix a crossing on the ground that the route of the road had not been finally determined is not tenable where the proceedings fixing the route had terminated before the order was made from which the appeal is taken.[16] On appeal from an order appointing commissioners the court cannot pass upon the questions as to the place and manner of crossing which are to be determined in the first instance by the commissioners.[17]

D. Crossing Highways — 1. Right to Cross — a. In General. The legislature may authorize a railroad company to construct its road across public highways,[18] turnpikes,[19] or streets.[20] The right to cross is sometimes expressly conferred by statutory or charter provisions;[21] but need not be conferred in express terms as it will be implied from a grant of authority to construct a railroad upon a certain route or between certain termini,[22] or to connect with another railroad;[23] and in cases where the right is expressly granted, it is not necessary

mission, *supra*); but not to the supreme court (Grand Trunk Western R. Co. *v.* Railroad Commission, 167 Ind. 261, 78 N. E. 975).

13. Maine Cent. R. Co. *v.* Waterville, etc., R., etc., Co., 89 Me. 328, 36 Atl. 453.

14. *In re* Minneapolis, etc., R. Co., 36 Minn. 481, 32 N. W. 556.

15. Chicago, etc., R. Co. *v.* Chicago, etc., R. Co., 91 Iowa 16, 58 N. W. 918.

16. *In re* New York, etc., R. Co., 88 N. Y. 279.

17. *In re* Boston Hoosac Tunnel, etc., Co., 79 N. Y. 64; *In re* Eastern Wisconsin R., etc., Co., 127 Wis. 641, 107 N. W. 496.

18. Madera R. Co. *v.* Raymond Granite Co., 3 Cal. App. 668, 87 Pac. 27; Tennessee, etc., R. Co. *v.* Adams, 3 Head (Tenn.) 596.

19. Cincinnati, etc., R. Co. *v.* Spring Grove Ave. Co., 9 Ohio Dec. (Reprint) 625, 15 Cinc. L. Bul. 384; White River Turnpike Co. *v.* Vermont Cent. R. Co., 21 Vt. 590.

20. Northern Coal, etc., Co. *v.* Wilkes-Barre, 218 Pa. St. 269, 67 Atl. 352; South Waverly's Appeal, 7 Pa. Cas. 386, 11 Atl. 245; Pepper *v.* Union R. Co., 113 Tenn. 53, 85 S. W. 864; Tennessee, etc., R. Co. *v.* Adams, 3 Head (Tenn.) 596.

Authority to cross any "public road or way" includes city streets as well as country highways. Canton *v.* Canton Cotton Warehouse Co., 84 Miss. 268, 36 So. 266, 105 Am. St. Rep. 428, 65 L. R. A. 561. But see Tennessee, etc., R. Co. *v.* Adams, 3 Head (Tenn.) 596, holding that a right to cross "any public road" does not include city streets.

21. Madera R. Co. *v.* Raymond Granite Co., 3 Cal. App. 668, 87 Pac. 27; State *v.* Davenport, etc., R. Co., 47 Iowa 507; Canton *v.* Canton Cotton Warehouse Co., 84 Miss. 268, 36 So. 266, 105 Am. St. Rep. 428, 65 L. R. A. 561; South Waverly's Appeal, 7 Pa. Cas. 386, 11 Atl. 245.

The right to construct a railroad "over or under" a highway includes the right to construct it "upon" a street or highway. State *v.* Davenport, etc., R. Co., 47 Iowa 507.

Branch lines.— The right granted to the Lake Superior, etc., R. Co. by the Minnesota statute of 1861, to construct its railroad across any public road or highway, does not extend to branch roads which are neither a part of nor appurtenant to its main line. St. Paul, etc., R. Co. *v.* Duluth, 73 Minn. 270, 76 N. W. 35, 43 L. R. A. 433.

22. Allen *v.* Jersey City, 53 N. J. L. 522, 22 Atl. 257; Atty.-Gen. *v.* Morris, etc., R. Co., 19 N. J. L. 386; Raritan Tp. *v.* Port Reading R. Co., 49 N. J. Eq. 11, 23 Atl. 127; Northern Coal, etc., Co. *v.* Wilkes-Barre, 218 Pa. St. 269, 67 Atl. 352; Cleveland, etc., R. Co. *v.* Speer, 56 Pa. St. 325, 94 Am. Dec. 841; Tennessee, etc., R. Co. *v.* Adams, 3 Head (Tenn.) 596; Ottawa *v.* Canada Atlantic R. Co., 33 Can. Sup. Ct. 376 [*affirming* 4 Ont. L. Rep. 56, 1 Ont. Wkly. Rep. 349 (*affirming* 2 Ont. L. Rep. 336)].

A railroad company authorized to construct lateral branches not exceeding three miles in length from either terminus or from any point on the line of its main road may cross roads of the township in which it is located in constructing the branches or the streets of a city formed out of a portion of the township, without the consent of the city. Northern Coal, etc., Co. *v.* Wilkes-Barre, 218 Pa. St. 269, 67 Atl. 352.

A mining company authorized by law to construct and operate a railroad from its works to another railroad has the same right to cross a public highway as an ordinary railroad company. *Ex p.* Bacot, 36 S. C. 125, 15 S. E. 204, 16 L. R. A. 586.

23. Louisville, etc., R. Co. *v.* State, 9 Baxt. (Tenn.) 522, holding that a statute authorizing railroad companies to connect their tracks and requiring them to interchange

to specify the particular streets or highways which may be crossed.[24] The legislature may authorize a railroad company to cross streets without the consent of the municipality,[25] and under some of the statutes it is held that such consent is not necessary;[26] but it is also competent for the legislature to require that the consent of the municipality shall be first obtained,[27] and under some of the statutes a railroad company has no right to cross city streets without the consent of the municipality,[28] and such permission when granted may be restricted by such reasonable conditions as the municipality may see fit to impose.[29] In New York it is provided by statute that a railroad company shall not construct its road across a highway in any town or street in any incorporated village without an order of the supreme court,[30] or across the streets of New York city except in accordance with such authority as the legislature may subsequently provide.[31]

freight impliedly authorizes a railroad company to cross a highway in connecting its tracks with another road.

24. Canton *v.* Canton Cotton Warehouse Co., 84 Miss. 268, 36 So. 266, 105 Am. St. Rep. 428, 65 L. R. A. 561.

25. Clinton *v.* Cedar Rapids, etc., R. Co., 24 Iowa 455; Canton *v.* Canton Cotton Warehouse Co., 84 Miss. 268, 36 So. 266, 105 Am. St. Rep. 428, 65 L. R. A. 561.

26. Morgan *v.* Des Moines Union R. Co., 113 Iowa 561, 85 N. W. 902; Chicago, etc., R. Co. *v.* Newton, 36 Iowa 299; Northern Coal, etc., Co. *v.* Wilkes-Barre, 218 Pa. St. 269, 67 Atl. 352; South Waverly's Appeal, 7 Pa. Cas. 386, 11 Atl. 245; Ottawa *v.* Canada Atlantic R. Co., 33 Can. Sup. Ct. 376 [*affirming* 4 Ont. L. Rep. 56, 1 Ont. Wkly. Rep. 336 (*affirming* 2 Ont. L. Rep. 336)].

Extent of use.— Where a railroad company is granted by a city ordinance a certain number of feet in width in which to cross a street, such grant is not exclusive, but the company may use a greater width since it has a right independently of the grant to cross streets without the consent of the municipality. Morgan *v.* Des Moines Union R. Co., 113 Iowa 561, 85 N. W. 902.

Longitudinal use of highway.— Under the Iowa code it is held that while a municipality cannot prevent a crossing of a street it may prevent a longitudinal use of the street, and that this includes a crossing at such an angle that the track or embankment upon which the rails are laid occupies any part of the street in front of property abutting thereon. Gates *v.* Chicago, etc., R. Co., 82 Iowa 518, 48 N. W. 1040.

27. Pittsburg, etc., R. Co. *v.* Chicago, 159 Ill. 369, 42 N. W. 781; Cincinnati Northern R. Co. *v.* Cincinnati, 8 Ohio Dec. (Reprint) 554, 8 Cinc. L. Bul. 334.

28. Chicago Terminal Transfer Co. *v.* Chicago, 220 Ill. 310, 77 N. E. 204 [*affirming* 121 Ill. App. 197]; Veazie *v.* Mayo, 45 Me. 560; Philadelphia *v.* Philadelphia, etc., R. Co., 7 Pa. Co. Ct. 390; Philadelphia, etc., R. Co. *v.* Kensington, etc., R. Co., 33 Wkly. Notes Cas. (Pa.) 182; Delaware, etc., R. Co. *v.* Syracuse, 157 Fed. 700.

In Ohio a railroad company cannot construct and maintain its road across a city street without the consent of the city authorities or without acquiring the right to do so by appropriate proceedings. Youngstown *v.* Pittsburgh, etc., R. Co., 3 Ohio Cir. Ct. 214, 2 Ohio Cir. Dec. 121; Cincinnati Northern R. Co. *v.* Cincinnati, 8 Ohio Dec. (Reprint) 554, 8 Cinc. L. Bul. 334.

In Washington City, D. C., the right to construct a railroad across streets of the city must be obtained from congress. Edmonds *v.* Baltimore, etc., R. Co., 114 U. S. 453, 5 S. Ct. 1098, 29 L. ed. 216.

A requirement for the recording in the county commissioner's office of the written assent of the mayor and aldermen of a town or city to the construction of a railroad to cross a street is merely directory and does not constitute a condition precedent to the right to construct the road. Veazie *v.* Mayo, 45 Me. 560.

29. Chicago Terminal Transfer Co. *v.* Chicago, 220 Ill. 310, 77 N. E. 204 [*affirming* 121 Ill. App. 197], holding that where a municipality authorized a railroad company to construct "one or more" tracks across certain streets, the ordinance to be null and void unless such tracks should be constructed within three years, if the company within the time limited constructed only one track across the streets, its authority was exhausted and it could not, after the expiration of such time, construct additional tracks across the streets crossed by the track previously constructed.

The remedy of the railroad company in case the municipality should arbitrarily and wrongfully refuse permission to cross a street or impose unreasonable burdens or restrictions upon the railroad company is by mandamus, and not by injunction to prevent the municipality from interfering with the construction of the road. Pittsburg, etc., R. Co. *v.* Chicago, 159 Ill. 369, 42 N. E. 781.

30. People *v.* Northern Cent. R. Co., 164 N. Y. 289, 58 N. E. 138 [*modifying* 35 N. Y. App. Div. 624, 54 N. Y. Suppl. 1112].

31. People's Rapid Transit Co. *v.* Dash, 125 N. Y. 93, 26 N. E. 25, 10 L. R. A. 728 [*affirming* 10 N. Y. Suppl. 849], holding that the act of 1860, prohibiting the building of any railroad "in, upon or along any or either of the streets or avenues of the city of New York," applies to and prohibits the building of a railroad across the streets of that city, and further, that the General Railroad Act, as amended by acts of 1880, 1887, authorizing railroad companies organized under it to cross streets and highways, does not grant

Statutes requiring the consent or petition of abuting property-owners to use the streets for railroad purposes apply only where it is proposed to locate the road along the street and not to a mere crossing of the street.[32]

b. Nature and Extent of Rights Acquired. Where a railroad crosses a highway the company does not take the land of the highway as real estate of individuals is taken,[33] and the railroad company acquires no exclusive rights in the crossing, but only the right to use it in common with the public traveling upon the highway.[34] It may use the highway only for the purpose of crossing,[35] and the right to cross does not confer a right to use the full width of its authorized right of way but only such space as is reasonably necessary for the purpose of passage,[36] and if the company acquires any rights within the limits of the highway beyond that actually occupied by the rails and road-bed, it is only such as is necessary to the full enjoyment of its right to lay the track across the highway and use it beneficially.[37] Where a railroad company constructs a bridge over its tracks at a street crossing, which is to constitute a part of the highway and to be maintained as such by the municipality, the title to the bridge is in the municipality and not the railroad company.[38]

c. Rights and Remedies of Public. Where the consent of the municipal or other public authorities is essential to the right to construct a railroad across a street or highway, a court of equity will enjoin the railroad company from proceeding without such consent to construct such crossing,[39] or from operating its trains thereon if already constructed,[40] or grant such other equitable relief as may be appropriate and necessary;[41] but unless a highway is materially obstructed or irreparable injury threatened, a mandatory injunction requiring the removal of the tracks will not be granted before final hearing.[42]

2. Place, Mode, and Expense of Crossing — a. In General. Where a railroad crosses a street or highway the legislature may regulate the manner and character of crossing,[43] or may delegate such power of regulation to a municipal corporation as to crossings within its limits;[44] and where the mode and manner of crossing is

the authority made requisite by the act of 1860.

32. Chicago, etc., R. Co. *v.* Dunbar, 100 Ill. 110 (holding that a statute requiring the petition of property-owners to "the use of" a street for railroad purposes or the right to lay railroad tracks "in any street" does not apply to a crossing of a street); Beekman *v.* Brooklyn, etc., R. Co., 89 Hun (N. Y.) 14, 35 N. Y. Suppl. 84 (holding that a charter provision requiring the consent or petition of property-owners on the street "along" which a railroad is to be operated, even if having application to any but street railroads, does not apply where the construction is "across" a street).

33. Bangor, etc., R. Co. *v.* Smith, 47 Me. 34.

34. Lake Shore, etc., R. Co. *v.* Elyria, 14 Ohio Cir. Ct. 48, 7 Ohio Cir. Dec. 312.

35. Bangor, etc., R. Co. *v.* Smith, 47 Me. 34; State *v.* Vermont Cent. R. Co., 27 Vt. 103.

Unauthorized uses.—A railroad acquires no right by crossing a highway to construct station-houses or other buildings thereon (State *v.* Vermont Cent. R. Co., 27 Vt. 103); or to construct a lateral branch from the main track within the limits of the highway at the crossing extending along and parallel with the highway (Bangor, etc., R. Co. *v.* Smith, 47 Me. 34); nor has the company any right to appropriate a portion of the highway by the construction of abutments or embankments thereon so as to exclude the public from a large portion of its width (Little Miami R. Co. *v.* Greene County Com'rs, 31 Ohio St. 338).

36. Jones *v.* Erie, etc., R. Co., 169 Pa. St. 333, 32 Atl. 535, 47 Am. St. Rep. 916; State *v.* Vermont Cent. R. Co., 27 Vt. 103.

37. Bangor, etc., R. Co. *v.* Smith, 47 Me. 34.

38. Pennsylvania R. Co. *v.* Greensburg, etc., St. R. Co., 176 Pa. St. 559, 35 Atl. 122, 36 L. R. A. 839.

39. Philadelphia, etc., R. Co. *v.* Kensington, etc., R. Co., 33 Wkly. Notes Cas. (Pa.) 182.

40. Cincinnati Northern R. Co. *v.* Cincinnati, 8 Ohio Dec. (Reprint) 554, 8 Cinc. L. Bul. 334.

41. State *v.* St. Louis, etc., R. Co., 86 Mo. 288.

42. Cincinnati Northern R. Co. *v.* Cincinnati, 8 Ohio Dec. (Reprint) 554, 8 Cinc. L. Bul. 334.

43. People *v.* Boston, etc., R. Co., 70 N. Y. 569, holding that a statute requiring a railroad company to construct a bridge at the point where the road intersects a turnpike, so as to carry the turnpike over the railroad in the manner specified in such act, is constitutional.

44. Chicago, etc., R. Co. *v.* State, 47 Nebr. 549, 66 N. W. 624, 53 Am. St. Rep. 557, 41

prescribed by statute the requirements must be complied with.[45] The mere right to cross a highway confers no right upon a railroad company to destroy the highway or render it useless as such,[46] and while ordinarily some impairment of the use or safety of the highway must necessarily result from the existence of the crossing,[47] it should be so located and constructed as not unnecessarily to injure the highway or impair the rights of the public in its use;[48] and frequently there are statutory or charter provisions to this effect,[49] or requiring that the highway shall be restored to its former state or such as not unnecessarily to have impaired its usefulness.[50] The railroad company must construct and maintain a safe and suitable crossing for the passage of persons and vehicles along the highway at the crossing,[51] which duty is frequently imposed in express terms by statutory or charter provisions,[52] and the company must also construct and maintain safe and suitable

L. R. A. 481, holding that the provision of the charter of the city of Omaha, authorizing such city by ordinance to require railroad companies to construct and keep in repair viaducts over streets crossed by their tracks, is a valid exercise of the police power of the state.

In Arkansas municipal corporations may, under the general powers conferred upon them in regard to streets, prescribe the grade of approaches at railroad crossings. Hughes *v.* Arkansas, etc., R. Co., 74 Ark. 194, 85 S. W. 773.

45. Bangor, etc., R. Co. *v.* Smith, 47 Me. 34.

46. Palatka, etc., R. Co. *v.* State, 23 Fla. 546, 3 So. 158, 11 Am. St. Rep. 395.

The right to use a section line highway is not taken away at the point of intersection by the construction of a railroad across it. Great Northern R. Co. *v.* Viborg, 17 S. D. 374, 97 N. W. 6.

Number of tracks.— Where a railroad company having the right to cross a street and, having constructed five parallel tracks, subsequently constructed four more, and the nine parallel tracks made the use of the street for ordinary travel so dangerous as practically to destroy it as a public highway, it was held that the use of such additional tracks would be enjoined. Newark *v.* Delaware, etc., R. Co., 42 N. J. Eq. 196, 7 Atl. 123.

47. Kyne *v.* Wilmington, etc., R. Co., 8 Houst. (Del.) 185, 14 Atl. 922; Little Miami R. Co. *v.* Greene County Com'rs, 31 Ohio St. 338.

48. *Florida.*— Palatka, etc., R. Co. *v.* State, 23 Fla. 546, 3 So. 158, 11 Am. St. Rep. 395.

Maine.— Veazie *v.* Penobscot R. Co., 49 Me. 119.

Massachusetts.— Gillett *v.* Western R. Corp., 8 Allen 560.

New Jersey.— Raritan Tp. *v.* Port Reading R. Co., 49 N. J. Eq. 11, 23 Atl. 127.

Tennessee.— Tennessee, etc., R. Co. *v.* Adams, 3 Head 596.

Vermont.— State *v.* Vermont Cent. R. Co., 27 Vt. 103.

See 41 Cent. Dig. tit. "Railroads," § 266.

Crossing at right angles.—A railroad company having authority to cross city streets at grade is not in any way restricted as to the angle at which it may cross so long as the tracks are not laid in front of property belonging to others. Morgan *v.* Des Moines Union R. Co., 113 Iowa 561, 85 N. W. 902.

49. Dickinson *v.* New Haven, etc., R. Co., 155 Mass. 16, 34 N. E. 334; State *v.* Hannibal, etc., R. Co., 86 Mo. 13; Newark *v.* Delaware, etc., R. Co., 42 N. J. Eq. 196, 7 Atl. 123; Northern Cent. R. Co. *v.* Com., 90 Pa. St. 300; North Manheim Tp. *v.* Reading, etc., R. Co., 10 Pa. Cas. 261, 14 Atl. 137.

Statutes construed.—A requirement that the crossing shall be so constructed as not to "obstruct" the highway does not mean that travel thereon shall not be rendered in any degree more inconvenient, but only that it shall not be stopped or interfered with more than is necessary. Newburyport Turnpike Corp. *v.* Eastern R. Co., 23 Pick. (Mass.) 326. Ground occupied by the owner in passing from one part of his farm to another is not an "established road or way" which the Pennsylvania statute of 1849 provides must not be impeded or obstructed by a railroad. Ambler's Appeal, 2 Pa. Cas. 375, 4 Atl. 187.

50. See *infra*, VI, D, 3, a.

51. *Indiana.*— Lake Shore, etc., R. Co. *v.* McIntosh, 140 Ind. 261, 38 N. E. 476.

Massachusetts.— Gillett *v.* Western R. Corp., 8 Allen 560.

Michigan.— Tobias *v.* Michigan Cent. R. Co., 103 Mich. 330, 61 N. W. 514; Maltby *v.* Chicago, etc., R. Co., 52 Mich. 108, 17 N. W. 717.

Nebraska.— Omaha, etc., R. Co. *v.* Brady, 39 Nebr. 27, 57 N. W. 767.

New York.— Gale *v.* New York Cent., etc., R. Co., 76 N. Y. 594; Hoyt *v.* New York, etc., R. Co., 6 N. Y. St. 7.

Vermont.— Mann *v.* Central Vermont R. Co., 55 Vt. 484, 45 Am. Rep. 628.

See 41 Cent. Dig. tit. "Railroads," §§ 266, 959.

Liability for injuries due to defective character of crossing see *infra*, X, F, 3.

The fact that there is a steep hill at one end of a street which renders it impracticable for loaded teams will not excuse the railroad company from building a crossing before the hill is graded, where there are citizens living on the street between the hill and the railroad who desire to pass over it. Ft. Dodge *v.* Minneapolis, etc., R. Co., 87 Iowa 389, 54 N. W. 243.

52. *Illinois.*— Cleveland, etc., R. Co. *v.* Johns, 106 Ill. App. 427.

approaches to the crossing.[53] What is a suitable and sufficient approach depends upon the circumstances of the particular case,[54] and may require the erection of guard rails at cuts or embankments,[55] or the bridging over of ditches.[56] The width of the crossing and approaches thereto depends upon the circumstances of the case and the character and use of the highway,[57] as they do not necessarily imply the full width of the highway or right of way of the railroad.[58] In the case

Indiana.— Evansville, etc., R. Co. *v.* State, 149 Ind. 276, 49 N. E. 2.

Iowa.— Farley *v.* Chicago, etc., R. Co., 42 Iowa 234.

Kansas.— Atchison, etc., R. Co. *v.* Miller, 39 Kan. 419, 18 Pac. 486.

Michigan.— Tobias *v.* Michigan Cent. R. Co., 103 Mich. 330, 61 N. W. 514; Thayer *v.* Flint, etc., R. Co., 93 Mich. 150, 53 N. W. 216.

Missouri.— Lincoln *v.* St. Louis, etc., R. Co., 75 Mo. 27.

Nebraska.— Burlington, etc., R. Co. *v.* Koonce, 34 Nebr. 479, 51 N. W. 1033.

New Jersey.— Raritan Tp. *v.* Port Reading R. Co., 49 N. J. Eq. 11, 23 Atl. 127.

New York.— Gale *v.* New York Cent., etc., R. Co., 76 N. Y. 594; Hoyt *v.* New York, etc., R. Co., 6 N. Y. St. 7.

See 41 Cent. Dig. tit. "Railroads," §§ 266, 959.

A statute is not unconstitutional as imposing a burden which did not exist when a railroad company was incorporated, which requires railroad companies to construct and keep in repair good and sufficient crossings where their roads cross a public highway. State *v.* Chicago, etc., R. Co., 29 Nebr. 412, 45 N. W. 469.

Lighting overhead bridge.— Under a statute making it the duty of railroad companies to provide "suitable crossings" for the accommodation of the public, a railroad company must furnish lights for an overhead bridge which the public safety requires to be lighted. Concord *v.* Boston, etc., R. Co., 69 N. H. 37, 38 Atl. 378.

The failure of an incorporated town to enact an ordinance for the improvement of its streets and to fix the grade thereof does not relieve a railroad company of the duty imposed by law to properly construct street crossings over its tracks. Evansville, etc., R. Co. *v.* State, 149 Ind. 276, 49 N. E. 2.

53. Illinois Cent. R. Co. *v.* Paradise Highway Com'rs, 61 Ill. App. 203; Moberly *v.* Kansas City, etc., R. Co., 17 Mo. App. 518.

An approach is "an embankment, grade, bridge, or structure which the construction of the road has made necessary to be erected or constructed within the right of way to enable persons passing along the highway with teams and vehicles to reach the crossing of the railroad." Illinois Cent. R. Co. *v.* Paradise Highway Com'rs, 61 Ill. App. 203, 208.

The term "crossing" includes the necessary embankments and approaches to the railroad. Farley *v.* Chicago, etc., R. Co., 42 Iowa 234; Moberly *v.* Kansas City, etc., R. Co., 17 Mo. App. 518.

The grade of the approach must not, under the Delaware statute, be greater than five degrees (Kyne *v.* Wilmington, etc., R. Co., 8 Houst. (Del.) 185, 14 Atl. 922); and a municipal corporation under a general power to establish, improve, and keep streets in repair may regulate the grade of approaches to street crossings) (Hughes *v.* Arkansas, etc., R. Co., 74 Ark. 194, 85 S. W. 773); but in the absence of statute they need not be extended back so that there is practically no incline, but may be constructed at whatever grade will furnish a safe and suitable crossing for the ordinary purposes of travel (Lake Shore, etc., R. Co. *v.* Brazzill, 13 Ohio Cir. Ct. 622, 6 Ohio Cir. Dec. 363).

54. Bloomington *v.* Illinois Cent. R. Co., 154 Ill. 539, 39 N. E. 478 [*affirming* 49 Ill. App. 129].

55. Evansville, etc., R. Co. *v.* Allen, 34 Ind. App. 636, 73 N. E. 630; Seybold *v.* Terre Haute, etc., R. Co., 18 Ind. App. 367, 46 N. E. 1054; Veazie *v.* Penobscot R. Co., 49 Me. 119.

Under the English statute, section 62 of the Railways Clauses Act of 1845, providing for hand rails at certain crossings, the justices have no power to order a railroad company to erect fences and hand rails at a level crossing on a public carriage road. Reg. *v.* Schofield, 58 J. P. 132, 69 L. T. Rep. N. S. 313, 5 Reports 575.

56. Illinois Cent. R. Co. *v.* Paradise, 61 Ill. App. 203, holding that an approach includes a bridge made necessary in order to reach the crossing by reason of the diversion of a natural watercourse within the right of way in the construction of the road.

A railroad company is not required to bridge ditches, although within the limits of the right of way, if so far from the track that what is a safe and proper approach for going on and over the crossing does not extend back so as to include such ditches. O'Fallon *v.* Ohio, etc., R. Co., 45 Ill. App. 572.

57. Bloomington *v.* Illinois Cent. R. Co., 154 Ill. 539, 39 N. E. 478 [*affirming* 49 Ill. App. 129]; Atchison, etc., R. Co. *v.* Henry, 57 Kan. 154, 45 Pac. 576.

58. Bloomington *v.* Illinois Cent. R. Co., 154 Ill. 539, 39 N. E. 478 [*affirming* 49 Ill. App. 129]; O'Fallon *v.* Ohio, etc., R. Co., 45 Ill. App. 572.

Crossing defined.— The words "railroad crossings" mean "that portion composing the track or road-bed" and "do not mean that the crossing includes the entire width of the right of way." O'Fallon *v.* Ohio, etc., R. Co., 45 Ill. App. 572.

The term "approaches" with regard to railroad crossings "means the embankments, or bridges, or grades, or structures of any sort, on each side of the railroad at the crossing, which serve as the passage or way for ap-

of a street in a city they should ordinarily cover the entire width of the street;[59] but in the case of ordinary highways it is not necessary that they should cover the entire width of the highway, but only what is reasonably necessary for the accommodation of the public travel thereon,[60] and the same is true to a considerable extent with regard to streets in villages and some cities or particular localities therein.[61] So also the length of the approaches depends upon the circumstances of the case,[62] and they need not necessarily extend back for the full width on the railroad right of way,[63] although the circumstances may require that they shall do so.[64]

b. Crossing At, Above, or Below Grade. In the absence of any statutory provision to the contrary a railroad company having a right to construct a railroad which will cross a street or highway may cross the same at grade,[65] provided the crossing is so constructed as not unreasonably to impede or obstruct the safe and convenient use of the highway,[66] and subject to the duty of restoring the highway to its former usefulness;[67] or it may carry its road above the street or highway by means of a bridge or viaduct;[68] and if authorized to change the grade of highways may lower the grade of a highway so as to make it pass under the railroad.[69] A statutory provision that a street or highway in a town or city may be crossed by a bridge is not mandatory but permissive, leaving it optional with the railroad company to grade or bridge the crossing,[70] and a requirement that the company shall in crossing so construct its road as not to impede or obstruct the safe and convenient use of the highway does not require that the crossing shall be at grade;[71] while on the other hand a statute providing how grade crossings shall be constructed does not authorize all crossings to be at grade, but applies only where such crossings are proper.[72] The legislature may prohibit or require the abolition of grade crossings,[73] or require the construction of bridges

proaching the crossing. . . . They do not and should not, in all cases, include all that part of the right of way that is covered by the street or highway and is not immediately at the crossing." Bloomington *v.* Illinois Cent. R. Co., 154 Ill. 539, 544, 547, 39 N. E. 478 [*affirming* 49 Ill. App. 129].

59. Cleveland, etc., R. Co. *v.* Johns, 106 Ill. App. 427; Indianapolis, etc., R. Co. *v.* State, 37 Ind. 489.

60. Cleveland, etc., R. Co. *v.* Johns, 106 Ill. App. 427; Atchison, etc., R. Co. *v.* Henry, 57 Kan. 154, 45 Pac. 576; Ellis *v.* Wabash, etc., R. Co., 17 Mo. App. 126.

61. Bloomington *v.* Illinois Cent. R. Co., 154 Ill. 539, 39 N. E. 478 [*affirming* 49 Ill. App. 129].

62. Illinois Cent. R. Co. *v.* Truesdall, 68 Ill. App. 324.

63. O'Fallon *v.* Ohio, etc., R. Co., 45 Ill. App. 572.

64. Illinois Cent. R. Co. *v.* Truesdall, 68 Ill. App. 324.

65. Hudson County *v.* New Jersey Cent. R. Co., 68 N. J. Eq. 500, 59 Atl. 303 [*affirmed* in 70 N. J. Eq. 806, 65 Atl. 1117]; *In re* West Jersey Traction Co., 59 N. J. Eq. 63, 45 Atl. 282; Baxter *v.* Spuyten Duyvil, etc., R. Co., 61 Barb. (N. Y.) 428, 11 Abb. Pr. N. S. 178; Johnston *v.* Providence, etc., R. Co., 10 R. I. 365; Morris *v.* Chicago, etc., R. Co., 26 Fed. 22.

66. See Johnston *v.* Providence, etc., R. Co., 10 R. I. 365.

A railroad company will be enjoined from constructing a "Y" at grade across the public streets of a borough when the only reason for so doing is to save the expense of improving a turn-table, and such construction would make three grade crossings within a distance of five hundred and fifty feet. Norristown *v.* Philadelphia, etc., R. Co., 17 Montg. Co. Rep. (Pa.) 72.

67. See *infra*, VI, D, 3.

68. Bubenzer *v.* Philadelphia, etc., R. Co., (Del. Ch. 1905) 61 Atl. 270.

69. Reg. *v.* Eastern Counties R. Co., 2 Q. B. 569, 2 G. & D. 1, 6 Jur. 820, 11 L. J. Q. B. 178, 3 R. & Can. Cas. 22, 42 E. C. L. 811; Breynton *v.* London, etc., R. Co., 10 Beav. 238, 50 Eng. Reprint 574, 2 Coop. t. Cott. 108, 11 Jur. 28, 4 R. & Can. Cas. 553, 47 Eng. Reprint 1076.

70. De Lucca *v.* North Little Rock, 142 Fed. 597.

71. Johnston *v.* Providence, etc., R. Co., 10 R. I. 365.

72. State *v.* Minneapolis, etc., R. Co., 39 Minn. 219, 39 N. W. 153.

73. New York, etc., R. Co.'s Appeal, 62 Conn. 527, 26 Atl. 122; Westbrook's Appeal, 57 Conn. 95, 17 Atl. 368; Cincinnati, etc., R. Co. *v.* Connersville, (Ind. 1908) 83 N. E. 503; Norwood *v.* New York, etc., R. Co., 161 Mass. 259, 37 N. E. 199; New York, etc., R. Co. *v.* Bristol, 151 U. S. 556, 14 S. Ct. 437, 38 L. ed. 269.

A statute relative to railroads "hereafter constructed" crossing at grade does not apply to a railroad company which, prior to the passage of such statute, had located its line of road and had incurred expenses upon the

or viaducts at crossings,[74] or authorize a municipal corporation to require such a crossing;[75] while on the other hand the legislature may expressly authorize grade crossings,[76] or it may authorize municipal corporations to permit railroad companies to construct grade crossings within their limits.[77] In New Jersey the statute prohibits the construction of grade crossings in cities unless permitted by the common council or other governing body in charge of its streets, which authorities, may, however, permit a grade crossing,[78] and in New York the statute provides that steam railroads subsequently built shall be so constructed as to avoid grade crossings whenever practicable to do so.[79] Where the statute provides that the crossing may be so constructed that the highway shall pass over or under the railroad, as may be found most expedient, the choice rests within the discretion of the railroad company,[80] which, if exercised in good faith will not be interfered with by the courts,[81] and it seems that the term "under or over" authorizes a crossing at grade.[82] Where the crossing is effected by carrying the railroad over the highway by means of a bridge, the bridge must be constructed at a sufficient height above the highway properly to accommodate the amount and character of travel upon the highway;[83] and if practicable to do so the bridge must be constructed so as to span the entire width of the way and not merely the traveled portion and without any pillars or abutments which will restrict the width or obstruct the use of the highway,[84] particularly in the case of

road-bed, bridges, etc., although the road was not completed at the crossing. Atty.-Gen. *v.* Ware River R. Co., 115 Mass. 400.

Abolition of grade crossings see *infra*, VI, D, 5, b.

74. Chicago, etc., R. Co. *v.* State, 47 Nebr. 549, 66 N. W. 624, 53 Am. St. Rep. 557, 41 L. R. A. 481; People *v.* Boston, etc., R. Co., 70 N. Y. 569.

75. Chicago, etc., R. Co. *v.* State, 47 Nebr. 549, 66 N. W. 624, 53 Am. St. Rep. 557, 41 L. R. A. 481.

In Kansas a city of the first class has the power in proper cases and in a proper manner to order a railroad company to construct a viaduct over its tracks, where the same crosses a public street. State *v.* Missouri Pac. R. Co., 33 Kan. 176, 5 Pac. 772.

76. Cambridge *v.* Railroad Com'rs, 153 Mass. 161, 26 N. E. 241.

77. Hudson County *v.* New Jersey Cent. R. Co., 68 N. J. Eq. 500, 59 Atl. 303 [*affirmed* in 70 N. J. Eq. 806, 65 Atl. 1117].

78. Hudson County *v.* New Jersey Cent. R. Co., 68 N. J. Eq. 500, 59 Atl. 303 [*affirmed* in 70 N. J. Eq. 806, 65 Atl. 1117], holding, further, that a boulevard is a "street" within the application of the statute.

In Jersey City the board of street and water commissioners is the governing body with regard to streets and has power to authorize grade crossings by railroads over the streets. Oliver *v.* Jersey City, 63 N. J. L. 96, 42 Atl. 782 [*reversed* on other grounds in 63 N. J. L. 634, 44 Atl. 709, 76 Am. St. Rep. 228, 48 L. R. A. 412].

A private individual cannot object to a crossing at grade on the ground that the statute prevents railroads from crossing any street or highway in any city except above or below grade, especially where he will not be particularly injured by a crossing at grade. Packard *v.* Bergen Neck R. Co., 48 N. J. Eq. 281, 22 Atl. 227.

79. Bolivar *v.* Pittsburg, etc., R. Co., 88 N. Y. App. Div. 387, 84 N. Y. Suppl. 678 [*affirmed* in 179 N. Y. 523, 71 N. E. 1141].

80. Illinois Cent. R. Co. *v.* Bentley, 64 Ill. 438; Conklin *v.* New York, etc., R. Co., 102 N. Y. 107, 6 N. E. 663; People *v.* New York Cent., etc., R. Co., 74 N. Y. 302 [*affirming* on this point 12 Hun 195].

Highways laid out after the construction of the railroad as well as previously existing highways are within the application of the rule giving the railroad company the election as to the mode of crossing, under a statute providing that the railroad company may carry the highway under or over its track, as may be found most expedient. Jamaica *v.* Long Island R. Co., 21 N. Y. Suppl. 327.

81. People *v.* New York Cent., etc., R. Co., 74 N. Y. 302; Jamaica *v.* Long Island R. Co., 21 N. Y. Suppl. 327.

82. *In re* West Jersey Traction Co., 59 N. J. Eq. 63, 45 Atl. 282, where the court said that a railroad passed "over" a public road when it crossed the same at grade. See also Conklin *v.* New York, etc., R. Co., 102 N. Y. 107, 6 N. E. 663.

83. Gray *v.* Danbury, 54 Conn. 574, 10 Atl. 198; Cook *v.* Boston, etc., R. Co., 133 Mass. 185.

Where it is sought to restrain a railroad company from building a low bridge over a turnpike and it appears that much work has been done in building such bridge before the turnpike company objected, and that the expense of raising the bridge would be heavy, and that the difficulty could be remedied at much less expense by lowering the surface of the turnpike at the crossing, the court will order the latter to be done at the expense of the railroad company. Wooster Turnpike Co. *v.* Cincinnati, etc., R. Co., 15 Ohio Cir. Ct 268, 8 Ohio Cir. Dec. 269.

84. Raritan Tp. *v.* Port Reading R. Co.,

streets,[85] and a municipal corporation has no right to authorize the construction of a bridge with pillars or abutments which constitute an obstruction to public travel.[86] The railroad company must comply with any express statutory requirements as to the width of the span of the bridge,[87] or its height above the level of the highway,[88] and the level of the highway beneath the bridge must not be so depressed as to form a basin which will become flooded and obstruct travel.[89] Where the highway is carried over the railroad upon a bridge, the character of the bridge depends upon the circumstances of the particular case,[90] and in the case of an ordinary highway it is not necessary to bridge the entire width of the highway, but only to construct a bridge reasonably sufficient to accommodate the public travel,[91] and even in the case of streets the bridge need not necessarily be the full width of the street; [92] but a statute prescribing the minimum width for the bridge does not authorize the company to reduce that portion of the highway on each side forming the approaches to the bridge to the same minimum width.[93] So also the bridge need only be of sufficient strength for the ordinary highway travel, and the railroad company is not required to make it sufficient to meet the additional use of a street railway.[94] Any statutory requirements as to the grade of the approaches to the bridge must be complied with.[95]

c. Character of Highway. A statute requiring the construction of crossings where a railroad crosses a public road or street applies only to streets and highways legally established; [96] and a statute requiring an under crossing where a railroad

49 N. J. Eq. 11, 23 Atl. 127; Delaware, etc., R. Co. *v.* Buffalo, 158 N. Y. 266, 478, 53 N. E. 44, 533 [*affirming* 4 N. Y. App. Div. 562, 38 N. Y. Suppl. 510]; Radnor Tp. *v.* Philadelphia, etc., R. Co., 214 Pa. St. 299, 63 Atl. 694; Schwenk *v.* Pennsylvania Schuylkill Valley Co., 2 Chest. Co. Rep. (Pa.) 177.

As a mere saving of expense a railroad company has no right to construct a bridge which does not span the entire width of the highway or to construct pillars or abutments within its limits. Raritan Tp. *v.* Port Reading R. Co., 49 N. J. Eq. 11, 23 Atl. 127.

If the statute prescribes the width to be left under the bridge the railroad company may erect piers for the bridge upon the highway provided a clear unobstructed space is left of the width required by the statute. Atty.-Gen. *v.* London, etc., R. Co., 7 L. J. Ch. 15, 1 R. & Can. Cas. 283, 9 Sim. 78, 16 Eng. Ch. 78, 59 Eng. Reprint 287.

85. Schwenk *v.* Pennsylvania Schuylkill R. Co., 2 Chest. Co. Rep. (Pa.) 177.

86. Delaware, etc., R. Co. *v.* Buffalo, 158 N. Y. 266, 478, 53 N. E. 44, 533 [*affirming* 4 N. Y. App. Div. 562, 38 N. Y. Suppl. 510]; Elyria *v.* Lake Shore, etc., R. Co., 23 Ohio Cir. Ct. 482.

87. Atty.-Gen. *v.* Tewkesbury, etc., R. Co., 1 De G. J. & S. 423, 9 Jur. N. S. 951, 32 L. J. Ch. 482, 8 L. T. Rep. N. S. 682, 66 Eng. Ch. 423, 46 Eng. Reprint 168.

Under the English statute of 1845 providing that in the case of railroad bridges constructed over turnpikes there shall be left a clear space of thirty-five feet unless the average available width for the passage of carriages is less, in which case the width of the bridge need not exceed such average available width, provided it shall not be less than twenty feet, footways are not to be included in determining the average available width of the turnpike. Reg. *v.* Rigby, 14 Q. B. 687, 14 Jur. 329, 19 L. J. Q. B. 153, 6 R. & Can. Cas. 479, 68 E. C. L. 687.

88. Atty.-Gen. *v.* Furness R. Co., 47 L. J. Ch. 776, 38 L. T. Rep. N. S. 555, 26 Wkly. Rep. 650.

89. Atty.-Gen. *v.* Furness R. Co., 47 L. J. Ch. 776, 38 L. T. Rep. N. S. 555, 26 Wkly. Rep. 650.

90. People *v.* New York, etc., R. Co., 89 N. Y. 266; Reg. *v.* Great Western R. Co., 12 U. C. Q. B. 250.

91. People *v.* New York, etc., R. Co., 89 N. Y. 266; Radnor Tp. *v.* Philadelphia, etc., R. Co., 214 Pa. St. 299, 63 Atl. 694.

92. Reg. *v.* Great Western R. Co., 12 U. C. Q. B. 250.

93. Reg. *v.* Birmingham, etc., R. Co., 2 Q. B. 47, 1 G. & D. 324, 4 Jur. 966, 10 L. J. Q. B. 322, 2 R. & Can. Cas. 694, 42 E. C. L. 565.

94. People *v.* Adams, 88 Hun (N. Y.) 122, 34 N. Y. Suppl. 579 [*affirmed* in 147 N. Y. 722, 42 N. E. 725]; Conshohocken R. Co. *v.* Pennsylvania R. Co., 15 Pa. Co. Ct. 445; Briden *v.* New York, etc., R. Co., 27 R. I. 569, 65 Atl. 315.

95. Atty.-Gen. *v.* Mid-Kent R. Co., L. R. 3 Ch. 100, 16 Wkly. Rep. 258.

Substituted road.— Where a road is diverted and a substitute constructed which crosses the railroad by a bridge, the general requirements of the statute as to the grade of approaches apply to the substituted road. Atty.-Gen. *v.* London, etc., R. Co., 7 L. J. Ch. 15, 1 R. & Can. Cas. 283, 9 Sim. 78, 16 Eng. Ch. 78, 59 Eng. Reprint 287.

96. St. Louis, etc., R. Co. *v.* Gordon, 157 Mo. 71, 57 S. W. 742, holding that if there are no condemnation proceedings or compensation made to a railroad company for the laying out of a street across its right of way, the street is not legally established, and a statute requiring a railroad company

crosses "any public highway" at a certain grade above the original level of the highway applies only to a highway laid out pursuant to law or used for such length of time as to constitute it a public highway;[97] but a statute authorizing a town to require a bridge at the crossing of any highway therein applies to a highway established by law, although not constructed;[98] and a statute requiring that a railroad company when it crosses "any established road or way" shall be so constructed as not to impede the travel thereon applies to a street duly laid out, although not actually opened for public use.[99] A statute prohibiting the crossing at grade of "the streets or highways in any city" does not apply to the crossing of a canal;[1] and a statute prohibiting a grade crossing of a street or highway leading to a public cemetery of a city does not apply to a street leading to a cemetery belonging to a private association.[2] So also a statute prohibiting grade crossings where a railroad crosses a turnpike or public highway does not include a public footpath.[3]

d. Changing Location or Grade of Highway. In the absence of statute a railroad company, in crossing a highway, has no right to change the location or route of the highway,[4] and to authorize such change the right must be conferred in express terms or by necessary implication.[5] The right is, however, frequently expressly conferred by statutory or charter provisions to make such changes in the location of a highway in certain cases,[6] and to acquire by purchase or con-

to construct crossings "where its railroad crosses 'public roads or town streets now or hereafter to be opened for public use,'" does not apply.

97. Northumberland *v.* Atlantic, etc., R. Co., 35 N. H. 574.

98. Worcester, etc., R. Co. *v.* Nashua, 63 N. H. 593, 4 Atl. 298.

99. Chester *v.* Baltimore, etc., R. Co., 140 Pa. St. 275, 21 Atl. 320.

1. Lehigh Valley R. Co. *v.* Dover, etc., R. Co., 43 N. J. L. 528, holding that, although the canal is declared to be a public highway, it is not within the application of the statute and may be crossed by a railroad by a lift bridge constructed at the grade of the canal banks.

2. Youngstown *v.* Pittsburgh, etc., R. Co., 3 Ohio Cir. Ct. 214, 2 Ohio Cir. Dec. 121.

3. Dartford Rural Dist. Council *v.* Bexley Heath R. Co., [1898] A. C. 210, 62 J. P. 227, 67 L. J. Q. B. 231, 77 L. T. Rep. N. S. 601, 46 Wkly. Rep. 235 [*affirming* [1896] 2 Q. B. 74, 60 J. P. 454, 65 L. J. Q. B. 469, 74 L. T. Rep. N. S. 540, 44 Wkly. Rep. 501].

4. State *v.* Warren R. Co., 29 N. J. L. 353; Buchholz *v.* New York, etc., R. Co., 148 N. Y. 640, 43 N. E. 76 [*reversing* 66 Hun 377, 21 N. Y. Suppl. 503]; Hughes *v.* Providence, etc., R. Co., 2 R. I. 493.

5. State *v.* Warren R. Co., 29 N. J. L. 353; Buchholz *v.* New York, etc., R. Co., 148 N. Y. 640, 43 N. E. 76 [*reversing* 66 Hun 377, 21 N. Y. Suppl. 503].

Provisions not authorizing change.—A railroad company has no right to change the route or location of a highway under a charter provision authorizing it to "alter and grade" highways crossed by its road (State *v.* Warren R. Co., 29 N. J. L. 353); or authorizing it to raise or lower the highway so that the road may pass under, over, or across the same (Hughes *v.* Providence, etc., R. Co., 2 R. I. 493); or under a statute authorizing a railroad company to construct its road "across, along or upon" a street or highway, provided it shall restore the same to "its former state, or to such state as not unnecessarily to have impaired its usefulness;" and providing that the highway "may be carried under or over the track, as may be found most expedient" (Buchholz *v.* New York, etc., R. Co., 148 N. Y. 640, 43 N. E. 76 [*reversing* 66 Hun 377, 21 N. Y. Suppl. 503]).

6. *Florida.*— Palatka, etc., R. Co. *v.* State, 23 Fla. 546, 3 So. 158, 11 Am. St. Rep. 395.

Illinois.— Illinois Cent. R. Co. *v.* Bentley, 64 Ill. 438.

Indiana.— Clawson *v.* Chicago, etc., R. Co., 95 Ind. 152.

New York.— Buchholz *v.* New York, etc., R. Co., 148 N. Y. 640, 43 N. E. 76 [*reversing* 66 Hun 377, 21 N. Y. Suppl. 503].

Pennsylvania.— Pennsylvania R. Co.'s Appeal, 128 Pa. St. 509, 18 Atl. 522; North Manheim Tp.'s Appeal, 10 Pa. Cas. 261, 14 Atl. 137.

England.— Reg. *v.* Wycombe R. Co., L. R. 2 Q. B. 310, 8 B. & S. 259, 36 L. J. Q. B. 121, 15 L. T. Rep. N. S. 610, 15 Wkly. Rep. 489.

Canada.— Fredericksburgh *v.* Grand Trunk R. Co., 6 Grant Ch. (U. C.) 555.

See 41 Cent. Dig. tit. "Railroads," § 270.

The necessity need not be absolute or such as cannot be overcome by engineering skill or money, in order to authorize a change of location, but the question depends upon what is reasonably practicable under the circumstances of the case, and is to be determined in the first instance by the railroad company, and unless its discretion is abused or used without due regard to the public interest, it will not be interfered with by the courts (Pennsylvania R. Co.'s Appeal, 128 Pa. St. 509, 18 Atl. 522); and the fact that a dangerous grade crossing may be avoided by a change in the location of the highway is a sufficient necessity to authorize

demnation such additional land as may be necessary for effecting the change,[7] the company being required in making such change to reconstruct the road at its own expense upon a suitable location and in a proper manner so as to provide an adequate substitute for the original road,[8] which when duly established becomes a part of the public highway, to be maintained as such and not a private road of the railroad company;[9] and after the new location has been duly completed and adopted and used by the public the old way cannot be reopened and the railroad company compelled to restore it.[10] It is often necessary in crossing a highway to alter the grade of the highway, since it is important and often necessary that the railroad should be kept upon a given level and not altered to meet the varying levels of intersecting roads,[11] and it seems that this right exists independently of statute as an incident of the right to cross, provided the highway is not unnecessarily obstructed or impaired.[12] The right to change the grade of a highway for the purpose of crossing is in some cases expressly conferred by statutory or charter

the company to make the change (Abington Tp. *v.* Northern Pennsylvania R. Co., 2 Pa. Dist. 68, 12 Pa. Co. Ct. 118).

Application to streets.— Ohio Rev. St. § 3284, providing that when necessary to cross a "road" or "stream" a railroad company may divert the same from its location or bed, but shall without unnecessary delay place such road or stream in such condition as not to impair its former usefulness, does not apply to streets. Cincinnati Northern R. Co. *v.* Cincinnati, 8 Ohio Dec. (Reprint) 554, 8 Cinc. L. Bul. 334.

Where the right to change is qualified, as by a charter provision authorizing a change in the location of a highway, which is so situated that the railroad "can not be judiciously laid out and made without interfering therewith," the company has no right to change the location of a highway merely to avoid the expense of constructing a bridge or embankment (Norwich, etc., R. Co. *v.* Killingly, 25 Conn. 402); and a statute authorizing a change in the line of a highway "where an embankment or cutting shall make a change in the line of such highway . . . desirable, with a view to a more easy ascent or descent," does not authorize such change at a grade crossing where there is no cutting or embankment at the crossing (Buchholz *v.* New York, etc., R. Co., 148 N. Y. 640, 43 N. E. 76 [*reversing* 66 Hun 377, 21 N. Y. Suppl. 503]).

Under the English statutes authorizing a diversion of a highway, such diversion is permissible only when necessary for the purpose of constructing the railroad, and the company cannot change the location of a highway merely to avoid the expense of constructing a crossing over or under it (Reg. *v.* Wycombe R. Co., L. R. 2 Q. B. 310, 8 B. & S. 259, 36 L. J. Q. B. 121, 15 L. T. Rep. N. S. 610, 15 Wkly. Rep. 489); or merely in order to carry the highway across the railroad at right angles (Atty.-Gen. *v.* Dorst Cent. R. Co., 3 L. T. Rep. N. S. 608, 9 Wkly. Rep. 189); but where if the railroad crossed a highway without diverting it a bridge would have to be made for the highway over the railroad, the highway may be diverted to a place where there is a level crossing if the road so diverted will be more convenient to the public than the vertical diversion by a bridge (Atty.-Gen. *v.* Ely, etc., R. Co., L. R. 4 Ch. 194, 38 L. J. Ch. 258, 20 L. T. Rep. N. S. 1, 17 Wkly. Rep. 356); and the authority conferred by the statute to divert a public highway applies to a permanent diversion and not merely to a temporary diversion for the purpose of constructing the railroad (Phillipps *v.* London, etc., R. Co., 4 Giffard 46, 9 Jur. N. S. 348, 7 L. T. Rep. N. S. 663, 66 Eng. Reprint 614).

7. Palatka, etc., R. Co. *v.* State, 23 Fla. 546, 3 So. 158, 11 Am. St. Rep. 395; Illinois Cent. R. Co. *v.* Bentley, 64 Ill. 438; Clawson *v.* Chicago, etc., R. Co., 95 Ind. 152.

8. Bean *v.* Howe, 85 Pa. St. 260; Ridley Tp. *v.* Baltimore, etc., R. Co., 2 Lanc. L. Rev. (Pa.) 375; Atty.-Gen. *v.* Barry Docks, etc., Co., 35 Ch. D. 573, 51 J. P. 644, 56 L. J. Ch. 1018, 56 L. T. Rep. N. S. 559, 35 Wkly. Rep. 830; Spencer *v.* London, etc., R. Co., 7 L. J. Ch. 281, 1 R. & Can. Cas. 159, 8 Sim. 193, 8 Eng. Ch. 193, 59 Eng. Reprint 77.

9. Palatka, etc., R. Co. *v.* State, 23 Fla. 546, 3 So. 158, 11 Am. St. Rep. 395.

Property in old road.— Where a railway company having made a substitute road inclosed and took possession of the portion of the old road which had ceased by the diversion to form a part of the turnpike road, it was held that there was nothing in the English Turnpike Act (3 Geo. III, c. 126) or in 8 & 9 Vict. c. 20, § 16, to place the company in the position of trustees of the substituted road so as to transfer to them the soil of the old road. Salisbury *v.* Great Northern R. Co., 5 C. B. N. S. 174, 5 Jur. N. S. 70, 28 L. J. C. P. 40, 7 Wkly. Rep. 75, 94 E. C. L. 174.

10. Schermerhorn *v.* Mt. McGregor R. Co., 69 Hun (N. Y.) 512, 23 N. Y. Suppl. 417; Pennsylvania R. Co.'s Appeal, 128 Pa. St 509, 18 Atl. 522.

11. Newburyport Turnpike Corp. *v.* Eastern R. Co., 23 Pick. (Mass.) 326.

12. Palatka, etc., R. Co. *v.* State, 23 Fla. 546, 3 So. 158, 11 Am. St. Rep. 395; Veazie *v.* Penobscot R. Co., 49 Me. 119; Conklin *v.* New York, etc., R. Co., 102 N. Y. 107, 6 N. E. 663; Atty.-Gen. *v.* Great Western R. Co., 14 Wkly. Rep. 726. *Compare* State *v.* New Jersey Cent. R. Co., 32 N. J. L. 220.

provisions,[13] and a provision authorizing a change in the grade of a highway for the purpose of passing "over or under" the same has been held to authorize such change for the purpose of crossing at the same level [14]

e. Character of Crossing as Constituting Nuisance.[15] The mere construction of a railroad across a highway, pursuant to legislative authority, is not a public nuisance,[16] although the crossing is at grade;[17] nor, where a railroad in crossing has changed the location of the highway pursuant to legislative authority, is the new crossing a private nuisance to persons residing near it, unless the company has been guilty of a want of proper care and skill in exercising the power conferred.[18] A railroad company may, however, be guilty of creating a nuisance by constructing a crossing in such a manner as improperly to obstruct or impair the use of the highway,[19] or to render the crossing of the tracks unsafe for travel,[20] or by locating the crossing at an unauthorized place,[21] or changing the location of the railroad without authority so as to cross the highway at a different place,[22] or by erecting buildings within the limits of the highway.[23]

f. Remedies. A railroad company, when legally bound to construct a crossing or a crossing of a particular character, may be compelled to do so by mandamus,[24]

13. Gates *v.* Chicago, etc., R. Co., 82 Iowa 518, 48 N. W. 1040; Newburyport Turnpike Corp. *v.* Eastern R. Co., 23 Pick. (Mass.) 326; Hughes *v.* Providence, etc., R. Co., 2 R. I. 493; Beardmer *v.* London, etc., R. Co., 1 Hall & T. 161, 47 Eng. Reprint 1367, 13 Jur. 327, 18 L. J. Ch. 432, 1 Macn. G. 112, 47 Eng. Ch. 112, 41 Eng. Reprint 1205, 5 R. & Can. Cas. 728.

14. Newburyport Turnpike Corp. *v.* Eastern R. Co., 23 Pick. (Mass.) 326, holding that a statute authorizing a change in the grade of a highway, for the purpose of passing "over or under" the same, authorizes a change in the grade of a turnpike road for the purpose of constructing the road across it upon the same level. But see Gates *v.* Chicago, etc., R. Co., 82 Iowa 518, 48 N. W. 1040, holding that a similar provision does not authorize a change in the grade of a city street for the purpose of crossing the same at grade.

15. Remedies in case of nuisance see *infra*, VI, D, 2, f.

16. Danville, etc., R. Co. *v.* Com., 73 Pa. St. 29; Johnston *v.* Providence, etc., R. Co., 10 R. I. 365.

The Maine statute of 1853, regulating the mode in which railroads shall cross highways, is not applicable to railroads already constructed, and therefore the provision therein making a railroad which has not conformed to the statute a nuisance and holding the directors personally liable does not apply to such roads. Veazie *v.* Mayo, 49 Me. 156.

17. Hudson County *v.* New Jersey Cent. R. Co., 68 N. J. Eq. 500, 59 Atl. 303 [*affirmed* in 70 N. J. Eq. 806, 65 Atl. 1117]; Johnston *v.* Providence, etc., R. Co., 10 R. I. 365.

18. Illinois Cent. R. Co. *v.* Bentley, 64 Ill. 438.

19. People *v.* Northern Cent. R. Co., 164 N. Y. 289, 58 N. E. 138 [*modifying* 36 N. Y. App. Div. 629 54 N. Y. Suppl. 1112]; Delaware, etc., R. Co. *v.* Buffalo, 158 N. Y. 266, 478, 53 N. E. 44, 533 [*affirming* 4 N. Y. App. Div. 562, 38 N. Y. Suppl. 510]; Northern Cent. R. Co. *v.* Com., 90 Pa. St. 300; Com. *v.* Erie, etc., R. Co., 27 Pa. St. 339, 67 Am. Dec. 471.

Bridges at crossings.— The erection by a railroad company of a bridge on a street under a decree of court permitting it is legal and such structure is not a nuisance (Cass *v.* Pennsylvania Co., 159 Pa. St. 273, 28 Atl. 161); unless the bridge is too low or too narrow for the proper passage of teams and vehicles under it (Com. *v.* Erie, etc., R. Co., 27 Pa. St. 339, 67 Am. Dec. 471); nor is the construction by a railroad company whose road crosses the highway below grade of a bridge of less width than the highway a nuisance *per se* (People *v.* New York, etc., R. Co., 89 N. Y. 266).

20. Paducah, etc., R. Co. *v.* Com., 80 Ky. 147, holding that the keeping of the iron rails of a railroad six or eight inches above the level of the highway at a public crossing constitutes a public nuisance.

21. Com. *v.* Erie, etc., R. Co., 27 Pa. St. 339, 67 Am. Dec. 471.

22. People *v.* Northern Cent. R. Co., 164 N. Y. 289, 58 N. E. 138 [*modifying* 36 N. Y. App. Div. 629, 54 N. Y. Suppl. 1112].

23. State *v.* Vermont Cent. R. Co., 27 Vt. 103.

24. State *v.* Missouri Pac. R. Co., 33 Kan. 176, 5 Pac. 772; Chicago, etc., R. Co. *v.* State, 47 Nebr. 549, 66 N. W. 624, 53 Am. St. Rep. 557, 41 L. R. A. 481. See also, generally, MANDAMUS, 26 Cyc. 367.

But mandamus will not be granted to compel the construction of a viaduct at a crossing required by a city ordinance passed pursuant to legislative authority, where the ordinance is vague and indefinite as to the dimensions and materials of the viaduct and its construction as required by the ordinance would necessitate a change in certain streets which would constitute a violation of a statute. State *v.* Missouri Pac. R. Co., 33 Kan. 176, 5 Pac. 772.

Form of writ.— Under the English statute of 1845 a railway company has the option

or, pursuant to a statute so providing, by a bill in equity to enforce the specific performance of such duty,[25] or the county or municipal authorities may, upon a failure or refusal of the railroad company to do so, do the work and recover from the railroad company;[26] but the existence of this right does not preclude the right to maintain a suit or proceeding to compel the railroad company to perform such duty.[27] Where the mode of crossing is discretionary with the railroad company a court of equity will not interfere, in the absence of a gross abuse of such discretion after the road is built and in operation;[28] but a railroad company may be enjoined from constructing a railroad bridge over a highway with abutments which encroach upon the width of the highway,[29] from constructing a crossing at grade where the statute provides that grade crossings shall be avoided whenever practicable to do so, and the proper authorities have not passed upon and determined the character of crossing,[30] from making an unauthorized change in the grade of a street at a crossing which will deprive the public of its convenient use,[31] or from taking or destroying a portion of an existing highway until it has provided a proper substitute as required by statute.[32] A railroad company may also be compelled by mandatory injunction to comply with statutory requirements as to the height of a railroad bridge above the level of the highway,[33] or the grade of the approaches to a highway bridge over the railroad.[34] Where the crossing as constructed constitutes a public nuisance the railroad company may be indicted,[35] or a municipality, pursuant to legislative authority to abate nuisances and remove obstructions from highways, may summarily abate the nuisance,[36] or a private individual who sustains a special injury thereby may maintain a private action for damages or to enjoin its continuance.[37]

where its line crosses a turnpike road or public highway, unless otherwise provided by the special act either to carry the road over the railway or railway over the road, and a mandamus commanding a company to do one of these two things is therefore defective unless it shows on the face of it circumstances which establish the impossibility of the company exercising this option. Reg. *v.* South-Eastern R. Co., 4 H. L. Cas. 471, 17 Jur. 901, 10 Eng. Reprint 545 [*affirming* 17 Q. B. 485, 20 L. J. Q. B. 428, 79 E. C. L. 485].

25. Roxbury *v.* Boston, etc., R. Corp., 6 Cush. (Mass.) 424; Montclair Tp. *v.* New York, etc., R. Co., 45 N. J. Eq. 436, 18 Atl. 242.

26. Galveston, etc., R. Co. *v.* Baudat, 18 Tex. Civ. App. 595, 45 S. W. 939.

27. Roxbury *v.* Boston, etc., R. Corp., 6 Cush. (Mass.) 424; Montclair Tp. *v.* New York, etc., R. Co., 45 N. J. Eq. 436, 18 Atl. 242.

28. South Waverly *v.* New York, etc., R. Co., 7 Pa. Cas. 386, 11 Atl. 245.

29. Schwenk *v.* Pennsylvania Schuylkill Valley R. Co., 2 Chest. Co. Rep. (Pa.) 177. But see Raritan Tp. *v.* Port Reading R. Co., 49 N. J. Eq. 11, 23 Atl. 127, holding that an injunction will not be granted, although the abutments encroach upon the limits of the highway, where the space left is sufficient for the present needs of the highway, and the remedy by indictment is adequate to compel a restoration thereof for its entire width.

30. Bolivar *v.* Pittsburg, etc., R. Co., 88 N. Y. App. Div. 387, 84 N. Y. Suppl. 678 [*affirmed* in 179 N. Y. 523, 71 N. E. 1141].

31. Jersey City *v.* New Jersey Cent. R. Co., 40 N. J. Eq. 417, 2 Atl. 262, holding further that a mnnicipality which has by law the supervision of the public highways within its limits may maintain the suit.

32. Atty.-Gen. *v.* Barry Docks, etc., Co., 35 Ch. D. 573, 51 J. P. 644, 56 L. J. Ch. 1018, 56 L. T. Rep. N. S. 559, 35 Wkly. Rep. 830; Atty.-Gen. *v.* Widnes R. Co., 30 L. T. Rep. N. S. 449, 22 Wkly. Rep. 607.

Form of injunction.— In granting an injunction to restrain a railroad company from interfering with a road until it shall have provided another as convenient as the former or as near thercto as the circumstances permit, as required by statute, the court cannot direct what the company ought to do except by stating the reasons which induce the court to come to this conclusion or the manner in which it appears to the court that that which seems an evil can be remedied. Atty.-Gen. *v.* London, etc., R. Co., 3 De G. & Sm. 439, 13 Jur. 467, 64 Eng. Reprint 552.

33. Atty.-Gen. *v.* Furness R. Co., 47 L. J. Ch. 776, 38 L. T. Rep. N. S. 555, 26 Wkly. Rep. 650.

34. Atty.-Gen. *v.* Mid-Kent R. Co., L. R. 3 Ch. 100, 16 Wkly. Rep. 258.

35. Com. *v.* Vermont, etc., R. Corp., 4 Gray (Mass.) 22; Northern Cent. R. Co. *v.* Com., 90 Pa. St. 300; State *v.* Vermont Cent. R. Co., 27 Vt. 103.

36. Delaware, etc., R. Co. *v.* Buffalo, 158 N. Y. 266, 478, 53 N. E. 44, 533 [*affirming* 4 N. Y. App. Div. 562, 38 N. Y. Suppl. 510].

37. Buchholz *v.* New York, etc., R. Co., 148 N. Y. 640, 43 N. E. 76 [*reversing* 66 Hun 377, 21 N. Y. Suppl. 503], holding

3. Restoring and Maintaining Highway — a. Duty to Restore Highway. Where a railroad crosses a highway it is the duty of the railroad company to restore the highway to its former condition or such condition as not unnecessarily to have impaired its usefulness.[38] This is a common-law duty,[39] but is very generally imposed upon railroad companies by statutory or charter provisions.[40] The duty of restoring the highway applies to any and all cases where the railroad crosses a highway, whether at grade or otherwise,[41] and is a condition inseparable from the right to cross,[42] or the right to alter the grade of a highway,[43] or to change the location of the highway where such change is authorized;[44] but is not a condition precedent to the right to cross the same with the railroad,[45] and where in crossing it is necessary to reconstruct the highway, the company

that such action may be maintained where the unlawful change in or obstruction of a highway by a railroad company diverts travel from the abutting premises of a hotel-keeper, and seriously interferes with his business.

38. Kyne *v.* Wilmington, etc., R. Co., 8 Houst. (Del.) 185, 14 Atl. 922; Evansville, etc., R. Co. *v.* Allen, 34 Ind. App. 636, 73 N. E. 630; Paducah, etc., R. Co. *v.* Com., 80 Ky. 147; Louisville Southern R. Co. *v.* Harrodsburg, 32 S. W. 604, 17 Ky. L. Rep. 780; St. Louis Southwestern R. Co. *v.* Johnson, 38 Tex. Civ. App. 322, 85 S. W. 476.

39. *Florida.*— Palatka, etc., R. Co. *v.* State, 23 Fla. 546, 3 So. 158, 11 Am. St. Rep. 395.

Illinois.— People *v.* Chicago, etc., R. Co., 67 Ill. 118.

Kentucky.— Paducah, etc., R. Co. *v.* Com., 80 Ky. 147.

Minnesota.— State *v.* Minnesota Transfer R. Co., 80 Minn. 108, 83 N. W. 32, 50 L. R. A. 656.

Missouri.— State *v.* Hannibal, etc., R. Co., 86 Mo. 13.

See 41 Cent. Dig. tit. "Railroads," §§ 274, 275.

Nothing but express statute will relieve a railroad company from restoring a public highway which it crosses to its former usefulness. State *v.* Hannibal, etc., R. Co., 86 Mo. 13.

40. *Connecticut.*— Hamden *v.* New Haven, etc., Co., 27 Conn. 158.

Indiana.— Chicago, etc., R. Co. *v.* Noblesville, 159 Ind. 237, 64 N. E. 860; Lake Shore, etc., R. Co. *v.* McIntosh, 140 Ind. 261, 38 N. E. 476.

Kansas.— Atchison, etc., R. Co. *v.* Townsend, 71 Kan. 524, 81 Pac. 205; Atchison, etc., R. Co. *v.* Miller, 39 Kan. 419, 18 Pac. 486.

Kentucky.— Greenup County *v.* Maysville, etc., R. Co., 88 Ky. 659, 11 S. W. 774, 11 Ky. L. Rep. 169.

Michigan.— Maltby *v.* Chicago, etc., R. Co., 52 Mich. 108, 17 N. W. 717.

Minnesota.— State *v.* Minneapolis, etc., R. Co., 39 Minn. 219, 39 N. W. 153.

Missouri.— State *v.* Wabash R. Co., 206 Mo. 251, 103 S. W. 1137.

New York.— Allen *v.* Buffalo, etc., R. Co., 151 N. Y. 434, 45 N. E. 845; People *v.* New York, etc., R. Co., 74 N. Y. 302.

North Carolina.—State *v.* Roanoke R., etc., Co., 109 N. C. 860, 13 S. E. 719.

Ohio.— Little Miami R. Co. *v.* Green County Com'rs, 31 Ohio St. 338.

Tennessee.— Dyer County *v.* Paducah, etc., R. Co., 87 Tenn. 712, 11 S. W. 943 [*overruling* Chesapeake, etc., R. Co. *v.* State, 16 Lea 300, 2 S. W. 208].

Texas.— International, etc., R. Co. *v.* Haddox, 36 Tex. Civ. App. 385, 81 S. W. 1036; St. Louis, etc., R. Co. *v.* Byas, 12 Tex. Civ. App. 657, 35 S. W. 22.

Wisconsin.—Oshkosh *v.* Milwaukee, etc., R. Co., 74 Wis. 534, 43 N. W. 489, 17 Am. St. Rep. 175; Oconto *v.* Chicago, etc., R. Co., 44 Wis. 231; Roberts *v.* Chicago, etc., R. Co., 35 Wis. 679.

England.— Atty.-Gen. *v.* London, etc., R. Co., 3 De G. & Sm. 439, 13 Jur. 467, 64 Eng. Reprint 552.

Canada.— Streetsville Plank Road Co. *v.* Hamilton, etc., R. Co., 13 U. C. Q. B. 600.

See 41 Cent. Dig. tit. "Railroads," §§ 274, 275.

The term "restore" imports a physical impairment of the road-bed itself, and when a railroad is lawfully located parallel with, but not crossing, a highway, so that the rights of way overlap, but the railroad does not disturb the traveled portion of the highway or constitute an obstruction in any sense, except that it is calculated to frighten horses, there is no duty on the part of the railroad company to remove such danger under a requirement that it shall restore a highway which it intersects so as not to impair its usefulness. State *v.* New Haven, etc., Co., 45 Conn. 331.

41. People *v.* Troy, etc., R. Co., 37 How. Pr. (N. Y.) 427, 2 Alb. L. J. 354; Indiana *v.* Lake Erie, etc., R. Co., 83 Fed. 284; Van Allen *v.* Grand Trunk R. Co., 29 U. C. Q. B. 436.

42. State *v.* Wabash R. Co., 206 Mo. 251, 103 S. W. 1137; Allen *v.* Buffalo, etc., R. Co., 151 N. Y. 434, 45 N. E. 845; Little Miami R. Co. *v.* Green County Com'rs, 31 Ohio St. 338; Oshkosh *v.* Milwaukee, etc., R. Co., 74 Wis. 534, 43 N. W. 489, 17 Am. St. Rep. 175.

43. Hamden *v.* New Haven, etc., Co., 27 Conn. 158.

44. Allen *v.* Buffalo, etc., R. Co., 151 N. Y. 434, 45 N. E. 845; State *v.* Dayton, etc., R. Co., 36 Ohio St. 434.

45. Richardson *v.* Vermont Cent. R. Co., 25 Vt. 465, 60 Am. Dec. 283.

will not be required to complete the reconstructed way before it occupies the bed of the original way;[46] but until the company has proceeded in accordance with the statutory or charter provisions, to substitute the new way constructed by it for the old, the latter will be regarded as still existing.[47] The duty to restore the highway subsists and remains until such condition is fully performed,[48] and is binding upon the successors of the company which effected the crossing,[49] and it does not mean a temporary but a permanent restoration, which continues as long as the highway exists and the company enjoys the right of crossing.[50] So also if changes are made by the railroad company, or occur in consequence of its operation, which affect the safety of the highway, the duty to preserve its usefulness attaches and remains until performed,[51] as where the railroad company subsequently changes the grade of its road at an existing crossing.[52] The obligation is also a continuing one in the sense of imposing upon the railroad company the duty of making whatever changes the public necessities may require in view of subsequent conditions.[53]

b. Mode and Sufficiency of Restoration. Statutes requiring the restoration of streets and highways to their former state or such as not to have impaired their usefulness are to be given a reasonable construction,[54] and it is not necessary that the highway should be restored to its actual former condition, which would be practically impossible,[55] or that its use should not in any degree be impaired, since some increased danger or inconvenience to travel is necessarily incident to all crossings;[56] but the highway must be restored so that its use is not materially or unnecessarily impaired or interfered with.[57] So also, where in constructing a crossing, it is necessary to change the location of a highway,[58] the new way must be so located and constructed as to furnish as safe and convenient a substitute for the original way as the circumstances will permit.[59] The duty of

46. Ridley Tp. *v.* Baltimore, etc., R. Co., 2 Lanc. L. Rev. (Pa.) 375.

47. Barber *v.* Essex, 27 Vt. 62.

48. Hamden *v.* New Haven, etc., Co., 27 Conn. 158; Little Miami R. Co. *v.* Green County Com'rs, 31 Ohio St. 338.

49. See *infra*, VI, D, 3, h.

50. Roe *v.* Elmendorf, 52 How. Pr. (N. Y.) 232; People *v.* Troy, etc., R. Co., 37 How. Pr. (N. Y.) 427, 2 Alb. L. J. 354; Dyer County *v.* Paducah, etc., R. Co., 87 Tenn. 712, 11 S. W. 943 [*overruling* Chesapeake, etc., Co. *v.* State, 16 Lea (Tenn.) 300, 2 S. W. 208].

51. Allen *v.* Buffalo, etc., R. Co., 151 N. Y. 434, 45 N. E. 845.

52. People *v.* Delaware, etc., R. Co., 177 N. Y. 337, 69 N. E. 651 [*affirming* 81 N. Y. App. Div. 335, 81 N. Y. Suppl. 478].

53. See *infra*, VI, D, 5, a.

54. Charlottesville *v.* Southern R. Co., 97 Va. 428, 34 S. E. 98.

55. Atchison, etc., R. Co. *v.* Townsend, 71 Kan. 524, 81 Pac. 205; McKinney *v.* New York Cent., etc., R. Co., 66 N. Y. App. Div. 207, 73 N. Y. Suppl. 48 [*affirmed* in 174 N. Y. 516, 66 N. E. 1112]; Little Miami R. Co. *v.* Green County Com'rs, 31 Ohio St. 338.

56. Kyne *v.* Wilmington, etc., R. Co., 8 Houst. (Del.) 185, 14 Atl. 922; People *v.* New York Cent., etc., R. Co., 74 N. Y. 302; McKinney *v.* New York Cent., etc., R. Co., 66 N. Y. App. Div. 207, 73 N. Y. Suppl. 48 [*affirmed* in 174 N. Y. 516, 66 N. E. 1112]; Charlottesville *v.* Southern R. Co., 97 Va. 428, 34 S. E. 98.

57. *Florida.*— Palatka, etc., R. Co. *v.* State, 23 Fla. 546, 3 So. 158, 11 Am. St. Rep. 395.

Indiana.— Seybold *v.* Terre Haute, etc., R. Co., 18 Ind. App. 367, 46 N. E. 1054.

Kansas.— Atchison, etc., R. Co. *v.* Townsend, 71 Kan. 524, 81 Pac. 205.

Ohio.— Little Miami R. Co. *v.* Green County Com'rs, 31 Ohio St. 338.

Wisconsin.— Roberts *v.* Chicago, etc., R. Co., 35 Wis. 679.

England.— Atty.-Gen. *v.* London, etc., R. Co., 3 De G. & Sm. 439, 13 Jur. 467, 64 Eng. Reprint 552.

See 41 Cent. Dig. tit. "Railroads," § 278.

58. See *supra*, VI, D, 2, d.

59. Allen *v.* Buffalo, etc., R. Co., 151 N. Y. 434, 45 N. E. 845; State *v.* Dayton, etc., R. Co., 36 Ohio St. 434; Baldwin Tp. *v.* Baltimore, etc., R. Co., 210 Pa. St. 86, 59 Atl. 478; Bean *v.* Howe, 85 Pa. St. 260; Atty.-Gen. *v.* Barry Docks, etc., Co., 35 Ch. D. 573, 51 J. P. 644, 56 L. J. Ch. 1018, 56 L. T. Rep. N. S. 559, 35 Wkly. Rep. 830; Atty.-Gen. *v.* London, etc., R. Co., 3 De G. & Sm. 439, 13 Jur. 467, 64 Eng. Reprint 552.

Proximity to railroad.— Where a railroad company in constructing a crossing changes the route of the highway it must not locate the new way along the railroad in such close proximity thereto as to render it dangerous for public travel. State *v.* Dayton, etc., R. Co., 36 Ohio St. 434.

Width of substituted way.— The railroad company in changing the location of a highway and substituting another must provide a highway of the same legal width as that

restoring a highway to a proper condition is imperative and is not discharged merely by the exercise of ordinary care,[60] and the duty includes the doing of whatever is necessary to be done in order to restore the highway to such condition.[61] Whether the railroad company has fully and properly performed its duty in this regard must necessarily depend largely upon the circumstances of the particular case,[62] and in actions based upon an alleged breach of such duty is ordinarily a question of fact for the jury.[63] Where a railroad crosses a city street it must be restored and made passable for the full width of the street,[64] and the same has been held in regard to an ordinary highway.[65] The duty of restoring the highway carries with it the right to exercise any powers conferred upon the railroad company by statute which are necessary therefor;[66] and it has been held that for the purpose of restoration the railroad company may change the grade of a highway,[67] or change the location of the highway,[68] and acquire by purchase or condemnation the lands necessary for such change.[69] The mode of restoration should ordinarily be left in the first instance to the discretion of the railroad company,[70] and in a proceeding to compel a restoration the writ should ordinarily be general and not specific as to what the railroad company shall do;[71] but the railroad company has no discretion as to whether it will restore

taken and not merely substitute a way of the width of the traveled portion of the original way. Com. *v.* Delaware, etc., R. Co., 215 Pa. St. 149, 64 Atl. 417.

60. International, etc., R. Co. *v.* Butcher, (Tex. Civ. App. 1904) 81 S. W. 819.

61. Cincinnati, etc., R. Co. *v.* Connersville, 170 Ind. 316, 83 N. E. 503; State *v.* Minnesota Transfer R. Co., 80 Minn. 108, 83 N. W. 32, 50 L. R. A. 656; State *v.* St. Paul, etc., R. Co., 35 Minn. 131, 28 N. W. 3, 59 Am. Rep. 313.

Statement of rule.—The rule as to restoring highways has been stated as follows: "What was meant was merely that the company should put the street in such condition as to furnish the public a thoroughfare reasonably safe and convenient, and substantially as capable of free and proper use as it was before. Whatever accomplishes this end is a performance of the duty; what does not is an infraction of it." State *v.* St. Paul, etc., R. Co., 35 Minn. 131, 134, 28 N. W. 3, 59 Am. Rep. 313.

Crossing above or below grade.—If the conditions of the particular case require it in order to render the crossing suitable and reasonably safe, the company must carry its railroad over or under the highway as the case may be. Cincinnati, etc., R. Co. *v.* Connersville, 170 Ind. 316, 83 N. E. 503.

62. Atchison, etc., R. Co. *v.* Henry, 57 Kan. 154, 45 Pac. 576; McKinney *v.* New York Cent., etc., R. Co., 66 N. Y. App. Div. 207, 73 N. Y. Suppl. 48 [*affirmed* in 174 N. Y. 516, 66 N. E. 1112].

The failure of a railroad company to remove a bank of earth on its right of way, consisting almost entirely of a natural hill through the base of which the track is laid in a cut and which obstructs the view of an approaching train from travelers on the highway, is not a failure to restore the highway to its former usefulness as required by the statute. Leitch *v.* Chicago, etc., R. Co., 93 Wis. 79, 67 N. W. 21.

63. Atchison, etc., R. Co. *v.* Henry, 57 Kan. 154, 45 Pac. 576; Allen *v.* Buffalo, etc., R. Co., 151 N. Y. 434, 45 N. E. 845; St. Louis, etc., R. Co. *v.* Byas, 12 Tex. Civ. App. 657, 35 S. W. 22; Roberts *v.* Chicago, etc., R. Co., 35 Wis. 679.

64. Indianapolis, etc., R. Co. *v.* State, 37 Ind. 489.

65. Lake Shore, etc., R. Co. *v.* McIntosh, 140 Ind. 261, 38 N. E. 476. But see *supra*, VI, D, 2, a.

66. People *v.* Dutchess, etc., R. Co., 58 N. Y. 152.

67. Rauenstein *v.* New York, etc., R. Co., 136 N. Y. 528, 32 N. E. 1047, 18 L. R. A. 768; Uline *v.* New York Cent., etc., R. Co., 101 N. Y. 98, 4 N. E. 536, 54 Am. Rep. 661.

68. Post *v.* West Shore R. Co., 123 N. Y. 580, 26 N. E. 7 [*modifying* 50 Hun 301, 3 N. Y. Suppl. 172]. But see Buchholz *v.* New York, etc., R. Co., 148 N. Y. 640, 43 N. E. 76 [*reversing* 66 Hun 377, 21 N. Y. Suppl. 503, and *distinguishing* People *v.* Dutchess, etc., R. Co., 58 N. Y. 152].

69. Post *v.* West Shore R. Co., 123 N. Y. 580, 26 N. E. 7 [*modifying* 50 Hun 301, 3 N. Y. Suppl. 172].

70. People *v.* Delaware, etc., R. Co., 177 N. Y. 337, 69 N. E. 651 [*affirming* 81 N. Y. App. Div. 335, 81 N. Y. Suppl. 478]; Post *v.* West Shore R. Co., 123 N. Y. 580, 26 N. E. 7.

71. People *v.* Delaware, etc., R. Co., 177 N. Y. 337, 69 N. E. 651 [*affirming* 81 N. Y. App. Div. 335, 81 N. Y. Suppl. 478], holding that in a proceeding to compel restoration the court may properly refuse a request for an under crossing, where it does not appear that such crossing is the only means by which the highway can be restored so as not to impair its usefulness.

Order of justices.—An order of justices directing a railroad company to repair damage done by it to a road in constructing the railroad need not specify the particulars of the damage nor what repairs are to be made; it is sufficient if it states the length of the damaged part of the road and orders the company generally to make good all damage

the highway,[72] and in any case where the nature of the thing to be done is uncertain and can only be determined by the judgment of the court, the writ may properly be made specific;[73] and where the railroad company in the exercise of its discretion has adopted a method of restoration which it claims to be sufficient, and which the court adjudges to be insufficient, it may properly direct specifically what the railroad company shall do so as not to fail again.[74]

c. Maintenance and Repairs.[75] It is not sufficient for a railroad company properly to construct a crossing and to restore the highway crossed to a proper condition;[76] but it is the duty of the company subsequently to keep and maintain the crossing in a safe and suitable state of repair,[77] including not only the crossing of the tracks but also the approaches thereto.[78] This is a common-law duty,[79] but is frequently expressly imposed by statutory or charter provisions.[80] So

done, and the order may include several highways in the same parish. London, etc., R. Co. *v.* Wetherall, 15 Jur. 247.

72. People *v.* Dutchess, etc., R. Co., 58 N. Y. 152.

73. State *v.* Minneapolis, etc., R. Co., 39 Minn. 219, 39 N. W. 153.

74. People *v.* Dutchess, etc., R. Co., 58 N. Y. 152.

75. Repair of bridges and approaches thereto see *infra*, VI, D, 3, d.

76. Southern R. Co. *v.* Morris, 143 Ala. 628, 42 So. 17; Maltby *v.* Chicago, etc., R. Co., 52 Mich. 108, 17 N. W. 717; Dyer County *v.* Paducah, etc., R. Co., 87 Tenn. 712, 11 S. W. 943 [*overruling* Chesapeake, etc., R. Co. *v.* State, 16 Lea (Tenn.) 300, 2 S. W. 208]. But see Missouri, etc., R. Co. *v.* Long, 27 Kan. 684.

77. *Alabama.*— Southern R. Co. *v.* Morris, 143 Ala. 628, 42 So. 17.

Indiana.— Lake Shore, etc., R. Co. *v.* McIntosh, 140 Ind. 261, 38 N. E. 476.

Iowa.— See *v.* Wabash R. Co., 123 Iowa 443, 99 N. W. 106; Farley *v.* Chicago, etc., R. Co., 42 Iowa 234.

Kentucky.— Paducah, etc., R. Co. *v.* Com., 80 Ky. 147.

Michigan.— Maltby *v.* Chicago, etc., R. Co., 52 Mich. 108, 17 N. W. 717.

Tennessee.— Dyer County *v.* Paducah, etc., R. Co., 87 Tenn. 712, 11 S. W. 943 [*overruling* Chesapeake, etc., R. Co. *v.* State, 16 Lea 300, 2 S. W. 208].

See 41 Cent. Dig. tit. "Railroads," §§ 274, 278.

78. *Alabama.*— Southern R. Co. *v.* Morris, 143 Ala. 628, 42 So. 17.

Illinois.— Ohio, etc., R. Co. *v.* Cox, 26 Ill. App. 491.

Iowa.— Farley *v.* Chicago, etc., R. Co., 42 Iowa 234.

Kentucky.— Paducah, etc., R. Co. *v.* Com., 80 Ky. 147.

Michigan.— Maltby *v.* Chicago, etc., R. Co., 52 Mich. 108, 17 N. W. 717.

New York.— People *v.* New York, etc., R. Co., 74 N. Y. 302.

See 41 Cent. Dig. tit. "Railroads," §§ 274, 278.

The approaches constitute a part of the crossing and must be maintained and kept in repair by the railroad company. See *v.* Wabash R. Co., 123 Iowa 443, 99 N. W. 106; Farley *v.* Chicago, etc., R. Co., 42 Iowa 234.

79. Farley *v.* Chicago, etc., R. Co., 42 Iowa 234; Paducah, etc., R. Co. *v.* Com., 80 Ky. 147; Maltby *v.* Chicago, etc., R. Co., 52 Mich. 108, 17 N. W. 717; Dyer County *v.* Paducah, etc., R. Co., 87 Tenn. 712, 11 S. W. 943 [*overruling* Chesapeake, etc., R. Co. *v.* State, 16 Lea (Tenn.) 300, 2 S. W. 208].

Although the statute only requires a restoration of the highway to its former state by the railroad company, the common law still requires that it shall maintain it in a reasonably safe condition. Maltby *v.* Chicago, etc., R. Co., 52 Mich. 108, 17 N. W. 717; Dyer County *v.* Paducah, etc., R. Co., 87 Tenn. 712, 11 S. W. 943 [*overruling* Chesapeake, etc., R. Co. *v.* State, 16 Lea (Tenn.) 300, 2 S. W. 208].

80. *Iowa.*— See *v.* Wabash, etc., R. Co., 123 Iowa 443, 99 N. W. 106.

Minnesota.— Goodhue County *v.* Duluth, etc., R. Co., 67 Minn. 213, 69 N. W. 898.

Mississippi.— Hamline *v.* Southern R. Co., 76 Miss. 410, 25 So. 295.

North Carolina.— Goforth *v.* Southern R. Co., 144 N. C. 569, 57 N. E. 209.

Texas.— International, etc., R. Co. *v.* Haddox, 36 Tex. Civ. App. 385, 81 S. W. 1036.

Vermont.— Clarendon *v.* Rutland R. Co., 75 Vt. 6, 52 Atl. 1057.

See 41 Cent. Dig. tit. "Railroads," §§ 274, 278.

In Connecticut the act of 1849 provided that railroad companies should "keep up and maintain" such bridges, excavations, embankments, approaches, etc., at the crossing as the convenience and safety of the public travel upon the street or highway should require, and the act of 1899 provided that railroad companies should maintain and keep in repair "all structures erected over their tracks at any highway crossing," but that it should be the duty of the municipality in which the structure is situated "to keep in repair the surface of the highway, including planking or other surface material of the highway upon the structure." The latter statute is construed as not intended to repeal the former or affect the duty of railroad companies to keep in repair all such structures previously constructed, but to apply only to bridges and structures necessitated by the elimination of grade crossings under the

also a continuing obligation to keep the crossing in repair is imposed by a statutory or charter provision that it shall be so constructed as not to obstruct the safe and convenient use of the highway;[81] that the highway shall be put in such condition and state of repair as not to impair its proper use;[82] or that the highway shall be restored to its former condition or such as not to have impaired its usefulness.[83] The structure of the crossing, whether of earth, wood, or other material which the existence of the railroad renders necessary, must be maintained and kept in repair by the railroad company;[84] but the duty to repair applies only to what is properly the crossing and approaches thereto, which do not necessarily include the entire width of the street or highway or right of way of the railroad.[85] It is not the duty of the railroad company to keep in repair as a part of the crossing a part of the highway which is not within the limits of the crossing;[86] but where a railroad company constructs two parallel tracks close together across a highway, it must keep in repair the space between the two lines of tracks.[87]

d. Bridges and Approaches. If the proper restoration of a street or highway so as not to impair its usefulness demands a crossing by means of a bridge or viaduct, it is the duty of the railroad company to provide such a crossing,[88] with the necessary excavations, embankments, and approaches thereto;[89] but a railroad company is not required to bridge a stream where the necessity for the

latter act. Middletown *v.* New York, etc., R. Co., 62 Conn. 492, 27 Atl. 119.

To keep a crossing "in proper condition for the use of the traveling public," within the application of a statute so providing, means simply a condition reasonably suitable for the ordinary public travel, and whether the crossing has been kept in such condition is properly submitted as a question of fact for the jury. St. Louis, etc., R. Co. *v.* Byas, 12 Tex. Civ. App. 657, 35 S. W. 22.

The term "highway" in the Mississippi statute requiring a railroad company to make easy grades over a "highway" which its road crosses, and to keep such crossing in good order, applies to city streets as well as roads in the country. Hamline *v.* Southern R. Co., 76 Miss. 410, 25 So. 295.

The exercise of ordinary care on the part of the railroad company is not a sufficient compliance with a statutory requirement that a crossing shall be kept in repair by the railroad company. International, etc., R. Co. *v.* Haddox, 36 Tex. Civ. App. 385, 81 S. W. 1036.

81. Wellcome *v.* Leeds, 51 Me. 313; Clarendon *v.* Rutland R. Co., 75 Vt. 6, 52 Atl. 1057.

82. Wayzata *v.* Great Northern R. Co., 50 Minn. 438, 52 N. W. 913.

83. Roe *v.* Elmendorf, 52 How. Pr. (N. Y.) 232; People *v.* Troy, etc., R. Co., 37 How. Pr. (N. Y.) 427, 2 Alb. L. J. 354; Dyer County *v.* Paducah, etc., R. Co., 87 Tenn. 712, 11 S. W. 943 [*overruling* Chesapeake, etc., R. Co. *v.* State, 16 Lea (Tenn.) 300, 2 S. W. 208]. But see Missouri, etc., R. Co. *v.* Long, 27 Kan. 684.

84. Farley *v.* Chicago, etc., R. Co., 42 Iowa 234.

A box culvert about nine feet from and parallel with the railroad track at the foot of an embankment supporting the track, and placed across the highway mainly for the purpose of draining and protecting the embankment and forming a part of the approach to the crossing, is a part of the railroad structure, and it is the duty of the railroad company to maintain it in a safe condition for persons traveling upon the highway. Atchison, etc., R. Co. *v.* Aderhold, 58 Kan. 293, 49 Pac. 83.

85. Bloomington *v.* Illinois Cent. R. Co., 154 Ill. 539, 39 N. E. 478 [*affirming* 49 Ill. App. 129]; Rutland *v.* Chicago, etc., R. Co., 71 Ill. App. 442.

A railroad company is not required to repair sidewalks within the limits of its right of way, unless they are properly a part of the crossing or of the approaches thereto. Bloomington *v.* Illinois Cent. R. Co., 154 Ill. 539, 39 N. E. 478 [*affirming* 49 Ill. App. 129].

86. Brookins *v.* Central R., etc., Co., 48 Ga. 523; Gulf, etc., R. Co. *v.* Sneed, 84 Miss. 252, 36 So. 261; West Lancashire Rural Dist. Council *v.* Lancashire, etc., R. Co., [1903] 2 K. B. 394, 67 J. P. 410, 72 L. J. K. B. 675, 1 Loc. Gov. 788, 89 L. T. Rep. N. S. 139, 19 T. L. R. 625, 51 Wkly. Rep. 694.

87. Scanlan *v.* Boston, 140 Mass. 84, 2 N. E. 787.

88. Burritt *v.* New Haven, 42 Conn. 174; State *v.* Minnesota Transfer R. Co., 80 Minn. 108, 83 N. W. 32, 50 L. R. A. 656; Parker *v.* Truesdale, 54 Minn. 241, 55 N. W. 901; State *v.* Minneapolis, etc., R. Co., 39 Minn. 219, 39 N. W. 153; State *v.* St. Paul, etc., R. Co., 35 Minn. 131, 28 N. W. 3, 59 Am. Rep. 313; Streetsville Plank Road Co. *v.* Hamilton, etc., R. Co., 13 U. C. Q. B. 600.

A bridge is a "safety device" within the meaning of that expression in the rule requiring that railroad companies must maintain at crossings all such safety devices as are reasonably necessary. State *v.* St. Paul, etc., R. Co., 98 Minn. 380, 108 N. W. 261.

89. State *v.* St. Paul, etc., R. Co., 35 Minn. 131, 28 N. W. 3, 59 Am. Rep. 313.

bridge as a part of the highway is not caused or affected by the existence of the railroad,[90] although it is within the limits of the railroad right of way.[91] Where a crossing is effected by means of a bridge for carrying a street or highway over the railroad tracks, it is the duty of the railroad company subsequently to keep such bridge in repair,[92] and also to keep in repair the approaches thereto.[93] This is a common-law duty,[94] but it is in some cases imposed by statutory or charter provisions relating expressly to the maintenance of such bridges,[95] and is included under the duty of restoring the highway to its former usefulness, which is a continuing duty.[96] The duty of making repairs applies to the whole structure built by the railroad company for the purpose of crossing,[97] although extending beyond the limits of the right of way,[98] and applies not only to the substructure or support but also to the surface or roadway upon the bridge or approaches,[99] unless it is

90. Ohio, etc., R. Co. *v.* Bridgeport, 63 Ill. App. 224; State *v.* St. Paul, etc., R. Co., 62 Minn. 450, 64 N. W. 1140.

91. Ohio, etc., R. Co. *v.* Bridgeport, 63 Ill. App. 224.

92. *Iowa.*— Newton *v.* Chicago, etc., R. Co., 66 Iowa 422, 23 N. W. 905.

Maine.— State *v.* Gorham, 37 Me. 451.

Minnesota.— State *v.* Minnesota Transfer R. Co., 80 Minn. 108, 83 N. W. 32, 50 L. R. A. 656.

New York.— Hayes *v.* New York Cent., etc., R. Co., 9 Hun 63; People *v.* Troy, etc., R. Co., 37 How. Pr. 427, 2 Alb. L. J. 354.

Pennsylvania.— Hays *v.* Gallagher, 72 Pa. St. 136; Conshohocken R. Co. *v.* Pennsylvania R. Co., 15 Pa. Co. Ct. 445.

Tennessee.— Dyer County *v.* Paducah, etc., R. Co., 87 Tenn. 712, 11 S. W. 943 [*overruling* Chesapeake, etc., R. Co. *v.* State, 16 Lea 300, 2 S. W. 208].

Vermont.— Clarendon *v.* Rutland R. Co., 75 Vt. 6, 52 Atl. 1057.

Canada.— Van Allen *v.* Grand Trunk R. Co., 29 U. C. Q. B. 436.

See 41 Cent. Dig. tit. "Railroads," § 279.

93. Newton *v.* Chicago, etc., R. Co., 66 Iowa 422, 23 N. W. 905; Titcomb *v.* Fitchburg R. Co., 12 Allen (Mass.) 254; People *v.* New York Cent., etc., R. Co., 74 N. Y. 302; Hayes *v.* New York Cent., etc., R. Co., 9 Hun (N. Y.) 63; North Staffordshire R. Co. *v.* Dale, 8 E. & B. 836, 4 Jur. N. S. 631, 27 L. J. M. C. 147, 92 E. C. L. 836; North of England R. Co. *v.* Langbaurgh, 24 L. T. Rep. N. S. 544. But see Taff Vale R. Co. *v.* Davies, 19 L. T. Rep. N. S. 278, holding that in the absence of statute a railroad company is not required to keep in repair the approaches to a bridge and that the provisions of the Railways Clauses Act relating to the repair of approaches to bridges are not retroactive.

Width of approaches.— The railroad company must keep in repair whatever constitutes at any time the approaches to the bridge, and if the public authorities subsequently increase the width of the highway and approaches, they must be kept in repair for the increased width by the railroad company. Carter *v.* Boston, etc., R. Corp., 139 Mass. 525, 2 N. E. 101.

94. Dyer County *v.* Paducah, etc., R. Co., 87 Tenn. 712, 11 S. W. 943 [*overruling* Chesapeake, etc., R. Co. *v.* State, 16 Lea 300, 2 S. W. 208].

95. State *v.* Gorham, 37 Me. 451; White *v.* Quincy, 97 Mass. 430; Titcomb *v.* Fitchburg R. Co., 12 Allen (Mass.) 254; Clarendon *v.* Rutland R. Co., 75 Vt. 6, 52 Atl. 1057; London, etc., R. Co. *v.* Wandsworth Dist. Bd. of Works, L. R. 8 C. P. 185, 42 L. J. M. C. 70; Bristol, etc., R. Co. *v.* Tucker, 13 C. B. N. S. 207, 7 L. T. Rep. N. S. 464, 106 E. C. L. 207; North Staffordshire R. Co. *v.* Dale, 8 E. & B. 836, 4 Jur. N. S. 631, 27 L. J. M. C. 147, 92 E. C. L. 836; Reg. *v.* South-Eastern R. Co., 32 L. T. Rep. N. S. 858.

Character of bridge.— In England the statute of 1845, section 46, requiring that where a highway is carried over a railroad the company shall keep the bridge in repair, does not apply to a bridge voluntarily constructed by a railroad company at a point where no highway existed at the time of its construction and where it was not constructed as an exercise of the power of the company to make necessary changes in the location of existing highways in constructing its road. London, etc., R. Co. *v.* Ogwen Dist. Council, 63 J. P. 295, 80 L. T. Rep. N. S. 401, 15 T. L. R. 291 [*affirming* 62 J. P. 691, 79 L. T. Rep. N. S. 208].

96. Roe *v.* Elmendorf, 52 How. Pr. (N. Y.) 232; People *v.* Troy, etc., R. Co., 37 How. Pr. (N. Y.) 427, 2 Alb. L. J. 354; Dyer County *v.* Paducah, etc., R. Co., 87 Tenn. 712, 11 S. W. 943 [*overruling* Chesapeake, etc., R. Co. *v.* State, 16 Lea (Tenn.) 300, 2 S. W. 208].

The disuse or removal of the track at the crossing is not sufficient to relieve the railroad company of the duty of keeping in repair a bridge constructed over it, since the company may reassert its right to the possession and use of the crossing, and so long as the company possesses such right, it must perform the condition incident thereto. People *v.* Troy, etc., R. Co., 37 How. Pr. (N. Y.) 427, 2 Alb. L. J. 354.

97. White *v.* Quincy, 97 Mass. 430.

98. White *v.* Quincy, 97 Mass. 430.

99. McFarlane *v.* Chicago, 185 Ill. 242, 57 N. E. 12; Hayes *v.* New York Cent., etc., R. Co., 9 Hun (N. Y.) 63; Lancashire, etc., R. Co. *v.* Bury, 14 App. Cas. 417, 54 J. P. 197, 59 L. J. Q. B. 85, 61 L. T. Rep. N. S. 417 [*affirming* 36 Wkly. Rep. 491]; North Staffordshire R. Co. *v.* Dale, 8 E. & B. 836, 4

otherwise provided by statute;[1] and where the railroad crosses below the grade of the highway in a cut, the duty extends to the entire width of the excavation made for the railroad.[2] The duty of a railroad company with regard to the maintenance and repair of bridges at crossings is not, however, any greater than that of the public authorities charged with the same duty as to other bridges along the highway.[3] It is not the duty of a railroad company to keep in repair a highway bridge across a stream outside of the limits of its right of way,[4] and where a railroad company in crossing changes the location of a highway, it is not required to keep in repair a bridge which it constructs across a stream in building a new way, and which is outside of the right of way and not at the crossing;[5] nor is the company required to keep in repair bridges over streams or ditches, although within the limits of the right of way, if so far removed from the crossing as not to be included within the approaches thereto,[6] or the necessity for which is in no way caused or affected by the construction of the railroad,[7] or to keep in repair any portion of the street or highway beyond the limits of the approaches proper;[8] but a bridge which is a necessary part of the crossing or approach must be kept in repair by the railroad company.[9] Where a railroad is carried over the highway by means of a bridge, it is not the duty of the railroad company to keep in repair

Jur. N. S. 631, 27 L. J. M. C. 147, 92 E. C. L. 836; Leech *v.* North Staffordshire R. Co., 29 L. J. M. C. 150, 1 L. T. Rep. N. S. 332, 8 Wkly. Rep. 216; Reg. *v.* South-Eastern R. Co., 32 L. T. Rep. N. S. 858; North of England R. Co. *v.* Langbaurgh, 24 L. T. Rep. N. S. 544. *Compare* New Haven *v.* New York, etc., R. Co., 39 Conn. 128.

Paving approaches.— Where a railroad company is required to maintain and keep in repair a viaduct and its approaches in a street, it must pay the expense of paving the approaches. McFarlane *v.* Chicago, 185 Ill. 242, 57 N. E. 12.

1. Yonkers *v.* New York Cent., etc., R. Co., 165 N. Y. 142, 58 N. E. 877 [*affirming* 32 N. Y. App. Div. 474, 52 N. Y. Suppl. 1074].

The New York statute of 1897 providing that where a highway crosses a railroad by an overhead bridge, the frame-work and abutments of the bridge shall be maintained and kept in repair by the railroad company and the roadway and approaches by the municipality in which the bridge is situated, includes such bridges existing at the time of the passage of the act (Bush *v.* Delaware, etc., R. Co., 166 N. Y. 210, 59 N. E. 838 [*affirming* 54 N. Y. App. Div. 616, 66 N. Y. Suppl. 1128]; Yonkers *v.* New York Cent., etc., R. Co., 165 N. Y. 142, 58 N. E. 877 [*affirming* 32 N. Y. App. Div. 474, 52 N. Y. Suppl. 1074]); and the stringers of a bridge are held to constitute a part of the frame-work which must be kept in repair by the railroad company (Bush *v.* Delaware, etc., R. Co., *supra*).

2. Titcomb *v.* Fitchburg R. Co., 12 Allen (Mass.) 254.

3. Conshohocken R. Co. *v.* Pennsylvania R. Co., 15 Pa. Co. Ct. 445, holding that a railroad company in constructing a bridge for a highway at a crossing is not required to provide for the future additional use of the bridge by an electric railway, and where the right to make such use of the bridge has been acquired, the railroad company cannot be compelled to alter or strengthen the bridge to make it suitable for such use.

4. Brookins *v.* Central R., etc., Co., 48 Ga. 523; Peterborough *v.* Grand Trunk R. Co., 32 Ont. 154.

5. Brookins *v.* Central R., etc., Co., 48 Ga. 523, holding further that the fact that the railroad company has at different times repaired such a bridge imposes no obligation upon the company to continue to do so. But see Pennsylvania R. Co. *v.* Irwin, 85 Pa. St. 336.

So also if the railroad company diverts a stream which a highway crosses by means of a bridge so that the stream crosses the highway at a different point outside of the railroad right of way, and it constructs a suitable new bridge at such place, it is not required to keep the bridge in repair. Peterborough *v.* Grand Trunk R. Co., 32 Ont. 154. See also Rutland *v.* Chicago, etc., R. Co., 71 Ill. App. 442.

6. Rutland *v.* Chicago, etc., R. Co., 71 Ill. App. 442; O'Fallon *v.* Ohio, etc., R. Co., 45 Ill. App. 572; Ohio, etc., R. Co. *v.* Bridgeport, 43 Ill. App. 89.

7. Rutland *v.* Chicago, etc., R. Co., 71 Ill. App. 442; Ohio, etc., R. Co. *v.* Bridgeport, 63 Ill. App. 224; Ohio, etc., R. Co. *v.* Bridgeport, 43 Ill. App. 89; Felder *v.* Southern R. Co., 76 S. C. 554, 57 S. E. 524.

8. State *v.* Northern Pac. R. Co., 99 Minn. 280, 109 N. W. 238, 110 N. W. 975.

9. Goodhue County *v.* Duluth, etc., R. Co., 67 Minn. 213, 69 N. W. 898, holding that where, in the construction of a railroad, a stream has been diverted from its natural channel into an artificial one, wholly upon the right of way, making it necessary to build a bridge over the stream constituting a part of the approach or crossing, it must be kept in repair by the railroad company.

A bridge which runs up to the cross ties of a railroad at a public road crossing is such an approach as the railroad company is required to keep in repair. Southern R. Co. *v.* Morris, (Ala. 1906) 42 So. 19.

that portion of the highway beneath the bridge;[10] and if the bridge was originally constructed at a proper height above the level of the highway the company is not required to keep the space the same by preventing any raise in the level of the highway or by raising the bridge in case the level of the highway is raised by natural causes or the action of the public authorities in repairing it;[11] but where the height of the bridge as originally constructed and without any change in the level of the highway becomes insufficient by reason of increased travel or the character of vehicles used upon the highway, it is the duty of the railroad company to make such alterations as are necessary to meet such conditions and render the use of the highway safe.[12] Where a highway bridge over a railroad has become out of repair and dangerous, the railroad company has a right to close it to prevent persons going thereon, although it is a part of the public highway;[13] but where a railroad company in making necessary repairs upon a bridge over its tracks closes the bridge and opens a temporary roadway across its tracks at a different point, it must make the temporary roadway reasonably safe.[14]

e. **Agreements as to Restoration and Maintenance.** A railroad company cannot exempt itself from liability for failure properly to restore or maintain a highway which it has obstructed by any stipulation with the contractors for construction;[15] but it has been held that a town or municipality invested with the regulation, control and duty of maintaining and repairing the streets or highways within its limits may by contract assume and thereby relieve the railroad company from the duty of keeping a bridge or crossing in repair,[16] and that such contract will relieve the railroad company from further liability to the public in this regard.[17] A distinction should, however, be made with regard to such contracts, according to whether any legal obligation already rested upon the railroad company to perform the duties therein provided for.[18] So in cases where a railroad company constructs a bridge or viaduct pursuant to a contract with a municipality, by which the latter agrees to keep the same or its approaches in repair, if the railroad company was already legally bound to do the entire work of construction and maintenance, the contract is not only without consideration,[19] but is one which the municipality has no power to make,[20] and the existence of such contract will not prevent the municipality from instituting proceedings to compel the railroad company to make any necessary repairs,[21] or impose upon the munici-

10. Gray *v.* Danbury, 54 Conn. 574, 10 Atl. 198; Metuchen *v.* Pennsylvania R. Co., 71 N. J. Eq. 404, 64 Atl. 484.

Although the highway is lowered in order to bring it to a proper depth below the bridge, the company is not bound to keep the slope of the road in repair as being part of the approaches on each side of the bridge. London, etc., R. Co. *v.* Skerton Tp., 5 B. & S. 559, 33 L. J. M. C. 158, 10 L. T. Rep. N. S. 648, 12 Wkly. Rep. 1102, 117 E. C. L. 559.

11. Gray *v.* Danbury, 54 Conn. 574, 10 Atl. 198.

12. Cooke *v.* Boston, etc., R. Co., 133 Mass. 185.

13. Toledo St. R. Co. *v.* Mammet, 13 Ohio Cir. Ct. 591, 6 Ohio Cir. Dec. 244.

14. Marshall *v.* Valley R. Co., 97 Va. 653, 34 S. E. 455.

15. Veazie *v.* Penobscot R. Co., 49 Me. 119.

16. Burlington *v.* New Haven, etc., R. Co., 26 Conn. 51; Hicks *v.* Chesapeake, etc., R. Co., 102 Va. 197, 45 S. E. 888.

The selectmen of a town who are the general supervisors of the highways therein and who are charged with the duty of constructing and repairing the same have authority to bind the town by contract with a railroad company to keep the crossings in repair. Burlington *v.* New Haven, etc., R. Co., 26 Conn. 51.

17. Hicks *v.* Chesapeake, etc., R. Co., 102 Va. 197, 45 S. E. 888.

18. Wetherbee *v.* Michigan Cent. R. Co., 122 Mich. 1, 80 N. W. 787; State *v.* Minnesota Transfer R. Co., 80 Minn. 108, 83 N. W. 32, 50 L. R. A. 656.

19. Newton *v.* Chicago, etc., R. Co., 66 Iowa 422, 23 N. W. 905; State *v.* Northern Pac. R. Co., 98 Minn. 429, 108 N. W. 269; State *v.* Minnesota Transfer R. Co., 80 Minn. 108, 83 N. W. 32, 50 L. R. A. 656.

20. Rouse *v.* Somerville, 130 Mass. 361; State *v.* Northern Pac. R. Co., 98 Minn. 429, 108 N. W. 269; State *v.* Minnesota Transfer R. Co., 80 Minn. 108, 83 N. W. 32, 50 L. R. A. 656.

The municipality is not estopped by having made certain repairs pursuant to its agreement. Rouse *v.* Somerville, 130 Mass. 361.

21. Newton *v.* Chicago, etc., R. Co., 66 Iowa 422, 23 N. W. 905; State *v.* Northern Pac. R. Co., 98 Minn. 429, 108 N. W. 269; State *v.* Minnesota Transfer R. Co., 80 Minn. 108, 83 N. W. 32, 50 L. R. A. 656.

pality any liability for injuries sustained by reason of the want of such repairs,[22] or relieve the railroad company from liability to third persons for injuries so caused.[23] If, however, the railroad company was under no legal obligation to construct the bridge, it cannot be compelled to waive the contract of the municipality and repair it,[24] or held liable in damages for an injury due to a failure of the municipality to repair the same according to its agreement.[25] An agreement on the part of a railroad company to construct suitable street crossings, in consideration of a right of way through a city, is enforceable against the railroad company;[26] but an agreement made in consideration of the right to lay a switch track across certain streets that the railroad company will construct and maintain "all the crossings of streets" over its tracks, will be construed as applying only to the streets crossed by the switch-track in question.[27] Where a railroad company changes the location of a highway in crossing and purchases additional land for a new location, it may legally agree with the grantor as to the character and location of the new way to be constructed thereon, which contract will be valid and binding between the parties, although not conclusive upon the public as to whether the company has properly restored the use of the original highway.[28]

f. Recovery of Expense of Restoring or Maintaining Highway. Where a railroad company has failed to restore a highway at a crossing to its former usefulness or to keep the crossing, bridge, or approaches in a proper state of repair, the municipal or other public authorities charged with the duty of maintaining the highway at such place may do so and recover from the railroad company the expenses necessarily incurred,[29] and in some cases it is so provided by statutory or charter provisions;[30] but the right to do such work and recover therefor is not

22. Rouse *v.* Somerville, 130 Mass. 361.

23. Butin *v.* New York Cent., etc., R. Co., 100 N. Y. App. Div. 42, 90 N. Y. Suppl. 909.

24. State *v.* Chicago, etc., R. Co., 85 Minn. 416, 89 N. W. 1.

25. Wetherbee *v.* Michigan Cent. R. Co., 122 Mich. 1, 80 N. W. 787.

26. Louisville, etc., R. Co. *v.* Harrodsburg, 32 S. W. 604, 17 Ky. L. Rep. 780.

27. State *v.* Morgan's Louisiana, etc., R. Co., 111 La. 120, 35 So. 482.

28. Post *v.* West Shore R. Co., 123 N. Y. 580, 26 N. E. 7.

29. State *v.* Gorham, 37 Me. 451; Pennsylvania R. Co. *v.* Irwin, 85 Pa. St. 336; Bean *v.* Howe, 85 Pa. St. 260; Dyer County *v.* Paducah, etc., R. Co., 87 Tenn. 712, 11 S. W. 943 [*overruling* Chesapeake, etc., R. Co. *v.* State, 16 Lea (Tenn.) 300, 2 S. W. 208]; Oconto *v.* Chicago, etc., R. Co., 44 Wis. 231.

Form of action.— In an action against a railroad company for taking possession of a public road, a count for reimbursement for expenses incurred in constructing a temporary way, being in the form of an implied assumpsit, cannot be joined with a count in case. Aston Tp. *v.* Chester Creek R. Co., 2 Del. Co. (Pa.) 9.

Enforcing obligation by assessment of railroad property.— Where a railroad company is required by statute to provide suitable bridges over the tracks at street crossings a city has no power, in order to enforce such liability, to determine that an existing bridge is insufficient and to construct a new one as a public improvement, and assess the entire cost upon the property of the railroad company although other property is benefited by the bridge, the charter requiring that the expense of such public improvements shall be paid by assessment on all the property benefited thereby. People *v.* Adams, 88 Hun (N. Y.) 122, 34 N. Y. Suppl. 579 [*affirmed* in 147 N. Y. 722, 42 N. E. 725].

The damages recoverable by a county should be confined to the reasonable cost of putting the county road in as good condition as it was before the railroad was built, without reference to the danger of travel on the road from the proximity of the railroad. Richmond, etc., R. Co. *v.* Estill County, 105 Ky. 808, 49 S. W. 805, 20 Ky. L. Rep. 1634.

30. See Chicago, etc., R. Co. *v.* Chicago, 140 Ill. 309, 29 N. E. 1109; Clarendon *v.* Rutland R. Co., 75 Vt. 6, 52 Atl. 1057; Weymouth *v.* Port Townsend Southern R. Co., 6 Wash. 575, 34 Pac. 154.

Under the Illinois statute of 1874, the railroad company is not only liable for the expenses incurred by the public authorities but also subject to a fine. Chicago, etc., R. Co. *v.* Chicago, 140 Ill. 309, 29 N. E. 1109.

Form of action.— Under a city charter providing that in case a railroad company shall fail to comply with an order of the city council for the building or repairing of bridges at crossings, the city council may require the work to be done at the expense of the city, and that the treasurer of the city may collect the amount of such expense, in an action of trespass on the case in his own name, such expense cannot be recovered in an action of assumpsit in the name of the city. New Haven *v.* New York, etc., R. Co., 39 Conn. 128.

Sufficiency of complaint.— Under a statute

an exclusive remedy and does not prevent the public authorities from instituting appropriate proceedings to compel the railroad company to perform its duty in this regard.[31]

g. Character of Highway. The duty of restoring highways at crossings and of maintaining and keeping the crossings in repair ordinarily applies only to regular public highways,[32] that is, such as are regularly laid out and established pursuant to law or regularly dedicated to the public, or used for such time as is essential to constitute a public highway.[33] The term "highway" contemplates a regular public highway,[34] and a provision as to "any regularly laid out public highway" in a statute imposing a penalty for non-compliance therewith, will not be construed as including a public highway established by user only;[35] but a city street is a "highway" within the application of the statutes,[36] and the duty of restoring the same applies to a street regularly designated and dedicated to the public, although not opened and fitted for use.[37] Wherever a way existed as a public highway, however established, at the time the railroad company was constructed across it, it is the duty of the railroad company to keep the cross-

providing that a railroad company shall be responsible to the county "for all expenses incurred" in relocating and opening the portion of a road appropriated by a railroad company, the relocating or reopening is a condition precedent to the right to recover such damages, and a complaint alleging that such expense "is and will be" a certain sum, without averring that any such expense has been incurred, does not state a cause of action. Weymouth *v.* Port Townsend Southern R. Co., 6 Wash. 575, 34 Pac. 154.

31. Indianapolis, etc., R. Co. *v.* State, 37 Ind. 489, where it was held that notwithstanding such right mandamus would lie to compel the railroad company to restore a highway to its former condition.

32. *Georgia.*— Berry *v.* Northeastern R. Co., 72 Ga. 137.

Kansas.— Missouri, etc., R. Co. *v.* Long, 27 Kan. 684.

Michigan.— Flint, etc., R. Co. *v.* Willey, 47 Mich. 88, 10 N. W. 120.

Nebraska.— Omaha, etc., R. Co. *v.* Martin, 14 Nebr. 295, 15 N. W. 696.

South Carolina.— Moragne *v.* Charleston, etc., R. Co., 77 S. C. 437, 58 S. E. 150.

Texas.— Taylor, etc., R. Co. *v.* Warner, 88 Tex. 642, 32 S. W. 868; Gulf, etc., R. Co. *v.* Montgomery, 85 Tex. 64, 14 S. W. 1015.

See 41 Cent. Dig. tit. "Railroads," § 276.

"Public roads or private ways established pursuant to law."— The Georgia statute requiring railroad companies to keep in repair "the public roads or private ways established pursuant to law" which the railroad crosses does not apply to a path or unfrequented way not established by law (Berry *v.* Northeastern R. Co., 72 Ga. 137), or to a farm crossing which was not established pursuant to law (Cox *v.* East Tennessee, etc., R. Co., 68 Ga. 446).

The Illinois statute providing that the landowner may after notice to the railroad company repair a farm crossing and recover double the cost from the railroad company impliedly imposes on the company the duty of maintaining such crossings in repair. Baltimore, etc., R. Co. *v.* Keck, 89 Ill. App. 72.

The English statute requiring railroad companies to construct and maintain other roads in lieu of those interfered with or rendered impassable by the construction of a railroad applies to private as well as public roads (Llewellyn *v.* Vale of Glamorgan R. Co., [1897] 2 Q. B. 239, 66 L. J. Q. B. 670, 76 L. T. Rep. N. S. 778 [*affirmed* in [1898] 1 Q. B. 473, 67 L. J. Q. B. 305, 78 L. T. Rep. N. S. 70, 14 T. L. R. 205, 46 Wkly. Rep. 290]); but does not apply to a road which was originally a public road but which has been abandoned by the public and some individual merely desires to continue to use for his own purposes (Freeman *v.* Tottenham, etc., Junction R. Co., 11 Jur. N. S. 107, 11 L. T. Rep. N. S. 702, 13 Wkly. Rep. 335).

33. Taylor, etc., R. Co. *v.* Warner, 88 Tex. 642, 32 S. W. 868; Gulf, etc., R. Co. *v.* Montgomery, 85 Tex. 64, 19 S. W. 1015.

A public highway may be established by user, but the use must be under such circumstances and for such length of time as to constitute it a public highway, in order to impose any duty upon the railroad company to keep a crossing in repair. Missouri, etc., R. Co. *v.* Long, 27 Kan. 684.

34. Flint, etc., R. Co. *v.* Willey, 47 Mich. 88, 10 N. W. 120; Gulf, etc., R. Co. *v.* Montgomery, 85 Tex. 64, 19 S. W. 1015. But see Goforth *v.* Southern R. Co., 144 N. C. 569, 57 S. E. 209, holding that the terms "highway" and "established roads or ways" are not limited to "public highways," but include a neighborhood road used by the people of a particular locality as a mill and church road.

35. Missouri, etc., R. Co. *v.* Long, 27 Kan. 684.

36. Hamline *v.* Southern R. Co., 76 Miss. 410, 25 So. 295 [*distinguishing* Mobile, etc., R. Co. *v.* State, 51 Miss. 137]; Racine *v.* Chicago, etc., R. Co., 92 Wis. 118, 65 N. W. 857.

37. Racine *v.* Chicago, etc., R. Co., 92 Wis. 118, 65 N. W. 857.

ing in repair;[38] and if, although the highway crossed is not legally a public highway, the railroad company recognizes and invites the public to use it as such by assuming to construct or maintain a bridge or crossing, it is its duty to keep the same in proper repair;[39] but the duty in such a case is a common-law and not a statutory duty,[40] and the rule does not apply where the railroad company has at no time recognized the way crossed as a public highway.[41]

h. Companies and Persons Liable. The duty of restoring, maintaining, and repairing highways crossed by a railroad is a condition inseparable from the right to cross and attaches to whatever person or company exercises the franchise,[42] and is therefore binding upon the successors of the company by which the crossing was originally effected,[43] including purchasers at judicial sales.[44] This duty is not affected by the fact that the railroad company may be insolvent and in the hands of a receiver,[45] or the fact that a street railroad company whose tracks run along the highway is also under obligation to keep the highway between the rails of its tracks in repair;[46] nor does the fact that the charter of the railroad company imposes certain requirements as to crossings prevent the application of general statutory provisions not inconsistent therewith,[47] or in the absence of a contrary intention, express or implied, affect any common-law duties of the railroad company in this regard.[48]

i. Failure to Restore or Maintain as Constituting Nuisance. A failure on the part of a railroad company to restore or maintain a highway which it has crossed,

38. Lehigh Valley R. Co. *v.* Laceyville Bridge Co., 23 Pa. Co. Ct. 225, holding further that the railroad company being bound to keep the crossing in repair cannot enjoin a bridge company from constructing a bridge across a stream the use of which will divert public travel to such highway and increase the amount of travel across the railroad, or compel the bridge company to construct an overhead crossing at such place which was crossed by the railroad company at grade.

39. Retan *v.* Lake Shore, etc., R. Co., 94 Mich. 146, 53 N. W. 1094; Stewart *v.* Cincinnati, etc., R. Co., 80 Mich. 166, 44 N. W. 1116; Lillstrom *v.* Northern Pac. R. Co., 53 Minn. 464, 55 N. W. 624, 20 L. R. A. 587; Kelly *v.* South Minnesota R. Co., 28 Minn. 98, 9 N. W. 588 [*overruled* on other grounds in Morse *v.* Minneapolis, etc., R. Co., 30 Minn. 465, 16 N. W. 358]; Toledo *v.* Lake Shore, etc., R. Co., 17 Ohio Cir. Ct. 265, 9 Ohio Cir. Dec. 135; Dublin *v.* Taylor, etc., R. Co., 92 Tex. 535, 50 S. W. 120 [*modifying* (Civ. App. 1898) 49 S. W. 667]; Missouri Pac. R. Co. *v.* Bridges, 74 Tex. 520, 12 S. W. 210, 15 Am. St. Rep. 856; Texas, etc., R. Co. *v.* Hall, 17 Tex. Civ. App. 45, 43 S. W. 25; Hall *v.* Texas, etc., R. Co., (Tex. Civ. App. 1896) 35 S. W. 321; Texas, etc., R. Co. *v.* Neill, (Tex. Civ. App. 1895) 30 S. W. 369.

Compliance with an order of public authorities to construct a crossing, where the railroad crosses a way, is a recognition and adoption of it as a public highway, and the railroad company will be estopped as against one injured by defects therein, to deny that it is a public crossing. Ohio, etc., R. Co. *v.* Cox, 26 Ill. App. 491.

40. Taylor, etc., R. Co. *v.* Warner, 88 Tex. 642, 32 S. W. 868.

41. Missouri, etc., R. Co. *v.* Long, 27 Kan. 684; Gulf, etc., R. Co. *v.* Montgomery, 85 Tex. 64, 19 S. W. 1015.

42. People *v.* Chicago, etc., R. Co., 67 Ill. 118; Allen *v.* Buffalo, etc., R. Co., 151 N. Y. 434, 45 N. E. 845.

A railroad company which acquired a right of way for a switch track some twenty-five or thirty years since and has maintained and always claimed ownership of the track and used the same almost daily for many years, and which cannot show that any one else owned the track, will be deemed to own the track in such sense as to require it to maintain in repair a sidewalk across it. Cleveland, etc., R. Co. *v.* Miller, 165 Ind. 381, 74 N. E. 509.

43. *Illinois.*— People *v.* Chicago, etc., R. Co., 67 Ill. 118.

Indiana.— Seybold *v.* Terre Haute, etc., R. Co., 18 Ind. App. 367, 46 N. E. 1054.

Missouri.— State *v.* Wabash R. Co., 208 Mo. 251, 103 S. W. 1137.

New Jersey.— New York, etc., R. Co. *v.* State, 50 N. J. L. 303, 13 Atl. 1 [*affirmed* in 53 N. J. L. 244, 23 Atl. 168].

New York.— Allen *v.* Buffalo, etc., R. Co., 151 N. Y. 434, 45 N. E. 845.

Ohio.— Little Miami R. Co. *v.* Green County Com'rs, 31 Ohio St. 338.

Tennessee.— Dyer County *v.* Paducah, etc., R. Co., 87 Tenn. 712, 11 S. W. 943.

See 41 Cent. Dig. tit. "Railroads," § 277.

44. New York, etc., R. Co. *v.* State, 50 N. J. L. 303, 13 Atl. 1 [*affirmed* in 53 N. J. L. 244, 23 Atl. 168].

45. Ft. Dodge *v.* Minneapolis, etc., R. Co., 87 Iowa 389, 54 N. W. 243.

46. Masterson *v.* New York Cent., etc., R. Co., 84 N. Y. 247, 38 Am. Rep. 510.

47. Henry *v.* Wabash Western R. Co., 44 Mo. App. 100.

48. Dyer County *v.* Paducah, etc., R. Co., 87 Tenn. 712, 11 S. W. 943.

whereby the highway is improperly obstructed or travel thereon interfered with, or made dangerous, constitutes a public nuisance,[49] and renders the railroad company subject to indictment,[50] or an action for the abatement of the nuisance,[51] or liable in damages for special injuries sustained thereby.[52]

j. Rights and Remedies of Public. Where a railroad company fails in its duty as to restoring and maintaining a street or highway which it has crossed, it may be proceeded against by indictment for a public nuisance in obstructing the highway,[53] or by mandamus to compel a performance of such duty,[54] or the public authorities may resort to the equity powers of the court,[55] and sue to enjoin the further obstruction of the highway,[56] or for a mandatory injunction to compel the railroad company properly to restore or maintain the same,[57] and for damages

49. *Connecticut.*— Hamden *v.* New Haven, etc., R. Co., 27 Conn. 158.

Florida.— Palatka, etc., R. Co. *v.* State, 23 Fla. 546, 3 So. 158, 11 Am. St. Rep. 395.

Indiana.— Seybold *v.* Terre Haute, etc., R. Co., 18 Ind. App. 707, 46 N. E. 1054.

Kentucky.— Com. *v.* Louisville, etc., R. Co., 109 Ky. 59, 58 S. W. 478, 702, 22 Ky. L. Rep. 572; Paducah, etc., R. Co. *v.* Com., 80 Ky. 147.

New Jersey.— New York, etc., R. Co. *v.* State, 50 N. J. L. 303, 13 Atl. 1 [*affirmed* in 53 N. J. L. 244, 23 Atl. 168].

New York.— People *v.* New York Cent., etc., R. Co., 74 N. Y. 302.

Ohio.— Little Miami R. Co. *v.* Green County Com'rs, 31 Ohio St. 338.

Vermont.— Mann *v.* Central Vermont R. Co., 55 Vt. 484, 45 Am. Rep. 628.

See 41 Cent. Dig. tit. "Railroads," § 283.

50. Paducah, etc., R. Co. *v.* Com., 80 Ky. 147; New York, etc., R. Co. *v.* State, 50 N. J. L. 303, 13 Atl. 1 [*affirmed* in 53 N. J. L. 244, 23 Atl. 168]; People *v.* New York Cent., etc., R. Co., 74 N. Y. 302 [*reversing* 12 Hun 195]. See also *infra*, VI, K, 2.

51. Little Miami, etc., R. Co. *v.* Green County Com'rs, 31 Ohio St. 338.

52. Mann *v.* Central Vermont R. Co., 55 Vt. 484, 45 Am. Rep. 628.

53. See *supra*, VI, D, 3, i.

54. *Illinois.*— People *v.* Chicago, etc., R. Co., 67 Ill. 118.

Indiana.— Indianapolis, etc., R. Co. *v.* State, 37 Ind. 489.

Minnesota.— State *v.* Minnesota Transfer R. Co., 80 Minn. 108, 83 N. W. 32, 50 L. R. A. 656.

New York.— People *v.* Northern Cent. R. Co., 164 N. Y. 289, 58 N. E. 138; People *v.* Dutchess, etc., R. Co., 58 N. Y. 152.

United States.— Indiana *v.* Lake Erie, etc., R. Co., 83 Fed. 284.

See 41 Cent. Dig. tit. "Railroads," § 281. See also, generally, MANDAMUS, 26 Cyc. 367–369.

Where duty is merely contractual.— Where a railroad company pulled down a county bridge and erected another, at the same time entering into an agreement with the trustees of the road to repair such portions of the approaches to the bridge as had previously been repaired by the county, it was held that the company had not interfered with the road so as to bring the case within 8 & 9 Vict. *c.* 20, § 58, and consequently that a mandamus commanding it to repair the road could not be granted. *Ex p.* Exeter Road, 16 Jur. 669.

55. Greenup County *v.* Maysville, etc., R. Co., 88 Ky. 659, 11 S. W. 774, 11 Ky. L. Rep. 169; State *v.* Dayton, etc., R. Co., 36 Ohio St. 434; Fenelon Falls *v.* Victoria R. Co., 29 Grant Ch. (U. C.) 4.

Who may sue.— A suit in equity to compel the restoration or maintenance of a highway may be brought by a town which is responsible for the construction and repair of highways within its limits (Jamestown *v.* Chicago, etc., R. Co., 69 Wis. 648, 34 N. W. 728; Fenelon Falls *v.* Victoria R. Co., 29 Grant Ch. (U. C.) 4); or by a county (Greenup County *v.* Maysville, etc., R. Co., 88 Ky. 659, 11 S. W. 774, 11 Ky. L. Rep. 169); or the attorney-general may sue in the name of the state, with or without a relator (State *v.* Dayton, etc., R. Co., 36 Ohio St. 434); and in New York, under the statute of 1890, the commissioners of highways may sue in the name of the town in which the highway is situated (Windsor *v.* Delaware, etc., Canal Co., 92 Hun (N. Y.) 127, 36 N. Y. Suppl. 863 [*affirmed* in 155 N. Y. 645, 49 N. E. 1105]).

56. State *v.* Dayton, etc., R. Co., 36 Ohio St. 434 (holding further that it is proper for the court in its decree to prescribe what changes shall be made by the railroad company which shall operate to supersede the injunction); Atty.-Gen. *v.* Great Northern R. Co., 4 De G. & Sm. 75, 14 Jur. 684, 15 Jur. 387, 64 Eng. Reprint 741.

57. Metuchen *v.* Pennsylvania R. Co., 71 N. J. Eq. 404, 64 Atl. 484; Oshkosh *v.* Milwaukee, etc., R. Co., 74 Wis. 534, 43 N. W. 489, 17 Am. St. Rep. 175; Jamestown *v.* Chicago, etc., R. Co., 69 Wis. 648, 34 N. W. 728.

A city need not establish a permanent grade for its streets before requiring a railroad company to restore the same at a crossing, since the company need only repair the injury which it has done (Oshkosh *v.* Milwaukee, etc., R. Co., 74 Wis. 534, 43 N. W. 489, 17 Am. St. Rep. 175); but where a railroad company by lawful authority constructs its road across a street before a grade has been established and offers to put the tracks in proper condition, conforming to the grade of the street when established, a city cannot compel the railroad company

for the obstruction prior to the suit;[58] but they have no right to place obstructions across the railroad so as to prevent the passage of trains across the highway.[59] The duty to restore a highway being a continuous duty is not affected by the statute of limitations.[60] So also where a railroad company acquires a right of way through a town on condition that it will construct proper street crossings, the town may sue in equity for a specific performance of the agreement.[61] The public authorities may also do the necessary work of restoration or repair and recover therefor from the railroad company,[62] or if an injury results for which the municipality is held liable in damages, it may recover indemnity from the railroad company;[63] but a town has no such possession of a national road, the fee of which is in the state, as will enable it to maintain an action of trespass *quare clausum fregit* against a railroad company for failing to restore it at a crossing.[64] In some cases an action by certain public officers or municipal authorities to compel a railroad company to perform its duties in regard to the restoration of highways and maintenance of crossings is expressly authorized by statute;[65] but statutory remedies in such cases are ordinarily held to be cumulative and not to prevent a resort to the other remedies existing at common law or in equity.[66] The existence of a remedy by mandamus is no bar to an indictment,[67] nor is it any bar to the maintenance of a suit or a proceeding by mandamus to compel the railroad company to perform its duty that the public authorities might do the work and recover from the railroad company,[68] or proceed by indictment,[69] or recover a statutory penalty,[70] or sue the railroad company for indemnity in case of a resulting injury for which they should be held liable.[71] Where by statute

to grade the entire width of the street in advance of any action of its own in regard to establishing such grade (Lake Shore, etc., R. Co. *v.* Franklin, 193 Pa. St. 496, 44 Atl. 583).

58. Greenup County *v.* Maysville, etc., R. Co., 88 Ky. 659, 11 S. W. 774, 11 Ky. L. Rep. 169.

Mitigation of damages.— Where suit is brought by a county to recover damages for failure to restore the highway, evidence that the company caused a new road to be built, intending it to be used in lieu of the old road, and that such new road was accepted by the county, should be submitted to the jury, who may consider the building of such new road in mitigation of damages. Greenup County *v.* Maysville, etc., R. Co., 21 S. W. 351, 14 Ky. L. Rep. 699.

59. London, etc., R. Co. *v.* Blake, 2 R. & Can. Cas. 322, holding that where a railroad company was required by its charter to restore and repair highways crossed or diverted to the satisfaction of the board of surveyors of a parish, and the company diverted a highway and constructed a substitute, which was not accepted as satisfactory, the surveyors had no right to put up fences across the railroad but that they must apply to the court either for an injunction or mandamus.

60. Windsor *v.* Delaware, etc., Canal Co., 92 Hun (N. Y.) 127, 36 N. Y. Suppl. 863 [*affirmed* in 155 N. Y. 645, 49 N. E. 1105]; Hatch *v.* Syracuse, etc., R. Co., 50 Hun (N. Y.) 64, 4 N. Y. Suppl. 509.

61. Louisville Southern R. Co. *v.* Harrodsburg, 32 S. W. 604, 17 Ky. L. Rep. 780, holding, however, that the court should not direct the particular kind of crossing to be maintained but merely the maintenance of a proper crossing, leaving the company to comply with the requirement at its peril.

62. See *supra*, VI, D, 3, f.

63. Hamden *v.* New Haven, etc., Co., 27 Conn. 158, holding that such action may be maintained, although the town had never proceeded against the railroad company by mandamus or otherwise to compel it to restore the highway.

64. St. Louis, etc., R. Co. *v.* Summit, 3 Ill. App. 155.

65. Metuchen *v.* Pennsylvania R. Co., 71 N. J. Eq. 404, 64 Atl. 484; Windsor *v.* Delaware, etc., Canal Co., 92 Hun (N. Y.) 127, 36 N. Y. Suppl. 863 [*affirmed* in 155 N. Y. 645, 49 N. E. 1105].

66. People *v.* New York Cent., etc., R. Co., 74 N. Y. 302; State *v.* Dayton, etc., R. Co., 36 Ohio St. 434.

67. People *v.* New York Cent., etc., R. Co., 74 N. Y. 302 [*reversing* 12 Hun 185]; Reg. *v.* Birmingham, etc., R. Co., 9 C. & P. 469, 38 E. C. L. 278.

68. Indianapolis, etc., R. Co. *v.* State, 37 Ind. 489; Oshkosh *v.* Milwaukee, etc., R. Co., 74 Wis. 534, 43 N. W. 489, 17 Am. St. Rep. 175; Indiana *v.* Lake Erie, etc., R. Co., 83 Fed. 284. But see Concord Tp.'s Appeal, 1 Walk. (Pa.) 195, holding that where a railroad company refuses to repair a road which it has raised in crossing, the township should repair the road and sue the railroad company for damages, and that therefore equity would not take jurisdiction of a suit to compel the company to repair the road.

69. Indiana *v.* Lake Erie, etc., R. Co., 83 Fed. 284.

70. Indiana *v.* Lake Erie, etc., R. Co., 83 Fed. 284.

71. Indianapolis, etc., R. Co. *v.* State, 37 Ind. 489.

the control of highways at railroad crossings is vested in railroad commissioners, if a railroad company neglects to construct or maintain crossings the remedy of the public authorities is by application to the railroad commissioners.[72] If the owner of a private way makes no objection to the construction of a railroad across it by which the use of the way is obstructed, a mandatory injunction to compel the restoration of the way involving a large expense to the railroad company will not be granted, but plaintiff will be left to an action for damages where such remedy is adequate.[73]

4. Highway Laid Out After Construction of Railroad — a. Power to Establish Highway Across Railroad. The legislature may authorize the construction of a street or highway across a railroad,[74] since the right of way is held subject to the right of the public to have streets and highways extended across the same whenever the public necessities require;[75] and while in some cases such authority is conferred in express terms,[76] it may be conferred either expressly or by necessary implication.[77] A general authority to condemn property for or to lay out streets and highways is sufficient to authorize the crossing of a railroad,[78] provided the use of the road for railroad purposes is not destroyed or materially impaired.[79] A statute authorizing the laying out of a street or highway across the "track" of any railroad without compensation applies to the entire road-bed and not

72. New York, etc., R. Co. *v.* New Haven, 70 Conn. 390, 39 Atl. 597, holding that in such case municipal authorities can neither compel the railroad company to construct and repair crossings nor perform such work by the agents of the municipality.

73. Louisville, etc., R. Co. *v.* Smith, 117 Ky. 364, 78 S. W. 160, 25 Ky. L. Rep. 1459.

74. Chicago, etc., R. Co. *v.* Chicago, 140 Ill. 309, 29 N. E. 1109; People *v.* Delaware, etc., R. Co., 11 N. Y. App. Div. 280, 42 N. Y. Suppl. 1011 [*affirmed* in 159 N. Y. 545, 54 N. E. 1093].

75. Pittsburg, etc., R. Co. *v.* Chicago, 159 Ill. 369, 42 N. E. 781; Illinois Cent. R. Co. *v.* Chicago, 141 Ill. 586, 30 N. E. 1044, 17 L. R. A. 530; Baltimore, etc., R. Co. *v.* State, 159 Ind. 510, 65 N. E. 508; Philadelphia, etc., R. Co. *v.* Philadelphia, 9 Phila. (Pa.) 563.

Under the New York statute of 1853, providing that any railroad company across whose tracks a street or highway shall be laid out shall cause such street or highway to be taken across its track as shall be most convenient for public travel, a railroad company cannot be required to take a street across its tracks where no public benefit would result but only private interests be subserved, or where such tracks are in constant use by the railroad company. People *v.* New York Cent., etc., R. Co., 69 Hun (N. Y.) 166, 23 N. Y. Suppl. 456.

Right of railroad to compensation see Eminent Domain, 15 Cyc. 669.

Reopening highway.— Where a railroad company recognized and adopted the dedication of streets which crossed its right of way, as shown by a plat, and planked the crossing and maintained it for a number of years, mere non-user by the public will not defeat the right of a city to open and replank the crossing after the railroad company has wrongfully destroyed it. Chicago, etc., R. Co. *v.* Council Bluffs, 109 Iowa 425, 80 N. W. 564.

76. Illinois Cent. R. Co. *v.* Chicago, 141 Ill. 586, 30 N. E. 1044, 17 L. R. A. 530; Delaware, etc., Canal Co. *v.* Whitehall, 90 N. Y. 21; Albany Northern R. Co. *v.* Brownell, 24 N. Y. 345; People *v.* Delaware, etc., R. Co., 11 N. Y. App. Div. 280, 42 N. Y. Suppl. 1011 [*affirmed* in 159 N. Y. 545, 54 N. E. 1093].

77. Central Vermont R. Co. *v.* Royalton, 58 Vt. 234, 4 Atl. 586.

78. *Illinois.*— Pittsburg, etc., R. Co. *v.* Chicago, 159 Ill. 369, 42 N. E. 781.

Iowa.— Albia *v.* Chicago, etc., R. Co., 102 Iowa 624, 71 N. W. 541.

Missouri.— Hannibal *v.* Hannibal, etc., R. Co., 49 Mo. 480.

Ohio.— Little Miami, etc., R. Co. *v.* Dayton, 23 Ohio St. 510.

Vermont.— Central Vermont R. Co. *v.* Royalton, 58 Vt. 234, 4 Atl. 868.

See 41 Cent. Dig. tit. "Railroads," § 286.

79. Hannibal *v.* Hannibal, etc., R. Co., 49 Mo. 480; Little Miami, etc., R. Co. *v.* Dayton, 23 Ohio St. 510.

Although the opening of a street will be an inconvenience to the railroad company whose track will be crossed thereby, it cannot prevent the crossing, where it will not destroy any franchises of the company. Philadelphia, etc., R. Co. *v.* Philadelphia, 9 Phila. (Pa.) 563.

If there is not a mere crossing, permitting of a concurrent use for highway and railroad purposes, but the laying out of the street or highway also involves the taking of property of the railroad company the occupation of which must necessarily be exclusive, such as grounds used for a station-house, engine-house, turn-tables, and the like, express legislative authority is necessary. New Jersey Southern R. Co. *v.* Long Branch Com'rs, 39 N. J. L. 28; Albany Northern R. Co. *v.* Brownell, 24 N. Y. 345.

merely to the iron or railway,[80] and the track may embrace one or more single tracks,[81] including turnouts and switches,[82] or in other words whatever may fairly be regarded as the roadway;[83] but it should be limited to the tracks used for public traffic,[84] and does not include tracks constituting a yard or place devoted to the switching and storing of cars and making up of trains,[85] or grounds used for depots, freight-houses, engine-houses, turn-tables, and other terminal structures,[86] or in other words property not properly admitting of a concurrent use for highway and railroad purposes.[87] In Maine the statute expressly prohibits the laying out of a way across property of a railroad company used for station purposes.[88] Any statutory regulations or restrictions in regard to the construction of streets or highways across railroads must be complied with,[89] such as that a street or highway shall not be constructed across a railroad within a given distance of another highway crossing,[90] that before the street or highway is constructed municipal authorities must obtain authority therefor from the county commissioners,[91] or give notice to the railroad company and afford it an opportunity to be heard upon the question of necessity,[92] and that if it be decided by the municipal authorities that the crossing is necessary the railroad commissioners shall, before other proceedings are taken, determine the character of the crossing;[93] and under the New York statute the railroad company has a right of appeal to the appellate division of the supreme court from the decision of the municipal authorities as to the necessity for the crossing.[94]

b. Character of Crossing. Where a street or highway is laid out across a railroad it should be so located and constructed as not unnecessarily to injure the railroad;[95] but in the absence of statute it seems that it may be constructed

80. Delaware, etc., Canal Co. *v.* Whitehall, 90 N. Y. 21.

81. Boston, etc., R. Co. *v.* Greenbush, 52 N. Y. 510; Albany Northern R. Co. *v.* Brownell, 24 N. Y. 345.

82. Delaware, etc., Canal Co. *v.* Whitehall, 90 N. Y. 21; Boston, etc., R. Co. *v.* Greenbush, 52 N. Y. 510.

83. Boston, etc., R. Co. *v.* Greenbush, 52 N. Y. 510.

84. Rochester, etc., R. Co. *v.* Rochester, 17 N. Y. App. Div. 257, 45 N. Y. Suppl. 687.

85. People *v.* New York Cent., etc., R. Co., 156 N. Y. 570, 51 N. E. 312 [*reversing* 25 N. Y. App. Div. 632, 50 N. Y. Suppl. 1132]; Rochester, etc., R. Co. *v.* Rochester, 17 N. Y. App. Div. 257, 45 N. Y. Suppl. 687.

The mere fact that the tracks are used for switching or making up trains, if also used for the passing of trains, does not relieve them from the operation of the statute. Boston, etc., R. Co. *v.* Greenbush, 52 N. Y. 510.

86. People *v.* New York Cent., etc., R. Co., 156 N. Y. 570, 51 N. E. 312 [*reversing* 25 N. Y. App. Div. 632, 50 N. Y. Suppl. 1132]; Albany Northern R. Co. *v.* Brownell, 24 N. Y. 345; Rochester, etc., R. Co. *v.* Rochester, 17 N. Y. App. Div. 257, 45 N. Y. Suppl. 687. See also Prospect Park, etc., R. Co. *v.* Williamson, 91 N. Y. 552.

87. Albany Northern R. Co. *v.* Brownell, 24 N. Y. 345.

88. Atlantic, etc., R. Co.'s Appeal, 100 Me. 430, 62 Atl. 141, holding that "station purposes" include such grounds at the station as are convenient, necessary, and actually used by the railroad company for approaches and exits for the public, for the location of depots and other necessary buildings for railroad purposes, sidings for passing trains, and storing cars and switches and places where passengers may get on and off trains and goods may be loaded and unloaded.

89. Com. *v.* Haverhill, 7 Allen (Mass.) 523; *In re* Ludlow St., 172 N. Y. 542, 65 N. E. 494 [*affirming* 59 N. Y. App. Div. 180, 68 N. Y. Suppl. 1046].

90. New York, etc., R. Co. *v.* Capner, 49 N. J. L. 555, 9 Atl. 781; New Egypt, etc., R. Co. *v.* Drummond, 45 N. J. L. 511.

The distance between the crossings must be determined by considering the width of the crossings and not the width of the highways elsewhere. New Egypt, etc., R. Co. *v.* Drummond, 45 N. J. L. 511.

91. Com. *v.* Haverhill, 7 Allen (Mass.) 523.

92. *In re* Ludlow St., 172 N. Y. 542, 65 N. E. 494 [*affirming* 59 N. Y. App. Div. 180, 68 N. Y. Suppl. 1046], holding that the requirement as to notice and opportunity to be heard applies to proceedings commenced before the passage of the act, under a city charter which did not require such notice, where the petition was not acted upon until after the act took effect.

93. People *v.* New York Cent., etc., R. Co., 31 N. Y. App. Div. 334, 52 N. Y. Suppl. 234 [*affirmed* in 158 N. Y. 410, 53 N. E. 166].

94. Matter of North Third Ave., 32 N. Y. App. Div. 394, 53 N. Y. Suppl. 46. See also Matter of North Third Ave., 30 N. Y. App. Div. 256, 51 N. Y. Suppl. 353. *Compare* People *v.* Delaware, etc., R. Co., 11 N. Y. App. Div. 280, 42 N. Y. Suppl. 1011 [*affirmed* in 159 N. Y. 545, 54 N. E. 1093].

95. Northern Cent. R. Co. *v.* Baltimore, 46 Md. 425.

in whatever manner will not unnecessarily injure the railroad,[96] and may be constructed across the railroad at grade.[97] A statute providing that the street or highway may be constructed "over or across" the railroad authorizes the public authorities at their election to construct the same across the railroad at grade,[98] and the right to cross at grade is not affected by a requirement that they shall restore the railroad crossing to its former state or so as not to have impaired its usefulness.[99] Grade crossings are, however, dangerous and may be prohibited by the legislature,[1] and while this is in some cases done in express terms,[2] a statute requiring the crossing to be "under or over" the railroad contemplates a crossing at a different level and prohibits a grade crossing.[3] Statutes prohibiting the construction of streets or highways across railroads at grade apply to highways located and even partly constructed prior to the statute, if not fully completed for use by the public at the place of crossing,[4] and to crossings incidental to the relocation of an existing highway,[5] and apply notwithstanding the railroad company may consent to a crossing of its tracks at grade,[6] or a grade crossing would be more convenient to the public.[7]

c. **Construction and Maintenance of Crossing.** In the absence of statute a railroad company cannot be required to construct and maintain crossings where a street or highway is made across its right of way after the construction of the railroad,[8] there being no common-law duty on the part of the railroad company in such cases to construct crossings or bridges or approaches thereto;[9] but such

96. See Central Vermont R. Co. *v.* Royalton, 58 Vt. 234, 4 Atl. 868.

97. Ligonier Valley R. Co. *v.* Latrobe, 216 Pa. St. 221, 65 Atl. 548; Philadelphia, etc., R. Co. *v.* Upper Darby Tp., 202 Pa. St. 429, 51 Atl. 1030; Cincinnati, etc., R. Co. *v.* Morgan County, 143 Fed. 798, 75 C. C. A. 56.

98. Illinois Cent. R. Co. *v.* Chicago, 141 Ill. 586, 30 N. E. 1044, 17 L. R. A. 530, holding further that in such a case a court of equity has no authority to interfere with the exercise of such discretion and order a crossing by means of a viaduct.

99. Illinois Cent. R. Co. *v.* Chicago, 141 Ill. 586, 30 N. E. 1044, 17 L. R. A. 530.

1. New York, etc., R. Co. *v.* Waterbury, 55 Conn. 19, 10 Atl. 162.

2. New York, etc., R. Co. *v.* New Haven, 70 Conn. 390, 30 Atl. 597; New York, etc., R. Co. *v.* Waterbury, 55 Conn. 19, 10 Atl. 162.

The Massachusetts statute provides that the crossing may be at grade if the county commissioners shall determine that the public necessity requires such a crossing but not otherwise (Old Colony R. Co. *v.* Fall River, 147 Mass. 455, 18 N. E. 425); and the statute applies to a petition for the laying out of a highway pending at the time of its passage (Old Colony, etc., R. Co. *v.* Plymouth County Com'rs, 11 Gray 512).

In Pennsylvania the act of 1901 prohibits the construction thereafter of highways across a railroad at grade except by permission of the court of common pleas (Pennsylvania R. Co. *v.* Bogert, 209 Pa. St. 589, 59 Atl. 800; *In re* Mifflinville Bridge, 206 Pa. St. 420, 55 Atl. 1122); and such permission should not be granted unless it is shown that under the circumstances a grade crossing is necessary (Pennsylvania R. Co. *v.* Bogert, *supra*).

3. Boston, etc., R. Co. *v.* Lawrence, 2 Allen (Mass.) 107; Central Vermont R. Co. *v.* Royalton, 58 Vt. 234, 4 Atl. 868.

A provision that the highway "may" be constructed so as to pass "under or over" the railroad will be construed as "must" and prohibits a crossing at grade. Central Vermont R. Co. *v.* Royalton, 58 Vt. 234, 4 Atl. 868.

4. New York, etc., R. Co. *v.* New Haven, 70 Conn. 390, 30 Atl. 597; New York, etc., R. Co. *v.* Waterbury, 55 Conn. 19, 10 Atl. 162.

But if a street is established and regularly laid out several years prior to the taking effect of an act prohibiting grade crossings except when allowed by the court, the statute does not apply, although up to that time the crossing was not planked or what it should have been to meet the public requirements as to convenience. Ligonier Valley R. Co. *v.* Latrobe, 216 Pa. St. 221, 65 Atl. 548.

5. Pennsylvania R. Co. *v.* Bogert, 209 Pa. St. 589, 59 Atl. 100; *In re* Mifflinville Bridge, 206 Pa. St. 420, 55 Atl. 1122.

6. New York, etc., R. Co. *v.* Waterbury, 55 Conn. 19, 10 Atl. 162.

7. Pennsylvania R. Co. *v.* Bogert, 209 Pa. St. 589, 59 Atl. 100.

8. Albia *v.* Chicago, etc., R. Co., 102 Iowa 624, 71 N. W. 541.

9. O'Fallon *v.* Ohio, etc., R. Co., 45 Ill. App. 572; Northern Cent. R. Co. *v.* Baltimore, 46 Md. 425; State *v.* Wilmington, etc., R. Co., 74 N. C. 143. But see State *v.* St. Paul, etc., R. Co., (Minn. 1906) 108 N. W. 261.

On change of location of crossing.— Where an existing crossing which it is the duty of the railroad company to repair is, after construction of the railroad, changed to a different place by common consent of the company and the public, so that the new crossing is merely a substitute for the old one, it is the duty of the railroad company to keep such crossing in repair. People *v.* Chicago, etc., R. Co., 67 Ill. 118.

duty being upon the public authorities by whom the street is established and constructed,[10] and there are a few decisions to the effect that the railroad company cannot constitutionally be required by statute to do so without compensation.[11] The great weight of authority, however, is that the legislature may under the police power of the state,[12] or a right reserved to alter or amend the railroad charter,[13] require railroad companies at their own expense to construct and maintain crossings where streets or highways are established across a railroad already constructed,[14] or to pay a portion of such expense,[15] and that the rule applies to crossings by means of a bridge or viaduct as well as to crossings at grade,[16] and that the right to enforce such a requirement as a police regulation cannot be divested by any contract between a municipality and a railroad company.[17] It has even been held that the railroad company may be required to construct and maintain that portion of the highway within the limits of its right of way;[18] but on the contrary it has been held that the public authorities should construct and maintain that portion of the highway within the limits of the right of way which they would have been required to build if the railroad had not been constructed,[19] or that the expense thereof should be included in the estimate of damages to the railroad company,[20] notwithstanding the statute in terms imposes this duty upon the rail-

10. Boston, etc., R. Co. *v.* Cambridge, 159 Mass. 283, 34 N. E. 382; Chester *v.* Philadelphia, etc., R. Co., 3 Walk. (Pa.) 368.

Discontinuance and reëstablishment of highway.— Where a railroad company required by law to construct a bridge at the crossing of an existing highway constructed its road across a turnpike after the turnpike had been discontinued by the legislature and before it was reëstablished as a public highway, during which time it existed as an open way *de facto*, it was held that a continuous existence as a public highway was not essential and that it was the duty of the railroad company and not the public authorities to construct the bridge at the crossing. Cambridge *v.* Charlestown Branch R. Co., 7 Metc. (Mass.) 70.

11. Illinois Cent. R. Co. *v.* Bloomington, 76 Ill. 447; State *v.* Shardlow, 43 Minn. 524, 46 N. W. 74; State *v.* Hennepin County Dist. Ct., 42 Minn. 247, 44 N. W. 7, 7 L. R. A. 121.

12. Chicago, etc., R. Co. *v.* Chicago, 140 Ill. 309, 29 N. E. 1109; State *v.* St. Paul, etc., R. Co., (Minn. 1906) 108 N. W. 261; Illinois Cent. R. Co. *v.* Copiah County, 81 Miss. 685, 33 So. 502; Chicago, etc., R. Co. *v.* Chicago, 166 U. S. 226, 17 S. Ct. 581, 41 L. ed. 979.

13. New York, etc., R. Co. *v.* Waterbury, 60 Conn. 1, 22 Atl. 439.

14. *Illinois.*— Chicago, etc., R. Co. *v.* Chicago, 140 Ill. 309, 29 N. E. 1109; O'Fallon *v.* Ohio, etc., R. Co., 45 Ill. App. 572.

Indiana.—Lake Erie, etc., R. Co. *v.* Shelley, 163 Ind. 36, 71 N. E. 151.

Maine.—Boston, etc., R. Co. *v.* York County Com'rs, 79 Me. 386, 10 Atl. 113; Portland, etc., R. Co. *v.* Deering, 78 Me. 61, 2 Atl. 670, 57 Am. Rep. 784.

Minnesota.— State *v.* Northern Pac. R. Co., 98 Minn. 429, 108 N. W. 269; State *v.* St. Paul, etc., R. Co., (1906) 108 N. W. 261 [*disapproving* on this point State *v.* Hennepin County Dist. Ct., 42 Minn. 247, 44 N. W. 7, 7 L. R. A. 121].

Mississippi.—Illinois Cent. R. Co. *v.* Copiah County, 81 Miss. 685, 33 So. 502.

Nebraska.— Missouri Pac. R. Co. *v.* Cass County, 76 Nebr. 396, 107 N. W. 773; State *v.* Chicago, etc., R. Co., 29 Nebr. 412, 45 N. W. 469.

Tennessee.— Harriman *v.* Southern R. Co., 111 Tenn. 538, 82 S. W. 213.

Texas.— Gulf, etc., R. Co. *v.* Milam County, 90 Tex. 355, 38 S. W. 747.

United States.— Chicago, etc., R. Co. *v.* Chicago, 166 U. S. 226, 17 S. Ct. 581, 41 L. ed. 979.

See 41 Cent. Dig. tit. "Railroads," §§ 287, 288.

15. New York, etc., R. Co. *v.* Waterbury, 60 Conn. 1, 22 Atl. 439.

16. State *v.* St. Paul, etc., R. Co., (Minn. 1906) 108 N. W. 261; Illinois Cent. R. Co. *v.* Copiah County, 81 Miss. 685, 33 So. 502; Harriman *v.* Southern R. Co., 111 Tenn. 538, 82 S. W. 213. But see Albia *v.* Chicago, etc., R. Co., 102 Iowa 624, 71 N. W. 541, holding that a statutory requirement that the railroad company shall construct "good, sufficient, and safe crossings" is applicable as regards streets and highways established after the construction of the railroad only to grade crossings, and that it does not impose such duty in the case of crossings over the road requiring the construction of a bridge or viaduct.

17. State *v.* Northern Pac. R. Co., 98 Minn. 429, 108 N. W. 269; State *v.* St. Paul, etc., R. Co., (Minn. 1906) 108 N. W. 261.

18. Boston, etc., R. Co. *v.* York County Com'rs, 79 Me. 386, 10 Atl. 115; Portland, etc., R. Co. *v.* Deering, 78 Me. 61, 2 Atl. 670, 57 Am. Rep. 784.

19. People *v.* Lake Shore, etc., R. Co., 52 Mich. 277, 17 N. W. 841; Missouri Pac. R. Co. *v.* Cass County, 76 Nebr. 386, 107 N. W. 773; State *v.* Chicago, etc., R. Co., 29 Nebr. 412, 45 N. W. 469.

20. Missouri Pac. R. Co. *v.* Cass County, 76 Nebr. 396, 107 N. W. 773.

road company,[21] and that the legislature cannot constitutionally require the railroad company to construct at its own expense all that portion of the highway within the limits of the railroad right of way.[22] In some cases it has been held without expressly or necessarily deciding as to the power of the legislature, that particular statutes relating to the construction and maintenance of crossings were not intended to apply to streets and highways laid out across a railroad already constructed;[23] but a majority of the statutes have been construed as applying to such cases,[24] although since the duty imposed thereby exists solely by reason of the statute, it should not be extended beyond the fair import of the language used.[25] Where the statutes are held applicable and their validity sustained, the expense of constructing and maintaining a crossing is not to be considered or included in estimating the railroad company's damages for the condemnation of a right of way across its tracks.[26] Where the action of the public authorities in laying out the highway across the railroad is unauthorized, the railroad company cannot be required to construct and maintain a crossing.[27]

21. Missouri Pac. R. Co. *v.* Cass County, 76 Nebr. 396, 107 N. W. 773.

22. People *v.* Lake Shore, etc., R. Co., 52 Mich. 277, 17 N. W. 841.

23. *Arkansas.*— Prairie County *v.* Fink, 65 Ark. 492, 47 S. W. 301.

Kansas.— Rock Creek Tp. *v.* St. Joseph, etc., R. Co., 43 Kan. 543, 23 Pac. 585.

Louisiana.— State *v.* Morgan's Louisiana, etc., R., etc., Co., 111 La. 120, 35 So. 482.

North Carolina.—State *v.* Wilmington, etc., R. Co., 74 N. C. 143.

Wisconsin.— Chicago, etc., R. Co. *v.* Milwaukee, 97 Wis. 418, 72 N. W. 1118.

See 41 Cent. Dig. tit. "Railroads," §§ 287, 288.

Where the statutory provisions are conflicting, as where a railroad charter requires it to construct bridges or passages "where any road now in use" shall cross the same, and further provides that the company shall be subject to the provisions of the charter of another company, which charter requires the construction of bridges or passages at the crossing of any road "now or hereafter laid out," a court of equity will not require the railroad company to construct a bridge or passage, the legal right not being clear and it further appearing that the street was not in use, and that such requirement would impose a large expense upon the railroad company. Hackensack Imp. Commission *v.* New Jersey Midland R. Co., 22 N. J. Eq. 94.

24. *Georgia.*— Cleveland *v.* Augusta, 102 Ga. 233, 29 S. E. 584, 43 L. R. A. 638.

Illinois.— Chicago, etc., R. Co. *v.* Chicago, 140 Ill. 309, 29 N. E. 1109; Illinois Cent. R. Co. *v.* Paradise Highway Com'rs, 61 Ill. App. 203.

Indiana.— Cincinnati, etc., R. Co. *v.* Connersville, 170 Ind. 316, 83 N. E. 503; Lake Erie, etc., R. Co. *v.* Shelley, 163 Ind. 36, 71 N. E. 151; Baltimore, etc., R. Co. *v.* State, 159 Ind. 510, 65 N. E. 508; Evansville, etc., R. Co. *v.* State, 149 Ind. 276, 49 N. E. 2; Louisville, etc., R. Co. *v.* Smith, 91 Ind. 119.

Kentucky.— Com. *v.* Louisville, etc., R. Co., 109 Ky. 59, 58 S. W. 478, 702, 22 Ky. L. Rep. 572.

Maine.— Boston, etc., R. Co. *v.* York County Com'rs, 79 Me. 386, 10 Atl. 113; Portland, etc., R. Co. *v.* Deering, 78 Me. 61, 2 Atl. 670, 57 Am. Rep. 784.

Minnesota.— State *v.* St. Paul, etc., R. Co., 98 Minn. 380, 108 N. W. 261.

Mississippi.— Illinois Cent. R. Co. *v.* Swalm, 83 Miss. 631, 36 So. 147; Illinois Cent. R. Co. *v.* Copiah County, 81 Miss. 685, 33 So. 502.

Nebraska.— Missouri Pac. R. Co. *v.* Cass County, 76 Nebr. 396, 107 N. W. 773; State *v.* Chicago, etc., R. Co., 29 Nebr. 412, 45 N. W. 469.

Tennessee.— Harriman *v.* Southern R. Co., 111 Tenn. 538, 82 S. W. 213.

Texas.—Gulf, etc., R. Co. *v.* Milam County, 90 Tex. 355, 38 S. W. 747. But see San Antonio, etc., R. Co. *v.* Belt, 24 Tex. Civ. App. 281, 59 S. W. 607.

See 41 Cent. Dig. tit. "Railroads," §§ 287, 288.

A highway acquired by prescription is within the application of the statutes requiring railroad companies to make and maintain crossings. Texas, etc., R. Co. *v.* Kaufman County, 17 Tex. Civ. App. 251, 42 S. W. 586.

25. O'Fallon *v.* Ohio, etc., R. Co., 45 Ill. App. 572.

26. *Illinois.*— Chicago, etc., R. Co. *v.* Chicago, 140 Ill. 309, 29 N. E. 1109.

Indiana.—Lake Erie, etc., R. Co. *v.* Shelley, 163 Ind. 36, 71 N. E. 151.

Maine.— Boston, etc., R. Co. *v.* York County Com'rs, 79 Me. 386, 10 Atl. 113.

Texas.— Gulf, etc., R. Co. *v.* Milam County, 90 Tex. 355, 38 S. W. 747.

United States.— Chicago, etc., R. Co. *v.* Chicago, 166 U. S. 226, 17 S. Ct. 581, 41 L. ed. 979.

See 41 Cent. Dig. tit. "Railroads," §§ 287, 288.

Where the railroad company is required to pay a portion of the expense of a crossing, such portion is not to be included in its estimate of damages. New York, etc., R. Co. *v.* Waterbury, 60 Conn. 1, 22 Atl. 439.

27. Chapin *v.* Maine Cent. R. Co., 97 Me. 151, 53 Atl. 1105, holding that where the statute authorizing a municipality to lay out

In Massachusetts it is provided by statute that all the expenses incident to the construction and maintenance of a way across a railroad shall be borne by the county, city, town, or other owner thereof, but that if the crossing be at grade the railroad company shall at its own expense guard and protect the rails so as to secure a safe and easy passage across its road,[28] and the statute is given practical effect by including the expense for which the railroad company is not liable in its estimate of damages;[29] but if the railroad company refuses to do the necessary work, it cannot prevent the public authorities from going upon its right of way and performing the work in any suitable manner.[30]

5. Change After Construction of Railroad — a. In General. The legislature may compel a railroad company after the construction of its road to make whatever changes in regard to the crossing of streets and highways the public safety and convenience may reasonably require,[31] or may delegate to municipal corporations the power of requiring such changes,[32] or act through the instrumentality of a commission;[33] and any such changes falling properly within the police power of the state may be required to be made at the sole expense of the railroad company,[34] or a municipality in which the crossing is located may be required to pay a portion of the expense.[35] So also the duty of maintaining and keeping in repair suitable crossings and of restoring highways crossed so as not to impair their usefulness, is a continuing duty,[36] and it frequently happens that a crossing or mode of restoration originally sufficient may become insufficient by reason of subsequent conditions, increased travel, character of vehicles used, and the like,[37] in which case it is the duty of the railroad company to do whatever the public convenience and necessity may require in order to meet such conditions,[38]

a street expressly provides that it shall not be laid across the tracks of a certain railroad company, without the consent of such company, and such consent is not obtained, the railroad company cannot be required to construct and maintain a crossing.

28. Old Colony R. Co. *v.* New Bedford, 188 Mass. 234, 74 N. E. 468; Boston, etc., R. Co. *v.* Cambridge, 159 Mass. 283, 34 N. E. 382; Old Colony R. Co. *v.* Fall River, 147 Mass. 455, 18 N. E. 425; Scanlan *v.* Boston, 140 Mass. 84, 2 N. E. 787.

Construction and application of statute.— The intention of the statute is to impose upon the city or other corporation authorized to maintain the way the expense of constructing and maintaining it up to the outer line of the railroad tracks, or so near their foundation as not to interfere with them, and upon the railroad company the expense of the crossing between these lines (Old Colony R. Co. *v.* Fall River, 147 Mass. 455, 18 N. E. 425); and it is held that where the railroad company has two parallel tracks near together, it must keep in repair the space between the two lines of tracks (Scanlan *v.* Boston, 140 Mass. 84, 2 N. E. 787); and that the provision imposing the expense of constructing and maintaining the highway at the crossing upon the public authorities applies only to the laying out of a new highway and not to the mere widening of an existing way (Carter *v.* Boston, etc., R. Corp., 139 Mass. 525, 2 N. E. 101).

29. Boston, etc., R. Co. *v.* Cambridge, 159 Mass. 283, 34 N. E. 382.

30. Old Colony R. Co. *v.* Fall River, 147 Mass. 455, 18 N. E. 425.

31. People *v.* Union Pac. R. Co., 20 Colo. 186, 37 Pac. 610; New England R. Co. *v.* Railroad Com'rs, 171 Mass. 135, 50 N. E. 549; Boston, etc., R. Co. *v.* Hampden County Com'rs, 164 Mass. 551, 42 N. E. 100; Fitchburg R. Co. *v.* Grand Junction R., etc., Co., 4 Allen (Mass.) 198; New York, etc., R. Co. *v.* Bristol, 151 U. S. 556, 14 S. Ct. 437, 38 L. ed. 269.

32. People *v.* Union Pac. R. Co., 20 Colo. 186, 37 Pac. 610.

33. New York, etc., R. Co. *v.* Bristol, 151 U. S. 556, 14 S. Ct. 437, 38 L. ed. 269; Toronto *v.* Grand Trunk R. Co., 37 Can. Sup. Ct. 232.

34. New York, etc., R. Co. *v.* Bristol, 151 U. S. 556, 14 S. Ct. 437, 38 L. ed. 269.

35. Toronto *v.* Grand Trunk R. Co., 37 Can. Sup. Ct. 232.

36. People *v.* Union Pac. R. Co., 20 Colo. 186, 37 Pac. 610; State *v.* St. Paul, etc., R. Co., 35 Minn. 131, 28 N. W. 3, 59 Am. Rep. 313; Hatch *v.* Syracuse, etc., R. Co., 50 Hun (N. Y.) 64, 4 N. Y. Suppl. 509; Charlottesville *v.* Southern R. Co., 97 Va. 428, 34 S. E. 98.

37. Burritt *v.* New Haven, 42 Conn. 174; Atchison, etc., R. Co. *v.* Henry, 57 Kan. 154, 45 Pac. 576; State *v.* St. Paul, etc., R. Co., 35 Minn. 131, 28 N. W. 3, 59 Am. Rep. 313; Newark *v.* Erie R. Co., (N. J. Ch. 1907) 68 Atl. 413.

38. *Connecticut.*— Burritt *v.* New Haven, 42 Conn. 174.

Georgia.— Cleveland *v.* Augusta, 102 Ga. 233, 29 S. E. 584, 43 L. R. A. 638.

Kansas.— Atchison, etc., R. Co. *v.* Henry, 57 Kan. 154, 45 Pac. 576.

and it may be compelled by appropriate proceedings to do so,[39] or held liable in damages for resulting injuries.[40] Changes within the application of the foregoing rules have been held to include the construction of a bridge or viaduct at a crossing formerly constructed at grade,[41] with the necessary excavations, embankments, and approaches therefor,[42] the widening of a crossing or its approaches to make it sufficient to accommodate the increased amount of travel or character of vehicles used,[43] the widening of a bridge and its approaches,[44] the widening of the space where the street or highway passes under a railroad,[45] and the removal therefrom of pillars or abutments which reduce the width or obstruct the use of the highway,[46] the alteration of a railroad bridge so as to prevent the discharge of water upon a street below,[47] lowering the grade of a railroad constructed upon an embankment to the level of a street,[48] or the changing of the grade of the railroad in order to conform to a change in the grade of a street;[49] but it is not the duty of a railroad company to strengthen or reconstruct a bridge

Massachusetts.— Cooke *v.* Boston, etc., R. Corp., 133 Mass. 185.

Minnesota.— State *v.* Minneapolis, etc., R. Co., 39 Minn. 219, 39 N. W. 153; State *v.* St. Paul, etc., R. Co., 35 Minn. 131, 28 N. W. 3, 59 Am. Rep. 313.

New Jersey.— Newark *v.* Erie R. Co., (Ch. 1907) 68 Atl. 413; Metuchen *v.* Pennsylvania R. Co., 71 N. J. Eq. 404, 64 Atl. 484.

New York.— Hatch *v.* Syracuse, etc., R. Co., 50 Hun 64, 4 N. Y. Suppl. 509.

Virginia.— Charlottesville *v.* Southern R. Co., 97 Va. 428, 34 S. E. 98.

United States.— Indiana *v.* Lake Erie, etc., R. Co., 83 Fed. 284.

See 41 Cent. Dig. tit. "Railroads," §§ 291, 292.

39. State *v.* Minneapolis, etc., R. Co., 39 Minn. 219, 39 N. W. 153; Newark *v.* Erie R. Co., (N. J. Ch. 1907) 68 Atl. 413; Metuchen *v.* Pennsylvania R. Co., 71 N. J. Eq. 404, 64 Atl. 484; Hatch *v.* Syracuse, etc., R. Co., 50 Hun (N. Y.) 64, 4 N. Y. Suppl. 509; Indiana *v.* Lake Erie, etc., R. Co., 83 Fed. 284.

A court of chancery may compel railroad companies whose roads cross streets at grade and whose charters contain appropriate provisions to elevate or depress their tracks or the highways crossing them (Newark *v.* Erie R. Co., (N. J. Ch. 1907) 68 Atl. 413; Newark *v.* New Jersey Cent. R. Co., (N. J. Ch. 1907) 67 Atl. 1009); but such requirements should not be made where it will involve a large expense to the railroad company unless the crossing is peculiarly dangerous (Newark *v.* New Jersey Cent. R. Co., *supra*).

40. Cooke *v.* Boston, etc., R. Co., 133 Mass. 185.

41. People *v.* Union Pac. R. Co., 20 Colo. 186, 37 Pac. 610; Burritt *v.* New Haven, 42 Conn. 174; State *v.* Minneapolis, etc., R. Co., 39 Minn. 219, 39 N. W. 153; State *v.* St. Paul, etc., R. Co., 35 Minn. 131, 28 N. W. 3, 59 Am. Rep. 313; Newark *v.* Erie R. Co., (N. J. Ch. 1907) 68 Atl. 413.

Abolition of grade crossings generally see *infra*, VI, D, 5, b.

42. Burritt *v.* New Haven, 42 Conn. 174; State *v.* St. Paul, etc., R. Co., 35 Minn. 131, 28 N. W. 3, 59 Am. Rep. 313.

43. Atchison, etc., R. Co. *v.* Henry, 57 Kan. 154, 45 Pac. 576; Indiana *v.* Lake Erie, etc., R. Co., 83 Fed. 284.

44. Charlottesville *v.* Southern R. Co., 97 Va. 428, 34 S. E. 98.

45. New England R. Co. *v.* Railroad Com'rs, 171 Mass. 135, 50 N. E. 549; Metuchen *v.* Pennsylvania R. Co., (N. J. Ch. 1906) 64 Atl. 484; Hatch *v.* Syracuse, etc., R. Co., 50 Hun (N. Y.) 64, 4 N. Y. Suppl. 509.

46. Metuchen *v.* Pennsylvania R. Co., (N. J. Ch. 1906) 64 Atl. 484; Hatch *v.* Syracuse, etc., R. Co., 50 Hun (N. Y.) 64, 4 N. Y. Suppl. 509; Elyria *v.* Lake Shore, etc., R. Co., 23 Ohio Cir. Ct. 482.

Although the municipality authorizes the erection of abutments which lessen the width of the street, the railroad company may be compelled to remove them, since the municipality has no right to authorize such an obstruction to the public travel. Elyria *v.* Lake Shore, etc., R. Co., 23 Ohio Cir. Ct. 482. See also Delaware, etc., R. Co. *v.* Buffalo, 158 N. Y. 266, 478, 53 N. E. 44, 533 [*affirming* 4 N. Y. App. Div. 562, 38 N. Y. Suppl. 510].

47. Boston, etc., R. Co. *v.* Hampden County, 164 Mass. 551, 42 N. E. 100.

48. Chicago, etc., R. Co. *v.* Noblesville, 159 Ind. 237, 64 N. E. 860; Houston, etc., R. Co. *v.* Dallas, 98 Tex. 396, 84 S. W. 648, 70 L. R. A. 850 [*reversing* (Civ. App. 1904) 78 S. W. 525].

Reasonableness and practicability of change. — While it is within the police power of a municipality to require a railroad company to lower the level of its tracks at crossings to conform to the grade of streets, an ordinance so requiring cannot be sustained if it is manifestly unreasonable in imposing burdens upon the railroad company which are entirely disproportionate to the benefits to the public or if a compliance with the ordinance would be impracticable. Houston, etc., R. Co. *v.* Dallas, 98 Tex. 396, 84 S. W. 648, 70 L. R. A 850 [*reversing* (Civ. App. 1904) 78 S. W. 525].

49. Cleveland *v.* Augusta, 102 Ga. 233, 29 S. E. 584, 43 L. R. A. 638, holding that it is the duty of a railroad company at its own expense to alter the grade of its track and crossing to conform to a change in the grade of a street, although it involves the raising of the grade of its track several feet

which is sufficiently strong and suitable for the ordinary highway traffic, so as to make it suitable for the additional use of a street railway;[50] nor, in the absence of express legislative requirement, can a railroad company be required to change the location of its road in order to avoid frightening horses on a parallel highway, where the road was lawfully located and the only change of condition is that a greater number of persons are exposed to the danger and that the danger is increased by reason of the greater speed and number of trains.[51]

b. Abolition and Removal of Grade Crossings. The legislature may as a police regulation for the public safety,[52] or under a power reserved to alter or amend a railroad charter,[53] require the abolition of existing crossings at grade between streets or highways and railroads, so that the one shall pass over or under the other by means of a bridge, viaduct, or undercrossing,[54] or may authorize a municipality to require such change,[55] or it may act through the instrumentality of a commission,[56] which may be either general or special,[57] and may require that the expense of such change may be paid either by the railroad company or the county, township, or municipality where the crossing is situated or in part by

for a distance of several hundred yards on either side of the approaches to the street.

50. People *v.* Adams, 88 Hun (N. Y.) 122, 34 N. Y. Suppl. 579 [*affirmed* in 147 N. Y. 722, 42 N. E. 725]; Conshohocken R. Co. *v.* Pennsylvania R. Co., 15 Pa. Co. Ct. 445; Briden *v.* New York, etc., R. Co., 27 R. I. 569, 65 Atl. 315. See also Carolina Cent. R. Co. *v.* Wilmington St. R. Co., 120 N. C. 520, 26 S. E. 913.

The only duty to strengthen the bridge would be where, by reason of increase in the amount of travel, or by greater weight of vehicles in use, or for any other reason, the bridge becomes insufficient for ordinary highway traffic. Briden *v.* New York, etc., R. Co., 27 R. I. 569, 65 Atl. 315.

51. State *v.* New Haven, etc., R. Co., 45 Conn. 331.

52. New York, etc., R. Co.'s Appeal, 62 Conn. 527, 26 Atl. 122; Woodruff *v.* New York, etc., R. Co., 59 Conn. 63, 20 Atl. 17; Westbrook's Appeal, 57 Conn. 95, 17 Atl. 368; Norwood *v.* New York, etc., R. Co., 161 Mass. 259, 37 N. E. 199; New York, etc., R. Co. *v.* Bristol, 151 U. S. 556, 14 S. Ct. 437, 38 L. ed. 269.

53. New York, etc., R. Co.'s Appeal, 62 Conn. 527, 26 Atl. 122; Norwood *v.* New York, etc., R. Co., 161 Mass. 259, 37 N. E. 199; New York, etc., R. Co. *v.* Bristol, 151 U. S. 556, 14 S. Ct. 437, 38 L. ed. 269.

54. *Colorado.*— People *v.* Union Pac. R. Co., 20 Colo. 186, 37 Pac. 610.

Connecticut.— New York, etc., R. Co.'s Appeal, 62 Conn. 527, 26 Atl. 122; Woodruff *v.* New York, etc., R. Co., 59 Conn. 63, 20 Atl. 17; Westbrook's Appeal, 57 Conn. 95, 17 Atl. 368; Woodruff *v.* Catlin, 54 Conn. 277, 6 Atl. 849.

Massachusetts.— Norwood *v.* New York, etc., R. Co., 161 Mass. 259, 37 N. E. 199.

New York.— Matter of Boston, etc., R. Co., 64 N. Y. App. Div. 257, 72 N. Y. Suppl. 32 [*affirmed* in 170 N. Y. 619, 63 N. E. 1115].

United States.— New York, etc., R. Co. *v.* Bristol, 150 U. S. 556, 14 S. Ct. 437, 38 L. ed. 269.

See 41 Cent. Dig. tit. "Railroads," §§ 293, 294.

55. People *v.* Union Pac. R. Co., 20 Colo. 186, 37 Pac. 610.

Validity of ordinance.—An ordinance requiring a railroad company to construct viaducts at street crossings is not void for uncertainty because it is in general terms, and does not specify the details of the work, since the plans and specifications for the work, prepared by the authority of the city council, will supplement the ordinance. Burlington, etc., R. Co. *v.* People, 20 Colo. App. 181, 77 Pac. 1026.

Entire vacation of grade crossing unnecessary.— Where a municipality, pursuant to legislative authority, requires a railroad company to construct a bridge or viaduct for a street at a former grade crossing, it is not necessary that the street below shall be given over entirely to the use of the railroad company or vacated, but if this would inconvenience a large number of people it may require a bridge or viaduct for a part of the width of the street and leave the balance so as to be used at grade. People *v.* Union Pac. R. Co., 20 Colo. 186, 37 Pac. 610.

56. Woodruff *v.* New York, etc., R. Co., 59 Conn. 63, 20 Atl. 17; Woodruff *v.* Catlin, 54 Conn. 277, 6 Atl. 849; Matter of Boston, etc., R. Co., 64 N. Y. App. Div. 257, 72 N. Y. Suppl. 32 [*affirmed* in 170 N. Y. 619, 63 N. E. 1115]; New York, etc., R. Co. *v.* Bristol, 151 U. S. 556, 14 S. Ct. 437, 38 L. ed. 269.

57. Mooney *v.* Clark, 69 Conn. 241, 37 Atl. 506, 1080; New York, etc., R. Co.'s Appeal, 62 Conn. 527, 26 Atl. 122.

The legislature may authorize an agreement between a railroad company and certain municipal officers and citizens appointed by the legislature to represent the municipality with regard to abolishing grade crossings and apportioning the expense, which, when approved by the railroad commissioners, shall be binding upon all the parties. Mooney *v.* Clark, 69 Conn. 241, 37 Atl. 506, 1080.

both.[58] Municipalities are, however, in the exercise of such delegated powers, confined to those expressly granted or reasonably implied,[59] and the same rule applies to powers and proceedings of county commissioners.[60] Owing to their danger, which increases with increasing population and amount of traffic, there is a growing tendency to abolish grade crossings;[61] and in a number of jurisdictions statutes have been enacted for this purpose. The statutes are in some cases general laws and in others relate to particular roads, municipalities or localities, and are so varying in their terms that it is impracticable to attempt to set out their provisions.[62] In some cases the statutes authorize agreements between railroad companies and municipalities with reference to the abolition of grade crossings,[63] and under some of the statutes the railroad company may

58. New York, etc., R. Co.'s Appeal, 62 Conn. 527, 26 Atl. 122; Woodruff *v.* New York, etc., R. Co., 59 Conn. 63, 20 Atl. 17; Woodruff *v.* Catlin, 54 Conn. 277, 6 Atl. 849.

59. State *v.* Indianapolis Union R. Co., 160 Ind. 45, 66 N. E. 163, 60 L. R. A. 831, holding that under a power to declare what shall constitute and to abate nuisances, and in order to afford protection to persons using the streets, to require railroad companies to change the grade and crossings of their roads and raise or lower their tracks and construct bridges and viaducts, a municipality has not the broad power of abolishing all grade crossings in a city and compelling railroad companies to construct a system of elevated tracks, without regard to the circumstances or conditions of any particular crossing.

60. Grinnell *v.* Portage County, 27 Ohio Cir. Ct. 118, holding that since the application of the Ohio statute is limited to existing crossings of existing railroads, the county commissioners have no authority to change the location of a highway in order to avoid a grade crossing with a proposed railroad not yet constructed.

61. Westbrook's Appeal, 57 Conn. 95, 17 Atl. 368; Matter of Boston, etc., R. Co., 64 N. Y. App. Div. 257, 72 N. Y. Suppl. 32 [*affirmed* in 170 N. Y. 619, 63 N. E. 1115].

62. See the statutes of the several states; and the following cases:

Connecticut.— New York, etc., R. Co.'s Appeal, 62 Conn. 527, 26 Atl. 122; Woodruff *v.* New York, etc., R. Co., 59 Conn. 63, 20 Atl. 17; Westbrook's Appeal, 57 Conn. 95, 17 Atl. 368; Woodruff *v.* Catlin, 54 Conn. 277, 6 Atl. 869.

Massachusetts.— Norwood *v.* New York, etc., R. Co., 161 Mass. 259, 37 N. E. 199.

New Jersey.— Swift *v.* Delaware, etc., R. Co., 66 N. J. Eq. 34, 57 Atl. 456.

New York.—Melenbacker *v.* Salamanca, 188 N. Y. 370, 80 N. E. 1090 [*affirming* 116 N. Y. App. Div. 691, 101 N. Y. Suppl. 1073]; *In re* Terminal R. Co., 122 N. Y. App. Div. 59, 106 N. Y. Suppl. 655; Matter of Boston, etc., R. Co., 64 N. Y. App. Div. 257, 72 N. Y. Suppl. 32 [*affirmed* in 170 N. Y. 619, 63 N. E. 1115].

Ohio.—Grinnell *v.* Portage County, 27 Ohio Cir. Ct. 118.

United States.— New York, etc., R. Co. *v.* Bristol, 151 U. S. 556, 14 S. Ct. 437, 38 L. ed. 269.

See 41 Cent. Dig. tit. "Railroads," §§ 293, 294.

The Connecticut statute of 1889 enlarges the provisions of the previons statutes and requires that every railroad company operating a road in that state shall remove or apply for the removal of at least one grade crossing each year for every sixty miles of road operated by it in that state, the crossings to be removed being those which in the opinion of the directors are most dangerous, and in case of failure to do so the railroad commissioners, if in their opinion the financial condition of the company will warrant it, shall order such removal. New York, etc., R. Co.'s Appeal, 62 Conn. 527, 26 Atl. 122.

The Ohio statute relates only to existing crossings of existing and operated railroads, and does not authorize a change in the location of a highway to avoid a grade crossing with a proposed railroad not yet constructed. Grinnell *v.* Portage County, 27 Ohio Cir. Ct. 118.

63. Mooney *v.* Clark, 69 Conn. 241, 37 Atl. 506, 1080; Swift *v.* Delaware, etc., R. Co., 66 N. J. Eq. 34, 57 Atl. 156; Erie R. Co. *v.* Buffalo, 180 N. Y. 192, 73 N. E. 26 [*reversing* 96 N. Y. App. Div. 640, 89 N. Y. Suppl. 1104, 96 N. Y. App. Div. 458, 89 N. Y. Suppl. 122].

The New Jersey statute of 1874 authorizing cities to make contracts with companies "whose roads enter their corporate limits" for the purpose of relocating and elevating the railroad tracks or changing the grade of streets does not authorize such a contract with a railroad company whose road is constructed wholly within the limits of the city, and the application of the amendatory act of 1893 is similarly restricted, although in terms applying to any railroad which may "enter or lie within" such cities. Morris, etc., Dredging Co. *v.* Jersey City, 64 N. J. L. 142, 45 Atl. 917.

Effect on contract with private parties.— A contract between a railroad company and a private individual for the maintenance of a switch track across a street at grade must, so far at least as the right to specific performance is concerned, be deemed subject to the public duty of the railroad company, under a statute authorizing contracts betwen railroad companies and municipalities for the removal of grade crossings, and the removal of such a crossing will not be

itself institute the proceedings,[64] and obtain an order for the abolition of a grade crossing against the opposition of the municipality in which it is situated.[65] There is no constitutional objection to requiring the county, town, or municipality where the crossing is located to pay a portion of the expense of the change,[66] and the statutes in some cases provide for or authorize an apportionment of the expense between them and the railroad company,[67] which may be in proportions fixed without reference to the value of the property or the benefits severally received;[68] but it is also competent to impose upon the railroad company the entire expense of making the change,[69] or any part thereof,[70] although the railroad company cannot be required to pay all or any part of the expense of general

enjoined. Swift *v.* Delaware, etc., R. Co., 66 N. J. Eq. 452, 54 Atl. 939 [*affirming* 66 N. J. Eq. 34, 57 Atl. 456].

64. Westbrook's Appeal, 57 Conn. 95, 17 Atl. 368; Matter of Terminal R. Co., 122 N. Y. App. Div. 59, 106 N. Y. Suppl. 655; Matter of Boston, etc., R. Co., 64 N. Y. App. Div. 257, 72 N. Y. Suppl. 32 [*affirmed* in 170 N. Y. 619, 63 N. E. 1115].

A company operating a road under a perpetual lease may institute proceedings for the abolition of grade crossings. Westbrook's Appeal, 57 Conn. 95, 17 Atl. 368.

Discontinuance of proceedings.— A petition by a railroad company to abolish a grade crossing, under the Massachusetts statute of 1890, may not be discontinued by the company as a matter of right after it has proceeded to the appointment of commissioners, and an appearance by the town in which the crossing is situated, and the town objects to such discontinuance. *In re* New York, etc., R. Co., 182 Mass. 439, 65 N. E. 815.

65. Westbrook's Appeal, 57 Conn. 95, 17 Atl. 368; Matter of Boston, etc., R. Co., 64 N. Y. App. Div. 257, 72 N. Y. Suppl. 32 [*affirmed* in 170 N. Y. 619, 63 N. E. 1115].

66. Westbrook's Appeal, 57 Conn. 95, 17 Atl. 368; Woodruff *v.* Catlin, 54 Conn. 277, 6 Atl. 849; Matter of Boston, etc., R. Co., 64 N. Y. App. Div. 257, 72 N. Y. Suppl. 32 [*affirmed* in 170 N. Y. 619, 63 N. E. 1115].

67. Woodruff *v.* New York, etc., R. Co., 59 Conn. 63, 20 Atl. 17; Westbrook's Appeal, 57 Conn. 95, 17 Atl. 368; *In re* Newton, 172 Mass. 5, 51 N. E. 183; Norwood *v.* New York, etc., R. Co., 161 Mass. 259, 37 N. E. 199; Melenbacker *v.* Salamanca, 188 N. Y. 370, 80 N. E. 1090 [*affirming* 116 N. Y. App. Div. 691, 101 N. Y. Suppl. 1073]; New York, etc., R. Co. *v.* Bristol, 151 U. S. 556, 14 S. Ct. 437, 38 L. ed. 269.

A street railway company occupying a street at the crossing of a steam railroad may be required to pay a portion of the expense of abolishing the grade crossing. *In re* Taunton, 185 Mass. 199, 70 N. E. 48.

The Massachusetts statute of 1890 provides that the railroad company shall pay sixty-five per cent of "the total actual cost of the alterations, including in such cost the cost of the hearing and the compensation of the commissioners and auditors for their services, and all damages, including those mentioned in section five of this act," the remaining thirty-five per cent to be apportioned between the commonwealth and the city, town, etc. (*In re* Providence, etc., R. Co., 172 Mass. 117, 51 N. E. 459; Boston, etc., R. Co. *v.* Charlton, 161 Mass. 32, 36 N. E. 688); and the statute contemplates that in the cost to be apportioned may be included not only expenditures made directly upon the alterations themselves, but such as are rendered necessary to adapt existing structures and arrangements to such alterations (*In re* Newton, 172 Mass. 5, 51 N. E. 183); and expenses fairly incurred in carrying out the decree, such as legal expenses incurred by the town in defending and settling claims for damages for land taken for the purpose of abolishing the crossing (Boston, etc., R. Co. *v.* Charlton, *supra*); but it does not include expenses incurred by one of the parties not in carrying out the decree but before the decree was made and in opposition thereto (*In re* Providence, etc., R. Co., 172 Mass. 117, 51 N. E. 459), or authorize either party to make whatever improvements it chooses in connection with the alterations and have them included as a part of the cost of the alterations to be apportioned (*In re* Newton, *supra*); the statute also contemplates that the total cost shall be arrived at by a proper system of credits as well as debits, the account being credited with what is or ought to be actually received or realized from the alterations, not including incidental benefits or betterments (*In re* Westborough, 184 Mass. 107, 68 N. E. 30). For application of these principles to particular items allowable or not allowable see the following cases: *In re* Westborough, *supra*; *In re* Norwood, 183 Mass. 147, 66 N. E. 637; *In re* Newton, *supra*.

68. New York, etc., R. Co.'s Appeal, 58 Conn. 532, 20 Atl. 670; Norwood *v.* New York, etc., R. Co., 161 Mass. 259, 37 N. E. 199.

69. New York, etc., R. Co.'s Appeal, 62 Conn. 527, 26 Atl. 122; New York, etc., R. Co. *v.* Bristol, 151 U. S. 556, 14 S. Ct. 437, 38 L. ed. 269.

The authority of railroad commissioners to determine "at whose expense" the change shall be made, while authorizing an apportionment, does not require it, and the commissioners may impose the entire expense upon the railroad company. Fairfield's Appeal, 57 Conn. 167, 17 Atl. 764.

70. New York, etc., R. Co.'s Appeal, 58 Conn. 532, 20 Atl. 670; Norwood *v.* New York, etc., R. Co., 161 Mass. 259, 37 N. E. 199.

improvements in a system of highways not fairly incidental to changes in the crossing at the railroad.[71] Where the railroad company is required to make the change, it must not only do the work of construction but subsequently, at its own expense, keep the same in repair.[72] Where railroad tracks are owned by different companies jointly, the obligation to build a bridge or viaduct over the same is a joint obligation;[73] but where several companies severally own parallel tracks to be crossed by a single bridge, the duty of each is several and each company should be required to build that part of the bridge above its own tracks, including the width of its right of way,[74] and if there be an intervening space between the rights of way, each company whose tracks are adjacent thereto should build over one-half of such space,[75] and the companies owning the outside tracks should each build the approach to the bridge adjacent to its tracks.[76] The duty of abolishing grade crossings may arise from the general duty of making such changes as subsequent conditions have rendered necessary for the public safety,[77] and a railroad company when required by law to construct and maintain bridges and passages at crossings and authorized to alter and grade highways so that public travel thereon shall not be impeded may of its own motion abolish existing grade crossings on its road.[78] In the absence of statute an abutting landowner is not entitled to damages for a change in the grade of a highway made in order to abolish a grade crossing,[79] and when any right to such damages is given by statute the requirements of the statute must be strictly complied with.[80]

c. Changing Crossings From Different Level to Grade. The exigencies of a particular locality may demand a grade crossing instead of a crossing at a differ-

71. Norwoood *v.* New York, etc., R. Co., 161 Mass. 259, 37 N. E. 199.

But a contract may be made between a railroad company and a municipality having authority to make such contract for a plan of street alterations and improvements more extensive than the abolition of the grade crossing renders necessary, whereby the railroad company is relieved of any expense beyond that for which it would be legally responsible in making the changes actually necessary. Old Colony R. Co. *v.* Boston, 189 Mass. 116, 75 N. E. 134.

72. Atty.-Gen. *v.* Ft. St. Union Depot Co., 117 Mich. 609, 76 N. W. 85.

But if the railroad company is under no legal obligation to change a crossing from grade to one by which a street is carried over the tracks by a bridge, but makes such change under a contract with the municipality, by which the railroad company agrees to maintain the masonry and foundations, and the municipality the superstructure, the railroad company is not liable for an injury due to a failure to keep the surface of the bridge in proper repair. Wetherbee *v.* Michigan Cent. R. Co., 122 Mich. 1, 80 N. W. 787.

73. State *v.* St. Paul, etc., R. Co., 75 Minn. 473, 78 N. W. 87.

74. State *v.* St. Paul, etc., R. Co., 75 Minn. 473, 78 N. W. 87; State *v.* Minneapolis, etc., R. Co., 39 Minn. 219, 39 N. W. 153.

75. State *v.* St. Paul, etc., R. Co., 75 Minn. 473, 78 N. W. 87.

76. State *v.* St. Paul, etc., R. Co., 75 Minn. 473, 78 N. W. 87; State *v.* Minneapolis, etc., R. Co., 39 Minn. 219, 39 N. W. 153.

77. See *supra*, VI, D, 5, a.

78. West Jersey, etc., R. Co. *v.* Waterford Tp., 64 N. J. Eq. 663, 55 Atl. 157, holding further that the authorities of a township in which the railroad crossing is located have no power to prevent a railroad company authorized by its charter to erect overhead bridges from erecting the same and making incidental changes in the grade of highways. See also State *v.* New Jersey Cent. R. Co., 32 N. J. L. 220.

79. Melenbacker *v.* Salamanca, 188 N. Y. 370, 80 N. E. 1090 [*affirming* 116 N. Y. App. Div. 691, 101 N. Y. Suppl. 1073]; Smith *v.* Boston, etc., R. Co., 181 N. Y. 132, 73 N. E. 679 [*affirming* 99 N. Y. App. Div. 94, 91 N. Y. Suppl. 412]; Talbot *v.* New York, etc., R. Co., 151 N. Y. 155, 45 N. E. 382 [*affirming* 78 Hun 473, 29 N. Y. Suppl. 187]. See also Clark *v.* Elizabeth, 61 N. J. L. 565, 40 Atl. 616, 737.

If the change in the grade was not authorized by ordinance it is illegal and an abutting landowner may sue for and recover the damages sustained thereby. United New Jersey R., etc., Co. *v.* Lewis, 68 N. J. Eq. 437, 59 Atl. 227.

The New Jersey statute of 1889 providing that "it shall be lawful" for municipal authorities to award damages to abutting landowners where the grade of the street is changed is construed as not conferring a merely discretionary power but as imposing an imperative duty. Clark *v.* Elizabeth, 61 N. J. L. 565, 40 Atl. 616, 737.

80. Melenbacker *v.* Salamanca, 188 N. Y. 370, 80 N. E. 1090 [*affirming* 116 N. Y. App. Div. 691, 101 N. Y. Suppl. 1073], holding that under a statute requiring any claim for damages to be filed with the railroad commissioners within sixty days after the completion of the work, a landowner is not entitled to recover, where the only claim filed within such time was with the municipal authorities.

ent level,[81] and a municipality invested with authority to regulate, control, and improve its streets may, when it deems that the public necessities so require, change the grade of a street so as to reduce an overhead crossing to the grade of the railroad,[82] and it cannot, in the absence of express legislative authority, divest itself of the power to make such a change,[83] although the legislature may authorize such a contract.[84]

6. Determination as to Necessity, Place, Mode, and Expense of Crossing — a. In General. The determination of the various questions relating to the crossings of railroads and highways is vested in commissioners, boards, courts, public officers, or municipal authorities, according to the provision of the different statutes, which vary greatly in the different jurisdictions and under different statutes in the same jurisdiction.[85] Under the New York statutes where a railroad is laid out across a highway the right to cross is obtained by application to the supreme court,[86] and where it is proposed to lay out a street across a railroad the necessity therefor is to be determined by the common council of the municipality.[87] The character of the crossing, whether at grade or otherwise, is ordinarily determined by the railroad commissioners,[88] crossing commissioners,[89] or county commissioners.[90] In Maine the statutes place practically all questions relative to crossings under the control of the railroad commissioners.[91] In

81. Wabash R. Co. *v.* Defiance, 167 U. S. 88, 17 S. Ct. 748, 42 L. ed. 87.

82. Wabash R. Co. *v.* Defiance, 167 U. S. 88, 17 S. Ct. 748, 42 L. ed. 87 [*affirming* 52 Ohio St. 262, 40 N. E. 89 (*affirming* 10 Ohio Cir. Ct. 27, 8 Ohio Cir. Dec. 703)].

83. Wabash R. Co. *v.* Defiance, 167 U. S. 88, 17 S. Ct. 748, 42 L. ed. 87 [*affirming* 52 Ohio St. 262, 40 N. E. 89 (*affirming* 10 Ohio Cir. Ct. 27, 8 Ohio Cir. Dec. 703)], holding that the statute relied on did not authorize such a contract.

84. Philadelphia, etc., R. Co.'s Appeal, 121 Pa. St. 44, 15 Atl. 476, holding that the statute relied on authorized a contract which would prevent the municipality from changing the grade of a street so as to change the overhead crossing to the level of the railroad.

85. See the statutes of the several states; and cases cited *infra*, notes 86–95.

In Nebraska the board of transportation has jurisdiction to hear complaints and make orders in regard to the construction and repair of crossings, where railroads intersect public highways. State *v.* Chicago, etc., R. Co., 29 Nebr. 412, 45 N. W. 469.

86. Bolivar *v.* Pittsburg, etc., R. Co., 88 N. Y. App. Div. 387, 84 N. Y. Suppl. 678 [*affirmed* in 179 N. Y. 523, 71 N. E. 1141].

87. Matter of Nineteenth St., 66 N. Y. App. Div. 618, 72 N. Y. Suppl. 845 [*affirmed* in 169 N. Y. 602, 62 N. E. 1099].

88. Smith *v.* New Haven, 59 Conn. 203, 22 Atl. 146; Maine Cent. R. Co. *v.* Bangor, etc., R. Co., 89 Me. 555, 36 Atl. 1050; Bolivar *v.* Pittsburg, etc., R. Co., 88 N. Y. App. Div. 387, 84 N. Y. Suppl. 678 [*affirmed* in 179 N. Y. 523, 71 N. E. 1141]; Matter of Nineteenth St., 66 N. Y. App. Div. 618, 72 N. Y. Suppl. 845 [*affirmed* in 169 N. Y. 602, 62 N. E. 1099].

The Maine statute of 1889, authorizing railroad commissioners to determine whether the crossing shall be at grade or otherwise, applies to all crossings wherever situated. *In re* Railroad Com'rs, 87 Me. 247, 32 Atl. 863.

The laying out of the highway need not be fully completed before the railroad commissioners may determine whether it shall pass under or over the railroad. Smith *v.* New Haven, 59 Conn. 203, 22 Atl. 146.

Where the legislature expressly authorizes grade crossings.— Where a statute authorizing a municipality to construct an avenue provides that it may construct the same across any railroad at grade, and that the railroad commissioners shall "prescribe the details of the crossing," this authority to prescribe the details does not authorize them to order an overhead crossing. Cambridge *v.* Railroad Com'rs, 153 Mass. 161, 26 N. E. 241.

89. Ft.-Street Union Depot Co. *v.* State R. Crossing Bd., 81 Mich. 248, 45 N. W. 973, holding that under the Michigan statute the crossing board may not only determine the character of crossings, whether at grade or otherwise, but if the crossing is at grade may determine what safeguards shall be provided by the railroad company to protect against accidents.

90. Boston, etc., R. Co. *v.* Middlesex County, 1 Allen (Mass.) 324, holding that under Rev. St. c. 24, § 13, county commissioners have final jurisdiction of the question whether a highway which crosses a railroad shall be laid out over, under, or on a level with it.

The county commissioners must decide under the Massachusetts statute whether a proposed highway to be constructed across a railroad shall cross over, under, or at grade, and if not, their adjudication laying out the highway may be quashed on certiorari. Old Colony, etc., R. Co. *v.* Plymouth County Com'rs, 11 Gray (Mass.) 512.

91. Maine Cent. R. Co. *v.* Bangor, etc., R. Co., 89 Me. 555, 36 Atl. 1050; *In re* Railroad Com'rs, 87 Me. 247, 32 Atl. 863.

Crossing private track.— The control of the railroad commissioners over crossings of railroads and highways applies only where both

Massachusetts county commissioners are given jurisdiction of questions relating to the obstruction of highways by the construction or operation of railroads,[92] the alteration of crossings,[93] and raising or lowering highways at crossings,[94] whose orders are enforceable by proceedings in equity in the supreme judicial court.[95]

b. Jurisdiction and Proceedings of Courts. The jurisdiction and proceedings of different courts have been considered in the preceding sections with reference to the rights and remedies of the public in regard to the crossings of railroads and highways.[96] Clear legal duties on the part of the railroad company in this regard may be enforced by mandamus,[97] and unauthorized or improper acts restrained by injunction.[98] Where a railroad is in the hands of a receiver, the duty of constructing a crossing may be enforced by application to the court appointing the receiver.[99] Under the Massachusetts statutes the superior court or any justice thereof sitting in equity may enforce the orders and decrees made under the grade crossing statute of 1890,[1] and the supreme judicial court is given jurisdiction in equity to enforce the orders of county commissioners relating to crossings.[2] The court will not enforce an order of the county commissioners

are public ways, and where a highway is laid out over a spur track constructed without legislative authority and only by permission of the landowners where located, the railroad commissioners have no jurisdiction to determine the rights of the parties, since such track is merely private property of the railroad company. *In re* Railroad Com'rs, 83 Me. 273, 22 Atl. 168.

92. Dickinson *v.* New Haven, etc., Co., 155 Mass. 16, 34 N. E. 334.

93. Boston, etc., R. Co. *v.* Hampden County Com'rs, 164 Mass. 551, 42 N. E. 100; Roxbury *v.* Boston, etc., R. Corp., 2 Gray (Mass.) 460.

Changing grade of railroad.— County commissioners have no authority to change the grade of a railroad where it crosses or is crossed by a highway under their authority to alter "the approaches to or method of such crossing." Boston, etc., R. Co. *v.* Hampden County Com'rs, 116 Mass. 73.

The Massachusetts statute of 1890 and amendatory acts apply only to the abolition of grade crossings (Boston, etc., R. Co. *v.* Middlesex County Com'rs, 177 Mass. 511, 59 N. E. 115; Northampton *v.* New Haven, etc., R. Co., 175 Mass. 430, 56 N. E. 598); and if an alteration in a crossing is necessary not involving such a change it must be done by application to the county commissioners (Northampton *v.* New Haven, etc., R. Co., *supra*).

94. Roxbury *v.* Boston, etc., R. Corp., 2 Gray (Mass.) 460; Roxbury *v.* Boston, etc., R. Corp., 6 Cush. (Mass.) 424.

95. See *infra*, VI, D, 6, b.

96. See *supra*, VI, D, 1, c; VI, D, 2, f; VI, D, 3, j.

97. *Illinois.*— People *v.* Chicago, etc., R. Co., 67 Ill. 118.

Indiana.— Indianapolis, etc., R. Co. *v.* State, 37 Ind. 489.

Minnesota.— Parker *v.* Truesdale, 54 Minn. 241, 55 N. W. 901.

Nebraska.— Chicago, etc., R. Co. *v.* State, 47 Nebr. 549, 66 N. W. 624, 53 Am. St. Rep. 557, 41 L. R. A. 481.

New York.— People *v.* Northern Cent. R. Co., 164 N. Y. 289, 58 N. E. 138.

United States.— Indiana *v.* Lake Erie, etc., R. Co., 83 Fed. 284.

See 41 Cent. Dig. tit. "Railroads," § 299. See also, generally, MANDAMUS, 26 Cyc. 365 *et seq.*

Making writ specific as to details of work to be done in restoring highway to its former condition see *supra*, VI, D, 3, b.

Changing plan of alteration.— On mandamus to compel a railroad company to bridge its tracks at a street crossing, the court on hearing of the return to an alternative writ may determine from the evidence the best plan to accomplish the desired objects and disregard the plans made a part of the alternative writ, and order the bridge to be constructed in accordance with new plans. State *v.* St. Paul, etc., R. Co., 75 Minn. 473, 78 N. W. 87.

Mandamus will not be granted to compel a railroad company to construct a bridge in lieu of a level crossing pursuant to an order of the board of trade, where it appears that the company is wholly without funds and has not the means of providing the money required for that purpose. *In re* Bristol, etc., R. Co., 3 Q. B. D. 10, 47 L. J. Q. B. 48, 37 L. T. Rep. N. S. 527, 26 Wkly. Rep. 236.

98. Springfield *v.* Connecticut River R. Co., 4 Cush. (Mass.) 63; State *v.* Dayton, etc., R. Co., 36 Ohio St. 434; Philadelphia, etc., R. Co. *v.* Kensington, etc., R. Co., 33 Wkly. Notes Cas. (Pa.) 182.

99. Ft. Dodge *v.* Minneapolis, etc., R. Co., 87 Iowa 389, 54 N. W. 243, holding further that the court may in its order direct the character of the crossing to be constructed.

1. Norwood *v.* New York, etc., R. Co., 162 Mass. 564, 39 N. E. 186.

2. Nichols *v.* Boston, etc., R. Co., 174 Mass. 379, 54 N. E. 881; Dickinson *v.* New Haven, etc., Co., 155 Mass. 16, 34 N. E. 334; Vermont, etc., R. Co. *v.* Franklin County Com'rs, 10 Cush. (Mass.) 12; Roxbury *v.* Boston, etc., R. Corp., 6 Cush. (Mass.) 424.

Who may maintain bill.— The bill in equity

unless it is sufficiently definite and certain as to what is required to be done,[3] and the court has no authority to change the order but only to enforce it as made;[4] but the court may, where its jurisdiction is invoked under the statute, inquire whether the county commissioners have acted in excess of their jurisdiction.[5]

c. Abolition and Removal of Grade Crossings.[6] Jurisdiction of matters relating to the abolition of grade crossings is ordinarily vested in railroad commissioners,[7] crossing commissioners,[8] county commissioners,[9] or special commissioners appointed by the legislature,[10] or by the court.[11] These commissioners are ordinarily vested with very broad powers in regard to the carrying out of such changes;[12] and where their powers conflict with those which would other-

provided for by the Massachusetts statute for enforcing orders of county commissioners respecting the manner of constructing a crossing can be maintained only by the mayor and aldermen of the city or the selectmen of the town within which the way is situated, and not by any individual inhabitant of such city or town, although he is owner in fee simple of the land over which the way is located. Brainard *v.* Connecticut River R. Co., 7 Cush. (Mass.) 506.

3. Roxbury *v.* Boston, etc., R. Corp., 2 Gray (Mass.) 460.

4. Stanley *v.* Old Colony R. Co., 176 Mass. 145, 57 N. E. 344.

5. Nichols *v.* Boston, etc., R. Co., 174 Mass. 379, 54 N. E. 881.

6. Abolition of grade crossings generally see *supra*, VI, D, 5, b.

7. Cullen *v.* New York, etc., R. Co., 66 Conn. 211, 33 Atl. 910; Maine Cent. R. Co. *v.* Bangor, etc., R. Co., 89 Me. 555, 36 Atl. 1050; Leighton *v.* Concord, etc., R. Co., 72 N. H. 224, 55 Atl. 938; Matter of Buffalo Terminal R. Co., 122 N. Y. App. Div. 59, 106 N. Y. Suppl. 655 [*affirmed* in 192 N. Y. 534, 84 N. E. 1121]; Matter of Boston, etc., R. Co., 64 N. Y. App. Div. 257, 72 N. Y. Suppl. 32 [*affirmed* in 170 N. Y. 619, 63 N. E. 1115].

8. See Ft.-St. Union Depot Co. *v.* State R. Crossing Bd., 81 Mich. 248, 45 N. W. 973.

9. Davis *v.* Hampshire County Com'rs, 153 Mass. 218, 26 N. E. 848, 11 L. R. A. 750; Roxbury *v.* Boston, etc., R. Corp., 2 Gray (Mass.) 460.

Enforcement of order of commissioners by proceedings in equity under the Massachusetts statute see *supra*, VI, D, 6, b.

10. Woodruff *v.* New York, etc., R. Co., 59 Conn. 63, 20 Atl. 17, holding that where the legislature determines the necessity for abolishing certain grade crossings and appoints a special commission for carrying out the work, their duties include not only a decision as to the plan but seeing to the performance of the work, and that the commission is not *functus officio* so long as anything within the scope of their duties remains to be performed.

11. *In re* Old Colony R. Co., 163 Mass. 356, 40 N. E. 198; Norwood *v.* New York, etc., R. Co., 161 Mass. 259, 37 N. E. 199.

Enforcement of orders of commissioners.— Under the Massachusetts statute of 1890, relating to the abolition of grade crossings, providing that the superior court or any justice thereof sitting in equity may compel compliance with the act, and with the decrees, agreements, and decisions made thereunder, an order for doing the work may be made at the time of confirming the decree of the commissioners as well as afterward, and on the order confirming the decree of the commissioners the court may appoint an auditor for the accounts of expenses incurred in doing the work. Norwood *v.* New York, etc., R. Co., 162 Mass. 564, 39 N. E. 186.

Determining the cost of abolishing grade crossings.— The commissioners, although required to apportion the cost, are not required to ascertain and estimate in their report what the actual cost of abolishing the grade crossing will be. *In re* Westborough, 169 Mass. 495, 48 N. E. 763.

12. Cullen *v.* New York, etc., R. Co., 66 Conn. 211, 33 Atl. 910; Woodruff *v.* New York, etc., R. Co., 59 Conn. 63, 20 Atl. 17.

Authorizing encroachment on highway.— Railroad commissioners in abolishing a grade crossing may authorize a railroad company to construct a supporting abutment for the overhead crossing within the limts of the highway, and if a municipality deems such encroachment to be unnecessary its only remedy is by appeal from the order of the commissioners. Bristol *v.* New England R. Co., 70 Conn. 305, 39 Atl. 235, 40 L. R. A. 479.

Elevating spur tracks.— Railroad commissioners in abolishing a grade crossing may require the railroad company to elevate a spur track used for delivering freight and operated as a part of its system by means of an additional bridge. New York, etc., R. Co.'s Appeal, 75 Conn. 264, 53 Atl. 314.

The location of a railroad track and station may be changed by the commissioners for the purpose of abolishing a grade crossing. *In re* Westborough, 169 Mass. 495, 48 N. E. 763.

Under the Buffalo Grade Crossing Act, N. Y. Laws (1888, 1890, 1892), the commissioners were authorized to amend the plan adopted only in matters of detail and could not order any substantial extension thereof. Lehigh Valley R. Co. *v.* Adam, 176 N. Y. 420, 68 N. E. 665 [*reversing* 70 N. Y. App. Div. 427, 75 N. Y. Suppl. 515].

The New York Railroad Law of 1897 providing that all steam surface railroads "except additional switches and sidings" must be so constructed as to avoid grade crossings where practicable confers on the board of

wise fall within the jurisdiction of municipal authorities with regard to the control of streets or highways, the latter must give way.[13] The commissioners are in some cases authorized to apportion the expense of the proposed change between the railroad company and the county or municipality where the crossing is located.[14] The commissioners have no authority as an independent matter to discontinue existing highways or lay out new ones,[15] and cannot abolish a grade crossing merely by discontinuing the highway crossed;[16] but when necessary in order to effect the abolition of a grade crossing they may change the location of the crossing,[17] and as incidental to such change a portion of a highway may be discontinued and another substituted,[18] such changes being deemed to be merely alterations in the existing way and not an independent discontinuance or construction

railroad commissioners authority to eliminate grade crossings and also to determine how sidings or switches shall be taken over a highway, where a railroad company concedes that the board may deal with them; the quoted words being an exception available to a railroad company seeking the benefit of the statute. Matter of Buffalo Terminal R. Co., 122 N. Y. App. Div. 59, 896, 106 N. Y. Suppl. 655, 659.

13. Cullen *v.* New York, etc., R. Co., 66 Conn. 211, 33 Atl. 910, holding that the railroad commissioners for the purpose of abolishing a grade crossing may discontinue a portion of a highway within a municipality, although the charter of the municipality gives it the exclusive control over its highways and their establishment and discontinuance.

14. Doolittle *v.* Branford, 59 Conn. 402, 22 Atl. 336; Boston, etc., R. Co. *v.* Newton, 148 Mass. 474, 20 N. E. 106; Boston, etc., R. Co. *v.* Concord, 69 N. H. 91, 44 Atl. 808; Ottawa Electric R. Co. *v.* Ottawa, etc., R. Co., 37 Can. Sup. Ct. 354.

Ordering payment of gross sum.—The commissioners authorized to apportion the expense of abolishing grade crossings between a railroad company and a municipality may, if they have the means of ascertaining what the entire cost will be, do so in advance and order the municipality to pay a gross sum representing its proportion. Doolittle *v.* Branford, 59 Conn. 402, 22 Atl. 336.

Apportionment of expense of abolishing grade crossings see *supra*, VI, D, 5, b.

15. Doolittle *v.* Branford, 59 Conn. 402, 22 Atl. 336; Blake *v.* Concord, etc., R. Co., 73 N. H. 597, 64 Atl. 202.

16. Blake *v.* Concord, etc., R. Co., 73 N. H. 597, 64 Atl. 202.

But a portion of a way may be discontinued and a new portion constructed connecting two other existing ways so as to avoid crossing the railroad entirely at such place, and the length of the new way which may be constructed for such purpose depends upon the circumstances of the particular case. Meriden *v.* Bennett, 76 Conn. 58, 55 Atl. 564.

17. Doolittle *v.* Branford, 59 Conn. 402, 22 Atl. 336; Maine Cent. R. Co. *v.* Bangor, etc., R. Co., 89 Me. 555, 36 Atl. 1050; Norwood *v.* New York, etc., R. Co., 161 Mass. 259, 37 N. E. 199; Davis *v.* Hampshire County Com'rs, 153 Mass. 218, 26 N. E. 848, 11 L. R. A. 750; Leighton *v.* Concord, etc., R. Co., 72 N. H. 224, 55 Atl. 938.

In Massachusetts it was held, under the statute of 1872, that the location of the crossing could not be changed (Lancaster *v.* Worcester County Com'rs, 113 Mass. 100); but as subsequently amended the statute authorizes a change of location for the purpose of abolishing a grade crossing (Davis *v.* Hampshire County Com'rs, 153 Mass. 218, 26 N. E. 848, 11 L. R. A. 750).

The extent of the change of location which may be made depends upon the circumstances of the particular case. Davis *v.* Hampshire County Com'rs, 153 Mass. 218, 26 N. E. 848, 11 L. R. A. 750.

Restoration after change of location.—Where the location of a highway has been changed in order to abolish a grade crossing, it cannot be reëstablished at the same place, although at a different grade, except by new proceedings under the same statute. New Haven, etc., Co. *v.* Hampshire County Com'rs, 173 Mass. 12, 52 N. E. 1076.

Where parallel streets extend across railroad tracks and the crossing is dangerous the board of railroad commissioners may decide how many viaducts shall be constructed and determine that the traffic on certain streets may be diverted into such viaducts, especially where the railroad company will pay the expenses of the construction of the viaducts and the damages resulting to property-owners. Matter of Buffalo Terminal R. Co., 122 N. Y. App. Div. 59, 896, 106 N. Y. Suppl. 655, 659.

18. Meriden *v.* Bennett, 76 Conn. 58, 55 Atl. 564; Cullen *v.* New York, etc., R. Co., 66 Conn. 211, 33 Atl. 910; Maine Cent. R. Co. *v.* Bangor, etc., R. Co., 89 Me. 555, 36 Atl. 1050; *In re* Newton, 172 Mass. 5, 51 N. E. 183; *In re* Westborough, 169 Mass. 495, 48 N. E. 763; Norwood *v.* New York, etc., R. Co., 161 Mass. 259, 37 N. E. 199; Leighton *v.* Concord, etc., R. Co., 72 N. H. 224, 55 Atl. 938.

The New York statute of 1897 gives the board of railroad commissioners jurisdiction to determine in what manner crossings shall be made, to close a highway and divert the travel thereof to another highway, and to change the grade thereof subject only to a review by the appellate court and the court of appeals. Matter of Buffalo Terminal R. Co., 122 N. Y. App. Div. 59, 896, 106 N. Y. Suppl. 655, 659.

of a new way,[19] and such additional land may be taken as is necessary for effecting the change.[20] The commissioners can, however, make only such a discontinuance or new construction as is properly incidental to the necessary change in location of the crossing,[21] and the new way must be no more than a fair equivalent for that which is given up,[22] and must serve practically the same public needs so as to be in fact a substitute for the original way and not a new highway.[23] The commissioners cannot change the location of a way where it is practicable to separate the grades at the existing location,[24] and no greater change in the location of a highway should be made than is reasonably necessary in order to avoid the grade crossing.[25]

d. Petition, Notice, and Evidence. Under some of the statutes a petition for the abolition of a grade crossing may be brought either by the public or municipal authorities where the crossing is located,[26] or by the railroad company itself,[27] and a company operating the road under a perpetual lease is the owner of the road within the application of the statute and may institute such proceedings.[28] A petition for the abolition of a grade crossing need not set out the precise manner in which the separation of grades is to be accomplished, nor need any plan or specification thereof accompany the petition,[29] and a petition to county commissioners for the alteration of a railroad bridge at a crossing, which alleges the necessity for and purpose of the alteration, is sufficient without setting out any definite specification of the alteration.[30] An objection to a petition to railroad commissioners for the abolition of a grade crossing, on the ground that it was not properly brought, is in the nature of a plea in abatement, and should be made at the hearing before the railroad commissioners;[31] and where county commissioners are required to determine the necessity for alterations in a crossing, upon an expression of an opinion by the municipal authorities or directors of the railroad company that it is necessary, an objection to the sufficiency of such expression of opinion should be made before the county commissioners, and cannot be made in a collateral proceeding after they have ordered the alteration.[32] Where a statute imperatively requires a railroad company to construct and maintain crossings where the railroad crosses a highway, the performance of such duty is not dependent upon any notice from the public authorities in charge of high-

19. Doolittle *v.* Branford, 59 Conn. 402, 22 Atl. 336.

20. Maine Cent. R. Co. *v.* Bangor, etc., R. Co., 89 Me. 555, 36 Atl. 1050; Lancy *v.* Boston, 186 Mass. 128, 71 N. E. 302.

Assessing damages.— Under the Maine statute where new land is taken in changing the location of a crossing to abolish a crossing at grade, the railroad commissioners are to assess the damages. Maine Cent. R. Co. *v.* Bangor, etc., R. Co., 89 Me. 555, 36 Atl. 1050.

21. Blake *v.* Concord, etc., R. Co., 73 N. H. 597, 64 Atl. 202.

22. Norwood *v.* New York, etc., R. Co., 161 Mass. 259, 37 N. E. 199, holding that while a case might arise where it would be proper to order the substitution of two new ways and crossings for a discontinued way, such substitution is improper where both of the new ways are a considerable distance from the old one and of considerable length, and apparently intended as an improvement in the general means of communication in the neighborhood, rather than a provision for the better accommodation of persons using the existing crossing.

23. Blake *v.* Concord, etc., R. Co., 73 N. H. 597, 64 Atl. 202.

24. Fairfield's Appeal, 57 Conn. 167, 17 Atl. 764.

25. Davis *v.* Hampshire County Com'rs, 153 Mass. 218, 26 N. E. 848, 11 L. R. A. 750.

26. See Westbrook's Appeal, 57 Conn. 95, 17 Atl. 368.

27. See Westbrook's Appeal, 57 Conn. 95, 17 Atl. 368; *In re* New York, etc., R. Co., 182 Mass. 439, 65 N. E. 815; Matter of Boston, etc., R. Co., 64 N. Y. App. Div. 257, 72 N. Y. Suppl. 32 [*affirmed* in 170 N. Y. 619, 63 N. E. 1115].

Form of petition by railroad company.—A petition in form "The petition of the directors" of a certain railroad company, signed "The directors of" such company by H. "their attorney," is a sufficient compliance with the statute. Westbrook's Appeal, 57 Conn. 95, 17 Atl. 368.

28. Westbrook's Appeal, 57 Conn. 95, 17 Atl. 368.

29. Norwood *v.* New York, etc., R. Co., 161 Mass. 259, 37 N. E. 199.

30. Boston, etc., R. Co. *v.* Hampden County Com'rs, 164 Mass. 551, 42 N. E. 100.

31. Westbrook's Appeal, 57 Conn. 95, 17 Atl. 368.

32. Parsons *v.* Northampton, 154 Mass. 410, 28 N. E. 350.

ways;[33] but a notice to the railroad company is necessary in order to authorize the public authorities to do the work on a failure of the railroad company to do so and to recover therefor from the railroad company.[34] On a petition to county commissioners for laying out a highway across a railroad, a notice must be given to the railroad company;[35] and when a petition for the abolition of a grade crossing is brought by the railroad company, the municipality where the crossing is situated should be given notice of the proceedings although the statute does not expressly require it;[36] but a statutory requirement that the railroad commissioners shall communicate their decision as to the abolition of a grade crossing to the parties within a certain time has been held to be merely directory and not to affect the validity of the order,[37] and the same has been held with reference to a requirement that the railroad commissioners shall file in their office and send copies of their decision to the railroad company.[38] In proceedings to compel the construction of a bridge at a crossing over the tracks of two or more railroad companies the court should receive evidence as to their respective interests so as to determine what part of the structure is to be built by each company,[39] and may call expert witnesses for the purpose of determining the kind of bridge to be built,[40] and in proceedings against one railroad company to require it to bridge its tracks at a crossing, evidence as to the extent of the use of the crossing by another company is admissible as bearing upon the question of the necessity for a bridge at such place;[41] but in a proceeding to compel the construction of an under-grade crossing, evidence of proposals by the railroad company to build such crossing made prior to the institution of the action is not admissible to show the necessity for such a crossing.[42]

e. Review. In proceedings relating to the crossings of railroads and highways and the abolition of grade crossings, an appeal from the decision of the commissioners is in some cases provided for,[43] or the commissioner's report must be presented to the superior court for confirmation or rejection,[44] or a jury may be applied for to revise their decision;[45] while under other statutes or with respect

33. Lincoln *v.* St. Louis, etc., R. Co., 75 Mo. 27.

34. Henry *v.* Wabash Western R. Co., 44 Mo. App. 100, holding that it is immaterial by whom the notice is served if actually delivered to the proper representatives of the railroad company, and that any unnecessary details in the notice are mere surplusage and do not affect its validity.

35. Old Colony, etc., R. Co. *v.* Plymouth County Com'rs, 11 Gray (Mass.) 512, decided under the Massachusetts statute of 1857, requiring such notice.

36. Westbrook's Appeal, 57 Conn. 95, 17 Atl. 368.

37. Spencer's Appeal, 78 Conn. 301, 61 Atl. 1010.

38. Maine Cent. R. Co. *v.* Bangor, etc., R. Co., 89 Me. 555, 36 Atl. 1050.

39. State *v.* St. Paul, etc., R. Co., 75 Minn. 473, 78 N. W. 87.

40. State *v.* St. Paul, etc., R. Co., 75 Minn. 473, 78 N. W. 87.

41. State *v.* Minneapolis, etc., R. Co., 39 Minn. 219, 39 N. W. 153.

42. State *v.* Minneapolis, etc., R. Co., 90 Minn. 88, 95 N. W. 581.

43. See Spencer's Appeal, 78 Conn. 301, 61 Atl. 1010; New York, etc., R. Co.'s Appeal, 62 Conn. 527, 26 Atl. 122; Matter of Nineteenth St., 66 N. Y. App. Div. 618, 72 N. Y. Suppl. 845 [*affirmed* in 169 N. Y. 602, 62 N. E. 1099]; Matter of Boston, etc., R. Co., 64 N. Y. App. Div. 257, 72 N. Y. Suppl. 32 [*affirmed* in 170 N. Y. 619, 63 N. E. 1115].

Parties.— On appeal by the railroad company the railroad commissioners are proper parties. New York, etc., R. Co.'s Appeal, 62 Conn. 527, 26 Atl. 122.

Construction of street across railroad.— Under the New York statutes of 1890, 1897, providing for the laying out of a street over a railroad as the railroad commissioners shall direct, but that the municipal corporation shall first determine whether such new street is necessary, an appeal may he taken from the determination of the common council of the municipality as to such necessity. Matter of Nineteenth St., 66 N. Y. App. Div. 618, 72 N. Y. Suppl. 845 [*affirmed* in 169 N. Y. 602, 62 N. E. 1099].

Effect of reversal as to one crossing.— Where a general order abolishing all the grade crossings in the town is held erroneous as to one particular crossing, and there is nothing in the record to suggest that such crossing was not considered on its own facts, the order will stand undisturbed as to the other crossings. Fairfield's Appeal, 57 Conn. 167, 17 Atl. 764.

44. *In re* Old Colony R. Co., 163 Mass. 356, 40 N. E. 198, holding that a landowner whose land is taken in proceedings to abolish a grade crossing may appear and contest the confirmation of the commissioner's report.

45. Boston, etc., R. Co. *v.* Newton, 148

to certain matters no appeal is provided for,[46] or it is expressly provided that the decisions of the commissioners shall be final and conclusive, in which case no appeal can be taken.[47] If no appeal is taken the decision of the commissioners is final and conclusive and cannot be reviewed in a collateral proceeding,[48] and where a direct appeal is taken their decision should not be reversed by the court unless it clearly appears that it is founded on erroneous legal principles or contrary to the clear weight of evidence.[49] In one jurisdiction where the statute authorizes the commissioners to apportion the costs of the alteration according to their discretion, their decision as to such apportionment is not reviewable;[50] but in another their decision is reviewable by the superior court which on such review may exercise the same discretion as the commissioners as to the apportionment after which no other appeal can be taken;[51] and under another statute authorizing a review by a jury of the questions of fact found by the commissioners, the jury may review the question of apportionment of costs.[52] The commissioners are ordinarily the tribunal to decide the questions of fact in regard to the proposed change or abolition of a grade crossing,[53] and the court on appeal or the presentation of their report for confirmation or rejection cannot reject it merely because it differs with the commissioners as to questions of fact;[54] nor can it consider the entire matter as one before it for original action and substitute its own opinion for that of the commissioners and order the change to be made according to a different method from that determined upon by them.[55]

E. Crossing Private Lands — 1. In General. A railroad company in constructing its road across private lands must do so in such manner as not to cause unnecessary injury thereto;[56] and during the process of construction the railroad company must use all prudent and reasonable means to enable the landowner to enjoy his property in the ordinary mode and to prevent injury thereto.[57] The English statutes require railroad companies to provide various "accommo-

Mass. 474, 20 N. E. 106. See also Boston, etc., R. Corp. *v.* Winchester, 156 Mass. 217, 30 N. E. 1139.

46. Waterbury's Appeal, 57 Conn. 84, 17 Atl. 355.

47. Wheeler *v.* New York, etc., R. Co., 71 Conn. 270, 41 Atl. 808.

48. Doolittle *v.* Branford, 59 Conn. 402, 22 Atl. 336, holding that on mandamus to enforce an order of the railroad commissioners for the abolition of a grade crossing, the court cannot review the decision of the commissioners as to whether the public convenience and necessity demand the change.

49. Matter of Boston, etc., R. Co., 64 N. Y. App. Div. 257, 72 N. Y. Suppl. 32 [*affirmed* in 170 N. Y. 619, 63 N. E. 1115].

Order held erroneous.— An order of the board of railroad commissioners for a change of a highway crossing from grade to an under crossing which will render the highway impassable for considerable portions of the year on account of overflow, and the only relief afforded will be a crossing at grade, dependent upon the permission of the railroad company, is erroneous and will be reversed on appeal. Matter of Delaware, etc., R. Co., 116 N. Y. App. Div. 62, 101 N. Y. Suppl. 9.

50. Boston, etc., R. Co. *v.* Concord, 69 N. H. 91, 44 Atl. 808, holding further that the statute is not unconstitutional for failing to provide for an appeal.

51. Fairfield's Appeal, 57 Conn. 167, 17 Atl. 764.

52. Boston, etc., R. Co. *v.* Newton, 148 Mass. 474, 20 N. E. 106.

53. *In re* Hadley, 178 Mass. 319, 59 N. E. 805; *In re* Old Colony R. Co., 163 Mass. 356, 40 N. E. 198.

54. *In re* Hadley, 178 Mass. 319, 59 N. E. 805.

55. Spencer's Appeal, 78 Conn. 301, 61 Atl. 1010; *In re* Old Colony R. Co., 163 Mass. 356, 40 N. E. 198.

56. Heath *v.* Texas, etc., R. Co., 37 La. Ann. 728; Bourdier *v.* Morgan's Louisiana, etc., R. Co., 35 La. Ann. 947.

Retaining walls.— Where a right of way is granted to a railroad company and the company is obliged to make a deep cut in order to enjoy the right, it is not bound to build walls to prevent the falling in of the banks for the protection of the adjoining property. Hortsman *v.* Covington, etc., R. Co., 18 B. Mon. (Ky.) 218.

In constructing a tunnel under legislative authority to construct it close to houses or buildings the company must not only make compensation for any damage which its construction may occasion to adjacent buildings, but if there are two modes of constructing the work it must adopt that course which will do the least injury to the adjacent property. Freehold Gen. Land Inv. Co. *v.* Metropolitan Dist. R. Co., 14 L. T. Rep. N. S. 96.

57. Comings *v.* Hannibal, etc., R. Co., 48 Mo. 512; Holden *v.* Rutland, etc., R. Co., 30 Vt. 297; Clark *v.* Vermont, etc., R. Co., 28 Vt. 103.

dation works" for the benefit of adjacent landowners,[58] except where such owners have accepted and received compensation in lieu thereof.[59] The works are to be such as are required at the time the lands are taken with regard to their use at the time, and not as may be required by a subsequent use or change of circumstances,[60] and the company cannot be compelled to make any further or additional accommodation works after five years from the completion of the works and the opening of the railway.[61] If the landowner considers the accommodation works provided to be insufficient he may at his own expense make such further works as shall be agreed to by the company or in case of disagreement shall be authorized by two justices.[62] As the duty of providing and maintaining accommodation works is not one owing to the public but to the particular landowner, it may be released by him.[63] The railroad company and landowner may agree as to accommodation works to be provided by the former, and such a contract may be specifically enforced by a suit in equity.[64]

2. Private or Farm Crossings — a. Right to Cross Railroad or Construct Crossings. The right to a private farm crossing across a railroad track may be

58. Dixon *v.* Great Western R. Co., [1897] 1 Q. B. 300, 66 L. J. Q. B. 132, 75 L. T. Rep. N. S. 539, 45 Wkly. Rep. 226; Great Western R. Co. *v.* Talbot, [1902] 2 Ch. 759, 71 L. J. Ch. 835, 87 L. T. Rep. N. S. 405, 18 T. L. R. 775, 51 Wkly. Rep. 312; Wilkinson *v.* Hull, etc., R., etc., Co., 20 Ch. D. 323, 51 L. J. Ch. 788, 46 L. T. Rep. N. S. 455, 30 Wkly. Rep. 617; Wiseman *v.* Booker, 3 C. P. D. 184, 38 L. T. Rep. N. S. 292, 26 Wkly. Rep. 634; Reg. *v.* Fisher, 3 B. & S. 191, 9 Jur. N. S. 571, 32 L. J. M. C. 12, 7 L. T. Rep. N. S. 325, 11 Wkly. Rep. 69, 113 E. C. L. 191.

The accommodation works include all necessary crossings, bridges, passages, fences, gates, stiles, culverts, drains, and watering places for cattle. See Dixon *v.* Great Western R. Co., [1897] 1 Q. B. 300, 66 L. J. Q. B. 132, 75 L. T. Rep. N. S. 539, 45 Wkly. Rep. 226.

The object of accommodation works is to make good any interruptions to the use of the lands caused by the construction of a railroad, and where a particular accommodation is no longer required the obligation to afford it also ceases. Midland R. Co. *v.* Gribble, [1895] 2 Ch. 827, 64 L. J. Ch. 826, 73 L. T. Rep. N. S. 270, 12 Reports 513, 44 Wkly. Rep. 133 [*affirming* 60 J. P. 55].

Complaints and disagreements as to the character or sufficiency of accommodation works are to be settled by application to two justices, who may make such orders as may be necessary, and a court of chancery will not assume jurisdiction of such controversy. Hood *v.* North Eastern R. Co., L. R. 11 Eq. 116, 40 L. J. Ch. 17, 23 L. T. Rep. N. S. 433, 19 Wkly. Rep. 266.

Action for damages for insufficiency.— Where a railroad company constructed a culvert to carry off water from land adjacent to the railroad, and no complaint was made by the landowner of the insufficiency of the culvert, and no application was made to justices for additional accommodation works within the five years limited by the statute, and an injury subsequently arose from the insufficiency of the culvert, it was held that the statutory remedy was exclusive and that no action for damages could be maintained. Colley *v.* London, etc., R. Co., 5 Ex. D. 277, 44 J. P. 427, 49 L. J. Exch. 575, 42 L. T. Rep. N. S. 807, 29 Wkly. Rep. 16.

59. Rhondda, etc., R. Co. *v.* Talbot, [1897] 2 Ch. 131, 66 L. J. Ch. 570, 76 L. T. Rep. N. S. 694.

60. Reg. *v.* Brown, L. R. 2 Q. B. 630; Rhondda, etc., R. Co. *v.* Talbot, [1897] 2 Ch. 131, 66 L. J. Ch. 570, 76 L. T. Rep. N. S. 694.

Subsequent use by landowner.— The use of the accommodation works by the landowner is not restricted to the exact conditions existing at the time of their construction, but includes their use for any purpose which may be taken to have been fairly within the contemplation of the parties at that time, but not uses which could not have then been anticipated and which substantially increase the burden of the servitude. Great Western R. Co. *v.* Talbot, [1902] 2 Ch. 759, 71 L. J. Ch. 835, 87 L. T. Rep. N. S. 405, 18 T. L. R. 775, 51 Wkly. Rep. 312.

61. Dixon *v.* Great Western R. Co., [1897] 1 Q. B. 300, 66 L. J. Q. B. 132, 75 L. T. Rep. N. S. 539, 45 Wkly. Rep. 226, holding, however, that the provision that the company shall not be compelled after five years to make "any further or additional" accommodation works does not apply where it has not within such time made any accommodation works at all, and if it builds a fence after this period it must subsequently keep it in repair.

62. Rhondda, etc., R. Co. *v.* Talbot, [1897] 2 Ch. 131, 66 L. J. Ch. 570, 76 L. T. Rep. N. S. 694, holding, however, that the landowner has no right to make any works which he may think proper and that he can act only under the conditions expressed in the statute.

63. Midland R. Co. *v.* Gribble, [1895] 2 Ch. 827, 64 L. J. Ch. 826, 73 L. T. Rep. N. S. 270, 12 Reports 513, 44 Wkly. Rep. 133 [*affirming* 60 J. P. 55].

64. Raphael *v.* Thames Valley R. Co., L. R. 2 Ch. 147, 36 L. J. Ch. 209, 16 L. T. Rep. N. S. 1, 15 Wkly. Rep. 322.

acquired by prescription,[65] by contract or covenant in the deed of conveyance of the right of way,[66] or by virtue of a statutory or charter provision expressly conferring the right to cross,[67] or imposing upon the railroad company the duty of constructing crossings.[68] The circumstances may also be such as to entitle a landowner to a right of way of necessity,[69] and while this necessity must be actual and not a mere matter of convenience,[70] it need not be absolute, and a landowner whose property is divided by a railroad is entitled to use or make such a crossing or crossings as may be necessary for the reasonably convenient use of his land, provided he exercises his right with due regard to the paramount rights of the railroad company,[71] although the mere right to cross does not impose upon the railroad company the duty of constructing a crossing.[72] In the absence of such provisions or conditions the right of the railroad company in its right of way is exclusive, and adjacent landowners have no right to cross it,[73] or to construct crossings,[74] or if regular crossings are established to cross it at other places;[75]

65. Louisville, etc., R. Co. *v.* Brooks, 77 S. W. 693, 25 Ky. L. Rep. 1307; Hardy *v.* Alabama, etc., R. Co., 73 Miss. 719, 19 So. 661; Well *v.* Northern R. Co., 14 Ont. 594.

But to secure a prescriptive right the use must be adverse and under a claim of right, and not merely permissive. Cleveland, etc., R. Co. *v.* Munsell, 192 Ill. 430, 61 N. E. 374; Canadian Pac. R. Co. *v.* Guthrie, 31 Can. Sup. Ct. 155 [*reversing* 27 Ont. App. 64].

In New Hampshire, under a statute providing that no title by adverse possession can be acquired by or against a railroad company, a landowner cannot acquire a prescriptive right to a private crossing over the railroad. Costello *v.* Grand Trunk R. Co., 70 N. H. 403, 47 Atl. 265.

66. Kraeer *v.* Pennsylvania R. Co., 218 Pa. St. 569, 67 Atl. 871; Hall *v.* Clearfield, etc., R. Co., 168 Pa. St. 64, 31 Atl. 940. See also *supra*, V, G, 6.

Limitation of right.— The reservation in a right of way deed of a right to cross the railroad does not entitle the landowner to cross over any and every part of the right of way, but only to such a crossing as is reasonably necessary, and where the place of crossing has been selected the landowner has no right to cross at other places. Chesapeake, etc., R. Co. *v.* Richardson, 98 S. W. 1042, 30 Ky. L. Rep. 426.

67. See Kyle *v.* Auburn, etc., R. Co., 2 Barb. Ch. (N. Y.) 489.

Limitation of right.— A charter provision giving landowners a right to cross the track of a railroad does not give them the right to do so in such a manner as to interfere with the reasonable use of the road by the railroad company. Connecticut, etc., R. Co. *v.* Holton, 32 Vt. 43.

68. See *infra*, VI, E, 2, b.

69. Housatonic R. Co. *v.* Waterbury, 23 Conn. 101; New York, etc., R. Co. *v.* Railroad Com'rs, 162 Mass. 81, 38 N. E. 27.

70. Jones Fertilizing Co. *v.* Cleveland, etc., R. Co., 2 Ohio S. & C. Pl. Dec. 511, 7 Ohio N. P. 245.

If there is a public highway by which the landowner can have convenient access from one part of his property to another, he cannot claim a way of necessity. Carroll *v.* Great Western R. Co., 14 U. C. Q. B. 614.

71. Atchison, etc., R. Co. *v.* Gough, 29 Kan. 94; Gratz *v.* Lake Erie, etc., R. Co., 76 Ohio St. 230, 81 N. E. 239; Mitchell, etc., Lumber Co. *v.* Wabash R. Co., 6 Ohio S. & C. Pl. Dec. 135, 3 Ohio N. P. 231.

If the railroad has fenced its right of way the landowner may make openings in the fence for farm crossings at such places as the necessities of his farm demand and which will not interfere with the paramount use of the right of way by the railroad company, and the company must maintain the necessary gates in the right-of-way fence at such crossings. Atchison, etc., R. Co. *v.* Conlon, 9 Kan. App. 338, 61 Pac. 321.

Limitation of right.—A landowner has no right to make any and all crossings which he may desire, but to entitle him to make a farm crossing two things must concur: (1) The necessities of his farm must demand a crossing at the place in question; and (2) its use must not interfere with the paramount use of the railroad company. Chicago, etc., R. Co. *v.* Cosper, 42 Kan. 561, 22 Pac. 634.

72. See *infra*, VI, E, 2, b.

73. New York, etc., R. Co. *v.* Comstock, 60 Conn. 200, 22 Atl. 511.

74. Speese *v.* Schuylkill River East Side R. Co., 8 Pa. Dist. 584, 23 Pa. Co. Ct. 17, 44 Wkly. Notes Cas. 493; Connecticut, etc., R. Co. *v.* Holton, 32 Vt. 43.

A distinction as to the extent of the rights of a railroad company exists according to whether the right of way was acquired by deed or condemnation, and a deed of a right of way, although not expressly providing for crossings, may, by its provisions, as construed by the acts of the parties, entitle the landowner to construct a crossing which is necessary for the complete enjoyment of his property, and which will not endanger or interfere with the operation of the railroad. Mt. Pleasant Coal Co. *v.* Delaware, etc., R. Co., 200 Pa. St. 434, 50 Atl. 251.

75. Chesapeake, etc., R. Co. *v.* Richardson, 98 S. W. 1042, 30 Ky. L. Rep. 426; Connecticut, etc., R. Co. *v.* Holton, 32 Vt. 43.

and in one jurisdiction the construction of crossings without the consent of the railroad company is expressly prohibited by statute.[76]

b. Duty of Railroad Company to Construct Crossings. In the absence of statute or agreement a railroad company is not obliged to construct private or farm crossings for the benefit of adjacent landowners,[77] or to continue to maintain an existing crossing;[78] nor is the railroad company obliged to construct a crossing where the landowner has merely a statutory right to cross the track,[79] or a right of way of necessity.[80] The duty of constructing private or farm crossings may, however, be imposed upon railroad companies by contract or covenant in the conveyance of the right of way,[81] or provision in the charter of the company,[82] or if such crossing is a part of the plan of construction filed or agreed upon by the railroad company and is considered in the award of damages to the landowner, the railroad company is bound to construct and maintain the crossing,[83] which must be of the character provided for.[84] There are also in a number of jurisdictions statutory provisions expressly requiring railroad companies to construct such crossings or to do so in certain cases or under certain conditions.[85] These

76. Speese *v.* Schuylkill River East Side R. Co., 8 Pa. Dist. 584, 23 Pa. Co. Ct. 17, 44 Wkly. Notes Cas. 493.

This statute does not apply so as to affect any rights secured under a deed of conveyance of the right of way. Mt. Pleasant Coal Co. *v.* Delaware, etc., R. Co., 200 Pa. St. 434, 50 Atl. 251.

77. Kyle *v.* Auburn, etc., R. Co., 2 Barb. Ch. (N. Y.) 489; Gulf, etc., R. Co. *v.* Jones, 3 Tex. App. Civ. Cas. § 21. See also March *v.* Portsmouth, etc., R. Co., 19 N. H. 372. But see Kirk *v.* Kansas City, etc., R. Co., 51 La. Ann. 664, 25 So. 463.

78. New York, etc., R. Co. *v.* Comstock, 60 Conn. 200, 22 Atl. 511.

79. Kyle *v.* Auburn, etc., R. Co., 2 Barb. Ch. (N. Y.) 489, holding that a railroad company constructing its road under the New York statute of 1838, giving adjacent landowners the right to cross the road but not requiring the company to construct crossings, is not bound to construct any crossings except such as it has designated upon the profile and map of the road filed by it.

80. Gulf, etc., R. Co. *v.* Jones, 3 Tex. App. Civ. Cas. § 21.

81. Gray *v.* Burlington, etc., R. Co., 37 Iowa 119; Eatman *v.* New Orleans Pac. R. Co., 35 La. Ann. 1018; Hall *v.* Clearfield, etc., R. Co., 168 Pa. St. 64, 31 Atl. 940; Hugo *v.* Great Western R. Co., 16 U. C. Q. B. 506. See also *supra*, V, G, 6.

A railroad company may contract jointly with individuals in the settlement of litigation to which it is a party and bind itself jointly with them to construct, keep up, and perpetually maintain stock gaps and crossings across its track on the premises involved in the litigation. Chattanooga, etc., R. Co. *v.* Davis, 89 Ga. 708, 15 S. E. 626.

The parol agreement of the president of a railroad company made at the time of, and as a part of the consideration for, the execution of a deed of a right of way, to build a crossing over the railroad connecting the two portions of the grantor's land, is binding upon the railroad company and must be complied with in order to give the company a right of possession. Perkiomen R. Co. *v.* Bromer, 217 Pa. St. 263, 66 Atl. 359.

Cow gaps.—A covenant in a deed binding a railroad company "to construct all crossings reasonably necessary" does not bind it to construct cow gaps. Kentucky Union R. Co. *v.* Forkner, 40 S. W. 462, 19 Ky. L. Rep. 378.

82. Louisville, etc., R. Co. *v.* Emerson, 125 Ky. 104, 100 S. W. 863, 30 Ky. L. Rep. 1149; Green *v.* Morris, etc., R. Co., 24 N. J. L. 486.

A charter provision that the railroad shall be so constructed as not to obstruct the safe and convenient use of any private way which it crosses imposes upon the company the duty of maintaining a safe and convenient crossing for such private way. Keefe *v.* Sullivan County R. Co., 63 N. H. 271.

83. Stone *v.* Missouri Pac. R. Co., 75 Kan. 600, 90 Pac. 251; Chicago, etc., R. Co. *v.* Wynkoop, 73 Kan. 590, 85 Pac. 595; Kansas City, etc., R. Co. *v.* Kregelo, 32 Kan. 608, 5 Pac. 15; Rathbun *v.* New York, etc., R. Co., 20 R. I. 60, 37 Atl. 300.

84. Chicago, etc., R. Co. *v.* Wynkoop, 73 Kan. 590, 85 Pac. 595.

85. *Illinois.*— Chalcraft *v.* Louisville, etc., R. Co., 113 Ill. 86 [*affirming* 14 Ill. App. 516].

Iowa.— Mattice *v.* Chicago Great Western R. Co., 130 Iowa 749, 107 N. W. 949; Herrstrom *v.* Newton, etc., R. Co., 129 Iowa 507, 105 N. W. 436.

Massachusetts.— New York, etc., R. Co. *v.* Railroad Com'rs, 162 Mass. 81, 38 N. E. 27.

Mississippi.— Alabama, etc., R. Co. *v.* Odeneal, 73 Miss. 34, 19 So. 202.

Missouri.— Quantock *v.* Missouri, etc., R. Co., 197 Mo. 93, 94 S. W. 978 [*affirming* 117 Mo. App. 469, 74 S. W. 1034].

New Hampshire.— Costello *v.* Grand Trunk R. Co., 70 N. H. 403, 47 Atl. 265; Keefe *v.* Sullivan County R. Co., 63 N. H. 271.

New York.— Buffalo Stone, etc., Co. *v.* Delaware, etc., R. Co., 130 N. Y. 152, 29 N. E. 121 [*affirming* 7 N. Y. Suppl. 604]; Smith *v.* New York, etc., R. Co., 63 N. Y. 58; Peck-

statutory requirements apply whether the railroad company acquires its right

ham *v.* Dutchess County R. Co., 20 N. Y. Suppl. 39.

Ohio.— Jones Fertilizing Co. *v.* Cleveland, etc., R. Co., 2 Ohio S. & C. Pl. Dec. 504, 7 Ohio N. P. 245.

Pennsylvania.— Dubbs *v.* Philadelphia, etc., R. Co., 148 Pa. St. 66, 23 Atl. 883.

Texas.— Texas, etc., R. Co. *v.* Ford, (Civ. App. 1897) 42 S. W. 589.

Virginia.— Adams *v.* Tidewater R. Co., 107 Va. 798, 60 S. E. 129.

West Virginia.— Clarke *v.* Ohio River, etc., R. Co., 39 W. Va. 732, 20 S. E. 696.

Canada.— *In re* Cockerline, etc., R. Co., 5 Can. R. Cas. 313.

See 41 Cent. Dig. tit. "Railroads," § 306.

Constitutionality of statute see CONSTITUTIONAL LAW, 8 Cyc. 983.

Construction and application of statutes.— Under a statute requiring railroad companies to construct crossings "when and where the same may become necessary," for adjoining landowners, the term "necessary" is used in the sense of reasonably convenient, and the rights of the railroad company and the public as well as of the landowner must be considered. Chalcraft *v.* Louisville, etc., R. Co., 113 Ill. 86 [*affirming* 14 Ill. App. 516]. Where the statute provides that where a person owns land on both sides of a railroad the railroad company shall construct crossings, if requested to do so, a landowner is entitled to a crossing, although he can have access from one part of his property to another by means of a public highway (Mattice *v.* Chicago, etc., R. Co., 130 Iowa 749, 107 N. W. 949; Herrstrom *v.* Newton, etc., R. Co., 129 Iowa 507, 105 N. W. 436); but the Pennsylvania statute of 1849 expressly excepts from the duty of constructing crossings cases where a public highway passes through the property (Traut *v.* New York, etc., R. Co., (Pa. 1888) 15 Atl. 678). Where the statute provides that where a person owns land on both sides of the railroad the company shall "when required to do so" make a crossing, the obligation exists only where such landowner has requested a crossing. Anderson *v.* Chicago, etc., R. Co., 48 Iowa 346. Under a statute requiring railroad companies to construct "convenient and suitable" crossings over its track for "necessary plantation roads," the term "necessary" does not mean "indispensable" but "reasonably convenient," and the term "plantation" includes a stock farm as well as one used for agricultural purposes (Alabama, etc., R. Co. *v.* Odeneal, 73 Miss. 34, 19 S. W. 202); and a road connecting a dwelling-house and pasture lands of a farm through which a railroad runs is a necessary plantation road, within the meaning of the statute if its disuse would involve any considerable inconvenience or expense to the tenant in possession (Alabama, etc., R. Co. *v.* Ligon, 74 Miss. 176, 20 So. 988). A statute requiring railroad companies to make "a good and sufficient causeway or causeways, whenever the same may be necessary, to enable the occupant or occupants of said lands to cross or pass over the same," contemplates a crossing whenever reasonably necessary to afford the landowner a convenient mode of access, and he is entitled to a crossing, although he might pass from one part of his property to another over roads adjoining his property by a circuitous route of about one-half mile (Dubbs *v.* Philadelphia, etc., R. Co., 148 Pa. St. 66, 23 Atl. 883); and such a requirement applies to what is necessary for the future as well as the present use of the land, and a railroad company having left a causeway will not be allowed to fill it up, although not in use where the probable future use of the land would make it necessary (Hespenheide *v.* King, 31 Pittsb. Leg. J. N. S. (Pa.) 242). In Texas the statute provides that railroad companies which have fenced their right of way may be required to make openings through their fence and over their road-bed every one and one-half miles, and if such fence divides any inclosure at least one opening shall be made within such inclosure. San Antonio, etc., R. Co. *v.* Grier, 20 Tex. Civ. App. 138, 49 S. W. 148; Burgess *v.* Missouri, etc., R. Co., (Tex. Civ. App. 1897) 41 S. W. 703. The Texas statute requiring railroad companies to construct farm crossings does not apply to cases where the right of way was acquired before the enactment of the statute. Owazarzak *v.* Gulf, etc., R. Co., 31 Tex. Civ. App. 229, 71 S. W. 793; San Antonio, etc., R. Co. *v.* Grier, (Tex. Civ. App. 1907) 42 S. W. 1022. The New York statute of 1850 expressly requiring railroad companies to construct farm crossings was not repealed by the act of 1854, which omits the express requirement but provides that openings shall be placed at "farm crossings," or the statute of 1890, compiling the existing laws on the same subject and containing substantially the same provision. Peckham *v.* Dutchess County, 20 N. Y. Suppl. 39.

In Canada the statute of 14 & 15 Vict. c. 51, § 13, required railroad companies to construct fences with openings, gates, or bars "and farm crossings" for the use of proprietors of lands adjoining the railroad (Burke *v.* Grand Trunk R. Co., 6 U. C. C. P. 484; Reist *v.* Grand Trunk R. Co., 6 U. C. C. P. 421); but in a subsequent consolidation of the statutes the word "and" was changed to "at" so as to provide that the company should construct fences with openings, gates, or bars "at farm crossings" (Brown *v.* Toronto, etc., R. Co., 26 U. C. C. P. 206); and it was therefore held that a railroad company was not under any statutory obligation to construct farm crossings (Guay *v.* Reg., 17 Can. Sup. Ct. 30; Vezina *v.* Reg., 17 Can. Sup. Ct. 1 [in effect *overruling* Canada Southern R. Co. *v.* Clouse, 13 Can. Sup. Ct. 139 (*reversing* 11 Ont. App. 287)]; Ontario Lands, etc. *v.* Canada Southern R. Co., 1 Ont. L. Rep. 215; Brown *v.* Toronto, etc., R. Co., *supra*). In 1888, however, a statute was enacted which again expressly required a railroad company to "make cross-

of way by purchase or condemnation,[86] and the duty is not affected by the assessment and payment of damages in condemnation proceedings.[87] They also apply to railroads in process of construction as well as to completed roads.[88] Where the railroad company contests the right of the landowner to a crossing, it is entitled to a reasonable time after the determination of the right in favor of the landowner to construct the crossing;[89] and where the duty of constructing the crossing is imposed by covenant in a deed of right of way but no time is specified, the company is entitled to a reasonable time after the road is built.[90] The statutory duty of constructing crossings includes the duty of maintaining and keeping them in repair as long as needed;[91] but a railroad company is not required to keep in repair a private crossing which a landowner uses merely by permission of the railroad company,[92] or to maintain a statutory crossing after it is no longer necessary;[93] and where the crossing is constructed and maintained under a contract between the railroad company and the landowner, the question of maintenance and repair depends upon the terms of the contract.[94]

c. Character of Lands and Persons Entitled to Crossings. A statute merely requiring the construction of crossings "for necessary plantation roads" applies whether the lands are inclosed or not,[95] but does not entitle a person owning land on only one side of the railroad to a crossing to reach the land of another person.[96]

ings for persons across whose land the railway is carried" (Ontario Lands, etc., Co. *v.* Canada Southern R. Co., *supra*), which, however, was held not to be retrospective in its operation (Carew *v.* Grand Trunk R. Co., 2 Can. R. Cas. 241, 5 Ont. L. Rep. 653, 2 Ont. Wkly. Rep. 313; Ontario Lands, etc., Co. *v.* Canada Southern R. Co., *supra*); and the subsequent railway act of 1903 also requires that "every company shall make crossings for persons across whose lands the railway is carried, convenient and proper for the crossing of the railway for farm purposes" (*In re* Cockerline, etc., R. Co., 5 Can. R. Cas. 313); and orders directing the establishment of farm crossings over railways subject to the act of 1903 are exclusively within the jurisdiction of the board of railway commissioners (Grand Trunk R. Co. *v.* Perrault, 36 Can. Sup. Ct. 671).

86. Smith *v.* New York, etc., R. Co., 63 N. Y. 58; Clarke *v.* Rochester, etc., R. Co., 18 Barb. (N. Y.) 350.

87. Beardsley *v.* Lehigh Valley R. Co., 142 N. Y. 173, 36 N. E. 877 [*affirming* 65 Hun 502, 20 N. Y. Suppl. 458]; Jones *v.* Seligman, 81 N. Y. 190 [*affirming* 16 Hun 230]; Buffalo Stone, etc., Co. *v.* Delaware, etc., R. Co., 7 N. Y. Suppl. 604 [*affirmed* in 130 N. Y. 152, 29 N. E. 121].

If the damages were assessed prior to the statute requiring railroad companies to construct crossings and the damages included the cost to the landowner of constructing the crossings necessary, the statute does not apply and the railroad company cannot be required to construct them. Missouri, etc., R. Co. *v.* Chenault, 24 Tex. Civ. App. 481, 60 S. W. 55.

88. Adams *v.* Tidewater R. Co., 107 Va. 798, 60 S. E. 129.

89. Alabama, etc., R. Co. *v.* Odeneal, 74 Miss. 824, 21 So. 52.

90. Livingston *v.* Iowa Midland R. Co., 35 Iowa 555.

91. Madison *v.* Missouri Pac. R. Co., 60 Mo. App. 599; Keefe *v.* Sullivan County R. Co., 63 N. H. 271.

Limitation as to duty.— The farm crossing required by statute is intended for the benefit of the owner of the farm through which a railroad passes, and the company is under no legal obligation to maintain the crossing in good condition for general public use. Johnson *v.* Chicago, etc., R. Co., 96 Minn. 316, 104 N. W. 961.

Repair of approaches.— Where a railroad crosses a farm and the company has constructed a farm crossing, it is not bound to keep in repair the approaches to the crossing within the farm. Palmer *v.* Michigan Cent. R. Co., 7 Ont. L. Rep. 87, 3 Ont. Wkly. Rep. 89 [*affirming* 2 Can. R. Cas. 239, 6 Ont. L. Rep. 90, 2 Ont. Wkly. Rep. 477].

Where a railroad company agrees to maintain and does maintain two farm crossings on a single farm, its obligation to keep them in a reasonably safe condition is the same as it would be in the case of a single crossing required by the statute. Grasse *v.* Milwaukee, etc., R. Co., 36 Wis. 582.

92. Moragne *v.* Charleston, etc., R. Co., 77 S. C. 437, 58 S. E. 150.

93. Midland R. Co. *v.* Gribble, [1895] 2 Ch. 827, 64 L. J. Ch. 826, 73 L. T. Rep. N. S. 270, 12 Reports 513, 44 Wkly. Rep. 133 [*affirming* 60 J. P. 55], where the landowner sold all of his land on one side of the railroad without reserving any right of way across the land sold.

94. Walters *v.* Minneapolis, etc., R. Co., 76 Minn. 506, 79 N. W. 516, holding that the practical construction given to the contract by the parties is controlling, and that where the company customarily removed the planks at the crossing during the winter months, such removal did not constitute negligence on the part of the railroad company.

95. Hardy *v.* Alabama, etc., R. Co., 73 Miss. 719, 19 So. 661.

96. Seelbinder *v.* Illinois Cent. R. Co., 73 Miss. 84, 19 So. 300.

Where the statute requires the construction of crossings for the use of the proprietors of the lands "adjoining" the railroad, its application is not limited to cases where the railroad divides a farm or tract of land or to conditions existing at the time of the original construction;[97] and under such a statute the landowner is entitled to a crossing where he owns land on one side only in order to reach a highway on the other,[98] where at the time of the construction of the railroad he owned land on one side and subsequently purchases land on the other side,[99] or where he owns land on both sides of the railroad but there is a strip of land belonging to another intervening between the railroad and his land on one side;[1] and such a statute does not require that any particular quantity of land shall be benefited;[2] but where a landowner owns land on only one side of the railroad and a crossing would serve no useful purpose, the company will not be required to construct it;[3] and, where he owns land on both sides of the railroad at the time the crossing is constructed and subsequently sells all the land on one side without reserving any right of way across the land sold, he abandons his right to the crossing.[4] Where the statute requires crossings when a person owns laud "on both sides of any railway," the term "railway" does not mean merely the right of way.[5] A railroad company is not required to construct crossings for the benefit of a landowner whose property is situated entirely on one side of the railroad under a statute requiring crossings where the road passes through the lands of any person,[6] or for persons "across" whose lands the road passes;[7] and a statute requiring that when a person owns a certain amount of land in one body through which the railroad passes the railroad shall construct crossings applies only where the lands on each side are in one ownership at the time of the original construction,[8] and does not require the construction of additional crossings if the land is subsequently divided up into several tracts of over the amount specified.[9] The actual *bona fide* owner of lands through which a railroad passes is entitled to the crossings required by statute, although his title is not registered.[10] A statute requiring "farm crossings" does not apply to lots within city limits,[11] although the business conducted upon such lots may necessitate crossing the railroad tracks in order to reach a street or alley.[12] A charter provision requiring a railroad company to provide proper crossings for persons through whose land the road passes imposes a continuing duty, and if at the time the road was constructed no crossing was necessary, but a crossing subsequently becomes necessary, it is the duty of the railroad company to construct it.[13]

97. Quantock *v.* Missouri, etc., R. Co., 117 Mo. App. 469, 74 So. 1034 [*affirmed* in 197 Mo. 93, 94 S. W. 978].

98. Buffalo Stone, etc., Co. *v.* Delaware, etc., R. Co., 130 N. Y. 152, 29 N. E. 121 [*affirming* 7 N. Y. Suppl. 604].

99. Quantock *v.* Missouri, etc., R. Co., 197 Mo. 93, 94 S. W. 978 [*affirming* 117 Mo. App. 469, 74 So. 1034, and *disapproving* Stumpe *v.* Missouri, etc., R. Co., 61 Mo. App. 357].

1. Buffalo Stone, etc., Co. *v.* Delaware, etc., R. Co., 130 N. Y. 152, 29 N. E. 121 [*affirming* 7 N. Y. Suppl. 604].

2. Clarke *v.* Rochester, etc., R. Co., 18 Barb. (N. Y.) 350.

3. Kerr *v.* West Shore R. Co., 2 N. Y. Suppl. 686.

4. Midland R. Co. *v.* Gribble, [1895] 2 Ch. 827, 64 L. J. Ch. 826, 73 L. T. Rep. N. S. 270, 12 Reports 513, 44 Wkly. Rep. 133 [*affirming* 60 J. P. 55].

5. Mattice *v.* Chicago Great Western R. Co., 130 Iowa 749, 107 N. W. 949, holding that a landowner is entitled to a crossing, although on one side of the track there is a strip of land belonging to the railroad company acquired by purchase for railroad purposes intervening between his land and the right of way as originally condemned as the term "railway" includes land so used.

6. Thompson *v.* Louisville, etc., R. Co., 76 S. W. 44, 25 Ky. L. Rep. 529.

7. Grand Trunk R. Co. *v.* Therrien, 30 Can. Sup. Ct. 485.

8. Gratz *v.* Lake Erie, etc., R. Co., 76 Ohio St. 230, 81 N. E. 239.

9. Jones Fertilizing Co. *v.* Cleveland, etc., R. Co., 2 Ohio S. & C. Pl. Dec. 511, 7 Ohio N. P. 245.

10. Boldue *v.* Canadian Pac. R. Co., 23 Quebec Super. Ct. 238.

11. Williams *v.* Chicago, etc., R. Co., 228 Ill. 593, 81 N. E. 1133 [*affirming* 132 Ill. App. 274]; Smith *v.* Missouri, etc., R. Co., 94 Mo. App. 398, 68 S. W. 238.

12. Williams *v.* Chicago, etc., R. Co., 228 Ill. 593, 81 N. C. 1133 [*affirming* 132 Ill. App. 274].

13. Louisville, etc., R. Co. *v.* Pittman, 53 S. W. 1040, 21 Ky. L. Rep. 1037.

d. Number, Location, and Purposes of Crossings. Where the number of crossings is governed by contract or covenant in the deed of right of way, the railroad company must comply with its agreement,[14] and where the statute only requires one crossing the landowner is not entitled to more than one if a suitable crossing is provided.[15] Where the statute does not specify any number but merely requires crossings or suitable, sufficient, or necessary crossings, the railroad company must construct whatever number is reasonably necessary for the proper accommodation of the landowner,[16] which is ordinarily a question of fact depending upon the circumstances of the particular case,[17] and if it be shown that the number originally constructed is not sufficient the company may be compelled to construct additional crossings;[18] but the company is not required to construct any more than are reasonably necessary,[19] nor has the landowner any right to construct additional crossings at other places at his own expense.[20] In the location of the crossing the rights of both parties must be considered,[21] and whether suitably and properly located is ordinarily a question of fact depending upon the circumstances of the particular case.[22] In the absence of statute or agreement to the contrary, the railroad company may designate the location of the crossing,[23] but the landowner is entitled to be reasonably and fairly accommodated,[24] and the railroad company must consider his rights and cannot so locate the crossing as to subject him to needless and unreasonable injury or inconvenience.[25] Where the statute authorizes the landowner to designate the place of crossing, the railroad company must construct it at the place designated if such

14. Gray *v.* Burlington, etc., R. Co., 37 Iowa 119, holding that if the covenant in the deed provides for the construction of two crossings, the railroad company must construct two, although the statute requiring railroad companies to construct crossings only provides for one.

15. State *v.* Burlington, etc., R. Co., 99 Iowa 565, 68 N. W. 819.

16. Alabama, etc., R. Co. *v.* Odeneal, 73 Miss. 34, 19 So. 202; Jones *v.* Seligman, 81 N. Y. 190 [*affirming* 16 Hun 230].

17. Alabama, etc., R. Co. *v.* Odeneal, 73 Miss. 34, 19 So. 202; Jones *v.* Seligman, 81 N. Y. 190 [*affirming* 16 Hun 230].

The expense to the railroad company is a question which should be considered in determining what number of crossings should be put in. Van Kleeck *v.* Dutchess County R. Co., 78 Hun (N. Y.) 263, 28 N. Y. Suppl. 902.

18. Louisville, etc., R. Co. *v.* Emerson, 100 S. W. 863, 30 Ky. L. Rep. 1149; Jones *v.* Seligman, 81 N. Y. 190 [*affirming* 16 Hun 230].

Where a farm is divided after a railroad company has constructed its road and provided one crossing, it must construct another crossing for that portion which by the division is left without one. Louisville, etc., R. Co. *v.* Emerson, 100 S. W. 863, 30 Ky. L. Rep. 1149. But see Clarke *v.* Ohio River R. Co., 39 W. Va. 732, 20 S. E. 696, holding that when once the railroad company has put in suitable crossings it cannot afterward be required to put in additional crossings.

19. Van Kleeck *v.* Dutchess County R. Co., 78 Hun (N. Y.) 263, 28 N. Y. Suppl. 902.

20. Connecticut, etc., R. Co. *v.* Holton, 32 Vt. 43.

21. Chalcraft *v.* Louisville, etc., R. Co., 113 Ill. 86 [*affirming* 14 Ill. App. 516]; Costello *v.* Grand Trunk R. Co., 70 N. H. 403, 47 Atl. 265; Wademan *v.* Albany, etc., R. Co., 51 N. Y. 568; Buffalo Stone, etc., Co. *v.* Delaware, etc., R. Co., 7 N. Y. Suppl. 604 [*affirmed* in 130 N. Y. 152, 29 N. E. 121]; Burke *v.* Grand Trunk R. Co., 6 U. C. C. P. 484.

22. Jones *v.* Seligman, 81 N. Y. 190 [*affirming* 16 Hun 230]; Buffalo Stone, etc., Co. *v.* Delaware, etc., R. Co., 7 N. Y. Suppl. 604 [*affirmed* in 130 N. Y. 152, 29 N. E. 121]; Burke *v.* Grand Trunk R. Co., 6 U. C. C. P. 484.

23. Wademan *v.* Albany, etc., R. Co., 51 N. Y. 568 [*overruling* Wheeler *v.* Rochester, etc., R. Co., 12 Barb. (N. Y.) 227]; Holmes *v.* Philadelphia, etc., R. Co., 2 Pa. L. J. 387.

The landowner cannot prescribe the place for the crossing, while on the other hand the railroad company, although entitled to select the place of crossing, must consider its convenience and usefulness to the landowner, and if the latter is not satisfied he may sue for damages, and it is a question for the jury whether the company has properly performed its duty. Burke *v.* Grand Trunk R. Co., 6 U. C. C. P. 484.

Mandamus will not be granted to compel a railroad company to make crossings at a particular place where the company desires one location and the landowner another. Reist *v.* Grand Trunk R. Co., 12 U. C. Q. B. 675.

24. Jones *v.* Seligman, 81 N. Y. 190 [*affirming* 16 Hun 230].

25. Beardsley *v.* Lehigh Valley R. Co., 65 Hun (N. Y.) 502, 20 N. Y. Suppl. 458 [*affirmed* in 142 N. Y. 173, 36 N. E. 877]; Buffalo Stone, etc., Co. *v.* Delaware, etc., R. Co., 7 N. Y. Suppl. 604 [*affirmed* in 130 N. Y. 152, 29 N. E. 121]; Burke *v.* Grand Trunk R. Co., 6 U. C. C. P. 484.

location is a reasonable one;[26] but if the landowner refuses to designate the place of crossing the railroad company may do so provided it furnishes an adequate crossing.[27] Where the landowner is authorized to construct a crossing, upon failure of the railroad to do so, and recover the cost from the railroad company, he must in locating the crossing do so with due regard to the interest of the railroad company and the safety of the public.[28] In some jurisdictions the statutes provide that if the parties cannot agree as to the number and location of the crossings, these questions shall be determined by commissioners or some other tribunal designated for that purpose.[29] Statutes requiring farm crossings are not limited to crossings solely for agricultural purposes;[30] but the landowner is only entitled to use the crossing for purposes which may be taken to have been fairly within the contemplation of the parties at the time of its construction,[31] and cannot use it in such a manner as to endanger the operation of trains upon the railroad.[32] Where a railroad company is required to make crossings over its road where it passes through government lands, the government may subsequently sell such lands for any purpose and the purchasers may use the crossings for any purpose that may be convenient for the enjoyment of the land which will not interfere with the operation of the railroad.[33]

e. Character and Sufficiency of Crossings. Where a railroad company is required to construct crossings the crossing must be such as reasonably to meet the necessities and convenience of the landowner,[34] and the duty of constructing a crossing includes the duty of constructing the necessary approaches thereto.[35] It is competent for the railroad company and landowner to agree as to the character of the crossing,[36] if it is not such as to endanger the safety of the public,[37] and to provide whether it shall be at grade or otherwise,[38] or whether it shall be open or provided with gates or bars.[39] If as is usually the case the statutes do

26. Van Vranklin *v.* Wisconsin, etc., R. Co., 68 Iowa 576, 27 N. W. 761; Boggs *v.* Chicago, etc., R. Co., 54 Iowa 435, 6 N. W. 744.

27. Schrimper *v.* Chicago, etc., R. Co., 115 Iowa 35, 82 N. W. 916, 87 N. W. 731.

28. Chalcraft *v.* Louisville, etc., R. Co., 113 Ill. 86 [*affirming* 14 Ill. App. 516], holding that the landowner has no right to locate the crossing at a place where it will greatly increase the danger of collisions and that he may be enjoined from so doing.

29. Costello *v.* Grand Trunk R. Co., 70 N. H. 403, 47 Atl. 265; Connecticut, etc., R. Co. *v.* Holton, 32 Vt. 43.

30. Buffalo Stone, etc., Co. *v.* Delaware, etc., R. Co., 130 N. Y. 152, 29 N. E. 121 [*affirming* 7 N. Y. Suppl. 604], holding that they also include crossings for removing natural products of the land, such as stone and minerals. But see Hewett *v.* Knox County Com'rs, 85 Me. 308, 27 Atl. 179, holding that under a statute providing that the county commissioners may order a railroad company to make and maintain "cattle guards, cattle passes and farm crossings," an award of damages providing that the railroad company shall keep open a road to a limekiln of the landowner is beyond the power of the commissioners.

31. Great Western R. Co. *v.* Talbot, [1902] 2 Ch. 759, 71 L. J. Ch. 835, 87 L. T. Rep. N. S. 405, 18 T. L. R. 775, 51 Wkly. Rep. 312, holding that while the landowner may make any use of the crossing which may be taken to have been fairly within the contemplation of the parties at the time of its construction, it cannot be used for purposes which could not have been so contemplated and which materially increase the burden of the easement, as for conveying goods from places not upon his property and not served by the road crossed at the time the easement was created.

32. Great Northern R. Co. *v.* McAlister, [1897] 1 Ir. 537, holding that the landowner has no right to use a traction engine on the crossing in hauling stone from a quarry where such use would be a source of danger to passing trains.

33. United Land Co. *v.* Great Eastern R. Co., L. R. 10 Ch. 586, 44 L. J. Ch. 685, 33 L. T. Rep. N. S. 292, 23 Wkly. Rep. 896.

34. Kendall *v.* Chicago, etc., R. Co., (Tex. Civ. App. 1906) 95 S. W. 757; Gulf, etc., R. Co. *v.* Clay, 28 Tex. Civ. App. 176, 66 S. W. 1115.

35. Birlew *v.* St. Louis, etc., R. Co., 104 Mo. App. 561, 79 S. W. 490.

36. Chicago, etc., R. Co. *v.* Wynkoop, 73 Kan. 590, 85 Pac. 595; Gulf, etc., R. Co. *v.* Clay, 28 Tex. Civ. App. 176, 66 S. W. 1115; Gulf, etc., R. Co. *v.* Schawe, 22 Tex. Civ. App. 599, 55 S. W. 357.

37. See Missouri, etc., R. Co. *v.* Chenault, 24 Tex. Civ. App. 481, 60 S. W. 55.

38. Chicago, etc., R. Co. *v.* Wynkoop, 73 Kan. 590, 85 Pac. 595.

39. Gulf, etc., R. Co. *v.* Clay, 28 Tex. Civ. App. 176, 66 S. W. 1115.

A contract for an open crossing is not void as being contrary to public policy (Gulf, etc., R. Co. *v.* Clay, 28 Tex. Civ. App. 176, 66

not specify the character of crossing, its character is not to be determined solely with reference to the convenience of the landowner,[40] or the convenience of or expense to the railroad company,[41] but upon a proper consideration of all the interests involved.[42] In such cases the railroad company may decide the character of crossing, subject only to the limitation that it shall be suitable, sufficient, or adequate, within the meaning of the statutes,[43] which is ordinarily a question of fact to be determined with reference to the circumstances of the particular case,[44] and the landowner cannot demand as a matter of right either a grade crossing,[45] or a crossing above or below grade.[46] Grade crossings are the kind usually constructed and are ordinarily adequate;[47] but if owing to the location and conditions such a crossing is not adequate the railroad company must provide an over or under crossing,[48] although it involves considerable additional expense.[49] Whether the crossing shall be an open one or may be constructed with gates or bars depends somewhat upon the character of its use.[50] A closed crossing provided with suitable gates is not necessarily improper or inadequate,[51] and it has been

S. W. 1115; Gulf, etc., R. Co. *v.* Schawe, 22 Tex. Civ. App. 599, 55 S. W. 357); and a railroad company agreeing to give the owner of a farm an open crossing must comply therewith unless compliance will unnecessarily interfere with the safe operation of the railroad or with the public necessities of rapid transportation (Hartsborn *v.* Chicago Great Western R. Co., 137 Iowa 324, 113 N. W. 840).

40. State *v.* Burlington, etc., R. Co., 99 Iowa 565, 68 N. W. 819.

41. Herrstrom *v.* Newton, etc., R. Co., 129 Iowa 507, 105 N. W. 436.

42. State *v.* Burlington, etc., R. Co., 99 Iowa 565, 68 N. W. 819; Truesdale *v.* Jensen, 91 Iowa 312, 59 N. W. 47; Beardsley *v.* Lehigh Valley R. Co., 65 Hun (N. Y.) 502, 20 N. Y. Suppl. 458 [*affirmed* in 142 N. Y. 173, 36 N. E. 877]; State *v.* Wisconsin Cent. R. Co., 123 Wis. 551, 102 N. W. 16.

Matters to be considered as affecting the character of crossing are the character of its use by the landowner, the cost of construction, the effect upon the operation of the railroad, and upon the safety of life and property. Truesdale *v.* Jensen, 91 Iowa 312, 59 N. W. 47.

43. Guinn *v.* Iowa, etc., R. Co., 125 Iowa 301, 101 N. W. 94.

44. State *v.* Burlington, etc., R. Co., 99 Iowa 565, 68 N. W. 819; Gray *v.* Burlington, etc., R. Co., 37 Iowa 119; Ellsworth *v.* New Jersey Cent. R. Co., 34 N. J. L. 93; Beardsley *v.* Lehigh Valley R. Co., 65 Hun (N. Y.) 502, 20 N. Y. Suppl. 458 [*affirmed* in 142 N. Y. 173, 36 N. E. 877].

45. Guinn *v.* Iowa, etc., R. Co., 125 Iowa 301, 101 N. W. 94.

46. Schrimper *v.* Chicago, etc., R. Co., 115 Iowa 35, 82 N. W. 916, 87 N. W. 731; State *v.* Burlington, etc., R. Co., 99 Iowa 565, 68 N. W. 819; State *v.* Chicago, etc., R. Co., 86 Iowa 304, 53 N. W. 253; Reist *v.* Grand Trunk R. Co., 15 U. C. Q. B. 355.

Under a charter requirement that a railroad company shall construct "bridges or passages over or under" its road, where "any public or other road" shall cross the same, and that if the railroad shall intersect any farm or land of any individual, the company shall provide "suitable wagon ways," the provision as to the construction of bridges does not apply to farm crossings. Green *v.* Morris, etc., R. Co., 24 N. J. L. 486.

47. Schrimper *v.* Chicago, etc., R. Co., 115 Iowa 35, 82 N. W. 916, 87 N. W. 731; State *v.* Burlington, etc., R. Co., 99 Iowa 565, 68 N. W. 819; State *v.* Chicago, etc., R. Co., 86 Iowa 304, 53 N. W. 253.

48. Herrstrom *v.* Newton, etc., R. Co., 129 Iowa 507, 105 N. W. 436; Jones *v.* Seligman, 81 N. Y. 190 [*affirming* 16 Hun 230]; Beardsley *v.* Lehigh Valley R. Co., 65 Hun (N. Y.) 502, 20 N. Y. Suppl. 458 [*affirmed* in 142 N. Y. 173, 36 N. E. 877]; State *v.* Wisconsin Cent. R. Co., 123 Wis. 551, 102 N. W. 16; *In re* Cockerline, etc., R. Co., 5 Can. R. Cas. 313.

Railroad commissioners may require a railroad company to construct a farm crossing under its railroad if a crossing of a different character would not under the circumstances be a suitable crossing. *In re* Cockerline, etc., R. Co., 5 Can. R. Cas. 313.

49. Herrstrom *v.* Newton, etc., R. Co., 129 Iowa 507, 105 N. W. 436.

50. State *v.* Burlington, etc., R. Co., 99 Iowa 565, 68 N. W. 819.

51. Yazoo, etc., R. Co. *v.* Anderson, 76 Miss. 582, 25 So. 295; Missouri, etc., R. Co. *v.* Chenault, 24 Tex. Civ. App. 481, 60 S. W. 55.

Where the railroad company has fenced its track, although not required to do so, it has sufficiently complied with the statute requiring it to construct a crossing for a plantation road by making the crossing with gates in its fence, and is not required to provide an open crossing protected by cattle-guards. Yazoo, etc., R. Co. *v.* Anderson, 76 Miss. 582, 25 So. 295.

It is competent for the landowner to show, where a railroad company has agreed to construct "all necessary" crossings, that an open crossing is necessary for the proper use of his premises. Gulf, etc., R. Co. *v.* Clay, 28 Tex. Civ. App. 176, 66 S. W. 1115.

Under the Texas statute requiring railroad companies to make "openings or crossings through their fence and over their road-bed,"

held that such a crossing is sufficient as a means of affording access between adjacent fields or parts of a pasture;[52] but that where the crossing is to afford access to a highway and is much used the landowner is entitled to an open crossing unobstructed by gates.[53]

f. Removal, Change, or Obstruction of Crossing. Where a landowner is entitled to the crossing and one has been constructed, the railroad company has no right arbitrarily to change, remove, stop up, or obstruct it,[54] and if it does so it may be required to restore the same or compensate the landowner in damages.[55] The landowner is, however, bound to anticipate such changes and alterations in the railroad as public necessity may require,[56] and the railroad company may, for the purpose of making such necessary alterations in its road, change the location of a crossing,[57] or change its character as from an under or overhead crossing to a grade crossing,[58] or place gates at an open crossing where its use as an open

the term "openings" does not contemplate an open crossing, and a railroad company is not required to provide such a crossing unless a crossing of that character is necessary in the particular case. Missouri, etc., R. Co. *v.* Chenault, 24 Tex. Civ. App. 481, 60 S. W. 55; Burgess *v.* Missouri, etc., R. Co., (Tex. Civ. App. 1897) 41 S. W. 703.

52. State *v.* Burlington, etc., R. Co., 99 Iowa 565, 68 N. W. 819; Curtis *v.* Chicago, etc., R. Co., 62 Iowa 418, 17 N. W. 591; Beau *v.* Jasper, etc., R. Co., (Tex. Civ. App. 1907) 101 S. W. 874.

53. Boggs *v.* Chicago, etc., R. Co., 54 Iowa 435, 6 N. W. 744; Gray *v.* Burlington, etc., R. Co., 37 Iowa 119.

The landowner is not necessarily entitled to an open crossing, although the crossing is used for reaching a highway, and he is not so entitled when such a crossing by reason of the grade and curvature the railroad track would render collisions with stock probable and be a source of much danger to persons and property transported by the railroad, and the location is such as to make an open crossing under or above the track impracticable. Truesdale *v.* Jensen, 91 Iowa 312, 59 N. W. 47.

54. *Illinois.*— Baltimore, etc., R. Co. *v.* Brubaker, 217 Ill. 462, 75 N. E. 523.

Kansas.— Stone *v.* Missouri Pac. R. Co., 75 Kan. 600, 90 Pac. 251.

Kentucky.— Louisville, etc., R. Co. *v.* Brooks, 77 S. W. 693, 25 Ky. L. Rep. 1307.

Massachusetts.— Humphreys *v.* Old Colony R. Co., 160 Mass. 323, 35 N. E. 859.

New Hampshire.— Farwell *v.* Boston, etc., R. Co., 72 N. H. 335, 56 Atl. 751.

Pennsylvania.— Marsh *v.* Lehigh, etc., R. Co., 215 Pa. St. 141, 64 Atl. 366; Dubbs *v.* Philadelphia, etc., R. Co., 148 Pa. St. 66, 23 Atl. 883.

Wisconsin.— State *v.* Wisconsin Cent. R. Co., 123 Wis. 551, 102 N. W. 16.

See 41 Cent. Dig. tit. "Railroads," §§ 312, 313.

Gates or bars.— Although the contract of the railroad company to construct crossings did not expressly provide for an open crossing, but merely that it should be such as was convenient or necessary, if the railroad company constructs and for many years maintains an open crossing it cannot subsequently obstruct it with gates or bars. Williams *v.* Clark, 140 Mass. 238, 5 N. E. 802; Gulf, etc., R. Co. *v.* Schawe, 22 Tex. Civ. App. 609, 55 S. W. 357. See also Hamlin *v.* New York, etc., R. Co., 176 Mass. 514, 57 N. E. 1006.

If a railroad company, although not required to construct crossings, does construct them, it cannot afterward remove them unless such removal be necessary for the improvement of the road, where their construction was considered in the award of damages to the landowner. March *v.* Portsmouth, etc., R. Co., 19 N. H. 372.

Where a railroad company covenanted with the landowner to provide suitable farm crossings and the successors in title of the original covenantee have for many years used one of such crossings to reach a village, post-office, and station, which use has been acquiesced in by the railroad company, the company cannot abolish the crossing on the ground that it has ceased to be used as a farm crossing. Kraeer *v.* Pennsylvania R. Co., 218 Pa. St. 569, 67 Atl. 871.

Application to railroad commissioners.— On application to railroad commissioners, under the Canada statute of 1903, for leave to fill up an under crossing which the company had contracted to construct and maintain, and to substitute therefor a grade crossing, it was held that since the contract was valid and binding and the proposed substitute not as advantageous as the under crossing, and the application was not made in the interest of the public but merely to save expense to the railroad company, the application should be refused. Anderson *v.* Toronto, etc., R. Co., 3 Can. R. Cas. 444.

55. See *infra*, VI, E, 4, a, (I).

56. Speer *v.* Erie R. Co., 68 N. J. Eq. 615, 60 Atl. 197 [*reversing* 64 N. J. Eq. 601, 54 Atl. 539].

57. Costello *v.* Grand Trunk R. Co., 70 N. H. 403, 47 Atl. 265, holding further that the location of the new crossing is to be determined in the same manner and upon the same considerations as the original location.

58. Schrimper *v.* Chicago, etc., R. Co., 115 Iowa 35, 82 N. W. 916, 87 N. W. 731, holding further that where the crossing is constructed as a statutory duty a landowner cannot acquire a prescriptive right to a crossing of the character originally constructed.

crossing has become dangerous to the operation of trains.[59] A railroad company may also change the location of a crossing where its existence at the original location interferes with the safe operation of the railroad.[60] But the railroad company cannot, even where the changes are so made, deprive the landowner without compensation of the accommodation to which he is entitled,[61] and must provide such a crossing as he is entitled to or make compensation in damages,[62] although the changes are not made voluntarily by the railroad company but under the compulsion of a decree of court.[63] Where the contract of the railroad company to construct a crossing is so limited as not to include the approaches, if the grade of the crossing is subsequently changed the necessary alterations in the approaches must be made by the landowner.[64]

g. Agreement With or Waiver by Landowner.[65] The landowner may agree to the substitution of a new crossing at a different place for an old crossing to which he is entitled;[66] and where a landowner expressly agrees to abandon an existing grade crossing in consideration of being allowed an overhead crossing, he cannot afterward use both.[67] So also where a railroad company is required by statute to construct crossings, this duty may be waived entirely by the landowner for whose benefit they are to be constructed;[68] but the right to a crossing or crossings of the number, location, and character to which he is entitled is not waived by the assessment and receipt of the damages in condemnation proceedings,[69] or by a conveyance of a right of way which makes no express provision as to crossings;[70] nor is an agreement by a landowner to the construction of a public crossing on his land a waiver of his right to a private crossing to which he is entitled by statute.[71]

3. Fences and Cattle-Guards — a. Duty to Construct. In the absence of statute or agreement a railroad company is not obliged to fence along its right

59. Aistrope *v.* Tabor, etc., R. Co., (Iowa 1898) 75 N. W. 334.

60. Hartshorn *v.* Chicago Great Western R. Co., 137 Iowa 324, 113 N. W. 840.

61. Speer *v.* Erie R. Co., 68 N. J. Eq. 615, 60 Atl. 197 [*reversing* 64 N. J. Eq. 601, 54 Atl. 539].

Injunction until new crossing provided.— Where a railroad company pursuant to a contract constructs an open crossing at a point mutually agreed on, but which interferes with the safe operation of the railroad, and it is practicable to establish a crossing at another point, the company must take the initiative and demand that the owner select a reasonable place for the new crossing, and until it does so it should be enjoined from closing the existing crossing. Hartshorn *v.* Chicago Great Western R. Co., 137 Iowa 324, 113 N. W. 840.

62. Chesapeake, etc., R. Co. *v.* Richardson, 98 S. W. 1042, 30 Ky. L. Rep. 426; Speer *v.* Erie R. Co., 68 N. J. Eq. 615, 60 Atl. 197 [*reversing* 64 N. J. Eq. 601, 54 Atl. 539].

63. Speer *v.* Erie R. Co., 68 N. J. Eq. 615, 60 Atl. 197 [*reversing* 64 N. J. Eq. 601, 54 Atl. 539].

64. Williams *v.* Clark, 140 Mass. 238, 5 N. E. 802.

65. **Agreements between railroad company and landowner as to:** The right to cross or have a crossing see *supra*, VI, E, 2, a. Duty to construct crossing see *supra*, VI, E, 2, b. Number and location of crossings see *supra*, VI, E, 2, d. Character of the crossings see *supra*, VI, E, 2, e.

66. Hamlin *v.* New York, etc., R. Co., 166 Mass. 462, 44 N. E. 444.

67. Speese *v.* Schuylkill River East Side R. Co., 201 Pa. St. 568, 51 Atl. 316.

68. Madison *v.* Missouri Pac. R. Co., 60 Mo. App. 599.

69. Beardsley *v.* Lehigh Valley R. Co., 142 N. Y. 173, 36 N. E. 877 [*affirming* 65 Hun 502, 20 N. Y. Suppl. 458]; Jones *v.* Seligman, 81 N. Y. 190 [*affirming* 16 Hun 230]; Buffalo Stone, etc., Co. *v.* Delaware, etc., R. Co., 7 N. Y. Suppl. 604 [*affirmed* in 130 N. Y. 152, 29 N. E. 121].

In the assessment of damages it must be assumed that both parties stood upon their rights with regard to the construction of crossings and that if the railroad company was required to construct crossings the award was made upon the assumption that it would do so. Beardsley *v.* Lehigh Valley R. Co., 142 N. Y. 173, 36 N. E. 877 [*affirming* 65 Hun 502, 20 N. Y. Suppl. 458].

Where the railroad company is required by a covenant in a deed of a right of way of a certain width to construct crossings and subsequently condemns an additional strip of land, the acceptance of the amount awarded for such strip and not including that conveyed does not affect the right of the landowner to insist upon the crossing provided for in the deed. Gray *v.* Burlington, etc., R. Co., 37 Iowa 119.

70. Smith *v.* New York, etc., R. Co., 63 N. Y. 58.

71. Herrstrom *v.* Newton, etc., R. Co., 129 Iowa 507, 105 N. W. 436.

of way for the protection of lands through or along which it passes,[72] or to construct cattle-guards where it enters or leaves such lands or inclosures,[73] and if it does so voluntarily it is not obliged subsequently to maintain and keep them in repair.[74] So also the landowner is not, in the absence of statute or agreement, obliged to fence his lands for the protection of the railroad,[75] nor has he any right to go upon the railroad right of way and construct cattle-guards for his own benefit where the road passes through his land.[76] There have been a great number and variety of statutes enacted in different jurisdictions relating to the construction of fences and cattle-guards. Some of these statutes are not designed for, and have no application to, the protection of the lands or property of the adjoining landowner, but are designed solely for the public safety, the protection of the railroad company and its freight and passengers, or to prevent animals from coming upon the track and being injured,[77] and these statutes together with all statutory provisions in so far as they relate to duties and liabilities of this character are treated in other parts of this article.[78] There are, however, in a number of jurisdictions statutory provisions which are designed for, or the application of which includes, the protection of the lands, stock, and crops of adjacent landowners, and which require the railroad company to construct fences,[79] or cattle-

72. *Arkansas.*— Caststeel *v.* St. Louis, etc., R. Co., 81 Ark. 364, 99 S. W. 540; St. Louis, etc., R. Co. *v.* Walbrink, 47 Ark. 330, 1 S. W. 545.

Illinois.— Alton, etc., R. Co. *v.* Baugh, 14 Ill. 211.

Iowa.— Henry *v.* Dubuque, etc., R. Co., 2 Iowa 288.

Missouri.— Mangold *v.* St. Louis, etc., R. Co., 116 Mo. App. 606, 92 S. W. 753.

New York.— Matter of Long Island R. Co., 3 Edw. 487.

United States.— Ward *v.* Paducah, etc., R. Co., 4 Fed. 862.

See 41 Cent. Dig. tit. "Railroads," § 315.

73. St. Louis, etc., R. Co. *v.* Walbrink, 47 Ark. 330, 1 S. W. 545; Rossignoll *v.* Northeastern R. Co., 75 Ga. 354; Alton, etc., R. Co. *v.* Baugh, 14 Ill. 190; Ward *v.* Paducah, etc., R. Co., 4 Fed. 862. But see State *v.* Colorado Southern, etc., R. Co., 120 La. 9, 44 So. 905; Matter of Long Island R. Co., 3 Edw. (N. Y.) 487.

74. Rossignoll *v.* Northeastern R. Co., 75 Ga. 354; Ward *v.* Paducah, etc., R. Co., 4 Fed. 862.

75. Boston, etc., R. Co. *v.* Briggs, 132 Mass. 24.

76. Alton, etc., R. Co. *v.* Baugh, 14 Ill. 211, holding further that the rule applies whether the railroad company owns its right of way in fee or not.

77. Cannon *v.* Louisville, etc., R. Co., 34 Ill. App. 640; Clark *v.* Hannibal, etc., R. Co., 36 Mo. 202.

78. Existence and validity of statutory provisions see *infra*, X, B, 6.

Construction and application of statutory provisions with reference to: Injuries from collisions with animals on track see *infra*, X, D, 2, b, (II). Injuries to persons on or near the track see *infra*, X, E, 2, a, (V), (B). Injuries to animals see *infra*, X, H, 4.

79. *Illinois.*— Ohio, etc., R. Co. *v.* People, 121 Ill. 483, 13 N. E. 236 [*affirming* 21 Ill. App. 23].

Maine.— Cotton *v.* Wiscasset, etc., R. Co., 98 Me. 511, 57 Atl. 758.

Michigan.— Gardner *v.* Smith, 7 Mich. 410, 74 Am. Dec. 722.

Minnesota.— Gould *v.* Great Northern R. Co., 63 Minn. 37, 65 N. W. 125, 56 Am. Rep. 453, 30 L. R. A. 590.

Missouri.— Silver *v.* Kansas City, etc., R. Co., 78 Mo. 528, 47 Am. Rep. 118; Trice *v.* Hannibal, etc., R. Co., 49 Mo. 438; Gordon *v.* Chicago, etc., R. Co., 44 Mo. App. 201.

Nebraska.— Chicago, etc., R. Co. *v.* Lyon, 50 Nebr. 640, 70 N. W. 261.

England.— Wiseman *v.* Booker, 3 C. P. D. 184, 38 L. T. Rep. N. S. 292, 26 Wkly. Rep. 634.

Canada.— Nichol *v.* Canada Southern R. Co., 40 U. C. Q. B. 583; Brown *v.* Grand Trunk R. Co., 24 U. C. Q. B. 350.

See 41 Cent. Dig. tit. "Railroads," § 315.

The various provisions of the Kentucky statutes relating to the construction of fences by railroad companies are quoted in a recent case where their constitutionality is sustained (Steadd *v.* Southern R. Co., 109 Ky. 214, 58 S. W. 581, 22 Ky. L. Rep. 713); and they put railroad companies upon the same footing as other adjoining landowners and require them to construct one half of the fence between the right of way and adjoining lands (Owensboro, etc., R. Co. *v.* Courts, 109 Ky. 154, 58 S. W. 521, 22 Ky. L. Rep. 672); but neither a railroad company nor an abutting landowner can require the other to erect a division fence on its proportion of the dividing line or recover from the other the cost of its construction, unless written notice is given to build half of the fence, and the railroad company is not required to fence or contribute to the cost of a division fence unless the abutting land is improved or inclosed or if unimproved and uninclosed it has been previously inclosed on three sides with sufficient fences or fences and natural barriers which will prevent the egress of stock

guards;[80] and it is the duty of the company subsequently to keep them in a proper state of repair.[81] These statutes apply whether the railroad company acquires its right of way by purchase or condemnation,[82] and whether it has merely an easement or an absolute title;[83] but the requirement does not apply if, in the assessment of damages in condemnation proceedings, the landowner received compensation for such fences as the statute requires.[84] So also as the requirement is for the benefit of the landowner it may be waived by him.[85] If the statute requires

(Pitman *v.* Louisville, etc., R. Co., 104 S. W. 693, 31 Ky. L. Rep. 988). It is provided that the requirement shall not apply to any lands where the owner or his vendor has received compensation for fencing (Owensboro, etc., R. Co. *v.* Courts, *supra*); but this must be affirmatively shown and will not be presumed from a grant of a right of way where the deed makes no reference to fencing (Owensboro, etc., R. Co. *v.* Courts, *supra*; Owensboro, etc., R. Co. *v.* Townsend, 107 Ky. 291, 53 S. W. 662, 21 Ky. L. Rep. 997). It is further provided that if the railroad company has been given a right of way through the lands in question free of charge, the entire fencing between the right of way and the adjoining lands shall be done by and at the cost of the railroad company (Steadd *v.* Southern R. Co., *supra*); but this provision is held not to apply to cases where the right of way was acquired prior to the enactment of the statute (Ringo *v.* Chesapeake, etc., R. Co., 111 Ky. 679, 64 S. W. 522, 23 Ky. L. Rep. 941; Louisville, etc., R. Co. *v.* Thompson, 64 S. W. 515, 23 Ky. L. Rep. 936).

In New Hampshire the express requirement of the statute of 1840 that the railroad company should erect and maintain "a proper and sufficient fence on each side of the track" was omitted in the revision of the statutes and a provision inserted that if the railroad company should neglect to fence, the landowner might do so and recover double the value, but it is held that the change in the statute was not intended to affect the duty of the railroad company to construct a fence as required under the previous statute. Dean *v.* Sullivan R. Co., 22 N. H. 316.

80. *Georgia.*— Fenn *v.* Georgia, etc., R. Co., 116 Ga. 942, 43 S. E. 378.

Iowa.— Heskett *v.* Wabash, etc., R. Co., 61 Iowa 467, 16 N. W. 525; Smith *v.* Chicago, etc., R. Co., 38 Iowa 518.

Kansas.— Missouri Pac. R. Co. *v.* Manson, 31 Kan. 337, 2 Pac. 800.

Mississippi.— Kansas City, etc., R. Co. *v.* Spencer, 72 Miss. 491, 17 So. 168.

North Carolina.— Shepard *v.* Suffolk, etc., R. Co., 140 N. C. 391, 53 S. E. 137.

South Carolina.— Burnett *v.* Southern R. Co., 62 S. C. 281, 40 S. E. 679.

Tennessee.— Louisville, etc., R. Co. *v.* Timmons, 116 Tenn. 29, 91 S. W. 1116.

Texas.— Missouri, etc., R. Co. *v.* Wetz, 97 Tex. 581, 80 S. W. 988; Southwestern Telegraph, etc., Co. *v.* Krause, (Civ. App. 1906) 92 S. W. 431.

See 41 Cent. Dig. tit. "Railroads," § 315.

Under the Alabama statute requiring a railroad company to construct cattle-guards whenever "the owner of the land" through which the road passes shall demand them and show that they are necessary to prevent depredations of stock, the company is not required to construct them upon a demand made by a tenant of such lands. Louisville, etc., R. Co. *v.* Murphree, 129 Ala. 432, 29 So. 592.

Under the Kentucky statute providing that railroad companies shall erect and maintain cattle-guards at terminal points of fences constructed along their lines, but where there is a private passway across the railroad the landowner shall pay half the expense of the cattle-guards and gates, the owner to erect the gates and the railroad company the cattle-guards, the railroad company is not required to erect cattle-guards where its road enters and leaves a farm, there being no terminal point there of the right-of-way fence, or at a place where the owner has a passway and has not offered to pay half the expense. Payton *v.* Louisville, etc., R. Co., 115 Ky. 53, 72 S. W. 346, 24 Ky. L. Rep. 1896.

81. Fortune *v.* Chesapeake, etc., R. Co., 58 S. W. 711, 22 Ky. L. Rep. 749.

Notice to repair.—Under the Arkansas statute requiring a railroad company to construct cattle-guards and keep them in repair upon receiving ten days' notice in writing from the owner of the lands through which the road runs, notice to repair is as essential as notice to construct, and it must be given by the landowner and not by a tenant, unless the tenant is authorized by the landowner to give notice in the latter's name. Chicago, etc., R. Co. *v.* Adams, 84 Ark. 14, 106 S. W. 200.

82. Missouri, etc., R. Co. *v.* Manson, 31 Kan. 337, 2 Pac. 800; Shepard *v.* Suffolk, etc., R. Co., 140 N. C. 391, 53 S. E. 137; Missouri, etc., R. Co. *v.* Wetz, 97 Tex. 581, 80 S. W. 988.

In West Virginia it is held that a railroad company is not bound to fence its line from adjoining improved lands except where it has condemned land for its use. Grafton, etc., R. Co. *v.* Davisson, 45 W. Va. 12, 29 S. E. 1028, 72 Am. St. Rep. 799.

83. Chicago, etc., R. Co. *v.* Fitzhugh, 82 Ark. 179, 100 S. W. 1149; Missouri Pac. R. Co. *v.* Manson, 31 Kan. 337, 2 Pac. 800.

84. Welles *v.* Northern Cent. R. Co., 150 Pa. St. 620, 25 Atl. 51.

85. Louisville, etc., R. Co. *v.* Timmons, 116 Tenn. 29, 91 S. W. 1116, holding that during the interval that negotiations are pending between a railroad company and the landowner for the fencing of his land on a division of expenses in lieu of putting in cattle-guards, the landowner is deemed to have waived the absence of cattle-guards and cannot lawfully

the railroad company to fence its right of way through certain lands, it is not sufficient merely to construct cattle-guards where the road enters and leaves such lands,[86] or to keep a watchman on guard at such places;[87] and conversely if the statute requires the construction of cattle-guards where the road passes through a field or inclosure, it is not sufficient to fence the right of way through such land.[88] The duty of constructing fences or cattle-guards may be imposed upon the railroad company by a charter provision,[89] or contract or covenant in a deed of the right of way.[90]

b. Application and Effect of Fence or Stock Laws. The statutes relating to the construction and maintenance of partition fences are ordinarily held not to apply as between railroad companies and the owners of lands adjacent to the railroad right of way,[91] although a distinction has been made between cases where the railroad company has a mere easement and where it owns its right of way absolutely.[92] So also the existence of a stock law in a particular locality prohibiting stock from running at large does not affect the statutory duty of a railroad company to construct cattle-guards where its road enters and leaves inclosed lands.[93]

c. Time For Construction.[94] The Illinois statute requiring fences and cattle-guards allows the railroad company six months after the road or some part thereof is open for use within which to construct them.[95] Where the statutes require

complain of injuries suffered during the existence of such waiver.

86. Shotwell *v.* St. Joseph, etc., R. Co., 37 Mo. App. 654.

87. Shotwell *v.* St. Joseph, etc., R. Co., 37 Mo. App. 654.

88. Missouri, etc., R. Co. *v.* Wetz, 97 Tex. 581, 80 S. W. 988.

89. Holden *v.* Rutland, etc., R. Co., 30 Vt. 297; Clark *v.* Vermont, etc., R. Co., 28 Vt. 103.

90. Chicago, etc., R. Co. *v.* McEwen, 35 Ind. App. 251, 71 N. E. 926; Lake Erie, etc., R. Co. *v.* Griffin, 25 Ind. App. 138, 53 N. E. 1042, 57 N. E. 722; Hugo *v.* Great Western R. Co., 16 U. C. Q. B. 506.

Covenants in deed of right of way see *supra*, V, G, 6.

A statute requiring fencing does not affect or impair any contract obligations in this regard made prior to the enactment of the statute (Lake Erie, etc., R. Co. *v.* Griffin, 25 Ind. App. 138, 53 N. E. 1042, 57 N. E. 722); and a contract made after the statute is not without consideration as being for the performance of a duty already imposed by law, where it provides for fences and cattle-guards particularly described and is broader than the statutory requirement (Chicago, etc., R. Co. *v.* McEwen, 35 Ind. App. 251, 71 N. E. 926).

The purchaser of the property of a railroad company is not bound by a contract made by the railroad company for the construction of fences of which such purchaser had no notice, nor does a constitutional prohibition against the alienation of any "franchise" so as to relieve the franchise or property from liabilities of the grantor apply to such a case. Bailey *v.* Southern R. Co., 22 Ky. L. Rep. 1397, 60 S. W. 631, 61 S. W. 31.

91. *Illinois.*— Cannon *v.* Louisville, etc., R. Co., 34 Ill. App. 640.

Iowa.— Henry *v.* Dubuque, etc., R. Co., 2 Iowa 288.

Massachusetts.— Boston, etc., R. Co. *v.* Briggs, 132 Mass. 24.

New York.— *In re* Long Island R. Co., 3 Edw. 487.

United States.— Ward *v.* Paducah, etc., R. Co., 4 Fed. 862.

See 41 Cent. Dig. tit. "Railroads," § 316.

The Kentucky statute expressly puts railroad companies upon the same footing as other adjacent landowners and requires them to construct one half of the fence between the right of way and adjacent lands (Owensboro, etc., R. Co. *v.* Courts, 109 Ky. 154, 58 S. W. 521, 22 Ky. L. Rep. 672); but a landowner cannot recover damages for a failure of the railroad company to do so unless he has constructed or offered to construct his half of the fence (Parrish *v.* Louisville, etc., R. Co., 104 S. W. 690, 31 Ky. L. Rep. 1020; Hall *v.* Cincinnati Southern R. Co., 17 S. W. 207, 13 Ky. L. Rep. 436).

In New Jersey where a suit in equity was brought to compel a railroad company to construct fences the court, without expressly deciding as to the application of the partition fence law to railroad companies, dismissed the bill upon the ground that the statute provided a different remedy for its enforcement. See Vandorn *v.* New Jersey Southern R. Co., 42 N. J. Eq. 463, 8 Atl. 99.

92. Dean *v.* Sullivan R. Co., 22 N. H. 316, holding that while the statute would not apply if the railroad company had a mere easement, it does apply if the railroad company owns its right of way absolutely.

93. Shepard *v.* Suffolk, etc., R. Co., 140 N. C. 391, 53 S. E. 137.

94. As affecting liability for injury to animals see *infra*, X, H, 4, a, (VII).

95. St. Louis, etc., R. Co. *v.* Smith, 216 Ill. 339, 74 N. E. 1063; Cannon *v.* Louisville, etc., R. Co., 34 Ill. App. 640.

fencing but do not specify the time for their construction, the obligation is concurrent with the existence of the necessity for the protection which the requirement is designed to afford,[96] which necessity arises as soon as the railroad company has opened up its right of way through the fences and inclosures of the lands through which it passes.[97] The fences required should be constructed at least by the time the railroad is put in operation,[98] and while it cannot be said as a matter of law that the railroad company must construct them before this time,[99] it is not as a matter of law entitled to wait until such time,[1] or until the road is completed,[2] or so far completed as to enable it to transport materials thereon from a distance;[3] and where during the process of construction the railroad company makes openings through the fences of a landowner, if it does not then construct its fences it must adopt other measures to protect the landowner and prevent the escape of his stock and prevent other stock from trespassing upon his lands.[4] Where the duty of fencing is imposed by a contract which does not specify the time for their construction, they must be constructed within a reasonable time.[5]

d. At What Places Required.[6] Statutes requiring railroad companies to fence their tracks for the benefit of adjoining landowners apply although the road is constructed upon a bridge or trestle if there are openings through which stock could pass under the track from one side of the road to the other;[7] and a statute requiring the railroad company to fence where its road passes through inclosed lands applies although the fence inclosing such lands is not strictly a lawful fence,[8] unless the statute expressly requires that it shall be a lawful fence.[9] Under the Canadian statute the railroad company must fence if the lands through which the road passes are either improved or settled and inclosed.[10] Where the

96. Silver *v.* Kansas City, etc., R. Co., 78 Mo. 528, 47 Am. Rep. 118; Gordon *v.* Chicago, etc., R. Co., 44 Mo. App. 201; Shotwell *v.* St. Joseph, etc., R. Co., 37 Mo. App. 654.

97. Gardner *v.* Smith, 7 Mich. 410, 74 Am. Dec. 722; Silver *v.* Kansas City, etc., R. Co., 78 Mo. 528, 47 Am. Rep. 118; Shotwell *v.* St. Joseph, etc., R. Co., 37 Mo. App. 654; Bradly *v.* Great Western R. Co., 11 U. C. Q. B. 220.

The company is entitled to reasonable time, which period begins to run from the time of entry upon the lands for constructing the railroad. Rutledge *v.* Woodstock, etc., R. Co., 12 U. C. Q. B. 663.

98. Silver *v.* Kansas City, etc., R. Co., 78 Mo. 528, 47 Am. Rep. 118; Comings *v.* Hannibal, etc., R. Co., 48 Mo. 512; Clark *v.* Vermont, etc., R. Co., 28 Vt. 103.

99. Comings *v.* Hannibal, etc., R. Co., 48 Mo. 512; Holden *v.* Rutland, etc., R. Co., 30 Vt. 297; Clark *v.* Vermont, etc., R. Co., 28 Vt. 103.

1. Gardner *v.* Smith, 7 Mich. 410, 47 Am. Dec. 722; Silver *v.* Kansas City, etc., R. Co., 78 Mo. 528, 47 Am. Rep. 118; Bradly *v.* Great Western R. Co., 11 U. C. Q. B. 220.

The liability for failure to fence will attach with regard to any portion of the road as soon as a reasonable time for constructing the fence has elapsed after the necessity therefor has arisen (Wilkerson *v.* St. Louis, etc., R. Co., 106 Mo. App. 336, 80 S. W. 308); and not until the lapse of such reasonable time (Rutledge *v.* Woodstock, etc., R. Co., 12 U. C. Q. B. 663); what is a reasonable time being not a matter of law but of fact, depending upon the circumstances of the particular case including the accessibility and difficulty of procuring and transporting materials (Silver *v.* Kansas City, etc., R. Co., 78 Mo. 528, 47 Am. Rep. 118).

In Canada it is held that under the statute of 14 & 15 Vict. c. 51, which has two distinct provisions as to fences, with different objects, the first to keep animals from the track and the second to protect adjacent lands, the duty to fence under the latter provision might arise before the road was put in operation but not until after six months from the time the company had taken the land and after a request by the landowner to fence and a reasonable time to comply with such request. Elliott *v.* Buffalo, etc., R. Co., 16 U. C. Q. B. 289; Ferguson *v.* Buffalo, etc., R. Co., 16 U. C. Q. B. 296.

2. Bradly *v.* Great Western R. Co., 11 U. C. Q. B. 220.

3. Gordon *v.* Chicago, etc., R. Co., 44 Mo. App. 201.

4. Gardner *v.* Smith, 7 Mich. 410, 74 Am. Dec. 722; Comings *v.* Hannibal, etc., R. Co., 48 Mo. 512; Holden *v.* Rutland, etc., R. Co., 30 Vt. 297; Clark *v.* Vermont, etc., R. Co., 28 Vt. 103.

5. Lawton *v.* Fitchburg R. Co., 8 Cush. (Mass.) 230, 54 Am. Dec. 753.

6. As affecting liability for injury to animals see *infra*, X, H, 4, b.

7. Baker *v.* Chicago, etc., R. Co., 41 Mo. App. 260.

8. Biggerstaff *v.* St. Louis, etc., R. Co., 60 Mo. 567.

9. Missouri Pac. R. Co. *v.* Youngstrom, 47 Kan. 349, 27 Pac. 982.

10. Dreger *v.* Canadian Northern R. Co., 15 Manitoba 386, holding that under the Railway Act of 1903, requiring a company to

statute requires a railroad company to fence on both sides of its road, it has reference to the sides of the right of way and not merely the track,[11] and the fence must be constructed upon the outer edge of the right of way along the line where it meets the lands of the adjoining owner.[12] Where the statute expressly designates the points at which cattle-guards shall be constructed it must be complied with,[13] and if they cannot be located at the exact point required they must be located as near thereto as practicable.[14] Where the statute requires cattle-guards where a road passes through inclosed lands, it does not apply unless the lands are inclosed,[15] and if inclosed the inclosure must be a substantial one with a fence which will turn stock so as to make the cattle-guards of some practical benefit;[16] but if the fence is reasonably sufficient for this purpose it need not be a strictly lawful fence.[17] A statute requiring cattle-guards where the road enters or leaves inclosed lands applies to a town lot as well as lands in the country;[18] and a statute requiring cattle-guards where the road enters or leaves any improved or fenced land applies to lands fenced or improved after the construction of the railroad as well as before,[19] and is not limited to division fences between different owners but applies to fences dividing the lands of the same owner;[20] but if cattle-guards are constructed where the road enters or leaves a large inclosure, it is not necessary to construct others between the different parcels of land into which it is divided if there are no fences between such parcels,[21] or to construct other cattle-guards at a private crossing within such inclosure.[22] A statute requiring cattle-guards where the road enters the inclosure of a private owner does not apply where it runs between the lands of different owners without severing the lands of either;[23] and where the statute requires the construction of suitable cattle-guards they need not be constructed at a private crossing where there is no dividing fence and the railroad company has fenced its track and provided gates;[24] and where the statute requires cattle-guards on the dividing line between adjoining

fence, the words "not improved or settled, and inclosed," describing lands in respect to which the company is not required to fence, should either be construed to mean "not improved and not inclosed, or not settled and not inclosed," or should be read with the comma put after the word "improved" instead of after the word "settled," so that either way the obligation to fence exists as to land that is either: (1) Improved; or (2) settled and inclosed.

11. Ohio, etc., R. Co. *v.* People, 121 Ill. 483, 13 N. E. 236 [*affirming* 21 Ill. App. 23].

12. *Illinois.*— Ohio, etc., R. Co. *v.* People, 121 Ill. 483, 13 N. E. 236 [*affirming* 21 Ill. App. 23]; Wabash, etc., R. Co. *v.* Zeigler, 108 Ill. 304.

Indiana.— Evansville, etc., R. Co. *v.* Huffman, 32 Ind. App. 425, 70 N. E. 173.

Minnesota.— Gould *v.* Great Northern R. Co., 63 Minn. 37, 65 N. W. 125, 56 Am. St. Rep. 453, 30 L. R. A. 590.

Missouri.— McNear *v.* Wabash R. Co., 42 Mo. App. 14. But see Marshall *v.* St. Louis, etc., R. Co., 51 Mo. 138.

New York.— Ferris *v.* Van Buskirk, 18 Barb. 397.

See 41 Cent. Dig. tit. "Railroads," § 318.

Crooked or Virginia fence.— Where a railroad company is required to construct fences on the sides of its road the statute is complied with if the company erects a crooked or Virginia fence, three feet of the rails being upon the land of the adjacent owner and three feet upon the land of the railroad company alternately. Ferris *v.* Van Buskirk, 18 Barb. (N. Y.) 397.

13. Southwestern Tel., etc., Co. *v.* Krause, (Tex. Civ. App. 1906) 92 S. W. 431.

14. Missouri Pac. R. Co. *v.* Manson, 31 Kan. 337, 2 Pac. 800, holding that where, on account of depot grounds, cattle-guards cannot be located at the point where the railroad enters the lands to be protected, the company must construct them at the first point which will not interfere with the necessities and conveniences of the public and the company.

15. Louisville, etc., R. Co. *v.* Timmons, 116 Tenn. 29, 91 S. W. 1116.

16. Yazoo, etc., R. Co. *v.* Sallis, 89 Miss. 636, 42 So. 202; Louisville, etc., R. Co. *v.* Timmons, 116 Tenn. 29, 91 S. W. 1116.

17. St. Louis, etc., R. Co. *v.* Hale, 82 Ark. 175, 100 S. W. 1148.

18. Shepard *v.* Suffolk, etc., R. Co., 140 N. C. 391, 53 S. E. 137.

19. Heskett *v.* Wabash, etc., R. Co., 61 Iowa 467, 16 N. W. 525.

20. Smith *v.* Chicago, etc., R. Co., 38 Iowa 518.

21. Gibbons *v.* Yazoo, etc., R. Co., (Miss. 1902) 33 So. 5.

22. Gulf, etc., R. Co. *v.* Ellis, 85 Miss. 586, 38 So. 210.

23. Gulf, etc., R. Co. *v.* London, 3 Tex. App. Civ. Cas. § 426.

24. Clarke *v.* Ohio River R. Co., 39 W. Va. 732, 20 S. E. 696.

owners "when necessary to protect such lands," it is not necessary to construct them if the lands are not inclosed.[25] A statute requiring cattle-guards where a railroad crosses the line of any fence is not limited to fences existing at the time the road was built, but applies to those constructed at any time thereafter.[26]

e. Nature and Sufficiency. Where the statute does not specifically describe the character of fence to be constructed, it must be reasonably sufficient to turn all kinds of domestic animals.[27] The cattle-guards must also be such as are reasonably sufficient to prevent ingress or egress of stock,[28] but the railroad company is not obliged to make them absolutely impassable for stock,[29] and they are sufficient if as well adapted for this purpose as it is practicable to make them with due regard to the safety of the road-bed and the operation of trains thereon.[30] The type of cattle-guard should be that which is best calculated to keep out stock and at the same time be reasonably preservative of the safety of public travel.[31] The term "cattle-guard" has no precise signification,[32] but the requirement contemplates a protection of the entire right of way against the passage of stock to and from adjoining lands;[33] so that the mere construction of a pit under the track is not sufficient,[34] but the cattle-guards must by means of wing fences or otherwise be extended across the right of way to the adjoining lands,[35] the adjoining landowner not being required to extend his fences across the right of way to the track,[36] and in fact having no right to do so.[37]

4. Actions and Proceedings to Enforce Rights — a. Nature and Form of Remedy — (I) *Relative to Crossings.* Where the statute imposing the duty upon railroad companies with regard to the construction of private or farm crossings expressly provides the method of its enforcement, the statutory method must be followed;[38] but a remedy given by statute will not be held to be exclusive

25. Alabama Great Southern R. Co. *v.* Fowler, 104 Ga. 148, 30 S. E. 243.

26. Burnett *v.* Southern R. Co., 62 S. C. 281, 40 S. E. 679.

27. Lake Erie, etc., R. Co. *v.* Deutsch, 60 Ill. App. 144; Cotton *v.* Wiscasset, etc., R. Co., 98 Me. 511, 57 Atl. 785, holding that where the statute requires a "legal and sufficient" fence, it is not sufficient, although of legal height unless it will turn sheep as well as larger domestic animals.

28. Missouri Pac. R. Co. *v.* Manson, 31 Kan. 337, 2 Pac. 800; Yazoo, etc., R. Co. *v.* Harrington, 85 Miss. 366, 37 So. 1016.

29. Choctaw, etc., R. Co. *v.* Vosburg, 71 Ark. 232, 72 S. W. 574.

The fact that stock have gone over a cattle-guard is not conclusive as to its insufficiency. Choctaw, etc., R. Co. *v.* Goset, 70 Ark. 427, 68 S. W. 879.

30. Choctaw, etc., R. Co. *v.* Vosburg, 71 Ark. 232, 72 S. W. 574; Choctaw, etc., R. Co. *v.* Goset, 70 Ark. 427, 68 S. W. 879.

31. Yazoo, etc., R. Co. *v.* Harrington, 85 Miss. 366, 37 So. 1016, holding that a Ross surface cattle-guard, although better than a pit as regards the safety of travel, is not a compliance with the statute unless it is reasonably efficient to keep out stock.

32. Heskett *v.* Wabash, etc., R. Co., 61 Iowa 467, 16 N. W. 525.

33. Heskett *v.* Wabash, etc., R. Co., 61 Iowa 467, 16 N. W. 525; Missouri Pac. R. Co. *v.* Morrow, 32 Kan. 217, 4 Pac. 87; Grace *v.* Gulf, etc., R. Co., (Miss. 1899) 25 So. 875; Kansas City, etc., R. Co. *v.* Spencer, 72 Miss. 491, 17 So. 168.

34. Heskett *v.* Wabash, etc., R. Co., 61 Iowa 467, 16 N. W. 525; Missouri Pac. R. Co. *v.* Manson, 31 Kan. 337, 2 Pac. 800; Kansas City, etc., R. Co. *v.* Spencer, 72 Miss. 491, 17 So. 168.

35. Heskett *v.* Wabash, etc., R. Co., 61 Iowa 467, 16 N. W. 525; Missouri Pac. R. Co. *v.* Manson, 31 Kan. 337, 2 Pac. 800; Louisville, etc., R. Co. *v.* Timmons, 116 Tenn. 29, 91 S. W. 1116.

If the railroad company has only an easement for a right of way of one hundred feet on each side of its track and can only occupy the land necessary for its purposes, it is only required to construct the wing fences connecting with its cattle-guards to where the right of way is being used and occupied by the adjoining landowner. Louisville, etc., R. Co. *v.* Bigbee, 100 Tenn. 204, 45 S. W. 671.

36. Missouri Pac. R. Co. *v.* Morrow, 32 Kan. 217, 4 Pac. 87.

37. Heskett *v.* Wabash, etc., R. Co., 61 Iowa 467, 16 N. W. 525.

38. Baltimore, etc., R. Co. *v.* Campbell, 109 Ill. App. 25; Chicago, etc., R. Co. *v.* Eichman, 47 Ill. App. 156.

Under the Illinois statute providing that on failure or refusal of a railroad company to construct crossings the landowner entitled thereto may after notice to the company construct it and recover from the company double the value thereof, if a railroad company removes a farm crossing without providing another the landowner cannot recover the cost of constructing the crossing where he has not given any notice to the company or constructed crossings himself, since the

unless the language of the statute so requires.[39] If a railroad company fails to construct crossings where it is its duty to do so, the landowner may sue for and recover damages,[40] or the railroad company may be compelled by mandamus to construct crossings,[41] or to construct crossings of such a character as the landowner is entitled to,[42] or such duty may be enforced by a suit in equity,[43] or the railroad commissioners may take cognizance of the matter and make an order which may be enforced by the court.[44] Where the landowner is entitled to a crossing and one has been constructed he may sue to enjoin the railroad company from removing, closing, or obstructing it,[45] or if the company has already done so it may be compelled to restore the same by mandamus,[46] or by a suit in equity,[47] or the landowner may sue for damages.[48] While the court may compel a railroad

remedy must be enforced as the statute prescribes. Baltimore, etc., R. Co. *v.* Campbell, 109 Ill. App. 25.

But a remedy provided in case of statutory crossings does not affect the right of a landowner to sue for specific performance of an agreement as to the construction of crossings which is broader in its provisions than the requirements of the statute. Baltimore, etc., R. Co. *v.* Brubaker, 217 Ill. 462, 75 N. E. 523.

In Massachusetts the statute authorizes a recovery of double the damages sustained by reason of the neglect of a railroad company to comply with an order of the county commissioners requiring the construction of crossings, etc., for the benefit of the owner of the land through which the road passes, but such action cannot be maintained unless the time within which the structures are to be made is prescribed in the order. Keith *v.* Cheshire R. Co., 1 Gray (Mass.) 614.

39. Swinney *v.* Chicago, 123 Iowa 219, 98 N. W. 635, holding that a statutory right to apply to the railroad commissioners for an order relative to the construction of a crossing does not preclude a remedy by mandamus without first making such application.

A statute authorizing the landowner to construct the crossing upon a failure of the railroad company to do so and recover therefor from the railroad company is a merely cumulative remedy. Green *v.* Morris, etc., R. Co., 24 N. J. L. 486.

40. Louisville, etc., R. Co. *v.* Pittman, 53 S. W. 1040, 21 Ky. L. Rep. 1037; Reist *v.* Grand Trunk R. Co., 15 U. C. Q. B. 355. See also *infra*, VI, J, 1, h.

Plaintiff's conveyance of the fee in the land, retaining a life-estate after instituting the suit and without reserving any right to prosecute the same, does not affect his right to sue for damages for breach of a contract to construct crossings. Cincinnati Southern R. Co. *v.* Hudson, 88 Ky. 480, 11 S. W. 509, 10 Ky. L. Rep. 1043.

Character of crossing.— Where a railroad company fails to maintain a crossing of the character which it has contracted to maintain the landowner may sue for and recover damages. Louisville, etc., R. Co. *v.* Pittman, 64 S. W. 460, 23 Ky. L. Rep. 877.

41. Swinney *v.* Chicago, etc., R. Co., 123 Iowa 219, 98 N. W. 635.

42. Boggs *v.* Chicago, etc., R. Co., 54 Iowa 435, 6 N. W. 744.

43. Baltimore, etc., R. Co. *v.* Brubaker, 217 Ill. 462, 75 N. E. 523.

44. State *v.* Mason, etc., R. Co., 85 Iowa 516, 52 N. W. 490.

The order of the railroad commissioners must be reasonable or it will not be enforced by the court. State *v.* Burlington, etc., R. Co., 99 Iowa 565, 68 N. W. 819.

45. Stone *v.* Missouri Pac. R. Co., 75 Kan. 600, 90 Pac. 251; Chicago, etc., R. Co. *v.* Wynkoop, 73 Kan. 590, 85 Pac. 595; Hamlin *v.* New York, etc., R. Co., 176 Mass. 514, 57 N. E. 1006; Lakenan *v.* Hannibal, etc., R. Co., 36 Mo. App. 363; Kraeer *v.* Pennsylvania R. Co., 218 Pa. St. 569, 67 Atl. 871; Hespenheide *v.* King, 30 Pittsb. Leg. J. N. S. (Pa.) 171. See also Cleveland, etc., R. Co. *v.* Munsell, 192 Ill. 430, 61 N. E. 374.

A railroad company will not be enjoined from disturbing a passageway under the trestle work of its road where there is no evidence that at the time plaintiff's land was taken there was any agreement by defendant that it would give him a crossing at the point in question. Plaintiff must be left to his statutory remedy to compel defendant to construct a causeway. Griswold *v.* Baltimore, etc., R. Co., 3 Del. Co. (Pa.) 549.

46. State *v.* Wisconsin Cent. R. Co., 123 Wis. 551, 102 N. W. 16.

47. Baltimore, etc., R. Co. *v.* Brubaker, 217 Ill. 462, 75 N. E. 523; Louisville, etc., R. Co. *v.* Brooks, 77 S. W. 693, 25 Ky. L. Rep. 1307; Hamlin *v.* New York, etc., R. Co., 176 Mass. 514, 57 N. E. 1006; Marsh *v.* Lehigh Valley R. Co., 215 Pa. St. 141, 64 Atl. 366.

48. Farwell *v.* Boston, etc., R. Co., 72 N. H. 335, 56 Atl. 751; Dubbs *v.* Philadelphia, etc., R. Co., 148 Pa. St. 66, 23 Atl. 883. See also *infra*, VI, J, 1, h.

The temporary closing of a crossing by a tenant of the landowner is not sufficient to show an intent on the part of the landowner to abandon his right or to authorize the railroad company to close up the crossing. Farwell *v.* Boston, etc., R. Co., 72 N. H. 335, 56 Atl. 751.

It is a practical destruction of a crossing, entitling the landowner to sue for damages, where the railroad company changes the grade of its road-bed so that the crossing cannot be used without the construction of approaches which will extend back upon plaintiff's land. Chesapeake, etc., R. Co. *v.* Richardson, 98 S. W. 1042, 30 Ky. L. Rep. 426.

company specifically to perform its duty with regard to the construction and maintenance of crossings,[49] and will do so where the conditions authorizing such a decree are present and other remedies are inadequate,[50] such a decree is ordinarily discretionary with the court and in many cases may properly be denied and plaintiff left to his action for damages,[51] whether the duty is imposed by statute,[52] or by agreement.[53] If a landowner is using a crossing which he has no right to use, the railroad company may sue to enjoin him from so doing,[54] or maintain an action of trespass for the wrongful entry upon its property.[55]

(II) *Relative to Fences and Cattle-Guards.* Where a railroad company fails to construct or maintain fences or cattle-guards as required by statute, the landowner may sue for damages;[56] but he is not limited to such remedy and may sue to compel the railroad company specifically to perform its duty,[57] and a performance of such duty may be enforced by mandamus,[58] or mandatory

Notice to railroad company of construction. — Under a statute giving a landowner a right of action for damages for the obstruction of a private way, and requiring the landowner to give notice of the obstruction to the railroad company, the notice need not, in the absence of any express requirement, point out the particulars and extent of the obstruction. Greenwood *v.* Wilton, etc., R. Co., 23 N. H. 261.

49. Baltimore, etc., R. Co. *v.* Brubaker, 217 Ill. 462, 75 N. E. 523; Louisville, etc., R. Co. *v.* Brooks, 77 S. W. 693, 25 Ky. L. Rep. 1307.

Compelling performance by injunction. — Where a railroad company agrees with a landowner to construct a crossing upon the same level as an existing private way which will be crossed by the railroad, and is proceeding to construct it upon a different level, the company may be enjoined from constructing it at a different level or from interfering with the existing way except upon constructing a crossing of the character provided by the contract. Foster *v.* Birmingham, etc., R. Co., 2 Wkly. Rep. 378.

50. Baltimore, etc., R. Co. *v.* Brubaker, 217 Ill. 462, 75 N. E. 523; Louisville, etc., R. Co. *v.* Brooks, 77 S. W. 693, 25 Ky. L. Rep. 1307.

51. Goding *v.* Bangor, etc., R. Co., 94 Me. 542, 48 Atl. 114; Speer *v.* Erie R. Co., 68 N. J. Eq. 615, 60 Atl. 197 [*reversing* 64 N. J. Eq. 601, 54 Atl. 539]; Murdfeldt *v.* New York, etc., R. Co., 102 N. Y. 703, 7 N. E. 404; Clarke *v.* Rochester, etc., R. Co., 18 Barb. (N. Y.) 350.

Specific performance will be denied where the crossing would be of little benefit to the landowner and its construction would impose a disproportionate burden upon the railroad company (Goding *v.* Bangor, etc., R. Co., 94 Me. 542, 48 Atl. 114; Murdfeldt *v.* New York, etc., R. Co., 102 N. Y. 703, 7 N. E. 404; Clarke *v.* Rochester, etc., R. Co., 18 Barb. (N. Y.) 350; Martin *v.* Maine Cent. R. Co., 19 Quebec Super. Ct. 561); or where a crossing constructed and located as agreed upon would, owing to the existing conditions, greatly endanger the safety of public travel on the railroad (Goding *v.* Bangor, etc., R. Co., *supra*); or when the landowner has never designated the place for the crossing which by the terms of the contract was a condition precedent (Johnson *v.* Ohio River R. Co., 61 W. Va. 141, 56 S. E. 200). So also if a railroad company has located the crossing at an improper place and it appears that the cost of constructing another crossing at a different place would exceed plaintiff's damages, due to the existing location, it will not be required to do so (Wademan *v.* Albany, etc., R. Co., 51 N. Y. 568); and where the railroad company changes the grade of its road under compulsion of an order of court, so that a grade crossing of the character agreed on cannot be provided, and the landowner refuses to accept a grade crossing at a different level with approaches, and insists upon an under crossing which would be much more expensive to construct, the court will not compel the construction of such a crossing but leave the landowner to his action for damages (Speer *v.* Erie R. Co., 68 N. J. Eq. 615, 60 Atl. 197 [*reversing* 64 N. J. Eq. 601, 54 Atl. 539]).

52. Clarke *v.* Rochester, etc., R. Co., 18 Barb. (N. Y.) 350.

53. Speer *v.* Erie R. Co., 68 N. J. Eq. 615, 60 Atl. 197 [*reversing* 64 N. J. Eq. 601, 54 Atl. 539]; Johnson *v.* Ohio River R. Co., 61 W. Va. 141, 56 S. E. 200.

A contract to construct crossings will not be enforced where the contract provided that the company should make such crossings as the landowner should within one month notify the company in writing to make, and the landowner did not give such notice within the time limited. Darnley *v.* London, etc., R. Co., L. R. 2 H. L. 43, 36 L. J. Ch. 404, 16 L. T. Rep. N. S. 217, 15 Wkly. Rep. 817.

54. New York, etc., R. Co. *v.* Comstock, 60 Conn. 200, 22 Atl. 511.

55. Connecticut, etc., R. Co. *v.* Holton, 32 Vt. 43.

56. Atchison, etc., R. Co. *v.* Billings, 77 Kan. 119, 93 Pac. 590; Gould *v.* Great Northern R. Co., 63 Minn. 37, 65 N. W. 125, 56 Am. St. Rep. 453, 30 L. R. A. 590.

57. Jones *v.* Seligman, 81 N. Y. 190 [*affirming* 16 Hun 230].

58. Ohio, etc., R. Co. *v.* People, 121 Ill. 483, 13 N. E. 236 [*affirming* 21 Ill. App. 23], holding that where the railroad company has constructed a fence, but not at the proper place, it may be compelled by mandamus to locate it properly.

injunction.[59] In some jurisdictions a failure to fence or construct cattle-guards is made the subject of a penalty,[60] or the landowner is authorized to construct them himself and recover from the railroad company.[61] Where the duty is imposed by contract the landowner may sue for damages for breach of the contract,[62] or in equity for specific performance thereof;[63] but ejectment is not a proper remedy where the landowner permits the railroad company to enter upon his land and construct its road without objection, and the agreement to fence is a condition subsequent and not precedent.[64] On breach of a contract to construct fences the landowner may recover as damages the reasonable cost of their construction without first constructing them;[65] and where there has been a breach of the contract and an action instituted, the railroad company cannot defeat plaintiff's right to recover by subsequently constructing the fences unless it is done with plaintiff's consent,[66] or he accepts what is done as a partial or complete discharge of the agreement.[67]

b. Parties, Pleading, and Trial. An action to compel a railroad company to construct crossings can only be maintained by a person who is entitled to the benefit of the statute,[68] and only those interested in the subject-matter of the litigation are necessary parties.[69] In an action for damages for failure to construct crossings the complaint must show such an estate or interest in plaintiff as imposes a duty to him on the part of defendant to construct them.[70] In an action to compel the construction of a fence required by statute it is not necessary for the complaint to negative any exceptions in the statute imposing such duty.[71] It is ordinarily a question of fact for the jury or the court trying the case without a jury whether under the circumstances of the particular case crossings which the railroad company has provided are suitable and sufficient,[72] properly located,[73] and of sufficient number,[74] or where the statute requires crossings for "necessary plantation roads," whether a particular road is necessary.[75] It is also a question

Where right is disputed.— Where on mandamus to compel a railroad company to install cattle-guards it is admitted that some of the cattle-guards in question are necessary, but it is contended that the others are not necessary, the writ will be made peremptory as to those admitted to be necessary and the suit dismissed as to the others, with leave to bring an ordinary suit. State *v.* Colorado Southern, etc., R. Co., 120 La. 9, 44 So. 905.

59. Atchison, etc., R. Co. *v.* Billings, 77 Kan. 119, 93 Pac. 590.

60. See *infra*, X, B, 7, a.

61. See *infra*, VI, E, 5.

62. Taylor *v.* Northern Pac. Coast R. Co., 56 Cal. 317; Longansport, etc., R. Co. *v.* Wray, 52 Ind. 578; Lawton *v.* Fitchburg R. Co., 8 Cush. (Mass.) 230, 54 Am. Dec. 753; Baker *v.* Chicago, etc., R. Co., 57 Mo. 265.

Measure of damages see *infra*, VI, E, 4, c.

63. Baker *v.* Chicago, etc., R. Co., 57 Mo. 265.

But specific performance will not be decreed where it would impose a hardship upon the railroad company without any corresponding benefit to the landowner. Johnson *v.* Ohio River R. Co., 61 W. Va. 141, 56 S. E. 200.

64. Baker *v.* Chicago, etc., R. Co., 57 Mo. 265.

65. Taylor *v.* Northern Pac. Coast R. Co., 56 Cal. 317; Logansport, etc., R. Co. *v.* Wray, 52 Ind. 578.

66. Indiana, etc., R. Co. *v.* Adams, 112 Ind. 302, 14 N. E. 80; Lawton *v.* Fitchburg R. Co., 8 Cush. (Mass.) 230, 54 Am. Dec. 753.

67. Indiana, etc., R. Co. *v.* Adams, 112 Ind. 302, 14 N. E. 80.

68. Jones Fertilizing Co. *v.* Cleveland, etc., R. Co., 2 Ohio S. & C. Pl. Dec. 511, 7 Ohio N. P. 245, holding that, under a statute providing that "a person owning" a certain amount of land in one tract through which a railroad passes may require crossings, a lessee cannot maintain the action.

69. Cleveland, etc., R. Co. *v.* Hobbie, 61 Ill. App. 396, holding that in a suit to compel performance of an agreement to construct a crossing, persons having an interest in the land at the time of the agreement, but who have quitclaimed all their interest to plaintiff, are not necessary parties.

70. Marsh *v.* Rutland R. Co., 80 Vt. 397, 67 Atl. 1098.

71. Steadd *v.* Southern R. Co., 109 Ky. 214, 58 S. W. 581, 22 Ky. L. Rep. 713.

72. Gray *v.* Burlington, etc., R. Co., 37 Iowa 119; Ellworth *v.* New Jersey Cent. R. Co., 34 N. J. L. 93; Kendall *v.* Chicago, etc., R. Co., (Tex. Civ. App. 1906) 95 S. W. 757.

73. Jones *v.* Seligman, 81 N. Y. 190 [*affirming* 16 Hun 230]; Buffalo Stone, etc., Co. *v.* Delaware, etc., R. Co., 7 N. Y. Suppl. 604 [*affirmed* in 130 N. Y. 152, 29 N. E. 121].

74. Alabama, etc., R. Co. *v.* Odeneal, 73 Miss. 34, 19 So. 202; Jones *v.* Seligman, 81 N. Y. 190 [*affirming* 16 Hun 230].

75. Alabama, etc., R. Co. *v.* Odeneal, 73 Miss. 34, 19 So. 202.

of fact for the jury whether a cattle-guard constructed is reasonably sufficient to turn stock;[76] and, in an action for failure to maintain a fence which the railroad company has removed, if it is contended that the action is barred by the statute of limitations, but the evidence as to the time of removal is conflicting, this question should be submitted to the jury.[77]

c. Damages.[78] The measure of damages for breach of a contract on the part of a railroad company to construct fences, cattle-guards, or crossings is not the difference in the value of the land with or without such improvements,[79] but is what it would reasonably cost to construct the same.[80] Plaintiff is not, however, limited in his recovery to the cost of construction;[81] but he may also recover damages for the inconvenience which he has already sustained,[82] and special damages occasioned by the failure of the railroad company to construct or maintain the fences, etc., such as for injuries to stock, crops, or pastures.[83] The measure of damages for the necessary destruction of a crossing in changing the grade of the railroad tracks depends upon the character and use of the crossing.[84]

5. Construction by Landowner and Recovery From Railroad Company — a. In General. In some jurisdictions the statutes provide that if the railroad company fails or refuses to construct the fences required, the landowner may do so and recover therefor from the railroad company,[85] and there are similar provisions in regard to cattle-guards,[86] and farm crossings.[87] The statutes also authorize

76. Choctaw, etc., R. Co. *v.* Goset, 70 Ark. 427, 68 S. W. 879.

77. Hunter *v.* Burlington, etc., R. Co., 76 Iowa 490, 91 N. W. 305.

78. **Damages for injuries** generally see *infra*, VI, J, 2, g.

79. St. Louis, etc., R. Co. *v.* Lurton, 72 Ill. 118; Cincinnati Southern R. Co. *v.* Hudson, 88 Ky. 480, 11 S. W. 509, 10 Ky. L. Rep. 1043; Erie, etc., R. Co. *v.* Johnson, 101 Pa. St. 555. But see Brown *v.* Pittsburg, etc., R. Co., 29 Pa. Super. Ct. 131, holding that where a railroad company agrees, in consideration of a grant of a right of way, to construct a farm crossing, but fails to do so for the reason that it has constructed a public crossing which the landowner could use, the measure of damages for the breach of the agreement is the difference between the market value of the farm with a suitable farm crossing and its market value without any other farm crossing than that at the public crossing.

80. *California.*— Taylor *v.* Northern Pac. Coast R. Co., 56 Cal. 317.

Illinois.— St. Louis, etc., R. Co. *v.* Lurton, 72 Ill. 118.

Indiana.— Louisville, etc., R. Co. *v.* Power, 119 Ind. 269, 21 N. E. 751; Logansport, etc., R. Co. *v.* Wray, 52 Ind. 578.

Kentucky.— Cincinnati Southern R. Co. *v.* Hudson, 88 Ky. 480, 11 S. W. 509, 10 Ky. L. Rep. 1043.

Massachusetts.— Lawton *v.* Fitchburg, etc., R. Co., 8 Cush. 230, 54 Am. Dec. 753.

See 41 Cent. Dig. tit. "Railroads," § 325.

Contract to build and maintain fence.— Where a railroad company agrees to build and maintain a fence through a farm and only builds the fence, the measure of damages in an action for breach of the agreement is the annual cost of keeping the fence in repair. Erie, etc., R. Co. *v.* Johnson, 101 Pa. St. 555.

81. Louisville, etc., R. Co. *v.* Sumner, 106 Ind. 55, 5 N. E. 404, 55 Am. Rep. 719.

82. Cincinnati Southern R. Co. *v.* Hudson, 88 Ky. 480, 11 S. W. 509, 10 Ky. L. Rep. 1043.

83. Chicago, etc., R. Co. *v.* Ward, 16 Ill. 522; Louisville, etc., R. Co. *v.* Power, 119 Ind. 269, 21 N. E. 751; Chicago, etc., R. Co. *v.* Barnes, 116 Ind. 126, 18 N. E. 459; Louisville, etc., R. Co. *v.* Sumner, 106 Ind. 55, 5 N. E. 404, 55 Am. Rep. 719.

84. Speer *v.* Erie R. Co., (N. J. 1907) 65 Atl. 1024 [*reversing* 70 N. J. Eq. 318, 62 Atl. 943].

85. *Illinois.*— Toledo, etc., R. Co. *v.* Sieberns, 63 Ill. 217.

Indiana.— Chicago, etc., R. Co. *v.* Irons, 38 Ind. App. 196, 78 N. E. 207; Chicago, etc., R. Co. *v.* Croy, 33 Ind. App. 461, 71 N. E. 671; Midland R. Co. *v.* Gascho, 7 Ind. App. 407, 34 N. E. 643.

Kansas.— Missouri Pac. R. Co. *v.* Youngstrom, 47 Kan. 349, 27 Pac. 982.

Missouri.— Fletcher *v.* St. Louis, etc., R. Co., 73 Mo. 142.

Ohio.— Pittsburg, etc., R. Co. *v.* Bosworth, 46 Ohio St. 81, 18 N. E. 533, 2 L. R. A. 199 [*affirming* 1 Ohio Cir. Ct. 69, 1 Ohio Cir. Dec. 42]; Millhouse *v.* Chicago, etc., R. Co., 7 Ohio Cir. Ct. 466, 4 Ohio Cir. Dec. 682.

See 41 Cent. Dig. tit. "Railroads," § 328.

Either the owner or occupant of the lands may, under the Illinois statute, construct fences upon a failure of the railroad company after notice to do so and recover therefor. Indiana, etc., R. Co. *v.* Sampson, 31 Ill. App. 513.

86. Texas, etc., R. Co. *v.* Young, 60 Tex. 201.

87. Baltimore, etc., R. Co. *v.* Campbell, 109 Ill. App. 25; Birlew *v.* St. Louis, etc., R. Co., 104 Mo. App. 561, 79 S. W. 490; Morris, etc. R. Co. *v.* Green, 15 N. J. Eq. 469.

Approaches to crossings.— Since it is the

the making of necessary repairs by the landowner,[88] and if the railroad company constructs a fence and it is not such as the law requires, the landowner may make it sufficient,[89] or if the railroad company undertakes to repair the fence and does not repair it properly, the landowner may make such further repairs as are necessary,[90] or if the fence is permitted to become so defective that it cannot be repaired the landowner may build a new fence and recover therefor.[91] The statutes in some cases authorize a recovery of double the value,[92] or the recovery of attorney's fees.[93] The landowner cannot recover compensation for any fencing which it was not the duty of the railroad company to provide,[94] as where his lands were not inclosed by a lawful fence and the statute only requires the company to fence its track in such cases; [95] and if the statute allows a certain period after the road is completed before any liability for failure to fence will attach, the landowner cannot fence and recover therefor before the expiration of this period.[96] So there can be no recovery under the statute for a fence constructed by the landowner where the cost of such fencing as the statute requires was included in his assessment of damages in the condemnation proceedings,[97] or the landowner agreed to construct them and received compensation therefor; [98] but a personal contract on the part of the landowner to construct fences will not prevent his grantee who takes without notice of the contract from fencing and recovering therefor from the railroad company.[99] The statutes authorizing the landowner to construct or repair fences or cattle-guards are ordinarily held to be merely permissive, affording a cumulative remedy, and not to affect his right to recover damages sustained by reason of the failure of the railroad company to construct or repair them,[1] and the same rule applies to similar statutes relating to farm crossings; [2] but in an action for damages sustained plaintiff cannot also recover the cost of future construction which at the time of the action he has not performed.[3]

b. Notice to Railroad Company. The statutes ordinarily require the land-

duty of the railroad company to construct approaches to crossings the landowner, if he constructs them, may recover therefor as well as for the construction of the crossing. Birlew *v.* St. Louis, etc., R. Co., 104 Mo. App. 561, 79 S. W. 490.

88. Lake Erie, etc., R. Co. *v.* Deutsch, 60 Ill. App. 144; Vandalia R. Co. *v.* Fetters, 40 Ind. App. 615, 82 N. E. 978; Terre Haute, etc., R. Co. *v.* Salmon, 34 Ind. App. 564, 73 N. E. 268; Texas, etc., R. Co. *v.* Young, 60 Tex. 201.

The fact that the landowner's other fences are out of repair does not affect the duty of the railroad company to keep its fence along the right of way in repair or the right of the landowner to repair it and recover therefor upon failure of the railroad company after notice to do so. Vandalia R. Co. *v.* Fetters, 40 Ind. App. 615, 82 N. E. 978.

89. Lake Erie, etc., R. Co. *v.* Deutsch, 60 Ill. App. 144; Chicago, etc., R. Co. *v.* Croy, 33 Ind. App. 461, 71 N. E. 671.

90. Chicago, etc., R. Co. *v.* Irons, 38 Ind. App. 196, 78 N. E. 207.

91. Terre Haute, etc., R. Co. *v.* Erdel, 163 Ind. 348, 71 N. E. 960; Vandalia R. Co. *v.* Seltenright, 40 Ind. App. 659, 82 N. E. 980; Terre Haute, etc., R. Co. *v.* Salmon, 34 Ind. App. 564, 73 N. E. 268.

92. Lake Erie, etc., R. Co. *v.* Deutsch, 60 Ill. App. 144.

93. Vandalia R. Co. *v.* Stephens, 39 Ind. App. 11, 78 N. E. 1055; Terre Haute, etc., R. Co. *v.* Salisbury, 38 Ind. App. 100, 77 N. E. 1097.

Proof that plaintiff employed an attorney is not essential to authorize the allowance of an attorney's fee. If his complaint was signed by an attorney, who represented him in the subsequent proceedings, it is sufficient. Terre Haute, etc., R. Co. *v.* Salisbury, 38 Ind. App. 100, 77 N. E. 1097.

94. Welles *v.* Northern Cent. R. Co., 150 Pa. St. 620, 25 Atl. 51.

95. Missouri Pac. R. Co. *v.* Youngstrom, 47 Kan. 349, 27 Pac. 982.

96. McNear *v.* Wabash R. Co., 42 Mo. App. 14.

97. Welles *v.* Northern Cent. R. Co., 150 Pa. St. 620, 25 Atl. 51.

98. Warner *v.* Baltimore, etc., R. Co., 31 Ohio St. 265.

99. Pittsburg, etc., R. Co. *v.* Bosworth, 46 Ohio St. 81, 18 N. E. 533, 2 L. R. A. 199 [*affirming* 1 Ohio Cir. Ct. 69, 1 Ohio Cir. Dec. 42].

1. Buttles *v.* Chicago, etc., R. Co., 43 Mo. App. 280; San Antonio, etc., R. Co. *v.* Knoepfli, 82 Tex. 270, 17 S. W. 1052; Texas, etc., R. Co. *v.* Young, 60 Tex. 201. But see Millhouse *v.* Chicago, etc., R. Co., 7 Ohio Cir. Ct. 466, 4 Ohio Cir. Dec. 682.

2. Sheridan *v.* Atchison, etc., R. Co., 56 Mo. App. 68; Green *v.* Morris, etc., R. Co., 24 N. J. L. 486.

3. Baltimore, etc., R. Co. *v.* Campbell, 109 Ill. App. 125.

owner before proceeding to construct or repair fences or cattle-guards to give a certain notice to the railroad company,[4] and a compliance with this requirement is essential to a recovery;[5] but if the landowner has given notice of an intention to repair fences and it is found that they are too defective to be repaired, he may proceed to construct new ones.[6] If the statute does not provide within what time after notice the landowner shall construct or repair the fence, a delay, if not prejudicial to the rights of the railroad company, will not affect his right to recover.[7] In Indiana the statute further requires that after the construction or repairs the landowner shall furnish the railroad company an itemized statement of the expense a certain number of days before suit.[8]

c. Character and Location of Work Done by Landowner. Where a landowner constructs a fence upon failure of the railroad company to do so he must, in order to recover therefor, construct such a fence as the railroad company is required to construct;[9] but he is not obliged to construct the cheapest kind of fence which will satisfy the requirement.[10] So also he need not fence both sides of the track, although the railroad company is required to do so,[11] or build the

4. Malott *v.* Mapes, 111 Ill. App. 340; Chicago, etc., R. Co. *v.* Abbott, 10 Ind. App. 99, 37 N. E. 557; Pitman *v.* Louisville, etc., R. Co., 104 S. W. 693, 31 Ky. L. Rep. 988.

Under the Missouri statute it is not necessary to give notice of the landowner's intention to build a fence where the railroad company has failed to do so, but only in the case of repairs. McNear *v.* Wabash R. Co., 42 Mo. App. 14.

Form, contents, and sufficiency of notice.— The notice should show on its face the right of the person giving it to have the railroad company build the fences, but where the evidence shows that it was given by the owner of the land it will be held sufficient. Indiana, etc., R. Co. *v.* Sampson, 31 Ill. App. 513. If the statute requires the notice to "describe the lands" on which the fence is to be built, but does not prescribe any particular form of description, it is sufficient if it clearly indicates to the railroad company the land intended. Lake Erie, etc., R. Co. *v.* Deutsch, 60 Ill. App. 144. The Indiana statute requires that a notice for repairs must state the probable cost but contains no such requirement in regard to the construction of a fence, and where a fence is so defective that a new one must be built the notice need not state the probable cost. Vandalia R. Co. *v.* Kanarr, 38 Ind. App. 146, 77 N. E. 1135. Where the statute provides that the company shall construct the fence within a certain time after notice, the notice need not demand that it be constructed within this time. Indiana, etc., R. Co. *v.* Sampson, 31 Ill. App. 513. A notice addressed to the railroad company by its initials instead of hy its full name is sufficient (Indiana, etc., R. Co. *v.* Sampson, *supra*); and a mistake in the name of the railroad company in the notice is immaterial if it is of such a character that the company would not be misled and the notice is served upon the proper agent of the company (Vandalia R. Co. *v.* Kanarr, 38 Ind. App. 146, 77 N. E. 1135). A notice in regard to the construction of farm crossings should specify with reasonable certainty what crossings are required. Green *v.* Morris, etc., R. Co., 24 N. J. L. 486.

Service of notice.— One is a station agent within the statute providing for service of notice to build fences who sells tickets for the railroad company on commission, regardless of whether trains stop regularly at such station or the amount of business transacted there, where the company has advertised to the public that it would receive passengers at such station and that tickets should be purchased of such person. Malott *v.* Mapes, 111 Ill. App. 340.

5. Chicago, etc., R. Co. *v.* Abbott, 10 Ind. App. 99, 37 N. E. 557; Pitman *v.* Louisville, etc., R. Co., 104 S. W. 693, 31 Ky. L. Rep. 988.

6. Terre Haute, etc., R. Co. *v.* Erdel, 163 Ind. 348, 71 N. E. 960; Terre Haute, etc., R. Co. *v.* Salmon, 34 Ind. App. 564, 73 N. E. 268.

7. Terre Haute, etc., R. Co. *v.* Earhart, 35 Ind. App. 56, 73 N. E. 711, holding that a delay of two years when in no way detrimental to the rights of the railroad company will not affect the right to recover.

8. Chicago, etc., R. Co. *v.* Croy, 33 Ind. App. 461, 71 N. E. 671.

9. Indiana, etc., R. Co. *v.* Sampson, 31 Ill. App. 513; Chicago, etc., R. Co. *v.* Lyon, 50 Nebr. 640, 70 N. W. 261.

The fact that the railroad company has built similar fences at other places to the one built by the landowner will not entitle him to recover if such a fence is not of the character that the railroad company is required to build. Chicago, etc., R. Co. *v.* Lyon, 50 Nebr. 640, 70 N. W. 261.

10. Terre Haute, etc., R. Co. *v.* Salisbury, 38 Ind. App. 100, 77 N. E. 1097, holding that while the landowner could not construct and recover for a fence that was unreasonably expensive he may recover the cost of a woven wire fence, although a barbed wire fence would have satisfied the requirement of the statute and been somewhat less expensive.

11. Fletcher *v.* St. Louis, etc., R. Co., 73 Mo. 142, holding that while the landowner could not recover for constructing an incomplete portion of a fence on either one or both sides of the railroad, he may recover if he fences the entire length of the track through

entire fence which he has notified the company to build, before he can recover for the part completed.[12] The landowner in order to recover must also locate the fence where the railroad company is required to locate it,[13] which, if the statute requires the company to fence on the sides of the road, means along the dividing line between the right of way and adjacent lands,[14] and independently of such a requirement it seems that the landowner would have no right to set the fence back upon the right of way so as to deprive the railroad company of any part thereof.[15] If, however, the railroad company itself voluntarily locates the fence away from this line upon its right of way and fails to keep it in repair, the landowner may repair it where located and recover therefor.[16]

d. Actions For Recovery. The statutes authorizing a construction by the landowner and a recovery from the railroad company are ordinarily of a penal character, and plaintiff must bring himself clearly within their provisions.[17] The complaint must allege every fact essential to a recovery,[18] and so must allege that the road was not properly fenced at the time the notice was given,[19] that it had been constructed for such length of time as to make it the duty of the railroad company to fence,[20] that a proper notice to the railroad company was given,[21] and that the landowner constructed a fence of such character and at such place

his lands on one side so as to protect the same without fencing on the other side of the track.

12. Toledo, etc., R. Co. *v.* Sieberns, 63 Ill. 217, holding that the landowner may sue for and recover the value of any considerable portion of the fence completed by him before building the entire fence which he has notified the company to build.

13. Wabash, etc., R. Co. *v.* Zeigler, 108 Ill. 304; Evansville, etc., R. Co. *v.* Huffman, 32 Ind. App. 425, 70 N. E. 173.

A slight mislocation of only six or eight inches within the limits of the right of way, on reconstructing a fence which has been allowed to go to decay, while not concluding the railroad company as a boundary line, will not defeat the landowner's right to recover the cost of constructing the fence. Vandalia R. Co. *v.* Seltenright, 40 Ind. App. 659, 82 N. E. 980.

14. Wabash, etc., R. Co. *v.* Zeigler, 108 Ill. 304; Evansville, etc., R. Co. *v.* Huffman, 32 Ind. App. 425, 70 N. E. 173; McNear *v.* Wabash R. Co., 42 Mo. App. 14.

Explanation of rule.— The rule that the fence must be constructed along the dividing line between the right of way and adjacent lands does not mean that it cannot be set entirely upon the right of way, but it does require that it shall be substantially along the dividing line. Wabash, etc., R. Co. *v.* Zeigler, 108 Ill. 304; McNear *v.* Wabash R. Co., 42 Mo. App. 14. But see Marshall *v.* St. Louis, etc., R. Co., 51 Mo. 138.

15. See Vandalia R. Co. *v.* Stephens, 39 Ind. App. 11, 78 N. E. 1055.

16. Lake Erie, etc., R. Co. *v.* Deutsch, 60 Ill. App. 144.

17. Wabash, etc., R. Co. *v.* Zeigler, 108 Ill. 304; Indiana, etc., R. Co. *v.* Sampson, 31 Ill. App. 513; McNear *v.* Wabash R. Co., 42 Mo. App. 14. But see Chicago, etc., R. Co. *v.* Woodard, 13 Ind. App. 296, 41 N. E. 544.

18. Evansville, etc., R. Co. *v.* Huffman, 32 Ind. App. 425, 70 N. E. 173; Lake Erie, etc., R. Co. *v.* Lannert, 1 Ind. App. 102, 27 N. E. 324.

Under the Kentucky statute the complaint must allege that the notice required by statute was given to the railroad company and that the abutting land was improved or inclosed, or if unimproved and uninclosed that it had been previously inclosed on three sides with sufficient fences, or with fences and natural barriers which will prevent the egress of stock. Pitman *v.* Louisville, etc., R. Co., 104 S. W. 693, 31 Ky. L. Rep. 988.

19. Lake Erie, etc., R. Co. *v.* Lannert, 1 Ind. App. 102, 27 N. E. 324.

Allegation sufficient.— An allegation that the road was not fenced when the act requiring railroad companies to fence their tracks was passed, and that after the act was passed defendant failed to fence its track, sufficiently shows that the road was not fenced at the time notice was served upon the company. Midland R. Co. *v.* Gascho, 7 Ind. App. 407, 34 N. E. 643.

20. Lake Erie, etc., R. Co. *v.* Lannert, 1 Ind. App. 102, 27 N. E. 324.

Allegation sufficient.— Where the complaint alleges that defendant has owned and operated its line of railroad through the county in which the land is situated for several years past, it sufficiently shows the completion of the road more than twelve months prior to the service of the notice as required by the statute. Midland R. Co. *v.* Gascho, 7 Ind. App. 407, 34 N. E. 643.

21. Midland R. Co. *v.* Gascho, 7 Ind. App. 407, 34 N. E. 643 (holding, however, that a complaint which alleges that plaintiffs gave written notice to defendant of their intention to fence is sufficient on demurrer, under a statute providing that such notice shall be served on "the nearest freight receiving and shipping agent employed by the company or person controlling and operating said railroad"); Pitman *v.* Louisville, etc., R. Co., 104 S. W. 693, 31 Ky. L. Rep. 988.

as the law requires,[22] stating its cost,[23] and where such fact is material the date of its completion.[24] It is not necessary, however, where the statute excepts certain places from the duty of fencing to negative such exceptions in the complaint,[25] nor is it necessary to file with or embody in the complaint the notice to the railroad company,[26] or the itemized statement of the landowner's expenses which the statute requires to be furnished to the railroad company.[27] Plaintiff must also upon the trial establish by proof every fact essential to a recovery,[28] and must therefore show that the road had been completed for such time as to make it the duty of the railroad company to fence at the time the notice was given,[29] that his lands were inclosed by a lawful fence where the statute only requires the company to fence its tracks in such cases,[30] that a proper notice to the railroad company was given,[31] and that plaintiff constructed such a fence at such place as the law required.[32] Plaintiff's ownership of the land is sufficiently shown by proof that he and his grantees had been in possession for many years claiming to own it, without producing the title papers, in the absence of any evidence to the contrary.[33] Where the statute allows a recovery of the value or double the value of the fence or repairs, the reasonable value and not the actual cost is the basis of calculation for the amount recoverable.[34]

F. Waters and Watercourses — 1. Right to Construct Railroad Over or Near Waters and Watercourses.[35] While legislative authority is necessary,[36] the legislature may, subject to the paramount authority of the federal government,[37] authorize a railroad company to construct its road and build bridges across navigable waters,[38] or along navigable waters below high-water mark,[39] or upon lands under water,[40] or across a canal,[41] and such authority need not be express,[42] but may be implied, where such location is reasonably necessary from

22. Indiana, etc., R. Co. *v.* Sampson, 31 Ill. App. 513; Evansville, etc., R. Co. *v.* Huffman, 32 Ind. App. 425, 70 N. E. 173.

23. Indiana, etc., R. Co. *v.* Sampson, 31 Ill. App. 513.

24. Evansville, etc., R. Co. *v.* Huffman, 32 Ind. App. 425, 70 N. E. 173.

25. Midland R. Co. *v.* Gascho, 7 Ind. App. 407, 34 N. E. 643. *Compare* Vandalia R. Co. *v.* Shadle, 40 Ind. App. 682, 82 N. E. 990, holding, however, that if the action is not to recover the cost of original fencing but merely to recover the cost of repairing a fence already constructed by the railroad company, the complaint need not negative the exceptions contained in the statute.

26. Chicago, etc., R. Co. *v.* Ross, 8 Ind. App. 188, 35 N. E. 290.

27. Vandalia R. Co. *v.* Fetters, 40 Ind. App. 615, 82 N. E. 978; Vandalia R. Co. *v.* Kanarr, 38 Ind. App. 146, 77 N. E. 1135.

28. McNear *v.* Wabash R. Co., 42 Mo. App. 14.

29. Chicago, etc., R. Co. *v.* Abbott, 10 Ind. App. 99, 37 N. E. 557; McNear *v.* Wabash R. Co., 42 Mo. App. 14.

30. Missouri Pac. R. Co. *v.* Youngstrom, 47 Kan. 349, 27 Pac. 982.

31. Chicago, etc., R. Co. *v.* Abbott, 10 Ind. App. 99, 37 N. E. 557, holding that the fact that a copy of the notice is made a part of the complaint is not sufficient evidence that it was given to the railroad company.

Evidence sufficient.— In the absence of any evidence to the contrary, plaintiff's testimony that he served the notice in writing of his intention to construct a fence, on one of defendant's agents, whose name he did not remember, but who claimed to be defendant's agent, at the place of service, is sufficient to support a finding that a proper notice was given. Chicago, etc., R. Co. *v.* Woodard, 13 Ind. App. 296, 41 N. E. 544.

32. McNear *v.* Wabash R. Co., 42 Mo. App. 14.

33. Terre Haute, etc., R. Co. *v.* Smith, 65 Ill. App. 101.

34. Terre Haute, etc., R. Co. *v.* Smith, 65 Ill. App. 101; Lake Erie, etc., R. Co. *v.* Deutsch, 60 Ill. App. 144.

The cost is evidence of the value but not conclusive. Terre Haute, etc., R. Co. *v.* Smith, 65 Ill. App. 101.

35. Use of water by railroad company see Waters.

36. Dundalk, etc., R. Co. *v.* Smith, 97 Md. 177, 54 Atl. 628. See also, generally, Navigable Waters, 29 Cyc. 312.

37. See Hamilton *v.* Vicksburg, etc., R. Co., 34 La. Ann. 970, 44 Am. Rep. 451.

38. Hamilton *v.* Vicksburg, etc., R. Co., 34 La. Ann. 970, 44 Am. Rep. 451; Pedrick *v.* Raleigh, etc., R. Co., 143 N. C. 485, 55 S. E. 877, 10 L. R. A. N. S. 554.

Location of crossing.— A railroad company authorized by its charter to cross a river "above or near" a certain town is not required to cross above the town. Pedrick *v.* Raleigh, etc., R. Co., 143 N. C. 485, 55 S. E. 877, 10 L. R. A. 554.

39. See Navigable Waters, 29 Cyc. 363.

40. Kerr *v.* West Shore R. Co., 127 N. Y. 269, 27 N. E. 833.

41. Tuckahoe Canal Co. *v.* Tuckahoe, etc., R. Co., 11 Leigh (Va.) 42, 36 Am. Dec. 374.

42. Fall River Iron Works Co. *v.* Old Colony, etc., R. Co., 5 Allen (Mass.) 221.

authority to construct a road between certain termini.[43] A railroad bridge which obstructs navigation is a public nuisance, particularly if constructed without legislative authority;[44] but the construction of a permanent railroad bridge without draws across non-navigable waters is not a public nuisance.[45]

2. Construction and Maintenance.[46] A railroad or railroad bridge across navigable waters must be so constructed as not to interfere with navigation.[47] In crossing streams and watercourses the railroad company must construct its road so as not to obstruct the flow of water,[48] and must construct its bridges and culverts with sufficient openings and in such manner as properly to permit the passage of the water and prevent injury to riparian owners,[49] taking into consideration the nature of the country,[50] and making provision for the amount of water at all seasons,[51] and under conditions of storm and flood which are likely to occur,[52] and for the passage of floating ice which may reasonably be expected,[53] and must subsequently maintain the same in proper condition and repair.[54] The railroad company has no right to divert a stream so as to discharge the water upon the lands of another at a different place,[55] or so as wrongfully to deprive one entitled

43. *Louisiana.*— Hamilton *v.* Vicksburg, etc., R. Co., 34 La. Ann. 970, 44 Am. Rep. 451.

Massachusetts.— Fall River Iron Works Co. *v.* Old Colony, etc., R. Co., 5 Allen 221.

North Carolina.— Pedrick *v.* Raleigh, etc., R. Co., 143 N. C. 485, 55 S. E. 877, 10 L. R. A. N. S. 554.

Virginia.— Tuckahoe Canal Co. *v.* Tuckahoe, etc., R. Co., 11 Leigh 42, 36 Am. Dec. 374.

Wisconsin.— Miller *v.* Prairie du Chien, etc., R. Co., 34 Wis. 533.

See 41 Cent. Dig. tit. "Railroads," § 333.

44. See Navigable Waters, 29 Cyc. 312.

45. Joliet, etc., R. Co. *v.* Healy, 94 Ill. 416, holding that the Healy slough which empties into the south branch of the Chicago river is not a navigable stream, and the erection of a permanent railroad bridge across it is not a public nuisance.

46. Liability for injuries from construction or maintenance over or near waters and watercourses see *infra*, VI, J, 1, f.

Flooding lands as ground for compensation in condemnation proceedings see Eminent Domain, 15 Cyc. 707.

47. See Navigable Waters, 29 Cyc. 312 *et seq.*

48. New York, etc., R. Co. *v.* Hamlet Hay Co., 149 Ind. 344, 47 N. E. 1060, 49 N. E. 269; Kirk *v.* Kansas City, etc., R. Co., 51 La. Ann. 667, 25 So. 457; International, etc., R. Co. *v.* Walker, (Tex. Civ. App. 1906) 97 S. W. 1081.

49. *Illinois.*— Chicago, etc., R. Co. *v.* Carpenter, 125 Ill. App. 306.

Massachusetts.— Bryant *v.* Bigelow Carpet Co., 131 Mass. 491.

Nebraska.— Chicago, etc., R. Co. *v.* Andreesen, 62 Nebr. 456, 87 N. W. 167.

Vermont.— Hatch *v.* Vermont Cent. R. Co., 25 Vt. 49.

West Virginia.— Neal *v.* Ohio River R. Co., 47 W. Va. 316, 34 S. E. 914.

England.—Manser *v.* Northern, etc., R. Co., 5 Jur. 983, 2 R. & Can. Cas. 380; Coates *v.* Clarence R. Co., 8 L. J. Ch. O. S. 72, 1 Russ. & M. 181, 5 Eng. Ch. 181, 39 Eng. Reprint 70.

See 41 Cent. Dig. tit. "Railroads," § 334. See also, generally, Bridges, 5 Cyc. 1091, 1092.

Construction of piers for bridge.—The right of a railroad company to build a bridge across a stream includes the right to place necessary piers on its banks and in the bed, and there is no liability for the proper exercise of this right, although there may be where a special injury results from its negligent exercise (Braine *v.* Northern Cent. R. Co., 218 Pa. St. 43, 66 Atl. 985); and so a railroad company having power by its charter to cross a river, the property of a waterworks company, by the erection of a viaduct, the viaduct may be constructed of more than one arch built on piles driven into the bed of the river and need not cross the stream by a single span or arch (Birmingham Waterworks *v.* London, etc., R. Co., 4 L. T. Rep. N. S. 398).

50. New York, etc., R. Co. *v.* Hamlet Hay Co., 149 Ind. 344, 47 N. E. 1060, 49 N. E. 269.

51. New York, etc., R. Co. *v.* Hamlet Hay Co., 149 Ind. 344, 47 N. E. 1060, 49 N. E. 269.

52. New York, etc., R. Co. *v.* Hamlet Hay Co., 149 Ind. 344, 47 N. E. 1060, 49 N. E. 269; Neal *v.* Ohio River Co., 49 W. Va. 316, 34 S. E. 914.

53. McGlenneghan *v.* Omaha, etc., R. Co., 25 Nebr. 523, 41 N. W. 350, 13 Am. St. Rep. 508.

54. West *v.* Louisville, etc., R. Co., 8 Bush (Ky.) 404; Kirk *v.* Kansas City, etc., R. Co., 51 La. Ann. 667, 25 So. 457; Bryant *v.* Bigelow Carpet Co., 131 Mass. 491.

A prescriptive right to maintain a culvert at the place and of the size as originally constructed does not include the right to maintain it as it was after it sank into the watercourse over which it was constructed so as to obstruct the flow of water. Corwin *v.* Erie R. Co., 84 N. Y. App. Div. 555, 82 N. Y. Suppl. 753 [*affirmed* in 178 N. Y. 590, 70 N. E. 1097].

55. George *v.* Wabash Western R. Co., 40 Mo. App. 433; Wright *v.* Syracuse, etc., R.

thereto of the use of the water of the stream,[56] and if any diversion is necessary on account of cuts or fills a suitable new channel must be constructed and maintained,[57] and if a temporary diversion is necessary during the process of construction the company must afterward restore the stream to its old channel.[58] The matter of diverting a stream may, however, be regulated by contract between the railroad company and the landowner.[59] In some cases the statutes expressly prohibit the construction of a solid embankment across a watercourse,[60] or provide that where a railroad company constructs its road along or across a stream it must do so in such manner as not to interfere with the free use thereof, and so as to afford security for life and property,[61] or that it shall restore the stream to its former state or such as not unnecessarily to have impaired its usefulness;[62] and these provisions impose a continuing obligation,[63] and apply to non-navigable as well as navigable streams,[64] but not to drainage ditches.[65] With regard to surface waters railroad companies are, in the absence of statute, governed by the

Co., 49 Hun (N. Y.) 445, 3 N. Y. Suppl. 480 [*affirmed* in 124 N. Y. 668, 27 N. E. 854].

56. Atchison, etc., R. Co. *v.* Long, 46 Kan. 701, 27 Pac. 182, 26 Am. St. Rep. 165; Garwood *v.* New York Cent., etc., R. Co., 83 N. Y. 400, 38 Am. Rep. 452 [*affirming* 17 Hun 356]; Cott *v.* Lewiston R. Co., 36 N. Y. 214, 1 Transcr. App. 26, 34 How. Pr. 222; Clark *v.* Pennsylvania R. Co., 145 Pa. St. 438, 22 Atl. 989, 27 Am. St. Rep. 710.

Diversion of water for use of engines see WATERS.

57. Cott *v.* Lewiston R. Co., 36 N. Y. 214, 1 Transcr. App. 26, 34 How. Pr. 222.

58. Lefurgy *v.* New York, etc., R. Co., 3 N. Y. Suppl. 302.

59. Harrelson *v.* Kansas City, etc., R. Co., 151 Mo. 482, 52 S. W. 368, holding that where the landowner agreed with a railroad company for the diversion of a stream and the location of a trestle under which it would pass at a certain point, neither he nor those claiming under him could afterward compel the railroad company to change its location, although the natural elements had wrought such changes as to make a change in the location of the trestle desirable.

Supply of water — duration of duty. A clause in an agreement by a railroad company binding the company to procure a supply of water as good as that cut off by the construction of the road from the lands of the vendor only binds the company to do once for all that which may reasonably be expected to insure a sufficient supply of water, and does not bind it to do whatever may be necessary from time to time to secure that result. *Re* Gray, 44 L. T. Rep. N. S. 567.

60. Kenney *v.* Kansas City, etc., R. Co., 74 Mo. App. 301, holding that where the evidence upon the question is conflicting, it is error for the court to assume that a slough across which defendant has constructed an embankment is a watercourse, since if not a watercourse the company will not be liable under the statute.

61. New York, etc., R. Co. *v.* Hamlet Hay Co., 149 Ind. 344, 47 N. E. 1060, 49 N. E. 269; Graham *v.* Chicago, etc., R. Co., 39 Ind. App. 294, 77 N. E. 57, 1055.

The "life and property," the security for which is to be provided for under the Indiana statute, are not those of the railroad company, but those connected with the stream crossed. New York, etc., R. Co. *v.* Hamlet Hay Co., 149 Ind. 344, 47 N. E. 1060, 49 N. E. 269.

62. *Illinois.*—Chicago, etc., R. Co. *v.* Moffitt, 75 Ill. 524.

Indiana.— New York, etc., R. Co. *v.* Hamlet Hay Co., 149 Ind. 344, 47 N. E. 1060, 49 N. E. 269; Graham *v.* Chicago, etc., R. Co., 39 Ind. App. 294, 77 N. E. 57, 1055.

Kansas.— Atchison, etc., R. Co. *v.* Long, 46 Kan. 701, 27 Pac. 182, 26 Am. St. Rep. 165.

Missouri.— Abbott *v.* Kansas City, etc., R. Co., 83 Mo. 271, 53 Am. Rep. 581.

New York.— Cott *v.* Lewiston R. Co., 36 N. Y. 214, 1 Transcr. App. 26, 34 How. Pr. 222.

Texas.— International, etc., R. Co. *v.* Walker, (Civ. App. 1906) 97 S. W. 1081.

Vermont.— Hatch *v.* Vermont Cent. R. Co., 25 Vt. 49.

See 41 Cent. Dig. tit. "Railroads," § 334.

In constructing a bridge it is the duty of the railroad company under such a statute to do so in such manner as not to obstruct the flow of water and cause it to overflow adjacent lands and subsequently to keep the bridge in such condition. Chicago, etc., R. Co. *v.* Moffitt, 75 Ill. 524.

As applied to navigable streams, the requirement is designed to protect the rights of the public in navigation. Kerr *v.* West Shore R. Co., 127 N. Y. 269, 27 N. E. 833.

63. Chicago, etc., R. Co. *v.* Moffitt, 75 Ill. 524; Cott *v.* Lewiston R. Co., 36 N. Y. 214, 1 Transcr. App. (N. Y.) 26, 34 How. Pr. 222.

64. Chicago, etc., R. Co. *v.* Moffitt, 75 Ill. 524; Graham *v.* Chicago, etc., R. Co., 39 Ind. App. 294, 77 N. E. 57, 1055.

65. New Jersey, etc., R. Co. *v.* Tutt, 168 Ind. 205, 80 N. E. 420, holding that a drainage ditch not fed by any spring or watercourse and used and constructed solely for surface drainage is not a "stream of water"

same principles as are applicable to private owners;[66] but the rule as to surface waters varies under the civil and common law, and the decisions in the different states are not uniform.[67] In some cases railroad companies are expressly required by statute to construct culverts or sluices for drainage purposes,[68] or to construct drainage ditches along the sides of the road-bed,[69] and the duty of constructing

or "watercourse" which the railroad company is obliged to restore to its former state.

66. Chorham *v.* Queen Anne's R. Co., 3 Pennew. (Del.) 407, 54 Atl. 687; New Jersey, etc., R. Co. *v.* Tutt, 168 Ind. 205, 80 N. E. 420; Egener *v.* New York, etc., R. Co., 3 N. Y. App. Div. 157, 38 N. Y. Suppl. 319; Jenkins *v.* Wilmington, etc., R. Co., 110 N. C. 438, 15 S. E. 193.

The duty of a railroad company as a common carrier, with respect to the safety and protection of passengers and freight, does not affect or vary the duty which it owes to others in common with private persons in regard to surface waters. Chorham *v.* Queen Anne's R. Co., 3 Pennew. (Del.) 407, 54 Atl. 687.

67. Egener *v.* New York, etc., R. Co., 3 N. Y. App. Div. 157, 38 N. Y. Suppl. 319; Joliffe *v.* Chesapeake, etc., R. Co., (Va. 1894) 20 S. E. 781.

Obstruction, diversion, or flowage generally see WATERS.

A watercourse is not within the application of the common-law rule as to surface waters and cannot be obstructed by a railroad company. Neal *v.* Ohio River R. Co., 47 W. Va. 316, 34 S. E. 914.

68. Kankakee, etc., R. Co. *v.* Horan, 23 Ill. App. 259; Austin, etc., R. Co. *v.* Anderson, 79 Tex. 427, 15 S. W. 484, 23 Am. St. Rep. 350; International, etc., R. Co. *v.* Walker, (Tex. Civ. App. 1906) 97 S. W. 1081; St. Louis Southwestern R. Co. *v.* Selman, (Tex. Civ. App. 1905) 89 S. W. 1101.

In Texas the statute requires that a railroad company in constructing its road-bed must first construct "the necessary culverts or sluices as the natural lay of the land requires for the necessary drainage thereof" (Austin, etc., R. Co. *v.* Anderson, 79 Tex. 427, 15 S. W. 484, 23 Am. St. Rep. 350; Gulf, etc., R. Co. *v.* Helsley, 62 Tex. 593); and under this statute the company must construct its culverts so as not to divert the natural flow of surface waters from its usual course to the injury of adjoining landowners (Austin, etc., R. Co. *v.* Anderson, *supra*); and must subsequently maintain such culverts and sluices in proper condition (International, etc., R. Co. *v.* Glover, (Civ. App. 1904) 84 S. W. 604). The railroad company should take into consideration not only the conditions existing when the road is constructed but such changes and conditions as it could have foreseen, such as that adjoining land would be changed from timber land into cultivated fields (St. Louis, etc., R. Co. *v.* Robbins, (Civ. App. 1905) 89 S. W. 1099); and where the culverts become insufficient after construction of the railroad through change of condition by the land being cleared and cultivated, the company must make them sufficient, but the rule is otherwise where the conditions are changed by ditches, embankments, or other obstructions made by third persons (St. Louis Southwestern R. Co. *v.* Jenkins, (Civ. App. 1905) 89 S. W. 1106); and the duty of the railroad company under this statute cannot be delegated to another so as to absolve it from liability (Denison, etc., R. Co. *v.* Barry, (Civ. App. 1904) 80 S. W. 634). The statute applies to the construction of switch tracks (Houston, etc., R. Co. *v.* Barr, 44 Tex. Civ. App. 571, 99 S. W. 437); and has reference to water overflowing from a stream as well as ordinary surface waters (Gulf, etc., R. Co. *v.* Pearce, 43 Tex. Civ. App. 387, 95 S. W. 1133); but was not intended to compel companies to keep excavations along the right of way free from accumulation of water, but only to prevent the road from interfering with the natural drainage of the land (Dobbins *v.* Missouri, etc., R. Co., 91 Tex. 60, 41 S. W. 62, 66 Am. St. Rep. 856, 38 L. R. A. 573).

69. Cox *v.* Hannibal, etc., R. Co., 174 Mo. 588, 74 S. W. 854.

In Missouri the statute provides that railroad companies shall construct and maintain "suitable ditches and drains" along each side of the road-bed of such railroad to connect with ditches, drains, or watercourses so as to afford sufficient outlet to drain and carry off the water along such railroad whenever the draining of such water has been obstructed or rendered necessary by the construction of such railroad (Cox *v.* Hannibal, etc., R. Co., 174 Mo. 588, 74 S. W. 854); and the statute has reference to surface waters caused by overflow as well as those caused by rains and snow (Cox *v.* Hannibal, etc., R. Co., *supra*); but the statute does not require the construction in any case of ditches or drains in or through the road-bed (Field *v.* Chicago, etc., R. Co., 21 Mo. App. 600); and does not require the construction of such lateral ditches and drains unless there are other ditches, drains, or watercourses with which they can connect (Graves *v.* Kansas City, etc., R. Co., 69 Mo. App. 574; Field *v.* Chicago, etc., R. Co., *supra*); or apply to a railroad constructed along a city street (Jackson *v.* Chicago, etc., R. Co., 41 Fed. 656).

The Ohio statute (Rev. St. § 3342), requiring railroad companies to construct and keep open ditches sufficient to conduct to some proper outlet the water which accumulates along the sides of the road-bed from the construction or operation of the road, is valid in so far as the accumulation of water is injurious to the contiguous lands or detrimental to the public, but invalid where such water is not injurious to such

culverts in embankments may be imposed by contract between the railroad company and the landowner.[70] A railroad company has no right to divert and collect surface waters and discharge the same in large quantities upon the lands of another;[71] and on the other hand it is not obliged to keep open ditches outside of its right of way upon the land of another,[72] or to construct ditches for the purpose of draining adjacent lands.[73] A railroad company may after the construction of its road-bed make changes therein which may be found to be proper, but must do so with due regard to the rights of others.[74]

3. Wharves, Docks, and Access to Waters. Where a railroad company has in good faith located its road within the limits authorized by its charter, the fact that it may be constructed upon or so as to injure a wharf does not entitle the owner to equitable relief against such construction.[75] A statutory requirement that a railroad company shall restore a stream to its former state or so as not to impair its usefulness does not require it to construct a draw in its road, where constructed across a non-navigable bay of a river, so as to afford access to a private wharf,[76] and a charter requirement that a railroad company shall construct drawbridges for the passage of vessels and boats, where it crosses bays, applies only to those which are generally navigable.[77] In some cases, however, railroad companies are required by statutory or charter provisions to extend docks which are cut off by the construction of a railroad,[78] or to construct new docks in the place of those injured,[79] or to construct roads or passes over or under the road to afford adjacent landowners access to the water.[80]

4. Companies Affected by Statutory Regulations. A statutory provision requiring railroad companies to restore streams to their former state or so as not

lands or the public. Chicago, etc., R. Co. *v.* Keith, 67 Ohio St. 279, 65 N. E. 1020, 60 L. R. A. 525.

70. Hill *v.* Buffalo, etc., R. Co., 10 Grant Ch. (U. C.) 506, holding, however, that specific performance of a contract to construct culverts will not be decreed against a purchasing company where it purchases without knowledge of the contract and no notice thereof was given by the landowner, and the cost of constructing them after the completion of the railroad would impose a great hardship upon such company.

71. Chorman *v.* Queen Anne's R. Co., 3 Pennew. (Del.) 407, 54 Atl. 687; Curtis *v.* Eastern R. Co., 98 Mass. 428.

72. Joliffe *v.* Chesapeake, etc., R. Co., (Va. 1894) 20 S. E. 781.

73. Field *v.* Chicago, etc., R. Co., 76 Mo. 614.

But if a landowner gives a railroad company permission to construct a ditch upon his land and the company does not complete the ditch but leaves it so that its only effect is to carry off water from the railroad to plaintiff's land and leave it without any outlet, he may recover damages for the resulting injury. Utter *v.* Great Western R. Co., 17 U. C. Q. B. 392.

74. George *v.* Wabash Western R. Co., 40 Mo. App. 433, holding that in making such changes the railroad company has no right to divert a stream so as to flood the lands of another.

75. Fall River Iron Works Co. *v.* Old Colony, etc., R. Co., 5 Allen (Mass.) 221.

76. Kerr *v.* West Shore R. Co., 127 N. Y. 269, 27 N. E. 833.

77. Getty *v.* Hudson River R. Co., 21 Barb. (N. Y.) 617, holding that a private landowner on a bay which is not generally navigable cannot compel a railroad company to construct a draw opposite his property.

78. Tillotson *v.* Hudson River R. Co., 9 N. Y. 575 [*affirming* 15 Barb. 406], holding that a charter provision requiring a railroad company to build draws in all bridges across the mouths of bays and inlets, and to extend all wharves the road may cut off, does not oblige the company to extend wharves within bays and creeks whose communication is provided for by draws, but applies only to those whose communication is cut off without a draw.

79. Bell *v.* Hull, etc., R. Co., 9 L. J. Exch. 213, 6 M. & W. 699, 2 R. & Can. Cas. 279, holding that under a statute requiring a railroad company to construct a new wharf in lieu of one "so much injured as to be impassable or inconvenient" for landing or shipping, the statute is not limited to cases of actual injury to the wharf itself but applies where the railroad is so constructed that access to the wharf is rendered inconvenient and dangerous.

80. People *v.* New York Cent., etc., R. Co., 168 N. Y. 187, 61 N. E. 172 [*reversing* 61 N. Y. App. Div. 494, 70 N. Y. Suppl. 684], holding that under a charter provision requiring a railroad company to construct roads or passes over or under its road to afford access to a river, the duty depends upon the present conditions, and not those existing at the time of the construction of the road, and that if by reason of changed conditions the number of openings originally constructed is no longer necessary, the company may close up such as are not needed.

unnecessarily to have impaired their usefulness imposes a continuing obligation which is binding upon a purchasing company,[81] or consolidated company of which the company constructing the road is a constituent;[82] and a statute requiring every railroad company "operating" any railroad to construct ditches applies to a company taking charge of a road under a license from the owner.[83] The Illinois statute requiring railroad companies to keep in repair culverts sufficient for the free passage of water in watercourses crossed by the road applies only to roads constructed after the act went into effect.[84]

G. Maintenance and Repair.[85] Since it is the duty of a railroad company which has constructed a railroad to operate the same,[86] it is also its duty to maintain the road in such condition and repair as properly to perform its duties to the public,[87] and in some cases railroad commissioners are invested with authority to determine the necessity for and character of such repairs.[88] A railroad company may be compelled by mandamus to repair its road,[89] or to replace a portion of its track which it has wrongfully taken up;[90] but where it appears that the railroad company has not the necessary funds or credit to enable it to make the repairs needed, and that the road cannot be operated except at a loss, mandamus to compel the making of such repairs will not be granted,[91] for while the financial condition of the company does not exonerate it from the performance of its public duties, yet if it is wholly unable to perform such duties a proceeding in the nature of quo warranto and not mandamus is the proper remedy.[92] A railroad company for the purpose of making necessary repairs may dig up and temporarily disturb the surface of a street within the limits of its location.[93] It is also the duty of a railroad company to exercise ordinary care in guarding against probable obstructions of its track from causes not located upon its own right of way,[94] and it may

81. Graham *v.* Chicago, etc., R. Co., 39 Ind. App. 294, 77 N. E. 57, 1055; Lefurgy *v.* New York, etc., R. Co., 3 N. Y. Suppl. 302.

82. Chicago, etc., R. Co. *v.* Moffitt, 75 Ill. 524.

83. Graves *v.* Kansas City, etc., R. Co., 69 Mo. App. 574.

84. Wabash R. Co. *v.* Sanders, 47 Ill. App. 436.

85. **As affecting liability for injuries:** To persons on or near track see *infra*, X, E, 2, a, (v). At crossings see *infra*, X, F, 3. To animals see *infra*, X, H, 3, c. By fire see *infra*, X, I, 2, 3.

Repair of highway crossings see *supra*, VI, D, 3, c.

86. See *infra*, X, A.

87. Ohio, etc., R. Co. *v.* People, 120 Ill. 200, 11 N. E. 347; People *v.* Albany, etc., R. Co., 11 Abb. Pr. (N. Y.) 136, 19 How. Pr. 523 [*affirmed* in 37 Barb. 216 (*affirmed* in 24 N. Y. 261)].

88. State *v.* Kansas Cent. R. Co., 47 Kan. 497, 28 Pac. 208, holding, however, that under the Kansas statute providing that whenever in the judgment of the railroad commissioners any repairs on a railroad are demanded for the security, etc., of the public, they shall inform the railroad company of the improvements and changes which they adjudge to be necessary, the findings and recommendations of the commissioners are advisory and not conclusive in mandamus proceedings to compel the company to make such repairs.

Necessity for notice or order of railroad commissioners.— The notice required by the Kentucky statute of 1893, to be given by the railroad commissioners to rebuild or repair depots when in their opinion it becomes necessary, is specially applicable to cases where a depot has been burned or has become unfit for the accommodation of the public, and a notice or order from the commissioners is not essential, before the company can be required to comply with the statute as to furnishing certain conveniences at depots and keeping the same in proper condition and repair. Louisville, etc., R. Co. *v.* Com., 91 Ky. 207, 30 S. W. 616, 17 Ky. L. Rep. 116.

89. People *v.* Albany, etc., R. Co., 11 Abb. Pr. (N. Y.) 136, 19 How. Pr. 523 [*affirmed* in 37 Barb. 216 (*affirmed* in 24 N. Y. 261)].

90. Rex *v.* Severn, etc., R. Co., 2 B. & Ald. 646, 21 Rev. Rep. 433.

91. Ohio, etc., R. Co. *v.* People, 120 Ill. 200, 11 N. E. 347; State *v.* Dodge City, etc., R. Co., 53 Kan. 329, 36 Pac. 755, 24 L. R. A. 564.

92. Ohio, etc., R. Co. *v.* People, 120 Ill. 200, 11 N. E. 347.

93. New York Cent., etc., R. Co. *v.* Cambridge, 186 Mass. 249, 71 N. E. 557, holding further that a city ordinance forbidding the digging up of any street or otherwise obstructing it without first obtaining a written license from the superintendent of streets will not be construed as applying to a railroad company in making necessary repairs within the limits of its location at a street crossing.

94. Filbin *v.* Chesapeake, etc., R. Co., 91 Ky. 444, 16 S. W. 92, 13 Ky. L. Rep. 14, holding, however, that the railroad company is only required to exercise ordinary care in this respect, and is not liable for an injury due to a tree being blown upon the track by

maintain a suit in equity for their removal from adjacent lands if of such a character as to constitute a source of danger.[95]

H. Contracts For Construction or Repair — 1. In General. A railroad company having authority to construct a railroad and having acquired its right of way [96] may contract with another person for the construction of the road or a portion thereof,[97] or for the making of subsequent repairs,[98] and may do so without retaining any right of supervision or control over the contractor as to the manner of doing the work;[99] and persons dealing with independent contractors are bound at their peril to know the capacity in which the latter are acting and their relations with the railroad company.[1] A railroad company has no right to enter into a contract to aid in the construction of the road of another company in another state.[2] A construction contract, although made with one assuming to represent the railroad company, but without proper authority for making such contract, may become binding upon the railroad company by subsequent ratification,[3] and the railroad company may be liable upon a contract which is *ultra vires* where it has been fully performed in good faith by the other party and the railroad company has had the full benefit of the performance of the contract.[4] So also where a construction contract is set aside in equity as *ultra vires* the company may be required to account for the benefits which it has received from a part performance.[5]

2. Construction and Operation of Contract. The construction and operation of railroad construction contracts, in the absence of any special statutory provision relating thereto, is governed by the rules relating to contracts generally,[6]

a storm, where it was at such a distance from the track that it was not reasonable to suppose that it would fall across it.

95. Louisville, etc., R. Co. *v.* Johnson, 100 Ky. 153, 37 S. W. 844, 18 Ky. L. Rep. 624, holding that a suit in equity will lie at the instance of a railroad company for the removal of dead timber standing in such proximity to its right of way as to endanger the safety of passengers.

96. Hughes *v.* Cincinnati, etc., R. Co., 39 Ohio St. 461; Cunningham *v.* International R. Co., 51 Tex. 503, 32 Am. Rep. 632.

97. *Alabama.*—Arrington *v.* Savannah, etc., R. Co., 95 Ala. 434, 11 So. 7.

Kansas.—Kansas Cent. R. Co. *v.* Fitzsimmons, 18 Kan. 34.

Nebraska.—Hitte *v.* Republican Valley R. Co., 19 Nebr. 620, 28 N. W. 284.

Ohio.—Hughes *v.* Cincinnati, etc., R. Co., 39 Ohio St. 461.

South Carolina.—Rogers *v.* Florence R. Co., 31 S. C. 378, 9 S. E. 1059.

Texas.—Cunningham *v.* International R. Co., 51 Tex. 503, 32 Am. Rep. 632.

98. Bibb *v.* Norfolk, etc., R. Co., 87 Va. 711, 14 S. E. 163.

99. *Nebraska.*—Hitte *v.* Republican Valley R. Co., 19 Nebr. 620, 28 N. W. 284.

Ohio.—Hughes *v.* Cincinnati, etc., R. Co., 39 Ohio St. 461.

South Carolina.—Rogers *v.* Florence R. Co., 31 S. C. 378, 9 S. E. 1059.

Texas.—Cunningham *v.* International R. Co., 51 Tex. 503, 32 Am. Rep. 632.

Virginia.—Bibb *v.* Norfolk, etc., R. Co., 87 Va. 711, 14 S. E. 163.

Liability for injuries see *infra*, X, C, 2.

1. Blanding *v.* Davenport, etc., R. Co., 88 Iowa 225, 55 N. W. 81, holding that one performing work of construction under a contract with a contractor for construction is a subcontractor, and cannot claim a lien as a principal contractor because he supposed that the principal contractor was an agent of the railroad company.

2. Bostwick *v.* Chapman, 60 Conn. 553, 24 Atl. 32.

3. Cunningham *v.* Massena Springs, etc., R. Co., 63 Hun (N. Y.) 439, 18 N. Y. Suppl. 600 [*affirmed* in 138 N. Y. 614, 33 N. E. 1082], holding that where a contractor performs work of construction on a contract made with the president and general manager of the railroad company, without any resolution passed at a directors' meeting, but the work was done with the knowledge of its officers and without any dissent on the part of the company, it will be held to have ratified the contract and be liable thereunder.

4. Cunningham *v.* Massena Springs, etc., R. Co., 63 Hun (N. Y.) 439, 18 N. Y. Suppl. 600 [*affirmed* in 138 N. Y. 614, 33 N. E. 1082], holding that where in an action against a railroad company on a construction contract defendant contended that so much of the contract as provided for the building of a pile bridge and a small piece of road adjoining, but beyond the end of its line was *ultra vires* and void, but it appeared that the work was done in good faith, and defendant had taken possession and accepted the benefits of the contract, it could not avail itself of that objection.

5. New Castle Northern R. Co. *v.* Simpson, 23 Fed. 214.

6. See, generally, Contracts, 9 Cyc. 577.

Particular contracts construed see Fish *v.* Wolfe, 50 Iowa 636; Hatch *v.* Minnesota R. Constr. Co., 26 Minn. 451, 5 N. W. 97.

and particularly to other building and construction contracts.[7] As in other cases the intention of the parties must govern,[8] and this must be gathered from the instrument as a whole,[9] and in cases of doubt by reference to the subject-matter and surrounding circumstances and conditions.[10] If the language of the contract is plain and explicit, its terms must control,[11] and parol evidence is not admissible to vary it.[12] The construction put upon the contract by the parties is also an important consideration,[13] and where the parties by their subsequent conduct have given the contract a particular construction not inconsistent with its terms, they will ordinarily be held to be bound thereby.[14] Such contracts frequently require a construction of terms and expressions more or less peculiar to this particular class of work,[15] and while particular words are to be taken in their ordinary and popular sense, in the absence of anything to show that they were used in a different sense,[16] terms which are peculiar to railroad construction should be applied according to their meaning and usage in this connection,[17] and the testimony of experts or persons familiar with the usage of such terms is admissible to explain their meaning.[18] Whether covenants in the contract are to be

Particular provisions construed.— Where a written contract to fill in a trestle on a railroad track provides for the compensation by the cubic yard of dirt, the contractor cannot recover for the space occupied by a brick culvert constructed by the railroad company under the trestle. East Tennessee, etc., R. Co. *v.* Matthews, 85 Ga. 457, 11 S. E. 841. A right reserved to change the location or grade of the road upon paying the contract price for any extra work occasioned thereby does not authorize a fundamental change in the character and nature of the work, as from embankment to trestle work, and if such change is made by the company to the prejudice of the contractor it must make good his loss. Wolff *v.* McGavock, 29 Wis. 290. Where a contract for grading provided that the contractors should receive in payment the actual cost for wages and teams at prices to be approved by the chief engineer, and ten per cent on such cost as their compensation, and the contractor sublet the work with the approval of the engineer, they are entitled to recover the ten per cent on the amount paid the subcontractor; the same being the cost of the work intended by the contract. Ford *v.* St. Louis, etc., R. Co., 54 Iowa 723, 7 N. W. 126.

7. See, generally, BUILDERS AND ARCHITECTS, 6 Cyc. 18.

8. Mansfield, etc., R. Co. *v.* Veeder, 17 Ohio 385; Dunham *v.* Dayton, etc., R. Co., 3 Ohio Dec. (Reprint) 329.

9. Mansfield *v.* New York Cent., etc., R. Co., 102 N. Y. 205, 6 N. E. 386; Wyandotte, etc., R. Co. *v.* King Bridge Co., 100 Fed. 197, 40 C. C. A. 325; Lee *v.* New Haven, etc., R. Co., 15 Fed. Cas. No. 8,197.

10. Williams *v.* Chicago, etc., R. Co., 153 Mo. 487, 54 S. W. 689.

11. Alton, etc., R. Co. *v.* Northcott, 15 Ill. 49; Olson *v.* Snake River Valley R. Co., 22 Wash. 139, 60 Pac. 156.

12. Merritt *v.* Peninsular Constr. Co., 91 Md. 453, 46 Atl. 1013; Clark *v.* Diffenderfer, 31 Mo. App. 232; Barker *v.* Troy, etc., R. Co., 27 Vt. 766.

13. Western Union R. Co. *v.* Smith, 75 Ill. 496; Williams *v.* Chicago, etc., R. Co., 153 Mo. 487, 54 S. W. 689.

14. Western Union R. Co. *v.* Smith, 75 Ill. 496; Chicago, etc., R. Co. *v.* Vosburgh, 45 Ill. 311; Galveston, etc., R. Co. *v.* Johnson, 74 Tex. 256, 11 S. W. 1113; Barker *v.* Troy, etc., R. Co., 27 Vt. 766.

If the contractor accepts payment based upon a particular construction of the contract, he will be bound by that construction (Barker *v.* Troy, etc., R. Co., 27 Vt. 766), unless it was accepted under protest (Galveston, etc., R. Co. *v.* Johnson, 74 Tex. 256, 11 S. W. 1113).

Time of payment.— If the contract merely provides the amount and mode of compensation without any provision as to the time of payment, the contractor could not, looking to the contract alone, call for payment until a complete performance of the contract on his part, but where it was the custom of the company to pay its contractors on monthly estimates, and this practice was adopted and followed in regard to the contract in question, it may well be considered as the rule of payment under the contract and binding upon the parties. Boody *v.* Rutland R. Co., 3 Fed. Cas. No. 1,635, 3 Blatchf. 25, 24 Vt. 660.

15. See the following cases construing and applying the terms "surfaced" (Western Union R. Co. *v.* Smith, 75 Ill. 496); "earthwork," "grading," "surfacing," and "filling in" (Snell *v.* Cottingham, 72 Ill. 161); "cuttings on the line of the road" and "excavation" (Grand Rapids, etc., R. Co. *v.* Van Dusen, 29 Mich. 431); "hardpan" (Williams *v.* Chicago, etc., R. Co., 153 Mo. 487, 54 S. W. 689; Mansfield, etc., R. Co. *v.* Veeder, 17 Ohio 385); and "solid rock" (Fruin *v.* Crystal R. Co., 89 Mo. 397, 14 S. W. 557).

16. Fruin *v.* Crystal R. Co., 89 Mo. 397, 14 S. W. 557, holding that the words "solid rock" will be construed in the ordinary sense as applying to all solid rock, including flint rock, in the absence of any showing that they were used in a different sense.

17. Western Union R. Co. *v.* Smith, 75 Ill. 496, holding that the term "surfaced" must be applied according to the sense in which it is used by persons engaged in the construction of railroads.

18. Texas, etc., R. Co. *v.* Rust, 19 Fed. 239.

considered as dependent or independent depends upon the intention of the parties as shown by the whole contract.[19] A contract to construct the road-bed of a railroad between two designated places will include all the grading between the termini as indicated by the depot grounds, and will not be satisfied by completing the work to the corporate limits of the places named,[20] and a contract to construct a railroad includes not only the grading and placing of ties but the laying of rails so that cars can pass over it;[21] and a contract for the complete construction of a railroad includes cattle-guards, water-tanks, stock-gaps, side-tracks, and Y's,[22] but does not impose upon the contractor any obligation to equip it with rolling stock;[23] although an agreement to build a railroad "and to have the said road in operation" by a certain time has been held to include not only construction but equipment with rolling stock.[24] A contract for the construction of a road-bed does not include clearing and grubbing the right of way beyond the space necessary for the road-bed and its support;[25] and a contract to do certain grading upon a railroad which the railroad company is constructing necessarily presupposes that the railroad company will furnish the right of way.[26]

3. Supervision, Approval, and Estimates of Engineer. Railroad construction contracts frequently provide that the work shall be done under the supervision or subject to the approval of the railroad company's engineer,[27] who is in some cases authorized, if in his opinion the work is not progressing rapidly enough to be completed within the time specified, to declare the contract abandoned or employ others to execute any part of the work and charge the same to the contractor,[28] and where such power is conferred upon the engineer by the contract, its exercise by him in good faith will be binding upon the parties;[29] but such contracts imply that the railroad company shall furnish a competent and reliable engineer,[30] and that he shall do all that the contract requires to be done by him in due season,[31] and shall act honestly and in good faith toward the contractor.[32] It is also frequently provided that the estimates and decisions of the engineer as to various matters such as the measurement, classification, amount, and quality of the work shall be final and conclusive,[33] and such a provision is held to be valid

19. Philadelphia, etc., R. Co. *v.* Howard, 13 How. (U. S.) 307, 14 L. ed. 157.

20. Western Union R. Co. *v.* Smith, 75 Ill. 496.

21. Ford *v.* Ingles Coal Co., 102 S. W. 332, 31 Ky. L. Rep. 382.

22. Central Trust Co. *v.* Condon, 67 Fed. 84, 14 C. C. A. 314.

23. Central Trust Co. *v.* Condon, 67 Fed. 84, 14 C. C. A. 314.

24. Flanagan Bank *v.* Graham, 42 Oreg. 403, 71 Pac. 137, 790.

25. Alexander *v.* Robertson, 86 Tex. 511, 26 S. W. 41 [*reversing* (Civ. App. 1893) 24 S. W. 680].

26. Chicago, etc., R. Co. *v.* Yawger, 24 Ind. App. 460, 56 N. E. 50.

27. St. Paul, etc., R. Co. *v.* Bradbury, 42 Minn. 222, 44 N. W. 1; Smith *v.* Boston, etc., R. Co., 36 N. H. 458; McMahon *v.* New York, etc., R. Co., 20 N. Y. 463; Jones *v.* Gilchrist, 88 Tex. 88, 30 S. W. 442 [*reversing* (Civ. App. 1894) 27 S. W. 890].

Form of certificate.— Under a contract providing for payment upon the certificate of the engineer that the work contemplated under the contract "has been fully completed and finished, agreeably to the various stipulations and specifications of this agreement," a certificate reading: "This is to certify that I have accepted" the work done, specifying the work accepted and signed by the engineer, is sufficient. Eastham *v.* Western Constr. Co., 36 Wash. 7, 77 Pac. 1051.

28. Louisville, etc., R. Co. *v.* Donnegan, 111 Ind. 179, 12 N. E. 153; Geiger *v.* Western Maryland R. Co., 41 Md. 4; Langdon *v.* Northfield, 42 Minn. 464, 44 N. W. 984.

29. Geiger *v.* Western Maryland R. Co., 41 Md. 4.

30. Louisville, etc., R. Co. *v.* Donnegan, 111 Ind. 179, 12 N. E. 153; Smith *v.* Boston, etc., R. Co., 36 N. H. 458; Herrick *v.* Belknap, 27 Vt. 673.

31. Smith *v.* Boston, etc., R. Co., 36 N. H. 458; Herrick *v.* Belknap, 27 Vt. 673.

32. Louisville, etc., R. Co. *v.* Donnegan, 111 Ind. 179, 12 N. E. 153; Wortman *v.* Montana Cent. R. Co., 22 Mont. 266, 56 Pac. 316.

An agreement to do the work to the "full satisfaction" of the chief engineer and directors of the company does not of itself give the company power arbitrarily to rescind the contract, but means that the work must be done to its satisfaction not unreasonably withheld. Lee *v.* New Haven, etc., R. Co., 15 Fed. Cas. No. 8,197.

33. St. Paul, etc., R. Co. *v.* Bradbury, 42 Minn. 222, 44 N. W. 1; McMahon *v.* New York, etc., R. Co., 20 N. Y. 463; Mundy *v.* Louisville, etc., R. Co., 67 Fed. 633, 14 C. C. A. 583.

and binding;[34] and where the contract so provides the estimates and decisions of the engineer will be final and conclusive upon the parties, in the absence of fraud or such gross mistake as to imply bad faith or a failure to exercise an honest judgment,[35] and will be equally conclusive upon both parties.[36] Where the engineer has made a decision upon a matter as to which by the contract his decision is to be final and conclusive, and this decision has been accepted and acted upon, he cannot subsequently change it;[37] nor can the contractor, if he has with knowl-

34. *Colorado.*—Denver, etc., R. Co. *v.* Riley, 7 Colo. 494, 4 Pac. 785.

Iowa.— Ross *v.* McArthur, 85 Iowa 203, 52 N. W. 125.

Kentucky.— Cincinnati Southern R. Co. *v.* Cummings, 6 Ky. L. Rep. 441.

Minnesota.— St. Paul, etc., R. Co. *v.* Bradbury, 42 Minn. 222, 44 N. W. 1.

Missouri.— Williams *v.* Chicago, etc., R. Co., 153 Mo. 487, 54 S. W. 689; Williams *v.* Chicago, etc., R. Co., 112 Mo. 463, 20 S. W. 631, 34 Am. St. Rep. 403.

New York.— Sweet *v.* Morrison, 116 N. Y. 19, 22 N. E. 276, 15 Am. St. Rep. 376; McMahon *v.* New York, etc., R. Co., 20 N. Y. 463.

Pennsylvania.— Howard *v.* Allegheny Valley R. Co., 69 Pa. St. 489.

Vermont.— Herrick *v.* Belknap, 27 Vt. 673.

Virginia.— Condon *v.* South Side R. Co., 14 Gratt. 302; Kidwell *v.* Baltimore, etc., R. Co., 11 Gratt. 676.

United States.— Mundy *v.* Louisville, etc., R. Co., 67 Fed. 633, 14 C. C. A. 583; Lewis *v.* Chicago, etc., R. Co., 49 Fed. 708; Wood *v.* Chicago, etc., R. Co., 39 Fed. 52.

Canada.— Sherwood *v.* Balch, 30 Ont. 1.

But see Louisville, etc., R. Co. *v.* Donnegan, 111 Ind. 179, 12 N. E. 153; Kistler *v.* Indianapolis, etc., R. Co., 88 Ind. 460.

The fact that the engineer is a stockholder in the railroad company does not affect the validity of the stipulation, since whether a stock-holder or not he does not purport to be an indifferent third party but a representative of the railroad company. Williams *v.* Chicago, etc., R. Co., 112 Mo. 463, 20 S. W. 631, 34 Am. St. Rep. 403.

35. *Arkansas.*— Hot Springs R. Co. *v.* Maher, 48 Ark. 522, 3 S. W. 639.

Colorado.— Denver, etc., R. Co. *v.* Riley, 7 Colo. 494, 4 Pac. 785.

Delaware.— Crumlish *v.* Wilmington, etc., R. Co., 5 Del. Ch. 270.

Florida.— Finegan *v.* L'Engle, 8 Fla. 413.

Georgia.— Grant *v.* Savannah, etc., R. Co., 51 Ga. 348.

Illinois.— Snell *v.* Brown, 71 Ill. 133; Central Military Tract R. Co. *v.* Spurck, 24 Ill. 587.

Iowa.— Ross *v.* McArthur, 85 Iowa 203, 52 N. W. 125.

Louisiana.— O'Donnell *v.* Henry, 44 La. Ann. 845, 11 So. 245.

Maine.— Seretto *v.* Rockland, etc., R. Co., 101 Me. 140, 63 Atl. 651.

Minnesota.— Langdon *v.* Northfield, 42 Minn. 464, 44 N. W. 984; St. Paul, etc., R. Co. *v.* Bradbury, 42 Minn. 222, 44 N. W. 1.

Missouri.— Williams *v.* Chicago, etc., R. Co., 153 Mo. 487, 54 S. W. 689; Williams *v.* Chicago, etc., R. Co., 112 Mo. 463, 20 S. W. 631, 34 Am. St. Rep. 403; Mackler *v.* Mississippi River, etc., R. Co., 62 Mo. App. 677; Clark *v.* Diffenderfer, 31 Mo. App. 232.

New York.— Sweet *v.* Morrison, 116 N. Y. 19, 22 N. E. 276, 15 Am. St. Rep. 376.

Pennsylvania.— Howard *v.* Allegheny Valley R. Co., 69 Pa. St. 489; Yutzy *v.* Buffalo Valley R. Co., 1 Walk. 463.

Vermont.— Barker *v.* Belknap, 27 Vt. 700; Vanderwerker *v.* Vermont Cent. R. Co., 27 Vt. 130.

Virginia.— Condon *v.* South Side R. Co., 14 Gratt. 302; Kidwell *v.* Baltimore, etc., R. Co., 11 Gratt. 676.

United States.— Chicago, etc., R. Co. *v.* Price, 138 U. S. 185, 11 S. Ct. 290, 34 L. ed. 917 [*affirming* 38 Fed. 304]; Martinsburg, etc., R. Co. *v.* March, 114 U. S. 549, 5 S. Ct. 1035, 29 L. ed. 255; Mundy *v.* Louisville, etc., R. Co., 67 Fed. 633, 14 C. C. A. 583; Ogden *v.* U. S., 60 Fed. 725, 9 C. C. A. 251; Summers *v.* Chicago, etc., R. Co., 49 Fed. 714; Lewis *v.* Chicago, etc., R. Co., 49 Fed. 708.

Right of contractor to notice and opportunity to be present.— Where the contract provides that the estimates and measurements made by the engineer shall be final and conclusive, it has been held that the contractor is entitled to notice and opportunity to be present when they are made, and that if the engineer proceeds *ex parte* it will not constitute such a final estimate as will bind the contractor. McMahon *v.* New York, etc., R. Co., 20 N. Y. 463. But see Wilson *v.* York, etc., R. Co., 11 Gill & J. (Md.) 58, holding that in the making of measurements of the work done the contractor is not entitled to notice and opportunity to be present, but that in making estimates of certain expenses to be allowed him he is so entitled and without such notice will not be bound thereby.

Time for making classification.— In the absence of any provision to the contrary in the contract, the classification of the material to be excavated may be made by the engineer before the work is done, and where he has classified the material as of a certain kind, to which a certain rate applies, and the contractor is permitted to proceed with the work upon that basis, the company cannot be permitted subsequently to make a different classification more onerous to the contractor. Ricker *v.* Collins, 81 Tex. 662, 17 S. W. 378.

36. Chicago, etc., R. Co. *v.* Moran, 187 Ill. 316, 58 N. E. 335 [*affirming* 85 Ill. App. 543].

37. Chicago, etc., R. Co. *v.* Moran, 187 Ill.

edge of the facts expressed his satisfaction therewith, subsequently impeach it as erroneous or improper.[38] An engineer's estimates are not, however, conclusive unless the contract so provides,[39] nor where it does so provide except as to the matters specified therein.[40] So also provisions that his estimates shall be conclusive do not entirely oust the courts of jurisdiction,[41] and such estimates may be impeached and relieved against on the ground of fraud or gross error or mistake,[42] by proceedings in a court of equity,[43] or it has been held in a court of law;[44] but the mistake must be so gross as to imply bad faith or a failure to exercise an honest judgment,[45] or so gross and palpable as to leave no doubt in the mind of

316, 58 N. E. 335 [*affirming* 85 Ill. App. 543].

38. Williams *v.* Chicago, etc., R. Co., 153 Mo. 487, 54 S. W. 689.

39. Illinois Cent. R. Co. *v.* Manion, 113 Ky. 7, 67 S. W. 40, 23 Ky. L. Rep. 2267, 101 Am. St. Rep. 345; Memphis, etc., R. Co. *v.* Wilcox, 48 Pa. St. 161; Central Trust Co. *v.* Louisville St. R. Co., 70 Fed. 282.

A stipulation that the engineer shall make estimates does not make such estimates conclusive, and in all cases where the contract does not expressly provide that they are to be conclusive they are to be tested by their actual correctness, and the contractor may show that they are not correct. Memphis, etc., R. Co. *v.* Wilcox, 48 Pa. St. 161.

Where there is an essential parol alteration of a written contract which provided that the engineer's decision should be final, and there is no stipulation that his decision shall be final as to matters arising under the contract as changed, a decision of the engineer under such contract is not binding, and where such decision covers indiscriminately the whole work it cannot stand as to part. Malone *v.* Philadelphia, etc., R. Co., 157 Pa. St. 430, 27 Atl. 756.

40. *Colorado.*— Denver, etc., R. Co. *v.* Riley, 7 Colo. 494, 4 Pac. 785.

Illinois.— Chicago, etc., R. Co. *v.* Moran, 187 Ill. 316, 58 N. E. 335 [*affirming* 85 Ill. App. 543].

Maryland.—Annapolis, etc., R. Co. *v.* Ross, 68 Md. 310, 11 Atl. 820.

Missouri.— Williams *v.* Chicago, etc., R. Co., 112 Mo. 463, 20 S. W. 631, 34 Am. St. Rep. 403.

Pennsylvania.— Dohbling *v.* York Springs R. Co., 203 Pa. St. 628, 53 Atl. 493; Lauman *v.* Young, 31 Pa. St. 306.

Matters "relative to or touching" the agreement.—A provision that the decision of the engineer shall be conclusive in any dispute arising between the parties to the agreement "relative to or touching the same," does not cover questions outside of the contract and clearly could not cover a claim for damages for the abrogation of the contract by the railroad company. Dohbling *v.* York Springs R. Co., 203 Pa. St. 628, 53 Atl. 493.

41. Atlanta, etc., R. Co. *v.* Manghan, 49 Ga. 266; Wortman *v.* Montana Cent. R. Co., 22 Mont. 266, 56 Pac. 316.

42. *Missouri.*— Williams *v.* Chicago, etc., R. Co., 112 Mo. 463, 20 S. W. 631, 34 Am. St. Rep. 403.

Ohio.— Mansfield, etc., R. Co. *v.* Veeder, 17 Ohio 385.

Vermont.— Herrick *v.* Belknap, 27 Vt. 573.

Virginia.— Norfolk, etc., R. Co. *v.* Mills, 91 Va. 613, 22 S. E. 556; Mills *v.* Norfolk, etc., R. Co., 90 Va. 523, 19 S. E. 171.

United States.— Fruin-Bambrick Constr. Co. *v.* Ft. Smith, etc., R. Co., 140 Fed. 465; Lewis *v.* Chicago, etc., R. Co., 49 Fed. 708; Wood *v.* Chicago, etc., R. Co., 39 Fed. 52; Fletcher *v.* New Orleans, etc., R. Co., 19 Fed. 731.

The meaning of the word "mistake" as used in this connection has been explained as follows: (1) That the court will relieve against mistakes in measurements and calculations apparent on the face of the estimate or which are clearly proven. (2) If it is satisfactorily shown that the engineer has failed through oversight to measure or estimate any particular part of the work the court will grant relief as to such mistake. (3) If it appears that the engineer has put a wrong construction upon the contract the court will correct any substantial errors resulting from such mistake. (4) But that the court will not undertake to revise the decision of the engineer as to matters intrusted to his special skill or judgment. (5) Slight discrepancies in measurements must also be disregarded. Lewis *v.* Chicago, etc., R. Co., 49 Fed. 708.

The fact that the engineer is an employee of the railroad company does not commit it to the consequences of his misconduct while acting as an arbiter for both parties, and an estimate or award which is the result of collusion between the engineer and the contractor will not be binding upon the railroad company. Gonder *v.* Berlin Branch R. Co., 171 Pa. St. 492, 33 Atl. 61.

No demand for a different estimate or effort to procure one is necessary in order to entitle the contractor to recover, where the estimate made by the engineer was fraudulent. Baltimore, etc., R. Co. *v.* Laffertys, 14 Gratt. (Va.) 478.

43. Herrick *v.* Belknap, 27 Vt. 673; O'Brien *v.* Champlain Constr. Co., 107 Fed. 338; Wood *v.* Chicago, etc., R. Co., 39 Fed. 52.

44. Williams *v.* Chicago, etc., R. Co., 112 Mo. 463, 20 S. W. 631, 34 Am. St. Rep. 403. But see Wood *v.* Chicago, etc., R. Co., 39 Fed. 52.

45. Hot Springs R. Co. *v.* Maher, 48 Ark. 522, 3 S. W. 639; Martinsburg, etc., R. Co. *v.* March, 114 U. S. 549, 5 S. Ct. 1035, 29 L. ed. 255.

the court that grave injustice has been done thereby;[46] and errors of judgment as distinguished from mistakes of fact cannot be relieved against in the absence of fraud or bad faith.[47] The engineer in making estimates and measurements must proceed according to the provisions of the contract,[48] and it is competent to show that he has disregarded or violated the contract provisions,[49] or has misconstrued the contract and made his estimates upon a different basis from that contemplated.[50] Ordinarily the making of the estimates provided for is a condition precedent to the right to sue upon the contract;[51] but if through the neglect or fault of the engineer or the railroad company the estimate is not made, or the engineer refuses to make it, the contractor may sue and show the amount and value of the work done by other evidence.[52] Where the contract provides that the measurements are to be made by the chief engineer, it has been held that measurements made by an assistant engineer, although approved by the chief engineer, will not be final and conclusive,[53] although admissible in evidence in an action on the contract;[54] but where the contract merely provides for estimates by "the engineer," it has been held that they need not, in order to be conclusive, be made by the chief engineer.[55] So also the engineer contemplated by such contracts is the incumbent of the office at the time the estimate or award is to be made, and not the person who may have held that office at the time the contract was entered into.[56] Railroad construction contracts frequently provide for partial payments to be made as the work progresses, based upon monthly or other periodical estimates made by the engineer as to the amount and value of the work done,[57] with, in some cases, a separate final estimate to be made after the work is completed as a basis for settlement of the balance due;[58] and where the contract so provides the estimates of the engineer are, in the absence of fraud or gross mistake, conclusive both as to the periodical estimates[59] and the final estimates.[60] Where

46. Mundy *v.* Louisville, etc., R. Co., 67 Fed. 633, 14 C. C. A. 583.

47. Lewis *v.* Chicago, etc., R. Co., 49 Fed. 708. See also Wood *v.* Chicago, etc., R. Co., 39 Fed. 52.

48. Alton, etc., R. Co. *v.* Northcott, 15 Ill. 49; Galveston, etc., R. Co. *v.* Henry, 65 Tex. 685; Mills *v.* Norfolk, etc., R. Co., 90 Va. 523, 19 S. E. 171.

49. Mills *v.* Norfolk, etc., R. Co., 90 Va. 523, 19 S. E. 171.

50. Williams *v.* Chicago, etc., R. Co., 112 Mo. 463, 20 S. W. 631, 34 Am. Rep. 403; Mansfield *v.* Veeder, 17 Ohio 385; Galveston, etc., R. Co. *v.* Henry, 65 Tex. 685; Lewis *v.* Chicago, etc., R. Co., 49 Fed. 708.

51. Williams *v.* Chicago, etc., R. Co., 112 Mo. 463, 20 S. W. 631, 34 Am. Rep. 403; Martinsburg, etc., R. Co. *v.* March, 114 U. S. 549, 5 S. Ct. 1035, 29 L. ed. 255.

52. Kistler *v.* Indianapolis, etc., R. Co., 88 Ind. 460; Starkey *v.* De Graff, 22 Minn. 431; Williams *v.* Chicago, etc., R. Co., 112 Mo. 463, 20 S. W. 631, 34 Am. Rep. 403; McMahon *v.* New York, etc., R. Co., 20 N. Y. 463.

53. Wilson *v.* York, etc., R. Co., 11 Gill & J. (Md.) 58. *Contra*, Sweet *v.* Morrison, 116 N. Y. 19, 22 N. E. 276, 15 Am. St. Rep. 376, holding that the chief engineer need not make the measurements himself.

54. Miller *v.* Sullivan R. Co., 14 Tex. Civ App. 112, 33 S. W. 695, 35 S. W. 1084, 37 S. W. 778.

55. Herrick *v.* Belknap, 27 Vt. 673. See also Central Military Track R. Co. *v.* Spurck, 24 Ill. 587.

56. North Lebanon R. Co. *v.* McGrann, 33 Pa. St. 530, 75 Am. Dec. 624.

Although the contract stipulates that the term "engineer" as used therein shall be considered as referring to a particular person named, yet if such person is discharged or leaves the company's employment and the company appoints a successor and notifies the contractor and the latter acquiesces in the substitution, it will constitute a waiver of the provisions of the contract and be binding upon both parties. Serretto *v.* Rockland, etc., R. Co., 101 Me. 140, 63 Atl. 651.

57. *Kentucky.*— Cincinnati Southern R. Co. *v.* Cummings, 6 Ky. L. Rep. 442.

Missouri.— Mackler *v.* Mississippi River, etc., Co., 62 Mo. App. 677.

Pennsylvania.— Gonder *v.* Berlin Branch R. Co., 171 Pa. St. 492, 33 Atl. 61.

Vermont.— Barker *v.* Belknap, 27 Vt. 700.

Virginia.— Kidwell *v.* Baltimore, etc., R. Co., 11 Gratt. 676.

58. Rutherford *v.* Brachman, 40 Ohio St. 604; Gonder *v.* Berlin Branch R. Co., 171 Pa. St. 492, 33 Atl. 61; Kidwell *v.* Baltimore, etc., R. Co., 11 Gratt. (Va.) 676.

The final estimate is not confined to the work of the last month or period, but is designed rather as a revision of the entire work after its completion. Rutherford *v.* Brachman, 40 Ohio St. 604.

59. Mackler *v.* Mississippi, etc., R. Co., 62 Mo. App. 677; Barker *v.* Belknap, 27 Vt. 700.

60. Grant *v.* Savannah, etc., R. Co., 51 Ga. 348; Kidwell *v.* Baltimore, etc., R. Co., 11 Gratt. (Va.) 676.

the contract calls for payment according to periodical estimates, it has been held to import accurate and final estimates,[61] and that when made and acquiesced in they will be binding and not subject to change by future measurements unless it was understood by both parties that they were to be considered as mere approximations to be subsequently corrected;[62] but it has been held that in making the final estimate the previous periodical estimates are to be regarded merely as approximate estimates of the relative value of the work completed and not conclusive,[63] and that the contractor cannot, before the final estimate is made, sue for the balance due upon the basis of the last periodical estimate,[64] and that on the final estimate the railroad company is entitled to show that the engineer, for the accommodation of the contractor, has increased the periodical estimates beyond the amount actually due, with the understanding that the proper reduction should be made upon the final estimate.[65]

4. Provisions to Secure Performance. Railroad construction contracts frequently provide that if the work is not being done in a satisfactory manner or rapidly enough to be completed within the time limited the railroad company may terminate the contract,[66] or employ others to do any part of the work and charge the same to the contractor;[67] or they may prescribe a sum to be paid as liquidated damages for each day or other period of delay beyond the time limited for completion;[68] or, where the contractor is to be paid in instalments upon periodical estimates, provide that the company shall retain a certain per cent of the amounts found to be due until the completion of the contract.[69] Where the contract provides for a retention by the company of a percentage of the amounts due according to the monthly estimates until the completion of the work, a contractor cannot recover these amounts without showing a performance of the contract or a valid excuse for non-performance.[70] If the contractor is forced to abandon the work or prevented from completing it by the wrongful act or default of the railroad company, he does not forfeit the percentage retained by it,[71] and if the company suspends or delays the work for an indefinite or unreasonable time, it cannot withhold the percentage retained on the ground that it is payable only upon the completion of the work;[72] but such retained amounts are forfeited if the contractor voluntarily abandons the work without just cause or any default on the part of the railroad company,[73] or where the company rightfully terminates the contract under a power reserved to do so where the work is not progressing

But for fraud or gross mistake on the part of the engineer the final estimate may be avoided by the contractor. Fruin-Bambrick Constr. Co. *v.* Ft. Smith, etc., R. Co., 140 Fed. 465.

61. Barker *v.* Belknap, 27 Vt. 700; Herrick *v.* Belknap, 27 Vt. 673.

62. Barker *v.* Belknap, 27 Vt. 700.

63. Cincinnati Southern R. Co. *v.* Cummings, 6 Ky. L. Rep. 441.

If the contractor is prevented from completing the work by the fault of the railroad company and no final estimate is made and the periodical estimates were merely approximate estimates, the contractor is entitled to recover for all work actually done whether estimated or not. Bean *v.* Miller, 69 Mo. 384.

64. Gonder *v.* Berlin Branch R. Co., 171 Pa. St. 492, 33 Atl. 61.

65. Gonder *v.* Berlin Branch R. Co., 171 Pa. St. 492, 33 Atl. 61.

66. Geiger *v.* Western Maryland R. Co., 41 Md. 4; Waco Tap R. Co. *v.* Shirley, 45 Tex. 355.

67. Langdon *v.* Northfield, 42 Minn. 464, 44 N. W. 984; Jackson *v.* Cleveland, etc., R. Co., 19 Wis. 400.

68. Fruin *v.* Crystal R. Co., 89 Mo. 397, 14 S. W. 557; Mansfield *v.* New York Cent., etc., Co., 102 N. Y. 205, 6 N. E. 386; Texas, etc., R. Co. *v.* Rust, 19 Fed. 239.

69. Geiger *v.* Western Maryland R. Co., 41 Md. 4; Langdon *v.* Northfield, 42 Minn. 464, 44 N. W. 984; Jackson *v.* Cleveland, etc., R. Co., 19 Wis. 400.

70. Jackson *v.* Cleveland, etc., R. Co., 19 Wis. 400.

71. *Alabama.*— Danforth *v.* Tennessee, etc., R. Co., 93 Ala. 614, 11 So. 60.

Kentucky.— Elizabethtown, etc., R. Co. *v.* Pottinger, 10 Bush 185.

Maine.— Seretto *v.* Rockland, etc., R. Co., 101 Me. 140, 63 Atl. 651.

Maryland.— Rodemer *v.* Gonder, 9 Gill 288.

New York.— Curnan *v.* Delaware, etc., R. Co., 138 N. Y. 480, 34 N. E. 201.

72. Curnan *v.* Delaware, etc., R. Co., 138 N. Y. 480, 34 N. E. 201.

73. Finegan *v.* L'Engle, 8 Fla. 413; Merritt *v.* Peninsular Constr. Co., 91 Md. 453, 46 Atl. 1013; Strauss *v.* R. Co., 7 W. Va. 368;

satisfactorily.[74] The contractor, however, forfeits only the amount of the percentages retained pursuant to the contract, and not unpaid balances of the amounts which should previously have been paid.[75] Where the contract prescribes a sum as liquidated damages for delay, the contractor will be liable therefor unless performance was prevented by the act of God, the law, or the railroad company,[76] and he cannot escape liability on the ground that the delay was due to unexpected casualties,[77] or to the fact that the work proved to be more difficult or expensive than anticipated;[78] but if the contractor has acted in good faith and the delay results from causes not under his control, he will not be liable for any damages in excess of the stipulated amount,[79] and if the delay was caused by the conduct of the railroad company it cannot recover the amounts stipulated.[80] A right reserved by the railroad company to terminate the contract or employ others upon the work where it is not progressing satisfactorily is not an exclusive remedy and does not affect the right of the railroad company to also recover any damages caused by a breach of the contract by the contractor;[81] and where the contract authorizes the company to employ others at the contractor's expense, and also contains a provision for the retention of a certain percentage of the monthly estimates, the contractor's liability to reimburse the company under the former provision is not limited to the amount retained by it under the latter.[82] On the other hand, where such rights are reserved to the railroad company it must act in good faith and cannot exercise them arbitrarily without just cause,[83] as merely to avail itself of an opportunity to get the work done more cheaply;[84] and where a bond with sureties is required of the contractor, a subsequent failure of the sureties is not sufficient ground for the company to terminate the contract without allowing an opportunity of furnishing new sureties.[85] The action of the company in terminating the contract, although rightful and in accordance with its provisions, does not deprive the contractor of the right to recover instalments for work done which were due and payable prior to such termination.[86]

5. EXTRA WORK. A contractor for railroad construction is entitled to compensation for any extra work not covered by the original contract which is done by him at the request of the railroad company or in consequence of changes in the plans and specifications made by it,[87] or rendered necessary by errors of the

Jackson *v.* Cleveland, etc., R. Co., 19 Wis. 400.

74. Hennessey *v.* Farrell, 4 Cush. (Mass.) 267.

75. Ricker *v.* Fairbanks, 40 Me. 43 (holding that under a contract authorizing the company to declare the contract abandoned if the work is not progressing with sufficient rapidity, and providing that in such event "any balance of money due shall be forfeited" such balance refers only to the percentages of the amounts due on the monthly instalments which the company is authorized by the contract to retain and not to any unpaid balances of the amounts which should have been paid to the contractor); Geiger *v.* Western Maryland R. Co., 41 Md. 4 (holding that where the contract provides that the contractor shall forfeit as liquidated damages "the unpaid part of the balance of the work," this includes only the percentages rightfully retained and not unpaid balances which were previously due and payable). See also Lord *v.* Belknap, 1 Cush. (Mass.) 279.

76. Fruin *v.* Crystal R. Co., 89 Mo. 397, 14 S. W. 557.

77. Texas, etc., R. Co. *v.* Rust, 19 Fed. 239.

78. Fruin *v.* Crystal R. Co., 89 Mo. 397, 14 S. W. 557.

79. Texas, etc., R. Co. *v.* Rust, 19 Fed. 239.

80. Dunavant *v.* Caldwell, etc., R. Co., 122 N. C. 999, 29 S. E. 837. See also Mansfield *v.* New York Cent., etc., R. Co., 102 N. Y. 205, 6 N. E. 386.

81. Jackson *v.* Cleveland, 19 Wis. 400; American Bonding, etc., Co. *v.* Baltimore, etc., R. Co., 124 Fed. 866, 60 C. C. A. 52. But see MacDonald *v.* Saginaw Valley, etc., R. Co., 16 Fed. Cas. No. 8,766.

82. Langdon *v.* Northfield, 42 Minn. 464, 44 N. W. 984.

83. Louisville, etc., R. Co. *v.* Donnegan, 111 Ind. 179, 12 N. E. 153; Rodemer *v.* Gonder, 9 Gill (Md.) 288; Wortman *v.* Montana Cent. R. Co., 22 Mont. 266, 56 Pac. 316; Philadelphia, etc., R. Co. *v.* Howard, 13 How. (U. S.) 307, 14 L. ed. 157.

84. Philadelphia, etc., R. Co. *v.* Howard, 13 How. (U. S.) 307, 14 L. ed. 157.

85. Waco Tap R. Co. *v.* Shirley, 45 Tex. 355.

86. Philadelphia, etc., R. Co. *v.* Howard, 13 How. (U. S.) 307, 14 L. ed. 157.

87. *Illinois.*— Western Union R. Co. *v.* Smith, 75 Ill. 496.

Indiana.— Ohio, etc., R. Co. *v.* Crumbo, 4 Ind. App. 456, 30 N. E. 434.

Maryland.— Annapolis, etc., R. Co. *v.* Ross,

company's engineer under whose direction the work is to be done;[88] but he can only recover for such work as is not covered by the terms of the original contract.[89] A contractor cannot recover for extra work which is made necessary by the negligent or unskilful manner in which he has done the work undertaken,[90] or due to natural causes,[91] or which is done at the instance of a person having no authority to bind the company and whose act the company has not ratified,[92] or done at the instance of the company's engineer where he was acting beyond his authority,[93] or due to the rejection of materials by the company's engineer where he was authorized by the contract to determine the kind and quality of material to be used;[94] and if the contract provides that no claim for extra work shall be allowed unless it is done pursuant to a written order of the engineer or other designated person, there can be no recovery for work done upon the parol authority of such person,[95] although the contract also provides that the engineer may direct alterations and additions to the work.[96] A contractor is not entitled to extra compensation merely because the work turns out to be more difficult or expensive than anticipated or unexpected obstacles are encountered,[97] unless he was induced

68 Md. 310, 11 Atl. 820; Orange, etc., R. Co. *v.* Placide, 35 Md. 315.

Missouri.— Fruin *v.* Crystal R. Co., 89 Mo. 397, 14 S. W. 557.

Texas.— Houston, etc., R. Co. *v.* Trentem, 63 Tex. 442.

United States.— Philadelphia, etc., R. Co. *v.* Howard, 13 How. 307, 14 L. ed. 157; Fruin-Bambrick Constr. Co. *v.* Ft. Smith, etc., R. Co., 140 Fed. 465; Central Trust Co. *v.* Condon, 67 Fed. 84, 14 C. C. A. 314.

88. Wyandotte, etc., R. Co. *v.* King Bridge Co., 100 Fed. 197, 40 C. C. A. 325, holding that, where the railroad company's engineer was to determine the location of a bridge to be constructed, a contractor is entitled to recover for extra work made necessary by an error on the part of the engineer in the original location of the bridge.

89. Western Union R. Co. *v.* Smith, 75 Ill. 496; Williams *v.* Chicago, etc., R. Co., 153 Mo. 487, 54 S. W. 689; Central Trust Co. *v.* Condon, 67 Fed. 84, 14 C. C. A. 314.

Under a contract for the complete construction of a railroad the contractor is not entitled to extra compensation for the construction of cattle-guards, water tanks, stock gaps, side-tracks, and Ys, which should be construed as being included under the contract for complete construction. Central Trust Co. *v.* Condon, 67 Fed. 84, 14 C. C. A. 314.

Although the work is done in a different manner from that provided for by the contract, if there is no agreement for extra compensation and the contractor accepts without objection periodical payments based upon the original contract provisions and rates of compensation, he cannot after the work is completed claim any extra compensation. Kidwell *v.* Baltimore, etc., R. Co., 11 Gratt. (Va.) 676.

90. Fruin *v.* Crystal R. Co., 89 Mo. 397, 14 S. W. 557.

91. Central Trust Co. *v.* Condon, 67 Fed. 84, 14 C. C. A. 314, holding that a contractor for the complete construction of a railroad is not entitled to compensation for extra work occasioned by the occurrence of a slide during the process of construction.

92. Woodruff *v.* Rochester, etc., R. Co., 108 N. Y. 39, 14 N. E. 832; Thayer *v.* Vermont Cent. R. Co., 24 Vt. 440.

93. Baltimore, etc., R. Co. *v.* Jolly, 71 Ohio St. 92, 72 N. E. 888; Alexander *v.* Robertson, 86 Tex. 511, 26 S. W. 41 [*reversing* (Civ. App. 1893) 24 S. W. 680].

94. Jones *v.* Gilchrist, 88 Tex. 88, 30 S. W. 442 [*reversing* (Civ. App. 1894) 27 S. W. 890].

95. *California.*— White *v.* San Rafael, etc., R. Co., 50 Cal. 417.

Maryland.— Merritt *v.* Peninsular Constr. Co., 91 Md. 453, 46 Atl. 1013.

New York.— Woodruff *v.* Rochester, etc., R. Co., 108 N. Y. 39, 14 N. E. 832.

Ohio.— Baltimore, etc., R. Co. *v.* Jolly, 71 Ohio St. 92, 72 N. E. 888.

Vermont.— Barker *v.* Troy, etc., R. Co., 27 Vt. 766; Vanderwerker *v.* Vermont Cent. R. Co., 27 Vt. 130.

United States.— Fruin-Bambrick Constr. Co. *v.* Ft. Smith, etc., R. Co., 140 Fed. 465. But see Wyandotte, etc., R. Co. *v.* King Bridge Co., 100 Fed. 197, 40 C. C. A. 325.

But see Illinois Cent. R. Co. *v.* Manion, 113 Ky. 7, 67 S. W. 40, 23 Ky. L. Rep. 2267, 101 Am. St. Rep. 345; Houston, etc., R. Co. *v.* Trentem, 63 Tex. 442.

There is nothing inequitable or unreasonable in a stipulation that no claim for extra work shall be allowed unless done upon the written order of the engineer, it being a proper provision for the protection of the company against doubtful claims. White *v.* San Rafael R. Co., 50 Cal. 417.

The rule does not apply to a separate contract made by the engineer for a different kind of work not included in the original contract and in which there is no similar provision with regard to extra work. Vanderwerker *v.* Vermont Cent. R. Co., 27 Vt. 130.

96. White *v.* San Rafael R. Co., 50 Cal. 417, holding that such authority is entirely consistent with the requirement that his action shall be evidenced by writing.

97. Cannon *v.* Wildman, 28 Conn. 472; St. Paul, etc., R. Co. *v.* Bradbury, 42 Minn. 222, 44 N. W. 1; Groton Bridge, etc., Co. *v.* Ala-

to enter into the contract through fraud or misrepresentation on the part of the company;[98] and in the absence of such fraud or misrepresentation it is not material that he chose to rely upon mere estimates or expressions of opinion made by the company as to the amount or character of the work,[99] particularly where he was instructed not to rely thereon or that the company would not be responsible for their accuracy.[1] A provision in the contract that the contractor shall not make any charge for extra labor will prevent a recovery for any unnecessary extra work or work which is better or more expensive than the contract requires,[2] but will not prevent a recovery for extra work made necessary by the conduct of the railroad company.[3] Extra work, in the absence of express agreement, should be paid for at the contract price if it is of a character covered by the terms of the contract as to price;[4] but if of a different character, then according to what it is reasonably worth.[5]

6. Payment in Stock or Bonds of Railroad Company. Railroad construction contracts frequently provide for a part payment in stock or bonds of the railroad company,[6] and such a contract is not, in the absence of fraud or over-valuation of the work or under-valuation of the stock and bonds, invalid.[7] If no time for payment is fixed by the contract the contractor cannot sue to recover the stock without a demand and refusal to deliver it,[8] nor where the time of payment is fixed can the contractor refuse to receive the stock and demand payment in money because the railroad company did not seek him out and tender the stock on the day named.[9] So also the contractor cannot refuse to receive stock and demand payment in money because the company has mortgaged its road,[10] or because it has procured an alteration of its charter increasing the amount of its stock where a right to alter the charter was reserved by the legislature in the original act.[11] The fact that the company has paid several of the monthly instalments in full in cash does not waive its right subsequently to make payment in stock to the agreed amount.[12] Where the contract provides that the contractor shall take a certain proportion in stock at par, but there is no right of election expressly or impliedly reserved to the company to pay either in stock or cash, if the stock is not delivered the contractor cannot recover the amount represented by its par value but only its market value;[13] but where the company pays more than the agreed proportion in cash it will constitute a waiver of the right to pay such

bama, etc., R. Co., 80 Miss. 162, 31 So. 739; Fruin *v.* Crystal R. Co., 89 Mo. 397, 14 S. W. 557.

98. Fruin *v.* Crystal R. Co., 89 Mo. 397, 14 S. W. 557.

99. Cannon *v.* Wildman, 28 Conn. 472; St. Paul, etc., R. Co. *v.* Bradbury, 42 Minn. 222, 44 N. W. 1; Groton Bridge, etc., Co. *v.* Alabama, etc., R. Co., 80 Miss. 162, 31 So. 739; Fruin *v.* Crystal R. Co., 89 Mo. 397, 14 S. W. 557.

1. Cannon *v.* Wildman, 28 Conn. 472; St. Paul, etc., R. Co. *v.* Bradbury, 42 Minn. 222, 44 N. W. 1.

2. Chicago, etc., R. Co. *v.* Vosburgh, 45 Ill. 311.

3. Chicago, etc., R. Co. *v.* Vosburgh, 45 Ill. 311, holding that where the earth for the construction of an embankment was to be furnished by the railroad company and to be taken by the contractor from a particular place, and he was subsequently required to go to a more distant and inconvenient place requiring additional expense, he might recover therefor notwithstanding a provision in the contract that he would not charge for extra labor.

4. Chicago, etc., R. Co. *v.* Vosburgh, 45 Ill. 311; Annapolis, etc., R. Co. *v.* Ross, 68 Md. 310, 11 Atl. 820; Houston, etc., R. Co. *v.* Trentem, 63 Tex. 442.

5. Chicago, etc., R. Co. *v.* Vosburgh, 45 Ill. 311; Houston, etc., R. Co. *v.* Trentem, 63 Tex. 442.

6. See Orange, etc., R. Co. *v.* Placide, 35 Md. 315; Cleveland, etc., R. Co. *v.* Kelley, 5 Ohio St. 180; Jones *v.* Chamberlain, 30 Vt. 196.

7. Coe *v.* East Alabama, etc., R. Co., 52 Fed. 531 [*affirmed* in 54 Fed. 569, 4 C. C. A. 511].

8. Boody *v.* Rutland, etc., R. Co., 3 Fed. Cas. No. 1,635, 3 Blatchf. 25, 24 Vt. 660.

9. Moore *v.* Hudson River R. Co., 12 Barb. (N. Y.) 156.

10. Boody *v.* Rutland R. Co., 3 Fed. Cas. No. 1,635, 3 Blatchf. 25, 24 Vt. 660.

11. Moore *v.* Hudson River R. Co., 12 Barb. (N. Y.) 156.

12. Harris *v.* Somerset, etc., R. Co., 47 Me. 298.

13. Cleveland, etc., R. Co. *v.* Kelley, 5 Ohio St. 180.

amount in stock, and in paying the balance in stock it cannot claim a deduction therefor according to the difference in the par and market values of the stock.[14]

7. Subcontracts. Where a contractor sublets the work or a portion thereof there is ordinarily no contractual relation between the railroad company and the subcontractor,[15] and the subcontractor cannot pass by the contractor, who is his immediate employer, and sue the railroad company for an amount due him from the contractor,[16] unless the railroad company for a sufficient consideration has assumed such liability.[17] So the railroad company will not be liable to the subcontractor for extra work done by him under his contract with the contractor,[18] nor can a subcontractor recover against the railroad company for extra work done at the instance of the company's engineer if the latter had no authority to bind the company by a contract for such work.[19] The contracts with subcontractors frequently contain provisions similar to those previously referred to in the contracts between the railroad company and the principal contractor with regard to the supervision, approval, estimates, and decisions of the company's engineer,[20] and the provisions to insure performance, authorizing the contractor, if the work is not progressing satisfactorily, to terminate the contract or employ others upon the work,[21] or providing for a retention by the contractor of a percentage of the amounts due according to the periodical estimates until the completion of the work;[22] and the same rules apply as to the conclusiveness of the engineer's estimates and decisions,[23] which may be impeached for fraud or gross mistake,[24] and the right of the contractor to take advantage of the provisions to secure performance,[25] which must be exercised fairly and in good faith.[26] Where the railroad company is to retain a percentage of the amounts due as security for the completion of the work and the contractor to retain a per-

14. Jones *v.* Chamberlain, 30 Vt. 196.

15. Richmond R., etc., Co. *v.* Harris, (Va. 1899) 32 S. E. 458.

16. Lake Erie, etc., R. Co. *v.* Eckler, 13 Ind. 67 Richmond R., etc., Co. *v.* Harris, (Va. 1899) 32 S. E. 458.

17. Chapman *v.* Pittsburgh, etc., R. Co., 18 W. Va. 184, holding that where, during performance of the work by the subcontractor, the contractor fails and the railroad company, to induce the subcontractor to go on with the work, agrees to pay him the debt of the contractor, there is a sufficient consideration and the railroad company will be liable.

18. Richmond R., etc., Co. *v.* Harris, (Va. 1899) 32 S. E. 458.

19. Thayer *v.* Vermont Cent. R. Co., 24 Vt. 440.

20. Rogers *v.* Hogan, 58 Me. 305; Sweet *v.* Morrison, 116 N. Y. 19, 22 N. E. 276, 15 Am. St. Rep. 376; Faunce *v.* Burke, 16 Pa. St. 469, 55 Am. Dec. 519; Van Hook *v.* Burns, 10 Wash. 22, 38 Pac. 763.

21. Hendrie *v.* Canadian Bank, 49 Mich. 401, 13 N. W. 792; Maloney *v.* Malcomb, 31 Mo. 45; Faunce *v.* Burke, 16 Pa. St. 469, 55 Am. Dec. 519.

22. Blair *v.* Corby, 29 Mo. 480; Faunce *v.* Burke, 16 Pa. St. 469, 55 Am. Dec. 519.

23. Sweet *v.* Morrison, 116 N. Y. 19, 22 N. E. 276, 15 Am. St. Rep. 376; Faunce *v.* Burke, 16 Pa. St. 469, 55 Am. Dec. 519.

When finding not conclusive.— Although the contract provides that in case of a dispute the decisions of the chief engineer of the railroad company shall be conclusive, a finding by him on a disputed point is not conclusive if it appears that he paid no personal attention to the matter but acted solely upon statements of his subordinates. Van Hook *v.* Burns, 10 Wash. 22, 38 Pac. 763.

24. Gulf, etc., R. Co. *v.* Ricker, (Tex. 1891) 17 S. W. 382, holding further that where the contract provides for a classification of material by the company's engineer, whose decision is to be final, and the contract is sublet upon the same terms, and an action is brought by the subcontractor against the contractor and the railroad company to recover the balance upon the ground that the classification was fraudulent or grossly erroneous or not according to the terms of the contract, and this allegation is established, the subcontractor may recover against the contractor, and the contractor may, under proper allegations, recover over against the railroad company.

25. Maloney *v.* Malcomb, 31 Mo. 45; Faunce *v.* Burke, 16 Pa. St. 469, 55 Am. Dec. 519.

Who may give notice.— Where the contract provides that the contractor after written notice to the subcontractor from the company's engineer may declare the contract forfeited on the ground that the work is not progressing rapidly enough, the notice to the subcontractor need not be given by the engineer but may be given by the contractor himself after notice to him from the engineer. Hendrie *v.* Canadian Bank, 49 Mich. 401, 13 N. W. 792.

26. McAndrews *v.* Tippett, 39 N. J. L. 105.

centage as security for the completion of the subcontract and the subcontractor completes his portion, he is entitled to full payment, including the percentage retained by the contractor, although the latter is not entitled to his percentage as against the railroad company;[27] and if the subcontractor performs his contract in full accordance with its terms he is entitled to payment, although the work does not conform to the requirements of the contract between the railroad company and the principal contractor.[28] If the subcontractor is prevented from completing his contract by the wrongful act or failure of the contractor to comply with his part of the agreement, the subcontractor may recover the damages sustained;[29] but whether a subcontractor may hold the contractor liable for damages for breach of contract where the default of the contractor is due to the delay of the railroad company in doing certain preliminary work depends upon whether the contract was intended to be dependent upon the company doing such work in time.[30] If the subcontractor is prevented from completing his contract by a failure of the railroad company to procure a part of the right of way, his failure to complete is excused and he may recover of the contractor for the work done;[31] and if the contractor fails to make payments of the instalments due as the work progresses, the subcontractor may abandon the work and recover for what has been done.[32] Where the contractor in terms "sublets" a part of his contract, the work to be done under and according to the provisions of the original contract except at a lower rate, the original contract becomes a part of the subcontract, and the subcontractor is bound by its requirements and is equally entitled to the benefit of any provisions that are to his advantage.[33] A provision in the original contract that the contractor shall not sublet the work without the written consent of the railroad company is for the benefit of the latter and may be waived by it,[34] either expressly or impliedly;[35] but if the contractor without such consent makes a subcontract and the subcontractor has knowledge of the provisions in the original contract, the subcontract will be deemed to have been made subject to the contingency of the work being stopped by the railroad company.[36] Contracts with subcontractors are subject to the same rules of construction as contracts between railroad companies and the principal contractor.[37]

27. Blair *v.* Corby, 29 Mo. 480.

28. Johnson *v.* Des Moines, etc., R. Co., 129 Iowa 281, 105 N. W. 509.

29. McAndrews *v.* Tippett, 39 N. J. L. 105.

30. Hammond *v.* Beeson, 112 Mo. 190, 20 S. W. 474.

31. Bean *v.* Miller, 69 Mo. 384.

32. Bean *v.* Miller, 69 Mo. 384.

33. Price *v.* Garland, 3 N. M. 285, 6 Pac. 472.

34. Danforth *v.* Tennessee, etc., R. Co., 93 Ala. 614, 11 So. 60; Lauman *v.* Young, 31 Pa. St. 306.

35. Danforth *v.* Tennessee, etc., R. Co., 93 Ala. 614, 11 So. 60.

Effect of acquiescence.— Where a construction contract provides that no subcontract shall be made without the written consent of the engineer under penalty of forfeiture of the work sublet, the subletting of a portion of the work by the contractor previous to the execution of the contract and which has been acquiesced in by all the parties will not work a forfeiture. Lauman *v.* Young, 31 Pa. St. 306.

36. Dolan *v.* Rodgers, 149 N. Y. 489, 44 N. E. 167, holding that in such case it will be implied as a part of the subcontract that if the work is stopped by the railroad company both parties are to be released as to the future but bound as to the past, and if the subcontractor before being stopped has completed a part of the work and the contractor is paid for such work by the railroad company, he must also pay the subcontractor therefor.

37. Sweet *v.* Morrison, 116 N. Y. 19, 22 N. E. 276, 15 Am. St. Rep. 376; Faunce *v.* Burke, 16 Pa. St. 469, 55 Am. Dec. 519.

Construction and operation of contracts between railroad companies and contractors see *supra*, VI, H, 2.

Particular contracts construed.— Under a subcontract which provides that in case of default in making payments by the railroad company to the contractor the latter shall have a right to cancel the contract, and that in the event of cancellation the subcontractor shall be paid for "labor done and materials furnished up to the date of the cancellation," he may recover for materials procured or prepared to be furnished, although not delivered if they are so cut that they are not useful for any other purpose and are not marketable. Dickinson *v.* Gray, 8 S. W. 876, 9 S. W. 281, 10 Ky. L. Rep. 292. Where a railroad company contracts with a contractor to furnish and place "about one hundred thousand cubic yards" of stone at a certain place, and provides for supplemen-

8. PERFORMANCE OR BREACH OF CONTRACT — a. In General. To entitle the contractor to recover, he must show a performance of the contract on his part or an excuse for its non-performance.[38] If he has expressly agreed to complete the work by a certain time he must make good his agreement and cannot be excused unless performance was prevented by the act of God, the law, or the railroad company,[39] and it is not sufficient that the delay was due to unexpected casualties, obstacles, or difficulties;[40] but a provision that the work shall be completed by a certain time may be waived by the railroad company,[41] either expressly or impliedly,[42] in which case the company cannot recover damages for the delay,[43] or insist upon a stipulation for liquidated damages;[44] and if after the contract is entered into the railroad company directs changes or extra work not covered by the original contract, which will necessitate a longer time for completion, the time originally limited must be extended according to what is reasonably necessary for such work.[45] If the failure of the contractor to complete the work according to the terms of the contract is due to the wrongful act or default of the railroad company, he is excused for a failure to complete the entire work,[46] or to complete it within

tal contracts for any additional material which may be required, and the contractor sublets the contract to C, who agrees to perform the conditions of the original contract and that the amount of stone may be increased up to the amount of three hundred thousand cubic yards, this provision applies only in case the additional amount is necessary to complete the contract, and where the work is completed he cannot be required to furnish this additional amount to be used by the contractor upon a different contract subsequently made. Shanklin *v.* Brown, 102 N. Y. App. Div. 473, 92 N. Y. Suppl. 860 [*affirmed* in 189 N. Y. 526, 82 N. E. 1133].

38. Seretto *v.* Rockland, etc., R. Co., 101 Me. 140, 63 Atl. 651.

39. Fruin *v.* Crystal R. Co., 89 Mo. 397, 14 S. W. 557.

The contractor cannot excuse his failure to complete the work in time, on the ground that the company, when he had purchased material and contracted debts for labor on its credit, failed to meet its obligations, and thereby so impaired its credit that he could not dispose of its stock and bonds at a price that would afford him means to carry on the work. Wood *v.* Boney, (N. J. Ch. 1891) 21 Atl. 574.

40. Fruin *v.* Crystal R. Co., 89 Mo. 397, 14 S. W. 557; Texas, etc., R. Co. *v.* Rust, 19 Fed. 239.

41. Grant *v.* Savannah, etc., R. Co., 51 Ga. 348; Wortman *v.* Montana Cent. R. Co., 22 Mont. 266, 56 Pac. 316; Atlantic, etc., R. Co. *v.* Delaware Constr. Co., 98 Va. 503, 37 S. E. 13; Fruin-Bambrick Constr. Co. *v.* Ft. Smith, etc., R. Co., 140 Fed. 465.

42. Grant *v.* Savannah, etc., R. Co., 51 Ga. 348.

If the contractor is allowed to proceed after the time limit has expired it will be presumed that the breach was waived and that the company intended that he should have a reasonable time to complete it. Wortman *v.* Montana Cent. R. Co., 22 Mont. 266, 56 Pac. 316.

43. Grant *v.* Savannah, etc., R. Co., 51 Ga. 348. But see Snell *v.* Cottingham, 72 Ill. 161, holding that a railroad company, by permitting a contractor to go on and finish the work, waives only the performance on the day fixed, and that while the contractor may recover on a *quantum meruit* for the work done, the company will have a right to recoup the damages sustained by reason of the failure to complete the road within the time stipulated if the delay was not due to its own default.

If the company abandons the construction of a part of the line which remains to be graded under the contract, and directs the contractor to cease work, the company cannot counter-claim for damages for failure to complete the contract although this was done after the time limited for the completion of the work had expired, if the company made no complaint of the failure to complete the work within the time limited. Hutchinson *v.* New Sharon, etc., R. Co., 63 Iowa 727, 18 N. W. 915.

44. Fruin-Bambrick Constr. Co. *v.* Ft. Smith, etc., R. Co., 140 Fed. 405, holding that a provision for the payment of one hundred dollars for each day's delay as liquidated damages is waived by the company accepting the road and starting to operate it in the condition it was in at the expiration of the time limit, and permitting the contractor to go on and perfect the work of construction after the road is in operation.

45. Texas, etc., R. Co. *v.* Rust, 19 Fed. 239.

46. Bean *v.* Miller, 69 Mo. 284 (holding that where the railroad company has not secured a right of way the refusal of the owners of the land through which the road is laid out to permit the contractor to enter thereon to construct the road is sufficient excuse for his failure to construct the road at such places); Olson *v.* Snake River Valley R. Co., 22 Wash. 139, 60 Pac. 156 (holding that a failure to excavate certain ditches included under the contract is excused if due to the refusal of the company's engineer to furnish the contractor with the necessary levels without which the work could not be done).

the time limited by the contract.[47] In the case of an entire contract the general rule is that the whole work must be completed and delivered in a state of completion before payment can be demanded, and if any part has been destroyed before that time the loss must fall upon the contractor;[48] but if the railroad company has accepted the part completed the loss must fall upon it.[49] Where the contractor is to be paid in instalments as the work progresses the contract is not entire,[50] and the covenant to pay is independent of the covenant of the contractor to finish the work within a given time,[51] so that a failure to complete the work or to do so within the time limited will not affect the right of the contractor to recover any unpaid instalments which were due and payable prior to his default;[52] and if he abandons the contract without cause and has at the time received advances in excess of the amounts due, the railroad company may recover such excess.[53]

b. Performance Prevented or Delayed by Railroad Company. If the contractor is prevented from completing the contract by the wrongful conduct or default of the railroad company, he may recover the damages sustained,[54] and the value of the work done;[55] and if during the process of construction the company fails to comply with its part of the agreement or otherwise wrongfully interrupts or suspends the progress of the work, the contractor may abandon it,[56]

47. *Indiana.*— Louisville, etc., R. Co. *v.* Donnegan, 111 Ind. 179, 12 N. E. 153, failure of company to procure right of way and furnish stakes for location of bridges and trestles.

New York.— Mansfield *v.* New York Cent., etc., R. Co., 102 N. Y. 205, 6 N. E. 386.

North Carolina.— Dunavant *v.* Caldwell, etc., R. Co., 122 N. C. 999, 29 S. E. 837.

Texas.— Perkins *v.* Locke, (Civ. App. 1894) 27 S. W. 783, failure of company to pay instalments as different sections of the work were completed.

Virginia.— Atlantic, etc., R. Co. *v.* Delaware Constr. Co., 98 Va. 503, 37 S. E. 13.

48. Atlantic, etc., R. Co. *v.* Delaware Constr. Co., 98 Va. 503, 37 S. E. 13.

49. Atlantic, etc., R. Co. *v.* Delaware Constr. Co., 98 Va. 503, 37 S. E. 13, holding further that a formal acceptance is not necessary, it being sufficient that the company has taken possession and is using the part completed.

50. Wright *v.* Petrie, Sm. & M. Ch. (Miss.) 282; Perkins *v.* Locke, (Tex. Civ. App. 1894) 27 S. W. 783.

51. Philadelphia, etc., R. Co. *v.* Howard, 13 How. (U. S.) 307, 14 L. ed. 157.

52. Perkins *v.* Locke, (Tex. App. 1894) 27 S. W. 783; Philadelphia, etc., R. Co. *v.* Howard, 13 How. (U. S.) 307, 14 L. ed. 157.

53. Wright *v.* Petrie, Sm. & M. Ch. (Miss.) 282.

54. *Alabama.*— Tennessee, etc., R. Co. *v.* Danforth, 112 Ala. 80, 20 So. 502; Danforth *v.* Tennessee, etc., R. Co., 93 Ala. 614, 11 So. 60.

Illinois.— Dobbins *v.* Higgins, 78 Ill. 440.

Indiana.— Chicago, etc., R. Co. *v.* Jawger, 24 Ind. App. 460, 56 N. E. 50.

Kentucky.— Elizabethtown, etc., R. Co. *v.* Pottinger, 10 Bush 185.

Pennsylvania.— Dobbling *v.* York Springs R. Co., 203 Pa. St. 628, 53 Atl. 493.

Texas.— Waco Tap R. Co. *v.* Shirley, 45 Tex. 355.

United States.— Hambly *v.* Delaware, etc., R. Co., 21 Fed. 541.

Canada.— Tate *v.* Port Hope, etc., R. Co., 17 U. C. Q. B. 354.

55. Tennessee, etc., R. Co. *v.* Danforth, 112 Ala. 80, 20 So. 502; Danforth *v.* Tennessee, etc., R. Co., 93 Ala. 614, 11 So. 60; Cox *v.* Western Pac. R. Co., 47 Cal. 87; Rodemer *v.* Gonder, 9 Gill (Md.) 288.

56. *California.*— Cox *v.* Western Pac. R. Co., 47 Cal. 87.

Illinois.— Western Union R. Co. *v.* Smith, 75 Ill. 496.

Maine.— Seretto *v.* Rockland, etc., R. Co., 101 Me. 140, 63 Atl. 651.

Michigan.— Grand Rapids, etc., R. Co. *v.* Van Dusen, 29 Mich. 431.

Missouri.— Bean *v.* Miller, 69 Mo. 384.

United States.— Lee *v.* New Haven, etc., R. Co., 15 Fed. Cas. No. 8,197.

If the contractor is expressly notified to proceed no further he is fully justified in quitting the work and suing for damages for breach of the contract. Chapman *v.* Kansas City, etc., R. Co., 146 Mo. 481, 48 S. W. 646.

If the railroad company fails to make periodical payments as the work progresses, according to the provisions of the contract, the contractor may abandon the work (Seretto *v.* Rockland, etc., R. Co., 101 Me. 140, 63 Atl. 651; Grand Rapids, etc., R. Co. *v.* Van Dusen, 29 Mich. 431; Bean *v.* Miller, 69 Mo. 384; Lee *v.* New Haven, etc., R. Co., 15 Fed. Cas. No. 8,197); although the money is withheld for the purpose of making payments to laborers and subcontractors, if there is no provision in the contract authorizing the company to do so (Dobbins *v.* Higgins, 78 Ill. 440); and the contractor may sue for the value of the work done (Seretto *v.* Rockland, etc., R. Co., *supra*; Lee *v.* New Haven, etc., R. Co., *supra*); but it has been held that a failure to pay instalments, while authorizing the contractor to suspend work and recover for the work done, is not such a breach of the entire contract as to entitle him to

and recover the value of the work completed,[57] and the damages sustained by reason of the wrongful conduct or default of the company;[58] but although a delay or suspension of the work is made necessary by the conduct of the railroad company, the contractor is not obliged to abandon the contract but may subsequently complete the work and recover in addition to the contract price the damages caused by the interruption.[59] If the contractor, through the fault of the railroad company, or its failure to comply with its part of the contract, is delayed in beginning or completing the work, he is entitled to recover the damages sustained by such delay,[60] as in case of a delay on the part of the company in doing certain preliminary work which it was its duty to do,[61] or in procuring the right of way,[62] or in making surveys,[63] or assigning the work to be done each month according to the provisions of the contract,[64] or in making periodical payments as the work progresses as provided by the contract.[65]

9. Actions.[66] Railroad construction contracts are of such a character that specific performance will not be enforced in equity;[67] but in case of a breach of

recover damages for the profits which he would have earned had the contract been fully performed (Wharton *v.* Winch, 140 N. Y. 287, 35 N. E. 589 [*reversing* 19 N. Y. Suppl. 477]).

Where the work is to be paid for in sections as each ten miles is completed, a refusal of the company to pay when one section is completed authorizes the contractor to treat the contract as rescinded for the remainder and sue for the work done at the contract price. Miller *v.* Sullivan, 14 Tex. Civ. App. 112, 33 S. W. 695, 35 S. W. 1084, 37 S. W. 778.

57. *California.*— Cox *v.* Western Pac. R. Co., 47 Cal. 87.

Illinois.— Dobbins *v.* Higgins, 78 Ill. 440.

Maine.— Seretto *v.* Rockland, etc., R. Co., 101 Me. 140, 63 Atl. 651.

Missouri.— Bean *v.* Miller, 69 Mo. 384.

Texas.— Miller *v.* Sullivan, 14 Tex. Civ. App. 112, 33 S. W. 695, 35 S. W. 1084, 37 S. W. 778.

United States.— Lee *v.* New Haven, etc., R. Co., 15 Fed. Cas. No. 8,197.

58. Elizabethtown, etc., R. Co. *v.* Pottinger, 10 Bush (Ky.) 185; Seretto *v.* Rockland, etc., R. Co., 101 Me. 140, 63 Atl. 651.

59. Louisville, etc., R. Co. *v.* Hollerbach, 105 Ind. 137, 5 N. E. 28; Mansfield *v.* New York Cent., etc., R. Co., 102 N. Y. 205, 6 N. E. 386. *Compare* Western Union R. Co. *v.* Smith, 75 Ill. 496; Grand Rapids, etc., R. Co. *v.* Van Dusen, 29 Mich. 431.

60. *Indiana.*— Louisville, etc., R. Co. *v.* Hollerbach, 105 Ind. 137, 5 N. E. 28.

Maine.— Seretto *v.* Rockland, etc., R. Co., 101 Me. 140, 63 Atl. 651.

Maryland.— Orange, etc., R. Co. *v.* Placide, 35 Md. 315.

New York.— Mansfield *v.* New York Cent., etc., R. Co., 102 N. Y. 205, 6 N. E. 386.

Texas.— O'Connor *v.* Smith, 84 Tex. 232, 19 S. W. 168.

United States.— Philadelphia, etc., R. Co. *v.* Howard, 13 How. 307, 14 L. ed. 157.

A provison in the contract that should the work be suspended or delayed no damages shall be claimed therefor will be binding if the delay was not caused by the railroad company for any fraudulent purpose or to injure the contractor but was due to an unexpected calamity (Snell *v.* Brown, 71 Ill. 133); but a provision that in case the company is delayed in acquiring title to lands or for other reasons the contractor shall not be entitled to damages therefor, but shall have an extension of time, applies only to delays which the company may suffer and not to a delay caused by the company in failing to have a survey made for the work (O'Connor *v.* Smith, 84 Tex. 232, 19 S. W. 168); and although the contract stipulates against damages due to delays caused by the company if the company suspends work but requests the contractor to keep his men and teams upon the work in readiness to resume when required, a contract on the part of the company to compensate him for the loss and expense thus incurred will be implied (Curnan *v.* Delaware, etc., R. Co., 138 N. Y. 480, 34 N. E. 201].

If the contractor is delayed by reason of an injunction he cannot recover damages for the delay unless the railroad company fails to use reasonable diligence to obtain a dissolution of the injunction. Philadelphia, etc., R. Co. *v.* Howard, 13 How. (U. S.) 307, 14 L. ed. 157.

61. Louisville, etc., R. Co. *v.* Hollerback, 105 Ind. 137, 5 N. E. 28; Mansfield *v.* New York Cent., etc., R. Co., 102 N. Y. 205, 6 N. E. 386.

62. Lauman *v.* Young, 31 Pa. St. 306.

63. O'Connor *v.* Smith, 84 Tex. 232, 19 S. W. 168.

64. Dunham *v.* Dayton, etc., R. Co., 3 Ohio Dec. (Reprint) 329.

65. Orange, etc., R. Co. *v.* Placide, 35 Md. 315, holding further that the liability of the company for damages due to a delay caused by a failure to make payments according to the terms of the contract is not affected by the fact that one of the contractors had private means of his own which he might have employed in fulfilling the contract.

66. See, generally, Contracts, 9 Cyc. 685.

67. *New Jersey.*—Danforth *v.* Philadelphia, etc., R. Co., 30 N. J. Eq. 12.

Virginia.— Ewing *v.* Litchfield, 91 Va. 575, 22 S. E. 362.

United States.— Texas, etc., R. Co. *v.* Rust,

the contract by the other party an action for damages may be maintained by either the railroad company [68] or the contractor.[69] If the contractor is prevented from completing his contract by the wrongful act of the railroad company he may in the same action sue for the amount due for the work completed and for damages for the breach of the contract in preventing him from completing it.[70] To entitle the contractor to maintain an action upon the contract there must have been a performance on his part according to the terms of the contract,[71] and so he cannot sue upon the contract where he has wrongfully abandoned the work before completion,[72] or, if time was of the essence of the contract, where he has not completed the work within the time limited; [73] but if he has been permitted to continue after the time limited and the company has accepted the work he may sue in assumpsit,[74] and recover on a *quantum meruit*.[75] The contractor may also sue in assumpsit where by consent of the railroad company he has been released from completing the work,[76] or the time of performance has been extended; [77] and if prevented from completing it by the railroad company he need not resort to a special action but may sue in assumpsit on the implied liability of the company for the work done.[78]

I. Liabilities For Labor, Materials, or Supplies[79] — **1. In General.** In the absence of statute or agreement, a railroad company is not liable for work done for and under the employment of a contractor,[80] or for materials furnished to a contractor.[81] In some jurisdictions, however, there are statutes imposing a liability on the part of railroad companies to laborers who are employed by contractors in the construction of the railroad,[82] or to those furnishing labor or

17 Fed. 275, 5 McCrary 348; Fallon *v.* Missouri, etc., R. Co., 8 Fed. Cas. No. 4,629, 1 Dill. 121; Ross *v.* Union Pac. R. Co., 20 Fed. Cas. No. 12,080, Woolw. 26.

England.— South Wales R. Co. *v.* Wythes, 3 Eq. Rep. 70, 1 Kay & J. 186, 24 L. J. Ch. 1, 3 Wkly. Rep. 3, 69 Eng. Reprint 422 [*affirmed* in 3 Eq. Rep. 153, 24 L. J. Ch. 87, 3 Wkly. Rep. 133].

Canada.— Johnson *v.* Montreal, etc., R. Co., 22 Grant Ch. (U. C.) 290.

See also, generally, Specific Performance.

68. American Bonding, etc., Co. *v.* Baltimore, etc., R. Co., 124 Fed. 866, 60 C. C. A. 52.

69. Arrington *v.* Savannah, etc., R. Co., 95 Ala. 434, 11 So. 7; Danforth *v.* Tennessee, etc., R. Co., 93 Ala. 614, 11 So. 60; Louisville, etc., R. Co. *v.* Hollerbach, 105 Ind. 137, 5 N. E. 28; Waco Tap. R. Co. *v.* Shirley, 45 Tex. 355.

70. Tennessee, etc., R. Co. *v.* Danforth, 112 Ala. 80, 20 So. 502; Danforth *v.* Tennessee, etc., R. Co., 93 Ala. 614, 11 So. 60.

Amendment.— If the original complaint seeks only a recovery for the work done it may be amended by adding counts for damages, without introducing a new cause of action. Tennessee, etc., R. Co. *v.* Danforth, 112 Ala. 80, 20 So. 502.

71. Finegan *v.* L'Engle, 8 Fla. 413; Barker *v.* Troy, etc., R. Co., 27 Vt. 766.

72. Finegan *v.* L'Engle, 8 Fla. 413.

73. Barker *v.* Troy, etc., R. Co., 27 Vt. 766; Emerson *v.* Slater, 22 How. (U. S.) 28, 16 L. ed. 360; Slater *v.* Emerson, 19 How. (U. S.) 224, 15 L. ed. 626.

74. Lee *v.* New Haven, etc., R. Co., 15 Fed. Cas. No. 8,197.

75. Snell *v.* Cottingham, 72 Ill. 161; Emerson *v.* Slater, 22 How. (U. S.) 28, 16 L. ed. 360; Slater *v.* Emerson, 19 How. (U. S.) 224, 15 L. ed. 626.

But the company may recoup the damages sustained by reason of the failure of the contractor to complete the contract within the time limited. Snell *v.* Cottingham, 72 Ill. 161.

76. Baltimore, etc., R. Co. *v.* Resley, 7 Md. 297.

77. Barker *v.* Troy, etc., R. Co., 27 Vt. 766.

78. Rodemer *v.* Gonder, 9 Gill (Md.) 288, holding that in such an action if the work was to be paid for on the basis of monthly estimates, and those estimates have been made and payments made, they are conclusive as to the value of the work covered thereby, but that as to work not estimated or adjusted plaintiff is at large upon his *quantum meruit* and may show the actual value of such work.

79. **Liens for labor or supplies** see *infra*, VIII, A, 6, i; VIII, A, 9, g.

80. Indianapolis, etc., R. Co. *v.* O'Reily, 38 Ind. 140.

81. Cameron *v.* Orleans, etc., R. Co., 108 La. 83, 32 So. 208.

An agreement on the part of a railroad company to "protect all claims for materials, labor and board" does not include a claim for hay and feed furnished to a contractor for teams employed by the latter. Pennsylvania Co. *v.* Mehaffey, 75 Ohio St. 432, 80 N. E. 177, 116 Am. St. Rep. 746.

82. *Maine.*— George *v.* Washington County R. Co., 93 Me. 134, 44 Atl. 377.

Missouri.— Peters *v.* St. Louis, etc., R. Co., 23 Mo. 107.

New York.— Kent *v.* New York Cent. R. Co., 12 N. Y. 628.

materials,[83] or labor, materials, or supplies to a contractor.[84] These statutes apply to companies incorporated prior to the enactment of the statutes,[85] and are not unconstitutional,[86] at least in so far as they apply to future contracts; [87] but while they are remedial as to the laborers and others provided for,[88] they impose upon the railroad companies liabilities which would not otherwise exist and should not be extended beyond the fair import of the terms used.[89] In Kansas the statute requires the railroad company to take a bond from the contractors, conditioned for the payment of laborers, materialmen, and those furnishing goods and provisions to a contractor, and provides that in case of failure to do so the railroad company shall be liable therefor,[90] but if such bond is taken the railroad company is relieved from liability.[91] In Louisiana the statutes prohibit payments or advances to contractors until the amounts due to laborers at the time of such payments are paid or secured; [92] and in Pennsylvania the statute prohibits any transfer by a railroad company of its property while the claims of contractors and laborers employed in the construction or repair of its road are unpaid, and makes any transfer void as against such claims;[93] while in Indiana the statute makes the stock-holders of the railroad company individually liable after the assets of the company are exhausted for unpaid claims for labor performed in the construction of the road.[94] In some cases the statutes limit the liability of the railroad company to claims for labor for a certain period,[95] or limit its liability according to

Vermont.— Branin *v.* Connecticut, etc., R. Co., 31 Vt. 214.

Wisconsin.— Redmond *v.* Galena, etc., R. Co., 39 Wis. 426.

See 41 Cent. Dig. tit. "Railroads," § 342.

Services performed on a quantum meruit as well as for a stipulated price are within the application and protection of the statutes. Chapman *v.* Utica, etc., R. Co., 4 Lans. (N. Y.) 96.

A lumber company organized under Me. Rev. St. c. 48, § 116, as a manufacturing corporation, having constructed a railroad on its own land to facilitate its lumbering operations, is not a railroad company within the application of a statute making such companies liable to laborers employed by contractors in the construction of the road. Palangio *v.* Wild River Lumber Co., 86 Me. 815, 29 Atl. 1087.

83. Hart *v.* Boston, etc., R. Co., 121 Mass. 510; Dudley *v.* Toledo, etc., R. Co., 65 Mich. 655, 32 N. W. 884.

84. Kansas City, etc., R. Co. *v.* Graham, 67 Kan. 791, 74 Pac. 232; Parkinson *v.* Alexander, 37 Kan. 110, 14 Pac. 466.

85. Peters *v.* St. Louis, etc., R. Co., 23 Mo. 107.

86. Hart *v.* Boston, etc., R. Co., 121 Mass. 510; Peters *v.* St. Louis, etc., R. Co., 23 Mo. 107; Branin *v.* Connecticut, etc., R. Co., 31 Vt. 214.

87. Hart *v.* Boston, etc., R. Co., 121 Mass. 510.

88. Chicago, etc., R. Co. *v.* Sturgis, 44 Mich. 538, 7 N. W. 213.

89. Wells *v.* Mehl, 25 Kan. 205; Missouri, etc., R. Co. *v.* Baker, 14 Kan. 563; Blanchard *v.* Portland, etc., R. Co., 87 Me. 241, 32 Atl. 890; Dudley *v.* Toledo, etc., R. Co., 65 Mich. 655, 32 N. W. 884; Chicago, etc., R. Co. *v.* Sturgis, 44 Mich. 538, 7 N. W. 213.

90. Kansas City, etc., R. Co. *v.* Graham, 67 Kan. 791, 74 Pac. 232; Parkinson *v.* Alexander, 37 Kan. 110, 14 Pac. 466.

91. Mann *v.* Burt, 35 Kan. 10, 10 Pac. 95 (holding further that the requirement that the bond shall be filed is merely directory, and not a necessary condition to exempt the railroad company from liability); Atchison, etc., R. Co. *v.* Cuthbert, 14 Kan. 212.

Form and conditions of bond.— In a bond given under the Kansas statute to protect laborers, mechanics, and others in the construction of railroads, the railroad company is the proper obligee, and if such bond contains all the conditions required by the statute it is not vitiated by the addition of other conditions. Atchison, etc., R. Co. *v.* Cuthbert, 14 Kan. 212.

92. Meyer *v.* Vicksburg, etc., R. Co., 35 La. Ann. 897, holding that under the Louisiana statute of 1880, a railroad company cannot be held liable on an order for money drawn by one of its contractors who has not provided for the payment of wages due to his laborers.

93. Hart's Appeal, 96 Pa. St. 355, holding, however, that the statute applies only to those having a direct contractual relation with the company, and that the subsequent statute of 1862 does not enlarge the class of persons protected, but merely aids in the remedy.

A legislative authority to mortgage a railroad does not repeal the protection given by the Pennsylvania statute of 1843, to contractors, laborers, etc., as to construction debts, and such claims are superior to a mortgage lien and may be enforced against the property. Tyron, etc., R. Co. *v.* Jones, 79 Pa. St. 60.

94. See Marks *v.* Indianapolis, etc., R. Co., 38 Ind. 440; Indianapolis, etc., R. Co. *v.* O'Reily, 38 Ind. 140.

95. Peters *v.* St. Louis, etc., R. Co., 24 Mo. 586; Kent *v.* New York Cent. R. Co., 12 N. Y. 628.

But the labor need not be on consecutive days in order to recover for the full number

the amount due from the railroad company to the contractor at the time of the presentation of the claim,[96] or authorize the railroad company to withhold money due to the contractor until claims for which it would be liable are paid.[97]

2. Nature and Purpose of Labor, Materials, or Supplies. The statutes imposing a liability upon railroad companies for labor and materials furnished to contractors apply only to labor and materials performed and used in the construction or repair of the road;[98] but are not limited to the original construction and apply to the construction of additional side-tracks,[99] or the construction of a new bridge in place of an old one.[1] The labor applies only to the manual labor of the persons employed,[2] and does not apply to the furnishing of the labor of others,[3] or teams or wagons.[4] The materials include only those which enter into the construction or repair of the road,[5] and do not include board or feed furnished for teams,[6] or for employees of the contractor,[7] or goods, provisions, and other such supplies.[8] In Kansas the statute expressly includes goods and provisions furnished to a contractor,[9] but applies only where they are furnished to the contractor himself.[10]

3. Persons Entitled to Payment — a. In General. The benefit of statutes imposing a liability upon railroad companies to laborers, materialmen, or persons furnishing supplies to contractors should not be extended to include persons not fairly within the terms of the statute,[11] and statutes for the protection of laborers and materialmen do not include the contractors or subcontractors themselves.[12]

b. Laborers.[13] Under statutes imposing a liability upon railroad companies to laborers employed by contractors, the term "laborer" is ordinarily held to include only ordinary manual laborers,[14] who have personally performed the labor for which the claim is made.[15] So it is held that the term "laborer" does not

of days allowed by the statute. Peters *v.* St. Louis, etc., R. Co., 24 Mo. 586.

96. Dudley *v.* Toledo, 65 Mich. 655, 32 N. W. 884; Bottomley *v.* Port Huron, etc., R. Co., 44 Mich. 542, 7 N. W. 214.

97. Dawson *v.* Iron Range, etc., Co., 97 Mich. 33, 56 N. W. 106; Dudley *v.* Toledo, etc., R. Co., 65 Mich. 655, 32 N. W. 884.

98. Dudley *v.* Toledo, etc., R. Co., 65 Mich. 655, 32 N. W. 884.

99. Missouri, etc., R. Co. *v.* Brown, 14 Kan. 557.

1. Atchison, etc., R. Co. *v.* McConnell, 25 Kan. 370.

2. Dudley *v.* Toledo, etc., R. Co., 65 Mich. 655, 32 N. W. 884.

3. Chicago, etc., R. Co. *v.* Sturgis, 44 Mich. 538, 7 N. W. 213; Cummings *v.* New York, etc., R. Co., 1 Lans. (N. Y.) 68.

Persons not laborers who merely furnish the labor of others see *infra*, VI, I, 3, b.

4. Mann *v.* Burt, 35 Kan. 10, 10 Pac. 95; Dudley *v.* Toledo, etc., R. Co., 65 Mich. 655, 32 N. W. 884; Groves *v.* Kansas City, etc., R. Co., 57 Mo. 304; Balch *v.* New York, etc., R. Co., 46 N. Y. 521. But see Chicago, etc., R. Co. *v.* Sturgis, 44 Mich. 538, 7 N. W. 213.

Where a laborer uses his own team see *infra*, VI, I, 3, b.

5. Dudley *v.* Toledo, etc., R. Co., 65 Mich. 655, 32 N. W. 884.

6. Dudley *v.* Toledo, etc., R. Co., 65 Mich. 655, 32 N. W. 884.

7. Dudley *v.* Toledo, etc., R. Co., 65 Mich. 655, 32 N. W. 884.

8. Dudley *v.* Toledo, etc., R. Co., 65 Mich. 655, 32 N. W. 884.

9. Kansas City, etc., R. Co. *v.* Graham, 67 Kan. 791, 74 Pac. 232, holding that the term "provisions or goods" includes corn, oats, and bran.

10. Parkinson *v.* Alexander, 37 Kan. 110, 14 Pac. 466.

If not furnished to the contractor there is no liability on the part of either the obligors on the bond, where a bond is taken (Parkinson *v.* Alexander, 37 Kan. 110, 14 Pac. 466); or on the part of the railroad company where it fails to take a bond as required by statute (St. Louis, etc., R. Co. *v.* Ritz, 30 Kan. 30, 1 Pac. 27).

Goods and provisions furnished to subcontractors see *infra*, VI, I, 3, c.

11. Wells *v.* Mehl, 25 Kan. 205; Missouri, etc., R. Co. *v.* Baker, 14 Kan. 563; Blanchard *v.* Portland, etc., R. Co., 87 Me. 241, 32 Atl. 890.

12. Martin *v.* Michigan, etc., R. Co., 62 Mich. 458, 29 N. W. 40.

13. Laborers of subcontractor see *infra*, VI, I, 3, c.

14. Missouri, etc., R. Co. *v.* Baker, 14 Kan. 563; Blanchard *v.* Portland, etc., R. Co., 87 Me. 241, 32 Atl. 890; Groves *v.* Kansas City, etc., R. Co., 57 Mo. 304; Balch *v.* New York, etc., R. Co., 46 N. Y. 521. But see Warner *v.* Hudson River R. Co., 5 How. Pr. (N. Y.) 454.

Laborer defined see 24 Cyc. 810.

15. Balch *v.* New York, etc., R. Co., 46 N. Y. 521; Cummings *v.* New York, etc., R. Co., 1 Lans. (N. Y.) 68. But see Warner *v.* Hudson River R. Co., 5 How. Pr. (N. Y.) 454.

include persons employed as superintendents and timekeepers,[16] clerks,[17] or persons merely furnishing the labor of others,[18] or furnishing teams and wagons.[19] Where a laborer furnishes and works with his own team, it has been held that he cannot recover under the statute, where the services were performed at an agreed price for the joint labor of himself and team,[20] although it is stated that if there were separate agreements as to each the laborer might recover for his personal services;[21] but in other cases it has been held, without special reference to the question of separate agreements, that a laborer may recover not only for his personal labor but for the use of his team with which he worked.[22] So also a statute giving laborers on railroads a preferred lien does not include civil engineers,[23] and a statute revoking a grant to an insolvent railroad company and conferring it upon another on condition that it shall pay the claims of laborers against the other company does not include civil engineers or an assistant general manager of such company.[24]

c. Subcontractors and Persons Dealing With Them. In the absence of statute or agreement a railroad company is not liable for work done for and under the employment of a subcontractor,[25] nor is the principal contractor liable for labor so performed for a subcontractor,[26] or supplies furnished to or upon his order.[27] The statutes for the protection of laborers and materialmen do not include subcontractors,[28] and a subcontractor is not entitled to recover as a laborer, although he personally labors along with those employed by him.[29] The statutes imposing a liability on the part of railroad companies to laborers of contractors are, however, held to apply to laborers employed by subcontractors as well as those employed by the original contractor;[30] but a statute making a transfer or assignment of its property by a railroad company void as against the unpaid

16. Mann *v.* Burt, 35 Kan. 10, 10 Pac. 95; Missouri, etc., R. Co. *v.* Baker, 14 Kan. 563; Blanchard *v.* Portland, etc., R. Co., 87 Me. 241, 32 Atl. 890. But see Warner *v.* Hudson River R. Co., 5 How. Pr. (N. Y.) 454.

17. Mann *v.* Burt, 35 Kan. 10, 10 Pac. 95.

18. Groves *v.* Kansas City, etc., R. Co., 57 Mo. 304; Atcherson *v.* Troy, etc., R. Co., 1 Abb. Dec. (N. Y.) 13, 6 Abb. Pr. N. S. 329; Cummings *v.* New York, etc., R. Co., 1 Lans. (N. Y.) 68. But see Warner *v.* Hudson River R. Co., 5 How. Pr. (N. Y.) 454.

19. Groves *v.* Kansas City, etc., R. Co., 57 Mo. 304; Balch *v.* New York, etc., R. Co., 46 N. Y. 521; Atcherson, etc., R. Co. *v.* Troy, etc., R. Co., 1 Abb. Dec. (N. Y.) 13, 6 Abb. Pr. N. S. 329; Cummings *v.* New York, etc., R. Co., 1 Lans. (N. Y.) 68. But see Warner *v.* Hudson River R. Co., 5 How. Pr. (N. Y.) 454.

20. Mann *v.* Burt, 35 Kan. 10, 10 Pac. 95; Balch *v.* New York, etc., R. Co., 46 N. Y. 521; Atcherson, etc., R. Co. *v.* Troy, etc., R. Co., 1 Abb. Dec. (N. Y.) 13, 6 Abb. Pr. N. S. 329.

21. See Mann *v.* Burt, 35 Kan. 10, 10 Pac. 95; Atcherson, etc., R. Co. *v.* Troy, etc., R. Co., 1 Abb. Dec. (N. Y.) 13, 6 Abb. Pr. N. S. 329.

22. Branin *v.* Connecticut, etc., R. Co., 31 Vt. 214. See also Chicago, etc., R. Co. *v.* Sturgis, 44 Mich. 538, 7 N. W. 213.

23. Pennsylvania, etc., R. Co. *v.* Leuffer, 84 Pa. St. 168, 24 Am. Rep. 189 [*reversing* 11 Phila. 548].

Liens for labor or supplies see *infra*, VIII, A, 6, i.

24. State *v.* Rusk, 55 Wis. 465, 13 N. W. 452.

25. Marks *v.* Indianapolis, etc., R. Co., 38 Ind. 440; Indianapolis, etc., R. Co. *v.* O'Reily, 38 Ind. 140.

26. Ferguson *v.* Despo, 8 Ind. App. 523, 34 N. E. 575; Streeter *v.* Dowell, 43 Kan. 545, 23 Pac. 599.

27. Ferguson *v.* Despo, 8 Ind. App. 523, 34 N. E. 575; Streeter *v.* Dowell, 43 Kan. 545, 23 Pac. 599.

28. Martin *v.* Michigan, etc., R. Co., 62 Mich. 458, 29 N. W. 40.

29. Rogers *v.* Dexter, etc., R. Co., 85 Me. 372, 27 Atl. 257, 21 L. R. A. 528.

30. *Kansas.*— Mann *v.* Corrigan, 28 Kan. 194.

Maine.— George *v.* Washington County R. Co., 93 Me. 134, 44 Atl. 377.

Missouri.— Grannahan *v.* Hannibal, etc., R. Co., 30 Mo. 546; Peters *v.* St. Louis, etc., R. Co., 24 Mo. 586.

New York.— Kent *v.* New York Cent. R. Co., 12 N. Y. 628 [*overruling* Millered *v.* Lake Ontario, etc., R. Co., 9 How. Pr. 238].

Vermont.— Branin *v.* Connecticut, etc., R. Co., 31 Vt. 214.

Wisconsin.— Redmond *v.* Galena, etc., R. Co., 39 Wis. 426; Mundt *v.* Sheboygan, etc., R. Co., 31 Wis. 451.

See 41 Cent. Dig. tit. "Railroads," § 347.

Laborers of subcontractors in the second degree are within the application and protection of the statute. Redmond *v.* Galena, etc., R. Co., 39 Wis. 426.

The violation of an agreement not to sublet a construction contract does not affect the statutory liability of the railroad company to laborers of the subcontractor. Grannahan *v.* Hannibal, etc., R. Co., 30 Mo. 546.

claims of contractors and laborers employed in the construction of the road has been held to be limited to those having a direct contractual relation with the company and not to include subcontractors or their employees.[31] The Kansas statute, although applying to goods and provisions furnished to a contractor, does not apply to those furnished to or upon the order of a subcontractor.[32]

d. Assignees or Purchasers of Claims. Claims against railroad companies under their statutory liability for labor, materials, or supplies furnished to contractors are assignable and may be enforced against the railroad company in an action by the assignee.[33]

4. Notice and Proceedings.[34] The statutes imposing a liability on railroad companies for labor and materials furnished to contractors require a notice of the claim to be presented to or served upon the railroad company within a certain time, and ordinarily prescribe the form and contents of such notice,[35] and it is

31. Hart's Appeal, 96 Pa. St. 355, holding that the Pennsylvania statute of 1862 does not enlarge the class of persons protected by the resolution of 1843.

32. Parkinson *v.* Alexander, 37 Kan. 110, 14 Pac. 466; St. Louis, etc., R. Co. *v.* Ritz, 30 Kan. 30, 1 Pac. 27.

If furnished to a subcontractor or upon his order there is no liability either on the part of the obligors on the bond where a bond is taken (Parkinson *v.* Alexander, 37 Kan. 110, 14 Pac. 466; Wells *v.* Mehl, 25 Kan. 205), or on the part of the railroad company, where it fails to take such bond as required by statute (St. Louis, etc., R. Co. *v.* Ritz, 30 Kan. 30, 1 Pac. 27).

33. Missouri, etc., R. Co. *v.* Brown, 14 Kan. 557; Dudley *v.* Toledo, etc., R. Co., 65 Mich. 665, 32 N. W. 884; Chicago, etc., R. Co. *v.* Sturgis, 44 Mich. 538, 7 N. W. 213; Peters *v.* St. Louis, etc., R. Co., 24 Mo. 586.

The assignee may sue in his own name to enforce a claim for labor performed for a contractor. Peters *v.* St. Louis, etc., R. Co., 24 Mo. 586.

What constitutes assignment.— Where laborers of a contractor or subcontractor are paid by a third person on orders drawn by the contractor or subcontractor, such payment does not constitute an assignment to such person of the laborer's claims, and gives such person no right of action against the railroad company. Dudley *v.* Toledo, etc., R. Co., 65 Mich. 655, 32 N. W. 884; Martin *v.* Michigan, etc., R. Co., 62 Mich. 458, 29 N. W. 40. *Compare* Missouri, etc., R. Co. *v.* Brown, 14 Kan. 557.

34. Enforcement of liabilities generally see *infra*, VIII, A, 13, 14.

Foreclosure of liens see *infra*, VIII, B.

35. *Massachusetts.*—Hart *v.* Boston Revere Beach, etc., R. Co., 121 Mass. 510.

Michigan.— Quackenbush *v.* Chicago, etc., R. Co., 91 Mich. 308, 51 N. W. 883; Martin *v.* Michigan, etc., R. Co., 62 Mich. 458, 29 N. W. 40.

Missouri.— Peters *v.* St. Louis, etc., R. Co., 24 Mo. 586; Rapauno Chemical Co. *v.* Greenfield, etc., R. Co., 59 Mo. App. 6.

New York.— Kent *v.* New York Cent. R. Co., 12 N. Y. 628; Chapman *v.* Utica, etc., R. Co., 4 Lans. 96.

Wisconsin.— Redmond *v.* Galena, etc., R. Co., 39 Wis. 426; Mundt *v.* Sheboygan, etc., R. Co., 31 Wis. 451.

See 41 Cent. Dig. tit. "Railroads," § 350.

Form and sufficiency of notice.— In the notice to the railroad company, certainty beyond that of a common intent is not required, and a notice is not invalid for omitting the full name of the railroad company if it is clearly designated by the name given (Peters *v.* St. Louis, etc., R. Co., 24 Mo. 586); and where the statute does not expressly require that the notice shall state the name of the contractor, but merely the "particular nature and amount" of the claim, a notice to a railroad company that plaintiff has a claim against it of a specified amount for labor in the construction of the road between specified dates, is sufficient, although it does not name the contractor by whom plaintiff was employed (Mundt *v.* Sheboygan, etc., R. Co., 31 Wis. 451); but a notice which is merely a claim for a balance due for work done, without stating that it was for plaintiff's personal labor or the character of the labor, or when performed, or the rate per day, or how much had been paid thereon, is not sufficient (Quackenbush *v.* Chicago, etc., R. Co., 91 Mich. 308, 51 N. W. 883).

Service of notice.— Under a statute requiring the notice to be served upon an engineer or other agent or person employed by the railroad company having charge of the section of the road on which the labor was performed or materials furnished, service upon the general manager of the company is not sufficient in the absence of proof that he had supervision over such section of the road (Rapauno Chemical Co. *v.* Greenfield, etc., R. Co., 59 Mo. App. 6); but the notice may be served upon the chief engineer of the road, although the section of the road upon which the work is performed is under the immediate charge of an assistant engineer (Chapman *v.* Utica, etc., R. Co., 4 Lans. (N. Y.) 96).

Time for giving notice.— Where the statute requires the notice to be given "within twenty days after the completion of such labor," it is not necessary to give notice at monthly intervals during a continuous term of employment, but a notice within twenty days after the completion of the whole time worked is sufficient (George *v.* Washington

usually required that the action to enforce the claim shall be instituted within a certain time thereafter.[36] The claimant, in order to enforce this statutory liability against the railroad company, must comply with all the requirements of the statute,[37] and upon the trial must allege and prove every fact essential to bring the claim within the application of the statute and to show his right to recover thereon.[38] Where the statute makes the liability of the railroad company conditional upon the existence of an indebtedness on its part to the contractor, the existence of such indebtedness must be established;[39] but where the statute imposes a direct liability upon the railroad company and requires the action to be brought within a specified time after the labor is performed, it is immaterial whether at the time of the action there is anything due from the railroad company to the contractor or not.[40] Such actions may be brought before justices of the peace for amounts within their jurisdiction.[41] Where a contractor executes a bond with sureties for the payment of all just claims for labor and materials used by him in the construction of the road, persons holding such claims may maintain an action on the bond.[42]

J. Injuries From Construction or Maintenance — 1. Nature and Extent of Liability — a. In General. The constitutional right of a person whose property is taken or injured without his consent for public purposes to compensation therefor[43] is not affected by the legislative authority of a railroad company to construct the road,[44] or municipal consent to its construction within the corporate limits,[45] and if there has been no condemnation or compensation made he may recover the damages sustained by action or other appropriate proceeding;[46] but it will be presumed that compensation for all injuries necessarily incidental to the construction of the road in a lawful and proper manner were included in the assessment of damages in condemnation proceedings,[47] or in the consideration for the grant of the right of way.[48] It follows that where the railroad company in constructing its road has proceeded under legislative authority and in a lawful and proper manner, with due care, there can be no recovery as for a tort for any incidental or consequential damages,[49] or any right to enjoin

County R. Co., 93 Me. 134, 44 Atl. 377); and where the statute requires notice "within thirty days after such claim or demand shall have accrued," and it appears that it was the custom not to pay the laborers for each month's work until the fifteenth of the following month, the claim does not accrue until the usual time of payment, and a notice within thirty days thereafter is sufficient (Mundt *v.* Sheboygan, etc., R. Co., 31 Wis. 451).

36. George *v.* Washington County R. Co., 93 Me. 134, 44 Atl. 377; Rapauno Chemical Co. *v.* Greenfield, etc., R. Co., 59 Mo. App. 6; Kent *v.* New York Cent. R. Co., 12 N. Y. 628; Redmond *v.* Galena, etc., R. Co., 39 Wis. 426.

37. Martin *v.* Michigan, etc., R. Co., 62 Mich. 458, 29 N. W. 40; Rapauno Chemical Co. *v.* Greenfield, etc., R. Co., 59 Mo. App. 6.

38. Dudley *v.* Toledo, etc., R. Co., 65 Mich. 655, 32 N. W. 884.

39. Bottomly *v.* Port Huron, etc., R. Co., 44 Mich. 542, 7 N. W. 214.

40. Redmond *v.* Galena, etc., R. Co., 39 Wis. 426.

41. Grannahan *v.* Hannibal, etc., R. Co., 30 Mo. 546; Redmond *v.* Galena, etc., R. Co., 39 Wis. 426.

42. Wells *v.* Kavanagh, 70 Iowa 519, 30 N. W. 871, holding, however, that where the condition of the bond covers only claims justly due, plaintiff must show by evidence that the work was performed or materials furnished, and that his claim therefor is just, and further that orders given by the contractor to laborers and charged to their accounts do not constitute an admission which will bind the sureties on the bond that the amount of such orders is justly due.

43. See Eminent Domain, 15 Cyc. 639 *et seq.*

Measure and elements of damages see Eminent Domain, 15 Cyc. 704, 995.

44. Costigan *v.* Pennsylvania R. Co., 54 N. J. L. 233, 23 Atl. 810; Gulf, etc., R. Co. *v.* Fuller, 63 Tex. 467.

45. Martin *v.* Chicago, etc., R. Co., 47 Mo. App. 452; Rosenthal *v.* Taylor, etc., R. Co., 79 Tex. 325, 15 S. E. 268.

46. See Eminent Domain, 15 Cyc. 979 *et seq.*

47. See *infra*, VI, J, 1, c.

48. See *supra*, V, D, 3, a.

49. *Massachusetts.*— Bryant *v.* Bigelow Carpet Co., 131 Mass. 491.

New Hampshire.— Towle *v.* Eastern R. Co., 17 N. H. 519.

New York.— Chapman *v.* Albany, etc., R. Co., 10 Barb. 360.

Ohio.— Lewis *v.* Mt. Adams, etc., R. Co., 7 Ohio Dec. (Reprint) 566, 3 Cinc. L. Bul. 1007.

Texas.— International, etc., R. Co. *v.* Pape, 62 Tex. 313.

the work of construction;[50] but the legislative authority which protects the company against liability for merely incidental damages does not authorize any direct invasion of private rights,[51] and the company will be liable for damages caused by unauthorized acts,[52] or failure to comply with statutory requirements,[53] or by any encroachment upon lands outside of the limits of its right of way,[54] or trespass committed upon such adjacent lands.[55] The company will also be liable for any injuries due to the negligent or improper manner of constructing its road,[56] for the general rule applies that it must so use its property as not unnecessarily to injure another;[57] but this rule does not require that where the company has acquired a right of way it must construct its road thereon in such manner as to

Vermont.— Hatch *v.* Vermont Cent. R. Co., 25 Vt. 49.

England.— Emsley *v.* North Eastern R. Co., [1896] 1 Ch. 418, 60 J. P. 182, 65 L. J. Ch. 385, 74 L. T. Rep. N. S. 113.

Canada.— Ross *v.* Canadian Pac. R. Co., 1 Can. R. Cas. 461; Wallace *v.* Grand Trunk R. Co., 16 U. C. Q. B. 551; McDonell *v.* Ontario, etc., R. Co., 11 U. C. Q. B. 271.

See 41 Cent. Dig. tit.. "Railroads," §§ 351, 353.

A railroad company which erects a fence on its own land to prevent snow from being blown upon its road is not liable for damages occasioned by the accumulation of snow upon another's land on the other side of the fence, since it is a proper and reasonable use of its property. Carson *v.* Western R. Co., 8 Gray (Mass.) 423.

50. Emsley *v.* North Eastern R. Co., [1896] 1 Ch. 418, 60 J. P. 182, 65 L. J. Ch. 385, 74 L. T. Rep. N. S. 113. See also Warburton *v.* London, etc., R. Co., 1 R. & Can. Cas. 558.

51. Costigan *v.* Pennsylvania R. Co., 54 N. J. L. 233, 23 Atl. 810; Biscoe *v.* Great Eastern R. Co., L. R. 16 Eq. 636, 21 Wkly. Rep. 902.

52. Hotard *v.* Texas, etc., R. Co., 36 La. Ann. 450; Rogers *v.* Kennebec, etc., R. Co., 35 Me. 319; Caledonian R. Co. *v.* Colt, 7 Jur. N. S. 475, 3 L. T. Rep. N. S. 252, 3 Macq. H. L. 833; Wilkes *v.* Gzowski, 3 U. C. Q. B. 308.

Failure to file map of road.— Under a statute providing that a railroad company before constructing a part of its road shall make and file in the office of the county clerk a map and profile, it has no authority to clear the right of way before such filing and will be liable for damages to the line of a telephone company in clearing the way, although it surveyed its line of road before the telephone line was constructed. White River R. Co. *v.* Batesville, etc., Tel. Co., 81 Ark. 195, 98 S. W. 721.

Injunctive relief.— Where a railroad company constructed its line so as to leave for the passage for a private road two intervals of nine feet three inches each, when the interval required by statute for such a way was twelve feet, and plaintiff's right of way was not disputed but he had lain by and allowed the work to proceed and the damage accruing in consequence was small, it was held that the court would not grant an injunction to restrain the infringement of his legal right. Wintle *v.* Bristol, etc., R. Co., 6 L. T. Rep. N. S. 20, 10 Wkly. Rep. 210.

53. Caledonian R. Co. *v.* Colt, 7 Jur. N. S. 475, 3 L. T. Rep. N. S. 252, 3 Macq. H. L. 833, holding that an action for damages will lie against a railroad company for not restoring a private railroad within the period prescribed by statute.

54. Roushlange *v.* Chicago, etc., R. Co., 115 Ind. 106, 17 N. E. 198; Ryan *v.* Mississippi Valley, etc., R. Co., 62 Miss. 162.

Where an embankment is negligently constructed so that the earth of the embankment spreads beyond the right of way upon plaintiff's land, he may recover for the damages sustained. Sims *v.* Ohio River, etc., R. Co., 56 S. C. 30, 33 S. E. 746.

55. Booth *v.* McIntyre, 31 U. C. C. P. 183.

56. *Illinois.*— Ohio, etc., R. Co. *v.* Dooley, 32 Ill. App. 228.

Kentucky.— Louisville, etc., R. Co. *v.* Bonhago, 94 Ky. 67, 21 S. W. 526, 14 Ky. L. Rep. 737; Illinois Cent. R. Co. *v.* Moore, 82 S. W. 624, 26 Ky. L. Rep. 859.

Maine.— Rogers *v.* Kennebec, etc., R. Co., 35 Me. 319.

Massachusetts.— Bryant *v.* Bigelow Carpet Co., 131 Mass. 491.

New York.— Egener *v.* New York, etc., R. Co., 3 N. Y. App. Div. 157, 38 N. Y. Suppl. 319.

South Carolina.— Sims *v.* Ohio River, etc., R. Co., 56 S. C. 30, 33 S. E. 746.

Texas.— Rosenthal *v.* Taylor, etc., R. Co., 79 Tex. 325, 15 S. W. 268; Nading *v.* Denison, etc., R. Co., (Civ. App. 1901) 62 S. W. 97.

West Virginia.— Richards *v.* Ohio River, etc., R. Co., 56 W. Va. 592, 49 S. E. 385.

England.— Biscoe *v.* Great Eastern R. Co., L. R. 16 Eq. 636, 21 Wkly. Rep. 902.

Canada.— Vanhorn *v.* Grand Trunk R. Co., 18 U. C. Q. B. 356.

See 41 Cent. Dig. tit. "Railroads," §§ 351, 353.

In the case of impairment of lateral support the actionable wrong is not the excavation but permitting another's land to fall, and the landowner cannot recover damages until the earth is so much disturbed that it slides or falls. Kansas City Northwestern R. Co. *v.* Schwake, 70 Kan. 141, 78 Pac. 431, 68 L. R. A. 673.

57. Evansville, etc., R. Co. *v.* Dick, 9 Ind. 433; Kirk *v.* Kansas City, etc., R. Co., 51 La. Ann. 667, 25 So. 457; Biscoe *v.* Great Eastern R. Co., L. R. 16 Eq. 636, 21 Wkly. Rep. 902.

occasion the least possible injury to the owners of adjacent lands, regardless of its own interests and the requirements of a properly constructed road-bed.[58]

b. Effect of Ownership of Right of Way. The fact that the railroad company owns its right of way absolutely does not affect its liability for damages to the property of others caused by the negligent or improper manner of constructing its road,[59] or by improper encroachments upon the land outside the limits of its right of way.[60]

c. Effect of Assessment in Condemnation Proceedings.[61] Where land is condemned for the construction of a railroad the damages assessed include whatever injuries will result from its construction and are incidental to its use,[62] so that the landowner cannot thereafter recover damages for injuries merely incidental to the construction of the road if done in a lawful and proper manner;[63] but the damages are assessed upon the theory that the road will be constructed in a skilful and proper manner,[64] and since so limited the landowner may subsequently recover damages for any injury due to a negligent or improper construction of the road,[65] or improper encroachment upon his lands outside of the right of way,[66] or failure to comply with a statutory requirement, such as the construction of fences or cattle-guards,[67] or restoring a private way interfered with by the

58. International, etc., R. Co. *v.* Pape, 62 Tex. 313, holding that a railroad company will not be liable because it constructed its road through plaintiff's land upon an embankment, whereby access between different parts of his property was rendered less convenient.

A railroad company is not bound to construct a trestle instead of an embankment because the former would occasion less inconvenience to the landowner. Gulf, etc., R. Co. *v.* Richards, 11 Tex. Civ. App. 95, 32 S. W. 96.

59. Ohio, etc., R. Co. *v.* Dooley, 32 Ill. App. 228; Roushlange *v.* Chicago, etc., R. Co., 115 Ind. 106, 17 N. E. 198; Union Pac. R. Co. *v.* Dyche, 31 Kan. 120, 1 Pac. 243 [*reversed* without opinion on stipulation of counsel in 32 L. ed. 325].

60. Roushlange *v.* Chicago, etc., R. Co., 115 Ind. 106, 17 N. E. 198.

Where a railroad company by adverse possession acquires a right of way over private property its title is limited to the extent of its possession and it will be liable to the owner of adjacent land for damages resulting from a widening of the right of way beyond such limits. Ryan *v.* Mississippi Valley, etc., R. Co., 62 Miss. 162.

61. Effect of conveyance of right of way see *supra*, V, D, 3, a.

62. See EMINENT DOMAIN, 15 Cyc. 705.

63. *Missouri.*— Clark *v.* Hannibal, etc., R. Co., 36 Mo. 202.

New Hampshire.— Clark *v.* Boston, etc., R. Co., 24 N. H. 114; Aldrich *v.* Cheshire R. Co., 21 N. H. 359, 53 Am. Dec. 212.

North Carolina.— Fleming *v.* Wilmington, etc., R. Co., 115 N. C. 676, 20 S. E. 714.

Texas.— International, etc., R. Co. *v.* Pape, 62 Tex. 313.

Canada.— Knapp *v.* Great Western R. Co., 6 U. C. C. P. 187.

See 41 Cent. Dig. tit. "Railroads," § 362.

Where a company is not required to fence or construct cattle-guards the cost of constructing such as will be rendered necessary by the construction of the railroad is included in the assessment of damages, and the landowner cannot subsequently recover for injuries due to their absence. Clark *v.* Hannibal, etc., R. Co., 36 Mo. 202; Gulf, etc., R. Co. *v.* London, 3 Tex. App. Civ. Cas. § 426.

64. McCormick *v.* Kansas City, etc., R. Co., 57 Mo. 433; Chicago, etc., R. Co. *v.* Andreesen, 62 Nebr. 456, 87 N. W. 167; Hatch *v.* Vermont Cent. R. Co., 25 Vt. 49. See also, generally, EMINENT DOMAIN, 15 Cyc. 728.

65. *Illinois.*— Cleveland, etc., R. Co. *v.* Pattison, 67 Ill. App. 351; Chicago, etc., R. Co. *v.* Willi, 53 Ill. App. 603.

Indiana.— Roushlange *v.* Chicago, etc., R. Co., 115 Ind. 106, 17 N. E. 198.

Missouri.— McCormick *v.* Kansas City, etc., R. Co., 57 Mo. 433.

Nebraska.— Chicago, etc., R. Co. *v.* Andreesen, 62 Nebr. 456, 87 N. W. 167; Chicago, etc., R. Co. *v.* O'Neill, 58 Nebr. 239, 78 N. W. 521.

New Hampshire.— Perley *v.* Boston, etc., R. Co., 57 N. H. 212.

Tennessee.— Carriger *v.* East Tennessee, etc., R. Co., 7 Lea 388.

Vermont.— Hatch *v.* Vermont Cent. R. Co., 25 Vt. 49.

See 41 Cent. Dig. tit. "Railroads," § 362. See also, generally, EMINENT DOMAIN, 15 Cyc. 995.

Removal of stock gaps.— Where land in the possession of tenants is condemned as the property of the landlord and all damages for the condemning of the right of way paid to him, the railroad company will be liable to tenants for injuries to crops by trespassing stock due to a removal by the company after the condemnation of cattle-guards previously maintained by it. Rome, etc., Constr. Co. *v.* Jennings, 85 Ga. 444, 11 S. E. 839.

66. Roushlange *v.* Chicago, etc., R. Co., 115 Ind. 106, 17 N. E. 198.

67. Houston, etc., R. Co. *v.* Meador, 50 Tex. 77.

construction of the railroad;[68] and this rule applies although the injury results from some new use made by plaintiff of his property after the construction of the road, provided such use is a reasonable and customary one,[69] and is not affected by the fact that plaintiff was not the owner of the land at the time the railroad was built.[70]

d. Release, Waiver, or Estoppel.[71] Where a landowner verbally agrees to convey a right of way without charge, and the railroad company relying on his promise and without objection on his part constructs its road, he is estopped to thereafter recover damages for the taking of his property,[72] or if he permits a railroad company to excavate a tunnel on his land without objection until the tunnel is completed and the railroad constructed through it, he is estopped to maintain an action for damages;[73] but the consent of a landowner to the construction of a railroad through his premises is not a waiver of the statutory duty of the company to construct fences or cattle-guards.[74] Where a landowner executes a contract releasing the railroad company from all damages which will result from the construction of its road, a subsequent purchaser of the property with knowledge of the contract will be bound thereby;[75] but a release of all damages caused by the construction of the railroad does not contemplate or prevent a recovery for injuries due to a negligent or improper construction;[76] and a mere parol license given to a railroad company by a landowner to divert water upon his lands may be revoked by a subsequent grantee and damages recovered for injuries accruing subsequent to such revocation.[77] A lot owner in a city is not estopped to recover damages to his property caused by the negligent or improper manner of constructing a railroad in a street by having signed a petition to the city authorities to grant the company a right of way through the street,[78] or by having been a member of the city council and voted in favor of granting the right of way,[79] or by having consented to the construction of a new sidewalk to take the place of one removed to make room for the alterations in the street made necessary by the railroad.[80]

e. Occupation or Obstruction of Streets and Highways.[81] As to whether the use of a street or highway for railroad purposes when duly authorized is such a use as entitles an abutting property-owner to compensation or damages the authorities are not entirely agreed, and the subject has been elsewhere fully considered.[82] Where such use is held to entitle the abutting owner to compensation or the particular use or acts done by the railroad company constitute an injury to his property for which he is entitled to be compensated and there has been no condemnation or compensation made, he may sue for and recover the damages sustained[83] without proof of negligence in the manner of doing the

68. Caledonian R. Co. *v.* Colt, 7 Jur. N. S. 475, 3 L. T. Rep. N. S. 252, 3 Macq. H. L. 833.

69. Perley *v.* Boston, etc., R. Co., 57 N. H. 212.

70. Carriger *v.* East Tennessee, etc., R. Co., 7 Lea (Tenn.) 388.

71. Conveyance of right of way as a waiver of damages see *supra*, V, D, 3, a.

72. Evans *v.* Gulf, etc., R. Co., 9 Tex. Civ. App. 124, 28 S. W. 903.

73. Norfolk, etc., R. Co. *v.* Perdue, 40 W. Va. 442, 21 S. E. 755.

74. Houston, etc., R. Co. *v.* Meador, 50 Tex. 77.

75. Root *v.* Pennsylvania Co., 5 Ohio S. & C. Pl. Dec. 315, 7 Ohio N. P. 337.

76. St. Louis, etc., R. Co. *v.* Hurst, 25 Ill. App. 98; Jungblum *v.* Minneapolis, etc., R. Co., 70 Minn. 153, 72 N. W. 971; Fremont, etc., R. Co. *v.* Harlin, 50 Nebr. 698, 70 N. W. 263, 61 Am. St. Rep. 578, 36 L. R. A. 417; Brown *v.* Pine Creek R. Co., 183 Pa. St. 38, 38 Atl. 401.

77. Foot *v.* New Haven, etc., Co., 23 Conn. 214.

78. Louisville, etc., R. Co. *v.* Hall, 13 Ky. L. Rep. 174.

79. Lamm *v.* Chicago, etc., R. Co., 45 Minn. 71, 47 N. W. 455, 10 L. R. A. 268.

80. Atchison, etc., R. Co. *v.* Pratt, 53 Ill. App. 263.

81. Rights in and use of streets and highways see *supra*, V, I.

82. See EMINENT DOMAIN, 15 Cyc. 672.

83. *California.*— Coates *v.* Atchison, etc., R. Co., 1 Cal. App. 441, 82 Pac. 640.

Illinois.— Illinois Cent. R. Co. *v.* Davis, 71 Ill. App. 99.

Kentucky.— Henderson Belt R. Co. *v.* Dechamp, 95 Ky. 219, 24 S. W. 605, 16 Ky. L. Rep. 82.

Maryland.— Baltimore, etc., R. Co. *v.* Reaney, 42 Md. 117.

work;[84] but where the construction of the road does not of itself entitle such owner to compensation the right to recover damages depends upon the manner of its construction,[85] and if the work done was duly authorized and the company has proceeded in a legal and proper manner, there can be no recovery for merely incidental or consequential damages.[86] The railroad company will, however, be liable for all damages sustained where it has constructed its road in a street or highway without authority,[87] or has constructed it in an unauthorized manner,[88] and generally for injuries resulting from the negligent or improper mode of construction,[89] or failure to comply with statutory requirements;[90] but for damages resulting from works of construction, although incidental to the construction of a railroad, which were done by municipal or other public authorities, and over

Missouri.— Martin *v.* Chicago, etc., R. Co., 47 Mo. App. 452.

Ohio.— Lake Shore, etc., R. Co. *v.* Brown, 16 Ohio Cir. Ct. 269, 9 Ohio Cir. Dec. 37.

Pennsylvania.— Hare *v.* Pittsburg, etc., R. Co., 10 Pa. Super. Ct. 647.

Texas.— Schier *v.* Cane Belt R. Co., (Civ. App. 1907) 100 S. W. 360; Texarkana, etc., R. Co. *v.* Bulgier, (Civ. App. 1898) 47 S. W. 1047.

Wisconsin.— Buchner *v.* Chicago, etc., R. Co., 60 Wis. 264, 19 N. W. 56.

See 41 Cent. Dig. tit. "Railroads," § 354.

Municipal consent cannot affect the right of a property-owner to recover damages where he is deprived of a property right for which he has a constitutional right to compensation. Martin *v.* Chicago, etc., R. Co., 47 Mo. App. 452.

Smoke, sparks, cinders, and vibrations.—An adjoining lot owner is entitled to recover damages for a direct injury to his property from smoke, sparks, cinders, and vibrations caused by the operation of a railroad in a street. Willis *v.* Kentucky, etc., Bridge Co., 104 Ky. 186, 46 S. W. 488, 20 Ky. L. Rep. 475; Louisville Southern R. Co. *v.* Hooe, 47 S. W. 621, 20 Ky. L. Rep. 849; Louisville Southern R. Co. *v.* Hooe, (Ky. 1896) 38 S. W. 131. See also generally, EMINENT DOMAIN, 15 Cyc. 754.

84. Baltimore, etc., R. Co. *v.* Reaney, 42 Md. 117; Schier *v.* Cane Belt R. Co., (Tex. Civ. App. 1907) 100 S. W. 360.

Lateral support.— Where property is injured by reason of the impairment of lateral support in constructing a railroad tunnel under a street, the owner is entitled to recover for the damages sustained without regard to negligence in the manner of doing the work. Baltimore, etc., R. Co. *v.* Reaney, 42 Md. 117.

85. Fulton *v.* Short Route R. Transfer Co., 85 Ky. 640, 4 S. W. 332, 9 Ky. L. Rep. 291, 7 Am. St. Rep. 619.

86. *Illinois.*— Kotz *v.* Chicago, etc., R. Co., 70 Ill. App. 284.

Indiana.— Dwenger *v.* Chicago, etc., R. Co., 98 Ind. 153.

Iowa.— Slatten *v.* Des Moines Valley R. Co., 29 Iowa 148, 4 Am. Rep. 205.

Kansas.— Ottawa, etc., R. Co. *v.* Larson, 40 Kan. 301, 19 Pac. 661, 2 L. R. A. 59.

Minnesota.— Robinson *v.* Great Northern R. Co., 48 Minn. 445, 51 N. W. 384.

New York.— Bennett *v.* Long Island R. Co., 181 N. Y. 431, 74 N. E. 418 [*affirming* 89 N. Y. App. Div. 379, 85 N. Y. Suppl. 938]; Fobes *v.* Rome, etc., R. Co., 121 N. Y. 505, 24 N. E. 919, 8 L. R. A. 453; Chapman *v.* Albany, etc., R. Co., 10 Barb. 360.

See 41 Cent. Dig. tit. "Railroads," § 354.

Changing grade of street.—An authorized change in the grade of a street, made in order to restore it to its former condition of usefulness where it is crossed by a railroad, does not entitle an abutting owner to recover damages. Conklin *v.* New York, etc., R. Co., 102 N. Y. 107, 6 N. E. 663; Connors *v.* Great Western R. Co., 6 U. C. C. P. 108.

87. Baltimore, etc., R. Co. *v.* Taylor, 6 App. Cas. (D. C.) 259.

88. *Indiana.*— Tate *v.* Ohio, etc., R. Co., 7 Ind. 479.

Iowa.— Gates *v.* Chicago, etc., R. Co., 82 Iowa 518, 48 N. W. 1040.

Missouri.— Restetsky *v.* Delmar Ave., etc., R. Co., 106 Mo. App. 382, 85 S. W. 665.

New Jersey.— United New Jersey R., etc., Co. *v.* Lewis, 68 N. J. Eq. 437, 59 Atl. 227.

Rhode Island.— Hughes *v.* Providence, etc., R. Co., 2 R. I. 493.

See 41 Cent. Dig. tit. "Railroads," § 354.

An unauthorized change in the grade of a street by a railroad company entitles an abutting lot owner to recover the damages resulting therefrom. Gates *v.* Chicago, etc., R. Co., 82 Iowa 518, 48 N. W. 1040.

89. Tate *v.* Ohio, etc., R. Co., 7 Ind. 479; Parrot *v.* Cincinnati, etc., R. Co., 10 Ohio St. 624; Quillinan *v.* Canada Southern R. Co., 6 Ont. 567.

Effect of acquiescence.— Where there is no evidence that a demand was ever made upon a railroad company occupying a street to level the bed of its road and the top of the rails it will be presumed from long acquiescence that the track was laid as was intended, and an abutting lot owner cannot recover damages for such alleged defect. Merchants' Union Barb-Wire Co. *v.* Chicago, etc., R. Co., 79 Iowa 613, 44 N. W. 900.

90. Missouri Pac. R. Co. *v.* Speed, 3 Tex. Civ. App. 454, 22 S. W. 527, holding that a railroad company will be liable to an abutting owner for damages due to lessened facilities for ingress and egress to and from his property, caused by a failure to restore the

which the railroad company had no control, the company will not be liable.[91] A person cannot maintain a private action for a mere obstruction of a street or highway by which he is injured only as a member of the public generally,[92] as where a person, although an abutting landowner, is not affected as to his right of ingress and egress to and from his property, but only as to his use of the street or highway in common with the rest of the public;[93] but if he sustains a special injury different from that of the public generally he may recover therefor,[94] as where the railroad is so constructed in front of abutting property as improperly to obstruct the owner's right of ingress and egress,[95] or is so constructed or maintained as to constitute a public nuisance from which a special injury is sustained.[96] The railroad company will also be liable for injuries sustained by persons in the use of a street or highway due to a dangerous condition negligently created or left unguarded by the company in constructing its road,[97] or its failure to restore the street or highway to its former condition,[98] or to construct and maintain

street or highway to its former condition as required by statute after a reasonable time has elapsed for it to do so.

91. Foster *v.* New York Cent., etc., R. Co., 118 N. Y. App. Div. 143, 103 N. Y. Suppl. 531; Welde *v.* New York, etc., R. Co., 28 N. Y. App. Div. 379, 51 N. Y. Suppl. 290; Taylor *v.* New York, etc., R. Co., 27 N. Y. App. Div. 190, 50 N. Y. Suppl. 697.

Where a city constructs a temporary track for the use of a railroad during the changes and improvements in its streets, the railroad company is not liable to a property-owner for an injury caused by the resulting interference with access to his property, where no negligence in the operation of the road is shown. McGrane *v.* Philadelphia, etc., R. Co., 20 Pa. Super. Ct. 200.

92. *Connecticut.*— Newton *v.* New York, etc., R. Co., 72 Conn. 420, 44 Atl. 813.

Missouri.— Stephenson *v.* Missouri Pac. R. Co., 68 Mo. App. 642.

Ohio.— Wheeling, etc., R. Co. *v.* McLaughlin, 15 Ohio Cir. Ct. 1, 7 Ohio Cir. Dec. 647.

Vermont.— Buck *v.* Connecticut, etc., R. Co., 42 Vt. 370.

Canada.— Hamilton *v.* Covert, 16 U. C. C. P. 205; Hamilton, etc., Road Co. *v.* Great Western R. Co., 17 U. C. Q. B. 567; Ward *v.* Great Western R. Co., 13 U. C. Q. B. 315.

See 41 Cent. Dig. tit. "Railroads," § 354.

93. Stephenson *v.* Missouri Pac. R. Co., 68 Mo. App. 642.

If the obstruction is not in front of plaintiff's property and does not interfere with the easement of access immediately in front thereof, the owner cannot maintain a private action for damages, although access to it is rendered more inconvenient, the injury sustained being one in common with the public. Newton *v.* New York, etc., R. Co., 72 Conn. 420, 44 Atl. 813.

94. Brewer *v.* Boston, etc., R. Co., 113 Mass. 52; Haney *v.* Gulf, etc., R. Co., 3 Tex. App. Civ. Cas. § 278; Patton *v.* Olympia Door, etc., Co., 15 Wash. 210, 46 Pac. 237.

A plank road company has a special interest in its road different from that of the public using it and may recover damages for a failure on the part of a railroad company which has constructed a railroad across the plank road to restore the latter to its former condition within a reasonable time. Streetsville Plank Road Co. *v.* Hamilton, etc., R. Co., 13 U. C. Q. B. 600.

95. *California.*— Coats *v.* Atchison, etc., R. Co., 1 Cal. App. 441, 82 Pac. 640.

Indiana.— Tate *v.* Ohio, etc., R. Co., 7 Ind. 479.

Kansas.—Atchison, etc., R. Co. *v.* Armstrong, 71 Kan. 366, 80 Pac. 978, 114 Am. St. Rep. 474, 1 L. R. A. N. S. 113.

Kentucky.— Chesapeake, etc., R. Co. *v.* Lordier, 50 S. W. 15, 20 Ky. L. Rep. 1759.

Missouri.— Martin *v.* Chicago, etc., R. Co., 47 Mo. App. 452.

Canada.— Quillinan *v.* Canada Southern R. Co., 6 Ont. 567; Brown *v.* Toronto, etc., R. Co., 26 U. C. C. P. 206.

See 41 Cent. Dig. tit. "Railroads," § 354.

Where the property abuts on two streets the fact that the access thereto from one street is unimpaired will not affect the right to recover damages for obstructing the access from the other street. Hulett *v.* Missouri, etc., R. Co., 80 Mo. App. 87 [*disapproving* in part Stephenson *v.* Missouri Pac. R. Co., 68 Mo. App. 642].

96. Cane Belt R. Co. *v.* Ridgeway, 38 Tex. Civ. App. 108, 85 S. W. 496; Haney *v.* Gulf, etc., R. Co., 3 Tex. App. Civ. Cas. § 278.

97. Deming *v.* Terminal R. Co., 169 N. Y. 1, 61 N. E. 983, 88 Am. St. Rep. 521 [*affirming* 49 N. Y. App. Div. 493, 63 N. Y. Suppl. 615]; Houston, etc., R. Co. *v.* Pollard, 28 Tex. Civ. App. 172, 66 S. W. 851.

98. Chicago, etc., R. Co. *v.* Leachman, 161 Ind. 512, 69 N. E. 253; Evansville, etc., R. Co. *v.* Allen, 34 Ind. App. 636, 73 N. E. 630; Texas Midland R. Co. *v.* Johnson, 20 Tex. Civ. App. 572, 50 S. W. 1044; Thompson *v.* Great Western R. Co., 24 U. C. C. P. 429; Fairbanks *v.* Great Western R. Co., 35 U. C. Q. B. 523.

Where a railroad company builds a temporary way for the public around the track while constructing a crossing, which after completion of the road and restoration of the crossing is left in a dangerous condition, without any notice thereof to the public, the company will be liable to a person injured thereby. Texas Midland R. Co. *v.* Johnson, 20 Tex. Civ. App. 572, 50 S. W. 1044.

crossings in a safe and proper condition,[99] and if a municipality has been held liable for an injury caused by a defective condition of a crossing which it was primarily the duty of a railroad company to keep in repair, it may recover over against the company;[1] but the railroad company can only be held liable where the defect or condition causing the injury was one for which it was responsible.[2] Where a municipality grants a railroad company a right of way through its streets upon the express condition that the company shall pay all damages to property-owners which shall result from the construction of the road, the company will be liable therefor,[3] and the property-owner may recover for damages done during the process of construction as well as for that caused by the construction of the road when completed.[4] So also where a charter provision requires a railroad company to pay "all damages that may arise to any person," from the construction of the road, the company will be liable for damages so caused, although there is not a taking of plaintiff's property within the application of the constitutional provision relating to the making of compensation in such cases.[5]

f. Obstruction, Diversion, or Interference With Waters and Watercourses.[6] An adjacent landowner may recover damages for injuries resulting from the construction of a railroad over or near a watercourse, where such injuries are due to the negligent or improper construction of the road,[7] or breach of duty on the part of the railroad company in regard to its maintenance and repair.[8] A suit in equity may also be maintained to restrain a railroad company from wrongfully diverting the waters of a stream,[9] or to compel it to restore a stream wrongfully diverted to its former channel,[10] or to remedy an improper mode of con-

99. Southern Indiana R. Co. *v.* McCarrell, 163 Ind. 469, 71 N. E. 156; Evansville, etc., R. Co. *v.* Allen, 34 Ind. App. 636, 73 N. E. 630; Camp *v.* Wabash R. Co., 94 Mo. App. 272, 68 S. W. 96; Sonn *v.* Erie R. Co., 66 N. J. L. 428, 49 Atl. 458; Oliver *v.* North Eastern R. Co., L. R. 9 Q. B. 409, 43 L. J. Q. B. 198.

Only reasonable care is required on the part of a railroad company in maintaining a highway crossing. St. Louis, etc., R. Co. *v.* Johnson, 38 Tex. Civ. App. 322, 85 S. W. 476.

1. Independence *v.* Missouri Pac. R. Co., 86 Mo. App. 585.

2. Ross *v.* Metropolitan, etc., R. Co., 104 N. Y. App. Div. 378, 93 N. Y. Suppl. 679.

Bridge over highway.—A railroad company which builds a bridge over a highway of more than the height required by law is not liable to one injured while driving under the same, where the highway authorities have subsequently raised the original surface of the highway so as to make the bridge less than the required height. Carson *v.* Weston, 1 Ont. L. Rep. 15.

3. St. Louis, etc., R. Co. *v.* Haller, 82 Ill. 208; St. Louis, etc., R. Co. *v.* Capps, 72 Ill. 188.

The right of action in such cases is based upon and governed by the ordinance without reference to the constitutional provision in regard to compensation for property taken or damaged for corporate purposes. St. Louis, etc., R. Co. *v.* Haller, 82 Ill. 208.

4. St. Louis, etc., R. Co. *v.* Capps, 72 Ill. 188.

5. Bradley *v.* New York, etc., R. Co., 21 Conn. 294, holding that under such a provision the damages include not only those which are direct but also those which are incidental or consequential, provided they are actual and substantial and not merely speculative.

But if there is neither an injury nor a taking of plaintiff's property and the acts of defendant were duly authorized, there can be no recovery. Nicholson *v.* New York, etc., R. Co., 22 Conn. 74, 56 Am. Dec. 390.

6. See, generally, WATERS.

7. McCormick *v.* Kansas City, etc., R. Co., 57 Mo. 433; Chicago, etc., R. Co. *v.* Andreesen, 62 Nebr. 456, 87 N. W. 167; Hatch *v.* Vermont Cent. R. Co., 25 Vt. 49; McGillivray *v.* Great Western R. Co., 25 U. C. Q. B. 69; Vanhorn *v.* Grand Trunk R. Co., 9 U. C. C. P. 264, 18 U. C. Q. B. 356.

8. West *v.* Louisville, etc., R. Co., 8 Bush (Ky.) 404.

Maintenance of protecting wall.—A railroad company which bridges low land near a river having on it a wall constituting part of a system adopted by adjoining proprietors to prevent flooding is liable to one of such proprietors whose lands are flooded by reason of its neglect to keep its part of the wall in repair. Savannah, etc., R. Co. *v.* Lawton, 75 Ga. 192.

9. Atchison, etc., R. Co. *v.* Long, 46 Kan. 701, 27 Pac. 182, 26 Am. St. Rep. 165; Garwood *v.* New York Cent., etc., R. Co., 83 N. Y. 400, 38 Am. Rep. 452 [*affirming* 17 Hun 356]; Pugh *v.* Golden Valley R. Co., 15 Ch. D. 330, 49 L. J. Ch. 721, 42 L. T. Rep. N. S. 863, 28 Wkly. Rep. 863.

Acquiescence on the part of plaintiff during a long period during which the railroad company has expended a large sum of money in constructing its road will bar a right to equitable relief. Illingworth *v.* Manchester, etc., R. Co., 2 R. & Can. Cas. 187.

10. Wright *v.* Syracuse, etc., R. Co., 49

struction which will occasion constantly recurring injuries by overflowing plaintiff's land.[11] The adjoining landowner may recover damages for injuries to his lands, property, or crops due to the negligent or improper obstruction,[12] or diversion of a stream,[13] insufficient or improperly constructed bridges or culverts,[14] or failure to keep the same in proper condition or repair,[15] a failure to comply with a statutory requirement as to the mode of constructing the road along or across watercourses,[16] or statutes requiring the company to restore a stream to its former state,[17] or to construct culverts and sluices for drainage purposes,[18]

Hun (N. Y.) 445, 3 N. Y. Suppl. 480 [*affirmed* in 124 N. Y. 668, 27 N. E. 854].

11. Keates *v.* Holywell R. Co., 28 L. T. Rep. N. S. 183.

12. *Illinois.*— Chicago, etc., R. Co. *v.* Henneberry, 153 Ill. 354, 38 N. E. 1043 [*affirming* 42 Ill. App. 126]; Ohio, etc., R. Co. *v.* Long, 52 Ill. App. 670.

Indiana.— Terre Haute, etc., R. Co. *v.* McKinley, 33 Ind. 274.

Maine.— Penley *v.* Maine Cent. R. Co., 92 Me. 59, 42 Atl. 233.

Nebraska.— Chicago, etc., R. Co. *v.* Andreesen, 62 Nebr. 456, 87 N. W. 167.

Texas.— Gulf, etc., R. Co. *v.* Roberts, (Civ. App. 1905) 86 S. W. 1052; Gulf, etc., R. Co. *v.* Steele, 29 Tex. Civ. App. 328, 69 S. W. 171.

Canada.— Vanhorn *v.* Grand Trunk R. Co., 9 U. C. C. P. 264, 18 U. C. Q. B. 356; Anderson *v.* Great Western R. Co., 11 U. C. Q. B. 126.

See 41 Cent Dig. tit. "Railroads," § 357.

Although the obstruction is of a temporary character during the process of construction the railroad company will be liable if the obstruction is unnecessary or if it is maintained for an unnecessary length of time. Anderson *v.* Great Western R. Co., 11 U. C. Q. B. 126.

It is no defense in an action against a railroad company for damages to plaintiff's land by the negligent construction and maintenance of an embankment across a river, that plaintiff acquired his land after defendant had constructed the embankment. Gulf, etc., R. Co. *v.* Moore, (Tex. Civ. App. 1904) 81 S. W. 569.

Erecting trestles in stream under bridge.— Where a railroad company for the purpose of strengthening and supporting a previously constructed bridge erects trestles under the bridge in the bed of the stream in such a way as to accumulate ice in large quantities, which on breaking away destroys a dam, the owner of the dam is entitled to recover for the damages sustained. Dutton *v.* Philadelphia, etc., R. Co., 32 Pa. Super. Ct. 630.

Building pier in stream.— In an action for injuries to land caused by a railroad company building a bridge pier in a stream, it is error to charge that, although the company had a right to bridge the stream it would be liable for any injury caused by any change, modification, or interference with the natural flow of the water, as such instruction would permit a recovery for injuries incidentally ensuing from a careful and proper exercise of a legal right. Braine *v.* Northern Cent. R. Co., 218 Pa. St. 43, 66 Atl. 985.

13. East St. Louis, etc., R. Co. *v.* Eisentraut, 134 Ill. 96, 24 N. E. 760 [*affirming* 34 Ill. App. 563]; George *v.* Wabash Western R. Co., 40 Mo. App. 433; Garwood *v.* New York Cent., etc., R. Co., 83 N. Y. 400, 38 Am. Rep. 452 [*affirming* 17 Hun 356]; Cott *v.* Lewiston R. Co., 36 N. Y. 214, 1 Transcr. App. 26, 34 How. Pr. 222.

14. *Illinois.*— Chicago, etc., R. Co. *v.* Carpenter, 125 Ill. App. 306.

Maine.— Penley *v.* Maine Cent. R. Co., 92 Me. 59, 42 Atl. 233.

Massachusetts.— Bryant *v.* Bigelow Carpet Co., 131 Mass. 491.

Nebraska.— Chicago, etc., R. Co. *v.* Andreesen, 62 Nebr. 456, 87 N. W. 167; McCleneghan *v.* Omaha, etc., R. Co., 25 Nebr. 523, 41 N. W. 350, 13 Am. St. Rep. 508.

Vermont.— Hatch *v.* Vermont Cent. R. Co., 25 Vt. 49.

West Virginia.— Neal *v.* Ohio River R. Co., 47 W. Va. 316, 34 S. E. 914.

Canada.— Vanhorn *v.* Grand Trunk R. Co., 9 U. C. C. P. 264, 18 U. C. Q. B. 356; McGillivray *v.* Great Western R. Co., 25 U. C. Q. B. 69; Carron *v.* Great Western R. Co., 14 U. C. Q. B. 192; Robitaille *v.* Canadian Pac. R. Co., 15 Quebec Super. Ct. 246.

See 41 Cent. Dig. tit. "Railroads," § 357.

15. West *v.* Louisville, etc., R. Co., 8 Bush (Ky.) 404; Bryant *v.* Bigelow Carpet Co., 131 Mass. 491; Payne *v.* Kansas City, etc., R. Co., 112 Mo. 6, 20 S. W. 322, 17 L. R. A. 628.

16. New York, etc., R. Co. *v.* Hamlet Hay Co., 149 Ind. 344, 47 N. E. 1060, 49 N. E. 269; Graham *v.* Chicago, etc., R. Co., 39 Ind. App. 294, 77 N. E. 57, 1055.

17. *Illinois.*— Chicago, etc., R. Co. *v.* Moffitt, 75 Ill. 524.

Indiana.— Graham *v.* Chicago, etc., R. Co., 39 Ind. App. 294, 77 N. E. 57, 1055.

New York.— Cott *v.* Lewiston R. Co., 36 N. Y. 214, 1 Transcr. App. 26, 34 How. Pr. 222.

Vermont.— Hatch *v.* Vermont Cent. R. Co., 25 Vt. 49.

Canada.— Moison *v.* Great Western R. Co., 14 U. C. Q. B. 102.

See 41 Cent. Dig. tit. "Railroads," § 357.

18. Kankakee, etc., R. Co. *v.* Horan, 23 Ill. App. 259; Austin, etc., R. Co. *v.* Anderson, 79 Tex. 427, 15 S. W. 484, 23 Am. St. Rep. 350; Gulf, etc., R. Co. *v.* Helsley, 62 Tex. 593; St. Louis Southwestern R. Co. *v.* Selman, (Tex. Civ. App. 1905) 89 S. W. 1101; St. Louis Southwestern R. Co. *v.* Rollins, (Tex. Civ. App. 1905) 89 S. W. 1099.

Under a statutory requirement that a railroad company shall construct "the necessary

or lateral ditches along the road-bed.[19] Damages may also be recovered for wrongfully obstructing a landowner's right of access to a navigable river.[20] A railroad company will also be liable for damages resulting from a wrongful obstruction or diversion of surface waters,[21] its liability in this regard being the same as that of private owners;[22] but the rule of liability is different under the civil and common law, and there is a corresponding lack of uniformity in the decisions of the different states.[23] Under the civil law rule a railroad company is liable for damages due to an obstruction of surface waters by the construction of its road;[24] but under the common-law rule it may without liability construct its road-bed without providing openings for surface drainage,[25] and is not liable for a diversion or obstruction of surface water due to a properly constructed road-bed.[26] The railroad company has a right to provide for the drainage of its road-bed so as to

culverts or sluices as the natural lay of the land requires for the necessary drainage thereof," the requirement is imperative and the exercise of reasonable care will not relieve the company's liability if they prove insufficient and the land is thereby flooded. Kankakee, etc., R. Co. *v.* Horan, 23 Ill. App. 259.

It is no defense in an action against a railroad company for damages to land, owing to defendant's failure to construct necessary culverts, that what would have protected plaintiff's property would have injured another (St. Louis Southwestern R. Co. *v.* Rollins, (Tex. Civ. App. 1905) 89 S. W. 1099); that defendant's embankment was constructed before plaintiff became the owner of the property (Texas, etc., R. Co. *v.* Maddox, 26 Tex. Civ. App. 297, 63 S. W. 134); or that the point where a break in the embankment occurred causing plaintiff's lands to be flooded was not adjacent to his lands (Missouri, etc., R. Co., *v.* McGregor, (Tex. Civ. App. 1902) 68 S. W. 711).

19. Cox *v.* Hannibal, etc., R. Co., 174 Mo. 588, 74 S. W. 854; Byrne *v.* Keokuk, etc., R. Co., 47 Mo. App. 383.

20. North Shore R. Co. *v.* Pion, 14 App. Cas. 612, 59 L. J. P. C. 25, 61 L. T. Rep. N. S. 525 [*affirming* 14 Can. Sup. Ct. 677 (*reversing* 12 Quebec 205)]; Bigaouette *v.* North Shore R. Co., 17 Can. Sup. Ct. 363.

21. Chorman *v.* Queen Anne R. Co., 3 Pennew. (Del.) 407, 54 Atl. 687; Curtis *v.* Eastern R. Co., 98 Mass. 428; Alton *v.* Hamilton, etc., R. Co., 13 U. C. Q. B. 595.

Stagnant water constituting nuisance.— Where a railroad company in constructing its road-bed obstructs a natural drain, thereby causing water to accumulate and form a stagnant pond near the residence of an adjoining landowner, amounting to a nuisance dangerous to health, the company will be liable for damages resulting therefrom, whether the nuisance be of a temporary or permanent character. Georgia, etc., R. Co. *v.* Jernigan, 128 Ga. 501, 57 S. E. 791.

A municipality which owns a road may sue for and recover damages for an injury to such road caused by the negligent and improper construction of drains by a railroad company. Sarnia *v.* Great Western R. Co., 17 U. C. Q. B. 65.

Flood waters from river.— Where a railroad company constructed a solid embankment across low lands which caused plaintiff's lands to be damaged by the flood waters of a river from which such land was formerly protected, it was held that, although the company was not required by statute to make flood openings in its embankments and could not be compelled by mandamus to do so, yet since it might by proper care have prevented the injury sustained by the landowner, an action was maintainable for the recovery of damages therefor. Lawrence *v.* Great Northern R. Co., 16 Q. B. 643, 15 Jur. 652, 20 L. J. Q. B. 293, 6 R. & Can. Cas. 656, 71 E. C. L. 643.

22. Egener *v.* New York, etc., R. Co., 3 N. Y. App. Div. 157, 38 N. Y. Suppl. 319; Jenkins *v.* Wilmington, etc., R. Co., 110 N. C. 438, 15 S. E. 293.

23. Abbott *v.* Kansas City, etc., R. Co., 83 Mo. 271, 53 Am. Rep. 581; Egener *v.* New York, etc., R. Co., 3 N. Y. App. Div. 157, 38 N. Y. Suppl. 319; Jolliffe *v.* Chesapeake, etc., R. Co., (Va. 1894) 20 S. E. 781. See also, generally, WATERS.

24. Gillam *v.* Madison County R. Co., 49 Ill. 484, 95 Am. Dec. 627; Philadelphia, etc., R. Co. *v.* Davis, 68 Md. 281, 11 Atl. 822, 6 Am. St. Rep. 440. See also, generally, WATERS.

25. Missouri Pac. R. Co. *v.* Keyes, 55 Kan. 205, 40 Pac. 275, 49 Am. St. Rep. 249; Abbott *v.* Kansas City, etc., R. Co., 83 Mo. 271, 53 Am. Rep. 581; Egener *v.* New York, etc., R. Co., 3 N. Y. App. Div. 157, 38 N. Y. Suppl. 319; Nichol *v.* Canada Southern R. Co., 40 U. C. Q. B. 583.

The principles applicable to streams of running water do not apply to the flow of mere surface waters. Crewson *v.* Grand Trunk R. Co., 27 U. C. Q. B. 68.

26. Abbott *v.* Kansas City, etc., R. Co., 83 Mo. 271, 53 Am. Rep. 581 [*overruling* Shane *v.* Kansas City, etc., R. Co., 71 Mo. 237, 36 Am. Rep. 480; McCormick *v.* Kansas City, etc., R. Co., 70 Mo. 359, 35 Am. Rep. 431]; Benson *v.* Chicago, etc., R. Co., 78 Mo. 504; Munkers *v.* Kansas City, etc., R. Co., 60 Mo. 334; Hosher *v.* Kansas City, etc., R. Co., 60 Mo. 329; Fleming *v.* Wilmington, etc., R. Co., 115 N. C. 676, 20 S. E. 714; Hornby *v.* New Westminster Southern R. Co., 6 Brit. Col. 588; Nichol *v.* Canada Southern R. Co., 40 U. C. Q. B. 583. See also, generally, WATERS.

protect and preserve the same,[27] but it must do so in a reasonable manner and with due regard to the rights of others,[28] and in no case has a railroad company the right to divert and collect surface waters and discharge the same in large quantities to the injury of lands where they would not otherwise flow.[29] The right of action for damages for constructing an insufficient culvert across a stream does not accrue at the time of construction but when a resulting injury from an overflow occurs,[30] but each overflow caused by such negligent construction creates a new cause of action.[31]

g. Fences and Cattle-Guards. Where a railroad company is not required to fence its track or construct cattle-guards, it will not be liable to an adjoining landowner for injuries occasioned by their absence,[32] such as injuries to crops or pastures by trespassing animals,[33] and if it has voluntarily constructed them will not be liable for failure to maintain or keep them in repair.[34] The railroad company has a right for its own protection to construct a fence upon its right of way,[35] but it may be liable for constructing a fence in such a negligent or improper manner as to constitute a nuisance or source of danger.[36] Where railroad companies are expressly required to construct fences or cattle-guards, the right to recover for damages occasioned by their failure to do so depends upon the purpose of the requirement;[37] and if the design of the statute is not to protect the adjacent landowner, but merely to protect the railroad and insure the safety of passengers

27. Benson *v.* Chicago, etc., R. Co., 78 Mo. 504; McCormick *v.* Kansas City, etc., R. Co., 57 Mo. 433; Jenkins *v.* Wilmington, etc., R. Co., 110 N. C. 438, 15 S. E. 193; Hornby *v.* New Westminster Southern R. Co., 6 Brit. Col. 588.

28. McCormick *v.* Kansas City, etc., R. Co., 57 Mo. 433; Staton *v.* Norfolk, etc., R. Co., 111 N. C. 278, 16 S. E. 181, 17 L. R. A. 838.

Discharging accumulated water.—A railroad company will be liable for injury to adjacent lands caused by cutting openings in an embankment to allow the escape of water accumulated against one side of the embankment by reason of an unprecedented rain fall. Whalley *v.* Lancashire, etc., R. Co., 13 Q. B. D. 131, 48 J. P. 500, 53 L. J. Q. B. 285, 50 L. T. Rep. N. S. 472, 32 Wkly. Rep. 711.

29. Chorman *v.* Queen Anne's R. Co., 3 Pennew. (Del.) 407, 54 Atl. 687; Curtis *v.* Eastern R. Co., 98 Mass. 428; Staton *v.* Norfolk, etc., R. Co., 111 N. C. 278, 16 S. E. 181, 17 L. R. A. 838; Minor *v.* Buffalo, etc., R. Co., 9 U. C. C. P. 280.

Permitting other landowners to use railroad ditch.— Where a railroad company constructs a drainage ditch along its road-bed through the lands of one adjacent owner, and afterward permits other landowners to divert the drainage of their lands into such ditch, causing it to overflow and injure plaintiff's lands, the company will be liable. Illinois Cent. R. Co. *v.* Heisner, 192 Ill. 571, 61 N. E 656 [*affirming* 93 Ill. App. 469].

30. Kelly *v.* Pittsburg, etc., R. Co., 28 Ind. App. 457, 63 N. E. 233, 91 Am. St. Rep. 134; Chicago, etc., R. Co. *v.* Andreesen, 62 Nebr. 456, 87 N. W. 167; Vanhorn *v.* Grand Trunk R. Co., 9 U. C. C. P. 264, 18 U. C. Q. B. 356.

31. Chicago, etc., R. Co. *v.* Willi, 53 Ill. App. 603.

32. St. Louis, etc., R. Co. *v.* Walbrink, 47 Ark. 330, 1 S. W. 545; Fairchild *v.* New Orleans, etc., R. Co., 62 Miss. 177; Ward *v.* Paducah, etc., R. Co., 4 Fed. 862.

A railroad company is entitled to an open right of way and may make openings in fences of a landowner in constructing its road, and if not required to fence its track or construct cattle-guards will not be liable for injuries caused by animals entering through such openings. Caststeel *v.* St. Louis, etc., R. Co., 81 Ark. 364, 99 S. W. 540.

Animal falling into unfenced cut.— Where a railroad company is not required to fence its track, it will not be liable for injury to an animal which falls into an unfenced cut where the road passes through a pasture. Jones *v.* Western North Carolina R. Co., 95 N. C. 328.

33. Caststeel *v.* St. Louis, etc., R. Co., 81 Ark. 364, 99 S. W. 540; Ward *v.* Paducah, etc., R. Co., 4 Fed. 862.

34. Rossignoll *v.* Northeastern R. Co., 75 Ga. 354; Vicksburg, etc., R. Co. *v.* Dixon, 61 Miss. 119; Ward *v.* Paducah, etc., R. Co., 4 Fed. 862.

35. Carson *v.* Western R. Co., 8 Gray (Mass.) 423, holding that a railroad company which erects a fence on its own land to prevent snow from being blown upon its road is not liable for damages occasioned by the accumulation of snow upon the land of another on the other side of the fence.

36. Winkler *v.* Carolina, etc., R. Co., 126 N. C. 370, 35 S. E. 621, 78 Am. St. Rep. 663, holding that a railroad company will be liable for injury to stock caused by the construction of a barbed wire fence through a pasture, where it is constructed in a negligent and improper manner.

37. Cannon *v.* Louisville, etc., R. Co., 34 Ill. App. 640; Peoria, etc., R. Co. *v.* Schiller, 12 Ill. App. 443; Clark *v.* Hannibal, etc., R. Co., 36 Mo. 202.

and trains thereon, and to prevent animals from coming upon the track and being injured, the company will not be liable for injuries to crops or pastures by trespassing animals.[38] So also where the statute imposing the duty expressly provides the liability for its non-performance, the right of recovery is limited accordingly.[39] Where, however, the statute is for the benefit of adjoining landowners and its application not restricted to particular injuries, the landowner may recover for any injury which is a natural and proximate result of the omission of such duty,[40] or failure subsequently to keep the fences or cattle-guards in repair,[41] such as the destruction of or injury to his crops,[42] or pastures,[43] or for animals which escape from his inclosures and are lost or injured.[44] The landowner is also entitled to recover damages for the diminution of the value of the use of his land owing to the absence of fences or cattle-guards,[45] or the deprivation of the use

38. Cannon *v.* Louisville, etc., R. Co., 34 Ill. App. 640; Peoria, etc., R. Co. *v.* Schiller, 12 Ill. App. 443; Clark *v.* Hannibal, etc., R. Co., 36 Mo. 202.

39. Peoria, etc., R. Co. *v.* Schiller, 12 Ill. App. 443 (holding that where the statute expressly provides that for failure to fence or construct cattle-guards the company shall be liable for injuries to animals by its engines or cars, the company will not be liable for an injury to crops by trespassing animals); Mangold *v.* St. Louis, etc., R. Co., 116 Mo. App. 606, 92 S. W. 573 (holding that under the Missouri statute, which provides that the railroad company for failure to fence shall be liable for injuries to animals and for injuries done by animals coming upon the adjacent lands, there can be no recovery upon the ground that the landowner was deprived of the use of his lands for agricultural purposes). But see Leggett *v.* Rome, etc., R. Co., 41 Hun (N. Y.) 80, holding that the provision of the New York statute that until the fences and cattle-guards required are built the railroad company shall be liable for all injuries to animals was not intended to limit the liability of the railroad company to the injury specified.

40. Leggett *v.* Rome, etc., R. Co., 41 Hun (N. Y.) 80.

Cost of herding cattle.—A landowner may recover damages for being compelled on account of the failure of the railroad company to construct cattle-guards to incur the expense of herding his cattle to prevent them from escaping from his inclosures. Chicago, etc., R. Co. *v.* Behney, 48 Kan. 47, 28 Pac. 980.

41. Fortune *v.* Chesapeake, etc., R. Co., 58 S. W. 711, 22 Ky. L. Rep. 749.

42. *Iowa.*— Donald *v.* St. Louis, etc., R. Co., 44 Iowa 157.

Mississippi.— Kansas City, etc., R. Co. *v.* Spencer, 72 Miss. 491, 17 So. 168.

Missouri.— Silver *v.* Kansas City, etc., R. Co., 78 Mo. 528, 47 Am. Rep. 118; Biggerstaff *v.* St. Louis, etc., R. Co., 60 Mo. 567; Trice *v.* Hannibal, etc., R. Co., 49 Mo. 438; Rosentingle *v.* Illinois Southern R. Co., 122 Mo. App. 492, 99 S. W. 788; Gordon *v.* Chicago, etc., R. Co., 44 Mo. App. 201.

New Hampshire.— Dean *v.* Sullivan R. Co., 22 N. H. 316.

Texas.— Houston, etc., R. Co. *v.* Adams, 63 Tex. 200; Texas, etc., R. Co. *v.* Dudley, 1 Tex. App. Civ. Cas. § 540.

Canada.— Nichol *v.* Canada Southern R. Co., 40 U. C. Q. B. 583; Brown *v.* Grand Trunk R. Co., 24 U. C. Q. B. 350.

See 41 Cent. Dig. tit. "Railroads," § 356.

Injury by plaintiff's own animals.— If the railroad company fails to fence its tracks a landowner may recover for a resulting injury to crops done by his own animals which escape from his pasture land to his cultivated land. Smith *v.* Chicago, etc., R. Co., 38 Iowa 518; Kirkpatrick *v.* Illinois Southern R. Co., 120 Mo. App. 416, 96 S. W. 1036.

Animals wrongfully at large.— In some jurisdictions where it is unlawful for stock to run at large it is held that a failure to fence or construct cattle-guards will not render the railroad company liable for injury to crops of an adjoining landowner, where the animals causing such injury were wrongfully at large and trespassing upon the railroad. Gowan *v.* St. Paul, etc., R. Co., 25 Minn. 328; Chapin *v.* Sullivan, 39 N. H. 53, 75 Am. Dec. 207.

Change in location of owner's fence.—Where a railroad company after making insufficient cattle-guards where the road enters inclosed lands agrees that if the landowner will remove his fence to another line it will erect new cattle-guards at the new location, it will be liable for damage to his crops by reason of its failure to construct them within a reasonable time. Missouri Pac. R. Co. *v.* Lynch, 31 Kan. 531, 3 Pac. 372.

Limitations.— The fact of cattle from time to time getting upon plaintiff's land and destroying crops does not constitute a "continuation of damage" so as to entitle plaintiff to recover for more than six months' injury, the statute referring not to a continuation of the omission but the damage resulting therefrom, and several unconnected acts of damage, each complete in itself, will not constitute continuation within the meaning of the statute. Brown *v.* Grand Trunk R. Co., 24 U. C. Q. B. 350.

43. Buttles *v.* Chicago, etc., R. Co., 43 Mo. App. 280; Shotwell *v.* St. Joseph, etc., R. Co., 37 Mo. App. 654.

44. Gardner *v.* Smith, 7 Mich. 410, 74 Am. Dec. 722; Southwestern Tel., etc., Co. *v.* Krause, (Tex. Civ. App. 1906) 92 S. W. 431; Holden *v.* Rutland, etc., R. Co., 30 Vt. 297.

45. Gould *v.* Great Northern R. Co., 63

of a pasture.[46] A railroad company has a right to make openings in existing fences which intersect its right of way for the purpose of constructing its road;[47] but where a railroad company is required to fence or construct cattle-guards, if it does not do so at the time it opens up its right of way through the inclosures of the landowner it must provide other adequate means of protection,[48] and if it does not it will be liable for a resulting injury to crops,[49] or for animals which escape from such inclosures and are lost.[50] Where a railroad company has acquired the right to construct its road through certain lands, it is not liable for the acts of a contractor for construction or his servants in tearing down fences,[51] or leaving open gates or bars;[52] but the rule is otherwise where such acts are done before the railroad company has acquired the right to enter and construct its road upon such lands;[53] and the company cannot delegate to a contractor its statutory duty of fencing so as to escape liability for the non-performance of such duty.[54] The failure of a landowner to avail himself of a statutory authority to construct fences or cattle-guards upon failure of the railroad company to do so will not preclude his right to recover for damages sustained by reason of the failure of the railroad company to construct them.[55] If the landowner constructs his fences upon the railroad right of way the company may, when necessary, remove them, provided it does no unnecessary damage in so doing.[56]

h. Private or Farm Crossings. Where a railroad company is required to construct private or farm crossings, the landowner may recover damages for the loss or inconvenience sustained by reason of its failure to do so,[57] or failure to provide a suitable crossing,[58] or for unreasonable delay in making it,[59] or result-

Minn. 37, 65 N. W. 125, 56 Am. St. Rep. 453, 30 L. R. A. 590; Nelson *v.* Minneapolis, etc., R. Co., 41 Minn. 131, 42 N. W. 788; Emmons *v.* Minneapolis, etc., R. Co., 38 Minn. 215, 36 N. W. 340; Emmons *v.* Minneapolis, etc., R. Co., 35 Minn. 503, 29 N. W. 202; Leggett *v.* Rome, etc., R. Co., 41 Hun (N. Y.) 80; Louisville, etc., R. Co. *v.* Timmons, 116 Tenn. 29, 91 S. W. 1116.

46. Leggett *v.* Rome, etc., R. Co., 41 Hun (N. Y.) 80; Louisville, etc., R. Co. *v.* Timmons, 116 Tenn. 29, 91 S. W. 1116.

47. Rutledge *v.* Woodstock, etc., R. Co., 12 U. C. Q. B. 663.

48. Gardner *v.* Smith, 7 Mich. 410, 74 Am. Dec. 722; Comings *v.* Hannibal, etc., R. Co., 48 Mo. 512; Holden *v.* Rutland, etc., R. Co., 30 Vt. 297.

49. Comings *v.* Hannibal, etc., R. Co., 48 Mo. 512; Clark *v.* Vermont, etc., R. Co., 28 Vt. 103.

50. Gardner *v.* Smith, 7 Mich. 410, 74 Am. Dec. 722; Holden *v.* Rutland, etc., R. Co., 30 Vt. 297.

51. Clark *v.* Hannibal, etc., R. Co., 36 Mo. 202.

52. Clark *v.* Vermont, etc., R. Co., 28 Vt. 103.

53. Ullman *v.* Hannibal, etc., R. Co., 67 Mo. 118 [*distinguishing* Clark *v.* Hannibal, etc., R. Co., 36 Mo. 202].

54. Silver *v.* Kansas City, etc., R. Co., 78 Mo. 528, 47 Am. Rep. 118.

55. See *infra*, VI, J, 1, m.

56. Texas Cent. R. Co. *v.* Wills, (Tex. Civ. App. 1897) 41 S. W. 848.

57. *Kentucky.*— Louisville, etc., R. Co. *v.* Pittman, 53 S. W. 1040, 21 Ky. L. Rep. 1037.

Louisiana.— Heath *v.* Texas, etc., R. Co., 37 La. Ann. 728.

Missouri.— Sheridan *v.* Atchison, etc., R. Co., 56 Mo. App. 68.

New Jersey.— Green *v.* Morris, etc., R. Co., 24 N. J. L. 486.

Canada.— Reist *v.* Grand Trunk R. Co., 15 U. C. Q. B. 355.

See 41 Cent. Dig. tit. "Railroads," § 355.

Under the New Hampshire statute damages for failure to construct crossings cannot be recovered unless the place, number, and manner of their construction have been determined by agreement between the parties or in the manner provided for by the statute in case they are unable to agree. Costello *v.* Grand Trunk R. Co., 70 N. H. 403, 47 Atl. 265; Horne *v.* Atlantic, etc., R. Co., 36 N. H. 440.

A landowner may recover for stock drowned in a pasture during an overflow, owing to the failure of a railroad company to provide openings for crossings in its right-of-way fences, as required by statute; and where it appears that the stock would have been drowned in an ordinary overflow the fact that the flood was unprecedented will not affect the question of defendant's liability. Gulf, etc., R. Co. *v.* Clay, 28 Tex. Civ. App. 176, 66 S. W. 1115.

Where it is necessary to change the location of a crossing on account of alterations and improvements in the road-bed, if there is an unreasonable delay in constructing the new crossing the landowner may recover for the damages sustained during such delay, but if it was not unreasonable he can recover only nominal damages. Costello *v.* Grand Trunk R. Co., 70 N. H. 403, 47 Atl. 265.

58. Burke *v.* Grand Trunk R. Co., 6 U. C. C. P. 484.

59. Burke *v.* Grand Trunk R. Co., 6 U. C. C. P. 484.

ing from its obstruction or removal of an existing crossing to which he is entitled;[60] and a statutory right of the landowner to construct the crossing himself and recover therefor from the railroad company does not preclude his right to recover damages sustained by reason of the failure of the railroad company to do so.[61] Damages may also be recovered for injuries sustained in the use of the crossing due to its negligent or improper construction or condition,[62] but the liability of the railroad company only extends to those who are entitled to the benefit or use of the crossing.[63]

1. Injuries From Blasting.[64] A railroad company in constructing its road has a lawful right to excavate by means of blasting whenever necessary to do so,[65] and the damage incident to a proper exercise of this right is considered as an element of damage in condemnation proceedings.[66] The railroad company will, however, be liable for injuries to the lands, buildings, person, or property of an adjacent landowner due to negligence in the manner of blasting,[67] and in some cases it has been held that the company will be liable for all injuries caused by its blasting regardless of the degree of care employed in doing the work.[68] In other cases, however, it is held that the railroad company will not be liable in the absence of negligence;[69] but the degree of care must be proportionate to the danger of injury,[70] and whether due care under the circumstances has been exercised is ordinarily a question of fact for the jury.[71] Where the blasting is in a dangerous locality, such as near a dwelling, the company should, if practi-

60. Ohio, etc., R. Co. *v.* McGehee, 47 Ill. App. 348; Farwell *v.* Boston, etc., R. Co., 72 N. H. 335, 56 Atl. 751; Dubbs *v.* Philadelphia, etc., R. Co., 148 Pa. St. 66, 23 Atl. 833; Wells *v.* Northern R. Co., 14 Ont. 594.

If a railroad company constructs bars at an open crossing the landowner may recover damages unless the bars were necessary for the purposes of the railroad in its own operations. Willey *v.* Norfolk Southern R. Co., 96 N. C. 408, 1 S. E. 446.

61. See *infra*, VI, J, 1, m.

62. Cotton *v.* New York, etc., R. Co., 20 N. Y. Suppl. 347; Prince *v.* New York Cent., etc., R. Co., 14 N. Y. Suppl. 817.

63. See *infra*, VI, J, 1, j.

64. Injuries from blasting generally see EXPLOSIVES, 19 Cyc. 7.

65. St. Louis, etc., R. Co. *v.* Hanks, 80 Ark. 417, 97 S. W. 666; Whitehouse *v.* Androscoggin R. Co., 52 Me 208; Sabin *v.* Vermont Cent. R. Co., 25 Vt. 363; Watts *v.* Norfolk, etc., R. Co., 39 W. Va. 196, 18 S. E. 521, 45 Am. St. Rep. 894, 23 L. R. A. 674.

It is not a private nuisance for a railroad company to use explosives in excavating in the construction of its road. Booth *v.* Rome, etc., R. Co., 140 N. Y. 267, 35 N. E. 592, 37 Am. St. Rep. 552, 24 L. R. A. 105 [*reversing* 17 N. Y. Suppl. 336].

66. Whitehouse *v.* Androscoggin R. Co., 52 Me. 208; Brown *v.* Providence, etc., R. Co., 5 Gray (Mass.) 35; Blackwell *v.* Lynchburg, etc., R. Co., 111 N. C. 151, 16 S. E. 12, 32 Am. St. Rep. 786, 17 L. R. A. 729; Sabin *v.* Vermont Cent. R. Co., 25 Vt. 363.

67. Georgia Cent. R. Co. *v.* Bernstein, 113 Ga. 175, 38 S. E. 394; Louisville, etc., R. Co. *v.* Bonhayo, 94 Ky. 67, 21 S. W. 526, 14 Ky. L. Rep. 737; Wheeler *v.* Norton, 92 N. Y. App. Div. 368, 86 N. Y. Suppl. 1095 [*affirming* 84 N. Y. Suppl. 524]; Blackwell *v.* Lynchburg, etc., R. Co., 111 N. C. 151, 16 S. E. 12, 32 Am. St. Rep. 786, 17 L. R. A. 729.

A full compliance with municipal regulations in regard to blasting will not relieve the company from liability if it was in fact negligent. Georgia Cent. R. Co. *v.* Bernstein, 113 Ga. 175, 38 S. E. 394.

68. G. B. & L. R. Co. *v.* Eagles, 9 Colo. 544, 13 Pac. 696; Wheeler *v.* Norton, 92 N. Y. App. Div. 368, 86 N. Y. Suppl. 1095 [*affirming* 84 N. Y. Suppl. 524]; Carman *v.* Steubenville, etc., R. Co., 4 Ohio St. 399; Gossett *v.* Southern R. Co., 115 Tenn. 376, 89 S. W. 737, 112 Am. St. Rep. 846, 1 L. R. A. N. S. 97.

Damages recoverable.— There can be no recovery on the ground that plaintiff was disquieted and kept in a state of alarm if there was no physical injury or impairment of health, but plaintiff may recover for a diminution in the usable value of his property and the loss and inconvenience due to being compelled temporarily to vacate his house and premises. Gossett *v.* Southern R. Co., 115 Tenn. 376, 89 S. W. 737, 112 Am. St. Rep. 846, 1 L. R. A. N. S. 97.

69. St. Louis, etc., R. Co. *v.* Hanks, 80 Ark. 417, 97 S. W. 666; Booth *v.* Rome, etc., R. Co., 140 N. Y. 267, 35 N. E. 592, 37 Am. St. Rep. 552, 24 L. R. A. 105 [*reversing* 17 N. Y. Suppl. 336]; Sabin *v.* Vermont Cent. R. Co., 25 Vt. 363; Watts *v.* Norfolk, etc., R. Co., 39 W. Va. 196, 19 S. E. 521, 45 Am. St. Rep. 894, 23 L. R. A. 674.

70. Booth *v.* Rome, etc., R. Co., 140 N. Y. 267, 35 N. E. 592, 37 Am. St. Rep. 552, 24 L. R. A. 105 [*reversing* 17 N. Y. Suppl. 336].

71. Georgia Cent. R. Co. *v.* Bernstein, 113 Ga. 175, 38 S. E. 394; Blackwell *v.* Lynchburg, etc., R. Co., 111 N. C. 151, 16 S. E. 12, 32 Am. St. Rep. 786, 17 L. R. A. 729.

cable to do so at a reasonable expense, cover and protect the blast,[72] and should give timely warning to those residing or employed in the vicinity.[73] While the company will not be liable in the absence of negligence for the mere throwing of rock by blasting upon adjacent lands,[74] it will be liable for the resulting damage if it is not removed within a reasonable time.[75] The railroad company may also be liable for using a blast where injury is liable to result and it is practicable to remove the rock without blasting,[76] or for using blasts of unnecessary power,[77] and may be enjoined from conducting its blasting operations in such manner as to cause unnecessary danger or injury to adjacent property.[78]

j. Persons Entitled to Sue. Although a railroad company may have been guilty of negligence or the breach of some duty in regard to the construction or maintenance of its road, only those to whom the company owes a duty in respect to the matter complained of are entitled to sue or recover damages therefor.[79] So if a statute imposing a duty or liability limits it to a particular class of persons, only such persons can sue as are within the application of the statute;[80] and since the statutory duty of providing private or farm crossings is for the benefit of the landowner,[81] the railroad company will not be liable by reason of their condition to persons who are not entitled to use them.[82] The right of action for damages to property where the damage accrues directly from and immediately upon the

72. Blackwell *v.* Lynchburg, etc., R. Co., 111 N. C. 151, 16 S. E. 12, 32 Am. St. Rep. 786, 17 L. R. A. 729.

73. Blackwell *v.* Lynchburg, etc., R. Co., 111 N. C. 151, 16 S. E. 12, 32 Am. St. Rep. 786, 17 L. R. A. 729, holding further, that if the company has been accustomed to give warning before blasting it will be liable for injury to one who places himself in a dangerous position because misled by its failure to do so in the particular case.

74. St. Louis, etc., R. Co. *v.* Hanks, 80 Ark. 417, 97 S. W. 666; Sabin *v.* Vermont Cent. R. Co., 25 Vt. 363.

75. Whitehouse *v.* Androscoggin R. Co., 52 Me. 208; Sabin *v.* Vermont Cent. R. Co., 25 Vt. 363; Watts *v.* Norfolk, etc., R. Co., 39 W. Va. 196, 19 S. E. 521, 45 Am. St. Rep. 894, 23 L. R. A. 674.

76. Wheeler *v.* Norton, 92 N. Y. App. Div. 368, 86 N. Y. Suppl. 1095 [*affirming* 84 N. Y. Suppl. 524].

77. See Booth *v.* Rome, etc., R. Co., 140 N. Y. 267, 35 N. E. 592, 37 Am. St. Rep. 552, 24 L. R. A. 105 [*reversing* 17 N. Y. Suppl. 336].

78. Arnold *v.* Furness R. Co., 22 Wkly. Rep. 613.

79. Johnson *v.* Chicago, etc., R. Co., 96 Minn. 316, 104 N. W. 961; Opdycke *v.* Easton, etc., R. Co., 68 N. J. L. 12, 52 Atl. 243.

Conditon of railroad bridge.— Negligence on the part of a railroad company in permitting a railroad bridge to get out of repair will not render it liable to a mere licensee who was injured while using it. Opdycke *v.* Easton, etc., R. Co., 68 N. J. L. 12, 52 Atl. 243.

80. Louisville, etc., R. Co. *v.* Murphree, 129 Ala. 432, 29 So. 592; Florida Cent., etc., R. Co. *v.* Judge, 100 Ga. 600, 28 S. E. 379.

Application of rule.— Under a statute requiring railroad companies to construct cattle-guards "whenever the owner of the land" through which the road runs shall demand them and show that they are necessary to prevent depredations of stock "upon his land," no one except the actual owner of the land can sue for damages caused by a failure to construct them (Georgia Cent. R. Co. *v.* Sturgis, 149 Ala. 573, 43 So. 96; Louisville, etc., R. Co. *v.* Murphree, 129 Ala. 432, 29 So. 592); and where a statute requiring the construction of cattle-guards provides that the company shall be liable "to the owner of the land" for all damages caused by a failure to construct them, the liability extends only to the owner of the land and not to one who is merely cultivating it (Florida Cent., etc., R. Co. *v.* Judge, 100 Ga. 600, 28 S. E. 379); but under a statute requiring a railroad company to fence its tracks where the road passes through inclosed lands, and providing that if it fails to do so it shall be liable to any owner or occupier of the land for resulting damages, a person is an occupier within the application of the statute who is a tenant of a part of the field which is within one inclosure and rented to different persons, although the point where the stock entered which injured his crop was not adjacent to the part of the field rented by him (Brannock *v.* St. Louis, etc., R. Co., 106 Mo. App. 379, 80 S. W. 699); and a person is also within the application of the statute who is a tenant of the land adjoining the railroad at the point where the stock entered, and from which they passed to other lands owned by him and within a common inclosure and injured crops thereon (Langkop *v.* Missouri Pac. R. Co., 55 Mo. App. 611). The word "proprietors" also includes tenants of lands adjoining a railroad, who may recover for injury to crops due to the failure of the railroad company to fence. Brown *v.* Grand Trunk R. Co., 24 U. C. Q. B. 350.

81. Johnson *v.* Chicago, etc., R. Co., 96 Minn. 316, 104 N. W. 961.

82. Johnson *v.* Chicago, etc., R. Co., 96 Minn. 316, 104 N. W. 961; Mann *v.* Chicago, etc., R. Co., 86 Mo. 347; Cornell *v.* Skaneateles, etc., R. Co., 15 N. Y. Suppl. 581.

construction of the road does not pass to a grantee of the land;[83] but where the damage accrues after the construction as a consequence of the negligent or improper mode of construction, as in the case of overflows due to the want of proper culverts, a person owning the property at the time of the injury may recover, although he did not own it when the road was constructed,[84] and bought the property with knowledge of the existing conditions.[85]

k. Companies and Persons Liable.[86] Where a railroad constructed by one company subsequently passes into the hands of another company, the original company is alone liable for injuries due to the construction or maintenance of the road which accrued prior to the transfer,[87] and the succeeding company is alone liable for the injuries resulting from any new work of construction or repair done by it thereafter.[88] The succeeding company will also be liable for injuries resulting after its acquisition of the road due to the manner in which it was constructed by its predecessor, if it continues to use the road in its defective or improper condition,[89] with knowledge of such condition.[90] Ordinarily to hold the succeeding company liable it must have notice of the condition causing the injury;[91] but if it has actual knowledge thereof an express notice and demand to remedy the defect is not necessary,[92] and no notice is necessary where the defect or condition constitutes a public nuisance and results from a violation of a statutory duty.[93] Statutory duties of a continuing nature, such as the duty to restore a highway to its former condition or to maintain crossings, devolve upon the succeeding company, which will be liable therefor in the same manner as the original company would have been.[94] Where the injury results from concurrent acts of two or more railroad companies, each will be liable therefor.[95]

l. Proximate Cause of Injury. Although a railroad company in the construction or maintenance of its road may have been guilty of negligence or the omission of some statutory duty, there can be no recovery therefor unless such negligence or omission was the proximate cause of the injury complained of.[96]

83. Evans *v.* Savannah, etc., R. Co., 90 Ala. 54, 7 So. 758.

84. Carriger *v.* East Tennessee, etc., R. Co., 7 Lea (Tenn.) 388; Richards *v.* Ohio River R. Co., 56 W. Va. 592, 49 S. E. 385.

85. Richards *v.* Ohio River R. Co., 56 W. Va. 592, 49 S. E. 385.

86. As between vendor and purchaser see *infra*, VII, B, 4, c.

As between lessor and lessee see *infra*, VII, C, 6, c.

Companies affected by statutory regulations see *infra*, X, B, 2.

Injuries from operation of road see *infra*, X, C.

Liability for acts of independent contractor see MASTER AND SERVANT, 26 Cyc. 1546 *et seq.*

87. Hammond *v.* Port Royal, etc., R. Co., 15 S. C. 10.

88. Day *v.* New Orleans Pac. R. Co., 37 La. Ann. 131.

89. Willitts *v.* Chicago, etc., R. Co., 88 Iowa 281, 55 N. W. 313, 21 L. R. A. 608; Penley *v.* Maine Cent. R. Co., 92 Me. 59, 42 Atl. 223; Culver *v.* Chicago, etc., R. Co., 38 Mo. App. 130; Vaughn *v.* Buffalo, etc., R. Co., 72 Hun (N. Y.) 471, 25 N. Y. Suppl. 246.

90. Willitts *v.* Chicago, etc., R. Co., 88 Iowa 281, 55 N. W. 313, 21 L. R. A. 608.

91. Peoria, etc., R. Co. *v.* Barton, 38 Ill. App. 469, holding that without previous notice of the defective character of a railroad bridge or request to make changes therein, a railroad company purchasing the road after its construction will not be liable to a landowner whose property is overflowed and injured on account of the manner in which the bridge was originally constructed.

92. Willitts *v.* Chicago, etc., R. Co., 88 Iowa 281, 55 N. W. 313, 21 L. R. A. 608.

93. Vaughn *v.* Buffalo, etc., R. Co., 72 Hun (N. Y.) 471, 25 N. Y. Suppl. 246.

94. Seybold *v.* Terre Haute, etc., R. Co., 18 Ind. App. 367, 46 N. E. 1054; Allen *v.* Buffalo, etc., R. Co., 151 N. Y. 434, 45 N. E. 845; Vaughn *v.* Buffalo, etc., R. Co., 72 Hun (N. Y.) 471, 25 N. Y. Suppl. 246.

Continuing duty to restore highway see *supra*, VI, D, 3, h.

95. Texas, etc., R. Co. *v.* Maddox, 26 Tex. Civ. App. 297, 63 S. W. 134.

96. Gulf, etc., R. Co. *v.* Sneed, 84 Miss. 252, 36 So. 261; Biggerstaff *v.* St. Louis, etc., R. Co., 60 Mo. 567; Grau *v.* St. Louis, etc., R. Co., 54 Mo. 240; Chapin *v.* Sullivan R. Co., 39 N. H. 53, 75 Am. Dec. 207; St. Louis Southwestern R. Co. *v.* Johnson, 38 Tex. Civ. App. 322, 85 S. W. 476.

Application of rule.— The failure of a railroad company to fence its tracks or construct cattle-guards as required by statute is not the proximate cause of an injury to crops done by trespassing animals, if the animals came upon the land at some other point than that at which the company had failed to fence or construct cattle-guards (Giggerstaff *v.* St. Louis, etc., R. Co., 60 Mo. 567; Chapin *v.*

So also the injury must be one which might reasonably have been anticipated as the natural and probable result of such negligent act or omission,[97] and the determination of this question is ordinarily one of fact for the jury;[98] but if the injury was one which might reasonably have been anticipated as the natural and probable result the railroad company will be liable,[99] and it is not necessary that the negligence of the railroad company should be the sole cause of the injury,[1] or that the precise injury which in fact did occur should have been foreseen.[2] It must also of course appear that the act or omission causing the injury was one for which the railroad company and not some third person was responsible.[3]

m. Contributory Negligence of Person Injured or Damaged. In actions based upon the negligence or omission of a statutory duty by a railroad company in regard to the construction or maintenance of its road, a recovery may, as in other cases, be precluded by the contributory negligence of the person injured or damaged,[4] and it is the duty of a person to exercise ordinary care in protecting his property against injury from such causes if he can do so with slight trouble or expense;[5] but he is not required to incur any large amount of trouble

Sullivan R. Co., 39 N. H. 53, 75 Am. Dec. 207; Gulf, etc., R. Co. *v.* Simonton, 2 Tex. Civ. App. 558, 22 S. W. 285); or if they were turned into plaintiff's field by defendant's servants on being extricated from a wrecked train which had rolled down an embankment (Gray *v.* St. Louis, etc., R. Co., 54 Mo. App. 240).

97. Charlebois *v.* Gogebic, etc., R. Co., 91 Mich. 59, 51 N. W. 812; Holden *v.* Rutland, etc., R. Co., 30 Vt. 297.

Application of rule.— Where a railroad company constructs a fill against which after a heavy rain a pool of water is formed upon its right of way on the opposite side of the fill from plaintiff's house and where he has no right to cross, the company will not be liable for the death of plaintiff's child who climbs over the fill and falls into such pool and is drowned, as the injury is one which could not have been foreseen when the fill was made (Charlebois *v.* Gogebic, etc., R. Co., 91 Mich. 59, 51 N. W. 812); and where a railroad company fails to fence its track as required by statute and animals escape from an adjoining inclosure and are lost or injured, the liability of the railroad company will depend upon whether under the circumstances the loss or the injury which occurred was a natural and proper result of such omission (Gordon *v.* Chicago, etc., R. Co., 44 Mo. App. 201; Holden *v.* Rutland, etc., R. Co., 30 Vt. 297).

98. Holden *v.* Rutland, etc., R. Co., 30 Vt. 297.

99. Chicago, etc., R. Co. *v.* Hoag, 90 Ill. 339 (holding that where one sustains damage to his property resulting from the freezing upon his premises of water which flows thereon from a railroad tank, the damage being sustained in consequence of the freezing of the water, but for which it would have flowed away from the premises without injury, the company will be liable as the injury is one which might reasonably and naturally have been expected to result); St. Louis, etc., R. Co. *v.* McKinsey, 78 Tex. 298, 14 S. W. 645, 22 Am. St. Rep. 54 (holding that a railroad company which has negligently destroyed a pasture fence is not relieved from liability for the loss of horses which escape in consequence thereof by the fact that they had recently been brought from a remote part of the state, and the company had no notice of their character, as it could reasonably have anticipated that the owner of the pasture would put therein stock that would be liable to stray off in the absence of a fence).

1. Evansville, etc., R. Co. *v.* Allen, 34 Ind. App. 636, 73 N. E. 630.

2. Evansville, etc., R. Co. *v.* Allen, 34 Ind. App. 636, 73 N. E. 630.

3. Gulf, etc., R. Co. *v.* Tucker, 38 Tex. Civ. App. 224, 85 S. W. 461, holding that where a railroad company in constructing its road through plaintiff's inclosure closed up the openings made in his fences with wire and bars, whereupon plaintiff placed a gate at said point which was used by the public generally, and through which stock entered his inclosure and destroyed his crops, he cannot recover against the railroad company in the absence of evidence showing by whom or through whose fault the gate was left open.

Private switch.—A railroad company is not responsible for a public nuisance caused by an embankment built in order to make a connection between a private switch and its tracks where it did not construct the switch or have any interest therein, and could not under an existing constitutional provision prevent its construction or the connection with its tracks. Louisville, etc., R. Co. *v.* Com., 101 S. W. 382, 31 Ky. L. Rep. 65.

4. Reynolds *v.* Missouri, etc., R. Co., 70 Kan. 340, 78 Pac. 801; Ward *v.* Paducah, etc., R. Co., 4 Fed. 862.

5. Atchison, etc., R. Co. *v.* Jones, 110 Ill. App. 626; Millhouse *v.* Chicago, etc., R. Co., 7 Ohio Cir. Ct. 466, 4 Ohio Cir. Dec. 682; Gulf, etc., R. Co. *v.* Simonton, 2 Tex. Civ. App. 558, 22 S. W. 285; Ward *v.* Paducah, etc., R. Co., 4 Fed. 862.

This rule does not apply so as to compel a landowner to construct fences or cattle-guards upon failure of the railroad company to construct them, although he is authorized by statute to do so and recover therefor

or expense for such purpose,[6] or to abandon or forego the ordinary and proper uses of his property on account of the negligent acts or omissions of the railroad company,[7] or to anticipate in planning a particular use of his property that the railroad company will not at the proper time perform its duty.[8] So it is not contributory negligence, where the railroad company has failed to construct fences or cattle-guards, for a landowner to turn his stock into a pasture from which they might escape by reason of the absence of such fences or cattle-guards to his cultivated lands and injure his crops,[9] or to plant a crop which on account of their absence would be exposed to depredations of stock,[10] particularly where he has reason to believe that the railroad company will perform such duty by the time the protection to be afforded thereby will be needed.[11] So also the failure of a landowner to avail himself of a statutory authority to construct fences or cattle-guards, upon failure of the railroad company to do so, and recover their cost, is not contributory negligence which will bar his right to recover for injuries occasioned by the failure of the railroad company to do so,[12] and the same rule applies under similar statutes relating to the construction of private or farm crossings.[13]

2. Actions — a. Nature and Form of Remedy.[14] Where property has been injured by the negligent or improper construction of a railroad, the proper remedy is by an action at law for damages and not by proceedings for an assessment of damages under the statutes relating to condemnation;[15] and where property has not been entered upon but has been injured by the construction of a railroad, and no remedy is provided by statute, an action at law will lie to recover the damages sustained.[16] Where stones have been thrown upon adjacent lands by blasting and not removed within a reasonable time, the proper form of action is case and not trespass;[17] and to recover damages occasioned by a failure of a

from the railroad company. San Antonio, etc., R. Co. *v.* Knoepfli, 82 Tex. 270, 17 S. W. 1052; Houston, etc., R. Co. *v.* Adams, 63 Tex. 200; Texas, etc., R. Co. *v.* Young, 60 Tex. 201. But see Millhouse *v.* Chicago, etc., R. Co., 7 Ohio Cir. Ct. 466, 4 Ohio Cir. Dec. 682.

6. Smith *v.* Chicago, etc., R. Co., 38 Iowa 518.

Precautions against flooding lands.—Where a railroad company raises the grade of its road-bed so as to cause a flooding of adjacent lands, the landowner is not obliged to grade up his lot so as to prevent overflow, and his failure to do so is not negligence which will bar a recovery. Texas, etc., R. Co. *v.* Maddox, 26 Tex. Civ. App. 297, 63 S. W. 134.

7. Kirkpatrick *v.* Illinois Southern R. Co., 120 Mo. App. 416, 96 S. W. 1036; Gulf, etc., R. Co. *v.* Clay, 28 Tex. Civ. App. 176, 66 S. W. 1115.

Where a railroad company neglects to provide open crossings as required by statute where it passes through an inclosed pasture, it is not contributory negligence on the part of the owner to use the pasture knowing that it is subject to overflow and that without such means of escape his stock are liable to be drowned. Gulf, etc., R. Co. *v.* Clay, 28 Tex. Civ. App. 176, 66 S. W. 1115.

8. Raridan *v.* Iowa Cent. R. Co., 69 Iowa 527, 29 N. W. 599.

A tenant of property is not precluded from recovering for injuries due to the negligent construction of a railroad, because he rented the property knowing the road was to be built or did not subsequently terminate his lease, as he had a right to assume that the road would be constructed in a lawful and proper manner. International, etc., R. Co. *v.* Capers, 33 Tex. Civ. App. 283, 77 S. W. 39.

9. Kirkpatrick *v.* Illinois Southern R. Co., 120 Mo. App. 416, 96 S. W. 1036.

10. Smith *v.* Chicago, etc., R. Co., 38 Iowa 518.

11. Smith *v.* Chicago, etc., R. Co., 38 Iowa 518.

12. Buttles *v.* Chicago, etc., R. Co., 43 Mo. App. 280; Dean *v.* Sullivan R. Co., 22 N. H. 316; San Antonio, etc., R. Co. *v.* Knoepfli, 82 Tex. 270, 17 S. W. 1052; Houston, etc., R. Co. *v.* Adams, 63 Tex. 200; Texas, etc., R. Co. *v.* Young, 60 Tex. 201; Houston, etc., R. Co. *v.* Dugger, (Tex. Civ. App. 1903) 77 S. W. 1046. But see Millhouse *v.* Chicago, etc., R. Co., 7 Ohio Cir. Ct. 466, 4 Ohio Cir. Dec. 682.

13. Sheridan *v.* Atchison, etc., R. Co., 56 Mo. App. 68; Green *v.* Morris, etc., R. Co., 24 N. J. L. 486.

14. **Remedies of owner of property** see, generally, Eminent Domain, 15 Cyc. 979 *et seq.*

15. Estabrooks *v.* Peterborough, etc., R. Co., 12 Cush. (Mass.) 224; Sims *v.* Ohio River, etc., R. Co., 56 S. C. 30, 33 S. E. 746. See also Cole *v.* Carolina Cent. R. Co., 74 N. C. 587.

16. Ritchie *v.* Pittsburgh, etc., R. Co., 14 Pittsb. Leg. J. N. S. (Pa.) 424.

17. Sabin *v.* Vermont Cent. R. Co., 25 Vt. 363.

railroad company to construct farm crossings as required by statute, an action on the case for tort is the proper remedy.[18] Where the lawful construction of a railroad causes an injury to property of a permanent character, the entire damage, past, present, and future, resulting therefrom, should be sued for and recovered in one action,[19] and a judgment in one action will bar any subsequent action for the same cause;[20] but if the injury results from a negligent or improper construction, plaintiff is not required to treat the injury as of a permanent character, but may sue for the damages already sustained and may maintain successive actions as often as a new injury occurs,[21] as for each overflow and damage to lands or crops caused by a defective or improperly constructed bridge or culvert.[22] If, however, plaintiff treats the negligent or defective structure as a permanent source of injury, and recovers the full amount of damages both present and prospective, he cannot afterward maintain a second action for damages.[23] So also where successive injuries have resulted from the same breach of duty, as from a failure of the railroad company to fence its tracks, they constitute a single cause of action which may be sued for in one complaint, and plaintiff cannot be compelled to elect as to which he will proceed upon;[24] but on the contrary if he splits up such single cause of action and sues for one item of the damages, the judgment will be a bar to any subsequent action for a different item which might have been included in the first complaint.[25] An action by a landowner for consequential damages to his property from the construction of a railroad may be brought at any time after its construction if within the period of limitations.[26]

b. Jurisdiction and Venue. Where land situated in one county is damaged by reason of the construction of a railroad embankment in another county, the action may be brought in either county;[27] and under the statutes in some jurisdictions actions for damages to land by the construction of a railroad are not local but transitory, and need not be brought in the county where the land lies,[28] but may be brought in any county through which the road runs,[29] or where service may be had upon defendant as provided by statute.[30] The provision of the Missouri statute that actions against railroad companies for killing or injuring stock shall be brought before a justice in the township in which the injury occurred or in an adjoining township does not apply to actions for injuries to crops.[31] Where the suit is for damages and no ground of equity jurisdiction is disclosed by the pleadings, it is error to transfer the case to the equity docket.[32]

c. Pleading. In actions for injuries due to the construction or maintenance of a railroad, as in other civil actions, the complaint must allege facts sufficient

18. Green *v.* Morris, etc., R. Co., 24 N. J. L. 486, holding, however, that a count in tort for the damages sustained cannot be joined with a count to recover the value of the crossing constructed by plaintiff, as the latter count is founded upon contract.

19. Chicago, etc., R. Co. *v.* Loeb, 118 Ill. 203, 8 N. E. 460, 59 Am. Rep. 341; Elizabethtown, etc., R. Co. *v.* Combs, 10 Bush (Ky.) 382, 19 Am. Rep. 67.

20. Chicago, etc., R. Co. *v.* Loeb, 118 Ill. 203, 8 N. E. 460, 59 Am. Rep. 341; Fowle *v.* New Haven, etc., R. Co., 107 Mass. 352.

21. Chicago, etc., R. Co. *v.* Schaffer, 124 Ill. 112, 16 N. E. 239 [*affirming* 26 Ill. App. 280].

22. Chicago, etc., R. Co. *v.* Schaffer, 124 Ill. 112, 16 N. E. 239 [*affirming* 26 Ill. App. 280]; Chicago, etc., R. Co. *v.* Willi, 53 Ill. App. 603.

23. Chicago, etc., R. Co. *v.* Schaffer, 124 Ill. 112, 16 N. E. 239 [*affirming* 26 Ill. App. 280].

24. Ray *v.* St. Louis, etc., R. Co., 25 Mo. App. 104.

25. Steiglider *v.* Missouri Pac. R. Co., 38 Mo. App. 511.

26. Chicago, etc., R. Co. *v.* O'Neill, 58 Nebr. 239, 78 N. W. 521.

27. Ohio, etc., R. Co. *v.* Combs, 43 Ill. App. 119 [*affirmed* in 142 Ill. 187, 31 N. E. 598].

28. Archibald *v.* Mississippi, etc., R. Co., 66 Miss. 424, 6 So. 238; Omaha, etc., R. Co. *v.* Brown, 29 Nebr. 492, 46 N. W. 39.

29. Archibald *v.* Mississippi, etc., R. Co., 66 Miss. 424, 6 So. 238.

30. Omaha, etc., R. Co. *v.* Brown, 29 Nebr. 492, 46 N. W. 39.

31. Rosentingle *v.* Illinois Southern R. Co., 122 Mo. App. 492, 99 S. W. 788, holding that such actions may be brought in the same manner as if the action was against an individual.

32. Hughes *v.* Arkansas, etc., R. Co., 74 Ark. 194, 85 S. W. 773.

to constitute a cause of action,[33] and with sufficient particularity to inform defendant of the acts or omissions relied on.[34] The complaint must show plaintiff's right to maintain the action,[35] and a breach of duty on the part of the railroad

33. Henry *v.* Nashville, etc., R. Co., 142 Ala. 386, 38 So. 361; Field *v.* Chicago, etc., R. Co., 76 Mo. 614; Fuller *v.* Atchison, etc., R. Co., 106 Mo. App. 392, 80 S. W. 914; Privett *v.* Wilmington, etc., R. Co., 54 S. C. 98, 32 S. E. 75.

Complaint held insufficient.— Where the action is based on the ground that the mode of constructing or maintaining the road is a nuisance, the complaint must allege either that it was constructed by defendant or maintained by it after notice to abate the nuisance. Wabash R. Co. *v.* Sanders, 47 Ill. App. 436. A complaint alleging that defendant had by collusion with another company allowed the latter to use its road and grade a branch, whereby defendant aided such company "to reach plaintiff's possession," which was taken by the latter company by force from plaintiff and his crops destroyed, does not constitute a cause of action. Henry *v.* Nashville, etc., R. Co., 142 Ala. 386, 38 So. 361. A petition in a suit to enjoin a railroad company from acting under an ordinance permitting it to construct an arch over a street, which alleges that the arch would be a public and private nuisance, and that an obstruction of the street would damage plaintiff, but does not allege that the arch would obstruct the street, or any facts showing that it would in itself be a nuisance, is insufficient. Gilcrest Co. *v.* Des Moines, 128 Iowa 49, 102 N. W. 831. A complaint which charges negligence in the maintenance of a roadway under a railroad bridge, but alleges an injury from falling on a pathway outside of such road, as to which no negligence is alleged, does not state a cause of action. Fuller *v.* Atchison, etc., R. Co., 106 Mo. App. 392, 80 S. W. 914. In an action against the successor of the company which constructed a railroad for damages due to the obstruction of water by an embankment, the complaint is insufficient if it does not allege that defendant constructed the embankment or has increased it since becoming the owner of the road. Privett *v.* Wilmington, etc., R. Co., 54 S. C. 98, 32 S. E. 75.

Complaint held sufficient.— If the complaint contains all the allegations necessary to state a cause of action it will be held sufficient, although they are stated in a disconnected manner and the complaint is not artificially drawn. Rosentingle *v.* Illinois Southern R. Co., 122 Mo. App. 492, 99 S. W. 788. In an action for flooding plaintiff's land where the complaint alleges that it was due to the raising of defendant's track, it is not objectionable for failing to allege that drains existed before the raising of the track, and that the natural drainage from plaintiff's property was toward the track so that the raising of the track caused it to change its course. Texas, etc., R. Co. *v.* Maddox, 26 Tex. Civ. App. 297, 63 S. W. 134. A complaint alleging that defendant's road passes through the inclosed premises of plaintiff at a point about two miles north of a certain station, and that at points where defendant's road entered such premises it had refused to maintain cattle-guards, sufficiently alleges plaintiff's ownership of the premises and sufficiently describes the same as against a general demurrer. Missouri, etc., R. Co. *v.* Wetz, 38 Tex. Civ. App. 563, 87 S. W. 373, 375. A complaint is sufficient in an action to recover damages for closing a passageway under defendant's road which alleges ownership of the lands to which the way is appurtenant, and a continuous adverse use under a claim of right with notice to defendant of the passageway for more than twenty-one years. Lake Erie, etc., R. Co. *v.* Hoff, 25 Ind. App. 239, 56 N. E. 925. Complaint held sufficient in an action for an injury to lands due to failure to restore a stream to its former condition or such as not to impair its usefulness as required by statute see Moison *v.* Great Western R. Co., 14 U. C. Q. B. 102. Complaint held sufficient in an action for injury to lands due to a failure to construct proper culverts or leave sufficient openings for the escape of water see Cameron *v.* Ontario, etc., R. Co., 14 U. C. Q. B. 612.

34. Missouri Pac. R. Co. *v.* Johnson, 3 Tex. App. Civ. Cas. § 275.

In an action for failure to construct farm crossings the complaint should specify with reasonable certainty what and how many crossings defendant has failed to construct. Green *v.* Morris, etc., R. Co., 24 N. J. L. 486.

It is not necessary to allege the exact date of the injury if the complaint alleges that plaintiff is unable to do so and the time is stated as within a period which shows that the action is not barred by the statute of limitations. Texas, etc., R. Co. *v.* Maddox, 26 Tex. Civ. App. 297, 63 S. W. 134.

35. Georgia Cent. R. Co. *v.* Sturgis, 149 Ala. 573, 43 So. 96, holding that under the Alabama statute requiring the construction of cattle-guards "whenever the owner of the land through which the road passes" shall demand and show the necessity for them, a complaint alleging damages by reason of defendant's failure to construct them is demurrable unless it alleges that plaintiff is owner of the land.

In an action for the obstruction of a way the complaint must allege that the way is a private way or show that plaintiff has sustained a special injury different from the public generally. Lamphier *v.* Worcester, etc., R. Co., 33 N. H. 495.

It is a sufficient allegation of plaintiffs' ownership of the land, in an action for wrongfully destroying a crossing, where plaintiffs allege that the crossing was on "their farm." Zook *v.* Illinois Cent. R. Co., 80 S. W. 211, 25 Ky. L. Rep. 2194.

company;[36] or in other words that the railroad company was guilty of negligence in doing the act alleged,[37] or under a legal obligation to perform the act alleged to have been omitted;[38] and the facts out of which such duty arises should be pleaded.[39] So also where the duty imposed is dependent upon the existence of certain conditions, the complaint must allege the existence of such conditions,[40] and if the statute allows a certain time for the performance of the duty, the lapse of such time must be alleged,[41] and if the performance of the duty is contingent upon a request by the landowner, such request must be alleged.[42] A direct and express allegation of negligence is not essential if it is a necessary deduction from the facts alleged,[43] or the complaint alleges a failure to perform a statutory duty and damages resulting therefrom;[44] while on the other hand a general allegation of negligence in the construction of the road is not sufficient without allegations showing wherein it was negligently or defectively constructed.[45] If the complaint states a good cause of action at common law it is not demurrable because it contains a prayer for double damages and does not allege sufficient facts to constitute a cause of action under the statute allowing such damages.[46] Ordinarily the allegation of damage should not be general but should point out the specific injury sustained;[47] but general allegations of the continuous operation of the road and a continuous neglect to fence it and that damages resulted therefrom are sufficient to authorize a recovery for such damages as invariably follow the exposure of lands by the absence of fences and which cannot easily be itemized.[48] The complaint should also allege the amount of damage sustained;[49] but in an action for injury to plaintiff's lands if the complaint alleges the amount of the damage sustained, it need not state the value of the lands before and after the injury complained of.[50] A complaint is sufficient, although it does not specifically

36. Cannon *v.* Louisville, etc., R. Co., 34 Ill. App. 640; Field *v.* Chicago, etc., R. Co., 76 Mo. 614.

37. Randle *v.* Pacific R. Co., 65 Mo. 325; Wallace *v.* Columbia, etc., R. Co., 34 S. C. 62, 12 S. E. 815, holding that a complaint which alleges that defendant wrongfully erected an obstruction across the streams on plaintiff's land, whereby it was flooded to his damage, does not state a cause of action since it does not show that the obstruction was wanton or negligent, or that defendant could have constructed its road so as to avoid the injury, and that the allegation that it was done "wrongfully" states merely a conclusion of law.

A complaint sufficiently alleges negligence in the construction of a railroad where it alleges that a railroad embankment was so negligently constructed that it spread beyond the right of way over plaintiff's land, although it avers that it was the natural slope of the clay used in making the embankment which caused it to project beyond such right of way. Sims *v.* Ohio River, etc., R. Co., 56 S. C. 30, 33 S. E. 746.

38. Field *v.* Chicago, etc., R. Co., 76 Mo. 614.

39. Field *v.* Chicago, etc., R. Co., 76 Mo. 614.

40. Graves *v.* Kansas City, etc., R. Co., 69 Mo. App. 574, holding that where a statute requires the construction of lateral ditches and drains along the road-bed where there are other ditches, drains, or watercourses with which they may connect and form an outlet, a complaint for damages caused by a failure to construct them is fatally defective if it fails to allege the existence of such conditions.

41. Cannon *v.* Louisville, etc., R. Co., 34 Ill. App. 640 (holding that under the Illinois statute it must be alleged, in an action based upon a failure of the railroad company to fence its tracks, that the road had been open for use for six months prior to the injury); Ferguson *v.* Buffalo, etc., R. Co., 16 U. C. Q. B. 296 (holding that under the Canadian statute, in an action for injury to crops due to a failure to fence, it must be alleged that six months had elapsed since the taking of the land by the railroad company); Elliott *v.* Buffalo, etc., R. Co., 16 U. C. Q. B. 289.

42. Elliott *v.* Buffalo, etc., R. Co., 16 U. C. Q. B. 289; Ferguson *v.* Buffalo, etc., R. Co., 16 U. C. Q. B. 296.

43. Clark *v.* Dyer, 81 Tex. 339, 16 S. W. 1061; Sabine, etc., R. Co. *v.* Hadnot, 67 Tex. 503, 4 S. W. 138.

44. Clark *v.* Dyer, 81 Tex. 339, 16 S. W. 1061.

45. Missouri Pac. R. Co. *v.* Johnson, 3 Tex. App. Civ. Cas. § 275.

46. Comings *v.* Hannibal, etc., R. Co., 48 Mo. 512.

47. Grand Rapids, etc., R. Co. *v.* Southwick, 30 Mich. 444.

48. Grand Rapids, etc., R. Co. *v.* Southwick, 30 Mich. 444.

49. Missouri Pac. R. Co. *v.* Johnson, 3 Tex. App. Civ. Cas. § 275, holding that in an action for the destruction of crops the complaint should allege their market value.

50. International, etc., R. Co. *v.* Glover, (Tex. Civ. App. 1904) 84 S. W. 604.

allege that the railroad is located on or runs through the county where the action is brought, if it alleges an injury located territorially within such county,[51] at least unless objected to specifically upon this ground.[52] The complaint need not anticipate and negative matters of affirmative defense,[53] and in an action for injuries to crops by stock due to a failure to fence where the road passes through inclosed lands, it is not necessary to negative the possibility that they entered upon plaintiff's lands at the crossing of a public highway.[54] A plea by defendant that the structure causing the injury was constructed under authority of a city ordinance for the city and not for defendant, and denying that it was negligently constructed, states a defense to the action and should not be stricken out;[55] but a plea by defendant which neither traverses nor confesses and avoids the averments of the complaint is bad upon demurrer.[56]

d. Evidence — (I) *PRESUMPTIONS AND BURDEN OF PROOF.* In an action for injury to property by the construction of a railroad, it will be presumed that all incidental and consequential damages were properly included in the assessment of damages in the condemnation proceedings.[57] As in other civil actions the burden is upon plaintiff to prove negligence or a breach of duty on the part of the railroad company,[58] and upon defendant to prove contributory negligence on the part of plaintiff when relied on as a defense.[59]

(II) *ADMISSIBILITY.* As in other civil actions evidence is not admissible unless it has some direct and legitimate bearing upon the facts in issue.[60] So in an action for injuries to property by the construction of a railroad, evidence is not admissible as to what plaintiff originally paid for the property,[61] or the principle upon which damages were assessed in the condemnation proceedings,[62] or of injuries to property other than that alleged to have been injured;[63] and evidence of repairs made subsequent to the injury is not admissible upon the question of the condition at the time of the injury.[64] Where a railroad company is not required to construct cattle-guards, in an action for injury to crops evidence that the railroad company had promised to construct them is not admissible in the absence of evidence that the award of damages in the condemnation proceedings was affected thereby.[65] In an action for injuries due to the negligent manner of constructing the road, evidence as to the value of plaintiff's land before and after its construction is not admissible as it does not present a proper measure of damages.[66] In an action for failure to construct cattle-guards as required by

51. East Georgia, etc., R. Co. *v.* King, 91 Ga. 519, 17 S. E. 939; Grand Rapids, etc., R. Co. *v.* Southwick, 30 Mich. 444.

52. East Georgia, etc., R. Co. *v.* King, 91 Ga. 519, 17 S. E. 939.

53. St. Louis Southwestern R. Co. *v.* Rollins, (Tex. Civ. App. 1905) 89 S. W. 1099.

54. Clare *v.* Chicago, etc., R. Co., 79 Mo. 39.

55. De Baker *v.* Southern California R. Co., 106 Cal. 257, 39 Pac. 610, 46 Am. St. Rep. 237.

56. Seaboard Air Line R. Co. *v.* Wright, 148 Ala. 27, 41 So. 461, holding that where, in an action for injury to crops due to a failure to maintain proper cattle-guards, the complaint alleges that they had been at all times wholly insufficient to prevent stock from entering plaintiff's field, a plea alleging that defendant maintained cattle-guards at such place of a specified make which were in general use for like purposes by all or most of the railroad companies in the United States is fatally defective in failing to allege that they were reasonably sufficient to turn stock.

57. Fairchild *v.* New Orleans, etc., R. Co., 62 Miss. 177.

58. Randle *v.* Pacific R. Co., 65 Mo. 325.

59. See *v.* Wabash R. Co., 123 Iowa 443, 99 N. W. 106.

60. Denison, etc., R. Co. *v.* Cummins, (Tex. Civ. App. 1897) 42 S. W. 588; Hatch *v.* Vermont Cent. R. Co., 28 Vt. 142.

61. Denison, etc., R. Co. *v.* Cummins, (Tex. Civ. App. 1897) 42 S. W. 588.

62. Fleming *v.* Wilmington, etc., R. Co., 115 N. C. 676, 20 S. E. 714.

63. Jeffersonville, etc., R. Co. *v.* Esterle, 13 Bush (Ky.) 667.

64. See *v.* Wabash R. Co., 123 Iowa 443, 99 N. W. 106; Gulf, etc., R. Co. *v.* Haskell, 4 Tex. Civ. App. 550, 23 S. W. 536.

65. Fairchild *v.* New Orleans, etc., R. Co., 62 Miss. 177.

66. Cadle *v.* Muscatine Western R. Co., 44 Iowa 11; Reed *v.* Canastota Northern R. Co., 20 N. Y. Suppl. 241; Carson *v.* Norfolk, etc., R. Co., 128 N. C. 95, 38 S. E. 287.

Measure of damages see *infra*, VI, J, 2, g.

statute, evidence that on account of their absence plaintiff was compelled to employ additional help in driving his stock across the right of way is admissible as tending to show the damages sustained; [67] and in an action for damages to crops by flooding lands, evidence of the cultivation of crops prior to the time for which a recovery is sought, and the effect of water thereon, is admissible as tending to show the effect of similar conditions during the period for which a recovery is sought if properly limited for such purpose.[68] Evidence of a person who testifies from actual observation as to the insufficiency of a bridge to properly admit the passage of the water of a stream is admissible, although he is not an expert.[69] In an action for flooding lands due to the breaking of a railroad embankment alleged to have been negligently constructed, where defendant alleges that it was properly constructed and the injury due to an unprecedented flood, evidence that certain city and county bridges were washed away is not admissible on the part of defendant in the absence of evidence that they were properly constructed;[70] but evidence that the defect or condition occasioning the injury complained of has been remedied is admissible upon the part of defendant in mitigation of damages.[71]

(III) *Weight and Sufficiency.* In actions for injuries due to the construction or maintenance of a railroad, the rules relating to the weight and sufficiency of evidence are the same as in other civil actions.[72] In an action for injuries due to defects in a highway bridge across a railroad which it was defendant's duty to keep in repair, a failure to prove that defendant constructed the bridge is not fatal to a recovery; [73] but where the action is for a nuisance in constructing a railroad in a street and the road was constructed by lawful authority, there can be no recovery in the absence of evidence that the road was constructed in a negligent or improper manner.[74]

e. Issues, Proof, and Variance. Only such matters can be considered as are put in issue by the pleadings,[75] and supported by evidence upon the trial,[76] and there can be no recovery upon a cause of action not alleged,[77] nor can a failure to state a cause of action be remedied by evidence upon the trial.[78] Plaintiff must upon the trial support by proof the material allegations of the complaint or a nonsuit may properly be granted,[79] and the case must be proved as alleged, any material variance being fatal to a recovery.[80] In an action for injury to crops by trespassing animals, due to alleged defects in fences or cattle-guards, where

67. Missouri, etc., R. Co. *v.* Wetz, 38 Tex. Civ. App. 563, 87 S. W. 373, 375.

68. Willitts *v.* Chicago, etc., R. Co., 88 Iowa 281, 55 N. W. 313, 21 L. R. A. 608.

69. Willitts *v.* Chicago, etc., R. Co., 88 Iowa 281, 55 N. W. 313, 21 L. R. A. 608.

70. Missouri, etc., R. Co. *v.* McGregor, (Tex. Civ. App. 1902) 68 S. W. 711.

71. Alabama Midland R. Co. *v.* Coskry, 92 Ala. 254, 9 So. 202, holding that in an action against a railroad company for damage to property by excavations in highways in constructing its road, evidence that the defects were afterward repaired by the city is admissible in mitigation of damages.

72. See, generally, Evidence, 17 Cyc. 753 *et seq.*

Evidence held sufficient, although entirely circumstantial, to show that the railroad was constructed by defendant company, in the absence of any evidence to the contrary (Kankakee, etc., R. Co. *v.* Horan, 23 Ill. App. 259); or to warrant the jury in returning a verdict for seven hundred and fifty dollars for damages to crops due to a failure to construct cattle-guards (Yazoo, etc., R. Co. *v.* Hubbard, 75 Miss. 480, 37 So. 1011).

73. Southern R. Co. *v.* Taylor, 148 Ala. 52, 42 So. 625.

74. Randle *v.* Pacific R. Co., 65 Mo. 325.

75. O'Connor *v.* St. Louis, etc., R. Co., 56 Iowa 735, 10 N. W. 263; Loewenstein *v.* Missouri Pac. R. Co., 110 Mo. App. 686, 85 S. W. 625; Kendall *v.* Chicago, etc., R. Co., (Tex. Civ. App. 1906) 95 S. W. 757.

76. Chicago, etc., R. Co. *v.* Harper, (Ill. 1888) 19 N. E. 31.

77. Field *v.* Chicago, etc., R. Co., 76 Mo. 614; Loewenstein *v.* Missouri Pac. R. Co., 110 Mo. App. 686, 85 S. W. 625; Baltimore, etc., R. Co. *v.* Lersch, 58 Ohio St. 639, 51 N. E. 543.

78. Field *v.* Chicago, etc., R. Co., 76 Mo. 614.

79. Lee *v.* Savannah, etc., R. Co., 115 Ga. 64, 41 S. E. 246.

Proof of plaintiff's ownership of lands.— In an action for flooding lands alleged to be the property of plaintiff, it is sufficient for him in the first instance to make a *prima facie* case by showing possession at the time of the injury. Choctaw, etc., R. Co. *v.* Rice, 7 Indian Terr. 514, 104 S. W. 819.

80. Wisconsin Cent. R. Co. *v.* Wieczorek,

defendant answers that plaintiff's fence was down in various places and that the animals entered through such fence, it is not necessary for defendant to prove that such fence was down in more than one place.[81]

f. Trial. In actions for injuries from the construction or maintenance of a railroad the conduct of the trial is governed by the principles relating to civil actions generally.[82] Disputed questions of fact are for the determination of the jury,[83] and the court must correctly instruct them as to the law of the case,[84] and should not submit issues or grounds of liability not raised by the pleadings,[85] or not supported by the evidence.[86]

g. Damages.[87] Where property is injured by the construction or maintenance of a railroad, the measure of damages should always be that of just compensation for the actionable injury sustained.[88] If the injury is of a permanent character the measure of damages is the diminution in the value of the property;[89] but if the injury is due to a structure or condition of a temporary character or which can and should be remedied, and for the continuance of which successive actions for resulting injuries may be maintained, plaintiff is not entitled to recover

151 Ill. 579, 38 N. E. 678 [*reversing* 51 Ill. App. 498].

It is a material variance in an action for injury to plaintiff's property by the construction of a railroad, where the complaint alleges that the tracks are laid upon a certain street within ten feet of plaintiff's property, and the proof shows that they are laid beyond the street and fifty feet from his property (Wisconsin Cent. R. Co. *v.* Wieczorek, 151 Ill. 579, 38 N. E. 678 [*reversing* 51 Ill. App. 498]); or in an action for obstructing a private way where the complaint alleges the location of the way and the obstruction, and the proof is of a different way crossing defendant's tracks at a different place (Bolton *v.* Manistee, etc., R. Co., 95 Mich. 202, 54 N. W. 875); or where the complaint alleges that the way is entirely obstructed so that plaintiff is unable to pass and the proof shows that it is only partially obstructed, leaving ample room for ingress and egress (Ross *v.* Georgia, etc., R. Co., 33 S. C. 477, 12 S. E. 101).

It is not a fatal variance where plaintiff fails to prove the date of the injury as of the exact day of the month alleged in the complaint. Southern R. Co. *v.* Taylor, 148 Ala. 52, 42 So. 625.

81. Kansas City, etc., R. Co. *v.* Mayfield, (Tex. Civ. App. 1908) 107 S. W. 940.

82. See, generally, TRIAL.

83. Olver *v.* Burlington, etc., R. Co., 111 Iowa 221, 82 N. W. 609; Restetsky *v.* Delmar Ave., etc., Co., 106 Mo. App. 382, 85 S. W. 665; Cantelou *v.* Trinity, etc., R. Co., (Tex. Civ. App. 1907) 101 S. W. 1017.

It is a question for the jury where the evidence is conflicting, or different conclusions might reasonably be drawn therefrom, whether in an action for an injury resulting from a crossing alleged to be negligently constructed or maintained the railroad company was guilty of negligence in regard thereto (Southern R. Co. *v.* Clarke, 106 Va. 496, 56 S. E. 274); or in an action for damages for placing bars across a private way, whether such bars were necessary or unnecessary for the purposes of the railroad company in the operation of its road (Willey *v.* Norfolk, etc., R. Co., 96 N. C. 408, 1 S. E. 446).

84. Dallas, etc., R. Co. *v.* Able, 72 Tex. 150, 9 S. W. 871.

85. O'Connor *v.* St. Louis, etc., R. Co., 56 Iowa 735, 10 N. W. 263; Lowenstein *v.* Missouri Pac. R. Co., 110 Mo. App. 686, 85 S. W. 625.

86. Chicago, etc., R. Co. *v.* Harper, (Ill. 1888) 19 N. E. 31.

An instruction is properly refused if it is not supported by the evidence and would be confusing and misleading to the jury. Gulf, etc., R. Co. *v.* Wynne, (Tex. Civ. App. 1905) 91 S. W. 823.

87. See, generally, DAMAGES, 13 Cyc. 150 *et seq.*

88. Railroad Co. *v.* Cook, 57 Ark. 387, 21 S. W. 1066.

In an equitable action against a railroad company for an injunction and damages for illegally using plaintiff's land for a switch, loss of the use of the premises up to the time of the trial may be included in the damages. Burditt *v.* New York Cent. R. Co., 71 Hun (N. Y.) 361, 24 N. Y. Suppl. 1137.

89. Chicago, etc., R. Co. *v.* Baker, 73 Ill. 316; Thompson *v.* Citizens' Traction Co., 181 Pa. St. 131, 37 Atl. 205; Shenango, etc., R. Co. *v.* Braham, 79 Pa. St. 447; Hare *v.* Pittsburg, etc., R. Co., 10 Pa. Super. Ct. 647; Louisville, etc., R. Co. Lellylett, 114 Tenn. 368, 85 S. W. 881, 1 L. R. A. N. S. 49; Dallas, etc., R. Co. *v.* Langston, (Tex. Civ. App. 1906) 98 S. W. 425; Denison, etc., R. Co. *v.* Barry, (Tex. Civ. App. 1904) 80 S. W. 634 [*affirmed* in 98 Tex. 248, 83 S. W. 5].

In determining the amount of depreciation in the market value of the property the jury should consider the uses to which the property is put or for which it is suitable, and any special benefits to the particular property from the construction of the road, but no allowance is to be made on account of the benefits common to property generally in the vicinity due to the location and operation of the road. Dallas, etc., R. Co. *v.* Langston, (Tex. Civ. App. 1906) 98 S. W. 425.

as for a permanent injury to his property,[90] but only for the injury sustained prior to the action;[91] and the measure of damages to the property is the depreciation in the rental value during the continuance of such condition,[92] and not the difference in the market value of the property.[93] Where the injury is due merely to the negligent or improper manner of constructing the railroad, the measure of damages is not the difference in the value of the property before and after the construction of the railroad,[94] but the difference in the value of the property with the road constructed as it is and what its value would be with the road properly constructed,[95] or, it has been held, the difference in the rental value of the property with the road constructed as it is and if properly constructed.[96] If a railroad is constructed in a street so as to obstruct access to plaintiff's place of business, the measure of damages is the loss of profits in the business and not the depreciation in the rental value of the property.[97] Where lands are flooded by reason of the negligent or improper construction of a railroad, the measure of damages is the value of property destroyed together with the injury to the land,[98] provided there is an injury to the land itself,[99] the damage for such injury being measured by the difference in the value of the land before and after the flooding,[1] taking into consideration its condition with respect to crops.[2] If there is no physical injury to the land itself but it is merely rendered subject to overflow, the measure of damages is the injury resulting from each overflow,[3] and if the cause is one which may be remedied the damage to the land is not the difference in its value but the depreciation in the rental value during the continuance of such condition.[4] Plaintiff may recover for the permanent injury to his land and the past damages

90. Railroad Co. *v.* Cook, 57 Ark. 387, 21 S. W. 1066; Louisville, etc., R. Co. *v.* Lellylett, 114 Tenn. 368, 85 S. W. 881, 1 L. R. A. N. S. 49.

91. Railroad Co. *v.* Cook, 57 Ark. 387, 21 S. W. 1066.

92. Railroad Co. *v.* Cook, 57 Ark. 387, 21 S. W. 1066; Louisville, etc., R. Co. *v.* Lellylett, 114 Tenn. 368, 85 S. W. 881, 1 L. R. A. N. S. 49; Cane Belt R. Co. *v.* Ridgeway, 38 Tex. Civ. App. 108, 85 S. W. 496.

93. Railroad Co. *v.* Cook, 57 Ark. 387, 21 S. W. 1066.

94. Cadle *v.* Muscatine Western R. Co., 44 Iowa 11; Carson *v.* Norfolk, etc., R. Co., 128 N. C. 95, 38 S. E. 287; Cane Belt R. Co. *v.* Ridgeway, 38 Tex. Civ. App. 108, 85 S. W. 496.

95. Cadle *v.* Muscatine Western R. Co., 44 Iowa 11; Carson *v.* Norfolk, etc., R. Co., 128 N. C. 95, 38 S. E. 287; Ridley *v.* Seaboard, etc., R. Co., 118 N. C. 996, 24 S. E. 730, 32 L. R. A. 708.

96. O'Connor *v.* St. Louis, etc., R. Co., 56 Iowa 735, 10 N. W. 263.

97. International, etc., R. Co. *v.* Capers, 33 Tex. Civ. App. 283, 77 S. W. 39.

98. Gulf, etc., R. Co. *v.* Pool, 70 Tex. 713, 8 S. W. 535. See also, generally, DAMAGES, 13 Cyc. 152.

99. Green *v.* Taylor, etc., R. Co., 79 Tex. 604, 15 S. W. 685; Gulf, etc., R. Co. *v.* Haskell, 4 Tex. Civ. App. 550, 23 S. W. 546.

1. Willitts *v.* Chicago, etc., R. Co., 88 Iowa 281, 55 N. W. 313, 21 L. R. A. 608; Sullens *v.* Chicago, etc., R. Co., 74 Iowa 659, 38 N. W. 545, 7 Am. St. Rep. 501; Higgins *v.* New York, etc., R. Co., 78 Hun (N. Y.) 567, 29 N. Y. Suppl. 563; Chase *v.* New York Cent., etc., R. Co., 24 Barb. (N. Y.) 273; Gentry *v.* Richmond, etc., R. Co., 38 S. C. 284, 16 S. E. 893; Owens *v.* Missouri Pac. R. Co., 67 Tex. 679, 4 S. W. 593. *Compare* Adams *v.* Durham, etc., R. Co., 110 N. C. 325, 14 S. E. 857, holding that where the injury is due to a cause which may be removed, the measure of damages is not the difference in the market value of the land before and after the injury, but should be estimated by comparing its productiveness before and after the flooding.

Where land has been rented for cultivation and is rendered unfit for such purpose by flooding, the tenant's measure of damages is not merely the rental value of land, but its value for cultivation, which is the difference between the rental value and the production less the cost of production. Georgia R., etc., Co. *v.* Berry, 78 Ga. 744, 4 S. E. 10.

2. Willitts *v.* Chicago, etc., R. Co., 88 Iowa 281, 55 N. W. 313, 21 L. R. A. 608; Drake *v.* Chicago, etc., R. Co., 63 Iowa 302, 19 N. W. 215, 50 Am. Rep. 746.

Growing crops are a part of the realty and in determining the difference in the value of the land before and after the injury the value of the crops should be considered but the estimate should be made with reference to the value at the time of the injury (Drake *v.* Chicago, etc., R. Co., 63 Iowa 302, 19 N. W. 215, 50 Am. Rep. 746); and where there is no allegation that any crops were destroyed but only that the land itself was injured, crops which might have been made are too remote and speculative to be considered (Gentry *v.* Richmond, etc., R. Co., 38 S. C. 284, 16 S. E. 893).

3. Gulf, etc., R. Co. *v.* Helsley, 62 Tex. 593; Gulf, etc., R. Co. *v.* Haskell, 4 Tex. Civ. App. 550, 23 S. W. 546.

4. Kansas City, etc., R. Co. *v.* Cook, 57 Ark. 387, 21 S. W. 1066.

to his crops in one action,[5] but cannot recover the value of land rendered unfit for cultivation and also damages to crops not planted.[6] Where crops have been destroyed the measure of damages is not the value of the crop at the date of maturity,[7] or the rental value of the land;[8] but the proper measure of damages has been held to be the value of the crop at the time of maturity less the cost of cultivation and marketing,[9] or the value of the crop at the time of the injury,[10] which, however, is not to be estimated according to the intrinsic value of an immature crop,[11] but according to the probable yield and value at maturity and the cost of cultivation and marketing.[12] Where a railroad company fails to construct fences or cattle-guards, the measure of the landowner's damages is the amount of the loss or injury directly resulting.[13] The measure of damages for the general injury to his property is the diminution in its rental value, due to the absence of the fences or cattle-guards,[14] and not merely what it would cost to

5. Ridley *v.* Seaboard, etc., R. Co., 124 N. C. 34, 32 S. E. 325.

The jury should assess separately the damage to the land and the damage to the crops and the sum of the amounts will be the measure of plaintiff's recovery. International, etc., R. Co. *v.* Pape, 73 Tex. 501, 11 S. W. 526.

6. Yazoo, etc., R. Co. *v.* Darden, (Miss. 1903) 34 So. 386.

7. Texas, etc., R. Co. *v.* Young, 60 Tex. 201.

8. Donald *v.* St. Louis, etc., R. Co., 44 Iowa 157, holding that since a landowner has a right to plant a crop, although the railroad company has failed to construct fences and cattle-guards to protect the same, the measure of damages for a destruction of the crop is the value of the crop and not the rental value of the land.

9. Smith *v.* Chicago, etc., R. Co., 38 Iowa 518.

10. St. Louis, etc., R. Co. *v.* Lyman, 57 Ark. 512, 22 S. W. 170; Chicago, etc., R. Co. *v.* Schaffer, 26 Ill. App. 280 [*affirmed* in 124 Ill. 112, 16 N. E. 239]; Byrne *v.* Minneapolis, etc., R. Co., 38 Minn. 212, 36 N. W. 339, 8 Am. St. Rep. 668; Texas, etc., R. Co. *v.* Bayliss, 62 Tex. 570; Texas, etc., R. Co. *v.* Young, 60 Tex. 201; Gulf, etc., R. Co. *v.* Carter, (Tex. Civ. App. 1894) 25 S. W. 1023. See also, generally, DAMAGES, 13 Cyc. 153.

Pasture.— The measure of damage for the destruction of grass used for pasturage caused by the failure of the company to construct fences is the value of the pasture from the time it could be so used until the fences were constructed. Buttles *v.* Chicago, etc., R. Co., 43 Mo. App. 280.

Partial destruction.— Where a crop is only partially destroyed by trespassing animals, it has been held that if the crop was a matured one the measure of damages should be the value of the part destroyed and not the entire crop, and if a growing crop the measure of damages should be the difference in value of the entire crop as it stood on the land immediately before the injury and the value of the part not destroyed as it stood immediately after the injury. Kansas City, etc., R. Co. *v.* Mayfield, (Tex. Civ. App. 1908) 107 S. W. 940.

11. Chicago, etc., R. Co. *v.* Schaffer, 26 Ill. App. 280 [*affirmed* in 124 Ill. 112, 16 N. E. 239].

12. St. Louis, etc., R. Co. *v.* Lyman, 57 Ark. 512, 22 S. W. 170; Chicago, etc., R. Co. *v.* Schaffer, 26 Ill. App. 280 [*affirmed* in 124 Ill. 112, 16 N. E. 239]; International, etc., R. Co. *v.* Pape, 73 Tex. 501, 11 S. W. 526; Texas, etc., R. Co. *v.* Young, 60 Tex. 201.

These elements do not constitute the measure of damages but are matters of evidence proper to be considered in determining the value at the time of the injury. Gulf, etc., R. Co. *v.* Carter, (Tex. Civ. App. 1894) 25 S. W. 1023.

13. Nelson *v.* St. Louis, etc., R. Co., 49 Kan. 165, 30 Pac. 178; St. Louis, etc., R. Co. *v.* Sharp, 27 Kan. 134; Nelson *v.* Minneapolis, etc., R. Co., 41 Minn. 131, 42 N. W. 788.

Items and elements of damages.—The damages for failure to construct fences or cattle-guards may include expenses incurred by the landowner in guarding his stock to prevent their escaping from his inclosures (Nelson *v.* St. Louis, etc., R. Co., 49 Kan. 165, 30 Pac. 178), or in order to prevent the loss of the use of a pasture (Raridan *v.* Iowa Cent. R. Co., 69 Iowa 527, 29 N. W. 599); and in cases of injury to crops he may, in addition to the value of the crop, recover for expenses incurred in an effort to protect them from injury (Smith *v.* Chicago, etc., R. Co., 38 Iowa 518; Missouri Pac. R. Co. *v.* Ricketts, 45 Kan. 617, 26 Pac. 50; St. Louis, etc., R. Co. *v.* Ritz, 33 Kan. 404, 6 Pac. 533; St. Louis, etc., R. Co. *v.* Sharp, 27 Kan. 134); and the fact that the landowner has a right to join his fences with the fence of the railroad company, so as to have the benefit of it as a line fence, may be considered in determining the damages (Gould *v.* Great Northern R. Co., 63 Minn. 37, 65 N. W. 125, 56 Am. St. Rep. 453, 30 L. R. A. 590).

14. Finch *v.* Chicago, etc., R. Co., 46 Minn. 250, 48 N. W. 915; Nelson *v.* Minneapolis, etc., R. Co., 41 Minn. 131, 42 N. W. 788; Emmons *v.* Minneapolis, etc., R. Co., 38 Minn. 215, 36 N. W. 340.

The term "rental value" in this connection has been held to mean simply "the value of the use of the land for any purpose for which it is adapted in the hands of a prudent and discreet occupant upon a judicious system of husbandry," and the damages

construct them.[15] For failure to construct private or farm crossings as required by statute, the measure of damages is the actual loss and inconvenience suffered by plaintiff in the use of his premises by reason of their absence.[16] Where a railroad is required by statute to leave openings in its right-of-way fences, where the road passes through an inclosure, and the company, although constructing them for others, refuses to do so for plaintiff, after a demand therefor, exemplary damages may be awarded.[17] For the obstruction of a private crossing the measure of damages is such amount as will fairly compensate plaintiff for the deprivation of its use during the period of obstruction,[18] but punitive damages cannot be recovered if the railroad company did not act wantonly or maliciously but under a mistake as to its legal rights.[19] The damages must in all cases be limited to those resulting from the particular acts or injuries alleged in the complaint,[20] and shown by the evidence,[21] and plaintiff cannot recover a larger amount than what he alleges he has sustained.[22]

h. Review. Questions of review are governed by the rules relating to civil actions generally.[23] The verdict or findings of the jury will not ordinarily be disturbed when based upon conflicting evidence and there is evidence legally sufficient to support them,[24] and a verdict will not be set aside on the ground that the damages are excessive where the amount was variously estimated by different witnesses and the verdict is fairly within the estimates given,[25] or is not so great as clearly to indicate that the jury acted corruptly or disregarded the instructions of the court.[26] Judgment will not be reversed for an error which was not prejudicial to appellant in the admission of evidence,[27] or instructions to the jury,[28] or for refusal to give a special charge requested which, although correct, is covered by the general charge given.[29]

should be what will compensate the owner for the diminution in the value of such use. Nelson *v.* Minneapolis, etc., R. Co., 41 Minn. 131, 42 N. W. 788.

The particular use made of the property must be considered, and where it is prepared and usable for pasture and the owner is wholly deprived of its use for such purpose, by reason of the absence of cattle-guards, he is entitled to recover its rental value for that purpose during the time he is so deprived or to the extent he is deprived thereof. Louisville, etc., R. Co. *v.* Timmons, 116 Tenn. 29, 91 S. W. 1116.

15. Emmons *v.* Minneapolis, etc., R. Co., 38 Minn. 215, 36 N. W. 340.

16. Ohio, etc., R. Co. *v.* McGehee, 47 Ill. App. 348; Port *v.* Huntingdon, etc., R. Co., 168 Pa. St. 19, 31 Atl. 950.

The damages may include the additional expense of gathering a crop caused by being compelled to use a more inconvenient means of access thereto. Ohio, etc., R. Co. *v.* McGehee, 47 Ill. App. 348.

17. San Antonio, etc., R. Co. *v.* Grier, 20 Tex. Civ. App. 138, 49 S. W. 148, holding further that a judgment for one hundred dollars exemplary damages is not excessive.

18. Louisville, etc., R. Co. *v.* Carter, 66 S. W. 617, 23 Ky. L. Rep. 2104.

19. Louisville, etc., R. Co. *v.* Carter, 66 S. W. 617, 23 Ky. L. Rep. 2104.

20. Baltimore, etc., R. Co. *v.* Lersch, 58 Ohio St. 639, 51 N. E. 543.

21. Texas Cent. R. Co. *v.* Wills, (Tex. Civ. App. 1897) 41 S. W. 848.

22. Gulf, etc., R. Co. *v.* Simonton, 2 Tex. Civ. App. 558, 22 S. W. 285.

23. See, generally, APPEAL AND ERROR, 2 Cyc. 474.

24. Ohio, etc., R. Co. *v.* Combs, 142 Ill. 187, 31 N. E. 598 [*affirming* 43 Ill. App. 119]; Kankakee, etc., R. Co. *v.* Horan, 23 Ill. App. 259; Olver *v.* Burlington, etc., R. Co., 111 Iowa 221, 82 N. W. 609; Gulf, etc., R. Co. *v.* Wynne, (Tex. Civ. App. 1905) 91 S. W. 823; Gulf, etc., R. Co. *v.* Clay, 28 Tex. Civ. App. 176, 66 S. W. 1115; Texas, etc., R. Co. *v.* Maddox, 26 Tex. Civ. App. 297, 63 S. W. 134; Marshall *v.* Valley R. Co., 97 Va. 653, 34 S. E. 455.

25. Nicholson *v.* New York, etc., R. Co., 22 Conn. 74, 56 Am. Dec. 390; St. Louis, etc., R. Co. *v.* Capps, 72 Ill. 188.

26. Nicholson *v.* New York, etc., R. Co., 22 Conn. 74, 56 Am. Dec. 390; Southern R. Co. *v.* Clarke, 106 Va. 496, 56 N. E. 274.

A verdict for permanent damages against a railroad company for injuries to land caused by an overflow, resulting from the digging of a ditch, will not be disturbed, although it is not shown that the injury will recur, when defendant asked that all permanent damages therefrom if any should be assessed in the action. Hocutt *v.* Wilmington, etc., R. Co., 124 N. C. 214, 32 S. E. 681.

27. Olver *v.* Burlington, etc., R. Co., 111 Iowa 221, 82 N. W. 609; Willitts *v.* Chicago, etc., R. Co., 88 Iowa 281, 55 N. W. 313, 21 L. R. A. 608.

28. Nicholson *v.* New York, etc., R. Co., 22 Conn. 74, 56 Am. Dec. 390; Dallas, etc., R. Co. *v.* Able, 72 Tex. 150, 9 S. W. 871.

29. Gulf, etc., R. Co. *v.* Wynne, (Tex. Civ. App. 1905) 91 S. W. 823.

K. Offenses Incident to Construction and Maintenance[30]**— 1. In General.** A railroad company as well as a natural person is liable to indictment for unlawfully obstructing a public highway,[31] and such indictment may be maintained either upon common-law principles,[32] or under statutes making it an indictable offense for any person to obstruct a public highway.[33] So also a railroad company is liable to indictment for a breach of duty imposed upon it by law for the benefit of the public in regard to highways, such as the mode of constructing its road across or upon highways, restoring or reconstructing highways crossed or encroached upon, or maintaining and repairing crossings and approaches thereto,[34] whether such breach of duty assumes the shape of an act of misfeasance or nonfeasance.[35] The remedy by indictment is not affected by the existence of a remedy by mandamus,[36] or by the fact that the public authorities in charge of highways might do what the railroad company omitted and recover therefor from the company,[37] or the existence of a statutory remedy,[38] such as a penalty to be recovered by a civil action,[39] nor does the fact that a person injured has a private remedy affect the right of the state to indict for the public wrong.[40]

2. As Constituting Nuisance. A railroad company is liable to indictment for so constructing or maintaining its road as to constitute a public nuisance.[41] Any construction of a railroad upon a public street or highway if without legal authority is a nuisance;[42] but if duly authorized it is not, although upon a street or highway,

30. Offenses incident to operation of road see *infra*, X, B, 8.

31. People *v.* New York, etc., R. Co., 74 N. Y. 302 [*reversing* 12 Hun 195]; Northern Cent. R. Co. *v.* Com., 90 Pa. St. 300; Louisville, etc., R. Co. *v.* State, 3 Head (Tenn.) 523, 75 Am. Dec. 778.

32. New York, etc., R. Co. *v.* State, 50 N. J. L. 303, 13 Atl. 1 [*affirmed* in 53 N. J. L. 244, 23 Atl. 168].

33. St. Louis, etc., R. Co. *v.* State, 52 Ark. 51, 11 S. W. 1035; State *v.* Ohio River R. Co., 38 W. Va. 242, 18 S. E. 582; State *v.* Monongahela R. Co., 37 W. Va. 108, 16 S. E. 519.

Nature of obstruction.— Under the Mississippi statute making it an indictable offense for any person to obstruct a highway, it is held that the statute contemplates obstructions caused by physical means or positive action, and does not embrace or apply to a mere omission to repair a highway bridge over the railroad track, a specific remedy for failure to keep bridges in repair being provided by a different section of the code. Vicksburg, etc., R. Co. *v.* State, 64 Miss. 5, 8 So. 128.

34. *New Jersey.*— New York, etc., R. Co. *v.* State, 50 N. J. L. 303, 13 Atl. 1 [*affirming* 53 N. J. L. 244, 23 Atl. 168].

New York.— People *v.* New York Cent., etc., R. Co., 74 N. Y. 302 [*reversing* 12 Hun 195].

Pennsylvania.— Com. *v.* Pennsylvania R. Co., 117 Pa. St. 637, 12 Atl. 38 [*reversing* 2 Pa. Co. Ct. 391]; Pittsburgh, etc., R. Co. *v.* Com., 101 Pa. St. 192; Ridley Tp. *v.* Baltimore, etc., R. Co., 2 Lanc. L. Rev. 375.

Tennessee.— Louisville, etc., R. Co. *v.* State, 3 Head 523, 75 Am. Dec. 778.

England.— Reg. *v.* Birmingham, etc., R. Co., 9 C. & P. 469, 38 E. C. L. 278.

See 41 Cent. Dig. tit. "Railroads," § 21.

The lessee of a railroad is liable to indictment for failing to construct a new highway in lieu of one taken by the lessor company in the construction of the road without performing such duty as required by statute. Com. *v.* Pennsylvania R. Co., 117 Pa. St. 637, 12 Atl. 38 [*reversing* 2 Pa. Co. Ct. 391].

35. New York, etc., R. Co. *v.* State, 50 N. J. L. 303, 13 Atl. 1 [*affirmed* in 53 N. J. L. 244, 23 Atl. 168]; Pittsburgh, etc., R. Co. *v.* Com., 101 Pa. St. 192.

36. People *v.* New York, etc., R. Co., 74 N. Y. 302 [*reversing* 12 Hun 195]; Pittsburgh, etc., R. Co. *v.* Com., 101 Pa. St. 192.

37. New York, etc., R. Co. *v.* State, 50 N. J. L. 303, 13 Atl. 1 [*affirmed* in 53 N. J. L. 244, 23 Atl. 168]; Pittsburgh, etc., R. Co. *v.* Com., 101 Pa. St. 192.

38. St. Louis, etc., R. Co. *v.* State, 52 Ark. 51, 11 S. W. 1035; People *v.* New York Cent. R. Co., 74 N. Y. 302 [*reversing* 12 Hun 195].

39. St. Louis, etc., R. Co. *v.* State, 52 Ark. 51, 11 S. W. 1035.

40. Northern Cent. R. Co. *v.* Com., 90 Pa. St. 300.

41. Com. *v.* Vermont, etc., R. Corp., 4 Gray (Mass.) 22; Com. *v.* Nashua, etc., R. Corp., 2 Gray (Mass.) 54; People *v.* New York Cent., etc., R. Co., 74 N. Y. 302 [*reversing* 12 Hun 195]; Northern Cent R. Co. *v.* Com., 90 Pa. St. 300; State *v.* Monongahela River R. Co., 37 W. Va. 108, 16 S. E. 519.

42. Com. *v.* Old Colony, etc., R. Co., 14 Gray (Mass.) 93; Com. *v.* Vermont, etc., R. Corp., 4 Gray (Mass.) 22.

Unauthorized location.— Where a railroad authorized to be constructed upon a particular location is constructed upon a different location, it is a nuisance upon every highway which it touches in its illegal course. Com. *v.* Erie R. Co., 27 Pa. St. 339, 67 Am. Dec. 471.

Changing location or route of highway.— A statute authorizing a railroad company to

necessarily a nuisance,[43] although it may become such from the negligent or improper manner of its construction or maintenance.[44] So a railroad company is indictable for a nuisance for so constructing its road as improperly to obstruct a street or highway,[45] for failure to restore a highway to its former condition,[46] or to construct a new highway in the place of one appropriated,[47] or to make such substituted highway suitable and sufficient,[48] or a failure to construct suitable crossings and approaches,[49] or to keep such crossings and approaches in a safe and proper state of repair,[50] or to keep in repair a highway bridge across its track.[51]

3. INDICTMENT.[52] An indictment for obstructing a highway must allege every fact essential to show the commission of the offense charged,[53] and the material facts must be charged with such fulness as to show the complete offense,[54] and if the acts alleged as constituting the offense might under certain circumstances be

"alter and grade" public highways at railroad crossings so that travel thereon will not be impeded merely authorizes a change of grade, and a change in the location or route of the highway without any other statutory authority is indictable as a nuisance. State *v.* Warren R. Co., 29 N. J. L. 353.

Non-compliance with conditions.— Where selectmen, pursuant to statutory authority, require a draw to be made in a railroad for the accommodation of public travel on a highway at a crossing, the construction of the railroad without such a draw and so as to obstruct the public travel is indictable as a nuisance (Com. *v.* Nashua, etc., R. Corp., 2 Gray (Mass.) 54); and where a railroad company occupies a part of a county road with the consent of the county court, given upon the condition that the company shall restore the road to its former state or such as not unnecessarily to have impaired its usefulness, if the company fails to comply with such condition it may be indicted for maintaining a nuisance (State *v.* Ohio River R. Co., 38 W. Va. 242, 18 S. E. 582; State *v.* Monongahela River R. Co., 37 W. Va. 108, 16 S. E. 519).

43. State *v.* Louisville, etc., R. Co., 86 Ind. 114; Danville, etc., R. Co. *v.* Com., 73 Pa. St. 29.

44. Northern Cent. R. Co. *v.* Com., 90 Pa. St. 300; Com. *v.* Erie, etc., R. Co., 27 Pa. St. 339, 67 Am. Dec. 471.

45. Com. *v.* Nashua, etc., R. Corp., 2 Gray (Mass.) 54; Northern Cent. R. Co. *v.* Com., 90 Pa. St. 300.

A turnpike constructed by a corporation is a public highway the obstruction of which by the construction of a railroad is indictable as a public nuisance. Northern Cent. R. Co. *v.* Com., 90 Pa. St. 300.

Effect of jurisdiction of county commissioners.— The construction of a railroad over a highway in such manner as to obstruct public travel is indictable as a nuisance notwithstanding a statute conferring upon county commissioners "the original jurisdiction of all questions touching obstructions to turnpikes, highways or town-ways caused by the construction or operation of railroads." Com. *v.* Nashua, etc., R. Corp., 2 Gray (Mass.) 54.

46. People *v.* New York Cent., etc., R. Co., 74 N. Y. 302 [*reversing* 12 Hun 195]; State *v.* Monongahela River R. Co., 37 W. Va. 108, 16 S. E. 519; Reg. *v.* Scott, 3 Q. B. 543, 2 G. & B. 729, 6 Jur. 1084, 11 L. J. Q. B. 254, 3 R. & Can. Cas. 187, 43 E. C. L. 858.

Failure to restore highway as constituting nuisance see *supra*, VI, D, 3, i.

47. State *v.* Monongahela River R. Co., 37 W. Va. 108, 16 S. E. 519; Reg. *v.* Morris, 1 B. & Ad. 441, 20 E. C. L. 551.

48. Reg. *v.* Scott, 3 Q. B. 543, 2 G. & D. 729, 6 Jur. 1084, 11 L. J. Q. B. 254, 3 R. & Can. Cas. 187, 43 E. C. L. 858.

49. People *v.* New York, etc., R. Co., 74 N. Y. 302 [*reversing* 12 Hun 195].

50. Com. *v.* Louisville, etc., R. Co., 109 Ky. 58, 58 S. W. 478, 702, 22 Ky. L. Rep. 572; Paducah, etc., R. Co. *v.* Com., 80 Ky. 147, 3 Ky. L. Rep. 650; People *v.* New York Cent. R. Co., 74 N. Y. 302 [*reversing* 12 Hun 195].

51. New York, etc., R. Co. *v.* State, 50 N. J. L. 303, 13 Atl. 1 [*affirmed* in 53 N. J. L. 244, 23 Atl. 168].

52. See, generally, INDICTMENTS AND INFORMATIONS, 22 Cyc. 157.

53. State *v.* Chicago, etc., R. Co., 63 Iowa 508, 19 N. W. 299; State *v.* Portland, etc., R. Co., 58 Me. 46.

54. State *v.* Roanoke R., etc., Co., 109 N. C. 860, 13 S. E. 719, holding that, since plank may lawfully be used by a railroad company in constructing a crossing, an indictment charging the company with obstructing a public highway "by placing in and across it certain plank" but not showing in what way the plank was misused or misapplied at the crossing, or that defendant allowed the plank to become out of repair or in such improper condition as to obstruct the highway, is insufficient.

Indictment held sufficient.— An indictment against a railroad company, charging that it "unlawfully suffered and permitted a public nuisance where its road crossed a certain highway, by suffering and permitting the approaches of said road, on either side of the railroad track within said railroad's right of way, to become and remain very steep and narrow, so as to be inconvenient and dangerous of ascent and descent for wagons and other vehicles" is sufficiently certain as to the offense and in particularizing the circumstances. Louisville, etc., R. Co. *v.* Com., 11 Ky. L. Rep. 442.

lawful these circumstances must be negatived by proper averments;[55] but it is not necessary to use the exact language of the statute if words of equivalent import are used,[56] nor on an indictment under a statute for obstructing a public highway is it necessary to allege that the act was "knowingly and wilfully" done where the statute does not use this expression as an element of the offense.[57] Where a railroad company is authorized to construct its road across a highway, an indictment for maintaining a public nuisance in so doing must allege or show that the obstruction was permitted or maintained for an unreasonable length of time;[58] and where a railroad company is authorized to construct a bridge across navigable waters, provided it is not so constructed as "to prevent" the navigation of such waters, an indictment which merely alleges that navigation is "obstructed and impeded" is not sufficient.[59]

4. Trial, Judgment, and Relief.[60] On a prosecution under a statute making it an offense to obstruct a public highway, it is necessary for the state to prove that at the time of the alleged obstruction the way was a public highway, that it was obstructed within the period prescribed by the statute of limitations prior to the finding of the indictment, and that it was so obstructed by defendant;[61] and defendant is entitled to introduce any competent evidence to show that any of these facts are not true.[62] Any material variance between the allegations of the indictment and the proof is fatal to a conviction.[63] On an indictment

55. State *v.* Chicago, etc., R. Co., 63 Iowa 508, 19 N. W. 299, holding that a statute which allows a railroad company to raise or lower any highway to allow its track to cross over or under it, and requires the highway to be put in good repair as soon as may be, authorizes excavations or embankments in the construction of its road, and that an indictment for making an excavation in a highway does not charge an offense in the absence of averments that the acts were not done in the construction of a railroad or that the highway was not repaired, even though it be charged that they were done "wilfully and unlawfully."

Under a statutory provision that railroads may cross highways, but that the condition and manner of crossing are to be first determined in writing by the county commissioners, and providing that a crossing not made according to the provision of the statute shall be regarded as a nuisance, an indictment for maintaining such nuisance is fatally defective as charging a statutory offense, without an allegation that the railroad crosses the highway in a manner not determined in writing by the county commissioners. State *v.* Portland, etc., R. Co., 58 Me. 46.

56. Palatka, etc., R. Co. *v.* State, 23 Fla. 546, 3 So. 158, 11 Am. St. Rep. 395, holding that under a statute making it an indictable offense to "obstruct any public road or established highway," an indictment alleging that the way obstructed was a "common highway" made and laid out for the people of the state to use at their pleasure on foot, on horseback, and in vehicles, is sufficient.

57. State *v.* Chesapeake, etc., R. Co., 24 W. Va. 809, holding that under a statute making it a misdemeanor to "obstruct or injure any road," an allegation that it was done "unlawfully" or "without legal authority," is sufficient, and that an additional allegation that it was done "knowingly and wilfully" may be disregarded as surplusage and will not affect the validity of the indictment.

58. Com. *v.* Morganfield, etc., R. Co., 101 S. W. 304, 30 Ky. L. Rep. 1274.

59. State *v.* Portland, etc., R. Co., 57 Me. 402.

60. On indictment for nuisances generally see Nuisances, 29 Cyc. 1287, 1288.

61. State *v.* Chesapeake, etc., R. Co., 24 W. Va. 809.

Statute of limitations.— Where the offense is a continuing one, such as a failure to restore a highway to its former condition or construct a new highway in lieu of one taken as required by the statutes, the statute of limitation does not apply (Com. *v.* Allegheny Valley R. Co., 14 Pa. Super. Ct. 336; State *v.* Ohio River R. Co., 38 W. Va. 242, 18 S. E. 582); but an indictment charging a railroad company with erecting a nuisance by building its road on a turnpike and failing to furnish a sufficient substitute therefor, and not averring any act of continuous wrong-doing, will not support a conviction where the evidence shows that the company more than a year before the indictment was found constructed a substitute, and that it was thereafter permitted to operate its road without hindrance or protest or any notice that its substituted road was claimed to be insufficient (Louisville, etc., R. Co. *v.* Com., 26 S. W. 536, 16 Ky. L. Rep. 68).

62. State *v.* Chesapeake, etc., R. Co., 24 W. Va. 809, holding that on a trial for obstructing a public road by raising the track of the railroad at the point where it was crossed by such road, defendant is entitled to show that at the time of the alleged obstruction the railroad at that place was in possession and control of another company.

63. State *v.* Roanoke R., etc., Co., 109 N. C. 860, 13 S. E. 719, holding that where

against a railroad company for obstructing a highway, where defendant claims to have constructed a new highway in the place of the one appropriated, the question of the sufficiency of the new highway is for the jury;[64] and where a statute requires a railroad company to construct crossings so as not to impede travel on the highway, and on an indictment for maintaining an illegal crossing it is shown that the width of the highway was somewhat narrowed, but it is not free from doubt as to whether it was such as to impede travel, the question is for the jury.[65] On an indictment against a railroad company for obstructing a highway the question of the validity of the company's charter cannot be raised or determined.[66] On an indictment for obstructing a highway a judgment can be rendered requiring the removal of the obstruction;[67] but on an indictment for breach of a statutory duty to reconstruct a highway in lieu of one taken, the sentence cannot require the company to remove the obstruction from the old road or to construct a new one, but can go no further than to punish for the offense committed.[68] The confirmation by statute of the illegal location of a railroad in a highway is no ground for arresting judgment on an indictment for a nuisance by such obstruction on which the railroad company has been convicted before the passage of the statute.[69]

L. Motive Power and Rolling Stock.[70] Any restrictions in the charter of a railroad company or statute under which the company was incorporated or the road constructed as to the motive power to be used are binding upon the company;[71] and where the charter permits the company to select the motive power but prohibits it from constructing its road through a municipality without the consent of the municipal authorities, such a consent may be granted upon condition that the municipality shall retain the right to regulate the motive power to be used,[72] and in such case another railroad company authorized by statute to operate trains over the tracks of the road so located is subject to the same control of the municipality.[73] So also it seems that a right conferred upon a municipality to regulate the "manner of using" a railroad is broad enough to cover the kind of motive power to be used.[74] A railroad company expressly

an indictment charges a railroad company with obstructing a public highway "by placing in and across it certain plank," and the evidence shows that the defecet consisted of a hole in the crossing, the variance is fatal.

64. State *v.* Monongahela River R. Co., 37 W. Va. 108, 16 S. E. 519.

65. Com. *v.* Philadelphia, etc., R. Co., 23 Pa. Super. Ct. 235.

66. Com. *v.* Philadelphia, etc., R. Co., 23 Pa. Super. Ct. 235.

67. Palatka, etc., R. Co. *v.* State, 23 Fla. 546, 3 So. 158, 11 Am. St. Rep. 395, holding, however, that where the illegality of the obstruction is due merely to the manner in which the railroad was constructed across or upon the highway, the judgment should permit the railroad company to abate the nuisance in some proper way, as by additional grading or the making of such changes as would prevent the railroad from constituting an obstruction to travel and not require the absolute removal of the elements of the roadbed from the highway.

On a rule to show cause why the sheriff should not abate the nuisance where the railroad company has been indicted for obstructing a public road by an embankment and has pleaded guilty and been sentenced to abate the nuisance, the company is bound to show affirmatively that the nuisance was in fact abated, and this is true, although no replication was filed to the answer to the rule. Com. *v.* Philadelphia, etc., R. Co., 33 Pa. Super. Ct. 452.

68. Pittsburgh, etc., R. Co. *v.* Com., 101 Pa. St. 192; Com. *v.* Allegheny Valley R. Co., 14 Pa. Super. Ct. 336.

69. Com. *v.* Old Colony, etc., R. Co., 14 Gray (Mass.) 93.

70. Statutory, municipal, and official regulations see *infra*, X, B, 3.

On street railroads see STREET RAILROADS.

71. State *v.* Tupper, Dudley (S. C.) 135, holding that where a railroad company authorized by its charter to select the character of motive power is by a subsequent statute authorized to extend its road beyond its original terminus in a city, on the express condition that steam locomotives shall not be used on such extension, the latter statute is binding upon the railroad company as to the portion of road constructed thereunder.

72. New York, etc., R. Co. *v.* New York, 18 Fed. Cas. No. 10,199, 4 Blatchf. 193, holding that in such case a municipality may prohibit the use of steam as a motive power within its limits.

73. New York, etc., R. Co. *v.* New York, 18 Fed. Cas. No. 10,199, 4 Blatchf. 193.

74. New York, etc., R. Co. *v.* New York, 18 Fed. Cas. No. 10,199, 4 Blatchf. 193.

authorized to select its motive power may adopt whatever it chooses,[75] and may lawfully operate its trains by steam;[76] and it has the same right with regard to the motive power to be used by another company which it may lawfully permit to use its tracks in the absence of any statutory restriction relating to the latter company.[77] Where a railroad company is authorized to use either one or the other of two specified motive powers, its adoption of one is not final and it may subsequently change to the other;[78] and where it is permitted by a municipality to construct its tracks therein on condition of using a certain motive power, the municipality may subsequently authorize it to change to another which it is authorized by its charter to use.[79] In the absence of any statutory or charter provision relating thereto, the railroad company may select the kind of motive power which it will use,[80] and may operate its trains by electricity,[81] the right to use electricity not being affected by the fact that, at the date of the statute under which the company was incorporated, electricity as a motive power was not known,[82] or by the fact that the courts had been accustomed to designate railroads incorporated thereunder as steam railroads.[83] Where the right to select the kind of motive power is subsequently restricted by statute so as to exclude steam, the legislature may by a subsequent act remove the restriction.[84] The right to use steam as a motive power and to carry freight and passengers carries with it the right to construct and use the appliances ordinarily employed for such purposes, such as locomotive engines, heavy freight and passenger cars, and heavy T-rails, commonly used on steam railroads;[85] and the fact that at the date of the statute under which the railroad company was incorporated certain motive powers were unknown and particular kinds of rails and rolling stock were not in use, does not, in the absence of express restriction, affect the right of the railroad company to adopt improved methods and appliances which will facilitate the conduct of its business and are consistent with the public safety.[86]

VII. SALES, LEASES, TRAFFIC CONTRACTS, AND CONSOLIDATION.*

A. Right to Alienate or Transfer Franchises or Property. The power of a railroad company to alienate or transfer its property and franchises is governed by the general principle that a corporation may exercise only such powers as are expressly conferred or necessarily implied as fairly incidental thereto;[87] and further, that a charter to operate a railroad is granted primarily in the interest of the public, and its acceptance imposes upon the company certain

75. People *v.* Brooklyn, etc., R. Co., 89 N. Y. 75.

76. People *v.* Brooklyn, etc., R. Co., 89 N. Y. 75; State *v.* Tupper, Dudley (S. C.) 135.

77. People *v.* Brooklyn, etc., R. Co., 89 N. Y. 75.

78. McCartney *v.* Chicago, etc., R. Co., 112 Ill. 611.

79. McCartney *v.* Chicago, etc., R. Co., 112 Ill. 611.

80. Howley *v.* Central Valley R. Co., 213 Pa. St. 36, 62 Atl. 109, 2 L. R. A. N. S. 138.

81. Howley *v.* Central Valley R. Co., 213 Pa. St. 36, 62 Atl. 109, 2 L. R. A. N. S. 138; Sparks *v.* Philadelphia, etc., R. Co., 212 Pa. St. 105, 61 Atl. 881.

82. Howley *v.* Central Valley R. Co., 213 Pa. St. 36, 62 Atl. 109, 2 L. R. A. N. S. 138; Sparks *v.* Philadelphia, etc., R. Co., 212 Pa. St. 105, 61 Atl. 881.

83. Howley *v.* Central Valley R. Co., 213 Pa. St. 36, 62 Atl. 109, 2 L. R. A. N. S. 138, holding that such designation was not intended as a limitation upon the character of motive power, but merely as a means of distinguishing ordinary railroads from street railroads.

84. People *v.* Brooklyn, etc., R. Co., 89 N. Y. 75, where the constitutionality of the statute was considered only with reference to the rights of the state as representative of the general public and the railroad company, the question of its constitutionality as impairing the rights of individuals or adjacent landowners not being involved or decided.

85. Millvale Borough *v.* Evergreen R. Co., 131 Pa. St. 1, 18 Atl. 993, 7 L. R. A. 369.

86. Howley *v.* Central Valley R. Co., 213 Pa. St. 36, 62 Atl. 109, 2 L. R. A. N. S. 138.

87. State *v.* Consolidation Coal Co., 46 Md. 1; Stockton *v.* New Jersey Cent. R. Co., 50 N. J. Eq. 52, 24 Atl. 964, 17 L. R. A. 97; Central Transp. Co. *v.* Pullman's Palace Car Co., 139 U. S. 24, 11 S. Ct. 478, 35 L. ed. 55. See also CORPORATIONS, 10 Cyc. 1096.

* By James A. Gwyn.

obligations to the public from which it cannot voluntarily absolve itself,[88] so that a railroad company cannot, without legislative authority, alienate its franchises or property necessary for the exercise of the same, or by contract, conveyance, lease, or otherwise, absolve or incapacitate itself from the proper performance of its public duties, or delegate them to another;[89] nor can a railroad company which has been granted a franchise to construct a public road farm out a part of its franchise so as to enable a private individual to construct a part of such road on its right of way and operate the same for his own benefit as a private road.[90]

B. Sales — 1. Right to Sell or Purchase — a. In General.[91] A railroad company cannot, without legislative authority, sell its franchise to be a corporation,[92] or its road and franchises for maintaining and operating the same,[93] or any real estate acquired and held solely for the purpose of exercising such franchises.[94] The same rule applies to the right to purchase the road, property, and franchises of another company.[95] To constitute a valid sale there must be both a power to sell in the vendor and a power to purchase in the vendee,[96] and a charter provision authorizing a particular company to purchase any other railroad confers no authority upon any other railroad company to sell it;[97] but a provision authorizing it to purchase the property and franchises of a particular company impliedly authorizes the latter to sell.[98] Authority to sell a railroad or to purchase the

88. Peoria, etc., R. Co. *v.* Coal Valley Min. Co., 68 Ill. 489; Central Transp. Co. *v.* Pullman's Palace Car Co., 139 U. S. 24, 11 S. Ct. 478, 35 L. ed. 55; Thomas *v.* West Jersey R. Co., 101 U. S. 71, 25 L. ed. 950; York, etc., R. Co. *v.* Winans, 17 How. (U. S.) 30, 15 L. ed. 27.

89. *Illinois.*— Peoria, etc., R. Co. *v.* Coal Valley Min. Co., 68 Ill. 489.

Maryland.— State *v.* Consolidation Coal Co., 46 Md. 1.

New Jersey.— Stockton *v.* New Jersey Cent. R. Co., 50 N. J. Eq. 52, 24 Atl. 964, 17 L. R. A. 97.

Pennsylvania.— Rafferty *v.* Central Traction Co., 22 Pittsb. Leg. J. N. S. 15.

Texas.— Gulf, etc., R. Co. *v.* Morris, 67 Tex. 692, 4 S. W. 156.

United States.— Central Transp. Co. *v.* Pullman's Palace Car Co., 139 U. S. 24, 11 S. Ct. 478, 35 L. ed. 55; Thomas *v.* West Jersey R. Co., 101 U. S. 71, 25 L. ed. 950; York, etc., R. Co. *v.* Winans, 17 How. 30, 15 L. ed. 27.

See 41 Cent. Dig. tit. "Railroads," § 375.

But the legislature may authorize an alienation of the franchise of a railroad company either in whole or in part. East Boston, etc., R. Co. *v.* Eastern R. Co., 13 Allen (Mass.) 422.

90. Stewart's Appeal, 56 Pa. St. 413.

91. **Vendibility of corporate franchises** in general see Corporations, 10 Cyc. 1090 *et seq.*

92. New Orleans, etc., R. Co. *v.* Delamore, 34 La. Ann. 1225; Welch *v.* Old Dominion Min., etc., Co., 10 N. Y. Suppl. 174; Coe *v.* Columbus, etc., R. Co., 10 Ohio St. 372, 75 Am. Dec. 518; Ragan *v.* Aiken, 9 Lea (Tenn.) 609, 42 Am. Rep. 684.

93. *Maryland.*—State *v.* Consolidation Coal Co., 46 Md. 1.

Nebraska.— Clarke *v.* Omaha, etc., R. Co., 4 Nebr. 458, 5 Nebr. 314.

New Jersey.— Elkins *v.* Camden, etc., R. Co., 36 N. J. Eq. 5.

Ohio.— Coe *v.* Columbus, etc., R. Co., 10 Ohio St. 372, 75 Am. Dec. 518.

Texas.— East Line, etc., R. Co. *v.* State, 75 Tex. 434, 12 S. W. 690; Gulf, etc., R. Co. *v.* Morris, 67 Tex. 692, 4 S. W. 156.

United States.— Louisville, etc., R. Co. *v.* Com., 161 U. S. 677, 16 S. Ct. 714, 40 L. ed. 849; Branch *v.* Jesup, 106 U. S. 468, 1 S. Ct. 495, 27 L. ed. 279; Mackintosh *v.* Flint, etc., R. Co., 34 Fed. 582; Blair *v.* St. Louis, etc., R. Co., 22 Fed. 36.

See 41 Cent. Dig. tit. "Railroads," § 394.

Purchase of unauthorized private road.— Where a person having constructed without lawful authority a private railroad to coal mines owned by him, the operation of which was enjoined as a nuisance, then organized a corporation of which he owned all the stock, known as a railroad coal and oil company, with power to construct or purchase any railroad, and such company purchased the mines and private road which constituted its only assets, it was held that the purchase of such road was not such as was contemplated by the act of incorporation and that it was still a private road the operation of which would be enjoined. McCandless' Appeal, 70 Pa. St. 210.

94. Coe *v.* Columbus, etc., R. Co., 10 Ohio St. 372, 75 Am. Dec. 518.

95. Elkins *v.* Camden, etc., R. Co., 36 N. J. Eq. 5; East Line, etc., R. Co. *v.* State, 75 Tex. 434, 12 S. W. 690; Gulf, etc., R. Co. *v.* Morris, 67 Tex. 692, 4 S. W. 156; Louisville, etc., R. Co. *v.* Com., 161 U. S. 677, 16 S. Ct. 714, 40 L. ed. 849.

96. East Line, etc., R. Co. *v.* Rushing, 69 Tex. 306, 6 S. W. 834.

97. State *v.* Consolidation Coal Co., 46 Md. 1.

98. New York, etc., R. Co. *v.* New York, etc., R. Co., 52 Conn. 274.

road of another company is in some cases conferred in express terms;[99] but authority to sell or purchase cannot be implied from authority to lease,[1] or mortgage,[2] or to consolidate,[3] or connect or unite with other roads;[4] nor can a prohibition against a sale to a parallel or competing line be construed as authority to sell to a company whose road is not parallel or competing.[5] Even in the case of express authority to sell or purchase the right cannot be extended beyond the provisions of the statute,[6] as where the statute refers only to connecting lines,[7] or companies of the same state.[8] So a statute authorizing a company which is unable to complete its road to sell to another company does not authorize the sale of a completed road;[9] and a statute authorizing a railroad company to purchase any railroad "constructed" by any other company, if the roads of such companies are connected or continuous, does not authorize one company to purchase the property and franchises of another prior to the construction of its road.[10] It has also been held that a grant of power to a railroad company to locate and construct branch roads does not confer any authority to purchase and operate a road already constructed under a different charter,[11] but that a company authorized to construct a line of railroad upon a particular route and to purchase property of all kinds may purchase as a part of its line a road already constructed upon a part of the route authorized.[12] The legislature may, subject to any constitutional limitations and restrictions, authorize one railroad company to purchase from another even its franchise to be a corporation,[13] and the sale of a railroad, although made

99. Bentonville, etc., R. Co. *v.* Arkansas, etc., R. Co., (Ark. 1907) 105 S. W. 84.

Statutes authorizing sale or purchase.—The Maine statute of 1857 authorized the sale of the Buckfield Branch railroad to the Cumberland and Oxford Central Railroad Company, with all the rights of the former road, including that of connecting with the Atlantic and St. Lawrence railroad. Portland, etc., R. Co. *v.* Grand Trunk R. Co., 46 Me. 69. The Illinois statute of 1899 authorizes a foreign railroad company to purchase the road of a domestic company, if such road is not a parallel or competing line. Illinois State Trust Co. *v.* St. Louis, etc., R. Co., 217 Ill. 504, 75 N. E. 562. The Tennessee statute of 1871 authorizes any railroad company of that state to acquire by purchase or other lawful contract the road and franchises of any other railroad company. Wehrhane *v.* Nashville, etc., R. Co., 4 N. Y. St. 541. In Michigan and Ohio the statutes authorize a railroad company which is unable to complete the construction of its road to sell all or a part thereof to another company which is not a competing line. Dewey *v.* Toledo, etc., R. Co., 91 Mich. 351, 51 N. W. 1063; Young *v.* Toledo, etc., R. Co., 76 Mich. 485, 43 N. W. 632; Toledo, etc., R. Co. *v.* Hinsdale, 45 Ohio St. 556, 15 N. E. 665. A statute authorizing a company to sell and convey its property, real and personal, and to incorporate its capital stock with that of any other company, will authorize a sale of its road. Branch *v.* Jesup, 106 U. S. 468, 1 S. Ct. 495, 27 L. ed. 279.

1. Elkins *v.* Camden, etc., R. Co., 36 N. J. Eq. 5.

2. Gulf, etc., R. Co. *v.* Morris, 67 Tex. 692, 4 S. W. 156.

3. Tippecanoe County *v.* Lafayette, etc., R. Co., 50 Ind. 85; Elkins *v.* Camden, etc., R. Co., 36 N. J. Eq. 5; East Line, etc., R. Co. *v.* State, 75 Tex. 434, 12 S. W. 690; Mackintosh *v.* Flint, etc., R. Co., 34 Fed. 582. *Compare* Branch *v.* Jesup, 106 U. S. 468, 1 S. Ct. 495, 27 L. ed. 279.

4. Tippecanoe County *v.* Lafayette, etc., R. Co., 50 Ind. 85; Louisville, etc., R. Co. *v.* Com., 161 U. S. 677, 16 S. Ct. 714, 40 L. ed. 849.

5. East Line, etc., R. Co. *v.* State, 75 Tex. 434, 12 S. W. 690.

6. Clarke *v.* Omaha, etc., R. Co., 4 Nebr. 458, 5 Nebr. 314; East Line, etc., R. Co. *v.* State, 75 Tex. 434, 12 S. W. 690.

Authority to a consolidated company to sell real or personal property previously belonging to a constituent company will be construed as applying only to such property as is not needed for operating the road, surplus lands and probably personal effects not in use or required for use on the road. Spence *v.* Mobile, etc., R. Co., 79 Ala. 576.

7. East Line, etc., R. Co. *v.* State, 75 Tex. 434, 12 S. W. 690; East Line, etc., R. Co. *v.* Rushing, 69 Tex. 306, 6 S. W. 834.

8. Upson County R. Co. *v.* Sharman, 37 Ga. 644.

9. Mackintosh *v.* Flint, etc., R. Co., 34 Fed. 582.

10. Clarke *v.* Omaha, etc., R. Co., 4 Nebr. 458, 5 Nebr. 314.

11. Elkins *v.* Camden, etc., R. Co., 36 N. J. Eq. 5; Campbell *v.* Marietta, etc., R. Co., 23 Ohio St. 168; Gulf, etc., R. Co. *v.* Morris, 67 Tex. 692, 4 S. W. 156. But see Thompson *v.* New York, etc., R. Co., 3 Sandf. Ch. (N. Y.) 625; Branch *v.* Jesup, 106 U. S. 468, 1 S. Ct. 495, 27 L. ed. 279; New York Cent. Trust Co. *v.* Washington County R. Co., 124 Fed. 813.

12. Branch *v.* Jesup, 106 U. S. 468, 1 S. Ct. 495, 27 L. ed. 279; Branch *v.* Atlantic, etc., R. Co., 4 Fed. Cas. No. 1,807, 3 Woods 481.

13. State *v.* Sherman, 22 Ohio St. 411, hold-

without legislative authority, may be ratified and rendered valid by a subsequent legislative enactment.[14] A railroad company, although authorized to sell its road, has no power to sell its conditional stock subscriptions, where the condition has not been performed so as to entitle the purchaser to perform it and enforce the subscription;[15] and there can be no sale of the right of way of a railroad apart from the franchise to operate the road to one having no right to exercise such franchise.[16]

b. Parallel or Competing Lines. In some jurisdictions there are constitutional or statutory provisions expressly prohibiting one railroad company from purchasing or acquiring control of a parallel or competing line,[17] the object being to promote competition and prevent monopolies,[18] and such a prohibition cannot be evaded by letting the transfer take the form of a judicial sale,[19] or purchase of a controlling interest in the stock of such company,[20] or interposing a nominal trustee as purchaser;[21] and stock-holders have no such right to sell their stock

ing, however, that under the Ohio constitution the legislature cannot grant to one railroad company the power to purchase from another its franchise to be a corporation, unless the grant is made in such form as to impose a personal liability upon stockholders of the purchasing company for the debts of the corporation.

14. Hatcher *v.* Toledo, etc., R. Co., 62 Ill. 477; Boston, etc., R. Co. *v.* New York, etc., R. Co., 13 R. I. 260.

15. Toledo, etc., R. Co. *v.* Hinsdale, 45 Ohio St. 556, 15 N. E. 665.

16. East Alabama, etc., R. Co. *v.* Doe, 114 U. S. 340, 5 S. Ct. 869, 28 L. ed. 136. See also Upson County R. Co. *v.* Sharman, 37 Ga. 644.

17. *Illinois.*— Illinois State Trust Co. *v.* St. Louis, etc., R. Co., 208 Ill. 419, 70 N. E. 357.

Kentucky.— Louisville, etc., R. Co. *v.* Com., 97 Ky. 675, 31 S. W. 476, 17 Ky. L. Rep. 427.

Mississippi.— Yazoo, etc., R. Co. *v.* Southern R. Co., 83 Miss. 746, 36 So. 74.

Pennsylvania.— Pennsylvania R. Co. *v.* Com., 3 Pa. Cas. 100, 7 Atl. 368 [*affirming* 1 Pa. Co. Ct. 214].

Texas.— East Line, etc., R. Co. *v.* State, 75 Tex. 434, 12 S. W. 690; East Line, etc., R. Co. *v.* Rushing, 69 Tex. 306, 6 S. W. 834.

United States.— Louisville, etc., R. Co. *v.* Com., 161 U. S. 677, 16 S. Ct. 714, 40 L. ed. 849; Pearsall *v.* Great Northern R. Co., 161 U. S. 646, 16 S. Ct. 705, 40 L. ed. 838; Kimball *v.* Atchison, etc., R. Co., 46 Fed. 888.

See 41 Cent. Dig. tit. "Railroads," § 382.

The state may prohibit the sale of a railroad to a company owning a parallel or competing line (East Line, etc., R. Co. *v.* Rushing, 69 Tex. 306, 6 S. W. 834); or restrict a general power to sell previously given so as to exclude sales to such companies where the right has not been acted upon (Louisville, etc., R. Co. *v.* Com., 161 U. S. 677, 16 S. Ct. 714, 40 L. ed. 849; Pearsall *v.* Great Northern R. Co., 161 U. S. 646, 16 S. Ct. 705, 40 L. ed. 838).

The Georgia constitution provides that the legislature shall not authorize any corporation to purchase stock in or make any contract with another corporation, the effect of which may be or is intended to be to defeat or lessen competition or encourage monopolies, and that all such contracts and agreements shall be illegal and void. Clarke *v.* Georgia Cent. R., etc., Co., 50 Fed. 338, 15 L. R. A. 683; Hamilton *v.* Savannah, etc., R. Co., 49 Fed. 412; Langdon *v.* Branch, 37 Fed. 449, 2 L. R. A. 120.

Under the Mississippi constitution the general statute prohibiting any railroad company from purchasing a competing road cannot be suspended by a private act for the benefit of a particular railroad company. Yazoo, etc., R. Co. *v.* Southern R. Co., 83 Miss. 746, 36 So. 74.

The building of an additional road by one company for the purpose of facilitating and enlarging its business, which is parallel with another road leased by it for nine hundred and ninety-nine years, and which will not compete with any road of any other company, is not within a constitutional prohibition against the acquisition of a parallel or competing road. Catawissa R. Co. *v.* Philadelphia, etc., R. Co., 3 Pa. Dist. 111, 14 Pa. Co. Ct. 280, 34 Wkly. Notes Cas. 11.

Condemning an additional strip of land for the purpose of laying an additional track, to be operated in conjunction with the existing track as a double track railroad, does not violate a constitutional provision forbidding a railroad company from acquiring a parallel or competing line. Chicago, etc., R. Co. *v.* Chicago, etc., R. Co., 211 Ill. 352, 71 N. E. 1017.

18. Louisville, etc., R. Co. *v.* Com., 97 Ky. 675, 31 S. W. 476, 17 Ky. L. Rep. 427; Pennsylvania R. Co. *v.* Com., 3 Pa. Cas. 100, 7 Atl. 368 [*affirming* 1 Pa. Co. Ct. 214].

19. Louisville, etc., R. Co. *v.* Com., 161 U. S. 677, 16 S. Ct. 714, 40 L. ed. 849.

20. Pennsylvania R. Co. *v.* Com., 3 Pa. Cas. 100, 7 Atl. 368 [*affirming* 1 Pa. Co. Ct. 214]; Pearsall *v.* Great Northern R. Co., 161 U. S. 646, 16 S. Ct. 705, 40 L. ed. 838.

21. Pennsylvania R. Co. *v.* Com., 3 Pa. Cas. 100, 7 Atl. 368 [*affirming* 1 Pa. Co. Ct. 214]; Com. *v.* Beech Creek, etc., R. Co., 1 Pa. Co. Ct. 223 [*affirmed* in 3 Pa. Cas. 83, 7 Atl. 374].

as will prevent the granting of an injunction to prevent one railroad company from obtaining control of a competing line.[22] Independently of express prohibition such purchases are contrary to public policy.[23] To be within the prohibition referred to the roads need not be parallel in a strictly mathematical sense,[24] and may be competing, although not parallel,[25] or may be competing by reason of their relations with, control, or management of other lines than their own,[26] and in determining whether they are parallel or competing, the lines which the companies are authorized by their charters to construct as well as those which have been actually constructed must be considered.[27] The provisions should, however, be reasonably construed according to the purposes of their enactment and their application limited accordingly.[28]

c. Subscription to or Purchase of Stock.[29] While a railroad company may take stock of another railroad company by way of security for a debt,[30] it has no right to invest its corporate funds in the purchase of such stock,[31] or become an incorporator or subscriber to the stock of another railroad company,[32] particularly where the object is to secure an interest in the management of such road,[33] except where it is authorized to do so by its charter or statute;[34] and independently of the right to hold stock in another corporation the rule against the sale or purchase of a railroad without legislative authority prevents one railroad company from acquiring the virtual ownership or control of another by the acquisition of a controlling interest in its stock.[35] If, however, a statute authorizes a railroad company to acquire by purchase or other lawful contract the road and franchises of any other company, it may purchase a majority of the stock of another company for the purpose of gaining the control and practical ownership thereof,[36] and where a statute authorizes one railroad company which is unable to complete the construction of its road to sell the same to another company, such other company may purchase a controlling interest in its stock.[37] The legislature may, under a power reserved to alter or amend a charter, authorize

22. Pennsylvania R. Co. *v.* Com., 3 Pa. Cas. 100, 7 Atl. 368 [*affirming* 1 Pa. Co. Ct. 214].

23. Central R. Co. *v.* Collins, 40 Ga. 582; Elkins *v.* Camden, etc., R. Co., 36 N. J. Eq. 5; Louisville, etc., R. Co. *v.* Com., 161 U. S. 677, 16 S. Ct. 714, 40 L. ed. 849.

24. Louisville, etc., R. Co. *v.* Com., 97 Ky. 675, 31 S. W. 476, 17 Ky. L. Rep. 427.

25. East Line, etc., R. Co. *v.* Rushing, 69 Tex. 306, 6 S. W. 834.

26. Pennsylvana R. Co. *v.* Com., 3 Pa. St. 100, 7 Atl. 368 [*affirming* 1 Pa. Co. Ct. 214]; Com. *v.* Beech Creek, etc., R. Co., 1 Pa. Co. Ct. 223 [*affirmed* in 3 Pa. Cas. 83, 7 Atl. 374]; East Line, etc., R. Co. *v.* State, 75 Tex. 434, 12 S. W. 690.

27. Illinois State Trust Co. *v.* St. Louis, etc., R. Co., 217 Ill. 504, 75 N. E. 562; Pennsylvania R. Co. *v.* Com., 3 Pa. St. 100, 7 Atl. 368 [*affirming* 1 Pa. Co. Ct. 214].

28. Illinois State Trust Co. *v.* St. Louis, etc., R. Co., 217 Ill. 504, 75 N. E. 562; Kimball *v.* Atchison, etc., R. Co., 46 Fed. 888.

29. Power to hold stock in another corporation see, generally, CORPORATIONS, 10 Cyc. 1107.

30. See Milbank *v.* New York, etc., R. Co., 64 How. Pr. (N. Y.) 20.

31. Hazelhurst *v.* Savannah, etc., R. Co., 43 Ga. 13; Central R. Co. *v.* Collins, 40 Ga. 582; Milbank *v.* New York, etc., R. Co., 64 How. Pr. (N. Y.) 20. But see Smith *v.* Newark, etc., R. Co., 8 Ohio Cir. Ct. 583, 4 Ohio Cir. Dec. 356, holding that a railroad company may, although not expressly authorized by its charter to do so, invest in dividend-paying stock in another company and will be liable for assessments thereon.

32. New Jersey Cent. R. Co. *v.* Pennsylvania R. Co., 31 N. J. Eq. 475 [*reversed* on other grounds in 32 N. J. Eq. 755]; Valley R. Co. *v.* Lake Erie Iron Co., 46 Ohio St. 44, 18 N. E. 486, 1 L. R. A. 412.

33. Central R. Co. *v.* Collins, 40 Ga. 582.

34. Oelbermann *v.* New York, etc., R. Co., 77 Hun (N. Y.) 332, 29 N. Y. Suppl. 545, holding that the New York statute of 1892 providing that any stock corporation, except moneyed corporations (banking and insurance companies), may purchase stock of other corporations, applies to railroad companies, and is not restricted by the statute of 1890, authorizing a railroad company to purchase the stock of another railroad company of which it is a lessee.

35. Central R. Co. *v.* Collins, 40 Ga. 582; Elkins *v.* Camden, 36 N. J. Eq. 5.

In passing upon such transactions the courts will have regard to their objects and purposes rather than the means by which they are effected. Elkins *v.* Collins, 36 N. J. Eq. 5.

36. Wehrhane *v.* Nashville, etc., R. Co., 42 Hun (N. Y.) 660, 4 N. Y. St. 541.

37. Dewey *v.* Toledo, etc., R. Co., 91 Mich. 351, 51 N. W. 1063.

one railroad company to subscribe to or purchase stock of another company,[38] but the right to do so will not be implied but must be clearly conferred;[39] and a statute authorizing a railroad company, for the purpose of forming a connection, to aid another company in the construction of its road by means of a subscription to its capital stock does not authorize a purchase of the stock of such company from its stock-holders.[40] A statute authorizing a railroad company to purchase stock in any railroad company whose line connects with its own applies to the purchase of stock of a foreign as well as a domestic company.[41]

d. Consent and Rights of Stock-Holders. Stock-holders of one of the contracting railroads may sue to enjoin an *ultra vires* sale or purchase of the road or a controlling interest in the stock of the company;[42] and even where the sale or purchase is authorized by statute, it cannot be made without the consent of the stock-holders,[43] who may sue to enjoin its execution,[44] although it is held that where the sale or purchase is authorized and there is no provision to the contrary, the consent of a majority of the stock is sufficient.[45] Where the sale is authorized, stock-holders who with knowledge of the fact and terms of the sale make no objection but acquiesce and delay until after rights of third parties have intervened, will be estopped to question its validity or have it declared invalid.[46]

2. Requisites and Validity of Conveyance. The validity of a conveyance of a railroad as affected by its formal requisites and mode of execution is governed by the general principles relating to deeds and the formal execution of corporate contracts,[47] and where the sale is authorized a conveyance executed by the proper

38. White *v.* Syracuse, etc., R. Co., 14 Barb. (N. Y.) 559.

39. Hazelhurst *v.* Savannah, etc., R. Co., 43 Ga. 13.

40. Columbus, etc., R. Co. *v.* Burke, 10 Ohio Dec. (Reprint) 136, 19 Cinc. L. Bul. 27, holding further that such a statute does not authorize a railroad company to purchase the stock of a coal company which has by its charter the right to construct a railroad, which right it has never exercised.

41. Venner *v.* Atchison, etc., R. Co., 28 Fed. 581.

42. Central R. Co. *v.* Collins, 40 Ga. 582; Upson County R. Co. *v.* Sharman, 37 Ga. 644; Elkins *v.* Camden, etc., R. Co., 36 N. J. Eq. 5; Pearsall *v.* Great Northern R. Co., 161 U. S. 646, 16 S. Ct. 705, 40 L. ed. 838.

A single stock-holder may sue to enjoin the ultra vires purchase of a controlling interest in a competing line, notwithstanding he purchased his stock after the negotiations were begun and for the express purpose of defeating the transaction. Elkins *v.* Camden, etc., R. Co., 36 N. J. Eq. 5.

43. Boston, etc., R. Corp. *v.* New York, etc., R. Co., 13 R. I. 260; Mackintosh *v.* Flint, etc., R. Co., 34 Fed. 582.

A contract between two railroad companies for the management of the business of both by one of them upon an agreed division of receipts and expenses does not warrant the managing company in purchasing at the common expense a controlling interest in a rival line, without the consent of the stock-holders of the other company. Nashua, etc., R. Co. *v.* Boston, etc., R. Co., 136 U. S. 356, 10 S. Ct. 1004, 34 L. ed. 363 [*reversing* 8 Fed. 458].

44. Mackintosh *v.* Flint, etc., R. Co., 34 Fed. 582.

45. Waldoborough *v.* Knox, etc., R. Co., 84 Me. 469, 24 Atl. 942; Venner *v.* Atchison, etc., R. Co., 28 Fed. 581.

Where the charter authorized a sale of the road if approved by a majority of the stock-holders and was subsequently amended by a provision that no contract made by the directors should be valid unless ratified "by the stock-holders," it was held that the latter provision was not a repeal of the former and that unanimous consent was not necessary, but that a sale might be made as formerly by the approval of a majority. Louisville, etc., R. Co. *v.* Jarvis, 87 S. W. 759, 27 Ky. L. Rep. 986.

Under the Michigan statute a sale of a railroad may be made by consent of two thirds of the stock-holders, and such a sale by a company organized after the enactment of the statute is valid and concludes a dissenting stock-holder. Farmers' Loan, etc., Co. *v.* Toledo, etc., R. Co., 54 Fed. 759, 4 C. C. A. 561.

46. Emerson *v.* New York, etc., R. Co., 14 R. I. 555; Boston, etc., R. Corp. *v.* New York, etc., R. Co., 13 R. I. 260.

And although a stock-holder was not notified or present or represented at the meeting at which the directors were authorized to sell, while he will not be bound by the terms of the purchase, yet if he bought his stock the day before the meeting from one who had agreed to sell it to the selling company to enable it to make the sale of the road, and had himself been in the confidential employment of both companies, he cannot attack the sale in equity and will be required to transfer his stock to the purchasing company on payment of its value, or at his election to abide by the sale. Young *v.* Toledo, etc., R. Co., 76 Mich. 485, 43 N. W. 632.

47. See Corporations, 10 Cyc. 1000 *et seq.*; Deeds, 13 Cyc. 526 *et seq.*

officers and under the corporate seal of the corporation is *prima facie* valid.[48] Non-compliance with the requirements of the statute authorizing the sale that all the debts of the vendor shall first be paid will not invalidate the sale, where the amount of such debts is inconsiderable and the purchasing company agrees to pay the same.[49] Where the sale is authorized the vendor company will be estopped to deny its validity, although there were irregularities in the proceeding, if the purchasing company has been permitted without objection to take possession of the road and make improvements thereon,[50] and an estoppel to question the validity of the sale may also exist against non-consenting stock-holders[51] or creditors of the company.[52]

3. PROPERTY AND RIGHTS INCLUDED. The property and rights included under a sale of a railroad or railroad property depends upon the intention of the parties as shown by the terms and proper construction of the conveyance,[53] construed in connection with and subject to the provisions of the statute authorizing the same.[54] Generally speaking, the purchaser takes only what is described in the deed of conveyance,[55] and in the conveyance of a railroad and its "appurtenances" a separate road or interest therein cannot pass as an appurtenance to the road conveyed,[56] nor will land pass as appurtenant to other land, or property of the same class or kind as appurtenant to that conveyed.[57] The sale of a railroad does not pass the franchise of being a corporation or work a dissolution of the company.[58] In a conveyance of railroad property it is not always practicable to require a specific description by metes and bounds of all grounds used for depots, side-tracks, and the like,[59] and the description will be held sufficient to

Proceedings held valid.— Where the statute authorizes a sale by consent of two thirds of the stock-holders and this number accepts a proposition for the sale of the road, and passes a resolution authorizing the directors to consummate the same, a sale made by the president and secretary pursuant to a resolution of the directors is valid. Young *v.* Toledo, etc., R. Co., 76 Mich. 485, 43 N. W. 632.

Recording.— Where a statute authorizing one railroad company to purchase the franchises and property of another provides that title shall vest on the filing of a certificate in the office of the secretary of state, a recording in the records of the towns is not necessary. New York, etc., R. Co. *v.* New York, etc., R. Co., 52 Conn. 274.

48. Atlantic, etc., R. Co. *v.* St. Louis, etc., R. Co., 66 Mo. 228, holding further that in such case the burden is upon any person claiming the sale to be invalid upon the ground that it was not assented to by the stock-holders to establish this fact.

49. Mahaska County R. Co. *v.* Des Moines Valley R. Co., 28 Iowa 437.

50. Mahaska County R. Co. *v.* Des Moines Valley R. Co., 28 Iowa 437. See also Hervey *v.* Illinois Midland R. Co., 28 Fed. 169.

Where a railroad company abandons the construction of its road before completion and sells it to another company, which constructs a part of the road and operates the same for a number of years without objection, the vendor will be estopped to deny the right of the purchasing company to complete the construction of the road. Little Rock, etc., R. Co. *v.* Little Rock, etc., R. Co., 36 Ark. 663.

51. See *supra*, VII, B, 1, d.

52. Fogg *v.* Blair, 133 U. S. 534, 10 S. Ct. 338, 33 L. ed. 721, holding that where one railroad company has sold its road and franchises to another, which has assumed the debts and liabilities of the vendor company, a creditor of the latter, who has proceeded against the purchasing company and obtained a judgment against it, based upon the assumed validity of such transfer, cannot afterward object that it was *ultra vires*.

53. Philadelphia *v.* Philadelphia, etc., R. Co., 58 Pa. St. 253 [*disapproving* 47 Pa. St. 325]; Farmers' Loan, etc., Co. *v.* Oregon, etc., R. Co., 58 Fed. 639; Philadelphia Inv. Co. *v.* Ohio, etc., R. Co., 41 Fed. 278.

Particular instruments construed.— On a conveyance by a railroad company of its road and all its property except that "not necessary for or used or acquired for the purpose of operation of said railway," land on which the company has constructed a depot and side-track is not within the exception but passes by the conveyance. Fordyce *v.* Rapp, 131 Mo. 354, 33 S. W. 57. Where it was agreed that the road should be delivered free from indebtedness and the purchase of its stock and bonds was merely a means to that end, the conveyance will be held to include overdue coupons of the bonds included in the sale. Farmers' Loan, etc., Co. *v.* Oregon, etc., R. Co., 58 Fed. 639.

54. Philadelphia *v.* Philadelphia, etc., R. Co., 58 Pa. St. 253.

55. Philadelphia Inv. Co. *v.* Ohio, etc., R. Co., 41 Fed. 378.

56. Philadelphia *v.* Philadelphia, etc., R. Co., 58 Pa. St. 253.

57. Philadelphia Inv. Co. *v.* Ohio, etc., R. Co., 41 Fed. 378.

58. Arthur *v.* Commercial, etc., Bank, 9 Sm. & M. (Miss.) 394, 48 Am. Dec. 719.

59. Fordyce *v.* Rapp, 131 Mo. 354, 33 S. W. 57.

convey title if it is such that the property intended to be conveyed can be identified and distinguished from all other property.[60]

4. Rights and Liabilities of Purchasers[61] — **a. In General.** A railroad company which purchases the road of another must carry out and perform the charter obligations and public duties of its vendor,[62] and takes the road subject to any limitations and conditions imposed upon the rights exercised by the grantor,[63] including any limitation or restriction as to the rates chargeable upon the road for transportation by the vendor.[64] Special statutory exemptions or privileges of the vendor do not, in the absence of express statutory provision, pass to the purchasing company,[65] such as an immunity from taxation,[66] or right to fix and determine the rates for transportation,[67] particularly where the charter of the purchasing company provides that it shall be subject to all the laws applying to railroad companies generally.[68] Where the purchase of a railroad is authorized and is made in good faith for a valuable consideration,[69] the purchaser is not, in the absence of any statutory provision or agreement to the contrary, liable for the debts, contracts, or personal obligations of the vendor,[70] but takes the road

60. Lake Shore, etc., R. Co. *v.* Pittsburg, etc., R. Co., 71 Ill. 38; Fordyce *v.* Rapp, 131 Mo. 354, 33 S. W. 57.

61. Purchasers at foreclosure sale see *infra*, VIII, B, 14.

Purchasing bondholders or other creditors see *infra*, VIII, B, 15.

Priorities of liens and mortgages see *infra*, VIII, A, 9.

Injuries from operation of road see *infra*, X, C, 3.

62. Chicago, etc., R. Co. *v.* Chicago, 183 Ill. 341, 55 N. E. 648 [*affirming* 83 Ill. App. 233]; Graham *v.* Chicago, etc., R. Co., 39 Ind. App. 294, 77 N. E. 57, 1055; State *v.* Dodge, etc., R. Co., 53 Kan. 377, 36 Pac. 747, 42 Am. St. Rep. 295.

63. Mobile *v.* Steiner, 61 Ala. 559; Chicago, etc., R. Co. *v.* Chicago, 183 Ill. 341, 58 N. E. 648 [*affirming* 83 Ill. App. 233].

64. Mobile *v.* Steiner, 61 Ala. 559; Campbell *v.* Marietta, etc., R. Co., 23 Ohio St. 168.

65. Sublette *v.* St. Louis, etc., R. Co., 96 Mo. App. 113, 69 S. W. 745; St. Louis, etc., R. Co. *v.* Gill, 156 U. S. 649, 15 S. Ct. 484, 39 L. ed. 567.

66. State *v.* Morgan, 28 La. Ann. 482; Pickard *v.* East Tennessee, etc., R. Co., 130 U. S. 637, 9 S. Ct. 640, 32 L. ed. 1051; Morgan *v.* Louisiana, 93 U. S. 217, 23 L. ed. 860. See also, generally, Taxation.

67. Norfolk, etc., R. Co. *v.* Pendleton, 156 U. S. 667, 15 S. Ct. 413, 39 L. ed. 574; St. Louis, etc., R. Co. *v.* Stevenson, 156 U. S. 667, 15 S. Ct. 484, 491, 39 L. ed. 573; Matthews *v.* Corporation Com'rs, 97 Fed. 400.

68. Norfolk, etc., R. Co. *v.* Pendleton, 156 U. S. 667, 15 St. Ct. 413, 39 L. ed. 574 [*affirming* 88 Va. 350, 13 S. E. 709, 86 Va. 1004, 11 S. E. 1062].

69. Hawkins *v.* Georgia, etc., R. Co., 119 Ga. 159, 46 S. E. 82; Powell *v.* North Missouri R. Co., 42 Mo. 63.

70. *Arkansas.*— Sappington *v.* Little Rock, etc., R. Co., 37 Ark. 23.

Georgia.— Hawkins *v.* Georgia Cent. R. Co., 119 Ga. 159, 46 S. E. 82.

Kansas.— Hukle *v.* Atchison, etc., R. Co. 71 Kan. 251, 80 Pac. 603.

Missouri.— Dickey *v.* Kansas City, etc., R. Co., 122 Mo. 223, 26 S. W. 685; Powell *v.* North Missouri R. Co., 42 Mo. 63.

New York.— Martindale *v.* Western New York, etc., R. Co., 45 N. Y. App. Div. 328, 60 N. Y. Suppl. 1026, 47 N. Y. App. Div. 634, 62 N. Y. Suppl. 1142.

Texas.— Williams *v.* Texas Midland R. Co., 22 Tex. Civ. App. 278, 55 S. W. 130.

Wisconsin.— Menasha *v.* Milwaukee, etc., R. Co., 52 Wis. 414, 9 N. W. 396; Wright *v.* Milwaukee, etc., R. Co., 25 Wis. 46.

United States.— Des Moines, etc., R. Co. *v.* Wabash, etc., R. Co., 135 U. S. 576, 10 S. Ct. 753, 34 L. ed. 243; Hoard *v.* Chesapeake, etc., R. Co., 123 U. S. 222, 8 S. Ct. 74, 31 L. ed. 130; Rice *v.* Norfolk, etc., R. Co., 153 Fed. 497, 82 C. C. A. 447.

See 41 Cent. Dig. tit. "Railroads," §§ 399, 400.

Implied contract to maintain station.— Where a railroad company sells land for building lots platted with reference to a station to be established in their vicinity, any implied contract between the purchaser of such lots and the railroad company that the latter will maintain the station is not, in the absence of statute or agreement to the contrary, binding upon the company which purchases the road, so as to prevent it from removing such station or render it liable in damages for the removal. Williams *v.* Texas Midland R. Co., 22 Tex. Civ. App. 278, 55 S. W. 130.

Adoption of contract.— Where a railroad company purchases from a coal company a road leading to a coal mine and contracts to transport coal of the latter company over the road at a certain rate, and subsequently sells the road to another company, if the last company for three years operates the road in accordance with the terms of the contract of its vendor, charging only the special rates therein provided, it will be held to have adopted the same, and will be bound thereby, although it did not at the time of the purchase covenant to carry out the terms of the contract (Chicago, etc., R. Co. *v.* Chicago, etc., Coal Co., 79 Ill. 121); and where one

free from all contracts and claims against the vendor which do not constitute valid liens,[71] or do not run with the land or otherwise bind the property or franchises purchased.[72] Such liability is in some cases imposed by the statute authorizing the sale or purchase,[73] or incorporating the purchasers,[74] or is expressly assumed by the purchaser in the contract of conveyance;[75] but where the purchaser expressly assumes the debts of its predecessor, the creditors of such company do not acquire a lien upon the property but merely the right to look to the purchasing company for payment.[76] Where a railroad company is authorized to purchase stock of another company it is entitled to vote upon such stock,[77] and will be liable for assessments thereon.[78]

b. Covenants or Conditions in Grant of Right of Way. The purchaser of a railroad is bound by any covenants in the original grant of the right of way which run with the land,[79] but not by covenants which do not run with the land;[80] although if a railroad company purchases a road with knowledge of an oral agreement on the part of its vendor, made in consideration of a grant of the right of way to maintain a private crossing, it takes the road subject thereto and cannot abolish the

railroad company contracts for a joint use of a portion of the track of another company upon certain terms and subsequently sells its road, if the purchasing company continues to use the portion of the track contracted for it will be bound by the terms and conditions of the contract (South Carolina R. Co. *v.* Wilmington, etc., R. Co., 7 S. C. 410).

Where any trust is imposed upon the property conveyed and the purchaser takes with knowledge thereof, it takes subject to the performance of the trust. Thornton *v.* St. Paul, etc., R. Co., 45 How. Pr. (N. Y.) 416, holding that where a railroad company agreed to deliver mortgage bonds as security for a debt, a subsequent purchaser of the road with knowledge of the agreement takes it subject to the trust.

Contract between railroad company and express company.—Where a railroad company entered into a contract by which it undertook to grant to an express company for a term of five years exclusive express privileges and facilities upon the entire railroad system of which its line formed a part and the other roads of the system approved the contract and made an agreement among themselves, to which the express company was not a party, for a division of the payments, and the contracting railroad company was sold and the purchaser refused to assume responsibility for further performance of the contract by other roads, and made a new contract, it was held that the original contract was entire and was terminated by such action as to all the roads concerned. Smith *v.* Wells, 96 Fed. 375.

71. Sappington *v.* Little Rock, etc., R. Co., 37 Ark. 23; Menasha *v.* Milwaukee, etc., R. Co., 52 Wis. 414, 9 N. W. 396; Wright *v.* Milwaukee, etc., R. Co., 25 Wis. 46.

72. Des Moines, etc., R. Co. *v.* Wabash, etc., R. Co., 135 U. S. 576, 10 S. Ct. 753, 34 L. ed. 243, holding that, although the contract in terms provides that it or any damages from a breach thereof shall be a continuing lien upon the road, it is not binding upon the purchaser where there is nothing in the nature of the contract to make it one running with the land or chargeable upon the road after passing into other hands.

73. Chicago, etc., R. Co. *v.* Lundstrom, 16 Nebr. 254, 20 N. W. 198, 49 Am. Rep. 718; Missouri, etc., R. Co. *v.* Warner, 30 Tex. Civ. App. 280, 70 S. W. 365; Winona, etc., R. Co. *v.* Plainview, 143 U. S. 371, 12 S. Ct. 530, 36 L. ed. 191 [*affirming* 36 Minn. 505, 517, 32 N. W. 745, 749].

To render a company liable on promissory notes made by another company, the fact that defendant was authorized to purchase the road of the company making the notes on condition that it should pay the debts of the latter is not sufficient, but it must further be shown that defendant actually purchased the road. Desmond *v.* St. Louis, etc., R. Co., 77 Ill. 631.

Under the Ohio statute of 1902 authorizing the purchase of a connecting or continuous line, and providing that the purchasing company shall be subject to all the "duties, obligations, and restrictions" of the former company, it is held that the duties and obligations referred to are those imposed upon railroad companies by the general laws of the state, and do not include a claim for breach of contract. Rice *v.* Norfolk, etc., R. Co., 153 Fed. 497, 82 C. C. A. 447.

74. St. Louis, etc., R. Co. *v.* Miller, 43 Ill. 199.

75. Lenz *v.* Chicago, etc., R. Co., 111 Wis. 198, 86 N. W. 607; Hervey *v.* Illinois Midland R. Co., 28 Fed. 169.

76. Hervey *v.* Illinois Midland R. Co., 28 Fed. 169.

77. Oelbermann *v.* New York, etc., R. Co., 77 Hun (N. Y.) 332, 29 N. Y. Suppl. 545.

78. Smith *v.* Newark, etc., R. Co., 8 Ohio Cir. Ct. 583, 4 Ohio Cir. Dec. 356.

79. Toledo, etc., R. Co. *v.* Cosand, 6 Ind. App. 222, 33 N. E. 251, holding that a covenant to erect and maintain fences, cattle-guards, and farm crossings runs with the land and is binding upon the purchaser.

80. Dickey *v.* Kansas City, etc., R. Co., 122 Mo. 223, 26 S. W. 685, holding that a covenant to furnish a landowner with a perpetual

crossing.[81] Any conditions subsequent in grants of rights of way which will defeat the estate granted should be strictly construed,[82] and a sale and conveyance to another railroad company is not of itself a breach of a condition that the road constructed upon the right of way shall be kept up and operated,[83] or that the land granted shall be used for depot purposes only.[84] Where a railroad company is granted a mere easement for the operation of its own road, an attempted sale of a portion of the right of way to another company for the construction of a road thereon operates as an abandonment of that portion of the right of way.[85]

c. Injuries From Construction and Maintenance. The purchaser of a railroad is not liable for injuries to property caused by the construction or maintenance of the road which were sustained prior to the purchase,[86] or even those sustained after the purchase if it had no notice of the existence of the defect or condition causing the same;[87] but it will be liable for such damages where it continued to use the road with knowledge of its defective condition,[88] or for damages due to a continuance of a nuisance created by the vendor,[89] unless the nuisance was on other property not belonging to or under the control of the railroad company,[90] and also for damages due to any acts on its own part with regard to the construction, alteration, or repair of the road.[91]

5. Remedies By or Against Companies. Where the statute under which the purchase is made imposes a liability upon the purchasing company for the debts and liabilities of the vendor, it need not provide any specific remedies in favor of the creditors, but they may sue the purchasing company at common law in debt or assumpsit as the case may be;[92] and where the purchasing company agrees to assume or pay the debts and liabilities of the vendor, such agreement constitutes a direct liability to creditors of the latter upon which they may sue;[93] and one creditor may sue for and recover the full amount of his claim without making the other creditors parties or suing in their behalf;[94] but although such liability is imposed by statute, a judgment cannot be rendered against the purchasing company in an action brought against the vendor alone.[95] A contract between the purchasing company and a third party who guarantees that the vendor shall deliver the road free from all liens and encumbrances is personal to the purchasing company, and is not enforceable in equity for the benefit of bondholders of the vendor.[96] Where the sale is authorized a deed from one railroad company to another, signed by the proper officer and under the corporate seal of the grantor, is *prima facie* valid, and the burden is upon any one denying its validity on the ground that the stock-holders had not consented to its execution to establish such invalidity;[97] but where the charter of a railroad company requires that the incorporators shall purchase the property and franchises of an existing company as a condition precedent to their organization as a corporate body, such

pass on a railroad passing over his land does not run with the land or bind a purchaser of the road.

81. Swan *v.* Burlington, etc., R. Co., 72 Iowa 650, 34 N. W. 457.

82. Southard *v.* New Jersey Cent. R. Co., 26 N. J. L. 13.

83. Louisville, etc., R. Co. *v.* Covington, 2 Bush (Ky.) 526.

84. Southard *v.* New Jersey Cent. R. Co., 26 N. J. L. 13.

85. Blakely *v.* Chicago, etc., R. Co., 46 Nebr. 272, 64 N. W. 972.

86. Hammond *v.* Port Royal, etc., R. Co., 15 S. C. 10.

87. Peoria, etc., R. Co. *v.* Barton, 38 Ill. App. 469; Central Trust Co. *v.* Wabash, etc., R. Co., 57 Fed. 441.

88. Culver *v.* Chicago, etc., R. Co., 38 Mo. App. 130.

89. Culver *v.* Chicago, etc., R. Co., 38 Mo. App. 130; Brown *v.* Cayuga, etc., R. Co., 12 N. Y. 486.

90. Wayland *v.* St. Louis, etc., R. Co., 75 Mo. 548.

91. Southern R. Co. *v.* Puckett, 121 Ga. 322, 48 S. E. 968.

92. St. Louis, etc., R. Co. *v.* Miller, 43 Ill. 199, holding that where the action is upon a judgment an action of debt is proper.

93. Lenz *v.* Chicago, etc., R. Co., 111 Wis. 198, 86 N. W. 607.

94. Galveston, etc., R. Co. *v.* Butler, 56 Tex. 506.

95. Missouri, etc., R. Co. *v.* Fulmore, (Tex. Civ. App. 1894) 26 S. W. 238.

96. Randall *v.* Detroit, etc., R. Co., 134 Mich. 493, 96 N. W. 567.

97. Atlantic, etc., R. Co. *v.* St. Louis, etc., R. Co., 66 Mo. 228.

company must, under a plea of *nul tiel* corporation, show that the purchase was made before it can recover property of the previously existing company.[98] Where the purchaser of a railroad company agrees to deliver as a part of the purchase-price certain of its own stock and bonds to a certain value, and such delivery is not made, the vendor in suing to recover the balance of the debt is entitled to recover the full amount, although the market value of such stock and bonds is below par.[99] Where railroad properties are sold subject to certain conditions subsequent upon the breach of which the property is to revert to the grantor, if such conditions are not performed and the grantor does any act showing an intention to take advantage of the breach, the property is not thereafter subject to attachment for any debt incurred by the purchaser during his possession.[1]

C. Leases — 1. Right to Make or Take Lease — a. In General. A railroad company cannot without legislative authority lease its road to another company,[2] even with the consent of all its stock-holders,[3] and to constitute a valid lease the lessee must have authority to take as well as the lessor to execute the lease,[4] and such authority will not be implied but must be clearly conferred.[5] It will not be implied from the usual grant of powers in railroad charters,[6] or the use of such

98. Wheadon *v.* Peoria, etc., R. Co., 42 Ill. 494.

99. Texas Western R. Co. *v.* Gentry, 69 Tex. 625, 8 S. W. 98.

1. Schlesinger *v.* Kansas City, etc., R. Co., 152 U. S. 444, 14 S. Ct. 647, 38 L. ed. 507 [*affirming* 39 Fed. 741].

2. *Alabama.*—Memphis, etc., R. Co. *v.* Greyson, 88 Ala. 572, 7 So. 122, 16 Am. St. Rep. 69.

District of Columbia.—Howard *v.* Chesapeake, etc., R. Co., 11 App. Cas. 300.

Indiana.—Tippecanoe County *v.* Lafayette, etc., R. Co., 50 Ind. 85.

New Jersey.—Stockton *v.* New Jersey Cent. R. Co., 50 N. J. Eq. 52, 24 Atl. 964, 17 L. R. A. 97.

New York.—Troy, etc., R. Co. *v.* Kerr, 17 Barb. 581.

Pennsylvania.—Van Steuben *v.* Central R. Co., 178 Pa. St. 367, 35 Atl. 992, 34 L. R. A. 577; Pittsburgh, etc., R. Co. *v.* Bedford, 81* Pa. St. 104.

Texas.—Central R. Co. *v.* Morris, 68 Tex. 49, 3 S. W. 457.

United States.—Oregon R., etc., Co. *v.* Oregonian R. Co., 145 U. S. 52, 12 S. Ct. 814, 36 L. ed. 620; Central Transp. Co. *v.* Pullman Palace Car Co., 139 U. S. 24, 11 S. Ct. 478, 35 L. ed. 55; Oregon R., etc., Co. *v.* Oregonian R. Co., 130 U. S. 1, 9 S. Ct. 409, 32 L. ed. 837 [*reversing* 23 Fed. 232, 10 Sawy. 464]; Pennsylvania R. Co. *v.* St. Louis, etc., R. Co., 118 U. S. 290, 630, 6 S. Ct. 1094, 7 S. Ct. 24, 30 L. ed. 83, 284; Thomas *v.* West Jersey R. Co., 101 U. S. 71, 25 L. ed. 950.

England.—Winch *v.* Birkenhead, etc., R. Co., 5 De G. & Sm. 562, 16 Jur. 1035, 64 Eng. Reprint 1243; Great Northern R. Co. *v.* Eastern Counties R. Co., 9 Hare 306, 21 L. J. Ch. 837, 7 R. & Can. Cas. 643, 41 Eng. Ch. 306, 68 Eng. Reprint 520.

Canada.—Hinckley *v.* Gildersleeve, 19 Grant Ch. (U. C.) 212.

See 41 Cent. Dig. tit. "Railroads," § 404.

Effect of curative statutes.—An *ultra vires* lease made without statutory authority may be validated by a subsequent curative statute (Terre Haute, etc., R. Co. *v.* Cox, 102 Fed. 825, 42 C. C. A. 654); but the fact that the legislature, after a railroad company has made an *ultra vires* lease, passes a statute forbidding the directors of the company, "its lessees or agents," from collecting more than a fixed sum of compensation for carrying passengers and freight, is not a ratification of the lease or an acknowledgment of its validity (Thomas *v.* West Jersey R. Co., 101 U. S. 71, 25 L. ed. 950).

3. East Anglian R. Co. *v.* Eastern Counties R. Co., 11 C. B. 775, 16 Jur. 249, 21 L. J. C. P. 23, 7 R. & Can. Cas. 150, 73 E. C. L. 775.

4. St. Louis, etc., R. Co. *v.* Terre Haute, etc., R. Co., 145 U. S. 393, 12 S. Ct. 953, 36 L. ed. 748 [*affirming* 33 Fed. 440]; Pennsylvania R. Co. *v.* St. Louis, etc., R. Co., 118 U. S. 290, 630, 6 S. Ct. 1094, 7 S. Ct. 24, 30 L. ed. 83, 284; East Anglian R. Co. *v.* Eastern Counties R. Co., 11 C. B. 775, 16 Jur. 249, 21 L. J. C. P. 23, 7 R. & Can. Cas. 150, 73 E. C. L. 775.

A statute authorizing railroad companies to make contracts "for leasing" their roads confers power to either make or take leases. St. Louis, etc., R. Co. *v.* Terre Haute, etc., R. Co., 145 U. S. 393, 12 S. Ct. 953, 36 L. ed. 748 [*affirming* 33 Fed. 440].

5. Black *v.* Delaware Canal Co., 24 N. J. Eq. 455; Pittsburgh, etc., R. Co. *v.* Bedford, etc., R. Co., 81* Pa. St. 104; Wood *v.* Bedford, etc., R. Co., 8 Phila. (Pa.) 94; Oregon R., etc., Co. *v.* Oregonian R. Co., 130 U. S. 1, 9 S. Ct. 409, 32 L. ed. 837 [*reversing* 23 Fed. 232, 10 Sawy. 464]; Pennsylvania R. Co. *v.* St. Louis, etc., R. Co., 118 U. S. 290, 630, 6 S. Ct. 1094, 7 S. Ct. 24, 30 L. ed. 83, 284.

A prohibition against consolidation cannot be construed as authority to lease. Central, etc., R. Co. *v.* Morris, 68 Tex. 49, 3 S. W. 457.

6. Pennsylvania R. Co. *v.* St. Louis, etc., R. Co., 118 U. S. 290, 630, 6 S. Ct. 1094, 7 S. Ct. 24, 30 L. ed. 83, 284.

terms as "assigns" or "successors," [7] or from statutes authorizing the execution of mortgages,[8] or authorizing railroad companies to consolidate,[9] or connect with other roads,[10] or to enter into traffic or other operating contracts; [11] and in the case of express authority to lease the right must be limited according to the express provisions of the statute, as in cases where the statute refers only to connecting or continuous lines,[12] or companies of the same state; [13] and a statute authorizing a lease to another railroad company does not authorize a lease to an individual,[14] nor does a charter provision authorizing a particular railroad company to lease and operate other roads authorize it to lease its own road to another company.[15] Certain statutes and charter provisions have, however, been held impliedly to authorize a lease, although not expressly so providing; [16] and it has been held that an authority granted to one company to take leases of other roads impliedly authorizes other companies to make such leases.[17] The right to lease is frequently conferred in express terms either generally [18] or as between companies of the same state,[19] or as between those whose roads form connecting or continuous

7. Oregon R., etc., Co. *v.* Oregonian R. Co., 130 U. S. 1, 9 S. Ct. 409, 32 L. ed. 837 [*reversing* 23 Fed. 232, 10 Sawy. 464]; Briscoe *v.* Southern Kansas R. Co., 40 Fed. 273.

8. Muntz *v.* Algiers, etc., R. Co., 111 La. 423, 35 So. 624, 100 Am. St. Rep. 495, 64 L. R. A. 222.

9. Archer *v.* Terre Haute, etc., R. Co., 102 Ill. 493; Tippecanoe County *v.* Lafayette, etc., R. Co., 50 Ind. 85; Mills *v.* Central R. Co., 41 N. J. Eq. 1, 2 Atl. 453.

10. Tippecanoe County *v.* Lafayette, etc., R. Co., 50 Ind. 85; St. Louis, etc., R. Co. *v.* Terre Haute, etc., R. Co., 145 U. S. 393, 12 S. Ct. 953, 36 L. ed. 748 [*affirming* 33 Fed. 440].

11. Tippecanoe County *v.* Lafayette, 50 Ind. 85; St. Louis, etc., R. Co. *v.* Terre Haute, etc., R. Co., 145 U. S. 393, 12 S. Ct. 953, 36 L. ed. 748 [*affirming* 33 Fed. 440]; Pennsylvania R. Co. *v.* St. Louis, etc., R. Co., 118 U. S. 290, 630, 6 S. Ct. 1094, 7 S. Ct. 24, 30 L. ed. 83, 284; Thomas *v.* West Jersey R. Co., 101 U. S. 71, 25 L. ed. 950. But see Woodruff *v.* Erie R. Co., 93 N. Y. 609; Gere *v.* New York Cent., etc., R. Co., 19 Abb. N. Cas. (N. Y.) 193; Pittsburg, etc., R. Co. *v.* Columbus, etc., R. Co., 19 Fed. Cas. No. 11,197, 8 Biss. 456.

12. Eel River R. Co. *v.* State, 155 Ind. 433, 57 N. E. 388; Van Steuben *v.* Central R. Co., 178 Pa. St. 367, 35 Atl. 992, 34 L. R. A. 577 [*reversing* 4 Pa. Dist. 153]; Pittsburgh, etc., R. Co. *v.* Bedford, etc., R. Co., 81* Pa. St. 104; Wood *v.* Bedford, etc., R. Co., 8 Phila. (Pa.) 94.

13. See *infra*, VII, C, 1, d.

14. Abbott *v.* Johnstown, etc., R. Co., 80 N. Y. 27, 36 Am. Rep. 572. See also Woodruff *v.* Erie, etc., R. Co., 93 N. Y. 609 [*reversing* 25 Hun 246]; Fisher *v.* Metropolitan El. R. Co., 34 Hun (N. Y.) 433.

15. Mills *v.* Central R. Co., 41 N. J. Eq. 1, 2 Atl. 453.

16. Woodruff *v.* Erie R. Co., 93 N. Y. 609; Wormser *v.* Metropolitan St. R. Co., 98 N. Y. App. Div. 29, 90 N. Y. Suppl. 714 [*affirmed* in 184 N. Y. 83, 76 N. E. 1036, 112 Am. St. Rep. 596]; Fisher *v.* Metropolitan El. R. Co., 34 Hun (N. Y.) 433; Gere *v.* New York Cent., etc., R. Co., 19 Abb. N. Cas. (N. Y.) 193; Kaufman *v.* Pittsburg, etc., R. Co., 217 Pa. St. 599, 66 Atl. 1108.

In New York the statute of 1839 authorizing railroad companies to contract with other railroad companies for the use of their respective roads was held to authorize leases (Woodruff *v.* Erie, etc., R. Co., 93 N. Y. 609; Gere *v.* New York Cent., etc., R. Co., 19 Abb. N. Cas. 193); and by the act of 1892 such authority is expressly given, the statute providing, however, that a lease for over one year shall not be valid unless affirmed by the holders of two thirds of the stock (Flynn *v.* Brooklyn St. R. Co., 9 N. Y. App. Div. 269, 41 N. Y. Suppl. 566 [*affirmed* in 158 N. Y. 493, 53 N. E. 520].

The power to purchase outright any other railroad includes the lesser power of leasing and operating another road for a definite term. Kaufman *v.* Pittsburg, etc., R. Co., 217 Pa. St. 599, 66 Atl. 1108.

Charter provisions.—A lease of a railroad may be made under a charter provision authorizing the railroad company to "farm out" its rights of transportation (Hill *v.* Atlantic, etc., R. Co., 143 N. C. 539, 55 S. E. 854, 9 L. R. A. N. S. 606; State *v.* Richmond, etc., R. Co., 72 N. C. 634; Southern R. Co. *v.* North Carolina R. Co., 81 Fed. 595), or authorizing the company to "rent or farm out" its exclusive right of transportation on the road and the "privileges thereof" (Central R., etc., Co. *v.* Macon, 43 Ga. 605).

17. Kaufman *v.* Pittsburg, etc., R. Co., 217 Pa. St. 599, 66 Atl. 1108; Pinkerton *v.* Pennsylvania Traction Co., 193 Pa. St. 229, 44 Atl. 284.

18. Ackerman *v.* Cincinnati, etc., R. Co., 143 Mich. 58, 106 N. W. 558, 114 Am. St. Rep. 640; State *v.* Montana R. Co., 21 Mont. 221, 53 Pac. 623, 45 L. R. A. 271; Boston, etc., R. Co. *v.* Boston, etc., R. Co., 65 N. H. 393, 23 Atl. 529.

19. Pence *v.* St. Paul, etc., R. Co., 28 Minn. 488, 11 N. W. 80; Freeman *v.* Minneapolis, etc., R. Co., 28 Minn. 443, 10 N. W. 594; Stockton *v.* New Jersey Cent. R. Co., 50 N. J. Eq. 52, 24 Atl. 964, 17 L. R. A. 97; Cincin-

lines;[20] and such authority may be given either by a charter provision or a subsequent statute, the provisions of which are accepted by the stock-holders;[21] but a statute of one state authorizing a railroad company to lease its road has no extraterritorial effect and does not authorize it to lease a road owned by it in another state.[22] A railroad company may lease a portion of its right of way or other property for purposes which will increase or facilitate the business of the company and not interfere with the proper performance of its public duties.[23]

b. Continuous or Connecting Lines. In some cases the statutes expressly authorize leases in the case of roads which form connecting or continuous lines.[24] Under these statutes it is not necessary that the roads should connect at their termini so as to make one an extension of the other,[25] or that the roads should be of the same gauge;[26] and the connection may be by means of an intervening road which one of the contracting companies has the right to operate or use,[27] but there must be an actual connection.[28]

c. Parallel or Competing Lines. In some cases the statutes expressly prohibit

nati, etc., R. Co. *v.* Sleeper, 5 Ohio Dec. (Reprint) 196, 3 Am. L. Rec. 464.

Lease to consolidated company.— A statute providing that "any railroad corporation created by this state may lease its road to any other railroad corporation so created" authorizes a lease by a domestic railroad company to a railroad company formed by the consolidation of a domestic railroad company and another company of a different state. Peters *v.* Boston, etc., R. Co., 114 Mass. 127.

20. See *infra*, VII, C, 1, b.

21. Vermont, etc., R. Co. *v.* Vermont Cent. R. Co., 34 Vt. 1.

22. Briscoe *v.* Southern Kansas R. Co., 40 Fed. 273. See also Van Steuben *v.* New Jersey Cent. R. Co., 178 Pa. St. 367, 35 Atl. 992, 34 L. R. A. 577 [*reversing* 4 Pa. Dist. 153].

23. Michigan Cent. R. Co. *v.* Bullard, 120 Mich. 416, 79 N. W. 635 (holding that a railroad company may lease a portion of its right of way to a manufacturing company with the view of facilitating the securing of freight therefrom); Gilliland *v.* Chicago, etc., R. Co., 19 Mo. App. 411 (holding that a railroad company may lease a portion of its land for the erection of a grain elevator); Roby *v.* New York Cent., etc., R. Co., 142 N. Y. 176, 36 N. E. 1053 (holding that a railroad company may lease a portion of its right of way for a coal yard and trestle for the purpose of handling and receiving coal transported over the railroad).

Permitting use of land by third persons generally see *supra*, V, H, 4.

24. *Georgia.*— Georgia R., etc., Co. *v.* Maddox, 116 Ga. 64, 42 S. E. 315; Central R., etc., Co. *v.* Macon, 43 Ga. 605.

Kansas.— Atchison, etc., R. Co. *v.* Fletcher, 35 Kan. 236, 10 Pac. 596.

Nebraska.— State *v.* Atchison, etc., R. Co., 38 Nebr. 437, 57 N. W. 20, 24 Nebr. 143, 38 N. W. 43, 8 Am. St. Rep. 164.

New Jersey.— Black *v.* Delaware, etc., Canal Co., 24 N. J. Eq. 455.

Ohio.— Chapman *v.* Mad River, etc., R. Co., 1 Ohio Dec. (Reprint) 567, 10 West. L. J. 399.

Pennsylvania.— Philadelphia, etc., R. Co. *v.* Catawissa R. Co., 53 Pa. St. 20; Gratz *v.* Pennsylvania R. Co., 41 Pa. St. 447; Wood *v.* Bedford, etc., R. Co., 8 Phila. 94.

United States.— Hancock *v.* Louisville, etc., R. Co., 145 U. S. 409, 12 S. Ct. 969, 36 L. ed. 755; Eakin *v.* St. Louis, etc., R. Co., 8 Fed. Cas. No. 4,236.

See 41 Cent. Dig. tit. "Railroads," § 378.

25. Hancock *v.* Louisville, etc., R. Co., 145 U. S. 409, 12 S. Ct. 969, 36 L. ed. 755, holding that under the Kentucky statute authorizing leases where the roads form a "continuous line" it is not essential that the leased road shall be an extension from either terminus of the main line but that it may be simply a collateral branch forming a continuous road via the junction to either terminus of such main line.

26. Philadelphia, etc., R. Co. *v.* Catawissa R. Co., 53 Pa. St. 20, holding that under a statute authorizing the lease of connecting roads a connection means either such a union of the tracks as to admit of the passage of cars from one road to the other or such an intersection as to admit of the convenient interchange of freight and passengers at the point of intersection. But see Hampe *v.* Mt. Oliver, etc., R. Co., 24 Pittsb. L. J. N. S. (Pa.) 330.

27. Atchison, etc., R. Co. *v.* Fletcher, 35 Kan. 236, 10 Pac. 596.

28. Pittsburgh, etc., R. Co. *v.* Bedford, etc., R. Co., 81* Pa. St. 104.

Unfinished roads.— Where the statute authorizing a lease provides that the roads must be either directly or by means of intersecting roads "connected with each other," there can be no lease of an unfinished road where no actual connection has been effected. Pittsburgh, etc., R. Co. *v.* Bedford, etc., R. Co., 81* Pa. St. 104; Wood *v.* Bedford, etc., R. Co., 8 Phila. (Pa.) 94.

Roads incorporated under special act.— The Pennsylvania General Railroad Acts of 1861 and 1870, requiring the railroads of a lessor and lessee to be connected, do not apply to the special act of 1871 conferring on certain companies the power to merge, consolidate, or unite with any other company. Kaufman *v.* Pittsburg, etc., R. Co., 217 Pa. St. 599, 66 Atl. 1108.

leases in the case of parallel or competing lines,[29] and where the statute authorizing a lease applies in terms only to connecting and continuous lines, it does not authorize a lease to a parallel and competing line,[30] and in the absence of any express prohibition it seems that such leases would be contrary to public policy.[31] It has been held, however, that where there is an express statutory authority to lease without any qualifications or restrictions the lease may be made to a parallel and competing line,[32] and this notwithstanding there is an express prohibition against the consolidation of such roads.[33] What roads are parallel or competing is to be determined principally by the question of competition, and to be within the constitutional or statutory prohibitions the roads need not necessarily be parallel in a mathematical sense or connect the same principal termini, and may be competing by reason of their relations or connections with other roads or means of transportation;[34] nor is it necessary that the roads should be actually engaged in cutting rates, but it is sufficient if they are in a position to do so.[35]

d. Foreign Companies. Without legislative authority a railroad company of one state cannot lease its road to a company of another state,[36] and a statute

29. State *v.* Mobile, etc., R. Co., 86 Miss. 172, 38 So. 732, 112 Am. St. Rep. 277; Hafer *v.* Cincinnati, etc., R. Co., 4 Ohio S. & C. Pl. Dec. 487, 29 Cinc. L. Bul. 68; East Line, etc., R. Co. *v.* State, 75 Tex. 434, 12 S. W. 690.

30. Eel River R. Co. *v.* State, 155 Ind. 433, 57 N. E. 388.

31. Eel River R. Co. *v.* State, 155 Ind. 433, 57 N. E. 388. But see Gere *v.* New York Cent. R. Co., 19 Abb. N. Cas. (N. Y.) 193, holding that if the legislature has authorized in general terms the leasing of railroads the courts cannot declare the lease of a competing line invalid on the ground of public policy.

32. State *v.* Montana R. Co., 21 Mont. 221, 53 Pac. 623, 45 L. R. A. 271; Gere *v.* New York Cent. R. Co., 19 Abb. N. Cas. (N. Y.) 193.

The New York statute of 1839 has been held to authorize a railroad company to lease its road even to a parallel and competing line to be operated by it (Gere *v.* New York, etc., R. Co., 19 Abb. N. Cas. (N. Y.) 193), but not to hold the same vacant and unused (Troy, etc., R. Co. *v.* Boston, etc., R. Co., 86 N. Y. 107).

33. State *v.* Montana, etc., R. Co., 21 Mont. 221, 53 Pac. 623, 45 L. R. A. 271; Gere *v.* New York Cent. R. Co., 19 Abb. N. Cas. (N. Y.) 193. But see East St. Louis Connecting R. Co. *v.* Jarvis, 92 Fed. 735, 34 C. C. A. 639, holding that a lease of a parallel and competing railroad for ten years is a "consolidation" within the constitutional prohibition.

Application of provisions prohibiting consolidation of parallel and competing lines see *infra*, VII, E, 2, c.

34. State *v.* Montana R. Co., 21 Mont. 221, 53 Pac. 623, 45 L. R. A. 271; Hafer *v.* Cincinnati, etc., R. Co., 4 Ohio S. & C. Pl. Dec. 487, 29 Cinc. L. Bul. 68; East St. Louis Connecting R. Co. *v.* Jarvis, 92 Fed. 735, 34 C. C. A. 639.

35. Hafer *v.* Cincinnati, etc., R. Co., 4 Ohio S. & C. Pl. Dec. 487, 29 Cinc. L. Bul. 68.

36. *District of Columbia.*— Howard *v.* Chesapeake, etc., R. Co., 11 App. Cas. 300.

Illinois.— Archer *v.* Terre-Haute, etc., R. Co., 102 Ill. 493.

New Jersey.— Black *v.* Delaware, etc., Canal Co., 24 N. J. Eq. 455.

Ohio.— Ohio, etc., R. Co. *v.* Indianapolis, etc., R. Co., 3 Ohio Dec. (Reprint) 458, 5 Am. L. Reg. N. S. 733.

United States.— Pennsylvania R. Co. *v.* St. Louis, etc., R. Co., 118 U. S. 290, 6 S. Ct. 1094, 30 L. ed. 83, 118 U. S. 630, 7 S. Ct. 24, 30 L. ed. 284.

See 41 Cent. Dig. tit. "Railroads," § 387.

In Ohio by statute a railroad company incorporated in that state may lease its road to other companies of that state but not to a railroad company created by the laws of another state. Cincinnati, etc., R. Co. *v.* Sleeper, 5 Ohio Dec. (Reprint) 196, 3 Am. L. Rec. 464.

In New Jersey the statute of 1880 authorized leases to either domestic or foreign railroad companies, but the provision as to foreign companies was repealed by the act of 1885, which expressly prohibits any lease to a foreign company until the assent of the legislature thereto has been obtained, which latter statute is not unconstitutional. Stockton *v.* New Jersey Cent. R. Co., 50 N. J. Eq. 52, 24 Atl. 964, 17 L. R. A. 97.

Under the Minnesota statute of 1878, providing that any Iowa railroad company may extend its road into the state of Minnesota and shall have and possess all the powers, franchises, and privileges of railroad companies incorporated under the general laws of that state, provided such non-resident company shall first file a true copy of its articles of incorporation with the secretary of that state, a Minnesota company cannot lease its road to an Iowa company until the latter has complied with the provisions of the statute. Freeman *v.* Minneapolis, etc., R. Co., 28 Minn. 443, 10 N. W. 594.

In New Hampshire the statute of 1883 provides that "railroad corporations created by the laws of other states, operating roads within this state, shall have the same rights for the purposes of . . leasing . . . roads as if created by the laws of this state." Bos-

authorizing leases to other companies of the same state confers no authority for a lease to a foreign company.[37] Such authority must also be conferred upon each of the contracting companies by their charters or the laws of the states creating them.[38] It has been held, however, that a lease to a company of another state may be made under a general authority to lease to another railroad company,[39] and in some cases the statutes authorizing the lease apply in express terms to companies of other states,[40] or to such companies in cases where their roads form a connecting and continuous line.[41] Where a statute authorizes leases to domestic companies but expressly prohibits leases to foreign companies, the prohibition cannot be evaded by interposing as a nominal lessee a domestic company which is in fact owned and controlled by a foreign company.[42]

e. Consent of Stock-Holders. A railroad company has no right to make a lease of its road without the consent of its stock-holders,[43] and frequently the statutes so provide,[44] and also prescribe the number of stock-holders who must consent.[45] The consent of the stock-holders must be obtained by a vote at a regular meeting and not by an informal consultation of them separately;[46] but in the absence of evidence to the contrary it will be presumed that the meeting was properly held and that the proceedings were regular and valid.[47] In the absence of any provision as to the number it has been held that a lease may be authorized by a majority,[48] but elsewhere it has been held that all of the stock-holders must concur,[49] and that the legislature cannot authorize the execution of a lease by a majority against the will of a dissenting minority,[50] even where

ton, etc., R. Co. *v.* Boston, etc., R. Co., 65 N. H. 393, 23 Atl. 529.

37. Freeman *v.* Minneapolis, etc., R. Co., 28 Minn. 443, 10 N. W. 594; Black *v.* Delaware, etc., Canal Co., 24 N. J. Eq. 455.

38. St. Louis, etc., R. Co. *v.* Terre Haute, etc., R. Co., 145 U. S. 393, 12 S. Ct. 953, 36 L. ed. 748 [*affirming* 33 Fed. 440]; Pennsylvania R. Co. *v.* St. Louis, etc., R. Co., 118 U. S. 290, 6 S. Ct. 1094, 30 L. ed. 83, 118 U. S. 630, 7 S. Ct. 24, 30 L. ed. 284.

39. Boston, etc., R. Co. *v.* Boston, etc., R. Co., 65 N. H. 393, 23 Atl. 529; Day *v.* Ogdensburgh, etc., R. Co., 107 N. Y. 129, 13 N. E. 765. But see Freeman *v.* Minneapolis, etc., R. Co., 28 Minn. 443, 10 N. W. 594.

40. Ackerman *v.* Cincinnati, etc., R. Co., 143 Mich. 58, 106 N. W. 558, 114 Am. St. Rep. 640; St. Louis, etc., R. Co. *v.* Terre Haute, etc., R. Co., 145 U. S. 393, 12 S. Ct. 953, 36 L. ed. 748 [*affirming* 33 Fed. 440].

41. Atchison, etc., R. Co. *v.* Fletcher, 35 Kan. 236, 10 Pac. 596; Sturges *v.* Knapp, 31 Vt. 1; Pittsburg, etc., R. Co. *v.* Columbus, etc., R. Co., 19 Fed. Cas. No. 11,197, 8 Biss. 456.

42. Stockton *v.* New Jersey Cent. R. Co., 50 N. J. Eq. 52, 24 Atl. 964, 17 L. R. A. 97.

43. Mills *v.* New Jersey Cent. R. Co., 41 N. J. Eq. 1, 2 Atl. 453; *In re* Opinion of Judges, 120 N. C. 623, 28 S. E. 18; Boston, etc., R. Corp. *v.* New York, etc., R. Co., 13 R. I. 260; Stevens *v.* Davison, 18 Gratt. (Va.) 819, 98 Am. Dec. 292. But see Beveridge *v.* New York, etc., R. Co., 112 N. Y. 1, 19 N. E. 489, 2 L. R. A. 648, holding that where a railroad company is authorized by statute to lease its road, and the statute does not prescribe the manner of making it, it may be made by the directors without the consent or ratification of the stock-holders.

44. Henry *v.* Pittsburg, etc., R. Co., 5 Ohio S. & C. Pl. Dec. 41, 2 Ohio N. P. 118; St. Louis, etc., R. Co. *v.* Terre Haute, etc., R. Co., 145 U. S. 393, 12 S. Ct. 953, 36 L. ed. 748 [*affirming* 33 Fed. 440]; Rogers *v.* Nashville, etc., R. Co., 91 Fed. 299, 33 C. C. A. 517; Peters *v.* Lincoln, etc., R. Co., 14 Fed. 319, 4 McCrary 269.

An agreement to lease made before construction of the road cannot be enforced unless subsequently ratified by the stock-holders. Peters *v.* Lincoln, etc., R. Co., 14 Fed. 319, 4 McCrary 269.

The fact that the directors agreed upon the terms of the lease before submitting the question to the stock-holders, where no such preliminary agreement was necessary under the statute, does not affect the validity of the lease if duly authorized by the stock-holders. Jones *v.* Concord, etc., R. Co., 67 N. H. 234, 30 Atl. 614, 68 Am. St. Rep. 650.

45. Black *v.* Delaware, etc., Canal Co., 24 N. J. Eq. 455; Continental Ins. Co. *v.* New York, etc., R. Co., 187 N. Y. 225, 79 N. E. 1026 [*affirming* 103 N. Y. App. Div. 282, 93 N. Y. Suppl. 27]; Rogers *v.* Nashville, etc., R. Co., 91 Fed. 299, 33 C. C. A. 517; Peters *v.* Lincoln, etc., R. Co., 14 Fed. 319, 4 McCrary 269.

46. Stevens *v.* Davison, 18 Gratt. (Va.) 819, 98 Am. Dec. 692; Peters *v.* Lincoln, etc., R. Co., 12 Fed. 513, 2 McCrary 275.

47. Hill *v.* Atlantic, etc., R. Co., 143 N. C. 539, 55 S. E. 854, 9 L. R. A. N. S. 606.

48. Waldoborough *v.* Knox, etc., R. Co., 84 Me. 469, 24 Atl. 942; O'Neill *v.* Hestonville, etc., R. Co., 9 Pa. Dist. 2.

49. Mills *v.* New Jersey Cent. R. Co., 41 N. J. Eq. 1, 2 Atl. 453.

50. Dow *v.* Northern R. Co., 67 N. H. 1, 36 Atl. 510. But see Black *v.* Delaware, etc., Canal Co., 24 N. J. Eq. 455, holding that the state may, under the right of eminent do-

the right is reserved to alter or amend the charter.[51] Non-consenting stock-holders may sue in equity to enjoin the execution of the lease,[52] or any operation thereunder, and to have it declared invalid,[53] provided such objection is seasonably made;[54] but the consent of the stock-holders, although required by law, is for their personal benefit and may be waived by them,[55] or the right to object that the lease was made without their consent barred by laches,[56] and this notwithstanding the statute provides that without such consent the lease shall not be perfected,[57] or shall be null and void.[58] A stock-holder who voted for the lease cannot afterward dissent.[59]

f. Modification, Rescission, or Termination. The power to enter into a lease will impliedly authorize the companies by mutual consent subsequently to modify its terms or cancel it;[60] but the same consent of the stock-holders as is necessary for the authorization of a lease in the first instance is essential to authorize a subsequent modification of its terms,[61] or its rescission.[62] Where a railroad company has made a lease which is *ultra vires* and void, it may rescind or abandon it at any time,[63] and ought to do so at the earliest opportunity.[64] In the absence of fraud one of the companies is not entitled to a decree for the cancellation of a lease merely because its directors have been guilty of an error of judgment in regard to its terms,[65] and where the lease is not void but merely voidable, the

main, authorize a lease by less than the whole number of stock-holders, provision being made for compensating the dissenting stock-holders for the value of their stock.

51. Dow *v.* Northern R. Co., 67 N. H. 1, 36 Atl. 510. But see Durfee *v.* Old Colony, etc., R. Co., 5 Allen (Mass.) 230.

52. Black *v.* Delaware, etc., Canal Co., 24 N. J. Eq. 455.

53. Dow *v.* Northern R. Co., 67 N. H. 1, 36 Atl. 510; Mills *v.* New Jersey Cent. R. Co., 41 N. J. Eq. 1, 2 Atl. 453.

54. Mills *v.* New Jersey Cent. R. Co., 41 N. J. Eq. 1, 2 Atl. 453, holding that a delay of fifty-four days is not such laches as to bar an action to annul the lease.

55. St. Louis, etc., R. Co. *v.* Terre Haute, etc., R. Co., 145 U. S. 393, 12 S. Ct. 953, 36 L. ed. 748 [*affirming* 33 Fed. 410]; Eakin *v.* St. Louis, etc., R. Co., 8 Fed. Cas. No. 4,236.

56. Boston, etc., R. Co. *v.* Boston, etc., R. Co., 65 N. H. 393, 23 Atl. 529; Hill *v.* Atlantic, etc., R. Co., 143 N. C. 539, 55 S. E. 854, 9 L. R. A. N. S. 606; Boston, etc., R. Co. *v.* New York, etc., R. Co., 13 R. I. 260; St. Louis, etc., R. Co. *v.* Terre Haute, etc., R. Co., 145 U. S. 393, 12 S. Ct. 953, 36 L. ed. 748 [*affirming* 33 Fed. 410]; Eakin *v.* St. Louis, etc., R. Co., 8 Fed. Cas. No. 4,236.

If the lease is unauthorized and therefore *ultra vires* and void, stock-holders who did not consent thereto are not estopped by lapse of time or the receipt of benefits under the lease to sue to have it declared invalid and annulled. Tippecanoe County *v.* Lafayette, etc., R. Co., 50 Ind. 85.

57. Eakin *v.* St. Louis, etc., R. Co., 8 Fed. Cas. No. 4,236.

58. St. Louis, etc., R. Co. *v.* Terre Haute, etc., R. Co., 145 U. S. 393, 12 S. Ct. 953, 36 L. ed. 748 [*affirming* 33 Fed. 410].

59. Boston, etc., R. Co. *v.* Graham, 179 Mass. 62, 60 N. E. 405, holding that even under a statute authorizing a lease by a vote of the majority of stock-holders and providing that any stock-holder may dissent within a specified time, and that in such case the lessee shall acquire such stock at its valuation, stock-holders who voted for the lease cannot file a dissent under the statute and require the lessee to purchase their stock.

60. Harkness *v.* Manhattan R. Co., 54 N. Y. Super. Ct. 174; Henry *v.* Pittsburg, etc., R. Co., 5 Ohio S. & C. Pl. Dec. 41, 2 Ohio N. P. 118.

61. March *v.* Eastern R. Co., 43 N. H. 515; Continental Ins. Co. *v.* New York, etc., R. Co., 187 N. Y. 225, 79 N. E. 1026 [*affirming* 103 N. Y. App. Div. 282, 93 N. Y. Suppl. 27]; Metropolitan El. R. Co. *v.* Manhattan El. R. Co., 11 Daly (N. Y.) 373; Henry *v.* Pittsburg, etc., R. Co., 5 Ohio S. & C. Pl. Dec. 41, 2 Ohio N. P. 118.

Number of stock-holders.— It has been held that a modification of the terms of a lease may be authorized by a majority of the stock-holders (Harkness *v.* Manhattan R. Co., 54 N. Y. Super. Ct. 174. But see March *v.* Eastern R. Co., 43 N. H. 415), or by a two-thirds vote of all the stock (Continental Ins. Co. *v.* New York, etc., R. Co., 187 N. Y. 225, 79 N. E. 1026 [*affirming* 103 N. Y. App. Div. 282, 93 N. Y. Suppl. 27]).

Where the directors may authorize the lease in the first instance without the consent of the stock-holders, as is held under a particular New York statute, they may also, without such consent, modify the terms of the lease and reduce the amount of the rent contracted for. Beveridge *v.* New York, etc., R. Co., 112 N. Y. 1, 19 N. E. 489, 2 L. R. A. 648.

62. Henry *v.* Pittsburg, etc., R. Co., 5 Ohio S. & C. Pl. Dec. 41, 2 Ohio N. P. 118.

63. Thomas *v.* West Jersey R. Co., 101 U. S. 71, 25 L. ed. 950.

64. Thomas *v.* West Jersey R. Co., 101 U. S. 71, 25 L. ed. 950.

65. Jesup *v.* Illinois Cent. R. Co., 43 Fed. 483.

right to a rescission may be lost by laches or acquiescence.[66] So also a lessee desiring to rescind the lease for fraud or breach of warranty must act promptly upon discovering the fraud or breach.[67] Where the lease provides in case of a breach of any of its covenants for a right of reëntry by the lessor, and a termination of the rights and interests of the lessee, any breach of such covenants entitles the lessor to maintain an action for its forfeiture;[68] but a forfeiture will not be declared where the lessor did not elect to so declare it at the time of the breach, and the covenant was afterward performed by the lessee prior to the institution of suit.[69] The lessor must also perform any covenants on its part, but the court will not, upon its failure to do so, decree a rescission of the lease if such a decree would be inequitable, but will require the lessor specifically to perform its agreement within a reasonable time.[70] A decree for the sale of a portion of the leased road to satisfy a mortgage made prior to the lease is not while unexecuted such an eviction of the lessee by paramount title as to entitle the lessee to a rescission,[71] nor will the appointment of a receiver, who is merely a receiver of the rents and profits due from the lessee and is under instruction not to interfere with the lessee's possession, have such effect.[72] It is competent for a state to provide that a foreign railroad company shall not enjoy a lease of a railroad in such state until it acquires it in conformity to the statutes, and that a failure to conform to the statutes shall be a ground for forfeiture of the lease.[73]

2. Requisites and Validity — a. In General. The validity of a railroad lease with respect to its formal requisites and mode of execution is governed by the principles relating to leases and the formal execution of corporate contracts generally,[74] and any statutory requirements must be complied with;[75] but it will be presumed, in the absence of evidence to the contrary, that all the proceedings of the directors and stock-holders were regular and valid,[76] and although irregular,

66. Barr *v.* New York, etc., R. Co., 125 N. Y. 263, 26 N. E. 145 [*reversing* 52 Hun 555, 5 N. Y. Suppl. 623]; Jesup *v.* Illinois Cent. R. Co., 43 Fed. 483.

67. Knickerbocker Trust Co. *v.* O'Rourke Engineering Constr. Co., 124 N. Y. App. Div. 210, 108 N. Y. Suppl. 707, holding further that the lessee of railroad cars waives any right to disaffirm the lease for breach of warranty, where without attempting to rescind or suggesting any ground justifying a rescission, it makes an arrangement for subleasing cars not needed by it.

68. South Carolina, etc., R. Co. *v.* Augusta Southern R. Co., 111 Ga. 420, 36 S. E. 593.

69. South Carolina, etc., R. Co. *v.* Augusta Southern R. Co., 111 Ga. 420, 36 S. E. 593.

70. Pittsburg, etc., R. Co. *v.* Columbus, etc., R. Co., 19 Fed. Cas. No. 11,197, 8 Biss. 456.

71. Pittsburg, etc., R. Co. *v.* Columbus, etc., R. Co., 19 Fed. Cas. No. 11,197, 8 Biss. 456.

72. Pittsburg, etc., R. Co. *v.* Columbus, etc., R. Co., 19 Fed. Cas. No. 11,197, 8 Biss. 456.

73. Louisiana, etc., R. Co. *v.* State, 75 Ark. 435, 88 S. W. 559, holding, however, that the Arkansas statute of 1901, providing for the forfeiture of such a lease if not made in conformity with the statute, is not retroactive.

74. See Corporations, 10 Cyc. 1000 *et seq.*; Landlord and Tenant, 24 Cyc. 894 *et seq.*

Consent of stock-holders see *supra*, VII, C, 1, e.

Power of subcommittee.— Where the executive committee of a railroad company appoint from their number a subcommittee to confer with a similar committee from another company and agree upon the terms of a lease, and report the same to the executive committee, the subcommittee has no right to make a contract binding upon the company, and the casual presence at such meeting and assent of other members of the executive committee, who with the subcommittee would constitute a majority thereof, will not make the agreement signed by the subcommittee a contract binding upon the company. Dows *v.* Chicago, etc., R. Co., 7 Fed. Cas. No. 4,048.

Although a lease is not signed if it was reduced to writing and acted upon and partially performed by both parties it must be considered as binding as if signed. Farmers' Loan, etc., Co. *v.* St. Joseph, etc., R. Co., 2 Fed. 117, 1 McCrary 247.

75. Ohio, etc., R. Co. *v.* Indianapolis, etc., R. Co., 3 Ohio Dec. (Reprint) 458, 5 Am. L. Reg. 733; Rue *v.* Missouri Pac. R. Co., 74 Tex. 474, 8 S. W. 533, 15 Am. St. Rep. 852; Kent Coast R. Co. *v.* London, etc., R. Co., L. R. 3 Ch. 656, 19 L. T. Rep. N. S. 174, 16 Wkly. Rep. 1027.

Acknowledgment.— A lease by one railroad company to another for a term of more than three years must be legally acknowledged. Ohio, etc., R. Co. *v.* Indianapolis, etc., R. Co., 3 Ohio Dec. (Reprint) 458, 5 Am. L. Reg. 733.

An unrecorded lease of cars is valid as between the parties. Meyer *v.* Western Car Co., 102 U. S. 1, 26 L. ed. 59.

76. Hill *v.* Atlantic, etc., R. Co., 143 N. C.

the acts done, if within the powers of the company, may be subsequently ratified.[77] The right to operate a railroad and take tolls therefrom is not necessarily of a corporate character, so as to render a lease to an individual invalid;[78] and where a statute permits railroad companies to lease their roads to other railroad companies, a lease to a private individual while not expressly authorized is not void upon grounds of public policy.[79] A lease procured through fraud or collusion or by directors who are pecuniarily interested in both companies is voidable,[80] but is not absolutely void,[81] and may be ratified,[82] which may be by acquiescence or conduct inconsistent with any right or intention to avoid it.[83] If the lease is strictly *ultra vires* as being beyond the corporate powers of the company it is void.[84] A lease of a railroad is not invalid because executed pursuant to a scheme that another corporation shall own the stock of the lessee,[85] but a provision in the lease that the lessor renounces all its duties to the public vitiates the lease.[86] Any conditions in the lease imposed by the lessor which would prevent the lessee from properly performing its public duties as a common carrier are contrary to public policy and void,[87] but if the conditions are conditions subsequent the lessee takes the road free from the illegal condition.[88] Where a railroad company by a single instrument, the provisions of which are, however, separate and distinct, contracts to sell its road and until it can make a good title thereto free from encumbrances, to lease it to the purchaser, the lease if authorized is valid, although the contract of sale may be *ultra vires*.[89]

b. Rent and Term of Lease. A railroad company may lease its road for a term longer than the period of its corporate existence where the charter is subject to renewal.[90] Power to lease includes the power to fix the rent and the manner in which it shall be paid,[91] and the lessee may agree as rent to pay or guarantee

539, 55 S. E. 854, 9 L. R. A. N. S. 606; Oregon R. Co. *v.* Oregon R., etc., Co., 28 Fed. 505.

77. Oregon R. Co. *v.* Oregon R., etc., Co., 28 Fed. 505.

78. Middlebury Bank *v.* Edgerton, 30 Vt. 182.

79. Woodruff *v.* Erie, etc., R. Co., 93 N. Y. 609 [*reversing* 25 Hun 246].

80. Barr *v.* New York, etc., R. Co., 125 N. Y. 263, 26 N. E. 145 [*reversing* 52 Hun 555, 5 N. Y. Suppl. 623].

The right to avoid a lease made by common directors is in the corporation and not the minority stock-holders. Continental Ins. Co. *v.* New York, etc., R. Co., 187 N. Y. 225, 79 N. E. 1026 [*affirming* 103 N. Y. App. Div. 282, 93 N. Y. Suppl. 27].

81. Continental Ins. Co. *v.* New York, etc., R. Co., 187 N. Y. 225, 79 N. E. 1026 [*affirming* 103 N. Y. App. Div. 282, 93 N. Y. Suppl. 27]; Barr *v.* New York, etc., R. Co., 125 N. Y. 263, 26 N. E. 145 [*reversing* 52 Hun 555, 5 N. Y. Suppl. 623]; Jesup *v.* Illinois Cent. R. Co., 43 Fed. 483.

82. Continental Ins. Co. *v.* New York, etc., R. Co., 187 N. Y. 225, 79 N. E. 1026 [*affirming* 103 N. Y. App. Div. 282, 93 N. Y. Suppl. 27].

83. Barr *v.* New York, etc., R. Co., 125 N. Y. 263, 26 N. E. 145 [*reversing* 52 Hun 555, 5 N. Y. Suppl. 623].

84. Thomas *v.* West Jersey R. Co., 101 U. S. 71, 25 L. ed. 950.

Lease of stock-yards.—A lease by a railroad company of its stock-yards to one of its own agents, the company agreeing to pay him for loading and unloading stock, for which he was to furnish forage to be charged against shippers and collected by him, is void under the Missouri statute prohibiting officers or employees of railroad companies to be interested in furnishing supplies to such companies or in the business of transportation of freight or passengers over the roads owned or operated by them. Rue *v.* Missouri Pac. R. Co., 74 Tex. 474, 8 S. W. 533, 15 Am. St. Rep. 852.

85. Flynn *v.* Brooklyn City R. Co., 9 N. Y. App. Div. 269, 41 N. Y. Suppl. 566 [*affirmed* in 158 N. Y. 493, 53 N. E. 520].

86. Anderson *v.* Union Terminal R. Co., 161 Mo. 411, 61 S. W. 874.

87. Metropolitan Trust Co. *v.* Columbus, etc., R. Co., 95 Fed. 18.

88. Metropolitan Trust Co. *v.* Columbus, etc., R. Co., 95 Fed. 18.

89. U. S. Trust Co. *v.* Mercantile Trust Co., 88 Fed. 140, 31 C. C. A. 427 [*affirming* 80 Fed. 18].

90. Gere *v.* New York Cent., etc., R. Co., 19 Abb. N. Cas. (N. Y.) 193; Union Pac. R. Co. *v.* Chicago, etc., R. Co., 163 U. S. 564, 16 S. Ct. 1173, 41 L. ed. 265 [*affirming* 51 Fed. 309, 2 C. C. A. 174 (*affirming* 47 Fed. 15)].

91. Day *v.* Ogdensburgh, etc., R. Co., 107 N. Y. 129, 13 N. E. 765; Gere *v.* New York Cent., etc., R. Co., 19 Abb. N. Cas. (N. Y.) 193; Henry *v.* Pittsburg, etc., R. Co., 5 Ohio S. & C. Pl. Dec. 41, 2 Ohio N. P. 118; Sidell *v.* Missouri Pac. R. Co., 78 Fed. 724, 24 C. C. A. 216; Hazard *v.* Vermont, etc., R. Co., 17 Fed. 753.

the payment of the interest on the bonds of the lessor during the term of the lease,[92] or a part of the principal of such bonds annually,[93] or the entire amount thereof at the expiration of the lease;[94] and where the rent is to be paid in the form of dividends or interest on bonds, it may be made payable directly to the stock-holders or bondholders instead of to the lessor company to be distributed by it.[95] An agreement to pay rent to a third company does not make the lease void for want of consideration, where such company owns substantially all of the stock and bonds of the lessor.[96]

c. Subletting or Assignment. The legislative authority of a railroad company to lease its road passes to the lessee as a part of the franchise, in the absence of any provision to the contrary in the lease;[97] and the lessee may, in the absence of statute, sublet or assign the lease,[98] except where it contains a covenant to the contrary;[99] but the relation between the lessor and lessee being one of privity, both of contract and estate, the lessee cannot avoid its liability by an assignment of the lease.[1] A contract right acquired by one railroad company to use a portion of the track of another passes to the lessee of its road as an appurtenance thereto, in the absence of any provision in the contract against its assignment.[2] An assignment of a lease of a railroad must be in writing,[3] but the validity of the assignment is not affected by the insolvency of the assignee.[4] Where the road of a company which has leased certain trackage and terminal facilities is sold under foreclosure, if its successor and the lessor continue to act under the lease and recognize it as valid and binding between them, the former will be bound thereby without any formal assignment.[5]

d. Who May Question Validity. If a lease, although *ultra vires*, is not in violation of any statute or contrary to public policy, it seems that only the immediate parties thereto, the companies or the stock-holders who are parties by representation, may question its validity upon the ground of a want of authority to make it.[6] Its validity may be attacked by stock-holders against whom no principle of estoppel exists,[7] but not by mortgage bondholders who stand upon a security taken in express subjection to the lease.[8] A third person not a party to the lease who has entered into a valid contract with the lessee for services to be rendered by the latter, and received the benefit thereof, cannot, in an action upon such contract, plead as a defense that the lessee was operating under a void lease;[9] and in an action by the lessor and lessee to enjoin a third company from constructing a competing line without legislative authority, the fact that the lease was not acknowledged and recorded as required by statute cannot be set up by defendant.[10] Where the lease is unauthorized and contrary to public

92. Day *v.* Ogdensburgh, etc., R. Co., 107 N. Y. 129, 13 N. E. 765; Gere *v.* New York Cent., etc., R. Co., 19 Abb. N. Cas. (N. Y.) 193; Eastern Townships' Bank *v.* St. Johnsbury, etc., R. Co., 40 Fed. 423.

93. Day *v.* Ogdensburgh, etc., R. Co., 107 N. Y. 129, 13 N. E. 765.

94. Gere *v.* New York Cent., etc., R. Co., 19 Abb. N. Cas. (N. Y.) 193.

95. Ætna Ins. Co. *v.* Albany, etc., R. Co., 156 Fed. 132.

96. Union Pac. R. Co. *v.* Chicago, etc., R. Co., 163 U. S. 564, 16 S. Ct. 1173, 41 L. ed. 265 [*affirming* 51 Fed. 309, 2 C. C. A. 174 (*affirming* 47 Fed. 15)].

97. Georgia R., etc., Co. *v.* Maddox, 116 Ga. 64, 42 S. E. 315.

98. Philadelphia, etc., R. Co. *v.* Catawissa R. Co., 53 Pa. St. 20.

99. Terre Haute, etc., R. Co. *v.* Peoria, etc., R. Co., 61 Ill. App. 405; Boston, etc., R. Co. *v.* Boston, etc., R. Co., 65 N. H. 393, 23 Atl. 529.

1. Frank *v.* New York, etc., R. Co., 7 N. Y. St. 814.

2. Philadelphia, etc., R. Co. *v.* Catawissa R. Co., 53 Pa. St. 20.

3. Frank *v.* New York, etc., R. Co., 7 N. Y. St. 814.

4. Frank *v.* New York, etc., R. Co., 7 N. Y. St. 814.

5. Jacksonville, etc., R. Co. *v.* Louisville, etc., R. Co., 150 Ill. 480, 37 N. E. 924 [*affirming* 47 Ill. App. 414].

6. Vermont, etc., R. Co. *v.* Vermont Cent. R. Co., 34 Vt. 1.

7. Memphis, etc., R. Co. *v.* Grayson, 88 Ala. 572, 7 So. 122, 16 Am. St. Rep. 69; Tippecanoe County *v.* Lafayette, etc., R. Co., 50 Ind. 85.

8. Vermont R. Co. *v.* Vermont Cent. R. Co., 34 Vt. 1.

9. Southern Pac. R. Co. *v.* U. S., 28 Ct. Cl. 77.

10. Pennsylvania R. Co. *v.* National R. Co., 23 N. J. Eq. 441.

policy the state by its attorney-general may sue in equity for preventive relief and is not confined to an action at law to forfeit the charter.[11]

e. Estoppel to Deny Validity. While there is some conflict of authority as to the application of the doctrine of estoppel in the case of corporate contracts generally, where the contract is *ultra vires*,[12] the weight of authority as to railroad leases is that if the lease is strictly *ultra vires* it is void and cannot be made good by ratification or estoppel,[13] and that, although the contract has been partly executed and one company has enjoyed benefits thereunder, it is not estopped to set up its invalidity in an action to enforce a covenant in the lease,[14] or to recover rents due according to the terms of the lease;[15] but the rule is otherwise where the lease is authorized and the alleged invalidity consists only in some irregularity or informality in its execution or ratification by the stock-holders,[16] or where it is merely voidable as on account of the conflicting pecuniary interests of common directors in both companies.[17] A stock-holder who voted for the lease will be estopped to attack its validity as long as the company remains committed thereto, but not after it has been formally repudiated as invalid by a subsequent meeting of the stock-holders.[18]

3. Construction and Operation — a. In General. In construing railroad leases the general rules in regard to the construction of leases and contracts generally apply.[19] The contract must be so construed as to carry out the intention

11. Stockton *v.* New Jersey Cent. R. Co., 50 N. J. Eq. 52, 24 Atl. 964, 17 L. R. A. 97.

12. See Corporations, 10 Cyc. 1146 *et seq.*

13. See *infra*, VII, C, 6, e.

14. Central Transp. Co. *v.* Pullman's Palace Car Co., 139 U. S. 24, 11 S. Ct. 478, 35 L. ed. 55.

15. Oregon R., etc., Co. *v.* Oregonian R. Co., 145 U. S. 52, 12 S. Ct. 814, 36 L. ed. 620; Oregon R., etc., Co. *v.* Oregonian R. Co., 130 U. S. 1, 9 S. Ct. 409, 32 L. ed. 837; Central Transp. Co. *v.* Pullman's Palace-Car Co., 139 U. S. 24, 11 S. Ct. 478, 35 L. ed. 55. But see Camden, etc., R. Co. *v.* May's Landing, etc., R. Co., 48 N. J. L. 530, 7 Atl. 523; Woodruff *v.* Erie R. Co., 93 N. Y. 609 [*reversing* 25 Hun 246].

Recovery independent of contract see *infra*, VII, C, 6, e.

16. Humphreys *v.* St. Louis, etc., R. Co., 37 Fed. 307.

17. Barr *v.* New York, etc., R. Co., 125 N. Y. 263, 26 N. E. 145 [*reversing* 52 Hun 555, 5 N. Y. Suppl. 623]; Jesup *v.* Illinois Cent. R. Co., 43 Fed. 483.

18. Memphis, etc., R. Co. *v.* Grayson, 88 Ala. 572, 7 So. 122, 16 Am. St. Rep. 69.

19. See Contracts, 9 Cyc. 577; Landlord and Tenant, 24 Cyc. 914.

Particular contracts construed.— Where one railroad company leased its road to another, which agreed to equip it with engines, cars, etc., and to give as favorable accommodation to its business as if they owned it, and to run regular trains and also extra trains when required, for which last they should be allowed "the actual cost of running the same," it being further agreed that the lessees should collect the revenues of the leased road, and before paying them to the lessors take out a certain sum semiannually for running the trains over their road, and a certain proportion of the balance for the use of their road by such trains, it was held that the "actual cost" of the extra trains included only money actually paid out and not a proportion of the expense of the lessee's road or the wear and tear on its tracks. Lexington, etc., R. Co. *v.* Fitchburg R. Co., 9 Gray (Mass.) 226. A lease does not vest the lessee with authority of its own motion to put in force unexecuted franchises of construction and appropriation vested in the lessor, where it does not expressly so provide, but on the contrary impliedly reserves such right to the lessor, the lease providing that the lessor might, at the request of the lessee, execute every corporate power, which the lessor might then or thereafter put in force to enable the lessee to enjoy all the rights, privileges, etc., of the premises demised. Lewis *v.* Philadelphia, etc., R. Co., 39 Leg. Int. (Pa.) 13. Where a railroad company which guaranteed the bonds of another company with a right of subrogation to the mortgage lien further agreed "either to furnish equipment for the operation of said road, or to lease and operate the same on terms to be agreed upon between them," this stipulation cannot be construed as a contract to lease for a rental sufficient to pay the interest on the guaranteed bonds. Dows *v.* Chicago, etc., R. Co., 7 Fed. Cas. No. 4,048. Where a lease stipulated that if the lessor should become dissatisfied with the reserved rent and his claim was not adjusted he might apply to "the chancellor of the state of New York, for the time being," to appoint appraisers, it was held that the parties must have intended the court of chancery and not the mere personal incumbent of the chancellorship and that the supreme court having subsequently succeeded to the powers and duties of the court of chancery, the application must be to this tribunal. New York Cent. R. Co. *v.* Saratoga, etc., R. Co., 39 Barb. (N. Y.) 289.

of the parties,[20] which must be gathered from the instrument as a whole,[21] and in case of doubt by reference to the subject-matter, situation of the parties, and circumstances and conditions existing at the time of its execution.[22] The practical construction given to the contract by the parties as shown by their subsequent acts is also a material factor in determining their intention.[23] Where there is no uncertainty or ambiguity the terms of the contract as expressed therein must govern,[24] and in the absence of anything to show a contrary intention, the words used will be construed according to their ordinary and popular sense.[25] The lease must also be construed with reference to the objects proposed by the existing charters of the companies at the time it was made.[26] An agreement in the lease to submit differences to arbitration does not permit one of the parties which has invoked the jurisdiction of a court of equity to limit such jurisdiction and to prevent the court from determining all the equities between the parties relative to the subject-matter,[27] or affect the right of stock-holders to sue where the dispute is not between the companies but between the stock-holders and the companies.[28] A lease made without legislative authority does not *ipso facto* dissolve the corporation,[29] or release a subscriber to its stock from his subscription,[30] or affect the liability of the company to be sued upon a liability incurred prior to the lease.[31]

b. Nature of Contract. It is frequently important to determine both as affecting the right to execute and the rights and liabilities resulting therefrom, whether a particular contract is in fact a lease,[32] and this must be determined

20. *In re* New York Cent. R. Co., 49 N. Y. 414 [*reversing* 49 Barb. 501]; Southern R. Co. *v.* Franklin, etc., R. Co., 96 Va. 693, 32 S. E. 485, 44 L. R. A. 297; Jesup *v.* Illinois Cent. R. Co., 43 Fed. 483.

21. March *v.* Eastern R. Co., 43 N. H. 515; Mt. Morris *v.* King, 77 Hun (N. Y.) 18, 28 N. Y. Suppl. 281; Southern R. Co. *v.* Franklin, etc., R. Co., 96 Va. 693, 32 S. E. 485, 44 L. R. A. 297; Chicago, etc., R. Co. *v.* Denver, etc., R. Co., 143 U. S. 596, 12 S. Ct. 479, 36 L. ed. 277 [*modifying* and *affirming* 45 Fed. 304].

22. *Massachusetts.*— Eastern R. Co. *v.* Rogers, 124 Mass. 527.

Michigan.— Pere Marquette R. Co. *v.* Wabash R. Co., 141 Mich. 215, 104 N. W. 650.

New Hampshire.—March *v.* Eastern R. Co., 43 N. H. 515.

New York.— *In re* New York Cent. R. Co., 49 N. Y. 414 [*reversing* 49 Barb. 501].

Ohio.— Henry *v.* Pittsburg, etc., R. Co., 5 Ohio S. & C. Pl. Dec. 41, 2 Ohio N. P. 118.

Virginia.— Southern R. Co. *v.* Franklin, etc., R. Co., 96 Va. 693, 32 S. E. 485, 44 L. R. A. 297.

United States.— Chicago, etc., R. Co. *v.* Denver, etc., R. Co., 143 U. S. 596, 12 S. Ct. 479, 36 L. ed. 277 [*modifying* and *affirming* 45 Fed. 304]; Jesup *v.* Illinois Cent. R. Co., 43 Fed. 483.

England.— West London R. Co. *v.* London, etc., R. Co., 11 C. B. 327, 17 Jur. 301, 22 L. J. C. P. 117, 7 R. & Can. Cas. 477, 73 E. C. L. 327.

See 41 Cent. Dig. tit. "Railroads," § 417.

Covenant for repairs.— Where the lease of a railroad with all its appurtenances and equipment provides that the lessee shall return the road at the expiration of the lease in as good repair as when leased, natural wear only excepted, it must be construed as requiring the lessee to keep and return the road in good running condition and to renew any structures which might become unsafe for use through accident or decay. Sturges *v.* Knapp, 31 Vt. 1.

23. Lewiston, etc., R. Co. *v.* Grand Trunk R. Co., 97 Me. 261, 54 Atl. 750; Vermont, etc., R. Co. *v.* Vermont Cent. R. Co., 34 Vt. 1; Grand Trunk Western R. Co. *v.* Chicago, etc., R. Co., 141 Fed. 785, 73 C. C. A. 43.

24. Pennsylvania Co. *v.* Erie, etc., R. Co., 108 Pa. St. 621.

25. Michigan Cent. R. Co. *v.* Pere Marquette R. Co., 128 Mich. 333, 87 N. W. 271.

26. March *v.* Eastern R. Co., 43 N. H. 515.

27. Chamberlain *v.* Connecticut Cent. R. Co., 54 Conn. 472, 9 Atl. 244.

28. March *v.* Eastern R. Co., 43 N. H. 515.

29. Troy, etc., R. Co. *v.* Kerr, 17 Barb. (N. Y.) 581.

30. Ottawa, etc., R. Co. *v.* Black, 79 Ill. 262; Hays *v.* Ottawa, etc., R. Co., 61 Ill. 422; Troy, etc., R. Co. *v.* Kerr, 17 Barb. (N. Y.) 581.

31. U. S. *v.* Little Miami, etc., R. Co., 1 Fed. 700.

32. South Carolina, etc., R. Co. *v.* Augusta Southern R. Co., 107 Ga. 164, 33 S. E. 36; U. S. Rolling Stock Co. *v.* Potter, 48 Iowa 56; Ohio, etc., R. Co. *v.* Indianapolis, etc., R. Co., 3 Ohio Dec. (Reprint) 458, 5 Am. L. Reg. N. S. 733; Great Northern R. Co. *v.* Eastern Counties R. Co., 9 Hare 306, 21 L. J. Ch. 837, 7 R. & Can. Cas. 643, 41 Eng. Ch. 306, 68 Eng. Reprint 520.

Particular contracts construed and held to constitute a lease see the following cases: Rome R. Co. *v.* Chattanooga, etc., R. Co., 94 Ga. 422, 21 S. E. 69; Louisville, etc., R. Co. *v.* Illinois Cent. R. Co., 174 Ill. 448, 51 N. E. 824; Michigan Cent. R. Co. *v.* Pere Marquette

not by the name given to it by the parties or the terms used but by its essential character.[33] So where railroad companies have power to enter into certain contracts but not to lease, an instrument, although termed a lease, may be valid as a traffic or other operating contract;[34] while on the other hand, in the absence of statute, any contract is unauthorized which is in substance and effect a lease, although it is not so called,[35] or it is expressly stipulated that it shall not be regarded as such.[36]

c. Subletting or Assignment. In accordance with the rules relating to leases generally,[37] if the conveyance is of the entire interest of the lessee it is an assignment of the lease, but if of only a part of the unexpired term, it is a sublease,[38] whatever may be the form or language of the instrument,[39] and if the transfer affects only a part of the leased property but passes the entire interest of the lessee in such portion, it is an assignment *pro tanto*.[40] A company in possession other than the lessee will be presumed to be in possession as the assignee of the term,[41] but is not estopped from showing that it is not an assignee.[42] An assignment of the lease creates a privity of estate between the original lessor and the assignee,[43] and the assignee is bound by covenants in the original lease which run with the land,[44] including the covenants to pay rent;[45] but there is no privity of contract between the original lessor and the assignee,[46] and between the original lessor and a sublessee there is no privity either of contract or estate,[47]

R. Co., 128 Mich. 333, 87 N. W. 271; March *v.* Eastern R. Co., 43 N. H. 515; Vermont, etc., R. Co. *v.* Vermont Cent. R. Co., 34 Vt. 1; Thomas *v.* West Jersey R. Co., 101 U. S. 71, 25 L. ed. 950. Contracts held not to be a lease see the following cases: Turner *v.* Potter, 56 Iowa 251, 9 N. W. 208; U. S. Rolling Stock Co. *v.* Potter, 48 Iowa 56; South Carolina, etc., R. Co. *v.* Carolina, etc., R. Co., 93 Fed. 543, 35 C. C. A. 423.

33. U. S. Rolling Stock Co. *v.* Potter, 48 Iowa 56; Union Pac. R. Co. *v.* Chicago, etc., R. Co., 163 U. S. 564, 16 S. Ct. 1173, 41 L. ed. 265 [*affirming* 51 Fed. 309, 2 C. C. A. 174 (*affirming* 47 Fed. 15)].

34. St. Joseph, etc., R. Co. *v.* St. Louis, etc., R. Co., 135 Mo. 173, 36 S. W. 602, 33 L. R. A. 607; Union Pac. R. Co. *v.* Chicago, etc., R. Co., 163 U. S. 564, 16 S. Ct. 1173, 41 L. ed. 265 [*affirming* 51 Fed. 309, 2 C. C. A. 174 (*affirming* 47 Fed. 15)].

35. Ohio, etc., R. Co. *v.* Indianapolis, etc., R. Co., 3 Ohio Dec. (Reprint) 458, 5 Am. L. Reg. N. S. 733; London, etc., R. Co. *v.* London, etc., R. Co., 4 De G. & J. 362, 5 Jur. N. S. 801, 28 L. J. Ch. 521, 7 Wkly. Rep. 591, 61 Eng. Ch. 284, 45 Eng. Reprint 140; Winch *v.* Birkenhead, etc., R. Co., 5 De G. & Sm. 562, 16 Jur. 1035, 64 Eng. Reprint 1243; Great Northern R. Co. *v.* Eastern Counties R. Co., 9 Hare 306, 21 L. J. Ch. 837, 7 R. & Can. Cas. 643, 41 Eng. Ch. 306, 68 Eng. Reprint 520.

36. Great Northern R. Co. *v.* Eastern Counties R. Co., 9 Hare 306, 21 L. J. Ch. 837, 7 R. & Can. Cas. 643, 41 Eng. Ch. 306, 68 Eng. Reprint 520.

37. See LANDLORD AND TENANT, 24 Cyc. 962 *et seq.*

38. *Indiana.*— Indianapolis, etc., Union *v.* Cleveland, etc., R. Co., 45 Ind. 281.

Missouri.— St. Joseph, etc., R. Co. *v.* St. Louis, etc., R. Co., 135 Mo. 173, 36 S. W. 602, 33 L. R. A. 607.

New Hampshire.— Boston, etc., R. Co. *v.* Boston, etc., R. Co., 65 N. H. 393, 23 Atl. 529.

New York.— Stewart *v.* Long Island R. Co., 102 N. Y. 601, 8 N. E. 200, 55 Am. Rep. 844; Frank *v.* New York, etc., R. Co., 7 N. Y. St. 814.

Texas.— Gulf, etc., R. Co. *v.* Settegast, 79 Tex. 256, 15 S. W. 228.

See 41 Cent. Dig. tit. "Railroads," §§ 419, 431.

39. St. Joseph, etc., R. Co. *v.* St. Louis, etc., R. Co., 135 Mo. 173, 36 S. W. 602, 33 L. R. A. 607; Boston, etc., R. Co. *v.* Boston, etc., R. Co., 65 N. H. 393, 23 Atl. 529.

The fact that a different rent is reserved in the second lease will not prevent its operating as an assignment, where it transfers the entire interest of the original lessee. Stewart *v.* Long Island R. Co., 102 N. Y. 601, 8 N. E. 200, 55 Am. Rep. 844.

40. Boston, etc., R. Co. *v.* Boston, etc., R. Co., 65 N. H. 393, 23 Atl. 529.

41. Ecker *v.* Chicago, etc., R. Co., 8 Mo. App. 223; Frank *v.* New York, etc., R. Co., 7 N. Y. St. 814.

42. Frank *v.* New York, etc., R. Co., 7 N. Y. St. 814.

43. St. Joseph, etc., R. Co. *v.* St. Louis, etc., R. Co., 135 Mo. 173, 36 S. W. 602, 33 L. R. A. 607; Stewart *v.* Long Island R. Co., 102 N. Y. 601, 8 N. E. 200, 55 Am. Rep. 844; West Virginia, etc., R. Co. *v.* McIntire, 44 W. Va. 210, 28 S. E. 696.

44. Stewart *v.* Long Island R. Co., 102 N. Y. 601, 8 N. E. 200, 55 Am. Rep. 844; West Virginia, etc., R. Co. *v.* McIntire, 44 W. Va. 210, 28 S. E. 696.

45. Stewart *v.* Long Island R. Co., 102 N. Y. 601, 8 N. E. 200, 55 Am. Rep. 844; Frank *v.* New York, etc., R. Co., 7 N. Y. St. 814.

46. Frank *v.* New York, etc., R. Co., 7 N. Y. St. 814.

47. St. Joseph, etc., R. Co. *v.* St. Louis,

and the sublessee is not bound by covenants in the original lease unless it has contracted to be so.[48] A covenant against subletting or assignment cannot be evaded by any indirect proceeding, such as the assignment by the lessee of the entire gross earnings, with an agreement to continue to operate the road under the direction of the assignee;[49] but a covenant against subletting or assignment is not broken by giving another a mere license to use the leased property,[50] and where one railroad company leases to another a portion of its right of way on which to construct the road of the latter, the lease being to the lessee and to "its successors and assigns forever," and another clause provides that the lessee shall not assign or sublet any of the rights granted, the latter clause will be construed as only preventing an assignment of such rights, separate from the road of the lessee and not to prevent their passing to an assignee of the lessee's road as a part thereof.[51] Although a lease provides that it shall not be assignable, if the assignee takes and operates the road under and by virtue of the lease it must be held to have assumed the duty imposed thereby upon the lessee to operate the road.[52] Where one railroad company leases the road of another and agrees to assume a lease taken by the latter of a third road, whether such assumption applies to the whole term of the assumed lease or only to the part thereof covered by the term of the second will depend upon the intention of the parties as shown by a proper construction of the contract.[53]

d. Property Rights and Franchises Included. The property rights and franchises included in the lease must be determined by the terms and proper construction of the contract,[54] which, however, will be presumed to include whatever rights and property of the lessor are necessary for the operation of the road and the proper exercise of the rights granted.[55] A lease of a railroad with all its appurtenances includes a contract right acquired by the lessor to use a portion of the track of a third company.[56]

e. Rents and Advances.[57] Where there are express provisions in the lease as to the amount or method of computing the rent and the time and manner of payment, the rights and liabilities of the companies must be determined by a proper construction of the contract,[58] and if no particular amount is stipulated

etc., R. Co., 135 Mo. 173, 36 S. W. 602, 33 L. R. A. 607.

48. Missouri, etc., R. Co. *v.* Keahey, 37 Tex. Civ. App. 330, 83 S. W. 1102.

49. Boston, etc., R. Co. *v.* Boston, etc., R. Co., 65 N. H. 393, 23 Atl. 529.

50. Pence *v.* St. Paul, etc., R. Co., 28 Minn. 488, 11 N. W. 80.

51. Minneapolis, etc., R. Co. *v.* St. Paul, etc., R. Co., 35 Minn. 265, 28 N. W. 705.

52. Schmidt *v.* Louisville, etc., R. Co., 101 Ky. 441, 41 S. W. 1015, 19 Ky. L. Rep. 666, 38 L. R. A. 809.

53. Jesup *v.* Illinois Cent. R. Co., 43 Fed. 483, holding that where the A company leased the road of the B company for forty years and then leased its own road to the C company for twenty years, the C company agreeing to assume the lease of the B road, the agreement will be construed as applying only during the continuance of the second lease, where the road of the A company is a connecting link between the C road and the B road, without which the latter would be of no use to the C company.

54. Gray *v.* Massachusetts Cent. R. Co., 171 Mass. 116, 50 N. E. 549; Norwich, etc., R. Co. *v.* Worcester, 147 Mass. 518, 18 N. E. 409; *In re* New York Cent. R. Co., 49 N. Y. 414 [*reversing* 49 Barb. 501]; Chicago, etc., R. Co. *v.* Denver, etc., R. Co., 143 U. S. 596, 12 S. Ct. 479, 36 L. ed. 277 [*modifying* and *affirming* 45 Fed. 304].

Lands included.— Where the lease in terms includes all the lands "upon and across which its said railroad, or any part thereof, or its machine shop, warehouses, freight or passenger depots or buildings, are constructed," it includes all lands acquired for use in operating the road, and without which the use of the road or any part thereof would be less convenient and valuable, although not absolutely necessary. *In re* New York Cent. R. Co., 49 N. Y. 414 [*reversing* 49 Barb. 501].

55. Chicago, etc., R. Co. *v.* Denver, etc., R. Co., 143 U. S. 596, 12 S. Ct. 479, 36 L. ed. 277 [*modifying* and *affirming* 45 Fed. 304].

56. Philadelphia, etc., R. Co. *v.* Catawissa R. Co., 53 Pa. St. 20.

57. Validity of lease as affected by provisions in regard to rents see *supra*, VII, C, 2, b.

58. Eastern R. Co. *v.* Rogers, 124 Mass. 527; Cincinnati, etc., R. Co. *v.* Indiana, etc., R. Co., 44 Ohio St. 287, 7 N. E. 139; Henry *v.* Pittsburg, etc., R. Co., 5 Ohio S. & C. Pl. Dec. 41, 2 Ohio N. P. 118; Vermont, etc., R. Co. *v.* Vermont Cent. R. Co., 34 Vt. 1; Ætna Ins. Co. *v.* Albany, etc., R. Co., 156 Fed. 132.

a promise to pay whatever is a reasonable amount will be implied.[59] A failure on the part of the lessor to perform an independent covenant does not affect the liability of the lessee for the agreed rent.[60]

4. Rights of Stock-Holders.[61] Stock-holders may sue to enjoin the execution of an unauthorized lease,[62] or to have it declared invalid and canceled,[63] or to enforce any right growing out of the lease and affecting their interests where the company refuses to do so,[64] but not otherwise.[65] Where by statute a certain proportion of the stock-holders may authorize a lease, the minority cannot defeat the right on the ground that the lease would impair the market value of the stock or prevent the payment of dividends on the common stock during the term of the lease;[66] but the stock-holders have a right to insist that the terms of the lease as agreed upon in so far as they affect their interests shall be carried out.[67] If the lease was authorized and not contrary to public policy and is objected to only upon the ground of being prejudicial to the rights of stock-holders, it cannot be attacked by stock-holders who voted to approve it, but only by the dissenting minority,[68] and stock-holders having a right to object must not be guilty of laches in asserting their objection.[69] An agreement by the lessee to pay a rental which will produce a certain dividend on the stock of the lessor does not constitute a contract to which the holders of such stock are parties or privies, so as to entitle them to maintain an action therefor against the lessee.[70]

5. Rights of Creditors and Bondholders. It seems that a railroad company in debt cannot transfer its entire property by lease so as to prevent the application of the property at its full valte to the satisfaction of its debts,[71] or lease its road to a particular creditor to be operated by him indefinitely, according to his own discretion and for his own benefit.[72] A lease may be made upon such terms as to constitute an assignment for the benefit of creditors,[73] in which case any provisions for preference if forbidden by law are void;[74] but where a lease is

Division of earnings.—A provision of a lease that the lessee "shall, in each and every year of the term demised, pay or cause to be paid to said [lessor], in the manner and at times hereinafter specified, thirty per-centum of the gross earnings of the demised property," is not one for the payment of rental but for the division of the earnings of the property, as earnings; and under it thirty per cent of such earnings become in equity the property of the lessor at once upon their receipt, being held by the lessee in trust for the purpose specified in the lease. Terre Haute, etc., R. Co. *v.* Cox, 102 Fed. 825, 42 C. C. A. 654.

59. Rome R. Co. *v.* Chattanooga, etc., R. Co., 94 Ga. 422, 21 S. E. 69.

60. Henry *v.* Pittsburg, etc., R. Co., 5 Ohio S. & C. Pl. Dec. 41, 2 Ohio N. P. 118.

61. Necessity for consent of stock-holders and rights of the dissenting minority see *supra*, VII, C, 1, e.

62. Winch *v.* Birkenhead, etc., R. Co., 5 De G. & Sm. 562, 16 Jur. 1035, 64 Eng. Reprint 1243.

63. Tippecanoe County *v.* Lafayette, etc., R. Co., 50 Ind. 85.

64. Henry *v.* Pittsburg, etc., R. Co., 5 Ohio S. & C. Pl. Dec. 41, 2 Ohio N. P. 118.

65. Flynn *v.* Brooklyn City R. Co., 9 N. Y. App. Div. 269, 41 N. Y. Suppl. 566 [*affirmed* in 158 N. Y. 493, 53 N. E. 520].

66. Middletown *v.* Boston, etc., R. Co., 53 Conn. 351, 5 Atl. 706, where the charter provided that no dividend should be declared on the common stock until after a seven per cent annual dividend on the preferred stock, and the rent stipulated for in the lease was only sufficient to produce a four per cent dividend on the preferred stock.

67. March *v.* Eastern R. Co., 43 N. H. 515, holding further that to entitle stock-holders to equitable relief it is not necessary to charge any fraud or collusion on the part of the directors, but that it is sufficient that the directors have misinterpreted the rights growing out of the lease.

68. Boston, etc., R. Co. *v.* Boston, etc., R. Co., 65 N. H. 393, 23 Atl. 527.

69. Boston, etc., R. Co. *v.* Boston, etc., R. Co., 65 N. H. 393, 23 Atl. 527; Hill *v.* Atlantic, etc., R. Co., 143 N. C. 539, 55 S. E. 854. 9 L. R. A. N. S. 606.

70. Beveredge *v.* New York El. R. Co., 112 N. Y. 1, 19 N. E. 489, 2 L. R. A. 648.

71. See Chicago, etc., R. Co. *v.* Chicago Third Nat. Bank, 134 U. S. 276, 10 S. Ct. 550, 33 L. ed. 900.

72. Cleveland, etc., R. Co. *v.* La Crosse, etc., R. Co., 5 Fed. Cas. No. 2,887, holding that such lease will be declared invalid at the suit of other creditors.

73. Bittenbender *v.* Sunbury, etc., R. Co., 40 Pa. St. 269; Lucas *v.* Sunbury, etc., R. Co., 32 Pa. St. 458.

Lease held not to be an assignment in trust for benefit of creditors with preferences see Gratz *v.* Pennsylvania R. Co., 41 Pa. St. 447.

74. Bittenbender *v.* Sunbury, etc., R. Co., 40 Pa. St. 269.

authorized an objection that it would impair the rights of bondholders or creditors can be made only by them and not by a stock-holder.[75] A judgment after a lease does not of its own right defeat the lease or deprive the lessee company of its interest or possession, but operates against the lessor and the interest retained in the leased road.[76] Where a railroad company has authority to lease its road a statute authorizing it to mortgage the road will not be construed as impliedly prohibiting a lease, but the lease will be enjoined at the instance of the mortgage trustee, where its terms are prejudicial to the rights of creditors as secured by the statute authorizing the mortgage.[77] If the lessee covenants to discharge all valid liens, creditors having such liens may sue in equity to enforce their payment,[78] and rents due under a lease are subject to garnishment by creditors of the lessor.[79] Where simultaneously with the execution of a lease, and as part of the same transaction, certain mortgages and agreements are made for the benefit of bondholders, a trustee for such bondholders may sue to compel the lessee specifically to perform its agreement to operate the road,[80] or to recover damages for the breach of conditions of the lease;[81] but where the trustee in such an action for the benefit of bondholders recovers judgment against the lessee, the fact that the lessee denied the breach and resisted a recovery will not prevent it from asserting as owner of a portion of such bonds its right to a *pro rata* share of the recovery.[82]

6. Rights and Liabilities of Lessor and Lessee — a. In General. The rights, duties, and liabilities of the lessor and lessee as between themselves, in so far as they are provided for in the lease, must be governed by the terms and proper construction of that contract;[83] and where the lease specifies the duties and liabilities of each, neither company is restricted in any manner not provided in the contract, but may obtain new legislative grants and avail itself of any new powers which will not interfere with the due operation of its contract with the other company.[84] The lessee ordinarily, with respect to the leased property, succeeds to all the rights and franchises of the lessor,[85] and in its operation of the leased

75. Middletown *v.* Boston, etc., R. Co., 53 Conn. 351, 5 Atl. 706.

76. Chicago, etc., R. Co. *v.* Chicago Third Nat. Bank, 134 U. S. 276, 10 S. Ct. 550, 33 L. ed. 900.

77. Phillips *v.* Eastern R. Co., 138 Mass. 122.

78. Chicago, etc., R. Co. *v.* Chicago Third Nat. Bank, 134 U. S. 276, 10 S. Ct. 550, 33 L. ed. 900 [*affirming* 26 Fed. 820], holding further that where a railroad company in debt leases its road and property to another company, which agrees to pay all judgment liens against the lessor and to complete the road, and the two companies execute a deed of trust to secure bonds of the lessor, the proceeds of which are received by the lessee and partly used for its own benefit, the lessee is in equity liable for debts which existed against the lessor before the lease, although they were not reduced to judgment.

79. Milwaukee, etc., R. Co. *v.* Brooks Locomotive Works, 121 U. S. 430, 7 S. Ct. 1094, 30 L. ed. 995, holding that where the leased road is operated by a mortgage trustee of the lessee, without assuming or taking any assignment of the lease, the obligation to pay for such use is to the lessor and the amount due subject to garnishment.

80. Schmidtz *v.* Louisville, etc., R. Co., 101 Ky. 441, 41 S. W. 1015, 19 Ky. L. Rep. 666, 38 L. R. A. 809.

81. Louisville, etc., R. Co. *v.* Schmidt, 112 Ky. 717, 66 S. W. 629, 23 Ky. L. Rep. 2097.

82. Louisville First Nat. Bank *v.* Louisville, etc., R. Co., 79 S. W. 280, 25 Ky. L. Rep. 2051.

83. Georgia, etc., R. Co. *v.* Southern R. Equipment Co., 107 Ga. 186, 33 S. E. 184; Lexington, etc., R. Co. *v.* Fitchburg R. Co., 9 Gray (Mass.) 226; Catawissa R. Co. *v.* Philadelphia, etc., R. Co., 168 Pa. St. 544, 32 Atl. 62, 3 Pa. Dist. 111, 14 Pa. Co. Ct. 280, 34 Wkly. Notes Cas. 11; Southern R. Co. *v.* Franklin, etc., R. Co., 96 Va. 693, 32 S. E. 485, 44 L. R. A. 297.

Construction and operation of lease see *supra*, VII, C, 3.

Set-off in action on covenants.— Where a railroad lease provides that the lessee shall pay annually from the gross earnings a certain sum to keep up the organization of the lessor, the lessee being compelled to operate the road until the termination of the lease, and furnish the means necessary therefor, it cannot set off against the amount set apart to keep up the lessor's organization the amount of a judgment which it holds against the lessor. Louisville, etc., R. Co. *v.* Cumberland, etc., R. Co., 54 S. W. 5, 55 S. W. 884, 21 Ky. L. Rep. 1126, 1409.

84. March *v.* Eastern R. Co., 43 N. H. 515.

85. Canton *v.* Canton Cotton Warehouse Co., 84 Miss. 268, 36 So. 266, 65 L. R. A.

road is not bound by any limitations in its own charter with respect to the rates which it is permitted to charge upon its own road;[86] but it succeeds to no greater rights than those of the lessor,[87] and must in operating the leased road be governed by the charter of the lessor.[88] So also where a company of one state leases a road in another state it is subject to local legislation in that state in the same manner as the lessor would have been if no lease had been made.[89] The lessee also succeeds to the charter obligations of the lessor and the necessity of performing its public duties.[90] It must operate the leased road,[91] and keep it in repair,[92] and cannot abandon or cease to operate any part thereof,[93] or change its location.[94] It must also furnish all necessary rolling stock and equipment for its proper operation and for the transportation of both freight and passengers,[95] and may be compelled by mandamus to so,[96] or enjoined from abandoning any of its public duties.[97] So also where the lease expressly or by clear implication provides that the lessee shall operate the road, it may be compelled specifically to perform its agreement,[98] and if an action at law would not afford adequate redress the court will compel it to operate the road for the term of the lease, although it cannot be operated except at a loss;[99] but where the lease or contract for the use of trackage and

561; Pennsylvania R. Co. *v.* Sly, 65 Pa. St. 205; London, etc., R. Co. *v.* South Eastern R. Co., 8 Exch. 584, 22 L. J. Exch. 193.

86. Palm *v.* New York, etc., R. Co., 60 N. Y. Super. Ct. 162, 17 N. Y. Suppl. 471; Pennsylvania R. Co. *v.* Sly, 65 Pa. St. 205.

87. State *v.* Mobile, etc., R. Co., 86 Miss. 172, 38 So. 732, 122 Am. St. Rep. 277.

88. Chicago *v.* Evans, 24 Ill. 52; Pennsylvania R. Co. *v.* Sly, 65 Pa. St. 205; McCandless *v.* Richmond, etc., R. Co., 38 S. C. 103, 16 S. E. 429, 18 L. R. A. 440.

89. Buffalo Stone, etc., Co. *v.* Delaware, etc., R. Co., 130 N. Y. 152, 29 N. E. 121 [*affirming* 7 N. Y. Suppl. 604]; McCandless *v.* Richmond, etc., R. Co., 38 S. C. 103, 16 S. E. 429, 18 L. R. A. 440; Stone *v.* Illinois Cent. R. Co., 116 U. S. 347, 6 S. Ct. 348, 388, 1191, 29 L. ed. 650.

90. *Illinois.*— People *v.* St. Louis, etc., R. Co., 176 Ill. 512, 52 N. E. 292, 35 L. R. A. 656.

Massachusetts.— Nichols *v.* Boston, etc., R. Co., 174 Mass. 379, 54 N. E. 881.

Mississippi.— State *v.* Mobile, etc., R. Co., 86 Miss. 172, 38 So. 732, 122 Am. St. Rep. 277.

New York.— Buffalo Stone, etc., Co. *v.* Delaware, etc., R. Co., 130 N. Y. 152, 29 N. E. 121 [*affirming* 7 N. Y. Suppl. 604].

Pennsylvania.— Com. *v.* Pennsylvania R. Co., 117 Pa. St. 637, 12 Atl. 38 [*reversing* 2 Pa. Co. Ct. 391]; Mullen *v.* Philadelphia Traction Co., 4 Pa. Co. Ct. 164, 20 Wkly. Notes Cas. 203.

See 41 Cent. Dig. tit. "Railroads," § 423.

The lessee is liable to indictment for failing to restore a highway to its former condition as required by the charter of the lessor. Com. *v.* Pennsylvania R. Co., 117 Pa. St. 637, 12 Atl. 38 [*reversing* 2 Pa. Co. Ct. 391].

The duty to pave and repair streets on which the road is located, imposed upon the lessor by its charter, is also by the acceptance of a lease of the road imposed upon the lessee so as to render it liable to the public for an injury due to the omission of such duty. Mullen *v.* Philadelphia Traction Co., 4 Pa. Co. Ct. 164, 20 Wkly. Notes Cas. 203.

Accommodations at stations.—A railroad company using a station under a rental contract with another company is liable for failing to provide certain conveniences and accommodations at the station under a statute requiring "each railroad and railway corporation operating a line of railway in the state of Texas for the transportation of passengers" to provide and maintain the same. State *v.* Southern Kansas R. Co., (Tex. Civ. App. 1907) 99 S. W. 167.

91. People *v.* St. Louis, etc., R. Co., 176 Ill. 512, 52 N. E. 292, 35 L. R. A. 656.

92. Miller *v.* New York Cent. R. Co., 125 N. Y. 118, 26 N. E. 35 [*reversing* 3 N. Y. Suppl. 245].

93. State *v.* Mobile, etc., R. Co., 86 Miss. 172, 38 So. 732, 122 Am. St. Rep. 277.

94. State *v.* Mobile, etc., R. Co., 86 Miss. 172, 38 So. 732, 122 Am. St. Rep. 277.

Change of location of track on right of way. — Where one railroad company leases to another the right to build and maintain a railroad upon land of the former, the parties may, after the track has been located and built, by oral agreement change its location within the limits specified in the lease. Minneapolis, etc., R. Co. *v.* St. Paul, etc., R. Co., 35 Minn. 265, 28 N. W. 705.

95. People *v.* St. Louis, etc., R. Co., 176 Ill. 512, 52 N. E. 292, 35 L. R. A. 656, holding that the lessee may be required to run separate trains for freight and passengers instead of mixed trains.

96. People *v.* St. Louis, etc., R. Co., 176 Ill. 512, 52 N. E. 292, 35 L. R. A. 656.

97. State *v.* Mobile, etc., R. Co., 86 Miss. 172, 38 So. 732, 122 Am. St. Rep. 277.

98. Schmidtz *v.* Louisville, etc., R. Co., 101 Ky. 441, 41 S. W. 1015, 19 Ky. L. Rep. 666, 38 L. R. A. 809; Southern R. Co. *v.* Franklin, etc., R. Co., 96 Va. 693, 32 S. E. 485, 44 L. R. A. 297.

99. Schmidtz *v.* Louisville, etc., R. Co., 101 Ky. 441, 41 S. W. 1015, 19 Ky. L. Rep. 666, 38 L. R. A. 809; Southern R. Co. *v.* Franklin,

terminal facilities is merely for the right to such use, to be paid for on a wheelage basis, and contains no express covenant to use the same, the lessee will not be compelled to do so or enjoined from using similar facilities of a different company.[1] If the lease is unauthorized the lessor company remains liable for the proper performance of all its charter obligations and public duties,[2] and is liable for any injuries growing out of the negligence of the lessee company or its servants in the operation of the leased road,[3] and the lessee will not be compelled to operate the road under a void lease.[4] It is also held that the lessor company remains liable for the performance of any of its corporate obligations antecedent to the lease, although the lease is authorized and the lessee company is also liable.[5] Under a statute imposing a penalty upon any company "operating" a railroad for violation of certain statutory regulations the lessor company is not liable for a penalty incurred by the lessee in the operation of the leased road.[6] Where one railroad company has leased its road to another it cannot bring an action against the latter merely to obtain an opinion of the court as to whether the lease is *ultra vires*, where neither company claims that it is invalid or asks to be relieved therefrom.[7]

b. Liability on Contracts.[8] In the absence of any statutory provision or agreement to the contrary the lessee takes the property without any liability for debts of the lessor not constituting a lien upon the leased property,[9] and is not bound by any contracts made by the lessor,[10] or liable for any breach of contract committed by the lessor prior to the lease;[11] and conversely the lessor company is not bound by any contracts entered into between the lessee and third persons to which it is not a party.[12] Where there is a provision in the lease as to debts and contracts the rights and liabilities of the parties depend upon the terms and proper consideration of the agreement.[13] A free pass given by the

etc., R. Co., 96 Va. 693, 32 S. E. 485, 44 L. R. A. 297. *Compare* Port Clinton R. Co. *v.* Cleveland, etc., R. Co., 13 Ohio St. 544; Henry *v.* Pittsburg, etc., R. Co., 5 Ohio S. & C. Pl. Dec. 41, 2 Ohio N. P. 118.

Where the lessee agrees to perform all the public obligations of the lessor with respect to the operation of the road, it cannot refuse to do so on the ground that the lessor by reason of its financial condition could not do so or that to do so would be onerous or unprofitable to the lessee. Winchester, etc., R. Co. *v.* Com., 106 Va. 264, 55 S. E. 692.

1. Grand Trunk R. Co. *v.* Chicago, etc., R. Co., 141 Fed. 785, 73 C. C. A. 43, holding further that if the contract be construed as imposing a duty to use such facilities, it cannot be enforced at the suit of other lessees of such facilities.

2. Central, etc., R. Co. *v.* Morris, 68 Tex. 49, 3 S. W. 457.

3. See *infra*, X, C, 4, a, (I).

4. People *v.* Colorado, etc., R. Co., 42 Fed. 638.

5. Chicago, etc., R. Co. *v.* Crane, 113 U. S. 424, 5 S. Ct. 578, 28 L. ed. 1064.

6. State *v.* Pittsburgh, etc., R. Co., 135 Ind. 578, 35 N. E. 700.

7. Ogdensburgh, etc., R. Co. *v.* Vermont, etc., R. Co., 4 Hun (N. Y.) 712.

8. **Contracts as common carrier** with passengers and shippers of goods see *infra*, X, C, 4, g.

9. Missouri Pac. R. Co. *v.* Owens, 1 Tex. App. Civ. Cas. § 384.

10. Pennsylvania Co. *v.* Erie, etc., R. Co., 108 Pa. St. 621, holding that a contract by the lessor to give an annual pass in consideration of a release of the right of way is not binding upon the lessee.

A covenant to build a station at a particular place entered into by a railroad company in a conveyance of the right of way is not binding upon, and cannot be specifically enforced against, a lessee of the road. Churchill *v.* Salisbury, etc., R. Co., 23 Wkly. Rep. 894 [*modifying* 32 L. T. Rep. N. S. 216].

11. Missouri Pac. R. Co. *v.* Owens, 1 Tex. App. Civ. Cas. § 384.

12. Galveston, etc., R. Co. *v.* Scheidemantel, (Tex. Civ. App. 1893) 24 S. W. 328. See also Mahoney *v.* Atlantic, etc., R. Co., 63 Me. 68; Arrowsmith *v.* Nashville, etc., R. Co., 57 Fed. 165.

13. Pennsylvania Co. *v.* Erie, etc., R. Co., 108 Pa. St. 621.

Particular provisions construed.— Where a lessee covenanted to pay all obligations of the lessor incurred "as common carriers, warehousemen, or otherwise," and thereafter to pay the interest on certain mortgage bonds of the lessor, it was held that "or otherwise" referred only to obligations of the same class as those enumerated and that earnings in the hands of receivers of the lessee were applicable to interest on the bonds rather than to judgments on the claims not falling within the class. Welden Nat. Bank *v.* Smith, 86 Fed. 398, 30 C. C. A. 133. Where a railroad company contracts for certain rails which are not to be delivered until called for by the company, and afterward leases its road and transfers to the lessee all contracts and agreements previously entered into in relation to the business of the road, the lessor is not liable for rails subsequently

lessor, being a mere license without any consideration, is revoked by the lease and need not be honored by the lessee.[14]

c. Liabilities Arising From Construction and Maintenance of Road.[15] For any injuries to property due to the original construction of the road or its appurtenances the lessor remains liable,[16] and the lessee is not liable,[17] but the lessee will be liable for the continuance of a nuisance created by the lessor,[18] and for damages resulting from its own acts in making repairs or alterations upon the leased road the lessee is liable,[19] and the lessor is not,[20] notwithstanding the lessor is bound under the terms of the lease to compensate the lessee for the cost of such work.[21] Where the lease provides that during the term the lessee will do and perform all acts which in the absence of such lease the law would impose upon the lessor, it must construct farm crossings which are required by statute.[22] On the expiration of the lease of a railroad the road reverts to the lessor, charged with the duty of maintaining stations established by the lessee during the term of the lease.[23]

d. Taxes and Assessments. In accordance with the general rules relating to landlord and tenant,[24] in the case of leases of railroads or other property by or to railroad companies, the duty of paying taxes and assessments chargeable against the leased property rests, in the absence of any special covenant or agreement, upon the lessor.[25] Under some statutes, however, for the purposes of taxation, the lessee is to be regarded as the owner,[26] or the lessee is required to pay the taxes in the first instance with a right to recover the amount from the lessor or to deduct the same from the rent,[27] and such a provision is not unconstitutional

delivered to the lessee without any authority from the lessor. Pittsburg, etc., R. Co. *v.* Harbaugh, 4 Brewst. (Pa.) 115.

14. Turner *v.* Richmond, etc., R. Co., 70 N. C. 1.

15. **Injuries from operation of road** due to defects in road-bed or other property see *infra*, X, C, 4, f.

16. Anderson *v.* Cincinnati Southern R. Co., 86 Ky. 44, 5 S. W. 49, 9 Ky. L. Rep. 303, 9 Am. St. Rep. 263.

17. Kearney *v.* New Jersey Cent. R. Co., 167 Pa. St. 362, 31 Atl. 637; Guinn *v.* Ohio River R. Co., 46 W. Va. 151, 33 S. W. 87, 76 Am. St. Rep. 806.

18. Western, etc., R. Co. *v.* Cox, 93 Ga. 561, 20 S. E. 68; Dickson *v.* Chicago, etc., R. Co., 71 Mo. 575; Tate *v.* Missouri, etc., R. Co., 64 Mo. 149.

19. Fifield *v.* New York, etc., R. Co., 125 N. Y. 704, 26 N. E. 752; Miller *v.* New York, etc., R. Co., 125 N. Y. 118, 26 N. E. 35 [*reversing* 3 N. Y. Suppl. 245]; Shores *v.* Southern R. Co., 72 S. C. 244, 51 S. E. 699; State *v.* Troy, etc., R. Co., 57 Vt. 144.

20. Chicago, etc., R. Co. *v.* Eichman, 47 Ill. App. 156; Ackerman *v.* Cincinnati, etc., R. Co., 143 Mich. 58, 106 N. W. 558, 114 Am. St. Rep. 640.

21. Miller *v.* New York, etc., R. Co., 125 N. Y. 118 [*reversing* 3 N. Y. Suppl. 245].

22. Buffalo Stone, etc., Co. *v.* Delaware, etc., R. Co., 130 N. Y. 152, 29 N. E. 121 [*affirming* 7 N. Y. Suppl. 604].

23. State *v.* New Haven, etc., R. Co., 37 Conn. 153, decided under a statute providing that no railroad company shall abandon any depot or station on its road after the same has been established for twelve months, except by the approval of the railroad commissioners.

24. See LANDLORD AND TENANT, 24 Cyc. 1074–1075.

Taxation of leased property in general see TAXATION.

25. Philadelphia, etc., R. Co. *v.* Baltimore City Appeal Tax Court, 50 Md. 397; Baltimore, etc., R. Co. *v.* Pausch, 8 Ohio S. & C. Pl. Dec. 677, 7 Ohio N. P. 624; East Tennessee, etc., R. Co. *v.* Morristown, (Tenn. Ch. App. 1895) 35 S. W. 771; Vermont, etc., R. Co. *v.* Vermont Cent. R. Co., 63 Vt. 1, 21 Atl. 262, 731, 10 L. R. A. 562.

The word "owner" in a tax statute relating to property owned by railroad companies does not apply to cars leased by it from another company. State *v.* St. Louis County, 84 Mo. 234 [*affirming* 13 Mo. App. 53].

26. Huck *v.* Chicago, etc., R. Co., 86 Ill. 352; Kennedy *v.* St. Louis, etc., R. Co., 62 Ill. 395; People *v.* Reid, 64 Hun (N. Y.) 553, 19 N. Y. Suppl. 528.

Under the New Hampshire statute a railroad may be taxed either to the lessor or to the lessee where the latter agrees thereto. Atlantic, etc., R. Co. *v.* State, 60 N. H. 133.

27. Philadelphia, etc., R. Co. *v.* Baltimore City Appeal Tax Ct., 50 Md. 397; Vermont, etc., R. Co. *v.* Vermont Cent. R. Co., 63 Vt. 1, 21 Atl. 262, 731, 10 L. R. A. 562.

Taxes paid by lessee under unconstitutional statute.— Where a statute imposes a tax upon the entire gross earnings of railroads and provides that the tax shall be paid by the lessee, and deducted by it from the rent, and such taxes are paid by the lessee while such legislation is upheld by the decision of the supreme court, the lessor will not be permitted to recover such amount from the lessee because of a subsequent decision by that court declaring the statute unconstitu-

as an impairment of the contract between the lessor and lessee.[28] The question of taxes and assessments is frequently provided for by covenants in the lease, and in such case the rights and liabilities of the parties as between themselves depend upon the terms and construction of their agreement,[29] and such covenants run with the land.[30]

e. Effect of Invalidity. If a lease is strictly *ultra vires* it is void,[31] and cannot be made good by ratification or estoppel,[32] or the basis of any right of action by or against either party.[33] Where the companies are *in pari delicto* the court will aid neither,[34] either to enforce the provisions of the lease or to cancel and set it aside.[35] Neither company can maintain a suit for specific performance of the

tional as imposing a tax upon interstate business. Vermont, etc., R. Co. *v.* Vermont Cent. R. Co., 63 Vt. 1, 21 Atl. 262, 731, 10 L. R. A. 562.

Taxation on gross receipts.—The amount to be deducted by the lessee for the payment of taxes on gross receipts should not be computed upon the basis of the mileage of the roads operated but according to the actual receipts of the leased road. Vermont, etc., R. Co. *v.* Vermont Cent. R. Co., 65 Vt. 366, 26 Atl. 638.

28. Vermont, etc., R. Co. *v.* Vermont Cent. R. Co., 63 Vt. 1, 21 Atl. 262, 731, 10 L. R. A. 562, holding, however, that the statute in question was unconstitutional in respect to a provision imposing a tax upon the gross earnings of the road, in so far as it related to interstate business.

29. Lewiston, etc., R. Co. *v.* Grand Trunk R. Co., 97 Me. 261, 54 Atl. 750; West Virginia, etc., R. Co. *v.* McIntire, 44 W. Va. 210, 28 S. E. 696.

Particular covenants construed.—A covenant by the lessee of a railroad that it "will pay, as operating expenses, all taxes and assessments . . . which may be lawfully levied or assessed" upon the property is not an assumption of liability for taxes already assessed and levied and constituting a lien from the beginning of the year during which the lease was made. Cleveland, etc., R. Co. *v.* Spencer, 73 Fed. 559, 19 C. C. A. 559. Where the lessee covenants "to pay all taxes now or hereafter imposed by law upon the property hereby demised and the earnings from or business thereof," the covenant will not be construed to cover the shares of capital stock of the lessor or the property or franchise upon which the value of such shares was made after the lease for purposes of taxation, especially where the parties have for thirty years acted upon a contrary construction. Erie, etc., R. Co. *v.* Pennsylvania R. Co., 208 Pa. St. 506, 57 Atl. 980. Where a lease provided that the lessee should pay all taxes, assessments, etc., imposed during the term upon the premises leased or on any business, earnings, or income of the same, or "by reason of the ownership thereof," and that the intent of such clause was that all governmental charges on the property or income therefrom capable of enforcement against the property of the company owning or the party leasing the same should be paid by the lessee, whatever the form of such charge, it was held that the interpreting clause did not limit the preceding one so as to require payment by the lessees of charges on "the property or income thereof" only, but that it was bound to pay a tax imposed on the franchise of the lessor, it being a tax imposed "by reason of the ownership" of the road. Thomas *v.* Cincinnati, etc., R. Co., 93 Fed. 587. A covenant by the lessee to "pay all taxes or duties levied or to be levied" on the premises during the term does not include assessments for paving a sidewalk. Twycross *v.* Fitchburg R. Co., 10 Gray (Mass.) 293.

Personal judgment against lessee.—Although the lessee of a railroad has covenanted to pay all lawful taxes and assessments, a city cannot recover a personal judgment against the lessee for the amount of an assessment, the covenant being solely for the benefit of the lessor. Chicago, etc., R. Co. *v.* Ottumwa, 112 Iowa 300, 83 N. W. 1074.

30. West Virginia, etc., R. Co. *v.* McIntire, 44 W. Va. 210, 28 S. E. 696.

31. Central Transp. Co. *v.* Pullman's Palace-Car Co., 139 U. S. 24, 11 S. Ct. 478, 35 L. ed. 55; Thomas *v.* West Jersey R. Co., 101 U. S. 71, 25 L. ed. 950; East St. Louis, etc., R. Co. *v.* Jarvis, 92 Fed. 735, 34 C. C. A. 639.

32. Ohio, etc., R. Co. *v.* Indianapolis, etc., R. Co., 3 Ohio Dec. (Reprint) 458, 5 Am. L. Reg. N. S. 733; Central Transp. Co. *v.* Pullman's Palace-Car Co., 139 U. S. 24, 11 S. Ct. 478, 35 L. ed. 55.

33. St. Louis, etc., R. Co. *v.* Terre Haute, etc., R. Co., 145 U. S. 393, 12 S. Ct. 953, 36 L. ed. 748 [*affirming* 33 Fed. 440]; Central Transp. Co. *v.* Pullman's Palace-Car Co., 139 U. S. 24, 11 S. Ct. 478, 35 L. ed. 55; Cox *v.* Terre Haute, etc., R. Co., 133 Fed. 371, 66 C. C. A. 433 [*affirming* 123 Fed. 439]; East St. Louis, etc., R. Co. *v.* Jarvis, 92 Fed. 735, 34 C. C. A. 639.

34. Ohio, etc., R. Co. *v.* Indanapolis, etc., R. Co., 3 Ohio Dec. (Reprint) 458, 5 Am. L. Reg. N. S. 733; St. Louis, etc., R. Co. *v.* Terre Haute, etc. R. Co., 145 U. S. 393, 12 S. Ct. 953, 36 L. ed. 748 [*affirming* 33 Fed. 440]; Great Northern R. Co. *v.* Eastern Counties R. Co., 9 Hare 306, 21 L. J. Ch. 837, 7 R. & Can. Cas. 643, 41 Eng. Ch. 306, 68 Eng. Reprint 520.

35. St. Louis, etc., R. Co. *v.* Terre Haute, etc., R. Co., 145 U. S. 393, 12 S. Ct. 953, 36 L. ed. 748 [*affirming* 33 Fed. 440], holding that where the lease has been party executed

conditions of the lease,[36] or to enjoin the other company from interfering with the rights secured thereby,[37] or to recover rents due under the lease,[38] or to enforce a covenant by the lessor that in case it should elect to terminate the lease before the end of the term it would pay the lessee the value of the unexpired term.[39] If the contract of lease is *ultra vires* a contract by a third company to guarantee the performance of its conditions is also void and cannot be enforced.[40] If the lease, although *ultra vires*, is not tainted with any immorality and has been partly executed, a court of equity will, independently of the contract, as far as possible do justice between the companies, by compelling one to return or account for what it has received under the lease,[41] or make such compensation as may be just for the use actually enjoyed of the leased property;[42] but in such case the action is not maintained upon the contract or according to its terms but upon the implied contract of defendant to return or make compensation for property or money which it has no right to retain.[43]

D. Contracts For Control, Operation, or Use of Railroads or Incidental Facilities — 1. Right to Make Contracts — a. In General.[44] Railroad companies can make only such contracts with regard to the control, operation, or use of their roads or incidental facilities as are within the powers expressly granted by their charters or other statutes, or may be implied as being fairly incidental thereto,[45] and they cannot, without legislative authority, make any contract which incapacitates them from performing their public duties or delegate such duties to another.[46] So a railroad company cannot, without legislative

the lessor cannot maintain a bill in equity to set aside and cancel it. But see Union Bridge Co. *v.* Troy, etc., R. Co., 7 Lans. (N. Y.) 240, holding that where the lease is not only *ultra vires* but is contrary to public policy, an action may be maintained by one of the parties to set it aside, and that the fact that the party is *in pari delicto* is immaterial, since the public interest requires that such relief should be given, and it is given to the public through the party, but that the court will not proceed any further in behalf of the party suing than to declare the lease invalid.

36. Ohio, etc., R. Co. *v.* Indianapolis, etc., R. Co., 3 Ohio Dec. (Reprint) 458, 5 Am. L. Reg. N. S. 733.

37. Great Northern R. Co. *v.* Eastern Counties R. Co., 9 Hare 306, 21 L. J. Ch. 837, 7 R. & Can. Cas. 643, 41 Eng. Ch. 306, 68 Eng. Reprint 520.

38. Central Transp. Co. *v.* Pullman's Palace-Car Co., 139 U. S. 24, 11 S. Ct. 478, 35 L. ed. 55; Cox *v.* Terre Haute, etc., R. Co., 133 Fed. 371, 66 C. C. A. 433 [*affirming* 123 Fed. 439]; East St. Louis, etc., R. Co. *v.* Jarvis, 92 Fed. 735, 34 C. C. A. 639.

39. Thomas *v.* West Jersey R. Co., 101 U. S. 71, 25 L. ed. 950.

40. Pennsylvania R. Co. *v.* St. Louis, etc., R. Co., 118 U. S. 290, 6 S. Ct. 1094, 30 L. ed. 83, 118 U. S. 630, 7 S. Ct. 24, 30 L. ed. 284.

41. Pullman's Palace-Car Co. *v.* Central Transp. Co., 171 U. S. 138, 18 S. Ct. 808, 43 L. ed. 108; Pullman's Palace-Car Co. *v.* Central Transp. Co., 72 Fed. 211; Pullman's Palace-Car Co. *v.* Central Transp. Co., 65 Fed. 158.

42. St. Louis, etc., R. Co. *v.* Cleveland, etc., R. Co., 125 U. S. 658, 8 S. Ct. 1011, 31 L. ed. 832; Farmers' Loan, etc., Co. *v.* St. Joseph, etc., R. Co., 2 Fed. 117, 1 McCrary 247.

43. Central Transp. Co. *v.* Pullman's Palace-Car Co., 139 U. S. 24, 11 S. Ct. 478, 35 L. ed. 55.

44. Powers and duties of receiver as to traffic contracts see *infra*, IX, E.

45. Pennsylvania R. Co. *v.* St. Louis, etc., R. Co., 118 U. S. 290, 6 S. Ct. 1094, 30 L. ed. 83, 118 U. S. 630, 7 S. Ct. 24, 30 L. ed. 284; East Anglian R. Co. *v.* Eastern Counties R. Co., 11 C. B. 775, 16 Jur. 249, 21 L. J. C. P. 23, 7 R. & Can. Cas. 150, 73 E. C. L. 775; Shrewsbury, etc., R. Co. *v.* North Western R. Co., 6 H. L. Cas. 113, 3 Jur. N. S. 775, 26 L. J. Ch. 482, 10 Eng. Reprint 1237 [*affirming* 4 De G. M. & G. 115, 17 Jur. 845, 22 L. J. Ch. 682, 1 Wkly. Rep. 172, 53 Eng. Ch. 90, 43 Eng. Reprint 451]. See also Ohio, etc., R. Co. *v.* Indianapolis, etc., R. Co., 3 Ohio Dec. (Reprint) 458, 5 Am. L. Reg. N. S. 733.

The purchase of a steamboat to run in connection with a railroad is an unauthorized departure from the business of the company. Pearce *v.* Madison, etc., R. Co., 21 How. (U. S.) 441, 16 L. ed. 184.

46. Central Transp. Co. *v.* Pullman's Palace-Car Co., 139 U. S. 24, 11 S. Ct. 478, 35 L. ed. 55; Thomas *v.* West Jersey R. Co., 101 U. S. 71, 25 L. ed. 950; Beman *v.* Rufford, 15 Jur. 914, 20 L. J. Ch. 537, 1 Sim. N. S. 550, 40 Eng. Ch. 550, 61 Eng. Reprint 212.

Disabling effect in view of increased business.— The fact that a contract by one railroad company granting to another a joint use of its terminal and trackage facilities may, by reason of increased business in the future, interfere with the proper performance by the former of its duties, will not affect the validity of the contract where there is no present interference or ground to apprehend that such will be the case within any reasonable time.

authority, by any form of contract turn over its road and franchises to another company,[47] nor can any other railroad company without similar authority make any contract to receive and operate the road and franchises of the first,[48] nor can one railroad company guarantee the performance by another of a contract which the latter had no authority to make.[49] A railroad company cannot except by legislative authority enter into a partnership with another railroad company.[50] While contracts are contrary to public policy which tend to disable a railroad company from performing its public duties,[51] or which tend to stifle competition,[52] the rule is otherwise where the contract tends to increase facilities for connections, through transportation, or otherwise to promote the interest and convenience of the public,[53] and the statutes will be liberally construed to sustain contracts of this character,[54] and if the subject-matter of the contract is not foreign to the purposes for which the company was created, and it may fairly be regarded as incidental to or consequential upon those things which the legislature has authorized, it ought not unless expressly prohibited be held *ultra vires*.[55] The validity of

Should the contingency occur the courts are competent to relieve from the consequences of the changed conditions. Union Pac. R. Co. *v.* Chicago, etc., R. Co., 163 U. S. 564, 16 S. Ct. 1173, 41 L. ed. 265 [*affirming* 51 Fed. 309, 2 C. C. A. 174 (*affirming* 47 Fed. 15)].

Telegraph franchise of railroad company.— Where a statute imposes upon a railroad company the duty of constructing and maintaining on its right of way a telegraph line for governmental, commercial, and other purposes, the company cannot, without legislative authority, alienate the franchise or avoid the obligation thus imposed after the construction of such line of telegraph, by any lease or contract for its maintenance and operation by a telegraph company (U. S. *v.* Western Union Tel. Co., 50 Fed. 28; Western Union Tel. Co. *v.* Union Pac. R. Co., 3 Fed. 423, 721, 1 McCrary 418, 558, 581; Atlantic, etc., Tel. Co. *v.* Union Pac. R. Co., 1 Fed. 745); but where a telegraph company is authorized by law to construct a line upon the right of way, the railroad company, if maintaining its separate wires, offices, and operators for the purposes required of it, may lawfully contract with the telegraph company for the joint use and maintenance of a single line of poles for both sets of wires (Union Pac. R. Co. *v.* U. S., 59 Fed. 813, 8 C. C. A. 282 [*reversing* on this point 50 Fed. 28]).

47. Pennsylvania R. Co. *v.* St. Louis, etc., R. Co., 118 U. S. 290, 6 S. Ct. 1094, 30 L. ed. 83, 118 U. S. 630, 7 S. Ct. 24, 30 L. ed. 284; Earle *v.* Seattle, etc., R. Co., 56 Fed. 909; Winch *v.* Birkenhead, etc., R. Co., 5 De G. & Sm. 562, 16 Jur. 1035, 64 Eng. Reprint 1243; Great Northern R. Co. *v.* Eastern Counties R. Co., 9 Hare 306, 21 L. J. Ch. 837, 7 R. & Can. Cas. 643, 41 Eng. Ch. 306, 68 Eng. Reprint 520; Beman *v.* Rufford, 15 Jur. 914, 20 L. J. Ch. 537, 1 Sim. N. S. 550, 40 Eng. Ch. 550, 61 Eng. Reprint 212.

Power to lease road see *supra*, VII, C, 1.

48. Pennsylvania R. Co. *v.* St. Louis, etc., R. Co., 118 U. S. 290, 6 S. Ct. 1094, 30 L. ed. 83, 118 U. S. 630, 7 S. Ct. 24, 30 L. ed. 284; Winch *v.* Birkenhead, etc., R. Co., 5 De G. & Sm. 562, 16 Jur. 1035, 64 Eng. Reprint 1243.

49. Pennsylvania R. Co. *v.* St. Louis, etc., R. Co., 118 U. S. 290, 6 S. Ct. 1094, 30 L. ed. 83, 118 U. S. 630, 7 S. Ct. 24, 30 L. ed. 284.

50. South Carolina, etc., R. Co. *v.* Augusta, etc., R. Co., 107 Ga. 164, 33 S. E. 36.

51. Wiggins Ferry Co. *v.* Chicago, etc., R. Co., 128 Mo. 224, 27 S. W. 568, 30 S. W. 430.

52. Texas, etc., R. Co. *v.* Southern Pac. R. Co., 41 La. Ann. 970, 6 So. 888, 17 Am. St. Rep. 445.

53. St. Joseph, etc., R. Co. *v.* St. Louis, etc., R. Co., 135 Mo. 173, 36 S. W. 602, 33 L. R. A. 607; Union Pac. R. Co. *v.* Chicago, etc., R. Co., 163 U. S. 564, 16 S. Ct. 1173, 41 L. ed. 265 [*affirming* 51 Fed. 309, 2 C. C. A. 174 (*affirming* 47 Fed. 15)]; Jacksonville, etc., R. Co. *v.* Hooper, 160 U. S. 514, 16 S. Ct. 379, 40 L. ed. 515.

54. Union Pac. R. Co. *v.* Chicago, etc., R. Co., 163 U. S. 564, 16 S. Ct. 1173, 41 L. ed. 265 [*affirming* 51 Fed. 309, 2 C. C. A. 174 (*affirming* 47 Fed. 15)].

55. St. Joseph, etc., R. Co. *v.* St. Louis, etc., R. Co., 135 Mo. 173, 36 S. W. 602, 33 L. R. A. 607; Norfolk, etc., R. Co. *v.* Shippers' Compress Co., 83 Va. 272, 2 S. E. 139; Union Pac. R. Co. *v.* Chicago, etc., R. Co., 163 U. S. 564, 16 S. Ct. 1173, 41 L. ed. 265 [*affirming* 51 Fed. 309, 2 C. C. A. 174 (*affirming* 47 Fed. 15)]; Jacksonville, etc., R. Co. *v.* Hooper, 160 U. S. 514, 16 S. Ct. 379, 40 L. ed. 515; Pittsburg, etc., R. Co. *v.* Keokuk, etc., Bridge Co., 131 U. S. 371, 9 S. Ct. 770, 33 L. ed. 157; Green Bay, etc., R. Co. *v.* Union Steamboat Co., 107 U. S. 98, 2 S. Ct. 221, 27 L. ed. 413.

The rule is not limited to what is absolutely necessary for the exercise of the powers expressly granted, but in the absence of express restriction so long as the acts done fall within the scope and purpose of the creation of the company and the reasonable contemplation of its charter, the company is no more restricted in the exercise of its implied contractual powers than a natural person. St. Joseph, etc., R. Co. *v.* St. Louis, etc., R. Co., 135 Mo. 173, 36 S. W. 602, 33 L. R. A. 607. See also Baltimore *v.* Baltimore, etc., R. Co., 21 Md. 50.

Grant of exclusive right to telegraph company to use right of way see *supra*, V, H, 4, text and note 34.

the contract must be determined not by the form of expression or name given to it by the parties, but by what rights and privileges are in fact granted and what burdens and obligations assumed.[56] So as being within the implied powers of such companies or the proper construction and application of governing statutes, contracts have been held valid between railroad companies for the joint or interchangeable use of their tracks,[57] bridges,[58] or terminal facilities;[59] between railroad companies and bridge companies;[60] between a railroad company and a shipping company for a certain amount of space on the vessels of the latter to be filled with goods transported by the railroad company;[61] between two railroad companies for the operation by one of the road of the other for a limited period;[62] and a contract by a railroad company for the lease of a hotel at the terminus of its road located at a distance from any town.[63] A railroad company cannot be compelled to enter into traffic contracts or contracts for trackage or terminal facilities with other companies,[64] and a constitutional right to establish a physicial connec-

56. St. Joseph, etc., R. Co. *v.* St. Louis, etc., R. Co., 135 Mo. 173, 36 S. W. 602, 33 L. R. A. 607 (where an instrument termed a "lease" was held to be not a lease but a valid "operating contract"); Union Pac. R. Co. *v.* Chicago, etc., R. Co., 163 U. S. 564, 16 S. Ct. 1173, 41 L. ed. 265 [*affirming* 51 Fed. 309, 2 C. C. A. 174 (*affirming* 47 Fed. 15)] (where a contract, although termed a lease, was held to be a valid contract for trackage and terminal facilities); Earle *v.* Seattle, etc., R. Co., 56 Fed. 909 (where an alleged traffic contract was held to be an invalid transfer by one company of the control of its road to another).

57. Georgia R., etc., Co. *v.* Maddox, 116 Ga. 64, 42 S. E. 315; Michigan Cent. R. Co. *v.* Pere Marquette R. Co., 128 Mich. 333, 87 N. W. 271; Jourdan *v.* Long Island R. Co., 6 N. Y. St. 89; Union Pac. R. Co. *v.* Chicago, etc., R. Co., 163 U. S. 564, 16 S. Ct. 1173, 41 L. ed. 265 [*affirming* 51 Fed. 309, 2 C. C. A. 174 (*affirming* 47 Fed. 15)].

Right to make regulations.—When one railroad company acquires a right to operate its trains over a part of the line of another company, such right is subject to the rules and regulations which the latter company is empowered to make in regard to the operation of trains upon its line. Such rules if reasonable must be complied with and the burden is upon the company complaining to show that they are not reasonable. Rhymney R. Co. *v.* Taff Vale R. Co., 29 Beav. 153, 7 Jur. N. S. 202, 30 L. J. Ch. 482, 4 L. T. Rep. N. S. 227, 9 Wkly. Rep. 222, 54 Eng. Reprint 585 [*affirmed* in 4 L. T. Rep. N. S. 534, 9 Wkly. Rep. 362].

Conditions precedent.— Where a special act provides that one railroad company shall have running powers over the road of another and that any differences which may from time to time arise between the companies shall be settled by arbitration, it is not a condition precedent to the exercise of such powers that existing differences shall first be so settled. Taff Vale R. Co. *v.* Barry Dock, etc., Co., 7 R. & Can. Tr. Cas. 52.

58. Union Pac. R. Co. *v.* Chicago, etc., R. Co., 163 U. S. 564, 16 S. Ct. 1173, 41 L. ed. 265 [*affirming* 51 Fed. 309, 2 C. C. A. 174 (*affirming* 47 Fed. 15)].

59. Georgia R., etc., Co. *v.* Maddox, 116 Ga. 64, 42 S. E. 315; Michigan Cent. R. Co. *v.* Pere Marquette R. Co., 128 Mich. 333, 87 N. W. 271; Union Pac. R. Co. *v.* Chicago, etc., R. Co., 163 U. S. 564, 16 S. Ct. 1173, 41 L. ed. 265 [*affirming* 51 Fed. 309, 2 C. C. A. 174 (*affirming* 47 Fed. 15)].

60. Pittsburg, etc., R. Co. *v.* Keokuk, etc., Bridge Co., 131 U. S. 371, 9 S. Ct. 770, 33 L. ed. 157, holding a particular contract to be valid between a railroad company and a bridge company which provided for the use by the former of the bridge together with other railroad companies, each company to pay tolls and any deficiency in the gross amount so realized to be contributed by the companies proportionally.

Extending road beyond authorized terminus.—A contract between a railroad company and a bridge company for the use by the railroad company of the bridge for operating its trains across the same, made for the purpose of operating the road beyond the terminus authorized by law, is *ultra vires* and void. Union Bridge Co. *v.* Troy, etc., R. Co., 7 Lans. (N. Y.) 240.

61. Norfolk, etc., R. Co. *v.* Shippers' Compress Co., 83 Va. 272, 2 S. E. 139.

62. Illinois Midland R. Co. *v.* People, 84 Ill. 426 (decided under St. (1885), authorizing railroad companies to make contracts and arrangements with each other for leasing and running their respective roads or any part thereof); St. Joseph, etc., R. Co. *v.* St. Louis, etc., R. Co., 135 Mo. 173, 36 S. W. 602, 33 L. R. A. 607 (where a contract was held valid by which one railroad company which was in financial difficulties contracted with another company to operate its road for a term of years, the road to be operated under the supervision of the company owning it, and the earnings to be accounted for and applied to its use and benefit); Michigan Cent. R. Co. *v.* Wealleans, 24 Can. Sup. Ct. 309 [*reversing* 21 Ont. App. 297] (decided under the Dominion Railway Act of 1879).

63. Jacksonville, etc., R. Co. *v.* Hooper, 160 U. S. 514, 16 S. Ct. 379, 40 L. ed. 375.

64. Terre Haute, etc., R. Co. *v.* Peoria, etc., R. Co., 61 Ill. App. 405; Atchison, etc., R. Co. *v.* Denver, etc., R. Co., 110 U. S. 667, 4

tion of the tracks of one railroad company with those of another confers no right to a business connection.[65]

b. Continuous or Connecting Lines. Traffic contracts between connecting roads for through transportation are not contrary to public policy but are beneficial to the public,[66] particularly where they are intended not to defeat but to meet competition,[67] and are in some cases expressly authorized by constitutional or statutory provisions;[68] and there are also statutes authorizing one railroad company for the purpose of effecting connections to assist in the construction or extension of another road.[69] The provisions of these contracts and the charter and statutory provisions applicable thereto are so varying that few general rules can be laid down. It has been held in different jurisdictions, either as being within the implied powers or the application of governing statutes, that connecting railroads may make traffic contracts for through transportation over their lines,[70] or with connecting boat lines,[71] or ferries,[72] and that the companies may act together in fixing rates and agreeing upon a uniform rate for through traffic over the entire line,[73] and may agree upon the basis of division of the joint profits of the through

S. Ct. 185, 28 L. ed. 291 [*reversing* 15 Fed. 650].

65. Atchison, etc., R. Co. *v.* Denver, etc., R. Co., 110 U. S. 667, 4 S. Ct. 185, 28 L. ed. 291 [*reversing* 15 Fed. 650].

66. Hartford, etc., R. Co. *v.* New York, etc., R. Co., 3 Rob. (N. Y.) 411; Dayton, etc., R. Co. *v.* Pittsburgh, etc., R. Co., 25 Ohio Cir. Ct. 705 [*affirmed* in 67 Ohio St. 523, 67 N. E. 1100]; Cumberland Valley R. Co. *v.* Gettysburg, etc., R. Co., 177 Pa. St. 519, 35 Atl. 952.

67. Graham *v.* Macon, etc., R. Co., 120 Ga. 757, 49 S. E. 75.

68. *Illinois.*—Archer *v.* Terre-Haute, etc., R. Co., 102 Ill. 493.

New Jersey.—Black *v.* Delaware, etc., Canal Co., 22 N. J. Eq. 130.

New York.—Connecticut Mut. L. Ins. Co. *v.* Cleveland, etc., R. Co., 41 Barb. 9, 26 How. Pr. 225 [*affirmed* in 4 Thomps. & C. 251].

Ohio.—Dayton, etc., R. Co. *v.* Pittsburgh, etc., R. Co., 25 Ohio Cir. Ct. 705 [*affirmed* in 67 Ohio St. 523, 67 N. E. 1100].

Canada.—Michigan Cent. R. Co. *v.* Wealleans, 24 Can. Sup. Ct. 309 [*reversing* 21 Ont. App. 297].

See 41 Cent. Dig. tit. "Railroads," § 379.

69. Baltimore *v.* Baltimore, etc., R. Co., 21 Md. 50 (holding that one company may aid the construction of a connecting road by a loan of money, taking a mortgage or other security therefor); Connecticut Mut L. Ins. Co. *v.* Cleveland, etc., R. Co., 41 Barb. (N. Y.) 9, 26 How. Pr. 225 [*affirmed* in 4 Thomps. & C. 251] (holding that one company may assist the other by guaranteeing the payment of the interest coupons of its bonds); Missouri, etc., R. Co. *v.* Sidell, 67 Fed. 464, 35 U. S. App. 152, 14 C. C. A. 477 (holding that under the Kansas statute one railroad company may pay for the extension of another company's line, which will connect with its own by means of an intervening road controlled by the latter).

Establishing uniform gauge.—Where by statute one railroad company is permitted to aid another in the construction of its road, for the purpose of forming a connection therewith, it may render such aid for the purpose of establishing a uniform gauge upon the connecting road. Connecticut Mut. L. Ins. Co. *v.* Cleveland, etc., R. Co., 41 Barb. (N. Y.) 9, 26 How. Pr. 225.

Application of earnings to purchase of bonds.—A contract by which a railroad company is to send all its traffic over a connecting railroad, the company operating the latter to reserve one fourth of the gross earnings of the traffic and to apply it to the purchase of a portion of the construction bonds issued for completing the connection, is not *ultra vires*. Ohio, etc., R. Co. *v.* Short, 6 Ohio Dec. (Reprint) 703, 7 Am. L. Rec. 474.

70. Sussex R. Co. *v.* Morris, etc., R. Co., 19 N. J. Eq. 13 [*reversed* on other grounds in 20 N. J. Eq. 542]; Tonawanda Valley, etc., R. Co. *v.* New York, etc., R. Co., 42 Hun (N. Y.) 496; Hartford, etc., R. Co. *v.* New York, etc., R. Co., 3 Rob. (N. Y.) 411; Cumberland Valley R. Co. *v.* Gettysburg, etc., R. Co., 177 Pa. St. 519, 35 Atl. 952; Midland R. Co. *v.* Great Western R. Co., L. R. 8 Ch. 841, 42 L. J. Ch. 438, 28 L. T. Rep. N. S. 718, 21 Wkly. Rep. 657.

71. Graham *v.* Macon, etc., R. Co., 120 Ga. 757, 49 S. E. 75; Stewart *v.* Erie, etc., Transp. Co., 17 Minn. 372; Green Bay, etc., R. Co. *v.* Union Steamboat Co., 107 U. S. 98, 2 S. Ct. 221, 27 L. ed. 413; Owen Sound Steamship Co. *v.* Canadian Pac. R. Co., 17 Ont. 691.

Guaranteeing amount of earnings.—A contract between a railroad company and a connecting steamboat company by which the latter agrees to run certain boats in connection with the trains of the former, the railroad company agreeing and guaranteeing that the gross earnings of the boats shall be at least a certain amount, is not invalid. Green Bay, etc., R. Co. *v.* Union Steamboat Co., 107 U. S. 98, 2 S. Ct. 221, 27 L. ed. 413.

72. Wiggins Ferry Co. *v.* Chicago, etc., R. Co., 73 Mo. 389, 39 Am. Rep. 519.

73. Columbus, etc., R. Co. *v.* Indianapolis, etc., R. Co., 6 Fed. Cas. No. 3,047, 5 McLean 450, holding that by such joint action

traffic,[74] which may be by an arbitrary schedule agreed upon and not necessarily by giving to each company the share earned upon its own line and on that only.[75] The connecting companies may agree that in so far as they may lawfully do so each will deliver to the other all of the traffic controlled by it destined to points reached by way of the other,[76] and use its influence to promote the business of the other so far as it can do so with due regard to its own interests;[77] but while a railroad company may give a particular ferry the handling of all its business at a certain point to the exclusion of rival ferries,[78] it cannot bind itself not to use a different mode of transportation, such as a bridge, which will furnish a quicker and more convenient mode of crossing the stream.[79] A traffic contract for through transportation may include incompleted extensions or branches which have been authorized but not such as have not been authorized at the time of the contract.[80] An agreement for through traffic does not in the absence of express stipulation, prevent one of the companies from subsequently altering the gauge of its road.[81] It has been held that while railroad companies may lawfully make a business connection for through traffic where each company separately operates its own road, the companies cannot form a partnership arrangement for the joint operation by both of the entire line and a division of the profits,[82] or although separately operated agree to share jointly the accidental losses in the through traffic occurring on both roads;[83] but elsewhere it has been held that two railroad companies whose roads form a continuous line may enter into a joint arrangement for operating their roads as one line and become jointly liable for money borrowed in the furtherance of the business of such line,[84] or contract for the joint purchase and ownership of locomotives to be run over both roads,[85] or that one railroad company may transfer the practical control and management of its road and property to a connecting line to be operated as a part of the system of such connecting line.[86] In order to be a connecting road within the application of the statutes the connection need not be direct but may be by means of an intervening road,[87] or ferry line.[88]

c. Parallel or Competing Lines.[89] There are in some jurisdictions constitutional or statutory provisions prohibiting in the case of parallel or competing

neither company parts with or transfers to the other company any part of its corporate powers.

74. Sussex R. Co. *v.* Morris, etc., R. Co., 19 N. J. Eq. 13 [*reversed* on other grounds in 20 N. J. Eq. 542]; Hartford, etc., R. Co. *v.* New York, etc., R. Co., 3 Rob. (N. Y.) 411; Midland R. Co. *v.* Great Western R. Co., L. R. 8 Ch. 841, 42 L. J. Ch. 438, 28 L. T. Rep. N. S. 718, 21 Wkly. Rep. 657; Owen Sound Steamship Co. *v.* Canadian Pac. R. Co., 17 Ont. 691.

75. Sussex R. Co. *v.* Morris, etc., R. Co., 19 N. J. Eq. 13 [*reversed* on other grounds in 20 N. J. Eq. 542]; Owen Sound Steamship Co. *v.* Canadian Pac. R. Co., 17 Ont. 691.

76. Graham *v.* Macon, etc., R. Co., 120 Ga. 757, 49 S. E. 75; Wiggins Ferry Co. *v.* Chicago, etc., R. Co., 73 Mo. 389, 39 Am. Rep. 519; Tonawanda Valley, etc., R. Co. *v.* New York, etc., R. Co., 42 Hun (N. Y.) 496; Cumberland Valley R. Co. *v.* Gettysburg, etc., R. Co., 177 Pa. St. 519, 35 Atl. 952.

77. Tonawanda Valley, etc., R. Co. *v.* New York, etc., R. Co., 42 Hun (N. Y.) 496; Cumberland Valley R. Co. *v.* Gettysburg, etc., R. Co., 177 Pa. St. 519, 35 Atl. 952.

78. Wiggins Ferry Co. *v.* Chicago, etc., R. Co., 73 Mo. 389, 39 Am. Rep. 519.

79. Wiggins Ferry Co. *v.* Chicago, etc., R. Co., 128 Mo. 224, 27 S. W. 568, 30 S. W. 430.

80. Morris, etc., R. Co. *v.* Sussex R. Co., 20 N. J. Eq. 542 [*reversing* 19 N. J. Eq. 13].

81. Sussex R. Co. *v.* Morris, etc., R. Co., 19 N. J. Eq. 13 [*reversed* on other grounds in 20 N. J. Eq. 542].

82. Burke *v.* Concord R. Co., 61 N. H. 160. See also Nashua, etc., R. Corp. *v.* Boston, etc., R. Corp., 164 Mass. 222, 41 N. E. 268, 49 Am. St. Rep. 454.

83. State *v.* Concord R. Corp., 62 N. H. 375.

84. Chicago, etc., R. Co. *v.* Ayres, 140 Ill. 644, 30 N. E. 687 [*affirming* 39 Ill. App. 607].

85. Olcott *v.* Tioga R. Co., 27 N. Y. 546, 84 Am. Dec. 298.

86. State *v.* Ohio, etc., R. Co., 6 Ohio Cir. Ct. 415, 3 Ohio Cir. Dec. 518; Michigan Cent. R. Co. *v.* Wealleans, 24 Can. Sup. Ct. 309 [*reversing* 21 Ont. App. 297].

87. Missouri Pac. R. Co. *v.* Sidell, 67 Fed. 464, 14 C. C. A. 477.

88. Baltimore *v.* Baltimore, etc., R. Co., 21 Md. 50.

89. See, generally, MONOPOLIES, 27 Cyc. 888.

roads any contracts or combinations, the intention or effect of which is to give one the control of the other or otherwise stifle competition,[90] besides the federal statutes: "An act to regulate commerce," commonly called the "Interstate Commerce Act," [91] and "An act to protect trade and commerce against unlawful restraints and monopolies" commonly called the "Anti-Trust Act," [92] and independently of such provisions, contracts and combinations which tend to create monopolies or destroy proper competition are contrary to public policy.[93] So "pooling contracts" between competing roads are held to be invalid as against public policy,[94] and in violation of the statutes relating to contracts and combinations between parallel and competing roads,[95] and the same rule applies to an agreement not to construct a competing line,[96] or to a contract by which one company agrees not to extend its line beyond a certain point beyond which it would compete with another road.[97] All contracts which restrict competition are not, however, illegal or contrary to public policy,[98] and a contract which merely

90. Manchester, etc., R. Co. *v.* Concord R. Co., 66 N. H. 100, 20 Atl. 383, 49 Am. St. Rep. 582, 9 L. R. A. 689; Morrill *v.* Boston, etc., R. Co., 55 N. H. 531; Pennsylvania R. Co. *v.* Com., 3 Pa. Cas. 100, 7 Atl. 368 [*affirming* 1 Pa. Co. Ct. 214]; Pennsylvania R. Co. *v.* Com., 3 Pa. Cas. 83, 7 Atl. 374 [*affirming* 1 Pa. Co. Ct. 223]; Louisville, etc., R. Co. *v.* Kentucky, 161 U. S. 677, 16 S. Ct. 714, 40 L. ed. 849; Pearsall *v.* Great Northern R. Co., 161 U. S. 646, 16 S. Ct. 705, 40 L. ed. 838 [*reversing* 73 Fed. 933].

What are parallel or competing lines.—A road may be a competing road with reference to another by reason of traffic contracts with different roads, and a road may come within the prohibition as to a "parallel or competing line," although not completed and in operation. Pennsylvania R. Co. *v.* Com., 3 Pa. Cas. 100, 7 Atl. 368 [*affirming* 1 Pa. Co. Ct. 214].

Application of provisions: To sales see *supra*, VII, B, 1, b. To leases see *supra*, VII, C, 1, c. To consolidations see *infra*, VII, E, 2, c.

91. See U. S. *v.* Trans-Missouri Freight Assoc., 58 Fed. 58, 7 C. C. A. 15, 24 L. R. A. 73 [*affirming* 53 Fed. 440].

92. U. S. *v.* Joint Traffic Assoc., 171 U. S. 505, 19 S. Ct. 25, 43 L. ed. 259; U. S. *v.* Trans-Missouri Freight Assoc., 166 U. S. 290, 17 S. Ct. 540, 41 L. ed. 1007 [*reversing* 58 Fed. 58, 7 C. C. A. 15, 24 L. R. A. 73 (*affirming* 53 Fed. 440)]. See also, generally, MONOPOLIES, 27 Cyc. 888.

93. *Georgia.*— Central R. Co. *v.* Collins, 40 Ga. 582.

Indiana.— Cleveland, etc., R. Co. *v.* Closser, 126 Ind. 348, 26 N. E. 159, 22 Am. St. Rep. 593, 9 L. R. A. 754.

Louisiana.— Texas, etc., R. Co. *v.* Southern Pac. R. Co., 41 La. Ann. 970, 6 So. 888, 17 Am. St. Rep. 445.

New York.— Hartford, etc., R. Co. *v.* New York, etc., R. Co., 3 Rob. 411.

United States.— Chicago, etc., R. Co. *v.* Wabash, etc., R. Co., 61 Fed. 993, 9 C. C. A. 659.

See 41 Cent. Dig. tit. "Railroads," § 384.

Furnishing facilities to rival telegraph companies.—A railroad company cannot make a valid contract with one telegraph company not to furnish transportation facilities for the construction of a competing line and refuse to carry and distribute material for the construction of such line. Mercantile Trust Co. *v.* Atlantic, etc., R. Co., 63 Fed. 910.

94. Cleveland, etc., R. Co. *v.* Closser, 126 Ind. 348, 26 N. E. 159, 22 Am. St. Rep. 593, 9 L. R. A. 754; Texas, etc., R. Co. *v.* Southern Pac. R. Co., 41 La. Ann. 970, 6 So. 888, 17 Am. St. Rep. 445; Chicago, etc., R. Co. *v.* Wabash, etc., R. Co., 61 Fed. 993, 9 C. C. A. 659; Charlton *v.* Newcastle, etc., R. Co., 5 Jur. N. S. 1096, 7 Wkly. Rep. 731. But see Midland R. Co. *v.* London, etc., R. Co., L. R. 2 Eq. 524, 35 L. J. Ch. 831, 15 L. T. Rep. N. S. 264, 15 Wkly. Rep. 34.

95. Morrill *v.* Boston, etc., R. Co., 55 N. H. 531.

96. Midland R. Co. *v.* London, etc., R. Co., L. R. 2 Eq. 524, 35 L. J. Ch. 831, 15 L. T. Rep. N. S. 64, 15 Wkly. Rep. 34.

97. Hartford, etc., R. Co. *v.* New York, etc., R. Co., 3 Rob. (N. Y.) 411.

98. *New Hampshire.*— Manchester, etc., R. Co. *v.* Concord R. Co., 66 N. H. 100, 20 Atl. 383, 49 Am. St. Rep. 582, 9 L. R. A. 689.

New York.— Ives *v.* Smith, 3 N. Y. Suppl. 645 [*affirmed* in 8 N. Y. Suppl. 46].

United States.— U. S. *v.* Trans-Missouri Freight Assoc., 58 Fed. 58, 7 C. C. A. 15, 24 L. R. A. 73 [*affirming* 53 Fed. 440].

England.— Midland R. Co. *v.* London, etc., R. Co., L. R. 2 Eq. 524, 35 L. J. Ch. 831, 15 L. T. Rep. N. S. 264, 15 Wkly. Rep. 34; Hare *v.* London, etc., R. Co., 2 Johns. & H. 80, 7 Jur. N. S. 1145, 30 L. J. Ch. 817, 70 Eng. Reprint 978.

Canada.— Campbell *v.* Northern R. Co., 26 Grant Ch. (U. C.) 522; Great Western R. Co. *v.* Grand Trunk R. Co., 25 U. C. Q. B. 37.

See 41 Cent. Dig. tit. "Railroads," § 384.

Such contracts may be distinctly beneficial to the public by preventing the fluctuations of rates and unjust discriminations between shippers which invariably attend unrestricted competition between rival companies (Manchester, etc., R. Co. *v.* Concord R. Co., 66 N. H. 100, 20 Atl. 383, 49 Am. St. Rep. 582, 9 L. R. A. 689 [*quoting* Morawetz Corp. (2d ed.) § 1131]); or by preventing the ruin

prevents an unlimited and ruinous competition, without raising rates to an unjust standard or causing the other company to violate its duties to the public, should be sustained,[99] unless it falls within an express constitutional or statutory prohibition.[1]

2. REQUISITES AND VALIDITY. In the absence of any statutory provision relating specifically to railroads or to the particular railroad in question, contracts of the kind under consideration are governed by the rules relating to contracts of corporations generally with respect to their formal requisites, and mode of execution, and the authority of the officers executing the same,[2] and are entitled to the same presumptions.[3] To render the contract valid each of the contracting companies must have power to enter into it,[4] and any legislative requirements as to how the contract shall be made must be complied with,[5] and if the rights contracted for constitute an interest in land the contract must be in writing.[6] The fact that a contract is invalid as to some of its provisions does not necessarily make it invalid as a whole,[7] and if the contract is divisible that part which is valid will be enforced;[8] and a contract between two railroad companies is not invalid because the charter of one will expire during the term of the contract, where the charter is capable of renewal and the contract is expressly made binding upon the assigns and successors of the parties.[9] While a distinction exists between contracts which are strictly *ultra vires*, as beyond the powers of the company or contrary to public policy, and contracts where the invalidity consists in some improper exercise or lack of authority on the part of its officers or informality in the execution of the

of one company by the other which would ultimately result in raising rates to the highest possible standard (Hare *v.* London, etc., R. Co., 2 Johns. & H. 80, 7 Jur. N. S. 1145, 30 L. J. Ch. 817, 70 Eng. Reprint 978).

Agreement not to reduce rates.—An agreement between a railroad company and a competing traction company that for a limited period the railroad company would not "lower its present rates of fare unless required by law" is not contrary to public policy, where such rates are within the limits expressly prescribed by statute. Raritan River R. Co. *v.* Middlesex, etc., Traction Co., 70 N. J. L. 732, 58 Atl. 332.

99. Manchester, etc., R. Co. *v.* Concord, etc., R. Co., 66 N. H. 100, 20 Atl. 383, 49 Am. St. Rep. 582, 9 L. R. A. 689. *Compare* U. S. *v.* Trans-Missouri Freight Assoc., 58 Fed. 58, 7 C. C. A. 15, 24 L. R. A. 73 [*affirming* 53 Fed. 440, and *reversed* in 166 U. S. 290, 17 S. Ct. 540, 41 L. ed. 1007].

1. Manchester, etc., R. Co. *v.* Concord, etc., R. Co., 66 N. H. 100, 20 Atl. 383, 49 Am. St. Rep. 582, 9 L. R. A. 689; U. S. *v.* Trans-Missouri Freight Assoc., 166 U. S. 290, 17 S. Ct. 540, 41 L. ed. 1007 [*reversing* 58 Fed. 58, 7 C. C. A. 15, 24 L. R. A. 73 (*affirming* 53 Fed. 440)].

2. See CORPORATIONS, 10 Cyc. 1000.

3. Union Pac. R. Co. *v.* Chicago, etc., R. Co., 163 U. S. 564, 16 S. Ct. 1173, 41 L. ed. 265 [*affirming* 51 Fed. 309, 2 C. C. A. 174 (*affirming* 47 Fed. 15)]; Pittsburgh, etc., R. Co. *v.* Keokuk, etc., Bridge Co., 131 U. S. 371, 9 S. Ct. 770, 33 L. ed. 157. See also CORPORATIONS, 10 Cyc. 1003.

4. Central Transp. Co. *v.* Pullman's Palace-Car Co., 139 U. S. 24, 11 S. Ct. 478, 35 L. ed. 55.

5. Great Western R. Co. *v.* Grand Trunk R. Co., 24 U. C. Q. B. 107, holding that under the Railway Clauses Consolidation Act, the consent of two thirds of the stock-holders is essential to the validity of any traffic or operating contract coming within the provisions of that act.

6. Port Jervis, etc., R. Co. *v.* New York, etc., R. Co., 132 N. Y. 439, 30 N. E. 855.

7. Hartford, etc., R. Co. *v.* New York, etc., R. Co., 3 Rob. (N. Y.) 411; Dayton, etc., R. Co. *v.* Pittsburgh, etc., R. Co., 25 Ohio Cir. Ct. 705 [*affirmed* in 67 Ohio St. 523, 67 N. E. 1100]; Union Pac. R. Co. *v.* Chicago, etc., R. Co., 163 U. S. 564, 16 S. Ct. 1173, 41 L. ed. 265 [*affirming* 51 Fed. 309, 2 C. C. A. 174 (*affirming* 47 Fed. 15)].

A contract between a railroad company and a telegraph company is valid as to a provision that the railroad company shall give the telegraph company the exclusive use of its right of way for telegraphic purposes, and the telegraph company gives to the railroad company the right to use the telegraph line for its business, but a provision that the railroad company will deliver for the telegraph company whatever it may need for construction, operation, and repairs at any point on the line, and that it will not perform such services for any competing telegraph company except at regular rates and at regular stations, is contrary to public policy and void. Western Union Tel. Co. *v.* Atlantic, etc., Tel. Co., 7 Ohio Dec. (Reprint) 163, 1 Cinc. L. Bul. 201.

8. Western Union Tel. Co. *v.* Atlantic, etc., Tel. Co., 7 Ohio Dec. (Reprint) 163, 1 Cinc. L. Bul. 201.

9. Union Pac. R. Co. *v.* Chicago, etc., R. Co., 163 U. S. 564, 16 S. Ct. 1173, 41 L. ed. 265 [*affirming* 51 Fed. 309, 2 C. C. A. 174 (*affirming* 47 Fed. 15)].

contract,[10] those of the former class which are strictly *ultra vires* are void and cannot be rendered valid by ratification or estoppel,[11] and may be disaffirmed, although partly executed;[12] but where the contract has been partly executed and one company has received its benefits, it will not be permitted to retain such benefits and at the same time set up the invalidity of the contract,[13] and may be required in equity to account for and return what it has received under the contract, at least where the other party is not *in pari delicto* or the contract is merely *malum prohibitum*.[14]

3. Construction and Operation. In construing contracts between railroad companies the rules applicable to the construction of contracts generally apply.[15]

10. South Side Pass. R. Co. *v.* Second Ave. R. Co., 191 Pa. St. 492, 43 Atl. 346; Union Pac. R. Co. *v.* Chicago, etc., R. Co., 51 Fed. 309, 2 C. C. A. 174 [*affirmed* in 163 U. S. 564, 16 S. Ct. 1173, 41 L. ed. 265].

Although a contract between two railroad companies is voidable in equity at the election of one of them within a reasonable time, for want of a quorum of directors at the meeting who are not directors of the other company, a delay in exercising the election to avoid it will operate as a waiver of the right to do so. U. S. Rolling Stock Co. *v.* Atlantic, etc., R. Co., 34 Ohio St. 450, 32 Am. Rep. 380.

Where a railroad company acquiesces in the use of its tracks by another company for the period of one year, it is chargeable with knowledge of the existence of a contract on its part made by a receiver of the road permitting such use. Jourdan *v.* Long Island R. Co., 6 N. Y. St. 89.

11. Ohio, etc., R. Co. *v.* Indianapolis, etc., R. Co., 3 Ohio Dec. (Reprint) 458; Central Transp. Co. *v.* Pullman's Palace-Car Co., 139 U. S. 24, 11 S. Ct. 478, 35 L. ed. 55; Pennsylvania R. Co. *v.* St. Louis, etc., R. Co., 118 U. S. 290, 6 S. Ct. 1094, 30 L. ed. 83, 118 U. S. 630, 7 S. Ct. 24, 30 L. ed. 284. *Compare* Dayton, etc., R. Co. *v.* Pittsburgh, etc., R. Co., 25 Ohio Cir. Ct. 705 [*affirmed* in 67 Ohio St. 523, 67 N. E. 1100].

The doctrine of ultra vires and of estoppel as applicable to *ultra vires* acts and contracts is fully treated in another title. See Corporations, 10 Cyc. 1146 *et seq.*

12. Central Transp. Co. *v.* Pullman's Palace-Car Co., 139 U. S. 24, 11 S. Ct. 478, 35 L. ed. 55; Pennsylvania R. Co. *v.* St. Louis, etc., R. Co., 118 U. S. 290, 6 S. Ct. 1094, 30 L. ed. 83, 118 U. S. 630, 7 S. Ct. 24, 30 L. ed. 284; Thomas *v.* West Jersey R. Co., 101 U. S. 71, 25 L. ed. 950.

13. Manchester, etc., R. Co. *v.* Concord, etc., R. Co., 66 N. H. 100, 20 Atl. 383, 49 Am. St. Rep. 582, 9 L. R. A. 689; Tonawanda, etc., R. Co. *v.* New York, etc., R. Co., 42 Hun (N. Y.) 496; Dayton, etc., R. Co. *v.* Pittsburgh, etc., R. Co., 25 Ohio Cir. Ct. 705 [*affirmed* in 67 Ohio St. 523, 67 N. E. 1100].

Where two railroads are under a joint manager who applies the joint funds belonging to both roads to the improvement of one of them, it may be required to account to the other therefor, although the traffic contract for such joint management was *ultra vires* (Nashua, etc., R. Corp. *v.* Boston, etc., R. Corp., 164 Mass. 222, 41 N. E. 268, 49 Am. St. Rep. 454); but it can recover only its proportionate share of the funds so expended and not the entire amount (Nashua, etc., R. Corp. *v.* Boston, etc., R. Corp., 157 Mass. 268, 31 N. E. 1060).

14. Manchester, etc., R. Co. *v.* Concord, etc., R. Co., 66 N. H. 100, 20 Atl. 383, 49 Am. St. Rep. 582, 9 L. R. A. 689.

15. See Contracts, 9 Cyc. 577; and the following cases:

Kansas.— Chicago Great Western R. Co. *v.* Kansas City, etc., R. Co., 75 Kan. 167, 88 Pac. 1085, holding that in a contract for the joint use of a railroad, providing that "taxes on property jointly used shall be included in the cost of maintenance," the word "taxes" should be construed as including special assessments for local improvements.

Minnesota.— Chicago Great Western R. Co. *v.* St. Paul Union Depot Co., 68 Minn. 220, 71 N. W. 23, construing a contract between a railroad company and a depot company, and holding that the latter is required to furnish reasonable depot facilities and service for mixed trains, but is not compelled to admit them to the use of the same tracks as used by trains composed of passenger cars only.

Missouri.— Union Depot Co. *v.* Chicago, etc., R. Co., 113 Mo. 213, 30 S. W. 792, construing a contract between a union depot company and a railroad company, and holding that the latter company had a right to use the depot for the trains of a purchased line as well as its original line on payment only of the rental imposed by the terms of the contract. See also St. Joseph Union Depot Co. *v.* Chicago, etc., R. Co., 131 Mo. 291, 31 S. W. 908 [*distinguishing* Union Depot Co. *v.* Chicago, etc., R. Co., *supra*], holding that the rule is otherwise where each of the roads in question previously had similar contracts with the depot company and were paying separate rentals.

New Jersey.— Elmira Rolling Mill Co. *v.* Erie R. Co., 28 N. J. Eq. 400, construing a grant by one railroad company of the use of its "terminal facilities" to another, and holding that the latter is not required to pay any part of the salaries of persons employed at the depot for the purpose of providing such facilities.

New York.— Port Jervis, etc., R. Co. *v.* New York, etc., R. Co., 132 N. Y. 439, 30 N. E. 855 (construing a parol agreement for the use by one company of the tracks,

The contract must be given the meaning understood and intended by the parties at the time of its execution,[16] and in construing any part of the contract the court will examine the entire contract and may also consider the relations of the parties, their connection with the subject-matter of the contract, and the circumstances

yards, station, and turn-table of another as being merely temporary and permissive); Blossburg, etc., R. Co. *v.* Tioga, etc., R. Co., 1 Abb. Dec. 149, 1 Keyes 486 (construing a contract for the operation by one railroad company of a road owned by another for the mutual benefit of both in regard to its provisions relating to the rates to be charged and division of receipts).

Ohio.— Dayton, etc., R. Co. *v.* Pittsburgh, etc., R. Co., 25 Ohio Cir. Ct. 705 [*affirmed* in 67 Ohio St. 523, 67 N. E. 1100], construing a contract between two railroad companies for the use by one of the road of the other as to the application of the term "road" as used in the contract.

Tennessee.— East Tennessee, etc., R. Co. *v.* Nashville, etc., R. Co., (Ch. App. 1897) 51 S. W. 202, construing an agreement between several railroad companies as to the joint use of a depot.

United States.— Columbus, etc., R. Co. *v.* Pennsylvania R. Co., 143 Fed. 757, 74 C. C. A. 647 (construing a contract between two railroad companies for the joint use of certain tracks, stations, and other terminal facilities as to the apportionment of the cost of maintenance of the property for the joint use); Park *v.* New York, etc., R. Co., 72 Fed. 594 (construing a contract between a railroad company and an express company).

England.— Lancashire, etc., R. Co. *v.* East Lancashire R. Co., 5 H. L. Cas. 792, 2 Jur. N. S. 767, 25 L. J. Exch. 278, 4 Wkly. Rep. 780, 10 Eng. Reprint 1114 (construing a contract for trackage and terminal facilities); Midland R. Co. *v.* Manchester, etc., R. Co., 22 L. T. Rep. N. S. 601 (construing a contract for trackage rights with regard to the application of the term "local traffic"); North Eastern R. Co. *v.* Scarhorough, etc., R. Co., 8 R. & Can. Tr. Cas. 157 (construing a working agreement between railroad companies in regard to the liability for the cost of repairs upon the roadbed).

Canada.—Brantford *v.* Buffalo, etc., R. Co., 29 U. C. Q. B. 607, construing a traffic contract in regard to provisions imposing a liability upon one company upon bonds issued by the other.

See 41 Cent. Dig. tit. "Railroads," § 436.

Particular contracts construed.—A contract relating to local freight business "from and to Newark and Columbus, with stations on the line of said road between those points," does not include the carriage of freights from one intermediate station to another such station. Baltimore, etc., R. Co. *v.* Pittsburgh, etc., R. Co., 55 Fed. 701. Where three railroad companies, one owning a road from A to B and the others roads from B to C, having through traffic arrangements, jointly contracted with a person for the exclusive use of his sleeping cars on their roads, to be run "over the line of said roads" between A and C, and "in connection with the night passenger express through trains between said cities," the contract is not violated by the use of other sleeping cars in trains between B and C which do not also pass over the portion of the road between A and B. Stanley *v.* Cleveland, etc., R. Co., 18 Ohio St. 552. Where several parties agree to contribute to the cost of operating and maintaining a railroad in proportion to the number of cars shipped over it by each, one is not entitled to claim any reduction in the amount of his contribution on the ground that the cars used by another were of greater capacity. Alleghany Lumber Co. *v.* Hoyt, 77 Hun (N. Y.) 607, 28 N. Y. Suppl. 182. Where an agreement whereby a railroad company constructs a switch for the joint use of itself and a mining company expressly excepts a certain portion from the use of the mining company, the latter acquires no right to use such excepted portion by a mere permissive use thereof for a time or by the fact that the railroad company built the switch without legislative authority. Coe *v.* New Jersey Midland R. Co., 28 N. J. Eq. 100 [*affirmed* in 28 N. J. Eq. 593]. A contract by which one railroad company grants the use of its tracks to another for "all the trains required in the prosecution of its business" gives the latter no right to license other companies in the prosecution of their separate business to run trains over the track without the consent of the former. Dayton, etc., R. Co. *v.* Pittsburgh, etc., R. Co., 25 Ohio Cir. Ct. 705 [*affirmed* in 67 Ohio St. 523, 67 N. E. 1100]. In a contract between two railroad companies requiring one of them in case flagmen or switchmen were required at a crossing to "pay the entire cost of such flagmen or switchmen" and also "the entire cost and expense of constructing and maintaining all watch houses, signal stations, signals, and other similar appliances that may be now or at any time hereafter required," the term "other similar appliances" does not include an interlocking system at the crossing. Chicago, etc., R. Co. *v.* Chicago, etc., R. Co., 113 Wis. 161, 87 N. W. 1085, 89 N. W. 180. Where a contract by which one railroad company is to use a part of the track of another, provides that the maintenance of the track shall be charged to the joint account, losses from injuries to employees engaged in the work of maintenance are a part of the cost of the maintenance and chargeable under the contract to the joint account. Louisville, etc., R. Co. *v.* Chesapeake, etc., R. Co., 107 Ky. 191, 53 S. W. 277, 21 Ky. L. Rep. 875.

16. Jacksonville, etc., R. Co. *v.* Louisville, etc., R. Co., 150 Ill. 480, 37 N. E. 924 [*affirming* 47 Ill. App. 414]; Chicago, etc.,

under which it was signed,[17] and the conditions then existing.[18] If, however, there is no ambiguity in the language of the contract the court cannot put upon it any construction other than what the words signify,[19] and terms having a particular significance in the usage of persons operating railroads will be given that meaning in construing traffic contracts.[20] Where the contract is fairly and reasonably open to two constructions, one making it legal and the other illegal, the former will be adopted;[21] and where the contract is in any degree in restraint of competition it will be strictly construed and not extended in its application beyond its express provisions,[22] nor will a contract be so construed as to militate against the convenience and comfort of the traveling public if it can fairly be construed otherwise.[23] The practical construction given to the contract by the parties is a material factor in determining its meaning,[24] and where the parties by their acts and declarations have put a practical construction upon the agree-

R. Co. *v.* Chicago, etc., R. Co., 113 Wis. 161, 87 N. W. 1085, 89 N. W. 180.

17. Chicago, etc., R. Co. *v.* Chicago, etc., R. Co., 113 Wis. 161, 87 N. W. 1085, 89 N. W. 180; Chicago, etc., R. Co. *v.* Denver, etc., R. Co., 143 U. S. 596, 12 S. Ct. 479, 36 L. ed. 277 [*affirming* 45 Fed. 304]; Llanelly R., etc., Co. *v.* London, etc., R. Co., L. R. 7 H. L. 550, 45 L. J. Ch. 539, 32 L. T. Rep. N. S. 575, 23 Wkly. Rep. 927.

Application of rule.— Where a railroad company was entitled to the use of the terminal facilities of a depot company upon purchase of a certain number of shares of stock of the latter, and tendered the par value which was refused by the depot company, which demanded the market value thereof, a suit was instituted to determine this question. Pending this litigation the companies entered into a contract to remain in force until the question was settled by litigation or agreement by which the railroad company was to use the terminal facilities at a certain monthly rental, which agreement was to be "without prejudice" to the rights in litigation "or otherwise." Litigation as to the price of the stock being determined in favor of the railroad company it was held that the term "without prejudice" could not under the circumstances be construed as applying only to proceedings in the suit pending, and that the railroad company was entitled to have the amount paid in as rental applied as a part payment upon the amount due from it for the stock of the depot company. Chicago, etc., R. Co. *v.* St. Paul Union Depot Co., 54 Minn. 411, 56 N. W. 129.

18. Wiggins Ferry Co. *v.* Chicago, etc., R. Co., 73 Mo. 389, 39 Am. Rep. 519.

Where a contract between a bridge company and certain railroad companies provides that the railroad companies shall pay the cost of maintenance and all necessary repair, and many years afterward owing to an increase of water traffic and regulations of the War Department it becomes necessary to put in a new draw span and fender piers, which would not have been required by any conditions existing or in contemplation of the parties at the time of the contract, the railroad companies are not liable for the cost of such improvements under the contract. Pittsburg, etc., R. Co. *v.* Dodd, 115 Ky. 176, 72 S. W. 822, 24 Ky. L. Rep. 2057, 74 S. W. 1096, 25 Ky. L. Rep. 255.

19. Louisville, etc., R. Co. *v.* Louisville St. R. Co., 100 Ky. 690, 39 S. W. 42, 19 Ky. L. Rep. 11.

20. Jacksonville, etc., R. Co. *v.* Louisville, etc., R. Co., 150 Ill. 480, 37 N. E. 924 [*affirming* 47 Ill. App. 414], holding that the term "terminal facilities" in railroad usage does not include tracks other than those used in making up trains, and that a switch service performed by one company for another over tracks leading to the works of a car manufacturing company, not the property of the company performing such services, is not included in its grant of terminal facilities.

21. Wiggins Ferry Co. *v.* Chicago, etc., R. Co., 128 Mo. 224, 27 S. W. 568, 30 S. W. 430 (holding that a contract by a railroad company giving a particular ferry the exclusive handling of its traffic across a river at a particular place will be construed as applying only to rival ferries and will not prevent the railroad company from using a bridge subsequently built, which affords a quicker and more convenient mode of crossing the stream with its freight and passengers); Morris, etc., R. Co. *v.* Sussex R. Co., 20 N. J. Eq. 542 [*reversing* 19 N. J. Eq. 13] (holding that a provision in a traffic contract making it applicable to "any future extensions or branches" of the roads will be considered as applying only to such extensions or branches as were authorized to be constructed at the time of the contract); Delaware, etc., R. Co. *v.* Kutter, 147 Fed. 51, 77 C. C. A. 315.

22. Wiggins Ferry Co. *v.* Ohio, etc., R. Co., 72 Ill. 360; Wiggins Ferry Co. *v.* Chicago, etc., R. Co., 128 Mo. 224, 27 S. W. 568, 30 S. W. 430.

23. Stanley *v.* Cleveland, etc., R. Co., 18 Ohio St. 552; Central Trust Co. *v.* Wabash, etc., R. Co., 29 Fed. 546.

24. St. Joseph Union Depot Co. *v.* Chicago, etc., R. Co., 131 Mo. 291, 31 S. W. 908; Delaware, etc., R. Co. *v.* Kutter, 147 Fed. 51, 77 C. C. A. 315; Columbus, etc., R. Co. *v.* Pennsylvania R. Co., 143 Fed. 757, 74 C. C. A. 647.

ment existing between them, the courts will ordinarily adopt and enforce such construction.[25]

4. Assignment of Contract. An agreement between two railroad companies, conferring on each the right to run its cars over the tracks of the other, each retaining the absolute control over its road for all other purposes, confers no interest which can be assigned or leased;[26] but the contract may expressly provide for an assignment of the rights acquired thereunder,[27] and one company may succeed to the rights and liabilities of another under a contract made expressly on behalf of the company "its successors and assigns," [28] or which provides that it shall be binding upon the lessees, assigns, grantees, or successors of each company.[29] An exception in the contract with respect to the rights granted is as binding upon its representatives and assigns as upon the original company.[30]

5. Termination or Modification. A traffic or other operating contract between railroad companies cannot be altered or modified arbitrarily by either party but only by the concurrence of both,[31] and if the contract is fixed by its terms to continue for a certain period it cannot be revoked by either party on notice.[32] A contract may of course be terminated by either party at any time if it contains an express stipulation to that effect; [33] and it has been held that a contract between two railroad companies for trackage, depot, or terminal facilities, containing no provision as to how long it is to remain in force, may be rescinded by either party at any time upon reasonable notice; [34] and where the legislature under a right reserved in the charter of a railroad permits another company to connect with and enter upon and use its tracks for a fixed compensation, such right when acted upon does not constitute a perpetual contract between the companies, and it is competent for the company using the tracks of the other to withdraw from such use and by legislative authority form connections with other roads.[35] Where the same companies at different dates enter into traffic contracts with regard to their respective roads, if it appears that it was not the intention of the parties that the second contract should annul or alter the first, the failure of one of the companies to comply with the second contract will not affect its rights under the terms of the first.[36]

25. Pittsburg, etc., R. Co. *v.* Dodd, 115 Ky. 176, 72 S. W. 822, 24 Ky. L. Rep. 2057, 74 S. W. 1096, 25 Ky. L. Rep. 255; Hartford, etc., R. Co. *v.* New York, etc., R. Co., 3 Rob. (N. Y.) 411; Chicago, etc., R. Co. *v.* Northern Pac. R. Co., 101 Fed. 792, 42 C. C. A. 25; St. Joseph Union Depot Co. *v.* Chicago, etc., R. Co., 89 Fed. 648, 32 C. C. A. 284.

26. Brooklyn Crosstown R. Co. *v.* Brooklyn City R. Co., 51 Hun (N. Y.) 600, 3 N. Y. Suppl. 901.

27. Wiggins Ferry Co. *v.* Chicago, etc., R. Co., 73 Mo. 389, 39 Am. Rep. 519; Chicago, etc., R. Co. *v.* Denver, etc., R. Co., 46 Fed. 145.

28. Jacksonville, etc., R. Co. *v.* Louisville, etc., R. Co., 150 Ill. 480, 37 N. E. 924 [*affirming* 47 Ill. App. 414].

29. Chicago, etc., R. Co. *v.* Denver, etc., R. Co., 46 Fed. 145.

30. Coe *v.* New Jersey Midland R. Co., 28 N. J. Eq. 100 [*affirmed* in 28 N. J. Eq. 593].

31. Philadelphia, etc., R. Co. *v.* River Front R. Co., 168 Pa. St. 357, 31 Atl. 1098.

32. Cumberland Valley R. Co. *v.* Gettysburg, etc., R. Co., 177 Pa. St. 519, 35 Atl. 952.

33. Queen City Coal Co. *v.* Louisville, etc., R. Co., 44 S. W. 103, 19 Ky. L. Rep. 1628.

Where a contract between a railroad company and a bridge company provides that it may be terminated by either party upon a certain notice, such a notice given by the railroad company and acted on by both parties terminates the contract, although the railroad company continues to use the bridge. Pittsburg, etc., R. Co. *v.* Dodd, 115 Ky. 176, 72 S. W. 822, 24 Ky. L. Rep. 2057, 74 S. W. 1096, 25 Ky. L. Rep. 255.

34. Chattanooga, etc., R. Co. *v.* Cincinnati, etc., R. Co., 44 Fed. 456. But see Llanelly R., etc., Co. *v.* London, etc., & N. W. R. Co., L. R. 7 H. L. 550, 45 L. J. Ch. 539, 32 L. T. Rep. N. S. 575, 23 Wkly. Rep. 927.

If the companies cannot readjust their relations after the withdrawal of one from an existing contract, the courts will make such *ad interim* orders as may be necessary to protect the rights of the parties and secure the preservation and operation of the road. Philadelphia, etc., R. Co. *v.* River Front R. Co., 168 Pa. St. 357, 31 Atl. 1098.

35. Boston, etc., R. Co. *v.* Boston, etc., R. Co., 5 Cush. (Mass.) 375.

36. Bartlette *v.* Norwich, etc., R. Co., 33 Conn. 560, holding that where several railroad companies agreed that one of them should build and operate a connecting road and the others contribute a certain propor-

6. Rights, Liabilities, and Remedies.[37] A court of equity will enjoin the execution of a contract by which one railroad company without legislative authority seeks to turn over its road to another company,[38] or unlawfully seeks to acquire the control of a parallel or competing line;[39] and where the road of one company, under the disguise of a traffic contract, has been illegally turned over to another the stock-holders who did not consent thereto may maintain a bill in equity to enjoin a further operation under the contract and for an accounting and the appointment of a receiver.[40] Where the contract is valid the general rules in regard to contracts apply, and the party entitled may sue for and recover the amount due according to the terms of the contract,[41] or the damages sustained by reason of the breach thereof.[42] Courts of equity also have jurisdiction to decree the specific performance of such contracts,[43] and such relief will be granted where an action at law would be inadequate and the contract is capable of specific performance and is not inequitable or contrary to public policy,[44] particularly where its specific performance would be to the interest of the public.[45] Where one railroad company has a contract right to use a portion of the track of another as a part of its line, and such right is afterward denied, the company owning the track will be enjoined from interfering with such use;[46] but injunctive relief against the violation of contracts will not ordinarily be granted where there is a doubt as to the legality of the contract,[47] or plaintiff's right is doubtful or an action at law or in equity prosecuted in the ordinary manner will afford adequate redress.[48] A railroad company in permitting another to use a portion of its tracks is performing the duty of a common carrier in supplying an instrumentality of transportation and may charge only what is a reasonable sum for such use,[49] and a special charter privilege as to rates chargeable by a railroad company does not so inhere in the road as to pass to another company which subsequently acquires the right to operate it.[50] Where a railroad company contracts to allow another to use its right of way upon such terms and for such compensation as may be agreed upon by the companies, and subsequently denies the right to such use upon any terms,

tion of the expenses, the earnings of the road to be paid to a trustee for distribution among the companies until their contributions were repaid, and subsequently the same companies agreed that a certain number of express trains should be run over their roads daily, the failure of one of the companies to carry out the contract regarding the express trains on account of its insolvency did not affect the duty of the operating company to apply the net earnings to the repayment of the construction expenses as provided by the first contract.

37. Liability for injuries incident to operation of road see *infra*, X, C, 5, 6, 7, 10.

38. Winch *v.* Birkenhead, etc., R. Co., 5 De G. & Sm. 562, 16 Jur. 1035, 64 Eng. Reprint 1243.

39. Pennsylvania R. Co. *v.* Com., 2 Pa. Cas. 83, 7 Atl. 374 [*affirming* 1 Pa. Co. Ct. 223].

40. Earle *v.* Seattle, etc., R. Co., 56 Fed. 909.

41. Pittsburgh, etc., R. Co. *v.* Keokuk, etc., Bridge Co., 131 U. S. 371, 9 S. Ct. 770, 33 L. ed. 157; Green Bay, etc., R. Co. *v.* Union Steam-Boat Co., 107 U. S. 98, 2 S. Ct. 221, 27 L. ed. 413.

42. Graham *v.* Macon, etc., R. Co., 120 Ga. 757, 49 S. E. 75; Norfolk, etc., R. Co. *v.* Shippers' Compress Co., 83 Va. 272, 2 S. E. 139.

43. Union Pac. R. Co. *v.* Chicago, etc., R. Co., 163 U. S. 564, 16 S. Ct. 1173, 41 L. ed. 265 [*affirming* 51 Fed. 309, 2 C. C. A. 174 (*affirming* 47 Fed. 15)].

44. Cumberland Valley R. Co. *v.* Gettysburg, etc., R. Co., 177 Pa. St. 519, 35 Atl. 952; Union Pac. R. Co. *v.* Chicago, etc., R. Co., 163 U. S. 564, 16 S. Ct. 1173, 41 L. ed. 265 [*affirming* 51 Fed. 309, 2 C. C. A. 174 (*affirming* 47 Fed. 15)]; Chicago, etc., R. Co. *v.* Union Pac. R. Co., 74 Fed. 989; Central Trust Co. *v.* Wabash, etc., R. Co., 29 Fed. 546; Wolverhampton, etc., R. Co. *v.* London, etc., R. Co., L. R. 16 Eq. 433, 43 L. J. Ch. 131.

45. Central Trust Co. *v.* Wabash, etc., R. Co., 29 Fed. 546.

46. Lathrop *v.* Junction R. Co., 4 Fed. 41; Great Northern R. Co. *v.* Manchester, etc., R. Co., 5 De G. & Sm. 138, 16 Jur. 146, 64 Eng. Reprint 1053.

47. South Yorkshire R. Co. *v.* Great Northern R. Co., 3 De G. M. & G. 576, 22 L. J. Ch. 761, 1 Wkly. Rep. 203, 52 Eng. Ch. 203, 43 Eng. Reprint 226.

48. Baltimore, etc., R. Co. *v.* Pittsburgh, etc., R. Co., 1 Ohio Cir. Ct. 100, 1 Ohio Cir. Dec. 60. See also Shrewsbury, etc., R. Co. *v.* Stour Valley R. Co., 2 De G. M. & G. 866, 51 Eng. Ch. 677, 42 Eng. Reprint 1111.

49. Toledo, etc., R. Co. *v.* Michigan Cent. R. Co., 5 Ohio S. & C. Pl. Dec. 147, 7 Ohio N. P. 376.

50. Pittsburgh, etc., R. Co. *v.* Moore, 33 Ohio St. 384, 31 Am. Rep. 543.

so that a resort to the court is necessary to enforce the right, the court will determine the whole case and settle both the right and the compensation;[51] but in an action by a railroad company to recover for the use of its tracks and terminal facilities, where there is no definite agreement as to the amount to be paid, the amount paid to it for a similar use by other roads, which in fact own all of its stock, affords no test of what is reasonable as between it and another company having no such connection with it.[52] Where the contract between a bridge company and several railroad companies provides that they shall be charged upon an equal basis and that the charges shall be limited to such rates as will produce a certain sum, if the bridge company charges a higher rate the surplus illegally accumulated may be recovered by the railroad companies in the same proportion in which it was paid.[53] Where several railroad companies having termini in a certain city agree to connect their roads and organize a separate company for this purpose, the fact that one of them constructs a portion of the connecting line upon its own land at its own expense makes it the legal owner of that portion,[54] but does not give it any right to prohibit its use by the other companies as a part of the continuous line.[55] A railroad company by giving another company the right to use its tracks does not obligate itself to put the track in repair or make any change in its existing state,[56] and the mere fact that one railroad company is operating a road constructed by another does not establish an assumption by it of an obligation incurred by the latter in the construction of its road;[57] but a company having the control and operation of a railroad will be equally liable with the owner thereof for the continuance of a nuisance growing out of the manner of its construction.[58]

E. Consolidation — 1. Definition and Nature. A consolidation has been defined as being a merger, a union, or amalgamation, by which the stock of the two corporations is made one, by which their property and franchises are combined into one, by which their powers become the powers of one, by which their names are merged into one, and by which the identity of the two practically, if not actually, runs into one.[59] The term "amalgamation" is used in England and in Canada,[60]

51. Central Trust Co. *v.* Wabash, etc., R. Co., 29 Fed. 546.

52. Peoria, etc., R. Co. *v.* Chicago, etc., R. Co., 127 U. S. 200, 8 S. Ct. 1125, 32 L. ed. 110 [*affirming* 18 Fed. 484].

53. Louisville Bridge Co. *v.* Louisville, etc., R. Co., 106 Ky. 674, 51 S. W. 185, 21 Ky. L. Rep. 271.

54. Pennsylvania R. Co.'s Appeal, 80 Pa. St. 265.

55. Lathrop *v.* Junction R. Co., 4 Fed. 41, 14 Fed. Cas. No. 8,110, 9 Wkly. Notes Cas. (Pa.) 277.

56. Murch *v.* Concord R. Corp., 29 N. H. 9, 61 Am. Dec. 631.

57. Sheridan *v.* Atchison, etc., R. Co., 56 Mo. App. 68, where the obligation was to construct a farm crossing.

58. Tate *v.* Missouri, etc., R. Co., 64 Mo. 149.

59. State *v.* Montana R. Co., 21 Mont. 221, 242, 53 Pac. 623, 45 L. R. A. 271.

Other definitions are: "When the rights, franchises, and effects of two or more corporations, are, by legal authority and agreement of the parties, combined and united into one whole, and committed to a single corporation, the stock-holders of which are composed of those (so far as they choose to become such) of the companies thus agreeing, this is in law, and according to common understanding, a consolidation of such companies; whether such single corporation, called the consolidated company, be a new one then created, or one of the original companies, continuing in existence with only larger rights, capacities and property." Meyer *v.* Johnston, 64 Ala. 603, 656. "The consolidation of two or more railroad corporations is the permanent union in their interests, management, and control, either in the formation of a new company out of the consolidated ones, or else by a consolidated management of the old ones unitedly, whilst their distinct corporate entities still remain." Rorer Railroads 588 [*quoted* in State *v.* Montana R. Co., 21 Mont. 221, 240, 53 Pac. 623, 45 L. R. A. 271].

60. Eastern Union R. Co. *v.* Cochrane, 2 C. L. R. 292, 9 Exch. 197, 17 Jur. 1103, 23 L. J. Exch. 61, 7 R. & Can. Cas. 792, 2 Wkly. Rep. 43; Charlton *v.* Newcastle, etc., R. Co., 5 Jur. N. S. 1096, 7 Wkly. Rep. 731; Yool *v.* Great Western R. Co., 39 L. J. Ch. 562, 22 L. T. Rep. N. S. 781, 18 Wkly. Rep. 825; Bruff *v.* Cobbold, 30 L. T. Rep. N. S. 597; Fargey *v.* Grand Junction R. Co., 4 Ont. 232.

"**The term 'amalgamation,'** as pointed out by Wood, V. C., in *In re* Empire Assur. Corp., L. R. 4 Eq. 341, 36 L. J. Ch. 663, 16 L. T. Rep. N. S. 345, 15 Wkly. Rep. 889,

but in this country is not in general use or favorably regarded.[61] The term "consolidation" properly applies to a corporate union,[62] as distinguished from a physical union or connection of the tracks,[63] or business agreement affecting the ownership, operation, use, or control of the roads,[64] and is clearly distinguishable from a purchase by one company of the road of another,[65] lease,[66] traffic agreement,[67] agreement to consolidate at a future date,[68] or the acquisition by one company of stock in another.[69] It has been held that the term "consolidation" may properly be applied to a corporate union effected either by the termination or dissolution of the constituent companies and the creation of a new and distinct company or by the merger of one or more companies into another existing company under the name of the latter which continues in existence but with larger rights and property,[70] while in other cases it has been held that a union of the latter character should be termed a merger instead of a consolidation.[71]

2. Right to Consolidate — a. In General. In the absence of legislative authority, two railroad companies have no power to consolidate,[72] and such authority must be clearly given and cannot be implied from any uncertain or doubtful language in regard to the powers conferred upon such companies,[73] and must also be conferred upon each of the companies entering into the con-

has no definite and positive signification. It is employed to denote loosely various operations in themselves widely different, which more or less completely work a transfer of corporate affairs from one corporation to another, and a merger of the former body into the latter." Fargey *v.* Grand Junction R. Co., 4 Ont. 232, 243.

61. Meyer *v.* Johnston, 64 Ala. 603; State *v.* Montana R. Co., 21 Mont. 221, 53 Pac. 623, 45 L. R. A. 271.

62. Chicago, etc., R. Co. *v.* Ashling, 160 Ill. 373, 43 N. E. 373 [*affirming* 56 Ill. App. 327]; Pingree *v.* Michigan Cent. R. Co., 118 Mich. 314, 76 N. W. 635, 53 L. R. A. 274; State *v.* Montana R. Co., 21 Mont. 221, 53 Pac. 623, 45 L. R. A. 271.

63. Louisville, etc., R. Co. *v.* Kentucky, 161 U. S. 677, 16 S. Ct. 714, 40 L. ed. 849.

64. Pingree *v.* Michigan Cent. R. Co., 118 Mich. 314, 76 N. W. 635, 53 L. R. A. 274; Morrill *v.* Smith County, 89 Tex. 529, 36 S. W. 56.

65. Hawkins *v.* Georgia Cent. R. Co., 119 Ga. 159, 46 S. E. 82; Chicago, etc., R. Co. *v.* Ashling, 160 Ill. 373, 43 N. E. 373 [*affirming* 56 Ill. App. 327]; Elkins *v.* Camden, etc., R. Co., 36 N. J. Eq. 5; Mackintosh *v.* Flint, etc., R. Co., 34 Fed. 582.

66. State *v.* Montana R. Co., 21 Mont. 221, 53 Pac. 623, 45 L. R. A. 271; Mills *v.* Central R. Co., 41 N. J. Eq. 1, 2 Atl. 453; Gere *v.* New York Cent., etc., R. Co., 19 Abb. N. Cas. (N. Y.) 193; Missouri Pac. R. Co. *v.* Owens, 1 Tex. App. Civ. Cas. § 384.

67. Pingree *v.* Michigan Cent. R. Co., 118 Mich. 314, 76 N. W. 635, 53 L. R. A. 274; Morrill *v.* Smith County, 89 Tex. 529, 36 S. W. 56.

68. Shrewsbury, etc., R. Co. *v.* Stour Valley R. Co., 2 De G. M. & G. 866, 51 Eng. Ch. 677, 42 Eng. Reprint 1111.

69. Elkins *v.* Camden, etc., R. Co., 36 N. J. Eq. 5. *Compare* Williamson *v.* New Jersey Southern R. Co., 26 N. J. Eq. 398.

70. Meyer *v.* Johnston, 64 Ala. 603; State *v.* Montana R. Co., 21 Mont. 221, 53 Pac. 623, 45 L. R. A. 271. But see Powell *v.* North Missouri R. Co., 42 Mo. 63.

71. Lee *v.* Atlantic Coast Line R. Co., 150 Fed. 775. See also Atlantic, etc., R. Co. *v.* Georgia, 98 U. S. 359, 25 L. ed. 185; Tomlinson *v.* Branch, 15 Wall. (U. S.) 460, 21 L. ed. 189.

There is a distinct difference between a consolidation and a merger of two railroad companies. In a consolidation both go out of existence as separate corporations and a new corporation is created which takes their place and property, while in the case of a merger one loses its identity by absorption in the other, which remains in existence and succeeds to its property and issues its own stock to the stock-holders of the merged company. Lee *v.* Atlantic Coast Line R. Co., 150 Fed. 775.

72. American L. & T. Co. *v.* Minnesota, etc., R. Co., 157 Ill. 641, 42 N. E. 153; Morrill *v.* Smith County, 89 Tex. 529, 36 S. W. 56 [*reversing* (Civ. App. 1895) 33 S. W. 899]; Missouri Pac. R. Co. *v.* Owens, 1 Tex. App. Civ. Cas. § 384; Pearce *v.* Madison, etc., R. Co., 21 How. (U. S.) 441, 16 L. ed. 184; Charlton *v.* Newcastle, etc., R. Co., 5 Jur. N. S. 1096, 7 Wkly. Rep. 731.

73. Morrill *v.* Smith County, 89 Tex. 529, 36 S. W. 56 [*reversing* (Civ. App. 1895) 33 S. W. 899]; Louisville, etc., R. Co. *v.* Kentucky, 161 U. S. 677, 16 S. Ct. 714, 40 L. ed. 849.

Statutes not authorizing consolidation.— Authority to "unite" with other roads refers to a physical connection of the tracks, and not to a consolidation or union of franchises (Louisville, etc., R. Co. *v.* Kentucky, 161 U. S. 677, 16 S. Ct. 714, 40 L. ed. 849); and a statute authorizing a railroad company "to connect itself with any other railroad company" refers merely to a traffic consolidation and not a corporate consolidation (Morrill *v.* Smith County, 89 Tex. 529, 36 S. W. 56 [*reversing* (Civ. App. 1895) 33 S. W. 899]).

solidation.[74] Authority conferred upon a particular railroad company to consolidate with others does not pass to the resulting consolidated company so as to authorize it to make successive consolidations with other companies;[75] but where the right to consolidate is conferred upon railroad companies generally, subject only to the usual restrictions in regard to parallel or competing lines, the right is not exhausted by a single exercise or affected by the fact that one of the constituent companies is the product of a prior consolidation,[76] and under such a statute there may be a consolidation at the same time of more than two companies.[77] The legislature may authorize the consolidation of two or more railroad companies,[78] and legislative sanction for a consolidation may be given either by a general law or special charter provision,[79] or by statutes passed before the consolidation or by a subsequent legislative ratification,[80] and the legislature may authorize either a modified surrender of the old companies or their total extinction and the creation by their union of a new company.[81] The legislature may revoke a power previously given to consolidate if it has not been executed,[82] or limit a general power previously given so as to exclude consolidations between parallel or competing lines,[83] although there is no reservation of power to alter or amend the charter.[84] The legislature in authorizing a consolidation may also impose such conditions as it may deem proper,[85] and the company by exercising the right impliedly consents to and is bound by the conditions imposed.[86]

b. Continuous or Connecting Lines.[87] There are constitutional or statutory provisions in some jurisdictions expressly authorizing the consolidation of railroad companies whose roads form a connecting and continuous line,[88] and two

74. Morrill *v.* Smith County, 89 Tex. 529, 36 S. W. 56 [*reversing* (Civ. App. 1895) 33 S. W. 899]; Louisville, etc., R. Co. *v.* Kentucky, 161 U. S. 677, 16 S. Ct. 714, 40 L. ed. 849. See also Spencer *v.* Seaboard Air Line R. Co., 137 N. C. 107, 49 S. E. 96, 1 L. R. A. N. S. 604. But see *In re* Prospect Park, etc., R. Co., 67 N. Y. 371, holding that where power is given by statute to one railroad company to consolidate with any other, whatever other company it selects for a union and finds willing to join it has power to unite with it, although such other company is not named in the statute.

75. Morrill *v.* Smith County, 89 Tex. 529, 36 S. W. 56 [*reversing* (Civ. App. 1895) 33 S. W. 899].

76. Smith *v.* Cleveland, etc., R. Co., 170 Ind. 382, 81 N. E. 501; Taylor *v.* Atlantic, etc., R. Co., 57 How. Pr. (N. Y.) 26.

77. Smith *v.* Cleveland, etc., R. Co., 170 Ind. 382, 81 N. E. 501; Bonner *v.* Terre Haute, etc., R. Co., 151 Fed. 985, 81 C. C. A. 476.

78. Ohio, etc., R. Co. *v.* People, 123 Ill. 467, 14 N. E. 874; State *v.* Maine Cent. R. Co., 66 Me. 488.

79. American L. & T. Co. *v.* Minnesota, etc., R. Co., 157 Ill. 641, 42 N. E. 153; Spencer *v.* Seaboard Air Line R. Co., 137 N. C. 107, 49 S. E. 96, 1 L. R. A. N. S. 604.

80. American L. & T. Co. *v.* Minnesota, etc., R. Co., 157 Ill. 641, 42 N. E. 153.

Effect of curative statutes see *infra*, VII, E, 2, f.

81. State *v.* Maine Cent. R. Co., 66 Me. 488.

82. Pearsall *v.* Great Northern R. Co., 161 U. S. 646, 16 S. Ct. 705, 40 L. ed. 838 [*reversing* 73 Fed. 933].

83. Pearsall *v.* Great Northern R. Co., 161 U. S. 646, 16 S. Ct. 705, 40 L. ed. 838 [*reversing* 73 Fed. 933].

84. Louisville, etc., R. Co. *v.* Kentucky, 161 U. S. 677, 16 S. Ct. 714, 40 L. ed. 849.

85. Ashley *v.* Ryan, 153 U. S. 436, 14 S. Ct. 865, 38 L. ed. 773 [*affirming* 49 Ohio St. 504, 31 N. E. 721 (*affirming* 6 Ohio Cir. Ct. 208, 3 Ohio Cir. Dec. 418)]. See also Louisville, etc., R. Co. *v.* Kentucky, 161 U. S. 677, 16 S. Ct. 714, 40 L. ed. 849.

The legislature may require that proceedings for the condemnation of land through certain counties shall be governed by the provisions of the original charter of one of the companies. Swayze *v.* New Jersey Midland R. Co., 36 N. J. L. 295.

86. Mobile, etc., R. Co. *v.* State, 89 Miss. 724, 41 So. 259, 122 Am. St. Rep. 295; Ashley *v.* Ryan, 153 U. S. 436, 14 S. Ct. 865, 38 L. ed. 773 [*affirming* 49 Ohio St. 504, 31 N. E. 721 (*affirming* 6 Ohio Cir. Ct. 208, 3 Ohio Cir. Dec. 418)].

Substitution of annuity for principal debt. — Where on authorizing a consolidation the state agrees to accept in lieu of a debt owing to it by one of the constituent companies, a certain annuity to be paid by the consolidated company, the consolidated company cannot subsequently claim the right to settle the original indebtedness instead of paying the annuity agreed upon. Northern Cent. R. Co. *v.* Hering, 93 Md. 164, 48 Atl. 461.

87. See, generally, CORPORATIONS, 10 Cyc. 293.

88. *Alabama.*— Georgia Pac. R. Co. *v.* Gaines, 88 Ala. 377, 7 So. 382; Georgia Pac. R. Co. *v.* Wilks, 86 Ala. 478, 6 So. 34.

Nebraska.— State *v.* Chicago, etc., R. Co., 25 Nebr. 156, 41 N. W. 125, 2 L. R. A. 564.

roads may be connected either directly or by an intervening road,[89] or bridge;[90] but while a connection is a prerequisite to continuity, the fact of connection does not necessarily make them continuous.[91] The statutes contemplate that the consolidated road shall form one instead of two or more lines of road,[92] and the provisions must be construed subject to the limitations in regard to the consolidation of parallel or competing lines.[93]

c. **Parallel or Competing Lines.**[94] The legislature may prohibit the consolidation of parallel or competing lines of railroad,[95] and state legislation of this character, although affecting interstate roads, is within the police power and not an infringement upon the power of congress to regulate interstate commerce,[96] and in many jurisdictions there are constitutional or statutory provisions expressly prohibiting the consolidation of parallel or competing roads.[97] The object of

New Jersey.—Black *v.* Delaware, etc., Canal Co., 22 N. J. Eq. 130.

New York.—New York Cent., etc., R. Co. *v.* Yonkers, 103 N. Y. Suppl. 252; People *v.* Boston, etc., R. Co., 12 Abb. N. Cas. 230.

Ohio.—State *v.* Vanderbilt, 37 Ohio St. 590; Burke *v.* Cleveland, etc., R. Co., 10 Ohio Dec. (Reprint) 525, 21 Cinc. L. Bul. 11.

See 41 Cent. Dig. tit. "Railroads," § 380.

Consolidation prior to construction.—Under a statute authorizing a consolidation of connecting roads, the companies may consolidate prior to the construction and actual connection of the roads. Livingston County *v.* Portsmouth First Nat. Bank, 128 U. S. 102, 9 S. Ct. 18, 32 L. ed. 359.

The term "adjoining state" in a statute authorizing a consolidation with a connecting road in an adjoining state applies to a state adjoining that into which a company has constructed its road, and is not limited to states adjoining that in which the company is incorporated. Adelbert College *v.* Toledo, etc., R. Co., 5 Ohio S. & C. Pl. Dec. 14, 3 Ohio N. P. 15.

89. Black *v.* Delaware, etc., Canal Co., 22 N. J. Eq. 130.

Under the Ohio statute it is held that there can be no consolidation where the connection is by means of a leased line and the lessor is not one of the consolidating companies (State *v.* Vanderbilt, 37 Ohio St. 590); but that two companies may be consolidated, although their lines do not connect directly, where the connection is made by means of a union company located within the limits of a city and designed for furnishing union depot, trackage, and terminal facilities for the roads entering the city, the stock of which is owned in part by the companies entering into the consolidation (Burke *v.* Cleveland, etc., R. Co., 10 Ohio Dec. (Reprint) 525, 21 Cinc. L. Bul. 11).

90. New York Cent., etc., R. Co. *v.* Yonkers, 103 N. Y. Suppl. 252, holding further that the communicating bridge need not belong to either of the railroad companies but may belong to an independent bridge company.

91. People *v.* Boston, etc., R. Co., 12 Abb. N. Cas. (N. Y.) 230; State *v.* Vanderbilt, 37 Ohio St. 590.

92. People *v.* Boston, etc., R. Co., 12 Abb. N. Cas. (N. Y.) 230.

93. People *v.* Boston, etc., R. Co., 12 Abb. N. Cas. (N. Y.) 230; State *v.* Vanderbilt, 37 Ohio St. 590.

94. See, generally, CORPORATIONS, 10 Cyc. 291.

95. Louisville, etc., R. **Co.** *v.* Com., 161 U. S. 677, 16 S. Ct. 714. **40 L.** ed. 849 [*affirming* 97 Ky. 675, 31 S. W. **476,** 17 Ky. L. Rep. 427].

The legislature has power to revoke a general authority previously given to consolidate with other roads which has not been executed, and to provide that it shall not apply to parallel or competing lines (Pearsall *v.* Great Northern R. Co., 161 U. S. 646, 16 S. Ct. 705, 40 L. ed. 838 [*reversing* 73 Fed. 933]), although there is no reservation of power to alter or amend the charter (Louisville, etc., R. Co. *v.* Com., 161 U. S. 677, 16 S. Ct. 714, 40 L. ed. 849).

96. Louisville, etc., R. Co. *v.* Com., 161 U. S. 677, 16 S. Ct. 714, 40 L. ed. 849 [*affirming* 97 Ky. 675, 31 S. W. 476, 17 Ky. L. Rep. 427].

97. *Kentucky.*—Louisville, etc., R. Co. *v.* Com., 97 Ky. 675, 31 S. W. 476, 17 Ky. L. Rep. 427.

Mississippi.—State *v.* Mobile, etc., R. Co., 86 Miss. 172, 38 So. 732, 122 Am. St. Rep. 277.

Montana.—State *v.* Montana R. Co., 21 Mont. 221, 53 Pac. 623, 45 L. R. A. 271.

Nebraska.—State *v.* Atchison, etc., R. Co., 24 Nebr. 143, 38 N. W. 43, 8 Am. St. Rep. 164.

New Hampshire.—Currier *v.* Concord R. Corp., 48 N. H. 321.

New York.—Gere *v.* New York Cent., etc., R. Co., 19 Abb. N. Cas. 193; People *v.* Boston, etc., R. Co., 12 Abb. N. Cas. 230.

***Ohio.*—State *v.* Vanderbilt,** 37 Ohio St. 590.

Texas.—East Line, etc., R. Co. *v.* State, 75 Tex. 434, 12 S. W. 690.

United States.—Pearsall *v.* Great Northern R. Co., 161 U. S. 646, 16 S. Ct. 705, 40 L. ed. 838 [*reversing* 73 Fed. 933]; East St. Louis, etc., R. **Co.** *v.* Jarvis, 92 Fed. 735, 34 C. C. A. 639.

See 41 Cent. Dig. tit. "Railroads," § 385.

"Competing roads are those which are rivals in business." People *v.* Boston, etc., R. Co., 12 Abb. N. Cas. (N. Y.) 230, 240.

The consolidation of terminal railroads doing business in a single city so that the cars

these provisions is to prevent monopolies and combinations which would interfere with the benefit to the public resulting from free competition,[98] and they cannot be evaded by means of a judicial sale,[99] or the purchase or transfer of a controlling interest of the stock of one road to another,[1] or any agreement or business consolidation, although not a corporate consolidation, which would have the effect which it is the design of such provisions to prevent;[2] nor will legislative acquiescence in the acquisition by one railroad company of other local and branch lines, although some are parallel to its own, estop the state from opposing a consolidation with a parallel and competing through line running between the same principal termini;[3] but it has been held that these prohibitions in regard to consolidation do not prevent the leasing of one road to a company owning a competing line, in the absence of any similar prohibition in regard to leases.[4] The question as to what roads are within the prohibition must be determined mainly by whether a consolidation would substantially affect competition,[5] and two roads, although in some respects parallel, may not be within the prohibition by reason of not connecting common points,[6] particularly where another road under a different management is located between them;[7] but on the other hand they may be within the prohibition, although not parallel in a mathematical sense,[8] and any roads which are parallel in a general sense and connect the same

of the various railroads entering the city may be brought to the union station or to various warehouses over a common track or tracks is not within the application of the constitutional prohibition, which relates to railroad business in its ordinary meaning as carried on by lines of railroads traversing the state. State *v.* St. Louis Terminal R. Assoc., 182 Mo. 284, 81 S. W. 395.

98. State *v.* Atchison, etc., R. Co., 24 Nebr. 143, 38 N. W. 43, 8 Am. St. Rep. 164; Currier *v.* Concord R. Corp., 48 N. H. 321; East St. Louis, etc., R. Co. *v.* Jarvis, 92 Fed. 735, 34 C. C. A. 639.

99. Louisville, etc., R. Co. *v.* Com., 161 U. S. 677, 693, 16 S. Ct. 714, 40 L. ed. 849, where the court said: "The inhibition of the Constitution is not against the sale to individuals, though they may chance to be stockholders in a competing line, but against the acquisition by a railway, in any form, of a parallel or competing line. If this could be evaded by going through the form of a judicial sale, the constitutional provision would be of no value."

1. Pearsall *v.* Great Northern R. Co., 161 U. S. 646, 16 S. Ct. 705, 40 L. ed. 838 [*reversing* 73 Fed. 933].

2. Currier *v.* Concord R. Corp., 48 N. H. 321; Pearsall *v.* Great Northern R. Co., 161 U. S. 646, 16 S. Ct. 705, 40 L. ed. 838 [*reversing* 73 Fed. 933]; East St. Louis, etc., R. Co. *v.* Jarvis, 92 Fed. 735, 34 C. C. A. 639.

3. Louisville, etc., R. Co. *v.* Com., 161 U. S. 677, 16 S. Ct. 714, 40 L. ed. 849.

4. State *v.* Montana R. Co., 21 Mont. 221, 53 Pac. 623, 45 L. R. A. 271 (where the lease was for ten years); Gere *v.* New York Cent., etc., R. Co., 19 Abb. N. Cas. (N. Y.) 193 (where the lease was for four hundred and seventy-five years). *Contra*, State *v.* Atchison, etc., R. Co., 24 Nebr. 143, 38 N. W. 43, 8 Am. St. Rep. 164 (where the lease was for nine hundred and ninety-nine years and held to be in effect a consolidation and within the constitutional prohibition, but was subsequently permitted upon findings of fact by a referee to the effect that the roads were not in fact competing lines. See State *v.* Atchison, etc., R. Co., 38 Nebr. 437, 57 N. W. 20); East St. Louis, etc., R. Co. *v.* Jarvis, 92 Fed. 735, 34 C. C. A. 639 (holding that a lease for ten years to a competing line is within the prohibition against a consolidation of competing lines).

5. State *v.* St. Louis Terminal R. Assoc., 182 Mo. 284, 81 S. W. 395; Burke *v.* Cleveland, etc., R. Co., 10 Ohio Dec. (Reprint) 525, 21 Cinc. L. Bul. 11; Louisville, etc., R. Co. *v.* Kentucky, 161 U. S. 677, 16 S. Ct. 714, 40 L. ed. 849; Dady *v.* Georgia, etc., R. Co., 112 Fed. 838; East St. Louis, etc., R. Co. *v.* Jarvis, 92 Fed. 735, 34 C. C. A. 639; Kimball *v.* Atchison, etc., R. Co., 46 Fed. 888.

If the roads are not in their general features competing, as where they are widely divergent and reach different commercial centers, they are not within the prohibition, although there may be some incidental competition resulting from their crossing and intersecting other lines which serve as feeders (Burke *v.* Cleveland, etc., R. Co., 10 Ohio Dec. (Reprint) 525, 21 Cinc. L. Bul. 11), or crossing streams upon which steamboats are operated (Dady *v.* Georgia, etc., R. Co., 112 Fed. 838).

Intersecting lines.— The Indiana statute prohibiting the consolidation of one railroad with another which crosses or intersects its line was designated to prevent the absorption of competing lines and does not apply where the intersection is at a terminal point. Smith *v.* Cleveland, etc., R. Co., 170 Ind. 382, 81 N. E. 501.

6. Louisville, etc., R. Co. *v.* Com., 161 U. S. 677, 16 S. Ct. 714, 40 L. ed. 849; Kimball *v.* Atchison, etc., R. Co., 46 Fed. 888.

7. Kimball *v.* Atchison, etc., R. Co., 46 Fed. 888.

8. People *v.* Boston, etc., R. Co., 12 Abb. N.

principal points so as to constitute competing lines are within the prohibition;[9] and two railroads, although not generally parallel or connecting the same termini, may be competing lines by reason of their relations with, control, or management of other lines than their own.[10]

d. With Foreign Companies.[11] In the absence of legislative authority a railroad company of one state has no right to consolidate with a company of a different state,[12] and the legislature of one state cannot grant any exclusive authority for such a consolidation,[13] nor can the legislatures of two different states unite in forming from two or more existing companies a single company which shall be the same legal entity in both states;[14] but each may authorize a company organized under its own laws to consolidate with a company of the other,[15] and under such authority a consolidation may be effected prior to the construction of the railroads;[16] but a statute authorizing such a consolidation and not in terms retroactive will not validate a consolidation with a foreign company entered into prior to its enactment.[17]

e. Consent of Stock-Holders.[18] A consolidation of two or more railroad companies cannot be effected by the action of the directors alone, but must be done by the stock-holders,[19] and except where at the time of the subscription there were constitutional or statutory provisions authorizing a consolidation or an amendment of the charter,[20] all of the stock-holders must consent,[21] since the relation

Cas. (N. Y.) 230; East St. Louis, etc., R. Co. *v.* Jarvis, 92 Fed. 735, 34 C. C. A. 639.

9. State *v.* Vanderbilt, 37 Ohio St. 590; Louisville, etc., R. Co. *v.* Com., 161 U. S. 677, 16 S. Ct. 714, 40 L. ed. 849.

10. State *v.* Montana R. Co., 21 Mont. 221, 53 Pac. 623, 45 L. R. A. 271; East Line, etc., R. Co. *v.* State, 75 Tex. 434, 12 S. W. 609; East St. Louis, etc., R. Co. *v.* Jarvis, 92 Fed. 735, 34 C. C. A. 639.

11. See, generally, CORPORATIONS, 10 Cyc. 293.

12. American L. & T. Co. *v.* Minnesota, etc., R. Co., 157 Ill. 641, 42 N. E. 153.

13. People *v.* New York, etc., R. Co., 129 N. Y. 474, 29 N. E. 959, 15 L. R. A. 82 [*reversing* 61 Hun 66, 15 N. Y. Suppl. 635], holding that concurrent legislation on the part of the different states is necessary and that all that one state can do is to authorize a company incorporated under its laws to consolidate with a company of a different state upon like permission being granted by the legislatnre of that state.

14. Ohio, etc., R. Co. *v.* People, 123 Ill. 467, 14 N. E. 874; Quincy R. Bridge Co. *v.* Adams County, 88 Ill. 615; Chicago, etc., R. Co. *v.* Auditor-Gen., 53 Mich. 79, 18 N. W. 586.

Status of consolidated company see *infra*, VII, E, 6, e.

15. Bishop *v.* Brainerd, 28 Conn. 289; Ohio, etc., R. Co. *v.* People, 123 Ill. 467, 14 N. E. 874; Boardman *v.* Lake Shore, etc., R. Co., 84 N. Y. 157.

The constitution of the United States which confers upon congress the right to regulate commerce among the several states does not affect the power of the states to authorize the consolidation of different railroads running through such states. Boardman *v.* Lake Shore, etc., R. Co., 84 N. Y. 157.

In Indiana the statute authorizes railroad companies organized in that state to consolidate with a company organized in an adjoining state and applies to companies organized after as well as before the enactment of the statute. Smith *v.* Cleveland, etc., R. Co., 170 Ind. 382, 81 N. E. 501.

16. Livingston County *v.* Portsmouth First Nat. Bank, 128 U. S. 102, 9 S. Ct. 18, 32 L. ed. 359.

17. American L. & T. Co. *v.* Minnesota, etc., R. Co., 157 Ill. 641, 42 N. E. 153.

18. See, generally, CORPORATIONS, 10 Cyc. 297.

19. Mowrey *v.* Indianapolis, etc., R. Co., 17 Fed. Cas. No. 9,891, 4 Biss. 78.

20. Market St. R. Co. *v.* Hellman, 109 Cal. 571, 42 Pac. 225.

21. *Alabama.*— Nathan *v.* Tompkins, 82 Ala. 437, 2 So. 747.

Illinois.— Illinois Grand Trunk R. Co. *v.* Cook, 29 Ill. 237.

Indiana.— Booe *v.* Junction R. Co., 10 Ind. 93; McCray *v.* Junction R. Co., 9 Ind. 358.

Kentucky.— Owensboro Deposit Bank *v.* Barrett, 13 S. W. 337, 11 Ky. L. Rep. 337.

United States.— Mowrey *v.* Indianapolis, etc., R. Co., 17 Fed. Cas. No. 9,891, 4 Biss. 781.

See 41 Cent. Dig. tit. "Railroads," § 389.

Buying out minority.— It has been held that while a dissenting stock-holder may enjoin the consolidation until he is paid for his interest or security given therefor, the majority of the stock-holders may force a consolidation against his consent by buying out his shares at their actual value (Lauman *v.* Lebanon Valley R. Co., 30 Pa. St. 42, 72 Am. Dec. 685); but elsewhere the reasoning of this decision has been expressly disapproved (Mowrey *v.* Indianapolis, etc., R. Co., 17 Fed. Cas. No. 9,891, 4 Biss. 781).

Condemning stock of dissenting stock-holders.— In a recent decision it has been held that, although at the time a stock-holder became such, there was no provision authorizing a consolidation, or right reserved to

between the stock-holders and the company is contractual and cannot be impaired by the legislature;[22] and while a consolidation, if authorized by the legislature, is not necessarily void, although without the consent of all the stock-holders, it releases them from their subscriptions to the stock of the constituent companies.[23] But subscriptions to the stock of the constituent companies must be deemed to have been made with reference to any constitutional or statutory provisions then existing, authorizing a consolidation of such companies with others,[24] in which case a majority of the stock-holders may exercise the power,[25] and also where there was in existence at the time a right reserved to alter or amend the charter, the legislature may authorize a consolidation by consent of less than all the stock-holders.[26]

f. Effect of Curative Statutes.[27] The legislature may validate an unauthorized or informal consolidation by a subsequent curative act,[28] or recognition of the new company as a corporation *de jure*;[29] but a statute merely authorizing consolidations such as that previously entered into without authority and not in terms retroactive will not validate the consolidation.[30]

3. Agreements and Proceedings. In some cases the statutes set out the necessary procedure for effecting a consolidation,[31] and there must be a compliance with their provisions,[32] such as the preliminary agreement by the directors,[33] due notice thereof to the stock-holders,[34] and a subsequent ratification by

amend the charter, the legislature, although it could not compel a dissenting stock-holder to become a stock-holder in the new company, might authorize a consolidation by a majority of the stock by providing under its power of eminent domain for the condemnation of the stock of a dissenting stock-holder and paying him the value thereof. Spencer *v.* Seaboard Air Line R. Co., 137 N. C. 107, 49 S. E. 96, 1 L. R. A. N. S. 604.

Where the constituent companies are of different states, the method by which each secures the consent of its own stock-holders is governed by the laws of that state and need not conform to the laws of the other state. Bradford *v.* Frankfort, etc., R. Co., 142 Ind. 383, 40 N. E. 471, 41 N. E. 819.

22. McCray *v.* Junction R. Co., 9 Ind. 358; Owensboro Deposit Bank *v.* Barrett, 13 S. W. 337, 11 Ky. L. Rep. 337.

23. Booe *v.* Junction R. Co., 10 Ind. 93; McCray *v.* Junction R. Co., 9 Ind. 358.

Rights and liabilities of stock-holders see *infra*, VII, E, 6, f.

24. Bish *v.* Johnson, 21 Ind. 299; Mansfield, etc., R. Co. *v.* Brown, 26 Ohio St. 223; Bonner *v.* Terre Haute, etc., R. Co., 151 Fed. 985, 81 C. C. A. 476.

25. Bonner *v.* Terre Haute, etc., R. Co., 151 Fed. 985, 81 C. C. A. 476.

26. Market St. R. Co. *v.* Hellman, 109 Cal. 571, 42 Pac. 225; Hale *v.* Cheshire R. Co., 161 Mass. 443, 37 N. E. 307. See also Bishop *v.* Brainard, 28 Conn. 289.

If the charter of the company was prior to the constitutional provision authorizing the legislature to alter or amend, a subsequent statutory provision authorizing a consolidation does not authorize a consolidation without the consent of all of the stock-holders. Mowrey *v.* Indianapolis, etc., R. Co., 17 Fed. Cas. No. 9,891, 4 Biss. 78.

The terms of the consolidation agreed upon by the majority are binding upon the minority where there is a right reserved to alter or amend the charter, and the legislature authorizes a consolidation upon such terms as may be approved by a majority of the stock-holders. Hale *v.* Cheshire R. Co., 161 Mass. 443, 37 N. E. 307.

27. See, generally, Corporations, 10 Cyc. 316.

28. Bishop *v.* Brainerd, 28 Conn. 289; Mitchell *v.* Deeds, 49 Ill. 416, 45 Am. Dec. 621; Illinois Grand Trunk R. Co. *v.* Cook, 29 Ill. 237; Fisher *v.* Evansville, etc., R. Co., 7 Ind. 407.

29. Mead *v.* New York, etc., R. Co., 45 Conn. 199; McAuley *v.* Columbus, etc., R. Co., 83 Ill. 348.

30. American L. & T. Co. *v.* Minnesota, etc., R. Co., 157 Ill. 641, 42 N. E. 153.

31. Tuttle *v.* Michigan Air Line R. Co., 35 Mich. 247; State *v.* Chicago, etc., R. Co., 25 Nebr. 156, 41 N. W. 125, 2 L. R. A. 564; Mansfield, etc., R. Co. *v.* Brown, 26 Ohio St. 223; Leavenworth County *v.* Chicago, etc., R. Co., 134 U. S. 688, 10 S. Ct. 708, 33 L. ed. 1064 [*affirming* 25 Fed. 219]; Phinizy *v.* Augusta, etc., R. Co., 62 Fed. 678.

32. Brown *v.* Dibble, 65 Mich. 520, 32 N. W. 656; Tuttle *v.* Michigan Air Line R. Co., 35 Mich. 247; State *v.* Vanderbilt, 37 Ohio St. 590; Mansfield, etc., R. Co. *v.* Brown, 26 Ohio St. 223.

33. See Tuttle *v.* Michigan Air Line R. Co., 35 Mich. 247.

34. Brown *v.* Dibble, 65 Mich. 520, 32 N. W. 656; Tuttle *v.* Michigan Air Line R. Co., 35 Mich. 247.

Form and sufficiency of notice.— The notices to the stock-holders of the different companies need not be signed and published jointly by the secretaries of the several companies, but are properly signed and published separately and the notice to the stock-holders of each need be published only in the counties through which that road runs. Wells *v.* Rodgers, 60 Mich. 525, 27 N. W. 671.

them,[35] and approval by the designated officers of the state,[36] filing with the secretary of state a certificate of articles of consolidation,[37] which must be in the required form,[38] payment of a consolidation tax,[39] or fee for filing the articles of consolidation;[40] and under some of the statutes the election of a new board of directors by the consolidated company is essential to vest in it the title to the property of the constituent companies.[41] A failure, however, strictly to comply with all the provisions of the statute will not necessarily render the consolidation void,[42] and there may be a consolidated corporation *de facto*, although there were irregularities in the proceedings.[43] A failure on the part of the stock-holders of one of several companies to confirm the agreement of consolidation does not impair it as to the others, where the agreement expressly provided that in such an event the others should perfect and carry out the agreement;[44] but where upon a proposition for the consolidation of certain roads a fund is subscribed and placed in the hands of a committee for the purpose of extending and completing some of the roads so as to form a through line, and one of the roads is refused permission by the legislature to enter into the consolidation, a loan by the committee to that company for the purpose of completing its line is a misappropriation of the fund for which they may be required to account to the subscribers.[45] The statutes frequently authorize railroad companies to consolidate upon such terms as they may agree upon;[46] but such provisions relate only to the adjustment of the interests of the

35. See Tuttle *v.* Michigan Air Line R. Co., 35 Mich. 247.

36. Brown *v.* Dibble, 65 Mich. 520, 32 N. W. 656.

37. State *v.* Chicago, etc., R. Co., 145 Ind. 229, 43 N. E. 226; Peninsular R. Co. *v.* Tharp, 28 Mich. 506.

Upon filing the certificate in the office of the secretary of state the consolidated company becomes a legal corporation, although the certificate has not been recorded. Com. *v.* Atlantic, etc., R. Co., 53 Pa. St. 9.

Rights previously acquired not affected.— Where two railroad companies are authorized to consolidate, a failure of the companies to file with the secretary of state the certificate required by the statute does not affect the validity of a conveyance executed before the passage of the statute, whereby one of the companies transferred to the other all its property, rights and franchises. Atlantic, etc., R. Co. *v.* St. Louis, etc., R. Co., 66 Mo. 228 [*reversing* 3 Mo. App. 315].

38. State *v.* Vanderbilt, 37 Ohio St. 590, holding that the certificate made by the directors of the consolidating companies, under Ohio Rev. St. § 3381, must show the number and the places of residence of the directors of the new company.

Date of agreement.— An agreement for the consolidation of two railroad companies which is duly signed and sealed after the meetings of the stock-holders of both companies has been held and the consolidation ordered is not rendered invalid by the fact that it bears date prior to the meetings. Wells *v.* Rodgers, 60 Mich. 525, 27 N. W. 671.

39. Ashley *v.* Ryan, 153 U. S. 436, 14 S. Ct. 865, 38 L. ed. 773 [*affirming* 49 Ohio St. 504, 31 N. E. 721 (*affirming* 6 Ohio Cir. Ct. 208, 3 Ohio Cir. Dec. 418)].

40. State *v.* Chicago, etc., R. Co., 145 Ind. 229, 43 N. E. 226.

41. Mansfield, etc., R. Co. *v.* Drinker, 30 Mich. 124; Mansfield, etc., R. Co. *v.* Brown, 26 Ohio St. 223.

Time of election.— The new directors cannot be elected until after the consolidation proceedings are consummated by filing the articles of consolidation with the secretary of state. Mansfield, etc., R. Co. *v.* Brown, 26 Ohio St. 223.

42. Leavenworth County *v.* Chicago, etc., R. Co., 134 U. S. 688, 10 S. Ct. 708, 33 L. ed. 1064 [*affirming* 25 Fed. 219] (holding that under the Missouri statute requiring that before any railroad companies shall consolidate under the provisions of the act they shall file with the secretary of state a resolution accepting the provisions thereof, passed by a majority vote of the stock of each company, and also file with the secretary of state a certified copy of the articles of agreement with the new corporate name adopted, after which the consolidation shall be considered duly consummated, a failure to file the first resolution as required will not render the consolidation void, where the articles of agreement were filed and the other proceedings duly complied with); Phinizy *v.* Augusta, etc., R. Co., 62 Fed. 678 (holding that where the agreement of consolidation was accepted, ratified, and recorded in the office of the secretary of state as required by law, the consolidation was not void, so as to preclude the consolidated company from acting as a corporation because the agreement did not have upon it the certificates of the several secretaries of the constituent companies, that it had been accepted by a majority of the stock-holders as required by the statute).

43. See *infra*, VII, E, 6, b.

44. Phinizy *v.* Augusta, etc., R. Co., 62 Fed. 678.

45. Gould *v.* Seney, 9 N. Y. Suppl. 818 [*reversing* in part 5 N. Y. Suppl. 928].

46. Meyer *v.* Johnston, 64 Ala. 603; Chicago, etc., R. Co. *v.* Ashling, 160 Ill. 373, 43

stock-holders and the administrative details affecting the consolidation,[47] and do not authorize any action inconsistent with the charter provisions or existing statutes,[48] or any contract or agreement between the companies which would conclude the rights of creditors or persons having claims against either of the constituent companies,[49] or a transfer of the property and franchises of the constituent companies to the consolidated company free from the liabilities, duties, and obligations which the former owed to private individuals or to the public generally.[50] Under the New York statute it is held that the companies may by the agreement of consolidation provide for the period of the corporate life of the consolidation company irrespective of any restrictions in the articles of incorporation of either of the constituent companies.[51]

4. Who May Question Validity. Ordinarily the validity of a consolidation or the legal existence of the consolidated company can be attacked only by the state,[52] and cannot be questioned in a collateral proceeding,[53] or even in a direct action or proceeding by private litigants;[54] but this rule applies only where there is at least a corporation *de facto*,[55] and if there was no statutory authority for the consolidation its validity may be collaterally attacked.[56] It is also held that a stock-holder or subscriber to the stock of one of the constituent companies who did not consent to the consolidation or have any knowledge of the proceedings is not precluded from questioning the validity of the consolidation in an action against him by the consolidated company to recover a stock assessment or enforce his subscription, although the proceedings were sufficient to constitute the new company a corporation *de facto*.[57]

5. Estoppel to Question Validity. A railroad company formed by a voluntary consolidation, which has succeeded to the property and the exercise of the fran-

N. E. 373 [*affirming* 56 Ill. App. 327]; State *v.* Baltimore, etc., R. Co., 77 Md. 489, 26 Atl. 865; Adams *v.* Yazoo, etc., R. Co., 77 Miss. 194, 24 So. 200, 317, 28 So. 956, 60 L. R. A. 33.

47. State *v.* Baltimore, etc., R. Co., 77 Md. 489, 26 Atl. 865; Adams *v.* Yazoo, etc., R. Co., 77 Miss. 194, 24 So. 200, 317, 28 So. 956, 60 L. R. A. 33.

The consolidated company has power to determine the number and amount of shares of that company and to classify such stock into common and preferred and may issue a greater or less number of shares than that of the aggregate of the constituent companies in order to secure an equitable division of property between the stock-holders of such companies. Burke *v.* Cleveland, etc., R. Co., 10 Ohio Dec. (Reprint) 525, 21 Cinc. L. Bul. 11.

48. Adams *v.* Yazoo, etc., R. Co., 77 Miss. 194, 24 So. 200, 317, 28 So. 956.

49. State *v.* Baltimore, etc., R. Co., 77 Md. 489, 26 Atl. 865; Fargey *v.* Grand Junction R. Co., 4 Ont. 232.

50. Tompkins *v.* Augusta Southern R. Co., 102 Ga. 436, 30 S. E. 992.

51. New York Cent., etc., R. Co. *v.* Yonkers, 103 N. Y. Suppl. 252.

52. Terhune *v.* Potts, 47 N. J. L. 218; Bell *v.* Pennsylvania, etc., R. Co., (N. J. Ch. 1887) 10 Atl. 741; National Docks R. Co. *v.* New Jersey Cent. R. Co., 32 N. J. Eq. 755; Rothschild *v.* Rochester, etc., R. Co., 1 Pa. Co. Ct. 620; Honston, etc., R. Co. *v.* Shirley, 54 Tex. 125; Toledo, etc., R. Co. *v.* Continental Trust Co., 95 Fed. 497, 36 C. C. A. 155.

53. Smith *v.* Cleveland, etc., R. Co., 170 Ind. 382, 81 N. E. 501; Chicago, etc., R. Co. *v.* Stafford County, 36 Kan. 121, 12 Pac. 593; Hamilton *v.* Clarion, etc., R. Co., 144 Pa. St. 34, 23 Atl. 53, 13 L. R. A. 779; Rothschild *v.* Rochester, etc., R. Co., 1 Pa. Co. Ct. 620; Toledo, etc., R. Co. *v.* Continental Trust Co., 95 Fed. 497, 36 C. C. A. 155; Phinizy *v.* Augusta, etc., R. Co., 62 Fed. 678.

54. Terhune *v.* Potts, 47 N. J. L. 218 (holding that where there has been a consolidation *de facto*, bondholders of the constituent companies cannot maintain an information in the nature of a quo warranto to test the validity of the consolidation); Bell *v.* Pennsylvania, etc., R. Co., (N. J. Ch. 1887) 10 Atl. 741, (holding that stock-holders of the constituent companies cannot maintain a bill in equity to annul a consolidation made by several railroad companies and to have declared void a mortgage executed by the consolidated company upon the aggregate property); Terhune *v.* New Jersey Midland R. Co., 38 N. J. Eq. 423 (holding that equity cannot dissolve a company formed by the consolidation of several other companies, on the ground alleged by a stock-holder in one of the original companies that the consolidation was for a fraudulent purpose and was not legally effected).

55. American L. & T. Co. *v.* Minnesota, etc., R. Co., 157 Ill. 641, 42 N. E. 153.

56. American L. & T. Co. *v.* Minnesota, etc., R. Co., 157 Ill. 641, 42 N. E. 153.

57. Tuttle *v.* Michigan Air Line R. Co., 35 Mich. 247; Mansfield, etc., R. Co. *v.* Stout, 26 Ohio St. 241.

chises of the constituent companies, or induced third persons to contract with it upon the faith of its legal existence as a corporation, is estopped to deny the validity of the consolidation,[58] or its title to property mortgaged by it,[59] or the validity of contracts made by it and of which it has received the benefit,[60] or its liability upon obligations of the constituent companies.[61] This estoppel applies to one of the constituent companies which has participated in all the steps essential to the creation of a *de facto* corporation by consolidation,[62] and also to the stock-holders of a constituent company who participated in the proceedings of that company by which it agreed to and effected the consolidation,[63] or have enjoyed the benefits of its privileges,[64] or who have been guilty of laches in failing to make any objection until after a long lapse of time, during which rights and equities of third parties have intervened;[65] and a stock-holder who with knowledge of the facts voluntarily participates in the consolidation proceedings will be estopped to assert any right existing against one of the constituent companies which from its nature would be impossible of performance after the consolidation.[66] So also third persons by their dealings with a consolidated company *de facto* may be estopped to deny the validity of the consolidation.[67]

6. Operation and Effect of Consolidation — a. In General. Upon the consolidation of two or more railroad companies the exact legal status of the consolidated company is somewhat anomalous and hard to define, since technically speaking and for general purposes it is a new corporation, but in some respects and for some purposes should be considered merely as a continuation of the old companies under a new name.[68] The question depends largely upon the provisions of the statute authorizing the consolidation,[69] and the proceedings taken under and by authority thereof.[70] Ordinarily the effect of the consolidation is to create a new company and to dissolve or terminate the existence of the constituent companies,[71] except in so far as their separate existence may be expressly

58. Chicago, etc., R. Co. *v.* Ashling, 160 Ill. 373, 43 N. E. 373 [*affirming* 56 Ill. App. 327]; Racine, etc., R. Co. *v.* Farmers' L. & T. Co., 49 Ill. 331, 95 Am. Dec. 595; Adelbert College *v.* Toledo, etc., R. Co., 5 Ohio S. & C. Pl. Dec. 14, 3 Ohio N. P. 15; Hamilton *v.* Clarion, etc., R. Co., 144 Pa. St. 34, 23 Atl. 53, 13 L. R. A. 779; Gulf, etc., R. Co. *v.* Hutcheson, 3 Tex. App. Civ. Cas. § 96.

59. Racine, etc., R. Co. *v.* Farmers' L. & T. Co., 49 Ill. 331, 95 Am. Dec. 595.

60. Dimpfel *v.* Ohio, etc., R. Co., 7 Fed. Cas. No. 3,918, 9 Biss. 127, 8 Reporter 641 [*affirmed* in 110 U. S. 209, 3 S. Ct. 573, 28 L. ed. 121].

61. Gulf, etc., R. Co. *v.* Hutcheson, 3 Tex. App. Civ. Cas. § 96.

62. Bradford *v.* Frankfort, etc., R. Co., 142 Ind. 383, 40 N. E. 741, 41 N. E. 819.

63. Bradford *v.* Frankfort, etc., R. Co., 142 Ind. 383, 40 N. E. 741, 41 N. E. 819.

64. Rothschild *v.* Rochester, etc., R. Co., 1 Pa. Co. Ct. 620.

65. Dimpfel *v.* Ohio, etc., R. Co., 7 Fed. Cas. No. 3,918, 9 Biss. 127, 8 Reporter 641 [*affirmed* in 110 U. S. 209, 3 S. Ct. 573, 28 L. ed. 121].

66. Tagart *v.* Northern Cent. R. Co., 29 Md. 557, holding that a person owning stock and bonds of one of the constituent companies who did not exercise an option to have his bonds converted into stock of that company when it was practicable, and acquiesced and participated in the consolidation by which it became impossible to secure the conversion to which he was previously entitled, is estopped to assert such right or recover damages therefor against the consolidated company.

67. Toledo, etc., R. Co. *v.* Continental Trust Co., 95 Fed. 497, 36 C. C. A. 155, 82 Fed. 642.

Where a city subscribes to the corporate stock of a consolidated company and issues its bonds in payment of the subscription, it is estopped in an action on the bonds to deny the corporate existence of the consolidated company or the validity of the consolidation proceedings. Lewis *v.* Clarendon, 15 Fed. Cas. No. 8,320, 5 Dill. 329, 6 Reporter 609.

68. Kinion *v.* Kansas City, etc., R. Co., 39 Mo. App. 382, per Biggs, J.

69. Meyer *v.* Johnston, 64 Ala. 603; Chicago, etc., R. Co. *v.* Ashling, 160 Ill. 373, 43 N. E. 373 [*affirming* 56 Ill. App. 327]; Keokuk, etc., R. Co. *v.* Missouri, 152 U. S. 301, 14 S. Ct. 592, 38 L. ed. 450; Central R. etc., Co. *v.* Georgia, 92 U. S. 665, 23 L. ed. 757.

It is not the material out of which the consolidated company is formed but the act which formed it which must be looked to for its character and status. Shields *v.* State, 26 Ohio St. 86.

70. Meyer *v.* Johnston, 64 Ala. 603.

71. *Arkansas.*— St. Louis, etc., R. Co. *v.* Berry, 41 Ark. 509.

Illinois.— People *v.* Louisville, etc., R. Co., 120 Ill. 48, 10 N. E. 657.

continued by the statute for the benefit of creditors,[72] and it has been asserted that such is the uniform and necessary effect of what is properly termed a consolidation; [73] but on the contrary it is held that such is not necessarily or always the case,[74] and that a consolidation may be effected by the absorption or merger of one or more railroad companies into another existing company which becomes the consolidated company, and does not lose its identity but merely continues with enlarged rights, capacities, and property under its original name,[75] or even under a new name without becoming a new company.[76]

b. Invalid or Incomplete Consolidation. An attempted consolidation made without any authority of law does not create even a corporation *de facto*,[77] and since an illegal consolidation does not create a new company, it does not affect the identity of the constituent companies, which will be liable for any acts done by the so-called consolidated company in the operation of their roads; [78] and where an illegal consolidation is dissolved by the court and a decree entered providing that obligations fairly incurred by the consolidated company for the benefit of the constituent companies shall be paid by them, execution may be issued against them on a judgment recovered against the consolidated company prior to the dissolution;[79] but the constituent companies will not be liable on contracts made by the officers of such consolidated company which were not within the corporate powers of these companies.[80] Where, however, there is authority to consolidate, the consolidated company may be a corporation *de facto*, although there were irregularities in the consolidation proceedings,[81] or some of the con-

Indiana.— McMahan *v.* Morrison, 16 Ind. 172, 79 Am. Dec. 418.

Kansas.— Kansas, etc., R. Co. *v.* Smith, 40 Kan. 192, 19 Pac. 636; Council Grove, etc., R. Co. *v.* Lawrence, 3 Kan. App. 274, 45 Pac. 125.

Maine.— State *v.* Maine Cent. R. Co., 66 Me. 488.

Maryland.—State *v.* Baltimore, etc., R. Co., 77 Md. 489, 26 Atl. 865.

Mississippi.—Adams *v.* Yazoo, etc., R. Co., 77 Miss. 194, 24 So. 200, 317, 28 So. 956, 60 L. R. A. 33.

Missouri.— State *v.* Lesueur, 145 Mo. 322, 46 S. W. 1075.

Ohio.— Shields *v.* State, 26 Ohio St. 86.

United States.— Keokuk, etc., R. Co. *v.* Missouri, 152 U. S. 301, 14 S. Ct. 592, 38 L. ed. 450; Maine Cent. R. Co. *v.* Maine, 96 U. S. 499, 24 L. ed. 836; Shields *v.* Ohio, 95 U. S. 319, 24 L. ed. 357; Ferguson *v.* Meredith, 1 Wall. 25, 17 L. ed. 604; Ridgway Tp. *v.* Griswold, 20 Fed. Cas. No. 11,819, 1 McCrary 151.

See 41 Cent. Dig. tit. "Railroads," § 450.

Application of rule.— Upon the theory that the original companies are dissolved it is held that where the constituent companies were organized before, and the consolidation effected after, the adoption of a constitutional provision authorizing the alteration, amendment, or repeal of a corporate charter, the consolidated company was subject to the provision and was a company "formed under a general law," within the application of the provision. Shields *v.* State, 26 Ohio St. 86.

72. State *v.* Maine Cent. R. Co., 66 Me. 488.

73. Adams *v.* Yazoo, etc., R. Co., 77 Miss. 194, 24 So. 200, 317, 28 So. 956, 60 L. R. A. 33.

74. Meyer *v.* Johnston, 64 Ala. 603; Chicago, etc., R. Co. *v.* Ashling, 160 Ill. 373, 43 N. E. 373 [*affirming* 56 Ill. App. 327]; Central R., etc., Co. *v.* Georgia, 92 U. S. 665, 23 L. ed. 757.

75. Chicago, etc., R. Co. *v.* Ashling, 160 Ill. 373, 43 N. E. 373 [*affirming* 56 Ill. App. 327]; Central R., etc., Co. *v.* Georgia, 92 U. S. 665, 23 L. ed. 757.

Such consolidation may be effected by one company, pursuant to legislative authority, absorbing another and issuing to the stockholders of the latter shares of its own stock in exchange for that of the company absorbed. Central R., etc., Co. *v.* Georgia, 92 U. S. 665, 23 L. ed. 757.

76. Meyer *v.* Johnston, 64 Ala. 603.

77. American L. & T. Co. *v.* Minnesota, etc., R. Co., 157 Ill. 641, 42 N. E. 153, holding further that the action of the secretary of state in filing and recording the agreement of consolidation was without authority of law and had no effect either to legalize the attempted consolidation or to give it the status of a corporation *de facto*.

78. Latham *v.* Boston, etc., R. Co., 38 Hun (N. Y.) 265.

79. Ketcham *v.* Madison, etc., R. Co., 20 Ind. 260, holding that notice of the motion for execution was properly served upon the presidents of the constituent companies.

80. Pearce *v.* Madison, etc., R. Co., 21 How. (U. S.) 441, 16 L. ed. 184, holding that where two railroad companies illegally consolidated, no action can be sustained on the notes of the consolidated company, given for the purchase of a steamboat line to run in connection with the railroads, which was an unauthorized departure from the business of these companies.

81. Bradford *v.* Frankfort, etc., R. Co., 142 Ind. 383, 40 N. E. 741, 41 N. E. 819;

stituent companies did not possess all of the qualifications required by the statute.[82] Unless a statutory authority to consolidate is acted upon and a consolidation effected, the authority to consolidate does not impose any liability upon either company for debts of the other,[83] nor can any conditions imposed by the statute authorizing the consolidation be enforced;[84] but until the consolidation is consummated the constituent companies continue in the full enjoyment of their franchises.[85]

e. As to Property, Rights, and Privileges. The effect of a consolidation upon the rights and privileges of the consolidated company depends largely upon the terms of the statute under which the consolidation is effected.[86] Ordinarily the consolidated company succeeds to all the property of the constituent companies,[87] together with the rights, privileges, and franchises previously enjoyed by them,[88] and the statutes usually so provide;[89] but the consolidated company

Terhune *v.* New Jersey Midland R. Co., 38 N. J. Eq. 423.

82. Toledo, etc., R. Co. *v.* Continental Trust Co., 95 Fed. 497, 36 C. C. A. 155.

83. Southgate *v.* Atlantic, etc., R. Co., 61 Mo. 89.

84. Gibbes *v.* Greenville, etc., R. Co., 13 S. C. 228.

85. Mansfield, etc., R. Co. *v.* Brown, 26 Ohio St. 223, holding that under Ohio Railroad Consolidation Act of 1856, the constituent companies continue in the enjoyment of their franchises and may accept subscriptions to their capital stock until the consolidation is consummated, by filing the agreement of consolidation with the secretary of state.

86. State *v.* Maine Cent. R. Co., 66 Me. 488.

87. Cashman *v.* Brownlee, 128 Ind. 266, 27 N. E. 560; New York Cent. R. Co. *v.* Saratoga, etc., R. Co., 39 Barb. (N. Y.) 289.

The right to rents for the use by another company of a part of one of the consolidated roads passes to the consolidated company as a necessary appurtenance to the ownership of the property. New York Cent. R. Co. *v.* Saratoga, etc., R. Co., 39 Barb. (N. Y.) 289.

88. *Illinois.*— Cooper *v.* Corbin, 105 Ill. 224; Robertson *v.* Rockford, 21 Ill. 451.

Indiana.— Smith *v.* Cleveland, etc., R. Co., (1907) 81 N. E. 501; Paine *v.* Lake Erie, etc., R. Co., 31 Ind. 283.

Louisiana.— Shreveport Traction Co. *v.* Kansas City, etc., R. Co., 119 La. 759, 44 So. 457.

Mississippi.— Natchez, etc., R. Co. *v.* Lambert, 70 Miss. 779, 13 So. 33.

New Jersey.— Day *v.* New York, etc., R. Co., 58 N. J. L. 677, 34 Atl. 1081.

New York.— Prouty *v.* Michigan Southern, etc., R. Co., 4 Thomps. & C. 230.

North Carolina.— Barker *v.* Southern R. Co., 137 N. C. 214, 49 S. E. 115.

Pennsylvania.— Com. *v.* Buffalo, etc., R. Co., 207 Pa. St. 160, 56 Atl. 412.

Tennessee.— Miller *v.* Lancaster, 5 Coldw. 514.

United States.— Green County *v.* Conners, 109 U. S. 104, 3 S. Ct. 69, 27 L. ed. 872; Lewis *v.* Clarendon, 15 Fed. Cas. No. 8,320, 5 Dill. 329, 6 Reporter 609; Branch *v.* Atlantic, etc., R. Co., 4 Fed. Cas. No. 1,807, 3 Woods 481.

See 41 Cent. Dig. tit. "Railroads," § 448.

A consolidated company succeeds to the right to continue proceedings already instituted by one of the constituent companies for the condemnation of land (California Cent. R. Co. *v.* Hooper, 76 Cal. 404, 18 Pac. 599; Day *v.* New York, etc., R. Co., 58 N. J. L. 677, 34 Atl. 1081); the right to condemn land for making local alterations in the line (Smith *v.* Cleveland, etc., R. Co., (Ind. 1907) 81 N. E. 501); the right to complete the construction of a branch road connecting with one of the constituent roads which the latter had power to construct (State *v.* Greene County, 54 Mo. 540); the right to receive municipal subscriptions to its capital stock (Scotland County *v.* Thomas, 94 U. S. 682, 24 L. ed. 219; Lewis *v.* Clarendon, 15 Fed. Cas. No. 8,320, 5 Dill. 329, 6 Reporter 609); the right to recover on municipal bonds given in aid of the construction of one of the constituent companies (Green County *v.* Conners, 109 U. S. 104, 3 S. Ct. 69, 27 L. ed. 872); the right to recover on a bond of indemnity given to one of the constituent companies for any damages which might be recovered against it on account of the location of one of its depots (Miller *v.* Lancaster, 5 Coldw. (Tenn.) 514); the right to compromise and settle a claim against one of the constituent companies and maintain an action to enforce the settlement (Paine *v.* Lake Erie, etc., R. Co., 31 Ind. 283); and the necessary affidavit required to be made by an officer of one of the constituent companies to secure a certain immunity granted to that company may subsequently be made by the corresponding officer of the consolidated company (Natchez, etc., R. Co. *v.* Lambert, 70 Miss. 779, 13 So. 33); and where a railroad company limited by its act of incorporation to three tracks consolidates with another having no limit as to the number of tracks which may be used, the consolidated company is not limited to three tracks (New York Cent., etc., R. Co. *v.* Yonkers, 103 N. Y. Suppl. 252).

89. Ohio, etc., R. Co. *v.* People, 123 Ill. 467, 14 N. E. 874; Day *v.* New York, etc., 58 N. J. L. 677, 34 Atl. 1081. See also cases cited *supra*, note 88.

does not become invested with any other or greater rights than were possessed by the constituent companies,[90] and a consolidation does not in all cases confer upon the new company the sum total of all the rights, powers, and privileges of the constituent companies.[91] The consolidated company succeeds to whatever rights, privileges, and immunities are possessed by each of the constituent companies in common,[92] and also to any special right or privilege enjoyed by one of them alone in so far as it may be separately exercised or enjoyed with respect to the portion of the road or property derived from that company; [93] but a separate right or privilege of one company does not pass to the consolidated company so as to become a general right of that company with respect to the entire road or property,[94] nor do any separate rights of the constituent companies pass to the consolidated company which from their nature cannot be exercised or enjoyed by it under its new constitution.[95]

d. As to Duties and Liabilities. Where there has been a consolidation of two or more railroad companies, the consolidated company becomes liable to perform the duties required of the constituent companies,[96] and to carry out their contracts or respond in damages upon a failure or refusal to do so,[97] and ordinarily becomes subject to all their existing debts and liabilities,[98] or at least

90. Ruggles *v.* People, 91 Ill. 256.

91. Georgia Pac. R. Co. *v.* Gaines, 88 Ala. 377, 7 So. 382; Georgia Pac. R. Co. *v.* Wilks, 86 Ala. 478, 6 So. 34; State *v.* Maine Cent. R. Co., 66 Me. 488.

Under the Alabama statute it is only when the consolidated roads form a continuous line that the new company succeeds to "all the rights, powers and franchises" of the constituent companies, and except in such cases the right of one of such companies to acquire land other than what is necessary for the purposes of constructing and operating the road does not pass to the consolidated company. Georgia Pac. R. Co. *v.* Gaines, 88 Ala. 377, 7 So. 382.

92. Mead *v.* New York, etc., R. Co., 45 Conn. 199; Robertson *v.* Rockford, 21 Ill. 451; Prouty *v.* Michigan Southern, etc., R. Co., 4 Thomps. & C. (N. Y.) 230.

93. Natchez, etc., R. Co. *v.* Lambert, 70 Miss. 779, 13 So. 33; State *v.* Greene County, 54 Mo. 540; Tomlinson *v.* Branch, 15 Wall. (U. S.) 460, 21 L. ed. 189.

Immunity from taxation see TAXATION.

94. Tomlinson *v.* Branch, 15 Wall. (U. S.) 460, 21 L. ed. 189; Philadelphia, etc., R. Co. *v.* Maryland, 10 How. (U. S.) 376, 13 L. ed. 461.

95. Maine Cent. R. Co. *v.* Maine, 96 U. S. 499, 24 L. ed. 836 [*affirming* 66 Me. 488], holding that where the conditions upon which the special rights of the constituent companies existed could be performed only while the companies were distinct corporations operating separate lines, they do not pass to the consolidated company.

96. Peoria, etc., R. Co. *v.* Coal Valley Min. Co., 68 Ill. 489.

A statutory prohibition relating to one of the constituent companies against removing its workshops from a certain town without the consent of the municipal authorities is binding upon the consolidated company, and it will be liable in damages in case the shops are removed. Whitby *v.* Grand Trunk R. Co., 3 Ont. L. Rep. 536, 1 Ont. Wkly. Rep. 292.

97. See *infra*, VII, E, 6, g.

98. *Alabama.*— Meyer *v.* Johnston, 53 Ala. 237; Warren *v.* Mobile, etc., R. Co., 49 Ala. 582.

Georgia.— Montgomery, etc., R. Co. *v.* Boring, 51 Ga. 582.

Indiana.— Lousiville, etc., R. Co. *v.* Boney, 117 Ind. 501, 20 N. E. 432, 3 L. R. A. 435; Columbus, etc., R. Co. *v.* Powell, 40 Ind. 57; Indianapolis, etc., R. Co. *v.* Jones, 29 Ind. 465, 95 Am. Dec. 654.

Kansas.— Hutchinson, etc., R. Co. *v.* Fair, (1897) 48 Pac. 591; Berry *v.* Kansas City, etc., R. Co., 52 Kan. 774, 759, 36 Pac. 724, 34 Pac. 805, 39 Am. St. Rep. 381, 371.

Maryland.— State *v.* Baltimore, etc., R. Co., 77 Md. 489, 26 Atl. 865.

Michigan.— Batterson *v.* Chicago, etc., R. Co., 53 Mich. 125, 18 N. W. 584.

Texas.— Gulf, etc., R. Co. *v.* Hutcheson, 3 Tex. App. Civ. Cas. § 96; Missouri Pac. R. Co. *v.* Owens, 1 Tex. App. Civ. Cas. § 384.

Virginia.— Langhorne *v.* Richmond R. Co., 91 Va. 369, 22 S. E. 159.

United States.— Bailey *v.* New York Cent., etc., R. Co., 22 Wall. 604, 22 L. ed. 840; Harrison *v.* Union Pac. R. Co., 13 Fed. 522, 4 McCrary 264.

Canada.— Brewer *v.* Lake Erie, etc., R. Co., 2 Can. R. Cas. 257, 2 Ont. Wkly. Rep. 125; Cayley *v.* Cobourg, etc., R. Co., 14 Grant Ch. (U. C.) 571.

See 41 Cent. Dig. tit. "Railroads," §§ 448, 453.

Liability for torts of the constituent companies in the operation of their respective roads prior to the consolidation see *infra*, X, C, 7, b.

The consolidated company may mortgage property received from one of the constituent companies to secure a debt owed by the latter at the time of the consolidation. Wright *v.* Bundy, 11 Ind. 398.

Consolidation after judicial sale.— Where a railroad company executes a deed of trust upon its road under which the same is sold and the purchaser organizes a new company,

to the extent of the assets received from the constituent company which incurred the liability.[99] The statutes authorizing the consolidation frequently impose such liability in express terms,[1] or it is assumed by the articles of consolidation,[2] but the liability exists independently of such provisions as a necessary legal result of the consolidation.[3] In some cases the statutes preserve the separate existence of the constituent companies with respect to their existing debts and liabilities,[4] in which case an action may be instituted against one of the constituent companies after the consolidation upon a liability previously incurred by it,[5] but this is merely a cumulative protection for creditors and does not affect the liability

with legislative authority to receive and exercise the franchise, the purchaser takes the property discharged of all debts which were not prior liens, and upon a subsequent consolidation with another company the consolidated company does not become liable for the debts of the original company; and this notwithstanding a statute enacted subsequent to the consolidation provides that on a consolidation the new company shall be liable for all debts of the old, as such statutes are not retroactive (Hatcher *v.* Toledo, etc., R. Co., 62 Ill. 477); and where one railroad company purchases the property and franchises of another at a sale under a deed of trust, and after such sale and purchase the legislature passes an act for the merger of the two companies, which is not passed in contemplation of an agreement between them but merely in order to authorize the purchasing company to operate the road purchased, the latter company does not thereby subject itself to pay the liabilities of the purchased road (Houston, etc., R. Co. *v.* Shirley, 54 Tex. 125).

99. Tompkins *v.* Augusta Southern R. Co., 102 Ga. 436, 30 S. E. 992; Berry *v.* Kansas City, etc., R. Co., 52 Kan. 774, 759, 36 Pac. 724, 34 Pac. 805, 39 Am. St. Rep. 381, 371; Harrison *v.* Union Pac. R. Co., 13 Fed. 522, 4 McCrary 264.

Substitution of consolidated company as defendant.— Where, one of the constituent companies having defaulted upon the payment of dividends on its guaranteed stock, plaintiff obtained a judgment for the amount of unpaid dividends, and an order restraining defendant from paying any other dividends or making any disposition of or charge upon the funds or property of the company until payment thereof, an order substituting the consolidated company as a defendant is erroneous, since it affects not merely the property derived from the original defendant but subjects the entire funds and property of the consolidated company to the restraint adjudged against the constituent company. Prouty *v.* Lake Shore, etc., R. Co., 52 N. Y. 363.

1. *Kansas.*— Kansas City-Leavenworth R. Co. *v.* Langley, 70 Kan. 453, 78 Pac. 858.

Maine.— Penley *v.* Maine Cent. R. Co., 92 Me. 59, 42 Atl. 233.

Massachusetts.— John Hancock Mut. L. Ins. Co. *v.* Worcester, etc., R. Co., 149 Mass. 214, 21 N. E. 364.

Michigan.— Batterson *v.* Chicago, etc., R. Co., 53 Mich. 125, 18 N. W. 584.

Missouri.— Black *v.* St. Louis, etc., R. Co., 110 Mo. App. 198, 85 S. W. 96.

South Carolina.— Pickett *v.* Southern R. Co., 69 S. C. 445, 48 S. E. 466.

United States.— Bailey *v.* New York Cent., etc., R. Co., 22 Wall. 604, 22 L. ed. 840.

See 41 Cent. Dig. tit. "Railroads," §§ 448, 453.

All debts and liabilities "except mortgages."— Under the New York statute which provides that all debts and liabilities of the constituent companies "except mortgages" shall attach to the consolidated company and be enforceable against it as if incurred or contracted by it, an action may be maintained against the consolidated company upon bonds of the constituent companies, although secured by a mortgage upon the property of the latter, since the debt is different from the mortgage which is merely collateral or incident thereto, and the words "except mortgages" are merely intended to confine the property lien created by the mortgage to the property owned prior to the consolidation by the company giving it. Polhemus *v.* Fitchburg R. Co., 123 N. Y. 502, 26 N. E. 31 [*affirming* 50 Hun 397, 3 N. Y. Suppl. 327]. *Contra,* Janes *v.* Fitchburg R. Co., 50 Hun (N. Y.) 310, 3 N. Y. Suppl. 165.

2. St. Louis, etc., R. Co. *v.* Marker, 41 Ark. 542; Atlantic Coast Line R. Co. *v.* Cone, 53 Fla. 1017, 43 So. 514; Western Union R. Co. *v.* Smith, 75 Ill. 496; Taylor *v.* Atlantic, etc., R. Co., 57 How. Pr. (N. Y.) 26.

The consolidated company may assume particular obligations of the constituent companies which the statute provides shall not attach to the new company, the exemptions being merely a privilege which that company may waive. Taylor *v.* Atlantic, etc., R. Co., 57 How. Pr. (N. Y.) 26.

3. Tompkins *v.* Augusta Southern R. Co., 102 Ga. 436, 30 S. E. 992; Louisville, etc., R. Co. *v.* Boney, 117 Ind. 501, 20 N. E. 432, 3 L. R. A. 435; State *v.* Baltimore, etc., R Co., 77 Md. 489, 26 Atl. 865.

4. Warren *v.* Mobile, etc., R. Co., 49 Ala. 582; Gale *v.* Troy, 51 Hun (N. Y.) 470, 4 N. Y. Suppl. 295; Pickett *v.* Southern R. Co., 69 S. C. 445, 48 S. E. 466; Stewart *v.* Walterboro, etc., R. Co., 64 S. C. 92, 41 S. E. 827.

5. Gale *v.* Troy, etc., R. Co., 51 Hun (N. Y.) 470, 4 N. Y. Suppl. 295; Stewart *v.* Walterboro, etc., R. Co., 64 S. C. 92, 41 S. E. 827.

It is no defense in such an action that defendant has no property but has turned over the same to the consolidated company. Gale

of the consolidated company.[6] It has also been provided that the assets of the constituent companies should continue liable for liens and claims against the respective companies, the actions or proceedings to enforce the same to be brought against the consolidated company.[7] If no part of the franchise is reserved to either of the constituent companies, they will not be liable to the public for the performance of duties devolving upon the new company,[8] nor, where the existence of the constituent companies is extinguished by the consolidation, can an action against them be instituted after the consolidation, but any action to enforce liabilities previously incurred by them must be brought against the consolidated company.[9]

e. In Case of Consolidation With Foreign Company. The consolidation of railroad companies of different states has the usual effect as to dissolving or terminating the existence of the constituent companies and creating a new company;[10] but this new company, although having a single name, management, and but one set of stock-holders, is nevertheless a separate corporation in each state,[11] having in each the status of a domestic corporation,[12] and its rights and liabilities in each are derived from and determined by the laws of that state,[13] and are unaf-

v. Troy, etc., R. Co., 51 Hun (N. Y.) 470, 4 N. Y. Suppl. 295.

6. Warren *v.* Mobile, etc., R. Co., 49 Ala. 582; Pickett *v.* Southern R. Co., 69 S. C. 445, 48 S. E. 466. But see Joseph *v.* Southern R. Co., 127 Fed. 606.

7. See Demorest *v.* Midland R. Co., 10 Ont. Pr. 73.

8. Peoria, etc., R. Co. *v.* Coal Valley Min. Co., 68 Ill. 489.

9. Indianola R. Co. *v.* Fryer, 56 Tex. 609.

10. Ohio, etc., R. Co. *v.* People, 123 Ill. 467, 14 N. E. 874; Ashley *v.* Ryan, 49 Ohio St. 504, 31 N. E. 721 [*affirming* 6 Ohio Cir. Ct. 208, 3 Ohio Cir. Dec. 418]; Rio Grande Western R. Co. *v.* Telluride, etc., R. Co., 16 Utah 125, 51 Pac. 46; Keokuk, etc., R. Co. *v.* Missouri, 152 U. S. 301, 14 S. Ct. 592, 38 L. ed. 450.

Effect of consolidation in general see *supra*, VII, E, 6, a.

Effect as to time for completing road.— Where a railroad company of one state, incorporated under a statute providing that unless it completed its road within ten years its act of incorporation should be void, consolidates with a company of a different state prior to the completion of its road and before the expiration of the ten years, the consolidated company is not limited to the unexpired portion of such term for completing the road, but is entitled to ten years from the time the articles of incorporation of the new company are filed. Rio Grande Western R. Co. *v.* Telluride Power, etc., Co., 16 Utah 125, 51 Pac. 146.

11. *Illinois.*— Ohio, etc., R. Co. *v.* People, 123 Ill. 467, 14 N. E. 874; Racine, etc., R. Co. *v.* Farmers' L. & T., etc., Co., 49 Ill. 331, 45 Am. Dec. 595.

Michigan.—Chicago, etc., R. Co. *v.* Auditor-Gen., 53 Mich. 79, 18 N. W. 586.

Nebraska.— Trester *v.* Missouri Pac. R. Co., 33 Nebr. 171, 49 N. W. 1110.

Ohio.— Ashley *v.* Ryan, 49 Ohio St. 504, 31 N. E. 721 [*affirming* 6 Ohio Cir. Ct. 208, 3 Ohio Cir. Dec. 418].

Pennsylvania.— Rothschild *v.* Rochester, etc., R. Co., 1 Pa. Co. Ct. 620.

United States.— Graham *v.* Boston, etc., R. Co., 14 Fed. 753.

See 41 Cent. Dig. tit. "Railroads," §§ 388, 450.

12. *Illinois.*— Ohio, etc., R. Co. *v.* People, 123 Ill. 467, 14 N. E. 874.

Indiana.— Smith *v.* Cleveland, etc., R. Co., 170 Ind. 382, 81 N. E. 501.

Minnesota.— *In re* St. Paul, etc., R. Co., 36 Minn. 85, 30 N. W. 432.

Nebraska.— Trester *v.* Missouri, etc., R. Co., 33 Nebr. 171, 49 N. W. 1110.

United States.— Graham *v.* Boston, etc., R. Co., 14 Fed. 753.

See 41 Cent. Dig. tit. "Railroads," §§ 388, 448, 450.

Right of eminent domain.— The consolidated company is a domestic corporation within the application of constitutional and statutory provisions relating to the power of exercising the right of eminent domain. Trester *v.* Missouri Pac. R. Co., 33 Nebr. 171, 49 N. W. 1110; State *v.* Chicago, etc., R. Co., 25 Nebr. 156, 41 N. W. 125, 2 L. R. A. 564.

13. *Illinois.*— Ohio, etc., R. Co. *v.* People, 123 Ill. 467, 14 N. E. 874; Quincy R. Bridge Co. *v.* Adams County, 88 Ill. 615.

Michigan.—Chicago, etc., R. Co. *v.* Auditor-Gen., 53 Mich. 79, 18 N. W. 586.

Nebraska.— Trester *v.* Missouri Pac. R. Co., 33 Nebr. 171, 49 N. W. 1110.

New York.— People *v.* New York, etc., R. Co., 129 N. Y. 474, 29 N. E. 959, 15 L. R. A. 82 [*reversing* 61 Hun 66, 15 N. Y. Suppl. 635].

Ohio.— Ashley *v.* Ryan, 49 Ohio St. 504, 31 N. E. 721 [*affirming* 6 Ohio Cir. Ct. 208, 3 Ohio Cir. Dec. 418].

Pennsylvania.— Rothschild *v.* Rochester, etc., R. Co., 1 Pa. Co. Ct. 620.

See 41 Cent. Dig. tit. "Railroads," §§ 388, 448, 450.

Each state may legislate in respect to the company and its operations in that state as if no consolidation had taken place. Peik *v.* Chicago, etc., R. Co., 94 U. S. 164, 24 L. ed.

fected by the law of the other,[14] or in other words, the new corporation stands in each state as the original company stood in that state with the same rights and liabilities.[15] But the consolidated company having but a single management, name, and corporate seal must necessarily act in the transaction of its business as a single company,[16] and its directors, stock-holders, and officers may hold meetings and transact corporate business in either of the states,[17] and the consolidated company is not subject to a state constitutional provision requiring that a majority of the directors of any railroad company incorporated by the laws of that state shall be residents of that state.[18] The consolidated company in each state succeeds to the rights and privileges of the original company in that state,[19] and may exercise with regard to the entire road and property whatever rights it enjoys under the laws of both states,[20] such as the issuance of preferred or guaranteed stock,[21] or the issuance of bonds and the execution of mortgages on its property,[22] which may cover property situated in both states;[23] but the action of the company in one state in issuing bonds and executing mortgages which are valid in that state will not create a debt which will bind the property of the company in the other state, unless valid according to the laws of that state.[24]

f. Rights and Liabilities of Stock-Holders and Subscribers to Stock. Stock-holders of one of the constituent companies may maintain a bill in equity to enjoin a proposed consolidation for which there is no legislative authority.[25] So also where the consent of all the stock-holders is necessary, any dissenting stock-holder may sue to enjoin the consolidation,[26] and if the consolidation is effected without his consent he is released from his subscription to the stock of the constituent company,[27] and may maintain a suit against the consolidated company to recover the value of his interest in the constituent company wrongfully appropriated by it,[28]

97, holding that the legislature of one state may prescribe the maximum rates for transportation to be charged in that state.

14. Quincy R. Bridge Co. *v.* Adams County, 88 Ill. 615; Rothschild *v.* Rochester, etc., R. Co., 1 Pa. Co. Ct. 620; Minot *v.* Philadelphia, etc., R. Co., 18 Wall. (U. S.) 206, 21 L. ed. 888.

15. Ohio, etc., R. Co. *v.* People, 123 Ill. 467, 14 N. E. 874; Minot *v.* Philadelphia, etc., R. Co., 18 Wall. (U. S.) 206, 21 L. ed. 888.

The result of this rule is that the consolidated company may and frequently does possess very different rights, powers, and privileges and is subject to different liabilities in the different states in which the roads composing it are located. Chicago, etc., R. Co. *v.* Auditor-Gen., 53 Mich. 79, 18 N. W. 586.

16. Racine, etc., R. Co. *v.* Farmers' L. & T. Co., 49 Ill. 331, 95 Am. Dec. 595.

17. Ohio, etc., R. Co. *v.* People, 123 Ill. 467, 14 N. E. 874; Graham *v.* Boston, etc., R. Co., 14 Fed. 753.

18. Ohio, etc., R. Co. *v.* People, 123 Ill. 467, 14 N. E. 874.

19. Mead *v.* New York, etc., R. Co., 45 Conn. 199; Cooper *v.* Corbin, 105 Ill. 224; Rio Grande Western R. Co. *v.* Telluride Power, etc., Co., 16 Utah 125, 51 Pac. 146.

20. Mead *v.* New York, etc., R. Co., 45 Conn. 199; Prouty *v.* Michigan Southern, etc., R. Co., 4 Thomps. & C. (N. Y.) 230.

21. Prouty *v.* Michigan Southern, etc., R. Co., 4 Thomps. & C. (N. Y.) 230.

22. Mead *v.* New York, etc., R. Co., 45 Conn. 199.

23. Racine, etc., R. Co. *v.* Farmers' L. & T. Co., 49 Ill. 331, 95 Am. Dec. 595.

24. Rothschild *v.* Rochester, etc., R. Co., 1 Pa. Co. Ct. 620.

25. Charlton *v.* Newcastle, etc., R. Co., 5 Jur. N. S. 1096, 7 Wkly. Rep. 731.

26. Nathan *v.* Tompkins, 82 Ala. 437, 2 So. 747; Mowrey *v.* Indianapolis, etc., R. Co., 17 Fed. Cas. No. 9,891, 4 Biss. 78.

A stock-holder is not estopped to object to a consolidation when submitted to the stock-holders because he did not previously oppose it as a director. Mowrey *v.* Indianapolis, etc., R. Co., 17 Fed. Cas. No. 9,891, 4 Biss. 78.

27. Illinois Grand Trunk R. Co. *v.* Cook, 29 Ill. 237; Booe *v.* Junction R. Co., 10 Ind. 93; McCray *v.* Junction R. Co., 9 Ind. 358.

A dissenting stock-holder may enjoin the foreclosure of a mortgage executed by him to secure the payment of notes given for stock in one of the constituent companies. Illinois Grand Trunk R. Co. *v.* Cook, 29 Ill. 237.

If the consolidation was one of the original purposes for which the constituent company was organized, a consolidation authorized after a subscription to the stock does not release a dissenting stock-holder. Hanna *v.* Cincinnati, etc., R. Co., 20 Ind. 30.

28. Owensboro Deposit Bank *v.* Barrett, 13 S. W. 337, 11 Ky. L. Rep. 910; Douglass *v.* Concord, etc., R. Co., 72 N. H. 26, 54 Atl. 883; International, etc., R. Co. *v.* Bremond, 53 Tex. 96. See also Lauman *v.* Lebanon Valley R. Co., 30 Pa. St. 42, 72 Am. Dec. 685.

but he cannot recover a personal judgment against its directors.[29] To entitle a dissenting stock-holder to equitable relief by injunction or to declare the consolidation invalid, he must not be guilty of laches in making his objection,[30] but such a delay as would preclude the right to such relief will not affect his right to recover from the consolidated company the value of his interest in the constituent company.[31] The statutes or articles of consolidation ordinarily fix upon a basis of exchange of stock in the old companies for that of the new,[32] and the statutes provide for the payment of dissenting stock-holders or those who refuse to convert their stock for the value thereof,[33] with the procedure for determining its value.[34] A dissenting stock-holder is not released if at the time of his subscription there was in existence a constitutional or statutory provision authorizing the consolidation,[35] or a right reserved to alter or amend the charter, and the legislature has authorized a consolidation by consent of less than the entire number of stock-holders.[36] Since the consolidated company succeeds to the rights and property of the constituent companies,[37] it may, except as to dissenting stock-holders who are thereby released, sue for and recover any unpaid subscriptions to stock of the constituent companies,[38] and where the subscription was made subject to certain conditions and there were statutes authorizing a consolidation, the consolidated company may perform the conditions and enforce the subscription.[39] Subscriptions to stock of the constituent companies as to which the subscribers are not released become assets of the consolidated company, and creditors of that company upon its insolvency may maintain a creditor's bill to enforce the liability thereon.[40] Where a stock-holder in one of the constituent companies sells his interest to the consolidated company, which consists only of his interest as a stock-holder in the former company, he is not entitled to a vendor's lien upon the right of way.[41] An immunity from liability for debts of the corporation enjoyed by stock-holders of the constituent companies does not, in the absence of express provision, pass to the stock-holders of the consolidated company.[42]

29. International, etc., R. Co. *v.* Bremond, 53 Tex. 96.

30. Bell *v.* Pennsylvania, etc., R. Co., (N. J. Ch. 1887) 10 Atl. 741; Spencer *v.* Seaboard Air Line R. Co., 137 N. C. 107, 49 S. E. 96, 1 L. R. A. N. S. 604.

31. Douglass *v.* Concord, etc., R. Co., 72 N. H. 26, 54 Atl. 883; International, etc., R. Co. *v.* Bremond, 53 Tex. 96.

32. Chicago, etc., R. Co. *v.* Ashling, 160 Ill. 373, 43 N. E. 373 [*affirming* 56 Ill. App. 327]; John Hancock Mut. L. Ins. Co. *v.* Worcester, etc., R. Co., 149 Mass. 214, 21 N. E. 364; Capley *v.* Cobourg, etc., R. Co., 14 Grant Ch. (U. C.) 571.

Where the articles of consolidation provide for the issuance of stock of the consolidated company in certain proportions in exchange for stock of the constituent companies, stock-holders of the latter cannot maintain any action against the consolidated company to compel the issuance of such stock that they could not have maintained against the constituent companies prior to the consolidation. Babcock *v.* Schuylkill, etc., R. Co., 133 N. Y. 420, 31 N. E. 30 [*affirming* 15 N. Y. Suppl. 193], holding that where the articles of consolidation provided that stock-holders of the constituent companies should be entitled to receive one share of stock in the consolidated company for every two shares of the constituent company, a suit to compel the issuance of full-paid shares of the consolidated company in this proportion for shares of the constituent company on which plaintiff had paid up only ten per cent, was properly dismissed.

33. Douglass *v.* Concord, etc., R. Co., 72 N. H. 26, 54 Atl. 883; Spencer *v.* Seaboard Air Line R. Co., 137 N. C. 107, 49 S. E. 96, 1 L. R. A. N. S. 604; Pittsburgh, etc., R. Co. *v.* Garrett, 50 Ohio St. 405, 34 N. E. 493.

34. Douglass *v.* Concord, etc., R. Co., 72 N. H. 26, 54 Atl. 883; Spencer *v.* Seaboard Air Line R. Co., 137 N. C. 107, 49 S. E. 96, 1 L. R. A. N. S. 604; Pittsburgh, etc., R. Co. *v.* Garrett, 50 Ohio St. 405, 34 N. E. 493.

35. Bish *v.* Johnson, 21 Ind. 299; Sparrow *v.* Evansville, etc., R. Co., 7 Ind. 369; Mansfield, etc., R. Co. *v.* Brown, 26 Ohio St. 223.

36. Market St. R. Co. *v.* Hellman, 109 Cal. 571, 42 Pac. 225; Hale *v.* Cheshire R. Co., 161 Mass. 443, 37 N. E. 307.

37. See *supra*, VII, E, 6, c.

38. Sparrow *v.* Evansville, etc., R. Co., 7 Ind. 369; Mansfield, etc., R. Co. *v.* Brown, 26 Ohio St. 223; Cork, etc., R. Co. *v.* Paterson, 18 C. B. 414, 86 E. C. L. 414.

39. Mansfield, etc., R. Co. *v.* Stout, 26 Ohio St. 241.

40. Hamilton *v.* Clarion, etc., R. Co., 144 Pa. St. 34, 23 Atl. 53, 13 L. R. A. 779.

41. Cross *v.* Burlington, etc., R. Co., 58 Iowa 62, 12 N. W. 71.

42. Minneapolis, etc., R. Co. *v.* Gardner, 177 U. S. 332, 20 S. Ct. 656, 44 L. ed. 793 [*affirming* 73 Minn. 517, 76 N. W. 282].

g. Contracts and Conveyances. The consolidated company succeeds to the contract obligations and liabilities of the constituent companies,[43] and may be required specifically to perform the same,[44] or respond in damages,[45] and is bound by any covenants in deeds of rights of way made to the constituent companies,[46] and its rights therein are subject to be defeated by conditions in the deeds by which they were conveyed to the original companies.[47] The consolidated company also succeeds to the contract rights and privileges of the constituent companies,[48] and may maintain actions to enforce the same.[49] It takes such contracts, however, subject to any conditions specified therein which must be performed in order to authorize a recovery,[50] and if it is unable to do so according to the terms of the contract it cannot recover thereon;[51] but if it can perform the con-

43. *Arkansas.*— Sappington *v.* Little Rock, etc., R. Co., 37 Ark. 23, contract to construct road-bed so as to protect plaintiff's property from overflow.

Georgia.— Tompkins *v.* Augusta Southern R. Co., 102 Ga. 436, 30 S. E. 992, contract of carriage.

Illinois.— Western Union R. Co. *v.* Smith, 75 Ill. 496, contract for work and labor.

Texas.— Missouri, etc., R. Co. *v.* Carter, 95 Tex. 461, 68 S. W. 159, contract to build and maintain a switch for the convenience of a mill-owner.

United States.— Continental Trust Co. *v.* Toledo, etc., R. Co., 86 Fed. 929.

England.— Lindsey *v.* Great Northern R. Co., 10 Hare 664, 17 Jur. 522, 22 L. J. Ch. 995, 1 Wkly. Rep. 257, 44 Eng. Ch. 643, 68 Eng. Reprint 1094, contract to build station and stop trains at specified place.

Canada.— Whitby *v.* Grand Trunk R. Co., 32 Ont. 99 (contract to maintain workshops in a certain town during operation of the road); Fargey *v.* Grand Junction R. Co., 4 Ont. 232 (contract to construct a cattle pass).

See 41 Cent. Dig. tit. "Railroads," § 452.

Contracts for use of sleeping cars.—Where one of the constituent companies contracts with a sleeping-car company to haul and use the cars of that company exclusively for a certain period "on its own line of road, and all roads which it now controls, or may hereafter control, by ownership, lease, or otherwise," the contract binds the consolidated company to haul such cars on all roads owned or controlled by the old company at the time of the consolidation, but does not extend the operation of the contract to other roads acquired by the consolidated company. Pullman's Palace-Car Co. *v.* Missouri Pac. R. Co., 115 U. S. 587, 6 S. Ct. 194, 29 L. ed. 499 [*affirming* 11 Fed. 634, 3 McCrary 645].

44. Boardman *v.* Lake Shore, etc., R. Co., 84 N. Y. 157; Union Pac. R. Co. *v.* McAlpine, 129 U. S. 305, 9 S. Ct. 286, 32 L. ed. 673 [*affirming* 23 Fed. 168].

45. India Mut. Ins. Co. *v.* Worcester, etc., R. Co., (Mass. 1890) 25 N. E. 975; Day *v.* Worcester, etc., R. Co., 151 Mass. 302, 23 N. E. 824; John Hancock Mut. L. Ins. Co. *v.* Worcester, etc., R. Co., 149 Mass. 214, 21 N. E. 364; Whitby *v.* Grand Trunk R. Co., 32 Ont. 99.

Refusal to honor ticket.— If the consolidated company refuses to honor a ticket issued prior to the consolidation by one of the constituent companies and which has not expired by limitation, and ejects the person offering it from its train, it will be liable in damages. Tompkins *v.* Augusta Southern R. Co., 102 Ga. 436, 30 S. E. 992.

46. Mobile, etc., R. Co. *v.* Gilmer, 85 Ala. 422, 5 So. 138, covenant to establish a flag station or depot upon land of grantee and to permit him to cultivate the right of way so long as the privilege did not interfere with the requirements of the company.

47. Hickox *v.* Chicago, etc., R. Co., 78 Mich. 615, 44 N. W. 143.

48. *Indiana.*— Sparrow *v.* Evansville, etc., R. Co., 7 Ind. 369.

New York.— New York Cent. R. Co. *v.* Saratoga, etc., R. Co., 39 Barb. 289.

Ohio.— Mansfield, etc., R. Co. *v.* Brown, 26 Ohio St. 223.

Texas.— Missouri, etc., R. Co. *v.* Carter, 95 Tex. 461, 68 S. W. 159.

United States.— Lightner *v.* Boston, etc., R. Co., 15 Fed. Cas. No. 8,343, 1 Lowell 338.

England.— *In re* Wansbeck R. Co., L. R. 1 C. P. 269, 12 Jur. N. S. 746.

See 41 Cent. Dig. tit. "Railroads," § 452.

Right to use patented devices.— Where each of the constituent companies had contracted for the privilege of using a patent axle box on all cars which they then owned or might thereafter own, the right to such use passes to the consolidated company. Lightner *v.* Boston, etc., R. Co., 15 Fed. Cas. No. 8,343, 1 Lowell 338.

Leases and rents.— Where one of the constituent companies had leased to another company the right to use a part of its track, the consolidated company succeeds to the right to recover the rents specified and to the benefit of any stipulations in the lease with regard to an increased rental after a certain period. New York Cent., etc., R. Co. *v.* Saratoga, etc., R. Co., 39 Barb. (N. Y.) 289.

49. Sparrow *v.* Evansville, etc., R. Co., 7 Ind. 369; Mansfield, etc., R. Co. *v.* Brown, 26 Ohio St. 223.

50. Brown *v.* Dibble, 65 Mich. 520, 32 N. W. 656.

51. New Jersey Midland R. Co. *v.* Strait, 35 N. J. L. 322, holding that where defendant contracted to take at a certain price bonds of a certain railroad company, which afterward consolidated with another company, the consolidated company could not tender its own bonds, although of equal or greater value and

dition and the statutes in force at the time of the contract authorized a consolidation, it is entitled to do so and recover upon the contract.[52] The consolidated company may also recover upon a bond given with sureties by an agent of one of the constituent companies to such company and its successors, where the agent is continued in the employment of the consolidated company with the same duties and the defalcation occurs subsequent to the consolidation.[53]

h. Liens and Mortgages. A consolidation does not affect existing liens but the consolidated company takes the property of the constituent companies subject to such liens,[54] and is chargeable with notice thereof,[55] and so the consolidation does not affect the rights of mortgage creditors;[56] but a consolidation does not create any lien in favor of creditors of the constituent companies who previously had none,[57] and the lien created by a subsequent mortgage executed by the consolidated company upon the consolidated property takes precedence of any unsecured claims of creditors of the constituent companies.[58]

i. Effect as to Actions Pending.[59] In some cases it has been held that the consolidation of two or more railroad companies works such a dissolution of the constituent companies as to abate any pending actions by or against them;[60] but in others it is held that the consolidation does not abate pending actions,[61] and

recover on the contract, the consideration offered not being that agreed for.

52. Mansfield, etc., R. Co. *v.* Stout, 26 Ohio St. 223.

53. Pennsylvania, etc., R. Co. *v.* Harkins, 149 Pa. St. 121, 24 Atl. 175; Eastern Union R. Co. *v.* Cochrane, 2 C. L. R. 292, 9 Exch. 197, 17 Jur. 1103, 23 L. J. Exch. 61, 2 Wkly. Rep. 43, 7 R. & Can. Cas. 792; London, etc., R. Co. *v.* Goodwin, 3 Exch. 736, 18 L. J. Exch. 337.

54. *Maine.*— Hamlin *v.* Jerrard, 72 Me. 62.

Massachusetts.— Shaw *v.* Norfolk County R. Co., 16 Gray 407.

Mississippi.—Mississippi Valley Co. *v.* Chicago, etc., R. Co., 58 Miss. 846.

New York.— Vilas *v.* Page, 106 N. Y. 439, 13 N. E. 743.

United States.— Rutten *v.* Union Pac. R. Co., 17 Fed. 480; Western Div. R. Co. *v.* Drew, 29 Fed. Cas. No. 17,434, 3 Woods 691.

See 41 Cent. Dig. tit. "Railroads," § 453.

55. Mississippi Valley Co. *v.* Chicago, etc., R. Co., 58 Miss. 846; Western Div. R. Co. *v.* Drew, 29 Fed. Cas. No. 17,434, 3 Woods 691.

56. Eaton, etc., R. Co. *v.* Hunt, 20 Ind. 457; Hamlin *v.* Jerrard, 72 Me. 62; Shaw *v.* Norfolk County R. Co., 16 Gray (Mass.) 407.

Repairs and improvements made upon the mortgaged property by the consolidated company are considered as accessions thereto and are subject to the mortgage having the prior lien. Hamlin *v.* Jerrard, 72 Me. 62.

57. Wabash, etc., R. Co. *v.* Ham, 114 U. S. 587, 5 S. Ct. 1081, 29 L. ed. 235.

No lien is created in favor of bondholders of the constituent companies where none previously existed, by a stipulation in the agreement of consolidation that such bonds should "be protected by said consolidated company," nor do such bondholders acquire any lien by virtue of a subsequent mortgage executed by the consolidated company to secure bonds issued by it, although the object of the mortgage as shown by its recitals was that all the company's indebtedness, including that of the constituent companies, "should be consolidated into one and the same mortgage debt upon equitable principles." Wabash, etc., R. Co. *v.* Ham, 114 U. S. 587, 5 S. Ct. 1081, 29 L. ed. 235. *Contra,* Compton *v.* Wabash, etc., R. Co., 45 Ohio St. 592, 16 N. E. 110, 18 N. E. 380.

58. Wabash, etc., R. Co. *v.* Ham, 114 U. S. 587, 5 S. Ct. 1081, 29 L. ed. 235.

59. See, generally, CORPORATIONS, 10 Cyc. 310.

60. Kansas, etc., R. Co. *v.* Smith, 40 Kan. 192, 19 Pac. 636; Wagner *v.* Atchison, etc., R. Co., 9 Kan. App. 661, 58 Pac. 1018; Council Grove, etc., R. Co. *v.* Lawrence, 3 Kan. App. 274, 45 Pac. 125.

Effect on pending appeals.— Where a consolidation is effected pending an appeal from a judgment against one of the constituent companies, the proceedings in error must be dismissed unless there is an order of revivor against the consolidated company, made in accordance with the provisions of the statute and with the consent of the new company in cases where such consent is necessary. Cunkle *v.* Interstate R. Co., 54 Kan. 194, 40 Pac. 184.

61. *Florida.*—Atlantic Coast Line R. Co. *v.* Cone, 53 Fla. 1017, 43 So. 514.

Illinois.— Chicago, etc., R. Co. *v.* Ashling, 160 Ill. 373, 43 N. E. 373 [*affirming* 56 Ill. App. 327].

Michigan.— See Swartwout *v.* Michigan Air Line R. Co., 24 Mich. 389.

Mississippi.— Shackleford *v.* Mississippi Cent. R. Co., 52 Miss. 159.

Missouri.— Kinion *v.* Kansas City, etc., R. Co., 39 Mo. App. 574.

Pennsylvania.— Baltimore, etc., R. Co. *v.* Musselman, 2 Grant 348.

Tennessee.— East Tennessee, etc., R. Co. *v.* Evans, 6 Heisk. 607.

See 41 Cent. Dig. tit. "Railroads," § 454.

In Illinois and New York the statutes expressly provide that pending actions shall

that the consolidated company may be made a party by amendment of the pleadings,[62] and without being brought into court by a new service of process,[63] or that the consolidated company may be substituted as a defendant after verdict and judgment rendered against it,[64] or that the pending action may be prosecuted to judgment against the constituent company and execution thereon issued against the property of that company in the hands of the consolidated company;[65] but where the act authorizing the consolidation preserves the corporate existence of the constituent companies and their liability for existing obligations, a judgment cannot be rendered against the consolidated company in an action pending against one of the constituent companies, unless the former is made a party, although it has assumed the liabilities of the constituent companies.[66]

7. Actions By or Against Consolidated Company. To enforce against the consolidated company a liability previously incurred by one of the constituent companies the consolidated company may be sued directly in an action at law[67] in its own name,[68] and a judgment *in personam* rendered against it;[69] but the declaration should show against which of the constituent companies the cause of action arose, and allege the facts necessary to show a liability therefor on the part of defendant.[70] In pleading the consolidation it is not necessary to set out the steps taken to effect it,[71] but is sufficient to allege that the companies were authorized to and did consolidate;[72] and, if the consolidation was under the laws of another state, to set out the statutes and allege that their provisions were complied with and the consolidation effected.[73] Where railroad companies of two different states consolidate, in whichever state the consolidated company is sued it is proper to designate it as a corporation created by and existing under the laws of that state.[74] A general denial by a consolidated company, although by statute admitting its corporate existence, does not admit the allegation of consolidation upon which its liability depends.[75] In an action against the consolidated company to enforce a liability of one of the constituent companies, the directors or officers of the new company are not necessary or proper parties.[76] Where one railroad company has been authorized to consolidate with another under the name of the latter, in order to render the latter liable for a debt of the former plaintiff must prove that the proposed consolidation was in fact effected;[77] and conversely, to authorize the consolidated company to recover upon a right of action existing in favor of another company, it must show that the consolidation has been duly consummated, so as to constitute it the legal successor of

not abate by reason of the consolidation. Chicago, etc., R. Co. *v.* Ashling, 160 Ill. 373, 43 N. E. 373 [*affirming* 56 Ill. App. 327]; Gale *v.* Troy, etc., R. Co., 51 Hun (N. Y.) 470, 4 N. Y. Suppl. 295.

62. Kinion *v.* Kansas City, etc., R. Co., 39 Mo. App. 574.

Condemnation proceedings.—Where the consolidation is effected during the pendency of condemnation proceedings the consolidated company may be substituted as a party. California Cent. R. Co. *v.* Hooper, 76 Cal. 404, 18 Pac. 599; Day *v.* New York, etc., R. Co., 58 N. J. L. 677, 34 Atl. 1081.

63. Kinion *v.* Kansas City, etc., R. Co., 39 Mo. App. 574; Kinion *v.* Kansas City, etc., R. Co., 39 Mo. App. 382.

64. Louisville, etc., R. Co. *v.* Summers, 131 Ind. 241, 30 N. E. 873.

65. Atlantic Coast Line R. Co. *v.* Cone, 53 Fla. 1017, 43 So. 514.

66. Selma, etc., R. Co. *v.* Harbin, 40 Ga. 706.

67. Langhorne *v.* Richmond R. Co., 91 Va. 369, 22 S. E. 159.

68. Columbus, etc., R. Co. *v.* Skidmore, 69 Ill. 566; Eaton, etc., R. Co. *v.* Hunt, 20 Ind. 457; Boardman *v.* Lake Shore, etc., R. Co., 84 N. Y. 157; Langhorne *v.* Richmond R. Co., 91 Va. 369, 22 S. E. 159.

69. Louisville, etc., R. Co. *v.* Boney, 117 Ind. 501, 20 N. E. 432, 3 L. R. A. 435.

70. Marquette, etc., R. Co. *v.* Langton, 32 Mich. 251.

71. Rothschild *v.* Rio Grande Western R. Co., 18 N. Y. Suppl. 548; Collins *v.* Chicago, etc., R. Co., 14 Wis. 492.

72. Collins *v.* Chicago, etc., R. Co., 14 Wis. 492.

73. Rothschild *v.* Rio Grande Western R. Co., 18 N. Y. Suppl. 548.

74. Central Trust Co. *v.* St. Louis, etc., R. Co., 41 Fed. 551.

Status of company as a domestic corporation in each state see *supra*, VII, E, 6, e.

75. Koons *v.* Chicago, etc., R. Co., 23 Iowa 493.

76. Chase *v.* Vanderbilt, 62 N. Y. 307.

77. Southgate *v.* Atlantic, etc., R. Co., 61 Mo. 89.

the former company;[78] and the same rule applies in an action by a third person upon a claim originally existing in favor of one of the constituent companies and assigned to plaintiff by the consolidated company.[79]

VIII. INDEBTEDNESS, SECURITIES, LIENS, AND MORTGAGES.*

A. Nature and Extent of Liabilities[80] — **1. In General.** Within the limits prescribed by its charter or governing statutes, a railroad company, as a general rule, has power to incur any indebtedness or obligation necessary to carry out the purposes and objects for which it was created,[81] including indebtedness for construction.[82] Under some of such charter or statutory provisions, the railroad company cannot incur an indebtedness exceeding a certain amount,[83] and under others, it cannot incur a single obligation of less than a certain amount.[84] A railroad company has no power to make, and is not liable upon, contracts or obligations which are outside of its purposes and objects,[85] or outside of the powers which it can delegate to its officers;[86] and this applies, although its business is benefited as a direct result of such contract,[87] as every person who enters into an obligation with it is bound at his peril to take notice of the legal limits of its capacity to contract;[88] although it is held in some jurisdictions that, notwithstanding the act creating the obligation is *ultra vires*, if the railroad company, with the permission and acquiescence of the stock-holders, holds itself out as competent to contract and carry on its business under color of law and procures credit and induces creditors to part with money on the faith of such contract, the contract will be binding in a court of equity not only on the corporation but also on the stock-holders.[89] A railroad company is also liable upon such obligations as its charter, which it has accepted, or governing statute, expressly imposes upon it.[90]

78. Mansfield, etc., R. Co. *v.* Brown, 26 Ohio St. 223.

It will be presumed, in the absence of any showing to the contrary, that there has been an election of a board of directors of the new company so as to vest in it the rights of the constituent companies, where it is shown that there was a consolidation, and that the consolidated company has since been doing business under the new name (Detroit, etc., R. Co. *v.* Starnes, 38 Mich. 698); but where the date of such election is material and the facts relating thereto as alleged in the complaint are denied, the burden is upon plaintiff to show that it occurred at such time as to entitle it to maintain the action (Mansfield, etc., R. Co. *v.* Brown, 26 Ohio St. 223).

79. Brown *v.* Dibble, 65 Mich. 520, 32 N. W. 656.

80. Effect of consolidation see *supra*, VII, E, 6.

Effect of lease of road see *supra*, VII, C.

Liabilities for work, labor, or materials used in construction of road see *supra*, VI, I.

81. Belfast, etc., R. Co. *v.* Belfast, 77 Me. 445, 1 Atl. 362. See also Smith *v.* Nashua, etc., R. Co., 27 N. H. 86, 94, 59 Am. Dec. 364.

A railroad corporation has no power to assume a share of the accidental losses happening in the through business of a connecting railroad. State *v.* Concord R. Corp., 62 N. H. 375.

82. Belfast, etc., R. Co. *v.* Belfast, 77 Me. 445, 1 Atl. 362, holding that a railroad company has power to incur indebtedness for the construction of its road, notwithstanding it has by vote pledged itself not to begin construction until sufficient stock is subscribed to complete it, and thereafter has enacted a by-law providing that no assessment shall be made on the shares until such amount is subscribed. And see *supra*, VI, I.

83. See, generally, CORPORATIONS, 10 Cyc. 1103, 1104, 1171.

84. Eastern Tp.'s Bank *v.* St. Johnsbury, etc., R. Co., 40 Fed. 423, holding, however, that under Vt. Rev. Laws, § 3350, requiring the obligations of a railroad company to be for not less than one hundred dollars each, a guaranty by the lessor of a railroad to "pay the interest upon the within bond as specified in the interest coupons thereto attached" is not a separate promise to pay each coupon, but is a guaranty of the whole interest to become due on the bonds, and although each coupon is for less than one hundred dollars the guaranty is not prohibited by such statute.

85. George *v.* Nevada Cent. R. Co., 22 Nev. 228, 38 Pac. 441.

86. George *v.* Nevada Cent. R. Co., 22 Nev. 228, 38 Pac. 441.

87. George *v.* Nevada Cent. R. Co., 22 Nev. 228, 38 Pac. 441. And see CORPORATIONS, 10 Cyc. 1146 *et seq.*

88. George *v.* Nevada Cent. R. Co., 22 Nev. 228, 38 Pac. 441.

89. Johnson *v.* Mercantile Trust, etc., Co., 94 Ga. 324, 21 S. E. 576. See also, generally, CORPORATIONS, 10 Cyc. 1154 *et seq.*

90. State *v.* New Orleans, etc., R. Co., 3 Rob. (La.) 418, holding that under the act of

*By Henry H. Skyles.

2. Borrowing Money.[91] As a general rule a railroad company like other private or quasi-public corporations,[92] unless restrained by statute,[93] has power to borrow money for purposes incidental to its organization and operation,[94] such as for the purpose of constructing its road;[95] and to make and issue therefor negotiable paper,[96] bonds,[97] and mortgages.[98] This power, however, may be subject to statutory restrictions,[99] such as that the company cannot borrow at a rate of interest exceeding a certain per cent.[1] But it has been held that a railroad company is not exempt from the rule that forbids a corporation which has received the full benefit of a loan from avoiding its liability therefor by reason of a statute limiting the amount of indebtedness which it may incur.[2] If money for the use of the railroad company is borrowed upon the personal credit of an officer or agent of the company, and the lender accepts such personal responsibility, he cannot afterward make the company his debtor therefor.[3]

3. Making and Indorsement of Negotiable Instruments. As incidental to its power to borrow money and incur other indebtedness, a railroad company, like other private corporations,[4] unless restrained by its charter or governing statutes,[5] has power to make, accept, and indorse negotiable paper in payment or settlement of debts which it may incur in the course of its legitimate business or in respect to any matter within the purposes of its creation.[6] Under this power,

March 1, 1836, section 1, amending the charter of the New Orleans and Carrollton Railroad Company, providing that "the company shall pay to the State, in ten equal annual instalments from the acceptance of the present act, seventy-five thousand dollars to be employed by the State" for certain purposes, the state is entitled to recover, whether such purposes have been commenced or not, since the railroad company has nothing to do with the appropriation of the amount it contracted to pay.

Constables' wages.— Where a statute provides for the appointment of constables, during the construction of the railway and works, to be paid by the company, the latter's liability for such wages does not cease with the opening of the line, but continues so long as workmen are employed in completing any of the works. North British R. Co. *v.* Horne, 5 R. & Can. Cas. 231.

91. Liens for loans and advances see *infra*, VIII, A, 6, f.

92. See, generally, Corporations, 10 Cyc. 1101 *et seq.*

93. Savannah, etc., R. Co. *v.* Lancaster, 62 Ala. 555.

94. Savannah, etc., R. Co. *v.* Lancaster, 62 Ala. 555; Kelly *v.* Alabama, etc., R. Co., 58 Ala. 489; Richards *v.* Merrimack, etc., R. Co., 44 N. H. 127; Gloninger *v.* Pittsburgh, etc., R. Co., 139 Pa. St. 13, 21 Atl. 211, holding that such power will be implied from the power to mortgage.

In England and Canada, however, a railroad company has no power, in the absence of statute, to borrow money (Commercial Bank *v.* Great Western R. Co., 13 L. T. Rep. N. S. 105. See Yorkshire R. Wagon Co. *v.* Maclure. 21 Ch. D. 309, 51 L. J. Ch. 857, 47 L. T. Rep. N. S. 290, 30 Wkly. Rep. 761. And see Corporations, 10 Cyc. 1101 note 72); and one advancing money to such a company is bound to ascertain for himself at his own risk whether the loan is authorized by the shareholders and has no right to assume that the directors have authority to borrow (Commercial Bank *v.* Great Western R. Co., *supra*).

95. Savannah, etc., R. Co. *v.* Lancaster, 62 Ala. 555; Gloninger *v.* Pittsburgh, etc., R. Co., 139 Pa. St. 13, 21 Atl. 211.

96. See *infra*, VIII, A, 3.

97. See *infra*, VIII, A, 4.

98. See *infra*, VIII, A, 7.

99. See Southwestern Arkansas, etc., R. Co. *v.* Hays, 63 Ark. 355, 38 S. W. 665.

1. Southwestern Arkansas, etc., R. Co. *v.* Hays, 63 Ark. 355, 38 S. W. 665 (seven per cent under Sandels & H. Dig. § 6268); Metropolitan Trust Co. *v.* Railroad Equipment Co., 108 Fed. 913, 48 C. C. A. 135 (seven per cent under Ohio Rev. St. § 3287).

2. Beach *v.* Wakefield, 107 Iowa 567, 76 N. W. 688, 78 N. W. 197.

3. Strider *v.* Winchester, etc., R. Co., 21 Gratt. (Va.) 440.

4. See Corporations, 10 Cyc. 1111–1122, where this subject is fully treated.

5. Southwestern Arkansas, etc., R. Co. *v.* Hays, 63 Ark. 355, 38 S. W. 665 (holding that the mere fact that a note is made by a railroad company does not bring it within Sandels & H. Dig. § 6268, under which railroad companies have no power to borrow money at a rate of interest exceeding seven per cent per annum, as it may not have been given for borrowed money); Richmond, etc., R. Co. *v.* Snead, 19 Gratt. (Va.) 354, 100 Am. Dec. 670.

6. Southwestern Arkansas, etc., R. Co. *v.* Hays, 63 Ark. 355, 38 S. W. 665; Smead *v.* Indianapolis, etc., R. Co., 11 Ind. 104; Hamilton *v.* Newcastle, etc., R. Co., 9 Ind. 359; Richards *v.* Merrimack, etc., R. Co., 44 N. H. 127.

Lease warrants.— Under Ohio Rev. St. § 3287, which authorizes railroad companies to issue bonds or notes and secure the same by a pledge of their property or income, a railroad company has power to issue so-called "lease warrants" for deferred payments on

a railroad company may make and issue negotiable bonds,[7] or negotiable certificates payable in money or bonds.[8] But except in so far as authorized by its charter or governing statutes,[9] a railroad company has no general power to make or accept negotiable instruments for purposes foreign to its creation,[10] such as accommodation paper to aid in an undertaking not contemplated by its charter.[11] But even where the making or indorsement is without authority, a railroad company may be held liable for money paid for it by another on paper.[12]

4. MAKING AND ISSUE OF BONDS — a. Power to Issue. A railroad company may have express power to make and issue bonds by virtue of its charter or governing statutes,[13] or like other private corporations,[14] this power may be implied from its power to mortgage its property,[15] or borrow money,[16] or from its power to incur any other indebtedness in carrying out the legitimate purposes of its creation;[17]

equipment, the title to which remains in the seller until all such warrants are paid and then passes to the company. Metropolitan Trust Co. *v.* Railroad Equipment Co., 108 Fed. 913, 48 C. C. A. 135.

Usury.— The effect of Ohio Rev. St. § 3282, authorizing railroad companies to borrow money at a rate of interest not exceeding seven per cent and to issue bonds or notes for the same, and of section 3290, which provides that the directors may sell or negotiate such bonds or notes at not less than seventy-five per cent of par, is to exempt railroad companies from the operation of the general usury statute; and notes or lease warrants issued by a railroad company for deferred payments on equipment bought are valid, although their amount is greater than the sum due on the price of such equipment with the legal rate of interest, but not greater than would have been required if they had borne interest at seven per cent and been discounted at seventy-five per cent of par. Metropolitan Trust Co. *v.* Railroad Equipment Co., 108 Fed. 913, 48 C. C. A. 135; Metropolitan Trust Co. *v.* Columbus, etc., R. Co., 93 Fed. 702.

In England and Canada, however, the rule is stated that a railroad company has no power to make or indorse negotiable paper (Bateman *v.* Mid-Wales, L. R. 1 C. P. 499, Harr. & R. 508, 12 Jur. N. S. 453, 35 L. J. C. P. 205, 14 Wkly. Rep. 672, holding also that the question of such power is properly raised by a plea denying the acceptance, although the acceptance was given by order of the directors under the seal of the company; Topping *v.* Buffalo, etc., R. Co., 6 U. C. C. P. 141; Brockville, etc., R. Co. *v.* Canada Cent. R. Co., 41 U. C. Q. B. 431), unless such power is expressly or by necessary implication, conferred upon it by its charter or other governing statute (Peruvian R. Co. *v.* Thames, etc., Ins. Co., L. R. 2 Ch. 617, 36 L. J. Ch. 864, 16 L. T. Rep. N. S. 644, 15 Wkly. Rep. 1002; Commercial Bank *v.* Great Western R. Co., 13 L. T. Rep. N. S. 105; Kingston Mar. R. Co. *v.* Gunn, 3 U. C. Q. B. 368).

7. Miller *v.* New York, etc., R. Co., 8 Abb. Pr. (N. Y.) 431, 18 How. Pr. 374.

8. Pusey *v.* New Jersey West Line R. Co., 14 Abb. Pr. N. S. (N. Y.) 434, holding that a railroad company authorized to construct a road and to issue and negotiate bonds for that purpose may issue negotiable certificates payable in money or bonds in payment for work done in the construction of the road.

9. Smead *v.* Indianapolis, etc., R. Co., 11 Ind. 104, holding that under a charter power to contract with a connecting road for its use, etc., a railroad company has power to execute notes or bills to pay the expenses of altering the gauge of such other road.

10. Smead *v.* Indianapolis, etc., R. Co., 11 Ind. 104.

11. Smead *v.* Indianapolis, etc., R. Co., 11 Ind. 104.

12. Brockville, etc., R. Co. *v.* Canada Cent. R. Co., 41 U. C. Q. B. 431, holding this to be true in case of money paid by an accommodation indorser. See also, generally, MONEY PAID, 27 Cyc. 832.

13. See Coe *v.* Columbus, etc., R. Co., 10 Ohio St. 372, 75 Am. Dec. 518; Fountaine *v.* Carmarthen, etc., R. Co., L. R. 5 Eq. 316, 37 L. J. Ch. 429, 16 Wkly. Rep. 476; West Cornwall R. Co. *v.* Mowatt, 12 Jur. 407, 17 L. J. Ch. 366, holding, however, that under a power to issue debentures for money borrowed, the company has no power to issue them in respect to an agreement for discount on shares sold.

14. See, generally, CORPORATIONS, 10 Cyc. 1167 *et seq.*

15. Gloninger *v.* Pittsburgh, etc., R. Co., 139 Pa. St. 13, 21 Atl. 211.

16. Miller *v.* New York, etc., R. Co., 8 Abb. Pr. (N. Y.) 431, 18 How. Pr. 374; *In re* Mersey R. Co., [1895] 2 Ch. 287, 64 L. J. Ch. 625, 72 L. T. Rep. N. S. 735, 12 Reports 345 (under Railway Companies Act (1867), § 24).

Bonds pledged as security for a pre-existing debt by a railroad company authorized "from time to time to borrow such sums of money as may be necessary for completing and finishing and operating its road" and to issue bonds as security are valid. Duncomb *v.* New York, etc., R. Co., 84 N. Y. 190 [*reversing* 22 Hun 133].

17. Mead *v.* New York, etc., R. Co., 45 Conn. 199; Craven *v.* Atlantic, etc., R. Co., 77 N. C. 289; Raymond *v.* Spring Grove, etc., R. Co., 10 Ohio Dec. (Reprint), 416, 21 Cinc. L. Bul. 103; Philadelphia, etc., R. Co. *v.* Lewis, 33 Pa. St. 33, 75 Am. Dec. 574.

Lloyd's bonds which merely acknowledge

and this includes the power to issue them in exchange for bonds previously issued,[18] or at a discount,[19] except in so far as restrained or prohibited by charter or statutory provisions.[20] A constitutional or statutory provision which prohibits railroad companies from issuing stock or bonds except for money, labor, or property actually received and applied to the purposes for which the company was created does not interfere with the usual methods of raising money by issuing stock and bonds for legitimate corporate purposes,[21] as for the purpose of raising money to pay debts incurred in constructing and equipping its road;[22] nor does it prohibit the company from delivering bonds as advance payment on a contract obligation of as great value as the bonds.[23]

b. What Law Governs. Where a railroad extends through two or more states and is incorporated by the laws of each, an issue of bonds if valid under the laws of the state in which they are issued is valid everywhere, notwithstanding they would have been invalid if issued under the laws of one or more of such other states through which the road runs.[24]

c. Forms, Requisites, and Validity — (i) *In General.* Ordinarily a railroad company may issue its bonds in any form or upon any conditions it sees proper, so long as not unauthorized,[25] such as in the form of bonds convertible into stock.[26] But it is necessary that all the charter, statutory, or constitutional requirements in respect thereto be complied with, as that they be issued within the restrictions and only for the purposes prescribed by such provisions,[27] and in the mode author-

a debt and promise to pay in the future see *In re* Cork, etc., R. Co., L. R. 4 Ch. 748, 39 L. J. Ch. 277, 21 L. T. Rep. N. S. 735, 18 Wkly. Rep. 26; Chambers *v.* Manchester etc., R. Co., 5 B. & S. 588, 33 L. J. Q. B. 268, 10 Jur. N. S. 700, 10 L. T. Rep. N. S. 715, 12 Wkly. Rep. 980, 117 E. C. L. 588; White *v.* Carmarthen, etc., R. Co., 1 Hem. & M. 786, 33 L. J. Ch. 93, 9 L. T. Rep. N. S. 439, 11 L. T. Rep. N. S. 179 note, 12 Wkly. Rep. 68, 71 Eng. Reprint 344.

18. Mead *v.* New York, etc., R. Co., 45 Conn. 199.

19. Coe *v.* Columbus, etc., R. Co., 10 Ohio St. 373, 75 Am. Dec. 518.

20. Craven *v.* Atlantic, etc., R. Co., 77 N. C. 289.

In ascertaining the price for which bonds of a railroad company were sold, for the purpose of determining their validity under a statute prohibiting their sale for less than seventy-five per cent of their par value, but which fixed no minimum limit on the sale of stock, where an amount of both bonds and stock were issued to a contractor in consideration of a reorganization agreement, it is not necessary that the value of the consideration received by the company should be equally distributed between both bonds and stock according to the amount of each issue to the contractor, but the stock may properly be computed in the payment at its market value; nor is the value of what was actually done by the contractor the measure of consideration received by the company for the bonds, but the value of what he undertook by his contract to do. Toledo, etc., R. Co. *v.* Continental Trust Co., 95 Fed. 497, 36 C. C. A. 155, 96 Fed. 784, 37 C. C. A. 587 [*modifying* 86 Fed. 929].

21. Peoria, etc., R. Co. *v.* Thompson, 103 Ill. 187; Memphis, etc., R. Co. *v.* Dow, 120 U. S. 287, 7 S. Ct. 482, 30 L. ed. 595.

22. Peoria, etc., R. Co. *v.* Thompson, 103 Ill. 187 (holding this to be true in respect to an issue of bonds before the work to be paid for has been actually done); Com. *v.* Lehigh Ave. R. Co., 129 Pa. St. 405, 18 Atl. 414, 498, 5 L. R. A. 367 (construing Const. art. 16, § 7).

23. Hudson River, etc., R. Co. *v.* Hanfield, 36 N. Y. App. Div. 605, 55 N. Y. Suppl. 877. on contract to construct the railroad.

24. Atwood *v.* Shenandoah Valley R. Co., 85 Va. 966, 9 S. E. 748, holding that bonds issued by a railroad company under its charter powers in the state of Virginia are valid, notwithstanding they would have been void if issued in Maryland or West Virginia by which states the railroad company was also incorporated.

25. Willoughby *v.* Chicago Junction R., etc., Co., 50 N. J. Eq. 656, 25 Atl. 277.

Where the words or terms of a railroad bond are equivocal, or not entirely clear, the court may consider the deed of trust in connection with the bond, to ascertain the real contract between the company and the bondholders. Shoemaker *v.* Dayton, etc., R. Co., 10 Ohio Dec. (Reprint) 12, 18 Cinc. L. Bul. 43.

26. Belmont *v.* Erie R. Co., 52 Barb. (N. Y.) 637 (holding this power to exist, when exercised in good faith, although it increases the amount of the capital stock beyond that fixed by the charter); Van Allen *v.* Illinois Cent. R. Co., 7 Bosw. (N. Y.) 515; Ramsey *v.* Erie R. Co., 38 How. Pr. (N. Y.) 193 (although it increases the capital stock beyond the amount fixed by the charter); Denney *v.* Cleveland, etc., R. Co., 28 Ohio St. 108.

27. Peoria, etc., R. Co. *v.* Thompson, 103 Ill. 187; East Boston Freight R. Co. *v.* Hubbard, 10 Allen (Mass.) 459 note (holding that under St. (1852) c. 286, bonds issued

ized;[28] although in respect to *bona fide* holders, such bonds may be valid, although invalid as between the original parties.[29] Thus ordinarily bonds are invalid if for an amount in excess of the limit prescribed by the company's charter or governing statutes.[30] So a railroad company has no power, under its general authority to borrow money, to issue irredeemable or perpetual bonds which may in effect increase its capital stock and change the rights of its existing creditors,[31] and such an issue may be restrained by injunction at the suit of stock-holders.[32] But where bonds are issued in good faith to pay or secure some legitimate corporate indebtedness, they are not rendered invalid by the mere fact that they are issued for a sum in excess of the indebtedness which they are issued to secure.[33] Nor is an issue of bonds invalid as against the company merely because of some irregularity or fraud which does not affect the company's liability as principal debtor.[34] Bonds secured by a mortgage are not rendered invalid because of a want of power to execute the mortgage.[35] A subsequent creditor of a railroad company cannot

without authority are void, together with the mortgage given to secure them); Kemble *v.* Wilmington, etc., R. Co., 14 Fed. Cas. No. 7,684, 13 Phila. (Pa.) 469, 5 Wkly. Notes Cas. (Pa.) 172 (holding that Pa. Act, April 8, 1861, does not authorize railroad companies organized thereunder to issue bonds otherwise than for a new, adequate, or valuable consideration increasing the available funds of the company). See also Quebec *v.* Quebec Cent. R. Co., 10 Can. Sup. Ct. 563.

Consolidated company.—Although N. Y. Laws (1850), c. 225, § 28, subd. 10, providing that railroad corporations may borrow such sums as are necessary for completing, finishing, and operating their roads, and issue bonds for the money borrowed, and secure the repayment by mortgage on the corporate property and franchises, which section was made applicable to consolidated corporations under Laws (1869), c. 917, § 8, may have been designed to carry with it an implication that mortgage bonds could not be issued for any other purpose, such limitation was removed as to consolidated companies by section 2 of the act of 1869. Taylor *v.* Atlantic, etc., R. Co., 57 How. Pr. (N. Y.) 26.

28. East Boston Freight Co. *v.* Hubbard, 10 Allen (Mass.) 459 note.

29. See *infra*, VIII, A, 4, e, (II).

30. Baker *v.* Guarantee Trust, etc., Co., (N. J. Ch. 1895) 31 Atl. 174; Raymond *v.* Spring Grove, etc., R. Co., 10 Ohio Dec. (Reprint) 416, 21 Cinc. L. Bul. 103 (holding that where bonds are issued in excess of the amount allowed by law, there can be no recovery on the bonds, against the individual stock-holders and directors who caused the issue); New Castle, Northern R. Co. *v.* Simpson, 21 Fed. 533; Fountaine *v.* Carmarthen R. Co., L. R. 5 Eq. 316, 37 L. J. Ch. 429, 16 Wkly. Rep. 476. *Compare* Belmont *v.* Erie R. Co., 52 Barb. (N. Y.) 637.

Under the Pennsylvania act of April 18, 1874, a contract for the issuance of bonds which increases the company's indebtedness beyond the amount of its capital stock subscribed, etc., is void. New Castle Northern R. Co. *v.* Simpson, 21 Fed. 533.

In determining whether there has been an overissue of bonds, where a contractor is to be paid for building a railroad in the bonds and stock of the corporation as the work progresses, only the labor and materials actually paid for by the contractor can be taken into account, even if stock paid for but not issued can be considered; since the corporation itself is liable for labor and materials not paid for. Baker *v.* Guarantee Trust, etc., Co., (N. J. Ch. 1895) 31 Atl. 174.

31. Taylor *v.* Philadelphia, etc., R. Co., 7 Fed. 386, 14 Phila. (Pa.) 479.

32. Taylor *v.* Philadelphia, etc., R. Co., 7 Fed. 386, 14 Phila. (Pa.) 479.

33. Sioux City, etc., R. Co. *v.* Manhattan Trust Co., 92 Fed. 428, 34 C. C. A. 431 (holding that railroad stock and bonds issued in exchange for the stock and bonds of a former company, not shown to have been invalid, in pursuance of a reorganization scheme, which, so far as it appears, was entered into in good faith by the issuing company, are not invalid under Nebr. Const. art. 11, § 5 Consol. St. (1891) p. 72, which provides that a railroad company shall not issue stock or bonds except for money, labor, or property actually received, and that fictitious issues of stock or bonds shall be void, merely because at the time of the exchange the cash value of the physical property and franchises acquired by the reorganization company was not equal to the par value of its securities); Farmers' L. & T. Co. *v.* Rockaway Valley R. Co., 69 Fed. 9 (holding that railroad bonds issued to pay for the construction of a road are not rendered invalid by the fact that the road was constructed for less than the amount of the bonds, where the contract for the construction was fairly made and carried out and called for that amount).

34. Kelly *v.* Alabama, etc., R. Co., 58 Ala. 489, holding that, although railroad bonds be indorsed in fraud under the internal improvement law, such void indorsement, while releasing the state as surety for the railroad company, will not release the company from its liability for the bonds secured.

35. Illinois Trust, etc., Bank *v.* Pacific R. Co., 117 Cal. 332, 49 Pac. 197; Philadelphia, etc., R. Co. *v.* Lewis, 33 Pa. St. 33, 75 Am. Dec. 574.

attack the validity of bonds on grounds which the railroad company has waived or does not question.[36]

(II) *VALIDITY IN HANDS OF DIRECTORS.* Under some statutes the purchase of railroad stock, bonds, or securities by a director of the company, either directly or indirectly, for less than their par value is voidable.[37] Such statutes, however, apply only to original sales made by the company and do not affect the validity of bonds which a director has acquired an interest in through a third person.[38]

(III) *ESTOPPEL TO DENY VALIDITY.* A railroad company may be estopped by its conduct to deny the validity of an issue of bonds.[39]

d. Negotiation or Sale — (I) *IN GENERAL.* The negotiability of railroad bonds is governed, in the absence of special statute, by the rules applicable to the negotiability of corporate bonds generally.[40] Ordinarily the disposition or sale of such bonds is regulated by statute.[41] Authority to issue and dispose of railroad

36. Toledo, etc., R. Co. *v.* Continental Trust Co., 95 Fed. 497, 36 C. C. A. 155, 96 Fed. 784, 37 C. C. A. 587 [*modifying* 86 Fed. 929], holding that where a full settlement has been made between a railroad company and a contractor to whom the company issued bonds in payment for work, which settlement was acquiesced in by all parties in interest, subsequent creditors of the company cannot attack the validity of the bonds on the ground of fraud on the part of the contractor by a failure properly to perform the contract.

37. Toledo, etc., R. Co. *v.* Continental Trust Co., 95 Fed. 497, 36 C. C. A. 155, 96 Fed. 784, 37 C. C. A. 587 [*modifying* 86 Fed. 929], construing Ohio Rev. St. § 3313.

38. Toledo, etc., R. Co. *v.* Continental Trust Co., 95 Fed. 497, 36 C. C. A. 155, 96 Fed. 784, 37 C. C. A. 587 [*modifying* 86 Fed. 929], holding that the acquiring of an interest in bonds by a director through a contractor, to whom the company had contracted to deliver them in payment for work after they had been issued by the company and deposited with trustees to be delivered to the contractor as the work progressed, either by direct purchase or by a secret agreement made after such issuance and deposit, does not invalidate such bonds.

A verbal option given to certain creditors by a contractor to purchase bonds from him at less than par after they are earned under his contract in consideration of their consent, as bondholders of a prior company, to a certain plan of reorganization, which agreement was wholly collateral to his contract with the company, does not invalidate such bonds in the hands of the directors. Toledo, etc., R. Co. *v.* Continental Trust Co., 95 Fed. 497, 36 C. C. A. 155, 96 Fed. 784, 37 C. C. A. 587 [*modifying* 86 Fed. 929].

Subsequent creditors cannot attack the validity of such bonds in the hands of directors, where it is not questioned by the corporation or its stock-holders. Toledo, etc., R. Co. *v.* Continental Trust Co., 95 Fed. 497, 36 C. C. A. 155, 96 Fed. 784, 37 C. C. A. 587 [*modifying* 86 Fed. 929].

39. Singer *v.* St. Louis, etc., R. Co., 6 Mo. App. 427; Shoemaker *v.* Dayton, etc., R. Co., 10 Ohio Dec. (Reprint) 252, 19 Cinc. L. Bul. 322, holding that a railroad company may be estopped from disputing the validity of bonds issued by it without authority where it has, with the full knowledge of all the facts, redeemed a large amount of the bonds and paid interest on them for many years.

40. See CORPORATIONS, 10 Cyc. 1172, 1173.

The usage and practice of railroad companies, and of capitalists and business men, and decisions of the courts have made this class of securities negotiable instruments. White *v.* Vermont, etc., R. Co., 21 How. (U. S.) 575, 16 L. ed. 221.

Interest coupons attached to such a bond, and which refer to the bond, partake of the same character as the bond itself; and this character is not changed by cutting them off from the bond; and although an action may be maintained upon the coupons without production of the bond, a recovery must be based upon the obligations contained in the bond. McClelland *v.* Norfolk Southern R. Co., 110 N. Y. 461, 18 N. E. 237, 6 Am. St. Rep. 397, 1 L. R. A. 299.

Overdue and unpaid interest coupons do not of themselves make the bonds to which they are attached non-negotiable. Indiana, etc., R. Co. *v.* Sprague, 103 U. S. 756, 26 L. ed. 554.

An option given a mortgage trustee to declare a railroad bond due before the time of payment in case of default in the payment of interest does not affect the negotiability of such bond. Chicago, etc., R. Co. *v.* Northern Trust Co., 90 Ill. App. 460.

41. McGregor *v.* Covington, etc., R. Co., 1 Disn. (Ohio) 509, 12 Ohio Dec. (Reprint) 763 (holding, however, that a statute authorizing a sale of bonds of railroad companies at such prices as the directors may choose to take for them does not apply to foreign corporations); Continental Trust Co. *v.* Toledo, etc., R. Co., 82 Fed. 642 (holding that Ohio Rev. St. § 3290, regulating the rates and prices at which railroad corporations may sell their bonds and other securities, does not invalidate bonds received by a contractor for work done, unless it is clear that the cost of the work was palpably less than the statutory price of the bonds, so that the parties knew it to be so when the contract was made); Toronto Gen. Trusts Corp. *v.* Cen-

bonds for the purpose of raising money for corporate purposes authorizes a pledge of them for such purposes.[42] Where such bonds, complete in form, and negotiable by delivery, are placed in the custody of the president or other managing officer of the company, he thereby becomes clothed with an apparent authority to dispose of them,[43] and to fill in necessary blanks, such as inserting the obligee's name.[44]

(II) *Rights of Creditors Against Subscribers to Bonds.* Railroad mortgage bondholders who subscribe to its debenture bonds, agreeing to pay specified portions of their subscription as called for, in effect agree to loan the company money and receive the bonds as security; and such transaction does not create any trust in favor of creditors of the railroad company;[45] and such bondholders do not thereby become liable to creditors of the company for the amounts unpaid on such agreement on the analogy of the liability of stock-holders to the extent of unpaid stock subscriptions.[46] Nor where the agreement is executory have such creditors any remedy in equity to reach and apply the amount so due as property belonging to the debtor.[47]

e. Rights of Bondholders Generally[48] — (I) *In General.* Ordinarily the rights of a purchaser or pledgee of railroad bonds are governed by the rules applicable to sales and pledges of bonds generally;[49] but these rights may be varied by

tral Ontario R. Co., 4 Can. R. Cas. 359, 10 Ont. L. Rep. 347, 5 Ont. Wkly. Rep. 600 [*reversing* 3 Can. R. Cas. 344, 7 Ont. L. Rep. 660, 3 Ont. Wkly. Rep. 520]; Toronto Bank *v.* Cobourg, etc., R. Co., 7 Ont. 1.

42. Illinois Trust, etc., Bank *v.* Pacific R. Co., 117 Cal. 332, 49 Pac. 197; Farmers' L. & T. R. Co. *v.* Toledo, etc., R. Co., 54 Fed. 759, 4 C. C. A. 561 (holding that a railroad company is authorized under Howell Annot. St. Mich. § 3352, to pledge its bonds for money borrowed); Duncomb *v.* New York, etc., R. Co., 84 N. Y. 190 (holding that a railroad company authorized to issue bonds to raise money for the operation of the road may pledge its bonds as security for its office rent). See, generally, Pledges, 31 Cyc. 779.

43. Pittsburgh, etc., R. Co. *v.* Lynde, 55 Ohio St. 23, 44 N. E. 596, holding also that if without the consent or knowledge of the company he wrongfully and for his own benefit negotiates them, and in due course of business before due, to one who pays therefor their fair value, without notice of any restriction on such apparent power of disposition, the transaction confers upon such purchaser a valid title to the bonds so purchased and entitles him to a lien against the mortgaged property for their payment.

44. Toronto Bank *v.* Cobourg, etc., R. Co., 7 Ont. 1.

45. Pettibone *v.* Toledo, etc., R. Co., 148 Mass. 411, 19 N. E. 337, 1 L. R. A. 787, holding that the fact that the debenture bonds are issued to enable the corporation to complete its road does not create any trust in favor of creditors whose claims are for supplies furnished in the construction of the road.

46. Pettibone *v.* Toledo, etc., R. Co., 148 Mass. 411, 19 N. E. 337, 1 L. R. A. 787.

47. Pettibone *v.* Toledo, etc., R. Co., 148 Mass. 411, 19 N. E. 337, 1 L. R. A. 787, holding that where the contract between the corporation and the subscribers to the bonds is executory on both sides and not assignable by either party, it is not within Pub. St. c. 151, § 2, cl. 11, giving creditors a remedy in equity to reach and apply "any property, right, title, or interest, legal or equitable," belonging to a debtor.

48. Priorities between bondholders see *infra*, VIII, A, 9, m, (I).

Right to interest see *infra*, VIII, A, 10.

Purchase by bondholders at foreclosure sale see *infra*, VIII, B, 15.

Rights of bondholders on reorganization after foreclosure sale see *infra*, VIII, B, 16, b.

49. See Vermont, etc., R. Co. *v.* Vermont Cent. R. Co., 34 Vt. 1; and, generally, Bonds, 5 Cyc. 784 *et seq.*; Corporations, 10 Cyc. 1173 *et seq.*; Pledges, 31 Cyc. 779.

Each bondholder sustains a contractual relation to every other bondholder, so that in dealing with the common security, he cannot pursue a wholly selfish course, prejudicial to the community in interest. Lyman *v.* Kansas City, etc., R. Co., 101 Fed. 636.

A purchaser of railroad bonds is entitled to recover the face value of the bonds regardless of what he paid for them. Jesup *v.* Racine City Bank, 14 Wis. 331; Wade *v.* Chicago, etc., R. Co., 149 U. S. 327, 13 S. Ct. 892, 37 L. ed. 755, holding this to be true where there is no infirmity or defense between the antecedent parties to the bonds.

A pledgee of railroad bonds is entitled to recover only the amount of his indebtedness, with interest, which the bonds were pledged to secure (Rice's Appeal, 79 Pa. St. 168 [*reversing* 9 Phila. 294]; Jesup *v.* Racine City Bank, 14 Wis. 331; London Financial Assoc. *v.* Wrexham, etc., R. Co., L. R. 18 Eq. 566, 30 L. T. Rep. N. S. 491. And see, generally, Pledges, 31 Cyc. 779); and this rule also applies to a subsequent holder of such bonds with notice of the character of the transaction between the railroad company and the pledgee (Simmons *v.* Taylor, 23 Fed. 849).

the special contract under which the purchase or pledge is made.[50] Negotiable railroad bonds, valid on their face, are good in the hands of *bona fide* purchasers for value,[51] notwithstanding their issuance or application may have been such as to make them voidable in the hands of the original taker.[52] Such a holder, in the absence of notice to the contrary, has a right to assume that all charter and statutory requirements in respect to the issuance and application of the bonds have been complied with.[53] In accordance with this principle, railroad bonds are valid in the hands of such a purchaser, although they were issued in violation of restrictions in the charter,[54] especially where such restrictions are for the benefit of shareholders and they make no objection to the issuance or application.[55] Holders of non-negotiable railroad bonds, however, take them subject to all defenses, legal and equitable, of the company which issues them;[56] and the stock-holders of the company cannot claim that they will suffer irreparable injury if the bonds pass into the hands of purchasers for value without notice,[57] and have no right on that ground to an injunction, restraining the issue of the bonds, or to its continuance if already granted.[58]

(II) *WHO ARE BONA FIDE HOLDERS.* In accordance with the rules governing the holders of bonds generally,[59] a person is a *bona fide* holder of railroad bonds within the meaning of the above rule, who purchases the bonds in the open

Illegal Lloyd's bonds in the hands of assignee see Chambers *v.* Manchester, etc., R. Co., 5 B. & S. 588, 10 Jur. N. S. 700, 33 L. J. Q. B. 268, 10 L. T. Rep. N. S. 715, 12 Wkly. Rep. 980, 117 E. C. L. 588.

Injunction to restrain application for legislation that might affect bondholder's rights see Gregory *v.* Canada Imp. Co., Russ. Eq. Dec. (Nova Scotia) 358.

50. See Singer *v.* St. Louis, etc., R. Co., 6 Mo. App. 427; Vose *v.* Bronson, 6 Wall. (U. S.) 452, 18 L. ed. 846; Dwight *v.* Smith, 13 Fed. 50, holding that the question whether bondholders who have acquired their bonds since money in the hands of the trustees applicable to the bonds accrued are entitled to share in that money depends upon the nature of the right and of the transaction by which they acquired the bonds.

Designation by lot.— The object of a provision in a contract requiring that bonds of each purchaser be designated by lot is for the purpose of treating all bondholders alike, and therefore such designation is unnecessary when all the bonds are held by one person. Ohio, etc., R. Co. *v.* Short, 6 Ohio Dec. (Reprint) 703, 7 Am. L. Rec. 474.

A purchaser of bonds under an assurance that no further indebtedness shall be placed upon a portion of the road then constructed enjoys all his rights against the company, unaffected by those of a purchaser of bonds issued subsequently in violation of the assurance. McMurray *v.* Moran, 134 U. S. 150, 10 S. Ct. 427, 33 L. ed. 814; Union Trust Co. *v.* Nevada, etc., R. Co., 20 Fed. 80.

51. Peoria, etc., R. Co. *v.* Thompson, 103 Ill. 187; Porter *v.* Pittsburg Bessemer Steel Co., 122 U. S. 267, 7 S. Ct. 1206, 30 L. ed. 1210, 120 U. S. 649, 7 S. Ct. 741, 30 L. ed. 830.

52. Grant *v.* Green, 46 Ill. 469 (holding that where railroad bonds are issued in good faith and within corporate powers and the transaction in other respects is a real one, their validity in the hands of innocent holders is not affected by the fact that the purposes for which they were issued were not fully carried out); Galveston, etc., R. Co. *v.* Cowdrey, 11 Wall. (U. S.) 459, 20 L. ed. 199; Long Island L. & T. Co. *v.* Columbia, etc., R. Co., 65 Fed. 455 See also London Financial Assoc. *v.* Wrexham, etc., R. Co., L. R. 18 Eq. 566, 30 L. T. Rep. N. S. 491.

Bonds indorsed by the state are valid in the hands of a *bona fide* purchaser for value, although they were misapplied by the railroad company. Morton *v.* New Orleans, etc., R., etc., Co., 79 Ala. 590; Gilman *v.* New Orleans, etc., R. Co., 72 Ala. 566.

53. Ellsworth *v.* St. Louis, etc., R. Co., 98 N. Y. 553 [*affirming* 33 Hun 7].

54. Ellsworth *v.* St. Louis, etc., R. Co., 98 N. Y. 553 [*affirming* 33 Hun 7] (holding that as against a *bona fide* holder of bonds issued by a railroad company, it may not be shown that restrictions imposed by its charter on its power to issue bonds were violated, as such corporations in general have power to issue bonds); Fidelity Ins., etc., Co. *v.* Western Pennsylvania, etc., R. Co., 138 Pa. St. 494, 21 Atl. 21, 21 Am. St. Rep. 911 (holding that the fact that a railroad company has violated its charter by the issuance of bonds secured by a mortgage in an amount greater than twice its paid-up capital stock will not entitle the company's general creditors who became such with notice of the mortgage to share in the proceeds of the foreclosure sale on an equality with the *bona fide* purchasers of the bonds).

55. Tyrell *v.* Cairo, etc., R. Co., 7 Mo. App. 294.

56. Kissel *v.* Chicago, etc., R. Co., 44 Misc. (N. Y.) 156, 89 N. Y. Suppl. 796.

57. Kissel *v.* Chicago, etc., R. Co., 44 Misc. (N. Y.) 156, 89 N. Y. Suppl. 796.

58. Kissel *v.* Chicago, etc., R. Co., 44 Misc. (N. Y.) 156, 89 N. Y. Suppl. 796.

59. See, generally, BONDS, 5 Cyc. 795 *et seq.*; CORPORATIONS, 10 Cyc. 1176.

market, supposing them to be valid and having no notice to the contrary,[60] or who acquires them from a *bona fide* holder, even though he is not himself a holder without notice;[61] and except where fraud in the inception of the bonds is shown,[62] the presumption is that holders of negotiable bonds are *bona fide* holders for value,[63] especially where the recitals on the face of the bonds lull and satisfy inquiry.[64] A purchaser of such bonds, however, is bound to take notice of all facts affecting their validity which are apparent on the face of the bonds,[65] or which the circumstances attending their issuance or transfer and which are sufficient to excite suspicion in the mind of a prudent person, call to his attention.[66] Where the bonds are issued under a public statute, every purchaser of such bonds is put upon inquiry as to the terms of such statute and is bound at his peril to take notice of them.[67]

(III) *MODIFICATION OF CONTRACT BY REORGANIZATION SCHEME.* Every railroad bondholder secured by a mortgage is equally entitled under the agreement made with him to be protected in all the advantages legally secured by it,[68] and except where such authority is given by statute,[69] or by the instrument cre-

60. Galveston, etc., R. Co. *v.* Cowdrey, 11 Wall. (U. S.) 459, 20 L. ed. 199.

Where the persons to whom the bonds are issued by a railroad company have notice of the facts showing their illegality, such bonds will be void in their hands. Chicago *v.* Cameron, 120 Ill. 447, 11 N. E. 899 [*affirming* 22 Ill. App. 91].

61. Porter *v.* Pittsburg Bessemer Steel Co., 122 U. S. 267, 7 S. Ct. 1206, 30 L. ed. 1210, 120 U. S. 649, 7 S. Ct. 741, 30 L. ed. 830].

62. Shellenberger *v.* Altoona, etc., Connecting R. Co., 212 Pa. St. 413, 61 Atl. 1000, 108 Am. St. Rep. 876.

The holder of such bonds must establish the fact that he is a bona fide purchaser and mere possession of the bonds is insufficient for this purpose. Shellenberger *v.* Altoona, etc., Connecting R. Co., 212 Pa. St. 413, 61 Atl. 1000, 108 Am. St. Rep. 876; Simmons *v.* Taylor, 38 Fed. 682.

63. Gilman *v.* New Orleans, etc., R. Co., 72 Ala. 566; Shellenberger *v.* Altoona, etc., Connecting R. Co., 212 Pa. St. 413, 61 Atl. 1000, 108 Am. St. Rep. 876.

64. Stanton *v.* Alabama, etc., R. Co., 22 Fed. Cas. No. 13,297, 2 Woods 523.

65. Parsons *v.* Jackson, 99 U. S. 434, 25 L. ed. 457 (uncertainty of amount payable apparent on face of bond); Stanton *v.* Alabama, etc., R. Co., 22 Fed. Cas. No. 13,297, 2 Woods 523.

Where interest coupons refer to the bonds to which they are attached and such bonds and the mortgage given to secure the same contain conditions which affect the negotiability of the bonds, the holder of such coupons is chargeable with notice of such terms. McClelland *v.* Norfolk Southern R. Co., 110 N. Y. 469, 18 N. E. 237, 6 Am. St. Rep. 397, 1 L. R. A. 299.

Terms in mortgage or deed of trust.— Where reference is made on the face of the bonds to such matters, the purchaser of the bonds is bound to take notice of the terms of the mortgage or deed of trust which was executed to secure the bonds. Morton *v.* New Orleans, etc., R. Co., etc., 79 Ala. 590; Grant *v.* Winona, etc., R. Co., 85 Minn. 422, 89 N. W. 60 [*limiting* Guilford *v.* Minneapolis, etc., R. Co., 48 Minn. 560, 51 N. W. 658, 31 Am. St. Rep. 694] (holding that where a railway bond contains a statement that it is one of a series of bonds secured by a mortgage upon the property of a railroad, it puts a purchaser thereof on inquiry as to all the powers conferred upon the trustee on the foreclosure thereof); Taylor *v.* Atlantic, etc., R. Co., 57 How. Pr. (N. Y.) 26. But see Raymond *v.* Spring Grove, etc., R. Co., 10 Ohio Dec. (Reprint) 416, 21 Cinc. L. Bul. 103.

66. Gilman *v.* New Orleans, etc., R. Co., 72 Ala. 566 (purchase at greatly inadequate price); Riggs *v.* Pennsylvania, etc., R. Co., 16 Fed. 804 (holding that where railroad bonds, secured by mortgage, are signed and issued by a trustee, whose duty, it usually would be considered, was to act for the bondholders in enforcing payments to them, and to bring suit against the company for covenants broken, and not necessarily to place upon the market the bonds for sale, and the bonds sold are for a very small per cent of the face value, the purchaser thereof is put upon inquiry in regard to the regularity or validity of their issue).

67. Morton *v.* New Orleans, etc., R. Co., etc., 79 Ala. 590; Gilman *v.* New Orleans, etc., R. Co., 72 Ala. 566.

68. Taylor *v.* Atlantic, etc., R. Co., 55 How. Pr. (N. Y.) 275.

69. Gates *v.* Boston, etc., Air-Line R. Co., 53 Conn. 333, 5 Atl. 695 (holding that where a railroad fails and the mortgage has to be foreclosed, the legislature has full power to authorize the bondholders by a vote of the majority and with an equal opportunity to all to organize as a new corporation with the rights of the old company; and a dissenting minority have no private rights that can be successfully asserted against such action); Canada Southern R. Co. *v.* Gebhard, 109 U. S. 527, 3 S. Ct. 363, 27 L. ed. 1020 (holding that where the parliament of the dominion of Canada authorizes a corporation existing under its authority, to enforce upon its mortgage creditors a settlement by which

ating the trust,[70] no agreement or scheme of reorganization, without foreclosure, can be entered into by a trustee and some of the bondholders, which would prejudicially affect the rights of other bondholders, without their assent.[71]

(IV) *Powers, Acts, and Proceedings of Committees or Agents For Bondholders.*[72] Where the holders of railroad bonds enter into an agreement by which they authorize a committee or agent to represent them in exchanging or disposing of their bonds or in otherwise representing their rights, the validity of the acts or contracts of such committee or agent in representing them will depend upon the terms of the agreement by which the authority is given.[73]

they are to receive other securities of the corporation in place of their mortgage bonds, and the scheme is assented to by a large majority of the bondholders, and the rights of the citizens of the United States who are bondholders to participate in the reorganization on the same terms as Canadians or other British subjects is preserved and recognized, the settlement is binding upon the bondholders who are citizens of the United States and who sue in the courts of the United States to recover on their bonds).

70. See Sage *v.* Iowa Cent. R. Co., 99 U. S. 334, 25 L. ed. 394.

71. Hollister *v.* Stewart, 111 N. Y. 644, 19 N. E. 782; Taylor *v.* Atlantic, etc., R. Co., 55 How. Pr. (N. Y.) 275; Fidelity Ins., etc., Co. *v.* Western Pennsylvania, etc., R. Co., 138 Pa. St. 494, 21 Atl. 21, 21 Am. St. Rep. 911 (holding that where officers of a railroad company have violated its charter by issuing bonds secured by a mortgage in an amount greater than twice its paid-up capital, an agreement between the railroad company and one advancing money to pay the interest of the coupons on the bonds under which the one making the advances is treated as an original bondholder and allowed to share equally in the proceeds of the foreclosure sale is not valid as against the bondholders who were not consulted and who did not consent to the agreement); Poland *v.* Lemoille Valley R. Co., 52 Vt. 144.

Mere silence of a bondholder is not sufficient to show his consent to the reorganization scheme. Philadelphia, etc., R. Co. *v.* Love, 125 Pa. St. 488, 17 Atl. 455.

Amount due dissenting bondholder immaterial.— That the amount due a dissenting bondholder and the extent to which he may be entitled to participate in the advantages of the security may be, comparatively speaking, not very significant does not justify the court in disregarding the above principle, it being enough that a material right may be prejudiced and the party deprived of the full advantage of his contract and security, to require that the court shall not interpose to his manifest injury. Taylor *v.* Atlantic, etc., R. Co., 55 How. Pr. (N. Y.) 275.

First takers or any successive holders of such bonds cannot diminish the security, or in any way affect the rights of any subsequent *bona fide* holders. Belden *v.* Burke, 72 Hun (N. Y.) 51, 25 N. Y. Suppl. 601 [*reversed* on the facts in 147 N. Y. 542, 42 N. E. 261]. Thus where a railroad mortgage recites that covenants contained therein shall inure to the benefit of successive holders of the bonds it is given to secure, the first taker of the bonds, which are negotiable in form, cannot enter into any agreement with the railroad company or its officers abrogating the mortgage covenants so as to bind a subsequent *bona fide* purchaser of the bonds for value before maturity; and such a purchaser has the right to look to the mortgage, which is a matter of public record, with full assurance that the conditions contained therein will be enforced for his benefit. Belden *v.* Burke, 72 Hun (N. Y.) 51, 25 N. Y. Suppl. 601 [*reversing* 20 N. Y. Suppl. 320, and *reversed* on the facts in 147 N. Y. 542, 42 N. E. 261].

Fraud.— That a first taker of the bonds had full knowledge of the covenants in the mortgage at the time he accepted the bonds in satisfaction of a loan previously made by it to the officers of a railroad company and their associates to enable them to secure all the stock of the company will not render him liable to a subsequent bondholder as a participant in the fraud of the officers, unless it is shown that at the time the loan was made the first taker had knowledge of the officers' intention to mislead subsequent bondholders by the insertion of the covenant in the mortgage. Belden *v.* Burke, 72 Hun (N. Y.) 51, 25 N. Y. Suppl. 601 [*reversed* on the facts in 147 N. Y. 542, 42 N. E. 261].

72. **Purchasing committee** see *infra*, VIII, B, 15, b.

73. Brooks *v.* Dick, 17 N. Y. Suppl. 259 (holding that where a committee representing railway bondholders, after foreclosure of the mortgage securing their bonds, is authorized to exchange such bonds received by it for bonds of a new company or of a consolidated company of equal value, and is also empowered to pay certain debts and liens from the bonds received by it on such exchange, the committee is authorized to contract with others for the cancellation and discharge of such indebtedness and devote a portion of the bonds so received to that purpose; and the fact that the committee could only exchange for bonds of equal value gives the bondholders no right to receive the same intact); Olcott *v.* Powers, 15 N. Y. Suppl. 263 (holding that under special authority given to a committee to contract to sell the bonds to a third person, a contract made by the committee pursuant to a resolution adopted by a majority of the bondholders at a meeting called by the committee to consider the proposition of the purchaser, and assented to by two thirds of the stock-holders, is valid as against the non-assenting minor-

(v) *Refunding Debt and Substitution of Bonds.* The rights and liabilities of bondholders under an agreement providing for the refunding of their indebtedness and the substitution of new for old bonds depend upon the terms of the agreement.[74] Thus, under an agreement by a holder of railroad bonds to surrender them on receipt of other new bonds, the railroad company is not bound to deliver the stipulated new bonds until all of the outstanding old bonds are surrendered to it,[75] or their absence accounted for and adequate security offered to indemnify the company against liability to any adverse claimant,[76] even though a decree entered by the consent of the parties has directed a cancellation of the old bonds and a discharge of the mortgage securing them.[77] But where the surrender of the old bonds is not dependent upon any contingency, and is without reservation, the bondholder thereby gives up his lien under the old mortgage and takes one under the new mortgage.[78] A bondholder who is a party to such an agreement cannot set up a secret agreement between himself and the company to the detriment of other holders of new bonds without notice of his equity.[79] Nor can a bondholder who has not consented and who does not exchange claim any greater rights than he is entitled to under his old contract.[80] Where the holders of coupons under an earlier issue accept in payment bonds issued under a later statute giving them a preference over the earlier bonds, but which statute is subsequently declared unconstitutional, the holders of such new bonds are estopped from claiming a lien therefor under the earlier act;[81] and although there

ity, and it is not necessary at a called meeting of the bondholders to amend or reconsider the bondholders' agreement); Langdon *v.* Vermont, etc., R. Co., 53 Vt. 228 (holding that bondholders are all bound by the acts of such committee within the scope of its authority).

74. See Sutliff *v.* Cleveland, etc., R. Co., 24 Ohio St. 147.

An exchange of old bonds for new ones, under a mortgage authorizing such exchange, and requiring the trustee to hold the old bonds as collateral for the new ones, until all the old bonds were surrendered, when the entire issue was to be canceled, is binding on the holders of such new bonds, although the entire issue was never surrendered, and they are not entitled to have their old bonds back. Central Trust Co. *v.* Marietta, etc., R. Co., 73 Fed. 589.

75. Union Pac. R. Co. *v.* Stewart, 95 U. S. 279, 24 L. ed. 431.

76. Union Pac. R. Co. *v.* Stewart, 95 U. S. 279, 24 L. ed. 431.

77. Union Pac. R. Co. *v.* Stewart, 95 U. S. 279, 24 L. ed. 431.

78. Union Trust Co. *v.* Illinois Midland R. Co., 117 U. S. 434, 6 S. Ct. 809, 29 L. ed. 963 (holding also that bonds surrendered and exchanged absolutely and marked "canceled" cannot be reinstated and put on a footing with bonds not exchanged); New York Security, etc., Co. *v.* Louisville, etc., R. Co., 102 Fed. 382 (holding that the exchange works a novation of the debt, and operates as an extinguishment of the bonds surrendered).

Where no action is taken by the company to keep the surrendered bonds alive, and it subsequently issues a second series of bonds secured by a new mortgage, the recitals of prior indebtedness in which show such bonds to have been paid, the equities of purchasers of bonds of such new issue, and of subsequent purchasers of unexchanged bonds secured by the same mortgage, in reliance upon the extinguishment of a large part of the debt thereby secured, are superior to any equity in favor of the holders of the first bonds, whether acquired by exchange or purchase, to have the surrendered bonds kept alive and enforced as collateral security to their holdings. New York Security, etc., Co. *v.* Louisville, etc., R. Co., 102 Fed. 382.

79. *Ex p.* White, 2 S. C. 469.

80. Barry *v.* Missouri, etc., R. Co., 34 Fed. 829, holding that where provision is made for the retiring of a series of secured income bonds and issuing new bonds in exchange, the bonds surrendered to be held by a trust company uncanceled until all are retired, a bondholder who does not consent to surrender his bonds is not entitled, in an accounting under the mortgage, to claim for interest due him more of the income than his share would have been had no bonds been surrendered.

81. Hand *v.* Savannah, etc., R. Co., 17 S. C. 219, holding that such bonds are not entitled to the rank held by the coupons which they are given to satisfy.

The fact that some coupons of the first-lien bonds were paid in state guaranteed bonds under the later statute raises no equity for the payment of the unfunded coupons of the same class and dates, in preference to the bonds and later coupons; such unfunded coupons are entitled to take only their *pro rata* with other bonds and coupons of the first lien not postponed by settlement or the estoppel of their owners. Hand *v.* Savannah, etc., R. Co., 17 S. C. 219.

The holders of first-lien bonds retaining that rank are exclusively entitled to the benefit of the first lien and cannot be required to share that benefit with the second statute lien to the extent of the quantity

is no presumption of fact that persons owning the coupons also owned the bonds,[82] parties holding such coupons uncanceled are entitled to prove their claims in like manner as the original holders could have done.[83] The acceptance of receivers' certificates by bondholders does not, in the absence of an express or implied agreement to that effect, operate as a waiver of the lien of the bonds,[84] or as a novation.[85]

(VI) *BONDS CONVERTIBLE INTO STOCK.* Where a railroad company issues bonds convertible into stock of the company at the option of the holder, the rights of such bondholder depend upon the terms of the statute or contract which authorizes the conversion.[86] This option must be exercised by the bondholder within the time specified, if any,[87] or if no time is specified, within a reasonable time;[88] and if the company refuses or fails to make such exchange upon a proper

of the first lien removed by the estoppel of parties holding under it. Hand *v.* Savannah, etc., R. Co., 17 S. C. 219.

82. Hand *v.* Savannah, etc., R. Co., 17 S. C. 219.

83. Hand *v.* Savannah, etc., R. Co., 17 S. C. 219.

84. Skiddy *v.* Atlantic, etc., R. Co., 22 Fed. Cas. No. 12,922, 3 Hughes 320.

85. Skiddy *v.* Atlantic, etc., R. Co., 22 Fed. Cas. No. 12,922, 3 Hughes 320.

86. Van Allen *v.* Illinois Cent. R. Co., 7 Bosw. (N. Y.) 515; Campbell *v.* London, etc., R. Co., 5 Hare 519, 11 Jur. 651, 4 R. & Can. Cas. 475, 26 Eng. Ch. 519, 67 Eng. Reprint 1017, loan notes. See also Jones *v.* Canada Cent. R. Co., 46 U. C. Q. B. 250.

This option is available only to the actual holder of the bonds, and so long as he continues such (Denney *v.* Cleveland, etc., R. Co., 28 Ohio St. 108); and he cannot retain the bonds for the benefit of himself and future assignees and assign his right of action against the company for a breach of the stipulation giving him such option (Denney *v.* Cleveland, etc., R. Co., *supra*); nor after he has assigned the bonds to another, can he maintain an action to recover damages from the company for its refusal, prior to the assignment, to convert the bonds (Denney *v.* Cleveland, etc., R. Co., *supra*); and therefore a petition for damages sustained by reason of a refusal of the company to convert the bonds is fatally defective in not alleging that plaintiffs were, at the commencement of the action, the holders of the bonds on which the suit was brought (Denney *v.* Cleveland, etc., R. Co., *supra*).

Where the option is exercised prior to the declaration of a dividend and the bondholder receives stock issued prior to that time, he is entitled to share in the dividend (Jones *v.* Terre Haute, etc., R. Co., 57 N. Y. 196); but he is not entitled to dividends declared prior to his demand for the stock (Sutliff *v.* Cleveland, etc., R. Co., 24 Ohio St. 147). Thus where interest is allowed to the bondholders up to the date of the first dividend and is paid by issuing to them new stock, the sum so paid, however, not exceeding the net earnings of the road during the time named, a bondholder who has been regularly paid the interest on his bonds up to the time of the dividend and who then elects to change his bonds into stock is only entitled to receive stock to the amount of the principal sum specified in the bonds and can claim no part of the new stock so issued by the company or any compensation or allowance in stock or otherwise on account thereof. Sutliff *v.* Cleveland, etc., R. Co., *supra*.

Where the bonds are converted in bad faith for the purpose of keeping the control of the company in the hands of the board of directors, a court of equity will interfere on the ground of fraud. Wm. H. Baldwin *v.* Hillsborough, etc., R. Co., 1 Ohio Dec. (Reprint) 546, 10 West. L. J. 356.

87. Carpenter *v.* Chicago, etc., R. Co., 119 N. Y. App. Div. 169, 104 N. Y. Suppl. 152 (holding that under a stipulation in the bonds that they may be converted into preferred stock at any time within ten days after any dividend is declared and becomes payable on the preferred stock, on surrender of the bonds and unmatured coupons, a bondholder who presents his bonds sixty days after a dividend has become payable and after all the coupons have matured and been paid is not entitled to exchange the same for preferred stock); Muhlenberg *v.* Philadelphia, etc., R. Co., 47 Pa. St. 16. See Campbell *v.* London, etc., R. Co., 5 Hare 519, 11 Jur. 651, 4 R. & Can. Cas. 475, 26 Eng. Ch. 519, 67 Eng. Reprint 1017 (loan notes); Pearson *v.* London, etc., R. Co., 9 Jur. 341, 14 L. J. Ch. 412, 4 R. & Can. Cas. 62, 14 Sim. 541, 37 Eng. Ch. 541, 60 Eng. Reprint 468. Thus, a stipulation and certificate accompanying the bonds which entitles the holder to a stated number of shares of the company's preferred stock at any time within ten days after any dividend shall be declared and become payable upon said stock does not entitle the bondholder to tender bonds in payment of the preferred stock sold months after their maturity and after the railroad company had deposited money for the payment of the bonds at the place of payment designated therein. Loomis *v.* Chicago, etc., R. Co., 102 Fed. 233, 42 C. C. A. 290.

An agreement extending the time of payment before maturity of the bonds does not extend the right of conversion after the time limited. Muhlenberg *v.* Philadelphia, etc., R. Co., 47 Pa. St. 16.

88. Tagart *v.* Northern Cent. R. Co., 29 Md. 557; Chaffee *v.* Middlesex R. Co., 146 Mass. 224, 16 N. E. 34.

Where the bonds are convertible at or before maturity, the option should be exercised

demand, the bondholder may recover damages for a breach of the agreement,[89] or sue in equity for specific performance.[90] A holder of such bonds is not a stockholder, or entitled to the rights of such, until a conversion has been made.[91] Where a company issuing convertible bonds is afterward consolidated with another company, under a statute or agreement by which the liabilities of the old company are imposed upon or assumed by the new company, a holder of such bonds may demand a compliance with his contract by the new company and upon its refusal to do so may recover damages occasioned thereby;[92] or, where the consolidation is upon terms of perfect equality, the new company is bound to deliver its own stock for such bonds on demand, or to pay the damages occasioned by a refusal.[93]

(VII) *RIGHT OF BONDHOLDERS TO REGISTER AND VOTE AT CORPORATE MEETINGS.* Under some statutes railroad bondholders may be given the right to vote at stock-holders' meetings, their right in this respect being regulated by the agreement under which they acquire the bonds, and the governing statutes.[94] But such right cannot be given to bondholders where it is inconsistent with or contrary to the constitution, or the railroad company's charter, or the governing statutes.[95] Under the Canadian statutes, where at any time interest on railroad

on or before that day. Chaffee *v.* Middlesex, R. Co., 146 Mass. 224, 16 N. E. 34, holding that where they mature on Sunday, it is too late to present them for conversion on Monday.

89. Chaffee *v.* Middlesex R. Co., 146 Mass. 224, 16 N. E. 34; Van Allen *v.* Illinois Cent. R. Co., 7 Bosw. (N. Y.) 515.

Defenses.—It is no defense to a demand for such stock that the company could acquire none except in the open market at a ruinous rate, or that no other bondholder had made such a demand. Bratten *v.* Catawissa R. Co., 211 Pa. St. 21, 60 Atl. 319.

The measure of damages in such case is the market value of the stock at the time of the demand (Bratten *v.* Catawissa R. Co., 211 Pa. St. 21, 60 Atl. 319); or, where instalments are still due on the bonds, the difference between the market value of the stock at the time the demand for it is made and the amount of instalments previously called in and interest on such instalments, with interest on such difference from the time of the demand to the day of the verdict (Van Allen *v.* Illinois Cent. R. Co., 7 Bosw. (N. Y.) 515).

90. Chaffee *v.* Middlesex R. Co., 146 Mass. 224, 16 N. E. 34, holding, however, that a suit for specific performance cannot be maintained where there is no unissued stock of the company at the time the bonds are convertible, and a demand is made.

91. See Parkinson *v.* West End St. R. Co., 173 Mass. 446, 53 N. E. 891.

92. John Hancock Mut. Ins. Co. *v.* Worcester, etc., R. Co., 149 Mass. 214, 21 N. E. 364; Cayley *v.* Cobourg, etc., R. Co., 14 Grant Ch. (U. C.) 571. *Compare* Tagart *v.* Northern Cent. R. Co., 29 Md. 557; Parkinson *v.* West End St. R. Co., 173 Mass. 446, 53 N. E. 891.

Estoppel.— Where the bondholder does not elect to have his bonds converted at the time of the consolidation, when it is practicable, and acquiesces and participates in an arrangement by which such conversion becomes impossible afterward, he is bound by his election and precluded from impeaching the arrangement, which at the time it was made was satisfactory to him. Tagart *v.* Northern Cent. R. Co., 29 Md. 557.

Notice.— A bondholder cannot be deprived by a consolidation of his privilege of having his bonds converted into stock of the company issuing them and relegated to the rights conferred upon him instead by the articles of consolidation until he has had a fair opportunity, after notice of the contemplated change, to exercise his original rights, and has elected not to do so. Rosenkrans *v.* Lafayette, etc., R. Co., 18 Fed. 513.

93. India Mut. Ins. Co. *v.* Worcester, etc., R. Co., (Mass. 1890) 25 N. E. 975; Day *v.* Worcester, etc., R. Co., 151 Mass. 302, 23 N. E. 824. See also Child *v.* New York, etc., R. Co., 129 Mass. 170.

94. Phillips *v.* Eastern R. Co., 138 Mass. 122 (holders of certificates of indebtedness entitled to vote for directors under St. (1876) c. 236); Hart *v.* Odgensburg, etc., R. Co., 69 Hun (N. Y.) 378, 23 N. Y. Suppl. 639 (income mortgage bondholders entitled to vote for directors upon registering their bonds thirty days before the election); State *v.* McDaniel, 22 Ohio St. 354 (holding that where a railroad company reorganized under the act of April 11, 1861, and in the agreement therefor it was stipulated that certain bonds of the original company should be assumed by the new company, and the holder thereof entitled to vote at all meetings of stock-holders upon conditions specified, which a bondholder performed, such holder was entitled to vote without further action on the part of the new company).

An executory agreement by such a bondholder to sell and deliver his bonds does not deprive him of his voting privilege. State *v.* McDaniel, 22 Ohio St. 354.

95. Durkee *v.* People, 155 Ill. 354, 40 N. E. 626, 46 Am. St. Rep. 340 [*affirming* 53 Ill. App. 396], holding that a by-law of a railroad company empowering bondholders to

bonds remains unpaid and owing,[96] the holders of such bonds at the next ensuing general annual meeting,[97] or at special meetings,[98] of the company shall have the same rights and privileges and qualifications for directors and for voting as are attached to shareholders,[99] provided the bonds and any transfers thereof shall have been first registered in the same manner as is provided for the registration of shares generally.[1]

5. Guaranty and Suretyship[2] — a. In General. As a general rule a railroad company, like other private corporations other than surety or guaranty companies,[3] has no power to enter into any contract or indorsement by which it becomes a guarantor or surety, or otherwise lends its credit to another person or company,[4]

vote at stock-holders' meetings and a provision of such bonds giving such right to vote are void under the constitutional and statutory provisions requiring the directors to be stock-holders, and elected at the annual meeting of the stock-holders by a majority in value of the stock, upon a cumulative system of voting, and not otherwise.

96. *In re* Thomson, etc., R. Co., 8 Ont. Pr. 423, 9 Ont. Pr. 119 (holding that, where objection is made that it did not appear that the company had made default in payment of the interest, the coupons not being shown to have been presented at the place named for payment, the fact that the company never had been ready to pay them there or elsewhere is a sufficient answer to the objection); Weddell *v.* Ritchie, 4 R. & Can. Cas. 347, 10 Ont. L. Rep. 5, 5 Ont. Wkly. Rep. 733.

97. The words "at the next general meeting" are merely indicative of the earliest period at which such bondholders might vote, and the statute does not require a new registration in order to entitle the bondholders to vote at any subsequent meeting so long as the interest remains unpaid. Hendrie *v.* Grand Trunk R. Co., 2 Ont. 441; Weddell *v.* Ritchie, 4 Can. R. Cas. 347, 10 Ont. L. Rep. 5, 5 Ont. Wkly. Rep. 733.

98. Hendrie *v.* Grand Trunk R. Co., 2 Ont. 441 (holding that where a statute extends the bondholder's right to vote at special meetings, such bondholder has a right to vote on all subjects coming before the special meeting); *In re* Osler, etc., R. Co., 8 Ont. Pr. 506.

99. Hendrie *v.* Grand Trunk R. Co., 2 Ont. 441; Weddell *v.* Ritchie, 4 Can. R. Cas. 347, 10 Ont. L. Rep. 5, 5 Ont. Wkly. Rep. 733.

Each bondholder has as many votes as he has bonds.— Weddell *v.* Ritchie, 4 Can. R. Cas. 347, 10 Ont. L. Rep. 5, 5 Ont. Wkly. Rep. 733; Bunting *v.* Laidlaw, 8 Ont. Pr. 538.

Where the votes of registered bondholders are rejected, an arrangement upon which the vote was had, although confirmed by two thirds of the actual shareholders present or represented, is nevertheless not properly confirmed within the meaning of the statute, and an action to compel specific performance of the arrangement will be dismissed. Hendrie *v.* Grand Trunk R. Co., 2 Ont. 441.

1. Hendrie *v.* Grand Trunk R. Co., 2 Ont. 441.

The production or registration of transfers is not necessary to registration of the bonds. *In re* Johnson, etc., R. Co., 8 Ont. Pr. 535; *In re* Osler, etc., R. Co., 8 Ont. Pr. 506.

Proof of prima facie title to the bonds is sufficient to entitle one to a registration of bonds (*In re* Thomson, etc., R. Co., 9 Ont. Pr. 119; *In re* Johnson, etc., R. Co., 8 Ont. Pr. 535); and the mere fact that such bondholders were directors of the company is no objection, where it is not denied that they had done what was necessary under the statute to entitle them to become holders (*In re* Thomson, etc., R. Co., *supra*).

Mandamus should issue to compel the company to register the bonds of holders who are entitled to qualify and vote under the statute. *In re* Thomson, etc., R. Co., 8 Ont. Pr. 423, 9 Ont. Pr. 119. See also *In re* Johnson, etc., R. Co., 8 Ont. Pr. 535; *In re* Osler, etc., R. Co., 8 Ont. Pr. 506.

A demand for registration upon the assistant secretary of the company is sufficient where it is shown that he performed all the duties of the secretary's office. *In re* Thomson, etc., R. Co., 9 Ont. Pr. 119.

2. **Power of the government to guarantee interest on railroad bonds** see Quebec *v.* Atlantic, etc., R. Co., 8 Quebec Q. B. 42.

3. See, generally, Corporations, 10 Cyc. 1109 *et seq.*

4. Smead *v.* Indianapolis, etc., R. Co., 11 Ind. 104; Northside R. Co. *v.* Worthington, 88 Tex. 562, 30 S. W. 1055, 53 Am. St. Rep. 778; Louisville, etc., R. Co. *v.* Louisville Trust Co., 174 U. S. 552, 19 S. Ct. 817, 43 L. ed. 1081 [*modifying* 75 Fed. 433, 22 C. C. A. 378]; Pennsylvania R. Co. *v.* St. Louis, etc., R. Co., 118 U. S. 290, 6 S. Ct. 1094, 30 L. ed. 83; Macgregor *v.* Dover, etc., R. Co., 18 Q. B. 618, 17 Jur. 21, 22 L. J. Q. B. 69, 7 R. & Can. Cas. 227, 83 E. C. L. 618; Colman *v.* Eastern Counties R. Co., 10 Beav. 1, 11 Jur. 74, 16 L. J. Ch. 73, 4 R. & Can. Cas. 513, 50 Eng. Reprint 481; East Anglian R. Co. *v.* Eastern Counties R. Co., 11 C. B. 775, 16 Jur. 249, 21 L. J. C. P. 23, 73 E. C. L. 775.

Illustrations.— Thus in the absence of an explicit grant of such power, a railroad company has no authority to guarantee a specified dividend on the stock of a grain elevator company as a premium to induce a subscriber to take such stock, although the guarantee may have been made in part consideration of necessary services to be rendered for the company by the subscriber. Memphis Grain,

even though it may derive some indirect benefit from the guaranty,[5] except in so far as it is expressly authorized to do so by its charter or other statute,[6] and except where the power to do so is implied from the company's general powers, as being necessary and proper to enable it to accomplish the objects for which it was created, and in the conduct of its business;[7] and where such a guaranty, or

etc., Elevator Co. *v.* Memphis, etc., R. Co., 85 Tenn. 703, 5 S. W. 52, 4 Am. St. Rep. 798. So a railroad company has no power to guarantee the payment of expenses of a musical festival, although the guaranty was made with the reasonable belief that the festival would be of great pecuniary benefit to the company, and expenses were incurred in reliance upon such guaranty. Davis *v.* Old Colony R. Co., 131 Mass. 258, 41 Am. Rep. 221. But see State Bd. of Agriculture *v.* Citizens St. R. Co., 47 Ind. 407, 17 Am. Rep. 702. Since under the Indiana statutes a railroad company has no power to lease a line of road of another company, a company is not brought within the terms of 2 Burns Rev. St. Ind. (1894) § 5216, authorizing a company "whose line of railway extends across the state in either direction" to become a guarantor of the bonds of a railroad of an adjoining state under certain conditions, by the fact that it is operating a leased line across the state; and its guaranty of bonds of the company of another state building a connecting line is *ultra vires* and cannot be enforced. Central Trust Co. *v.* Indiana, etc., R. Co., 98 Fed. 666, 39 C. C. A. 220. So a contract by which a railroad company, not empowered by its charter, guarantees the payment of interest and dividends on bonds and stock of a hotel company on the line of its road, is *ultra vires* and void; and it makes no difference that the payment is called commissions on traffic receipts from and to certain stations (Western Maryland R. Co. *v.* Blue Ridge Hotel Co., 102 Md. 307, 62 Atl. 351, 111 Am. St. Rep. 362, 1 L. R. A. N. S. 887); nor does the fact that the hotel company expended money in the erection of its building upon the faith of such guaranty estop the railroad company to set up the defense that the contract is void (Western Maryland R. Co. *v.* Blue Ridge Hotel Co., *supra*).

5. Davis *v.* Old Colony R. Co., 131 Mass. 258, 41 Am. Rep. 221; Northside R. Co. *v.* Worthington, 88 Tex. 562, 30 S. W. 1055, 53 Am. St. Rep. 778; Colman *v.* Eastern Counties R. Co., 10 Beav. 1, 11 Jur. 74, 16 L. J. Ch. 73, 4 R. & Can. Cas. 513, 50 Eng. Reprint 481.

6. Western Maryland R. Co. *v.* Blue Ridge Hotel Co., 102 Md. 307, 62 Atl. 351, 111 Am. St. Rep. 362, 1 L. R. A. N. S. 887; Connecticut Mut. L. Ins. Co. *v.* Cleveland, etc., R. Co., 41 Barb. (N. Y.) 9, 26 How. Pr. 225; Louisville, etc., R. Co. *v.* Louisville Trust Co., 174 U. S. 552, 19 S. Ct. 817, 43 L. ed. 1081 [*modifying* 75 Fed. 433, 22 C. C. A. 378] (construing Ind. Laws (1883), p. 182, c. 127; Horner Rev. St. §§ 3951*a*–3951*c*); Zabriskie *v.* Cleveland, etc., R. Co., 23 How. (U. S.) 381, 16 L. ed. 488; Central Trust Co. *v.* Indiana, etc., R. Co., 98 Fed. 666, 39 C. C. A. 220.

Statutory requirements must be complied with in entering into a contract of guaranty. See Louisville, etc., R. Co. *v.* Louisville Trust Co., 174 U. S. 552, 19 S. Ct. 817, 43 L. ed. 1081 [*modifying* 75 Fed. 433, 22 C. C. A. 378].

Sanction by stock-holders.—A guaranty by a railroad company of the bonds of a connecting line, pursuant to the power given by the charter of the company, for the purpose of securing valuable business connections, is not a fundamental change in the purpose and object of the corporation and an exercise of such power by the directors need not be sanctioned by the stockholders, in the absence of a statutory requirement. Louisville Trust Co. *v.* Louisville, etc., R. Co., 75 Fed. 433, 22 C. C. A. 378.

Repeal of statutes.—Ind. St. March 8, 1883 (Laws (1883), p. 182, c. 127, Horner Rev. St. §§ 3951*a*–3951*c*), authorizing railroad companies organized under the laws of that state to guarantee the bonds of a company of another state under certain circumstances, and in a prescribed manner supersedes and repeals, as to matters within its scope and terms, provisions of all former statutes of the state on the subject. Louisville, etc., R. Co. *v.* Louisville Trust Co., 174 U. S. 552, 19 S. Ct. 817, 43 L. ed. 1081 [*modifying* 75 Fed. 433, 22 C. C. A. 378].

7. Green Bay, etc., R. Co. *v.* Union Steamboat Co., 107 U. S. 98, 2 S. Ct. 221, 27 L. ed. 413; Codman *v.* Vermont, etc., R. Co., 5 Fed. Cas. No. 2,935, 16 Blatchf. 165 (guaranty of notes issued to pay floating debt for the construction of the road); Colman *v.* Eastern Counties R. Co., 10 Beav. 1, 11 Jur. 74, 16 L. J. Ch. 73, 4 R. & Can. Cas. 513, 50 Eng. Reprint 481.

Illustrations.—Thus it is within the powers of a railroad company to become guarantor of a contract made by a construction company for the services of an engineer, to be rendered in the construction of its road; and it is not relieved from liability by a subsequent change in its obligations by which the services are not required. Mathesius *v.* Brooklyn Heights R. Co., 96 Fed. 792. So a railroad corporation may, for a valuable consideration, guarantee the payment of a debt which it may directly contract to pay. Low *v.* California Pac. R. Co., 52 Cal. 53, 28 Am. Rep. 629. So a guaranty that certain lots of a land company will become worth a certain price, and an agreement to pay the difference between such price and what the lots would bring at auction, in order to procure a right of way over streets running through land owned by the land company, is not *ultra vires*. Vanderveer *v.*

a contract to give one, is for an unauthorized purpose, it has been held that it is strictly *ultra vires*, unlawful, and void, and incapable of being made good by ratification or estoppel.[8] But a railroad company having power to receive and dispose of the securities of another company has power to guarantee such securities;[9] and power to make contracts for leasing and operating the road of another company implies power to include in the lease a guaranty of the securities of such other company as part of the consideration.[10] The validity and effect of a contract of guaranty when entered into by a railroad company with authority is regulated by the rules governing guaranties generally.[11]

b. Rights of Purchasers of Securities Guaranteed. Where a contract of

Asbury Park, etc., St. R. Co., 82 Fed. 355.

Where a railroad company buys property subject to a mortgage securing bonds, it may guarantee the payment thereof, if such guaranty is taken as payment *pro tanto* of its debt. Ellerman *v.* Chicago Junction R., etc., Co., 49 N. J. Eq. 217, 23 Atl. 287.

8. Western Maryland R. Co. *v.* Blue Ridge Hotel Co., 102 Md. 307, 62 Atl. 351, 111 Am. St. Rep. 362, 1 L. R. A. 887 (holding that where a railroad company made an *ultra vires* contract by which it guaranteed the payment of interest and dividend on the bonds and stock of a hotel company, to aid in the improvement of the latter's property, and thereafter received nothing of benefit from the hotel company except increased earnings for transportation of passengers and freight over its road, it was not precluded from subsequently claiming that the contract was *ultra vires* and void); Louisville, etc., R. Co. *v.* Louisville Trust Co., 174 U. S. 552, 19 S. Ct. 817, 43 L. ed. 1081 [*modifying* 75 Fed. 433, 22 C. C. A. 378]; Central Trust Co. *v.* Indiana, etc., R. Co., 98 Fed. 666, 39 C. C. A. 220.

9. Low *v.* California Pac. R. Co., 52 Cal. 53, 28 Am. Rep. 629; Madison, etc., R. Co. *v.* Norwich Sav. Soc., 24 Ind. 457; Ellerman *v.* Chicago Junction R., etc., Co., 49 N. J. Eq. 217, 23 Atl. 287; Chicago, etc., R. Co. *v.* Howard, 7 Wall. (U. S.) 392, 19 L. ed. 117; Rogers Locomotive, etc., Works *v.* Southern R. Assoc., 34 Fed. 278 (holding that a railroad company which has power by its charter to issue its own bonds has power to guarantee the bonds of another railroad company which it receives in payment of a debt and sells for value or transfers in payment of its own debts, the guaranty being given to augment the credit of the bonds and obtain an adequate price for them); Opdyke *v.* Pacific R. Co., 18 Fed. Cas. No. 10,546, 3 Dill. 55.

10. Atchison, etc., R. Co. *v.* Fletcher, 35 Kan. 236, 10 Pac. 596.

Under Vt. Rev. Laws, § 3303, authorizing railroad companies to lease and operate the roads of other companies, a contract of lease by which the lessee guarantees the payment of interest on bonds given in payment for the construction of the road, the interest being the same amount and payable at the same time as the agreed rent, is valid. Eastern Tps'. Bank *v.* St. Johnsbury, etc., R. Co., 40 Fed. 423.

An additional contract made by a railroad company after it has guaranteed the bonds of another company under a lease of the road of such company, and after the commencement of a branch line and issue of new bonds, that "with regard to the lease of said branch, it shall be used and operated in the same manner and on the same terms as the main line," refers merely to the leasing and operation and does not include an agreement to guarantee the branch line bonds. Dows *v.* Chicago, etc., R. Co., 7 Fed. Cas. No. 4,048.

11. See, generally, GUARANTY, 20 Cyc. 1392.

Mere parol declarations and promises by the officers and directors of a railroad company to guarantee the bonds of another company will not bind the railroad company. Dows *v.* Chicago, etc., R. Co., 7 Fed. Cas. No. 4,048.

Consideration.— Where a railroad company holds stock in another company and the latter's road will become a feeder to the former's line, there is a sufficient consideration for a guaranty by the former of bonds issued by the latter to aid in the construction of its road. Harrison *v.* Union Pac. R. Co., 13 Fed. 522, 4 McCrary 264. So an arrangement between several connecting railroad companies for the purpose of securing a uniform gauge of the several roads and thus increasing the business and profits of each, forms a sufficient consideration for a guaranty by one of the companies of payment of securities issued by another. Connecticut Mut L. Ins. Co. *v.* Cleveland, etc., R. Co., 41 Barb. (N. Y.) 9, 26 How. Pr. 225. The words "for value received" on an indorsement of guaranty import a sufficient consideration and a company so indorsing is not to be deemed an accommodation indorser or guarantor. Connecticut Mut. L. Ins. Co. *v.* Cleveland, etc., R. Co., 41 Barb. (N. Y.) 9, 26 How. Pr. 225.

A guaranty may be valid, although the security to which it is annexed be void.— Connecticut Mut. L. Ins. Co. *v.* Cleveland, etc., R. Co., 41 Barb. (N. Y.) 9, 26 How. Pr. 225. See, generally, GUARANTY, 20 Cyc. 1420 *et seq.*

Cancellation.— Where a contract of guaranty is upon certain conditions, a retaking and resumption of control of the consideration, upon a breach of such condition operates as a cancellation of the contract so far as it remains executory. U. S. Trust Co. *v.* Western Contract Co., 81 Fed. 454, 26 C. C. A. 472.

guaranty is strictly *ultra vires*, all purchasers of the securities guaranteed are chargeable with notice of the railroad company's want of power and cannot enforce the guaranty.[12] Where, however, the guaranty is merely voidable by reason of some irregularity in the exercise of the power, or in other words, where it is only *ultra vires* as between the corporators because it is in violation of their rights, or because of some defect in the contract which may not be binding on the corporation, the guaranty, although invalid in the hands of a holder with notice,[13] is good and enforceable in the hands of a *bona fide* holder, without notice.[14] In such cases both the company as an entity and the stock-holders as such may be estopped from repudiating the guaranty as against one who has made investments and acted upon the faith of such guaranty.[15]

6. Liens Generally[16] — **a. In General.** A railroad company has a general power to give a lien on its property for purposes within the scope of the power conferred on it to construct and operate a railway,[17] unless this power is expressly negatived by its charter or governing statutes;[18] and an express power to borrow and give specified securities will not exclude this general power.[19] In the absence of statute, liens on railroad property are governed by the rules regulating liens generally.[20] The rights and liabilities under a lien may be controlled by the con-

12. Smead *v.* Indianapolis, etc., R. Co., 11 Ind. 104; Central Trust Co. *v.* Indiana, etc., R. Co., 98 Fed. 666, 39 C. C. A. 220.

13. Louisville, etc., R. Co. *v.* Louisville Trust Co., 174 U. S. 552, 19 S. Ct. 817, 43 L. ed. 1081 [*modifying* 75 Fed. 433, 22 C. C. A. 378].

14. Atchison, etc., R. Co. *v.* Fletcher, 35 Kan. 236, 10 Pac. 596; Connecticut Mut. L. Ins. Co. *v.* Cleveland, etc., R. Co., 41 Barb. (N. Y.) 9, 26 How. Pr. 225; Louisville, etc., R. Co. *v.* Louisville Trust Co., 174 U. S. 552, 19 S. Ct. 817, 43 L. ed. 1081 [*modifying* 75 Fed. 433, 22 C. C. A. 378].

Illustrations.— Thus where a railroad company of Indiana, being empowered by the statute of the state upon a petition by the holders of a majority of the stock, to guarantee the bonds of a company of an adjoining state, the construction of whose road would be beneficial to its own business, such a guaranty, although made without a petition or assent of its stock-holders, and therefore illegal and voidable, is not *ultra vires*; and, when made on negotiable bonds by its proper officers under the seal of the corporation authorized thereto by its directors, may be enforced by a *bona fide* purchaser of such bonds in the market having no notice of the irregularity. Louisville, etc., R. Co. *v.* Louisville Trust Co., 174 U. S. 552, 19 S. Ct. 817, 43 L. ed. 1081 [*modifying* 75 Fed. 433, 22 C. C. A. 378 (*reversing* 69 Fed. 431)].

Holders of guaranteed securities have a right to presume that the guarantors have done their duty and have proceeded regularly in the execution of their powers (Connecticut Mut. L. Ins. Co. *v.* Cleveland, etc., R. Co., 41 Barb. (N. Y.) 9, 26 How. Pr. 225), and are not bound to examine the records of the guarantor company, which are private records, to ascertain whether its power has been exercised (Louisville, etc., R. Co. *v.* Louisville Trust Co., 174 U. S. 552, 19 S. Ct. 817, 43 L. ed. 1081 [*modifying* 75 Fed. 433, 22 C. C. A. 378]).

15. Cozart *v.* Georgia R., etc., Co., 54 Ga. 379; State Board of Agriculture *v.* Citizens' St. R. Co., 47 Ind. 407, 17 Am. Rep. 702; Zabriskie *v.* Cleveland, etc., R. Co., 23 How. (U. S.) 381, 16 L. ed. 488.

Illustrations.— Thus where a railroad company empowered by a statute to execute a guaranty of bonds of another company under certain conditions has executed such guaranty, it cannot urge its non-compliance with the conditions to defeat its liability thereon against *bona fide* holders of the bonds. Central Trust Co. *v.* Indiana, etc., R. Co., 98 Fed. 666, 39 C. C. A. 220. So a guarantor railroad company is liable to the *bona fide* holder of bonds, although its charter contained no authority to make an accommodation guaranty, as it is within the corporate powers of the guarantor to sell and guarantee bonds held by it in the usual course of business, and particularly where the guaranty appeared on its face and from a circular of the grantor's agent who sold the bonds, to be such a contract, as the company had power to make. Madison, etc., R. Co. *v.* Norwich Sav. Soc., 24 Ind. 457. So a guaranty by one railroad company of the bonds of another is obligatory in favor of the purchaser of the bonds, on the faith of the guaranty, notwithstanding it may, in its inception, have been *ultra vires*, and that the consideration did not appear. Arnot *v.* Erie R. Co., 67 N. Y. 315 [*affirming* 5 Hun 608].

16. Liens arising from management of road by receiver see Receivers.

17. Charlebois *v.* Great North West Cent. R. Co., 9 Manitoba 1.

18. Charlebois *v.* Great North West Cent. R. Co., 9 Manitoba 1.

19. Charlebois *v.* Great North West Cent. R. Co., 9 Manitoba 1.

20. See Merriman *v.* Chicago, etc., R. Co., 66 Fed. 663, 14 C. C. A. 36, holding that where plaintiffs, by creditors' bill, acquire a lien on an equity of redemption on a railroad sold under foreclosure, they have no lien on bonds substituted for such equity

tract under which the particular lien is created.[21] But where the lien is created by statute, the rights and liabilities thereunder are regulated by such statute.[22] A judgment against a railroad company becomes a lien upon its road and realty in the same manner as upon the real estate of a natural person.[23]

b. What Law Governs. The validity and effect of railroad liens are determined by the law of the place where the property is situated on which the liens are sought to be enforced.[24]

c. Loss or Waiver of Lien — (i) *In General.* The loss or waiver of a lien on railroad property is, in the absence of statute, regulated by the rules governing liens generally.[25] A mechanic's lien on railroad property may be waived or lost by the acceptance of other security for the claim.[26] But a contract for such security has the effect of a waiver only upon the performance of the contract,[27]

in a suit between their debtor and the purchaser in foreclosure to which they are not parties. And see, generally, LIENS, 25 Cyc. 655.

Equitable liens.— An agreement to build a branch road and convey it to the railroad company in consideration of the payment to the party so building of all the freights earned on such branch until the cost is repaid creates an equitable lien on such freight which will be enforced against the receiver of the railroad company appointed in proceedings to foreclose a prior mortgage. Fidelity Ins., etc., Co. *v.* Norfolk, etc., R. Co., 72 Fed. 704.

A guaranty by a railroad company of the payment of state bonds delivered to it, indorsed on the bonds, gives no lien for their payment upon its property, and does not prevent the company from giving a mortgage on its property to secure bonds issued by it, a sale on the foreclosure of which gives title to the property. McKittrick *v.* Arkansas Cent. R. Co., 152 U. S. 473, 14 S. Ct. 661, 38 L. ed. 518.

21. Vermont, etc., R. Co. *v.* Vermont Cent. R. Co., 34 Vt. 1, holding that where under a lease between two railroads one furnished the money to complete the other, and, on such completion, was to take possession and operate the latter road, and was to have a lien on the tolls, fares, etc., of both roads as security for the payment of the stipulated rent, the lien is enforceable for the rents in arrear on so much of the road as was constructed and used.

22. Hill *v.* La Crosse, etc., R. Co., 11 Wis. 214 (holding that, so far as a railroad company's liability for its property subjected to liens is concerned, there is no distinction between a lien created by a mortgage and a mechanic's lien under the statute); Western Div. R. Co. *v.* Drew, 25 Fed. Cas. No. 17,434, 3 Woods 691 (holding that the lien of bondholders on railroad property created by statute is regulated by such statute notwithstanding the fact that without its aid a resulting equity would have arisen in favor of such bondholders).

23. Ludlow *v.* Clinton Line R. Co., 15 Fed. Cas. No. 8,600, 1 Flipp. 25. See also, generally, JUDGMENTS, 23 Cyc. 1350 *et seq.*

A judgment recovered against a railroad company after the road has been sold under a mortgage foreclosure and the sale confirmed (Jeffrey *v.* Moran, 101 U. S. 285, 25 L. ed. 785), or after its entire equity of redemption has been extinguished by such a sale and its property and franchises are in the entire possession and control of the purchaser as owner (Baltimore Trust, etc., Co. *v.* Hofstetter, 85 Fed. 75, 29 C. C. A. 35) does not become a lien at law on the road; nor in equity upon the fund arising from the sale where the proceeds of the sale are less than the mortgage debt (Jeffrey *v.* Moran, 101 U. S. 285, 25 L. ed. 785).

24. Midland Valley R. Co. *v.* Moran Bolt, etc., Mfg. Co., 80 Ark. 399, 97 S. W. 679; Barney, etc., Mfg. Co. *v.* Hart, 1 S. W. 414, 8 Ky. L. Rep. 223 (holding that the lien of a builder for the purchase-price of the cars made in another state and brought into the state of Kentucky is governed by the laws of Kentucky); Nichols *v.* Mase, 94 N. Y. 160.

Demands not a statutory lien in one state when presented in another state in which they would be statutory liens if they had arisen there are entitled to the same status as statutory liens. Blair *v.* St. Louis, etc., R. Co., 19 Fed. 861.

25. See Sykes *v.* Brockville, etc., R. Co., 9 Grant Ch. (U. C.) 9, holding that the right to a specific lien on debentures is waived by a reference of all matters in difference to aribitration and an award in the lien claimant's favor. And see, generally, LIENS, 25 Cyc. 673 *et seq.*

A lien for rolling stock furnished may be lost by delivering the stock of the company without making any special provision to receive a payment. Coe *v.* Pennock, 5 Fed. Cas. No. 2,942 [*affirmed* in 23 How. 117, 16 L. ed. 436].

26. Kilpatrick *v.* Kansas City, etc., R. Co., 38 Nebr. 620, 57 N. W. 664, 41 Am. St. Rep. 741; Meyer *v.* Delaware R. Constr. Co., 100 U. S. 457, 25 L. ed. 593; Ohio Falls Car Mfg. Co. *v.* Central Trust Co., 71 Fed. 916, 18 C. C. A. 386; Central Trust Co. *v.* Richmond, etc., R. Co., 68 Fed. 90, 15 C. C. A. 273, 41 L. R. A. 458. *Compare* Flynn *v.* Des Moines, etc., R. Co., 63 Iowa 490, 19 N. W. 312, holding that the taking of collateral security for an indebtedness does not prevent the party from obtaining a mechanic's lien that he would be otherwise entitled to.

27. Baumhoff *v.* St. Louis, etc., R. Co., 171 Mo. 120, 71 S. W. 156, 94 Am. St. Rep. 770;

and where the contract is inconsistent with an intent to retain the lien;[28] or, in some jurisdictions, only where it affirmatively appears that there was an intent to look to such security and not to the lien.[29]

(11) *Liens For Public Aid Granted.* A lien in favor of a state for public aid granted to a railroad company may ordinarily be released or waived by the state, by an act of the legislature,[30] or by a foreclosure under the statute;[31] or such release may be accomplished by way of a compromise, notwithstanding a constitutional prohibition against a release.[32] If a lien attaches in favor of the state alone, it may be released or postponed by the state, although the bonds which the lien secures are outstanding and unpaid;[33] but where such lien also attaches in favor of the bondholders, it cannot be waived or postponed by the state alone.[34]

d. Liens For Right of Way or Land Granted. In accordance with the general rules governing vendors' liens,[35] a vendor of land to a railroad company for a right of way or other purpose is entitled to the same lien upon the land sold for the

Central Trust Co. *v.* Richmond, etc., R. Co., 68 Fed. 90, 15 C. C. A. 273, 41 L. R. A. 458.

28. Carnegie *v.* Lancaster, etc., R. Co., 3 Ohio S. & C. Pl. Dec. 343, 1 Ohio N. P. 300, holding, however, that an agreement to extend the time of payment on the giving of additional security does not waive the lien.

Stipulation to pay out of certain fund.— A stipulation in a contract between a railroad company and a construction company that the former will pay the latter out of a certain fund is at most an appropriation of such fund, and is not such a taking by the construction company of a collateral security as to vitiate its mechanic's lien. Delaware R. Constr. Co. *v.* Davenport, etc., R. Co., 46 Iowa 406; Meyer *v.* Delaware R. Constr. Co., 100 U. S. 457, 25 L. ed. 593.

29. McIlheney *v.* Binz, 80 Tex. 1, 13 S. W. 655, 26 Am. St. Rep. 705; Hale *v.* Burlington, etc., R. Co., 13 Fed. 203, 2 McCrary 558.

30. See Stevens *v.* Memphis, etc., R. Co., 114 U. S. 663, 5 S. Ct. 974, 1098, 29 L. ed. 281.

Missouri acts of 1865 and 1881, authorizing the Hannibal, etc., R. Co. to issue bonds secured by a mortgage superior to the lien of the state for aid granted provided that the proceeds of the bonds be paid to the state, are not in conflict with Mo. Const. (1875) art. 4, §§ 50, 51, prohibiting the legislature "to release or alienate the lien held by the State from any railroad or in any wise change the tenor or meaning, or pass any Act explanatory thereof; but the same shall be enforced in accordance with the original terms upon which it was acquired." Rolston *v.* Crittenden, 120 U. S. 390, 7 S. Ct. 599, 30 L. ed. 721 [*affirming* 10 Fed. 254, 3 McCrary 332]. But see answers to questions propounded by Governor Fletcher, June 27, 1866, 37 Mo. 139.

Waiver and substitution.— Where a state in full possession of a railroad upon an express trust to continue until state bonds loaned to the company are paid or exchanged, empowers by an act of legislature a county of the state to loan its bonds to the company and authorizes the commissioner receiving the reduced earnings to pay into the county treasury a sufficient sum to meet the interest on the county bonds, the state thereby waives its lien *pro tanto* in favor of the county, which becomes substituted thereto. Ketchum *v.* Pacific R. Co., 14 Fed. Cas. Nos. 7,739, 7,740, 4 Dill. 78, 87 note [*affirmed* in 101 U. S. 306, 25 L. ed. 999].

New York Act Dec. 14, 1847 (Laws (1847), c. 471), entitled "An act to release the prior lien of the state on the Hudson and Berkshire Railroad" did not release, reduce, or compromise the debt created against such company by Act April 28, 1840 (Laws (1840), c. 178), passed for the aid of said company; nor did such act release from the mortgage to the state created by the latter act, any of the property covered by that mortgage. Darby *v.* Wright, 6 Fed. Cas. No. 3,574, 3 Blatchf. 170.

31. Stevens *v.* Memphis, etc., R. Co., 114 U. S. 663, 5 S. Ct. 974, 1098, 29 L. ed. 281.

32. Woodson *v.* Murdock, 22 Wall. (U. S.) 351, 22 L. ed. 716, holding that the provision of the Missouri constitution which ordains that the general assembly shall have no power to release the lien held by the state on any railroad does not prevent the state from making a compromise of any debt due it or to become due, although the constitutional ordinance adopted at the same time as the state constitution relating to the payment of state and railroad indebtedness, after providing for a sale by the state of any railroad in debt to it, and for the possible case of a purchase by the state of the road, provides for a sale of the road after the state has so become owner, ordaining in such case "that no sale shall be made without reserving a lien for all sums remaining due."

33. Stevens *v.* Memphis, etc., R. Co., 114 U. S. 663, 5 S. Ct. 974, 1098, 29 L. ed. 281 [*distinguishing* Hand *v.* Savannah, etc., R. Co., 12 S. C. 314].

34. Gibbes *v.* Greenville, etc., R. Co., 13 S. C. 228; Hand *v.* Savannah, etc., R. Co., 12 S. C. 314.

35. See, generally, VENDOR AND PURCHASER.

unpaid purchase-money as an ordinary vendor,[36] except where he accepts other security therefor with the intention to rely solely upon it for payment.[37] This lien attaches as well where the sale is by operation of law as where it is by voluntary contract,[38] and attaches against the vendee and all subsequent purchasers with notice.[39] A lien for right of way is on the whole line of road and not only upon the particular piece of ground sold.[40] Ordinarily the same remedies exist for enforcing such lien as in the case of a vendor to other persons.[41] Upon default in payment, as in other cases, the vendor may have a sale of the land,[42] although the railroad is actually made and ready for traffic;[43] and may have a receiver appointed of the rents, issues, and profits of the land, until the sale, for the purpose of enforcing the lien.[44] The unpaid vendor may also be entitled to an injunction restraining the company from running trains or otherwise using the land, where the land is unsalable or he cannot otherwise recover his purchase-money;[45] but as

36. Springfield, etc., R. Co. *v.* Stewart, 51 Ark. 285, 10 S. W. 767; Dayton, etc., R. Co. *v.* Lewton, 20 Ohio St. 401 (holding a vendor to have an equitable lien where the legal title to the land is still retained by him); Hempfield R. Co. *v.* Thornburg, 1 W. Va. 261; Wing *v.* Tottenham, etc., R. Co., L. R. 3 Ch. 740, 37 L. J. Ch. 654, 16 Wkly. Rep. 1098; St. Germans *v.* Crystal Palace R. Co., L. R. 11 Eq. 568, 24 L. T. Rep. N. S. 288, 19 Wkly. Rep. 584; Winchester *v.* Mid-Hants R. Co., L. R. 5 Eq. 17, 37 L. J. Ch. 64, 17 L. T. Rep. N. S. 161, 16 Wkly. Rep. 72; Walker *v.* Ware, etc., R. Co., L. R. 1 Eq. 195, 12 Jur. N. S. 18, 35 Beav. 52, 14 Wkly. Rep. 158, 35 L. J. Ch. 94, 13 L. T. Rep. N. S. 517, 55 Eng. Reprint 813; Keane *v.* Athenry, etc., R. Co., 19 Wkly. Rep. 43, 318.

That the railway against which such lien exists is purchased by another company under statutory authority does not deprive unpaid owners of any lien they had for the price of land theretofore sold to the old company. Paterson *v.* Buffalo, etc., R. Co., 17 Grant Ch. (U. C.) 521.

Entry by the company under the English Lands Clauses Consolidation Act, § 85, does not deprive the vendor of his lien. Walker *v.* Wade, etc., R. Co., L. R. 1 Eq. 195, 35 Beav. 52, 12 Jur. N. S. 18, 35 L. J. Ch. 94, 13 L. T. Rep. N. S. 517, 14 Wkly. Rep. 158, 55 Eng. Reprint 813.

One conveying a right of way without retaining a claim against the company or lien on the land for the price cannot call to account the treasurer of a fund raised by voluntary subscription for the purpose of placing the road in the company's hands, free of encumbrance. Crisman *v.* Smith, 44 N. J. Eq. 238, 14 Atl. 484.

37. Springfield, etc., R. Co. *v.* Stewart, 51 Ark. 285, 10 S. W. 767.

Payment of money as security, under an agreement entered into before the price is determined, does not deprive the vendor of his lien. Walker *v.* Ware, etc., R. Co., L. R. 1 Eq. 195, 35 Beav. 52, 12 Jur. N. S. 18, 35 L. J. Ch. 94, 13 L. T. Rep. N. S. 517, 14 Wkly. Rep. 158, 55 Eng. Reprint 813.

The rights and franchises of a railroad company do not prevail over a vendor's lien; and where land is sold to a railroad company for the purposes of the road, and a mortgage taken to secure the unpaid purchase-money, the lien is not thereby lost. Galt *v.* Erie, etc., R. Co., 14 Grant Ch. (U. C.) 499, 15 Grant Ch. (U. C.) 637.

38. Mims *v.* Macon, etc., R. Co., 3 Ga. 333.

39. Mims *v.* Macon, etc., R. Co., 3 Ga. 333.

40. Crosby *v.* Morristown, etc., R. Co., (Tenn. Ch. App. 1897) 42 S. W. 507.

41. See Wing *v.* Tottenham, etc., R. Co., L. R. 3 Ch. 740, 37 L. J. Ch. 654, 16 Wkly. Rep. 1098.

42. Munns *v.* Isle of Wight R. Co., L. R. 5 Ch. 414, 39 L. J. Ch. 522, 23 L. T. Rep. N. S. 96, 18 Wkly. Rep. 781 [*reversing* L. R. 8 Eq. 653, 17 Wkly. Rep. 1081]; Wing *v.* Tottenham, etc., R. Co., L. R. 3 Ch. 740, 37 L. J. Ch. 654, 16 Wkly. Rep. 1098; Lycett *v.* Stafford, etc., R. Co., L. R. 13 Eq. 261, 41 L. J. Ch. 474, 25 L. T. Rep. N. S. 870; Walker *v.* Ware, etc., R. Co., L. R. 1 Eq. 195, 35 Beav. 52, 12 Jur. N. S. 18, 13 L. T. Rep. N. S. 517, 14 Wkly. Rep. 158, 55 Eng. Reprint 813; Keane *v.* Athenry, etc., R. Co., 19 Wkly. Rep. 43, 318.

43. Munns *v.* Isle of Wight R. Co., L. R. 5 Ch. 414, 39 L. J. Ch. 522, 23 L. T. Rep. N. S. 96, 18 Wkly. Rep. 781 [*reversing* L. R. 8 Eq. 653, 17 Wkly. Rep. 1081]; Wing *v.* Tottenham, etc., R. Co., L. R. 3 Ch. 740, 37 L. J. Ch. 654, 16 Wkly. Rep. 1098. And see cases cited in the preceding note.

Effect of sale.— Land of a railroad company sold to enforce the vendor's lien for unpaid purchase-money is sold free from all claims of the public to use it as a highway. Munns *v.* Isle of Wight R. Co., L. R. 5 Ch. 414, 39 L. J. Ch. 522, 23 L. T. Rep. N. S. 96, 18 Wkly. Rep. 781.

44. Munns *v.* Isle of Wight R. Co., L. R. 5 Ch. 414, 39 L. J. Ch. 522, 23 L. T. Rep. N. S. 96, 18 Wkly. Rep. 781; St. Germans *v.* Crystal Palace R. Co., L. R. 11 Eq. 568, 24 L. T. Rep. N. S. 288, 19 Wkly. Rep. 584; Winchester *v.* Mid-Hants R. Co., L. R. 5 Eq. 17, 37 L. J. Ch. 64, 17 L. T. Rep. N. S. 161, 16 Wkly. Rep. 72.

45. Allgood *v.* Merrybent, etc., R. Co., 33 Ch. D. 571, 55 L. J. Ch. 743, 55 L. T. Rep. N. S. 835, 35 Wkly. Rep. 180 (holding that the court will on default in payment, and where the land is unsalable, grant an injunction to restrain the railroad company from running trains over the road and from con-

this remedy renders the land useless to both parties, it ordinarily will not be granted, until a sale, or at least until all reasonable efforts have been made to sell the land.[46]

e. Liens For Rolling Stock Furnished. The validity and effect of a lien for rolling stock furnished to a railroad company under a contract of sale reserving title depends upon its compliance with the statutory requirements, such as recordation within a specified time.[47]

f. Liens For Loans or Advances. A person making advances or loans to a railroad company upon its request or promise may be entitled to a lien on its property therefor,[48] particularly where they are made on the faith of a bond and mortgage.[49] Where, under an arrangement scaling down a railroad company's indebtedness, a creditor surrenders his bonds and receives new ones for all except a small portion of the reduced indebtedness to him, he is entitled to a lien equal to that of other bond and mortgage creditors for the whole amount due him.[50] But an agreement by a railroad company to prefer its bondholders in the disposition of a certain fund gives them no lien on such fund.[51]

tinuing in possession of the land); Winchester *v.* Mid-Hants R. Co., L. R. 5 Eq. 17, 37 L. J. Ch. 64, 17 L. T. Rep. N. S. 161, 16 Wkly. Rep. 72. See Cosens *v.* Bagnor R. Co., L. R. 1 Ch. 594, 12 Jur. N. S. 738, 36 L. J. Ch. 104, 15 L. T. Rep. N. S. 168, 14 Wkly. Rep. 1002.

46. Munns *v.* Isle of Wight R. Co., L. R. 5 Ch. 414, 39 L. J. Ch. 522, 23 L. T. Rep. N. S. 96, 18 Wkly. Rep. 781 [*reversing* L. R. 8 Eq. 653, 17 Wkly. Rep. 1081] (holding an injunction until a sale not the proper form of relief, as it would make the land useless to both parties); Bell *v.* Northampton, etc., R. Co., L. R. 2 Ch. 100, 36 L. J. Ch. 319, 15 L. T. Rep. N. S. 169, 15 Wkly. Rep. 27; Lycett *v.* Stafford, etc., R. Co., L. R. 13 Eq. 261, 41 L. J. Ch. 474, 25 L. T. Rep. N. S. 870; Williams *v.* Aylesbury, etc., R. Co., 28 L. T. Rep. N. S. 547, 21 Wkly. Rep. 819 (holding that an injunction to restrain the company from using the land ought not to be awarded, at all events until after another attempt had been made to sell the land); Keane *v.* Athenry, etc., R. Co., 19 Wkly. Rep. 43, 318.

47. Newgass *v.* Atlantic, etc., R. Co., 56 Fed. 676, construing Va. Code, § 2462, which provides that a conditional sale of rolling stock to a railroad company where legal title is reserved to the vendor until the purchase-money is paid shall be void as to creditors and *bona fide* purchasers of the vendee unless the contract is recorded as therein required and "each locomotive and car be plainly and permanently marked with the name of the vendor on both sides thereof followed by the word 'owner.'"

Contract by foreign corporations.— Ga. Laws (1889), p. 188, invalidating contracts for the sale of rolling stock made, or to be made, to the owner or operator of a railway within the state of Georgia, with reservation of title and requiring such contracts to be recorded within six months after execution, has no application to such a contract made before the passage of such act by two foreign corporations outside of the state, for the sale of rolling stock to be used within the state. Central Trust Co. *v.* Marietta, etc., R. Co., 48 Fed. 865, 1 C. C. A. 130.

A lien for rolling stock reserved by contract under Va. Code, § 2462, is in no wise inconsistent with the existence of a lien under section 4025, which gives to all who furnish supplies necessary to the operation of a railway "a prior lien on the franchise, gross earnings, and all the real and personal property" of the road upon condition that the claim be recorded as required by section 2486. Newgass *v.* Atlantic, etc., R. Co., 56 Fed. 676.

48. Farmers' L. & T. Co. *v.* Stuttgart, 92 Fed. 246 (holding that the payment of taxes at the request of the company will create such a lien); Badgerow *v.* Manhattan Trust Co., 64 Fed. 931 (holding that the fact that complainants and others subscribed to a fund for the construction of a railroad, on an agreement by defendant that certain bonds should be set apart for and delivered to them, is probably sufficient to establish an equitable lien in complainants' favor).

One loaning money to a company owning all the stock of a railroad company cannot, as a party to an equitable proceeding against the railroad company alone, be allowed, by virtue of his right as an alleged creditor of the railroad company, payment of the loan out of earnings of such company which came into the hands of the receiver while the road was being operated by him, although the receiver had previously used portions of such earnings in paying interest to the bondholders secured by the mortgage, and in making betterments and improvements on the railroad property which largely increased the value of the bondholders' security. Macon Exch. Bank *v.* Macon Constr. Co., 97 Ga. 1, 25 S. E. 326, 33 L. R. A. 800.

49. Porter *v.* Pittsburg Bessemer Steel Co., 120 U. S. 649, 7 S. Ct. 741, 30 L. ed. 830, 122 U. S. 267, 7 S. Ct. 1206, 30 L. ed. 1210, holding this to be true in respect to a *bona fide* holder for value of such bonds for the amount of the loan made thereon. See also U. S. Trust Co. *v.* Western Contract Co., 81 Fed. 454, 26 C. C. A. 472.

50. Blair *v.* St. Louis, etc., R. Co., 23 Fed. 524.

51. Newby *v.* Oregon Cent. R. Co., 18 Fed. Cas. No. 10,144, Deady 609.

g. Liens For Damages. A grantor of property to a railroad company for a right of way is entitled to a lien for damages caused by a breach of the contract contained in the instrument conveying such property, as in failing to construct the road in the manner agreed upon;[52] such as for damages caused by its failure to fence and build crossings along or over the right of way according to agreement;[53] although a failure to build fences as agreed upon does not entitle such owner to a lien for a trespass outside the right of way,[54] or for damages caused by negligent construction of the road.[55] It has been held that this lien is confined to that portion of the road covered by the contract.[56] Under some statutes a person is entitled to a lien for any loss or damage to the person or property sustained from a railroad upon his compliance with the statutory requirements.[57]

h. Liens For Public Aid Granted — (i) *In General.* Where the federal or state government grants aid to a railroad company by guaranteeing its bonds or by authorizing an issuance of federal, state, or county bonds in aid of the company, it does not thereby acquire a lien on the property of the railroad company,[58] unless the statute authorizing such guaranty or issue expressly provides for such a lien,[59]

52. Dayton, etc., R. Co. *v.* Lewton, 20 Ohio St. 401 (holding such a grantor entitled to an equitable lien for damages caused by the non-construction of cattle-guards at crossings in compliance with the contract); Levy *v.* Tatum, (Tex. Civ. App. 1897) 43 S. W. 941. See also Crosby *v.* Morristown, etc., R. Co., (Tenn. Ch. App. 1897) 42 S. W. 507.

53. Hull *v.* Chicago, etc., R. Co., 65 Iowa 713, 22 N. W. 940; Davies *v.* St. Louis, etc., R. Co., 56 Iowa 192, 9 N. W. 117; Varner *v.* St. Louis, etc., R. Co., 55 Iowa 677, 8 N. W. 634.

54. Hull *v.* Chicago, etc., R. Co., 65 Iowa 713, 22 N. W. 940.

55. Hull *v.* Chicago, etc., R. Co., 65 Iowa 713, 22 N. W. 940; Tolle *v.* Owensboro, etc., R. Co., 111 Ky. 623, 64 S. W. 455, 23 Ky. L. Rep. 864, holding that no lien exists upon a railroad for damages recovered by temporary injuries resulting from negligence in the construction of the road, as from the negligent failure to construct a sufficient culvert under an embankment.

56. Davies *v.* St. Louis, etc., R. Co., 56 Iowa 192, 9 N. W. 117; Varner *v.* St. Louis, etc., R. Co., 55 Iowa 677, 8 N. W. 634.

57. Kansas City Southern R. Co. *v.* King, 74 Ark. 366, 85 S. W. 1131 (construing Kirby Dig. §§ 6661–6663); Winter *v.* Iowa Cent. R. Co., 111 Iowa 342, 82 N. W. 760 (holding, however, that under Code (1873), § 1309, making a judgment against a railroad company for injuries a lien on the property of the corporation situated in the county where the judgment is obtained, such judgment is not a lien on the property where it is afterward reversed and the property sold before the recovery of a second judgment); State Trust Co. *v.* Kansas City, etc., R. Co., 115 Fed. 367 (holding that Sandels & H. Dig. Ark. § 6251, was not repealed by the act of March 31, 1899, in so far as rights previously accrued are concerned).

Tenn. St. (Milliken & V. Code, § 1271), declaring that no railroad company shall have power to give a mortgage which shall be valid against judgments and decrees for damages occasioned to persons or property in the operation of the road, does not create any lien in favor of such claims but merely postpones the mortgage to them; and hence a purchaser at a foreclosure sale takes the property free from liability for such claims, unless they have become liens by contract or some legal proceeding. Baltimore Trust, etc., Co. *v.* Hofstetter, 85 Fed. 75, 29 C. C. A. 35. Thus a judgment for personal injuries, rendered pending a general creditors' suit to wind up the affairs of the company, and in which a receiver was appointed, and the property sold, and notice to present claims published, is not a lien on the assets of the company which can be enforced against a purchaser at the receiver's sale. Barnett *v.* East Tennessee, etc., R. Co., (Ch. App. 1898) 48 S. W. 817.

Personal judgment.— A lien created by Kirby Dig. §§ 6661–6663, in favor of persons sustaining loss or damage to person or property, against railroads causing such loss or damage, does not entitle a person injured to a personal judgment against a purchaser of the railroad subject to the lien where such purchaser is not otherwise liable on the claim. Kansas City Southern R. Co. *v.* King, 74 Ark. 366, 85 S. W. 1131.

58. McKittrick *v.* Arkansas Cent. R. Co., 152 U. S. 473, 14 S. Ct. 661, 38 L. ed. 518, holding that Ark. Acts, July 21, 1868, and April 10, 1869, did not create a lien on the property of a railroad company for whose benefit state bonds were issued, and that neither the state nor its bondholders were entitled to sequestration of the income and revenue arising from the property in the hands of the purchasers thereof under foreclosure of mortgage.

59. Colt *v.* Barnes, 64 Ala. 108; Gibbes *v.* Greenville, etc., R. Co., 13 S. C. 228; McGraw *v.* Memphis, etc., R. Co., 5 Coldw. (Tenn.) 434; Wilson *v.* Boyce, 92 U. S. 320, 23 L. ed. 608; Cincinnati *v.* Morgan, 3 Wall. (U. S.) 275, 18 L. ed. 146 (holding that to acquire such a lien upon the *corpus* of the road, as against all mortgages and encumbrancers, it is necessary that the statute express in terms not doubtful the intention to give a

or the terms of the statute are such as clearly show an intention that such a lien should be created.[60]

(II) *NATURE AND EXTENT OF LIEN.* The nature and extent of such a lien depends upon the wording of the statute under which it arises.[61] Such a lien ordinarily operates as a specific appropriation of the property of the company to the payment of the bonds, on default of principal and interest;[62] and is not restricted to the portion of the road then finished, or to the property then owned by the company, but extends to the entire road, its franchises and all the property then belonging to it or afterward acquired.[63]

(III) *PERSONS ENTITLED TO BENEFIT OF LIEN.* Where bonds are issued by a state in aid of a railroad company, such bonds become the debt of the state and the statutory lien in its favor does not inure to the benefit of *bona fide* holders of such bonds,[64] unless the terms of the statute extend such lien to them;[65] nor does an indorsement by a railroad company of such bonds give a lien to holders thereof.[66] But on the other hand it is held that since a creditor is entitled to all securities or franchises which the surety may receive from the principal debtor, the statutory lien arising upon an indorsement of railroad bonds by the state

lien); Wilson *v.* Ward's Lumber Co., 67 Fed. 674; Knevals *v.* Florida Cent., etc., R. Co., 66 Fed. 224, 13 C. C. A. 410. See Tompkins *v.* Little Rock, etc., R. Co., 125 U. S. 109, 8 S. Ct. 762, 31 L. ed. 615 [*affirming* 18 Fed. 344, 5 McCrary 597, and *reversing* 21 Fed. 370, 15 Fed. 6].

60. Ketchum *v.* St. Louis, 101 U. S. 306, 25 L. ed. 999 (holding that Mo. Act, Jan. 7, 1865, authorizing the county of St. Louis to issue its bonds for a certain amount to aid in the construction of a certain railroad and providing that the fund commissioners of the railroad company, or the person having the custody of its bonds should, every month after issuance of such bonds, pay to the county out of the earnings of the railroad, a certain sum to meet the interest on the bonds, created on its acceptance by the company and the county, an equitable lien or charge in favor of the county on the earnings of the railroad to the extent necessary to meet the interest on the bonds as it accrued); U. S. *v.* Kansas Pac. R. Co., 99 U. S. 455, 25 L. ed. 289; U. S. *v.* Central Pac. R. Co., 99 U. S. 449, 25 L. ed. 287 [*reversing* 25 Fed. Cas. No. 14,763, 4 Sawy. 341].

Where state bonds so issued are void, they do not create a lien on railroad property in favor of the state. Tompkins *v.* Little Rock, etc., R. Co., 125 U. S. 109, 8 S. Ct. 762, 31 L. ed. 615 [*affirming* 18 Fed. 344, 5 McCrary 597, and *reversing* 21 Fed. 370, 15 Fed. 6].

61. Forrest *v.* Luddington, 68 Ala. 1; U. S. *v.* Kansas Pac. R. Co., 99 U. S. 455, 25 L. ed. 289, holding that bonds granted by the United States to the Kansas Pacific Railroad Company under the act of July 1, 1862 (12 U. S. St. at L. 489), are not a lien on, nor is the company liable for five per cent of the net earnings of, that portion of its road west of the one-hundredth meridian.

Moneys earned by a railroad company in working its road are not comprehended within the lien arising under Tenn. Act, Feb. 11, 1862, c. 151, authorizing the issue and loan of bonds of the state to the Memphis and Ohio Railroad Company and investing the state with a lien upon that property. McGraw *v.* Memphis, etc., R. Co., 5 Coldw. (Tenn.) 434.

62. Forrest *v.* Luddington, 68 Ala. 1, holding this to be true where a state indorses the bonds of a railroad company and takes a lien on the road and equipment as a security for the payment of the bonds.

63. Colt *v.* Barnes, 64 Ala. 108 (under Ala. Act, Feb. 21, 1870); Wilson *v.* Beckwith, 140 Mo. 359, 41 S. W. 985 [*overruling* Wilson *v.* Beckwith, 117 Mo. 61, 22 S. W. 639]; Whitehead *v.* Vineyard, 50 Mo. 30 (holding that a lien of the state upon the Iron Mountain Railroad Lands created by Sess. Act (1851), p. 266, embraces lands acquired by the road after the creation of the lien); Wilson *v.* Boyce, 92 U. S. 320, 23 L. ed. 608 [*affirming* 30 Fed. Cas. No. 17,793, 2 Dill. 539] (holding that the lien of the state under the Missouri act of March 3, 1857, extended to lands which had before that time been granted by congress to aid in the construction of the road, and by the state to the railroad company and that the lien of the state was not confined to the road and such property immediately connected with the road as was necessary for its operation); Wilson *v.* Ward Lumber Co., 67 Fed. 674.

64. McKittrick *v.* Arkansas Cent. R. Co., 152 U. S. 473, 14 S. Ct. 661, 38 L. ed. 518; Tompkins *v.* Little Rock, etc., R. Co., 125 U. S. 109, 8 S. Ct. 762, 31 L. ed. 615 [*affirming* 18 Fed. 344, 5 McCrary 597, and *reversing* 21 Fed. 370, 15 Fed. 6]; Stevens *v.* Louisville, etc., R. Co., 3 Fed. 673, 2 Flipp. 715.

65. Florida Cent. R. Co. *v.* Schutte, 103 U. S. 118, 26 L. ed. 327.

66. McKittrick *v.* Arkansas Cent. R. Co., 152 U. S. 473, 14 S. Ct. 661, 38 L. ed. 518, holding also that such indorsement does not prevent the company from giving a mortgage of its property to secure bonds it may issue.

is a security for the payment of the indorsed bonds and operates as a specific appropriation of the property and franchises of the railroad company to their payment which the bondholders may enforce whenever default shall be made by the company in the payment of the principal or interest.[67] The summary remedies given by statute for the enforcement of the liens of the state to secure it against loss by reason of its indorsement of the bonds of a railroad company can only be exercised by the state;[68] but where the state has failed to exercise such remedies and disclaims its liability for the indorsed bonds, such statutes afford no obstacle to a resort to a court of equity by the bondholders for the enforcement of the statutory lien for their benefit,[69] and the fact that the state cannot be made a party to the suit, no relief being asked against it, does not affect the jurisdiction of the court or the equity of the bill.[70] Where such bonds, issued in exchange for railroad bonds secured by a statutory mortgage, are declared invalid, the holders of the bonds may, in equity, enforce the mortgage for their own benefit.[71]

i. Liens For Labor or Supplies[72] — (i) *IN GENERAL.* Independently of statute, a person selling goods to a railroad company may have a lien thereon for the unpaid purchase-money so long as he retains actual or constructive control of the goods;[73] or an equitable lien for services or supplies furnished may arise by virtue of the contract between the railroad company and the party furnishing them.[74] In most jurisdictions, however, statutes have been enacted which give to every mechanic, builder, artisan, workman, or other person who shall do or perform any work or labor upon or furnish any materials, machinery, fixtures, or other things toward the equipment or to facilitate the operation of a railroad a paramount lien therefor on the road-bed and other property of the company.[75]

67. Morton *v.* New Orleans, etc., R., etc., Co., 79 Ala. 590; Gilman *v.* New Orleans, etc., R. Co., 72 Ala. 566; Forrest *v.* Luddington, 68 Ala. 1 (holding this to be true, although the governor of the state is directed by the statute to file a bill for the foreclosure on default of the payment of the bonds); Gibbes *v.* Greenville, etc., R. Co., 13 S. C. 228; Hand *v.* Savannah, etc., R. Co., 12 S. C. 314.

68. Forrest *v.* Luddington, 68 Ala. 1.

69. Forrest *v.* Luddington, 68 Ala. 1.

70. Forrest *v.* Luddington, 68 Ala. 1.

71. Western Div. Western North Carolina R. Co. *v.* Drew, 29 Fed. Cas. No. 17,434, 3 Woods 691.

72. Liability for work, labor, or materials used in the construction of the road in general see *supra*, VI, I.

Priority of liens for labor and supplies see *infra*, VIII, A, 9, g.

73. Ware River R. Co. *v.* Vibbard, 114 Mass. 447. See also, generally, SALES.

74. Denison, etc., R. Co. *v.* Raney-Alton Mercantile Co., 3 Indian Terr. 104, 53 S. W. 496 (to the extent that the supplies bettered the property of the company); Fidelity Ins., etc., Co. *v.* Shenandoah Valley R. Co., 33 W. Va. 761, 11 S. E. 58; Dillon *v.* Barnard, 21 Wall. (U. S.) 430, 22 L. ed. 673 [*affirming* 7 Fed. Cas. No. 3,915, Holmes 386], holding, however, that in order to create an equitable lien for future services upon particular funds, there must be in addition to an express promise by the railroad company upon which the contractor relies some act of appropriation on the part of the company depriving itself of the control of the funds and conferring upon the contractor the right to have them applied to his payment when the services are rendered or the materials are furnished. See also Myer *v.* Dupont, 79 Ky. 416.

75. Midland Valley R. Co. *v.* Moran Bolt, etc., Mfg. Co., 80 Ark. 399, 97 S. W. 679; Tucker *v.* St. Louis, etc., R. Co., 59 Ark. 81, 26 S. W. 375; Herrin *v.* Warren, 61 Miss. 509 (construing Acts (1882), p. 115, and Code, § 1379); Luttrell *v.* Knoxville, etc., R. Co., (Tenn. 1907) 105 S. W. 565 (construing Acts (1883), c. 220, § 3, as amended by Acts (1891), c. 98, § 1); Fox *v.* Seal, 22 Wall. (U. S.) 424, 22 L. ed. 774; Central Trust Co. *v.* Richmond, etc., R. Co., 68 Fed. 90, 15 C. C. A. 273, 41 L. R. A. 458 [*affirmed* in 68 Fed. 105, 15 C. C. A. 289, 34 L. R. A. 625]. And see the statutes of the several states.

A constitutional provision requiring the legislature to pass laws to protect laborers on railroads, etc., does not impose any lien on the road-bed and franchise of a railroad company for labor and materials furnished thereto, nor does it require the legislature to do so. Central, etc., R. Co. *v.* Henning, 52 Tex. 466; Tyler Tap R. Co. *v.* Driscol, 52 Tex. 13.

Repeal of statute.— Oreg. Laws (1889), p. 75, giving railroad subcontractors, materialmen, and laborers a lien, supersedes, and by implication repeals the prior Mechanics' Lien Law as applied to railroads. Ban *v.* Columbia Southern R. Co., 109 Fed. 499.

Consistency of liens.— A contract under which cars are furnished to a railroad com-

The intent and object of such statutes is to protect laborers and persons furnishing materials for the construction and repair of railroads,[76] and to give a security for the debt.[77] The existence and extent of such lien therefore, being in derogation of the common law, must depend wholly upon the provisions of the statute,[78] which must be strictly construed in respect at least to the ascertainment of the rights of the parties entitled;[79] although where the lien has once attached the statute should be liberally construed as to its remedial part.[80] And since the statute itself fixes the limit beyond which the right to a lien does not exist,[81] and presupposes a right of action in the party claiming the lien, the lien is not intended to confer a right of action where none existed without it.[82] Nor does the lien exist for claims not provided for by the statute,[83] such as for damages arising from a breach of contract.[84] But where the statute applies, a debt in whatever shape it may be has the benefit of the lien given by the statute,[85] and may be enforced against a purchaser of the railroad within the time limited by statute for its enforcement, although such purchaser's title was acquired without notice of the lien.[86]

(11) *Retroactive Effect of Statutory Provisions.* Ordinarily such a statute relates only to the labor and materials furnished after its passage and gives no right to a lien for labor and materials furnished before it was enacted.[87] It does not give a lien for labor or supplies furnished under a contract executed prior to its passage,[88] although the labor or materials were furnished after the statute took effect.[89] But it has been held that, although the contract is entered into prior to the passage of such a statute, if the property subject to such lien was not in existence when the statute was enacted, but only comes into existence afterward by labor and supplies furnished under the contract, the party furnishing

pany and providing for payment of the purchase-money in monthly instalments with the right in the vendor on default to take possession of the cars and sell, returning any surplus after payment of outstanding notes to the vendee, is not inconsistent with his lien for supplies under the statute and the fact that such vendor puts his name on the cars as owner and records the contract as required in the case of conditional sales, does not amount to a waiver of his statutory lien for supplies. Newgass *v.* Atlantic, etc., R. Co., 56 Fed. 676.

76. Dudley *v.* Toledo, etc., R. Co., 65 Mich. 655, 32 N. W. 884.

77. Cincinnati, etc., R. Co. *v.* Shera, 36 Ind. App. 315, 73 N. E. 293.

78. St. Johns, etc., R. Co. *v.* Bartola, 28 Fla. 82, 9 So. 853; Midland R. Co. *v.* Wilcox, 122 Ind. 84, 23 N. E. 506; Cincinnati, etc., R. Co. *v.* Shera, 36 Ind. App. 315, 73 N. E. 293; Noll *v.* Cumberland Plateau R. Co., 112 Tenn. 140, 79 S. W. 380; Laidlaw *v.* Portland, etc., R. Co., 42 Wash. 292, 84 Pac. 855, construing Acts (1893), p. 32, c. 24, § 1.

79. Tucker *v.* St. Louis, etc., R. Co., 59 Ark. 81, 26 S. W. 375; Cincinnati, etc., R. Co. *v.* Shera, 36 Ind. App. 315, 73 N. E. 293; Cleburne Nat. Bank *v.* Gulf, etc., R. Co., 95 Tex. 176, 66 S. W. 203.

80. Tucker *v.* St. Louis, etc., R. Co., 59 Ark. 81, 26 S. W. 375; Cincinnati, etc., R. Co. *v.* Shera, 36 Ind. App. 315, 73 N. E. 293.

81. Tucker *v.* St. Louis, etc., R. Co., 59 Ark. 81, 26 S. W. 375.

82. Tucker *v.* St. Louis, etc., R. Co., 59 Ark. 81, 26 S. W. 375.

83. St. Johns, etc., R. Co. *v.* Bartola, 28 Fla. 82, 9 So. 853; Cleburne Nat. Bank *v.* Gulf, etc., R. Co., 95 Tex. 176, 66 S. W. 203, holding that Rev. St. art. 3312, giving to mechanics, laborers, and operatives who perform labor in the construction of any railroad a lien "on such railroad and its equipments," does not give a lien to mechanics and laborers performing labor in the erection of machine-shops, work-shops, roundhouses, etc., on land belonging to the company and adjoining its right of way.

84. St. Johns, etc., R. Co. *v.* Bartola, 28 Fla. 82, 9 So. 853.

85. Fox *v.* Seal, 22 Wall. (U. S.) 424, 22 L. ed. 774, holding that under a general resolution in the Pennsylvania act of Jan. 21, 1843, prohibiting railroad companies and similar corporations from mortgaging or transferring their property so as to defeat laborers employed in the construction of work, the lien of such laborers is not merged in any judgment by the contractor against the company for his debt, or by any proceedings upon such judgment.

86. Brown *v.* Buck, 54 Ark. 453, 16 S. W. 195.

87. Arbuckle *v.* Illinois Midland R. Co., 81 Ill. 429.

88. Choctaw, etc., R. Co. *v.* Speer Hardware Co., 71 Ark. 126, 71 S. W. 267; Choctaw, etc., R. Co. *v.* Sullivan, 70 Ark. 262, 68 S. W. 495 (holding that the contract is governed by the law in force at the time of its execution); Parker *v.* Massachusetts R. Co., 115 Mass. 580.

89. Parker *v.* Massachusetts R. Co., 115 Mass. 580.

such labor and supplies is entitled to a lien under the statute, and that such application of the statute invades no right of property.[90]

(III) *APPLICATION OF GENERAL MECHANICS' LIEN LAW.* As a rule the general mechanics' lien laws do not apply to railroads;[91] and although a statute may expressly provide for such liens on a railroad,[92] or its language or intent may clearly include railroads,[93] such construction will not be put upon a general mechanics' lien law unless the language of the statute clearly requires it to be done.[94]

(IV) *NATURE AND PURPOSE OF LABOR, MATERIAL, OR EXPENDITURE.* The right to such a lien rests upon the theory that the labor or materials have gone into the building of the road and to that extent added to its value, and therefore a lien for such labor and material should be given to him who does the one or furnishes the other;[95] and beyond this the statute should never be carried unless imperatively demanded by the language used.[96] Accordingly the right to such a lien is ordinarily restricted to claims for labor performed or materials furnished for use in the construction or repair of the road,[97] or which, although

90. Knoxville, etc., R. Co. *v.* Hoge, 26 S. W. 534, 16 Ky. L. Rep. 9.

91. *Arkansas.*— Dano *v.* Mississippi, etc., R. Co., 27 Ark. 564.

Missouri.— Dunn *v.* North Missouri R. Co., 24 Mo. 493.

Ohio.— Rutherfoord *v.* Cincinnati, etc., R. Co., 35 Ohio St. 559 [*affirming* 5 Ohio Dec. (Reprint) 584, 6 Am. L. Rec. 758], holding that Act (1877), § 1 [74 Ohio L. p. 168], giving a mechanic's lien on "any house, mill, manufactory, or other building or appurtenance, fixture, bridge, or other structure," etc., for labor performed and machinery or materials furnished by the contractor "for erecting, altering, repairing or removing" the same, does not authorize such a lien upon a railroad.

Texas.— Central, etc., R. Co. *v.* Henning, 52 Tex. 466; Tyler Tap R. Co. *v.* Driscol, 52 Tex. 13.

United States.— Buncombe County *v.* Tommey, 115 U. S. 122, 5 S. Ct. 626, 29 L. ed. 308 [construing N. C. Act, March 28, 1870 (Pub. Laws, c. 206, p. 263)]; Cleveland, etc., R. Co. *v.* Knickerbocker Trust Co., 86 Fed. 73; Pennsylvania Steel Co. *v.* J. E. Potts Salt, etc., Co., 63 Fed. 11, 11 C. C. A. 11; Industrial, etc., Guaranty Co. *v.* Electrical Supply Co., 58 Fed. 732, 7 C. C. A. 471 (holding that the General Lien Law of Ohio (Rev. St. § 3184, as amended by the act of April 15, 1889) gives no right to a lien upon a railroad for material used in and for its construction.

See also MECHANICS' LIENS, 27 Cyc. 26.

The specific requirements for a mechanic's lien do not apply to the statute providing for liens upon railroads, but the general principles applicable to liens, when not modified by statute, do apply. Atlantic Dynamite Co. *v* Baltimore, etc., R. Co., 101 Ill. App. 13.

A lien upon a railroad bridge for work performed and material furnished cannot be obtained, in Ohio, under the ordinary mechanics' law, but must be obtained under the act of April 10, 1884, known as the Railroad Lien Law. Cleveland, etc., R. Co. *v.* Knickerbocker Trust Co., 86 Fed. 73. But see Bowman *v.* Springfield, etc., R. Co., 1 Ohio Cir. Ct. 64, 1 Ohio Cir. Dec. 39.

92. Schaghticoke Powder Co. *v.* Greenwich, etc., R. Co., 183 N. Y. 306, 76 N. E. 153, 11 Am. St. Rep. 751, 2 L. R. A. N. S. 288, holding that Laws (1897), c. 418, §§ 2, 3, authorizing a mechanic's lien and providing that the term "real property" shall include in addition, all bridges, and trestle work, and structures connected therewith, erected for the use of a railroad, places such structures in the category of real property, so that a lien may be acquired against a railroad company for materials furnished in the construction of its road. And see the statutes of the several states.

93. Buncombe County *v.* Tommey, 115 U. S. 122, 5 S. Ct. 626, 29 L. ed. 308; Ban *v.* Columbia Southern R. Co., 117 Fed. 21, 54 C. C. A. 407 [*reversing* 109 Fed. 499]; Giant Powder Co. *v.* Oregon Pac. R. Co., 42 Fed. 470, 8 L. R. A. 700, holding that Oreg. Comp. Laws (1887), § 3669, which provides for mechanics' liens upon "any building, wharf, bridge, ditch, flume, tunnel, fence, machinery, or aqueduct, or any other structure" authorizes a lien upon a railroad as properly coming under the head of "other structure."

94. Tyler Tap R. Co. *v.* Driscol, 52 Tex. 13; Buncombe County *v.* Tommey, 115 U. S. 122, 5 S. Ct. 1186, 29 L. ed. 305; Pennsylvania Steel Co. *v.* J. E. Potts Salt, etc., Co., 63 Fed. 11, 11 C. C. A. 11.

95. Cincinnati, etc., R. Co. *v.* Shera, 36 Ind. App. 315, 73 N. E. 293; Central Trust Co. *v.* Texas, etc., R. Co., 23 Fed. 703.

96. Indiana, etc., R. Co. *v.* Shera, 36 Ind. App. 315, 73 N. E. 293; Central Trust Co. *v.* Texas, etc., R. Co., 23 Fed. 703.

97. St. Louis, etc., R. Co. *v.* Rogers, 72 Ark. 270, 79 S. W. 794 (holding that it is necessary under such statute that the services be performed for and be beneficial to the railroad company); Dudley *v.* Toledo, etc., R. Co., 65 Mich. 655, 32 N. W. 884; Industrial, etc., Guaranty Co. *v.* Electrical Supply Co., 58 Fed. 732, 7 C. C. A. 471 (holding that the lien cannot be extended to a claim for furnishing an electric lighting

not actually incorporated in the road, is necessary for the work.[98] The term "materials," within the meaning of such statute, ordinarily applies only to materials entering into the construction of the road and thereafter invisible except as they survive in tangible results,[99] such as blasting powder or explosives furnished to a contractor and used in preparing the road-bed;[1] but it does not apply to materials which, while used in the doing of the work survive its performance and remain the property of the owner,[2] or which only very remotely enter into the construction of the road,[3] such as materials furnished to be used in the erection of boarding-houses for men and stables for horses;[4] nor, in the absence of a statutory provision to that effect, does it apply to teams[5] or tools[6] used upon the work; or

plant for hotel premises at the instance of a railroad company); Central Trust Co. *v.* Texas, etc., R. Co., 23 Fed. 703.

Digging a well at a stock-yard owned by a railroad company is "work of any kind in the construction or repair of a railroad," for which the laborer is entitled to a lien under Ind. Rev. St. (1894) § 7265. Wabash R. Co. *v.* Achemire, 19 Ind. App. 482, 49 N. E. 835.

Whether the materials were sold to the railroad company or to its contractor is immaterial if they were used in the construction of the railroad. Ozark, etc., Cent. R. Co. *v.* Moran Balt., etc., Mfg. Co., 75 Ark. 106, 86 S. W. 848.

98. Dean *v.* Reynolds, 12 Ind. App. 97, 39 N. E. 763 (work done in grubbing and clearing the right of way essential to the grading and building of the road); Rapauno Chemical Co. *v.* Greenfield, etc., R. Co., 59 Mo. App. 6; Andrews *v.* St. Louis Tunnel R. Co., 16 Mo. App. 299 [*disapproving* Knapp *v.* St. Louis, etc., R. Co., 6 Mo. App. 205].

A contractor who loads ballast belonging to a railroad company on its cars from pits located at the end of a spur whence it is transported and unloaded by the company upon its road-bed in improving and repairing the same is entitled to a lien under Mo. Rev. St. (1889) § 6741, giving a lien to such persons as do the work in improving or constructing a road-bed, if the contract is made with the railroad company, its agents, or contractors. Sweem *v.* Atchison, etc., R. Co., 85 Mo. App. 87.

99. Dudley *v.* Toledo, etc., R. Co., 65 Mich. 655, 32 N. W. 884; Pennsylvania Co. *v.* Mehaffey, 75 Ohio St. 432, 80 N. E. 177, 116 Am. St. Rep. 746; Central Trust Co. *v.* Texas, etc., R. Co., 27 Fed. 178.

1. Rapauno Chemical Co. *v.* Greenfield, etc., R. Co., 59 Mo. App. 6; Schaghticoke Powder Co. *v.* Greenwich, etc., R. Co., 183 N. Y. 306, 76 N. E. 153, 111 Am. St. Rep. 751, 2 L. R. A. N. S. 288; Luttrell *v.* Knoxville, etc., R. Co., (Tenn. 1907) 105 S. W. 565; Hercules Powder Co. *v.* Knoxville, etc., R. Co., 113 Tenn. 382, 83 S. W. 354, 106 Am. St. Rep. 836, 67 L. R. A. 487; Giant Powder Co. *v.* Oregon Pac. R. Co., 42 Fed. 470, 8 L. R. A. 700. *Compare* Indiana Powder Co. *v.* St. Louis, etc., R. Co., 116 Mo. App. 364, 92 S. W. 150, holding that where plaintiff sold blasting powder to a contractor with which to quarry rock from his own land to be broken and delivered to defendant railroad company, and the purpose for which and the place where the rock was to be used, if at all, by the railroad company was not stated in the contract, complainant was not entitled to a lien on the railroad for the value of the powder so furnished under Mo. Rev. St. (1889) § 4239.

2. St. Louis, etc., R. Co. *v.* Love, 74 Ark. 528, 86 S. W. 395; Schaghticoke Powder Co. *v.* Greenwich, etc., R. Co., 183 N. Y. 306, 76 N. E. 153, 111 Am. St. Rep. 751, 2 L. R. A. N. S. 288; Texas, etc., R. Co. *v.* Allen, 1 Tex. App. Civ. Cas. § 568; Frick *v.* Norfolk, etc., R. Co., 86 Fed. 725, 32 C. C. A. 31; Central Trust Co. *v.* Texas, etc., R. Co., 27 Fed. 178.

Illustrations.— Gasoline, gasoline torches, and coal oil used for lighting a railroad tunnel while in process of construction, packing, mattocks, cotton waste, electric light supplies, carts, tools, shovels, spades, blacksmith tools, wagons, scrapers, plows, machines, machinery, derricks, derrick crabs, cables, and repairs for all these, are not lienable, within Tenn. Acts (1883), c. 220, § 3, as amended by Acts (1891), c. 98, § 1. Luttrell *v.* Knoxville, etc., R. Co., (Tenn. 1907) 105 S. W. 565.

3. Carson *v.* Shelton, 107 S. W. 793, 32 Ky. L. Rep. 1083, 15 L. R. A. N. S. 509.

Too remote.— Tableware and commissary supplies furnished to a subcontractor and materials furnished to the workmen in part payment for their labor are not lienable, as the sense in which they enter into the construction of the road is too remote. Luttrell *v.* Knoxville, etc., R. Co., (Tenn. 1907) 105 S. W. 565. Groceries furnished a subcontractor to supply his boarding-house where he boards his laborers, are not "supplies" within Ky. St. (1903) § 2492. Carson *v.* Shelton, 107 S. W. 793, 32 Ky. L. Rep. 1083, 15 L. R. A. N. S. 509. See also Ferguson *v.* Despo, 8 Ind. App. 523, 34 N. E. 575.

4. Stewart-Chute Lumber Co. *v.* Missouri Pac. R. Co., 33 Nebr. 29, 49 N. W. 769, 28 Nebr. 39, 44 N. W. 47; Luttrell *v.* Knoxville, etc., R. Co., (Tenn. 1907) 105 S. W. 565.

5. St. Louis, etc., R. Co. *v.* Love, 74 Ark. 528, 86 S. W. 395; Dudley *v.* Toledo, etc., R. Co., 65 Mich. 655, 32 N. W. 884; Texas, etc., R. Co. *v.* Allen, 1 Tex. App. Civ. Cas. § 568.

6. Luttrell *v.* Knoxville, etc., R. Co., (Tenn. 1907) 105 S. W. 565; Waters-Pierce Oil Co. *v.* U. S., etc., Trust Co., 44 Tex. Civ. App. 397, 99 S. W. 212; Texas, etc., R. Co. *v.* Allen, 1 Tex. App. Civ. Cas. § 568.

to medical services rendered,[7] or clothing or board furnished to laborers;[8] or to lubricating or illuminating oil for running the road;[9] or to food furnished for teams;[10] or to coal consumed in the operation of a steam shovel used by a contractor.[11] The term "labor" applies to manual labor of persons employed.[12] A lien cannot be acquired under such a statute for money expended in acquiring a right of way,[13] paying salaries or expenses of a construction company,[14] paying a commission for guaranteeing a contract of such company,[15] or for hiring teams,[16] or other legal expenses.[17] It is also necessary that, in order that a person may be entitled to such a lien, the labor and materials be furnished in such a manner that the railroad company would be liable to pay the contractor or materialman for them.[18] Such lien does not arise where the labor or material is furnished to a principal contractor in his individual capacity.[19]

(v) *Delivery and Use of Materials.* The lien for materials furnished attaches as soon as the materials are delivered,[20] regardless of whether they are actually used in the construction of the road.[21] But there can be no lien for materials contracted for and prepared but never delivered.[22] Nor can a contractor have a lien for material lost by his negligence, although the title to it had passed to the company.[23]

7. Newgass *v.* Atlantic, etc., R. Co., 56 Fed. 676.

8. Dudley *v.* Toledo, etc., R. Co., 65 Mich. 655, 32 N. W. 884; Newgass *v.* Atlantic, etc., R. Co., 56 Fed. 676.

9. Waters-Pierce Oil Co. *v.* U. S., etc., Trust Co., 44 Tex. Civ. App. 397, 99 S. W. 212; Central Trust Co. *v.* Texas, etc., R. Co., 23 Fed. 703.

10. Dudley *v.* Toledo, etc., R. Co., 65 Mich. 655, 32 N. W. 884; Pennsylvania Co. *v.* Mehaffey, 75 Ohio St. 432, 80 N. E. 177, 116 Am. St. Rep. 746, construing Rev. St. §§ 3208, 3211.

11. Cincinnati, etc., R. Co. *v.* Shera, 36 Ind. App. 315, 73 N. E. 293.

12. Dudley *v.* Toledo, etc., R. Co., 65 Mich. 655, 32 N. W. 884.

The services of a foreman who superintends and directs laborers in the work of construction or repair is within a statute giving "the laborer or other person who shall perform work or labor" a lien for his services. St. Louis, etc., R. Co. *v.* Love, 74 Ark. 528, 86 S. W. 395. See also Ferguson *v.* Despo, 8 Ind. App. 523, 34 N. E. 575.

13. Richmond, etc., Constr. Co. *v.* Richmond, etc., R. Co., 68 Fed. 105, 15 C. C. A. 289, 34 L. R. A. 625.

14. Richmond, etc., Constr. Co. *v.* Richmond, etc., R. Co., 68 Fed. 105, 15 C. C. A. 289, 34 L. R. A. 625.

15. Richmond, etc., Constr. Co. *v.* Richmond, etc., R. Co., 68 Fed. 105, 15 C. C. A. 289, 34 L. R. A. 625.

16. St. Louis, etc., R. Co. *v.* Love, 74 Ark. 528, 86 S. W. 395.

17. Richmond, etc., Constr. Co. *v.* Richmond, etc., R. Co., 68 Fed. 105, 15 C. C. A. 289, 34 L. R. A. 625.

18. Central Trust Co. *v.* Bridges, 57 Fed. 753, 6 C. C. A. 539, holding that the fact that the money obtained on a draft given by a railroad company to its principal contractor for construction of its road was used by him to pay for the labor and material will not create a labor or materialman's lien on the railroad in favor of the holder of the draft.

Materials furnished to a contractor for, and used by him in the construction of, a railroad are to be regarded as furnished to the railroad company. Heltzell *v.* Chicago, etc., R. Co., 77 Mo. 315.

19. Central Trust Co. *v.* Bridges, 57 Fed. 753, 6 C. C. A. 539.

20. Stewart-Chute Lumber Co. *v.* Missouri Pac. R. Co., 28 Nebr. 39, 44 N. W. 47; Central Trust Co. *v.* Richmond, etc., R. Co., 68 Fed. 90, 15 C. C. A. 273, 41 L. R. A. 458; Central Trust Co. *v.* Chicago, etc., R. Co., 54 Fed. 598.

21. Stewart-Chute Lumber Co. *v.* Missouri Pac. R. Co., 28 Nebr. 39, 44 N. W. 47 (holding that such lien attaches immediately upon the furnishing of the material to the subcontractor, in good faith by the materialman, and that it is not necessary to allege or prove the actual application of such material to the purpose intended); Luttrell *v.* Knoxville, etc., R. Co., (Tenn. 1907) 105 S. W. 565; Westinghouse Air Brake Co. *v.* Kansas City Southern R. Co., 137 Fed. 26, 71 C. C. A. 1 [*reversing* 128 Fed. 129, 129 Fed. 455] (holding that the furnishing to a railroad company of proper materials for the construction of its road or equipment is sufficient to sustain a mechanic's lien under Mo. Rev. St. (1899) § 4239 *et seq.*, without proof of their application for that purpose); Central Trust Co. *v.* Chicago, etc., R. Co., 54 Fed. 598.

That only a portion of the material furnished is used will not prevent a lien attaching for the whole amount delivered. Neilson *v.* Iowa Eastern R. Co., 51 Iowa 184, 1 N. W. 434, 33 Am. Rep. 124, 51 Iowa 714, 3 N. W. 779.

22. Richmond, etc., Constr. Co. *v.* Richmond, etc., R. Co., 68 Fed. 105, 15 C. C. A. 289, 34 L. R. A. 625.

23. Richmond, etc., Constr. Co. *v.* Richmond, etc., R. Co., 68 Fed. 105, 15 C. C. A. 289, 34 L. R. A. 625.

(VI) *PROPERTY COVERED BY LIEN.* As a general rule a statutory lien for labor and materials furnished to a railroad company attaches to the entire road;[24] and cannot be enforced against a separate part of the road,[25] although such part may be all of the road which the lienor constructed or aided to construct.[26] This rule, however, is subject to the modification that the lien extends only to the completed portion of the road,[27] and not to a projected portion to be completed thereafter;[28] but the fact that the road as projected when the labor and materials are furnished is not fully completed will not defeat the lien.[29] Likewise the lien extends only to the interest in the road of the company by which the laborer or mechanic is employed.[30] Except where the statute provides otherwise,[31] such lien attaches only to real estate,[32] and does not attach to the rolling stock and

24. *California.*— Cox *v.* Western Pac. R. Co., 44 Cal. 18, holding that a contractor who grades a section only of the road cannot file a lien on that section alone.

Georgia.— Farmers' L. & T. Co. *v.* Candler, 87 Ga. 241, 13 S. E. 560.

Indiana.— Farmers' L. & T. Co. *v.* Canada, etc., R. Co., 127 Ind. 250, 26 N. E. 784, 11 L. R. A. 740 (holding that where a lien is obtained by laborers and materialmen against a railroad running continuously through several counties by filing such a notice as the law requires in one county, the lien extends to the proceeds of a sale of the entire road); Midland R. Co. *v.* Wilcox, 122 Ind. 84, 23 N. E. 506; Louisville, etc., R. Co. *v.* Boney, 117 Ind. 501, 20 N. E. 432, 3 L. R. A. 435.

Missouri.— Bagnell Timber Co. *v.* Missouri, etc., R. Co., 180 Mo. 420, 79 S. W. 1130; Cranston *v.* Union Trust Co., 75 Mo. 29. Mo. Rev. St. (1887) c. 102, art. 4, giving a lien for labor and material expended in constructing a railroad on "the roadbed, station houses, depots, bridges, rolling stock, real estate and improvements of such railroad," covers the company's railroad within the state whatever the stage of its construction, length of its route, or number of counties through which it is located and includes its right of way. Bethune *v.* Cleveland, etc., R. Co., 149 Mo. 587, 51 S. W. 465.

United States.— Central Trust Co. *v.* Wabash, etc., R. Co., 30 Fed. 332.

See 41 Cent. Dig. tit. "Railroads," § 491.

Compare Adams *v.* Grand Island, etc., R. Co., 12 S. D. 424, 81 N. W. 960, 10 S. D. 239, 72 N. W. 577.

That some of the lines of a railroad's system have been paying and others not does not justify a casting of the entire burden of such lien upon the latter. Central Trust Co. *v.* Wabash, etc., R. Co., 30 Fed. 332.

Under the mechanics' lien law of Oregon a subcontractor who performs work in building an extension of a railroad may claim and enforce a lien therefor upon such extension only, and the fact that he does not include in his claim the entire road of the company does not violate any public policy of the state, or give the company any ground to object to his claim. Ban *v.* Columbia Southern R. Co., 117 Fed. 21, 54 C. C. A. 407 [*reversing* 109 Fed. 499].

25. Farmers' L. & T. Co. *v.* Candler, 87 Ga. 241, 13 S. E. 560; Graham *v.* Mt. Sterling Coalwood Co., 14 Bush (Ky.) 425, 29 Am. Rep. 412; Cranston *v.* Union Trust Co., 75 Mo. 29 (not against so much of the road only as is benefited by the labor); Knapp *v.* St. Louis, etc., R. Co., 74 Mo. 374 [*affirming* 6 Mo. App. 205]. *Compare* Waters-Pierce Oil Co. *v.* U. S., etc., Trust Co., 44 Tex. Civ. App. 397, 99 S. W. 212 (holding that under Const. art. 16, § 37, and Sayles Rev. Civ. St. art. 3294, the lien attaches only on the particular building or article made or repaired with the material furnished); Central Trust Co. *v.* Georgia Pac. R. Co., 83 Fed. 386 (holding that if railroad contractors have a lien under the Mississippi statute superior to an earlier mortgage such superiority is limited to the embankments and structures actually made by them as distinguished from the land and right of way).

26. Farmers' L. & T. Co. *v.* Candler, 87 Ga. 241, 13 S. E. 560.

27. Nielson *v.* Iowa Eastern R. Co., 51 Iowa 184, 1 N. W. 434, 33 Am. Rep. 124, 51 Iowa 714, 3 N. W. 779.

28. Nielson *v.* Iowa Eastern R. Co., 51 Iowa 184, 1 N. W. 434, 33 Am. Rep. 124, 51 Iowa 714, 3 N. W. 779.

29. Nielson *v.* Iowa Eastern R. Co., 51 Iowa 184, 1 N. W. 434, 33 Am. Rep. 124, 51 Iowa 714, 3 N. W. 779.

30. Breed *v.* Nagle, 46 Ga. 112, holding that the lien given by the act of 1869 to laborers or mechanics for labor and material furnished in the construction of a railroad extends only to the interest in the road of the company by which the laborer or mechanic is employed; and if that company is a lessee of the railroad the lien extends only to his interest as such.

31. Brown *v.* Buck, 54 Ark. 453, 16 S. W. 195, holding that under the act of March 19, 1887, any one who furnishes materials to build any railroad is entitled to a lien upon the road-bed, equipment, or appurtenances of the road, irrespective of whether it is owned by an incorporated company, a firm, or individuals in common.

Under Va. Code, § 2485, one who furnishes supplies necessary to the operation of a railway has "a prior lien on the franchise, gross earnings, and on all the real and personal property" of the road, upon condition that the claim be recorded as required by section 2486. Newgass *v.* Atlantic, etc., R. Co., 56 Fed. 676.

32. See Nielson *v.* Iowa Eastern R. Co., 51 Iowa 714, 3 N. W. 779.

other movables belonging to the company,[33] nor does it attach to the franchise of the company.[34]

(VII) *AMOUNT, COMMENCEMENT, AND DURATION OF LIEN.* The commencement and duration of such lien is regulated by the statute.[35] Ordinarily the lien originates as an incipient or inchoate lien with the beginning of the work,[36] or with the delivery of the materials,[37] and continues as such until perfected, in the manner prescribed, such as by the filing of notice,[38] or until it is lost by a failure to comply with such requirements within the prescribed time.[39] The amount of such lien in favor of a person other than the principal contractor under some statutes is measured by the reasonable value of the labor and materials furnished regardless of the price agreed upon between the claimant and the contractor,[40] and payment to the contractor, after the lien claimant has perfected his lien by filing notice or otherwise, will not defeat his rights.[41] Under other statutes, however, the lien of a subcontractor is limited to the price agreed upon to be paid by the company to the original contractor,[42] and shall not in any case

33. Nielson *v.* Iowa Eastern R. Co., 51 Iowa 184, 1 N. W. 434, 33 Am. Rep. 124; New England Car Spring Co. *v.* Baltimore, etc., R. Co., 11 Md. 81, 69 Am. Dec. 181; Texas, etc., R. Co. *v.* Allen, 1 Tex. App. Civ. Cas. § 568.

34. Nielson *v.* Iowa Eastern R. Co., 51 Iowa 714, 3 N. W. 779; Bethune *v.* Cleveland, etc., R. Co., 149 Mo. 537, 51 S. W. 465.

35. Brown *v.* Buck, 54 Ark. 453, 16 S. W. 195, holding that the lien under the act of March 19, 1887, continues against the owners of a railroad for the space of one year after it accrues whether the ownership is acquired before or after the lien attached. And see the statutes of the several states.

In Illinois, under Hurd Rev. St. (1899) c. 82, § 14, relating to railroad liens and providing that the lien created shall continue for three months from the time of the performance of the subcontract, or doing of the work, or furnishing the material, except when suit shall be commenced by petition, where, in a suit by a subcontractor having a lien to enforce payment upon material furnished the contractor, it appears that the material was furnished in January, 1900, and the contractors who were necessary parties were not made parties until December 19, the right to the lien is lost, as a suit as to parties brought in by amendment is begun only from the time of the amendment. Atlantic Dynamite Co. *v.* Baltimore, etc., R. Co., 101 Ill. App. 13.

36. St. Louis, etc., R. Co. *v.* Kerr, 153 Ill. 182, 38 N. E. 638; Delaware R. Constr. Co. *v.* Davenport, etc., R. Co., 46 Iowa 406; Central Trust Co. *v.* Richmond, etc., R. Co., 68 Fed. 90, 15 C. C. A. 273, 41 L. R. A. 458.

37. See *supra*, VIII, A, 6, i, (v).

38. Central Trust Co. *v.* Richmond, etc., R. Co., 68 Fed. 90, 15 C. C. A. 273, 41 L. R. A. 458, construing Barbour & C. St. Ky. §§ 2492-2495. And see *infra*, VIII, A, 6, i, (XI).

The lien of a subcontractor of railroad work attaches, under the statute, when the work is commenced, and continues until it is finished, but the same remains inchoate until the notice required by the statute is given. St. Louis, etc., R. Co. *v.* Kerr, 153 Ill. 182, 38 N. E. 638.

39. St. Louis, etc., R. Co. *v.* Kerr, 153 Ill. 182, 38 N. E. 638 (holding that the provision in Rev. St. § 57, c. 82, that no subcontractor's lien "shall attach" until notice shall have been served as required in that section, means that the inchoate lien will cease, and not become a fixed lien, if the notice is not given); Central Trust Co. *v.* Richmond, etc., R. Co., 68 Fed. 90, 15 C. C. A. 273, 41 L. R. A. 458.

40. Morris *v.* Louisville, etc., R. Co., 123 Ind. 489, 24 N. E. 335; Chapman *v.* Elgin, etc., R. Co., 11 Ind. App. 632, 39 N. E. 289.

41. Indiana, etc., R. Co. *v.* Larrew, 130 Ind. 368, 30 N. E. 517; Central Trust Co. *v.* Richmond, 68 Fed. 90, 15 C. C. A. 273, 41 L. R. A. 458.

42. Ban *v.* Columbia Southern R. Co., 109 Fed. 499, construing Oreg. Law (1889), p. 75.

Payments to subcontractors, where their claims exceed the whole price payable to the principal contractor, are primarily applicable to that part of their claims which cannot be secured by their *pro rata* liens (Central Trust Co. *v.* Richmond, etc., R. Co., 68 Fed. 90, 15 C. C. A. 273, 41 L. R. A. 458), and in the absence of fraud, the fact that a bargain between a contractor and a subcontractor is a hard one is no reason for applying a different rule (Richmond, etc., Constr. Co. *v.* Richmond, etc., R. Co., 68 Fed. 105, 15 C. C. A. 289, 34 L. R. A. 625).

In estimating the value of the contract price to be paid to a contractor in stock and bonds for the purpose of limiting the liens of subcontractors, the market value of such bonds and stock should be taken (Central Trust Co. *v.* Richmond, etc., R. Co., 68 Fed. 90, 15 C. C. A. 273, 41 L. R. A. 458); and a value given to the bonds by the use of the stock in connection with them may be taken into account (Central Trust Co. *v.* Richmond, etc., R. Co., 68 Fed. 90, 15 C. C. A. 273, 41 L. R. A. 458); and where the railroad company has agreed with the contractor to pay certain interest on such bonds, such interest should be deducted (Central Trust Co. *v.* Richmond, etc., R. Co., *supra*).

exceed the amount due from the railroad company to the principal contractor,[43] at the time of the service of notice on the company by the subcontractor,[44] or at the time the bill of items of the labor and material furnished is furnished to the company;[45] and if there is nothing due to the lien claimants' contractor at the time the lien cannot be enforced against the railroad.[46] Where there are several subcontractors entitled to liens, the amount due to the principal contractor should be apportioned among all of them according to the whole amount of their lienable claims, whether actually perfected or not.[47]

(VIII) *LOCALITY OF ROAD AND PLACE OF CONTRACT.* The right to such lien is not confined to one county where the labor or material is furnished in two or more counties; but it fastens upon the entire and continuous line of the road and may be enforced in any of the counties through which the road runs.[48] Nor under some statutes is it essential to the enforcement of the lien within a particular state that the labor be performed or the materials delivered within that state.[49]

(IX) *CONTRACTS SUPPORTING LIEN.* A contract such as is required to support a laborer's or mechanic's lien need not be express or in writing, but may be oral or implied.[50] But such a lien, being a creature of the statute, cannot owe its existence to an agreement alone.[51]

43. Sweem *v.* Atchison, etc., R. Co., 85 Mo. App. 87 (holding that the charge of a subcontractor suing for a lien must not be greater than that of the original contractor, but the railroad company, to secure the protection of the statute, must interpose such matter as a defense, and the subcontractor need not allege or prove that his charge is not greater than that of his principal); Adams *v.* Grand Island, etc., R. Co., 10 S. D. 239, 72 N. W. 577, 12 S. D. 424, 81 N. W. 960; Ban *v.* Columbia Southern R. Co., 109 Fed. 499.

44. Coleman *v.* Oregonian R. Co., 25 Oreg. 286, 35 Pac. 656; Central Trust Co. *v.* Bridges, 57 Fed. 753, 6 C. C. A. 539.

45. Dudley *v.* Toledo, etc., R. Co., 65 Mich. 655, 32 N. W. 884.

46. Nash *v.* Chicago, etc., R. Co., 62 Iowa 49, 17 N. W. 106; Roland *v.* Centerville, etc., R. Co., 61 Iowa 380, 16 N. W. 355; Congdon, etc., Hardware Co. *v.* Grand Island, etc., R. Co., 14 S. D. 575, 86 N. W. 633 (holding that where plaintiff who furnished supplies to a subcontractor fails to file his statements for a lien within the statutory period, and the contractor fully pays the subcontractor, the statute does not entitle plaintiff to a lien against the railroad, although the company has not paid the contractor); Central Trust Co. *v.* Bridges, 57 Fed. 753, 6 C. C. A. 539.

47. Central Trust Co. *v.* Richmond, etc., R. Co., 68 Fed. 90, 15 C. C. A. 273, 41 L. R. A. 458.

48. Midland R. Co. *v.* Wilcox, 122 Ind. 84, 12 N. E. 506, holding that under the act of July 18, 1885 (Elliott Suppl. §§ 1699–1704), providing that the lien shall be on the railroad within the "county" in which the labor and material is performed and furnished, the legislature did not intend to limit the lien to a single county, and that where the work extends into two or more counties it may be enforced in any one of the counties as to the entire line of unfinished road.

49. Thompson *v.* St. Paul City R. Co., 45 Minn. 13, 47 N. W. 259 (so construing Gen. St. (1878) c. 90, § 1); Carnegie *v.* Lancaster, etc., R. Co., 3 Ohio S. & C. Pl. Dec. 343, 1 Ohio N. P. 300 (holding that one furnishing material for the construction of a railroad within the state under a contract with the company or the contractor, by the terms of which the material is delivered outside of the state, is entitled to a lien on the road).

Under Mo. St. (Rev. St. (1899) § 4239), however, providing that persons doing work or furnishing ties, etc., for a railroad company shall have a lien on the property of the company, it is held that a person furnishing ties in another state which are used outside of Missouri is not entitled to a lien on the property of the railroad company in the state. Bagnell Timber Co. *v.* Missouri, etc., R. Co., 180 Mo. 420, 79 S. W. 1130 [*overruling* St. Louis Bridge, etc., Co. *v.* Memphis, etc., R. Co., 72 Mo. 664].

Under the Arkansas statute (Kirby Dig. § 666) a materialman is entitled to a lien for so much of the material as is furnished and used in that state. Midland Valley R. Co. *v.* Moran Bolt, etc., Mfg. Co., 80 Ark. 399, 97 S. W. 679.

50. Nielson *v.* Iowa Eastern R. Co., 51 Iowa 184, 1 N. W. 434, 33 Am. Rep. 124, holding this to be true under Rev. St. § 1846, giving a mechanic's lien for material furnished "under or by virtue of a contract."

51. Texas, etc., R. Co. *v.* McCaughey, 62 Tex. 271 (holding that an agreement to which the laborer is not a party made between a railroad company and a contractor that board furnished the laborer by the contractor shall be deducted from his wages and constitute a lien upon the property of the company does not give a contractor a laborer's lien); Gulf, etc., R. Co. *v.* Winder, 26 Tex. Civ. App. 263, 63 S. W. 1043 (holding that the fact that the railroad company's contract with a construction company for

(x) *Persons Entitled to Liens* — (a) *In General.* The persons entitled to claim a statutory lien for labor done or material furnished depends upon the wording of the particular statute under which the lien is claimed,[52] and unless the claimant is within the class designated by the statutory provision under which he claims a lien, he is not entitled to such lien.[53] Some statutes extend to contractors and subcontractors furnishing work and labor as well as to those actually performing labor.[54] Under other statutory provisions, however, a distinction is clearly marked between those who contract for labor and material and the persons who actually perform labor and actually furnish material;[55] some of the provisions of such statutes extending only to laborers or mechanics who actually do the work or furnish the material,[56] and not to a contractor or subcontractor who merely furnishes labor or materials and does not perform any labor or work personally.[57] Under some statutes no one is entitled to a lien unless his contract is directly with the railroad company,[58] or unless there is some privity between him and the railroad company,[59] even though the labor or supplies furnished inure to the benefit of the company.[60] A mere creditor of one entitled to such a lien has no right to the lien, although money loaned by him may have been used to furnish the materials supplied to the railroad company.[61]

(b) *Who Are Contractors.* A contractor within the meaning of a statutory provision giving such lien to contractors is one who furnishes labor or materials under a contract directly with the railroad company or through a duly authorized officer or agent.[62]

work done in the construction of its roadbed provided that payment therefor was not to be made until the bonds of the railroad company were "sold or hypothecated" does not affect the right of laborers to a lien given by Rev. St. arts. 3312, 3313, where such provision is not contained in the contract between such laborers and the construction company).

52. See Van Frank *v.* St. Louis, etc., R. Co., 93 Mo. App. 412, 67 S. W. 688.

Under Mo. Rev. St. (1889) § 6741, and Rev. St. (1899) § 4239, providing that "all persons" performing any work or furnishing any material under contract with the railroad company in constructing or improving the road, bridges, etc., of such company, shall have a lien therefor on the railroad property, a civil engineer who surveyed and staked out a railroad and then superintended the building of the road is entitled to a lien for his salary (Van Frank *v.* St. Louis, etc., R. Co., 93 Mo. App. 412, 67 S. W. 688), as is also a foreman, for his wages, who directs the work of laborers in improving a railroad (Sweem *v.* Atchison, etc., R. Co., 85 Mo. App. 87).

53. Tucker *v.* St. Louis, etc., R. Co., 59 Ark. 81, 26 S. W. 375; Templin *v.* Chicago, etc., R. Co., 73 Iowa 548, 35 N. W. 634.

The general superintendent of a railroad and a construction company, working on a salary, has no lien for services rendered while the company was constructing the road, he not being a mechanic or a contractor within the lien law. McDonald *v.* Charleston, etc., R. Co., 93 Tenn. 281, 24 S. W. 252.

54. Couper *v.* Gaboury, 69 Fed. 7, 16 C. C. A. 112, construing the Florida act of June 3, 1887.

55. Savannah, etc., R. Co. *v.* Callahan, 49 Ga. 506; Chicago, etc., R. Co. *v.* Sturgis, 44 Mich. 538, 7 N. W. 213.

56. Ozark, etc., R. Co. *v.* Moran Bolt, etc., Co., 75 Ark. 106, 86 S. W. 848; St. Louis, etc., R. Co. *v.* Love, 74 Ark. 528, 86 S. W. 395; Little Rock, etc., R. Co. *v.* Spencer, 65 Ark. 183, 47 S. W. 196, 42 L. R. A. 334; Breed *v.* Nagle, 46 Ga. 112; Eastern Texas R. Co. *v.* Davis, 37 Tex. Civ. App. 342, 83 S. W. 883; Gulf, etc., R. Co. *v.* Winder, 26 Tex. Civ. App. 263, 63 S. W. 1043.

57. Little Rock, etc., R. Co. *v.* Spencer, 65 Ark. 183, 47 S. W. 196, 42 L. R. A. 334; Eastern Texas R. Co. *v.* Davis, 37 Tex. Civ. App. 342, 83 S. W. 883, holding that a subcontractor for certain railroad construction work who agreed to distribute certain ties for the contractor, and thereafter did a large part of the work by hired hands, is only entitled to a lien under Rev. St. (1895) arts. 3312, 3313, for ties distributed by the personal use of his own team. See also Bartlett *v.* Patterson, 9 Ohio Dec. (Reprint) 73, 10 Cinc. L. Bul. 367; and *infra*, VIII, A, 6, i, (x), (c).

58. Arbuckle *v.* Illinois, etc., R. Co., 81 Ill. 429.

59. Tucker *v.* St. Louis, etc., R. Co., 59 Ark. 81, 26 S. W. 375; Howard *v.* Moore, 20 Fla. 163; Richardson *v.* Norfolk, etc., R. Co., 37 W. Va. 641, 17 S. E. 195.

60. Tucker *v.* St. Louis, etc., R. Co., 59 Ark. 81, 26 S. W. 375.

61. Fowler *v.* Buffalo, etc., R. Co., Sheld. (N. Y.) 525 (holding that under Laws (1871), c. 872, § 5, and Laws (1870), c. 529, a creditor of a subcontractor cannot acquire a lien on bridges and trestle work erected for a railroad); Mellon *v.* Morristown, etc., R. Co., (Tenn. Ch. App. 1895) 35 S. W. 464.

62. Templin *v.* Chicago, etc., R. Co., 73

(c) *Mechanics and Persons Performing Labor.* As to who is a laborer or employee within the meaning of these statutes also depends upon the wording of the particular statute.[63] Ordinarily, however, the term as used in these statutes includes only persons other than officers, managers, or general superintendents,[64] who actually perform manual work and labor,[65] in the construction, repair, or operation of the road,[66] but has been held to include the foreman or superintendent of a gang of laborers engaged in construction or repair work,[67] a civil engineer,[68] or a bookkeeper;[69] but it has been held not to extend to one

Iowa 548, 35 N. W. 634 (holding that where one railroad company sells its road to another before completion and agrees with the president of the latter to complete the same, the seller is a contractor); Hearne *v.* Chillicothe, etc., R. Co., 53 Mo. 224 (holding that a person furnishing material to a railroad company under a contract with its president is a general contractor within the meaning of the Mechanics' Lien Law); Central Trust Co. *v.* Bridges, 57 Fed. 753, 6 C. C. A. 539 (holding that under the Tennessee act of March 29, 1883, relating to railroad contractor's liens, the contractor must deal directly with the company in order to secure a lien for work or material).

A contractor with a construction company, which as far as creditors are concerned is in fact the same as the railroad company, is entitled to a lien as an original contractor with the railroad company. Wick *v.* Ft. Plain, etc., R. Co., 27 N. Y. App. Div. 577, 50 N. Y. Suppl. 479; McDonald *v.* Charleston, etc., R. Co., 93 Tenn. 281, 24 S. W. 252.

Engineers who are engaged in laying out a railroad under a contractor whose contract provides that the railroad company shall pay for their services are entitled to have liens as contractors against the railroad company. Central Trust Co. *v.* Condon, 67 Fed. 84, 14 C. C. A. 314.

A contractor whose contract has been set aside at the suit of the railroad company as *ultra vires,* but who has been allowed compensation for work actually done under the contract, is entitled to a mechanic's lien under the Pennsylvania resolution of Jan. 21, 1843. New Castle, etc., R. Co. *v.* Simpson, 26 Fed. 133.

Where one railroad company assumes the management of another, all the earnings of both being deposited in a common fund from which all expenses of both are paid, the former is not a supplier of materials or a contractor with the latter so as to be entitled to a lien on the property of the latter for the amount expended by it over and above the amount received from it, as any such excess is only an advance of money. U. S. Trust Co. *v.* Western Contract Co., 81 Fed. 454, 26 C. C. A. 472.

63. Bladen *v.* Marietta, etc., R. Co., 97 Tenn. 392, 37 S. W. 135, holding that cooks for a crew building a railroad bridge are entitled to a lien under Tenn. Act (1891), p. 215, c. 98. And see cases cited *infra,* notes 64–75.

64. Wick *v.* Ft. Plain, etc., R. Co., 27 N. Y. App. Div. 577, 50 N. Y. Suppl. 479; McDonald *v.* Charleston, etc., R. Co., 93 Tenn. 281, 24 S. W. 252.

65. Mornan *v.* Carroll, 35 Iowa 22 (holding that under Revision (1860), § 1869, a day laborer employed upon the construction of a railroad can establish a mechanic's lien for his wages); Balch *v.* New York, etc., R. Co., 46 N. Y. 521; Wick *v.* Ft. Plain, etc., R. Co., 27 N. Y. App. Div. 577, 50 N. Y. Suppl. 479; Gilchrist *v.* Helena Hot Springs, etc., R. Co., 58 Fed. 708 (holding that persons who occupy the position of managing agent and superintendent of trains, but who also on occasion run trains, clean cars, repair tracks, or act as "general utility" men must be considered as performing work and labor within Mont. Comp. St. c. 25, § 707).

66. St. Louis, etc., R. Co. *v.* Mathews, 75 Tex. 92, 12 S. W. 976.

Under a Texas statute (Sayles Civ. St. art. 3179*a*) the word "laborer" means one who performs manual services in the construction, repair, or operation contemplated by the statute, and does not embrace one who may work in preparing ties or other materials to be used in the construction of the road. St. Louis, etc., R. Co. *v.* Mathews, 75 Tex. 92, 12 S. W. 976; St. Louis, etc., R. Co. *v.* Lyle, 6 Tex. Civ. App. 753, 26 S. W. 264. Sayles Annot. Civ. St. (1897) art. 3312, giving a prior lien to laborers, etc., performing labor or working with teams or otherwise in the operation or repair of a railroad, includes persons who clear weeds, grass, and bushes off a right of way with their own labor, and who take down and put up a right of way fence. Missouri, etc., R. Co. *v.* Bryan, (Tex. Civ. App. 1908) 107 S. W. 572.

67. St. Louis, etc., R. Co. *v.* Love, 74 Ark. 528, 86 S. W. 395; Sweem *v.* Atchison, etc., R. Co., 85 Mo. App. 87; Texas, etc., R. Co. *v.* Allen, 1 Tex. App. Civ. Cas. § 568.

68. Wick *v.* Ft. Plain, etc., R. Co., 27 N. Y. App. Div. 577, 50 N. Y. Suppl. 479. But see Pennsylvania, etc., R. Co. *v.* Leuffer, 84 Pa. St. 168, 24 Am. Rep. 189 [*reversing* 11 Phila. 548]; Gulf, etc., R. Co. *v.* Berry, 31 Tex. Civ. App. 408, 72 S. W. 1049, holding that a civil engineer is not entitled to a lien for wages earned by him in the construction of a railroad under Texas Rev. St. art. 3312, being neither a mechanic, laborer, nor operator.

"All persons who perform labor or furnish labor" as used in Ky. Laws (1888), embraces the services of a civil engineer who actually superintended and directed the construction of the work. Central Trust Co. *v.* Richmond, etc., R. Co., 54 Fed. 723.

69. Wick *v.* Ft. Plain, etc., R. Co., 27 N. Y.

who merely has charge of the company's office and of the receipts and keeps in a book the time of the workmen as handed to him.[70] Nor does the term "laborer" extend to contractors or subcontractors who supply laborers and teams,[71] even though they personally expend labor with that of the laborers employed by them;[72] but such contractor or subcontractor must rely upon the statute giving a lien in favor of persons furnishing labor or material.[73] A teamster is a laborer so far as his own personal services are concerned,[74] but has been held not to be such as respects the use of his team.[75]

(D) *Subcontractors and Persons Dealing With Them.* A subcontractor within the meaning of these statutes is one who furnishes labor or material under a contract with the principal contractor;[76] and to acquire a lien he must bring himself within the statute providing for subcontractors,[77] and can have no lien under a statute providing for contractors only.[78] A subcontractor's lien under some statutes is independent of that of the principal contractor or of its waiver or loss.[79] Some statutes, while including subcontractors or persons furnishing labor or material to the principal contractor, do not embrace one who furnishes labor or materials under a contract with a subcontractor.[80] Under other statutes, how-

App. Div. 577, 50 N. Y. Suppl. 479, working for daily or monthly wages. But see Milligan *v.* San Antonio, etc., R. Co., (Tex. Civ. App. 1898) 46 S. W. 918, holding that under Rev. St. (1895) art. 3312, a bookkeeper and auditor in the employ of a construction company which built a railroad is not a laborer, mechanic, or operative and is therefore not entitled to a lien thereon for the amount due him for his services.

A bookkeeper for a crew building a railroad bridge is entitled to a lien under Tenn. Act (1891), p. 215, c. 98, declaring that every person who performs any part of the work in grading any railroad roadway or aids in the construction of its bridges, etc., or who performs any valuable services, manual or professional, by which any railroad receives a benefit, shall have a lien. Bladen *v.* Marietta, etc., R. Co., 97 Tenn. 392, 37 S. W. 135.

70. Gilchrist *v.* Helena Hot Springs, etc., R. Co., 58 Fed. 708.

71. Chicago, etc., R. Co. *v.* Sturgis, 44 Mich. 538, 7 N. W. 213; Balch *v.* New York, etc., R. Co., 46 N. Y. 521; Central, etc., R. Co. *v.* Henning, 52 Tex. 466; Tyler Tap R. Co. *v.* Discol. 52 Tex. 13; Tod *v.* Kentucky Union R. Co., 52 Fed. 241, 3 C. C. A. 60, 18 L. R. A. 305.

A contractor or subcontractor procuring railroad construction work to be done through the labor of others is not within Tex. Rev. St. (1895) arts. 3312, 3313, imposing a lien on railroad property for the protection of laborers and mechanics who may perform labor with teams or tools in its construction or repair. Eastern Texas R. Co. *v.* Davis, 37 Tex. Civ. App. 342, 83 S. W. 883. Nor do such statutes give a lien to a subcontractor or one who lets teams to a contractor to use on the railroad, in payment of a debt owing the contractor, who continued to use them after the debt was paid. Eastern Texas R. Co. *v.* Foley, 30 Tex. Civ. App. 129, 69 S. W. 1030. Nor was such a contractor or subcontractor entitled to a lien under Rev. Civ. St. art. 3179*a*. Krakauer *v.* Locke, 6 Tex. Civ. App. 446, 25 S. W. 700; Parks *v.* Locke, (Tex. Civ. App. 1894) 25 S. W. 702.

72. Rogers *v.* Dexter, etc., R. Co., 85 Me. 372, 27 Atl. 257, 21 L. R. A. 528.

73. Tod *v.* Kentucky Union R. Co., 52 Fed. 41, 3 C. C. A. 60, 18 L. R. A. 305.

74. Mann *v.* Burt, 35 Kan. 10, 10 Pac. 95.

75. Mann *v.* Burt, 35 Kan. 10, 10 Pac. 95 (holding that if a price is fixed for the joint labor of the teamster and team the debt is indivisible and the company is not chargeable therefor); Balch *v.* New York, etc., R. Co., 46 N. Y. 521. But see Chicago, etc., R. Co. *v.* Sturgis, 44 Mich. 538, 7 N. W. 213; Missouri, etc., R. Co. *v.* Bryan, (Tex. Civ. App. 1908) 107 S. W. 572; Eastern Texas R. Co. *v.* Davis, 37 Tex. Civ. App. 342, 83 S. W. 883 (under Rev. St. (1895) arts. 3312, 3313); Eastern Texas R. Co. *v.* Foley, 30 Tex. Civ. App. 129, 69 S. W. 1030.

76. Templin *v.* Chicago, etc., R. Co., 73 Iowa 548, 35 N. W. 634.

A day laborer employed by and a man who furnishes material to a contractor for railroad construction are not subcontractors within the meaning of the lien law. Farmers' L. & T. Co. *v.* Canadian, etc., R. Co., 127 Ind. 250, 26 N. E. 784, 11 L. R. A. 740.

77. Templin *v.* Chicago, etc., R. Co., 73 Iowa 548, 35 N. W. 634.

78. Tucker *v.* St. Louis, etc., R. Co., 59 Ark. 81, 26 S. W. 375 (holding that a subcontractor has no lien under Laws (1887), p. 96, giving a lien to contractors and certain others who work and labor in the construction of a railroad); Cartter *v.* Rome, etc., Constr. Co., 89 Ga. 158, 15 S. E. 36; Richardson *v.* Norfolk, etc., R. Co., 37 W. Va. 641, 17 S. E. 195.

79. Central Trust Co. *v.* Richmond, etc., R. Co., 68 Fed. 90, 15 C. C. A. 273, 41 L. R. A. 458.

80. Howard *v.* Moore, 20 Fla. 163; Cairo, etc., R. Co. *v.* Watson, 85 Ill. 531; Smith Bridge Co. *v.* Louisville, etc., Air Line R. Co., 72 Ill. 506; Utter *v.* Crane, 37 Iowa 631; Central Trust Co. *v.* Richmond, etc., R. Co., 54 Fed. 723, construing Ky. Laws (1888).

ever, the lien is extended to subcontractors of the second,[81] or even third degree,[82] and to persons doing labor for or furnishing material to either of these.[83]

(E) *Assignees or Purchasers of Claims.* In some jurisdictions it is held that such a lien is a personal right that is not assignable at law;[84] nor in such jurisdictions can one acquire such lien by paying off the lien claims and taking up the certificates of indebtedness,[85] even though he does so at the request of the railroad company.[86] In other jurisdictions, however, it is held that, in the absence of statute to that effect, the right to such a lien is not a mere personal privilege, but that the lien may be assigned so as to entitle the assignee to enforce it under the statute;[87] and hence that the lien passes with an assignment of the contract or certified evidences of the lien indebtedness,[88] such as laborers' time checks.[89] Under some statutes it is held that where the lien is inchoate, all the statutory requirements not having been complied with, it cannot be assigned so as to entitle

81. *Arkansas.*— Midland Valley R. Co. *v.* Moran Bolt, etc., Mfg. Co., 80 Ark. 399, 97 S. W. 679; St. Louis, etc., R. Co. *v.* Love, 74 Ark. 528, 86 S. W. 395. See St. Louis, etc., R. Co. *v.* Henry, (1905) 86 S. W. 841; St. Louis, etc., R. Co. *v.* Rogers, 72 Ark. 270, 79 S. W. 794; Choctaw, etc., R. Co. *v.* Speer Hardware Co., 71 Ark. 126, 71 S. W. 267, holding that under the act of March 31, 1899, no lien is given for supplies to employees of subcontractors not in privity with the railroad company.

Indiana.— Pere Marquette R. Co. *v.* Smith, 36 Ind. App. 439, 74 N. E. 545.

Minnesota.— Spafford *v.* Duluth, etc., R. Co., 48 Minn. 515, 51 N. W. 469, under Mechanic's Lien Law as amended in 1874.

Texas.— Austin, etc., R. Co. *v.* Daniels, 62 Tex. 70.

Wisconsin.— Mundt *v.* Sheboygan, etc., R. Co., 31 Wis. 451.

See 41 Cent. Dig. tit. "Railroads," § 498.

One who lets his team and teamster to a subcontractor to do work in constructing a railroad is entitled to a lien under Minn. St. (1889) c. 200, § 3. Perry *v.* Duluth Transfer R. Co., 56 Minn. 306, 57 N. W. 792.

82. Eccleston *v.* Hetting, 17 Mont. 88, 42 Pac. 105, holding that where parties contracted to furnish ties to a railroad company and afterward sublet the contract to one who contracted with plaintiff to haul and deliver the ties, plaintiff was entitled to a mechanic's lien for his labor.

83. Pere Marquette R. Co. *v.* Smith, 36 Ind. App. 439, 74 N. E. 545 (holding that Burns Annot. St. (1901) § 7265, giving a lien to one performing labor in construction of a railroad under a contract with a subcontractor of the railroad company, extends to a laborer of one having a subcontract under a subcontractor); Pere Marquette R. Co. *v.* Baertz, 36 Ind. App. 408, 74 N. E. 51; Austin, etc., R. Co. *v.* Daniels, 62 Tex. 70.

84. Dano *v.* Mississippi, etc., R. Co., 27 Ark. 564; Cairo, etc., R. Co. *v.* Fackney, 78 Ill. 116.

85. Cairo, etc., R. Co. *v.* Fackney, 78 Ill. 116.

86. Cairo, etc., R. Co. *v.* Fackney, 78 Ill. 116.

87. *Indiana.*— Midland R. Co. *v.* Wilcox, 122 Ind. 84, 23 N. E. 506.

Iowa.— Kent *v.* Muscatine, etc., R. Co., 115 Iowa 383, 88 N. W. 935.

Michigan.— Dudley *v.* Toledo, etc., R. Co., 65 Mich. 655, 32 N. W. 884; Chicago, etc., R. Co. *v.* Sturgis, 44 Mich. 538, 7 N. W. 213.

Missouri.— Little Rock Trust Co. *v.* Southern Missouri, etc., R. Co., 195 Mo. 669, 93 S. W. 944, construing Rev. St. (1899) § 4256, permitting such assignment.

Ohio.— Farmers' L. & T. Co. *v.* Cincinnati, etc., R. Co., 10 Ohio Dec. (Reprint) 481, 21 Cinc. L. Bul. 275, holding that claims for supplies furnished for the construction of a railroad under Rev. St. § 3398, may be assigned and judgment thereon taken by the assignee.

Texas.— McIlhenny *v.* Binz, 80 Tex. 1, 13 S. W. 655, 26 Am. St. Rep. 705; Austin, etc., R. Co. *v.* Daniels, 62 Tex. 70 (holding that the lien passes with an assignment of the accounts); Texas, etc., R. Co. *v.* Allen, 1 Tex. App. Civ. Cas. § 568. See also Texas, etc., R. Co. *v.* McCaughey, 62 Tex. 271.

See 41 Cent. Dig. tit. "Railroads," § 499.

A subcontractor cannot, on paying the wages of his employees, take an assignment of their liens and enforce them against the road. Krakauer *v.* Locke, 6 Tex. Civ. App. 446, 25 S. W. 700.

88. Midland R. Co. *v.* Wilcox, 122 Ind. 84, 23 N. E. 506 (holding that the assignment of estimates for amounts due from contractors certified to by the railroad company for whom the work was done, and of the contract with the company, carries the right of lien for the estimates and for work done before and after the assignment); Austin, etc., R. Co. *v.* Rucker, 59 Tex. 587.

89. Pere Marquette R. Co. *v.* Baertz, 36 Ind. App. 408, 74 N. E. 51 (holding that where there is evidence that the checks were indorsed by the laborers to whom issued, and purchased by plaintiff at the suggestion of the maker, it is sufficient to show an assignment of the laborers' claims with their right to a lien); Kent *v.* Muscatine, etc., R. Co., 115 Iowa 383, 88 N. W. 935; Texas, etc., R. Co. *v.* Dorman, (Tex. Civ. App. 1901) 62 S. W. 1086; Texas, etc., R. Co. *v.* McMullen, 1 Tex. App. Civ. Cas. § 160.

the assignee to perfect or create the lien by complying with such requirements;[90] but after the lien has once been perfected it may be assigned so as to entitle the assignee to enforce it.[91]

(XI) *NOTICE, REGISTRATION, OR FILING OF LIEN* — (A) *In General.* Although the doing of work and furnishing materials gives an inchoate lien or right to acquire a lien,[92] yet in order to perfect a valid and enforceable lien superior to other liens, it is necessary that the lien claimant should at least substantially comply with all the statutory requirements and take all the steps required by the statute.[93] The statutes providing for such lien usually prescribe that the lien claimant, in order to perfect his lien, shall file or have recorded,[94] in a designated place,[95] at or within a designated time,[96] an instrument in the nature of a

90. Fleming *v.* Greener, 41 Ind. App. 77, 83 N. E. 354; Frailey *v.* Winchester, etc., R. Co., 96 Ky. 570, 29 S. W. 446, 16 Ky. L. Rep. 645 (holding that under Gen. St. (1888) appendix, p. 88, if the person who performs the labor or furnishes the labor, material or teams fails to file a sworn statement as required by the statute, one to whom he assigns the claim cannot acquire a lien by making the required statement and affidavit in his stead; and the lien being a statutory right no rule of equity can be invoked to give relief which the statute fails to furnish); O'Connor *v.* Current River R. Co., 111 Mo. 185, 20 S. W. 16 (holding that a mechanic's lien on a railroad will not lie in favor of an assignee where the claim had been assigned before the account was filed in the office of the circuit court); Brown *v.* Chicago, etc., R. Co., 36 Mo. App. 458; Griswold *v.* Carthage, etc., R. Co., 18 Mo. App. 52; Norman *v.* Edington, 115 Tenn. 309, 89 S. W. 744 (holding that under Shannon Code, § 3580, creating a laborer's lien for labor performed in railroad construction and requiring that the laborer shall give written notice thereof to the railroad company within ninety days, no lien can be enforced by assignees of claims for services so rendered where the required notice was not given).

A purchaser of labor tickets cannot acquire a lien therefor under the Kentucky statute providing for a lien on a railroad in favor of one furnishing labor for the construction or improvement thereof. Frailey *v.* Winchester, etc., R. Co., 96 Ky. 570, 29 S. W. 446, 16 Ky. L. Rep. 645.

91. O'Connor *v.* Current River R. Co., 111 Mo. 185, 20 S. W. 16; Norman *v.* Edington, 115 Tenn. 309, 89 S. W. 744.

92. See *supra*, VIII, A, 6, i, (VII).

93. Greeley, etc., R. Co. *v.* Harris, 12 Colo. 226, 20 Pac. 764; Cairo, etc., R. Co. *v.* Cauble, 4 Ill. App. 133; Van Frank *v.* St. Louis, etc., R. Co., 89 Mo. App. 573, holding that where a claimant has not attempted to enforce his lien under Rev. St. (1889) § 4239 *et seq.*, he is not entitled to a lien on a different theory against the proceeds of a sale of the property.

Failure of the clerk of the court to forward a copy of the account to the secretary of state as required by Rev. St. § 3203, will not defeat a mechanic's lien against the railroad. St. Louis Bridge, etc., Co. *v.* Memphis, etc., R. Co., 72 Mo. 664.

94. Barney, etc., Mfg. Co. *v.* Hart, 1 S. W. 414, 8 Ky. L. Rep. 223; State *v.* Mexican Gulf R. Co., 5 La. Ann. 333 (holding that one claiming a privilege for materials furnished for the use of a railroad which exceeds five hundred dollars in amount must show that he has recorded the claim under Civ. Code, arts. 32, 39); Meyer *v.* Egbert, 101 U. S. 728, 25 L. ed. 1078; Brooks *v.* Burlington, etc., R. Co., 101 U. S. 443, 25 L. ed. 1057 (holding that where a subcontractor has filed his claim in due form against the contractor and the company and within the required time, the validity of his lien is not affected by the fact that he has not also presented to the company a settlement had between himself and the contractor).

That a contractor files his claim in a court of equity which has taken possession of the property by its receivers, and that such claim is allowed as a valid indebtedness of the company does not relieve him from complying with the statutory requirements as to filing and recording the contract or claim in order to entitle him to a mechanic's lien therefor. Houston First Nat. Bank *v.* Ewing, 103 Fed. 168, 43 C. C. A. 150.

95. Arkansas Cent. R. Co. *v.* McKay, 30 Ark. 682.

County.— Under some statutes it is held that in order to obtain a lien upon a railroad a laborer or materialman is only required to file notice in the proper office in the county, where he furnished the material or did the work, through which the road runs (Farmers' L. & T. Co. *v.* Canada, etc., R. Co., 127 Ind. 250, 26 N. E. 784, 11 L. R. A. 740), or in each county in which the labor was performed (Richmond, etc., Constr. Co. *v.* Richmond, etc., R. Co., 68 Fed. 105, 15 C. C. A. 289, 34 L. R. A. 625); and that one notice filed in each of the proper counties will cover the entire line of the road, where it is included in one contract and where the work had been done upon it and materials furnished for it as a continuous line (Midland R. Co. *v.* Wilcox, 122 Ind. 84, 23 N. E. 506). Under other statutes, however, it is held that a lien upon the property of a railroad company as an entirety can be secured only by filing the claim in the clerk's office in every county through which the road passes. Boston *v.* Chesapeake, etc., R. Co., 76 Va. 180, construing Code (1873), c. 115, § 3, cl. 11.

96. See *infra*, VIII, A, 6, i, (XI), (C).

claim, notice, or statement of lien, showing that a lien is claimed and sought to be enforced against the railroad company.[97] Under a statute providing that a failure to file a statement shall not defeat the lien except as against purchasers and encumbrancers,[98] a statement filed limits the amount of the lien only with respect to purchasers and incumbrancers.[99]

(B) *Notice of Claim or Lien.* In addition to filing or recording the claim or statement, a person, other than the principal contractor, who wishes to acquire a lien is generally required to give notice to the company, or its authorized agent or trustee, in the prescribed time and manner, that he has furnished labor or material for which he has not been paid, and that he intends to claim his lien;[1] and mere knowledge by the company that a certain person is doing work and furnishing materials is not sufficient to entitle such person to a lien without other notice by or on his behalf.[2] It is generally required that the notice shall be in writing, and compliance with the statute in this respect is essential.[3] Except

97. Greeley, etc., R. Co. *v.* Harris, 12 Colo. 226, 20 Pac. 764; Fleming *v.* Greener, 41 Ind. App. 77, 83 N. E. 354; Tod *v.* Kentucky Union R. Co., 52 Fed. 241, 3 C. C. A. 60, 18 L. R. A. 305; Giant Powder Co. *v.* Oregon Pac. R. Co., 42 Fed. 470, 8 L. R. A. 700.

Under an Iowa statute, Code, § 2091, providing that laborers shall have a lien on any tax voted in aid of a railroad company for the amount due them for labor performed in the construction of the road, no statement of the demand due need be filed, or other act indicative of an intent to claim the lien done, to entitle the laborer to avail himself thereof. Kent *v.* Muscatine, etc., R. Co., 115 Iowa 383, 88 N. W. 935.

98. Neilson *v.* Iowa Eastern R. Co., 51 Iowa 184, 1 N. W. 434, 33 Am. Rep. 124.

99. Neilson *v.* Iowa Eastern R. Co., 51 Iowa 184, 1 N. W. 434, 33 Am. Rep. 124, holding that a statement filed under such statute with the clerk does not, as against persons to whom material is furnished, limit the amount of the lien.

1. *Colorado.*— Under Lien Act (1881), § 4, providing that every mechanic shall have a lien by serving on the person for whose structure the work has been performed, or upon his agent in charge, or, where there is no agent, by posting in a conspicuous place on the structure a statement, etc., unless a statement is served as required a claimant is not entitled to a decree establishing his lien. Greeley, etc., R. Co. *v.* Harris, 12 Colo. 226, 20 Pac. 764. The notice required by section 5 of such statute to be filed in the office of the clerk and recorder of the county is in addition to and does not take the place of the statement required by section 4. Greeley, etc., R. Co. *v.* Harris, *supra.*

Illinois.— Cairo, etc., R. Co. *v.* Cauble, 85 Ill. 555.

Indiana.— Indiana, etc., R. Co. *v.* Larrew, 130 Ind. 368, 30 N. E. 517; Ferguson *v.* Despo, 8 Ind. App. 523, 34 N. E. 575.

Iowa.— Lounsbury *v.* Iowa, etc., R. Co., 49 Iowa 255. *Compare* Johnson *v.* Des Moines, etc., R. Co., 129 Iowa 281, 105 N. W. 509, holding that where a company was indebted to the contractor for construction in an amount greatly in excess of a subcontractor's claim at the time of institution of suit by the latter to enforce a lien for such claim, it is immaterial to the enforcement of the lien whether the subcontractor served notice of his claim on the railroad company within the prescribed time after the completion of the work.

Missouri.— Morgan *v.* Chicago, etc., R. Co., 76 Mo. 161, under Rev. St. (1879) §§ 3200–3216. Notice of a claim against a railroad company for services or material required by section 787 of such statute is to fix a personal liability on the company and not to establish a lien. Morgan *v.* Chicago, etc., R. Co., *supra.* But under Rev. St. (1899) §§ 4241, 1057, twenty days' notice is not necessary to create a lien in favor of laborers employed by a subcontractor to grade the road. Kasper *v.* St. Louis Terminal R. Co., 101 Mo. App. 323, 74 S. W. 145.

Ohio.— Scioto Valley R. Co. *v.* McCoy, 42 Ohio St. 251.

Tennessee.—Norman *v.* Edington, 115 Tenn. 309, 89 S. W. 744, holding that the notice required under Shannon Code, § 3580, is to be given by the persons claiming the lien and cannot be given by an assignee of the claimant.

United States.— Central Trust Co. *v.* Bridges, 57 Fed. 753, 6 C. C. A. 539, holding that under the Tennessee act of March 29, 1883, a subcontractor must serve notice on the railroad company of the principal contractor's failure to pay him.

See 41 Cent. Dig. tit. "Railroads," § 501.

A declaration served upon the railroad company by the claimant, containing a count based upon a lien, is a sufficient notice under Tenn. Act (1883), c. 220. Central Trust Co. *v.* Condon, 67 Fed. 84, 14 C. C. A. 314.

2. Lounsbury *v.* Iowa, etc., R. Co., 49 Iowa 255.

Notice of plaintiff's claim given to the company at a time when something was due from it to its contractor does not render the service of the statement required by statute unnecessary. Greeley, etc., R. Co. *v.* Harris, 12 Colo. 226, 20 Pac. 764.

3. Pou *v.* Covington, etc., R. Co., 84 Ga. 311, 10 S. E. 744; Lounsbury *v.* Iowa, etc., R. Co., 49 Iowa 255; Scioto Valley R. Co. *v.* McCoy, 42 Ohio St. 251; Norman *v.* Edington, 115 Tenn. 309, 89 S. W. 744.

where the statute prescribes a certain manner in which service of the notice shall be made,[4] personal service of the notice is required,[5] and personal service on a domestic company in such case may be made, where service cannot be had on its chief officer or managing agent, by service on any officer whose official relation to the governing body or managing agent or chief officer is such as would make it his duty to communicate such notice to such body, agent, or officer; [6] but service on a station agent,[7] or on a person who has desk room in the office of the company but who has no connection with its officers,[8] is insufficient.

(c) *Time For Filing Lien or Giving Notice.* It is also essential to the existence of such a lien that the claim or statement shall be filed within the time limited by statute,[9] and that the required notice be served upon the company within the prescribed time.[10] The statutes usually provide that the claim or statement

4. Rapauno Chemical Co. *v.* Greenfield, etc., R. Co., 59 Mo. App. 6 (holding that under Rev. St. (1889) § 2565, service upon the general manager of the company is insufficient unless it appears that he had the immediate supervision of the section of the road on which the materials were used); Scioto Valley R. Co. *v.* McCoy, 42 Ohio St. 251 (holding that under 51 Ohio Laws, p. 51, providing that notice shall be served upon the secretary or other officer or agent of said railroad company, service on a director is sufficient).

Filing notice with the circuit clerk is not sufficient unless the president and secretary of the company do not reside and cannot be found in the county. Cairo, etc., R. Co. *v.* Cauble, 85 Ill. 555.

Under Colo. Sess. Laws (1889), p. 249, § 3, requiring the claimant to serve a statement on the owner of the property, his agent or trustee, service by delivery to the clerk of the superintendent of the owner is insufficient in the absence of evidence that the statement was delivered by him to the superintendent. Union Pac. R. Co. *v.* Davidson, 21 Colo. 93, 39 Pac. 1095.

5. Pou *v.* Covington, etc., R. Co., 84 Ga. 311, 10 S. E. 744; Williams *v.* Dittenhoefer, 188 Mo. 134, 86 S. W. 242; Dalton *v.* St. Louis, etc., R. Co., 113 Mo. App. 71, 87 S. W. 610.

6. Williams *v.* Dittenhoefer, 188 Mo. 134, 86 S. W. 242; Heltzell *v.* Chicago, etc., R. Co., 77 Mo. 315, holding that the secretary of the corporation is such an officer upon whom the notice may be served.

7. Williams *v.* Dittenhoefer, 188 Mo. 134, 86 S. W. 242; Dalton *v.* St. Louis, etc., R. Co., 113 Mo. App. 71, 87 S. W. 610.

An indorsement on a copy of a lien statement admitting that it was served on a certain person, described as station agent for defendant railroad company, is insufficient to show that it was left at the business office of defendant corporation with the agent in charge. Williams *v.* Dittenhoefer, 188 Mo. 134, 86 S. W. 242.

Station agents of a foreign railroad corporation are so far its representatives as to receive notice of a claim for services to enforce a lien under Mo. Rev. St. (1879) §§ 3200–3216. Morgan *v.* Chicago, etc., R. Co., 76 Mo. 161.

8. Heltzel *v.* Kansas City, etc., R. Co., 77 Mo. 482.

9. Arkansas Cent. R. Co. *v.* McKay, 30 Ark. 682; Bear *v.* Burlington, etc., R. Co., 48 Iowa 619; Tod *v.* Kentucky Union R. Co., 52 Fed. 241.

Under a Kentucky statute each contractor or subcontractor should file his lien within sixty days after the end of the month in which he completes his own work, and not from the end of that in which the work of the last contractor or subcontractor engaged is completed. Central Trust Co. *v.* Richmond, etc., R. Co., 54 Fed. 723, 68 Fed. 90, 15 C. C. A. 273, 41 L. R. A. 458.

Under an Iowa statute (Act 16 Gen. Assembly, c. 100, § 7) a subcontractor shall have sixty days from the last day of the month in which his work was done, within which to file his claim. Sandval *v.* Ford, 55 Iowa 461, 8 N. W. 324, holding that the word "done" in this statute means "performed" and does not mean "completed"; so that for the work performed in each calendar month the claim of lien must be filed within sixty days from the end of the month.

Sale of road.— Where a lien for materials furnished is not filed within the statutory time and the road is sold on foreclosure to the bondholders, notice of such lien will not be imputed to the bondholders from the mere fact of an entry in the books of the old company concerning the claim due plaintiff. Bear *v.* Burlington, etc., R. Co., 48 Iowa 619. But where during the progress of contract work for a railroad company it sells out to another company and the latter assumes to pay its grantor's debts, it is not necessary for the contractors to file their lien within the prescribed time of the date of the sale, in order to preserve their lien against the second named company, since the contract will support a lien against the former company, and all who take the property with notice of the obligation. Williams *v.* Chicago, etc., R. Co., 112 Mo. 463, 20 S. W. 631, 34 Am. St. Rep. 403.

10. Chicago, etc., R. Co. *v.* Moran, 187 Ill. 316, 58 N. E. 335 [*affirming* 85 Ill. App. 543 (construing Rev. St. c. 82, § 3)]; Sandval *v.* Ford, 55 Iowa 461, 8 N. W. 324 (construing Act 16 Gen. Assembly, c. 100, § 7). See also Delaware R. Constr. Co. *v.* Davenport, etc., R. Co., 46 Iowa 406.

shall be filed within a designated period from the time the claim falls due,[11] in which case the period runs from the time the last instalment falls due; [12] or within a designated period after the claimant has completed the work or furnished the materials for which the lien is claimed,[13] in which case the period runs from the date on which the last item is done or furnished,[14] under each separate contract.[15]

Filing by a laborer with the clerk of the district court of his written settlement with the subcontractor within the thirty days allowed by Laws (1875), c. 49, is a sufficient giving of notice of the settlement to the owner and the contractor as required by the statute. Bundy *v.* Keokuk, etc., R. Co., 49 Iowa 207.

11. Newgass *v.* Atlantic, etc., R. Co., 56 Fed. 676, construing Va. Code, § 2486.

12. Newgass *v.* Atlantic, etc., R. Co., 56 Fed. 676.

Under a Missouri statute a materialman has been held entitled to a lien for the whole amount due him for materials furnished for a railroad under an open and current account, if the last item of the account accrued subsequently to the time in which a lien could be filed. Central Trust Co. *v.* Texas, etc., R. Co., 23 Fed. 673.

13. *California.*— Cox *v.* Western Pac. R. Co., 44 Cal. 18.

Iowa.— Bear *v.* Burlington, etc., R. Co., 48 Iowa 619.

South Dakota.— Congdon *v.* Grand Island, etc., R. Co., 14 S. D. 575, 86 N. W. 633.

Washington.— Seattle *v.* Ah Kow, 2 Wash. Terr. 36, 3 Pac. 188, holding that under Laws (1877), sixty days from the completion of the work, or from cessation of labor thereon, is allowed to the original contractor only, and every person save him has but thirty days.

United States.— Central Trust Co. *v.* Chicago, etc., R. Co., 54 Fed. 598, construing Mo. Rev. St. § 6743.

See 41 Cent. Dig. tit. "Railroads," § 502.

14. Atlantic Dynamite Co. *v.* Baltimore, etc., R. Co., 101 Ill. App. 13; Carnegie *v.* Lancaster, etc., R. Co., 3 Ohio S. & C. Pl. Dec. 343, 1 Ohio N. P. 300; Hercules Powder Co. *v.* Knoxville, etc., R. Co., 113 Tenn. 382, 83 S. W. 354, 106 Am. St. Rep. 836, 67 L. R. A. 487; Cleveland, etc., R. Co. *v.* Knickerbocker Trust Co., 86 Fed. 73; Central Trust Co. *v.* Chicago, etc., R. Co., 54 Fed. 598.

Where the work is delayed from time to time by mutual agreement between the railroad company and the subcontractor, and ultimately it is agreed that the railroad company shall furnish the labor and put up the material already procured by the subcontractor, and the subcontractor is not released from liability to furnish material until the work is actually completed, notice of a lien filed within the statutory period after the actual completion of the work by the company is in time, although it is not filed until more than the statutory period after the agreement was made, and although the subcontractor did no work and furnished no more material after that date. Chicago, etc., R. Co. *v.* Moran, 187 Ill. 316, 58 N. E. 335 [*affirming* 85 Ill. App. 543].

Where a contract to furnish engines provides for placing them in position and for a thirty days' test, the limitation within which a lien may be perfected does not begin to run until they are placed in position, adjusted, and put in operation. Frick Co. *v.* Norfolk, etc., R. Co., 86 Fed. 725, 32 C. C. A. 31.

15. Lyon *v.* New York, etc., R. Co., 127 Mass. 101; Frick Co. *v.* Norfolk, etc., R. Co., 86 Fed. 725, 32 C. C. A. 31, holding that where materials and labor are furnished a railroad company as they are from time to time ordered, and not in fulfilment of a single contract, the limitation within which a lien therefor may be perfected begins to run on each item at the time it is furnished.

Where separate orders for entirely different kinds of material are given about a month apart for railroad supplies, such orders are separate contracts, and in order to obtain a lien, separate claims must be filed from the date of the last item furnished under each order. Central Trust Co. *v.* Chicago, etc., R. Co., 54 Fed. 598.

Where materials are ordered in car-load lots, each order being separate and each invoice payable on shipment or at any particular time thereafter, a lien cannot exist for materials furnished more than ninety days prior to filing an account, notwithstanding a part was furnished within such time. Heltzell *v.* Chicago, etc., R. Co., 77 Mo. 315.

Entire contract.— But where materials are furnished or delivered pursuant to a contract to furnish the same as needed by the company, the several deliveries are so connected as an entirety that a notice of lien within the statutory period from the date of the last delivery secures a lien for all the deliveries, although some are made more than such period before the notice of the lien. Hercules Powder Co. *v.* Knoxville, etc., R. Co., 113 Tenn. 382, 83 S. W. 354, 106 Am. St. Rep. 836, 67 L. R. A. 487. Thus a contract for the sale of a certain amount of iron to be delivered in specified quantities at fixed times is an entire contract, so that the time for perfecting a valid lien for all of it is to be determined by the date of delivery of the last shipment, and an agreement to extend the time of payment of the first shipment in giving additional security does not make the contract severable. Carnegie *v.* Lancaster, etc., R. Co., 3 Ohio S. & C. Pl. Dec. 343, 1 Ohio N. P. 300. So the fact that the last shipment of materials was not delivered because of notice that the purchaser was insolvent and had abandoned the work does not affect the seller's right of lien for

Where such period has commenced to run by reason of the completion of the work or furnishing of the materials, the claimant cannot thereafter extend or revive the time by doing or furnishing small items and thereby fix a date upon which the period must commence anew,[16] especially where the doing or furnishing of such items is merely colorable, and the real intention is to save or restore a right which is already imperiled or lost.[17] Where, however, even after the contract is substantially completed the claimant does further work or furnishes further materials which is necessary for the proper performance of the contract, and this is done in good faith, the period for filing the lien will run from the period of doing such work or the furnishing of such material.[18] So the running of the period is suspended by a decree of court for an account.[19]

(D) *Sufficiency of Statement of Claim.* A notice, claim, or statement must substantially comply with all the requirements of the statute,[20] and all matters which the statute requires to be stated must be substantially set forth.[21] Thus

prior materials furnished, although furnished more than the statutory period prior to the notice of lien. Hercules Powder Co. *v.* Knoxville, etc., R. Co., *supra*.

16. Westinghouse Air Brake Co. *v.* Kansas City Southern R. Co., 137 Fed. 26, 71 C. C. A. 1 [*reversing* 129 Fed. 455]; Central Trust Co. *v.* Chicago, etc., R. Co., 54 Fed. 598.

17. Central Trust Co. *v.* Chicago, etc., R. Co., 54 Fed. 598.

18. Gordon *v.* San Francisco, etc., R. Co., 86 Cal. 620, 25 Pac. 125, holding that in determining whether a mechanic's lien against a railroad company was filed within the statutory period from the completion of the work, it is proper to count as part of the work the time spent in doing work which, although not contemplated by the contract, was such that the contractor's obligations to the company would not terminate until it was completed.

19. Newgass *v.* Atlantic, etc., R. Co., 56 Fed. 676, holding that where a creditor's bill is filed against a railroad company and the court refers the case to a commission to determine the claims and their priorities, this suspends the running of the six months upon which the claim for lien for supplies is required to be filed by Va. Code, § 2486.

20. *Colorado.*— Greeley, etc., R. Co. *v.* Harris, 12 Colo. 226, 20 Pac. 764.

Missouri.— Peters *v.* St. Louis, etc., R. Co., 24 Mo. 586, holding that notices by railroad laborers of an intention to claim their liens "to the Iron Mountain railroad and to the officers, agents and servants thereof," stating amount, number of days of labor, time performed, and the contractor from whom due are sufficient.

New York.— Mahley *v.* German Bank, 52 N. Y. App. Div. 131, 64 N. Y. Suppl. 1080, notice of lien held sufficient under Laws (1897), c. 418, § 9.

Ohio.— Rousculp *v.* Ohio Southern R. Co., 19 Ohio Cir. Ct. 436, 10 Ohio Cir. Dec. 621, holding that under Rev. St. § 3208, a contractor who accepted a promissory note of the company as evidence of his claim for labor and material furnished and made no reference to such note in his lien, did not thereby waive his right to a lien as it was not necessary to refer to or describe the note in such lien.

Pennsylvania.— Este *v.* Pennsylvania R. Co., 13 Pa. Dist. 451.

See 41 Cent. Dig. tit. "Railroads," § 503.

The notice need not be accompanied with a copy of the contract between the original contractor and the railroad company since the contract mentioned in the statute refers to the one between the subcontractor and his principal. Cairo, etc., R. Co. *v.* Cauble, 4 Ill. App. 133.

Where improper words used in a notice can be stricken out as surplusage and leave the notice complete, the notice will be sufficient. St. Louis, etc., R. Co. *v.* Kerr, 153 Ill. 182, 38 N. E. 638, holding that where a notice of a subcontractor's lien was addressed to the president of the "St. Louis, and Peoria R. Co.," but claimed a lien for work done "for the said Chicago and Peoria R. Co.," while the copy of the contract attached to the notice clearly showed that the work was done on the "St. Louis and Peoria R. Co.," the notice was sufficient and the words "Chicago and Peoria R. Co." surplusage.

Under Ky. Laws (1888), providing that persons who furnish labor or materials in the construction of railroads must file a verified statement of the amount claimed in the clerk's office within sixty days after the last day of the last month in which any labor was performed and materials or teams furnished, the statute is sufficiently complied with in the case of laborers hired by the month, who while working filed a statement and claim for the previous month for which they had not been paid and after they ceased working filed another statement for such labor performed after and not included in the first statement. Central Trust Co. *v.* Richmond, etc., R. Co., 54 Fed. 723.

21. Texas, etc., R. Co. *v.* Orman, 3 N. M. 365, 9 Pac. 595, holding that no lien can be allowed for labor and materials not embraced in the claim and notice of lien.

A requirement that the statement must set forth the amount due, for which the lien is claimed, does not necessitate a detailed statement of the claim. Central Trust Co. *v.* Richmond, etc., R. Co., 54 Fed. 723.

it is provided under some statutes that the notice or claim shall state the name of the person or company by whom the claimant was employed and to whom he furnished the materials,[22] designating, if there are several persons, what portion was furnished to each severally,[23] except where there is but one contract;[24] and shall state the company's interest or ownership in the land over which the road is constructed;[25] shall correctly describe the property to be charged;[26] and shall clearly and definitely set forth the nature and amount of the labor and materials for which the lien is claimed,[27] the agreed price or value,[28] the whole contract price for the material or labor,[29] and the dates when the work was done or materials furnished.[30] Where the work is done or the materials furnished under separate contracts, there should be separate accounts or claims filed under each contract.[31] Defects in such notice, however, may be waived by the company, as where it makes no objection thereto in the trial court.[32]

(E) *Successive or Amended Statements or Liens.* Under some statutes it is held that the filing of one claim or account, sufficient to create a lien under the statute, exhausts the contractor's power to encumber the property, and that successive liens for the same labor and materials cannot be filed, even within the statutory period;[33] and that the prescribed time within which the lien may be enforced after filing cannot be extended by the filing of an amendment or a new lien.[34] But even under such statutes, if the first lien filed is defective another lien may be filed within the prescribed period.[35]

j. Traffic Balance Liens. In at least one jurisdiction a statutory lien exists in favor of one railroad company on the property of a connecting railroad com-

22. Bringham *v.* Knox, 127 Cal. 40, 59 Pac. 198 (claim held sufficient under Cal. Code Civ. Proc. § 1183); Gordan Hardware Co. *v.* San Francisco, etc., R. Co., (Cal. 1889) 22 Pac. 406, (1890) 23 Pac. 1025.

23. Gordan Hardware Co. *v.* San Francisco, etc., R. Co., (Cal. 1889) 22 Pac. 406, (1890) 23 Pac. 1025.

24. Harmon *v.* San Francisco, etc., R. Co., 86 Cal. 617, 25 Pac. 124, (1890) 23 Pac. 1024, holding that under Cal. Code Civ. Proc. § 1187, requiring the lienor's claim to state the name of the person to whom he furnished the materials, one who furnishes materials to a railroad contractor and afterward to his assignee need not state what portion he furnished to each since there is but one contract and the company has to settle only with the assignee.

25. Vincent *v.* Snoqualmie Mill Co., 7 Wash. 566, 35 Pac. 396.

26. Adams *v.* Grand Island, etc., R. Co., 12 S. D. 424, 81 S. W. 960, 10 S. D. 239, 72 N. W. 577 (construing Comp. Laws, § 5470); Giant Powder Co. *v.* Oregon Pac. R. Co., 42 Fed. 470, 8 L. R. A. 700 (holding that a person entitled to a lien may in his notice of lien confine his claim to that portion or section of the road in the construction of which his material was used).

27. Gordan Hardware Co. *v.* San Francisco, etc., R. Co., (Cal. 1889) 22 Pac. 406, holding that a description of the materials furnished as "nails, spikes, iron, steel, picks, shovels and other like material" is too indefinite and uncertain to sustain a lien.

If lienable and non-lienable accounts are blended so that they cannot be separated, it will cause the whole claim to be rejected. Sweem *v.* Atchison, etc., R. Co., 85 Mo. App. 87. But a mere trivial matter not embraced in the account will not have the effect to destroy the lien. Sweem *v.* Atchison, etc., R. Co., 85 Mo. App. 87.

An item for work done after the lien account had been sworn to and filed should be excluded from the lien account. Lyons *v.* Carter, 84 Mo. App. 483; Mahley *v.* German Bank, 52 N. Y. App. Div. 131, 64 N. Y. Suppl. 1080.

28. Mahley *v.* German Bank, 52 N. Y. App. Div. 131, 64 N. Y. Suppl. 1080.

29. Mahley *v.* German Bank, 52 N. Y. App. Div. 131, 64 N. Y. Suppl. 1080.

30. Koken Iron Works *v.* Robertson Ave. R. Co., 141 Mo. 228, 44 S. W. 269; Mahley *v.* German Bank, 52 N. Y. App. Div. 131, 64 N. Y. Suppl. 1080.

31. O'Connor *v.* Current River R. Co., 111 Mo. 185, 20 S. W. 16 (holding that charges for work done under two distinct contracts cannot be blended together in one mechanic's lien); Central Trust Co. *v.* Chicago, etc., R. Co., 54 Fed. 598.

32. Luttrell *v.* Knoxville, etc., R. Co., (Tenn. 1907) 105 S. W. 565.

33. Cox *v.* Western Pac. R. Co., 44 Cal. 18 (holding that the lien laws of California do not enable a railroad contractor to file successive liens for successive portions of work done under an entire contract, nor to file separate liens upon distinct portions of the road as they are successively completed, but that only one lien can be acquired, and it must apply to the whole road); Battle *v.* McArthur, 49 Fed. 715 (construing Mo. Rev. St. (1879) §§ 3202, 3205].

34. Battle *v.* McArthur, 49 Fed. 715.

35. Williams *v.* Chicago, etc., R. Co., 112 Mo. 463, 20 S. W. 631, 34 Am. St. Rep. 403.

pany for a balance due from the latter under a traffic agreement for the interchange of business.[36]

7. Mortgages and Trust Deeds[37] — a. Power to Mortgage — (i) *In General.* Although it is held in some jurisdictions that a railroad company, like private corporations generally, has the power to mortgage its property, real and personal, unless restrained by its charter or statutes,[38] by the weight of authority, such a company, since it is a quasi-public corporation and as such is charged with public duties, has no power to mortgage its property and franchises,[39] unless such power is granted to it by the legislature either in express words,[40] or by reasonable and necessary implication therefrom,[41] as from its authority to borrow

36. International, etc., R. Co. *v.* Coolidge, 26 Tex. Civ. App. 595, 62 S. W. 1097, holding that Rev. St. art. 4538, providing that every railway interchanging business with another connecting railway is a trustee for such connecting railway, and that money due shall be a lien on the property of the connecting railway to the extent of balances due each quarter, which lien shall be superior to all other liens save laborers' liens, was not intended to restrict the lien of a connecting railway for a balance due to the same species of property covered by a laborer's lien, but that such lien extended to all assets of the road including lands given to the road as a bonus but not used in the business of the road.

37. Corporate mortgages generally see Corporations, 10 Cyc. 1182 *et seq.*

Who may execute corporate mortgages generally see Corporations, 10 Cyc. 1198 *et seq.*

Ratification by corporations generally see Corporations, 10 Cyc. 1069 *et seq.*, 1202.

38. Savannah, etc., R. Co. *v.* Lancaster, 62 Ala. 555; Kelly *v.* Alabama, etc., R. Co., 58 Ala. 489; Mobile, etc., R. Co. *v.* Talman, 15 Ala. 472; Allen *v.* Montgomery R. Co., 11 Ala. 437; Miller *v.* Rutland, etc., R. Co., 36 Vt. 452, holding that a railroad company has power to mortgage its road and the franchise in the road to procure rails for the construction of the road. See also Kennebec, etc., R. Co. *v.* Portland, etc., R. Co., 59 Me. 9 [*citing* Shepley *v.* Atlantic, etc., R. Co., 55 Me. 395, 407, where the court said: "The doctrine that all railroad mortgages made without the consent of the Legislature are illegal and void, because they may operate as a permanent transfer of the corporate powers from the original corporators to another body, seems to us to have little to commend it but much to condemn it"].

39. State *v.* Mexican Gulf R. Co., 3 Rob. (La.) 513; Atkinson *v.* Marietta, etc., R. Co., 15 Ohio St. 21. And see cases cited *infra*, notes 40–44.

40. *California.*— Bishop *v.* McKillican, 124 Cal. 321, 57 Pac. 76, 71 Am. St. Rep. 68.

Florida.— State *v.* Florida Cent. R. Co., 15 Fla. 690, holding that under the legislation of Florida, the Florida Central Railroad Company had power to execute a bond which was to be a mortgage by virtue of the statute and without the execution of an additional mortgage to secure it; and to such bond when executed attached the lien, power, and duty of the state as trustee under the statute.

Georgia.— Georgia, etc., R. Co. *v.* Barton, 101 Ga. 466, 28 S. E. 482, construing Code (1882), § 1689*i*.

Illinois.— Palmer *v.* Forbes, 23 Ill. 301.

Louisiana.— State *v.* Morgan, 28 La. Ann. 482 (holding that prior to the act of 1856, authorizing railroad companies to mortgage their property and franchises, the railroad companies in this state had no authority to execute such a mortgage); State *v.* Mexican Gulf R. Co., 3 Rob. 513.

New Jersey.— Baker *v.* Guaranty Trust, etc., Co., (Ch. 1895) 31 Atl. 174.

New York.— Platt *v.* New York, etc., R. Co., 9 N. Y. App. Div. 87, 41 N. Y. Suppl. 42 [*affirming* 17 Misc. 22, 39 N. Y. Suppl. 871, and *affirmed* in 153 N. Y. 670, 48 N. E. 1106], construing Laws (1850), c. 140, § 10, and Laws (1892), c. 676, § 4, subd. 10.

Pennsylvania.— Gloninger *v.* Pittsburgh, etc., R. Co., 139 Pa. St. 13, 21 Atl. 211 (holding that, where such power is expressly given by its charter, it is not necessary to the exercise of the power that it be expressly authorized to issue bonds thereafter, as that is a necessary incident of the power to mortgage); Rothschild *v.* Rochester, etc., R. Co., 1 Pa. Co. Ct. 620.

Tennessee.— Frazier *v.* East Tennessee, etc., R. Co., 88 Tenn. 138, 12 S. W. 537.

Texas.— Galveston, etc., R. Co. *v.* Fontaine, 23 Tex. Civ. App. 519, 57 S. W. 872.

United States.— Compton *v.* Jesup, 68 Fed. 263, 15 C. C. A. 397.

England.— Hart *v.* Eastern Union R. Co., 7 Exch. 246, 6 R. & Can. Cas. 818.

See 41 Cent. Dig. tit. "Railroads," § 505.

Legislative authority to mortgage includes power to make a deed trust in the nature of a mortgage. Pullan *v.* Cincinnati, etc., R. Co., 20 Fed. Cas. No. 11,461, 4 Biss. 35.

41. State *v.* Florida Cent. R. Co., 15 Fla. 690; Bardstown, etc., R. Co. *v.* Metcalfe, 4 Metc. (Ky.) 199, 81 Am. Dec. 541; East Boston Freight R. Co. *v.* Eastern R. Co., 13 Allen (Mass.) 422; Coe *v.* Columbus, etc., R. Co., 10 Ohio St. 372, 75 Am. Dec. 518; Miller *v.* Rattermann, 10 Ohio Dec. (Reprint) 555, 12 Cinc. L. Bul. 99, holding that it is within the power of a railroad company to renew an old mortgage debt by issuing preferred stock and executing a mortgage to a trustee for the holders of such stock to

money on its credit,[42] and to execute such securities in amount and kind as it may deem expedient;[43] or from its authority to alienate, sell, or dispose of its property.[44] And according to the weight of authority a mortgage executed without such authority is invalid,[45] except where it is subsequently ratified by an act of the legislature.[46] It has been held, however, that the above rule does not apply to property which is not essential to or of use in the fulfilment of the company's public purposes and not necessary to enable it to perform its public duties; but that such property may be mortgaged without statutory authority.[47]

(II) *Limitation of Power in General.* Where this power is statutory, the conditions upon and limitations within which it may be exercised are ordinarily regulated by the statute authorizing the mortgage.[48] The statutes usually limit the amount of indebtedness or obligations for which a railroad mortgage may be issued.[49] Where the power to mortgage is a special one, ordinarily it cannot be exercised for any other purpose than that expressed in the statute authorizing the power,[50] but statutory authority to mortgage to secure the payment of debts contracted in constructing and completing the road[51] has been held to include not only the completion of the road as authorized at the time of the passage of the statute, but also the necessary acquisition of rolling-stock and the building or acquisition of such branches as may thereafter be authorized;[52] and the mere

secure the fulfilment of the obligations of the company with respect thereto.

42. Electric Lighting Co. *v.* Rust, 117 Ala. 680, 23 So. 751; Bardstown, etc., R. Co. *v.* Metcalfe, 4 Metc. (Ky.) 199, 81 Am. Dec. 541; Ludlow *v.* Hurd, 1 Disn. (Ohio) 552, 12 Ohio Dec. (Reprint) 791; Carey *v.* Pittsburgh, etc., R. Co., 2 Ohio Dec. (Reprint) 85, 1 West. L. Month. 338; Parker *v.* New Orleans, etc., R. Co., 33 Fed. 693.

43. Pierce *v.* Milwaukee, etc., R. Co., 24 Wis. 551, 1 Am. Rep. 203.

44. McAllister *v.* Plant, 54 Miss. 106; Branch *v.* Atlantic, etc., R. Co., 4 Fed. Cas. No. 1,807, 3 Woods 481; Bickford *v.* Grand Junction R. Co., 1 Can. Sup. Ct. 696 [*reversing* 23 Grant Ch. (U. C.) 302].

45. See cases cited *supra*, notes 39–44.

46. See *infra*, VIII, A, 7, b, (III).

47. Platt *v.* Union Pac. R. Co., 99 U. S. 48, 25 L. ed. 424 (holding that the reason of the rule is inapplicable to a mortgage of property which is not a part of the road and in no way connected with its use); Bickford *v.* Grand Junction R. Co., 1 Can. Sup. Ct. 696. See also Gardner *v.* London, etc., R. Co., L. R. 2 Ch. 201, 36 L. J. Ch. 323, 15 L. T. Rep. N. S. 552, 15 Wkly. Rep. 324.

48. Richards *v.* Merrimack, 44 N. H. 127 (holding, however, that the power of a railroad company to borrow money and mortgage its property is not limited by the usual clause in its charter providing that shares shall not be assessed over one hundred dollars and that if more money is necessary it shall be raised by creating new shares); Rothschild *v.* Rochester, etc., R. Co., 1 Pa. Co. Ct. 620 (holding that a mortgage of the property of a railroad company is an increase of its indebtedness which can be affected only by complying with the Const. art. 16, § 7, and with the act of assembly of April 18, 1874, passed to enforce such constitutional provision).

The Tennessee act of March 15, 1881, does not repeal the limitation on a railroad company's mortgaging power contained in the act of March 24, 1877, which inhibits the railroad company "to give or create any mortgage or other kind of lien on its railway property in this State, which shall be valid and binding against judgments and decrees and executions therefrom for timber furnished and work or labor done on, or for damages done to persons and property in the operation of its railroad in this State." Frazier *v.* East Tennessee, etc., R. Co., 88 Tenn. 138, 12 S. W. 537.

49. Beach *v.* Wakefield, 107 Iowa 567, 76 N. W. 688, 78 N. W. 197 (construing Code (1873), § 1061, and Laws 20 Gen. Assembly, c. 22; 21 Gen. Assembly, c. 57); Baker *v.* Guarantee Trust, etc., Co., (N. J. Ch. 1895) 31 Atl. 174 (holding that the power of a railroad company to mortgage its property and franchises is limited strictly to borrowing money on its mortgage bonds and to the amount of cash paid in on account of subscriptions to its capital stock); Flynn *v.* Coney Island, etc., R. Co., 26 N. Y. App. Div. 416, 50 N. Y. Suppl. 74 (holding that section 2 of the "Stock Corporation Law," restricting the amount of corporate obligations secured by bonds, is applicable to railroad corporations and that the amount of a railroad mortgage must be limited either by the amount of the capital stock, or by two thirds of the value of the property of the company, if that be greater than the capital stock).

A mortgage executed to secure a void issue of bonds under Mass. St. (1854) c. 286, is also void. East Boston Freight R. Co. *v.* Hubbard, 10 Allen (Mass.) 459 note.

50. Frazier *v.* East Tennessee, etc., R. Co., 88 Tenn. 138, 12 S. W. 537.

51. McLane *v.* Placerville, etc., R. Co., 66 Cal. 606, 6 Pac. 748.

52. Gloninger *v.* Pittsburgh, etc., R. Co., 139 Pa. St. 13, 21 Atl. 211. But see Frazier *v.* East Tennessee, etc., R. Co., 88 Tenn. 138, 12 S. W. 527.

fact that the company is specially authorized to execute a mortgage for a particular purpose does not take away or abridge its general powers to execute mortgages.[53] If the statute is a special one applicable only to a certain railroad, another railroad company cannot avail itself of its provisions to authorize a mortgage made by it.[54]

(III) *PROPERTY SUBJECT TO BE MORTGAGED* — (A) *In General.* The power to mortgage a railroad ordinarily embraces every species of property owned by the company necessary for the operation of the road,[55] although this power may be controlled by the particular statute by which it is conferred.[56] Power to mortgage the franchises and property of a railroad company implies as incidental thereto the power to mortgage every kind of property that may be necessary to the enjoyment of the franchises and road.[57] A general power to mortgage the whole road includes power to mortgage any part of it.[58]

(B) *Franchises.* Ordinarily a railroad company may mortgage its franchises and corporate rights only where it has statutory authority to do so;[59] and an

53. Mobile, etc., R. Co. *v.* Talman, 15 Ala. 472; Allen *v.* Montgomery, etc., R. Co., 11 Ala. 437; Bickford *v.* Grand Junction R. Co., 1 Can. Sup. Ct. 696 [*reversing* 23 Grant Ch. (U. C.) 302], holding that the statutory power to borrow money and secure loans cannot be considered as implying that the company's powers to mortgage are to be limited to that object.

54. Georgia Southern, etc., R. Co. *v.* Barton, 101 Ga. 466, 28 S. E. 842 (holding that where the charter of a railroad company in express terms defines and limits its power to mortgage, a general provision in a preceding section of the charter authorizing the company to build a railroad "and the same to use, equip, and enjoy all the rights, privileges and immunities granted to" another railroad company, does not confer upon the former company the mortgaging power of the latter under its charter); Central Trust Co. *v.* East Tennessee, etc., R. Co., 69 Fed. 658.

55. Ludlow *v.* Hurd, 1 Disn. (Ohio) 552, 12 Ohio Dec. (Reprint) 791; Gardner *v.* London, etc., R. Co., L. R. 2 Ch. 201, 36 L. J. Ch. 323, 15 L. T. Rep. N. S. 552, 15 Wkly. Rep. 324.

A right of way of a railroad is of such a nature as to be capable of being pledged to the state as security for a loan, and on failure of redemption of being sold and transferred so as to vest the easement in the purchaser. Junction R. Co. *v.* Ruggles, 7 Ohio St. 1.

56. Taber *v.* Cincinnati, etc., R. Co., 15 Ind. 459 (holding that the power to mortgage conferred by Loc. Laws (1851), p. 43, had reference only to such lands and property as the company could lawfully acquire, and could not therefore have included such as were not necessary for the purposes of the road); Bath *v.* Miller, 51 Me. 341 (holding that St. (1860) c. 450, 475, authorizing the extension of a certain railroad and a mortgage of "the original road" and "of the extension," treating them as distinct roads, and as having separate and distinct franchises, does not authorize a mortgage of the whole road as a unit, and therefore not of property purchased by the earnings of the whole road after its completion).

57. Phillips *v.* Winslow, 18 B. Mon. (Ky.) 431, 68 Am. Dec. 729; Coe *v.* Columbus, etc., R. Co., 10 Ohio St. 372, 75 Am. Dec. 518; Dunham *v.* Earl, 8 Fed. Cas. No. 4,149.

A mortgage of land, acquired and held solely for exercising a railroad franchise, as security for the bonds of the road under a power "to pledge the entire road, fixtures, and equipment with all the appurtenances, income, and resources thereof" will be valid without special legislative authority to execute it. Coe *v.* Columbus, etc., R. Co., 10 Ohio St. 372, 75 Am. Dec. 518.

58. East Boston Freight R. Co. *v.* Eastern R. Co., 13 Allen (Mass.) 422; Chartiers R. Co. *v.* Hodgens, 85 Pa. St. 501; Minnesota Co. *v.* St. Paul Co., 2 Wall. (U. S.) 609, 17 L. ed. 886 (holding that a railroad company owning the whole of a long railroad and all the rolling stock upon it may assign the particular portions of such rolling stock to particular divisions, and mortgage each portion with the division to which it is assigned); Pullan *v.* Cincinnati, etc., R. Co., 20 Fed. Cas. No. 11,461, 4 Biss. 35. But see East Boston Freight R. Co. *v.* Hubbard, 10 Allen (Mass.) 459 note.

59. *Iowa.*— Dunham *v.* Isett, 15 Iowa 284, holding that whether under Code (1851), c. 43, the corporate franchise of a railroad company can be mortgaged, it may be mortgaged under Act March 28, 1858, c. 25, p. 19.

Massachusetts.— East Boston Freight R. Co. *v.* Eastern R. Co., 13 Allen 422; Com. *v.* Smith, 10 Allen 448, 87 Am. Dec. 672, holding that a railroad company has no power at common law to mortgage its franchises.

Minnesota.— First Div. St. Paul, etc., R. Co. *v.* Parcher, 14 Minn. 297, holding that section 21 of its charter as well as art. 9, § 10, of the constitution adopted April 15, 1858, authorized the Minn. & Pac. R. Co. to mortgage its corporate franchise.

Mississippi.— McAllister *v.* Plant, 54 Miss. 106.

New Hampshire.— Pierce *v.* Emery, 32 N. H. 484.

New York.— Hoyle *v.* Plattsburgh, etc., R. Co., 51 Barb. 45 [*reversed* on other grounds in 54 N. Y. 314, 13 Am. Rep. 595].

Ohio.— Coe *v.* Columbus, etc., R. Co., 10 Ohio St. 372, 75 Am. Dec. 518.

express authority for a railroad company to mortgage its road, income, or other property does not imply power to mortgage its franchises,[60] or such other property as is absolutely essential to the exercise of the franchises; [61] although in some jurisdictions it is held that while a power to mortgage the road and other property does not include the power to mortgage the franchise of being a corporation,[62] or the franchise of exemption from taxation,[63] it does include power to mortgage such franchises as are not necessarily corporate rights, such as the franchise to build, own, and manage a road and to take tolls thereon, and are necessary to the enjoyment of the road; [64] and it has been held that this power may be implied from the charter power to borrow money.[65] A railroad company lawfully purchasing its franchise has implied authority to mortgage it for the purchase-money.[66] But a previously unauthorized mortgage of franchises may be made valid as between the parties by a subsequent act of the legislature.[67] Nor will the fact that a mortgage attempting to convey property and franchise is inoperative as to the franchise render the mortgage entirely void; but it operates to convey the property.[68]

(c) *Income, Rents, and Profits.* A railroad company ordinarily has no power to mortgage its income, rents, and profits,[69] except where such authority is given

Texas.— Houston, etc., R. Co. *v.* Shirley, 54 Tex. 125.

United States.— Hall *v.* Sullivan R. Co., 11 Fed. Cas. No. 5,948, Brunn. Col. Cas. 613; Pullan *v.* Cincinnati, etc., R. Co., 20 Fed. Cas. No. 11,461, 4 Biss. 35.

See 41 Cent. Dig. tit. "Railroads," § 508.

Compare Miller *v.* Rutland, etc., R. Co., 36 Vt. 452, holding that a railroad company may mortgage its road and franchises to procure rails for the construction of a road, although the title of the corporation to the whole of the road is not perfected.

The mere fact of incorporation for the purpose of owning and managing a railroad, and with authority to exercise the right of eminent domain, will not authorize a railroad company to mortgage its franchises. Com. *v.* Smith, 10 Allen (Mass.) 448, 87 Am. Dec. 672.

60. Missouri Pac. R. Co. *v.* Owens, 1 Tex. App. Civ. Cas. § 384; Randolph *v.* Wilmington, etc., R. Co., 20 Fed. Cas. No. 11,563, 11 Phila. (Pa.) 502; Pullan *v.* Cincinnati, etc., R. Co., 20 Fed. Cas. No. 11,461, 4 Biss. 35.

61. Missouri Pac. R. Co. *v.* Owens, 1 Tex. App. Civ. Cas. § 384.

62. Bardstown, etc., R. Co. *v.* Metcalfe, 4 Metc. (Ky.) 199, 81 Am. Dec. 541; Atkinson *v.* Marietta, etc., R. Co., 15 Ohio St. 21; Memphis, etc., R. Co. *v.* Berry, 112 U. S. 609, 5 S. Ct. 299, 28 L. ed. 837; Branch *v.* Atlantic, etc., R. Co., 4 Fed. Cas. No. 1,807, 3 Woods 481.

The franchise to exist as a corporation pertains to the stock-holders as such, and each one's interest therein accompanies the transfer of his share of stock. By statute in Alabama, the purchasers of a railroad are enabled to constitute themselves into a body corporate, and have all the rights and franchises in respect to it the company was vested with. Meyer *v.* Johnston, 53 Ala. 237.

63. Morgan *v.* Louisiana, 93 U. S. 217, 23 L. ed. 860.

64. Meyer *v.* Johnston, 53 Ala. 237 (holding that the franchise which a railroad company in this state transfers by its mortgage is not its franchise to exist as a corporation, but only such of its franchises or privileges as will enable the grantee to have the same use and beneficial enjoyment of the property as the company itself had and that especially is this the case when the charter merely authorizes the company to mortgage "its means, property and effects," without express mention of franchises); Bardstown, etc., R. Co. *v.* Metcalfe, 4 Metc. (Ky.) 199, 81 Am. Dec. 541; Coe *v.* Columbus, etc., R. Co., 10 Ohio St. 372, 75 Am. Dec. 518; Pierce *v.* Milwaukee, etc., R. Co., 24 Wis. 551, 1 Am. Rep. 203 (holding that a railroad company authorized by its charter "to borrow money" and execute "such securities in amount and kind" as it might deem expedient may mortgage its entire road with its franchises); Branch *v.* Atlantic, etc., R. Co., 4 Fed. Cas. No. 1,807, 3 Woods 481.

A grant of a right of way through certain streets with the right to construct its railroad thereon and occupy them in its use is a franchise which may be mortgaged. New Orleans, etc., R. Co. *v.* Delamore, 114 U. S. 501, 5 S. Ct. 1009, 29 L. ed. 244.

65. Bardstown, etc., R. Co. *v.* Metcalfe, 4 Metc. (Ky.) 199, 81 Am. Dec. 541.

66. Memphis, etc., R. Co. *v.* Dow, 19 Fed. 388.

67. Hall *v.* Sullivan R. Co., 11 Fed. Cas. No. 5,948, Brunn. Col. Cas. 613.

68. Butler *v.* Rahm, 46 Md. 541; Gloninger *v.* Pittsburgh, etc., R. Co., 139 Pa. St. 13, 21 Atl. 211.

69. Georgia Southern, etc., R. Co. *v.* Barton, 101 Ga. 466, 28 S. E. 842. But see Kelly *v.* Alabama, etc., R. Co., 58 Ala. 489, holding that a resolution of railroad directors, authorizing an issuance of bonds to raise money, and execution of a deed of trust to secure the same, etc., "and on all the real and personal property," etc., authorizes a trust deed conveying the tolls, freights, rents, income, etc.

to it by statute;[70] and this power will not be implied from authority to mortgage its property and franchises.[71] Where such power is given, the company, in order to make the pledge effectual, may stipulate in the mortgage that, on default of the trustee named therein, the mortgagee may take possession and operate the railroad and receive its earnings.[72]

(D) *After-Acquired Property.* The power to mortgage railroad property and franchises includes the power to mortgage future-acquired property [73] as well as property owned by it at the time of the execution of the instrument; and as soon as the property is acquired or comes into existence the mortgage operates upon it,[74] and creates an equitable lien or mortgage upon it.[75]

b. Form, Requisites, and Validity — (I) *NATURE AND ESSENTIALS OF CONVEYANCES IN GENERAL.* In accordance with the rules regulating mort-

70. Jessup *v.* Bridge, 11 Iowa 572, 79 Am. Dec. 513; Seibert *v.* Minneapolis, etc., R. Co., 52 Minn. 246, 53 N. W. 1151; Carey *v.* Pittsburgh, etc., R. Co., 2 Ohio Dec. (Reprint) 85, 1 West. L. Month. 338 (holding, however, that this power extends only to such income as is not necessary for the maintenance and operation of the road); Welch *v.* Pittsburgh, etc., R. Co., 2 Ohio Dec. (Reprint) 5, 1 West. L. Month. 87.

71. Georgia Southern, etc., R. Co. *v.* Barton, 101 Ga. 466, 28 S. E. 842, construing Code (1882), § 1689*i*.

72. Seibert *v* Minneapolis, etc., R. Co., 52 Minn. 246, 53 N. W. 1151.

73. *Alabama.*— Meyer *v.* Johnston, 53 Ala. 237.

Connecticut.— Buck *v.* Seymour, 46 Conn. 156.

Georgia.— McTighe *v.* Macon Constr. Co., 94 Ga. 306, 21 S. E. 701, 47 Am. St. Rep. 153, 32 L. R. A. 208, holding also that a *de facto* company may make such a mortgage.

Illinois.— Quincy *v.* Chicago, etc., R. Co., 94 Ill. 537.

Iowa.— Jessup *v.* Bridge, 11 Iowa 572, 79 Am. Dec. 513.

Louisiana.— Bell *v.* Chicago, etc., R. Co., 34 La. Ann. 785, holding that the prohibitions against mortgaging future property, found in the civil code, relate to ordinary transactions between individuals, and do not apply to railroad corporations.

Michigan.— Pere Marquette R. Co. *v.* Graham, 136 Mich. 444, 99 N. W. 408.

Missouri.— Omaha, etc., R. Co. *v.* Wabash, etc., R. Co., 108 Mo. 298, 18 S. W. 1101.

New Hampshire.— Pierce *v.* Emery, 32 N. H. 484.

New Jersey.— Baker *v.* Guarantee Trust, etc., Co., (Ch. 1895) 31 Atl. 174 (holding that neither the statute authorizing a railroad company to mortgage its property and franchises, nor the policy of the law forbids the giving of a mortgage on a railroad not yet built or on property not yet acquired by the company); Williamson *v.* New Jersey South R. Co., 26 N. J. Eq. 398.

New York.— Seymour *v.* Canandaigua, etc., R. Co., 25 Barb. 284, 14 How. Pr. 531, holding that the words "corporate property and franchises" as used in Gen. R. Act (1850), subd. 10, § 28, include all the rights and interests of a railroad corporation, and that it was the intention of the legislature to authorize such corporation to mortgage all or singular the property of the corporation, with its rights and interests acquired and to be acquired, as an entirety.

Ohio.— Coe *v.* Peacock, 14 Ohio St. 187; Coe *v.* Columbus, etc., R. Co., 10 Ohio St. 372, 75 Am. Dec. 518; Ludlow *v.* Hurd, 1 Disn. 522, 12 Ohio Dec. (Reprint) 791; Welch *v.* Pittsburgh, etc., R. Co., 2 Ohio Dec. (Reprint) 5, 1 West. L. Month. 87.

Tennessee.— Clay *v.* East Tennessee, etc., R. Co., 6 Heisk. 421.

Wisconsin.— Pierce *v.* Milwaukee, etc., R. Co., 24 Wis. 551, 1 Am. Rep. 203.

United States.— Galveston, etc., R. Co. *v.* Cowdrey, 11 Wall. 459, 20 L. ed. 199; Pennock *v.* Coe, 23 How. 117, 16 L. ed. 436; Central Trust Co. *v.* Chattanooga, etc., R. Co., 94 Fed. 275, 36 C. C. A. 241; Compton *v.* Jesup, 68 Fed. 263, 15 C. C. A. 397; Blackburn *v.* Selma, etc., R. Co., 3 Fed. Cas. No. 1,467, 2 Flipp. 525.

Under La. Rev. St. §§ 726, 727, 2396, 2397, a railroad company, when authorized to borrow money for construction purposes, may mortgage such property as it may acquire in the future. Parker *v.* New Orleans, etc., R. Co., 33 Fed. 693. But see State *v.* New Orleans, etc., R. Co., 4 Rob. 231; State *v.* Mexican Gulf R. Co., 3 Rob. 513.

74. Meyer *v.* Johnston, 53 Ala. 237; Parker *v.* New Orleans, etc., R. Co., 33 Fed. 693.

75. *Illinois.*— Hunt *v.* Bullock, 23 Ill. 320.

Ohio.— Welch *v.* Pittsburgh, etc., R. Co., 2 Ohio Dec. (Reprint) 5, 1 West. L. Month. 87. Under the registry law of Ohio a mortgage of lands to be afterward acquired being a mere contract to convey such lands as security or as it has been termed an equitable mortgage, it has no validity against third persons who acquire a legal interest in and liens upon the property. Coe *v.* Columbus, etc., R. Co., 10 Ohio St. 372, 75 Am. Dec. 518.

Pennsylvania.— Philadelphia, etc., R. Co. *v.* Woelpper, 64 Pa. St. 366, 3 Am. Rep. 596.

Tennessee.— Clay *v.* East Tennessee, etc., R. Co., 6 Heisk. 421.

England.— Holroyd *v.* Marshall, 10 H. L. Cas. 191, 9 Jur. N. S. 213, 33 L. J. Ch. 193, 7 L. T. Rep. N. S. 172, 11 Wkly. Rep. 171, 11 Eng. Reprint 999.

gages generally,[76] and in the absence of statute, no particular form is necessary to constitute a mortgage of railroad property; but it is only requisite that the instrument or instruments should evince a present purpose on the part of the company to convey the title to specified property, sufficiently described, to a designated person as mortgagee or trustee to be held by him as security for the payment of a certain indebtedness, or for the performance of some other act on its part.[77] Ordinarily a mortgage on railroad property is made in the form of a trust deed, the secured bondholders thereunder being entitled, through the intervention of the trustees, to the same benefits as if they were made parties to the instrument.[78] Thus a deed of trust executed by a railroad company to secure the payment of bonds and coupons is in effect a mortgage.[79] The trustee therein may in general be any person,[80] or be a foreign corporation or trust company,[81] or even a director or officer of the company.[82] In equity, almost any instrument or agreement showing an intention to pledge railroad property as security for its indebtedness will be considered or treated as a mortgage,[83] although it lacks the formal requisites of a mortgage, and is insufficient to constitute a mortgage at common law or under the statute, or although it is so defectively executed as to be invalid as a legal instrument,[84] or although it amounts to no more than an unexecuted contract to give a lien or mortgage,[85] provided the con-

76. See MORTGAGES, 27 Cyc. 1078 *et seq.*

77. See *In re* York, etc., R. Co., 50 Me. 552, 52 Me. 82, conveyance held to be a mortgage and not a deed of trust.

A contract between a manufacturer of cars and a railroad company by which the latter is bound to pay the price of certain cars delivered to it by the former, either paying its notes or by surrendering the property to be sold in order to make payments, is a mortgage. Herryford *v.* Davis, 102 U. S. 235, 26 L. ed. 160.

A bill of sale by a railroad company to the manufacturer of certain rolling stock which has been delivered and partly paid for, with an agreement for a lease by the company and ownership by it when paid for, constitutes in effect a mortgage. Potter *v.* Boston Locomotive Works, 1 Gray (Mass.) 154.

Taking preferred stock has been held to be a contract for an advance of money to the company and the same as a purchase of the company's bonds and only another form of mortgage. See West Chester, etc., R. Co. *v.* Jackson, 77 Pa. St. 321.

A contract whereby cars and locomotives are leased to a railroad company, which agrees to pay for every car and locomotive so delivered an annual rent, for a certain period, at the end of which the cars and locomotives are to become the property of the railroad company, with a proviso that upon default of payment of the annual rent, or failure to observe any of the covenants of the lease, the rights of the company shall be determined and the property reclaimed by the lessors, is a mortgage, and not a lease. Frank *v.* Denver, etc., R. Co., 23 Fed. 123.

Bonds creating a lien upon railroad property and intended as security for an indebtedness are in effect mortgages and are governed by the laws relating to mortgages. King *v.* Tuscumbia, etc., R. Co., 14 Fed. Cas. No. 7,808.

78. McLane *v.* Placerville, etc., R. Co., 66 Cal. 606, 6 Pac. 748; Butler *v.* Rahm, 46 Md. 541; Southern Pac. R. Co. *v.* Doyle, 11 Fed. 253, 8 Sawy. 60.

Me. Rev. St. (1857) c. 61, § 51 *et seq.*, and St. (1858) c. 30, relative "to trustees of railroads," and regulating the proceedings to be had when a railroad has been conveyed to trustees for the use of bondholders contemplate the execution of a deed of trust, and not the execution of a mortgage. *In re* York, etc., R. Co., 50 Me. 552.

79. Coe *v.* Johnson, 18 Ind. 218; Wisconsin Cent. R. Co. *v.* Wisconsin River Land Co., 71 Wis. 94, 36 N. W. 837.

80. Ellis *v.* Boston, etc., R. Co., 107 Mass. 1. See also, generally, MORTGAGES, 27 Cyc. 1046; TRUSTS.

81. Hervey *v.* Illinois Midland R. Co., 28 Fed. 169; Farmers' L. & T. Co. *v.* Chicago, etc., R. Co., 27 Fed. 146.

82. Ellis *v.* Boston, etc., R. Co., 107 Mass. 1.

83. See Barney, etc., Mfg. Co. *v.* Hart, 1 S. W. 414, 8 Ky. L. Rep. 223; Ketchum *v.* Pacific R. Co., 14 Fed. Cas. No. 7,739, 4 Dill. 78 [*affirmed* in 101 U. S. 289, 25 L. ed. 932].

84. Miller *v.* Rutland, etc., R. Co., 36 Vt. 452 (holding that a mortgage executed by the president of a railroad company in his own name intending it to be a valid mortgage of the company, although not the deed of the corporation, should be regarded as an equitable mortgage and valid as against the company and against holders of bonds secured by subsequent mortgages executed by the company to trustees with notice of the existence of such mortgage); Central Trust Co. *v.* Bridges, 57 Fed. 753, 6 C. C. A. 539.

85. Waco Tap R. Co. *v.* Shirley, 45 Tex. 355; Poland *v.* Lamoille Valley R. Co., 52 Vt. 144; Holroyd *v.* Marshall, 10 H. L. Cas. 191, 9 Jur. N. S. 213, 33 L. J. Ch. 193, 7 L. T. Rep. N. S. 172, 11 Wkly. Rep. 171, 11 Eng. Reprint 999.

An unexecuted promise to execute a mortgage under which the mortgagor goes into

tract is one of which a court of equity will decree specific performance.[86] Under some statutes bonds issued by,[87] or in aid of,[88] a railroad company constitute a mortgage on its property without the execution of an additional mortgage to secure the same.

(II) *REQUISITES AND VALIDITY.* It is essential that the mortgage shall be based upon a valuable consideration,[89] and if it is made upon an inadequate consideration as part of an illegal and fraudulent scheme, it is null and void,[90] even in the hands of a *bona fide* holder.[91] Except where there are special statutory provisions governing such mortgages, a railroad mortgage is regulated by the limitations, prohibitions, or other requirements applicable to mortgages generally,[92] such as to mode of execution;[93] and this applies to mortgages of personal property, it being necessary in the absence of statute otherwise that all the requirements as to chattel mortgages generally be complied with.[94]

(III) *RETROACTIVE AND CURATIVE STATUTES.* A railroad mortgage which is *ultra vires*, as being made without legislative authority, may be subsequently ratified or cured by an act of the legislature, and thereby made as binding as if originally authorized,[95] so far as the state and the public are con-

possession is in equity equivalent to a mortgage as between the parties. Texas Western R. Co. *v.* Gentry, 69 Tex. 625, 8 S. W. 98.

86. Holroyd *v.* Marshall, 10 H. L. Cas. 191, 9 Jur. N. S. 213, 33 L. J. Ch. 193, 7 L. T. Rep. N. S. 172, 11 Wkly. Rep. 171, 11 Eng. Reprint 999.

87. State *v.* Florida Cent. R. Co., 15 Fla. 690; Brunswick, etc., R. Co. *v.* Hughes, 52 Ga. 557.

88. U. S. *v.* Union Pac. R. Co., 91 U. S. 72, 23 L. ed. 224; Tompkins *v.* Little Rock, etc., R. Co., 15 Fed. 6. See State *v.* Mexican Gulf R. Co., 3 Rob. (La.) 513.

89. Union Trust Co. *v.* New York, etc., R. Co., 9 Ohio Dec. (Reprint) 773, 17 Cinc. L. Bul. 176.

Consideration of mortgages generally see MORTGAGES, 27 Cyc. 1049 *et seq.*

90. Union Trust Co. *v.* New York, etc., R. Co., 9 Ohio Dec. (Reprint) 773, 17 Cinc. L. Bul. 176.

91. Union Trust Co. *v.* New York, etc., R. Co., 9 Ohio Dec. (Reprint) 773, 17 Cinc. L. Bul. 176.

92. Farmers' L. & T. Co. *v.* Oregon, etc., R. Co., 24 Fed. 407, holding that the clause in section 3 of the Oregon act of Oct. 26, 1882 (Sess. Laws, p. 65), commonly called the "Mortgage Tax Law," which declares that all mortgages whereby land in more than one county "is made security for the payment of a debt, shall be void," applies to a mortgage executed by a railroad company of its road and other property in several counties, and that therefore such mortgage is void and of no effect. It is stated in the opinion of the court in this case, however, that by the act of 1885 (Sess. Laws, p. 9), railroad mortgages thereafter executed are taken out of the operation of this clause.

93. Bishop *v.* McKillican, 124 Cal. 321, 57 Pac. 76, 71 Am. St. Rep. 68 (holding that where the statute conferring the power on railroad companies to execute mortgages does not prescribe the mode of execution, the mode and manner of the execution of mortgages of real and personal property by such company is that prescribed by the statutes for the execution of such mortgages in general); Palmer *v.* Forbes, 23 Ill. 301.

The acknowledgment of a railroad mortgage may be made in another state from that in which the company was organized and its property is located. Hodder *v.* Kentucky, etc., R. Co., 7 Fed. 793.

94. Hunt *v.* Bullock, 23 Ill. 320 (holding that unless a mortgage of the personal property of a railroad conforms to the requirements of the law in regard to chattel mortgages, the property covered by it will be liable to attachment and sale on execution by the creditors of the road); Richards *v.* Merrimack, etc., R. Co., 44 N. H. 127.

A failure of agents to sign the oath professedly as acting for the company does not invalidate a mortgage of personalty of a railroad company sworn to by the agents executing it. Richards *v.* Merrimack, etc., R. Co., 44 N. H. 127.

A mortgage or trust deed of personalty not accompanied by an affidavit of good faith as required by Wash. Code, § 1648, is void as against a judgment creditor, in respect to rolling stock and other movable property. Illinois Trust, etc., Bank *v.* Seattle Electric R., etc., Co., 82 Fed. 936, 27 C. C. A. 268.

A deed of trust of personalty which provides for the possession to remain with the railroad company not acknowledged before a justice of the peace of the district in which the company has its principal office or place of business, and where no memorandum of the same, with a list of the property embraced in it, is entered on the justice's docket, is void as against third persons. Hunt *v.* Bullock, 23 Ill. 320.

95. *Illinois.*— Hatcher *v.* Toledo, etc., R. Co., 62 Ill. 477.

Iowa.— Dunham *v.* Isett, 15 Iowa 284.

Maine.— Shepley *v.* Atlantic, etc., R. Co., 55 Me. 395.

Massachusetts.— Shaw *v.* Norfolk County R. Co., 5 Gray 162.

New Hampshire.— Richards *v.* Merrimack, etc., R. Co., 44 N. H. 127.

cerned.[96] But it cannot, by such curative statute, change the vested rights of individuals in respect to such mortgage; but such rights are to be determined by the laws in force when they accrued.[97] Thus, so far as the state and public are concerned, a mortgage by a railroad company of its corporate franchises without authority in its charter may be ratified and rendered valid by subsequent legislative enactment, since the right to object to such mortgage is one that affects the public alone and the legislature as the representatives of the people may waive it by a subsequent act.[98] But the legislature cannot subsequently confirm a fraudulent foreclosure sale of the mortgaged property.[99]

(iv) *Assent of Shareholders or Directors.* Under some statutes it is essential to the validity of a railroad mortgage that shareholders of a given number or amount consent thereto,[1] or that the mortgage be authorized by a vote of the directors;[2] although where the directors are given general power to mortgage, the fact that by other sections of the statute the company cannot do certain other things without the concurrence of the stock-holders does not require such concurrence in the execution of a mortgage.[3]

(v) *Necessity and Effect of Registration.* Railroad mortgages, like other mortgages, must be recorded in the manner prescribed in order to charge third parties with notice thereof;[4] and unless a railroad mortgage is acknowledged and recorded as required by the laws of the state where the property is situated, it will not establish a lien on such property in favor of the mortgagee as against

New Jersey.— See Kelly *v.* Boylan, 32 N. J. Eq. 581 [*reversed* in 36 N. J. Eq. 331, on the ground that the act of April 21, 1876, is prospective only].

Ohio.— Coe *v.* Columbus, etc., R. Co., 10 Ohio St. 372, 75 Am. Dec. 518.

United States.— Galveston, etc., R. Co. *v.* Cowdrey, 11 Wall. 459, 20 L. ed. 199 (holding that the Texas act of Dec. 19, 1857, providing that the property and franchises of a railroad company shall be subject to payment of its debts and legal liabilities extends to mortgages executed before the passage of the law as well as after); Hall *v.* Sullivan R. Co., 14 Fed. Cas. No. 5,948, Brunn. Col. Cas. 613.

See 41 Cent. Dig. tit. "Railroads," § 512.

A legislative act authorizing the trustees to sell the road is a ratification of a mortgage so far as the state and public are concerned. Richards *v.* Merrimack, etc., R. Co., 44 N. H. 127.

96. Richards *v.* Merrimack, etc., R. Co., 44 N. H. 127.

97. Richards *v.* Merrimack, etc., R. Co., 44 N. H. 127.

An execution creditor, having acquired priority over a chattel mortgage by reason of the failure of the mortgagor to file his mortgage or take immediate possession of the property mortgaged is not deprived of his priority by a subsequent act of the legislature making the filing unnecessary when the mortgage is registered as a conveyance of lands. Williamson *v.* New Jersey Southern R. Co., 29 N. J. Eq. 311.

98. Hatcher *v.* Toledo, etc., R. Co., 62 Ill. 477. See Hall *v.* Sullivan R. Co., 11 Fed. Cas. No. 5,948, Brunn. Col. Cas. 613.

99. White Mountains R. Co. *v.* White Mountains R. Co., 50 N. H. 50.

1. Galveston, etc., R. Co. *v.* Fontaine, 23 Tex. Civ. App. 519, 57 S. W. 872 (holding, however, that the authorization of stockholders as required by Rev. St. art. 4487, is not required as a condition to the execution of a mortgage to secure an extension of time for the payment of a lien on the property, since such mortgage creates no new lien; the purpose of the statute being to restrict the power of the railroad company to incur liabilities to become a lien on their franchises and property); Hervey *v.* Illinois Midland R. Co., 28 Fed. 169 (holding that the provision of the Illinois General Railroad Act that the assent of two thirds in amount of the stock shall be essential to the validity of any mortgage applies only to companies formed under that act). And see the statutes of the several states.

As to corporate mortgages generally see CORPORATIONS, 10 Cyc. 1190 *et seq.*

2. See McLane *v.* Placerville, etc., R. Co., 66 Cal. 606, 6 Pac. 748; and, generally, CORPORATIONS, 10 Cyc. 1198 *et seq.*

3. Hodder *v.* Kentucky, etc., R. Co., 7 Fed. 793.

4. See Gilchrist *v.* Helena, etc., R. Co., 47 Fed. 593, holding that Mont. Cod. St. (1888) p. 824, § 706, relating to mortgages by railroad companies and providing that the records in the office of the secretary of state of a mortgage by a railroad company whose line is wholly or in part in Montana shall be notice to all parties without further records, is not repealed by Mont. Cod. St. (1888) p. 1073, §§ 1555, 1538.

Conflict of laws.— Where a railroad mortgage made in one state on property situated there is valid by the laws of that state, it will be recognized and enforced in another state, although there has been no compliance with the laws of such other state requiring chattel mortgages to be filed therein. Winslow *v.* Troy Iron, etc., Factory, 1 Disn. (Ohio) 229, 12 Ohio Dec. (Reprint) 591.

subsequent *bona fide* creditors, purchasers, and mortgagees,[5] although as between the parties to the mortgage it is valid without registration.[6] Except where there are special statutes or charter provisions relating to the acknowledgment and recording of railroad mortgages,[7] the acknowledgment and recordation of such mortgages are regulated by the statutes applicable to mortgages generally.[8] Under some statutes a railroad mortgage covering the realty and the franchises as well as the personalty connected therewith and used for railroad purposes, is not subject to the statutes regarding the acknowledgment and recording of chattel mortgages, and if the mortgage is recorded in the manner prescribed for mortgages of real estate it is valid,[9] particularly where another statute makes special provision for railroad mortgages.[10] But under other statutes where a mortgage purporting to cover real and personal property is not executed in the manner prescribed for mortgages of personal property but only as a mortgage of real property, it is void as to the personal property.[11] Thus in some jurisdictions a mortgage of rolling stock is regarded as a chattel mortgage and must be executed and recorded in the manner prescribed for such mortgages generally.[12] But in other jurisdictions it is held that rolling stock as well as other articles of personalty which are essential to the use of the road are to be regarded as fixtures and pass under a mortgage of the road, so that such a mortgage is not within the statutes providing for the filing and recording of chattel mortgages;[13] although, even

5. Barney *v.* Hart, 1 S. W. 414, 8 Ky. L. Rep. 223; Coe *v.* New Jersey Midland R. Co., 31 N. J. Eq. 105; State Trust Co. *v.* Kansas City, etc., R. Co., 120 Fed. 398; Frank *v.* Denver, etc., R. Co., 23 Fed. 123.

6. State Trust Co. *v.* Kansas City, etc., R. Co., 120 Fed. 398; Illinois Cent. R. Co. *v.* Mississippi Cent. R. Co., 12 Fed. Cas. No. 7,008.

7. See Boston, etc., R. Co. *v.* Coffin, 50 Conn. 150 (holding that the recording of a mortgage on a railroad in the office of the secretary of state has the same effect that it would have if recorded in all of the towns along the line of such road); Parker *v.* New Orleans, etc., R. Co., 33 Fed. 693 (holding that it is not necessary under La. Rev. St. §§ 726, 727, 2396, 2397, Rev. Laws (1904), § 2428, to the validity of a railroad mortgage given to raise money for construction purposes that it should be reinscribed).

8. See Stevens *v.* Buffalo, etc., R. Co., 31 Barb. (N. Y.) 590; and cases cited *infra*, notes 9–16.

9. Cooper *v.* Corbin, 105 Ill. 224 (holding that a deed of trust by a railroad company of all its properties and franchises recorded in every county through which the road runs is valid, although not acknowledged in accordance with the chattel mortgage act); Peoria, etc., R. Co. *v.* Thompson, 103 Ill. 187; Platt *v.* New York, etc., R. Co., 9 N. Y. App. Div. 87, 41 N. Y. Suppl. 42 [*affirming* 17 Misc. 22, 39 N. Y. Suppl. 871, and *affirmed* in 153 N. Y. 670, 48 N. E. 1106] (under Laws (1868), c. 779); Hammock *v.* Farmers' L. & T. Co., 105 U. S. 77, 26 L. ed. 1111; Metropolitan Trust Co. *v.* Pennsylvania, etc., R. Co., 25 Fed. 760 (holding also that section 86 of the New Jersey act, respecting railroads, has not been repealed by section 18 of the act of March 25, 1881); Farmers' L. & T. Co. *v.* St. Joseph, etc., R. Co., 8 Fed. Cas. No. 4,669, 3 Dill. 412. *Compare* Boylan *v.* Kelly, 36 N. J. Eq. 331 [*reversing* 32 N. J. Eq. 581]; Hoyle *v.* Plattsburgh, etc., R. Co., 54 N. Y. 314, 13 Am. Rep. 595 [*reversing* 51 Barb. 45].

10. Southern California Motor-Road Co. *v.* Union L. & T. Co., 64 Fed. 450, 12 C. C. A. 215 [*modifying* 51 Fed. 840]; Metropolitan Trust Co. *v.* Pennsylvania, etc., R. Co., 25 Fed. 760.

11. Bishop *v.* McKillican, 124 Cal. 321, 57 Pac. 76, 71 Am. St. Rep. 68; Illinois Trust, etc., Bank *v.* Seattle Electric R., etc., Co., 82 Fed. 936, 27 C. C. A. 268. But see Southern California Motor-Road Co. *v.* Union L. & T. Co., 64 Fed. 450, 12 C. C. A. 215 [*modifying* 51 Fed. 840], construing Cal. Civ. Code, §§ 456, 2955, 2959.

12. Potter *v.* Boston Locomotive Works, 12 Gray (Mass.) 154; Williamson *v.* New Jersey Southern R. Co., 29 N. J. Eq. 311 [*reversing* 28 N. J. Eq. 277] (holding that a mortgage by a railroad company on its roadbed and franchises together with its engines, cars, and rolling stock, so far as regards the latter class of property is a chattel mortgage within the provisions of the act concerning chattel mortgages); Radebaugh *v.* Tacoma, etc., R. Co., 8 Wash. 570, 36 Pac. 460 (holding that under Gen. St. § 1646 *et seq.*, a mortgage upon real estate of the railroad company and purporting to cover rolling stock also does not bind the latter class of property where the instrument is executed and recorded as a real estate mortgage, and does not comply with the formalities required in the execution of chattel mortgages); Hervey *v.* Rhode Island Locomotive Works, 93 U. S. 664, 23 L. ed. 1003.

13. Platt *v.* New York, etc., R. Co., 9 N. Y. App. Div. 87, 41 N. Y. Suppl. 42 [*affirming* 17 Misc. 22, 39 N. Y. Suppl. 871, and *affirmed* in 153 N. Y. 670, 48 N. E. 1106]; Farmers' L. & T. Co. *v.* Hendrickson, 25 Barb.

in the later jurisdictions, a different principle applies to such other personal property as may be used or is commonly used for other than railroad purposes.[14] Under some statutes the recordation of a chattel mortgage of railroad property is not necessary where the mortgagee takes possession of the property before a levy or seizure in behalf of those as to whom it was otherwise void.[15] All persons are chargeable with notice of a mortgage taken by a state to secure a loan made by it to a railroad company in pursuance of a public statute, although the mortgage is not recorded.[16]

(VI) *NECESSITY FOR DELIVERY.* In some jurisdictions a chattel mortgage under which the mortgagor is permitted to retain possession of the mortgaged property with a power of disposition is void as against creditors,[17] except as to such property as is necessary to carry on the business of the road.[18] Thus where a railroad company is empowered to pledge its income, since it owes a duty to the public to operate its road, the power to pledge carries with it as an incident the power to dispose of sufficient income for the two-fold purpose of creating mortgage liabilities and of discharging its duties to the public,[19] and to the extent therefore that the mortgage permits the disposal of income to provide means of repairing and running its road such a provision in the mortgage does not render it void.[20]

(VII) *PERSONS ENTITLED OR ESTOPPED TO DENY VALIDITY.*[21] Such requirements as are for the benefit of stock-holders can be taken advantage of only by such stock-holders; and a creditor cannot dispute the validity of the mortgage on the ground that some of such requirements have not been complied with.[22] A participant in a fraudulent issue of railroad bonds cannot dispute the validity of a mortgage executed to secure them.[23] Where the company has exceeded the statutory limit of indebtedness and has executed a mortgage on its property to secure the debt which is not in itself opposed to public policy, neither the company nor any creditor or encumbrancer whose rights accrued subsequent to such mortgage, and with notice thereof, has any standing to question its validity on that ground.[24] A bondholder who accepts his bonds, referring on their face to the mortgage given to secure them, and retains such bonds without objection for an unreasonable length of time, is estopped from questioning the validity of any provision in the mortgage.[25] A railroad construction company which, before the road is turned over to the company for which it is being built, mortgages some of the property for money used in building the road, cannot avoid the mortgage on the ground that it was not the owner of the property at the time the

(N. Y.) 484; Herryford *v.* Davis, 102 U. S. 235, 26 L. ed. 160 (construing laws of Missouri); Farmers' L. & T. Co. *v.* St. Joseph, etc., R. Co., 8 Fed. Cas. No. 4,669, 3 Dill. 412. But see Hoyle *v.* Plattsburgh, etc., R. Co., 54 N. Y. 314, 13 Am. Rep. 595 [*reversing* 51 Barb. 45 (*affirming* 47 Barb. 104)]; Stevens *v.* Buffalo, etc., R. Co., 31 Barb. (N. Y.) 590.

14. Farmers' L. & T. Co. *v.* St. Joseph, etc., R. Co., 8 Fed. Cas. No. 4,669, 3 Dill. 412.

15. State Trust Co. *v.* Kansas City, etc., R. Co., 120 Fed. 398. And see, generally, CHATTEL MORTGAGES, 6 Cyc. 1054.

16. Memphis, etc., R. Co. *v.* State, 37 Ark. 632.

17. Williamson *v.* New Jersey Southern R. Co., 29 N. J. Eq. 311; Coe *v.* Peacock, 14 Ohio St. 187; Welch *v.* Pittsburgh, etc., R. Co., 2 Ohio Dec. (Reprint) 5, 1 West. L. Month. 87.

18. Covey *v.* Pittsburg, etc., R. Co., 3 Phila. (Pa.) 173.

19. Welch *v.* Pittsburgh, etc., R. Co., 2 Ohio Dec. (Reprint) 5, 1 West. L. Month. 87.

20. Welch *v.* Pittsburgh, etc., R. Co., 2 Ohio Dec. (Reprint) 5, 1 West. L. Month. 87.

21. As to corporate mortgages generally see CORPORATIONS, 10 Cyc. 1195 *et seq.*

22. Hervey *v.* Illinois Midland R. Co., 28 Fed. 169.

23. Reed's Appeal, 122 Pa. St. 565, 16 Atl. 100.

24. Beach *v.* Wakefield, 107 Iowa 567, 76 N. W. 688, 78 N. W. 197, holding that the rule that creditors and junior lienors of a corporation executing a mortgage exceeding its limit of indebtedness who may acquire their rights subsequent to such mortgage are estopped with the corporation to question its validity does not except a railroad corporation from its operation because of the latter's quasi-public character and functions.

25. Lyman *v.* Kansas City, etc., R. Co., 101 Fed. 636.

mortgage was given.[26] A person whose right or claim depends upon the same instruments that operate to make a railroad mortgage valid cannot deny the validity of such mortgage on the ground that such instruments are invalid.[27]

c. Construction and Operation Generally[28] — (I) *IN GENERAL.* The construction and operation of railroad mortgages is ordinarily regulated by the rules applying to the construction and operation of mortgages generally,[29] and as in the case of other mortgages the elementary rule to be followed is to ascertain the intention of the parties from the mortgage, interpreted in the light of the attending circumstances, and if possible give effect to such intention.[30] The statute under which the mortgage is executed may be referred to in construing the mortgage.[31] A mortgage of railroad rights and property does not free the remaining interest of the company in that property from liability for other debts.[32]

(II) *WHAT LAW GOVERNS.* In the absence of some special statute to the contrary, railroad mortgages are subject to the same laws as all other mortgages.[33]

d. Property and Funds Included — (I) *IN GENERAL.* The nature, location, and extent of the property covered by a railroad mortgage depends upon the intention of the parties, which must be determined from the description of the property contained in the mortgage, interpreted according to the established

26. Hardin *v.* Iowa R., etc., Co., 78 Iowa 726, 43 N. W. 543, 6 L. R. A. 52.

27. Beekman *v.* Hudson River West Shore R. Co., 35 Fed. 3.

28. As to application of proceeds of mortgage see *infra*, VIII, A, 8.

As to debts and obligations secured see *infra*, VIII, A, 7, e.

As to interest see *infra*, VIII, A, 10.

As to priorities see *infra*, VIII, A, 9.

As to property and funds included see *infra*, VIII, A, 7, d.

As to rights, duties, and liabilities of mortgagees and trustees see *infra*, VIII, A, 7, f.

29. See MORTGAGES, 27 Cyc. 1135 *et seq.*

Particular mortgages construed.— Under a railroad mortgage of all its property and also all its tolls, income, rents, issues, and profits, with the affirmative right of possession and management of the road in the mortgagors, the mortgagors have a legal right to contract for such articles as would enter into the expense of maintaining and operating the road. Parkhurst *v.* Northern Cent. R. Co., 19 Md. 472, 81 Am. Dec. 648. A provision for the expenditure of money received from the sale of part of the property clear of the mortgage is not complied with by the expenditure of other money before the receipt of the purchase-money of the property sold, unless it is expended under circumstances such as connect the antecedent expenditure and the purchase-money together in such way as to show that the expenditure is made with the expectation of reimbursement out of the purchase-money and in reliance upon the receipt thereof for that purpose. Long Dock Co. *v.* Morris, etc., R. Co., (N. J. Ch. 1887) 9 Atl. 194.

Where general and special terms are employed in the mortgage, the special terms will control the general ones if there is a repugnancy. Pullan *v.* Cincinnati, etc., Air-Line R. Co., 20 Fed. Cas. No. 11,461, 4 Biss. 35.

Where the mortgage and bond secured thereby contain inconsistent provisions, those contained in the bond will prevail. Rothschild *v.* Rio Grande Western R. Co., 84 Hun (N. Y.) 103, 32 N. Y. Suppl. 37 [*affirmed* in 17 N. Y. App. Div. 635, 45 N. Y. Suppl. 1147, 31 N. Y. App. Div. 630, 53 N. Y. Suppl. 1113 (*affirmed* in 164 N. Y. 594, 595, 58 N. E. 1091, 1092)].

30. Parkhurst *v.* Northern Cent. R. Co., 19 Md. 472, 81 Am. Dec. 648.

Particular mortgage construed.— A clause providing for the payment of principal and interest without "any deduction" in respect of "any taxes" refers only to taxes which might be levied upon the mortgaged property while in the mortgagor's possession, and does not constitute a contract not to deduct the duty imposed by the revenue act. Haight *v.* Pittsburgh, etc., R. Co., 6 Wall. (U. S.) 15, 18 L. ed. 818. A mortgage to secure the payment of dividends to the holders of certificates purporting to be certificates of preferred stock is an incident to the principal obligation; and the terms and purport of the certificates express the real intention of the parties even though some of the stipulations of the mortgage may be apparently inconsistent with the intent as expressed by the certificates. Miller *v.* Ratterman, 47 Ohio St. 141, 24 N. E. 496 [*reversing* 10 Ohio Dec. (Reprint) 555, 22 Cinc. L. Bul. 99].

Although the mortgage does not contain words of inheritance the intention to pass the fee may be gathered from its provisions; and where for the execution of its provisions an estate in fee simple must be vested in a trustee the record of the mortgage in full is notice that the mortgage is intended to pass the fee. Randolph *v.* New Jersey West Line R. Co., 28 N. J. Eq. 49.

31. Northern Cent. R. Co. *v.* State, 17 Md. 8.

32. Coe *v.* Columbus, etc., R. Co., 10 Ohio St. 372, 75 Am. Dec. 518.

33. Hunt *v.* Bullock, 23 Ill. 320; Palmer *v.* Forbes, 23 Ill. 301. And see, generally, MORTGAGES, 27 Cyc. 1133.

rules of construction, and aided by extrinsic evidence for purposes of identification and limitation,[34] reference being had to the statute authorizing the mortgage,[35] and if possible such a construction must be given to the mortgage as to carry out the intention of the parties in respect to the property to be conveyed.[36] In the absence of restrictive words, the natural import of the language used in the description must be adjudged the intent and scope of the mortgage.[37] Thus a mortgage of the road with its corporate privileges and appurtenances covers the entire surveyed line of the railroad, to its whole extent;[38] but at the same time covers only such property as is useful and necessary and employed in the construction, maintenance, operation, preservation, repair, or security of the road;[39] and therefore does not embrace property not used or to be used in connection with the

Where it does not appear where a mortgage upon a railroad operating in several states was executed the court of one state will not be bound to adopt the construction given by the courts of another of such states to a similar mortgage, but it will be presumed that the courts of such other state will construe the instrument in accordance with the common-law rule. Mississippi Valley, etc., R. Co. *v.* U. S. Express Co., 81 Ill. 534.

34. See Buck *v.* Memphis, etc., R. Co., 4 Cent. L. J. 430; Chapman *v.* Pittsburgh, etc., R. Co., 26 W. Va. 299 (mortgage by Pennsylvania company chartered to build a road from near Pittsburg to the Pennsylvania state line held to convey no property in West Virginia); Hodder *v.* Kentucky, etc., R. Co., 7 Fed. 793. And see, generally, MORTGAGES, 27 Cyc. 1137 *et seq.*

Where general words of description are followed by particular words the latter will control the former if there be a repugnancy. Pullan *v.* Cincinnati, etc., Air-Line R. Co., 20 Fed. Cas. No. 11,461, 4 Biss. 35. Thus an enumeration of the property and rights intended to be conveyed limits and explains previous general words of description. Butler *v.* Rahm, 46 Md. 541.

Reference to other instruments.— The recording of a mortgage of railroad property described generally "as the same is located by survey duly filed in the office of the clerk of the county" gives no notice of specific property, if in fact the survey was not filed until six months thereafter. Bird *v.* New Jersey, etc., R. Co., 3 N. Y. App. Div. 344, 38 N. Y. Suppl. 281. So the description contained in a second mortgage cannot be aided by that contained in a first mortgage, if the second contains no reference to the former mortgage, and expresses no intention that the later shall cover the same property as the first. McIlhenny *v.* Binz, 80 Tex. 1, 13 S. W. 655, 26 Am. St. Rep. 705.

In determining whether property is real or personal in its nature so as to be included within a mortgage of the property of the road, it has been held that the ground on which a railroad is built as well as the structures, depot, grounds, buildings, turntables, rolling stock, rails, ties, chairs, spikes, and the like, and all other material brought upon the ground of the railroad company designed to be attached to the railroad is real estate; but fuel, oil, and the like which are designed for consumption in the use and which may be sold and carried away and used as well for other purposes as in the operation of the road, and when taken away have no distinguishing marks to show that they are designed for railroad uses, are personal property. Palmer *v.* Forbes, 23 Ill. 301. See also Hunt *v.* Bullock, 23 Ill. 320.

35. Coe *v.* New Jersey Midland R. Co., 31 N. J. Eq. 105.

Where an act of the legislature contemplates a mortgage of all the company's estate, a mortgage given pursuant to such authority will be regarded as intended to convey the whole estate, unless the contrary appears. Coe *v.* New Jersey Midland R. Co., 31 N. J. Eq. 105.

36. See Hoyle *v.* Plattsburgh, etc., R. Co., 51 Barb. (N. Y.) 45 [*reversed* on other grounds in 54 N. Y. 314, 13 Am. Rep. 595].

37. Central Trust Co. *v.* Kneeland, 138 U. S. 414, 11 S. Ct. 357, 34 L. ed. 1014, holding that where a company, incorporated to construct a railroad between two cities named as its termini, gives a mortgage which expressly covers its line constructed or to be constructed between the main termini together with all the stations, depots, grounds, engine-houses, machine shops, buildings, and erections now or hereafter appertaining thereto, such description of the line of railroad creates a lien upon its terminal facilities in those cities, and is not limited to so much of the road as is found within the city limits of those places.

38. Eldridge *v.* Smith, 34 Vt. 484; Central Trust Co. *v.* Chattanooga, etc., R. Co., 89 Fed. 388.

39. Morgan *v.* Donovan, 58 Ala. 241.

A depot building, as against a mechanic's lien, is property connected with the line of the railroad and regarded as part of the mortgaged premises covered by a mortgage containing a general description covering the railroad line, depots, station houses, etc. Coe *v.* New Jersey Midland R. Co., 31 N. J. Eq. 105.

That property purchased was intended for use on a railroad controlled under an invalid lease, and used in connection with the railroad owned by the company, does not exclude it from the operation of a mortgage covering all property acquired by the company which might be used as a part of its railroad or might be necessary for the construction or operation thereof. Buck *v.* Seymour, 46 Conn. 156.

railroad, and in the promotion of the direct and proximate purposes of its construction.[40] So except where the company has authority to mortgage its corporate franchises,[41] a mortgage of the railroad and franchise does not convey its corporate existence or its general corporate powers, but only such franchises as are necessary to make the conveyance beneficial to the grantees, to maintain and manage the railroad and receive the profits thereof.[42] Where the mortgage specifically enumerates certain classes of property to be covered by the mortgage, ordinarily it will not cover other classes of property not named,[43] although the words "all other property" are used in connection with the specific description, as these words so used refer only to the classes of property enumerated.[44] In England a debenture or mortgage of the "undertaking" of a railroad company and of the rates and tolls arising out of the undertaking gives the debenture holder a charge upon the undertaking generally as a going concern and upon the tolls and sums of money owned by the company,[45] and includes the tolls and property of the company as proprietors,[46] but not stock or property as carriers,[47] nor does it give a specific charge upon the lands of the company,[48] or upon the rolling stock.[49]

(II) *Nature of Title of Mortgagor.* Unless restricted to some particular interest or estate, a railroad mortgage, like other mortgages,[50] conveys all title or interest, whether legal or equitable, which the company then has in the mortgaged property,[51] and a mortgage on the equitable title of certain railroad property will not be postponed to a subsequent mortgage on the legal title given to secure its own indebtedness.[52] But it does not attach to property to which the railroad company has never had a consummated right or equity.[53]

(III) *Designation of Property by Mortgagor.* Where a mortgage on the rolling stock of a certain division of a railroad contains a covenant to designate in a certain mode as belonging to that division a certain proportion of the whole rolling stock owned by the company, as against subsequent mortgagees

40. Morgan *v.* Donovan, 58 Ala. 241.

Property purchased of an opposition steamship line not with a view of employing it in connection with the business of the road, but simply to withdraw it from the business to prevent competition, is not covered by such a mortgage. Morgan *v.* Donovan, 58 Ala. 241.

41. First Div. St. Paul, etc., R. Co. *v.* Parcher, 14 Minn. 297, holding that a mortgage upon the "roads, lands, and franchises" of a corporation includes the corporate franchise, or the right to be a corporation, where the corporation had authority under its charter and the constitution of the state to mortgage the corporate franchise.

42. Chadwick *v.* Old Colony R. Co., 171 Mass. 239, 50 N. E. 629; Eldridge *v.* Smith, 34 Vt. 484.

43. Alabama *v.* Montague, 117 U. S. 602, 611, 6 S. Ct. 911, 914, 29 L. ed. 1000, 1003; Smith *v.* McCullough, 104 U. S. 25, 26 L. ed. 637.

44. Brainerd *v.* Peck, 34 Vt. 496; Alabama *v.* Montague, 117 U. S. 602, 611, 6 St. Ct. 911, 914, 29 L. ed. 1000, 1003.

45. Gardner *v.* London, etc., R. Co., L. R. 2 Ch. 201, 36 L. J. Ch. 232, 15 L. T. Rep. N. S. 552, 15 Wkly. Rep. 324.

46. Hart *v.* Eastern Union R. Co., 7 Exch. 246, 6 R. & Can. Cas. 818.

47. Hart *v.* Eastern Union R. Co., 7 Exch. 246, 6 R. & Can. Cas. 818.

48. Wickham *v.* New Brunswick, etc., R. Co., L. R. 1 P. C. 64, 12 Jur. N. S. 34, 35 L. J. P. C. 6, 14 L. T. Rep. N. S. 311, 14 Wkly. Rep. 251; Doe *v.* St. Helen's, etc., R. Co., 2 Q. B. 364, 1 G. & D. 663, 6 Jur. 641, 11 L. J. Q. B. 6, 2 R. & Can. Cas. 756, 42 E. C. L. 715; Hart *v.* Eastern Union R. Co., 7 Exch. 246, 6 R. & Can. Cas. 818; Gardner *v.* London, etc., R. Co., L. R. 2 Ch. 201, 36 L. J. Ch. 323, 15 L. T. Rep. N. S. 552, 15 Wkly. Rep. 324.

49. Gardner *v.* London, etc., R. Co., L. R. 2 Ch. 201, 36 L. J. Ch. 323, 15 L. T. Rep. N. S. 552, 15 Wkly. Rep. 324.

50. See, generally, Mortgages, 27 Cyc. 1138 *et seq.*

51. Kneeland *v.* Luce, 141 U. S. 491, 12 S. Ct. 32, 35 L. ed. 830 (mortgagee held to have an equitable lien on the road, although the mortgagor had no legal title thereto); Central Trust Co. *v.* Kneeland, 138 U. S. 414, 11 S. Ct. 357, 34 L. ed. 1014.

Where lands are bought by the commissioner of a railroad company for its use, and the deeds are taken to a director of the company, on the execution of the deeds to such director, the company becomes seized with the legal estate in the lands described in the deeds, so as to render them subject to the lien and operation of a mortgage from the company to trustees for the bondholders. Buffalo, etc., R. Co. *v.* Lampson, 47 Barb. (N. Y.) 533.

52. Central Trust Co. *v.* Kneeland, 138 U. S. 414, 11 S. Ct. 357, 34 L. ed. 1014.

53. Chicago, etc., R. Co. *v.* Loewenthal, 93 Ill. 433.

of the entire system of the railroad, the first mortgage covers only such rolling stock as is thereafter designated as belonging to the division named;[54] and the lien of such mortgage on the rolling stock which has been designated is not lost by subsequent obliteration of the designations, where such rolling stock is otherwise traceable, as against the mortgagor or others claiming under a subsequent mortgage of the entire road and appurtenant rolling stock, who take with notice of the former lien created thereby.[55]

(iv) *Right of Way and Other Lands.* A railroad mortgage in general terms of all its property and franchises covers only land used for the road.[56] In the absence of a specific reservation, a mortgage of railroad real estate includes its right of way on such realty;[57] but does not cover a portion of the route which was partially constructed but which was abandoned for another route.[58] A mortgage of real estate used or appropriated or connected with the railroad embraces only real estate used or appropriated for operating or maintaining the road,[59] and does not cover real estate which has not been used or appropriated for such purposes,[60] such as town lots held by the road,[61] unless directly appurtenant to the railroad and indispensably necessary to the enjoyment of its franchises,[62] or lands acquired for subdivision and sale,[63] or a hotel in nowise connected with the railroad system.[64] A mortgage on all lands included in the location of the road or used for railroad purposes embraces such lands lying outside of the lay-out of the road as are actually needed for and used by the road;[65] but it does not embrace lands so situated but not used by the company for railroad purposes,[66] although purchased with the company's funds and in connection with the right of way.[67] On the other hand a mortgage of all lands outside the right of way which are not actually used for railroad purposes does not embrace lands within the right of way or those without but actually used for such purposes.[68] If the mortgage specifically described the land to be charged, ordinarily it will not include other lands not so described.[69]

(v) *Rolling Stock, Tracks, and Other Personal Property.* A mortgage generally of the road and all other property, real and personal, appertaining or appurtenant to the road, embraces rolling stock,[70] and all other per-

54. U. S. Trust Co. *v.* Wabash Western R. Co., 38 Fed. 891, holding this to be true, although the whole amount covenanted for was not so designated.

55. U. S. Trust Co. *v.* Wabash Western R. Co., 38 Fed. 891.

56. Youngman *v.* Elmira, etc., R. Co., 65 Pa. St. 278.

57. Hardin *v.* Iowa R., etc., Co., 78 Iowa 726, 43 N. W. 543, 6 L. R. A. 52; Bosworth *v.* Pittsburgh, etc., R. Co., 1 Ohio Cir. Ct. 69, 1 Ohio Cir. Dec. 42 [*affirmed* in 46 Ohio St. 81, 18 N. E. 533, 2 L. R. A. 199], holding that a grant and release to a railroad company to enter upon lands and select a strip thereof for a right of way and to hold the same for the purpose of the railroad as long as may be necessary will pass by a subsequent mortgage and sale thereunder.

58. Meyer *v.* Johnston, 53 Ala. 237, holding also that such abandoned route reverted to the owners of the soil.

59. Eldridge *v.* Smith, 34 Vt. 484.

A conveyance in trust of railroad lands "intended for the use and accommodation of said road" applies to the intention of the company in respect to the use of the land at the time the mortgage is executed and not to the original design when purchasing it. Eldridge *v.* Smith, 34 Vt. 484.

60. Walsh *v.* Barton, 24 Ohio St. 28; Hatry *v.* Painesville, etc., R. Co., 1 Ohio Cir. Ct. 426, 1 Ohio Cir. Dec. 238.

61. Shamokin Valley R. Co. *v.* Livermore, 47 Pa. St. 465, 86 Am. Dec. 552.

62. Shamokin Valley R. Co. *v.* Livermore, 47 Pa. St. 465, 86 Am. Dec. 552.

It is a question of fact for the jury whether town lots owned by a railroad company are indispensable to the enjoyment of its franchises, so as to be bound by a mortgage of the road "with its corporate privileges and appurtenances." Shamokin Valley R. Co. *v.* Livermore, 47 Pa. St. 465, 86 Am. Dec. 552.

63. Pardee *v.* Aldridge, 189 U. S. 429, 23 S. Ct. 514, 47 L. ed. 883 [*affirming* 24 Tex. Civ. App. 254, 60 S. W. 789].

64. Guaranty Trust Co. *v.* Atlantic Coast Electric R. Co., 132 Fed. 68.

65. Boston, etc., R. Co. *v.* Coffin, 50 Conn. 150.

66. Boston, etc., R. Co. *v.* Coffin, 50 Conn. 150.

67. Boston, etc., R. Co. *v.* Coffin, 50 Conn. 150.

68. See Boston, etc., R. Co. *v.* Coffin, 50 Conn. 150.

69. Alabama *v.* Montague, 117 U. S. 602, 611, 6 S. Ct. 911, 914, 29 L. ed. 1000, 1003.

70. Henshaw *v.* Bellows Falls Bank, 10

sonal property which is indispensable, or at least useful to the operation of the road;[71] but it does not embrace personal property which is not appurtenant to the road,[72] and therefore does not include stock in an elevator company which owns and operates an elevator near the road,[73] or steamboats used in connection with the road beyond its terminus.[74] So a mortgage of the road, its tolls and revenues, covers all the rolling stock and fixtures whether movable or immovable, essential to the production of tolls and revenues.[75] It has been held that the rolling stock of a railroad is realty so as to pass by a mortgage of the real estate;[76] but on the other hand it has been held to be personalty and therefore not embraced in a mortgage of the realty and fixtures in the absence of other words embracing chattels.[77] A specific description or enumeration of the personalty covered ordinarily excludes all other kinds of personalty;[78] but where the specific description is followed by general words, such as "all other property," it also covers property kindred to that specifically mentioned,[79] and in such case it at least covers the property mentioned although it be too uncertain to cover more.[80]

(VI) *EARNINGS, INCOME, AND OTHER FUNDS.* Where the mortgage does not embrace income, rents, and profits, the mortgagee is not entitled to a lien on such funds earned and received by the company while it is in possession of the mortgaged property,[81] except those received after the mortgagee has filed a bill

Gray (Mass.) 568; Pullan *v.* Cincinnati, etc., R. Co., 20 Fed. Cas. No. 11,461, 4 Biss. 35, holding that a mortgage of all property of the company, including the right of way, and land occupied, and all rails and other materials used thereon, or procured therefor, includes the rolling stock of the road.

A mortgage lien upon rolling stock is not lost by its being withdrawn from present use upon a broad gauge road and changed to meet a contemplated narrowing of the gauge, notwithstanding the stock on the road is kept up and improved at the same time that these materials for a narrow-gauge road are withdrawn. Hamlin *v.* Jerrard, 72 Me. 62.

71. Coe *v.* McBrown, 22 Ind. 252, where such a mortgage was held to embrace wood provided for the use of the road from time to time. See also Yorkshire R. Wagon Co. *v.* Maclure, 21 Ch. D. 309, 51 L. J. Ch. 857, 47 L. T. Rep. N. S. 290, 30 Wkly. Rep. 761.

Cast-off articles, fragments, and old materials, once forming part of a road or used in its operation, still continue under the mortgage if a proper and judicial management of the road requires that they should be recast or exchanged for new articles for the uses of the road, and a power in the mortgage authorizing the company to sell such articles does not invalidate the mortgage as to them. Coopers *v.* Wolf, 15 Ohio St. 523.

Old iron rails taken up from the road as unfit for further use are included in a deed of trust as part of the railroad property including road-bed, rails, etc.; and the trustees are entitled to have the same applied to pay interest upon bonds in preference to subsequent execution creditors of the company. Salem First Nat. Bank *v.* Anderson, 75 Va. 250.

72. See Humphreys *v.* McKissock, 140 U. S. 304, 11 S. Ct. 779, 35 L. ed. 473.

73. Humphreys *v.* McKissock, 140 U. S. 304, 11 S. Ct. 779, 35 L. ed. 473.

74. Parish *v.* Wheeler, 22 N. Y. 494; Hatry *v.* Painesville, etc., R. Co., 1 Ohio Cir. Ct. 426, 1 Ohio Cir. Dec. 238.

75. State *v.* Northern Cent. R. Co., 18 Md. 193.

76. Palmer *v.* Forbes, 23 Ill. 301; Michigan Cent. R. Co. *v.* Chicago, etc., R. Co., 1 Ill. App. 399.

Rolling stock, rails, ties, chairs, spikes, and all other property brought upon the realty, if intended to be attached thereto, are covered by a mortgage thereof. Palmer *v.* Forbes, 23 Ill. 301.

77. Williamson *v.* New Jersey Southern R. Co., 29 N. J. Eq. 311 [*reversing* 28 N. J. Eq. 277]; Hoyle *v.* Plattsburgh, etc., R. Co., 54 N. Y. 314, 13 Am. Rep. 595 [*reversing* 51 Barb. 45]; Bement *v.* Plattsburgh, etc., R. Co., 47 Barb. (N. Y.) 104 (holding that rolling stock of a railroad does not pass by foreclosure and sale under a mortgage, the terms of which did not include such rolling stock as personal property, as such stock is not a fixture); Beardsley *v.* Ontario Bank, 31 Barb. (N. Y.) 619; Radebaugh *v.* Tacoma, etc., R. Co., 8 Wash. 570, 36 Pac. 460 (holding that both the constitution and the statutes declare rolling stock of a railroad company to be personal property).

78. Smith *v.* McCullough, 104 U. S. 25, 26 L. ed. 637, holding that a mortgage of railroad property with a specific description of the different kinds of such property does not include municipal bonds issued in aid of the road and not specifically mentioned in such description.

79. Raymond *v.* Clark, 46 Conn. 129.

80. Pennock *v.* Coe, 23 How. (U. S.) 117, 16 L. ed. 436, holding that a mortgage on locomotives and all other personalty covers the locomotives even if it be too uncertain to cover other property.

81. Rumsey *v.* People's R. Co., 91 Mo. App. 202 (holding that where a mortgage does not embrace the earnings and rents of a rail-

of foreclosure and demanded possession.[82] And even where the mortgage in terms gives a lien upon the rents, income, and profits, if the mortgagor is permitted to remain in possession of the mortgaged property until default, and to receive the rents and profits, the mortgage is a prior lien only upon the net earnings of the company while in possession after the payment of expenses of operation;[83] and until possession of the mortgaged premises is actually taken by the mortgagee or trustee,[84] or the proper judicial authority intervenes,[85] as by the appointment of a receiver in foreclosure proceedings,[86] or until a demand is made therefor or for a surrender of possession under the mortgage,[87] all such funds belong to the railroad company and are subject to its control; and the company is not bound to account to the mortgagee therefor, nor is the mortgagee entitled to assert a right to such funds in the hands of the company,[88] or in the

road company the mortgagee is not entitled to this fund under foreclosure proceedings); Farmers' L. & T. Co. *v.* Cary, 13 Wis. 110; U. S. Trust Co. *v.* Wabash R. Co., 150 U. S. 287, 14 S. Ct. 86, 37 L. ed. 1085.

82. U. S. Trust Co. *v.* Wabash R. Co., 150 U. S. 287, 14 S. Ct. 86, 37 L. ed. 1085.

83. *Kentucky.*— Schmidt *v.* Louisville, etc., R. Co., 95 Ky. 289, 25 S. W. 494, 26 S. W. 547, 15 Ky. L. Rep. 785.

Maryland.— Parkhurst *v.* Northern Cent. R. Co., 19 Md. 472, 81 Am. Dec. 648.

Minnesota.— Seibert *v.* Minneapolis, etc., R. Co., 58 Minn. 39, 59 N. W. 822.

Ohio.— Darst *v.* Pittsburgh, etc., R. Co., 3 Ohio Dec. (Reprint) 199, 4 Wkly. L. Gaz. 377; McCormack *v.* Central Ohio R. Co., 3 Ohio Dec. (Reprint) 103, 3 Wkly. L. Gaz. 218; Carey *v.* Pittsburgh, etc., R. Co., 2 Ohio Dec. (Reprint) 85, 1 West. L. Month. 338.

Tennessee.— Clay *v.* East Tennessee, etc., R. Co., 6 Heisk. 421.

United States.— Hale *v.* Frost, 99 U. S. 389, 25 L. ed. 419; Fosdick *v.* Schall, 99 U. S. 235, 25 L. ed. 339.

See 41 Cent. Dig. tit. "Railroads," § 525.

Net earnings are ascertained by deducting from the gross receipts of a railroad business its proportional share of operating the entire road. Schmidt *v.* Louisville, etc., R. Co., 95 Ky. 289, 25 S. W. 494, 26 S. W. 547, 15 Ky. L. Rep. 785. But in determining such net earnings the company is not entitled to deduct from its gross earnings a loss incurred in selling income bonds at a discount or the difference between the rate of interest certain bondholders agreed to accept and the rate the company originally agreed to pay, or a floating debt contracted before the income mortgage was executed; but the company is entitled to deduct not only amounts used in operating and repairing the road but also amounts for which it has become liable on such accounts. Barry *v.* Missouri, etc., R. Co., 27 Fed. 1.

The earnings of business carried in both directions is covered by a mortgage given on the net earnings of all business coming to a certain road from or over another road. Schmidt *v.* Louisville, etc., R. Co., 95 Ky. 289, 25 S. W. 494, 26 S. W. 547, 15 Ky. L. Rep. 785.

84. Ellis *v.* Boston, etc., R. Co., 107 Mass. 1; Coe *v.* Beckwith, 31 Barb. (N. Y.) 339; Gilman *v.* Illinois, etc., Tel. Co., 91 U. S. 603, 23 L. ed. 405.

85. Gilman *v.* Illinois, etc., Tel. Co., 91 U. S. 603, 23 L. ed. 405.

86. Platt *v.* New York, etc., R. Co., 63 N. Y. App. Div. 401, 71 N. Y. Suppl. 913 [*reversed* on other grounds in 170 N. Y. 451, 63 N. E. 532], holding, however, that such a receiver is not entitled to earnings collected before his appointment.

87. Mississippi Valley, etc., R. Co. *v.* U. S. Express Co., 81 Ill. 534; Sage *v.* Memphis, etc., R. Co., 125 U. S. 361, 8 S. Ct. 887, 31 L. ed. 694; Dow *v.* Memphis, etc., R. Co., 124 U. S. 652, 8 S. Ct. 673, 21 L. ed. 565 [*reversing* 20 Fed. 768]; Galveston, etc., R. Co. *v.* Cowdrey, 11 Wall. (U. S.) 459, 20 L. ed. 199.

Commencement of a suit in equity to enforce a surrender of possession to the trustees under the mortgage, in accordance with its terms, is a demand for possession, and if the trustees are then entitled to possession the company must account from that time. Dow *v.* Memphis, etc., R. Co., 124 U. S. 652, 8 S. Ct. 673, 21 L. ed. 565 [*reversing* 20 Fed. 768].

A decree entitling the trustees to possession of the road under the provision of the mortgage also entitles them, there being no debts for current expenses, to receive all profits earned since the commencement of the suit, the effect of the decree being to establish their right to possession at the time the suit was begun, and to make the company's possession after that date wrongful. Dow *v.* Memphis, etc., R. Co., 124 U. S. 652, 8 S. Ct. 673, 21 L. ed. 565 [*reversing* 20 Fed. 768].

88. *Illinois.*— Mississippi Valley, etc., R. Co. *v.* U. S. Express Co., 81 Ill. 534.

Maine.— Noyes *v.* Rich, 52 Me. 115.

Minnesota.— De Graff *v.* Thompson, 24 Minn. 452.

New York.— Platt *v.* New York, etc., R. Co., 63 N. Y. App. Div. 401, 71 N. Y. Suppl. 913 [*reversed* on other grounds in 170 N. Y. 451, 63 N. E. 532].

Virginia.— Frayser *v.* Richmond, etc., R. Co., 81 Va. 388; Gibert *v.* Washington City, etc., R. Co., 33 Gratt. 645.

United States.— Hale *v.* Frost, 99 U. S. 389, 25 L. ed. 419; Fosdick *v.* Schall, 99 U. S. 235, 25 L. ed. 339; Gilman *v.* Illinois, etc., Tel. Co., 91 U. S. 603, 23 L. ed. 405; Mercantile Trust Co. *v.* Baltimore, etc., R.

hands of a receiver appointed on behalf of a judgment creditor.[89] Until such possession or demand therefor, such funds are liable to the creditors of the railroad company as if no mortgage existed.[90] It has been held, however, that funds in the hands of the treasurer of a railroad company at the time of the execution of a mortgage of all its property are embraced therein and cannot be held against the paramount right of the trustees by a creditor of the company, although the trustees have permitted the company to use and manage the road and its other property.[91] Notwithstanding the above general rule, the parties may agree in the mortgage that such future earnings and profits shall be held in equity by the mortgagee, and under such an agreement the earnings and income whenever received are operated upon by the mortgage and the party receiving them holds them in trust for whoever is in equity entitled to them.[92] After a mortgagee or trustee takes possession of the mortgaged premises, the mortgage covers all future income and earnings;[93] and thereafter such earnings are no longer subject to execution or garnishment.[94] An unpaid balance due on a subscription to the stock of a railroad company is not included in a mortgage of the right of way and other property.[95]

(VII) *AFTER-ACQUIRED PROPERTY* — (A) *In General.* At common law a railroad mortgage of after-acquired property is inoperative as to such property, on the theory that a person cannot grant or convey an effective title to anything to which he has no right.[96] In equity, however, such a mortgage is upheld and liberally construed;[97] and it is well settled that where the terms of the mortgage show an intention to embrace after-acquired property,[98] the mortgage will attach as an equitable lien upon all after-acquired property, embraced in the terms of the mortgage, as soon as it is acquired or comes into existence,[99] whether the prop-

Co., 94 Fed. 722; Williamson *v.* New Albany, etc., R. Co., 30 Fed. Cas. No. 17,753, 1 Biss. 198.

See 41 Cent. Dig. tit. "Railroads," § 525.

89. Sage *v.* Memphis, etc., R. Co., 125 U. S. 361, 8 S. Ct. 887, 31 L. ed. 694.

90. Smith *v.* Eastern R. Co., 124 Mass. 154; Merchants' Bank *v.* Petersburg R. Co., 12 Phila. (Pa.) 482; Gilman *v.* Illinois, etc., Tel. Co., 91 U. S. 603, 23 L. ed. 405.

91. Woodman *v.* York, etc., R. Co., 45 Me. 207. See Buck *v.* Memphis, etc., R. Co., 4 Cent. L. J. 430.

92. Pullan *v.* Cincinnati, etc., R. Co., 20 Fed. Cas. No. 11,462, 5 Biss. 237.

93. Galena, etc., R. Co. *v.* Menzies, 26 Ill. 121; Frayser *v.* Richmond, etc., R. Co., 81 Va. 388; Gibert *v.* Washington City, etc., R. Co., 33 Gratt. (Va.) 645.

94. Mississippi Valley, etc., R. Co. *v.* U. S. Express Co., 81 Ill. 534; Galena, etc., R. Co. *v.* Menzies, 26 Ill. 121.

95. Dean *v.* Biggs, 25 Hun (N. Y.) 122, holding that such balance is not included in the mortgage of a right of way and the other property of the company, its chattels and things pertaining thereto, its charter rights, privileges, and franchises, and all its estate, right, title, interest, property, and possession, claims, and demands whatsoever.

96. Emerson *v.* European, etc., R. Co., 67 Me. 387, 24 Am. Rep. 39; Pierce *v.* Emery, 32 N. H. 484; Coe *v.* Pennock, 5 Fed. Cas. No. 2,942; Dunham *v.* Cincinnati, etc., R. Co., 8 Fed. Cas. No. 4,148.

97. Little Rock, etc., R. Co. *v.* Page, 35 Ark. 304.

98. Coopers *v.* Wolf, 15 Ohio St. 523. See also *infra*, VIII, A, 7, d, (VII), (C); and cases cited *infra*, note 99.

A reasonably certain description of the after-acquired property intended to be included in the mortgage should be contained in the mortgage. Calhoun *v.* Memphis, etc., R. Co., 4 Fed. Cas. No. 2,309, 2 Flipp. 442, 8 Reporter 395. A description of after-acquired property as "all property which may hereafter belong to said company and be used as a part of said road" is not too indefinite. Buck *v.* Seymour, 46 Conn. 156.

99. *Alabama.*— Meyer *v.* Johnston, 53 Ala. 237, 64 Ala. 603.

Arkansas.— Little Rock, etc., R., Co. *v.* Page, 35 Ark. 304.

Illinois.— Frost *v.* Galesburg, etc., R. Co., 167 Ill. 161, 47 N. E. 357; Quincy *v.* Chicago, etc., R. Co., 94 Ill. 537.

Louisiana.— Bell *v.* Chicago, etc., R. Co., 34 La. Ann. 785.

Missouri.—St. Joseph, etc., R. Co. *v.* Smith, 170 Mo. 327, 70 S. W. 700.

New Hampshire.— Pierce *v.* Emery, 32 N. H. 484.

New Jersey.— Williamson *v.* New Jersey Southern R. Co., 25 N. J. Eq. 13.

New York.— Nichols *v.* Mase, 94 N. Y. 160; Stevens *v.* Watson, 4 Abb. Dec. 302, 45 How. Pr. 104; Platt *v.* New York, etc., R. Co., 9 N. Y. App. Div. 87, 41 N. Y. Suppl. 42 [*affirming* 17 Misc. 22, 39 N. Y. Suppl. 871, and *affirmed* in 153 N. Y. 670, 154 N. Y. 742, 48 N. E. 1106, 49 N. E. 1103]; Benjamin *v.* Elmira, etc., R. Co., 49 Barb. 441; Seymour *v.* Canandaigua, etc., R. Co., 25 Barb. 284, 14 How. Pr. 531.

Ohio.— Coopers *v.* Wolf, 15 Ohio St. 523.

erty is acquired by the company under its old name or under its new name after reorganization.[1] But such a mortgage does not cover property which the railroad company had no power to acquire or hold when the mortgage was executed, and the acquisition of which was not in contemplation at that time.[2] It is held that an after-acquired property clause extends only to property subsequently acquired by the mortgagor company,[3] and therefore does not cover property acquired by a consolidated company into which the mortgagor company has been merged, as against a mortgagee of the consolidated company.[4]

(B) *Title or Interest Covered.* The above rule that a railroad mortgage attaches in equity to after-acquired property applies not only to property to which it acquires the legal title, but also to that to which it acquires only a full equitable title.[5] But this lien operates upon the property only in the condition in which it is at the time it is acquired, or in other words, attaches only to such interest as the mortgagor company acquires;[6] and therefore is subject to any covenant, lien, encumbrance, or other charge existing upon the property at that time, although junior in point of time;[7] although it may be enforced against the mortgagor company and all persons claiming rights which have accrued after the mortgage

Pennsylvania.— Philadelphia, etc., R. Co. *v.* Woelpper, 64 Pa. St. 366, 3 Am. Rep. 596.

Vermont.— Brainerd *v.* Peck, 34 Vt. 496.

Wisconsin.— Pierce *v.* Milwaukee, etc., R. Co., 24 Wis. 551, 1 Am. Rep. 203.

United States.— Central Trust Co. *v.* Kneeland, 138 U. S. 414, 34 L. ed. 1014; Pennock *v.* Coe, 23 How. 117, 16 L. ed. 436; Guaranty Trust Co. *v.* Atlantic Coast Electric R. Co., 138 Fed. 517, 71 C. C. A. 41 [*affirming* 132 Fed. 68]; Parker *v.* New Orleans, etc., R. Co., 33 Fed. 693 [*affirmed* in 143 U. S. 42, 12 S. Ct. 364, 36 L. ed. 66]; Barnard *v.* Norwich, etc., R. Co., 2 Fed. Cas. No. 1,007, 4 Cliff. 351, 14 Nat. Bankr. Reg. 469; Dunham *v.* Cincinnati, etc., R. Co., 8 Fed. Cas. No. 4,148 [*reversed* on other grounds in 1 Wall. 254, 17 L. ed. 584].

See 41 Cent. Dig. tit. "Railroads," §§ 526, 527.

A covenant in the mortgage that the money secured should be applied to the equipment which should stand pledged is enforceable in equity, and therefore equity will sanction its voluntary performance. Pennock *v.* Coe, 23 How. (U. S.) 117, 16 L. ed. 436.

A covenant for further assurance, contained in a first mortgage executed by a railway company to trustees to secure its bonds, operates as an equitable lien upon the after-acquired property. Stevens *v.* Watson, 4 Abb. Dec. (N. Y.) 302, 45 How. Pr. 104.

Equity treats a mortgage of property to be afterward acquired, as a contract binding in conscience, to execute a mortgage upon it at the instant it comes into being, and will enforce specific performance; and if no specific performance is requested it considers the mortgage as already executed, and binds everybody to respect the equitable lien who knows of it, or without knowing of it has got the property without valuable consideration. Little Rock, etc., R. Co. *v.* Page, 35 Ark. 304.

1. Meyer *v.* Johnston, 53 Ala. 237, 64 Ala. 603.

2. Meyer *v.* Johnston, 53 Ala. 237, 64 Ala. 603.

3. New York Security, etc., Co. *v.* Louisville, etc., R. Co., 102 Fed. 382.

4. New York Security, etc., Co. *v.* Louisville, etc., R. Co., 102 Fed. 382.

5. Boston, etc., R. Co. *v.* Coffin, 50 Conn. 150 (holding that lands purchased after the mortgage is made pass, although the legal title was in the president and treasurer of the company in their private names, said lands having been procured with the funds of the company and being held in trust for it); Central Trust Co. *v.* Kneeland, 138 U. S. 414, 34 L. ed. 1014; Toledo, etc., R. Co. *v.* Hamilton, 134 U. S. 296, 10 S. Ct. 546, 33 L. ed. 905.

Inchoate rights.—A railroad mortgage covering after-acquired property attaches to the company's right to a deed of lands under a contract to convey, executed after the execution of the mortgage, and continues to attach to it as the right grows in value, whether the increased value arises from payments and improvements made by the company, or by a new consolidated company which took the entire property and assumed the first company's debts. Hamlin *v.* European, etc., R. Co., 72 Me. 83.

6. Meyer *v.* Johnston, 53 Ala. 237, 64 Ala. 603; Lake Erie, etc., R. Co. *v.* Priest, 131 Ind. 413, 31 N. E. 77; Williamson *v.* New Jersey Southern R. Co., 28 N. J. Eq. 277 [*reversed* on other grounds in 29 N. J. Eq. 311]; Central Trust Co. *v.* Kneeland, 138 U. S. 414, 11 S. Ct. 357, 34 L. ed. 1014; New Orleans, etc., R. Co. *v.* Mellen, 12 Wall. (U. S.) 362, 20 L. ed. 434; Western Union Tel. Co. *v.* Burlington, etc., R. Co., 11 Fed. 1, 3 McCrary 130.

7. Meyer *v.* Johnston, 53 Ala. 237, 64 Ala. 603; Lake Erie, etc., R. Co. *v.* Priest, 131 Ind. 413, 31 N. E. 77; Coe *v.* Delaware, etc., R. Co., 34 N. J. Eq. 266; Williamson *v.* New Jersey Southern R. Co., 28 N. J. Eq. 277 [*reversed* on other grounds in 29 N. J. Eq. 311]; New Orleans, etc., R. Co. *v.* Mellen, 12 Wall. (U. S.) 362, 20 L. ed. 434; Farmers' L. & T. Co. *v.* Denver, etc., R. Co., 126 Fed. 46, 60 C. C. A. 588; Frank *v.* Denver,

attached,[8] and especially as against claimants under a junior mortgage which by its terms is subject to the prior mortgage,[9] and against junior judgment creditors.[10] This latter rule, however, is subject to the qualification that, although the railroad mortgage is subject to liens and charges existing at the time it is acquired on rolling stock and other loose property susceptible of separate ownership and of separate liens,[11] yet in regard to rails and other articles which become affixed to and a part of the railroad, the lien of a prior mortgage will prevail in favor of *bona fide* creditors as against any encumbrance thereon in favor of the furnisher of the property,[12] as against a reservation of title in such furnisher or seller.[13]

(c) *Necessity For Words of Futurity.* It has been held that where a railroad company is empowered to mortgage all of its property, privileges, and franchises, such a mortgage is a conveyance of the property and franchises as an entire thing, and that therefore after-acquired property essential thereto passes as an incident or accession to the franchise to acquire property without the employment of words of futurity.[14] By the weight of authority, however, in order for a mortgage to pass after-acquired property, it should contain either words of futurity, or the language should at least be such as to show an intention to convey such property.[15]

(d) *Property Must Be Necessary and Appurtenant to Road and Specifically Described.* Ordinarily, in order that after-acquired property may be embraced in a railroad mortgage describing after-acquired property in general terms, it must be such property as appertains or is appurtenant to the road and is necessary to the enjoyment of the franchise or the operation of the road;[16] or if it is

etc., R. Co., 23 Fed. 123; Loomis *v.* Davenport, etc., R. Co., 17 Fed. 301, 3 McCrary 489.

8. East Alabama R. Co. *v.* East Tennessee, etc., R. Co., 78 Ala. 275; Bell *v.* Chicago, etc., R. Co., 34 La. Ann. 785; Stevens *v.* Watson, 4 Abb. Dec. (N. Y.) 302, 45 How. Pr. 104.

9. Pierce *v.* Emery, 32 N. H. 484; Stevens *v.* Watson, 4 Abb. Dec. (N. Y.) 302, 45 How. Pr. 104.

10. Stevens *v.* Watson, 4 Abb. Dec. (N. Y.) 302, 45 How. Pr. 104.

11. Fosdick *v.* Southwestern Car Co., 99 U. S. 256, 25 L. ed. 344; Fosdick *v.* Schall, 99 U. S. 235, 25 L. ed. 339 (holding that where the owner of rolling stock sold the same to a railroad company, reserving title in the cars until the purchase-price was paid, the lien of a mortgage executed prior to the sale covering after-acquired property did not attach to the rolling stock on its delivery to the company so as to defeat the seller of the right to reclaim it as against the mortgage); New Orleans, etc., R. Co. *v.* Mellen, 12 Wall. (U. S.) 362, 20 L. ed. 434.

12. Porter *v.* Pittsburg Bessemer Steel Co., 122 U. S. 267, 7 S. Ct. 1206, 30 L. ed. 1210, 120 U. S. 649, 7 S. Ct. 741, 30 L. ed. 830; New Orleans, etc., R. Co. *v.* Mellen, 12 Wall. (U. S.) 362, 20 L. ed. 434.

13. Porter *v.* Pittsburg Bessemer Steel Co., 122 U. S. 267, 7 S. Ct. 1206, 30 L. ed. 1210, 120 U. S. 649, 7 S. Ct. 741, 30 L. ed. 830. *Compare* Western Union Tel. Co. *v.* Burlington, etc., R. Co., 11 Fed. 1, 3 McCrary 130.

14. See Pierce *v.* Emery, 32 N. H. 484; Louisville Trust Co. *v.* Cincinnati Inclined-Plane R. Co., 91 Fed. 699; Parker *v.* New Orleans, etc., R. Co., 33 Fed. 693 [*affirmed* in 143 U. S. 42, 12 S. Ct. 364, 36 L. ed. 66]. *Compare* Farmers' L. & T. Co. *v.* Commercial Bank, 11 Wis. 207, holding that the doctrine that where a railroad company mortgages its entire road and all its franchises, any after-acquired property will pass to the mortgagee as an incident to the franchise of acquiring property cannot be applied to a case where several mortgages are given on separate divisions of the road.

On the doctrine of accretion without particular mention of the property afterward acquired, a mortgage by a railroad company will pass under a general description, property subsequently acquired, which is essential to its use, and which may be fairly taken as a part and parcel of the road. Calhoun *v.* Memphis, etc., R. Co., 4 Fed. Cas. No. 2,309, 2 Flipp. 442.

15. St. Joseph, etc., R. Co. *v.* Smith, 170 Mo. 327, 70 S. W. 700; Seymour *v.* Canandaigua, etc., R. Co., 25 Barb. (N. Y.) 284, 14 How. Pr. 531; Pennock *v.* Coe, 23 How. (U. S.) 117, 16 L. ed. 436; Louisville Trust Co. *v.* Cincinnati Inclined-Plane R. Co., 91 Fed. 699, holding that there is nothing in the statutes of Ohio relating to the extension of lines of railroad, or authorizing a change in the proposed location of such lines, which has the effect of extending a railroad mortgage by operation of law, to cover after-acquired property which would not be included by the terms of the mortgage, construed by the rules of the common law.

A mortgage of "all and singular, its franchises and property, both real and personal" cannot be held by such language to include property subsequently acquired through the exercise of a franchise it then possesses for the purpose of adding to or extending its line. Louisville Trust Co. *v.* Cincinnati Inclined-Plane R. Co., 91 Fed. 699.

16. Morgan *v.* Donovan, 58 Ala. 241; Chi-

not such property, there must be a special description of it in the mortgage.[17] This does not mean, however, that the property should be property without which the railroad could not be operated; but it means all property reasonably necessary and convenient to the operation of the road, and includes such property as the company may thereafter deem it best to acquire for the most profitable use of the franchises and the greatest benefit to the public.[18]

(E) *Right of Way and Other Lands.* A general mortgage of a railroad company embracing its road and all after-acquired property appertaining or appurtenant to the road covers only lands which are appurtenant to and connected with the actual operation of the road;[19] and therefore does not include lands which do not appertain to or are not so connected with the road;[20] and if the intention is to include such after-acquired lands not so connected with the road, they should be described in the mortgage with reasonable certainty.[21] Thus such an after-acquired property clause has been held to include a hotel, erected on after-acquired land near a depot on the line of the road, for the purpose of an eating-house and to accommodate employees, passengers, and others,[22] or lands subsequently acquired for a right of way,[23] or lands purchased with the design of using them for railroad purposes, although they are subsequently found unsuitable for such purposes and not so used,[24] or lands subsequently contracted for for the purpose of acquiring additional facilities for the accommodation of engines and cars,[25] or lands over which the road is at the time located, although the title thereto or right of way therein is not acquired until subsequently;[26] but it has been held not to include a tract of land afterward purchased and laid out in town lots,[27] or lands donated by the government in aid of the construction of the road,[28] or lands obtained for subdivision and sale,[29] or a lot of woodland lying some distance from the track and used to supply wood and timber on the road,[30] or property acquired adjacent to depot grounds and leased for a barber shop, grocery, and other usages entirely foreign to the operation of the road.[31]

eago, etc., R. Co. *v.* Tice, 232 Ill. 232, 83 N. E. 818; Shirley *v.* Waco Tap R. Co., 78 Tex. 131, 10 S. W. 543; Pardee *v.* Aldridge, 189 U. S. 429, 23 S. Ct. 514, 47 L. ed. 883 [*affirming* 24 Tex. Civ. App. 254, 60 S. W. 789].

17. Shirley *v.* Waco Tap R. Co., 78 Tex. 131, 10 S. W. 543.

18. Buck *v.* Seymour, 46 Conn. 156.

19. *Connecticut.*— Boston, etc., R. Co. *v.* Coffin, 50 Conn. 150.

Michigan.— Pere Marquette R. Co. *v.* Graham, 136 Mich. 444, 99 N. W. 408.

Missouri.— St. Joseph, etc., R. Co. *v.* Smith, 170 Mo. 327, 70 S. W. 700, holding such mortgage to cover lands subsequently deeded to the company for a railroad right of way and railroad stock-yards and houses.

New York.— Stevens *v.* Watson, 4 Abb. Dec. 302, 45 How. Pr. 104.

Wisconsin.— Farmers' L. & T. Co. *v.* Fisher, 17 Wis. 114.

United States.— Calhoun *v.* Memphis, etc., R. Co., 4 Fed. Cas. No. 2,309, 2 Flipp. 442, 8 Reporter 395.

See 41 Cent. Dig. tit. "Railroads," § 528.

The presumption is that after-acquired lands are necessary for the company and are properly acquired by it. Stevens *v.* Watson, 4 Abb. Dec. (N. Y.) 302, 45 How. Pr. 104.

20. Boston, etc., Air Line R. Co. *v.* Coffin, 50 Conn. 150; Mississippi Valley Co. *v.* Chicago, etc., R. Co., 58 Miss. 896, 38 Am. Rep. 348; Walsh *v.* Barton, 24 Ohio St. 28; Pardee *v.* Aldridge, 189 U. S. 429, 23 S. Ct. 514, 47 L. ed. 883 [*affirming* 24 Tex. Civ. App. 254, 60 S. W. 789]; New Orleans, etc., R. Co. *v.* Union Trust Co., 41 Fed. 717.

21. Calhoun *v.* Memphis, etc., R. Co., 4 Fed. Cas. No. 2,309, 2 Flipp. 442, 8 Reporter 395.

22. Omaha, etc., R. Co. *v.* Wabash, etc., R. Co., 108 Mo. 298, 18 S. W. 1101; U. S. Trust Co. *v.* Wabash, etc., R. Co., 32 Fed. 480. *Compare* Mississippi Valley Co. *v.* Chicago, etc., R. Co., 58 Miss. 896, 38 Am. Rep. 348.

23. Seymour *v.* Canandaigua, etc., R. Co., 25 Barb. (N. Y.) 284, 14 How. Pr. 531.

24. Hawkins *v.* Mercantile Trust, etc., Co., 96 Ga. 580, 23 S. E. 498.

25. Hamlin *v.* European, etc., R. Co., 72 Me. 83.

26. Pierce *v.* Milwaukee, etc., R. Co., 24 Wis. 551, 1 Am. Rep. 203.

27. Calhoun *v.* Memphis, etc., R. Co., 4 Fed. Cas. No. 2,309, 2 Flipp. 442, 8 Reporter 395.

28. Shirley *v.* Waco Tap R. Co., 78 Tex. 131, 10 S. W. 543; New Orleans Pac. R. Co. *v.* Parker, 143 U. S. 42, 12 S. Ct. 364, 36 L. ed. 66.

29. Pardee *v.* Aldridge, 189 U. S. 429, 23 S. Ct. 514, 47 L. ed. 883 [*affirming* 24 Tex. Civ. App. 254, 60 S. W. 789].

30. Dinsmore *v.* Racine, etc., R. Co., 12 Wis. 649.

31. Chicago, etc., R. Co. *v.* McGuire, 31

Nor does such mortgage embrace lands which at the time of the execution of the mortgage the company had no right to accept and which are subsequently acquired under the authority of the legislature.[32]

(F) *Rolling Stock and Other Personalty.* Where the terms of the mortgage are sufficient to show such intention, a railroad mortgage will attach, in equity, to after-acquired rolling stock, as soon as it is acquired and placed upon the road,[33] and to tracks,[34] rails,[35] fuel,[36] and other supplies and personalty incident to and indispensable to the use and enjoyment of other property conveyed;[37] and the

Ind. App. 110, 65 N. E. 932, 99 Am. St. Rep. 249.

32. Meyer *v.* Johnston, 53 Ala. 237, 64 Ala. 603.

33. *Alabama.*— Meyer *v.* Johnston, 53 Ala. 237, 64 Ala. 603.

Kentucky.—Phillips *v.* Winslow, 18 B. Mon. 431, 68 Am. Dec. 729.

Maine.— Morrill *v.* Noyes, 56 Me. 458, 96 Am. Dec. 486.

Massachusetts.—Howe *v.* Freeman, 14 Gray 566, holding that cars subsequently purchased by the corporation were included in the mortgage, although the mortgagees had not taken possession for foreclosure.

Pennsylvania.— Philadelphia, etc., R. Co. *v.* Woelpper, 64 Pa. St. 366, 3 Am. Rep. 596.

United States.— Pennock *v.* Coe, 23 How. 117, 16 L. ed. 436; Manhattan Trust Co. *v.* Sioux City, etc., R. Co., 68 Fed. 72.

See 41 Cent. Dig. tit. "Railroads," § 529.

Illustrations.— Thus a mortgage which in terms covers "all the following, present, and in future to be acquired property" of the railroad company, naming in the description of such property its engines, cars, and machinery, covers not only cars, engines, and machinery in existence at the date of the mortgage but such as are to take their place and are subsequently added to them by the company. Shaw *v.* Bill, 95 U. S. 10, 24 L. ed. 333. So a mortgage covering all after-acquired property will include rolling stock, although it is personal property under the state constitution. Scott *v.* Clinton, etc., R. Co., 21 Fed. Cas. No. 12,527, 6 Biss. 529. So a trust deed by a corporation of all its lands, fixtures, structures, etc., then owned and thereafter to be owned, by it, includes cars, locomotives, and other rolling stock from time to time acquired by the company, either under its old name or its new name, after reorganization. Meyer *v.* Johnston, 53 Ala. 237, 64 Ala. 603. So a mortgage by a railroad company in Ohio, where the power exists, under the law, to mortgage after-acquired property, which, although it contains no after-acquired property clause in terms, includes the railroad and rolling stock, and all the tolls, incomes, issues, and profits to accrue from the same or any part thereof, extends to and covers also future-acquired rolling stock and equipment purchased for, and needed in the operation of, the road mortgaged, and without which the income covered by the mortgage could not be earned. Louisville Trust Co. *v.* Cincinnati Inclined-Plane R. Co., 91 Fed. 699. But a clause in a mortgage by a railroad company covering "all and singular, the cars and rolling stock . . . of said company" cannot be extended by construction to include any more than the cars and rolling stock then owned by the mortgagor. Louisville Trust Co. *v.* Cincinnati Inclined-Plane R. Co., *supra.*

Repairs and improvements upon rolling stock are in the nature of accessions to a mortgaged chattel and subject to the mortgage covering the rolling stock. Hamlin *v.* Jerrard, 72 Me. 62.

34. Mercantile Trust, etc., Co. *v.* Roanoke etc., R. Co., 109 Fed. 3.

Track laid on land of another company.— Where a railroad company furnishes the ties and rails and lays a spur track upon a road-bed owned by another, under an agreement between them, such track does not become a part of the realty, as between the parties, but remains the property of the company, and passes by a sale under a mortgage previously given by it, covering after-acquired property. Mercantile Trust, etc., Co. *v.* Roanoke, etc., R. Co., 109 Fed. 3.

35. Weetjen *v.* St. Paul, etc., R. Co., 4 Hun (N. Y.) 529.

36. Phillips *v.* Winslow, 18 B. Mon. (Ky.) 431, 68 Am. Dec. 729; Dunham *v.* Earl, 8 Fed. Cas. No. 4,149, holding that a mortgage expressly including all after-acquired personal property covers fuel collected and stored by the company for the use of its engines.

37. *Kentucky.*— Phillips *v.* Winslow, 18 B. Mon. 431, 68 Am. Dec. 729.

New Hampshire.— Pierce *v.* Emery, 32 N. H. 484.

New York.— Platt *v.* New York, etc., R. Co., 9 N. Y. App. Div. 87, 41 N. Y. Suppl. 42 [*affirming* 17 Misc. 22, 39 N. Y. Suppl. 871, and *affirmed* in 153 N. Y. 670, 48 N. E. 1106, 154 N. Y. 742, 49 N. E. 1103].

Ohio.— Coe *v.* Peacock, 14 Ohio St. 187.

Canada.— Lanark *v.* Cameron, 9 U. C. C. P. 109.

See 41 Cent. Dig. tit. "Railroads," § 529.

Office furniture.—A mortgage of railroad property, embracing after-acquired property, includes office furniture, suitable in kind and of the necessary amount, provided for the use of the employees of the company in the performance of their daily duties, as well as for the directors to transact their business. Ludlow *v.* Hurd, 1 Disn. (Ohio) 522, 12 Ohio Dec. (Reprint) 791.

Property not included.—A mortgage containing the words: "And all other personal property belonging to said company, as the same now is in use by said company, or as the same may be hereafter changed or re-

fact that the transaction by which the property is obtained is called a lease does not vary this rule, if it is in reality a sale, and the title is retained in the so-called lessor as security for the purchase-price,[38] although the mortgage will attach in such case subject to such lien or encumbrance;[39] and such mortgagee's lien will be superior to the claims of subsequent creditors, purchasers, and mortgagees,[40] but subject to liens or encumbrances existing upon it when acquired.[41] But the mere fact that rolling stock is placed upon a railroad does not affix it thereto, and therefore a mortgage, although in terms covering after-acquired rolling stock, does not attach to rolling stock temporarily placed upon the road under a contract with the company then operating it.[42]

(G) *Enlarged or Extended Road.* A mortgage upon the road and all property, privileges, franchises, etc., acquired and to be acquired, will embrace a portion of the road projected or contemplated at the time of the execution of the mortgage but thereafter completed or constructed,[43] notwithstanding a change in the route if it is in the general direction authorized,[44] and notwithstanding a consolidation with other companies and change of name,[45] and although it is completed by a contractor on the company's failure to do so.[46] Such a mortgage will also embrace a subsequently purchased road or right of way which is within the chartered limits of the mortgagor company, and which it might have constructed if it had not been purchased;[47] or a subsequently acquired or constructed

newed by said company," does not embrace certain machinery for "burnetizing" ties and timber so as to render them more durable, which machinery was not in existence at the time of the mortgage, and took the place of nothing that was therein specified. Brainerd *v.* Peck, 34 Vt. 496. So a mortgage by a railroad company of its stock, materials, and every other kind of personal property which shall be used for operating said railroad does not profess to cover railroad chairs afterward bought by the company, but which were never used. Farmers' L. & T. Co. *v.* Commercial Bank, 11 Wis. 207, 15 Wis. 424, 82 Am. Dec. 689. So where a railroad company by virtue of an act of the legislature mortgaged not all of the property "then" owned by both the new and old portions of the road, but "all the property of said extension subsequently to be acquired," it was held that wood subsequently purchased with the earnings and for the use of the whole road and not belonging exclusively to the extension would not pass by the mortgage, and might therefore be attached. Bath *v.* Miller, 53 Me. 308.

38. Kentucky Contracting, etc., Co. *v.* Continental Trust Co., 108 Fed. 1, 47 C. C. A. 143.

39. Kentucky Contracting, etc., Co. *v.* Continental Trust Co., 108 Fed. 1, 47 C. C. A. 143. See Fosdick *v.* Southwestern Car Co., 99 U. S. 256, 25 L. ed. 344; Fosdick *v.* Schall, 99 U. S. 235, 25 L. ed. 339.

40. Pierce *v.* Emery, 32 N. H. 484 (holding that under the mortgage in this case the trustees were entitled to hold personal property, acquired by the road after the mortgage, against subsequent mortgagees of the specific property so acquired); Weetjen *v.* St. Paul, etc., R. Co., 4 Hun (N. Y.) 529 (holding that where a mortgage of railroad property provided that it should cover all after-acquired property, and iron rails acquired after the execution of the mortgage were pledged to firms of which the trustee under the mortgage was a member, to secure advances made thereon to the road, the knowledge of the trustee was the knowledge of the firm, and the latter could not claim to hold the iron as *bona fide* purchasers without notice as against the bondholders); Ludlow *v.* Hurd, 1 Disn. (Ohio) 522, 12 Ohio Dec. (Reprint) 791; Pennock *v.* Coe, 23 How. (U. S.) 117, 16 L. ed. 436 (holding that the mortgage was superior to the claims of subsequent mortgagees and bondholders who recovered judgment, issued execution, and had it levied on part of the rolling stock of the company which was not in existence when the first mortgage was given); Scott *v.* Clinton, etc., R. Co., 21 Fed. Cas. No. 12,527, 6 Biss. 529, execution creditor.

41. Meyer *v.* Johnston, 53 Ala. 237, 64 Ala. 603.

42. Hardesty *v.* Pyle, 15 Fed. 778.

43. Meyer *v.* Johnston, 53 Ala. 237, 64 Ala. 603; Hatry *v.* Painesville, etc., R. Co., 1 Ohio Cir. Ct. 426, 1 Ohio Cir. Dec. 238; Texas Western R. Co. *v.* Gentry, 69 Tex. 625, 8 S. W. 98; New York Guaranty Trust Co. *v.* Atlantic Coast Electric R. Co., 132 Fed. 68; Central Trust Co. *v.* Chattanooga, etc., R. Co., 89 Fed. 388.

44. Meyer *v.* Johnston, 53 Ala. 237, 64 Ala. 603; Elwell *v.* Grand St., etc., R. Co., 67 Barb. (N. Y.) 83, holding that a mortgage upon a projected railroad, describing the road according to plans, should be enforced against the road as built, although the plans are changed in favor of persons who have loaned money upon the faith of it.

45. Meyer *v.* Johnston, 64 Ala. 603.

46. Dunham *v.* Cincinnati, etc., R. Co., 1 Wall. (U. S.) 254, 17 L. ed. 584.

47. East Alabama R. Co. *v.* Tennessee, etc., R. Co., 78 Ala. 274; Branch *v.* Jesup, 106 U. S. 468, 1 S. Ct. 495, 27 L. ed. 279; Cen-

branch road or spur track,[48] although not in contemplation at the time of the mortgage;[49] and may be broad enough to embrace a leasehold of another road, subsequently leased to be used in connection with its own road.[50] But it does not include a line of road afterward unauthorizedly constructed[51] or purchased;[52] nor does it cover a lease, of its own road, to which the mortgagee was not a party;[53] or a separate branch road thereafter constructed under a special charter,[54] or amendment of its original charter;[55] or a subsequently purchased road, which at the time of its purchase is not connected with the mortgagor's road.[56] So a mortgage in terms limited to the road then owned does not cover an after-acquired line or extension;[57] and a mortgage by one railroad company which built part of the road and then abandoned its operation does not cover that part of the road which is completed by another and separate company.[58] Nor does a mortgage of the main line from one terminus to another and the franchises acquired and to be acquired pertaining to that line, cover lands and franchises thereafter acquired through an extension of the road beyond one terminus, since the extension is not a part of the main line, or pertaining thereto, although acquired to be used in connection therewith.[59]

(H) *Earnings, Income, and Other Funds.* A railroad mortgage of future earnings or income is inoperative at law,[60] and even in equity a mortgage of the future earnings of the road does not embrace the proceeds of a subsequent extension constructed under authority of an amendment to the company's charter, as against attaching creditors of such proceeds.[61] But ordinarily, in equity, the mortgagee's security extends to income subsequently accruing, even after default.[62] When a railroad mortgage purporting to cover net income or earnings specifies the lines from which such income is to be derived, the lines so described constitute the income fund pledged,[63] and in ascertaining the net income the company can-

tral Trust Co. *v.* Washington County R. Co., 124 Fed. 813.

48. Coe *v.* Delaware, etc., R. Co., 34 N. J. Eq. 266; Seymour *v.* Canandaigua, etc., R. Co., 25 Barb. (N. Y.) 284, 14 How. Pr. 531 (holding the mortgage to cover a branch road from the main track which was not laid out or even projected at the time of the original location, as a legitimate incident to the main road); Central Trust Co. *v.* Washington County R. Co., 124 Fed. 813.

49. Coe *v.* Delaware, etc., R. Co., 34 N. J. Eq. 266, holding that when a mortgage is given by a railroad company on its franchises and on its road to be thereafter built, and a branch road, not in contemplation at the date of such encumbrance, is afterward laid and built, such branch road will pass under such mortgage, subject to the burdens put upon it by the company in the course, and as incidents of, its acquisition.

50. Guaranty Trust Co. *v.* Atlantic Coast Electric R. Co., 138 Fed. 517 [*affirming* 132 Fed. 68]; Columbia Finance, etc., Co. *v.* Kentucky Union R. Co., 60 Fed. 794, 9 C. C. A. 264 (holding that a railroad mortgage covering "all the corporate rights, privileges, franchises, and immunities, and all things in action, contracts, claims, and demands of the said party of the first part, whether now owned or hereafter acquired in connection or relating to the said railroad," is sufficient to include a subsequently acquired lease of a belt railway whereby the company acquired access to a city at one of its terminals); Barnard *v.* Norwich, etc., R. Co., 2 Fed. Cas. No. 1,007, 4 Cliff. 351. See Central Trust Co. *v.* Kneeland, 138 U. S. 414, 11 S. Ct. 357, 34 L. ed. 1014.

Title to such leased road is good in the hands of the trustee under the mortgage, as against subsequent assignees in bankruptcy of the mortgagor. Barnard *v.* Norwich, etc., R. Co., 2 Fed. Cas. No. 1,007, 4 Cliff. 351.

51. Hodder *v.* Kentucky, etc., R. Co., 7 Fed. 793.

52. Hodder *v.* Kentucky, etc., R. Co., 7 Fed. 793.

53. Moran *v.* Pittsburgh, etc., R. Co., 32 Fed. 878.

54. Meyer *v.* Johnston, 53 Ala. 237, 64 Ala. 603.

55. Alexandria, etc., R. Co. *v.* Graham, 31 Gratt. (Va.) 769.

56. Murray *v.* Farmville, etc., R. Co., 101 Va. 262, 43 S. E. 553.

57. Louisville Trust Co. *v.* Cincinnati Inclined-Plane R. Co., 91 Fed. 699.

58. Smythe *v.* Chicago, etc., R. Co., 22 Fed. Cas. No. 13,135, 8 Reporter 709. See Chicago, etc., R. Co. *v.* Lowenthal, 93 Ill. 433.

59. Randolph *v.* New Jersey West Line R. Co., 28 N. J. Eq. 49.

60. Emerson *v.* European, etc., R. Co., 67 Me. 387, 24 Am. Rep. 39.

61. Alexandria, etc., R. Co. *v.* Graham, 31 Gratt. (Va.) 769.

62. Central Trust Co. *v.* Chattanooga, etc., R. Co., 94 Fed. 275, 36 C. C. A. 241.

63. Spies *v.* Chicago, etc., R. Co., 40 Fed. 34, 6 L. R. A. 565.

not charge against the income of such lines the expenses or losses incurred in operating additional after-acquired lines.[64]

(VIII) *ESTOPPEL OF MORTGAGOR AND MORTGAGEE.* The estoppel of the mortgagor and mortgagee to a railroad mortgage to dispute title is regulated by the rules governing mortgages generally.[65] The mere fact that a subsequent mortgage declares that it is subject to certain prior mortgages given by the railroad company, and that they are superior liens on the property therein described, acquired and to be acquired, does not estop the company from denying that such prior mortgages covered certain property embraced in the subsequent mortgage.[66] An erroneous recital of the resolution of the directors authorizing the execution of a mortgage does not estop the mortgagee to show the correct resolution, authorizing a mortgage of after-acquired property.[67]

e. Debts and Obligations Secured — (I) *IN GENERAL.* What debts and obligations are secured by a particular railroad mortgage is governed by the rules regulating the debts and obligations secured by mortgages generally.[68] Thus where the mortgage purports to secure certain coupons and bonds and substantially describes the same, it will secure the debt evidenced thereby,[69] although the coupons and bonds were irregularly issued.[70] But where the mortgage in terms secures an indebtedness of a specified class or kind, it cannot be made to cover obligations or liabilities not falling within the designated class.[71] A provision in the mortgage for compensation to the trustees for services which they may render does not give to such a trustee a lien for his services.[72] In the absence of an agreement otherwise, where certificates of indebtedness secured by a mortgage are exchanged for preferred stock, the holders of such stock are merely stock-holders and hold it in subordination to the claims of the residue of the holders of the certificates of indebtedness, under the mortgage.[73]

(II) *BONDS ISSUED UNDER MORTGAGE.* What bonds or bonded indebtedness is secured by a railroad mortgage depends upon the terms of the mortgage construed in connection with the company's charter or governing statutes and the circumstances attending its execution; [74] and if there is any doubt or ambiguity as to whether certain bonds are secured by a particular mortgage it may be removed by parol evidence,[75] as by evidence that no other bonds were executed or issued than those it is claimed the mortgage secures.[76] If it clearly appears from the evidence that the bonds in question are the ones referred to in the mortgage ordinarily it is sufficient to show that they are the bonds secured.[77] Thus bonds

64. Spies *v.* Chicago, etc., R. Co., 40 Fed. 34, 6 L. R. A. 565.

65. See MORTGAGES, 27 Cyc. 1153.

66. Farmers' L. & T. Co. *v.* Racine Commercial Bank, 15 Wis. 424, 82 Am. Dec. 689.

67. Hatry *v.* Painesville, etc., R. Co., 1 Ohio Cir. Ct. 426, 1 Ohio Cir. Dec. 238.

68. See, generally, MORTGAGES, 27 Cyc. 1056 *et seq.*

Any doubt or ambiguity as to whether a certain indebtedness is secured by a particular mortgage may be removed by parol evidence. Butler *v.* Rahm, 46 Md. 541.

69. Mason *v.* York, etc., R. Co., 52 Me. 82.

70. Mason *v.* York, etc., R. Co., 52 Me. 82.

71. Mason *v.* York, etc., R. Co., 52 Me. 82, holding that a mortgage to secure the payment of certain bonds and coupons does not secure the claim of an indorser of notes of the company.

72. Mercantile Trust, etc., Co. *v.* Atlantic, etc., R. Co., 99 N. C. 139, 5 S. E. 417.

73. Phillips *v.* Eastern R. Co., 138 Mass. 122.

74. See Day *v.* Ogdensburgh, etc., R. Co., 107 N. Y. 129, 15 N. E. 765 (holding that where first consolidated mortgage bonds and income mortgage bonds are issued, only the principal of the latter being secured by the mortgage, interest being payable out of the net earnings as determined by the directors, such income bondholders have no lien on the road for the payment of the interest and are bound by the decision of the directors); Atwood *v.* Shenandoah Valley R. Co., 85 Va. 966, 9 S. E. 748.

Where the state guarantees bonds of a railroad company issued in exchange for its outstanding mortgage bonds, with the provision that the bonds so taken up shall stand as security to the state until all the bonds secured by mortgage shall be retired, the state is entitled to the benefit of the mortgage as regards the mortgage bonds taken up so long as any of such bonds remain outstanding. Gibbes *v.* Greenville, etc., R. Co., 13 S. C. 228.

75. Butler *v.* Rahm, 46 Md. 541.

76. Butler *v.* Rahm, 46 Md. 541.

77. Butler *v* Rahm, 46 Md. 541.

dated prior to the date of the mortgage are secured thereby where they are clearly described in the mortgage and there is nothing in the mortgage inconsistent with the fact that they had been before executed.[78] A mortgage executed to secure bonds issued for a certain purpose does not secure bonds issued for a different purpose or bonds illegally issued, except as they come into the hands of *bona fide* purchasers for value and without notice.[79] A mortgage made to secure bonds to be thereafter issued is inoperative as security unless the bonds are actually issued to *bona fide* creditors, before the liens of other creditors attach to the property conveyed.[80] Where a statute authorizes a general mortgage for the benefit of creditors but contains no provision for contingent liabilities, bonds of another company indorsed and guaranteed by the mortgagor company, but not yet due, are not covered by the security of such mortgage.[81] Where a mortgage provides for the retirement of certain bonds without providing for the manner of effecting such retirement, the mode thereof is in the discretion of the company and in order for a bondholder to participate in the security of the mortgage he must comply with the terms dictated by it.[82] Consent by the holders of a portion of first mortgage bonds to the issue of preference bonds of like character to be a lien on the road prior to their bonds is a mere equitable mortgage or pledge of the interest under the first mortgage of those who consented, as security for the payment of the preference bonds,[83] and does not change the rights under the mortgage of the non-assenting bondholders.[84]

f. Rights, Duties, and Liabilities of Mortgagees and Trustees[85] — (i) *APPOINTMENT, TENURE, AND REMOVAL.* As in the case of other mortgages,[86] a railroad mortgage or deed of trust may make express provision for the removal or appointment of a trustee upon the death, resignation, removal, absence, disability, or refusal to act of one or more of the trustees first named,[87] in which case the mode of supplying vacancies provided for in the mortgage governs the appointment and not the general law.[88] Ordinarily the mortgage provides that upon the vacancy of a trusteeship all of the trustee's estate, right, interest, power, and control shall be divested and cease,[89] and that the trust estate shall vest in the remaining trustee or trustees with or without power to fill vacancies;[90] or that the vacancy shall be supplied by the remaining trustees as by appointment from the bondholders;[91] or that a successor shall be appointed by the bondholders,[92] or by the company;[93] or that a successor shall be approved or appointed

78. Butler *v.* Rahm, 46 Md. 541.

79. Central Trust Co. *v.* California, etc., R. Co., 110 Fed. 70.

80. Allen *v.* Montgomery, 11 Ala. 437.

81. Merchants' Nat. Bank *v.* Eastern R. Co., 124 Mass. 518.

82. Claflin *v.* South Carolina R. Co., 8 Fed. 118, 4 Hughes 12.

83. Poland *v.* Lamoille Valley R. Co., 52 Vt. 144.

84. Poland *v.* Lamoille Valley R. Co., 52 Vt. 144.

85. Liability for injuries arising from operation of road see *infra*, X, C, 8.

86. See MORTGAGES, 27 Cyc. 1046 *et seq.*

87. See Pillsbury *v.* Consolidated European, etc., R. Co., 69 Me. 394.

Collateral attack.— Where a change of trustee has been made in apparent conformity to the mortgage, the legality of the change cannot be collaterally determined on the application of individual bondholders to be permitted to intervene in a suit to foreclose the mortgage instituted by the substituted trustee. Bowling Green Trust Co. *v.* Virginia Pass., etc., Co., 132 Fed. 921.

88. Macon, etc., R. Co. *v.* Georgia R. Co. 63 Ga. 103; Pillsbury *v.* Consolidated European, etc., R. Co., 69 Me. 394.

89. Pillsbury *v.* Consolidated European, etc., R. Co., 69 Me. 394.

90. Ellis *v.* Boston, etc., R. Co., 107 Mass. 1.

91. Richards *v.* Merrimack, etc., R. Co., 44 N. H. 127, holding also that the election of persons who have procured bonds for the purpose of qualifying themselves for trusteeship will not be invalid if no intention of fraud is shown.

92. Tarbell's Appeal, 7 Pa. Super. Ct. 283, holding that where a clause in a railroad mortgage provides that in the event of the resignation or refusal to act of the trustee, the railroad company shall have power to appoint a new trustee, but that any trustee thus appointed may at any time be superseded by a new appointment made by the holders of a majority of the bonds secured by the mortgage, the bondholders may, upon the resignation of such a trustee, appoint a successor without an application to the court.

93. Tarbell's Appeal, 7 Pa. Super. Ct. 283.

by a designated court,[94] upon a proper proceeding by the bondholders,[95] or by the directors of the company.[96] And although it may be provided by statute that in the absence of a provision in the mortgage for supplying such vacancy, a designated court may appoint a new trustee,[97] a court of equity may, for a sufficient reason,[98] and upon a proper application and notice, make a removal and new appointment independently of statutory authority or any directions in the mortgage; [99] and to a proceeding in equity for such a removal or appointment the mortgagor and surviving trustees are necessary parties.[1] Power of the court in this respect is not defeated by the formation of a new corporation by a majority of the bondholders; [2] or by a foreclosure promoted by the bondholders, the trustees not being parties thereto, and a sale of the equity of redemption on execution to the new corporation; [3] or by the creation of a new debt, secured by a mortgage, for the extension of the road; [4] or by estoppel through laches and because a majority of the bonds was represented at the organization of the new corporation.[5] Except where the mortgage or deed of trust provides that the same title and power shall vest in the successors,[6] the appointment of a new

94. Pillsbury *v.* Consolidated European, etc., R. Co., 69 Me. 394.

Notice of approval.— If the mortgage provides for filling a vacancy by a nomination *ex parte* of one of the beneficiaries and approval by the judge of the superior court, notice to the mortgagor of the application for approval is not required. Macon, etc., R. Co. *v.* Georgia R. Co., 63 Ga. 103.

95. Pillsbury *v.* Consolidated European, etc., R. Co., 69 Me. 394, request in writing by one or more bondholders.

96. Pillsbury *v.* Consolidated European, etc., R. Co., 69 Me. 394.

97. See Pillsbury *v.* Consolidated European, etc., R. Co., 69 Me. 394.

98. See Beadleson *v.* Knapp, 13 Abb. Pr. N. S. (N. Y.) 335.

A trustee's refusal to convey trust property as required by a decree of foreclosure of a mortgage is cause for removal in the absence of an adequate reason for such refusal. Harrison *v.* Union Trust Co., 144 N. Y. 326, 39 N. E. 353.

Misappropriation of funds.— Where a trustee is appointed by a surety company of a sinking fund to pay the company's debts and the trust deed allows him to invest the moneys in such securities as the president or board of directors might recommend but without any previous direction he loans a portion to a firm of which he is a senior member and which soon afterward becomes insolvent, he should be removed and a receiver appointed to take charge of the funds pending an investigation of his acts (North Carolina R. Co. *v.* Wilson, 81 N. C. 223), and his misconduct in this respect is not relieved by his taking collaterals to secure such loan which he thought to be good at the time of taking them (North Carolina R. Co. *v.* Wilson, *supra*).

99. *In re* Anson, 85 Me. 79, 26 Atl. 996; Tarbell's Appeal, 7 Pa. Super. Ct. 283. But see Washington, etc., R. Co. *v.* Alexandria, etc., R. Co., 19 Gratt. (Va.) 592, 100 Am. Dec. 710, holding that if the deed of trust provides for notice to the president or a director of the company, the jurisdiction of the court depends upon the giving of such notice.

Special statutory provisions regarding the election of trustees by the bondholders are merely cumulative and not restrictive and therefore do not interfere with the equity jurisdiction of the court to appoint a new trustee in such case. *In re* Anson, 85 Me. 79, 26 Atl. 996.

Notice.— An order substituting a new trustee without the required notice for one who has gone and remains in the enemy's line in time of war is null and void. Washington, etc., R. Co. *v.* Alexandria, etc., R. Co., 19 Gratt. (Va.) 592, 100 Am. Dec. 710.

A non-resident and absent trustee may be removed by a court of equity and the appointment of another in his stead be made *ex parte*, where service on the absent trustee is impossible. Ketchum *v.* Mobile, etc., R. Co., 14 Fed. Cas. No. 7,737, 2 Woods 532.

That the absent trustee is within a country at war with the country in which the court is sitting does not detract from its power to remove him and appoint another but furnishes a good reason for its exercise. And where such trustee soon after the cessation of hostilities learns of his removal and the appointment of another in his stead and for an unreasonable length of time makes no claim to his trusteeship and does not act as trustee, he will be held to have abandoned his office as trustee and to have acquiesced in the appointment of his successor. Ketchum *v.* Mobile, etc., R. Co., 14 Fed. Cas. No. 7,737, 2 Woods 532.

1. *In re* Anson, 85 Me. 79, 26 Atl. 996.

A creditor whose claim is payable out of a sinking fund for which a trustee has been appointed is not a necessary party to a proceeding for the trustee's removal. North Carolina R. Co. *v.* Wilson, 81 N. C. 223.

2. *In re* Anson, 85 Me. 79, 26 Atl. 996.

3. *In re* Anson, 85 Me. 79, 26 Atl. 996.

4. *In re* Anson, 85 Me. 79, 26 Atl. 996.

5. *In re* Anson, 85 Me. 79, 26 Atl. 996.

6. Craft *v.* Indiana, etc., R. Co., 166 Ill. 580, 46 N. E. 1132 (holding that trustees lawfully appointed to succeed deceased trustees originally appointed may execute a power of sale thereunder without an additional written conveyance of the property to them where the

trustee is not complete until the property is vested in him and therefore the court usually embraces in a decree appointing such trustee a direction for a proper conveyance to him from his co-trustees.[7] The power of removal is not absolute and a removal cannot be made capriciously or except for sufficient causes, affecting the faithfulness and capacity of the trustee,[8] or the interest of the *cestuis que trustent*,[9] or perhaps on account of public interest.[10] It is also well settled in chancery practice that trustees are not to be removed or discharged from part of their trust leaving them burdened and responsible for the remainder;[11] nor will such a trust be discharged until fully performed or the *cestuis que trustent* are in a condition to manage it themselves.[12] As the trustee's duties are personal in their character and incapable of delegation, his office of trustee becomes vacant by his voluntarily removing to and becoming a resident of a foreign country;[13] but a citizen of the United States may act as trustee in any state in the Union.[14] A trustee, once having assumed his office, is morally and legally bound to continue in the performance of his duties until discharged by an order of the court of chancery,[15] or by the unanimous consent of the *cestuis que trustent*,[16] which in case a number of such *cestuis que trustent* are under a disability can be had only through the agency of a court of equity.[17] The fact that the trustee parts with the bonds required by his qualification does not prevent him from being charged as trustee.[18]

(II) *NATURE OF DUTIES.* The duties of trustees under a railroad mortgage are regulated by the general rules of law which affect all trustees;[19] and the law of the state where the mortgage is executed and the mortgaged property situated furnishes the rule for determining the rights of mortgagees after condition broken.[20] The duties assumed by a trustee to whom a railroad mortgage is made for the benefit of bondholders are those which are defined by the instrument creating the trust,[21] and such other duties as are imposed upon him by the relation of the parties and the situation and character of the trust property, which duties may change from time to time as circumstances change.[22] Until the actual foreclosure

deed provides that upon the death of the trustees therein named the same title and powers vested in them shall vest in their successors); Ellis *v.* Boston, etc., R. Co., 107 Mass. 1.

7. Pillsbury *v.* Consolidated European, etc., R. Co., 69 Me. 394; Ellis *v.* Boston, etc., R. Co., 107 Mass. 1.

8. Beadleson *v.* Knapp, 13 Abb. Pr. N. S. (N. Y.) 335 (holding that a trustee will not be removed on the ground that he declines to employ counsel for the foreclosure of a first mortgage and declines to elect to act as trustee under one of the mortgages and to resign his trusteeship under the other, where it appears that his action is the result of sound judgment on his part and not against the interest of any of the bondholders); Sturges *v.* Knapp, 31 Vt. 1.

9. Sturges *v.* Knapp, 31 Vt. 1.

10. Sturges *v.* Knapp, 31 Vt. 1.

11. Sturges *v.* Knapp, 31 Vt. 1.

12. Sturges *v.* Knapp, 31 Vt. 1.

13. Farmers' L. & T. Co. *v.* Hughes, 11 Hun (N. Y.) 130; Hughes *v.* Chicago, etc., R. Co., 47 N. Y. Super. Ct. 531.

14. Farmers' L. & T. Co. *v.* Chicago, etc., R. Co., 27 Fed. 146.

15. Sturges *v.* Knapp, 31 Vt. 1. *Compare* Tarbell's Appeal, 7 Pa. Super. Ct. 283.

16. Sturges *v.* Knapp, 31 Vt. 1.

17. Sturges *v.* Knapp, 31 Vt. 1.

18. Richards *v.* Merrimack, etc., R. Co., 44 N. H. 127.

19. First Nat. F. Ins. Co. *v.* Salisbury, 130 Mass. 303. See also, generally, MORTGAGES, 27 Cyc. 1229 *et seq.*; TRUSTS.

20. Dow *v.* Memphis, etc., R. Co., 20 Fed. 260.

Me. Rev. St. (1857) c. 51, § 51, and St. (1858) c. 30, relating to trustees of railroads apply to cases where the trust, the trustee, and the *cestuis que trustent* are all created by one and the same instrument; and not to a case where a mortgage is made to an individual to secure him and his assigns who subsequently became holders of the bonds to be issued by him; and should such a mortgagee transfer any part of the bonds, he would hold the mortgaged estate as mortgagee for the part not transferred and as trustee for the holders of the portion transferred precisely as any mortgagee would do under similar circumstances, but neither before nor after such transfer would he be such a trustee as the statute contemplates. *In re* York, etc., R. Co., 50 Me. 552, 52 Me. 82.

21. Frishmuth *v.* Farmers' L. & T. Co., 95 Fed. 5 [*affirmed* in 107 Fed. 169, 46 C. C. A. 222]; Denver, etc., R. Co. *v.* U. S. Trust Co., 41 Fed. 720 (construction of authority to issue bonds); Riker *v.* Alsop, 27 Fed. 251.

22. Sturges *v.* Knapp, 31 Vt. 1; Frishmuth *v.* Farmers' L. & T. Co., 95 Fed. 5 [*affirmed* in 107 Fed. 169, 46 C. C. A. 222].

Bailees or agents.— Where boats are delivered to mortgage trustees of a railroad com-

of the mortgage the trusts imposed upon the trustees are ordinarily entirely fiduciary and executory;[23] and where the mortgage deed is amply secured, and so long as prompt payment is made, the office of the trustees is rather passive and their duties are ordinarily performed by the corporation or its officers.[24] After a forfeiture occurs, however, either by non-payment of interest or principal, or both, the duties of the trustees become active and responsible.[25] It then becomes their duty to take possession of the road and its fixtures and to manage and control the same for the benefit of all parties interested.[26] If the principal or interest on bonds become due and is unpaid and the trustees have not the means to pay it, it will be their absolute duty to proceed against the property.[27]

(III) *Extent of Duties in General.* Within the limitations of the above rules, it is the duty of the trustee in possession to manage the property in a reasonably prudent and careful manner so as to keep it in a good state of preservation in order to make it available for the payment of the bonds both both principal and interest,[28] being authorized for this purpose to institute and defend proceedings affecting the trust property,[29] to incur necessary expenses,[30] and even under some circumstances to borrow money upon receiver's certificates.[31] This must be so until some organization of the bondholders and the acquiring of some capacity to act by a majority, or in some such way as to enable them to discharge the new class of duties thrown upon them by the forfeiture of the condition of the mortgage and the surrendering of the road with its incidents and fixtures.[32] The trustee must take care that the property is not wasted or depreciated,[33] and that its income is not improperly diverted from the payment of principal or interest on the mortgage debt as it accrues,[34] and that the proceeds of the obligations and securities are properly applied to purposes of the trust.[35] The rule in ordinary cases is that the mortgagee can always claim the rents, income, or profits of the mortgaged property, after forfeiture of the mortgage;[36] but he is required to be active in making the claim, either by giving notice to the tenants or lessees in possession or by filing his bill for the purpose of foreclosure in a court of equity,[37] or if the road be in the hands of a third party, by demanding

pany which are not included in the mortgage, the trustees become bailees or agents of the company with all its rights as against strangers interfering with the boats. Parish *v.* Wheeler, 22 N. Y. 494.

23. Sturges *v.* Knapp, 31 Vt. 1.

24. Sturges *v.* Knapp, 31 Vt. 1; Frishmuth *v.* Farmers' L. & T. Co., 95 Fed. 5 [*affirmed* in 107 Fed. 169, 46 C. C. A. 222].

25. Sturges *v.* Knapp, 31 Vt. 1.

26. Sturges *v.* Knapp, 31 Vt. 1. And see *infra*, VIII, A, 7, f, (VIII).

27. Florida *v.* Anderson, 91 U. S. 667, 23 L. ed. 290.

28. Sturges *v.* Knapp, 31 Vt. 1. See U. S. Trust Co. *v.* Wabash Western R. Co., 150 U. S. 287, 14 S. Ct. 86, 37 L. ed. 1085.

29. Seney *v.* Wabash Western R. Co., 150 U. S. 310, 14 S. Ct. 94, 37 L. ed. 1092; U. S. Trust Co. *v.* Wabash Western R. Co., 150 U. S. 287, 14 S. Ct. 86, 37 L. ed. 1085.

Notice.— Trustees of a railroad mortgage of a leased line who are parties to a bill under which a receiver is appointed for the lessee company are bound to take notice of all orders to the receiver affecting their interests and if they deem such orders injurious should at once ask the court to cancel or modify the same. U. S. Trust Co. *v.* Wabash Western R. Co., 150 U. S. 287, 14 S. Ct. 86, 37 L. ed. 1085.

30. See *infra*, VIII, A, 7, f, (IX).

31. Shaw *v.* Little Rock, etc., R. Co., 100 U. S. 605, 25 L. ed. 757, holding, however, that except under extraordinary circumstances, the power of the court ought never to be exercised in enabling the trustees, where the railroad is unfinished, to borrow money by reason of receivers' certificates which create a paramount lien upon the property, in order to complete the work.

32. Sturges *v.* Knapp, 31 Vt. 1.

33. First Nat. F. Ins. Co. *v.* Salisbury, 130 Mass. 303.

34. First Nat. F. Ins. Co. *v.* Salisbury, 130 Mass. 303.

Where money applicable to the payment of bonds comes into the hands of the trustees, each bondholder becomes immediately entitled to the share of the money applicable to his bond, and can immediately recover the same. Dwight *v.* Smith, 13 Fed. 50.

35. Little Rock, etc., R. Co. *v.* Huntington, 120 U. S. 160, 7 S. Ct. 517, 30 L. ed. 591; Frishmuth *v.* Farmers' L. & T. Co., 95 Fed. 5.

36. Johnston *v.* Riddle, 70 Ala. 219.

37. Johnston *v.* Riddle, 70 Ala. 219; U. S. Trust Co. *v.* Wabash Western R. Co., 150 U. S. 287, 14 S. Ct. 86, 37 L. ed. 1085, holding that, where the mortgagees demand immediate possession and the court without their assent makes an order for surrendering to them after thirty days, they are equitably entitled to rentals for that period; but if on the other

possession of such party;[38] and in the absence of a claim by notice, he obtains no lien on such rents, income, or profits, by the mere filing of his bill, or even by the service of a summons on defendants.[39] To secure this right or lien, he must procure the appointment of a receiver by the court;[40] and until notice is given by taking possession or otherwise, or a receiver is duly appointed, the mortgagor is entitled to continue his enjoyment of the rents, he being regarded, in equity, as the real and true owner of the property as against everybody excepting only the mortgagee.[41] A trustee cannot waive defaults and release the mortgagor company from its obligations to the bondholders,[42] nor has he power to change or impair any legal right of the bondholders.[43] Before an actual foreclosure of the mortgage the trustees are the only responsible parties in regard to the management of the property;[44] and they cannot be relieved from this responsibility except by a decree of a court of chancery.[45] After foreclosure, although the contingent interests are mostly cut off and the number and character of the ultimate *cestuis que trustent* very much changed, the duties of the trustees and the necessity of their continuing to act remain much the same.[46] A trustee cannot delegate the performance of his duties to another;[47] nor can any one but the trustee enforce the covenants and conditions of the mortgage,[48] or take proper measures to protect the interests of bondholders in respect to matters not provided for by the terms of the instrument.[49] Where a bondholder has a statutory lien on a railroad he cannot avail himself of it directly as he could if it were a mortgage given to secure the bonds alone, but he must induce the trustees to act in the mode pointed out by statute.[50]

(IV) *REPRESENTATION OF MORTGAGOR, BONDHOLDERS, AND OTHER BENEFICIARIES.* While a trustee is selected by the mortgagor and represents it,[51] he also represents those who may become the holders of the bonds and is bound to act in good faith and exercise reasonable care and prudence for the protection of their interests,[52] and must not be guilty of any acts of fraud or collusion,[53] or

hand an order is entered by consent giving them possession at the end of thirty days, they are not entitled to rentals for the intervening time.

Money voluntarily deposited to the credit of the trustee for the payment of coupons cannot be claimed by him, where he has not taken possession or run the road, or taken any action against the company by virtue of the trust deed. Coe *v.* Beckwith, 31 Barb. (N. Y.) 339, 10 Abb. Pr. 296. But if the company runs the road and deposits money from the income to the credit of the trustee, upon the same trusts as those specified by the mortgage, he by that act acquires a title thereto. Coe *v.* Beckwith, *supra.* Authority for such deposits by the directors may be presumed, as it would be a breach of duty for them to make such deposits without authority. Coe *v.* Beckwith, *supra.*

38. U. S. Trust Co. *v.* Wabash Western R. Co., 150 U. S. 287, 14 S. Ct. 86, 37 L. ed. 1085.

39. Johnston *v.* Riddle, 70 Ala. 219.

40. Johnston *v.* Riddle, 70 Ala. 219.

41. Johnston *v.* Riddle, 70 Ala. 219.

42. Hollister *v.* Stewart, 111 N. Y. 644, 19 N. E. 782.

43. Hollister *v.* Stewart, 111 N. Y. 644, 19 N. E. 782.

44. Sturges *v.* Knapp, 31 Vt. 1.

45. Sturges *v.* Knapp, 31 Vt. 1.

46. Sturges *v.* Knapp, 31 Vt. 1.

47. Merrill *v.* Farmers' L. & T. Co., 24 Hun (N. Y.) 297, holding that a trustee is liable for damages sustained by reason of his having permitted a majority of the bondholders to institute and carry on foreclosure proceedings without his personal supervision and control.

48. Frishmuth *v.* Farmers' L. & T. Co., 95 Fed. 5 [*affirmed* in 107 Fed. 169, 46 C. C. A. 222].

49. Frishmuth *v.* Farmers' L. & T. Co., 95 Fed. 5 [*affirmed* in 107 Fed. 169, 46 C. C. A. 222].

50. Florida *v.* Anderson, 91 U. S. 667, 23 L. ed. 290.

51. Frishmuth *v.* Farmers' L. & T. Co., 95 Fed. 5 [*affirmed* in 107 Fed. 169, 46 C. C. A. 222].

52. First Nat. F. Ins. Co. *v.* Salisbury, 130 Mass. 303; Loeb *v.* Chur, 3 Silv. Sup. (N. Y.) 147, 6 N. Y. Suppl. 296 [*affirmed* in 125 N. Y. 726, 27 N. E. 756] (holding that since the interest which he represents is the interest of the mortgagee and it is only this which he is under any legal liability to protect, the general creditors of the railroad company cannot complain that the trustee improperly gives a release of errors in a decree adjudicating that the rights of the company have become vested in another corporation); Frishmuth *v.* Farmers' L. & T. Co., 95 Fed. 5 [*affirmed* in 107 Fed. 169, 46 C. C. A. 222]; Bound *v.* South Carolina R. Co., 50 Fed. 853.

53. Bound *v.* South Carolina R. Co., 50 Fed. 853; London Credit Co. *v.* Arkansas Cent. R. Co., 15 Fed. 46, 5 McCrary 23; Cottam *v.* Eastern Counties R. Co., 1 Johns. & H. 243, 30 L. J. Ch. 217, 6 Jur. N. S. 1367, 3

of self-interest prejudicial to the interests of the bondholders;[54] otherwise he is liable to the bondholders for any breach of duty as trustee he may commit.[55] And conversely the bondholders or beneficiaries are bound by all acts done in good faith by such trustee on their behalf.[56] So a trustee's duty to the bondholders is to them severally and he is not at liberty to follow the advice or wishes of the majority unless specially authorized.[57] He has no right, as against and without the consent of a bondholder in the absence of provisions in the mortgage authorizing it, to waive and condone defaults in the payment of principal or interest on the bonds,[58] or to assent to and recognize a new mortgage given priority over the mortgage securing such bondholder.[59] And if, upon the request of bondholders, a trustee in any case refuses or neglects to act, whatever rights as against

L. T. Rep. N. S. 465, 9 Wkly. Rep. 49, 70 Eng. Reprint 737, holding that the possession by one of three trustees of railroad debentures gives him no implied authority to deal with them, and a transfer of such bonds by forging his co-trustees' signatures is void.

54. Farmers' L. & T. Co. *v.* Northern Pac. R. Co., 66 Fed. 169 (holding that the rule that courts are to deal with bondholders only through their trustees does not apply where it appears that the trustees are in a position prejudicial to the interests of the bondholders); Bound *v.* South Carolina R. Co., 50 Fed. 853. And see *infra*, VIII, A, 7, f, (XI).

55. Rhinelander *v.* Farmers' L. & T. Co., 172 N. Y. 519, 65 N. E. 499 [*affirming* 58 N. Y. App. Div. 473, 619, 69 N. Y. Suppl. 437, 1144] (holding that where a trustee fails to carry out the provisions of the mortgage as to the issuing of bonds and paying out the proceeds thereof, it is a breach of his duty as trustee rendering him liable to the bondholders); Riker *v.* Alsop, 27 Fed. 251 [*reversed* on other grounds in 155 U. S. 448, 15 S. Ct. 162, 39 L. ed. 218].

Defending suit.— A trustee cannot be held liable to bondholders because of his failure to defend a suit for the forfeiture of a land grant to which the company would have been entitled on making a certain payment, where it is not shown that there was any defense, or that the rights of the company had not been previously lost without fault of the trustee. Frishmuth *v.* Farmers' L. & T. Co., 107 Fed. 169, 46 C. C. A. 222 [*affirming* 95 Fed. 5].

Where under a plan to reorganize a railroad trustees are appointed to whom the bondholders are to surrender one third of their bonds and receive stock in lieu thereof, and the trustees are to hold the surrendered bonds for the benefit of all who concurred in the plan; and some non-concurring bondholders afterward institute suit to sell the road, and the trustees buy it in and convey it to a newly organized corporation without preserving and recognizing a paramount lien in the holders for two thirds of their bonds not surrendered, the trustees are personally liable to the bondholders for the amount of such bonds. Riker *v.* Alsop, 27 Fed. 251 [*reversed* on the facts in 155 U. S. 448, 15 S. Ct. 162, 39 L. ed. 218].

Where at the time the mortgage is made the railroad company is without substantial property aside from its franchises and the security is practically to be created by the use of the proceeds of the bonds which ought to be issued by the trustee, the proceeds to be used for specified purposes, and the company fails to comply with the requirements of the mortgage, diverting the proceeds of bonds received, a further issuance of bonds to it without taking measures to see that they are properly applied is a breach of the trust for which the trustee can be held liable by the bondholders. Frishmuth *v.* Farmers' L. & T. Co., 95 Fed. 5 [*affirmed* in 107 Fed. 169, 46 C. C. A. 222].

A trustee who becomes such subsequent to certain acts done by other trustees and joins in subsequent acts belonging to the same transaction, without inquiring whether they would prejudice the rights of the bondholders or other beneficiaries, is liable with the original trustees for losses occasioned thereby. Riker *v.* Alsop, 27 Fed. 251 [*reversed* on the facts in 155 U. S. 448, 15 S. Ct. 162, 39 L. ed. 218].

56. London Credit Co. *v.* Arkansas Cent. R. Co., 15 Fed. 46, 5 McCrary 23.

The assent of trustees to the acquisition of a lien superior to their mortgage is binding on the bondholders. Pierce *v.* Emery, 32 N. H. 484.

Notice to the trustees of the existence of rights or encumbrances on the mortgaged property is notice to the bondholders (Haven *v.* Emery, 33 N. H. 66; Miller *v.* Rutland, etc., R. Co., 36 Vt. 452); and it makes no difference that the bonds are negotiable (Miller *v.* Rutland, etc., R. Co., *supra*).

In legal proceedings affecting the trust to which the bondholders are not actual parties, the trustee represents the bondholders, and whatever binds him, if he acts in good faith, binds them. Shaw *v.* Little Rock, etc., R. Co., 100 U. S. 605, 25 L. ed. 757. And see Rochester Trust, etc., Co. *v.* Oneonta, etc., R. Co., 122 N. Y. App. Div. 193, 107 N. Y. Suppl. 237.

57. Hollister *v.* Stewart, 111 N. Y. 644, 19 N. E. 782; Toler *v.* East Tennessee, etc., R. Co., 67 Fed. 168, holding that the trustee is bound to exercise his judgment and discretion in the interest of all the bondholders and not in behalf of the majority bondholders alone.

58. Hollister *v.* Stewart, 111 N. Y. 644, 19 N. E. 782.

59. Hollister *v.* Stewart, 111 N. Y. 644, 19 N. E. 782.

the mortgagor are vested in the trustee inure to the benefit of the bondholders and are enforceable by them.[60] But where, although the trustees have been guilty of a breach of trust, there is some excuse for their acts, they will be held liable only as trustees and not personally.[61]

(v) *SALE OF PROPERTY.* A trustee may sell the railroad or other trust property where empowered by the mortgage to do so, provided he sells in the manner prescribed thereby;[62] but in the absence of such power contained in the mortgage, the trustee may sell only upon authority from the court,[63] and if he sells without making application for such authority, it is a breach of trust which renders him personally liable for any damage to the bondholders occasioned thereby;[64] and even where the power to sell upon a certain contingency is contained in the mortgage, the execution of such trust may be controlled by a court of equity at the suit of *cestuis qui trustent.*[65] Where a trustee is empowered to sell on such terms and conditions as he may deem best, he has power to warrant title to the property sold.[66] Where the sale is made by trustees and the company participates in the sale, it is estopped to deny the authority of the trustees to execute the deed conveying the land in question.[67] But where trustees holding the title to lands for the benefit of a railroad company convey a certain part of the same for their own personal benefit, such conveyance is voidable as against the railroad company,[68] although it is valid as to one claiming by title adverse to that held by the railroad company.[69]

(vi) *LEASE OF PROPERTY.* After a breach of conditions in the mortgage, the trustees may, in the exercise of their discretion for the best interests of all parties in interest, lease the road,[70] upon such terms and conditions as the trustees may deem best.[71] Such lease may be executed by a trustee even after foreclosure,[72] particularly where the bondholders are in an unorganized state.[73] Before condition broken the mortgagor, if permitted to remain in possession and control of the property, may execute a lease thereof;[74] but this authority terminates upon the breach of the conditions of the mortgage,[75] and the trustees cannot by oral assent confirm a lease executed by the mortgagor thereafter.[76]

60. O'Beirne *v.* Allegheny, etc., R. Co., 151 N. Y. 372, 45 N. E. 873 [*affirming* 80 Hun 570, 30 N. Y. Suppl. 588].

On refusal of a trustee to sue for specific performance of an agreement made by the mortgagor company, a mortgage bondholder may maintain such an action against the mortgagor company on behalf of himself and other bondholders similarly situated, before default in the bonds. O'Beirne *v.* Allegheny, etc., R. Co., 151 N. Y. 372, 45 N. E. 873 [*affirming* 80 Hun 570, 30 N. Y. Suppl. 588].

61. Hollister *v.* Stewart, 111 N. Y. 644, 19 N. E. 782.

62. See Dubuque, etc., R. Co. *v.* Pierson, 70 Fed. 303, 17 C. C. A. 401.

63. James *v.* Cowing, 17 Hun (N. Y.) 256 [*reversed* on other grounds in 82 N. Y. 449].

64. James *v.* Cowing, 17 Hun (N. Y.) 256 [*reversed* on other grounds in 82 N. Y. 449].

65. Youngman *v.* Elmira, etc., R. Co., 65 Pa. St. 278, holding also that the court's decision as to its jurisdiction cannot be impeached collaterally.

66. Dubuque, etc., R. Co. *v.* Pierson, 70 Fed. 303, 17 C. C. A. 401.

67. Wood *v.* Dubuque, etc., R. Co., 28 Fed. 910.

68. Miller *v.* Iowa Land Co., 56 Iowa 374, 9 N. W. 316.

69. Miller *v.* Iowa Land Co., 56 Iowa 374, 9 N. W. 316.

70. Sturges *v.* Knapp, 31 Vt. 1, holding that where the trustees have no rolling stock and equipment and no means of purchasing any, they cannot be required to attempt to operate the road on their own account, except as a matter of strict necessity and practicability, and that under such circumstances they act judicially in leasing the road.

Informality in the terms of the lease or unreasonableness in its provisions is not ground for avoiding the lease by the lessors or those they represent, unless the contract is *ultra vires.* Sturges *v.* Knapp, 31 Vt. 1.

That the trustees discuss and agree upon a lease does not make a binding lease, nor estop one of their number from denying such lease. Pond *v.* Vermont Valley R. Co., 19 Fed. Cas. No. 11,264.

Rights of bondholders under a lease providing for the payment of net earnings to them cannot be defeated by the failure of the lessor to pay the sums due from it to the lessee under the contract. Schmidtz *v.* Louisville, etc., R. Co., 101 Ky. 441, 41 S. W. 1015, 19 Ky. L. Rep. 666, 38 L. R. A. 809.

71. Sturges *v.* Knapp, 31 Vt. 1.

72. Sturges *v.* Knapp, 31 Vt. 1.

73. Sturges *v.* Knapp, 31 Vt. 1.

74. Haven *v.* Adams, 4 Allen (Mass.) 80.

75. Haven *v.* Adams, 4 Allen (Mass.) 80.

76. Haven *v.* Adams, 4 Allen (Mass.) 80.

(VII) *POWER TO BID IN PROPERTY.* Trustees may be empowered to bid in the property at the request of the majority of the bondholders at a foreclosure sale;[77] or this power may be given to them by an order of the court upon such terms as the order prescribes;[78] and if necessary to protect the interests of the bondholders it may be the duty of the trustees to bid in the property in default of bidders, independent of an order and decree authorizing them to do so.[79]

(VIII) *POSSESSION AND OPERATION OF ROAD*[80] — (A) *In General.* Under a morfgage reserving the sole and exclusive management and control of the property to the mortgagor until default, the right of possession until such default is in the mortgagor.[81] A railroad mortgage, however, usually provides that the mortgage trustee shall take possession upon default in the payment of principal or interest,[82] and upon compliance with such requirements as the mortgage may provide.[83] Under such a mortgage the mortgagor company is usually entitled to remain in possession and operation of the road until default,[84] and where the trustee has obtained possession on default and the railroad company has paid all past due instalments and is in a condition to meet future instalments, it may be entitled to a return of the possession of the property ;[85] although it has been held that in the absence of a stipulation in a mortgage giving the mortgagor company the right to possession until default, the mortgagee or trustee has the right to take possession at any time;[86] and in case of a manifest purpose on the part of the mortgagor to waste or destroy the property, or not to apply the income to pay-

77. See James *v.* Cowing, 82 N. Y. 449 [*reversing* 17 Hun 256].

78. James *v.* Cowing, 82 N. Y. 449 [*reversing* 17 Hun 256].

Where the order merely fixes the minimum at which the trustee may allow others to buy, he may in his discretion bid a larger sum. James *v.* Cowing, 82 N. Y. 449 [*reversing* 17 Hun 256].

79. Rogers *v.* Wheeler, 2 Lans. (N. Y.) 486 [*affirmed* in 43 N. Y. 598], holding that the trustees for mortgage bondholders of a railroad company are bound to bid in the property if necessary to protect the interests of their *cestuis que trustent*, independently of a decree of foreclosure and sale under the mortgage authorizing them in default of bidders to purchase the mortgaged property as proceeds to operate the road and receive the income thereof.

80. **Possession and use of property under mortgages** generally see MORTGAGES, 27 Cyc. 1234 *et seq.*

81. First Nat. F. Ins. Co. *v.* Salisbury, 130 Mass. 303; Southern Pac. R. Co. *v.* Doyle, 11 Fed. 253, 8 Sawy. 60.

A mortgagor retaining possession is presumed to be the mortgagee's agent in operating the road. Watts *v.* Sweeney, 127 Ind. 116, 26 N. E. 680, 22 Am. St. Rep. 615.

82. Macon, etc., R. Co. *v.* Georgia R. Co., 63 Ga. 103; First Nat. F. Ins. Co. *v.* Salisbury, 130 Mass. 303 (holding that, although the mortgage provides that until default the mortgagor company shall remain in possession and that on default and on request of one half in amount of the holders of the bonds the trustee shall sell the property and apply the proceeds upon the payment of the bonds, on default the trustees have the power to foreclose and take possession of the property, although not requested so to do by one half in amount of the bondholders); Shaw *v.* Norfolk County R. Co., 5 Gray (Mass.) 162; Seibert *v.* Minneapolis, etc., R. Co., 52 Minn. 246, 53 N. W. 1151; *In re* New Paltz, etc., R. Co., 26 Misc. (N. Y.) 324, 56 N. Y. Suppl. 1060, holding that the trustee is entitled to take possession and operate the road, as against a permanent receiver appointed in proceedings to dissolve the company.

A mortgage which gives the trustees power to take possession of the road and use it in certain contingencies, and, at their discretion, on certain conditions, to sell it, contemplates that they may do the former only, or both The trustees need not confine themselves to either measure, but they may first enter and then sell the road, using the road for the purposes of the trust until a sale is effected. Macon, etc., R. Co. *v.* Georgia R. Co., 63 Ga. 103.

83. Union Trust Co. *v.* Missouri, etc., R. Co., 26 Fed. 485, holding that under the particular mortgage the trustee could not hold possession of the road unless the bondholders had either exercised their option in declaring the principal sum due and payable, or had demanded the foreclosure of the mortgage.

84. See Union Trust Co. *v.* Missouri, etc., R. Co., 26 Fed. 485.

85. Union Trust Co. *v.* Missouri, etc., R. Co., 26 Fed. 485.

A surrender of possession of the road to the railroad company may be ordered where the principal does not accrue for many years, and past-due instalments of interest have been tendered and paid to the trustee in possession. Union Trust Co. *v.* Missouri, etc., R. Co., 26 Fed. 485.

86. First Nat. F. Ins. Co. *v.* Salisbury, 130 Mass. 303.

ment of interest, to the injury of the bondholders, it is his duty to enter and take possession of the property, and manage it for the security of the *cestuis que trustent.*[87] Trustees in possession have sufficient power in the nature of a franchise to enable them to discharge the duties which the public have a right to demand in keeping in repair and operating the road; [88] and for this purpose they may use their own proper names or adopt any other name they may choose, and are not bound to do business in the name of the company to whose rights they have succeeded; [89] or they may appoint an agent to manage the road without personally going upon the premises themselves.[90] But the trustees' power to take possession must be exerted upon all the property mortgaged.[91] A trustee in possession under authority of the mortgage is the company's agent in the management of the road and it is liable to third persons for his acts.[92] Trustees who purchase at a foreclosure sale and operate the road under a decree authorizing them to do so are liable as common carriers for goods received by them while thus operating the road,[93] and they are not in possession of the property as receivers, and are not relieved from liability on the ground that they stood in that relation to the court, since they are accountable, not to the court, but to the bondholders; [94] nor are they released from their liability as common carriers by a conveyance of the property to a new company organized in obedience to a decree of court, where the act or contract as common carrier was done or entered into before the transfer took place.[95] The trustees' right to possession upon default under a mortgage giving them such right is superior to that of a contractor who claims possession under a contract with the railroad company, and who holds bonds secured by the mortgage.[96] Under a statute giving the state a lien for aid granted, certain state officers may take possession and operate the road upon default.[97] Since the legal title of the trustees to the property of the railroad company is only for the

87. First Nat. F. Ins. Co. *v.* Salisbury, 130 Mass. 303.

88. Palmer *v.* Forbes, 23 Ill. 301; Jones *v.* Seligman, 81 N. Y. 190 [*affirming* 16 Hun 230], holding that the trustees under a mortgage operating a railroad are liable to a landowner for a neglect to maintain fences and farm crossings, and that he may enforce performance of such duty without resort to an action for damages given by Laws (1854), c. 285, § 8.

89. Palmer *v.* Forbes, 23 Ill. 301.

90. Palmer *v.* Forbes, 23 Ill. 301; Rice *v.* St. Paul, etc., R. Co., 24 Minn. 464, holding that where an article of a railroad mortgage authorizes trustees on default to take possession, hold, and use the road, operating the same by their superintendents, managers, receivers, or servants or other attorney or agents, the receiver meant is one of the trustees and not a technical receiver to be appointed by the court.

91. Coe *v.* Peacock, 14 Ohio St. 197.

92. Rio Grande R. Co. *v.* Cross, 5 Tex. Civ. App. 454, 23 S. W. 529, 1004, holding that the company is liable for goods lost *in transitu* over the road during the trustee's management.

93. Barter *v.* Wheeler, 49 N. H. 9, 6 Am. Rep. 434; Rogers *v.* Wheeler, 43 N. Y. 598 [*affirming* 2 Lans. 486].

94. Rogers *v.* Wheeler, 43 N. Y. 598 [*affirming* 2 Lans. 486].

95. Rogers *v.* Wheeler, 43 N. Y. 598 [*affirming* 2 Lans. 486].

96. Allen *v.* Dallas, etc., R. Co., 1 Fed. Cas. No. 221, 3 Woods 316.

97. Hand *v.* Savannah, etc., R. Co., 8 S. C. 207.

The words "income and revenue" in a statute providing that in case of default by the railroad company on the bonds, the state may take possession of the income and revenues of the company, necessarily embrace the earnings of the road. Tompkins *v.* Little Rock, etc., R. Co., 15 Fed. 6.

Under S. C. Act (1869), § 5, proceedings by a controller-general to take possession of the road are not barred by a decree of the circuit court transferring the possession of the road to the receiver and the advisory board, to be operated for the benefit of the creditors and stock-holders of the road. Hand *v.* Savannah, etc., R. Co., 8 S. C. 207. The authority conferred upon the controller-general by such act is not in conflict with the rights of the creditors of the road, nor does it impair the obligation of the contract between the state and the holders of the bonds issued by the corporation and guaranteed by the state under the act of 1856. Hand *v.* Savannah, etc., R. Co., *supra.* Nor is the act of 1869, authorizing the controller-general on a certain contingency to take possession of the Savannah & Charleston railroad, repealed by the act of 1871, directing proceedings for the foreclosure to be taken against all railroad companies which had failed to pay the interest due upon the bonds of the companies guaranteed by the state. Hand *v.* Savannah, etc., R. Co., *supra.* Nor does such act in authorizing and directing the controller-general to take possession of the road on the company's becoming insol-

purpose of executing the trusts, and a court of equity has like power of execution, where such court has obtained possession of the mortgaged property it will not surrender it, unless it is apparent that the trustees can better execute the trust in justice to all parties.[98]

(B) *Contracts.* Trustees in possession of and operating a railroad are liable upon the contracts of operatives employed upon the road to the same extent as the corporation would have been had it continued in possession.[99] But a trustee entering into possession and operating the road is not bound by contracts made by the mortgagor while in possession under the mortgage,[1] unless such contracts were expressly authorized by the mortgage.[2]

(IX) *Compensation and Expenses.* Trustees are entitled to reimbursement for all expenses reasonably and necessarily incurred in the execution of the trust,[3] such as reasonable counsel fees and costs expended in prosecuting and defending proper proceedings to protect the trust property,[4] and are entitled to reasonable compensation for their services,[5] including compensation for services rendered, and fees and costs in foreclosure proceedings,[6] provided such services or expenditures are within the line of the duties imposed upon them by the instrument creating the trust.[7] If the trustee is appointed upon a specific compensation and after he has rendered services is discharged, he is entitled to the compensation agreed upon.[8] Where the mortgagor railroad company in the trust deed reserves the right to sell the land and pay the proceeds of the sales thereof

vent and failing to pay the guaranteed bonds authorize the performance of an act which could only be performed through the instrumentality of the judicial department of the state. Hand *v.* Savannah, etc., R. Co., *supra*.

98. Illinois Cent. R. Co. *v.* Mississippi Cent. R. Co., 12 Fed. Cas. No. 7,008.

99. Sprague *v.* Smith, 29 Vt. 421, 70 Am. Dec. 424.

1. Ellis *v.* Boston, etc., R. Co., 107 Mass. 1.

2. Ellis *v.* Boston, etc., R. Co., 107 Mass. 1.

3. Ellis *v.* Boston, etc., R. Co., 107 Mass. 1; Central Trust Co. *v.* Wabash, etc., R. Co., 36 Fed. 622.

4. Louisville, etc., R. Co. *v.* Schmidt, 107 S. W. 745, 33 Ky. L. Rep. 346; Central Trust Co. *v.* Wabash, etc., R. Co., 36 Fed. 622.

Where a suit by a trustee is unnecessary, he should not be allowed counsel fees therefor. Bound *v.* South Carolina R. Co., 62 Fed. 636.

5. Palmer *v.* Forbes, 23 Ill. 301; Gilman *v.* Des Moines Valley R. Co., 41 Iowa 22 (holding trustees entitled to two per cent on the par value of bonds received in exchange for land sold by them); Ellis *v.* Boston, etc., R. Co., 107 Mass. 1; Bound *v.* South Carolina R. Co., 62 Fed. 536 (holding trustee not entitled to compensation for services rendered in unnecessary suit); Easton *v.* Houston, etc., R. Co., 40 Fed. 189 (holding that in foreclosure proceedings the allowance of five hundred dollars was ample compensation for the services of a trustee of the mortgage of which there was only one bond of five hundred dollars outstanding, the balance of the issue of one million five hundred thousand dollars being deposited with a trust company, his services in the litigation being merely nominal and going no further than the use of his name); Central Trust Co. *v.* Wabash, etc., R. Co., 36 Fed. 622; Dow *v.* Memphis, etc., R. Co., 32 Fed. 185, 23 Blatchf. 84 (trustee held entitled only to one per cent compensation allowed by N. Y. Rev. St. p. 2, c. 6, tit. 3, art. 3, § 58).

A trustee of a senior divisional mortgage who is made party defendant to a bill to foreclose a junior general mortgage is entitled to be reimbursed out of the proceeds of sale, for his services and for counsel fees in the proceedings, although he has filed a bill in another court to foreclose the divisional mortgage and procured the appointment of a separate receiver for that division. Central Trust Co. *v.* Wabash, etc., R. Co., 36 Fed. 622.

Where in foreclosure proceedings on a second railroad mortgage the lien of the first mortgage is not questioned, the sole duty of the trustee under the first mortgage is to see that the amount due thereunder is determined and a decree made conserving the interests of the bondholders and for anything further he is not entitled to compensation or counsel fees. Bound *v.* South Carolina R. Co., 62 Fed. 536.

6. Phinizy *v.* Augusta, etc., R. Co., 98 Fed. 776; Mercantile Trust Co. *v.* Missouri, etc., R. Co., 41 Fed. 8, where the mortgage makes provision for such expenses.

The allowance to trustees for their services in relation to a foreclosure will be proportioned to the amount of service actually required and rendered; and where they do not take possession of the property, and no duties are required of them in its administration or in the distribution of the proceeds, a comparatively small allowance will be made them. Phinizy *v.* Augusta, etc., R. Co., 98 Fed. 776.

7. Tracy *v.* Gravios R. Co., 13 Mo. App. 295 [*affirmed* in 84 Mo. 210].

8. Maury *v.* Chesapeake, etc., R. Co., 27 Gratt. (Va.) 698.

to the trustees after deducting expenses incurred in executing the trust, it may retain the proper amount for expenses in making the sales and may also pay the taxes out of the proceeds thereof.[9]

(x) *Individual Interest in Transactions.* Where everything is honestly done by the trustee and the rights of others have not been prejudiced to his advantage the mere fact of interest on his part in the transaction is not sufficient to justify the court in withholding a confirmation of his acts.[10] But the trustee should not acquire adverse interests, or put himself in a position or relation which is antagonistic or hostile to the interests of the bondholders.[11] Thus where he holds the legal title to the trust property for the benefit of its bondholders, he cannot speculate with the trust property.[12] He cannot purchase an outstanding title and hold it for his own use [13] even though such title is acquired by purchase at a judicial sale,[14] or is superior to the one conveyed to him in trust.[15] Nor can a trustee who has acquired such outstanding title require the company in an action of ejectment to refund to him the amount paid for such title.[16] The mere fact that some of the trustees were holders of bonds secured by their trust is not sufficient to make them incompetent to consent to a decree of foreclosure embodying a plan of reorganization.[17]

(xi) *Actions, Remedies, and Proceedings By or Against Mortgagees and Trustees* — (a) *In General* — (1) Against Trustees. If the trustees fail to perform their duties, either through wilfulness, indifference, or error of judgment, the bondholders or other beneficiaries who are aggrieved by their conduct may obtain relief in equity,[18] as by a bill to compel the trustee to take possession and manage the mortgaged property,[19] or to compel them to

9. Nickerson *v.* Atchison, etc., R. Co., 17 Fed. 408, 3 McCrary 455.

10. Shaw *v.* Little Rock, etc., R. Co., 100 U. S. 605, 25 L. ed. 757.

11. Baker *v.* Springfield, etc., R. Co., 86 Mo. 75.

12. Baker *v.* Springfield, etc., R. Co., 86 Mo. 75.

13. Baker *v.* Springfield, etc., R. Co., 86 Mo. 75.

14. Baker *v.* Springfield, etc., R. Co., 86 Mo. 75.

15. Baker *v.* Springfield, etc., R. Co., 86 Mo. 75.

16. Baker *v.* Springfield, etc., R. Co., 86 Mo. 75.

17. Shaw *v.* Little Rock, etc., R. Co., 100 U. S. 605, 25 L. ed. 757.

18. First Nat. F. Ins. Co. *v.* Salisbury, 130 Mass. 303; Florida *v.* Anderson, 91 U. S. 667, 23 L. ed. 290.

A bill praying that the trustees be compelled to record a mortgage and that such mortgage be declared a prior lien over other mortgages should be denied, where the evidence does not establish satisfactorily the organization of the railroad company at the time of the issuance of the bonds, or the existence of the mortgage securing the same. Riggs *v.* Pennsylvania, etc., R. Co., 16 Fed. 804.

A suit against trustees for negligent administration of their trust must be brought on behalf of all the bondholders similarly situated and who may choose to come in, and cannot be maintained by individual bondholders on their own behalf. Frishmuth *v.* Farmers' L. & T. Co., 95 Fed. 5.

The mortgagor is not a necessary party to a suit by bondholders against the trustee for negligent administration of his trust. Frishmuth *v.* Farmers' L. & T. Co., 95 Fed. 5.

19. First Nat. F. Ins. Co. *v.* Salisbury, 130 Mass. 303, holding that a bill brought by less than one sixth in amount of the holders of the bonds secured by a railroad mortgage, against the trustees thereunder, to compel them to take possession, and which alleges a default in the payment of interest, and that the corporation had signified a purpose not to pay interest unless the holders of the bonds would take a rate less than that specified, and that its net income was insufficient to enable it to pay interest, and that it was applying the income to unsecured debts, and that there was danger that if this course continued the property would be inadequate security for the payment of the mortgage, is sufficient on demurrer.

Defenses.— It is no defense to a bill by the holders of first mortgage bonds to compel the trustees named therein to take possession of the mortgaged property after the company's default, that litigation may be necessary to ascertain what property is covered by the mortgage, or that a great burden and personal liability for injuries done and debts subsequently incurred will thereby be imposed upon such trustees. First Nat. F. Ins. Co. *v.* Salisbury, 130 Mass. 303.

Parties.— In a suit by part of the holders of first mortgage bonds against trustees to compel them to take possession of the mortgaged property, other holders of bonds of the same issue will be allowed to come in as plaintiffs; but subsequent mortgage bondholders are not necessary parties, where the trustees are the same under both mortgages. First Nat. F. Ins. Co. *v.* Salisbury, 130 Mass. 303.

properly apply moneys received as trustees;[20] or the bondholders may compel them to act by mandamus.[21] Where the trustees abandon their trust or have been remiss in their duty, the bondholders or other beneficiaries may also take proper steps in equity to have them removed and new trustees appointed;[22] and may sue such trustees for damages sustained by reason of their misconduct.[23] A petition seeking to hold a trustee of a railroad liable to pay a judgment received against the company is defective where it does not allege what moneys of the company had come into the hands of the trustee.[24]

(2) By Trustees. At common law if the mortgagor company makes default in payment, the mortgagee or trustee being entitled to the possession of the mortgaged property may maintain ejectment therefor.[25] While a court of equity will not take possession and operate a railroad at the instance of a trustee or mortgagee except by an action to foreclose the mortgage,[26] yet the trustee being entitled on default to take possession under the terms of the mortgage,[27] if prevented from doing so may, without bringing an action to foreclose, apply to a court of equity to be put into possession,[28] the proper remedy in such case being a bill for the specific enforcement of the mortgagee's or trustee's rights.[29] When questions of difficulty arise, the trustee may also apply to a court of equity for instructions in the execution of his trust.[30] A trustee may sue for the specific performance of a contract leasing the road, for the benefit of bondholders,[31] or to compel the execution of a conveyance to the railroad company, under a contract of sale.[32] So after condition broken the trustee may maintain an action

20. Dwight *v.* Smith, 13 Fed. 50, holding that where there has accrued a large amount of money applicable and not applied on the bonds after satisfying prior liens, the bondholders are entitled to relief against those having the money.

21. Florida *v.* Anderson, 91 U. S. 667, 23 L. ed. 290.

22. Stevens *v.* Eldridge, 23 Fed. Cas. No. 13,396, 4 Cliff. 348.

23. James *v.* Cowing, 17 Hun (N. Y.) 256 [*reversed* on other grounds in 82 N. Y. 449].

The measure of damages to a bondholder who has sued a trustee for misconduct in improperly selling corporate property is the value of his proportionate part of the property thus wrongfully sold. James *v.* Cowing, 82 N. Y. 449 [*reversing* 17 Hun 256].

24. Nicholson *v.* Louisville, etc., R. Co., 55 Ind. 504.

25. Dow *v.* Memphis, etc., R. Co., 20 Fed. 260; Galt *v.* Erie, etc., R. Co., 19 U. C. C. P. 357.

26. Seibert *v.* Minneapolis, etc., R. Co., 52 Minn. 246, 53 N. W. 1151.

27. See *supra*, VIII, A, 7, f, (VIII).

28. Seibert *v.* Minneapolis, etc., R. Co., 52 Minn. 246, 53 N. W. 1151.

29. Shepley *v.* Atlantic, etc., R. Co., 55 Me. 395 (holding that if the mortgage was a valid one, a court of equity has jurisdiction to decree specific performance of a stipulation in the mortgage authorizing the trustees to take possession of the mortgaged property for the non-payment of the bonds); Dow *v.* Memphis, etc., R. Co., 20 Fed. 260 (holding that where a railroad mortgage embraces a road, rolling stock, and other personal property of the company, the proper remedy of the mortgagee to obtain possession of the mortgaged property after condition broken is by a bill in equity for specific enforcement of the mortgagee's rights).

Cumulative remedies.— A stipulation in a railroad mortgage that in case of default in the payment of interest for sixty days it should be obligatory on the trustees named in the mortgage upon the written request of one third in interest of the holders of the bonds to take possession, operate, and sell the road and other mortgaged property is cumulative as a remedy and not exclusive of the remedies given by law. Dow *v.* Memphis, etc., R. Co., 20 Fed. 260.

30. Coe *v.* Beckwith, 31 Barb. (N. Y.) 339.

Parties.— In such an action all the creditors need not, in case they are numerous and unknown to plaintiff, be joined as parties (Coe *v.* Beckwith, 31 Barb. (N. Y.) 339); nor need a sheriff who holds a warrant of attachment on income of the road deposited by the company to the credit of the trustee for the payment of interest coupons, or a depositary of the fund, be made parties, where plaintiff in the attachment suit has been joined as a party (Coe *v.* Beckwith, *supra*).

31. Schmidtz *v.* Louisville, etc., R. Co., 101 Ky. 441, 41 S. W. 1015, 19 Ky. L. Rep. 666, 38 L. R. A. 809, holding that a railroad lease providing for the payment of net earnings to the holders of mortgage bonds of the lessor is for the benefit not only of the lessor and lessee but of the bondholders, and that the trustee for the bondholders may sue for the specific performance of the contract for their benefit.

32. Farmers' L. & T. Co. *v.* Fisher, 17 Wis. 114; Boston Safe-Deposit, etc., Co. *v.* Bankers', etc., Tel. Co., 36 Fed. 288 [*affirmed* in 147 U. S. 431, 13 S. Ct. 396, 37 L. ed. 231].

for any material injury to the property that would amount to restrainable waste;[33] but where the property is in possession and use of the mortgagor under the terms of the mortgage, the trustee cannot sue the mortgagor for such depreciation as would or might follow from its use;[34] nor can a trustee maintain an action before condition broken for waste which might have been actionable after condition broken;[35] nor can the mortgagee or trustee sue a lessee on a covenant to repair which would or might have followed the use of the property by the mortgagor.[36] Where the old trustees have been removed and new ones appointed, the latter are the proper parties to seek redress on behalf of the bondholders against third persons.[37]

(B) *Injunction.* In accordance with the rules regulating injunctions generally,[38] bondholders may obtain an injunction to restrain a diversion of the funds or property covered by the mortgage,[39] or to restrain the trustees from carrying into effect an agreement whereby the terms of the mortgage as to the time of payment and rate of interest are changed;[40] or where a trustee incapacitates himself from discharging his duties an injunction will lie to restrain him from acting as trustee,[41] and from further prosecuting an action as such.[42] Likewise the remedy by injunction will be exercised in favor of a trustee acting under a railroad mortgage upon all its property, for the security of bondholders;[43] and a mortgagee or trustee may at any time have an injunction to restrain waste that will impair the bondholders' security.[44] So an injunction will lie at the instance of subsequent encumbrancers to restrain trustees under a prior mortgage from executing the trusts prejudicially to their interests.[45] While as a general rule an injunction in one state will lie to enjoin an action at law in another state,[46] it has been held that where mortgage trustees of a railroad company as such have no property subject to sequestration within the state an injunction will not lie to enjoin

33. Grand Trunk R. Co. *v.* Central Vermont R. Co., 91 Fed. 696.

34. Grand Trunk R. Co. *v.* Central Vermont R. Co., 91 Fed. 696.

35. Grand Trunk R. Co. *v.* Central Vermont R. Co., 91 Fed. 696.

36. Grand Trunk R. Co. *v.* Central Vermont R. Co., 91 Fed. 696.

37. Stevens *v.* Eldridge, 23 Fed. Cas. No. 13,396, 4 Cliff. 348.

38. See, generally, INJUNCTIONS, 22 Cyc. 724.

39. Weetjen *v.* St. Paul, etc., R. Co., 4 Hun (N. Y.) 529; Shoemaker *v.* Dayton, etc., R. Co., 10 Ohio Dec. (Reprint) 12, 18 Cinc. L. Bul. 43, holding that a court of equity on the application of holders of income bonds of a railroad company, for themselves and other bondholders, should take cognizance of the trust and restrain the corporation from diverting the funds to which the bondholders are entitled to look for the payment of their interest.

40. Reinach *v.* Meyer, 55 How. Pr. (N. Y.) 283, holding also that an objection that an application to confirm the agreement which was denied was made in an action in which the first mortgage bondholders were not made parties is of no force.

The injunction should be continued where it is clear that if the trustee of one class of bondholders is permitted to carry out the agreement injustice will be done to another class of bondholders. Reinach *v.* Meyer, 55 How. Pr. (N. Y.) 283.

The injunction will be continued pendente lite where it is doubtful whether the agreement is valid or not. Reinach *v.* Meyer, 55 How. Pr. (N. Y.) 283.

41. Farmers' L. & T. Co. *v.* Hughes, 11 Hun (N. Y.) 130.

42. Farmers' L. & T. Co. *v.* Hughes, 11 Hun (N. Y.) 130.

43. Roberts *v.* Denver, etc., R. Co., 8 Colo. App. 504, 46 Pac. 880; Felton *v.* Potomac F. Ins. Co., 4 Del. Ch. 573 (holding that at the suit of the trustees under a first mortgage who hold possession of the railroad and property under the mortgage, an injunction will be awarded to restrain the seizure of a locomotive off the line of the road under a foreign attachment by the holder of coupons of bonds of a second mortgage); Winslow *v.* Troy Iron, etc., Factory, 1 Disn. (Ohio) 229, 12 Ohio Dec. (Reprint) 591 (holding that an injunction will lie at the instance of a trustee to prevent the sale of the driving wheels of a locomotive temporarily detached for the purpose of repair and afterward levied on by other creditors of the corporation); Farmers' L. & T. Co. *v.* Fisher, 17 Wis. 114; Holroyd *v.* Marshall, 10 H. L. Cas. 191, 9 Jur. N. S. 213, 33 L. J. Ch. 193, 7 L. T. Rep. N. S. 172, 11 Wkly. Rep. 171, 11 Eng. Reprint 999 (holding that a mortgagee of future-acquired property may have an injunction as soon as it comes into his possession to restrain its removal).

44. Grand Trunk R. Co. *v.* Central Vermont R. Co., 91 Fed. 696.

45. Illinois Cent. R. Co. *v.* Mississippi Cent. R. Co., 12 Fed. Cas. No. 7,008.

46. Bellows Falls Bank *v.* Rutland, etc., R. Co., 28 Vt. 470.

such trustees from prosecuting an action in another state, as there would be no means of enforcing the injunction.[47]

(c) *Accounting.* Trustees or mortgagees are bound to account for all profits or advantages obtained by them through their positions as mortgagees or trustees.[48] One who is a sole trustee under a railroad mortgage is a necessary party to a suit against the railroad company for an accounting,[49] and on the failure to join him as such the bill should be dismissed.[50] Trustees appointed by the court in pursuance of legislative authority may be ordered at any time upon the application of a party interested, to report or account to the court, without any express provision to that effect in the statute or in the order of appointment.[51] The rule that where a party seeking equitable relief is bound to pay some unascertainable amount before relief can be granted, it is not necessary to pay or tender the amount before bringing suit, but that it will be sufficient if he offers in his complaint to pay or perform whatever obligations rest upon him in that regard, applies in an action against a trustee to compel him to account concerning the trust fund or property,[52] especially where it appears that he repudiated the trust before the action was brought.[53]

8. Application of Proceeds of Obligations and Securities.[54] The proceeds of mortgage obligations and securities must be applied to the purposes and in the manner specified in the mortgage or deed of trust,[55] such as to the extinguishment

47. Bellows Falls Bank *v.* Rutland, etc., R. Co., 28 Vt. 470.

48. Cram *v.* Farmers' L. & T. Co., 5 Rob. (N. Y.) 226, holding that trustees are bound to account for the whole of the proceeds of a sale, and not entitled to deduct therefrom advances made by them for the purpose of operating the road.

This liability to account is not imposed as a punishment for a breach of duty, but arises from a trustee's agency for his *cestuis que trustent* who have a right by ratifying and adopting his acts to obtain the benefit of them. Cram *v.* Farmers' L. & T. Co., 5 Rob. (N. Y.) 226.

The statute of limitations does not, as a general rule, affect a trustee's obligation to account until there has been a denial or a repudiation of the trust. Zebley *v.* Farmers' L. & T. Co., 139 N. Y. 461, 34 N. E. 1067 [*reversing* 63 Hun 541, 18 N. Y. Suppl. 526].

Where the bondholders disaffirm a foreclosure sale under which the trustee received checks which he failed to collect and the bondholders secure a new sale at which they, in a new corporate capacity, become purchasers, there is no cause of action for an accounting against the trustee with respect to the uncollected checks. Harrison *v.* Union Trust Co., 144 N. Y. 326, 39 N. E. 353.

Parties.— Where trustees under two mortgages of separate sections of a railroad are sued for an accounting by the bondholders of one of the sections, the bondholders of the other section are necessary parties. Cram *v.* Farmers' L. & T. Co., 5 Rob. (N. Y.) 226.

Pleading.— A complaint against a trustee for an accounting should allege that defendant had been in possession of some part of the road or received some of its income or ought to have done so, and was chargeable therefor or that the trustee had title to the road or had funds to which the bondholders were entitled. Harrison *v.* Union Trust Co., 144 N. Y. 326, 39 N. E. 353. So where an action is brought by a bondholder for an accounting against a railroad company wherein he makes the trustee under the mortgage defendant, it must be alleged and proved that such trustee had been requested to bring such action and that he neglected and failed to do so, and that he is therefore made a defendant in the action. Morgan *v.* Kansas Pac. R. Co., 15 Fed. 55, 21 Blatchf. 134.

49. Morgan *v.* Kansas Pac. R. Co., 15 Fed. 55, 21 Blatchf. 134.

That he was not and could not be found within the district to be served with process does not excuse his not being joined as a party, where the issue is as to whether he was requested and refused to sue. Morgan *v.* Kansas Pac. R. Co., 15 Fed. 55, 21 Blatchf. 134.

50. Morgan *v.* Kansas Pac. R. Co., 15 Fed. 55, 21 Blatchf. 134.

51. *In re* Eastern R. Co., 120 Mass. 412.

52. Zebley *v.* Farmers' L. & T. Co., 139 N. Y. 461, 34 N. E. 1067 [*reversing* 53 Hun 541, 18 N. Y. Suppl. 526].

53. Zebley *v.* Farmers' L. & T. Co., 139 N. Y. 461, 34 N. E. 1067 [*reversing* 53 Hun 541, 18 N. Y. Suppl. 526].

54. Applications of earning, income, and sinking fund see *infra*, VIII, A, 11.

Disposition of proceeds of foreclosure sale see *infra*, VIII, B, 17.

55. Claflin *v.* South Carolina R. Co., 8 Fed. 118, 4 Hughes 12, bonds held to be regularly issued and properly applied to a floating debt.

Salaries of the officers of the railroad company are a necessary part of the expenses of construction of the road and may be paid out of the construction fund or with the bonds to be used to raise construction funds,

of the floating debt of the company,[56] and to the retirement of secured bonds;[57] or the mortgage may provide that a specified portion of the bonds shall be delivered to certain officers of the railroad company to be applied to the improvement of the railroad property,[58] and to the purchase of such real estate and other property as the interests of the railroad company may require,[59] upon proper demands and specific statements of the latter indicating a purpose to use the bonds in accordance with the provisions of the mortgage.[60] Such provisions in the mortgage impress an express trust upon such proceeds requiring their application to the designated purposes;[61] and it is the duty of the trustee in the mortgage to see that such trust is properly enforced,[62] and in case he refuses or neglects to do

unless restricted by the charter. Blackburn *v.* Selma, etc., R. Co., 3 Fed. Cas. No. 1,467, 2 Flipp. 525.

Fraud.— It is fraud on the bondholders for the stock-holders and officers of the railroad company to divert to their individual use proceeds which the mortgage provided should be applied in double-tracking and improving the railroad and in purchasing such real estate or other property as the interests of the company might require. Belden *v.* Burke, 72 Hun (N. Y.) 51, 25 N. Y. Suppl. 601 [*reversing* 20 N. Y. Suppl. 320, and *reversed* on other grounds in 147 N. Y. 542, 42 N. E. 261].

56. Claflin *v.* South Carolina R. Co., 8 Fed. 118, 4 Hughes 12.

57. Claflin *v.* South Carolina R. Co., 8 Fed. 118, 4 Hughes 12, holding also that where a second mortgage on railroad property recites that the proceeds of the bonds secured thereby shall be so applied, bonds purchased by the company with the proceeds of such second mortgage bonds should be delivered up and canceled.

58. Belden *v.* Burke, 72 Hun (N. Y.) 51, 25 N. Y. Suppl. 601 [*reversing* 20 N. Y. Suppl. 320, and *reversed* on other grounds in 147 N. Y. 542, 42 N. E. 261], holding that where a railroad mortgage stipulates that the mortgagee is to be the trustee for the holders of the bonds secured by the mortgage, that the bonds are to be certified by the trustee, and that a specified portion shall be delivered to the president and vice-president of the railroad company, a further covenant in the mortgage that these officers will apply the proceeds of the bonds so delivered to the improvement of the railroad property becomes operative and binding on the railroad company as soon as the bonds are so certified and delivered.

Misapplication.— Under such provision the application of a portion of the proceeds by such officers to the repayment of a loan made by a bank and used by them in acquiring the stock of the railroad company is a breach of a covenant that such proceeds will be used in the improvement of the railroad property. Belden *v.* Burke, 72 Hun (N. Y.) 51, 25 N. Y. Suppl. 601 [*reversing* 20 N. Y. Suppl. 320, and *reversed* on other grounds in 147 N. Y. 542, 42 N. E. 261]. It is likewise a breach of such covenant for such officers to use another portion of the proceeds in paying for coal lands which they had purchased and afterward sold to the railroad company, where the mortgage embraces the coal lands as well as the railroad property. Belden *v.* Burke, *supra*.

59. Belden *v.* Burke, 72 Hun (N. Y.) 51, 25 N. Y. Suppl. 601 [*reversing* 20 N. Y. Suppl. 320, and *reversed* on other grounds in 147 N. Y. 542, 42 N. E. 261], holding that the investment of a portion of the proceeds of the bonds in the stock of a coal company cannot be considered as an acquisition of "other property" within the meaning of a covenant in the mortgage that the proceeds of the bonds shall be used in equipping and improving the railroad "and in purchasing such real estate and other property" as the interests of the railroad company may require.

60. Fleisher *v.* Farmers' L. & T. Co., 58 N. Y. App. Div. 473, 69 N. Y. Suppl. 437 [*affirmed* in 172 N. Y. 519, 65 N. E. 499], holding certain statements, although not specifically describing the purposes for which the proceeds of the bonds were to be applied, sufficient to authorize the trustee's action in issuing the bonds.

61. Belden *v.* Burke, 72 Hun (N. Y.) 51, 25 N. Y. Suppl. 601 [*reversing* 20 N. Y. Suppl. 320, and *reversed* on other grounds in 147 N. Y. 542, 42 N. E. 261]; Central Trust Co. *v.* Burke, 2 Ohio S. & C. Pl. Dec. 96, 1 Ohio N. P. 169.

62. Belden *v.* Burke, 72 Hun (N. Y.) 51, 25 N. Y. Suppl. 601 [*reversing* 20 N. Y. Suppl. 320, and *reversed* on other grounds in 147 N. Y. 542, 42 N. E. 261]; Frishmuth *v.* Farmers' L. & T. Co., 95 Fed. 5 (holding that where the railroad company notably fails to comply with the requirements of the mortgage by diverting the proceeds of bonds received, a further issuance of bonds to it without taking measures to see that they are properly applied is a breach of trust for which the trustee can be held liable by the bondholders); Dows *v.* Chicago, etc., R. Co., 7 Fed. Cas. No. 4,048.

Where the charter of a consolidated company recites the uses to which money derived from the sale of its bonds is to be put and a trust agreement is entered on in accordance with the terms of the charter, and the bonds are sold under a prospectus pointing out a source of inquiry as to the charter and trust, but misstating the purpose for which the money is to be used, the trustees are not liable to the bondholders where they use the money in accordance with the trust agreement but not in the manner set out in the

so it may be enforced by any persons afterward becoming holders of the bonds,[63] except that holders of the bonds who acquire them with full notice of a misapplication of the proceeds cannot enforce them against the railroad company.[64] So a covenant in a mortgage to devote the proceeds of the bonds secured thereby to the improvement of the mortgage property for the benefit of future bondholders cannot, after such bonds are sold under an agreement by which the covenant is in effect abrogated, be enforced in equity by one who subsequently buys some of the bonds, not relying on the mortgage covenant, but upon his own judgment, after full inquiry with knowledge of the exact situation, and who shows no actual or prospective loss by the transaction.[65]

9. Priorities of Liens and Mortgages[66] — a. In General. The priorities of railroad liens are determined by the *lex fori*.[67] As a general rule liens on railroad property, as in the case of liens generally, have priority according to the order of time at which they attach,[68] and a railroad company cannot by an act of its own displace a prior by a later lien.[69] The priority of such liens, however, may be otherwise regulated by statute,[70] or by agreement between the

prospectus. Banque Franco-Egyptienne *v.* Brown, 34 Fed. 162.

63. Belden *v.* Burke, 72 Hun (N. Y.) 51, 25 N. Y. Suppl. 601 [*reversing* 20 N. Y. Suppl. 320, and *reversed* on other grounds in 147 N. Y. 542, 42 N. E. 261] (holding that a *bona fide* holder of a portion of the bonds may bring the suit in favor of himself and of all others similarly situated); Central Trust Co. *v.* Burke, 2 Ohio S. & C. Pl. Dec. 96, 1 Ohio N. P. 169.

That the railroad bonds were issued and exchanged for state bonds in order that the stock-holders of the railroad company might use the proceeds of the state bonds for their own private advantage, and that they are so used, and not for the purposes contemplated by the statute which authorized the exchange, is no defense against the railroad bonds in the hands of *bona fide* holders. Western Div. Western North Carolina R. Co. *v.* Drew, 29 Fed. Cas. No. 17,434, 3 Woods 691.

Following money into the hands of third persons.— Where a railroad company sells its bonds by an agent who issues a prospectus stating for what uses the money is to be applied, no fiduciary relation exists between the bondholder and the company, and a bondholder cannot pursue the money as a trust fund where the company has parted with it to another for a different use, who has obtained title to it, as between himself and the company, since it is only where money is held in a fiduciary character that it can be followed into the hands of a third person. Banque Franco-Egyptienne *v.* Brown, 34 Fed. 162.

64. Chicago *v.* Cameron, 120 Ill. 447, 11 N. E. 899.

65. Belden *v.* Burke, 147 N. Y. 542, 42 N. E. 261 [*reversing* 72 Hun 51, 25 N. Y. Suppl. 601, and *affirming* 20 N. Y. Suppl. 320].

66. As affected by property and funds included in mortgage see *supra*, VIII, A, 7, d.

Priorities of receivers' certificates and other claims against receivers as determined by principals governing priorities in receivership actions see Receivers.

67. Central Trust Co. *v.* East Tennessee, etc., R. Co., 69 Fed. 658, holding that where a mortgage executed by a Tennessee railroad company, the road of which extends into Georgia, is in course of foreclosure and ancillary proceedings are had in Georgia, the priority over the mortgage of judgments recovered in Georgia on causes of action therein arising and filed in the Georgia court, is determinable by the laws of Georgia.

Where the property of an insolvent railroad company consists of a leasehold interest in a road extending into or through different states and the rolling stock used in operating the same, and creditors' suits are commenced in the federal courts in each of the several jurisdictions, and judgment creditors in the different states are, by the local statutes, given a priority of lien on certain of the property of the company, in the distribution of assets the proceeds of such property will be apportioned according to the mileage in each state and the judgments therein given priority as to the respective portions. Thomas *v.* Cincinnati, etc., R. Co., 91 Fed. 195.

68. Clay *v.* East Tennessee, etc., R. Co., 6 Heisk. (Tenn.) 421; Galveston, etc., R. Co. *v.* Cowdrey, 11 Wall. (U. S.) 459, 20 L. ed. 199; Skiddy *v.* Atlantic, etc., R. Co., 22 Fed. Cas. No. 12,922, 3 Hughes 320 (holding that a valid equitable lien as against subsequent encumbrancers or their agents is created by an agreement that the so-called preferred stock of a railroad company shall be a lien of a certain class provided the agreement is brought to their knowledge); Smythe *v.* Chicago, etc., R. Co., 22 Fed. Cas. No. 13,135, 8 Reporter 709; Yorkshire R. Wagon Co. *v.* Maclure, 21 Ch. D. 309, 51 L. J. Ch. 857, 47 L. T. Rep. N. S. 290, 30 Wkly. Rep. 761; *Re* Arauco Co., 79 L. T. Rep. N. S. 336.

Undisputed claims having undoubted priority may be ordered paid in advance of the adjustment of the rights of other creditors whose claims are inferior. Hand *v.* Savannah, etc., R. Co., 13 S. C. 467.

69. Meyer *v.* Johnston, 53 Ala. 237.

70. See the statutes of the several states. And see Chattanooga, etc., R. Co. *v.* Evans, 66 Fed. 809, 14 C. C. A. 116; *In re* Mersey

parties.[71] The above rule also is subject to the rule that secured creditors are preferred to unsecured ones,[72] and that statutory liens should be paid before mortgage bonds.[73] Equitable liens payable solely out of the earnings of the road should be paid out of the *corpus* of the property only after the mortgage bonds have been satisfied.[74] Judgment creditors should be postponed to prior mortgages.[75] Liens which are concurrent, or which are made equal by the terms of the mortgage have no preference as between themselves but each lienor is entitled to his *pro rata* share of the fund or property to which the liens attach.[76]

b. Necessity and Effect of Registration — (i) *In General.* Except where regulated by special statute,[77] the general laws regulating the recording of liens and mortgages apply to railroad liens and mortgages, requiring that they shall be recorded in order that they may have a preference over subsequent claims or liens,[78] unless, in some jurisdictions, the subsequent lienor has notice of the prior unrecorded mortgage or lien at the time he acquires his lien.[79] Thus, in order that a railroad mortgage may be effective as against subsequent lienors, it should be recorded in every county in which the road is laid.[80] An unrecorded or defect-

R. Co., [1895] 2 Ch. 287, 64 L. J. Ch. 625, 72 L. T. Rep. N. S. 735, 12 Reports 345 (construing section 24 of the Companies' Clauses Act, 1863); *In re* Hull, etc., R. Co., 40 Ch. D. 119, 58 L. J. Ch. 205, 59 L. T. Rep. N. S. 877, 37 Wkly. Rep. 145 [*affirming* 59 L. T. Rep. N. S. 302] (construing section 23 of the Railroad Companies' Act of 1867); Harrison *v.* Cornwall Minerals R. Co., 18 Ch. D. 334, 51 L. J. Ch. 98, 45 L. T. Rep. N. S. 498; *In re* Burry Port, etc., R. Co., 54 L. J. Ch. 710, 52 L. T. Rep. N. S. 842, 33 Wkly. Rep. 741; Robinson *v.* Cambrian R. Co., 17 Wkly. Rep. 441; *In re* Cobourgh, etc., R. Co., 16 Grant Ch. (U. C.) 571.

71. Mason *v.* York, etc., R. Co., 52 Me. 82.

72. See Skiddy *v.* Atlantic, etc., R. Co., 22 Fed. Cas. No. 12,922, 3 Hughes 320; *In re* Liskeard, etc., R. Co., [1903] 2 Ch. 681, 72 L. J. Ch. 754, 89 L. T. Rep. 437, 19 T. L. R. 653; *In re* General South American Co., 2 Ch. D. 337, 34 L. T. Rep. N. S. 706, 24 Wkly. Rep. 891, holding that shareholders holding debentures purporting to charge all the property of the company have priority over the general creditors of the company and their priority is not affected by an imperfection in the registry of debentures kept by the company.

73. Blair *v.* St. Louis, etc., R. Co., 25 Fed. 232.

74. Blair *v.* St. Louis, etc., R. Co., 25 Fed. 232. And see *infra*, VIII, A, 9, g.

75. Coe *v.* Columbus, etc., R. Co., 10 Ohio St. 372, 75 Am. Dec. 518, holding that the fact that a judgment debt against a railroad company whose property is covered by a mortgage is for money lent for payment of interest and taxes gives the creditor no greater right as against the mortgagee than other judgment creditors of the road, to levy on the interest of the road not covered by the mortgage if the levy will impair the mortgagee's security; and this is true, although the mortgage being defectively executed is merely an executory contract creating an equitable lien on the property.

76. Dunham *v.* Cincinnati, etc., R. Co., 1 Wall. (U. S.) 254, 17 L. ed. 584.

Mortgage debentures have no priority as respects each other but are on an equality; and one debenture holder is not entitled to issue execution otherwise than as trustee for himself and all other debenture holders entitled to be paid *pari passu* with himself. Bowen *v.* Brecon R. Co., L. R. 3 Eq. 541, 36 L. J. Ch. 344, 16 L. T. Rep. N. S. 6, 15 Wkly. Rep. 482.

77. Wilson *v.* Beckwith, 117 Mo. 61, 22 S. W. 639, construing the act of Dec. 11, 1855 (Loc. Laws (1855), p. 468), providing that the state might issue aid bonds to a railroad company; that the company should signify its acceptance by filing a receipt therefor, and that when recorded in the office of the secretary of state, each certificate of acceptance would be a mortgage of the road; and holding that, although the act was not recorded with the recorder of deeds in the counties where the lands of the road were situated, yet all persons claiming under a deed of trust executed by the company on the road, which deed of trust stated that it was subject to the lien of the state created under the act, took subject to all certificates previously filed with the secretary of state.

78. New Orleans, etc., R. Co. *v.* Mellen, 12 Wall. (U. S.) 362, 20 L. ed. 434. And see *supra*, VIII, A, 7, b, (v); and, generally, Mortgages, 27 Cyc. 1155 *et seq.*

79. Mead *v.* New York, etc., R. Co., 45 Conn. 199, holding that a creditor of a railroad company who, with knowledge of an outstanding unrecorded mortgage, attaches and afterward levies his execution on the mortgage property, obtains no priority of title. *Compare* Stevens *v.* Buffalo, etc., R. Co., 31 Barb. (N. Y.) 590.

80. Ludlow *v.* Clinton Line R. Co., 15 Fed. Cas. No. 8,600, 1 Flipp. 25. *Compare* Wilson *v.* Beckwith, 117 Mo. 61, 22 S. W. 639.

Where a railroad passes through several counties and a mortgage thereof is recorded in one of those counties before judgment recovered against the company by a stranger, but is not recorded in the other counties, he has a priority of lien over the judgment upon the part of the road lying in that particular

ively recorded mortgage is inferior to a subsequent judgment,[81] or to a subsequent attachment lien covering the same property;[82] and the mere fact that a prior claim or lien may appear from the company's records does not give it precedence over subsequent liens on the same property.[83] But an unliquidated claim is inferior to a subsequent mortgage which is recorded before the claim is reduced to judgment.[84] *Bona fide* holders of overissued bonds have an equitable lien which, although unrecorded, is superior to the unrecorded lien of income bonds subsequently issued,[85] but inferior to that of a subsequently recorded mortgage.[86]

(II) *Rolling Stock, Supplies, Etc.* In some jurisdictions a mortgage purporting to cover rolling stock, supplies, and other personal property, unless recorded in the manner prescribed for chattel mortgages, is invalid as far as such property is concerned as to subsequent creditors and encumbrancers of the railroad company.[87] The lien of such a mortgage, although covering after-acquired property, is subject to the lien or rights of one who thereafter conditionally sells or leases cars or other rolling stock to the railroad company with reservation of title, although the conditional sale or lease is unrecorded;[88] and this rule is not affected by a statutory provision requiring the reservation in such cases to be in writing and recorded, as such provision is intended only for the benefit of subsequent purchasers and creditors of the vendee.[89] It has been held that where such lease or conditional sale amounts in fact to a mortgage, unless it is acknowledged and recorded as a mortgage, it will not establish a lien as against attachment and execution creditors,[90] or purchasers from the railroad company.[91]

c. Priorities Between Mortgages and Other Claims in General. As a general rule as between a mortgage of railroad property and other claims constituting liens thereon, that which is prior in time is prior in right,[92] except as to certain

county, but not upon such portions of it as lie in the other counties; nor is such subsequent lien in such other counties superseded by a subsequent recording of the mortgage therein. Ludlow *v.* Clinton Line R. Co., 15 Fed. Cas. No. 8,600, 1 Flipp. 25.

81. Coe *v.* New Jersey Midland R. Co., 31 N. J. Eq. 105, holding that unrecorded mortgages of franchises and equipment of an insolvent railroad corporation are not valid against subsequent judgment creditors, who, but for the receivership obtained in a suit to foreclose one of the mortgages, might have made a valid levy on the equipment.

82. Claflin *v.* South Carolina R. Co., 8 Fed. 118, 4 Hughes 12.

83. Blair *v.* St. Louis, etc., R. Co., 25 Fed. 684 [*affirmed* in 133 U. S. 534, 10 S. Ct. 338, 33 L. ed. 721].

84. Fogg *v.* Blair, 133 U. S. 534, 10 S. Ct. 338, 33 L. ed. 721 [*affirmed* in 25 Fed. 684].

85. Stephens *v.* Benton, 1 Duv. (Ky.) 112.

86. Stephens *v.* Benton, 1 Duv. (Ky.) 112.

87. Hoyle *v.* Plattsburgh, etc., R. Co., 54 N. Y. 314, 13 Am. Rep. 595 [*reversing* 51 Barb. 45]; Stevens *v.* Buffalo, etc., R. Co., 31 Barb. (N. Y.) 590, holding also that if a subsequent judgment creditor levies upon such rolling stock and sells the same by virtue of an execution issued on his judgment, the purchaser will be entitled to hold the same discharged of the lien of the prior mortgage. And see *supra*, VIII, A, 7, b, (v). But see Williamson *v.* New Jersey Southern R. Co., 28 N. J. Eq. 277 [*reversed* on other grounds in 29 N. J. Eq. 311].

Notice to a judgment creditor of an existing mortgage on the rolling stock is no answer to his objection that the mortgage has not been filed for record. Stevens *v.* Buffalo, etc., R. Co., 31 Barb. (N. Y.) 590.

88. Meyer *v.* Western Car Co., 102 U. S. 1, 26 L. ed. 59; Newgass *v.* Atlantic, etc., R. Co., 56 Fed. 676; Central Trust Co. *v.* Marietta, etc., R. Co., 48 Fed. 868, 1 C. C. A. 133.

89. Central Trust Co. *v.* Marietta, etc., R. Co., 48 Fed. 868, 1 C. C. A. 133.

90. Frank *v.* Denver, etc., R. Co., 23 Fed. 123.

91. Frank *v.* Denver, etc., R. Co., 23 Fed. 123.

92. Dunham *v.* Isett, 15 Iowa 284 (holding that a provision in a mortgage that "all of the rights of the bondholders or trustee, are subject to the possession, control and management of the directors of said company until default" does not give creditors under contracts made before default and after the mortgage a preference over the mortgage liens); Miller *v.* Rattermann, 10 Ohio Dec. (Reprint) 555, 22 Cinc. L. Bul. 99 [*reversed* on other grounds in 47 Ohio St. 141, 24 N. E. 496]; Salem First Nat. Bank *v.* Anderson, 75 Va. 250 (holding that a mortgage by a railroad company of all its personal property including road-bed and rails entitles the trustees thereof to rails taken from the road to apply on the mortgage in preference to a subsequent execution creditor of the company).

The title of a debenture holder of a railway company is prior to that of any subsequent judgment creditor who has obtained an elegit; and if his security is in danger of being impaired by such judgment creditor,

varieties of liens specially favored by law,[93] or as to liens which are given preference by an agreement between the parties.[94] Ordinarily a railroad mortgage takes precedence over debts due creditors of the company whether created before or subsequently to the mortgage,[95] unless such creditors have a prior equitable right.[96] Since a mortgage on railroad property covers only such interest in the property as the company has at the time the mortgage attaches,[97] it is subject to any liens by which the property comes into the company's possession.[98] A mortgage covering after-acquired property will take precedence over the claim of a contractor who has afterward completed an unbuilt part of the road under an agreement that he shall retain possession of the road and apply the earnings to the liquidation of his debt and who has retained possession under his agreement;[99] or a mortgage on the property of an old railroad company given by its successor is entitled to priority over the claims of a creditor for services and advances to the old company who did not obtain a judgment against either company until

he may file a bill to protect his security, although the time fixed for the payment of the debenture holder has not arrived. Wildy *v.* Mid-Hants R. Co., 18 L. T. Rep. N. S. 73, 16 Wkly. Rep. 409.

93. See *infra*, VIII, A, 9, g, h.

94. Fidelity Ins., etc., Co. *v.* Shenandoah Valley R. Co., 32 W. Va. 244, 9 S. E. 180, 33 W. Va. 761, 11 S. E. 58; South Eastern R. Co. *v.* Jortin, 6 H. L. Cas. 425, 4 Jur. N. S. 467, 27 L. J. Ch. 145, 10 Eng. Reprint 1360.

95. Seaboard Air-Line R. Co. *v.* Knickerbocker Trust Co., 125 Ga. 463, 54 S. E. 138; Central Trust Co. *v.* Bridges, 57 Fed. 753, 6 C. C. A. 539.

A surety upon a supersedeas bond given by a railroad company while apparently solvent and not in default in interest, if compelled after the insolvency of the company to pay the judgment appealed from, is not entitled to be repaid from the proceeds of the property of the company in preference to a mortgagee thereof. Whitely *v.* Central Trust Co., 76 Fed. 74, 22 C. C. A. 67, 34 L. R. A. 303.

A lien of a trustee and bondholders under a mortgage is superior to that of one claiming under an agreement by the mortgagor railroad company to pay as part of the purchase-price any judgment that might be recovered in a personal injury action against its vendor, in so far as the trustee and bondholders are purchasers for value without notice. Ingram *v.* Cincinnati, etc., R. Co., 107 S. W. 239, 32 Ky. L. Rep. 849.

96. Gregg *v.* Mercantile Trust Co., 109 Fed. 220, 38 C. C. A. 318; Farmers' L. & T. Co. *v.* Missouri, etc., R. Co., 21 Fed. 264.

Equitable lien on trust funds.— Where the stock-holders of a railroad company to relieve themselves of their statutory liability for its debts subscribe a loan to the company to pay the floating debt, the money so acquired is a trust fund for creditors, and any portion misappropriated may be followed by them into the hands of a reorganized company, and an equitable lien exists in their favor thereon to the amount of their claims superior to the first mortgage on the road. Hatry *v.* Painesville, etc., R. Co., 1 Ohio Cir. Ct. 426, 1 Ohio Cir. Dec. 238 [*affirmed* in 23 Cinc. L. Bul. 281].

An agreement or order to pay a certain demand out of the proceeds of sale of first bonds sold by the company does not constitute an agreement to set apart any specific earnings or profits and therefore does not constitute an equitable lien, so as to take precedence of a mortgage executed to a company afterward purchasing the railroad property before the issue of the bonds. Roberts *v.* Central Trust Co., 128 Fed. 882, 63 C. C. A. 220 [*affirming* 110 Fed. 70].

Estoppel.— Where the company, before the mortgage to trustees was executed, owned a carload of railroad iron subject to the lien of the United States for duties and agreed with plaintiffs that they might pay the duty, that the company might lay the iron on its track, and that plaintiffs, if the company did not repay them the money paid for duties within a specified time, might take up the iron and hold it as security for the money advanced, and the iron having passed according to this bargain into the possession of the company, the lien for the duties is gone and cannot be asserted by plaintiffs against the mortgage of the trustees. Pierce *v.* Emery, 32 N. H. 484.

Subrogation.—A railway company when on the verge of insolvency paid the interest on its debenture stock with money borrowed from its bankers. The bank claimed against the company's assets payment in full of the loan in priority to any further payments to the debenture stock-holders, on the ground that, the interest of the stock being a charge on the company's undertaking, they were entitled by subrogation to the benefit of the charge. It was held that the bank could not be treated as assignee of the stock-holders' right to their interest, and that the claim therefore failed. *In re* Wrexham, etc., R. Co., [1898] 2 Ch. 663, 68 L. J. Ch. 28, 79 L. T. Rep. N. S. 463, 47 Wkly. Rep. 172.

97. See *supra*, VIII, A, 7, d, (VII), (B).

98. New Orleans, etc., R. Co. *v.* Mellen, 12 Wall. (U. S.) 362, 20 L. ed. 434.

99. Dunham *v.* Cincinnati, etc., R. Co., 1 Wall. (U. S.) 254, 17 L. ed. 584 [*reversing* 8 Fed. Cas. No. 4,148].

some years after the mortgage was given,[1] and the nature of whose services and advances does not entitle him to a statutory lien on the property of the old company.[2] But a mortgagee of a railroad has no preference over a judgment creditor, at whose instance a receiver is appointed, to surplus earnings which have accumulated in the hands of the receiver prior to the filing of the bill of foreclosure.[3] A recorded mortgage held by the trustee before any bonds are issued or any mortgage debt created is held by such trustee merely as the agent of the railroad company, so that mechanics' liens which attached prior to the issuance of any bonds are prior in lien.[4]

d. Liens For Public Aid Granted. The priority of a lien on railroad property in favor of a state, county, or municipality as security for its issuing or indorsing bonds or subscribing to stock in aid of the company is usually regulated by the statute, or provision of the constitution, authorizing the granting of such aid.[5] Some statutes expressly provide that such liens shall be prior and superior to all liens or encumbrances created by the company and all other claims existing or to exist against it.[6] Persons dealing with a railroad company are bound to take notice of a public statute giving a state or a county a lien on railroad property for public aid granted to it,[7] and such lien therefore is superior to claims of purchasers of the property of such company,[8] and to its bonds issued under a mortgage subsequently executed,[9] and to the holder of a tax certificate which by statute is receivable by the company for freight and passage.[10] But where under such a statute first mortgage bonds are transferred to the state as security for bonds issued by it in aid of a road, the state as holder of such first mortgage bonds has no priority over other bonds of the same issue held by individuals.[11] So the lien of the state under such a statute is subordinate to the interest and claim of a vendor of railroad property reserved in the deed of conveyance,[12] or to the lien of a person who has recovered judgment for the value of his land taken for the

1. Fogg *v.* Blair, 133 U. S. 534, 10 S. Ct. 338, 33 L. ed. 721 [*affirming* 22 Fed. 36, 25 Fed. 684].

2. Fogg *v.* Blair, 133 U. S. 534, 10 S. Ct. 338, 33 L. ed. 721 [*affirming* 22 Fed. 36, 25 Fed. 684].

3. Veatch *v.* American L. & T. Co., 84 Fed. 274, 28 C. C. A. 384 [*affirming* 79 Fed. 471, 25 C. C. A. 39].

4. Reynolds *v.* Manhattan Trust Co., 83 Fed. 593, 27 C. C. A. 620.

5. State *v.* Jacksonville, etc., R. Co., 16 Fla. 708 (holding that the lien of the trustees of the internal improvement fund is prior to that of the state); State *v.* Lagrange, etc., R. Co., 4 Humphr. (Tenn.) 488; Mercantile Trust Co. *v.* Baltimore, etc., R. Co., 82 Fed. 360 (holding that where by a statute authorizing a state to subscribe to the stock of a railroad company the interest and dividends of the state are to be paid from the "profits," the state does not become a creditor of the company, but is a preferred stock-holder having no equitable lien on the property of the company which entitles the holder of the stock to dividends from the earnings of the road in preference to the payment of a mortgage indebtedness subsequently contracted). *Compare* Sinking Fund Com'rs *v.* Northern Bank, 1 Metc. (Ky.) 174.

Where an act of congress of July 1, 1862, provided for the issue of United States bonds to aid in the construction of the Union Pacific railroad, which bonds were to be a first mortgage on the road, and also provided that a certain per cent of the net earnings of the road should be annually applied to the payment of the bonds, and a later act of July 2, 1864, amending the former, authorized the company to issue its first mortgage bonds and subordinated the lien of the United States bonds thereto, the latter act postponed the payment of such certain per cent of the net earnings to the government until the interest on the first mortgage bonds thereby authorized had been paid. U. S. *v.* Sioux City, etc., R. Co., 99 U. S. 491, 25 L. ed. 292; U. S. *v.* Central Pac. R. Co., 99 U. S. 449, 25 L. ed. 287; Union Pac. R. Co. *v.* U. S., 99 U. S. 402, 25 L. ed. 274 [*reversing* 13 Ct. Cl. 401].

6. Colt *v.* Barnes, 64 Ala. 108, construing the act of Feb. 21, 1870.

7. Ketchum *v.* St. Louis, 101 U. S. 306, 25 L. ed. 999 [*affirming* 14 Fed. Cas. Nos. 7,739, 7,740, 4 Dill. 78, 87 note]; Tompkins *v.* Little Rock, etc., R. Co., 15 Fed. 6.

8. Ketchum *v.* St. Louis, 101 U. S. 306, 25 L. ed. 999 [*affirming* 14 Fed. Cas. Nos. 7,739, 7,740, 4 Dill. 78, 87 note].

9. Ketchum *v.* St. Louis, 101 U. S. 306, 25 L. ed. 999 [*affirming* 14 Fed. Cas. Nos. 7,739, 7,740, 4 Dill. 78, 87 note].

10. State *v.* Nashville, etc., R. Co., 7 Lea (Tenn.) 15.

11. Minnesota, etc., R. Co. *v.* Sibley, 2 Minn. 13.

12. Tennessee, etc., R. Co. *v.* East Alabama R. Co., 73 Ala. 426.

road,[13] or to mortgagees who have become such under a subsequent statute authorizing the railroad company to borrow money and mortgage its property.[14] The holders of bonds so issued and indorsed by the state are entitled to priority over junior encumbrancers,[15] unless they have waived or lost their priority by some act on their part.[16] The holders of bonds indorsed by the state are not bound to look primarily to the state for payment, and neither the railroad company nor junior encumbrancers can object that such holders have made no effort to obtain payment from the state;[17] nor will the first bondholders be required to look primarily to the state for payment on the ground that they hold a double security.[18]

e. Liens For Right of Way or Land Granted. Except where the vendor has waived his right to priority,[19] or the vendor's lien is a secret one of which the mortgage bondholders had no notice,[20] the lien of a vendor of land sold or taken for railroad purposes for the unpaid purchase-price thereof or for just compensation, if no price has been fixed, is superior to that of a mortgage on the road,[21] although the mortgage contains an after-acquired property clause,[22] particularly to that of a subsequent mortgage,[23] and particularly where the sale is a conditional

13. White *v.* Nashville, etc., R. Co., 7 Heisk. (Tenn.) 518.

14. Brown *v.* State, 62 Md. 439.

15. Hand *v.* Savannah, etc., R. Co., 12 S. C. 314, 17 S. C. 219.

Postponement.— Where a state indorsing the corporate bonds of a railroad and reserving a statutory lien afterward attempts to postpone the lien and let in a new issue of bonds, which attempt is void, the holders of first lien bonds retaining that rank are exclusively entitled to the benefit of the first lien and cannot be required to share that benefit with the second statute lien to the extent of the quantity of the first lien removed by the estoppel of parties holding under it. Hand *v.* Savannah, etc., R. Co., 12 S. C. 314, 17 S. C. 219.

16. Hand *v.* Savannah, etc., R. Co., 12 S. C. 314, holding that where by the act of 1869 certain bonds were issued for money borrowed in aid of a railroad and the lien held by the state on the road under the act of 1856 was to become subordinate to such bonds and other bonds guaranteed by the state which were to be issued in exchange for past-due coupons of 1856, the parties receiving these guaranteed bonds in exchange for coupons thereby surrendered all rights to claims for the coupons or bonds so received or the protection of the lien created by the act of 1856, and by such funding of coupons they accepted the postponement of the lien of 1856 as to all bonds and coupons of the same class owned by them at that time.

Estoppel.— Where a state indorsed railroad bonds and reserved a statutory lien and afterward attempted to postpone the lien to let in a new issue of the bonds, the former bondholders are not estopped from asserting their prior lien because, knowing of this attempt, they, without objection, permitted money raised thereunder to be expended upon the improvement of the mortgaged premises. Hand *v.* Savannah, etc., R. Co., 12 S. C. 314. Nor are they estopped from asserting their rights under the statutory lien by reason of the fact that they accepted payment of their coupons from the company after the rebuilding of the road under a later statute. Hand *v.* Savannah, etc., R. Co., *supra*. Nor because of their failure to oppose the passage of the act postponing the lien. Hand *v.* Savannah, etc., R. Co., *supra*.

Burden of proof.— On the issue of such estoppel, the question whether the holder of bonds and coupons secured by the lien has accepted in payment of his past-due coupons, bonds issued under a statute postponing such lien is one of fact and the burden is on him who asserts the estoppel. Hand *v.* Savannah, etc., R. Co., 17 S. C. 219.

Evidence.—And upon such issue entries in the handwriting of a deceased treasurer, in the regularly kept books of the company, are competent evidence to show who funded the coupons and received in exchange therefor bonds under the later statute. Hand *v.* Savannah, etc., R. Co., 17 S. C. 219.

17. Hand *v.* Savannah, etc., R. Co., 12 S. C. 314.

18. Hand *v.* Savannah, etc., R. Co., 12 S. C. 314.

19. Fisk *v.* Potter, 2 Abb. Dec. (N. Y.) 138, 2 Keyes 64.

20. Fisk *v.* Potter, 2 Abb. Dec. (N. Y.) 138, 2 Keyes 64.

21. Central Trust Co. *v.* Bridges, 57 Fed. 753, 6 C. C. A. 539.

22. Central Trust Co. *v.* Louisville, etc., R. Co., 81 Fed. 772, holding that railroad mortgage bondholders who by virtue of a future-acquired property clause in the mortgage obtain an interest in or lien upon lands condemned for the use of the company hold subject to the claim of the prior owner for the purchase-money. But see Pierce *v.* Milwaukee, etc., R. Co., 24 Wis. 551, 1 Am. Rep. 203.

23. Hatry *v.* Painesville, etc., R. Co., 1 Ohio Cir. Ct. 426, 1 Ohio Cir Dec. 238 [*affirmed* in 23 Cinc. L. Bul. 281]; Central Trust Co. *v.* Louisville, etc., R. Co., 81 Fed. 772, holding that holders of railroad bonds secured by a mortgage made after certain property has been taken for the use of the road or before compensation has been made

one.[24] Such lien is also superior to the lien of bonds issued or indorsed by the state,[25] or to other subsequent lienors.[26]

f. Liens For Rolling Stock Furnished. A railroad mortgage covering after-acquired property is superior to a lien or claim on subsequently acquired rolling stock in favor of a lessor of such property,[27] under a lease which in fact amounts to a purchase of the property by the company,[28] or to a mortgage thereof by the company,[29] or which is otherwise a mere device to prevent the property from coming under the after-acquired property clause.[30] Such mortgage is also superior to a chattel mortgage, by the furnisher of the rolling stock, to a director and general counsel of the railroad company,[31] or to a claim for equipment of a furnisher who relies on the credit of the company and on an indorser of notes taken by him from the railroad company in payment.[32] But such mortgage is inferior to the rights or lien of a vendor of such rolling stock under a conditional sale;[33] or to a *bona fide* lessor of such rolling stock, with reservation of title;[34] although such mortgage is superior to the rights of a vendor who delivers the rolling stock without any condition or reservation as to payment.[35] Nor can a vendor claim such lien as against a prior lien if he obtains a judgment against the company for his work.[36]

take subject to the compensation which may be adjudged therefor and are bound by the judgment, although they were not parties to the suit upon which it was rendered.

24. Tennessee, etc., R. Co. *v.* East Alabama R. Co., 73 Ala. 426; Wright *v.* Kentucky, etc., R. Co., 117 U. S. 72, 6 S. Ct. 697, 29 L. ed. 821.

25. Hand *v.* Savannah, etc., R. Co., 12 S. C. 314.

26. Wright *v.* Kentucky, etc., R. Co., 117 U. S. 72, 6 S. Ct. 697, 29 L. ed. 821, holding that where an uncompleted road-bed is transferred to a railroad company by a contract providing that the title shall not vest until the performance of certain conditions, the construction company, having notice of the contract and the conditions, can acquire no lien for work done on the property superior to the vendor's right to take the same for breach of condition.

27. Manhattan Trust Co. *v.* Sioux City, etc., R. Co., 68 Fed. 72, holding that a railroad mortgage covering after-acquired property is prior to any lien existing in favor of a lessor of depot grounds under McClain Code Iowa, § 2192, on rolling stock delivered to the railroad company before its use on depot grounds.

28. McGourkey *v.* Toledo, etc., R. Co., 146 U. S. 536, 13 S. Ct. 170, 36 L. ed. 1079 [*affirming* 36 Fed. 520].

29. McGourkey *v.* Toledo, etc., R. Co., 146 U. S. 536, 13 S. Ct. 170, 36 L. ed. 1079 [*affirming* 36 Fed. 520].

30. McGourkey *v.* Toledo, etc., R. Co., 146 U. S. 536, 13 S. Ct. 170, 36 L. ed. 1079 [*affirming* 36 Fed. 520].

31. Flanagan Bank *v.* Graham, 42 Oreg. 403, 71 Pac. 137, 790.

32. Continental Trust Co. *v.* Toledo, etc., R. Co., 93 Fed. 532, holding that a manufacturer who furnished locomotives to a railroad company in part on credit, taking notes for such deferred payment indorsed by a third person, must be held to have relied upon the credit of the company and the indorser, and is not entitled to a lien on the company's property superior to that of a prior mortgage, although the locomotives were needed to enable the company to continue the operation of the road.

33. Fosdick *v.* Schall, 99 U. S. 235, 25 L. ed. 339; Metropolitan Trust Co. *v.* Railroad Equipment Co., 108 Fed. 913, 48 C. C. A. 135 (holding that a corporation making a conditional sale of equipment to a railroad company, retaining title until the full payment of notes given for the price, on the foreclosure of a mortgage covering all the property of the company before payment, is entitled to take back the equipment, or in case the mortgagees elect to retain it, to a first lien thereon for the amount still due without any deduction on account of expenditures made by the railroad company or its receiver for the preservation or improvement of such property); Metropolitan Trust Co. *v.* Columbus, etc., R. Co., 93 Fed. 702 (holding that a corporation making a conditional sale of equipment to a railroad company, rental to be paid therefor, and applied on the purchase-price and the title to remain in the seller until full payment, on a foreclosure of mortgages against the railroad company before full payment, is entitled to take back the equipment, or in case the mortgagees elect to retain it, the first lien on the property for the amount still due thereon); Central Trust Co. *v.* Marietta, etc., R. Co., 48 Fed. 864, 1 C. C. A. 139 (holding also that where such rolling stock was supplied to an improvement company which turned it over to a railroad company, the original vendor could take nothing by a resale to him by the improvement company of such rolling stock). *Compare* Wallbridge *v.* Farwell, 18 Can. Sup. Ct. 1.

34. Central Trust Co. *v.* Ohio Southern R. Co., 17 Ohio Cir. Ct. 633, 9 Ohio Cir. Dec. 317.

35. Coe *v.* Pennock, 5 Fed. Cas. No. 2,942 [*affirmed* in 23 How. 117, 16 L. ed. 436].

36. Coe *v.* Pennock, 5 Fed. Cas. No. 2,942

g. Liens For Construction, Labor, or Supplies — (i) *IN GENERAL.* Although the doctrine is of recent origin, it has become settled law in this country that in the final distribution of the assets of an insolvent railroad corporation which has been placed in the hands of a receiver there are certain claims against the fund which, under certain circumstances, are entitled to priority of payment over the debts of the corporation secured by mortgage upon its property.[37] Thus, except where there is a statutory provision to the contrary,[38] the rule is well settled in equity that where a railroad company becomes insolvent and is placed in the hands of a receiver, current debts for wages of employees, equipment, useful improvements, necessary repairs, and other necessary expenses incurred in operating the road are entitled to, and the court may order that they shall, be a charge upon the current earnings of the road superior to the claims of creditors secured by a mortgage on the *corpus* of the railroad property,[39] or on the

[*affirmed* in 23 How. 117, 16 L. ed. 436], holding also that if he obtains a judgment against the company for the work, an execution cannot be levied on the rolling stock on which a former lien exists.

37. McIlhenney *v.* Binz, 80 Tex. 1, 13 S. W. 655, 26 Am. St. Rep. 705; Louisville Trust Co. *v.* Louisville, etc., R. Co., 174 U. S. 674, 19 S. Ct. 827, 43 L. ed. 1130 [*reversing* 84 Fed. 539, 28 C. C. A. 202], holding that in railroad foreclosure proceedings accompanied by a receivership, it is the duty of the court at times to give to certain unsecured claims a priority over the mortgage debt.

38. Alexander *v.* Mercantile Trust, etc., Co., 100 Ga. 537, 28 S. E. 235 (holding that under Civ. Code, § 2719 *et seq.*, the demands secured by legal liens at the time of filing a bill of foreclosure should first be paid and should not be postponed in favor of charges against the property in favor of persons whose claims are superior in equity but not secured by a legal lien); New York Cent. Trust Co. *v.* Thurman, 94 Ga. 735, 20 S. E. 141.

39. *Alabama.*— Drennen *v.* Mercantile Trust, etc., Co., 115 Ala. 592, 23 So. 164, 67 Am. St. Rep. 72, 39 L. R. A. 623.

Arkansas.— Barstow *v.* Pine Bluff, etc., R. Co., 57 Ark. 334, 21 S. W. 652.

Colorado.— Grand Junction First Nat. Bank *v.* Wyman, 16 Colo. App. 468, 66 Pac. 456.

New York.— Townsend *v.* Oneonta, etc., R. Co., 88 N. Y. App. Div. 208, 84 N. Y. Suppl. 427; Brown *v.* New York, etc., R. Co., 19 How. Pr. 84.

Texas.— McIlhenny *v.* Binz, 80 Tex. 1, 13 S. W. 655, 26 Am. St. Rep. 705.

Utah.— New York Cent. Trust Co. *v.* Utah Cent. R. Co., 16 Utah 12, 50 Pac. 813.

Virginia.— Smith *v.* Washington City, etc., R. Co., 33 Gratt. 617.

Washington.— Bellingham Bay Imp. Co. *v.* Fairhaven, etc., R. Co., 17 Wash. 371, 49 Pac. 514.

United States.— Lackawanna Iron, etc., Co. *v.* Farmers' L. & T. Co., 176 U. S. 298, 20 S. Ct. 363, 40 L. ed. 475; Virginia, etc., Coal Co. *v.* Georgia Cent. R., etc., Co., 170 U. S. 355, 18 S. Ct. 657, 42 L. ed. 1068; Kneeland *v.* American L. & T. Co., 136 U. S. 89, 10 S. Ct. 950, 34 L. ed. 379; St. Louis, etc., R. Co. *v.* Cleveland, etc., R. Co., 125 U. S. 658, 8 S. Ct. 1011, 31 L. ed. 832; Union Trust Co. *v.* Morrison, 125 U. S. 591, 8 S. Ct. 1004, 31 L. ed. 825; Burnham *v.* Bowen, 111 U. S. 776, 4 S. Ct. 675, 28 L. ed. 596; Union Trust Co. *v.* Souther, 107 U. S. 591, 2 S. Ct. 295, 27 L. ed. 488; Hale *v.* Frost, 99 U. S. 389, 25 L. ed. 419; Fosdick *v.* Schall, 99 U. S. 235, 25 L. ed. 339; Rodger Ballast Car Co. *v.* Omaha, etc., R. Co., 154 Fed. 629, 83 C. C. A. 403; Southern R. Co. *v.* Ensign Mfg. Co., 117 Fed. 417, 54 C. C. A. 591; Monsarrat *v.* Mercantile Trust Co., 109 Fed. 230, 48 C. C. A. 328; Rhode Island Locomotive Works *v.* Continental Trust Co., 108 Fed. 5, 47 C. C. A. 147; International Trust Co. *v.* T. B. Townsend Brick, etc., Co., 95 Fed. 850, 37 C. C. A. 396; Grand Trunk R. Co. *v.* Central Vermont R. Co., 88 Fed. 620 (holding this to be true as against a mortgage on which the first default of interest occurred during the receivership, where the stock of supplies coming into the hands of the receivers exceeded the amount of such claims and it appears that the net earnings under the receivership to the time of default on the mortgage interest, together with the betterments made, also largely exceeded such claims); Southern R. Co. *v.* Tillett, 76 Fed. 507, 22 C. C. A. 303; New England R. Co. *v.* Carnegie Steel Co., 75 Fed. 54, 21 C. C. A. 219; Bound *v.* South Carolina R. Co., 58 Fed. 473, 7 C. C. A. 322; Thomas *v.* Peoria, etc., R. Co., 36 Fed. 808; Farmers' Loan, etc., Co. *v.* Vicksburg, etc., R. Co., 33 Fed. 778; Calhoun *v.* St. Louis, etc., R. Co., 14 Fed. 9, 9 Biss. 330; Taylor *v.* Philadelphia, etc., R. Co., 7 Fed. 377. See Northern Pac. R. Co. *v.* Lamont, 69 Fed. 23, 16 C. C. A. 364; Denniston *v.* Chicago, etc., R. Co., 7 Fed. Cas. No. 3,800, 4 Biss. 414.

England.— See Proffitt *v.* Wye Valley R. Co., 64 L. T. Rep. N. S. 669.

Canada.— Sage *v.* Shore Line R. Co., 2 N. Brunsw. Eq. 321. See Wallbridge *v.* Farwell, 18 Can. Sup. Ct. 1.

See 41 Cent. Dig. tit. "Railroads," §§ 563–567; and, generally, RECEIVERS.

The reason for this rule, which is generally applied only to railroads, is because of their quasi-public character. They obtain and use certain franchises granted by the public and in consideration thereof must

income,[40] or as against other general creditors,[41] unless the claimant has lost or waived his right to a preference.[42] In some jurisdictions this preference is protected by statute.[43] The income out of which the mortgagee is to be paid is the net income obtained by deducting from the gross earnings what is required for necessary operating and managing expenses, proper equipment, and useful improvements;[44]

subserve the interests of the public. Especially must every railroad be kept a going concern. To this end their earnings are first applied to debts incurred for labor and supplies necessary to keep the road in actual operation. In this way not only is the public interest served, but the value of the property covered by the mortgage is maintained, and the interests of all concerned not allowed to go to ruin. Southern R. Co. *v.* Ensign Mfg. Co., 117 Fed. 417, 54 C. C. A. 591. The reason for the rule has also been stated to be "not because the creditors to whom such debts are due have in law a lien upon the mortgaged property or the income, but because, in a sense, the officers of the company are trustees of the earnings for the benefit of the different classes of creditors and the stock-holders; and if they give to one class of creditors that which properly belongs to another, the court may, upon an adjustment of the accounts, so use the income which comes into its own hands, as, if practicable, to restore the parties to their original equitable rights." Fosdick *v.* Schall, 99 U. S. 235, 253, 25 L. ed. 339.

This preference exists upon all the lines of the railroad system prior in right to both local and general mortgages. Central Trust Co. *v.* Wabash, etc., R. Co., 30 Fed. 332.

Equity cannot be cut off.— The equity of one who furnished supplies shortly before the appointment of receivers to be paid out of funds or income in their hands cannot be cut off before he becomes a party to the proceedings, by orders entered at the instance of the mortgage creditors. New England R. Co. *v.* Carnegie Steel Co., 75 Fed. 54, 21 C. C. A. 213.

An attaching creditor who has attached tolls before they came into the hands of the trustees, and before default, acquires a lien thereon superior to that of the trustees. Clay *v.* East Tennessee, etc., R. Co., 6 Heisk. (Tenn.) 421.

Current income, within the meaning of this rule, does not include the proceeds of mileage sold in bulk, at a discount, over other railroads, for which the railroad company acts in issuing the same, the proceeds not having been accounted for to them, but used for its own purposes. Gregg *v.* Metropolitan Trust Co., 124 Fed. 721, 59 C. C. A. 637.

40. Darst *v.* Pittsburgh, etc., R. Co., 3 Ohio Dec. (Reprint) 199, 4 Wkly. L. Gaz. 377. And see the cases cited *supra*, note 39.

41. Ruhlender *v.* Chesapeake, etc., R. Co., 91 Fed. 5, 33 C. C. A. 299, holding that a receivership, although obtained in a suit in behalf of general creditors, does not entitle such creditors to payment from the earnings under the receivership in preference to claims usually denominated "debts of the income" and which are preferential charges thereon as against all other creditors.

42. State Trust Co. *v.* Kansas City, etc., R. Co., 129 Fed. 455, holding that the filing of a statement under a statute for a mechanic's lien for the debt waives the right to afterward assert an equitable preferential lien in a foreclosure suit.

Prosecuting an action on the claim to a final judgment before the commencement of a suit to foreclose a mortgage does not cause the creditor to lose his right to a preference. Central Trust Co. *v.* Clark, 81 Fed. 269, 26 C. C. A. 397.

Laches.— Laches of a creditor in asserting his claim may deprive him of his right to an equitable preference. Stewart *v.* Wisconsin Cent. R. Co., 95 Fed. 577; Grand Trunk R. Co. *v.* Central Vermont R. Co., 78 Fed. 690, holding that where a lessee is bound to pay from gross earnings certain prior claims before paying anything to the bondholders, but the holders of these claims permit payment to the bondholders first, they then become common unsecured creditors of the lessee whose claims on the appointment of a receiver are not entitled to preference out of subsequently accruing earnings. But the delay of the one furnishing the supplies shortly before the receivership to interpose his claim until after the mortgage creditors have interposed by foreclosure proceedings will not bar his recovery, if there are still assets from which the claim may be paid. New England R. Co. *v.* Carnegie Steel Co., 75 Fed. 54, 21 C. C. A. 219. So laches in asserting the demand does not cause the priority of such claim to be lost if an action at law to enforce the demand has not been barred by the statute of limitations. Bellingham Bay Imp. Co. *v.* Fairhaven, etc., R. Co., 17 Wash. 371, 49 Pac. 514.

43. See Darst *v.* Pittsburgh, etc., R. Co., 3 Ohio Dec. (Reprint) 199, 4 Wkly. L. Gaz. 377; Bell *v.* St. Johnsbury, etc., R. Co., 76 Vt. 42, 56 Atl. 105 (construing St. § 3803); Farmers' Loan, etc., Co. *v.* Vicksburg, etc., R. Co., 33 Fed. 778, construing Miss. Code, § 1033, which provides that no mortgage on the income, future earnings, or rolling stock of a railroad shall be valid against debts contracted in carrying on the business of the corporation; and holding that such statute does not give a prior lien to the holders of such claims, but merely prevents those claiming a prior lien under such mortgage from setting it up to defeat such claims.

44. Barstow *v.* Pine Bluff, etc., R. Co., 57 Ark. 334, 21 S. W. 652; Clay *v.* East Tennessee, etc., R. Co., 6 Heisk. (Tenn.) 421; Fosdick *v.* Schall, 99 U. S. 235, 25 L. ed. 339; Rodger Ballast Car Co. *v.* Omaha, etc., R. Co., 154 Fed. 629, 83 C. C. A. 403.

and every railroad mortgagee in accepting his security impliedly agrees that the current debts made in the ordinary course of business shall be met from the current receipts before he has any claim upon the income;[45] and if in the operation of the railroad by trustees or a receiver, earnings or income which should have been used in meeting obligations for current labor and supplies are diverted from this purpose and are used for the benefit of the mortgage creditors, as by paying interest, purchasing property, and making permanent improvements, such diversion must be made good, and is entitled to a priority of payment out of the *corpus* of the mortgaged property or its proceeds,[46] to the extent that the labor or supplies have contributed to the permanent improvement or betterment of the corporate property,[47] or in so far as the gross earnings of the company have been diverted from the payment thereof and paid to the bondholders.[48] But where there has been no such diversion,[49] or where the earnings of the road are more

45. Southern R. Co. *v.* Carnegie Steel Co., 176 U. S. 257, 20 S. Ct. 347, 44 L. ed. 458 [*affirming* 76 Fed. 492, 22 C. C. A. 289]; Fosdick *v.* Schall, 99 U. S. 235, 25 L. ed. 339; Rodger Ballast Car Co. *v.* Omaha, etc., R. Co., 154 Fed. 629, 83 C. C. A. 403.

46. *Alabama.*— Drennen *v.* Mercantile Trust, etc., Co., 115 Ala. 592, 23 So. 164, 67 Am. St. Rep. 72, 39 L. R. A. 623.

Arkansas.— Barstow *v.* Pine Bluff, etc., R. Co., 57 Ark. 334, 21 S. W. 652.

Colorado.— Grand Junction First Nat. Bank *v.* Wyman, 16 Colo. App. 468, 66 Pac. 456.

Missouri.— Van Frank *v.* St. Louis, etc., R. Co., 89 Mo. App. 489.

Texas.— McIlhenny *v.* Binz, 80 Tex. 1, 13 S. W. 655, 26 Am. St. Rep. 705; Waters-Pierce Oil Co. *v.* U. S., etc., Trust Co., 44 Tex. Civ. App. 397, 99 S. W. 212.

Utah.— New York Cent. Trust Co. *v.* Utah Cent. R. Co., 16 Utah 12, 50 Pac. 813; Litzenberger *v.* Jarvis-Conklin Trust Co., 8 Utah 15, 28 Pac. 871.

Washington.— Bellingham Bay Imp. Co. *v.* Fairhaven, etc., R. Co., 17 Wash. 371, 49 Pac. 514.

United States.— Southern R. Co. *v.* Carnegie Steel Co., 176 U. S. 257, 20 S. Ct. 347, 44 L. ed. 458 [*affirming* 76 Fed. 492, 22 C. C. A. 289]; Kneeland *v.* American L. & T. Co., 136 U. S. 89, 10 S. Ct. 950, 34 L. ed. 379; St. Louis, etc., R. Co. *v.* Cleveland, etc., R. Co., 125 U. S. 658, 8 S. Ct. 1011, 31 L. ed. 832; Burnham *v.* Bowen, 111 U. S. 776, 4 S. Ct. 675, 28 L. ed. 596; Union Trust Co. *v.* Walker, 107 U. S. 596, 2 S. Ct. 299, 27 L. ed. 490; Fordyce *v.* Kansas City, etc., Connecting R. Co., 145 Fed. 566; Southern R. Co. *v.* Ensign Mfg. Co., 117 Fed. 417, 54 C. C. A. 591; Gregg *v.* Mercantile Trust Co., 109 Fed. 220, 48 C. C. A. 318; Rhode Island Locomotive Works *v.* Continental Trust Co., 108 Fed. 5, 47 C. C. A. 147; International Trust Co. *v.* T. B. Townsend Brick, etc., Co., 95 Fed. 850, 37 C. C. A. 396; Southern R. Co. *v.* Tillett, 76 Fed. 507, 22 C. C. A. 303; Pennsylvania Finance Co. *v.* Charleston, etc., R. Co., 62 Fed. 205, 10 C. C. A. 323; Calhoun *v.* St. Louis, etc., R. Co., 14 Fed. 9, 9 Biss. 330. See Toledo, etc., R. Co. *v.* Hamilton, 134 U. S. 296, 10 S. Ct. 546, 33 L. ed. 905.

See 41 Cent. Dig. tit. "Railroads," §§ 563–567.

Dependent on diversion.— The right of one furnishing supplies to a preference over the mortgagee is dependent upon the fact that there has been a diversion of the net earnings of the mortgaged property over and above the necessary expenditures for operation and that such diversion has inured to the benefit of the mortgagee and the burden rests upon the claimant of such preference to establish such facts. Kansas L. & T. Co. *v.* Sedalia Electric R., etc., Co., 108 Fed. 702.

The diversion need not be prior to the receivership.— Virginia, etc., Coal Co. *v.* Georgia Cent. R., etc., Co., 170 U. S. 355, 18 S. Ct. 657, 42 L. ed. 1068 [*affirming* 66 Fed. 803, 14 C. C. A. 112].

47. Drennen *v.* Mercantile Trust, etc., Co., 115 Ala. 592, 23 So. 164, 67 Am. St. Rep. 72, 39 L. R. A. 623. And see the cases cited *supra*, note 46.

48. Drennen *v.* Mercantile Trust, etc., Co., 115 Ala. 592, 23 So. 164, 67 Am. St. Rep. 72, 39 L. R. A. 623. And see the cases cited *supra*, note 46.

49. Hammerly *v.* Mercantile Trust, etc., Co., 123 Ala. 596, 26 So. 646; Waters-Pierce Oil Co. *v.* U. S., etc., Trust Co., 44 Tex. Civ. App. 397, 99 S. W. 212; Gregg *v.* Metropolitan Trust Co., 197 U. S. 183, 25 S. Ct. 415, 49 L. ed. 717 [*affirming* 124 Fed. 721, 59 C. C. A. 637]; St. Louis, etc., R. Co. *v.* Cleveland, etc., R. Co., 125 U. S. 658, 8 S. Ct. 1011, 31 L. ed. 832; Penn *v.* Calhoun, 121 U. S. 251, 7 S. Ct. 906, 30 L. ed. 915; Niles Tool Works Co. *v.* Louisville, etc., R. Co., 112 Fed. 561, 50 C. C. A. 390; Monsarrat *v.* Mercantile Trust Co., 109 Fed. 230, 48 C. C. A. 328; Rhode Island Locomotive Works *v.* Continental Trust Co., 108 Fed. 5, 47 C. C. A. 147; International Trust Co. *v.* T. B. Townsend Brick, etc., Co., 95 Fed. 850, 37 C. C. A. 396; Farmers' L. & T. Co., *v.* Northern Pac. R. Co., 68 Fed. 36; U. S. Trust Co. *v.* New York, etc., R. Co., 25 Fed. 800. *Compare* Cleveland, etc., R. Co. *v.* Knickerbocker Trust Co., 86 Fed. 73.

A secretary rendering services to a railroad company six months prior to the appointment of a receiver is not entitled to priority over mortgage bondholders where there has been no diversion of earnings for

than sufficient to pay all its operating expenses,[50] labor and supply claimants are ordinarily not entitled to priority out of the *corpus* of the railroad property unless the terms of the mortgage permit of such priority;[51] although it has been held that the court may in its discretion, in accordance with the facts and circumstances of the particular case, and where the current income is insufficient, order such claim to prior payment out of the proceeds of sale, notwithstanding there has been no diversion of the income.[52] But this equitable right in favor of operating expenses does not exist against second mortgage bondholders for a diversion of current income for the benefit of first mortgage bondholders;[53] nor, it has been held, do these rules apply to a private railroad.[54]

(II) *Effect of Lease of Road.* As a general rule the above doctrine applies whether the labor or supplies were furnished to the company owning the property or to a lessee thereof.[55] But it has been held that the rule does not apply as against a lessor for improvements made upon a lessor's interest by a receiver of the lessee, where the lease gave the lessee no right to make such improvements at the lessor's expense.[56]

(III) *What Constitutes a Diversion.* A diversion within the meaning of the above rule means the use of the current income for the payment of claims for labor or supplies or other matters which were not necessary to keep the road a going concern;[57] and may consist in using such income to pay for permanent improvements,[58] rentals,[59] or interest on the mortgage.[60]

the benefit of bondholders. Central Trust Co. *v.* Chattanooga, etc., R. Co., 69 Fed. 295.

50. Security Trust Co. *v.* Goble R. Co., 44 Oreg. 370, 74 Pac. 919, 75 Pac. 697.

51. New York Cent. Trust Co. *v.* Utah Cent. R. Co., 16 Utah 12, 50 Pac. 813; Union Trust Co. *v.* Illinois Midland R. Co., 117 U. S. 434, 6 S. Ct. 809, 29 L. ed. 963; Denniston *v.* Chicago, etc., R. Co., 7 Fed. Cas. No. 3,800, 4 Biss. 414. And see the cases cited *supra*, notes 49, 50.

52. Pennsylvania Finance Co. *v.* Charleston, etc., R. Co., 62 Fed. 205, 10 C. C. A. 323. See also Receivers.

53. St. Louis, etc., R. Co. *v.* Cleveland, etc., R. Co., 125 U. S. 658, 8 S. Ct. 1011, 31 L. ed. 832; Central Trust Co. *v.* East Tennessee, etc., R. Co., 80 Fed. 624, 26 C. C. A. 30.

54. Grand Junction First Nat. Bank *v.* Wyman, 16 Colo. App. 468, 66 Pac. 456, holding that where a railroad belongs to a mining company and is not used by the public but only in the operation of the mine, a claim for money borrowed to keep the road in operation should not be given precedence over a mortgage securing the company's bonds.

55. Virginia, etc., Coal Co. *v.* Georgia Cent. R., etc., Co., 170 U. S. 355, 18 S. Ct. 657, 42 L. ed. 1068 [*affirming* 66 Fed. 803, 14 C. C. A. 112] (holding also that it is immaterial whether the lease is valid or not); Stewart *v.* Wisconsin Cent. R. Co., 95 Fed. 577.

56. Felton *v.* Cincinnati, 95 Fed. 336, 37 C. C. A. 88.

57. Gregg *v.* Mercantile Trust Co., 109 Fed. 220, 48 C. C. A. 318, holding that the payment of trust certificates issued for cars or equipment furnished which was not necessary to keep the railroad a going concern, and which certificates therefore did not create a debt of the income, is a diversion of such earnings inuring to the benefit of the mortgagees under whose mortgage the equipment passed subject to the lien of the vendor.

Breach of contract.—A breach by a controlling railroad company of a contract requiring income to be first applied to operating expenses can be complained of only by the other company, and does not constitute a diversion of funds so as to entitle a claimant for an injury due to negligence to a preference out of the income as against a mortgagee. Veatch *v.* American L. & T. Co., 79 Fed. 471, 25 C. C. A. 39.

58. Southern R. Co. *v.* Carnegie Steel Co., 176 U. S. 257, 20 S. Ct. 347, 44 L. ed. 458 [*affirming* 76 Fed. 492, 22 C. C. A. 289]; Southern R. Co. *v.* Tillett, 76 Fed. 507, 22 C. C. A. 303.

59. Southern R. Co. *v.* Carnegie Steel Co., 176 U. S. 257, 20 S. Ct. 347, 44 L. ed. 458 [*affirming* 76 Fed. 492, 22 C. C. A. 289]. And see *infra*, VIII, A, 9, k.

60. Southern R. Co. *v.* Carnegie Steel Co., 176 U. S. 257, 20 S. Ct. 347, 44 L. ed. 458 [*affirming* 76 Fed. 492, 22 C. C. A. 289]; Southern R. Co. *v.* Tillett, 76 Fed. 507, 22 C. C. A. 303. *Compare* Farmers' L. & T. Co. *v.* Fidelity Ins., etc., Co., (Tex. Civ. App. 1897) 41 S. W. 113.

Giving credit for a certain period to a railroad company to pay for supplies furnished indicates a contemplation that during that period the interest falling due on the mortgage bonds is to be paid out of the earnings and hence such payments are not a diversion of earnings within the above rule. Bound *v.* South Carolina R. Co., 58 Fed. 473, 7 C. C. A. 322.

A diversion of earnings of a railroad from operating expenses to interest on bonds is not shown by the fact that through an extended period the gross receipts would have been

(IV) *REQUISITES OF OPERATING EXPENSES* — (A) *In General.* The mere fact that that which an unsecured creditor of an insolvent railroad company furnished to the company was for the preservation of the property and the benefit of the mortgage securities is not sufficient to give his claim priority over mortgage creditors in the distribution of the net earnings;[61] but before such creditors are entitled to a preference it should reasonably appear from all the circumstances that the debt was one to be fairly regarded as part of the operating expenses of the railroad company, incurred in the ordinary course of the business of the railroad and to be met out of the current receipts;[62] and in this sense operating expenses, or current debts, include only such expenses as are reasonably necessary to operate the railroad and keep it a going concern.[63] Thus "operating expenses" within the application of the above rules have been held to include debts due to connecting lines growing out of an interchange of business,[64] and debts due for the use and occupation of leased property or lines,[65] or for necessary repairs,[66]

sufficient to meet all operating expenses if no interest had been paid, since, at the time when there was no default in the payment of operating expenses, the earnings were rightfully appropriated to pay the interest. St. Louis, etc., R. Co. *v.* Cleveland, etc., R. Co., 125 U. S. 658, 8 S. Ct. 1011, 31 L. ed. 832.

61. Southern R. Co. *v.* Carnegie Steel Co., 176 U. S. 257, 20 S. Ct. 347, 44 L. ed. 458 [*affirming* 76 Fed. 492, 22 C. C. A. 289]; Rodger Ballast Car Co. *v.* Omaha, etc., R. Co., 154 Fed. 629, 83 C. C. A. 403.

62. Southern R. Co. *v.* Carnegie Steel Co., 176 U. S. 257, 20 S. Ct. 347, 44 L. ed. 458 [*affirming* 76 Fed. 492, 22 C. C. A. 289]; Rodger Ballast Car Co. *v.* Omaha, etc., R. Co., 154 Fed. 629, 83 C. C. A. 403.

63. Security Trust Co. *v.* Goble R. Co., 44 Oreg. 370, 74 Pac. 919, 75 Pac. 697; Southern R. Co. *v.* Carnegie Steel Co., 176 U. S. 257, 20 S. Ct. 347, 44 L. ed. 458 [*affirming* 76 Fed. 492, 22 C. C. A. 289]; Virginia, etc., Coal Co. *v.* Georgia Cent. R., etc., Co., 170 U. S. 355, 18 S. Ct. 657, 42 L. ed. 1068 (holding that this equity is dependent upon the fact that the supplies were sold and specially purchased for the use and were used in the operation of the road and were essential for such operation); Hale *v.* Frost, 99 U. S. 389, 25 L. ed. 419 (car springs and spirals and supplies for machinery department); Southern R. Co. *v.* Chapman Jack Co., 117 Fed. 424, 54 C. C. A. 598; Southern R. Co. *v.* Ensign Mfg. Co., 117 Fed. 417, 54 C. C. A. 591; Cleveland, etc., R. Co. *v.* Knickerbocker Trust Co., 86 Fed. 73.

Services rendered in a logging venture of a railroad company are not services necessary to keep the road a going concern within the meaning of the above rule. Security Trust Co. *v.* Goble, etc., R. Co., 44 Oreg. 370, 74 Pac. 919, 75 Pac. 697.

Legal services.— The fact that legal services rendered to a railroad company resulted in benefit to its bondholders does not displace the lien of the latter who are not parties to the contract of employment, in favor of a claim for such services. Pennsylvania Finance Co. *v.* Charleston, etc., R. Co., 52 Fed. 678. Thus legal services rendered to a railroad company in maintaining before the court the validity of municipal bonds are not of a character to take precedence of the company's mortgage bonds. Pennsylvania Finance Co. *v.* Charleston, etc., R. Co., 52 Fed. 678. So claims for legal services rendered a railroad company in the ordinary course of its business under special employment, which do not directly contribute in some way to the advantage of the mortgagees do not stand upon the same plane with the labor of operatives or the claims of those who furnish materials or supplies to maintain the road. Gregg *v.* Mercantile Trust Co., 109 Fed. 220, 48 C. C. A. 318. See *In re* Mersey R. Co., 64 L. J. Ch. 623, 72 L. T. Rep. N. S. 535.

The annual salary of an attorney of a railroad which falls due only a short time before the road is placed in the hands of a receiver is entitled to priority over mortgage bondholders. Blair *v.* St. Louis, etc., R. Co., 23 Fed. 521.

In computing net earnings during a receivership, only such expenditures as are actually made can be deducted from the gross earnings. Bell *v.* St. Johnsbury, etc.. R. Co., 76 Vt. 42, 56 Atl. 105.

There is no rule of law declaring what constitutes operating expenses of a railroad company, but it is a matter of evidence and determinable like any other fact, and where the witnesses are together in their testimony as to this matter, the preponderance on the point as to what constitutes operating expenses must control. Schmidt *v.* Louisville, etc., R. Co., 119 Ky. 287, 84 S. W. 314, 27 Ky. L. Rep. 21.

64. Van Frank *v.* Missouri Pac. R. Co., 89 Mo. App. 460; St. Louis, etc., R. Co. *v.* Cleveland, etc., R. Co.. 125 U. S. 658, 8 S. Ct. 1011, 31 L. ed. 832; Monsarrat *v.* Mercantile Trust Co., 109 Fed. 230, 48 C. C. A. 328; Gregg *v.* Mercantile Trust Co., 109 Fed. 220, 48 C. C. A. 318; Ames *v.* Union Pac. R. Co., 73 Fed. 49; Pennsylvania Finance Co. *v.* Charleston, etc., R. Co., 62 Fed. 205, 10 C. C. A. 323. *Compare* Jessup *v.* Atlantic, etc., R. Co., 13 Fed. Cas. No. 7,299, 3 Woods 441.

65. See *infra*, VIII, A, 9, k.

66. Bell *v.* St. Johnsbury, etc., R. Co., 76 Vt. 42, 56 Atl. 105; Union Trust Co. *v.* Illinois Midland R. Co., 117 U. S. 434, 6

rails,[67] cross ties essential to the replacement of ties decayed,[68] wages due employees,[69] taxes,[70] compensation or expenses of trustee or receiver in executing the trust,[71] costs of receivership,[72] and debts due for the purchase,[73] or rental of necessary rolling stock;[74] and the fact that such debts were incurred for betterments does not affect the right to have them paid out of the current income where such

S. Ct. 809, 29 L. ed. 963; Southern R. Co. *v.* Tillett, 76 Fed. 507, 22 C. C. A. 303. *Compare* Meyer *v.* Johnston, 53 Ala. 237.

67. Southern R. Co. *v.* Carnegie Steel Co., 176 U. S. 257, 20 S. Ct. 347, 44 L. ed. 458 [*affirming* 76 Fed. 492, 22 C. C. A. 289]. *Compare* Galveston, etc., R. Co. *v.* Cowdrey, 11 Wall. (U. S.) 459, 20 L. ed. 199.

The use of part of the rails to repair other roads under the company's control and in its possession, whose preservation in a proper condition is vital to its successful operation, will not preclude a right to a preference in payment of that claim over the mortgage debt out of the current income of the railroad. Southern R. Co. *v.* Carnegie Steel Co., 176 U. S. 257, 20 S. Ct. 347, 44 L. ed. 458 [*affirming* 76 Fed. 492, 22 C. C. A. 289].

68. Gregg *v.* Mercantile Trust Co., 109 Fed. 220, 48 C. C. A. 318.

69. Douglass *v.* Cline, 12 Bush (Ky.) 608; Litzenberger *v.* Jarvis-Conklin Trust Co., 8 Utah 15, 28 Pac. 871; Union Trust Co. *v.* Illinois Midland R. Co., 117 U. S. 434, 6 S. Ct. 809, 29 L. ed. 963.

70. U. S. Trust Co. *v.* Mercantile Trust Co., 88 Fed. 140, 31 C. C. A. 427 [*affirming* 80 Fed. 18].

71. McIlhenny *v.* Binz, 80 Tex. 1, 13 S. W. 655, 26 Am. St. Rep. 705; Smith *v.* Washington City, etc., R. Co., 33 Gratt. (Va.) 617; Union Trust Co. *v.* Illinois Midland R. Co., 117 U. S. 434, 6 S. Ct. 809, 29 L. ed. 963; Queen Anne's Ferry, etc., Co. *v.* Queen Anne's R. Co., 148 Fed. 41.

Moneys expended and liabilities incurred by the receivers or trustees in the management of property intrusted to them constitute preferential claims upon the trust estate which must be paid out of its proceeds before it can be distributed to the beneficiaries. Mercantile Trust Co. *v.* Farmers' L. & T. Co., 81 Fed. 254, 26 C. C. A. 383 [*affirming* 71 Fed. 601].

72. Van Frank *v.* St. Louis, etc., R. Co., 89 Mo. App. 489; *In re* Wrexham, etc., R. Co., [1900] 1 Ch. 261, 69 L. J. Ch. 291, 82 L. T. Rep. N. S. 33, 16 T. L. R. 169, 48 Wkly. Rep. 311 [*modifying* 68 L. J. Ch. 115, 80 L. T. Rep. N. S. 648].

Compensation for counsel of a receiver for services necessary to the successful management of the road is an operating expense. Bayliss *v.* Lafayette, etc., R. Co., 2 Fed. Cas. No. 1,141, 9 Biss. 90, 8 Reporter 579.

Sureties on an appeal-bond for a railroad company having become liable thereon by reason of the company's default, such liability is a current operating expense occurring during the receivership and hence should be paid out of the current earnings. Farmers' L. & T. Co. *v.* Northern Pac. R. Co., 71 Fed. 245.

Expenditures for litigation engaged in by the receivers, but arising from matters anterior to their appointment, and with which they had nothing to do as receivers, cannot be allowed as operating expenses. Bell *v.* St. Johnsbury, etc., R. Co., 76 Vt. 42, 56 Atl. 105.

73. Gregg *v.* Mercantile Trust Co., 109 Fed. 220, 48 C. C. A. 318 (holding that a debt incurred for locomotives acquired to give the road additional motive power is not one which is entitled to preference over mortgage debts merely because the locomotives when acquired passed under the mortgage and added to the security of the mortgage; but while that is a fact to be considered it does not alone warrant the displacement of a mortgage lien but it must further appear that the acquisition was reasonably necessary to the useful operation of the road); Rhode Island Locomotive Works *v.* Continental Trust Co., 108 Fed. 5, 47 C. C. A. 147 (holding, however, that the purchase of certain locomotives was not a necessary current expense). But see Rodger Ballast Car Co. *v.* Omaha, etc., R. Co., 154 Fed. 629, 83 C. C. A. 403.

74. Mercantile Trust, etc., Co. *v.* Southern Iron Car Line, 113 Ala. 543, 21 So. 373 (holding that where car rental contracts are continued in force by receivers appointed in foreclosure proceedings, under license from the court, the car rent becomes a lien on the property superior to the lien of the mortgage debt); Lane *v.* Macon, etc., R. Co., 96 Ga. 630, 24 S. E. 157; St. Louis, etc., R. Co. *v.* O'Hara, 177 Ill. 525, 52 N. E. 734, 53 N. E. 118 [*affirming* 75 Ill. App. 496]; *Re* Cornwall Minerals R. Co., 48 L. T. Rep. N. S. 41. But see Union Trust Co. *v.* Illinois Midland R. Co., 117 U. S. 434, 6 S. Ct. 809, 29 L. ed. 963; Rodger Ballast Car Co. *v.* Omaha, etc., R. Co., 154 Fed. 629, 83 C. C. A. 403; Grand Trunk R. Co. *v.* Central Vermont R. Co., 90 Fed. 163 (holding that a claim against a railroad for car rentals or mileage occurring prior to a receivership is not entitled to payment as a preferential debt); Pullman's Palace-Car Co. *v.* American L. & T. Co., 84 Fed. 18, 28 C. C. A. 263 (holding that the mileage due under a contract for the use of Pullman palace cars is not distinguishable from car rentals and cannot be made a preferred claim on the appointment of a receiver for the railroad company); Mather Humane Stock Transp. Co. *v.* Anderson, 76 Fed. 164, 22 C. C. A. 109 (holding also that the fact that by the terms of a lease of cars to a railroad company a portion of the rent was not due when receivers for the company were appointed, does not give a claim for that portion of the rent a preference over a mortgage on the road recorded before the making of the

betterments were necessary.[75] But it has been held that "operating expenses" do not include claims for damages,[76] or debts for printed matter and stationery,[77] or for advertising matter furnished to the railroad company prior to the appointment of a receiver,[78] or for labor or supplies purchased by the company to be used on a road other than the one which the mortgage covers.[79]

(B) *Debts For Original Construction or Permanent Improvements.* This rule, however, does not ordinarily apply to debts of original construction, since these debts are supposed to be paid out of the fund arising out of the original sale of stocks and bonds and have no claim upon the current earnings of the road through which alone the equities of preferred creditors are reached;[80] nor should this preference be applied to expenditures for repairs so extensive as to amount to permanent improvements such as a reconstruction or the construction of a new

lease). *Compare* Thomas *v.* Western Car Co., 149 U. S. 95, 13 S. Ct. 824, 37 L. ed. 663, where the lessor relied upon the general credit of the company.

75. McIlhenny *v.* Binz, 80 Tex. 1, 13 S. W. 655, 26 Am. St. Rep. 705; Farmers' L. & T. Co. *v.* Vicksburg, etc., R. Co., 33 Fed. 778. *Compare* Terre Haute, etc., R. Co. *v.* Harrison, 88 Fed. 913, 32 C. C. A. 130.

76. See *infra*, VIII, A, 9, j.

77. Van Frank *v.* St. Louis, etc., R. Co., 89 Mo. App. 489; Bell *v.* St. Johnsbury, etc., R. Co., 76 Vt. 42, 56 Atl. 105, holding this to be true under St. § 3803, giving to railroad creditors "having claims for services rendered and materials furnished to keep the road in repair, and run the same" a certain preference in the personalty and net earnings.

Bills for advertising the road, its trains, etc., contracted by a committee while in the management of the road, are for legitimate operating expenses and are entitled to priority as such, equally as though they had been contracted by the trustee in possession. Queen Anne's Ferry, etc., Co. *v.* Queen Anne's R. Co., 148 Fed. 41.

78. Central Trust Co. *v.* East Tennessee, etc., R. Co., 80 Fed. 624, 26 C. C. A. 30.

79. Southern R. Co. *v.* Chapman Jack Co., 117 Fed. 424, 54 C. C. A. 598; Southern R. Co. *v.* Ensign Mfg. Co., 117 Fed. 417, 54 C. C. A. 591.

80. *Arkansas.*— Barstow *v.* Pine Bluff, etc., R. Co., 57 Ark. 334, 21 S. W. 652.

Georgia.— Farmers' L. & T. Co. *v.* Candler, 92 Ga. 249, 18 S. E. 540, holding that a railroad contractor has no priority as against the lien of a mortgage upon a railroad because his supplies or materials went to make up its real value.

Michigan.— Ten Eyck *v.* Pontiac, etc., R. Co., 114 Mich. 494, 72 N. W. 362.

Texas.— McIlhenny *v.* Binz, 80 Tex. 1, 13 S. W. 655, 26 Am. St. Rep. 705.

United States.— Lackawanna Iron, etc., Co. *v.* Farmers' L. & T. Co., 176 U. S. 298, 20 S. Ct. 363, 44 L. ed. 475 [*affirming* 79 Fed. 202, 24 C. C. A. 487]; Toledo, etc., R. Co. *v.* Hamilton, 134 U. S. 296, 10 S. Ct. 546, 33 L. ed. 905; Porter *v.* Pittsburg Bessemer Steel Co., 120 U. S. 649, 7 S. Ct. 741, 30 L. ed. 830, 122 U. S. 267, 7 S. Ct. 1206, 30 L. ed. 1210; Niles Tool Works Co. *v.* Louisville, etc., R. Co., 112 Fed. 561, 50 C. C. A. 390; Farmers' L. & T. Co. *v.* Stuttgart, etc., R. Co., 92 Fed. 246; Farmers' L. & T. Co. *v.* Cape Fear, etc., R. Co., 73 Fed. 712.

See 41 Cent. Dig. tit. "Railroads," §§ 563–567.

Original construction.— The term has a technical meaning. It is that construction of bridges, grades, culverts, rails, ties, docks, etc., that is necessary to be done before the road can be opened, or before they can be occupied or used, and not such structures as are intended to replace old and wornout counterparts. Cleveland, etc., R. Co. *v.* Knickerbocker Trust Co., 86 Fed. 73, 76.

Claims of contractors and laborers for labor performed in the construction of a railroad subsequent to the execution of a mortgage on the road will not be allowed except as postponed to the mortgage debt; and this is true whether or not mechanics' or laborers' liens have been filed in the proper court. Contracts made prior to the execution of the mortgage and work done thereunder create no lien superior to that of the mortgage. Claims of contractors and laborers for labor performed in the construction of a railroad subsequent to the execution of the mortgage to secure its bonds will not be allowed except as postponed to the bondholders notwithstanding the work is performed and mechanics' and laborers' liens filed in the proper court before the registration of the mortgage. Tommey *v.* Spartanburg, etc., R. Co., 7 Fed. 429, 4 Hughes 640.

A claim for cutting down and clearing away timber for the road for its original construction cannot be given preference upon foreclosure of a prior mortgage on the road. Barstow *v.* Pine Bluff, etc., R. Co., 57 Ark. 334, 21 S. W. 652.

A guarantor of such a debt who pays the debt has no greater claim in equity to a lien on the road superior to the prior mortgage than the original creditor would have if unpaid. Farmers' L. & T. Co. *v.* Stuttgart, etc., R. Co., 92 Fed. 246.

A purchaser of notes executed by one railroad company cannot establish a lien therefor on the property of another superior to that of a prior mortgage, merely because the maker used the proceeds in the construction of the second road. Farmers' L. & T. Co. *v.* Stuttgart, etc., R. Co., 92 Fed. 246.

road.[81] It has been held, however, that there may be construction claims which appeal as strongly to the conscience of a court of equity as the debts which are commonly known as operating expenses;[82] and when mortgages are executed upon an unfinished road and they show upon their face that it was contemplated that the work of construction should be prosecuted to completion, the new road should be considered "a useful improvement," and if the road be put into the hands of a receiver before the work and materials are paid for the holders of the claims for such work and materials should be paid from the net earnings of the road while under control of the court.[83]

(c) *Accrual of Indebtedness.* In respect to debts incurred before a receiver was appointed, in order that they may be entitled to priority within the meaning of the above rule, they must have been incurred within a reasonable time before the receiver was appointed and left unpaid because of the sudden action of the court in making such appointment.[84] The determination of this period is ordinarily within the sound discretion of the court having jurisdiction of the accounts,[85] and has usually been fixed at six months before the appointment of the receiver,[86] although as to such debts there is no arbitrary six months' rule,[87] and the equities of the case may be such that a claim will be allowed preference if incurred within a year,[88] or even for a longer period, as where the services are rendered or supplies furnished under a continuous contract,[89] or where the delay in enforcing payment was not caused by the creditor.[90] But if the debt has become an ordinary floating

81. Powers *v.* Jourdan, 4 N. Y. St. 839; Lackawanna Iron, etc., Co. *v.* Farmers' L. & T. R. Co., 176 U. S. 298, 20 S. Ct. 363, 44 L. ed. 475 [*affirming* 79 Fed. 262, 24 C. C. A. 487]; Phinizy *v.* Augusta, etc., R. Co., 62 Fed. 771.

82. McIlhenny *v.* Binz, 80 Tex. 1, 13 S. W. 655, 26 Am. St. Rep. 705.

83. McIlhenny *v.* Binz, 80 Tex. 1, 13 S. W. 655, 26 Am. St. Rep. 705.

84. Drennen *v.* Mercantile Trust, etc., Co., 115 Ala. 592, 23 So. 164, 67 Am. St. Rep. 72, 39 L. R. A. 623; New York Cent. Trust Co. *v.* Utah Cent. R. Co., 16 Utah 12, 50 Pac. 813; Southern R. Co. *v.* Ensign Mfg. Co., 117 Fed. 417, 54 C. C. A. 591; Central Trust Co. *v.* East Tennessee, etc., R. Co., 80 Fed. 624, 26 C. C. A. 30; Morgan's Louisiana, etc., R., etc., Co. *v.* Farmers' L. & T. Co., 79 Fed. 210, 24 C. C. A. 495; Blair *v.* St. Louis, etc., R. Co., 23 Fed. 521 (holding that attorney's fees earned a year and a half before the appointment of a receiver are not entitled to any preference); Gooderham *v.* Toronto, etc., R. Co., 8 Ont. App. 685.

One whose claim accrued more than seventeen months before the impounding of the property by the mortgage bondholders, and who extended the time for its payment for eighteen months after it was due, is not entitled to a preference over the mortgage bondholders either out of the income or out of the proceeds of the mortgaged property. Westinghouse Air Brake Co. *v.* Kansas City Southern R. Co., 137 Fed. 26, 71 C. C. A. 1 [*reversing* on other grounds 128 Fed. 129, 129 Fed. 455].

85. Central Trust Co. *v.* East Tennessee, etc., R. Co., 80 Fed. 624, 26 C. C. A. 30.

In fixing the time within which such claims will be allowed and ordered paid the court will adopt by analogy the rule of the state statutes in relation to liens on railroads for work done and supplies and materials furnished. Turner *v.* Indianapolis, etc., R. Co., 24 Fed. Cas. No. 14,258, 8 Biss. (U. S.) 315.

86. Gregg *v.* Metropolitan Trust Co., 197 U. S. 183, 25 S. Ct. 415, 49 L. ed. 717 [*affirming* 124 Fed. 721, 59 C. C. A. 637]; Westinghouse Air Brake Co. *v.* Kansas City S. R. Co., 137 Fed. 26, 71 C. C. A. 1 [*reversing* on other grounds 128 Fed. 129, 129 Fed. 455]; Southern R. Co. *v.* Chapman Jack Co., 117 Fed. 424, 54 C. C. A. 598; Monsarrat *v.* Mercantile Trust Co., 109 Fed. 230, 48 C. C. A. 328; Gregg *v.* Mercantile Trust Co., 109 Fed. 220, 48 C. C. A. 318; Thomas *v.* Cincinnati, etc., R. Co., 91 Fed. 195; Central Trust Co. *v.* East Tennessee, etc., R. Co., 80 Fed. 624, 26 C. C. A. 30; Farmers' L. & T. Co. *v.* Vicksburg, etc., R. Co., 33 Fed. 778; Blair *v.* St. Louis, etc., R. Co., 22 Fed. 471. See Cleveland, etc., R. Co. *v.* Knickerbocker Trust Co., 86 Fed. 73.

The reason that six months is approximately the limited time within which preferential claims must accrue is that there is usually an interval of six months between the dates when instalments of interest upon the bonds fall due, and the mortgages generally so provide, and the warranted inference is that, when an instalment of interest is paid, current expenses to that time have either been paid, or funds to pay them have been lawfully provided. Westinghouse Air Brake Co. *v.* Kansas City, 137 Fed. 26, 71 C. C. A. 1.

87. Northern Pac. R. Co. *v.* Lamont, 69 Fed. 23, 16 C. C. A. 364.

88. Vanfrank *v.* Missouri Pac. R. Co., 89 Mo. App. 460; Southern R. Co. *v.* Carnegie Steel Co., 176 U. S. 257, 20 S. Ct. 347, 44 L. ed. 458 [*affirming* 76 Fed. 492, 22 C. C. A. 289].

89. Blair *v.* St. Louis, etc., R. Co., 22 Fed. 769.

90. Central Trust Co. *v.* Utah Cent. R. Co., 16 Utah 12, 50 Pac. 813.

debt, which must be determined from the facts of each particular case, it is not entitled to preference.[91]

(D) *Debt Contracted on Faith of Current Income.* It is also essential, in order that such debts may have priority, that the person furnishing the labor or supplies must have relied upon the fact that the current earnings would be applied to the payment of his debt, and not have contracted upon the personal responsibility of the railroad company or another;[92] and whether the debt was contracted upon the personal credit of the company, without any reference to its receipts, is to be determined in each case by the amount of the debt, the time and terms of payment, and all other circumstances attending the transaction.[93]

(V) *Rights of Assignees.* An assignee of a claim for labor or supplies furnished to a railroad company has the same right to assert the priority of the assigned claim as the assignor had.[94]

h. Statutory Liens in General. The rights of laborers and materialmen to priority over mortgages and encumbrances on railroad property is in some jurisdictions expressly regulated by statute.[95] Under some statutes a person who

91. Duncan *v.* Mobile, etc., R. Co., 8 Fed. Cas. No. 4,137, 2 Woods 542. See Brown *v.* New York, etc., R. Co., 19 How. Pr. (N. Y.) 84.

92. Virginia, etc., Coal Co. *v.* Central R., etc., Co., 170 U. S. 355, 18 S. Ct. 657, 42 L. ed. 1068; Thomas *v.* Western Car Co., 149 U. S. 95, 13 S. Ct. 824, 34 L. ed. 663; Penn *v.* Calhoun, 121 U. S. 251, 7 S. Ct. 906, 30 L. ed. 915; Fordyce *v.* Kansas City, etc., R. Co., 145 Fed. 566; Southern R. Co. *v.* Ensign Mfg. Co., 117 Fed. 417, 54 C. C. A. 591; Rhode Island Locomotive Works *v.* Continental Trust Co., 108 Fed. 5, 47 C. C. A. 147; Ruhlender *v.* Chesapeake, etc., R. Co., 91 Fed. 5, 33 C. C. A. 299 (holding that where steel rails were sold to an individual on his own credit for the lessee of a railroad, the seller is not entitled to a preferential lien therefor on the property of the lessor); Louisville, etc., R. Co. *v.* Central Trust Co., 87 Fed. 500, 31 C. C. A. 89; Morgan's Louisiana, etc., R., etc., Co. *v.* Farmers' L. & T. Co., 79 Fed. 210, 24 C. C. A. 495; Skiddy *v.* Atlantic, etc., R. Co., 22 Fed. Cas. No. 12,922, 3 Hughes 320.

93. Southern R. Co. *v.* Carnegie Steel Co., 176 U. S. 257, 20 S. Ct. 347, 44 L. ed. 458 [*affirming* 76 Fed. 492, 22 C. C. A. 289].

Demanding and receiving collateral security to a large amount for a debt on account of rails to be used in repairing the road is a circumstance tending to show that the seller did not regard itself as entitled to an equitable claim upon net earnings in preference to mortgage creditors, but relied on the general credit of the railroad company. Lackawanna Iron, etc., Co. *v.* Farmers' L. & T. Co., 176 U. S. 293, 20 S. Ct. 363, 44 L. ed. 475 [*affirming* 79 Fed. 202, 24 C. C. A. 487]. But the equities of a creditor furnishing that which protects and preserves the mortgage security and materially increases its value are none the less because the original debt was evidenced by the notes of the company, taken for its convenience and renewed for its accommodation. Southern R. Co. *v.* Carnegie Steel Co., 176 U. S. 257, 20 S. Ct. 347, 44 L. ed. 458 [*affirming* 76 Fed. 492, 22 C. C. A. 289].

94. Drennen *v.* Mercantile Trust, etc., Co., 115 Ala. 592, 23 So. 164, 67 Am. St. Rep. 72, 39 L. R. A. 623; Farmers' L. & T. Co. *v.* Cincinnati, etc., R. Co., 10 Ohio Dec. (Reprint) 481, 21 Cinc. L. Bul. 275 (holding that the assignee of a claim for supplies furnished in the construction of a railroad under Rev. St. § 3398, is entitled to the same right of priority as the original claimant would have been had the judgment been taken by him); Union Trust Co. *v.* Walker, 107 U. S. 596, 2 S. Ct. 299, 27 L. ed. 490; Columbus, etc., R. Co.'s Appeal, 109 Fed. 177, 48 C. C. A. 275 (holding that the right of preference attaching to a labor claim against an insolvent railroad company inheres in the claim itself and not in the claimant and passes with the claim to an assignee); Northern Pac. R. Co. *v.* Lamont, 69 Fed. 23, 16 C. C. A. 364.

95. See Kilpatrick *v.* Kansas City, etc., R. Co., 38 Nebr. 620, 57 N. W. 664, 41 Am. St. Rep. 741 (construing Comp. St. (1893) c. 54, art. 2, §§ 2, 3); Rousculp *v.* Ohio Southern R. Co., 19 Ohio Cir. Ct. 436, 10 Ohio Cir. Dec. 621 (construing Rev. St. § 3208, as amended by act of April 6, 1883, and holding the lien of one who had furnished material for the construction of a railroad extension to be prior to the liens of trustees); Poland *v.* Lamoille Valley R. Co., 52 Vt. 144 (construing Gen. St. c. 28, § 102); Jessup *v.* Atlantic, etc., R. Co., 13 Fed. Cas. No. 7,299, 3 Woods 441; and, generally, the statutes of the several states.

Under Va. Code, §§ 2485, 2486, the claim of a telegraph company against a railroad company for services rendered under a contract by which the railroad company was to pay at agreed rates, and by which the accounts were to be settled yearly, is a labor claim and entitled to priority over mortgages if recorded within six months after maturity. Newgass *v.* Atlantic, etc., R. Co., 72 Fed. 712.

Under Ky. St. (Barbour & Car. St. §§ 2492-2495) relative to mechanics' liens upon railroads, consent by an owner to the making of a subcontract by the principal contractor and

furnishes labor and materials for constructing a railroad, and who complies with certain statutory requirements, has a lien on the road for the amount due him therefor in preference to mortgages and other encumbrances on the road given after the actual commencement of the work of construction,[96] even though the mortgages or liens existed at the time the labor or material were furnished, but were given after the work had commenced,[97] or after the passage of the stat-

to such subcontractors having a lien, does not give such subcontractor a principal contractor's lien or a lien superior to mortgages or statutory liens. Richmond, etc., Constr. Co. *v.* Richmond, etc., R. Co., 68 Fed. 105, 15 C. C. A. 289, 34 L. R. A. 625.

Tenn. Act (1877), c. 72, p. 92, providing that no railroad company shall have power to execute any mortgage or other lien which shall be valid as against judgments for work and labor done or materials furnished, applies only when the work and materials are furnished in such manner that the railroad company would be liable to pay the contractor or materialman for them, and not when they are furnished to a principal contractor in his individual capacity, without establishing a lien in the manner prescribed by the Tennessee act of March 29, 1883. Central Trust Co. *v.* Bridges, 57 Fed. 753, 6 C. C. A. 539. And if in the latter case judgments are nevertheless fraudulently obtained against the company, the statute will not prevent a court of equity from disregarding them. Central Trust Co. *v.* Bridges, *supra*. Nor does the act of 1877 include materials furnished and work done in the company's machine shops on locomotives; or railroad supplies, such as tools, spikes, hardware, etc. Chattanooga, etc., R. Co. *v.* Evans, 66 Fed. 809, 14 C. C. A. 116.

Rights of holders of certificates entitling them to bonds secured by a mortgage under a Mississippi statute have been held not to be entitled to a first lien as against those who furnished labor and materials for the construction of the road. See Thompson *v.* Memphis, etc., R. Co., 24 Fed. 338.

96. Collins *v.* Central Bank, 1 Ga. 435 (construing section 11 of the charter of the Monroe Railroad, etc., Company); St. Louis, etc., R. Co. *v.* Kerr, 153 Ill. 182, 38 N. E. 638 (construing Rev. St. c. 82, §§ 55–57, and holding that a subcontractor who has served a proper notice in due time has a lien superior to a mortgage given before service of notice but after commencement of work by him); Chicago, etc., R. Co. *v.* Union Rolling Mills Co., 109 U. S. 702, 3 S. Ct. 594, 27 L. ed. 1081.

Under the laws of Iowa, a mechanic's lien for work done under a contract takes precedence of all encumbrances put on the property by a mortgage or otherwise after the work is commenced (Meyer *v.* Delaware R. Constr. Co., 100 U. S. 457, 25 L. ed. 593); and work done by a contractor upon a part of a railroad then in process of construction entitles him to a lien over that of a prior mortgage over the entire road (Meyer *v.* Egbert, 101 U. S. 728, 25 L. ed. 1078). Thus under Iowa Code (1897), §§ 3091–3095, a builder constructing a union depot for a terminal railway and warehouse corporation, which is a railroad company within the statute, and where the building of such depot was the real and primary purpose of the corporation's organization, has a mechanic's lien on the corporation's entire railroad property prior to encumbrances and liens accruing subsequent to the beginning of the work. Beach *v.* Wakefield, 107 Iowa 567, 76 N. W. 688, 78 N. W. 197.

Under Oreg. Laws (1889), p. 75, which confers on a subcontractor performing work for a contractor of a railroad company, a lien on the road to the amount of the contract price, on serving notice of his lien on the company, such lien attaches only for the amount actually due the contractor from the company at the time notice is served; and hence a judgment creditor of the contractor who has garnished the company for the amount due the contractor is entitled to priority over a subcontractor who afterward files his notice of lien with the company. Coleman *v.* Oregonian R. Co., 25 Oreg. 286, 35 Pac. 656.

Under the Pennsylvania statute of Jan. 21, 1843, an unpaid contractor, laborer, or workman employed in the construction of a railroad in Pennsylvania has a lien of indefinite duration on such road, which lien has precedence over every right that can be acquired by or under any mortgage made after the debt to the contractor was incurred. Fox *v.* Seal, 22 Wall. (U. S.) 424, 22 L. ed. 774. And this act was not repealed by the act of April 12, 1851, authorizing a certain railroad company to execute a mortgage. Fox *v.* Seal, *supra*.

The North Carolina act of March 1, 1873 (Pub. Laws (1872), c. 131, Battle Revisal, pp. 269, 270, c. 26, §§ 46, 48), applies only to private corporations, and will not give a priority of lien to the claims of materialmen and laborers upon the foreclosure of a railroad mortgage. Buncombe County *v.* Tommey, 115 U. S. 122, 5 S. Ct. 626, 29 L. ed. 305.

A mortgage on a railroad to be built cannot take priority over the statutory liens of laborers and materialmen for aid in constructing the road, unless the mortgagee is a *bona fide* purchaser who has actually paid value for bonds secured by the mortgage before he has notice of the liens of laborers and materialmen. Farmers' L. & T. Co. *v.* Canada, etc., R. Co., 127 Ind. 250, 26 N. E. 784, 11 L. R. A. 740.

97. Under the Iowa laws, the lien accorded to mechanics and materialmen employed in the construction of a railroad dates from the commencement of construction and has priority over a mortgage executed during the building, although before the particular work or material for which the claim is made were contributed. Brooks *v.* Burlington, etc., R.

ute,[98] unless the claimant has waived or is estopped to assert his claim or lien.[99] But such claims for labor and material are generally not entitled to preference over mortgages or encumbrances upon the road given before the work was commenced,[1] or before the statute took effect,[2] unless at the date of the execution and delivery of the mortgage the proposed railroad had only a nominal existence and possessed no right of way or franchises.[3] Such a statutory lien is also superior to an allowance to counsel of the railroad company.[4]

i. Liens For Loans and Advances. Where advances are made or liabilities incurred by third parties at the request and for the benefit of the trustees, receiver, or bondholders under a railroad mortgage, for the purpose of preserving the mortgaged property for the benefit of the bondholders, such advances or liabilities may constitute a preferential claim against the income or *corpus* of the property for which it was incurred.[5] Thus debts due for advances made upon such request, to pay operating expenses are entitled to priority of payment out of the current income,[6] such as advances made for the purpose of paying taxes,[7] wages due to

Co., 101 U. S. 443, 25 L. ed. 1057; Taylor *v.* Burlington, etc., R. Co., 23 Fed. Cas. No. 13,783, 4 Dill. 570. But under such statutes, the lien of a mechanic for repairs upon a completed railroad is not paramount and superior to the lien of a mortgage executed after the commencement and before the completion of the road, nor will the lien of the mechanic upon the particular work performed by him take precedence of a mortgage, when the improvements he has made constitute an integral part of the road. Bear *v.* Burlington, etc., R. Co., 48 Iowa 619.

98. Central Trust Co. *v.* Louisville, etc., R. Co., 70 Fed. 282.

99. Poland *v.* Lamoille Valley R. Co., 52 Vt. 144 (holding, however, that a creditor's priority under Gen. St. c. 28, § 102, is not waived by his taking a note for his claim); Chicago, etc., R. Co. *v.* Union Rolling Mill Co., 109 U. S. 702, 3 S. Ct. 594, 27 L. ed. 1081 (holding that the lien for materials furnished under Ill. Rev. St. c. 82, § 51, is not waived either by a provision of the contract reserving a lien to the contractor or by a credit given the purchaser beyond the statutory time for enforcing the lien); Meyer *v.* Egbert, 101 U. S. 728, 25 L. ed. 1078 (holding that a railroad contractor who was a stock-holder in a construction company which, when it placed on the market bonds secured by a mortgage, gave a guarantee that the local subscriptions and grants would be sufficient to prepare the road for the reception of the rails, and also undertook to make good any deficiency, is not thereby estopped from setting up his lien as against the mortgagee).

1. See Metropolitan Trust Co. *v.* Tonawanda Valley, etc., R. Co., 103 N. Y. 245, 8 N. E. 488 [*reversing* 40 Hun 80]; Reed's Appeal, 122 Pa. St. 565, 16 Atl. 100.

In Texas, under Sayles Rev. Civ. St. arts. 3294–3301, claims for material furnished for the construction or repair of a railroad are subordinate to the rights of holders of the mortgage bonds where the mortgage was on the road at the time of the inception of the lien given by such statute, unless the material was for new construction constituting a betterment whereby the security of the mortgage was increased. Waters-Pierce Oil Co. *v.* U. S., etc., Trust Co., 44 Tex. Civ. App. 397, 99 S. W. 212.

Prior vendor's lien.—A construction company has no lien upon the road-bed and property of the road as against the conditional vendor of such road under a contract existing before the work had been *bona fide* begun by such construction company, and where it had actual notice of the contract before that time. Wright *v.* Kentucky, etc., R. Co., 117 U. S. 72, 6 S. Ct. 697, 29 L. ed. 821.

Under the Ohio railroad lien laws, a lien good as against prior mortgages cannot be obtained for work and labor furnished in the reconstruction of a bridge. Cleveland, etc., R. Co. *v.* Knickerbocker Trust Co., 86 Fed. 73.

2. Andrews *v.* St. Louis Tunnel R. Co., 16 Mo. App. 299 (holding that a deed of trust executed prior to the passage of the act providing for liens on railroads is superior to a lien for materials furnished for the road after the passage of the act, but prior to the expiration of the ninety days within which it was not effective); Feike *v.* Chicago, etc., R. Co., 12 Ohio Cir. Ct. 362, 5 Ohio Cir. Dec. 640 (so construing Rev. St. § 3208, amended April 6, 1893); Central Trust Co. *v.* Louisville, etc., R. Co., 70 Fed. 282; Barnhill *v.* Hampton, etc., R. Co., 3 N. Brunsw. Eq. 371.

3. Kilpatrick *v.* Kansas City, etc., R. Co., 38 Nebr. 620, 57 N. W. 664, 41 Am. St. Rep. 741.

4. New Castle Northern R. Co. *v.* Simpson, 26 Fed. 133, construing the Pennsylvania act of Jan. 21, 1843.

5. Jones *v.* Central Trust Co., 73 Fed. 568, 19 C. C. A. 569; Brockville *v.* Sherwood, 7 Grant Ch. (U. C.) 297. See Allan *v.* Manitoba, etc., R. Co., 10 Manitoba 143.

6. Humphreys *v.* Allen, 100 Ill. 511; Farmers' L. & T. Co. *v.* Vicksburg, etc., R. Co., 33 Fed. 778; Sage *v.* Shore Line R. Co., 2 N. Brunsw. Eq. 321.

7. Humphreys *v.* Allen, 100 Ill. 511 (holding that the president of a railway company who advances from his own means money to save the property from levy and sale for unpaid taxes is entitled to a lien on the fund in court for distribution paramount to the claims of other creditors); Farmers' L. & T.

employees,[8] or traffic balances.[9] The mere fact, however, that money loaned to a railroad company is applied to the payment of operating expenses,[10] or to the payment of interest on its first mortgage bonds,[11] does not entitle the lender to a preference over the mortgage bondholders, although the earnings of the road were applied to the payment of interest on the bonds;[12] particularly where the advances amount merely to a loan upon the credit of the company,[13] or where there has been no diversion of such funds to the benefit of the bondholders.[14] Advances for the purpose of completing the construction of a railroad will be postponed in equity to the lien of the mortgage bondholders,[15] unless such advances are made in consequence of the requests. promises, and acts of all the bondholders.[16] One advancing money to pay for certain railroad property, taking title to himself as security, has a lien thereon superior to the mortgagees of the railroad company with notice,[17] and any change in the form of the obligation to him short of an actual payment, does not extinguish his right to priority.[18]

j. Liens For Damages. Under the statutes in some jurisdictions a judgment for damages to property,[19] or for personal injuries,[20] for which the railroad com-

Co. *v.* Stuttgart, etc., R. Co., 92 Fed. 246 (holding that one who at the request of a railroad company, as its agent, pays taxes due on its property is entitled to a lien thereon for the amount advanced superior to that of a mortgage).

8. Farmers' L. & T. Co. *v.* Vicksburg, etc., R. Co., 33 Fed. 778; Atkins *v.* Petersburg R. Co., 1 Fed. Cas. No. 604, 3 Hughes 307.

9. Farmers' L. & T. Co. *v.* Vicksburg, etc., R. Co., 33 Fed. 778.

10. Morgan's Louisiana, etc., R., etc., Co. *v.* Texas Cent. R. Co., 137 U. S. 171, 11 S. Ct. 61, 34 L. ed. 625.

11. Morgan's Louisiana, etc., R., etc., Co. *v.* Texas Cent. R. Co., 137 U. S. 171, 11 S. Ct. 61, 34 L. ed. 625; Kentucky Contracting, etc., Co. *v.* Continental Trust Co., 108 Fed. 1, 47 C. C. A. 143.

12. Morgan's Louisiana, etc., R., etc., Co. *v.* Texas Cent. R. Co., 137 U. S. 171, 11 S. Ct. 61, 34 L. ed. 625.

13. New Jersey Midland R. Co. *v.* Wortendyke, 27 N. J. Eq. 658; Penn *v.* Calhoun, 121 U. S. 251, 7 S. Ct. 906, 30 L. ed. 915; Southern Development Co. *v.* Farmers' L. & T. Co., 79 Fed. 212, 24 C. C. A. 497; Peninsular Iron Co. *v.* Eells, 68 Fed. 24, 15 C. C. A. 189; Blair *v.* St. Louis, etc., R. Co., 23 Fed. 521, holding that one who pays a judgment against a railroad company a few weeks before the appointment of a receiver under an agreement that the amount so advanced shall be repaid by the company is not entitled to priority over bondholders.

14. Penn *v.* Calhoun, 121 U. S. 251, 7 S. Ct. 906, 30 L. ed. 915.

15. Kelly *v.* Green Bay, etc., R. Co., 5 Fed. 846, 10 Biss. 151.

16. Kelly *v.* Green Bay, etc., R. Co., 5 Fed. 846, 10 Biss. 151.

17. Columbus, etc., R. Co.'s Appeal, 109 Fed. 177, 48 C. C. A. 275. *Compare* Frost *v.* Galesburg, etc., R. Co., 167 Ill. 161, 47 N. E. 357 [*affirming* 68 Ill. App. 186].

18. Frost *v.* Galesburg, etc., R. Co., 167 Ill. 161, 47 N. E. 357 [*affirming* 68 Ill. App. 186].

19. Hill *v.* Southern R. Co., (Tenn. Ch. App. 1897) 42 S. W. 888; State *v.* Port Royal, etc., R. Co., 84 Fed. 67, holding that a judgment against a railroad company for injuries to personal property, when rendered in a suit brought within twelve months from the time the cause of action arose, is a lien prior to that of a railroad mortgage.

Under the Tennessee act of 1877, a judgment against a railroad company for damage caused by the negligent failure to promptly deliver goods which in consequence were burned in the station is one for damages to property in the operation of the road within the meaning of such statute preferring such a judgment over mortgages. Central Trust Co. *v.* East Tennessee, etc., R. Co., 70 Fed. 764. But such statute does not apply to damages resulting from the detention of freight shipped over the line, unless such damage was occasioned by an actual injury to the property, and unless the same occurred within the state. Chattanooga, etc., R. Co. *v.* Evans, 66 Fed. 809, 14 C. C. A. 116.

Vt. Rev. Laws (1880), § 3353, giving claims against a railroad company for "the loss of property while in the possession of said corporation" preference over mortgages given by the company, applies only to liabilities growing out of the operation of a railroad within the state, and does not include a claim based upon covenants of a lease of a railroad in another state. Grand Trunk R. Co. *v.* Central Vermont R. Co., 91 Fed. 696.

20. Burlington, etc., R. Co. *v.* Verry, 48 Iowa 458 (construing Code (1873), § 1309); Frazier *v.* East Tennessee, etc., R. Co., 88 Tenn. 138, 12 S. W. 537; Barnett *v.* East Tennessee, etc., R. Co., (Tenn. Ch. App. 1898) 48 S. W. 817 (construing Acts (1877), c. 12, § 3); Hill *v.* Southern R. Co., (Tenn. Ch. App. 1897) 42 S. W. 888; King *v.* Thompson, 110 Fed. 319, 49 C. C. A. 59 (construing Ohio Rev. St. (1880) §§ 3393-3400); Southern R. Co. *v.* Bouknight, 70 Fed. 442, 17 C. C. A. 181, 30 L. R. A. 823 (holding that S. C. Gen. St. (1882) § 1528, providing that a judgment against a railroad company for personal injuries shall be a lien as of the date of the injury superior to the lien of any mortgage to secure bonds is binding on a mortgagee in a mortgage made after the passage of the

pany is responsible, constitutes a lien on the railroad property prior to that of mortgage creditors,[21] from the date the cause of action arose,[22] unless the claimant has by his own acts waived his lien or estopped himself from asserting it,[23] and except, under some statutes, as to mortgages or liens in existence at the time of the passage of the act.[24] The costs necessarily resulting from the action to procure such judgment and to enforce the lien are entitled to like priority.[25] Under some statutes such claims are not entitled to priority until they have been reduced to judgment even though an action thereon is pending,[26] except where the claim has become liquidated by a settlement with the company.[27] In the absence of statute, however, such priority does not exist over preëxisting liens.[28] Nor does such statute apply to a judgment against a lessee of a railroad so as to render it a lien on the property superior to a mortgage given by the lessor prior to the lease;[29] nor does it give the judgment creditor any right to payment from earnings of the road while in the hands of receivers, where all rights and interests of the lessee in the property and earnings are extinguished by such appointment and a subsequent sale of the property is for less than the mortgage debt.[30] So where a lessee assumes all obligations incurred in the operation of the leased road, including judgments for negligence, accidents, etc., the net earnings of the leased road accruing in the hands of the receivers of the company are not chargeable with judgments obtained during the receivership for losses sustained prior thereto.[31] A claim or judgment for damages, however, is not ordinarily entitled to priority on the ground that it is an operating expense,[32] although it has been held that

act, and on a purchaser at a foreclosure sale thereunder); Phinizy *v.* Augusta, etc., R. Co., 63 Fed. 922; Pennsylvania Finance Co. *v.* Charleston, etc., R. Co., 62 Fed. 205, 10 C. C. A. 323 (holding that under N. C. Code, §§ 685, 1255, on foreclosure of a railroad mortgage a judgment for personal injuries will take precedence of the mortgage in the distribution of the proceeds of sale, although the action on which judgment was founded was not brought within sixty days of the registration of the mortgage); Central Trust Co. *v.* Central Iowa R. Co., 38 Fed. 889.

21. Fidelity Ins., etc., Co. *v.* Norfolk, etc., R. Co., 127 Fed. 662, 62 C. C. A. 388 [*affirming* 114 Fed. 389 (*affirming* 90 Fed. 175)].

Under S. C. Gen. St. (1882) § 1528, a purchaser at a foreclosure sale under a mortgage given after the passage of the act by a consolidated company composed of companies of South Carolina and of Georgia, cannot complain of the priority of a judgment entered under the act of South Carolina, against the consolidated company, for injuries received in Georgia. Southern R. Co. *v.* Bouknight, 70 Fed. 442, 17 C. C. A. 181, 30 L. R. A. 823. So a judgment recovered against a railroad company in South Carolina for an injury caused by a lessee of its road for an act done in Georgia is entitled to the benefit of the South Carolina statute giving such judgment precedence over the mortgage. Central Trust Co. *v.* Charlotte, etc., R. Co., 65 Fed. 257.

22. Southern R. Co. *v.* Bouknight, 70 Fed. 442, 17 C. C. A. 181, 30 L. R. A. 823.

A provision that the lien of the judgment shall relate back to the date of the injury is intended only to fix priorities between conflicting liens, and does not destroy the preference of such judgment over mortgages. Southern R. Co. *v.* Bouknight, 70 Fed. 442, 17 C. C. A. 181, 30 L. R. A. 823.

23. Hill *v.* Southern R. Co., (Tenn. Ch. App. 1897) 42 S. W. 888, holding that Tenn. Act (1887), c. 12, § 13, providing that no railroad company shall give or create any mortgage or other lien on its property which shall be valid and binding against judgments and executions thereon for damages to persons and property, in the operation of its railroad, does not give the holder of such a judgment the right to assert his claim, where general creditors' proceedings have been instituted and due notice given him to participate therein, and he has failed to do so, and the whole estate has been finally wound up.

24. Phinizy *v.* Augusta, etc., R. Co., 63 Fed. 922. See Southern R. Co. *v.* Bouknight, 70 Fed. 442, 17 C. C. A. 181, 30 L. R. A. 823.

25. Central Trust Co. *v.* Central Iowa R. Co., 38 Fed. 889.

26. Burlington, etc., R. Co. *v.* Verry, 48 Iowa 458.

27. Frazier *v.* East Tennessee, etc., R. Co., 88 Tenn. 138, 12 S. W. 537.

28. Farmers' L. & T. Co. *v.* Longworth, 83 Fed. 336, 27 C. C. A. 541 (holding that a judgment creditor whose claim originated in the negligent act of the railroad company's servant is not entitled to a preference over the holders of preëxisting liens); Farmers' L. & T. Co. *v.* Nestelle, 79 Fed. 748, 25 C. C. A. 194; Farmers' L. & T. Co. *v.* Northern Pac. R. Co., 79 Fed. 227, 24 C. C. A. 511.

29. Fidelity Ins., etc., Co. *v.* Norfolk, etc., R. Co., 127 Fed. 662, 62 C. C. A. 388 [*affirming* 114 Fed. 389].

30. Fidelity Ins., etc., Co. *v.* Norfolk, etc., R. Co., 127 Fed. 662, 62 C. C. A. 388 [*affirming* 114 Fed. 389].

31. Grand Trunk R. Co. *v.* Central Vermont R. Co., 81 Fed. 60.

32. Fidelity Ins., etc., Co. *v.* Norfolk, etc., R. Co., 127 Fed. 662, 62 C. C. A. 388 [*affirm-*

where the receiver is in possession, a claim for personal injuries happening during such possession is an operating expense entitled to priority.[33] A claim for damages to abutting property resulting from the construction and operation of a railroad stands on the same footing as a claim for a taking of property and constitutes an equitable lien which has priority over a mortgage of the road.[34]

k. Liens For Rent of Track or Terminal Privileges. Reasonable rentals due for track or terminal privileges which are necessary to keep the road a going concern constitute an operating expense within the meaning of the rule entitling such expenses to priority of payment over mortgage creditors,[35] except where the provisions of the lease clearly indicate that the lessor did not rely upon the rentals as constituting an equitable charge upon the current income.[36] But this rule does not apply to rentals due to leased lines which were not necessary to the operation of the road.[37] Claims for rent, however, are superior in equity to the payment of interest on bonds in the hands of bondholders who had guaran-

ing 114 Fed. 389]; Front St. Cable R. Co. *v.* Drake, 84 Fed. 257; New York Security, etc., Co. *v.* Louisville, etc., R. Co., 79 Fed. 386 (holding that a judgment for a death loss accruing in the operation of the road cannot be regarded as a necessary operating expense so as to be entitled to priority over a mortgage); Farmers' L. & T. Co. *v.* Green Bay, etc., R. Co., 45 Fed. 664; *In re* Wrexham, etc., R. Co., [1900] 1 Ch. 261, 69 L. J. Ch. 291, 82 L. T. Rep. N. S. 33, 16 T. L. R. 169, 48 Wkly. Rep. 311 [*modifying* 68 L. J. Ch. 115, 80 L. T. Rep. N. S. 648].

A claim for the value of goods lost by fire while in possession of the railroad company and before the road is placed in the hands of a receiver is not entitled to a priority before claims of bondholders. Easton *v.* Houston, etc., R. Co., 38 Fed. 12.

A claim for death by negligence occurring before the appointment of a receiver is not entitled to be paid out of the income or *corpus* prior to the mortgage debt. Veatch *v.* American L. & T. Co., 79 Fed. 471, 25 C. C. A. 39.

33. Anderson *v.* Condict, 93 Fed. 349, 35 C. C. A. 335; Cross *v.* Evans, 86 Fed. 1, 29 C. C. A. 523.

34. Central Trust Co. *v.* Thurman, 94 Ga. 735, 20 S. E. 141; Penn Mutual L. Ins. Co. *v.* Heiss, 141 Ill. 35, 31 N. E. 138, 33 Am. St. Rep. 273; Fordyce *v.* Kansas City, etc., Connecting R. Co., 145 Fed. 566; Central Trust Co. *v.* Hennen, 90 Fed. 593, 33 C. C. A. 189. And see EMINENT DOMAIN, 15 Cyc. 933, 1014.

That the mortgage was executed and recorded and the mortgage bonds sold before the judgments were recovered or the rights of action accrued does not destroy the priority of the judgment over the mortgage, where the mortgage is given before the road is built, since the bondholders are chargeable with notice of the acts of the railroad company in completing its road. Penn Mut. L. Ins. Co. *v.* Heiss, 141 Ill. 35, 31 N. E. 138, 33 Am. St. Rep. 273.

35. Union Trust Co. *v.* Illinois Midland R. Co., 117 U. S. 434, 6 S. Ct. 809, 29 L. ed. 963 (holding this to be true where without the leased lines the operation of the road would have been impracticable); Manhattan Trust Co. *v.* Sioux City, etc., R. Co., 102 Fed. 710 (holding that a claim against a railroad company for the rental of terminal property accruing under a lease within six months prior to the receivership is entitled to priority of payment over the bondholders from a fund in court produced by the operation of the road by the receiver as an ordinary and necessary running expense of the road); Central Trust Co. *v.* Continental Trust Co., 86 Fed. 517, 30 C. C. A. 235 (holding that, where a lease has been adopted by the receiver and court, the rent should be paid as an operating expense, and where the receiver has been unable to procure money for its payment, it is proper, on final decree, to declare the unpaid rentals to be a first lien on the property); Savannah, etc., R. Co. *v.* Jacksonville, etc., R. Co., 79 Fed. 35, 24 C. C. A. 437; Great Eastern R. Co. *v.* East London R. Co., 44 L. T. Rep. N. S. 903. See also St. Louis, etc., R. Co. *v.* Cleveland, etc., R. Co., 125 U. S. 658, 8 S. Ct. 1011, 31 L. ed. 832. *Compare* Louisville, etc., R. Co. *v.* Central Trust Co., 87 Fed. 500, 31 C. C. A. 89.

Estoppel.— The lessor of a railroad and the holders of the bonds of the lessee, having consented to a decree whereby receivers and managers were appointed to operate the road for their benefit, are estopped to claim that the debts incurred by the receivers and managers while operating the road are inferior to their claims under a lease and the bonds. Langdon *v.* Vermont, etc., R. Co., 53 Vt. 228, 54 Vt. 593.

36. Louisville, etc., R. Co. *v.* New York Cent. Trust Co., 87 Fed. 500, 31 C. C. A. 89.

Claims for the rental of terminal facilities accruing under a perpetual lease which reserves to the lessor the right to terminate it and retake possession of the property with all its additions and improvements made thereon by the lessee, in case of default in payment of rentals for thirty days, are not debts of the income entitled to preference of payment over mortgage debts from the earnings of the road. Gregg *v.* Mercantile Trust Co., 109 Fed. 220, 48 C. C. A. 318.

37. Central Trust Co. *v.* Charlotte, etc., R. Co., 65 Fed. 264.

teed the payment of the rent.[38] Rentals due under a lease reserving payment therefor out of the tolls, fares, and income of the road constitute a lien thereon in priority to subsequent mortgages.[39] Where the lessor company covenants to keep up its organization and make all reports required by law such agreement implies that it is to be done at the expense of the lessor company and therefore such expense is not a lien on the property of the road superior to that of bondholders claiming under a mortgage executed by the lessee company.[40]

l. Priorities Between Different Mortgages. The priorities between different mortgages on the same railroad property are regulated by the rules governing priorities between mortgages generally.[41] Thus the order of priority of different railroad mortgages on the same property ordinarily depends upon the order in which they have attached as liens upon such property,[42] unless there are exceptional circumstances which render it equitably fair that a junior mortgage should have the preference,[43] or unless the junior mortgage is given priority by statute.[44] A railroad mortgage covering after-acquired property ordinarily has priority over a subsequent mortgage on the same property,[45] executed by a subsequent grantee,[46] and the fact that a certain portion of the road is built with money raised upon the later mortgage does not give such mortgage priority over an earlier one.[47] Such a mortgage, however, is inferior to a purchase-money mortgage for land acquired by the railroad company,[48] or to a purchase-money mortgage of personal property, susceptible of separate ownership and separate liens, subsequently acquired by the company,[49] even though the latter mortgage is not recorded;[50] although it has been held otherwise where the property purchased becomes annexed to and a part of the property covered by the general mortgage,[51] as where iron rails are laid down and become part of the railroad.[52] A mortgage existing on a railroad at the time it is purchased by another railroad company is superior to a mortgage of the latter company on its road and which attaches to the newly acquired road.[53]

m. Priority Between Bondholders — (i) *In General.* The priorities of the holders of railroad bonds depend largely upon the terms of the contract under which the bonds were acquired,[54] and upon the equities of the particular case;[55] or preference may be given to certain bonds by the statute authorizing the par-

38. St. Louis, etc., R. Co. *v.* Indianapolis, etc., R. Co., 21 Fed. Cas. No. 12,236, 9 Biss. 99.

39. Vermont, etc., R. Co. *v.* Vermont Cent. R. Co., 34 Vt. 1.

40. Vermont, etc., R. Co. *v.* Vermont Cent. R. Co., 34 Vt. 1.

41. See Columbus, etc., R. Co.'s Appeal, 109 Fed. 177, 48 C. C. A. 275; and, generally, MORTGAGES, 27 Cyc. 1167 *et seq.*

42. Galveston, etc., R. Co. *v.* Cowdrey, 11 Wall. (U. S.) 459, 20 L. ed. 199.

43. See Campbell *v.* Texas, etc., R. Co., 4 Fed. Cas. No. 2,369, 2 Woods 263.

44. Randolph *v.* Wilmington, etc., R. Co., 20 Fed. Cas. No. 11,563, 11 Phila. (Pa.) 502, holding that a mortgage of a branch line under a special act providing that it shall be a first lien thereon takes precedence of a prior mortgage of the railroad as then "made or to be made."

45. Pierce *v.* Emery, 32 N. H. 484; Thompson *v.* White Water Valley R. Co., 132 U. S. 68, 10 S. Ct. 29, 33 L. ed. 256 (holding that a mortgage on all property, materials, rights, and privileges, then or thereafter appertaining to the road, has priority over a subsequent mortgage on the earnings of a section of the road, given to secure money for constructing that section by a lessee, who had stipulated to construct it as one of the considerations of the lease); Columbus, etc., R. Co.'s Appeal, 109 Fed. 177, 48 C. C. A. 275.

46. Wade *v.* Chicago, etc., R. Co., 149 U. S. 327, 13 S. Ct. 892, 37 L. ed. 755.

47. Galveston, etc., R. Co. *v.* Cowdrey, 11 Wall. (U. S.) 459, 20 L. ed. 199.

48. Hand *v.* Savannah, etc., R. Co., 12 S. C. 314.

49. New Orleans, etc., R. Co. *v.* Mellen, 12 Wall. (U. S.) 362, 20 L. ed. 434.

50. New Orleans, etc., R. Co. *v.* Mellen, 12 Wall. (U. S.) 362, 20 L. ed. 434.

51. New Orleans, etc., R. Co. *v.* Mellen, 12 Wall. (U. S.) 362, 20 L. ed. 434.

52. New Orleans, etc., R. Co. *v.* Mellen, 12 Wall. (U. S.) 362, 20 L. ed. 434.

53. Branch *v.* Atlantic., etc., R. Co., 4 Fed. Cas. No. 1,807, 3 Woods 481.

54. See Pennsylvania R. Co. *v.* Allegheny Valley R. Co., 48 Fed. 139.

55. Stephens *v.* Benton, 1 Duv. (Ky.) 112; *In re* Cork, etc., R. Co., L. R. 4 Ch. 748, 39 L. J. Ch. 277, 21 L. T. Rep. N. S. 735, 18 Wkly. Rep. 226.

ticular issue.[56] Ordinarily, outstanding bonds of a prior issue are entitled to priority over a subsequent issue of bonds,[57] particularly where a decree of foreclosure of the mortgage under which the latter bonds are issued, declares the outstanding bonds a first lien on the road or the proceeds of its sale,[58] and this preference passes to a *bona fide* holder of such bonds.[59] Unsecured bonds do not *ipso facto* become a lien upon the corporate property equal in dignity to secured bonds.[60] Bonds of the same issue and secured by the same mortgage have an equality of priority dating from the record of the mortgage, regardless of the time at which the various bonds are negotiated;[61] and the fact that part of an issue of bonds is issued as the purchase-price of certain property gives the bonds so used no prior lien on such property over other bonds of the same issue.[62] The holders of first lien bonds are exclusively entitled to the benefit of the first lien,[63] and where certain holders of such bonds are estopped to assert a preference by reason of their having accepted bonds of another issue, the holders of the first bonds not so estopped are not bound to share their prior lien with the holders of the new bonds to the extent that the first lien was removed by the estoppel;[64] nor are bonds issued in payment of coupons of the first lien bonds entitled to the rank held by the coupons which these bonds satisfied.[65] Where bondholders have a remedy for enforcing the payment of interest in case of default and they fail to enforce such remedy, they have no claim for priority in the distribution of the proceeds of foreclosure over other bondholders of the same class who have received interest.[66] Income bonds entitled to a preference out of the capital stock and income have no priority over mortgage bonds out of the proceeds of the latter.[67] A guarantor of railroad bonds who has made only a partial payment thereof is not entitled to an equal footing with mortgage creditors on the ground of subrogation,[68] since the payment of the whole debt for which the surety is liable is essential to subrogation.[69]

(II) *Interest Coupons or Bonds and Securities Substituted Therefor.* In the absence of some provision in the mortgage to that effect coupons severed from negotiable bonds secured by a mortgage on railroad property are not entitled to priority of payment over the principal of the bonds or

56. See Herrick *v.* Grand Trunk R. Co., 7 Can. L. J. 240, construing 12 Vict. c. 29; 18 Vict. c. 74; 19 & 20 Vict. c. 111.

57. Gibbes *v.* Greenville, etc., R. Co., 13 S. C. 228; Kneeland *v.* Lawrence, 140 U. S. 209, 11 S. Ct. 786, 35 L. ed. 492.

58. Kneeland *v.* Lawrence, 140 U. S. 209, 11 S. Ct. 786, 35 L. ed. 492.

59. Kneeland *v.* Lawrence, 140 U. S. 209, 11 S. Ct. 786, 35 L. ed. 492.

60. Brunswick, etc., R. Co. *v.* Hughes, 52 Ga. 557.

61. Pittsburgh, etc., R. Co. *v.* Lynde, 55 Ohio St. 23, 44 N. E. 596; Stanton *v.* Alabama, etc., R. Co., 22 Fed. Cas. No. 13,297, 2 Woods 523, holding further that the fact that bonds of this kind are numbered is not for the purpose of giving one number any advantage over the other, but simply for the convenience of registration and identification, and that bonds bearing a higher number stand on the same footing as those bearing a lower number, and if the mortgage property is inadequate to pay all, are entitled to share *pro rata* with the others in its proceeds.

Effect of purchase of property by bondholders.— Where upon a sale under a mortgage a committee representing a part of the bondholders purchases the property for cash and the committee had previously advertised its purpose to protect the property, and its invitation to all bondholders to share the expense and result was kept open until the sale, bondholders who did not accept the invitation and were not represented by the committee cannot claim a priority in the distribution of the cash consideration paid by the committee merely because the latter immediately resold the property for sufficient to pay the par value of the bonds represented by it, the order for sale having directed a distribution of the fund received on the sale *pari passu* among all the bondholders. Bound *v.* South Carolina R. Co., 71 Fed. 53.

62. Murray *v.* Farmville, etc., R. Co., 101 Va. 262, 43 S. E. 553.

63. Hand *v.* Savannah, etc., R. Co., 17 S. C. 219.

64. Hand *v.* Savannah, etc., R. Co., 17 S. C. 219.

65. Hand *v.* Savannah, etc., R. Co., 17 S. C. 219.

66. Humphreys *v.* Morton, 100 Ill. 592.

67. Garrett *v.* May, 19 Md. 177.

68. Columbia Finance, etc., Co. *v.* Kentucky Union R. Co., 60 Fed. 794, 9 C. C. A. 264.

69. Columbia Finance, etc., Co. *v.* Kentucky Union R. Co., 60 Fed. 794, 9 C. C. A. 264.

the coupons subsequently maturing.[70] But where such appears to be the intention of the parties, unpaid coupons should be paid before the principal of any of the bonds,[71] and before coupons or interest falling due at a later period; [72] and detached coupons in the hands of others than the holders of the bonds from which they were detached should be paid before such bonds.[73] Holders of canceled or extinguished coupons are not entitled to any preference over other secured bondholders.[74] New bonds received for coupons or interest by way of substitution therefor are entitled to the same rank and priority as the original debt.[75] But a mere promise or stipulation in the new notes or bonds that a certain amount of the gross earnings is pledged in liquidation of the new securities does not create a specific lien or equitable assignment so as to give a holder thereof priority over the bonded debt out of such earnings.[76]

10. Interest and Coupons — a. In General. Interest on a railroad indebtedness is ordinarily governed by the rules regulating interest generally.[77] Where the interest is reserved by contract, the manner and terms of payment are usually governed by the bonds, mortgage, or other contract by which the interest is reserved.[78] But in the absence of a contract governing the particular case, interest

70. State *v.* Spartanburg, etc., R. Co., 8 S. C. 129 (holding that where a railroad corporation issued coupon bonds which the state guaranteed in consideration of receiving a lien on the entire franchise and property of the company, and there was a default in the payment of the bonds and interest coupons, and the state's lien was foreclosed, the holders of past-due coupons were not entitled to a priority in the distribution of the proceeds as against holders of bonds not then due; but that such proceeds are distributable *pari passu* between the holders of the past-due coupons and the holders of the bonds); Ketchum *v.* Duncan, 96 U. S. 659, 24 L. ed. 868 [*affirming* 8 Fed. Cas. No. 4,138, 3 Woods 567].

As between a holder of uncanceled coupons received as security for advances to the company, and bondholders who receive the amount of their coupons in ignorance of such transaction, supposing the coupons to have been paid, the bondholders have the prior equity and if upon foreclosure and sale of the mortgaged property the sum realized is insufficient to pay the face of the bonds, the holder of the coupons is not entitled to share in the proceeds. Union Trust Co. *v.* Monticello, etc., R. Co., 63 N. Y. 311, 20 Am. Rep. 541.

71. Sewall *v.* Brainerd, 38 Vt. 364 (holding that on the surrender of a railroad and its property to the trustees under a mortgage to secure its bonds, the coupon holders have a right in equity to have the unpaid coupons paid first and paid in the order in which they fell due when such was the presumed intention and expectation of the bondholders in selling and the purchasers in buying); Stevens *v.* New York, etc., R. Co., 23 Fed. Cas. No. 13,406, 13 Blatchff 412.

72. Stevens *v.* New York, etc., R. Co., 23 Fed. Cas. No. 13,406, 13 Blatchf. 412.

73. Stevens *v.* New York, etc., R. Co., 23 Fed. Cas. No. 13,406, 13 Blatchff. 412.

74. Hollister *v.* Stewart, 111 N. Y. 644, 19 N. E. 782.

75. Gibbes *v.* Greenville, etc., R. Co., 13 S. C. 228, holding that such new bonds are entitled to a priority over the mortgage bonds. *Compare* Hand *v.* Savannah, etc., R. Co., 17 S. C. 219.

76. McIlhenny *v.* Binz, 80 Tex. 1, 13 S. W. 655, 26 Am. St. Rep. 705.

77. See, generally, Interest, 22 Cyc. 1459 *et seq.*

As between lienors of different priorities interest should be allowed to the superior lienors from the maturity of the claims. Richmond, etc., Constr. Co. *v.* Richmond, etc., R. Co., 68 Fed. 105, 15 C. C. A. 289, 34 L. R. A. 625. See also Harrison *v.* Cornwall Minerals R. Co., 18 Ch. D. 334, 51 L. J. Ch. 98, 45 L. T. Rep. N. S. 498.

78. See Shoemaker *v.* Dayton, etc., R. Co., 10 Ohio Dec. (Reprint) 12, 18 Cinc. L. Bul. 43; Foster *v.* Mansfield, etc., R. Co., 36 Fed. 627 [*affirmed* in 146 U. S. 88, 13 S. Ct. 28, 36 L. ed. 899], holding that where a construction company receives bonds in advance of the completion of the work under an agreement by which it agrees to pay all interest accruing before the road became in a condition for traffic, and by which the railroad company also agreed to reimburse the construction company for all interest paid, not properly chargeable to it, the construction company is only bound to pay interest on so many bonds as it received and used to which it was not entitled.

Extension of payment.— Where the mortgage authorizes the bondholders or a part thereof to extend the time of payment of interest, such extension of time must be made in the manner and upon the condition prescribed by the mortgage. McClelland *v.* Norfolk Southern R. Co., 110 N. Y. 469, 18 N. E. 237, 6 Am. St. Rep. 397, 1 L. R. A. 299, holding that where a mortgage provided that on default for six months in the interest on the bonds secured, the principal should become due at the option of the trustees, and a majority in interest of the bondholders might instruct the trustees to sell the property, or to reverse their election, and extend the time of payment of the interest, but that

may be recovered by way of damages.[79] Thus overdue interest coupons carry interest from the time they are payable;[80] and, although the last interest coupons have been paid, if the principal debt is not paid when due it will continue to carry interest, although there is no provision in the bonds to that effect.[81] Where the lien or claim, together with interest thereon, has been converted into a judgment which bears interest, additional interest on the claim cannot thereafter be recovered.[82] A *bona fide* transferee of bonds or other indebtedness is entitled to recover interest from the time it fell due,[83] and the railroad company cannot set up as against such transferee a collateral defense it may have had against the original holders.[84] A demand for interest due on bonds is sufficient if made by the holders of the bonds or coupons at the place where they are payable,[85] and a further demand by the mortgage trustee is not necessary.[86] After railroad property has passed into the hands of a receiver or of an assignee in insolvency, interest on debts against the railroad company is not ordinarily allowed against funds in the receiver's hands,[87] unless there are funds in the hands of the receivers or their privies, especially applicable to the payment of the claim and which would not be exhausted by the allowance of interest.[88]

b. Rate of Interest. Subject to constitutional limitations the legislature may fix the rate of interest to be allowed on a railroad indebtedness in a particular case.[89] But except where regulated by a special statute,[90] the rate of interest which may be recovered on a railroad indebtedness is governed by the statutes regulating interest generally,[91] and subject to these statutes the railroad company may contract for any rate of interest upon its indebtedness.[92] The reservation of an illegal rate, however, will not prevent a recovery of the original debt with legal interest.[93]

c. Loss, Waiver, or Other Bar of Right. The waiver or loss of interest on railroad bonds or other indebtedness may be effected by the acts of the parties themselves,[94] as by a failure to attempt to recover it within the period of limita-

the action of the trustees or the bondholders, in case of a default, should not affect any subsequent default, a majority of the bondholders could not extend the time of payment of interest until after a default of interest thereon of six months.

79. See Connecticut Mut. L. Ins. Co. *v.* Cleveland, etc., R. Co., 41 Barb. (N. Y.) 9, 26 How. Pr. 225.

80. Connecticut Mut. L. Ins. Co. *v.* Cleveland, etc., R. Co., 41 Barb. (N. Y.) 9, 26 How. Pr. 225; Gibert *v.* Washington City, etc., R. Co., 33 Gratt. (Va.) 586.

81. Price *v.* Great Western R. Co., 16 L. J. Exch. 87, 16 M. & W. 244, 4 R. & Can. Cas. 707.

82. *Re* European Cent. R. Co., 4 Ch. D. 33, 46 L. J. Ch. 57, 35 L. T. Rep. N. S. 583, 25 Wkly. Rep. 92.

83. McElrath *v.* Pittsburg, etc., R. Co., 55 Pa. St. 189.

84. McElrath *v.* Pittsburg, etc., R. Co., 55 Pa. St. 189 (holding that where a railroad company contracted for the construction of its road, and as the work progressed, without giving notice of any claim for damages for delay, delivered to the contractors bonds payable with interest from date, which bonds with some of the interest coupons overdue were transferred, the transferee was entitled to recover interest from the date of the bonds, and the company was estopped to claim damages for delay in the work); McKenzie *v.* Montreal, etc., R. Co., 29 U. C. C. P. 333.

85. Taber *v.* Cincinnati, etc., R. Co., 15 Ind. 459.

86. Taber *v.* Cincinnati, etc., R. Co., 15 Ind. 459.

87. Thomas *v.* Western Car Co., 149 U. S. 95, 13 S. Ct. 824, 37 L. ed. 663; New England R. Co. *v.* Carnegie Steel Co., 75 Fed. 54, 21 C. C. A. 219.

88. New England R. Co. *v.* Carnegie Steel Co., 75 Fed. 54, 21 C. C. A. 219.

89. See Southwestern Arkansas, etc., R. Co. *v.* Hays, 63 Ark. 355, 38 S. W. 665; Metropolitan Trust Co. *v.* Railroad Equipment Co., 108 Fed. 913, 48 C. C. A. 135; Campbell *v.* Texas, etc., R. Co., 4 Fed. Cas. No. 2,369, 2 Woods 263, holding, however, that the addition of a certain per cent to the interest of substituted bonds over and above that allowed on the original bonds is an invasion of the rights of bondholders under the original mortgage. See also Morrison *v.* Eaton, etc., R. Co., 14 Ind. 110.

90. See Memphis, etc., R. Co. *v.* Dow, 120 U. S. 287, 7 S. Ct. 482, 30 L. ed. 595.

91. See Memphis, etc., R. Co. *v.* Dow, 120 U. S. 287, 7 S. Ct. 482, 30 L. ed. 595.

92. Memphis, etc., R. Co. *v.* Dow, 120 U. S. 287, 7 S. Ct. 482, 30 L. ed. 595.

93. Philadelphia, etc., R. Co. *v.* Lewis, 33 Pa. St. 33, 75 Am. Dec. 574.

94. Lyon *v.* New York, etc., R. Co., 13 N. Y. St. 732; Pollitz *v.* Farmers' L. & T. Co., 53 Fed. 210, holding, however, that where a cross complainant of a dissenting bond-

tion governing the particular case;[95] or where the interest is claimed as damages, and not by reason of any contract therefor, it will not be allowed if the delay in the payment of the principal debt is a result of the neglect of the creditor to demand and enforce such payment.[96] The recovery of interest on bonds may be lost or barred by the performance or non-performance of certain conditions provided for in the bonds and mortgages.[97] Thus where the income bonds and mortgages provide that no interest shall be recovered until the board of directors shall have adjudged and awarded an ascertained amount as net earnings, there can be no recovery of interest until such amount is adjudged and awarded,[98] unless the board of directors improperly neglect or refuse to take the necessary action.[99] So where mortgage bonds provide that no more interest shall be payable than shall be certified by a vote of the majority of the board of directors to have been earned during the preceding interest period, and that in default of such certificate no interest shall be payable, interest cannot be recovered on such bonds unless the certificate was made,[1] or unless it was unreasonably refused after a request therefor.[2] The fact that the financial agents of a railroad company at a time when it was in a failing condition agreed to purchase and hold the interest coupons on its bonds does not prevent such agents from enforcing payment to them of such coupons, on the ground that it was a breach of trust.[3]

11. Application of Earnings, Income, and Sinking Fund — a. In General. The earnings, income, and profits of a railroad company constitute a trust fund, in the hands of its officers, for the payment of its debts,[4] and should be applied: (1) To the payment of the necessary expenses and liabilities incident to the maintenance and operation of the road;[5] and this is the only fund to which unsecured creditors may have recourse;[6] (2) to the payment of interest on mortgages;[7] and (3) the net earnings or net income thus ascertained by paying or deducting the operating expenses from the gross or current income of the road[8] should be

holder has taken the position throughout the suit that complainant could at any time surrender his bonds and receive new ones in lieu thereof, and counsel in their brief have offered to deliver the lieu bonds and cash upon such surrender, the cross complainant is not in a position to insist that complainant had by misconduct forfeited his right to interest.

95. *In re* Cornwall Minerals R. Co., [1897] 2 Ch. 74, 61 J. P. 345, 535, 66 L. J. Ch. 561, 76 L. T. Rep. N. S. 832, 46 Wkly. Rep. 5 (holding that where debenture stock is issued by a company formed by a special act which incorporates the provisions of Part III of the Companies Clauses Act of 1863, the right to interest on such stock being a statutory one is not barred for twenty years); Toronto Gen. Trusts Corp. *v.* Central Ontario R. Co., 6 Ont. L. Rep. 534, 2 Ont. Wkly. Rep. 946.

96. McDonald *v.* Great Western R. Co., 21 U. C. Q. B. 223.

97. Henry *v.* Syracuse, etc., R. Co., 57 N. Y. Super. Ct. 69, 5 N. Y. Suppl. 437, holding that where it is covenanted that the number of bonds to be paid in each year shall be determined by drawing lots, and that the principal of the bonds so drawn shall be payable at the option of the holders upon the surrender of the bonds drawn with all the coupons thereto belonging, and after a certain date the interest upon the bonds so drawn shall cease, the option of the holders of the bonds so drawn applies only to their right to retain possession of the bonds and that interest on them ceases on the specified date for which they are drawn whether the holders of such bonds surrender them or not.

98. Spies *v.* Chicago, etc., R. Co., 40 Fed. 34, 6 L. R. A. 565.

99. Spies *v.* Chicago, etc., R. Co., 40 Fed. 34, 6 L. R. A. 565.

1. Thomas *v.* New York, etc., R. Co., 139 N. Y. 163, 34 N. E. 877 [*affirming* 19 N. Y. Suppl. 766, 22 N. Y. Civ. Proc. 326].

2. Thomas *v.* New York, etc., R. Co., 139 N. Y. 163, 34 N. E. 877 [*affirming* 19 N. Y. Suppl. 766, 22 N. Y. Civ. Proc. 326].

3. Ketchum *v.* Duncan, 96 U. S. 659, 24 L. ed. 868 [*affirming* 8 Fed. Cas. No. 4,138, 3 Woods 567].

4. Newport, etc., Bridge Co. *v.* Douglass, 12 Bush (Ky.) 673. And see, generally, Corporations, 10 Cyc. 1249 *et seq.*

5. Darst *v.* Pittsburgh, etc., R. Co., 3 Ohio Dec. (Reprint) 199, 4 Wkly. L. Gaz. 377; McCormack *v.* Central Ohio R. Co., 3 Ohio Dec. (Reprint) 103, 3 Wkly. L. Gaz. 218; Carey *v.* Pittsburgh, etc., R. Co., 2 Ohio Dec. (Reprint) 85, 1 West. L. Month. 338. See Gray *v.* Manitoba, etc., R. Co., [1897] A. C. 254, 66 L. J. P. C. 66 [*affirming* 11 Manitoba 42]. And see *supra*, VIII, A, 9, g.

6. Van Frank *v.* Missouri Pac. R. Co., 89 Mo. App. 460.

7. Carey *v.* Pittsburgh, etc., R. Co., 2 Ohio Dec. (Reprint) 85, 1 West. L. Month. 338.

8. Ames *v.* Union Pac. R. Co., 73 Fed. 49.

applied to the payment of liens in the order of their priorities.[9] So long as there are outstanding unliquidated debts which equitably have the right to have the income applied to the satisfaction thereof, a bondholder cannot compel its appropriation to the liquidation of his claim;[10] and in the absence of contract liens, or rights created by legal proceedings, the officers of a railroad company may exercise a reasonable and proper discretion as to the order in which the debts shall be paid,[11] and this discretion cannot be taken from them by notice to the company that a particular creditor intends to demand a preference.[12] Where a trust fund is created to secure a particular class of creditors only, such creditor may be rightfully paid out of such fund.[13] As between creditors of the same class, if the fund applicable to their claims is insufficient to pay all, it should be divided among them *pro rata*.[14] But the mere fact that a claim, which is a lien on the property of the road, is determined to be a claim of a certain class payable out of the earnings of the road, does not preclude its payment from the proceeds of a sale of the property on which it is a lien if the earnings are insufficient to pay it.[15] In England under some statutes, upon an abandonment of a railroad, the parliamentary deposit required by such statutes may become general assets for the benefit of general creditors.[16]

9. Carey *v.* Pittsburgh, etc., R. Co., 2 Ohio Dec. (Reprint) 85, 1 West. L. Month. 338.

Priorities generally see *supra*, VIII, A, 9.

General judgment creditors, whether their claims arose out of contract or tort, are as much entitled as the mortgage bondholders to participate in the distribution of surplus income accumulating in the hands of a receiver appointed at the instance of stockholders, before the income has been impounded by the mortgage bondholders; and, if there are equitable considerations giving the bondholders a better right, they must be shown by proper averment. Veatch *v.* American L. & T. Co., 79 Fed. 471, 25 C. C. A. 39 [*affirmed* in 84 Fed. 274, 28 C. C. A. 384].

Where a mortgagor company holds possession and receives the earnings of the road under the terms of the mortgage, a general judgment creditor of the company is entitled, by virtue of a garnishment on the officers of the railroad company, to the net income of the road to the date of a decree of foreclosure and the appointment of a special receiver, the decree being silent as to such income and the road meanwhile being operated by the company. Gilman *v.* Illinois, etc., Tel. Co., 91 U. S. 603, 23 L. ed. 405 [*affirming* 10 Fed. Cas. No. 5,443, 1 McCrary 170].

Net earnings from the operation of a road by a receiver appointed under a general creditors' bill belong to the creditors in the same order of priority and must be preserved in the distribution as the proceeds of the property itself on its sale. Thomas *v.* Cincinnati, etc., R. Co., 91 Fed. 202.

10. Roberts *v.* Denver, etc., R. Co., 8 Colo. App. 504, 46 Pac. 880.

11. Newport, etc., Bridge Co. *v.* Douglass, 12 Bush (Ky.) 673.

12. Newport, etc., Bridge Co. *v.* Douglass, 12 Bush (Ky.) 673.

13. Hatry *v.* Painesville, etc., R. Co., 1 Ohio Cir. Ct. 426, 1 Ohio Cir. Dec. 238 [*affirmed* in 23 Cinc. L. Bul. 281]; Central Trust Co. *v.* Chattanooga, etc., R. Co., 89 Fed. 388.

Statement of payment.— Under an agreement by which the lessee agrees to apply certain net earnings to the payment of a mortgage bond and coupons and to make quarterly statements as to earnings and expenses, such lessee cannot delay making such statement of payment and afterward set off losses against such net earnings. Schmidt *v.* Louisville, etc., R. Co., 119 Ky. 287, 84 S. W. 314, 27 Ky. L. Rep. 21.

A lease providing for the payment of net earnings to the mortgage bondholders of the lessor, after it is assented to by the bondholders, operates as an irrevocable assignment to them of the net earnings. Grand Trunk R. Co. *v.* Central Vermont R. Co., 78 Fed. 690. And while the lessee is bound to pay out of the gross earnings certain prior claims before paying anything to bondholders, yet where the holders of such claims let payment be made to the bondholders first, they become common unsecured creditors of the lessee, and, a receiver having been appointed, they are not entitled as against the bondholders to have their claims paid out of the earnings accruing after the appointment of the receiver, where there is nothing to show that the gross earnings prior to the receiver's appointment were not sufficient to pay their claims. Grand Trunk R. Co. *v.* Central Vermont R. Co., 78 Fed. 690.

14. Hatry *v.* Painesville, etc., R. Co., 1 Ohio Cir. Ct. 426, 1 Ohio Cir. Dec. 238 [*affirmed* in 23 Cinc. L. Bul. 281].

15. Vollmer *v.* San Antonio, etc., R. Co., (Tex. Civ. App. 1898) 47 S. W. 378.

16. See *In re* Lancashire, etc., R. Co., [1903] 2 Ch. 711, 72 L. J. Ch. 789, 52 Wkly. Rep. 26 [*distinguishing In re* Wrexham, etc., R. Co., [1900] 1 Ch. 261, 69 L. J. Ch. 291, 82 L. T. Rep. N. S. 33, 16 T. L. R. 169, 48 Wkly. Rep. 311]; Webster *v.* Petre, 4 Ex. D. 127, 27 Wkly. Rep. 662; *In re* Waterford, etc., R. Co., Ir. R. 4 Eq. 490, 19 Wkly. Rep.

b. Mortgagees of Stock. Bondholders to whom stock of a railroad company has been mortgaged as collateral security cannot in equity charge the lessee of the mortgaged road with earnings derived under the lease where there is no fraud in the lease;[17] and the fact that the mortgage of such stock was given by the state, which owned a majority of the stock, does not bind the state to use its controlling interest in the road exclusively in the interest of its mortgagees of the stock,[18] nor impress the earnings received by the lessee of the road with a trust for the benefit of such mortgagees.[19]

c. Creation and Maintenance of Sinking Fund. Provision is sometimes made by statute for a railroad sinking fund, which is to be created and maintained out of certain sources of revenue,[20] and applied to certain debts or investments of the company;[21] or provision for such fund may be made by mortgage,[22] or by

145; *Re* Manchester, etc., R. Co., 45 L. T. Rep. N. S. 129.

General debts to be paid out of such assets have been held to include the costs of a petition by the depositor for the transfer out to him of the bulk of the deposit moneys (*In re* Laugharne R. Co., L. R. 12 Eq. 454, 19 Wkly. Rep. 1108), and the costs and charges of a solicitor and parliamentary agent, not promoters of the company, for obtaining the statute (*In re* Kensington Station Act, L. R. 20 Eq. 197, 32 L. T. Rep. N. S. 183, 23 Wkly. Rep. 463), but not to include costs on account of the promotion to the company (*In re* Barry R. Co., 4 Ch. D. 315, 46 L. J. Ch. 206, 36 L. T. Rep. N. S. 125, 25 Wkly. Rep. 201; *In re* Brampton, etc., R. Co., L. R. 10 Eq. 613, 39 L. J. Ch. 681, 23 L. T. Rep. N. S. 356, 18 Wkly. Rep. 994).

17. Gibson *v.* Richmond, etc., R. Co., 37 Fed. 743, 2 L. R. A. 467.

18. Gibson *v.* Richmond, etc., R. Co., 37 Fed. 743, 2 L. R. A. 467.

19. Gibson *v.* Richmond, etc., R. Co., 37 Fed. 743, 2 L. R. A. 467.

20. See New England Mut. L. Ins. Co. *v.* Phillips, 141 Mass. 535, 6 N. E. 534; Phillips *v.* Eastern R. Co., 138 Mass. 122, construing St. (1876) c. 236, § 13.

Under the Thurman Act (20 U. S. St. at L. 58 [U. S. Comp. St. (1901) p. 3569]), providing that twenty-five per cent of the net earnings of certain railroad companies shall be paid into the treasury of the United States toward the liquidation of bonds loaned to the company by the government, and that the net earnings "shall be ascertained by deducting from the gross amount of their earnings respectively the necessary expenses actually paid within the year in operating the same and keeping the same in a state of repair, and also the sum paid by them respectively within the year in discharge of interest on their first-mortgage bonds, whose lien has priority over the lien of the United States, and excluding from consideration all sums owing or paid by said companies respectively for interest upon any other portion of their indebtedness," the phrase "necessary expenses" is to be liberally construed, embracing expenses of operating in accordance with the demands of business coming to the road and excluding those not conducive to that end (Union Pac. R. Co. *v.* U. S., 20 Ct. Cl. 70); but expenses for improvements of the road, buildings and equipment, whereby the capital stock was increased in value are not to be deducted from the gross earnings (U. S. *v.* Central Pac. R. Co., 138 U. S. 84, 11 S. Ct. 285, 34 L. ed. 895). Thus under such act, it has been held that the following items should be excluded as not being proper deductions from the gross receipts of the road: Money needed to place it in proper repair but not actually expended for that purpose; the expenses of the land department; the interest on a funded debt which had priority over the lien of the United States; the fifty per cent retained by the latter from the amount of services rendered to it; but that the following items should be allowed provided they were actually paid out of the earnings of the road and not raised by bonds or stocks: The equipment account or replacing and rebuilding rolling stock, machinery, etc.; the amounts paid for depot grounds and the expenses of the same; and the construction accounts for the improvements and additions to the track, etc. U. S. *v.* Kansas Pac. R. Co., 99 U. S. 455, 25 L. ed. 289; U. S. *v.* Central Pac. R. Co., 99 U. S. 449, 25 L. ed. 287; Union Pac. R. Co. *v.* U. S., 99 U. S. 402, 25 L. ed. 274 [*reversing* on other grounds 13 Ct. Cl. 401].

21. New England Mut. L. Ins. Co. *v.* Phillips, 141 Mass. 535, 6 N. E. 534 (holding that the trustees of a railroad by virtue of St. (1876) c. 236, and St. (1885) c. 8, are bound to cancel all certificates of indebtedness purchased by them with the sinking fund as fast as the same are bought); Opinion of Justices, 5 Metc. (Mass.) 596 (construing St. (1838) c. 9, § 3); Fidelity Ins., etc., Co. *v.* United New Jersey R., etc., Co., 36 N. J. Eq. 405 (holding that where a sinking fund, to provide for the payment of certain railroad mortgage bonds, is by a provision of the bonds to be invested in certain other bonds of the same railroad, the trustee could not be directed, in the absence of the bondholders, to invest in other bonds than those specified, merely because the bonds specified could only be purchased at a premium).

22. Wilds *v.* St. Louis, etc., R. Co., 102 N. Y. 410, 7 N. E. 290 [*affirming* 64 How. Pr. 418].

an agreement entered into between the railroad company and a guarantor of its mortgage bonds.[23]

d. Payment of Interest. Where the mortgage bonds provide that interest on the bonds shall be paid out of the proceeds arising from the sales of certain lands,[24] or from the income of the road,[25] it is the duty of the trustee to so apply such funds; and if during a certain interest period the fund is insufficient to pay the interest then accruing in full, the deficiency will accumulate and become a charge upon such funds subsequently realized,[26] unless it affirmatively appears that this will be contrary to the intention of the parties.[27]

e. Diversion of Funds. It is a diversion or misapplication of funds to apply the income of a railroad to the payment of a floating debt without the consent of the bondholders,[28] even though such application could be made on favorable terms and would be equitable,[29] and probably for the interest of the bondholders.[30] But the fact that claims not entitled to preference have been improperly paid from funds in the hands of receivers does not entitle a mortgagee to insist that the amount shall be deducted from funds applicable to preferred claims.[31] If a part of the funds is misappropriated to the payment of creditors of another class, then to the extent of such misappropriation creditors whose funds are thus misapplied are entitled to priority of payment out of funds belonging to such other class of creditors.[32]

f. Remedies For Enforcement of Rights. A court of equity will interpose at

23. Central R., etc., Co. *v.* Farmers' L. & T. Co., 116 Fed. 700, holding that where a railroad company guaranteed second mortgage bonds of another company which it controlled, and required the latter to deposit with it as trustee a certain sum each year to create a sinking fund for the payment of the bonds at maturity, and both companies became insolvent and their property was sold under decrees of foreclosure, holders of unpaid guaranteed bonds were entitled in equity to have so much of the proceeds of the sale as equaled the accumulated sinking fund treated as a trust fund and applied to the payment of their bonds, as against the holders of deficiency judgments taken in the foreclosure suits against the guarantors.

In a proceeding by a holder of guaranteed bonds to enforce the payment thereof from the sinking fund which the company issuing them had paid into the hands of the guarantor, as trustee for their redemption at maturity, the question whether or not the guarantee of the bonds of one railroad company by another was *ultra vires* is immaterial; nor is it any defense to such proceeding that the guarantor was without legal power to undertake the duties of trustee. Central R., etc., Co. *v.* Farmers' L. & T. Co., 116 Fed. 700.

24. Little Rock, etc., R. Co. *v.* Huntington, 120 U. S. 160, 7 S. Ct. 517, 30 L. ed. 591.

25. Dayton, etc., R. Co. *v.* Shoemaker, 3 Ohio Cir. Ct. 473, 2 Ohio Cir. Dec. 270 [*affirming* 10 Ohio Dec. (Reprint) 12, 18 Cinc. L. Bul. 43].

26. Dayton, etc., R. Co. *v.* Shoemaker, 3 Ohio Cir. Ct. 473 [*affirming* 10 Ohio Dec. (Reprint) 12, 18 Cinc. L. Bul. 43]; Little Rock, etc., R. Co. *v.* Huntington, 120 U. S. 160, 7 S. Ct. 517, 30 L. ed. 591.

Cumulative interest.— Where income bonds provide for the payment of interest at such rate, not exceeding a given per cent, as the net earnings of the road "will reach to pay," and the deed of trust which secures the bonds recites that the net income after the payment of certain charges and privileges is pledged to the payment of the interest on the bonds for an amount equal to the specified per cent; the interest is cumulative and the bondholders are entitled to be paid interest out of the surplus earnings up to the maximum rate of such per cent and if the net earnings in any year or interest period are insufficient to pay such interest in full, they are entitled to have such deficiency made up out of the future surplus net earnings. Shoemaker *v.* Dayton, etc., R. Co., 10 Ohio Dec. (Reprint) 12, 18 Cinc. L. Bul. 43.

27. Dayton, etc., R. Co. *v.* Shoemaker, 3 Ohio Cir. Ct. 473, 2 Ohio Cir. Dec. 270 [*affirming* 10 Ohio Dec. (Reprint) 12, 18 Cinc. L. Bul. 43].

28. Duncan *v.* Mobile, etc., R. Co., 8 Fed. Cas. No. 4,137, 2 Woods 542.

29. Duncan *v.* Mobile, etc., R. Co., 8 Fed. Cas. No. 4,137, 2 Woods 542.

30. Duncan *v.* Mobile, etc., R. Co., 8 Fed. Cas. No. 4,137, 2 Woods 542.

31. Grand Trunk R. Co. *v.* Central Vermont R. Co., 88 Fed. 620.

32. Hatry *v.* Painesville, etc., R. Co., 1 Ohio Cir. Ct. 426, 1 Ohio Cir. Dec. 238 [*affirmed* in 23 Cinc. L. Bul. 281]; Mills *v.* Northern R. Co., L. R. 5 Ch. 621, 23 L. T. Rep. N. S. 719, 19 Wkly. Rep. 171, holding that, where a company has paid for things properly chargeable to capital out of revenue, it is justified in recouping the revenue account at a subsequent time out of capital; and may, if necessary, raise fresh capital under its borrowing powers for that purpose.

the instance of the proper parties to enjoin a misapplication of the income or earnings of a railroad company,[33] or to compel its application to the payment of the proper indebtedness;[34] or, where there has been a failure to properly apply the income or earnings, the creditor may bring a bill in equity for an accounting,[35] except where the obligation to such creditor is merely contractual and not fiduciary;[36] or where there has been a misapplication, the creditor may bring an action at law to recover the amount of the fund which should have been applied to his claim.[37] Where all the preferred claims against a railroad company can be paid

33. Dayton, etc., R. Co. *v.* Shoemaker, 3 Ohio Cir. Ct. 473, 2 Ohio Cir. Dec. 270 [*affirming* 10 Ohio Dec. (Reprint) 12, 18 Cinc. L. Bul. 43]; Barry *v.* Missouri, etc., R. Co., 36 Fed. 228, holding that where a company has misapplied its earnings as against an income mortgage, and a decree allows the income bondholders to move for an injunction against further misapplication, and the company relies on a bare denial of a charge of misapplication, giving no figures from which the condition of its business or the manner of disposing of its earnings can be determined, and giving no explanation of the shrinkage of its net earnings, an injunction will be allowed, although for a cause other than the particular one formerly had in view, and although the charge is in part on information and belief.

Where a railroad company has agreed to apply net income in its possession to the payment of certain interest, a court of equity will, at the suit of the bondholder, interpose to prevent the diversion of such fund and compel its application to the payment of interest. Dayton, etc., R. Co. *v.* Shoemaker, 3 Ohio Cir. Ct. 473, 2 Ohio Cir. Dec. 270 [*affirming* 10 Ohio Dec. (Reprint) 12, 18 Cinc. L. Bul. 43].

A simple contract creditor of a railroad company who has no lien or mortgage upon the assets of the company or any judgment against it cannot maintain a bill in equity to restrain the company from dealing with its assets as it pleases. Mills *v.* Northern R. Co., L. R. 5 Ch. 621, 23 L. T. Rep. N. S. 719, 19 Wkly. Rep. 171.

34. Lane *v.* Baughman, 17 Ohio St. 642, 93 Am. Dec. 653; Dayton, etc., R. Co. *v.* Shoemaker, 3 Ohio Cir. Ct. 473, 2 Ohio Cir. Dec. 270 [*affirming* 10 Ohio Dec. (Reprint) 12, 18 Cinc. L. Bul. 43]; Hatry *v.* Painesville, etc., R. Co., 1 Ohio Cir. Ct. 426, 1 Ohio Cir. Dec. 258 [*affirmed* in 23 Cinc. L. Bul. 281]; Darst *v.* Pittsburgh, etc., R. Co., 5 Ohio Dec. (Reprint) 199, 4 Wkly. L. Gaz. 377, holding that in an action against a railroad company to compel the application of the income of the road to the payment of the preferred claim of a creditor, the court can require the company or any officer who is a party to apply money then on hand or thereafter to be received in satisfaction of such claim, the order to be enforced by attachment.

Where a railroad company fails to apply its income according to law, a creditor who has a lien on the property of the road by judgment or otherwise may enforce the proper application of such income by petition in the nature of a creditor's bill, and may thereby reach money in the hands of agents as well as property acquired after the execution of the mortgage, if such money and property be not necessary for operating the road. Carey *v.* Pittsburgh, etc., R. Co., 2 Ohio Dec. (Reprint) 85, 1 West. L. Month. 338.

35. Buel *v.* Baltimore, etc., R. Co., 24 Misc. (N. Y.) 646, 53 N. Y. Suppl. 749; Spies *v.* Chicago, etc., R. Co., 40 Fed. 34, 6 L. R. A. 565, holding, however, that the complaint should be dismissed because complainant having alleged a case of fraud should not be permitted to support it on any other ground.

Pleading.— Where a lessee railroad company agrees to apply the net earnings to the payment of a mortgage bond and coupons, and to furnish quarterly an account of operating expenses, etc., on a petition against such lessee for an accounting and its failure to so apply its net earnings or to make such report, plaintiff need not allege that there were net earnings; it being sufficient to set forth the bond, coupons, aver non-payment, and ask for an accounting (Schmidt *v.* Louisville, etc., R. Co., 119 Ky. 287, 84 S. W. 314, 27 Ky. L. Rep. 21); and a petition which seeks to recover not only on the coupons due when the petition was filed, but also to compel payment into court of the net earnings as they might thereafter accrue to meet subsequent coupons, and to provide a fund to meet the bond at maturity, is sufficient without a subsequent amendment, to cover the accounting of net earnings between the filing of the petition and the hearing of the cause (Schmidt *v.* Louisville, etc., R. Co., *supra*).

Where in an accounting in favor of income bondholders the company has paid a higher rate of interest than needful on former encumbrances, it cannot charge the difference against the income to the injury of the bondholders in direct contravention of the provisions of the mortgage securing the income bonds. Barry *v.* Missouri, etc., R. Co., 34 Fed. 829.

36. Thomas *v.* New York, etc., R. Co., 139 N. Y. 163, 34 N. E. 877, holding that a bondholder could not ask for an accounting of the earnings, as of a trust fund in the company's hands for the bondholders' benefit, the obligation being merely contractual and not fiduciary.

37. U. S. *v.* Kansas Pac. R. Co., 26 Fed. Cas. No. 15,505, 4 Dill. 367, 1 N. Y. Wkly. Dig. 444 [*reversed* on other grounds in 99 U. S. 455, 24 L. ed. 289], holding that under the act of July 1, 1862 (12 U. S. St. at L. 489), the government may recover at law of

from the income or property which is not necessary for its operation, each creditor may proceed for himself without making other bondholders or creditors under the mortgage parties.[38] The income of the road may also be attached by a trustee process for operating expenses.[39] Where a railroad mortgage gives bondholders the right to inspect the company's statement of earnings, interest, etc., the extent of their right depends upon the reasonable intent of the language of the mortgage;[40] but, in the absence of such provision in the mortgage, bondholders have no right to such an inspection.[41]

12. PAYMENT, SATISFACTION, RELEASE, OR DISCHARGE[42] — a. In General. Railroad bonds may be discharged by a new issue of bonds in substitution therefor.[43] Bonds delivered merely in furtherance of a device to defraud other creditors must, as to such creditors, be considered paid and canceled.[44] Where trustees of a railroad company purchase a portion of its property at a foreclosure sale in their individual right, their purchase cannot be treated as a payment of the mortgage by them as trustee mortgagees, so as to enable them to set it off against the sum due in a foreclosure suit of the railroad mortgage.[45] As a general rule a merger of bonds and stock does not take place where the interest of the mortgagee does not require it, and where there is no intent that there should be a merger, and where there is none in fact by a union in the same person of the title and mortgage.[46]

b. Right to Make Payment. In the absence of a provision in the contract to that effect, bondholders are not required to accept payment before maturity

the Union Pacific and other railroad companies receiving United States bonds, five per cent of the net income until the bonds and interest are paid.

38. Darst *v.* Pittsburgh, etc., R. Co., 3 Ohio Dec. (Reprint) 199, 4 Wkly. L. Gaz. 377.

Each judgment creditor of a railroad company having a lien on the property of the road of the first preferred class may proceed for himself against the company to compel the proper application of the income of the road for his benefit and in such action may make the railroad company and mortgagees parties, and in such a proceeding will be entitled to the benefit of his own vigilance. Carey *v.* Pittsburgh, etc., R. Co., 2 Ohio Dec. (Reprint) 85, 1 West. L. Month. 338.

39. Smith *v.* Eastern R. Co., 124 Mass. 154.

40. Pronick *v.* Metropolitan Trust Co., 67 N. Y. App. Div. 616, 74 N. Y. Suppl. 577, holding that where a mortgage securing bonds of a railroad company provided that, between the first and thirtieth of September in each year, the railroad company should file with the trustee a statement of earnings, etc., and the rate of interest to be paid on the bonds, and that during that period a certain number of bondholders might object in a manner prescribed by the mortgage to the interest and rate, there was an implied grant on the part of bondholders to an inspection of the interest statement; but that the right to inspect such statement was limited to the statement for the current year and that a bondholder could not compel a trustee to exhibit statements for prior years.

41. Pronick *v.* Metropolitan Trust Co., 67 N. Y. App. Div. 616, 74 N. Y. Suppl. 577.

42. Payment, release, and satisfaction of mortgages generally see MORTGAGES, 27 Cyc. 1386 *et seq.*

43. Canada Southern R. Co. *v.* Gebhard, 109 U. S. 527, 3 S. Ct. 363, 27 L. ed. 1020 [*reversing* 1 Fed. 387, 17 Blatchf. 416], holding that the payment of certain first mortgage railroad bonds executed and issued in the dominion of Canada and payable in the city of New York is discharged by virtue of an act of parliament of the dominion of Canada authorizing such railroad company to issue new bonds in substitution for such former bonds. And see *supra*, VIII, A, 4, e, (v).

44. Chattanooga, etc., R. Co. *v.* Evans, 66 Fed. 809, 14 C. C. A. 116, holding that where a railroad company sells its property to another railroad company for guaranteed bonds of the latter and the contract of sale provides that the larger part of these bonds shall be distributed to holders of stock and income bonds of the selling company, which stock and income bonds are to be delivered to the guarantor as a consideration for the guaranty, the income bonds must be considered as paid and canceled as against unsecured creditors of the selling company.

45. Griggs *v.* Detroit, etc., R. Co., 10 Mich. 117.

46. Ten Eyck *v.* Pontiac, etc., R. Co., 114 Mich. 494, 72 N. W. 362, holding that one who, as attorney for a railroad company, the promoter of which was H, negotiated a contract with an investment company of which H was president and chief stockholder, by which the investment company was to construct the railroad and receive a certain amount of the stock and mortgage bonds of the railroad company, cannot, as a creditor of the railroad company, and having known all the facts insist upon a merger of the bonds and stock in the hands of H who acquired them through the investment company.

of their bonds,[47] and a statute, the effect of which is to make a mortgage debt become due before the time fixed in the mortgage, cannot be enforced.[48]

c. Payment in Scrip or Other Medium. Where the promise to pay bonds is in the alternative, to pay the principal or interest in money or some other medium of payment, such as scrip, the promisor has an option either to pay in money or its equivalent;[49] but if, when a payment is due, the company does not exercise its option, its right to do so is gone and the promisee is entitled to demand payment in money,[50] without a presentment of the bonds or a demand of payment;[51] nor does the fact that the bondholder had accepted another medium for past payments amount to a waiver of his right to demand money.[52] Under some statutes certificates of indebtedness may be delivered to a creditor in exchange for existing debts and obligations to an equal amount,[53] as the same shall be ascertained and liquidated.[54] A railroad company authorized to sell its bonds at a discount may receive in payment therefor construction material as well as cash.[55] A subcontractor is bound to accept payment as provided for in the principal contract;[56] but if a proper tender is not made to him of the article in which he is to be paid, he may maintain an action for a money judgment.[57] Materialmen and laborers, however, are not bound to accept anything in payment except money whatever may be the contract between the owner and contractor.[58]

47. Missouri, etc., R. Co. *v.* Union Trust Co., 156 N. Y. 592, 51 N. E. 309 [*affirming* 87 Hun 377, 34 N. Y. Suppl. 443]; Chicago, etc., R. Co. *v.* Pyne, 30 Fed. 86.

48. Randolph *v.* Middleton, 26 N. J. Eq. 543 [*reversing* 25 N. J. Eq. 306].

49. Texas, etc., R. Co. *v.* Marlor, 123 U. S. 687, 8 S. Ct. 311, 31 L. ed. 303 [*affirming* 19 Fed. 867, 21 Fed. 383, 22 Blatchf. 464].

Waiver.— Where the officers of a railroad company which has agreed to pay certain claims in stock, informs a claimant that if the claim is established the company will pay the "amount with interest," it thereby waives the right to pay in stock. Dubuque, etc., R. Co. *v.* Pierson, 70 Fed. 303, 17 C. C. A. 401.

50. Texas, etc., R. Co. *v.* Marlor, 123 U. S. 687, 8 S. Ct. 311, 31 L. ed. 303 [*affirming* 19 Fed. 867, 21 Fed. 383, 22 Blatchf. 464].

51. Texas, etc., R. Co. *v.* Marlor, 123 U. S. 687, 8 S. Ct. 311, 31 L. ed. 303 [*affirming* 19 Fed. 867, 21 Fed. 383, 22 Blatchf. 464].

52. Texas, etc., R. Co. *v.* Marlor, 123 U. S. 687, 8 S. Ct. 311, 31 L. ed. 303 [*affirming* 19 Fed. 867, 21 Fed. 383, 22 Blatchf. 464].

Estoppel.— Where a contract with a construction company provided that certificates of indebtedness should issue to the contractor with interest warrants attached, and these warrants were assigned to third persons who for three years accepted part payment of semiannual interest on deferred warrants, although under a true construction of the contract the entire interest should be paid in cash, the certificate holders who had not examined the semiannual statements or the original contract are not estopped from enforcing such contract according to its true meaning. Knapp *v.* New York, etc., R. Co., 2 Bosw. (N. Y.) 297.

53. Merchants' Nat. Bank *v.* Eastern R. Co., 124 Mass. 518, construing St. (1876) c. 236.

Laches.— It has been held that a secured creditor of the Eastern Railroad Company is not entitled, after the lapse of four years from the enactment of the statute of 1876, chapter 236, and five years from the time to which, by the terms of the statute, the claims against the corporation were to be made up as cash, to present his claim for adjustment and to receive certificates of indebtedness therefor; he having in the meantime received interest on his debt at a greater rate than he would have received under such certificates. Hamor *v.* Eastern R. Co., 133 Mass. 315.

A creditor of a railroad company who holds its promissory note and as collateral security for the same certain other notes of the company is not entitled under such statute to sell such collateral security and receive certificates of indebtedness for the balance due on the original note. Merchants' Nat. Bank *v.* Eastern R. Co., 124 Mass. 518.

54. Merchants' Nat. Bank *v.* Eastern R. Co., 124 Mass. 518.

In ascertaining the amount for which a certificate of indebtedness under St. (1876) c. 36, is to issue to a secured creditor, the value of the collateral security must first be deducted; and if this security consists of the bond of another corporation guaranteed and indorsed by defendant company, the amount to be applied on the debt is the value of the bond without the indorsement of the bond and guaranty. Merchants' Nat. Bank *v.* Eastern R. Co., 124 Mass. 518.

55. Coe *v.* Columbus, etc., R. Co., 10 Ohio St. 372, 75 Am. Dec. 518.

56. Farmers' L. & T. Co. *v.* Canada, etc., R. Co., 127 Ind. 250, 26 N. E. 784, 11 L. R. A. 740.

57. Farmers' L. & T. Co. *v.* Canada, etc., R. Co., 127 Ind. 250, 26 N. E. 784, 11 L. R. A. 740.

58. Farmers' L. & T. Co. *v.* Canada, etc., R. Co., 127 Ind. 250, 26 N. E. 784, 11 L. R. A. 740.

d. Necessity and Effect of Surrender of Evidence of Indebtedness. Where the evidence of indebtedness indicates an intention to that effect, payment thereof can be made only upon delivery or an offer to deliver.[59] Where a railroad mortgage provides that if the net income for any interest period is insufficient to pay the interest coupons for that period the holder shall receive scrip certificates for the deficit, a coupon holder upon which there is a deficit is entitled to the right of a scrip holder whether he surrenders his coupon or not.[60] Railroad bonds which are merely pledged as collateral security are not, when discharged and surrendered, the property of the company liable to be reached by garnishment against an officer of the company receipting for the same, but who in fact never received them.[61] A railroad contractor who has negotiated notes received in part payment of his claim is not first required to take up such notes before obtaining a judgment and lien for his services, but the judgment may provide for their payment out of the sum allowed.[62]

e. Release or Discharge. A lien or claim on railroad property may be released or discharged by a subsequent agreement, between the claimant and the railroad company, which shows an intention to adjust all existing controversies between the parties and to mutually release all existing obligations and liabilities.[63] But a change in the form of the mortgage debt, such as the substitution of new bonds for those originally secured, does not extinguish or affect the lien.[64] If bonds are sold and pass into the hands of a *bona fide* holder upon the supposition that the sale covers all coupons attached and detached and not paid and canceled, past-due detached coupons in the hands of one not an innocent purchaser for value must be considered as paid and canceled as against such purchaser.[65] Holders of coupons convertible into scrip acquire no vested interest in a mortgage under which the coupons were issued, where the mortgage was released, and the bonds which it secured were destroyed before issuing;[66] and it is immaterial that the release erroneously recites the book in which the mortgage is recorded, the mortgage being otherwise sufficiently described.[67] A lien on the property and franchises of a railroad company will not be discharged by judicial sale unless the lien-holder has been made a party to the proceeding and a decree entered against him providing that his lien shall be discharged by the sale.[68]

13. Enforcement of Liabilities Against Property — a. Nature and Form of Remedy in General. Ordinarily the proper remedy for enforcing payment of a claim payable out of railroad funds or property is a bill in equity for an accounting and distribution of the funds which the railroad company should have applicable thereto,[69] or by a bill to sell the mortgagor company's equity of redemption,[70]

59. See Osborne *v.* Preston, etc., R. Co., 9 U. C. C. P. 241.

60. Barry *v.* Missouri, etc., R. Co., 27 Fed. 1.

61. Galena, etc., R. Co. *v.* Stahl, 103 Ill. 67.

62. McDonald *v.* Charleston, etc., R. Co., 93 Tenn. 281, 24 S. W. 252.

63. Stewart *v.* Hoyt, 111 U. S. 373, 4 S. Ct. 519, 28 L. ed. 461.

64. Mowry *v.* Farmers' L. & T. Co., 76 Fed. 38, 22 C. C. A. 52.

65. Chicago, etc., R. Co. *v.* Turner, 79 Mich. 103, 44 N. W. 174.

66. Com. *v.* Wilmington, etc., R. Co., (Pa. 1889) 17 Atl. 5.

67. Com. *v.* Wilmington, etc., R. Co., (Pa. 1889) 17 Atl. 5.

68. Fidelity Title, etc., Co. *v.* Schenley Park, etc., R. Co., 189 Pa. St. 363, 42 Atl. 140, 69 Am. St. Rep. 815.

69. Schneider *v.* Cincinnati, etc., R. Co., 10 Ohio Dec. (Reprint) 364, 20 Cinc. L. Bul. 457; Galt *v.* Erie, etc., R. Co., 14 Grant Ch (U. C.) 499.

Notice.— Where in a suit by preferred creditors to reach personalty and net earnings during a receivership, a mandate is sent down, affording relief as to "such of the orators as had no notice" of the pendency of a previous cross bill by similar creditors, the notice intended is the formal notice directed by the former decree to be given to all creditors to come in and prove their claims, and not mere knowledge of the pendency of the cross bill (Bell *v.* St. Johnsbury, etc., R. Co., 76 Vt. 42, 56 Atl. 105); and a publication by the solicitors for the orators in the cross bill, without an order of court or of the master, of an advertisement, asking all creditors to bring in their claims, is without legal efficacy (Bell *v.* St. Johnsbury, etc., R. Co., *supra*).

70. Vicksburg, etc., R. Co. *v.* McCutchen, 52 Miss. 645, holding that the judgment creditors of a railroad company whose road is

and not an action at law for a personal judgment against the owner of the road.[71] Where a holder of unpaid coupons which have accumulated by reason of a deficiency of the net earnings applicable thereto brings a suit on some of such bonds for an accounting and afterward sues at law to recover on coupons on other bonds of the same issue, he is entitled to an account in the equity suit not merely for net earnings prior to the commencement of such suit to pay coupons then due, but also for all coupons due and net earnings received after the commencement of the suit until the accounts are stated,[72] and the lawsuits on the coupons should be stayed as plaintiff's rights can be protected in the equity suit.[73] As a general rule a creditor at large or before judgment cannot proceed by a creditor's bill to reach assets of a railroad company even if there be nothing liable to attachment or execution;[74] but where a creditor is entitled to payment out of a specific or trust fund, a petition in the nature of a creditor's bill may be maintained without judgment.[75] It has been held that where railroad property is worth much more than the amount of the debt and interest, it should be leased by public auction for the shortest term that will bring the amount due, and the accruing interest and principal as the same shall become due;[76] but if no one can be found who will take it for a term of years, then it should be sold absolutely, the company to elect whether the property shall be first offered for a term of years.[77] Some statutes also provide for a suspension period during which no action or suit may be commenced on railroad liabilities without leave.[78]

b. Attachment and Execution — (i) *IN GENERAL.* While as a general rule railroad property may be levied on and sold as an entirety, in the absence of statute, separate parts or parcels thereof which would affect the operation of the road as a whole cannot be taken separately.[79] For no class of creditors should the indispensable means of operating a railroad be taken away until the final sale of the entire road shall be necessary;[80] and it is a well settled rule that except where there is a statutory provision to the contrary,[81] and except where

subject to mortgage are not limited to the earnings or income of the company on a bill to obtain satisfaction of their judgments and to sell the equity of redemption subject to priorities and prior encumbrances.

71. Schneider *v.* Cincinnati, etc., R. Co., 10 Ohio Dec. (Reprint) 364, 20 Cinc. L. Bul. 457.

72. Morgan *v.* Union Pac. R. Co., 11 Fed. 692.

73. Morgan *v.* Union Pac. R. Co., 11 Fed. 692.

74. Darst *v.* Pittsburgh, etc., R. Co., 3 Ohio Dec. (Reprint) 199, 4 Wkly. L. Gaz. 377.

75. Darst *v.* Pittsburgh, etc., R. Co., 3 Ohio Dec. (Reprint) 199, 4 Wkly. L. Gaz. 377.

76. Bardstown, etc., R. Co. *v.* Metcalfe, 4 Metc. (Ky.) 199, 81 Am. Dec. 541; Winchester, etc., R. Co. *v.* Colfelt, 27 Gratt. (Va.) 777.

77. Bardstown, etc., R. Co. *v.* Metcalfe, 4 Metc. (Ky.) 199, 81 Am. Dec. 541.

78. London Financial Assoc. *v.* Wrexham, etc., R. Co., L. R. 18 Eq. 566, 30 L. T. Rep. N. S. 491.

79. Graham *v.* Mt. Sterling Coalroad Co., 14 Bush (Ky.) 425, 29 Am. Rep. 412; New York Cent. Trust Co. *v.* Moran, 56 Minn. 188, 57 N. W. 471, 29 L. R. A. 212; Cranston *v.* Union Trust Co., 75 Mo. 29; Compton *v.* Jesup, 68 Fed. 263, 15 C. C. A. 397; Georgia *v.* Atlantic, etc., R. Co., 10 Fed. Cas. No. 5,351, 3 Woods 434; Ludlow *v.* Clinton Line R. Co., 15 Fed. Cas. No. 8,600, 1 Flipp. 25 (holding that where there is a judgment against a railroad, and a mortgage of the road which has precedence of the judgment as to that part of the road lying in one county, a sale under execution cannot be made of that part of the road not subject to the prior lien of the mortgage; but the whole road must be appraised and sold together and the proceeds be brought into court and distributed according to the priority of the liens). *Compare* Weddington *v.* Carver, (Tex. Civ. App. 1907) 100 S. W. 786.

Where a railroad runs between two points in different states, a sale of that part of the road lying in one state under a levy on a judgment obtained by a bondholder would be an unjustifiable use of a legal right, and restrained on a bill filed by another bondholder. Du Pont *v.* Boshong, 8 Fed. Cas. No. 4,184, 1 Wkly. Notes Cas. (Pa.) 378.

80. Carey *v.* Pittsburgh, etc., R. Co., 2 Ohio Dec. (Reprint) 85, 1 West. L. Month. 338.

81. Hall *v.* Carney, 140 Mass. 131, 3 N. E. 14 (holding that railroad cars are, for the purposes of attachment, personal property, and that the Massachusetts statutes treat them as such and provide a special mode of attaching them; and that it is not necessary for an officer in attaching to take possession of them personally, or by a keeper, to preserve the attachment); Texas-Mexican R. Co. *v.* Wright, 88 Tex. 346, 31 S. W. 613,

the attachment or execution is to enforce a specific lien which accrued upon the acquisition of the property by the company,[82] the franchise of a railroad company is not subject to seizure and sale upon execution;[83] and it follows as a natural sequence, that tracks, road-bed, and other lands,[84] easements,[85] rolling stock,[86] and other things essential to the existence of the company and the execution of its corporate duty, and without which its franchise would be of no practical use, cannot be levied upon and sold on execution at law so as to detach them from the franchise and thus destroy its use.[87] Nor can the property be severed

31 L. R. A. 200 (construing Const. art. 10, § 4); Gulf, etc., R. Co. *v.* Newell, 73 Tex. 334, 11 S. W. 342, 15 Am. St. Rep. 788; Weddington *v.* Carver, (Tex. Civ. App. 1907) 100 S. W. 786 (construing Sayles Rev. Civ. St. arts. 3313, 4553). See Bowen *v.* Brecon, etc., R. Co., L. R. 3 Eq. 541, 36 L. J. Ch. 344, 16 L. T. Rep. N. S. 6, 15 Wkly. Rep. 482; Russell *v.* East Anglian R. Co., 15 Jur. 935, 20 L. J. Ch. 257, 3 MacN. & G. 125, 6 R. & Can. Cas. 501, 49 Eng. Ch. 95, 42 Eng. Reprint 208.

In Pennsylvania the special fieri facias allowed by act of April 7, 1870, Pub. Laws 58, on which such property may be sold (Mausel *v.* New York, etc., R. Co., 171 Pa. St. 606, 33 Atl. 377; Philadelphia, etc., R. Co.'s Appeal, 70 Pa. St. 355; Buffalo Coal Co. *v.* Rochester, etc., R. Co., 8 Wkly. Notes Cas. (Pa.) 126. *Compare* Oakland R. Co. *v.* Keenan, 56 Pa. St. 198 (under Act June 16, 1836, § 72); Covey *v.* Pittsburg, etc., R. Co., 3 Phila. (Pa.) 173) is a substitute for the writ of sequestration under the act of June 16, 1836, section 73, and compliance with conditions precedent to the issuance of the latter is necessary to authorize the former (Mausel *v.* New York, etc., R. Co., 171 Pa. St. 606, 33 Atl. 377); and if a special fieri facias be issued without a demand first having been made upon the officers of the company and without a levy having been made upon the personal property of the company the writ will be stayed (Mausel *v.* New York, etc., R. Co., *supra*).

82. McKay *v.* Ripley, etc., R. Co., 42 W. Va. 23, 24 S. E. 685 (holding that where one agreed to sell land to a railroad company for a money consideration, and the company entered upon the land with the vendor's consent, and built its railroad, and operated the same for several years, but failed to pay the money consideration, the vendor was entitled to enforce payment thereof as a vendor's lien by separate sale of the specific land); Hill *v.* La Crosse, etc., R. Co., 11 Wis. 214.

Where land on which is a railroad track is attached, and pending the litigation a railroad company purchases such land, it cannot object to a sale of the land in the attachment proceedings, on the ground that a section of the railroad cannot be sold. Chapman v. Pittsburg, etc., R. Co., 26 W. Va. 299.

83. *Illinois.*— Hatcher *v.* Toledo, etc., R. Co., 62 Ill. 477; Bruffett *v.* Great Western R. Co., 25 Ill. 353.

Indiana.— Louisville, etc., R. Co. *v.* Boney, 117 Ind. 501, 20 N. E. 432, 3 L. R. A. 435.

Louisiana.— New Orleans, etc., R. Co. *v.* Delamore, 34 La. Ann. 1225; State *v.* Morgan, 28 La. Ann. 482.

Ohio.— Ludlow *v.* Hurd, 1 Disn. 522, 12 Ohio Dec. (Reprint) 791.

Pennsylvania.— Mausel *v.* New York, etc., R. Co., 171 Pa. St. 606, 33 Atl. 377.

See 41 Cent. Dig. tit. "Railroads," §§ 595, 596, 598. And see EXECUTIONS, 17 Cyc. 947.

84. Louisville, etc., R. Co. *v.* Boney, 117 Ind. 501, 20 N. E. 432, 3 L. R. A. 435; Hackley *v.* Mack, 60 Mich. 591, 27 N. W. 871 (track and road-bed); Coe *v.* Columbus, etc., R. Co., 10 Ohio St. 372, 75 Am. Dec. 518.

A right of way cannot be sold on execution or otherwise to a purchaser who does not own the franchise. East Alabama R. Co. *v.* Doe, 114 U. S. 340, 5 S. Ct. 869, 29 L. ed. 136.

A decree directing a sale of a portion of the right of way and road-bed is inoperative, where the road has not been abandoned, or the franchise under which it was built surrendered; and the court may properly refuse to award process for the enforcement of such decree, since the effect of a sale would be merely to cloud the title of the owner of the road and its franchise. Connor *v.* Tennessee Cent. R. Co., 109 Fed. 931, 48 C. C. A. 730, 54 L. R. A. 687.

85. Western Pennsylvania R. Co. *v.* Johnston, 59 Pa. St. 290.

86. New York Cent. Trust Co. *v.* Moran, 56 Minn. 188, 57 N. W. 471, 29 L. R. A. 212; Carey *v.* Pittsburgh, etc., R. Co., 2 Ohio Dec. (Reprint) 85, 1 West. L. Month. 338; Covey *v.* Pittsburg, etc., R. Co., 3 Phila. (Pa.) 173.

87. McColgan *v.* Baltimore Belt R. Co., 85 Md. 519, 36 Atl. 1026; Northern Pac. R. Co. *v.* Shimmell, 6 Mont. 161, 9 Pac. 889 (office safe used in facilitating operations of road); Carey *v.* Pittsburgh, etc., R. Co., 2 Ohio Dec. (Reprint) 85, 1 West. L. Month. 338; Youngman *v.* Elmira, etc., R. Co., 65 Pa. St. 278; Loudenschlager *v.* Benton, 3 Grant (Pa.) 384; Covey *v.* Pittsburg, etc., R. Co., 3 Phila. (Pa.) 173; Longstreth *v.* Philadelphia, etc., R. Co., 11 Wkly. Notes Cas. (Pa.) 94, 309; Connor *v.* Tennessee Cent. R. Co., 109 Fed. 931, 48 C. C. A. 730, 54 L. R. A. 687.

An injunction may be allowed restraining the removal and sale on execution of portions of the mortgaged property of a railroad upon the application of the mortgagee, when the whole of the mortgaged property is insufficient to pay the mortgage debt. Lane *v.* Baughman, 17 Ohio St. 642, 93 Am. Dec. 653.

and sold in equity.[88] Some statutes expressly protect the rolling stock of a railroad company from execution.[89] But a creditor may attach the mortgagor company's equity of redemption.[90] Personal property left on the road when the mortgagees of the railroad took possession under their mortgage cannot be taken on execution subsequently issued against the company.[91]

(II) *Property Abandoned or Unnecessary For Operation of Road.* The above exemption, however, does not apply where the railroad company has ceased the use of its franchises and the performance of its public duties;[92] nor does it apply to surplus lands,[93] unnecessary rolling stock and equipment,[94] or to other property not needed or used for corporate purposes.[95]

(III) *Income and Revenues.* The income and revenues of a railroad company which are pledged for the payment of outstanding bonds are not liable to attachment by judgment creditors of the company.[96]

14. Actions on Obligations — a. In General. A bondholder may sue in assumpsit for the amount of his unpaid bonds or coupons,[97] notwithstanding the majority in interest of the holders of bonds of the same class have consented to waive their rights secured by the mortgage;[98] and this common-law right cannot

88. Carey *v.* Pittsburgh, etc., R. Co., 2 Ohio Dec. (Reprint) 85, 1 West. L. Month. 338.

89. Great Northern R. Co. *v.* Tahourdin, 13 Q. B. D. 320, 53 L. J. Q. B. 69, 50 L. T. Rep. N. S. 186, 32 Wkly. Rep. 559 (construing Railroad Companies Act (1867), §§ 3, 4); Midland Waggon Co. *v.* Potteries R. Co., 6 Q. B. D. 36, 50 L. J. Q. B. 6, 43 L. T. Rep. N. S. 511, 29 Wkly. Rep. 78 (holding that, under the Railway Companies Act (1867), § 4, the rolling stock and plant of a railway is protected from seizure on execution by a judgment creditor, and that this protection continues, although the railway is afterward closed for traffic, without any probability of its resuming); *In re* Manchester, etc., R. Co., [1897] 1 Ch. 276, 66 L. J. Ch. 139, 75 L. T. Rep. N. S. 416, 45 Wkly. Rep. 331 (construing Railway Companies Act (1867), § 4).

Exemption from distress: Under the Railway Rolling Stock Protection Act (1872), § 3, see Easton Estate Co. *v.* Western Waggon, etc., Co., 50 J. P. 790, 54 L. T. Rep. N. S. 735. Under the Railway Companies Act (1867), § 4, see Eyton *v.* Denbigh, etc., R. Co., 38 L. J. Ch. 74, 16 Wkly. Rep. 928.

90. Lane *v.* Baughman, 17 Ohio St. 642, 93 Am. Dec. 653.

91. Palmer *v.* Forbes, 23 Ill. 301.

92. Gardner *v.* Mobile, etc., R. Co., 102 Ala. 635, 15 So. 271, 48 Am. St. Rep. 84; Benedict *v.* Heineberg, 43 Vt. 231 (holding that a portion of a railroad bed abandoned by the company for public service is subject to levy on execution); Connor *v.* Tennessee Cent. R. Co., 109 Fed. 931, 48 C. C. A. 730, 54 L. R. A. 687.

93. Plymouth R. Co. *v.* Colwell, 39 Pa. St. 337, 80 Am. Dec. 526 (holding that lands purchased by a railroad company beyond what are actually dedicated to public purposes are liable to be levied in execution and sold as are the lands of any other debtor); *In re* Ogilvie, L. R. 7 Ch. 174, 41 L. J. Ch. 336; Gardner *v.* London, etc., R. Co., L. R. 2 Ch. 385, 15 L. T. Rep. N. S. 644, 15 Wkly. Rep. 324; *In re* Calne R. Co., L. R. 9 Eq. 658; *In re* Hull, etc., R. Co., L. R. 2 Eq. 262, 35 L. J. Ch. 838, 14 L. T. Rep. N. S. 855, 14 Wkly. Rep. 758; *Re* Bristol, etc., R. Co., 20 L. T. Rep. N. S. 70.

Land not needed for the operation of the road should be first sold, in enforcing a vendor's lien, and if insufficient the balance of the tract may then be sold. Seasongood *v.* Miami Valley R. Co., 8 Ohio Dec. (Reprint) 739, 9 Cinc. L. Bul. 256.

94. Boston, etc., R. Co. *v.* Gilmore, 37 N. H. 410, 72 Am. Dec. 336; Coe *v.* Columbus, etc., R. Co., 10 Ohio St. 372, 75 Am. Dec. 518; Carey *v.* Pittsburgh, etc., R. Co., 2 Ohio Dec. (Reprint) 85, 1 West. L. Month. 338.

Coal in the yards of a railroad company may be levied on and sold on execution against the company if there is left an abundant amount necessary to keep the company's trains running and supply all demands for operating the road, until a sufficient supply can be obtained elsewhere. Louisville, etc., R. Co. *v.* Noel, 15 Ky. L. Rep. 493.

95. Carey *v.* Pittsburgh, etc., R. Co., 2 Ohio Dec. (Reprint) 85, 1 West. L. Month. 338.

A canal basin is not a legitimate incident to a railroad having no authorized canal connection, and is not protected from levy and sale on execution against the company. Plymouth R. Co. *v.* Colwell, 39 Pa. St. 337, 80 Am. Dec. 526.

96. Dunham *v.* Isett, 15 Iowa 284, holding that where the property and revenues of a railroad company are pledged by the company to secure the payment of certain outstanding bonds, and the earnings of the road are insufficient to discharge the interest as it accrues thereon, the revenues so pledged are not subject to attachment by other judgment creditors of the company, and an attachment of the same will be restrained by injunction upon application to a court of equity.

97. Manning *v.* Norfolk Southern R. Co., 29 Fed. 838.

98. Manning *v.* Norfolk Southern R. Co., 29 Fed. 838.

be taken away by implications, especially if these are drawn from instruments other than that which is given in direct and positive acknowledgment of the debt.[99] Hence such right is not affected by remedies provided in a mortgage executed simultaneously with the bonds,[1] unless the provisions of the mortgage exclude the common-law right in express terms or by necessary implication.[2] In some jurisdictions, statutory remedies are provided for certain claims, such as for labor and materials, against the railroad company,[3] in which case the statute must be strictly followed, particularly if it gives a remedy where none before existed.[4] An action by a bondholder to enforce an equitable lien in his own behalf, as well as in behalf of those in like interest who may come in and contribute to the expenses of and join in the prosecution of the suit, is binding only on those who are made or become parties to the suit and bear their proportion of the expenses;[5] and a suit brought by an individual bondholder in which no relief is sought or obtained in behalf of other bondholders and in which they are not permitted to become parties is not a bar to subsequent suits of bondholders of the same class.[6]

b. Conditions Precedent. Under some statutes, before a claimant may maintain his action, he must have complied with certain conditions,[7] such as an attempt at adjustment with the superintendent of the road.[8] Such conditions may also be provided for by the terms of the mortgage.[9] But a railroad company cannot take advantage of the non-performance of such conditions where the non-performance was caused by its own wrong.[10] A condition required in order to prevent individual bondholders from prejudicing the lien of the mortgage by litigation for their own benefit and against a reasonable number of those intended to be protected by the mortgage need not be complied with in an action for an accounting and to restrain a diversion of net earnings.[11]

c. Parties. The parties to an action on railroad obligations are regulated by the rules governing parties in civil actions generally.[12] An assignee of rail-

99. Manning *v.* Norfolk Southern R. Co., 29 Fed. 838.

1. Philadelphia, etc., R. Co. *v.* Johnson, 54 Pa. St. 127; Manning *v.* Norfolk Southern R. Co., 29 Fed. 838.

2. Manning *v.* Norfolk Southern R. Co., 29 Fed. 838.

3. See Chicago, etc., R. Co. *v.* Sturgis, 44 Mich. 538, 7 N. W. 213; Central Trust Co. *v.* Condon, 67 Fed. 84, 14 C. C. A. 314, construing Tenn. Acts (1883), c. 220.

4. Chicago, etc., R. Co. *v.* Sturgis, 44 Mich. 538, 7 N. W. 213.

5. Adelbert College *v.* Toledo, etc., R. Co., 5 Ohio S. & C. Pl. Dec. 14, 3 Ohio N. P. 15, holding further that such a suit does not come under that provision of chancery practice that when the question is one of common or general interest to many persons, or when the parties are very numerous and it is impracticable to bring them all before the court, one or more may sue for the benefit of all.

6. Adelbert College *v.* Toledo, etc., R. Co., 5 Ohio S. & C. Pl. Dec. 14, 3 Ohio N. P. 15.

7. See Mason *v.* Cooper, 19 Ga. 543; Ferguson *v.* Despo, 8 Ind. App. 523, 34 N. E. 575, construing Act April 13, 1835, § 1, as amended by Act March, 1889, § 6, Elliott Suppl. § 1710.

8. Mason *v.* Cooper, 19 Ga. 543.

9. See Buel *v.* Baltimore, etc., R. Co., 24 Misc. (N. Y.) 646, 53 N. Y. Suppl. 749.

10. Gulf, etc., R. Co. *v.* Winder, 26 Tex. Civ. App. 263, 63 S. W. 1043, holding that where defendant railroad company issued scrip to its employees payable when the first train over its road reached a certain point and subsequently abandoned the work on the road so that the condition never happened, it cannot postpone the collection of the claims of workmen on the ground that such scrip has never matured.

11. Buel *v.* Baltimore, etc., R. Co., 24 Misc. (N. Y.) 646, 53 N. Y. Suppl. 749.

12. See Allan *v.* Manitoba, etc., R. Co., 10 Manitoba 123; Charlebois *v.* Great North West Cent. R. Co., 9 Manitoba 1; and, generally, PARTIES, 30 Cyc. 1.

A sole trustee under an income mortgage of a railroad company is a necessary party to a suit against such company for an accounting and an injunction, and on failure to join him as such, the bill will be dismissed. Morgan *v.* Kansas Pac. R. Co., 15 Fed. 55, 21 Blatchf. 134.

In an action for materials and supplies furnished a railroad company under Ohio Rev. St. § 1398, other holders of liens upon the railroad are not necessary or proper parties, in order to permit plaintiff to apply for the determination of the priority of his judgment in a subsequent action to marshal liens on the road. Farmers' L. & T. Co. *v.* Cincinnati, etc., R. Co., 10 Ohio Dec. (Reprint) 481, 21 Cinc. L. Bul. 275.

A railroad company and its contractor and subcontractor are necessary parties to a suit on a due-bill given by the contractor in lieu of time checks given to laborers for work in the construction of the road, in which it

road bonds, to whom the bonds have not been delivered, is a proper but not a necessary party to an action on the bonds by the assignor,[13] unless the debtor company has some legal defense against the assignee alone.[14] Persons who are not necessary or proper parties may be entitled to intervene in the suit.[15] Under a statute permitting intervention, only such claimants may avail themselves of such remedy as the statute authorizes so to do.[16]

d. Pleadings, Evidence, Instructions, Verdict, and Judgment. Except where regulated by special statute, the rules applying in civil actions generally regulate the pleadings,[17] issues,[18] presumptions and burden of proof,[19] admissibility,[20] or

is sought to obtain a personal judgment against the subcontractor, and to enforce a laborer's lien against the railroad. Texas, etc., R. Co. *v.* Dorman, (Tex. Civ. App. 1901) 62 S. W. 1086.

A non-resident contractor who is a primary debtor of one claiming a mechanic's lien against a railroad company is a necessary party to a suit to enforce such lien, but it is not essential that there should be a personal judgment against him, it being sufficient that he be brought into court by a warning order merely. St. Louis, etc., R. Co. *v.* Love, 74 Ark. 528, 86 S. W. 395.

The owner of the road is an essential party defendant to an action to establish a lien against the road for labor and material furnished for building the road. Little Rock Trust Co. *v.* Southern Missouri, etc., R. Co., 195 Mo. 669, 93 S. W. 944 (construing Rev. St. (1899) §§ 4245, 4246, 4248); Lyons *v.* Carter, 84 Mo. App. 483.

The omission of the lessee of a railroad in a proceeding to establish a lien on the road, as a party, merely renders the lien nugatory as to its rights under the lease, but does not prevent the establishment of a lien, for what it may be worth, against the interest of the owner of the road. Lyons *v.* Carter, 84 Mo. App. 483.

13. Texas Western R. Co. *v.* Gentry, 69 Tex. 625, 8 S. W. 98.

14. Texas Western R. Co. *v.* Gentry, 69 Tex. 625, 8 S. W. 98.

15. Carey *v.* Pittsburgh, etc., R. Co., 2 Ohio Dec. (Reprint) 85, 1 West. L. Month. 338, holding that in an action against a railroad company in which judgment against defendant merely is sought, mortgagees are not generally necessary parties defendant; but under Code, § 35, they may be let in to defend on application not only as parties in interest entitled to such equitable remedies as may be afforded by a separate proceeding in equity under the old practice in chancery, but entitled by virtue of this statute to defeat a recovery.

Claimants not within a general order requiring the receivers to pay a certain claim can only be heard upon a petition of intervention, and have no standing to file a motion for payment of their claims in court. Grand Trunk R. Co. *v.* Central Vermont R. Co., 91 Fed. 561.

16. Gulf, etc., R. Co. *v.* Winder, 26 Tex. Civ. App. 263, 63 S. W. 1043, holding that under Rev. St. art. 3313, only lien-holders are entitled to intervene in an action against a railroad company for work rendered in the construction of defendant's road-bed.

17. See Veatch *v.* American L. & T. Co., 79 Fed. 471, 25 C. C. A. 39 (holding that where plaintiffs in judgments against a railroad company for deaths by negligence, claim a preference out of current income as against mortgage bondholders on the ground that when the accident occurred the road was being operated by a company acting as the agent of the bondholder the latter assertion being a mere conclusion of the pleader and the facts on which it is based being vague and general the claim to a preference on that ground should be denied); McKenzie *v.* Montreal, etc., R. Co., 27 U. C. C. P. 224. And see, generally, PLEADING, 31 Cyc. 1.

A demurrer to a complaint asserting priority of a lien over a mortgage upon an unsecured account for materials and supplies is properly overruled where any item of the account is such as entitles a creditor to a preferred claim. Bellingham Bay Imp. Co. *v.* Fairhaven, etc., R. Co., 17 Wash. 371, 49 Pac. 514.

A complaint on a railroad bond must allege facts sufficient to show that the bond was issued for an authorized purpose, but need not allege that it was necessary to issue the bonds. Miller *v.* New York, etc., R. Co., 8 Abb. Pr. (N. Y.) 431, 18 How. Pr. 374.

Pleadings in a statutory action should substantially comply with the terms of the statute. Scioto Valley R. Co. *v.* Cronin, 38 Ohio St. 122 [*affirming* 7 Ohio Dec. (Reprint) 224, 1 Cinc. L. Bul. 315]. In a statutory action for labor and material, the facts on which the claim is based should be specially pleaded (Chicago, etc., R. Co. *v.* Sturgis, 44 Mich. 538, 7 N. W. 213), and a declaration on the common counts in assumpsit with a mere allusion to the statute is not sufficient (Chicago, etc., R. Co. *v.* Sturgis, *supra*).

A petition of intervention should set forth in an orderly way, so as to be subject to traverse, the facts necessary for the relief sought. Grand Trunk R. Co. *v.* Central Vermont R. Co., 91 Fed. 561.

18. See Singer *v.* St. Louis, etc., R. Co., 6 Mo. App. 427.

19. Sweem *v.* Atchison, etc., R. Co., 85 Mo. App. 87, holding that a subcontractor is presumed to rely on his lien and does not have to prove it, as the burden is on the owner to show that he relied on the credit of the contractor alone.

20. Downs *v.* Union Pac. R. Co., 4 Kan. 201 (holding that, in an action against a railroad company for labor done, under a general denial, alleging that it was not done

sufficiency of the evidence,[21] instructions,[22] and verdict and judgment,[23] in an action on an obligation against a railroad company.

15. "Scheme of Arrangement" With Creditors. By statute in England,[24] and Canada,[25] where a railroad company becomes unable to meet its engagements with its creditors, the directors may prepare and file a scheme of arrangement between the company and its creditors, whereby provision is made for the debts of the company.[26] These statutes provide *inter alia* for stay of actions,[27] stay of execution, attachment, or other process,[28] assent by mortgagees and debenture

for the company but for a contractor, the contract of the contractor with the company is admissible in evidence); Bagnell Timber Co. *v.* Missouri, etc., R. Co., 180 Mo. 420, 79 S. W. 1130 (holding that while Rev. St. (1889) § 4241, providing for the filing of railroad liens, does not require the lien to be verified, yet, where such a lien has an affidavit attached, the signature to which is the only means of identifying the paper or connecting plaintiff with it, it must be regarded as an entire instrument, so that plaintiff is not entitled to read the lien to the jury omitting the affidavit).

An instrument given by a subcontractor in lieu of time checks issued to laborers, which recites that it is issued in lieu of time checks issued for labor performed in the construction of the railroad, is admissible in an action thereon against a subcontractor and the railroad company to enforce the laborer's lien, although the declaration contained therein that it was for work performed in the construction of the road is not binding on the company, it being admissible as against the subcontractor. Texas, etc., R. Co. *v.* Dorman, (Tex. Civ. App. 1901) 62 S. W. 1086.

A recital in a due-bill given in lieu of time checks that it reserves the labor liens allowed by law to the persons performing the work is admissible in an action against the subcontractor and the railroad company to enforce such lien, for the purpose of showing that the lien has not been waived. Texas, etc., R. Co. *v.* Dorman, (Tex. Civ. App. 1901) 62 S. W. 1086.

21. Bagnell Timber Co. *v.* Missouri, etc., R. Co., 180 Mo. 420, 79 S. W. 1130 (holding evidence in an action against a railroad company to enforce a lien for ties and to recover a personal judgment under a contract alleged to have been entered into between plaintiffs and the railroad company and its tie contractors jointly, insufficient to support a finding that the contract was joint); Central Trust Co. *v.* Georgia Pac. R. Co., 83 Fed. 386 (holding that railroad contractors seeking to assert a lien upon embankments and structures actually erected by them cannot recover anything when they fail to prove what improvements or erections they made with sufficient detail or certainty of value to authorize any findings for any particular amount).

22. Bagnell Timber Co. *v.* Missouri, etc., R. Co., 180 Mo. 420, 79 S. W. 1130, holding an instruction in respect to a lien for ties so erroneous as to require the reversal of a personal judgment.

23. Galveston, etc., R. Co. *v.* Howrin, (Tex. 1888) 9 S. W. 661, holding that where in an action for work done on a railroad, the evidence was that plaintiff had been working for a contractor and fearing that he would not be paid was about to quit work when defendant's agent induced him to continue under promise to pay him, and a part of the work was done, and this was several months earlier than alleged in the petition, a verdict for an amount nearly equal to plaintiff's whole claim, as well for the work done before as after the promise was made, should be set aside as contrary to the pleadings and evidence.

24. Railway Companies Act (1867), §§ 8–22.

25. Railway Act (1903), §§ 285–289. And see *Re* Windsor, etc., R. Co., 3 Cartwr. Cas. (Can.) 387, 16 Nova Scotia 312 (construing Nova Scotia Act (1874), c. 104); Murdoch *v.* Windsor, etc., R. Co., 3 Cartwr. Cas. (Can.) 368, Russ. Eq. Dec. (Nova Scotia) 137.

26. See *In re* Baie des Chaleurs R. Co., 9 Can. Exch. 386.

27. See Devas *v.* East India, etc., Dock Co., 58 L. J. Ch. 522, 61 L. T. Rep. N. S. 217.

Upon the filing of such scheme, the court has power to restrain, upon terms, creditors from proceeding with any action or suit against the company pending the discussion of the scheme; but such power will be exercised only when the court is satisfied that the scheme makes proper provision for the payment of debts. *In re* Cambrian R. Co., L. R. 3 Ch. 278, 37 L. J. Ch. 409, 18 L. T. Rep. N. S. 522, 16 Wkly. Rep. 346, holding that a scheme providing that instead of payment of the debts of vendors of land and other creditors debenture bonds should be given to the full amount of their claims was not such a provision as would induce a court of chancery to interfere to prevent creditors from pursuing their remedies. And see *In re* Atlantic, etc., R. Co., 9 Can. Exch. 283. But sections 7 and 9 of the Railroad Companies Act of 1867 apply only to the time between the filing of the scheme of arangement and its enrolment, and after enrolment the court has no jurisdiction without a bill being filed to restrain an action against the company. *In re* Potteries, etc., R. Co., L. R. 5 Ch. 67, 39 L. J. Ch. 273, 22 L. T. Rep. N. S. 53, 18 Wkly. Rep. 155.

28. *In re* Potteries, etc., R. Co., L. R. 5 Ch. 67, 39 L. J. Ch. 273, 22 L. T. Rep. N. S. 53, 18 Wkly. Rep. 155 (holding that sections 7 and 9 of the English Railway Companies Act of 1867 does not apply after the enrolment of the scheme so as to require a judgment creditor to obtain leave of court to issue execution); *In re* Devon, etc., R. Co.,

holders,[29] preference shareholders,[30] creditors,[31] and others;[32] and for the confirmation,[33] and enrolment and effect of the scheme.[34]

L. R. 6 Eq. 610, 615, 37 L. J. Ch. 914, 18 L. T. Rep. N. S. 631, 17 Wkly. Rep. 133 (holding that, after publication of notice of the filing of a scheme of arrangement by a railway company, creditors of the company will not be allowed, without first obtaining leave of the court, to issue execution upon a scire facias against shareholders of the company). And see *Re* Cambrian R. Co., 22 L. T. Rep. N. S. 116, 18 Wkly. Rep. 416, (construing the Cambrian Railway Companys Act of 1868); Healey *v.* Chichester, etc., R. Co., L. R. 9 Eq. 148, 39 L. J. Ch. 387, 21 L. T. Rep. N. S. 811, 18 Wkly. Rep. 270 (construing the Companies' Clauses Consolidation Act, § 36).

Motion for leave.— When a railroad company has filed a scheme which has been sanctioned by one branch of the court, a motion for leave to issue execution must be made in that branch of the court by which the scheme was sanctioned. Christ Church *v.* East Junction, etc., R. Co., 17 Wkly. Rep. 819.

29. *In re* East Junction, etc., R. Co., L. R. 8 Eq. 87, 38 L. J. Ch. 522, 21 L. T. Rep. N. S. 86, holding that after a scheme of arrangement has been assented to in writing by three fourths in value of the debenture holders, although dissenting debenture holders are entitled to appear and oppose the scheme, the scheme is binding upon the minority unless it can be shown that the vote of the majority was obtained by fraud.

30. *Re* Cambrian R. Co., 24 L. T. Rep. N. S. 417, 19 Wkly. Rep. 871, holding that the assent of the preference shareholders must be given in writing.

The assent of holders of preferred one-half shares need not be obtained in writing before the scheme can be confirmed by the court. *In re* Brighton, etc., R. Co., 44 Ch. D. 28, 59 L. J. Ch. 329, 62 L. T. Rep. N. S. 353, 38 Wkly. Rep. 321.

31. Such scheme when matured becomes binding only on persons who have assented thereto or who are members of classes which under the statutes have become bound by the assent of the requisite majority. *In re* Cambrian R. Co., L. R. 3 Ch. 278, 37 L. J. Ch. 409, 18 L. T. Rep. N. S. 522, 16 Wkly. Rep. 346. It is not binding upon outside creditors who have not assented thereto. *In re* East Junction, etc., R. Co., L. R. 8 Eq. 87, 38 L. J. Ch. 522, 21 L. T. Rep. N. S. 86; *In re* Bristol, etc., R. Co., L. R. 6 Eq. 448, 37 L. J. Ch. 851, 16 Wkly. Rep. 1112; *In re* Baie des Chaleurs R. Co., 9 Can. Exch. 386.

Rights prejudicially affected.— The assent of the statutory majority of a class to a scheme of arrangement cannot be dispensed with if any existing right of that class is prejudicially affected. *In re* Neath, etc., R. Co., [1892] 1 Ch. 349, 66 L. T. Rep. N. S. 40, 40 Wkly. Rep. 289 [*affirming* 61 L. J. Ch. 172]. Whenever confirmation of a scheme prejudicially affecting outside creditors is sought, the court, before confirming it, will require the written consent thereto of all outside creditors. *In re* Bristol, etc., R. Co., L. R. 6 Eq. 448, 37 L. J. Ch. 851, 16 Wkly. Rep. 1112.

Parties who have recovered a judgment against a railroad company and converted it into a statutory mortgage are not bound by a scheme of arrangement to which they have not assented. Stephens *v.* Cork, etc., R. Co., Ir. R. 6 Eq. 604.

32. See English Railway Companies Act (1867), §§ 10–15; Canada Railway Act (1903), § 286.

33. See *In re* West Cork R. Co., Ir. R. 7 Eq. 96; *Re* Eastern, etc., R. Co., 67 L. T. Rep. N. S. 711; *Re* Teign Valley R. Co., 17 L. T. Rep. N. S. 201; Robertson *v.* Wrexham, etc., R. Co., 17 Wkly. Rep. 137.

A scheme should be confirmed where it is a reasonable and honest one and does not in any way exceed the powers afforded by the statute, or deprive the creditors of any legal rights which they possess, but is likely to benefit all persons concerned, the secured and the unsecured creditors as well as the shareholders, and to which no sufficient objection has been established. *In re* East India, etc., Dock Co., 44 Ch. D. 38, 62 L. T. Rep. N. S. 239, 38 Wkly. Rep. 516; *In re* Irish, etc., R. Co., Ir. R. 3 Eq. 190.

Such scheme should not be confirmed where it appears that the opposition to it is reasonable and based upon due regard to the interests of those opposing it (see *Re* Somerset, etc., R. Co., 21 L. T. Rep. N. S. 656, 18 Wkly. Rep. 332; *In re* Letterkenny R. Co., Ir. R. 4 Eq. 538), or where it appears or is shown that all creditors of the same class are not to receive equitable treatment (*In re* Baie des Chaleurs R. Co., 9 Can. Exch. 386). The court cannot sanction a scheme which gives to the holders of debenture stock the right to vote like shareholders. *Re* Stafford, etc., R. Co., 41 L. J. Ch. 777, 20 Wkly. Rep. 921.

Petitioners not in possession.— Where the petitioners for the confirmation of a scheme of arrangement filed under the provisions of Canada Railway Act (1903), § 285, are not in possession of the railway which they seek to mortgage as security for the issue of new bonds, the application to confirm will be refused. *In re* Atlantic, etc., R. Co., 9 Can. Exch. 413.

34. Stevens *v.* Mid-Hants R. Co., L. R. 8 Ch. 1064, 42 L. J. Ch. 694, 29 L. T. Rep. N. S. 318, 21 Wkly. Rep. 858 (holding that unpaid vendors of lands sold to the company, and debenture holders of the company, do not, by accepting debenture stock under the provisions of the scheme, lose any priority which they previously had over an elegit creditor who is not bound by the scheme); *In re* Devon, etc., R. Co., L. R. 6 Eq. 610, 615, 37 L. J. Ch. 914, 18 L. T. Rep. N. S. 631, 17 Wkly. Rep. 133.

A debenture holder, although he has obtained judgment and issued execution against

B. Foreclosure of Liens and Mortgages — 1. Right to Foreclose — a. In General. The foreclosure of a railroad mortgage is, in the absence of provisions in the mortgage to the contrary, ordinarily governed by the rules applicable to the foreclosure of mortgages generally,[35] except in so far as it may be regulated by special statute.[36] A railroad mortgage is an entirety and there can be but one foreclosure.[37] The prior foreclosure of a mortgage of railroad property securing railroad bonds also collaterally secured by trust deeds given by various parties is not a prerequisite to the foreclosure of such trust deeds, where it would be useless and nothing would be realized therefrom.[38]

b. Default in Payment of Principal or Interest. Ordinarily a mortgage given to secure the payment of railroad bonds and interest coupons may be foreclosed by the trustee, or other proper party, immediately on default in payment of any instalment of principal or interest,[39] to the extent of the instalments which are due and unpaid,[40] especially where, by the terms f the mortgage, proceedings

a railroad company before the filing of the scheme of arrangement, still remains a debenture holder for the purposes, and is therefore bound by the scheme when assented to by three fourths in value of the holders of the company's debentures, and after enrolment of the scheme will be restrained from taking any further steps to enforce his judgment. *In re* Potteries, etc., R. Co., L. R. 5 Ch. 67, 39 L. J. Ch. 273, 22 L. T. Rep. N. S. 53, 18 Wkly. Rep. 155.

An outside creditor is not bound by a scheme of arrangement and cannot derive any indirect benefit from it. Stevens *v.* Mid-Hants R. Co., L. R. 8 Ch. 1064, 42 L. J. Ch. 694, 29 L. T. Rep. N. S. 318, 21 Wkly. Rep. 858.

35. See Mortgages, 27 Cyc. 1439 *et seq.*

Waiver of default by majority of bondholders see Hollister *v.* Stewart, 111 N. Y. 644, 19 N. E. 782. Where a mortgage provided that on default in the payment of coupons for ninety days, the principal of the bonds should become due and payable at the option of the trustee, but that a majority of the bondholders might waive the right to consider the principal due, such provision does not affect the right to collect the interest, and although the bondholders might waive the right to consider the principal due, the default in the payment of interest is not thereby waived. Lyon *v.* New York, etc., R. Co., 13 N. Y. St. 732 [*affirmed* in 14 Daly 489, 15 N. Y. St. 348].

A mortgagee or judgment creditor of a railroad is not entitled to enforce payment of his demand by sale or foreclosure of the railroad; but is only entitled to have a manager or receiver of the undertaking appointed. Galt *v.* Erie, etc., R. Co., 14 Grant Ch. (U. C.) 499.

36. Kennebec, etc., R. Co. *v.* Portland, etc., R. Co., 59 Me. 9 (holding that Pub. Laws (1857), c. 57, providing for the foreclosure of valid mortgages "whenever any railroad company shall have mortgaged its franchise" reaches all this class of conveyances and the words used are sufficiently retroactive to apply to mortgages executed before its passage); Austin, etc., R. Co. *v.* Daniels, 62 Tex. 70 (construing Act Feb. 18, 1879, Rev. St. appendix, p. 4, § 1).

37. Gates *v.* Boston, etc., R. Co., 53 Conn. 333, 5 Atl. 695.

38. Chicago, etc., Land Co. *v.* Peck, 112 Ill. 408.

39. Central Trust Co. *v.* New York City, etc., R. Co., 33 Hun (N. Y.) 513; Pennsylvania L. Ins., etc., Co. *v.* Philadelphia, etc., R. Co., 69 Fed. 482; Farmers' L. & T. Co. *v.* Chicago, etc., R. Co., 61 Fed. 543; Mercantile Trust Co. *v.* Chicago, etc., R. Co., 61 Fed. 372; Central Trust Co. *v.* Texas, etc., R. Co., 23 Fed. 846.

A tender of interest, unless of interest due on all the bonds, is insufficient to arrest an action by a bondholder suing on behalf of himself and others to foreclose a mortgage securing the bonds, for default in payment of interest thereon. Van Benthuysen *v.* Central New England, etc., R. Co., 17 N. Y. Suppl. 709.

That the mortgagee has failed to keep correct accounts is no ground for restraining him from proceeding on the mortgage, where there is no proof that the debt has been paid. Spring Brook R. Co. *v.* Lehigh Coal, etc., R. Co., 2 Lack. Leg. N. (Pa.) 258.

40. Long Island L. & T. Co. *v.* Long Island City, etc., R. Co., 85 N. Y. App. Div. 36, 82 N. Y. Suppl. 644 [*affirmed* in 178 N. Y. 588, 70 N. E. 1102]; Goodman *v.* Cincinnati, etc., R. Co., 2 Disn. (Ohio) 176 (holding that where a deed of trust was given to secure the payment of principal and interest of certain railroad bonds, so much of the premises as is necessary may be sold to pay arrears of interest, although no part of the principal has become due); London Credit Co. *v.* Arkansas Cent. R. Co., 15 Fed. 46, 5 McCrary 23.

Where no provision making the principal due on default in the payment of interest is contained in the mortgage, powers given by the mortgage to the trustee after default for a stated period in the payment of interest, to take possession of the mortgaged property and sell the same, and apply the proceeds to the payment of interest, do not change the maturity of the principal so as to authorize a foreclosure for the entire debt on default in the payment of interest. McFadden *v.* Mays' Landing, etc., R. Co., 49 N. J. Eq. 176, 22 Atl. 932.

for the collection of interest by ordinary judgment and execution at law is forbidden;[41] and although the mortgage fails to provide expressly for immediate foreclosure on such default.[42] This right to immediately institute foreclosure proceedings for the payment of interest is not affected by provisions for cumulative remedies in the mortgage, as that in case of default in the payment of interest for a specified period the principal shall become due and payable and the trustee be entitled to take possession with or without entry or foreclosure, and operate or sell the property,[43] especially where the laws of the state in which the mortgaged property is situated forbid sales under powers of such character, out of court.[44] Nor where the mortgagor is permitted to remain in possession is the trustee's right of foreclosure for an unpaid instalment affected by a further provision that on default in the payment of interest for a specified time, it should be the duty of the trustee to enforce the rights of the bondholders upon the request of a specified number or percentage of the bondholders, although such request has not been made,[45] as such request is necessary only where the trustee wishes to proceed to foreclose or take possession without the intervention of any court,[46] or where the bondholders wish to coerce the trustee to proceed by a foreclosure action.[47] So a provision authorizing a majority of the bondholders on default to notify the trustee to take no further steps to sell the property until another default refers merely to a summary sale by the trustee alone and a suit to foreclose may be maintained notwithstanding the opposition of the majority.[48] Where the railroad company is hopelessly insolvent, a railroad mortgage may sometimes be foreclosed, although as to the indebtedness secured by it there has been no default.[49] Where the mortgage provides that the principal shall become due

41. Pennsylvania L. Ins., etc., Co. *v.* Philadelphia, etc., R. Co., 69 Fed. 482.

42. Central Trust Co. *v.* Texas, etc., R. Co., 23 Fed. 846.

43. Eaton, etc., R. Co. *v.* Hunt, 20 Ind. 457 (holding that the power given to a trustee to sell is a cumulative remedy and does not deprive the bondholders of the right to foreclose); Long Island L. & T. Co. *v.* Long Island City, etc., R. Co., 85 N. Y. App. Div. 36, 82 N. Y. Suppl. 644 [*affirmed* in 178 N. Y. 588, 70 N. E. 1102]; Central Trust Co. *v.* New York City, etc., R. Co., 33 Hun (N. Y.) 513 (holding that a provision for an entry by the trustee after ten months' default in the payment of interest does not prevent a foreclosure for the interest at any time after default); State Trust Co. *v.* Kansas City, etc., R. Co., 120 Fed. 398; Central Trust Co. *v.* Texas, etc., R. Co., 23 Fed. 846; Dow *v.* Memphis, etc., R. Co., 20 Fed. 260; Alexander *v.* Iowa Cent. R. Co., 1 Fed. Cas. No. 166, 3 Dill. 487.

A waiver of a condition, requiring six months' default before foreclosure, by the company is not of itself a fraud on the stock-holders. Chicago, etc., Rapid Transit Co. *v.* Northern Trust Co., 90 Ill. App. 460 [*affirmed* in 195 Ill. 288, 63 N. E. 136].

44. Alexander *v.* Iowa Cent. R. Co., 1 Fed. Cas. No. 166, 3 Dill. 487.

45. First Nat. F. Ins. Co. *v.* Salisbury, 130 Mass. 303; Farmers' L. & T. Co. *v.* Chicago, etc., R. Co., 61 Fed. 543; Mercantile Trust Co. *v.* Chicago, etc., R. Co., 61 Fed. 372; Farmers' L. & T. Co. *v.* Chicago, etc., R. Co., 27 Fed. 146 (holding that the provisions which prohibit the trustee without the consent of a majority of the bonds to declare the principal due upon maturity and take possession of the mortgaged property, operate or sell it or maintain a foreclosure suit for the principal before the maturity of the bonds do not abrogate the right of a trustee at the request of a single bondholder, to foreclose for a default in the payment of interest); Dow *v.* Memphis, etc., R. Co., 20 Fed. 260; London Credit Co. *v.* Arkansas Cent. R. Co., 15 Fed. 46, 5 McCrary 23.

A trustee's right to foreclose in its discretion is not dependent on the request of the bondholders, where the mortgage authorizes foreclosure by the trustee if default is made in the payment of interest, and authorizes a majority of the bondholders to request foreclosure. Knickerbocker Trust Co. *v.* Oneonta, etc., R. Co., 116 N. Y. App. Div. 78, 101 N. Y. Suppl. 241 [*affirmed* in 188 N. Y. 38, 80 N. E. 568].

46. Morgan's Louisiana, etc., R., etc., Co. *v.* Texas Cent. R. Co., 137 U. S. 171, 11 S. Ct. 61, 34 L. ed. 625.

47. Farmers' L. & T. Co. *v.* New York, etc., R. Co., 78 Hun (N. Y.) 213, 28 N. Y. Suppl. 933 [*reversed* on other grounds in 150 N. Y. 410, 44 N. E. 1043, 55 Am. St. Rep. 689, 34 L. R. A. 76, 94 N. Y. Suppl. 928].

48. Toler *v.* East Tennessee, etc., R. Co., 67 Fed. 168.

49. McIlhenny *v.* Binz, 80 Tex. 1, 13 S. W. 655, 26 Am. St. Rep. 705, holding that where a railroad company alleged its insolvency and prayed for a sale of its property and the distribution of its proceeds among its creditors, and a receiver was appointed, and a mortgage creditor filed a cross bill asking foreclosure of the mortgages on both of which default in the payment of interest had been

for purposes of foreclosure upon a default in interest continuing for a specified time, the trustee may, upon the default continuing for such length of time, proceed to the collection of the whole amount of principal and interest by a bill in equity without a formal declaration of the maturity of such principal, unless the mortgage so requires.[50]

c. Persons Entitled to Sue in General. The right to proceed for the foreclosure of a railroad mortgage is in the legal holder of the mortgage, the mortgagee, or trustee,[51] or in the actual creditor, that is, the one who is the real and beneficial owner of the debt or obligation secured, and who is entitled to receive the money due.[52] A guarantor of railroad mortgage bonds, who by the express terms of the mortgage is to be subrogated to all the rights of the mortgagees in respect to payments made by him has a right to foreclose for interest payments made by him,[53] and this right cannot be denied on the ground that, as he would still remain bound on his guarantee, he would have the right to further foreclosures for future payments.[54]

d. Rights, Remedies, and Powers of Trustees. A trustee under a railroad mortgage is ordinarily the proper party to institute foreclosure proceedings for a breach of conditions in the mortgage.[55] In making a foreclosure a large discretion is vested in the trustee,[56] and any limitations upon his power to institute foreclosure proceedings should be strictly construed;[57] although he should be governed by the voice of the majority of bondholders secured, acting in good faith and asking what is not inconsistent with the provisions of the trust.[58] But the bondholders not being necessary parties to a foreclosure proceeding by a trustee,[59] they cannot control the action of the trustee so long as he is not guilty of misconduct or proves himself incompetent or appears to have an adverse interest.[60] A provision authorizing the trustee to refuse to institute foreclosure proceedings until properly indemnified does not restrict or limit his rights in the matter of instituting suit.[61] Where a trustee's title has become divested he has no right to represent the bondholders in foreclosure proceedings.[62] If a part of the trustees

made, but the debt secured by the second only was due, both mortgages were properly foreclosed, although by its terms the first mortgage was not subject to foreclosure until default in payment of the principal at maturity.

50. Morgan's Louisiana, etc., R., etc., Co. *v.* Texas Cent. R. Co., 137 U. S. 171, 11 S. Ct. 61, 34 L. ed. 625.

51. See Boston, etc., Air Line R. Co. *v.* Coffin, 50 Conn. 150. And see *infra*, VIII, B, 1, d; and, generally, MORTGAGES, 27 Cyc. 1543.

52. Sinking Fund Com'rs *v.* Northern Bank, 1 Metc. (Ky.) 174, holding that a pledgor of railroad bonds on which interest is not paid has the right to ask for the foreclosure of a mortgage whether the nominal mortgagee desires it or not.

53. Dows *v.* Chicago, etc., R. Co., 7 Fed. Cas. No. 4,048 [*affirmed* in 94 U. S. 444, 24 L. ed. 207].

54. Dows *v.* Chicago, etc., R. Co., 7 Fed. Cas. No. 4,048 [*affirmed* in 94 U. S. 444, 24 L. ed. 207].

55. Phillips *v.* Southern Div. Chesapeake, etc., R. Co., 110 Ky. 33, 60 S. W. 941, 22 Ky. L. Rep. 1530; Seibert *v.* Minneapolis, etc., R. Co., 52 Minn. 148, 53 N. W. 1134, 38 Am. St. Rep. 530, 20 L. R. A. 535; Mercantile Trust Co. *v.* Chicago, etc., R. Co., 61 Fed. 372.

56. Gates *v.* Boston, etc., Air-Line R. Co., 53 Conn. 333, 5 Atl. 695.

That a competing railroad had secured control of the mortgagor company and diverted traffic from it in order to prevent it from paying interest on the bonds thereby compelling a foreclosure does not affect the right of a trustee to foreclose. Farmers' L. & T. Co. *v.* New York, etc., R. Co., 94 N. Y. Suppl. 928.

57. Guaranty Trust, etc., Co. *v.* Green Cove Springs, etc., R. Co., 139 U. S. 137, 11 S. Ct. 512, 35 L. ed. 116; Farmers' L. & T. Co. *v.* Chicago, etc., R. Co., 61 Fed. 543.

A provision which prohibits foreclosure and judicial sale, by providing that the mode of sale by the trustee set forth in the deed shall be exclusive of all others, is an attempt to oust the courts of jurisdiction and is invalid. Guaranty Trust, etc., Co. *v.* Green Cove Springs, etc., R. Co., 139 U. S. 137, 11 S. Ct. 512, 35 L. ed. 116.

58. Gates *v.* Boston, etc., Air-Line R. Co., 53 Conn. 333, 5 Atl. 695. See Farmers' L. & T. Co. *v.* New York, etc., R. Co., 150 N. Y. 410, 44 N. E. 1043, 55 Am. St. Rep. 689, 34 L. R. A. 76.

59. See *infra*, VIII, B, 6.

60. Phillips *v.* Southern Div. Chesapeake, etc., R. Co., 110 Ky. 33, 60 S. W. 941, 22 Ky. L. Rep. 1530.

61. Phillips *v.* Southern Div. Chesapeake, etc., R. Co., 110 Ky. 33, 60 S. W. 941, 22 Ky. L. Rep. 1530.

62. Barnes *v.* Chicago, etc., R. Co., 122 U. S. 1, 7 S. Ct. 1043, 30 L. ed. 1128.

refuse to act, a foreclosure suit may be prosecuted by the remaining trustee or trustees and those refusing to act may be made defendants.[63] So where one of several trustees dies, the surviving trustee or trustees may maintain the suit.[64]

e. Rights and Remedies of Bondholders. Foreclosure proceedings may be instituted by a bondholder, or any other beneficiary, for himself and others where the trustee unreasonably neglects or refuses to do so,[65] or where the trustee is not a proper person to represent the bondholders or other beneficiaries, either by reason of interests hostile to the parties, or conduct prejudicial to their rights, or for other reasons,[66] or where the trustees are dead.[67] In such a case a single bondholder may sue without the consent of the other bondholders,[68] and it is no defense that he is actuated by improper motives.[69] A provision in a railroad mortgage that there shall be a request by a certain number or percentage of the bondholders to the trustee to institute the foreclosure proceedings before a bondholder may institute a foreclosure suit should be strictly complied with,[70] unless it appears that such compliance is impossible,[71] or the trustees' interests are antagonistic.[72] Such a bill should ordinarily be filed against the company by one or more of the bondholders on behalf of themselves and all other bondholders similarly situated;[73] although an averment to this effect is unnecessary where

63. Phillips *v.* Southern Div. Chesapeake, etc., R. Co., 110 Ky. 33, 60 S. W. 941, 22 Ky. L. Rep. 1530.

64. Phillips *v.* Southern Div. Chesapeake, etc., R. Co., 110 Ky. 33, 60 S. W. 941, 22 Ky. L. Rep. 1530. *Compare* Shaw *v.* Norfolk County R. Co., 5 Gray (Mass.) 162, holding that a foreclosure suit by several trustees does not abate on the death of one of the trustees but must be postponed until the vacancy is filled.

65. Phillips *v.* Southern Div. Chesapeake, etc., R. Co., 110 Ky. 33, 60 S. W. 941, 22 Ky. L. Rep. 1530; Seibert *v.* Minneapolis, etc., R. Co., 52 Minn. 148, 53 N. W. 1134, 38 Am. St. Rep. 530, 20 L. R. A. 535; Van Benthuysen *v.* Central New England, etc., R. Co., 17 N. Y. Suppl. 709; Beekman *v.* Hudson River West Shore R. Co., 35 Fed. 3; Farmers' L. & T. Co. *v.* Chicago, etc., R. Co., 27 Fed. 146; Alexander *v.* Iowa Cent. R. Co., 1 Fed. Cas. No. 166, 3 Dill. 487.

Stipulation limiting right of bondholder.— The bondholders may agree among themselves on what conditions the right to foreclose may be exercised by an individual bondholder, and a provision in the mortgage that no proceedings in law or equity shall be taken by any bondholder secured thereby to foreclose the equity of redemption independently of the trustee. until after the refusal of the trustee to comply with a requisition first made on him by the holders of a certain percentage of the bonds secured by such mortgage, is reasonable and valid. Seibert *v.* Minneapolis, etc., R. Co., 52 Minn. 148, 53 N. W. 1134, 38 Am. St. Rep. 530, 20 L. R. A. 535. The effect of such stipulation is not to divest the bondholders of their right to judicial remedies or to oust the courts of their jurisdiction. but is merely the imposition of certain conditions on themselves in respect to the exercise of that right. Seibert *v.* Minneapolis, etc., R. Co., *supra*. So one who accepts bonds secured by a mortgage providing that the same shall not be foreclosed without the request therefor by a majority of the bondholders thereunder cannot restrain the making of an agreement by such majority that they will not request such foreclosure. Emery v. New York, etc., R. Co., 9 Misc. (N. Y.) 310, 30 N. Y. Suppl. 306, 1131.

The holder of any one of a series of bonds secured by a railroad mortgage made to trustees may, on refusal of the trustees so to do, maintain a suit for the foreclosure of the mortgage, for default in the payment of interest. McFadden *v.* Mays' Landing, etc., R. Co., 49 N. J. Eq. 176, 22 Atl. 932.

A provision giving the majority bondholders an option to declare the principal due on default of payment of interest does not prevent a single bondholder from foreclosing for interest. Alexander *v.* Iowa Cent. R. Co., 1 Fed. Cas. No. 166, 3 Dill. 487.

That the mortgage gives the trustee the right to take possession and sell the road for default in the payment of interest does not exclude the right of a bondholder to judicial foreclosure. Louisville, etc., R. Co. *v.* Schmidt, 52 S. W. 835, 21 Ky. L. Rep. 556.

66. Mercantile Trust Co. *v.* Lamoille Valley R. Co., 17 Fed. Cas. No. 9,432, 16 Blatchf. 324.

67. Galveston, etc., R. Co. *v.* Cowdrey, 11 Wall. (U. S.) 459, 20 L. ed. 199.

68. Louisville, etc., R. Co. *v.* Schmidt, 52 S. W. 835, 21 Ky. L. Rep. 556.

69. Louisville, etc., R. Co. *v.* Schmidt, 52 S. W. 835, 21 Ky. L. Rep. 556.

70. Cochran *v.* Pittsburgh, etc., R. Co., 150 Fed. 682.

Ratification by bondholder of suit by trustee without such request see London Credit Co. *v.* Arkansas Cent. R. Co., 15 Fed. 46, 5 McCrary 23.

71. Cochran *v.* Pittsburgh, etc., R. Co., 150 Fed. 682.

72. Cochran *v.* Pittsburgh, etc., R. Co., 150 Fed. 682.

73. Mason *v.* York, etc., R. Co., 52 Me. 82; McFadden *v.* Mays' Landing, etc., R. Co., 49 N. J. Eq. 176, 22 Atl. 932; Wright *v.*

default has been made only on the bonds of complainant; [74] and if there are several successive mortgages, and the complainants hold bonds secured by each mortgage, the bill may be filed on behalf of themselves and all the bondholders under each mortgage.[75] Where the mortgage security is doubtful, no one even professing to act in behalf of all who may come in and contribute to the expenses of the suit can proceed alone against the company and ask a sale of the property mortgaged, but the other bondholders should be made parties.[76] A provision requiring the request of one fourth of the bondholders under a railroad mortgage before foreclosure will not prevent foreclosure at the suit of a smaller number where more than three fourths of the bonds are held by a party who is charged in the bill with having caused the default by misappropriating the earnings of the road.[77] If the complainants to a bill of foreclosure to which the trustee has been made defendant elect to dismiss the bill as to the trustee, the court has the discretion to allow the trustee to file a bill for the benefit of all the bondholders.[78] But where a trustee has properly instituted a foreclosure suit, a bondholder cannot prosecute an independent suit of foreclosure, but can only be heard for his individual rights by coming into the trustee's pending suit.[79] Where some of the bondholders do not wish to foreclose, they may be allowed to purchase the bonds of those desiring a foreclosure and pay all costs, and thereby stay the proceedings.[80]

2. Foreclosure Without Action — a. Under Lien For Public Aid Granted. The foreclosure of a lien or mortgage on railroad property for public aid granted to it is usually regulated by the statute under which such lien or mortgage is created.[81] Under such statutes it is usually provided that, upon default or breach of the conditions under which the aid was granted, the proper officers may enter and sell the road in the prescribed manner,[82] although a court of equity may interpose to restrain a sale of the railroad property where a sale under the circumstances would be inequitable.[83] But under such statutes a sale cannot be made without

Ohio, etc., R. Co., 1 Disn. (Ohio) 465, 12 Ohio Dec. (Reprint) 736; New Orleans Pac. R. Co. *v.* Parker, 143 U. S. 42, 12 S. Ct. 364. 36 L. ed. 66; Galveston, etc., R. Co. *v.* Cowdrey, 11 Wall. (U. S.) 459, 20 L. ed. 199.

A holder of overdue interest coupons cannot maintain an action in his own name to compel a trustee to enforce payment of such bonds and interest by a sale of the property covered by the deed of trust, which was executed to secure a series of negotiable bonds with non-negotiable interest coupons attached. Wright *v.* Ohio, etc., R. Co., 1 Disn. (Ohio) 465, 12 Ohio Dec. (Reprint) 736.

74. McFadden *v.* Mays' Landing, etc., R. Co., 49 N. J. Eq. 176, 22 Atl. 932.

75. Galveston, etc., R. Co. *v.* Cowdrey, 11 Wall. (U. S.) 459, 20 L. ed. 199.

76. Nashville, etc., R. Co. *v.* Orr, 18 Wall. (U. S.) 471. 21 L. ed. 810.

77. Linder *v.* Hartwell R. Co., 73 Fed. 320.

78. Alexander *v.* Iowa Cent. R. Co., 1 Fed. Cas. No. 166, 3 Dill. 487.

79. Stern *v.* Wisconsin Cent. R. Co., 22 Fed. Cas. No. 13,378, 8 Reporter 488, 1 Fed. 555.

80. Tillinghast *v.* Troy, etc., R. Co., 48 Hun (N. Y.) 420, 1 N. Y. Suppl. 243 [*affirmed* in 121 N. Y. 649, 24 N. E. 1091].

81. See the statutes of the several states. And see Perry *v.* Clinton, etc., R. Co., 11 Rob. (La.) 412.

82. State *v.* Jacksonville, etc., R. Co., 16 Fla. 708 (construing the act of Jan. 16, 1855); State *v.* McKay, 43 Mo. 594 (construing the act of Feb. 19, 1866); *In re* Answers to Questions, 37 Mo. 129 (construing the act of April 8, 1865); Johnson *v.* Atlantic, etc., Transit Co., 156 U. S. 618, 15 S. Ct. 520, 39 L. ed. 556 (construing the Florida act of Jan. 8, 1853).

Under a Florida statute, the trustees of the internal improvement fund of the state having sold certain railroads for the purpose of taking up a state indebtedness with the purchase-money, and such purchase-money not being thereafter paid, any of the bonds of the state sought to be canceled remaining in the hands of a purchaser are under the control of the trustees rather than the holder. Littlefield *v.* Bloxham, 117 U. S. 419, 6 S. Ct. 793, 29 L. ed. 930.

In Texas, neither under the act of Aug. 15, 1870, nor under the joint resolution of May 18, 1871, could the governor of Texas, after a sale had been made to the state of the Houston Tap, etc., railroad, exact from a subsequent purchaser a bond conditioned that the purchaser would keep such railroad in running order and that he would not remove or cause to be removed any of the iron from the track of such railroad or any of the rolling stock therefrom. Ireland *v.* Taylor, 68 Tex. 158, 4 S. W. 65.

83. Ralston *v.* Crittenden, 13 Fed. 508, 3 McCrary 344, holding that the sale of a railroad for interest due the state, which interest amounts to less than the sum which the com-

preserving a lien upon all the property and franchises sold for the purchase-money, if it is not paid at the time of the sale.[84]

b. By Exercise of Power of Sale. Where a railroad mortgage or deed of trust authorizes the trustees on a breach of conditions to take possession and sell the property, the trustees may, when the conditions of the deed are broken, take possession and sell in the manner and upon the terms prescribed by the deed, without a foreclosure before the courts;[85] and if they proceed to sell in the manner prescribed,[86] and after compliance with any conditions in the deed,[87] the sale will divest the title of the railroad company.[88] If a power of sale is to be executed by the trustee on certain contingencies, he may be controlled, restrained, and directed by a court of equity at the suit of parties standing in the relation of *cestuis que trustent*, the rule for his guidance being derived from the instrument itself.[89]

3. Defenses. The defenses to an action to foreclose a railroad mortgage are ordinarily regulated by the general rules governing defenses to foreclosures of mortgages.[90] It is a good defense to such an action that the defaulted bonds or coupons have been paid,[91] that a prior suit of foreclosure is pending,[92] or that the railroad company has misapplied its earnings in order to bring about a default.[93] But it is not a good defense that the value of the railroad stock is abnormally depressed by the financial conditions,[94] or by false reports and harassing suits by complainants,[95] and that there is good ground to anticipate a substantial

pany must pay in order to discharge its liability to the state, will be enjoined.

84. *In re* Answers to Questions, 37 Mo. 129.

85. Brunswick, etc., R. Co. *v.* Hughes, 52 Ga. 557; Mason *v.* York, etc., R. Co., 52 Me. 82; Bradley *v.* Chester Valley R. Co., 36 Pa. St. 141.

Foreclosure by exercise of power of sale in general see Mortgages, 27 Cyc. 1449 *et seq.*

A trustee with power of sale has the right to decide in the first instance as to the right of the bondholders to have the property sold to pay the bonds; but persons representing the railroad company have the concurrent right of appeal to the courts for an adjudication upon the claims and rights of the alleged bondholders. Western Div. Western North Carolina R. Co. *v.* Drew, 29 Fed. Cas. No. 17,433, 3 Woods 674.

A Michigan statute (Howell Annot. St. § 3351), authorizing the execution of mortgages by railroad companies with such power therein for sale as shall in the judgment of the board be found expedient, excepts railroad mortgages from the general statutes relating to foreclosure of real estate mortgages. Ten Eyck *v.* Pontiac, etc., R. Co., 114 Mich. 494, 72 N. W. 362.

Where a power of sale is to be exercised by a trustee in case of continued default for sixty days after notice to the mortgagor of an intention to sell, but not until the sale has been previously advertised for sixty days, the two periods are not synchronous, but successive; the term required for the advertisement to run does not begin until the term of the prescribed notice has expired. Macon, etc., R. Co. *v.* Georgia R. Co., 63 Ga. 103.

86. Macon, etc., R. Co. *v.* Georgia R. Co., 63 Ga. 103 (notice of sale to mortgagor); Brunswick, etc., R. Co. *v.* Hughes, 52 Ga. 557.

87. Macon, etc., R. Co. *v.* Georgia R. Co., 63 Ga. 103. See also Western Div. Western North Carolina R. Co. *v.* Drew, 29 Fed. Cas. No. 17,433, 3 Woods 674.

88. Brunswick, etc., R. Co. *v.* Hughes, 52 Ga. 557; Coe *v.* New Jersey Midland R. Co., 31 N. J. Eq. 105.

89. Bradley *v.* Chester Valley R. Co., 36 Pa. St. 141.

90. See, generally, Mortgages, 27 Cyc. 1549 *et seq.*

Fraud.— Where upon default on railroad bonds a majority of the bondholders request the trustees to institute foreclosure proceedings, the mere fact that certain bondholders, including the president of the road, retained counsel for the company for the purpose of procuring service of process in a genuine action to foreclose mortgages does not constitute a fraud as to second mortgage bondholders who had at the time no knowledge of such action. Farmers' L. & T. Co. *v.* Green Bay, etc., R. Co., 6 Fed. 100, 10 Biss. 203.

91. Chamberlain *v.* Connecticut Cent. R Co., 54 Conn. 472, 9 Atl. 244.

92. Mercantile Trust Co. *v.* Atlantic, etc., R. Co., 70 Fed. 518, holding that where the trustee in a second mortgage has begun suit for foreclosure, making the trustee in the first mortgage a party and receivers of the road have been appointed and taken possession, a first mortgagee will not be permitted to bring an independent suit for the foreclosure of that mortgage.

93. Farmers' L. & T. Co. *v.* New York, etc., R. Co., 150 N. Y. 410, 44 N. E. 1043, 55 Am. St. Rep. 689, 34 L. R. A. 76 [*reversing* 78 Hun 213, 28 N. Y. Suppl. 933], holding such defense available to a stock-holder.

94. Toler *v.* East Tennessee, etc., R. Co., 67 Fed. 168.

95. Toler *v.* East Tennessee, etc., R. Co., 67 Fed. 168.

enhancement of the value;[96] or that complainants are bringing the suit in the interests of a rival company that it may purchase the railroad while the price is depressed;[97] that complainant, a purchaser of bonds, purchased them from, and at the request of, the lessee of the mortgaged railroad and that he instituted foreclosure proceedings as a means of relieving the lessee from the inconvenience or loss arising from the operation of the road;[98] or that the mortgagor had leased the road, where such lease was made without the mortgagee's consent;[99] nor can a defense be founded on equities arising between the mortgagor and a third party.[1] Nor can a railroad company, or its stock-holders or a purchaser, deny the validity of its incorporation in a suit to foreclose a mortgage which it has executed.[2] A defendant may be estopped from setting up matters of defense which otherwise would be good.[3] Intervening bondholders who are within the protection of the court cannot insist upon the alleged misconduct of a trustee in commencing a foreclosure suit, as a ground for denying the foreclosure.[4] As a general rule a claim or demand of defendant against complainant in a foreclosure suit cannot be set up by way of counter-claim or set-off.[5] In an action by an assignee, the mortgagor company may ordinarily set up the same defenses as would be available to it if the action was by the original holder.[6] Matters which are available as a defense in a foreclosure action cannot be made the basis of a suit to enjoin such action.[7]

4. Jurisdiction and Powers of the Court. In the absence of special statute

96. Toler *v.* East Tennessee, etc., R. Co., 67 Fed. 168.

97. Toler *v.* East Tennessee, etc., R. Co., 67 Fed. 168.

98. McFadden *v.* Mays' Landing, etc., R. Co., 49 N. J. Eq. 176, 22 Atl. 932.

99. Hale *v.* Nashua, etc., R. Co., 60 N. H. 333.

1. Peoria, etc., R. Co. *v.* Thompson, 103 Ill. 187; Farmers' L. & T. Co. *v.* Rockaway Valley R. Co., 69 Fed. 9 (holding that an agreement between bondholders and a lessee of the road cannot be interposed by a bondholder to prevent the foreclosure of a mortgage); Foster *v.* Mansfield, etc., R. Co., 36 Fed. 627 [*affirmed* in 146 U. S. 88, 13 S. Ct. 28, 36 L. ed. 899] (holding that an agreement of a construction company to pay the interest is no defense to a bill of foreclosure brought by the trustees at the instance of a company to whom the bonds were negotiated).

A statutory remedy given to a state and affording a paramount lien for its indorsement of bonds is enforceable by the state alone, and cannot be set up by purchasers of the railroad in a contest between them and the holders of indorsed bonds secured also by the corporation's mortgage, to defeat the latter in foreclosing such mortgage. Kelly *v.* Alabama, etc., R. Co., 58 Ala. 489.

2. Coe *v.* New Jersey Midland R. Co., 31 N. J. Eq. 105; Hatry *v.* Painesville, etc., R. Co., 1 Ohio Cir. Ct. 426, 2 Ohio Cir. Dec. 238 [*affirmed* in 23 Cinc. L. Bul. 281]; Farmers' L. & T. Co. *v.* Toledo, etc., R. Co., 67 Fed. 49; Beekman *v.* Hudson River West Shore R. Co., 35 Fed. 3.

3. Chicago, etc., Rapid Transit R. Co. *v.* Northern Trust Co., 90 Ill. App. 460 [*affirmed* in 195 Ill. 288, 63 N. E. 136] (holding that where trustees under a railroad mortgage declare the debt matured without request from the required number of stockholders, and the company acquiesces in such declaration, it is not entitled to resist foreclosure on the ground that no such request has been made, in the absence of any objection by the bondholders); Central Trust Co. *v.* Washington County R. Co., 124 Fed. 813 (holding that where at the time a railroad was constructed no objection was made to the contract by which the company's stocks and bonds were issued in payment therefor, it could not subsequently be objected, after a long acquiescence, in a suit to foreclose a mortgage securing the bonds, that the actual cost of construction was only two thirds of the par value of the bonds issued in payment therefor, and that the bonded indebtedness secured should therefore be scaled).

4. Dows *v.* Chicago, etc., R. Co., 7 Fed. Cas. No. 4,048 [*affirmed* in 94 U. S. 444, 24 L. ed. 207].

5. Ryan *v.* Anglesea R. Co., (N. J. Ch. 1888) 12 Atl. 539, holding that the receiver of a railroad, made a party defendant in an action to foreclose a mortgage, cannot set up an agreement with complainant by which he was to hold the road for complainant's benefit, the latter to pay all the costs and expenses, it not appearing that it was intended to secure to the receiver the right to set off his fees and costs against the amount of the mortgage.

6. Chicago, etc., R. Co. *v.* Loewenthal, 93 Ill. 433. And see, generally, Mortgages, 27 Cyc. 1553.

7. Waymire *v.* San Francisco, etc., R. Co., 112 Cal. 646, 44 Pac. 1086, holding that the fact that bonds had been transferred without consideration being available as a defense to the foreclosure action, an injunction could not be granted at the instance of stockholders to enjoin the foreclosure on that ground.

otherwise, the rules governing the jurisdiction and powers of courts in the foreclosure of liens and mortgages generally apply to actions for the foreclosure of liens and mortgages on railroad property.[8] A court of equity has jurisdiction to foreclose such liens or mortgages,[9] and it has power to decree a sale of the mortgaged railroad property on default in payment of interest, although the terms of the mortgage do not authorize such sale, and the bonds secured by the mortgage have not matured, if it appears that there is an urgent necessity for the sale.[10] Where a court of equity has jurisdiction of the parties and of the property as an entire indivisible thing, it may in its discretion foreclose a mortgage on railroad property, although embracing lands in another state, and may direct a sale thereof, and the execution of a proper conveyance to the purchaser.[11] But it has been held that where a road in one state is consolidated with a road in another state and a mortgage existed on the latter road at the time of the consolidation,

8. See, generally, MORTGAGES, 27 Cyc. 1516 *et seq.*

In **Texas** the county court has jurisdiction in an action to foreclose a mechanic's lien on railroad property where the amount claimed is within the jurisdiction of the court; and the fact that the value of the railroad exceeds the jurisdictional amount does not take away its jurisdiction, since the whole property of the road is not to be sold but only so much as shall be sufficient to satisfy the lien. Texas, etc., R. Co. *v.* Allen, 1 Tex. App. Civ. Cas. § 568. But a statute giving the county court jurisdiction to foreclose a laborer's lien on the "equipment" of a railway does not give it jurisdiction to foreclose a lien on the road-bed, or on any property of the road not embraced within the meaning of the word. St. Louis, etc., R. Co. *v.* Sandal, 3 Tex. App. Civ. Cas. § 379.

In **New York** the superior court of Buffalo has no jurisdiction of proceedings to enforce a lien for labor and materials furnished in the construction of bridges and trestle work for a railroad, under Laws (1844), c. 305, as amended by Laws (1870), c. 529. Fowler *v.* Buffalo, etc., R. Co., Sheld. 525.

Curing defect.— Where the legislature, after a decree of sale in proceedings to foreclose a railroad mortgage, passes a law to carry the decree into effect, any defect in the jurisdiction of the court is thereby cured. Youngman *v.* Elmira, etc., R. Co., 65 Pa. St. 278.

Justices of the peace.— The paramount lien created in Arkansas by Kirby Dig. §§ 6661–6663, in favor of a person sustaining a loss or damage to personal property against a railroad causing such loss or damage, cannot be declared and enforced in a suit before a justice of the peace. Kansas City Southern R. Co. *v.* King, 74 Ark. 366, 85 S. W. 1131.

Exclusive jurisdiction.— In a suit to foreclose a mortgage executed by a railroad company, brought against the company and certain mechanics' lien claimants in the county within which the company has franchises, and not in the county in which its principal business office is located and in which its land is situated, the court has exclusive jurisdiction of the entire controversy including the right of the lien claimants to enforce their lien for work done in the county in which the company has its principal business office. Prather Engineering Co. *v.* Genesee Cir. Judge, 149 Mich. 53, 112 N. W. 502.

The pendency in the state courts of a suit by the trustees of a railroad mortgage to foreclose is not a bar to a similar suit in the federal court by a bondholder secured thereby. Beekman *v.* Hudson River West Shore R. Co., 35 Fed. 3.

9. Luttrell *v.* Knoxville, etc., R. Co., (Tenn. 1907) 105 S. W. 565; Noll *v.* Cumberland Plateau R. Co., 112 Tenn. 140, 79 S. W. 380.

10. McLane *v.* Placerville, etc., R. Co., 66 Cal. 606, 6 Pac. 748, holding that such a necessity appears where the railroad company is insolvent, and a subsequent purchaser under a junior encumbrance will not discharge the interest, and the road must be run at a loss if operated by the trustee, and the road if unused must and will decay, and cannot be then repaired for lack of funds by the trustee.

11. Macon, etc., R. Co. *v.* Parker, 9 Ga. 377; Craft *v.* Indianapolis, etc., R. Co., 166 Ill. 580, 46 N. E. 1132 (holding that a court of general equity jurisdiction having the necessary parties before it has jurisdiction to foreclose a trust mortgage on a railroad and its franchises, although a part of the line is outside the state, or to direct trustees to make a sale under the power in the mortgage); McElrath *v.* Pittsburg, etc., R. Co., 55 Pa. St. 189; Wilmer *v.* Atlanta, etc., Air-Line R. Co., 30 Fed. Cas. No. 17,776, 2 Woods 447. But see Grey *v.* Manitoba, etc., R. Co., [1897] A. C. 254, 66 L. J. P. C. 66 [*affirming* 11 Manitoba 42].

Where there are sundry fieri facias against an insolvent railroad company, threatening to seize and sell the road, with its equipments, extending one hundred miles in length through six different counties, equity will take jurisdiction of the matter, direct a sale of the entire property for the benefit of all concerned, and distribute the fund according to the practice and usage in chancery, in a creditor's suit against executors and administrators. In such a case, no other court but that of chancery possesses adequate jurisdiction to reach and dispose of the entire merits. Macon, etc., R. Co. *v.* Parker, 9 Ga. 377.

the mortgagee can maintain an action in the courts of the state in which the mortgaged road is situated, and have a sale of the road within the limits of such state,[12] and that no jurisdiction exists in the courts of the former state to foreclose such mortgage.[13] Where the property has been sold and transferred under a foreclosure decree, the court has no further jurisdiction in the suit to entertain a petition to enforce a claim against the property or to require the payment by the purchaser of any claim which has not been filed as required by the decree.[14]

5. Limitations and Laches. The time within which a suit to foreclose a lien or mortgage on railroad property is, as in the case of a foreclosure of liens or mortgages generally, usually regulated by statute,[15] and if not brought within the time specified, the lien loses its validity.[16] Independently of statute a court of equity may refuse to decree a foreclosure where a complainant has been guilty of unreasonable delay in instituting his proceedings, such as a delay sufficient to raise the presumption that the claim has either been paid or abandoned,[17] although as a general rule a delay short of the whole period allowed by the statute of limitations will not have this effect.[18]

6. Parties[19] — a. In General. As a general rule all persons interested in the proceedings for the foreclosure of a railroad mortgage should be made parties.[20] But there are exceptions to this rule, particularly in foreclosure proceedings in federal courts,[21] and ordinarily it is enough that sufficient parties to represent all the adverse interests of plaintiffs and defendants are brought before the court.[22] In a suit by bondholders or others for the foreclosure of a railroad mortgage, the trustees of the mortgage bondholders should be made parties.[23] The doctrine

12. Eaton, etc., R. Co. *v.* Hunt, 20 Ind. 457.

13. Eaton, etc., R. Co. *v.* Hunt, 20 Ind. 457.

14. Grand Trunk R. Co. *v.* Central Vermont R. Co., 103 Fed. 740.

15. St. Louis, etc., R. Co. *v.* Love, 74 Ark. 528, 86 S. W. 395, holding that under the direct provisions of the statute an action to enforce a mechanic's lien against a railroad must be brought within one year after the claim accrues. See also, generally, Mortgages, 27 Cyc. 1558 *et seq.*

Under Ga. Code, §§ 1979, 1982, a suit on a contractor's lien must be brought within twelve months from the date of the record, although the road has been seized by the governor; and a suit within the meaning of the statute is not commenced until service of process on defendant. Cherry *v.* North, etc., R. Co., 65 Ga. 633.

Under Ill. Rev. St. (1874) c. 82, a suit to enforce a mechanic's lien against a railroad must be begun within three months from the time of the performance of the work or furnishing the material. Cairo, etc., R. Co. *v.* Canble, 4 Ill. App. 133. See also Arbuckle *v.* Illinois Midland R. Co., 81 Ill. 429.

Under Tex. Rev. St. art. 3315, prescribing twelve months as the period of limitation for suits for the enforcement of mechanics' and laborers' liens, the limitation does not begin to run until the suit can be brought, and if the wages are payable in the future, not until the time specified has come. Gulf, etc., R. Co. *v.* Berry, 31 Tex. Civ. App. 408, 72 S. W. 1049.

16. Cherry *v.* North, etc., R. Co., 65 Ga. 633.

17. Woods *v.* Pittsburgh, etc., R. Co., 99 Pa. St. 101; Gunnison *v.* Chicago, etc., R. Co., 117 Fed. 629. And see, generally, Mortgages, 27 Cyc. 1562.

18. Bellingham Bay Imp. Co. *v.* Fairhaven, etc., R. Co., 17 Wash. 371, 79 Pac. 514, holding that the equitable lien obtained upon the assets of a railroad company by furnishing the labor and material used for operating the road is not barred by laches before the claim is barred by the statute of limitations.

19. Parties to foreclosure of mortgages generally see Mortgages, 27 Cyc. 1562 *et seq.*

20. Bowling Green Trust Co. *v.* Virginia Pass., etc., Co., 132 Fed. 921.

Waiver of objection of want of necessary parties see Luttrell *v.* Knoxville, etc., R. Co., (Tenn. 1907) 105 S. W. 565.

21. Bowling Green Trust Co. *v.* Virginia Pass., etc., Co., 132 Fed. 921.

22. Kerp *v.* Michigan Lake Shore R. Co., 14 Fed. Cas. No. 7,727.

Where there are successive mortgages and the trustees of a prior mortgage file a bill to foreclose the same, all the bondholders under a subsequent mortgage need not be made parties to the suit. Campbell *v.* Texas, etc., R. Co., 4 Fed. Cas. No. 2,366, 1 Woods 368.

Assignor.—When the title to bonds, claimed by both parties to the bill by different assignments from the same person making no claim to the bonds, is in dispute, it is not necessary to join the assignor as a party. Hale *v.* Nashua, etc., R. Co., 60 N. H. 333.

23. Hale *v.* Nashua, etc., R. Co., 60 N. H. 333; Stevens *v.* Union Trust Co., 57 Hun (N. Y.) 498, 11 N. Y. Suppl. 268; Alexander *v.* Iowa Cent. R. Co., 1 Fed. Cas. No. 166, 3 Dill. 487.

also seems to be well settled that a trustee in a mortgage or trust deed speaks and acts for the bondholders and other beneficiaries, and that the latter are neither necessary nor proper parties unless the fitness of the particular trustee or his conduct as such in failing to efficiently, honestly, or impartially discharge his duty is brought in question,[24] particularly where the bondholders are numerous.[25] They may be admitted as parties, however, where the trustee is guilty of misconduct or shows himself incompetent to properly execute the trust or where he is shown to have interests adverse to those of the bondholders.[26] Proper but not necessary parties to a suit of foreclosure are the owner of the equity of redemption,[27] a lessee in possession of the mortgaged premises,[28] junior encumbrancers,[29] and others who are so connected with the subject-matter that their presence before the court cannot be objected to as a misjoinder, although a full and com-

In a suit by first mortgage bondholders, who are also holders of a second mortgage on a part of the road, praying for an account of the earnings from different parts of the road or for a foreclosure and appointment of a receiver, the trustees of a second mortgage are necessary parties. Mercantile Trust Co. *v.* Portland, etc., R. Co., 10 Fed. 604.

Control of proceedings.— Where the trustees apply to come in and have been admitted as complainants in a bill of foreclosure, they must control the proceedings. Richards *v.* Chesapeake, etc., R. Co., 20 Fed. Cas. No. 11,771, 1 Hughes 28.

The getting of a consent decree by bondholders for a sale of the road to pay their bonds in a proceeding in which neither the state nor trustees were represented, when the latter were pursuing their lawful remedy to subject the road to the payment of the purchase-money, is an inequitable interference with and a fraud upon the bondholders' rights. Florida *v.* Anderson, 91 U. S. 667, 23 L. ed. 290.

24. *Illinois.*— See St. Louis, etc., R. Co. *v.* Kerr, 153 Ill. 182, 38 N. E. 638 [*affirming* 48 Ill. App. 496]; Chicago, etc., R. Co. *v.* Peck, 112 Ill. 408.

Kentucky.— Phillips *v.* Southern Div. Chesapeake, etc., R. Co., 110 Ky. 33, 60 S. W. 941, 22 Ky. L. Rep. 1530. But see Bardstown, etc., R. Co. *v.* Metcalfe, 4 Metc. 199, 81 Am. Dec. 541.

Massachusetts.— Shaw *v.* Norfolk County R. Co., 5 Gray 162.

New Jersey.— Williamson *v.* New Jersey Southern R. Co., 25 N. J. Eq. 13.

Ohio.— Coe *v.* Columbus, etc., R. Co., 10 Ohio St. 372, 75 Am. Dec. 518, holding that where the legal title to property is conveyed in trust to secure railroad bondholders, the bondholders are neither necessary nor proper parties to a suit of foreclosure, and for the appointment of a receiver.

Pennsylvania.—McElrath *v.* Pittsburg, etc., R. Co., 68 Pa. St. 37.

United States.— Bowling Green Trust Co. *v.* Virginia Pass., etc., Co., 132 Fed. 921; Grand Trunk R. Co. *v.* Central Vermont R. Co., 88 Fed. 622 (holding that where a mortgage to secure railroad bonds provides that it may be foreclosed upon default at the request of a majority of the bondholders, a bill filed by the trustee alleging such default and request is not subject to demurrer because the bondholders are not joined as orators); Clyde *v.* Richmond, etc., R. Co., 55 Fed. 445; Farmers' L. & T. Co. *v.* Kansas City, etc., R. Co., 53 Fed. 182; Campbell *v.* Texas, etc., R. Co., 4 Fed. Cas. No. 2,366, 1 Woods 368; Dows *v.* Chicago, etc., R. Co., 7 Fed. Cas. No. 4,048; Kerp *v.* Michigan Lake Shore R. Co., 14 Fed. Cas. No. 7,727; Skiddy *v.* Atlantic, etc., R. Co., 22 Fed. Cas. No. 12,922, 3 Hughes 320.

See 41 Cent. Dig. tit. "Railroads," § 615.

25. St. Louis, etc., R. Co. *v.* Kerr, 153 Ill. 182, 38 N. E. 638 [*affirming* 48 Ill. App. 496]; Chicago, etc., R. Land Co. *v.* Peck, 112 Ill. 408; Bardstown, etc., R. Co. *v.* Metcalfe, 4 Metc. (Ky.) 199, 81 Am. Dec. 541; Farmers' L. & T. Co. *v.* Kansas City, etc., R. Co., 53 Fed. 182; Campbell *v.* Texas, etc., R. Co., 4 Fed. Cas. No. 2,366, 1 Woods 368.

26. Phillips *v.* Southern Div. Chesapeake, etc., R. Co., 110 Ky. 33, 60 S. W. 941, 22 Ky. L. Rep. 1530; Williamson *v.* New Jersey Southern R. Co., 25 N. J. Eq. 13; McElrath *v.* Pittsburg, etc., R. Co., 68 Pa. St. 37. *Compare* Farmers' L. & T. Co. *v.* Northern Pac. R. Co., 70 Fed. 423 (holding that in a suit by a trustee under several necessarily conflicting mortgages of a railroad and its various branches, plaintiff cannot fairly represent both sides of the controversy and representatives of the bondholders in different mortgages will hence be permitted to be made parties); Toler *v.* East Tennessee, etc., R. Co., 67 Fed. 168 (holding that in a suit by minority bondholders to foreclose a railroad mortgage, the majority bondholders may be made parties on a claim that under the mortgage there can be no foreclosure without permission of such majority); Farmers' L. & T. Co. *v.* Northern Pac. R. Co., 66 Fed. 169 (holding that a provision in a mortgage that no holder of a bond secured thereby shall institute a suit to foreclose, except after a refusal by the trustee, does not prevent a court of equity from admitting a bondholder as a party in a suit brought by the trustee if such admission is otherwise proper); Campbell *v.* Texas, etc., R. Co., 4 Fed. Cas. No. 2,366, 1 Woods 368.

27. Beekman *v.* Hudson River West Shore R. Co., 35 Fed. 3.

28. Chamberlain *v.* Connecticut Cent. R. Co., 54 Conn. 472, 9 Atl. 244; Beekman *v.* Hudson River, West Shore R. Co., 35 Fed. 3.

29. Forrest *v.* Luddington, 68 Ala. 1.

plete decree could be made without regard to their rights.[30] A general creditor is neither a necessary nor a proper party to such a suit.[31] Where separate mortgages are given on distinct portions of a road at different times to secure the debts of separate creditors, one mortgagee is not a necessary party to a suit which another mortgagee may bring to foreclose his mortgage;[32] and where it appears that the making of a subsequent mortgagee a party to the foreclosure suit hinders and delays the suit the bill should be dismissed as to him.[33] Neither the state nor the holders of state bonds issued in aid of a railroad company and guaranteed by the company, under a statute which does not make the bonds a lien on the road, are necessary parties to a foreclosure of a mortgage on the railroad;[34] nor is a state which is an indorser of bonds secured by a statutory mortgage a necessary party to a suit brought by the holders of the bonds to foreclose the mortgage.[35] Where at the time of commencement of the foreclosure suit an action is pending on behalf of the people to dissolve the railroad company on the ground of insolvency, neither a temporary receiver appointed in that action nor the people are necessary parties to the foreclosure suit,[36] although the court has power in its discretion to allow the people or the receiver to intervene therein.[37]

b. Foreclosure of Mechanics' Liens. In the absence of a special statutory provision otherwise, the parties to a proceeding to enforce a lien for work and labor or material furnished against railroad property are regulated by the rules governing parties to a foreclosure of mechanics' liens generally.[38] Thus in such an action the owner of the road is generally a necessary party defendant;[39] although it is not necessary that all the companies interested in the railroad be made parties to the proceedings.[40] In an action for material and labor furnished under a contract with the contractor such contractor is a necessary party defendant.[41] So in an action by a subcontractor to foreclose a mechanic's lien based on the claim that the contractor has been fully paid in advance by the terms of

Persons becoming encumbrancers pending proceedings to foreclose are not necessary parties to a bill of foreclosure. Youngman *v.* Elmira, etc., R. Co., 65 Pa. St. 278.

30. Phillips *v.* Southern Div. Chesapeake, etc., R. Co., 110 Ky. 33, 60 S. W. 941, 22 Ky. L. Rep. 1530; Farmers' L. & T. Co. *v.* Cape Fear, etc., R. Co., 71 Fed. 38; Farmers' L. & T. Co. *v.* Houston, etc., R. Co., 44 Fed. 115.

31. Herring *v.* New York, etc., R. Co., 105 N. Y. 340, 12 N. E. 763 (holding that unsecured creditors are not necessary or proper parties to and have no right to intervene in an action to foreclose a mortgage upon railroad property and franchises); Farmers' L. & T. Co. *v.* New Rochelle, etc., R. Co., 57 Hun (N. Y.) 376, 10 N. Y. Suppl. 810 [*affirmed* in 126 N. Y. 624, 27 N. E. 410].

32. Bronson *v.* La Crosse, etc., R. Co., 2 Black (U. S.) 524, 17 L. ed. 347.

Where a second mortgage covers leased lines without touching the rights of lessors and the foreclosure is a part of the suit in which all the property is in the hands of receivers, neither the mortgagor, the first mortgagee, nor any lessor is in strictness a necessary party. Grand Trunk R. Co. *v.* Central Vermont R. Co., 88 Fed. 622.

33. Richards *v.* Chesapeake, etc., R. Co., 20 Fed. Cas. No. 11,771, 1 Hughes 28.

34. McKittrick *v.* Arkansas Cent. R. Co., 152 U. S. 473, 14 S. Ct. 661, 38 L. ed. 518.

35. Young *v.* Montgomery, etc., R. Co., 30 Fed. Cas. No. 18,166, 2 Woods 606.

36. Herring *v.* New York, etc., R. Co., 105 N. Y. 340, 12 N. E. 763.

37. Herring *v.* New York, etc., R. Co., 105 N. Y. 340, 12 N. E. 763. And see *infra*, VIII, B, 6, c.

38. See, generally, MECHANICS' LIENS, 27 Cyc. 344 *et seq.*

Attorneys for a railroad contractor to whom the latter is indebted for legal services in acquiring the right of way and who holds title deeds and other papers relative to the construction of the road upon which they claim a lien, are not proper parties to a suit by a subcontractor to foreclose a mechanic's lien upon the road. Hilton Bridge Constr. Co. *v.* New York Cent., etc., R. Co., 145 N. Y. 390, 40 N. E. 86 [*affirming* 84 Hun 225, 32 N. Y. Suppl. 514].

39. Little Rock Trust Co. *v.* Southern Missouri, etc., R. Co., 195 Mo. 669, 93 S. W. 944; Lyons *v.* Carter, 84 Mo. App. 483; Mackler *v.* Mississippi River, etc., R. Co., 62 Mo. App. 677 (holding that where an owner of a railroad contracted for labor to be performed on it and afterward leased the road for a term of years, such owner must be joined with the lessee as a party defendant in an action brought to enforce the lien for the labor performed under the contract); Central Trust Co. *v.* Chicago, etc., R. Co., 54 Fed. 598.

40. Morgan *v.* Chicago, etc., R. Co., 76 Mo. 161.

41. Eastern Texas R. Co. *v.* Davis, 37 Tex. Civ. App. 342, 83 S. W. 883.

his contract, the owner, although admitting that he has paid the contractor and accepted the work when finished, may make the contractor and an assignee of the contractor parties to the suit.[42] So in an action to enforce the lien of a laborer of a subcontractor, the contractor should be made a party in order that the railroad company may obtain a judgment which will protect it in a settlement with the contractor.[43] In an action by an assignee to enforce such a lien for labor performed for a subcontractor both the contractor and the subcontractor are necessary parties.[44] So in a suit to enforce a lien founded on an unadjudicated claim for materials furnished to a subcontractor, to whom the principal contractor let part of the work, the subcontractor is a necessary party.[45]

c. Interveners and New Parties. As a general rule any person having such an interest in or lien upon the mortgaged premises and in the debt secured that his rights might be compromised by a decree in his absence can be allowed to intervene or be made a new party in the foreclosure, on his own petition,[46] or by a supplemental bill,[47] except where he has an adequate remedy at law by an independent suit;[48] and if the claimant having a right of intervention neglects or refuses to come in and entitle himself to the benefit of a decree, equity will not assist him to set aside and annul it.[49] This rule may be applied in favor of

42. Hilton Bridge Constr. Co. *v.* New York Cent., etc., R. Co., 145 N. Y. 390, 40 N. E. 86 [*affirming* 84 Hun 225, 32 N. Y. Suppl. 514].

43. Jasper, etc., R. Co. *v.* Peek, (Tex. Civ. App. 1907) 102 S. W. 776.

44. Austin, etc., R. Co. *v.* Rucker, 59 Tex. 587.

45. Luttrell *v.* Knoxville, etc., R. Co., (Tenn. 1907) 105 S. W. 565.

46. *Colorado.*— Grand Junction First Nat. Bank *v.* Wyman, 16 Colo. App. 468, 66 Pac. 456.

Georgia.— Macon, etc., R. Co. *v.* Parker, 9 Ga. 377.

New Jersey.— Hewitt *v.* Montclair R. Co., 25 N. J. Eq. 100 [*affirmed* in 27 N. J. Eq. 479].

New York.— Herring *v.* New York, etc., R. Co., 105 N. Y. 340, 12 N. E. 763.

West Virginia.— Fidelity Ins., etc., Co. *v.* Shenandoah Valley R. Co., 32 W. Va. 244, 9 S. E. 180.

United States.— Central Trust Co. *v.* Condon, 67 Fed. 84, 14 C. C. A. 314; Farmers' L. & T. Co. *v.* Texas Western R. Co., 32 Fed. 359, intervention allowed even after decree.

See 41 Cent. Dig. tit. "Railroads," § 616; and, generally, MORTGAGES, 27 Cyc. 1580 *et seq.*

The right of a telegraph company to establish lines along the right of way of a railroad company whose property is in the hands of receivers pending foreclosure may be presented and adjudicated by intervention in a foreclosure suit. Union Trust Co. *v.* Atchison, etc., R. Co., 8 N. M. 327, 43 Pac. 701; Mercantile Trust Co. *v.* Atlantic, etc., R. Co., 63 Fed. 513.

Intervention by certificate holders.—A receiver who issues certificates which are a lien on the road and who has in his hands funds from which they should be paid if valid is a necessary party defendant to an intervention by the certificate holders in a suit to foreclose the mortgage on the road (Central Trust Co. *v.* Sheffield, etc., Coal, etc., Co., 44 Fed. 526); but the complainant in the original suit is not a proper party defendant to such intervention where it appears that he no longer has an interest in the fund in controversy and no relief is asked as against him (Central Trust Co. *v.* Sheffield, etc., Coal, etc., Co., *supra*); and the fact that the principal of the certificates is not due will not make the intervention premature if the interest thereon is then due and unpaid (Central Trust Co. *v.* Sheffield, etc., Coal, etc., Co., *supra*).

Where the road passes into two states in each of which it is a domestic corporation, and the trustee in a mortgage on the whole road first brings a suit in one state to foreclose, and afterward an ancillary suit in the other state for the same purpose, he cannot prevent a lien creditor of the company who has not filed his claim in the first suit from intervening in the second to establish his lien. Fidelity Ins., etc., Co. *v.* Shenandoah Valley R. Co., 32 W. Va. 244, 9 S. E. 180.

Intervention for taxes — parties.— Where the original suit is still pending, and the order confirming the sale of the railroad specifies that any taxes which may finally be adjudged to be a lien upon the property shall be a liability on the railroad, this is sufficient notice to such purchasers of a claim for taxes; and in an intervening petition filed in the original suit to collect delinquent taxes the purchasers at such sale need not be made parties thereto. U. S. Trust Co. *v.* Territory, 10 N. M. 416, 62 Pac. 987.

47. Baass *v.* Chicago, etc., R. Co., 39 Wis. 296; Mercantile Trust Co. *v.* Atlantic, etc., R. Co., 70 Fed. 518; Fitzgerald *v.* Evans, 49 Fed. 426, 1 C. C. A. 307.

48. Van Frank *v.* St. Louis, etc., R. Co., 93 Mo. App. 412, 67 S. W. 688 (construing Rev. St. (1889) § 6741; Rev. St. (1899) æ 4349); Bartlett *v.* Patterson, 9 Ohio Dec. (Reprint) 73, 10 Cinc. L. Bul. 367.

49. Macon, etc., R. Co. *v.* Parker, 9 Ga. 377.

interventions by individual bondholders seeking to be heard in an action by the mortgage trustee, or other bondholders who are not properly protecting their interests,[50] or in favor of the representatives of such bondholders [51] or of purchasers at the foreclosure sale.[52] But claimants will not be allowed to intervene after a long delay when the whole case is about to be closed unless they offer to become responsible for what has occurred or what might from the delay thereafter occur.[53] Nor can a claimant intervene in respect to a matter which is foreign to the litigation in the foreclosure suit,[54] or where the controversy or intervention is beyond the jurisdiction of the court.[55] A railroad stock-holder will not be allowed to intervene in a foreclosure suit unless he charges fraud or collusion between plaintiffs and the defendant company.[56]

7. Process and Appearance. In accordance with the rules governing process and notice or appearance in foreclosure suits generally,[57] in order that a decree in a suit for the foreclosure of a lien or mortgage on railroad property may be binding on parties whose presence is essential thereto, it is necessary that such parties voluntarily appear or be served with process or notice.[58] In a foreclosure

50. Williamson *v.* New Jersey Southern R. Co., 25 N. J. Eq. 13; De Betz's Petition, 9 Abb. N. Cas. (N. Y.) 246; Coe *v.* Columbus, etc., R. Co., 10 Ohio St. 372, 75 Am. Dec. 518 (holding that bondholders are not entitled to intervene where there is no imputation against the trustee which could make it necessary for them to intervene in the foreclosure suit); Bowling Green Trust Co. *v.* Virginia Pass., etc., Co., 132 Fed. 921; New York Cent. Trust Co. *v.* California, etc., R. Co., 110 Fed. 70 [*affirmed* in 128 Fed. 882, 63 C. C. A. 220]; New York Cent. Trust Co. *v.* Marietta, etc., R. Co., 63 Fed. 492; Clyde *v.* Richmond, etc., R. Co., 55 Fed. 445 (holding that bondholders are not entitled to intervene in the absence of a showing of negligence on the part of the trustee in protecting their interests or that there is any conflict between the various interests represented by the trustee).

Bondholders, if aggrieved by a decree rendered in a suit to which the trustee of the mortgage was a party, can intervene and become actual parties, and then make such application to the court for relief as is competent for parties to make in the same suit; or they may institute such other auxiliary, revisory, or supplemental proceedings as a party to the suit might institute. Campbell *v.* Texas, etc., R. Co., 4 Fed. Cas. No. 2,366, 1 Woods 368.

51. Farmers' L. & T. Co. *v.* Northern Pac. R. Co., 66 Fed. 169.

52. Grand Trunk R. Co. *v.* Vermont Cent. R. Co., 91 Fed. 569; Fitzgerald *v.* Evans, 49 Fed. 426, 1 C. C. A. 307.

A purchaser of part of the road, including stock, machinery, franchises, etc., of the entire road, under the senior mortgage, cannot intervene in a suit brought against the company by a junior mortgagee, for the purpose of keeping down the amount of the decree. Bronson *v.* La Crosse, etc., R. Co., 2 Black (U. S.) 524, 17 L. ed. 347.

53. Central Trust Co. *v.* Texas, etc., R. Co., 24 Fed. 153.

The failure of an unsecured creditor to at once intervene in foreclosure suits is not fatal to his rights, since he is not bound to presume that any purpose for shutting out his rights was in the minds of the parties to the foreclosure suit (Louisville Trust Co. *v.* Louisville, etc., R. Co., 174 U. S. 674, 19 S. Ct. 827, 43 L. ed. 1130 [*reversing* 84 Fed. 539, 28 C. C. A. 202]); and such a creditor is not dilatory merely because of the filing of a bill against the company for a receiver, on behalf of a judgment creditor and all other creditors of the alleged insolvent company, where no action was taken to notify any creditors, or to bring them into court to present their claims, and where it is not shown that the unsecured creditor had any notice of the suit (Louisville Trust Co. *v.* Louisville, etc., R. Co., *supra*).

54. Cutting *v.* Florida R., etc., Co., 45 Fed. 444.

55. Cutting *v.* Florida R., etc., Co., 45 Fed. 444.

56. Guarantee Trust, etc., Co. *v.* Duluth, etc., R. Co., 70 Fed. 803; New York Cent. Trust Co. *v.* Marietta, etc., R. Co., 48 Fed. 14.

57. See, generally, Mechanics' Liens, 27 Cyc. 362 *et seq.*; Mortgages, 27 Cyc. 1584 *et seq.*

58. Hassall *v.* Wilcox, 130 U. S. 493, 9 S. Ct. 590, 32 L. ed. 1001, holding that under Tex. Gen. Laws (1879), c. 12, providing that laborers on railroads shall have a lien prior to all others upon such railroads and that the same may be enforced by action, it is essential to such proceeding that there should be at least constructive notice by some form of publication or advertisement to adverse claimants to appear and maintain their rights, and where no provision is made for notice either personal or constructive to such adverse claimants, the proceedings cannot be sustained as proceedings *in rem*. See Fitzgerald *v.* Evans, 49 Fed. 426, 1 C. C. A. 307.

Service on a railroad company, which is not made a party to the suit and which is not shown to have any connection with the subject-matter of the suit, is not sufficient to bring into court another company which is made a party and which is alleged to be the

suit by junior mortgagees, senior mortgagees can be made parties only by service of process or voluntary appearance,[59] and a general notice calling upon them to present their claims is not sufficient,[60] except where they are represented by trustees who are actual parties to the suit, in which case a notice calling upon them to present their claims before the master will be effectual.[61]

8. Pleading — a. Declaration, Bill, or Complaint — (i) *In General.* A declaration, bill, or complaint in a suit in equity to foreclose should conform to the ordinary rules of chancery pleading and the allegations therein be distinct and specific,[62] and should contain a proper statement of all the facts essential to the complainant's cause of action and connect defendant or defendants with the liability asserted under the mortgage, and an appropriate prayer of relief.[63] Thus it should allege facts showing complainant's ownership of the debt and the right to maintain the action,[64] and the default relied upon as the basis of the suit.[65]

(ii) *Enforcement of Lien For Labor and Supplies.* A complaint or petition in an action to foreclose a lien for labor and work or materials furnished a railroad company should conform to the requirements of the statute and should allege all the facts upon which such lien arises and which authorize its enforcement under the statute.[66]

owner of the *res* sought to be subjected to the lien. Little Rock Trust Co. *v.* Southern Missouri, etc., R. Co., 195 Mo. 669, 93 S. W. 944.

59. Young *v.* Montgomery, etc., R. Co., 30 Fed. Cas. No. 18,166, 2 Woods 606.

60. Young *v.* Montgomery, etc., R. Co., 30 Fed. Cas. No. 18,166, 2 Woods 606.

61. Young *v.* Montgomery, etc., R. Co., 30 Fed. Cas. No. 18,166, 2 Woods 606.

62. Savannah, etc., R. Co. *v.* Lancaster, 62 Ala. 555; Barnes *v.* Chicago, etc., R. Co., 2 Fed. Cas. No. 1,016, 8 Biss. 514, 8 Reporter 776 [*affirmed* in 122 U. S. 1, 7 S. Ct. 1043, 30 L. ed. 1128].

63. Savannah, etc., R. Co. *v.* Lancaster, 62 Ala. 555; Vermont, etc., R. Co. *v.* Vermont Cent. R. Co., 50 Vt. 500. And see, generally, Mortgages, 27 Cyc. 1590 *et seq.*

In a foreclosure suit by a bondholder, the neglect or refusal of the trustee to act, or a vacancy of his office, must be alleged and proved. Phillips *v.* Southern Div. Chesapeake, etc., R. Co., 110 Ky. 33, 60 S. W. 941, 22 Ky. L. Rep. 1530.

Multifariousness.—A bill in equity by bondholders seeking to foreclose a railroad mortgage, and also to recover bonds claimed by a part of plaintiffs and alleged to be wrongfully held by one of defendants, is not bad for multifariousness. Hale *v.* Nashua, etc., R. Co., 60 N. H. 333.

64. Toler *v.* East Tennessee, etc., R. Co., 67 Fed. 168, holding that on foreclosure of a mortgage for default in the payment of interest coupons an allegation that they are due and wholly unpaid "to your orator and other holders of said bonds" is a sufficient allegation of ownership.

65. Savannah, etc., R. Co. *v.* Lancaster, 62 Ala. 555, holding that where a deed of trust or mortgage made by a railroad company to secure an issue of bonds and interest thereon provides that on default of payment of interest for six months the principal shall also become due, a bill by the trustees for foreclosure averring such default in the payment of interest is not demurrable because it fails to allege that the interest coupons were presented for payment at the office or agency at which they were payable.

66. *Arkansas.*— Tucker *v.* St. Louis, etc., R. Co., 59 Ark. 81, 26 S. W. 375, holding that a complaint by a subcontractor to enforce a lien under Laws (1887), p. 96, is demurrable where it fails to show any privity of contract between himself and the company, and that the company was indebted to the principal contractor who was not made a party.

Georgia.— Cartter *v.* Rome, etc., Constr. Co., 89 Ga. 158, 15 S. E. 36.

Illinois.— Atlantic Dynamite Co. *v.* Baltimore, etc., R. Co., 101 Ill. App. 13, holding that under Hurd Rev. St. (1899) c. 82, §§ 8, 9, an allegation that the materials furnished were used in the railroad is a material allegation.

Indiana.— Dean *v.* Reynolds, 12 Ind. App. 97, 39 N. E. 763.

Indian Territory.— Denison, etc., R. Co. *v.* Raney-Alton Mercantile Co., 3 Indian Terr. 104, 53 S. W. 496.

Michigan.— Chicago, etc., R. Co. *v.* Sturgis, 44 Mich. 538, 7 N. W. 213.

Missouri.— O'Connor *v.* Current River R. Co., 111 Mo. 185, 20 S. W. 16 (petition by assignee of account before lien filed held insufficient); Ireland *v.* Atchison, etc., R. Co., 79 Mo. 572.

United States.— Central Trust Co. *v.* Condon, 67 Fed. 84, 14 C. C. A. 314, holding that under Tenn. Acts (1883), c. 220, a creditor's bill against a railroad company and all claimants setting out the facts from which either a principal or subcontractor's lien might be held to arise and claiming the former but asking that the latter be allowed if held to be the proper relief is a compliance with the requirements of a suit to enforce a subcontractor's lien.

See 41 Cent. Dig. tit. "Railroads," § 619; and, generally, Mechanics' Liens, 27 Cyc. 367 *et seq.*

Sufficiency of petition as to notice under Ill. Rev. St. (1874) c. 672, § 534 (see Cairo,

b. Plea, Answer, and Subsequent Pleadings. The answer, plea, or subsequent pleading to a bill of foreclosure of a railroad mortgage is regulated by the rules governing pleas, answers, and subsequent pleadings in foreclosure suits generally,[67] such as that the plea or answer must be responsive to the bill or complaint and controvert all its material allegations.[68] Where one entitled to a statutory lien upon the property of an insolvent railroad company intervenes in a suit to foreclose a mortgage on such property for the purpose of having his claim decreed priority over the mortgage debts, the original suit and the relief claimed by the intervener both being equitable, a plea of an adequate remedy at law is not necessary to entitle defendants to avail themselves of that defense.[69]

9. Issues, Proof, and Variance. In accordance with the rules governing issues, proof, and variance in civil cases generally, and particularly those relating to foreclosure suits,[70] questions as to the amounts and validity of the bonds secured will be determined on the hearing;[71] but in a foreclosure suit a question as to an adverse title to part of the mortgaged premises pending between the receiver of the railroad and a third party cannot be litigated;[72] nor can an issue as to the identity of the bondholder be raised where the right of the trustee to foreclose the mortgage is not dependent upon a request of the bondholders.[73] The question of ownership of the bonds secured cannot properly be raised in the foreclosure suit, as such question properly comes up for consideration on the distribution of the proceeds.[74]

10. Evidence. The rules of evidence applying in foreclosure suits generally [75]

etc., R. Co. *v.* Cauble, 85 Ill. 555); and under N. C. Code, § 1492 (see Moore *v.* Cape Fear, etc., R. Co., 112 N. C. 236, 17 S. E. 152).

67. See Sioux City, etc., R. Co. *v.* Manhattan Trust Co., 92 Fed. 428, 34 C. C. A. 431, holding that in a suit by a trustee to foreclose a railroad mortgage, the question of the ownership of the bonds secured properly comes up for consideration on distribution of the proceeds of the sale, and not before; and that allegations in the answer of the mortgagor seeking to raise such question are properly stricken out by the court. And see. generally, Mortgages, 27 Cyc. 1600 *et seq.*

Leave to file answer after delay see Central Trust Co. *v.* Texas, etc., R. Co., 23 Fed. 846, 24 Fed. 151.

Answer and cross complaint by a lessee company see Chamberlain *v.* Connecticut Cent. R. Co., 54 Conn. 472, 9 Atl. 244.

68. Chamberlain *v.* Connecticut Cent. R. Co., 54 Conn. 472, 9 Atl. 244; Brooks *v.* Vermont Cent. R. Co., 4 Fed. Cas. No. 1,964, 14 Blatchf. 463.

Cross bill.— Where a bill of foreclosure is filed by one who has no title in the mortgage, there can be no foreclosure unless the trustee in the mortgage files a cross bill for that purpose. American L. & T. Co. *v.* East, etc., R. Co., 37 Fed. 242.

69. Van Frank *v.* Brooks, 93 Mo. App. 412, 67 S. W. 688.

70. See Neilson *v.* Iowa Eastern R. Co., 51 Iowa 184, 1 N. W. 434, 33 Am. Rep. 124; and, generally, Mortgages, 27 Cyc. 1609 *et seq.*; Trial.

Variance.— There is no variance between a statement in a lien that the claimant contracted with the railroad company and a statement in the petition to enforce it that he contracted with a corporation acting as the agent or trustee of the railroad company. Mackler *v.* Mississippi River, etc., R. Co., 52 Mo. App. 516.

Admissions.— In an action to enforce a lien against a railroad for supplies furnished, a contention that no such lien could exist from verbal promises which were not made to complainant is untenable, where the promises made were embodied in the pleadings, for an admission in the pleading is conclusive for all purposes of the cause whether the facts relate to the parties or to third persons. Denison, etc., R. Co. *v.* Raney-Alton Mercantile Co., 3 Indian Terr. 104, 53 S. W. 496.

71. Guaranty Trust, etc., Co. *v.* Green Cove Springs, etc., R. Co., 139 U. S. 137, 11 S. Ct. 512, 35 L. ed. 116.

72. Farmers' L. & T. Co. *v.* Green Bay, etc., R. Co., 6 Fed. 100, 10 Biss. 203.

73. Knickerbocker Trust Co. *v.* Oneonta, etc., R. Co., 116 N. Y. App. Div. 78, 101 N. Y. Suppl. 241 [*affirmed* in 188 N. Y. 38, 80 N. E. 568].

74. Sioux City, etc., R. Co. *v.* Manhattan Trust Co., 92 Fed. 428, 34 C. C. A. 431; Toler *v.* East Tennessee, etc., R. Co., 67 Fed. 168.

Where a trustee is authorized to foreclose in his discretion on default in payment of interest, an issue attempted to be raised as to the ownership of certain of the bonds secured by the mortgage as between rival claimants is immaterial to the trustee's right to foreclose, although the mortgage provided that the trustee should not be bound to recognize any person as a bondholder unless or until his bonds were submitted to the trustee for inspection if required and his title satisfactorily established, if disputed. Knickerbocker Trust Co. *v.* Oneonta, etc., R. Co., 116 N. Y. App. Div. 78, 101 N. Y. Suppl. 241 [*affirmed* in 188 N. Y. 38, 80 N. E. 568].

75. See Mechanics' Liens, 27 Cyc. 407 *et seq.*; Mortgages, 27 Cyc. 1612 *et seq.*

apply to the presumptions and burden of proof,[76] admissibility,[77] and the weight and sufficiency [78] of the evidence in a suit to foreclose a lien or mortgage on railroad property.

11. TRIAL OR HEARING AND REFERENCE. The trial or hearing of a foreclosure suit against a railroad company is governed by the rules governing foreclosure suits generally.[79] In accordance with such rules, the question as to the amount due upon the lien or mortgage may be referred to a master or referee to find and report upon, and exceptions may then be filed to his report and a decree made upon the hearing and determination of such exceptions.[80] A reference may also be had to

76. Grattan Tp. *v.* Chilton, 97 Fed. 145, 38 C. C. A. 84, holding that where under Nebr. Comp. St. (1897) p. 800, § 4023, bonds were voted, and were issued by the proper officers after the road was complete, they, or the coupons therefrom, are *prima facie* evidence that the statute had been complied with, and, if the statute had not been complied with, that such fact must be pleaded and proved as an affirmative defense in an action on such bonds or coupons.

Under the Kentucky act of March 20, 1876, giving a lien for supplies actually used in operating a railroad, the burden of proof is on the claimant to show what part of the supplies furnished by him was actually used for the operation of the road. Tod *v.* Kentucky Union R. Co., 52 Fed. 241, 3 C. C. A. 60, 18 L. R. A. 305.

Where the holder of a judgment for materials and supplies furnished under Ohio Rev. St. § 3398, claims priority over mortgages existing before the supplies were furnished, the burden of proof is upon him to show not only that he has obtained such judgment but that the cause of action upon which it was obtained was such as to come within the terms of such section of the statute. Farmers' L. & T. Co. *v.* Cincinnati, etc., R. Co., 10 Ohio Dec. (Reprint) 481, 21 Cinc. L. Bul. 275.

77. Neilson *v.* Iowa Eastern R. Co., 51 Iowa 184, 1 N. W. 434, 33 Am. Rep. 124, 51 Iowa 714, 3 N. W. 779, holding that in an action for the enforcement of a materialman's lien against a railroad for materials furnished under a written contract, parol evidence of the use of such materials in such road is not improper); Jasper, etc., R. Co. *v.* Peek, (Tex. Civ. App. 1907) 102 S. W. 776 (holding that a laborer employed by a subcontractor of a contractor for the construction of a railroad who sues to enforce his lien for work done in the construction of the railroad may establish his case against the railroad company by showing that the work was performed under the employment of a subcontractor connected with the contractor, although the latter is not a party).

Proof of notice.— A notice of lien filed in a county clerk's office cannot be proved by a certified copy thereof from such office; nor is the certificate of the county clerk stating when it was filed proper evidence of that fact. Sampson *v.* Buffalo, etc., R. Co., 2 Hun (N. Y.) 512, 4 Thomps. & C. 600.

78. Pere Marquette R. Co. *v.* Baertz, 36 Ind. App. 408, 74 N. E. 51; Dudley *v.* Toledo, etc., R. Co., 65 Mich. 655, 32 N. W. 884 (construing Howell Annot. St. §§ 3423–3425); Rapauno Chemical Co. *v.* Greenfield, etc., R. Co., 59 Mo. App. 6 (holding that proof that one to whom giant powder was furnished by a materialman seeking to enforce a lien therefor against a railroad company was the subcontractor for the necessary work in preparing a portion of the company's railroad for the reception of ties and iron, is sufficient *prima facie* proof of his authority to contract for such powder for the purposes of the work); Tennis *v.* Wetzel, etc., R. Co., 140 Fed. 193 (holding evidence insufficient to sustain the claim of defendant that the work of complainant under the contract for labor and material was performed with such negligence and incompetency as to defeat complainant's right to recover for the same or entitle defendant to recoup damages).

79. See Farmers' L. & T. Co. *v.* Candler, 87 Ga. 241, 13 S. E. 560, holding a particular verdict not to set up a lien upon the whole railroad referred to therein, but only upon a certain part. And see, generally, MORTGAGES, 27 Cyc. 1637 *et seq.*

Intervener.— Where a judgment creditor whose judgment was recovered before the appointment of a receiver and who lives at a distance from the place where the court was held intervenes in a foreclosure suit against the railroad, he should be given the fullest opportunity of a hearing, and technical rules should not be enforced against him, and upon the payment of costs by him an order confirming the master's report may be set aside at his instance and the matter referred back to the master. Central Trust Co. *v.* Wabash, etc., R. Co., 27 Fed. 175.

80. See Central Trust Co. *v.* Unadilla Valley R. Co., 35 Misc. (N. Y.) 604, 72 N. Y. Suppl. 189, holding that allegations by holders of a portion of the bonds that a foreclosure is necessary because the persons controlling the road and substantially all the other bonds failed to pay the interest and improperly diverted the funds of the road was insufficient to prevent a reference to compute the amount due on default if such parties could appear on such reference, and testify in support of their claims. And see, generally, MORTGAGES, 27 Cyc. 1638 *et seq.*

Outstanding bonds pledged as collateral may be included by the referee in his estimate of the amount due. Peck *v.* New York, etc., R. Co., 59 How. Pr. (N. Y.) 419.

Allowance of rent.— Where the referee is instructed to allow reasonable rent for the

consider the ownership and validity of bonds,[81] or to ascertain and fix the priorities of the various encumbrances on the railroad property.[82] Where a reference is made to ascertain the gross earnings and expenses of a certain section of the road covered by a mortgage, and it appears that such section has not been operated separately, but as a part of the whole road, and that the railroad company, although under a legal obligation to keep a separate account of the income and expenses of such section, has failed to do so, it is not an erroneous principle for the master to make a *pro rata* estimate of the earnings and expenses of the whole road.[83]

12. Judgment or Decree — a. In General. The judgment or decree in a foreclosure suit of a railroad lien or mortgage is ordinarily governed by the rules applicable to judgments and decrees in foreclosure suits generally.[84] Ordinarily such judgment or decree is *in rem*,[85] and should declare the fact, nature, and extent of the default which constitutes the breach of the condition of the mortgage,[86] and the amount then due;[87] but it need not establish that a particular instalment is due to any particular person;[88] and such decree is not to be regarded as final as to the debts entitled to share in the distribution, for any other creditor may challenge the debts when the claims are produced in the master's office and have ascertainment and classification.[89] But it has been held that where that

use of rolling stock, eight per cent will be held to be too low a rent for the use of such stock, where it appears that the owners thereof were to bear all the loss and deterioration. Pullan *v.* Cincinnati, etc., Air-Line R. Co., 20 Fed. Cas. No. 11,462, 5 Biss. 237.

Exceptions to report.—The corporation cannot urge as an exception to the report of a master appointed to ascertain the amount of a claim that he did not accompany his report with the evidence heard by him where such defendant railroad company did not appear at the hearing, although notified to do so, and demand that the evidence be taken down. Denison, etc., R. Co. *v.* Raney-Alton Mercantile Co., 3 Indian Terr. 104, 53 S. W. 496. But where, on a proceeding to enforce a lien for supplies furnished, the court appointed an appraiser to ascertain the value of improvements which were made on the property, the adoption of his report over defendant's exception will not be disturbed where no exception is taken at the time of the appointment to the ascertaining of such value by appraisers, rather than by jury. Denison, etc., R. Co. *v.* Raney-Alton Mercantile Co., 3 Indian Terr. 104, 53 S. W. 496.

A stock-holder's dismissal of his exceptions to an auditor's finding cannot be objected to by an intervening bondholder. Weed *v.* Gainesville, etc., R. Co., 119 Ga. 576, 46 S. E. 885.

Evidence.— On a hearing before a master or referee where evidence is offered, and its competency or admissibility is objected to, the master should receive it subject to the objection, so that the court may pass upon the matter on review. Kansas L. & T. Co. *v.* Sedalia Electric R., etc., Co., 108 Fed. 702.

81. Weed *v.* Gainesville, etc., R. Co., 119 Ga. 576, 46 S. E. 885; Guaranty Trust Co. *v.* Atlantic Coast Electric R. Co., 132 Fed. 68 (holding that where a trust mortgage is given by a railroad company to secure its bonds and questions arise as to whether some of the bonds were legally issued, a decree for the sale of the mortgaged property need not be stayed before the determination of such questions, but they may be considered upon a reference to the master after the making of the decree of sale); Sioux City, etc., R. Co. *v.* Manhattan Trust Co., 92 Fed. 428, 34 C. C. A. 431; Toler *v.* East Tennessee, etc., R. Co., 67 Fed. 168.

82. Kansas L. & T. Co. *v.* Sedalia Electric R., etc., Co., 108 Fed. 702.

The findings of a master to whom the claim of an intervener in a railroad foreclosure suit to preference of payment over the mortgagee has been referred should show whether there has been a diversion of net income since the intervener's claim accrued and whether, if so, it inured to the benefit of the mortgagee, and his report should contain a summary statement of the evidence on which his conclusions are based, with reference to the evidence in the record, showing the amount diverted, and the particular manner in which it was used, to enable the court to see from the facts found, whether it went into improvements of the property or its betterment, or the payment of interest. Kansas L. & T. Co. *v.* Sedalia Electric R., etc., Co., 108 Fed. 702.

83. Pullan *v.* Cincinnati, etc., Air-Line R. Co., 20 Fed. Cas. No. 11,462, 5 Biss. 237.

84. See, generally, Mortgages, 27 Cyc. 1641 *et seq.*

85. See Welsh *v.* First Div. St. Paul, etc., R. Co., 25 Minn. 314; Rothschild *v.* Rochester, etc., R. Co., 1 Pa. Co. Ct. 620; Tod *v.* Kentucky Union R. Co., 52 Fed. 241, 3 C. C. A. 60, 18 L. R. A. 305.

86. Chicago, etc., R. Co. *v.* Fosdick, 106 U. S. 47, 1 S. Ct. 10, 27 L. ed. 47; Toler *v.* East Tennessee, etc., R. Co., 67 Fed. 168.

87. Chicago, etc., R. Co. *v.* Fosdick, 106 U. S. 47, 1 S. Ct. 10, 27 L. ed. 47.

88. Toler *v.* East Tennessee, etc., R. Co., 67 Fed. 168.

89. Toler *v.* East Tennessee, etc., R. Co., 67 Fed. 168.

part of a right of way on which labor was performed was a part of an entire system of a railroad and necessary for the carrying out of the railroad duties to the public so that it could not be sold apart from the entire line to foreclose a laborer's or materialman's lien it was proper for the court in the exercise of its equity powers to direct a personal judgment against the railroad company.[90] The amount of the debt for which a foreclosure decree may be given is only the amount actually due and unpaid to complainant.[91] In its usual form, a decree of foreclosure should contain an order for the sale of the mortgaged premises for the satisfaction of the debt,[92] reserving the right to any party to redeem on paying the several amounts found due with costs; [93] and in decreeing a sale the court is not bound by a mode of procedure prescribed by the mortgage in case of a sale by the trustee without foreclosure, but should exercise a sound discretion, having due regard to the interests of all parties.[94]

b. Adjudication of Claims of Interveners or Other Creditors. It is proper for the foreclosure decree when warranted by the pleadings and proof to settle and determine all claims and questions raised between the parties to the suit as to the ownership of the debt, the liability for it, or exoneration from it, the proportion in which it should be shared,[95] or of its priority or preference,[96] and

90. Pere Marquette R. Co. *v.* Baertz, 36 Ind. App. 408, 74 N. E. 51.

A personal judgment may be given a laborer who has a lien on the road for work done under a subcontractor in the construction of the road, the road being practically completed, although the company is not yet engaged in the business of a common carrier. Pere Marquette R. Co. *v.* Baertz, 36 Ind. App. 408, 74 N. E. 51.

Under Mo. Rev. St. (1889) c. 102, art. 4, providing that, in an action to enforce a lien on a railroad for labor done thereon, no personal judgment shall be rendered except as against such defendants as might be sued thereon in an ordinary action at law, it is not proper to render a personal judgment against a railroad company in an action by a subcontractor to enforce such a lien. Bethune *v.* Cleveland, etc., R. Co., 149 Mo. 587, 51 S. W. 465.

Form of lien.— In an action for the enforcement of a mechanic's lien against railroad property, the decree should be against the railroad company and the original contractor (Cairo, etc., R. Co. *v.* Cauble, 4 Ill. App. 133. And see MECHANICS' LIENS, 27 Cyc. 429 text and note 81); and should describe the property to which the lien is to apply (Bethune *v.* Cleveland, etc., R. Co., 149 Mo. 587, 51 S. W. 465).

91. Union Trust Co. *v.* St. Louis, etc., R. Co., 24 Fed. Cas. No. 14,403, 5 Dill. 1.

92. Wetzel, etc., R. Co. *v.* Tennis Bros. Co., 145 Fed. 458, 75 C. C. A. 266 [*affirming* 140 Fed. 193]; Farmers' L. & T. Co. *v.* Chicago, etc., R. Co., 27 Fed. 146. But see Breeze *v.* Midland R. Co., 26 Grant Ch. (U. C.) 225.

93. Bound *v.* South Carolina R. Co., 58 Fed. 473, 7 C. C. A. 322.

94. Low *v.* Blackford, 87 Fed. 392, 31 C. C. A. 15. Farmers' L. & T. Co. *v.* Green Bay, etc., R. Co., 6 Fed. 100, 10 Biss. 203.

95. *Alabama.*— Morton *v.* New Orleans, etc., R. Co., etc., Assoc., 79 Ala. 590.

Illinois.— Penn Mut. L. Ins. Co. *v.* Heiss, 141 Ill. 35, 31 N. E. 138, 33 Am. St. Rep. 273, holding that where judgments have been entered against a railroad company by default for damages caused by the construction of a railroad in a public street, it is proper for a court of equity, when asked to make such judgment payable out of the proceeds of the foreclosure sale of the railroad before payment of the mortgage debt, to open the judgments and require a reassessment of the damages by a jury.

Kentucky.— Louisville, etc., R. Co. *v.* Schmidt, 52 S. W. 835, 21 Ky. L. Rep. 556.

Ohio.— Farmers' L. & T. Co. *v.* Cincinnati, etc., R. Co., 10 Ohio Dec. (Reprint) 481, 21 Cinc. L. Bul. 275.

United States.— Toledo, etc., R. Co. *v.* Continental Trust Co., 95 Fed. 497, 36 C. C. A. 155 [*modifying* 86 Fed. 929] (holding also that it is not necessary that the decree of foreclosure should await the establishing and adjustment of all claims filed in an ancillary creditor's suit); Wheeling Bridge, etc., R. Co. *v.* Reymann Brewing Co., 90 Fed. 189, 32 C. C. A. 571.

Where receivers and managers are appointed to operate a railroad for the benefit of a lessor of the road and mortgage bondholders of the lessee, claims growing out of the maintenance of the railroad by the receivers and managers will be adjudicated without an amendment of the foreclosure proceedings to cover their claims. Langdon *v.* Vermont, etc., R. Co., 54 Vt. 593.

Release.— Where the operating expenses of a railroad in the hands of a receiver and manager are sufficient in amount to entirely consume the income and earnings of the road, the lessor, who is entitled to a certain per cent of the cost of the construction of the road to be paid from the earnings and income, and bondholders, the interest on whose bonds is in default, will be directed to release their interest in the property to a trustee to hold for their benefit. Langdon *v.* Vermont, etc., R. Co., 54 Vt. 593.

96. Colt *v.* Barnes, 64 Ala. 108 (holding

it may provide for an accounting between the parties.[97] But the decree should save and reserve any rights arising under a hostile and paramount title.[98] The court may pass a final decree as to the ascertained debts and retain the bill for the enforcement of further liens thereafter to be proved and established.[99]

c. Nature and Extent of Property. As a general rule a foreclosure decree can order a sale only of the entire road, and a judgment or decree which attempts to foreclose a lien or mortgage on a specified portion of the road instead of on the whole road is void,[1] except where the property is divisible, in which case a sale should be ordered of so much as will satisfy the amount due.[2] Lands which are not included in the railroad mortgage may be sold under a decree of foreclosure, where the facts shown establish an equitable lien in favor of bondholders secured by the mortgage.[3] Where a railroad company, with the consent of a vendee, has constructed its road over land, and in an action to foreclose the vendor's lien the proceeds of the land outside of the right of way are insufficient to satisfy the lien, the right of way with the improvements thereon should not be sold to satisfy the lien for the balance, but should be condemned, the value thereof being ascertained by taking the value of the land and damages to the rest of the tract caused by the taking, and a judgment with a lien on the road-bed to secure its payment entered against the company for the amount so ascertained.[4] A judgment foreclosing a laborer's lien on the equipment of a railroad need not specify the particular articles on which it is to operate but it is sufficient to declare the lien foreclosed upon the equipment to an extent sufficient to satisfy the judgment.[5]

d. Provisions as to Bids and Terms of Sale. The decree should also prescribe the terms and conditions of the sale, and these terms may, if equity requires it, be different from the terms stipulated in the mortgage itself.[6] Thus the decree may prescribe that part of the bid shall be for cash,[7] or that a part may be paid in bonds secured by the foreclosed mortgage;[8] and that the sale shall be made subject to certain outstanding obligations;[9] or upon a subsequent presentation of

that where it appears in foreclosure proceedings for the benefit of all the bondholders that a part of the bonds have been indorsed by the state under the act of Feb. 21, 1870, no motion or petition is necessary to enable the chancellor to decree the priority of the bonds so indorsed); Bank of Commerce *v.* Central Coal, etc., Co., 115 Fed. 878, 53 C. C. A. 334; Farmers' L. & T. Co. *v.* Green Bay, etc., R. Co., 6 Fed. 100, 10 Biss. 203.

97. Langdon *v.* Vermont, etc., R. Co., 54 Vt. 593; Linder *v.* Hartwell R. Co., 73 Fed. 320 (holding that, although the mortgagor can use the earnings of the mortgaged property without accounting until foreclosure, this rule does not prevent a decree in a suit for the foreclosure of a railroad mortgage for an accounting by another company which is alleged to have diverted the earnings of the mortgagor company while in control thereof); Thomas *v.* Peoria, etc., R. Co., 36 Fed. 808 (holding, however, that a contract of lease of cars to the mortgagor company, by the car company, dominated by the same persons, cannot be made the basis of an accounting for the use of the leased cars).

98. Compton *v.* Jesup, 68 Fed. 263, 15 C. C. A. 397.

99. Langdon *v.* Vermont, etc., R. Co., 54 Vt. 593.

1. Farmers' L. & T. Co. *v.* Candler, 87 Ga. 241, 13 S. E. 560 (construing Code, § 1990); Chicago, etc., R. Co. *v.* Loewenthal, 93 Ill. 433; Bardstown, etc., R. Co. *v.* Metcalfe, 4 Metc. (Ky.) 199, 81 Am. Dec. 541.

2. Bardstown, etc., R. Co. *v.* Metcalfe, 4 Metc. (Ky.) 199, 81 Am. Dec. 541.

3. Chicago, etc., Rapid Transit R. Co. *v.* Northern Trust Co., 90 Ill. App. 460 [*affirmed* in 195 Ill. 288, 63 N. E. 136].

4. Finnell *v.* Louisville Southern R. Co., 99 Ky. 570, 36 S. W. 553, 18 Ky. L. Rep. 410.

5. St. Louis, etc., R. Co. *v.* Sandal, 3 Tex. App. Civ. Cas. § 379.

6. Farmers' L. & T. Co. *v.* Green Bay, etc., R. Co., 6 Fed. 100, 10 Biss. 203, holding that the court is not bound to adopt the provisions of the mortgage as to the application of the bonds upon the bid of the purchaser, or as to the proportion in which such bonds should be received or as to the manner in which their value should be ascertained.

7. Sage *v.* Iowa Cent. R. Co., 99 U. S. 334, 25 L. ed. 394.

8. Farmers' L. & T. Co. *v.* Green Bay, etc., R. Co., 6 Fed. 100, 10 Biss. 203.

Where the decree authorizes the mortgage bonds to be applied on the purchase of a railroad upon a foreclosure sale, it is not essential that such decree should determine the percentage value of such bonds before the sale actually took place. Farmers' L. & T. Co. *v.* Green Bay, etc., R. Co., 6 Fed. 100, 10 Biss. 203.

9. Bound *v.* South Carolina R. Co., 58 Fed.

intervening claims, the court may require as a condition precedent to the confirmation of the sale that the purchaser shall make a larger cash payment to meet all exigencies than that fixed by the terms of the decree;[10] and the court may order that the property shall not be sold for less than a certain sum;[11] or it may name an upset price large enough to cover costs and all allowances made by the court for receiver's certificates and interest, liens prior to the bonds, amounts diverted from the earnings and all undetermined claims which will be settled before the confirmation and sale.[12]

e. Parties and Pleadings. A decree of foreclosure is limited by the bill or complaint, and ordinarily cannot grant any relief not prayed for;[13] although a prayer for general relief will authorize any action in the complainant's favor, shown by the proofs to be just and equitable and not inconsistent with the pleadings;[14] and although the specific relief sought is a strict foreclosure, a decree for a sale of the property and for the enforcement of an agreement contained in the mortgage is appropriate under a prayer for general relief.[15] Where all the claims are before the court with prayers for general affirmative relief, it may decree a sale of the property free from all liens.[16] But where all the parties are not represented before the court, a decree which directs a sale free of all liens and encumbrances without making provision for other bondholders, subsequent mortgagees, and other creditors is fatally defective.[17] All persons properly represented before the court in a foreclosure proceeding, whether as plaintiffs or defendants, or who are charged with notice of such proceedings, are bound and concluded by the decree rendered therein and estopped from disputing the validity of the proceedings or the title of the purchaser.[18] This rule includes persons acquiring interests in the mortgaged premises pending the foreclosure proceedings.[19] Thus a judgment

473, 7 C. C. A. 322, holding that a decree for sale under foreclosure of a road which is in the hands of a receiver may properly direct that the sale be made subject to outstanding obligations of the receiver, at the same time requiring the receiver to file a statement thereof in detail so that the amount may be known with sufficient certainty to enable intending purchasers to bid with confidence.

10. Farmers' L. & T. Co. *v.* Green Bay, etc., R. Co., 6 Fed. 100, 10 Biss. 203.

11. McIlhenny *v.* Binz, 80 Tex. 1, 30 S. W. 655, 26 Am. St. Rep. 705.

12. New York Cent. Trust Co. *v.* Washington County R. Co., 124 Fed. 813; Blair *v.* St. Louis, etc., R. Co., 25 Fed. 232.

13. St. Johns, etc., R. Co. *v.* Bartola, 28 Fla. 82, 9 So. 853, holding that under a bill in equity to enforce a lien given by Laws (1879), c. 3132, for labor performed on a railroad, it is error to render a decree for a larger sum than is claimed by plaintiff in the special prayer for relief, although there is also a prayer for general relief.

14. Sage *v.* Iowa Cent. R. Co., 99 U. S. 334, 25 L. ed. 394.

15. Sage *v.* Iowa Cent. R. Co., 99 U. S. 334, 25 L. ed. 394.

16. Bound *v.* South Carolina R. Co., 58 Fed. 473, 7 C. C. A. 322.

17. New Orleans Pac. R. Co. *v.* Parker, 143 U. S. 42, 12 S. Ct. 364, 36 L. ed. 66 [*affirming* 33 Fed. 693].

18. Omaha, etc., R. Co. *v.* O'Neill, 81 Iowa 463, 46 N. W. 1100; Real Estate Trust Co. *v.* Perry County R. Co., 213 Pa. St. 57, 63, 62 Atl. 25, 27 (holding that bondholders having notice of the decree and proceedings have no standing to petition many years thereafter for a change of the decree so as to correct any inequality among the bondholders); Milwaukee, etc., R. Co. *v.* Soutter, 2 Wall. (U. S.) 600, 17 L. ed. 886; Central Trust Co. *v.* Wabash, etc., R. Co., 30 Fed. 332 (holding that it is too late after the decree and sale for holders of underlying mortgage bonds to object to the manner in which the earnings of the system had been applied prior to the decree and proceedings to foreclose their mortgage, and too late for the court to so correct the decree as to change the rights of the purchaser); Wilmer *v.* Atlanta, etc., R. Co., 30 Fed. Cas. No. 17,776, 2 Woods 447. *Compare* Simmons *v.* Taylor, 23 Fed. 849.

Where the parties are numerous and the bill for foreclosure is brought by certain bondholders on behalf of themselves and all other bondholders whose bonds were secured by the same deed who chose to come in as complainants, and where they share the expenses of the suit, it is not a valid objection to the making of a decree in accordance with the prayer of the bill that all of the bondholders were not made actual parties, as they may be allowed to come in as complainants or may propound their claims before the master. Wilmer *v.* Atlanta, etc., R. Co., 30 Fed. Cas. No. 17,776, 2 Woods 447.

Collateral attack.— Questions relating to the validity of a decree directing foreclosure of the mortgage cannot be raised by objections to the confirmation of the sale. Crouch *v.* Dakota, etc., R. Co., 18 S. D. 540, 101 N. W. 722; New York Cent. Trust Co. *v.* Peoria, etc., R. Co., 118 Fed. 30, 55 C. C. A. 52.

19. Jackson *v.* Centerville, etc., R. Co., 64

or decree in a foreclosure suit fairly brought and honestly and regularly conducted by a bondholder for the benefit of all the bondholders is conclusive and binding upon all the parties represented therein;[20] but if such suit is not conducted in good faith and is used as an instrument to acquire advantages for plaintiff at the expense of those whom he has assumed to protect, the latter will not be bound thereby.[21] So if the trustees of a mortgage on a railroad are parties to the suit, a decree rendered in the case is as binding on the bondholders secured by it, as if they had been made parties, unless they can show some fraud practised upon, or connived at, by the trustees themselves.[22] But persons having an interest in or lien upon the road who are not joined as parties in a foreclosure suit are not bound or in any way affected by the decree therein unless they consent thereto.[23] A party who has intervened in a foreclosure suit to which there are several parties defendant will not, upon the rendering of a decree and the dismissal of all the parties save one from whom the intervener claims relief, lose his standing in the action.[24]

f. Payment and Discharge. The formal method of decreeing a foreclosure is to order that defendant pay in a limited time the amount found due by the decree and that in default thereof it shall be foreclosed with its equity of redemption or that the property shall be sold and the proceeds applied as directed.[25] Where the decree provides that defendant shall have a last opportunity to avert a sale of the property by paying what is due with interest and costs it is for the court to determine in the exercise of its sound discretion as to what is a reasonable time to allow for payment.[26] Where only a part of the mortgage debt is due, upon payment of such amount the foreclosure decree will be suspended until a default again occurs.[27] Where the amount due has been passed on and finally fixed by the court and the right of the mortgagor to pay the sum thus

Iowa 292, 20 N. W. 442; Youngman *v.* Elmira, etc., R. Co., 65 Pa. St. 278.

20. Stevens *v.* Union Trust Co., 57 Hun (N. Y.) 498, 11 N. Y. Suppl. 268.

21. Stevens *v.* Union Trust Co., 57 Hun (N. Y.) 498, 11 N. Y. Suppl. 268.

22. Campbell *v.* Texas, etc., R. Co., 4 Fed. Cas. No. 2,366, 1 Woods 368; Farmers' L. & T. Co. *v.* Northern Pac. R. Co., 94 Fed. 454; Morgan's Louisiana, etc., R., etc., Co. *v.* Moran, 91 Fed. 22, 33 C. C. A. 313; Credit Co. *v.* Arkansas Cent. R. Co., 15 Fed. 46, 5 McCrary 23.

After confirmation of the sale of a railroad under decree of foreclosure, holders of the mortgage bonds will not be allowed, at a subsequent term, to be made parties to the original foreclosure suit, for the purpose of impeaching the decree, sale, and confirmation as fraudulent, although in the order of confirmation the power to make further order is expressly reserved. Wetmore *v.* St. Paul, etc., R. Co., 3 Fed. 177, 1 McCrary 466.

23. Stevens *v.* Union Trust Co., 57 Hun (N. Y.) 498, 11 N. Y. Suppl. 268; Hassall *v.* Wilcox, 130 U. S. 493, 9 S. Ct. 590, 32 L. ed. 1001; Zimmerman *v.* Kansas City Northwestern R. Co., 144 Fed. 622, 75 C. C. A. 424; Central Trust Co. *v.* Florida R., etc., Co., 43 Fed. 751; Union Trust Co. *v.* St. Louis, etc., R. Co., 24 Fed. Cas. No. 14,403, 5 Dill. 1, holding that on the foreclosure of a blanket mortgage given by a consolidated company containing a covenant to pay interest on mortgages given by the separate owners, the decree cannot extend to the latter where the holders are not made parties.

Decree making accepters of benefits consent thereto see Wood *v.* Dubuque, etc., R. Co., 28 Fed. 910.

Where some of the company's property is claimed to be covered by two mortgages, the question thus raised cannot be determined in a foreclosure suit brought by one of the mortgagees, to which the other mortgagee is not a party. Bronson *v.* La Crosse, etc., R. Co., 2 Black (U. S.) 524, 17 L. ed. 347.

Where several suits ancillary to one another are instituted in the several districts through which a railroad runs and an identical decree is entered in all providing for a unit sale, such suits are to be regarded as distinct and the provisions of the decree as separately applicable to the portions of the road within the several districts, and accordingly parties to the suits cannot represent in one district the rights of lienors upon property lying in another district. Compton *v.* Jesup, 68 Fed. 263, 15 C. C. A. 397.

24. Joliet Iron, etc., Co. *v.* Chicago, etc., R. Co., 51 Iowa 300, 1 N. W. 761.

25. Cairo, etc., R. Co. *v.* Cauble, 4 Ill. App. 133; Farmers' L. & T. Co. *v.* Chicago, etc., R. Co., 27 Fed. 146.

26. Chicago, etc., Rapid Transit R. Co. *v.* Northern Trust Co., 90 Ill. App. 460 [*affirmed* in 195 Ill. 288, 63 N. E. 136]; Columbia Finance, etc., Co. *v.* Kentucky Union R. Co., 60 Fed. 794, 9 C. C. A. 264, holding that an allowance of four months is not an abuse of such discretion.

27. Chicago, etc., R. Co. *v.* Fosdick, 106 U. S. 47, 27 L. ed. 47; Farmers' L. & T. Co. *v.* Chicago, etc., R. Co., 27 Fed. 146.

settled and fixed is clear, the court then has no discretion to withhold such restoration and refuse to discharge the receiver.[28]

g. Opening, Vacating, or Modifying.[29] A final decree of foreclosure cannot be vacated by the court of its own motion after the expiration of the term at which it was granted.[30] But it may subsequently amend, modify, or open the decree of sale as to the mode of its execution, the manner of sale, the publication of such sale, the distribution of proceeds arising therefrom, or as to any other matter which does not change its essential parts,[31] provided the application therefor is seasonably made.[32] Where a decree of sale prescribes a limitation within which claims may be presented, the court may, in its discretion, in decreeing a confirmation of the sale, abrogate such limitation.[33]

h. Operation and Effect. The rules governing the operation and effect of foreclosure decrees generally apply to judgments or decrees foreclosing liens and mortgages on railroad property.[34] Thus a decree of foreclosure and sale is a final decree, although further directions may be necessary with reference to its execution,[35]

28. Milwaukee, etc., R. Co. *v.* Soutter, 2 Wall. (U. S.) 510, 17 L. ed. 900.

29. Opening or vacating judgment of foreclosure of mortgages generally see MORTGAGES, 27 Cyc. 1665 *et seq.*

Opening and vacating sale see *infra*, VIII, B, 13, h.

30. Central Trust Co. *v.* Grant Locomotive Works, 135 U. S. 207, 10 S. Ct. 736, 34 L. ed. 97; Turner *v.* Indianapolis, etc., R. Co., 24 Fed. Cas. No. 14,259, 3 Biss. 380.

31. Farmers' Loan Co. *v.* Oregon Pac. R. Co., 28 Oreg. 44, 40 Pac. 1089 (holding that where the original decree for sale directed the property to be sold as an entirety for cash and that so much of the price "as is not required to be paid in cash may be paid in receivers' certificates," a subsequent supplemental order directing a sale to be made for cash in United States gold coin is not an essential modification of the original decree); Carey *v.* Houston, etc., R. Co., 45 Fed. 438, 52 Fed. 671; Dow *v.* Memphis, etc., R. Co., 20 Fed. 768 [*reversed* on other grounds in 124 U. S. 652, 8 S. Ct. 673, 31 L. ed. 565]; Turner *v.* Indianapolis, etc., R. Co., 24 Fed. Cas. No. 14,250, 8 Biss. 380 (holding that a decree for the sale of a railroad providing that the purchaser shall pay enough money to liquidate certain judgments, etc., may be amended at a subsequent term by providing that the property shall be sold subject to such judgments).

Consent judgment directing sale vacated and defendants allowed to come in and defend see Toronto Gen. Trusts Corp. *v.* Central Ontario R. Co., 6 Ont. L. Rep. 1, 2 Ont. Wkly. Rep. 259.

32. Duncan *v.* Atlantic, etc., R. Co., 88 Fed. 840, 4 Hughes 125 (holding that, where more than a year and a half has elapsed since the entry of a final decree of foreclosure and sale, such decree will not be modified by the court so as to reduce the amount of the cash payment required by such decree on an application made only two days before the date fixed for the sale); Carey *v.* Houston, etc., R. Co., 45 Fed. 438, 52 Fed. 671.

33. Olcott *v.* Headrick, 141 U. S. 543, 12 S. Ct. 81, 35 L. ed. 851.

34. Welsh *v.* First Div. St. Paul, etc., R. Co., 25 Minn. 314, holding that the effect of a judgment in a proceeding to foreclose a mortgage given by a railroad company to trustees to secure an issue of negotiable bonds is to determine the amount of the mortgage debts so as to know how much of a security will be required to satisfy the same. And see, generally, MORTGAGES, 27 Cyc. 1669 *et seq.*

Effect on lease.— Where railroad mortgage bonds matured ten years before the expiration of a lease executed at the same time the mortgage was executed, and which expressly provided for the execution of the mortgage, the mortgage, although it referred to the lease by way of explanation of the purpose for which the mortgage bonds were issued, was not taken subject to the lease and its foreclosure terminates the lease. Louisville, etc., R. Co. *v.* Schmidt, 52 S. W. 835, 21 Ky. L. Rep. 556. But an unexecuted decree of sale of a portion of a leased railroad for the purpose of satisfying a mortgage made prior to the lease is not such an eviction of the lessee, by paramount title, as to terminate the lease. Pittsburg, etc., R. Co. *v.* Columbus, etc., R. Co., 19 Fed. Cas. No. 11,197, 8 Biss. 456.

Effect on property without the state.—A decree of sale made by a court of New York in proceedings for the foreclosure of a railroad mortgage brought in accordance with the code of civil procedure of that state and a deed made by a master or commissioner in pursuance of such decree of sale are ineffective to pass title to property in Pennsylvania. Rothschild *v.* Rochester, etc., R. Co., 1 Pa. Co. Ct. 620.

A final decree, whereby the purchasers at the foreclosure sale are vested with a title free from all liens for receiver's debts, operates to set aside so much of a previous order authorizing the issue of receiver's certificates as made them a paramount lien on the road, and transfers the lien of the certificate, if any, to the proceeds of the sale. Mercantile Trust Co. *v.* Kanawha, etc., R. Co., 58 Fed. 6, 7 C. C. A. 3.

35. Bronson *v.* La Crosse, etc., R. Co., 2 Black (U. S.) 524, 17 L. ed. 347.

or although it may permit the subsequent assertion and litigation of claims upon the proceeds of sale.[36] But it does not of itself merge the debt secured by the mortgage or extinguish its lien, although these results follow where the decree is enforced by a valid and regular sale.[37]

13. Sale — a. In General. A foreclosure sale of railroad property is governed by the rules regulating foreclosure sales generally.[38] Thus a sale must be supported by and within the limits and conditi ns prescribed by the decree ordering the sale to be made,[39] and if the officer or master or commissioner in making the sale wrongfully interprets the order of the court, the sale is invalid,[40] even though the court has confirmed the record of the sale, but without its attention being directed to the mistake, or any issue being raised as to what the order really meant.[41] As a general rule the sale should be at public auction.[42] But where the court is fully informed as to the selling value of the property, it may authorize a private sale.[43] Objections based on any substantial irregularity in the proceedings preliminary and leading up to the sale and which are prejudicial to the party objecting should be made to the confirmation of the sale; but questions relating to the validity of the decree cannot ordinarily be raised by objections to the confirmation of the sale.[44]

b. Notice and Appraisement. Due notice of the sale must be given in accordance with the provisions of the decree or statute governing such sales,[45] such as that such notice shall be published in certain newspapers,[46] and shall definitely describe the property to be sold.[47] It is also necessary under some statutes that

36. Central Trust Co. *v.* Western North Carolina R. Co., 89 Fed. 24. See also New York Guaranty, etc., Co. *v.* Tacoma R., etc., Co., 83 Fed. 365, 27 C. C. A. 550.

37. Columbus, etc., R. Co.'s Appeal, 109 Fed. 177, 48 C. C. A. 275 (holding, however, the terms of the decree to be inconsistent with the retention of any lien on the property sold for the unpaid purchase-money which could be enforced by the court in a subsequent foreclosure suit); St. Louis Southwestern R. Co. *v.* Jackson, 95 Fed. 560, 37 C. C. A. 165.

Adjudication of claims.— A finding that the petitioner's claim filed upon a petition of intervention in a foreclosure suit "is a lien on said mortgaged premises so purchased" at the sale, followed by an order for its payment from the fund in court, is merely a matter of inducement to the order for payment, and not an adjudication that the lien on the property still continues. St. Louis Southwestern R. Co. *v.* Jackson, 95 Fed. 560, 37 C. C. A. 165.

38. See, generally, Mortgages, 27 Cyc. 1680 *et seq.*

Mortgaged premises must be sold to satisfy the whole debt and not a part thereof; and where a seizing creditor of a railroad company sues for an instalment of a debt, secured by a mortgage, the property mortgaged must be sold for the whole debt on such terms of credit as are granted by the original mortgage. Branner *v.* Hardy, 18 La. Ann. 537.

39. Milwaukee, etc., R. Co. *v.* Soutter, 2 Wall. (U. S.) 609, 17 L. ed. 886.

Where the receiver makes a sale under authority of a decree and such sale is confirmed by the court, it is valid, notwithstanding the provisions of a statute stating that "when any property is ordered to be sold by the decree of any Chancery Court . . . such sale shall in all cases be made by the register of the court ordering the same" as such statute is merely directory and not mandatory. Rome, etc., R. Co. *v.* Sibert, 97 Ala. 393, 12 So. 69, construing Code, § 3600.

40. Milwaukee, etc., R. Co. *v.* Soutter, 2 Wall. (U. S.) 609, 17 L. ed. 886.

41. Milwaukee, etc., R. Co. *v.* Soutter, 2 Wall. (U. S.) 609, 17 L. ed. 886.

42. See Bound *v.* South Carolina R. Co., 46 Fed. 315.

43. Bound *v.* South Carolina R. Co., 46 Fed. 315, holding further that the opinion of one person not shown to be an expert and who must derive his knowledge from the opinion of others is not sufficient information to justify the court in ordering such a sale.

44. New York Cent. Trust Co. *v.* Peoria, etc., R. Co., 118 Fed. 30, 55 C. C. A. 52.

45. Trust Co. *v.* Mauch Chunk, etc., R. Co., 1 Lehigh Co. L. J. (Pa.) 84. And see, generally, Mortgages, 27 Cyc. 1689 *et seq.*

46. Sage *v.* Iowa Cent. R. Co., 99 U. S. 334, 25 L. ed. 394, holding that where notice was ordered to be published in a certain newspaper and it was published in another into which the first newspaper was merged but in which its identity remained, its publication was a substantial compliance with the order.

In Illinois, Rev. St. (1874) p. 713, 2 Starr & C. Annot. St. c. 95, § 14, providing that sales of real estate under mortgage shall be, on notice, published in the county or counties where the property is situated and no sale shall be made, except in such county or counties, does not apply to sale of a line of railroad with its equipment, franchises, etc. Craft *v.* Indiana, etc., R. Co., 166 Ill. 580, 46 N. E. 1132.

47. Milwaukee, etc., R. Co. *v.* Milwaukee,

the property shall be appraised in order to determine its actual value as a preliminary to the sale.[48]

c. Time For Sale. Where it is to the interest of all the parties concerned and the existing conditions otherwise require it, the court may order an immediate sale,[49] although all conflicting rights have not been adjudicated,[50] and even pending foreclosure proceedings.[51] Ordinarily, however, where the rights of the parties have not been established, a sale cannot be ordered without the consent of all the parties,[52] or until the rights of the various parties are fully ascertained and determined.[53] Nor should an immediate sale be ordered where there is a reasonable prospect of payment by a faithful application of the profits of the road.[54] Under some statutes a sale cannot be ordered until after the expiration of a specified time after the decree of foreclosure.[55] The court also has power to order a postponement of the sale on petition of parties in interest, and should do so where any good cause is shown, such as that a sale on the day originally appointed would be unfair or oppressive or would result in material loss.[56] But where the relative priorities of the various classes of creditors entitled to participate in the proceeds of the sale are ascertained, and the conditions are such that an early sale is indispensable, the sale will not be postponed until the interests of the individual creditors have been adjusted and the class to which their demands belong has been ascertained.[57] Nor will a sale be postponed merely because a road is more prosperous than for some time past, where it would take some years of such prosperity to pay the already overdue instalments.[58] It is too late two days before the date fixed for the sale to ask for its postponement without a tender of the debt or what is equivalent to a tender.[59]

d. Nature and Extent of Property Included in Sale. A foreclosure sale includes only the property which the decree ordered to be sold together with the accompanying rights and franchises necessary to its profitable use, and lawfully included

etc., R. Co., 20 Wis. 174, 88 Am. Dec. 740, holding that the description should be so definite that purchasers may know what they are purchasing.

48. Southwestern Arkansas, etc., R. Co. *v.* Hays, 63 Ark. 355, 38 S. W. 665 (holding that a statute requiring an appraisement of the property before sale under powers contained in mortgage and trust deeds does not apply to a sale under a decree of foreclosure); Coe *v.* Columbus, etc., R. Co., 10 Ohio St. 372, 75 Am. Dec. 518 (as to real property); Columbia Finance, etc., Co. *v.* Kentucky Union R. Co., 60 Fed. 794, 9 C. C. A. 264. And see, generally, MORTGAGES, 27 Cyc. 1684 *et seq.*

49. Bound *v.* South Carolina R. Co., 50 Fed. 853, holding that where most of the lien-holders of a railroad are urging a sale and it appears that, in spite of the exercise of ability and great economy by the receiver during the past three years, no interest has been paid on any of the securities for a year, the property will be ordered sold, although the sale is opposed by one class of bondholders.

50. Cleveland First Nat. Bank *v.* Shedd, 121 U. S. 74, 7 S. Ct. 807, 30 L. ed. 877 (holding this to be true where the railroad was depreciating while in the hands of the court and the adjustment of conflicting rights could take place as well after as before the sale); Bound *v.* South Carolina R. Co., 50 Fed. 853; Turner *v.* Indianapolis, etc., R. Co., 24 Fed. Cas. No. 14,259, 8 Biss. 380 (holding that a railroad may be sold subject to claims against it as finally adjudicated where the amount depends upon a long course of litigation).

51. Middleton *v.* New Jersey, etc., R. Co., 26 N. J. Eq. 269 [*reversed* on the facts in 27 N. J. Eq. 557].

52. Bound *v.* South Carolina R. Co., 46 Fed. 315.

53. Pennsylvania R. Co. *v.* Allegheny Valley R. Co., 42 Fed. 82.

54. Coe *v.* Pennock, 5 Fed. Cas. No. 2,942 [*affirmed* in 23 How. 117, 16 L. ed. 436].

55. Benedict *v.* St. Joseph, etc., R. Co., 19 Fed. 173, holding also that Kan. Comp. Laws, § 3983, providing that no order for the sale of railroad property mortgaged with a waiver of appraisement can be ordered by the court until the expiration of six months after the decree of foreclosure, is binding on the federal courts.

56. U. S., etc., Trust Co. *v.* Young, (Tex. Civ. App. 1907) 101 S. W. 1045, holding that where property of a railroad company in the hands of a receiver was ordered sold under a foreclosure judgment and a part of it was in litigation, which necessarily depreciated its value and would have lessened the amount of the bid at the sale, the court was justified in postponing the sale until the litigation was settled.

57. Hand *v.* Savannah, etc., R. Co., 13 S. C. 467.

58. Duncan *v.* Atlantic, etc., R. Co., 88 Fed. 840, 4 Hughes 125.

59. Duncan *v.* Atlantic, etc., R. Co., 88 Fed. 840, 4 Hughes 125.

in the mortgage and sale,[60] and a sale of more property than is authorized by the decree to be sold is invalid.[61] As a general rule the railroad cannot be cut into fragments and separate portions sold at different sales, but a sale under a decree of sale of the road and all property rights and franchises must be as an entirety,[62] although the road runs through several counties or states.[63] Where, however, the property is susceptible of division, the court may order it to be sold separately.[64] The purchaser, however, takes his title subject to all prior rights or liens of which he had or ought to have had notice and which are not cut off by

60. Randolph *v.* Wilmington, etc., R. Co., 11 Phila. (Pa.) 502. See also Westinghouse Electric, etc., Co. *v.* New Paltz, etc., Traction Co., 32 Misc. (N. Y.) 132, 65 N. Y. Suppl. 644.

Where the decree directs a sale of the road, the franchises of the company, right of way, depots, rolling stock, tools, and all other property of the company, real, personal, and mixed, the purchaser at such sale is not entitled to the money, the surplus earnings of the road, in the hands of the receiver, but is entitled to all cars, engines, and other property placed on the road by the receiver in the discharge of his duty to carry on the business of the road and keep it in repair. Strang *v.* Montgomery, etc., R. Co., 23 Fed. Cas. No. 13,523, 3 Woods 613.

61. Milwaukee, etc., R. Co. *v.* Soutter, 2 Wall. (U. S.) 609, 17 L. ed. 886, holding that where the marshal sold more of the property than he was ordered to sell, a confirmation of the sale did not validate the sale of the property improperly included, especially where the court afterward ordered that the property set forth in the decree be delivered to the purchaser, the presumption being that the court was not aware of the fact that the marshal had sold property not mentioned in the order of sale.

62. Macon, etc., R. Co. *v.* Parker, 9 Ga. 377; Connor *v.* Tennessee Cent. R. Co., 109 Fed. 931, 48 C. C. A. 730, 54 L. R. A. 687; Knevals *v.* Florida Cent., etc., R. Co., 66 Fed. 224, 13 C. C. A. 410; Wilmer *v.* Atlanta, etc., R. Co., 30 Fed. Cas. No. 17,776, 2 Woods 447. And see *supra*, VIII, A, 13. *Compare* Central Ontario R. Co. *v.* Trusts, etc., Co., [1905] A. C. 576, 74 L. J. P. C. 116, 93 L. T. Rep. N. S. 317, 21 T. L. R. 732, 4 Can. R. Cas. 340 [*affirming* 4 Can R. Cas. 328, 8 Ont. L. Rep. 342, 3 Ont. Wkly. Rep. 910 (*affirming* 2 Can. R. Cas. 274, 6 Ont. L. Rep. 1, 2 Ont. Wkly. Rep. 259)].

Where a single mortgage to secure three series of bonds each of which constitute a first lien upon one of the three divisions of a road and a second lien upon the other two is foreclosed in equity, the three divisions should not be sold separately, nor should the property be offered both in separate divisions and as an entirety, and the most advantageous bid accepted; but the entire property should be sold as an entirety and the proceeds apportioned among the bondholders of the three classes according to the relative value of the three divisions. Low *v.* Blackford, 87 Fed. 392, 31 C. C. A. 15 [*affirming* 82 Fed. 344].

Where two mortgages are given, one on the western section of the road and afterward one on its eastern section, both mortgages covering the rolling stock used on the entire line embracing both sections and both are foreclosed, the rolling stock belongs to the company which purchased under the senior mortgage. Minnesota Co *v.* St. Paul Co., 6 Wall. (U. S.) 742, 18 L. ed. 856.

Ark. Const. art. 17, § 11, which provides that the rolling stock of a railroad company shall be personal property and liable to execution and sale like personal property of individuals does not prohibit a sale as an entirety of railroad property including rolling stock, where it does not prejudice the interests of any one. Southwestern Arkansas, etc., R. Co. *v.* Hays, 63 Ark. 355, 38 S. W. 665.

63. Macon, etc., R. Co. *v.* Parker, 9 Ga. 377; Hand *v.* Savannah, etc., R. Co., 12 S. C. 314, holding that where a part of the railroad is in one state and part in another, a court of the first state in ordering the foreclosure sale should order a sale of the entire road, so much thereof as lay in the second state being subject to the liens existing in that state.

Mo. Rev. St. (1889) c. 102, art. 4, requiring that under the special fieri facias authorized thereby to satisfy a lien against a railroad for labor "the writ shall be returnable as in ordinary executions, and the advertisement, sale and conveyance of real estate under the same shall be made as under ordinary execution" does not preclude the sale of a railroad as a whole on which a lien exists, because it is not within the limits of a single county, since the method thus adopted is not beyond the purpose of the fieri facias to satisfy the lien from a sale of the road as a whole. Bethune *v.* Cleveland, etc., R. Co., 149 Mo. 587, 51 S. W. 465.

64. Southwestern Arkansas, etc., R. Co. *v.* Hays, 63 Ark. 355, 38 S. W. 665 (holding that the refusal of the chancellor, in a suit to foreclose a mortgage of the road-bed and rolling stock of a railroad company, to order the road-bed and rolling stock to be sold as an entirety, as requested by the mortgagor, is not error where it does not appear that all of the rolling stock is needed for the operation of the road, and where it was left to the commissioner's discretion to sell the property as an entirety or separately, as he might deem most expedient); Bardstown, etc., R. Co. *v.* Metcalfe, 4 Metc. (Ky.) 199, 81 Am. Dec. 541.

A decree which directs the commissioner to sell "all of said property" will not be held to require a sale of the road-bed and rolling stock separately merely because the

the foreclosure proceedings.[65] In some jurisdictions, although the mortgage treats the property as an entirety, yet as respects the remedy, it is to be severed and the realty and personalty is sold according to the rules relating to the disposition of property so situated.[66]

e. Price and Terms of Sale.[67] A wide discretion as to the details and terms of sale in view of the nature of the property may be exercised in the foreclosure of a mortgage of all the real estate, fixtures, and franchise right of operation of a railroad.[68] Ordinarily the officer making the sale has no authority to sell on credit, particularly where the decree directs a sale for cash.[69] It is competent to require an immediate deposit by the purchaser of a reasonable part of his bid.[70]

f. Persons Entitled to Purchase. Who may become the purchasers at a foreclosure sale may be expressly provided for by the mortgage itself,[71] or by statute,[72] but as a general rule one who occupies a position of trust or confidence toward the mortgagor company, such as would make it inequitable for him to acquire the title for himself, cannot become a purchaser.[73] Thus a director of a company being a fiduciary cannot purchase the property of the company at a judicial sale without the consent of the company or permission of the chancellor who decreed the sale,[74] and where the purchase is made by such a person, the company is entitled to a surrender of the road on placing the purchaser *in statu quo*.[75] So where all persons have an opportunity to bid, the fact that the road is purchased by the president of the company in his individual right will not in itself raise a trust relation between him and a holder of the bonds of the company which will entitle the latter to treat him as a trustee of the property so purchased.[76] It has been held that a purchase by a mortgage trustee is voidable, although not absolutely void;[77] but junior mortgage creditors can only avoid such sale by tender-

court refused to specifically direct that they be sold together as an entirety. Southwestern Arkansas, etc., R. Co. *v.* Hays, 63 Ark. 355, 38 S. W. 665.

65. Western Union Tel. Co. *v.* Burlington, etc., R. Co., 11 Fed. 1, 3 McCrary 130.

66. Coe *v.* Columbus, etc., R. Co., 10 Ohio St. 372, 75 Am. Dec. 518.

67. **Terms and conditions of foreclosure sales generally** see MORTGAGES, 27 Cyc. 1699.

68. Coe *v.* Columbus, etc., R. Co., 10 Ohio St. 372, 75 Am. Dec. 518; Rutland R. Co. *v.* Beique, 37 Can. Sup. Ct. 303 [*affirming* 10 Can. Exch. 139].

The holders of preferred stock, constituting a lien on the corporate property and earnings second only to the first mortgage, may not use the stock to make up the amount of their bid on foreclosure sale of the property, after paying adjudicated claims of creditors, as this would, in effect, be dividing the property of the corporation among them to the prejudice of any creditors not parties to the suit. Continental Trust Co. *v.* Toledo, etc., R. Co., 86 Fed. 929.

69. Pindle *v.* Pennsylvania, etc., R. Co., 1 Lehigh Val. L. Rep. (Pa.) 201.

70. Hand *v.* Savannah, etc., R. Co., 13 S. C. 467.

Right of bidder to return of deposit see Feike *v.* Cincinnati, etc., R. Co., 3 Ohio Cir. Ct. 72, 2 Ohio Cir. Dec. 41.

71. Farmers' L. & T. Co. *v.* Iowa Cent. R. Co., 8 Fed. Cas. No. 4,664, 4 Dill. 546, holding that where a deed of trust of railroad property provides that on foreclosure the property may be sold and conveyed by the trustee to such person or company as the holders of a majority of the outstanding bonds may, in writing, request or direct, the court will not direct the trustee to convey the property to the company named in the absence of evidence that such company has been designated as the company to whom the property shall be transferred.

72. Boston, etc., R. Co. *v.* Boston, etc., R. Co., 65 N. H. 393, 23 Atl. 529 (holding that under Laws (1881), c. 232, relating to the foreclosure sale of the Manchester and Keene railroad and authorizing "any railroad company" to purchase it, the purchase by the Boston and Lowell Railroad Company was legal); Rothchild *v.* Memphis, etc., R. Co., 113 Fed. 476, 51 C. C. A. 310 (construing Tenn. Acts (1881), c. 82).

73. Pacific R. Co. *v.* Ketchum, 101 U. S. 289, 25 L. ed. 932.

A purchase by a solicitor of a railroad company in a foreclosure sale is not of itself necessarily invalid, but it will be closely scrutinized and until impeached must stand. Pacific R. Co. *v.* Ketchum, 101 U. S. 289, 25 L. ed. 932.

74. Covington, etc., R. Co. *v.* Bowler, 9 Bush (Ky.) 468.

75. Covington, etc., R. Co. *v.* Bowler, 9 Bush (Ky.) 468.

76. London Credit Co. *v.* Arkansas Cent. R. Co., 15 Fed. 46, 5 McCrary 23.

77. Kitchen *v.* St. Louis, etc., R. Co., 69 Mo. 224; Cunningham *v.* Macon, etc., R. Co., 156 U. S. 400, 15 S. Ct. 361, 39 L. ed. 471.

A purchase by the trustee gives the railroad company the right to redeem provided

ing reimbursement.[78] A junior encumbrancer may become the purchaser.[79] Under some statutes the purchaser must be one capable not only of owning the property, but also of exercising the rights and powers and of assuming the duties incident to such ownership.[80]

g. Persons Entitled to Question Validity. As a general rule every person whose rights are injuriously affected by a decree of foreclosure and a sale under it has a right to move to set aside the sale, although he was not a party to the action.[81] Such objection may be made by the mortgagor company,[82] or by bondholders,[83] or stock-holders.[84] But a party who otherwise would be entitled to raise objections to the validity or irregularity of foreclosure and sale may be prevented from doing so on principles of estoppel, as where he fails to interpose his objections by a proper proceeding and at a proper time,[85] or where he participates in the sale or bids.[86]

h. Opening and Vacating Sale and Resale.[87] A court of equity may vacate or set aside a foreclosure sale which is shown to be tainted with fraud or deceit,[88]

the company exercises the right within a reasonable time and before new equities have intervened. Kitchen *v.* St. Louis, etc., R. Co., 69 Mo. 224.

78. Cunningham *v.* Macon, etc., R. Co., 156 U. S. 400, 15 S. Ct. 361, 39 L. ed. 471.

79. Nova Scotia Cent. R. Co. *v.* Halifax Banking Co., 21 Can. Sup. Ct. 536.

80. Texas Southern R. Co. *v.* Harle, (Tex. 1907) 105 S. W. 1107 [*reversing* (Civ. App. 1907) 101 S. W. 878], holding this to be true under Rev. St. (1895) art. 4559, which provides that the purchaser or purchasers of the entire road-bed, track, franchise, and chartered rights of a railroad company on execution or judicial sale, etc., and their associates, may exercise all powers and franchises granted to the company by its charter and the general laws and shall be deemed to be the true owners of the charter and corporators thereunder and shall have power to construct and work the road upon the same terms imposed by the charter and general laws.

The purchaser may have "associates" under such statute, and they may be other than those who made the purchase. Texas Southern R. Co. *v.* Harle, (Tex. 1907) 105 S. W. 1107 [*reversing* (Civ. App. 1907) 101 S. W. 878].

Where a married woman purchases a railroad at judicial sale under Rev. St. (1895) § 4549, even if she is under disability by reason of her coverture to assume the responsibilities of a purchaser as to the control and management of the property, yet there is no objection to a suitable person taking title in his name and undertaking the responsibilities of a purchaser and at the same time acting as her trustee so far as to give her the returns from operating the property, and this equitable interest she and her husband have power in spite of the coverture to exchange for stock in a company organized to take over the road. Texas Southern R. Co. *v.* Harle, (Tex. 1907) 105 S. W. 1107 [*reversing* (Civ. App. 1907) 101 S. W. 878].

81. Wenger *v.* Chicago, etc., R. Co., 114 Fed. 34, 51 C. C. A. 660. And see, generally, MORTGAGES, 27 Cyc. 1710 *et seq.*

82. Delaware, etc., R. Co. *v.* Scranton, 34 N. J. Eq. 429; Youngman *v.* Elmira, etc., R. Co., 65 Pa. St. 278.

83. Youngman *v.* Elmira, etc., R. Co., 65 Pa. St. 278.

84. Rothschild *v.* Rochester, etc., R. Co., 1 Pa. Co. Ct. 620.

A shareholder who has accepted and disposed of bonds of the company illegally issued, while precluded from questioning the validity of the bonds and mortgage securing the same, is not barred of his right as a stock-holder to assert want of title in the purchaser of the corporate property under foreclosure of a mortgage. Rothschild *v.* Rochester, etc., R. Co., 1 Pa. Co. Ct. 620.

85. Racine, etc., R. Co. *v.* Farmers' L. & T. Co., 86 Ill. 187; Crouch *v.* Dakota, etc., R. Co., 13 S. D. 540, 101 N. W. 722; Union Trust Co. *v.* Illinois Midland R. Co., 117 U. S. 434, 6 S. Ct. 809, 29 L. ed. 963.

86. Blanks *v.* Farmers' L. & T. Co., 122 Fed. 849, 59 C. C. A. 59. *Compare* Chapman *v.* Pittsburg, etc., R. Co., 26 W. Va. 299.

87. Opening or setting aside foreclosure sales generally see MORTGAGES, 27 Cyc. 1710 *et seq.*

88. Kurtz *v.* Philadelphia, etc., R. Co., 187 Pa. St. 59, 40 Atl. 988; McKittrick *v.* Arkansas Cent. R. Co., 152 U. S. 473, 14 S. Ct. 661, 38 L. ed. 518; Leavenworth County *v.* Chicago, etc., R. Co., 134 U. S. 688, 10 S. Ct. 708, 33 L. ed. 1064 [*affirming* 25 Fed. 219]; James *v.* Milwaukee, etc., R. Co., 6 Wall. (U. S.) 752, 18 L. ed. 885, fraudulent notice of sale held sufficient to vitiate sale.

A sale to a committee of reorganization by whose plan the stock-holders of a mortgagor appear to obtain some benefit in the purchasing company is open to the closest scrutiny where general creditors of the mortgagor are left unprovided for; but where the foreclosure is instituted and carried on in the ordinary course for the honest purpose only of enforcing rights of bondholders, the mere fact that the stock-holders of the old company may, under a purchasing arrangement, be given some interest in the securities of the new in exchange for their stock, while it may be indicative of fraud, does not render the

as where the purchase has been made in pursuance of a corrupt scheme to gain possession of the railroad property inequitably;[89] or where the sale has been made for such a grossly inadequate consideration as to raise a presumption of fraud and unfair dealing.[90] A sale may also be set aside at the instance of the party injured on the ground of mistake or surprise.[91] But generally a motion to vacate cannot be based on grounds of objection which were or might have been set up in defense to the foreclosure suit or against the confirmation of the sale.[92] Nor will a sale be set aside for any defects or irregularities which do not invalidate the title of the purchaser or work substantial or real injury to the rights of any party in interest.[93] In ordering the sale to be set aside, the court should also make such orders as may be necessary to place the parties in the position they occupied before the sale, and to protect intervening parties.[94] Where a lienor is entitled to be paid his lien out of the proceeds of such sale and his claim is not paid within a reasonable time out of such proceeds, a resale of the property may be ordered.[95] But a resale will not be ordered on an offer of a larger bid without the support of some special circumstances in aid of it, particularly where it appears that the expenses of a resale would be large and the creditors would receive only a small additional sum and that the purchaser desires to immediately equip and operate the railroad and that the public interest requires that the operation should be begun as soon as possible.[96]

i. Operation and Effect. A sale under a decree of foreclosure of all the property and franchises of a railroad company and a conveyance of such property and franchises to the purchaser as directed by the court operates to divest the company of all its right, title, and interest therein and leaves to it only its franchise to exist as a corporation.[97] Thereafter the company cannot by any act or negligence of its own subject the property so sold or the franchises of the company to exercise the rights, powers, and privileges of a railroad company

sale fraudulent *per se*, and a general creditor of the old company cannot successfully attack such sale without showing actual fraud and that the property of such company has, by reason of such fraud, been placed beyond his reach on execution. Wenger *v.* Chicago, etc., R. Co., 114 Fed. 34, 51 C. C. A. 660.

89. Price *v.* Utah, etc., R. Co., 4 Utah 72, 6 Pac. 528; James *v.* Milwaukee, etc., R. Co., 6 Wall. (U. S.) 752, 18 L. ed. 885.

90. Wesson *v.* Chapman, 76 Hun (N. Y.) 592, 28 N. Y. Suppl. 192; Price *v.* Utah, etc., R. Co., 4 Utah 72, 6 Pac. 528. See Meyer *v.* Utah, etc., R. Co., 3 Utah 280, 3 Pac. 393.

Mere inadequacy of price which is not sufficient to show that the sale was not the result of fair dealing is not a sufficient ground for setting aside the sale. Turner *v.* Indianapolis, etc., R. Co., 24 Fed. Cas. No. 14,259, 8 Biss. 380. But the inadequacy must be so gross as to shock the conscience and show that it is not the result of fair dealings or an honest price. Farmers' L. & T. Co. *v.* Oregon Pac. R. Co., 28 Oreg. 44, 40 Pac. 1089; Turner *v.* Indianapolis, etc., R. Co., 24 Fed. Cas. No. 14,259, 8 Biss. 380.

Where parties desire to have the sale set aside for inadequacy of the bid, they must show that some person, who is responsible, will make an advance bid. Turner *v.* Indianapolis, etc., R. Co., 24 Fed. Cas. No. 14,259, 8 Biss. 380.

91. Peck *v.* New Jersey, etc., R. Co., 22 Hun (N. Y.) 129 [*affirmed* in 85 N. Y. 246].

92. Delaware, etc., R. Co. *v.* Scranton, 34 N. J. Eq. 429; Meyer *v.* Utah, etc., R. Co., 3 Utah 280, 3 Pac. 393; Robinson *v.* Iron R. Co., 135 U. S. 522, 10 S. Ct. 907, 34 L. ed. 276.

93. Walker *v.* Montpelier, etc., R. Co., 30 N. J. Eq. 525.

94. James *v.* Milwaukee, etc., R. Co., 6 Wall. (U. S.) 752, 18 L. ed. 885.

95. Compton *v.* Jesup, 167 U. S. 1, 17 S. Ct. 795, 42 L. ed. 55, 68 Fed. 263, 15 C. C. A. 397; Farmers' L. & T. Co. *v.* Newman, 127 U. S. 649, 8 S. Ct. 1364, 32 L. ed. 303.

Where the purchaser refuses to apply the surplus of such sale to the payment *pro rata* of all matured coupons or bonds of the same grade as the one upon which the seizure and sale is made, which are presented and demanded, it is the duty of the sheriff to reoffer the property for sale. Branner *v.* Hardy, 18 La. Ann. 537.

Where a railroad's right to redeem from a sale of foreclosure has become barred, the holders of outstanding liens who had not been made parties to the first proceeding are not entitled to another sale of the property but are only entitled to a decree allowing them a reasonable time to redeem. Crouch *v.* Dakota, etc., R. Co., 18 S. D. 540, 101 N. W. 722.

96. Wesson *v.* Chapman, 76 Hun (N. Y.) 592, 28 N. Y. Suppl. 192.

97. Sodus Bay, etc., R. Co. *v.* Lapham, 43 Hun (N. Y.) 314, 6 N. Y. St. 159; New

in connection therewith to any liability.[98] Such sale vests the purchaser with the entire title of the railroad company, not only to the physical property sold but also to the franchises to operate the same as a railroad.[99]

14. Rights and Liabilities of Purchasers — a. Corporate Capacity, Franchises, and Powers of Original Company. Unless authorized by statute,[1] a purchaser at a foreclosure sale under a mortgage of the franchises and property of a railroad company does not, by virtue of his purchase, acquire the franchise of the company to exist as a corporation;[2] but such purchase and transfer confers a right to reorganize as a new corporation subject to the laws existing at the time of the reorganization,[3] and as such to have possession of the property,[4] and to succeed to all the rights and privileges of the old company appurtenant to the maintenance and operation of the road,[5] such as the right to maintain and operate the road,[6] and receive the rents and profits, except such as accrued before the purchaser became invested with the title and right of possession;[7] nor is the purchaser entitled to the earnings of the road after confirmation of a sale if he persistently delays compliance with his bid and has not paid the purchase-money.[8] But in the absence of express direction in the statute to that effect, or of an equivalent implication by necessary construction, a special statutory exemption or privilege granted to a railroad company,[9] such as immunity from taxation,[10] or

York Cent. Trust Co. *v.* Western North Carolina R. Co., 112 Fed. 471.

The title of a subsequent purchaser from the company of its lands is destroyed by a sale of them under the mortgage. Wilson *v.* Boyce, 92 U. S. 320, 23 L. ed. 608.

98. New York Cent. Trust Co. *v.* Western North Carolina R. Co., 112 Fed. 471.

99. Chicago, etc., R. Co. *v.* Fosdick, 106 U. S. 47, 1 S. Ct. 10, 27 L. ed. 47; Gunnison *v.* Chicago, etc., R. Co., 117 Fed. 629.

1. See Vicksburg, etc., R. Co. *v.* Elmore, 46 La. Ann. 1237, 15 So. 701 (under Act 38, 1877); First Div. St. Paul, etc., R. Co. *v.* Parcher, 14 Minn. 297 [construing Laws Ex. Sess. (1857) c. 1, and amendment to constitution, art. 9, § 10, adopted April 15, 1858].

Under Tex. Rev. St. § 4260, the purchasers at a judicial sale of a railroad corporation succeed to all its rights, powers, and privileges and may continue business in its name, no change of name being required or notice to be given, and in its dealings with strangers it need not show by what authority it claims its succession. Acres *v.* Moyne, 59 Tex. 623.

2. Bruffett *v.* Great Western R. Co., 25 Ill. 353; Atkinson *v.* Marietta, etc., R. Co., 15 Ohio St. 21; Norfolk, etc., R. Co. *v.* Pendleton, 156 U. S. 667, 15 S. Ct. 413, 39 L. ed. 574 [*affirming* 86 Va. 1004, 11 S. E. 1062, 88 Va. 350, 13 S. E. 709]; Memphis, etc., R. Co. *v.* Berry Com'rs, 112 U. S. 609, 5 S. Ct. 299, 28 L. ed. 837.

3. Dow *v.* Beidelman, 49 Ark. 325, 5 S. W. 297 (under Const. art. 17, § 10); Norfolk, etc., R. Co. *v.* Pendleton, 156 U. S. 667, 15 S. Ct. 413, 39 L. ed. 574 [*affirming* 86 Va. 1004, 11 S. E. 1062, 88 Va. 350, 13 S. E. 709].

4. Central Trust Co. *v.* Western North Carolina R. Co., 89 Fed. 24, holding that the fact that the purchaser of a North Carolina railroad at foreclosure sale is a Virginia corporation is not an objection that any private person can urge against the purchasers in possession of the property.

5. Com. *v.* Central Pass. R. Co., 52 Pa. St. 506; Miller *v.* Rutland, etc., R. Co., 36 Vt. 452; Connor *v.* Tennessee Cent. R. Co., 109 Fed. 931, 48 C. C. A. 730, 54 L. R. A. 687.

6. Memphis, etc., R. Co. *v.* Berry, 112 U. S. 609, 5 S. Ct. 299, 28 L. ed. 837.

Although natural persons cannot exercise the franchises conferred by a state on railroads where they bid in the property of such railroads, they may hold it including the franchises and transmit it intact to a corporation authorized to exercise the franchises. Parker *v.* Elmira, etc., R. Co., 165 N. Y. 274, 59 N. E. 81 [*affirming* 27 N. Y. App. Div. 383, 49 N. Y. Suppl. 1127].

Motive power.— The fact that the lessee of a railroad surrendered its rights for the purpose of enabling the lessor company to accept the benefits of a statute, conditioned that steam should not be used as a motive power on the road, does not preclude the lessee company, after purchasing the road at a foreclosure sale, from operating it with steam. People *v.* Long Island R. Co., 60 How. Pr. (N. Y.) 395.

7. Downs *v.* Farmers' L. & T. Co., 79 Fed. 215, 24 C. C. A. 500.

8. Boyle *v.* Farmers' L. & T. Co., 88 Fed. 930, 32 C. C. A. 142.

9. Dow *v.* Beidelman, 49 Ark. 325, 5 S. W. 297; Little Rock, etc., R. Co. *v.* McGehee, 41 Ark. 202; St. Louis, etc., R. Co. *v.* Gill, 156 U. S. 649, 15 S. Ct. 484, 39 L. ed. 567; Flint, etc., R. Co. *v.* U. S., 112 U. S. 737, 5 S. Ct. 368, 28 L. ed. 862; St. Paul, etc., R. Co. *v.* U. S., 112 U. S. 733, 5 S. Ct. 366, 28 L. ed. 861.

10. Norfolk, etc., R. Co. *v.* Pendleton, 156 U. S. 667, 15 S. Ct. 413, 39 L. ed. 574 [*affirming* 86 Va. 1004, 11 S. E. 1062, 88 Va. 350, 13 S. E. 709]; St. Louis, etc., R. Co.

a right to fix and determine rates of fare,[11] does not accompany the property in its transfer to a purchaser under foreclosure.

b. Grantees or Successors of Purchasers. A grantee or successor of such purchaser is entitled to all the rights of the original purchaser,[12] and is also charged with infirmities of title arising from illegality in the sale, and with claims or equities which would have been available against the original purchaser,[13] except in so far as he is entitled to protection in the character of a purchaser in good faith without notice,[14] or except in so far as the duty or liability is incurred or imposed upon the original purchasers personally.[15]

c. Construction, Maintenance, and Operation. A purchaser of a railroad under foreclosure is also bound to perform the duties to the public which are coupled with the enjoyment of the corporate privileges and which the original company owed to the public,[16] such as the duty of properly constructing, repairing, equipping, and operating the road.[17] But a purchaser's duty to construct is

v. Gill, 156 U. S. 649, 15 S. Ct. 484, 39 L. ed. 567; Memphis, etc., R. Co. *v.* Berry, 112 U. S. 609, 5 S. Ct. 299, 28 L. ed. 837. And see, generally, TAXATION. But see Atlantic, etc., R. Co. *v.* Allen, 15 Fla. 637.

11. St. Louis, etc., R. Co. *v.* Gill, 156 U. S. 649, 15 S. Ct. 484, 39 L. ed. 567; Matthews *v.* North Carolina Corp. Com'rs, 97 Fed. 400. But *compare* Railroad Com'r *v.* Grand Rapids, etc., R. Co., 130 Mich. 248, 89 N. W. 967 (construing 2 Comp. Laws (1897), § 6224); Parker *v.* Elmira, etc., R. Co., 165 N. Y. 274, 59 N. E. 81 [*affirming* 27 N. Y. App. Div. 383, 49 N. Y. Suppl. 1127]; Grand Rapids, etc., R. Co. *v.* Osborn, 193 U. S. 17, 24 S. Ct. 310, 48 L. ed. 598 (holding that purchasers of a railroad, not having any right to demand to be incorporated under the laws of a state, but voluntarily accepting the privileges and benefits of an incorporation law, are bound by the provisions of existing laws regulating rates of fare and are, as well as the corporation formed, estopped from repudiating the burdens attached by the statute to the privilege of becoming a corporation); Ball *v.* Rutland R. Co., 93 Fed. 513.

12. Chicago, etc., R. Co. *v.* Towle, 10 Ind. App. 540, 37 N. E. 358 (defendant held not bound by a traffic contract disclaimed by the original purchaser); Pittsburg, etc., R. Co. *v.* Bosworth, 46 Ohio St. 81, 18 N. E. 533, 2 L. R. A. 199 [*affirming* 1 Ohio Cir. Ct. 69, 1 Ohio Cir. Dec. 42] (holding that where a contract made by a landowner to a railroad company granted to the latter a right of way over his land for a certain specified consideration, the landowner agreeing to erect and maintain fences, the lessee of the railroad which had succeeded to the rights of the former company by purchase at foreclosure sale is entitled to the benefit of the grant of the right of way).

Under Tenn. Laws (1881), c. 9, as amended by Laws (1887), c. 198, and Laws (1891), c. 61, and under Laws (1877), c. 12, § 2, c. 20, a railroad corporation of another state which had been recognized by an act of the Tennessee legislature and which had become the purchaser of lines of railroads in the state formerly owned by Tennessee companies, from one who acquired title thereto through foreclosure sales, became vested by virtue of such statutes with all the powers with reference thereto possessed by the mortgagor companies, including the power to lease such lines to any corporation competent under the laws of the state to become the lessee thereof. Rogers *v.* Nashville, etc., R. Co., 91 Fed. 299, 33 C. C. A. 517.

13. State *v.* Iowa Cent. R. Co., 83 Iowa 720, 50 N. W. 280; Vilas *v.* Page, 106 N. Y. 439, 13 N. E. 743; Frazier *v.* East Tennessee, etc., R. Co., 88 Tenn. 138, 12 S. W. 537; Florida *v.* Anderson, 91 U. S. 667, 23 L. ed. 290.

14. Vilas *v.* Page, 106 N. Y. 439, 13 N. E. 743; Frazier *v.* East Tennessee, etc., R. Co., 88 Tenn. 138, 12 S. W. 537.

Where the purchaser is a representative of a mortgage bondholder, his conveyance by a quitclaim deed to several different corporations afterward consolidated does not constitute the consolidation corporation a *bona fide* purchaser without notice, the consideration paid being expressed to be the capital stock of the new company, the old bondholders thus becoming stock-holders of the new corporation; and bondholders under a mortgage executed by the new corporation being notified by the recitals of the mortgage take their bonds subject to the purchase-money lien. Continental Trust Co. *v.* American Surety Co., 80 Fed. 180, 25 C. C. A. 364.

15. Holland *v.* Lee, 71 Md. 338, 18 Atl. 661, holding certain bonds to be the individual obligations of the signers, the original purchasers of the road.

16. New York, etc., R. Co. *v.* State, 50 N. J. L. 303, 13 Atl. 1 [*affirmed* in 53 N. J. L. 244, 23 Atl. 168].

That the purchaser has leased a part of the road required to be operated by the decree of foreclosure, to another company, and that such portion is being operated in connection with the line of the lessor company, does not excuse the purchaser from its liability under a decree requiring it to operate such portion of the line. State *v.* Iowa Cent. R. Co., 83 Iowa 720, 50 N. W. 280.

17. State *v.* Jack, 145 Fed. 281, 76 C. C. A. 165 [*affirming* 113 Fed. 823], holding, however, that the purchasers were not bound sev-

limited to the portion mortgaged and purchased by him; and where the old company has completed only a part of its road and this part is mortgaged and sold, the purchaser is not bound to complete the whole road.[18]

d. Injuries. A purchaser at a foreclosure sale is not liable for injuries occurring while the road was in possession of the old company or a receiver,[19] except where the decree of foreclosure and sale requires the purchaser to assume such liability,[20] and except where the acts causing the injury are done by the receiver as the purchaser's agent.[21] But a purchaser will be liable for damages due to the continuance by it of a nuisance created by the mortgagor company or receiver, of which such purchaser had notice.[22]

e. Contracts in General. The purchaser at a foreclosure sale is also not bound by contracts made by the mortgagor company, whether such contracts are leases,

eral years after the railroad had been dismantled to replace the same in the same condition it was when dismantled in order that the road could be operated by others as a public highway.

The duty of building and keeping in repair bridges across highways which was imposed on the railroad company by its charter devolves upon a new corporation which purchased the franchises and property of the old corporation at a sale under a decree of foreclosure and which organized itself under N. Y. Revision, p. 916, § 56. New York, etc., R. Co. *v.* State, 50 N. J. L. 303, 13 Atl. 1 [*affirmed* in 53 N. J. L. 244, 23 Atl. 168]; Montclair Tp. *v.* New York, etc., R. Co., 45 N. J. Eq. 436, 18 Atl. 242.

A railway company is bound to construct its road to and from the several points named in its charter, and, when built, to run its trains over its entire line, in such a manner as to afford reasonable facilities for the prompt and efficient transaction of such legitimate business as may be offered to it on any and every part of its road; and this obligation is equally binding on its successors. No part of the road can be abandoned without rendering its franchises liable to forfeiture. People *v.* Louisville, etc., R. Co., 120 Ill. 48, 10 N. E. 657.

18. Chartiers R. Co. *v.* Hodgens, 85 Pa. St. 501.

19. *Georgia.*— Seaboard Air-Line R. Co. *v.* Knickerbocker Trust Co., 125 Ga. 463, 54 S. E. 138.

Indian Territory.— Atchison, etc., R. Co. *v.* Young, 3 Indian Terr. 60, 53 S. W. 481.

Iowa.— White *v.* Keokuk, etc., R. Co., 52 Iowa 97, 2 N. W. 1016.

Missouri.— George *v.* Wabash Western R. Co., 40 Mo. App. 433.

New York.— Metz *v.* Buffalo, etc., R. Co., 58 N. Y. 61, 17 Am. Rep. 201.

South Carolina.— Hammond *v.* Port Royal, etc., R. Co., 15 S. C. 10.

Texas.— Houston Electric St. R. Co. *v.* Bell, (Civ. App. 1897) 42 S. W. 772; Holman *v.* Galveston, etc., R. Co., 14 Tex. Civ. App. 499, 37 S. W. 464.

Injuries from operation generally see *infra*, X, C, 3, c, (II).

Liability for injuries as to purchasers under sales other than foreclosure sales see *supra*, VII, B, 4.

N. C. Code, § 1255, making liens for judgments for torts superior to mortgages of incorporated companies, does not render property purchased at a foreclosure sale of a railroad company liable for the satisfaction of a judgment recovered on a tort alleged to have been committed by the mortgagor after the sale. Julian *v.* Central Trust Co., 193 U. S. 93, 24 S. Ct. 399, 48 L. ed. 629 [*affirming* 115 Fed. 956, 53 C. C. A. 438].

20. Brown *v.* Wabash R. Co., 96 Ill. 297; Sloan *v.* Iowa Cent. R. Co., 62 Iowa 728, 16 N. W. 331; Atchison, etc., R. Co. *v.* Cunningham, 59 Kan. 722, 54 Pac. 1055 (holding that where the terms of the decree of the United States court directing a sale of a railroad required the purchasers as a part consideration to pay all liabilities incurred by the receivers before delivery of possession of the property, one who sustained injuries while the railroad was operated by the receiver may maintain an action against the purchasers in the state court and is not required to resort to the court which entered the decree); Central Trust Co. *v.* Denver, etc., R. Co., 97 Fed. 239, 38 C. C. A. 143; Farmers' L. & T. Co. *v.* Central R. Co., 17 Fed. 758, 5 McCrary 421; Farmers' L. & T. Co. *v.* Central R. Co., 7 Fed. 537, 2 McCrary 181.

Under a decree that any purchaser shall take subject to all unpaid claims of landowners for damages for property taken, injured, or destroyed in the construction of the railroad, a purchaser is not liable upon a judgment rendered prior to the sale against the old company for a trespass in entering upon plaintiff's land and constructing its road without leave, especially where it appeared that after obtaining the judgment plaintiff had granted a right of way to the old company. Campbell *v.* Pittsburgh, etc., R. Co., 137 Pa. St. 574, 20 Atl. 949.

21. Houston, etc., R. Co. *v.* Bath, 17 Tex. Civ. App. 697, 44 S. W. 595, holding that the possession of a railroad by a receiver after sale, confirmation, deed, and expiration of the time within which the court ordered delivery of the property to the purchaser, being at the instance and for the benefit of the purchaser, is as the purchaser's agent and it is liable for damages to a shipper occurring during the same.

22. George *v.* Wabash Western R. Co., 40 Mo. App. 433.

sales, mortgages, guarantees,[23] or traffic contracts,[24] except such as are a lien upon or otherwise bind the property and franchises purchased,[25] and except where the purchaser either expressly or by necessary implication adopts or assumes the contract previously made with the mortgagor company,[26] or liability thereon is provided for in the decree,[27] or created by statute;[28] or unless the contract is

23. *Iowa.*— Hunter *v.* Burlington, etc., R. Co., 84 Iowa 605, 51 N. W. 64.
Kansas.— Hukle *v.* Atchison, etc., R. Co., 71 Kan. 251, 80 Pac. 603.
New York.— People *v.* Rome, etc., R. Co., 103 N. Y. 95, 8 N. E. 369.
South Carolina.— Hammond *v.* Port Royal, etc., R. Co., 15 S. C. 10.
Virginia.— Sherwood *v.* Atlantic, etc., R. Co., 94 Va. 291, 26 S. E. 943.
Wisconsin.— Menasha *v.* Milwaukee, etc., R. Co., 52 Wis. 414, 9 N. W. 396.
United States.— Hoard *v.* Chesapeake, etc., R. Co., 123 U. S. 222, 8 S. Ct. 74, 31 L. ed. 130.
See 41 Cent. Dig. tit. "Railroads," § 648.
Removal of switch.— Where plaintiff and others living near a railroad constructed a grade and furnished cross-ties for a switch for neighborhood convenience, under a contract with the company that the switch should remain permanently, and the road and franchises of the contracting company were subsequently sold under a decree of foreclosure and purchased by defendant, defendant could remove the switch unless it assumed the original contract in accordance with the provisions of the act of March 3, 1865, section 3. Smith *v.* Indianapolis, etc., R. Co., Wils. (Ind.) 88.

24. Cincinnati, etc., R. Co. *v.* Cincinnati, etc., R. Co., 9 Ohio S. & C. Pl. Dec. 493, 6 Ohio N. P. 427, holding that where a railroad company which had a freight contract with another line was sold on foreclosure, and the order of sale directed the receiver to sell the road with all appurtenances but did not mention contracts with other roads, such contract did not pass as appurtenant to the road. *Compare* Tennessee *v.* Quintard, 80 Fed. 829, 26 C. C. A. 165.

25. Menasha *v.* Milwaukee, etc., R. Co., 52 Wis. 414, 9 N. W. 396.

26. Smith *v.* Indianapolis, etc., R. Co., Wils. (Ind.) 88; Hukle *v.* Atchison, etc., R. Co., 71 Kan. 251, 80 Pac. 603; South Carolina R. Co. *v.* Wilmington, etc., R. Co., 7 S. C. 410; Tennessee *v.* Quintard, 80 Fed. 829, 26 C. C. A. 165.
Illustrations.—Thus where, after a master's sale of a railroad, but before confirmation thereof, a third party intervenes asserting a right to have the railroad in the hands of the purchaser bound by a traffic agreement made with the receiver before the sale and the purchaser does not then ask to be relieved from his bid but submits to a decree confirming the sale and reserving the rights of the intervener for future determination, this amounts to an election by the purchaser to take the property burdened with the contract if the same shall be upheld by the courts. Tennessee *v.* Quintard, 80 Fed. 829, 26 C. C. A. 165. So where a railroad company and a telegraph company agree to construct a line of telegraph on the former's road and afterward the road is sold under a foreclosure to which the telegraph company is not a party, to a new company having notice of such agreement and the new company continues for several years to enjoy performance by the telegraph company, which expends large sums on the faith that the agreement has been adopted, such agreement is binding on the new company, although it may not run with the land and although the mortgage on which the foreclosure was made was prior to the agreement. Western Union Tel. Co. *v.* Atlantic, etc., Tel. Co., 7 Ohio Dec. (Reprint) 163, 284, 1 Cinc. L. Bul. 201, 2 Cinc. L. Bul. 74. So where a railroad company built on its right of way a switch for a patron who paid the cost and took possession under an agreement that if the railroad company or its successors desired to have possession of the switch he should be repaid the cost, and the property was sold on foreclosure by the federal court to which the occupant of the switch was not a party and the receiver in possession pending foreclosure respected the occupant's exclusive claim, such occupant can recover the cost for constructing the switch from the company taking possession on foreclosure. Kansas City, North Western, etc., R. Co. *v.* Frohwerk, 68 Kan. 292, 74 Pac. 1124. So where an agreement was made between plaintiff and a receiver of a railroad whereby under certain conditions plaintiff was to have a lien on the road, and this agreement was consented to by the representatives of a purchasing committee appointed by the road and such committee had notice of this fact and the conditions were fulfilled and plaintiff's lien established, and the road was bought at foreclosure by the committee for its principal, purchasers of the road, the latter were not purchasers for value without notice, and took the property subject to plaintiff's lien. Vilas *v.* Page, 106 N. Y. 439, 13 N. E. 743. But the mere fact that purchasers continued to receive coal under a contract with the mortgagor company until notified by the coal company that the contracts would be renewed at the expiration of a year, of which renewal clause the purchaser was ignorant, does not constitute an adoption by the purchasers of such clause. Sloss Iron, etc., Co. *v.* South Carolina, etc., R. Co., 85 Fed. 133, 29 C. C. A. 50.

27. Amsden *v.* Dubuque, etc., R. Co., 13 Iowa 132; Hukle *v.* Atchison, etc., R. Co., 71 Kan. 251, 80 Pac. 603.

28. Hukle *v.* Atchison, etc., R. Co., 71 Kan. 251, 80 Pac. 603; Mason City, etc., R. Co. *v.* Union Pac. R. Co., 124 Fed. 409 [*affirmed* in 128 Fed. 230, 64 C. C. A. 348].

one running with the land and which would have passed under a deed of the road.[29] A purchaser is not bound by an obligation of a railroad company of a strictly personal character.[30] The decree of foreclosure and sale may expressly provide that the purchaser may be at liberty to abandon or disclaim certain agreements made by the mortgagor company.[31]

f. Right of Way and Other Interests in Land. The purchaser also acquires all right, title, and interest of the mortgagor company in and to the railroad property covered by the description contained in the mortgage and decree of sale.[32] Thus a railroad company's interest in the right of way will pass to a purchaser under a foreclosure of a mortgage embracing all of the company's right in the property,[33] as does also all other property, rights, and franchises covered by

29. Lake Erie, etc., R. Co. *v.* Priest, 131 Ind. 413, 31 N. E. 77; Midland R. Co. *v.* Fisher, 125 Ind. 19, 24 N. E. 756, 21 Am. St. Rep. 189, 8 L. R. A. 604; Rome, etc., R. Co. *v.* Ontario Southern R. Co., 16 Hun (N. Y.) 445.

30. Gulf, etc., R. Co. *v.* Newell, 73 Tex. 334, 11 S. W. 342, 15 Am. St. Rep. 788 (contract to maintain a depot at a certain place); Menasha *v.* Milwaukee, etc., R. Co., 52 Wis. 414, 9 N. W. 396.

A contract with a county making a subscription or donation in aid of a railroad in consideration of its performing certain conditions is merely a personal undertaking and not a covenant running with the land, and hence is not binding on the purchaser of the road under foreclosure. People *v.* Louisville, etc., R. Co., 120 Ill. 48, 10 N. E. 657.

31. Chicago, etc., R. Co. *v.* Towle, 10 Ind. App. 540, 37 N. E. 358; Farmers' L. & T. Co. *v.* Chicago, etc., R. Co., 44 Fed. 653.

32. Western Pennsylvania R. Co. *v.* Johnston, 59 Pa. St. 290; Everett *v.* Galveston, etc., R. Co., 28 Tex. Civ. App. 528, 67 S. W. 453, holding that title to land which was never occupied by the right of way or roadbed or used by the company does not pass.

Estate or interest acquired by purchasers under foreclosures generally see MORTGAGES, 27 Cyc. 1723 *et seq.*

A grant by a municipal corporation of a right of way through certain streets of the municipality, with the right to construct its railroad thereon and occupy them in its use, is a franchise which may be mortgaged and pass to the purchaser at a sale under foreclosure of the mortgage. New Orleans, etc., R. Co. *v.* Delamore, 114 U. S. 501, 5 S. Ct. 1009, 29 L. ed. 244.

Fee.—Where a tract of land, through which a railroad right of way runs, has been sold in a judicial proceeding foreclosing a mortgage, in which proceeding no reference is made to the right of way, and no reservation of the fee therein is made, the fee passes to the purchaser. McLemore *v.* Charleston, etc., R. Co., 111 Tenn. 639, 69 S. W. 338. But the mere fact that the map of a railroad filed with a mortgage executed by it shows its tracks laid in a street does not justify a purchaser at foreclosure in believing that he acquires title to the fee in the street, the record title to which is in the abutting owner, with nothing to show that it had ever been divested by condemnation proceedings or by a license authorizing the construction of the road. Syracuse Solar Salt Co. *v.* Rome, etc., R. Co., 67 Hun (N. Y.) 153, 22 N. Y. Suppl. 321.

33. Harshbarger *v.* Midland R. Co., 131 Ind. 177, 27 N. E. 352, 30 N. E. 1083 (holding that, where a railroad company's road is sold on foreclosure, there is no abandonment of the rights acquired by the old company over the land on which the road-bed is made, and the purchaser takes possession by virtue of its purchase as successor to its rights); Columbus, etc., R. Co. *v.* Braden, 110 Ind. 558, 11 N. E. 357; Barker *v.* Southern R. Co., 137 N. C. 214, 49 S. E. 115 (construing Laws (1854–1855), c. 229, § 11); Pittsburg, etc., R. Co. *v.* Bosworth, 46 Ohio St. 81, 18 N. E. 533, 2 L. R. A. 199 [*affirming* 1 Ohio Cir. Ct. 69, 1 Ohio Cir. Dec. 42]; Junction R. Co. *v.* Ruggles, 7 Ohio St. 1; Crouch *v.* Dakota, etc., R. Co., 18 S. D. 540, 101 N. W. 722.

Road on street.— Where a railroad obtains from a municipal corporation its unconditional consent to the construction of a railroad on one of its streets, a purchaser at foreclosure sale of all the property, rights, and franchises of the railroad acquires its rights to the use of the whole street including the part over which no road had been actually constructed and it can exercise such right without further consent from the city (Denison, etc., R. Co. *v.* St. Louis South Western R. Co., 96 Tex. 233, 72 S. W. 161 [*affirming* 30 Tex. Civ. App. 474, 72 S. W. 201]); and the fact that the charter of the purchasing company confers on it power to occupy the streets of the city in question for right-of-way purposes, subject to the condition precedent that it obtain the city's consent, does not require it to surrender the right of way which it has acquired by its purchase and reacquire the same by the exercise of its charter powers (Denison, etc., R. Co. *v.* St. Louis South Western R. Co., *supra*).

The sale of a railroad under a mortgage before the damages of the landowner are paid or secured will not divest the right of such landowner to recover compensation for the occupancy of his land from the purchaser of the railroad at the sale under the mortgage. Western Pennsylvania R. Co. *v.* Johnston, 59 Pa. St. 290.

the foreclosed mortgage and adapted to the purchaser's use and substantially described in the deed of conveyance.[34] But such purchaser takes no title to land which had been purchased by the railroad company without power to do so, although the mortgage covered all its property, franchises, etc.[35] The purchaser also takes the property subject to easements in the adjoining landowners,[36] or in other railroad companies,[37] and subject to any other reservations, conditions, or restrictions imposed by the instrument under which the mortgagor's title vested.[38]

g. Leases. Where a purchaser under foreclosure of the property, rights, and franchises of a railroad company which had leased a certain line or a part thereof from another company enters into possession and operates the leased road, such purchaser is bound by the terms of the lease with the mortgagor company so long as it remains in possession and use thereof,[39] although there has been no formal assignment of the lease,[40] and although the leased line is not included in the property purchased, as in such case, if the purchaser enters into possession and operates it, he must be regarded as an assignee of the lease and liable for the rents which the original lessee had agreed to pay,[41] except in so far as the lease has been modified by an agreement between the lessor and the lessee.[42] The purchaser, however, may abandon or disclaim a lease made by the mortgagor company pending foreclosure proceedings, particularly where the terms of the decree give the purchaser such right.[43]

h. Indebtedness, Securities, Liens, and Mortgages. A purchaser under foreclosure of the property and franchises of a railroad company is not liable merely by reason of its succession, for the debts of the old company not secured by prior liens,[44] unless such purchaser expressly or by necessary implication agrees

34. Pere Marquette R. Co. *v.* Graham, 136 Mich. 444, 99 N. W. 408; Crouch *v.* Dakota, etc., R. Co., 18 S. D. 540, 101 N. W. 722; Jack *v.* Williams, 106 Fed. 259.

35. Youngman *v.* Elmira, etc., R. Co., 65 Pa. St. 278.

36. Hunter *v.* Burlington, etc., R. Co., 84 Iowa 605, 51 N. W. 64.

Habitual use of a pass way under a railroad, stipulated for in the oral grant of the right of way, is sufficient to charge the purchaser of the road with knowledge of the grantor's rights therein. Swan *v.* Burlington, etc., R. Co., 72 Iowa 650, 34 N. W. 457.

37. Union Pac. R. Co. *v.* Mason City, etc., R. Co., 199 U. S. 160, 26 S. Ct. 19, 50 L. ed. 134 [*affirming* 128 Fed. 230, 64 C. C. A. 348]; Joy *v.* St. Louis, 138 U. S. 1, 11 S. Ct. 243, 34 L. ed. 843 [*affirming* 29 Fed. 546].

A covenant to permit other railroad companies to use the right of way is binding on a subsequent purchaser with notice, particularly where such covenant is a link in the chain of title between the mortgagee and such purchaser. Joy *v.* St. Louis, 138 U. S. 1, 11 S. Ct. 243, 34 L. ed. 843 [*affirming* 29 Fed. 546].

38. New York, etc., R. Co. *v.* Stanley, 35 N. J. Eq. 283.

39. Louisville, etc., R. Co. *v.* Illinois Cent. R. Co., 174 Ill. 448, 51 N. E. 824 (holding that where a railroad company mortgaged its property and subsequently by lease was permitted to maintain its tracks across those of another and the former road was sold under foreclosure and the purchaser conveyed the property to one who leased it to another, the terms of the former lease were binding on the last lessee even after the original term had expired without a renewal being made, where such lessee remained in possession); St. Louis, etc., R. Co. *v.* East St. Louis, etc., R. Co., 39 Ill. App. 354 [*affirmed* in 139 Ill. 401, 28 N. E. 1088]; St. Joseph Union Depot Co. *v.* Chicago, etc., R. Co., 89 Fed. 648, 32 C. C. A. 284 (holding that where a corporation purchasing a railroad sold on foreclosure continues to use depot facilities, the right to which was acquired by the mortgagor by a contract made after the execution of the mortgage, claiming that it succeeded to such right by its purchase, it is bound by the contract of its predecessor for the payment of rent).

Assumpsit.— The purchaser of a railroad at foreclosure is liable in assumpsit for the use and occupation of a line of which the company had a lease. Jacksonville, etc., R. Co. *v.* Louisville, etc., R. Co., 150 Ill. 480, 37 N. E. 924 [*affirming* 47 Ill. App. 414].

40. Jacksonville, etc., R. Co. *v.* Louisville, etc., R. Co., 150 Ill. 480, 37 N. E. 924 [*affirming* 47 Ill. App. 414].

41. Frank *v.* New York, etc., R. Co., 122 N. Y. 197, 25 N. E. 332 [*modifying* 7 N. Y. St. 814].

42. Frank *v.* New York, etc., R. Co., 122 N. Y. 197, 25 N. E. 332 [*modifying* 7 N. Y. St. 814].

43. Farmers' L. & T. Co. *v.* Chicago, etc., R. Co., 44 Fed. 653.

Waiver of right to disclaim see Farmers' L. & T. Co. *v.* Chicago, etc., R. Co., 44 Fed. 653.

44. *Arkansas.*— Kansas City Southern R. Co. *v.* King, 74 Ark. 366, 85 S. W. 1131.

Georgia.— Seaboard Air-Line R. Co. *v.*

to pay or assume the same,[45] or unless the purchaser's liability therefor is provided for in the decree,[46] or, as is sometimes the case, such liability is

Knickerbocker Trust Co., 125 Ga. 463, 54 S. E. 138.

Illinois.— Bruffett *v.* Great Western R. Co., 25 Ill. 353.

Indiana.— Midland R. Co. *v.* Fisher, 125 Ind. 19, 24 N. E. 756, 21 Am. St. Rep. 189, 8 L. R. A. 604; Lake Erie, etc., R. Co. *v.* Griffin, 92 Ind. 487.

Iowa.— Brockert *v.* Iowa Cent. R. Co., 93 Iowa 132, 61 N. W. 405.

Louisiana.— Bell *v.* Chicago, etc., R. Co., 34 La. Ann. 785, holding that a purchaser at foreclosure sale of after-acquired property covered by the mortgage cannot be affected by a judgment obtained against the property after the recording of the mortgage.

Michigan.— Cook *v.* Detroit, etc., R. Co., 43 Mich. 349, 5 N. W. 390, holding that a railroad company does not by purchasing a railroad on foreclosure and organizing and filing a statutory declaration in accordance with Laws (1859), § 2373, become responsible for the prior unsecured debts of the foreclosed company.

Nebraska.— Lincoln Tp. *v.* Kansas City, etc., R. Co., 77 Nebr. 79, 108 N. W. 140.

South Dakota.— Crouch *v.* Dakota, etc., R. Co., 18 S. D. 540, 101 N. W. 722.

Wisconsin.— Gilman *v.* Sheboygan, etc., R. Co., 37 Wis. 317; Smith *v.* Chicago, etc., R. Co., 18 Wis. 17.

United States.— McKittrick *v.* Arkansas Cent. R. Co., 152 U. S. 473, 14 S. Ct. 661, 38 L. ed. 518.

See 41 Cent. Dig. tit. "Railroads," § 651.

In North Carolina the corporate property of a North Carolina railroad company covered by a legally authorized mortgage of all its franchises and property does not continue liable for the debts of such company, accruing after sale on foreclosure proceedings to a non-resident railroad company authorized by its charter to make the purchase, because of the failure of the latter to exercise the privilege conferred by Code, §§ 697, 698, 1936, 2005, of organizing a domestic corporation to operate the purchased property. Julian *v.* Central Trust Co., 193 U. S. 93, 24 S. Ct. 399, 48 L. ed. 629 [*affirming* 115 Fed. 956, 53 C. C. A. 438].

45. *Illinois.*— Bruffett *v.* Great Western R. Co., 25 Ill. 353.

Indiana.— Lake Erie, etc., R. Co. *v.* Griffin, 92 Ind. 487.

New York.—Taylor *v.* Atlantic, etc., R. Co., 57 How. Pr. 26.

Texas.— Missouri, etc., R. Co. *v.* Lacy, 13 Tex. Civ. App. 391, 35 S. W. 505. See Houston, etc., R. Co. *v.* Keller, 8 Tex. Civ. App. 537, 28 S. W. 724.

Wisconsin.— Pfeifer *v.* Sheboygan, etc., R. Co., 18 Wis. 155, 86 Am. Dec. 751.

See 41 Cent. Dig. tit. "Railroads," § 651.

46. *Arkansas.*— Kansas City Southern R. Co. *v.* King, 74 Ark. 366, 85 S. W. 1131.

Illinois.— Brown *v.* Wabash R. Co., 96 Ill. 297; Wabash R. Co. *v.* Stewart, 41 Ill. App. 640.

Indian Territory.—Atchison, etc., R. Co. *v.* Young, 3 Indian Terr. 60, 53 S. W. 481.

Kansas.— Hukle *v.* Atchison, etc., R. Co., 71 Kan. 251, 80 Pac. 603; Atchison, etc., R. Co. *v.* Cunningham, 59 Kan. 722, 54 Pac. 1055.

United States.—Anderson *v.* Condict, 93 Fed. 349, 35 C. C. A. 335, 94 Fed. 716, 36 C. C. A. 737 (holding that where a decree for the sale of railroad property in a foreclosure suit contains an independent and unconditional provision that the sale shall be subject to all current liabilities of the receiver, the purchaser takes the property subject to such conditions without regard to the question of priority between such liabilities and the liens under which the sale is made); Farmers' L. & T. Co. *v.* Central R. Co., 7 Fed. 537, 2 McCrary 181. See Central Trust Co. *v.* Wabash, etc., R. Co., 30 Fed. 332.

See 41 Cent. Dig. tit. "Railroads," § 651.

Conditions precedent.— A purchaser under an order of court in a receivership can only be held liable for claims against the receiver according to the terms of such order; and where a railroad in the hands of a receiver acting under the direction of the federal court is ordered to be sold and possession delivered to the purchaser subject to the payment of any claims against the receiver which should be established within a specified time, the purchaser will not be liable by virtue of such order alone to one who fails to have his claim so ascertained and allowed. Houston, etc., R. Co. *v.* Crawford, 88 Tex. 277, 31 S. W. 176, 53 Am. St. Rep. 752, 28 L. R. A. 761.

Burden of proof.— The burden of proving that obligations incurred by the receiver of a railroad were named in the order directing the sale is on the party seeking to recover them against the purchaser. Atchison, etc., R. Co. *v.* Young, 3 Indian Terr. 60, 53 S. W. 481.

Power of court.— It is a proper exercise of the chancery power of a court to surrender the property to the purchaser, retaining jurisdiction of the original case, and retaining the authority to enforce the payment of the debts and liabilities incurred by the court's receiver in the operation of the road (Farmers' L. & T. Co. *v.* Central R. Co., 17 Fed. 758, 5 McCrary 521); and after the discharge of a railroad receiver appointed by the court and a delivery of the road to the purchaser at a foreclosure sale ordered by such court, the said court has power to adjudicate a claim against the receiver and to enforce its payment against the purchaser of the road according to the state law (Houston, etc., R. Co. *v.* Crawford, 88 Tex. 277, 31 S. W. 176, 53 Am. St. Rep. 752, 28 L. R. A. 761).

The mere fact that purchasers knew that certain judgments had been decreed to be first liens on the property does not render the company organized by such purchasers to operate the road liable for the amount

created by statute;[47] or unless it affirmatively appears that the circumstances attending the creation of the new corporation and its succession to the property and franchises of the mortgagor company are such as to warrant a finding that it is in reality a continuation of the old company.[48] The purchaser, however, takes his title subject to all prior valid liens and encumbrances of which he had or ought to have had notice, and which are not cut off by the foreclosure proceedings,[49] such as a vendor's lien for the unpaid purchase-money,[50] or a lien in favor of the state for public aid granted;[51] particularly where the decree of foreclosure and sale so provides.[52] Where a decree requires the purchasers to pay all valid claims outstanding against the receiver growing out of the operation of the road by him, such payments are a part of the purchase-price for which the purchasers receive full equivalent in the property conveyed, and they are not entitled to be subrogated to the rights of the holders of claims against the receiver so paid, as creditors of the mortgagor company.[53] And as a general rule the doctrine of *caveat emptor* as applied to judicial sales operates not only to deprive the purchaser of a railroad sold under foreclosure of any

of the judgments. Houston, etc., R. Co. *v.* Keller, 8 Tex. Civ. App. 537, 28 S. W. 724.

47. See Atchison, etc., R. Co. *v.* Young, 3 Indian Terr. 60, 53 S. W. 481; Hukle *v.* Atchison, etc., R. Co., 71 Kan. 251, 80 Pac. 603.

The terms "servant" and "employee" as used in a statute providing that in a foreclosure sale of a railroad the court granting the foreclosure decree shall provide in such decree or otherwise that the purchaser shall "fully pay all sums due and owing by such foreclosed railroad company to any servant or employe of such company" do not include a secretary of such railroad company. Wells *v.* Southern Minnesota R. Co., 1 Fed. 270, 1 McCrary 18.

Kirby Dig. St. Ark. § 6587, providing that where a corporation or individual purchases any railroad, the purchaser shall hold the same subject to all debts and obligations of the vendor, does not apply to a purchaser of a railroad at a foreclosure sale by a court commissioner, but such purchaser takes the property free from the debts and liabilities of the mortgagor, except such as are prior liens. Kansas City Southern R. Co. *v.* King, 74 Ark. 366, 85 S. W. 1131.

48. Pfeifer *v.* Sheboygan, etc., R. Co., 18 Wis. 155, 86 Am. Dec. 751; Smith *v.* Chicago, etc., R. Co., 18 Wis. 17.

49. Kansas City Southern R. Co. *v.* King, 74 Ark. 366, 85 S. W. 1131; Thompson *v.* Hollingsworth, 21 Ind. 475; San Antonio, etc., R. Co. *v.* Bowles, 88 Tex. 634, 32 S. W. 880; Rio Rrande, etc., R. Co. *v.* Ortiz, 75 Tex. 602, 12 S. W. 1129; Compton *v.* Jesup, 167 U. S. 1, 17 S. Ct. 795, 42 L. ed. 55; Atchison, etc., R. Co. *v.* Osborn, 148 Fed. 606, 78 C. C. A. 378. And see *infra*, VIII, B, 14, i.

Judgments establishing statutory liens against the property may be enforced against the railroad in the hands of a purchaser under foreclosure, although the receiver of the road was not a party to the suit in which the judgment was entered, and the judgment creditor's petition to intervene in the foreclosure was dismissed without prejudice. Blair *v.* Walker, 26 Fed. 73.

50. Florida *v.* Anderson, 91 U. S. 667, 23 L. ed. 290. See Houston First Nat. Bank *v.* Ewing, 103 Fed. 168, 43 C. C. A. 150.

51. See Doggett *v.* Florida R. Co., 99 U. S. 72, 25 L. ed. 301; Florida *v.* Anderson, 91 U. S. 667, 23 L. ed. 290.

52. Central Indiana R. Co. *v.* Grantham, 143 Fed. 43, 52, 74 C. C. A. 197, 206; Grand Trunk R. Co. *v.* Central Vermont R. Co., 105 Fed. 411; Mercantile Trust Co. *v.* St. Louis, etc., R. Co., 99 Fed. 485; Central Trust Co. *v.* Georgia Pac. R. Co., 87 Fed. 288, 30 C. C. A. 648 (holding that under a foreclosure decree making it a condition of the sale that the purchaser, as part of the consideration, shall satisfy all claims which shall be adjudged by the court to be prior in lien to the mortgage, one who is adjudged to have such prior lien is entitled to payment regardless of its limits or extent on the railroad property, and it is immaterial whether it covers any specific structures or any other integral part of the road); Continental Trust Co. *v.* American Surety Co., 80 Fed. 180, 25 C. C. A. 364.

Interest.— Where coupons from railroad bonds not bearing interest by their terms were not presented for payment at the designated place where the money was deposited to meet them and the residue of the fund subsequently passed to a purchaser at a foreclosure sale, the holder is not entitled to recover interest from such purchaser. Grand Trunk R. Co. *v.* Central Vermont R. Co., 105 Fed. 411.

Rights of assignee.— A railroad company taking an assignment acquired by a purchasing committee at a foreclosure sale under a decree providing for payment into court of additional sums if necessary to meet the claims adjudged to be superior liens cannot set up as against claims of this character a title acquired subsequent to the foreclosure sale by purchasing the road at a judicial sale made by another court to enforce a lien claimed to be superior to the mortgage and to the claim in controversy. Baltimore Trust, etc., Co. *v.* Hofstetter, 85 Fed. 75, 29 C. C. A. 35.

53. Morgan's Louisiana, etc., R., etc., Co. *v.* Moran, 91 Fed. 22, 33 C. C. A. 313.

recourse against the proceeds of the property on account of existing encumbrances or tax liens on the property, but also of any claim to reimbursement for such liens from a fund in court or in the hands of a receiver, derived from the earnings of the property during the receivership, unless the decree or order of sale, or special equitable considerations, give him a right to such reimbursement.[54]

i. Interveners and Other Claimants. The purchaser is chargeable with notice that a particular lien will or may be claimed where the claimant has intervened in the foreclosure proceedings and obtained leave to proceed in another court to establish his lien;[55] but such purchaser is not bound to look beyond what appears on the face of the record and anticipate a future claim for a lien,[56] and if the claimant fails to bring his claim to the notice of the court he is without remedy after decree and distribution,[57] unless his claim is one which by the decree is imposed upon and subject to which the purchasers acquire title to the property.[58] But a claimant cannot by intervention in the foreclosure proceeding seek to impeach the validity of the decree and sale, as this can only be done by an original suit.[59] Where the purchaser has paid his bid in full according to the decree and the sale is confirmed, he cannot be compelled to further pay a claim which is adjudicated against the receiver after the confirmation of sale.[60] As against an unforeclosed lien, the purchaser may intervene in a suit to enforce such lien and assert the equities and rights to which he succeeds by virtue of his purchase, and if they are such that a sale under such lien will not convey a good title, but merely cloud the title of the intervener, the sale should not be ordered.[61]

j. Vacation or Invalidity of Sale. Where the purchasers at a foreclosure sale of a railroad become such through an arrangement which is a fraud on the creditors, such purchasers are liable as trustees for the full value of the road,[62] and are chargeable with interest on the claims of the complaining creditors from the date of the sale to that of the final decree in the suit to set aside the sale.[63] But although the purchaser was one in bad faith and the sale is set aside, such purchaser may be entitled to compensation for reconstructing and repairing the road and putting it in working order, where it was in a state of complete dilapidation and ruin when bought.[64] Where a purchaser fails to make good his bid, not for want of funds but because he thinks the price too high, he cannot be excused on a resale of the property for a less price from making good the difference if the unsecured creditors will be benefited thereby.[65]

k. Actions or Proceedings By or Against Purchaser. The rules applicable in civil cases generally ordinarily apply in actions or proceedings by or against a purchaser at a foreclosure sale of railroad property, on questions of pleading,[66]

54. Terre Haute, etc., R. Co. *v.* Harrison, 96 Fed. 907, 37 C. C. A. 615.

55. Loomis *v.* Davenport, 17 Fed. 301, 3 McCrary 489.

56. Hale *v.* Burlington, etc., R. Co., 13 Fed. 203, 2 McCrary 558.

57. Anderson *v.* Condict, 93 Fed. 349, 35 C. C. A. 335, 94 Fed. 716, 36 C. C. A. 437.

58. Anderson *v.* Condict, 93 Fed. 349, 35 C. C. A. 335, 94 Fed. 716, 36 C. C. A. 437.

59. State Trust Co. *v.* Kansas City, etc., R. Co., 120 Fed. 398.

60. Chicago, etc., R. Co. *v.* McCammon, 61 Fed. 772, 10 C. C. A. 50.

61. Connor *v.* Tennessee Cent. R. Co., 109 Fed. 931, 48 C. C. A. 730, 54 L. R. A. 687.

62. Drury *v.* Milwaukee, etc., R. Co., 7 Wall. (U. S.) 299, 19 L. ed. 40.

63. Drury *v.* Milwaukee, etc., R. Co., 7 Wall. (U. S.) 299, 19 L. ed. 40.

64. Jackson *v.* Ludeling, 99 U. S. 513, 25 L. ed. 460.

The rule of compensation in such a case is to allow credit to the possessors for the value of the materials of such improvements as are yet in existence and the cost of the labor bestowed thereon not to exceed their value when delivered up, but not for the improvements which were consumed in the use; and interest on the outlay of the possessors will also be allowed to an amount not exceeding the net earnings or fruits received from the improvements; but such possessors will be accountable for all the fruits received by them from the property and will have a lien on it for any balance found to be due them on such an accounting. Jackson *v.* Ludeling, 99 U. S. 513, 25 L. ed. 460.

65. Central Trust Co. *v.* Cincinnati, etc., R. Co., 58 Fed. 500.

66. See Milwaukee, etc., R. Co. *v.* Milwaukee, etc., R. Co., 20 Wis. 174, 88 Am. Dec. 740, holding that where a complaint to enforce rights of action obtained under a

parties,[67] issues, proof, and variance,[68] and evidence.[69] A purchaser or his assignee may have a writ of assistance to recover possession of the road, or a portion thereof, which is unlawfully withheld;[70] or he may maintain ejectment for the mortgaged premises before condition broken unless there is a stipulation to the contrary.[71] Where the property of a railroad company is acquired by another railroad company after foreclosure proceedings which are void as against a holder of bonds guaranteed by the mortgagor company, such bondholder is not entitled to sue the purchasing company in equity and apply the assets so transferred to the payment of his bonds until he has exhausted his legal remedies against the mortgagor.[72]

15. Purchasing Bondholders or Other Creditors — a. In General. Where the bonded indebtedness of a railroad company equals or exceeds the value of the road, it is lawful for the stock-holders, bondholders, and other creditors of such road, or a number of them, to enter into an arrangement by which the property shall be sold under foreclosure and purchased by trustees or a committee for

chattel mortgage sale does not aver specifically that such choses in action were sold on foreclosure of the mortgage, or that the price bid for the property was in any way dependent upon the existence of the rights of action mortgaged, it does not show that the plaintiff has a right to maintain the action.

Joinder.— Where a holder of bonds guaranteed by a railroad company deposits them with a trust company for specific uses, and thereafter such company wrongfully refuses to deliver the bonds on demand, the owner cannot join an action to recover them with a suit against another corporation, which has acquired the assets of the guarantor company under void foreclosure proceedings to apply such assets in payment of the bonds, such company being in no way responsible for the trust company's withholding of the bonds. Sawyer *v.* Atchison, etc., R. Co., 129 Fed. 100, 63 C. C. A. 602 [*affirming* 119 Fed. 252].

67. Boyle *v.* Farmers' L. & T. Co., 101 Fed. 184, 41 C. C. A. 291 (holding that the purchaser of railroad property at a foreclosure sale who acts in making the purchase for other parties to whom he at once transfers the title cannot thereafter maintain a petition to require the receiver of the property during the foreclosure proceedings to pay taxes assessed thereon during the receivership); Thompson *v.* Northern Pac. R. Co., 93 Fed. 384, 35 C. C. A. 357 (holding that under a decree which requires the purchaser of the property, as a part of the consideration therefor, to pay all valid demands against the receivers growing out of their operation of the road and reserves the right of the court to enforce such claims against the property, the purchaser is a proper party defendant to an action on such a claim, being entitled to defend, and in an action commenced after the property has been conveyed to him and the receivers have been discharged he may properly be made sole defendant).

68. See the cases cited *infra*, this note.

On an issue as to whether the title to rolling stock passed to purchasers under a foreclosure sale of the property of a railroad which had possession thereof as a bailee, the bailor may show that his title to the rolling stock has been recognized by the president of the railroad company claiming it under the sale, and that such company in its sworn report to the secretary of the interior stated that the rolling stock belonged to one under whom the bailor claimed. Collins *v.* Bellefonte Cent. R. Co., 171 Pa. St. 243, 33 Atl. 331. And on such issue the bailor may introduce evidence that his claim to the property was made known to all bidders at the sale. Collins *v.* Bellefonte Cent. R. Co., *supra*.

69. Kansas City Southern R. Co. *v.* King, 74 Ark. 366, 85 S. W. 1131, holding that, in a suit against a purchaser to enforce a liability incurred by the railroad company prior to the purchase, there can be no recovery on account of provisions in the foreclosure decree subjecting the purchaser to the liabilities incurred by the railroad company where the decree is not introduced in evidence and there is nothing in the case to show that it contained such provisions.

Burden of proof.— On a general foreclosure sale of the property of a railroad company, the burden is on the one alleging that certain land belonging to it did not pass to the purchasers to show this fact. Kevals *v.* Florida Cent., etc., R. Co., 66 Fed. 224, 13 C. C. A. 410.

70. Farmers' L. & T. Co. *v.* Chicago, etc., R. Co., 44 Fed. 653. See, generally, Mortgages, 27 Cyc. 1740.

The validity of a lease given by a receiver *pendente lite* should not be determined on a motion for a writ of assistance to obtain possession. Farmers' L. & T. Co. *v.* Staten Island Belt Line R. Co., 6 N. Y. App. Div. 148, 39 N. Y. Suppl. 996.

71. Youngman *v.* Elmira, etc., R. Co., 65 Pa. St. 278, holding that where a railroad mortgage covering all the real property, franchises, etc., of a railroad company is foreclosed and the mortgaged property is sold and conveyed by the trustee in the mortgage to the purchaser, he and his assignees stand in the same shoes as the mortgagees and are entitled to maintain such action.

72. Sawyer *v.* Atchison, etc., R. Co., 129 Fed. 100, 63 C. C. A. 602 [*affirming* 119 Fed. 252].

their benefit and a new company organized to receive the property,[73] unless such arrangement is made in fraud of other creditors.[74] Such an agreement may be made between the creditors and bondholders without the concurrence of the stock-holders,[75] or between bondholders and stock-holders,[76] or between the bondholders themselves.[77] Provisions for a reorganization scheme by the bondholders on foreclosure may be made in the mortgage securing the bonds.[78]

b. Rights, Powers, and Proceedings of Committees. The rights, powers, and liabilities of a reorganization committee are usually governed by the agreement under which they are appointed and act.[79] Ordinarily they are given a large

73. Cushman *v.* Bonfield, 139 Ill. 219, 28 N. E. 937 [*affirming* 36 Ill. App. 436]; Kitchen *v.* St. Louis, etc., R. Co., 69 Mo. 224; Taylor *v.* Atlantic, etc., R. Co., 57 How. Pr. (N. Y.) 26; Farmers' L. & T. Co. *v.* Louisville, etc., R. Co., 103 Fed. 110; Memphis, etc., R. Co. *v.* Dow, 19 Fed. 388; Hancock *v.* Toledo, etc., R. Co., 9 Fed. 738, 11 Biss. 148.

A decree foreclosing mortgages cannot be impeached because of a prior agreement between the committee of bondholders and officers and directors of the company to form a reorganized company and purchase the property at the sale, and thereby relieve it from the unsecured debts of the company, even though it is part of such agreement that the stock-holders of the old company may obtain stock in the new on payment of a small difference, where the mortgages are due because of default in the payment of interest and the company is in fact insolvent, and it does not appear that the trustees who brought the suit are parties to or had knowledge of the agreement, or that the default which matured the mortgages was due to such agreement. Farmers' L. & T. Co. *v.* Louisville, etc., R. Co., 103 Fed. 110.

Illustrations.— A plan of reorganization made by railroad bondholders for the purpose of purchasing the property at foreclosure sale, and by which stock-holders in the old company are permitted to convert their stock into stock in the new company on payment of a stipulated difference is not for that reason fraudulent and void as to general creditors of the old company, where it does not appear that any of the stock-holders, as such, are parties to the plan; that it caused or in any manner affected the foreclosure proceedings, or deprived the general creditors of any rights, so that whatever rights, if any, are secured to the stock-holders are at the expense of the bondholders, and not of the unsecured creditors. Farmers' L. & T. Co. *v.* Louisville, etc., R. Co., 103 Fed. 110. So a proposed reorganization to be effected in connection with the foreclosure sale under certain mortgages by which the bonded indebtedness is refunded on longer time and at reduced interest, and which allows each stock-holder to retain his stock on the payment of his *pro rata* share of the floating debt, is not a fraud on the stock-holders and will not be enjoined at the suit of some of them who do not suggest any other method by which the financial embarrassment of the company can be met. Carey *v.* Houston, etc., R. Co., 45 Fed. 438. A valid agreement may be made between a railroad company and mortgagees in trust of its road and the bondholders, that after a sale under the mortgage the company shall be so reorganized that the stock-holders and unsecured creditors of the old company shall become stock-holders in the new; and such agreement will modify to that extent the effect of the mortgage sale. Smith *v.* Chicago, etc., R. Co., 18 Wis. 17.

That the parties comprising the purchasers are the same as those comprising the new corporation is no bar to their dealing with each other, as all that the law requires in such cases is that the transaction should be free from fraud and executed in good faith. Thayer *v.* Wathen, 17 Tex. Civ. App. 382, 44 S. W. 906.

74. Kitchen *v.* St. Louis, etc., R. Co., 69 Mo. 224; Louisville Trust Co. *v.* Louisville, etc., R. Co., 174 U. S. 674, 19 S. Ct. 827, 43 L. ed. 1130 [*reversing* 84 Fed. 539, 28 C. C. A. 202], holding that a reorganization agreement with the intention of excluding from any interest in the property all unsecured creditors is not permissible, and that the confirmation of a sale under such agreement should be refused until the interests of unsecured creditors have been preserved.

75. Taylor *v.* Atlantic, etc., R. Co., 57 How. Pr. (N. Y.) 26.

76. Louisville Trust Co. *v.* Louisville, etc., R. Co., 174 U. S. 674, 19 S. Ct. 827, 43 L. ed. 1130 [*reversing* 84 Fed. 539, 28 C. C. A. 202].

77. Moss *v.* Geddes, 28 Misc. (N. Y.) 291, 59 N. Y. Suppl. 867.

Bondholders do not occupy a fiduciary relation to each other as a result of their common interest in the mortgage property, and in case of the insolvency of the company any number of such bondholders may legitimately combine together for their mutual protection and may purchase the property at a sale under the mortgage in their own interest without becoming liable to account therefor to other bondholders where they are guilty of no fraud or unfair dealing. Moss *v.* Geddes, 28 Misc. (N. Y.) 291, 59 N. Y. Suppl. 867.

78. See Child *v.* New York, etc., R. Co., 129 Mass. 170.

79. Industrial, etc., Trust *v.* Tod, 52 N. Y. App. Div. 195, 64 N. Y. Suppl. 1093 [*reversed* on other grounds in 170 N. Y. 233, 63 N. E. 285]; Van Sicklen *v.* Bartol, 95 Fed. 793.

Loans.— An agreement binding a committee to purchase the mortgaged property and form a new corporation, the committee to use the bonds so far as necessary for purposes of the purchase; the bondholders to deposit

discretion in carrying out the reorganization plan,[80] and may be expressly exempted from personal liability for their acts except in cases of wilful malfeasance or gross negligence.[81] The purchasing trustee or committee under such an arrangement becomes a trustee for all the beneficiaries, or at least for such as are parties to the agreement,[82] and as such is accountable to them for the property or its proceeds,[83] and for their acts in carrying out the scheme.[84] If the committee acts in good faith they are entitled to reimbursement for expenses incurred or advances made by them personally or upon their credit in the execution of their trust,[85] and it is not necessary before bringing an action for an accounting that they turn over to the beneficiaries new securities received under the reorganization scheme;[88] nor can they be held liable for the failure of the plan of reorganization, which proved impracticable, if they acted in good faith and with reasonable diligence.[87]

the bonds with a specified trust company, to be delivered to the committee on request, does not restrict the committee to such trust company as the source of the loan. Coppell *v.* Hollins, 91 Hun (N. Y.) 570, 36 N. Y. Suppl. 500 [*affirmed* in 159 N. Y. 551, 54 N. E. 1089].

80. Van Siclen *v.* Bartol, 95 Fed. 793.

Power of the reorganization committee to construe the agreement is authorized by a provision in such agreement, making such construction final, and can be exercised by such committee only when it acts in good faith. Industrial, etc., Trust *v.* Tod, 52 N. Y. App. Div. 195, 64 N. Y. Suppl. 293 [*reversed* on other grounds in 170 N. Y. 233, 63 N. E. 285].

The committee may issue only a portion of the authorized stock, leaving the balance unissued, instead of issuing the whole. White *v.* Wood, 129 N. Y. 527, 29 N. E. 835 [*reversing* 13 N. Y. Suppl. 631].

81. Industrial, etc., Trust *v.* Tod, 170 N. Y. 233, 63 N. E. 285 [*reversing* 52 N. Y. App. Div. 195, 64 N. Y. Suppl. 1093]; Van Siclen *v.* Bartol, 95 Fed. 793.

82. Cushman *v.* Bonfield, 139 Ill. 219, 28 N. E. 937 [*affirming* 36 Ill. App. 436].

83. Cushman *v.* Bonfield, 139 Ill. 219, 28 N. E. 937 [*affirming* 36 Ill. App. 436].

Remedies.—Where mortgaged railroad property is purchased by the trustee at foreclosure sale, under a provision in the decree allowing such purchase, and providing that on payment by any bondholder of his proportionate share of the moneys paid by the trustee as expenses of the action, and other moneys directed by the decree to be paid in cash, the purchase should inure to the benefit of any such bondholders; and where the trustee afterward sells the property to a new corporation without the knowledge of such bondholder, and refuses to account to him for his share of the proceeds, such bondholder's remedy is not limited to intervention in the foreclosure suit, but he can sue the trustee for an accounting. Zebley *v.* Farmers' L. & T. Co., 139 N. Y. 461, 34 N. E. 1067 [*reversing* 63 Hun 541, 18 N. Y. Suppl. 526]. And the payment or tender of such proportionate share by the bondholder is not necessary as a condition precedent to his right to such an accounting. Zebley *v.* Farmers' L. & T. Co., *supra*. The new corporation to which the trustee transferred the trust party is not a necessary party to the action by the bondholder for an accounting, where its title under the sale is not questioned and no relief is asked against it nor any facts stated which would warrant any relief. Zebley *v.* Farmers' L. & T. Co., *supra*.

84. Indiana, etc., R. Co. *v.* Swannell, 157 Ill. 616, 41 N. E. 989, 30 L. R. A. 290 [*affirming* 54 Ill. App. 260]; Industrial, etc., Trust *v.* Tod, 52 N. Y. App. Div. 195, 64 N. Y. Suppl. 1093 [*reversed* on other grounds in 170 N. Y. 233, 63 N. E. 285].

Where a reorganization committee uses bonds of the road deposited with it to purchase the property at foreclosure, without having first prepared a plan of reorganization, as required by the reorganization agreement, and then presents the bonds to the commissioner appointed to effect the sale, who stamps on them an indorsement of a part payment resulting by virtue of such purchase, and the committee then sells the property over the bondholders' protest to a new corporation, such committee is guilty of a breach of contract, and not a conversion. Industrial, etc., Trust *v.* Tod, 170 N. Y. 233, 63 N. E. 285 [*reversing* 52 N. Y. App. Div. 195, 64 N. Y. App. Div. 1093].

85. Coppell *v.* Hollins, 91 Hun (N. Y.) 570, 36 N. Y. Suppl. 500 [*affirmed* in 159 N. Y. 551, 54 N. E. 1089].

That one of the committee did not act in most of the transactions is immaterial, where the bondholders knew that he would not act in concert with the other members of the committee, and where he had by consent of all parties agreed to abide by the action of the counsel for the committee. Coppell *v.* Hollins, 91 Hun (N. Y.) 570, 36 N. Y. Suppl. 500 [*affirmed* in 159 N. Y. 551, 54 N. E. 1089].

Bondholders cannot be charged with the expenses incurred by the committee on a former attempt to reorganize the company, to which they had not assented. Van Siclen *v.* Bartol, 95 Fed. 793.

86. Coppel *v.* Hollins, 91 Hun (N. Y.) 570, 36 N. Y. Suppl. 500 [*affirmed* in 159 N. Y. 551, 54 N. E. 1089].

87. Van Siclen *v.* Bartol, 95 Fed. 793, holding that a failure to fully set out in a circular to the bondholders the reasons for the abandonment of the plan and the adoption

Parties to the agreement cannot object to acts of the committee which are not injurious to their interests.[88] The terms of the reorganization plan can only be changed by concerted action of the committee or a majority of it in the exercise of its power and for the benefit of the company and not for its own benefit.[89] Where, under the terms of the reorganization plan, the reorganization committee and their successors have the power to vote on a certain per cent of the stock to be issued, the fact that such committee has disposed of stock belonging to them individually does not affect their authority as members of the committee to act as directors and to hold and vote upon the trust stock.[90]

c. Rights of Bondholders, Stock-Holders, and Creditors. After a sale and reorganization under such a scheme, the rights and liabilities of bondholders, stock-holders, and creditors to come into such arrangement are governed by the terms of the agreement.[91] Any bondholder, stock-holder, or other creditor, who by the terms of the agreement is offered the privilege of coming in has a right to be admitted and participate in the benefits of the reorganization,[92] provided he applies to come in within a reasonable time or within the time fixed by the agreement,[93] and complies or offers to comply with other terms or conditions prescribed by the agreement;[94] and in some jurisdictions this is expressly provided by statute.[95] If this right is denied, such person may maintain an action to recover the damages sustained by reason of such refusal,[96] or for a specific enforcement of the agreement.[97] But where the parties come into the arrange-

of another does not render the committee liable, where plaintiff, a bondholder, made no inquiry for further information, and by his own negligence failed to respond in time to share in the benefits of the plan as finally carried out.

88. Walker *v.* Montclair, etc., R. Co., 30 N. J. Eq. 525.

89. Hoopes *v.* Corbin, 1 N. Y. St. 212.

90. Haines *v.* Kinderhook, etc., R. Co., 33 N. Y. App. Div. 154, 53 N. Y. Suppl. 368 [*affirming* 23 Misc. 605, 52 N. Y. Suppl. 1061].

91. Child *v.* New York, etc., R. Co., 129 Mass. 170 (holding that the holders of certain interest warrants were not entitled to demand stock of the new company in exchange for them); Thayer *v.* Wathen, 17 Tex. Civ. App. 382, 44 S. W. 906; Lyman *v.* Kansas City, etc., R. Co., 101 Fed. 636; Mackintosh *v.* Flint, etc., R. Co., 34 Fed. 582.

92. Walker *v.* Whelen, 4 Phila. (Pa.) 389.

An agreement for the benefit of bondholders of a certain class entitles all the bondholders of such class to participate in the benefit of the arrangement, and is not confined to persons who had signed the power of attorney given to the agent or committee who made the purchase. Walker *v.* Whelen, 4 Phila. (Pa.) 389; Sage *v.* Iowa Cent. R. Co., 99 U. S. 334, 25 L. ed. 394.

93. Dow *v.* Iowa Cent. R. Co., 144 N. Y. 426, 39 N. E. 398 [*affirming* 70 Hun 186, 24 N. Y. Suppl. 292]; Thornton *v.* Wabash R. Co., 81 N. Y. 462; Duncan *v.* Mobile, etc., R. Co., 8 Fed. Cas. No. 4,139, 3 Woods 597, holding that bondholders not subscribing to the reorganization plan were entitled to participate in the purchase or reorganization on an equal footing with the others provided they should come in by a day named.

94. Carpenter *v.* Catlin, 44 Barb. (N. Y.) 75, 29 How. Pr. 423; Miller *v.* Dodge, 28 Misc. (N. Y.) 640, 59 N. Y. Suppl. 1070; Landis *v.* Western Pennsylvania R. Co., 133 Pa. St. 579, 19 Atl. 556.

95. See Pierce *v.* Ayer, 88 Me. 100, 33 Atl. 777; Somerset R. Co. *v.* Pierce, 88 Me. 86, 33 Atl. 772.

Under Ky. St. § 771, providing that upon judicial sale of any railroad the purchaser shall pay in cash, except that if the property be purchased by the holders of securities issued by the company the purchaser shall be required to pay only such amount as the court may deem sufficient to insure compliance with the bid, and the purchaser shall therefore be entitled to pay the bid by payment of money or surrender of securities in proportion as such securities shall be entitled to receive the purchase-money, and that all holders of the same class of securities shall be entitled to have equal rights with such purchaser, all holders of railroad bonds are entitled to membership in a pool organized among the bondholders to purchase the property at foreclosure sale. Reed *v.* Schmidt, 115 Ky. 67, 72 S. W. 367, 24 Ky. L. Rep. 1889, 61 L. R. A. 270.

96. Reed *v.* Schmidt, 115 Ky. 67, 72 S. W. 367, 24 Ky. L. Rep. 1889, 61 L. R. A. 270, holding that where the holders of railroad mortgage bonds are improperly excluded from a pool organized by bondholders to purchase the property at foreclosure sale, they are entitled, after the property has been sold by the pool to third parties, to an accounting and to their proportionate share of the proceeds of the transaction.

97. Hitchcock *v.* New Jersey Midland R. Co., 33 N. J. Eq. 86 [*affirmed* in 34 N. J. Eq. 278]. See Dester *v.* Ross, 85 Mich. 370, 48 N. W. 530.

ment, in the absence of fraud or concealment, they are bound thereby,[98] and must either withdraw or accept the plan as a whole,[99] and are not entitled to a rescission of the reorganization agreement after it has been executed by the purchase of the property, the cancellation of the old mortgage, and the payment of a large part of the assumed indebtedness.[1] Ordinarily all the bondholders who were parties to such reorganization scheme are, in equity, the owners of the property so purchased by their trustee, as tenants in common, and are entitled to relief in a suit by one of them, for himself and others similarly situated, their community of right and interest making it admissible in such case for all the other beneficiaries to come into such suit by intervening petitions.[2] A purchase under a reorganization agreement does not divest the property of the original trust, but the purchaser will hold the same in trust for the parties secured by the mortgage or trust deed,[3] and the property may be followed by the bondholders into the hands of a purchaser from the trustee with knowledge of the trust;[4] and the failure of the scheme under which the purchase was made will not divest or extinguish the trust,[5] nor will the failure of some of the *cestuis que trustent* to perform their undertakings with the purchaser have any effect upon the rights of others who comply with their agreement;[6] nor will their equitable rights be affected by

98. Crawshay *v.* Soutter, 6 Wall. (U. S.) 739, 18 L. ed. 845.

99. Miller *v.* Dodge, 28 Misc. (N. Y.) 640, 59 N. Y. Suppl. 1070.

1. Columbus, etc., R. Co.'s Appeals, 109 Fed. 177, 48 C. C. A. 275.

2. Indiana, etc., R. Co. *v.* Swannell, 157 Ill. 616, 41 N. E. 989, 30 L. R. A. 290 [*affirming* 54 Ill. App. 260].

3. Indiana, etc., R. Co. *v.* Swannell, 157 Ill. 616, 41 N. E. 989, 30 L. R. A. 290 [*affirming* 54 Ill. App. 260]; Cushman *v.* Bonfield, 139 Ill. 219, 28 N. E. 937 [*affirming* 36 Ill. App. 436].

Where a reorganization plan makes no provision for protecting the interests of bondholders, a bondholder who has failed to pay his share of the costs and expenses, and to whom his bonds have been returned by the trustee, has a right to enforce the trust, since the trustee could not rescind the trust agreement after he had obtained title in pursuance of it. Indiana, etc., R. Co. *v.* Swannell, 157 Ill. 616, 41 N. E. 989, 30 L. R. A. 290 [*affirming* 54 Ill. App. 260]. Where such bondholder, with full knowledge of the trust reposed in the purchaser at the foreclosure sale, and of the equitable interests of the other bondholders in the property bought, sells and conveys the property to another, and receives and retains for his own use the proceeds of such sale, he will be required to account for such proceeds to the other holders of bonds. Cushman *v.* Bonfield, 139 Ill. 219, 28 N. E. 937 [*affirming* 36 Ill. App. 436]. In such case, the concealment of the sale of the property, and the negotiations for the sale by such party from the other bondholders, is evidence of fraud and deception. The fact that he may have been the holder of a majority of the bonds, and had the right to dictate a sale of the property, will not change the result, nor will the fact that a bondholder whose rights were denied may have at some time consented to a sale of the property, or may have had an adverse interest. To deprive him of all right to participate in the sale is evidence of fraud. Cushman *v.* Bonfield, 139 Ill. 219, 28 N. E. 937 [*affirming* 36 Ill. App. 436].

The return by such trustee to a bondholder, of the latter's bonds, upon an order receipting in full for the bonds and discharging the trustee from all liability, does not release the equities that such bondholder has in the property purchased by such trustee, and transferred by him to another company. Indiana, etc., R. Co. *v.* Swannell, 157 Ill. 616, 41 N. E. 989, 30 L. R. A. 290 [*affirming* 54 Ill. App. 260].

4. Indiana, etc., R. Co. *v.* Swannell, 157 Ill. 616, 41 N. E. 989, 30 L. R. A. 290 [*affirming* 54 Ill. App. 260].

A purchaser with notice of the trust, either express or implied, becomes himself a trustee of the property for the beneficiary, and is bound in the same manner as the original trustee, even though he purchases for a valuable consideration. Indiana, etc., R. Co. *v.* Swannell, 157 Ill. 616, 41 N. E. 989, 30 L. R. A. 290 [*affirming* 54 Ill. App. 260].

5. Cushman *v.* Bonfield, 139 Ill. 219, 28 N. E. 937 [*affirming* 36 Ill. App. 436].

A release by a bondholder of the trustee in the reorganization scheme from all further duty or liability, and a waiver of all rights obtained through or by him, will not preclude such bondholder from following the railroad property purchased by such trustee in his official capacity and transferred by him with notice to another company. Indiana, etc., R. Co. *v.* Swannell, 157 Ill. 616, 41 N. E. 989, 30 L. R. A. 290 [*affirming* 54 Ill. App. 260].

6. Indiana, etc., R. Co. *v.* Swannell, 157 Ill. 616, 41 N. E. 989, 30 L. R. A. 290 [*affirming* 54 Ill. App. 260]; Cushman *v.* Bonfield, 139 Ill. 219, 28 N. E. 937 [*affirming* 36 Ill. App. 436].

In such case, the sale having been made in the interest of all the bondholders, he, as one of such bondholders, will become entitled to an equitable interest proportionate to the

the failure of the trustee to properly apply assessments paid by them.[7] Bondholders purchasing under such an agreement have the equitable right, after stating the cost and charges of the litigation and trust, to pay the residue of their bid in bonds.[8]

16. Reorganization by Purchasers — a. In General. Purchasers at a foreclosure sale of railroad property and franchises may organize a corporation under such name as they may adopt;[9] and in most jurisdictions there are statutory provisions authorizing or requiring purchasers at such sale to organize a new company for the purposes of the transfer.[10] Such statutory provisions, however, do not apply where the purchaser is a corporation already existing and capable of holding the railroad property and exercising the franchise;[11] or where the purchasing company does not contemplate operating or maintaining the line of the old company.[12]

b. Rights of Bondholders, Stock-Holders, and Creditors. The effect of a foreclosure sale and reorganization, unless it is impeached for fraud, is to extinguish all the rights of the stock-holders of the old company,[13] and thereafter they have no rights in the reorganized company except such as are secured to them, if any, by the decree of foreclosure or by voluntary arrangement among the parties in interest.[14] After the reorganization the rights of the bondholders, stock-holders, and creditors of the old company who have assented to or come into the reorganized company depend upon the terms of the reorganization plan,[15] and the governing statutes.[16] Thus it may be arranged that the new securities to be

numher of bonds he owns, while the equitable interests of the other bondholders will remain unaffected; and if he is compelled to pay more than his share of the expenses of securing the title, he will be entitled to contribution from the other bondholders. Cushman *v.* Bonfield, 139 Ill. 219, 28 N. E. 937 [*affirming* 36 Ill. App. 436].

7. Cushman *v.* Bonfield, 139 Ill. 219, 28 N. E. 937 [*affirming* 36 Ill. App. 436].

8. Duncan *v.* Mobile, etc., R. Co., 8 Fed. Cas. No. 4,139, 3 Woods 597.

9. Vicksburg, etc., R. Co. *v.* Elmore, 46 La. Ann. 1237, 15 So. 701.

10. See Railroad Com'rs *v.* Grand Rapids, etc., R. Co., 130 Mich. 248, 89 N. W. 967 (construing Comp. Laws (1897), § 6227); Dester *v.* Ross, 85 Mich. 370, 45 N. W. 530; People *v.* Brooklyn, etc., R. Co., 89 N. Y. 75 (construing N. Y. Railroad Acts, Laws (1854), c. 282, § 1; Laws (1873), c. 469, § 1, c. 710, § 1); Texas Southern R. Co. *v.* Harle, (Tex. 1907) 105 S. W. 1107 [*reversing* (Civ. App. 1907) 101 S. W. 878] (construing Rev. St. (1895) art. 4550). And see the statutes of the several states; and Jones Corp. Bonds & Mortg. (3d ed.) 772, for a collection of the statutes on this subject.

Reorganization and reincorporation of corporations in general see Corporations, 10 Cyc. 281 *et seq.*

Under the Georgia act of Dec. 15, 1894, purchasers organizing a corporation under such statute must file a petition for that purpose with the secretary of state, which petition must be verified, and there must be a certificate of incorporation, although it was otherwise under the act of Dec. 17, 1892. Thomas *v.* Milledgeville R. Co., 99 Ga. 714, 27 S. E. 756. The issuance by the secretary of state of a certificate of incorporation to such purchasers does not *ipso facto* create a corporation authorized to operate the railroad and exercise the franchises of that company; such corporation does not come into complete existence until after organization under the certificate in the manner prescribed. Watson *v.* Albany, etc., R. Co., 111 Ga. 10, 36 S. E. 324.

The ownership of the property by the new company is not affected by the fact that the company was organized for the purpose of raising money upon bonds which failed of realization, since, as soon as organized, the company acquired a legal existence, owed duties fixed by law, and was no longer subject to the will of the organizers. Texas Southern R. Co. *v.* Harle, (Tex. 1907) 105 S. W. 1107 [*reversing* (Civ. App. 1907) 101 S. W. 878].

11. People *v.* Brooklyn, etc., R. Co., 89 N. Y. 75.

12. Munson *v.* Syracuse, etc., R. Co., 103 N. Y. 58, 8 N. E. 355, construing Laws (1873), c. 710.

13. Thornton *v.* Wabash R. Co., 81 N. Y. 462; Dow *v.* Iowa Cent. R. Co., 70 Hun (N. Y.) 186, 24 N. Y. Suppl. 292 [*affirmed* in 144 N. Y. 426, 39 N. E. 398]; Carpenter *v.* Catlin, 44 Barb. (N. Y.) 75, 29 How. Pr. 423. See Fosdick *v.* Green, 1 Cinc. Super. Ct. 537.

14. Vatable *v.* New York, etc., R. Co., 96 N. Y. 50; Thornton *v.* Wabash R. Co., 81 N. Y. 462.

15. See Davidson *v.* Mexican Nat. R. Co., 58 Fed. 653; Central Trust Co. *v.* Cincinnati, etc., R. Co., 58 Fed. 500.

16. See Pratt *v.* Munson, 84 N. Y. 582, holding, however, that the provision of Laws (1853), c. 502, § 2, permitting a stockholder of a railroad company within six months after a foreclosure sale to acquire stock of the company purchasing, upon pay-

issued by the new company shall be exchanged for and extinguish the bonds of the old company,[17] where the demand therefor is made in proper time,[18] and one who has consented to the agreement may be compelled to surrender his old bonds and accept the new ones as provided therein.[19] The consummation of such a plan operates as a payment of the old bonds,[20] and the former holders thereof have no claim upon the proceeds of the sale as unsecured creditors, to the amount by which the sum realized falls below the amount of such bonds.[21] If a stock-holder, bondholder, or other creditor refuses or fails to come into the reorganization, or to comply with certain conditions until after the expiration of the specified time, he can claim no right to participate therein,[22] even though he was ignorant of the agreement until after the expiration of the time fixed, and in such case his only remedy, if any, would be to attack the foreclosure.[23] Where the plan of reorganization is not prohibited by law, a stock-holder, bondholder, or general creditor who takes part in the reorganization is estopped, in the absence of fraud, to attack the reorganization as *ultra vires*.[24] Where, however, there has been fraud in the reorganization plan, the transfer of the property may be set aside in equity.[25]

c. Rights and Liabilities of Reorganized Company.[26] As a general rule the new company succeeds to all the property, rights, privileges, and duties of the old company,[27] except such as were granted to the latter company by a special statute,[28] and except such as were not covered by the mortgage under which the road was sold.[29] But the property purchased at the foreclosure sale, where a new charter is secured and a reorganization had thereunder, must be transferred by the purchasers to the new company,[30] and the new company may issue bonds for the property bought.[31] As a general rule the reorganized or new company is not bound by the debts or obligations of the old corporation,[32] except where

ment of a proportionate share of the price, was repealed by the act of 1854, amending the General Railroad Act, and by the act of 1874, to facilitate the reorganization of railroads sold under mortgage.

17. Houston, etc., R. Co. *v.* Keller, 90 Tex. 214, 37 S. W. 1062 [*reversing* (Civ. App. 1896) 36 S. W. 859].

18. Hoopes *v.* Corbin, 1 N. Y. St. 212.

19. Pollitz *v.* Farmers' L. & T. Co., 53 Fed. 210.

20. Houston, etc., R. Co. *v.* Keller, 90 Tex. 214, 37 S. W. 1062 [*reversing* (Civ. App. 1896) 36 S. W. 859].

21. Central Trust Co. *v.* Cincinnati, etc., R. Co., 58 Fed. 500.

Judgment creditors who have advanced money to the railroad company and who are included in the reorganization agreement on the same basis as the bondholders are in a like position after the completion of the scheme by the delivery of the road to the new company, and their claims also must be considered as paid. Central Trust Co. *v.* Cincinnati, etc., R. Co., 58 Fed. 500.

22. Vatable *v.* New York, etc., R. Co., 96 N. Y. 50 [*reversing* 9 Abb. N. Cas. 271, 11 Abb. N. Cas. 133]; Thornton *v.* Wabash R. Co., 81 N. Y. 462; Carpenter *v.* Catlin, 44 Barb. (N. Y.) 75, 29 How. Pr. 423 (holding that a bondholder who signed the agreement and failed to surrender his bonds on request has no right to claim any benefits under the agreement after the purchase of the road, and the formation of a new company); Columbus, etc., R. Co.'s Appeal, 109 Fed. 177, 48 C. C. A. 275; Wetmore *v.* St. Paul, etc., R. Co., 3 Fed. 177, 1 McCrary 466, 29 Fed. Cas. No. 17,469, 5 Dill. 531.

23. Thornton *v.* Wabash R. Co., 81 N. Y. 462; Hoopes *v.* Corbin, 1 N. Y. St. 212.

24. Hollins *v.* St. Paul, etc., R. Co., 9 N. Y. Suppl. 909.

25. St. Louis, etc., R. Co. *v.* Des Moines, etc., R. Co., 101 Fed. 632.

26. Liability of reorganized company to taxation see TAXATION.

27. Pollard *v.* Maddox, 28 Ala. 321; Vicksburg, etc., R. Co. *v.* Elmore, 46 La. Ann. 1237, 15 So. 701; Pierce *v.* Ayer, 88 Me. 100, 33 Atl. 777; Somerset R. Co. *v.* Pierce, 88 Me. 86, 33 Atl. 772; Gray *v.* Massachusetts Cent. R. Co., 171 Mass. 116, 50 N. E. 549.

28. Dow *v.* Beidelman, 49 Ark. 325, 5 S. W. 297. And see *supra*, VIII, B, 14, a.

29. Wilmington, etc., R. Co. *v.* Downward, (Del. 1888) 14 Atl. 720.

30. Thayer *v.* Wathen, 17 Tex. Civ. App. 382, 44 S. W. 906.

31. Thayer *v.* Wathen, 17 Tex. Civ. App. 382, 44 S. W. 906, so held under Rev. Sts. (1895) art. 4584*e*.

32. *Illinois.*— Morgan County *v.* Thomas, 76 Ill. 120.

Indiana.— Moyer *v.* Ft. Wayne, etc., R. Co., 132 Ind. 88, 31 N. E. 567.

Michigan.— Cook *v.* Detroit, etc., R. Co., 43 Mich. 349, 5 N. W. 390.

New York.— People *v.* Rome, etc., R. Co., 103 N. Y. 95, 8 N. E. 369.

Wisconsin.— Gilman *v.* Sheboygan, etc., R.

the circumstances are such as to warrant the conclusion that the new company is not a special and distinct company but merely a continuation of the old company, and hence the same person in law,[33] and except where the new company has either in express terms or by reasonable implication assumed the debts and obligations of the old company,[34] and except where this liability is imposed by the statute under which the reorganization takes place,[35] or by the decree of foreclosure and sale,[36] and except as to such claims as constitute a paramount lien on the property or fund received under the purchase.[37] The new company, however, is liable to account for the railroad property to a holder of bonds of the old company who has not come into the reorganization,[38] but it is not liable for the operation of the road during the time intervening between the purchase and its organization, unless its possession during that time is affirmatively shown.[39] After a sale under the mortgage and a subsequent sale by the purchaser to a new company the receiver of the old company cannot, by a summary process, compel the officers of the new company to turn over to him the books of the old company, which books passed into their possession when the property changed hands and have been used as the books of the new company, although the same persons were officers of the old company.[40] Where the new company has come by the property fraudulently it cannot, when deprived of its possession, recover for repairs or improvements or for encumbrances paid by it while in possession.[41]

17. Disposition of Proceeds and Surplus. The distribution of the proceeds of a foreclosure sale of railroad property is ordinarily governed by the rules applicable to the distribution of the proceeds of foreclosure sales generally.[42] Ordi-

Co., 37 Wis. 317; Vilas *v.* Milwaukee, etc., R. Co., 17 Wis. 497.

United States.— Hoard *v.* Chesapeake, etc., R. Co., 123 U. S. 222, 8 S. Ct. 74, 37 L. ed. 130; Sullivan *v.* Portland, etc., R. Co., 94 U. S. 806, 24 L. ed. 324.

See 41 Cent. Dig. tit. "Railroads," § 661. And see *supra*, VIII, B, 14, e, h.

Where a railroad company is incorporated by a special act authorizing its organization, etc., on the purchase of another road under foreclosure there is no privity between the two companies, so as to render the new company to which the assets of the old are sold liable for the latter's debts. Stewart's Appeal, 72 Pa. St. 291.

33. See Wilson *v.* Chesapeake, etc., R. Co., 21 Gratt. (Va.) 654.

34. St. Louis, etc., R. Co. *v.* Miller, 43 Ill. 199; Columbus, etc., R. Co.'s Appeal, 109 Fed. 177, 48 C. C. A. 275; Dubuque, etc., R. Co. *v.* Pierson, 70 Fed. 303, 17 C. C. A. 401.

A new promise by the reorganized company must be shown, and in order to prove such there must be shown some action on the part of the directors of the reorganized company, from which a promise can be fairly inferred; the mere certificate of their secretary that the amount was due on specified items will be insufficient to prove a new promise or to bind the company, unless it appears that he had been empowered to adjust the claim. American Cent. R. Co. *v.* Miles, 52 Ill. 174.

Where judgment for land condemned for the road has been rendered against the railroad company, which judgment remains unpaid, and after a sale of the entire road and franchises under foreclosure a new company is organized, which takes possession of the road and occupies the land, the new company is liable in equity to pay the judgment on the ground of having adopted the original transaction. Lake Erie, etc., R. Co. *v.* Griffin, 92 Ind. 487.

35. Keeler *v.* Atchison, etc., R. Co., 92 Fed. 545, 34 C. C. A. 523, construing Kan. Sess. Laws (1876), c. 110, § 1.

36. Chicago, etc., R. Co. *v.* Farmers' L. & T. Co., 79 Fed. 158; Wood *v.* Dubuque, etc., R. Co., 28 Fed. 910; Farmers' L. & T. Co. *v.* Central R. Co., 17 Fed. 758, 5 McCrary 421.

37. Morgan County *v.* Thomas, 76 Ill. 120; Stratton *v.* European, etc., R. Co., 76 Me. 269; Western Div. Western North Carolina R. Co. *v.* Drew, 29 Fed. Cas. No. 17,434, 3 Woods 691.

38. Brooks *v.* Vermont Cent. R. Co., 22 Fed. 211.

39. Pittsburgh, etc., R. Co. *v.* Fierst, 96 Pa. St. 144.

40. Olmsted *v.* Rochester, etc., R. Co., 46 Hun (N. Y.) 552, holding further that the receiver must institute some proceeding for their surrender, to which the new company must be made a party, to the end that there may be a determination of the ownership.

41. Milwaukee, etc., R. Co. *v.* Soutter, 13 Wall. (U. S.) 517, 20 L. ed. 543.

42. See Mortgages, 27 Cyc. 1761 *et seq.*

Waiver.— That a claimant holds a note of the debtor company secured by its mortgage bonds under an agreement that the note is "to be payment when paid" does not waive a right to claim payment from the proceeds of the sale on foreclosure of the debtor company's railroad. Pennsylvania Finance Co. *v.* Charleston, etc., R. Co., 62 Fed. 205, 10 C. C. A. 323.

Where the proceeds are in court, the court may order that so much of the proceeds as

narily the proceeds should be distributed: (1) To the payment of all proper costs and expenses attendant upon the foreclosure proceedings and sale;[43] (2) to the payment of any claims allowed by the court or by statute as superior to the lien of the mortgage or lien foreclosed;[44] (3) to the foreclosed mortgage debt,[45] and the surplus, if any, to other lienors or creditors according to their legal priorities, or, if none, to the mortgagor.[46] Where several debts or claims are equally entitled to be paid out of the proceeds, they are entitled to share ratably therein;[47] and where, after the court has ordered a *pro rata* distribution among those who have proved their claims, and after some of them have received their proportion, others come in, it is unjust to allow the latter the same proportion in the undistributed balance, but the whole account should be recast at a lower rate, each creditor who had been settled with being required to make a *pro rata* refund.[48] The fact that a railroad extending into different states cannot be sold on execution at law and can be reached only by proceedings in equity does not render the proceeds of such a road when sold under foreclosure equitable assets which can be administered irrespective of legal priority.[49] Where in a suit by a junior lienor to foreclose a mortgage of all the lands, franchises, and property of a railroad, a prior mortgagee of part of the lands intervenes, such mortgagee is not entitled to have the amount of his mortgage paid out of the funds in the hands of the receiver or out of the proceeds of a sale made pursuant to the decree of foreclosure, subject to such mortgage, since such sale passes only the equity of redemption.[50] Where claimant's lien covers only a portion of the road he is entitled to distribution out of only such proportion of the proceeds of the sale of the entire property as the value of the portion on which his lien exists bears to the value of the entire road.[51]

is necessary to pay the claimants then before the court shall be so used, and that the remainder be paid out by the commissioners according to the foreclosure decree. Clews *v.* First Mortg. Bondholders, 51 Ga. 131.

One having a lien on an equity of redemption in a railroad cannot complain of the disposition of the money paid therefor so long as the liens prior to his exceed the value of the equity of redemption. Merriman *v.* Chicago, etc., R. Co., 66 Fed. 663, 14 C. C. A. 36.

43. Farmers' L. & T. Co. *v.* Stuttgart, etc., R. Co., 106 Fed. 565.

44. Chicago, etc., R. Co. *v.* Fosdick, 106 U. S. 47, 1 S. Ct. 10, 27 L. ed. 47; Farmers' L. & T. Co. *v.* Stuttgart, etc., R. Co., 106 Fed. 565; Thomas *v.* Cincinnati, etc., R. Co., 91 Fed. 202; Central Trust Co. *v.* Clark, 81 Fed. 269, 26 C. C. A. 397.

45. See Park *v.* Candler, 113 Ga. 647, 39 S. E. 89; Security Sav., etc., Co. *v.* Goble, etc., R. Co., 44 Oreg. 370, 74 Pac. 919, 75 Pac. 697; Chicago, etc., R. Co. *v.* Fosdick, 106 U. S. 47, 1 S. Ct. 10, 27 L. ed. 47.

Proceeds of the sale of personal property covered by the mortgage are equally applicable to the payment of the mortgage indebtedness with the proceeds of the sale of the real estate. Security Sav., etc., Co. *v.* Goble, etc., R. Co., 44 Oreg. 370, 74 Pac. 919, 75 Pac. 697.

46. Chicago, etc., R. Co. *v.* Fosdick, 106 U. S. 47, 1 S. Ct. 10, 27 L. ed. 47; State Trust Co. *v.* Kansas City, etc., R. Co., 120 Fed. 398; Central Trust Co. *v.* East Tennessee, etc., R. Co., 69 Fed. 658.

Priorities generally see *supra*, VIII, A, 9.

Surrender of title papers.— Where title papers belonging to the railroad company placed in the hands of a person to be held until amounts due certain persons are paid are surrendered under order of the court having charge of the company's property in insolvency proceedings, and the assets are thereby increased, the debts for which they are held should be paid out of the funds from the sale of the road next after the right-of-way claims. McDonald *v.* Charleston, etc., R. Co., 93 Tenn. 281, 24 S. W. 252.

Personal liability of purchaser.— The purchaser of mortgaged railroad property at a sheriff's sale is personally bound for the surplus of the adjudication, and holds such surplus subject to the claims of inferior mortgage creditors who have for their security a special mortgage on the property sold. Branner *v.* Hardy, 18 La. Ann. 537.

Unissued bonds and coupons taken up and canceled are not entitled to participate in the proceeds of a foreclosure sale. Atlantic Trust Co. *v.* Kinderhook, etc., R. Co., 17 N. Y. App. Div. 212, 45 N. Y. Suppl. 492.

47. Morton *v.* New Orleans, etc., R., etc., Co., 79 Ala. 590; Branner *v.* Hardy, 18 La. Ann. 537; State *v.* Mexican Gulf R. Co., 5 La. Ann. 333.

48. Pinkard *v.* Allen, 75 Ala. 73.

49. Central Trust Co. *v.* East Tennessee, etc., R. Co., 69 Fed. 658.

50. Woodworth *v.* Blair, 112 U. S. 8, 5 S. Ct. 6, 28 L. ed. 615.

51. Chicago, etc., R. Co. *v.* Loewenthal, 93 Ill. 433 (holding that on the foreclosure of

18. Review of Proceedings. The review of foreclosure proceedings on railroad property is generally regulated by the rules applicable to reviews of foreclosure proceedings generally.[52] As a general rule the appeal brings up nothing but errors legally assigned, and the review will be restricted to the specific questions thus pointed out and designated for review.[53] Thus the appellate court will not review decisions upon points resting wholly in the discretion of the lower court, unless an abuse of such discretion is shown;[54] nor will it review such errors as have been waived or acquiesced in by the parties concerned.[55] It will not review an alleged error respecting the property in a railroad foreclosure suit, and the allowance of amounts due to holders of mortgage bonds, if the evidence presented before the master is not brought before it, and if no objection to the proof was taken below.[56] Where the record on appeal is too meager for the appellate court to determine whether there was error in the decree, such decree must be affirmed.[57] General creditors are not injured by a release of errors by the trustee in an action in which an adjudication that the property had become vested in another corporation was had, where it appears that the company was hopelessly insolvent and that under no circumstances could the general creditors receive anything out of the assets.[58] A supersedeas will not be granted on an appeal from an order confirming a foreclosure sale, where the main decree was not superseded on appeal therefrom.[59]

19. Fees and Costs.[60] Allowances may properly be made from the fund realized on foreclosure to compensate counsel for services rendered for the common benefit in preserving or protecting the railroad property,[61] particularly where

a mortgage on a railroad commenced by the mortgagor company and completed by another company, the proceeds of the sale must be distributed in the proportion which the work done by the mortgagor company bears to the value of the entire road as completed by the new company); Hand *v.* Savannah, etc., R. Co., 17 S. C. 219. See Low *v.* Blackford, 87 Fed. 392, 31 C. C. A. 15 [*affirming* 82 Fed. 344].

52. See Mortgages, 27 Cyc. 1673 *et seq.*

Parties.— Receivers in a suit to foreclose a railroad mortgage, who had been finally discharged prior to the filing of an intervening petition to establish a judgment recovered against them as a claim against a fund reserved by the court after sale of the road to cover such claims, and who were not made parties to the petition are not necessary parties on an appeal from the decree entered thereon. St. Louis Southwestern R. Co. *v.* Jackson, 95 Fed. 560, 37 C. C. A. 165. So, upon petition for a bill of review upon decree of foreclosure of a railroad mortgage by second mortgage bondholders, they cannot object to the decree on the ground that persons claiming title adversely to a part of the mortgage premises were not made parties, where they deny the railroad company's title to such disputed property. Farmers' L. & T. Co. *v.* Green Bay, etc., R. Co., 6 Fed. 100, 10 Biss. 203.

53. Farmers' L. & T. Co. *v.* Green Bay, etc., R. Co., 6 Fed. 100, 10 Biss. 203, holding that the court may take into consideration the laches of the petitioner in not presenting the petition for nearly two years after the decree had been filed and within a few days before the sale was advertised to take place, where there are no averments in the petition sufficient to excuse the delay of such person in presenting his petition.

An agreement entered into between the bondholders for the proposed organization of the road can only be considered to the extent that the particular interests of the petitioner might be involved. Farmers' L. & T. Co. *v.* Green Bay, etc., R. Co., 6 Fed. 100, 10 Biss. 203.

54. Central Trust Co. *v.* Grant Locomotive Works, 135 U. S. 207, 10 S. Ct. 736, 34 L. ed. 97, holding that the refusal of the court to allow a mortgagee to amend and supplement its petition for a rehearing of an order making certain expenses a prior lien on the property of the company, and to file it as an original bill of review as of that date, after the time limited by statute for taking an appeal therefor, is a matter of discretion.

55. Guion *v.* Liverpool, etc., Ins. Co., 109 U. S. 173, 3 S. Ct. 108, 27 L. ed. 895; Indiana Southern R. Co. *v.* Liverpool, etc., Ins. Co., 109 U. S. 168, 3 S. Ct. 108, 27 L. ed. 895.

56. Indiana Southern R. Co. *v.* Liverpool, etc., Ins. Co., 109 U. S. 168, 3 S. Ct. 108, 27 L. ed. 895.

57. Kneeland *v.* Luce, 141 U. S. 437, 12 S. Ct. 39, 35 L. ed. 808.

58. Loeb *v.* Chur, 3 Silv. Sup. (N. Y.) 147, 6 N. Y. Suppl. 296.

59. Farmers' L. & T. Co. *v.* Iowa Cent. R. Co., 8 Fed. Cas. No. 4,664, 4 Dill. 546.

60. Compensation and expenses of trustee see *supra*, VIII, A, 7, f, (IX).

Costs and fees in foreclosure suits generally see Mortgages, 27 Cyc. 1775 *et seq.*

61. Phinizy *v.* Augusta, etc., R. Co., 98 Fed. 776.

Illustrations.— Thus, where the holder of second-mortgage railroad bonds brings suit

provision therefor is made in the foreclosed mortgage,[62] the amount of the fees to be allowed depending upon the nature, extent, and difficulty of the services rendered, the amount involved, and other pertinent circumstances of the case, and being very largely in the discretion of the court, so that its decision will not be reversed, unless an abuse of discretion is shown by the allowance of an entirely unwarranted or excessive fee.[63] Counsel, however, who appear and represent the individual interests of particular parties do not come within this rule.[64] Allowance should also be made for a sheriff's or other officer's fees or compensation,[65] and for reasonable compensation to a master appointed in the foreclosure suit.[66]

20. Redemption[67] — a. Right of Redemption in General. A mortgagor company and those succeeding to its title, or any person having a title or interest in the mortgaged premises which would be prejudiced by a foreclosure, is entitled to redeem from the lien or mortgage existing on the railroad property.[68] As to the right to redeem from the foreclosure sale, however, the law is not so well

for the appointment of a receiver, and a receiver is thereupon appointed with the consent of all interested parties and to the advantage of all, the services rendered by complainant's attorneys being for the common benefit should be paid for from the assets of the company. Bound *v.* South Carolina R. Co., 43 Fed. 404. So where, in the foreclosure of a railroad mortgage, complainant is the holder of a majority of the bonds secured, and the trustee, by agreement with complainant, has declined to act in the foreclosure proceedings and is made a co-defendant, and full allowance has been made to the counsel of complainant and to the receiver for his services, all for duties which by the mortgage were assigned to the trustee, it is not error to refuse an allowance to the trustee's counsel. Philadelphia Inv. Co. *v.* Ohio, etc., R. Co., 46 Fed. 696.

Where the mortgaged property is insufficient to pay the mortgages, an order cannot be made for an allowance of fees to counsel of the mortgagor, to be paid out of money in the hands of the receiver. Mercantile Trust Co. *v.* Missouri, etc., R. Co., 41 Fed. 8.

62. Seibert *v.* Minneapolis, etc., R. Co., 58 Minn. 65, 59 N. W. 826; Southern California Motor-Road Co. *v.* Union L. & T. Co., 64 Fed. 450, 12 C. C. A. 215.

Where the mortgage so provides, counsel fees should be allowed pursuant to the terms of the mortgage rather than on equitable principles. Seibert *v.* Minneapolis, etc., R. Co., 58 Minn. 65, 59 N. W. 826 [*modifying* 58 Minn. 58, 57 N. W. 1068].

63. Easton *v.* Houston, etc., R. Co., 40 Fed. 189; Walker *v.* Quincy, etc., R. Co., 28 Fed. 734.

In federal courts, where the question of fees to be allowed counsel for their services in the foreclosure of a railroad mortgage is submitted to the court, it is not bound by any contract made by the trustee, or by any state law or practice, but is governed entirely by the rules of federal courts of equity which require that the allowance shall be a reasonable one, in view of all the circumstances of the case and the usages and practice of the bar to which they belong. Phinizy *v.* Augusta, etc., R. Co., 98 Fed. 776.

Minn. Gen. St. (1878) c. 81, § 44, fixing the amount of attorney's fees to be allowed on foreclosure of a mortgage of land, does not apply to an ordinary railroad mortgage. Seibert *v.* Minneapolis, etc., R. Co., 58 Minn. 65, 59 N. W. 826.

64. Phinizy *v.* Augusta, etc., R. Co., 98 Fed. 776 (holding that counsel who appear for parties who intervene and unsuccessfully contest the validity of the mortgage do not come within this rule); Bound *v.* South Carolina R. Co., 59 Fed. 509.

65. Gilman *v.* Des Moines Valley R. Co., 42 Iowa 495.

Under Ala. Code, § 3600, providing that "when any property is ordered to be sold by the decree of a chancery court, such sale shall in all cases be made by the register of the court ordering the same," the register will not be entitled to commissions on a sale which he merely directs, the sale being made by a receiver under the direction of a court, instead of by the register. Rome, etc., R. Co. *v.* Sibert, 97 Ala. 393, 12 So. 69.

66. Brown *v.* King, 62 Fed. 529, 10 C. C. A. 541.

67. **Redemption** generally see Mortgages, 27 Cyc. 1799 *et seq.*

68. Simmons *v.* Taylor, 23 Fed. 849.

Purchasers at a foreclosure under a first mortgage have a right in equity to redeem from a second mortgage, and in proceeding to foreclose the second mortgage a decree should be added declaring that such mortgage is a lien on the properties mortgaged, and that if the same is not paid such property shall be sold to satisfy such lien. Simmons *v.* Taylor, 23 Fed. 849.

Where a railroad company owning a road lying in two states, chartered by both, mortgages its whole road and franchises, and its right of redemption in one state is sold on execution, the purchaser is entitled to redeem the whole road. Wood *v.* Goodwin, 49 Me. 260, 77 Am. Dec. 259.

Parties.— Where a bill is brought against a railroad company in possession, and a portion of its members, to redeem the road from a mortgage, alleging that defendants are partakers of the income of the road, all who have been connected with the mortgages of the railroad, so as to render them liable for the income under it, should be made parties

settled. While an equity of redemption from such a sale exists, while the trustees are in possession of the road and operating it for the benefit of bondholders,[69] or at any time prior to the confirmation of the sale, by bringing into court the amount due and costs; [70] yet in the absence of a statute to the contrary, a valid foreclosure and sale, duly confirmed, extinguishes the equity of redemption,[71] and the only remedy in such a case, if any, is by a suit to vacate the decree.[72] In some jurisdictions, however, a statutory right to redeem is given under which a specified time is generally allowed for redemption before the decree or sale is made final; [73] although, even in such jurisdictions, a general statute applying to redemptions of land in ordinary cases does not apply in case of a railroad foreclosure.[74] A right to redeem from the sale may also be given by the decree of foreclosure.[75] A right of redemption to which a mortgagor company is entitled, after surrender of the property to the state to which it has been mortgaged, cannot be enforced by a suit against the state in its own courts.[76] Where a railroad company, which has the apparent legal title to the equity of redemption of a mortgage on another road, held and operated by the mortgage trustees, has paid off and canceled part of the mortgage and stands ready to pay off the balance, it is entitled to possession pending a suit by stock-holders of the mortgagor company to render void such apparent legal title.[77]

b. Rights of Creditors. A judgment creditor of the mortgagor or owner of the equity of redemption has a right to redeem, provided he does so in the mode prescribed by statute.[78] Where a railroad company owning equities of redemption in the roads of two former companies consolidated to form it is merged by consolidation into another company by proceedings which fix upon its property a lien in favor of its creditors, such lien is one upon the separate equities of redemption, and the lienors have the same right of separate redemption from the mortgages as the railroad company.[79] Where a railroad company's right to redemption from a sale on foreclosure of certain liens has become barred, the holders of other outstanding liens who had not been made parties to the first proceedings

defendant. Kennebec, etc., R. Co. *v.* Portland, etc., R. Co., 54 Me. 173.

69. Ashuelot R. Co. *v.* Elliot, 52 N. H. 387, 57 N. H. 397.

70. Chicago, etc., R. Co. *v.* Fosdick, 106 U. S. 47, 1 S. Ct. 10, 27 L. ed. 47.

71. Turner *v.* Indianapolis, etc., R. Co., 24 Fed. Cas. No. 14,259, 8 Biss. 380.

72. Delaware, etc., R. Co. *v.* Scranton, 34 N. J. Eq. 429.

73. See the statutes of the several states. And see Porter *v.* Pittsburg Bessemer Steel Co., 122 U. S. 267, 7 S. Ct. 1206, 30 L. ed. 1210, 120 U. S. 649, 7 S. Ct. 741, 30 L. ed. 830 (construing Ind. Rev. St. (1881) §§ 770–776); Columbia Finance, etc., Co. *v.* Kentucky Union R. Co., 60 Fed. 794, 9 C. C. A. 264; Jackson, etc., Co. *v.* Burlington, etc., R. Co., 29 Fed. 474 (construing Vt. Act, March 3, 1873).

74. Columbia Finance, etc., Co. *v.* Kentucky Union R. Co., 60 Fed. 794, 9 C. C. A. 264, holding that where railroad franchises and property are mortgaged and are to be sold on foreclosure, they are to be treated as an entirety, and that this entirety is not "real estate," within Ky. Gen. St. c. 63, art. 8, which allows one year for redemption, when the property does not bring two thirds of its appraised value.

Ill. Rev. St. (1845) c. 57, § 15, providing that land sold under mortgage may be redeemed, does not apply to a sale of railroad property, where the mortgage covers the personal as well as the real property, and hence where the franchise and property, real and personal, of a railroad corporation are sold in foreclosure proceedings, the sale may be made without right of redemption. Peoria, etc., R. Co. *v.* Thompson, 103 Ill. 187; Hammock *v.* Farmers L. & T. Co., 105 U. S. 77, 26 L. ed. 1111.

75. Simmons *v.* Taylor, 38 Fed. 682.

76. Troy, etc., R. Co. *v.* Com., 127 Mass. 43.

77. Barnard *v.* Hartford, etc., R. Co., 2 Fed. Cas. No. 1,003.

78. Vicksburg, etc., R. Co. *v.* McCutchen, 52 Miss. 645.

Such right cannot be defeated by the railroad company by its exacting a deed of trust with a long time to run. Vicksburg, etc., R. Co. *v.* McCutchen, 52 Miss. 645.

Parties.— None of the mortgagees, trustees, or beneficiaries are necessary parties to a bill by a judgment creditor of a railroad corporation whose road and property are subject to trust deeds and other encumbrances praying for a decree for the sale of the equity of redemption, subject to all liens, priorities, and encumbrances, and for a writ of possession to place the purchaser in possession. Vicksburg, etc., R. Co. *v.* McCutchen, 52 Miss. 645.

79. Compton *v.* Jesup, 68 Fed. 263, 15 C. C. A. 397, 167 U. S. 1, 17 S. Ct. 795, 42 L. ed. 55.

are not entitled to another sale of the property, but are only entitled to a decree allowing them a reasonable time to redeem.[80] Where the legal title to a railroad has been acquired by the holders of certain liens thereon, they are entitled to maintain a bill of strict foreclosure to cut off the equity and right of junior encumbrancers to redeem.[81]

c. Bar or Waiver of Right. In accordance with the rules regulating the bar or waiver of rights of redemption generally,[82] a right to an equity of redemption may be waived or barred by a long and unreasonable delay in asserting the right, amounting to laches, which is not attributable to ignorance, and which is not explained or sufficiently excused; [83] or by any declarations or conduct on the part of the person entitled to the right, which amounts to a positive and definite relinquishment or surrender of the right; [84] or it may be barred by his failure to redeem within the time limited by the decree of foreclosure.[85]

21. Proceedings to Set Aside Foreclosure. The general rules applicable to proceedings to set aside foreclosures generally govern proceedings to set aside a foreclosure of railroad property,[86] as on questions of pleading,[87] or parties.[88] The party objecting must move promptly and act with diligence, and an unreasonable delay in the assertion of his objections, amounting to laches, and not explained or excused, is sufficient to bar him from relief.[89] In a suit to set aside a foreclosure the validity and sufficiency of the proceedings in the foreclosure suit prior to the sale cannot be questioned,[90] nor can other matters which were proper for adjudication in the foreclosure suit.[91] The decree under such a bill should be no broader than is required by the pleadings.[92]

80. Crouch *v.* Dakota, etc., R. Co., 18 S. D. 540, 101 N. W. 722.

81. Crouch *v.* Dakota, etc., R. Co., 18 S. D. 540, 101 N. W. 722.

82. See, generally, Mortgages, 27 Cyc. 1815 *et seq.*

83. Simmons *v.* Burlington, etc., R. Co., 159 U. S. 278, 16 S. Ct. 1, 40 L. ed. 150; Farmers' L. & T. Co. *v.* Forest Park, etc., R. Co., 65 Fed. 882, 13 C. C. A. 186.

84. Simmons *v.* Taylor, 38 Fed. 682.

85. Simmons *v.* Taylor, 38 Fed. 682.

86. See New York Cent. Trust Co. *v.* Peoria, etc., R. Co., 104 Fed. 420, 43 C. C. A. 616, holding that a holder of second-mortgage bonds of a railroad company, who was an active participant in litigation resulting in decrees foreclosing the mortgages on the property, and its sale thereunder, is not entitled to file a petition of intervention three years after such decrees were entered, attacking the validity of the proceedings on account of an alleged fraudulent collusion between the receivers and other bondholders, by which the foreclosure of the first mortgages was brought about, where it does not appear that he has been deprived of any rights which were accorded to any other bondholder, or that he sustained any injury from such alleged fraud, if it existed. And see, generally, Mortgages, 27 Cyc. 1717 *et seq.*

A stock-holder of a railroad company may file a bill to set aside a foreclosure sale as fraudulent on behalf of the corporation, after the directors have refused to do so. Foster *v.* Mansfield, etc., R. Co., 36 Fed. 627 [*affirmed* in 146 U. S. 88, 13 S. Ct. 28, 36 L. ed. 899].

An alleged agreement between a committee of income bondholders and a committee of first-mortgage bondholders, as individuals, by which the former were to participate in the reorganization of the company, cannot be considered in such suit, where the members of the latter committee are not made parties. Robinson *v.* Iron R. Co., 135 U. S. 522, 10 S. Ct. 907, 34 L. ed. 276.

87. Robinson *v.* Iron R. Co., 135 U. S. 522, 10 S. Ct. 907, 34 L. ed. 276, holding a bill to be demurrable, where there is no allegation of actual fraud in the sale, no offer to redeem from it, and no averment of consideration or mutuality in an alleged agreement between two committees, or that the property was sold for less than its actual value.

88. Wenger *v.* Chicago, etc., R. Co., 114 Fed. 34, 51 C. C. A. 660, holding that to a suit in equity by a creditor of a railroad company to enforce his claim against the property of such company, which has been sold in foreclosure proceedings, and passed into the hands of a reorganized company, on the ground that such sale and purchase were fraudulent, a corporation which owns all the stock of the new company and the trustee for its bondholders are both necessary parties, and a bill which neither joins them as parties nor shows that they cannot be made defendants is demurrable.

89. Raphael *v.* Rio Grande Western R. Co., 132 Fed. 12, 65 C. C. A. 632; New York Cent. Trust Co. *v.* Peoria, etc., R. Co., 104 Fed. 418, 43 C. C. A. 613; Foster *v.* Mansfield, etc., R. Co., 36 Fed. 627 [*affirmed* in 146 U. S. 88, 13 S. Ct. 28, 36 L. ed. 899].

90. Robinson *v.* Iron R. Co., 135 U. S. 522, 10 S. Ct. 907, 34 L. ed. 276.

91. Robinson *v.* Iron R. Co., 135 U. S. 522, 10 S. Ct. 907, 34 L. ed. 276.

92. Barnes *v.* Chicago, etc., R. Co., 122

IX. RECEIVERS.*

A. In General.[93] It is now well settled that the court may in a proper case place a railroad in the hands of a receiver;[94] but the power is always exercised with reluctance and only in case of manifest necessity in order to preserve the property and protect the rights of those interested therein,[95] and a receiver will not be appointed where such necessity is not shown,[96] or there is another adequate remedy at law or in equity,[97] or a receiver if appointed would have no duties to perform,[98] or where it appears that a greater injury would result from the appointment of a receiver than from leaving the road in the hands of the present management.[99] The general rule also is that to justify the appointment of a receiver there must be a suit pending,[1] the appointment of a receiver being merely ancillary to the relief demanded in such suit;[2] but it has been held that where a case is presented which demands relief which can best be given by a receivership, such relief will not necessarily be refused because the time has not arrived when other substantial relief can be asked.[3] A receiver will not be appointed where it appears that the suit is collusive and designed to accomplish some fraudulent or improper purpose;[4] but it is not sufficient evidence of a fraudulent collusion that the officers or directors of the company concurred in the application for the appointment,[5] or admitted the truth of the allegations of the bill.[6] Provision for the appointment of receivers is in some cases expressly made by statute,[7] but the

U. S. 1, 7 S. Ct. 1043, 30 L. ed. 1128 [*affirming* 2 Fed. Cas. No. 1,061, 8 Biss. 514, 8 Reporter 776].

93. Accounting and compensation of receivers see RECEIVERS.

Actions by or against receivers see RECEIVERS.

Allowance and payment of claims see RECEIVERS.

Liabilities on bonds or undertakings in receivership proceedings see RECEIVERS.

Priorities of liens and claims see RECEIVERS.

Receiver's certificate see RECEIVERS.

Supervision and instruction of court see RECEIVERS.

Wrongful receiverships see RECEIVERS.

94. Meyer *v.* Johnston, 53 Ala. 237; State *v.* Jacksonville, etc., R. Co., 15 Fla. 201; Stevens *v.* Davidson, 18 Gratt. (Va.) 819, 98 Am. Dec. 692; Cole *v.* Philadelphia, etc., R. Co., 140 Fed. 944.

95. Meyer *v.* Johnston, 53 Ala. 237; State *v.* Jacksonville, etc., R. Co., 15 Fla. 201; Merriam *v.* St. Louis, etc., R. Co., 136 Mo. 145, 36 S. W. 630; Milwaukee, etc., R. Co. *v.* Soutter, 2 Wall. (U. S.) 510, 17 L. ed. 900; Tysen *v.* Wabash R. Co., 24 Fed. Cas. No. 14,315, 8 Biss. 247.

96. Merriam *v.* St. Louis, etc., R. Co., 136 Mo. 145, 36 S. W. 630; Rochester *v.* Bronson, 41 How. Pr. (N. Y.) 78.

97. Rice *v.* St. Paul, etc., R. Co., 24 Minn. 464; Merriam *v.* St. Louis, etc., R. Co., 136 Mo. 145, 36 S. W. 630; Boston, etc., R. Co. *v.* Boston, etc., R. Co., 65 N. H. 393, 23 Atl. 529.

98. *In re* Knott, etc., R. Co., [1901] 2 Ch. 8, 70 L. J. Ch. 463, 84 L. T. Rep. N. S. 433, 17 T. L. R. 353, 49 Wkly. Rep. 469 (holding that the court will not appoint a receiver for a road which is not completed and ready for traffic where it is not suggested that there are any outstanding debts due to the company or any income which the receiver would be entitled to receive, so that if appointed he would have no duties to perform); *In re* Birmingham, etc., R. Co., 18 Ch. D. 155, 50 L. J. Ch. 594, 45 L. T. Rep. N. S. 164, 29 Wkly. Rep. 908 (holding that a receiver will not be appointed where the company never acquired any land or constructed any road and has no property).

99. Tysen *v.* Wabash R. Co., 24 Fed. Cas. No. 14,315, 8 Biss. 247.

1. State *v.* Ross, 122 Mo. 35, 25 S. W. 947, 23 L. R. A. 534. See also, generally, RECEIVERS.

2. State *v.* Ross, 122 Mo. 435, 25 S. W. 947, 23 L. R. A. 534.

3. Brassey *v.* New York, etc., R. Co., 19 Fed. 663. See also Central Trust Co. *v.* Wabash, etc., R. Co., 29 Fed. 618; Wabash, etc., R. Co. *v.* Central Trust Co., 23 Fed. 513. But see State *v.* Ross, 122 Mo. 435, 25 S. W. 947, 23 L. R. A. 534.

4. Sage *v.* Memphis, etc., R. Co., 18 Fed. 571, 5 McCrary 643.

5. Brassey *v.* New York, etc., R. Co., 19 Fed. 663.

6. Pennsylvania L. Ins., etc., Co. *v.* Jacksonville, etc., R. Co., 55 Fed. 131, 5 C. C. A. 53.

7. See the statutes of the several states; and the following cases:

California.— McLane *v.* Placerville, etc., R. Co., 66 Cal. 606, 6 Pac. 748; Sacramento, etc., R. Co. *v.* San Francisco Super. Ct., 55 Cal. 453.

Kentucky.— Ball *v.* Maysville, etc., R. Co., 102 Ky. 486, 43 S. W. 731, 19 Ky. L. Rep. 1540, 80 Am. St. Rep. 362; Ingram *v.* Cin-

* By James A. Gywn.

power of the court to make such appointment is not dependent upon statutory enactment.[8]

B. Grounds of Appointment — 1. In General.[9] The propriety of appointing a receiver for a railroad is so dependent upon the circumstances of each particular case that it is impracticable to attempt definitely to state the grounds which will justify such appointment.[10] The matter is ordinarily said to rest in the discretion of the court,[11] which, however, is not arbitrary but to be exercised in accordance with the settled principles governing the appointment of receivers,[12] and always sparingly, cautiously, and with reference to all the circumstances of the particular case.[13] A receiver will not be appointed merely because it would do no harm,[14] or because all the parties consent,[15] or because the company is insolvent,[16] or where it does not appear that the circumstances are such as to make the appointment of a receiver necessary;[17] but where it appears that such relief is necessary to preserve and protect the property and the rights of those interested therein, the appointment will be made.[18] So in order to protect the

cinnati, etc., R. Co., 107 S. W. 239, 32 Ky. L. Rep. 849.

New Jersey.— Sewell *v.* Cape May, etc., R. Co., (Ch. 1887) 9 Atl. 785.

New York.— Rochester *v.* Bronson, 41 How. Pr. 78.

Tennessee.— State *v.* Edgefield, etc., R. Co., 6 Lea 353.

Texas.— Bonner *v.* Hearne, 75 Tex. 242, 12 S. W. 38.

England.— *In re* Manchester, etc., R. Co., 14 Ch. D. 645, 49 L. J. Ch. 365, 42 L. T. Rep. N. S. 714; Russell *v.* East Anglian R. Co., 15 Jur. 935, 20 L. J. Ch. 257, 2 Mac. & G. 125, 6 R. & Can. Cas. 501, 49 Eng. Ch. 95, 42 Eng. Reprint 208.

See 41 Cent. Dig. tit. "Railroads," § 672 *et seq.*

Railway ancillary to dock.— A company formed for the purpose of making a dock and afterward authorized by statute to make a short piece of railway over its own land connected with the line of a railroad company and to work it for through traffic is a company "constituted by act of parliament for the purpose of making a railway," and so is a railway company within the meaning of the act of 1867, so that a receiver and manager may be appointed on the application of a judgment creditor, and the receiver and manager may be appointed of the whole undertaking of the company and not merely of the railway belonging to it. *In re* East India, etc., Dock Co., 38 Ch. D. 576, 57 L. J. Ch. 1053, 59 L. T. Rep. N. S. 236, 36 Wkly. Rep. 849 [*affirming* 58 L. T. Rep. N. S. 714].

8. Meyer *v.* Johnston, 53 Ala. 237.

Jurisdiction and powers of court see *infra*, IX, C, 1.

9. **In foreclosure proceedings** see Mortgages, 27 Cyc. 1622.

10. Mercantile Trust Co. *v.* Missouri, etc., R. Co., 36 Fed. 221, 1 L. R. A. 397.

11. Sage *v.* Memphis, etc., R. Co., 125 U. S. 361, 8 S. Ct. 887, 31 L. ed. 694; Farmers' L. & T. Co. *v.* Winona, etc., R. Co., 59 Fed. 957; Farmers' L. & T. Co. *v.* Kansas City, etc., R. Co., 53 Fed. 182; Farmers' L. & T. Co. *v.* Chicago, etc., R. Co., 27 Fed. 146; Williamson *v.* New Albany, etc., R. Co., 30 Fed. Cas. No. 17,753, 1 Biss. 198.

12. Merriam *v.* St. Louis, etc., R. Co., 136 Mo. 145, 36 S. W. 630. See also Louisville, etc., R. Co. *v.* Eakin, 100 Ky. 745, 39 S. W. 416, 19 Ky. L. Rep. 54.

13. Meyer *v.* Johnston, 53 Ala. 237; Merriam *v.* St. Louis, etc., R. Co., 136 Mo. 145, 36 S. W. 630; Sage *v.* Memphis, etc., R. Co., 125 U. S. 361, 8 S. Ct. 887, 31 L. ed. 694; Farmers' L. & T. Co. *v.* Kansas City, etc., R. Co., 53 Fed. 182; Tysen *v.* Wabash, etc., R. Co., 24 Fed. Cas. No. 14,315, 8 Biss. 247.

14. Merriam *v.* St. Louis, etc., R. Co., 136 Mo. 145, 36 S. W. 630.

15. Whelpley *v.* Erie R. Co., 29 Fed. Cas. No. 17,504, 6 Blatchf. 271.

16. Meyer *v.* Johnston, 53 Ala. 237; Farmers' L. & T. Co. *v.* Chicago, etc., R. Co., 27 Fed. 146.

17. Merriam *v.* St. Louis, etc., R. Co., 136 Mo. 145, 36 S. W. 630; Tysen *v.* Wabash, etc., R. Co., 24 Fed. Cas. No. 14,315, 8 Biss. 247.

A receiver will not be appointed because during an action to prevent an illegal consolidation of two railroad companies the stock-holders, contrary to an injunction, elected directors for the new company (Cleveland, etc., R. Co. *v.* Jewett, 37 Ohio St. 649); and in a suit between two railroad companies, each claiming the exclusive right to use the tracks extending through a tunnel, where it appears that the regulations and management by which the tunnel is controlled are sufficient and reasonable, the court will not disturb them by appointing a receiver (Delaware, etc., R. Co. *v.* Erie R. Co., 21 N. J. Eq. 298); and where a railroad company has sublet a leased lien contrary to the covenants of the lease a receiver will not be appointed in a suit brought by the lessor to enforce a forfeiture of the lease, where it appears that the lessor is responsible and is operating the road (Boston, etc., R. Co. *v.* Boston, etc., R. Co., 65 N. H. 393, 23 Atl. 529).

18. Ingram *v.* Cincinnati, etc., R. Co., 107 S. W. 239, 32 Ky. L. Rep. 849; Stevens *v.* Davidson, 18 Gratt. (Va.) 819, 98 Am. Dec.

security of the bondholders a receiver will be appointed with authority to complete the construction of a railroad, where the company is unable to do so, in order to prevent a forfeiture of its charter,[19] or of a valuable land grant.[20] A receiver may also properly be appointed in proceedings by the state to forfeit the franchise of a railroad company,[21] or where the company has incurred a forfeiture of its charter by a suspension of business.[22] Where a railroad company makes a lease of its road and thereafter executes a trust deed securing bonds of the road a receiver cannot be appointed to take charge of the road as against the lessee at the suit of the bondholders.[23]

2. Default in Payment of Indebtedness. A default in the payment of principal or interest of bonds or mortgages is not of itself sufficient to necessitate the appointment of a receiver,[24] although the company is insolvent;[25] but the matter rests in the discretion of the court,[26] and a receiver will not be appointed where it does not appear to be necessary,[27] or where it appears that it would do more

692; Farmers' L. & T. Co. *v.* Winona, etc., R. Co., 59 Fed. 957; Allen *v.* Dallas, etc., R. Co., 1 Fed. Cas. No. 221, 3 Woods 316.

A receiver may properly be appointed upon a bill alleging that plaintiff had recovered judgment against one of defendant companies, and that it had transferred its road to the other defendant, and that the grantee had never operated the road and the grantor had no power to make the transfer, which was only made for the purposes of defrauding plaintiff (Louisville, etc., R. Co. *v.* Southworth, 38 Ill. App. 225); and where pending an action for personal injuries against a railroad company the company sells its road to another, the vendee agreeing to pay any judgment recovered, and after the purchase the vendee abandons and ceases to operate a large portion of the road, and allows the property to depreciate, it is sufficient ground for the appointment of a receiver, under the Kentucky statute authorizing such appointment where the property is in danger of being lost or materially injured (Ingram *v.* Cincinnati, etc., R. Co., 107 S. W. 239, 32 Ky. L. Rep. 849).

Extending receivership.— Where a railroad is in the hands of receivers pending suits of foreclosure and the settlement of priority of liens, it is proper, on the application of a lien-holder claiming a priority, to extend the receivership as to such claim over the portion of the road on which the priority is claimed (Mercantile Trust Co. *v.* Missouri, etc., R. Co., 41 Fed. 8); and where a railroad has been placed in the hands of a receiver under one mortgage, it may, upon petition of prior mortgagees, be extended for their protection (Farmers', etc., Bank *v.* Philadelphia, etc., R. Co., 14 Phila. (Pa.) 456).

19. Allen *v.* Dallas, etc., R. Co., 1 Fed. Cas. No. 221, 3 Woods 316.

20. Allen *v.* Dallas, etc., R. Co., 1 Fed. Cas. No. 221, 3 Woods 316; Kennedy *v.* St. Paul, etc., R. Co., 14 Fed. Cas. No. 7,706, 2 Dill. 448. See also Kennedy *v.* St. Paul, etc., R. Co., 14 Fed. Cas. No. 7,707, 5 Dill. 519, where on an application to issue debentures to raise money to complete a road to prevent the forfeiture of a land grant, the court refused to allow the issue for the purpose of raising the money in the first instance, but authorized the receiver to complete the road with money furnished by the bondholders and after completion to issue debentures for the amount so advanced and used.

21. Texas Trunk R. Co. *v.* State, 83 Tex. 1, 18 S. W. 199.

22. People *v.* Northern R. Co., 53 Barb. (N. Y.) 98 [*affirmed* in 42 N. Y. 217], holding that the judgment of forfeiture may direct the appointment of a receiver notwithstanding the statute makes it the duty of the attorney-general immediately after the rendition of such a judgment to institute proceedings for that purpose, the statute being intended to cover cases where no receiver was appointed in the judgment, and not to prevent the court from rendering complete relief in and by the judgment itself.

23. Louisville, etc., R. Co. *v.* Eakin, 100 Ky. 745, 39 S. W. 416, 19 Ky. L. Rep. 54.

24. Merriam *v.* St. Louis, etc., R. Co., 136 Mo. 145, 36 S. W. 630; Farmers' L. & T. Co. *v.* Winona, etc., R. Co., 59 Fed. 957; American L. & T. Co. *v.* Toledo, etc., R. Co., 29 Fed. 416; Tysen *v.* Wabash R. Co., 24 Fed. Cas. No. 14,315, 8 Biss. 247; Union Trust Co. *v.* St. Louis, etc., R. Co., 24 Fed. Cas. No. 14,402, 4 Dill. 114; Williamson *v.* New Albany, etc., R. Co., 30 Fed. Cas. No. 17,753, 1 Biss. 198.

25. Merriam *v.* St. Louis, etc., R. Co., 136 Mo. 145, 36 S. W. 630.

26. Farmers' Loan, etc., Co. *v.* Winona, etc., R. Co., 59 Fed. 957; Union Trust Co. *v.* St. Louis, etc., R. Co., 24 Fed. Cas. No. 14,402, 4 Dill. 114; Williamson *v.* New Albany, etc., R. Co., 30 Fed. Cas. No. 17,753, 1 Biss. 198.

27. Rice *v.* St. Paul, etc., R. Co., 24 Minn. 464; American L. & T. Co. *v.* Toledo, etc., R. Co., 29 Fed. 416; Union Trust Co. *v.* St. Louis, etc., R. Co., 24 Fed. Cas. No. 14,402, 4 Dill. 114; Blair *v.* St. Louis, etc., R. Co., 20 Fed. 348.

Although the mortgage covers the income of the road and gives the trustee a right of possession on default, and such possession has been refused, a receiver will not be appointed unless it appears that there will be loss to the bondholders, since the trustee has the usual remedies to obtain possession, and unless there is danger of loss to the bond-

harm than good.[28] Such appointment will, however, be made whenever a necessity therefor is shown,[29] as where in addition to the default the company is insolvent and the mortgage security inadequate,[30] particularly if there be other considerations making such appointment proper, as where the officers of the company are acting contrary to the interest of the stock-holders,[31] or misapplying the income of the road,[32] or failing to apply earnings to the payment of interest,[33] or the road is in possession of certain bondholders whose interests are hostile to the other bondholders.[34] The court may also appoint a receiver where by the terms of a deed of trust it is made the duty of the trustee to take possession on default and he fails to do so,[35] or where the mortgage or deed of trust authorizes the mortgagee or trustee upon a default to take possession and operate the road and apply the income to the payment of the indebtedness.[36] So also where the trustees under a prior mortgage take possession and undertake to execute the trust prejudicially to the subsequent encumbrancers the court will take the road out of their possession and place it in the hands of a receiver.[37] Circumstances may also exist where a default is imminent and manifest which will make the appointment of a receiver proper before the default has actually occurred,[38] but ordinarily a receiver will not be appointed before default.[39]

3. Mismanagement of Road. A receiver will not be appointed merely because of internal dissensions regarding the management of the road;[40] but where a railroad has been mortgaged and the company is notoriously insolvent and is wasting the property so as to imperil the security, a receiver will be appointed.[41] Where in a foreclosure suit the bondholders are entitled to take possession by a receiver and manage the property, the fact that it is being properly managed by the company is not ground for refusing to appoint a receiver.[42]

C. Appointment, Qualification, and Tenure — 1. Jurisdiction and Powers of Court.[43] While the appointment of receivers is in some cases regulated by statute,[44] courts of equity have, independently of statute, jurisdiction

holders there is no more reason for sequestering the income than any other property of the company. Union Trust Co. *v.* St. Louis, etc., R. Co., 24 Fed. Cas. No. 14,402, 4 Dill. 114.

28. Tysen *v.* Wabash R. Co., 24 Fed. Cas. No. 14,315, 8 Biss. 247.

29. Taylor *v.* Philadelphia, etc., R. Co., 14 Phila. (Pa.) 451; Putnam *v.* Jacksonville, etc., R. Co., 61 Fed. 440; Mercantile Trust Co. *v.* Missouri, etc., R. Co., 36 Fed. 221, 1 L. R. A. 397.

30. Kelly *v.* Alabama, etc., R. Co., 58 Ala. 489; Central Trust Co. *v.* Chattanooga, etc., R. Co., 94 Fed. 275, 36 C. C. A. 241; Farmers' L. & T. Co. *v.* Winona, etc., R. Co., 59 Fed. 957; Dow *v.* Memphis, etc., R. Co., 20 Fed. 260; Kerp *v.* Michigan, etc., R. Co., 14 Fed. Cas. No. 7,727.

31. Farmers' L. & T. Co. *v.* Winona, etc., R. Co., 59 Fed. 957.

32. Kelly *v.* Alabama, etc., R. Co., 58 Ala. 489; Dow *v.* Memphis, etc., R. Co., 20 Fed. 260.

33. Dow *v.* Memphis, etc., R. Co., 20 Fed. 260; Kerp *v.* Michigan Lake Shore R. Co., 14 Fed. Cas. No. 7,727.

34. Benedict *v.* St. Joseph, etc., R. Co., 19 Fed. 173.

35. Wilmer *v.* Atlanta, etc., Air-Line R. Co., 30 Fed. Cas. No. 17,775, 2 Woods 409, holding further that in such a case the appointment may be made, although it does not appear that the mortgage security is inadequate.

36. McLane *v.* Placerville, etc., R. Co., 66 Cal. 606, 6 Pac. 748; Sacramento, etc., R. Co. *v.* San Francisco Super. Ct., 55 Cal. 453. But see Rice *v.* First Div. St. Paul, etc., R. Co., 24 Minn. 464.

37. Illinois Cent. R. Co. *v.* Mississippi Cent. R. Co., 12 Fed. Cas. No. 7,008.

38. Wabash, etc., R. Co. *v.* Central Trust Co., 23 Fed. 513; Brassey *v.* New York, etc., R. Co., 19 Fed. 663.

39. American L. & T. Co. *v.* Toledo, etc., R. Co., 29 Fed. 416.

40. American L. & T. Co. *v.* Toledo, etc., R. Co., 29 Fed. 416; Tysen *v.* Wabash R. Co., 24 Fed. Cas. No. 14,315, 8 Biss. 247.

41. Western Div. Western North Carolina R. Co. *v.* Drew, 29 Fed. Cas. No. 17,434, 3 Woods 691, holding further that such appointment will be made notwithstanding it is provided by statute that the mortgagee shall not be entitled to possession until after a decree of foreclosure.

42. Van Benthuysen *v.* Central New England, etc., R. Co., 17 N. Y. Suppl. 709.

43. Concurrent and conflicting jurisdiction of different courts see Courts, 11 Cyc. 988, 1011, 1019.

Power of judge at chambers or in vacation to appoint receivers see Judges, 23 Cyc. 554.

44. Sacramento, etc., R. Co. *v.* San Francisco Super. Ct., 55 Cal. 453; Cincinnati, etc.,

to appoint receivers,[45] and in jurisdictions where law and equity are administered by the same court, the power is exercised by courts of general jurisdiction having the powers previously exercised by courts of equity.[46] While a court cannot extend its powers beyond its territorial jurisdiction,[47] it has been held that a court having jurisdiction of the person of the corporation may appoint a receiver for an entire line of railroad, although extending beyond the jurisdiction of the court or running through several different states,[48] and may acquire possession of the property by compelling the company to execute assignments to the receiver;[49] and that the fact that some of the property may be in the hands of third persons so that the receiver may have to invoke the assistance of the courts in other jurisdictions is no ground for refusing to make such appointment, as such assistance will ordinarily be granted through comity;[50] but the usual practice is to institute ancillary proceedings in the different jurisdictions for the appointment of the same person as receiver of the entire property.[51] In foreclosure proceedings the court cannot appoint a receiver except for the property or portion of the road covered by the mortgage;[52] and in case of several distinct roads operated as a general system, the court cannot in a suit to foreclose a mortgage on one of such roads, appoint a receiver for the roads of the other companies which are not affected by the mortgage and are not parties to the suit.[53] In a suit to enforce a contract lien on a mortgaged road the court has jurisdiction, in advance of any application to foreclose the mortgage, to take possession of the property by a receiver and sell the same subject to all superior liens, and distribute the proceeds among those entitled thereto.[54]

2. Proceedings For Appointment. Ordinarily a receiver for a railroad should not be appointed upon an *ex parte* application,[55] and the court will not appoint

R. Co. *v.* Sloan, 31 Ohio St. 1; Bonner *v.* Hearne, 75 Tex. 242, 12 S. W. 38.

The Texas statute providing that a suit for the appointment of a receiver for a corporation shall be brought "in the county where the principal office of said corporation is located" is held by construction in connection with other statutes as merely conferring on the corporation the privilege of having such suits instituted in the county of its principal office and not to deprive the district courts of other counties of the power of making such appointment in case the corporation fails to plead such privilege. Bonner *v.* Hearne, 75 Tex. 242, 12 S. W. 38.

45. Meyer *v.* Johnston, 53 Ala. 237.

A federal court may in the exercise of its chancery jurisdiction and without any statutory authority appoint a receiver for a railroad on a proper showing by a proper party. Cole *v.* Philadelphia, etc., R. Co., 140 Fed. 944.

In Canada the high court of justice has power to appoint a receiver of a railroad company at the instance of a creditor, both where the company being situated within the province is under provincial legislative jurisdiction and also where it is under federal legislative jurisdiction, if there is no federal legislation providing otherwise. Wile *v.* Bruce Mines R. Co., 11 Ont. L. Rep. 200, 7 Ont. Wkly. Rep. 157.

46. Texas Trunk R. Co. *v.* State, 83 Tex. 1, 18 S. W. 199.

Appointment in legal action or proceeding. — A state district court having jurisdiction both at law and also that previously exercised by courts of chancery may appoint a receiver in a quo warranto proceeding to forfeit the charter of a railroad company. Texas Trunk R. Co. *v.* State, 83 Tex. 1, 18 S. W. 199.

47. State *v.* Jacksonville, etc., R. Co., 15 Fla. 201; Texas, etc., R. Co. *v.* Gay, 86 Tex. 571, 26 S. W. 599, 25 L. R. A. 52.

In Florida a receiver cannot be appointed by the judge of one circuit to take possession of property of a railroad company in another circuit of that state. State *v.* Jacksonville, etc., R. Co., 15 Fla. 201.

48. Wilmer *v.* Atlanta, etc., Air-Line R. Co., 30 Fed. Cas. No. 17,775, 2 Woods 409. See also Port Royal, etc., R. Co. *v.* King, 93 Ga. 63, 19 S. E. 809, 24 L. R. A. 730; State *v.* Northern Cent. R. Co., 18 Md. 193. But see Texas, etc., R. Co. *v.* Gay, 86 Tex. 571, 26 S. W. 599, 25 L. R. A. 52.

49. Wilmer *v.* Atlanta, etc., Air-Line R. Co., 30 Fed. Cas. No. 17,775, 2 Woods 409.

50. Wilmer *v.* Atlanta, etc., Air-Line R. Co., 30 Fed. Cas. No. 17,775, 2 Woods 409.

51. Central Trust Co. *v.* Wabash, etc., R. Co., 29 Fed. 618.

Ancillary appointment see *infra*, IX, H, 2.

52. State *v.* Jacksonville, etc., R. Co., 15 Fla. 201; Merriam *v.* St. Louis, etc., R. Co., 136 Mo. 145, 36 S. W. 630. But see Rumsey *v.* Peoples R. Co., 91 Mo. App. 202; Platt *v.* New York, etc., R. Co., 170 N. Y. 451, 63 N. E. 532 [*reversing* 63 N. Y. App. Div. 401, 71 N. Y. Suppl. 913].

53. Hook *v.* Bosworth, 64 Fed. 443, 12 C. C. A. 208.

54. Park *v.* New York, etc., R. Co., 70 Fed. 641.

55. Wabash R. Co. *v.* Dykeman, 133 Ind.

a receiver without notice to the adverse party and an opportunity to be heard where it is not shown that a manifest and urgent necessity for such immediate appointment exists,[56] or where a temporary injunction will adequately protect the rights of the parties until such notice can be given.[57] Circumstances may arise, however, under which the appointment of a receiver on an *ex parte* application without notice will be proper;[58] but to justify such an appointment the bill or petition must allege facts showing it to be necessary,[59] and it is not sufficient merely to allege that such an emergency exists.[60] The bill or petition must in all cases allege sufficient facts to justify the appointment of a receiver,[61] although the fact that the averments were not such as to have made it proper to appoint a receiver will not make the order appointing one a nullity.[62] So also the court should not appoint a receiver merely on a bill filed without being supported by evidence or affidavits,[63] and where the facts alleged as grounds for the appointment are positively denied a receiver will not ordinarily be appointed;[64] but while this is true where the hearing is on bill and answer only, if there is other evidence in support of the bill it will be considered, and if on the evidence the court is of the opinion that a case is made for the appointment of a receiver, such appointment will be made notwithstanding the denials of the answer.[65] The court may appoint a receiver on petition in the pending cause without the filing of an original bill,[66] and the usages of courts of equity as to the manner of appointing receivers where it is not otherwise provided by statute are alike applicable to cases arising under the codes.[67] Where a prior mortgagee fails to take possession a junior encumbrancer whose rights are likely to be injured by the property remaining in possession of the mortgagor may file his bill, and, if sufficient cause

56, 32 N. E. 823; Chicago, etc., R. Co. *v.* Cason, 133 Ind. 49, 32 N. E. 827; Cook *v.* Detroit, etc., R. Co., 45 Mich. 453, 8 N. W. 74; People *v.* Albany, etc., R. Co., 55 Barb. (N. Y.) 344 [*affirmed* in 57 N. Y. 161]; Devoe *v.* Ithaca, etc., R. Co., 5 Paige (N. Y.) 521.

56. *Florida.*— State *v.* Jacksonville, etc., R. Co., 15 Fla. 201.

Indiana.— Wabash R. Co. *v.* Dykeman, 133 Ind. 56, 32 N. E. 823; Chicago, etc., R. Co. *v.* Cason, 133 Ind. 49, 32 N. E. 827.

Missouri.— Merriam *v.* St. Louis, etc., R. Co., 136 Mo. 145, 36 S. W. 630.

New York.— People *v.* Albany, etc., R. Co., 55 Barb. 344 [*affirmed* in 57 N. Y. 161].

Ohio.— Cleveland, etc., R. Co. *v.* Jewett, 37 Ohio St. 649.

See 41 Cent. Dig. tit. "Railroads," § 677.

The non-residence of one defendant is no excuse for failing to give notice to another defendant who is not a non-resident. Wabash R. Co. *v.* Dykeman, 133 Ind. 56, 32 N. E. 823.

A service of the petition for the appointment of a receiver at the instance of a judgment creditor, under the English statute of 1867, must be made upon the company in the manner prescribed by the statute. *Re* Beddgelert R. Co., 24 L. T. Rep. N. S. 122, 19 Wkly. Rep. 427.

57. Devoe *v.* Ithaca, etc., R. Co., 5 Paige (N. Y.) 521.

58. Louisville, etc., R. Co. *v.* Schmidt, 52 S. W. 835, 21 Ky. L. Rep. 556.

In Missouri it is held that where a receiver is appointed *ex parte* the appointment cannot be made for a longer time than is fairly and reasonably requisite to allow defendant to show cause against a further continuance of the receivership; what is such a reasonable time being dependent upon the circumstances of the particular case. St. Louis, etc., R. Co. *v.* Wear, 135 Mo. 230, 36 S. W. 357, 658, 33 L. R. A. 341, holding that three months is unreasonably long.

59. Wabash R. Co. *v.* Dykeman, 133 Ind. 56, 32 N. E. 823; Chicago, etc., R. Co. *v.* Cason, 133 Ind. 49, 32 N. E. 827; People *v.* Albany, etc., R. Co., 55 Barb. (N. Y.) 344 [*affirmed* in 57 N. Y. 161].

60. Wabash R. Co. *v.* Dykeman, 133 Ind. 56, 32 N. E. 823.

61. Merriam *v.* St. Louis, etc., R. Co., 136 Mo. 145, 36 S. W. 630; Cleveland, etc., R. Co. *v.* Jewett, 37 Ohio St. 649.

Existence of assets or property.— On an application by creditors for the appointment of a receiver for a railroad company which has been dissolved, the bill must show the existence of property or assets upon which the court can act. Bigelow *v.* Union Freight R. Co., 137 Mass. 478.

62. Hervey *v.* Illinois Midland R. Co., 28 Fed. 169.

63. Newcastle, etc., R. Co.'s Appeal, 3 Walk. (Pa.) 281.

64. Rochester *v.* Bronson, 41 How. Pr. (N. Y.) 78; Whitehouse *v.* Point Defiance, etc., R. Co., 9 Wash. 558, 38 Pac. 152.

65. Allen *v.* Dallas, etc., R. Co., 1 Fed. Cas. No. 221, 3 Woods 316. See also Chicago, etc., R. Co. *v.* Kenney, 159 Ind. 72, 62 N. E. 26.

66. Langdon *v.* Vermont, etc., R. Co., 54 Vt. 593.

67. Cincinnati, etc., R. Co. *v.* Sloan, 31 Ohio St. 1.

is shown, have the property placed in the hands of a receiver, without making the prior encumbrancers parties;[68] and in a suit by trustees under a railroad mortgage asking for the appointment of a receiver, bondholders under the mortgage are not necessary or proper parties, where the interest of all the bondholders is the same and no misconduct or incompetency on the part of the trustee is charged.[69]

3. Hearing, Order, and Relief Granted. On a motion for the appointment of a receiver the case cannot be heard on its merits as at the final hearing;[70] nor will the court, on an application for the appointment of a receiver, take jurisdiction of and decide questions having no relation to the object for which the receiver is appointed.[71] An application for the appointment of a receiver may be denied temporarily and continued pending negotiations and proceedings which may affect the propriety of making the appointment,[72] and the refusal of a motion for the appointment of a receiver is no bar to a subsequent application by leave of court, even upon the same state of facts;[73] and the order appointing a receiver to take possession of and operate a railroad may be modified or changed by the court without the consent of the parties.[74] It is the better practice for the order appointing the receiver to stipulate as to the debts and liabilities of the company to be paid by the receiver;[75] but it is not essential that the order for the payment of preferred debts should be made at the time and as a condition of the appointment, and if not then made it may be made subsequently.[76] The court in appointing a receiver may impose such terms as a condition of making the appointment as it may deem just and equitable,[77] and the party a king for and accepting the appointment on the conditions imposed will be bound thereby.[78] The court has power to protect its receiver in his possession and control of the property and may enjoin others from interfering therewith;[79] but it cannot, in a suit in which the receiver is appointed, enjoin another railroad company not a party to the suit and not charged with any interference with the property in the possession of the receiver, from discriminating between the receiver's road and the other connecting roads as to the shipments of freight.[80] The court may also determine the compensation to which the receiver shall be entitled.[81]

68. Illinois Cent. R. Co. *v.* Mississippi Cent. R. Co., 12 Fed. Cas. No. 7,008.

69. Skiddy *v.* Atlantic, etc., R. Co., 22 Fed. Cas. No. 12,922, 3 Hughes 320, holding that an application of bondholders to be made parties under such circumstances was properly denied.

70. Kerp *v.* Michigan, etc., R. Co., 14 Fed. Cas. No. 7,727.

71. Taylor *v.* Philadelphia, etc., R. Co., 7 Fed. 381, holding that the court will not determine the propriety of postponing a meeting called for the election of officers.

72. Central Trust Co. *v.* Wabash R. Co., 25 Fed. 693.

73. Belmont *v.* Erie R. Co., 52 Barb. (N. Y.) 637.

74. *Ex p.* Dunn, 8 S. C. 207.

75. Farmers' L. & T. Co. *v.* Kansas City, etc., R. Co., 53 Fed. 182; Central Trust Co. *v.* St. Louis, etc., R. Co., 41 Fed. 551.

76. Central Trust Co. *v.* St. Louis, etc., R. Co., 41 Fed. 551; Blair *v.* St. Louis, etc., R. Co., 22 Fed. 471.

77. Farmers' L. & T. Co. *v.* Kansas City, etc., R. Co., 53 Fed. 182. See also Fosdick *v.* Schall, 99 U. S. 235, 25 L. ed. 339; Dow *v.* Memphis, etc., R. Co., 20 Fed. 260.

If a mortgagee is unwilling to take a receiver on the terms imposed the foreclosure can proceed without a receivership. Central Trust Co. *v.* St. Louis, etc., R. Co., 41 Fed. 551.

If the appointment is not made as a favor to the bondholders but as a matter of legal right under an express provision contained in the mortgage in regard to the appointment of a receiver, the court cannot make claims not already constituting a lien a prior lien upon the corpus of the property, where the income of the road is insufficient to pay current expenses. U. S. Trust Co. *v.* New York, etc., R. Co., 25 Fed. 800.

78. Farmers' L. & T. Co. *v.* Kansas City, etc., R. Co., 53 Fed. 182, holding further that where in a foreclosure suit the trustee in good faith assents to the terms imposed, the bondholders which he represents are as much bound by such assent as if it had been given by them in person.

79. Vermont, etc., R. Co. *v.* Vermont Cent. R. Co., 46 Vt. 792.

80. Wood *v.* New York, etc., R. Co., 61 Fed. 236.

81. *Re* Hull, etc., R. Co., 57 L. T. Rep. N. S. 82, holding that while the court cannot dictate to a person what he shall take it may refuse to appoint or retain as a receiver a person who is unwilling to serve for the compensation allowed.

4. Defenses and Objections to Appointment. The fact that a receiver for a railroad has already been appointed in one action will not prevent the appointment of another receiver in another action by different parties and involving different rights, although affecting the same property; [82] and in a foreclosure suit a receiver may be appointed notwithstanding the road is in the possession of a lessee, where the lessee is a party before the court; [83] nor does the fact that the equipment of a road of one company which is being operated by a different company may be insufficient to enable a receiver to operate it deprive a judgment creditor of a statutory right to have a receiver appointed on the return of his execution unsatisfied.[84] Upon the insolvency of a controlling railroad company, if the allied companies have been carried into the hands of a receiver along with the controlling company they may have receivers of their own appointed.[85]

5. Who May Apply For Appointment. Receivers for railroads may, in a proper case, be appointed upon the application of mortgagees or trustees in a deed of trust,[86] bondholders,[87] stock-holders,[88] creditors,[89] and while it is unusual,[90] it has been held that a receiver may under some circumstances be appointed upon the application of the company itself.[91] The state, although not a creditor of the

82. St. Louis Car Co. *v.* Stillwater St. R. Co., 53 Minn. 129, 54 N. W. 1064, holding that a receivership in a suit to foreclose a railroad mortgage will not prevent the appointment of a receiver in a suit by a judgment creditor to sequester the property and effects of the company for the benefit of creditors, since the first receivership is only for the purpose of foreclosure, and affects only the property covered by the mortgage, while the latter affects the entire property, and the powers of the receivers in the two cases are entirely different.

83. Kerp *v.* Michigan, etc., R. Co., 14 Fed. Cas. No. 7,727.

84. Ball *v.* Maysville, etc., R. Co., 102 Ky. 486, 43 S. W. 731, 18 Ky. L. Rep. 1540, 80 Am. St. Rep. 362.

85. Evans *v.* Union Pac. R. Co., 58 Fed. 497.

86. McLane *v.* Placerville, etc., R. Co., 66 Cal. 606, 6 Pac. 748; Farmers' L. & T. Co. *v.* Winona, etc., R. Co., 59 Fed. 957; Phinizy *v.* Augusta, etc., R. Co., 56 Fed. 273; Mercantile Trust Co. *v.* Missouri, etc., R. Co., 36 Fed. 221, 1 L. R. A. 397; Gray *v.* Manitoba, etc., R. Co., 11 Manitoba 42.

87. Taylor *v.* Philadelphia, etc., R. Co., 14 Phila. (Pa.) 451; Cole *v.* Philadelphia, etc., R. Co., 140 Fed. 944; Putnam *v.* Jacksonville, etc., R. Co., 61 Fed. 440.

88. Stevens *v.* Davidson, 18 Gratt. (Va.) 819, 98 Am. Dec. 692; Cole *v.* Philadelphia, etc., R. Co., 140 Fed. 944; Earle *v.* Seattle, etc., R. Co., 56 Fed. 909.

89. *Illinois.*— Louisville, etc., R. Co. *v.* Southworth, 38 Ill. App. 225.

New York.— Loder *v.* New York, etc., R. Co., 4 Hun 22.

United States.— Sage *v.* Memphis, etc., R. Co., 125 U. S. 361, 8 S. Ct. 887, 31 L. ed. 694.

England.— Kingston *v.* Cowbridge R. Co., 41 L. J. Ch. 152.

Canada.— Peto *v.* Welland R. Co., 9 Grant Ch. (U. C.) 455.

See 41 Cent. Dig. tit. "Railroads," § 680.

The Kentucky statute of 1890 provides that a judgment creditor of a railroad company after execution returned "no property found" in whole or in part may have a receiver for the road appointed. Ball *v.* Maysville, etc., R. Co., 102 Ky. 486, 43 S. W. 731, 18 Ky. L. Rep. 1540, 80 Am. St. Rep. 362.

Under the New Jersey statute authorizing the appointment of a receiver for a railroad in certain cases "upon the application of any creditor," persons who have guaranteed the payment of a debt of such a company are creditors of the company in respect to such debt within the meaning of the statute. Pennsylvania R. Co. *v.* Pemberton, etc., R. Co., 28 N. J. Eq. 338.

The English statute of 1867 expressly provides for the appointment of a receiver, and if necessary also a manager, upon application of a judgment creditor (*In re* Manchester, etc., R. Co., 14 Ch. D. 645, 49 L. J. Ch. 365, 42 L. T. Rep. N. S. 714); but the statute does not apply to a creditor who recovers a judgment upon a contract entered into prior to the passage of the act, although the judgment is recovered subsequently thereto (*In re* Beddgelert R. Co., 24 L. T. Rep. N. S. 122, 19 Wkly. Rep. 427).

A receiver will not be appointed at the instance of creditors for a railroad company which has been dissolved where it is not shown that there are any assets or property with respect to which the court can act. Bigelow *v.* Union Freight R. Co., 137 Mass. 478.

90. Atkins *v.* Wabash, etc., R. Co., 29 Fed. 161.

91. Central Trust Co. *v.* Wabash, etc., R. Co., 29 Fed. 618; Wabash, etc., R. Co. *v.* Central Trust Co., 23 Fed. 513; Wabash, etc., R. Co. *v.* Central Trust Co., 22 Fed. 272. See also Quincy, etc., R. Co. *v.* Humphreys, 145 U. S. 82, 12 S. Ct. 787, 36 L. ed. 632 [*affirming* 34 Fed. 259]. But see State *v.* Ross, 122 Mo. 435, 25 S. W. 947, 23 L. R. A. 534.

company, may, in the interest of the public, apply for the appointment of a receiver in a proceeding to forfeit the charter of the company.[92]

6. Who May or Should Be Appointed. The person appointed as receiver of a railroad should be a person of known character and business capacity,[93] and one who is in a position to represent impartially all the interests concerned.[94] The court in making the appointment should act upon these considerations,[95] and is free to exercise its discretion and cannot be dictated to by bondholders or others interested as to what particular person shall be appointed.[96] The court will not ordinarily appoint an officer or director,[97] or a stock-holder of the road,[98] or an officer of a parallel or competing road,[99] or a party to the suit,[1] or an attorney of one of the parties,[2] or a person pecuniarily interested in the road or under any obligation to those who are.[3] It is also the better practice not to appoint a non-resident,[4] or more than one receiver;[5] but the court may in its discretion appoint a non-resident,[6] or more than one receiver,[7] although if more than one is appointed and they become hostile to each other they should be removed and a single receiver appointed.[8] So also there is no inflexible rule making an officer of the company ineligible to appointment as receiver;[9] and it may not be improper to appoint an officer of the company who was in no way responsible for the condition making the receivership necessary, and whose ability and knowledge of the affairs and needs of the company commend him as a proper person to be appointed,[10] par-

92. Texas Trunk R. Co. *v.* State, 83 Tex. 1, 18 S. W. 199.

93. Farmers' L. & T. Co. *v.* Cape Fear, etc., R. Co., 62 Fed. 675, holding, however, that where the person appointed possesses the qualifications of character, business ability, and the absence of any pecuniary interest, it is no objection to his appointment that he is not a railroad expert in the sense of being acquainted with all the details of the mechanical work of a railroad plant.

94. Pennsylvania Finance Co. *v.* Charleston, etc., R. Co., 45 Fed. 436; Atkins *v.* Wabash, etc., R. Co., 29 Fed 161; Meier *v.* Kansas Pac. R. Co., 16 Fed. Cas. No. 9,395, 5 Dill. 476, 6 Reporter 642.

95. *Re* Hull, etc., R. Co., 57 L. T. Rep. N. S. 82.

96. *Re* Hull, etc., R. Co., 57 L. T. Rep. N. S. 82.

97. Pennsylvania Finance Co. *v.* Charleston, etc., R. Co., 45 Fed. 436; Atkins *v.* Wabash, etc., R. Co., 29 Fed. 161.

One under whose management the condition arose leading up to and making necessary the receivership should not be continued in the control of the road as receiver. Atkins *v.* Wabash, etc., R. Co., 29 Fed. 161; Richards *v.* Chesapeake, etc., R. Co., 20 Fed. Cas. No. 11,771, 1 Hughes 128.

98. Atkins *v.* Wabash, etc., R. Co., 29 Fed. 161.

99. St. Louis, etc., R. Co. *v.* Wear, 135 Mo. 230, 36 S. W. 357, 658, 33 L. R. A. 341, holding that under the Missouri constitution providing that the manager of a railroad company shall not in any way control or act as officer of another railroad company operating a parallel or competing line, the president of one railroad company is not eligible as receiver for a company operating a parallel or competing line.

1. Pennsylvania Finance Co. *v.* Charleston, etc., R. Co., 45 Fed. 436.

2. Pennsylvania Finance Co. *v.* Charleston, etc., R. Co., 45 Fed. 436.

3. Meier *v.* Kansas Pac. R. Co., 16 Fed. Cas. No. 9,395, 5 Dill. 476, 6 Reporter 642.

While a personal interest may stimulate activity and vigilance on the part of the receiver, it is equally liable that such vigilance may when occasion arises be directed unduly to advancing that personal interest. Meier *v.* Kansas Pac. R. Co., 16 Fed. Cas. No. 9,395, 5 Dill. 476, 6 Reporter 642.

4. Meier *v.* Kansas Pac. R. Co., 16 Fed. Cas. No. 9,395, 5 Dill. 476, 6 Reporter 642.

5. Meier *v.* Kansas Pac. R. Co., 16 Fed. Cas. No. 9,395, 5 Dill. 476, 6 Reporter 642.

6. Farmers' L. & T. Co. *v.* Cape Fear, etc., R. Co., 62 Fed. 675. See also Stanton *v.* Alabama, etc., R. Co., 22 Fed. Cas. No. 13,296, 2 Woods 506.

7. See Stanton *v.* Alabama, etc., R. Co., 22 Fed. Cas. No. 13,296, 2 Woods 506; *Re* Hull, etc., R. Co., 57 L. T. Rep. N. S. 82.

8. Meier *v.* Kansas Pac. R. Co., 16 Fed. Cas. No. 9,395, 5 Dill. 476, 6 Reporter 642.

9. Ralston *v.* Washington, etc., R. Co., 65 Fed. 557.

10. Ralston *v.* Washington, etc., R. Co., 65 Fed. 557; Farmers' L. & T. Co. *v.* Northern Pac. R. Co., 61 Fed. 546. See also Bowling Green Trust Co. *v.* Virginia Pass., etc., Co., 133 Fed. 186.

A director may be appointed manager under the English statute of 1867 providing for the appointment of a receiver for a railroad company and if necessary also a manager. *In re* Manchester, etc., R. Co., 14 Ch. D. 645, 49 L. J. Ch. 365, 42 L. T. Rep. N. S. 714.

Construction of order.— On a motion to appoint a receiver in an action in the name of the state for the foreclosure of a railroad mortgage, an order that the president and directors of the company continue in the possession and management of the property

ticularly where the parties interested consent to his appointment.[11] The English statute of 1867, providing for the appointment of receivers for railroads, also provides for the appointment of a manager if necessary;[12] and it is held that such necessity exists and a manager must be appointed whenever the road is to be operated and continued as a going concern;[13] but it seems that the court may either appoint different persons,[14] or may appoint the same person as receiver and manager.[15] The manager like the receiver is to be appointed by and act under the control of the court.[16]

7. Removal of Receivers and Termination of Receivership.[17] Whenever a receiver takes possession under his appointment he holds as an officer of the court and cannot be ousted except by its order;[18] but the power to remove a receiver is incidental to the power to appoint,[19] and is ordinarily a matter within the discretion of the court.[20] The court will remove a receiver for incompetency,[21] or misconduct,[22] or where it appears that the appointment was procured through collusion and for a fraudulent or improper purpose.[23] So also where a receiver is appointed for a railroad company operating different lines of road, and a road is included under the receivership over which such company has no right of possession or control, but is interested in only as a creditor and stock-holder, such road will be released and discharged from the custody of the receiver.[24] The receivership will be continued as long as may be necessary to carry out the purposes of the appointment,[25] which is a matter within the sound discretion of the court;[26] but the road should be restored to its rightful owners as soon as possible,[27] and the receiver should be discharged and the receivership terminated whenever its

under the order of and subject to the court, and that they make report to the court at such times as it may require, constitutes them receivers. *Ex p.* Brown, 15 S. C. 518; *In re* Fifty-four First Mortg. Bonds, 15 S. C. 304.

11. Farmers' L. & T. Co. *v.* Northern Pac. R. Co., 61 Fed. 546.

12. *In re* Manchester, etc., R. Co., 14 Ch. D. 645, 49 L. J. Ch. 365, 42 L. T. Rep. N. S. 714.

13. *In re* Manchester, etc., R. Co., 14 Ch. D. 645, 49 L. J. Ch. 365, 42 L. T. Rep. N. S. 714.

14. See *Re* Hull, etc., R. Co., 57 L. T. Rep. N. S. 82.

15. See *In re* Eastern, etc., R. Co., 45 Ch. D. 367, 63 L. T. Rep. N. S. 604.

16. *In re* Manchester, etc., R. Co., 14 Ch. D. 645, 49 L. J. Ch. 365, 42 L. T. Rep. N. S. 714.

17. Power of judge at chambers or in vacation to discharge receiver see Judges, 23 Cyc. 554.

18. Illinois Cent. R. Co. *v.* Mississippi Cent. R. Co., 12 Fed. Cas. No. 7,008.

19. Cincinnati, etc., R. Co. *v.* Sloan, 31 Ohio St. 1.

20. Milwaukee, etc., R. Co. *v.* Soutter, 154 U. S. 540, 14 S. Ct. 1158, 17 L. ed. 604; Milwaukee, etc., R. Co. *v.* Howard, 131 U. S. appendix lxxxi, 18 L. ed. 252.

The court will not remove a receiver who is competent and otherwise unobjectionable merely because he is not acceptable to a majority stock-holder (Street *v.* Maryland Cent. R. Co., 58 Fed. 47); or even where the receiver has been guilty of a breach of duty where it appears that he acted in good faith and under advice of counsel, and to the best of his judgment for the benefit of all parties (Simpson *v.* Ottawa, etc., R. Co., 1 Ch. Chamb. (U. C.) 337).

21. Atkins *v.* Wabash, etc., R. Co., 29 Fed. 161.

22. Handy *v.* Cleveland, etc., R. Co., 31 Fed. 689; Atkins *v.* Wabash, etc., R. Co., 29 Fed. 161.

Misconduct of an agent of a receiver is not ground for discharging the receiver where it appears that he used due care in selecting and supervising his agents and discharged the wrong-doer as soon as he discovered his misconduct. Clarke *v.* Georgia Cent. R., etc., Co., 66 Fed. 16.

23. Sage *v.* Memphis, etc., R. Co., 18 Fed. 571, 5 McCrary 643.

The mere concurrence of the directors in the attempt to secure the appointment of the receiver does not of itself show a fraudulent collusion for which the receiver should be discharged. Brassey *v.* New York, etc., R. Co., 19 Fed. 663.

24. Georgia Cent. R., etc., Co. *v.* Farmers' L. & T. Co., 56 Fed. 357.

25. Sewell *v.* Cape May, etc., R. Co., (N. J. Ch. 1887) 9 Atl. 785; Langdon *v.* Vermont, etc., R. Co., 54 Vt. 593 [*distinguishing* Vermont, etc., R. Co. *v.* Vermont Cent. R. Co., 50 Vt. 500]; Clarke *v.* Georgia Cent. R., etc., Co., 54 Fed. 556.

26. Milwaukee, etc., R. Co. *v.* Soutter, 154 U. S. 540, 14 S. Ct. 1158, 17 L. ed. 604.

27. Sewell *v.* Cape May, etc., R. Co., (N. J. Ch. 1887) 9 Atl. 785; Milwaukee, etc., R. Co. *v.* Soutter, 2 Wall. (U. S.) 510, 17 L. ed. 900; Platt *v.* Philadelphia, etc., R. Co., 65 Fed. 872; Dow *v.* Memphis, etc., R. Co., 20 Fed. 260; Taylor *v.* Philadelphia, etc., R. Co., 9 Fed. 1.

objects have been accomplished or its continuance is no longer necessary;[28] and where receivers of a railroad company have executed the duty for which they were appointed, it is the right and duty of the party upon whose application they were appointed to see to it that they are discharged if he would avoid the consequences of their continuing to act in that capacity,[29] although the court may act upon its own motion.[30] Where at the time of the receivership one company is operating the road of another, the court will not, on discharging the receiver, determine a controversy between the companies as to the right of possession but will return the road to the company which was in possession at the time of the appointment.[31] A person petitioning the court to remove a receiver for misconduct or incompetency should be prepared not only to prefer specific charges of wrong-doing but to accompany them with proof,[32] but the receiver by answering the petition waives the right to object to it on the ground that the charges were not sufficiently definite.[33]

D. Operation and Effect of Appointment. The appointment of a receiver for a railroad ordinarily has the effect of taking the property out of the possession and control of the company and placing it in the hands of the receiver as the representative of the court.[34] The receiver upon his appointment and qualification is entitled to the possession and control of the property,[35] which the court will assist him in obtaining[36] and subsequently protect against outside interference.[37] The appointment of the receiver does not have the effect of terminating the corporate existence of the company,[38] or affect existing liens or vested property rights,[39] or change the status of unsecured into secured claims.[40] The receiver is not the agent of the railroad company;[41] nor is he, no matter at

28. Louisville, etc., R. Co. *v.* Southworth, 38 Ill. App. 225; Milwaukee, etc., R. Co. *v.* Soutter, 2 Wall. (U. S.) 510, 17 L. ed. 900; Howard *v.* La Crosse, etc., R. Co., 12 Fed. Cas. No. 6,760, Woolw. 49.

A refusal to discharge a receiver and terminate the receivership when it is no longer necessary and a right to a restoration of the property is clear is a judicial error which will be corrected on appeal. Milwaukee, etc., R. Co. *v.* Soutter, 2 Wall. (U. S.) 510, 17 L. ed. 900.

29. Langdon *v.* Vermont, etc., R. Co., 53 Vt. 228.

30. Platt *v.* Philadelphia, etc., R. Co., 65 Fed. 872.

31. Long Branch, etc., R. Co. *v.* Sneden, 26 N. J. Eq. 539.

32. Farmers' L. & T. R. Co. *v.* Northern Pac. R. Co., 61 Fed. 546.

33. Farmers' L. & T. R. Co. *v.* Northern Pac. R. Co., 61 Fed. 546.

34. Ohio, etc., R. Co. *v.* Davis, 23 Ind. 553, 85 Am. Dec. 477; Metz *v.* Buffalo, etc., R. Co., 58 N. Y. 61, 17 Am. Rep. 201; Ellis *v.* Indianapolis, etc., R. Co., 5 Ohio Dec. (Reprint) 497, 6 Am. L. Rec. 288.

Receiver of rents and profits.— Where a receiver is appointed "of the rents, issues, and profits" of a railroad company, the management of the railroad remains in the hands of the company, but the receiver is entitled to receive the gross receipts and not merely the surplus after the payment of operating expenses. Simpson *v.* Ottawa, etc., R. Co., 1 Ch. Chamb. (U. C.) 126.

Under the English statute unpaid capital is not receivable by a receiver appointed under section 4 of the Railway Companies Act of 1867, and therefore the appointment of a receiver of the undertaking of a railway company under that act does not affect the right of a judgment creditor to issue execution against unpaid capital, under section 36 of the Companies Clauses Act of 1845. *Re* West Lancashire R. Co., 63 L. T. Rep. N. S. 56.

35. Union Trust Co. *v.* Weber, 96 Ill. 346; Secor *v.* Toledo, etc., R. Co., 21 Fed. Cas. No. 12,605, 7 Biss. 513; Russell *v.* East Anglian R. Co., 14 Jur. 1033, 20 L. J. Ch. 257, 3 Macn. & G. 104, 6 R. & Can. Cas. 501, 49 Eng. Ch. 80, 42 Eng. Reprint 201.

36. Secor *v.* Toledo, etc., R. Co., 21 Fed. Cas. No. 12,605, 7 Biss. 513; Russell *v.* East Anglian R. Co., 14 Jur. 1033, 20 L. J. Ch. 257, 3 Macn. & G. 104, 6 R. & Can. Cas. 501, 49 Eng. Ch. 80, 42 Eng. Reprint 201.

37. Vermont, etc., R. Co. *v.* Vermont Cent. R. Co., 46 Vt. 792; Secor *v.* Toledo, etc., R. Co., 21 Fed. Cas. No. 12,605, 7 Biss. 513; Thomas *v.* Cincinnati, etc., R. Co., 62 Fed. 803; Fidelity Trust, etc., Co. *v.* Mobile St. R. Co., 53 Fed. 687; Metropolitan Trust Co. *v.* Columbus, etc., R. Co., 95 Fed. 18; Russell *v.* East Anglian R. Co., 14 Jur. 1033, 20 L. J. Ch. 257, 3 Macn. & G. 104, 6 R. & Can. Cas. 501, 49 Eng. Ch. 80, 42 Eng. Reprint 201.

38. Fidelity Ins., etc., Co. *v.* Norfolk, etc., R. Co., 114 Fed. 389 [*affirmed* in 127 Fed. 662, 62 C. C. A. 388].

39. Union Trust Co. *v.* Weber, 96 Ill. 346; *Ex p.* Dunn, 8 S. C. 207.

40. U. S. Trust Co. *v.* New York, etc., R. Co., 25 Fed. 800.

41. Ohio, etc., R. Co. *v.* Davis, 23 Ind. 553, 85 Am. Dec. 477; St. Louis, etc., R. Co. *v.* Brincker, 65 Kan. 321, 69 Pac. 328; Metz

whose instance appointed, the agent or representative of either party to the litigation or any special interest represented therein;[42] but he holds the property as the representative of the court for the benefit of all who may be interested therein or ultimately found to be entitled thereto.[43] The appointment of the receiver is not subject to collateral attack,[44] unless the court was entirely without authority to make such appointment.[45]

E. Contracts and Leases Before Appointment — 1. Contracts. A receiver of a railroad company is not bound by a contract made by the railroad company prior to his appointment and not constituting a lien upon the property,[46] and is not obliged to pay out assets or earnings of the company thereon,[47] nor can he be compelled specifically to perform the same,[48] or held liable in damages for a refusal to do so,[49] unless the contract has been subsequently ratified or adopted,[50] and the receiver is entitled to a reasonable time to look into the con-

v. Buffalo, etc., R. Co., 58 N. Y. 61, 17 Am. Rep. 201; Missouri, etc., R. Co. *v.* McFadden, 89 Tex. 138, 33 S. W. 853.

42. Central Trust Co. *v.* Wabash, etc., R. Co., 23 Fed. 863.

43. Quincy, etc., R. Co. *v.* Humphreys, 145 U. S. 82, 12 S. Ct. 787, 36 L. ed. 632; Memphis, etc., R. Co. *v.* Hoechner, 67 Fed. 456, 14 C. C. A. 469; Central Trust Co. *v.* Wabash, etc., R. Co., 23 Fed. 863; Wabash, etc., R. Co. *v.* Central Trust Co., 22 Fed. 272; *In re* Mersey R. Co., 37 Ch. D. 610, 57 L. J. Ch. 283, 58 L. T. Rep. N. S. 745, 36 Wkly. Rep. 372.

A judgment creditor who obtains an order for the appointment of a receiver does not acquire any priority or advantage over other judgment creditors, and therefore if the road is already in the hands of a receiver the court should refuse to appoint another receiver at the instance of a different judgment creditor. *In re* Mersey R. Co., 37 Ch. D. 610, 57 L. J. Ch. 283, 58 L. T. Rep. N. S. 745, 36 Wkly. Rep. 372.

44. Basting *v.* Ankeny, 64 Minn. 133, 66 N. W. 66; Russell *v.* East Anglian R. Co., 14 Jur. 1033, 20 L. J. Ch. 257, 3 Macn. & G. 104, 6 R. & Can. Cas. 501, 49 Eng. Ch. 80, 42 Eng. Reprint 201.

45. State *v.* Ross, 122 Mo. 435, 25 S. W. 947, 23 L. R. A. 534.

46. Spencer *v.* Brooks, 97 Ga. 681, 25 S. E. 480; Ellis *v.* Boston, etc., R. Co., 107 Mass. 1; Brown *v.* Warner, 78 Tex. 543, 14 S. W. 1032, 22 Am. St. Rep. 67, 11 L. R. A. 394; Southern Express Co. *v.* Western North Carolina R. Co., 99 U. S. 191, 25 L. ed. 319; Whightsel *v.* Felton, 95 Fed. 923; Manhattan Trust Co. *v.* Sioux City, etc., R. Co., 81 Fed. 50; Grand Trunk R. Co. *v.* Central Vermont R. Co., 81 Fed. 541; *In re* Seattle, etc., R. Co., 61 Fed. 541; Ames *v.* Union Pac. R. Co., 60 Fed. 966; Central Trust Co. *v.* Marietta, etc., R. Co., 51 Fed. 15, 16 L. R. A. 90.

Traffic contracts between different roads are not binding upon a receiver of one of the roads (Ames *v.* Union Pac. R. Co., 60 Fed. 966); and where, under an existing contract for a joint use by another company of a part of the tracks and terminal facilities of the receiver's road, there is due a large amount which is unsecured, he may properly after notice sever the connection between the roads (Elmira Iron, etc., Rolling Mill Co. *v.* Erie R. Co., 26 N. J. Eq. 284); but the court may order the receiver to adopt an advantageous traffic contract (Seibert *v.* Minneapolis, etc., R. Co., 58 Minn. 53, 59 N. W. 879); and when both of the contracting roads have been placed in the hands of receivers the court may modify the terms of the contract if unduly burdensome to one of the companies, provided it can be done with due regard to the interest of the other company, so as to make it just and equitable in its application to both (*In re* New Jersey, etc, R. Co., 29 N. J. Eq. 67).

An agreement between a railroad company and its employees whereby the latter are not to be discharged except for cause to be determined by arbitrators is not binding upon a receiver of the road. *In re* Seattle, etc., R. Co., 61 Fed. 541.

Where the contract constitutes a statutory lien the court will order the amount due thereunder to be paid according to the priority of the claim. Newgass *v.* Atlantic, etc., R. Co., 72 Fed. 712.

A covenant in the grant of a right of way that the railroad company will erect and maintain a station upon the land of the grantor is binding upon a receiver of the road, who is liable in damages for discontinuing the station, although ordered to do so by the court. Levy *v.* Tatum, (Tex. Civ. App. 1897) 43 S. W. 941.

47. Ellis *v.* Boston, etc., R. Co., 107 Mass. 1.

Where a railroad company contracted to purchase certain land and constructed its road thereon and then went into the hands of a receiver, it was held, on a petition by the landowner for payment, that as the contract price was exorbitant the court would not order the claim to be paid but would authorize the receiver to pay what was a reasonable compensation. Coe *v.* New Jersey Midland R. Co., 30 N. J. Eq. 21.

48. Southern Express Co. *v.* Western North Carolina R. Co., 99 U. S. 191, 25 L. ed. 319; Central Trust Co. *v.* Marietta, etc., R. Co., 51 Fed. 15, 16 L. R. A. 90.

49. Brown *v.* Warner, 78 Tex. 543, 14 S. W. 1072, 22 Am. St. Rep. 67, 11 L. R. A. 394; Whightsel *v.* Felton, 95 Fed. 923; Keeler *v.* Atchison, etc., R. Co., 92 Fed. 545, 34 C. C. A. 523.

50. Wabash, etc., R. Co. *v.* Central Trust

tract and determine if it is advantageous to adopt it.[51] So also a contract by one receiver creates no legal obligation on a subsequent receiver in the same receivership.[52] The court may authorize a receiver to adopt and carry out an advantageous contract previously made by the company;[53] and if necessary to hold the other party to a performance of a continuing contract may order the receiver to pay amounts due thereunder prior to his appointment as well as those which accrue during the receivership;[54] and where a contract has been adopted the court will see that it is carried out according to its terms, although it may subsequently appear not to be an advantageous contract.[55]

2. Leases. The receiver of a railroad which is operating another road as lessee does not become by reason of his appointment an assignee of the lease and is not bound by its conditions,[56] unless the lease is subsequently adopted;[57] but he has an election subject to the direction of the court whether he will adopt it or not,[58] and is entitled to a reasonable time to investigate the conditions and determine which will be more beneficial to the interests which he represents;[59] and the possession and operation of the road by the receiver during such period,

Co., 22 Fed. 269. See also Brown *v.* Warner, 78 Tex. 543, 14 S. W. 1072, 22 Am. St. Rep. 67, 11 L. R. A. 394.

Building contract.— Where, at the time a receiver was appointed with authority to carry on the business of the railroad company in all its branches, work was being performed by a contractor in constructing certain buildings under a contract with the company, and the receiver took no steps to terminate the contract for several months, after which he ordered the work to be stopped and made a new contract with the contractor for its completion, it was held that the receiver was liable at the original contract price for the work done from the time of his appointment up to the date when he ordered the work to be stopped. Girard L. Ins., etc., Co. *v.* Cooper, 51 Fed. 332, 2 C. C. A. 245.

Contract for water-supply.— Where, in consideration of the grant of a right of way, the railroad company agreed to erect a water tank on the land of the grantor and to pay for water supplied from a spring on such land, and the contract was for a long time deemed advantageous and carried out both by the company and the receiver, it was held that the contract was intended to continue as long as the right of way was used and that the receiver had no right to discontinue the use of the water-supply. Howe *v.* Harding, 76 Tex. 17, 13 S. W. 41, 18 Am. St. Rep. 17.

51. Ames *v.* Union Pac. R. Co., 60 Fed. 966.

52. Kansas Pac. R. Co. *v.* Bayles, 19 Colo. 348, 35 Pac. 744; Lehigh Coal, etc., Co. *v.* New Jersey Central R. Co., 38 N. J. Eq. 175, 41 N. J. Eq. 167, 3 Atl. 134 [*reversed* on the facts in 43 N. J. Eq. 669, 12 Atl. 188].

It is not a ratification of a contract made by a prior receiver that the second receiver after his appointment paid the amount which had accrued thereunder prior to his appointment. Kansas Pac. R. Co. *v.* Bayles, 19 Colo. 348, 35 Pac. 744.

If a receiver does not disaffirm or seek a rescission or modification of a contract made by his predecessor within a reasonable time, he will be bound thereby. South Carolina, etc., R. Co. *v.* South Carolina, etc., R. Co., 93 Fed. 543, 35 C. C. A. 423.

53. Seibert *v.* Minneapolis, etc., R. Co., 58 Minn. 53, 59 N. W. 879; Newgass *v.* Atlantic, etc., R. Co., 72 Fed. 712.

54. Seibert *v.* Minneapolis, etc., R. Co., 58 Minn. 53, 59 N. W. 879, holding that in order to keep the contract in force the court may order such payments to be made as a claim prior to the lien of a mortgage.

55. Wabash, etc., R. Co. *v.* Central Trust Co., 22 Fed. 269.

56. Seney *v.* Wabash, etc., R. Co., 150 U. S. 310, 14 S. Ct. 94, 37 L. ed. 1092; U. S. Trust Co. *v.* Wabash, etc., R. Co., 150 U. S. 287, 14 S. Ct. 86, 37 L. ed. 1085; St. Joseph, etc., R. Co. *v.* Humphreys, 145 U. S. 105, 12 S. Ct. 795, 36 L. ed. 690; Quincy, etc., R. Co. *v.* Humphreys, 145 U. S. 82, 12 S. Ct. 787, 36 L. ed. 632; New York, etc., R. Co. *v.* New York, etc., R. Co., 58 Fed. 268; Park *v.* New York, etc., R. Co., 57 Fed. 799.

The lease of a depot is governed by the same principles as stated in the text. Carswell *v.* Farmers' L. & T. Co., 74 Fed. 88, 20 C. C. A. 282.

Where the mortgage covers the leasehold interest and the receiver is invested with the entire estate, including such interest, and operates the leased line, it has been held that he becomes an assignee of the lease and as such is liable for the rent stipulated. Brown *v.* Toledo, etc., R. Co., 35 Fed. 444. *Compare* New York, etc., R. Co. *v.* New York, etc., R. Co., 58 Fed. 268.

57. Woodruff *v.* Erie R. Co., 93 N. Y. 609 [*reversing* 25 Hun 246]; Central Trust Co. *v.* Continental Trust Co., 86 Fed. 517, 30 C. C. A. 235; Clyde *v.* Richmond, etc., R. Co., 63 Fed. 21.

58. New York, etc., R. Co. *v.* New York, etc., R. Co., 58 Fed. 268.

The court is not bound to direct the receiver to adopt the lease of a road that is not paying expenses and thus impose a loss upon the other road. St. Joseph, etc., R. Co. *v.* Humphreys, 145 U. S. 105, 12 S. Ct. 795, 36 L. ed. 690.

59. U. S. Trust Co. *v.* Wabash, etc., R. Co., 150 U. S. 287, 14 S. Ct. 86, 37 L. ed.

if without any manifestion of an intention to adopt the lease, or opposition to the right of the lessor to resume possession, does not make the lease binding upon the receiver.[60] It is ordinarily, however, a matter of necessity that the receiver shall take at least a temporary possession of the leased road,[61] and the lessor is ordinarily entitled to compensation for the use of the road while in the hands of the receiver,[62] and certainly where there are not earnings which may be so applied;[63] but the amount and rate of compensation will depend upon the circumstances under which the receiver took and held possession.[64] If no intention was manifested to adopt the lease and no objection or obstacle interposed to the lessor's right to recover possession, the receiver will not be liable for the rents stipulated but only for the fair and reasonable value of the use of the property,[65] and in such case the court will ordinarily limit the amount to be paid according to the net earnings of the road,[66] and refuse the payment of rents where there are no earnings over and above operating expenses.[67] A receiver will be liable, however, according to the terms of the lease where the lessor was not at the time of the appointment entitled to demand possession, and the court did not order the possession restored but indicated by its orders that the rent would be paid,[68] or where the lessor, being entitled to demand possession, did so and the demand was refused by the court, and the receiver allowed to retain possession, although the lease was not finally adopted.[69] The court may order or authorize the adoption of a lease,[70] and in such case the receiver will be bound by the covenants and

1085; St. Joseph, etc., R. Co. *v.* Humphreys, 145 U. S. 105, 12 S. Ct. 795, 36 L. ed. 690; Quincy, etc., R. Co. *v.* Humphreys, 145 U. S. 82, 12 S. Ct. 787, 36 L. ed. 632; Johnson *v.* Lehigh Valley Traction Co., 130 Fed. 932; Carswell *v.* Farmers' L. & T. Co., 74 Fed. 88, 20 C. C. A. 282; Park *v.* New York, etc., R. Co., 57 Fed. 799.

60. St. Joseph, etc., R. Co. *v.* Humphreys, 145 U. S. 105, 12 S. Ct. 795, 36 L. ed. 690; Quincy, etc., R. Co. *v.* Humphreys, 145 U. S. 82, 12 S. Ct. 787, 36 L. ed. 632 [*affirming* 34 Fed. 259].

The retention of possession of a depot leased from a depot company for ten months is not an unreasonable time or an adoption of the lease where no intention to adopt it was manifested or possession demanded by the depot company, which on the contrary manifested a preference that the receiver should retain it upon any reasonable terms, and during this period negotiations were pending as to the terms upon which the receiver could afford to retain and use it. Carswell *v.* Farmers' L. & T. Co., 74 Fed. 88, 20 C. C. A. 282.

61. Farmers' L. & T. Co. *v.* Northern Pac. R. Co., 58 Fed. 257; Central Trust Co. *v.* Wabash, etc., R. Co., 46 Fed. 26.

62. Woodruff *v.* Erie, etc., R. Co., 93 N. Y. 609 [*reversing* 25 Hun 246]; Charlotte, etc., R. Co. *v.* Chester, etc., R. Co., 118 N. C. 1078, 24 S. E. 769; Clyde *v.* Richmond, etc., R. Co., 63 Fed. 21; Farmers' L. & T. Co. *v.* Northern Pac. R. Co., 58 Fed. 257.

63. Clyde *v.* Richmond, etc., R. Co., 63 Fed. 21.

64. Farmers' L. & T. Co. *v.* Northern Pac. R. Co., 58 Fed. 257 [*distinguishing* Quincy, etc., R. Co. *v.* Humphreys, 145 U. S. 82, 12 S. Ct. 787, 36 L. ed. 632].

65. New York, etc., R. Co. *v.* New York, etc., R. Co., 58 Fed. 268.

66. Farrar *v.* Southwestern R. Co., 116 Ga. 337, 42 S. E. 527; Central Trust Co. *v.* Wabash, etc., R. Co., 23 Fed. 863.

Where the receiver has already paid to the lessor more than the net earnings of the property while in his possession, the court will not order any other payment to be made out of the *corpus* of the estate. Park *v.* New York, etc., R. Co., 57 Fed. 799.

Consent decree.— Where the lessor of a railroad having the right to take possession on default in the payment of rent, by consenting to a decree permits the road to be operated by receivers, the application of the income of the road to the payment of the rent must be postponed until the expenses of the administration of the receivers have been paid. Langdon *v.* Vermont, etc., R. Co., 54 Vt. 593.

The amount is not necessarily limited according to the actual receipts of the leased road as an equitable basis of compensation, since the value of the leased road as a connecting link in a system may be much greater than the sum actually received for transportation over it. Woodruff *v.* Erie R. Co., 93 N. Y. 609 [*reversing* 25 Hun 246].

67. U. S. Trust Co. *v.* Wabash, etc., R. Co., 150 U. S. 287, 14 S. Ct. 86, 37 L. ed. 1085; Quincy, etc., R. Co. *v.* Humphreys, 145 U. S. 82, 12 S. Ct. 787, 36 L. ed. 632; Cox *v.* Terre Haute, etc., R. Co., 133 Fed. 371, 66 C. C. A. 433 [*affirming* 123 Fed. 439].

68. Brown *v.* Toledo, etc., R. Co., 35 Fed. 444.

69. Farmers' L. & T. Co. *v.* Northern Pac. R. Co., 58 Fed. 257 [*distinguishing* Quincy, etc., R. Co. *v.* Humphreys, 145 U. S. 82, 12 S. Ct. 787, 36 L. ed. 632].

70. Woodruff *v.* Erie R. Co., 93 N. Y. 609 [*reversing* 25 Hun 246]; Mercantile Trust Co. *v.* Farmers' L. & T. Co., 81 Fed. 254, 26 C. C. A. 383 [*affirming* 71 Fed. 601].

conditions of the lease,[71] and liable for the rents according to the terms stipulated therein,[72] which in such cases become a part of the operating expenses and constitute a prior lien to that of a mortgage.[73]

3. LEASES AND CONDITIONAL SALES OF ROLLING STOCK. Leases of rolling stock, which are in some cases made in the form of a conditional sale,[74] are governed by the general principles above stated,[75] that the receiver is not an assignee of the lease or bound by its terms,[76] unless the lease is subsequently adopted,[77] but is entitled to a reasonable time to decide whether it should be adopted or not.[78] The owner of the cars is, however, ordinarily entitled to demand their possession,[79] and to compensation for their use while in the hands of the receiver,[80] which, if the lease is not adopted or the right of the lessor to resume possession resisted, is ordinarily determined not according to the terms of the lease but according to the fair and reasonable value of such use.[81] The court may authorize the adoption

The question of renouncing or adopting a lease is a question of business policy and not of law and the decision and order of the court are administrative rather than judicial and should not be disturbed by an appellate court unless an abuse of discretion is shown. Mercantile Trust Co. *v.* Farmers' L. & T. Co., 81 Fed. 254, 26 C. C. A. 383 [*affirming* 71 Fed. 601].

71. Charlotte, etc., R. Co. *v.* Chester, etc., R. Co., 118 N. C. 1078, 24 S. E. 769; U. S. Trust Co. *v.* Mercantile Trust Co., 88 Fed. 140, 31 C. C. A. 427 [*affirming* 80 Fed. 18]; Clyde *v.* Richmond, etc., R. Co., 63 Fed. 21.

72. Woodruff *v.* Erie R. Co., 93 N. Y. 609 [*reversing* 25 Hun 246]; Central Trust Co. *v.* Continental Trust Co., 86 Fed. 517, 30 C. C. A. 235.

Where the receiver denies that he is operating the road under the lease, the court will not determine this mixed question of law and fact upon a petition to have the receiver comply with the terms of the lease, where all the parties interested are not before the court. People *v.* Erie R. Co., 54 How. Pr. (N. Y.) 59.

73. Central Trust Co. *v.* Continental Trust Co., 86 Fed. 517, 30 C. C. A. 235; Mercantile Trust Co. *v.* Farmers' L. & T. Co., 81 Fed. 254, 26 C. C. A. 383 [*affirming* 71 Fed. 601].

Priorities see *supra*, VIII, A, 9; and, generally, RECEIVERS.

74. See Lane *v.* Macon, etc., R. Co., 96 Ga. 630, 24 S. E. 157; Sunflower Oil Co. *v.* Wilson, 142 U. S. 313, 12 S. Ct. 235, 35 L. ed. 1025; Platt *v.* Philadelphia, etc., R. Co., 84 Fed. 535, 28 C. C. A. 488.

Valuation of cars.— Where, in a foreclosure proceeding, a car company intervened, claiming title to certain cars under a conditional sale, and the case was referred to a master to report upon the advisability of purchasing or returning the cars and also upon their value, it was held that it appearing that the price of rolling stock had gone up ten per cent since the cars were furnished, the master, in estimating their value, properly added ten per cent to the amount for which they were sold before deducting the percentage for wear and tear. Central Trust Co. *v.* Marietta, etc., R. Co., 48 Fed. 875, 1 C. C. A. 140.

75. See *supra*, IX, E, 2.

76. Sunflower Oil Co. *v.* Wilson, 142 U. S. 313, 12 S. Ct. 235, 35 L. ed. 1025; Platt *v.* Philadelphia, etc., R. Co., 84 Fed. 535, 28 C. C. A. 488. But see Southern Iron Car Line Co. *v.* East Tennessee, etc., R. Co., (Tenn. Ch. App. 1897) 42 S. W. 529.

77. Mercantile Trust, etc., Co. *v.* Southern Iron Car Line Co., 113 Ala. 543, 21 So. 373; Easton *v.* Houston, etc., R. Co., 38 Fed. 784.

A promise by the receiver to apply to the court for authority to pay the rent, and that in the meanwhile he will keep the leased cars in good repair if left in his possession, does not bind the trust estate to pay the rent stipulated in the lease. Coe *v.* New Jersey Midland R. Co., 27 N. J. Eq. 37.

A contract by the receiver continuing the lease for a limited time, made by order of the court, does not amount to an adoption of the original lease beyond that period. Platt *v.* Philadelphia, etc., R. Co., 84 Fed. 535, 28 C. C. A. 488.

78. Platt *v.* Philadelphia, etc., R. Co., 84 Fed. 535, 28 C. C. A. 488.

In case of a lease and conditional sale the receiver is entitled to a reasonable time to elect whether to complete the purchase or to return the cars, paying the rent for the time they have been used by him. Sunflower Oil Co. *v.* Wilson, 142 U. S. 313, 12 S. Ct. 235, 35 L. ed. 1025.

79. Farmers' L. & T. Co. *v.* Chicago, etc., R. Co., 42 Fed. 6.

80. Lane *v.* Macon, etc., R. Co., 96 Ga. 630, 24 S. E. 157; Coe *v.* New Jersey Midland, etc., R. Co., 27 N. J. Eq. 37; Platt *v.* Philadelphia, etc., R. Co., 84 Fed. 535, 28 C. C. A. 488; Thomas *v.* Peoria, etc., R. Co., 36 Fed. 808; Turner *v.* Indianapolis, etc., R. Co., 24 Fed. Cas. No. 14,260, 8 Biss. 527, 8 Reporter 453.

Where the receiver turns over the road to another company which operates it as "agent and representative" of the receiver, and agrees to pay "all the expenses of said operations," it is liable for the reasonable value of leased cars retained in the operation of the road. Platt *v.* Philadelphia, etc., R. Co., 84 Fed. 535, 28 C. C. A. 488.

81. Farmers' L. & T. Co. *v.* Chicago, etc., R. Co., 42 Fed. 6. See also Coe *v.* New Jersey Midland R. Co., 27 N. J. Eq. 37.

Even where the court refuses on demand either to adopt the lease or to return the cars, if the owner of the cars did not except

of the lease,[82] and if adopted the receiver is bound by its covenants and conditions,[83] and liable for the rent stipulated therein,[84] which becomes a part of the operating expenses and a preferred claim superior to the lien of a mortgage.[85] So also if a receiver, after adoption of the lease and without the consent of the lessor, leases the cars to another company, he is liable for the rent according to the terms of the original lease.[86]

F. Operation, Control, and Management of Road — 1. In General. Owing to the peculiar nature of a railroad both the public convenience and the private interests in the property demand that when in the hands of a receiver it shall be kept up and maintained as a going concern,[87] and while this is ordinarily done out of the income,[88] and should be whenever the net earnings of the road are sufficient,[89] the court may, when necessary, authorize a receiver to incur an indebtedness for such purposes,[90] such as necessary repairs,[91] or the purchase of rolling stock,[92] and make such indebtedness a first lien upon the property.[93] So also while the court should not ordinarily undertake anything in the nature of a new and distinct enterprise,[94] it is frequently proper for it to authorize something more than the mere operation of the property placed in the hands of the receiver, not as a new enterprise but as a means of better preserving the property or operating it more profitably, such as further works of construction or the leasing of another road.[95] Generally speaking, the court may order or authorize the receiver

to the order but acquiesced therein the amount to be paid should be determined not according to the terms of the lease but according to what would be a reasonable rental during the possession of the receiver. Lane *v.* Macon, etc., R. Co., 96 Ga. 630, 24 S. E. 157.

As to what is a fair and reasonable compensation no definite rule applicable to all cases can be laid down, but generally speaking a fair compensation would be what similar cars to be used in the same manner and upon similar roads would commonly rent for in the open market for the period in question. Thomas *v.* Peoria, etc., R. Co., 36 Fed. 808.

Where the parties agree as to the value of the use of the cars retained and used by a receiver in a foreclosure suit, the court may properly order such amount to be paid by the receiver. Meyer *v.* Western Car Co., 102 U. S. 1, 26 L. ed. 59.

Where the officers of the car company and railroad company are the same the terms of the lease cannot be considered as a basis for the amount of compensation to be paid for the use of the cars. Thomas *v.* Peoria, etc., R. Co., 36 Fed. 808.

82. Mercantile Trust, etc., Co. *v.* Southern Iron Car Line, 113 Ala. 543, 21 So. 373.

83. Easton *v.* Houston, etc., R. Co., 38 Fed. 784, holding that the receiver is bound by a covenant in the lease to keep and return the leased cars in good condition and repair.

84. Mercantile Trust, etc., Co. *v.* Southern Iron Car Line, 113 Ala. 543, 21 So. 373.

85. Mercantile Trust, etc., Co. *v.* Southern Iron Car Line, 113 Ala. 543, 21 So. 373.

Priority of claims see *supra*, VIII, A, 9; and, generally, RECEIVERS.

86. Mercantile Trust, etc., Co. *v.* Southern Iron Car Line, 113 Ala. 543, 21 So. 373.

87. Meyer *v.* Johnston, 53 Ala. 237; Vanderbilt *v.* Central R. Co., 43 N. J. Eq. 669, 12 Atl. 188; Hoover *v.* Montclair, etc., R. Co., 29 N. J. Eq. 4; South Carolina, etc., R. Co. *v.* Carolina, etc., R. Co., 93 Fed. 543, 35 C. C. A. 423.

88. See Meyer *v.* Johnston, 53 Ala. 237.

89. Taylor *v.* Philadelphia, etc., R. Co., 9 Fed. 1, 19 Fed. Cas. No. 11,085*a*, 14 Phila. (Pa.) 501, holding that where the net earnings of the road are sufficient for the purpose the court should not authorize a receiver to borrow money to purchase rolling stock, the only object of the loan being that the net earnings might be applied to the payment of interest on bonds.

90. Meyer *v.* Johnston, 53 Ala. 237; Hoover *v.* Montclair, etc., R. Co., 29 N. J. Eq. 4; Vilas *v.* Page, 106 N. Y. 439, 13 N. E. 743; Union Trust Co. *v.* Illinois Midland R. Co., 117 U. S. 434, 6 S. Ct. 809, 29 L. ed. 963; Wallace *v.* Loomis, 97 U. S. 146, 24 L. ed. 895; Stanton *v.* Alabama, etc., R. Co., 22 Fed. Cas. No. 13,296, 2 Woods 506.

91. Hoover *v.* Montclair, etc., R. Co., 29 N. J. Eq. 4.

92. Vilas *v.* Page, 106 N. Y. 439, 13 N. E. 743.

93. Meyer *v.* Johnston, 53 Ala. 237; Hoover *v.* Montclair, etc., R. Co., 29 N. J. Eq. 4; Vilas *v.* Page, 106 N. Y. 439, 13 N. E. 743; Wallace *v.* Loomis, 97 U. S. 146, 24 L. ed. 895; Stanton *v.* Alabama, etc., R. Co., 22 Fed. Cas. No. 13,296, 2 Woods 506.

Priorities of claims see *supra*, VIII, A, 9; and, generally, RECEIVERS.

94. See Mercantile Trust Co. *v.* Missouri, etc., R. Co., 41 Fed. 8; Ritchie *v.* Central Ontario R. Co., 7 Ont. L. R. 727, 3 Ont. Wkly. Rep. 609.

95. Mercantile Trust Co. *v.* Missouri, etc., R. Co., 41 Fed. 8; Kelly *v.* Green Bay, etc., R. Co., 5 Fed. 846, 10 Biss. 151.

Construction of branch lines. — The court may, if to the advantage of the road in the hands of the receiver, authorize the receiver

to do any acts with regard to the preservation and operation of the road which are within the corporate powers of the company; [96] but the receiver cannot exercise nor can the court authorize him to exercise any powers or franchises beyond those of the company to whose possession he succeeds.[97] While the extent of the receiver's authority independently of any previous order or authority from the court cannot well be precisely defined,[98] he is usually clothed with considerable discretionary power in regard to the ordinary affairs of the road and its operation and is not obliged to first submit all matters to the court,[99] and the court will subsequently confirm whatever acts of the receiver it would have authorized in the first instance had such authority been asked.[1] As a receiver is the agent of the court, his authority is necessarily limited to such powers as the court appointing him is authorized to confer,[2] and which were in fact conferred by the order appointing him,[3] or prescribed by statute where his powers are so defined;[4] and he cannot, without the direction of the court, incur expenses on account of the property in his hands beyond what are necessary for its preservation, use, and

to apply revenues in his hands to the construction of a branch line. Gibert *v.* Washington City, etc., R. Co., 33 Gratt. (Va.) 586.

The court will not authorize a receiver to borrow money and issue certificates which will be a first lien on the property for the purpose of completing a portion of the road without the consent of the bondholders and lien-holders, where it does not appear that such additional work of construction will add to the salable value of the road (Philadelphia Inv. Co. *v.* Ohio, etc., R. Co., 36 Fed. 48); or authorize a receiver to proceed with the construction of a small portion of the incompleted part of a railroad where it is questionable whether such a construction will be of any real benefit to the undertaking, and in the face of the opposition of those of the bondholders whose interest is largely in excess of those desiring it and in the face of a judgment directing a sale of the road (Ritchie *v.* Central Ontario R. Co., 7 Ont. L. R. 727, 3 Ont. Wkly. Rep. 609).

96. Morrison *v.* Forman, 177 Ill. 427, 53 N. E. 73; Gibert *v.* Washington City, etc., R. Co., 33 Gratt. (Va.) 586; South Carolina, etc., R. Co. *v.* Carolina, etc., R. Co., 93 Fed. 543, 35 C. C. A. 423.

Statutory receivers.— Where a receivership is not created by the court but the receiver is appointed by the governor of the state under an internal improvement statute granting aid to the railroad company, and providing for the appointment of a receiver in certain cases, the receivership is governed by the statute, and the powers of the receiver cannot be enlarged by the court. State *v.* Edgefield, etc., R. Co., 6 Lea (Tenn.) 353.

Application of Interstate Commerce Act.— The enactment of the Interstate Commerce Act of 1906, commonly known as the Hepburn Act, and providing that after May 1, 1908, it shall be unlawful for a railroad company to transport from one state to another any commodity mined or produced by it or in which it may have an interest, is not sufficient ground for revoking an authority previously given to a receiver for developing a new mine, improving the line of railroad, and making connections with another road, where it does not appear that after the act would take effect the receiver could not market all the coal within the state or make an advantageous disposition of the mining properties without violating the statute, which applies only to interstate traffic. New York Cent. Trust Co. *v.* Pittsburg, etc., R. Co., 52 Misc. (N. Y.) 195, 101 N. Y. Suppl. 837.

97. Lewis *v.* Germantown, etc., R. Co., 16 Phila. (Pa.) 608.

98. South Carolina, etc., R. Co. *v.* Carolina, etc., R. Co., 93 Fed. 543, 35 C. C. A. 423.

99. South Carolina, etc., R. Co. *v.* Carolina, etc., R. Co., 93 Fed. 543, 35 C. C. A. 423; Phinizy *v.* Augusta, etc., R. Co., 62 Fed. 771.

Application of rule.—A receiver may, without previous authority from the court, incur ordinary operating expenses, such as salaries and the costs of necessary supplies and materials, and the expenses of keeping the road and rolling stock in order (South Carolina, etc., R. Co. *v.* Carolina, etc., R. Co., 93 Fed. 543, 35 C. C. A. 423); and may make a contract with another company which is a joint owner and user of a railroad bridge for the making of necessary repairs upon the bridge (Central Trust Co. *v.* Wabash, etc., R. Co., 52 Fed. 908).

Regulating train service.—An order made by the court adopting a schedule of wages to be paid by the receiver is not violated by the receiver in respect to employees receiving monthly wages by varying the train service to meet changed conditions of traffic, although such change requires somewhat longer hours and more miles of service. Dexter *v.* Union Pac. R. Co., 75 Fed. 947.

1. Phinizy *v.* Augusta, etc., R. Co., 62 Fed. 771.

2. International, etc., R. Co. *v.* Wentworth, 8 Tex. Civ. App. 5, 27 S. W. 680.

3. Gooderham *v.* Toronto, etc., R. Co., 28 Grant Ch. (U. C.) 212.

4. International, etc., R. Co. *v.* Wentworth, 8 Tex. Civ. App. 5, 27 S. W. 680.

operation as contemplated by his appointment.[5] The receiver may, and in many cases must, act through agents,[6] and it will be presumed that an agent occupying a certain position under a receiver is invested with the same authority as if he was in the employ of the railroad company.[7] Although the property is in the custody of the court it is operated by the receiver as a common carrier, whose rights and duties are those of a common carrier,[8] and the court should recognize and conform to the established usages and customs in regard to the operation of railroads.[9] A receiver has no right unjustly to discriminate as to rates and facilities between different connecting carriers,[10] or between different shippers;[11] and the court may make such orders as are necessary to compel the receiver properly to perform his duties as a common carrier and to prevent discriminations,[12] and may compel a receiver to repay amounts exacted by unjust discriminations.[13] The court may also adjust differences between the receiver and his employees, and require a receiver to make such contracts or arrangements in regard to rates of wages and conditions of employment as it may deem proper.[14] The receiver must comply with any statutory requirements as to the use and operation of the road,[15] and a receiver appointed by a federal court must operate the road according to the laws of the state in which it is situated.[16] A receiver cannot, without authority from the court, condemn land on behalf of the railroad company,[17] and it has been doubted whether the court may authorize a receiver to do so;[18]

5. International, etc., R. Co. *v.* Wentworth, 8 Tex. Civ. App. 5, 27 S. W. 680; Cowdrey *v.* Galveston, etc., R. Co., 93 U. S. 352, 23 L. ed. 950; Charlebois *v.* Great North West Cent. R. Co., 11 Manitoba 135.

Application of rule.—A receiver has no right to make expenditures to defeat a proposed subsidy from a city to aid in the construction of a competing road, although its construction might diminish the future earnings of the road in his hands (Cowdrey *v.* Galveston, etc., R. Co., 93 U. S. 352, 23 L. ed. 950); and a receiver has no right to expend money for the maintenance of a reading room for the benefit of employees of the road, since such expenditure is charitable in its nature, and does not properly appertain to the administration of the trust (Langdon *v.* Vermont, etc., R. Co., 54 Vt. 593).

6. Kansas Pac. R. Co. *v.* Bayles, 19 Colo. 348, 35 Pac. 744; South Carolina, etc., R. Co. *v.* Carolina, etc., R. Co., 93 Fed. 543, 35 C. C. A. 423.

7. Kansas Pac. R. Co. *v.* Bayles, 19 Colo. 348, 35 Pac. 744; Northern Pac. R. Co. *v.* American Trading Co., 195 U. S. 439, 25 S. Ct. 84, 49 L. ed. 269 [*affirming* 120 Fed. 873, 57 C. C. A. 533 (*reversing* 112 Fed. 829)].

8. Beers *v.* Wabash, etc., R. Co., 34 Fed. 244.

9. Central Trust Co. *v.* Colorado Midland R. Co., 89 Fed. 560, holding that where a receiver acts in accordance with the common usage of the business in paying claims for lost express matter, upon affidavits as to its value, such evidence should be accepted as sufficient by the court.

10. Cutting *v.* Florida R., etc., Co., 43 Fed. 747; Beers *v.* Wabash, etc., R. Co., 34 Fed. 244; Missouri Pac. R. Co. *v.* Texas, etc., R. Co., 30 Fed. 2.

11. Cincinnati Stock-Yards Co. *v.* United R. Stock-Yards Co., 8 Ohio Dec. (Reprint) 395, 7 Cinc. L. Bul. 295; McCoy *v.* Marietta, etc., R. Co., 15 Fed. Cas. No. 8,730*b*.

12. Cincinnati Stock-Yards Co. *v.* United R. Stock-Yards Co., 8 Ohio Dec. (Reprint) 395, 7 Cinc. L. Bul. 295; Missouri Pac. R. Co. *v.* Texas, etc., R. Co., 30 Fed. 2.

A federal court will not enjoin a receiver appointed by and under the control of a state court from discriminating between different shippers, but will leave the petitioner to apply to the state court for the proper relief. McCoy *v.* Marietta, etc., R. Co., 15 Fed. Cas. No. 8,730*b*.

13. Cutting *v.* Florida, etc., R. Co., 43 Fed. 747.

14. Waterhouse *v.* Comer, 55 Fed. 149, 19 L. R. A. 403.

15. Peckham *v.* Dutchess County R. Co., 145 N. Y. 385, 40 N. E. 15 [*modifying* 81 Hun 399, 31 N. Y. Suppl. 105], holding that where, after a judgment was rendered against a railroad company, requiring it to construct a farm crossing as required by statute, the company leased its road to another company for which a receiver was subsequently appointed, the receiver should be required to construct the crossing or in case he had not means to do so and the bondholders in whose interest he was appointed would not furnish the means, he should be required to surrender the property upon which the road was constructed to the owner entitled to the crossing and be enjoined from making any further use of it until the judgment was complied with.

16. Erb *v.* Morasch, 177 U. S. 584, 20 S. Ct. 819, 44 L. ed. 897 [*affirming* 60 Kan. 251, 56 Pac. 133].

17. Minneapolis Western R. Co. *v.* Minneapolis, etc., R. Co., 61 Minn. 502, 63 N. W. 1035.

18. See Minneapolis Western R. Co. *v.* Minneapolis, etc., R. Co., 61 Minn. 502, 63 N. W. 1035.

but it has been held that the court may do so when necessary to complete an undertaking previously commenced by the company and which is essential to the profitable operation of the road.[19]

2. Contracts of Receivers. The court may authorize a receiver to make any contracts necessary for the preservation and operation of the road which are within the corporate powers of the company,[20] and the receiver is ordinarily invested with a broad discretion as to the making of such contracts,[21] and is not required in all cases to first procure authority from the court.[22] So a receiver may without previous authority from the court make contracts for necessities for the operation of the road,[23] make contracts as to rates of transportation,[24] and the giving of such rebates as are not unlawful,[25] contract with a shipper to furnish cars at a certain time and place,[26] and make contracts for through transportation to points beyond the terminus of the road under his control;[27] but a receiver has no right, without the sanction of the court, to make contracts involving a large outlay of money or extending beyond the receivership,[28] and the court will not authorize a large expenditure which is not absolutely essential for the proper maintenance and operation of the road and which can be met only by anticipating income.[29] The receiver's contracts are subject to the approval of the court;[30] but the court will ordinarily recognize and enforce all contracts made in good faith and for a proper purpose, although not previously authorized,[31] even where the contract may seem to be improvident if it has been fully performed in good faith and without notice on the part of the other party as to its improvident character;[32] and where the contract has not been performed and the

19. Morrison *v.* Forman, 177 Ill. 427, 53 N. E. 73, holding that under such circumstances the court may authorize a receiver to condemn lands for a depot, yards, and sidings.

20. South Carolina, etc., R. Co. *v.* Carolina, etc., R. Co., 93 Fed. 543, 35 C. C. A. 423, holding that where a road in the hands of a receiver is not paying expenses the receiver may, with the consent of the court, contract with another company to operate it, and may in such contract agree to save the operating company harmless against actions for damages by reason of its operation of the road.

21. Vanderbilt *v.* Central R. Co., 43 N. J. Eq. 669, 12 Atl. 188; Northern Pac. R. Co. *v.* American Trading Co., 195 U. S. 439, 25 S. Ct. 84, 49 L. ed. 269 [*affirming* 120 Fed. 873, 57 C. C. A. 533 (*reversing* 112 Fed. 829)].

22. Kansas Pac. R. Co. *v.* Bayles, 19 Colo. 348, 35 Pac. 744; Vanderbilt *v.* Central R. Co., 43 N. J. Eq. 669, 12 Atl. 188; South Carolina, etc., R. Co. *v.* Carolina, etc., R. Co., 93 Fed. 543, 35 C. C. A. 423.

Authority from the court is only necessary in those cases where the intention of the receiver is to make contracts involving large expenditures or for extraordinary purposes or creating obligations extending beyond the receivership. South Carolina, etc., R. Co. *v.* Carolina, etc., R. Co., 93 Fed. 543, 35 C. C. A. 423.

23. South Carolina *v.* Port Royal, etc., R. Co., 89 Fed. 565.

24. Kansas Pac. R. Co. *v.* Bayles, 19 Colo. 348, 35 Pac. 744; Bayles *v.* Kansas Pac. R. Co., 13 Colo. 181, 22 Pac. 341, 5 L. R. A. 480.

The receiver of a railroad may give an unusually low rate in order to introduce into general use a cheap and valuable article which if brought into general demand would add to the freight receipts of the roads handling it. Clarke *v.* Central R., etc., Co., 66 Fed. 16.

25. Kansas Pac. R. Co. *v.* Bayles, 19 Colo. 348, 35 Pac. 744; *Ex p.* Benson, 18 S. C. 38, 44 Am. Rep. 564.

26. San Antonio, etc., R. Co. *v.* Barnett, (Tex. Civ. App. 1898) 44 S. W. 20 [*distinguishing* International, etc., R. Co. *v.* Wentworth, 8 Tex. Civ. App. 5, 27 S. W. 680].

27. Kansas Pac. R. Co. *v.* Bayles, 19 Colo. 348, 35 Pac. 744; Northern Pac. R. Co. *v.* American Trading Co., 195 U. S. 439, 25 S. Ct. 84, 49 L. ed. 269 [*affirming* 120 Fed. 873, 57 C. C. A. 533 (*reversing* 112 Fed. 829)]. But see International, etc., R. Co. *v.* Wentworth, 8 Tex. Civ. App. 5, 27 S. W. 680.

28. Chicago Deposit Vault Co. *v.* McNulta, 153 U. S. 554, 14 S. Ct. 915, 38 L. ed. 819.

29. Lee *v.* Victoria R. Co., 29 Grant Ch. (U. C.) 110.

30. Vanderbilt *v.* Central R. Co., 43 N. J. Eq. 669, 12 Atl. 188; Chicago Deposit Vault Co. *v.* McNulta, 153 U. S. 554, 14 S. Ct. 915, 38 L. ed. 819; South Carolina *v.* Port Royal, etc., R. Co., 89 Fed. 565.

31. South Carolina, etc., R. Co. *v.* Carolina, etc., R. Co., 93 Fed. 543, 35 C. C. A. 423; South Carolina *v.* Port Royal, etc., R. Co., 89 Fed. 565. See also Kerr *v.* Little, 42 N. J. Eq. 528, 9 Atl. 110 [*reversed* on the facts in 44 N. J. Eq. 263, 14 Atl. 613].

32. See Vanderbilt *v.* Central R. Co., 43 N. J. Eq. 669, 12 Atl. 188.

court refuses to order it carried out on account of its improvident character, it may allow the other party compensation for expenditures made in good faith preparatory to carrying out the contract on its part.[33] The receiver may contract through agents,[34] but he cannot delegate to an agent any greater powers than he himself possesses.[35] The contracts of a receiver are not binding upon him personally unless he has pledged his individual credit, but only in his representative capacity.[36] A traffic contract made by a receiver with another road, allowing the latter to operate trains over his road, if without any stipulation as to its continuance, is terminable at the will of the receiver.[37]

3. Making or Taking Leases. The court may, whenever essential to a more profitable operation of the road in the hands of the receiver, authorize the receiver to lease and operate another road;[38] but a receiver has no authority to make a lease without the approval of the court,[39] and a statutory receiver appointed by the governor of the state under a statute granting aid to the company and providing for the appointment of a receiver to operate the road in case of a default in the payment on the part of the railroad company cannot, in the absence of statutory authority, lease the road to another company,[40] even with the consent and approval of the governor.[41]

G. Rights and Liabilities of Company After Discharge of Receiver — 1. In General. Since, when a receiver for a railroad has been duly appointed by a court of competent jurisdiction, the property is in the custody of the court, and the receiver is the agent of the court and not of the company,[42] the railroad company is not ordinarily liable after the discharge of the receiver for any claims arising against the receiver as such during the receivership,[43] whether in contract or in tort.[44] So the company will not ordinarily be liable for claims based upon the negligence or misconduct of the receiver or his employees in the operation of the road,[45] or bound by his contracts,[46] nor can the company enforce against a third person a contract made by such person with the receiver.[47] The rule as to the non-liability of the railroad company is in some cases changed by statute,[48]

33. Vanderbilt *v.* Central R. Co., 43 N. J. Eq. 669, 12 Atl. 188.

34. Bayles *v.* Kansas Pac. R. Co., 13 Colo. 181, 22 Pac. 341, 5 L. R. A. 480; Northern Pac. R. Co. *v.* American Trading Co., 195 U. S. 439, 25 S. Ct. 84, 49 L. ed. 269 [*affirming* 120 Fed. 873, 57 C. C. A. 533 (*reversing* 112 Fed. 829)].

35. International, etc., R. Co. *v.* Wentworth, 8 Tex. Civ. App. 5, 27 S. W. 680.

36. Vanderbilt *v.* Central R. Co., 43 N. J. Eq. 669, 12 Atl. 188; Newman *v.* Davenport, 9 Baxt. (Tenn.) 538.

37. Philadelphia Inv. Co. *v.* Ohio, etc., R. Co., 41 Fed. 378.

38. Gilbert *v.* Washington City, etc., R. Co., 33 Gratt. (Va.) 586; Mercantile Trust Co. *v.* Missouri, etc., R. Co., 41 Fed. 8.

39. Chicago Deposit Vault Co. *v.* McNulta, 153 U. S. 554, 14 S. Ct. 915, 38 L. ed. 819.

40. State *v.* McMinnville, etc., R. Co., 6 Lea (Tenn.) 369; McMinnville, etc., R. Co. *v.* Huggins, 3 Baxt. (Tenn.) 177.

Ratification of such a lease can be made only by the legislature and the acceptance of rent if not accepted by any legislative action is not a ratification, and the lease being unauthorized and void the lessee is not entitled to the value of improvements made upon the road. State *v.* McMinnville, etc., R. Co., 6 Lea (Tenn.) 369.

41. State *v.* McMinnville, etc., R. Co., 6 Lea (Tenn.) 369.

42. Ohio, etc., R. Co. *v.* Davis, 23 Ind. 553, 85 Am. Dec. 477; Metz *v.* Buffalo, etc., R. Co., 58 N. Y. 61, 17 Am. Rep. 201; Ellis *v.* Indianapolis, etc., R. Co., 5 Ohio Dec. (Reprint) 497, 6 Am. L. Rec. 289; Missouri, etc., R. Co. *v.* McFadden, 89 Tex. 138, 33 S. W. 853.

43. Godfrey *v.* Ohio, etc., R. Co., 116 Ind. 30, 18 N. E. 61; Ohio, etc., R. Co. *v.* Davis, 23 Ind. 553, 85 Am. Dec. 477; Metz *v.* Buffalo, etc., R. Co., 58 N. Y. 61, 17 Am. Rep. 201; Missouri, etc., R. Co. *v.* McFadden, 89 Tex. 138, 33 S. W. 853; Davis *v.* Duncan, 19 Fed. 477.

44. Godfrey *v.* Ohio, etc., R. Co., 116 Ind. 30, 18 N. E. 61.

45. See *infra*, X, C, 9, c.

46. Ellis *v.* Indianapolis, etc., R. Co., 5 Ohio Dec. (Reprint) 497, 6 Am. L. Rec. 288.

47. Consolidated Coal, etc., Co. *v.* Cincinnati, etc., R. Co., 9 Ohio Dec. (Reprint) 15, 10 Cinc. L. Bul. 42, holding that an agreement with the receiver of a railroad to supply coal for the use of the road for a certain time cannot be enforced by the company after the discharge of the receiver and surrender of the road to the company, although the full term for which such agreement was to be operative has not expired.

48. Yoakum *v.* Kroeger, (Tex. Civ. App. 1894) 27 S. W. 953; Missouri, etc., R. Co. *v.* Chilton, 7 Tex. Civ. App. 183, 27 S. W. 272.

or by an express assumption of such liability by the company;[49] and where the road is returned to the company without sale and with permanent improvements made by the receiver out of the net earning of the road collected by him, the company will be liable for claims ar sing against the receiver and payable out of such earnings,[50] to the extent of the funds so diverted.[51] The company will be liable on a contract made by it, although at the time of performance the road is in the hands of a receiver;[52] and a judgment rendered against the company while the roads is in the hands of a receiver operates as a lien upon its property, and if kept alive may be enforced against the property after the discharge of the receiver and its return to the company.[53] A recognition by the court of the maintenance of a bridge over a cut on an abandoned right of way as a charge on the assets in the hands of a receiver imposes no duty upon the company subsequently to maintain the bridge, where no such duty would otherwise exist.[54] Where the receiver is discharged and the court orders all the property to be turned over to a newly organized company, subject to an agreement on the part of such company to pay "all outstanding debts and claims against said receivership," the order does not include a judgment against the old company which was never presented to or allowed by the receiver, and which never became a debt or claim against the receivership.[55]

2. Actions and Proceedings. In an action against a railroad company on a cause of action arising against a receiver, all the facts necessary to show a liability on the part of the company therefor must be alleged and proved,[56] and a special verdict must find upon every issue necessary to establish such liability.[57] Under a statute imposing an absolute liability upon the company for claims arising against the receivership, it is not necessary to allege or prove any investment of funds in betterments on the road.[58] Where the company is liable by

In Texas the statute of 1889 makes the railroad company upon the restoration of its property without sale liable for any unpaid liabilities of the receiver arising out of and during the receivership, without regard to the question of betterments (Yoakum v Kroeger, (Civ. App. 1894) 27 S. W. 953); but the statute has been held not to be applicable to cases where the receiver was appointed by a federal court (Missouri, etc., R. Co. *v.* Wood, (Civ. App. 1899) 52 S. W. 93); or at least in so far as it provides for the rendition of judgments against a receiver after his discharge in actions pending at that time (Fordyce *v.* Du Bose, 87 Tex. 78, 26 S. W. 1050; Fordyce *v.* Beecher, 2 Tex. Civ. App. 29, 21 S. W. 179).

49. Missouri, etc., R. Co. *v.* Chilton, 7 Tex. Civ. App. 183, 27 S. W. 272.

50. Texas, etc., R. Co. *v.* Donovan, 86 Tex. 378, 25 S. W. 10; Boggs *v.* Brown, 82 Tex. 41, 17 S. W. 830; Texas, etc., R. Co. *v.* Geiger, 79 Tex. 13, 15 S. W. 214; Missouri, etc., R. Co. *v.* Lacy, 13 Tex. Civ. App. 391, 35 S. W. 505; Garrison *v.* Texas, etc., R. Co., 10 Tex. Civ. App. 136, 30 S. W. 725; Texas, etc., R. Co. *v.* Manton, 164 U. S. 636, 17 S. Ct. 216, 41 L. ed. 580 [*affirming* 60 Fed. 979, 9 C. C. A. 300].

Rejection of claim by federal court.— Where a receiver has been discharged and the property returned to the company with betterments, it is liable on a judgment recovered against the receiver in a state court, although the federal court which appointed the receiver rejected the claim on intervention. Garrison *v.* Texas, etc., R. Co., 10 Tex. Civ. App. 136, 30 S. W. 725.

51. Missouri, etc., R. Co. *v.* Lacy, 13 Tex. Civ. App. 391, 35 S. W. 505.

52. Gulf, etc., R. Co. *v.* Insurance Co. of North America, (Tex. Civ. App. 1894) 28 S. W. 237.

53. Mather *v.* Cincinnati R. Tunnel Co., 3 Ohio Cir. Ct. 284, 2 Ohio Cir. Dec. 161.

54. Alabama, etc., R. Co. *v.* Brandon, (Miss. 1893) 14 So. 438.

55. Ferguson *v.* Toledo, etc., R. Co., 85 N. Y. App. Div. 352, 83 N. Y. Suppl. 283 [*affirmed* in 183 N. Y. 557, 76 N. E. 1095].

56. Texas, etc., R. Co. *v.* Adams, 78 Tex. 372, 14 S. W. 666, 22 Am. St. Rep. 56; Howe *v.* St. Clair, 8 Tex. Civ. App. 101, 27 S. W. 800.

On a petition seeking to establish liens provided for by the Texas statute of 1889, upon property turned over to a company by a receiver, for unpaid liabilities arising during the receivership, the discharge of the receiver must be alleged. Howe *v.* St. Clair, 8 Tex. Civ. App. 101, 27 So. 800.

If it is shown that betterments were made upon the road and that it was returned to the company without sale, it will be presumed that such betterments were made out of the earnings of the road, and the burden is upon defendant to show the contrary. Missouri, etc., R. Co. *v.* Chilton, 7 Tex. Civ. App. 183, 27 S. W. 272.

57. Texas, etc., R. Co. *v.* Watson, 13 Tex. Civ. App. 555, 36 S. W. 290.

58. International, etc., R. Co. *v.* Cook, 16

reason of the return of the road with betterments, the claim need not be adjusted in the court appointing the receiver, but an action may be brought in another court,[59] and plaintiff may sue at law and recover a personal judgment against the company.[60] In such cases the court has no right to require that such claims shall be established by intervention in the original suit,[61] or within a specified time,[62] and the same rule applies where the liability is imposed by statute.[63] In an action against a railroad company if the receivership has been terminated and the receiver discharged, he is not a necessary party defendant,[64] and if the action is brought against both the receiver and the company judgment may be rendered against the company alone.[65] In the absence of statute a judgment cannot be rendered against a receiver after his discharge which will bind either the property or the railroad company.[66]

H. Foreign and Ancillary Receiverships — 1. Foreign Appointment. A court cannot extend its jurisdiction by the appointment of a receiver,[67] and the authority of a receiver as such is limited by the territorial jurisdiction of the court appointing him,[68] and any recognition accorded him beyond such limits rests entirely upon comity;[69] but through comity the authority of a receiver appointed in one jurisdiction will be recognized in many ways by the courts of other jurisdictions,[70] and generally, whenever to do so would not be contrary to the laws or public policy of the latter jurisdictions, or prejudicial to the rights of their citizens;[71] but such courts will not accord to a foreign receiver rights or powers to which he would not be entitled in the jurisdiction of his appointment.[72]

2. Ancillary Appointment. Where a railroad extending through different states or jurisdictions is placed in the hands of a receiver, it is ordinarily highly desirable that it should be operated under a single management;[73] and while it has been held that in such cases a court of one jurisdiction may appoint a receiver for the entire line if it has jurisdiction of the person of the corporation, and may compel the company to execute assignments of property situated in other jurisdictions to the receiver,[74] the usual practice is to institute ancillary proceedings in the jurisdictions other than that in which the receiver was first appointed,[75] the courts of such jurisdictions, both through comity and to secure a harmonious and more profitable management,

Tex. Civ. App. 386, 41 S. W. 665; Yookum *v.* Kroeger, (Tex. Civ. App. 1894) 27 S. W. 953.

59. Texas, etc., R. Co. *v.* Geiger, 79 Tex. 13, 15 S. W. 214.

60. Texas, etc., R. Co. *v.* Manton, 164 U. S. 636, 17 S. Ct. 216, 41 L. ed. 580 [*affirming* 60 Fed. 979, 9 C. C. A. 300].

61. Texas, etc., R. Co. *v.* Bailey, 83 Tex. 19, 18 S. W. 481; Texas, etc., R. Co. *v.* Griffin, 76 Tex. 441, 13 S. W. 471; Texas, etc., R. Co. *v.* Johnson, 76 Tex. 421, 13 S. W. 463, 18 Am. St. Rep. 60.

62. Texas, etc., R. Co. *v.* Watts, (Tex. 1891) 18 S. W. 312; Texas, etc., R. Co. *v.* Johnson, 76 Tex. 421, 13 S. W. 463, 18 Am. St. Rep. 66.

63. Missouri, etc., R. Co. *v.* Chilton, 7 Tex. Civ. App. 183, 27 S. W. 272.

64. San Antonio, etc., R. Co. *v.* Barnett, (Tex. Civ. App. 1898) 44 S. W. 20.

65. Bonner *v.* Blum, (Tex. Civ. App. 1894) 25 S. W. 60.

66. Texas, etc., R. Co. *v.* Watson, (Tex. Civ. App. 1894) 24 S. W. 952.

67. Atkins *v.* Wabash, etc., R. Co., 29 Fed. 161.

68. Dillon *v.* Oregon, etc., R. Co., 66 Fed. 622; Atkins *v.* Wabash, etc., R. Co., 29 Fed. 161.

69. Bagby *v.* Atlantic, etc., R. Co., 86 Pa. St. 291.

70. Guaranty Trust, etc., Co. *v.* Philadelphia, etc., R. Co., 69 Conn. 709, 38 Atl. 792, 38 L. R. A. 804; Robertson *v.* Staed, 135 Mo. 135, 36 S. W. 610, 58 Am. St. Rep. 569, 23 L. R. A. 303; Dillon *v.* Oregon, etc., R. Co., 66 Fed. 622.

71. Robertson *v.* Staed, 135 Mo. 135, 36 S. W. 610, 58 Am. St. Rep. 569, 33 L. R. A. 203.

72. Bagby *v.* Atlantic, etc., R. Co., 86 Pa. St. 291.

73. Port Royal, etc., R. Co. *v.* King, 93 Ga. 63, 19 S. E. 809, 24 L. R. A. 730; Dillon *v.* Oregon, etc., R. Co., 66 Fed. 622; New York, etc., R. Co. *v.* New York, etc., R. Co., 58 Fed. 263.

74. Wilmer *v.* Atlanta, etc., R. Co., 30 Fed. Cas. No. 17,775, 2 Woods 409. See also *supra*, IX, C, 1.

75. Central Trust Co. *v.* Wabash, etc., R. Co., 29 Fed. 618. But see Taylor *v.* Atlantic, etc., R. Co., 57 How. Pr. (N. Y.) 9.

Where an ancillary appointment is the only relief demanded the court has refused to entertain jurisdiction of the bill (Mercantile Trust Co. *v.* Kanawha, etc., R. Co., 39 Fed. 337); but the court may entertain a bill for such purpose or may make such appoint-

appointing the same person as receiver.[76] The court of initial proceeding and by which the receiver was first appointed is the court of primary jurisdiction[77] and should direct and control the receiver in regard to the operation and management of the property as a whole, and through comity the courts of ancillary jurisdiction should recognize and assist in carrying out its orders and directions.[78] This rule does not involve a refusal of jurisdiction or surrender of judicial independence on the part of the courts of ancillary appointment;[79] but on the contrary the courts of one jurisdiction cannot, and should not if they had such power, delegate or surrender to the courts of another jurisdiction the powers which the laws of their own states and justice to their own citizens require that they should retain and exercise.[80] The courts of ancillary appointment still have power with regard to the portion of the road or property within their territorial jurisdictions to make such independent orders affecting the operation of that part of the road as the interests of the property may require or the nature of the proceedings in both courts justify,[81] to hear and determine claims,[82] and to pass upon questions of rights of property in their jurisdictions;[83] and where they may properly afford relief will not require their citizens to go into the courts of other jurisdictions for the enforcement of their rights;[84] and comity requires that such acts and orders

ment in an *ex parte* proceeding (Platt *v.* Philadelphia, etc., R. Co., 54 Fed. 569).

76. Port Royal, etc., R. Co. *v.* King, 93 Ga. 63, 19 S. E. 809, 24 L. R. A. 730; Dillon *v.* Oregon, etc., R. Co., 66 Fed. 622; New York, etc., R. Co. *v.* New York, etc., R. Co., 58 Fed. 268; Central Trust Co. *v.* Wabash R. Co., 29 Fed. 618.

Circumstances might arise which would justify the appointment of a different person as receiver in the different jurisdictions, but as such appointments tend to break up the road or system and create conflicts between the different courts in the administration of the same property, they should not be made unless strong reasons therefor are presented. New York, etc., R. Co. *v.* New York, etc., R. Co., 58 Fed. 268.

Removal of receiver.— Where the same receiver has been appointed by the courts of different jurisdictions, the court of ancillary jurisdiction has the power to remove such receiver as to the property within its jurisdiction and appoint a different person (Central Trust Co. *v.* Wabash, etc., R. Co., 29 Fed. 618); but the practice has been condemned as being in disregard of the comity which should exist between the different courts, it being held that an application for removal should be addressed to the court of primary jurisdiction (Chattanooga, etc., R. Co. *v.* Felton, 69 Fed. 273).

77. Dillon *v.* Oregon, etc., R. Co., 66 Fed. 622.

The proceeding ought properly to be instituted in a jurisdiction where the principal offices of the road are located and where there is some material part of its road, and this court should be the court of primary jurisdiction; but where a receiver appointed by the court of a certain district has been recognized for over two years by all the parties and the courts of the different districts traversed by the road as the court of primary jurisdiction, the same person having been appointed by ancillary proceedings in all of such districts, these courts should continue to recognize the original appointing court as the court of primary jurisdiction, although the only property controlled by the railroad company in such district consisted of a leased line which was surrendered to its owners within a month after the receiver was appointed. Farmers' L. & T. Co. *v.* Northern Pac. R. Co., 72 Fed. 26 [*overruling* Farmers' L. & T. Co. *v.* Northern Pac. R. Co., 69 Fed. 871].

78. Guarantee Trust, etc., Co. *v.* Philadelphia, etc., R. Co., 69 Conn. 709, 38 Atl. 792, 38 L. R. A. 804; Dillon *v.* Oregon, etc., R. Co., 66 Fed. 622; Ames *v.* Union Pac. R. Co., 60 Fed. 966.

The rule is not based upon comity alone but is a rule of utility resting upon sound public policy. Any other rule would tend to break up a road or system of roads into as many different lines as there were courts having jurisdiction over the different portions and to create confusion and conflict of authority and financial loss in its operation. Dillon *v.* Oregon, etc., R. Co., 66 Fed. 622.

Absolute uniformity is not always possible in the different jurisdictions, since the rights of all parties must be governed by the statutes and course of decision and procedure in each respectively, and as to mere matters of procedure, such as for the allowance and payment of claims, a lack of uniformity in the orders of the different courts is not material. Central Trust Co. *v.* Texas, etc., R. Co., 22 Fed. 135.

79. Dillon *v.* Oregon, etc., R. Co., 66 Fed. 622.

80. Taylor *v.* Atlantic, etc., R. Co., 57 How. Pr. (N. Y.) 9.

81. Guarantee Trust, etc., Co. *v.* Philadelphia, etc., R. Co., 69 Conn. 709, 38 Atl. 792, 38 L. R. A. 804.

82. Ames *v.* Union Pac. R. Co., 60 Fed. 966.

83. Chattanooga, etc., R. Co. *v.* Felton, 69 Fed. 273.

84. Chattanooga, etc., R. Co. *v.* Felton, 69

should be respected by the court of primary jurisdiction.[85] Where, however, all the accounts are being filed and settled and disbursements made under the direction of the court of primary jurisdiction, that court is the proper forum in which to apply for the payment of claims.[86] The same receiver may be appointed by different courts and the appointments be merely concurrent, without one being primary and the other ancillary, jurisdiction and control being alike invoked and conceded by each of the tribunals, and each being competent to enforce the observance of obligations arising under its sanction.[87]

3. Actions and Proceedings. While as a general rule a receiver cannot, in the absence of statute, be sued without leave of the court appointing him,[88] a receiver appointed in one jurisdiction may by leave of the court appointing him be sued in another jurisdiction,[89] and in a garnishment proceeding the fact that a receiver is a non-resident is immaterial where he is operating a road within the jurisdiction of the court issuing the garnishee process and where the sum due to the judgment debtor is payable.[90]

X. OPERATION.

A. Duty to Operate and Injuries From Operation*— 1. Nature and Extent of Duty — a. In General.[91] The franchises, rights, and privileges of railroad companies are granted by the state in consideration of the resulting benefits to the public and their acceptance by a railroad company imposes upon it the duty of operating the railroad when constructed,[92] and of doing so in the manner and for the purposes contemplated by its charter,[93] and impartially without discrimination for or against persons demanding similar services,[94] which duties it may be compelled by mandamus or other proper proceeding to perform.[95]

Fed. 273; Ames *v.* Union Pac. R. Co., 60 Fed. 966.

85. Guarantee Trust, etc., Co. *v.* Philadelphia, etc., R. Co., 69 Conn. 709, 38 Atl. 792, 38 L. R. A. 804; Ames *v.* Union Pac. R. Co., 60 Fed. 966.

86. Clyde *v.* Richmond, etc., R. Co., 56 Fed. 539; Jennings *v.* Philadelphia, etc., R. Co., 23 Fed. 569.

87. Matter of U. S. Rolling Stock Co., 55 How. Pr. (N. Y.) 286, 57 How. Pr. 16.

88. De Graffenried *v.* Brunswick, etc., R. Co., 57 Ga. 22; Anderson *v.* Buffalo, etc., R. Co., 2 Pa. Co. Ct. 402; Barton *v.* Barbour, 104 U. S. 126, 26 L. ed. 672. See also, generally, Receivers.

Vacating attachment.— Where a receiver appointed in one state and operating a railroad in another is sued in the latter, an attachment issued in such suit will be vacated. Killmer *v.* Hobart, 58 How. Pr. (N. Y.) 452.

89. Carrey *v.* Spencer, 36 N. Y. Suppl. 886.

90. Phelan *v.* Ganebin, 5 Colo. 14, holding further that it is not necessary to obtain leave of the court appointing the receiver in a different state before instituting such proceedings.

91. Duty as common carrier see Carriers, 6 Cyc. 352.

Duty to furnish facilities to express companies see Carriers, 6 Cyc. 374.

Duty to maintain and repair see *supra*, VI, G.

Failure to operate as a ground of forfeiture of franchise see *supra*, II, J, 5.

Liability for injury to employees see Master and Servant, 26 Cyc. 1076.

92. Gates *v.* Boston, etc., Air-Line R. Co., 53 Conn. 333, 5 Atl. 695; People *v.* New York Cent., etc., R. Co., 28 Hun (N. Y.) 543, 3 N. Y. Civ. Proc. 11; Farmers' L. & T. Co. *v.* Henning, 8 Fed. Cas. No. 4,666; Rex *v.* Severn, etc., R. Co., 2 B. & Ald. 646, 21 Rev. Rep. 433. But see Reg. *v.* Great Western R. Co., 62 L. J. Q. B. 572, 69 L. T. Rep. N. S. 572, 9 Reports 1.

93. State *v.* Hartford, etc., R. Co., 29 Conn. 538; State *v.* Atlantic Coast Line R. Co., 53 Fla. 650, 44 So. 213. 13 L. R. A. N. S. 320; Union Pac. R. Co. *v.* Hall, 91 U. S. 343, 23 L. ed. 428 [*affirming* 28 Fed. Cas. No. 16,601, 4 Dill. 479].

94. Chicago, etc., R. Co. *v.* Suffern, 129 Ill. 274, 21 N. E. 824 [*affirming* 27 Ill. App. 404]; Messenger *v.* Pennsylvania R. Co., 37 N. J. L. 531, 18 Am. Rep. 754.

95. *Connecticut.*— State *v.* Hartford, etc., R. Co., 29 Conn. 538.

Illinois.— Chicago, etc., R. Co. *v.* Suffern, 129 Ill. 274, 21 N. E. 824 [*affirming* 27 Ill. App. 404].

New York.— People *v.* New York Cent. etc., R. Co., 28 Hun 543, 3 N. Y. Civ. Proc. 11.

United States.—Union Pac. R. Co. *v.* Hall, 91 U. S. 343, 23 L. ed. 428 [*affirming* 28 Fed. Cas. No. 16,601, 4 Dill. 479].

England.— Rex *v.* Severn, etc., R. Co., 2 B. & Ald. 646, 21 Rev. Rep. 433.

See 41 Cent. Dig. tit. "Railroads," § 711.

* By James A. Gwyn.

Conversely a railroad company will not be enjoined from operating its road as a means of compelling it to comply with a contract obligation which it owes to a particular individual.[96] A railroad company may be compelled to operate its road between certain points as a continuous line where its charter expressly so requires,[97] or to operate a ferry which by legislative authority it has acquired as an extension and part of its line,[98] or to resume its duties as a common carrier of freight and passengers which it has virtually suspended owing to a controversy with its employees as to the rate of wages where no sufficient excuse is shown for not providing other employees sufficient to do the work.[99] But in the absence of statute the duty of a railroad company as to operating its road is no greater than the public interests demand and justify,[1] and where there is not sufficient traffic to pay expenses the company will not be required to operate the road at a loss,[2] or to make needed repairs where the road is not paying expenses and the company has not the necessary funds or means of raising them;[3] nor will the lessee of a railroad company under a lease which all parties admit to be void be compelled to operate the road.[4]

b. Abandonment of Road or Portion Thereof.[5] While under a statute which is merely permissive a railroad company cannot be compelled to construct its railroad,[6] yet where a railroad has been constructed and put in operation the company has ordinarily no right to abandon the enterprise,[7] or cease to operate any portion of the road,[8] and it may be compelled to resume the operation,[9] or

96. Taylor *v.* Florida East Coast R. Co., 54 Fla. 635, 45 So. 574, 16 L. R. A. N. S. 307, holding that the grantor of a right of way cannot sue to enjoin the operation of trains over a line of railroad on the ground that the company has violated a covenant to maintain a spur track and depot upon his land, since the rights of the public require uninterrupted service.

97. Union Pac. R. Co. *v.* Hall, 91 U. S. 343, 23 L. ed. 428 [*affirming* 28 Fed. Cas. No. 16,601, 4 Dill. 479].

98. Brownell *v.* Old Colony R. Co., 164 Mass. 29, 41 N. E. 107, 49 Am. St. Rep. 442, 29 L. R. A. 169.

99. People *v.* New York Cent., etc., R. Co., 28 Hun (N. Y.) 543, 3 N. Y. Civ. Proc. 11.

1. Com. *v.* Fitchburg R. Co., 12 Gray (Mass.) 180; Sherwood *v.* Atlantic, etc., R. Co., 94 Va. 291, 26 S. E. 943; Jack *v.* Williams, 113 Fed. 823 [*affirmed* in 145 Fed. 281, 76 C. C. A. 165].

2. State *v.* Dodge City, etc., R. Co., 53 Kan. 329, 36 Pac. 755, 24 L. R. A. 564; Jack *v.* Williams, 113 Fed. 823 [*affirmed* in 145 Fed. 281, 76 C. C. A. 165].

If there is not sufficient traffic over a particular line of road to pay for the expense of running trains thereon this is sufficient evidence that the public do not require it to be kept in operation and in such case the company may cease operating the road unless this would be contrary to the express provisions of its charter. Morawetz Priv. Corp. § 1119 [*quoted* in Jack *v.* Williams, 113 Fed. 823 (*affirmed* in 145 Fed. 281, 76 C. C. A. 165); People *v.* Colorado Cent. R. Co., 42 Fed. 638].

3. Ohio, etc., R. Co. *v.* People, 120 Ill. 200, 11 N. E. 347; State *v.* Dodge City, etc., R. Co., 53 Kan. 329, 36 Pac. 755, 24 L. R. A. 564.

4. People *v.* Colorado Cent. R. Co., 42 Fed. 638.

5. Abandonment of location see *supra*, IV, E, 2.

Removal or abandonment of stations see *supra*, IV, G, 3.

6. State *v.* Southern Minnesota R. Co., 18 Minn. 40. See also, generally, *supra*, VI, A, 1.

7. Gates *v.* Boston, etc., R. Co., 53 Conn. 333, 5 Atl. 695; Farmers' L. & T. Co. *v.* Henning, 8 Fed. Cas. No. 4,666. But see Reg. *v.* Great Western R. Co., 62 L. J. Q. B. 572, 69 L. T. Rep. N. S. 572, 9 Reports 1.

8. Chicago, etc., R. Co. *v.* Suffern, 129 Ill. 274, 21 N. E. 824 [*affirming* 27 Ill. App. 404]; Atty.-Gen. *v.* West Wisconsin R. Co., 36 Wis. 466; Rex *v.* Severn, etc., R. Co., 2 B. & Ald. 646, 21 Rev. Rep. 433. In People *v.* Albany R. Co., 37 Barb. (N. Y.) 216 [*affirming* 11 Abb. Pr. 136, 19 How. Pr. 523, and *affirmed* in 24 N. Y. 261], a preliminary injunction was granted restraining defendant from taking up the tracks upon a portion of its road which it desired to abandon, but on final hearing the complaint praying the injunction restraining the removal of the track and demanding as relief that the company be required to reopen and operate that portion of the road was dismissed, and on appeal this judgment was affirmed, the justices being divided as to the question of the right of the railroad company to abandon a portion of its road, but agreeing that the remedy was not by suit in equity for specific performance but by mandamus, indictment, or a proceeding to annul the existence of the corporation.

9. Rex *v.* Severn, etc., R. Co., 2 B. & Ald. 646, 21 Rev. Rep. 433. But see Reg. *v.* Great Western, etc., R. Co., 62 L. J. Q. B. 572, 69 L. T. Rep. N. S. 572, 9 Reports 1.

to replace a portion of the track which it has wrongfully taken up,[10] or to restore a switch connection.[11] A railroad company may, however, in the absence of statute abandon the operation of a road which cannot be operated except at a loss.[12] Where the road as a whole is profitable the company may be compelled to operate the whole, including an unprofitable portion if bound to do so by its charter, by statute, or by contract with the state;[13] but in the absence of such positive duty whether it will be compelled to continue the operation of an unprofitable portion depends upon the circumstances of the case.[14]

c. Private Branches, Spurs, and Side-Tracks. The term "railroad" includes all side-tracks necessary or convenient for the transaction of the company's business;[15] and if a railroad company controls and operates a switch or side-track as a part of its system, although primarily for the benefit of a particular shipper, it may be compelled to transport freight for others at points along the line where such persons have a right to ship or receive it.[16] But where a switch is constructed for the benefit of a particular shipper, on his land, and subsequently under rights expressly reserved in the contract, the railroad company cancels its agreement and sells the switch to the landowner, he has the exclusive right to the use of the switch,[17] and the railroad company cannot be required to receive the freight of others on or along such private switch of which it has not the management or control.[18] Railroad companies cannot be required to construct switches or spur tracks away from their lines to accommodate individual interests,[19] and if so constructed for the accommodation of a private warehouse, mine, quarry, or the like, may be discontinued by the railroad company in the absence of any contract to continue their operation for a particular length of time,[20] pro-

10. Rex *v.* Severn, etc., R. Co., 2 B. & Ald. 646, 21 Rev. Rep. 433.

11. Chicago, etc., R. Co. *v.* Suffern, 129 Ill. 274, 21 N. E. 824 [*affirming* 27 Ill. App. 404].

12. Jack *v.* Williams, 113 Fed. 823 [*affirmed* in 145 Fed. 281, 76 C. C. A. 165].

13. Brownell *v.* Old Colony R. Co., 164 Mass. 29, 41 N. E. 107, 49 Am. St. Rep. 442, 29 L. R. A. 169 (holding that where a railroad company has acquired a ferry as an extension and part of its line it may be compelled to operate the ferry in connection with the rest of its line as required by statute, although the ferry alone is unprofitable); State *v.* Sioux City, etc., R. Co., 7 Nebr. 357 (holding that where a railroad company has received a grant of land from the state upon condition that it shall construct and operate a railroad between certain points the company cannot discontinue the operation of a portion of such line on the ground that it is unprofitable).

14. Sherwood *v.* Atlantic, etc., R. Co., 94 Va. 291, 26 S. E. 943, where it was held that, although the road as a whole was profitable, if the abandonment of an unprofitable portion of the road inflicted no particular hardship upon those making the complaint, while its operation would entail a loss by the company far in excess of any benefit conferred, and which in its ultimate effect might embarrass or prevent the performance of other duties in respect to larger interests and affect a greater number of citizens, its operation ought not to be required.

Where a railroad company by consolidation becomes the owner of two lines of road between the same towns, one of which may be abandoned without serious detriment to any considerable number of people, it will not be compelled to operate both where such operation would entail a large expense without adequate return. People *v.* Rome, etc., R. Co., 103 N. Y. 95, 8 N. E. 369. See also People *v.* Brooklyn Heights R. Co., 69 N. Y. App. Div. 549, 75 N. Y. Suppl. 202 [*affirmed* in 172 N. Y. 90, 64 N. E 788].

15. Roby *v.* State, 76 Nebr. 450, 107 N. W. 766.

16. Bedford-Bowling Green Stone Co. *v.* Oman, 115 Ky. 369, 73 S. W. 1038, 24 Ky. L. Rep. 2274; Roby *v.* State, 76 Nebr. 450, 107 N. W. 766.

17. Oman *v.* Bedford-Bowling Green Stone Co., 134 Fed. 64, 67 C. C. A. 190 [*affirming* 134 Fed. 441].

18. Bedford-Bowling Green Stone Co. *v.* Oman, 134 Fed. 441 [*affirmed* in 134 Fed. 64, 67 C. C. A. 190].

19. Railroad Com'rs *v.* St. Louis Southwestern R. Co., 35 Tex. Civ. App. 52, 80 S. W. 102, 98 Tex. 67, 1141, holding that the Texas statute providing that the railroad commissioners may require the building of sidings and spur-tracks sufficient to handle the business tendered to railroad companies applies only to such business as comes to the railroad from the public, and does not authorize the commissioners to compel a railroad company to construct switches and spur-tracks away from its line to accommodate individual interests.

20. Bartlett *v.* Chicago, etc., R. Co., 96 Wis. 335, 71 N. W. 598; Mercantile Trust Co. *v.* Columbus, etc., R. Co., 90 Fed. 148; Jones *v.* Newport News, etc., R. Co., 65 Fed. 736, 13 C. C. A. 95.

vided a reasonable notice of such intention be given,[21] unless there is some constitutional or statutory provision to the contrary;[22] and where a company is chartered primarily for the conduct of a particular business with the incidental privilege of constructing a railroad for the transportation of its product, which, however, must also transport the produce of others at certain specified rates, the company may, in the absence of any provision to the contrary, discontinue the road whenever its own interests require it, and it is not obliged to continue its operation for the benefit of others.[23]

d. Accommodations and Facilities at Stations.[24] By the common law a railroad company is under no obligation to provide depots or warehouses for the accommodation of passengers awaiting transportation or for the reception or storage of freight;[25] and in the absence of any charter provision, statutory requirement, or order made pursuant to legislative authorization a railroad company cannot be compelled to provide such accommodations[26] or be held liable in damages for injuries to person or property occasioned by its failure to do so.[27] If, however, a railroad company voluntarily erects depots, thereby inviting persons having business with the road to enter and use the same, they must be maintained in a safe condition,[28] and at the time for the arrival and departure of trains must

Particular contracts construed.— Where a railroad company agrees to construct a spur-track on its land for the accommodation of a coal dealer, the contract providing that whenever the company "may find it necessary for the accommodation of its business to remove such spur track," no claim for damages shall be made by the coal dealer, the decision of the railroad company to remove it is final, provided it acted in good faith, and, in the absence of evidence that it did not do so, evidence that such removal was not necessary for the accommodation of the company's business is immaterial. Whittemore *v.* New York, etc., R. Co., 191 Mass. 392, 77 N. E. 717. A railroad company cannot be compelled to maintain a switch built under contract with a private shipper for his use after the company's permission to occupy the street where the switch is located has been terminated by a contract between the railroad company and the city, made pursuant to legislative authority, whereby the company agrees to abolish its grade crossings and elevate its tracks. Swift *v.* Delaware, etc., R. Co., 66 N. J. Eq. 34, 57 Atl. 456 [*affirmed* in 66 N. J. Eq. 452, 58 Atl. 939], holding that the contract with the shipper will not be specifically enforced in equity and that the remedy, if any, is by an action at law for damages.

21. Durden *v.* Southern R. Co., 2 Ga. App. 66, 58 S. E. 299, holding that while a railroad company may, in the absence of statute or agreement, remove or abandon a spur or switch track at a particular place, the manner in which the right is exercised may create a cause of action in favor of one who is damaged thereby, and that if such removal is without reasonable notice the company will be liable to a person who has been accustomed to ship timber from such switch and has timber at the switch awaiting shipment at the time it is discontinued.

22. Chicago, etc., R. Co. *v.* Suffern, 129 Ill. 274, 21 N. E. 824 [*affirming* 27 Ill. App. 404], holding that under a constitutional provision that railroad companies shall permit connections to be made with their tracks so that warehouses, mines, and the like may be reached by the cars of the company, if a switch and side-track has been established leading to a coal mine, the company has no right to discontinue it and may be compelled by mandamus to restore the connection.

Under the Wisconsin statute which provides that if the owner of an elevator, warehouse, or mill constructs at his own expense a track therefrom to a railroad, the railroad company shall permit the connection and operate trains thereon, an action will not lie against a railroad company for failing to operate such a spur-track in connection with plaintiff's warehouse, where it is not shown by the complaint who constructed the track or who owns it. Bartlett *v.* Chicago, etc., R. Co., 96 Wis. 335, 71 N. W. 598.

23. Montell *v.* Consolidation Coal Co., 45 Md. 16.

24. Statutory regulations see *infra*, X, B, 3, a.

Location of stations see *supra*, IV, G.

25. Page *v.* Louisville, etc., R. Co., 129 Ala. 232, 29 So. 676; People *v.* New York, etc., R. Co., 104 N. Y. 58, 9 N. E. 856, 15 Am. Rep. 484 [*reversing* 40 Hun 570]; Chaddick *v.* Lindsay, 5 Okla. 616, 49 Pac. 940. But see State *v.* Republican Valley R. Co., 17 Nebr. 647, 24 N. W. 329, 52 Am. Rep. 424.

26. People *v.* New York, etc., R. Co., 104 N. Y. 58, 9 N. E. 856, 15 Am. Rep. 484 [*reversing* 40 Hun 570]. *Contra*, State *v.* Republican Valley R. Co., 17 Nebr. 647, 24 N. W. 329, 52 Am. Rep. 424.

27. Page *v.* Louisville, etc., R. Co., 129 Ala. 232, 29 So. 676; Chaddick *v.* Lindsay, 5 Okla. 616, 49 Pac. 940.

28. Alabama, etc., R. Co. *v.* Arnold, 84 Ala. 159, 4 So. 359, 5 Am. St. Rep. 354;

be kept open,[29] and properly lighted,[30] and heated.[31] A railroad company may lawfully designate the places abutting on its station platform where the owners of competing omnibus or hack lines shall stand their vehicles to receive and discharge passengers and baggage;[32] but in some cases it has been held that the company has no right to grant to one or more hackmen, to the exclusion of all others, the privilege of entering its station grounds to solicit patronage from incoming passengers.[33]

e. Train Service and Accommodations. A railroad company authorized to condemn land and act as a common carrier must provide such train service and accommodations as will meet the necessities of the general public,[34] and not merely serve private interests;[35] but the extent of its duty in this regard varies as the exigencies of the traffic and its remunerative character demand and justify,[36] and the manner in which it shall conduct its business, including the number and frequency of trains, rests largely in the discretion of the company.[37] While this discretion must be exercised in good faith and with a due regard to the interests of the public,[38] it seems that in the absence of express statutory authority the courts have no power to interfere with it or to require more trains or additional accommodations so long as the railroad company does not suspend or cease its duties as a common carrier,[39] and certainly such an order is unwarranted where

McDonald *v.* Chicago, etc., R. Co., 26 Iowa 124, 95 Am. Dec. 114.

29. Draper *v.* Evansville, etc., R. Co., 165 Ind. 117, 74 N. E. 889.

30. Alabama Great Southern R. Co. *v.* Arnold, 84 Ala. 159, 4 So. 359, 5 Am. St. Rep. 354; Louisville, etc., R. Co. *v.* Treadway, 143 Ind. 689, 40 N. E. 804, 41 N. E. 794; Patten *v.* Chicago, etc., R. Co., 32 Wis. 524.

31. Texas, etc., R. Co. *v.* Cornelius, 10 Tex. Civ. App. 125, 30 S. W. 720. *Contra*, Page *v.* Louisville, etc., R. Co., 129 Ala. 232, 29 So. 676.

32. Lucas *v.* Herbert, 148 Ind. 64, 47 N. E. 146, 37 L. R. A. 376.

33. Kalamazoo Hack, etc., Co. *v.* Sootsma, 84 Mich. 194, 47 N. W. 667, 22 Am. St. Rep. 693, 10 L. R. A. 819; State *v.* Reid, 76 Miss. 211, 24 So. 308, 71 Am. St. Rep. 528, 43 L. R. A. 134; Montana Union R. Co. *v.* Langlois, 9 Mont. 419, 24 Pac. 208, 18 Am. St. Rep. 745, 8 L. R. A. 753. *Contra*, Old Colony R. Co. *v.* Tripp, 147 Mass. 35, 17 N. E. 89, 9 Am. St. Rep. 661; Donovan *v.* Pennsylvania R. Co., 199 U. S. 279, 26 S. Ct. 91, 50 L. ed. 192 [*affirming* 124 Fed. 1016, 60 C. C. A. 168]; Hole *v.* Digby, 27 Wkly. Rep. 884.

34. State *v.* Atlantic Coast Line R. Co., 53 Fla. 650, 44 So. 213, 13 L. R. A. N. S. 320; State *v.* Hazelton, etc., R. Co., 40 Ohio St. 504; Dublin, etc., R. Co. *v.* Midland Great Western R. Co., 8 R. & Can. Tr. Cas. 39; Maidstone *v.* Southeastern R. Co., 7 R. & Can. Tr. Cas. 99.

35. State *v.* Hazelton, etc., R. Co., 40 Ohio St. 504, holding that where a railroad company which was chartered with power to condemn land and act as a common carrier constructed a narrow gauge road with heavy grades and sharp curves to coal mines owned by stock-holders of the railroad company and suitable only for the transportation of coal, no passenger cars being run or depots constructed or anything done to secure or accommodate public traffic, such conduct was an abuse of its charter powers for which the charter of the company might be forfeited.

36. Arkansas Midland R. Co. *v.* Canman, 52 Ark. 517, 13 S. W. 280; Ohio, etc., R. Co. *v.* People, 120 Ill. 200, 11 N. E. 347; Sussex County *v.* London, etc., R. Co., 8 R. & Can. Tr. Cas. 17.

37. Ohio, etc., R. Co. *v.* People, 120 Ill. 200, 11 N. E. 347; People *v.* Brooklyn Heights R. Co., 69 N. Y. App. Div. 549, 75 N. Y. Suppl. 202 [*affirmed* in 172 N. Y. 90, 64 N. E. 788]; Caterham R. Co. *v.* London, etc., R. Co., 1 C. B. N. S. 410, 26 L. J. C. P. 161, 87 E. C. L. 410.

38. State *v.* Atlantic Coast Line R. Co., 53 Fla. 650, 44 So. 213, 13 L. R. A. N. S. 320; People *v.* St. Louis, etc., R. Co., 176 Ill. 512, 52 N. E. 292, 35 L. R. A. 656, (1896) 45 N. E. 824.

39. Ohio, etc., R. Co. *v.* People, 120 Ill. 200, 11 N. E. 347; People *v.* Brooklyn Heights R. Co., 69 N. Y. App. Div. 549, 75 N. Y. Suppl. 202 [*affirmed* in 172 N. Y. 90, 64 N. E. 788]; People *v.* Long Island R. Co., 31 Hun (N. Y.) 125.

Station agents.— A railroad company cannot be compelled to continue the services of a station agent at an unimportant village of only forty persons where the business does not justify the expense and the stoppage of trains is not discontinued and there are other regular stations within a few miles on each side of the place in question. Chicago, etc., R. Co. *v.* State, 74 Nebr. 77, 103 N. W. 1087.

Effect of contract.— Where a railroad company on being permitted to purchase the road of another company contracts with the state that the terminal facilities at a certain city shall never be less adequate than at the date of purchase it may be required to keep open and operate a sufficient number of trains at a particular station in that city, although it has greatly enlarged and increased the facilities at another of its stations in the same city. State *v.* Northern R. Co., 89 Minn. 563, 95 N. W. 297.

the road as operated is unable to pay expenses,[40] or where it is not shown that the facilities furnished are not reasonably adequate and the increase demanded would impose an undue hardship upon the company.[41] A railroad company is bound on common-law principles to stop a sufficient number of its trains at stations to meet the demands of public convenience and business necessity;[42] but it is a reasonable regulation on the part of a railroad company that certain trains shall not stop at all stations provided there are enough to serve the purpose of local travel,[43] except as to places where it is expressly required by statute that all trains shall stop.[44] Separate trains for freight and passengers should be run if there is a demand for each class of traffic and the business of the road is sufficiently large and profitable to warrant it,[45] but otherwise this will not be required and mixed trains may be operated.[46] A board of railroad commissioners has no authority to interpret and enforce a contract between a railroad company and private individuals as to the maintenance of a station,[47] but where in consideration of the granting of a right of way the railroad company agrees with a landowner to build a station upon his land and stop all regular trains at it, he may maintain an action for the specific performance of the contract.[48]

2. Proceedings to Compel Operation or Furnishing of Facilities — a. In General. Mandamus is a proper remedy to compel a railroad company to perform a clear legal duty in regard to the operation of its road or providing proper facilities, train service, or accommodations if there is no other adequate remedy.[49] The proper remedy for a breach of duty on the part of a railroad company, in regard to the operation of its road, is not by a suit in equity on behalf of the state to compel specific performance of such duty, but by mandamus, quo warranto,

40. Ohio, etc., R. Co. *v.* People, 120 Ill. 200, 11 N. E. 347.

41. People *v.* Long Island R. Co., 31 Hun (N. Y.) 125.

42. People *v.* Louisville, etc., R. Co., 120 Ill. 48, 10 N. E. 657.

Stoppage of through trains.— Where the local train service at a particular place is found by the railroad commissioners to be inadequate a railroad company will be required in the alternative either to stop its through trains or to provide additional local facilities substantially the same as would be afforded by the stoppage of such trains. Railroad Com'rs *v.* Atlantic Coast Line R. Co., 74 S. C. 80, 54 S. E. 224.

43. Hutchinson *v.* Southern R. Co., 140 N. C. 123, 52 S. E. 263.

A refusal to designate as a flag station for through trains an unincorporated town containing only a few houses and situated within three miles of a regular station is not an unreasonable regulation. St. Louis, etc., R. Co. *v.* Adcock, 52 Ark. 406, 12 S. W. 874.

44. People *v.* Louisville, etc., R. Co., 120 Ill. 48, 10 N. E. 657, holding that under the Illinois statute railroad companies must stop all regular passenger trains at the railroad stations of county-seats and may be compelled by mandamus to do so.

In Arkansas by statute, upon the application of not less than fifty citizens of any incorporated town, a railroad company may be compelled to stop all of its trains within such town, provided the corporate authorities shall provide and make tender to the railroad company of sufficient means to defray the reasonable expenses of grading a switch or side-track for the use of the company at such place. St. Louis, etc., R. Co. *v.* B'Shears, 59 Ark. 237, 27 S. W. 2, holding, however, that the fact that the company has already constructed all the switches and side-tracks necessary for the stoppage of trains does not affect the necessity of making such tender before the company can be compelled to stop all of its trains at such place. See also St. Louis, etc., R. Co. *v.* Crandall, 75 Ark. 89, 86 S. W. 855, 112 Am. St. Rep. 42.

45. People *v.* St. Louis, etc., R. Co., 176 Ill. 512, 52 N. E. 292, 35 L. R. A. 656, (1896) 45 N. E. 824, holding further that the sufficiency of the earnings of a railroad company to justify the expense of running separate freight and passenger trains over a certain branch line constituting a part of the system is not to be determined by the profits of that branch alone, but must be determined by the profits of the whole business of the entire road.

46. Arkansas Midland R. Co. *v.* Canman, 52 Ark. 517, 13 S. W. 280.

47. People *v.* Railroad Com'rs, 32 N. Y. App. Div. 158, 52 N. Y. Suppl. 901 [*affirmed* in 158 N. Y. 421, 53 N. E. 163].

48. Lawrence *v.* Saratoga Lake R. Co., 3 N. Y. St. 743, holding, however, that such a contract does not require the company to run any trains but only to stop such regular trains as it does run.

49. See Mandamus, 26 Cyc. 365 *et seq.*

Parties.— On mandamus against the lessee of a railroad to compel it to operate the road the lessor company is a necessary party. Chicago, etc., R. Co. *v.* Crane, 113 U. S. 424, 5 S. Ct. 578, 28 L. ed. 1064.

or indictment;[50] and where the company is wholly unable to discharge the duties it owes to the public and which the law has imposed upon it, a proceeding in the nature of a quo warranto is the proper remedy, and not mandamus.[51] The non-compliance with a charter provision of a railroad company, requiring it to run through trains between certain towns, does not give any right of action to such towns for damages, but the state alone can maintain an action or proceeding for such disregard of the statute;[52] nor can private individuals who have contributed money for the construction of a line of railroad through a city maintain an action in equity to restrain the company from changing its line and discontinuing the portion running through the city, at least where the injury is not peculiar to them, the remedy being by suit in the name of the proper officer of the state.[53] In some jurisdictions the regulation of the operation of railways is vested primarily in the hands of the railroad commissioners,[54] whose orders may be enforced by mandamus;[55] and in such jurisdictions proceedings on the part of private parties to compel the furnishing of increased facilities should be instituted in the first instance by complaint made to the railroad commissioners.[56]

b. Appointment of Receivers.[57] Under a New Jersey statute if any railroad company in that state fails or neglects to run daily trains on any part of its road for the space of ten days, the chancellor of the state, upon petition of any citizen of the state, may appoint a receiver to operate the road,[58] the statute not, however, applying to roads constructed at a seaside resort, not exceeding four miles in length and intended merely for the transportation of summer travelers and tourists.[59] If the company has in fact failed or neglected to operate its road for the time specified, the court will not stay the application of the statute for an inquiry into

50. People *v.* Albany, etc., R. Co., 24 N. Y. 261, 82 Am. Dec. 295.

51. Ohio, etc., R. Co. *v.* People, 120 Ill. 200, 11 N. E. 347.

52. Elizabethtown *v.* Chesapeake, etc., R. Co., 94 Ky. 377, 22 S. W. 609, 15 Ky. L. Rep. 313.

53. Henry *v.* Ann Arbor R. Co., 116 Mich. 314, 75 N. W. 886.

54. See the following cases:

Alabama.— Page *v.* Louisville, etc., R. Co., 129 Ala. 232, 29 So. 676.

Florida.— State *v.* Atlantic Coast Line R. Co., 53 Fla. 650, 44 So. 213, 13 L. R. A. N. S. 320.

Maine.— Railroad Com'rs *v.* Portland, etc., R. Co., 63 Me. 269, 18 Am. Rep. 208.

Minnesota.— State *v.* Minneapolis, etc., R. Co., 76 Minn. 469, 79 N. W. 510.

New York.— People *v.* Brooklyn Heights R. Co., 172 N. Y. 90, 64 N. E. 788 [*affirming* 69 N. Y. App. Div. 549, 75 N. Y. Suppl. 202].

South Carolina.— Railroad Com'rs *v.* Atlantic Coast Line R. Co., 74 S. C. 80, 54 S. E. 224.

South Dakota.— State *v.* Chicago, etc., R. Co., 11 S. D. 282, 77 N. W. 104.

See 41 Cent. Dig. tit. "Railroads," §§ 716, 717.

Review of proceedings.— In South Carolina the court, on application for mandamus to compel compliance with an order of the railroad commissioners, will not review findings of fact made by the commissioners after notice and hearing, in the absence of allegations charging fraud or other grounds for setting aside the adjudication. Railroad Com'rs *v.* Atlantic Coast Line R. Co., 74 S. C. 80, 54 S. E. 224. In South Dakota, on proceedings to enforce the order of commissioners, the court may review the proceedings of the commissioners and inquire into the facts and circumstances upon which the order was based. State *v.* Chicago, etc., R. Co., 11 S. D. 282, 77 N. W. 104. In New York the determination of the railroad commissioners may be reviewed on certiorari, where the appellate division has the power of reviewing the facts. People *v.* Brooklyn Heights R. Co., 172 N. Y. 90, 64 N. E. 788.

55. Railroad Com'rs *v.* Portland, etc., R. Co., 63 Me. 269, 18 Am. Rep. 208; Railroad Com'rs *v.* Atlantic Coast Line R. Co., 74 S. C. 80, 54 S. E. 224. See also, generally, MANDAMUS, 26 Cyc. 372.

56. People *v.* Brooklyn Heights R. Co., 172 N. Y. 90, 64 N. E. 788 [*affirming* 69 N. Y. App. Div. 549, 75 N. Y. Suppl. 202].

57. See, generally, RECEIVERS.

58. *In re* Long Branch, etc., R. Co., 24 N. J. Eq. 398.

The power of appointment is vested in the office of chancellor and not in the chancellor in his individual capacity, and while a vice-chancellor cannot assume jurisdiction of such a case, except by force of a reference made by the chancellor to this effect, he may do so where the case is so referred. Delaware Bay, etc., R. Co. *v.* Markley, 45 N. J. Eq. 139, 16 Atl. 436.

59. Delaware Bay, etc., R. Co. *v.* Markley, 45 N. J. Eq. 139, 16 Atl. 436 [*reversing* (Ch. 1887) 11 Atl. 261, 737], holding that the exception applies to all roads having the designated characteristics, without regard to the time of their construction, and regardless of the fact that they were incor-

the cause of the failure to do so.[60] It is discretionary with the chancellor as to the length of time the operation of the road by the receiver shall continue;[61] but possession will be restored upon satisfactory proof to the chancellor that the company is able and ready to operate the road,[62] provided it is further shown that the petitioning company is at the time of the application also entitled to the possession.[63] In the absence of statute the court will not appoint a receiver *ex parte* to operate a railroad, unless immediate necessity for such relief is clearly shown.[64]

3. Injuries to Property From Operation of Road — a. In General.[65] Where a railroad is constructed by lawful authority, an adjoining landowner cannot recover for the injury or inconvenience due to the smoke, noise, vibrations, or other incidents necessary to its operation, where it is not operated in a negligent or unlawful manner,[66] although it may be located in the streets of a town or city,[67]

porated under a general law imposing the duty of running trains at all times.

60. *In re* Long Branch, etc., R. Co., 24 N. J. Eq. 398.

61. *In re* Long Branch, etc., R. Co., 24 N. J. Eq. 402 [*affirmed* in 26 N. J. Eq. 539].

62. *In re* Long Branch, etc., R. Co., 24 N. J. Eq. 398.

63. *In re* Long Branch, etc., R. Co., 24 N. J. Eq. 402 [*affirmed* in 26 N. J. Eq. 539].

64. Chicago, etc., R. Co. *v.* Cason, 133 Ind. 49, 32 N. E. 827, holding that an application for the appointment of a receiver, alleging that executions had been levied upon defendant's rolling stock, preventing its operation; that it and its predecessors were insolvent, and that there were large quantities of freight under contract for immediate shipment, did not allege facts sufficient to justify the appointment of a receiver without notice to the company.

65. Injuries from construction and maintenance see *supra*, VI, J.

Injuries to animals see *infra*, X, H.

Injuries from fire see *infra*, X, I.

66. *Indiana.*— Dwenger *v.* Chicago, etc., R. Co., 98 Ind. 153.

Kansas.— Atchison, etc., R. Co. *v.* Armstrong, 71 Kan. 366, 80 Pac. 978, 114 Am. St. Rep. 474, 1 L. R. A. N. S. 113.

Kentucky.— Louisville, etc., R. Co. *v.* Orr, 91 Ky. 109, 15 S. W. 8, 12 Ky. L. Rep. 756; Louisville, etc., R. Co. *v.* Walton, 67 S. W. 988, 24 Ky. L. Rep. 9.

Louisiana.— Werges *v.* St. Louis, etc., R. Co., 35 La. Ann. 641.

Michigan.— Grand Rapids, etc., R. Co. *v.* Heisel, 38 Mich. 62, 31 Am. Rep. 306.

Missouri.— Randle *v.* Pacific R. Co., 65 Mo. 325.

New Jersey.— Beseman *v.* Pennsylvania R. Co., 50 N. J. L. 235, 13 Atl. 164 [*affirmed* in 52 N. J. L. 221, 20 Atl. 169]; Bordentown, etc., Turnpike Road *v.* Camden, etc., Transp. Co., 17 N. J. L. 314.

New York.— Flinn *v.* New York Cent., etc., R. Co., 58 Hun 230, 12 N. Y. Suppl. 341; Schenectady First Baptist Church *v.* Utica, etc., R. Co., 6 Barb. 313.

North Carolina.— Thomason *v.* Seaboard Air-Line R. Co., 142 N. C. 318, 55 S. E. 205.

Ohio.— Parrot *v.* Cincinnati, etc., R. Co., 10 Ohio St. 624; Fliehman *v.* Cleveland, etc., R. Co., 11 Ohio Dec. (Reprint) 543, 27 Cinc. L. Bul. 302; Lewis *v.* Mt. Adams, etc., R. Co., 7 Ohio Dec. (Reprint) 566, 3 Cinc. L. Bul. 1007.

Pennsylvania.— Pennsylvania R. Co. *v.* Marchant, 119 Pa. St. 541, 13 Atl. 690, 4 Am. St. Rep. 659; Struthers *v.* Dunkirk, etc., R. Co., 87 Pa. St. 282.

Tennessee.— Louisville, etc., R. Co. *v.* Lellyett, 114 Tenn. 368, 85 S. W. 881, 1 L. R. A. N. S. 49.

Texas.— St. Louis, etc., R. Co. *v.* Shaw, 99 Tex. 559, 92 S. W. 30, 122 Am. St. Rep. 663, 6 L. R. A. N. S. 245; Houston, etc., R. Co. *v.* Barr, 44 Tex. Civ. App. 571, 99 S. W. 437.

Virginia.— Fisher *v.* Seaboard Air-Line R. Co., 102 Va. 363, 46 S. E. 381.

Canada.— Bennett *v.* Grand Trunk R. Co., 1 Can. R. Cas. 451, 2 Ont. L. Rep. 425; *In re* Devlin, 40 U. C. Q. B. 160.

See 41 Cent. Dig. tit. "Railroads," §§ 720, 723.

As an element of damages in condemnation proceedings see Eminent Domain, 15 Cyc. 753.

The fact that the operation of a railroad disturbs religious worship does not render the railroad company liable where the road is located by authority of law and operated in a lawful and proper manner (Dwenger *v.* Chicago, etc., R. Co., 98 Ind. 153; Schenectady First Baptist Church *v.* Utica, etc., R. Co., 6 Barb. (N. Y.) 313; Taylor *v.* Seaboard Air-Line R. Co., 145 N. C. 400, 59 S. E. 129, 122 Am. St. Rep. 455), but the company will be liable for wrongful or negligent acts in the operation of its road in the vicinity of a church, which disturb the services and render the place unfit for public worship (Schenectady First Baptist Church *v.* Schenectady, etc., R. Co., 5 Barb. (N. Y.) 79).

67. *Kansas.*— Atchison, etc., R. Co. *v.* Armstrong, 71 Kan. 366, 80 Pac. 978, 114 Am. St. Rep. 474, 1 L. R. A. N. S. 113.

Kentucky.— Louisville, etc., R. Co. *v.* Orr, 91 Ky. 109, 15 S. W. 8, 12 Ky. L. Rep. 756.

Louisiana.— Werges *v.* St. Louis, etc., R. Co., 35 La. Ann. 641.

Missouri.— Randle *v.* Pacific R. Co., 65 Mo. 325.

since the act of operation being authorized by law cannot confer any right of action so long as it is exercised in a lawful and proper manner; [68] and the same rule applies under similar circumstances to the injury or inconvenience due to the location, maintenance, and use of structures and appliances necessarily incident to the operation of the road, such as terminal yards, turn-tables, engine-houses, and the like.[69] The company will, however, be liable for any injury due to its trains being operated in a negligent or improper manner,[70] or due to the negligent or improper manner of locating, using, or maintaining structures and appurte-

Pennsylvania.— Struthers *v.* Dunkirk, etc., R. Co., 87 Pa. St. 282.

See 41 Cent. Dig. tit. "Railroads," §§ 720, 723.

Compare Rosenthal *v.* Taylor, etc., R. Co., 79 Tex. 325, 15 S. W. 268.

Character of abutting owner's interest in street.— Where a railroad company is authorized to operate its trains along or across the streets of a city, and the fee of such streets is not in the adjacent landowners, they cannot recover damages on account of the noise, smoke, etc., where the road is not operated in a negligent or unlawful manner (Colorado Cent. R. Co. *v.* Mollandin, 4 Colo. 154; Grand Rapids, etc., R. Co. *v.* Heisel, 38 Mich. 62, 31 Am. Rep. 306); but where the adjoining landowner owns the fee in the street or highway subject only to the public easement the legislature or municipal authorities, or both, cannot authorize its use for the purpose of a railroad without obtaining the consent of such owner or making him compensation therefor, as such use imposes an additional burden not contemplated by its original acquisition or dedication for the purposes of an ordinary highway (Williams *v.* New York Cent. R. Co., 16 N. Y. 97, 69 Am. Dec. 651 [*reversing* 18 Barb. 222]); and where a railroad is constructed in a street, without any lawful authority, an adjoining owner may recover for the injury to his property, although not the owner of the fee in the street (Grand Rapids, etc., R. Co. *v.* Heisel, 47 Mich. 393, 11 N. W. 212).

The operation of a purely private railway over or along public streets cannot be authorized by the municipal authorities, and any adjacent owner, the value of whose property is depreciated thereby, may maintain an action for the damages sustained irrespective of his ownership of the fee in the street. Gustafson *v.* Hamm, 56 Minn. 334, 57 N. W. 1054, 22 L. R. A. 565.

In Ohio it is provided by statute that railroad companies may by agreement with the municipal authorities occupy a street or other public ground, but that they "shall be responsible for injuries done thereby to private or public property lying upon or near to such ground," which may be recovered in a civil action by the owner thereof (Columbus, etc., R. Co. *v.* Gardner, 45 Ohio St. 309, 13 N. E. 69; Shepherd *v.* Baltimore, etc., R. Co., 130 U. S. 426, 9 S. Ct. 598, 32 L. ed. 970), under which statute it is not necessary that the property should be directly on the street on which the road is operated, it being sufficient if it is sufficiently near to the place where the road is operated to be directly injured thereby (Toledo R., etc., Co. *v.* Meinen, 27 Ohio Cir. Ct. 208; Shepherd *v.* Baltimore, etc., R. Co., *supra*); and the owner is entitled to recover full compensation for the depreciation in value of his property (Grafton *v.* Baltimore, etc., R. Co., 21 Fed. 309), including any special injury or depreciation thereto, due to the noise, smoke, and sparks of fire occasioned by the running of the locomotive and cars along the street (Columbus, etc., R. Co. *v.* Gardner, *supra*); but the right of recovery for such damages is personal and does not pass to a grantee of the land in so far as they have occurred at the time of the conveyance (Cincinnati, etc., R. Co. *v.* Campbell, 51 Ohio St. 328, 37 N. E. 266).

68. Colorado Cent. R. Co. *v.* Mollandin, 4 Colo. 154; Werges *v.* St. Louis, etc., R. Co., 35 La. Ann. 641; Beseman *v.* Pennsylvania R. Co., 50 N. J. L. 235, 13 Atl. 164 [*affirmed* in 52 N. J. L. 221, 20 Atl. 169].

Limitation of rule.— The statutory sanction which will justify an injury to private property by a railroad company must be express or must be given by clear and unquestionable implication from the powers expressly conferred. Otherwise the railroad company will be liable for the damages sustained. Cogswell *v.* New York, etc., R. Co., 103 N. Y. 10, 8 N. E. 537, 57 Am. Rep. 701; Spring *v.* Delaware, etc., R. Co., 88 Hun (N. Y.) 385, 34 N. Y. Suppl. 810 [*affirmed* in 157 N. Y. 692, 51 N. E. 1094].

69. Georgia R., etc., Co. *v.* Maddox, 116 Ga. 64, 42 S. E. 315; Friedman *v.* New York, etc., R. Co., 89 N. Y. App. Div. 38, 85 N. Y. Suppl. 404 [*affirmed* in 180 N. Y. 550, 73 N. E. 1123]; Taylor *v.* Seaboard Air-Line R. Co., 145 N. C. 400, 59 S. E. 129, 122 Am. St. Rep. 455; St. Louis, etc., R. Co. *v.* Shaw, 99 Tex. 559, 92 S. W. 30, 122 Am. St. Rep. 663, 6 L. R. A. N. S. 245; Cantelou *v.* Trinity, etc., R. Co., (Tex. Civ. App. 1907) 101 S. W. 1017.

70. Louisville, etc., R. Co. *v.* Orr, 91 Ky. 109, 15 S. W. 8, 12 Ky. L. Rep. 756; Grand Rapids, etc., R. Co. *v.* Heisel, 38 Mich. 62, 31 Am. Rep. 306; Thomason *v.* Seaboard Air-Line R. Co., 142 N. C. 300, 55 S. E. 198.

Operation in violation of statute or ordinance.— The fact that a train is operated in a public street in a manner in violation of a city ordinance does not render the company liable, unless plaintiff can show special damages resulting therefrom to him or his property (Werges *v.* St. Louis, etc., R. Co., 35 La. Ann. 641); but where a statute prohibits the running of trains in cities at over

nances incident to the operation of the road,[71] although they are necessary to its operation.[72]

b. Nuisances.[73] The operation of a railroad constructed by lawful authority cannot, by reason of the noise, smoke, vibrations, or other objectionable features necessarily incident thereto, be deemed a nuisance in the absence of any negligence or abuse in the manner of its operation,[74] although it may be located along a public

a certain speed, and makes the company liable for injuries done by such trains, the statute is applicable to injuries to real as well as personal property where it can be shown that such injury was due to the excessive rate of speed (Porterfield *v.* Bond, 38 Fed. 391).

Running over hose at fire.— Where at a fire it is necessary in order to reach the water-supply to run the hose across a railroad track, and the servants of the railroad company negligently run over and cut the hose, the railroad company will be liable for damages done by the fire which are due to the cutting off of the water-supply (Metallic Compression Casting Co. *v.* Fitchburg, R. Co., 109 Mass. 277, 12 Am. Rep. 689; Phenix Ins. Co. *v.* New York Cent., etc., R. Co., 122 N. Y. App. Div. 113, 106 N. Y. Suppl. 696), notwithstanding the owner of the property destroyed was not the owner of the hose, and the firemen were volunteers, and the railroad company owned the right of way (Metallic Compression Casting Co. *v.* Fitchburg R. Co., *supra*); but while the company would be liable if its servants had knowledge of the presence of the hose and could have stopped the train, they are not chargeable with negligence in failing to watch for and discover, especially at night, such obstructions upon the track (Clark *v.* Grand Trunk Western R. Co., 149 Mich. 440, 112 N. W. 1121).

It is not negligence on the part of a railroad company for which an abutting landowner may recover, that the railroad company operates its freight trains upon the track nearest to the house of such owner, or that it operates thereon trains which are long and heavy, requiring two engines. Flinn *v.* New York Cent., etc., R. Co., 58 Hun (N. Y.) 230, 12 N. Y. Suppl. 341.

71. *Illinois.*— Wylie *v.* Ellwood, 134 Ill. 281, 25 N. E. 570, 23 Am. St. Rep. 673, 9 L. R. A. 726; Illinois Cent. R. Co. *v.* Grabill, 50 Ill. 241; Kuhn *v.* Illinois Cent. R. Co., 111 Ill. App. 323.

Kentucky.— Louisville, etc., R. Co. *v.* Walton, 67 S. W. 988, 24 Ky. L. Rep. 9.

New York.— Cogswell *v.* New York, etc., R. Co., 103 N. Y. 10, 8 N. E. 537, 57 Am. Rep. 701; Spring *v.* Delaware, etc., R. Co., 88 Hun 385, 34 N. Y. Suppl. 810 [*affirmed* in 157 N. Y. 692, 51 N. E. 1094].

North Carolina.— Thomason *v.* Seaboard Air-Line R. Co., 142 N. C. 300, 55 S. E. 198.

Texas.— Rainey *v.* Red River, etc., R. Co., 99 Tex. 276, 89 S. W. 768, 90 S. W. 1096, 122 Am. St. Rep. 622, 3 L. R. A. N. S. 590; Gulf, etc., R. Co. *v.* Blue, (Civ. App. 1907) 102 S. W. 128; Missouri, etc., R. Co. *v.* Anderson, 36 Tex. Civ. App. 121, 81 S. W. 781.

United States.— Baltimore, etc., R. Co. *v.* Fifth Baptist Church, 108 U. S. 317, 2 S. Ct. 719, 27 L. ed. 739.

See 41 Cent. Dig. tit. "Railroads," §§ 720, 723.

72. Louisville, etc., R. Co. *v.* Walton, 67 S. W. 988, 24 Ky. L. Rep. 9; Cogswell *v.* New York, etc., R. Co., 103 N. Y. 10, 8 N. E. 537, 57 Am. Rep. 701; Texas, etc., R. Co. *v.* Edrington, 100 Tex. 496, 101 S. W. 441, 9 L. R. A. N. S. 988.

73. See, generally, NUISANCES, 29 Cyc. 1143.

74. *Michigan.*— Grand Rapids, etc., R. Co. *v.* Heisel, 38 Mich. 62, 31 Am. Rep. 306.

New Jersey.— Beseman *v.* Pennsylvania R. Co., 50 N. J. L. 235, 13 Atl. 164 [*affirmed* in 52 N. J. L. 221, 20 Atl. 169]; Ridge *v.* Pennsylvania R. Co., 58 N. J. Eq. 172, 43 Atl. 275.

New York.— Hentz *v.* Long Island R. Co., 13 Barb. 646; Anderson *v.* Rochester, etc., R. Co., 9 How. Pr. 553.

North Carolina.— Taylor *v.* Seaboard Air-Line R. Co., 145 N. C. 400, 59 S. E. 129, 122 Am. St. Rep. 455.

Ohio.— Parrot *v.* Cincinnati, etc., R. Co., 10 Ohio St. 624; Ross *v.* Cincinnati, etc., R. Co., 27 Ohio Cir. Ct. 135.

Pennsylvania.— Bell *v.* Ohio, etc., R. Co., 2 Pittsb. Leg. J. 42.

United States.— Miller *v.* Long Island R. Co., 17 Fed. Cas. No. 9,580*a*.

Canada.— Bennett *v.* Grand Trunk R. Co., 1 Can. R. Cas. 451, 2 Ont. L. Rep. 425.

See 41 Cent. Dig. tit. "Railroads," § 721.

The use of the main tracks in making up trains will not be enjoined as a nuisance on the ground of annoyance to persons living near such tracks where no abuse or negligent use of its franchise is shown, and this notwithstanding the company is permitted by statute to condemn land for such purposes, the statute making no provision as to the location of such land. Beideman *v.* Atlantic City R. Co., (N. J. Ch. 1890) 19 Atl. 731.

If a railroad is constructed without authority by a private individual for his own use under a contract with the railroad company which it had no power to make, its operation will be enjoined as a nuisance at the instance of an adjoining landowner. Stewart's Appeal, 56 Pa. St. 413.

Frightening horses on highway.— The fact that the operation of steam locomotives on a railroad constructed parallel with and adjacent to a highway frightens horses and makes travel upon the highway more dangerous does not make the operation of the road a nuisance where its construction and operation are duly authorized by law. Rex *v.* Pease, 4

street,[75] or pass through a populous village or city;[76] and the same rule applies under similar circumstances to the construction, maintenance, and use of terminal yards and structures and appliances necessarily incident to the operation of the road.[77] But a railroad company may be guilty of maintaining a nuisance by reason of the negligent or improper manner of operating or using its cars and locomotives,[78] or of erecting, using, and maintaining structures and appurtenances incidental to the operation of the road such as engine-houses, cattle-pens, coal-bins, and the like,[79] or making an unauthorized or improper use of streets.[80] The legislature may in the interest of the public welfare require that to be done such as the sounding of bells or whistles which in the absence of statute might be deemed a nuisance,[81] and ordinarily acts authorized by law such as the operation of trains over the road cannot constitute a nuisance unless done in an unauthorized or negligent manner;[82] but if the acts would be a nuisance on common-law grounds this rule can only apply where the statutory authorization is express or clearly implied from the powers expressly granted.[83]

c. Occupation or Obstruction of Streets or Highways. Where a railroad is located by lawful authority upon or across a street or highway, its operation, if not in a negligent or improper manner, is not a nuisance,[84] and furnishes no

B. & Ad. 30, 2 L. J. M. C. 26, 1 N. & M. 690, 24 E. C. L. 24.

75. Grand Rapids, etc., R. Co. *v.* Heisel, 38 Mich. 62, 31 Am. Rep. 306; Randle *v.* Pacific R. Co., 65 Mo. 325.

76. Hentz *v.* Long Island R. Co., 13 Barb. (N. Y.) 646; Anderson *v.* Rochester, etc., R. Co., 9 How. Pr. (N. Y.) 553.

77. *Georgia.*— Georgia, etc., R. Co. *v.* Maddox, 116 Ga. 64, 42 S. E. 315.

Illinois.— Illinois Cent. R. Co. *v.* Dennison, 116 Ill. App. 1; Illinois Cent. R. Co. *v.* Ferrell, 108 Ill. App. 659.

New York.— Friedman *v.* New York, etc., R. Co., 89 N. Y. App. Div. 38, 85 N. Y. Suppl. 404 [*affirmed* in 180 N. Y. 550, 73 N. E. 1123].

North Carolina.— Taylor *v.* Seaboard Air Line R. Co., 145 N. C. 400, 59 S. E. 129, 122 Am. St. Rep. 455.

Texas.— Rainey *v.* Red River, etc., R. Co., (Civ. App. 1904) 80 S. W. 95 [*reversed* on other grounds in 99 Tex. 276, 89 S. W. 678, 90 S. W. 1096, 122 Am. St. Rep. 622, 3 L. R. A. N. S. 590].

England.— London, etc., R. Co. *v.* Truman, 11 App. Cas. 45, 50 J. P. 388, 55 L. J. Ch. 354, 54 L. T. Rep. N. S. 250, 34 Wkly. Rep. 657.

See 41 Cent. Dig. tit. "Railroads," § 721.

78. *District of Columbia.*— Neitzey *v.* Baltimore, etc., R. Co., 5 Mackey 34.

Indiana.— Pittsburgh, etc., R. Co. *v.* Welch, 12 Ind. App. 433, 40 N. E. 650.

Kentucky.— Louisville, etc., R. Co. *v.* Com., 80 Ky. 143, 3 Ky. L. Rep. 644, 44 Am. Rep. 468.

New Jersey.— Philadelphia, etc., R. Co. *v.* State, 61 N. J. L. 71, 38 Atl. 820; Pennsylvania R. Co. *v.* Thompson, 45 N. J. Eq. 870, 19 Atl. 622; Pennsylvania R. Co. *v.* Angel, 41 N. J. Eq. 316, 7 Atl. 432, 56 Am. Rep. 1.

New York.— Colgate *v.* New York Cent., etc., R. Co., 51 Misc. 503, 100 N. Y. Suppl. 650.

North Carolina.— Thomason *v.* Seahoard Air Line Co., 142 N. C. 300, 55 S. E. 198.

West Virginia.— Mason *v.* Ohio River R. Co., 51 W. Va. 183, 41 S. E. 418.

See 41 Cent. Dig. tit. "Railroads," § 721.

79. *Illinois.*— Wylie *v.* Elwood, 134 Ill. 281, 25 N. E. 570, 23 Am. St. Rep. 673, 9 L. R. A. 726; Illinois Cent. R. Co. *v.* Grabill, 50 Ill. 241; Kuhn *v.* Illinois Cent. R. Co., 111 Ill. App. 323.

New York.— Garvey *v.* Long Island R. Co., 159 N. Y. 323, 54 N. E. 57, 70 Am. St. Rep. 550 [*affirming* 9 N. Y. App. Div. 254, 41 N. E. 397]; Cogswell *v.* New York, etc., R. Co., 103 N. Y. 10, 8 N. E. 537, 57 Am. Rep. 701; Spring *v.* Delaware, etc., R. Co., 88 Hun 385, 34 N. Y. Suppl. 810 [*affirmed* in 157 N. Y. 692, 51 N. E. 1094].

North Carolina.— Thomason *v.* Seaboard Air Line Co., 142 N. C. 300, 55 S. E. 198.

Texas.— Missouri, etc., R. Co. *v.* Perry, (Civ. App. 1907) 102 S. W. 1169; Missouri, etc., R. Co. *v.* Anderson, 36 Tex. Civ. App. 121, 81 S. W. 781.

United States.— Baltimore, etc., R. Co. *v.* Fifth Baptist Church, 108 U. S. 317, 2 S. Ct. 719, 27 L. ed. 739.

England.— Smith *v.* Midland R. Co., 37 L. T. Rep. N. S. 224, 25 Wkly. Rep. 861, 26 Wkly. Rep. 10.

See 41 Cent. Dig. tit. "Railroads," § 721.

80. Galveston, etc., R. Co. *v.* Miller, (Tex. Civ. App. 1906) 93 S. W. 177; Stockdale *v.* Rio Grande Western R. Co., 28 Utah 201, 77 Pac. 849.

81. Pittsburgh, etc., R. Co. *v.* Brown, 67 Ind. 45, 33 Am. Rep. 73.

82. Grand Rapids, etc., R. Co. *v.* Heisel, 38 Mich. 62, 31 Am. Rep. 306; Randle *v.* Pacific R. Co., 65 Mo. 325; Schenectady First Baptist Church *v.* Utica, etc., R. Co., 6 Barb. (N. Y.) 313.

83. Cogswell *v.* New York, etc., R. Co., 103 N. Y. 10, 8 N. E. 537, 57 Am. Rep. 701; Spring *v.* Delaware, etc., R. Co., 88 Hun (N. Y.) 385, 34 N. Y. Suppl. 810 [*affirmed* in 157 N. Y. 692, 51 N. E. 1094].

84. See *supra*, X, A, 3, b.

right of action to adjacent owners for the injury or inconvenience necessarily incident thereto;[85] nor where a railroad company is authorized to construct and operate a railroad in a street can a court restrict the number of trains which may be operated thereon as a condition precedent to the construction of the track.[86] But the right to operate the road confers no authority for using the street in an unauthorized or improper manner,[87] such as converting it into a freight-yard, switch-yard, or place for storing cars or making up trains,[88] or allowing cars loaded with offensive substances to remain in the streets for an unnecessary and unreasonable length of time,[89] and private persons may recover for any special damages sustained by reason of such use.[90] Where a railroad company wrongfully allows its cars to stand so as to obstruct a public crossing, a private individual cannot recover where he has sustained no damage other than the mere delay occasioned to the public generally;[91] but may recover any special damages sustained by him by reason of the obstruction.[92] Municipal authorities have the right in the interest of public safety to authorize or require the construction of gates at street crossings, and when so authorized their construction cannot be enjoined as a nuisance at the instance of adjoining property-owners who may be inconvenienced thereby.[93] A railroad company is not liable for obstructing a private crossing with its trains unless such obstruction was negligent or unnecessary.[94]

85. See *supra*, X, A, 3, a.

86. Kentucky, etc., Bridge Co. *v.* Kreiger, 93 Ky. 243, 19 S. W. 738, 14 Ky. L. Rep. 151, holding that while a remedy will be afforded for any actual injury sustained by an improper operation of the railroad, such a condition cannot be imposed in anticipation of injuries to adjoining landowners which may never occur.

87. *District of Columbia.*— Neitzey *v.* Baltimore, etc., R. Co., 5 Mackey 34.

New Jersey.— Pennsylvania R. Co. *v.* Thompson, 45 N. J. Eq. 870, 19 Atl. 622; Pennsylvania R. Co. *v.* Angel, 41 N. J. Eq. 316, 7 Atl. 432, 56 Am. Rep. 1.

Tennessee.— Harmon *v.* Louisville, etc., R. Co., 87 Tenn. 614, 11 S. W. 703.

Texas.— Galveston, etc., R. Co. *v.* Miller, (Civ. App. 1906) 93 S. W. 177.

West Virginia.— Mason *v.* Ohio River R. Co., 51 W. Va. 183, 41 S. E. 418.

United States.— Frankle *v.* Jackson, 30 Fed. 398.

See 41 Cent. Dig. tit. "Railroads," § 722.

Where the railroad company's occupation of a street antedates plaintiff's ownership of the adjoining premises, and the company has always used the street in the manner complained of, and the evidence does not show when the street was opened, or what rights were reserved by abutting property-owners or acquired by the city or defendant's predecessors, it will not be presumed that the company had been continuously a wrongdoer without having acquired the right to such use of the street, and an injunction to restrain the company from using its tracks adjacent to plaintiff's premises, as a place for storing its cars, will not be granted. Mosner *v.* Rome, etc., R. Co., 51 Hun (N. Y.) 638, 5 N. Y. Suppl. 807.

Improper use by persons dealing with railroad company.— The fact that a railroad company has a right to use a public street for the operation of a railroad does not authorize a lumber company owning abutting property to make any improper use of the street, as by piling lumber thereon and erecting buildings and platforms for the loading of lumber, and obstructing the streets with a large number of cars. Jenks *v.* Lansing Lumber Co., 97 Iowa 342, 66 N. W. 231.

It is not an improper use of the street occupied by a railroad company to run trains at night as well as during the day, or to run heavy freight trains and to use bells and whistles. Frankle *v.* Jackson, 30 Fed. 398.

88. Neitzey *v.* Baltimore, etc., R. Co., 5 Mackey (D. C.) 34; Harmon *v.* Louisville, etc., R. Co., 87 Tenn. 614, 11 S. W. 703; Galveston, etc., R. Co. *v.* Miller, (Tex. Civ. App. 1906) 92 S. W. 177.

89. Pittsburgh, etc., R. Co. *v.* Welch, 12 Ind. App. 433, 40 N. E. 650; Colgate *v.* New York Cent., etc., R. Co., 51 Misc. (N. Y.) 503, 100 N. Y. Suppl. 650.

90. Neitzey *v.* Baltimore, etc., R. Co., 5 Mackey (D. C.) 34.

91. Shields *v.* Louisville, etc., R. Co., 97 Ky. 103, 29 S. W. 978, 16 Ky. L. Rep. 849, 27 L. R. A. 680.

92. Patterson *v.* Detroit, etc., R. Co., 56 Mich. 172, 22 N. W. 260.

Obstructing access to private business.—A person owning an eating house at a station located on the opposite side of the tracks from the depot cannot recover damages on account of the company leaving cars standing upon its tracks between the depot and his house, where it is not shown that they obstructed any public way or crossing over which plaintiff had the right of passage. Disbrow *v.* Chicago, etc., R. Co., 70 Ill. 246.

93. Textor *v.* Baltimore, etc., R. Co., 59 Md. 63, 43 Am. Rep. 540; Miller *v.* Long Island R. Co., 17 Fed. Cas. No. 9,580*a*, 10 Reporter 197.

94. Louisville, etc., R. Co. *v.* Scomp, 98 S. W. 1024, 30 Ky. L. Rep. 487.

d. Actions. The form of action for injury to property by the operation of a railroad in a public street is not an action of trespass but an action on the case, notwithstanding the fee to the center of the street may be in the adjoining owners.[95] Any individual may sue for and recover any special damages to his property due to the wrongful or negligent operation of the road, although the acts complained of may be in the nature of a public nuisance,[96] or he may sue to enjoin the wrongful acts constituting the nuisance.[97] An action for a nuisance in wrongfully operating a railroad in the vicinity of a church in such manner as to disturb the services and render the place unfit for public worship may be brought in the name of the church in its corporate capacity and need not be brought in the name of the individuals affected thereby,[98] and is properly brought against the railroad company as a corporation instead of against the agents who caused the wrongful act complained of.[99] Any cause of action for damages to adjoining property incident to the mere operation of a railroad arises as soon as the road is put in operation and the statute of limitations begins to run from that date;[1] but as to injuries resulting from an improper or negligent operation the cause of action does not accrue until the wrongful act is done and the limitation runs only from that time.[2] In an action for a nuisance if the acts alleged as constituting the nuisance are acts which the company has a right under its charter to do, if done in a legal and proper manner, the complaint must show that such acts were done in a negligent, unlawful, or improper manner;[3] and a complaint which alleges negligence in a general way without setting forth with a reasonable degree of particularity the things done or omitted, so as to show a breach of duty, is defective and subject to demurrer.[4] In an action for injury to property where the circumstances under which it occurred impose no duty upon plaintiff other than to remain passive, an express allegation that it occurred without any contributory negligence on his part is unnecessary.[5] In an action for injury to property by the operation of a railroad evidence is not admissible of similar injuries to the property of other persons,[6] or of personal injuries due to the negligent operation of its trains;[7] and evidence that plaintiff's buildings projected upon the sidewalk of the street so that they were themselves a nuisance is irrelevant.[8] In an action based upon the negligent construction of an engine-house, evidence that the defect complained of was remedied after suit was instituted is not competent as an admission of negligence, but is competent as tending to show that such defect was the cause of the injury complained of.[9] In actions for negligent injury to property, con-

95. Jeffersonville, etc., R. Co. *v.* Esterlee, 13 Bush (Ky.) 667.

96. Wylie *v.* Elwood, 134 Ill. 281, 25 N. E. 570, 23 Am. St. Rep. 673, 9 L. R. A. 726; Grand Rapids, etc., R. Co. *v.* Heisel, 47 Mich. 393, 11 N. W. 212.

97. Colgate *v.* New York Cent., etc., R. Co., 51 Misc. (N. Y.) 503, 100 N. Y. Suppl. 650; Smith *v.* Midland R. Co., 37 L. T. Rep. N. S. 224, 25 Wkly. Rep. 861, 26 Wkly. Rep. 10.

98. Schenectady First Baptist Church *v.* Schenectady, etc., R. Co., 5 Barb. (N. Y.) 79. But see Schenectady First Baptist Church *v.* Utica, etc., R. Co., 6 Barb. (N. Y.) 313.

Actions by religious societies see generally RELIGIOUS SOCIETIES.

99. Schenectady First Baptist Church *v.* Schenectady, etc., R. Co., 5 Barb. (N. Y.) 79.

1. Louisville, etc., R. Co. *v.* Orr, 91 Ky. 109, 15 S. W. 8, 12 Ky. L. Rep. 756.

2. Louisville, etc., R. Co. *v.* Orr, 91 Ky. 109, 15 S. W. 8, 12 Ky. L. Rep. 756; Louisville, etc., R. Co. *v.* Zachritz, 13 Ky. L. Rep. 141; Schueller *v.* San Antonio, etc., R. Co., (Tex. Civ. App. 1907) 102 S. W. 922.

But the statute is a bar, if pleaded, to the recovery of any damages due to the negligent operation of defendant's trains which accrued over five years (under the Kentucky statute), before the commencement of the action. Louisville, etc., R. Co. *v.* Gargan, 15 Ky. L. Rep. 95.

3. Taylor *v.* Seaboard Air Line R. Co., 145 N. C. 400, 59 S. E. 129, 122 Am. St. Rep. 455.

4. Thomason *v.* Seaboard Air Line R. Co., 142 N. C. 318, 55 S. E. 205.

5. Pittsburgh, etc., R. Co. *v.* Welch, 12 Ind. App. 433, 40 N. E. 650.

6. Kuhn *v.* Illinois Cent. R. Co., 111 Ill. App. 323; Jeffersonville, etc., R. Co. *v.* Esterle, 13 Bush (Ky.) 667.

7. Jeffersonville, etc., R. Co. *v.* Esterle, 13 Bush (Ky.) 667.

8. Macon *v.* Harris, 75 Ga. 761.

9. Kuhn *v.* Illinois Cent. R. Co., 111 Ill. App. 323.

tributory negligence on the part of plaintiff is, as in other actions based upon negligence, a good defense.[10]

B. Statutory, Municipal, and Official Regulations * — 1. Authority, Construction, and Application — a. Power to Impose and Validity of Regulations.[11] The legislature may under the police power of the state[12] subject railroad companies to all such regulations as are reasonable and necessary to promote the public safety, the safety of passengers, property, and the company's employees, and generally to compel the proper performance of their duties to the public and effectuate and promote the object of their creation.[13] The right extends to matters affecting the public convenience as well as the public safety,[14] and such police regulations are valid notwithstanding they may incidentally affect and to some

10. Murphy *v.* Wilmington, etc., R. Co., 70 N. C. 437, holding that where plaintiff, on going to defendant's warehouse after goods, left his wagon on the main track so as to be in the way of passing trains, he was guilty of such contributory negligence as to bar a recovery for injury to the wagon where the engineer exercised due care to avoid the injury after it was discovered.

11. See Constitutional Law, 8 Cyc. 695.

12. State *v.* Wabash, etc., R. Co., 83 Mo. 144; Gladson *v.* Minnesota, 166 U. S. 427, 17 S. Ct. 627, 41 L. ed. 1064; New York, etc., R. Co. *v.* New York, 165 U. S. 628, 17 S. Ct. 418, 41 L. ed. 853. See also, generally, Constitutional Law, 8 Cyc. 863 *et seq.*

13. State *v.* Wabash, etc., R. Co., 83 Mo. 144; People *v.* New York, etc., R. Co., 55 Hun (N. Y.) 409, 8 N. Y. Suppl. 672 [*affirmed* in 123 N. Y. 635, 25 N. E. 953]; Thorpe *v.* Rutland, etc., R. Co., 27 Vt. 140, 62 Am. Dec. 625; Gladson *v.* Minnesota, 166 U. S. 427, 17 S. Ct. 627, 41 L. ed. 1064. See also, generally, Constitutional Law, 8 Cyc. 871, 874.

Regulations have been held valid requiring locomotive engineers to be examined and licensed by the state authorities (Smith *v.* Alabama, 124 U. S. 465, 8 S. Ct. 564, 31 L. ed. 508); requiring certain employees to pass a physical examination as to color blindness or other defects of vision, the fee for such examination to be paid by the railroads (Nashville, etc., R. Co. *v.* Alabama, 128 U. S. 96, 9 S. Ct. 28, 32 L. ed. 352); requiring a heating apparatus so constructed that the fire will be extinguished if the car is overturned (Gause *v.* Lake Shore, etc., R. Co., 4 Ohio Dec. (Reprint) 369, 2 Clev. L. Rep. 44); prohibiting the heating of cars by means of stove or furnace kept inside of the cars (People *v.* New York, etc., R. Co., 55 Hun (N. Y.) 409, 8 N. Y. Suppl. 672 [*affirmed* in 123 N. Y. 635, 25 N. E. 953]; New York, etc., R. Co. *v.* New York, 165 U. S. 628, 17 S. Ct. 418, 41 L. ed. 853); prohibiting the running of freight trains except in certain cases or when carrying certain classes of freight on Sunday (Hennington *v.* Georgia, 163 U. S. 299, 16 S. Ct. 1086, 41 L. ed. 166); requiring engines to be equipped with a bell or whistle and to give signals at public crossings (Galena, etc., R. Co. *v.* Loomis, 13 Ill. 548, 56 Am. Dec. 471); requiring passenger cars to be supplied with pure drinking water for the use of the passengers (Southern R. Co. *v.* State, 125 Ga. 287, 54 S. E. 160, 114 Am. St. Rep. 203); requiring separate coaches for white and colored passengers (Southern Kansas R. Co. *v.* State, 44 Tex. Civ. App. 218, 99 S. W. 166); limiting the rate of speed of trains to six miles an hour in cities and villages (State *v.* Wisconsin Cent. R. Co., 128 Wis. 79, 107 N. W. 295); requiring a person or corporation operating a railroad under a contract or lease to have the same recorded in the offices of the secretary of state and the county clerks of the counties through which the road passes (Com. *v.* Chesapeake, etc., R. Co., 101 Ky. 159, 40 S. W. 250, 19 Ky. L. Rep. 329); and requiring trains to be brought to a full stop before crossing the tracks of another railroad (Lake Shore, etc., R. Co. *v.* Cincinnati, etc., R. Co., 30 Ohio St. 604).

A statute is unconstitutional which makes a railroad company absolutely liable for double the value of stock killed in case of a failure to report such injury within a specified time, since the requiring of such a notice is not a proper police regulation and the statute imposes an absolute liability regardless of whether the company had knowledge of the injury and regardless of any question of negligence on the part of the company or contributory negligence on the part of the owner of the animal. Jolliffe *v.* Brown, 14 Wash. 155, 44 Pac. 149, 53 Am. St. Rep. 868.

14. Davidson *v.* State, 4 Tex. App. 545, 30 Am. Rep. 166.

Regulations have been held valid requiring the erection of depots at the junction or intersection of different railroads (State *v.* Wabash, etc., R. Co., 83 Mo. 144; Missouri *v.* Kansas City, etc., R. Co., 32 Fed. 722); requiring passenger trains to stop at stations for not less than five minutes (Davidson *v.* State, 4 Tex. App. 545, 30 Am. Rep. 166); and requiring all passenger trains operated wholly within the state to stop at all county-seat towns (Gladson *v.* Minnesota, 166 U. S. 427, 17 S. Ct. 627, 41 L. ed. 1064 [*affirming* 57 Minn. 385, 59 N. W. 487, 24 L. R. A. 502]).

* By James A. Gwyn.

extent interfere with the transportation of interstate traffic.[15] The legislature may also delegate to railroad commissioners the power to supervise and regulate the operation of railroads;[16] or may delegate to municipal corporations the power to make police regulations affecting the operation of railroads within the corporate limits,[17] and many such regulations have been sustained as valid without express legislative authority for their enactment under the general police powers usually conferred upon or possessed by such bodies;[18] but municipal regulations to be valid must not be unreasonable,[19] uncertain,[20] or in conflict with statutory provisions.[21] Where, however, a railroad company accepts the benefits and privileges of an ordinance granting it a right of way through an incorporated city, it becomes also subject to the burdens imposed by such ordinance.[22] The legislature may also make regulations imposing additional burdens or liabilities where there is a reservation of power to alter or amend the charter,[23] or the regu-

15. New York, etc., R. Co. *v.* New York, 165 U. S. 628, 17 S. Ct. 418, 41 L. ed. 853; Hennington *v.* Georgia, 163 U. S. 299, 16 S. Ct. 1086, 41 L. ed. 166; Smith *v.* Alabama, 124 U. S. 465, 8 S. Ct. 564, 31 L. ed. 508. See also, generally, COMMERCE, 7 Cyc. 422.

16. State *v.* Missouri Pac. R. Co., 76 Kan. 467, 92 Pac. 606; Atlantic Express Co. *v.* Wilmington, etc., R. Co., 111 N. C. 463, 16 S. E. 393, 32 Am. St. Rep. 805, 18 L. R. A. 393. See also CONSTITUTIONAL LAW, 8 Cyc. 834.

Powers and duties of railroad commissioners see *supra*, I, C, 3.

17. Cincinnati, etc., R. Co. *v.* Bowling Green, 57 Ohio St. 336, 49 N. E. 121, 41 L. R. A. 422; Cincinnati, etc., R. Co. *v.* Sullivan, 32 Ohio St. 152. See, generally, CONSTITUTIONAL LAW, 8 Cyc. 839.

18. Baltimore, etc., R. Co. *v.* Whiting, 161 Ind. 228, 68 N. E. 266; Whitson *v.* Franklin, 34 Ind. 392; Seibert *v.* Missouri Pac. R. Co., 188 Mo. 657, 87 S. W. 995, 70 L. R. A. 72; Jackson *v.* Kansas City, etc., R. Co., 157 Mo. 621, 58 S. W. 32, 80 Am. St. Rep. 650; Robertson *v.* Wabash, etc., R. Co., 84 Mo. 119. But see Pennsylvania R. Co.'s Case, 213 Pa. St. 373, 62 Atl. 986, 3 L. R. A. N. S. 140 [*reversing* 27 Pa. Super. Ct. 113].

Validity of municipal regulations relating to signals and lookouts see *infra*, X, B, 4, b. Rate of speed see *infra*, X, B, 4, c. Lighting tracks see *infra*, X, B, 4, e. Signboards, flagmen, and gates at crossings see *infra*, X, B, 4, f. Obstructing streets and highways see *infra*, X, B, 5, a.

A grant of the right to use a street for the purpose of a railroad by a city does not deprive the city of the power to subsequently make any proper police regulations as to the operation and use of trains in the street. State *v.* Atlantic, etc., R. Co., 141 N. C. 736, 53 S. E. 290.

Private switch-yards.— In the absence of statute a municipality cannot impose regulations upon railroad companies in regard to switching cars within their private switch-yards. Smith *v.* Chicago Junction R. Co., 127 Ill. App. 89.

19. Southern Indiana R. Co. *v.* Bedford, 165 Ind. 272, 75 N. E. 268; White *v.* St. Louis, etc., R. Co., 44 Mo. App. 540; New Jersey Cent. R. Co. *v.* Elizabeth, 70 N. J. L. 578, 57 Atl. 404; McCullough *v.* Franklin Tp., 59 N. J. L. 106, 34 Atl. 1088; Jamaica *v.* Long Island R. Co., 37 How. Pr. (N. Y.) 379.

An ordinance is not void for unreasonableness which prohibits the letting off of steam by opening safety valves or cylinder cocks while the train is running within the corporate limits, or where the engine is within one hundred feet of a crossing, except for the purpose of allowing the escape of condensed steam on starting an engine (Pittsburg, etc., R. Co. *v.* Robson, 204 Ill. 254, 68 N. E. 468); or, subject to the same exception, "when the engine is in immediate proximity to any street or railroad crossing in said city" (Chicago, etc., R. Co. *v.* Steckman, 224 Ill. 500, 79 N. E. 602 [*affirming* 125 Ill. App. 299]).

20. New Jersey Cent. R. Co. *v.* Elizabeth, 70 N. J. L. 578, 57 Atl. 404, holding that a municipal ordinance imposing certain restrictions on steam railroad companies under penalty upon failure to comply with the provisions of a particular statute is void for uncertainty where the act referred to does not prescribe any duties to be performed by any steam railroad company.

21. Duggan *v.* Peoria, etc., R. Co., 42 Ill. App. 536; Chicago, etc., R. Co. *v.* Dougherty, 12 Ill. App. 181.

Application of rule.— An ordinance prohibiting the blowing of a locomotive whistle within the corporate limitations is invalid in so far as it conflicts with the statute requiring signals to be given in this manner and furnishes no excuse for non-compliance with the statutory requirements. Katzenberger *v.* Lawo, 90 Tenn. 235, 16 S. W. 611, 25 Am. St. Rep. 681, 13 L. R. A. 185. Where a town is within a metropolitan sanitary district it cannot by ordinance prescribe regulations as to the handling by railroad companies of offensive substances, where such regulations are within the powers and duties which the statute provides are to be "exclusively exercised" by the board of health of such district. Jamaica *v.* Long Island R. Co., 37 How. Pr. (N. Y.) 379.

22. Chicago Great Western R. Co. *v.* People, 79 Ill. App. 529.

23. Bulkley *v.* New York, etc., R. Co., 27

lation is a proper one under the police power of the state.[24] So railroad companies may be made absolutely liable for damages caused by fire communicated from their locomotives,[25] or liable without regard to negligence in the operation of the train in case of injury where certain statutory duties are not complied with,[26] or in such cases the legislature may alter the general rules of evidence and make the fact of the injury *prima facie* evidence of negligence and place the burden of proof upon the railroad company.[27]

b. Construction and Application of Regulations.[28] If the statute imposing a particular regulation prescribes a penalty for violation thereof, the statute must be strictly construed;[29] but otherwise the statute will be given a liberal construction to carry out and effectuate the intention of the legislature;[30] and in case of successive statutes imposing different or additional regulations the latter will not be construed as impliedly repealing or entirely superseding the former unless the provisions are so inconsistent that they cannot stand together.[31] The ordinary grammatical construction of the statute should prevail unless the context requires a different construction.[32] Where a statute prescribes a certain regulation as to the condition of railroad tracks which must be complied with by a certain date, a company whose road is not completed at the time specified is entitled to a reasonable time thereafter to comply with the statute.[33] The Alabama statute

Conn. 479; Baltimore, etc., R. Co. *v.* Kreager, 61 Ohio St. 312, 56 N. E. 203; Lake Shore, etc., R. Co. *v.* Sharpe, 38 Ohio St. 150. See also, generally, CONSTITUTIONAL LAW, 8 Cyc. 962.

24. Galena, etc., R. Co. *v.* Loomis, 13 Ill. 548, 56 Am. Dec. 471; Gillam *v.* Sioux City, etc., R. Co., 26 Minn. 268, 3 N. W. 353; Mathews *v.* St. Louis, etc., R. Co., 121 Mo. 298, 24 S. W. 591, 25 L. R. A. 161; Thorpe *v.* Rutland, etc., R. Co., 27 Vt. 140, 62 Am. Dec. 625; Nelson *v.* Vermont, etc., R. Co., 26 Vt. 717, 62 Am. Dec. 614. See also, generally, CONSTITUTIONAL LAW, 8 Cyc. 982.

25. Blackmore *v.* Missouri Pac. R. Co., 162 Mo. 455, 62 S. W. 993; Adams *v.* St. Louis, etc., R. Co., 138 Mo. 242, 28 S. W. 496, 29 S. W. 836; Campbell *v.* Missouri Pac. R. Co., 121 Mo. 340, 25 S. W. 936, 42 Am. St. Rep. 530, 25 L. R. A. 175; Mathews *v.* St. Louis, etc., R. Co., 121 Mo. 298, 24 S. W. 591, 25 L. R. A. 161; McFarland *v.* Missouri, etc., R. Co., 94 Mo. App. 336, 68 S. W. 105; Baltimore, etc., R. Co. *v.* Kreager, 61 Ohio St. 312, 56 N. E. 203; St. Louis, etc., R. Co. *v.* Mathews, 165 U. S. 1, 17 S. Ct. 243, 41 L. ed. 611.

26. Indianapolis, etc., R. Co. *v.* Marshall, 27 Ind. 300; Kansas Pac. R. Co. *v.* Mower, 16 Kan. 573; Louisville, etc., R. Co. *v.* Kice, 109 Ky. 786, 60 S. W. 705, 22 Ky. L. Rep. 1462.

27. Chicago, etc., R. Co. *v.* Reidy, 66 Ill. 43; Diamond *v.* Missouri Pac. R. Co., 6 Mont. 580, 13 Pac. 367; Joliffe *v.* Brown, 14 Wash. 155, 44 Pac. 149, 53 Am. St. Rep. 868.

The Tennessee statute placing the burden upon the railroad company to show that the statutory duties were complied with as to maintaining a lookout and other precautions to prevent accidents is constitutional. Louisville, etc., R. Co. *v.* Burke, 6 Coldw. 45.

28. See, generally, STATUTES.

29. State *v.* Cleveland, etc., R. Co., 157 Ind. 288, 61 N. E. 669; Kansas City, etc., R. Co. *v.* Jones, 73 Miss. 397, 18 S. W. 684; Bonner *v.* Franklin Co-Operative Assoc., 4 Tex. Civ. App. 166, 23 S. W. 317.

Penalty for violation of regulation see *infra*, X, B, 7, b, (I).

30. Ohio, etc., R. Co. *v.* Brubaker, 47 Ill. 462; Tallman *v.* Syracuse, etc., R. Co., 4 Abb. Dec. (N. Y.) 351, 4 Keyes 128.

31. Jeffersonville, etc., R. Co. *v.* Dunlap, 112 Ind. 93, 13 N. E. 403; Curry *v.* Chicago, etc., R. Co., 43 Wis. 665.

A statute which imposes a penalty upon railroad companies for the violation of certain regulations is not impliedly repealed by a subsequent statute making the violation a misdemeanor on the part of the officer or agent responsible therefor, there being no repugnancy in the two statutes. Mobile, etc., R. Co. *v.* Steiner, 61 Ala. 559.

But where two ordinances are so materially inconsistent that they cannot stand together, the latter covering the whole subject-matter of the former, prescribing new conditions with different penalties, the latter will be held to repeal and supersede the former. Terre Haute, etc., R. Co. *v.* South Bend, 146 Ind. 239, 45 N. E. 324, construing ordinances relating to the lighting of street crossings by railroad companies.

32. Grand Trunk R. Co. *v.* Washington, [1899] A. C. 275, 68 L. J. P. C. 37, 80 L. T. Rep. N. S. 301 [*affirming* 28 Can. Sup. Ct. 184 (*reversing* 24 Ont. App. 183)], construing the Canada statute requiring the blocking and filling of frogs and other spaces under railroad tracks, and holding that the power conferred upon the railway committee of the privy council to dispense with the requirements of section 4, during certain winter months, does not apply to the requirements of section 3 of the statute.

33. Gillin *v.* Patten, etc., R. Co., 93 Me. 80, 44 Atl. 361, construing the statute of 1889, requiring each railroad company to

requiring claims for damages against railroad companies to be either presented in writing or suit brought thereon within a certain n mber of days does not apply to actions for personal injuries.[34] The Georgia statute requiring railroad companies to keep in repair crossings over "public roads or private ways established pursuant to law;" and to give signals at such crossings, does not apply to private ways not established by law;[35] and the term "marks" as used in the Georgia statute requiring "a list of the different marks and brands" of stock killed to be filed with station agents refers only to such marks as are placed upon stock by artificial means for purposes of identification.[36]

2. Companies and Persons to Whom Applicable — a. In General.[37] In the absence of any provision to the contrary in the statute imposing the regulation or the charter of the company, statutory regulations in regard to railroads apply to all companies doing business within the state imposing the regulation,[38] whether chartered or unchartered,[39] and without regard to the time of their incorporation or construction or whether incorporated under general laws or special charters,[40] or whether the company owns the land on which its road is built or has merely a right of way over it;[41] but not to private lines on private property used by the proprietors exclusively for their private purposes.[42] Within the application of the statutes prescribing these regulations the term "railroad" applies to "dummy" lines,[43] "belt" lines maintained by connecting roads for the purpose of transferring freight,[44] and to roads using electricity as a motive power as well as steam

adjust, fill, or block the frogs and guard-rails on its track before Jan. 1, 1890.

34. Nicholson *v.* Mobile, etc., R. Co., 49 Ala. 205.

35. Willingham *v.* Macon, etc., R. Co., 113 Ga. 374, 38 S. E. 843.

36. Churchill *v.* Georgia R., etc., Co., 108 Ga. 265, 33 S. E. 972.

37. Companies and persons liable for injuries in general see *infra*, X, C.

Effect of operation by receiver as to liability for penalties or to indictment see *infra*, X, B, 7, d; X, B, 8, c.

38. Indianapolis, etc., R. Co. *v.* Kercheval, 16 Ind. 84; Gillam *v.* Sioux City, etc., R. Co., 26 Minn. 268, 3 N. W. 353; Staats *v.* Hudson River R. Co., 4 Abb. Dec. (N. Y.) 287, 3 Keyes 196, 33 How. Pr. 139.

Foreign corporation.— The New York statute of 1854, requiring "every railroad corporation whose line is open for use" to erect and maintain fences, applies to a foreign corporation which had prior to the passage of said act under and by virtue of the act of 1846, wherein was reserved the right to alter or repeal, extended its road within this state in so far as such road is open for use within the state. Purdy *v.* New York, etc., R. Co., 61 N. Y. 353.

The Kentucky statute requiring railroad companies to erect cattle-guards is not limited to railroads operated for five years, the provision as to five years mentioned in a preceding section of the statute having no reference to this duty. Kentucky Union R. Co. *v.* Forkner, 40 S. W. 462, 19 Ky. L. Rep. 378.

The Ontario statute requiring railroad companies to pack the frogs on their tracks does not apply to the Grand Trunk Railway Company, since the act expressly limits its application to railroad companies within the legislative control of that province. Monkhouse *v.* Grand Trunk R. Co., 8 Ont. App. 637; Clegg *v.* Grand Trunk R. Co., 10 Ont. 708.

39. Diamond *v.* Northern Pac. R. Co., 6 Mont. 580, 13 Pac. 367.

40. See *infra*, X, B, 2, b, c.

41. Missouri Pac. R. Co. *v.* Manson, 31 Kan. 337, 2 Pac. 800 (regulation as to construction of cattle-guards); Baltimore, etc., R. Co. *v.* Kreager, 61 Ohio St. 312, 56 N. E. 203 (regulation as to liability for fires communicated from locomotives). But see Easton R. Co. *v.* Portsmouth, 62 N. H. 344, holding that a railroad company is not liable to contribute as one of the "proprietors" of a railroad, to the expense of maintaining gates at highway crossings upon the track of another railroad in which it has no right or interest except a statutory right to use the track at a fixed compensation.

42. Matson *v.* Baird, 3 App. Cas. 1082, 39 L. T. Rep. N. S. 304, 26 Wkly. Rep. 835, holding that the English statute requiring gates at crossings does not apply to such a railroad.

43. Ensley R. Co. *v.* Chewning, 93 Ala. 24, 9 So. 458 (regulation requiring signals on approaching a public crossing or regular stopping place); Birmingham Mineral R. Co. *v.* Jacobs, 92 Ala. 187, 9 So. 320 (regulation requiring trains to stop before crossing another railroad); Katzenberger *v.* Lawo, 90 Tenn. 235, 16 S. W. 611, 25 Am. St. Rep. 681, 13 L. R. A. 185 (regulations as to lookout and precautions for the prevention of accidents).

44. Toledo, etc., R. Co. *v.* Bond, 35 Ind. App. 142, 72 N. E. 647, holding that a belt line railroad maintained in a city by two connecting through lines, for the purpose of transferring freight from one to the other, is

railroads; [45] and a company will be held to be "operating" a railroad within the application of the statutes if running trains thereon or any purpose,[46] including the operation of trains for construction purposes on incompleted portions.[47] A company operating a road will be held to be the owner thereof within the application of the statutes,[48] and statutes or ordinances applying in terms to any person running or causing trains to be run contrary to certain regulations apply to companies owning or operating the road as well as the servants violating such regulations; [49] but a statute which imposes a liability upon a particular officer or agent is not applicable to any other officer or agent not acting in the capacity named.[50] A statute imposing a liability for wrongful death due to negligence applies to a company operating trains in the course of its business over a private track outside of its chartered limits by the mere license or sufferance of the owner;[51] and a statute requiring trains to be stopped before crossing the tracks of any railroad applies to intersecting lines on which all of the trains are operated by the same company,[52] but not to the intersecting tracks of a switch-yard belonging to the same company; [53] and an ordinance requiring the "proprietors" of railroads to maintain flagmen and bell towers at all crossings does not apply to a company having only a temporary right to run trains over the track of another company subject to its control.[54] A statute in terms applicable to railroads of over a certain length applies to a road of over that length, although not all of the prescribed length is within the state imposing the regulation.[55]

b. Companies Organized Under Special Charters. Statutory regulations in regard to railroad companies apply to those incorporated under special charters as well as under general laws,[56] unless the statute imposing the regulation shows

a main track of a steam railroad, within the application of the Indiana statute requiring switches on such railroads to be indicated by a signal light so attached as to indicate safety when the switch is closed and danger when it is open.

45. Louisville, etc., R. Co. *v.* Anchors, 114 Ala. 492, 22 So. 279, 62 Am. St. Rep. 116, regulation as to stopping trains before crossing other railroads.

A change of motive power from steam to electricity on the road of a company which is the successor of a company incorporated under the general statutes as a railroad company does not make the road a street railroad or affect its duty to construct and maintain fences as required by statute. Hannah *v.* Metropolitan St. R. Co., 81 Mo. App. 78.

Street surface railroads.— The New York Railroad Law of 1892 providing that every railroad corporation shall maintain cattle-guards at road crossings applies to a suburban street surface railroad company incorporated under article 1 of the act, and requires cattle-guards where the track of such company crosses country roads. Evans *v.* Utica, etc., R. Co., 44 Misc. (N. Y.) 345, 89 N. Y. Suppl. 1089.

46. Glandon *v.* Chicago, etc., R. Co., 68 Iowa 457, 27 N. W. 457.

A railroad constructed by a mining and lumber company and which is operated by a railroad company whenever it is necessary and profitable for the company to do so, although not operated regularly and constantly, is within the application of the Missouri statute requiring that "any railroad corporation running or operating any railroad" shall erect and maintain lawful fences. Webb *v.* Southern Missouri, etc., R. Co., 92 Mo. App. 53.

47. Glandon *v.* Chicago, etc., R. Co., 68 Iowa 457, 27 N. W. 457 (liability for double the value of stock killed where railroad is not fenced); Chicago, etc., R. Co. *v.* Totten, 1 Kan. App. 558, 42 Pac. 269 (regulation requiring road to be fenced).

48. Indianapolis, etc., R. Co. *v.* People, 32 Ill. App. 286, regulation prohibiting obstruction of highways.

49. Southern R. Co. *v.* Jones, 33 Ind. App. 333, 71 N. E. 275 (ordinance regulating speed of trains); Missouri, etc., R. Co. *v.* Owens, (Tex. Civ. App. 1903) 75 S. W. 579 (ordinance regulating speed of trains).

50. Vaughan *v.* State, 116 Ga. 841, 43 S. E. 249, regulation prohibiting running of freight trains on Sunday.

51. Com. *v.* Boston, etc., R. Co., 126 Mass. 61.

52. Chesapeake, etc., R. Co. *v.* Com., 99 Ky. 175, 35 S. W. 266, 18 Ky. L. Rep. 54.

53. St. Louis Nat. Stock Yards *v.* Godfrey, 198 Ill. 288, 65 N. E. 90 [*affirming* 101 Ill. App. 40].

54. Lake Shore, etc., R. Co. *v.* Kaste, 11 Ill. App. 536.

55. People *v.* New York, etc., R. Co., 55 Hun (N. Y.) 409, 8 N. Y. Suppl. 672 [*affirmed* in 123 N. Y. 635, 25 N. E. 953], statute prohibiting heating of cars by stove or furnace kept inside the car.

56. *Alabama.*— Nashville, etc., R. Co. *v.* Peacock, 25 Ala. 229.

Illinois.— Illinois Cent. R. Co. *v.* Slater, 129 Ill. 91, 21 N. E. 575, 16 Am. St. Rep. 242, 6 L. R. A. 418.

Indiana.— Indianapolis, etc., R. Co. *v.* Mar-

a contrary intention, either expressly,[57] or by implication from the character of its provisions,[58] or there is some provision in the charter which prevents its application;[59] and the mere fact that the charter makes provision as to certain duties and how they shall be performed does not affect the right of the state in the exercise of its police power to impose other and further regulations in respect to the same duties,[60] or affect the application of existing general statutes not inconsistent with the provisions of the charter.[61]

c. Effect of Time of Incorporation or Construction. General statutory regulations affecting railroad companies are ordinarily applicable to those incorporated or constructed before as well as after the passage of the act,[62] unless the statute

shall, 27 Ind. 300; Indianapolis, etc., R. Co. *v.* Kercheval, 16 Ind. 84.

Minnesota.— Gillam *v.* Sioux City, etc., R. Co., 26 Minn. 268, 3 N. W. 353; Whittier *v.* Chicago, etc., R. Co., 24 Minn. 394.

New York.—Staats *v.* Hudson River R. Co., 4 Abb. Dec. 287, 3 Keyes 196, 33 How. Pr. 139.

See 41 Cent. Dig. tit. "Railroads," § 736.

57. Vandorn *v.* New Jersey, etc., R. Co., 42 N. J. Eq. 463, 8 Atl. 99, holding that the provision of the general railroad act in regard to fencing is confined by its terms to companies formed under that act and has no application to companies incorporated under special charters.

Under a statute making applicable such provisions thereof as are "not inconsistent" with the charters of railroad companies, a provision requiring railroad companies to construct and maintain fences with gates is not inconsistent with a charter provision merely requiring the company to construct and maintain fences and permitting adjoining landowners to construct and maintain gates therein at farm crossings. Staats *v.* Hudson River R. Co., 4 Abb. Dec. (N. Y.) 287, 3 Keyes 196, 33 How. Pr. 139.

58. Winger *v.* First Div. St. Paul, etc., R. Co., 22 Minn. 11; Devine *v.* St. Paul, etc., R. Co., 22 Minn. 8 (each holding that the Minnesota statute of 1872, requiring railroad companies to fence on each side of their tracks, was not intended to apply to roads whose charters required them to fence in certain places, since the subsequent sections of the statute prescribing the liability for failure to fence recognized two different classes of railroads and prescribed a different liability as to a company which had neglected to fence its road "as required by the terms of its charter and the amendments thereof."

The Minnesota statute which as originally enacted was construed as not intended to apply to companies whose charters **contained** provisions in regard to fencing was amended in 1877 so as to apply generally to all railroad companies. Gillam *v.* Sioux City, etc., R. Co., 26 Minn. 268, 3 N. W. 353.

59. Daniels *v.* St. Louis, etc., R. Co., 62 Mo. 43; Central Trust Co. *v.* Wabash, etc., R. Co., 30 Fed. 344. See also Indianapolis, etc., R. Co. *v.* Kercheval, 16 Ind. 84, holding, however, that a clause in a railroad charter providing that no person or body corporate or politic shall interfere therewith or do anything "to detract from, or affect, the profits of said corporation," will not exempt such railroad company from the operation of the statutes in regard to fencing the tracks, neither the cost of such fences nor the amount of damages paid for stock killed being a detraction from the profits of the company within the meaning of the statute.

The legislature cannot deprive the state of its police power and a charter provision giving a railroad company the right to regulate the speed of its trains is a mere license which in the exercise of such power the state may revoke. Cleveland, etc., R. Co. *v.* Harrington, 131 Ind. 426, 30 N. E. 37. See also Gillam *v.* Sioux City, etc., R. Co., 26 Minn. 268, 270, 3 N. W. 353, where the court said: "If, in any case, the legislature may bind the state not to exercise this [police] power, an intention so to do cannot be implied, but must appear in express and unmistakable terms."

It will be presumed that a general statute requiring the construction of fences and cattle-guards applies to companies operating under special charters unless a charter provision excepting it from the operation of such statute is pleaded and proved. Whittier *v.* Chicago, etc., R. Co., 24 Minn. 394.

60. Illinois Cent. R. Co. *v.* Slater, 129 Ill. 91, 21 N. E. 575, 16 Am. St. Rep. 242, 6 L. R. A. 418 (holding that the fact that the charter of a railroad company prescribes its duty as to the giving of crossing signals does not prevent the application of a general statute which defines such duty differently from the charter provisions); Gillam *v.* Sioux City, etc., R. Co., 26 Minn. 268, 3 N. W. 353 (holding that the fact that a charter of a railroad company provided that it should maintain fences at certain places does not prevent the application of a general statute requiring fencing at all places where the road can be fenced); Staats *v.* Hudson River R. Co., 4 Abb. Dec. (N. Y.) 287, 3 Keyes 196, 33 How. Pr. 139 (holding that a charter provision requiring a railroad company to construct and maintain fences does not prevent the application of a general statute requiring the construction and maintenance of fences with gates or bars).

61. Pratt *v.* Atlantic, etc., R. Co., 42 Me. 579.

62. *Illinois.*—Galena, etc., R. Co. *v.* Loomis, 13 Ill. 548, 56 Am. Dec. 471.

Indiana.— Indianapolis, etc., R. Co. *v.* Kercheval, 16 Ind. 84.

provides otherwise.[63] This rule applies in all cases where the regulation is a proper exercise of the police power,[64] or the right to alter or amend the charter is reserved.[65] Conversely, a statute in terms relating to "all existing railroad corporations" extends to railroad companies incorporated after as well as before its passage unless exception is provided in their charters.[66]

3. Equipment, Facilities, and Accommodations — a. Accommodations and Facilities at Stations. While there is no common-law duty to maintain depots or warehouses for the accommodation of freight and passengers,[67] there are statutes in some jurisdictions requiring railroad companies to maintain such buildings[68]

Massachusetts.— Lyman *v.* Boston, etc., R. Co., 4 Cush. 288.

Minnesota.— Gillam *v.* Sioux City R. Co., 26 Minn. 268, 3 N. W. 353.

Missouri.— Gorman *v.* Pacific R. Co., 26 Mo. 441, 72 Am. Dec. 220.

Pennsylvania.— Pennsylvania R. Co. *v.* Kelly, 31 Pa. St. 372. *Compare* Shick *v.* Pennsylvania R. Co., 1 Leg. Gaz. 61.

See 41 Cent. Dig. tit. "Railroads," § 737.

Application to particular regulations.— Railroads incorporated or constructed before as well as after the passage of the act have been held subject to the regulations relating to fencing tracks (Norris *v.* Androscoggin R. Co., 39 Me. 273, 63 Am. Dec. 621; Finch *v.* Chicago, etc., R. Co., 46 Minn. 250, 48 N. W. 915; Trice *v.* Hannibal, etc., R. Co., 35 Mo. 188; Gorman *v.* Pacific R. Co., 26 Mo. 441, 72 Am. Dec. 220; Staats *v.* Hudson River R. Co., 4 Abb. Dec. (N. Y.) 287, 3 Keyes 196, 33 How. Pr. 139; Shurley *v.* New York, etc., R. Co., 121 Pa. St. 511, 15 Atl. 567), construction of cattle-guards (Bulkley *v.* New York, etc., R. Co., 27 Conn. 479; Gillam *v.* Sioux City, etc., R. Co., 26 Minn. 268, 3 N. W. 353; Lake Shore, etc., R. Co. *v.* Sharpe, 38 Ohio St. 150), crossing signals (Galena, etc., R. Co. *v.* Loomis, 13 Ill. 548, 56 Am. Dec. 471), liability for fire communicated from locomotives (Lyman *v.* Boston, etc., R. Co., 4 Cush. (Mass.) 288), and regulations prohibiting the obstruction of public highway crossings (Pennsylvania R. Co. *v.* Kelly, 31 Pa. St. 372).

Under the Iowa statute requiring the erection of cattle-guards where a railroad "enters or leaves any improved or fenced land" a railroad constructed across unimproved and uninclosed lands which are afterward improved and inclosed must, after such change in the character of the land, be provided with cattle-guards where the road enters and leaves such land. Heskett *v.* Wabash, etc., R. Co., 61 Iowa 467, 16 N. W. 525.

63. Stearns *v.* Old Colony, etc., R. Co., 1 Allen (Mass.) 493.

The Massachusetts statute of 1846 requiring railroad companies to erect and maintain fences on both sides of any railroad which they might thereafter construct did not apply to a railroad which was located and partially constructed at the time of its passage (Stearns *v.* Old Colony, etc., R. Co., 1 Allen 493); but if notwithstanding the road was partially constructed the location was not filed until after the passage of the act the company was bound to erect and maintain fences (Sawyer *v.* Vermont, etc., R. Co., 105 Mass. 196).

Under the Montana civil code which requires railroad companies to fence their tracks, but provides that its provision shall not apply to corporations previously formed unless they elect to continue their existence under the code in the manner prescribed, a domestic railroad company formed before the code took effect and which has not made an election as provided is not liable for failure to fence its track. Menard *v.* Montana Cent. R. Co., 22 Mont. 340, 56 Pac. 592.

Under a statute applicable only to roads incorporated after a certain date, if a company incorporated after that date succeeds to the rights and privileges of a company incorporated before the date specified and the road is constructed by the last incorporated company, it is subject to the regulations prescribed by the statute. Rockwell *v.* New York, etc., R. Co., 51 Conn. 401.

Effect as to lessee of prior incorporation of lessor.— Under a statute in terms inapplicable to railroad companies previously incorporated, the exception of such company does not pass to its lessee which was incorporated after the passage of the act. Robinson *v.* Southern Pac. R. Co., 105 Cal. 526, 38 Pac. 94, 722, 28 L. R. A. 773.

64. Ohio, etc., R. Co. *v.* McClelland, 25 Ill. 123; Galena, etc., R. Co. *v.* Loomis, 13 Ill. 548, 56 Am. Dec. 471; Indianapolis, etc., R. Co. *v.* Kercheval, 16 Ind. 84; Gillam *v.* Sioux City, etc., R. Co., 26 Minn. 268, 3 N. W. 353; Gorman *v.* Pacific R. Co., 26 Mo. 441, 72 Am. Dec. 220.

65. Bulkley *v.* New York, etc., R. Co., 27 Conn. 479; Jeffersonville, etc., R. Co. *v.* Gabbert, 25 Ind. 431; Lake Shore, etc., R. Co. *v.* Sharpe, 38 Ohio St. 150.

66. Indianapolis, etc., R. Co. *v.* Blackman, 63 Ill. 117.

67. See *supra*, X, A, 1, d.

68. *Minnesota.*— State *v.* Minneapolis, etc., R. Co., 76 Minn. 469, 79 N. W. 510, holding that the Minnesota statute requiring the construction of depots "at all villages" applies only to incorporated villages and that the railroad company cannot be required to construct a station at an unincorporated village.

Missouri.— State *v.* Wabash, etc., R. Co., 83 Mo. 144, construing the Missouri statute requiring the maintenance of depots at the junction or intersection of different railways.

New Hampshire.—Boothby *v.* Grand Trunk R. Co., 66 N. H. 342, 34 Atl. 157; Nashua, etc., R. Co. *v.* Derry, 58 N. H. 65, holding

with suitable and convenient waiting-rooms for passengers,[69] and certain accommodations and facilities connected therewith,[70] and to keep the same in proper order and repair,[71] and at the time of the arrival and departure of trains to keep waiting-rooms open for the use of passengers,[72] and properly lighted and heated.[73] In some jurisdictions the statutes require that separate waiting-rooms shall be

that a notification of a vote of a town to require a railroad company to locate a depot is equivalent to the "request" prescribed by the New Hampshire statute.

Texas.— San Antonio, etc., R. Co. *v.* State, 79 Tex. 264, 14 S. W. 1063, construing the statute requiring depots at the junction or intersection of different railroads.

United States.— Missouri *v.* Kansas City, etc., R. Co., 32 Fed. 722, holding that the Missouri statute requiring the construction and maintenance of depots at the intersection of different railroads is not unconstitutional.

See 41 Cent. Dig. tit. "Railroads," § 740.

Statutes not requiring erection of depots.— A railroad company is not required to erect a depot or warehouse for the accommodation of passengers or freight by a statute merely empowering the company to erect such buildings (People *v.* New York, etc., R. Co., 104 N. Y. 58, 9 N. E. 856, 58 Am. Rep. 484 [*reversing* 40 Hun 570]), or requiring that a railroad company shall furnish "sufficient accommodation for the transportation" of passengers and property (Chaddick *v.* Lindsay, 5 Okla. 616, 49 Pac. 940), or empowering railroad commissioners to require the provision of such accommodations, where no order has been made by them pursuant to such authority (Page *v.* Louisville, etc., R. Co., 129 Ala. 232, 29 So. 676).

69. Illinois Cent. R. Co. *v.* Com., 52 S. W. 818, 21 Ky. L. Rep. 569.

A statute requiring "convenient and suitable" waiting-rooms and water-closets is not void for uncertainty (Louisville, etc., R. Co. *v.* Com., 103 Ky. 605, 45 S. W. 880, 46 S. W. 697, 20 Ky. L. Rep. 366); and what is a convenient and suitable waiting-room is a question of fact depending upon the size of the city, town, or station and the number of passengers arriving and departing therefrom (Illinois Cent. R. Co. *v.* Com., 90 S. W. 602, 28 Ky. L. Rep. 802).

70. Louisville, etc., R. Co. *v.* Com., 103 Ky. 605, 45 S. W. 880, 46 S. W. 697, 20 Ky. L. Rep. 366; Louisville, etc., R. Co. *v.* Com., 97 Ky. 207, 30 S. W. 616, 117 Ky. L. Rep. 116.

The "reasonable facilities" at stations which a railroad company is required by statute to provide do not mean all facilities which might be conducive to the convenience of the public, but such facilities as it is reasonable under the circumstances to require the railroad company to provide, and which it is within its power to furnish. Newry Nav. Co. *v.* Great Northern R. Co., 7 Can. R. & Tr. Cas. 176.

Water-closets.— A "convenient and suitable" water-closet must be accessible to the depot and must be suitable for women and children as well as men (Louisville, etc., R. Co. *v.* Com., 103 Ky. 605, 45 S. W. 880, 46 S. W. 697, 20 Ky. L. Rep. 366); but in a small village if suitable closets are provided they may be kept locked if it is a reasonable precaution to cleanliness and the key left with the station agent without posting any notice that the key can be obtained by applying to him (Louisville, etc., R. Co. *v.* Com., 45 S. W. 362, 20 Ky. L. Rep. 100); and a statute requiring railroad companies to provide water-closets at all stations does not apply to a flag station where there is merely an open platform and no station buildings or offices are kept (State *v.* Baltimore, etc., R. Co., 61 W. Va. 367, 56 S. E. 518). Under a statute requiring railroad companies to afford all reasonable facilities for receiving, forwarding, and delivering traffic, if the providing of water-closets for the use of passengers is a facility within the application of the statute, the company is not prevented after providing such closets from making a small and reasonable charge for their use and the railroad commissioners cannot require the company to permit them to be used without charge. West Ham *v.* Great Eastern R. Co., 64 L. J. Q. B. 340, 72 L. T. 395, 9 R. & Can. Tr. Cas. 7.

71. Illinois Cent. R. Co. *v.* Com., 90 S. W. 602, 28 Ky. L. Rep. 802; Illinois Cent. R. Co. *v.* Com., 52 S. W. 818, 21 Ky. L. Rep. 569.

72. Draper *v.* Evansville, etc., R. Co., 165 Ind. 117, 74 N. E. 889. See also Boothby *v.* Grand Trunk R. Co., 66 N. H. 342, 34 Atl. 157, holding that a failure to keep a station open and warm in inclement weather at the hour advertised for the departure of trains is a violation of the statute requiring railroad companies to provide "crossings, stations and other facilities for the public."

The Kentucky statute does not require that railroad companies should keep open and maintain depots at flag stations during the night-time. Sandifer *v.* Louisville, etc., R. Co., 89 S. W. 528, 28 Ky. L. Rep. 464.

Under the Texas statute which requires railroad companies to keep their depots lighted, warm, and open to the ingress and egress of passengers for not less than one hour before the arrival and after the departure of all passenger trains, the company is not obliged to keep a waiting-room open and permit a passenger arriving at one A. M. to leave his family therein for several hours until he can walk four and one-half miles into the country and procure a conveyance to carry them away. International, etc., R. Co. *v.* Pevey, 30 Tex. Civ. App. 460, 70 S. W. 778.

73. Texas, etc., R. Co. *v.* Cornelius, 10 Tex. Civ. App. 125, 30 S. W. 720; Texas, etc.,

maintained for white and colored passengers,[74] and that the ticket office shall be open for the sale of tickets a certain length of time before the departure of trains.[75] Railroad commissioners may in some jurisdictions, under the powers delegated to them, require the erection of a depot building,[76] or at an established station require the furnishing of suitable accommodations for freight as well as passengers;[77] but the enforcement of their orders by the courts will depend upon whether, under the circumstances, they are reasonable and just.[78]

b. Facilities For Shipment of Goods.[79] In some jurisdictions there are statutes requiring railroad companies to permit connections to be made on their roads with switches or spur-tracks leading to grain elevators, warehouses, and the like,[80] and to operate cars over such tracks which it may own, control, or have the right to use;[81] but the company cannot be required to operate cars over such tracks except for the purposes specified in the statute,[82] or over a track owned by another which is not reasonably safe.[83] The legislature cannot require a railroad company to permit a private person or corporation to erect a grain elevator or warehouse upon its right of way,[84] nor can railroad commissioners, under the powers vested in them to require the furnishing of adequate facilities, require a railroad company to furnish to a private individual a site upon its right of way for the erection of a grain elevator,[85] even though the railroad company may

R. Co. *v.* Mayes, (Tex. App. 1890) 15 S. W. 43.

74. St. Louis, etc., R. Co. *v.* State, 61 Ark. 9, 31 S. W. 570, holding, however, that the Arkansas statute requiring separate waiting-rooms for white and colored passengers does not require railroad companies to erect depot buildings at places where they have none, and further that a store near a flag station, where customers are accustomed to go while waiting for trains and where railroad tickets are sold on commission, but which the railroad company does not own, occupy, or control, is not a "passenger depot" within the meaning of the statute.

75. Louisville, etc., R. Co. *v.* Com., 102 Ky. 300, 43 S. W. 458, 19 Ky. L. Rep. 1462, 53 L. R. A. 149; Brady *v.* State, 83 Tenn. 628; Gulf, etc., R. Co. *v.* Dyer, 43 Tex. Civ. App. 93, 95 S. W. 12; International, etc., R. Co. *v.* Lister, (Tex. Civ. App. 1902) 72 S. W. 107.

The statutory requirement does not apply to cases where the company has regularly dispensed with the sale of any tickets whatever at a particular station for particular trains, and passengers boarding such trains are charged only the regular ticket rate of fare. Louisville, etc., R. Co. *v.* Com., 102 Ky. 300, 43 S. W. 458, 19 Ky. L. Rep. 1462, 53 L. R. A. 149; Brady *v.* State, 83 Tenn. 628.

76. Railroad Com'rs *v.* Portland, etc., R. Co., 63 Me. 269, 18 Am. Rep. 208; State *v.* Chicago, etc., R. Co., 12 S. D. 305, 81 N. W. 503, 47 L. R. A. 569.

77. People *v.* Delaware, etc., Canal Co., 32 N. Y. App. Div. 120, 52 N. Y. Suppl. 850 [*affirmed* in 165 N. Y. 362, 59 N. E. 158].

78. State *v.* Minneapolis, etc., R. Co., 76 Minn. 469, 79 N. W. 510, holding that an order of the railroad commissioners for the building of a passenger station at an unincorporated village of only one hundred inhabitants, in a strictly rural section, and within seven tenths of a mile of a regular freight and passenger station, is unreasonable and will not be enforced.

79. **General duties as common carrier** as to facilities for shipment of goods see CARRIERS, 6 Cyc. 372.

80. Chicago, etc., R. Co. *v.* Suffern, 129 Ill. 274, 21 N. E. 824 [*affirming* 27 Ill. App. 402]; Hoyt *v.* Chicago, etc., R. Co., 93 Ill. 601; Bartlett *v.* Chicago, etc., R. Co., 96 Wis. 335, 71 N. W. 598.

81. Hoyt *v.* Chicago, etc., R. Co., 93 Ill. 601 (holding, however, that one railroad company cannot be required to deliver consignments of grain at an elevator or warehouse which can be reached only by running cars over the side-track of another company which it has no right to use); Bartlett *v.* Chicago, etc., R. Co., 96 Wis. 335, 71 N. W. 598 (holding that under a statute which provides that the warehouseman shall construct the track at his own expense a railroad company will not be required to operate cars upon a side-track connecting with a warehouse, in the absence of any showing as to who constructed or owned the track).

82. Stetler *v.* Chicago, etc., R. Co., 49 Wis. 609, 6 N. W. 303, holding that under a statute requiring railroad companies to deliver consignments of "grain" to any consignee, elevator, or warehouse which can be reached by a track which it has the right to use, the company cannot be required to run cars over a spur-track owned by another person, for the purpose of delivering any other kind of merchandise.

83. Stetler *v.* Chicago, etc., R. Co., 49 Wis. 609, 6 N. W. 303.

84. State *v.* Chicago, etc., R. Co., 36 Minn. 402, 31 N. W. 365, holding that such a statute is unconstitutional, either as taking the private property of the railroad company for a private use, or for a public use without condemnation proceedings and due compensation being made to the owner.

85. Chicago, etc., R. Co. *v.* State, 50 Nebr.

previously have voluntarily granted such a privilege to some other individual, and the statutes prohibit any unjust discrimination.[86] A statute requiring railroad companies to build sidings and spur-tracks sufficient to handle the business tendered to such railroads does not require the building of switches and spur-tracks away from their lines to accommodate individual interests.[87] Where a statute authorizes individuals to attach cars to the motive power of a state railroad, the right may be denied by the commissioners in charge of the road as to any car which has been condemned as unfit for service.[88]

c. Train Service. The legislature has the right, under the police power of the state, to make all reasonable and necessary regulations to secure the furnishing of an adequate train service at points within the state,[89] although such regulations may incidentally affect and to some extent interfere with interstate traffic;[90] but if all local conditions are adequately met, railroad companies have a legal right to adopt special provisions for through traffic, and legislative interference therewith is unreasonable and an infringement of the constitutional requirements that commerce between states shall be free and unobstructed;[91] and where the regulation of railroads is put in the hands of railroad commissioners, the enforcement by the court of their orders relative to the train service to be furnished should be governed by these principles.[92] There are statutes in a number of the

399, 69 N. W. 955; Missouri Pac. R. Co. *v.* Nebraska, 164 U. S. 403, 17 S. Ct. 130, 41 L. ed. 489 [*reversing* 29 Nebr. 550, 45 N. W. 785].

86. Missouri Pac. R. Co. *v.* Nebraska, 164 U. S. 403, 17 S. Ct. 130, 41 L. ed. 489 [*reversing* 29 Nebr. 550, 45 N. W. 785].

87. Railroad Commission *v.* St. Louis, etc., R. Co., 35 Tex. Civ. App. 52, 80 S. W. 102, 98 Tex. 67, 80 S. W. 1141, holding that the statute applies only to business which comes to the railroad from the public for transportation and that the railroad commissioners have no authority under the statute to order the construction of a spur-track away from the main line for the use of a lumber company.

88. Miller *v.* Canal Com'rs, 21 Pa. St. 23.

89. Lake Shore, etc., R. Co. *v.* Ohio, 173 U. S. 285, 19 S. Ct. 465, 43 L. ed. 702 [*affirming* 8 Ohio Cir. Ct. 220, 4 Ohio Cir. Dec. 406] (holding that the Ohio statute requiring railroad companies to stop three passenger trains daily in each direction if so many are run at all towns of over three thousand inhabitants is constitutional); Gladson *v.* Minnesota, 166 U. S. 427, 17 S. Ct. 627, 41 L. ed. 1064 [*affirming* 57 Minn. 385, 59 N. W. 487, 24 L. R. A. 502; and *distinguishing* Illinois Cent. R. Co. *v.* Illinois, 163 U. S. 142, 16 S. Ct. 1096, 41 L. ed. 107] (holding that the Minnesota statute which requires all regular passenger trains to stop at all county-seat towns, but which expressly excepts through trains entering the state from other states and all transcontinental trains, is constitutional).

Length of time of stoppage.—A statute requiring that the stops of passenger trains at all stations shall be not less than five minutes is a valid police regulation. Davidson *v.* State, 4 Tex. App. 545, 30 Am. Rep. 166.

The legislature may require the construction of a station house at a particular point on the road and the stoppage of trains at such point, particularly where the power to alter or amend the charter of the company is expressly reserved. Com. *v.* Eastern R. Co., 103 Mass. 254, 4 Am. Rep. 555.

Separate trains for freight and passengers.—Under a statute requiring all railroad companies to furnish sufficient accommodations for transportation, an order of railroad commissioners requiring a railroad company to operate separate trains for freight and passengers is *prima facie* reasonable and valid, and will be enforced in the absence of any affirmative showing by the company that it is unreasonable. State *v.* Missouri Pac. R. Co., 76 Kan. 467, 92 Pac. 606.

90. Lake Shore, etc., R. Co. *v.* Ohio, 173 U. S. 285, 19 S. Ct. 564, 43 L. ed. 703 [*affirming* 8 Ohio Cir. Ct. 220, 4 Ohio Cir. Dec. 406]; Gladson *v.* Minnesota, 166 U. S. 427, 17 S. Ct. 627, 41 L. ed. 1064 [*affirming* 57 Minn. 385, 59 N. W. 487, 24 L. R. A. 502].

91. Cleveland, etc., R. Co. *v.* Illinois, 177 U. S. 114, 20 S. Ct. 722, 44 L. ed. 868 [*reversing* 175 Ill. 359, 51 N. E. 842]; Illinois Cent. R. Co. *v.* Illinois, 163 U. S. 142, 16 S. Ct. 1096, 41 L. ed. 107 [*reversing* 143 Ill. 434, 33 N. E. 173, 19 L. R. A. 119, and *overruling* Chicago, etc., R. Co. *v.* People, 105 Ill. 657] (holding that the Illinois statute requiring all regular passenger trains to stop at all county-seat towns, regardless of local conditions and the number of trains stopping at such stations and the character of the traffic carried, is unconstitutional).

92. Railroad Com'rs *v.* Atlantic Coast Line R. Co., 74 S. C. 80, 54 S. E. 224 (holding that on an application for mandamus to compel the stoppage of certain through trains, upon a finding by the railroad commissioners that the local service was inadequate, the order should be in the alternative, requiring the company either to stop such trains or to provide an additional local service); Railroad Com'rs *v.* Atlantic Coast Line R. Co., 71 S. C. 130, 50 S. E. 641 (holding that where the

states requiring that railroad companies shall run at least one train daily in each direction;[93] that a certain number of trains per day in each direction shall be stopped at all towns of over a certain population;[94] that companies operating entirely within the state shall stop all regular passenger trains at all county-seat towns;[95] that stops of passenger trains at stations shall be of a certain length;[96] that, upon the written application of a certain number of citizens of an incorporated town, a railroad company shall stop all of its trains at such place if the municipal authorities will provide and tender the amount necessary for constructing a switch or track at the place of stoppage;[97] and that where two railroad companies use the same line they shall provide reasonable and proper facilities, and that any contracts between them to the contrary shall be void.[98]

d. Connections and Facilities For Transfers.[99] A constitutional or statutory provision merely authorizing one railroad to connect with other roads is not mandatory but permissive,[1] and need not, in the absence of express limitation, be exercised within any particular time,[2] and a connection once made under such authority may, in the absence of agreement to the contrary, be discontinued without the consent of the other company.[3] So also a provision authorizing one company to connect with other railroads does not confer any right to run its cars over such roads,[4] or any right to a business connection for the purpose of through traffic;[5] and a statutory right on the part of one company to connect with the road of another will not prevent the latter from changing the gauge of its road, at least where the power to do so is granted and accepted before the first com-

railroad commissioners have duly ascertained that the train service at a certain point is inadequate, an order for the stoppage of additional trains at such points will be enforced by mandamus); Illinois Cent. R. Co. *v.* Mississippi R. Commission, 138 Fed. 327 [*affirmed* in 203 U. S. 335, 27 S. Ct. 90, 51 L. ed. 209] (holding that an order of railroad commissioners requiring certain through trains engaged in interstate traffic to stop at a particular station in addition to the local trains already provided is invalid and will not be enforced, and that while the state has a right to demand an adequate train service the right should be exercised by requiring additional local trains and not by interference with interstate traffic).

93. Com. *v.* Louisville, etc., R. Co., 120 Ky. 91, 85 S. W. 712, 27 Ky. L. Rep. 497, holding that the running of a through train which does not stop at way stations is not a compliance with the statute. *Compare* Com. *v.* Louisville, etc., R. Co., 66 S. W. 753, 23 Ky. L. Rep. 1986.

94. Lake Shore, etc., R. Co. *v.* Ohio, 173 U. S. 285, 19 S. Ct. 465, 43 L. ed. 702 [*affirming* 8 Ohio Cir. Ct. 220, 4 Ohio Cir. Dec. 406], Ohio statute requiring the stoppage of three trains per day in each direction if so many are run at all towns of over three thousand inhabitants.

95. Gladson *v.* Minnesota, 166 U. S. 427, 17 S. Ct. 627, 41 L. ed. 1064 [*affirming* 57 Minn. 385, 59 N. W. 487, 24 L. R. A. 502].

96. Davidson *v.* State, 4 Tex. App. 545, 30 Am. Rep. 166, statute requiring passenger trains to stop not less than five minutes at all stations.

97. St. Louis, etc., R Co. *v.* Crandell, 75 Ark. 89, 86 S. W. 855, 112 Am. St. Rep. 42; St. Louis, etc., R. Co. *v.* B'Shears, 59 Ark. 237, 27 S. W. 2, holding, however, that the railroad company cannot be compelled to comply with the statute until there has been a compliance with its conditions on the part of the municipal authorities.

98. Com. *v.* Louisville, etc., R. Co., 120 Ky. 91, 85 S. W. 712, 27 Ky. L. Rep. 497.

99. **Connections of tracks** see *supra*, IV, C, 2.

Connecting carriers see, generally, CARRIERS, 6 Cyc. 478.

Transfer of passengers to another train or line see CARRIERS, 6 Cyc. 584.

1. Richmond *v.* Dubuque, etc., R. Co., 33 Iowa 422; Androscoggin, etc., R. Co. *v.* Androscoggin, etc., R. Co., 52 Me. 417.

2. Atlantic, etc., R. Co. *v.* St. Louis, 66 Mo. 228, holding that, under a statute enacted in 1864, authorizing several railroad companies to connect their lines, and not providing any time for the acceptance of the act, its acceptance by a connection made in 1873 was in time.

3. Androscoggin, etc., R. Co. *v.* Androscoggin, etc., R. Co., 52 Me. 417; Boston, etc., R. Corp. *v.* Boston, etc., R. Co., 5 Cush. (Mass.) 375.

4. Pennsylvania R. Co. *v.* Canal Com'rs, 21 Pa. St. 9.

But if the charter of a railroad company provides that other companies shall have a right to run their cars over such road, the company must permit connections for this purpose, and the charter provision is sufficient authority for other railroad companies to make such connections. Union R. Co. *v.* Canton R. Co., 105 Md. 12, 65 Atl. 409.

5. Atchison, etc., R. Co. *v.* Denver, etc., R. Co., 110 U. S. 667, 4 S. Ct. 185, 28 L. ed. 291 [*reversing* 15 Fed. 650, 13 Fed. 546, 4 McCrary 325].

pany has elected to make the connection.[6] In some cases the statutes provide that one railroad company may operate cars over another road with which it connects with the permission of that road,[7] or expressly prohibit such operation over the connecting road except by consent of that road.[8] There are also provisions which expressly empower railroads to connect with others and require the latter to permit such connection,[9] and provide for an interchange of traffic,[10] or provide that each of two connecting railroad companies shall draw over its road the passengers, freight, or cars of the other,[11] and that the company shall construct such switches, side-tracks, and connections as may be necessary for a transfer of cars,[12] the statutes usually providing for a determination by commissioners of matters in regard to such connections as to which the companies are unable to agree.[13] In other jurisdictions the railroad commissioners may require

6. Androscoggin, etc., R. Co. *v.* Androscoggin, etc., R. Co., 52 Me. 417.

7. Pennsylvania R. Co. *v.* Canal Com'rs, 21 Pa. St. 9.

8. Fitchburg R. Co. *v.* Gage, 12 Gray (Mass.) 393.

9. Portland, etc., R. Co. *v.* Grand Trunk R. Co., 46 Me. 69; New York, etc., R. Co. *v.* Erie R. Co., 31 N. Y. App. Div. 378, 52 N. Y. Suppl. 318.

The roads need not actually intersect each other in order to come within the application of the New York statute; but it is sufficient if they are contiguous or so near to each other that the public interests require facilities for an interchange of cars, freight, and passengers. New York, etc., R. Co. *v.* Erie R. Co., 31 N. Y. App. Div. 378, 52 N. Y. Suppl. 318; Gallagher *v.* Keating, 27 Misc. (N. Y.) 131, 58 N. Y. Suppl. 366 [*affirmed* in 40 N. Y. App. Div. 81, 57 N. Y. Suppl. 632, 1123].

Steam railroads and electric or street railroads.— The New York statute which expressly refers to "every railroad corporation" applies to the intersection and connection of steam railroads with electric or street surface railroads. Stillwater, etc., R. Co. *v.* Boston, etc., R. Co., 171 N. Y. 589, 64 N. E. 511 [*reversing* 72 N. Y. App. Div. 294, 76 N. Y. Suppl. 69].

A right to connect "only on the easterly side" of another railroad would be lost by constructing the railroad so authorized across the other road, but the mere authority to so construct it will not, until exercised, affect the right to a connection on the easterly side. Portland, etc., R. Co. *v.* Grand Trunk R. Co., 46 Me. 69.

Necessity for agreement or condemnation. — Under a statute authorizing connections between different railroads and providing that, in case of disagreement as to the place and manner of making the connection, the question shall be determined by commissioners, one railroad company cannot enter upon the right of way of another for the purpose of connecting therewith, without previous agreement or condemnation proceedings. Richmond, etc., R. Co. *v.* Durham, etc., R. Co., 104 N. C. 658, 10 S. E. 659.

In Canada the board of railroad commissioners may permit one company to make a connection with the line of another company against the consent of the latter. Niagara, etc., R. Co. *v.* Grand Trunk R. Co., 3 Can. R. Cas. 256.

10. Hudson Valley R. Co. *v.* Boston, etc., R. Co., 106 N. Y. App. Div. 375, 94 N. Y. Suppl. 545 [*affirming* 45 Misc. 520, 92 N. Y. Suppl. 928]; New York, etc., R. Co. *v.* Erie R. Co., 31 N. Y. App. Div. 378, 52 N. Y. Suppl. 318.

But a connection should be legally made according to the provisions of the statute before any order is made by railroad commissioners requiring an interchange of traffic. Patriarche, etc., Canning Co. *v.* Grand Trunk R. Co., 5 Can. R. Cas. 200.

11. *Florida.*—Atlantic, etc., R. Co. *v.* State, 42 Fla. 358, 29 So. 319, 89 Am. St. Rep. 233.

Maine.— Portland, etc., R. Co. *v.* Grand Trunk R. Co., 46 Me. 69.

Massachusetts.— Boston, etc., R. Co. *v.* Nashua, etc., R. Co., 157 Mass. 258, 31 N. E. 1067; Fitchburg R. Co. *v.* Gage, 12 Gray 393.

New York.— Hudson Valley R. Co. *v.* Boston, etc., R. Co., 106 N. Y. App. Div. 375, 94 N. Y. Suppl. 545 [*affirming* 45 Misc. 520, 92 N. Y. Suppl. 928].

Tennessee.— Louisville, etc., R. Co. *v.* State, 9 Baxt. 522.

Texas.— International, etc., R. Co. *v.* Railroad Commission, 99 Tex. 332, 89 S. W. 961 [*affirming* (Civ. App. 1905) 86 S. W. 16].

See 41 Cent. Dig. tit. "Railroads," § 742.

12. Atlantic, etc., R. Co. *v.* State, 42 Fla. 358, 29 So. 319, 89 Am. St. Rep. 233, holding that the statute is constitutional and that the requirement may be enforced by a suit in equity by the state's attorney.

13. Portland, etc., R. Co. *v.* Grand Trunk R. Co., 46 Me. 69; Lexington, etc., R. Co. *v.* Fitchburg R. Co., 14 Gray (Mass.) 266; Boston, etc., R. Corp. *v.* Western R. Co., 14 Gray (Mass.) 253; Jennings *v.* Delaware, etc., R. Co., 103 N. Y. App. Div. 164, 93 N. Y. Suppl. 374 [*affirmed* in 190 N. Y. 42, 83 N. E. 1126]; New York, etc., R. Co. *v.* Erie R. Co., 31 N. Y. App. Div. 378, 52 N. Y. Suppl. 318; Richmond, etc., R. Co. *v.* Durham, etc., R. Co., 104 N. C. 658, 10 S. E. 659.

In Massachusetts, St. (1869) c. 408, § 5, vesting in railroad commissioners the powers and duties of commissioners appointed by the supreme court under Gen. St. c. 63, § 117, takes away the jurisdiction of that court and all commissioners appointed by it over proceedings pending before those commissioners

track connections between different roads for an interchange of cars and traffic.[14] A statutory right to form a connection with another railroad may be enforced by a suit in equity,[15] and where railroad companies are authorized to make connections for an interchange of traffic they may acquire land by purchase or condemnation for the purpose of effecting such connections.[16] A statute authorizing individuals to attach cars to the motive power of the state on a state railroad does not apply to a railroad company where such privilege is withheld by its charter,[17] and if the company cannot do so alone it cannot do so in connection with an individual.[18] A railroad company cannot be required to transfer cars delivered to it by another company from its station to another point as a switching service and at switching rates, where such point is beyond the yard limits and on the main line, and the service is performed by trains under regular despatch orders and not under the direction of the yard-master.[19] A Missouri statute requires the stoppage of all passenger trains at the junction or intersection of other railroads for a sufficient time to transfer passengers, baggage, mails, and express from one road to the other.[20]

e. Equipment of Trains. The legislature has full power and authority to enact any reasonable rules and regulations as to the equipment of trains which tend to increase the safety of operating or traveling thereon.[21] The federal statute known as the Safety Appliance Act contains a number of provisions in regard to the equipment of trains by railroad companies engaged in interstate commerce.[22] This statute prohibits the use of any car in moving interstate traffic which is not provided with couplers coupling automatically by impact and which can be uncoupled without the necessity of going between the ends of the cars,[23] or not provided with secure grab-irons or hand-holds on the ends and sides of the car,[24] and provides that the company shall be liable for a penalty of one hundred dollars for each violation,[25] and that an employee injured by cars in use contrary to the

at the time of its passage. New London Northern R. Co. *v.* Boston, etc., R. Co., 102 Mass. 386.

Under the Pennsylvania statute authorizing railroad companies to "connect their roads with roads of a similar character" on terms agreed on by the companies, and in case of a failure to agree, providing for the appointment of a jury to determine and fix such terms, the jury can determine only matters relating solely to the physical connection of the roads, and cannot order a transfer to the petitioning road of a part of the other company's road, station, lines, privileges, or franchises. Altoona, etc., R. Co. *v.* Beach Creek R. Co., 177 Pa. St. 443, 35 Atl. 734.

Exceptions in proceedings to determine matters relating to a proposed connection between two railroads which are not based upon any facts in the case are properly dismissed. *In re* Ohio River Junction R. Co., 219 Pa. St. 345, 68 Atl. 830.

14. International, etc., R. Co. *v.* Railroad Commission, 99 Tex. 332, 89 S. W. 961 [*affirming* (Civ. App. 1905) 86 S. W. 16], holding that the railroad commissioners may require intersecting railroads to make a track connection for an interchange of traffic, although the tracks of such roads do not cross at grade.

Under the Iowa statute providing that railroad companies having intersecting roads shall "whenever ordered by the railroad commissioners" unite and connect their tracks, the commissioners are not required to order such connection regardless of its cost, advisability, or necessity, but should do so only when they deem it best. Smith *v.* Chicago, etc., R. Co., 86 Iowa 202, 53 N. W. 128.

15. Union R. Co. *v.* Canton R. Co., 105 Md. 12, 65 Atl. 409.

16. Louisville, etc., R. Co. *v.* State, 9 Baxt. (Tenn.) 522.

17. Pennsylvania R. Co. *v.* Canal Com'rs, 21 Pa. St. 9.

18. Miller *v.* Canal Com'rs, 21 Pa. St. 23.

19. State *v.* Chicago, etc., R. Co., 88 Iowa 445, 55 N. W. 331.

20. State *v.* St. Louis, etc., R. Co., 105 Mo. App. 207, 79 S. W. 714, holding, however, that the statute does not require the stoppage of all trains where there are no passengers, baggage, etc., to be transferred.

21. Gause *v.* Lake Shore, etc., R. Co., 4 Ohio Dec. (Reprint) 369, 2 Clev. L. Rep. 44.

22. U. S. *v.* Illinois Cent. R. Co., 156 Fed. 182.

23. Johnson *v.* Southern Pac. Co., 196 U. S. 1, 25 S. Ct. 158, 49 L. ed. 363; U. S. *v.* Colorado, etc., R. Co., 157 Fed. 321, 85 C. C. A. 27.

24. U. S. *v.* Chicago, etc., R. Co., 157 Fed. 616; U. S. *v.* Louisville, etc., R. Co., 156 Fed. 193; U. S. *v.* Chicago, etc., R. Co., 143 Fed. 353.

25. Johnson *v.* Southern Pac. Co., 196 U. S. 1, 25 S. Ct. 158, 49 L. ed. 363; U. S. *v.* Colorado, etc., R. Co., 157 Fed. 321, 85 C. C. A. 27.

provisions of the act shall not be deemed to have assumed the risk thereby occasioned, although continuing in the employ of the company after notice of such condition.[26] There are also in a number of states statutes requiring the use of automatic or safety couplers,[27] prescribing certain regulations as to brakes and brakemen,[28] requiring the use of heating apparatus so constructed that the fire will be immediately extinguished when the cars are thrown from the track,[29] or prohibiting the heating of cars by means of stoves or furnaces inside the car,[30] requiring passenger trains to be supplied with pure drinking water for the use of passengers,[31] requiring that separate coaches or compartments shall be provided for white and colored passengers,[32] and providing that mixed trains shall be made up with the freight and baggage cars in front of the passenger coaches.[33] The federal Safety Appliance Act above referred to was designed to protect the lives and safety of trainmen and should be so construed as to give effect to that intention,[34] but not so as to make its requirements impracticable, unreasonable, or impossible to perform,[35] or so as to impose an absolute liability for a defect or condition due to unavoidable accident, or which at the time it was impossible for the company to avoid, discover, or repair.[36] The application of the statute

26. Mobile, etc., R. Co. *v.* Bromberg, 141 Ala. 258, 37 So. 395; Philadelphia, etc., R. Co. *v.* Winkler, 4 Pennew. (Del.) 387, 56 Atl. 112; Schlemmer *v.* Buffalo, etc., R. Co., 205 U. S. 1, 27 S. Ct. 407, 51 L. ed. 681; Chicago, etc., R. Co. *v.* Voelker, 129 Fed. 522, 65 C. C. A. 226, 70 L. R. A. 264.

27. Taylor *v.* Boston, etc., R. Co., 188 Mass. 390, 74 N. E. 591 (holding that the Massachusetts statute providing that railroad companies shall not use "in moving traffic" between places in that state a car not equipped with automatic couplers does not apply to a damaged car while being taken to a repair shop); Blanchard *v.* Detroit, etc., R. Co., 139 Mich. 694, 103 N. W. 170 (holding that the Michigan statute requiring railroad companies to provide "upon each end of every freight car" safety couplers that can be operated without going between the cars does not apply to the couplers on the tenders of locomotives); Thompson *v.* Missouri Pac. R. Co., 51 Nebr. 527, 71 N. W. 61 (holding that the Nebraska statute of 1891, requiring the use of automatic couplers, prohibited the putting in use of any new car not so equipped after the passage of the act, but permitted the continued use of old cars not so equipped until Jan. 1, 1895); Cleveland, etc., R. Co. *v.* Somers, 24 Ohio Cir. Ct. 67 (holding that the Ohio statute requiring automatic couplers does not apply to electric cars or to a railroad in process of construction and cars in use for that purpose).

28. Chicago, etc., R. Co. *v.* Maloney, 77 Ill. App. 191 (holding that the Illinois statute requiring a brake and brakeman upon the rear car of a freight train, unless the brakes are effectually operated by power applied from the locomotive, applies only to trains running from one place or station to another and not to cars being shifted about the yard in making up a train although such cars may be loaded); Mew *v.* Charleston, etc., R. Co., 55 S. C. 90, 32 S. E. 828 (holding that the South Carolina statute requiring a good and sufficient brake to be attached "to every car used for the transportation of freight except four-wheeled freight cars used only for that purpose," applies to eight-wheeled gondola cars used for hauling gravel and flat cars used for hauling lumber); State *v.* International, etc., R. Co., 29 Tex. Civ. App. 149, 68 S. W. 534 (holding that the Texas statute requiring a brake and brakeman "upon the hindmost car of all trains transporting passengers and merchandise" applies only to trains carrying both and not to trains carrying passengers only).

29. Gause *v.* Lake Shore, etc., R. Co., 4 Ohio Dec. (Reprint) 369, 2 Clev. L. Rep. 44, holding that to render the company liable for the penalty imposed, it is not necessary that the car should have been actually overturned without the apparatus provided extinguishing the fire.

30. People *v.* Clark, 14 N. Y. Suppl. 642, 8 N. Y. Cr. 169, 179.

31. Southern R. Co. *v.* State, 125 Ga. 287, 54 S. E. 160, 114 Am. St. Rep. 203.

32. Com. *v.* Louisville, etc., R. Co., 87 S. W. 262, 27 Ky. L. Rep. 932; Southern Kansas R. Co. *v.* State, 44 Tex. Civ. App. 218, 99 S. W. 166.

Application of statute.— Under a statute requiring separate coaches or compartments for white and colored passengers, if a train is carrying passengers it must be so equipped whether the particular train is carrying any colored passengers or not, and a press of business does not excuse the company from complying with the statute. Southern Kansas R. Co. *v.* State, 44 Tex. Civ. App. 218, 99 S. W. 166.

33. See Arkansas Midland R. Co. *v.* Canman, 52 Ark. 517, 13 S. W. 280.

34. U. S. *v.* Chicago, etc., R. Co., 156 Fed. 180; U. S. *v.* Atlantic Coast Line R. Co., 153 Fed. 918; U. S. *v.* Chicago, etc., R. Co., 149 Fed. 486.

35. Missouri Pac. R. Co. *v.* Brinkmeier, 77 Kan. 14, 93 Pac. 621.

36. U. S. *v.* Illinois Cent. R. Co., 156 Fed 182.

depends upon the fact of engaging in interstate commerce,[37] and extends to all cars except the four-wheeled and logging cars which are expressly excepted.[38] It applies to a locomotive,[39] and its tender,[40] to a steam shovel car,[41] to both ends of the car,[42] to cars in use in carrying interstate traffic, although at the time being hauled empty,[43] and even though they are on their way to a repair shop,[44] or being transferred by a terminal company from one road to another,[45] to a car loaded with materials or property belonging to the railroad company for which it receives no compensation for transportation,[46] to a car left during the course of a trip at a station by one train to be picked up by another,[47] to cars not at the time of the injury actually carrying interstate traffic but being made up for that purpose,[48] and under the statute as amended in 1903 to all cars used on any railroad engaged in interstate traffic, whether the particular car is for local or interstate use.[49] The provision that it shall not be necessary to go between the cars applies to the act

37. U. S. *v.* Colorado, etc., R. Co., 157 Fed. 321, 85 C. C. A. 27.

What constitutes engaging in interstate commerce.— A railroad company operating a railroad entirely within a single state and transporting thereon articles of commerce shipped in continuous passages from places without the state to stations on its road or *vice versa*, although free from any connection, control, management, or arrangement with another carrier for a continuous carriage or shipment, is engaged in interstate commerce and within the application of the statute, and no rebilling practised by the railroad company, without any new consents or contracts with the owners, can destroy or affect the interstate character of the shipments or of the transportation. U. S. *v.* Colorado, etc., R. Co., 157 Fed. 321, 85 C. C. A. 27. A car loaded with freight to be delivered in another state is used in moving interstate traffic by the company hauling it although such company only undertakes to deliver it to a connecting carrier within the same state. U. S. *v.* Southern R. Co., 135 Fed. 122. But see U. S. *v.* Geddes, 131 Fed. 452, 65 C. C. A. 320, holding that a narrow gauge road operating entirely within one state is not engaged in hauling interstate commerce because it receives and delivers freight from and to another road operating both within and without the state, where there is no exchange or common use of cars and no through bills of lading are issued by either road or any through rate fixed but each road charges and collects its local freight rate.

38. Schlemmer *v.* Buffalo, etc., R. Co., 205 U. S. 1, 27 S. Ct. 407, 51 L. ed. 681; U. S. *v.* Georgia Cent. R. Co., 157 Fed. 893.

This exception need not be negatived in the complaint in an action based upon the statute for personal injuries or to recover the penalty, and the burden rests upon defendant to bring itself within the proviso. Schlemmer *v.* Buffalo, etc., R. Co., 205 U. S. 1, 27 S. Ct. 407, 51 L. ed. 681; U. S. *v.* Atlantic Coast Line R. Co., 153 Fed. 918.

39. Johnson *v.* Southern Pac. Co., 196 U. S. 1, 25 S. Ct. 158, 49 L. ed. 363 [*reversing* 117 Fed. 462, 54 C. C. A. 508].

40. Philadelphia, etc., R. Co. *v.* Winkler, 4 Pennew. (Del.) 387, 56 Atl. 112.

41. Schlemmer *v.* Buffalo, etc., R. Co., 205 U. S. 1, 27 S. Ct. 407, 51 L. ed. 681.

42. U. S. *v.* Georgia Cent. R. Co., 157 Fed. 893.

43. Johnson *v.* Southern Pac. Co., 196 U. S. 1, 25 S. Ct. 158, 49 L. ed. 363 [*reversing* 117 Fed. 462, 54 C. C. A. 508]; U. S. *v.* Chicago, etc., R. Co., 157 Fed. 616; U. S. *v.* St. Louis, etc., R. Co., 154 Fed. 516; U. S. *v.* Great Northern R. Co., 145 Fed. 438; Voelker *v.* Chicago, etc., R. Co., 116 Fed. 867 [*reversed* on other grounds in 129 Fed. 522, 65 C. C. A. 226, 70 L. R. A. 264].

44. U. S. *v.* Chicago, etc., R. Co., 157 Fed. 616 (where the cars were being hauled from one state to a repair shop in another state); U. S. *v.* St. Louis, etc., R. Co., 154 Fed. 516 (where there was a repair shop at the place from which the cars were being taken).

45. U. S. *v.* Northern Pac. Terminal Co., 144 Fed. 861.

46. U. S. *v.* Chicago, etc., R. Co., 149 Fed. 486.

47. Johnson *v.* Southern Pac. Co., 196 U. S. 1, 25 S. Ct. 158, 49 L. ed. 363 [*reversing* 117 Fed. 462, 54 C. C. A. 508].

48. Mobile, etc., R. Co. *v.* Bromberg, 141 Ala. 258, 37 So. 395.

But the statute does not apply in such cases in the absence of proof that the cars or locomotives were used in interstate commerce. Rosney *v.* Erie R. Co., 135 Fed. 311, 68 C. C. A. 155.

49. U. S. *v.* Chicago, etc., R. Co., 149 Fed. 486.

The act of 1903 provides that it shall "apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce . . . and to all other locomotives, tenders, and cars, and similar vehicles used in connection therewith;" and in a recent case the court expressed some uncertainty as to whether the phrase "engaged in interstate commerce" referred to the word "railroad" or only to the words "trains, locomotives, etc.," but held that the car in question was within the application of the statute both because it was one ordinarily used in interstate traffic, although at the time being hauled empty, and also because it was attached to a locomotive used in interstate commerce, and therefore being

of coupling as well as uncoupling,[50] and to the act of preparing the clutch for the impact by which it is operated.[51] It is also the duty of a railroad company under the statute not only to equip its cars with the appliances required, but thereafter to keep them in proper order and repair so that they can be operated according to the requirements of the act,[52] and to inspect cars delivered to it by other connecting railroads and refuse to transport them if not properly equipped.[53] As to the nature and extent of the liability for using cars on which the appliances have become defective or out of repair the authorities are not entirely uniform. It has been held that knowledge on the part of the company of such defect or condition is not a necessary element of the offense,[54] and some of the cases seem to lay down the rule of liability regardless of the care exercised by the company in regard to discovering and repairing such defects,[55] or at least to impose a very high degree of care and diligence;[56] but other cases, while admitting that a literal construction of the statute would impose an absolute liability,[57] expressly deny that the company is absolutely liable or an insurer of the proper condition of the appliances;[58] and it has been held that if the car has been properly equipped

used "in connection therewith." U. S. *v.* Chicago, etc., R. Co., 157 Fed. 616.

50. Southern R. Co. *v.* Simmons, 105 Va. 651, 55 S. E. 459; Johnson *v.* Southern Pac. R. Co., 196 U. S. 1, 25 S. Ct. 158, 49 L. ed. 363 [*reversing* 117 Fed. 462, 54 C. C. A. 508]; U. S. *v.* Georgia Cent. R. Co., 157 Fed. 893; Chicago, etc., R. Co. *v.* Voelker, 129 Fed. 522, 65 C. C. A. 226, 70 L. R. A. 264.

51. Southern R. Co. *v.* Simmons, 105 Va. 651, 55 S. E. 459; Chicago, etc., R. Co. *v.* Voelker, 129 Fed. 522, 65 C. C. A. 226, 70 L. R. A. 264.

52. U. S. *v.* Louisville, etc., R. Co., 156 Fed. 193; U. S. *v.* Southern Pac. R. Co., 154 Fed. 897; U. S. *v.* Great Northern R. Co., 150 Fed. 229; U. S. *v.* Southern R. Co., 135 Fed. 122.

Time and place for repairs.—If a defect occurs during the progress of a trip and it is of such character that it can be repaired at any stage in the journey without serious inconvenience or delay, it should be repaired before the car is moved any further upon its journey (U. S. *v.* Southern Pac. R. Co., 154 Fed. 897); and if it occurs between stations where there are repair shops and is such that it cannot be repaired without taking the car to such a place, the company, while not liable until there is an opportunity to repair, cannot take the car by one repair shop to another at a more distant place (U. S. *v.* Southern Pac. R. Co., *supra*; U. S. *v.* Chicago, etc., R. Co., 149 Fed. 486); but where a defect in the coupling of a loaded car was discovered by defendant, but could not be repaired where the car was without blocking the entire business of the yards, and the place of business of the consignee of the contents of the car was only a short distance away and nearer than the repair track, and the company took the car to the consignee and had it unloaded before taking it to the repair track, it was held that it had adopted the most practicable course and was not guilty of a violation of the statute (U. S. *v.* Louisville, etc., R. Co., 156 Fed. 195).

53. U. S. *v.* Chicago, etc., R. Co., 149 Fed. 486.

54. U. S. *v.* Chicago, etc., R. Co., 156 Fed. 180; U. S. *v.* Southern Pac. R. Co., 154 Fed. 897; U. S. *v.* Chicago, etc., R. Co., 149 Fed. 486.

55. U. S. *v.* Chicago, etc., R. Co., 156 Fed. 180; U. S. *v.* Atlantic Coast Line R. Co., 153 Fed. 918; U. S. *v.* Southern R. Co., 135 Fed. 122.

It is no defense in an action for the penalty where it is shown that defendant hauled over its road a car on which the safety coupler was broken and could not be uncoupled without going between the ends of the cars, for the company to show that it exercised reasonable care in keeping the couplers in repair. U. S. *v.* Southern R. Co., 135 Fed. 122.

56. U. S. *v.* Indiana Harbor R. Co., 157 Fed. 565; U. S. *v.* Louisville, etc., R. Co., 156 Fed. 193.

If diligence can be recognized as a defense it must be the highest form of care and diligence. U. S. *v.* Indiana Harbor R. Co., 157 Fed. 565.

57. See U. S. *v.* Illinois Cent. R. Co., 156 Fed. 182.

58. Missouri Pac. R. Co. *v.* Brinkmeier, 77 Kan. 14, 93 Pac. 621; U. S. *v.* Illinois Cent. R. Co., 156 Fed. 182; U. S. *v.* Atchison, etc., R. Co., 150 Fed. 442.

The company is not liable where its inspectors failed on the first inspection of a car before delivering it to a connecting line to discover that the chain attached to a lever by which the coupler was operated was broken and the company moved the car to a transfer track, but on a second inspection on the following day discovered and repaired the defect before delivering the car to the other line. U. S. *v.* Atchison, etc., R. Co., 150 Fed. 442.

If a car is started in proper condition on an interstate journey and the appliances become defective during that journey, the company should not be held liable unless by the use of the utmost degree of diligence which would be used by a highly prudent person under the circumstances it could have discovered and repaired the defect. U. S. *v.* Illinois Cent. R. Co., 156 Fed. 182.

the company will not be liable for a defective condition subsequently occurring if it has exercised reasonable and ordinary care in regard to discovering and repairing such defects.[59] The statute is violated, although cars are provided with automatic couplers, if they are of different types so that they will not work automatically together,[60] or if the couplers, by reason of their defective condition or other cause, cannot be operated in the usual manner without going between the cars.[61]

f. Employees. In some jurisdictions there are statutes requiring that certain employees of railroad companies shall pass a physical examination for color blindness or other defect of vision,[62] or regulating the number or location of brakemen on the trains.[63]

4. Movement of Trains and Precautions — a. Time-Tables or Registers. In some jurisdictions there are statutes requiring railroad companies to maintain blackboards at stations and register thereon a certain time before the schedule time for the arrival of trains, whether such trains are late or on time and if late how much.[64] The statutes apply only to stations where there is a telegraph office,[65] and do not require the establishment of a telegraph office at a

59. Missouri Pac. R. Co. *v.* Brinkmeier, 77 Kan. 14, 93 Pac. 621.

60. Johnson *v.* Southern Pac. R. Co., 196 U. S. 1, 25 S. Ct. 158, 49 L. ed. 363 [*reversing* 117 Fed. 462, 54 C. C. A. 508].

61. Philadelphia, etc., R. Co. *v.* Winkler, 4 Pennew. (Del.) 387, 56 Atl. 112; U. S. *v.* Great Northern R. Co., 150 Fed. 229; Chicago, etc., R. Co. *v.* Voelker, 129 Fed. 522, 65 C. C. A. 226, 70 L. R. A. 264.

Chain disconnected.— Although the coupler is in perfect condition if the chain by which it is operated is not connected with the coupler so that the cars may be uncoupled without going between them, the company will be liable. U. S. *v.* Great Northern R. Co., 150 Fed. 229.

62. Nashville, etc., R. Co. *v.* State, 83 Ala. 71, 3 So. 702, holding that the requirement is constitutional and valid, and that, while it cannot regulate the making of contracts with employees in another state, it does apply to the employment of persons in the state under contracts made elsewhere.

The fee for examination under the Alabama statute is three dollars for each examination, and is "at the expense of the railroad companies," and the refusal of the company to pay does not relieve the physician accepting the appointment as examiner from the duty of examining and certifying as to the qualifications of applicants who come properly before him and he may be compelled by mandamus to do so. Baldwin *v.* Kouns, 81 Ala. 272, 2 So. 638.

63. Chicago, etc., R. Co. *v.* Maloney, 77 Ill. App. 191 (holding that the Illinois statute requiring a brakeman on the rear car of a freight train does not apply to cars being shifted about the yard in making up the train); Joyner *v.* South Carolina R. Co., 26 S. C. 49, 1 S. E. 52 (holding that the South Carolina statute on the subject of brakemen which applies in terms to passenger trains and freight trains considered separately, requiring on passenger trains one brakeman to every two cars and on freight trains one upon the rear car of the train, is not applicable to a mixed train); State *v.* International, etc., R. Co., 29 Tex. Civ. App. 149, 68 S. W. 534 (holding that the Texas statute requiring a brakeman on the rear car of "all trains transporting passengers and merchandise" does not apply to trains carrying passengers only).

A city ordinance prohibiting the movement of freight trains within the city limits unless manned with experienced brakemen "so stationed as to see the danger signals and hear the signals from the engine" contemplates that they shall be so stationed as not only to see and hear the danger signals but be able to give them to those whose duty it is to receive and obey them. Harper *v.* St. Louis Merchants' Bridge Terminal R. Co., 187 Mo. 575, 86 S. W. 99, holding, however, that the ordinance is complied with, although the brakeman was not on top of the car but was clinging to the side of the car if his duties could be as effectually performed in this manner.

64. Pennsylvania R. Co. *v.* State, 142 Ind. 428, 41 N. E. 937; State *v.* Indiana, etc., R. Co., 133 Ind. 69, 32 N. E. 817, 18 L. R. A. 502; State *v.* Cleveland, etc., R. Co., 8 Ohio Cir. Ct. 604, 4 Ohio Cir. Dec. 372.

The Indiana statute as amended in 1897 provides that any other device which may give the information required in more legible form than is practicable on a blackboard may be substituted therefor, and that the requirement as to registering the time of trains shall not apply to freight trains, mixed trains, or to stations during hours where the company does not regularly have a telegraph operator on duty. Southern R. Co. *v.* State, (Ind. App. 1904) 72 N. E. 174.

The requirement does not apply to a company operating a mere suburban line where the whole trip from one terminal to the other is made in a shorter period than that during which the notice is required to be posted. State *v.* Kentucky, etc., Bridge Co., 136 Ind. 195, 35 N. E. 991.

65. State *v.* Indiana, etc., R. Co., 133 Ind. 69, 32 N. E. 817, 18 L. R. A. 502; State *v.*

station where there is none or prevent the abandonment of one already established.[66]

b. Signals and Lookouts.[67] There are in many jurisdictions statutes requiring railroad companies to give signals by means of a bell or whistle on approaching public crossings,[68] and continuously thereafter,[69] or at intervals until the crossing is reached or passed,[70] or requiring the giving of such a signal on approaching a station,[71] or before starting a train is within a certain distance from a crossing,[72]

Cleveland, etc., R. Co., 8 Ohio Cir. Ct. 604, 4 Ohio Cir. Dec. 372.

66. Terre Haute, etc., R. Co. *v.* State, 13 Ind. App. 529, 41 N. E. 952.

67. **Construction and effect:** As to persons at crossings see *infra*, X, F, 7. As to persons on track in general see *infra*, X, E, 2, a, (VIII). As to injuries to animals see *infra*, X, H, 7, a, b.

68. See the following cases:

Arkansas.— St. Louis, etc., R. Co. *v.* Hendricks, 53 Ark. 201, 13 S. W. 699.

Connecticut.— Bates *v.* New York, etc., R. Co., 60 Conn. 259, 22 Atl. 538.

Illinois.— Mobile, etc., R. Co. *v.* Davis, 130 Ill. 146, 22 N. E. 850.

Indiana.— Cincinnati, etc., R. Co. *v.* Hiltzhauer, 99 Ind. 486.

Minnesota.— Palmer *v.* St. Paul, etc., R. Co., 38 Minn. 415, 38 N. W. 100.

Missouri.— Spiller *v.* St. Louis, etc., R. Co., 112 Mo. App. 491, 87 S. W. 43.

Ohio.— Toledo, etc., R. Co. *v.* Jump, 50 Ohio St. 651, 35 N. E. 1054.

South Carolina.— Brown *v.* Southern R. Co., 68 S. C. 260, 43 S. E. 794.

Texas.— Houston, etc., R. Co. *v.* O'Neal, 91 Tex. 671, 47 S. W. 95 [*reversing* (Civ. App. 1898) 45 S. W. 921].

See 41 Cent. Dig. tit. "Railroads," §§ 747, 755.

In Georgia the road crossing referred to in Civ. Code (1895), § 2222, requiring posts to be erected near crossings and a whistle sounded by the engineer on reaching such posts, is the crossing by a railroad of a public highway not only used but maintained as such by proper authorities having the same in charge. Atlantic Coast Line R. Co. *v.* Bunn, 2 Ga. App. 305, 58 S. E. 538.

The Kentucky statute of 1903 requiring signals at crossings outside of incorporated cities and towns applies to a crossing just within the limits of an incorporated town but which is outside of the settled portion thereof and is in effect a country crossing. Louisville, etc., R. Co. *v.* Molloy, 91 S. W. 685, 28 Ky. L. Rep. 1113.

In New York the statute of 1854 imposed upon railroad companies the duty of giving a signal by bell or whistle eighty rods from a public crossing and also made the engineer who should omit the required signal guilty of a misdemeanor. The statute, in so far as it imposed the duty upon the company, was repealed by the act of 1886, but the provision as to the criminal liability of an engineer is retained in the penal code. Lewis *v.* New York, etc., R. Co., 123 N. Y. 496, 26 N. E. 357; Petrie *v.* New York Cent., etc., R. Co., 66 Hun 282, 21 N. Y. Suppl. 159.

A "traveled place," within the application of the South Carolina statute requiring signals to be given by railroad companies at such places, includes a road crossing a railroad track which has been used by the public for twenty years. Kirby *v.* Southern R. Co., 63 S. C. 494, 41 S. E. 765; Strother *v.* South Carolina, etc., R. Co., 47 S. C. 375, 25 S. E. 272.

Effect of statute upon common-law duty.— A statute requiring a signal to be given at least sixty rods before the crossing is reached does not abrogate the common-law duty of giving such a signal at a greater distance if by reason of the speed of the train or the character of the crossing reasonable caution demands it. Kinyon *v.* Chicago, etc., R. Co., 118 Iowa 349, 92 N. W. 40, 96 Am. St. Rep. 382.

69. Baltimore, etc., R. Co. *v.* Wheeler, 63 Ill. App. 193; Houston, etc., R. Co. *v.* O'Neal, 91 Tex. 671, 47 S. W. 95; Galveston, etc., R. Co. *v.* Duelm, (Tex. Civ. App. 1893) 23 S. W. 596.

Kicking cars across highways.—A statute requiring the bell or whistle to be sounded continuously for eighty rods before a public highway is reached applies to cases where cars are kicked by an engine across a public highway. Baltimore, etc., R. Co. *v.* Wheeler, 63 Ill. App. 193.

70. Bates *v.* New York, etc., R. Co., 60 Conn. 259, 22 Atl. 538; Kirkpatrick *v.* Missouri, etc., R. Co., 71 Mo. App. 263.

71. Ensley R. Co. *v.* Chewning, 93 Ala. 24, 9 So. 458; Illinois Cent. R. Co. *v.* Davis, 104 Tenn. 442, 58 S. W. 296; Webb *v.* East Tennessee, etc., R. Co., 88 Tenn. 119, 12 S. W. 428.

Construction of Tennessee statute.— The Tennessee statute requiring that on approaching a town or city the bell or whistle of an engine shall be sounded when the train is at a distance of one mile therefrom and at short intervals until reaching the depot applies only to incorporated municipalities (Louisville, etc., R. Co. *v.* Collier, 104 Tenn. 189, 54 S. W. 980; Webb *v.* East Tennessee, etc., R. Co., 88 Tenn. 119, 12 S. W. 428); but applies to any incorporated town situated wholly or in part within the state, although the depot may be beyond the state line (Illinois Cent. R. Co. *v.* Davis, 104 Tenn. 442, 58 S. W. 296); and the distance prescribed of one mile means that distance from the corporate limits of the town and not from the depot or station (Illinois Cent. R. Co. *v.* Davis, *supra*; Webb *v.* East Tennessee, etc., etc., R. Co., *supra*).

72. Brown *v.* Southern R. Co., 65 S. C. 260, 43 S. E. 794; Littlejohn *v.* Richmond, etc., R. Co., 49 S. C. 12, 26 S. E. 967, each holding that the statute applies, although the

or within a town or city,[73] or to keep a lookout for persons or obstructions upon the track,[74] and on discovery thereof to sound an alarm signal,[75] or on backing trains into a passenger depot to have them preceded by a servant on foot to give warning.[76] The municipal authorities of a town or city may also by ordinance make reasonable regulations as to the signals and lookouts upon trains operated within the city,[77] and such ordinances frequently require that the bell on a locomotive shall be rung continuously while the train is in motion within the city limits,[78] or that trains shall not be backed without a person being stationed on

train when started is standing upon the crossing.

73. Louisville, etc., R. Co. *v.* Gardner, 1 Lea (Tenn.) 688.

74. Kansas City Southern R. Co. *v.* Morris, 80 Ark. 528, 98 S. W. 363; Little Rock, etc., R. Co. *v.* McQueeney, 78 Ark. 22, 92 S. W. 1120 (holding that the statute applies to the operation of cars and engines in a railroad yard); Payne *v.* Illinois Cent. R. Co., 155 Fed. 73, 83 C. C. A. 589 (holding that the Tennessee statute, requiring a railroad company to keep someone always on the lookout ahead and on discovering any person or animal upon the road to sound an alarm whistle, and to employ all means to prevent an accident, does not apply where a train is being made up within depot grounds); Rogers *v.* Cincinnati, etc., R. Co., 136 Fed. 573, 69 C. C. A. 321.

75. Rogers *v.* Cincinnati, etc., R. Co., 136 Fed. 573, 69 C. C. A. 321, holding that under the Tennessee statute requiring an alarm signal to be sounded when any person or other obstruction appears "upon the road," a person is not upon the road within the application of the statute unless on or sufficiently near the track to be struck or injured by a passing train.

76. Yazoo, etc., R. Co. *v.* Metcalf, 84 Miss. 242, 36 So. 259, holding that the Mississippi statute which requires that every train or engine backing into a passenger depot "and within fifty feet thereof, shall, for at least three hundred feet before it reaches or comes opposite to such depot," be preceded by a servant on foot to give warning, was intended to afford protection to all persons within three hundred feet of a passenger depot, and the phrase "within fifty feet" thereof refers solely to the question of whether or not the track on which the train is backing goes within the stated distance of the depot.

77. *Colorado.*— Denver, etc., R. Co. *v.* Ryan, 17 Colo. 98, 28 Pac. 79, holding that ordinances requiring the ringing of the locomotive bell when approaching or crossing a public street, and the stationing of flagmen at important crossings to give warning of danger, are reasonable and valid regulations.

Illinois.— Illinois Cent. R. Co. *v.* Gilbert, 157 Ill. 354, 41 N. E. 724, holding that under a statute authorizing city councils to "provide protection against the injury to persons, and property in the use of such railroad," the council may by ordinance require engines while passing through the city to keep their bells ringing continuously.

Kentucky.— Cincinnati, etc., R. Co. *v.* Com., 104 S. W. 771, 31 Ky. L. Rep. 1113, holding that the Kentucky statute authorizes all cities and towns to determine by ordinance what signals shall be given by trains running through the corporate limits, whether upon the streets or crossings.

Texas.— Missouri, etc., R. Co. *v.* McGlamory, (Civ. App. 1896) 34 S. W. 359, holding that where a city is authorized by its charter "to direct the use and regulate the speed of locomotive engines within the city," an ordinance requiring a bell to be rung on an engine at all times while in motion is valid.

United States.— Texas, etc., R. Co. *v.* Nelson, 50 Fed. 814, 1 C. C. A. 688, holding that under a charter provision empowering a city council "to direct the use and regulate the speed of locomotive engines in said city," an ordinance prohibiting the running of an engine or car without a bell attached thereto being rung before starting and all the time while in motion within the city is valid.

See 41 Cent. Dig. tit. "Railroads," §§ 747, 755.

An ordinance is unreasonable which requires that a signal shall be given by an approaching train that a street crossing is free from danger and that it must be given by "a member of the crew operating such approaching locomotive engine or train," since there is no reason why it should not be given by a gateman or other employee not engaged in operating the train. New Jersey Cent. R. Co. *v.* Elizabeth, 70 N. J. L. 578, 57 Atl. 404.

78. Illinois Cent. R. Co. *v.* Whitaker, 122 Ill. App. 333 (holding that the benefit of such an ordinance extends to employees as well as to the public); Gulf, etc., R. Co. *v.* Melville, (Tex. Civ. App. 1905) 87 S. W. 863 (holding that an ordinance requiring a locomotive bell to be rung continuously while the train is in motion within the corporate limits applies to the yard of the railroad situated within the city limits, although dedicated by the city to the railroad company for its exclusive use and the public excluded therefrom); Galveston, etc., R. Co. *v.* Levy, 35 Tex. Civ. App. 107, 79 S. W. 879 (holding that the ordinance does not apply merely to street crossings but to all the places within the city); Missouri, etc., R. Co. *v.* McGlamory, (Tex. Civ. App. 1896) 34 S. W. 359 (holding that an ordinance requiring a bell to be rung at all times while the train is in motion applies to all portions of the city including the private switch-yard of the company situated within the city); Texas, etc., R. Co. *v.* Nelson, 9 Tex. Civ. App. 156, 29 S. W. 78.

the rear car to give warning of danger.[79] The statutes requiring crossing signals apply to all public highway crossings,[80] including streets;[81] but not to private crossings,[82] or places within the railroad yard where people have been accustomed to cross solely by sufferance of the company,[83] or a public crossing not at grade,[84] or to trains which are not approaching a crossing.[85] Where the statute requires a signal to be given at a certain distance before reaching a crossing, it has been held that the signal must be given, although the train starts from a point less than the distance from the crossing,[86] but not where a train is pulling away from

79. Baltimore, etc., R. Co. *v.* Peterson, 156 Ind. 364, 59 N. E. 1044 (holding that the ordinance applies to a private switch-yard of a railroad company situated within the city); Pittsburgh, etc., R. Co. *v.* McNeil, 34 Ind. App. 310, 69 N. E. 471 (holding that the ordinance applies to the case of a freight train which is cut in two at a street crossing and a portion thereof afterward pushed backward over the crossing in order to couple it with the other section).

80. Mobile, etc., R. Co. *v.* Davis, 130 Ill. 146, 22 N. E. 850; International, etc., R. Co. *v.* Dalwigh, (Tex. Civ. App. 1898) 48 S. W. 527.

Under the Kentucky statute which provides that signals shall be sounded "outside of incorporated cities or towns" at a distance of at least fifty rods from the crossing, and that the company "shall give such signals in towns and cities as the legislative authorities thereof may require," the required signal must be given within fifty rods of every crossing outside of the town or city limits, whether the engine when it arrives at the fifty-rod limit is inside or outside of the corporate limits. Illinois Cent. R. Co. *v.* Com., 56 S. W. 409, 21 Ky. L. Rep. 1779.

Under the Georgia statute requiring railroad companies to give certain signals on approaching the crossings of public roads and private ways established pursuant to law, the words "established pursuant to law" relate only to private ways, and such signals must be given at the crossing of any road used by the public and which they have a right to use, whether established by law or acquired by dedication or prescription. Southern R. Co. *v.* Combs, 124 Ga. 1004, 53 S. E. 508.

81. Mobile, etc., R. Co. *v.* Davis, 130 Ill. 146, 22 N. E. 850; Elgin, etc., R. Co. *v.* Hoadley, 122 Ill. App. 165 [*affirmed* in 220 Ill. 462, 77 N. E. 151]. See also Russell *v.* Atchison, etc., R. Co., 70 Mo. App. 88; Ray *v.* Chesapeake, etc., R. Co., 57 W. Va. 333, 50 S. E. 413.

In Iowa the statute expressly excepts street crossings from the requirement of sounding the whistle unless required by an ordinance of the city, but the requirement that the bell shall be rung continuously until the crossing is past applies to street crossings. Golinvaux *v.* Burlington, etc., R. Co., 125 Iowa 652, 101 N. W. 465.

A city ordinance prohibiting the blowing of a locomotive whistle within the corporate limits cannot suspend the statutory duty of blowing the whistle on approaching crossings, and in so far as it conflicts with the statute is invalid. Curtis *v.* Gulf, etc., R. Co., 26 Tex. Civ. App. 304, 63 S. W. 149.

82. *Georgia.*— Comer *v.* Shaw, 98 Ga. 543, 25 S. E. 733; Georgia R. Co. *v.* Cox, 61 Ga. 455.

Illinois.— Toledo, etc., R. Co. *v.* Head, 62 Ill. 233.

Iowa.— Nichols *v.* Chicago, etc., R. Co., 125 Iowa 236, 100 N. W. 1115.

Maryland.— Annapolis, etc., R. Co. *v.* Pumphrey, 72 Md. 82, 19 Atl. 8.

Minnesota.— Czech *v.* Great Northern R. Co., 68 Minn. 38, 70 N. W. 791, 64 Am. St. Rep. 452, 38 L. R. A. 302.

See 41 Cent. Dig. tit. "Railroads," §§ 747, 755.

83. Gurley *v.* Missouri Pac. R. Co., 104 Mo. 211, 16 S. W. 11.

84. *Alabama.*— Lewis *v.* Southern R. Co., 143 Ala. 133, 38 So. 1023.

Georgia.— McElroy *v.* Georgia, etc., R. Co., 98 Ga. 257, 25 S. E. 439.

Illinois.— Cleveland, etc., R. Co. *v.* Halbert, 179 Ill. 196, 53 N. E. 623 [*reversing* 75 Ill. App. 592].

Texas.— Missouri, etc., R. Co. *v.* Thomas, 87 Tex. 282, 28 S. W. 343 [*reversing* (Civ. App. 1894) 28 S. W. 139].

Wisconsin.— Barron *v.* Chicago, etc., R. Co., 89 Wis. 79, 61 N. W. 303; Jenson *v.* Chicago, etc., R. Co., 86 Wis. 589, 57 N. W. 359, 22 L. R. A. 680.

See 41 Cent. Dig. tit. "Railroads," §§ 747, 755.

Contra.— Johnson *v.* Southern Pac. R. Co., 147 Cal. 624, 82 Pac. 306, 1 L. R. A. N. S. 307; People *v.* New York Cent. R. Co., 13 N. Y. 78 [*affirming* 25 Barb. 199].

In Ohio the statute expressly requires signals to be given at grade crossings and also where the road crosses any other traveled place "by bridge or otherwise." Toledo, etc., R. Co. *v.* Jump, 50 Ohio St. 651, 35 N. E. 1054.

85. Houston, etc., R. Co. *v.* Garcia, (Tex. Civ. App. 1905) 90 S. W. 713.

86. Spiller *v.* St. Louis, etc., R. Co., 112 Mo. App. 491, 87 S. W. 43.

In Texas where the statute requires that the whistle shall be blown and the bell rung at least eighty rods from the crossing and the bell kept ringing until the train is stopped or the crossing passed, it is held that if the train be started from a point less than eighty rods from the crossing the signal required at such point need not be given (Texas, etc., R. Co. *v.* Berry, 32 Tex. Civ. App. 259, 72 S. W. 423; Ft. Worth, etc., R. Co. *v.* Greer, 29 Tex. Civ. App. 561, 69 S. W. 421. But see Curtis *v.* Gulf, etc., R.

a crossing which at the time of starting it is entirely obstructing [87] unless the statute also requires a signal to be given on starting the train.[88] If the statute requires a signal by sounding the bell "or" whistle, either is sufficient.[89]

c. Rate of Speed. There are statutory provisions in some jurisdictions limiting the rate of speed at which trains may be operated in towns or cities,[90] or when backing into a passenger depot,[91] or requiring trains to slow up on approaching public crossings.[92] Municipal corporations have the power by ordinance to regulate and restrict the rate of speed of trains and locomotives while running within the corporate limits,[93] and such regulations will be upheld and enforced provided they are reasonable;[94] but an ordinance will be declared invalid if it is

Co., 26 Tex. Civ. App. 304, 63 S. W. 149); but that the requirement as to the continuous ringing of the bell applies, although the train is started from a point within the eighty-rod limit (Gulf, etc., R. Co. *v.* Hall, 34 Tex. Civ. App. 535, 80 S. W. 133. See also Texas, etc., R. Co. *v.* Bailey, 83 Tex. 19, 18 S. W. 481).

87. Stillson *v.* Hannibal, etc., R. Co., 67 Mo. 671.

88. Brown *v.* Southern R. Co., 65 S. C. 260, 43 S. E. 794.

89. East Tennessee, etc., R. Co. *v.* Deaver, 79 Ala. 216; Ohio, etc., R. Co. *v.* Reed, 40 Ill. App. 47; Downing *v.* Missouri, etc., R. Co., 70 Mo. App. 657; Hoover *v.* Kansas City, etc., R. Co., 69 Mo. App. 557.

90. Seaboard Air-Line R. Co. *v.* Smith, 53 Fla. 375, 43 So. 235; State *v.* Wisconsin Cent. R. Co., 133 Wis. 478, 113 N. W. 952; State *v.* Wisconsin Cent. R. Co., 128 Wis. 79, 107 N. W. 295; O'Brien *v.* Wisconsin Cent. R. Co., 119 Wis. 7, 96 N. W. 424; Schroeder *v.* Wisconsin Cent. R. Co., 117 Wis. 33, 93 N. W. 837.

Under the Wisconsin statute of 1898 which provides in section 1809 that in cities and in villages trains shall not be operated faster than six miles per hour until after passing all the traveled streets, and in section 1809*a* that trains may be operated within such limits at the rate of fifteen miles per hour, providing gates are placed and maintained at the street crossings, it is held that the two provisions must be construed together and limit the rate of speed to six miles per hour where no gates have been erected. O'Brien *v.* Wisconsin Cent. R. Co., 119 Wis. 7, 96 N. W. 424.

91. Yazoo, etc., R. Co. *v.* Metcalf, 84 Miss. 242, 36 So. 259, not over three miles per hour.

92. Georgia Cent. R. Co. *v.* Harper, 124 Ga. 836, 53 S. E. 391 (holding that the requirement does not apply where the train starts from a point so near the crossing that the statutory requirement could not be complied with); Comer *v.* Shaw, 98 Ga. 543, 25 S. E. 733 (holding that the requirement applies only to the crossings of public highways and not to private crossings); McElroy *v.* Georgia, etc., R. Co., 98 Ga. 257, 25 S. E. 439 (holding that the requirement applies only to grade crossings); Atty.-Gen. *v.* London, etc., R. Co., [1900] 1 Q. B. 78, 63 J. P. 772, 69 L. J. Q. B. 26, 81 L. T. Rep. N. S. 649, 16 T. L. R. 30 [*affirming* [1899] 1 Q. B. 72, 38 L. J. Q. B. 34, 79 L. T. Rep. N. S. 412, 15 T. L. R. 39] (holding that a railroad company will be enjoined from violating the requirements of such a statute, and that it is immaterial whether in fact any injury has been done to the public by the violation thereof).

93. *Florida.*— Seaboard Air Line R. Co. *v.* Smith, 53 Fla. 375, 43 So. 235.

Indiana.— Baltimore, etc., R. Co. *v.* Whiting, 161 Ind. 228, 68 N. E. 266; Whitson *v.* Franklin, 34 Ind. 392.

Kentucky.—Cincinnati, etc., R. Co. *v.* Com., 104 S. W. 771, 31 Ky. L. Rep. 1113.

Missouri.— Stotler *v.* Chicago, etc., R. Co., 200 Mo. 107, 98 S. W. 509; Gratiot *v.* Missouri Pac. R. Co., 116 Mo. 450, 21 S. W. 1094, 16 L. R. A. 189.

South Carolina.— Boggero *v.* Southern R. Co., 64 S. C. 104, 41 S. E. 819.

See 41 Cent. Dig. tit. "Railroads," § 749. See also, generally, MUNICIPAL CORPORATIONS.

The power of municipal corporations to regulate and limit the speed of trains within the corporate limits is in some cases conferred by the charter or a general statute in express terms (Chicago, etc., R. Co. *v.* Carlinville, 200 Ill. 314, 65 N. E. 730, 93 Am. St. Rep. 190, 60 L. R. A. 391; Cleveland, etc., R. Co. *v.* Harrington, 131 Ind. 426, 30 N. E. 37; Green *v.* Delaware, etc., Canal Co., 38 Hun (N. Y.) 51; Missouri, etc., R. Co. *v.* Owens, (Tex. Civ. App. 1903) 75 S. W. 579), and in others impliedly from the powers expressly granted (Baltimore, etc., R. Co. *v.* Whiting, 161 Ind. 228, 68 N. E. 266; Jackson *v.* Kansas City, etc., R. Co., 157 Mo. 621, 58 S. W. 32; Robertson *v.* Wabash, etc., R. Co., 84 Mo. 119); but exists independently of any statutory authority as a proper municipal police regulation (Whitson *v.* Franklin, 34 Ind. 392), and extends to all places within the corporate limits, although outside of the limits of public streets and thoroughfares (Green *v.* Delaware, etc., Canal Co., 38 Hun (N. Y.) 51. *Compare* New Jersey R., etc., Co. *v.* Jersey City, 29 N. J. L. 170), and is not affected by the powers vested in railroad commissioners to supervise and regulate the operation of railroads (Boggero *v.* Southern R. Co., 64 S. C. 104, 41 S. E. 819).

94. Chicago, etc., R. Co. *v.* Carlinville, 200 Ill. 314, 65 N. E. 730, 93 Am. St. Rep. 190, 60 L. R. A. 391; Whitson *v.* Franklin, 34 Ind. 392; Gratiot *v.* Missouri Pac. R. Co., 116 Mo. 450, 21 S. W. 1094, 16 L. R. A. 189; Houston, etc., R. Co. *v.* Dillard, (Tex. Civ. App. 1906) 94 S. W. 426; St. Louis South-

unreasonable,[95] at least in so far or as to localities where it may operate unreasonably,[96] or if it makes any unnecessary or unwarranted discrimination between different competing railroads,[97] or if it conflicts with any statutory provision

western R. Co. *v.* Bolton, 36 Tex. Civ. App. 87, 81 S. W. 123.

Ordinances have been held to be reasonable and valid which limit the rate of speed within the corporate limits to ten miles per hour (Chicago, etc., R. Co. *v.* Carlinville, 200 Ill. 314, 65 N. E. 730, 93 Am. St. Rep. 190, 60 L. R. A. 391), six miles per hour (Gratiot *v.* Missouri Pac. R. Co., 116 Mo. 450, 21 S. W. 1094, 16 L. R. A. 189; Buffalo *v.* New York, etc., R. Co., 6 Misc. (N. Y.) 630, 27 N. Y. Suppl. 297 [*affirming* 23 N. Y. Suppl. 303, 309, and *affirmed* in 152 N. Y. 276, 46 N. E. 496]; St. Louis Southwestern R. Co. *v.* Bolton, 36 Tex. Civ. App. 87, 81 S. W. 123), five miles per hour (Washington Southern R. Co. *v.* Lacey, 94 Va. 460, 26 S. E. 834), or even four miles per hour (Cleveland, etc., R. Co. *v.* Harrington, 131 Ind. 426, 30 N. E. 37; Whitson *v.* Franklin, 34 Ind. 392; Weyl *v.* Chicago, etc., R. Co., 40 Minn. 350, 42 N. W. 24). See also Larkin *v.* Burlington, etc., R. Co., 85 Iowa 492, 52 N. W. 480 (holding that, although a town is situated almost entirely on one side of the right of way, none of the streets crossing it and part of the right of way fenced, an ordinance limiting the rate of speed to ten miles per hour will not be declared invalid where it is not shown how much of the right of way is fenced or how much travel there is across the right of way); Knobloch *v.* Chicago, etc., R. Co., 31 Minn. 402, 18 N. W. 106 (holding that, although a portion of a city is not thickly populated, yet if it is laid out in streets, the population rapidly increasing, and considerable travel crosses the streets, an ordinance limiting the rate of speed to four miles per hour is not so far unreasonable as to that portion of the city as to justify the court in declaring it invalid).

An ordinance requiring trains to come to a full stop before crossing certain streets in a city is a reasonable and valid regulation. Buffalo *v.* New York, etc., R. Co., 152 N. Y. 276, 46 N. E. 496 [*affirming* 6 Misc. 630, 27 N. Y. Suppl. 297 (*affirming* 23 N. Y. Suppl. 303, 309)].

Interference with interstate commerce and mails.— If an ordinance limiting the rate of speed of trains within the corporate limits is a reasonable regulation for the public safety and a fair exercise of the police power vested in the city, it will not be declared invalid on the ground that it imposes a restriction upon the transportation of interstate commerce and the United States mails. Chicago, etc., R. Co. *v.* Carlinville, 200 Ill. 314, 65 N. E. 730, 98 Am. St. Rep. 190, 60 L. R. A. 391.

95. Meyers *v.* Chicago, etc., R. Co., 57 Iowa 555, 10 N. W. 896, 42 Am. Rep. 50 (holding that an ordinance limiting the speed of a train to four miles per hour after entering the city limits is unreasonable and void, where for three miles within those limits the railroad passes through agricultural lands and is fenced on both sides); White *v.* St. Louis, etc., R. Co., 44 Mo. App. 540 (holding that where the population of a city through which a railroad runs for over a mile does not exceed fifteen hundred inhabitants and only one third of its area is platted the balance being farming land, an ordinance restricting the speed of trains to four miles per hour within the city limits is unreasonable and invalid).

The power of the courts to declare an ordinance limiting the rate of speed of trains invalid on the ground that it is unreasonable extends to cases where the right to regulate the speed of trains is expressly conferred by statute (Chicago, etc., R. Co. *v.* Carlinville, 200 Ill. 314, 65 N. E. 730, 93 Am. St. Rep. 190, 60 L. R. A. 391; Burg *v.* Chicago, etc., R. Co., 90 Iowa 106, 57 N. E. 680, 48 Am. St. Rep. 419. *Compare* Cleveland, etc., R. Co. *v.* Harrington, 131 Ind. 426, 30 N. E. 27), unless the details of the municipal regulations authorized are definitely prescribed by the statute (see Chicago, etc., R. Co. *v.* Carlinville, *supra*); but an ordinance passed pursuant to legislative authority is *prima facie* valid and should not be declared invalid unless it is clearly shown that it is unreasonable and that the municipal authorities have abused their discretion (Chicago, etc., R. Co. *v.* Carlinville, *supra*; Knobloch *v.* Chicago, etc., R. Co., 31 Minn. 402, 18 N. W. 106).

A distinction may be made in regard to speed regulations between steam and electric cars, since the latter are more readily controlled than the former. Indianapolis Union R. Co. *v.* Waddington, 169 Ind. 448, 82 N. E. 1030.

96. Burg *v.* Chicago, etc., R. Co., 90 Iowa 106, 57 N. W. 680, 48 Am. St. Rep. 419 (holding that, where for a long distance through the corporate limits no platted streets were open across the track and the right of way was fenced on both sides, an ordinance limiting the rate of speed to six miles per hour is unreasonable and void as to such portion of the city); Evison *v.* Chicago, etc., R. Co., 45 Minn. 370, 48 N. W. 6, 11 L. R. A. 434 (holding that an ordinance limiting the speed of trains to four miles per hour is unreasonable as applied to a certain part of a railroad in the suburbs of a city running through an unsettled district for three miles or more which is securely fenced on both sides and has but one grade crossing within the entire distance); Plattsburg *v.* Hagenbush, 98 Mo. App. 669, 73 S. W. 725 (holding that an ordinance limiting the rate of speed to six miles per hour is reasonable and valid as to the thickly populated part of a city, but unreasonable as to a part of a city where there are but few houses near the track, and where to maintain such slow speed heavy trains would have to be doubled in order to pull up the grade).

97. Lake View *v.* Tate, 130 Ill. 247, 22

upon the same subject.[98] Ordinances limiting the rate of speed of trains within the corporate limits apply to all places within those limits,[99] including the unplatted and unsettled portions thereof,[1] the railroad switch-yards,[2] and lands belonging to the railroad company,[3] and to detached locomotives not hauling cars;[4] and ordinances prohibiting any person from running or permitting any train to be run at over a certain speed apply to the railroad companies as well as to the persons operating the trains.[5] When an ordinance prescribes different speed limits for freight and passenger trains, the fact that a regular freight train is carrying passengers does not authorize it to proceed at the higher rate of speed.[6] An ordinance permitting a higher rate of speed than that allowed by a prior ordinance on the condition that gates are constructed at crossings will not be construed as repealing the prior ordinance as to places where the condition has not been complied with;[7] but under an ordinance prescribing a certain speed limit until gates and signal bells are provided and operated, the limit ceases to be in force as soon as such appliances are constructed and put in operation, and is not revived by a subsequent failure on the part of the company to operate them.[8]

d. Precautions on Crossing Other Railroads.[9] In some jurisdictions there are statutes requiring that, before crossing the track of another railroad, trains must be brought to a full stop,[10] and not allowed to proceed until ascertaining

N. E. 791, 6 L. R. A. 268 [*affirming* 33 Ill. App. 78].

An ordinance is not invalid as making an unreasonable discrimination between railroads which excepts from the speed limitation prescribed a belt line running local trains around the city for local passenger traffic only, not competing with any other railroad, the fare for riding on which is limited by statute to five cents for each passenger between any two points on the line. Buffalo *v.* New York, etc., R. Co., 152 N. Y. 276, 46 N. E. 496 [*affirming* 6 Misc. 630, 27 N. Y. Suppl. 297 (*affirming* 23 N. Y. Suppl. 303, 309)]. An ordinance is not invalid on the ground of discrimination because it excepts from its operation an electric street car line operating between different points in the suburbs of a city. Erb *v.* Morasch, 8 Kan. App. 61, 54 Pac. 323.

98. Duggan *v.* Peoria, etc., R. Co., 42 Ill. App. 536; Chicago, etc., R. Co. *v.* Dougherty, 12 Ill. App. 181.

The existence of a statutory regulation in regard to speed in cities will not prevent the enactment of an ordinance upon the same subject broader in its application than the statute, although in so far as the ordinance may conflict with the statute it will of course be inoperative. Seaboard Air Line R. Co. *v.* Smith, 53 Fla. 375, 43 So. 235.

Under the New York statute of 1889, which provides that in cities of less than fifty thousand inhabitants it shall not be lawful for the common council to restrict the rate of speed of trains to less than thirty miles per hour where gates are established and persons furnished to attend the same, an ordinance is not in conflict with the statute which limits the rate of speed to two miles per hour in a city having more than this number of inhabitants. Haywood *v.* New York, etc., R. Co., 13 N. Y. Suppl. 177.

99. Whitson *v.* Franklin, 34 Ind. 392; Erb *v.* Morasch, 8 Kan. 61, 54 Pac. 323; Texarkana, etc., R. Co. *v.* Frugia, 43 Tex. Civ. App. 48, 95 S. W. 563; Houston, etc., R. Co. *v.* Powell, (Tex. Civ. App. 1897) 41 S. W. 695. See also Chicago, etc., R. Co. *v.* Pollock, 195 Ill. 156, 62 N. E. 831 [*affirming* 93 Ill. App. 483].

1. Whitson *v.* Franklin, 34 Ind. 392.

2. Houston, etc., R. Co. *v.* Powell, (Tex. Civ. App. 1897) 41 S. W. 695. But see Green *v.* Delaware, etc., Canal Co., 38 Hun (N. Y.) 51, holding that where the ordinance in terms limits the rate of speed "while passing through said city," it should be construed as applying only to trains passing through the city and not to the movement of cars and engines in the yard or station grounds while making up trains.

3. Whitson *v.* Franklin, 34 Ind. 392.

4. East St. Louis Connecting R. Co. *v.* Reames, 173 Ill. 582, 51 N. E. 68, holding further that, where different rates of speed are prescribed for freight and passenger trains, a freight engine does not, by being detached and used to carry employees to meals, lose its character as a freight engine.

5. Southern R. Co. *v.* Jones, 33 Ind. App. 333, 71 N. E. 275; Missouri, etc., R. Co. *v.* Owens, (Tex. Civ. App. 1903) 75 S. W. 579.

6. Chicago, etc., R. Co. *v.* Thorson, 68 Ill. App. 288.

7. Graney *v.* St. Louis, etc., R. Co., (Mo. 1897) 38 S. W. 969.

8. Hecker *v.* Illinois Cent. R. Co., 231 Ill. 574, 83 N. E. 456.

9. **To what roads and companies applicable** see *supra*, X, B, 2, a.

10. *Alabama.*— Louisville, etc., R. Co. *v.* Anchors, 114 Ala. 492, 22 So. 279, 62 Am. St. Rep. 116.

Illinois.— St. Louis Nat. Stock Yards *v.* Godfrey, 198 Ill. 288, 65 N. E. 90 [*affirming* 101 Ill. App. 40]; Indianapolis, etc., R. Co. *v.* People, 91 Ill. 452.

Kentucky.— Chesapeake, etc., R. Co. *v.*

that the way is clear,[11] or that such precautions shall be taken unless the company maintains flagmen or watchmen or some system of interlocking or other safety appliances which will render it safe for trains to pass without stopping,[12] and the requiring of such precautions is a constitutional and valid exercise of the police power of the state.[13]

e. Lighting Tracks. The legislature may, as a proper exercise of the police power, authorize municipal corporations to require railroad companies to light their tracks at crossings within the municipality,[14] and in some jurisdictions there are statutes conferring such power,[15] and providing that if the railroad company does not light its tracks as required by the statute, the municipality may do so at the company's expense.[16] The ordinance may prescribe any reasonable regulations as to the manner of lighting, the character and location of the lights, and the hours at which they are to be kept lighted;[17] but this power must be reason-

Com., 99 Ky. 175, 35 S. W. 266, 18 Ky. L. Rep. 54.

Ohio.— Lake Shore, etc., R. Co. *v.* Cincinnati, etc., R. Co., 30 Ohio St. 604.

Texas.—San Antonio, etc., R. Co. *v.* Bowles, 88 Tex. 634, 32 S. W. 880.

Wisconsin.— Lockwood *v.* Chicago, etc., R. Co., 55 Wis. 50, 12 N. W. 401.

See 41 Cent. Dig. tit. "Railroads," § 750.

Crossing street car tracks.—A statute providing that before a street car shall cross over a railroad track at grade some employee of the company shall go ahead and ascertain if the way is clear does not relieve the steam railroad company of the duty of operating its gates so as to indicate to the person operating the street car whether the track is clear. Kopp *v.* Baltimore, etc., R. Co., 25 Ohio Cir. Ct. 546.

11. Southern R. Co. *v.* Bonner, 141 Ala. 517, 37 So. 702; St. Louis Nat. Stock Yard *v.* Godfrey, 198 Ill. 288, 65 N. E. 90 [*affirming* 101 Ill. App. 40].

The meaning of the requirement that the engineer before proceeding must "know the way to be clear" is not only that the crossings be free from immediate obstruction but free from danger of such obstruction as ought reasonably to be expected, but it does not require knowledge that the way will certainly remain clear against all after occurring or extraordinary happenings. Southern R. Co. *v.* Bouner, 141 Ala. 517, 37 So. 702.

12. Chesapeake, etc., R. Co. *v.* Com., 99 Ky. 175, 35 S. W. 266, 18 Ky. L. Rep. 54; Toledo, etc., R. Co. *v.* Hydell, 25 Ohio Cir. Ct. 579.

One company may contract with another for the employment of levermen to operate an interlocking system at the intersection of their roads, but cannot by such contract shift its responsibility or relieve itself against negligence in the performance of this duty as to the public and third persons. Toledo, etc., R. Co. *v.* Hydell, 25 Ohio Cir. Ct. 579.

13. Lake Shore, etc., R. Co. *v.* Cincinnati, etc., R. Co., 30 Ohio St. 604.

The commissioners of the District of Columbia have authority to make such requirements under the police powers delegated to them by congress. Baltimore, etc., R. Co. *v.* District of Columbia, 10 App. Cas. (D. C.) 111.

A municipal corporation, although authorized by its charter "to regulate the speed and running of locomotive engines and railroad cars through said city," has no right to compel a steam railroad company to stop trains before crossing a street on which a street railway is operated. New Jersey Cent. R. Co. *v.* Elizabeth, 70 N. J. L. 578, 57 Atl. 404.

14. Pittsburgh, etc., R. Co. *v.* Hartford, 170 Ind. 674, 82 N. E. 787, 85 N. E. 362; Cincinnati, etc., R. Co. *v.* Bowling Green, 57 Ohio St. 336, 49 N. E. 121, 41 L. R. A. 422; Cincinnati, etc., R. Co. *v.* Sullivan, 32 Ohio St. 152; Cleveland, etc., R. Co. *v.* St. Bernard, 15 Ohio Cir. Ct. 588, 8 Ohio Cir. Dec. 385.

15. Chicago, etc., R. Co. *v.* Crawfordsville, 164 Ind. 70, 72 N. E. 1025; Cincinnati, etc., R. Co. *v.* Sullivan, 32 Ohio St. 152.

16. St. Mary *v.* Lake Erie, etc., R. Co., 60 Ohio St. 136, 53 N. E. 795; Bowling Green *v.* Cincinnati, etc., R. Co., 9 Ohio Cir. Ct. 524, 6 Ohio Cir. Dec. 531, 10 Ohio Cir. Ct. 63, 4 Ohio Cir. Dec. 39 [*affirmed* in 57 Ohio St. 336, 49 N. E. 121, 41 L. R. A. 422].

To entitle the city to recover for such lights it is not necessary that they should be placed directly on the track, and if located so as properly to light the track, it is immaterial that they also incidentally light a street of the village. Cleveland, etc., R. Co. *v.* St. Bernard, 19 Ohio Cir. Ct. 299, 10 Ohio Cir. Dec. 415.

The expense of the lighting may be declared a lien upon any real estate of the company situated within the municipality. Cincinnati, etc., R. Co. *v.* Sullivan, 32 Ohio St. 152.

17. Pittsburgh, etc., R. Co. *v.* Hartford, 170 Ind. 674, 82 N. E. 787, 85 N. E. 362; Chicago, etc., R. Co. *v.* Salem, 170 Ind. 153, 82 N. E. 913; Chicago, etc., R. Co. *v.* Crawfordsville, 164 Ind. 70, 72 N. E. 1025; Cincinnati, etc., R. Co. *v.* Bowling Green, 57 Ohio St. 336, 49 N. E. 121, 41 L. R. A. 422.

Application of rule.— The ordinance may require electric lights if there is an electric light plant within the municipality (Pittsburgh, etc., R. Co. *v.* Hartford City, 170 Ind. 674, 82 N. E. 787, 85 N. E. 362; Chicago, etc., R. Co. *v.* Crawfordsville, 164 Ind. 70, 72 N. E. 1025; Cincinnati, etc., R. Co. *v.* Bowling Green, 57 Ohio St. 336, 49 N. E. 121

ably exercised according to what may be necessary for the safety of the public at the crossing, and not as a means of compelling a railroad company to light the city streets.[18] An ordinance requiring the lighting of tracks should specify the time within which it must be complied with,[19] and fix definitely the time or times at which the lights shall be kept lighted;[20] but the ordinance will be enforced if sufficiently definite and certain in its terms to inform the company what it is required to do.[21]

f. Sign-Boards, Flagmen, and Gates at Crossings. In some jurisdictions there are statutes requiring railroad companies to maintain sign-boards at crossings,[22] and in others there are general statutes or charter provisions expressly authorizing municipal corporations to require railroad companies to maintain flagmen, switchmen, or gates at crossings,[23] or providing that such a requirement

[*affirming* 9 Ohio Cir. Ct. 524, 6 Ohio Cir. Dec. 531, 10 Ohio Cir. Ct. 524, 4 Ohio Cir. Dec. 39]), and may require the lights to be kept burning for five minutes before the arrival of a train (Pittsburgh, etc., R. Co. *v.* Hartford City, *supra*), or may require that they shall be kept burning for not less than thirty minutes prior to the passage of trains and shall be of two thousand candle power where this is the same power as the lights maintained by the municipality (Chicago, etc., R. Co. *v.* Salem, 170 Ind. 153, 82 N. E. 913); but an ordinance will not be sustained which requires electric lights of such high power and brilliancy as to obscure the headlights of locomotives and increase rather than diminish the danger at the crossing (Cleveland, etc., R. Co. *v.* St. Bernard, 15 Ohio Cir. Ct. 588, 8 Ohio Cir. Dec. 385).

18. Cleveland, etc., R. Co. *v.* Connersville, 147 Ind. 277, 46 N. E. 579, 62 Am. St. Rep. 418, 37 L. R. A. 175 (holding that an ordinance is invalid which requires a railroad company to light its tracks at crossings every night from dark until dawn by arc lights of two thousand candle power, suspended twenty-five feet above the tracks where the company does not run any train through the city after eight o'clock at night); Shelbyville *v.* Cleveland, etc., R. Co., 146 Ind. 66, 44 N. E. 929 (holding that an ordinance is invalid which requires a light to be placed at every point where any track crosses a street without regard to the extent or character of the use of such track or whether the safety of the public requires it).

19. Lake Erie, etc., R. Co. *v.* St. Marys, 14 Ohio Cir. Ct. 202, 7 Ohio Cir. Dec. 661, holding that under the Ohio statute such specification is essential to the validity of the ordinance.

20. Shelbyville *v.* Cleveland, etc., R. Co., 146 Ind. 66, 44 N. E. 929.

21. Pittsburgh, etc., R. Co. *v.* Hartford City, 170 Ind. 674, 82 N. E. 787, 85 N. E. 362 (holding that an ordinance requiring a railroad company to maintain electric lights at street crossings of sufficient power to light the entire crossing, not to exceed the power of the lights used by the city, and to keep them burning for five minutes before the arrival of each train at all times at night when there is no moon or when the moon is obscured, is not so indefinite as to be invalid); Chicago, etc., R. Co. *v.* Crawfordsville, 164 Ind. 70, 72 N. E. 1025 (holding that an ordinance is not invalid for indefiniteness because it excuses lighting by the company at such times as the moon furnishes sufficient light to light such crossings and at all times when the city lights are not in operation); St. Marys *v.* Lake Erie, etc., R. Co., 60 Ohio St. 136, 53 N. E. 795 (holding that an ordinance is sufficiently definite which fixes the time within which lighting shall be done as "from the hour of darkness to the hour of daylight on each and every day"); Cincinnati, etc., R. Co. *v.* Bowling Green, 57 Ohio St. 336, 49 N. E. 121, 41 L. R. A. 422 (holding that an ordinance providing that the lights shall be lighted for the same number of hours "as the said council does now, or may hereafter, require for electric lamps within the limits of said village for lighting streets" is sufficiently definite).

22. Payne *v.* Chicago, etc., R. Co., 44 Iowa 236 (holding, however, that the statute is not retroactive, and that the statutory liability for injuries occasioned by a failure to maintain such signboards does not apply to injuries occurring before the statute took effect); Soule *v.* Grand Trunk R. Co., 21 U. C. C. P. 308 (holding that the company will not be liable either to a person injured or on the ground of nuisance for having placed the posts supporting a signboard within the limits of the highway if it has located them in a reasonably proper manner with reference to the circumstances of the particular case).

It is a sufficient compliance with a statute requiring railroad companies to erect signboards with the inscription, "Look out for the Locomotive," where the company erects a signboard of suitable size with the words "Railroad Crossing" thereon. State Bd. of Education *v.* Mobile, etc., R. Co., 72 Miss. 236, 16 So. 489.

23. Chicago, etc., R. Co. *v.* Averill, 224 Ill. 516, 79 N. E. 654 [*affirming* 127 Ill. App. 275]; Altamont *v.* Baltimore, etc., R. Co., 184 Ill. 47, 56 N. E. 340 [*affirming* 84 Ill. App. 274]; Concord, etc., R. Co. *v.* Portsmouth, 64 N. H. 219, 9 Atl. 546; McCullough *v.* Franklin Tp., 59 N. J. L. 106, 34 Atl. 1088; State *v.* East Orange Tp., 41 N. J. L. 127.

The legislature has full power under the police power of the state to authorize a

may be made by a court of chancery,[24] county court,[25] county commissioners,[26] or railroad commissioners.[27] It has also been held in a number of cases that municipal corporations may, under the general police powers usually conferred upon them to regulate the use of streets or provide for the general welfare and safety, require railroad companies to maintain watchmen, flagmen, or gates at crossings within the corporate limits;[28] but on the contrary it has been held

municipal corporation to pass ordinances requiring railroad companies to maintain flagmen at the crossings. State *v.* East Orange Tp., 41 N. J. L. 127.

The authority can be exercised only by ordinance, and a mere notice to the railroad company by the municipal authorities not preceded by any ordinance is insufficient. Altamont *v.* Baltimore, etc., R. Co., 184 Ill. 47, 56 N. E. 340 [*affirming* 84 Ill. App. 274].

At unauthorized crossing.— Under the Rhode Island statute of 1896 providing that railroad companies shall maintain flagmen at highway crossings when in the opinion of the town council it is necessary for the public safety, and the act of 1890, providing that no highway shall be built across any railroad track at grade except by consent of the railroad commissioner, a railroad company is not obliged to maintain flagmen at a grade crossing over a highway not authorized by the railroad commissioner, although the town council has so ordered. McGoran *v.* New York, etc., R. Co., 25 R. I. 387, 55 Atl. 929.

24. Eckert *v.* Perth Amboy, 66 N. J. Eq. 437, 57 Atl. 438, holding that to justify the court in making a decree requiring gates or a flagman at a crossing, it is not necessary that the hazardous condition existing at such crossing should have been caused by the railroad company.

25. Matter of Patchogue St. Crossings, 74 Hun (N. Y.) 46, 26 N. Y. Suppl. 293; Matter of Islip Highway Com'rs, 74 Hun (N. Y.) 44, 26 N. Y. Suppl. 384.

Electric bell signals.—Under the New York General Railroad Act of 1890, authorizing the county court to make an order that a flagman or gates shall be maintained at a crossing or to make such other order as may be deemed proper, the court may order an electric bell signal to be placed at a crossing. Matter of Islip Highway Com'rs, 74 Hun (N. Y.) 48, 26 N. Y. Suppl. 385; Matter of Patchogue St. Crossings, 74 Hun (N. Y.) 46, 26 N. Y. Suppl. 293.

Proceedings to enforce regulations.— The commissioners of highways of a town are "local authorities" within the meaning of the New York statute providing that the court may on the application of the local authorities compel a railroad company to station a flagman or place gates at any point where a highway crosses a railroad at grade, and it is immaterial that they are designated in the petition as "highway commissioners" instead of "commissioners of highways" as in the statute, nor is it necessary that the application should state any facts showing the crossing to be dangerous other than the fact that it is a crossing at grade. *In re* Niagara Highway Com'rs, 72 Hun (N. Y.) 575, 25 N. Y. Suppl. 231.

26. State *v.* Chicago, etc., R. Co., 151 Ind. 474, 51 N. E. 914 (holding, however, that the Indiana statute of 1891, providing that where the tracks crossing a public highway are used for switching purposes, the county commissioners may require the railroad company to keep a flagman at the crossing, does not apply to street crossings since the statute also provides that the trustees of incorporated towns shall have "exclusive power over the streets"); Grand Trunk Western R. Co. *v.* State, 40 Ind. App. 695, 82 N. E. 1017 (holding that the Indiana statute of 1891 is not void for uncertainty).

27. See Wabash R. Co. *v.* Railroad Com'r, 120 Mich. 697, 79 N. W. 910; *Re* Canadian Pac. R. Co., 27 Ont. 559 [*affirmed* in 25 Ont. App. 65], railway committee of privy council.

28. *Georgia.*— Western, etc., R. Co. *v.* Young, 81 Ga. 397, 7 S. E. 912, 12 Am. St. Rep. 320.

Louisiana.— State *v.* Cozzens, 42 La. Ann. 1069, 8 So. 268.

Minnesota.— Green *v.* Eastern R. Co., 52 Minn. 79, 53 N. W. 808. But see Red Wing *v.* Chicago, etc., R. Co., 72 Minn. 240, 55 N. W. 223, 71 Am. St. Rep. 485.

Missouri.— Seibert *v.* Missouri Pac. R. Co., 188 Mo. 657, 87 S. W. 995, 70 L. R. A. 72.

Canada.— Liverpool *v.* Liverpool, etc., R. Co., 35 Nova Scotia 233.

See 41 Cent. Dig. tit. "Railroads," § 754.

Specific authority to regulate the speed of railway trains does not restrict a general grant of authority which standing alone would have authorized the adoption of an ordinance requiring a flagman to be kept at a crossing. Green *v.* Eastern R. Co., 52 Minn. 79, 53 N. W. 808.

If the general power is expressly limited as in the case of the Long Island City charter, which empowers the common council to regulate the use of streets by railroads, but with the reservation that it shall have no power to prohibit or control in any manner the use of steam power on any railroad from any part of Long Island to East river, an ordinance requiring such railroad companies within the city limits to place a flagman at their crossings is invalid. Long Island City *v.* Long Island R. Co., 79 N. Y. 561 [*affirming* 8 Hun 58].

Inherent police power.— It has been stated that in the absence of any express grant of even general powers municipal corporations might by ordinance require the maintenance of safety gates at crossings under the inherent police power of a municipality. See

that in the absence of express authority the general police powers delegated to municipal corporations do not authorize ordinances requiring flagmen, watchmen, or gates at crossings,[29] and that any authority in this regard which is expressly conferred cannot be extended beyond the terms of the statute.[30] Even where a municipal corporation has a general authority to pass such an ordinance it must, in order to be valid, be reasonable in its application to the particular case.[31]

5. Obstructing Streets and Highways — a. In General.[32] In some jurisdictions there are statutes expressly prohibiting the unnecessary or unreasonable obstruction of the crossings of public highways by railroads,[33] or prohibiting any obstruction of such crossings for more than a certain number of minutes at any one time.[34] A municipal corporation may also by ordinance make such regula-

Seibert *v.* Missouri Pac. R. Co., 188 Mo. 657, 87 S. W. 995, 70 L. R. A. 72.

29. *Indiana.*— Pittsburgh, etc., R. Co. *v.* Crown Point, 146 Ind. 421, 45 N. E. 587, 35 L. R. A. 684.

Minnesota.— Red Wing *v.* Chicago, etc., R. Co., 72 Minn. 240, 75 N. W. 223, 71 Am. St. Rep. 485 [*distinguishing* Green *v.* Eastern R. Co., 52 Minn. 79, 53 N. W. 808].

New Jersey.— West Jersey, etc., R. Co. *v.* Bridgeton, 64 N. J. L. 189, 44 Atl. 848.

Ohio.— Ravenna *v.* Pennsylvania Co., 45 Ohio St. 118, 12 N. E. 445.

Pennsylvania.— *In re* Pennsylvania R. Co., 213 Pa. St. 373, 62 Atl. 986 [*reversing* 27 Pa. Super. Ct. 113].

See 41 Cent. Dig. tit. "Railroads," § 754.

30. West Jersey, etc., R. Co. *v.* Bridgeton, 64 N. J. L. 189, 44 Atl. 848 (holding that express authority to require flagmen or signals does not authorize an ordinance requiring safety gates at street crossings); State *v.* Heubach, 11 Ohio Dec. (Reprint) 679, 28 Cinc. L. Bul. 299 (holding that authority to require gates and watchmen at crossings where the tracks are used for switching or making up trains does not authorize such a requirement at other crossings not so used).

31. Toledo, etc., R. Co. *v.* Jacksonville, 67 Ill. 37, 16 Am. Rep. 611; McCullough *v.* Franklin Tp., 59 N. J. L. 106, 34 Atl. 1088.

An ordinance is unreasonable and invalid which requires a railroad company to keep a flagman by day and a red lantern by night at a crossing within the city limits, where there is but a single track and the crossing but little used and not more dangerous than any ordinary crossing (Toledo, etc., R. Co., *v.* Jacksonville, 67 Ill. 37, 16 Am. Rep. 611); or which requires a railroad company to maintain a flagman at a crossing "between the hours of 7 o'clock, A. M. and 9 o'clock, P. M. of each and every day of the year," where the crossing is over switch-tracks only and such tracks are not in use after six o'clock P. M. nor on Sundays or holidays (Southern Indiana R. Co. *v.* Bedford, 165 Ind. 272, 75 N. E. 268); or which requires a railroad company to protect street crossings by gates and flagmen during that portion of the night when travelers on the highways as well as trains on the railroad are few and far between (McCullough *v.* Franklin Tp., 59 N. J. L. 106, 34 Atl. 1088); or which requires a railroad company to maintain gates and flagmen at crossings which are not in fact dangerous (New York, etc., R. Co. *v.* Bloomfield Tp., 59 N. J. L. 109, 35 Atl. 158); or which requires a railroad company to keep a watchman at a crossing within the corporate limits but which is practically in the open country and little frequented (Com. *v.* Philadelphia, etc., R. Co., 23 Pa. Super. Ct. 205); but it has been held that an ordinance requiring a railroad company to maintain gates at crossings in a city and to operate them both day and night will be presumed to be reasonable and valid in the absence of any affirmative showing to the contrary (Chicago, etc., R. Co. *v.* Averill, 224 Ill. 516, 79 N. E. 654 [*affirming* 127 Ill. App. 275]).

32. Penalty for obstructing highways see *infra*, X, B, 7, a.

Obstruction as an indictable offense see *infra*, X, B, 8, a, (III).

33. See the statutes of the several states; and the following cases:

Illinois.— Toledo, etc., R. Co. *v.* People, 81 Ill. 141; Chicago, etc., R. Co. *v.* People, 82 Ill. App. 679.

Indiana.— Becker *v.* State, 33 Ind. App. 261, 71 N. E. 188.

Maine.— State *v.* Grand Trunk R. Co., 59 Me. 189.

Massachusetts.— Com. *v.* New York, etc., R. Co., 112 Mass. 412.

Pennsylvania.— Com. *v.* Capp, 48 Pa. St. 53.

See 41 Cent. Dig. tit. "Railroads," §§ 758, 759.

34. *Illinois.*— Chicago, etc., R. Co. *v.* People, 82 Ill. App. 679.

Kentucky.— Louisville, etc., R. Co. *v.* Com., 117 Ky. 350, 78 S. W. 124, 79 S. W. 275, 25 Ky. L. Rep. 1452, 2050; Illinois Cent. R. Co. *v.* Com., 45 S. W. 367, 20 Ky. L. Rep. 115.

Massachusetts.— Com. *v.* Boston, etc., R. Co., 135 Mass. 550; Com. *v.* New York, etc., R. Co., 112 Mass. 412.

Michigan.— Hinchman *v.* Pere Marquette R. Co., 136 Mich. 341, 99 N. W. 277, 65 L. R. A. 553.

Mississippi.— Anderson *v.* Alabama, etc., R. Co., 81 Miss. 587, 33 So. 840; Illinois Cent. R. Co. *v.* State, 71 Miss. 253, 14 So. 459.

See 41 Cent. Dig. tit. "Railroads," §§ 758, 759.

tions as to the obstruction of its streets provided they be reasonable;[35] but an ordinance will be declared invalid if unreasonable either as to the rights of the railroad company,[36] or the rights of the public to the free and uninterrupted use of the street.[37] The term "highway" in statutes prohibiting their obstruction applies to all kinds of public ways,[38] but not to a private way.[39] To sustain an action for damages based upon the obstruction of a highway contrary to a statutory regulation it must be shown that the road obstructed was a public highway, that it was obstructed for the length of time prohibited by statute, and that such obstruction was the cause of the injury complained of.[40]

b. What Constitutes Obstruction. To constitute the obstruction of a highway crossing within the application of a statute or ordinance prohibiting the same, it is not necessary that there should have been any person present at the time who was actually prevented from using the crossing;[41] but the obstruction must have been of such a character as to obstruct travel and interfere with the use of the highway,[42] and if not of this character the mere fact that a train or car is left standing so as to project slightly within the limits of a crossing does not constitute an obstruction.[43]

35. *Alabama.*— Birmingham *v.* Alabama Great Southern R. Co., 98 Ala. 134, 13 So. 141, holding that an ordinance prohibiting the obstruction of a street for longer than three minutes is reasonable and valid.

Delaware.— McCoy *v.* Philadelphia, etc., R. Co., 5 Houst. 599, holding that an ordinance prohibiting the obstruction of a street for over ten minutes except in case of accident is valid.

Minnesota.— Duluth *v.* Mallett, 43 Minn. 204, 45 N. W. 154, holding that an ordinance prohibiting the stopping of a train or locomotive upon any street crossing either for switching or any other purpose except to prevent accident in case of immediate danger is not *prima facie* unreasonable.

Missouri.— Burger *v.* Missouri Pac. R. Co., 112 Mo. 238, 20 S. W. 439, 34 Am. St. Rep. 379, holding that an ordinance prohibiting the obstruction of a street crossing for over ten minutes is reasonable and valid.

New Jersey.— Pennsylvania R. Co. *v.* New Jersey City, 47 N. J. L. 286 (holding that an ordinance prohibiting the obstruction of a street crossing for over three minutes is not unreasonable as a whole and will not be declared invalid, although it might be unreasonable as to certain streets); Long *v.* Jersey City, 37 N. J. L. 348 (holding that an ordinance prohibiting the obstruction of a street crossing for over two minutes is reasonable and valid).

See 41 Cent. Dig. tit. "Railroads," § 759.

An ordinance may be valid in part and invalid in part where there are distinct provisions, some of which are reasonable and some not (Birmingham *v.* Alabama Great Southern R. Co., 98 Ala. 134, 13 So. 141); and where an ordinance prohibiting the obstruction of street crossings for more than a certain number of minutes at a time is not unreasonable as a whole, it will not be declared invalid because it may be unreasonable as to particular streets, the remedy being to resist its enforcement in such locality (Pennsylvania R. Co. *v.* Jersey City, 47 N. J. L. 286).

36. Birmingham *v.* Alabama Great Southern R. Co., 98 Ala. 134, 13 So. 141, holding that an ordinance prohibiting a railroad company from moving cars across a street between the hours of six A. M. and eleven P. M. for the purpose of being distributed in the yards, without regard to whether they are stopped upon the street or not, is unreasonable and void.

37. Gilcrest *v.* Des Moines, 128 Iowa 49, 102 N. W. 831, holding that an ordinance permitting trains to stand upon street crossings, if not over thirty minutes, is invalid, as unreasonably interfering with the rights of the public to the use of the street and authorizing the maintenance of a public nuisance.

38. Ohio, etc., R. Co. *v.* People, 39 Ill. App. 473, holding that the term "highway" as used in the statute applies to streets of a city, although the city has, by ordinance passed pursuant to its corporate authority, undertaken to regulate and prevent the obstruction of its streets.

39. Com. *v.* Boston, etc., R. Co., 135 Mass. 550, holding that the Massachusetts statute prohibiting the obstruction of "a highway, town way or street" does not apply to a private way in a city but only to public ways.

40. Anderson *v.* Alabama, etc., R. Co., 81 Miss. 587, 33 So. 840.

41. Chicago, etc., R. Co. *v.* People, 82 Ill. App. 679 [*distinguishing* Illinois Cent. R. Co. *v.* People, 49 Ill. App. 538, 540, 542].

42. Illinois Cent. R. Co. *v.* People, 59 Ill. App. 256; Illinois Cent. R. Co. *v.* People, 49 Ill. App. 538, 540, 542.

But travel need not be absolutely prevented, and it is sufficient to constitute an obstruction where cars are left standing upon each side of the crossing with an opening between them so narrow that only a gentle team could be driven through with safety. Great Western R. Co. *v.* Decatur, 33 Ill. 381.

43. Illinois Cent. R. Co. *v.* People, 59 Ill. App. 256; Hinchman *v.* Pere Marquette R.

6. Fences and Cattle-Guards. The legislature may, under the police power of the state, require railroad companies to fence their tracks or construct cattle-guards,[44] or make the company liable without regard to negligence in the operation of trains in case of failure to do so;[45] and there are in many jurisdictions statutes requiring railroad companies to construct fences or cattle-guards, or both, either generally or at particular places, or imposing certain penalties or liabilities in case of a failure to do so, the terms and applications of which have been fully considered in other parts of this article in connection with the duty to fence or construct cattle-guards where the road passes through private lands or inclosures,[46] and the liabilities growing out of a failure to construct or maintain them wherever required in case of injury to crops,[47] to persons on or near the track,[48] to animals,[49] and to trains and passengers thereon due to collisions with animals upon the track.[50] There is no common-law duty on the part of railroad companies to fence their tracks,[51] and the duties and liabilities in this regard vary or cease with the alteration or repeal of the statutes.[52] A statute in regard to fencing will not, however, be construed as repealing a former statute on the same subject or affecting the duties and liabilities imposed thereby if the two are not inconsistent and can stand together;[53] but a statute requiring in general terms that all railroad companies shall fence their tracks and construct cattle-guards will be construed as repealing a former statute under which such duties were dependent upon the action of the county commissioners in prescribing rules for their construction.[54]

Co., 136 Mich. 341, 99 N. W. 277, 63 L. R. A. 552; Crowley *v.* Chicago, etc., R. Co., 122 Wis. 287, 99 N. W. 1016.

44. *Illinois.*— Ohio, etc., R. Co. *v.* McClelland, 25 Ill. 124.

Kansas.— Kansas Pac. R. Co. *v.* Mower, 16 Kan. 573.

Mississippi.— Kansas City, etc., R. Co. *v.* Spencer, 72 Miss. 491, 17 So. 168.

Vermont.— Thorpe *v.* Rutland, etc., R. Co., 27 Vt. 140, 62 Am. Dec. 625.

Virginia.— Sanger *v.* Chesapeake, etc., R. Co., 102 Va. 86, 45 S. E. 750.

Wisconsin.— Blair *v.* Milwaukee, etc., R. Co., 20 Wis. 254.

See 41 Cent. Dig. tit. "Railroads," §§ 762. 763.

45. Indianapolis, etc., R. Co. *v.* Marshall, 27 Ind. 300; Kansas Pac. R. Co. *v.* Mower, 16 Kan. 573.

46. See *supra*, VI, E, 3.

47. See *supra*, VI, J, 1, g.

48. See *infra*, X, E, 2, a, (v), (B).

49. See *infra*, X, H, 4.

50. See *infra*, X, D, 2, b, (II).

51. Chicago, etc., R. Co. *v.* Woodworth, 1 Indian Terr. 20, 35 S. W. 238; Williams *v.* Michigan Cent. R. Co., 2 Mich. 259, 55 Am. Dec. 59; New Orleans, etc., R. Co. *v.* Field, 46 Miss. 573.

52. Campbell *v.* New York, etc., R. Co., 50 Conn. 128, holding that where, after land had been taken for a railroad, a statute requiring railroad companies to fence their lines was repealed and a new one passed requiring them to fence only where the commissioners should order it, the company was not bound in the absence of such order to maintain a fence.

Effect of repeal upon order of commissioners.— Where under a statute requiring railroad companies to fence when ordered by the commissioners, the company was ordered to fence, and after the order the statute was repealed and subsequently reënacted, the duty to fence terminated with the repeal and the order of the commissioners was not revived by the reënactment of the statute. Kane *v.* New York, etc., R. Co., 49 Conn. 139.

53. Jeffersonville, etc., R. Co. *v.* Dunlap, 112 Ind. 93, 13 N. E. 403.

Application of rule to particular statutes. —A statute not in terms requiring a fence but making railroad companies liable without regard to negligence for injuries to animals where their roads might be but are not fenced is not repealed by a subsequent statute requiring in express terms that railroads shall be fenced at certain places (Jeffersonville, etc., R. Co. *v.* Dunlap, 112 Ind. 93, 13 N. E. 409; Pennsylvania Co. *v.* McCarty, 112 Ind. 322, 13 N. E. 409; Chicago, etc., R. Co. *v.* Brown, 33 Ind. App. 603, 71 N. E. 908; Jeffersonville, etc., R. Co. *v.* Peters, 1 Ind. App. 69, 27 N. E. 299); nor is a statute requiring railroad companies to fence and making them liable for all injuries occasioned by a failure to do so repealed by a statute requiring railroad companies to fence their tracks where they pass through inclosed lands and imposing a penalty to be recovered by the landowner for failure to do so (Curry *v.* Chicago, etc., R. Co., 43 Wis. 665); nor does a statute shifting the duty of keeping the gates at a farm crossing closed from the railroad company to the landowner affect the liability of the railroad company for injury to animals escaping to the railroad track through gates at other places than farm crossings (Louisville, etc., R. Co. *v.* Hughes, 2 Ind. App. 68, 28 N. E. 158).

54. Gowan *v.* St. Paul, etc., R. Co., 25 Minn. 328.

7. Penalties For Violation of Regulations — a. Power to Impose. Where the legislature has power to make a certain regulation affecting railroad companies, it has also the power to affix a penalty for the violation of such regulation,[55] provided a reasonable time is allowed for compliance with the regulation;[56] and since corporations in operating railroads can act only through their agents, the company may be made subject to a penalty for defaults on the part of its servants.[57] In the absence of any constitutional restriction, the legislature may make whatever disposition of the penalty it may deem proper,[58] and may give the entire penalty to the person injured,[59] or may provide that a part shall go to the informer,[60] or to the prosecuting attorney.[61] The violation of many statutory regulations by railroad companies has accordingly been made the subject of a penalty,[62] such as a violation of speed regulations,[63] obstructing highways with cars or locomotives,[64] cutting through or interfering with a highway without

55. *Alabama.*— Mobile, etc., R. Co. *v.* Steiner, 61 Ala. 559, penalty for charging more than legal freight rates.

Minnesota.— State *v.* Winona, etc., R. Co., 19 Minn. 434, penalty for charging rates in excess of those allowed by law.

Missouri.— State *v.* Missouri Pac. R. Co., 149 Mo. 104, 50 S. W. 278, penalty for failure to give crossing signals.

Tennessee.— Parks *v.* Nashville, etc., R. Co., 13 Lea 1, 49 Am. Rep. 655, penalty for failure to announce stations.

United States.— State *v.* Kansas City, etc., R. Co., 32 Fed. 722, penalty for failure to erect depots.

See 41 Cent. Dig. tit. "Railroads," § 764.

56. Houston, etc., R. Co. *v.* State, (Tex. 1908) 107 S. W. 525 [*affirming* (Civ. App. 1907) 103 S. W. 449]; Missouri, etc., R. Co. *v.* State, 100 Tex. 420, 100 S. W. 766.

57. Hammond *v.* New York, etc., R. Co., 5 Ind. App. 526, 31 N. E. 817 (violation of speed regulations); State *v.* Chicago, etc., R. Co., 122 Iowa 22, 96 N. W. 904, 101 Am. St. Rep. 254 (failure to stop trains before crossing other railroads); State *v.* Missouri Pac. R. Co., 149 Mo. 104, 50 S. W. 278 (failure to give crossing signals); Parks *v.* Nashville, etc., R. Co., 13 Lea (Tenn.) 1, 49 Am. Rep. 655 (failure to announce stations at which trains stop).

58. State *v.* Indiana, etc., R. Co., 133 Ind. 69, 32 N. E. 817, 18 L. R. A. 502, holding that the penalty is not a fine within the application of the Indiana constitution providing that "the fines assessed in breaches of the penal laws of the state" shall belong to the common school fund.

59. Mobile, etc., R. Co. *v.* People, 24 Ill. App. 250 (penalty for failure to give crossing signals); Scott *v.* Missouri Pac. R. Co., 38 Mo. App. 523 (penalty for failure to remove dry vegetation and undergrowth from right of way to prevent fire).

60. State *v.* Wabash, etc., R. Co., 89 Mo. 562, 1 S. W. 130, holding that such a provision is not in violation of the Missouri constitution providing that "the clear proceeds" of all penalties shall belong to the several counties as a public school fund.

61. State *v.* Indiana, etc., R. Co., 133 Ind. 69, 32 N. E. 817, 18 L. R. A. 502.

62. See the statutes of the different states; and the following cases:

Arkansas.— Kansas City, etc., R. Co. *v.* Moon, 66 Ark. 409, 50 S. W. 996, failure to pay unpaid wages on discharge of employee.

Missouri.— McFarland *v.* Mississippi River, etc., R. Co., 175 Mo. 422, 75 S. W. 152, failure to remove dry vegetation and undergrowth from right of way to prevent fire.

New York.— People *v.* Clark, 14 N. Y. Suppl. 642, 8 N. Y. Cr. 169, 179, heating cars by means of a stove or furnace kept inside of the car.

Pennsylvania.— Simon *v.* Baltimore, etc., R. Co., 173 Pa. St. 517, 34 Atl. 221, failure to remove obstructions at private road or crossing place after notice.

Texas.— Houston, etc., R. Co. *v.* State, 61 Tex. 342 (failure to make annual reports to controller of public accounts); St. Louis Southwestern R. Co. *v.* Terhune, (Civ. App. 1904) 81 S. W. 74 (permitting Johnson grass to mature or go to seed on rights of way).

See 41 Cent. Dig. tit. "Railroads," § 764 *et seq.*

The Texas statute of 1905, requiring railroad companies under penalty to provide water-closets at all passenger stations and to keep them lighted and in a clean and sanitary condition, was held to be unconstitutional as to the provision requiring their construction, since it did not prescribe the time within which they were to be constructed or allow a reasonable time therefor (Houston, etc., R. Co. *v.* State, (1908) 107 S. W. 525 [*affirming* (Civ. App. 1907) 103 S. W. 449]; Missouri, etc., R. Co. *v.* State, 100 Tex. 420, 100 S. W. 766), and also to be invalid because it failed to designate with sufficient certainty what the railroad company was required to do (State *v.* Texas, etc., R. Co., (Civ. App. 1907) 103 S. W. 653), but to be constitutional and valid as applied to the lighting and maintenance of existing water-closets (Houston, etc., R. Co. *v.* State, *supra*).

63. Wabash R. Co. *v.* People, 78 Ill. App. 268; Buffalo *v.* New York, etc., R. Co., 23 N. Y. Suppl. 303 [*affirmed* in 6 Misc. 630, 27 N. Y. Suppl. 297]; State *v.* Wisconsin Cent. R. Co., 133 Wis. 478, 113 N. W. 952; State *v.* Wisconsin Cent. R. Co., 128 Wis. 79, 107 N. W. 295.

64. Indianapolis, etc., R. Co. *v.* People, 32 Ill. App. 286; Com. *v.* Capp, 48 Pa. St. 53.

providing a proper substitute,[65] a failure to give crossing signals,[66] to keep flagmen at a crossing,[67] to stop before crossing another railroad,[68] to announce stations at which trains stop,[69] to equip locomotives with bells or whistles [70] or with smoke consumers,[71] to provide blackboards at stations showing the time of arrival and departure of trains,[72] to construct fences,[73] cattle-guards,[74] or farm crossings,[75] or to provide separate accommodations for white and colored passengers; [76] and in one jurisdiction a penalty is provided by statute for injuries resulting in death due to the negligence of an officer, agent, or employee of the railroad company.[77]

b. Construction, Operation, and Effect — (1) *In General.* Statutes imposing penalties upon railroad companies are strictly construed and will not be extended by implication to cases not clearly within their application,[78] or so as

65. Llewellyn *v.* Vale of Glamorgan R. Co., [1897] 2 Q. B. 239, 66 L. J. Q. B. 670, 76 L. T. Rep. N. S. 778, 13 T. L. R. 491 [*affirmed* in [1898] 1 Q. B. 473, 67 L. J. Q. B. 305, 78 L. T. Rep. N. S. 70, 14 T. L. R. 205, 46 Wkly. Rep. 290].

Both public and private ways are within the application of the English statute, the penalty in the case of public ways to be paid to the trustees, commissioners, or other persons in charge thereof, and in the case of private ways to the owner thereof. Llewellyn *v.* Vale of Glamorgan R. Co., [1898] 1 Q. B. 473, 67 L. J. Q. B. 305, 78 L. T. Rep. N. S. 70, 14 T. L. R. 205, 46 Wkly. Rep. 290.

66. State *v.* Missouri Pac. R. Co., 149 Mo. 104, 50 S. W. 278; People *v.* New York Cent. R. Co., 13 N. Y. 78 [*affirming* 25 Barb. 199].

67. Grand Trunk Western R. Co. *v.* State, 40 Ind. App. 695, 82 N. E. 1017.

68. Indianapolis, etc., R. Co. *v.* People, 91 Ill. 452.

69. Parks *v.* Nashville, etc., R. Co., 13 Lea (Tenn.) 1, 49 Am. Rep. 655.

70. Chicago, etc., R. Co. *v.* State, 84 Ark. 409, 106 S. W. 199.

71. Southeastern, etc., R. Co. *v.* London County, 19 Cox C. C. 721, 65 J. P. 568, 84 L. T. Rep. N. S. 632.

The liability for the penalty depends upon whether the engine was equipped as required by the statute and not merely upon the fact of its emitting smoke, which might be due to the negligence of the person operating it, although it was properly equipped. Manchester, etc., R. Co. *v.* Wood, 2 E. & E. 344, 6 Jur. N. S. 70, 29 L. J. M. C. 39, 1 L. T. Rep. N. S. 31, 8 Wkly. Rep. 24, 105 E. C. L. 344.

72. State *v.* Indiana, etc., R. Co., 133 Ind. 69, 32 N. E. 817, 18 L. R. A. 502; State *v.* Cleveland, etc., R. Co., 8 Ohio Cir. Ct. 604, 4 Ohio Cir. Dec. 372.

73. Cotton *v.* Wiscasset, etc., R. Co., 98 Me. 511, 57 Atl. 785.

74. St. Louis, etc., R. Co. *v.* Hale, 82 Ark. 175, 100 S. W. 1148; Choctaw, etc., R. Co. *v.* Goset, 70 Ark. 427, 68 S. W. 879; Fenn *v.* Georgia Northern R. Co., 116 Ga. 942, 43 S. E. 378; Kansas City, etc., R. Co. *v.* Spencer, 72 Miss. 491, 17 So. 168; Burnett *v.* Southern R. Co., 62 S. C. 281, 40 S. E. 679.

Notice to railroad company.—Under a statute requiring railroad companies to construct cattle-guards where the road passes through "any inclosed lands," and providing a penalty for failure to do so after ten days' notice, the lands may be inclosed before or after the construction of the railroad, but they must be inclosed at the time when the notice is given. St. Louis, etc., R. Co. *v.* Hood, 67 Ark. 357, 55 S. W. 134. Where the statute requires the notice to "contain a description of the point where such cattle-guard is desired," a notice to the company demanding a cattle-guard between two named lots "where your line of road crosses said line" is sufficient. Fenn *v.* Georgia Northern R. Co., 116 Ga. 942, 43 S. E. 378. If the statute does not designate upon whom the notice shall be served, service upon a station agent in the county where the action is brought is sufficient. St. Louis, etc., R. Co. *v.* Hale, 82 Ark. 175, 100 S. W. 1148.

75. Miller *v.* Chicago, etc., R. Co., 133 Wis. 183, 113 N. W. 384.

76. Sturkie *v.* Southern R. Co., 71 S. C. 208, 50 S. E. 782; Southern Kansas R. Co. *v.* State, 44 Tex. Civ. App. 218, 99 S. W. 166.

77. Rine *v.* Chicago, etc., R. Co., 100 Mo. 228, 12 S. W. 640, holding that under Rev. St. (1879) prescribing a penalty of five thousand dollars for the death of any person from the negligence of "any officer, agent, servant or employe, whilst running or managing any locomotive, car or train of cars," the negligence need not be that of the superior in charge.

78. State *v.* Cleveland, etc., R. Co., 157 Ind. 288, 61 N. E. 669; Miller *v.* Chicago, etc., R. Co., 133 Wis. 183, 113 N. W. 384.

Application of rule to particular statutes.—The Indiana statute imposing a penalty of five dollars per day for unnecessarily obstructing a highway does not apply to the failure of a railroad company to restore a highway over which it has by legal authority constructed its road to its former condition as required by statute. Cummins *v.* Evansville, etc., R. Co., 115 Ind. 417, 18 N. E. 6. A railroad company cannot be subjected to the penalty prescribed by the Mississippi statute for neglecting to comply with an order of the railroad commissioners in regard to the construction of a depot, where the order fails to "prescribe the number and dimensions of the rooms therein for passengers" as required by the statute. State *v.* Alabama, etc., R. Co., 67 Miss. 647, 7 So. 502. The Mississippi statute providing a

to impose a cumulative penalty for successive violations,[79] or a liability upon,[80] or a right of recovery by or for the use of,[81] persons not clearly within the application of the statute; and where the penal clause of a statute is less comprehensive than the body of the statute the liability for the penalty will be restricted to the matters and persons specified in the penal clause.[82] But this rule of strict construction is not violated by the court taking a common sense view of the statute as a whole and adopting the sense of the words which best harmonizes with the clear intent and object of the legislature; [83] and where a statute imposes a duty to which

penalty for failure to construct cattle-guards where the road "passes through enclosed lands" does not apply to the inclosure formed by a public fence around a stock law district. Kansas City, etc., R. Co. *v.* Jones, 73 Miss. 397, 18 So. 684. The Missouri statute imposing a penalty for failing to stop all passenger trains at the junction or intersection of other railroads long enough to allow the transfer of passengers, baggage, mails, and express does not require the stoppage of all trains where there are no passengers, baggage, etc., to be transferred. State *v.* St. Louis, etc., R. Co., 105 Mo. App. 207, 79 S. W. 714. The New York statute prescribing a penalty for charging rates in excess of those prescribed by law does not apply to a railroad where it is not shown that the special acts authorizing its formation were followed up by an actual and due formation of a corporation under and pursuant to the general railroad act. Palm *v.* New York, etc., R. Co., 58 N. Y. Super. Ct. 502, 12 N. Y. Suppl. 554. Under the Texas statute requiring railroad companies to make certain openings or crossings through their right-of-way fences, the penalty prescribed applies only to a failure to make such crossings upon demand of two or more citizens at places outside of inclosures and independent of public highways and not to a failure to make an opening in a fence dividing an inclosure. Missouri, etc., R. Co. *v.* Chenault, 92 Tex. 501, 49 S. W. 1035. The Texas statute imposing a penalty for charging over a certain "rate" for freight "per hundred pounds" is construed as establishing one hundred pounds as the unit and not applying in the same proportion to shipments under that weight. Murray *v.* Gulf, etc., R. Co., 63 Tex. 407, 51 Am. Rep. 650. Under the Wisconsin statute imposing a penalty for failure to construct farm crossings for the landowner, where the road passes through "inclosed lands," the lands must be entirely surrounded by a substantial fence or barrier of some kind reasonably calculated to turn stock, and the lands of such owner must be separately inclosed and not merely under a common inclosure with the lands of others. Miller *v.* Chicago, etc., R. Co., 133 Wis. 183, 113 N. W. 384.

The converse proposition is equally true and the courts cannot read into the act any language that will excuse offenders any more than they can language which will increase their liability. U. S. *v.* Southern R. Co., 135 Fed. 122.

Statutes imposing penalties upon third persons for wilfully taking down, opening, or removing a railroad fence, cattle-guard, or crossing, or any part thereof, are also strictly construed. Oeflein *v.* Zautcke, 92 Wis. 176, 66 N. W. 108, holding that the statute does not apply to the breaking down of a gate by defendant's runaway team.

Statute of limitations.— Under the South Carolina act providing that the penalty for failing to provide separate coaches for white and colored passengers shall "after paying all proper fees and costs" go into the general fund of the state treasury, the fee referred to relates to the attorney's fee of the person instituting the suit, and to that extent the penalty does not go entirely to the state, and under the rule of strict construction the action must be held to be barred within one year instead of two years as in the case of a "forfeiture or penalty to the State." Sturkie *v.* Southern R. Co., 71 S. C. 208, 50 S. E. 782.

79. State *v.* Cleveland, etc., R. Co., 8 Ohio Cir. Ct. 604, 4 Ohio Cir. Dec. 372; Parks *v.* Nashville, etc., R. Co., 13 Lea (Tenn.) 1, 49 Am. Rep. 655.

80. Bonner *v.* Franklin Co-operative Assoc., 4 Tex. Civ. App. 166, 23 S. W. 317; U. S. *v.* Harris, 78 Fed. 290.

81. Kansas City, etc., R. Co. *v.* Jones, 73 Miss. 397, 18 So. 684.

82. State *v.* Cleveland, etc., R. Co., 157 Ind. 288, 61 N. E. 669, holding that under a statute requiring a railroad company to maintain blackboards of certain dimensions at stations and to report thereon the lateness of trains, and providing a penalty for each violation of the statute "in failing to report, or in making a false report," the penalty applies only to the reporting of trains and not to the requirement as to the dimensions of the blackboard.

83. State *v.* Indiana, etc., R. Co., 133 Ind. 69, 32 N. E. 817, 18 L. R. A. 502; People *v.* Clark, 14 N. Y. Suppl. 642, 8 N. Y. Cr. 169, 179.

Application to particular statutes.—A statute requiring a crossing signal to be given "when the railroad shall cross" any traveled public road, and providing a penalty for every neglect to do so, will not be confined to crossings where the roads are upon the same level, but applies to a case where a railroad crosses a public highway upon a bridge constructed over the highway. People *v.* New York Cent. R. Co., 13 N. Y. 78 [*affirming* 25 Barb. 199]. Under a statute imposing a penalty upon the "owner" of a railroad for failure to give crossing signals the company in possession of and operating a railroad will be construed to be the owner

a penalty is attached the penalty cannot be avoided by failing to do some other act necessary to the performance of the duty commanded.[84] A statute making the servant violating certain regulations liable to a penalty within certain limits and the company also liable for "the like sum" subjects the company to a like degree of liability and does not contemplate either a sum certain ascertained by a judgment against the offending servant,[85] or the sum prescribed by the statute as a penalty for a single violation.[86] A statute prescribing a penalty for failing to remove obstructions from a private road or crossing place after notice of "at least" a certain length does not fix the limit of time for removal, but merely prescribes the minimum notice under which the company might be held liable, leaving the maximum to be determined by the circumstances of the particular case.[87] In an action by the state to recover a penalty for the violation of a regulation by a railroad company it is no defense that no actual damage has resulted from such violation,[88] or that the company exercised reasonable care and diligence in the matter complained of,[89] or that the act constituting such violation was done by the servants of the company contrary to the rules of the company,[90] or without its knowledge and in violation of express instructions;[91] but it is a good defense as to the liability of both the servant and the company that the servant was exercising due care and making all efforts to avoid the violation but was unable to do so.[92]

(II) *SUCCESSIVE VIOLATIONS.* Since penal statutes are strictly construed it is held that in the case of successive violations of the statute only one penalty can be recovered for the violations prior to the institution of the suit unless the language of the statute clearly expresses a contrary intent;[93] but where the statute

thereof within the application of the statute. State *v.* Missouri Pac. R. Co., 149 Mo. 104, 50 S. W. 278. A railroad company operating a line of railroad is the corporation "owning" the railroad within the application of the Arkansas statutes imposing a penalty on a corporation owning a railroad for failing to equip its locomotives with bells or whistles. Chicago, etc., R. Co. *v.* State, 84 Ark. 409, 106 S. W. 199. A statute imposing a penalty upon any railroad company "operating a line of railway" within the state for failure to provide certain conveniences at stations applies to a company operating a road as lessee. State *v.* Southern Kansas R. Co., (Tex. Civ. App. 1906) 99 S. W. 167.

84. State *v.* Indiana, etc., R. Co., 133 Ind. 69, 32 N. E. 817, 18 L. R. A. 502, holding that under a statute requiring railroad companies to maintain blackboards at stations and to report thereon the lateness of trains, and providing a penalty for failing to report such information on the board, the penalty cannot be avoided by failing to provide the necessary blackboards.

85. Toledo, etc., R. Co. *v.* People, 81 Ill. 141, penalty for obstructing highways.

86. Indianapolis, etc., R. Co. *v.* People, 32 Ill. App. 286, penalty for obstructing highways.

87. Simon *v.* Baltimore, etc., R. Co., 173 Pa. St. 517, 34 Atl. 221.

88. Houston, etc., R. Co. *v.* State, 61 Tex. 342, failure to make annual reports to controller of public accounts.

89. U. S. *v.* Southern R. Co., 135 Fed. 122, holding that under the federal statute prescribing a penalty for any common carrier to use or permit to be used on its road any car used in moving interstate traffic, which is not equipped with couplers which work automatically and which can be uncoupled without going between cars, it is no defense that the company used reasonable care and diligence as to the discovery and repairing of such defects.

90. Indianapolis, etc., R. Co. *v.* People, 91 Ill. 452, failure to stop train before crossing other railroad.

91. Hammond *v.* New York, etc., R. Co., 5 Ind. App. 526, 31 N. E. 817 (violation of speed regulations); Buffalo *v.* New York, etc., R. Co., 23 N. Y. Suppl. 303, 309 [*affirmed* in 6 Misc. 630, 27 N. Y. Suppl. 297] (violation of speed regulations).

92. State *v.* Chicago, etc., R. Co., 122 Iowa 22, 96 N. W. 904, 101 Am. St. Rep. 254, holding that where, without any negligence, the engineer was unable to stop a train before crossing the track of another railroad as required by statute, owing to a defect in the brakes, neither the engineer nor the company is liable for the penalty.

93. Fisher *v.* New York Cent., etc., R. Co., 46 N. Y. 644 (holding that but one penalty can be recovered for charging rates in excess of those prescribed by law under a statute permitting the person paying such excessive rates to sue for the penalty and the excess paid); State *v.* Cleveland, etc., R. Co., 8 Ohio Cir. Ct. 604, 4 Ohio Cir. Dec. 372 (holding that only a single penalty can be recovered for violations of the statute requiring the erection of blackboards at stations and registering thereon the lateness of trains); Parks *v.* Nashville, etc., R. Co., 13 Lea (Tenn.) 1, 49 Am. Rep. 655 (hold-

clearly so provides an accumulation of penalties may be recovered for each and every violation;[94] and where the statute provides that certain servants of the company shall be liable for a certain penalty "for each offense" and the corporation "for the like sum," the company is also liable for a penalty for each offense and not for the sum prescribed for a single violation.[95] Under the statutes which are construed as allowing the recovery of but a single penalty, other suits may of course be instituted in case of subsequent violations of the statute.[96] Where a statute requiring certain accommodations and facilities at stations prescribes a penalty of a certain amount for each week the company fails to comply therewith, to be sued for by the county attorney, the company is liable for a cumulative penalty for each week but not for a separate penalty for each station within a county.[97]

c. Right of Recovery and Persons Entitled. If the statute provides that the penalty shall be sued for in the name of the state, without any other or further provision as to any person being entitled thereto, the right to sue is vested solely in the state and the action cannot be brought by a private person in the name of the state;[98] but under some of the statutes the penalty imposed is recoverable

ing that only a single penalty can be recovered for failures to announce stations at which trains stop as required by statute).

Under the Mississippi statute providing a penalty "for any failure" to construct and maintain "proper cattle-guards," where its road passes through inclosed lands and suitable crossings for plantation roads, only one penalty can be recovered as to all the cattle-guards and crossings which the company fails to construct which are within one inclosure. Kansas City, etc., R. Co. *v.* Spencer, 72 Miss. 491, 17 So. 168.

A book-account of penalties cannot be run up against a railroad company for successive delinquencies unless the statute clearly provides that there shall be a penalty for each and every offense. Parks *v.* Nashville, etc., R. Co., 13 Lea (Tenn.) 1, 49 Am. Rep. 655.

94. *Illinois.*— Chicago, etc., R. Co. *v.* People, 82 Ill. App. 679 (holding that under the statute prescribing a penalty "for each offense" in obstructing a highway by cars or locomotives, where a train is left standing so that the same train at the same time extends across and obstructs several highways, the obstruction of each highway is a separate offense); Indianapolis, etc., R. Co. *v.* People, 32 Ill. App. 286 (holding that under a statute prescribing a certain penalty "for each offense" for obstructing a highway, the recovery is not limited to a single penalty but may be recovered for each and every offense).

Indiana.— Southern R. Co. *v.* State, 165 Ind. 613, 75 N. E. 272; State *v.* Indiana, etc., R. Co., 133 Ind. 69, 32 N. E. 817, 18 L. R. A. 502; Southern R. Co. *v.* State, (App. 1904) 72 N. E. 174, holding that under a statute requiring the construction of blackboards at stations and registering thereon whether trains are late or on time, and providing a certain penalty "for each violation of the provision of this act," the company is liable for one penalty for each train during each trip at each station where there is a failure to comply with the provisions of the act.

New York.— People *v.* New York Cent. R. Co., 13 N. Y. 78 [*affirming* 25 Barb. 199], holding that under a statute requiring crossing signals and providing a certain penalty "for every neglect of this provision" the company incurs the penalty as often as it crosses any public road without giving the required signal.

Pennsylvania.— Lancaster *v.* Pennsylvania R. Co., 12 Lanc. Bar 99, holding that under an ordinance prohibiting the running of trains at over a certain rate of speed, the penalty is incurred every time a train is run at a speed in violation of the ordinance.

Wisconsin.— State *v.* Wisconsin Cent. R. Co., 133 Wis. 478, 113 N. W. 952, holding that cumulative penalties may be recovered for successive violations of a speed regulation, under a statute providing a certain penalty "for each and every such violation."

United States.— Missouri *v.* Kansas City, etc., R. Co., 32 Fed. 722, holding that under a statute providing that "for each day" a railroad company refuses or neglects to comply with a statutory provision as to the construction and maintenance of depots, it shall forfeit and pay a certain penalty, a cumulative penalty may be recovered for each day prior to the institution of the suit.

See 41 Cent. Dig. tit. "Railroads," § 769.

95. Indianapolis, etc., R. Co. *v.* People, 32 Ill. App. 286.

96. See Kansas City, etc., R. Co. *v.* Spencer, 72 Miss. 491, 17 So. 168; Fisher *v.* New York Cent., etc., R. Co., 46 N. Y. 644.

Under the Arkansas statute prescribing a penalty for failure to construct cattle-guards after ten days' notice, a landowner who has given one notice and recovered the penalty prescribed may afterward give successive notices and recover the penalty after each successive failure to comply therewith. Chicago, etc., R. Co. *v.* Fitzhugh, 83 Ark. 481, 104 S. W. 175.

97. Missouri, etc., R. Co. *v.* State, (Tex. Civ. App. 1906) 97 S. W. 724.

98. State *v.* Marietta, etc., R. Co., 108 N. C. 24, 12 S. E. 1041, construing the provisions of the North Carolina statute imposing a penalty for failing to make certain reports to the governor of the state.

by or for the benefit of the person aggrieved,[99] or person interested,[1] or in case of charges in excess of the rates prescribed by law by the person paying such rates,[2] or in the case of interfering with a road or way without providing a proper substitute, by the trustees, commissioners, or other persons having the management thereof, if a public way,[3] or by the person owning the road if a private way.[4] The fact that any wrongful act on the part of a railroad company is made the subject of a penalty does not prevent a person injured thereby from maintaining an action in tort for the damages sustained;[5] and where the statute imposes a penalty for the benefit of the "person aggrieved" any person sustaining an injury directly due to the act prohibited may recover the penalty regardless of his right to recover damages.[6] Under some of the statutes, however, it is held that the right to recover the penalty prescribed is an exclusive remedy, and that the amount of the penalty is intended as full compensation for the injury received, so that no action for damages can be maintained,[7] or that a statute imposing a penalty for the use of the "person aggrieved" provides an election of remedies,[8] and that a judgment in an action for damages is a bar to an action for the penalty based upon the same act of the railroad company whether the judgment be in favor of plaintiff,[9] or against him;[10] but under other statutes it is held that plaintiff may recover both

99. Chicago, etc., R. Co. *v.* People, 120 Ill. 667, 12 N. E. 207 [*affirming* 24 Ill. App. 562], holding that a person damaged by reason of his team being frightened by a train running at a speed in violation of a speed ordinance is a "person aggrieved" and entitled to recover the penalty prescribed.

The Missouri statute requiring railroad companies to remove dry vegetation and undergrowth from their rights of way in order to prevent fires does not in terms give the penalty to the person suffering the damage by reason of its failure to do so, but the provision that the company "shall incur a penalty not to exceed five hundred dollars, and be liable for all damages done by said neglect of duty" is held clearly to imply that the penalty is for the benefit of persons so damaged. McFarland *v.* Mississippi River, etc., R. Co., 175 Mo. 422, 75 S. W. 152.

1. Kansas City, etc., R. Co. *v.* Jones, 73 Miss. 397, 18 So. 684, holding that the Mississippi statute providing a penalty for failure to maintain cattle-guards "where its track passes through inclosed land . . . to be recovered by the person interested," confers no right of action upon persons who are not owners of lands entered by the railroad.

A tenant or lessee is a person interested and may sue for the penalty prescribed for failure to maintain cattle-guards, provided the road passes through the lands leased by him, although they are not separately inclosed (Yazoo, etc., R. Co. *v.* Young, (Miss. 1900) 28 So. 826); but not where the road only enters the lands leased by a different tenant of the same landlord, although under the same general inclosure (Southern R. Co. *v.* Murrell, 78 Miss. 446, 28 So. 824).

2. Fisher *v.* New York Cent., etc., R. Co., 46 N. Y. 644, holding further that the penalty can be recovered by a person who has paid the excessive fare while riding for the purpose of obtaining the penalty.

3. Reg. *v.* Wilson, 18 Q. B. 348, 16 Jur. 973, 21 L. J. Q. B. 281, 83 E. C. L. 348, holding that the "person having the management" thereof must be a person clothed with some public duty and that a landowner who dedicated a road to the public and subsequently voluntarily repaired it is not within the application of the statute.

4. Llewellyn *v.* Vale of Glamorgan R. Co., [1898] 1 Q. B. 473, 67 L. J. Q. B. 305, 78 L. T. Rep. N. S. 70, 14 T. L. R. 205, 46 Wkly. Rep. 290 (holding that the term "owner thereof" includes the owner of any portion of the road interfered with, and that the first such owner suing may recover the whole penalty for his own benefit); Collinson *v.* Newcastle, etc., R. Co., 1 C. & K. 546, 47 E. C. L. 546 (holding that a tenant of a farm over which the road interfered with passes cannot sue for the penalty).

5. Pennsylvania R. Co. *v.* Kelly, 31 Pa. St. 372.

6. Chicago, etc., R. Co. *v.* People, 120 Ill. 667, 12 N. E. 207 [*affirming* 24 Ill. App. 562].

Contributory negligence on the part of the person aggrieved is no defense to an action in the name of the state to recover the penalty prescribed for failing to give crossing signals. Mobile, etc., R. Co. *v.* People, 24 Ill. App. 250.

7. St. Louis, etc., R. Co. *v.* Busick, 74 Ark. 589, 86 S. W. 674; Choctaw, etc., R. Co. *v.* Vosburg, 71 Ark. 232, 72 S. W. 574, each decided under the Arkansas statute prescribing a penalty to be recovered by the landowner for failure of the railroad company to construct cattle-guards.

8. Illinois Cent. R. Co. *v.* People, 81 Ill. App. 176; Wabash R. Co. *v.* People, 78 Ill. App. 268, penalty for violation of speed regulations, the company being also liable by statute for damages done by trains in violating such regulations.

9. Illinois Cent. R. Co. *v.* People, 81 Ill. App. 176; Wabash R. Co. *v.* People, 78 Ill. App. 268.

10. Terre Haute, etc., R. Co. *v.* People, 41 Ill. App. 513, holding that where plaintiff

the penalty and the damages sustained,[11] and that they may be recovered in the same action.[12]

d. Effect of Operation by Receiver. A railroad company is not liable for a statutory penalty incurred while the road is being operated by a receiver,[13] nor is the receiver liable for such penalty unless he is clearly within the terms of the statute.[14]

e. Actions For Penalties — (I) *Nature and Form of Action.* The recovery of a penalty against a railroad company must ordinarily be by a civil action instead of by indictment,[15] and by an action of debt instead of an action on the case;[16] but under some of the statutes it may be by indictment,[17] or information.[18] Ordinarily the action should be brought in the name of the state,[19] but under some of the statutes it may be brought in the name of the person entitled to the penalty.[20] An action for the recovery of double damages for injury to stock occasioned by the failure of a railroad company to fence its tracks is not a penal action which must be brought in the name of the state but is properly brought in the name of the owner of the animal injured.[21]

(II) *Pleading.* The pleadings in actions against railroad companies for penalties are strictly construed, and the complaint must allege every fact necessary to bring the case strictly within the statute creating the liability,[22] must be suffi-

elects to sue for damages caused by a train operated at a speed in violation of a speed ordinance, a judgment against him determines that he is not a "person aggrieved."

11. Kansas City, etc., R. Co. *v.* Spencer, 72 Miss. 491, 17 So. 168, holding that under the Mississippi statute providing a penalty for failing to maintain cattle-guards "to be recovered by the person interested," the penalty is not in lieu of damages and that plaintiff may recover both.

Under the Missouri statute requiring railroad companies to remove dry vegetation and undergrowth from their rights of way in order to prevent fires and providing that for failure to do so the company "shall incur a penalty not to exceed five hundred dollars, and be liable for all damages done by said neglect of duty," it is held that the person sustaining damage by fire so caused may recover both the penalty and the damages. McFarland *v.* Mississippi River, etc., R. Co., 175 Mo. 422, 75 S. W. 152; Scott *v.* Missouri Pac. R. Co., 38 Mo. App. 523.

Under the New York statute providing a penalty for charging rates in excess of those prescribed by law, a person paying such rates may recover both the penalty and the excess paid. Fisher *v.* New York Cent., etc., R. Co., 46 N. Y. 644.

12. Kansas City, etc., R. Co. *v.* Spencer, 72 Miss. 491, 17 So. 168.

13. Arkansas Cent. R. Co. *v.* State, 72 Ark. 250, 79 S. W. 773 (penalty for failure to give crossing signals); Texas, etc., R. Co. *v.* Barnbart, 5 Tex. Civ. App. 601, 23 S. W. 801, 24 S. W. 331 (penalty for not properly caring for live stock in transit); Missouri, etc., R. Co. *v.* Stoner, 5 Tex. Civ. App. 50, 23 S. W. 1020 (penalty for detention of freight after tender of amount due as shown by bill of lading).

14. Campbell *v.* Wiess, (Tex. Civ. App. 1894) 25 S. W. 1076 (penalty for excessive charges); Bonner *v.* Franklin Co-operative Assoc., 4 Tex. Civ. App. 166, 23 S. W. 317 (penalty for unjust discrimination in freight rates); U. S. *v.* Harris, 78 Fed. 290 (penalty for non-compliance with statute relative to transportation of live stock).

15. Choctaw, etc., R. Co. *v.* State, 75 Ark. 369, 87 S. W. 631; Kansas City, etc., R. Co. *v.* State, 63 Ark. 134, 37 S. W. 1047.

16. Russell *v.* Louisville, etc., R. Co., 93 Va. 322, 25 S. E. 99.

17. State *v.* Grand Trunk R. Co., 59 Me. 189; State *v.* Wabash, etc., R. Co., 89 Mo. 562, 1 S. W. 130.

18. State *v.* Wabash, etc., R. Co., 89 Mo. 562, 1 S. W. 130.

19. See the statutes of the several states; and, generally, PENALTIES, 30 Cyc. 1347.

20. Kansas City, etc., R. Co. *v.* Spencer, 72 Miss. 491, 17 So. 168 (penalty for failure to construct cattle-guards); Scott *v.* Missouri Pac. R. Co., 38 Mo. App. 523 (penalty for failure to remove dry vegetation from right of way to prevent fires); Fisher *v.* New York Cent., etc., R. Co., 46 N. Y. 644 (penalty for charging rates in excess of those allowed by law); Russell *v.* Louisville, etc., R. Co., 93 Va. 322, 25 S. E. 99 (penalty for failure to construct cattle-guards).

21. Seaton *v.* Chicago, etc., R. Co., 55 Mo. 416; Fickle *v.* St. Louis, etc., R. Co., 54 Mo. 219; Hudson *v.* St. Louis, etc., R. Co., 53 Mo. 525.

22. St. Louis, etc., R. Co. *v.* State, 58 Ark. 39, 22 S. W. 918 (holding that where the statute requires a signal to be given by ringing a bell "or" blowing a whistle, either being sufficient, a complaint alleging in the conjunctive a failure to do the one "and" the other does not state a cause of action); State *v.* Wabash, etc., R. Co., 83 Mo. 144 (holding that in an action for the penalty for failure to construct a depot where a railroad engaged in the transportation of passengers intersects another railroad, the complaint must allege that each railroad was engaged in the transportation of passengers, the requirement being for the benefit of per-

ciently definite and certain to apprise defendant of the exact charge against him and the court of the issue to be tried,[23] and must show the statute under which the penalty is claimed and aver that the act complained of was contrary to the form of the statute.[24] Statutes relating in terms to owners of railroads are construed as applying to the companies operating them, and an allegation that defendant was operating the railroad in question at the time of the violation complained of is a sufficient allegation of ownership.[25] In an action for a penalty for failing to give crossing signals the complaint to be sufficiently certain must designate the particular highway crossings where the signal was not given,[26] and should state the time of day when the train crossed the highway, its direction and the kind of train, whether freight or passenger.[27] A pleading, although in the form of an indictment, will be sustained as a complaint if it contains the necessary allegations.[28]

sons transferring from one road to the other); New Jersey Cent. R. Co. *v.* Elizabeth, 64 N. J. L. 534, 45 Atl. 978 (holding that under an ordinance prohibiting the obstruction of a street by a train longer than necessary for the discharge of passengers, etc., and providing that when the obstruction is for over five minutes the train shall be broken at the request of any person desiring to use the crossing, a complaint in an action for the penalty prescribed is insufficient unless it alleges either that the obstruction continued longer than necessary for the purposes mentioned or that any person wishing to use the crossing demanded the train should be broken); Schloss *v.* Atchison, etc., R. Co., 85 Tex. 601, 22 S. W. 1014 (holding that under a statute prescribing a penalty for failure to deliver freight upon tender of the amount due "as shown by the bill of lading," the complaint must allege that in the particular case the amount due was shown by the bill of lading); Murray *v.* Gulf, etc., R. Co., 63 Tex. 407, 51 Am. Rep. 650 (holding that under a statute imposing a penalty for charging over a certain freight rate "per hundred pounds" and which is construed as not applying to shipments of less than that weight, a complaint is defective which alleges an over-charge on two packages each under a hundred pounds but together over that weight, where it fails to allege that they were sent by one and the same shipment and the same bill of lading).

Amendment of statutes.— Where a statute requiring trains to stop not less than two hundred feet from the crossing of another railroad is so amended that no distance is prescribed other than that it shall not be over eight hundred feet from the crossing, an action cannot be maintained where the complaint is based upon the statute as it stood prior to the amendment and the offense complained of occurred after the amendment went into effect. Mobile, etc., R. Co. *v.* People, 29 Ill. App. 428.

In an action by a city to recover a penalty prescribed by an ordinance thereof for obstructing its streets, which ordinance the city was expressly authorized to make by a public act of the legislature, the complaint need not aver the power of the city to enact the ordinance, but it is sufficient if it sets forth the ordinance by reciting its title and giving the substance of its provisions prescribing the penalty. Janesville *v.* Milwaukee, etc., R. Co., 7 Wis. 484.

Failure to maintain farm crossings.— Under a statute imposing a penalty for failure "to make and maintain convenient and suitable crossings over its track for necessary plantation roads," a declaration sufficiently shows a failure to "maintain" such a crossing which alleges that defendant had constructed a crossing but for six consecutive days left a train standing thereon wholly depriving plaintiff of its use, and that for the six days it "wholly neglected and refused to maintain said crossing." Illinois Cent. R. Co. *v.* Denham, 82 Miss. 77, 33 So. 839.

Alternative allegations.— In an action for a penalty for failure to keep a flagman at a crossing, a complaint alleging that the tracks "are used exclusively or regularly" for switching trains is not bad where either alternative furnishes a basis of liability. Grand Trunk Western R. Co. *v.* State, 40 Ind. App. 695, 82 N. E. 1017.

23. Ohio, etc., R. Co. *v.* People, 149 Ill. 663, 36 N. E. 989 [*reversing* 49 Ill. App. 225, 45 Ill. App. 583].

24. Crawford *v.* New Jersey R., etc., Co., 28 N. J. L. 479, holding that in an action for a penalty for failing to give crossing signals, an averment in the introductory part of certain counts in the declaration that defendant not regarding the statutes nor fearing the penalties therein contained did the acts complained of is not sufficient.

25. Indianapolis, etc., R. Co. *v.* People, 32 Ill. App. 286 (penalty for obstructing highway); State *v.* St. Joseph, etc., R. Co., 46 Mo. App. 466 (penalty for failure to give crossing signals).

26. Chicago, etc., R. Co. *v.* Howard, 38 Ill. 414, holding that it is not sufficient to designate the place merely as the crossing of a public highway in a certain county.

27. Ohio, etc., R. Co. *v.* People, 149 Ill. 663, 36 N. E. 989 [*reversing* 49 Ill. App. 225, 45 Ill. App. 583].

A mere notice to defendant without any amendment of the pleadings, stating the time, direction, and character of the train, is not sufficient since it is no part of the record and no protection to the company against a subsequent action for the same penalty. Choctaw, etc., R. Co. *v.* State, 75 Ark. 369, 87 S. W. 631.

28. St. Louis, etc., R. Co. *v.* State, 68

(III) *Evidence and Burden of Proof.* In actions for penalties the general rules of evidence in civil cases apply.[29] The burden of proof is upon plaintiff,[30] and the evidence must establish every fact necessary to bring the case strictly within the statute.[31] The proof must conform to the allegations of the complaint, any material variance being fatal to a recovery;[32] but the proof need not be beyond a reasonable doubt, a preponderance of evidence being sufficient.[33]

8. Offenses in or Affecting Operation of Railroads — a. By Railroad Company or Employees — (I) *In General.* In many jurisdictions railroad companies are by statute made liable to indictment and fine for various acts or omissions incident to the operation of their roads,[34] such as wrongful death due to negligence,[35] failure to provide certain accommodations and facilities at stations,[36] failure to maintain fences,[37] failure to erect sign-boards at crossings,[38] failure to stop trains before crossing other railroads,[39] operating under a contract or lease without having the same recorded,[40] running freight trains except in certain

Ark. 561, 60 S. W. 654; St. Louis, etc., R. Co. *v.* State, 55 Ark. 200, 17 S. W. 806.

29. State *v.* Chicago, etc., R. Co., 122 Iowa 22, 96 N. W. 904, 101 Am. St. Rep. 254. See also, generally, Evidence, 16 Cyc. 821; Penalties, 30 Cyc. 1357.

30. State *v.* Chicago, etc., R. Co., 122 Iowa 22, 96 N. W. 904, 101 Am. St. Rep. 254.

31. State *v.* St. Louis, etc., R. Co., 105 Mo. App. 207, 79 S. W. 714; Palm *v.* New York, etc., R. Co., 58 N. Y. Super. Ct. 502, 12 N. Y. Suppl. 554.

In an action for a penalty for failure to give crossing signals the evidence must show that a public highway existed at the place alleged (Chicago, etc., R. Co. *v.* Adler, 56 Ill. 344), but this may be sufficiently shown by the testimony of witnesses to the effect that there was a public traveled road at the place in question without producing records of the county court to show the legal establishment of the road (State *v.* St. Joseph, etc., R. Co., 46 Mo. App. 466).

No special damage need be shown in order to authorize a recovery under a statute imposing a penalty for failure to construct cattle-guards on request of a landowner where the road passes through inclosed lands to be recovered by the "person aggrieved." Kansas City, etc., R. Co. *v.* Pirtle, 68 Ark. 548, 60 S. W. 657, holding that the landowner is "aggrieved" by the mere failure of the company to construct the cattle-guard and is entitled to at least the minimum penalty prescribed by the statute in case it fails to do so.

32. St. Louis, etc., R. Co. *v.* State, 69 Ark. 363, 63 S. W. 804, holding that in an action for a penalty for obstructing a highway there can be no recovery where the evidence shows the obstruction to have been at the crossing of a different highway from that alleged in the complaint.

33. State *v.* Chicago, etc., R. Co., 122 Iowa 22, 96 N. W. 904, 101 Am. St. Rep. 254; Houston, etc., R. Co. *v.* State, (Tex. Civ. App. 1907) 103 S. W. 449; U. S. *v.* Georgia Cent. R. Co., 157 Fed. 893.

34. See the statutes of the several states; and cases cited *infra*, notes 36–61.

There is no constitutional objection to statutes making railroad companies criminally liable for the misconduct of their officers and agents in the discharge of their duties (Boston, etc., R. Co. *v.* State, 32 N. H. 215); or for failure to comply with a valid statutory regulation (State *v.* St. Louis, etc., R. Co., 83 Ark. 249, 103 S. W. 623; Southern R. Co. *v.* State, 125 Ga. 287, 54 S. E. 160, 114 Am. St. Rep. 203); but an act making the killing or injury of live stock by a railroad company a misdemeanor for which certain officers and agents may be indicted in case of refusal to pay or arbitrate the claim for the injury, which applies only to certain localities within the state and deprives defendant of the presumption of innocence by making proof of the injury *prima facie* evidence of negligence, is unconstitutional (State *v.* Divine, 98 N. C. 778, 4 S. E. 477).

35. See *infra*, X, B, 8, a, (II).

36. State *v.* St. Louis, etc., R. Co., 83 Ark. 254, 103 S. W. 625 (failure to keep waiting-rooms heated and supplied with drinking water); State *v.* St. Louis, etc., R. Co., 83 Ark. 249, 103 S. W. 623 (failure to maintain water-closets at passenger depots); State *v.* Cleveland, etc., R. Co., 137 Ind. 75, 36 N. E. 713 (failure to keep waiting-rooms open for a period of not less than one hour preceding the arrival of all passenger trains allowed by schedule to stop at the station); Louisville, etc., R. Co. *v.* Com., 103 Ky. 605, 45 S. W. 880, 46 S. W. 697, 20 Ky. L. Rep. 366 (failure to maintain suitable and convenient water-closets at stations in towns and cities); Illinois Cent. R. Co. *v.* Com., 52 S. W. 818, 21 Ky. L. Rep. 569 (failure to provide a suitable and convenient waiting-room and to keep same in decent order and repair).

The absence of waterworks in a town or city does not excuse or affect the liability of a railroad company for failing to maintain water-closets at stations as required by statute. Louisville, etc., R. Co. *v.* Com., 33 S. W. 939, 17 Ky. L. Rep. 1136.

37. People *v.* New York Cent. R. Co., 5 Park. Cr. (N. Y.) 195.

38. Texas, etc., R. Co. *v.* State, 41 Ark. 488.

39. Com. *v.* Chesapeake, etc., R. Co., 29 S. W. 136, 16 Ky. L. Rep. 481.

40. Com. *v.* Chesapeake, etc., R. Co., 72 S. W. 359, 24 Ky. L. Rep. 1880.

cases on Sunday,[41] heating cars by means of a stove or furnace inside of the car,[42] failure to supply passenger cars with pure drinking water,[43] or wrongfully obstructing streets and highways.[44] Independently of statute railroad companies are indictable for acts constituting a public nuisance,[45] or may be indicted for the non-performance of a statutory duty for which no punishment is specially provided under a general statute providing that in such cases the wilful omission of any duty enjoined by law upon any person holding a public trust or employment shall be punishable as a misdemeanor.[46] In some cases the statutes make particular officers or agents subject to indictment for certain acts or omissions,[47] in which case an indictment will lie only against the particular officer or agent specified,[48] or provide generally that any employee of the company shall be criminally liable for negligence or disobedience of the rules of the company whereby injury or death may result to any person.[49]

(II) *WRONGFUL DEATH.* In some jurisdictions railroad companies are by statute made liable to indictment and fine for negligent injuries resulting in death;[50] but the action, although criminal in form, is in effect a civil action for

41. Vaughan *v.* State, 116 Ga. 841, 43 S. E. 249, superintendent of transportation liable to indictment for running freight trains on Sunday.

42. People *v.* Clark, 14 N. Y. Suppl. 642, 8 N. Y. Cr. 169,,179, holding that either t e corporation or the officer or agent doing or causing to be done the act prohibited is liable to indictment.

43. Southern R. Co. *v.* State, 125 Ga. 287, 54 S. E. 160, 114 Am. St. Rep. 203.

44. See *infra*, X, B, 8, a, (III).

45. State *v.* Western North Carolina R. Co., 95 N. C. 602; State *v.* Louisville, etc., R. Co., 91 Tenn. 445, 19 S. W. 229; Louisville, etc., R. Co. *v.* State, 3 Head (Tenn.) 523, 75 Am. Dec. 778.

Mode of running trains.— It is an indictable nuisance for a railroad company habitually to run its trains at a public crossing at a dangerous rate of speed and without giving any warning signals or taking any other precautions to avoid injury to persons at the crossing, notwithstanding there is no statute limiting the rate of speed or requiring the giving of such signals. Louisville, etc., R. Co. *v.* Com., 13 Bush (Ky.) 388, 26 Am. Rep. 205.

46. People *v.* Long Island R. Co., 134 N. Y. 506, 31 N. E. 873 [*affirming* 58 Hun 412, 12 N. Y. Suppl. 41], holding that within the application of the statute the term "person" includes a corporation and that a railroad company as a common carrier holds a public employment.

47. Vaughan *v.* State, 116 Ga. 841, 43 S. E. 249 ("superintendent of transportation . . or the officer having charge of the business of that department of the railroad" liable for operating freight trains except in certain cases on Sunday); Becker *v.* State, 33 Ind. App. 261, 71 N. E. 188 (conductor or person having charge of a freight train liable for allowing train to obstruct highway crossing).

48. Vaughan *v.* State, 116 Ga. 841, 43 S. E. 249; Craven *r.* State, 109 Ga. 266, 34 S. E. 561.

49. Com. *v.* Griffin, 7 Phila. (Pa.) 679.

50. State *r.* Grand Trunk R. Co., 58 Me. 176, 4 Am. Rep. 258; Com. *r.* Boston, etc., R. Co., 121 Mass. 36; State *r.* Manchester, etc., R. Co., 52 N. H. 528.

There is no constitutional objection to statutes making railroad companies criminally liable for wrongful death due to the negligence or misconduct of their agents or employees. Boston, etc., R. Co. *r.* State, 32 N. H. 215.

Under the Massachusetts statute a railroad is criminally liable for wrongful death due to the negligence of the corporation, without regard to whether it be gross, but the negligence or carelessness of its servants in order to render the company criminally liable must be gross. Com. *v.* Boston, etc., R. Co., 133 Mass. 383. The liability imposed by the statute applies where the loss of life occurs upon a railroad track not owned by defendant or within the chartered limits of its road or a road then under its control but which is a private track of a coal company upon which the train is run by the mere sufferance and license of the owner. Com. *r.* Boston, etc., R. Co., 126 Mass. 61. If a person, although in the employment of a railroad company in the sense of working from day to day, is killed while riding on the road during time which is his own and when the company has no authority over him and is riding on a monthly ticket issued to employees containing more rides than necessary for traveling to and from their work, which may be used in private business, such person is a passenger and not "in the employment" of the company within the application of the statute. Doyle *r.* Fitchburg R. Co., 162 Mass. 66, 37 N. E. 770, 44 Am. St. Rep. 335, 25 L. R. A. 157.

The words "proprietor or proprietors" of a railroad, as used in the statutes, although not the most appropriate term to designate a corporation, apply to a railroad corporation (Com. *v.* Boston, etc., R. Co., 11 Cush. (Mass.) 512; State *r.* Gilmore, 24 N. H. 461), and only to the corporation, and do not impose any liability upon the individual stock-holders (State *v.* Gilmore, *supra*).

damages.[51] To sustain the action it must appear that the person for whose benefit the fine may be imposed is in existence,[52] and that the railroad company was negligent and that such negligence was the cause of the injury.[53] Contributory negligence on the part of decedent will defeat the action,[54] and the burden is upon the prosecution to show the absence of such negligence.[55]

(III) *OBSTRUCTING PUBLIC HIGHWAYS.* Independently of statute, a railroad company is subject to indictment on the ground of creating and maintaining a public nuisance by unreasonably or unnecessarily obstructing a public highway,[56] although the obstruction be outside of its right of way;[57] and in some jurisdictions there are statutes expressly making it an indictable offense for a railroad company to obstruct streets or highways, or to do so for over a certain length of time.[58] In a common-law action for nuisance it is a good defense if it be shown

51. Com. *v.* Boston, etc., R. Co., 121 Mass. 36; State *v.* Manchester, etc., R. Co., 52 N. H. 528.

A nolle prosequi may be entered by the prosecuting attorney while the case is on trial before the jury and against defendant's objection, the proceeding being essentially a civil action. State *v.* Maine Cent. R. Co., 77 Me. 244.

52. Com. *v.* Boston, etc., R. Co., 121 Mass. 36, holding that under the Massachusetts statute, if decedent was not a passenger and left no widow or children, there can be no recovery for the next of kin as is allowed where decedent was a passenger.

53. State *v.* Maine Cent. R. Co., 77 Me. 538, 1 Atl. 673.

54. State *v.* Maine Cent. R. Co., 77 Me. 538, 1 Atl. 673; State *v.* Maine Cent. R. Co., 76 Me. 357, 49 Am. Rep. 622; Com. *v.* Boston, etc., R. Co., 129 Mass. 500, 37 Am. Rep. 382; State *v.* Grand Trunk R. Co., 65 N. H. 663, 23 Atl. 525.

But if the negligence of the railroad company was the proximate cause and that of decedent remote, as where notwithstanding decedent's negligence the servants of the railroad company saw his danger and might have avoided the injury, but instead of so doing were grossly negligent and ran over him, the company may be held liable. State *v.* Manchester, etc., R. Co., 52 N. H. 528.

55. State *v.* Maine Cent. R. Co., 76 Me. 357, 49 Am. Rep. 622.

But this burden is sustained by proving facts and circumstances from which it may clearly be inferred that the person killed was in the exercise of due care and diligence. Com. *v.* Boston, etc., R. Corp., 126 Mass. 61.

56. *Indiana.*— State *v.* Louisville, etc., R. Co., 86 Ind. 114.

Iowa.— State *v.* Chicago, etc., R. Co., 77 Iowa 442, 42 N. W. 365, 4 L. R. A. 298.

Kentucky.— Illinois Cent. R. Co. *v.* Com., 45 S. W. 367, 20 Ky. L. Rep. 115; Com. *v.* Cincinnati, etc., R. Co., 7 Ky. L. Rep. 305.

North Carolina.— State *v.* Western North Carolina R. Co., 95 N. C. 602.

Tennessee.— State *v.* Louisville, etc., R. Co., 91 Tenn. 445, 19 S. W. 229.

See 41 Cent. Dig. tit. "Railroads," § 778.

The leaving of a hand car on a public road at a railroad crossing, and hanging buckets and clothing thereon whereby the road is obstructed and horses frightened, constitutes a public nuisance. Cincinnati R. Co. *v.* Com., 80 Ky. 137.

In Pennsylvania, the statute of 1845, providing that any engineer or other agent of a railroad company who shall obstruct a public crossing shall be subject to a penalty of twenty-five dollars, to be recovered in the name of the state before a justice of the peace, is held to be exclusive and to supersede the common-law remedy by indictment. Com. *v.* Capp, 48 Pa. St. 53.

57. Com. *v.* Cincinnati, etc., R. Co., 7 Ky. L. Rep. 305.

58. Louisville, etc., R. Co. *v.* Com., 117 Ky. 350, 78 S. W. 124, 79 S. W. 275, 25 Ky. L. Rep. 1452, 2050; Com. *v.* New York, etc., R. Co., 112 Mass. 412.

In Maine the statute prohibiting the obstruction provides a penalty for each offense, but under the statute regarding penalties the recovery may be by indictment, there being no other mode of procedure expressly provided. State *v.* Grand Trunk R. Co., 59 Me. 189.

In Mississippi, Code (1892), § 3551, makes it an indictable offense for a railroad company to stop its trains so as to obstruct travel upon a "highway" for over five minutes, or so as to obstruct a "street" for a longer period than shall be prescribed by ordinance of the city, town, or village; but the statute is construed as applying only to a highway in the country, or to a street in a municipality where there is an ordinance in regard to such obstruction, and if there is no such ordinance, the company is not liable to indictment under the statute for obstructing a street. Illinois Cent. R. Co. *v.* State, 71 Miss. 253, 14 So. 459.

Under the Indiana statute, the conductor, or person in charge of a train carrying freight, is liable to indictment for allowing the train to obstruct the crossing of a public highway. Becker *v.* State, 33 Ind. App. 261, 71 N. E. 188.

Where a statute and ordinance prescribe different periods of time as rendering the company liable for the obstruction of a highway, the ordinance is void in so far as it conflicts with the statute, and the company will be liable for obstructing a crossing for the time prescribed by the statute, although it is a less period than that prescribed by the ordinance. Louisville, etc.,

that the obstruction was necessarily incident to the proper operation of the road, and was not maintained for an unnecessary or unreasonable length of time;[59] but under a statute in terms absolute, prohibiting the obstruction of a highway for over a certain length of time, the company is liable without regard to whether the obstruction was reasonable or unreasonable, accidental or intentional;[60] and in neither case is it any defense that the servants or agents, in causing the obstruction, acted contrary to the rules or instructions of the company, provided they were acting within the scope of their employment.[61]

b. By Other Persons Affecting Property or Operation of Railroad — (I) *In General.* There are statutes in some jurisdictions making various acts of third parties affecting railroads or their operation indictable offenses,[62] such as wrongfully interfering with cars, locomotives, machinery, or appliances,[63] wrecking or obstructing the passage of trains,[64] breaking into cars or depots,[65] unlawfully boarding a passenger train with intent to rob the train,[66] stopping a train with intent to commit a robbery thereon,[67] throwing or shooting at or into trains or cars,[68] or stealing or attempting to steal rides without paying transportation.[69]

R. Co. *v.* Com., 117 Ky. 350, 78 S. W. 124, 79 S. W. 275, 25 Ky. L. Rep. 1452, 2050.

59. State *v.* Louisville, etc., R. Co., 86 Ind. 114.

60. Com. *v.* New York, etc., R. Co., 112 Mass. 412.

61. Com. *v.* New York, etc., R. Co., 112 Mass. 412; State *v.* Louisville, etc., R. Co., 91 Tenn. 445, 19 S. W. 229. *Compare* Gude *v.* State, 76 Ala. 100.

62. See the statutes of the several states; and cases cited *infra*, notes 63–86.

63. *Indiana.*— Coghill *v.* State, 37 Ind. 111.

Kentucky.— Thaeker *v.* Com., 85 S. W. 1096, 27 Ky. L. Rep. 620.

Tennessee.— Harris *v.* State, 14 Lea 485.

Texas.— Bullion *v.* State, 7 Tex. App. 462.

Wisconsin.— State *v.* Bisping, 123 Wis. 267, 101 N. W. 359.

See 41 Cent. Dig. tit. "Railroads," § 773.

The Minnesota statute making it a criminal offense to displace, remove, or destroy "a rail, sleeper, switch, bridge, viaduct, culvert, embankment, or structure, or any part thereof, attached or appertaining to, or connected with a railway" is construed as not applying to structures such as railroad fences not constituting any part of the railroad proper. State *v.* Walsh, 43 Minn. 444, 45 N. W. 721.

64. See *infra*, X, B, 8, b, (II).

65. Johnson *v.* State, 98 Ala. 57, 13 So. 503 (holding that it is not necessary to prove that the car was standing on the track of the railroad company); Carter *v.* Com., (Ky. 1887) 5 S. W. 48.

An attempt to break into a railroad car is not an offense under the Texas statute. Summers *v.* State, 49 Tex. Cr. 90, 90 S. W. 310.

66. People *v.* Lovren, 119 Cal. 88, 51 Pac. 22, 638, holding that the phrase "robbing a passenger train" is not meaningless as implying a legal impossibility.

Construction of statute.— The California statute making it a criminal offense to unlawfully board a train with intent to rob the train is declared to be an act to prevent train wrecking, and applies only to an operative train which is being used, so that it is not an offense under the statute to board a train which has already been wrecked with intent to rob. People *v.* Thompson, 115 Cal. 160, 46 Pac. 912.

67. State *v.* Stubblefield, 157 Mo. 360, 58 S. W. 337; State *v.* West, 157 Mo. 309, 57 S. W. 1071.

68. *Florida.*— Hamilton *v.* State, 30 Fla. 229, 11 So. 523.

Iowa.— State *v.* Leasman, 137 Iowa 191, 114 N. W. 1032.

Kentucky.— Burkhart *v.* Com., 119 Ky. 317, 83 S. W. 633, 26 Ky. L. Rep. 1245, holding that under a statute making it a felony to shoot at "a railroad passenger coach" on or in which are passengers or employees of the railroad company, a person wilfully shooting at a train of one or more cars containing passengers is guilty under the statute irrespective of whether they are such as are generally known as passenger coaches.

Mississippi.— State *v.* Ray, 87 Miss. 183, 39 So. 521, holding that a person who throws a missile into a coach in a moving train while standing on a platform of the coach violates the statute making it punishable to hurl any missile into a moving train.

North Carolina.— State *v.* Hinson, 82 N. C. 597, holding that it is not essential to a conviction under the statute to prove that a pistol discharged at a railroad train was loaded with some projectile as well as with powder.

See 41 Cent. Dig. tit. "Railroads," § 782.

Shooting at a brakeman is an offense cognizable by the general criminal law and is not within the application of the Michigan Railway Law making it a criminal offense to "willfully endanger or attempt to endanger the lives of persons engaged in the work of said road, or persons traveling on the engine or cars of said road." People *v.* Dunkel, 39 Mich. 255.

69. Mack *v.* State, 119 Ga. 352, 46 S. E. 437 (holding that a person who openly enters and remains in a car with no intent to pay his fare is not guilty under the statute, but that if he conceals himself on a

(II) *Wrecking or Obstructing Passage of Trains.* In many jurisdictions statutes have been enacted making it a criminal offense for any person wantonly and maliciously to injure any railroad,[70] or to wreck or attempt to wreck trains,[71] change or move rails or switches[72] or other fixture attached to the track or switches,[73] alter signals,[74] burn bridges;[75] obstruct an engine or car using or passing upon a railroad,[76] put obstructions upon the track,[77] or salt stock

train or in a car for the purpose of avoiding the payment of fare, he is guilty of "attempting to steal" a ride, if removed before the journey begins, or of "stealing" a ride, if not discovered until after the journey is actually begun); Daugherty *v.* State, 41 Tex. Cr. 661, 56 S. W. 620.

It is within the power of the legislature as a measure conducive to public safety to pass an act making penal the "stealing or attempting to steal a ride" on railroad trains without regard to whether the ride so stolen is the subject of larceny, nor is the act unconstitutional as seeking to punish by fine, imprisonment and penal servitude the non-payment of a debt due to a common carrier for transportation. Pressley *v.* State, 118 Ga. 315, 45 S. E. 395.

70. Clifton *v.* State, 73 Ala. 473.

71. Alsobrook *v.* State, 126 Ga. 100, 54 S. E. 805; Hodge *v.* State, 82 Ga. 643, 9 S. E. 676, holding that the statute applies to all railroads whether duly chartered as such or not.

What constitutes offense.— Under a statute making it a felony to "wreck or attempt to wreck" a railroad train, the actual wrecking accompanied by any wrongful act tending to produce such a disaster would be a crime, but to constitute a criminal attempt, where no wrecking ensues, an intention or purpose to wreck is essential. Nowell *v.* State, 94 Ga. 588, 21 S. E. 591.

72. *California.*— People *v.* Thompson, 111 Cal. 242, 43 Pac. 748.

Indiana.— Coghill *v.* State, 37 Ind. 111.

Kentucky.— Conley *v.* Com., 98 Ky. 125, 32 S. W. 285, 17 Ky. L. Rep. 678.

Missouri.— State *v.* Johns, 124 Mo. 379, 27 S. W. 1115.

Nebraska.— Davis *v.* State, 51 Nebr. 301, 70 N. W. 984, holding that a statute making it a felony wilfully and maliciously to displace the fixtures of a railroad track, and providing further that if such displacement causes the death of any one the person displacing such fixture shall be guilty of murder in the first or second degree or manslaughter, according to the nature of the offense, is not unconstitutional.

See 41 Cent. Dig. tit. "Railroads," § 780.

73. Rooney *v.* Com., 102 Ky. 373, 43 S. W. 689, 19 Ky. L. Rep. 1390, holding that a switch light is a "fixture attached to the track or switch" and its destruction an offense within the application of the statute.

74. See Harris *v.* State, 14 Lea (Tenn.) 485; State *v.* Bisping, 123 Wis. 267, 101 N. W. 359.

75. Duncan *r.* State, 29 Fla. 439, 10 So. 815, holding that a statute making it a criminal offense to burn certain structures including a "bridge" applies to a railroad bridge or viaduct.

76. Com. *v.* Killian, 109 Mass. 345, 12 Am. Rep. 714 (holding that under a statute providing a punishment for whoever "obstructs any engine or carriage passing upon a railroad" the act of a passenger in stopping a train by pulling the signal rope is not an offense whatever may have been his motive in so doing); Reg. *v.* Hadfield, L. R. 1 C. C. 253, 11 Cox C. C. 574, 39 L. J. M. C. 131, 22 L. T. Rep. N. S. 664, 18 Wkly. Rep. 955 (holding that under a statute making it a criminal offense to "obstruct, or cause to be obstructed, any engine or carriage using any railway" the obstruction need not be a physical one and that to cause a train to stop by altering signals is an offense within the application of the statute).

77. *Alabama.*— Clifton *v.* State, 73 Ala. 473.

Georgia.— Sanders *v.* State, 118 Ga. 329, 45 S. E. 365.

Indiana.— Coghill *v.* State, 37 Ind. 111, holding that the statute making it a felony to wilfully and maliciously place any obstruction upon a railroad track is not repealed by the statute making it a misdemeanor to in any manner obstruct a railroad.

Iowa.— State *v.* Hessenkamp, 17 Iowa 25.

Kentucky.— Conley *v.* Com., 98 Ky. 125, 32 S. W. 285, 17 Ky. L. Rep. 678.

Minnesota.— State *v.* Kilty, 28 Minn. 421, 10 N. W. 475.

Mississippi.— McCarty *v.* State, 37 Miss. 411.

Missouri.— State *v.* Johns, 124 Mo. 379, 27 S. W. 1115.

Nebraska.— Davis *v.* State, 51 Nebr. 301, 70 N. W. 984.

New Hampshire.— State *v.* Beckman, 57 N. H. 174.

New York.— People *v.* Adams, 16 Hun 549.

Tennessee.— Crawford *v.* State, 15 Lea 343, 54 Am. Rep. 423.

Texas.— Stanfield *v.* State, 43 Tex. Cr. 10, 62 S. W. 917; Cox *v.* State, (Cr. App. 1900) 59 S. W. 903 (holding that the obstruction need not be one which would necessarily endanger life, but it is sufficient if it "might endanger life"); Bullion *v.* State, 7 Tex. App. 462.

Wisconsin.— State *v.* Bisping, 123 Wis. 267, 101 N. W. 359.

England.— Reg. *v.* Bradford, Bell C. C. 268; Roberts *v.* Preston, 9 C. B. N. S. 208, 99 E. C. L. 208.

See 41 Cent. Dig. tit. "Railroads," § 780.

The fact that the road is not open for public traffic does not affect the liability

thereon,[78] or do any act whereby an engine or car might be upset, arrested, or thrown from the track.[79] Under such statutes the offense is complete by wilfully and intentionally doing the wrongful act prohibited,[80] and it is not necessary that a train should be actually stopped or obstructed,[81] or human life endangered,[82] or that defendant should have intended that any injury to a train or persons thereon should result;[83] nor is it any defense that it affirmatively appears that such was not his intention,[84] or that the railroad at the place obstructed was upon his land and the railroad company had not complied with its contract under which defendant had granted the right of way.[85] To put any object upon the track of such a character and in such a manner as would derail or endanger a train or the safety of the persons conveyed is to "obstruct" the track or train within the application of the statute.[86]

c. Effect of Operation by Receiver. A railroad company cannot be convicted for offenses incident to the operation of its road occurring while the road is being controlled and operated by a receiver;[87] but it may be convicted of offenses occurring prior to the time when the receiver went into possession,[88] and the receiver may be indicted for offenses incident to the operation of the road occurring during his control thereof.[89]

for obstructing the track where the road is in operation and being used for the conveyance of workmen and materials. Reg. *v.* Bradford, Bell C. C. 268.

Liability where obstruction causes death.— In Tennessee there are two statutes, the first making it a felony punishable by imprisonment to put any obstruction upon a railroad track "so as to endanger the safe running of the locomotive and cars," and the second making it a felony punishable by death where the death of any person shall be occasioned by an accident due to such obstruction. Harris *v.* State, 14 Lea (Tenn.) 485, holding, however, that the latter statute applies only in cases of obstructions endangering the safe running of the locomotive or cars and does not apply to a case where death results from the collision of a hand car with such obstruction.

78. See Clifton *v.* State, 73 Ala. 473.

79. Rooney *v.* Com., 102 Ky. 373, 43 S. W. 689, 19 Ky. L. Rep. 1390, holding that the destruction of a switch light is an offense within the application of the statute, although no actual injury resulted therefrom.

80. Clifton *v.* State, 73 Ala. 473; State *v.* Kilty, 28 Minn. 421, 10 N. W. 475; State *v.* Johns, 124 Mo. 379, 27 S. W. 1115; State *v.* Bisping, 123 Wis. 267, 101 N. W. 359.

Malice will be implied if defendant knew that trains were being operated on the road and he intentionally placed the obstruction upon the track unless he can show that it was put there for a lawful purpose. State *v.* Hessenkamp, 17 Iowa 25. But see Allison *v.* State, 42 Ind. 354.

81. State *v.* Kilty, 28 Minn. 421, 10 N. W. 475; State *v.* Bisping, 123 Wis. 267, 101 N. W. 359; Reg. *v.* Bradford, Bell C. C. 268.

82. State *v.* Bisping, 123 Wis. 267, 101 N. W. 359.

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

84. State *v.* Johns, 124 Mo. 379, 27 S. W. 1115 (where defendant removed a rail and then flagged the train in the hope of receiving a reward); State *v.* Beckman, 57 N. H. 174 (where defendant obstructed the track merely for the purpose of annoying persons using a hand car thereon); Crawford *v.* State, 15 Lea (Tenn.) 343, 54 Am. Rep. 423 (where defendant obstructed the track and then flagged the train in the hope of receiving a reward). But see Batting *v.* Bristol, etc., R. Co., 3 L. T. Rep. N. S. 665, 9 Wkly. Rep. 271.

85. State *v.* Hessenkamp, 17 Iowa 25.

86. Sanders *v.* State, 118 Ga. 329, 45 S. E. 365; State *v.* Kilty, 28 Minn. 421, 10 N. W. 475; Reg. *v.* Bradford, Bell C. C. 268.

But the object must be of such a character as to obstruct the train or endanger the lives of persons conveyed. Bullion *v.* State, 7 Tex. App. 462.

87. State *v.* Minneapolis, etc., R. Co., 88 Iowa 689, 56 N. W. 400 (indictment for nuisance in obstructing highway); Paducah, etc., R. Co. *v.* Com., 33 S. W. 822, 17 Ky. L. Rep. 1161 (indictment for failure to maintain certain accommodations at stations as required by statute); State *v.* Vermont Cent. R. Co., 30 Vt. 108 (indictment for nuisance in obstructing highway). But see Arkansas Cent. R. Co. *v.* State, 72 Ark. 252, 79 S. W. 772, holding that a railroad company may be indicted for failure to erect sign-boards at public crossings as required by statute, although at the time of such failure the road was in the hands of a receiver, since this could have been done by the company without interfering with the receiver in the rightful discharge of his duties.

88. State *v.* Minneapolis, etc., R. Co., 88 Iowa 689, 56 N. W. 400.

89. Com. *v.* Felton, 107 Ky. 330, 53 S. W. 1046, 21 Ky. L. Rep. 1039, holding that under the Kentucky statute providing that the words "corporation" or "company" may be construed as including any person, a receiver may be indicted for failure to provide certain

d. Indictment or Information — (i) *In General.* In an indictment against a railroad company it is a sufficient allegation of defendant's corporate existence to state the name of the company, and that it is a corporation existing under and by virtue of the laws of the state, duly organized and doing business;[90] and where the indictment is against the receiver of a railroad an averment that he is the receiver of and as such is operating a certain railroad is a sufficient averment of authority from the court appointing him to operate the road.[91] Where the statute only makes a particular officer or agent of the railroad company liable to indictment, the indictment must show that defendant is the officer or agent specified by the statute.[92] An indictment against a railroad company must allege every fact necessary to constitute the offense charged,[93] and must be sufficiently certain to enable defendant to prepare his defense and to make a judgment rendered thereon available as a bar to another prosecution;[94] and where the offense consists in the omission of some duty which is purely statutory, the duty of the railroad company to perform the act omitted must be averred.[95] But it is not necessary to use the exact language of the statute, certainty to a common intent being all that is required,[96] and an indictment will ordinarily be held good which is sufficiently

accommodations and facilities at stations which are required by statute, and that no order of the court appointing him is necessary to authorize him to make expenditures in order to comply with such statutes.

90. State *v.* Vermont Cent. R. Co., 28 Vt. 583, holding that it is not necessary to allege the time and place, when and where defendant became a corporation.

91. Com. *v.* Felton, 107 Ky. 330, 53 S. W. 1046, 21 Ky. L. Rep. 1039.

92. Vaughan *v.* State, 116 Ga. 841, 43 S. E. 249.

93. State *v.* Kansas City, etc., R. Co., 54 Ark. 546, 16 S. W. 567.

The indictment must allege that defendant was operating a railroad at the time and place mentioned in an indictment for failing to fix and block the frogs on its tracks to prevent injuries to its employees as required by statute (Com. *v.* Illinois Cent. R. Co., 55 S. W. 10, 21 Ky. L. Rep. 1342); and under a statute requiring railroad companies to provide convenient and suitable waiting-rooms at depots in cities and towns and "at such other stations as the Railroad Commission may require," an indictment for failing to provide a waiting-room at a certain village must allege that the railroad commission had made such requirement (Com. *v.* Illinois Cent. R. Co., 86 S. W. 542, 27 Ky. L. Rep. 763).

Where the prosecution is in effect a civil action as in a case of prosecution for wrongful death where the fine imposed is for the benefit of decedent's family, the form of the indictment is nevertheless governed by the rules applicable to indictments in other criminal cases (State *v.* Manchester, etc., R. Co., 52 N. H. 528), and in such case the indictment must show the existence of the persons for whose benefit the fine may be imposed (Com. *v.* Boston, etc., R. Co., 121 Mass. 36).

94. State *v.* St. Louis, etc., R. Co., 83 Ark. 254, 103 S. W. 625 (holding that under a statute requiring a railroad company to provide separate waiting-rooms for white and colored passengers and to keep the same heated and supplied with drinking water, an indictment charging a failure to keep a waiting-room at a particular station heated and supplied with drinking water, but not stating which waiting-room, is void for uncertainty); State *v.* St. Louis, etc., R. Co., 83 Ark. 249, 103 S. W. 623; State *v.* Cleveland, etc., R. Co., 137 Ind. 75, 36 N. E. 713 (holding that an indictment for failing to keep open a waiting-room for a certain period before the arrival of trains as required by statute must allege that defendant had provided a waiting-room at the place in question, the failure to maintain a waiting-room being also an indictable offense).

95. People *v.* New York Cent. R. Co., 5 Park. Cr. (N. Y.) 195, holding that an indictment for failing to maintain fences must show the duty of the company to fence, either by direct averment or by reciting or referring to the statute in such manner as to show the existence of such duty, and that in the absence of such allegation, the fact that it concludes "contrary to the form of the statute" is not sufficient.

96. Becker *v.* State, 33 Ind. App. 261, 71 N. E. 188 (holding that, under a statute making it unlawful for a conductor or person having charge of a train "carrying freight" to permit it to obstruct a public highway, an allegation that defendant had "charge of running a railroad freight train and freight cars" is sufficient); Louisville, etc., R. Co. *v.* Com., 103 Ky. 605, 45 S. W. 880, 46 S. W. 697, 20 Ky. L. Rep. 366 (holding that under a statute requiring defendant to provide a "convenient and suitable" waiting-room, an indictment alleging that it was not "suitable" is sufficient, without also alleging that it was not convenient); Louisville, etc., R. Co. *v.* Com., 33 S. W. 939, 17 Ky. L. Rep. 1136 (holding that under a statute requiring the maintenance of certain accommodations at "depots" in towns and cities, an indictment charging defendant with a failure to maintain them at its "passenger station" in a certain town is sufficient).

certain to enable defendant to make his defense and to be available as a bar to a subsequent prosecution.[97] Where a statute specifies several acts separately constituting, or several ways of committing, one and the same offense, for which the same punishment is prescribed, an indictment charging two or more of such acts together in the same count states but a single offense and is not bad for duplicity;[98] but if, under the language of the statute, each of the acts specified constitutes a separate and distinct offense, a joinder of two or more of such acts renders the indictment bad for duplicity.[99] In an indictment for wrongful death it is not necessary to specify the particular acts of negligence by reason of which the injury occurred, or to allege that deceased was exercising due care at the time of the accident,[1] or to set out the names of defendant's servants whose negligence occasioned the injury;[2] but the indictment must show that there is a surviving relative who is entitled to the fine.[3] In an indictment for failing to give the statutory crossing signals, it is sufficient to describe the place of such omission as the crossing of a public highway without alleging when or by what authority it was established;[4] but the indictment should specify which of defendant's trains committed the alleged offense where different trains were operated at the place upon the day specified;[5] and where the statute requires either the ringing of a bell "or" the blowing of a whistle, an indictment alleging in the conjunctive that it failed to do the one "and" the other does not show the commission of

97. Becker *v.* State, 33 Ind. App. 261, 71 N. E. 188; Com. *v.* Chesapeake, etc., R. Co., 72 S. W. 359, 24 Ky. L. Rep. 1880; Chesapeake, etc., R. Co. *v.* Com., 43 S. W. 445, 19 Ky. L. Rep. 1345.

Indictments held sufficient.— In an indictment against a conductor for obstructing a highway with a train, it is not necessary to state the name of the railroad company, defendant's employer, but it is sufficient to describe the way and the obstruction. State *v.* Malone, 8 Ind. App. 8, 35 N. E. 198. Under a statute requiring all trains to stop at least fifty feet before reaching the crossing of another railway, an indictment alleging that on a certain day defendant failed to stop any of its trains before reaching a certain crossing is not misleading or prejudicial, as a conviction could not be had under the indictment for more than one such offense. Com. *v.* Chesapeake, etc., R. Co., 29 S. W. 136, 16 Ky. L. Rep. 481. An indictment for failing to keep a waiting-room "in decent order and repair" as required by statute is sufficient where it alleges that it was not so kept, without any further specification. Illinois Cent. R. Co. *v.* Com., 52 S. W. 818, 21 Ky. L. Rep. 569. An indictment for operating a railroad under a lease without having the same recorded is sufficient if it follows the language of the statute and need not allege that the lease was in writing. Com. *v.* Chesapeake, etc., R. Co., 101 Ky. 159, 40 S. W. 250, 19 Ky. L. Rep. 329.

98. State *v.* Malone, 8 Ind. App. 8, 35 N. E. 198; State *v.* Manchester, etc., R. Co., 52 N. H. 528.

Indictment not bad for duplicity.— Under a statute making it a criminal offense to permit a freight train to remain standing on a street or highway, or wherever it is necessary to stop the train across such way to fail to leave an open space of a certain width, an indictment charging the stopping of a train across a street and a failure to leave a space as specified by the statute charges but a single offense and is not bad for duplicity. Becker *v.* State, 33 Ind. App. 261, 71 N. E. 188; State *v.* Malone, 8 Ind. App. 8, 35 N. E. 198. Under a statute requiring railroad companies to "provide a convenient and suitable waiting-room" and to "keep and maintain the same in decent order and repair," an indictment charging that the waiting-room provided was not "convenient or suitable" and was not "kept in decent order or repair," charges but a single offense. Illinois Cent. R. Co. *v.* Com., 52 S. W. 818, 21 Ky. L. Rep. 569. An indictment for wrongful death charging that the act was committed by the negligence or carelessness of defendant and by the unfitness, gross negligence, or carelessness of its servants, both being specified by statute, is not bad for duplicity. State *v.* Manchester, etc., R. Co., 52 N. H. 528.

99. State *v.* St. Louis, etc., R. Co., 83 Ark. 249, 103 S. W. 623.

Application of rule.— Under a statute requiring railroad companies to keep waiting-rooms heated and supplied with drinking water, an indictment charging a failure to do both charges two separate and distinct offenses and is bad for duplicity. State *v.* St. Louis, etc., R. Co., 83 Ark. 254, 103 S. W. 625.

1. State *v.* Manchester, etc., R. Co., 52 N. H. 528.

2. Com. *v.* Boston, etc., R. Corp., 11 Cush. (Mass.) 512.

3. State *v.* Gilmore, 24 N. H. 461.

4. Chesapeake, etc., R. Co. *v.* Com., 43 S. W. 445, 19 Ky. L. Rep. 1345.

5. Choctaw, etc., R. Co. *v.* State, 74 Ark. 159, 85 S. W. 85, holding that a motion to make the indictment more specific in regard to the identity of the train should have been granted.

an offense.[6] In an indictment against a railroad company for a public nuisance the acts constituting the nuisance must be set out with distinctness and certainty.[7] An indictment against a third person for a statutory offense affecting the property or operation of a railroad must allege every fact and circumstance necessary to constitute the offense,[8] and must be sufficiently certain to enable defendant to make his defense and to make a judgment rendered thereon available as a bar to another prosecution;[9] but if the statute itself states the elements of the offense, it is sufficient to charge it in the language of the statute.[10] An indictment for throwing or shooting at a train need not allege an intent to injure any particular person or persons,[11] or allege the ownership of the train.[12]

(II) *WRECKING OR OBSTRUCTING PASSAGE OF TRAINS.* An indictment for wrecking or obstructing the passage of trains must allege every material fact necessary to constitute the offense as defined by statute,[13] and should inform the accused of the leading and material grounds of the charge against him so as to enable him to make his defense;[14] but it is ordinarily sufficient to charge the

6. State *v.* Kansas City, etc., R. Co., 54 Ark. 546, 16 S. W. 567.

7. Louisville, etc., R. Co. *v.* Com., 40 S. W. 913, 19 Ky. L. Rep. 455, holding that an indictment for nuisance alleging that the railroad company permitted its engines to remain near a street crossing and allowed smoke and steam to escape therefrom is fatally defective in failing to allege that the engines were allowed to so remain for an unreasonable and unnecessary length of time.

Nuisance in obstructing public highways.— An indictment for nuisance in obstructing a street or highway is sufficiently certain where it charges that the offense was committed at a certain point on a certain street in a certain town by the placing of freight cars across such street (Com. *v.* Illinois Cent. R. Co., 118 Ky. 775, 82 S. W. 381, 26 Ky. L. Rep. 672); but it is fatally defective if it does not identify the street further than as a public highway in a certain town crossing defendant's track near the depot (Louisville, etc., R. Co. *v.* Com., 117 Ky. 350, 78 S. W. 124, 79 S. W. 275, 25 Ky. L. Rep. 1452). If the indictment alleges the necessary facts to show that the obstruction was a public nuisance, a further allegation that the obstruction was "for longer than five minutes," the period prescribed by statute, may be disregarded as surplusage. Illinois Cent. R. Co. *v.* Com., 45 S. W. 367, 20 Ky. L. Rep. 115.

8. Hamilton *v.* State, 30 Fla. 229, 11 So. 523 (indictment for shooting into car held insufficient as to allegations of facts constituting the offense); Carter *v.* Com., (Ky. 1887) 5 S. W. 48 (holding that an indictment for breaking into a car is fatally defective in failing to allege that the car was the property of another than the accused and that the latter had no right to enter it); State *v.* McKenna, 24 Utah 317, 67 Pac. 815 (holding that an indictment for closing the angle cocks and parting the air hose of certain cars is insufficient, under the Utah statute, where it fails to allege or show that such cars were "attached to or connected with any railroad").

An indictment for attempting to steal a ride is sufficient under the Georgia statute where it charges that defendant fraudulently concealed himself in a car of a railroad company for the purpose of avoiding the payment of fare and stealing a ride (Mack *v.* State, 119 Ga. 352, 46 S. E. 437); but under the Texas statute the indictment must allege the name of the person in charge of the train or that his name could not by reasonable diligence be ascertained by the grand jury (Daugherty *v.* State, (Tex. Civ. App. 1900) 56 S. W. 620).

An allegation that the railroad company was "chartered" is not necessary in an indictment under Ga. Pen. Code (1895), § 511, for throwing or shooting at or into railroad cars. Allen *v.* State, 123 Ga. 499, 51 S. E. 506 [*distinguishing* Kiser *v.* State, 89 Ga. 421, 15 S. E. 495, where the contrary was held on an indictment for the same offense but brought under a different statute].

9. Carter *v.* Com., (Ky. 1887) 5 S. W. 48.

10. State *v.* West, 157 Mo. 309, 57 S. W. 1071, holding a particular indictment to be sufficient under a statute making it a felony to stop a train with intent to commit a robbery thereon.

11. State *v.* Leasman, 137 Iowa 191, 114 N. W. 1032.

12. State *v.* Leasman, 137 Iowa 191, 114 N. W. 1032, holding, however, that if it be necessary to allege the ownership of the train, it is a sufficient allegation to allege that it was a train upon the track of a designated company.

13. Sanders *v.* State, 118 Ga. 788, 45 S. E. 602; State *v.* Mead, 27 Vt. 722.

Allegations sufficient.— Where the statute defines the offense of displacing or disturbing any "fixture attached to the track or switch," an indictment charging the displacing or disturbing of "the connecting rod of the said switch" is sufficient. Crawford *v.* Com., 35 S. W. 114, 18 Ky. L. Rep. 16. Allegations held sufficient as to the fact that the obstruction was placed upon the track of a railroad see Furlow *v.* State, 72 Ark. 384, 81 S. W. 232; State *v.* Kluseman, 53 Minn. 541, 55 N. W. 741.

14. State *v.* Wentworth, 37 N. H. 196, holding, however, that if defendant is informed

offense substantially in the language of the statute, with the material facts constituting the particular offense,[15] or to set forth all the material matters embraced in the statute going to make up the offense.[16] In an indictment for obstructing a railroad track it is not necessary to allege that any train was actually obstructed or hindered,[17] that the obstruction was such as would endanger the passage of trains or throw them from the track,[18] or that defendant intended to endanger life or the safety of any train,[19] or to set out the names of persons whose lives were endangered.[20] Neither is it necessary to allege who owned the road,[21] or whether it was owned by a corporation,[22] or if owned by a corporation whether it was legally chartered or organized,[23] or was a corporation authorized to do business within the state.[24] If the allegations of the indictment sufficiently charge the offense under the statute, additional and unnecessary allegations may be disregarded as surplusage.[25]

e. Issues, Proof, and Variance.[26] In prosecutions for offenses incident to the operation of railroads as in other criminal cases, the evidence must conform to the allegations of the indictment.[27] So where an indictment for wrongful death specifies the acts of negligence causing the injury, evidence of negligence in other respects is not admissible.[28] So also each material allegation of the indictment must be supported by proof,[29] and any material variance is fatal to a recovery;[30] but it is not necessary to prove all that is alleged if what is proved constitutes a

of the place where the track was obstructed, the character of the obstruction and the name of the railroad, he has all the necessary information for this purpose.

15. State *v.* Clemens, 38 Iowa 257; State *v.* Oliver, 55 Kan. 711, 41 Pac. 954; State *v.* Beckman, 57 N. H. 174; State *v.* Wentworth, 37 N. H. 196; Barton *v.* State, 28 Tex. App. 483, 13 S. W. 783.

An indictment is not bad for duplicity under the California statute, where it charges defendant with throwing a switch with intent to derail a train, "and" boarding a passenger train with intent to rob the train, both acts being directed against the same train, the statute specifying certain separate acts, including the above, as felonies, but the whole act being designed as a provision to prevent the wrecking of trains. People *v.* Thompson, 111 Cal. 242, 43 Pac. 748.

The omission of the word "of" between the word "track" and the name of the railroad company, in an indictment for placing an obstruction upon the track, does not render the indictment insufficient. Stanfield *v.* State, 43 Tex. Cr. 10, 62 S. W. 917.

16. State *v.* Wentworth, 37 N. H. 196.

The technical name of the offense need not be set out, it being sufficient if the indictment describes the offense in the language of the statute, and states the acts of defendant constituting the offense so clearly that he could not be misled as to the charge against him. State *v.* Hessenkamp, 17 Iowa 25.

17. State *v.* Clemens, 38 Iowa 257.

18. Riley *v.* State, 95 Ind. 446.

19. State *v.* Beckman, 57 N. H. 174; People *v.* Adams, 16 Hun (N. Y.) 549.

20. State *v.* Wentworth, 37 N. H. 196; Barton *v.* State, 28 Tex. App. 483, 13 S. W. 783.

21. State *v.* Wentworth, 37 N. H. 196.

22. State *v.* Wentworth, 37 N. H. 196. See also Alsobrook *v.* State, 126 Ga. 100, 54 S. E. 805, holding, however, that an allegation that it was the "track of the Georgia Southern and Florida Railway Company" imports a corporation. *Contra*, State *v.* Mead, 27 Vt. 722, where the statute defining the offense uses the term "of any railroad corporation."

23. Duncan *v.* State, 29 Fla. 439, 10 So. 815; State *v.* Wentworth, 37 N. H. 196. *Contra*, Sanders *v.* State, 118 Ga. 788, 45 S. E. 602, where the statute defining the offense specifies a "chartered" company.

24. Rooney *v.* Com., 102 Ky. 373, 43 S. W. 689, 19 Ky. L. Rep. 1390.

25. State *v.* Oliver, 55 Kan. 711, 41 Pac. 954 (allegation that defendant's intention was to injure the company, its passengers and employees); McCarty *v.* State, 37 Miss. 411 (unnecessary allegations descriptive of the nature and effect of the obstruction); Harris *v.* State, 82 Tenn. 485; State *v.* Bisping, 123 Wis. 267, 101 N. W. 359 (unnecessary allegation as to defendant's purpose in obstructing the track).

26. See, generally, INDICTMENTS AND INFORMATIONS, 22 Cyc. 450.

27. Com. *v.* Fitchburg R. Co., 126 Mass. 472; State *v.* Wentworth, 37 N. H. 196.

28. Com. *v.* Fitchburg R. Co., 126 Mass. 472; Com. *v.* Fitchburg R. Co., 120 Mass. 372.

29. Com. *v.* Fitchburg R. Co., 120 Mass. 372.

On an indictment for a public nuisance consisting in running trains at a dangerous rate of speed through an incorporated city without giving the necessary warning signals at crossings, it is necessary to prove not only the habitual rapid running of trains but also that the warning signals were not given. Cincinnati, etc., R. Co. *v.* Com., 104 S. W. 771, 31 Ky. L. Rep. 1113.

30. Illinois Cent. R. Co. *v.* Com., 104 Ky. 362, 47 S. W. 255, 20 Ky. L. Rep. 748, 990.

criminal offense of the nature and quality charged,[31] and where time is not of the essence of the offense, it need not be proved as alleged, but the offense may be proved to have been committed at any time prior to the finding of the indictment and within the period prescribed by the statute of limitations.[32] On an indictment for wrongful death under a statute making the company liable for negligence on the part of the company or gross negligence on the part of its servants, an indictment charging negligence on the part of the company is not supported by proof of mere negligence on the part of its servants without proof of any authorization or instruction from the company to do the acts complained of,[33] and where the gross negligence of its servants is relied on, such negligence must be proved as alleged.[34] On a prosecution for placing obstructions upon a railroad track the motive need not be proved,[35] but there must be legal and competent evidence identifying the defendant with the act constituting the offense;[36] and where the indictment alleges that the obstruction was placed upon the track of a particular railroad company, naming it, this becomes descriptive of the track and must be proved as alleged,[37] although if the indictment merely designates the name of the road without any allegation as to its ownership proof of ownership is not necessary.[38] On an indictment for burning a bridge alleged to be the property of a certain railroad company, the proof of ownership is sufficient if it shows that the bridge formed a part of the road-bed of the company named and was actually used by such company;[39] and where an indictment for attempting to wreck a train does not allege that it was owned or operated by a corporation, the state may show by parol evidence that the road was in fact known as the road of the company named in the indictment, without producing the charter of the company.[40] As in other criminal cases the jury is not authorized to convict upon a preponderance of evidence, but must be satisfied of defendant's guilt beyond a reasonable doubt.[41]

f. Evidence. On indictments for offenses incident to the operation of railroads the general rules of evidence in criminal cases apply,[42] except in prosecutions, as for wrongful death, which are in effect civil actions for damages and are governed by the same rules of evidence as civil actions of this character.[43] The evidence to be admissible must be relevant to the issue and have some legitimate bearing upon the question of defendant's guilt or innocence of the offense charged;[44] but

31. Allison *v.* State, 42 Ind. 354, holding that, on an indictment for obstructing a railroad track by placing pieces of timber thereon, the proof need not correspond with the allegations as to the number of pieces, proof of any number being sufficient to constitute the offense.

32. Cincinnati R. Co. *v.* Com., 80 Ky. 137 (indictment against a railroad company for obstructing a street); McCarty *v.* State, 37 Miss. 411 (indictment for placing obstructions upon a railroad track).

33. Com. *v.* Boston, etc., R. Co., 133 Mass. 383.

34. Com. *v.* Fitchburg R. Co., 120 Mass. 372.

An allegation of gross negligence is not sustained by proof that at the time of the injury the engine was being run at a high rate of speed, in the absence of any evidence that the servants of the railroad company in so doing were acting in violation of their duty. Com. *v.* Fitchburg R. Co., 126 Mass. 472.

35. Clifton *v.* State, 73 Ala. 473.

36. Cox *v.* State, (Tex. Cr. App. 1900) 59 S. W. 903 (placing obstruction on railroad track); Brown *v.* Com., 97 Va. 791, 37 S. E. 882 (placing obstruction on railroad track).

37. Blocker *v.* State, (Tex. Cr. App. 1903) 73 S. W. 955.

38. Clifton *v.* State, 73 Ala. 473.

39. Duncan *v.* State, 29 Fla. 439, 10 So. 815.

40. Walker *v.* State, 97 Ga. 213, 22 S. E. 528.

41. Cox *v.* Com., 9 S. W. 804, 10 Ky. L. Rep. 597 (indictment for breaking into depot with intent to steal); Stanfield *v.* State, 43 Tex. Cr. 10, 62 S. W. 917 (indictment for placing obstruction on railroad track).

42. See CRIMINAL LAW, 12 Cyc. 379.

Evidence held sufficient to support a conviction on a prosecution against a railroad company for failure to give crossing signals see Mobile, etc., R. Co. *v.* Com., 92 S. W. 299, 28 Ky. L. Rep. 1360.

Evidence held insufficient to support a conviction for failing to maintain a suitable water-closet at a station as required by statute see State *v.* Baltimore, etc., R. Co., 61 W. Va. 634, 57 S. E. 44.

43. State *v.* Grand Trunk R. Co., 58 Me. 176, 4 Am. Rep. 258.

44. Louisville, etc., R. Co. *v.* Com., 80 Ky. 143, 3 Ky. L. Rep. 644, 44 Am. Rep.

where there is any question as to whether defendant did the act charged, any evidence is admissible which tends to show a motive for the act.[45] Evidence of acts constituting a separate and distinct offense while not ordinarily admissible is admissible if such acts were so closely connected with the act charged as to be regarded as a part of the same transaction,[46] or for the purpose of showing the motive for committing the offense charged,[47] or the intention with which the act was done,[48] or that defendant was at the time in a position or situation to have committed the offense charged;[49] but the court should in such cases instruct the jury as to the purpose for which the evidence was admitted and limit their consideration of it accordingly.[50] On an indictment for attempting to wreck a railroad train, evidence of prior attempts is not admissible where it does not in any way connect accused with such attempts.[51] On an indictment against a railroad company for obstructing a highway, where each obstruction constitutes a separate offense, the prosecution should be required to elect which offense it will prosecute for, and the evidence should be limited to that offense.[52]

g. Trial and Review. The rules applicable to criminal cases generally apply to the conduct of the trial,[53] and proceedings for review.[54]

C. Companies and Persons Liable* — **1. In General.** Owing to the

468, holding that on a prosecution against a railroad company for nuisance in habitually operating its trains at a crossing in a negligent and dangerous manner, evidence is not admissible of the absence of casualties on other roads conducted in a more populous community and at the intersection of highways more generally used than the one in question.

On a prosecution for throwing a switch evidence that defendant knew that his brother was on a train which would shortly pass is inadmissible where its object is to show that defendant was so drunk that he did not know right from wrong, since this fact would not affect his liability. Conley *v.* Com., 98 Ky. 125, 32 S. W. 285, 17 Ky. L. Rep. 678.

45. State *v.* Dearborn, 59 N. H. 348, holding that on a prosecution for obstructing a railroad track, evidence that the company had twice caused the arrest of defendant on criminal charges is admissible as tending to show motive.

46. State *v.* Wentworth, 37 N. H. 196, evidence of placing other obstructions upon railroad track than those charged.

47. Barton *v.* State, 28 Tex. App. 483, 13 S. W. 783, evidence of placing other obstructions on track than those charged.

48. Stanfield *v.* State, 43 Tex. Cr. 10, 62 S. W. 917, holding that where, on an indictment for placing an obstruction on a railroad track, it was claimed by defendant that it was inadvertently done, evidence of the placing of a different obstruction upon the same track at a different place at a short time afterward on the same day is admissible.

49. State *v.* Wentworth, 37 N. H. 196.

50. Barton *v.* State, 28 Tex. App. 483, 13 S. W. 783.

51. Alsobrook *v.* State, 126 Ga. 100, 54 S. E. 805.

52. Louisville, etc., R. Co. *v.* Com., 117 Ky. 350, 78 S. W. 124, 79 S. W. 275, 25 Ky. L. Rep. 1452, 2050.

53. See CRIMINAL LAW, 12 Cyc. 504.

Instructions.—The instructions of the court must not be so framed that the jury might construe them as intimating an opinion upon the merits of the case or placing the burden of proof upon defendant. Stanfield *v.* State, 43 Tex. Cr. 10, 62 S. W. 917. On a prosecution of a railroad company for obstructing a street, it is not error to charge that malice is not an essential element of the offense, but that it must have been a wilful obstruction, and to define "wilfully" as "intentionally or knowingly" where the jury are also instructed that to be indictable the obstruction must have been unreasonable. State *v.* Chicago, etc., R. Co., 77 Iowa 442, 42 N. W. 365, 4 L. R. A. 298. On a prosecution under a statute making it a criminal offense to wilfully and maliciously disturb any fixture attached to a car by which it might be upset, etc., where there was evidence that defendant in turning on an air cock on the train did the act innocently without any knowledge that its probable effect would be to derail the train, it is error for the court to fail to submit the question of defendant's intent to the jury. Thacher *v.* Com., 85 S. W. 1096, 27 Ky. L. Rep. 620.

Questions for jury.— Whether a railroad company complies with Ky. St. (1903) § 772, requiring every railroad company to provide convenient and suitable waiting-rooms at its depots for passengers is for the jury, ascertainable on any evidence of the size of the town and the number of passengers arriving at and departing therefrom. Illinois Cent. R. Co. *v.* Com., 99 S. W. 320, 30 Ky. L. Rep. 697.

A special verdict on a prosecution against a railroad company must find defendant guilty or not guilty subject to the opinion of the court upon the law as applicable to the facts ascertained therein. State *v.* Divine, 98 N. C. 778, 43 S. E. 477.

54. See CRIMINAL LAW, 12 Cyc. 792.

* By James A. Gwyn.

relations often sustained by two or more companies or persons to the ownership, operation or use of the same road, the question frequently arises as to which or how many of such companies or persons is liable for an injury occurring in the operation of the road; and while there is some conflict of authority as to the rights and liabilities growing out of certain relations,[55] it is well settled that the company to which the franchise for the operation of a railroad is granted by the state assumes by its acceptance the duty toward the public of seeing that it is properly exercised, and cannot without legislative authority farm out its franchises or permit by lease, license, or otherwise, another company or person to exercise them so as to avoid the liabilities incident thereto.[56] It is equally well settled that any company using or operating a railroad, although not the owner of the road, is liable for its own negligence or that of its own servants.[57] A railroad company may also stand in the relation of agent to another so as to render that other liable for its negligent acts,[58] or the relation between two railroad companies may be such as to constitute a partnership with the liabilities ordinarily incident to that relation.[59] One railroad company does not become liable for the acts of the servants of another merely by reason of being a stock-holder in that company,[60] or guarantor of its bonds,[61] as such facts do not of themselves constitute either a partnership or make one company the servant or agent of the other;[62] but where one company actually controls others through the ownership of their stock and operates all of the lines as a single system, although the general management of each road is retained by the company owning it, the dominant company will be liable for injuries due to the negligence of one of the subordinate companies.[63] Where, pursuant to legislative authority for the interchange of business between intersecting roads, two railroad companies maintain at a point of intersection a depot and sidings for their joint use, one of such companies is not liable for injuries

55. Heron *v.* St. Paul, etc., R. Co., 68 Minn. 542, 71 N. W. 706; Logan *v.* North Carolina R. Co., 116 N. C. 940, 21 S. E. 959.

56. *Georgia.*— Macon, etc., R. Co. *v.* Mayes, 49 Ga. 355, 15 Am. Rep. 678.

Illinois.— Pennsylvania Co. *v.* Ellett, 132 Ill. 654, 24 N. E. 559; Wabash, etc., R. Co. *v.* Peyton, 106 Ill. 534, 46 Am. Rep. 705.

Louisiana.— Muntz *v.* Algiers, etc., R. Co., 111 La. 423, 35 So. 624, 100 Am. St. Rep. 495, 64 L. R. A. 222.

Minnesota.— Freeman *v.* Minneapolis, etc., R. Co., 28 Minn. 443, 10 N. W. 594.

Missouri.— McCoy *v.* Kansas City, etc., R. Co., 36 Mo. App. 445.

New York.—Abbott *v.* Johnstown, etc., Horse R. Co., 80 N. Y. 27, 36 Am. St. Rep. 572.

South Carolina.— Chester Nat. Bank *v.* Atlanta, etc., R. Co., 25 S. C. 216.

Texas.— Central, etc., R. Co. *v.* Morris, 68 Tex. 49, 3 S. W. 457.

Wisconsin.— Jefferson *v.* Chicago, etc., R. Co., 117 Wis. 549, 94 N. W. 289.

United States.— Briscoe *v.* Southern Kansas R. Co., 40 Fed. 273.

See 41 Cent. Dig. tit. "Railroads," § 789 *et seq.*

57. *Florida.*— Jacksonville, etc., R. Co. *v.* Garrison, 30 Fla. 557, 11 So. 929.

Illinois.— Wabash, etc., R. Co. *v.* Peyton, 106 Ill. 534, 46 Am. Rep. 705.

Kansas.— Chicago, etc., R. Co. *v.* Groves, 56 Kan. 601, 11 Pac. 628.

Minnesota.— Cantlon *v.* Eastern R. Co., 45 Minn. 481, 48 N. W. 22.

New York.— Leonard *v.* New York Cent., etc., R. Co., 42 N. Y. Super. Ct. 225.

Texas.— Texas, etc., R. Co. *v.* Ross, 7 Tex. Civ. App. 653, 26 S. W. 728.

United States.— Clark *v.* Geer, 86 Fed. 447, 32 C. C. A. 295.

See 41 Cent. Dig. tit. "Railroads," § 789 *et seq.*

Liability of lessee see *infra*, X, C, 4, a, (II).

Liability of company using or operating road of another see *infra*, X, C, 6.

Penalties.—A railroad company in the exclusive possession and operating the road of another is liable for the statutory penalty for failure to give crossing signals. State *v.* Missouri Pac. R. Co., 149 Mo. 104, 50 S. W. 278.

58. McWilliams *v.* Detroit Cent. Mills Co., 31 Mich. 274.

59. Block *v.* Fitchburg R. Co., 139 Mass. 308, 1 N. E. 348; Harrill *v.* South Carolina, etc., R. Co., 135 N. C. 601, 47 S. E. 730; Lehigh Valley R. Co. *v.* Dupont, 128 Fed. 840, 64 C. C. A. 478.

60. Jones *v.* Pennsylvania R. Co., 19 D. C. 178 [*reversed* on other grounds in 155 U. S. 333, 15 S. Ct. 136, 39 L. ed. 176]; Mathews *v.* Atchison, etc., R. Co., 60 Kan. 11, 55 Pac. 282; Atchison, etc., R. Co. *v.* Davis, 34 Kan. 209, 199, 8 Pac. 530, 146.

61. Mathews *v.* Atchison, etc., R. Co., 60 Kan. 11, 55 Pac. 282; Atchison, etc., R. Co. *v.* Davis, 34 Kan. 209, 199, 8 Pac. 530, 146.

62. Mathews *v.* Atchison, etc., R. Co., 60 Kan. 11, 55 Pac. 282.

63. Lehigh Valley R. Co. *v.* Delachesa, 145 Fed. 617, 76 C. C. A. 307.

occasioned by the negligence of the other in leaving a car belonging to and under the exclusive control of the latter standing upon the siding so as to obstruct the highway;[64] and where the statutes authorize the commitment of the loading of cars by railroad companies to the shipper, the company will not be liable for injuries caused by the negligence of the shipper while loading a car furnished him for that purpose.[65] Private persons will be liable for injuries due to the negligent handling of railroad cars by them or their servants,[66] or injuries due to malicious interference with railroad cars or machinery;[67] and one who owns a bridge connecting buildings owned by him on opposite sides of a railroad track will be liable for injuries to brakemen due to the bridge not being of sufficient height above the tracks.[68] A company operating a private railroad for logging purposes is liable to the same extent as an ordinary public railroad company for the negligence or misconduct of its servants,[69] or for damages caused by fires negligently communicated by its locomotives.[70]

2. Railroad Companies and Contractors For Construction — a. In General. A railroad company may contract for the construction of its road by another person without retaining any control over the manner of doing the work,[71] or may make such contract with regard to repairs on its road;[72] and in case of injuries occurring from the negligence or misconduct of a contractor or his employees or during his control of the road, the liability of the railroad company, as in the case of natural persons, depends upon whether the contractor was the agent or employee of the company or was an independent contractor,[73] and this question is determined primarily by whether the railroad company had the right to control the manner of doing the work,[74] or was in the possession and control of the road or the operation of the train thereon at the time and place of injury.[75] If the contractor for construction is an independent contractor the company will not be liable for his negligence or wrongful acts,[76] subject to the usual exceptions

64. Jolly *v.* Missouri, etc., R. Co., 38 Tex. Civ. App. 332, 85 S. W. 837; Missouri, etc., R. Co. *v.* Jolly, 31 Tex. Civ. App. 512, 72 S. W. 871.

65. Washington *v.* Texas, etc., R. Co., 22 Tex. Civ. App. 189, 54 S. W. 1092.

66. Noble *v.* Cunningham, 74 Ill. 51.

67. Munger *v.* Baker, 65 Barb. (N. Y.) 539, 1 Thomps. & C. 122.

68. Dukes *v.* Eastern Distilling Co., 51 Hun (N. Y.) 605, 4 N. Y. Suppl. 562. But see Stoneback *v.* Thomas Iron Co., 2 Pa. Cas. 97, 4 Atl. 721.

69. Stewart *v.* Cary Lumber Co., 146 N. C. 47, 59 S. E. 545.

70. Simpson *v.* Enfield Lumber Co., 133 N. C. 95, 45 S. E. 469, 131 N. C. 518, 42 S. E. 939; Craft *v.* Albemarle Timber Co., 132 N. C. 151, 43 S. E. 597.

71. *Kansas.*— Kansas Cent. R. Co. *v.* Fitzsimmons, 18 Kan. 34.

Nebraska.— Hitte *v.* Republican Valley R. Co., 19 Nebr. 620, 28 N. W. 284.

Ohio.— Hughes *v.* Cincinnati, etc., R. Co., 39 Ohio St. 461.

South Carolina.— Rogers *v.* Florence R. Co., 31 S. C. 378, 9 S. E. 1059.

Texas.— Cunningham *v.* International R. Co., 51 Tex. 503, 32 Am. Rep. 632.

See 41 Cent. Dig. tit. "Railroads," § 793.

After procuring the right of way the company may delegate to another lawful authority to enter upon the same and make its road-bed and perform other proper acts of construction (Cunningham *v.* International R. Co., 51 Tex. 503, 32 Am. Rep. 632); and if it retains no control over the manner of doing the work it will not be liable for trespass committed by the contractor or his servants outside of the right of way upon adjoining lands without the assent of the company (Waltemeyer *v.* Wisconsin, etc., R. Co., 71 Iowa 626, 33 N. W. 140; Hughes *v.* Cincinnati, etc., R. Co., 39 Ohio St. 461. *Compare* Cairo, etc., R. Co. *v.* Woolsey, 85 Ill. 370); but where a contractor wrongfully appropriates land for the right of way, he will not be considered as engaged merely in the work of construction but must be held to be acting for the corporation, and although the act was unauthorized the company will be liable therefor if it receives and enjoys its benefits (Bloomfield R. Co. *v.* Grace, 112 Ind. 128, 13 N. E. 680).

72. Bibb *v.* Norfolk, etc., R. Co., 87 Va. 711, 14 S. E. 163.

73. Kansas Cent. R. Co. *v.* Fitzsimmons, 18 Kan. 34; Hitte *v.* Republican Valley R. Co., 19 Nebr. 620, 28 N. W. 284; Hughes *v.* Cincinnati, etc., R. Co., 39 Ohio St. 461; Burton *v.* Galveston, etc., R. Co., 61 Tex. 526.

74. Rome, etc., R. Co. *v.* Chasteen, 88 Ala. 591, 7 So. 94; Cunningham *v.* International R. Co., 51 Tex. 503, 32 Am. Rep. 632; Bibb *v.* Norfolk, etc., R. Co., 87 Va. 711, 14 S. E. 163.

75. Kansas Cent. R. Co. *v.* Fitzsimmons, 18 Kan. 34.

76. *Kansas.*— Kansas Cent. R. Co. *v.* Fitzsimmons, 18 Kan. 34.

in such cases,[77] that the company will be liable where the act complained of was not merely collateral and occurred incidentally in the doing of the work, but the thing contracted to be done was of itself unlawful, essentially injurious, or a nuisance,[78] and that the railroad company cannot delegate to a contractor so as to escape liability the right to exercise its corporate franchises,[79] or avoid its liability in regard to any general duty or liability to the public imposed by law directly upon the company,[80] such as the statutory duties of constructing and maintaining fences or cattle-guards,[81] restoring highways to their former condition,[82] or keeping the crossings in repair,[83] or the statutory liability for the killing or injury of stock upon its road.[84] A railroad company cannot by contract with a contractor for repairs relieve itself from liability for injuries to the employees of the contractor, not parties to the contract, caused by the negligence of the railroad company in the operation of its trains.[85] A railroad company which furnishes to a contractor defective machinery and appliances is liable for injuries caused thereby to a third person in the use for which they were intended.[86]

b. Operation of Trains or Cars. In case of injuries due to the negligent or improper operation of trains on roads or parts thereof which are being built by construction contractors, the railroad company will not be liable if the train was exclusively controlled and operated by the contractor and his servants,[87] although it belonged to the railroad company and was furnished to the contractor as a part of the consideration for the work done,[88] and the servants in charge of it were employed primarily by the railroad company;[89] but the company will be liable for injuries done by the negligent operation of a train used to deliver supplies and materials to the contractor where it owns the train and operates it by its own servants,[90] although the contractor may have been in control of

Nebraska.— Hitte *v.* Republican Valley R. Co., 19 Nebr. 620, 28 N. W. 284.

Ohio.— Hughes *v.* Cincinnati, etc., R. Co., 39 Ohio St. 461.

Texas.— Cunningham *v.* International R. Co., 51 Tex. 503, 32 Am. Rep. 632.

Virginia.— Bibb *v.* Norfolk, etc., R. Co., 87 Va. 711, 14 S. E. 163.

England.— Knight *v.* Fox, 5 Exch. 721, 14 Jur. 963, 20 L. J. Exch. 9; Hobbit *v.* London, etc., R. Co., 4 Exch. 254; Reedie *v.* London, etc., R. Co., 4 Exch. 244, 20 L. J. Exch. 65, 6 R. & Can. Cas. 184.

See 41 Cent. Dig. tit. "Railroads," §§ 793–798.

Fires.—A railroad company is not liable for damages caused by fires due to the negligence of an independent contractor engaged in the construction of its road, although the statute makes the company liable for the acts of "any of its authorized agents or employees" in this regard. Rogers *v.* Florence R. Co., 31 S. C. 378, 9 S. E. 1059.

77. See MASTER AND SERVANT, 26 Cyc. 1557.

78. Ohio Southern R. Co. *v.* Morey, 47 Ohio St. 207, 24 N. E. 269, 7 L. R. A. 701. See also Bibb *v.* Norfolk, etc., R. Co., 87 Va. 711, 14 S. E. 163.

79. Chattanooga, etc., R. Co. *v.* Whitehead, 89 Ga. 190, 15 S. E. 44.

80. Cincinnati, etc., R. Co. *v.* Van Dorn, 1 Ohio Cir. Ct. 292, 1 Ohio Cir. Dec. 160; Houston, etc., R. Co. *v.* Meador, 50 Tex. 77.

81. Pound *v.* Port Huron, etc., R. Co., 54 Mich. 13, 19 N. W. 570; Gardner *v.* Smith, 7 Mich. 410, 74 Am. Dec. 722; Houston, etc., R. Co. *v.* Meador, 50 Tex. 77; Chicago, etc., R. Co. *v.* Yarbrough, (Tex. Civ. App. 1896) 35 S. W. 422.

The contractor is also personally liable where the statutory liability in terms applies to the railroad company "and their agents." Gardner *v.* Smith, 7 Mich. 410, 74 Am. Dec. 722, holding that the term "agents" should be construed in its broadest sense as embracing contractors as well as employees.

82. Cincinnati, etc., R. Co. *v.* Van Dorn, 1 Ohio Cir. Ct. 292, 1 Ohio Cir. Dec. 160.

83. Taylor, etc., R. Co. *v.* Warner, (Tex. Civ. App. 1895) 31 S. W. 66.

84. Huey *v.* Indianapolis, etc., R. Co., 45 Ind. 320; Wichita, etc., R. Co. *v.* Gibbs, 47 Kan. 274, 27 Pac. 991.

85. Ominger *v.* New York Cent., etc., R. Co., 4 Hun (N. Y.) 159, 6 Thomps. & C. 498.

86. Conlon *v.* Eastman R. Co., 135 Mass. 195.

87. City, etc., R. Co. *v.* Moores, 80 Md. 348, 30 Atl. 643, 45 Am. St. Rep. 345; Hitte *v.* Republican Valley R. Co., 19 Nebr. 620, 28 N. W. 284; Meyer *v.* Minland Pac. R. Co., 2 Nebr. 319; Cunningham *v.* International R. Co., 51 Tex. 503, 32 Am. Rep. 632; Union Pac. R. Co. *v.* Hause, 1 Wyo. 27.

88. Hitte *v.* Republican Valley R. Co., 19 Nebr. 620, 28 N. W. 284; Cunningham *v.* International R. Co., 51 Tex. 503, 32 Am. Rep. 632.

89. Cunningham *v.* International R. Co., 51 Tex. 503, 32 Am. Rep. 632.

90. Burton *v.* Galveston, etc., R. Co., 61 Tex. 526.

the company's train and servants to the extent of being authorized to designate when, where, and to what extent the supplies and materials should be transported;[91] and where a railroad company furnishes a contractor with locomotives, and men to operate them, whom it retains in its employ, it is liable for injuries to these servants due to the unsafe or defective condition of the locomotives furnished, although the contractor has exclusive possession of the track and control over the operation and movements of the train.[92] So also if a railroad company permits a contractor to exercise its franchises by running trains for general traffic on the road which he is constructing or repairing, it will be liable for injuries to third persons caused by the negligence of the contractor's servants in operating such trains;[93] but the fact that a contractor operates trains for general traffic will not render the company liable for his acts if he is not doing so for the benefit or with the consent of the company but without its authority,[94] or if the injury complained of was not sustained while the train was being operated for such purposes, but merely for the purposes of construction.[95]

3. Sale or Other Transfer of Railroad — a. In General. Where one railroad company purchases the road of another pursuant to authority vested in the corporations to make such sale and purchase, the transaction stands upon the same footing as any lawful sale or transfer of property made in good faith between private individuals,[96] and their rights and liabilities with respect to third persons are governed by the same principles unless modified by statute or agreement between the companies,[97] or by order of court in case of a judicial sale.[98]

b. Liability of Vendor or Predecessor. Where a railroad company has made a valid sale of its road and franchise for operating the same to another company or the same has been sold at a judicial sale, it is not liable for an injury due to the negligence or improper operation of the road occurring after it has parted with its ownership, operation, and control,[99] nor is this rule affected by the fact that the sale was not registered or that the property continued to be assessed in the name of the former owner.[1]

c. Liability of Purchaser or Transferee — (i) *In General.* Where there is authority to sell and there is a *bona fide* and valid sale and not a consolidation or mere change of name,[2] a railroad company which purchases the road and franchises of another is not liable for damages caused by the negligence or improper

91. Burton *v.* Galveston, etc., R. Co., 61 Tex. 526. See also Coggin *v.* Central R. Co., 62 Ga. 685, 35 Am. Rep. 132.

92. Savannah, etc., R. Co. *v.* Phillips, 90 Ga. 829, 17 S. E. 82.

93. Chattanooga, etc., R. Co. *v.* Whitehead, 89 Ga. 190, 15 S. E. 44; Chattanooga, etc., R. Co. *v.* Liddell, 85 Ga. 482, 11 S. E. 853, 21 Am. St. Rep. 169; Chicago, etc., R. Co. *v.* Whipple, 22 Ill. 105; Lakin *v.* Willamette Valley, etc., R. Co., 13 Oreg. 436, 11 Pac. 68, 57 Am. Rep. 25.

The contractor will be regarded as the agent or servant of the railroad company employing him if he is exercising the chartered powers and privileges of the company with its assent. Suburban R. Co. *v.* Balkwill, 195 Ill. 535, 63 N. E. 389 [*affirming* 94 Ill. App. 454].

Turn-tables.— A railroad company is liable for an injury due to the negligent condition of a turn-table while the completed portion of its road is being operated for general traffic by a contractor for construction. Kansas Cent. R. Co. *v.* Fitzsimmons, 22 Kan. 686, 31 Am. Rep. 203.

94. Kansas Cent. R. Co. *v.* Fitzsimmons, 18 Kan. 34.

95. Rome, etc., R. Co. *v.* Chasteen, 88 Ala. 591, 7 So. 94.

96. Hawkins *v.* Georgia Cent. R. Co., 119 Ga. 159, 46 S. E. 82; Chesapeake, etc., R. Co. *v.* Griest, 85 Ky. 619, 4 S. W. 323, 9 Ky. L. Rep. 177; Karn *v.* Illinois Southern R. Co., 114 Mo. App. 162, 89 S. W. 346.

97. Karn *v.* Illinois Southern R. Co., 114 Mo. App. 162, 89 S. W. 346.

98. Houston, etc., R. Co. *v.* Crawford, 88 Tex. 277, 31 S. W. 176, 53 Am. St. Rep. 752, 38 L. R. A. 761.

Liability of purchaser at judicial sale see *infra*, X, C, 3, c, (II).

99. Western R. Co. *v.* Huss, 70 Ala. 565; Western R. Co. *v.* Davis, 66 Ala. 578; Goodwin *v.* Bodcaw Lumber Co., 109 La. 1050, 34 So. 74.

1. Goodwin *v.* Bodcaw Lumber Co., 109 La. 1050, 34 So. 74.

2. Hawkins *v.* Georgia Cent. R. Co., 119 Ga. 159, 46 S. E. 82; Chesapeake etc., R. Co. *v.* Griest, 85 Ky. 619, 4 S. W. 323, 9 Ky. L. Rep. 177; Karn *v.* Illinois Southern R. Co., 114 Mo. App. 162, 89 S. W. 346; Pennison *v.* Chicago, etc., R. Co., 93 Wis. 344, 67 N. W. 702.

Consolidated roads see *infra*, X, C, 7, b.

operation of the road by its predecessor,[3] unless such liability is expressly assumed,[4] or it is otherwise provided by statute;[5] nor does a contract between the companies by which the purchasing company agrees to assume the debts and liabilities of the other confer any right upon a third person to sue the purchasing company in tort upon an unliquidated claim existing against the other company;[6] but the purchasing company will be liable for injuries occurring after the purchase due to the omission of a general statutory duty of a continuing character, although it should have been performed by its predecessor, such as the restoration of a highway to its former condition,[7] or the construction of fences and cattle-guards,[8] or for damages by fire set by its locomotives due to combustible material on its right of way, although it accumulated during the management of its predecessor,[9] or for injuries due to a non-compliance with the obligations imposed by the act authorizing the purchase.[10]

(II) *PURCHASER AT JUDICIAL SALE.* In the absence of statute or any order or agreement to the contrary, the purchaser of a railroad at a judicial sale under foreclosure or order of a court holding the custody of the property by a receiver, takes the property free from claims against the receiver arising out of his negligence or improper management of the road,[11] although the right of action

3. *Georgia.*— Hawkins *v.* Georgia Cent. R. Co., 119 Ga. 159, 46 S. E. 82.

Kentucky.— Louisville, etc., R. Co. *v.* Orr, 91 Ky. 109, 15 S. W. 8, 12 Ky. L. Rep. 756; Chesapeake, etc., R. Co. *v.* Griest, 85 Ky. 619, 4 S. W. 323, 9 Ky. L. Rep. 177; Louisville, etc., R. Co. *v.* Orr, 10 Ky. L. Rep. 677.

Missouri.— Lawson *v.* Illinois Southern R. Co., 116 Mo. App. 690, 94 S. W. 870; Porter *v.* Illinois Southern R. Co., 116 Mo. App. 526, 92 S. W. 744; Karn *v.* Illinois Southern R. Co., 114 Mo. App. 162, 89 S. W. 346; Burge *v.* St. Louis, etc., R. Co., 100 Mo. App. 460, 74 S. W. 7.

Texas.— Texas Cent. R. Co. *v.* Lyons, (Civ. App. 1896) 34 S. W. 362.

Wisconsin.— Pennison *v.* Chicago, etc., R. Co., 93 Wis. 344, 67 N. W. 702.

See 41 Cent. Dig. tit. "Railroads," § 800.

If the original company is in effect dissolved by the sale by having disposed of all its property and franchises, the remedy of plaintiff is to reduce his claim to judgment and enforce the same in equity against the stock-holders who received the purchase-money. Chesapeake, etc., R. Co. *v.* Griest, 85 Ky. 619, 4 S. W. 323, 9 Ky. L. Rep. 177.

If the purchasing company was in possession and operating the road prior to the actual transfer and at the time when the injury occurred, it would be the real perpetrator of the injury and consequently liable therefor. Karn *v.* Illinois Southern R. Co., 114 Mo. App. 162, 89 S. W. 346.

4. See Karn *v.* Illinois Southern R. Co., 114 Mo. App. 162, 89 S. W. 346.

5. New Bedford R. Co. *v.* Old Colony R. Co., 120 Mass. 397 (holding that under St. (1874) authorizing the purchase of the franchises and property of the Middleborough, etc., R. Co., by the Old Colony R. Co., and providing that the latter was to "be subject to all the duties, liabilities, obligations and restrictions to which" the former "may be subject," the latter became directly liable in an action of tort for damage occasioned by the prior negligence of the former company); Chicago, etc., R. Co. *v.* Lundstrom, 16 Nebr. 254, 20 N. W. 198, 49 Am. St. Rep. 718 (holding that a company purchasing the road of another is liable for personal injury inflicted by the latter, under the Nebraska statute of 1881, providing that the purchaser of a railroad "shall be subject to any and all laws. (liens), incumbrances, or indebtedness existing against the railroad company from which such road may be so purchased").

6. Hawkins *v.* Georgia Cent. R. Co., 119 Ga. 159, 46 S. E. 82; Chesapeake, etc., R. Co. *v.* Griest, 85 Ky. 619, 4 S. W. 323, 9 Ky. L. Rep. 177.

The claim must first be reduced to judgment by action against the company whose negligence occasioned the injury complained of. Chesapeake, etc., R. Co. *v.* Griest, 85 Ky. 619, 4 S. W. 323, 9 Ky. L. Rep. 177.

7. Thayer *v.* Flint, etc., R. Co., 93 Mich. 150, 53 N. W. 216.

8. Toledo, etc., R. Co. *v.* Arnold, 51 Ill. 241, holding further that where the statute requires railroads to be fenced within six months after they are opened for use, the purchasing company will be liable for injuries to stock due to the absence of fences, although it has not been in possession for six months, provided the road has been in use for that length of time.

9. Lake Erie, etc., R. Co. *v.* Cruzen, 29 Ill. App. 212, holding that the purchasing company is liable, although it had been in possession only seven days.

10. Johnson *v.* Pennsylvania R. Co., 2 Chest. Co. Rep. (Pa.) 315, holding that the Pennsylvania Railroad Company, under the act and contract of purchase from the state, is liable for damages resulting from the unsafe condition of a bridge over which a highway crosses the railroad, although such bridge was constructed by the state before it transferred the railroad to the company.

11. White *v.* Keokuk, etc., R. Co., 52 Iowa 97, 2 N. W. 1016; Tobin *v.* Central Vermont

accrued after the sale if before its confirmation by the court [12] or delivery of the deed; [13] but after title has vested in the purchaser by confirmation of the sale and deed, the purchaser will be liable for any subsequent torts of the receiver, if continued in possession, occurring between the time of the transfer of title and the final delivery of possession, to the extent of the permanent improvements made upon the property by the receiver with funds derived from the surplus earnings of the road during this period,[14] but in the absence of any investment in improvements of earnings accruing during such period, the purchaser cannot be held liable upon the ground that the receiver was his agent.[15] The court ordering the sale may impose a liability upon the purchaser as a part of the consideration of the purchase,[16] and the purchaser will be liable for claims against the receiver where it accepts the road under an order or decree imposing such liability,[17] or where such liability is assumed by covenant in the deed of transfer; [18] but a liability on the part of the purchaser existing merely by virtue of an order

R. Co., 185 Mass. 337, 70 N. E. 431; Metz *v.* Buffalo, etc., R. Co., 58 N. Y. 61, 17 Am. Rep. 201; Howe *v.* St. Clair, 8 Tex. Civ. App. 101, 27 S. W. 800.

A judgment against the receiver for a tort committed by him during his operation of the road cannot be declared a lien upon the property purchased. White *v.* Keokuk, etc., R. Co., 52 Iowa 97, 2 N. W. 1016.

Although the railroad company is the purchaser and thereby reacquires its property, it takes the same free from all claims against the receiver, except such as may be imposed by the terms of the sale. Howe *v.* St. Clair, 8 Tex. Civ. App. 101, 27 S. W. 800.

Under the North Carolina statute a purchaser of a railroad at a sale under foreclosure of a mortgage is liable for the torts of its predecessor to the extent of the value of the property purchased, but the judgment against the purchasing company should be credited with any surplus remaining in the hands of a receiver of the old company. Howe *v.* Harper, 127 N. C. 356, 37 S. E. 505.

12. Metz *v.* Buffalo, etc., R. Co., 58 N. Y. 61, 17 Am. Rep. 201.

13. White *v.* Keokuk, etc., R. Co., 52 Iowa 97, 2 N. W. 1016.

14. Houston, etc., R. Co. *v.* McFadden, 91 Tex. 194, 42 S. W. 593 [*affirming* on this point (Civ. App. 1897) 40 S. W. 216]; Houston, etc., R. Co. *v.* Crawford, 88 Tex. 277, 31 S. W. 176, 53 Am. St. Rep. 752, 28 L. R. A. 761; Houston, etc., R. Co. *v.* Kelly, (Tex. Civ. App. 1896) 35 S. W. 878; Houston, etc., R. Co. *v.* Strycharski, (Tex. Civ. App. 1896) 35 S. W. 851.

But to authorize a recovery in such cases against the purchaser, it is necessary for plaintiff to allege and prove that improvements were made by the receiver after the sale and conveyance by the application of earnings arising subsequent to the sale (Crawford *v.* Houston, etc., R. Co., 89 Tex. 89, 33 S. W. 534; Ray *v.* Dillingham, (Tex. Civ. App. 1897) 41 S. W. 188; Holman *v.* Galveston, etc., R. Co., 14 Tex. Civ. App. 409, 37 S. W. 464); although it has been held that an allegation that such improvements were made during the period that said property was in the hands of said receiver is sufficient to admit evidence of improvements made at any time during his possession (San Antonio, etc., R. Co. *v.* Bowles, 88 Tex. 634, 32 S. W. 880).

15. Ray *v.* Dillingham, (Tex. Civ. App. 1897) 41 S. W. 188. See also Archambeau *v.* New York, etc., R. Co., 170 Mass. 272, 49 N. E. 435; Fidelity Ins., etc., Co. *v.* Norfolk, etc., R. Co., 88 Fed. 815.

16. Houston, etc., R. Co. *v.* Crawford, 88 Tex. 277, 31 S. W. 176, 53 Am. St. Rep. 752, 28 L. R. A. 761.

17. Wabash R. Co. *v.* Stewart, 41 Ill. App. 640; Central Trust Co. *v.* Sloan, 65 Iowa 655, 22 N. W. 916; Sloan *v.* Central Iowa R. Co., 62 Iowa 728, 16 N. W. 331; Memphis, etc., R. Co. *v.* Glover, 78 Miss. 467, 29 So. 89; Baer *v.* Erie R. Co., 95 N. Y. Suppl. 486. But see Tobin *v.* Central Vermont R. Co., 185 Mass. 337, 70 N. E. 431, holding that a decree imposing as a condition of the sale that the purchaser should take subject to "all debts, obligations and liabilities of the receivers" does not authorize a person having an unliquidated claim for a tort against the receivers to sue the purchaser at law either in tort or contract, since the purchaser was not guilty of the tort and the claimant not a party to the agreement, but that such claims should be submitted to the determination of the court under whose authority the original proceedings were begun.

18. Memphis, etc., R. Co. *v.* Clover, 78 Miss. 467, 29 So. 89; Schmid *v.* New York, etc., R. Co., 32 Hun (N. Y.) 335; Baer *v.* Erie R. Co., 95 N. Y. Suppl. 486.

Limitation of purchaser's liability.— If the agreement of the purchasing company is merely to assume such claims as might have been enforced against the property or funds in the hands of the receiver not properly disposed of, it is not liable for the amount of such judgments as might be obtained upon liabilities incurred by the receiver, unless there were funds in his hands which might, in an action against him, have been subjected to their payment. Ryan *v.* Hays, 62 Tex. 42.

The complaint in an action seeking to hold the purchaser liable upon the ground of contract must set out the terms of the agreement. Houston, etc., R. Co. *v.* Norris, (Tex. Civ. App. 1897) 41 S. W. 708.

of court can be enforced only in accordance with the terms and conditions of such order.[19] The company purchasing a railroad under a foreclosure sale will be liable for any injury occurring after the purchase due to the non-performance of any duty of a continuing nature, although it should have been performed by its predecessor.[20]

4. Lessors and Lessees — a. In General — (1) *Liability of Lessor.* A railroad company to which a franchise for the operation of a railroad has been granted by the state cannot, without legislative authority, divest itself of any of the duties and liabilities incident thereto by leasing its road to another,[21] and so it is uniformly held that if the lease is unauthorized the lessor company will remain liable for the torts of the lessee in the operation of the road,[22] and in a few cases it has been stated broadly, without express reference to whether the lease was authorized or not, that the lessor is liable for the torts of the lessee.[23] Where, however, there is legislative authority for the execution of the lease but no express provision as to the subsequent liability of the lessor, there are directly conflicting lines of authority as to the lessor's liability,[24] some of the decisions holding that

19. Houston, etc., R. Co. *v.* Crawford, 88 Tex. 277, 31 S. W. 176, 53 Am. St. Rep. 752, 28 L. R. A. 761, holding that where the order imposing a liability upon the purchaser for claims against the receiver limits the time for their presentation, the purchaser will be liable only for such claims as are presented within the time limited.

20. Gage *v.* Pontiac, etc., R. Co., 105 Mich. 335, 63 N. W. 318, holding that the purchaser is liable for injuries occurring after the purchase and due to a failure to restore a highway to its former condition, although this duty should have been performed by its predecessor.

21. *Illinois.*— Ohio, etc., R. Co. *v.* Dunbar, 20 Ill. 623, 71 Am. Dec. 291.

Louisiana.— Muntz *v.* Algiers, etc., R. Co., 111 La. 423, 35 So. 624, 100 Am. St. Rep. 495, 64 L. R. A. 222.

Massachusetts.— Braslin *v.* Somerville Horse R. Co., 145 Mass. 64, 13 N. E. 65.

Minnesota.— Freeman *v.* Minneapolis, etc., R. Co., 28 Minn. 443, 10 N. W. 594.

Mississippi.—Illinois Cent. R. Co. *v.* Lucas, 89 Miss. 411, 42 So. 607.

New York.—Abbott *v.* Johnstown, etc., Horse R. Co., 80 N. Y. 27, 36 Am. Rep. 572.

North Carolina.— Logan *v.* North Carolina R. Co., 116 N. C. 940, 21 S. E. 959.

South Carolina.— Davis *v.* Atlanta, etc., Air Line R. Co., 63 S. C. 370, 577, 41 S. E. 468, 892; Parr *v.* Spartanburg, etc., R. Co., 43 S. C. 197, 20 S. E. 1009, 49 Am. St. Rep. 826; Chester Nat. Bank *v.* Atlanta, etc., Air Line R. Co., 25 S. C. 216.

Texas.— Central, etc., R. Co. *v.* Morris, 68 Tex. 49, 3 S. W. 457.

United States.— Briscoe *v.* Southern Kansas R. Co., 40 Fed. 273.

See 41 Cent. Dig. tit. "Railroads," §§ 802, 803, 804.

22. *Illinois.*— Ohio, etc., R. Co. *v.* Dunbar, 20 Ill. 623, 71 Am. Dec. 291.

Kentucky.— Louisville, etc., R. Co. *v.* Breeden, 111 Ky. 729, 64 S. W. 667, 23 Ky. L. Rep. 1021, 1763.

Louisiana.— Muntz *v.* Algiers, etc., R. Co., 111 La. 423, 35 So. 624, 100 Am. St. Rep. 495, 64 L. R. A. 222.

Minnesota.— Freeman *v.* Minneapolis, etc., R. Co., 28 Minn. 443, 10 N. W. 594.

New York.— Abbott *v.* Johnstown, etc., Horse R. Co., 80 N. Y. 27, 36 Am. Rep. 572.

Oregon.— Lakin *v.* Willamette Valley, etc., R. Co., 13 Oreg. 436, 11 Pac. 68, 57 Am. Rep. 25.

Pennsylvania.— Van Steuben *v.* New Jersey Cent. R. Co., 178 Pa. St. 367, 35 Atl. 992, 34 L. R. A. 577 [*reversing* 4 Pa. Dist. 153].

Texas.—International, etc., R. Co. *v.* Eckford, 71 Tex. 274, 8 S. W. 679; International, etc., R. Co. *v.* Dunham, 68 Tex. 231, 4 S. W. 472, 2 Am. St. Rep. 484; Central, etc., R. Co. *v.* Morris, 68 Tex. 49, 3 S. W. 457; International, etc., R. Co. *v.* Underwood, 67 Tex. 589, 4 S. W. 216; Missouri, etc., R. Co. *v.* Owens, (Civ. App. 1903) 75 S. W. 579; Galveston, etc., R. Co. *v.* Garteiser, 9 Tex. Civ. App. 456, 29 S. W. 939.

West Virginia.— Fisher *v.* West Virginia, etc., R. Co., 39 W. Va. 366, 19 S. E. 578, 23 L. R. A. 758.

United States.— Briscoe *v.* Southern Kansas R. Co., 40 Fed. 273.

See 41 Cent. Dig. tit. "Railroads," §§ 803, 804.

23. Chicago, etc., R. Co. *v.* Doan, 195 Ill. 168, 62 N. E. 826 [*affirming* 93 Ill. App. 247]; Wabash R. Co. *v.* Keeler, 127 Ill. App. 265; Chicago Union Traction Co. *v.* Stanford, 104 Ill. App. 99; Smith *v.* Atlanta, etc., R. Co., 130 N. C. 344, 42 S. E. 139, 131 N. C. 616, 42 S. E. 976; Perry *v.* Western North Carolina R. Co., 129 N. C. 333, 40 S. E. 191, 128 N. C. 471, 39 S. E. 27; Raleigh *v.* North Carolina R. Co., 129 N. C. 265, 40 S. E. 2; Benton *v.* North Carolina R. Co., 122 N. C. 1007, 30 S. E. 333; Kinney *v.* North Carolina R. Co., 122 N. C. 961, 30 S. E. 313; Norton *v.* North Carolina R. Co., 122 N. C. 910, 29 S. E. 886; Jackson *v.* Southern R. Co., 77 S. C. 550, 58 S. E. 605.

24. Little Rock, etc., R. Co. *v.* Daniels, 68 Ark. 171, 56 S. W. 874; Heron *v.* St. Paul, etc., R. Co., 68 Minn. 542, 71 N. W. 706;

the authority to lease implies an exemption from liability on the part of the lessor for the torts of the lessee,[25] and others holding that no such exemption is implied but that to relieve the lessor from liability there must, in addition to the authority to lease, be an express provision to this effect.[26] Some of the cases make a distinction between injuries growing out of negligence in the operation of trains or the general management of the road over which the lessor could exercise no control and injuries due to the omission of duties owing to the public which are imposed primarily upon the lessor,[27] holding that an authorized lease relieves the lessor from liability as to negligence of the lessee in the operation of its trains,[28] but not for injuries due to defects in the track or road-bed,[29] station houses,[30] or a failure to construct fences or cattle-guards;[31] while in others a further distinction is made between the liability of the lessor to the public generally and to employees of the lessee.[32] Where the legislative authority to lease is given subject to any

Logan *v.* North Carolina R. Co., 116 N. C. 940, 21 S. E. 959.

The federal courts in determining this question will not be bound by the rule of the state courts in the jurisdiction in which the courts sit. Curtis *v.* Cleveland, etc., R. Co., 140 Fed. 777; Yeates *v.* Illinois Cent. R. Co., 137 Fed. 943.

25. *Arkansas.*— Little Rock, etc., R. Co. *v.* Daniels, 68 Ark. 171, 56 S. W. 874.

Kansas.— Caruthers *v.* Kansas City, etc., R. Co., 59 Kan. 629, 54 Pac. 673, 44 L. R. A. 737.

Maine.— Mahoney *v.* Atlantic, etc., R. Co., 63 Me. 68 [*distinguishing* Stearns *v.* Atlantic, etc., R. Co., 44 Me. 95; Whitney *v.* Atlantic, etc., R. Co., 44 Me. 362, 69 Am. Dec. 103].

Michigan.— Ackerman *v.* Cincinnati, etc., R. Co., 143 Mich. 58, 106 N. W. 558, 114 Am. St. Rep. 640.

Minnesota.— Heron *v.* St. Paul, etc., R. Co., 68 Minn. 542, 71 N. W. 706.

New York.— See Philips *v.* New Jersey Northern R. Co., 62 Hun 233, 16 N. Y. Suppl. 909; Fisher *v.* Metropolitan El. R. Co., 34 Hun 433.

Pennsylvania.— Pinkerton *v.* Pennsylvania Traction Co., 193 Pa. St. 229, 44 Atl. 284 [*distinguishing* Hanlon *v.* Philadelphia, etc., Turnpike Road Co., 182 Pa. St. 115, 37 Atl. 943]; Sceiwak *v.* Philadelphia, etc., R. Co., 4 Pa. Dist. 339.

Texas.— Missouri Pac. R. Co. *v.* Watts, 63 Tex. 549.

Virginia.— See Virginia Midland R. Co. *v.* Washington, 86 Va. 629, 10 S. E. 927, 7 L. R. A. 344.

United States.— Hayes *v.* Northern Pac. R. Co., 74 Fed. 279, 20 C. C. A. 52; Arrowsmith *v.* Nashville, etc., R. Co., 57 Fed. 165.

See 41 Cent. Dig. tit. "Railroads," §§ 803, 804.

26. *Georgia.*— Singleton *v.* Southwestern R. Co., 70 Ga. 464, 48 Am. Rep. 574.

Illinois.— Chicago, etc., R. Co. *v.* Hart, 209 Ill. 414, 70 N. E. 654, 66 L. R. A. 75 [*affirming* 104 Ill. App. 57]; Balsley *v.* St. Louis, etc., R. Co., 119 Ill. 68, 8 N. E. 859 [*reversing* 18 Ill. App. 79].

Kentucky.— McCabe *v.* Maysville, etc., R. Co., 112 Ky. 861, 66 S. W. 1054, 23 Ky. L. Rep. 2328; Illinois Cent. R. Co. *v.* Sheegog, 103 S. W. 323, 31 Ky. L. Rep. 691.

Massachusetts.— Braslin *v.* Somerville Horse R. Co., 145 Mass. 64, 13 N. E. 65.

North Carolina.— Brown *v.* Atlanta, etc., Air Line R. Co., 131 N. C. 455, 42 S. E. 911; Harden *v.* North Carolina R. Co., 129 N. C. 354, 40 S. E. 184, 85 Am. St. Rep. 747, 55 L. R. A. 784; Pierce *v.* North Carolina R. Co., 124 N. C. 83, 32 S. E. 399, 44 L. R. A. 316; Logan *v.* North Carolina R. Co., 116 N. C. 940, 21 S. E. 959.

Ohio.— Fisher *v.* Baltimore, etc., R. Co., 6 Ohio S. & C. Pl. Dec. 67, 30 Ohio N. P. 283.

South Carolina.— Harmon *v.* Columbia, etc., R. Co., 28 S. C. 401, 5 S. E. 835, 13 Am. St. Rep. 686.

See 41 Cent. Dig. tit. "Railroads," §§ 803, 804.

In Georgia the rule that the lessor is not relieved from liability without legislative sanction expressly exempting it has been adopted and codified as a part of the law of that state. Georgia R., etc., Co. *v.* Haas, 127 Ga. 187, 56 S. E. 313.

27. Lee *v.* Southern Pac. R. Co., 116 Cal. 97, 47 Pac. 932, 58 Am. St. Rep. 140, 38 L. R. A. 71; St. Louis, etc., R. Co. *v.* Curl, 28 Kan. 622; Nugent *v.* Boston, etc., R. Co., 80 Me. 62, 12 Atl. 797, 6 Am. St. Rep. 151; Hayes *v.* Northern Pac. R. Co., 74 Fed. 279, 20 C. C. A. 52; Arrowsmith *v.* Nashville, etc., R. Co., 57 Fed. 165.

Elsewhere it has been expressly denied that any distinction exists with regard to the liability of the lessor company between injuries due to the omission of a duty resting upon the lessor, such as the defective condition of the track or bridges existing at the time of the lease, and injuries due to the negligence of the lessee's servants in the operation of its trains. Harmon *v.* Columbia, etc., R. Co., 28 S. C. 401, 5 S. E. 835, 13 Am. St. Rep. 686.

28. Hayes *v.* Northern Pac. R. Co., 74 Fed. 279, 20 C. C. A. 52; Arrowsmith *v.* Nashville, etc., R. Co., 57 Fed. 165.

29. Lee *v.* Southern Pac. R. Co., 116 Cal. 97, 47 Pac. 932, 58 Am. St. Rep. 140, 38 L. R. A. 71.

30. Nugent *v.* Boston, etc., R. Co., 80 Me. 62, 12 Atl. 797, 6 Am. St. Rep. 151.

31. St. Louis, etc., R. Co. *v.* Curl, 28 Kan. 622.

32. See *infra*, X, C, 4, h.

conditions or restrictions, the company acting upon such authority is bound by the conditions imposed,[33] and in some jurisdictions there are statutes expressly providing that the lessor shall remain liable as if it operated the road itself.[34] Where the lessor is liable for the negligence of the lessee, such liability applies to an injury occurring at a point beyond the limits of the leased road, upon the track of another company, where the license to use such track was acquired by the lessor and was derived by the lessee through the lease.[35]

(II) *LIABILITY OF LESSEE.* The authorities are uniform to the effect that the lessee company is liable for its own negligence or that of its servants in the operation of the leased road,[36] and by the weight of authority is subject to the statutory liabilities for fires communicated by its locomotives,[37] and for injury to animals where the road is not fenced.[38] The fact that the lessor company may also be liable in no way affects the liability of the lessee,[39] and as regards the liability of the lessee it is immaterial whether the lease was authorized or not,[40] nor can the lessee avoid its liability as to third persons by any contract or agreement with the lessor.[41] Where a railroad company leases the road of another it takes the road subject to the duties and liabilities imposed by the general law upon the lessor, and cannot, with respect to the operation of the leased road, claim the benefit of any special exemptions from liability contained in its own original charter.[42] The lessee of a railroad is also liable for injuries due to the negligence of the servants of an independent contractor, where such contractor is exercising any of the charter powers and franchises of the company with its assent.[43]

b. Assumption of Liabilities by Lessee. Where the lessor company would otherwise be liable for the acts of the lessee, such liability as to third persons is not affected by any covenant in the lease or contract between the companies, by which the lessee agrees to perform the duties and obligations of the lessor, or to indemnify the lessor for any liabilities incurred by reason of the acts of the lessee.[44]

33. Markey *v.* Louisiana, etc., R. Co., 185 Mo. 348, 84 S. W. 61.

34. Markey *v.* Louisiana, etc., R. Co., 185 Mo. 348, 84 S. W. 61; Fisher *v.* Baltimore, etc., R. Co., 6 Ohio S. & C. Pl. Dec. 67, 3 Ohio N. P. 283; Axline *v.* Toledo, etc., R. Co., 138 Fed. 169; Keller *v.* Kansas City, etc., R. Co., 135 Fed. 202.

Application of statutes to injuries to employees of lessee see *infra*, X, C, 4, h.

A railroad company chartered by congress is a "corporation of another state" within the application of the Missouri statute, providing that where a corporation of that state leases its road to a corporation of another state, it shall remain liable as if it operated the road itself. Smith *v.* Pacific R. Co., 61 Mo. 17.

35. Bouknight *v.* Charlotte, etc., R. Co., 41 S. C. 415, 19 S. E. 915.

36. Linfield *v.* Old Colony R. Corp., 10 Cush. (Mass.) 562, 57 Am. Dec. 124; Cantlon *v.* Eastern R. Co., 45 Minn. 481, 48 N. W. 22; International, etc., R. Co. *v.* Dunham, 68 Tex. 231, 4 S. W. 472, 2 Am. St. Rep. 484; Texas, etc., R. Co. *v.* Ross, 7 Tex. Civ. App. 653, 27 S. W. 728.

Crossing signals.—A railroad company operating a railroad as lessee is subject to the statutory liability for failure to give crossing signals. Linfield *v.* Old Colony R. Corp., 10 Cush. (Mass.) 562, 57 Am. Dec. 124.

Where lessee becomes a new corporation.—The Georgia statute of 1889, authorizing a lease of the Western and Atlantic railroad, provided that the lessee should become a corporation under the laws of that state, to be known as the Western and Atlantic Railroad Company, and subject to be sued for any cause of action to which it might become liable. The Nashville, etc., R. Co. became the lessee. It was held that an action for an injury sustained upon the leased road was not maintainable against the Nashville, etc., R. Co., but must be brought against the Western and Atlantic R. Co., the new corporation which the lessee had become under the provisions of the statute. Nashville, etc., R. Co. *v.* Edwards, 91 Ga. 24, 16 S. E. 347.

37. See *infra*, X, C, 4, j.

38. See *infra*, X, C, 4, i.

39. Davis *v.* Providence, etc., R. Co., 121 Mass. 134.

40. Gould *v.* Bangor, etc., R. Co., 82 Me. 122, 19 Atl. 84; Feital *v.* Middlesex R. Co., 109 Mass. 398, 12 Am. Rep. 720.

41. Clary *v.* Iowa Midland R. Co., 37 Iowa 344.

42. McMillan *v.* Michigan Southern, etc., R. Co., 16 Mich. 79, 93 Am. Dec. 208.

43. Suburban R. Co. *v.* Balkwill, 195 Ill. 535, 63 N. E. 389 [*affirming* 94 Ill. App. 454].

44. St. Louis, etc., R. Co. *v.* Curl, 28 Kan. 622 (holding that the lessor company is liable for injury to crops due to the absence of cattle-guards, although the lease provided that the lessee should perform all duties then

c. Liability of Lessee For Prior Acts or Omissions of Lessor. A railroad company operating a railroad under a lease is not liable for torts committed by the lessor prior to the execution of the lease,[45] or for permanent injuries to property due to the original construction of the road by the lessor;[46] but it is liable for subsequent injuries resulting from the continuance of a nuisance on the right of way, although it existed when the lease was made,[47] or for subsequent injuries due to the defective condition of the track or road-bed, although such defects were in the original construction or existed at the time of the lease.[48]

d. Operation by Lessee in Name or Interest of Lessor. The lessor company is liable for injuries occurring in the operation of its road by a lessee, where the road is being operated in the name [49] or wholly in the interest of the lessor company.[50]

e. Retention of Possession or Control by Lessor. Regardless of the effect of a lease in ordinary cases, if the lessor company retains a control over the operation of the road it will be liable for injuries resulting from such operation;[51] and conversely, a railroad company acquiring by lease or contract the right to operate trains over the road of another will be liable for injuries negligently done by such trains, although run in conformity with the time-tables of the lessor,[52] or under the direction and control of an agent or employee of the lessor.[53] If the lessor and lessee have a joint right of control, a person injured may sue either or both.[54]

f. Defects in Road-Bed or Other Property. It is ordinarily held that the lessor company is liable for injuries due to the condition of its track or road-bed,[55]

existing or thereafter imposed upon the lessor); Nugent *v.* Boston, etc., R. Co., 80 Me. 62, 12 Atl. 797, 6 Am. St. Rep. 151 (holding that the lessor is liable for personal injuries due to the defective condition of a station house, although the lease contained a covenant that the lessee would save the lessor harmless against all claims for injuries arising during the term of the lease). *Compare* Philips *v.* New Jersey Northern R. Co., 62 Hun (N. Y.) 233, 16 N. Y. Suppl. 909, where, however, it is stated that the contract by the terms of which the lessee became exclusively liable for the negligence of its servants in the operation of its trains was authorized by the legislature.

45. Pittsburg, etc., R. Co. *v.* Kain, 35 Ind. 291.

46. Guinn *v.* Ohio River R. Co., 46 W. Va. 151, 33 S. E. 87, 76 Am. St. Rep. 806.

47. Western, etc., R. Co. *v.* Cox, 93 Ga. 561, 20 S. E. 68; Tate *v.* Missouri, etc., R. Co., 64 Mo. 149.

48. See *infra*, X, C, 4, f.

49. Singleton *v.* Southwestern R. Co., 70 Ga. 464, 48 Am. Rep. 574; Bower *v.* Burlington, etc., R. Co., 42 Iowa 546.

50. Southern R. Co. *v.* Bouknight, 70 Fed. 442, 17 C. C. A. 181, 30 L. R. A. 823.

51. Driscoll *v.* Norwich, etc., R. Co., 65 Conn. 230, 32 Atl. 354 (holding that the lessor is liable where, by the terms of the lease, the managing agent appointed by the lessee was to be a person satisfactory to the lessor, and the treasurer of the lessor was to collect the earnings, pay the expenses, and after deducting the rent due pay over any balance to the lessee); Cincinnati, etc., R. Co. *v.* Sleeper, 5 Ohio Dec. (Reprint) 196, 3 Am. L. Rec. 464 (holding that the lessor is liable where by the terms of the lease the road was to be operated by a committee, one member of which was to be appointed by each company); Chesapeake, etc., R. Co. *v.* Howard, 178 U. S. 153, 20 S. Ct. 880, 44 L. ed. 1015 [*affirming* 14 App. Cas. (D. C.) 262].

Where the lease is made by trustees named in a mortgage for the benefit of bondholders, but such trustees by agreement with the lessee continue to operate and control the road, for the lessee, selecting the employees, receiving the earnings, paying expenses, and after deducting the rent due paying over any balance to the lessee, the trustees are liable for injuries occurring in the operation of the road. Ballou *v.* Farnum, 9 Allen (Mass.) 47.

52. Clary *v.* Iowa Midland R. Co., 37 Iowa 344.

53. Wabash, etc., R. Co. *v.* Peyton, 106 Ill. 534, 46 Am. Rep. 705, holding that where the lessee agrees that its trains shall be operated over the portion of the road leased under the orders and control of the yard master of the lessor, he must with regard to such trains be deemed the servant of the lessee.

54. Cincinnati, etc., R. Co. *v.* Sleeper, 5 Ohio Dec. (Reprint) 196, 3 Am. L. Rec. 464.

55. Lee *v.* Southern Pac. R. Co., 116 Cal. 97, 47 Pac. 932, 58 Am. St. Rep. 140, 38 L. R. A. 71; Southern R. Co. *v.* Sittasen, (Ind. App. 1905) 74 N. E. 898; Illinois Cent. R. Co. *v.* Sheegog, 103 S. W. 323, 31 Ky. L. Rep. 691; Trinity, etc., R. Co. *v.* Lane, 79 Tex. 643, 15 S. W. 477, 16 S. W. 18.

Flooding lands.— The lessor company is liable for injury to property by flooding due to defects in the original construction of its culverts, but not for a trespass committed by the servants of the lessee upon adjoining lands when repairing such defects. Chicago, etc., R. Co. *v.* Eichman, 47 Ill. App. 156.

or station house,[56] even under circumstances where it is conceded that it would not be liable for negligence of the lessee in the operation of its trains.[57] The lessee company is also liable for injuries due to the dangerous or improper condition of stations or station grounds,[58] or for injuries occurring during its operation of the road due to the defective condition of the track or road-bed, although such defects were in the original construction or existed at the time of the lease.[59]

g. Liability to Passengers or Shippers of Goods. In a number of cases the general rules holding the lessor company liable for the acts of the lessee where the lease was unauthorized or no express exemption from liability provided have been applied, apparently without any question being raised as to any distinction growing out of the nature of the liability, in actions for damages for personal injuries to passengers,[60] loss or delay of shipments of goods in transit,[61] and a refusal to transport goods upon demand,[62] and in a few cases it has been expressly held that no distinction exists between the liabilities arising *ex delicto* and *ex contractu*.[63]

h. Injury to Employees. In a few cases it has been held that the liability of the lessor for torts of the lessee, growing out of the fact that there was no authority for the lease or no express exemption from liability granted, applies to injuries to employees of the lessee as well as to the public generally,[64] and this notwithstanding the injury was not due to a defect in the road but solely to negligence in the operation of the trains.[65] Others, while expressly recognizing the liability of the lessor as to the public generally, hold that the rule does not apply to employ-

56. Nugent *v.* Boston, etc., R. Co., 80 Me. 62, 12 Atl. 797, 6 Am. St. Rep. 151.

Lease of part of right of way for eating house.— The fact that a railroad company leases a portion of its right of way near a station to a private person for the erection of an eating house, in which the railroad company has no interest, will not render the company liable for an injury to a patron of the house due to the defective condition of the steps of the house or the fact that it was not properly lighted. Texas, etc., R. Co. *v.* Mangum, 68 Tex. 342, 4 S. W. 617.

57. Lee *v.* Southern Pac. R. Co., 116 Cal. 97, 47 Pac. 932, 58 Am. St. Rep. 140, 38 L. R. A. 71. See also *supra*, X, C, 4, a, (I).

58. See Montgomery, etc., R. Co. *v.* Thompson, 77 Ala. 448, 54 Am. Rep. 72.

59. Littlejohn *v.* Fitchburg, etc., R. Co., 148 Mass. 478, 20 N. E. 103, 2 L. R. A. 502; Wasmer *v.* Delaware, etc., R. Co., 80 N. Y. 212, 36 Am. Rep. 608; Philadelphia, etc., R. Co. *v.* Anderson, 94 Pa. St. 351, 39 Am. Rep. 787.

60. *Georgia.*— Singleton *v.* Southwestern R. Co., 70 Ga. 464, 48 Am. Rep. 574.

Illinois.—Chicago, etc., R. Co. *v.* Doan, 195 Ill. 168, 62 N. E. 826 [*affirming* 93 Ill. App. 247]; Chicago Union Traction Co. *v.* Stanford, 104 Ill. App. 99.

Massachusetts.— Braslin *v.* Summerville Horse R. Co., 145 Mass. 64, 13 N. E. 65.

North Carolina.— Tillett *v.* Norfolk, etc., R. Co., 118 N. C. 1031, 24 S. E. 111.

Texas.— International, etc., R. Co. *v.* Underwood, 67 Tex. 589, 4 S. W. 216.

See 41 Cent. Dig. tit. "Railroads," § 812.

The contrary doctrine, recognized in some jurisdictions, that authority to lease exempts the lessor from liability for the negligence of the lessee, has also been applied to cases of personal injuries to passengers. Mahoney *v.* Atlantic, etc., R. Co., 63 Me. 68; Fisher *v.* Metropolitan El. R. Co., 34 Hun (N. Y.) 433; Arrowsmith *v.* Nashville, etc., R. Co., 57 Fed. 165.

A failure to stop at a station and afford a passenger an opportunity to alight is a breach of a public duty which renders the lessor liable where the road is being operated by a lessee. Pickens *v.* Georgia R., etc., Co., 126 Ga. 517, 55 S. E. 171.

61. Ohio, etc., R. Co. *v.* Dunbar, 20 Ill. 623, 71 Am. Dec. 291; Langley *v.* Boston, etc., R. Co., 10 Gray (Mass.) 103; International, etc., R. Co. *v.* Moody, 71 Tex. 614, 9 S. W. 465. See also International, etc., R. Co. *v.* Thornton, 3 Tex. Civ. App. 197, 22 S. W. 67, holding, however, that if the lessor is liable in such cases it is also entitled to the benefit of a stipulation in the contract of shipment limiting the liability to losses upon its own line.

62. Central, etc., R. Co. *v.* Morris, 68 Tex. 49, 3 S. W. 457.

63. Bouknight *v.* Charlotte, etc., R. Co., 41 S. C. 415, 19 S. E. 915 (holding that the lessor company is liable for personal injuries to a passenger); Chester Nat. Bank *v.* Atlanta, etc., R. Co., 25 S. C. 216 (holding that the lessor company is liable for the refusal of the lessee to deliver freight). But see Mahoney *v.* Atlantic, etc., R. Co., 63 Me. 68; Arrowsmith *v.* Nashville, etc., R. Co., 57 Fed. 165.

64. Chicago, etc., R. Co. *v.* Hart, 209 Ill. 414, 70 N. E. 654, 66 L. R. A. 75 [*affirming* 104 Ill. App. 57]; Logan *v.* North Carolina R. Co., 116 N. C. 940, 21 S. E. 959; Reed *v.* Southern R. Co., 75 S. C. 162, 55 S. E. 218.

65. Logan *v.* North Carolina R. Co., 116 N. C. 940, 21 S. E. 959.

ees of the lessee and that they cannot recover from the lessor for injuries due to the negligence of the lessee;[66] and others, while recognizing this latter view as applicable to injuries due to negligence in the operation of trains or defective machinery and appliances, hold that the lessor is liable for injuries to the employees of the lessee due to the condition of the track or road-bed,[67] or station houses.[68] There is a similar conflict even under statutes expressly providing that the lessor shall remain liable as if it operated the road itself; it being held under some that the provision applies to injuries to employees of the lessee,[69] and under others that the provision applies only to the duties of the company as a common carrier and not to injuries to employees due to the negligence of the lessee.[70]

i. Fences, Cattle-Guards, and Injury to Animals. In actions for injuries to animals if the action is based upon the negligence of the lessee the case depends upon the general principles above stated,[71] and the lessor will be liable where the lease was unauthorized,[72] or where it is held that an express exemption as well as authority to lease is necessary,[73] or the statute expressly provides that the liability of the lessor shall continue;[74] but not where the lease is authorized and it is held that authority to lease exempts the lessor from liability for the negligence of the lessee.[75] The lessee will also be liable for its own negligence.[76] Under statutes imposing a liability without regard to the question of negligence, for injuries to animals where the road is not fenced or provided with cattle-guards, it is ordinarily held that the lessor company is liable although the injury is inflicted by the trains of the lessee;[77] and that such liability also applies to injuries due

66. *Georgia.*— Banks *v.* Georgia R., etc., Co., 112 Ga. 655, 37 S. E. 992.

Indiana.— Baltimore, etc., R. Co. *v.* Paul, 143 Ind. 23, 40 N. E. 519, 28 L. R. A. 216.

Kentucky.— Swice *v.* Maysville, etc., R. Co., 116 Ky. 253, 75 S. W. 278, 25 Ky. L. Rep. 436; Lewis *v.* Maysville, etc., R. Co., 76 S. W. 526, 25 Ky. L. Rep. 948.

Mississippi.— Buckner *v.* Richmond, etc., R. Co., 72 Miss. 873, 18 So. 449.

Texas.— Evans *v.* Sabine, etc., R. Co., (1892) 18 S. W. 493; East Line, etc., R. Co. *v.* Culberson, 72 Tex. 375, 10 S. W. 706, 13 Am. St. Rep. 805, 3 L. R. A. 567.

Virginia.— Virginia Midland R. Co. *v.* Washington, 86 Va. 629, 10 S. E. 927, 7 L. R. A. 344.

United States.— Williard *v.* Spartanburg, etc., R. Co., 124 Fed. 796; Hukill *v.* Maysville, etc., R. Co., 72 Fed. 745.

See 41 Cent. Dig. tit. "Railroads," § 813.

67. Lee *v.* Southern Pac. R. Co., 116 Cal. 97, 47 Pac. 932, 58 Am. St. Rep. 140, 38 L. R. A. 71; Southern R. Co. *v.* Sittasen, (Ind. App. 1905) 74 N. E. 898; Illinois Cent. R. Co. *v.* Sheegog, 103 S. W. 323, 31 Ky. L. Rep. 691; Trinity, etc., R. Co. *v.* Lane, 79 Tex. 643, 15 S. W. 477, 16 S. W. 18. See also Banks *v.* Georgia R., etc., Co., 112 Ga. 655, 37 S. E. 992; East Line, etc., R. Co. *v.* Culberson, 72 Tex. 375, 10 S. W. 706, 13 Am. St. Rep. 805, 3 L. R. A. 567.

The proper ground of distinction has been held to be whether the injury to the employee was due to a breach of duty owing to the public generally or a duty arising out of the relation of employer and employee, such as a duty to provide a safe place to work in. Travis *v.* Kansas City, etc., R. Co., 119 La. 489, 44 So. 274, 121 Am. St. Rep. 526, 10 L. R. A. N. S. 1189, holding that in case of an injury to an employee of the lessee company due to a switch-yard not being properly lighted the duty was of the latter character and the lessor company not liable.

68. Nugent *v.* Boston, etc., R. Co., 80 Me. 62, 12 Atl. 797, 6 Am. St. Rep. 151.

69. Markey *v.* Louisiana, etc., R. Co., 185 Mo. 348, 84 S. W. 61. See also Brady *v.* Kansas City, etc., R. Co., 206 Mo. 509, 102 S. W. 978, 105 S. W. 1195.

70. Axline *v.* Toledo, etc., R. Co., 138 Fed. 169; Beltz *v.* Baltimore, etc., R. Co., 137 Fed. 1016.

71. See *supra*, X, C, 4, a.

72. International, etc., R. Co. *v.* Dunham, 68 Tex. 231, 4 S. W. 472, 2 Am. St. Rep. 484; Briscoe *v.* Southern Kansas R. Co., 40 Fed. 273.

73. Harmon *v.* Columbia, etc., R. Co., 28 S. C. 401, 5 S. E. 835, 13 Am. St. Rep. 686.

74. Brown *v.* Hannibal, etc., R. Co., 27 Mo. App. 394.

75. Little Rock, etc., R. Co. *v.* Daniels, 68 Ark. 171, 56 S. W. 874.

76. International, etc., R. Co. *v.* Dunham, 68 Tex. 231, 4 S. W. 472, 2 Am. St. Rep. 484.

77. *California.*—Fontaine *v.* Southern Pac. R. Co., 54 Cal. 645.

Indiana.— Ft. Wayne, etc., R. Co. *v.* Hinebaugh, 43 Ind. 354.

Missouri.— Price *v.* Barnard, 70 Mo. App. 175.

Oregon.— Eaton *v.* Oregon R., etc., Co., 19 Oreg. 391, 397, 24 Pac. 415, 417.

Vermont.— Nelson *v.* Vermont, etc., R. Co., 26 Vt. 717, 62 Am. Dec. 614.

Washington.— Oregon R., etc., Co. *v.* Dacres, 1 Wash. 195, 23 Pac. 415.

See 41 Cent. Dig. tit. "Railroads," §§ 814, 815.

to defects occurring in the fences or cattle-guards previously constructed by the lessor.[78] It is also held that the lessee is subject to the same liability for injuries due to the absence of fences or cattle-guards,[79] or a failure to keep those constructed in repair,[80] and in some cases the statutes imposing the duty or liability apply in terms to lessees.[81] The lessee company cannot avoid its liability by any contract or agreement with the lessor,[82] nor is it material as regards the lessee whether the lease was authorized or not.[83] So also in case of injury to crops by trespassing animals due to a failure to construct cattle-guards as required by statute, where the road passes through inclosed land, it is held that both the lessor [84] and the lessee[85] are liable.

j. Fires. In actions for damages caused by fires communicated by locomotives, if the action is based upon the negligence of the lessee in regard to the operation or condition of its locomotives, the liability of the lessor company depends upon the general principles above stated as to the liability of the lessor for the negligence of the lessee,[86] and the lessee company will be liable for its own negligence.[87] If the action is based upon statutes imposing a liability for all damages by fire communicated by locomotives, the lessor company is liable if the statute authorizing the lease provides that it shall not exonerate the lessor company from any duty or liability imposed by its charter or the general laws of the state,[88] or, it is held, even where the statute merely provides that every railroad company shall be liable for all damages caused by fires communicated by "its" locomotives; [89]

Contra.— Stephens *v.* Davenport, etc., R. Co., 36 Iowa 327; Throne *v.* Lehigh Valley R. Co., 88 Hun (N. Y.) 141, 34 N. Y. Suppl. 525; Van Natter *v.* Buffalo, etc., R. Co., 27 U. C. Q. B. 581.

78. Whitney *v.* Atlantic, etc., R. Co., 44 Me. 362. 69 Am. Dec. 103; Harris *v.* Quincy, etc., R. Co., 124 Mo. App. 45, 101 S. W. 601.

Where the fence is constructed pursuant to a contract between the lessor company and an adjoining landowner that company is liable for injury to an animal due to the defective condition of the fence, although the road is being operated by a lessee. Howard *v.* Maysville, etc., R. Co., 70 S. W. 631, 24 Ky. L. Rep. 1051.

79. *Iowa.*— Stewart *v.* Chicago, etc., R. Co., 27 Iowa 282 [*distinguishing* Liddle *v.* Keokuk, etc., R. Co., 23 Iowa 378].

New York.— Tracy *v.* Troy, etc., R. Co., 38 N. Y. 433, 98 Am. Dec. 54 [*affirming* 55 Barb. 529].

Vermont.— Clement *v.* Canfield, 28 Vt. 302.

Wisconsin.— McCall *v.* Chamberlain, 13 Wis. 637. See also Cook *v.* Milwaukee, etc., R. Co., 36 Wis. 45.

Canada.— Holmes *v.* Grand Trunk R. Co., 27 U. C. Q. B. 595. *Contra,* Bennett *v.* Covert, 24 U. C. Q. B. 38.

See 41 Cent. Dig. tit. "Railroads," §§ 814, 815.

80. Gould *v.* Bangor, etc., R. Co., 82 Me. 122, 19 Atl. 84.

81. Wabash R. Co. *v.* Williamson, 3 Ind. App. 190, 29 N. E. 455; Clary *v.* Iowa Midland R. Co., 37 Iowa 344; Burchfield *v.* Northern Cent. R. Co., 57 Barb. (N. Y.) 589.

In Indiana under a former statute it was held that the lessee company was not liable unless operating the road in the name of the lessor (Pittsburgh, etc., R. Co. *v.* Currant, 61 Ind. 38; Pittsburgh, etc., R. Co. *v.* Hannon, 60 Ind. 417; Pittsburgh, etc., R. Co. *v.* Bolner, 57 Ind. 572); but under the statute of 1881 the lessee is liable, although operating the road in its own name (Wabash R. Co. *v.* Williamson, 3 Ind. App. 190, 29 N. E. 455).

A company operating a road under a contract with the company owning it will be deemed a lessee within the application of the statute. Burchfield *v.* Northern Cent. R. Co., 57 Barb. (N. Y.) 589.

82. Clary *v.* Iowa Midland R. Co., 37 Iowa 344.

83. Gould *v.* Bangor, etc., R. Co., 82 Me. 122, 19 Atl. 84.

84. St. Louis, etc., R. Co. *v.* Curl, 28 Kan. 622.

85. Missouri Pac. R. Co. *v.* Morrow, 32 Kan. 217, 4 Pac. 87.

86. Heron *v.* St. Paul, etc., R. Co., 68 Minn. 542, 71 N. W. 706 (holding that the lessor company is not liable where the lease is authorized, as such authority impliedly exempts the lessor from liability); Fisher *v.* Baltimore, etc., R. Co., 6 Ohio S. & C. Pl. Dec. 67, 3 Ohio N. P. 283 (holding that the lessor company is liable either by virtue of the statute providing that lessors shall remain liable or under the general rule that the lessor is liable, although the lease is authorized, unless there is also an express exemption from liability); Van Steuben *v.* New Jersey Cent. R. Co., 178 Pa. St. 367, 35 Atl. 992, 34 L. R. A. 577 [*reversing* 4 Pa. Dist. 153] (holding that the lessor company is liable where the lease is unauthorized).

87. Cantlon *v.* Eastern R. Co., 45 Minn 481, 48 N. W. 22; Texas, etc., R. Co. *v.* Ross, 7 Tex. Civ. App. 653, 27 S. W. 728.

88. Bean *v.* Atlantic, etc., R. Co., 63 Me. 293; Stearns *v.* Atlantic, etc., R. Co., 46 Me. 95.

89. Ingersoll *v.* Stockbridge, etc., R. Co., 8

and the lessor company, although the lease is authorized, is liable under a statute imposing a liability upon all railroad companies for damages by fire due to a failure to keep their rights of way clear of combustible matter.[90] The lessee company by whose locomotives the fire was communicated is also subject to the statutory liability.[91] A railroad company which leases a portion of its right of way to a private person remains liable for fires due to an accumulation of combustible material upon the portion leased.[92]

5. Companies Permitting Use of Road by Others — a. In General. A railroad company by the acceptance of its charter and franchises from the state assumes a responsibility toward the public for the proper exercise thereof which it cannot escape without legislative authority,[93] and if it permits others to use its road the latter must be deemed to do so as its agents,[94] otherwise the company owning the road might enjoy the pecuniary benefits of its franchise while escaping its liabilities, leaving the public without redress in case those permitted to use the road were irresponsible.[95] So where a railroad company owning a road permits another company or person to use the same, it will be liable for injuries to persons or property due to the actionable negligence of the latter while using the road;[96]

Allen (Mass.) 438, holding that the locomotives of the lessee must be deemed those of the lessor within the application of the statute. *Contra*, Lipfeld *v.* Charlotte, etc., R. Co., 41 S. C. 285, 19 S. E. 497 (holding that a statute making every railroad company liable for damages by fire communicated "by its locomotive engines" must be strictly construed, and that the lessor company will not be liable under the statute where the fire was communicated by an engine of the lessee, although such company might be held liable if the action was based upon the common-law liability for negligence on the part of the lessee in the operation of its trains); Hunter *v.* Columbia, etc., R. Co., 41 S. C. 86, 19 S. E. 197.

90. Balsley *v.* St. Louis, etc., R. Co., 119 Ill. 68, 8 N. E. 859, 59 Am. Rep. 784 [*reversing* 18 Ill. App. 79].

91. Davis *v.* Providence, etc., R. Co., 121 Mass. 134; MacDonald *v.* New York, etc., R. Co., 23 R. I. 558, 51 Atl. 578.

92. Sprague *v.* Atchison, etc., R. Co., 70 Kan. 359, 78 Pac. 828.

93. *Georgia.*— Macon, etc., R. Co. *v.* Mayes, 49 Ga. 355, 15 Am. Rep. 678.

Illinois.— Pennsylvania Co. *v.* Ellett, 132 Ill. 654, 24 N. E. 559.

Missouri.— McCoy *v.* Kansas City, etc., R. Co., 36 Mo. App. 445.

South Carolina.— Smalley *v.* Atlanta, etc., Air Line R. Co., 73 S. C. 572, 53 S. E. 1000 [*overruling* Pennington *v.* Atlanta, etc., R. Co., 35 S. C. 439, 14 S. E. 852].

West Virginia.— Ricketts *v.* Chesapeake, etc., R. Co., 33 W. Va. 433, 10 S. E. 801, 25 Am. St. Rep. 901, 7 L. R. A. 354.

Wisconsin.— Jefferson *v.* Chicago, etc., R. Co., 117 Wis. 549, 94 N. W. 289.

See 41 Cent. Dig. tit. "Railroads," §§ 817, 819.

94. Pennsylvania Co. *v.* Ellett, 132 Ill. 654, 24 N. E. 559; Harbert *v.* Atlanta, etc., R. Co., 74 S. C. 13, 53 S. E. 1001.

95. Macon, etc., R. Co. *v.* Mayes, 49 Ga. 355, 15 Am. Rep. 678; Jefferson *v.* Chicago, etc., R. Co., 117 Wis. 549, 94 N. W. 289.

96. *Alabama.*— Georgia Cent. R. Co. *v.* Wood, 129 Ala. 483, 29 So. 775; Highland Ave., etc., R. Co. *v.* South, 112 Ala. 642, 20 So. 1003.

Arkansas.— St. Louis, etc., R. Co. *v.* Chappell, 83 Ark. 94, 102 S. W. 893, 10 L. R. A. N. S. 1175.

Georgia.— Macon, etc., R. Co. *v.* Mayes, 49 Ga. 355, 15 Am. Rep. 678.

Illinois.— Chicago, etc., R. Co. *v.* Schmitz, 211 Ill. 446, 71 N. E. 1050 [*affirming* 113 Ill. App. 295]; Chicago, etc., R. Co. *v.* Meech, 163 Ill. 305, 45 N. E. 290 [*affirming* 59 Ill. App. 69]; Pennsylvania Co. *v.* Ellett, 132 Ill. 654, 24 N. E. 559; Illinois Cent. R. Co. *v.* Finnigan, 21 Ill. 646.

Kentucky.— Louisville, etc., R. Co. *v.* Breeden, 111 Ky. 729, 64 S. W. 667, 23 Ky. L. Rep. 1021, 1763. But see Harper *v.* Newport News, etc., R. Co., 90 Ky. 359, 14 S. W. 346, 12 Ky. L. Rep. 333, holding that the company owning the road is not liable for the negligence of the servants of another company using the road, where the latter company has the exclusive control and management of the road.

Louisiana.— Hollins *v.* New Orleans, etc., R. Co., 119 La. 418, 44 So. 159.

Missouri.— Price *v.* Barnard, 65 Mo. App. 649; McCoy *v.* Kansas City, etc., R. Co., 36 Mo. App. 445.

North Carolina.— Aycock *v.* Raleigh, etc., R. Co., 89 N. C. 321.

South Carolina.— Harbert *v.* Atlanta, etc., R. Co., 74 S. C. 13, 53 S. E. 1001; Smalley *v.* Atlanta, etc., R. Co., 73 S. C. 572, 53 S. E. 1000 [*overruling* Pennington *v.* Atlanta, etc., R. Co., 35 S. C. 439, 14 S. E. 852].

Texas.— Gulf, etc., R. Co. *v.* Miller, 98 Tex. 270, 83 S. W. 182 [*affirming* 35 Tex. Civ. App. 116, 79 S. W. 1109]; Ray *v.* Pecos, etc., R. Co., 35 Tex. Civ. App. 123, 80 S. W. 112; Gulf, etc., R. Co. *v.* Bryant, 30 Tex. Civ. App. 4, 66 S. W. 804.

West Virginia.— Ricketts *v.* Chesapeake, etc., R. Co., 33 W. Va. 433, 10 S. E. 801, 25 Am. St. Rep. 901, 7 L. R. A. 354.

United States.— Central Trust Co. *v.* Den-

and if a domestic corporation permits a foreign corporation to run trains over its road as a part of a through line, the domestic corporation will be liable for injuries sustained upon the portion of its road so used caused by the negligence or misconduct of the servants of the foreign corporation.[97] So also the lessee of a railroad which permits another to use the road will be liable for the negligence of the latter;[98] but if a train of one company is without lawful authority trespassing upon the tracks of another, the company owning the road is not liable for injuries due to the negligence of those in charge of the train.[99]

b. Defects in Road-Bed and Other Property. A railroad company owning a railroad which permits another company to use the road is liable for injuries to persons on the trains of the latter due to the defective condition of the road-bed, track, or bridges,[1] or to the defective condition or negligent management of

ver, etc., R. Co., 97 Fed. 239, 38 C. C. A. 143. But see Clymer *v.* Central R. Co., 5 Fed. Cas. No. 2,912, 5 Blatchf. 317.

See 41 Cent. Dig. tit. "Railroads," §§ 817, 819.

The company using the road is also liable for the negligence of its own servants, but this fact does not affect the liability of the company owning the road. Pennsylvania Co. *v.* Ellett, 132 Ill. 654, 24 N. E. 559.

Application of rule to particular acts or omissions.— The rule stated imposes a liability upon the company owning the road not only for the negligence of the other company in the operation of its trains (see cases cited *supra*, this note, in support of text); but also for the negligence or misconduct of the servants of that company in obstructing the track so as to cause a collision (Georgia Pac. R. Co. *v.* Underwood, 90 Ala. 49, 8 So. 116, 24 Am. St. Rep. 756); obstructing highway crossings with its cars (Bussian *v.* Milwaukee, etc., R. Co., 56 Wis. 325, 14 N. W. 452); failing to give the statutory crossing signals (Harbert *v.* Atlanta, etc., R. Co., 74 S. C. 13, 53 S. E. 1001); or in committing an assault upon one of its own passengers (Ricketts *v.* Chesapeake, etc., R. Co., 33 W. Va. 433, 10 S. E. 801, 25 Am. St. Rep. 901, 7 L. R. A. 354).

Injury on private tracks.— Where a railroad company constructs a switch-track through an elevator building owned by an elevator company, but does not own the switch or exercise any control over its use, such railroad company is not liable for injury to an employee of the elevator company caused by the negligent operation of cars within the elevator by other employees of the elevator company. Sauls *v.* Chicago, etc., R. Co., 36 Tex. Civ. App. 155, 81 S. W. 89. The owner of a private track laid by the owner by permission of a city across a street will be liable for injuries due to the negligence of a railroad company while backing cars upon such track, where the company was not engaged in its own business but was rendering a special and temporary service to the owner of the track. McWilliams *v.* Detroit Cent. Mills Co., 31 Mich. 274.

Where private persons hire a train to run an excursion, the railroad company will be liable for injuries inflicted by those in charge of the train upon a person who having purchased a ticket from the company at a station attempts to board the excursion train. Chesapeake, etc., R. Co. *v.* Osborne, 97 Ky. 112, 30 S. W. 21, 16 Ky. L. Rep. 815, 53 Am. St. Rep. 407.

Where a railroad company owns a switch track between its main track and a mining company's mines and furnishes the mining company with cars to be loaded and permits the mining company to return them by loosening the brakes and permitting them to run down a grade, the railroad company will be liable for injuries caused by such cars. Smith *v.* Atchison, etc., R. Co., 25 Kan. 738.

In New York it is held that under Laws (1890), as amended by Laws (1893), c. 433, authorizing any railroad corporation to contract with any other such corporation for the use of their respective roads, the company owning the road is not liable for the negligence of the servants of another company using the road under such a contract. Cain *v.* Syracuse, etc., R. Co., 27 N. Y. App. Div. 376, 50 N. Y. Suppl. 1 [*affirming* 20 Misc. 459, 45 N. Y. Suppl. 538].

97. Ricketts *v.* Chesapeake, etc., R. Co., 33 W. Va. 433, 10 S. E. 801, 25 Am. St. Rep. 901, 7 L. R. A. 354.

98. Pittsburgh, etc., R. Co. *v.* Campbell, 86 Ill. 443; Suburban R. Co. *v.* Balkwill, 94 Ill. App. 454 [*affirmed* in 195 Ill. 535, 63 N. E. 389]. See also Decker *v.* Erie R. Co., 85 N. Y. App. Div. 13, 82 N. Y. Suppl. 895, where the trains of the company permitted to use the road were operated under the control of the lessee.

99. Wormus *v.* Tennessee Coal, etc., Co., 97 Ala. 326, 12 So. 111.

1. Central R., etc., Co. *v.* Phinazee, 93 Ga. 488, 21 S. E. 66; Ellison *v.* Georgia R. Co., 87 Ga. 691, 13 S. E. 809; Augusta, etc., R. Co. *v.* Killian, 79 Ga. 234, 4 S. E. 165; Hamilton *v.* Louisiana, etc., R. Co., 117 La. 243, 41 So. 560, 6 L. R. A. N. S. 787; Southern Kansas R. Co. *v.* Sage, (Tex. Civ. App. 1904) 80 S. W. 1038 [*reversed* on other grounds in 98 Tex. 438, 84 S. W. 814]; Texas, etc., R. Co. *v.* Moore, 8 Tex. Civ. App. 289, 27 S. W. 962.

Condition of place for boarding trains.— The company owning a railroad is not liable for injury to a person about to board a

its switches,[2] although the injured persons were employees of the latter company;[3] but one company, by granting permission to another company to run trains over its road, does not become liable for injuries caused by the defective condition of a track constructed and controlled by the latter company for the purpose of connecting the two roads,[4] nor is the company owning the road liable for injuries to employees upon the trains of the other, due to a defective condition of the cars of that company.[5] A refrigerator car company which constructs and furnishes a car for transportation over a railroad will be liable for an injury to an employee of the railroad company due to the defective condition of the car.[6]

c. Failure to Fence and Injury to Animals.[7] A railroad company owning a road which it permits another to use will be liable for injuries to animals caused by the negligent operation of the trains of the latter;[8] and where the statutes require the road to be fenced the company owning it will be liable for injuries to animals resulting from its unfenced condition, although the injuries were inflicted by the trains of the other company;[9] and the fact that the duty of fencing is imposed by the statute upon companies using as well as those owning the road does not affect the liability of the company owning it.[10]

d. Fires. Where a railroad company owning a road permits another to operate trains thereon and property is damaged by fire communicated from the locomotives of the latter, the company owning the road will be liable for its own negligence contributing to the injury in allowing combustible material to accumulate upon the right of way,[11] or in furnishing to the company or person using the road defective or improperly equipped locomotives,[12] and also for the negligence of the company using its road in the operation of the locomotives from which the fire was communicated,[13] or their defective or improper condition or equip-

freight train as a passenger of another company using the road, caused by the condition of the road-bed at such place, if it was not the usual place for the reception of passengers and was sufficiently safe and suitable for the ordinary purposes of freight trains. Murch *v.* Concord R. Corp., 29 N. H. 9, 61 Am. Dec. 631.

2. Peoria, etc., R. Co. *v.* Lane, 83 Ill. 448; Chicago Terminal Transfer R. Co. *v.* Vandenberg, 164 Ind. 470, 73 N. E. 990; Stodder *v.* New York, etc., R. Co., 50 Hun (N. Y.) 221, 2 N. Y. Suppl. 780 [*affirmed* in 121 N. Y. 655, 24 N. E. 1092].

3. Rome R. Co. *v.* Thompson, 101 Ga. 26, 28 S. E. 429; Ellison *v.* Georgia R., etc., Co., 87 Ga. 691, 13 S. E. 809; Chicago Terminal Transfer R. Co. *v.* Vandenberg, 164 Ind. 470, 73 N. E. 990; Hamilton *v.* Louisiana, etc., R. Co., 117 La. 243, 41 So. 560, 6 L. R. A. N. S. 787; Trinity, etc., R. Co. *v.* Lane, 79 Tex. 643, 15 S. W. 477, 16 S. W. 18; Southern Kansas R. Co. *v.* Sage, (Tex. Civ. App. 1904) 80 S. W. 1038 [*reversed* on other grounds in 98 Tex. 438, 84 S. W. 814].

4. Gwathney *v.* Little Miami R. Co., 12 Ohio St. 92.

5. Augusta, etc., R. Co. *v.* Killian, 79 Ga. 234, 4 S. E. 165.

6. Leas *v.* Continental Fruit Express, (Tex. Civ. App. 1907) 99 S. W. 859.

7. **Liability of company using road** see *infra*, X, C, 6, c.

8. Georgia Cent. R. Co. *v.* Wood, 129 Ala. 483, 29 So. 775; Illinois Cent. R. Co. *v.* Finnigan, 21 Ill. 646.

9. *Illinois.*— East St. Louis, etc., R. Co. *v.* Gerber, 82 Ill. 632; Toledo, etc., R. Co. *v.* Rumbold, 40 Ill. 143.

Indiana.— Ft. Wayne, etc., R. Co. *v.* Hinebaugh, 43 Ind. 354; Indianapolis, etc., R. Co. *v.* Solomon, 23 Ind. 534.

Kansas.— Kansas City, etc., R. Co. *v.* Ewing, 23 Kan. 273.

Maine.— Wyman *v.* Penobscot, etc., R. Co., 46 Me. 162.

Michigan.— Bay City, etc., R. Co. *v.* Austin, 21 Mich. 390.

Missouri.— Sinclair *v.* Missouri, etc., R. Co., 70 Mo. App. 588; Price *v.* Barnard, 65 Mo. App. 649.

New York.— Haas *v.* New York Cent., etc., R. Co., 11 N. Y. App. Div. 625, 42 N. Y. Suppl. 302.

See 41 Cent. Dig. tit. "Railroads," § 821.

10. Bay City, etc., R. Co. *v.* Austin, 21 Mich. 390.

11. Heron *v.* St. Paul, etc., R. Co., 68 Minn. 542, 71 N. W. 706; Delaware, etc., R. Co. *v.* Salmon, 39 N. J. L. 299, 23 Am. Rep. 214; Aycock *v.* Raleigh, etc., R. Co., 89 N. C. 321.

12. Brady *v.* Jay, 111 La. 1071, 36 So. 132, holding that where a lumber company owning a logging railroad contracted with a person to cut and transport its timber over the road, the company owning the road furnishing the means of transportation, it will be liable for fires set by locomotives furnished to the contractor which were not equipped with spark arresters, although they were operated exclusively by the contractor.

13. *Arkansas.*— St. Louis, etc., R. Co. *v.* Chappell, 83 Ark. 94, 102 S. W. 893, 10 L. R. A. N. S. 1175.

ment;[14] but a railroad company which permits a municipal corporation to use land belonging to it and not in use for railroad purposes, as a public dumping ground for waste materials, is not liable for damages caused by fire originating in such materials, where the railroad company had no supervision or control over the work at such place and was not guilty of any negligence in respect to the origin of the fire.[15]

6. Companies Operating or Using Roads of Others — a. In General. The liability of a railroad company using the road of another depends upon its control over the agency causing the injury and the duty which it owes to the injured party,[16] and such company cannot be charged with negligence in failing to perform an act unless it has both the power and the right to perform it,[17] as where it could not do so without being guilty of an unwarrantable intrusion or trespass upon the rights or property of the company owning the road;[18] but it has been held that a railroad company, by assuming to use the road of another in a defective condition, must be held to assume a liability for any injuries resulting from such defects in the course of its own use of the road.[19] A railroad company using the road of another is held to the same degree of care in its use as if it owned the road,[20] and is liable for any negligence or misconduct on the part of its own employees while under its control and in the conduct of its business,[21] without regard

Minnesota.—Heron *v.* St. Paul, etc., R. Co., 68 Minn. 542, 71 N. W. 706.

Missouri.—McCoy *v.* Kansas City, etc., R. Co., 36 Mo. App. 445.

North Carolina.—Aycock *v.* Raleigh, etc., R. Co., 89 N. C. 321.

Texas.—Galveston, etc., R. Co. *v.* Burnett, (Civ. App. 1896) 37 S. W. 779.

See 41 Cent. Dig. tit. "Railroads," § 823.

The lessee of a railroad which permits another to use the road will be liable for damages caused by fire due to the negligence of the latter company. Pittsburgh, etc., R. Co. *v.* Camphell, 86 Ill. 443; Heron *v.* St. Paul, etc., R. Co., 68 Minn. 542, 71 N. W. 706.

In Missouri the statute expressly makes "each railroad corporation owning or operating a railroad" in the state responsible for damages by fire from locomotives used upon the road, and the fact that a subsequent section of the statute authorizes a railroad company to permit another to use its road does not affect the liability of the company owning the road for fires caused by the locomotives of the other. McFarland *v.* Missouri, etc., R. Co., 94 Mo. App. 336, 68 S. W. 105.

14. Delaware, etc., R. Co. *v.* Salmon, 39 N. J. L. 299, 23 Am. Rep. 214; Jefferson *v.* Chicago, etc., R. Co., 117 Wis. 549, 94 N. W. 289.

Absence of knowledge on the part of the company owning the road as to the defective condition or improper equipment of the other's locomotives does not affect its liability. Jefferson *v.* Chicago, etc., R. Co., 117 Wis. 549, 94 N. W. 289.

15. Denver, etc., R. Co. *v.* Porter, 126 Fed. 288, 61 C. C. A. 168.

16. Collier *v.* Great Northern R. Co., 40 Wash. 639, 82 Pac. 935.

17. Lake Shore, etc., R. Co. *v.* Kaste, 11 Ill. App. 536, holding that a company having merely the right to run its trains over the road of another is not liable for failing to remove cars over which it has no authority or control which were so placed by another company as to obstruct a crossing.

18. Lake Shore, etc., R. Co. *v.* Kaste, 11 Ill. App. 536 (holding that a railroad company having merely the right to use the track of another is not liable for failing to construct bell towers at crossings); Collier *v.* Great Northern R. Co., 40 Wash. 639, 82 Pac. 935 (holding that a company merely having the right to run trains over the road of another is not liable for not repairing defects in a highway crossing).

19. See *infra*, X, C, 6, b, c.

20. Webb *v.* Portland, etc., R. Co., 57 Me. 117; McGrath *v.* New York Cent., etc., R. Co., 63 N. Y. 522; Leonard *v.* New York Cent., etc., R. Co., 42 N. Y. Super. Ct. 225.

Flagmen at crossings.—A railroad company using the road of another must maintain flagmen at a crossing wherever a failure to do so would be actionable negligence on the part of the company owning the road. Webb *v.* Portland, etc., R. Co., 57 Me. 117; McGrath *v.* New York Cent., etc., R. Co., 63 N. Y. 522.

Statutes regulating the liability of railroad companies which are authorized to use the same tracks as between themselves do not affect the common-law liability of each with respect to third persons. Eaton *v.* Boston, etc., R. Co., 11 Allen (Mass.) 500, 87 Am. Dec. 730.

21. Jacksonville, etc., R. Co. *v.* Peninsular Land, etc., Co., 27 Fla. 1, 157, 9 So. 661, 17 L. R. A. 33, 65; Cleveland, etc., R. Co. *v.* Berry, 152 Ind. 607, 53 N. E. 415, 46 L. R. A. 33; Chicago, etc., R. Co. *v.* Groves, 56 Kan. 601, 11 Pac. 628; Clark *v.* Geer, 86 Fed. 447, 32 C. C. A. 295.

Obstructing tracks.—Where two railroads have a traffic arrangement for the interchange of cars and one places cars upon the track of the other at an unusual time of night without notice or danger signals, it is liable for injuries due to a collision with

to whether such company owns the train which its servants are operating,[22] or whether at the time they are rightfully or wrongfully in the occupation and use of the road,[23] and notwithstanding there was also negligence on the part of the company owning the road.[24] So a railroad company using the road of another is liable for the negligence of its own servants in the operation of its trains over the road,[25] and this notwithstanding the trains are operated under and subject to the rules and orders of the company owning the road if its servants are guilty of acts of negligence independent of and not attributable to the orders under which they are run;[26] but such company will not be liable if its servants, trains, and all their movements are at the time under the absolute and exclusive control of the company owning the road.[27] A railroad company using the road of another is not liable for injuries due solely to the negligence of the servants of the company owning the road in the operation of the trains of that company;[28] but will be liable for injuries incident to the operation of its own trains due to negligence on the part of servants in the employ of the company owning the road, such as gatemen or flagmen at crossings, whose services it adopts and relies upon instead of employing others of its own for such duties.[29]

such obstruction. Lockhart *v.* Little Rock, etc., R. Co., 40 Fed. 631.

Obstructing highway.—A railroad company using the road of another is liable for injuries due to the wrongful obstruction of a highway by its trains. Hall *v.* Brown, 54 N. H. 495, holding further that a company using the road of another is a proprietor of the road within the application of a statute providing under penalty that "no such proprietors shall obstruct" a highway with a train for over two minutes.

22. Fletcher *v.* Boston, etc., R. Co., 1 Allen (Mass.) 9, 79 Am. Dec. 695.

23. Jacksonville, etc., R. Co. *v.* Peninsular Land, etc., Co., 27 Fla. 1, 157, 9 So. 661, 17 L. R. A. 33, 65; Cleveland, etc., R. Co. *v.* Berry, 152 Ind. 607, 53 N. E. 415, 46 L. R. A. 33.

Unauthorized use of street.—If a railroad company which has no authority to use a street for the purpose of its road uses a connecting road constructed thereon by the government as a military necessity for its own purposes and not merely for military purposes under orders of the government, it is a wrong-doer and liable for any injury resulting from such use. Mississippi, etc., R. Co. *v.* Wilson, 10 Heisk. (Tenn.) 496.

24. Chicago, etc., R. Co. *v.* Mitchell, 70 Ill. App. 188.

25. *District of Columbia.*—Mills *v.* Orange, etc., R. Co., 1 MacArthur 285.

Florida.— Jacksonville, etc., R. Co. *v.* Peninsular Land, etc., Co., 27 Fla. 1, 157, 9 So. 661, 17 L. R. A. 33, 65.

Georgia.— Seaboard Air Line R. Co. *v.* Randolph, 126 Ga. 238, 55 S. E. 47.

Illinois.— Chicago Great Western R. Co. *v.* Mitchell, 70 Ill. App. 188.

Kansas.— Chicago, etc., R. Co. *v.* Groves, 56 Kan. 601, 11 Pac. 628.

New York.— Leonard *v.* New York Cent., etc., R. Co., 42 N. Y. Super. Ct. 225.

Pennsylvania.— Hanover R. Co. *v.* Coyle, 55 Pa. St. 396.

United States.— Clark *v.* Geer, 86 Fed. 447, 32 C. C. A. 295.

Canada.— Brewer *v.* Lake Erie, etc., R. Co., 2 Can. R. Cas. 257, 2 Ont. Wkly. Rep. 125.

See 41 Cent. Dig. tit. "Railroads," § 826.

But a railroad company using a private switch belonging to a manufacturing company, merely for the purpose of switching cars for the manufacturing company under its direction, will not be liable for an injury to an employee of the manufacturing company, which was not due to negligence on the part of the railroad company but to the fact that the place provided for him to work was rendered unsafe by the presence of the railroad company's engines in the proper exercise of its rights under the permission and control of the manufacturing company. Lake Erie, etc., R. Co. *v.* Gaughan, 26 Ind. App. 1, 58 N. E. 1072.

26. Chicago Great Western R. Co. *v.* Mitchell, 70 Ill. App. 188; Chicago, etc., R. Co. *v.* Posten, 59 Kan. 449, 53 Pac. 465; Chicago, etc., R. Co. *v.* Martin, 59 Kan. 437, 53 Pac. 461; Chicago, etc., R. Co. *v.* Groves, 56 Kan. 601, 11 Pac. 628; Clark *v.* Geer, 86 Fed. 447, 32 C. C. A. 295.

27. Smith *v.* St. Louis, etc., R. Co., 85 Mo. 418, 55 Am. Rep. 380; Burns *v.* Delaware, etc., R. Co., 116 N. Y. App. Div. 111, 101 N. Y. Suppl. 225; Atwood *v.* Chicago, etc., R. Co., 72 Fed. 447.

But to relieve the company from liability the control of the other company over its trains and servants must at the time be full and absolute. Garven *v.* Chicago, etc., R. Co., 100 Mo. App. 617, 75 S. W. 193.

Using track of union station company.—Where a railroad company in common with other railroad companies uses the tracks of a union station company, and all trains while on such tracks must be under the full management and control of the station company, the railroad company will not be liable for an injury done by one of its trains while its operation is so controlled. Burns *v.* Delaware, etc., R. Co., 116 N. Y. App. Div. 111, 101 N. Y. Suppl. 225.

28. Sprague *v.* Smith, 29 Vt. 421, 70 Am. Dec. 424.

29. Leonard *v.* New York Cent., etc., R.

b. Defects in Road-Bed, Tracks, or Cars. A railroad company which uses a defective road belonging to another will be liable for injuries occurring in its own use of the road due to its defective or dangerous condition;[30] and it has been held that such liability extends not only to passengers and employees but also to third persons rightfully on or near the track who may be injured by reason of its unsafe condition.[31] So also a railroad company which uses cars belonging to another will be liable for injuries due to their defective condition while using them for its own purposes.[32]

c. Failure to Fence and Injury to Animals. The authorities are conflicting as to whether a railroad company using the road of another is, irrespective of the question of negligence in the operation of its trains, liable under the statutes relating to the fencing of railroads, for injuries to animals occasioned by the unfenced condition of the road. In some cases it has been held that the question must be determined by the terms of the statute,[33] and that the company using the road of another will be liable where the statute in terms imposes the duty or liability upon such companies as well as those owning the road,[34] but not where such companies are not within the terms of the statute;[35] but on the contrary it has been held that irrespective of the terms of the statute the company using the road must on grounds of public policy be held subject to the statutory liability for assuming to use the road in an unfenced condition.[36]

d. Fires.[37] A railroad company using the road of another is liable for damages

Co., 42 N. Y. Super. Ct. 225; Cleveland, etc., R. Co. *v.* Schneider, 45 Ohio St. 678, 17 N. E. 321; Toledo, etc., Cent. R. Co. *v.* Hydell, 25 Ohio Cir. Ct. 579.

30. Illinois Terminal R. Co. *v.* Thompson, 210 Ill. 226, 71 N. E. 328 [*affirming* 112 Ill. App. 463]; Wisconsin Cent. R. Co. *v.* Ross, 142 Ill. 9, 31 N. E. 412, 34 Am. St. Rep. 49 [*affirming* 43 Ill. App. 454]; Illinois Cent. R. Co. *v.* Kanouse, 39 Ill. 272, 89 Am. Dec. 307; Sibbald *v.* Grand Trunk R. Co., 19 Ont. 164 [*affirmed* in 18 Ont. App. 184 (*affirmed* in 20 Can. Sup. Ct. 259)].

Defective sewer.— Where a railroad company takes possession of a railroad built by another company and there is under the railroad a defective sewer, the company will be responsible for damages to property caused thereby after it takes possession. Coyle *v.* Pittsburg, etc., R. Co., 18 Pa. Super. Ct. 235.

31. Wabash, etc., R. Co. *v.* Peyton, 106 Ill. 534, 46 Am. Rep. 705. But see Collier *v.* Great Northern R. Co., 40 Wash. 639, 82 Pac. 935.

32. McCallion *v.* Missouri Pac. R. Co., 74 Kan. 785, 88 Pac. 50; Jetter *v.* New York, etc., R. Co., 2 Abb. Dec. (N. Y.) 458, 2 Keyes 154; Atcheson *v.* Grand Trunk R. Co., 1 Ont. L. Rep. 168.

33. Edwards *v.* Buffalo, etc., R. Co., 8 N. Y. App. Div. 390, 40 N. Y. Suppl. 788.

34. Pittsburgh, etc., R. Co. *v.* Thompson, 21 Ind. App. 355, 50 N. E. 828; Farley *v.* St. Louis, etc., R. Co., 72 Mo. 338.

35. Cincinnati, etc., R. Co. *v.* Bunnell, 61 Ind. 183; Edwards *v.* Buffalo, etc., R. Co., 8 N. Y. App. Div. 390, 40 N. Y. Suppl. 788; Parker *v.* Rensselaer, etc., R. Co., 16 Barb. (N. Y.) 315.

In Indiana, under the former statute of 1863, a company using the road of another was not liable for injuries to animals due to its unfenced condition, unless it was operating the road "in the corporate name" of the company owning it (Cincinnati, etc., R. Co. *v.* Norris, 61 Ind. 285; Cincinnati, etc., R. Co. *v.* Bunnell, 61 Ind. 183; Cincinnati, etc., R. Co. *v.* Paskins, 36 Ind. 380); but the rule is otherwise under Rev. St. (1881) §§ 4025, 4026, making any railroad company running trains over the road of another liable in the same manner and to the same extent as if it owned the road (Pittsburgh, etc., R. Co. *v.* Thompson, 21 Ind. App. 355, 50 N. E. 828).

In New York under the statute of 1892 requiring "every railroad corporation . . . or other person in possession of its road" to fence the same, a company having merely a right to run trains over the road of another under a traffic arrangement is not a person "in possession of its road" so as to be liable for injuries to animals due to its unfenced condition (Edwards *v.* Buffalo, etc., R. Co., 8 N. Y. App. Div. 390, 40 N. Y. Suppl. 788); and under the former statutes of 1850 and 1854, it was held that the duty of fencing was imposed upon the owner of the road and that another company using the road would not be liable (Parker *v.* Rensselaer, etc., R. Co., 16 Barb. 315; Shanchan *v.* New York, etc., R. Co., 10 Abb. Pr. 398), unless it was in effect the owner and operator of the road, as where it was in the exclusive use and control of the road, and the company owning it was merely a company for construction, having no rolling stock and no right under its charter to operate trains upon the road (Tracy *v.* Troy, etc., R. Co., 38 N. Y. 433, 98 Am. Dec. 54 [*affirming* 55 Barb. 529]).

36. Illinois Cent. R. Co. *v.* Kanouse, 39 Ill. 272, 89 Am. Dec. 307. See also East St. Louis, etc., R. Co. *v.* Gerber, 82 Ill. 632; Toledo, etc., R. Co. *v.* Rumbold, 40 Ill. 143.

37. Liability of company owning road see *supra*, X, C, 5, d.

caused by fires due to the negligent operation or defective condition of its locomotives,[38] notwithstanding the fire was communicated directly to combustible material which the company owning the road had permitted to accumulate upon its right of way;[39] and such companies have also been held to be within the application of statutes imposing a liability without regard to negligence for fires communicated by locomotives.[40]

7. Connecting and Consolidated Roads — a. Connecting Roads.[41] Where different companies operate connecting lines of railroad the liability of each is ordinarily, in the absence of statute or agreement to the contrary, limited to its own line,[42] each being liable for the negligence of its own servants in the operation of its trains and not for that of the other,[43] and the fact that one company is a stock-holder in another connecting line does not render it liable for the negligence of the servants of the other company.[44] Where there is an arrangement between the connecting roads for the interchange of cars, it is the duty of each on transferring a car to the other to see that it is in a safe and suitable condition for the use for which it is intended,[45] which duty extends not only to the receiving company as such but to its employees who are to handle the car,[46] and such employees may recover from the company delivering the car for injuries due to its defective condition,[47] notwithstanding the company employing them was also negligent in regard to inspecting and receiving the car;[48] but if the receiving company, after the car should have been returned, fails to do so and uses it in its own busi-

38. Jacksonville, etc., R. Co. *v.* Peninsular Land, etc., Co., 27 Fla. 1, 157, 9 So. 661, 17 L. R. A. 33, 65; Slossen *v.* Burlington, etc., R. Co., 60 Iowa 214, 14 N. W. 244, (1881) 10 N. W. 860; Pierce *v.* Concord R. Co., 51 N. H. 590; Genung *v.* New York, etc., R. Co., 21 N. Y. Suppl. 97.

39. Slossen *v.* Burlington, etc., R. Co., 60 Iowa 214, 14 N. W. 244, (1881) 10 N. W. 860; Genung *v.* New York, etc., R. Co., 21 N. Y. Suppl. 97.

40. Chicago, etc., R. Co. *v.* Meilson, 118 Ill. App. 343 (holding that the statutory liability for fires caused by a failure to keep the right of way clear of combustible material applies to a company using as well as a company owning the road); Pierce *v.* Concord R. Co., 51 N. H. 590 (holding that a railroad company which operates the road of another under a contract for a term of years, which is equivalent to a lease, is the "proprietor" of the road within the application of a statute making "the proprietors of every railroad" liable without regard to negligence for damages done by fire communicated "from any locomotive or other engine on such road"); Bush *v.* Southern R. Co., 63 S. C. 96, 40 S. E. 1029 (holding that a railroad company operating its trains over the road of another is liable under a statute providing that "every railroad corporation shall be responsible in damages" for property "injured by fire communicated by its locomotive engines").

41. Liability as common carrier see Carriers, 6 Cyc. 478, 571, 584, 598.

42. Pennsylvania R. Co. *v.* Jones, 155 U. S. 333, 15 S. Ct. 136, 39 L. ed. 176. See also McCaffrey *v.* Georgia Southern R. Co., 69 Ga. 622.

43. Atchison, etc., R. Co. *v.* Cochran, 43 Kan. 225, 23 Pac. 151, 19 Am. St. Rep. 129, 7 L. R. A. 414; Pennsylvania R. Co. *v.* Jones, 155 U. S. 333, 15 S. Ct. 136, 39 L. ed. 176.

44. Mathews *v.* Atchison, etc., R. Co., 60 Kan. 11, 55 Pac. 282; Atchison, etc., R. Co. *v.* Cochran, 43 Kan. 225, 23 Pac. 151, 19 Am. St. Rep. 129, 7 L. R. A. 414.

45. Missouri, etc., R. Co. *v.* Merrill, 61 Kan. 671, 60 Pac. 819; Teal *v.* American Min. Co., 84 Minn. 320, 87 N. W. 837; Moon *v.* Northern Pac. R. Co., 46 Minn. 106, 48 N. W. 679, 24 Am. St. Rep. 194; Hoye *v.* Great Northern R. Co., 120 Fed. 712.

46. Moon *v.* Northern Pac. R. Co., 46 Minn. 106, 48 N. W. 679, 24 Am. St. Rep. 194.

47. Missouri, etc., R. Co. *v.* Merrill, 61 Kan. 671, 60 Pac. 819; Teal *v.* American Min. Co., 84 Minn. 320, 87 N. W. 837; Moon *v.* Northern Pac. R. Co., 46 Minn. 106, 48 N. W. 679, 24 Am. St. Rep. 194 [*distinguishing* Sawyer *v.* Minneapolis, etc., R. Co., 38 Minn. 103, 35 N. W. 671, 8 Am. St. Rep. 648]; Hoye *v.* Great Northern R. Co., 120 Fed. 712. But see Glynn *v.* Central R. Co., 175 Mass. 510, 56 N. E. 698, 78 Am. St. Rep. 507, holding that the liability of the company delivering a defective car for injuries to employees of the company receiving it ceases as soon as the latter company has inspected and assumed control over the car.

Where there are three connecting roads and a car in a defective condition is delivered by the first to the second, and then by the second to the third, the first and second are jointly liable for an injury to an employee of the third company, caused by such defect. Missouri, etc., R. Co. *v.* Merrill, 61 Kan. 671, 60 Pac. 819.

Liability of company employing servants injured see Master and Servant, 26 Cyc. 1086, 1110.

48. Teal *v.* American Min. Co., 84 Minn. 320, 87 N. W. 837; Moon *v.* Northern Pac. R. Co., 46 Minn. 106, 48 N. W. 679, 24 Am.

ness, the company owning it will not be liable for injuries to the servants of the other company due to the defects in the car.[49] Where a car is to be delivered to a consignee, to be unloaded by his servants, both the companies loading and delivering the car must see that it is in a safe condition for unloading, but an intermediate connecting carrier is only required to see that it is safe for the purposes of transportation, and is not liable for injuries to the consignee's servants due to defects in the car;[50] and a railroad company which merely delivers cars of another company to a consignee is not liable after delivery for injuries to the servants of the consignee who are engaged in coupling the cars upon the private tracks of the latter, where it had no knowledge of the defect and was not responsible for its existence.[51]

b. Consolidated Roads — (i) *In General.*[52] It is ordinarily held that where two railroad companies are legally consolidated the new company succeeds to all the rights and liabilities of each of the constituent companies, and is liable for the torts of such companies committed prior to the consolidation,[53] and this notwithstanding the statute authorizing the consolidation preserves the separate identity of the constituent companies with respect to their existing liabilities;[54] and such liability may be enforced directly by an action at law against the new company.[55] So also the new company will be liable for injuries occurring after the consolidation due to the negligence or defective condition of the road-bed, bridges, or culverts constructed by one of the constituent companies,[56] or to the

St. Rep. 194; Hoye *v.* Great Northern R. Co., 120 Fed. 712.

If both companies were negligent, the one in delivering and the other in receiving a defective car, they are jointly liable. Hoye *v.* Great Northern R. Co., 120 Fed. 712.

49. Sawyer *v.* Minneapolis, etc., R. Co., 38 Minn. 103, 35 N. W. 671, 8 Am. St. Rep. 648.

50. Sykes *v.* St. Louis, etc., R. Co., 178 Mo. 693, 77 S. W. 723 [*affirming* 88 Mo. App. 193].

51. Atchison, etc., R. Co. *v.* Bump, 60 Ill. App. 444.

52. **Effect of consolidation** in general see *supra*, VII, E, 6; and, generally, Corporations, 10 Cyc. 302.

53. *Alabama.*— Warren *v.* Mobile, etc., R. Co., 49 Ala. 582.

Georgia.— Montgomery, etc., R. Co. *v.* Boring, 51 Ga. 582.

Indiana.—Cleveland, etc., R. Co. *v.* Prewitt, 134 Ind. 557, 33 N. E. 367; Indianapolis, etc., R. Co. *v.* Jones, 29 Ind. 465, 95 Am. Dec. 654.

Kansas.— Berry *v.* Kansas City, etc., R. Co., 52 Kan. 759, 774, 34 Pac. 805, 36 Pac. 724, 39 Am. St. Rep. 371, 381 [*distinguishing* Whipple *v.* Union Pac. R. Co., 28 Kan. 474].

Maryland.—State *v.* Baltimore, etc., R. Co., 77 Md. 489, 26 Atl. 865.

Michigan.— Batterson *v.* Chicago, etc., R. Co., 53 Mich. 125, 18 N. W. 584.

Virginia.— Langhorne *v.* Richmond R. Co., 91 Va. 369, 22 S. E. 159, (1894) 19 S. E. 122.

Canada.— Brewer *v.* Lake Erie, etc., R. Co., 2 Can. R. Cas. 257, 2 Ont. Wkly. Rep. 125.

See 41 Cent. Dig. tit. "Railroads," § 833.

Where the articles of incorporation expressly provide that the new company does not assume the liabilities of its constituent companies but that their separate existence shall be preserved for this purpose and the property contributed by each be subject to such liabilities, the consolidated company is not directly liable for the previous torts of the constituent companies, but plaintiff must first reduce his claim to judgment against the original company after which it might be enforced against the property of that company in the hands of the new company. Whipple *v.* Union Pac. R. Co., 28 Kan. 474.

A lease of a railroad for a period of ninety-nine years, although in some respects accomplishing the same purpose and results as a consolidation, is not such in legal effect, and does not render the lessee liable for injuries caused by the negligence of the lessor. Missouri Pac. R. Co. *v.* Owens, 1 Tex. App. Civ. Cas. § 384.

54. Warren *v.* Mobile, etc., R. Co., 49 Ala. 582; Pickett *v.* Carolina Div. Southern R. Co., 69 S. C. 445, 48 S. E. 466.

The original company may be sued where the statute provides that "all rights of creditors . . . shall be preserved and unimpaired; and the respective corporations may be deemed to continue in existence to preserve the same," the term "creditor" being sufficiently broad to include a claim for a tort (Stewart *v.* Walterboro, etc., R. Co., 64 S. C. 92, 41 S. E. 827); but this does not affect the liability of the new corporation under the other provisions of the statute (Pickett *v.* Carolina Div. Southern R. Co., 69 S. C. 445, 48 S. E. 466. But see Joseph *v.* Southern R. Co., 127 Fed. 606).

55. Langhorne *v.* Richmond R. Co., 91 Va. 369, 22 S. E. 159, (1894) 19 S. E. 122.

56. Chicago, etc., R. Co. *v.* Moffitt, 75 Ill. 524; Penley *v.* Maine Cent. R. Co., 92 Me. 59, 42 Atl. 233.

continuance of a nuisance originally created by one of the constituent companies.[57] A responsibility for the liabilities of the constituent companies is frequently imposed by the statutes authorizing the consolidation,[58] or is expressly assumed by the articles of consolidation,[59] but exists independently of any express provision to this effect as a legal result of the consolidation,[60] and the constituent companies cannot by any contract between themselves affect the rights of persons who have been injured by their torts.[61] Conversely, where a railroad company has made an ineffectual attempt to consolidate with another, it is liable for an injury due to the negligence of the persons operating the road by virtue of the attempted consolidation.[62]

(II) *Effect on Actions Pending.*[63] In some jurisdictions it is held that the consolidation of two or more railroad companies works such a dissolution of the constituent companies as to abate any actions pending against them at the time of the consolidation,[64] but in others it is held that such actions do not abate by the consolidation,[65] and that the new corporation may be substituted as a defendant after verdict and judgment rendered against it,[66] or that the action may proceed to judgment as brought without change of parties and the judgment be enforced against the new company.[67]

8. Mortgagees and Trustees in Possession. In the absence of statute a railroad company cannot, by the voluntary surrender of its road to a mortgagee or trustee of its own selection, under a mortgage deed of trust for the benefit of creditors or bondholders, escape liability for negligence in the operation of the road.[68] In such case the trustee must be deemed to be the agent of the company,[69] and the action may be maintained against the railroad company,[70] or against the trustee as such if the statute so provides,[71] or the trustee may be held personally liable in the same manner as a lessee or other person in possession

57. Jones *v.* Seaboard Air Line R. Co., 67 S. C. 181, 45 S. E. 188.

58. Penley *v.* Maine Cent. R. Co., 92 Me. 59, 42 Atl. 233; Batterson *v.* Chicago, etc., R. Co., 53 Mich. 125, 18 N. W. 584; Pickett *v.* Carolina Div. Southern R. Co., 69 S. C. 445, 48 S. E. 466.

59. St. Louis, etc., R. Co. *v.* Marker, 41 Ark. 542; Langborne *v.* Richmond R. Co., 91 Va. 369, 22 S. E. 159, (1894) 19 S. E. 122.

60. Cleveland, etc., R. Co. *v.* Prewitt, 134 Ind. 557, 33 N. E. 367; Indianapolis, etc., R. Co. *v.* Jones, 29 Ind. 465, 95 Am. Dec. 654; Berry *v.* Kansas City, etc., R. Co., 52 Kan. 759, 774, 34 Pac. 805, 36 Pac. 724, 39 Am. St. Rep. 371, 381; State *v.* Baltimore, etc., R. Co., 77 Md. 489, 26 Atl. 865.

61. State *v.* Baltimore, etc., R. Co., 77 Md. 489, 26 Atl. 865.

62. Latham *v.* Boston, etc., R. Co., 38 Hun (N. Y.) 265.

63. See also *supra*, VII, E, 6, i.

64. See Corporations, 10 Cyc. 310, 311.

65. Baltimore, etc., R. Co. *v.* Musselman, 2 Grant (Pa.) 348; East Tennessee, etc., R. Co. *v.* Evans, 6 Heisk. (Tenn.) 607.

In Illinois the statute expressly provides that a consolidation shall not abate pending actions. Chicago, etc., R. Co. *v.* Ashling, 160 Ill. 373, 43 N. E. 373 [*affirming* 56 Ill. App. 327].

66. Louisville, etc., R. Co. *v.* Summers, 131 Ind. 241, 30 N. E. 873.

67. Chicago, etc., R. Co. *v.* Ashling, 160 Ill. 373, 43 N. E. 373 [*affirming* 56 Ill. App. 327].

68. Jones *v.* Pennsylvania R. Co., 19 D. C. 178; Wisconsin Cent. R. Co. *v.* Ross, 142 Ill. 9, 31 N. E. 412, 34 Am. St. Rep. 49 [*affirming* 43 Ill. App. 454]; Acker *v.* Alexandria, etc., R. Co., 84 Va. 648, 5 S. E. 688; Naglee *v.* Alexandria, etc., R. Co., 83 Va. 707, 3 S. E. 369, 5 Am. St. Rep. 308; Pennsylvania R. Co. *v.* Jones, 155 U. S. 333, 15 S. Ct. 136, 39 L. ed. 176. But see State *v.* Consolidated European, etc., R. Co., 67 Me. 479.

The company would not be liable if the mortgage were made pursuant to legislative authority and the possession of the trustee was adverse to the railroad company and the result of proceedings *in invitum*. See Naglee *v.* Alexandria, etc., R. Co., 83 Va. 707, 3 S. E. 369, 5 Am. St. Rep. 308.

In Connecticut it was expressly provided by Rev. St. (1866) that the property of the road should be responsible while in the hands of the trustees, the liability to be enforced by action against the trustees. Lamphear *v.* Buckingham, 33 Conn. 237.

69. Jones *v.* Pennsylvania R. Co., 19 D. C. 178; Wisconsin Cent. R. Co. *v.* Ross, 142 Ill. 9, 31 N. E. 412, 34 Am. St. Rep. 49 [*affirming* 43 Ill. App. 454]; Grand Tower Mfg., etc., Co. *v.* Ullman, 89 Ill. 244.

70. Wisconsin Cent. R. Co. *v.* Ross, 142 Ill. 9, 31 N. E. 412, 34 Am. St. Rep. 49 [*affirming* 43 Ill. App. 454]; Grand Tower Mfg., etc., Co. *v.* Ullman, 89 Ill. 244; Naglee *v.* Alexandria, etc., R. Co., 83 Va. 707, 3 S. E. 369, 5 Am. St. Rep. 308.

71. Lamphear *v.* Buckingham, 33 Conn. 237.

and control and exercising for the time being the franchises of the company.[72] An action may also be maintained against the trustees of a railroad company upon the statutory liabilities for injury to animals due to the unfenced condition of the road,[73] or for damages by fires communicated by locomotives,[74] unless the liability of the trustee is expressly defined and limited by statute.[75]

9. Effect of Operation of Road by Receiver — a. In General.[76] The valid appointment of a receiver for a railroad company ordinarily has the effect of placing the property of the company and the actual management and operation of the road in the possession and under the control of the receiver to the entire exclusion of the railroad company,[77] but such appointment does not affect the corporate existence of the company,[78] or its right to exercise any of its corporate powers which it can exercise without interfering with the rights of the receiver under the terms of the order appointing him,[79] or its duty to perform any acts required of it by law which can be performed without such interference,[80] or its liability to be sued upon any cause of action accruing prior to the appointment of the receiver,[81] or subsequently thereto if existing against the company directly and not by reason of any acts of the receiver or his servants in the operation of the road.[82]

b. Liability of Receiver — (i) *In General.* While the rule varies in different jurisdictions as to the right to sue a receiver and the manner of enforcing liabilities incurred by him in his official capacity,[83] it is well settled that a receiver of a railroad company who is exercising the franchises of such company and operating its road is in his official capacity subject to the same rules of liability as the company would be if operating the road by virtue of the same franchises,[84] and that

72. Sprague *v.* Smith, 29 Vt. 421, 70 Am. Dec. 424.

73. Union Trust Co. *v.* Kendall, 20 Kan. 515 (holding that a corporation, although not a railroad corporation, which is acting as trustee for the bondholders of a railroad company, is liable under the statute providing that "every railway company or corporation in this state, and every assignee and lessee of such company or corporation, shall be liable"); Farrell *v.* Union Trust Co., 77 Mo. 475 (holding that a corporation, although not a railroad corporation, acting as trustee of a railroad company, is liable under the statute, although in terms applying to "railroad corporations running or operating any railroad in this State").

74. Daniels *v.* Hart, 118 Mass. 543.

75. Stratton *v.* European, etc., R. Co., 76 Me. 269; Stratton *v.* European, etc., R. Co., 74 Me. 422.

76. Effect as to liability for penalties see *supra*, X, B, 7, d.

Effect as to criminal liability see *supra*, X, B, 8, c.

Liability of purchaser of road in hands of receivers see *supra*, X, C, 3, c, (II).

Liability for injuries to employees see Master and Servant, 26 Cyc. 1088, 1370.

Leave of court to sue receivers see Receivers.

Priorities of claims see Receivers.

77. Memphis, etc., R. Co. *v.* Stringfellow, 44 Ark. 322, 51 Am. Rep. 598; Ohio, etc., R. Co. *v.* Davis, 23 Ind. 553, 85 Am. Dec. 477; Memphis, etc., R. Co. *v.* Hoechner, 67 Fed. 456, 14 C. C. A. 469.

78. Ohio, etc., R. Co. *v.* Russell, 115 Ill. 52, 3 N. E. 561; Wyatt *v.* Ohio, etc., R. Co., 10 Ill. App. 289; Heath *v.* Missouri, etc., R. Co., 83 Mo. 617; Decker *v.* Gardner, 124 N. Y. 334, 26 N. E. 814, 11 L. R. A. 480 [*reversing* 11 N. Y. Suppl. 388].

79. Decker *v.* Gardner, 124 N. Y. 334, 26 N. E. 814, 11 L. R. A. 480 [*reversing* 11 N. Y. Suppl. 388].

80. Ohio, etc., R. Co. *v.* Russell, 115 Ill. 52, 3 N. E. 561.

81. Decker *v.* Gardner, 124 N. Y. 334, 26 N. E. 814, 11 L. R. A. 480 [*reversing* 11 N. Y. Suppl. 388]. See also Ohio, etc., R. Co. *v.* Nickless, 71 Ind. 271; Pennsylvania Finance Co. *v.* Charleston, etc., R. Co., 46 Fed. 508.

82. Ohio, etc., R. Co. *v.* Russell, 115 Ill. 52, 3 N. E. 561; Kansas Pac. R. Co. *v.* Wood, 24 Kan. 619.

83. See, generally, Receivers.

84. *Illinois.*— McNulta *v.* Lockridge, 137 Ill. 270, 27 N. E. 452, 31 Am. St. Rep. 362; Robinson *v.* Kirkwood, 91 Ill. App. 54.

Kansas.— Rouse *v.* Redinger, 1 Kan. App. 355, 41 Pac. 433.

New Jersey.— Little *v.* Dusenberry, 46 N. J. L. 614, 50 Am. Rep. 445; Klein *v.* Jewett, 26 N. J. Eq. 474 [*affirmed* in 27 N. J. Eq. 550].

New York.— Camp *v.* Barney, 4 Hun 373, 6 Thomps. & C. 622; Graham *v.* Chapman, 11 N. Y. Suppl. 318.

Ohio.— Murphy *v.* Holbrook, 20 Ohio St. 137, 5 Am. Rep. 633; Potter *v.* Bunnell, 20 Ohio St. 150.

South Carolina.— *Ex p.* Brown, 15 S. C. 518.

Texas.— International, etc., R. Co. *v.* Bender, 87 Tex. 99, 26 S. W. 1047.

Vermont.— Newell *v.* Smith, 49 Vt. 255.

he can claim no exemption from liability on the ground that he is a public officer or officer of the court,[85] or the agent or trustee of persons not directly liable.[86] The receiver as such is also a common carrier,[87] and liable for injury to passengers,[88] or loss or delay of goods in transit,[89] and generally for the negligence of his servants in the operation of the road;[90] but a receiver of a railroad company which furnishes cars to another company under a traffic arrangement whereby the latter company is to operate them is not liable for injuries resulting from such operation upon the tracks of the latter company.[91] The liability of the receiver is not personal but merely in his official capacity,[92] so that an action against the receiver as such is in effect a proceeding *in rem*, affecting only the fund or property held by him by virtue of his office,[93] from which, however, it follows that where one receiver resigns and another is appointed by the court, an action may be maintained against the new receiver for a tort of the servants of his predecessor in the same receivership.[94]

(II) *FENCING AND INJURY TO ANIMALS.* Receivers are in their official capacity subject to the statutory liability for injuries to animals due to the road not being fenced,[95] although the statute does not in terms apply to receivers.[96]

(III) *WRONGFUL DEATH.*[97] Since the right of action for wrongful death is purely statutory, the right to maintain such action against the receiver of a railroad must be determined by the provisions of the statute.[98] Under some of the statutes an action may be maintained against a receiver for injuries resulting in death occurring during the receivership,[99] but others have been held not to include receivers;[1] and where the receiver is not primarily liable no action can

United States.— *In re* Pope, 30 Fed. 169; Winbourn's Case, 30 Fed. 167.

See 41 Cent. Dig. tit. "Railroads," § 838.

Fires.—A receiver as such is liable for damages to property by fire caused by negligence in the operation of the road during the receivership (Peoples *v.* Yoakum, 7 Tex. Civ. App. 85, 25 S. W. 1001); and is also subject to the statutory liability imposed upon "every railroad corporation" for injuries by fire communicated by locomotives, although the statute does not in terms apply to receivers (Wall *v.* Platt, 169 Mass. 398, 48 N. E. 270).

Cattle-guards and injuries to crops.—A receiver is liable for injury to crops due to a failure to maintain cattle-guards as required by law where the road passes through inclosed lands. Memphis, etc., R. Co. *v.* Glover, 78 Miss. 467, 29 So. 89.

85. Murphy *v.* Holbrook, 20 Ohio St. 137, 5 Am. Rep. 633; Blumenthal *v.* Brainerd, 38 Vt. 402, 91 Am. Dec. 350.

86. Murphy *v.* Holbrook, 20 Ohio St. 137, 5 Am. Rep. 633.

87. Paige *v.* Smith, 99 Mass. 395; Little *v.* Dusenberry, 46 N. J. L. 614, 50 Am. Rep. 445; *Ex p.* Brown, 15 S. C. 518; Newell *v.* Smith, 49 Vt. 255; Blumenthal *v.* Brainerd, 38 Vt. 402, 91 Am. Dec. 350.

88. Little *v.* Dusenberry, 46 N. J. L. 614, 50 Am. Rep. 445; Camp *v.* Barney, 4 Hun (N. Y.) 373, 6 Thomps. & C. 622; Winbourn's Case, 30 Fed. 167.

89. Paige *v.* Smith, 99 Mass. 395; Newell *v.* Smith, 49 Vt. 255.

90. McNulta *v.* Lockridge, 137 Ill. 270, 27 N. E. 452, 31 Am. St. Rep. 362; Camp *v.* Barney, 4 Hun (N. Y.) 373, 6 Thomps. & C. 622.

91. Thompson *v.* Dotterer, 105 La. 37, 29 So. 483.

92. See *infra*, X, C, 9, b, (V).

93. McNulta *v.* Lockridge, 137 Ill. 270, 27 N. E. 452, 31 Am. St. Rep. 362; Davis *v.* Duncan, 19 Fed. 477.

94. McNulta *v.* Lockridge, 137 Ill. 270, 27 N. E. 452, 11 Am. St. Rep. 362.

95. Robinson *v.* Kirkwood, 91 Ill. App. 54; Brockert *v.* Central Iowa R. Co., 82 Iowa 369, 47 N. W. 1026; Rouse *v.* Redinger, 1 Kan. App. 355, 41 Pac. 433; International, etc., R. Co. *v.* Pender, 87 Tex. 99, 26 S. W. 1047.

96. Rouse *v.* Redinger, 1 Kan. App. 355, 41 Pac. 433.

97. See, generally, DEATH, 13 Cyc. 310, 337.

98. Yoakum *v.* Selph, 83 Tex. 607, 19 S. W. 145; Turner *v.* Cross, 83 Tex. 218, 18 S. W. 578, 15 L. R. A. 262.

99. Little *v.* Dusenberry, 46 N. J. L. 614, 50 Am. Rep. 445; Murphy *v.* Holbrook, 20 Ohio St. 137, 5 Am. Rep. 633.

1. Yoakum *v.* Selph, 83 Tex. 607, 19 S. W. 145; Turner *v.* Cross, 83 Tex. 218, 18 S. W. 578, 15 L. R. A. 262; Dillingham *v.* Blake, (Tex. Civ. App. 1894) 32 S. W. 77; Brown *v.* Record, (Tex. Civ. App. 1893) 23 S. W. 704; Campbell *v.* Davis, (Tex. Civ. App. 1893) 22 S. W. 244; Texas, etc., R. Co. *v.* Thedens, (Tex. Civ. App. 1892) 21 S. W. 132; Bonner *v.* Thomas, (Tex. Civ. App. 1892) 20 S. W. 722; Houston, etc., R. Co. *v.* Roberts, (Tex. 1892) 19 S. W. 512; Burke *v.* Dillingham, 60 Fed. 729, 9 C. C. A. 255; Allen *v.* Dillingham, 60 Fed. 176, 8 C. C. A. 544.

In Texas it was held that an action for wrongful death could not be maintained

be maintained against the railroad company for such injuries occurring during the receivership, although the road is returned to the company with betterments.[2]

(IV) *PRECEDENT ACTS OR OMISSIONS OF COMPANY.*[3] An action for injury sustained before the appointment of a receiver cannot be maintained against the receiver but must be brought against the railroad company,[4] and if instituted against the company it is error to substitute the receiver after his appointment as defendant;[5] but a receiver is liable for injuries occurring after his appointment from a previously existing defective condition of the track or road-bed,[6] and it is no defense to such action that he had not been in possession for a sufficient length of time to repair the defect.[7]

(V) *PERSONAL LIABILITY OF RECEIVER.* A receiver while acting in his official capacity is not personally liable for the torts of his servants,[8] but only where he himself commits the wrong or injury complained of,[9] or where in respect to such injury the receiver was not acting in his official capacity under the control of the court, but as a natural person,[10] and in an action against him where he is liable only as receiver, the judgment should not be entered against him personally but in his official capacity.[11] If a receiver after confirmation of a sale of the property in his hands retains possession thereof, not as an officer of the court but in his individual capacity, he is personally liable for any injuries occurring in the operation of the road during such period and prior to his delivery of the property to the purchaser.[12]

(VI) *TERMINATION OF LIABILITY.* The liability of a receiver as such terminates upon his final discharge by the court,[13] and thereafter no action can

against the receiver of a railroad under the statute giving such right of action against the "proprietor, owner, charterer, or hirer" of any railroad (Turner *v.* Cross, 83 Tex. 218, 18 S. W. 578, 15 L. R. A. 262); but the law has been since so amended as to confer the right of action (see Bonner *v.* Thomas, (Tex. Civ. App. 1892) 20 S. W. 722).

2. See *infra*, X, C, 9, c, (II).

3. **Liability of railroad company** see *infra*, X, C, 9, c.

4. Decker *v.* Gardner, 124 N. Y. 334, 26 N. E. 814, 11 L. R. A. 480 [*reversing* 11 N. Y. Suppl. 388, and *distinguishing* Pickersgill *v.* Myers, 99 Pa. St. 702]; Hopkins *v.* Connel, 2 Tenn. Ch. 323; Pennsylvania Finance Co. *v.* Charleston, etc., R. Co., 46 Fed. 508; *In re* Dexterville Mfg., etc., Co., 4 Fed. 873. But see Combs *v.* Smith, 78 Mo. 32 (holding that an action may be maintained against a receiver for a tort of the company in constructing its road upon plaintiff's land without proper condemnation proceedings or making him compensation therefor); Grant *v.* Omaha, etc., R. Co., 94 Mo. App. 312, 68 S. W. 91 (holding that an action may, with the permission of the court, be maintained against the receiver of a railroad company for damages caused by fire escaping from its right of way, although the cause of action accrued before the receiver was appointed).

5. Decker *v.* Gardner, 124 N. Y. 334, 26 N. E. 814, 11 L. R. A. 480 [*reversing* 11 N. Y. Suppl. 388].

6. Bonner *v.* Mayfield, 82 Tex. 234, 18 S. W. 305; Texas, etc., R. Co. *v.* Geiger, 79 Tex. 13, 15 S. W. 214.

7. Bonner *v.* Mayfield, 82 Tex. 234, 18 S. W. 305.

8. McNulta *v.* Lockridge, 137 Ill. 270, 27 N. E. 452, 21 Am. St. Rep. 362; McNulta *v.* Ensch, 134 Ill. 46, 24 N. E. 631; Cardot *v.* Barney, 63 N. Y. 281, 20 Am. Rep. 533; Camp *v.* Barney, 4 Hun (N. Y.) 373, 6 Thomps. & C. 622; Hopkins *v.* Connel, 2 Tenn. Ch. 323; Davis *v.* Duncan, 19 Fed. 477.

9. See Davis *v.* Duncan, 19 Fed. 477.

Misfeasance and nonfeasance.—A receiver is not personally liable for a mere nonfeasance, such as negligence on the part of his servants in the operation of a train, but is liable for a misfeasance or positive wrong; and a complaint alleging an injury due to a defect in the machinery and equipment of the train, and that the train was being operated with knowledge on the part of the receiver of such defect at the time of the injury states a good cause of action against the receiver. Erwin *v.* Davenport, 9 Heisk. (Tenn.) 44.

10. Kain *v.* Smith, 80 N. Y. 458 [*reversing* 11 Hun 552, and *distinguishing* Cardot *v.* Barney, 63 N. Y. 281, 20 Am. Rep. 533], holding that where the receiver of a railroad appointed in one state acquires by contract the operation and control of a connecting road in another state, over which the court has no control, and operates the same not by the direction of any court but merely under his contract as an individual, he is personally liable for the manner in which it is operated.

11. McNulta *v.* Ensch, 134 Ill. 46, 24 N. E. 631; Robinson *v.* Kirkwood, 91 Ill. App. 54; Camp *v.* Barney, 4 Hun (N. Y.) 373, 6 Thomps. & C. 622.

12. Larsen *v.* U. S. Mortgage, etc., Co., 104 N. Y. App. Div. 76, 93 N. Y. Suppl. 610.

13. Archambeau *v.* Platt, 173 Mass. 249, 53 N. E. 816; Ryan *v.* Hayes, 62 Tex. 42.

be maintained against him as receiver,[14] and if discharged after the institution of an action, no judgment can be rendered against him;[15] so as to the receiver such action should abate,[16] unless provision as to pending actions is made by statute or the order of discharge;[17] but until finally discharged, the receiver as such is liable and may be sued,[18] notwithstanding he has turned over the possession of the property to the company or persons entitled thereto.[19]

c. Liability of Railroad Company — (i) *In General.* Where a railroad has been duly placed by a court of competent jurisdiction in the hands of a receiver who is in full possession and control of the road, the railroad company is not liable for the acts of the receiver or his servants in the operation of the road.[20] The possession of the receiver is not that of the company,[21] but of the court,[22] nor is he the agent or servant of the company or his servants its servants,[23] and the

14. Archambeau *v.* Platt, 173 Mass. 249, 53 N. E. 816; Davis *v.* Duncan, 19 Fed. 477.

15. McGehee *v.* Willis, 134 Ala. 281, 32 So. 301; Averill *v.* McCook, 86 Mo. App. 346; International, etc., R. Co. *v.* Ormond, 62 Tex. 274; Ryan *v.* Hays, 62 Tex. 42; Missouri, etc., R. Co. *v.* Wylie, (Tex. Civ. App. 1896) 33 S. W. 771; Fordyce *v.* Beecher, 2 Tex. Civ. App. 24, 21 S. W. 181.

In an action against the receiver alone a plea setting up that since the institution of the suit defendant has been fully and finally discharged by the court appointing him and has turned over all property which he had held as receiver presents a good defense to any further prosecution of the action. McGhee *v.* Willis, 134 Ala. 281, 32 So. 301.

16. Averill *v.* McCook, 86 Mo. App. 346.

17. Davis *v.* Duncan, 19 Fed. 477, holding, however, that a reservation as to pending actions in the order discharging the receiver providing that they may be prosecuted to conclusion and any judgment rendered be a charge upon the property and assets turned over, in the same manner as if he had not been discharged, applies only to pending actions and confers no right to institute a new action against the receiver after his discharge for an injury caused by the negligence of his servants during the receivership.

State statutes and federal receivers.—A state statute providing that the discharge of a receiver shall not abate any action pending against him as receiver does not apply to or control the discharge by a federal court of a receiver appointed by it. Fordyce *v.* Du Bose, 87 Tex. 78, 26 S. W. 1050; Fordyce *v.* Beecher, 2 Tex. Civ. App. 29, 21 S. W. 179.

18. Houston, etc., R. Co. *v.* Strycharski, (Tex. Civ. App. 1896) 35 S. W. 851; Fordyce *v.* Chance, 2 Tex. Civ. App. 24, 21 S. W. 181.

19. Houston, etc., R. Co. *v.* Strycharski, (Tex. Civ. App. 1896) 35 S. W. 851; Fordyce *v.* Chancey, 2 Tex. Civ. App. 24, 21 S. W. 181.

20. *Arkansas.*— Memphis, etc., R. Co. *v.* Stringfellow, 44 Ark. 322, 51 Am. Rep. 598.

Illinois.— Ohio, etc., R. Co. *v.* Anderson, 10 Ill. App. 313.

Indiana.— Godfrey *v.* Ohio, etc., R. Co., 116 Ind. 30, 18 N. E. 61; Bell *v.* Indianapolis, etc., R. Co., 53 Ind. 57; Ohio, etc., R. Co. *v.* Davis, 23 Ind. 553, 85 Am. Dec. 477.

Kansas.— St. Louis, etc., R. Co. *v.* Bricker, 65 Kan. 321, 69 Pac. 328; Union Pac. R. Co. *v.* Smith, 59 Kan. 80, 52 Pac. 102.

Kentucky.— Louisville Southern R. Co. *v.* Tucker, 105 Ky. 492, 49 S. W. 314, 20 Ky. L. Rep. 1303.

Missouri.—Turner *v.* Hannibal, etc., R. Co., 74 Mo. 602; Stevens *v.* Atchison, etc., R. Co., 87 Mo. App. 26.

New York.— Metz *v.* Buffalo, etc., R. Co., 58 N. Y. 61, 17 Am. Rep. 201.

Pennsylvania.— Howard *v.* Philadelphia, etc., R. Co., 6 Pa. Co. Ct. 589.

Texas.— Hicks *v.* International, etc., R. Co., 62 Tex. 38; Dillingham *v.* Anello, (Civ. App. 1895) 29 S. W. 1103; Texas, etc., R. Co. *v.* Bledsoe, 2 Tex. Civ. App. 88, 20 S. W. 1135.

United States.— Gableman *v.* Peoria, etc., R. Co., 82 Fed. 790; Chamberlain *v.* New York, etc., R. Co., 71 Fed. 636; Memphis, etc., R. Co. *v.* Hoechner, 67 Fed. 456, 14 C. C. A. 469; Davis *v.* Duncan, 19 Fed. 477.

See 41 Cent. Dig. tit. "Railroads," § 848.

In an action brought jointly against a railroad company in the hands of a receiver and the receiver, where it is determined that the receiver was in exclusive possession, the action may be dismissed as to the company or judgment against it set aside without affecting the right to recover against the receiver (St. Louis, etc., R. Co. *v.* Bricker, 65 Kan. 321, 69 Pac. 328); or if there is a verdict and judgment against both, it is not necessary that there be a reversal as to both defendants, but the judgment may be reversed as to the company and allowed to stand as to the receiver (Union Pac. R. Co. *v.* Smith, 59 Kan. 80, 52 Pac. 102; Louisville Southern R. Co. *v.* Tucker, 105 Ky. 492, 49 S. W. 314, 20 Ky. L. Rep. 1303).

21. Memphis, etc., R. Co. *v.* Stringfellow, 44 Ark. 322, 51 Am. Rep. 598; Ohio, etc., R. Co. *v.* Anderson, 10 Ill. App. 313; Ohio, etc., R. Co. *v.* Davis, 23 Ind. 553, 85 Am. Dec. 477.

22. Ohio, etc., R. Co. *v.* Davis, 23 Ind. 553, 85 Am. Dec. 477; St. Louis, etc., R. Co. *v.* Bricker, 65 Kan. 321, 69 Pac. 328; Memphis, etc., R. Co. *v.* Hoechner, 67 Fed. 456, 14 C. C. A. 469.

23. St. Louis, etc., R. Co. *v.* Bricker, 65 Kan. 321, 69 Pac. 328; Metz *v.* Buffalo, etc., R. Co., 58 N. Y. 61, 17 Am. Rep. 201; Memphis, etc., R. Co. *v.* Hoechner, 67 Fed. 456, 14 C. C. A. 469.

company having no control or right of control over them cannot be held liable for their acts.[24] It cannot, however, properly be stated without qualification that a railroad company is not liable for the acts of a receiver of its road under any circumstances,[25] for the company will be liable if the receiver is not in exclusive possession and control but jointly with the company,[26] or where the company is permitted to retain the actual control and management of the road, and the functions of the receiver are restricted to the receipt of the net earnings,[27] or if the receiver was appointed at the instance of the railroad company for the purpose of putting its property temporarily beyond the reach of creditors, and enabling it to tide over financial difficulties;[28] but the fact that a railroad company acquiesces in the action of a court of another state in the appointment of receivers for its lessee and permits them to operate its road does not deprive it of the right to show that at the time of the injury complained of its road was in the exclusive possession and control of the same receivers under an appointment by a court of competent jurisdiction in its own state in an action against it.[29] An action may be maintained against a railroad company for an injury sustained prior to the appointment of a receiver, although at the time the suit is brought the road is in the hands of the receiver.[30]

(II) *On Return of Road to Company Without Sale.* The fact that a railroad in the hands of a receiver is by order of court returned without sale to the company owning it, does not *ipso facto* make the company liable for claims against the receiver,[31] unless it is so provided by statute;[32] but if the road is by order of court returned to the company without sale and the receiver has invested net earnings of the road in permanent improvements, of which the company receives the benefit, it is subject to any liabilities incurred by the receiver which would have been enforceable against him and payable out of the funds so diverted,[33]

24. *Arkansas.*— Memphis, etc., R. Co. *v.* Stringfellow, 44 Ark. 322, 51 Am. Rep. 598.
Illinois.— Ohio, etc., R. Co. *v.* Anderson, 10 Ill. App. 313.
Indiana.— Ohio, etc., R. Co. *v.* Davis, 23 Ind. 553, 85 Am. Dec. 477.
New York.— Metz *v.* Buffalo, etc., R. Co., 58 N. Y. 61, 17 Am. Rep. 201.
United States.— Memphis, etc., R. Co. *v.* Hoechner, 67 Fed. 456, 14 C. C. A. 469.
See 41 Cent. Dig. tit. "Railroads," § 848.

25. Stewart *v.* Baltimore, etc., R. Co., 11 Ohio S. & C. Pl. Dec. 232, 8 Ohio N. P. 179.

26. Washington, etc., R. Co. *v.* Brown, 17 Wall. (U. S.) 445, 21 L. ed. 675.

27. Pennsylvania R. Co. *v.* Jones, 155 U. S. 333, 15 S. Ct. 136, 39 L. ed. 176 [*affirming* on this point 19 D. C. 178].

28. Stewart *v.* Baltimore, etc., R. Co., 11 Ohio S. & C. Pl. Dec. 232, 8 Ohio N. P. 179.

29. Trinity, etc., R. Co. *v.* Brown, (Tex. Civ. App. 1898) 46 S. W. 926.

30. Ohio, etc., R. Co. *v.* Nickless, 71 Ind. 271.

31. Texas, etc., R. Co. *v.* Huffman, 83 Tex. 286, 18 S. W. 741.

32. International, etc., R. Co. *v.* Cook, (Tex. Civ. App. 1895) 33 S. W. 888; Yoakum *v.* Kroeger, (Tex. Civ. App. 1894) 27 S. W. 953.
In Texas it is provided by the statute of 1899 that the company upon return of its property by a receiver without sale shall be responsible for all debts and liabilities of the receivership without reference to any question of investment of earnings in betterments (Texas Pac. R. Co. *v.* Johnson, 76 Tex. 421, 13 S. W. 463, 18 Am. St. Rep. 60; Yoakum *v.* Kroeger, (Civ. App. 1894) 27 S. W. 953); and the statute has been held to be constitutional (Missouri, etc., R. Co. *v.* Chilton, 7 Tex. Civ. App. 183, 27 S. W. 272).

33. Mobile, etc., R. Co. *v.* Davis, 62 Miss. 271; Stewart *v.* Baltimore, etc., R. Co., 11 Ohio S. & C. Pl. Dec. 232, 8 Ohio N. P. 179; Texas, etc., R. Co. *v.* Bloom, 85 Tex. 279, 20 S. W. 133; Texas, etc., R. Co. *v.* Comstock, 83 Tex. 537, 18 S. W. 946; Texas, etc., R. Co. *v.* Brick, 83 Tex. 526, 18 S. W. 947, 29 Am. St. Rep. 675; Texas, etc., R. Co. *v.* Bailey, 83 Tex. 19, 18 S. W. 481; Texas Pac. R. Co. *v.* White, 82 Tex. 543, 18 S. W. 478; Boggs *v.* Brown, 82 Tex. 41, 17 S. W. 830; Texas, etc., R. Co. *v.* Geiger, 79 Tex. 13, 15 S. W. 214; Texas Pac. R. Co. *v.* Johnson, 76 Tex. 421, 13 S. W. 463, 18 Am. St. Rep. 60; Texas, etc., R. Co. *v.* Gaal, 14 Tex. Civ. App. 459, 37 S. W. 462; Brown *v.* Rosedale St. R. Co., (Tex. App. 1890) 15 S. W. 120; Texas, etc., R. Co. *v.* Bloom, 60 Fed. 979, 9 C. C. A. 300.
Reason for rule.— The rule as stated in the text is based upon the equitable principle that the company has received the benefit of a fund which was primarily liable for the damages occasioned by the acts of the receiver (Texas, etc., R. Co. *v.* Huffman, 83 Tex. 286, 18 S. W. 741; Texas Pac. R. Co. *v.* Johnson, 76 Tex. 421, 13 S. W. 463, 18 Am. St. Rep. 60); and is an illustration of the principle of the Roman law known as *universitas juris*, or universal succession (Stewart *v.* Baltimore, etc., R. Co., 11 Ohio S. & C. Pl. Dec. 232, 8 Ohio N. P. 179).

provided no rights of third parties have intervened,[34] and the court in such cases has no power to make any order upon returning the property limiting the liability of the company to claims established by intervention in the suit in which the receiver was appointed,[35] or presented to and approved by the court making such order,[36] or limiting the time within which such claims must be established,[37] or to make any decree in a proceeding to which the claimant was not a party which would deprive him of the right to seek his remedy in any court of competent jurisdiction,[38] and within the time prescribed by law.[39] The company is, however, liable only to the extent of the net earnings diverted by the receiver to the betterment of the road,[40] and is not liable upon any cause of action which could not have been enforced against the receiver had he remained in possession.[41] It has been held that after the discharge of the receiver and restoration of the road to the company, the proper remedy for enforcing the liability of the railroad company is by a suit in equity;[42] but under the Texas practice if the receiver is discharged and the road returned to the company after the institution of an action against the receiver, the company may by amendment be made a party defendant,[43] and as regards the statute of limitations the action will be considered as a continuation of that originally brought against the receiver.[44] Where it is sought to render the company liable on the ground that the receiver invested earnings in betterments, this fact must be alleged,[45] and proved;[46] but where plaintiff shows that betterments were made by the receiver the presumption then is that they were made out of net earnings of the road, and the burden is upon defendant to show the contrary.[47] So also if the claims against the company for the acts of the receiver are in excess of the value of the betterments made by him, this defense must be pleaded by defendant.[48] Where it is provided by statute without qualification that the company, upon the return of its property without sale, shall be liable for all claims against the receiver, no allegation or

Where a judgment has been rendered against the receiver before his discharge, an action may be maintained thereon against the company after the road has been returned to it with betterments. Texas Pac. R. Co. *v.* Griffin, 76 Tex. 441, 13 S. W. 471.

34. See Mobile, etc., R. Co. *v.* Davis, 62 Miss. 271.

35. Texas, etc., R. Co. *v.* Bailey, 83 Tex. 19, 18 S. W. 481; Texas, etc., R. Co. *v.* Watts, (Tex. 1891) 18 S. W. 312; Texas, Pac. R. Co. *v.* Griffin, 76 Tex. 441, 13 S. W. 471; Texas Pac. R. Co. *v.* Johnson, 76 Tex. 421, 13 S. W. 463, 18 Am. St. Rep. 60; Texas, etc., R. Co. *v.* Boyd, 6 Tex. Civ. App. 205, 24 S. W. 1086; Kretz *v.* Texas, etc., R. Co., (Tex. App. 1890) 14 S. W. 1067.

36. Stewart *v.* Baltimore, etc., R. Co., 11 Ohio S. & C. Pl. Dec. 232, 8 Ohio N. P. 179.

37. Texas, etc., R. Co. *v.* Watts, (Tex. 1891) 18 S. W. 312; Texas Pac. R. Co. *v.* Johnson, 76 Tex. 421, 13 S. W. 463, 18 Am. St. Rep. 60; Kretz *v.* Texas, etc., R. Co., (Tex. App. 1890) 14 S. W. 1067.

38. Stewart *v.* Baltimore, etc., R. Co., 11 Ohio S. & C. Pl. Dec. 232, 8 Ohio N. P. 179; Texas, etc., R. Co. *v.* Watts, (Tex. 1891) 18 S. W. 312; Texas Pac. R. Co. *v.* Johnson, 76 Tex. 421, 13 S. W. 463, 18 Am. St. Rep. 60.

39. Texas Pac. R. Co. *v.* Griffin, 76 Tex. 441, 13 S. W. 471.

40. Texas, etc., R. Co. *v.* Bailey, 83 Tex. 19, 18 S. W. 481.

41. Texas, etc., R. Co. *v.* Collins, 84 Tex. 121, 19 S. W. 365; Brown *v.* Record, (Tex. Civ. App. 1893) 23 S. W. 704; Texas, etc., R. Co. *v.* Bledsoe, 2 Tex. Civ. App. 88, 20 S. W. 1135.

42. Mobile, etc., R. Co. *v.* Davis, 62 Miss. 271.

43. Texas, etc., R. Co. *v.* Comstock, 83 Tex. 537, 18 S. W. 946; Boggs *v.* Brown, 82 Tex. 41, 17 S. W. 830.

44. Texas, etc., R. Co. *v.* Huffman, 83 Tex. 286, 18 S. W. 741.

But if the amended complaint sets up a new cause of action charging the railroad company with liability not only upon the ground of betterments but also upon the ground that the receivership was fraudulent and collusive, it will be considered as to such new cause of action a new action against the railroad company. Texas, etc., R. Co. *v.* Watson, 13 Tex. Civ. App. 555, 36 S. W. 290.

45. Texas, etc., R. Co. *v.* Adams, 78 Tex. 372, 14 S. W. 666, 22 Am. St. Rep. 56.

46. Texas, etc., R. Co. *v.* Huffman, 83 Tex. 286, 18 S. W. 741; Texas, etc., R. Co. *v.* Adams, 78 Tex. 372, 14 S. W. 666, 22 Am. St. Rep. 56.

47. Missouri, etc., R. Co. *v.* Chilton, 7 Tex. Civ. App. 183, 27 S. W. 272; Texas, etc., R. Co. *v.* Barnhart, 5 Tex. Civ. App. 601, 23 S. W. 801, 24 S. W. 331.

48. Texas, etc., R. Co. *v.* Bailey, 83 Tex. 19, 18 S. W. 481.

proof of an investment in betterments is necessary,[49] it being sufficient merely to allege and show the return of the road to the company without sale.[50] If by the terms of a consent decree under which the possession of the road was restored to the company, it was taken subject to all claims and liabilities against the receiver, the company will be liable therefor without regard to the question of betterments.[51]

(III) *INVALID OR COLLUSIVE APPOINTMENT.* A railroad company is liable for the acts of a receiver whom it permits to take and operate its road under an appointment which is invalid for lack of jurisdiction of the court over the property,[52] or where such appointment was made through fraud or collusion on the part of the railroad company,[53] whether the court had jurisdiction or not,[54] the receiver being regarded in either case as the agent of the company;[55] and if in such case an action has been instituted against the receiver alone, the company may by amendment be made a defendant.[56]

(IV) *FENCING AND INJURY TO ANIMALS.*[57] Where by statute railroad companies are made liable, without regard to negligence in the operation of their trains, for stock killed or injured upon their roads, where such roads are not fenced, it has been held that an action for such injuries may be maintained against the railroad company, although at the time of the injury the road was operated by a receiver,[58] and in Indiana the statute expressly so provides,[59] and such action may be brought against the company in a state court, although the receiver operating the road was appointed by a court of the United States.[60] So also, where the statute provides that upon failure of the railroad company to fence its road the adjoining landowner may do so and recover double the cost of the fencing, an action for such recovery may be maintained against the company, although the road is in the hands of a receiver.[61]

d. Effect on Liability of Lessor and Lessee. Where one railroad company

49. International, etc., R. Co. *v.* Cook, 16 Tex. Civ. App. 386, 41 S. W. 665; Yoakum *v.* Kroeger, (Tex. Civ. App. 1894) 27 S. W. 953.

The contrary decisions holding such allegation and proof to be necessary were all decided under the rule of equity which prevailed prior to the enactment of the statute. Yoakum *v.* Kroeger, (Tex. Civ. App. 1894) 27 S. W. 953.

50. International, etc., R. Co. *v.* Cook, 16 Tex. Civ. App. 386, 41 S. W. 665.

51. Missouri, etc., R. Co. *v.* Chilton, 7 Tex. Civ. App. 183, 27 S. W. 272.

52. Texas, etc., R. Co. *v.* Gay, 86 Tex. 571, 26 S. W. 599, 25 L. R. A. 52.

53. Texas, etc., R. Co. *v.* Gay, 88 Tex. 111, 30 S. W. 543 [*affirming* (Civ. App. 1895) 27 S. W. 742]; Texas, etc., R. Co. *v.* Gay, 86 Tex. 571, 26 S. W. 599, 25 L. R. A. 52.

The appointment of an improper person as receiver does not make the appointment void or the receiver the agent of the company, but is a fact which may be considered in determining whether the appointment was collusive. San Antonio, etc., R. Co. *v.* Adams, 11 Tex. Civ. App. 198, 32 S. W. 733.

54. Texas, etc., R. Co. *v.* Gay, 86 Tex. 571, 26 S. W. 599, 25 L. R. A. 52.

55. Texas, etc., R. Co. *v.* Gay, 86 Tex. 571, 26 S. W. 599, 25 L. R. A. 52.

56. Texas, etc., R. Co. *v.* Gay, 88 Tex. 111, 30 S. W. 543 [*affirming* (Civ. App. 1895) 27 S. W. 742].

57. **Liability of receiver see** *supra*, X, C, 9, b, (II).

58. McKinney *v.* Ohio, etc., R. Co., 22 Ind. 99; Kansas Pac. R. Co. *v.* Wood, 24 Kan. 619; Central Trust Co. *v.* Wabash, etc., R. Co., 26 Fed. 12. But see Heath *v.* Missouri, etc., R. Co., 83 Mo. 617.

Under the Iowa statute it is held that a railroad company cannot be held liable for injuries to stock on account of the unfenced condition of its road, occurring during the operation of the road by a receiver (Schurr *v.* Omaha, etc., R. Co., 98 Iowa 418, 67 N. W. 280; Brockert *v.* Central Iowa R. Co., 82 Iowa 369, 47 N. W. 1026), but that the receiver may be held liable (Brockert *v.* Central Iowa R. Co., *supra*).

59. Indianapolis, etc., R. Co. *v.* Ray, 51 Ind. 269; Louisville, etc., R. Co. *v.* Canble, 46 Ind. 277; McKinney *v.* Ohio, etc., R. Co., 22 Ind. 99.

60. Louisville, etc., R. Co. *v.* Cauble, 46 Ind. 277; Kansas Pac. R. Co. *v.* Wood, 24 Kan. 619.

But the judgment cannot be enforced by the state court against the property in the possession of the receiver, which is the possession of the federal court. In such cases plaintiff should either apply to the proper federal court for leave to sue the receiver, or for an order from that court upon the receiver to pay the judgment. Ohio, etc., R. Co. *v.* Fitch, 20 Ind. 498.

61. Ohio, etc., R. Co. *v.* Russell, 115 Ill. 52, 3 N. E. 561, holding that the company is liable because the duty is imposed directly by law upon it, and the appointing of a receiver does not affect the corporate exist-

has leased its road to another and a receiver has been appointed for the lessee company, the lessee company upon the principles above stated [62] is not liable for the acts of its own receiver while in the exclusive control of its road and franchises; [63] but it has been held that wherever the lessor company would be liable for the acts of its lessee, such liability also continues to exist while its road is operated by receivers of the lessee company appointed in an action to which the lessor was not a party,[64] unless prior to the injury complained of such receivers have also been appointed as receivers of the lessor company by a court of competent jurisdiction in an action against that company.[65] Where a receiver of one road leases and operates another as receiver, he is in his official capacity liable for injuries due to the unsafe condition of the track of such road.[66]

10. Joint Liabilities — a. In General. Two or more railroad companies may be separately liable for the same injury and yet not jointly liable; [67] but where an injury is sustained by reason of the joint or concurrent negligence of two railroad companies or a railroad company and another company or person, plaintiff may sue both jointly,[68] and it is not necessary that there should be a breach of a joint duty or any concerted action on the part of defendants, but it is sufficient if their several acts of negligence concur and unite in producing the injury complained of;[69] nor is it material that one of defendants owed to plaintiff a higher degree of care than the other.[70] So in case of an injury growing out of a collision where there was negligence on the part of both defendants, plaintiff may sue jointly, according to the nature of the collision, the two railroad companies,[71] or railroad company and street railroad company,[72] or a railroad company and a hackman in whose vehicle plaintiff was a passenger.[73] A person injured at a crossing may maintain a joint action against the company owning the road and

ence of the company or its right or duty to perform any acts required of it which may be done without interfering with the rightful management of the road by the receiver.

62. See *supra*, X, C, 9, c, (1).

63. Chamberlain *v.* New York, etc., R. Co., 71 Fed. 636.

64. Harris *v.* Quincy, etc., R. Co., 124 Mo. App. 45, 101 S. W. 601; Parr *v.* Spartanburg, etc., R. Co., 43 S. C. 197, 20 S. E. 1009, 49 Am. St. Rep. 826. See also Washington, etc., R. Co. *v.* Brown, 17 Wall. (U. S.) 445, 21 L. ed. 675, where, however, the receiver was not in exclusive possession and control but jointly with the lessee company. But see Chamberlain *v.* New York, etc., R. Co., 71 Fed. 636.

Failure to fence.— The lessor company will be liable for injuries to stock which are due to the absence or defective condition of fences or cattle-guards, although the road at the time of the injury is being operated by a receiver of the lessee. Harris *v.* Quincy, etc., R. Co., 124 Mo. App. 45, 101 S. W. 601.

65. Trinity, etc., R. Co. *v.* Brown, (Tex. Civ. App. 1898) 46 S. W. 926.

66. Dillingham *v.* Crank, 87 Tex. 104, 27 S. W. 93.

67. Chicago, etc., R. Co. *v.* Rolvink, 31 Ill. App. 596; Langhorne *v.* Richmond R. Co., 91 Va. 369, 22 S. E. 159.

68. *District of Columbia.*— Washington, etc., R. Co. *v.* Hickey, 5 App. Cas. 436.

Indiana.—Chicago, etc., R. Co. *v.* Marshall, 38 Ind. App. 217, 75 N. E. 973.

New Jersey.— Matthews *v.* Delaware, etc., R. Co., 56 N. J. L. 34, 27 Atl. 919, 22 L. R. A. 261.

New York.— Startz *v.* Pennsylvania, etc., R. Co., 16 N. Y. Suppl. 810.

Texas.— Galveston, etc., R. Co. *v.* Croskell, 6 Tex. Civ. App. 160, 25 S. W. 486.

See 41 Cent. Dig. tit. "Railroads," § 854 *et seq.*

69. Chicago, etc., R. Co. *v.* Marshall, 38 Ind. App. 217, 75 N. E. 973; Matthews *v.* Delaware, etc., R. Co., 56 N. J. L. 34, 27 Atl. 919, 22 L. R. A. 261. *Compare* Chicago, etc., R. Co. *v.* Rolvink, 31 Ill. App. 596.

70. Chicago, etc., R. Co. *v.* Durand, 65 Kan. 380, 69 Pac. 356.

71. Cincinnati, etc., R. Co. *v.* Acrea, 40 Ind. App. 150, 81 N. E. 213, 82 N. E. 1009; Baltimore, etc., R. Co. *v.* Kleespies, 39 Ind. App. 151, 76 N. E. 1015, 78 N. E. 252; Chicago, etc., R. Co. *v.* Marshall, 38 Ind. App. 217, 75 N. E. 973; Chicago, etc., R. Co. *v.* Martin, 59 Kan. 437, 53 Pac. 461; Colegrove *v.* New York, etc., R. Co., 20 N. Y. 492, 75 Am. Dec. 418.

Injuries from collisions see, generally, *infra*, X, D.

72. Washington, etc., R. Co. *v.* Hickey, 5 App. Cas. (D. C.) 436; Matthews *v.* Delaware, etc., R. Co., 56 N. J. L. 34, 27 Atl. 919, 22 L. R. A. 261; Downey *v.* Philadelphia Traction Co., 161 Pa. St. 588, 29 Atl. 128 [*affirming* 3 Pa. Dist. 81, 14 Pa. Co. Ct. 251]; St. Louis, etc., R. Co. *v.* Wiggins, (Tex. Civ. App. 1908) 107 S. W. 899; Galveston, etc., R. Co. *v.* Vallrath, 40 Tex. Civ. App. 46, 89 S. W. 279.

73. Chicago, etc., R. Co. *v.* Durand, 65 Kan. 380, 69 Pac. 356.

another using it by its permission, where there was negligence on the part of the gateman of the one and those in charge of the train of the other,[74] or the company owning the road was negligent in not maintaining a flagman at the crossing and the other company in the manner of operating its trains.[75] Where two railroad companies operate a road jointly, they are jointly liable for injuries occurring in the operation of the road;[76] and in case of connecting roads, a person injured by a defective car transferred from one to the other may sue both jointly, where one was negligent in delivering a defective car and the other in receiving and using it without proper inspection.[77] A railroad company and a telephone company are jointly liable for an injury to a brakeman caused by a telephone wire being negligently allowed to hang too low across the track, where each knew or should have known of its condition;[78] and a railroad company and a passenger are jointly liable for an assault committed jointly by a conductor and such passenger upon another passenger;[79] and where the roads of two railroad companies intersect, they are jointly liable for an injury to an employee of a third company using the tracks with their permission, caused by the defective condition of the track at the point of intersection.[80] The company owning the road and another company which it permits to use it are jointly liable for the negligence of the latter,[81] or for injuries to stock by the trains of the latter, due to the unfenced condition of the road;[82] and where it is held that a lessor company is liable for the torts of the lessee,[83] both may be sued jointly for an injury due to the negligence of the latter.[84] In case of a joint liability plaintiff is not obliged to sue both defendants but may elect to sue either,[85] and it is no defense for the company sued that the negligence of the other company exceeded its own.[86] So also the jury may find against one joint defendant and in favor of the other,[87] and the former cannot complain that a verdict was rendered against it alone.[88] Where a joint action is brought against a railroad company and a contractor for injuries due to the condition of a crossing, which the contractor had agreed with the railroad company to keep in repair, the jury may, if they find the injury was due to the negligence of the contractor, render a verdict in favor of plaintiff against both defendants, and in favor of the railroad company over against the contractor, where a demand for such judgment is made in the pleadings of defendant railroad company.[89]

b. Acts of Persons in Joint Employ of Different Companies. Where an injury

74. Startz *v.* Pennsylvania, etc., R. Co., 16 N. Y. Suppl. 810.

75. Cleveland, etc., R. Co. *v.* Bender, 69 Ill. App. 262.

76. Bissell *v.* Michigan Southern, etc., R. Co., 22 N. Y. 258; Smith *v.* New York, etc., R. Co., 96 Fed. 504.

Where a particular train is operated jointly by two railroad companies, they are jointly liable for an injury due to the negligent operation of the train. Chesapeake, etc., R. Co. *v.* Davis, 58 S. W. 698, 22 Ky. L. Rep. 748, 119 Ky. 641, 60 S. W. 14, 22 Ky. L. Rep. 1156.

77. Missouri, etc., R. Co. *v.* Merrill, 61 Kan. 671, 60 Pac. 819; Hoye *v.* Great Northern R. Co., 120 Fed. 712.

78. Southwestern Tel., etc., Co. *v.* Crank, (Tex. Civ. App. 1894) 27 S. W. 38 [*affirmed* in 87 Tex. 104, 27 S. W. 93].

79. Georgia Cent. R. Co. *v.* Brown, 113 Ga. 414, 38 S. E. 989, 84 Am. St. Rep. 250.

80. Indiana, etc., R. Co. *v.* Barnhart, 115 Ind. 399, 16 N. E. 121. See also Breecher *v.* Chicago Junction R. Co., 119 Ill. App. 554.

81. Pennsylvania Co. *v.* Ellett, 132 Ill. 654, 24 N. E. 559; Pennsylvania Co. *v.* Greso, 102 Ill. App. 252; Pennsylvania Co. *v.* Greso, 79 Ill. App. 127; Cleveland, etc., R. Co. *v.* Bender, 69 Ill. App. 262; Hollins *v.* New Orleans, etc., R. Co., 119 La. 418, 44 So. 159.

82. Berchold *v.* Lake Shore, etc., R. Co., 4 Ohio Dec. (Reprint) 327, 1 Clev. L. Rep. 314.

83. See *supra*, X, C, 4, a, (1).

84. Wabash R. Co. *v.* Humphrey, 127 Ill. App. 334; Wabash R. Co. *v.* Keeler, 127 Ill. App. 265.

85. Wisconsin Cent. R. Co. *v.* Ross, 142 Ill. 9, 31 N. E. 412, 34 Am. St. Rep. 49 [*affirming* 43 Ill. App. 454]; Wabash, etc., R. Co. *v.* Peyton, 106 Ill. 534, 46 Am. Rep. 705; Grand Trunk R. Co. *v.* Huard, 36 Can. Sup. Ct. 655.

86. Union R., etc., Co. *v.* Shacklet, 119 Ill. 232, 10 N. E. 896 [*affirming* 19 Ill. App. 145].

87. Kirby *v.* Delaware, etc., Canal Co., 90 Hun (N. Y.) 588, 35 N. Y. Suppl. 975.

88. Kansas City, etc., R. Co. *v.* Stoner, 51 Fed. 649, 2 C. C. A. 437; Lockhart *v.* Little Rock, etc., R. Co., 40 Fed. 631.

89. Dallas, etc., R. Co. *v.* Able, 72 Tex. 150, 9 S. W. 871.

is inflicted by a train under the joint control of the servants of two companies or by servants employed by them jointly, the companies are jointly liable;[90] but two railroad companies operating parallel roads and having no business connection and each employing its own servants are not jointly liable for an injury at a highway crossing upon one of them, merely because their flagmen watched and were guided by the movements of each other.[91]

c. Railroad Company and Its Employees.[92] In some cases it is held that a railroad company and its employees are jointly liable for the torts of the latter committed within the scope of their employment,[93] although the acts complained of were wilful or malicious;[94] while others hold that the liability of the railroad company for the torts of its servants is not joint,[95] but that to render the company jointly liable there must have been actual participation or negligence on the part of the company concurring with that of the employee as distinguished from imputed negligence growing out of the relation of master and servant.[96]

11. Liability of Agents and Employees.[97] While some of the cases make a distinction between acts of misfeasance and nonfeasance,[98] it is ordinarily held that an agent or employee of a railroad company by whose negligent or wrongful acts an injury is inflicted is personally liable therefor,[99] and cannot escape liability upon the ground that he was acting merely as agent for another.[1] The term "agents" as used in statutes making railroad companies and their agents liable for injury to animals where the road is not fenced applies to engineers [2]

90. Moling *v.* Barnard, 65 Mo. App. 600; Nashville, etc., R. Co. *v.* Carroll, 6 Heisk. (Tenn.) 347.

91. Chicago, etc., R. Co. *v.* Conners, 30 Ill. App. 307.

92. See, generally, Master and Servant, 26 Cyc. 1545.

93. *Georgia.*— Southern R. Co. *v.* Grizzle, 124 Ga. 735, 53 S. E. 244, 110 Am. St. Rep. 191.

Indiana.— Blue *v.* Briggs, 12 Ind. App. 105, 39 N. E. 885.

Kentucky.— Illinois Cent. R. Co. *v.* Houchins, 121 Ky. 526, 89 S. W. 530, 28 Ky. L. Rep. 499, 123 Am. St. Rep. 205, 1 L. R. A. N. S. 375; Illinois Cent. R. Co. *v.* Coley, 121 Ky. 385, 89 S. W. 234, 28 Ky. L. Rep. 336, 1 L. R. A. N. S. 370; Winston *v.* Illinois Cent. R. Co., 111 Ky. 954, 65 S. W. 13, 23 Ky. L. Rep. 1283, 55 L. R. A. 603; Chesapeake, etc., R. Co. *v.* Dixon, 104 Ky. 608, 47 S. W. 615, 20 Ky. L. Rep. 792.

Massachusetts.— Hewett *v.* Swift, 3 Allen 420; Moore *v.* Fitchburg R. Corp., 4 Gray 465, 64 Am. Dec. 83.

New Jersey.— Brokaw *v.* New Jersey R., etc., Co., 32 N. J. L. 328, 90 Am. Dec. 659.

New York.— Priest *v.* Hudson River R. Co., 40 How. Pr. 456.

North Carolina.— Hough *v.* Southern R. Co., 144 N. C. 692, 57 S. E. 469.

South Carolina.— Able *v.* Southern R. Co., 73 S. C. 173, 52 S. E. 962; Schumpert *v.* Southern R. Co., 65 S. C. 332, 43 S. E. 813, 95 Am. St. Rep. 802.

United States.— Chesapeake, etc., R. Co. *v.* Dixon, 179 U. S. 131, 21 S. Ct. 67, 45 L. ed. 121; Riser *v.* Southern R. Co., 116 Fed. 215; Charman *v.* Lake Erie, etc., R. Co., 105 Fed. 449.

See 41 Cent. Dig. tit. "Railroads," § 858.

94. Able *v.* Southern R. Co., 73 S. C. 173, 52 S. E. 962. *Contra*, McIntyre *v.* Southern R. Co., 131 Fed. 985; Gustafson *v.* Chicago, etc., R. Co., 128 Fed. 85.

95. McIntyre *v.* Southern R. Co., 131 Fed. 985; Gableman *v.* Peoria, etc., R. Co., 82 Fed. 790; Warax *v.* Cincinnati, etc., R. Co., 72 Fed. 637.

96. McIntyre *v.* Southern R. Co., 131 Fed. 985; Warax *v.* Cincinnati, etc., R. Co., 72 Fed. 637.

97. See, generally, Master and Servant, 26 Cyc. 1543.

Joint liability of railroad company and its employees see *supra*, X, C, 10, c.

98. Bryce *v.* Southern R. Co., 125 Fed. 958 [*affirming* 122 Fed. 709]; Kelly *v.* Chicago, etc., R. Co., 122 Fed. 286. But see Ellis *v.* Southern R. Co., 72 S. C. 465, 52 S. E. 228, 3 L. R. A. N. S. 378.

99. *Georgia.*— Southern R. Co. *v.* Grizzle, 124 Ga. 735, 53 S. E. 244, 110 Am. St. Rep. 191.

Indiana.— Blue *v.* Briggs, 12 Ind. App. 105, 39 N. E. 885.

Kentucky.— Illinois Cent. R. Co. *v.* Coley, 121 Ky. 385, 89 S. W. 234, 28 Ky. L. Rep. 336, 1 L. R. A. N. S. 370; Martin *v.* Louisville, etc., R. Co., 95 Ky. 612, 26 S. W. 801, 16 Ky. L. Rep. 150.

New York.— Suydam *v.* Moore, 8 Barb. 358.

Pennsylvania.— See Rauch *v.* Lloyd, 31 Pa. St. 358, 72 Am. Dec. 747.

South Carolina.— Ellis *v.* Southern R. Co., 72 S. C. 465, 52 S. E. 228, 3 L. R. A. N. S. 378.

See 41 Cent. Dig. tit. "Railroads," §§ 859, 860.

1. Blue *v.* Briggs, 12 Ind. App. 105, 39 N. E. 885; Martin *v.* Louisville, etc., R. Co., 95 Ky. 612, 26 S. W. 801, 16 Ky. L. Rep. 150.

2. Suydam *v.* Moore, 8 Barb. (N. Y.) 358;

and firemen[3] engaged in the operation of the trains by which such injuries are inflicted.

12. Pleading Ownership and Operation — a. Complaint — (i) *In General.* In an action for an injury growing out of the operation of a railroad, the complaint must allege such facts in regard to the ownership, operation, or use of the road or the train causing the injury as may be necessary to show a liability on the part of the company or person sued for the particular injury complained of.[4] So although one railroad company may be liable for the acts of another, as in the case of a lease or license to use its road, the relation between the railroads must be pleaded with the facts necessary to create the liability,[5] and the complaint must show by which company the injury was inflicted; [6] but in an action against the company owning a road for the acts of another company which it has permitted to use the same, no further negligence need be alleged against defendant than that of the company which it has permitted to use its road.[7] Where the complaint states a common-law liability and is not based upon a charter provision or statute relating to a particular road, it is sufficient to allege that the injury occurred upon a road in the possession of and operated by defendant and as the result of its negligence, without stating the name of the road,[8] and in an action against a lessee or any company or person operating the road of another, it is not necessary to allege in what name the road was operated.[9] In an action against a consolidated company for a tort of one of the constituent companies, committed prior to the consolidation, it is not necessary to allege an express assumption of such liability by defendant in the articles of consolidation.[10] Where it is sought

St. Johnsbury, etc., R. Co. *v.* Hunt, 59 Vt. 294, 7 Atl. 277.

3. Suydam *v.* Moore, 8 Barb. (N. Y.) 358.

4. Pittsburg, etc., R. Co. *v.* Kain, 35 Ind. 291.

The complaint must show either that the injury was done by defendant or by some person for whose acts it is responsible. Wabash, etc., R. Co. *v.* Rooker, 90 Ind. 581.

Complaint held insufficient. — In an action for damages caused by fire communicated by a locomotive, a complaint is defective which does not allege that the locomotive was in the use either of defendant railroad company or its lessee (Frye *v.* Atlantic, etc., R. Co., 47 Me. 523); and in an action for injury to stock a complaint is defective which does not allege either that the train which caused the injury belonged to defendant or was being run over its road (Toledo, etc., R. Co. *v.* Weaver, 34 Ind. 298); and where the statute requiring railroad companies to fence their tracks provides that "the corporation and its agents" shall be liable for injuries occasioned by the want of such fences, the complaint must allege that defendant is a railroad corporation or the agent of such corporation (Cooley *v.* Brainerd, 38 Vt. 394).

Complaint held sufficient in respect to allegations regarding the corporate existence of defendant and the fact that it owned and operated the road at the time of the injury see Lake Erie, etc., R. Co. *v.* Griffin, 8 Ind. App. 47, 35 N. E. 396, 52 Am. St. Rep. 465.

A complaint which names defendant as lessee of a certain railroad and indicates that defendant is in possession of and operating the road, although not expressly alleging a lease, will be construed as seeking to charge defendant as lessee so as to bring it within the provision of Ga. Code, § 3407, that the lessee or corporation having possession of a railroad may be sued in the same jurisdiction as was the lessor or owner before the lease. Watson *v.* Richmond, etc., R. Co., 91 Ga. 222, 18 S. E. 306.

5. Cincinnati, etc., R. Co. *v.* Wood, 82 Ind. 593; Lake Erie, etc., R. Co. *v.* Rucker, 13 Ind. App. 600, 41 N. E. 470.

6. Central R. Co. *v.* Brinson, 64 Ga. 475; Wabash, etc., R. Co. *v.* Rooker, 90 Ind. 581. But see McCoy *v.* Kansas City, etc., R. Co., 36 Mo. App. 445, holding that in an action to enforce the liability of a railroad company as lessor for the acts of its lessee, it is sufficient to charge the act complained of as the act of the lessor, without reference to the lease or the fact that such act was done by the lessee.

7. Pennsylvania Co. *v.* Ellett, 132 Ill. 654, 24 N. E. 559.

8. Austin *v.* New York, etc., R. Co., 25 N. J. L. 381.

9. Cincinnati, etc., R. Co. *v.* Leviston, 97 Ind. 488; Wabash, etc., R. Co. *v.* Williamson, 3 Ind. App. 190, 29 N. E. 455.

In Indiana under a former statute a company operating the road of another was not liable for injuries to stock due to the road not being fenced, unless it was operating the road in the name of the company owning it, and such fact was necessary to be alleged (Jeffersonville, etc., R. Co. *v.* Downey, 61 Ind. 287; Cincinnati, etc., R. Co. *v.* Bunnell, 61 Ind. 183); but this element of liability and the consequent necessity of such allegation has been changed by an amendment of the statute (Cincinnati, etc., R. Co. *v.* Leviston, 97 Ind. 488).

10. Pennsylvania Co. *v.* Ellett, 132 Ill.

to hold a railroad company liable for the acts of a receiver, where the road is returned to the company without sale, and the receiver has made permanent improvements with earnings derived during the receivership, the facts necessary to show a liability upon this ground must be alleged.[11]

(II) *JOINT LIABILITIES.* In an action against two railroad companies jointly, it is sufficient to charge that the act complained of was done by defendants, without showing what relation they sustained to each other,[12] and if the existence of a particular relation between them is essential to fix a liability upon either, this is a matter of proof;[13] but where the complaint alleges that the injury was done by the train of one company upon the road of another company, and under the statute the liability of each depends upon the relation between them, in such case the complaint must allege such a relation as to bring the case within the application of the statute.[14]

b. Answer. Where defendant pleads as a defense that at the time of the injury the railroad was in the hands of and being operated by a receiver, it is not necessary to set forth a copy of the order of the court appointing the receiver;[15] but where a railroad company pleads that at the time of the injury the road was operated by its vendee, to which it had conveyed its property and franchises, the answer must show that the circumstances authorizing such sale existed.[16]

13. ISSUES, PROOF, AND VARIANCE. As in other civil actions,[17] only such evidence is admissible as tends to support the issues made by the pleadings,[18] and plaintiff must introduce proof in support of every material allegation of the complaint essential to a recovery,[19] unless admitted by the pleadings,[20] or conceded

654, 24 N. E. 559; Cleveland, etc., R. Co. *v.* Prewitt, 134 Ind. 557, 33 N. E. 367.

11. Dayhoff *v.* International, etc., R. Co., (Tex. Civ. App. 1894) 26 S. W. 517.

12. Indianapolis, etc., R. Co. *v.* Warner, 35 Ind. 515; Chicago, etc., R. Co. *v.* Clark, 26 Nebr. 645, 42 N. W. 703.

13. Indianapolis, etc., R. Co. *v.* Warner, 35 Ind. 515.

14. Cincinnati, etc., R. Co. *v.* Paskins, 36 Ind. 380, holding that the complaint does not state a cause of action against either the owning or using company, where it fails to allege that the former had leased its road or in any manner consented to its use by the other or that the latter was operating the road in the name of the former. See also Jeffersonville, etc., R. Co. *v.* Downey, 61 Ind. 183.

The Indiana statute was amended by the act of 1877, so that the company owning the road and any lessee or other company or person operating the same are now jointly and severally liable, without regard to whether the road is operated in the name of the company owning it or not. Cincinnati, etc., R. Co. *v.* Leviston, 97 Ind. 488.

15. Bell *v.* Indianapolis, etc., R. Co., 53 Ind. 57. But see Ohio, etc., R. Co. *v.* Fitch, 20 Ind. 498.

16. East Line, etc., R. Co. *v.* Rushing, 69 Tex. 306, 6 S. W. 834, holding that the answer was fatally defective in failing to allege that the road of the vendee was not a competing line.

17. See, generally, TRIAL.

18. Cincinnati, etc., R. Co. *v.* Bunnell, 61 Ind. 183.

19. Pittsburgh, etc., R. Co. *v.* Kain, 35 Ind. 291, holding that where the complaint alleges that a particular company inflicted the injury and afterward consolidated with another company so as to form defendant company, a recovery cannot be sustained upon proof of the injury as alleged without proof of the consolidation.

That the injury was done by one of defendant's trains is a material allegation and must be proved. Lake Erie, etc., R. Co. *v.* Rooker, 13 Ind. App. 600, 41 N. E. 470.

That defendant railroad company is a corporation, although so designated in the complaint, need not be proved by plaintiff where the statute imposes the liability upon "any railway company or corporation" and the action is on an appeal from the judgment of a justice, and defendant made no appearance before the justice. Kansas City, etc., R. Co. *v.* Bolson, 36 Kan. 534, 14 Pac. 5.

20. Spooner *v.* Delaware, etc., R. Co., 115 N. Y. 22, 21 N. E. 696; Allen *v.* Palmer, 101 N. Y. App. Div. 15, 91 N. Y. Suppl. 731.

Matters not admitted.—A plea of the general issue in an action where defendant is sued as a corporation organized by the consolidation of certain other companies, and therefore liable for the torts of one of the constituent companies, admits defendant's corporate existence but not the fact of consolidation upon which its liability depends (Zealy *v.* Birmingham R., etc., Co., 99 Ala. 579, 13 So. 118); and where two railroad companies own tracks in a street, and in an action against one of them the complaint alleges in general terms that defendant operated trains in that street and all the allegations are denied except that defendant did operate trains in the street, the answer does not admit that defendant operated trains on the tracks belonging to the other company (Collier *v.* Great Northern R. Co., 40 Wash. 639, 82 Pac. 935).

upon the trial;[21] but where the complaint contains two counts, one alleging that defendant was operating the road under a lease and the other that it was using, running, and controlling the road without specifying under what kind of contract or agreement, evidence of the facts alleged in the second count is sufficient to sustain the action without proof of the lease.[22] So also the proof must conform to the allegations of the pleadings and any material variance is fatal to a recovery,[23] but a variance which could not have surprised or prejudiced the adverse party will not be regarded as material;[24] and where the liability in question applies to a company operating the road of another, so that the question of ownership is immaterial, proof that defendant operated and controlled the road is sufficient, although the complaint alleged that it owned, operated, and controlled the road.[25] Under a plea of the general issue or general denial, defendant railroad company may show that the injury complained of occurred upon the road of a different company and through the negligence of the latter's servants,[26] or if upon its own road that at the time of the injury the road was in the hands of and being operated by a receiver,[27] or a lessee of defendant,[28] or that defendant was operating the road as lessee of another company, where such fact would be a defense as to the liability in issue.[29]

21. Lake Erie, etc., R. Co. *v.* Wills, 140 Ill. 614, 31 N. E. 122 [*affirming* 39 Ill. App. 649], holding that an objection that there was no evidence that defendant was the owner of or operating the road is not available after verdict, where the fact that defendant was in possession and operating the road was practically conceded by both parties and the case tried throughout upon that theory.

22. Central R., etc., Co. *v.* Gamble, 77 Ga. 584, 3 S. E. 287.

23. Cincinnati, etc., R. Co. *v.* Wood, 82 Ind. 593; Pittsburg, etc., R. Co. *v.* Kain, 35 Ind. 291.

Variance held fatal.— There is a material and fatal variance between an allegation that the injury was done by defendant and proof that it was done by a different company, a lessee of defendant (Cincinnati, etc., R. Co. *v.* Wood, 82 Ind. 593. But see McCoy *v.* Kansas City, etc., R. Co., 36 Mo. App. 445); an allegation that the injury was done upon defendant's road and proof that it was upon a road operated by defendant as lessee (**Central R. Co.** *v.* Brinson, 64 Ga. 475; Pittsburgh, etc., R. Co. *v.* Hannon, 60 Ind. 417); an allegation that the injury was done by a particular company which afterward consolidated with another to form defendant company, and proof that defendant was merely the lessee of the company which inflicted the injury and which occurred prior to the lease (Pittsburg, etc., R. Co. *v.* Kain, 35 Ind. 291); an allegation charging defendant with liability as the lessor or licensor of the company inflicting the injury and proof that defendant was itself operating the train where the injury occurred (Heins *v.* Savannah, etc., R. Co., 114 Ga. 678, 40 S. E. 710); an allegation that defendant caused an injury to plaintiff's land by obstructing a watercourse and proof that it was the embankment and culvert of a different railroad company which were located at the point where the damage was alleged to be (Cent. R. Co. *v.* Flournoy, 69 Ga. 763); an allegation that the train causing the injury was owned and operated by several defendant railroad companies and proof that it was owned and operated exclusively by one of them (Chicago, etc., R. Co. *v.* Rolvink, 31 Ill. App. 596); and an allegation that defendant caused the injury complained of and proof that the road where the injury occurred was owned by a different company, and at the time of the injury was operated by a receiver of that company (Wabash, etc., R. Co. *v.* McKittrick, 36 Ill. App. 82).

24. Texas, etc., R. Co. *v.* Wilson, (Tex. Civ. App. 1893) 21 S. W. 373. See also Illinois Terminal, etc., Co. *v.* Thompson, 210 Ill. 226, 71 N. E. 328, holding that the fact that a complaint charges a railroad company with negligence in regard to "its" track or switch-yard does not necessarily import or require proof of ownership in fee, but is sustained by proof that the company was rightfully using the track and operating its train thereon.

25. Missouri Pac. R. Co. *v.* Ricketts, 45 Kan. 617, 26 Pac. 50. See also Chicago, etc., R. Co. *v.* Schmitz, 211 Ill. 446, 71 N. E. 1050 [*affirming* 113 Ill. App. 295].

26. Richmond, etc., R. Co. *v.* Buice, 88 Ga. 180, 14 S. E. 205.

27. Archambeau *v.* New York, etc., R. Co., 170 Mass. 272, 49 N. E. 435; Kansas, etc., R. Co. *v.* Dorough, 72 Tex. 108, 10 S. W. 711; Dayhoff *v.* International, etc., R. Co., (Tex. Civ. App. 1894) 26 S. W. 517.

28. East Line, etc., R. Co. *v.* Culberson, 72 Tex. 375, 10 S. W. 706, 13 Am. St. Rep. 805, 3 L. R. A. 567, where the action was brought by an employee of the lessee company against the lessor company for an injury due to the negligence of the lessee for which the lessor company would not be liable.

29. Pittsburgh, etc., R. Co. *v.* Hunt, 71 Ind. 229, decided under an Indiana statute since amended, but under which, prior to the amendment, the lessee of a railroad company was not liable for injuries to stock on

14. Evidence — a. Presumptions and Burden of Proof. While the burden is upon plaintiff to show such facts in regard to the ownership, operation, or use of the road as are necessary to establish a liability on the part of defendant for the injury complained of,[30] it will be presumed in the absence of any evidence to the contrary, where it is shown or admitted that defendant owned the road, that it also controlled and operated it,[31] or if in possession of and operating the road that it is the owner of the road,[32] that trains operated upon defendant's road were owned and operated by it,[33] that a locomotive operated by defendant on its road was its locomotive,[34] or if attached to one of defendant's regular trains that it was under its control,[35] and that a locomotive bearing the name or initials of defendant company was owned and operated by it.[36] Where, however, it is shown that another company as well as defendant was operating trains over the same road, there is no presumption as to which inflicted the injury, and the burden is upon plaintiff to show this fact;[37] but where a locomotive is operated by an unincorporated association of railroad companies, constituting a switching association, it will be presumed that the company owning the locomotive is a member of the association.[38] In an action against a receiver of a railroad where it is shown that he was receiver of the road, it will be presumed that he was discharging the duties imposed upon him by that relation and was operating the road,[39] but in an action against a railroad company for a cause of action arising during a receivership, the burden is upon plaintiff to show that the road was returned to defendant without sale, and with permanent improvements made by the receiver from earnings accruing during the receivership.[40]

b. Admissibility. In regard to the admissibility of evidence the general rules in civil actions apply,[41] and generally speaking any evidence is admissible which is relevant to any material question in issue as to the ownership, operation, or use of the road.[42] In an action based upon the defective condition of

account of the road not being fenced, unless operating it in the name of the lessor.

30. Ohio, etc., R. Co. *v.* Taylor, 27 Ill. 207; Lake Erie, etc., R. Co. *v.* Rooker, 13 Ind. App. 600, 41 N. E. 470; Georgia, etc., R. Co. *v.* Baird, 76 Miss. 521, 24 So. 195.

31. Kerr *v.* Quincy, etc., R. Co., 113 Mo. App. 1, 87 S. W. 596; Peabody *v.* Oregon R., etc., Co., 21 Oreg. 121, 26 Pac. 1053, 12 L. R. A. 823; Plew *v.* Missouri, etc., R. Co., (Tex. Civ. App. 1894) 29 S. W. 403; Ferguson *v.* Wisconsin Cent. R. Co., 63 Wis. 145, 23 N. W. 123.

32. Illinois Cent. R. Co. *v.* Mills, 42 Ill. 407.

33. South-Alabama, etc., R. Co. *v.* Pilgreen, 62 Ala. 305; Lake Erie, etc., R. Co. *v.* Carson, 4 Ind. App. 185, 30 N. E. 432; Walsh *v.* Missouri Pac. R. Co., 102 Mo. 582, 14 S. W. 873, 15 S. W. 757; Brooks *v.* Missouri Pac. R. Co., 98 Mo. App. 166, 71 S. W. 1083.

Proof that another company owned the train does not rebut the presumption that it was operated under the control of the company owning the road, where it is conceded that such company was operating its road. Gulf, etc., R. Co. *v.* Miller, 98 Tex. 270, 83 S. W. 182 [*affirming* 35 Tex. Civ. App. 116, 79 S. W. 1109].

34. Bush *v.* Southern R. Co., 63 S. C. 96, 40 S. E. 1029.

35. Spink *v.* New York, etc., R. Co., 26 R. I. 115, 58 Atl. 499.

36. Ryan *v.* Baltimore, etc., R. Co., 60 Ill. App. 612.

The presumption is not conclusive and may be rebutted by evidence to the contrary (Chicago, etc., R. Co. *v.* Capek, 68 Ill. App. 500); but such presumption is not rebutted, although it may be somewhat weakened, by proof that at the time of the injury the locomotive was upon the track of a different company (East St. Louis Connecting R. Co. *v.* Altgen, 210 Ill. 213, 71 N. E. 377 [*affirming* 112 Ill. App. 471]).

37. St. Louis Southwestern R. Co. *v.* Heintz, 82 Ark. 459, 102 S. W. 221; Lake Erie, etc., R. Co. *v.* Rooker, 13 Ind. App. 600, 41 N. E. 470.

38. Pittsburgh, etc., R. Co. *v.* Callaghan, 50 Ill. App. 676.

39. McNulta *v.* Ensch, 134 Ill. 46, 24 N. E. 631.

40. Dayhoff *v.* International, etc., R. Co., (Tex. Civ. App. 1894) 26 S. W. 517.

41. See, generally, Evidence, 16 Cyc. 1110.

42. Martin *v.* Central Iowa R. Co., 59 Iowa 411, 13 N. W. 424; Williams *v.* Cleveland, etc., R. Co., 102 Mich. 537, 61 N. W. 52.

Evidence held admissible.—As tending to prove defendant's ownership of the road the pleadings in a former suit against defendant, showing that it acquired the road by purchase under a mortgage foreclosure prior to the injury are admissible (Martin *v.* Central Iowa R. Co., 59 Iowa 411, 13 N. W. 424); and while the mere ownership of stock in one railroad by another does not impose a liability upon the latter for negligence of the former, yet evidence of such fact is competent in connection with other facts and

premises alleged to be under the control of defendant, evidence of repairs made subsequent to the injury while not competent as evidence of prior negligence is, if properly limited for such purpose, admissible to show that the place in question was under defendant's control.[43] Where defendant is operating the road of another company as lessee a mortgage executed by defendant several years after the injury complained of is not admissible as evidence that defendant was in possession of the road at the time of the injury,[44] and in an action for injuries growing out of the construction of a railroad, evidence of general reputation in the community that defendant was constructing it is not admissible.[45]

c. Weight and Sufficiency. With regard to the weight and sufficiency of evidence, the general rules in civil actions apply,[46] and plaintiff must show by a preponderance of evidence such facts in regard to defendant's ownership or operation of the road or agency causing the injury as are necessary to create a liability therefor;[47] but direct and positive evidence of such facts is not always essential,[48] and since positive proof of the actual facts of ownership and operation is ordinarily easy for defendant and often difficult or impossible for plaintiff,[49] it is sufficient for plaintiff in the first instance to make a *prima facie* case by evidence of facts from which defendant's ownership or operation may be presumed,[50]

circumstances to be considered in passing upon the question whether the latter road owned and controlled the former (Jones *v.* Pennsylvania R. Co., 19 D. C. 178; Pennsylvania Co. *v.* Rossett, 116 Ill. App. 342. *Compare* Moynihan *v.* Pennsylvania R. Co., 19 D. C. 573). As tending to show that defendant was in possession of or operating the road at the time of the injury, a traffic agreement authorizing defendant to take possession of the road, which was owned by another company, on a certain date prior to the injury and a mortgage executed by both companies prior to the injury are admissible (Williams *v.* Cleveland, etc., R. Co., 102 Mich. 537, 61 N. W. 52); and it is also competent for this purpose to show that several months prior to the injury an inspection of the road was made by defendant (Union Pac. R. Co. *v.* Jones, 21 Colo. 340, 40 Pac. 891); and in an action against a railroad company for injuries to a traveler on a highway, caused by his horse taking fright at a mail crane erected at a crossing, evidence that the railroad company's employees worked on the crane is competent as tending to show that it was erected and maintained by the railroad company (Western R. Co. *v.* Cleghorn, 143 Ala. 392, 39 So. 133).

43. Bateman *v.* New York Cent., etc., R. Co., 47 Hun (N. Y.) 429; Skottowe *v.* Oregon Short Line, etc., R. Co., 22 Oreg. 430, 30 Pac. 222, 16 L. R. A. 593.

44. Williams *v.* Cleveland, etc., R. Co., 102 Mich. 537, 61 N. W. 52.

45. Missouri Pac. R. Co. *v.* Owens, 1 Tex. App. Civ. Cas. § 384.

46. See, generally, EVIDENCE, 17 Cyc. 753.

47. *Arkansas.*— St. Louis Southwestern R. Co. *v.* Heintz, 82 Ark. 459, 102 S. W. 221.

Colorado.— Denver, etc., R. Co. *v.* Robinson, 6 Colo. App. 432, 40 Pac. 840.

New Jersey.— Thompson *v.* New York, etc., R. Co., 7 N. J. L. J. 72.

New York.— Phillips *v.* New York Cent., etc., R. Co., 84 Hun 412, 32 N. Y. Suppl. 299.

Texas.— Taylor, etc., R. Co. *v.* Warner, 84 Tex. 122, 19 S. W. 449, 20 S. W. 823; Texas, etc., R. Co. *v.* Dessommes, (1891) 15 S. W. 806; Texas Midland R. Co. *v.* Cardwell, (Civ. App. 1900) 59 S. W. 288.

See 41 Cent. Dig. tit. "Railroads," § 861.

Evidence held sufficient to show defendant's ownership of the road (Illinois Cent. R. Co. *v.* Mills, 42 Ill. 407; Payne *v.* Quincy, etc., R. Co., 113 Mo. App. 609, 88 S. W. 164; Oyler *v.* Quincy, etc., R. Co., 113 Mo. App. 375, 88 S. W. 162; Keltenbaugh *v.* St. Louis, etc., R. Co., 34 Mo. App. 147); to show that defendant was operating the road at the time of the injury (Union Pac. R. Co. *v.* Jones, 9 Colo. 379, 12 Pac. 516; Ft. Scott, etc., R. Co. *v.* Fortney, 51 Kan. 287, 32 Pac. 904; Reynolds *v.* St. Louis, etc., R. Co., 22 Mo. App. 609; Pennsylvania R. Co. *v.* Sellers, 127 Pa. St. 406, 17 Atl. 987); to show that defendant was the owner of and in control of the road at the time of the injury (Louisville, etc., R. Co. *v.* Meadows, 87 Ind. 441); to show that defendant was the owner of and operating the road (Terre Haute, etc., R. Co. *v.* Walsh, 11 Ind. App. 13, 38 N. E. 534); and to sustain a finding that a coal house which obstructed plaintiff's view of the track at a crossing was erected and maintained by defendant (Carraher *v.* San Francisco Bridge Co., 81 Cal. 98, 22 Pac. 480).

In an action against defendants as trustees under a mortgage for the benefit of bondholders, it is not necessary to show that they were actually trustees but it is sufficient to show that they were acting as such and had the control and management of the road. Pearson *v.* Wheeler, 55 N. H. 41.

48. Chicago, etc., R. Co. *v.* Schmitz, 211 Ill. 446, 71 N. E. 1050 [*affirming* 113 Ill. App. 295]; Pittsburgh, etc., R. Co. *v.* Knutson, 69 Ill. 103; Louisville, etc., R. Co. *v.* Meadows, 87 Ind. 441; Evansville, etc., R. Co. *v.* Snapp, 61 Ind. 303.

49. Pittsburgh, etc., R. Co. *v.* Knutson, 69 Ill. 103; Keltenbaugh *v.* St. Louis, etc., R. Co., 34 Mo. App. 147.

50. Pittsburgh, etc., R. Co. *v.* Knutson, 69

and this, if defendant introduces no evidence to the contrary, will be sufficient to sustain a verdict for plaintiff,[51] but evidence on the part of plaintiff which merely creates such a presumption is not sufficient as against direct and positive evidence on the part of defendant to the contrary.[52]

15. Questions For Jury.[53] The case should be submitted to the jury wherever there is any competent evidence in regard to the ownership, operation, or control of the road or agency causing the injury which tends to show a liability on the part of defendant therefor,[54] or where the evidence in regard to such ownership or operation is conflicting or different conclusions might reasonably be drawn therefrom.[55]

D. Collisions and Accidents to Trains*—1. Management of Trains—a. In General. A railroad company must exercise due care to prevent collisions or accidents to trains which might result in injury to its passengers or employees, or to the passengers, employees, or trains of another company using the same or intersecting tracks;[56] but the standard and degree of care varies according to the relations between the parties.[57] In guarding against injury to its passengers, it is ordinarily held that a railroad company must exercise a high degree of care and diligence;[58] but this rule does not apply to cases of personal injuries where there is no relation of carrier and passenger between plaintiff and defendant,[59] or as between two railroad companies in regard to the injury by one of the property of the other,[60] and if the train of one company is wrongfully upon the track

Ill. 103; Keltenhaugh *v.* St. Louis, etc., R. Co., 34 Mo. App. 147.

Presumptions see *supra*, X, C, 14, a.

Relation of joint defendants.—Where plaintiff, in an action brought jointly against three railroad companies for personal injuries received at a depot, showed negligence on the part of those operating the train, which was made up of cars belonging to one company propelled by an engine of another by a crew paid by the third, and showed that the depot was maintained for the common benefit of the defendants, between whom some sort of agreement existed, it was held that he had made a *prima facie* case of joint liability without showing just what were the contract relations of defendants. Brown *v.* Southern Pac. Co., 31 Utah 318, 88 Pac. 7.

51. Pittsburgh, etc., R. Co. *v.* Knutson, 69 Ill. 103; Moore *v.* Quincy, etc., R. Co., 121 Mo. App. 674, 97 S. W. 607; Keltenbaugh *v.* St. Louis, etc., R. Co., 34 Mo. App. 147.

Application of rule.— In the absence of any evidence on the part of defendant to the contrary, proof of defendant's ownership of the road is sufficient proof that it was operating the road (Kerr *v.* Quincy, etc., R. Co., 113 Mo. App. 1, 87 S. W. 596; Ferguson *v.* Wisconsin Cent. R. Co., 63 Wis. 145, 23 N. W. 123); proof that defendant was operating the road is sufficient proof of its ownership (Illinois Cent. R. Co. *v.* Mills, 42 Ill. 407); proof that defendant alone kept in repair the track and used it, although it was used by another company, is sufficient proof of defendant's ownership (Georgia Cent. R. Co. *v.* Wood, 129 Ala. 483, 29 So. 775); and proof that the train causing the injury was operated on defendant's track is sufficient proof that it was operated by defendant (Walsh *v.* Missouri Pac. R. Co., 102 Mo. 582, 14 S. W. 873, 15 S. W. 757).

52. Chicago Gen. St. R. Co. *v.* Capek, 68 Ill. App. 500; Phillips *v.* New York Cent., etc., R. Co., 84 Hun (N. Y.) 412, 32 N. Y. Suppl. 299; Texas, etc., R. Co. *v.* Dessommes, (Tex. 1891) 15 S. W. 806.

53. See, generally, Trial.

54. Pittsburgh, etc., R. Co. *v.* Callaghan, 157 Ill. 406, 41 N. E. 909 [*affirming* 50 Ill. App. 676]; Pennsylvania R. Co. *v.* Sellers, 127 Pa. St. 406, 17 Atl. 987.

In an action against a consolidated company for a tort of one of the constituent companies, if there is any evidence tending to show such consolidation prior to the institution of the action, it is error to direct the verdict for defendant. Zealy *v.* Birmingham R., etc., Co., 99 Ala. 579, 13 So. 118.

55. Chicago Great Western R. Co. *v.* Troup, 69 Kan. 854, 76 Pac. 859; Peabody *v.* Oregon R., etc., Co., 21 Oreg. 121, 26 Pac. 1053, 12 L. R. A. 823.

56. Georgia Cent. R. Co. *v.* Martin, 138 Ala. 531, 36 So. 426; Chicago, etc., R. Co. *v.* Ransom, 56 Kan. 559, 44 Pac. 6; *In re* Merrill, 54 Vt. 200; Kansas City, etc., R. Co. *v.* Stoner, 51 Fed. 649, 2 C. C. A. 437.

57. Chicago, etc., R. Co. *v.* Kansas City Suburban Belt R. Co., 78 Mo. App. 245; New York, etc., R. Co. *v.* Atlantic Refining Co., 129 N. Y. 597, 29 N. E. 829 [*reversing* 13 N. Y. Suppl. 466]; Louisville, etc., R. Co. *v.* East Tennessee, etc., R. Co., 60 Fed. 993, 9 C. C. A. 314.

58. See Carriers, 6 Cyc. 591, 622.

59. Brimmer *v.* Illinois Cent. R. Co., 101 Ill. App. 198, holding that as between one railroad company and the employees of another using the same or intersecting tracks, the company is only held to the rule of ordinary care.

60. Chicago, etc., R. Co. *v.* Kansas City, etc., R. Co., 78 Mo. App. 245; Louisville, etc.,

*By James A. Gwyn.

of another the latter owes the former no higher degree of care than to any other trespasser under the same circumstances.[61]

b. Rate of Speed.[62] In the absence of any statute or ordinance on the subject no particular rate of speed in running a railroad train is negligence *per se*,[63] although the rate of speed may be considered in connection with other circumstances in determining the issue of negligence.[64] When the rate of speed is expressly limited by statute or ordinance the operation of trains at a speed exceeding the rate prescribed is negligence *per se*,[65] and renders the company liable for injuries due to such excessive rate of speed,[66] and such regulations are not intended merely for the protection of the general public in crossing railroad tracks but apply to cases of collision between trains resulting in personal injuries to employees thereon,[67] or damages to the train.[68]

c. Collision of Trains on Same Track. A railroad company is conclusively presumed to know the whereabouts of all of its own trains,[69] and must exercise due care to avoid collisions between its trains upon the same track, and its servants must exercise due care in the observance of schedule time and all rules and orders designed for this purpose.[70] So an employee upon one train may in the absence of contributory negligence recover against the railroad company for injuries caused by a collision due to the negligence of those in charge of another of defendant's trains,[71] or due to the negligence of its train despatcher in sending out trains upon the same section of track without proper orders to prevent collisions; [72] and a person riding upon an engine by invitation of the engineer who had authority to issue such invitation may recover for injuries resulting from a collision due to the negligence of the engineer of the other train.[73] Where two railroad companies by agreement or otherwise are rightfully entitled to the use of the same track, each company is under the duty of exercising due care to avoid injury to the trains and property of the other or to persons rightfully on such trains.[74] So in case of

R. Co. *v.* East Tennessee, etc., R. Co., 60 Fed. 993, 9 C. C. A. 314.

61. Chicago, etc., R. Co. *v.* Kansas City, etc., R. Co., 78 Mo. App. 245.

62. Statutory and municipal regulations see *supra*, X, B, 4, c.

63. Southern Indiana R. Co. *v.* Messick, 35 Ind. App. 676, 74 N. E. 1097.

64. Southern Indiana R. Co. *v.* Messick, 35 Ind. App. 676, 74 N. E. 1097, holding, however, that where the only circumstance shown beside the speed of the train was that it was run backward, it was insufficient to show negligence in a case where a construction train while so operated was derailed and overturned injuring an employee thereon, it being shown that it was safe to run an engine in this manner and that the track was unobstructed.

65. Chicago, etc., R. Co. *v.* Mochell, 193 Ill. 208, 61 N. E. 1028, 86 Am. St. Rep. 318 [*affirming* 96 Ill. App. 178]; Gulf, etc., R. Co. *v.* Pendery, 14 Tex. Civ. App. 60, 36 S. W. 793.

Railroad companies must take notice of all valid speed ordinances of cities through which their roads run and are bound thereby without any special notice thereof to such corporations or their servants. Cent. R., etc., Co. *v.* Brunswick, etc., R. Co., 87 Ga. 386, 13 S. E. 520.

66. Chicago, etc., R. Co. *v.* Mochell, 193 Ill. 208, 61 N. E. 1028, 86 Am. St. Rep. 318 [*affirming* 96 Ill. App. 178]; Gulf, etc., R. Co. *v.* Pendery, 14 Tex. Civ. App. 60, 36 S. W. 793.

67. Pittsburgh, etc., R. Co. *v.* Martin, 157 Ind. 216, 61 N. E. 229.

68. Central R., etc., Co. *v.* Brunswick, etc., R. Co., 87 Ga. 386, 13 S. E. 520.

69. Louisville, etc., R. Co. *v.* Heck, 151 Ind. 292, 50 N. E. 988.

70. Chesapeake, etc., R. Co. *v.* Hoskins, 43 S. W. 484, 19 Ky. L. Rep. 1359.

Backing train to avoid collision.— Where a train without fault on the part of the engineer is caught between a train of an intersecting road upon a crossing in front and some detached cars approaching his train on the same track from the rear, so that a collision with the one or the other is inevitable, the engineer is not guilty of wilful negligence in choosing either alternative, and is not guilty of any negligence in backing his train into the approaching cars in order to avoid the collision in front if this course was under the existing circumstances likely to cause the least damage. Chesapeake, etc., R. Co. *v.* McMichael, 15 S. W. 878, 13 Ky. L. Rep. 758.

71. Chesapeake, etc., R. Co. *v.* Hoskins, 43 S. W. 484, 19 Ky. L. Rep. 1359.

72. Louisville, etc., R. Co. *v.* Heck, 151 Ind. 292, 50 N. E. 988; Galveston, etc., R. Co. *v.* Arispe, 5 Tex. Civ. App. 611, 23 S. W. 928, 24 S. W. 33.

73. Whitehouse *v.* Grand Trunk R. Co., 29 Fed. Cas. No. 17,565, 2 Hask. 189.

74. Georgia Cent. R. Co. *v.* Martin, 138 Ala. 531, 36 So. 426; Chicago, etc., R. Co. *v.* Martin, 59 Kan. 437, 53 Pac. 461; *In re* Merrill, 54 Vt. 200; New York Cent. Trust

collision or accident to trains where there is a joint use of the same track, the employees of one company may in the absence of contributory negligence recover against the other company for injuries due to negligence on the part of that company's servants in the operation of its trains,[75] or in violating rules and orders,[76] as in failing to send out flagmen or to otherwise warn other trains where a train is delayed,[77] or stopped at an unusual place,[78] or run backward,[79] or due to negligence on the part of its switchmen in the operation of switches controlling the use of such tracks,[80] or to negligence on the part of the company in failing to issue proper orders to its trainmen for the prevention of collisions with other trains.[81] The company guilty of such negligence will also be liable for injury to the trains of the other railroad company,[82] or to passengers thereon,[83] and to the other company for liabilities incurred by it to third persons growing out of the collision.[84] Where both companies were negligent a person injured by the collision may sue either, and the company sued cannot urge as a defense that the negligence of the other company exceeded its own.[85]

d. Collision of Trains at Railroad Crossings — (i) *In General.* It is the duty of those in control of trains moving upon intersecting lines of railway when approaching or passing a railroad crossing to exercise due care commensurate with the danger of the situation to prevent collisions.[86] Due care must also be used to avoid collisions with street cars at the crossing of a street railroad.[87] In

Co. *v.* Denver, etc., R. Co., 97 Fed. 239, 38 C. C. A. 143.

75. Omaha, etc., R. Co. *v.* Morgan, 40 Nebr. 604, 59 N. W. 81; Gross *v.* Pennsylvania, etc., R. Co., 16 N. Y. Suppl. 616.

76. Jennings *v.* Philadelphia, etc., R. Co., 29 App. Cas. (D. C.) 219; Phillips *v.* Chicago, etc., R. Co., 64 Wis. 475, 25 N. W. 544.

Private rules adopted for the regulation and government of trains and trainmen do not stand upon the same footing as statutes and municipal ordinances, and a compliance therewith does not necessarily constitute reasonable care, nor does a violation thereof necessarily constitute negligence as a matter of law; but it is negligence to stop a train at an unusual place without complying with the rule requiring that in such cases other trains must be protected by sending out flagmen or otherwise. Smithson *v.* Chicago, etc., R. Co., 71 Minn. 216, 73 N. W. 853.

77. Phillips *v.* Chicago, etc., R. Co., 64 Wis. 475, 25 N. W. 544.

78. Georgia Cent. R. Co. *v.* Martin, 138 Ala. 531, 36 So. 426; Smithson *v.* Chicago, etc., R. Co., 71 Minn. 216, 73 N. W. 853.

79. Phillips *v.* Chicago, etc., R. Co., 64 Wis. 475, 25 N. W. 544.

80. Smith *v.* New York, etc., R. Co., 19 N. Y. 127, 75 Am. Dec. 305; *In re* Merrill, 54 Vt. 200; Sawyer *v.* Rutland, etc., R. Co., 27 Vt. 370.

81. Nary *v.* New York, etc., R. Co., 9 N. Y. Suppl. 153 [*affirmed* in 125 N. Y. 759, 27 N. E. 408].

82. *In re* Merrill, 54 Vt. 200.

83. Eddy *v.* Letcher, 57 Fed. 115, 6 C. C. A. 276.

84. New York Cent. Trust Co. *v.* Colorado Midland R. Co., 89 Fed. 560.

85. Union R., etc., Co. *v.* Schacklet, 119 Ill. 232, 10 N. E. 896 [*affirming* 19 Ill. App. 145].

86. Chicago, etc., R. Co. *v.* Ransom, 56 Kan. 559, 44 Pac. 6; Kansas City, etc., R. Co. *v.* Stoner, 51 Fed. 649, 2 C. C. A. 437; Great Western R. Co. *v.* Brown, 3 Can. Sup. Ct. 159 [*affirming* 2 Ont. App. 64 (*affirming* 40 U. C. Q. B. 333)].

Duty to stop, look, and listen.— If other means are not provided to prevent collisions it is the duty of a person in charge of a train before crossing another railroad to stop, look, and listen for other trains and ascertain whether the crossing may be made in safety. Cleveland, etc., R. Co. *v.* Gray, 148 Ind. 266, 46 N. E. 675.

Where public notice of the schedule time of trains is required by statute to be given, one company whose road crosses the track of another at a point near a station of the latter will be held to a knowledge approximately of the time when that company's trains should arrive at the crossing and must use such reasonable precautions to avoid collisions as the circumstances demand. Missouri Pac. R. Co. *v.* Chicago Great Western R. Co., 98 Mo. App. 214, 71 S. W. 1081.

The fact that the air brakes failed to work will not relieve the company from liability if there were other appliances by which its servants might, by the exercise of ordinary care, have stopped the train and they failed to do so. Missouri, etc., R. Co. *v.* Ransom, 15 Tex. Civ. App. 689, 41 S. W. 826.

Backing train to avoid collision.— Where an engineer having passed one crossing backs his train to avoid a collision with a train upon a second intersecting line in front and strikes a train which had since come upon the first crossing, the company will be liable if there was sufficient room for defendant's train between the two intersections and the collision could have been avoided by due care in backing the train. Kansas City, etc., R. Co. *v.* Lackey, 114 Ala. 152, 21 So. 444.

87. Chicago, etc., R. Co. *v.* Smith, 124

the performance of this duty the train must, before reaching the crossing, be brought to a full stop if a statute so requires,[88] and in any case those in charge of the train must keep a proper lookout for trains upon the intersecting track,[89] and have their train under proper control so that if the necessity arises it can be promptly stopped.[90] In case of collision if only one company was negligent there can be no recovery against the other,[91] but if both were negligent they are both liable,[92] and persons injured thereby may recover against either the full amount of the damages sustained regardless of the negligence of the other;[93] and, in an action by a passenger against both companies for injuries due to a negligent collision at a crossing, it is no defense for one of defendants to show merely that the negligence of the other exceeded its own.[94]

(II) *Right of Way Across Tracks.* Where the roads of different railroad companies intersect, questions of precedence in the use of the crossing are generally regulated by statute or by agreement between the companies,[95] but if not so regulated each company has an equal right to the use of the crossing.[96] In the absence of any rule or agreement to the contrary, when two trains approach a crossing at the same time, the train which first reaches the stopping place and stops has the right of precedence in passing the crossing,[97] and it is negligence on the part of the servants of one railroad company to attempt to pass a railroad

Ill. App. 627 [*affirmed* in 226 Ill. 178, 80 N. E. 716]; Central Pass. R. Co. *v.* Kuhn, 86 Ky. 578, 6 S. W. 441, 9 Ky. L. Rep. 725, 9 Am. St. Rep. 309.

It is negligence where a railroad train approaches in the daytime a street railway crossing in the midst of a dense fog at a rapid rate of speed without giving due warning of its approach. Wabash R. Co. *v.* Barrett, 117 Ill. App. 315.

88. See *infra*, X, D, 1, d, (III).

89. Pratt *v.* Chicago, etc., R. Co., 38 Minn. 455, 38 N. W. 356; Kansas City, etc., R. Co. *v.* Stoner, 51 Fed. 649, 2 C. C. A. 437.

90. Kansas City, etc., R. Co. *v.* Stoner, 51 Fed. 649, 2 C. C. A. 437.

91. Chesapeake, etc., R. Co. *v.* McMichael, 15 S. W. 878, 13 Ky. L. Rep. 758; Bunting *v.* Pennsylvania R. Co., 118 Pa. St. 204, 12 Atl. 448.

92. Washington, etc., R. Co. *v.* Hickey, 5 App. Cas. (D. C.) 436; Wabash, etc., R. Co. *v.* Shacklet, 105 Ill. 364, 44 Am. Rep. 791; Chicago, etc., R. Co. *v.* Smith, 124 Ill. App. 627 [*affirmed* in 226 Ill. 178, 80 N. E. 716]; Cincinnati, etc., R. Co. *v.* Acrea, 40 Ind. App. 150, 81 N. E. 213, 82 N. E. 1009; Baltimore, etc., R. Co. *v.* Kleespies, 39 Ind. App. 151, 76 N. E. 1015, 78 N. E. 252.

93. Kansas City, etc., R. Co. *v.* Stoner, 51 Fed. 649, 2 C. C. A. 437; Graham *v.* Great Western R. Co., 41 U. C. Q. B. 324.

A passenger of one railroad company may recover against another railroad company whose negligence contributes to cause a collision by which he was injured, although the company carrying him was also negligent (Wabash, etc., R. Co. *v.* Shacklet, 105 Ill. 364, 44 Am. Rep. 791; Pittsburgh, etc., R. Co. *v.* Spencer, 98 Ind. 186; Baltimore, etc., R. Co. *v.* Kleespies, 39 Ind. App. 151, 76 N. E. 1015, 78 N. E. 252; Holzab *v.* New Orleans, etc., R. Co., 38 La. Ann. 185, 58 Am. Rep. 177; Bunting *v.* Hogsett, 139 Pa. St. 363, 21 Atl. 31, 33, 34, 23 Am. St. Rep. 192, 12 L. R. A. 268; Parshall *v.* Minneapolis, etc., R. Co., 35 Fed. 649); and a passenger on a street car may recover against a railroad company whose negligence contributed to produce the injury, although those in charge of the street car were also negligent (Georgia Pac. R. Co. *v.* Hughes, 87 Ala. 610, 6 So. 413; Little Rock, etc., R. Co. *v.* Harrell, 58 Ark. 454, 25 S. W. 117; Chicago, etc., R. Co. *v.* Hines, 183 Ill. 482, 56 N. E. 177 [*affirming* 82 Ill. App. 488]); or were acting in violation of a contract between the companies as to the precautions to be taken by the employees of the street car company in the use of the crossing (Baltimore, etc., R. Co. *v.* Friel, 77 Fed. 126, 23 C. C. A. 77).

94. Chicago, etc., R. Co. *v.* Ransom, 56 Kan. 559, 44 Pac. 6.

95. See Missouri Pac. R. Co. *v.* Chicago Great Western R. Co., 98 Mo. App. 214, 71 S. W. 1081 [*citing* 3 Elliott Railroads, § 1133].

Under the Ohio statute where two trains of the same class approach a crossing at the same time on the main tracks the train of the company having the older right of way has precedence, but passenger trains have precedence over freight trains and regular trains on time take precedence over trains of the same class not on time or having no schedule time. Moulder *v.* Cleveland, etc., R. Co., 5 Ohio S. & C. Pl. Dec. 664, 1 Ohio N. P. 361.

96. Missouri Pac. R. Co. *v.* Chicago Great Western R. Co., 98 Mo. App. 214, 71 S. W. 1081.

As between a steam railroad and a street railroad the steam railroad has the right of way at a crossing. New York, etc., R. Co. *v.* New Jersey Electric R. Co., 60 N. J. L. 52, 37 Atl. 627, 38 L. R. A. 516.

97. Chicago, etc., R. Co. *v.* Chambers, 68 Fed. 148, 15 C. C. A. 327; Kansas City, etc., R. Co. *v.* Stoner, 51 Fed. 649, 2 C. C. A. 437.

crossing over which the other company has the right of way when a train of that company is approaching.[98] But on the other hand the company having the right of way cannot exercise such right where the engineer knows or has reason to believe that it will cause a collision,[99] or even rely absolutely upon a recognition and observance of his prior right by the other company;[1] and it is negligence on the part of the company having the right of way to attempt to pass the crossing without keeping a lookout for trains upon the other road,[2] or if such a train is approaching not to ascertain if it is going to stop,[3] or to proceed where it appears that it cannot or will not do so.[4]

(III) *DUTY TO STOP BEFORE CROSSING.*[5] The failure of a railroad company to bring its trains to a full stop before crossing the tracks of another railroad, if required by statute, is negligence *per se*,[6] whether there be any visible necessity for so doing or not,[7] and in the absence of contributory negligence renders the offending company liable for any damages directly caused by such omission,[8]

98. Chesapeake, etc., R. Co. *v.* McMichael, 15 S. W. 878, 13 Ky. L. Rep. 758; Davis *v.* Houston, etc., R. Co., 106 La. 81, 30 So. 250; Chicago, etc., R. Co. *v.* Chambers, 68 Fed. 148, 15 C. C. A. 327.

99. Chicago, etc., R. Co. *v.* Rockford, etc., R. Co., 72 Ill. 34.

1. Chicago, etc., R. Co. *v.* Ransom, 56 Kan. 559, 44 Pac. 6.

But if the other train has stopped as it was its duty to do, the engineer of the train having the right of way may reasonably presume that it will remain at its place until he has passed the crossing. Chicago, etc., R. Co. *v.* Chambers, 68 Fed. 148, 15 C. C. A. 327.

2. Pratt *v.* Chicago, etc., R. Co., 38 Minn. 455, 38 N. W. 356.

3. Chicago, etc., R. Co. *v.* Ransom, 56 Kan. 559, 44 Pac. 6.

4. Pratt *v.* Chicago, etc., R. Co., 38 Minn. 455, 38 N. W. 356.

5. Statutory and municipal regulations as to stopping trains before crossing other railroads see *supra*, X, B, 4, d.

6. Richmond, etc., R. Co. *v.* Freeman, 97 Ala. 289, 11 So. 800; San Antonio, etc., R. Co. *v.* Bowles, 88 Tex. 634, 32 S. W. 880.

Construction and application of statutes.— The fact that by stopping within one hundred feet of a crossing as required by statute the rear cars of a train would extend back crossing the track of another railroad does not relieve the company from the duty of stopping. Birmingham Mineral R. Co. *v.* Jacobs, 92 Ala. 187, 9 So. 320, 12 L. R. A. 830. Where the statute merely requires trains to be stopped before crossing another railroad but does not prescribe the distance from the crossing, they should be stopped at such a distance as under the circumstances common prudence would dictate as necessary to avoid a collision. Ft. Worth, etc., R. Co. *v.* Mackney, 83 Tex. 410, 18 S. W. 949. The Tennessee statute requiring trains on one railroad to stop before crossing the line of another has no application to the crossing by a steam railroad of an ordinary horse car line. Byrne *v.* Kansas City, etc., R. Co., 61 Fed. 605, 9 C. C. A. 666, 24 L. R. A. 693. The Wisconsin statute requiring trains approaching a railroad crossing to come to a stop "within four hundred feet thereof" does not require the train to be stopped when the engine reaches the four-hundred-foot post but somewhere between that post and the crossing. Lockwood *v.* Chicago, etc., R. Co., 55 Wis. 50, 12 N. W. 401.

7. San Antonio, etc., R. Co. *v.* Bowles, 88 Tex. 634, 32 S. W. 880.

8. Richmond, etc., R. Co. *v.* Freeman, 97 Ala. 289, 11 So. 800; Grand Rapids, etc., R. Co. *v.* Ellison, 117 Ind. 234, 20 N. E. 135; Cincinnati, etc., R. Co. *v.* Acrea, 40 Ind. App. 150, 81 N. E. 213, 82 N. E. 1009; San Antonio, etc., R. Co. *v.* Bowles, 88 Tex. 634, 32 S. W. 880; Great Western R. Co. *v.* Brown, 3 Can. Sup. Ct. 159 [*affirming* 2 Ont. App. 64 (*affirming* 40 U. C. Q. B. 333)]; Graham *v.* Great Western R. Co., 41 U. C. Q. B. 324.

The train must be stopped near the crossing where the engineer can see if it is safe to cross, and it is gross negligence to stop a train at a distance of seven hundred feet from the crossing where the view of the intersecting road is obstructed and then proceed to cross without again stopping the train, although the engineer may have received a signal from another employee that the crossing was clear. Grand Rapids, etc., R. Co. *v.* Ellison, 117 Ind. 234, 20 N. E. 135.

The air brake should be applied at a sufficient distance from the crossing to enable the train to be stopped by the hand brakes in case the air brakes fail to work. Great Western R. Co. *v.* Brown, 3 Can. Sup. Ct. 159 [*affirming* 2 Ont. App. 64 (*affirming* 40 U. C. Q. B. 333)].

If the engineer is unable to stop by reason of a failure of the brakes to work, it is negligence for him to approach a crossing at which a train on an intersecting road is due without giving a warning of his approach, especially where a collision might have been anticipated on account of the view of the train being obstructed by a cut. Missouri, etc., R. Co. *v.* Settle, 19 Tex. Civ. App. 357, 47 S. W. 825.

Persons entitled to recover.— The statute requiring trains to be stopped before crossing another railroad is not intended solely for the protection of trains using the crossing and of persons, employees, and others

or both companies in case each of two trains colliding at a crossing neglected to observe the precaution.[9] Merely stopping the train is not a sufficient precaution, but those in charge of the train must ascertain if the way is clear and proceed with due caution, keeping a careful lookout and with the train under proper control.[10] Where the rules of the company require its engineers to stop before crossing another railroad, it is their duty to obey such instructions, although signalled by another employee that the crossing is clear.[11]

(IV) *LIGHTS, SIGNALS, GATES, AND FLAGMEN.* A railroad company will be liable for injuries due to a collision caused by an engineer disregarding the warning of lights or signal devices at a crossing indicating that the crossing is occupied or that a train on the intersecting track has the right of way,[12] or his failure to observe such lights or signals and ascertain thereby whether he can cross with safety,[13] or for negligence on the part of its servants charged with the duty of giving the signals to trains at the crossing;[14] and where two intersecting roads establish a signal system for use at a crossing and each agrees to conform thereto, the company violating such agreement will be liable for any resulting injuries to the trains of the other, although the agreement contains no provision for indemnity in case of its violation.[15] Where a railroad crosses the track of a street railway it is negligence for a train to approach the crossing without giving a signal of its approach or other warning of danger,[16] particularly if it be dark or foggy so that the view of the train is obscured,[17] and at a crossing in a city which is much used and where street cars pass frequently it is negligence not to maintain gates or a flagman to prevent collisions therewith.[18] If gates are maintained, the railroad company will be liable for injuries resulting from collisions with street cars due to a failure to keep a servant to operate the gates,[19] or due to the negligence of its gatemen in not keeping a proper lookout for trains and cars and failing to lower the gates,[20] or operating the gates in a negligent or improper manner.[21]

rightfully on such trains, but for the protection of all persons rightfully within the region of danger created by a non-compliance with its requirements. Southern R. Co. *v.* Williams, 143 Ala. 212, 38 So. 1013, holding that a failure of a railroad company to stop at a crossing, whereby a train on the intersecting track is struck and overturned so as to injure a person rightfully walking by the side of the intersecting track, is negligence as to such person.

9. Cincinnati, etc., R. Co. *v.* Acrea, 40 Ind. App. 150, 81 N. E. 213, 82 N. E. 1009; San Antonio, etc., R. Co. *v.* Bowles, 88 Tex. 634, 32 S. W. 880.

The fact that another company was also negligent will not relieve defendant in an action against it alone if it was also negligent in failing to observe the precaution. Grand Rapids, etc., R. Co. *v.* Ellison, 117 Ind. 234, 20 N. E. 135.

10. Pratt *v.* Chicago, etc., R. Co., 38 Minn. 455, 38 N. W. 356; Kansas City, etc., R. Co. *v.* Stoner, 51 Fed. 649, 2 C. C. A. 437.

11. Wood *v.* New York Cent., etc., R. Co., 70 N. Y. 195.

12. Baltimore, etc., R. Co. *v.* Kleespies, 39 Ind. App. 151, 76 N. E. 1015, 78 N. E. 252.

13. Cleveland, etc., R. Co. *v.* Gray, 148 Ind. 266, 46 N. E. 675, holding that the negligence of a railroad company in running into the train of another company at a crossing is not excused by the fact that the crossing signal lights were hidden by the train of the other company or obscured by an electric light near the crossing, or that a lantern on a platform was mistaken for a switch-light, since such surroundings could have been anticipated and only demanded extra precautions in approaching the crossing.

14. Wood *v.* New York Cent., etc., R. Co., 70 N. Y. 195; Hydell *v.* Toledo, etc., R. Co., 74 Ohio St. 138, 77 N. E. 1066.

15. New York, etc., R. Co. *v.* Grand Rapids, etc., R. Co., 116 Ind. 60, 18 N. E. 182.

16. Missouri, etc., R. Co. *v.* Batsell, (Tex. Civ. App. 1896) 34 S. W. 1047.

17. Wabash R. Co. *v.* Barrett, 117 Ill. App. 315.

18. Central Pass. R. Co. *v.* Kuhn, 86 Ky. 578, 6 S. W. 441, 9 Ky. L. Rep. 725, 9 Am. St. Rep. 309.

19. Chicago, etc., R. Co. *v.* Averill, 224 Ill. 516, 79 N. E. 654 [*affirming* 127 Ill. App. 275].

20. Washington, etc., R. Co. *v.* Hickey, 5 App. Cas. (D. C.) 436; Toledo Consol. St. R. Co. *v.* Fuller, 17 Ohio Cir. Ct. 562, 9 Ohio Cir. Dec. 123.

21. Washington, etc., R. Co. *v.* Hickey, 5 App. Cas. (D. C.) 436, holding that it is gross negligence for a gatekeeper at a crossing to let down the gates upon a passing street car when it is immediately upon the crossing with a train approaching on the other track, whereby an injury results to a passenger upon the street car.

Gatekeeper not negligent.— Where a railroad company's gatekeeper shut the east gate at a crossing behind a west-bound street car

(v) *Obstructing Crossings.* Where one railroad company negligently leaves cars standing so as to obstruct a railroad crossing it will, in case of a collision therewith and in the absence of contributory negligence, be liable for injuries to the employees upon the train of the intersecting road,[22] and also for the damages done to the train of that company.[23]

2. Defects and Obstructions — a. Defects in Road-Bed or Tracks. A railroad company will be liable for injuries occasioned by the wrecking or derailing of trains due to negligence on the part of the company in the construction of its road-bed, tracks, trestles, bridges, or culverts,[24] or in failing to keep the same in a safe and proper state of repair,[25] or to inspect them with sufficient care and frequency for the purpose of discovering defects therein.[26] In the case of injuries due to the washing away of culverts and embankments by floods and storms the company will be liable if negligent as to their original construction;[27] but not if they are so constructed as to withstand any dangers of this character reasonably to be apprehended and they are destroyed by floods or storms of unusual and unprecedented violence and there was no negligence in the operation of the train,[28] unless the company was negligent in failing to inspect the road-bed within a proper time after such floods or storms.[29]

b. Obstructions on Track — (i) *In General.* A railroad company will be liable for personal injuries to persons rightfully upon its trains due to its trains running into obstructions upon the track, where there was negligence in the operation of the train,[30] or negligence on the part of defendant in putting such obstruc-

as it crossed in front of an approaching train and attempted to shut the west gate but a car going east ran under the gate, making it impossible to close it, there was no negligence in raising the east gate to enable this car to escape although it was unable to do so and a collision occurred resulting in injury to a passenger on the street car. Renders *v.* Grand Trunk R. Co., 144 Mich. 387, 108 N. W. 368.

22. Albert *v.* Sweet, 116 N. Y. 363, 22 N. E. 762 [*affirming* 3 N. Y. St. 738], holding further that since the action of defendant was not a legitimate use of the crossing, the fact that it had no notice of the special train upon which plaintiff was employed would not affect its liability.

23. Chicago, etc., R. Co. *v.* Kansas City Suburban Belt R. Co., 78 Mo. App. 245.

24. Florida R., etc., Co. *v.* Webster, 25 Fla. 394, 5 So. 714; Toledo, etc., R. Co. *v.* Conroy, 68 Ill. 560; McPherson *v.* St. Louis, etc., R. Co., 97 Mo. 253, 10 S. W. 846; Philadelphia, etc., R. Co. *v.* Anderson, 94 Pa. St. 351, 39 Am. Rep. 787.

25. Florida R., etc., Co. *v.* Webster, 25 Fla. 394, 5 So. 714; Toledo, etc., R. Co. *v.* Conroy, 68 Ill. 560; Rutherford *v.* Shreveport, etc., R. Co., 41 La. Ann. 793, 6 So. 644.

Under the Indiana statute imposing upon railroad companies the duty of keeping in repair their tracks at the crossing of intersecting railroads, it is negligence *per se* to disregard this duty, rendering the company liable for injuries occasioned thereby. Indiana, etc., R. Co. *v.* Barnhart, 115 Ind. 399, 16 N. E. 121.

26. Toledo, etc., R. Co. *v.* Conroy, 68 Ill. 560; Libby *v.* Maine Cent. R. Co., 85 Me. 34, 26 Atl. 943, 20 L. R. A. 812; Hardy *v.* North Carolina Cent. R. Co., 74 N. C. 734.

At times or places of particular peril greater promptness and vigilance in inspecting a road-bed is required, as in the case of severe storms, and particularly at places most likely to be affected thereby. Libby *v.* Maine Cent. R. Co., 85 Me. 34, 26 Atl. 943, 20 L. R. A. 812.

27. Kansas Pac. R. Co. *v.* Miller, 2 Colo. 442; McPherson *v.* St. Louis, etc., R. Co., 97 Mo. 253, 10 S. W. 846; Philadelphia, etc., R. Co. *v.* Anderson, 94 Pa. St. 351, 39 Am. Rep. 787; Great Western R. Co. *v.* Braid, 9 Jur. N. S. 339, 8 L. T. Rep. N. S. 31, 1 Moore P. C. N. S. 101, 1 New Rep. 527, 11 Wkly. Rep. 444, 15 Eng. Reprint 640.

28. Libby *v.* Maine Cent. R. Co., 85 Me. 34, 26 Atl. 943, 20 L. R. A. 812; International, etc., R. Co. *v.* Halloren, 53 Tex. 46, 37 Am. Rep. 744; Withers *v.* Great Northern R. Co., 1 F. & F. 165, 3 H. & N. 969, 27 L. J. Exch. 417.

29. Libby *v.* Maine Cent. R. Co., 85 Me. 34, 26 Atl. 943, 20 L. R. A. 812.

The track should be inspected after every severe storm before a train is allowed to pass and if not done and injury results the company will be liable. Hardy *v.* North Carolina Cent. R. Co., 74 N. C. 734.

30. Kird *v.* New Orleans, etc., R. Co., 105 La. 226, 29 So. 729; Mexican Cent. R. Co. *v.* Lauricella, 87 Tex. 277, 28 S. W. 277, 47 Am. St. Rep. 103.

Where engineers are ordered to "slow up" and keep a sharp lookout at a particular place because of a previous malicious obstruction of the track at such place, there must be such a slowing up and degree of watchfulness as will prevent an accident in case of a subsequent obstruction. Louisville, etc., R. Co. *v.* McKenna, 13 Lea (Tenn.) 280.

tion on or so near the track as to be struck by passing trains,[31] or in failing to discover and remove the obstruction if put there by others.[32]

(II) *ANIMALS.* A railroad company will be liable for injuries to persons rightfully upon its trains caused by collisions with animals upon the track where there was negligence in the operation of the train,[33] or in allowing bushes to grow upon the right of way so as to conceal the presence of animals thereon,[34] or where the animal was upon the track because of a failure of the railroad company to construct or maintain fences and cattle-guards as required by statute,[35] or was negligently left on or near the track by the servants of the company after being wounded by another of defendant's trains.[36]

(III) *LIABILITY OF PERSON CAUSING OBSTRUCTION* — (A) *In General.*[37] A person who wrongfully or negligently obstructs a railroad track will, in the absence of contributory negligence on the part of the railroad company, be liable for injury done to its trains and property by collision with such obstruction;[38] but a private owner of cars who puts them on a railroad track by permission of and at a place designated by the agent of the company will not be liable for an injury to another employee of the company caused by a train colliding with such cars.[39]

(B) *Permitting Animals to Be Upon Track.*[40] In jurisdictions where it is lawful for stock to run at large the mere fact of permitting them to do so is not such negligence as to render the owner liable to a railroad company in case they wander upon an unfenced track and a collision occurs resulting in injury to the train,[41] but even where it is lawful for stock to run at large they may be permitted to do so under such circumstances as to render the owner liable to the railroad company on the ground of negligence,[42] and in the absence of contributory negligence on the part of the company it may recover for injuries to its trains against the owner of animals which are negligently allowed to run at large in violation of

31. Kird *v.* New Orleans, etc., R. Co., 105 La. 226, 29 So. 729.

32. Virginia Cent. R. Co. *v.* Sanger, 15 Gratt. (Va.) 230.

33. *Arkansas.*— St. Louis, etc., R. Co. *v.* Stewart, 68 Ark. 606, 61 S. W. 169, 82 Am. St. Rep. 311.

Illinois.— Atchison, etc., R. Co. *v.* Elder, 149 Ill. 173, 36 N. E. 565.

Indiana.— Chicago, etc., R. Co. *v.* Grimm, 25 Ind. App. 608, 57 N. E. 640.

New York.— Brown *v.* New York Cent. R. Co., 34 N. Y. 404.

Texas.— Mexican Cent. R. Co. *v.* Lauricella, 87 Tex. 277, 28 S. W. 277, 47 Am. St. Rep. 103 [*affirming* (Civ. App. 1894) 26 S. W. 301].

See 41 Cent. Dig. tit. "Railroads," § 935.

The fact that the animal was a trespasser upon the track is no defense in an action against a railroad company for injuries to a person on the train caused by a collision with the animal. Lackawanna, etc., R. Co. *v.* Chenewith, 52 Pa. St. 382, 91 Am. Dec. 168.

34. Louisville, etc., R. Co. *v.* Ritter, 2 Ky. L. Rep. 385; Eames *v.* Texas, etc., R. Co., 63 Tex. 660.

35. Atchison, etc., R. Co. *v.* Elder, 149 Ill. 173, 36 N. E. 565; Blair *v.* Milwaukee, etc., R. Co., 20 Wis. 254. But see Buxton *v.* Northeastern R. Co., L. R. 3 Q. B. 549, 9 B. & S. 824, 37 L. J. Q. B. 258, 18 L. T. Rep. N. S. 795, 16 Wkly. Rep. 1124, holding that the duty to fence imposed by the English statute is for the benefit of adjoining landowners only and that in case of an injury to a passenger caused by a collision with an animal on the track the liability of the company will depend upon common-law principles.

If the railroad company is not required to fence its track, it will not, in the absence of other negligence, be liable for a personal injury due to a collision with an animal on the track and the fact that it has voluntarily fenced a part of its track imposes no obligation upon it to fence elsewhere. Tillotson *v.* Texas, etc., R. Co., 44 La. Ann. 95, 10 So. 400.

36. Mexican Cent. R. Co. *v.* Lauricella, 87 Tex. 277, 28 S. W. 277, 47 Am. St. Rep. 103 [*affirming* (Civ. App. 1894) 26 S. W. 301].

37. Criminal liability for wrecking or obstructing passage of trains see *supra*, X, B, 8, b, (II).

38. Montgomery Gas Light Co. *v.* Montgomery, etc., R. Co., 86 Ala. 372, 5 So. 735; Montgomery, etc., R. Co. *v.* Chambers, 79 Ala. 338; New York, etc., R. Co. *v.* Atlantic Refining Co., 129 N. Y. 597, 29 N. E. 829 [*reversing* 13 N. Y. 466].

39. Keeney *v.* Campbell, 215 Pa. St. 530, 64 Atl. 687.

40. Counter-claim in action for injury to animals see *infra*, X, H, 15, b.

41. Jenkins *v.* New Orleans, etc., R. Co., 15 La. Ann. 118. See also Savannah, etc., R. Co. *v.* Geiger, 21 Fla. 669, 58 Am. Dec. 697.

42. Hannibal, etc., R. Co. *v.* Kenney, 41 Mo. 271.

law,[43] or in the immediate vicinity of a dangerous crossing where it was probable that they would go upon the track;[44] but not if the railroad company was also negligent in the operation of the train;[45] nor can an employee of a railroad company who is injured by a collision of a train with an animal recover against the owner of the animal if it was upon the track by reason of the failure of the railroad company to fence its tracks as required by law.[46]

3. Negligence or Wrongful Acts of Employees or Third Persons — a. Incompetency, Negligence, or Misconduct of Employees. In case of injuries resulting from collisions or accidents to trains a railroad company is liable for the incompetency of its employees,[47] and for all acts done by them if within the scope of their employment,[48] although the particular act or means employed may have been unauthorized,[49] or even wilful or malicious;[50] but the company will not be liable for injuries resulting from unauthorized acts not within the scope of the servant's employment.[51]

b. Negligence or Wrongful Acts of Third Persons. A railroad company is not liable for injuries due to collisions or accidents to its trains caused by the negligent or wrongful acts of third persons not in the employ of the company and done without its knowledge or consent.[52]

4. Contributory Negligence. In case of damages or personal injuries growing out of collisions or accidents to trains, as in other cases, plaintiff cannot recover if his own negligence or wrongful act contributed directly to produce the injury complained of.[53] This rule applies to actions by one railroad company against

43. Annapolis, etc., R. Co. *v.* Baldwin, 60 Md. 88, 45 Am. Rep. 711.

44. Sinram *v.* Pittsburgh, etc., R. Co., 28 Ind. 244.

45. Housatonic R. Co. *v.* Knowles, 30 Conn. 313.

46. Sherman *v.* Anderson, 27 Kan. 333, 41 Am. Rep. 414; Child *v.* Hearn, L. R. 9 Exch. 176, 43 L. J. Exch. 100, 22 Wkly. Rep. 864.

47. Grand Rapids, etc., R. Co. *v.* Ellison, 117 Ind. 234, 20 N. E. 135.

48. Pittsburgh, etc., R. Co. *v.* Kirk, 102 Ind. 399, 1 N. E. 849, 52 Am. Rep. 675; New Orleans, etc., R. Co. *v.* Allbritton, 38 Miss. 242, 75 Am. Dec. 98; Snider *v.* Chicago, etc., R. Co., 108 Mo. App. 234, 83 S. W. 530; Gross *v.* Pennsylvania, etc., R. Co., 16 N. Y. Suppl. 616.

49. Pittsburgh, etc., R. Co. *v.* Kirk, 102 Ind. 399, 1 N. E. 849, 52 Am. Rep. 675.

50. New Orleans, etc., R. Co. *v.* Allbritton, 38 Miss. 242, 75 Am. Dec. 98.

51. Vormus *v.* Tennessee Coal, etc., Co., 97 Ala. 326, 12 So. 111; Stephenson *v.* Southern Pac. Co., 93 Cal. 558, 29 Pac. 234, 27 Am. St. Rep. 223, 15 L. R. A. 475; Snider *v.* Chicago, etc., R. Co., 108 Mo. App. 234, 83 S. W. 530; Mars *v.* Delaware, etc., Canal Co., 54 Hun (N. Y.) 625, 8 N. Y. Suppl. 107.

52. Williams *v.* Woodward Iron Co., 106 Ala. 254, 17 So. 517; Keeley *v.* Erie R. Co., 47 How. Pr. (N. Y.) 256; Ebrigh *v.* Mineral R., etc., Co., (Pa. 1888) 15 Atl. 709; Bunting *v.* Pennsylvania R. Co., 118 Pa. St. 204, 12 Atl. 448; Latch *v.* Rumner R. Co., 3 H. & N. 930, 27 L. J. Exch. 155.

The failure of a railroad company to recover a switch key from a discharged employee is not of itself sufficient to render the company liable for the act of such person in maliciously misplacing a switch, in the absence of any reason to anticipate such conduct on his part. East Tennessee, etc., R. Co. *v.* Kane, 92 Ga. 187, 18 S. E. 18, 22 L. R. A. 315.

Where a railroad company permits third persons to place loaded cars upon a spur-track, it will be chargeable with the negligence of the servants of such third persons in placing the cars so near the main line as to be struck by trains passing thereon. Georgia Pac. R. Co. *v.* Underwood, 90 Ala. 49, 8 So. 116, 24 Am. St. Rep. 756.

53. *Alabama.*— Highland Ave., etc., R. Co. *v.* Fennell, 111 Ala. 356, 21 So. 324.

Georgia.— Central R., etc., Co. *v.* Brunswick, etc., R. Co., 87 Ga. 386, 13 S. E. 520.

Illinois.— Wabash R. Co. *v.* Zerwick, 74 Ill. App. 670.

Indiana.— Evansville, etc., R. Co. *v.* Krapf, 143 Ind. 647, 26 N. E. 901.

Massachusetts.— Fletcher *v.* Boston, etc., R. Co., 187 Mass. 463, 73 N. E. 552, 105 Am. St. Rep. 414.

Michigan.— Vreeland *v.* Cincinnati, etc., R. Co., 109 Mich. 585, 67 N. W. 905.

Minnesota.— Mantell *v.* Chicago, etc., R. Co., 33 Minn. 62, 21 N. W. 853.

New York.— Martus *v.* Delaware, etc., R. Co., 15 Misc. 248, 13 N. Y. Suppl. 417.

United States.— Griggs *v.* Houston, 104 U. S. 553, 26 L. ed. 840.

See 41 Cent. Dig. tit. "Railroads," §§ 940, 941.

Facts showing contributory negligence.—A bridge foreman of a railroad, familiar with the operation of the trains thereon, who while not in the performance of any duty for the company but in the pursuit of his own business goes upon the track at night on a hand car, showing no light, and is killed in a collision with a special train at a distance from any crossing, is guilty of contributory negligence and cannot recover against the

another railroad company or street railroad company for damages to its trains,[54] by motormen and drivers of street cars against railroad companies,[55] by employees on the trains of one company against the other company,[56] and actions by railroad

railroad company even though the train was negligently operated. Russell *v.* Oregon Short Line R. Co., 155 Fed. 22, 83 C. C. A. 618.

Facts not showing contributory negligence. — It is not contributory negligence on the part of a passenger on a street car to jump from the car in order to avoid a threatened collision, if in so doing he acted as a reasonably prudent person would have done under the circumstances, although it subsequently appears that if he had not done so he would not have been injured. Washington, etc., R. Co. *v.* Hickey, 5 App. Cas. (D. C.) 436. It is not contributory negligence for a passenger on a street car to sit reading a paper while the street car is about to cross a railroad track if there is nothing to warn him of danger. Chicago, etc., R. Co. *v.* Smith, 124 Ill. App. 627 [*affirmed* in 226 Ill. 178, 80 N. E. 716]. A passenger who sees a train approaching a crossing on an intersecting road is not guilty of contributory negligence in not pulling the bell rope to warn the engineer of danger. Grand Rapids, etc., R. Co. *v.* Ellison, 117 Ind. 234, 20 N. E. 135. It is not contributory negligence on the part of a railroad company, as between it and a person obstructing the track, not to keep a lookout for obstructions which it had no reason to anticipate or not to maintain watchmen to guard against obstructions; the high degree of care which it owes to its passengers not being required in protecting its own property against the wrongs of others which it has no reason to anticipate. New York, etc., R. Co. *v.* Atlantic Refining Co., 129 N. Y. 597, 29 N. E. 829 [*reversing* 13 N. Y. Suppl. 466].

54. Central R., etc., Co. *v.* Brunswick, etc., R. Co., 87 Ga. 386, 13 S. E. 520; New York, etc., R. Co. *v.* New Jersey Electric R. Co., 60 N. J. L. 52, 37 Atl. 627, 38 L. R. A. 516; Roganville Lumber Co. *v.* Gulf, etc., R. Co., 36 Tex. Civ. App. 563, 82 S. W. 816.

Facts not showing contributory negligence. — In an action by one railroad company against another for injury to its trains growing out of a collision, the action of plaintiff company in stopping its train upon a railroad crossing in accordance with a custom long acquiesced in by the other company is not contributory negligence which will preclude a recovery, where defendant company was negligent in sending out a train not equipped with proper brakes and in failing to stop before reaching the crossing as required by law (Louisville, etc., R. Co. *v.* East Tennessee, etc., R. Co., 60 Fed. 993, 9 C. C. A. 314); and if defendant's train was a trespasser upon plaintiff's track and was there without the knowledge of plaintiff, plaintiff will not be chargeable with contributory negligence, merely because of a failure on the part of its servants to keep a lookout and discover such train at the earliest opportunity, where there was no want of due care in attempting to avoid the injury after it was discovered (Chicago, etc., R. Co. *v.* Kansas City, etc., R. Co., 78 Mo. App. 245).

55. *Alabama.*— Highland Ave., etc., R. Co. *v.* Fennell, 111 Ala. 356, 21 So. 324.

Indiana.—Pittsburgh, etc., R. Co. *v.* Browning, 34 Ind. App. 90, 71 N. E. 227.

Michigan.— Vreeland *v.* Cincinnati, etc., R. Co., 109 Mich. 585, 67 N. E. 905.

Minnesota.— Mantell *v.* Chicago, etc., R. Co., 33 Minn. 62, 21 N. W. 853.

New York.— Einsfield *v.* Niagara Junction R. Co., 49 N. Y. App. Div. 470, 63 N. Y. Suppl. 563; Martus *v.* Delaware, etc., R. Co., 15 Misc. 248, 36 N. Y. Suppl. 417.

See 41 Cent. Dig. tit. "Railroads," §§ 940, 941.

56. *Alabama.*— Louisville, etc., R. Co. *v.* Mosby, 125 Ala. 341, 28 So. 43; Southern R. Co. *v.* Bryan, 125 Ala. 297, 28 So. 445.

Illinois.— Wabash R. Co. *v.* Zerwick, 74 Ill. App. 670.

Indiana.— Evansville, etc., R. Co. *v.* Krapf, 143 Ind. 647, 36 N. E. 901.

Michigan.— Kelly *v.* Duluth, etc., R. Co., 92 Mich. 19, 52 N. W. 81.

Minnesota.— Thompson *v.* Chicago, etc., R. Co., 64 Minn. 159, 66 N. W. 265.

United States.— Northern Pac. R. Co. *v.* Cummiskey, 137 Fed. 508, 70 C. C. A. 92.

See 41 Cent. Dig. tit. "Railroads," §§ 940, 941.

A conductor of a railroad train who learns at a station that the train of another company preceding his upon the same track is behind time and only a few minutes ahead of his train is guilty of contributory negligence in not informing his engineer of this fact. Lake, etc., Michigan Southern R. Co. *v.* Hunter, 13 Ohio Cir. Ct. 441, 7 Ohio Cir. Dec. 206.

Facts not showing contributory negligence. — In an action by the engineer of one company against another company for personal injuries due to a collision, plaintiff is not guilty of contributory negligence because he failed to give the signals at public highway crossings or disregarded a municipal ordinance regulating the rate of speed, since such regulations are not intended for the prevention of collisions between trains (Georgia Cent. R. Co. *v.* Martin, 138 Ala. 531, 36 So. 426); or in failing to ascertain that defendant habitually ran its trains at a rate of speed in violation of an ordinance (Pittsburgh, etc., R. Co. *v.* Martin, 157 Ind. 216, 61 N. E. 229); and where one company is using the tracks of another under the rules and orders of the latter, and an engineer of the first under orders from the latter has placed his train upon a siding to await the passage of another train, it is not contributory negligence for him to leave his engine in charge of the fireman and go back into another car to confer with the conductor as to the operation of the train (Mintram *v.* New York,

employees against third persons for injuries due to obstructing the tracks.[57] An employee of one company who was not himself negligent is not precluded from recovering against another company for its negligence by the fact that the negligence of a co-employee contributed to produce the injury.[58] Negligence on the part of plaintiff, in order to preclude a recovery, must contribute directly as a proximate cause of the injury,[59] and mere negligence on the part of plaintiff will not preclude a recovery for wanton or wilful misconduct on the part of defendant.[60]

5. Proximate Cause of Injury. In actions for damages or personal injuries due to collisions or accidents to trains, there can be no recovery, although defendant was negligent, unless such negligence was a proximate cause of the injury complained of;[61] but defendant's negligence will be held a proximate cause of any resulting injury occurring without the intervention of any independent agency which was the natural and probable result of such negligence.[62] It is not necessary

etc., R. Co., 104 N. Y. App. Div. 38, 93 N. Y. Suppl. 331); nor is it contributory negligence *per se* for an engineer of one company to take a train into a switchyard of another over one track in contravention of a rule of the owner that such track shall be used only for outbound trains, he not having notice of the rule and there being evidence that it was not enforced but was habitually disregarded with the owner's knowledge and acquiescence (St. Louis Nat. Stock Yards *v.* Godfrey, 198 Ill. 288, 65 N. E. 90 [*affirming* 101 Ill. App. 40]); nor is it contributory negligence *per se* for an engineer to jump from his engine to avoid a threatened collision, although it subsequently appears that if he had not done so he would not have been injured (Jennings *v.* Philadelphia, etc., R. Co., 29 App. Cas. (D. C.) 219).

An engineer whose train has the right of way at a crossing has a right to presume that the other company will obey the law and stop its train, but it is negligence on his part, although having the right of way, to go upon the crossing in the face of facts reasonably indicating that it will not do so. Birmingham Mineral R. Co. *v.* Jacobs, 101 Ala. 149, 13 So. 408.

The degree of care which an employee upon one railroad must exercise in regard to his own safety against collisions with trains of another is merely ordinary care, and his conduct is not to be measured by that high degree of care which he is required to exercise for the safety of passengers upon his train. Thompson *v.* Chicago, etc., R. Co., 71 Minn. 89, 73 N. W. 707.

57. Glover *v.* Scotten, 82 Mich. 369, 46 N. W. 936; Hanson *v.* Whalen, 110 N. Y. App. Div. 793, 97 N. Y. Suppl. 237.

The fact that an engineer jumped from his engine where a collision seemed imminent is not contributory negligence which will prevent a recovery against another railroad company which had left cars standing so as to obstruct the track, although it subsequently appears that if he had not done so he would not have been injured. Albert *v.* Sweet, 3 N. Y. St. 738 [*affirmed* in 116 N. Y. 363, 22 N. E. 762].

58. Chicago, etc., R. Co. *v.* Vipond, 212 Ill. 199, 72 N. E. 22 [*affirming* 112 Ill. App. 558]; Chicago, etc., R. Co. *v.* Raidy, 203 Ill. 310, 67 N. E. 783 [*affirming* 100 Ill. App. 506]; Chicago, etc., R. Co. *v.* Harrington, 192 Ill. 9, 61 N. E. 622 [*affirming* 90 Ill. App. 638]; Southern Indiana R. Co. *v.* Davis, 32 Ind. App. 569, 69 N. E. 550 [*withdrawing* former opinion in (App. 1903) 68 N. E. 191]; Ft. Worth, etc., R. Co. *v.* Mackney, 83 Tex. 410, 18 S. W. 949.

The fellow servant doctrine (see Master and Servant, 26 Cyc. 1276) has no application to actions for personal injuries not brought against the common master. Chicago, etc., R. Co. *v.* Raidy, 203 Ill. 310, 67 N. E. 783 [*affirming* 100 Ill. App. 506].

But if there was no negligence on the part of defendant company and the injury was due solely to the negligence of the co-employee of plaintiff, he is not entitled to recover. Chicago, etc., R. Co. *v.* McKittrick, 78 Ill. 619.

59. Montgomery, etc., R. Co. *v.* Chambers, 79 Ala. 338; Chicago, etc., R. Co. *v.* Kansas City, etc., R. Co., 78 Mo. App. 245; Lonergan *v.* Erie R. Co., 67 N. Y. App. Div. 297, 73 N. Y. Suppl. 392 [*affirmed* in 173 N. Y. 616, 66 N. E. 1112].

60. Birmingham Southern R. Co. *v.* Powell, 136 Ala. 232, 33 So. 875.

61. Streets *v.* Grand Trunk R. Co., 76 N. Y. App. Div. 480, 78 N. Y. Suppl. 729 [*affirmed* in 178 N. Y. 553, 70 N. E. 1109]; Mars *v.* Delaware, etc., Canal Co., 8 N. Y. Suppl. 107; Texas, etc., R. Co. *v.* Doherty, (Tex. App. 1890) 15 S. W. 44.

Application of rule.—Where defendant was negligent in leaving an engine on a side-track unattended and with fire in it, such negligence was not the proximate cause of an injury to plaintiff, where the engine was moved to the main track by a wrong-doer and a collision ensued. Mars *v.* Delaware, etc., Canal Co., 8 N. Y. Suppl. 107. Where plaintiff's ice was destroyed by oil escaping from an oil tank car which was derailed without the fault of the railroad company, causing a leakage which it was unable to stop, plaintiff is not entitled to recover for alleged negligence in opening a valve in the tank where the oil which had previously escaped without the company's negligence was more than sufficient to destroy the ice. Commercial Ice Co. *v.* Philadelphia, etc., R. Co., 197 Pa. St. 238, 47 Atl. 205.

62. Bunting *v.* Hogsett, 139 Pa. St. 363,

that the particular injury which in fact occurred should have been foreseen,[63] nor is it necessary that defendant's negligence to be a proximate cause should be the sole cause of the injury, a person being injured by the concurring negligence of two railroad companies being entitled to recover against either.[64] So also one railroad company, although negligent in stopping a train upon a crossing, may recover against another railroad company for damages to such train resulting from a collision if the servants in charge of defendant's train saw or could have seen the train and by the exercise of ordinary care could have avoided the collision.[65]

6. Actions — a. Pleading. In an action for damage to property or personal injuries growing out of collisions or accidents to trains, the complaint must allege sufficient facts to show a cause of action in favor of plaintiff against defendant,[66] must allege facts upon which issue can be taken and not mere inferences or arguments,[67] and must not be uncertain or repugnant in its allegations.[68] While there must be an allegation of negligence on the part of defendant,[69] a general allegation that the act which caused the injury was negligently done or omitted is sufficient without setting out the details of the negligence,[70] but the act complained of must be stated.[71] If, however, the complaint undertakes to define the particular negligence causing the injury, its sufficiency must be tested by these special allegations.[72] In most jurisdictions the complaint need not negative

21 Atl. 31, 33, 34, 23 Am. St. Rep. 192, 12 L. R. A. 268.

Where an engineer reversed and abandoned his engine to avoid a collision due to his negligence or the negligence of the company employing him, and after the collision the engine, being left without control, ran back and collided with another train, resulting in injury to a person thereon, the original negligence will be held a proximate cause of the injury resulting from the second collision. Nary *v.* New York, etc., R. Co., 9 N. Y. Suppl. 153; Bunting *v.* Hogsett, 139 Pa. St. 363, 21 Atl. 31, 33, 34, 23 Am. St. Rep. 192, 12 L. R. A. 268.

63. Cincinnati, etc., R. Co. *v.* Acrea, 40 Ind. App. 150, 81 N. E. 213, 82 N. E. 1009.

64. Chicago, etc., R. Co. *v.* Averill, 224 Ill. 516, 79 N. E. 654 [*affirming* 127 Ill. App. 275]; Chicago, etc., R. Co. *v.* Harrington, 192 Ill. 9, 61 N. E. 622 [*affirming* 90 Ill. App. 638]; Chicago, etc., R. Co. *v.* Hines, 183 Ill. 482, 56 N. E. 177 [*affirming* 82 Ill. App. 488]; Baltimore, etc., R. Co. *v.* Kleespies, 39 Ind. App. 151, 76 N. E. 1015, 78 N. E. 252.

65. Missouri Pac. R. Co. *v.* Chicago Great Western R. Co., 98 Mo. App. 214, 71 S. W. 1081.

66. Chicago, etc., R. Co. *v.* Marshall, 38 Ind. App. 217, 75 N. E. 973.

67. Evansville, etc., R. Co. *v.* Krapf, 143 Ind. 647, 36 N. E. 901.

68. Highland Ave., etc., R. Co. *v.* South, 112 Ala. 642, 20 So. 1003.

69. See Evansville, etc., R. Co. *v.* Krapf, 143 Ind. 647, 36 N. E. 901.

70. Georgia Cent. R. Co. *v.* Martin, 138 Ala. 531, 36 So. 426; Stephenson *v.* Southern Pac. R. Co., 102 Cal. 143, 34 Pac. 618, 36 Pac. 407; Evansville, etc., R. Co. *v.* Krapf, 143 Ind. 647, 36 N. E. 901; Louisville, etc., R. Co. *v.* Jones, 108 Ind. 551, 9 N. E. 476; Ohio, etc., R. Co. *v.* Selby, 47 Ind. 471, 17 Am. Rep. 719; Southern Indiana R. Co. *v.* Messick, 35 Ind. App. 676, 74 N. E. 1097; Hannibal, etc., R. Co. *v.* Kenney, 41 Mo. 271.

Condition of track.— A complaint based upon negligence as to the condition of the track, resulting in the derailment of a train, which alleges that the track was "in bad condition and repair," is sufficiently specific as to the condition of the track. Ohio, etc., R. Co. *v.* Selby, 47 Ind. 471, 17 Am. Rep. 719.

71. See Stephenson *v.* Southern Pac. Co., 102 Cal. 143, 34 Pac. 618, 36 Pac. 407; Ohio, etc., R. Co. *v.* Selby, 47 Ind. 471, 17 Am. Rep. 719.

72. Highland Ave., etc., R. Co. *v.* South, 112 Ala. 642, 20 So. 1003; Baltimore, etc., R. Co. *v.* Kleespies, 39 Ind. App. 151, 76 N. E. 1015, 78 N. E. 252.

In an action against several railroad companies for injuries caused by collision a complaint is bad which sets out various acts of negligence, charging them against all of defendants indiscriminately without any particular act or omission being charged against any one or against all of defendants. Chicago, etc., R. Co. *v.* Marshall, 38 Ind. App. 217, 75 N. E. 973.

Failure to give signals.— A count alleging as a basis of defendant's negligence a failure to blow the whistle "and" ring the bell is demurrable where the statute requires only the one "or" the other and either is sufficient. Highland Ave., etc., R. Co. *v.* South, 112 Ala. 642, 20 So. 1003.

Violation of speed ordinance.— Where the complaint alleges negligence on the part of defendant in running a train at a rate of speed prohibited by a city ordinance, it is sufficient to aver the existence of the ordinance without filing a copy of it with the complaint. Madison, etc., R. Co. *v.* Taffe, 37 Ind. 361.

Failure to stop before crossing other railroad.— A complaint alleging negligence in

contributory negligence on the part of plaintiff,[73] and no adverse presumption arises from a failure to do so;[74] but where such allegation is made or necessary, a general allegation that the injury occurred without any fault or negligence on the part of plaintiff is sufficient,[75] unless the inference of negligence arises as a necessary legal conclusion from the facts stated.[76] In an action by a passenger of one railroad company against another company for injuries caused by a collision, it is not necessary to allege that the company carrying plaintiff was without fault.[77]

b. Issues, Proof, and Variance — (i) *IN GENERAL.* To authorize a recovery there must be proof in support of all the material allegations of the complaint,[78] but an immaterial allegation not essential to establish the cause of action need not be proved.[79] The allegations and proof must correspond and any material variance is fatal to a recovery,[80] so that there can be no recovery on a different cause of action from that alleged in the complaint,[81] and if the complaint sets out the particular acts of negligence constituting such cause of action the issues must be restricted to the acts specified;[82] but no variance should be regarded as material where the allegations and proof substantially correspond or the variance was not such as to mislead or prejudice the other party.[83] Under a complaint alleging "wrongful, wanton, or intentional negligence" on the part

failing to stop before crossing the tracks of another railroad as required by statute need not negative the exception made by a subsequent section of the statute as to crossings provided with interlocking switches. Cleveland, etc., R. Co. *v.* Gray, 148 Ind. 266, 46 N. E. 675.

Negligent operation of gates or switches.— In an action for personal injuries due to a collision between a train and a street car, caused by the negligent operation of the crossing gates, if the complaint alleges that the injury was caused by the negligence of defendant company and its servants and that there was negligence in the operation of the crossing gates, it is not necessary to make a specific averment that the gatekeeper was a servant of defendant or that the latter was bound to maintain the gates (Washington, etc., R. Co. *v.* Hickey, 5 App. Cas. (D. C.) 436); and in an action for injuries due to a car being derailed by a switch being left open and unlocked by defendant's servants it is not necessary to allege that it was the duty of defendant to keep the switch closed and locked (Chicago Terminal Transfer R. Co. *v.* Vandenberg, 164 Ind. 470, 73 N. E. 990).

73. Southern Indiana R. Co. *v.* Peyton, 157 Ind. 690, 61 N. E. 722; Pittsburgh, etc., R. Co. *v.* Browning, 34 Ind. App. 90, 71 N. E. 227. See also NEGLIGENCE, 29 Cyc. 575.

In Indiana it was formerly held that the complaint must negative contributory negligence on the part of plaintiff, a general allegation, however, being sufficient (Evansville, etc., R. Co. *v.* Krapf, 143 Ind. 647, 36 N. E. 901); but the rule was changed by statute in 1899 and the statute applies to causes of action existing at the time if the action was not commenced until after the statute took effect (Southern Indiana R. Co. *v.* Peyton, 157 Ind. 690, 61 N. E. 722).

74. Southern Indiana R. Co. *v.* Peyton, 157 Ind. 690, 61 N. E. 722.

75. Pittsburgh, etc., R. Co. *v.* Martin, 157 Ind. 216, 61 N. E. 229; Evansville, etc., R. Co. *v.* Krapf, 143 Ind. 647, 36 N. E. 901.

76. See Evansville, etc., R. Co. *v.* Krapf, 143 Ind. 647, 36 N. E. 901.

77. Pittsburgh, etc., R. Co. *v.* Spencer, 98 Ind. 186.

78. Heins *v.* Savannah, etc., R. Co., 114 Ga. 678, 40 S. E. 710.

79. Chicago, etc., R. Co. *v.* Vipond, 212 Ill. 199, 72 N. E. 22 [*affirming* 112 Ill. App. 558].

80. Alabama Great Southern R. Co. *v.* Hall, 105 Ala. 599, 17 So. 176, holding that where the complaint alleges that deceased was at the time of the accident engaged as a brakeman, proof that he was at the time acting as fireman constitutes a fatal variance.

81. Ely *v.* St. Louis, etc., R. Co., 77 Mo. 34.

82. Garven *v.* Chicago, etc., R. Co., 100 Mo. App. 617, 75 S. W. 193.

83. Rio Grande Western R. Co. *v.* Rubenstein, 5 Colo. App. 121, 38 Pac. 76; Washington, etc., R. Co. *v.* Hickey, 5 App. Cas. (D. C.) 436.

There is no material variance between a complaint alleging an injury due to "the negligent and dangerous condition of defendant's roadbed" and proof of negligence on the part of defendant's section foreman in failing to inspect the track, all acts of defendant's employees tending to show negligence in relation to the condition of the track being but incidents of proof of the main fact alleged (Texas, etc., R. Co. *v.* Barron, 4 Tex. Civ. App. 546, 23 S. W. 537); and in an action by an employee of one railroad company against another company for personal injuries, where the complaint alleges negligence on the part of defendant, and the existence of a contract between the companies permitting plaintiff's employer to run its trains over defendant's tracks, the contract is material only for the purpose of showing that plaintiff was rightfully upon the track at the time of injury, and if this is shown a failure to prove the terms of the contract strictly as alleged is not material (Sawyer *v.* Rutland, etc., R. Co., 27 Vt. 370).

of defendant's employees, plaintiff may recover upon proof of wantonness or wilfulness not amounting to intentional wrong-doing.[84]

(II) *EVIDENCE ADMISSIBLE UNDER PLEADINGS.* Evidence to be admissible must conform to the allegations of the complaint, and if the complaint specifies the acts of negligence relied on evidence of negligence in other respects is not admissible,[85] but evidence of defects in the road-bed other than that alleged to have been the immediate cause of the injury complained of is admissible in support of an allegation of gross negligence as to the condition of the road-bed and a claim for exemplary damages.[86] An ordinance is not admissible in evidence unless specially pleaded if the action is based upon the ordinance, but is admissible in a common-law action as evidence of negligence, where the ordinance does not itself give the right of action but merely prescribes a duty to be performed.[87]

e. Evidence — (I) *PRESUMPTIONS AND BURDEN OF PROOF.* In the absence of statute, except in the case of actions by passengers against the company carrying them,[88] negligence on the part of defendant cannot be presumed from the mere fact of the collision or accident,[89] and the burden of proof is upon plaintiff to establish this fact.[90] Where contributory negligence on the part of plaintiff

84. Southern R. Co. *v.* Bonner, 141 Ala. 517, 37 So. 702.

85. Garven *v.* Chicago, etc., R. Co., 100 Mo. App. 617, 75 S. W. 193.

Evidence held admissible under pleadings. — In case of collision between trains of two companies using the same track, where the complaint counts in a general way upon defendant's negligence in stopping its train without warning, and allowing it to be where it was run into by plaintiff's engine, it is proper for plaintiff to show that it was defendant's duty to send back a flagman to warn approaching trains, and testimony of a custom on well regulated railroads to do so is competent as tending to establish this duty. Georgia Cent. R. Co. *v.* Martin, 138 Ala. 531, 36 So. 426. Although in an action for injury to an engineer the complaint alleges negligence only as to the defective condition of the track, if defendant sets up contributory negligence on the part of plaintiff in the operation of the train, evidence is admissible on the part of plaintiff that an engineer in charge of another locomotive attached to the same train had full control over the train and air brakes. Southern Kansas R. Co. *v.* Sage, 43 Tex. Civ. App. 38, 94 S. W. 1074.

86. Texas, etc., R. Co. *v.* De Milley, 60 Tex. 194.

87. Mulderig *v.* St. Louis, etc., R. Co., 116 Mo. App. 655, 94 S. W. 801.

A copy of the ordinance need not be filed with the complaint but such ordinance is admissible under a general allegation of its existence where the action is not based upon the ordinance. Madison, etc., R. Co. *v.* Taffe, 37 Ind. 361.

88. See CARRIERS, 6 Cyc. 630, 631.

Application of rule as to passengers. — The rule that in case of a collision or the derailment of a train resulting in injury to a passenger on the train of defendant company, proof of such accident makes a *prima facie* case of negligence and places the burden upon defendant to rebut it, applies to injuries so caused to a mail agent riding in a postal car (Seybolt *v.* New York, etc., R. Co., 95 N. Y. 562, 47 Am. Rep. 75), or to an employee of an independent contractor riding on a construction train furnished to the contractor and controlled and operated by defendant railroad company (Louisville, etc., R. Co. *v.* Conroy, 63 Miss. 562, 56 Am. Rep. 835).

89. Little Rock, etc., R. Co. *v.* Harrell, 58 Ark. 454, 25 S. W. 117; Brimmer *v.* Illinois Cent. R. Co., 101 Ill. App. 198; Southern Indiana R. Co. *v.* Messick, 35 Ind. App. 676, 74 N. E. 1097; Renders *v.* Grand Trunk R. Co., 144 Mich. 387, 108 N. W. 368.

90. *Arkansas.* — Little Rock, etc., R. Co. *v.* Harrell, 58 Ark. 454, 25 S. W. 117.

Illinois. — Brimmer *v.* Illinois Cent. R. Co., 101 Ill. App. 198.

Indiana. — Ohio, etc., R. Co. *v.* Selby, 47 Ind. 471, 17 Am. Rep. 719.

Kentucky. — Central Pass. R. Co. *v.* Kuhn, 86 Ky. 578, 6 S. W. 441, 9 Ky. L. Rep. 725, 9 Am. St. Rep. 309.

Michigan. — Renders *v.* Grand Trunk R. Co., 144 Mich. 387, 108 N. W. 368.

See 41 Cent. Dig. tit. "Railroads," § 945.

But see Thomas *v.* Cincinnati, etc., R. Co., 91 Fed. 206.

In an action by a passenger against two railroad companies for injuries due to a collision alleged to have been caused by the negligence of both, the burden is upon the company carrying plaintiff to show the absence of negligence on its part and upon plaintiff to show negligence on the part of the other company. Central Pass. R. Co. *v.* Kuhn, 86 Ky. 578, 6 S. W. 441, 9 Ky. L. Rep. 725, 9 Am. St. Rep. 309. See also Little Rock, etc., R. Co. *v.* Harrell, 58 Ark. 454, 25 S. W. 117.

Under the Alabama statute proof of injury to persons or property by the train of a railroad company places the burden upon the company to show that the requirements of the preceding section of the statute were complied with, but this provision applies only to the requirements of that section (Ala. Code (1886), § 1144), and does not include the requirement of section 1145, that trains shall be stopped before crossing another railroad; the burden of proof being upon plaintiff in all

is relied on as a defense, the burden is upon defendant to establish it,[91] but plaintiff's own evidence may be considered in determining this question and may be sufficient to show contributory negligence.[92]

(II) *ADMISSIBILITY*.[93] In actions growing out of collisions or accidents to trains the general rules as to the admissibility of evidence in civil actions apply.[94] The evidence, to be admissible, must be relevant to the matters in issue,[95] and evidence is not admissible of other distinct acts of negligence which could not have contributed to the injury complained of,[96] or of other wrecks or accidents occurring at other places;[97] but in case of accidents alleged to be due to defects in the track or switches, evidence is admissible of other accidents at the same place from the same cause if accompanied by proof that the condition existing at such times was substantially the same.[98] While generally speaking the evidence should be limited to the time, place, and circumstances of the particular accident complained of,[99] this rule cannot be applied with absolute strictness.[1] So in actions based upon a defective condition of the track, road-bed, switches, or signal devices, evidence as to their condition shortly before or after the accident is admissible as tending to show their condition at that time;[2] but the evi-

cases except as to the requirements of section 1144. Georgia Pac. R. Co. *v.* Hughes, 87 Ala. 610, 6 So. 413.

91. St. Louis, etc., R. Co. *v.* Weaver, 35 Kan. 412, 11 Pac. 408, 57 Am. Rep. 176; Gulf, etc., R. Co. *v.* Pendry, 87 Tex. 553, 29 S. W. 1038, 47 Am. St. Rep. 125 [*reversing* (Civ. App. 1894) 27 S. W. 213]; Waterman *v.* Chicago, etc., R. Co., 82 Wis. 613, 52 N. W. 247, 1136.

92. Waterman *v.* Chicago, etc., R. Co., 82 Wis. 613, 52 N. W. 247, 1136.

93. Evidence admissible under pleadings see *supra*, X, D, 6, b, (II).

94. See, generally, EVIDENCE, 16 Cyc. 1110; NEGLIGENCE, 29 Cyc. 606.

95. Ohio, etc., R. Co. *v.* Selby, 47 Ind. 471, 17 Am. Rep. 719; Bunting *v.* Pennsylvania R. Co., 118 Pa. St. 204, 12 Atl. 448.

Evidence as to the number of ties necessary to make a first-class road-bed is not admissible where there is no issue as to the sufficiency of the number of ties but only as to their defective condition. Chicago, etc., R. Co. *v.* Lewis, 145 Ill. 67, 33 N. E. 960 [*affirming* 48 Ill. App. 274].

Evidence of other floods occurring after the washing away of a bridge which is alleged to have been insufficient is not admissible. Kansas Pac. R. Co. *v.* Miller, 2 Colo. 442.

96. Little Rock, etc., R. Co. *v.* Harrell, 58 Ark. 454, 25 S. W. 117; Louisville, etc., R. Co. *v.* Fox, 11 Bush (Ky.) 495.

Question to test memory of witness.— In an action for injuries caused by a defective or mismanaged switch, there was no prejudicial error in permitting defendant's switchman to be asked if he remembered a prior act of negligence on his part, where it appears that the question was asked only to test his memory which had seemed to be poor and nothing more was asked in regard to such negligence. Stodder *v.* New York, etc., R. Co., 50 Hun (N. Y.) 221, 2 N. Y. Suppl. 780 [*affirmed* in 121 N. Y. 655, 24 N. E. 1092].

97. Missouri Pac. R. Co. *v.* Mitchell, 75 Tex. 77, 12 S. W. 810; Fordyce *v.* Withers, 1 Tex. Civ. App. 540, 20 S. W. 766.

98. Morse *v.* Minneapolis, etc., R. Co., 30 Minn. 465, 16 N. W. 358, holding that evidence that other trains had missed the track at a particular switch, the defective condition of which is alleged to have caused the injury complained of, is competent as being in the nature of experiments to show the actual condition of the instrument alleged to be defective.

Successive breaking of rails at same place. — While disconnected acts of negligence, although of the same character, are not competent to show negligence in a particular case, yet in an action for negligence caused by a broken rail it is proper for the jury to consider the successive breaking of rails at the place of the accident within a short time, to indicate the condition of the track at that point and that the attention of the company had been called to its condition. Cleveland, etc., R. Co. *v.* Newell, 104 Ind. 264, 3 N. E. 836, 54 Am. Rep. 312.

99. Missouri Pac. R. Co. *v.* Mitchell, 75 Tex. 77, 12 S. W. 810.

1. Stoher *v.* St. Louis, etc., R. Co., 91 Mo. 509, 4 S. W. 389.

Lights shown by semaphore at a different crossing.— In the case of a collision at a crossing where one railroad crosses two other parallel railroads near together and the semaphore lights at each crossing are worked by the same lever, showing the same lights simultaneously at each, evidence is admissible as to a light shown at the crossing other than that at which the collision occurred as tending to show that there was the same signal at that crossing. Chicago, etc., R. Co. *v.* Vipond, 212 Ill. 199, 72 N. E. 22 [*affirming* 112 Ill. App. 558].

2. Stoher *v.* St. Louis, etc., R. Co., 91 Mo. 509, 4 S. W. 389; Stewart *v.* Everts, 76 Wis. 35, 44 N. W. 1092, 20 Am. St. Rep. 17.

Condition of semaphore.— Where a railroad crosses two other railroads which are near each other and the crossings are controlled by semaphores worked at the same time by the same lever, in case of a collision at the first crossing which results in destroying the semaphore at that crossing, and the condition

dence is not admissible if it relates to a time too remote to permit a just and fair inference that the condition was substantially the same at the time of the accident,[3] unless it is accompanied by other direct evidence to this effect.[4] It is also ordinarily held that evidence is not admissible as to defects in the track or road-bed at places other than that where the accident occurred and which it is not shown could have contributed to the injury complained of,[5] although they are in the same vicinity;[6] but where it is charged that defendant permitted its road to become wholly unsafe for travel over it and both actual and exemplary damages are claimed, evidence is admissible as to the general defective condition of the road,[7] and when the negligence alleged is in operating a train at a rapid speed over a defective track, plaintiff may show the condition of the track over which the train passed before reaching the place of accident.[8] Evidence of repairs or alterations made by the railroad company after the accident complained of is not admissible as evidence of a defective or insufficient condition existing at that time or an admission of negligence on the part of the company;[9] but such

of the semaphore at the time of the accident is a material question, evidence of the condition of the semaphore at the other crossing shortly after the accident is admissible. Chicago, etc., R. Co. *v.* Vipond, 112 Ill. App. 558 [*affirmed* in 212 Ill. 199, 72 N. E. 22].

Condition of ties found near track.— Evidence is admissible as to the condition of cross ties found shortly after the accident at the place where it occurred and where the railroad company had repaired the track by putting in new ties. Chicago, etc., R. Co. *v.* Lewis, 145 Ill. 67, 33 N. E. 960 [*affirming* 48 Ill. App. 274].

3. Stoher *v.* St. Louis, etc., R. Co., 91 Mo. 509, 4 S. W. 389.

Broken rails in evidence.— In an action for injury due to the derailment of a train by a broken rail, it is not competent to introduce in evidence the pieces of the broken rail which had been exposed to the weather for six months after the accident. Stewart *v.* Everts, 76 Wis. 35, 44 N. W. 1092, 20 Am. St. Rep. 17.

4. Jacksonville Southeastern R. Co. *v.* Southworth, 135 Ill. 250, 25 N. E. 1093 [*affirming* 32 Ill. App. 307].

Although repairs have been made at the place of accident evidence is admissible as to the condition of the switch to which it was alleged the accident was due, if such evidence is accompanied by proof that its condition had not been affected by the repairs made and was substantially the same as at the time of the accident. Stodder *v.* New York, etc., R. Co., 50 Hun (N. Y.) 221, 2 N. Y. Suppl. 780 [*affirmed* in 121 N. Y. 655, 24 N. E. 1092].

5. *Kentucky.*— Louisville, etc., R. Co. *v.* Fox, 11 Bush 495.

Minnesota.— Morse *v.* Minneapolis, etc., R. Co., 30 Minn. 465, 16 N. W. 358.

North Carolina.— Grant *v.* Raleigh, etc., R. Co., 108 N. C. 462, 13 S. E. 209.

Texas.— Missouri Pac. R. Co. *v.* Mitchell, 75 Tex. 77, 12 S. W. 810.

Wisconsin.— Stewart *v.* Evarts, 76 Wis. 35, 44 N. W. 1092, 20 Am. St. Rep. 17.

See 41 Cent. Dig. tit. "Railroads," § 946.

Where defendant assumes the burden of proof and its witnesses testify that the track at the place of the accident and in that vicinity was in good repair, plaintiff may in rebuttal not only show the defective condition of the track at the place of accident, but may also show its condition several hundred feet on either side thereof as corroborative. Ohio Valley R. Co. *v.* Watson, 93 Ky. 654, 21 S. W. 244, 14 Ky. L. Rep. 611, 40 Am. St. Rep. 211, 9 L. R. A. 310.

Where defendant immediately repaired the track at the place of accident so that plaintiff was unable to show its condition at that place, he is entitled to show its condition in the immediate vicinity as being some evidence, although not conclusive, as to the condition at the place of accident. Murphy *v.* New York Cent. R. Co., 66 Barb. (N. Y.) 125.

6. Morse *v.* Minneapolis, etc., R. Co., 30 Minn. 465, 16 N. W. 358.

7. Texas Trunk R. Co. *v.* Johnson, 86 Tex. 421, 25 S. W. 417 [*disapproving* in part (Civ. App. 1893) 25 S. W. 740]; Texas, etc., R. Co. *v.* De Milley, 60 Tex. 194.

8. Jacksonville Southeastern R. Co. *v.* Southworth, 135 Ill. 250, 25 N. E. 1093 [*affirming* 32 Ill. App. 307].

9. Morse *v.* Minneapolis, etc., R. Co., 30 Minn. 465, 16 N. W. 358 [*overruling* Kelly *v.* Southern Minnesota R. Co., 28 Minn. 98, 9 N. W. 588]; Hipsley *v.* Kansas City, etc., R. Co., 88 Mo. 348; Aldrich *v.* Concord, etc., R. Co., 67 N. H. 250, 29 Atl. 408; Texas Trunk R. Co. *v.* Ayres, 83 Tex. 268, 18 S. W. 684; San Antonio, etc., R. Co. *v.* Lynch, 8 Tex. Civ. App. 513, 28 S. W. 252; Fordyce *v.* Chancey, 2 Tex. Civ. App. 24, 21 S. W. 181; Fordyce *v.* Withers, 1 Tex. Civ. App. 540, 20 S. W. 766. But see St. Louis, etc., R. Co. *v.* Weaver, 35 Kan. 412, 11 Pac. 408, 57 Am. Rep. 176; Brehm *v.* Great Western R. Co., 34 Barb. (N. Y.) 256.

The reasons for this rule are that the fact of making changes or repairs after an accident does not necessarily tend to show any previous negligence, since accidents often reveal defects of such a character that the company was not chargeable with negligence in not sooner discovering them, or induce the company to adopt extraordinary precautions, and further that the admission of such testi-

evidence if properly limited to the purpose for which it is introduced is admissible to rebut evidence on the part of defendant that no repairs or alterations had been made after the accident,[10] or that the conditions causing the accident could not have been prevented,[11] or for the purpose of explaining other evidence.[12] A municipal ordinance limiting the rate of speed of trains is admissible upon the issue of defendant's negligence in the operation of the train,[13] and also upon the question of contributory negligence on the part of a person in charge of a street car in using a railroad crossing;[14] but such an ordinance is not admissible to charge an employee upon a train with contributory negligence where he had nothing to do with its operation.[15] Rules of the railroad company in regard to the operation of trains under conditions similar to those at the time the accident occurred are admissible,[16] but evidence is not admissible of rules adopted after the accident requiring certain precautions under similar conditions.[17] Rules made by a board of railroad commissioners governing the movement of trains at crossings are not admissible unless it is shown that they have been served upon or in some manner brought to the knowledge of the company against whom they are offered in evidence,[18] and the printed rules of the railroad company are not admissible to show contributory negligence on the part of an engineer in the absence of evidence that such rules were in force at the time of the injury and applied to the place where it occurred.[19] Upon the question of defendant's negligence in the operation of the train, evidence is admissible that defendant's engineer had been drinking;[20] and in the case of a collision between a train and a street car at a crossing, a contract between the companies providing that the street cars should be stopped and the way ascertained to be clear before crossing is admissible;[21] and in case of a collision between the trains of two companies in a switch yard, evidence of the environment and usual manner of conducting the business involved at the place of injury is competent as bearing upon the acts and conduct of the parties.[22] Testimony of a witness that just prior to an accident at a crossing the semaphore which was destroyed by the accident was in good working order is properly regarded as a statement of fact and not objectionable as a conclusion of the witness.[23]

(III) *WEIGHT AND SUFFICIENCY.* As to the weight and sufficiency of

mony would be contrary to public policy as tending to prevent railroad companies from making repairs and adopting additional precautions after the happening of an accident, if such action on their part should be considered as an admission of guilt. Morse *v.* Minneapolis, etc., R. Co., 30 Minn. 465, 16 N. W. 358; Aldrich *v.* Concord, etc., R. Co., 67 N. H. 250, 29 Atl. 408.

The fact that a new bridge was constructed in a different manner from the one previously washed away, causing the injury complained of, cannot be taken as an admission that the first was negligently constructed. Kansas Pac. R. Co. *v.* Miller, 2 Colo. 442.

10. Fordyce *v.* Moore, (Tex. Civ. App. 1893) 22 S. W. 235; Fordyce *v.* Withers, 1 Tex. Civ. App. 540, 20 S. W. 766.

11. St. Louis, etc., R. Co. *v.* Johnston, 78 Tex. 536, 15 S. W. 104.

12. St. Louis, etc., R. Co. *v.* Johnston, 78 Tex. 536, 15 S. W. 104, holding that evidence of an alteration in the road at the place of accident is admissible where such testimony is offered for the purpose of explaining a photograph of the place taken after such changes were made which had been introduced in evidence.

13. Madison, etc., R. Co. *v.* Taffe, 37 Ind. 361.

14. Madison, etc., R. Co. *v.* Taffe, 37 Ind. 361.

15. Chicago, etc., R. Co. *v.* Vipond, 212 Ill. 199, 72 N. E. 22 [*affirming* 112 Ill. App. 558].

16. St. Louis, etc., R. Co. *v.* Wiggins, (Tex. Civ. App. 1908) 107 S. W. 899; St. Louis, etc., R. Co. *v.* Andrews, 44 Tex. Civ. App. 426, 99 S. W. 871.

17. St. Louis, etc., R. Co. *v.* Andrews, 44 Tex. Civ. App. 426, 99 S. W. 871.

18. Chicago, etc., R. Co. *v.* Ransom, 56 Kan. 559, 44 Pac. 6.

19. Pittsburgh, etc., R. Co. *v.* Martin, 157 Ind. 216, 61 N. E. 229.

20. New York, etc., R. Co. *v.* Grand Rapids, etc., R. Co., 116 Ind. 60, 18 N. E. 182.

21. Connolly *v.* New York Cent., etc., R. Co., 35 N. Y. App. Div. 609, 55 N. Y. Suppl. 118.

22. St. Louis Nat. Stock Yards *v.* Godfrey, 198 Ill. 288, 65 N. E. 90 [*affirming* 101 Ill. App. 40].

23. Chicago, etc., R. Co. *v.* Vipond, 212 Ill. 199, 72 N. E. 22 [*affirming* 112 Ill. App. 558].

evidence the general rules in civil actions apply.[24] In order to authorize a verdict for plaintiff there must be some evidence tending to show negligence on the part of defendant and that such negligence was the cause of the injury complained of,[25] and where there is no evidence produced to sustain the material allegations of the complaint, a nonsuit is properly granted,[26] or the court may direct a verdict for defendant.[27]

d. Damages.[28] Exemplary damages may be allowed in case of gross negligence or wanton or wilful injury,[29] but not for errors in judgment or mere negligence.[30] In an action by a bridge foreman for loss of property on cars furnished him by the company in which to board his crew, caused by a collision, defendant's liability is limited to such property as was necessary to be carried in such cars for the work in which he was engaged.[31]

e. Questions For Jury. The case should be submitted to the jury if there is any evidence reasonably tending to support the issues made by the pleadings,[32] and the issue is for the jury wherever the evidence is conflicting or different conclusions might reasonably be drawn therefrom.[33] So it is ordinarily a question for the jury whether under all the facts and circumstances shown defendant was guilty of negligence,[34] and whether such negligence was a proximate cause

24. See, generally, EVIDENCE, 17 Cyc. 753; NEGLIGENCE, 29 Cyc. 621.

25. Southern Indiana R. Co. *v.* Messick, 35 Ind. App. 676, 74 N. E. 1097.

Evidence held sufficient to sustain a verdict based upon the negligently defective condition of defendant's road-bed (Booth *v.* Columbia, etc., R. Co., 6 Wash. 531, 33 Pac. 1075); to show that train was operated at a speed in violation of a city ordinance and that such speed was the cause of the injury (Walsh *v.* Missouri Pac. R. Co., 102 Mo. 582, 14 S. W. 873, 15 S. W. 757); to show that defendant's servant was acting within the scope of his employment (Snider *v.* Chicago, etc., R. Co., 108 Mo. App. 234, 83 S. W. 530); to support a finding that plaintiff was injured in the manner claimed by him and that the injury was not merely feigned as claimed by defendant (Baltimore, etc., R. Co. *v.* Kleespies, 39 Ind. App. 151, 76 N. E. 1015, 78 N. E. 252); to sustain a finding that plaintiff was not guilty of contributory negligence (Albert *v.* Sweet, 116 N. Y. 363, 22 N. E. 762); and to sustain a verdict on the ground that defendant could have avoided the collision by the exercise of proper care after the danger was discovered (Cincinnati, etc., R. Co. *v.* Shroder, 16 Ohio Cir. Ct. 636, 9 Ohio Cir. Dec. 208).

26. Heins *v.* Savannah, etc., R. Co., 114 Ga. 678, 40 S. E. 710.

27. Brimmer *v.* Illinois Cent. R. Co., 101 Ill. App. 198; Pennsylvania R. Co. *v.* Martin, 111 Fed. 586, 49 C. C. A. 474, 55 L. R. A. 361.

28. See, generally, DAMAGES, 13 Cyc. 1.

29. Richmond, etc., R. Co. *v.* Greenwood, 99 Ala. 501, 14 So. 495; Kansas Pac. R. Co. *v.* Miller, 2 Colo. 442.

In estimating damages on a judgment by default where the only question is the degree of defendant's culpability the jury may consider not only the particular acts of negligence which directly produced the injury, but also the prior negligence which led up to and produced the occasion for the negligence which directly caused the injury complained of. Kansas City, etc., R. Co. *v.* Sanders, 98 Ala. 293, 13 So. 57.

30. Kansas Pac. R. Co. *v.* Miller, 2 Colo. 442; Rutherford *v.* Shreveport, etc., R. Co., 41 La. Ann. 793, 6 So. 644.

31. St. Louis Southwestern R. Co. *v.* Henson, 61 Ark. 302, 32 S. W. 1079.

32. Chicago, etc., R. Co. *v.* Snyder, 128 Ill. 655, 21 N. E. 520; Wabash R. Co. *v.* Barrett, 117 Ill. App. 315; Wichita, etc., R. Co. *v.* Johnson, 47 Kan. 351, 27 Pac. 980; Robertson *v.* Boston, etc., R. Co., 160 Mass. 191, 35 N. E. 775; Albion Lumber Co. *v.* De Nobra, 72 Fed. 739, 19 C. C. A. 168; Chicago, etc., R. Co. *v.* Chambers, 68 Fed. 148, 15 C. C. A. 327.

33. Chicago, etc., R. Co. *v.* Snyder, 128 Ill. 655, 21 N. E. 520; Chicago Terminal Transfer R. Co. *v.* Vandenberg, 164 Ind. 470, 73 N. E. 990; Chicago, etc., R. Co. *v.* Chambers, 68 Fed. 148, 15 C. C. A. 327.

Signal lights at crossing.— Where the evidence is conflicting as to color of the signals displayed at a crossing, where it alleged that an engineer ran his train upon the crossing in disregard of the warning of such lights, the question is one of fact for the jury. Chicago, etc., R. Co. *v.* Vipond, 212 Ill. 199, 72 N. E. 22 [*affirming* 112 Ill. App. 558].

It is only where the facts are undisputed and are such that reasonable men may fairly draw but one conclusion from them that the question of negligence is ever considered one of law for the court. Chicago, etc., R. Co. *v.* Chambers, 68 Fed. 148, 15 C. C. A. 327.

34. Southern R. Co. *v.* Bonner, 141 Ala. 517, 37 So. 702; East Tennessee, etc., R. Co. *v.* Kane, 92 Ga. 187, 18 S. E. 18, 22 L. R. A. 315; Wabash R. Co. *v.* Barrett, 117 Ill. App. 315; Chicago Terminal Transfer R. Co. *v.* Vandenberg, 164 Ind. 470, 73 N. E. 990.

It is a question for the jury whether under the circumstances a railroad company was negligent in failing to recover a switch key from a discharged employee, who afterward

of the injury complained of.[35] The same rule applies to the question of contributory negligence where the evidence relating thereto is conflicting or different conclusions might reasonably be drawn therefrom,[36] so that it is ordinarily also a question for the jury whether plaintiff was guilty of a failure to exercise due care under the circumstances which contributed to the injury complained of.[37]

used it in maliciously misplacing a switch (East Tennessee, etc., R. Co. *v.* Kane, 92 Ga. 187, 18 S. E. 18, 22 L. R. A. 315); whether it was negligence for a railroad company to operate a train with the locomotive in the rear (Chicago, etc., R. Co. *v.* Grimm, 25 Ind. App. 494, 57 N. E. 640); whether in case of injuries due to a collision with a switch engine, which defendant's engineer had abandoned to avoid another collision with a different train, the engineer should have heard the signals or was too hasty in abandoning his engine and leaving it under steam without control (Nary *v.* New York, etc., R. Co., 9 N. Y. Suppl. 153); or whether the rate of speed at which a train was operated at the time and place of an accident was under the circumstances of the case such as to constitute negligence (Wabash R. Co. *v.* Barrett, 117 Ill. App. 315); and where a train carrying petroleum was wrecked without negligence on the part of the company and the oil ran upon adjacent property, and continued to do so for several days after the wreck and after the company had repaired its tracks, and the company did nothing to stop the flow which caused injury to adjacent property, the question as to the company's negligence in failing to stop the flow of oil is for the jury (Houston, etc., R. Co. *v.* Anderson, 44 Tex. Civ. App. 394, 98 S. W. 440).

35. East Tennessee, etc., R. Co. *v.* Kane, 92 Ga. 187, 18 S. E. 18, 22 L. R. A. 315; Chicago, etc., R. Co. *v.* Averill, 224 Ill. 516, 79 N. E. 654 [*affirming* 127 Ill. App. 275].

Application of rule.— Where a collision due to negligence occurred at a station and an engine ran against the waiting-room, and plaintiff, who would not otherwise have been injured, was injured by falling while climbing out of the window to avoid the supposed danger, the fall being due to the crowding of other passengers, it is a question for the jury whether the collision was a proximate cause of the injury. Cincinnati, etc., R. Co. *v.* Acrea, 40 Ind. App. 150, 81 N. E. 213, 82 N. E. 1009.

36. *District of Columbia.*— Jennings *v.* Philadelphia,. etc., R. Co., 29 App. Cas. 219.

Illinois.— Chicago, etc., R. Co. *v.* Harrington, 192 Ill. 9, 61 N. E. 622 [*affirming* 90 Ill. App. 638].

Maryland.—Baltimore, etc., R. Co. *v.* State, 104 Md. 76, 64 Atl. 304.

Missouri.— Threlkeld *v.* Wabash R. Co., 68 Mo. App. 127.

New York.— Harper *v.* Delaware, etc., R. Co., 22 N. Y. App. Div. 273, 47 N. Y. Suppl. 933.

United States.— St. Louis, etc., R. Co. *v.* Bishard, 147 Fed. 496, 78 C. C. A. 62; Albion Lumber Co. *v.* De Nobra, 72 Fed. 739, 19 C. C. A. 168; Chicago, etc., R. Co. *v.* Chambers, 68 Fed. 148, 15 C. C. A. 327.

See 41 Cent. Dig. tit. "Railroads," § 950.

37. Southern R. Co. *v.* Bonner, 141 Ala. 517, 37 So. 702; Birmingham Mineral R. Co. *v.* Jacobs, 101 Ala. 149, 13 S. W. 408; Chicago, etc., R. Co. *v.* Raidy, 203 Ill. 310, 67 N. E. 783 [*affirming* 100 Ill. App. 506]; Chicago, etc., R. Co. *v.* Harrington, 192 Ill. 9, 61 N. E. 622 [*affirming* 90 Ill. App. 638]; Lake Shore, etc., R. Co. *v.* Park, 131 Ill. 557, 23 N. E. 237 [*affirming* 33 Ill. App. 405]; Baltimore, etc., R. Co. *v.* State, 104 Md. 76, 64 Atl. 304; Robertson *v.* Boston, etc., R. Co., 160 Mass. 191, 35 N. E. 775.

It is a question for the jury whether an engineer was guilty of contributory negligence in failing to carry a headlight on his engine (Gross *v.* Pennsylvania, etc., R. Co., 16 N. Y. Suppl. 616); or in failing to stop his train before crossing another railroad as required by law (Lonergan *v.* Erie R. Co., 67 N. Y. App. Div. 297, 73 N. Y. Suppl. 392 [*affirmed* in 173 N. Y. 616, 66 N. E. 1112]); or in regard to the rate of speed at which he approached a crossing (Albert *v.* Sweet, 3 N. Y. St. 738 [*affirmed* in 116 N. Y. 363, 22 N. E. 762]); or in merely slowing down a train instead of bringing it to a full stop and listening for other trains before going upon a crossing (Kansas City, etc., R. Co. *v.* McDonald, 51 Fed. 178, 2 C. C. A. 153); or in jumping from his engine to avoid a threatened collision which did not in fact occur (Jennings *v.* Philadelphia, etc., R. Co., 29 App. Cas. (D. C.) 219); or whether plaintiff, a brakeman on a freight train, was under the circumstances guilty of contributory negligence in not jumping from the train in case of a collision (Hanson *v.* Minneapolis, etc., R. Co., 37 Minn. 355, 34 N. W. 223); or whether plaintiff, a member of a switching crew, was guilty of contributory negligence in riding on the front foot-board of the switch engine instead of on one of the cars (Chicago, etc., R. Co. *v.* Harrington, 192 Ill. 9, 61 N. E. 622 [*affirming* 90 Ill. App. 638]); or whether plaintiff, a street-car driver, was guilty of contributory negligence in going upon a crossing, relying upon the absence of defendant's flagman from his post and the want of any danger signal from him as an assurance of safety (Richmond *v.* Chicago, etc., R. Co., 87 Mich. 374, 49 N. W. 621); or relying upon the fact that the crossing gates were open and a signal from a person whom he supposed to be the gateman to cross (Evans *v.* Lake Shore, etc., R. Co., 88 Mich. 442, 50 N. W. 386, 14 L. R. A. 223); or relying upon the information given him by the conductor as to the absence of danger (Harper *v.* Delaware, etc., R. Co., 22 N. Y. App. Div. 273, 47 N. Y. Suppl. 933);

f. Instructions.[38] As in other cases, the instructions of the court must conform to and restrict the issues to the evidence,[39] must not be misleading,[40] or assume the existence of material facts in issue,[41] intimate an opinion upon the merits of the case,[42] or in any manner invade the province of the jury.[43] The instructions must correctly inform the jury as to the degree of care required by law in the particular case,[44] and where it is necessary to define the degrees of negligence requisite to authorize a recovery, such definitions must be correctly given.[45] An instruction is erroneous which authorizes a recovery upon a finding of negligence on the part of defendant without regard to whether such negligence was the cause of the injury complained of,[46] or without regard to the question of plaintiff's contributory negligence where the existence of such negligence is put in issue,[47] or which predicates a right of recovery upon a cause of action not stated in the complaint.[48] Requested instructions are properly refused if as applied to the facts of the case they fail to state the law correctly,[49] or are incomplete or obscure,[50] or are so worded as to be calculated to mislead the jury,[51] or if they are not based upon or authorized by the evidence,[52] or make defendant's ignorance

whether a person riding on an engine was guilty of contributory negligence in not jumping from the engine in an effort to avoid the injury (Wabash, etc., R. Co. *v.* Shacklet, 105 Ill. 364, 44 Am. Rep. 791); or whether the conduct of plaintiff, a street-car conductor, in merely going upon a crossing to look out for trains instead of walking all the way across it, as required by an ordinance, was the proximate cause of his being injured by the collision (Southern R. Co. *v.* Jones, 143 Ala. 328, 39 So. 118); or whether a passenger in a waiting-room was guilty of contributory negligence in trying to climb out of a window when a collision occurred at the station and an engine ran against the building (Cincinnati, etc., R. Co. *v.* Acrea, 40 Ind. App. 150, 81 N. E. 213, 82 N. E. 1009).

The violation of a rule of a street railway by a motorman as to precautions to be taken at a railroad crossing is not necessarily as between him and the intersecting railroad company such contributory negligence as to preclude a recovery for injuries caused by a collision, but it is a question of fact whether the non-observance of such rule was a want of ordinary care under the circumstances. Threlkeld *v.* Wabash R. Co., 68 Mo. App. 127; San Antonio, etc., R. Co. *v.* Way, 9 Tex. Civ. App. 214, 29 S. W. 205.

Although an act may be negligence per se, as running a train at a rate of speed prohibited by an ordinance, such negligence does not as a matter of law preclude a recovery, but it remains as a question of fact for the jury whether such negligence contributed to produce the injury complained of. Lake Shore, etc., R. Co. *v.* Parker, 131 Ill. 557, 23 N. E. 237 [*affirming* 33 Ill. App. 405].

38. See, generally, TRIAL.

39. Mulderig *v.* St. Louis, etc., R. Co., 116 Mo. App. 655, 94 S. W. 801.

40. Little Rock, etc., R. Co. *v.* Harrell, 58 Ark. 454, 25 S. W. 117.

Instruction not misleading.— In an action against two railroad companies for injuries caused by a collision, an instruction that if the one company was "wholly at fault" and the other used reasonable care, to find for plaintiff against the one and in favor of the other, and *vice versa*, was proper, and the language "wholly at fault," used in the sense of "alone," was not calculated to be misunderstood as referring to the measure of care required to be used by defendants. Houston R. Co. *v.* Ross, (Tex. Civ. App. 1894) 28 S. W. 254.

41. Richmond, etc., R. Co. *v.* Greenwood, 99 Ala. 501, 14 So. 495; Baltimore, etc., R. Co. *v.* State, 104 Md. 76, 64 Atl. 304; Stoher *v.* St. Louis, etc., R. Co., 91 Mo. 509, 4 S. W. 389; Philadelphia, etc., R. Co. *v.* Boyer, 97 Pa. St. 91.

42. Central R., etc., Co. *v.* Roach, 64 Ga. 635.

43. Richmond, etc., R. Co. *v.* Greenwood, 99 Ala. 501, 14 So. 495; Smithson *v.* Chicago, etc., R. Co., 71 Minn. 216, 73 N. W. 853; Philadelphia, etc., R. Co. *v.* Boyer, 97 Pa. St. 91; Gulf, etc., R. Co. *v.* Pendry, 87 Tex. 553, 29 S. W. 1038, 47 Am. St. Rep. 125 [*reversing* (Civ. App. 1894) 27 S. W. 213].

44. Ft. Worth, etc., R. Co. *v.* Enos, (Tex. Civ. App. 1898) 50 S. W. 595, holding that an instruction is erroneous which uses the term "proper care" without explaining the meaning of the term, leaving the jury to fix its own standard.

45. Missouri Pac. R. Co. *v.* Shuford, 72 Tex. 165, 10 S. W. 408.

46. Missouri Pac. R. Co. *v.* Shuford, 72 Tex. 165, 10 S. W. 408.

47. Wabash, etc., R. Co. v. Shacklet, 105 Ill. 364, 44 Am. Rep. 791.

48. Ely *v.* St. Louis, etc., R. Co., 77 Mo. 34.

49. Louisville, etc., R. Co. *v.* Jones, 108 Ind. 551, 9 N. E. 476.

50. Southern R. Co. *v.* Bonner, 141 Ala. 517, 37 So. 702.

51. Birmingham Mineral R. Co. *v.* Jacobs, 101 Ala. 149, 13 So. 408; Kansas City, etc., R. Co. *v.* McDonald, 51 Fed. 178, 2 C. C. A. 153.

52. Chicago, etc., R. Co. *v.* Snyder, 128 Ill. 655, 21 N. E. 520; Missouri, etc., R. Co. *v.* Edling, 18 Tex. Civ. App. 171, 45 S. W. 406.

of the law an excuse for its violation,[53] or predicate plaintiff's right of recovery upon the negligence of one of defendant's servants alone to the exclusion of others whose negligence might have contributed to the injury;[54] but requested instructions which state the law correctly should be given,[55] although it is sufficient if they are covered by the general charge.[56]

g. Verdict and Findings. A special verdict should find facts only and not conclusions of law, and, to be sufficient, must state facts and circumstances from which the court can deduce negligence as a conclusion of law.[57] In case of a general verdict with special findings, all the presumptions are in favor of the general verdict, and if the two can be reconciled judgment must follow the general verdict;[58] but if the special findings are so inconsistent with the general verdict that they cannot be reconciled therewith on any reasonable hypothesis, then the facts so found will control the general verdict and the court must give judgment accordingly.[59]

h. Appeal and Error. It is not the province of an appellate court to weigh the evidence where it is conflicting,[60] and if there is any evidence tending to support the verdict or finding of the jury it will not be disturbed,[61] although the appellate court may be of the opinion that it is against the weight of evidence.[62] A general objection to the admission of evidence which does not assign any reason as to why it should have been excluded will not be considered.[63] A judgment will not be reversed for a technical error which was without prejudice to the complaining party,[64] as in refusing to allow a question put to one witness where appellant was subsequently permitted to prove the same fact by the testimony of other witnesses,[65] or on account of an instruction given which although erroneous imposes upon appellant a less degree of care than the law requires,[66] or the refusal of a requested instruction which was more onerous upon the party asking it than the instruction as given,[67] or for an inadvertent mistake in stating the law to the jury where the mistake was immediately and fully corrected by the rest of the charge.[68]

E. Injuries to Licensees, Trespassers, and Others on Railroad Premises Other Than at Crossings*[69]— 1. Status and Rights of Such Persons —a. Persons On or Near Tracks Generally — (i) *In General.* As a general rule a railroad track, except at public crossings or in public streets or highways, is the

53. Birmingham Mineral R. Co. *v.* Jacobs, 101 Ala. 149, 13 So. 408.

54. Birmingham Mineral R. Co. *v.* Jacobs, 101 Ala. 149, 13 So. 408.

55. Ely *v.* St. Louis, etc., R. Co., 77 Mo. 34.

56. Southern Kansas R. Co. *v.* Sage, 43 Tex. Civ. App. 38, 94 S. W. 1074.

57. Pittsburgh, etc., R. Co. *v.* Spencer, 98 Ind. 186.

58. Grand Rapids, etc., R. Co. *v.* Ellison, 117 Ind. 234, 20 N. E. 135. See also Chicago, etc., R. Co. *v.* Snyder, 128 Ill. 655, 21 N. E. 520.

59. Grand Rapids, etc., R. Co. *v.* Ellison, (Ind. 1888) 18 N. E. 507.

60. St. Louis Nat. Stock Yards *v.* Godfrey, 198 Ill. 288, 65 N. E. 90 [*affirming* 101 Ill. App. 40].

61. St. Louis Nat. Stock Yards *v.* Godfrey, 198 Ill. 288, 65 N. E. 90 [*affirming* 101 Ill. App. 40]; Chicago Terminal Transfer R. Co. *v.* Vandenberg, 164 Ind. 470, 73 N. E. 990; Louisville, etc., R. Co. *v.* Jones, 108 Ind. 551, 9 N. E. 476; Booth *v.* Columbia, etc., R. Co., 6 Wash. 531, 33 Pac. 1075.

62. Booth *v.* Columbia, etc., R. Co., 6 Wash. 531, 33 Pac. 1075.

63. Louisville, etc., R. Co. *v.* Jones, 108 Ind. 551, 9 N. E. 476.

64. Grant *v.* Raleigh, etc., R. Co., 108 N. C. 462, 13 S. E. 209; Lakin *v.* Oregon Pac. R. Co., 15 Oreg. 220, 15 Pac. 641; Kansas City, etc., R. Co. *v.* Stoner, 51 Fed. 649, 2 C. C. A. 437.

65. Grant *v.* Raleigh, etc., R. Co., 108 N. C. 462, 13 S. E. 209.

66. Houston City St. R. Co. *v.* Ross, (Tex. Civ. App. 1894) 28 S. W. 254.

67. Ft. Worth, etc., R. Co. *v.* Mackney, 83 Tex. 410, 18 S. W. 949.

68. Annas *v.* Milwaukee, etc., R. Co., 67 Wis. 46, 30 N. W. 282, 58 Am. Rep. 848.

69. Companies and persons liable for injuries see *supra*, X, C.

Injuries at crossings see *infra*, X, F.

Injuries to employees see Master and Servant, 26 Cyc. 1076.

Injuries to passengers see Carriers, 6 Cyc. 590.

Injuries to persons on highways or private premises near tracks see *infra*, X, G.

* By Henry H. Skyles.

exclusive property of the railroad company; and all persons who go upon the railroad company's tracks except at such places, without the company's express or implied permission, are trespassers, and subject to certain qualifications hereafter considered, do so at their own peril,[70] especially where a conveniently accessible place for crossing is provided or is used with the company's permission,[71] and this is expressly declared by statute in some jurisdictions.[72] A person may likewise

70. *Alabama.*— Birmingham R., etc., Co. *v.* Jones, (1907) 45 So. 177; Louisville, etc., R. Co. *v.* Black, 89 Ala. 313, 8 So. 246.

Georgia.— Rome R. Co. *v.* Tolbert, 85 Ga. 447, 11 S. E. 840, walking through defendant's yard.

Illinois.— Illinois Cent. R. Co. *v.* Godfrey, 71 Ill. 500, 22 Am. Rep. 112; Galena, etc., R. Co. *v.* Jacobs, 20 Ill. 478; Cleveland, etc., R. Co. *v.* Hibsman, 99 Ill. App. 405.

Iowa.— Wagner *v.* Chicago, etc., R. Co., 122 Iowa 360, 98 N. W. 141.

Kentucky.— Shackleford *v.* Louisville, etc., R. Co., 84 Ky. 43, 4 Am. St. Rep. 189; Hulsey *v.* Louisville, etc., R. Co., 87 S. W. 302, 27 Ky. L. Rep. 969; Oatts *v.* Cincinnati, etc., R. Co., 22 S. W. 330, 15 Ky. L. Rep. 87.

Massachusetts.— Wright *v.* Boston, etc., R. Co., 129 Mass. 440.

Missouri.— Isabel *v.* Hannibal, etc., R. Co., 60 Mo. 475.

New York.— Clarke *v.* New York Cent., etc., R. Co., 104 N. Y. App. Div. 167, 93 N. Y. Suppl. 525; Riordan *v.* New York Cent., etc., R. Co., 41 Misc. 399, 84 N. Y. Suppl. 1046.

Ohio.— Driscoll *v.* Cincinnati, etc., R. Co., 1 Ohio Cir. Ct. 493, 1 Ohio Cir. Dec. 274.

Pennsylvania.— Philadelphia, etc., R. Co. *v.* Hummell, 44 Pa. St. 375, 84 Am. Dec. 457; Comly *v.* Pennsylvania R. Co., 9 Pa. Cas. 369, 12 Atl. 496.

Texas.— Bradley *v.* San Antonio, etc., R. Co., 80 Tex. 84, 16 S. W. 55; Houston, etc., R. Co. *v.* Boozer, 2 Tex. Unrep. Cas. 452.

Canada.— Grand Trunk R. Co. *v.* Anderson, 28 Can. Sup. Ct. 541 [*reversing* 24 Ont. App. 672]; Newell *v.* Canadian Pac. R. Co., 12 Ont. L. Rep. 21.

See 41 Cent. Dig. tit. "Railroads," § 1220.

Illustrations.— A former employee of the company who, after quitting its service and receiving his time check entitling him to transportation, does not leave within a reasonable time, but remains about the company's premises without business or lawful purpose, and not intending or expecting to take passage on a train, is a trespasser. Hern *v.* Southern Pac. Co., 29 Utah 127, 81 Pac. 902. So one who borrows a hand car for use on a railroad from an employee who is without authority to lend it is a mere trespasser. Louisville, etc., R. Co. *v.* Wade, 46 Fla. 197, 35 So. 863. But where the right of way of a railroad intervenes between a street and private lot from which a person desires to set out, he is entitled to walk over the railroad track and his act in so doing is not contributory negligence barring recovery for negligence of the railroad company in running a train over him. Crawford *v.* Railroad Co., 5 Phila. (Pa.) 359.

A railroad as such is not necessarily a public highway.— Murch *v.* Concord R. Corp., 29 N. H. 9, 61 Am. Dec. 631.

A constitutional declaration that all railroads are public highways authorizes the use of railroad tracks by pedestrians. McClanahan *v.* Vicksburg, etc., R. Co., 111 La. 781, 35 So. 902. *Contra*, Hyde *v.* Missouri Pac. R. Co., 110 Mo. 272, 19 S. W. 483.

That a railroad company does not own its right of way does not affect another's status as a trespasser. Dorsey *v.* Louisville, etc., R. Co., 80 S. W. 1131, 26 Ky. L. Rep. 232.

A policeman, although authorized by the railroad company to patrol its tracks, is nevertheless a trespasser in walking thereon for his own convenience on his way to enter on the discharge of his duties. Pennsylvania Co. *v.* Meyers, 136 Ind. 242, 36 N. E. 32.

A quarantine guard whose duty it is to prevent unauthorized persons from passing a quarantine line across railroad tracks is not, as a matter of law, a trespasser on such tracks within a few feet of the line; it being reasonably made to appear that the railroad company was probably aware of his presence. Louisville, etc., R. Co. *v.* Goulding, 52 Fla. 327, 42 So. 854.

The mere fact that it is difficult to determine where a highway ends and the right of way of the railroad company begins does not affect the question as to whether a particular person is a trespasser; nor is the fact that it may not have been the intention of such a person to become a trespasser material. Cleveland, etc., R. Co. *v.* Cline, 111 Ill. App. 416.

71. Wagner *v.* Chicago, etc., R. Co., 122 Iowa 360, 98 N. W. 141; LeDuc *v.* New York Cent., etc., R. Co., 92 N. Y. App. Div. 107, 87 N. Y. Suppl. 364; Gunther *v.* New York Cent., etc., R. Co., 81 N. Y. App. Div. 606, 81 N. Y. Suppl. 395; Wilby *v.* Midland R. Co., 35 L. T. Rep. N. S. 244.

Crossing a track in a city at an opening in a train, at a point one hundred feet distant from the street crossing, is a trespass, where there is no evidence that such opening was made for pedestrians and that it was ever so used. Dahlstrom *v.* St. Louis, etc., R. Co., 96 Mo. 99, 8 S. W. 777.

The fact that a party from the nature of his employment is authorized to cross the track of a railroad will not warrant such crossing at a place other than that provided by the railroad or with its acquiescence. Morgan *v.* Pennsylvania R. Co., 7 Fed. 78, 19 Blatchf. 239.

72. See Morgan *v.* Wabash R. Co., 159 Mo. 262, 60 S. W. 195; Hyde *v.* Missouri Pac.

become a trespasser by lingering on the tracks at a place where he has a right of crossing.[73] A child, although *non sui juris*, may become a trespasser.[74] It has been held, however, that one who goes upon the track in case of an emergency, although without permission, is not a trespasser.[75] Nor is a person a trespasser if he has a right upon the track by reason of his contractual relations with the company,[76] or if he otherwise goes thereon on business connected with the railroad company.[77] A licensee on the railroad's premises is a person who being neither a passenger, servant, nor trespasser, nor standing in any contractual relation to the company, is expressly or impliedly permitted by the railroad company to come on its premises for his own convenience or gratification.[78] But if his being on the company's premises is for the company's interest or benefit, as well as for his own, he is more than a mere licensee, and is upon the premises by the company's invitation, express or implied.[79]

(II) *Where Tracks Are On or Crossing Streets or Highways.* As a general rule a person is not necessarily to be held a trespasser merely by reason of his being on railroad tracks at a public crossing,[80] and this is true

R. Co., 110 Mo. 272, 19 S. W. 483, under Rev. St. (1889) § 2611.

Under Mass. Pub. St. c. 112, §§ 195, 212, see McCreary *v.* Boston, etc., R. Co., 156 Mass. 316, 31 N. E. 126; Dillon *v.* Connecticut River R. Co., 154 Mass. 478, 28 N. E. 899.

73. Birmingham R., etc., Co. *v.* Jones, (Ala. 1907) 45 So. 177.

74. Baltimore, etc., R. Co. *v.* Bradford, 20 Ind. App. 348, 49 N. E. 388, 67 Am. St. Rep. 252; Missouri Pac. R. Co. *v.* Prewitt, 7 Kan. App. 556, 51 Pac. 923; Trudell *v.* Grand Trunk R. Co., 126 Mich. 73, 85 N. W. 250, 53 L. R. A. 271 (holding that a boy of a little over seven years of age playing on a railroad's right of way is a trespasser as a matter of law); Brague *v.* Northern Cent. R. Co., 192 Pa. St. 242, 43 Atl. 987.

75. Spooner *v.* Delaware, etc., R. Co., 115 N. Y. 22, 21 N. E. 696 (holding that a child who goes on a track to save younger children from danger, knowing that a train is coming, is not a trespasser); San Antonio, etc., R. Co. *v.* Gray, 95 Tex. 424, 67 S. W. 763 [*reversing* on other grounds (Civ. App. 1901) 66 S. W. 229] (going on track to rescue child).

76. Southern R. Co. *v.* Goddard, 121 Ky. 567, 89 S. W. 675, 28 Ky. L. Rep. 523; Houston, etc., R. Co. *v.* O'Donnell, 99 Tex. 636, 92 S. W. 409 [*reversing* on other grounds (Civ. App. 1905) 90 S. W. 886].

77. Shelby *v.* Cincinnati, etc., R. Co., 85 Ky. 224, 3 S. W. 157, 8 Ky. L. Rep. 928.

One upon a side-track-seeking employment from a shipper of stock to feed and water his stock is there upon business indirectly connected with the railroad company and is not a trespasser. Shelby *v.* Cincinnati, etc., R. Co., 85 Ky. 224, 3 S. W. 157, 8 Ky. L. Rep. 928.

Where one railroad company leases certain terminal tracks of another company, a person on such tracks in the course of business with the latter company is not a trespasser as to the leasing company. Connell *v.* Southern R. Co., 91 Fed. 466, 33 C. C. A. 633.

78. Northwestern El. R. Co. *v.* O'Malley, 107 Ill. App. 599; Chicago, etc., R. Co. *v.* Martin, 31 Ind. App. 308, 65 N. E. 591; McDermott *v.* New York Cent., etc., R. Co., 28 Hun (N. Y.) 325; Norfolk, etc., R. Co. *v.* Wood, 99 Va. 156, 37 S. E. 846.

One walking on a path between two railroad tracks on his own errand and on no invitation of the railroad company is a mere licensee. Yazoo, etc., R. Co. *v.* Metcalf, 84 Miss. 242, 36 So. 259.

Where the dangerous character of the place is manifest and obvious there can be no implied license to the public to cross the track either through open spaces left between the cars or over or under cars, and in order to render the company liable for injury caused to a person who was passing between two cars in such a yard and whose presence and danger were unknown to the agents and employees of the company, there must be proof of an express license from the company. Grady *v.* Georgia R., etc., Co., 112 Ga. 668, 37 S. E. 861.

Purpose immaterial.— A person otherwise a licensee is not a trespasser because he had gone to the place to see a fight. Texas, etc., R. Co. *v.* Ball, (Tex. Civ. App. 1903) 73 S. W. 420 [*reversed* on other grounds in 96 Tex. 622, 75 S. W. 4].

A person on a railroad right of way to drive his calves therefrom, whence they had escaped because of the railroad company's failure to provide proper cattle-guards, is at most an implied licensee. Thompson *v.* Cleveland, etc., R. Co., 226 Ill. 542, 80 N. E. 1054, 9 L. R. A. N. S. 672 [*affirming* 123 Ill. App. 47].

79. Chicago, etc., R. Co. *v.* Martin, 31 Ind. App. 308, 65 N. E. 591.

A person on the grounds of a railroad company by invitation of the company cannot be treated as a trespasser. Chicago Terminal Transfer R. Co. *v.* Kotoski, 101 Ill. App. 300 [*affirmed* in 199 Ill. 383, 65 N. E. 350].

80. Florida Cent., etc., R. Co. *v.* Williams, 37 Fla. 406, 20 So. 558; Fehnrich *v.* Michigan Cent. R. Co., 87 Mich. 606, 49 N. W. 890 [*distinguishing* Kelly *v.* Michigan Cent. R. Co., 65 Mich. 186, 31 N. W. 904, 8 Am. St. Rep. 876], holding that one using a street

even though there is no necessity for his being there,[81] except where he is traveling along between the tracks and is on the crossing merely as an incident of his progress along the railroad.[82] Nor as a general rule is a person a mere licensee,[83] or trespasser in crossing,[84] or in walking along a track laid in a public street or highway,[85] especially where the tracks have been used by the public as a way for many years,[86] unless by the ordinance authorizing the location of the track the public is deprived of that part of the thoroughfare,[87] or unless the company has acquired the right to the exclusive use of the street by prescription.[88] It has been held, however, that a person is a trespasser in walking, without excuse, along a railroad spur track laid on the surface of a public alley,[89] and even in walking along the main line where the track is not imbedded so as to form a part of the roadway itself.[90] In the use of public streets and highways, trains and cars have the right of way over travelers on the highway, but in all other respects their rights to the use of the highway are equal.[91]

for the purpose of travel has a right when he comes to a railroad track not merely to cross it squarely but to walk upon it in getting off the street to a more direct route; and he is not a trespasser so long as the track continues along the street. And see *infra*, X, F, 2.

A child playing on a railroad track where it crosses a street or public highway is not a trespasser. Krenzer *v.* Pittsburg, etc., R. Co., 151 Ind. 587, 43 N. E. 649, 52 N. E. 220, 68 Am. St. Rep. 252; Tobin *v.* Missouri Pac. R. Co., (Mo. 1891) 18 S. W. 996.

81. Florida Cent., etc., R. Co. *v.* Williams, 37 Fla. 406, 20 So. 558.

82. Cleveland, etc., R. Co. *v.* Hibsman, 99 Ill. App. 405; Robards *v.* Wabash R. Co., 84 Ill. App. 477; Kelly *v.* Michigan Cent. R. Co., 65 Mich. 186, 31 N. W. 904, 8 Am. St. Rep. 876.

Such a person may cease to be a trespasser if when entering upon the highway he changes his purpose and uses the street as an exit from the railroad grounds. Monahan *v.* Chicago, etc., R. Co., 88 Minn. 325, 92 N. W. 1115.

83. Louisville, etc., R. Co. *v.* Downey, 18 Ind. App. 140, 47 N. E. 494; Pittsburgh, etc., R. Co. *v.* Bennett, 9 Ind. App. 92, 35 N. E. 1033; Lampkin *v.* McCormick, 105 La. 418, 29 So. 952, 83 Am. St. Rep. 245.

84. Baltimore, etc., R. Co. *v.* Cumberland, 176 U. S. 232, 20 S. Ct. 380, 44 L. ed. 447 [*affirming* 12 App. Cas. (D. C.) 598], holding that a person is not *ipso facto* a trespasser in crossing railroad tracks laid through the streets of a city upon or substantially upon the level of the street although he crosses at any point where it is convenient for him to do so instead of going to the regular street crossing.

85. *Illinois.*— Illinois Terminal R. Co. *v.* Mitchell, 214 Ill. 151, 73 N. E. 449 [*affirming* 116 Ill. App. 90].

Indiana.— Louisville, etc., R. Co. *v.* Phillips, 112 Ind. 59, 13 N. E. 132, 2 Am. St. Rep. 155; Manion *v.* Lake Erie, etc., R. Co., 40 Ind. App. 569, 80 N. E. 166; Pittsburg, etc., R. Co. *v.* Bennett, 9 Ind. App. 92, 35 N. E. 1033.

Kansas.— Kansas Pac. R. Co. *v.* Pointer, 9 Kan. 620.

Louisiana.— Lampkin *v.* McCormick, 105 La. 418, 29 So. 952, 83 Am. St. Rep. 245.

Missouri.— Morgan *v.* Wabash R. Co., 159 Mo. 262, 60 S. W. 195.

Pennsylvania.— Keller *v.* Philadelphia, etc., R. Co., 214 Pa. St. 82, 63 Atl. 413.

Texas.— Gulf, etc., R. Co. *v.* Walker, 70 Tex. 126, 7 S. W. 831, 8 Am. St. Rep. 582; Rio Grande, etc., R. Co. *v.* Martinez, 39 Tex. Civ. App. 460, 87 S. W. 853. See Galveston, etc., R. Co. *v.* Lewis, 5 Tex. Civ. App. 638, 25 S. W. 293.

United States.— Smith *v.* Pittsburgh, etc., R. Co., 90 Fed. 783; Toledo, etc., R. Co. *v.* Chisholm, 83 Fed. 652, 27 C. C. A. 663. See 41 Cent. Dig. tit. "Railroads," § 1221.

The open spaces between railroad tracks on a public street are public places and persons occupying them are neither trespassers nor licensees. Lampkin *v.* McCormick, 105 La. 418, 29 So. 952, 83 Am. St. Rep. 245.

Railroad on platted land.— A person is a trespasser while walking on a track which is not within the limits of any city, although it is laid on land which had been platted as a street in a plan for laying out a town which was ineffectual, and there is no roadway on the track for the use of public travel, although people sometimes walk on the track or alongside of it. Chesapeake, etc., R. Co. *v.* See, 79 S. W. 252, 25 Ky. L. Rep. 1995.

86. Illinois Terminal R. Co. *v.* Mitchell, 214 Ill. 151, 73 N. E. 449. But see Louisville, etc., R. Co. *v.* Miller, 12 Ind. App. 414, 40 N. E. 539.

87. Smith *v.* Pittsburgh, etc., R. Co., 90 Fed. 783; Toledo, etc., R. Co. *v.* Chisholm, 85 Fed. 652, 27 C. C. A. 653.

Construction of ordinance as not indicating a purpose to deprive the public of all use of the ground on which the track was laid so as to make one there injured by a train a trespasser see Toledo, etc., R. Co. *v.* Chisholm, 83 Fed. 652, 27 C. C. A. 663.

88. Smith *v.* Pittsburgh, etc., R. Co., 90 Fed. 783.

89. Montgomery *v.* Alabama Great Southern R. Co., 97 Ala. 305, 12 So. 170.

90. Louisville, etc., R. Co. *v.* Hairston, 97 Ala. 351, 12 So. 299.

91. Pittsburgh, etc., R. Co. *v.* Warrum,

(III) *After Ejection or Alighting From Train.* Although a person is wrongfully ejected from a railroad train, he is a trespasser if he walks along the railroad tracks to reach his destination,[92] except in so far as there is no other safe and convenient route from the point of his ejection.[93] Although in such case a person is excusable in using a track until he reaches a point where he can leave it,[94] he is at liberty to walk on the track no further than is absolutely necessary to enable him to reach a position of safety and it is his duty to use any means of egress from the track which would be made use of by a person of ordinary prudence for that purpose.[95] Likewise a passenger who by mistake alights from a train at a wrong place is a trespasser in going along the tracks to reach his destination;[96] but a passenger who is traveling on a drover's pass is not a trespasser in alighting and going along the tracks at a point where the train has stopped, to look after his stock.[97]

(IV) *Customary Use of Tracks*[98] — (A) *In General.* The status of one as a trespasser in going upon railroad tracks at a place other than at a public crossing, without express or implied permission, will not ordinarily be affected by the fact that he or others of the public have been accustomed to walk upon or cross the tracks at that place,[99] especially where repeated protests and warnings against such use have been given.[1] Nor as a general rule is the mere fact that the railroad company does not object or passively acquiesces in such custom

(Ind. App. 1907) 82 N. E. 934, (App. 1908) 84 N. E. 356; Jaffi *v.* Missouri Pac. R. Co., 205 Mo. 450, 103 S. W. 1026.

Mutual rights.— In that part of a street or highway in which a railroad track is laid, subject to the reciprocal duty of being diligent to avoid probable danger, the public has the right to use the whole of the street or highway and the company has the right to operate its trains. Southern R. Co. *v.* Crenshaw, 136 Ala. 573, 34 So. 913; Johnson *v.* Texas, etc., R. Co., (Tex. Civ. App. 1907) 100 S. W. 206. The act of a railroad company in maintaining a platform in a public street, with the consent of the municipal authorities, does not exclude the public from passing over it; the rights of the railroad and the public being reciprocal. Pittsburgh, etc., R. Co. *v.* Warrum, (Ind. App. 1907) 82 N. E. 934, (App. 1908) 84 N. E. 356.

92. Verner *v.* Alabama Great Southern R Co., 103 Ala. 574, 15 So. 872; Adams *v.* Louisville, etc., R. Co., 104 S. W. 363, 31 Ky. L. Rep. 987.

93. Verner *v.* Alabama Great Southern R. Co., 103 Ala. 574, 15 So. 872.

94. Verner *v.* Alabama Great Southern R. Co., 103 Ala. 574, 15 So. 872.

95. Ham *v.* Delaware, etc., Canal Co., 142 Pa. St. 617, 21 Atl. 1012, 155 Pa. St. 548, 26 Atl. 757, 20 L. R. A. 682. See also Bourke *v.* Delaware, etc., R. Co., 1 Lack. Leg. Rec. (Pa.) 108.

96. Indiana R. Co. *v.* Fierick, 158 Ind. 621, 64 N. E. 221.

97. Elgin, etc., R. Co. *v.* Thomas, 215 Ill. 158, 74 N. E. 109.

98. **As affecting duty of company to give signals and maintain lookouts** see *infra*, X, E, 2, a, (VIII).

As contributory negligence see *infra*, X, E, 4, a, (I), (E).

99. *Arkansas*.—Adams *v.* St. Louis, etc., R. Co., 83 Ark. 300, 103 S. W. 725, on railroad trestle.

Illinois.— Eggmann *v.* St. Louis, etc., R. Co., 47 Ill. App. 507.

Kentucky.— Elliott *v.* Louisville, etc., R. Co., 99 S. W. 233, 30 Ky. L. Rep. 471; Louisville, etc., R. Co. *v.* Redmon, 91 S. W. 722, 28 Ky. L. Rep. 1293; Gregory *v.* Louisville, etc., R. Co., 79 S. W. 238, 25 Ky. L. Rep. 1986.

Massachusetts.— Young *v.* Old Colony R. Co., 156 Mass. 178, 30 N. E. 560; Johnson *v.* Boston, etc., R. Co., 125 Mass. 75.

Missouri.— O'Donnell *v.* Missouri Pac. R. Co., 7 Mo. App. 190.

New York.— Hickett *v.* New York, etc., R. Co., 10 N. Y. St. 398.

Pennsylvania.— Culp *v.* Delaware, etc., R. Co., 9 Kulp 174.

Texas.— St. Louis Southwestern R. Co. *v.* Shiflet, 98 Tex. 326, 83 S. W. 677.

Washington.— Hamlin *v.* Columbia. etc., R. Co., 37 Wash. 448, 79 Pac. 991.

Wisconsin.— Schug *v.* Chicago, etc., R. Co., 102 Wis. 515, 78 N. W. 1090.

See 41 Cent. Dig. tit. "Railroads," § 1228.

One who sits on a railroad track and goes to sleep is a trespasser, although at a point where persons are accustomed to cross. Lyons *v.* Illinois Cent. R. Co., 59 S. W. 507, 22 Ky. L. Rep. 1032.

Where one in going from a depot walks down the track instead of taking a highway near by, he is a trespasser, and the fact that the track is a switch which many other people for years have used in preference to such highway is immaterial. Culp *v.* Delaware, etc., R. Co., 9 Kulp (Pa.) 174.

Neither an implied dedication nor a prescriptive right is proven by such a user by the public. Manion *v.* Lake Erie, etc., R. Co., 40 Ind. App. 569, 80 N. E. 166.

1. Denver, etc., R. Co. *v.* Buffehr, 30 Colo. 27, 69 Pac. 582.

sufficient to constitute such a person more than a trespasser,[2] or at most more than a mere licensee.[3] Where, however, the company's acquiescence is under circumstances, or is accompanied by acts which show an express or implied invitation or permission to so use the tracks, a person going thereon is more than a trespasser. In such case he is either a licensee,[4] or he has a right to be thereon by invitation.[5]

2. *Alabama.*— Louisville, etc., R. Co. *v.* Mitchell, 134 Ala. 261, 32 So. 735; Glass *v.* Memphis, etc., R. Co., 94 Ala. 581, 10 So. 215.
Georgia.— Central R. Co. *v.* Brinson, 70 Ga. 207.
Illinois.— Illinois Cent. R. Co. *v.* Eicher, 202 Ill. 556, 67 N. E. 376 [*reversing* 100 Ill. App. 599]; Blanchard *v.* Lake Shore, etc., R. Co., 126 Ill. 416, 18 N. E. 799, 9 Am. St. Rep. 630; Illinois Cent. R. Co. *v.* Godfrey, 71 Ill. 500, 22 Am. Rep. 112.
Kentucky.— Brown *v.* Louisville, etc., R. Co., 97 Ky. 228, 30 S. W. 639, 17 Ky. L. Rep. 145; Illinois Cent. R. Co. *v.* Johnson, 97 S. W. 745, 30 Ky. L. Rep. 142; Chesapeake, etc., R. Co. *v.* Barbour, 93 S. W. 24, 29 Ky. L. Rep. 339; Beiser *v.* Chesapeake, etc., R. Co., 92 S. W. 928, 29 Ky. L. Rep. 249; Chesapeake, etc., R. Co. *v.* See, 79 S. W. 252, 25 Ky. L. Rep. 1995; Wilmurth *v.* Illinois Cent. R. Co., 76 S. W. 193, 25 Ky. L. Rep. 671; Chesapeake, etc., R. Co. *v.* Perkins, 47 S. W. 259, 20 Ky. L. Rep. 608.
Maryland.— Baltimore, etc., R. Co. *v.* State, 62 Md. 479, 50 Am. Rep. 233.
Massachusetts.— Wright *v.* Boston, etc., R. Co., 142 Mass. 296, 7 N. E. 866.
Minnesota.— Akers *v.* Chicago, etc., R. Co., 58 Minn. 540, 60 N. W. 669.
Montana.— Eagan *v.* Montana Cent. R. Co., 24 Mont. 569, 63 Pac. 831.
New York.— Le Duc *v.* New York Cent., etc., R. Co., 92 N. Y. App. Div. 107, 87 N. Y. Suppl. 364.
Oregon.— Ward *v.* Southern Pac. Co., 25 Oreg. 433, 36 Pac. 166, 23 L. R. A. 715.
Texas.— St. Louis Southwestern R. Co. *v.* Shiflet, 98 Tex. 326, 83 S. W. 677; Missouri Pac. R. Co. *v.* Brown, (1891) 18 S. W. 670.
Canada.— Grand Trunk R. Co. *v.* Anderson, 28 Can. Sup. Ct. 541 [*reversing* 24 Ont. App. 672].
See 41 Cent. Dig. tit. "Railroads," § 1228.

Where a railroad track in a deep cut is fenced on both sides and is inclosed by iron cattle-guards at the crossing, the mere occasional passage of unauthorized pedestrians on the track there, with the knowledge of the company, is not sufficient to convert a trespasser there into a licensee. Goodman *v.* Louisville, etc., R. Co., 116 Ky. 900, 77 S. W. 174, 25 Ky. L. Rep. 1086, 63 L. R. A. 657.

Where a third person with the railroad's acquiescence maintains a crossing for the convenience of his own business, it does not import an invitation or license to the public to use the crossing and one crossing the track by it is nevertheless a trespasser. Donnelly *v.* Boston, etc., R. Co., 151 Mass. 210, 24 N. E. 38.

Where the right of way is not on or parallel to an adjoining street, but is entirely inclosed to prevent its use by the public, its use by the public in sometimes passing that way does not amount to a license. Louisville, etc., R. Co. *v.* Redmon, 122 Ky. 385, 91 S. W. 722, 28 Ky. L. Rep. 1293.

3. Smetanka *v.* New York Cent., etc., R. Co., 123 N. Y. App. Div. 323, 107 N. Y. Suppl. 973; Cleveland, etc., R. Co. *v.* Tartt, 64 Fed. 823, 12 C. C. A. 618, holding that one who walks along the track for his own convenience, without any invitation from the railroad company, although it has permitted others to walk along it, is at most a mere licensee.

4. *Georgia.*— Burton *v.* Western, etc., R. Co., 98 Ga. 783, 25 S. E. 736.
Montana.— Eagan *v.* Montana Cent. R. Co., 24 Mont. 569, 63 Pac. 831.
New York.— Swift *v.* Staten Island Rapid Transit R. Co., 123 N. Y. 645, 25 N. E. 378 [*affirming* 5 N. Y. Suppl. 316]; Best *v.* New York Cent., etc., R. Co., 117 N. Y. App. Div. 739, 102 N. Y. Suppl. 957.
Texas.— International, etc., R. Co. *v.* Ploeger, (Civ. App. 1905) 93 S. W. 226; Trinity, etc., R. Co. *v.* Simpson, (Civ. App. 1905) 86 S. W. 1034; Law *v.* Missouri, etc., R. Co., 29 Tex. Civ. App. 134, 67 S. W. 1025; Texas, etc., R. Co. *v.* Phillips, (Civ. App. 1897) 40 S. W. 344; Galveston, etc., R. Co. *v.* Lewis, 5 Tex. Civ. App. 638, 25 S. W. 293.
Wisconsin.— Delaney *v.* Milwaukee, etc., R. Co., 33 Wis. 67.
See 41 Cent. Dig. tit. "Railroads," § 1228.

Permission to special persons for the benefit and necessity of the railroad cannot be extended to those not in such relation to the company. Galena, etc., R. Co. *v.* Jacobs, 20 Ill. 478.

A daytime use of a railroad track by the general public does not establish a nighttime use. Frye *v.* St. Louis, etc., R. Co., 200 Mo. 377, 98 S. W. 566, 8 L. R. A. N. S. 1069.

A person walking on a track in a populous portion of a city, which track the public is accustomed to use as a footway, with the railroad company's acquiescence, is a licensee. Jones *v.* Charleston, etc., R. Co., 61 S. C. 556, 39 S. E. 758.

5. Young *v.* Old Colony R. Co., 156 Mass. 178, 30 N. E. 560; Lynch *v.* St. Joseph, etc., R. Co., 111 Mo. 601, 19 S. W. 1114; International, etc., R. Co. *v.* Ploeger, (Tex. Civ. App. 1905) 93 S. W. 226.

A mere permission or license to use the track is not an invitation. Wright *v.* Boston, etc., R. Co., 142 Mass. 296, 7 N. E. 866.

Circumstances not amounting to an invitation by the company to the public to use the tracks see Wright *v.* Boston, etc., R. Co., 142 Mass. 296, 7 N. E. 866; Devoe *v.* New York, etc., R. Co., 63 N. J. L. 276, 43 Atl. 899;

(B) *Sufficiency of Permission by Railroad.* As a general rule permission sufficient to constitute one a licensee, or more than a trespasser, may be inferred from facts and circumstances short of an actual invitation or consent on the part of the company.[6] But in order to warrant such an inference there must in general be a notorious and constant use of the tracks by the public,[7] and there must be a consent, either express or implied, by the railroad company to that use.[8] Such a license, whether express or implied, must proceed from the fact of someone having authority to grant it; and in the absence of proof it cannot be presumed that the servants of a railroad company who operate its trains have such authority.[9] It therefore cannot be implied from the mere fact that persons were accustomed to use the tracks as a passway,[10] or from mere sufferance or a passive acquiescence by a railroad company, in the occasional use of its tracks or right of way by pedestrians,[11] or from the further fact that the conductor or engineer of a train knew of such custom.[12] But its silence must be under circumstances which show an express or implied permission, or there must be some act on its part showing such permission or invitation.[13] In some jurisdictions, if the use of the tracks continues habitually, with the company's knowledge and without its objection for a long time,[14] as for twenty or more

Hammill *v.* Pennsylvania R. Co., 56 N. J. L. 370, 29 Atl. 151, 24 L. R. A. 531. Where a railroad company ballasted its tracks within switch limits so as to prevent injury to its employees, and made no objection to the use by the public, of a pathway formed by the ballast, it cannot be considered as inviting the public to use the path and persons using it are mere licensees. Illinois Cent. R. Co. *v.* Eicher, 202 Ill. 556, 67 N. E. 376 [*reversing* 100 Ill. App. 599].

That on two occasions a child was permitted by the railroad company to go on its track, while under the protection of an adult, will not permit an inference of an implied invitation to the child to go on the track unattended. Galena, etc., R. Co. *v.* Jacobs, 20 Ill. 478.

6. Thomas *v.* Chicago, etc., R. Co., 103 Iowa 649, 72 N. W. 783, 39 L. R. A. 399.

7. Wagner *v.* Chicago, etc., R. Co., 122 Iowa 360, 98 N. W. 141.

The path must be so well defined as to be an invitation to the public to cross, and its use so continuous that the company knew, or with care should have known, of such public use. Atchison, etc., R. Co. *v.* Potter, 64 Kan. 13, 67 Pac. 534, 56 L. R. A. 575.

8. Wagner *v.* Chicago, etc., R. Co., 122 Iowa 360, 98 N. W. 141.

Where a railroad provides walks which it invites the public to take, it rebuts any notion that it consented to the use of the space between its tracks for public travel. Wagner *v.* Chicago, etc., R. Co., 122 Iowa 360, 98 N. W. 141.

Only express consent will serve to license a thoroughfare under stationary cars. Central R., etc., Co. *v.* Rylee, 87 Ga. 491, 13 S. E. 584, 13 L. R. A. 634.

Consent.— Express consent is when the consent is actually proved to have been expressly granted by the party giving it; implied consent is when it is not so proved but is to be reasonably inferred or presumed from all the attending circumstances that the party at least tacitly assented to it. Patterson *v.* Philadelphia, etc., R. Co., 4 Houst. (Del.) 103.

9. St. Louis Southwestern R. Co. *v.* Shiflet, 98 Tex. 326, 83 S. W. 677.

10. St. Louis Southwestern R. Co. *v.* Shiflet, 98 Tex. 326 83 S. W. 677.

11. Chesapeake Beach R. Co. *v.* Donahue, 107 Md. 119, 68 Atl. 507.

12. St. Louis Southwestern R. Co. *v.* Shiflet, 98 Tex. 326, 83 S. W. 677.

13. See cases cited *supra*, notes 2–5.

14. *Georgia.*— Bullard *v.* Southern R. Co., 116 Ga. 644, 43 S. E. 39; Central R. Co. *v.* Brinson, 70 Ga. 207.

Illinois.—Chicago, etc., R. Co. *v.* Murowski, 78 Ill. App. 661.

Indiana.— Cleveland, etc., R. Co. *v.* Adair, 12 Ind. App. 569, 39 N. E. 672, 40 N. E. 822.

Iowa.— Booth *v.* Union Terminal R. Co., 126 Iowa 8, 101 N. W. 147; Thomas *v.* Chicago, etc., R. Co., 103 Iowa 649, 72 N. W. 783, 39 L. R. A. 399; Clampit *v.* Chicago, etc., R. Co., 84 Iowa 71, 50 N. W. 673.

New Hampshire.— Minot *v.* Boston, etc., R. Co., 74 N. H. 230, 66 Atl. 825.

New York.— Swift *v.* Staten Island Rapid Transit R. Co., 123 N. Y. 645, 25 N. E. 378 [*affirming* 5 N. Y. Suppl. 316]; McCarty *v.* New York Cent., etc., R. Co., 73 N. Y. App. Div. 34, 76 N. Y. Suppl. 321.

South Carolina.— Matthews *v.* Seaboard Air Line Co., 67 S. C. 499, 46 S. E. 335, 65 L. R. A. 286.

Texas.— Gulf, etc., R. Co. *v.* Matthews, 99 Tex. 160, 88 S. W. 192, (Civ. App. 1905) 89 S. W. 983 [*reversed* on other grounds in 100 Tex. 63, 93 S. W. 1068]; Missouri, etc., R. Co. *v.* Snowden, 44 Tex. Civ. App. 509, 99 S. W. 865; Texas Midland R. Co. *v.* Byrd, 41 Tex. Civ. App. 164, 90 S. W. 185; Hutchens *v.* St. Louis Southwestern R. Co., 40 Tex. Civ. App. 245, 89 S. W. 24; St. Louis Southwestern R. Co. *v.* Bolton, 36 Tex. Civ. App. 87, 81 S. W. 123; Texas, etc., R. Co. *v.* Ball, (Civ. App. 1903) 73 S. W. 420 [*reversed* on other grounds in 96 Tex. 622, 75 S. W. 4];

years,[15] or even for a shorter length of time,[16] it is sufficient permission to constitute one so traveling a licensee or at least more than a mere trespasser, especially where there are no sign-boards or warnings against going on the tracks.[17]

(c) *Effect of Sign-Boards and Warnings.* As a general rule, pedestrians who use a railroad track as a thoroughfare, despite posted notices and other warnings forbidding it, are trespassers.[18] The existence of the sign-board or warning, however, is not conclusive that a person has no license to use the way;[19] and a license to use the tracks may be acquired by customary use, despite such sign-boards or warnings.[20]

(d) *Violation of Statutes.* The mere fact that walking upon railroad tracks is forbidden or made an offense by statute does not generally prevent a person from acquiring a license to go thereon with the express or implied permission of the railroad company,[21] although in some jurisdictions such a license cannot be acquired by mere user,[22] except in paths or ways about depot grounds.[23]

Gulf, etc., R. Co. *v.* Matthews, 28 Tex. Civ. App. 92, 66 S. W. 588, 67 S. W. 788.

Utah.— Young *v.* Clark, 16 Utah 42, 50 Pac. 832.

Virginia.— Norfolk, etc., R. Co. *v.* De Board, 91 Va. 700, 22 S. E. 514, 29 L. R. A. 825; Norfolk, etc., R. Co. *v.* Carper, 88 Va. 556, 14 S. E. 328.

Wisconsin.— Hooker *v.* Chicago, etc., R. Co., 76 Wis. 542, 44 N. W. 1085.

See 41 Cent. Dig. tit. "Railroads," § 1229.

Where there is reason to presume that a railroad company had notice that persons were accustomed to walk on its track at a certain place, although no permission so to use it be shown, a person walking on such track is a licensee. Jones *v.* Charleston, etc., R. Co., 65 S. C. 410, 43 S. E. 884.

15. Barry *v.* New York Cent., etc., R. Co., 92 N. Y. 289, 44 Am. Rep. 377; Troy *v.* Cape Fear, etc., R. Co., 99 N. C. 298, 6 S. E. 77, 6 Am. St. Rep. 521; International, etc., R. Co. *v.* Woodward, 26 Tex. Civ. App. 389, 63 S. W. 1051; Virginia Midland R. Co. *v.* White, 84 Va. 498, 5 S. E. 573, 10 Am. St. Rep. 874.

16. Illinois Cent. R. Co. *v.* Dick, 91 Ky. 434, 15 S. W. 665, 12 Ky. L. Rep. 772 (one year); Roth *v.* Union Depot Co., 13 Wash. 525, 43 Pac. 641, 44 Pac. 253, 31 L. R. A. 855 (four or five years).

17. Cahill *v.* Chicago, etc., R. Co., 74 Fed. 285, 20 C. C. A. 184.

18. Koegel *v.* Missouri Pac. R. Co., 181 Mo. 379, 80 S. W. 905; Hyde *v.* Missouri Pac. R. Co., 110 Mo. 272, 19 S. W. 483; Smalley *v.* Southern R. Co., 57 S. C. 243, 35 S. E. 489; Hamlin *v.* Columbia, etc., R. Co., 37 Wash. 448, 79 Pac. 991.

A railroad employee passing along the track while off duty is not a trespasser within the meaning of a sign or warning forbidding, as trespassers, all persons except employees from going upon the tracks. International, etc., R. Co. *v.* Brooks, (Tex. Civ. App. 1899) 54 S. W. 1056.

19. O'Connor *v.* Boston, etc., R. Corp., 135 Mass. 352.

20. Murrell *v.* Missouri Pac. R. Co., 105 Mo. App. 88, 79 S. W. 505; International, etc., R. Co. *v.* Brooks, (Tex. Civ. App. 1899) 54 S. W. 1056. See Smalley *v.* Southern R. Co., 57 S. C. 243, 35 S. E. 489; Hamlin *v.* Columbia, etc., R. Co., 37 Wash. 448, 79 Pac. 991.

Mere acquiescence on the part of the railroad company in the use of the track by foot travelers is not sufficient to make such a user a license to use the track for such purpose. Beiser *v.* Chesapeake, etc., R. Co., 92 S. W. 928, 29 Ky. L. Rep. 249.

21. Le May *v.* Missouri Pac. R. Co., 105 Mo. 361, 16 S. W. 1049.

Although an ordinance makes it a misdemeanor to trespass on another's premises without his consent, a person, if run over by a train, while walking on a part of the railroad track habitually used as a footway with the knowledge of the railroad company, is not a trespasser and is therefore not guilty of a misdemeanor. Gulf, etc., R. Co. *v.* Matthews, 28 Tex. Civ. App. 92, 66 S. W. 588, 67 S. W. 788.

That the railroad company does not prosecute persons walking on its tracks in violation of statute (Me. Rev. St. c. 52, § 77) does not authorize persons to so use its tracks. Copp *v.* Maine Cent. R. Co., 100 Me. 568, 62 Atl. 735.

22. Anderson *v.* Chicago, etc., R. Co., 87 Wis. 195, 58 N. W. 79, 23 L. R. A. 203, holding that, under Rev. St. § 1811, no mere user of a track by the public will raise an implied license to walk over a trestle one hundred and twenty feet long, unplanked, and so narrow as to leave no room to avoid a passing train.

Under N. Y. Laws (1892), c. 676, § 53, providing that no person other than those connected with the railroad shall walk upon the track, except where the same crosses the streets or highways, a presumptive right to cross the tracks of a railroad company at a point not a highway or street crossing cannot be acquired even by long user, where it is necessary to walk along the tracks of intersecting railroads to reach such point of crossing. Keller *v.* Erie R. Co., 183 N. Y. 67, 75 N. E. 965 [*affirming* 98 N. Y. App. Div. 550, 90 N. Y. Suppl. 236].

23. Mason *v.* Chicago, etc., R. Co., 89 Wis. 151, 61 N. W. 300 (holding that Rev. St. § 1811, does not apply to a licensed path in or about depot grounds); Davis *v.* Chicago,

b. Persons at Stations — (1) *In General.* Railroad depot grounds and passenger houses, by reason of the general use to which they are appropriated, are quasi-public,[24] and a person going to such houses or passing over such depot grounds, in a proper manner and for a proper purpose,[25] as for the purpose of transacting business connected with the company,[26] or its employees,[27] or for the purpose of meeting friends or others arriving on trains,[28] or to see others depart,[29] or to take a train himself,[30] or for the purpose of passing over such grounds in going from one part of the city to another,[31] is not a trespasser, as the public is invited to use such places. But where one goes upon such grounds out of mere curiosity,[32] or for his own convenience for the transaction of business

etc., R. Co., 58 Wis. 646, 17 N. W. 406, 46 Am. Rep. 667.

24. Illinois Cent. R. Co. *v.* Hammer, 72 Ill. 347.

The platform of a railroad company at its station is not a public highway, but is a structure erected expressly for the accommodation of passengers arriving and departing on the trains of the company and, although other persons are usually allowed to walk over it, they have no right as against the company to do so. Gillis *v.* Pennsylvania R. Co., 59 Pa. St. 129, 98 Am. Dec. 317.

25. Illinois Cent. R. Co. *v.* Hammer, 72 Ill. 347.

Where there is a habit of stopping trains to allow passengers to get on and off whenever signaled, the license to others than those operating trains to occupy the right of way extends only to passengers getting on or off trains. Matson *v.* Port Townsend Southern R. Co., 9 Wash. 449, 37 Pac. 705.

To read notice.— Where a railroad company is required by statute to post at the nearest station house a notice of the killing of stock by its trains, and one who missed some of his stock goes upon the platform of the station to read a notice posted there, taking another with him to do the reading, and such other in climbing up to get at the notice falls through a defective plank in the platform and is injured, the railway company is liable. St. Louis, etc., R. Co. *v.* Fairbairn, 48 Ark. 491, 4 S. W. 50.

A person going to a station to mail letters at a mail car of a passing train is not a trespasser. Chicago, etc., R. Co. *v.* Parkinson, 56 Kan. 652, 44 Pac. 615.

A person who goes to a depot for a timetable is not a trespasser on the walk leading to the platform. Bradford *v.* Boston, etc., R. Co., 160 Mass. 392, 35 N. E. 1131.

A policeman whose habit is to visit the station at train time is a licensee. Ingalls *v.* Adams Express Co., 44 Minn. 128, 46 N. W. 325.

26. Illinois Cent. R. Co. *v.* Hammer, 72 Ill. 347.

Where the only office of an express company is at the depot of a railroad company and the express company is under the control of the railroad company, one going to the depot on business connected with the express company is not a trespasser on the depot platform so as to relieve the railroad company from liability for an injury occurring to such person by reason of a defect in the platform. Smith *v.* Texas, etc., R. Co., 2 Tex. Unrep. Cas. 329.

Where a person owns and keeps a lunch stand at a railroad station by authority of the company which can be approached only over the company's platform, the company is responsible for its condition to persons passing over it to make purchases at the lunch stand. Dillingham *v.* Teeling, (Tex. Civ. App. 1894) 24 S. W. 1094.

Where notice from the defendant company that certain goods are at its depot is received by a person, he is a licensee in going through its freight room to see after such goods. Danville, etc., R. Co. *v.* Brown, 90 Va. 340, 18 S. E. 278.

27. Illinois Cent. R. Co. *v.* Hammer, 72 Ill. 347. See also Illinois Cent. R. Co. *v.* Willis, 123 Ky. 636, 97 S. W. 21, 29 Ky. L. Rep. 1187.

28. Illinois Cent. R. Co. *v.* Hammer, 72 Ill. 347; Illinois Cent. R. Co. *v.* Wall, 53 Ill. App. 588.

One who having an appointment with a passenger enters the company's premises intending in case the appointment be made to become a passenger himself is not a trespasser. Texas, etc., R. Co. *v.* Best, 66 Tex. 116, 18 S. W. 224.

29. Illinois Cent. R. Co. *v.* Hammer, 72 Ill. 347; Lange *v.* Missouri Pac. R. Co., 208 Mo. 458, 106 S. W. 660; Banderob *v.* Wisconsin Cent. R. Co., 133 Wis. 249, 113 N. W. 738.

A hackman carrying passengers to a railroad depot for transportation and aiding them to alight upon the platform of the company is as lawfully upon the same as the passengers alighting. Tobin *v.* Portland, etc., R. Co., 59 Me. 183, 8 Am. Rep. 415.

Where a child accompanies a passenger to a railroad station, and after the departure of the train, and while the child is standing on the platform, servants in charge of a locomotive cause steam to be discharged therefrom, causing the child to go upon one of the tracks in an attempt to escape from the steam, it is not a trespasser while upon such track. Lange *v.* Missouri Pac. R. Co., 208 Mo. 458, 106 S. W. 660.

30. Matson *v.* Port Townsend Southern R. Co., 9 Wash. 449, 37 Pac. 705.

31. See Illinois Cent. R. Co. *v.* Hammer, 72 Ill. 347; Redigan *v.* Boston, etc., R. Co., 155 Mass. 44, 28 N. E. 1133, 31 Am. St. Rep. 520, 14 L. R. A. 276.

32. St. Louis, etc., R. Co. *v.* Fairbairn, 48 Ark. 491, 4 S. W. 50.

in no way connected with the railroad company,[33] no relation exists between him and the company which imposes upon the latter the duty of exercising even ordinary care for his protection. And so long as there is no provision or regulation, by virtue of statute, to the contrary, a railroad company may either exclude from its station or admit upon such conditions as may be thought fit any person not entering thereon for any of the authorized purposes above stated.[34]

(II) *On Approaches to Stations.*[35] A person is not a trespasser in going upon the accustomed approaches to stations,[36] even in going on or across tracks,[37] except where another place of approach is provided by the railroad company,[38] and except where the person going on the approaches has no business thereon connected with the company.[39] A person is even more than a mere licensee if in the course of business connected with the railroad company he is on an approach provided by the railroad company,[40] or if there is a necessity of using such approach, as in the case of going upon the tracks by reason of the fact that no other means of approach to the station is provided by the railroad company,[41] as in such cases it must be regarded that there is an invitation to use such approaches or tracks.

c. Persons on Trains. One who voluntarily boards a train on which he has no right, without permission, is a trespasser.[42] Where, however, he does so under

33. St. Louis, etc., R. Co. *v.* Fairbairn, 48 Ark. 491, 4 S. W. 50; Illinois Cent. R. Co. *v.* Lucas, 89 Miss. 411, 42 So. 607.

A person at a station house by mere permission or sufferance, and not for the purpose of transacting any business with the company or its agents or on any business connected with the operation of the road, cannot recover for an injury from its failure to exercise ordinary skill and care in the erection or maintenance of its station house. Pittsburgh, etc., R. Co. *v.* Bingham, 29 Ohio St. 364.

A boarding-house keeper who goes to the depot to meet an incoming train solely on his own business, as for the purpose of securing a boarder, is entitled to no protection by the railroad company in respect to keeping its platform in a safe condition. Post *v.* Texas, etc., R. Co., (Tex. Civ. App. 1893) 23 S. W. 708.

One paying a friendly visit to a telegraph operator in a telegraph office owned and occupied by a railroad company for its own purposes and convenience, and which is located on its land and near its track, although occasionally messages are sent therefrom and received thereat for outside parties for pay, is at most a mere licensee. Woolwine *v.* Chesapeake, etc., R. Co., 36 W. Va. 329, 15 S. E. 81, 32 Am. St. Rep. 859, 16 L. R. A. 271.

34. Perth Gen. Station Committee *v.* Ross, [1897] A. C. 479, 66 L. J. P. C. 81, 77 L. T. Rep. N. S. 226.

Remedy.— If a member of the public believes that he has a right to use the station, and thinks that he has been unreasonably prevented from doing so by the company, his remedy is by an application to the railroad commissioners, or other proper authorities, and not by an action at law. Perth Gen. Station Committee *v.* Ross, [1897] A. C. 479, 66 L. J. P. C. 81, 77 L. T. Rep. N. S. 226.

35. Contributory negligence of passengers on approaches to stations see CARRIERS, 6 Cyc. 642.

36. Chicago, etc., R. Co. *v.* Hedges, 105 Ind. 398, 7 N. E. 801, holding that a person crossing a part of a railway track habitually used by the public in approaching the depot, with the knowledge and consent of the railway company, is not a trespasser.

One seeking to board a train as a passenger who follows a beaten path in an attempt to get on a train about to leave is not a trespasser, although the path is some feet away from the depot. Willis *v.* Vicksburg, etc., R. Co., 115 La. 53, 38 So. 892.

Permission to use a path along the tracks by persons going to and from trains is not sufficient to constitute one who goes along such path for the purpose of meeting a passenger who was expected to arrive an hour later, and whom he desired to see on business of his own, more than a mere licensee. Pennsylvania R. Co. *v.* Martin, 111 Fed. 586, 49 C. C. A. 474, 55 L. R. A. 361.

37. Chicago, etc., R. Co. *v.* Hedges, 105 Ind. 398, 7 N. E. 801; Louisville, etc., R. Co. *v.* Hirsch, 69 Miss. 126, 13 So. 244.

38. See Adams *v.* New York, etc., R. Co., 21 N. Y. Suppl. 681.

39. James *v.* Illinois Cent. R. Co., 195 Ill. 327, 63 N. E. 153 [*affirming* 93 Ill. App. 294], holding that a person walking along railroad tracks adjacent to a railroad station in the hope of meeting a telegraph operator coming from his house is a trespasser.

40. Watkins *v.* Great Western R. Co., 46 L. J. C. P. 817, 37 L. T. Rep. N. S. 193, 25 Wkly. Rep. 905.

41. Louisville, etc., R. Co. *v.* Hirsch, 69 Miss. 126, 13 So. 244.

42. *Arkansas.*— St. Louis, etc., R. Co. *v.* Ledbetter, 45 Ark. 246.

Indiana.— Jordan *v.* Grand Rapids, etc., R. Co., 162 Ind. 464, 70 N. E. 524, 102 Am. St. Rep. 217, holding that a boy eight years of age who climbs on a box car to look at a sale of stock in an adjacent stock-yard is a trespasser.

Louisiana.—Snyder *v.* Natchez, etc., R. Co., 42 La. Ann. 302, 7 So. 582.

the belief that he has a right to do so because of permission given him by a trainman or other employee of the railroad company, he is not a wilful trespasser,[43] although he is at most a mere licensee.[44]

d. Persons Working On or About Tracks or Cars. Where one is engaged on or about railroad tracks or cars in work which is mutually beneficial to himself and the railroad company, and his work requires him to go on such tracks or cars, his going thereon when required is generally held to be by the express or implied invitation of the railroad company, and he is neither a trespasser,[45] nor a mere

Michigan.— Grunst *v.* Chicago, etc., R. Co., 109 Mich. 342, 67 N. W. 335.

Mississippi.—Alabama, etc., R. Co. *v.* Livingston, 84 Miss. 1, 36 So. 256.

Where a person, although lawfully upon railroad premises, afterward intrudes upon cars of the company on which he has no business, he becomes a trespasser (Snyder *v.* Natchez, etc., R. Co., 42 La. Ann. 302, 7 So. 582), and especially is this the case where such intrusion is forbidden by the railroad company (see Snyder *v.* Natchez, etc., R. Co., *supra*).

Although the company has notice of his obtrusion, and does not object, and no injury is done to its property, the person so obtruding on a railroad may be a trespasser. Littlejohn *v.* Richmond, etc., R. Co., 49 S. C. 12, 26 S. E. 967.

Where a person not a passenger procures another who is a passenger to transport his baggage for him, such person is a trespasser in going on the train while assisting such passenger with the baggage, notwithstanding it is the company's custom to permit persons to assist passengers, with their baggage, into its trains. Andrews *v.* Ft. Worth, etc., R. Co., (Tex. Civ. App. 1894) 25 S. W. 1040.

43. Alabama, etc., R. Co. *v.* Livingston, 84 Miss. 1, 36 So. 256.

44. Powers *v.* Boston, etc., R. Co., 153 Mass. 188, 26 N. E. 446; Pettit *v.* Great Northern R. Co., 58 Minn. 120, 59 N. W. 1082. See also Creeden *v.* Boston, etc., R. Co., 193 Mass. 280, 79 N. E. 344, constable.

One who enters a train under an arrangement with certain trainmen to leave a lunch for them is a mere licensee as to the railroad company. Wencker *v.* Missouri, etc., R. Co., 169 Mo. 592, 70 S. W. 145.

An employee of an independent contractor with a railroad company, in going to and from his work on the company's train, with the permission of the company's employees operating it, and with the knowledge and acquiescence of its roadmaster, superintendent, and general manager, is not a trespasser as regards the care due him by the company. Gulf, etc., R. Co. *v.* Lovett, (Tex. Civ. App. 1903) 74 S. W. 570 [*affirmed* in 97 Tex. 436, 79 S. W. 514].

By carrying on its cars vendors of fruit, etc., for sale to passengers, a railroad company does not invite the public to enter its trains at stations for the sole purpose of making purchases, and the company's failure to object to persons frequently doing so does not create more than a permissive license. Peterson *v.* South, etc., R. Co., 143 N. C. 260, 55 S. E. 618, 8 L. R. A. N. S. 1240.

45. *Illinois.*— Southern R. Co. *v.* Drake, 107 Ill. App. 12, holding that employees of a railroad contractor working on a passage track constructed on the right of way of a railroad company are not trespassers while leaving a dirt train on the passage track and crossing the main track, where the passage track was located by the railroad company for the contractor's use, and such use was by the railroad's permission.

Indiana.—Chicago, etc., R. Co. *v.* Pritchard. 168 Ind. 398, 79 N. E. 508, 81 N. E. 78, 9 L. R. A. N. S. 857 [*affirming* 39 Ind. App. 701, 78 N. E. 1044].

Kentucky.— Louisville, etc., R. Co. *v.* Farris, 100 S. W. 870, 30 Ky. L. Rep. 1193.

Texas.— Texas, etc., R. Co. *v.* McDonald, (Civ. App. 1905) 85 S. W. 493, holding that an employee of a person engaged in unloading gravel from cars hauled by defendant company is not a trespasser in taking a seat on a tie at the noon hour with his back against a car.

United States.— St. Louis, etc., R. Co. *v.* Miles, 79 Fed. 257, 24 C. C. A. 559, employee of lumber company engaged about a spur track built from the line of a railroad on land of the lumber company for convenience in unloading lumber.

See 41 Cent. Dig. tit. "Railroads," § 1225.

A landowner charged with the repair of gates in fences along a railroad right of way crossing his land is not a trespasser, in being on the right of way while inspecting the gates. Houston, etc., R. Co. *v.* O'Donnell, (Tex. 1906) 92 S. W. 409 [*reversing* (Civ. App. 1905) 90 S. W. 886].

A track repairer going on the right of way after work hours with the foreman and other members of the gang to take a train to the next working place is not a trespasser. Swadley *v.* Missouri Pac. R. Co., 118 Mo. 268, 24 S. W. 140, 40 Am. St. Rep. 366.

Where certain grounds are jointly occupied by two railroad companies so that the servants of each have to pass over the other's track in the discharge of their ordinary duties, the servants of neither company are trespassers as to the other. Illinois Cent. R. Co. *v.* Frelka, 110 Ill. 498.

Employees's wife.— Where the wife of a railroad employee with the permission of the railroad company and at the suggestion of its agent, under whose orders such employee is working at the time, is on a visit to her husband upon a car on a side-track, she is not a trespasser. Campbell *v.* Harris, 4 Tex. Civ. App. 636, 23 S. W. 35.

licensee.[46] Nor is a person a trespasser or bare licensee in going upon the railroad tracks where it has been the custom for him to do so in the course of his duties, with the company's express or implied permission.[47] If, however, the work is beneficial to such person alone, or to his employer alone, he is upon the trains or cars at most as a licensee.[48] But if the character of his duties does not require that such person should go on the track or cars, his presence thereon without the company's permission, is a trespass,[49] or at most a bare license.[50] If one who has no interest in the work voluntarily assists railroad employees, either with or without their request, he is nevertheless a trespasser.[51] But if he has an interest in the work, and for his own convenience or to facilitate or expedite his own or his employer's work he assists the railroad employees, at their request or with their consent, he is more than a trespasser, and is entitled to protection against the carelessness of other servants.[52]

2. Care Required and Liability of Railroad Company — a. As to Persons On or Near Tracks Generally — (1) *In General.* To render a railroad company responsible for injury resulting from the operation of its trains, or otherwise,

46. Froelich *v.* Interborough Rapid Transit Co., 120 N. Y. App. Div. 474, 104 N. Y. Suppl. 910 (holding that an employee of a switch and signal company, which had a contract with defendant railroad company to install switches and signals, is not a mere licensee on defendant's tracks while engaged in work under that contract); Dempsey *v.* New York Cent., etc., R. Co., 81 Hun (N. Y.) 156, 30 N. Y. Suppl. 724; Conlan *v.* New York Cent., etc., R. Co., 74 Hun (N. Y.) 115, 26 N. Y. Suppl. 659 [*affirmed* in 148 N. Y. 748, 43 N. E. 986] (employee of a third person whose duty it was to receive unloaded cars delivered by defendant at such third person's elevator); Ominger *v.* New York Cent., etc., R. Co., 4 Hun (N. Y.) 159, 6 Thomps. & C. 498 (workman for a contractor employed by defendant railroad company to repair its track); Collins *v.* New York, etc., R. Co., 55 N. Y. Super. Ct. 31, 8 N. Y. St. 164 [*affirmed* in 112 N. Y. 665, 20 N. E. 413] (employee of one who has contracted to lay water-pipes in a railroad yard); Holmes *v.* North Eastern R. Co., L. R. 6 Exch. 123, 40 L. J. Exch. 121, 24 L. T. Rep. N. S. 69 [*affirming* 17 Wkly. Rep. 800]. See also Cincinnati, etc., R. Co. *v.* Rodes, 102 S. W. 321, 31 Ky. L. Rep. 430.

47. Illinois Cent. R. Co. *v.* Hopkins, 200 Ill. 122, 65 N. E. 656 [*affirming* 100 Ill. App. 594], holding that where plaintiff had for eight years carried meals to mail clerks on defendant's railroad cars under an agreement with the clerks and with the knowledge and consent of defendant, he was on defendant's premises on its implied invitation in a matter in which it was interested and was not a mere licensee.

An employee of one railroad company is not a trespasser or bare licensee in going on the tracks of another railroad company in the course of his duties with such other company's express or implied permission. Watts *v.* Richmond, etc., R. Co., 89 Ga. 277, 15 S. E. 365; McMarshall *v.* Chicago, etc., R. Co., 80 Iowa 757, 45 N. W. 1065, 20 Am. St. Rep. 445; Turner *v.* Boston, etc., R. Co., 158 Mass. 261, 33 N. E. 520.

48. Chicago, etc., R. Co. *v.* Martin, 31 Ind. App. 308, 65 N. E. 591 (employee of a stone company who continues his work on the stone on a car which is being moved by the railroad company in making up a train); Ownes *v.* Pennsylvania R. Co., 41 Fed. 187 (person engaged in business near a railroad track whose duties require him to pass from one side of the track to the other).

A person given leave by a yard master of a railroad company to learn the duties of a certain occupation in the railroad yard with the expectation that he will be taken into employment on becoming competent, with the right to devote as much or little time as he sees fit in acquiring the necessary knowledge, is a licensee. Collier *v.* Michigan Cent. R Co., 27 Ont. App. 630.

One who erects a movable platform on the right of way of a railroad company for his own convenience in unloading freight is a mere licensee and the company is not bound to see that the platform is so placed as not to be struck by a train. McCabe *v.* Chicago, etc., R. Co., 88 Wis. 531, 60 N. W. 260.

That one has been employed by the owner to keep stock off the track does not save him from being a trespasser. Louisville, etc., R. Co. *v.* Vittitoe, 41 S. W. 269, 19 Ky. L. Rep. 612.

49. Cleveland, etc., R. Co. *v.* Stephenson, 139 Ind. 641, 67 N. E. 720; Sweeney *v.* Boston, etc., R. Co., 128 Mass. 5.

50. Cleveland, etc., R. Co. *v.* Stephenson, 139 Ind. 641, 37 N. E. 720.

51. Welch *v.* Maine Cent. R. Co., 86 Me. 552, 30 Atl. 116, 25 L. R. A. 658.

The mere fact that a railroad employee requests a person to do some act connected with the management of the train does not render such person any the less a trespasser, unless the employee had express authority from the company to make the request. Kentucky Cent. R. Co. *v.* Gastineau, 83 Ky. 119.

52. Welch *v.* Maine Cent. R. Co., 86 Me. 552, 30 Atl. 116, 25 L. R. A. 658; Cleveland, etc., R. Co. *v.* Marsh, 63 Ohio St. 236, 58 N. E. 821, 52 L. R. A. 142; Bonner *v.* Bryant, 1 Tex. Civ. App. 269, 21 S. W. 549. See also Pennsylvania Co. *v.* Gallagher, 40 Ohio St. 637, 48 Am. Rep. 689.

to persons on or near its tracks, it must have failed to use ordinary care in the performance of some duty owed to the person injured,[53] and the person injured must have taken ordinary care for his own protection.[54] A railroad company is not an insurer against every casualty that may happen, or liable for an injury attributable to inevitable accident which no vigilance could avoid;[55] nor is it required to provide against what it has no reasonable grounds to anticipate,[56] and if it exercises toward a person on or near its tracks what under the circumstances is reasonable care it is not liable.[57] If persons are accustomed to cross or travel on the railroad tracks at a particular place and this use is well known to the railroad company and its employees, it is the duty of the company to use reasonable care and diligence to discover and avoid injury to such persons, whether trespassers or licensees, whom it may reasonably expect to be on the track at that point,[58] as where the railroad tracks cross or run along a public street or highway and have been long used by pedestrians.[59] Where the company is operating a train on a city street used in common by it and pedestrians and vehicles, it must take precautions against collisions which are not necessary when it is operating trains on its own right of way.[60]

53. Kansas Pac. R. Co. *v.* Ward, 4 Colo. 30; Galena, etc., R. Co. *v.* Jacobs, 20 Ill. 478; Atchison, etc., R. Co. *v.* Whitbeck, 57 Kan. 729, 48 Pac. 16; Ellington *v.* Great Northern R. Co., 96 Minn. 176, 104 N. W. 827.

54. Galena, etc., R. Co. *v.* Jacobs, 20 Ill. 478.

Contributory negligence generally see *infra*, X, E, 4.

Where both parties stand on an equality as to the means of avoiding an accident and both are engaged in a lawful employment no more than ordinary diligence can be demanded of either. Brand *v.* Schenectady, etc., R. Co., 8 Barb. (N. Y.) 368.

55. Chicago, etc., R. Co. *v.* Stumps, 69 Ill. 409; Atchison, etc., R. Co. *v.* Whitbeck, 57 Kan. 729, 48 Pac. 16; Whitcomb *v.* Louisville, etc., R. Co., 47 La. Ann. 225, 16 So. 812.

56. Little *v.* Carolina Cent. R. Co., 118 N. C. 1072, 24 S. E. 514.

57. Heck *v.* New York Cent., etc., R. Co., 94 N. Y. App. Div. 562, 88 N. Y. Suppl. 154; Kent *v.* New York, etc., R. Co., 51 N. Y. App. Div. 508, 64 N. Y. Suppl. 623; Everett *v.* Richmond, etc., R. Co., 121 N. C. 519, 27 S. E. 991; Villeneuve *v.* Canadian Pac. R. Co., 21 Quebec Super. Ct. 422.

A rule of the company requiring its employees to use "great care" to avoid injury does not change the degree of care which the law requires from a company to a stranger. Heck *v.* New York Cent., etc., R. Co., 94 N. Y. App. Div. 562, 88 N. Y. Suppl. 154.

58. Bullard *v.* Southern R. Co., 116 Ga. 644, 43 S. E. 39; Cleveland, etc., R. Co. *v.* Gahan, 24 Ohio Cir. Ct. 277; Chesapeake, etc., R. Co. *v.* Rodgers, 100 Va. 324, 41 S. E. 732; Nuzum *v.* Pittsburgh, etc., R. Co., 30 W. Va. 228, 4 S. E. 242. And see *infra*, X, E, 2, a, (II), (III).

59. *Georgia.*— Bullard *v.* Southern R. Co., 116 Ga. 644, 43 S. E. 39.

Illinois.— East St. Louis Connecting R. Co. *v.* Reames, 173 Ill. 582, 51 N. E. 68; Chicago, etc., R. Co. *v.* Stumps, 69 Ill. 409, holding that a **railroad company must exercise a very high degree of care** in operating its road through public streets of a city.

Indiana.— Pittsburgh, etc., R. Co. *v.* Warrum, (App. 1907) 82 N. E. 934, 84 N. E. 356; Manion *v.* Lake Erie, etc., R. Co., 40 Ind. App. 569, 80 N. E. 166.

Louisiana.— Lampkin *v.* McCormick, 105 La. 418, 29 So. 952, 83 Am. St. Rep. 245.

New York.— Brand *v.* Schenectady, etc., R. Co., 8 Barb. 368.

Ohio.— Cleveland, etc., R. Co. *v.* Gahan, 24 Ohio Cir. Ct. 277.

Texas.— Gulf, etc., R. Co. *v.* Hodges, 76 Tex. 90, 13 S. W. 64; Gulf, etc., R. Co. *v.* Walker, 70 Tex. 126, 7 S. W. 831, 8 Am. St. Rep. 582; Rio Grande, etc., R. Co. *v.* Martinez, 39 Tex. Civ. App. 460, 87 S. W. 853; Texas, etc., R. Co. *v.* Roberts, (Civ. App. 1897) 45 S. W. 218 [*affirmed* in (1898) 45 S. W. 309].

United States.— Barley *v.* Chicago, etc., R. Co., 2 Fed. Cas. No. 997, 4 Biss. 430.

See 41 Cent. Dig. tit. "Railroads," § 1235.

A railroad company is held to the same degree of care as the owner of an ordinary carriage would exercise under like circumstances. Beers *v.* Housatonic R. Co., 19 Conn. 566; Brand *v.* Schenectady, etc., R. Co., 8 Barb. (N. Y.) 368; Mooney *v.* Hudson River R. Co., 1 Sweeny (N. Y.) 325.

A private railroad running through and across the thoroughfares of a city has been held bound to use extraordinary care. Wilson *v.* Cunningham, 3 Cal. 241, 58 Am. Dec. 407.

Where the injury occurs near a public crossing so that the means required to be adopted by those operating the train will enable a traveler to cross in safety at the crossing, if carried out, would have enabled the person injured to cross in safety at the place of the accident, the liability of the railroad company will be measured by the legal principles applicable to public crossings. Florida, etc., R. Co. *v.* Foxworth, 41 Fla. 1, 25 So. 338, 79 Am. St. Rep. 149.

60. Schwanenfeldt *v.* Chicago, etc., R. Co., 80 Nebr. 790, 115 N. W. 285.

(II) *As to Licensees Generally* — (A) *In General.* The rights of trespassers and licensees are entirely different from the rights of persons who are upon premises of a railroad company by invitation, express or implied, for a purpose connected with its business.[61] As a general rule a mere naked licensee on railroad tracks assumes the risks incident to his position,[62] and except where his presence thereon is known,[63] or may be reasonably expected,[64] a railroad company is under no duty or obligation to be actively vigilant in providing against danger or accident to him;[65] and is liable to him only for injuries caused by its active misconduct, or wilful or wanton injury.[66] But where a person is on the right

61. Illinois Cent. R. Co. *v.* Eicher, 202 Ill. 556, 67 N. E. 376 [*reversing* 100 Ill. App. 599].

62. Schreiner *v.* Great Northern R. Co., 86 Minn. 245, 90 N. W. 400, 58 L. R. A. 75; Sutton *v.* New York Cent., etc., R. Co., 66 N. Y. 243 [*reversing* 4 Hun 760]; Poling *v.* Ohio River R. Co., 38 W. Va. 645, 18 S. E. 782, 24 L. R. A. 215.

63. Cleveland, etc., R. Co. *v.* Stein, 24 Ohio Cir. Ct. 643 (holding that a railroad company is bound to use all reasonable diligence to protect such persons after discovering their peril); Norfolk, etc., R. Co. *v.* Wood, 99 Va. 156, 37 S. E. 846; Hogan *v.* Chicago, etc., R. Co., 59 Wis. 139, 17 N. W. 632.

64. Norfolk, etc., R. Co. *v.* Denny, 106 Va. 383, 56 S. E. 321; Hogan *v.* Chicago, etc., R. Co., 59 Wis. 139, 17 N. W. 632. And see cases cited *infra*, notes 67–70.

65. *Georgia.*— Savannah, etc., R. Co. *v.* Waller, 97 Ga. 164, 25 S. E. 823, 34 L. R. A. 459.

Illinois.— Illinois Cent. R. Co. *v.* Eicher, 202 Ill. 556, 67 N. E. 376 [*reversing* 100 Ill. App. 599]; Illinois Cent. R. Co. *v.* Hopkins, 100 Ill. App. 594 [*affirmed* in 200 Ill. 122, 65 N. E. 656]; Illinois Cent. R. Co. *v.* Janes, 67 Ill. App. 649.

Kentucky.— Louisville, etc., R. Co. *v.* Thornton, 58 S. W. 796, 22 Ky. L. Rep. 778.

Minnesota.— Schreiner *v.* Great Northern R. Co., 86 Minn. 245, 90 N. W. 400, 58 L. R. A. 75, holding that persons having no invitation to go on railroad tracks but who walk thereon for their own convenience are mere licensees and cannot require the railroad company to protect them from open and apparent dangers.

New York.— Sutton *v.* New York Cent., etc., R. Co., 66 N. Y. 243 [*reversing* 4 Hun 760]; Meinrenken *v.* New York Cent., etc., R. Co., 81 N. Y. App. Div. 132, 80 N. Y. Suppl. 1074; Goodall *v.* New York Cent., etc., R. Co., 89 Hun 559, 35 N. Y. Suppl. 544.

Ohio.— Cleveland, etc., R. Co. *v.* Stein, 24 Ohio Cir. Ct. 643.

Texas.— De la Pena *v.* International, etc., R. Co., 32 Tex. Civ. App. 241, 74 S. W. 58; Reichert *v.* International, etc., R. Co., (Civ. App. 1903) 72 S. W. 1031.

Virginia.— Norfolk, etc., R. Co. *v.* Bondurant, 107 Va. 515, 59 S. E. 1091, 122 Am. St. Rep. 867, 15 L. R. A. N. S. 443 (holding that a railroad company does not owe to a licensee the duty of employing competent servants to run its trains); Chesapeake, etc., R. Co. *v.* Farrow, 106 Va. 137, 55 S. E. 569; Norfolk, etc., R. Co. *v.* Stegall, 105 Va. 538, 54 S. E. 19.

West Virginia.— Poling *v.* Ohio River R. Co., 38 W. Va. 645, 18 S. E. 782, 24 L. R. A. 215.

Wisconsin.— Hogan *v.* Chicago, etc., R. Co., 59 Wis. 139, 17 N. W. 632, holding that a railroad company is not liable for injuries to a mere licensee on its track whose presence is unknown and unexpected if the usual signals are given and the usual requirements of caution observed.

United States.— Delaware, etc., R. Co. *v.* Wilkins, 153 Fed. 845, 83 C. C. A. 27; Morgan *v.* Pennsylvania R. Co., 7 Fed. 78, 19 Blatchf. 239.

Canada.— Spence *v.* Grand Trunk R. Co., 27 Ont. 303.

See 41 Cent. Dig. tit. "Railroads," § 1236.

A failure to prescribe rules and regulations governing the use of its tracks by its licensees will not render a railroad company liable for injuries to employees or one of its licensees caused by the negligence of another licensee. Texas Transp. Co. *v.* Shelton, 12 Tex. Civ. App. 651, 35 S. W. 874.

66. *Alabama.*—Mobile, etc., R. Co. *v.* Smith, (1907) 45 So. 57.

California.— Means *v.* Southern California R. Co., 144 Cal. 473, 77 Pac. 1001.

Delaware.— Tully *v.* Philadelphia, etc., R. Co., 3 Pennew. 455, 50 Atl. 95; Weldon *v.* Philadelphia, etc., R. Co., 2 Pennew. 11, 43 Atl. 156.

Illinois.— Thompson *v.* Cleveland, etc., R. Co., 226 Ill. 542, 80 N. E. 1054, 9 L. R. A. N. S. 672 [*affirming* 123 Ill. App. 47]; Illinois Cent. R. Co. *v.* Eicher, 202 Ill. 556, 67 N. E. 376 [*reversing* 100 Ill. App. 599]; Illinois Cent. R. Co. *v.* McMillion, 129 Ill. App. 27, 37; Ahern *v.* Chicago, etc., R. Co., 124 Ill. App. 36; McLaughlin *v.* Chicago, etc., R. Co., 115 Ill. App. 262.

Indiana.— Lingenfelter *v.* Baltimore, etc., R. Co., 154 Ind. 49, 55 N. E. 1021.

Kentucky.— See Illinois Cent. R. Co. *v.* Willis, 97 S. W. 21, 29 Ky. L. Rep. 1187.

Louisiana.— Settoon *v.* Texas, etc., R. Co., 48 La. Ann. 807, 19 So. 759.

Massachusetts.— Burke *v.* Boston, etc., R. Co., 195 Mass. 179, 80 N. E. 695; Griswold *v.* Boston, etc., R. Co., 183 Mass. 434, 67 N. E. 354.

Mississippi.— Illinois Cent. R. Co. *v.* Lucas, 89 Miss. 411, 42 So. 607; Illinois Cent. R. Co. *v.* Arnola, 78 Miss. 787, 29 So. 768, 84 Am. St. Rep. 645.

of way by the express or implied consent or invitation of the railroad company,[67] as where the public has habitually passed across or along the right of way at a certain place for a long time with the company's knowledge or consent,[68] a railroad company has reason to anticipate his presence on the track at such point

Missouri.— Carr *v.* Missouri Pac. R. Co., 195 Mo. 214, 92 S. W. 874.

New Jersey.— Devoe *v.* New York, etc., R. Co., 63 N. J. L. 276, 43 Atl. 899.

New York.— Sutton *v.* New York Cent., etc., R. Co., 66 N. Y. 243 [*reversing* 4 Hun 760]; Rosenthal *v.* New York, etc., R. Co., 112 N. Y. App. Div. 431, 98 N. Y. Suppl. 476; Meneo *v.* New Jersey Cent. R. Co., 84 N. Y. Suppl. 448.

North Carolina.— Willis *v.* Atlantic, etc., R. Co., 122 N. C. 905, 29 S. E. 941.

Virginia.— Norfolk, etc., R. Co. *v.* Wood, 99 Va. 156, 37 S. E. 846.

United States.— Pennsylvania R. Co. *v.* Martin, 111 Fed. 586, 49 C. C. A. 474, 55 L. R. A. 361; Cleveland, etc., R. Co. *v.* Tartt, 64 Fed. 823, 12 C. C. A. 618.

See 41 Cent. Dig. tit. "Railroads," § 1236.

A departure in some degree or particular from the ordinary course of procedure will not make the railroad company liable for an injury resulting therefrom, unless the doing of an act is shown which might reasonably be expected to cause injury to a person lawfully on the track under a license. Sutton *v.* New York Cent., etc., R. Co., 66 N. Y. 243 [*reversing* 4 Hun 760].

Degree of care.— As to active or unstable surroundings or conditions put in motion or caused by a railroad company it owes to a licensee on its right of way a degree of care reasonably commensurate to the known danger; but as to mere accommodations for travel and danger incident to fixed and long established conditions or surroundings, it owes such person no duty. Illinois Cent. R. Co. *v.* Parkhurst, 106 Ill. App. 467.

Licensee traveling alongside of track.— Toward the public traveling on a roadway alongside of a track as licensees rather than by virtue of any legal right, the railroad company is not required to exercise any greater care than toward those traveling on a public highway parallel to its tracks. Illinois Cent. R. Co. *v.* Schmitt, 100 Ill. App. 490.

67. *California.*— Hansen *v.* Southern Pac. Co., 105 Cal. 379, 38 Pac. 957.

Illinois.— Illinois Cent. R. Co. *v.* Eicher, 202 Ill. 556, 67 N. E. 376 [*reversing* 100 Ill. App. 599]; Elgin, etc., R. Co. *v.* Thomas, 115 Ill. App. 508 [*affirmed* in 215 Ill. 158, 74 N. E. 109]; Southern R. Co. *v.* Drake, 107 Ill. App. 12.

Iowa.— Croft *v.* Chicago, etc., R. Co., 134 Iowa 411, 109 N. W. 723.

New Jersey.— Devoe *v.* New York, etc., R. Co., 63 N. J. L. 276, 43 Atl. 899.

New York.— Flynn *v.* New Jersey Cent. R. Co., 142 N. Y. 439, 37 N. E. 514.

South Carolina.— Boggeno *v.* Southern R. Co., 64 S. C. 104, 41 S. E. 819.

Texas.— International, etc., R. Co. *v.* Howell, (Civ. App. 1907) 105 S. W. 560 [*affirmed* in (1908) 111 S. W. 142]; Law *v.* Missouri, etc., R. Co., 29 Tex. Civ. App. 134, 67 S. W. 1025.

United States.— Northern Pac. R. Co. *v.* Jones, 144 Fed. 47, 75 C. C. A. 205; Tutt *v.* Illinois Cent. R. Co., 104 Fed. 741, 44 C. C. A. 320.

England.— Marfell *v.* South Wales R. Co., 8 C. B. N. S. 525, 7 Jur. N. S. 290, 29 L. J. C. P. 315, 2 L. T. Rep. N. S. 629, 8 Wkly. Rep. 765, 98 E. C. L. 525.

Canada.— Collier *v.* Michigan Cent. R. Co., 27 Ont. App. 630.

See 41 Cent. Dig. tit. "Railroads," § 1236.

The gist of the liability in such cases consists in the fact that the person injured did not act merely on motives of his own, to which no sign of the owner or occupier contributed; but that he entered the premises because he was led by the acts or conduct of the owner or occupier to believe that the premises were intended to be used in the manner in which he used them, and that such use was not only acquiesced in but was in accordance with the intention or design for which the way or place was adapted and prepared or allowed to be used. Devoe *v.* New York, etc., R. Co., 63 N. J. L. 276, 43 Atl. 899.

68. *Illinois.*— St. Louis Nat. Stock Yards *v.* Brennan, 126 Ill. App. 601.

Missouri.— Frye *v.* St. Louis, etc., R. Co., 200 Mo. 377, 98 S. W. 566, 8 L. R. A. N. S. 1069.

New York.— Swift *v.* Staten Island Rapid Transit R. Co., 123 N. Y. 645, 25 N. E. 378 [*affirming* 52 Hun 614, 5 N. Y. Suppl. 316]; McCarty *v.* New York Cent., etc., R. Co., 73 N. Y. App. Div. 34, 76 N. Y. Suppl. 321 (holding that where boatmen had possessed the right and been in the habit for many years of passing along a railroad track, the company was presumed to know of this custom and was bound to exercise reasonable care for their protection); Larkin *v.* New York, etc., R. Co., 19 N. Y. Suppl. 479; Winslow *v.* Boston, etc., R. Co., 11 N. Y. St. 831.

Ohio.— Harriman *v.* Pittsburgh, etc., R. Co., 45 Ohio St. 11, 12 N. E. 451, 4 Am. St. Rep. 507; Baltimore, etc., R. Co. *v.* Campbell, 28 Ohio Cir. Ct. 662.

South Carolina.— Jones *v.* Charleston, etc., R. Co., 65 S. C. 410, 33 S. E. 884.

Texas.— Over *v.* Missouri, etc., R. Co., (Civ. App. 1903) 73 S. W. 535; Texas, etc., R. Co. *v.* Phillips, (Civ. App. 1897) 40 S. W. 344. See also Missouri, etc., R. Co. *v.* Brown, (Civ. App. 1907) 101 S. W. 464.

Virginia.— Williamson *v.* Southern R. Co., 104 Va. 146, 51 S. E. 195, 70 L. R. A. 1007.

Wisconsin.— Davis *v.* Chicago, etc., R. Co., 58 Wis. 646, 17 N. W. 406, 46 Am. Rep. 667; Delaney *v.* Milwaukee, etc., R. Co., 33 Wis. 67.

and is bound to use reasonable care to avoid injuring him, even though the employees in charge of the engine or cars which caused the injury were ignorant of such custom,[69] or were unaware of his presence on the track.[70]

(B) *Children.* The above rules also apply to children who are on the track. If the child is thereon as a licensee without invitation, the railroad company owes it no duty except not to wantonly or wilfully injure it,[71] unless its presence is known to the railroad employees, in which case reasonable care should be used to protect it from danger.[72] Likewise where the company has reason to expect that children will be on the track at a certain point, it is under the duty of using ordinary care to discover their presence and avoid injuring them.[73]

(III) *As to Trespassers Generally* — (A) *In General.* While the mere fact that a person injured is a trespasser will not generally relieve a railroad company from liability for its negligence in causing such injury,[74] as a general rule a railroad company is under no duty or obligation to exercise active vigilance to provide against injury to trespassers on its tracks or right of way until their presence is known,[75] particularly where the track is fenced and in the vicinity of signs

United States.— Cahill *v.* Chicago, etc., R. Co., 74 Fed. 285, 20 C. C. A. 184.

See 41 Cent. Dig. tit. "Railroads," § 1236.

69. Over *v.* Missouri, etc., R. Co., (Tex. Civ. App. 1903) 73 S. W. 535.

70. Elgin, etc., R. Co. *v.* Thomas, 115 Ill. App. 508 [*affirmed* in 215 Ill. 158, 74 N. E. 109].

71. Cleveland, etc., R. Co. *v.* Adair, 12 Ind. App. 569, 39 N. E. 672, 40 N. E. 822; Byrnes *v.* Boston, etc., R. Co., 181 Mass. 322, 63 N. E. 897; Schug *v.* Chicago, etc., R. Co., 102 Wis. 515, 78 N. W. 1090.

A railroad company need not keep or warn boys off a public street used by it. Le Beau *v.* Pittsburg, etc., R. Co., 69 Ill. App. 557.

72. Devereaux *v.* Thornton, 4 Ohio Dec. (Reprint) 449, 2 Clev. L. Rep. 177, holding that where a child six years old is on a railroad track near where the trains of the railroad company stop and move frequently, the company is not relieved from liability merely by ordering the child to go away from such vicinity, but it should see that it does go away.

73. See *infra*, X, E, 2, a, (VIII), (B), (3).

74. Jackson *v.* Kansas City, etc., R. Co., 157 Mo. 621, 58 S. W. 32, 80 Am. St. Rep. 650; Patton *v.* East Tennessee, etc., R. Co., 89 Tenn. 370, 15 S. W. 919, 12 L. R. A. 184 (holding, however, that such fact constitutes contributory negligence to be considered by the jury); Houston East, etc., Texas R. Co. *v.* Adams, 44 Tex. Civ. App. 288, 98 S. W. 222.

75. *Alabama.*— Birmingham R., etc., Co. *v.* Jones, (1907) 45 So. 177; Southern R. Co. *v.* Stewart, (1907) 45 So. 51.

Arkansas.— St. Louis Southwestern R. Co. *v.* Bryant, 81 Ark. 368, 99 S. W. 693.

Connecticut.— Nolan *v.* New York, etc., R. Co., 53 Conn. 461, 4 Atl. 106.

Georgia.— Southern R. Co. *v.* Chatman, 124 Ga. 1026, 53 S. E. 692, 6 L. R. A. N. S. 283. See Holmes *v.* Central R., etc., Co., 37 Ga. 593.

Illinois.— James *v.* Illinois Cent. R. Co., 195 Ill. 327, 63 N. E. 153 [*affirming* 93 Ill. App. 294]; McLain *v.* Chicago, etc., R. Co., 121 Ill. App. 614; Kinnare *v.* Chicago, etc., R. Co., 114 Ill. App. 230; Cleveland, etc., R. Co. *v.* Largent, 108 Ill. App. 650.

Indiana.— Brooks *v.* Pittsburgh, etc., R. Co., 158 Ind. 62, 62 N. E. 694.

Iowa.— Earl *v.* Chicago, etc., R. Co., 109 Iowa 14, 79 N. W. 381, 77 Am. St. Rep. 516; Thomas *v.* Chicago, etc., R. Co., 103 Iowa 649, 72 N. W. 783, 39 L. R. A. 399; Baker *v.* Chicago, etc., R. Co., 95 Iowa 163, 63 N. W. 667. *Compare* Clampit *v.* Chicago, etc., R. Co., 84 Iowa 71, 50 N. W. 673.

Kansas.— Mason *v.* Missouri Pac. R. Co., 27 Kan. 83, 41 Am. Rep. 405.

Kentucky.— Goodman *v.* Louisville, etc., R. Co., 116 Ky. 900, 77 S. W. 174, 25 Ky. L. Rep. 1086, 63 L. R. A. 657; Davis *v.* Chesapeake, etc., R. Co., 116 Ky. 144, 75 S. W. 275, 25 Ky. L. Rep. 342 [opinion in 70 S. W. 857, 24 Ky. L. Rep. 1125 withdrawn] Brown *v.* Louisville, etc., R. Co., 97 Ky. 228, 30 S. W. 639, 17 Ky. L. Rep. 145; Shackleford *v.* Louisville, etc., R. Co., 84 Ky. 43, 4 Am. St. Rep. 189; Adams *v.* Louisville, etc., R. Co., 104 S. W. 363, 31 Ky. L. Rep. 987; Smith *v.* Illinois Cent. R. Co., 90 S. W. 254, 28 Ky. L. Rep. 723; Yates *v.* Illinois Cent. R. Co., 89 S. W. 161, 28 Ky. L. Rep. 75; Chesapeake, etc., R. Co. *v.* See, 79 S. W. 252, 25 Ky. L. Rep. 1995; Gregory *v.* Louisville, etc., R. Co., 79 S. W. 238, 25 Ky. L. Rep. 1986; Louisville, etc., R. Co. *v.* Vittitoe, 41 S. W. 269, 19 Ky. L. Rep. 612; Embry *v.* Louisville, etc., R. Co., 36 S. W. 1123, 18 Ky. L. Rep. 434.

Louisiana.— Gilliam *v.* Texas, etc., R. Co., 114 La. 272, 38 So. 166; O'Connor *v.* Illinois Cent. R. Co., 44 La. Ann. 339, 10 So. 678; Reary *v.* Louisville, etc., R. Co., 40 La. Ann. 32, 3 So. 390, 8 Am. St. Rep. 497.

Massachusetts.— McCreary *v.* Boston, etc., R. Co., 156 Mass. 316, 31 N. E. 126.

Minnesota.— Ellington *v.* Great Northern R. Co., 96 Minn. 176, 104 N. W. 827.

Mississippi.— Christian *v.* Illinois Cent. R. Co., 71 Miss. 237, 15 So. 71.

Missouri.— Barney *v.* Hannibal, etc., R. Co., 126 Mo. 372, 28 S. W. 1069, 26 L. R. A.

warning people to keep off the tracks;[76] and is only bound to abstain from wantonly, recklessly, or wilfully injuring a trespasser,[77] and to exercise reasonable

847; Reyner *v.* Kansas City, etc., R. Co., 86 Mo. App. 521.

New Hampshire.— Shea *v.* Concord, etc., R. Co., 69 N. H. 361, 41 Atl. 774.

Oregon.— Ward *v.* Southern Pac. Co., 25 Oreg. 433, 36 Pac. 166, 23 L. R. A. 715.

Pennsylvania.— Philadelphia, etc., R. Co. *v.* Hummell, 44 Pa. St. 375, 84 Am. Dec. 457.

South Carolina.— Carter *v.* Columbia, etc., R. Co., 19 S. C. 20, 45 Am. Rep. 754.

Texas.— McCoy en *v.* Gulf, etc., R. Co., (Civ. App. 1903) 73 S. W. 46.

Virginia.— Chesapeake, etc., R. Co. *v.* Farrow, 106 Va. 137, 55 S. E. 569; Norfolk, etc., R. Co. *v.* Wood, 99 Va. 156, 37 S. E. 846.

Washington.— Dotta *v.* Northern Pac. R. Co., 36 Wash. 506, 79 Pac. 32.

United States.— Cleveland, etc., R. Co. *v.* Tartt, 99 Fed. 369, 39 C. C. A. 568; Sheehan *v.* St. Paul, etc., R. Co., 76 Fed. 201, 22 C. C. A. 121.

England.— Harrison *v.* North Eastern R. Co., 29 L. T. Rep. N. S. 844, 22 Wkly. Rep. 335.

See 41 Cent. Dig. tit. "Railroads," § 1238.

That the trespasser might have been seen before he was, or that the train was running at a dangerous or illegal rate of speed, is merely evidence of negligence which in such cases does not give a right of action for the injury. Cleveland, etc., R. Co. *v.* Tartt, 99 Fed. 369, 39 C. C. A. 568.

76. Frye *v.* St. Louis, etc., R. Co., 200 Mo. 377, 98 S. W. 566, 8 L. R. A. N. S. 1069.

77. *Alabama.*— Southern R. Co. *v.* Stewart, (1907) 45 So. 51; Verner *v.* Alabama Great Southern R. Co., 103 Ala. 574, 15 So. 872; Glass *v.* Memphis, etc., R. Co., 94 Ala. 581, 10 So. 215.

Delaware.— Tully *v.* Philadelphia, etc., R. Co., 3 Pennew. 455, 50 Atl. 95; Patterson *v.* Philadelphia, etc., R. Co., 4 Houst. 103.

Georgia.— Kendrick *v.* Seaboard Air-Line R. Co., 121 Ga. 775, 49 S. E. 762; Seaboard Air-Line R. Co. *v.* Shigg, 117 Ga. 454, 43 S. E. 706; Ashworth *v.* Southern R. Co., 116 Ga. 635, 43 S. E. 36, 59 L. R. A. 592; Grady *v.* Georgia R., etc., Co., 112 Ga. 668, 37 S. E. 861; Western, etc., R. Co. *v.* Meigs, 74 Ga. 857.

Illinois.— Bartlett *v.* Wabash R. Co., 220 Ill. 163, 77 N. E. 96 [*affirming* 116 Ill. App. 67]; Illinois Cent. R. Co. *v.* Eicher, 202 Ill. 556, 67 N. E. 376 [*reversing* 100 Ill. App. 599]; James *v.* Illinois Cent. R. Co., 195 Ill. 327, 63 N. E. 153 [*affirming* 93 Ill. App. 294]; Blanchard *v.* Lake Shore, etc., R. Co., 126 Ill. 416, 18 N. E. 799, 9 Am. St. Rep. 630; Janowicz *v.* Pittsburgh, etc., R. Co., 124 Ill. App. 149; McLaughlin *v.* Chicago, etc., R. Co., 115 Ill. App. 262; Kinnare *v.* Chicago, etc., R. Co., 114 Ill. App. 230; Cleveland, etc., R. Co. *v.* Cline, 111 Ill. App. 416, 424; Cleveland, etc., R. Co. *v.* Largent, 108 Ill. App. 650; Belt R. Co. *v.* Banicki, 102 Ill. App. 642; Griffin *v.* Chicago, etc., R. Co., 101 Ill. App. 284; Union Stock Yard, etc., Co. *v.* Goodman, 91 Ill. App. 426; Jelinski *v.* Belt R. Co., 86 Ill. App. 535; Robards *v.* Wabash R. Co., 84 Ill. App. 477; Meehan *v.* Chicago, etc., R. Co., 67 Ill. App. 39; Eggmann *v.* St. Louis, etc., R. Co., 47 Ill. App. 507.

Indiana.— Jordan *v.* Grand Rapids, etc., R. Co., 162 Ind. 464, 70 N. E. 524, 102 Am. St. Rep. 217; Chicago, etc., R. Co. *v.* Hedges, 105 Ind. 398, 7 N. E. 801; Terre Haute, etc., R. Co. *v.* Graham, 95 Ind. 286, 48 Am. Rep. 719.

Massachusetts.— Wright *v.* Boston, etc., R. Co., 142 Mass. 296, 7 N. E. 866; Johnson *v.* Boston, etc., R. Co., 125 Mass. 75.

Michigan.— Trudell *v.* Grand Trunk R. Co., 126 Mich. 73, 85 N. W. 250, 53 L. R. A. 271.

Minnesota.— Ellington *v.* Great Northern R. Co., 96 Minn. 176, 104 N. W. 827; Lando *v.* Chicago, etc., R. Co., 81 Minn. 279, 83 N. W. 1089.

Mississippi.— Dooley *v.* Mobile, etc., R. Co., 69 Miss. 648, 12 So. 956; Louisville, etc., R. Co. *v.* Williams, 69 Miss. 631, 12 So. 957.

New Hampshire.— See Brown *v.* Boston, etc., R. Co., 73 N. H. 568, 64 Atl. 1941, holding that Laws (1899), c. 75, § 2, limiting a railroad company's civil liability to persons injured while engaged in any act prohibited by section 1 to damages occasioned by its "wilful or gross negligence" does not limit the company's liability to damages occasioned by wilful or gross negligence in an action for injuries caused to a person while walking by the side of the track in the absence of a posted notice forbidding such use of the track.

New York.— Rosenthal *v.* New York, etc., R. Co., 112 N. Y. App. Div. 431, 98 N. Y. Suppl. 476; Clarke *v.* New York Cent., etc., R. Co., 104 N. Y. App. Div. 167, 93 N. Y. Suppl. 525; Le Duc *v.* New York Cent., etc., R. Co., 92 N. Y. App. Div. 107, 87 N. Y. Suppl. 364; Riordan *v.* New York Cent., etc., R. Co., 41 Misc. 399, 84 N. Y. Suppl. 1046.

Ohio.— Wabash R. Co. *v.* Norway, 7 Ohio Cir. Ct. 449, 4 Ohio Cir. Dec. 674; Driscoll *v.* Cincinnati, etc., R. Co., 1 Ohio Cir. Ct. 493, 1 Ohio Cir. Dec. 274.

Pennsylvania.— Bourke *v.* Delaware, etc., R. Co., 1 Lack. Leg. Rec. 108.

South Carolina.— Haltiwanger *v.* Columbia, etc., R. Co., 64 S. C. 7, 41 S. E. 810.

Texas.— Houston, etc., R. Co. *v.* Boozer, 2 Tex. Unrep. Cas. 452, holding that the negligence of the company must be so gross that it would have been liable for exemplary damages in case death had ensued.

Utah.—Heru *v.* Southern Pac. Co., 29 Utah 127, 81 Pac. 902.

Virginia.— Norfolk, etc., R. Co. *v.* Wood, 99 Va. 156, 37 S. E. 846.

West Virginia.— Huff *v.* Chesapeake, etc., R. Co., 48 W. Va. 45, 35 S. E. 866.

United States.— Grand Trunk R. Co. *v.* Flagg, 156 Fed. 359, 84 C. C. A. 263; Kansas

care to avoid injuring him after discovering his peril.[73] A trespasser cannot complain of a failure of a railroad company to observe a statute regulating the

City, etc., R. Co. *v.* Cook, 66 Fed. 115, 13 C. C. A. 364, 28 L. R. A. 181.

See 41 Cent. Dig. tit. "Railroads," § 1238.

Where a person lying on the track in an unconscious condition is killed, it is immaterial, in the absence of gross negligence on the part of the railroad company, whether such condition is the result of intoxication, or is caused by fever or some uncontrollable circumstance. Missouri Pac. R. Co. *v.* Brown, (Tex. 1891) 18 S. W. 670.

78. *Alabama.*— Southern R. Co. *v.* Stewart, (1907) 45 So. 51.

Arkansas.— St. Louis Southwestern R. Co. *v.* Bryant, 81 Ark. 368, 99 S. W. 693.

Georgia.—Southern R. Co. *v.* Chatman, 124 Ga. 1026, 53 S. E. 692, 6 L. R. A. N. S. 283; Hambright *v.* Western, etc., R. Co., 112 Ga. 36, 37 S. E. 99; Atlanta, etc., Air-Line R. *v.* Gravitt, 93 Ga. 369, 20 S. E. 550, 44 Am. St. Rep. 145, 26 L. R. A. 553; Atlanta, etc., Air-Line R. Co. *v.* Leach, 91 Ga. 419, 17 S. E. 619, 44 Am. St. Rep. 47.

Illinois.— Bartlett *v.* Wabash R. Co., 220 Ill. 163, 77 N. E. 96 [*affirming* 116 Ill. App. 67]; Illinois Cent. R. Co. *v.* Eicher, 202 Ill. 556, 67 N. E. 376 [*reversing* 100 Ill. App. 599]; Chicago Terminal Transfer R. Co. *v.* Gruss, 200 Ill. 195, 65 N. E. 693 [*affirming* 102 Ill. App. 439]; James *v.* Illinois Cent. R. Co., 195 Ill. 327, 63 N. E. 153 [*affirming* 93 Ill. App. 294]; Pittsburg, etc., R. Co. *v.* Bumstead, 48 Ill. 221, 95 Am. Dec. 539; McGuire *v.* Chicago, etc., R. Co., 120 Ill. App. 111.

Indiana.—Chicago, etc., R. Co. *v.* Pritchard, 168 Ind. 398, 79 N. E. 508, 81 N. E. 78, 9 L. R. A. N. S. 857 [*affirming* 39 Ind. App. 701, 78 N. E. 1044]; Jordan *v.* Grand Rapids, etc., R. Co., 162 Ind. 464, 70 N. E. 524, 102 Am. St. Rep. 217; Parker *v.* Pennsylvania Co., 134 Ind. 673, 34 N. E. 504, 23 L. R. A. 552.

Kentucky.— Chesapeake, etc., R. Co. *v.* Nipp, 125 Ky. 49, 100 S. W. 246, 30 Ky. L. Rep. 1131; Louisville, etc., R. Co. *v.* Redmon, 122 Ky. 385, 91 S. W. 722, 28 Ky. L. Rep. 1293; Davis *v.* Chesapeake, etc., R. Co., 116 Ky. 144, 75 S. W. 275, 25 Ky. L. Rep. 342 [opinion in 70 S. W. 857, 24 Ky. L. Rep. 1125 withdrawn]; Louisville, etc., R. Co. *v.* Hocker, 111 Ky. 707, 64 S. W. 638, 65 S. W. 119, 23 Ky. L. Rep. 982, 1274; Brown *v.* Louisville, etc., R. Co., 97 Ky. 228, 30 S. W. 639, 17 Ky. L. Rep. 145; Adams *v.* Louisville, etc., R. Co., 104 S. W. 363, 31 Ky. L. Rep. 987; Prince *v.* Illinois Cent. R. Co., 99 S. W. 293, 30 Ky. L. Rep. 469; Beiser *v.* Chesapeake, etc., R. Co., 92 S. W. 928, 29 Ky. L. Rep. 249; Smith *v.* Illinois Cent. R. Co., 90 S. W. 254, 28 Ky. L. Rep. 723; Yates *v.* Illinois Cent. R. Co., 89 S. W. 161, 28 Ky. L. Rep. 75; Manning *v.* Illinois Cent. R. Co., 84 S. W. 565, 27 Ky. L. Rep. 142; Maysville, etc., R. Co. *v.* McCabe, 82 S. W. 233, 26 Ky. L. Rep. 532; Wilmuth *v.* Illinois Cent. R. Co., 76 S. W. 193, 25 Ky. L. Rep. 671; Chesapeake, etc., R. Co. *v.* Perkins, 47 S. W. 259, 20 Ky. L. Rep. 608; Louisville, etc., R. Co. *v.* Vittitoe, 41 S. W. 269, 19 Ky. L. Rep. 612; Embry *v.* Louisville, etc., R. Co., 36 S. W. 1123, 18 Ky. L. Rep. 434; Eastern Kentucky R. Co. *v.* Powell, 33 S. W. 629, 17 Ky. L. Rep. 1051; Gherkins *v.* Louisville, etc., R. Co., 30 S. W. 651, 17 Ky. L. Rep. 201.

Minnesota.— Hepfel *v.* St. Paul, etc., R. Co., 49 Minn. 263, 51 N. W. 1049.

Mississippi.— Christian *v.* Illinois Cent. R. Co., 71 Miss. 237, 15 So. 71; Mobile, etc., R. Co. *v.* Watly, 69 Miss. 145, 13 So. 825.

Missouri.— Rine *v.* Chicago, etc., R. Co., 88 Mo. 392; Burde *v.* Chicago, etc., R. Co., 123 Mo. App. 629, 100 S. W. 509.

Nebraska.— Chicago, etc., R. Co. *v.* Wilgus, 40 Nebr. 660, 58 N. W. 1125; Chicago, etc., R. Co. *v.* Wymore, 40 Nebr. 645, 58 N. W. 1120.

New Hampshire.— Brown *v.* Boston, etc., R. Co., 73 N. H. 568, 64 Atl. 194.

New York.— Remer *v.* Long Island R. Co., 48 Hun 352, 1 N. Y. Suppl. 124.

North Carolina.— Harris *v.* Atlantic Coast Line R. Co., 132 N. C. 160, 43 S. E. 589; Perry *v.* Western North Carolina R. Co., 128 N. C. 471, 39 S. E. 27; Norwood *v.* Raleigh, etc., R. Co., 111 N. C. 236, 16 S. E. 4; Lay *v.* Richmond, etc., R. Co., 106 N. C. 404, 11 S. E. 412.

Ohio.— Erie R. Co. *v.* McCormick, 69 Ohio St. 45, 68 N. E. 571; Cleveland, etc., R. Co. *v.* Gahan, 24 Ohio Cir. Ct. 277 [*distinguishing* Lake Shore, etc., R. Co. *v.* Orvis, 12 Ohio Cir. Ct. 710, 4 Ohio Cir. Dec. 452].

Tennessee.— East Tennessee, etc., R. Co. *v.* Fain, 12 Lea 35.

Texas.— Houston, etc., R. Co. *v.* Ramsey, 43 Tex. Civ. App. 603, 97 S. W. 1067; Smith *v.* International, etc., R. Co., 34 Tex. Civ. App. 209, 78 S. W. 556; Over *v.* Missouri, etc., R. Co., (Civ. App. 1903) 73 S. W. 535; McCowen *v.* Gulf, etc., R. Co., (Civ. App. 1903) 73 S. W. 46.

Virginia.— Chesapeake, etc., R. Co. *v.* Farrow, 106 Va. 137, 55 S. E. 569; Seaboard, etc., R. Co. *v.* Vaughan, 104 Va. 113, 51 S. E. 452.

United States.— Texas, etc., R. Co. *v.* Modawell, 151 Fed. 421, 80 C. C. A. 651, 9 L. R. A. N. S. 646; Tutt *v.* Illinois Cent. R. Co., 104 Fed. 741, 44 C. C. A. 320.

See 41 Cent. Dig. tit. "Railroads," § 1238.

Where a station agent is notified that a trespasser, in a helpless condition, is on the track ahead of a train, his failure to notify the operators of the train renders the company liable for the trespasser's death. Glenn *v.* Louisville, etc., R. Co., 90 S. W. 975, 28 Ky. L. Rep. 949.

Where by reason of night and a curve in the track the operators of a train could not see a trespasser on the track until it was too late to prevent injury, the railroad company is not responsible. Hoback *v.* Louisville, etc., R. Co., 99 S. W. 241, 30 Ky. L. Rep. 476.

[X, E, 2, a, (III), (A)]

movement of trains.[79] While in some jurisdictions in order to render the railroad company liable for its failure to exercise ordinary care there must be actual knowledge of the trespasser's peril imputable to the company,[80] in most jurisdictions the company is under the duty of using reasonable care to discover and avoid injuring trespassers whom it has reason to anticipate may be on the tracks,[81] as where within the company's knowledge persons have been accustomed to be on the tracks at a certain place,[82] as in a city or thickly settled community where persons are likely to be found trespassing.[83]

79. Chicago, etc., R. Co. *v.* Moran, 129 Ill. App. 38.

The failure to observe a statutory duty does not render a railroad company liable to a trespasser unless the injury was wanton or wilful. Chicago, etc., R. Co. *v.* Tice, 111 Ill. App. 161; Chesapeake Beach R. Co, *v.* Donahue, 107 Md. 119, 68 Atl. 507, failure to stop for a half minute at stations as required by Code Pub. Gen. Laws, art. 23, § 266.

80. Cleveland, etc., R. Co. *v.* Largent, 108 Ill. App. 650; Thomas *v.* Chicago, etc., R. Co., 103 Iowa 649, 72 N. W. 783, 39 L. R. A. 399; Smith *v.* Illinois Cent. R. Co., 90 S. W. 254, 28 Ky. L. Rep. 723; Erie R. Co. *v.* McCormick, 69 Ohio St. 45, 68 N. E. 571.

81. *Georgia.*— Southern R. Co. *v.* Chatman, 124 Ga. 1026, 53 S. E. 692, 6 L. R. A. N. S. 283; Ashworth *v.* Southern R. Co., 116 Ga. 635, 43 S. E. 36, 59 L. R. A. 592. In this state the duty to observe ordinary care to a trespasser on a track does not devolve on the company's employees until his presence is known to them, but where the circumstances are such that the employees are bound on a given occasion to anticipate that persons may be on the track at a certain place, they must take such precautions to prevent injury as will meet the requirements of ordinary care and diligence. Southern R. Co. *v.* Chatman, *supra*; Hambright *v.* Western, etc., R. Co., 112 Ga. 36, 37 S. E. 99.

Missouri.— Eppstein *v.* Missouri Pac. R. Co., 197 Mo. 720, 94 S. W. 967; Koegel *v.* Missouri Pac. R. Co., 181 Mo. 379, 80 S. W. 905.

Nebraska.— Chicago, etc., R. Co. *v.* Wilgus, 40 Nebr. 660, 58 N. W. 1125; Chicago, etc., R. Co. *v.* Wymore, 40 Nebr. 645, 58 N. W. 1120.

New Hampshire.— Brown *v.* Boston, etc., R. Co., 73 N. H. 568, 64 Atl. 194; Myers *v.* Boston, etc., R. Co., 72 N. H. 175, 55 Atl. 892; Shea *v.* Concord, etc., R. Co., 69 N. H. 361, 41 Atl. 774; Mitchell *v.* Boston, etc., R. Co., 68 N. H. 96, 34 Atl. 674; Felch *v.* Concord R. Co., 66 N. H. 318, 29 Atl. 557.

Oregon.— Cassida *v.* Oregon R., etc., Co., 14 Oreg. 551, 13 Pac. 438.

Virginia.— Norfolk, etc., R. Co. *v.* Wood, 99 Va. 156, 37 S. E. 846.

Washington.— Dotta *v.* Northern Pac. R. Co., 36 Wash. 506, 79 Pac. 32.

See 41 Cent. Dig. tit. "Railroads," § 1238.

That the railroad company knows of the presence of a large crowd of people at a picnic ground on the railroad line does not impose on the company the duty of anticipating that any of those persons will trespass upon a railroad trestle situated some distance from the picnic ground, in violation of warning notices erected thereon. Smith *v.* Illinois Cent. R. Co., 90 S. W. 254, 28 Ky. L. Rep. 723.

82. *Delaware.*— Patterson *v.* Philadelphia, etc., R. Co., 4 Houst. 103.

Georgia.— Macon, etc., R. Co. *v.* Parker, 127 Ga. 471, 56 S. E. 616.

Kentucky.— Louisville, etc., R. Co. *v.* Daniel, 91 S. W. 691, 28 Ky. L. Rep. 1146, 3 L. R. A. N. S. 1190.

Missouri.— Koegel *v.* Missouri Pac. R. Co., 181 Mo. 379, 80 S. W. 905. Mo. Rev. St. (1889) § 2611, providing that if any person not connected with or employed on the railroad shall walk on the track except where the track is laid along a publicly traveled road and be injured thereby, he shall be deemed a trespasser in any action brought therefor, does not destroy plaintiff's right of recovery, since such statute only means that under such circumstances the walking on the track is to be considered negligence *per se* and will defeat a recovery in a case where contributory negligence would defeat it and does not relieve the company from all duty of exercising care toward a trespasser. Morgan *v.* Wabash R. Co., 159 Mo. 262, 60 S. W. 195.

North Carolina.— Norwood *v.* Raleigh, etc., R. Co., 111 N. C. 236, 16 S. E. 4.

South Carolina.— Carter *v.* Columbia, etc., R. Co., 19 S. C. 20, 45 Am. Rep. 754.

Texas.— Texas, etc., R. Co. *v.* Watkins, 88 Tex. 20, 29 S. W. 232; St. Louis, etc., R. Co. *v.* Crosnoe, 72 Tex. 79, 10 S. W. 342; International, etc., R. Co. *v.* Ploeger, (Civ. App. 1906) 93 S. W. 226; Texas, etc., R. Co. *v.* Barrett, 23 Tex. Civ. App. 545, 57 S. W. 602; St. Louis, etc., R. Co. *v.* Shifflet, (Civ. App. 1900) 56 S. W. 697.

Virginia.—Blankenship *v.* Chesapeake, etc., R. Co., 94 Va. 449, 27 S. E. 20.

See 41 Cent. Dig. tit. "Railroads," § 1238.

Where an unfenced railroad track is quite generally used as a highway by the public those in charge of passing engines are bound to use reasonable diligence to prevent injury to persons on the track. Corbett *v.* Oregon Short Line Co., 25 Utah 449, 71 Pac. 1065.

83. Brown *v.* Louisville, etc., R. Co., 97 Ky. 228, 30 S. W. 639, 17 Ky. L. Rep. 145; Illinois Cent. R. Co. *v.* Murphy, 97 S. W. 729, 30 Ky. L. Rep. 93; Chesapeake, etc., R. Co. *v.* Perkins, 47 S. W. 259, 20 Ky. L. Rep. 608; Pennsylvania R. Co. *v.* Lewis, 79 Pa. St. 33; Young *v.* Clark, 16 Utah 42, 50 Pac. 832;

(B) *Children.*[84] The above rules also apply to children as trespassers; and while the age or discretion of a child is to be considered in determining the question of negligence or contributory negligence,[85] yet it may become a trespasser, and as a general rule a railroad company owes no greater duty to it than to an adult,[86] and is not bound to use active vigilance to discover a child's presence, or to provide against injuring it;[87] but it is bound only to abstain from wilful or wanton injury,[88] and to exercise ordinary care to avoid injuring the child after discovering its peril,[89] or where it has reason to anticipate that a child will be

Lindsay *v.* Canadian Pac. R. Co., 68 Vt. 556, 35 Atl. 513.

84. Injuries to children on turn-tables see NEGLIGENCE, 29 Cyc. 463.

85. Mack *v.* South Bound R. Co., 52 S. C. 323, 29 S. E. 905, 68 Am. St. Rep. 913, 40 L. R. A. 679. And see *infra*, X, E, 4, a, (IV), (A).

86. Alabama Great Southern R. Co. *v.* Moorer, 116 Ala. 642, 22 So. 900; Lake Shore, etc., R. Co. *v.* Clark, 41 Ill. App. 343; Felton *v.* Aubrey, 74 Fed. 350, 20 C. C. A. 436.

87. *Georgia.*— Southern R. Co. *v.* Chatman, 124 Ga. 1026, 53 S. E. 692, 6 L. R. A. N. S. 283; Nashville, etc., R. Co. *v.* Priest, 117 Ga. 767, 45 S. E. 35; Southern R. Co. *v.* Eubanks, 117 Ga. 217, 43 S. E. 487.

Illinois.— Fitzgerald *v.* Chicago, etc., R. Co., 114 Ill. App. 118; Haberlau *v.* Lake Shore, etc., R. Co., 73 Ill. App. 261, holding that there is no duty on a railroad company to see that children do not climb upon its trains at street crossings.

Iowa.— Wagner *v.* Chicago, etc., R. Co., 124 Iowa 462, 100 N. W. 332; Horn *v.* Chicago, etc., R. Co., 124 Iowa 281, 99 N. W. 1068; Thomas *v.* Chicago, etc., R. Co., 93 Iowa 248, 61 N. W. 967.

Kentucky.— Jackson *v.* Louisville, etc., R. Co., 46 S. W. 5, 20 Ky. L. Rep. 309.

Michigan.— Hamilton *v.* Detroit, etc., R. Co., 142 Mich. 56, 105 N. W. 82; Bledsoe *v.* Grand Trunk R. Co., 126 Mich. 312, 85 N. W. 738.

Minnesota.— Ellington *v.* Great Northern R. Co., 96 Minn. 176, 104 N. W. 827.

New Jersey.— Delaware, etc., R. Co. *v.* Reich, 61 N. J. L. 635, 40 Atl. 682, 68 Am. St. Rep. 727, 41 L. R. A. 831.

Pennsylvania.—Estep *v.* Webster Coal, etc., Co., 213 Pa. St. 471, 62 Atl. 1082; McMullen *v.* Pennsylvania R. Co., 132 Pa. St. 107, 19 Atl. 27, 19 Am. St. Rep. 591 (holding that, although a boy ten years of age, who was lying across a railroad track just before he was run over, is not accountable for his own negligence, a recovery for his death is precluded by reason of his trespass); Crawford *v.* Railroad Co., 5 Phila. 359.

Texas.— Flores *v.* Atchison, etc., R. Co., 24 Tex. Civ. App. 328, 66 S. W. 709.

Washington.— Matson *v.* Port Townsend Southern R. Co., 9 Wash. 449, 37 Pac. 705.

United States.— Felton *v.* Aubrey, 74 Fed. 350, 20 C. C. A. 436; *Ex p.* Stell, 22 Fed. Cas. No. 13,358, 4 Hughes 157, holding that in such case the company is required to do only what prudent owners of railroads are doing in respect to their trains and equipment.

Canada.— McShane *v.* Toronto, etc., R. Co., 31 Ont. 185.

See 41 Cent. Dig. tit. "Railroads," § 1239.

A boy going upon railroad premises to witness the accidental burning of a train of tank cars filled with petroleum assumes the risk of the situation, and although he voluntarily renders some service in preventing the spread of the fire to other property, he cannot recover from the company for injuries caused by an explosion of one of the cars. Cleveland, etc., R. Co. *v.* Ballentine, 84 Fed. 935, 28 C. C. A. 572.

88. *Georgia.*— Nashville, etc., R. Co. *v.* Priest, 117 Ga. 767, 45 S. E. 35.

Illinois.— Kinnare *v.* Chicago, etc., R. Co., 114 Ill. App. 230.

Indiana.— Dull *v.* Cleveland, etc., R. Co., 21 Ind. App. 571, 52 N. E. 1013, holding that a railroad company is not liable for injuries to an infant trespasser, which are caused by mere negligence.

Massachusetts.— Anternoitz *v.* New York, etc., R. Co., 193 Mass. 542, 79 N. E. 789 (boys on cars); Morrissey *v.* Eastern R. Co., 126 Mass. 377, 30 Am. Rep. 686 (holding the railroad company not to be liable, unless the act causing the injury is done maliciously or with gross and cruel recklessness).

Minnesota.— Ellington *v.* Great Northern R. Co., 96 Minn. 176, 104 N. W. 827.

Mississippi.— Louisville, etc., R. Co. *v.* Williams, 69 Miss. 131, 12 So. 957.

Ohio.— Wabash R. Co. *v.* Norway, 7 Ohio Cir. Ct. 449, 4 Ohio Cir. Dec. 674; Steele *v.* Pittsburgh, etc., R. Co., 4 Ohio S. & C. Pl. Dec. 350.

Washington.— Matson *v.* Port Townsend Southern R. Co., 9 Wash. 449, 37 Pac. 705.

See 41 Cent. Dig. tit. "Railroads," § 1239.

89. *Alabama.*— Nashville, etc., R. Co. *v.* Harris, 142 Ala. 249, 37 So. 794, 110 Am. St. Rep. 29.

Delaware.— Tully *v.* Philadelphia, etc., R. Co., 3 Pennew. 455, 50 Atl. 95.

Illinois.— Union Stockyard, etc., Co. *v.* Butler, 92 Ill. App. 166.

Indiana.— Baltimore, etc., R. Co. *v.* Bradford, 20 Ind. App. 348, 49 N. E. 388, 67 Am. St. Rep. 252.

Iowa.— Wagner *v.* Chicago, etc., R. Co., 124 Iowa 462, 100 N. W. 332; Wagner *v.* Chicago, etc., R. Co., 122 Iowa 360, 98 N. W. 141; Thomas *v.* Chicago, etc., R. Co., 93 Iowa 248, 61 N. W. 967, where actually aware of his presence.

Kansas.— Missouri Pac. R. Co. *v.* Prewitt, 7 Kan. App. 556, 51 Pac. 923.

Kentucky.— Elliott *v.* Louisville, etc., R. Co., 99 S. W. 233, 30 Ky. L. Rep. 471; Jack-

on the track and therefore liable to be injured unless precautions to discover its presence are taken.[90]

(IV) *Care After Accident.* Where a person, whether a bare licensee or a trespasser, is injured without fault on the part of the railroad company, the company is not liable because its employees do not take charge of and care for such person after the accident;[91] although it is otherwise if the company was at fault in causing the injury,[92] or if its employees assume to take charge of and care for the injured person and do so negligently.[93]

(V) *By Defects in Roadway or Equipment* — (A) *In General.* A railroad company ordinarily owes no duty to trespassers or bare licensees, including children as such,[94] to keep its tracks,[95] right of way,[96] or other premises,[97] in a

son *v.* Louisville, etc., R. Co., 46 S. W. 5, 20 Ky. L. Rep. 309.

Michigan.— Hamilton *v.* Detroit, etc., R. Co., 142 Mich. 56, 105 N. W. 82; Katzinski *v.* Grand Trunk R. Co., 141 Mich. 75, 104 N. W. 409.

Minnesota.— Ellington *v.* Great Northern R. Co., 96 Minn. 176, 104 N. W. 827.

Ohio.— Ludden *v.* Columbus, etc., R. Co., 9 Ohio S. & C. Pl. Dec. 793, 7 Ohio N. P. 106.

Texas.— Gulf, etc., R. Co. *v.* Cunningham, (Civ. App. 1895) 30 S. W. 367.

United States.— Felton *v.* Aubrey, 74 Fed. 350, 20 C. C. A. 436.

See 41 Cent. Dig. tit. "Railroads," § 1239.

Degree of care.—A railroad company is bound to exercise such care for the protection of an infant, on its property, as would be reasonable under all the circumstances, including the maturity and capacity of the infant and its familiarity with the surroundings; but it is not required to be an insurer of the infant's safety. Tully *v.* Philadelphia, etc., R. Co., 3 Pennew. (Del.) 455, 50 Atl. 95.

90. Union Stockyards, etc., Co. *v.* Butler, 92 Ill. App. 166 (holding, however, that a railroad company is not bound to keep a constant watch or to use extraordinary care to prevent children's approach to the track); Wagner *v.* Chicago, etc., R. Co., 122 Iowa 360, 98 N. W. 141; Hicks *v.* Pacific R. Co., 64 Mo. 430; Missouri, etc., R. Co. *v.* Hammer, 34 Tex. Civ. App. 354, 78 S. W. 708; St. Louis, etc., R. Co. *v.* Abernathy, 28 Tex. Civ. App. 613, 68 S. W. 539. See also Gunn *v.* Ohio River R. Co., 36 W. Va. 165, 14 S. E. 465, 32 Am. St. Rep. 842.

Illustrations.— Where for two or three years small boys of immature years habitually frequented a railroad track and had persistently ridden on freight trains there, to the knowledge of the railroad employees, it was the duty of the employees to use ordinary care to prevent injuring the boys, although they had attempted to stop the custom. Davis *v.* St. Louis Southwestern R. Co., (Tex. Civ. App. 1906) 92 S. W. 931. So where children are on or about work trains so frequently that a person of ordinary prudence will apprehend danger to them, the fact that the employees do not know that a child is on the train in a dangerous position does not relieve the company from liability from an accident resulting therefrom. St. Louis Southwestern R. Co. *v.* Abernathy, 28 Tex. Civ. App. 613, 68 S. W. 539.

Flying switch.— Where the railroad servants know that there are a number of children around and between the tracks at a station, it is negligence to cut a car loose from a train and allow it to pass over a side-track, although the children are trespassers. Lange *v.* Missouri Pac. R. Co., 115 Mo. App. 582, 91 S. W. 989.

91. Union Pac. R. Co. *v.* Cappier, 66 Kan. 649, 72 Pac. 281, 69 L. R. A. 513; Griswold *v.* Boston, etc., R. Co., 183 Mass. 434, 67 N. E. 354.

That the company's servants did not use their best judgment in affording the person injured necessary assistance after the accident does not render the company liable where the injury was caused without fault on its part. Griswold *v.* Boston, etc., R. Co., 183 Mass. 434, 67 N. E. 354.

92. Union Pac. R. Co. *v.* Cappier, 66 Kan. 649, 72 Pac. 281, 69 L. R. A. 513; Whitesides *v.* Southern R. Co., 128 N. C. 229, 38 S. E. 878.

93. Union Pac. R. Co. *v.* Cappier, 66 Kan. 649, 72 Pac. 281, 69 L. R. A. 513; Northern Cent. R. Co. *v.* State, 29 Md. 420, 96 Am. Dec. 545.

94. Alabama Great Southern R. Co. *v.* Moorer, 116 Ala. 642, 22 So. 900.

95. International, etc., R. Co. *v.* Lee, (Tex. Civ. App. 1896) 34 S. W. 160, holding that there is no duty upon a railroad company to keep its switches blocked in private switch yards to lessen the chance of injuring pedestrians.

A defective frog is not negligence as to a trespasser or mere licensee (Akers *v.* Chicago, etc., R. Co., 58 Minn. 540, 60 N. W. 669; Archer *v.* Union Pac. R. Co., 110 Mo. App. 349, 85 S. W. 934), even though the act of the company in permitting such defect is in violation of a statute (Akers *v.* Chicago, etc., R. Co., *supra*).

96. Neal *v.* Southern R. Co., 128 N. C. 143, 38 S. E. 474; De la Pena *v.* International, etc., R. Co., 32 Tex. Civ. App. 241, 74 S. W. 58; Houston, etc., R. Co. *v.* Sgalinski, 19 Tex. Civ. App. 107, 46 S. W. 113; McConkey *v.* Oregon R., etc., Co., 35 Wash. 55, 76 Pac. 526.

97. Alabama Great Southern R. Co. *v.* Moorer, 116 Ala. 642, 22 So. 900; Norfolk,

reasonably safe condition; and is not liable for a defect thereon, unless its employees in making changes on such premises knowingly left them in an unsafe condition and failed to use reasonable precautions to avoid injury to persons likely to use them or to notify them of the danger.[98] Nor as to such persons, is the railroad company bound to provide and maintain reasonably safe appliances or equipment.[99] But as to a person upon its premises by express or implied invitation, or by right as one of the public, although the railroad company is not required to have its premises and equipment absolutely safe,[1] it is under an obligation to prevent injury to such person from any unseen or unusual danger, and therefore to exercise ordinary care to keep its premises in a reasonably safe condition,[2] and to provide and maintain reasonably safe appliances and equipment.[3]

(B) *Failure to Fence Railroad.*[4] In the absence of statute there is no duty upon a railroad company to fence its tracks, or right of way, for any purpose; and consequently the failure to do so cannot in the absence of statute be considered negligence as to persons who come upon the tracks at a point where there

etc., R. Co. *v.* De Board, 91 Va. 700, 22 S. E. 514, 29 L. R. A. 825.

98. Norfolk, etc., R. Co. *v.* De Board, 91 Va. 700, 22 S. E. 514, 89 L. R. A. 825, holding that if a railroad company carelessly or negligently makes an excavation not open to common observation of persons passing along the right of way, and not apparent to one exercising ordinary care, and knowing the premises to be in a dangerous condition, fails to repair the same or to give notice thereof to a licensee, and personal injury results therefrom without negligence on the part of such licensee, the railroad company is liable for damages for such injury.

99. Hortenstein *v.* Virginia-Carolina R. Co., 102 Va. 914, 47 S. E. 996.

A failure to maintain watchmen or operate gates or give warning of the approach of trains is not negligence as to a trespasser or bare licensee. Cannon *v.* Cleveland, etc., R. Co., 157 Ind. 682, 62 N. E. 8.

1. St. Louis, etc., R. Co. *v.* Ferrell, 84 Ark. 270, 105 S. W. 263 (holding that a railroad company is not liable for an injury to a prospective passenger upon its track who stumbled on a stake which was properly there and fell in front of a train); Colorado, etc., R. Co. *v.* Sonne, (Colo. 1905) 83 Pac. 383; Flynn *v.* New Jersey Cent. R. Co., 142 N. Y. 439, 37 N. E. 514.

2. *Arkansas.*— St. Louis, etc., R. Co. *v.* Dooley, 77 Ark. 561, 92 S. W. 789.

California.— Hansen *v.* Southern Pac. Co., 105 Cal. 379, 38 Pac. 957.

Colorado.— Colorado, etc., R. Co. *v.* Sonne, (1905) 83 Pac. 383.

Georgia.— Burton *v.* Western, etc., R. Co., 98 Ga. 783, 25 S. E. 736.

Indiana.— Louisville, etc., R. Co. *v.* Phillips, 112 Ind. 59, 13 N. E. 132, 2 Am. St. Rep. 155.

Iowa.— Goodrich *v.* Burlington, etc., R. Co., 103 Iowa 412, 72 N. W. 653 (space between a main rail and a guard rail wider than usual or necessary, and without proper filling below the balls of the rails); Robinson *v.* Chicago, etc., R. Co., 67 Iowa 292, 25 N. W. 249 (duty to maintain cattle-guards under Code (1873), § 1288).

New York.— Flynn *v.* New Jersey Cent. R. Co., 142 N. Y. 439, 37 N. E. 514.

South Carolina.— Matthews *v.* Seaboard Air-Line R. Co., 67 S. C. 499, 46 S. E. 335, 65 L. R. A. 286.

Texas.— Gulf, etc., R. Co. *v.* Bryant, 30 Tex. Civ. App. 4, 66 S. W. 804, negligence in construction of tracks.

England.—Manchester, etc., R. Co. *v.* Woodcock, 25 L. T. Rep. N. S. 335.

See 41 Cent. Dig. tit. "Railroads," § 1247.

The proximity of a platform belonging to a private individual to the railroad track is not negligence on the part of the railroad company, where it owns only the road-bed at that point and has no interest in or control over either the platform or the ground upon which it rests. Barber *v.* Richmond, etc., R. Co., 34 S. C. 444, 13 S. E. 630.

Under a Missouri statute (Rev. St. (1879) § 2121, Rev. St. (1899) § 4425), making a railroad company liable for a death "resulting from or caused by the negligence, unskilfulness or criminal intent of any officer, servant or employee while running, conducting, or managing any locomotive, car or train of cars," such a company is not liable for injuries caused to a person walking along its track, who is injured on account of a defect in the construction of the track, which causes the locomotive to be derailed. McKenna *v.* Missouri Pac. R. Co., 54 Mo. App. 161.

To put cattle-guards at places where the statute does not require them is not negligence. Galveston, etc., R. Co. *v.* Slinkard, (Tex. Civ. App. 1897) 39 S. W. 961.

3. Cederson *v.* Oregon R., etc., Co., 38 Oreg. 343, 62 Pac. 637, 63 Pac. 763; Gulf, etc., R. Co. *v.* Walker, 70 Tex. 126, 7 S. W. 831, 8 Am. St. Rep. 582; Lemay *v.* Quebec, etc., R. Co., 25 Quebec Super. Ct. 82.

Carelessness in loading a freight train of cars or in not attending to the adjustment of the load, by which an injury is done to a passenger in another train, will make the owners of the freight train responsible. Curtis *v.* Central R. Co., 6 Fed. Cas. No. 3,501, 6 McLean 401.

4. Existence and validity of statutory requirements as to fences see *supra*, X, B, 6.

is no fence and are injured.[5] In probably most jurisdictions, however, the fencing of a railroad track is regulated by statutes, under some of which the company's failure to erect and maintain the required fences may be considered negligence as to persons injured by reason of such failure.[6] But even under such statutes

5. *Connecticut.*— Nolan *v.* New York, etc., R. Co., 53 Conn. 461, 4 Atl. 106.

Georgia.— King *v.* Georgia Cent. R. Co., 107 Ga. 754, 33 S. E. 839; Western, etc., R. Co. *v.* Rogers, 104 Ga. 224, 30 S. E. 804.

Illinois.— Wabash R. Co. *v.* Gaull, 116 Ill. App. 443; Kinnare *v.* Chicago, etc., R. Co., 114 Ill. App. 230.

Kentucky.— Jackson *v.* Louisville, etc., R. Co., 46 S. W. 5, 20 Ky. L. Rep. 309, holding that a railroad company is not negligent in failing to erect a fence to keep trespassers off its switch-yard, especially where a watchman is employed.

Massachusetts.— Mugford *v.* Boston, etc., R. Co., 173 Mass. 10, 52 N. E. 1078.

Michigan.— Katzinski *v.* Grand Trunk R. Co., 141 Mich. 75, 104 N. W. 409 (holding that the law does not require a railroad company to fence its railroad yard); Rabidon *v.* Chicago, etc., R. Co., 115 Mich. 390, 73 N. W. 386, 39 L. R. A. 405; Marcott *v.* Marquette, etc., R. Co., 47 Mich. 1, 10 N. W. 53.

Missouri.— Barney *v.* Hannibal, etc., R. Co., 126 Mo. 372, 28 S. W. 1069, 26 L. R. A. 847, failure to fence freight yard not negligence.

New Hampshire.— Casista *v.* Boston, etc., R. Co., 69 N. H. 649, 45 Atl. 712 (infant trespasser); Cornwall *v.* Sullivan R. Co., 28 N. H. 161.

New York.—Roberton *v.* New York, 7 Misc. 645, 28 N. Y. Suppl. 13 [*affirmed* in 149 N. Y. 609, 44 N. E. 1128].

United States.— Reynolds *v.* Great Northern R. Co., 69 Fed. 808, 16 C. C. A. 435, 29 L. R. A. 695.

See 41 Cent. Dig. tit. "Railroads," § 1246.

A railroad company need not fence or place guards along its road where there are cuts or embankments, notwithstanding a public road may run parallel with the railroad. King *v.* Georgia Cent. R. Co., 107 Ga. 754, 33 S. E. 839; Daneck *v.* Pennsylvania R. Co., 59 N. J. L. 415, 37 Atl. 59, 59 Am. St. Rep. 613.

6. For the construction of particular statutes and their applicability to persons injured see the following cases:

Michigan.— Keyser *v.* Chicago, etc., R. Co., 56 Mich. 559, 23 N. W. 311, 56 Am. Rep. 405, 66 Mich. 390, 33 N. W. 867 (holding that, in an action for negligently running over a child on a railroad track, it may be shown that the railroad company failed to fence its tracks as required by statute); Marcott *v.* Marquette, etc., R. Co., 47 Mich. 1, 10 N. W. 53.

Minnesota.— Mattes *v.* Great Northern R. Co., 95 Minn. 386, 104 N. W. 234, 100 Minn. 34, 110 N. W. 98, construing Gen. St. (1894) § 2692, and holding that such statute applies to cattle-guards as a part of the fence. Failure of a railroad company to fence its road as required by statute is *prima facie* evidence of negligence. Ellington *v.* Great Northern R. Co., 96 Minn. 176, 104 N. W. 827; Nickolson *v.* Northern Pac. R. Co., 80 Minn. 508, 83 N. W. 454. Gen. St. (1894) §§ 2692, 2695, and Gen. St. (1897) c. 346, requiring railroad companies to construct and maintain fences on either side of their tracks, imposes a duty upon railroad companies, which inures to the benefit of children of tender years who may by reason of negligence in that respect be injured. Marengo *v.* Great Northern R. Co., 84 Minn. 397, 87 N. W. 1117, 87 Am. St. Rep. 369; Nickolson *v.* Northern Pac. R. Co., *supra*; Rosse *v.* St. Paul, etc., R. Co., 68 Minn. 216, 71 N. W. 20, 64 Am. St. Rep. 472, 37 L. R. A. 591. *Compare* Fitzgerald *v.* St. Paul, etc., R. Co., 29 Minn. 336, 13 N. W. 168, 43 Am. Rep. 212. Gen. St. (1894) § 2698, was repealed by Gen. St. (1894) § 2055, providing for a barbed wire fence along a right of way. Ellington *v.* Great Northern R. Co., 96 Minn. 176, 104 N. W. 827.

Nebraska.—Chicago, etc., R. Co. *v.* Grablin, 38 Nebr. 90, 56 N. W. 796, 57 N. W. 522, child.

Ohio.— Ludtke *v.* Lake Shore, etc., R. Co., 24 Ohio Cir. Ct. 120 (Rev. St. § 3324); Devereux *v.* Thornton, 4 Ohio Dec. (Reprint) 449, 2 Clev. L. Rep. 177, holding that the absence of the required fence is negligence and imposes a higher degree of care on the railroad company to look after a child playing along the track.

Rhode Island.— See Morrissey *v.* Providence, etc., R. Co., 15 R. I. 271, 3 Atl. 10.

Texas.— Houston, etc., R. Co. *v.* Boozer, 2 Tex. Unrep. Cas. 452.

Wisconsin.— Stuettgen *v.* Wisconsin Cent. R. Co., 80 Wis. 498, 50 N. W. 407; Schrier *v.* Milwaukee, etc., R. Co., 65 Wis. 457, 27 N. W. 167 (holding that the absence of a fence in compliance with Laws (1885), c. 193, is *prima facie* evidence of negligence on the part of the company); Schmidt *v.* Milwaukee, etc., R. Co., 23 Wis. 186, 99 Am. Dec. 158.

United States.— Baltimore, etc., R. Co. *v.* Cumberland, 176 U. S. 232, 20 S. Ct. 380, 34 L. ed. 447 [*affirming* 12 App. Cas. (D. C.) 598]; Hayes *v.* Michigan Cent. R. Co., 111 U. S. 228, 4 S. Ct. 369, 28 L. ed. 410.

Canada.— Tabb *v.* Grand Trunk R. Co., 8 Ont. L. Rep. 203, 3 Ont. Wkly. Rep. 885.

See 41 Cent. Dig. tit. "Railroads," § 1246.

Notice of defect.—A railroad company is charged with notice of an opening in the fence inclosing its tracks, when such opening has existed for more than two years and a path has been worn by persons passing to and fro through such opening and across the track at that point. Ludtke *v.* Lake Shore, etc., R. Co., 24 Ohio Cir. Ct. 120.

A statute requiring fences for the benefit of adjoining owners and occupants does not

a failure to fence is not negligence as to persons injured at a point where public necessity or convenience requires that there should be no fences,[7] such as at public crossings,[8] or at points within the limits of station or depot grounds which are either expressly or impliedly excepted by statute.[9] But statutes which are designed solely for the protection of live stock and which require fences along the railroad right of way to prevent stock from going on the tracks do not apply to persons; and consequently a failure to fence under such statutes cannot be considered as negligence as to persons injured at points where such fences are not maintained.[10] So also a duty to fence, as to persons off the railroad, to prevent them from getting upon it, is not due toward passengers or persons already on the line.[11]

(c) *Defect in Highway Occupied by Track.*[12] Where railroad tracks are laid over or alongside a public street or highway, it is generally the duty of the railroad company to so construct and maintain its road-bed as to restore and keep the street or highway in its former state of usefulness; and if it fails to do so it is liable for injuries caused thereby to travelers on such street or highway.[13] If the railroad company has knowledge of any defect in its road-bed which makes the street or highway more dangerous it is responsible for injuries caused by its

apply to persons injured while going on or along the track. Casista *v.* Boston, etc., R. Co., 69 N. H. 649, 45 Atl. 712 (Pub. St. c. 159, § 23); Cornwall *v.* Sullivan R. Co., 28 N. H. 161.

A statute providing for guards at the crossing of public roads and private ways does not require such guards along the side of the railroad tracks. King *v.* Georgia Cent. R. Co., 107 Ga. 754, 33 S. E. 839 (Civ. Code, §§ 2220, 2221).

7. Nicholson *v.* Northern Pac. R. Co., 80 Minn. 508, 32 N. W. 454.

Under Mass. Pub. St. c. 112, § 115, providing that railroad companies shall maintain suitable fences on both sides of their roads except "in places where the convenient use of the road would be thereby obstructed," the failure to maintain such fence is not negligence, when it was customary to unload freight at the place where plaintiff must have gone on the track. McCarthy *v.* Fitchburg R. Co., 154 Mass. 17, 27 N. E. 773.

8. Nicholson *v.* Northern Pac. R. Co., 80 Minn. 508, 32 N. W. 454.

9. Burtram *v.* Michigan Cent. R. Co., 148 Mich. 166, 111 N. W. 749; Rabidon *v.* Chicago, etc., R. Co., 115 Mich. 390, 73 N. W. 386, 39 L. R. A. 405; Nickolson *v.* Northern Pac. R. Co., 80 Minn. 508, 83 N. W. 454; Houston, etc., R. Co. *v.* Boozer, 2 Tex. Unrep. Cas. 452.

10. *Illinois.*— Wabash R. Co. *v.* Gaull, 116 Ill. App. 443.

Indiana.— McKinney *v.* Ohio, etc., R. Co., 22 Ind. 99; Thayer *v.* St. Louis, etc., R. Co., 22 Ind. 26, 85 Am. Dec. 409; Baltimore, etc., R. Co. *v.* Bradford, 20 Ind. App. 348, 49 N. E. 388, 67 Am. St. Rep. 252.

Massachusetts.— Byrnes *v.* Boston, etc., R. Co., 181 Mass. 322, 63 N. E. 897.

Minnesota.— Fitzgerald *v.* St. Paul, etc., R. Co., 29 Minn. 336, 13 N. W. 168, 43 Am. Rep. 212.

New Hampshire.— Cornwall *v.* Sullivan R. Co., 28 N. H. 161.

New York.— Ditchett *v.* Spuyten Duyvil, etc., R. Co., 67 N. Y. 425; Lehey *v.* Hudson River R. Co., 4 Rob. 204; Roberton *v.* New York, 7 Misc. 645, 28 N. Y. Suppl. 13 [*affirmed* in 149 N. Y. 609, 44 N. E. 1128].

Ohio.— Lake Shore, etc., R. Co. *v.* Liidtke, 69 Ohio St. 384, 69 N. E. 653.

United States.— Carper *v.* Norfolk, etc., R. Co., 78 Fed. 94, 23 C. C. A. 669, 35 L. R. A. 135; Walkenhauer *v.* Chicago, etc., R. Co., 17 Fed. 136, 3 McCrary 553. But see Union Pac. R. Co. *v.* McDonald, 152 U. S. 262, 14 S. Ct. 619, 38 L. ed. 434, holding that a failure to fence as required by statute for the protection of stock is evidence of negligence in the case of a person injured by reason of the absence of such fence.

See 41 Cent. Dig. tit. "Railroads," § 1246.

11. Harrold *v.* Great Western R. Co., 14 L. T. Rep. N. S. 440.

12. **Duty of railroad to maintain highway as exonerating public** see STREETS AND HIGHWAYS.

Liability of city for defects or obstructions in streets caused by railroad company see MUNICIPAL CORPORATIONS, 28 Cyc. 1354.

13. Wasmer *v.* Delaware, etc., R. Co., 80 N. Y. 212, 36 Am. Rep. 608; Ross *v.* Metropolitan St. R. Co., 116 N. Y. App. Div. 507, 101 N. Y. Suppl. 932; Coy *v.* Utica, etc., R. Co., 23 Barb. (N. Y.) 643; International, etc., R. Co. *v.* Haddox, 36 Tex. Civ. App. 385, 81 S. W. 1036 (obligation to restore street to former state of usefulness under Rev. St. (1895) art. 4426); Brownell *v.* Troy, etc., R. Co., 55 Vt. 218; McCandless *v.* Chicago, etc., R. Co., 71 Wis. 41, 36 N. W. 620. See Thompson *v.* Grand Trunk R. Co., 37 U. C. Q. B. 40.

Notice of a defect caused by a failure to restore a highway on which the track is laid to its former usefulness need not be shown in order to hold a railroad company responsible, as such defect is a public nuisance, and results from a violation of the law. Vaughan *v.* Buffalo, etc., R. Co., 72 Hun (N. Y.) 471, 25 N. Y. Suppl. 246.

neglect to have the defect repaired,[14] although such defect was not caused by any act on its part,[15] and although it is merely a lessee of the road.[16]

(D) *Lights on Cars, Trains, and Tracks.* A railroad company owes no duty to a trespasser or bare licensee on its tracks to keep a headlight burning on its engine,[17] or lights on its cars similar to headlights on engines,[18] especially where by reason of a dense fog, or otherwise, it would do no good.[19] It is under a duty, however, to use reasonable care in keeping lights on its engines or cars as to persons whom it has reason to anticipate may be on the tracks.[20] Likewise, while it is the duty of a railroad company to keep lighted at proper times its depot, approaches, and other places connected therewith, which are likely to be visited by passengers and persons lawfully on the premises,[21] it owes no such duty to trespassers or bare licensees.[22]

(E) *Means of Controlling Trains or Cars.* It is also the duty of a railroad company operating trains or cars at a place where persons are known or may be expected to be on the tracks to provide such trains or cars with the usual means and appliances for stopping, and keep them in proper repair,[23] and with a proper number of brakemen,[24] who shall have the brakes under proper control;[25] and to

14. Oakland R. Co. *v.* Fielding, 48 Pa. St. 320.

15. Oakland R. Co. *v.* Fielding, 48 Pa. St. 320.

16. Wasmer *v.* Delaware, etc., R. Co., 80 N. Y. 212, 36 Am. Rep. 608.

17. Eastern Kentucky R. Co. *v.* Powell, 33 S. W. 629, 17 Ky. L. Rep. 1051; Frye *v.* St. Louis, etc., R. Co., 200 Mo. 377, 98 S. W. 566, 8 L. R. A. N. S. 1069; Williamson *v.* Southern R. Co., 104 Va. 146, 51 S. E. 195, 113 Am. St. Rep. 1032, 70 L. R. A. 1007.

18. Gilliam *v.* Texas, etc., R. Co., 114 La. 272, 38 So. 166.

19. Dilas *v.* Chesapeake, etc., R. Co., 71 S. W. 492, 24 Ky. L. Rep. 1347.

20. Indianapolis, etc., R. Co. *v.* Galbreath, 63 Ill. 436 (while running through a village); Chicago, etc., R. Co. *v.* O'Neil, 64 Ill. App. 623 (especially where required by ordinance); Heavener *v.* North Carolina R. Co., 141 N. C. 245, 53 S. E. 513; Willis *v.* Atlantic, etc., R. Co., 122 N. C. 905, 29 S. E. 941; Purnell *v.* Raleigh, etc., R. Co., 122 N. C. 832, 29 S. E. 953; Canadian Pac. R. Co. *v.* Boisseau, 32 Can. Sup. Ct. 424 (conductor in defendant's employ). See also Eastern Kentucky R. Co. *v.* Powell, 33 S. W. 629, 17 Ky. L. Rep. 1051.

That there was no light or flagman on the rear of the end car of a long train which was running backward is immaterial where it is shown that the person injured must have been injured while attempting to cross the track near the engine. Bryant *v.* Illinois Cent. R. Co., (La. 1897) 22 So. 799.

21. Rozwadosfskie *v.* International, etc., R. Co., 1 Tex. Civ. App. 487, 20 S. W. 872. See Purnell *v.* Raleigh, etc., R. Co., 122 N. C. 832, 29 S. E. 953. And see, generally, CARRIERS, 6 Cyc. 609, text and note 31.

22. Houston, etc., R. Co. *v.* Sgalinski, 19 Tex. Civ. App. 107, 46 S. W. 113; Rozwadosfskie *v.* International, etc., R. Co., 1 Tex. Civ. App. 487, 20 S. W. 872.

23. Lake Shore, etc., R. Co. *v.* Hundt, 140 Ill. 525, 30 N. E. 458 [*affirming* 41 Ill. App. 220]; Waltz *v.* Pennsylvania R. Co., 216 Pa. St. 165, 65 Atl. 401 [*affirming* 31 Pa. Super. Ct. 286]; Barley *v.* Chicago, etc., R. Co., 2 Fed. Cas. No. 997, 4 Biss. 430, holding this to be true irrespective of any city ordinance requiring such appliances.

Duty as to appliances or equipment.— It is the duty of railroad companies to use upon their trains, whether for carrying passengers or freight, all improvements in machinery, or in the construction of cars, commonly used by other companies, to enable their employees to control the movement and speed of their trains on seeing persons on the track; and it is negligence if they do not use them, for which they are liable to a person injured if the improvement would in any appreciable degree have contributed to prevent the injury. Costello *v.* Syracuse, etc., R. Co., 65 Barb. (N. Y.) 92. And see Mott *v.* Hudson River R. Co., 8 Bosw. (N. Y.) 345.

24. Lake Shore, etc., R. Co. . Hundt, 140 Ill. 525, 30 N. E. 458 [*affirming* 41 Ill. App. 220], holding that putting a car in motion on a track where it is known that men may be, without any person being on the car and without any means of stopping it, is evidence tending to prove negligence.

Illustrations.— Thus it is negligence for a railroad company to send a car forward through a town or other such place, propelled only by its own impetus, without any one in charge to control it (Shelby *v.* Cincinnati, etc., R. Co., 85 Ky. 224, 3 S. W. 157, 9 Ky. L. Rep. 928); or to detach a car on a railroad track where persons are liable to be found and send it out of sight around a curve on a down grade, unattended by any one capable of checking it in case of danger (Ky *v.* Pennsylvania R. Co., 65 Pa. St. 269, 3 Am. Rep. 628).

Number of brakemen.—A railroad company is only bound to manage its trains with a sufficient number of brakemen to meet the ordinary use of its road, unless it has reasonable ground to believe that an unusual exigency will arise. Schmidt *v.* Chicago, etc., R. Co., 83 Ill. 405.

25. Lange *v.* Missouri Pac. R. Co., 115 Mo. App. 582, 91 S. W. 989, holding that it is

use proper means of securing cars which are standing at or near a place where persons may be expected to go upon the tracks.[26]

(VI) *ARTICLES PROJECTING, FALLING, OR THROWN FROM TRAIN.*[27] A trespasser or bare licensee on or near a railroad track cannot recover for injuries caused by articles projecting, falling, or being thrown from a train,[28] unless the railroad company knew of the danger and of the injured party's peril and failed to use ordinary care to avoid the injury.[29] But for injuries caused by such articles to one rightfully on or near the track a railroad company is responsible if it fails to use ordinary care to avoid the injury;[30] but not where the injury is the result of a mere casualty.[31] Although a railroad company is not primarily liable for the acts of third persons, such as mail or news agents, in throwing or delivering packages from its trains or cars, it owes a duty of not permitting dangerous habits of such agents in delivering packages in such a manner as to injure persons lawfully on its premises to continue, and if the company has knowledge, or the practice continues for a sufficient length of time to charge it with knowledge thereof, it is liable to one lawfully on its premises and injured by such practice.[32]

(VII) *MODE OF RUNNING TRAINS OR CARS GENERALLY*[33] — (A) *Care Required in General.* As a general rule a railroad company is under no duty to anticipate that trespassers will be on its tracks, and therefore is under no duty to use special care and precaution in the operations of its trains or cars so as to avoid injuring a trespasser or a bare licensee,[34] until after such person's peril is

the duty of the brakemen on a car cut loose from a train, in order to allow it to run on the side-track, to have the brake under control so as to be able to stop the car moving on a level grade at the rate of four miles an hour within a few feet.

26. Brown *v.* Pontchartrain R. Co., 8 Rob. (La.) 45, holding that a railroad company is liable for injuries caused by a car left standing on a side-track and not properly blocked, and which was put in motion by a strong wind, causing an injury to one who was crossing the track at a point over which it was necessary for him to go.

27. **Injuries to persons at stations** see *infra*, X, E, 2, b.

28. Thomas *v.* Cincinnati, etc., R. Co., 105 S. W. 379, 32 Ky. L. Rep. 67; Louisville, etc., R. Co. *v.* Wade, 36 S. W. 1125, 18 K. L. Rep. 549, holding that plaintiff, who was struck while walking between the rails of a switch-track by a timber projecting from a car which was then passing over the main track, could not recover.

A licensee walking near a railroad track cannot recover for an injury received by being struck by a brake-shoe which flies from a passing car. Carr *v.* Missouri Pac. R. Co., 195 Mo. 214, 92 S. W. 874.

29. Louisville, etc., R. Co. *v.* Wade, 36 S. W. 1125, 18 Ky. L. Rep. 549; Missouri, etc., R. Co. *v.* Scarborough, 29 Tex. Civ. App. 194, 68 S. W. 196.

30. Cleveland, etc., R. Co. *v.* Berry, 152 Ind. 607, 53 N. E. 415, 46 L. R. A. 33; Fletcher *v.* Baltimore, etc., R. Co., 168 U. S. 135, 18 S. Ct. 35, 42 L. ed. 411.

Under Ga. Code, § 3033, if the injury was caused by an article either falling or being thrown from a passing train of cars, the necessary inference in the absence of any evidence to the contrary is that the negligence was chargeable to the company's servants while acting within the scope of their duties. Savannah, etc., R. Co. *v.* Slater, 92 Ga. 391, 17 S. E. 350.

31. Clardy *v.* Southern R. Co., 112 Ga. 37, 37 S. E. 99, holding that a railroad company is not liable to a licensee who used the right of way as a footpath, for injuries occasioned by a blow from a stone which formed a portion of the ballast of the company's track, and which was casually dislodged from its place therein and hurled against him by a passing train.

32. *Illinois.*— Ohio, etc., R. Co. *v.* Simms, 43 Ill. App. 260.

Indiana.— Pittsburgh, etc., R. Co. *v.* Warrum, (App. 1907) 82 N. E. 934, (App. 1908) 84 N. E. 356.

Michigan.— Shaw *v.* Chicago, etc., R. Co., 123 Mich. 629, 82 N. W. 618, 81 Am. St. Rep. 230, 49 L. R. A. 308.

Minnesota.— Galloway *v.* Chicago, etc., R. Co., 56 Minn. 346, 57 N. W. 1058, 45 Am. St. Rep. 468, 23 L. R. A. 442. *Compare* McGrath *v.* Eastern R. Co., 74 Minn. 363, 77 N. W. 136.

New York.— Clifford *v.* New York Cent., etc., R. Co., 111 N. Y. App. Div. 809, 97 N. Y. Suppl. 954.

33. **Injuries to persons at crossings** see *infra*, X, F, 6.

Injuries to persons at stations see *infra*, X, E, 2, b, (IV).

Injuries to persons working on or about cars or tracks see X, E, 2, c.

34. Chenery *v.* Fitchburg R. Co., 160 Mass. 211, 35 N. E. 554, 22 L. R. A. 575; Burde *v.* Chicago, etc., R. Co., 123 Mo. App. 629, 100 S. W. 509; Kelly *v.* Philadelphia, etc., R. Co., 30 Leg. Int. (Pa.) 140; Norfolk, etc., R. Co. *v.* Stegall, 105 Va. 538, 54 S. E. 19, holding that a railroad company does not owe a duty to a bare licensee on its tracks, of employing competent servants to

discovered.[35] This rule, however, is subject to the exception that the railroad company must exercise ordinary care and caution, commensurate with the risk of accidents, in operating its trains or cars at places where persons, although trespassers or mere licensees, are known or may be expected to be on the tracks,[36] as in towns or cities;[37] and for a failure to exercise such care the railroad company

run its trains, or to run them in any particular manner or at a particular rate of speed.

Running a train of cars backward is not negligence as to a trespasser or a bare licensee. Yarnall *v.* St. Louis, etc., R. Co., 75 Mo. 575; Swindell *v.* Chicago, etc., R. Co., 44 Nebr. 841, 62 N. W. 1103.

Before moving cars standing on a side-track a railroad company is not required to examine them to ascertain whether or not there are any trespassers on or under the cars in a perilous position. Jordan *v.* Grand Rapids, etc., R. Co., 162 Ind. 464, 70 N. E. 524, 102 Am. St. Rep. 217; Flores *v.* Atchison, etc., R. Co., (Tex. Civ. App. 1900) 66 S. W. 709.

Rules regulating the distance at which trains shall run from each other on a railroad are intended solely for the protection of the property of the company and the safety of their employees and passengers, and not for persons who may be traveling along the highway; and no inference of negligence can be drawn from the proximity of trains in an action to recover damages for an injury to a person while crossing a railroad track at a place not known or used as a public crossing. Philadelphia, etc., R. Co. *v.* Spearen, 47 Pa. St. 300, 86 Am. Dec. 544. See also Mobile, etc., R. Co. *v.* Roberts, (Miss. 1898) 23 So. 393.

35. Louisville, etc., R. Co. *v.* Coleman, 86 Ky. 556, 6 S. W. 438, 8 S. W. 875, 10 Ky. L. Rep. 81; Yarnall *v.* St. Louis, etc., R. Co., 75 Mo. 575; Rosenthal *v.* New York, etc., R. Co., 112 N. Y. App. Div. 431, 98 N. Y. Suppl. 476; Houston, etc., R. Co. *v.* Hartnett, (Tex. Civ. App. 1898) 48 S. W. 773, holding that in such a case the employees operating engines must use such care as ordinarily prudent persons would exercise under like circumstances.

36. *Delaware.*— Tully *v.* Philadelphia, etc., R. Co., 3 Pennew. 455, 50 Atl. 95.

Kentucky.— Oliver *v.* Roach, 102 S. W. 274, 31 Ky. L. Rep. 284.

Massachusetts.— Chenery *v.* Fitchburg R. Co., 160 Mass. 211, 35 N. E. 554, 22 L. R. A. 575.

Missouri.— Hicks *v.* Pacific R. Co., 64 Mo. 430; Burde *v.* Chicago, etc., R. Co., 123 Mo. App. 629, 100 S. W. 509.

New York.— Bernhardt *v.* Rensselaer, etc., R. Co., 18 How. Pr. 427 [*reversed* on the facts in 32 Barb. 165, 19 How. Pr. 199 (*affirmed* in 1 Abb. Dec. 131, 23 How. Pr. 166)].

Texas.— International, etc., R. Co. *v.* Howell, (Civ. App. 1907) 105 S. W. 560 [*affirmed* in (1908) 111 S. W. 142].

United States.— Connell *v.* Southern R. Co., 91 Fed. 466, 33 C. C. A. 633.

Where the public are accustomed to use the railroad track as a passway, the railroad company must exercise a greater degree of care in running its trains or cars at such point than where the track is not so used. Arrwood *v.* South Carolina, etc., R. Co., 126 N. C. 629, 36 S. E. 151. In such a case it is the company's duty to use reasonable care to see that its tracks are clear before moving trains thereon, and a mere failure to observe persons on the track will not relieve the company from liability for their injuries. Fleming *v.* Louisville, etc., R. Co., 106 Tenn. 374, 61 S. W. 58.

Change in use of side-track.— Where a railroad company has an equal right to the use of two side-tracks, but has been in the habit of using but one, it is not chargeable with negligence in changing to the other without notice to one rightfully on such track, but to whom it does not stand in any special relation. Hoy *v.* Terminal R. Assoc., 65 Ill. App. 349.

Operating a train in disregard of a flag placed in a certain position as a signal to approaching trains is negligence as to one rightfully on the tracks. Kunsman *v.* Lehigh Valley R. Co., 10 Pa. Super. Ct. 1.

37. *Arkansas.*— St. Louis, etc., R. Co. *v.* Waren, 65 Ark. 619, 48 S. W. 222.

Florida.— Florida Cent., etc., R. Co. *v.* Foxworth, 41 Fla. 1, 25 So. 338, 79 Am. St. Rep. 149.

Kansas.— Kansas Pac. R. Co. *v.* Pointer, 9 Kan. 620.

Kentucky.— Chesapeake, etc., R. Co. *v.* Davis, 119 Ky. 64, 60 S. W. 14, 22 Ky. L. Rep. 1156, 58 S. W. 698, 22 Ky. L. Rep. 748; Kentucky Cent. R. Co. *v.* Smith, 93 Ky. 449, 20 S. W. 392, 14 Ky. L. Rep. 455, 18 L. R. A. 63; Conley *v.* Cincinnati, etc., R. Co., 89 Ky. 402, 12 S. W. 764, 11 Ky. L. Rep. 602; Illinois Cent. R. Co. *v.* Murphy, 97 S. W. 729, 30 Ky. L. Rep. 93, 11 L. R. A. N. S. 352; McCabe *v.* Maysville, etc., R. Co., 89 S. W. 683, 28 Ky. L. Rep. 536.

Maryland.— Bannon *v.* Baltimore, etc., R. Co., 24 Md. 108.

Missouri.— Hicks *v.* Pacific R. Co., 64 Mo. 430.

Pennsylvania.— Holt *v.* Pennsylvania R. Co., 206 Pa. St. 356, 55 Atl. 1055, holding that the company is bound to keep the train under control.

Texas.— International, etc., R. Co. *v.* Hall, (Civ. App. 1906) 92 S. W. 996.

Washington.— Roth *v.* Union Depot Co., 13 Wash. 525, 43 Pac. 641, 44 Pac. 253, 31 L. R. A. 855.

West Virginia.— Ray *v.* Chesapeake, etc., R. Co., 57 W. Va. 333, 50 S. E. 413.

United States.— Smith *v.* Pittsburgh, etc., R. Co., 90 Fed. 783.

is liable, unless the party injured knowing of the existence of the danger, purposely or negligently puts himself in the way.[38]

(B) *Method of Switching Cars.* The above rules apply to the operation of switching cars. Thus a railroad company is bound to use reasonable care in switching its cars even with respect to a trespasser or bare licensee after it discovers him in a perilous position.[39] Likewise it is bound to use reasonable care and caution in switching its cars at a place where it may expect persons to be on the track,[40] as in a city or town.[41]

To permit a loaded car to run down a grade alone on a track laid in a street without the exercise of any care or attention to see that no persons are in danger therefrom, constitutes negligence which renders the railroad company liable for a resulting injury. Smith *v.* Pittsburgh, etc., R. Co., 90 Fed. 783. See also Conley *v.* Cincinnati, etc., R. Co., 89 Ky. 402, 12 S. W. 764, 11 Ky. L. Rep. 602.

Degree of care.—A railroad company operating its trains on a thoroughfare of a town or city must use greater care than in less frequented localities (Florida Cent., etc., R. Co. *v.* Foxworth, 41 Fla. 1, 25 So. 338, 79 Am. St. Rep. 149; Powell *v.* Missouri Pac. R. Co., 59 Mo. App. 626); but it is only required to exercise ordinary care under the circumstances, or such a degree of care as would be exercised by a person of ordinary prudence under the same or similar circumstances (International, etc., R. Co. *v.* Hall, (Tex. Civ. App. 1906) 92 S. W. 996); and which is commensurate with the dangers incident to the handling of its cars and trains at such places (McVey *v.* Chesapeake, etc., R. Co., 46 W. Va. 111, 32 S. E. 1012). It has been held that as great care is incumbent upon operators of a train passing along a public street as at crossings. Houston, etc., R. Co. *v.* Laskowski, (Tex. Civ. App. 1898) 47 S. W. 59.

That the tracks on the company's right of way are used by the public in a town as a footway imposes on the company the obligation to use greater care in running and managing its trains at such a place than would be required at places where the tracks are not so used. McVey *v.* Chesapeake, etc., R. Co., 46 W. Va. 111, 32 S. E. 1012.

Municipal ordinances regulating the movements of locomotives and cars create duties, and their violation in case of a person injured as a result of such violation is negligence *per se.* Pittsburgh, etc., R. Co. *v.* Lightheiser, 163 Ind. 247, 71 N. E. 218, 660. And a railroad company is not relieved from the obligation of obeying all reasonable municipal regulations as to the management of its trains within the corporate limits, by the fact that its tracks, although on ground open to the public, are not upon the highway but on its own private property. Merz *v.* Missouri Pac. R. Co., 88 Mo. 672, 1 S. W. 382.

That the tracks are laid on an embankment, the property of the company, does not relieve a railroad company from the obligation of reasonable care to avoid accidents on railroad tracks running through cities. McGuire *v.* Vicksburg, etc., R. Co., 46 La. Ann. 1543, 16 So. 457.

38. Conley *v.* Cincinnati, etc., R. Co., 89 Ky. 402, 12 S. W. 764, 11 Ky. L. Rep. 602; Bannon *v.* Baltimore, etc., R. Co., 24 Md. 108.

39. Louisville, etc., R. Co. *v.* Coleman, 86 Ky. 556, 6 S. W. 438, 8 S. W. 875, 10 Ky. L. Rep. 81 (holding a railroad company to be liable by reason of the conductor on a detached car not at once putting on the brakes when he saw that a person on the track did not heed the engineer's warning); Menlo *v.* New Jersey Cent. R. Co., 84 N. Y. Suppl. 448.

40. *Illinois.*— Chicago, etc., R. Co. *v.* O'Neil, 64 Ill. App. 623.

Kentucky.— Conley *v.* Cincinnati, etc., R. Co., 89 Ky. 402, 12 S. W. 764, 11 Ky. L. Rep. 602.

New York.— Heck *v.* New York Cent., etc., R. Co., 94 N. Y. App. Div. 469, 88 N. Y. Suppl. 154; McCarty *v.* New York Cent., etc., R. Co., 73 N. Y. App. Div. 34, 76 N. Y. Suppl. 321.

Texas.— International, etc., R. Co. *v.* Brooks, (Civ. App. 1899) 54 S. W. 1056.

Washington.— Roth *v.* Union Depot Co., 13 Wash. 525, 43 Pac. 641, 44 Pac. 453, 31 L. R. A. 855.

Reasonable care is the measure of duty in such a case and the company is not bound to use "great care." Heck *v.* New York Cent., etc., R. Co., 94 N. Y. App. Div. 562, 88 N. Y. Suppl. 154.

Switching cars on a dark night without warning or lights on moving cars at a point where the railroad company knew pedestrians had the right and were in the habit of passing is not exercising reasonable care. McCarty *v.* New York Cent., etc., R. Co., 73 N. Y. App. Div. 34, 76 N. Y. Suppl. 321.

Running unattended cars at a rapid rate down a grade and around a curve out of sight of its railroad employees and over a track used daily by a number of people as a passway is gross negligence. Roth *v.* Union Depot Co., 13 Wash. 525, 43 Pac. 641, 44 Pac. 253, 31 L. R. A. 855.

41. Kentucky Cent. R. Co. *v.* Smith, 93 Ky. 449, 20 S. W. 392, 14 Ky. L. Rep. 455, 18 L. R. A. 63.

Making a running or flying switch on a street in a populous part of a city is a high degree of negligence. Kentucky Cent. R. Co. *v.* Smith, 93 Ky. 449, 20 S. W. 392, 14 Ky. L. Rep. 455, 18 L. R. A. 63.

(VIII) *SIGNALS AND LOOKOUTS* [42] — (A) *Duty to Give Signals* — (1) IN GENERAL. In the absence of statutory requirements, or knowledge of a person's perilous position, a railroad company is ordinarily under no duty to give warning by bell or whistle of the approach or movement of its trains at places other than at public crossings, depots, or in towns or cities; [43] although the trespasser at such points is an infant.[44] This rule, however, is subject to the qualification that where together with other circumstances increasing the risk of accident, the railroad company has reason to anticipate that persons will be on its tracks at certain places,[45] as in towns or cities,[46] or at other places where persons have been accustomed to cross or go upon the tracks for a long time within the railroad company's

42. Injuries to persons at crossings see *infra*, X, F, 7.

Injuries to persons working on or near tracks or cars see *infra*, X, E, 2, c, (II), (B).

43. *Alabama.*— Carrington *v.* Louisville, etc., R. Co., 88 Ala. 472, 6 So. 910.

California.— Toomey *v.* Southern Pac. R. Co., 86 Cal. 374, 24 Pac. 1074, 10 L. R. A. 139.

Illinois.— Kinnare *v.* Chicago, etc., R. Co., 114 Ill. App. 230.

Kentucky.— Gregory *v.* Louisville, etc., R. Co., 79 S. W. 238, 25 Ky. L. Rep. 1986; Lyons *v.* Illinois Cent. R. Co., 59 S. W. 507, 22 Ky. L. Rep. 1032; Oatts *v.* Cincinnati, etc., R. Co., 22 S. W. 330, 15 Ky. L. Rep. 87; Woodyard *v.* Kentucky Cent. R. Co., 15 S. W. 178, 12 Ky. L. Rep. 800.

New Jersey.— Furey *v.* New York Cent., etc., R. Co., 67 N. J. L. 270, 51 Atl. 505, holding that a person using a passage between cars of a broken freight train in defendant's yard cannot complain that no signal other than the customary one was given before closing the train.

New York.— Smetanka *v.* New York Cent., etc., R. Co., 123 N. Y. App. Div. 323, 105 N. Y. Suppl. 973; Enk *v.* Brooklyn City R. Co., 19 N. Y. Suppl. 130, holding that there is no obligation to sound a whistle or bell at a siding which is at neither a station nor a road crossing.

Ohio.— Driscoll *v.* Cincinnati, 1 Ohio Cir. Ct. 493, 1 Ohio Cir. Dec. 274.

Oregon.— Rathbone *v.* Oregon R. Co., 40 Oreg. 225, 66 Pac. 909.

South Carolina.— Cooper *v.* Charleston, etc., R. Co., 65 S. C. 214, 43 S. E. 682.

Tennessee.— Moran *v.* Nashville, etc., R. Co., 2 Baxt. 379.

Texas.— Missouri, etc., R. Co. *v.* Cowles, (Civ. App. 1902) 67 S. W. 1078.

Wisconsin.— Vaundry *v.* Chicago, etc., R. Co., 130 Wis. 283, 109 N. W. 926, holding that there is no statute requiring a railroad company to sound the whistle merely because a train is rounding a curve.

England.— Harrison *v.* Northeastern R. Co., 29 L. T. Rep. N. S. 844, 22 Wkly. Rep. 335.

See 41 Cent. Dig. tit. "Railroads," §§ 1257, 1261.

44. McDermott *v.* Kentucky Cent. R. Co., 93 Ky. 408, 20 S. W. 380, 14 Ky. L. Rep. 437.

45. Louisville, etc., R. Co. *v.* Goulding, 52 Fla. 327, 42 So. 854; Downing *v.* Morgan's Louisiana, etc., R., etc., Co., 104 La. 508, 29 So. 207; Rathbone *v.* Oregon R. Co., 40 Oreg. 225, 66 Pac. 909.

At all points of known or reasonably apprehended danger it is the duty of those in charge of a train to give notice of its approach independently of statute. Oliver *v.* Roach, 102 S. W. 274, 31 Ky. L. Rep. 284; Cooper *v.* Charleston, etc., R. Co., 65 S. C. 214, 43 S. E. 682.

Where persons engaged in business on the road are called upon to pass from one side of the track to the other, it is the duty of those operating the train when approaching such place to give warning of its approach, although it is not at a public crossing. Owens *v.* Pennsylvania R. Co., 41 Fed. 187.

Knowledge by a section master and by a supervisor of the road that a certain person had been in the habit of going upon the track at a certain point does not constitute such notice to those in charge of the running of trains as shows a duty on their part to warn such person of the running of an extra train. Comer *v.* Hill, 101 Ga. 340, 28 S. E. 856.

Failure to ring a bell in running in railroad yards as required by the rules of a railroad company is evidence of want of reasonable care on the part of those in charge, to one licensed to be in the railroad yard. Collier *v.* Michigan Cent. R. Co., 27 Ont. App. 630.

46. *Illinois.*— Indianapolis, etc., R. Co. *v.* Galbreath, 63 Ill. 436, holding that a railroad company is guilty of gross and criminal negligence in running a train in the night through a village without a light or any warning of its approach.

Kentucky.— Chesapeake, etc., R. Co. *v.* Nipp, 125 Ky. 49, 100 S. W. 246, 30 Ky. L. Rep. 1131; Johnson *v.* Louisville, etc., R. Co., 122 Ky. 487, 91 S. W. 707, 29 Ky. L. Rep. 36; Louisville, etc., R. Co. *v.* Taaffe, 106 Ky. 535, 50 S. W. 850, 21 Ky. L. Rep. 64; Conley *v.* Cincinnati, etc., R. Co., 89 Ky. 402, 12 S. W. 764, 11 Ky. L. Rep. 602; McCabe *v.* Maysville, etc., R. Co., 89 S. W. 683, 28 Ky. L. Rep. 536; Chesapeake, etc., R. Co. *v.* Keelin, 62 S. W. 261, 22 Ky. L. Rep. 1942.

Louisiana.— Downing *v.* Morgan's Louisiana, etc., R., etc., Co., 104 La. 508, 29 So. 207; Hamilton *v.* Morgan's Louisiana, etc., R., etc., Co., 42 La. Ann. 824, 8 So. 586.

New York.— Cumming *v.* Brooklyn City R. Co., 38 Hun 362 [*affirmed* in 104 N. Y. 669, 10 N. E. 855].

knowledge,[47] it is its duty to exercise reasonable care to give a warning by bell or whistle of an approaching train; and in some jurisdictions such warning, while going through towns or cities, is expressly required by statute or ordinance.[48] And in any case, if a person is seen in a perilous position on or near the track, and apparently is unaware of his danger, a failure to give him timely warning by bell or whistle is negligence,[49] unless such failure is caused by the engineer's

Pennsylvania.— Holt *v.* Pennsylvania R. Co., 206 Pa. St. 356, 55 Atl. 1055.

See 41 Cent. Dig. tit. "Railroads," §§ 1257, 1261.

47. *New York.*— Keller *v.* Erie R. Co., 98 N. Y. App. Div. 550, 100 N. Y. App. Div. 509, 90 N. Y. Suppl. 236 [*affirmed* in 183 N. Y. 67, 75 N. E. 965].

North Carolina.— Heavener *v.* North Carolina R. Co., 141 N. C. 245, 53 S. E. 513.

Ohio.— Wabash R. Co. *v.* Fox, 20 Ohio Cir. Ct. 440, 11 Ohio Cir. Dec. 148, in starting train.

South Carolina.— Boggero *v.* Southern R. Co., 64 S. C. 104, 41 S. E. 819.

Texas.— Texas, etc., R. Co. *v.* Watkins, (Civ. App. 1894) 26 S. W. 760.

England.— Dublin, etc., R. Co. *v.* Slattery, 3 App. Cas. 1155, 39 L. T. Rep. N. S. 365, 27 Wkly. Rep. 191.

See 41 Cent. Dig. tit. "Railroads," §§ 1257, 1261.

It is negligence per se for a railroad company to permit a train of its cars to be moved at a place where persons are accustomed to walk without having some of its servants in a position to give warning of its approach. Nuzum *v.* Pittsburgh, etc., R. Co., 30 W. Va. 228, 4 S. E. 242.

48. *Alabama.*— Peters *v.* Southern R. Co., 135 Ala. 533, 33 So. 332 (ringing of a bell or blowing a whistle at short intervals required by Code, § 3440); Carrington *v.* Louisville, etc., R. Co., 88 Ala. 472, 6 So. 910; East Tennessee, etc., R. Co. *v.* King, 81 Ala. 177, 2 So. 152.

Georgia.— Georgia Cent. R. Co. *v.* Bond, 114 Ga. 913, 41 S. E. 70, holding that where a person killed on a railroad was either, under Civ. Code, §§ 2222, 2224, entitled to be warned of the approach of a train by the ringing of the bell of the engine, or whether he was entitled to such notice under a city ordinance requiring the ringing of the bell, it was immaterial whether the neglect of the company in failing to signal was in disregard of the code or of the ordinance.

Illinois.— Southern R. Co. *v.* Drake, 107 Ill. App. 12.

Missouri.— Eppstein *v.* Missouri Pac. R. Co., 197 Mo. 720, 94 S. W. 967; Rafferty *v.* Missouri Pac. R. Co., 91 Mo. 33, 3 S. W. 393, holding such an ordinance not to apply to setting cars in a car yard over which there is no street crossing.

Tennessee.— Illinois Cent. R. Co. *v.* Davis, 104 Tenn. 442, 58 S. W. 296.

Texas.— Galveston, etc., R. Co. *v.* Levy, 35 Tex. Civ. App. 107, 79 S. W. 879 (holding that a failure to cause the engine bell to be rung continuously while the engine is in motion in a city as required by an ordinance is negligence *per se*); Gulf, etc. R. Co. *v.* Matthews, 28 Tex. Civ. App. 92, 66 S. W. 588, 67 S. W. 788.

West Virginia.— Nuzum *v.* Pittsburgh, etc., R. Co., 30 W. Va. 228, 4 S. E. 242, holding that a failure to ring a bell or blow a whistle as required under Acts (1882), § 61, is negligence *per se*.

See 41 Cent. Dig. tit. "Railroads," §§ 1260, 1266.

The word "town" as used in a statute (Milliken & V. Code Tenn. § 1298, subs. 3), regulating railroad signals on approaching a city or town includes only incorporated towns. Webb *v.* East Tennessee, etc., R. Co., 88 Tenn. 119, 12 S. W. 428.

Absolute liability.— Under Milliken & V. Code Tenn. § 1298, the requirement of the statute is imperative and a breach of it gives a right of action whether its non-observance was a proximate cause of the injury or not. Illinois Cent. R. Co. *v.* Davis, 104 Tenn. 442, 58 S. W. 296.

That the accident did not happen at or near a street crossing is immaterial on the question of the railroad company's negligence in failing to ring a bell continuously as required by a municipal ordinance. Galveston, etc., R. Co. *v.* Levy, 35 Tex. Civ. App. 107, 79 S. W. 879.

Where an ordinance makes it a misdemeanor to run trains in any part of the city at greater than a certain speed without continually ringing the bell, the neglect of the municipal authorities to enforce such ordinance in a part of the city does not excuse a violation thereof so as to relieve the railroad company from liability for injuries caused by a violation of the ordinance. Gulf, etc., R. Co. *v.* Matthews, 28 Tex. Civ. App. 92, 66 S. W. 588, 67 S. W. 788.

That the party injured did not know of the ordinance does not affect the railroad company's liability. Gulf, etc., R. Co. *v.* Matthews, 28 Tex. Civ. App. 92, 66 S. W. 588, 67 S. W. 788.

Where the track is not a part of the roadway itself, it has been held that a failure to sound the whistle or ring the bell while moving through a village as required by Ala. Code, § 1144, is not negligence *per se* if the engineer was guilty of no intent to cause the injury. Louisville, etc., R. Co. *v.* Hairston, 97 Ala. 351, 12 So. 299.

49. *Alabama.*— Frazer *v.* South Alabama, etc., R. Co., 81 Ala. 185, 1 So. 85, 60 Am. Rep. 145.

California.— Holmes *v.* South Pac. Coast R. Co., 97 Cal. 161, 31 Pac. 834.

Kentucky.— Illinois Cent. R. Co. *v.* Hocker, 55 S. W. 438, 21 Ky. L. Rep. 1398; Louis-

other efforts to avoid an injury.[50] But the omission to sound a bell or whistle, although required by statute, is not negligence as to one who sees or is aware of the approaching train,[51] or as to one who could not have heard the warning if given.[52] But the mere fact that the injured party could have heard the noise of the approaching train in time to enable him to avoid the injury will not excuse a failure to give the signals if he did not in fact hear such noise in time.[53]

(2) Crossing Signals or Warnings. In the absence of a provision in the statute specifically designating persons to whom the duty of giving crossing signals or warnings is due, it is generally held that such warnings are due only to persons on the highway using, about to use, or who have just used the crossing, and not to trespassers or licensees on the railroad tracks or right of way at places other than a crossing,[54] nor to persons riding or driving along parallel to the rail-

ville, etc., R. Co. *v.* Tinkham, 44 S. W. 439, 19 Ky. L. Rep. 1784.

Missouri.— Reyburn *v.* Missouri Pac. R. Co., 187 Mo. 565, 86 S. W. 174; Sinclair *v.* Chicago, etc., R. Co., 133 Mo. 233, 34 S. W. 76 (holding, however, that the fact that the engineer might have seen the trespasser on the track one eighth of a mile from him and gave no warning until within four hundred feet is not negligence if such warning was given in time for the trespasser to have safely left the track); Bell *v.* Hannibal, etc., R. Co., 72 Mo. 50.

North Carolina.— McCall *v.* Southern R. Co., 129 N. C. 298, 40 S. E. 67.

Tennessee.— See East Tennessee, etc., R. Co. *v.* Winters, 85 Tenn. 240, 1 S. W. 790.

Texas.— Texas Midland R. Co. *v.* Byrd, 41 Tex. Civ. App. 164, 90 S. W. 185; Missouri, etc., R. Co. *v.* Cowles, 29 Tex. Civ. App. 156, 67 S. W. 1078; International, etc., R. Co. *v.* Woodward, 26 Tex. Civ. App. 389, 63 S. W. 1051; Houston, etc., R. Co. *v.* Harvin, (Civ. App. 1899) 54 S. W. 629.

West Virginia.— Kelley *v.* Ohio River R. Co., 58 W. Va. 216, 52 S. E. 520, 2 L. R. A. N. S. 898; Teel *v.* Ohio River R. Co., 49 W. Va. 85, 38 S. E. 518.

Wisconsin.— Heddles *v.* Chicago, etc., R. Co., 74 Wis. 239, 42 N. W. 237.

See 41 Cent. Dig. tit. "Railroads," §§ 1257, 1275, 1276.

50. Heddles *v.* Chicago, etc., R. Co., 74 Wis. 239, 42 N. W. 237, holding that where, after the engineer saw that the person injured was about to cross, he was putting forth other exertions to save such party, and on account of such exertions had not time to have the whistle sounded, his failure to do so would not constitute negligence.

51. *Georgia.*— Central R. Co. *v.* Brinson, 70 Ga. 207.

Indiana.— Cincinnati, etc., R. Co. *v.* Long, 112 Ind. 166, 13 N. E. 659.

Iowa.— Carpenter *v.* Chicago, etc., R. Co., 126 Iowa 94, 101 N. W. 758.

Missouri.— Hutchinson *v.* Missouri Pac. R. Co., 195 Mo. 546, 93 S. W. 931; Skipton *v.* St. Joseph, etc., R. Co., 82 Mo. App. 134.

Canada.— Shoebrink *v.* Canada Atlantic R. Co., 16 Ont. 515.

Words of caution if within hearing are as effective to give notice as bells or whistles, and where such caution is given and heard the engineer is not guilty of negligence in not sounding the whistle. Skipton *v.* St. Joseph, etc., R. Co., 82 Mo. App. 134.

52. Johnson *v.* Rio Grande Western R. Co., 19 Utah 77, 57 Pac. 17.

53. Trinity, etc., R. Co. *v.* Simpson, (Tex. Civ. App. 1905) 86 S. W. 1034.

54. *California.*— Toomey *v.* Southern Pac. R. Co., 86 Cal. 374, 24 Pac. 1074, 10 L. R. A. 139.

Georgia.— Southern R. Co. *v.* Flynt, 2 Ga. App. 162, 58 S. E. 374.

Illinois.— Thompson *v.* Cleveland, etc., R. Co., 226 Ill. 542, 80 N. E. 1054, 9 L. R. A. N. S. 672 [*affirmed* in 123 Ill. App. 47]; Roden *v.* Chicago, etc., R. Co., 133 Ill. 72, 24 N. E. 425, 23 Am. St. Rep. 585 (holding that the omission to provide a flagman at a crossing and to ring the engine bell when approaching it do not constitute negligence as against a person who is walking along the track); Chicago, etc., R. Co. *v.* Eininger, 114 Ill. 79, 29 N. E. 196; Illinois Cent. R. Co. *v.* Schmitt, 100 Ill. App. 490; Smith *v.* Chicago, etc., R. Co., 99 Ill. App. 296; Illinois Cent. R. Co. *v.* Oberhoefer, 76 Ill. App. 672; Maney *v.* Chicago, etc., R. Co., 49 Ill. App. 105; Chicago, etc., R. Co. *v.* McKnight, 16 Ill. App. 596.

Indiana.— Baltimore, etc., R. Co. *v.* Bradford, 20 Ind. App. 348, 49 N. E. 388, 67 Am. St. Rep. 252.

Kentucky.— Chesapeake, etc., R. Co. *v.* Nipp, 125 Ky. 49, 100 S. W. 246, 30 Ky. L. Rep. 1131; Illinois Cent. R. Co. *v.* Willis, 123 Ky. 636, 97 S. W. 21, 29 Ky. L. Rep. 1187; Louisville, etc., R. Co. *v.* Redmon, 122 Ky. 385, 91 S. W. 722, 28 Ky. L. Rep. 1293; Davis *v.* Chesapeake, etc., R. Co., 116 Ky. 144, 75 S. W. 275, 25 Ky. L. Rep. 342 [opinion in 70 S. W. 857, 24 Ky. L. Rep. 1125, withdrawn]; Shackleford *v.* Louisville, etc., R. Co., 84 Ky. 43, 4 Am. St. Rep. 189; Chesapeake, etc., R. Co. *v.* Barbour, 93 S. W. 24, 29 Ky. L. Rep. 339; Louisville, etc., R. Co. *v.* Vittitoe, 41 S. W. 269, 19 Ky. L. Rep. 612. But see Rader *v.* Louisville, etc., R. Co., 104 S. W. 774, 31 Ky. L. Rep. 1105.

Missouri.— Zimmerman *v.* Hannibal, etc., R. Co., 71 Mo. 476.

Nebraska.— Omaha, etc., R. Co. *v.* Krayenbuhl, 48 Nebr. 553, 67 N. W. 447.

New Hampshire.— Batchelder *v.* Boston, etc., R. Co., 72 N. H. 528, 57 Atl. 926.

road.[55] In some jurisdictions, however, it is held that while the statutory signals are intended primarily as warnings to persons using or intending to use the crossings and not for those walking along the track or right of way, yet with regard to the latter as well as to the former a failure to comply with the statute is evidence of negligence to be considered by the jury together with other facts tending to show want of reasonable care on the part of the railroad company;[56] but if the failure to give such signals is the only negligence imputable to the railroad company, it is not liable in such cases.[57] Under some statutes such signals or warnings are held to be due to all persons lawfully on or near the crossing who may be exposed to danger by the approaching engine or train whether on the highway or on the right of way.[58] It has been held that a failure to sound crossing signals is not negligence as to a child on the tracks near the crossing and which is too young to understand the signals if given;[59] but on the other hand it has been

New York.— Harty *v.* New Jersey Cent. R. Co., 42 N. Y. 468; Winn *v.* New York Cent., etc., R. Co., 65 N. Y. App. Div. 572, 72 N. Y. Suppl. 899.

Ohio.— Cleveland, etc., R. Co. *v.* Workman, 66 Ohio St. 509, 64 N. E. 582, 90 Am. St. Rep. 602; Lake Shore, etc., R. Co. *v.* Harris, 23 Ohio Cir. Ct. 400.

Rhode Island.— O'Donnell *v.* Providence, etc., R. Co., 6 R. I. 211.

South Carolina.— Carter *v.* Charleston, etc., R. Co., 64 S. C. 316, 42 S. E. 161; Boggero *v.* Southern R. Co., 64 S. C. 104, 41 S. E. 819.

Virginia.— Hortenstein *v.* Virginia-Carolina R. Co., 102 Va. 914, 47 S. E. 996.

West Virginia.— Huff *v.* Chesapeake, etc., R. Co., 48 W. Va. 45, 35 S. E. 866; Christy *v.* Chesapeake, etc. R. Co., 35 W. Va. 117, 12 S. E. 1111; Spicer *v.* Chesapeake, etc., R. Co., 34 W. Va. 514, 12 S. E. 553, 11 L. R. A. 385.

Wisconsin.— Schug *v.* Chicago, etc., R. Co., 102 Wis. 515, 78 N. W. 1090.

United States.— Hastings *v.* Southern R. Co., 143 Fed. 260, 74 C. C. A. 398, 5 L. R. A. N. S. 775 (construing S. C. Civ. Code (1902), §§ 2132, 2139); Pike *v.* Chicago, etc., R. Co., 39 Fed. 754.

See 41 Cent. Dig. tit. "Railroads," §§ 1260, 1261, 1266.

One injured while standing in a switch-yard of a railroad company and not passing over a crossing cannot recover under a statute requiring crossing signals, although the yard is surrounded by streets. Hale *v.* Columbia, etc., R. Co., 34 S. C. 292, 13 S. E. 537; Neely *v.* Charlotte, etc., R. Co., 33 S. C. 136, 11 S. E. 636.

55. Southern R. Co. *v.* Flynt, 2 Ga. App. 162, 58 S. E. 374; Everett *v.* Great Northern R. Co., 100 Minn. 309, 111 N. W. 281, 9 L. R. A. N. S. 703; Reynolds *v.* Great Northern R. Co., 69 Fed. 808, 16 C. C. A. 435, 29 L. R. A. 695, holding that one injured while driving on a highway running parallel to the railroad track through his horse colliding with a train cannot recover on the ground that it failed to whistle for the crossing near the place of the accident, where he had not used and did not intend to use the crossing. And see *infra*, X, G, 3, c.

56. Georgia Cent. R., etc., Co. *v.* Golden, 93 Ga. 510, 21 S. E. 68; Georgia R., etc., Co. *v.* Daniel, 89 Ga. 463, 15 S. E. 538; Central R., etc., Co. *v.* Raiford, 82 Ga. 400, 9 S. E. 169; Georgia R. Co. *v.* Williams, 74 Ga. 723; Georgia R., etc., Co. *v.* Williams, 3 Ga. App. 272, 59 S. E. 846, 4 Ga. App. 23, 60 S. E. 808; Missouri, etc., R. Co. *v.* Saunders, (Tex. 1908) 106 S. W. 321 [*reversing* (Civ. App. 1907) 103 S. W. 457]; Texas, etc., R. Co. *v.* Shoemaker, 98 Tex. 451, 84 S. W. 1049 [*reversing* (Civ. App. 1904) 81 S. W. 1019]; San Antonio, etc., R. Co. *v.* Gray, 95 Tex. 424, 67 S. W. 763 [*reversing* (Civ. App. 1901) 66 S. W. 229]; Houston, etc., R. Co. *v.* O'Donnell, (Tex. Civ. App. 1905) 90 S. W. 886 [*reversed* on other grounds in 99 Tex. 636, 92 S. W. 409]; St. Louis Southwestern R. Co. *v.* Kilman, 39 Tex. Civ. App. 107, 86 S. W. 1050; International, etc., R. Co. *v.* Woodward, 26 Tex. Civ. App. 389, 63 S. W. 1051; Texas, etc., R. Co. *v.* Short, (Tex. Civ. App. 1900) 58 S. W. 56. *Compare* Coleman *v.* Wrightsville, etc., R. Co., 114 Ga. 386, 40 S. E. 247, holding that a railroad company is under no duty to a person who is unloading merchandise from a car on a side-track into a wagon, to which a horse is hitched, to comply with the requirements of Civ. Code, § 2224, respecting the giving of signals and checking the speed of the train before reaching a public crossing.

57. Atlanta, etc., R. Co. *v.* Gravitt, 93 Ga. 369, 20 S. E. 550, 44 Am. St. Rep. 145, 26 L. R. A. 553; St. Louis Southwestern R. Co. *v.* Bishop, 14 Tex. Civ. App. 504, 37 S. W. 764.

58. Lonergan *v.* Illinois Cent. R. Co., 87 Iowa 755, 49 N. W. 852, 53 N. W. 236, 17 L. R. A. 254 (holding that where the person injured was lawfully on defendant's depot grounds when defendant's engine passed without signal and frightened plaintiff's team causing it to run away and injure plaintiff, the railroad company was liable for failing to give the crossing signal as required by statute, although the person injured was not attempting to use such crossing); Wakefield *v.* Connecticut, etc., R. Co., 37 Vt. 330, 86 Am. Dec. 711.

59. Nashville, etc., R. Co. *v.* Harris, 142 Ala. 249, 37 So. 794, 110 Am. St. Rep. 29. See also Baltimore, etc., R. Co. *v.* Bradford,

held that such failure may be negligence, on the ground that the signals might have attracted the attention of the child's parents, if not of the child.[60]

(B) *Duty to Keep a Lookout* — (1) In General. In some jurisdictions it is held that a railroad company is bound to keep a proper lookout all along its line of track, for trespassers or bare licensees as well as for others, and is liable for injuries caused by its negligence in this respect not only to persons who are actually seen on the track, but also to persons who, by the exercise of ordinary care, could have been seen in time to avoid the accident;[61] and in some jurisdictions such precaution is expressly required by statute.[62] By the weight of authority,

20 Ind. App. 348, 49 N. E. 388, 67 Am. St. Rep. 252.

60. Chicago, etc., R. Co. *v.* Logue, 158 Ill. 621, 42 N. E. 53. But *compare* Chrystal *v.* Troy, etc., R. Co., 124 N. Y. 519, 26 N. E. 1103 [*reversing* 52 Hun 55, 4 N. Y. Suppl. 793].

61. *Nebraska.*— Chicago, etc., R. Co. *v.* Grablin, 38 Nebr. 90, 56 N. W. 796, 57 N. W. 522.

New Hampshire.— Mitchell *v.* Boston, etc., R. Co., 68 N. H. 96, 34 Atl. 674; Felch *v.* Concord R. Co., 66 N. H. 318, 29 Atl. 557.

North Carolina.— Sawyer *v.* Roanoke R., etc., Co., 145 N. C. 24, 58 S. E. 598; McArver *v.* Southern R. Co., 129 N. C. 380, 40 S. E. 94; Jeffries *v.* Seaboard Air Line R. Co., 129 N. C. 236, 39 S. E. 836; Whitesides *v.* Southern R. Co., 128 N. C. 229, 38 S. E. 878; Arrowood *v.* South Carolina, etc., R. Co., 126 N. C. 629, 36 S. E. 151; Powell *v.* Southern R. Co., 125 N. C. 370, 34 S. E. 530; Pickett *v.* Wilmington, etc., R. Co., 117 N. C. 616, 23 S. E. 264, 53 Am. St. Rep. 611, 30 L. R. A. 257.

Texas.— In this state the doctrine that a railroad company owes no duty to a trespasser or one wrongfully on its track, except to refrain from wanton injury to him, has been expressly repudiated; and it is held that the true rule is that it is the duty of the servants of a railroad company operating its trains to use reasonable care and caution to discover persons on its tracks, whether trespassers or not, and that a failure to use such care and caution is negligence on the part of the railroad company for which it is liable in damages for the injury resulting, unless its liability is defeated by the contributory negligence of the person injured. Texas, etc., R. Co. *v.* Watkins, 88 Tex. 20, 29 S. W. 232; Artusy *v.* Missouri Pac. R. Co., 73 Tex. 191, 11 S. W. 177; Galveston City R. Co. *v.* Hewitt, 67 Tex. 473, 3 S. W. 705, 60 Am. Rep. 32; Houston, etc., R. Co. *v.* Sympkins, 54 Tex. 615, 38 Am. Rep. 632; St. Louis Southwestern R. Co. *v.* Bolton, 36 Tex. Civ. App. 87, 81 S. W. 123; Missouri, etc., R. Co. *v.* Belew, 22 Tex. Civ. App. 264, 54 S. W. 1079. See Houston, etc., R. Co. *v.* Smith, 77 Tex. 179, 13 S. W. 972; St. Louis Southwestern R. Co. *v.* Bishop, 14 Tex. Civ. App. 504, 37 S. W. 764. But it is also held that if the party injured was a wrong-doer or trespasser at the time of the injury, the issue of contributory negligence is, as a general rule, established as a matter of law, so as to defeat his recovery, although not necessarily so (Texas, etc., R. Co. *v.* Watkins, 88 Tex. 20, 29 S. W. 232; St. Louis Southwestern R. Co. *v.* Bolton, *supra*); but that a licensee is not guilty of contributory negligence as a matter of law, and if the railroad company has reason to anticipate his presence on the track and fails to keep a proper lookout, it is liable to him for resulting injuries unless he is otherwise guilty of contributory negligence (Houston, etc., R. Co. *v.* O'Donnell, (Civ. App. 1905) 90 S. W. 886 [*reversed* on other grounds in 99 Tex. 636, 92 S. W. 409]); Hutchens *v.* St. Louis Southwestern R. Co., 40 Tex. Civ. App. 245, 89 S. W. 24; San Antonio, etc., R. Co. *v.* Brock, 35 Tex. Civ. App. 155, 80 S. W. 422; St. Louis Southwestern R. Co. *v.* Arnold, 32 Tex. Civ. App. 272, 74 S. W. 819; Kroeger *v.* Texas, etc., R. Co., 30 Tex. Civ. App. 87, 69 S. W. 809; St. Louis Southwestern R. Co. *v.* Jacobson, 28 Tex. Civ. App. 150, 66 S. W. 1111), although after discovering his peril it used every reasonable means to prevent the injury (Kroeger *v.* Texas, etc., R. Co., *supra*). It has also been held in this jurisdiction that it is not negligence to fail to constantly look out in front of an engine at a place where there is no crossing and where the railroad employees have no reason to expect that persons will be on or along the track. Houston, etc., R. Co. *v.* Smith, *supra*; St. Louis Southwestern R. Co. *v.* Bishop, *supra*. A second foreman or "straw boss" of a construction crew charged with the duties of indicating to the train crew by signaling when the construction crew was ready for the train to move, etc., is not engaged in the operation and management of the train, so as to render the company liable for his failure to either discover the party injured or warn him of his danger. Forge *v.* Houston, etc., R. Co., 41 Tex. Civ. App. 81, 90 S. W. 1118.

West Virginia.— Gunn *v.* Ohio River R. Co., 42 W. Va. 676, 26 S. E. 546, 36 L. R. A. 575.

See 41 Cent. Dig. tit. "Railroads," § 1258.

Where a lookout would have been unavailing as where the person injured steps immediately in front of the train or car from a safe place, a failure to keep a lookout will not render the company liable. Texas, etc., R. Co. *v.* Shivers, (Tex. Civ. App. 1907) 106 S. W. 894.

62. Little Rock, etc., R. Co. *v.* McQueeney, 78 Ark. 22, 92 S. W. 1120; East Tennessee,

however, a railroad company is ordinarily under no duty to exercise active vigilance to keep a lookout for trespassers or licensees on its track, and is liable in failing to use preventive efforts to avert an injury only after it becomes actually aware of danger to such persons.[63] This latter rule, however, in some jurisdic-

etc., R. Co. *v.* Winters, 85 Tenn. 240, 1 S. W. 790; East Tennessee, etc., R. Co. *v.* Humphreys, 12 Lea (Tenn.) 200; East Tennessee, etc., R. Co. *v.* White, 5 Lea (Tenn.) 540; Nashville, etc., R. Co. *v.* Nowlin, 1 Lea (Tenn.) 523; Moran *v.* Nashville, etc., R. Co., 2 Baxt. (Tenn.) 379 (holding, however, that an engineer need not keep a lookout behind); Towles *v.* Southern R. Co., 103 Fed. 405; Felton *v.* Newport, 92 Fed. 470, 34 C. C. A. 470.

Under a Tennessee statute (Milliken & V. Code, §§ 1298–1300), the railroad company's liability for failing to observe the statutory precautions is absolute, and in such case the inquiry is not whether the accident resulted from the failure to observe the precautions mentioned in the statute, but whether the company actually observed the precautions at the time the accident occurred. Smith *v.* Nashville, etc., R. Co., 6 Coldw. 589; Felton *v.* Newport, 105 Fed. 332, 44 C. C. A. 530, holding that the mere fact that a lookout was maintained as required by statute, and that he did not see a person on the track does not exonerate the railroad company from liability for the killing of such person, but it must further appear that the lookout could not have seen him in the exercise of due care and watchfulness. Such statute does not permit the running of a train with the engine in the rear even with a lookout in front so as to avoid its conditions. Little Rock, etc., R. Co. *v.* Wilson, 90 Tenn. 271, 16 S. W. 613, 25 Am. St. Rep. 693, 13 L. R. A. 364. But it does not apply to the making up of trains, and other necessary switching in a company's yards, and a person there struck by a moving car without an engine in front and lookout ahead can recover if at all, only under the rules of common law. Southern R. Co. *v.* Pugh, 95 Tenn. 419, 32 S. W. 311.

Movement of detached cars.— A statute requiring "the engineer, fireman, or some other person upon the locomotive" of a moving train to be constantly on the lookout "ahead" has no application to the movement by impetus or gravitation of cars detached from the locomotive. Patton *v.* Railway Co., 89 Tenn. 370, 15 S. W. 919, 12 L. R. A. 184.

Mass. Rev. Laws, c. 111, § 200, requiring that a trusty brakeman shall be stationed on the rear car of every freight train, does not apply to a work train used to distribute ties and sand for the repair of the road. Bacon *v.* New York, etc., R. Co., 194 Mass. 489, 80 N. E. 458.

63. *Alabama.*— Duncan *v.* St. Louis, etc., R. Co., 152 Ala. 118, 44 So. 418; Southern R. Co. *v.* Bush, 122 Ala. 470, 26 So. 168; Verner *v.* Alabama, etc., R. Co., 103 Ala. 574, 15 So. 872; Louisville, etc., R. Co. *v.* Black, 89 Ala. 313, 8 So. 246; Carrington *v.* Louisville, etc., R. Co., 88 Ala. 472, 6 So. 910; Bentley *v.* Georgia Pac. R. Co., 86 Ala. 484, 6 So. 37; Georgia Pac. R. Co. *v.* Blanton, 84 Ala. 154, 4 So. 621. While it is the duty of a railroad company to keep a proper lookout for obstructions and other dangers including, it may be, trespassers, it is not an absolute and particular duty as to an intruder upon the track so far as to constitute an omission to discover him and signal, negligence *per se* as to such intruder. Frazer *v.* South, etc., R. Co., 81 Ala. 185, 1 So. 85, 60 Am. Rep. 185.

Arkansas.— This rule was formerly adhered to in this state. St. Louis, etc., R. Co. *v.* Jordan, 65 Ark. 429, 47 S. W. 115; Brown *v.* St. Louis, etc., R. Co., 52 Ark. 120, 12 S. W. 203; St. Louis, etc., R. Co. *v.* Monday, 49 Ark. 257, 4 S. W. 782. But the rule is now otherwise by statute. See Little Rock, etc., R. Co. *v.* McQueeney, 78 Ark. 22, 92 S. W. 1120, under Kirby Dig. § 667.

Connecticut.— Nolan *v.* New York, etc., R. Co., 53 Conn. 451, 4 Atl. 106.

Illinois.— Bartlett *v.* Wabash R. Co., 220 Ill. 163, 77 N. E. 96; Wabash R. Co. *v.* Jones, 163 Ill. 167, 45 N. E. 50; Kinnare *v.* Chicago, etc., R. Co., 114 Ill. App. 230; Chicago, etc., R. Co. *v.* Urbaniac, 106 Ill. App. 325; Clevelaud, etc., R. Co. *v.* Hibsman, 99 Ill. App. 405; Smith *v.* Chicago, etc., R. Co., 99 Ill. App. 296; Lake Shore, etc., R. Co. *v.* Clark, 41 Ill. App. 343; Illinois Cent. R. Co. *v.* Frelka, 9 Ill. App. 605.

Indiana.— Pennsylvania Co. *v.* Meyers, 136 Ind. 242, 36 N. E. 32.

Indian Territory.— Gulf, etc., R. Co. *v.* Bolton, 2 Indian Terr. 463, 51 S. W. 1085.

Iowa.— Purcell *v.* Chicago, etc., R. Co., 117 Iowa 667, 91 N. W. 933; Thomas *v.* Chicago, etc., R. Co., 93 Iowa 248, 61 N. W. 967, 103 Iowa 649, 72 N. W. 783, 39 L. R. A. 399, 114 Iowa 169, 86 N. W. 259; Masser *v.* Chicago, etc., R. Co., 68 Iowa 602, 27 N. W. 776; McAllister *v.* Burlington, etc., R. Co., 64 Iowa 395, 20 N. W. 488.

Kentucky — Johnson *v.* Louisville, etc., R. Co., 122 Ky. 487, 91 S. W. 707, 29 Ky. L. Rep. 36; Louisville, etc., R. Co. *v.* Hathaway, 121 Ky. 666, 89 S. W. 724, 28 Ky. L. Rep. 628, 2 L. R. A. N. S. 498; McDermott *v.* Kentucky Cent., etc., R. Co., 93 Ky. 408, 20 S. W. 380, 14 Ky. L. Rep. 437; Conley *v.* Cincinnati, etc., R. Co., 89 Ky. 402, 12 S. W. 764, 11 Ky. L. Rep. 602; Louisville, etc., R. Co. *v.* Coleman, 86 Ky. 556, 6 S. W. 438, 8 S. W. 875, 10 Ky. L. Rep. 81; Illinois Cent. R. Co. *v.* Johnson, 97 S. W. 745, 30 Ky. L. Rep. 142; Chesapeake, etc., R. Co. *v.* Barbour, 93 S. W. 24, 29 Ky. L. Rep. 339; Beiser *v.* Chesapeake, etc., R. Co., 92 S. W. 928, 29

tions, is subject to the qualification that it is the duty of those in charge of a train to keep a lookout even for trespassers or bare licensees at places where and times when persons may reasonably be expected to be on the track,[64] as at points in

Ky. L. Rep. 249; Yates *v.* Illinois Cent. R. Co., 89 S. W. 161, 28 Ky. L. Rep. 75; Hulsey *v.* Louisville, etc., R. Co., 87 S. W. 302, 27 Ky. L. Rep. 969; Vanarsdall *v.* Louisville, etc., R. Co., 65 S. W. 858, 23 Ky. L. Rep. 1666; Louisville, etc., R. Co. *v.* Thornton, 58 S. W. 796, 22 Ky. L. Rep. 778; Louisville, etc., R. Co. *v.* Vittitoe, 41 S. W. 269, 19 Ky. L. Rep. 612; France *v.* Louisville, etc., R. Co., 22 S. W. 851, 15 Ky. L. Rep. 244; Louisville, etc., R. Co. *v.* Kellem, 21 S. W. 230, 14 Ky. L. Rep. 734. See also Rader *v.* Louisville, etc., R. Co., 104 S. W. 774, 31 Ky. L. Rep. 1105.

Maryland.— Western Maryland R. Co. *v.* Kehoe, 83 Md. 434, 35 Atl. 90.

Massachusetts.— Johnson *v.* J. M. Guffey Petroleum Co., 197 Mass. 302, 83 N. E. 874; Chenery *v.* Fitchburg R. Co., 160 Mass. 211, 35 N. E. 554, 22 L. R. A. 575.

Michigan.— Bouwmeester *v.* Grand Rapids, etc., R. Co., 67 Mich. 87, 34 N. W. 414.

Minnesota.— McNamara *v.* Great Northern R. Co., 61 Minn. 296, 63 N. W. 726; Hepfel *v.* St. Paul, etc., R. Co., 49 Minn. 263, 51 N. W. 1049; Studley *v.* St. Paul, etc., R. Co., 48 Minn. 249, 51 N. W. 115; Scheffler *v.* Minneapolis, etc., R. Co., 32 Minn. 518, 21 N. W. 711.

Mississippi.— Christian *v.* Illinois Cent. R. Co., 71 Miss. 237, 15 So. 71.

Missouri.— Williams *v.* Kansas City, etc., R. Co., 96 Mo. 275, 9 S. W. 573; Powell *v.* Missouri Pac. R. Co., 59 Mo. App. 626; Crow *v.* Wabash, etc., R. Co., 23 Mo. App. 357.

Montana.— Egan *v.* Montana Cent. R. Co., 24 Mont. 569, 63 Pac. 831.

Ohio.— Driscoll *v.* Cincinnati, etc., R. Co., 1 Ohio Cir. Ct. 493, 1 Ohio Cir. Dec. 274.

Oregon.— Rathbone *v.* Oregon R. Co., 40 Oreg. 225, 66 Pac. 909.

South Carolina.— See Mason *v.* Southern R. Co., 58 S. C. 70, 36 S. E. 440, 79 Am. St. Rep. 862, 53 L. R. A. 913.

Virginia.— Norfolk, etc., R. Co. *v.* Denny, 106 Va. 383, 56 S. E. 321.

United States.— Sheehan *v.* St. Paul, etc., R. Co., 76 Fed. 201, 22 C. C. A. 121; Farve *v.* Louisville, etc., R. Co., 42 Fed. 441.

See 41 Cent. Dig. tit. "Railroads," §§ 1258, 1261.

A railroad company operating stock-yards owes no duty to keep a lookout for the safety of a mere trespasser or licensee in such yards. Johnson *v.* Louisville, etc., R. Co., 91 S. W. 707, 29 Ky. L. Rep. 36.

A servant of a railroad who uses a tricycle on the track is bound to keep out of the way of trains, and it is not incumbent on the company to keep a lookout for him at places where the presence of persons on the track is not to be anticipated, and it owes him no duty until his presence on the track is actually discovered by those in charge of a train. Louisville, etc., R. Co. *v.* Jolly, 90 S. W. 977, 28 Ky. L. Rep. 989.

A rule requiring trainmen on extras and delayed trains "to keep a sharp lookout for all work trains, section men, and others who may be obstructing the track," does not apply to persons wrongfully on the track. Burg *v.* Chicago, etc., R. Co., 90 Iowa 106, 57 N. W. 680, 48 Am. St. Rep. 419.

64. *Connecticut.*— Sullivan *v.* New York, etc., R. Co., 73 Conn. 203, 47 Atl. 131.

Illinois.— Illinois Cent. R. Co. *v.* Frelka, 9 Ill. App. 605.

Iowa.— Thomas *v.* Chicago, etc., R. Co., 103 Iowa 649, 72 N. W. 783, 39 L. R. A. 399, holding that where a railroad company impliedly assents to the use of portions of its track as a footpath, employees operating trains thereon are bound to exercise care to ascertain if persons are on the track at such places.

Louisiana.— Willis *v.* Vicksburg, etc., R. Co., 115 La. 53, 38 So. 892.

Missouri.— Ayers *v.* Wabash R. Co., 190 Mo. 228, 88 S. W. 608; Fiedler *v.* St. Louis, etc., R. Co., 107 Mo. 645, 18 S. W. 847; Williams *v.* Kansas City, etc., R. Co., 96 Mo. 275, 9 S. W. 573.

Vermont.— Lindsay *v.* Canadian Pac. R. Co., 68 Vt. 556, 35 Atl. 513.

Wisconsin.— Whalen *v.* Chicago, etc., R. Co., 75 Wis. 654, 44 N. W. 849 (holding that a railroad company is liable for negligence in not providing a careful lookout in the direction the train is moving at a place where those in charge of the train knew that adults and children in considerable numbers were likely to be passing, although such precaution had not generally been taken at that place); Townley *v.* Chicago, etc., R. Co., 53 Wis. 626, 11 N. W. 55.

United States.— Garner *v.* Trumbull, 94 Fed. 321, 36 C. C. A. 361.

See 41 Cent. Dig. tit. "Railroads," §§ 1259, 1265.

A railroad company is not chargeable with notice that a man is liable to be lying on the track at such a place, and the mere fact that an engine strikes a man so lying on the track is not of itself sufficient to justify the inference that the engineer saw him or failed to use ordinary care to discover him in time to prevent injury. Ayers *v.* Wabash R. Co., 190 Mo. 228, 88 S. W. 608.

Even though the railroad company could not have prevented the injury after discovering the danger, it may be liable for failure to use proper care to discover a person at a place where there was reason to apprehend from the fact of long and extended use thereof by pedestrians that the track was not clear. Powell *v.* Missouri Pac. R. Co., 59 Mo. App. 626.

In private yards.—A railrad company may be negligent in failing to place a lookout on cars in making a flying switch in its private yard, frequently used with its consent by persons having business therein. Reifsnyder

cities, towns, and villages where persons are in the nabit of crossing or walking on the tracks.[65]

(2) SUFFICIENCY OF LOOKOUT. A proper lookout within the meaning of the above rule, in the absence of statute otherwise, need only be kept in what is a reasonable and prudent manner under the circumstances, the degree of care being such as a person of ordinary prudence and caution would commonly exercise under like circumstances, and varying as the known probability of danger may vary along the different portions of the route.[66] But it is not negligence to tem-

v. Chicago, etc., R. Co., 90 Iowa 76, 57 N. W. 692.

Where the use of the track by pedestrians has been confined largely to Sundays and to reasonable hours in the daytime, the railroad company is not bound to expect or required to be on the lookout for trespassers on the track at that point at midnight. Hoback *v.* Louisville, etc., R. Co., 99 S. W. 241, 30 Ky. L. Rep. 476.

65. *Alabama.*— Duncan *v.* St. Louis, etc., R. Co., 152 Ala. 118, 44 So. 418; Louisville, etc., R. Co. *v.* Black, 89 Ala. 313, 8 So. 246; Carrington *v.* Louisville, etc., R. Co., 88 Ala. 472, 6 So. 910; Bentley *v.* Georgia Pac. R. Co., 86 Ala. 484, 6 So. 37; South, etc., R. Co. *v.* Donovan, 84 Ala. 131, 4 So. 142, holding that within the corporate limits of a city or town where necessity may compel or usage sanction walking on the railroad track at places other than at public crossings, it is the duty of those who are engaged in running a train to keep a vigilant lookout even for trespassers.

Connecticut.— Nolan *v.* New York, etc., R. Co., 53 Conn. 461, 4 Atl. 106.

Georgia.— Brunswick, etc., R. Co. *v.* Gibson, 97 Ga. 489, 24 S. E. 484, holding that it is a question for the jury whether it was negligence to fail to have a flagman or other person on the rear end of a locomotive, while it was being run backward along a leading city street.

Kansas.— Missouri Pac. R. Co. *v.* Jaffi, 67 Kan. 81, 72 Pac. 535.

Kentucky.— Illinois Cent. R. Co. *v.* Murphy, 123 Ky. 787, 97 S. W. 729, 30 Ky. L. Rep. 93, 11 L. R. A. N. S. 352; Johnson *v.* Louisville, etc., R. Co., 122 Ky. 487, 91 S. W. 707, 29 Ky. L. Rep. 36; Louisville, etc., R. Co. *v.* Taaffe, 106 Ky. 535, 50 S. W. 850, 21 Ky. L. Rep. 64; Conley *v.* Cincinnati, etc., R. Co., 89 Ky. 402, 12 S. W. 764, 11 Ky. L. Rep. 602; Chesapeake, etc., R. Co. *v.* Nipp, 100 S. W. 246, 30 Ky. L. Rep. 1131; McCabe *v.* Maysville, etc., R. Co., 89 S. W. 683, 28 Ky. L. Rep. 536; Chesapeake, etc., R. Co. *v.* Keelin, 62 S. W. 61, 22 Ky. L. Rep. 1942; Gunn *v.* Felton, 57 S. W. 15, 22 Ky. L. Rep. 268.

Louisiana.— Hamilton *v.* Morgan's Louisiana, etc., R., etc., Co., 42 La. Ann. 824, 8 So. 586.

Missouri.— Lynch *v.* St. Joseph, etc., R. Co., 111 Mo. 601, 19 S. W. 1114; Williams *v.* Kansas City, etc., R. Co., 96 Mo. 275, 9 S. W. 573; Guenther *v.* St. Louis, etc., R. Co., 95 Mo. 286, 8 S. W. 371, 108 Mo. 18, 18 S. W. 846; Murrell *v.* Missouri Pac. R. Co., 105 Mo. App. 88, 79 S. W. 505.

Pennsylvania.— Kelly *v.* Philadelphia, etc., R. Co., 30 Leg. Int. 140.

Utah.— Teakle *v.* San Pedro, etc., R. Co., 32 Utah 276, 90 Pac. 402, 10 L. R. A. N. S. 486.

United States.— Barley *v.* Chicago, etc., R. Co., 2 Fed. Cas. No. 997, 4 Biss. 430.

See 41 Cent. Dig. tit. "Railroads," §§ 1258, 1259, 1263, 1265.

Backing a train within city limits without a brakeman or other persons on the cars or stationed elsewhere to keep a lookout ahead of the moving cars is negligence for which the railroad company is responsible. Savannah, etc., R. Co. *v.* Shearer, 58 Ala. 672; Hamilton *v.* Morgan's Louisiana, etc., R., etc., Co., 42 La. Ann. 824, 8 So. 586; Barley *v.* Chicago, etc., R. Co., 2 Fed. Cas. No. 997, 4 Biss. 430; Levoy *v.* Midland R. Co., 3 Ont. 623; Bennett *v.* Grand Trunk R. Co., 3 Ont. 446. *Compare* East Tennessee, etc., R. Co. *v.* King, 81 Ala. 177, 2 So. 152. It has been held, however, that such acts of a railroad company are not so gross as to justify an award of punitive damages (Hamilton *v.* Morgan's Louisiana, etc., R., etc., Co., 42 La. Ann. 824, 8 So. 586); and that they are not conclusive evidence although in violation of an ordinance (Scudder *v.* Indianapolis, etc., R. Co., Wils. (Ind.) 481).

Compliance with a city ordinance requiring a lookout on a locomotive engine when being used within the limits of a city is not due to persons walking on the private way of a railroad company at an uninhabited point, and not at a street crossing, although in a path used by the public with the silent acquiescence of the company. Baltimore, etc., R. Co. *v.* State, 62 Md. 479, 50 Am. Rep. 233.

A railroad bridge located within the city limits does not impose a duty on the railroad company as to trespassers on the bridge, where it is twenty-five or thirty feet above the grade of the street. Beiser *v.* Chesapeake, etc., R. Co., 92 S. W. 928, 29 Ky. L. Rep. 249.

66. Arrowood *v.* South Carolina, etc., R. Co., 126 N. C. 629, 36 S. E. 151 (holding that more care is required on a frequented track than on a clear one, and more diligence on a winding road than on a straight one); Houston, etc., R. Co. *v.* Sympkins, 54 Tex. 615, 38 Am. Rep. 632; Houston, etc., R. Co. *v.* Harvin, (Tex. Civ. App. 1899) 54 S. W. 629. See also *Ex p.* Stell, 22 Fed. Cas. No. 13,358, 4 Hughes 157.

Where the engineer is unable to keep a proper lookout, it is the duty of the fireman to be on the lookout and conversely. Arro-

porarily fail to look out where such failure is caused by a distraction of attention, to avoid personal injury to the employee keeping the lookout,[67] or by his attention being turned to other duties,[68] or by obstructions to sight.[69]

(3) Duty to Look Out For Children or Others Under Disability. In accordance with the above rules,[70] in some jurisdictions a railroad company is under the duty to keep a lookout for children or others under disability on its tracks, although they are trespassers;[71] and this has been held to be true even in jurisdictions in which there is no duty to look out for adult trespassers, on the ground that an infant cannot be a trespasser, or at most only technically so.[72] In other jurisdictions, however, the company is under no duty to keep such a lookout, any more than for adults or able persons,[73] except at places where it has

wood *v.* South Carolina, etc., R. Co., 126 N. C. 629, 36 S. E. 151; Nashville, etc., R. Co. *v.* Nowlin, 1 Lea (Tenn.) 523. And if the engineer and fireman are insufficient more help should be employed to keep a lookout. Jeffries *v.* Seaboard Air Line R. Co., 129 N. C. 236, 39 S. E. 836; Arrowood *v.* South Carolina, etc., R. Co., 126 N. C. 629, 36 S. E. 151.

An employee not on duty but simply being transported on a locomotive is not required to lookout for trespassers on the track, and his failure to do so is not imputable to the railroad company as negligence. Middle Georgia, etc., R. Co. *v.* Reynolds, 99 Ga. 638, 26 S. E. 61.

The lookout must be in his place and must be vigilant and watchful. East Tennessee, etc., R. Co. *v.* White, 5 Lea (Tenn.) 540.

Sending a brakeman down a track to see that the same is clear does not relieve the engineer in charge of the engine from the duty of keeping a reasonable lookout while the engine is in motion. Galveston, etc., R. Co. *v.* Levy, 35 Tex. Civ. App. 107, 79 S. W. 879.

67. *Ex p.* Stell, 22 Fed. Cas. No. 13,358, 4 Hughes 157, to avoid being hit by an iron door of the furnace while the fireman is throwing it open.

68. Eddy *v.* Sedgwick, (Tex. 1892) 18 S. W. 564 (looking back to see when the following cars have cleared a switch, and for the signals of the switchman); Teakle *v.* San Pedro, etc., R. Co., 32 Utah 276, 90 Pac. 402, 10 L. R. A. N. S. 486.

69. Richmond, etc., R. Co. *v.* Anderson, 31 Gratt. (Va.) 812, 31 Am. Rep. 750, sun shining in his eyes.

70. See *supra*, X, D, 2, a, (VIII), (B).

71. Chicago, etc., R. Co. *v.* Grablin, 38 Nebr. 90, 56 N. W. 796, 57 N. W. 522 (holding that where a child nine years old, while trespassing on the railroad company's track, is struck by an engine, the railroad company is liable if the engineer by the exercise of such careful lookout as was consistent with his other duties could have seen the child in time to have prevented the accident); Sawyer *v.* Roanoke R., etc., Co., 145 N. C. 24, 58 S. E. 598; McArver *v.* Southern R. Co., 129 N. C. 380, 40 S. E. 94; Bottoms *v.* Seaboard, etc., R. Co., 114 N. C. 699, 19 S. E. 730, 41 Am. St. Rep. 799, 25 L. R. A. 784; Bias *v.* Chesapeake, etc., R. Co., 46 W. Va. 349, 33 S. E. 240; Gunn *v.* Ohio River R. Co., 42 W. Va. 676, 26 S. E. 546, 36 L. R. A. 575.

In Texas the duty of a railroad company with reference to young children on a track is not to keep a reasonable lookout but to exercise ordinary care under all the circumstances existing, with reference to keeping a lookout. Texas, etc., R. Co. *v.* O'Donnell, 58 Tex. 27; Olivares *v.* San Antonio, etc., R. Co., (Civ. App. 1903) 77 S. W. 981, 37 Tex. Civ. App. 278, 84 S. W. 248. See Ollis *v.* Houston, etc., R. Co., 31 Tex. Civ. App. 601, 73 S. W. 30. If the railroad company could not have exercised ordinary care to discover the child on the track except by keeping a lookout, its failure to keep such lookout is negligence *per se*. Missouri, etc., R. Co. *v.* Hammer, 34 Tex. Civ. App. 354, 78 S. W. 708. And the railroad company is not relieved from liability in failing to keep a proper lookout by the exercise of due care after the peril is discovered (Texas, etc., R. Co. *v.* Harby, 28 Tex. Civ. App. 24, 67 S. W. 541); nor by the fact that a railroad bridge on which the child is run over and killed is not a public bridge (Texas, etc., R. Co. *v.* Harby, (Civ. App. 1902) 67 S. W. 541).

Where one goes upon a railroad track and becomes insensible from no fault of his own, and while in full view is run over and injured by a train, the railroad company is liable for the neglect of its agents in failing to keep a reasonable lookout (Houston, etc., R. Co. *v.* Sympkins, 54 Tex. 615, 38 Am. Rep. 632); but if his dangerous position was due to his own voluntary drunkenness the company is not liable unless the injury was wantonly or wilfully inflicted after he was discovered (Houston, etc., R. Co. *v.* Sympkins, 54 Tex. 615, 38 Am. Rep. 632; Sullivan *v.* St. Louis Southwestern R. Co., (Tex. Civ. App. 1896) 36 S. W. 1020).

72. Mason *v.* Southern R. Co., 58 S. C. 70, 36 S. E. 440, 79 Am. St. Rep. 826, 53 L. R. A. 913.

73. *Connecticut.*— Nolan *v.* New York, etc., R. Co., 53 Conn. 461, 4 Atl. 106.

Illinois.— Northwestern El. R. Co. *v.* O'Malley, 107 Ill. App. 599.

Iowa.— Thomas *v.* Chicago, etc., R. Co., 114 Iowa 169, 86 N. W. 259.

Kentucky.— Louisville, etc., R. Co. *v.* Logsdon, 118 Ky. 600, 81 S. W. 657, 26 Ky. L. Rep. 457 [*opinion* in 78 S. W. 409, 25 Ky. L. Rep. 1656 withdrawn]; McDermott

reason to anticipate that such children or persons will be on the track,[74] as in cities or towns.[75]

(IX) *RATE OF SPEED*[76] — (A) *In General.* In the absence of a statute or ordinance to the contrary, a railroad company, as a general rule, owes no duty to trespassers or licensees on its tracks as to the rate of speed at which its trains shall be run; and ordinarily it is not negligence *per se* for it to run its train at any rate consistent with the safety of passengers,[77] until the peril of such trespasser

v. Kentucky Cent. R. Co., 93 Ky. 408, 20 S. W. 980, 14 Ky. L. Rep. 437. But see Cincinnati, etc., R. Co. *v.* Dickerson, 102 Ky. 560, 44 S. W. 99, 19 Ky. L. Rep. 1817.

United States.—Woodruff *v.* Northern Pac. R. Co., 47 Fed. 689.

See 41 Cent. Dig. tit. "Railroads," § 1262.

That the railroad employees negligently or carelessly looked down the track and failed to observe children thereon does not render the railroad company liable any more than if they had not looked at all. Thomas *v.* Chicago, etc., R. Co., 114 Iowa 169, 86 N. W. 259.

In case of a drunken trespasser on a railroad, the railroad company is not liable for failure to discover his condition in time to prevent injuring him. St. Louis, etc., R. Co. *v.* Jordan, 65 Ark. 429, 47 S. W. 115; Dugan *v.* Chesapeake, etc., R. Co., 72 S. W. 291, 24 Ky. L. Rep. 1754.

74. Croft *v.* Chicago, etc., R. Co., 134 Iowa 411, 109 N. W. 723; Louisville, etc., R. Co. *v.* Logsdon, 118 Ky. 600, 87 S. W. 657, 26 Ky. L. Rep. 457 [opinion in 78 S. W. 409, 25 Ky. L. Rep. 1656 withdrawn]; Lindsay *v.* Canadian Pac. R. Co., 68 Vt. 556, 35 Atl. 513, holding that it is a question for the jury whether the railroad company was guilty of negligence in failing to watch for obstructions.

Where a railroad company has for a long time permitted children to travel and pass habitually over its road at a given point without objection or hindrance, it should, in the operation of its trains and management of its road so long as it acquiesces in such use, be held to anticipate continuances thereof, and is bound to exercise care accordingly apportioned to the probable danger to the children so using its road. Harriman *v.* Pittsburgh, etc., R. Co., 45 Ohio St. 11, 12 N. W. 451, 4 Am. St. Rep. 507.

75. Ashworth *v.* Southern R. Co., 116 Ga. 635, 43 S. E. 36, 59 L. R. A. 592; Frick *v.* St. Louis, etc., R. Co., 75 Mo. 542 [*affirming* 5 Mo. App. 435].

76. **Rate of speed at crossings** see *infra*, X, F, 8.

Rate of speed at stations see *infra*, X, E, 2, b, (IV).

77. *Connecticut.*— Nolan *v.* New York, etc., R. Co., 53 Conn. 461, 4 Atl. 106.

Georgia.— Georgia Cent. R. Co. *v.* Williams Buggy Co., 121 Ga. 293, 48 S. E. 939; Holland *v.* Sparks, 92 Ga. 753, 18 S. E. 990; Harden *v.* Georgia R. Co., 3 Ga. App. 344, 50 S. E. 1122.

Illinois.— Wabash, etc., R. Co. *v.* Neikirk, 15 Ill. App. 172; Garland *v.* Chicago, etc., R. Co., 8 Ill. App. 571.

Iowa.— Hoffard *v.* Illinois Cent. R. Co., (1907) 110 N. W. 446 (in rural districts); Heiss *v.* Chicago, etc., R. Co., 103 Iowa 590, 72 N. W. 787; Cohoon *v.* Chicago, etc., R. Co., 90 Iowa 169, 57 N. W. 729.

Kentucky.— Gregory *v.* Louisville, etc., R. Co., 79 S. W. 238, 25 Ky. L. Rep. 1986 (holding that the speed of a train in the country is not a matter that can be negligence as to trespassers on the track whose presence is unknown); Louisville, etc., R. Co. *v.* McCombs, 54 S. W. 179, 21 Ky. L. Rep. 1232.

Louisiana.— Sundmaker *v.* Yazoo, etc., Co., 106 La. 111, 30 So. 285; Houston *v.* Vicksburg, etc., R. Co., 39 La. Ann. 796, 2 So. 562.

Missouri.— Maher *v.* Atlantic, etc., R. Co., 64 Mo. 267.

Nebraska.— Omaha, etc., R. Co. *v.* Krayenbuhl, 48 Nebr. 553, 67 N. W. 447, holding that outside of towns and villages no rate of speed, however great, is alone sufficient to establish negligence.

Ohio.— Such *v.* Cleveland, etc., R. Co., 2 Ohio Dec. (Reprint) 352, 2 West. L. Month. 486, holding that the speed is not material unless it exceeds the limitations of due care.

Pennsylvania.— Custer *v.* Baltimore, etc., R. Co., 206 Pa. St. 529, 55 Atl. 1130 (through the open country); Eply *v.* Lehigh Valley R. Co., 3 Pa. Super. Ct. 509.

Rhode Island.— Vizacchero *v.* Rhode Island Co., 26 R. I. 392, 59 Atl. 105, 69 L. R. A. 188.

Texas.— Texas, etc., R. Co. *v.* Short, (Civ. App. 1900) 58 S. W. 56.

Virginia.— Hortenstein *v.* Virginia-Carolina R. Co., 102 Va. 914, 47 S. E. 996 (holding that a railroad company owes to a trespasser no duty in regard to the rate of speed on schedule time upon which it shall run its trains); Johnson *v.* Chesapeake, etc., R. Co., 91 Va. 171, 21 S. E. 238.

United States.— Chicago, etc., R. Co. *v.* O'Brien, 153 Fed. 511, 82 C. C. A. 461; Farve *v.* Louisville, etc., R. Co., 42 Fed. 441.

Canada.— Colpitts *v.* Reg., 6 Can. Exch. 254.

See 41 Cent. Dig. tit. "Railroads," §§ 1269, 1273.

A speed of fifty or sixty miles an hour is not negligence as to persons on the track, where there is no public crossing and where the railroad company is not bound to anticipate their presence. Georgia Cent. R. Co. *v.* Williams Buggy Co., 121 Ga. 293, 48 S. E. 939.

Exceeding schedule time.— It is not negligence *per se* for a train to exceed a rate of speed prescribed by the time-table of the railroad. If the time-table is framed with reference to a reasonable limit of safety at

or licensee is discovered;[78] but whether it is negligence to run a train at a certain rate of speed at any particular time and place is ordinarily a question of fact for the jury to determine under all the circumstances.[79] This rule, however, is subject to qualifications, under which the speed must be regulated and controlled, even in the absence or independent of statutory or municipal regulations, so as to show due regard for the safety of those of the public who, even without right, are accustomed with the railroad company's knowledge or consent, to pass to and fro over the track and sometimes temporarily to make use of the same by walking up and down upon it,[80] as in populous cities or towns,[81] especially in

any given point, then it would be negligence to exceed it; but it is otherwise if it is fixed from considerations of convenience and not with reference to what is safe or prudent. Colpitts *v.* Reg., 6 Can. Exch. 254.

A speed of twenty-five miles per hour outside the limits of a city or town, even in a thickly settled neighborhood, and at a point where some persons were accustomed to walk upon the tracks, is not in itself sufficient evidence of negligence. Missouri Pac. R. Co. *v.* Hansen, 48 Nebr. 232, 66 N. W. 1105.

The operation of an electric car in the country at such a rate of speed that the motorman is unable to stop in time to avoid injury after the headlight reveals the injured party is not negligence. Vizacchero *v.* Rhode Island Co., 26 R. I. 392, 59 Atl. 105.

There is no duty to slacken ordinary speed on approaching a curve, although it is in a cut, as a precaution against injury to persons walking or working on the track, but not known of or seen. Hoffard *v.* Illinois Cent. R. Co., (Iowa 1907) 110 N. W. 446.

78. Harden *v.* Georgia R. Co., 3 Ga. App. 344, 59 S. E. 1122; Neier *v.* Missouri Pac. R. Co., 12 Mo. App. 35, holding that, however slow a train may be going after discovery of a person's peril on the track, if the speed may still be further reduced and a collision thus avoided the railroad company is chargeable with negligence in not further reducing the speed. And see *infra*, X, E, 2, a, (x), (B).

79. Louisville, etc., R. Co. *v.* McCombs, 54 S. W. 179, 21 Ky. L. Rep. 1232; Texas, etc., R. Co. *v.* Short, (Tex. Civ. App. 1900) 58 S. W. 56. And see *infra*, X, E, 8, e, (I), (I).

80. Georgia Cent. R. Co. *v.* Williams Buggy Co., 121 Ga. 293, 48 S. E. 939; Sundmaker *v.* Yazoo, etc., R. Co., 106 La. 111, 30 So. 285; Houston *v.* Vicksburg, etc., R. Co., 39 La. Ann. 796, 2 So. 562; Malmsten *v.* Marquette, etc., R. Co., 49 Mich. 94, 34 N. W. 373, holding that the running of heavily loaded cars down a wharf at the rate of ten to fifteen miles an hour, without a locomotive, when people are landing from a steamboat, is sufficient to establish negligence on the part of the railroad company. *Compare* Missouri Pac. R. Co. *v.* Hansen, 48 Nebr. 232, 66 N. W. 1105.

When it is determined that a certain rate of speed is incompatible with public safety under the circumstances of the place, the rights of the company, even on its own track, are qualified by the law of the public good. Pennsylvania R. Co. *v.* Lewis, 79 Pa. St. 33.

Permitting a train to get beyond control on a steep grade and to descend the grade so as to drive other cars past the end of the track, where the servants of the railroad company knew or had good reason to believe persons were stationed with vehicles, may authorize an inference of negligence on the part of the company. Southern R. Co. *v.* Stutts, 144 Fed. 948, 75 C. C. A. 588.

81. *Illinois.*— Chicago, etc., R. Co. *v.* Dunleavy, 129 Ill. 132, 22 N. E. 15. *Compare* Garland *v.* Chicago, etc., R. Co., 8 Ill. App. 571, holding that it is not negligence to run a train at the rate of twenty-five miles an hour through an unincorporated village.

Kentucky.— Louisville, etc., R. Co. *v.* McCombs, 54 S. W. 179, 21 Ky. L. Rep. 1232.

Louisiana.— Sundmaker *v.* Yazoo, etc., R. Co., 106 La. 111, 30 So. 285; Peyton *v.* Texas, etc., R. Co., 41 La. Ann. 861, 6 So. 690, 15 Am. St. Rep. 430.

Mississippi.— Alabama, etc., R. Co. *v.* Lowe, 73 Miss. 203, 19 So. 96.

Missouri.— Haley *v.* Missouri Pac. R. Co., 197 Mo. 15, 93 S. W. 1120, 114 Am. St. Rep. 743; Reilly *v.* Hannibal, etc., R. Co., 94 Mo. 600, 7 S. W. 407.

Nebraska.— Meyer *v.* Midland Pac. R. Co., 2 Nebr. 319, holding also that a reasonable rate of speed in the open country is not reasonable in a thickly settled town.

Pennsylvania.— Custer *v.* Baltimore, etc., R. Co., 206 Pa. St. 529, 55 Atl. 1130; Hagan *v.* Philadelphia, etc., R. Co., 5 Phila. 179.

United States.— Farve *v.* Louisville, etc., R. Co., 42 Fed. 441, holding this rule to apply to an incorporated city or town.

See 41 Cent. Dig. tit. "Railroads," § 1273.

But see Nolan *v.* New York, etc., R. Co., 53 Conn. 461, 4 Atl. 106, holding that a railroad company is not bound to run its trains at a very low rate of speed through a city on its own right of way where persons have no right to be.

To run within the limits of a city in the night-time at a speed of twenty-five miles an hour, and while racing with a train of a parallel road, is negligence on the part of the railroad company. Crow *v.* Wabash, etc., R. Co., 23 Mo. App. 357.

Speed necessary to ascend grade.— That the grade of a railroad track laid in a street of a populous city is such that a freight train cannot ascend it without the aid of the momentum to be acquired by a high rate of speed does not justify a railroad company in running its train at such speed,

cases where the railroad tracks are laid upon the streets or other public places of such town or city.[82]

(B) *Statutory or Municipal Regulations.* The rate of speed at which trains may be run is now generally regulated by statute or ordinance,[83] under which it is usually provided that trains or cars shall not be run at more than a given rate of speed through a city or town,[84] for a violation of which the company may be liable to persons injured thereby whether trespassers or not,[85] although there

where so doing renders it liable to injure persons who, without negligence on their part, might be on the street, or renders it impossible for the engineer to stop the train in time to prevent such injury after seeing the danger. Haley *v.* Missouri Pac. R. Co., 197 Mo. 15, 93 S. W. 1120, 114 Am. St. Rep. 743.

To run through a village of two hundred inhabitants at twenty miles an hour is not negligence, where it is not shown that the train was improperly equipped as to brakes and brakemen. Johnson *v.* Chesapeake, etc., R. Co., 91 Va. 171, 21 S. E. 238.

82. Sundmaker *v.* Yazoo, etc., R. Co., 106 La. 111, 30 So. 285; Barley *v.* Chicago, etc., R. Co., 2 Fed. Cas. No. 997, 4 Biss. 430.

83. See the statutes of the several states; and cases cited *infra*, note 84.

Speed at crossings.— The violation of a statutory regulation as to slackening speed on approaching a crossing has been held to be evidence of negligence to be considered by the jury as to a person on the track or right of way near the crossing. Cent. R., etc., Co. *v.* Golden, 93 Ga. 510, 21 S. E. 68. But on the other hand it has been held that an ordinance limiting the rate of speed in passing over crossings does not imply that this rate is not to be exceeded between the crossings. Central R., etc., Co. *v.* Smith, 78 Ga. 694, 3 S. E. 397.

At drawbridge.—A statute (Ga. Code, § 1689*p*) requiring railroad trains to slow down to a certain rate of speed before running on or crossing any drawbridge over a stream which is navigated by vessels does not apply to the trestles and approaches leading up to the drawbridge proper. Savannah, etc., R. Co. *v.* Daniels, 90 Ga. 608, 17 S. E. 647, 20 L. R. A. 416.

84. See East St. Louis Connecting R. Co. *v.* O'Hara, 150 Ill. 580, 37 N. E. 917 [*affirming* 49 Ill. App. 282]; Martin *v.* Chicago, etc., R. Co., 118 Iowa 148, 91 N. W. 1034, 96 Am. St. Rep. 371, 59 L. R. A. 698 holding that such an ordinance has not for its sole object the protection of those crossing the tracks, but its benefit may be claimed by any person coming within its protection.

Construction of ordinances or statutes.— Particular ordinances or statutes have been held to apply to locomotives running without any cars attached (East St. Louis Connecting R. Co. *v.* O'Hara, 150 Ill. 580, 37 N. E. 917 [*affirming* 49 Ill. App. 282]); to a wrecking train consisting of an engine, tender, freight cars, and derrick car (Chicago, etc., R. Co. *v.* Johnson, 53 Ill. App. 478); to a train which has entered the city limits, although it has not arrived at any of the traveled streets (Hooker *v.* Chicago, etc., R. Co., 76 Wis. 542, 44 N. W. 1085, construing Rev. St. § 1809); to a train which is started upon private property, as soon as it passes beyond the limits of such property (Chicago, etc., R. Co. *v.* Pollock, 195 Ill. 156, 62 N. E. 831 [*affirming* 93 Ill. App. 483]); to a train or cars in the private switch yards of the railroad company (Crowley *v.* Burlington, etc., R. Co., 65 Iowa 658, 20 N. W. 467, 22 N. W. 918; Jackson *v.* Kansas City, etc., R. Co., 157 Mo. 621, 58 S. W. 32, 80 Am. St. Rep. 650; Grube *v.* Missouri Pac. R. Co., 98 Mo. 330, 11 S. W. 736, 14 Am. St. Rep. 645, 4 L. R. A. 776. But see Louisville, etc., R. Co. *v.* Redmon, 122 Ky. 385, 91 S. W. 722, 28 Ky. L. Rep. 1293; Green *v.* Delaware, etc., Canal Co., 38 Hun (N. Y.) 51). On the other hand particular statutes or ordinances have been held not to apply to unincorporated villages (Nolan *v.* Milwaukee, etc., R. Co., 91 Wis. 16, 64 N. W. 319); nor can such an ordinance ordinarily be restricted in its operation to situations where the question of speed would be of importance to travelers on the streets at grade crossings (Northern Cent. R. Co. *v.* Herchiskel, 74 Fed. 460, 20 C. C. A. 593). Such an ordinance is not usually construed as applying only to those portions of the city used by the public. Crowley *v.* Burlington, etc., R. Co., 65 Iowa 658, 20 N. W. 467, 22 N. W. 918.

That the road was built on a grade and curve before the passage of the ordinance, which rendered it impracticable to comply with the ordinance, does not relieve the railroad company from liability, in running its train at a rate of speed greater than that permitted by such an ordinance. Neier *v.* Missouri Pac. R. Co., 12 Mo. App. 25.

85. Alabama, etc., R. Co. *v.* Carter, 77 Miss. 511, 27 So. 993; Hooker *v.* Chicago, etc., R. Co., 76 Wis. 542, 44 N. W. 1085.

Subsequent ordinance.— The violation of an ordinance limiting the speed of trains to a certain rate is not avoided by showing the subsequent enactment of an ordinance limiting the speed rate with certain exceptions, where the company does not show that it is within any of the exceptions since the original ordinance will be considered as continuing in force. Graney *v.* St. Louis, etc., R. Co., 140 Mo. 89, 41 S. W. 246, 38 L. R. A. 633, (1897) 38 S. W. 969.

That it was impossible to stop in time to avoid the injury does not excuse the railroad company from liability where its negligence in violating the ordinance made it impossible to stop. Murrell *v.* Missouri Pac. R. Co., 105 Mo. App. 88, 79 S. W. 505.

was no actual collision.[86] While in some jurisdictions it is held that such speed regulations do not apply to trespassers, and that as to them a violation of the statute or ordinance is not negligence,[87] in most jurisdictions a violation of such statute or ordinance is negligence *per se* which may be the basis of a recovery by a person injured in consequence thereof, and who was without fault,[88] unless the rate of speed prescribed is unreasonable,[89] although to render such negligence actionable, it must, in some way, have occasioned the injury complained of.[90] In other jurisdictions, however, it is held that such violation is merely *prima facie* evidence of negligence to be submitted to the jury,[91] and is not of itself wilful or gross negligence which will justify a recovery by a trespasser or licensee,[92] although it, together with other circumstances, may tend to prove gross or wilful negligence.[93] It is not negligence to run a train within city limits at a speed less

That the person injured was an employee of the railroad company, and was engaged in the discharge of his duties at the time of the injury does not relieve the company from liability for running at a greater rate of speed than that permitted by ordinance. Houston, etc., R. Co. *v.* Powell, (Tex. Civ. App. 1897) 41 S. W. 695.

Where a portion of the track is commonly used as a footway to the knowledge of the company, a person so using it is entitled to the same benefit from the ordinance prohibiting the rapid running of trains as a person at a crossing. Gulf, etc., R. Co. *v.* Matthews, 28 Tex. Civ. App. 92, 66 S. W. 588, 67 S. W. 788.

Running a train through railroad yards in a city at a speed exceeding the limit prescribed by a city ordinance is not negligence authorizing a receovery by one injured while standing on the track. Ward *v.* Illinois Cent. R. Co., 56 S. W. 807, 22 Ky. L. Rep. 191.

Where the right of way is not on or parallel to an adjoining street but is entirely inclosed to prevent its use by the public, the violation of a speed ordinance is not negligence as to a person injured thereon. Louisville, etc., R. Co. *v.* Redmon, 122 Ky. 385, 91 S. W. 722, 28 Ky. L. Rep. 1293.

86. Illinois Cent. R. Co. *v.* Crawford, 169 Ill. 554, 48 N. E. 679 [*affirming* 68 Ill. App. 355].

Injury by suction.— Where a person is injured by being sucked under a train by the current of air put in motion by a train while running at a rate of speed prohibited by ordinance, the railroad company cannot be held liable unless it is shown that it knew that such excessive speed would produce such a result, or that a reasonably prudent man would have apprehended it. Graney *v.* St. Louis, etc., R. Co., 140 Mo. 89, 41 S. W. 246, 38 S. W. 969, 157 Mo. 666, 57 S. W. 276, 50 L. R. A. 153.

87. Clemans *v.* Chicago, etc., R. Co., 128 Iowa 394, 104 N. W. 431.

88. *Alabama.*— South Alabama, etc., R. Co. *v.* Donovan, 84 Ala. 141, 4 So. 142.

District of Columbia.— Baltimore, etc., R. Co. *v.* Golway, 6 App. Cas. 143.

Georgia.— Georgia Cent. R. Co. *v.* Bond, 111 Ga. 13, 36 S. E. 299; Barfield *v.* Southern R. Co., 108 Ga. 744, 33 S. E. 988. See also Georgia R., etc. Co. *v.* Williams, 3 Ga. App. 272, 59 S. E. 846, 4 Ga. App. 23, 60 S. E. 808.

Indiana.— Pennsylvania Co. *v.* Horton, 132 Ind. 189, 31 N. E. 45. But see Scudder *v.* Indianapolis, etc., R. Co., Wils. 481.

Kansas.— Kansas City Suburban Belt R. Co. *v.* Herman, (App. 1900) 62 Pac. 543; Erb *v.* Morasch, 8 Kan. App. 61, 54 Pac. 323.

Missouri.— Jackson *v.* Kansas City, etc., R. Co., 157 Mo. 621, 58 S. W. 32, 80 Am. St. Rep. 650; Prewitt *v.* Missouri, etc., R. Co., 134 Mo. 615, 36 S. W. 667; Schlereth *v.* Missouri Pac. R. Co., 115 Mo. 87, 21 S. W. 1110; Murrell *v.* Missouri Pac. R. Co., 105 Mo. App. 88, 79 S. W. 505.

Texas.— International, etc., R. Co. *v.* Hall, 35 Tex. Civ. App. 545, 81 S. W. 82, 520; Missouri, etc., R. Co. *v.* Owens, (Civ. App. 1903) 75 S. W. 579.

See 41 Cent Dig. tit. "Railroads," §§ 1270, 1274.

That the engineer who violated the ordinance was ignorant of its existence is immaterial on the question of the railroad company's negligence. Georgia Cent. R. Co. *v.* Bond, 111 Ga. 13, 36 S. E. 299.

89. South Alabama, etc., R. Co. *v.* Donovan, 84 Ala. 141, 4 So. 142.

90. Baltimore, etc., R. Co. *v.* Golway, 6 App. Cas. (D. C.) 143. And see *infra*, X, E, 5.

91. Illinois Cent. R. Co. *v.* Eicher, 202 Ill. 556, 67 N. E. 376 [*reversing* 100 Ill. App. 599]; Toledo, etc., R. Co. *v.* O'Connor, 77 Ill. 391; Southern R. Co. *v.* Drake, 107 Ill. App. 12; Smith *v.* Chicago, etc., R. Co., 99 Ill. App. 296; Chicago, etc., R. Co. *v.* Argo, 82 Ill. App. 667; Chicago, etc., R. Co. *v.* Gunderson, 65 Ill. App. 638; Chicago, etc., R. Co. *v.* Winters, 65 Ill. App. 435; Illinois Cent. R. Co. *v.* Murphy, 52 Ill. App. 65; Terre Haute, etc., R. Co. *v.* Voelker, 31 Ill. App. 314 [*affirmed* in 129 Ill. 540, 22 N. E. 20]; Brown *v.* Buffalo, etc., R. Co., 22 N. Y. 191; Beck *v.* Portland, etc., R. Co., 25 Oreg. 32, 34 Pac. 753; Northern Cent. R. Co. *v.* Herschiskel, 74 Fed. 460, 20 C. C. A. 593.

92. Illinois Cent. R. Co. *v.* Eicher, 202 Ill. 556, 67 N. E. 376 [*reversing* 100 Ill. App. 599]; Smith *v.* Chicago, etc., R. Co., 99 Ill. App. 296; Chicago, etc., R. Co. *v.* Argo, 82 Ill. App. 667.

93. Illinois Cent. R. Co. *v.* Eicher, 202 Ill. 556, 67 N. E. 376 [*reversing* 100 Ill. App. 599]; Illinois Cent. R. Co. *v.* Jernigan, 101

than that limited by ordinance, in the absence of any peculiar circumstances rendering such speed dangerous.[94]

(x) *Precautions as to Persons Seen On or Near Track*[95] — (A) *In General.* Where a person, whether a trespasser, licensee, or not, is discovered by the railroad employees on or near its tracks in a position of danger,[96] it is the duty of the railroad company to exercise ordinary care and precaution, that is, it must use all means at command, consistent with its higher duty to its passengers and others, in moving its trains or cars, to avoid injury to such persons; and if it fails to do so it is liable for the resulting injuries;[97] but not if it exercises such

Ill. App. 1 [*affirmed* in 198 Ill. 297, 65 N. E. 88].

94. Wickham *v.* Chicago, etc., R. Co., 95 Wis. 23, 69 N. W. 982.

95. Duty to discover persons on track see *supra*, X, E, 2, a, (VIII).

Precautions as to persons seen at or near crossings see *infra*, X, F, 9.

Injury avoidable notwithstanding contributory negligence see *infra*, X, E, 6.

Wilful, wanton, or gross negligence see *infra*, X, E, 7.

96. Hocker *v.* Louisville, etc., R. Co., 96 S. W. 526, 29 Ky. L. Rep. 842 (holding that where plaintiff was injured while standing between two cars by the sudden movement of the train, the mere fact that one of defendant's servants in charge of the train crew saw him crossing the tracks and standing near or at the cars was insufficient to charge defendant with knowledge that plaintiff was in a place of danger); Rangeley *v.* Southern R. Co., 95 Va. 715, 30 S. E. 386 (holding that where there is no evidence that defendant knew plaintiff was on the track before he was run over and it was shown that he was a young man in possession of all his faculties, it was not error to refuse to charge that defendant was liable if it could have avoided the injury after discovering, or could have discovered by the use of ordinary care, the peril of plaintiff).

That the fireman saw plaintiff approaching a train which was being made up in a switch-yard is not such knowledge that plaintiff would attempt to go between the cars of the train, so as to require the exercise of care in moving the same. Rodriguez *v.* International, etc., R. Co., 27 Tex. Civ. App. 325, 64 S. W. 1005.

A person between a moving train and some box cars on another track with nearly six feet between the tracks and three feet space between the cars is not in such a position of danger as to make the railroad company negligent in starting and moving its train, although such person is in sight of the railroad employees at the time. Barkley *v.* Missouri Pac. R. Co., 96 Mo. 367, 9 S. W. 793.

97. *California.*— Esrey *v.* Southern Pac. Co., 103 Cal. 541, 37 Pac. 500.

Colorado.— Kansas Pac. R. Co. *v.* Cranmer, 4 Colo. 524.

Connecticut.— Nolan *v.* New York, etc., R. Co., 53 Conn. 461, 4 Atl. 106.

Kentucky.— Flint *v.* Illinois Cent. R. Co., 88 S. W. 1055, 28 Ky. L. Rep. 1; Kendall *v.* Louisville, etc., R. Co., 76 S. W. 376, 25 Ky. L. Rep. 793; Louisville, etc., R. Co. *v.* Chism, 47 S. W. 251, 20 Ky. L. Rep. 584.

Michigan.— Bouwmeester *v.* Grand Rapids, etc., R. Co., 67 Mich. 87, 34 N. W. 414.

Mississippi.— Christian *v.* Illinois Cent. R. Co., 71 Miss. 237, 15 So. 71.

Missouri.— Reyburn *v.* Missouri Pac. R. Co., 187 Mo. 565, 86 S. W. 174; Reardon *v.* Missouri Pac. R. Co., 114 Mo. 384, 21 S. W. 731; Rine *v.* Chicago, etc., R. Co., 88 Mo. 392; Isabel *v.* Hannibal, etc., R. Co., 60 Mo. 475; Mathews *v.* Chicago, etc., R. Co., 63 Mo. App. 569.

Nebraska.— Omaha, etc., R. Co. *v.* Cook, 42 Nebr. 577, 60 N. W. 899.

New York.— German *v.* Suburban Rapid-Transit Co., 13 N. Y. Suppl. 897, holding that it is culpable negligence for an engineer, after having seen plaintiff in a dangerous position on the track, to back down upon him without looking again to see if he is out of the way.

Pennsylvania.— Kelly *v.* Philadelphia, etc., R. Co., 30 Leg. Int. 140.

Texas.— Houston, etc., R. Co. *v.* Finn, (Civ. App. 1908) 107 S. W. 94 [*affirmed* in (1908) 109 S. W. 918] (holding that those in charge of the train must use all means at command, that may be exercised consistent with the safety of the persons in control and those in their charge); Houston, etc., R. Co. *v.* Ramsey, 43 Tex. Civ. App. 603, 97 S. W. 1067; International, etc., R. Co. *v.* Woodward, 26 Tex. Civ. App. 389, 63 S. W. 1051; Houston, etc., R. Co. *v.* Harvin, (Civ. App. 1899) 54 S. W. 629. Under Rev. St. art. 2899, authorizing an action against a railroad company for injuries causing death when the death was caused by "the unfitness, gross negligence, or carelessness of the servants," of the railroad company, even if such servants saw that a child was in danger the company would only be liable for their gross negligence. Sabine, etc., R. Co. *v.* Hanks, 73 Tex. 323, 11 S. W. 377.

Virginia.— Norfolk, etc., R. Co. *v.* Dean, 107 Va. 505, 59 S. E. 389; Chesapeake, etc., R. Co. *v.* Farrow, 106 Va. 137, 55 S. E. 569; Humphreys *v.* Valley R. Co., 100 Va. 749, 42 S. E. 882, holding that the railroad company is bound to do all it consistently can, after discovering a trespasser's peril, to avoid injuring him.

United States.— Towles *v.* Southern R. Co., 103 Fed. 405; Anderson *v.* Hopkins, 91 Fed. 77, 33 C. C. A. 346.

See 41 Cent. Dig. tit. "Railroads," §§ 1275, 1276.

Basis of rule.— An injured person's right of action in such case is based upon the prin-

care, although the accident is not thereby avoided.[98] Although in such cases the railroad company must use all reasonable means within its power to avert an accident,[99] it is only required to exercise such care as a reasonably prudent man would exercise under like circumstances.[1] If practicable, when it becomes

ciple that a failure to exercise ordinary care under such circumstances amounts to a degree of reckless conduct that may be termed wilful and wanton, and when an act is wilfully and wantonly done contributory negligence on the part of the person injured is not an element to defeat recovery. Esrey *v.* Southern Pac. Co., 103 Cal. 541, 37 Pac. 500.

Where a trespasser is injured while attempting to pass between the cars of a train, by reason of the sudden starting of the train, the railroad company is liable if its employees saw and knew the danger of his position in time to avoid injury to him by the exercise of reasonable care. International, etc., R. Co. *v.* Tabor, 12 Tex. Civ. App. 283, 33 S. W. 894.

98. *Alabama.*— Southern R. Co. *v.* Gullatt, 150 Ala. 318, 43 So. 577; Alabama Great Southern R. Co. *v.* Moorer, 116 Ala. 642, 22 So. 900.

Illinois.— Chicago, etc., R. Co. *v.* Oswald, 94 Ill. App. 638.

Indian Territory.— Gulf, etc., R. Co. *v.* Bolton, 2 Indian Terr. 463, 51 S. W. 1085.

Kentucky.— Kendall *v.* Louisville, etc., R. Co., 76 S. W. 376, 25 Ky. L. Rep. 793.

Louisiana.— Sanders *v.* Texas, etc., R. Co., 118 La. 174, 42 So. 764.

Maine.— Copp *v.* Maine Cent. R. Co., 100 Me. 568, 62 Atl. 735, holding that where the engineer, as soon as it became evident that the person on the track might not get off in time, did all that he could to avoid running upon such person, he was not guilty of negligence in not sooner apprehending that such person would not leave the track.

New Mexico.— Candelaria *v.* Atchison, etc., R. Co., 6 N. M. 266, 27 Pac. 497.

Virginia.— Humphreys *v.* Valley R. Co., 100 Va. 749, 42 S. E. 882; Norfolk, etc., R. Co. *v.* Carper, 88 Va. 556, 14 S. E. 328.

United States.— St. Louis Southwestern R. Co. *v.* Purcell, 135 Fed. 499, 68 C. C. A. 211.

See 41 Cent. Dig. tit. "Railroads," §§ 1275, 1276.

99. *Alabama.*— Frazer *v.* South Alabams, etc., R. Co., 81 Ala. 185, 1 So. 85, 60 Am. Rep. 145, holding that it is reckless negligence to omit to use the means at hand to prevent an accident, when a prompt resort thereto might have prevented it, without endangering the train.

Kentucky.— Flint *v.* Illinois Cent. R. Co., 88 S. W. 1055, 28 Ky. L. Rep. 1.

Missouri.— Mathews *v.* Chicago, etc., R. Co., 63 Mo. App. 569.

Nebraska.— Omaha, etc., R. Co. *v.* Cook, 42 Nebr. 577, 60 N. W. 899.

Texas.— St. Louis Southwestern R. Co. *v.* Bishop, 14 Tex. Civ. App. 504, 37 S. W. 764.

United States.— Louisville, etc., R. Co. *v.* Morlay, 86 Fed. 240, 30 C. C. A. 6.

See 41 Cent. Dig. tit. "Railroads," §§ 1275, 1276.

1. *Kentucky.*— Louisville, etc., R. Co. *v.* Jolly, 90 S. W. 977, 28 Ky. L. Rep. 989.

Maryland.— Northern Cent. R. Co. *v.* State, 29 Md. 420, 96 Am. Dec. 545.

Missouri.— Woods *v.* Wabash R. Co., 188 Mo. 229, 86 S. W. 1082.

Nebraska.— Meyer *v.* Midland Pac. R. Co., 2 Nebr. 319.

New York.— Stewart *v.* Long Island R. Co., 54 N. Y. App. Div. 623, 66 N. Y. Suppl. 436 [*affirmed* in 166 N. Y. 604, 59 N. E. 1130].

North Carolina.— Little *v.* Carolina Cent. R. Co., 119 N. C. 771, 26 S. E. 106.

Texas.— International, etc., R. Co. *v.* McDonald, 75 Tex. 41, 12 S. W. 860; Texas, etc., R. Co. *v.* McCarty, (Civ. App. 1896) 35 S. W. 675, holding that an instruction that the failure to use all the means in its power to prevent the injury is negligence is erroneous.

United States.—Texas, etc., R. Co. *v.* Harby, 94 Fed. 303, 36 C. C. A. 353.

See 41 Cent. Dig. tit. "Railroads," §§ 1275, 1276.

The degree of care required varies according to the circumstances, and the more dangerous the indications, the more prudence a railroad employee must exercise, and where the indications are very slight, the degree of care may not be so high, but when the indications become a manifestation of approaching danger of collision, his prudence must rise up to that manifestation. Stewart *v.* Long Island R. Co., 54 N. Y. App. Div. 623, 66 N. Y. Suppl. 436 [*affirmed* in 166 N. Y. 604, 59 N. E. 1130].

Persons in charge of a hand-car are not held to the same degree of care in regard to a trespasser or pedestrian seen walking on the track as are persons in charge of a locomotive. Wright *v.* Southern R. Co., 132 N. C. 327, 43 S. E. 845.

Acts in emergency.— If the engineer or other employee uses such means as in his judgment are, in the emergency, most advisable to prevent an accident, he is not chargeable with negligence although he failed to use other means which were at hand provided he is competent and experienced in his business. Bell *v.* Hannibal, etc., R. Co., 72 Mo. 50, holding this rule to apply where he applied the air brakes but did not attempt to reverse the engine.

An engineer is not required to provide against what he has no reasonable ground to anticipate, but his obligation is to take proper precautions to guard against what is the usual or justly expected consequence of one's act, and not against unexpected, unusual, and extraordinary results. Little *v.* Carolina Cent. R. Co., 118 N. C. 1072, 24 S. E. 514. Where an engineer, acting on the reasonable belief that the person was safe, released the brakes when but for such belief he would have stopped the train, such person cannot recover. Little *v.* Carolina Cent. R. Co., *supra.*

aware of such person's danger, it should give a timely warning by bell, whistle, or otherwise;[2] and if necessary and practicable, as where under the circumstances it is impracticable to give a warning or it is apparent that the person on the track does not hear or will not heed such warning, due care should be used in slackening the speed of the approaching train,[3] or in stopping it,[4] and in some jurisdictions such precautions are expressly required by statute.[5] It is not negligence, however, to fail to exercise some of these precautions where it is impossible to do so after the person's peril is discovered,[6] as where the manifestation of the peril and the catastrophe are so close, in point of time, as to leave no room for preventive effort.[7]

(B) *Duty to Stop or Slacken Speed in General.* Since after the railroad employees in charge of a train have given all the usual and proper signals to warn persons of their approach,[8] they have a right to presume that a person seen on or near the tracks ahead and apparently aware of his danger will retreat to or remain in a place of safety,[9] except where regulated by statute,[10] and in the absence of circumstances indicating that such person will not or cannot get out of danger, they are not required to slacken speed or stop the train merely because such person is discovered on or near the track ahead,[11] and does not immediately change his

2. See *supra*, X, E, 2, a, (VIII), (A), (1).

The alarm signal must be given at such distance before reaching a person seen walking on the track as will enable him to hear it and get off the track. Kelley *v.* Ohio River R. Co., 58 W. Va. 216, 52 S. E. 520, 2 L. R. A. N. S. 898.

Where the engineer of a train on a side-track fails to warn a person standing on a parallel track that another train is approaching, such failure is not negligence, unless the engineer knew the other train was about to pass, or that plaintiff was unaware of its approach, or unless he suspected plaintiff would continue on the main track. Gregory *v.* Louisville, etc., R. Co., 79 S. W. 238, 25 Ky. L. Rep. 1986.

3. Louisville, etc., R. Co. *v.* Tinkham, 44 S. W. 439, 19 Ky. L. Rep. 1784. And see *infra*, X, E, 2, a, (X), (B).

4. Reardon *v.* Missouri Pac. R. Co., 114 Mo. 384, 21 S. W. 731, holding that the railroad company would be liable if its servants, after seeing plaintiff in a perilous position, in time to stop the train in safety to themselves and those on board by the use of ordinary means, failed to exercise ordinary care to avert the accident. And see *infra*, X, E, 2, a, (X), (B).

5. Under Milliken & V. Code Tenn. §§ 1298–1300, if a person appears on a track in front of an approaching train, it is the duty of the railroad employees to have a person on the lookout ahead, to sound a whistle, put down the brakes, and use every possible means to stop the train and prevent the accident. Knoxville, etc., R. Co. *v.* Acuff, 92 Tenn. 26, 20 S. W. 348; Patton *v.* East Tennessee, etc., R. Co., 89 Tenn. 370, 15 S. W. 919, 12 L. R. A. 184; Chesapeake, etc., R. Co. *v.* Foster, 88 Tenn. 671, 13 S. W. 694, 14 S. W. 428.

That the engine was behind the cars pushing them forward at the time of the accident is immaterial. Knoxville, etc., R. Co. *v.* Acuff, 92 Tenn. 26, 20 S. W. 348.

6. East Tennessee, etc., R. Co. *v.* Swaney, 5 Lea (Tenn.) 119, holding that if after a person could have been seen on a track by a lookout on the locomotive a compliance with the statute requiring the whistle to be sounded and the brakes to be put down is impossible, the company is not liable for failure to do so.

7. Frazer *v.* South Alabama, etc., R. Co., 81 Ala. 185, 1 So. 85, 60 Am. Rep. 145; Fisk *v.* Chicago, etc., R. Co., 111 Iowa 392, 82 N. W. 931.

8. Frech *v.* Philadelphia, etc., R. Co., 39 Md. 574.

9. See *infra*, X, E, 2, a, (X), (C).

10. See Louisville, etc., R. Co. *v.* Connor, 9 Heisk. (Tenn.) 19, holding that under the requirement of Code, § 1166, it is the duty of all engaged in running the train in whatever department employed to give the entire energies of their bodies and minds to bring into requisition all the means at their command to stop the train and prevent an accident, when a person appears on the track ahead.

11. *Alabama.*— Southern R. Co. *v.* Gullatt, 150 Ala. 318, 43 So. 577; Johnson *v.* Birmingham R., etc., Co., 149 Ala. 529, 43 So. 33; Louisville, etc., R. Co. *v.* Lewis, 141 Ala. 466, 37 So. 587; Frazer *v.* South Alabama, etc., R. Co., 81 Ala. 185, 1 So. 85, 60 Am. Rep. 145; Mobile, etc., R. Co. *v.* Blakely, 59 Ala. 471. But Code (1896), § 3440, requires locomotive engineers, upon perceiving an obstruction on the track, to use all means known to skilful engineers to stop their trains. Harris *v.* Nashville, etc., R. Co., (1907) 44 So. 962.

Florida.— Atlantic Coast Line R. Co. *v.* Miller, 53 Fla. 246, 44 So. 247; Florida Cent., etc., R. Co. *v.* Williams, 37 Fla. 406, 20 So. 558.

Illinois.— Bartlett *v.* Wabash R. Co., 220 Ill. 163, 77 N. E. 96; Chicago, etc., R. Co. *v.* Austin, 69 Ill. 426; Chicago, etc., R. Co. *v.* Thompson, 99 Ill. App. 277.

Indiana.— Pennsylvania Co. *v.* Meyers, 136 Ind. 242, 36 N. E. 32; Terre Haute, etc., R. Co. *v.* Graham, 46 Ind. 239.

position when the alarm signal is given,[12] or merely because a vehicle is seen slowly approaching or standing near the track;[13] and should a person near the track suddenly go upon the track and be injured, the fault will not be that of the company,[14] unless the employees' conduct is so grossly careless that the exercise of proper and reasonable caution by the party injured could not have protected him.[15] Where, however, such employees have reason to believe that such person is laboring under some disability,[16] or has failed to hear and apprehend the signals,[17] or where they otherwise know or have reasonable grounds to believe that such person is in a position of peril and will not or cannot get out of it in time, and then only, it is their duty to use all reasonable efforts within their power, consistent with the safety of the train, to stop the train if possible in time to avoid injuring him; and if they fail to do so the railroad company is liable for the resulting injury.[18] In accordance with the above rule it has been held that railroad

Iowa.— Horn *v.* Chicago, etc., R. Co., 124 Iowa 281, 99 N. W. 1068.

Kansas.— Chicago, etc., R. Co. *v.* Clinkenbeard, 72 Kan. 559, 84 Pac. 142.

Kentucky.— Ward *v.* Illinois Cent. R. Co., 56 S. W. 807, 22 Ky. L. Rep. 191; Illinois Cent. R. Co. *v.* Hocker, 55 S. W. 438, 21 Ky. L. Rep. 1398.

Louisiana.— Hebert *v.* Louisiana Western R. Co., 104 La. 483, 29 So. 239.

Maine.— Copp *v.* Maine Cent. R. Co., 100 Me. 568, 62 Atl. 735.

Maryland.— Frech *v.* Philadelphia, etc., R. Co., 39 Md. 574.

Massachusetts.— Chisholm *v.* Old Colony R. Co., 159 Mass. 3, 33 N. E. 927 (construing Pub. St. c. 112, § 212); June *v.* Boston, etc., R. Co., 153 Mass. 79, 26 N. E. 238.

Minnesota.— Erickson *v.* St. Paul, etc., R. Co., 41 Minn. 500, 43 N. W. 332, 5 L. R. A. 786.

Missouri.— Jackson *v.* Kansas City, etc., R. Co., 157 Mo. 621, 58 S. W. 32, 80 Am. St. Rep. 650; Reardon *v.* Missouri Pac. R. Co., 114 Mo. 384, 21 S. W. 731; Boyd *v.* Wabash Western R. Co., 105 Mo. 371, 16 S. W. 909; Maloy *v.* Wabash, etc., R. Co., 84 Mo. 270.

North Carolina.— McArver *v.* Southern R. Co., 129 N. C. 380, 40 S. E. 94.

Ohio.— Cincinnati, etc., R. Co. *v.* Murphy, 17 Ohio Cir. Ct. 223, 9 Ohio Cir. Dec. 703.

Oregon.— Cogswell *v.* Oregon, etc., R. Co., 6 Oreg. 417.

Texas.— San Antonio, etc., R. Co. *v.* McMillan, 100 Tex. 562, 102 S. W. 103 [*reversing* (Civ. App. 1906) 98 S. W. 421]; Texas, etc., R. Co. *v.* Roberts, 14 Tex. Civ. App. 532, 37 S. W. 870.

West Virginia.— Teel *v.* Ohio River R. Co., 49 W. Va. 85, 38 S. E. 518.

See 41 Cent. Dig. tit. "Railroads," § 1279.

That a passing train on an adjoining track is making considerable noise does not render an engineer negligent in not attempting to stop, after he has given the danger signals, since it is the duty of a person on the track to look as well as listen. Syme *v.* Richmond, etc., R. Co., 113 N. C. 558, 18 S. E. 114.

12. Hebert *v.* Louisiana Western R. Co., 104 La. 483, 29 So. 239.

13. Chicago, etc., R. Co. *v.* Austin, 69 Ill. 426.

14. Chicago, etc., R. Co. *v.* Austin, 69 Ill. 426.

15. Chicago, etc., R. Co. *v.* Austin, 69 Ill. 426.

16. See *infra*, X, E, 2, a, (x), (B), (1).

17. France *v.* Louisville, etc., R. Co., 22 S. W. 851, 15 Ky. L. Rep. 244; Frech *v.* Philadelphia, etc., R. Co., 39 Md. 574; Erickson *v.* St. Paul, etc., R. Co., 41 Minn. 500, 43 N. W. 332, 5 L. R. A. 786; Fiedler *v.* St. Louis, etc., R. Co., 107 Mo. 645, 18 S. W. 847.

18. *Alabama.*— Louisville, etc., R. Co. *v.* Young, (1907) 45 So. 238 (engineer must use promptly every appliance at hand known to prudent men to stop the engine); Louisville, etc., R. Co. *v.* Lewis, 141 Ala. 466, 37 So. 587; Southern R. Co. *v.* Bush, 122 Ala. 470, 26 So. 168; Alabama Great Southern R. Co. *v.* Moorer, 116 Ala. 642, 22 So. 900; Louisville, etc., R. Co. *v.* Black, 89 Ala. 313, 8 So. 246; Cook *v.* Georgia Cent. R., etc., Co., 67 Ala. 533.

Arkansas.— St. Louis, etc., R. Co. *v.* Wilkerson, 46 Ark. 513.

Florida.— Florida Cent., etc., R. Co. *v.* Williams, 37 Fla. 406, 20 So. 558.

Illinois.— Peirce *v.* Walters, 164 Ill. 560, 45 N. E. 1068 [*affirming* 63 Ill. App. 562].

Iowa.— Horn *v.* Chicago, etc., R. Co., 124 Iowa 281, 99 N. W. 1068; Vreeland *v.* Chicago, etc., R. Co., 92 Iowa 279, 60 N. W. 542 (holding that the fireman is under no duty to warn the engineer to stop his train until it is reasonably apparent that a person seen on the track by the fireman is in danger); Burg *v.* Chicago, etc., R. Co., 80 Iowa 106, 57 N. W. 680, 48 Am. St. Rep. 419.

Kansas.— Chicago, etc., R. Co. *v.* Clinkenbeard, 72 Kan. 559, 84 Pac. 142.

Kentucky.— Becker *v.* Louisville, etc., R. Co., 110 Ky. 474, 61 S. W. 997, 22 Ky. L. Rep. 1893, 96 Am. St. Rep. 459, 53 L. R. A. 267; Louisville, etc., R. Co. *v.* Taaffe, 106 Ky. 535, 50 S. W. 850, 21 Ky. L. Rep. 64; Chesapeake, etc., R. Co. *v.* Keelin, 62 S. W. 261, 22 Ky. L. Rep. 1942; Louisville, etc., R. Co. *v.* Pool, 49 S. W. 1060, 20 Ky. L. Rep. 1737; Louisville, etc., R. Co. *v.* Tinkham, 44 S. W. 439, 19 Ky. L. Rep. 1784; France *v.* Louisville, etc., R. Co., 22 S. W. 851, 15 Ky. L. Rep. 244.

Maine.— Copp *v.* Maine Cent. R. Co., 100 Me. 568, 62 Atl. 735.

Missouri.— Reardon *v.* Missouri Pac. R. Co., 114 Mo. 384, 21 S. W. 731.

employees discovering an object on the track are not under a duty to slow up or endeavor to stop the train, before the nature of the object is known;[19] but on the other hand it has been held that it is the duty of such employees when they discover an unknown object on the track to bring the train under control if possible, until the nature of the object is known, so as to be able to stop if necessary.[20]

Nebraska.— Union Pac. R. Co. *v.* Mertes, 35 Nebr. 204, 52 N. W. 1099.

New Mexico.— Candelaria *v.* Atchison, etc., R. Co., 6 N. M. 266, 27 Pac. 497.

New York.— Fitzgibbons *v.* Manhattan R. Co., 88 N. Y. Suppl. 341.

North Carolina.— McCall *v.* Southern R. Co., 129 N. C. 298, 40 S. E. 67; McLamb *v.* Wilmington, etc., R. Co., 122 N. C. 862, 29 S. E. 894. See also Pharr *v.* Southern R. Co., 133 N. C. 610, 45 S. E. 1021.

Texas.— International, etc., R. Co. *v.* Garcia, 75 Tex. 583, 13 S. W. 223 (holding that it is only incumbent to stop when it is manifest that such person does not heed the approaching danger); Houston, etc., R. Co. *v.* Finn, (Civ. App. 1908) 107 S. W. 94 [*affirmed* in (1908) 109 S. W. 918]; International, etc., R. Co. *v.* Munn, (Civ. App. 1907) 102 S. W. 442; San Antonio, etc., R. Co. *v.* Gray, (Civ. App. 1901) 66 S. W. 229 [*reversed* on other grounds in 95 Tex. 424, 67 S. W. 763]; Gulf, etc., R. Co. *v.* Hill, (Civ. App. 1900) 58 S. W. 255; Texas, etc., R. Co. *v.* Roberts, 14 Tex. Civ. App. 532, 37 S. W. 870; Sabine, etc., R. Co. *v.* Hanks, 2 Tex. Civ. App. 306, 21 S. W. 947.

Virginia.— Savage *v.* Southern R. Co., 103 Va. 422, 49 S. E. 484.

United States.— Saldana *v.* Galveston, etc., R. Co., 43 Fed. 862.

See 41 Cent. Dig. tit. "Railroads," § 1279.

When an engineer discovers a team dangerously near a track through the negligence of the driver, and he sees that the driver has gotten himself and his team into a place where there is danger of collision if the train proceeds, and that the driver cannot change the position of himself or his team, it is his duty to use all available appliances to stop the train; but if he does so the railroad company is not liable for an injury which follows. Chicago, etc., R. Co. *v.* Clinkenbeard, 72 Kan. 559, 84 Pac. 142.

Where it is impossible to stop the train in time to prevent injury on account of the speed at which the train is running, the railroad company is not liable to one injured, for such failure to stop. Illinois Cent. R. Co. *v.* Johnson, 97 S. W. 745, 30 Ky. L. Rep. 142; Haley *v.* Missouri Pac. R. Co., 197 Mo. 15, 93 S. W. 1120, 114 Am. St. Rep. 743.

A physical injury resulting from fright caused by the wrongful act or omission of the railroad's servants in failing to stop a train while crossing a bridge on which the injured person was walking and from which he had barely time to escape before the train reached him, may be recovered for from the railroad company where such servants saw and knew the dangerous situation of the injured person and knew, or should have known, that such person would be frightened and the injury that might result therefrom. Hendrix *v.* Texas, etc., R. Co., 40 Tex. Civ. App. 291, 89 S. W. 461.

Whether a brakeman on detached moving cars, who has received a danger signal from another railroad employee on the ground, is negligent in merely signaling the engineer to stop without endeavoring to stop the detached cars, where there is evidence that he acted promptly and could have stopped the detached cars before they ran over plaintiff is a question for the jury. Goodrich *v.* Burlington, etc., R. Co., 103 Iowa 412, 72 N. W. 653.

Where a person upon a railroad trestle upon seeing an approaching train jumps and is injured and the train stops before reaching the trestle, the railroad company is not guilty of negligence. Weeks *v.* Wilmington, etc., R. Co., 131 N. C. 78, 42 S. E. 541.

The failure of an engineer to stop a train in obedience to signals, although he did not know why he was signaled to stop, renders the railroad company liable for injuries caused thereby to a trespasser. Chicago, etc., R. Co. *v.* Pritchard, 168 Ind. 398, 79 N. E. 508, 81 N. E. 78, 9 L. R. A. N. S. 857 [*affirming* 39 Ind. App. 701, 78 N. E. 1044].

That it is impossible to entirely prevent the accident does not relieve the railroad company from liability for a death if the engineer could have stopped the engine in time to have spared life. Bernhardt *v.* Rensselaer, etc., R. Co., 23 How. Pr. (N. Y.) 166.

19. *Iowa.*— Burg *v.* Chicago, etc., R. Co., 90 Iowa 106, 57 N. W. 680, 48 Am. St. Rep. 419.

Kansas.— Missouri Pac. R. Co. *v.* Prewitt, 59 Kan. 734, 54 Pac. 1067 [*reversing* 7 Kan. App. 556, 51 Pac. 923].

Kentucky.— Louisville, etc., R. Co. *v.* Hathaway, 121 Ky. 666, 89 S. W. 724, 28 Ky. L. Rep. 628, 2 L. R. A. N. S. 498; Goodman *v.* Louisville, etc., R. Co., 116 Ky. 900, 77 S. W. 174, 25 Ky. L. Rep. 1086, 63 L. R. A. 657.

Mississippi.— Louisville, etc., R. Co. *v.* Williams, 69 Miss. 631, 12 So. 957.

New York.— Murch *v.* Western New York, etc., R. Co., 78 Hun 601, 29 N. Y. Suppl. 490.

Texas.— San Antonio, etc., R. Co. *v.* McMillan, 100 Tex. 562, 102 S. W. 103 [*reversing* (Civ. App. 1906) 98 S. W. 421], holding that a railroad company is not liable for the death of a person upon a railroad track where, when the trainmen discovered him, they did not recognize the object as a human being, and when they so recognized it, it was too late to stop the train before coming into collision with it.

Virginia.— Tucker *v.* Norfolk, etc., R. Co., 92 Va. 549, 24 S. E. 229.

United States.— New York, etc., R. Co. *v.* Kelly, 93 Fed. 745, 35 C. C. A. 571.

See 41 Cent. Dig. tit. "Railroads," § 1279.

20. Keyser *v.* Chicago, etc., R. Co., 56 Mich.

(c) *Right to Presume That Person Will Leave Track or Avoid Danger.* It is a well-settled rule that where the railroad employees in charge of a train see a person on or near the tracks in advance of the train, unless they know or can see from his condition,[21] or from the surrounding circumstances that he will not or cannot retire to a place of safety in time to prevent an accident,[22] they have a right to presume that such person is of sound mind and good hearing and eyesight;[23] and where the proper alarm signal or warning, as by bell or whistle, is given to him of the approaching train,[24] they have a right to act on the assumption that he will hear and heed the warning when given, and will retire to or remain in a place of safety in time to prevent injury from the approaching train of which he has knowledge or of which, by the ordinary use of his senses, he should have knowledge.[25] This presumption, however, does not exist as an abstract proposition of

559, 23 N. W. 311, 56 Am. Rep. 405, 66 Mich. 390, 33 N. W. 867; Isabel *v.* Hannibal, etc., R. Co., 60 Mo. 475. See also German *v.* Bennington, etc., R. Co., 71 Vt. 70, 42 Atl. 972.

21. See *infra*, X, E, 2, a, (x), (e), (2).

22. St. Louis, etc., R. Co. *v.* Monday, 49 Ark. 257, 4 S. W. 782; Peirce *v.* Walters, 164 Ill. 560, 45 N. E. 1068 [*affirming* 63 Ill. App. 562]; Pittsburgh, etc., R. Co. *v.* Judd, 10 Ind. App. 213, 36 N. E. 775; Louisville, etc., R. Co. *v.* Morlay, 86 Fed. 240, 30 C. C. A. 6.

That a person was sitting on a track on a trestle or was stooping over it before he was struck is no evidence that he was in a position from which he could not extricate himself, precluding the engineer from assuming that he would get off the track when the train came near. Smalley *v.* Southern R. Co., 57 S. C. 243, 35 S. E. 489.

23. *Alabama.*— Frazer *v.* South Alabama, etc., R. Co., 81 Ala. 185, 1 So. 85, 60 Am. Rep. 145.

Florida.— Atlantic Coast Line R. Co. *v.* Miller, 53 Fla. 246, 44 So. 247.

Kansas.— Chicago, etc., R. Co. *v.* Clinkenbeard, 72 Kan. 559, 84 Pac. 142.

Missouri.— Jackson *v.* Kansas City, etc., R. Co., 157 Mo. 621, 58 S. W. 32, 80 Am. St. Rep. 650.

Nebraska.— Omaha, etc., R. Co. *v.* Cook, 42 Nebr. 905, 62 N. W. 235.

Ohio.— Cincinnati, etc., R. Co. *v.* Murphy, 17 Ohio Cir. Ct. 223, 9 Ohio Cir. Dec. 703.

Texas.— Gulf, etc., R. Co. *v.* Hill, (Civ. App. 1900) 58 S. W. 255.

United States.— Finlayson *v.* Chicago, etc., R. Co., 9 Fed. Cas. No. 4,793, 1 Dill. 579.

See 41 Cent. Dig. tit. "Railroads," § 1280; and cases cited *infra*, notes 24, 25.

Adults are presumed to be of sound mind and body and capable of avoiding accidents; and if an adult person is killed on its right of way by a railroad train, the company cannot be held liable until it is shown that such person was in a helpless condition and that the engineer had knowledge of such helplessness in time to have stopped his train and prevented the accident. Teel *v.* Ohio River R. Co., 49 W. Va. 85, 38 S. E. 518.

Where there is nothing in the appearance or conduct of such person to indicate that he was deaf, insane, intoxicated, or otherwise incapable of using his senses and exercising discretion, the engineer may safely assume that he will heed a warning signal if given in time, and get off the track. Ludden *v.* Columbus, etc., R. Co., 9 Ohio S. & C. Pl. Dec. 793, 7 Ohio N. P. 106.

24. Illinois Cent. R. Co. *v.* Hocker, 55 S. W. 438, 21 Ky. L. Rep. 1398; Hebert *v.* Louisiana Western R. Co., 104 La. 483, 29 So. 239; Starbard *v.* Detroit, etc., R. Co., 122 Mich. 23, 80 N. W. 878; Finlayson *v.* Chicago, etc., R. Co., 9 Fed. Cas. No. 4,793, 1 Dill. 579.

Necessity for signal.— In some jurisdictions employees in charge of a railroad train are not authorized to presume that a person seen on the track will leave it in time to avoid injury unless some warning is given. Houston, etc., R. Co. *v.* Harvin, (Tex. Civ. App. 1899) 54 S. W. 629; Kelley *v.* Ohio River R. Co., 58 W. Va. 216, 52 S. E. 520, 2 L. R. A. N. S. 898.

25. *Alabama.*— Southern R. Co. *v.* Gullatt, 150 Ala. 318, 43 So. 577; Louisville, etc., R. Co. *v.* Lewis, 141 Ala. 466, 37 So. 587; Southern R. Co. *v.* Bush, 122 Ala. 470, 26 So. 168.

Arkansas.— St. Louis, etc., R. Co. *v.* Cain, (1907) 104 S. W. 533; St. Louis, etc., R. Co. *v.* Monday, 49 Ark. 257, 4 S. W. 782; St. Louis, etc., R. Co. *v.* Wilkerson, 46 Ark. 513.

California.— Holmes *v.* South Pac. Coast R. Co., 97 Cal. 161, 31 Pac. 834.

Florida.— Atlantic Coast Line R. Co. *v.* Miller, 53 Fla. 246, 44 So. 247.

Illinois.— Chicago, etc., R. Co. *v.* Thompson, 99 Ill. App. 277.

Indiana.— Ullrich *v.* Cleveland, etc., R. Co., 151 Ind. 358, 51 N. E. 95 (holding that the reliance upon such presumption is not wilfulness); Pennsylvania Co. *v.* Meyers, 136 Ind. 242, 36 N. E. 32; Indianapolis, etc., R. Co. *v.* McClaren, 62 Ind. 566; Terre Haute, etc., R. Co. *v.* Graham, 46 Ind. 239; Scudder *v.* Indianapolis, etc., R. Co., Wils. 481; Louisville, etc., R. Co. *v.* Cronbach, 12 Ind. App. 666, 41 N. E. 15; Pittsburgh, etc., R. Co. *v.* Judd, 10 Ind. App. 213, 36 N. E. 775.

Iowa.— Fisk *v.* Chicago, etc., R. Co., 111 Iowa 392, 82 N. W. 931.

Kansas.— Chicago, etc., R. Co. *v.* Clinkenbeard, 72 Kan. 559, 84 Pac. 142; Campbell *v.* Kansas City, etc., R. Co., 55 Kan. 536, 40 Pac. 997, holding that when an engineer sees an adult walking on the track in front of an engine who appears to have the use of his senses and not to be under any physical disability, he may presume that the trespasser

law; but whether or not it obtains in any particular case depends upon all the circumstances surrounding the parties at the time.[26] If acting in good faith and with reasonable prudence on such presumption the railroad employees delay using preventive efforts to avoid an injury until it is too late to do so, the railroad company will not be liable,[27] unless their own negligence, as in running at an unlawful rate of speed, precludes them from acting on such presumption.[28]

will heed the warning given and step from the track in time to avoid injury.

Kentucky.— Louisville, etc., R. Co. *v.* Redmon, 122 Ky. 385, 91 S. W. 722, 28 Ky. L. Rep. 1293; Illinois Cent. R. Co. *v.* Hocker, 55 S. W. 438, 21 Ky. L. Rep. 1398; France *v.* Louisville, etc., R. Co., 22 S. W. 851, 15 Ky. L. Rep. 244.

Louisiana.— Herbert *v.* Louisiana Western R. Co., 104 La. 483, 29 So. 239.

Maine.— Copp *v.* Maine Cent. R. Co., 100 Me. 568, 62 Atl. 735, holding that an engineer may ordinarily assume that persons walking on the track are aware of the approach of the locomotive and will seasonably leave the track for its free passage.

Michigan.— Starbard *v.* Detroit, etc., R. Co., 122 Mich. 23, 80 N. W. 878.

Minnesota.— Erickson *v.* St. Paul, etc., R. Co., 41 Minn. 500, 43 N. W. 332, 5 L. R. A. 786.

Missouri.— Carrier *v.* Missouri Pac. R. Co., 175 Mo. 470, 74 S. W. 1002; Livingston *v.* Wabash R. Co., 170 Mo. 452, 71 S. W. 136; Jackson *v.* Kansas City, etc., R. Co., 157 Mo. 621, 58 S. W. 32, 80 Am. St. Rep. 650; Boyd *v.* Wabash Western R. Co., 105 Mo. 371, 16 S. W. 909; Maloy *v.* Wabash, etc., R. Co., 84 Mo. 270; Bell *v.* Hannibal, etc., R. Co., 72 Mo. 50; Reyner *v.* Kansas City, etc., R. Co, 86 Mo. App. 521.

New York.— Spooner *v.* Delaware, etc., R. Co., 115 N. Y. 22, 21 N. E. 696; Bernhardt *v.* Rensselaer, etc., R. Co., 18 How. Pr. 427 [*reversed* on the facts in 32 Barb. 165, 19 How. Pr. 199].

North Carolina.— Clegg *v.* Southern R. Co., 133 N. C. 303, 45 S. E. 657, 132 N. C. 292, 43 S. E. 836; McArver *v.* Southern R. Co., 129 N. C. 380, 40 S. E. 94; Matthews *v.* Atlantic, etc., R. Co., 117 N. C. 640, 23 S. E. 177; Syme *v.* Richmond, etc., R. Co., 113 N. C. 558, 18 S. E. 114; High *v.* Carolina Cent. R. Co., 112 N. C. 385, 17 S. E. 79; McAdoo *v.* Richmond, etc., R. Co., 105 N. C. 140, 11 S. E. 316.

Ohio.— Cincinnati, etc., R. Co. *v.* Murphy, 17 Ohio Cir. Ct. 223, 9 Ohio Cir. Dec. 703; Driscoll *v.* Cincinnati, etc., R. Co., 1 Ohio Cir. Ct. 493, 1 Ohio Cir. Dec. 274; Ludden *v.* Columbus, etc., R. Co., 9 Ohio S. & C. Pl. Dec. 793, 7 Ohio N. P. 106.

South Carolina.— Smalley *v.* Southern R. Co., 57 S. C. 243, 35 S. E. 489.

Texas.— International, etc., R. Co. *v.* Garcia, 75 Tex. 583, 13 S. W. 223; Artusy *v.* Missouri Pac. R. Co., 73 Tex. 191, 11 S. W. 177; Houston, etc., R. Co. *v.* Smith, 52 Tex. 178; Houston, etc., R. Co. *v.* Ramsey, 43 Tex. Civ. App. 603, 97 S. W. 1067; Shetter *v.* Ft. Worth, etc., R. Co., 30 Tex. Civ. App. 536, 71 S. W. 31; Houston, etc., R. Co. *v.* Harvin, (Civ. App. 1899) 54 S. W. 629; St. Louis, etc., R. Co. *v.* Herrin, 6 Tex. Civ. App. 718, 26 S. W. 425.

Virginia.—Norfolk, etc., R. Co. *v.* Dean, 107 Va. 505, 59 S. E. 389; Humphreys *v.* Valley R. Co., 100 Va. 749, 42 S. E. 882; Rangeley *v.* Southern R. Co., 95 Va. 715, 30 S. E. 386; Tyler *v.* Sites, 90 Va. 539, 19 S. E. 174.

West Virginia.— Teel *v.* Ohio River R. Co., 49 W. Va. 85, 38 S. E. 518.

United States.— Bookman *v.* Seaboard Air Line R. Co., 152 Fed. 686, 81 C. C. A. 612; Central Trust Co. *v.* Wabash, etc., R. Co., 26 Fed. 896; Finlayson *v.* Chicago, etc., R. Co., 9 Fed. Cas. No. 4,793, 1 Dill. 579.

See 41 Cen. Dig. tit. "Railroads," § 1280.

Where a person apparently of adult age in possession of his ordinary faculties and at liberty to leave the track at pleasure is seen by an engineer on the track ahead of him, he may rightfully presume that such person will leave the track in time to avoid danger. Ohio, etc., R. Co. *v.* Walker, 113 Ind. 196, 15 N. E. 234, 3 Am. St. Rep. 638.

Starting train.— Where a person is seen on or about a standing train or cars, the reasonable presumption is that he appreciates the danger of his position and will get out of the way before the train is started, and the railroad company is not liable for injuries to him by the train being started unawares, in the absence of proof that it knew of his perilous position when it started. Kendall *v.* Louisville, etc., R. Co., 76 S. W. 376, 25 Ky. L. Rep. 793; Myers *v.* Boston, etc., R. Co., 72 N. H. 175, 55 Atl. 892.

One operating a hand-car across a bridge or trestle has the right to assume that persons crossing thereon will step off the track and permit it to pass, and he owes no duty toward them until he discovers by their behavior or conduct that they cannot or do not intend to leave the track; and that behavior or conduct must manifest itself positively and will not be inferred from their simply remaining on the track. Wright *v.* Southern R. Co., 132 N. C. 327, 43 S. E. 845.

26. Chicago, etc., R. Co. *v.* Woolridge, 72 Ill. App. 551; Texas, etc., R. Co. *v.* Roberts, 2 Tex. Civ. App. 111, 20 S. W. 960.

27. Southern R. Co. *v.* Bush, 122 Ala. 470, 26 So. 168; Tyler *v.* Sites, 88 Va. 470, 13 S. E. 978; Norfolk, etc., R. Co. *v.* Harman, 83 Va. 553, 8 S. E. 251. And see cases cited *supra*, notes 21–26.

28. Georgia R., etc., Co. *v.* Daniel, 89 Ga. 463, 15 S. E. 538 (holding that where an engineer in violation of a statute fails to check the speed of his train in approaching a public crossing he has no right to assume on seeing a man on the track that he will get off in time to save himself, and act on that assumption until he discovers too late to check the train effectively that he is in

The company will be liable if the injury was wilfully inflicted by its servants engaged in operating the train.[29]

(D) *As to Children* — (1) IN GENERAL. A railroad company also owes a child on or near its track the duty of using all reasonable means to avoid injuring it after becoming aware of its presence and peril.[30] If the child is of tender years the railroad employees have no right to presume that it will get or keep out of the way,[31] and more or a different kind of care is required in his case than in the case of one who has reached the age of discretion;[32] and precautions should be taken as soon as a child is seen near a track approaching it, and not merely after it goes on the track.[33] Where the railroad employees see that the child does not hear or understand the signals or apparently does not appreciate its position and will not get out of danger, they are bound to use all reasonable means within their power to stop the train if possible in time to prevent an accident.[34] But

attentive to his danger); Lake Shore, etc., R. Co. *v.* O'Conner, 115 Ill. 254, 3 N. E. 501 (holding that an engineer while driving his engine at a prohibited rate of speed has no right to assume that persons on or near the track will see the approach of his train and avoid danger therefrom).

29. Indianapolis, etc., R. Co. *v.* McClaren, 62 Ind. 566; Tyler *v.* Sites, 88 Va. 470, 13 S. E. 978; Norfolk, etc., R. Co. *v.* Harman, 83 Va. 553, 8 S. E. 251. And see *infra*, X, E, 7.

30. *Alabama.*— Nashville, etc., R. Co. *v.* Harris, 142 Ala. 249, 37 So. 794, 110 Am. St. Rep. 29; Alabama Great Southern R. Co. *v.* Dobbs, 101 Ala. 219, 12 So. 770.

California.— Benson *v.* Central Pac. R. Co., 98 Cal. 45, 32 Pac. 809, 33 Pac. 206.

Connecticut.— Nolan *v.* New York, etc., R. Co., 53 Conn. 461, 4 Atl. 106.

Delaware.— Tully *v.* Philadelphia, etc., R. Co., 2 Pennew. 537, 47 Atl. 1019, 82 Am. St. Rep. 425.

Iowa.— Thomas *v.* Chicago, etc., R. Co., 114 Iowa 169, 86 N. W. 259; Walters *v.* Chicago, etc., R. Co., 41 Iowa 71.

Kansas.— Kansas Pac. R. Co. *v.* Whipple, 39 Kan. 531, 18 Pac. 730.

Mississippi.— Mobile, etc., R. Co. *v.* Watly, 69 Miss. 145, 13 So. 825, holding that a railroad company need only use such efforts as are reasonable in the light of the circumstances as they appear to it.

Missouri.— Livingston *v.* Wabash R. Co., 170 Mo. 452, 71 S. W. 136.

Nebraska.— Meyer *v.* Midland Pac. R. Co., 2 Nebr. 319.

Pennsylvania.— Eply *v.* Lehigh Valley R. Co., 3 Pa. Super. Ct. 509 (holding that it is a question for the jury whether it is negligence to fail to ring a bell or blow a whistle where an infant is seen standing near the track at a crossing and facing the engine fully one half a mile away); Kelly *v.* Philadelphia, etc., R. Co., 30 Leg. Int. 140.

Wisconsin.— McVoy *v.* Oakes, 91 Wis. 214, 64 N. W. 748.

See 41 Cent. Dig. tit. "Railroads," § 1281.

Where a small object is seen upon the track which the railroad employees have no reason to believe to be a child or anything which can be injured or do injury to the train, they are not required to slow up until its nature can be ascertained; and if it be a child and the fact is undiscovered by them until too late to avoid injury, they will not be considered negligent. Missouri Pac. R. Co. *v.* Prewitt, 59 Kan. 734, 54 Pac. 1067 [*reversing* 7 Kan. App. 556, 51 Pac. 923]; Norfolk, etc., R. Co. *v.* Dunnaway, 93 Va. 29, 24 S. E. 698. But see Keyser *v.* Chicago, etc., R. Co., 66 Mich. 290, 33 N. W. 867.

Wanton negligence.— Where an engineer discovers a child in peril in time to avoid injuring it by the exercise of reasonable diligence and consciously fails to exercise such diligence, such failure is wanton negligence and the company is liable for his negligence. Alabama Great Southern R. Co. *v.* Burgess, 119 Ala. 555, 25 So. 251, 72 Am. St. Rep. 943.

31. See *infra*, X, E, 2, a, (X), (D), (2).

32. Nolan *v.* New York, etc., R. Co., 53 Conn. 461, 4 Atl. 106; Indianapolis, etc., R. Co. *v.* Pitzer, 109 Ind. 179, 6 N. E. 310, 10 N. E. 70, 58 Am. Rep. 387; Frick *v.* St. Louis, etc., R. Co., 75 Mo. 595; Houston, etc., R. Co. *v.* Boozer, 2 Tex. Unrep. Cas. 452, holding that while age or physical condition of a person injured in a collision does not ordinarily affect the degree of care required by those operating a locomotive, still in the case of a child which is known to those operating the engine to be on or about the track, a greater degree of care is required than in the case of ordinary persons. But see Bannon *v.* Baltimore, etc., R. Co., 24 Md. 108, holding that the infancy of the person injured does not change the degree of care or diligence to be used by defendant in the management of its cars or engines.

33. Little Rock, etc., R. Co. *v.* Barker, 39 Ark. 491; Livingston *v.* Wabash R. Co., 170 Mo. 452, 71 S. W. 136. But see Meyer *v.* Midland Pac. R. Co., 2 Nebr. 319.

34. *Indiana.*— Indiana, etc., R. Co. *v.* Pitzer, 109 Ind. 179, 6 N. E. 310, 10 N. E. 70, 58 Am. Rep. 387; Louisville, etc., R. Co. *v.* Lohges, 6 Ind. App. 288, 33 N. E. 449.

Iowa.— Thomas *v.* Chicago, etc., R. Co., 114 Iowa 169, 86 N. W. 259; Sutzin *v.* Chicago, etc., R. Co., 95 Iowa 304, 63 N. W. 709.

Kansas.— Kansas Pac. R. Co. *v.* Whipple, 39 Kan. 531, 18 Pac. 730.

New York.— Schwier *v.* New York Cent., etc., R. Co., 90 N. Y. 558.

North Carolina.— Jeffries *v.* Seaboard Air

where the child does not appear to be in any appreciable danger the railroad company is not responsible for an accident which could not have been guarded against by any reasonable degree of diligence.[35]

(2) RIGHT TO PRESUME CHILD WILL AVOID DANGER. As to a child of tender years, the railroad employees in charge of a train have no right to act on the assumption that it will heed signals of danger given by an approaching train, and will act with the discretion of an adult in remaining in a place of safety or getting out of the way of such trains,[36] unless it is apparently of sufficient age and intelligence to understand the danger of its position;[37] but on the contrary it is held that in such case the railroad employees are bound to assume that the child will remain and are charged with the highest degree of care on its behalf.[38]

(E) *As to Infirm or Helpless Persons* — (1) IN GENERAL. The degree of care and prudence required of railroad employees operating a train toward a person seen on or near the track as stated above [39] is not ordinarily affected by the physical condition of the party injured, when not involving the question of contributory negligence;[40] and the fact that such person is deaf or laboring under some other physical disability, in the absence of knowledge of that fact by such employees, does not increase their duty toward him; and if after becoming aware that he cannot or will not get out of danger, they use all reasonable efforts to prevent an injury, the railroad company is not liable,[41] although the person injured was deaf,[42]

Line R. Co., 129 N. C. 236, 39 S. E. 836, holding that it is the duty of an engineer to check the speed of his train in order to avoid injuring a child on the track when in the exercise of reasonable care the engineer should have first perceived the child and not when he actually saw it, although his attention was distracted by his duties, as in that event it is incumbent on the railroad company to employ sufficient assistants to maintain a proper lookout.

Ohio.— Ludden *v.* Columbus, etc., R. Co., 9 Ohio S. & C. Pl. Dec. 793, 7 Ohio N. P. 106.

Pennsylvania.— Kelly *v.* Philadelphia, etc., R. Co., 30 Leg. Int. 140.

Texas.— Missouri, etc., R. Co. *v.* Hammer, 34 Tex. Civ. App. 354, 78 S. W. 708, holding that the train operatives were bound as soon as they discovered the child to stop the train before reaching it, if it could be done by the exercise of the highest degree of care.

Wisconsin.— Friend *v.* Chicago, etc., R. Co., 104 Wis. 663, 80 N. W. 934.

United States.— Baltimore, etc., R. Co. *v.* Hellenthal, 88 Fed. 116, 31 C. C. A. 414.

See 41 Cent. Dig. tit. "Railroads," § 1281.

35. Cross *v.* Southern R. Co., 109 Ga. 170, 34 S. E. 277; Pennsylvania R. Co. *v.* Morgan, 82 Pa. St. 134; International, etc., R. Co. *v.* Wear, 33 Tex. Civ. App. 492, 77 S. W. 272.

36. *Georgia.*— Southern R. Co. *v.* Chatman, 124 Ga. 1026, 53 S. E. 692.

Indiana.— Indianapolis, etc., R. Co. *v.* Pitzer, 109 Ind. 179, 6 N. E. 310, 10 N. E. 70, 58 Am. Rep. 387.

Iowa.— Sutzin *v.* Chicago, etc., R. Co., 95 Iowa 304, 63 N. W. 709.

Kentucky.— Louisville, etc., R. Co. *v.* Vanarsdell, 77 S. W. 1103, 25 Ky. L. Rep. 1432.

Missouri.— Livingston *v.* Wabash R. Co., 170 Mo. 452, 71 S. W. 136; Riley *v.* Missouri Pac. R. Co., 68 Mo. App. 652.

New York.— Spooner *v.* Delaware, etc., R. Co., 115 N. Y. 22, 21 N. E. 696.

Ohio.— Ludden *v.* Columbus, etc., R. Co., 9 Ohio S. & C. Pl. Dec. 793, 7 Ohio N. P. 106.

Pennsylvania.— Kelly *v.* Philadelphia, etc., R. Co., 30 Leg. Int. 140.

Texas.— Missouri, etc., R. Co. *v.* Hammer, 34 Tex. Civ. App. 354, 78 S. W. 708. See also International, etc., R. Co. *v.* Wear, 33 Tex. Civ. App. 492, 77 S. W. 272.

West Virginia.— Gunn *v.* Ohio River R. Co., 42 W. Va. 676, 26 S. E. 546, 36 L. R. A. 575.

See 41 Cent. Dig. tit. "Railroads," § 1282.

37. Givens *v.* Louisville, etc., R. Co., 72 S. W. 320, 24 Ky. L. Rep. 1796; Trudell *v.* Grand Trunk R. Co., 126 Mich. 73, 85 N. W. 250, 53 L. R. A. 271; Merideth *v.* Richmond, etc., R. Co., 108 N. C. 616, 15 S. E. 137.

38. Burg *v.* Chicago, etc., R. Co., 90 Iowa 106, 57 N. W. 680, 48 Am. St. Rep. 419; Livingston *v.* Wabash R. Co., 170 Mo. 452, 71 S. W. 136.

39. See *supra*, X, E, 2, a, (X), (A), (B).

40. Houston, etc., R. Co. *v.* Boozer, 2 Tex. Unrep. Cas. 452.

41. Louisville, etc., R. Co. *v.* Black, 89 Ala. 313, 8 So. 246.

42. *Alabama.*— Frazer *v.* South, etc., R. Co., 81 Ala. 185, 1 So. 85, 60 Am. Rep. 145, holding that in the absence of proof showing that the employees in charge of the train were informed that the deceased was deaf, he must be regarded, so far as the duty of defendant is concerned, as in the full possession of his faculty of hearing.

Michigan.— Piskorowski *v.* Detroit, etc., R. Co., 121 Mich. 498, 80 N. W. 241, holding that under the circumstances negligence in not knowing of plaintiff's deafness could not be imputed to defendant.

Missouri.— Candee *v.* Kansas City, etc., R. Co., 130 Mo. 142, 31 S. W. 1029.

North Carolina.— Poole *v.* North Carolina R. Co., 53 N. C. 340.

intoxicated,[43] asleep,[44] or otherwise physically infirm or disabled.[45] Where, however, such operatives know, or have reasonable grounds for believing, that the person so seen is physically infirm or disabled, they are held to a greater degree of care and prudence than in the case of a person possessed of all his faculties.[46]

(2) RIGHT TO PRESUME PERSON WILL AVOID INJURY. In accordance with the above rules,[47] railroad employees in charge of a train, seeing a person on the track ahead, have a right to act on the presumption that he is in possession of his faculties and that he will hear and heed the signals given and will remain in or retire to a place of safety so as to avoid injury, unless they know that such person is defective in hearing or eyesight,[48] or that he otherwise labors under some disability that prevents him from knowing of his danger or from getting or keeping out of the way,[49] or unless there are indications of such disability from

Texas.— Artusy *v.* Missouri Pac. R. Co., 73 Tex. 191, 11 S. W. 177.

See 41 Cent. Dig. tit. "Railroads," § 1283.

43. Murch *v.* Western New York, etc., R. Co., 78 Hun (N. Y.) 601, 29 N. Y. Suppl. 490; Louisiana, etc., R. Co. *v.* McDonald, (Tex. Civ. App. 1899) 52 S. W. 649.

Where a person so intoxicated as apparently not to be able to care for himself is seen on or around railroad tracks by a foreman, yardmaster, or other officer or employee of a railroad company, it is their duty to use ordinary care either to see him to a place of safety or to notify the servants in charge of a train which is soon to pass, and if they do neither, the railroad company is liable if the servants in charge of an approaching train could have avoided the injury had they been duly notified. Cincinnati, etc., R. Co. *v.* Marrs, 119 Ky. 954, 85 S. W. 188, 27 Ky. L. Rep. 388, 115 Am. St. Rep. 289, 70 L. R. A. 291; Fagg *v.* Louisville, etc., R. Co., 111 Ky. 30, 63 S. W. 580, 23 Ky. L. Rep. 383, 54 L. R. A. 919. *Compare* Virginia Midland R. Co. *v.* Boswell, 82 Va. 932, 7 S. E. 383. Where, however, such a person, although seen on or about the track, is not physically or mentally helpless, and has departed, and the servants having knowledge of his condition have no reason to believe that he is still in the vicinity of the track, their failure to notify a train crew about to pass of his presence is not negligence. Southern R. Co. *v.* Back, 103 Va. 778, 50 S. E. 257.

44. Sims *v.* Macon, etc., R. Co., 28 Ga. 93; Gregory *v.* Southern Pac. R. Co., 2 Tex. Civ. App. 279, 21 S. W. 417 (holding that a railroad company is not liable for running over a person lying asleep on its track where its servants discovered him as soon as they could do so with reasonable care, and used all proper diligence to stop the train); New York, etc., R. Co. *v.* Kelly, 93 Fed. 745, 35 C. C. A. 571. But see East Tennessee, etc., R. Co. *v.* St. John, 5 Sneed (Tenn.) 524, 73 Am. Dec. 149.

45. *Alabama.*— Goodwin *v.* Cent. R., etc., Co., 96 Ala. 445, 11 So. 393, lying on track in apparently helpless condition.

Kentucky.— Louisville, etc., R. Co. *v.* Hathaway, 121 Ky. 666, 89 S. W. 724, 28 Ky. L. Rep. 628, 2 L. R. A. N. S. 498, lying beside the track.

New York.— McKenna *v.* New York Cent., etc., R. Co., 9 Daly 262 [*affirming* 8 Daly 304], holding that where a person so lay that an approaching train on another track could have passed without injuring him had he lain still, but after the train had nearly passed he threw his legs under the last wheels, there was no negligence in not stopping the train.

Texas.— Louisiana, etc., R. Co. *v.* McDonald, (Civ. App. 1899) 52 S. W. 649.

Virginia.— Tucker *v.* Norfolk, etc., R. Co., 92 Va. 549, 24 S. W. 229, lying on right of way near track.

See 41 Cent. Dig. tit. "Railroads," § 1283.

Where an engineer violating a rule of the company that "any object waved violently by any person on the track signifies danger, and is a signal to stop" pays no heed to a person running along the track waving his hat and making every possible effort to stop the train and does not apply brakes until too late to avoid an accident when he observes a person lying on the track, he will be held negligent. Seaboard, etc., R. Co. *v.* Joyner, 92 Va. 354, 23 S. E. 773.

46. Alabama Great Southern R. Co. *v.* Hamilton, 135 Ala. 343, 33 So. 157; Frech *v.* Philadelphia, etc., R. Co., 39 Md. 574; Houston, etc., R. Co. *v.* Boozer, 2 Tex. Unrep. Cas. 452; Texas, etc., R. Co. *v.* Robinson, 4 Tex. Civ. App. 121, 23 S. W. 433; Teel *v.* Ohio River R. Co., 49 W. Va. 85, 38 S. E. 518. See also Southwestern R. Co. *v.* Hankerson, 72 Ga. 182.

47. See *supra*, X, D, 2, a, (X), (C).

48. *Alabama.*— Louisville, etc., R. Co. *v.* Black, 89 Ala. 313, 8 So. 246.

Kentucky.— Nichols *v.* Louisville, etc., R. Co., 6 S. W. 339, 9 Ky. L. Rep. 702.

Missouri.— Candee *v.* Kansas City, etc., R. Co., 130 Mo. 142, 31 S. W. 1029.

Ohio.— Cincinnati, etc., R. Co. *v.* Murphy, 17 Ohio Cir. Ct. 223, 9 Ohio Cir. Dec. 703.

Oregon.— Cogswell *v.* Oregon, etc., R. Co., 6 Oreg. 417.

Texas.— Houston, etc., R. Co. *v.* O'Donnell, 99 Tex. 636, 92 S. W. 409 [*reversing* (Civ. App. 1905) 90 S. W. 886]; International, etc., R. Co. *v.* Garcia, 75 Tex. 583, 13 S. W. 223.

See 41 Cent. Dig. tit. "Railroads," § 1284.

49. *Arkansas.*— St. Louis, etc., R. Co. *v.* Monday, 49 Ark. 257, 4 S. W. 782; St. Louis, etc., R. Co. *v.* Wilkerson, 46 Ark. 513.

the party's actions or appearance sufficient to give notice to those in charge of the train of such fact.[50]

b. As to Persons at Stations — (i) *In General.* While railroad employees, knowing of the enhanced danger at depot grounds on account of persons constantly passing and repassing, are required to exercise a greater degree of caution and prudence than at other places where persons have no right to be, and where the employees have no right to expect to find them,[51] they ordinarily owe no duty to a trespasser or mere licensee upon depot premises except not to wantonly or wilfully injure him.[52] Where, however, a person is upon the depot premises or approaches upon the express or implied invitation of the railroad company, as for a business purpose connected with the railroad company or for which the depot is used, the railroad company should use a reasonable degree of care and prudence for his safety.[53] Thus a railroad company owes the duty of exercising reasonable and ordinary care and diligence to avoid injuring one who is on its station premises for the purpose of accompanying or meeting friends who are about to take or alight from its trains,[54] or who goes to the depot premises for

Florida.— Florida Cent. R. Co. *v.* Williams, 37 Fla. 406, 20 So. 558.

Missouri.— Jackson *v.* Kansas City, etc., R. Co., 157 Mo. 621, 58 S. W. 32, 80 Am. St. Rep. 650.

Nebraska.— Omaha, etc., R. Co. *v.* Cook, 42 Nebr. 905, 62 N. W. 235.

North Carolina.— Norwood *v.* Raleigh, etc., R. Co., 111 N. C. 236, 16 S. E. 4; Clark *v.* Wilmington, etc., R. Co., 109 N. C. 430, 14 S. E. 43, 14 L. R. A. 749; Dailey *v.* Richmond, etc., R. Co., 106 N. C. 301, 11 S. E. 320; McAdoo *v.* Richmond, etc., R. Co., 105 N. C. 140, 11 S. E. 316; Herring *v.* Wilmington, etc., R. Co., 32 N. C. 402, 51 Am. Dec. 395.

See 41 Cent. Dig. tit. "Railroads," § 1284.

50. Florida Cent., etc., R. Co. *v.* Williams, 37 Fla. 406, 20 So. 558.

As soon as anything occurs to raise a suspicion that such person has not possession of his senses or is otherwise helpless, the presumption that a person walking on the track will leave it on the approach of a train in time to avoid injury ceases to obtain, and the trainmen are required to use all reasonable care to avoid injury by stopping the train at once. Cincinnati, etc., R. Co. *v.* Murphy, 17 Ohio Cir. Ct. 223, 9 Ohio Cir. Dec. 703.

Where the person's manner indicates his helplessness or unconsciousness the engineer will be at fault in running him down, if by a proper lookout he could have seen him and avoided the injury. Clegg *v.* Southern R. Co., 133 N. C. 303, 43 S. E. 836, 45 S. E. 657.

That a deaf-mute is walking on the track with his head and body bent forward does not indicate to an engineer that he is not in possession of his faculties. Tyler *v.* Sites, 90 Va. 539, 19 S. E. 174.

51. Illinois Cent. R. Co. *v.* Hammer, 72 Ill. 347.

52. *California.*— Means *v.* Southern California R. Co., 144 Cal. 473, 77 Pac. 1001.

Illinois.— Deakin *v.* Illinois Cent. R. Co., 127 Ill. App. 258; Illinois Cent. R. Co. *v.* Hopkins, 100 Ill. App. 594 [*affirmed* in 200 Ill. 122, 65 N. E. 656].

Louisiana.—Reary *v.* Louisville, etc., R. Co., 40 La. Ann. 32, 3 So. 390, 8 Am. St. Rep. 497, holding that a railway company is not bound to the same degree of care in regard to persons unlawfully on its premises at depot grounds that it owes to its passengers.

Mississippi.— Dyche *v.* Vicksburg, etc., R. Co., 79 Miss. 361, 30 So. 711.

Virginia.— Norfolk, etc., R. Co. *v.* Wood, 99 Va. 156, 37 S. E. 846.

One who is permitted by the passive acquiescence of a railroad company to come upon its depot platform for his own purposes, in no way connected with the railroad company, is a bare licensee, who, although relieved from the responsibility of a trespasser, takes upon himself all the ordinary risks attached to the place, and the business carried on there. Norfolk, etc., R. Co. *v.* Wood, 99 Va. 156, 37 S. E. 846.

53. *California.*— Means *v.* Southern California R. Co., 144 Cal. 473, 77 Pac. 1001.

Illinois.— Illinois Cent. R. Co. *v.* Phillips, 55 Ill. 194.

Indiana.— Chicago, etc., R. Co. *v.* Thrasher, 35 Ind. App. 58, 73 N. E. 829.

Iowa.— Croft *v.* Chicago, etc., R. Co., 122 Iowa 687, 108 N. W. 1053.

Kansas.—Atchison, etc., R. Co. *v.* McElroy, 76 Kan. 271, 91 Pac. 785, 13 L. R. A. N. S. 620; Chicago, etc., R. Co. *v.* Parkinson, 56 Kan. 652, 44 Pac. 615.

Louisiana.— Harvey *v.* Louisiana Western R. Co., 114 La. 1065, 38 So. 859.

United States.— See Bowen *v.* Illinois Cent. R. Co., 136 Fed. 306, 69 C. C. A. 444, 70 L. R. A. 915.

See 41 Cent. Dig. tit. "Railroads," § 869.

Where a person on his way to deposit letters in a railway post-office on a train is called back by the station agent and requested to deliver railroad letters to the baggage master on the same train, there is no duty upon the station agent to protect such person from such damages as might be reasonably expected at the time. Chicago, etc., R. Co. *v.* Parkinson, 56 Kan. 652, 44 Pac. 615.

54. Atchinson, etc., R. Co. *v.* Johns, 36 Kan. 769, 14 Pac. 237, 59 Am. Rep. 609;

the purpose of leaving or carrying away freight,[55] or for the purpose of conducting business with a passenger about to depart on a train.[56]

(11) *DEFECTS IN STATIONS AND APPROACHES.* A railroad company owes no duty to a trespasser or bare licensee to maintain its depot premises or approaches in a safe condition,[57] and where a person enters uninvited upon such premises he assumes all the ordinary risks which attach to the condition of such premises.[58] But the company owes the duty of maintaining such premises and approaches in a safe condition to persons who come thereon by the express or implied invitation of the railroad company, as for the purpose of conducting business connected with the company,[59] as in the case of an employee of an express company

Banderob *v.* Wisconsin Cent. R. Co., 133 Wis. 249, 113 N. W. 738; Smith *v.* Great Eastern R. Co., L. R. 2 C. P. 4, 36 L. J. C. P. 22, 15 L. T. Rep. N. S. 246, 15 Wkly. Rep. 131. See also CARRIERS, 6 Cyc. 615.

55. Ward *v.* Maine Cent. R. Co., 96 Me. 136, 51 Atl. 947.

56. Klugherz *v.* Chicago, etc., R. Co., 90 Minn. 17, 95 N. W. 586, 101 Am. St. Rep. 384.

57. *California.*— Means *v.* Southern California R. Co., 144 Cal. 473, 77 Pac. 1001.

Colorado.— Watson *v.* Manitou, etc., R. Co., 41 Colo. 138, 92 Pac. 17.

Iowa.— Heiss *v.* Chicago, etc., R. Co., 103 Iowa 590, 72 N. W. 787.

Louisiana.— Burbank *v.* Illinois Cent. R. Co., 42 La. Ann. 1156, 8 So. 580, 11 L. R. A. 720.

Massachusetts.— Redigan *v.* Boston, etc., R. Co., 155 Mass. 44, 28 N. E. 1133, 31 Am. St. Rep. 520, 14 L. R. A. 276, holding that where a person not a passenger is injured while walking across defendant's station grounds and platforms with defendant's passive assent by falling through a trap door after dark, and the door is not a concealed peril, designedly laid, defendant is not liable therefor.

Minnesota.— Sullivan *v.* Minneapolis, etc., R. Co., 90 Minn. 390, 97 N. W. 114, 101 Am. St. Rep. 414; De Blois *v.* Great Northern R. Co., 71 Minn. 45, 73 N. W. 637.

Ohio.— Cincinnati, etc., R. Co. *v.* Aller, 64 Ohio St. 183, 60 N. E. 205 [*affirming* 56 Ohio St. 754, 49 N. E. 1114]; Pittsburgh, etc., R. Co. *v.* Bingham, 29 Ohio St. 364.

Texas.— Dobbins *v.* Missouri, etc., R. Co., 91 Tex. 60, 41 S. W. 62, 66 Am. St. Rep. 856, 38 L. R. A. 573. See also Texas Cent. R. Co. *v.* Harbison, 98 Tex. 490, 85 S. W. 1138.

West Virginia.— Woolwine *v.* Chesapeake, etc., R. Co., 36 W. Va. 329, 15 S. E. 81, 32 Am. St. Rep. 859, 16 L. R. A. 271.

United States.— Clark *v.* Howard, 88 Fed. 199, 31 C. C. A. 454, holding that one traversing a railway platform merely to deliver an article sold by him to persons on a train is entitled to no higher degree of care on the part of the railroad company with respect to keeping its platform in good condition than is due from a municipality to the public in respect to its streets and hence it is not liable for injury resulting from mere slipperiness due to sleet and snow recently fallen.

See 41 Cent. Dig. tit. "Railroads," § 870.

As regards a boarding-house keeper who goes to the depot to meet an incoming train for the purpose of securing a boarder, a railroad company is under no obligation to keep the platform about its depot in a safe condition. Post *v.* Texas, etc., R. Co., (Tex. Civ. App. 1893) 23 S. W. 708.

A constable who enters a train at a station not to serve a warrant but for the purpose of apprehending criminals has no rights against the railroad company greater than those of a mere licensee, and the company is under no obligation to furnish a safe place for him to alight from the train. Creeden *v.* Boston, etc., R. Co., 193 Mass. 280, 79 N. E. 344.

58. Means *v.* Southern California R. Co., 144 Cal. 473, 77 Pac. 1001.

59. *Illinois.*— Illinois Cent. R. Co. *v.* Hopkins, 200 Ill. 122, 65 N. E. 656 [*affirming* 100 Ill. App. 594], holding this rule to apply to a person engaged in taking meals to mail clerks on the train, which he had done for eight years.

Louisiana.— Burbank *v.* Illinois Cent. R. Co., 42 La. Ann. 1156, 8 So. 580, 11 L. R. A. 720.

Minnesota.— De Blois *v.* Great Northern R. Co., 71 Minn. 45, 73 N. W. 637.

New York.— Fitzgerald *v.* New York Cent., etc., R. Co., 84 N. Y. App. Div. 59, 81 N. Y. Suppl. 1109 [*affirmed* in 179 N. Y. 559, 71 N. E. 1131].

Ohio.— Cincinnati, etc., R. Co. *v.* Allen, 64 Ohio St. 183, 60 N. E. 205 [*affirming* 56 Ohio St. 754, 49 N. E. 1114].

Texas.— Fort Worth, etc., R. Co. *v.* Nesmith, (Civ. App. 1897) 40 S. W. 1071, holding that a railroad company is guilty of negligence in allowing a dangerous hole to remain in a platform which persons are accustomed to use in hauling and loading cotton for transportation over the lines of the railroad company.

Vermont.— Beard *v.* Connecticut, etc., R. Co., 48 Vt. 101.

Wisconsin.— Banderob *v.* Wisconsin Cent. R. Co., 133 Wis. 249, 113 N. W. 738, holding that a railroad company owes to one coming on its depot grounds to take leave of a passenger the duty of keeping in a safe condition all parts of its platforms and approaches thereto to which the public naturally resort, as well as all portions of its station grounds reasonably near to the platforms, where the public would naturally be likely to go.

delivering freight for shipment,[60] or of a person coming thereon to deliver or carry away freight.[61]

(III) *Articles Projecting, Falling, or Thrown From Trains.* A railroad company is also liable for injuries, caused by articles negligently projecting, falling, or being thrown from trains on depot premises, to one who is rightfully upon such premises by the express or implied invitation of the company;[62] but not for injuries so caused to one who is there without such invitation.[63] While an agent of the United States postal department, in charge of a mail car, is not a servant of the railroad company carrying mails under contract with the United States government, in such sense that the negligence of the agent in the matter of throwing a mail bag from the train, causing injury to a bystander, is primarily chargeable to the railroad company,[64] yet the railroad company is liable for injuries to persons who are rightfully on its depot premises, regardless of whether they are passengers or not,[65] if it permits the mail agent to pursue a course of conduct with reference to the throwing off of mail bags at stations which is dangerous to bystanders, and if the course of conduct has been continued for a sufficient length of time, so that the railway company is presumed to have had knowledge thereof, its liability will be sufficiently shown.[66]

See 41 Cent. Dig. tit. "Railroads," § 870. And see Carriers, 6 Cyc. 610.

A railroad company's obligation of care extends to and embraces all the accessories of its business, including stations and depots, which must be constructed and erected with care, properly lighted, and otherwise made convenient and safe for persons lawfully entering thereon for the transaction of business, although the company is bound to use only ordinary care except in favor of passengers. Toledo, etc., R. Co. *v.* Grush, 67 Ill. 262, 16 Am. Rep. 618. But the duty of keeping such places in a safe state of repair does not extend to streets or sidewalks of a town or city that are not owned or controlled by the railroad company. Webster *v.* Chesapeake, etc., R. Co., 105 S. W. 945, 32 Ky. L. Rep. 404.

Hackman.— A railroad company is liable to a hackman for injuries received, while carrying a passenger to its depot for transportation, from a defective platform, without negligence on his part, which it permitted to remain in an unsafe condition, although the platform was erected and maintained by it within the limits of the highway. Tobin *v.* Portland, etc., R. Co., 59 Me. 183. 8 Am. Rep. 415.

A railroad company is not obliged to erect a screen or fence at its station between the driveway thereto and the tracks, so that horses standing at the station may not be frightened at approaching trains. Flagg *v.* Chicago, etc., R. Co., 96 Mich. 30, 55 N. W. 444, 21 L. R. A. 835; Simkin *v.* London, etc., R. Co., 21 Q. B. D. 453, 53 J. P. 85, 59 L. T. Rep. N. S. 797.

The duty of a railroad company as to its stations and platforms is less onerous than its duty as to its road-bed and rolling stock. Fitch *v.* New Jersey Cent. R. Co., 74 N. J. L. 135, 64 Atl. 992.

Ice on a station platform is not necessarily negligence, but the company's negligence depends on whether it allows an unreasonable time to elapse before cleaning the platform. Fitch *v.* New Jersey Cent. R. Co., 74 N. J. L. 135, 64 Atl. 992.

Mailing letters.— It is the duty of a railroad company which carries the mail under a contract with the United States and by whose regulations postal clerks on mail trains are required to receive at the cars stamped letters and sell stamps, to furnish a reasonably safe passage to and from its mail trains, while stopping at its regular stations, for the purpose of mailing letters. Hale *v.* Grand Trunk R. Co., 60 Vt. 605, 15 Atl. 300, 1 L. R. A. 187.

60. Harvey *v.* Louisiana Western R. Co., 114 La. 1065, 38 So. 859.

61. Toledo, etc., R. Co. *v.* Grush, 67 Ill. 262, 16 Am. Rep. 618; Louisville, etc., R. Co. *v.* Wolfe, 80 Ky. 82, holding this to be true, although the railroad company did not know of the danger.

62. Toledo, etc., R. Co. *v.* Maine, 67 Ill. 298 (injury to one who is lawfully passing along the passenger platform to the depot to ascertain the time of departure of a certain train); Sullivan *v.* Vicksburg, etc., R. Co., 39 La. Ann. 200, 2 So. 586, 4 Am. St. Rep. 239 (injury by projecting brake to one on platform to meet friends). And see *supra*, X, E, 2, a, (VI).

63. Baltimore, etc., R. Co. *v.* Schwindling, 101 Pa. St. 258, 47 Am. Rep. 706.

64. Carver *v.* Minneapolis, etc., R. Co., 120 Iowa 346, 94 N. W. 862; Shaw *v.* Chicago, etc., Ry. Co., 123 Mich. 629, 82 N. W. 618, 81 Am. St. Rep. 230, 49 L. R. A. 308; Munster *v.* Chicago, etc., R. Co., 61 Wis. 325, 21 N. W. 223, 50 Am. Rep. 141.

65. Carver *v.* Minneapolis, etc., R. Co., 120 Iowa 346, 94 N. W. 862; Williams *v.* Louisville, etc., R. Co., 98 Ky. 247, 32 S. W. 934, 41 S. W. 1100, 17 Ky. L. Rep. 860; Bradford *v.* Boston, etc., R. Co., 160 Mass. 392, 35 N. E. 1131.

66. Carver *v.* Minneapolis, etc., R. Co., 120 Iowa 346, 94 N. W. 862; Galloway *v.* Chicago, etc., R. Co., 56 Minn. 346, 57 N. W. 1058, 45 Am. St. Rep. 468, 23 L. R. A. 442.

(IV) *OPERATION OF TRAINS.* Since the railroad employees have reason to expect that persons will be on the track at depot grounds, it is the duty of those in charge of a train to exercise ordinary care in approaching or running past a depot or station.[67] It is their duty in such case to give the proper or statutory signals,[68] keep a proper lookout,[69] and not to run at a negligent rate of speed.[70] Thus it is negligence to run a train at a high rate of speed past a station where a passenger train is receiving and discharging passengers,[71] or where a passenger train is just pulling into the station,[72] especially where the track on which the speeding train is moving is between the station and the track on which the passenger train is.[73]

See also CARRIERS, 6 Cyc. 610 text and note 33.

67. International, etc., R. Co. *v.* Jackson, 41 Tex. Civ. App. 51, 90 S. W. 918; Rogers *v.* Rhymney R. Co., 26 L. T. Rep. N. S. 879, 21 Wkly. Rep. 21; Jones *v.* Grand Trunk R. Co., 18 Can. Sup. Ct. 696 [*affirming* 16 Ont. App. 37].

Under Miss. Code (1892), § 3549, see King *v.* Illinois Cent. R. Co., 114 Fed. 855, 52 C. C. A. 489.

To back a train into a dark depot without any light or signal, so noiselessly and suddenly that a person who is lawfully at the depot is unable to get his horses out of the way, is negligence. Hollender *v.* New York Cent., etc., R. Co., 14 Daly (N. Y.) 219, 19 Abb. N. Cas. 18, 6 N. Y. St. 352.

To make a flying switch at depot grounds to the injury of a licensee who is crossing the track is negligence. Illinois Cent. R. Co. *v.* Hammer, 72 Ill. 347.

68. Ensley R. Co. *v.* Chewning, 93 Ala. 24, 9 So. 458.

Under Ala. Code, § 1144, requiring a whistle to be blown or a bell to be rung at least one fourth of a mile before reaching a regular stopping place, a junction is a regular stopping place within the meaning of such statute, and a failure to give the signals is negligence *per se.* Ensley R. Co. *v.* Chewning, 93 Ala. 24, 9 So. 458. But a place not on a public road, where a railroad company is in the habit of stopping its trains for the sole purpose of taking on or putting off passengers who had notified those in charge of trains to do so, is not a "regular depot or crossing" within code, section 1699, requiring a bell or whistle to be sounded within a quarter of a mile thereof. Cook *v.* Georgia Cent. R., etc., Co., 67 Ala. 533.

69. Bennett *v.* Grand Trunk R. Co., 3 Ont. 446.

Where a person on a track on depot grounds is injured by a backing engine, without either the engineer or fireman being on the lookout at or near the front of the tender, the railroad company is liable for negligence. Willis *v.* Vicksburg, etc., R. Co., 115 La. 53, 38 So. 892.

Miss. Code, § 3549, requiring railroad companies to have trains backing into a passenger depot preceded by a servant for at least three hundred feet before they reach the depot, and making the company liable for every injury inflicted while violating this section, is not restricted in its application to a particular class of persons, but allows a recovery to such persons as mere licensees. Yazoo, etc., R. Co. *v.* Metcalf, 84 Miss. 242, 36 So. 259.

70. Illinois Cent. R. Co. *v.* Murphy, 52 Ill. App. 65; Croft *v.* Chicago, etc., R. Co., 132 Iowa 687, 108 N. W. 1053; Harvey *v.* Louisiana Western R. Co., 114 La. 1065, 38 So. 859, holding that a railroad train, approaching a depot in a large city, should moderate its speed.

In the absence of any ordinance to the contrary no particular rate of speed on depot grounds will be negligence *per se.* Heiss *v.* Chicago, etc., R. Co., 103 Iowa 590, 72 N. W. 787; Cohoon *v.* Chicago, etc., R. Co., 90 Iowa 169, 67 N. W. 727. A rate of seven or eight miles an hour in approaching a station is not reckless running when the train can be stopped in fifteen or twenty feet. Ensley R. Co. *v.* Chewning, 93 Ala. 24, 9 So. 458.

To run a hand-car past a station at the rate of fifteen miles an hour, on a down grade, without bell or other notice of approach at an hour when passengers are about to gather to take a train, is negligence. Conklin *v.* New York Cent., etc., R. Co., 17 N. Y. Suppl. 651.

71. Pennsylvania Co. *v.* Reidy, 198 Ill. 9, 64 N. E. 698 [*affirming* 99 Ill. App. 477]; Chicago, etc., R. Co. *v.* Jennings, 89 Ill. App. 335; Chicago, etc., R. Co. *v.* Kelly, 75 Ill. App. 490. And see CARRIERS, 6 Cyc. 608 text and note 27.

72. Pennsylvania Co. *v.* Reidy, 198 Ill. 9, 64 N. E. 698 [*affirming* 99 Ill. App. 477]; Chicago, etc., R. Co. *v.* Kelly, 75 Ill. App. 490.

73. Chicago, etc., R. Co. *v.* Kelly, 182 Ill. 267, 54 N. E. 979 [*affirming* 80 Ill. App. 675]; Chicago, etc., R. Co. *v.* Ryan, 165 Ill. 88, 46 N. E. 208 [*affirming* 62 Ill. App. 264]; Atchison, etc., R. Co. *v.* McElroy, 76 Kan. 271, 91 Pac. 785, 123 Am. St. Rep. 134, 13 L. R. A. N. S. 620; Tubbs *v.* Michigan Cent. R. Co., 107 Mich. 108, 64 N. W. 1061, 61 Am. St. Rep. 320. And see CARRIERS, 6 Cyc. 608, text and note 27.

Where a passenger train is stopped on a side-track, having other trains between it and the depot platform, it is negligence to allow another train to pass between such train and the depot at a high rate of speed, without any warning, while business is being rightfully transacted with the standing train, and the railroad company is liable to any

c. As to Persons Working On or About Tracks or Cars — (I) *ON OR ABOUT TRACKS.* It is the duty of a railroad company to use reasonable care and precaution in the operation of its trains or cars, so as to protect persons working on or about its tracks, upon its express or implied invitation, from dangers of which it knows or ought to know,[74] as in the case of one lawfully on or about its tracks in the employ of an independent contractor.[75] But it is not liable for failing to provide against dangers which it does not know of, or could not reasonably have anticipated;[76] nor is it liable for injuries to a workman who is a trespasser or mere licensee, unless such injuries are caused by its failure to exercise reasonable care after he is observed to be in a dangerous position.[77]

(II) *ON OR ABOUT CARS* — (A) *In General.* As to persons working on or about a railroad company's cars, upon its express or implied invitation, the company owes the duty of exercising reasonable care and precaution to avoid injuring them.[78] In such cases the railroad company should exercise ordinary care in

person rightfully there who is injured thereby. Atchison, etc., R. Co. *v.* McElroy, 76 Kan. 271, 91 Pac. 785, 123 Am. St. Rep. 134, 13 L. R. A. N. S. 620.

74. Watts *v.* Richmond, etc., R. Co., 89 Ga. 277, 15 S. E. 365; Delaware, etc., R. Co. *v.* Hardy, 59 N. J. L. 562, 39 Atl. 637; Hudson *v.* Atlantic Coast Line R. Co., 142 N. C. 198, 55 S. E. 103; St. Louis, etc., R. Co. *v.* Miles, 79 Fed. 257, 24 C. C. A. 559, holding that an employee of a lumber company, engaged about a spur track, built from the line of a railroad on land of the lumber company, is not a trespasser, and the railroad company is bound to use ordinary care in handling its engines and cars on the spur track to avoid injuring him. See also Collier *v.* Michigan Cent. R. Co., 27 Ont. App. 630.

Where persons are lawfully and with defendant's knowledge engaged in grading for a new railway track alongside of and parallel to defendant's original or main track, and the ordinary duties of their work frequently require them to be in such close proximity to defendant's original track as to be liable to be struck by passing trains, and it has been the uniform practice of those operating the railroad to give such warning of their approach, the railroad company owes such persons the duty of active vigilance in giving proper signals of the approach of trains, and they have a right to rely upon the continued performance of such duty. Erickson *v.* St. Paul, etc., R. Co., 41 Minn. 500, 43 N. W. 332, 5 L. R. A. 786.

A person on a track simply in the performance of work given to him by a station agent without authority of the company cannot complain of a breach of a duty owed to the public, since his presence on the track is not induced by the fact that it is used for public travel. Cleveland, etc., R. Co. *v.* Marsh, 63 Ohio St. 236, 58 N. E. 821, 52 L. R. A. 142.

75. Pittsburgh, etc., R. Co. *v.* Cozatt, 39 Ind. App. 682, 79 N. E. 534; Caffi *v.* New York Cent., etc., R. Co., 49 Misc. (N. Y.) 620, 96 N. Y. Suppl. 835.

Where the railroad company has promised that its trains shall not pass a point at which the employees of a firm of contractors are engaged in removing rock and dirt in order to straighten the track, at a speed of more than six miles an hour, a violation of such promise is negligence as to the employees of such contractor. Johnson *v.* Richmond, etc., R. Co., 86 Va. 975, 11 S. E. 829.

76. Mobile, etc., R. Co. *v.* Dowdy, 91 S. W. 709, 28 Ky. L. Rep. 1370; Delaware, etc., R. Co. *v.* Hardy, 59 N. J. L. 562, 39 Atl. 637.

Where work is being prosecuted by a railroad contractor which is not of such a character as to interrupt the ordinary operation of trains, the railroad company is not guilty of negligence in failing to reduce the speed of trains at that point, in the absence of evidence that any one connected with the operation of the road and in authority had knowledge that the work was being done at the time and place in question. Carpenter *v.* Chicago, etc., R. Co., 126 Iowa 94, 101 N. W. 758.

77. Mobile, etc., R. Co. *v.* Dowdy, 91 S. W. 709, 28 Ky. L. Rep. 1370; Goodall *v.* New York Cent., etc., R. Co., 89 Hun (N. Y.) 559, 35 N. Y. Suppl. 544.

78. Union Pac. R. Co. *v.* Harwood, 31 Kan. 388, 2 Pac. 605; Martin *v.* Louisville, etc., R. Co., 95 Ky. 612, 26 S. W. 801, 16 Ky. L. Rep. 150 (employee of one railroad company injured through the negligence of another railroad company in allowing its car to stand at an improper place on a track which it was permitted to use); Cincinnati, etc., R. Co. *v.* Rodes, 102 S. W. 321, 31 Ky. L. Rep. 430; Pearlstein *v.* New York, etc., R. Co., 192 Mass. 20, 77 N. E. 1024; Ryan *v.* New York, etc., R. Co., 115 Fed. 197 [*affirmed* in 120 Fed. 1020, 56 C. C. A. 683].

Where a railroad employee has apparent authority to authorize another to work on cars the railroad company is liable for negligently injuring him, whether or not the employee had actual authority for that purpose. Santa Fe, etc., R. Co. *v.* Ford, (Ariz. 1906) 85 Pac. 1072.

Where a person injured was working at the right car, it is immaterial whether any of its servants pointed out such car, or who pointed it out. Gulf, etc., R. Co. *v.* Bryant, 30 Tex. Civ. App. 4, 66 S. W. 804.

maintaining the cars [79] and adjoining premises [80] upon which such person has to work or go in a reasonably safe condition; and should likewise use such care in the movement of trains or cars which are likely to injure a workman of whose presence it has or ought to have knowledge,[81] as in setting the brakes or other-

Such care is not restricted to persons working in or about the cars on the track, but also applies as to persons whose work is connected with such cars, and who may be injured by their being disturbed; as in the case of one working in an icehouse, to which ice was being removed from a car by means of slide, and who was injured by the slide being moved. Kansas City Southern R. Co. *v.* Moles, 121 Fed. 351, 58 C. C. A. 29.

79. See *infra*, X, E, 2, c, (II), (C).

80. Southern R. Co. *v.* Goddard, 121 Ky. 567, 89 S. W. 675, 28 Ky. L. Rep. 523; Kincaid *v.* Kansas City, etc., R. Co., 62 Mo. App. 365; Curtis *v.* De Coursey, 176 Pa. St. 446, 35 Atl. 183 (holding that a railroad company owes a duty to persons delivering and receiving freight to and from its freight yard to keep the passageway for wagons therein in a reasonably safe condition); Watts *v.* Hart, 7 Wash. 178, 34 Pac. 423, 771.

That a car is placed on an inclined track which causes it to careen, instead of being placed at a derrick for the purpose of being loaded, does not show that the track is out of repair, improperly constructed, or otherwise defective, so as to render the railroad company liable to a workman who is injured by slipping while working on the car. Baker *v.* Louisville, etc., Terminal R. Co., 106 Tenn. 490, 61 S. W. 1029, 53 L. R. A. 474.

Where a railroad company maintains a ditch on its premises about or near which a shipper who has no knowledge of its presence may have occasion to go in loading stock at night, and negligently fails to guard it with a barrier, or provide signal lights to prevent persons from falling therein, it is liable for damages to a shipper who is injured thereby. Southern R. Co. *v.* Goddard, 121 Ky. 567, 89 S. W. 675, 28 Ky. L. Rep. 523.

81. *Arizona.*— Santa Fe, etc., R. Co. *v.* Ford, (1906) 85 Pac. 1072.

Georgia.— Georgia Cent. R. Co. *v.* Duffey, 116 Ga. 346, 42 S. E. 510.

Illinois.— Chicago, etc., R. Co. *v.* Anderson, 166 Ill. 572, 46 N. E. 1125 [*affirming* 67 Ill. App. 386] (holding that, although a railroad company is required to exercise only ordinary care to prevent a collision after discovering that it is possible, it is not reversible error to charge that it is required to exercise "proper precautions and reasonable care and diligence"); Chicago, etc., R. Co. *v.* Clark, 2 Ill. App. 116.

Indiana.— Chicago, etc., R. Co. *v.* Stephenson, 33 Ind. App. 95, 69 N. E. 270.

Kansas.— Missouri, etc., R. Co. *v.* Taylor, 73 Kan. 482, 85 Pac. 528.

Kentucky.— Chesapeake, etc. *v.* Wiley, 90 S. W. 557, 28 Ky. L. Rep. 770, negligence of conductor in failing to see for himself as to whether the train was free before starting.

Minnesota.— Jacobson *v.* St. Paul, etc., R. Co., 41 Minn. 206, 42 N. W. 932.

Missouri.— Lovell *v.* Kansas City Southern R. Co., 121 Mo. App. 466, 97 S. W. 193.

New York.— Newson *v.* New York Cent. R. Co., 29 N. Y. 383 (running train so as to frighten horses of one unloading a car); Fisher *v.* New York Dock Co., 91 N. Y. App. Div. 526, 87 N. Y. Suppl. 117 [*affirmed* in 181 N. Y. 579, 74 N. E. 1117]; Harold *v.* New York Cent., etc., R. Co., 13 Daly 89.

Ohio.— Pennsylvania Co. *v.* Gallagher, 40 Ohio St. 637, 48 Am. Rep. 689.

Pennsylvania.— Forrest *v.* Philadelphia, etc., R. Co., 174 Pa. St. 181, 34 Atl. 601.

Texas.— Missouri, etc., R. Co. *v.* Thomas, (Civ. App. 1908) 107 S. W. 868 (person assisting consignee to unload car); St. Louis Southwestern R. Co. *v.* Kennemore, (Civ. App. 1904) 81 S. W. 802; St. Louis, etc., R. Co. *v.* Holmes, (Civ. App. 1899) 49 S. W. 658; Missouri, etc., R. Co. *v.* Holman, 15 Tex. Civ. App. 16, 39 S. W. 130.

Utah.— Hickey *v.* Rio Grande Western R. Co., 29 Utah 392, 82 Pac. 29, holding that a railroad company owes to teamsters who are rightfully in its yard and who are engaged at lawful work the duty of exercising reasonable care and diligence in the movement and operation of its engines and cars, so as to avoid injuring them, and that it is liable for injuries to such teamsters resulting from their teams taking fright at a noise, such as escaping steam made unnecessarily or negligently.

Canada.— Canada Atlantic R. Co. *v.* Hurdman, 25 Can. Sup. Ct. 205.

See 41 Cent. Dig. tit. "Railroads," § 873.

That the railroad company used due care to stop the train after discovering that a collision was probable is no defense to its negligence in moving its train on a track to the injury of a workman who was engaged about a car thereon. Chicago, etc., R. Co. *v.* Anderson, 166 Ill. 572, 46 N. E. 1125 [*affirming* 67 Ill. App. 386].

License to move car.— Where a railroad company leaves its cars securely coupled on a side-track for the use of certain licensees, whose license allowed them to uncouple such cars as were needed for immediate use and removal, the company is not bound to anticipate that such licensees will uncouple any other cars and leave them standing on a side-track. Jakoboski *v.* Grand Rapids, etc., R. Co., 106 Mich. 440, 64 N. W. 461.

The duty which a railroad company owes to a shipper while loading cars, in the management of its trains, is the exercise of that ordinary care which every man owes to his neighbor to do him no injury by negligence while both are engaged in lawful pursuits. Stinson *v.* New York Cent. R. Co., 32 N. Y. 333, 88 Am. Dec. 332.

wise securing cars left on a side-track upon which is located a car on or about which the injured person is working,[82] or in ascertaining the presence of such workman, and warning or notifying him of the intended movement of cars, which are likely to move or interfere with the car upon or about which he is working.[83] But where a person is working on or about a car without the railroad company's express or implied invitation, the company is under no duty to him except that it shall not wantonly or wilfully injure him, and that it shall exercise reasonable care after discovering his dangerous situation.[84]

(B) *Signals, Warnings, and Lookouts.* Where a railroad company knows, or has reason to know, that a person is working on or about a standing car, it is negligent and liable for resulting injuries if it fails to keep a proper lookout for such person,[85] or if it fails to give a reasonable and timely warning or notice to such person of its intention to move or interfere with the car,[86] unless he is

Ignorance by railroad servants of the presence in one of its cars of one rightfully working there does not relieve the company from liability for damage done by reason of its negligence. Georgia Cent. R. Co. *v.* Duffey, 116 Ga. 346, 42 S. E. 510.

That the place of delivery of freight is not a depot or public place, but a place selected by agreement between the consignee and the company for convenience, does not relieve the company from liability for negligently operating its trains to one rightfully on the premises engaged in removing freight. St. Louis, etc., R. Co. *v.* Ridge, 20 Ind. App. 547, 49 N. E. 828. But see New Brunswick R. Co. *v.* Vanwart, 17 Can. Sup. Ct. 35.

That the position of a fireman under his engine was not known to other employees projecting cars against such engine does not conclusively negative the idea of their negligence. Chicago, etc., R. Co. *v.* Stephenson, 33 Ind. App. 95, 69 N. E. 270.

82. Union Pac. R. Co. *v.* Harwood, 31 Kan. 388, 2 Pac. 605; Pratt *v.* New York, etc., R. Co., 187 Mass. 5, 82 N. E. 328; Wheeling, etc., R. Co. *v.* Rupp, 27 Ohio Cir. Ct. 212.

Where it had been the railroad company's custom to set the brake on the lowest car, and the company knew that the work performed by the employees of a loading contractor was dangerous unless the brake was so set, and such employees relied on the railroad company's compliance with the custom, it is negligence for the company to fail to comply with such duty voluntarily assumed. O'Leary *v.* Erie R. Co., 169 N. Y. 289, 62 N. E. 346 [*reversing* 51 N. Y. App. Div. 25, 64 N. Y. Suppl. 511]; Kesterson *v.* Southern R. Co., 146 N. C. 276, 59 S. E. 871.

83. See *infra*, X, D, 2, c, (II), (B).

84. *Alabama.*—Broslin *v.* Kansas City, etc., R. Co., 114 Ala. 398, 21 So. 475.

Illinois.— O'Day *v.* Chicago, etc., R. Co., 97 Ill. App. 632.

Indiana.— Chicago, etc., R. Co. *v.* Martin, 31 Ind. App. 308, 65 N. E. 591.

Iowa.— Mabbott *v.* Illinois Cent. R. Co., 116 Iowa 490, 89 N. W. 1076.

Missouri.— Hallihan *v.* Hannibal, etc., R. Co., 71 Mo. 113.

New Jersey.— Prosser *v.* West Jersey, etc., R. Co., (1907) 68 Atl. 58 [*affirming* (Ch. 1906) 63 Atl. 494]; Furey *v.* New York Cent., etc., R. Co., 67 N. J. L. 270, 51 Atl. 505.

New York.— Lehey *v.* Hudson River R. Co., 4 Rob. 204.

Texas.— Texas, etc., R. Co. *v.* McDonald, 99 Tex. 207, 88 S. W. 201.

See 41 Cent. Dig. tit. "Railroads," § 873.

Where a boy is injured or killed while coupling cars at the request of an employee of the railroad, it is for the jury to determine whether he had sufficient discretion to recognize the danger and guard against it; and if he had, being a trespasser, the company is not bound to anticipate injury and protect him against it. Kentucky Cent. R. Co. *v.* Gastineau, 83 Ky. 119.

85. Kentucky, etc., Bridge, etc., Co. *v.* Sydnor, 119 Ky. 18, 82 S. W. 989, 26 Ky. L. Rep. 951, 68 L. R. A. 183 (holding that it is the duty of the servants of a switch company, operating trains in its yards, to keep a lookout for car repairers employed by railroad companies, who are permitted by the switch company to repair the cars of their employers in the switch-yard); Hudson *v.* Atlantic Coast Line R. Co., 142 N. C. 198, 55 S. E. 103.

Where the operatives of a train could, by ordinary care, have discovered a signal placed on the track to notify them of the presence of a car repairer working under some cars, in time to have averted an injury to him, but negligently failed to so discover it, in consequence of which the car repairer was injured, their employer is liable, although the car repairer was negligent in not having placed the signal in a more conspicuous place. Kentucky, etc., Bridge, etc., Co. *v.* Sydnor, 119 Ky. 18, 82 S. W. 989, 26 Ky. L. Rep. 951, 68 L. R. A. 183.

86. *Arkansas.*— Little Rock, etc., R. Co. *v.* McQueeney, 78 Ark. 22, 92 S. W. 1120.

Georgia.— Georgia Cent. R. Co. *v.* Duffey, 116 Ga. 346, 42 S. E. 510.

Illinois.— Elgin, etc., R. Co. *v.* Thomas, 215 Ill. 158, 74 N. E. 109 [*affirming* 115 Ill. App. 508]; Pennsylvania Co. *v.* Backes, 133 Ill. 255, 24 N. E. 563 [*affirming* 35 Ill. App. 375]; Chicago, etc., R. Co. *v.* Goebel, 119 Ill. 515, 10 N. E. 369 [*affirming* 20 Ill. App. 163]; Illinois Cent. R. Co. *v.* Hoffman, 67 Ill. 287.

Indiana.— Abbitt *v.* Lake Erie, etc., R.

aware or has reason to expect that the car will be so moved and fails to use due care.[87]

(c) *Defects in Cars.* A railroad company owes a duty to all persons whose avocations require them to go on its cars in connection with its carrying business to use reasonable care to inspect and have such cars, both those which it owns and those received from other roads, in such repair or condition that they may be used with reasonable safety.[88] What means it should employ to this end,

Co., (1895) 40 N. E. 40; Lake Erie, etc., R. Co. *v.* Gaughan, 26 Ind. App. 1, 58 N. E. 1072; Toledo, etc., R. Co. *v.* Hauck, 8 Ind. App. 367, 35 N. E. 573.

Iowa.— Watson *v.* Wabash, etc., R. Co., 66 Iowa 164, 23 N. W. 380.

Kentucky.— Louisville, etc., R. Co. *v.* Farris, 100 S. W. 870, 30 Ky. L. Rep. 1193 (holding that if the company, before moving a car, notifies one engaged in unloading it to get off it, but he does not, the company is not liable for the resulting injury to him; but that if it moved the car without warning it is liable, although the injury resulted from a latent defect in the coupling which could not have been discovered by ordinary care); Louisville, etc., R. Co. *v.* Smith, 84 S. W. 755, 27 Ky. L. Rep. 257; Cincinnati, etc., R. Co. *v.* Vaught, 78 S. W. 859, 25 Ky. L. Rep. 1766, 1870.

Maryland.— Baltimore, etc., R. Co. *v.* Charvat, 94 Md. 569, 51 Atl. 413.

Michigan.— Fitzpatrick *v.* Michigan Cent. R. Co., 149 Mich. 194, 112 N. W. 915, failure to give the customary warning.

Mississippi.— New Orleans, etc., R. Co. *v.* Bailey, 40 Miss. 395.

Missouri.— Lovell *v.* Kansas City Southern R. Co., 121 Mo. App. 466, 97 S. W. 193.

New York.— McInerney *v.* Delaware, etc., Canal Co., 151 N. Y. 411, 45 N. E. 848; Barton *v.* New York Cent., etc., R. Co., 1 Thomps. & C. 297 [*affirmed* in 56 N. Y. 660], holding such rule to apply, although the statute may not in terms require a signal to be given before starting a train.

North Carolina.— Smith *v.* Southern R. Co., 129 N. C. 374, 40 S. E. 86.

Texas.— Texas, etc., R. Co. *v.* McDonald, (Civ. App. 1905) 85 S. W. 493; International, etc., R. Co. *v.* Neira, (Civ. App. 1894) 28 S. W. 95.

Utah.— Copley *v.* Union Pac. R. Co., 26 Utah 361, 73 Pac. 517.

United States.— Kansas City Southern R. Co. *v.* Moles, 121 Fed. 351, 58 C. C. A. 29; Chicago, etc., R. Co. *v.* Shaw, 116 Fed. 621, 54 C. C. A. 77.

See 41 Cent. Dig. tit. "Railroads," §§ 873, 875.

That the bell or whistle was sounded does not necessarily free the railroad company from negligence, as the length of the train or other circumstances may have been such that such signal could not have been heard at the place where the person injured was located. Pittsburgh, etc., R. Co. *v.* Ives, 12 Ind. App. 602, 40 N. E. 923; New Orleans, etc., R. Co. *v.* Bailey, 40 Miss. 395; Copley *v.* Union Pac. R. Co., 26 Utah 361, 73 Pac. 517.

Notice to employer.— It has been held that where notice of such intended movement of trains or cars is given to the employer of a workman engaged on or about the cars it is sufficient, and that a railroad company is not negligent for failing to notify an employee, in the absence of knowledge that he is at work about the cars at the time. McInerney *v.* Delaware, etc., Canal Co., 151 N. Y. 411, 45 N. E. 848 [*affirming* 82 Hun 615, 31 N. Y. Suppl. 1130]. But see Georgia Cent. R. Co. *v.* Duffey, 116 Ga. 346, 42 S. E. 510.

A custom of railroad employees to shunt cars on to a wharf of a coal company, without warning, does not defeat a recovery by an employee of the latter company for injuries, unless with knowledge thereof he fails to use due care. Baltimore, etc., R. Co. *v.* Charvat, 94 Md. 569, 51 Atl. 413.

Negligence, as a matter of law, may be inferred where, while the person injured was rightfully removing his goods from defendant's side-tracked cars, defendant's employees backed an engine so as to move such cars, without ringing the bell or giving other signal. Hadley *v.* Lake Erie, etc., R. Co., (Ind. App. 1897) 46 N. E. 935.

A watchman on duty, whose business it is to go through the railroad yards to guard and close open cars and see that they are not broken into, has the implied duty of looking after unloaded cars, and it is his duty to warn a person engaged in unloading a car of the approach of a train, or to give notice of his presence upon the track to those in charge of the train. Little Rock, etc., R. Co. *v.* McQueeney, 78 Ark. 22, 92 S. W. 1120.

87. Chicago, etc., R. Co. *v.* Goebel, 119 Ill. 515, 10 N. E. 369 [*affirming* 20 Ill. App. 163]; Illinois Cent. R. Co. *v.* Hoffman, 67 Ill. 287; Chicago Belt R. Co. *v.* Mantbei, 116 Ill. App. 330; Baltimore, etc., R. Co. *v.* Charvat, 94 Md. 569, 51 Atl. 413; Nauss *v.* Boston, etc., R. Co., 195 Mass. 364, 81 N. E. 280.

As to a workman who is aware of the approach of moving cars, a railroad company is not compelled to avoid striking cars upon which such workman is at the time, nor is it compelled to see that he gets off before the moving cars are permitted to strike or bump against the stationary cars. Rock Island, etc., R. Co. *v.* Dormady, 103 Ill. App. 127.

88. *Georgia.*— Savannah, etc., R. Co. *v.* Booth, 98 Ga. 20, 25 S. E. 928, holding that a railroad company is liable to a servant of one to whom it has furnished a car to be used in loading freight, for injuries by reason

and when they should be employed, depends on the surrounding circumstances.[89] If it delivers a car received from a connecting road, it is under an obligation to make the same inspection of it that it does of its own; that is, to exercise due diligence to see that it is in a reasonably safe condition.[90] But if the car is suitable and safe when it leaves the possession and control of a railroad company, it has exercised due care in the premises.[91]

(III) *APPLICATION OF RULE OF LIABILITY OF MASTER FOR INJURIES TO SERVANT.* In Pennsylvania it is expressly provided by statute that where a person is injured while lawfully engaged or employed on or about the roads, works, depots, premises, trains, or cars of a railroad company, of which com-

of defects which it could have discovered by ordinary care.

Indiana.— Chicago, etc., R. Co. *v.* Pritchard, 168 Ind. 398, 79 N. E. 508, 81 N. E. 78, 9 L. R. A. N. S. 857 [*affirming* 39 Ind. App. 701, 78 N. E. 1044].

Massachusetts.— Ladd *v.* New York, etc., R. Co., 193 Mass. 359, 79 N. E. 742; Hale *v.* New York, etc., R. Co., 190 Mass. 84, 76 N. E. 656; Larkin *v.* New York Cent., etc., R. Co., 166 Mass. 110, 44 N. E. 122.

Michigan.— Sheltrawn *v.* Michigan Cent. R. Co., 128 Mich. 669, 87 N. W. 893.

Missouri.— Roddy *v.* Missouri Pac. R. Co., 104 Mo. 234, 15 S. W. 1112, 24 Am. St. Rep. 333, 12 L. R. A. 746; Tateman *v.* Chicago, etc., R. Co., 96 Mo. App. 448, 70 S. W. 514; Sykes *v.* St. Louis, etc., R. Co., 88 Mo. App. 193.

Texas.— Gulf, etc., R. Co. *v.* Wittnebert, (1908) 108 S. W. 150 [*reversing* (Civ. App. 1907) 104 S. W. 424]; St. Louis Southwestern R. Co. *v.* Fenlaw, (Civ. App. 1896) 36 S. W. 295.

United States.— Texas, etc., R. Co. *v.* Archibald, 170 U. S. 665, 18 S. Ct. 777, 42 L. ed. 1188.

See 41 Cent. Dig. tit. "Railroads," § 876.

But see Risque *v.* Chesapeake, etc., R. Co., 104 Va. 476, 51 S. E. 730.

Safety in loading.— A railroad company is not guilty of negligence because a car load of lumber is not so piled on the car in loading that it will not fall over at the sides while being unloaded, on the removal of the stakes and cross ties which hold it securely while being transported. Hulse *v.* New York, etc., R. Co., 71 Hun (N. Y.) 40, 24 N. Y. Suppl. 512.

The falling of a car door upon a person who is endeavoring to open it to inspect the contents, consigned to his employers, is evidence of a defective condition of the door (Tateman *v.* Chicago, etc., R. Co., 96 Mo. App. 448, 70 S. W. 514); and the company is not relieved from liability because the injured person's employer put him to work about the car knowing of the defect, the employer having drawn the company's attention to it (Ladd *v.* New York, etc., R. Co., 193 Mass. 359, 79 N. E. 742).

Defective brakes.— It has been held that a car with defective brakes is not such an eminently defective instrument as to render a railroad company liable for an injury to one working on such car in the employ of a shipper. Roddy *v.* Missouri Pac. R. Co., 104 Mo. 234, 15 S. W. 1112, 24 Am. St. Rep. 333, 12 L. R. A. 746. But see Hale *v.* New York, etc., R. Co., 190 Mass. 84, 76 N. E. 656, brake shoe useless. Notice to a railroad company of the defectiveness of a brake on a car by reason of which a person entitled to work on such car is injured is not essential to a recovery. Sheltrawn *v.* Michigan Cent. R. Co., 128 Mich. 669, 87 N. W. 893.

Snow and ice on a car is not such a defect on the premises of the railroad company as will render it liable for injuries sustained by another's servant while working thereon, under the rule that the owner of the premises inviting others thereon is bound to keep them in a reasonably safe condition; the presence of the ice and snow being an obvious danger which the servant is held to assume. Baker *v.* Louisville, etc., Terminal R. Co., 106 Tenn. 490, 61 S. W. 1029, 53 L. R. A. 474. But see Kincaid *v.* Kansas City, etc., R. Co., 62 Mo. App. 365.

89. Sykes *v.* St. Louis, etc., R. Co., 88 Mo. App. 193.

That a railroad employee was notified that the door of a freight car in its use was in bad condition, and that the company did nothing to remedy the defect until after plaintiff was injured, is sufficient to show negligence on the part of the company in not discovering and repairing the defect. Ladd *v.* New York, etc., R. Co., 193 Mass. 359, 79 N. E. 742.

90. Ladd *v.* New York, etc., R. Co., 193 Mass. 359, 79 N. E. 742; Olson *v.* Pennsylvania, etc., Fuel Co., 77 Minn. 528, 80 N. W. 698; Sykes *v.* St. Louis, etc., R. Co., 88 Mo. App. 193; Gulf, etc., R. Co. *v.* Wittnebert, (Tex. 1908) 108 S. W. 150 [*reversing* (Civ. App. 1907) 104 S. W. 424]. *Compare* White *v.* New York, etc., R. Co., 25 R. I. 19, 54 Atl. 586.

That degree of care which is compatible with efficient service, and exercised by well managed railway companies, to see whether or not a car is safe, should be exercised by a railway company which receives a car from a connecting line. Sykes *v.* St. Louis, etc., R. Co., 88 Mo. App. 193.

Where a railroad company undertakes to inspect a car on receiving it, it is responsible for any negligence of its inspectors in the performance of their duties. Sykes *v.* St. Louis, etc., R. Co., 88 Mo. App. 193.

91. Olson *v.* Pennsylvania, etc., Fuel Co., 77 Minn. 528, 80 N. W. 698.

pany he is not an employee, or a passenger, his right of action and recovery against the railroad company shall be such only as would exist if he were an employee.[92] Under such statute if the place of the accident is for general purposes the premises of a railroad company and the person injured is lawfully engaged or employed on or about them, and is not a passenger;[93] or if the place is not exclusively and for general purposes, but only within a limited and statutory sense, the premises of a railroad company, but the person injured is engaged in a business connected with the railroad, in the sense that it is ordinarily the duty of railroad employees,[94] a person injured while so engaged is treated as a quasi-employee and cannot recover for ordinary negligence of a railroad employee;[95] but if the work has no relation to defendant's railroad work as such, and is connected with defendant's railroad only by irrelevant and immaterial circumstances of locality, the case is not within the statute at all, and a person injured while so employed by negligence of the railroad employees may recover therefor.[96]

92. Under Pa. Act, April 4, 1868 (Pamphl. Laws, p. 58), § 1, so providing, see Keck *v.* Philadelphia, etc., R. Co., 206 Pa. St. 501, 56 Atl. 47; Kirby *v.* Pennsylvania R. Co., 76 Pa. St. 506 (holding such statute constitutional); Union R. Co. *v.* Tate, 151 Fed. 550, 81 C. C. A. 66. And see cases cited *infra*, notes 93–96.

93. **Hayman** *v.* Philadelphia, etc., R. Co., 214 Pa. St. 436, 63 Atl. 967; Spisak *v.* Baltimore, etc., R. Co., 152 Pa. St. 281, 25 Atl. 497; Stone *v.* Pennsylvania R. Co., 132 Pa. St. 206, 19 Atl. 67; Baltimore, etc., R. Co. *v.* Colvin, 118 Pa. St. 230, 12 Atl. 337 (holding that a teamster employed by a shipper in hauling freight for shipment is within the statute, although at the time of the injury he is in the highway, and crossing defendant's tracks over which he must pass in the performance of his employment); Cummings *v.* Pittsburgh, etc., R. Co., 92 Pa. St. 82; Ricard *v.* North Pennsylvania R. Co., 89 Pa. St. 193 (holding that one who is injured while unloading his own goods from the cars of the company with permission of an agent of the company is within such statute); Kirby *v.* Pennsylvania R. Co., 76 Pa. St. 506; Hobbs *v.* Pennsylvania R. Co., 143 Fed. 180.

A carpenter who is employed in locomotive works and engaged in loading an engine on cars belonging to defendant railroad, and who is injured while walking on the track back to the works, must be considered a quasi-employee at the time of the accident. Hayman *v.* Philadelphia, etc., R. Co., 214 Pa. St. 436, 63 Atl. 967.

A newsboy engaged in selling papers, and permitted to pass in and out of the cars of a passenger railway company on such business, is not "engaged and employed on or about the roads, depot, premises," etc., within the meaning of such act. Philadelphia Traction Co. *v.* Orbann, 119 Pa. St. 37, 12 Atl. 816.

A road on which a railroad company has a right of trackage is a road of such company within the meaning of the statute. Mulherrin *v.* Delaware, etc., R. Co., 81 Pa. St. 366.

94. Hayman *v.* Philadelphia, etc., R. Co., 214 Pa. St. 436, 63 Atl. 967; Spisak *v.* Baltimore, etc., R. Co., 152 Pa. St. 281, 25 Atl. 497; Richter *v.* Pennsylvania Co., 104 Pa. St. 511; Hobbs *v.* Pennsylvania R. Co., 143 Fed. 180.

To bring a case within this class the person injured must not only be engaged in work connected with the railroad, but he must also be so engaged for or upon the property of the railroad company by whose negligence he is injured. Keck *v.* Philadelphia, etc., R. Co., 206 Pa. St. 501, 56 Atl. 47.

95. See cases cited *supra*, notes 92–94; and, generally, MASTER AND SERVANT, 26 Cyc. 1369 *et seq.*

A conductor of a sleeping car company in charge of a car of such company forming part of a train of a railroad company is within the statute, and if he is injured or killed in a collision, there can be no recovery therefor against the railroad company, where the collision was the result of the negligence of defendant's servants engaged in the operation of its trains. Scott *v.* Pennsylvania Co., 151 Fed. 931.

Where a railroad employee works on a train on the track of another road he accepts the risks of his employment in regard to his own road, but not those risks incident to the operation of the other road, unless engaged at the time in work for such road or for both roads jointly. Keck *v.* Philadelphia, etc., R. Co., 206 Pa. St. 501, 56 Atl. 47.

96. Hayman *v.* Philadelphia, etc., R. Co., 214 Pa. St. 436, 63 Atl. 967; Keck *v.* Philadelphia, etc., R. Co., 206 Pa. St. 501, 56 Atl. 47; Noll *v.* Philadelphia, etc., R. Co., 163 Pa. St. 504, 30 Atl. 157; Spisak *v.* Baltimore, etc., R. Co., 152 Pa. St. 281, 25 Atl. 497; Christman *v.* Philadelphia, etc., R. Co., 141 Pa. St. 604, 21 Atl. 738; Hobbs *v.* Pennsylvania R. Co., 143 Fed. 180.

Persons held not within such statute.—A locomotive engineer who is running a train over the tracks of another company under permission given to his employer to use such road, and is injured by the negligence of the employees of the other company. Keck *v.* Philadelphia, etc., R. Co., 206 Pa. St. 501, 56 Atl. 47; Philadelphia, etc., R. Co. *v.* Baker, 155 Fed. 407, 84 C. C. A. 86 [*affirming* 149 Fed. 882]. A car inspector of one

d. As to Persons on Trains [97]— (i) *In General.* A railroad company owes no duty to a trespasser or mere licensee who is attempting to steal a ride or otherwise trespass on its trains or cars, to protect him from injury,[98] except that it shall not wantonly, wilfully, or recklessly injure him,[99] and that it shall exercise ordinary

railroad company who is killed while in the performance of his duty by the negligence of the employees of a connecting road. Vannatta *v.* New Jersey Cent. R. Co., 154 Pa. St. 262, 26 Atl. 384, 35 Am. St. Rep. 823; Kunsman *v.* Lehigh Valley R. Co., 10 Pa. Super. Ct. 1, 44 Wkly. Notes Cas. 14. One engaged in a rolling-mill to haul ashes from the furnace to a cinder pile on the opposite side of a railroad switch. Richter *v.* Pennsylvania Co., 104 Pa. St. 511. A mail agent, in a car of one railroad company forming part of a train being operated by it on its own road, who is injured in a collision between such train and a train of defendant company which was wrongfully on the same track at the time, is not, as regards defendant company, within Pa. Act (1868). Delaware, etc., R. Co. *v.* Yarrington, 152 Fed. 396, 81 C. C. A. 522 [*affirming* 143 Fed. 565].

97. Application of rule of liability of master for injuries to servant see *supra*, X, E, 2, c, (III).

Removal of trespassers see *infra*, X, E, 3, b.

98. *Arkansas.*— Houston, etc., R. Co. *v.* Bolling, 59 Ark. 395, 27 S. W. 492, 43 Am. St. Rep. 38, 27 L. R. A. 190; St. Louis, etc., R. Co. *v.* Ledbetter, 45 Ark. 246.

California.— Lemasters *v.* Southern Pac. Co., 131 Cal. 105, 63 Pac. 128.

Illinois.— Chicago, etc., R. Co. *v.* Michie, 83 Ill. 427, holding that a railroad company is not liable for the accidental killing of one riding by stealth upon an engine, without the consent of any officer or agent of the company, and in violation of rules of the company known by him.

Indiana.— Indianapolis, etc., R. Co. *v.* Pitzer, 109 Ind. 179, 6 N. E. 310, 10 N. E. 70, 58 Am. Rep. 387.

Iowa.— Johnson *v.* Chicago, etc., R. Co., 123 Iowa 224, 98 N. W. 642; Earl *v.* Chicago, etc., R. Co., 109 Iowa 14, 79 N. W. 381, 77 Am. St. Rep. 516.

Kansas.— Wilson *v.* Atchison, etc., R. Co., 66 Kan. 183, 71 Pac. 282; Handley *v.* Missouri Pac. R. Co., 61 Kan. 237, 59 Pac. 271.

Kentucky.— Vertrees *v.* Newport News, etc., R. Co., 95 Ky. 314, 25 S. W. 1, 15 Ky. L. Rep. 680; Harris *v.* Southern R. Co., 76 S. W. 151, 25 Ky. L. Rep. 559.

Louisiana.— Holmes *v.* Crowell, etc., Co., 51 La. Ann. 352, 25 So. 265 (attempt to board moving engine by steps leading up to the engineer's cab); Snyder *v.* Natchez, etc., R. Co., 42 La. Ann. 302, 7 So. 582.

Massachusetts.— Bjornquist *v.* Boston, etc., R. Co., 185 Mass. 130, 70 N. E. 53, 102 Am. St. Rep. 332; Leonard *v.* Boston, etc., R. Co., 170 Mass. 318, 49 N. E. 621.

Michigan.— Grunst *v.* Chicago, etc., R. Co., 109 Mich. 342, 67 N. W. 335.

Minnesota.— Wickenburg *v.* Minneapolis, etc., R. Co., 94 Minn. 276, 102 N. W. 713; Pettit *v.* Great Northern R. Co., 58 Minn. 120, 59 N. W. 1082.

Missouri.— Feeback *v.* Missouri Pac. R. Co., 167 Mo. 206, 66 S. W. 965.

New York.— Johnson *v.* New York Cent., etc., R. Co., 173 N. Y. 79, 65 N. E. 946.

North Carolina.— Peterson *v.* South, etc., R. Co., 143 N. C. 260, 55 S. E. 618, 8 L. R. A. N. S. 1240; Rickert *v.* Southern R. Co., 123 N. C. 255, 31 S. E. 497.

Ohio.— Baltimore, etc., R. Co. *v.* Railroad Co., 3 Ohio S. & C. Pl. Dec. 687, 3 Ohio N. P. 310.

Tennessee.— Illinois Cent. R. Co. *v.* Meacham, 91 Tenn. 428, 19 S. W. 232.

Texas.— St. Louis Southwestern R. Co. *v.* Mayfield, 35 Tex. Civ. App. 82, 79 S. W. 365; Crawleigh *v.* Galveston, etc., R. Co., 28 Tex. Civ. App. 260, 67 S. W. 140; Atchison, etc., R. Co. *v.* Mendoza, (Civ. App. 1900) 60 S. W. 327, 62 S. W. 418.

Utah.— Morgan *v.* Oregon Short Line R. Co., 27 Utah 92, 74 Pac. 523.

United States.—Mitchell *v.* New York, etc., R. Co., 146 U. S. 513, 13 S. Ct. 259, 36 L. ed. 1064; Singleton *v.* Felton, 101 Fed. 526, 42 C. C. A. 57.

See 41 Cent. Dig. tit. "Railroads," §§ 878, 879.

Where a person of mature years boards the caboose of a freight train, with the intention of traveling as a passenger, and he makes no investigation as to whether the train is intended for passengers, although members of the crew are present, and it is against the rules of the company for such train to carry passengers, and he is injured in a collision due to carelessness, but not to wanton or wilful negligence, the railroad company is not liable. St. Louis, etc., R. Co. *v.* Reed, 76 Ark. 106, 88 S. W. 836, 113 Am. St. Rep. 78.

99. *Arkansas.*— St. Louis, etc., R. Co. *v.* Ledbetter, 45 Ark. 246.

Georgia.— Charleston, etc., R. Co. *v.* Johnson, 1 Ga. App. 441, 57 S. E. 1064.

Illinois.— Illinois Cent. R. Co. *v.* Leiner, 202 Ill. 624, 67 N. E. 398, 95 Am. St. Rep. 266 [*affirming* 103 Ill. App. 438].

Kansas.— Wilson *v.* Atchison, etc., R. Co., 66 Kan. 183, 71 Pac. 282; Handley *v.* Missouri Pac. R. Co., 61 Kan. 237, 59 Pac. 271; Hendryx *v.* Kansas City, etc., R. Co., 45 Kan. 377, 25 Pac. 893.

Massachusetts.— Bjornquist *v.* Boston, etc., R. Co., 185 Mass. 130, 70 N. E. 53, 102 Am. St. Rep. 332; McKeon *v.* New York, etc., R. Co., 183 Mass. 271, 67 N. E. 329, 97 Am. St. Rep. 437; Leonard *v.* Boston, etc., R. Co., 170 Mass. 318, 49 N. E. 621.

Missouri.— Wencker *v.* Missouri, etc., R. Co., 169 Mo. 592, 70 S. W. 145.

New York.— Johnson *v.* New York Cent., etc., R. Co., 173 N. Y. 79, 65 N. E. 946.

North Carolina.— Peterson *v.* South, etc.,

care to avoid injuring him after discovering his presence.[1] As far as such trespasser or licensee is concerned a railroad company has a right to presume that no one is on the cars,[2] and if it does not discover his peril in time to prevent injury by the exercise of ordinary care it is not responsible for any injury he may sustain;[3] and even where it knows that he is on the car it is not liable for an injury which could not be foreseen as a probable consequence.[4] But where a person goes upon a train or car upon the company's express or implied invitation,[5] as in the case of one accompanying a passenger,[6] or performing some duty on the train or car,[7] such as a postal clerk,[8] the company owes him the duty of exercising reasonable care and prudence to look out for and protect him from injury.

(II) *As to Children.*[9] In accordance with the above rules a railroad company is ordinarily under no duty or obligation to ascertain the presence of a child which is wrongfully on its trains or cars,[10] or to make any provision for the child's

R. Co., 143 N. C. 260, 55 S. E. 618, 8 L. R. A. N. S. 1240.

Tennessee.— Illinois Cent. R. Co. *v.* Meacham, 91 Tenn. 428, 19 S. W. 232.

Utah.— Morgan *v.* Oregon Short Line R. Co., 27 Utah 92, 74 Pac. 523.

See 41 Cent. Dig. tit. "Railroads," §§ 878, 879; and cases cited *supra*, note 98.

1. *Arkansas.*— St. Louis, etc., R. Co. *v.* Ledbetter, 45 Ark. 246.

Georgia.— Charleston, etc., R. Co. *v.* Johnson, 1 Ga. App. 441, 57 S. E. 1064.

Iowa.— Johnson *v.* Chicago, etc., R. Co., 123 Iowa 224, 98 N. W. 642.

Kentucky.— Skirvin *v.* Louisville, etc., R. Co., 100 S. W. 308, 30 Ky. L. Rep. 1208; Harris *v.* Southern R. Co., 76 S. W. 151, 25 Ky. L. Rep. 559; Louisville, etc., R. Co. *v.* Kemery, 66 S. W. 20, 23 Ky. L. Rep. 1734.

Minnesota.— Pettit *v.* Great Northern R. Co., 58 Minn. 120, 59 N. W. 1082.

North Carolina.— Cook *v.* Southern R. Co., 128 N. C. 333, 38 S. E. 925.

Texas.— De Palacios *v.* Rio Grande, etc., R. Co., (Civ. App. 1898) 45 S. W. 612, holding that a railroad company is liable for the death of a trespasser on its trains where its servants could have lessened the speed of the train upon discovering the danger of deceased, so as to avoid the accident or so decrease the force of the blow that death would not have resulted.

Utah.— Everett *v.* Oregon Short Line, etc., R. Co., 9 Utah 340, 34 Pac. 289.

See 41 Cent. Dig. tit. "Railroads," §§ 878, 879; and cases cited *supra*, note 99.

Where cars are left standing on a side-track near a depot, it has been held that a railroad company should seek to ascertain whether there are any persons in the car, although wrongfully, before backing other cars against them. Louisville, etc., R. Co. *v.* Popp, 96 Ky. 99, 27 S. W. 992, 16 Ky. L. Rep. 369. But see Jordan *v.* Grand Rapids, etc., R. Co., 162 Ind. 464, 70 N. E. 524, 102 Am. St. Rep. 217.

2. St. Louis, etc., R. Co. *v.* Ledbetter, 45 Ark. 246.

3. Harris *v.* Southern R. Co., 76 S. W. 151, 25 Ky. L. Rep. 559.

4. St. Louis, etc., R. Co. *v.* Ledbetter, 45 Ark. 246.

5. See Holmes *v.* Cromwell, 51 La. Ann. 352, 25 So. 265.

6. Houston, etc., R. Co. *v.* Leslie, 57 Tex. 83. And see CARRIERS, 6 Cyc. 615.

7. Orcutt *v.* Northern Pac. R. Co., 45 Minn. 368, 47 N. W. 1068 (drover accompanying stock); Louisville, etc., R. Co. *v.* Conroy, 63 Miss. 562, 56 Am. Rep. 835 (laborer in the employ of a railroad contractor whose duty required him to ride on a construction train and to shovel dirt to and from the cars).

Running at a rate of speed deemed convenient for the conduct of its business does not make a railroad company guilty of negligence *per se*, in the absence of a regulating statute or ordinance, in case a derailment occurs resulting in an injury to a licensee, an express messenger, on the train. Chicago, etc., R. Co. *v.* O'Brien, 153 Fed. 511, 82 C. C. A. 461.

8. Chicago, etc., R. Co. *v.* Kelly, 182 Ill. 267, 54 N. E. 979 [*affirming* 80 Ill. App. 675]. And see CARRIERS, 6 Cyc. 542.

9. **Riding at invitation of employees** see *infra*, X, E, 2, d, (III), (B).

10. *Arkansas.*— Catlett *v.* St. Louis, etc., R. Co., 57 Ark. 461, 21 S. W. 1062, 38 Am. St. Rep. 254, holding that it is not negligence for a railroad company to omit to keep a lookout to prevent boys from swinging on the ladders of its slowly moving freight trains.

Illinois.— Chicago, etc., R. Co. *v.* Hoffman, 82 Ill. App. 453; Chicago, etc., R. Co. *v.* Lammert, 12 Ill. App. 408.

Kentucky.—Louisville, etc., R. Co. *v.* Hunt, 13 S. W. 275, 11 Ky. L. Rep. 825.

Maryland.— State *v.* Baltimore, etc., R. Co., 24 Md. 84, 87 Am. Dec. 600.

Minnesota.— Hepfel *v.* St. Paul, etc., R. Co., 49 Minn. 263, 51 N. W. 1049.

Washington.—Oregon R., etc., Co. *v.* Egley, 2 Wash. 409, 26 Pac. 973, 26 Am. St. Rep. 860, holding that the fact that a railroad company's servants failed to discover a boy riding on the foot-board of an engine is no evidence of negligence, especially when the company had issued a bulletin to allow no boys on the track, and its servants drove them away whenever they saw them there.

See 41 Cent. Dig. tit. "Railroads," §§ 880–883.

But see Thompson *v.* Missouri, etc., R. Co., 11 Tex. Civ. App. 307, 32 S. W. 191.

safety,[11] except that it shall not wantonly, wilfully, or recklessly injure him,[12] and that it shall exercise reasonable care to avoid injuring him after it discovers his position of peril,[13] the degree of care required in such cases being greater than that in case of an older person.[14] If the child is on the train or car at the invitation, express or implied, of the railroad company, it is under the duty of exercising ordinary care, taking into consideration the child's apparent age and intelligence, to prevent him from being injured.[15]

(III) *PERSONS RIDING BY INVITATION OR ACQUIESCENCE OF EMPLOYEES* — (A) *In General.* That a person enters an engine or car upon the invitation or with the acquiescence of an employee who has no authority to give such permission does not make him more than, at most, a mere licensee, and the railroad company therefore is under no duty to protect him from injury,[16] except that it

Standing cars.— A railroad company is under no duty to maintain a guard over its cars left standing upon its tracks in order to keep children playing about them from going upon or under them, or to examine such cars for the presence of children before moving them. Chicago, etc., R. Co. *v.* Stumps, 69 Ill. 409; Chicago, etc., R. Co. *v.* McLaughlin, 47 Ill. 265; East St. Louis Connecting R. Co. *v.* Jenks, 54 Ill. App. 91; Curley *v.* Missouri Pac. R. Co., 98 Mo. 13, 10 S. W. 593.

11. *Illinois.*—Chicago, etc., R. Co. *v.* Roath, 35 Ill. App. 349; Chicago, etc., R. Co. *v.* Lammert, 12 Ill. App. 408.

Iowa.— Horn *v.* Chicago, etc., R. Co., 124 Iowa 281, 99 N. W. 1068.

Kansas.— Central Bank Union Pac. R. Co. *v.* Henigh, 23 Kan. 347, 33 Am. Rep. 167.

Kentucky.— Louisville, etc., R. Co. *v.* Webb, 99 Ky. 332, 35 S. W. 1117, 18 Ky. L. Rep. 258; Louisville, etc., R. Co. *v.* Hunt, 13 S. W. 275, 11 Ky. L. Rep. 825.

Louisiana.—Bollinger *v.* Texas, etc., R. Co., 47 La. Ann. 721, 17 So. 253, 49 Am. St. Rep. 379; Hubener *v.* New Orleans, etc., R. Co., 23 La. Ann. 492.

Massachusetts.—McEachern *v.* Boston, etc., R. Co., 150 Mass. 515, 23 N. E. 231.

Missouri.— Barney *v.* Hannibal, etc., R. Co., 126 Mo. 372, 28 S. W. 1069, 26 L. R. A. 847, holding that a railroad company owes no duty to a child playing in its yard to see that he does not jump on its moving cars.

Ohio.— Wabash R. Co. *v.* Norway, 7 Ohio Cir. Ct. 449, 4 Ohio Cir. Dec. 674.

Pennsylvania.— Woodbridge *v.* Delaware. etc., R. Co., 105 Pa. St. 460.

South Carolina.— Elkins *v.* South Carolina, etc., R. Co., 64 S. C. 553, 43 S. E. 19.

Virginia.— Seaboard, etc., R. Co. *v.* Hickey, 102 Va. 394, 46 S. E. 392.

See 41 Cent. Dig. tit. "Railroads," §§ 880–883.

There is no duty to give any signal before loosening brakes on a standing car where there was no reason to suppose that any person would be injured thereby. Chicago, etc., R. Co. *v.* McLaughlin, 47 Ill. 265.

That a railroad employee had sent a child on an errand does not render the company liable for injuring such child while climbing over a moving freight car, where the errand had been finished for some time prior to the injury. Fitzgerald *v.* Chicago, etc., R. Co., 114 Ill. App. 118.

12. Pittsburgh, etc., R. Co. *v.* Redding, 140 Ind. 101, 39 N. E. 921, 34 L. R. A. 767; Hendryx *v.* Kansas City, etc., R. Co., 45 Kan. 377, 25 Pac. 893; Galveston, etc., R. Co. *v.* Zantzinger. (Tex. Civ. App. 1899) 49 S. W. 677; Mexican Nat. R. Co. *v.* Crum, 6 Tex. Civ. App. 702, 25 S. W. 1126.

13. *Indiana.*— Pittsburgh, etc., R. Co. *v.* Redding, 140 Ind. 101, 39 N. E. 921, 34 L. R. A. 767.

Kentucky.— Louisville, etc., R. Co. *v.* Hunt. 13 S. W. 275, 11 Ky. L. Rep. 825.

Massachusetts.—Mugford *v.* Boston, etc., R. Co., 173 Mass. 10, 52 N. E. 1078.

Michigan.— Chicago, etc., R. Co. *v.* Smith, 46 Mich. 504, 9 N. W. 830, 41 Am. Rep. 177.

Minnesota.— Hepfel *v.* St. Paul, etc., R. Co., 49 Minn. 263, 51 N. W. 1049.

Missouri.— Curley *v.* Missouri Pac. R. Co., 98 Mo. 13, 10 S. W. 593.

Texas.— Texas, etc., R. Co. *v.* Buch, (Civ. App. 1907) 102 S. W. 124 [*reversed* on other grounds in (1907) 105 S. W. 987]; Thompson *v.* Missouri, etc., R. Co., 11 Tex. Civ. App. 307, 32 S. W. 191.

United States.— Miles *v.* Receivers, 17 Fed. Cas. No. 9,544, 4 Hughes 172.

See 41 Cent. Dig. tit. "Railroads," §§ 880–883.

That a child seven years of age is permitted to enter a passenger train at a regular station does not render the railroad company guilty of negligence, since a carrier is not under any duty to keep persons, young or old, from entering its trains. Indianapolis, etc., R. Co. *v.* Pitzer, 109 Ind. 179, 6 N. E. 310, 10 N. E. 70, 58 Am. Rep. 387.

14. Indianapolis, etc., R. Co. *v.* Pitzer, 109 Ind. 179, 6 N. E. 310, 10 N. E. 70, 58 Am. Rep. 387.

15. Texas, etc., R. Co. *v.* Brown, 11 Tex. Civ. App. 503, 33 S. W. 146; Mexican Nat. R. Co. *v.* Crum, 6 Tex. Civ. App. 702, 25 S. W. 1126.

16. *Kentucky.*— Skirvin *v.* Louisville, etc., R. Co., 100 S. W. 308, 30 Ky. L. Rep. 1208; Cook *v.* Louisville, etc., R. Co., 72 S. W. 729, 24 Ky. L. Rep. 1967; Louisville, etc., R. Co. *v.* Thornton, 58 S. W. 796, 22 Ky. L. Rep. 778, no duty to stop to enable him to get off.

Massachusetts.— Powers *v.* Boston, etc., R. Co., 153 Mass. 188, 26 N. E. 446.

North Carolina.— Vassor *v.* Atlantic Coast

shall not wantonly and wilfully injure him,[17] and that it shall exercise ordinary care to protect him after discovering him in a dangerous position.[18] Thus where a person rides on a freight or work train upon the invitation or license of the conductor or other employee, he is charged with the knowledge that such train is not intended or adapted for the use of passengers, and cannot suppose that such employee had authority to extend to him such invitation, and therefore cannot recover for injuries received,[19] even though there is a custom of permitting persons to board or ride on such trains,[20] especially where there is a rule of the company inconsistent with such permission or custom,[21] unless the officials of the road know of such custom and acquiesce therein.[22] But where one is riding on such train or car upon the invitation or with permission of an agent having author-

Line R. Co., 142 N. C. 68, 54 S. E. 849, 7 L. R. A. N. S. 950, holding that where plaintiff, when injured by the explosion of an engine, was riding on a freight train by permission of the conductor, and there was no evidence of wanton or wilful injury, plaintiff could not recover.

Pennsylvania.— Flower *v.* Pensylvania R. Co., 69 Pa. St. 210, 8 Am. Rep. 251.

South Carolina.—Darwin *v.* Charlotte, etc., R. Co., 23 S. C. 531, 55 Am. Rep. 32, holding that where a person who is neither an employee of the railroad company nor a passenger goes upon the pilot of an engine, he has no right of action against the railroad company for injuries received in a collision, even though the engineer knew that he was there and did not order him off.

Tennessee.— Sands *v.* Southern R. Co., 108 Tenn. 1, 64 S. W. 478.

Canada.— Nightingale *v.* Union Colliery Co., 9 Brit. Col. 453.

See 41 Cent. Dig. tit. "Railroads," § 884. And see CARRIERS, 6 Cyc. 540.

Riding by collusion.— Where a person by collusion with an employee of a railroad company, who has no right to determine who may ride on a train nor to collect fares for so doing, obtains a passage in a coal car attached to a freight train by paying such employee a nominal sum of money, and on the approach of daylight the latter gives to the former an order accompanied by a threat of personal violence, to leave the train, the purpose in so doing being to prevent the detection of both in the wrong done to the company, and thereupon the trespasser jumps from the train while it is in motion and is injured, the company is not liable, although the trespasser be a minor, if he has sufficient knowledge and discretion to understand and participate in the fraud practised upon the company. Smith *v.* Georgia R., etc., Co., 113 Ga. 9, 38 S. E. 330.

17. Willis *v.* Atlantic, etc., R. Co., 122 N. C. 905, 29 S. E. 941, holding that the fact that a person riding on a hand-car of defendant railway company is a mere licensee does not excuse its gross negligence by which he was injured.

18. Skirvin *v.* Louisville, etc., R. Co., 100 S. W. 308, 30 Ky. L. Rep. 1208; Dalton *v.* Louisville, etc., R. Co., 56 S. W. 657, 22 Ky. L. Rep. 97.

19. *Indiana.*— Pennsylvania Co. *v.* Coyer, 163 Ind. 631, 72 N. E. 875.

Kentucky.— Dalton *v.* Louisville, etc., R. Co., 56 S. W. 657, 22 Ky. L. Rep. 97, holding that the only duty a railroad company owes to one riding on a freight train without right, but by the mere sufferance of the servants in charge of the train is not to injure him after knowledge of his danger, and therefore the company is not liable for his death in a collision, even though it resulted from the company's gross negligence.

Massachusetts.— Powers *v.* Boston, etc., R. Co., 153 Mass. 188, 26 N. E. 446 (in caboose); Files *v.* Boston, etc., R. Co., 149 Mass. 204, 21 N. E. 311, 14 Am. St. Rep. 411 (in cab of engine).

South Carolina.— Burns *v.* Southern R. Co., 63 S. C. 46, 40 S. E. 1018.

Texas.— Texas, etc., R. Co. *v.* Black, 87 Tex. 160, 27 S. W. 118.

See 41 Cent. Dig. tit. "Railroads," § 884.

20. Powers *v.* Boston, etc., R. Co., 153 Mass. 188, 26 N. E. 446; Files *v.* Boston, etc., R. Co., 149 Mass. 204, 21 N. E. 311, 14 Am. St. Rep. 411; Sands *v.* Southern R. Co., 108 Tenn. 1, 64 S. W. 478.

That the person injured and others had previously jumped on and off the cars of the company without remonstrance from the employees does not amount to an invitation from the company to the person injured to jump on and off its moving cars thereafter, so as to make the company liable for an injury resulting therefrom. Wilson *v.* Atchison, etc., R. Co., 66 Kan. 183, 71 Pac. 282.

21. Powers *v.* Boston, etc., R. Co., 153 Mass. 188, 26 N. E. 446; Baltimore, etc., R. Co. *v.* Cox, 66 Ohio St. 276, 64 N. E. 119, 90 Am. St. Rep. 583; Sands *v.* Southern R. Co., 108 Tenn. 1, 64 S. W. 478; Chicago, etc., R. Co. *v.* Martin, 35 Tex. Civ. App. 186, 79 S. W. 1101.

Notice of rule.— Where an employee of a construction company received notice from a railroad company of a rule prohibiting the employees of such construction company from riding on a work train, the habitual disregard of such rule by such employees and the trainmen in charge of the work train will not render the railway company liable unless it had knowledge of such disregard and acquiesced therein. Pennsylvania Co. *v.* Coyer, 163 Ind. 631, 72 N. E. 875.

22. Pennsylvania Co. *v.* Coyer, 163 Ind. 631, 72 N. E. 875; Powers *v.* Boston, etc., R. Co., 153 Mass. 188, 26 N. E. 446; Sands *v.* Southern R. Co., 108 Tenn. 1, 64 S. W. 478.

ity to invite or give him permission to ride thereon, he is entitled to the exercise of ordinary care for his protection.[23]

(B) *As to Children.* Likewise a railroad company owes no duty to a child which goes upon an engine or car upon the invitation or with the permission of an employee having no authority to grant such right,[24] if the child is able to appreciate its danger;[25] except that defendant shall not wilfully or wantonly injure it.[26] But where the permission or custom of allowing children to ride on a train or car is known and acquiesced in by the officials of the road, and the employee has apparent authority to grant such permission, it is the duty of the railroad company to use due care for the protection of one upon its train or car upon such an invitation or permission.[27] So, where the child is not of sufficient age or intelligence to appreciate the danger of boarding and riding on a car, and the act is such as might be done by a child of his age and intelligence, and the railroad employees invited or permitted him to ride there, the company will be liable, although it had forbidden the employees to permit any one to ride on the car.[28]

3. Removal of Trespassers[29]— a. In General. A railroad company, through its properly authorized agents, has a right to remove trespassers from its tracks, bridges, or other premises using such force as is reasonably necessary to accomplish that object;[30] but if such agent uses more force than is necessary to remove

23. Chicago, etc., R. Co. *v.* McKnight, 16 Ill. App. 596 (riding on a hand-car with section men); Pennsylvania Co. *v.* Coyer, 163 Ind. 631, 72 N. E. 875; Creed *v.* Pennsylvania R. Co., 86 Pa. St. 139, 27 Am. Rep. 693; Texas, etc., R. Co. *v.* Black, 87 Tex. 160, 27 S. W. 118; Prince *v.* International, etc., R. Co., 64 Tex. 144 (riding on hand-car); Gulf, etc., R. Co. *v.* Walters, (Tex. Civ. App. 1907) 107 S. W. 369 (holding that while a railroad company does not owe a licensee riding on its train that high degree of care which it is required to exercise toward passengers, it owes him the duty of exercising ordinary care for his safety and protection from injury at the hands of its agents and servants); Campbell *v.* Harris, 4 Tex. Civ. App. 636, 23 S. W. 35.

Where one employed by contractors in getting out gravel for a railroad company rides to and from his work on a train which hauls the gravel with permission of the agents of the railroad company, they only owe him the duty of exercising ordinary care not to injure him. Lovett *v.* Gulf, etc., R. Co., 97 Tex. 436, 79 S. W. 514 [*affirming* (Civ. App. 1903) 74 S. W. 570].

24. Flower *v.* Pennsylvania R. Co., 69 Pa. St. 210, 8 Am. Rep. 251; Texas, etc., R. Co. *v.* Black, 87 Tex. 160, 27 S. W. 118; Mexican Nat. R. Co. *v.* Crum, 6 Tex. Civ. App. 702, 25 S. W. 1126. But see Western, etc., R. Co. *v.* Wilson, 71 Ga. 22; Harris *v.* Southern R. Co., 76 S. W. 151, 25 Ky. L. Rep. 559.

Riding on hand-car.— A child of tender years cannot recover from a railroad company for injuries received by him while riding on a hand-car, if the company's rules forbid such employees to take any one on the car except an employee and there is no custom to permit persons to ride on the hand-car shown to have been known to or acquiesced in by the officials of the company. Houston, etc., R. Co. *v.* Bolling, 59 Ark. 395, 27 S. W. 492, 43 Am. St. Rep. 38, 27 L. R. A. 190; Lake Shore, etc., R. Co. *v.* Duer, 21 Ohio Cir. Ct. 512, 11 Ohio Cir. Dec. 761. See also Dougherty *v.* Chicago, etc., R. Co., 137 Iowa 257, 114 N. W. 902, 14 L. R. A. N. S. 590.

25. Missouri, etc., R. Co. *v.* Rodgers, 89 Tex. 675, 36 S. W. 244.

26. Lake Shore, etc., R. Co. *v.* Duer, 21 Ohio Cir. Ct. 512, 11 Ohio Cir. Dec. 761; Mexican Nat. R. Co. *v.* Crum, 6 Tex. Civ. App. 702, 25 S. W. 1126.

27. Houston, etc., R. Co. *v.* Bolling, 59 Ark. 395, 27 S. W. 492, 43 Am. St. Rep. 38, 27 L. R. A. 190; Ashworth *v.* Southern R. Co., 116 Ga. 635, 43 S. E. 36, 59 L. R. A. 592; Lake Shore, etc., R. Co. *v.* Duer, 21 Ohio Cir. Ct. 512, 11 Ohio Cir. Dec. 761; Texas, etc., R. Co. *v.* Black, 87 Tex. 160, 27 S. W. 118. See also Ecliff *v.* Wabash, etc., R. Co., 64 Mich. 196, 31 N. W. 180.

That boys of mature age have been accustomed to ride on a hand-car for their own pleasure by the consent and invitation of the section foreman, although continuing at irregular periods for over a year, is not sufficient to constitute a license on the part of the company to so use the car where the rule of the company prohibits such use to the knowledge of the foreman, in the absence of a showing that some one of the managing officers of the company had actual or constructive knowledge of such permission and use. Lake Shore, etc., R. Co. *v.* Duer, 21 Ohio Cir. Ct. 512, 11 Ohio Cir. Dec. 761.

To permit a child of tender years to ride on an open car loaded with loose dirt, which slips and throws him off, injuring him, is negligence *per se*, for which the railroad company is liable. Burke *v.* Ellis, 105 Tenn. 702, 58 S. W. 855.

28. Missouri, etc., R. Co. *v.* Rodgers, 89 Tex. 675, 36 S. W. 243.

29. Wilful, wanton, or unauthorized acts of employees see *infra*, X, E, 7.

30. Landrigan *v.* State, 31 Ark. 50, 25 Am.

the trespasser, whereby the latter is injured, the railroad company is liable therefor.[31]

b. From Trains.[32] While a railroad company has the right to eject trespassers from its trains,[33] the fact that a person is a trespasser on a train does not forfeit him his legal rights;[34] and although sufficient force, depending upon the resistance offered, may generally be used in a reasonable way to accomplish the expulsion,[35] reasonable and ordinary care under the circumstances must be used in order not to cause the trespasser unnecessary injury,[36] and in doing this the company is generally liable only for wanton, wilful, or reckless injury.[37] If the railroad employees having authority to expel trespassers[38] do so in an unnecessarily careless, forceful, or violent manner,[39] as by forcibly ejecting him from the train

Rep. 547; Haehl *v.* Wabash R. Co., 119 Mo. 325, 24 S. W. 737.

31. Haehl *v.* Wabash R. Co., 119 Mo. 325, 24 S. W. 737.

32. Ejection of passengers see CARRIERS, 6 Cyc. 549 *et seq.*

33. Cincinnati, etc., R. Co. *v.* Boyer, 18 Ohio Cir. Ct. 327, 10 Ohio Cir. Dec. 199; Folley *v.* Chicago, etc., R. Co., 16 Okla. 32, 84 Pac. 1090.

A trespasser detected while climbing on a rapidly moving train may be ordered off or his attempt resisted with reasonable force while the train is still in motion, and he cannot by merely gaining a foothold on the train compel the company to permit him to ascend, or to stop the train for his convenience. Powell *v.* Erie R. Co., 70 N. J. L. 290, 58 Atl. 930.

A trespasser may be compelled to get off a moving train, without its stopping, where its speed is not so great that an injury to him would be reasonably expected to occur. Krueger *v.* Chicago, etc., R. Co., 84 Mo. App. 358; Bolin *v.* Chicago, etc., R. Co., 108 Wis. 333, 84 N. W. 446, 81 Am. St. Rep. 911.

34. Cincinnati, etc., R. Co. *v.* Boyer, 18 Ohio Cir. Ct. 327, 10 Ohio Cir. Dec. 199.

35. Cincinnati, etc., R. Co. *v.* Boyer, 18 Ohio Cir. Ct. 327, 10 Ohio Cir. Dec. 199; Morgan *v.* Oregon Short Line R. Co., 27 Utah 92, 74 Pac. 523. And see CARRIERS, 6 Cyc. 564 text and note 55.

Efforts to cling to a train to prevent falling under the wheels cannot be considered as a resistance by a trespasser to those attempting to remove him while the train is in motion. Southern R. Co. *v.* Shaw, 86 Fed. 865, 31 C. C. A. 70.

36. *Illinois.*— Chicago, etc., R. Co. *v.* Doherty, 53 Ill. App. 282.

Iowa.— Doggett *v.* Chicago, etc., R. Co., 134 Iowa 690, 112 N. W. 171.

Missouri.— Brill *v.* Eddy, 115 Mo. 596, 22 S. W. 488.

North Carolina.— Cook *v.* Southern R. Co., 128 N. C. 333, 38 S. E. 925, holding that such care must be used as a person of ordinary prudence and skill would usually exercise under the same or similar circumstances.

Pennsylvania.— Arnold *v.* Pennsylvania R. Co., 115 Pa. St. 135, 8 Atl. 213, 2 Am. St. Rep. 542; Cauley *v.* Pittsburgh, etc., R. Co., 98 Pa. St. 498.

Texas.— House *v.* Blum, (Civ. App. 1900) 56 S. W. 82; Texas, etc., R. Co. *v.* Lyons, (Civ. App. 1899) 50 S. W. 161; Houston, etc., R. Co. *v.* Grigsby, 13 Tex. Civ. App. 639, 35 S. W. 815, 36 S. W. 496.

Utah.— Morgan *v.* Oregon Short Line R. Co., 27 Utah 92, 74 Pac. 523, 30 Utah 82, 83 Pac. 576.

United States.— Southern R. Co. *v.* Shaw, 86 Fed. 865, 31 C. C. A. 70.

See 41 Cent. Dig. tit. "Railroads," §§ 887, 888. And see CARRIERS, 6 Cyc. 563.

Checking or stopping train.— It is the duty of servants in charge of a train in putting a trespasser off to see that the train has stopped before ejecting him, or that its speed is so checked as to render it safe for him to alight. Illinois Cent. R. Co. *v.* McManus, 67 S. W. 1000, 24 Ky. L. Rep. 81. A railroad company has a right to stop its train to eject a trespasser. Morgan *v.* Oregon Short Line R. Co., 27 Utah 92, 74 Pac. 523.

A trespasser must be given a reasonable opportunity to alight without injury. Rowell *v.* Boston, etc., R. Co., 68 N. H. 358, 44 Atl. 488; Texas, etc., R. Co. *v.* Mother, 5 Tex. Civ. App. 87, 24 S. W. 79; Chesapeake, etc., R. Co. Anderson, 93 Va. 650, 25 S. E. 947.

Where a trespasser persists in boarding a moving train notwithstanding repeated warnings to desist, and he is finally forced to drop from the train by the brakeman and receives injuries, the railroad company is not liable. Johnson *v.* Chicago, etc., R. Co., 94 Fed. 473.

37. Morgan *v.* Oregon Short Line R. Co., 27 Utah 92, 74 Pac. 523; Toledo, etc., R. Co. *v.* Gordan, 143 Fed. 95, 74 C. C. A. 289, holding that the only duty owing by those in charge of a railroad company to a trespasser is to abstain from wanton and reckless injury to him when rightfully expelled; but that duty is imperative and whether or not it is observed in any case depends upon all the circumstances involved. See also House *v.* Blum, (Tex. Civ. App. 1900) 56 S. W. 821; and *infra*, X, E, 7, e.

38. See *infra*, X, E, 7, e.

39. *Georgia.*—Anderson *v.* Southern R. Co., 107 Ga. 500, 33 S. E. 644.

Iowa.— Hamilton *v.* Chicago, etc., R. Co., 119 Iowa 650, 93 N. W. 594.

Kentucky.— Illinois Cent. R. Co. *v.* West, 60 S. W. 290, 22 Ky. L. Rep. 1387.

Mississippi.— Alabama, etc., R. Co. *v.* Livingston, 84 Miss. 1, 36 So. 256, holding that a

while it is moving at a dangerous speed,[40] or by forcing him to jump or leave the train at a dangerous place,[41] or while it is running at a dangerous speed,[42] as

railroad company is liable for the conduct of a conductor in cursing and abusing a trespasser on ejecting him from the train.

Missouri.— Brill *v.* Eddy, 115 Mo. 596, 22 S. W. 488; Krueger *v.* Chicago, etc., R. Co., 84 Mo. App. 358.

New Hampshire.— Rowell *v.* Boston, etc., R. Co., 68 N. H. 358, 44 Atl. 488.

New Jersey.—West Jersey, etc., R. Co. *v.* Welsh, 62 N. J. L. 655, 42 Atl. 736, 72 Am. St. Rep. 659.

North Carolina.— Hayes *v.* Southern R. Co., 141 N. C. 195, 53 S. E. 847.

Ohio.— Cincinnati, etc., R. Co. *v.* Boyer, 18 Ohio Cir. Ct. 327, 10 Ohio Cir. Dec. 199.

Oklahoma.— Folley *v.* Chicago, etc., R. Co., 16 Okla. 32, 84 Pac. 1090.

Pennsylvania.— Pennsylvania R. Co. *v.* Vandiver, 42 Pa. St. 365, 82 Am. Dec. 520.

Texas.— Galveston, etc., R. Co. *v.* Zantzinger, 93 Tex. 64, 53 S. W. 379, 77 Am. St. Rep. 829, 47 L. R. A. 282 [*affirming* (Civ. App. 1899) 49 S. W. 677]; Houston, etc., R. Co. *v.* Bowen, 36 Tex. Civ. App. 165, 81 S. W. 80; Southern Pac. R. Co. *v.* Pender, 24 Tex. Civ. App. 133, 57 S. W. 574; Texas, etc., R. Co. *v.* Black, 23 Tex. Civ. App. 119, 57 S. W. 330; Southern Pac. R. Co. *v.* Kennedy, 9 Tex. Civ. App. 232, 29 S. W. 304.

United States.— Southern R. Co. *v.* Shaw, 86 Fed. 865, 31 C. C. A. 70, holding that where a person stealing a ride on a train continues to get on after being put off, it does not entitle the railroad company to use increased force especially where the trespasser is a child ten years old.

See 41 Cent. Dig. tit. "Railroads," §§ 887, 888.

Where the railroad servants eject a trespasser in a drunken and helpless condition in a deep cut on a dark night, and he is run over and killed by a train which follows as the servants ejecting him had reason to believe that he would be, the railroad company is liable for his death, although the place at which he was ejected was the place at which he entered the train. Fagg *v.* Louisville, etc., R. Co., 111 Ky. 30, 63 S. W. 580, 23 Ky. L. Rep. 383, 54 L. R. A. 919.

40. *Georgia.*—Anderson *v.* Southern R. Co., 107 Ga. 500, 33 S. E. 644; Savannah, etc., R. Co. *v.* Godkins, 104 Ga. 655, 30 S. E. 178, forcible expulsion from freight train running twenty-five miles an hour.

Illinois.— Illinois Cent. R. Co. *v.* King, 179 Ill. 91, 53 N. E. 552, 76 Am. St. Rep. 93 [*affirming* 77 Ill. App. 581]; Indiana, etc., R. Co. *v.* Hendrian, 92 Ill. App. 462 [*affirmed* in 190 Ill. 501, 60 N. E. 902]; St. Louis, etc., R. Co. *v.* Reagan, 52 Ill. App. 488.

Indiana.— Wabash R. Co. *v.* Savage, 110 Ind. 156, 9 N. E. 85; Carter *v.* Louisville, etc., R. Co., 98 Ind. 552, 49 Am. Rep. 780.

Iowa.— Doggett *v.* Chicago, etc., R. Co., 134 Iowa 690, 112 N. W. 171; Johnson *v.* Chicago, etc., R. Co., 116 Iowa 639, 88 N. W. 811.

Kentucky.— Louisville, etc., R. Co. *v.* Bernard, 37 S. W. 841, 18 Ky. L. Rep. 672.

New York.— Hoffman *v.* New York Cent., etc., R. Co., 87 N. Y. 25, 41 Am. Rep. 337; Hill *v.* Baltimore, etc., R. Co., 75 N. Y. App. Div. 325, 78 N. Y. Suppl. 134, 11 N. Y. Annot. Cas. 418; Barrett *v.* New York Cent., etc., R. Co., 45 N. Y. App. Div. 225, 61 N. Y. Suppl. 9.

Texas.— St. Louis Southwestern R. Co. *v.* Huffman, (Civ. App. 1895) 32 S. W. 30.

Virginia.— Chesapeake, etc., R. Co. *v.* Anderson, 93 Va. 650, 25 S. E. 947.

See 41 Cent. Dig. tit. "Railroads," §§ 887, 888.

That a trespasser boarded a train while it was moving in violation of a statute making such an act a misdemeanor does not afford a defense to his claim of damages for an injury caused by his being forcibly ejected from a rapidly moving train. Johnson *v.* Chicago, etc., R. Co., 116 Iowa 639, 88 N. W. 811.

A trespasser injured while trying to climb on a slowly moving train which he was prevented from doing by a brakeman cannot recover damages from the railroad company unless the injury was caused by the use of unnecessary force by the brakeman. Louisville, etc., R. Co. *v.* Bernard, 37 S. W. 841, 18 Ky. L. Rep. 672.

Knowledge of danger.— A conductor in ejecting a trespasser while the train is in motion is charged with what he knows, or in the exercise of ordinary care should have known, of the danger of putting a person off a moving train; but he is not charged with the affirmative duty of ascertaining a particular trespasser's crippled condition. Doggett *v.* Chicago, etc., R. Co., 134 Iowa 690, 112 N. W. 171.

41. Hamilton *v.* Chicago, etc., R. Co., 119 Iowa 650, 93 N. W. 594; Rounds *v.* Delaware, etc., R. Co., 64 N. Y. 129, 21 Am. Rep. 597 [*affirming* 3 Hun 329, 5 Thomps. & C. 475], holding that a trespasser may recover for injuries sustained by his being kicked from a moving train on to a pile of wood, near the track after he had refused to jump from the train on account of the wood); Texas, etc., R. Co. *v.* Buch, (Tex. Civ. App. 1907) 102 S. W. 124 [*reversed* on other grounds in (1907) 105 S. W. 987].

42. *Illinois.*— Chicago, etc., R. Co. *v.* West, 125 Ill. 320, 17 N. E. 788, 8 Am. St. Rep. 380 [*affirming* 24 Ill. App. 44].

Iowa.— Benton *v.* Chicago, etc., R. Co., 55 Iowa 496, 8 N. W. 330.

Missouri.— Farber *v.* Missouri Pac. R. Co., 139 Mo. 272, 40 S. W. 932; Krueger *v.* Chicago, etc., R. Co., 84 Mo. App. 358.

North Carolina.— Pierce *v.* North Carolina R. Co., 124 N. C. 83, 32 S. E. 399, 44 L. R. A. 316.

Oklahoma.— Folley *v.* Chicago, etc., R. Co., 16 Okla. 32, 84 Pac. 1090.

Pennsylvania.— Enright *v.* Pittsburg Junc-

by throwing missiles at him,[43] or by using threatening language or acts,[44] which cause him to lose his presence of mind or self-control,[45] the railroad company is liable for the resulting injuries.

c. From Depots. A railroad depot and grounds have a quasi-public character by the license of the company as a common carrier of passengers; but that license extends only to a reasonable use for the accommodation of passengers and necessary privileges connected with the business.[46] A railroad company may therefore make reasonable regulations for the conduct of all persons who come upon its depot premises, and may authorize its servants to remove therefrom any person who violates its regulations, using no greater force than is necessary for the removal.[47] This rule has been applied to innkeepers or their agents upon a depot platform for the purpose of soliciting passengers to patronize their houses,[48] and to persons selling lunches to passengers or soliciting orders therefor.[49]

tion R. Co., 198 Pa. St. 166, 47 Atl. 938, 82 Am. St. Rep. 795, 53 L. R. A. 330.

Texas.— Texas, etc., R. Co. *v.* Mother, 5 Tex. Civ. App. 87, 24 S. W. 79.

Virginia.— Chesapeake, etc., R. Co. *v.* Anderson, 93 Va. 650, 25 S. E. 947.

See 41 Cent. Dig. tit. "Railroads," §§ 887, 888.

43. Dorsey *v.* Kansas City, etc., R. Co., 104 La. 478, 29 So. 177, 52 L. R. A. 92; Powell *v.* Erie R. Co., 70 N. J. L. 290, 58 Atl. 930; Cook *v.* Southern R. Co., 128 N. C. 333, 38 S. E. 925; Polatty *v.* Charleston, etc., R. Co., 67 S. C. 391, 45 S. E. 932, 100 Am. St. Rep. 750.

44. *Kansas.*— Kansas City, etc., R. Co. *v.* Kelly, 36 Kan. 655, 14 Pac. 172, 59 Am. Rep. 596, holding that where a boy in obedience to a command and in fear of being thrown off jumps from a train while moving at a dangerous rate of speed, in the night-time, and is run over and injured, the company is liable.

Massachusetts.— Mugford *v.* Boston, etc., R. Co., 173 Mass. 10, 52 N. E. 1078.

Missouri.— Farber *v.* Missouri Pac. R. Co., 139 Mo. 272, 40 S. W. 932.

New Jersey.— Powell *v.* Erie R. Co., 70 N. J. L. 290, 58 Atl. 930.

North Carolina.— Hayes *v.* Southern R. Co., 141 N. C. 195, 53 S. E. 847.

Oklahoma.— Folley *v.* Chicago, etc., R. Co., 16 Okla. 32, 84 Pac. 1090.

Pennsylvania.— Enright *v.* Pittsburg Junction R. Co., 198 Pa. St. 166, 47 Atl. 938, 82 Am. St. Rep. 795, 53 L. R. A. 330.

Texas.— Galveston, etc., R. Co. *v.* Zantzinger, 93 Tex. 64, 53 S. W. 379, 77 Am. St. Rep. 829, 47 L. R. A. 282 [*affirming* (Civ. App. 1899) 49 S. W. 677]; Texas, etc., R. Co. *v.* Buch, (Tex. Civ. App. 1907) 102 S. W. 124 [*reversed* on other grounds in (1907) 105 S. W. 987]; Texas, etc., R. Co. *v.* Lyons, (Civ. App. 1899) 50 S. W. 161; Houston, etc., R. Co. *v.* Grigsby, 13 Tex. Civ. App. 639, 35 S. W. 815, 36 S. W. 496; Texas, etc., R. Co. *v.* Mother, 5 Tex. Civ. App. 87, 24 S. W. 79.

See 41 Cent. Dig. tit. "Railroads," §§ 887, 888.

45. Mugford *v.* Boston, etc., R. Co., 173 Mass. 10, 52 N. E. 1078 (holding that, although the command to get off frightened the trespasser into obedience, if it did not cause him to lose his judgment and self control, the railroad company is not liable); Powell *v.* Erie R. Co., 70 N. J. L. 290, 58 Atl. 930 (holding that a trespasser has no right of action where he voluntarily releases his hold and falls to the ground and is injured, and it does not appear that he lost his hold in an attempt to avoid physical injury or that he was so overcome with fear as to lose his presence of mind and self control).

46. Weiler *v.* Pennsylvania R. Co., 12 Pittsb. Leg. J. N. S. (Pa.) 347.

Such license is revocable as to all persons except those who have legitimate business there growing out of the operation of the road or with the officers or employees of the company. Harris *v.* Stevens, 31 Vt. 79, 73 Am. Dec. 337.

Railroad companies are not bound to permit persons not having business with them as carriers to go upon, and remain at their station and grounds; and its officers in charge of the railway station may inquire as to the business of any one in the depot apparently without ostensible business or whom they suspect to be there on improper business. Weiler *v.* Pennsylvania R. Co., 12 Pittsb. Leg. J. N. S. (Pa.) 347.

47. Landrigan *v.* State, 31 Ark. 50, 25 Am. Rep. 547; Com. *v.* Power, 7 Metc. (Mass.) 596, 41 Am. Dec. 465; Weiler *v.* Pennsylvania R. Co., 12 Pittsb. Leg. J. N. S. (Pa.) 347 (holding that where a person known to be a ticket scalper refuses to disclose his business upon depot grounds, upon request, and refuses or neglects to leave when ordered, he may be removed by such force as is necessary); Harris *v.* Stevens, 31 Vt. 79, 73 Am. Dec. 337. And see CARRIERS, 6 Cyc. 549 *et seq.*

Where a cabman in a railroad station has concluded the business which brought him there and refuses to leave, he becomes a trespasser, and the railway servants are entitled to remove him by force if necessary. Wood *v.* North British R. Co., 2 Falc. 1.

48. Landrigan *v.* State, 31 Ark. 50, 25 Am. Rep. 547; Com. *v.* Power, 7 Metc. (Mass.) 596, 41 Am. Dec. 465.

49. Fluker *v.* Georgia R., etc., Co., 81 Ga. 461, 8 S. E. 529, 12 Am. St. Rep. 328, 2 L. R. A. 843, holding also that a railroad

4. Contributory Negligence[50] — a. Of Persons On or Near Tracks Generally — (i) *In General* — (A) *Care Required.* As a general rule it is the duty of a person going on or near a railroad track to use ordinary care and precaution, under the circumstances, to protect himself from the dangers which he knows or has reason to know are incident to the operation of the road and the running of its trains; and if he fails to do so he is guilty of contributory negligence which will prevent a recovery.[51] This rule applies generally whether the person so situated is rightfully there by the express or implied invitation of the railroad company, or otherwise,[52] or whether he is a mere licensee.[53] The degree of care and precaution required depends upon the circumstances at the particular time and place, and on the question of contributory negligence, it is material whether

corporation may exclude whom it pleases when they come to transact their own private business with passengers or third persons, and admit whom it pleases when they come to transact such business.

50. Injury avoidable notwithstanding contributory negligence see *infra*, X, E, 6.

Contributory negligence of passengers see Carriers, 6 Cyc. 635 *et seq.*

Imputed negligence see Negligence, 29 Cyc. 542.

51. *Florida.*— Seaboard Air Line R. Co. *v.* Smith, 53 Fla. 375, 43 So. 235.

Georgia.— Georgia Southern, etc., R. Co. *v.* George, 92 Ga. 760, 19 S. E. 813.

Indiana.—Pittsburgh, etc., R. Co. *v.* Cozatt, 39 Ind. App. 682, 79 N. E. 534.

New York.— Winslow *v.* Boston, etc., R. Co., 11 N. Y. St. 831.

North Carolina.— Matthews *v.* Atlantic, etc., R. Co., 117 N. C. 640, 23 S. E. 177.

Texas.— St. Louis Southwestern R. Co. *v.* Everett, (Civ. App. 1905) 89 S. W. 457.

Canada.— Thompson *v.* Grand Trunk R. Co., 37 U. C. Q. B. 40.

See 41 Cent. Dig. tit. "Railroads," §§ 1285, 1286.

Degree of care.— A person crossing a track at a point not a public highway is required to exercise a degree of care at least as great as that exacted of a person crossing at a public highway. Winslow *v.* Boston, etc., R. Co., 11 N. Y. St. 831.

52. *Arkansas.*— St. Louis, etc., R. Co. *v.* Ross, 56 Ark. 271, 19 S. W. 837, 61 Ark. 617, 33 S. W. 1054.

Colorado.— Colorado, etc., R. Co. *v.* Sonne, 34 Colo. 206, 83 Pac. 383.

Delaware.— Patterson *v.* Philadelphia, etc., R. Co., 4 Houst. 103.

Illinois.—Chicago, etc., R. Co. *v.* McKnight, 16 Ill. App. 596.

Indiana.— Pittsburgh, etc., R. Co. *v.* Seivers, 162 Ind. 234, 67 N. E. 680, 70 N. E. 133; Jeffersonville, etc., R. Co. *v.* Goldsmith, 47 Ind. 43.

Michigan.— Pzolla *v.* Michigan Cent. R. Co., 54 Mich. 273, 20 N. W. 71.

Missouri.— Loeffler *v.* Missouri Pac. R. Co., 96 Mo. 267, 9 S. W. 580.

New Jersey.— Diebold *v.* Pennsylvania R. Co., 50 N. J. L. 478, 14 Atl. 576.

New York — Williams *v.* Delaware, etc., R. Co., 2 N. Y. Suppl. 435; McClure *v.* New York Cent., etc., R. Co., 5 N. Y. St. 140.

North Carolina.— Griffin *v.* Seaboard Air Line R. Co., 138 N. C. 55, 50 S. E. 516; Meredith *v.* Richmond, etc., R. Co., 108 N. C. 616, 13 S. E. 137.

Pennsylvania.— Little Schuylkill Nav. R., etc., Co. *v.* Norton, 24 Pa. St. 465, 64 Am. Dec. 672.

Texas.— Houston, etc., R. Co. *v.* O'Donnell, (Civ. App. 1905) 90 S. W. 886 [*reversed* on other grounds in 99 Tex. 636, 92 S. W. 409]; Galveston, etc., R. Co. *v.* Garteiser, 9 Tex. Civ. App. 456, 29 S. W. 939 [*affirming* 2 Tex. Civ. App. 230, 21 S. W. 631].

Virginia.— Chesapeake, etc., R. Co. *v.* Farrow, 106 Va. 137, 55 S. E. 569.

Wisconsin.— Goldstein *v.* Chicago, etc., R. Co., 46 Wis. 404, 1 N. W. 37.

See 41 Cent. Dig. tit. "Railroads," §§ 1285, 1286.

That a policeman is authorized by a railroad company to patrol and keep tramps off its tracks does not relieve him from the duty of exercising due care for his own safety. Pennsylvania Co. *v.* Meyers, 136 Ind. 242, 36 N. E. 32.

Illustrations.— Thus a person is guilty of contributory negligence where, having business with defendant's freight department, he is struck by a car while standing on a track in the drilling yard of the company with his back toward the only direction of danger (Diebold *v.* Pennsylvania R. Co., 50 N. J. L. 478, 14 Atl. 576); or, where his duty requires him to stand on a railroad track, he remains there longer than necessary (Goodall *v.* New York Cent. R. Co., 89 Hun (N. Y.) 559, 35 N. Y. Suppl. 544).

Use of public street.— The public has an equal right with a railroad company to use a street, and the proper use thereof by a pedestrian does not necessarily charge him with contributory negligence, unless the circumstances are such as to indicate to a man of ordinary prudence that the use thereof at the time and place will be attended with danger. Hall *v.* International, etc., R. Co., 98 Tex. 100, 81 S. W. 520.

53. Richards *v.* Chicago, etc., R. Co., 81 Iowa 426, 47 N. W. 63; Nichols *v.* Gulf, etc., R. Co., 83 Miss. 126, 36 So. 192; Teakle *v.* San Pedro, etc., R. Co., 32 Utah 276, 90 Pac. 402, 10 L. R. A. N. S. 486 (holding that a licensee walking on a railroad track must observe a reasonable lookout for his own safety and exercise reasonable care, notwithstanding the duty imposed on train operatives to observe a reasonable lookout to prevent

the person injured was a trespasser or mere licensee, or whether he was at the place of the injury by the invitation of the company.[54] Thus it is held that a higher degree of care is required of one walking along a track than of one crossing directly over it,[55] at a public crossing,[56] although he may be at or on such a crossing at the time;[57] and while a person, although rightfully on the track, assumes the ordinary risks incident to the operation of the road,[58] he need not generally exercise more than ordinary care,[59] nor provide against unknown or unusual dangers.[60] But it is held that a trespasser who walks upon or along a track is bound to exercise the utmost degree of care and diligence;[61] and it is also held that the fact that he is a trespasser makes him guilty of contributory negligence.[62]

(B) *Knowledge of Danger.* A railroad track is of itself notice of danger to any one crossing or walking thereon,[63] and a person may be guilty of contributory negligence in wrongfully walking thereon regardless of whether he knew that trains were due at the time.[64] Where a person familiar with the locality and the operation of the road goes upon or near the track and exposes himself to dangers which he knows or has reason to know, he is bound to exercise a degree of care commensurate with the danger to be expected,[65] and if he fails to do so

injury to him); Tucker *v.* Baltimore, etc., R. Co., 59 Fed. 968, 8 C. C. A. 416.

An actual or implied license to use tracks as a footpath, laid on what was previously a highway, does not relieve a pedestrian of the duty of exercising care. Meredith *v.* Richmond, etc., R. Co., 108 N. C. 616, 13 S. E. 137.

A licensee on a railroad right of way is not as a matter of law guilty of contributory negligence in being there. Hutchens *v.* St. Louis Southwestern R. Co., (Tex. Civ. App. 1905) 89 S. W. 24.

54. Norfolk, etc., R. Co. *v.* Denny, 106 Va. 383, 56 S. E. 321.

55. Ryan *v.* New York Cent., etc., R. Co., 17 N. Y. App. Div. 221, 45 N. Y. Suppl. 542.

56. Central R., etc., Co. *v.* Raiford, 82 Ga. 400, 9 S. E. 169.

57. Central R., etc., Co. *v.* Raiford, 82 Ga. 400, 9 S. E. 169.

58. Jeffersonville, etc., R. Co. *v.* Goldsmith, 47 Ind. 43; Richards *v.* Chicago, etc., R. Co., 81 Iowa 426, 47 N. W. 63; Sullivan *v.* Vicksburg, etc., R. Co., 39 La. Ann. 800, 2 So. 586, 4 Am. St. Rep. 239; Williams *v.* Delaware, etc., R. Co., 2 N. Y. Suppl. 435.

59. Kirby *v.* Southern R. Co., 63 S. C. 494, 41 S. E. 765 (holding that a person approaching a track at a place other than a public crossing or traveled place need not exercise more than ordinary care whether the view there be obstructed or not); Galveston, etc., R. Co. *v.* Garteiser, 9 Tex. Civ. App. 456, 29 S. W. 230, 2 Tex. Civ. App. 230, 21 S. W. 631 (holding that a person rightfully traveling on a hand-car as a servant of a railway contractor is not bound to use the highest degree of care to avoid collision with the company's train).

60. Carver *v.* Minneapolis, etc., R. Co., 120 Iowa 346, 94 N. W. 862; Sullivan *v.* Vicksburg, etc., R. Co., 39 La. Ann. 800, 2 So. 586, 4 Am. St. Rep. 239.

61. Hickett *v.* New York, etc., R. Co., 10 N. Y. St. 398; Finlayson *v.* Chicago, etc., R. Co., 9 Fed. Cas. No. 4,793, 1 Dill. 579.

Trespassers upon the yards of a railroad company are charged with a knowledge of present and continuous danger, and are required to exercise the greatest care and prudence to protect themselves from danger. Houston, etc., R. Co. *v.* Boozer, 2 Tex. Unrep. Cas. 452.

62. Parker *v.* Pennsylvania Co., 134 Ind. 673, 34 N. E. 504, 23 L. R. A. 552; Frye *v.* St. Louis, etc., R. Co., 200 Mo. 577, 98 S. W. 566, 8 L. R. A. N. S. 1069 (holding that under Rev. St. (1899) § 1105, it is negligence *per se* for one to walk upon a railroad track). See also Bradley *v.* Louisville, etc., R. Co., 149 Ala. 545, 42 So. 818.

63. Scudder *v.* Indianapolis, etc., R. Co., Wils. (Ind.) 481; Glenn *v.* Norfolk, etc., R. Co., 128 N. C. 184, 38 S. E. 812; Savage *v.* Southern R. Co., 103 Va. 422, 49 S. E. 484.

Pedestrians using tracks must be held to know the danger ordinarily attending the running of trains. Louisville, etc., R. Co. *v.* Schmetzer, 94 Ky. 424, 22 S. W. 603, 15 Ky. L. Rep. 194.

A licensee walking along a railroad track is charged with the knowledge that the track is frequently used for the passage of trains and the shifting of cars, and he must be considered as charged with knowledge of the usual method of shifting cars at such point, where the method had been in use for many years. Chesapeake, etc., R. Co. *v.* Farrow, 106 Va. 137, 55 S. E. 569.

64. Louisville, etc., R. Co. *v.* McClish, 115 Fed. 268, 53 C. C. A. 60.

65. Cleveland, etc., R. Co. *v.* Berry, 152 Ind. 607, 53 N. E. 415, 46 L. R. A. 33; Ilsley *v.* Missouri Pac. R. Co., 197 Mo. 15, 93 S. W. 1120, 114 Am. St. Rep. 743; Craven *v.* Philadelphia, etc., R. Co., 9 Pa. Co. Ct. 157; St. Louis, etc., R. Co. *v.* Bennett, 69 Fed. 525, 16 C. C. A. 300.

Where a person familiar with the locality elects to travel upon the railroad tracks instead of taking a safer road, as by paths or roads at the side, he is bound to know that the track or space between them is dangerous and to use a degree of care commensurate

he is guilty of contributory negligence, which will prevent a recovery,[66] in some cases as a matter of law.[67] The mere fact, however, that one has knowledge of the danger does not make him guilty of negligence *per se* in going on or near the tracks, if he has a right to go there and if he otherwise uses ordinary care;[68] and if he uses the care that a man of ordinary prudence under like circumstances and knowing the danger to be apprehended would have exercised, he is entitled to recover for injuries due to the railroad company's negligence.[69]

(c) *Acts in Emergencies.* Where a person who, without his own fault, is placed in sudden peril by an approaching train or car, or otherwise, makes a mistake in judgment in endeavoring to avoid injury, he is not guilty of contributory negligence as a matter of law, although his act is the direct and immediate cause of his injury, if he otherwise acts in a manner in which a man of ordinary prudence would have acted under similar circumstances;[70] although it is otherwise where his position of peril is caused by some act of negligence on his own part.[71] Thus a person is not guilty of contributory negligence in attempting to rescue another from in front of an approaching train,[72] unless his efforts are made

therewith. Chicago, etc., R. Co. *v.* Flint, 22 Ill. App. 502; Callender *v.* Carlton Iron Co., 9 T. L. R. 646 [*affirmed* in 10 T. L. R. 366]; Phillips *v.* Grand Trunk R. Co., 1 Ont. L. Rep. 28.

66. Walker *v.* Redington Lumber Co., 86 Me. 191, 29 Atl. 979; Haley *v.* Missouri Pac. R. Co., 197 Mo. 15, 93 S. W. 1120, 114 Am. St. Rep. 743; International, etc., R. Co. *v.* Lee, (Tex. Civ. App. 1896) 34 S. W. 160; St. Louis, etc., R. Co. *v.* Sharp, 3 Tex. App. Civ. Cas. § 328; Johnson *v.* Rio Grande Western R. Co., 19 Utah 77, 57 Pac. 17.

One who voluntarily goes across a switch yard without invitation, and, where he has knowledge that trains are constantly passing, cannot recover for injuries received by stepping on a track in front of a moving engine on the ground that he was compelled to do so by an emergency created by the approach of an engine on an adjoining track. Briscoe *v.* Southern R. Co., 103 Ga. 224, 28 S. E. 638.

67. Pittsburgh, etc., R. Co. *v.* Collins, 87 Pa. St. 405, 30 Am. Rep. 371 (holding that where a person without right and without a full knowledge of the location voluntarily places himself upon a railroad track at a place where there is no crossing and which is a known place of danger, it is negligence *per se* and no damages can be recovered except for wanton injury); Delaware, etc., R. Co. *v.* Wilkins, 153 Fed. 845, 83 C. C. A. 27; Rich *v.* Chicago, etc., R. Co., 149 Fed. 79, 78 C. C. A. 663.

68. Carver *v.* Minneapolis, etc., R. Co., 120 Iowa 346, 94 N. W. 862; Haley *v.* Missouri Pac. R. Co., 197 Mo. 15, 93 S. W. 1120, 114 Am. St. Rep. 743.

Knowledge of the defective condition of a track, without knowledge that such condition would make it dangerous for one to travel a path beside the track while cars were passing over it, will not render one traveling the path guilty of contributory negligence. Missouri, etc., R. Co. *v.* Brown, (Tex. Civ. App. 1907) 101 S. W. 464.

69. Haley *v.* Missouri Pac. R. Co., 197 Mo. 15, 93 S. W. 1120, 114 Am. St. Rep. 743.

70. *Georgia.*— Atlanta, etc., R. Co. *v.* Roberts, 116 Ga. 505, 42 S. E. 753, injured while jumping from car, which he was loading and which was derailed.

Illinois.— Chicago, etc., R. Co. *v.* Dignan, 56 Ill. 487.

Minnesota.— Mark *v.* St. Paul, etc., R. Co., 30 Minn. 493, 16 N. W. 367.

Missouri.— Feeney *v.* Wabash R. Co., 123 Mo. App. 420, 99 S. W. 477.

New York.— Roll *v.* Northern Cent. R. Co., 15 Hun 496 [*affirmed* in 80 N. Y. 647].

Ohio.— Balser *v.* Chicago, etc., R. Co., 9 Ohio S. & C. Pl. Dec. 523, 7 Ohio N. P. 482.

Pennsylvania.—Hagan *v.* Philadelphia, etc., R. Co., 5 Phila. 179.

Tennessee.— Southern R. Co. *v.* Pugh, 97 Tenn. 624, 37 S. W. 555.

Texas.— Texas Midland R. Co. *v.* Byrd, 41 Tex. Civ. App. 164, 90 S. W. 185; Texas, etc., R. Co. *v.* Watkins, (Civ. App. 1904) 26 S. W. 760.

See 41 Cent. Dig. tit. "Railroads," § 1295.

If the proof is not clear as to the elements of time and space on which an error of judgment is based, such error should not be held negligence as a matter of law, but the question should be left to the jury. Chicago, etc., R. Co. *v.* Smith, 180 Ill. 453, 54 N. E. 325 [*affirming* 77 Ill. App. 492]; Bernhard *v.* Rensselaer, etc., R. Co., 1 Abb. Dec. (N. Y.) 131, 23 How. Pr. 166 [*affirming* 32 Barb. 165, 19 How. Pr. 199].

That one had but a minute in which to catch a train does not render his condition one of such sudden peril as to exempt him from the duty of exercising due care. Foreman *v.* Pennsylvania R. Co., 11 Pa. Co. Ct. 475.

71. Balser *v.* Chicago, etc., R. Co., 9 Ohio S. & C. Pl. Dec. 523, 7 Ohio N. P. 482.

72. Becker *v.* Louisville, etc., R. Co., 110 Ky. 474, 61 S. W. 997, 22 Ky. L. Rep. 1893, 96 Am. St. Rep. 459, 53 L. R. A. 267; Peyton *v.* Texas, etc., R. Co., 41 La. Ann. 861, 6 So. 690, 17 Am. St. Rep. 430 (holding this to be true where the person injured believed that he could save the life of the person in danger and avoid injury himself, and it appears that he would not have been harmed had not the train been running at a high rate of speed); Eckert *v.* Long Island R. Co., 43 N. Y. 502,

under such circumstances as to constitute rashness in the judgment of prudent persons,[73] or unless the perilous situation of such other and of himself is caused by his own negligence.[74] This rule, however, does not apply to efforts to save property.[75]

(D) *Use of Track in General.* Ordinarily a person is guilty of contributory negligence which will defeat a recovery of damages, where he is injured while carelessly standing,[76] sitting, or lying down upon,[77] or walking, or otherwise traveling on or so near a railroad track as to be in the way of passing trains,[78]

3 Am. Rep. 721; Roll *v.* Northern Cent. R. Co., 15 Hun (N. Y.) 496 [*affirmed* in 80 N. Y. 647]; San Antonio, etc., R. Co. *v.* Gray, 95 Tex. 424, 67 S. W. 763 [*reversing* on other grounds (Civ. App. 1901) 66 S. W. 229].

A mother's attempt to rescue her infant child from an approaching train is not contributory negligence, although she may negligently have allowed it to go upon the track; but the railroad company is not liable unless negligent in respect to the child before, or in respect to the mother or child after, the attempt to rescue. Donahoe *v.* Wabash, etc., R. Co., 83 Mo. 560, 53 Am. Rep. 594.

73. Peyton *v.* Texas, etc., R. Co., 41 La. Ann. 861, 6 So. 690, 17 Am. St. Rep. 430; Eckert *v.* Long Island R. Co., 43 N. Y. 502, 3 Am. Rep. 721; Roll *v.* Northern Cent. R. Co., 15 Hun (N. Y.) 496 [*affirmed* in 80 N. Y. 647].

74 Atlanta, etc., Air-Line R. Co. *v.* Leach, 91 Ga. 419, 17 S. E. 619, 44 Am. St. Rep. 47 (attempt to rescue child negligently permitted to be on track); De Mahy *v.* Morgan's Louisiana, etc., R., etc., Co., 45 La. Ann. 1329, 14 So. 61. See also Evansville, etc., R. Co. *v.* Hiatt, 17 Ind. 102; Anderson *v.* Northern R. Co., 25 U. C. C. P. 301.

75. Collins *v.* Illinois Cent. R. Co., 77 Miss. 855, 27 So. 837; Eckert *v.* Long Island R. Co., 43 N. Y. 502, 3 Am. Rep. 721.

76. *Alabama.*— Tennessee Coal, etc., Co. *v.* Hansford, 125 Ala. 349, 28 So. 45, 82 Am. St. Rep. 241; Nave *v.* Alabama Great Southern R. Co., 96 Ala. 264, 11 So. 391.

Kansas.— Coy *v.* Missouri Pac. R. Co., 74 Kan. 853, 86 Pac. 468; Zirkle *v.* Missouri Pac. R. Co., 67 Kan. 77, 72 Pac. 539, standing on track in conversation, with back turned to cars about fifty feet distant.

Massachusetts.— Rigg *v.* Boston, etc., R. Co., 158 Mass. 309, 33 N. E. 512.

Missouri.— Bell *v.* Hannibal, etc., R. Co., 86 Mo. 599, demurrer to evidence sustained.

New Jersey.— Diebold *v.* Pennsylvania R. Co., 50 N. J. L. 478, 14 Atl. 576.

North Carolina.— Lea *v.* Durham, etc., R. Co., 129 N. C. 459, 40 S. E. 212.

Pennsylvania.— Little Schuylkill Nav. R., etc., Co. *v.* Norton, 24 Pa. St. 465, 64 Am. Dec. 672.

United States.— Brennan *v.* Delaware, etc., R. Co., 83 Fed. 124, 27 C. C. A. 418.

See 41 Cent. Dig. tit. "Railroads," § 1287.

Where one has a right of immediate crossing only, he is guilty of contributory negligence in stopping on the track for several minutes, whereby he is injured. Tennessee Coal, etc., Co. *v.* Hansford, 125 Ala. 349, 28 So. 45, 82 Am. St. Rep. 241.

A New Jersey statute (Pub. Laws (1869), p. 806, Rev. p. 920, § 67), providing that one injured while standing on a railroad track shall not recover against the company is not limited in its application to main tracks. Diebold *v.* Pennsylvania R. Co., 50 N. J. L. 478, 14 Atl. 576.

77. Parish *v.* Western, etc., R. Co., 102 Ga. 285, 29 S. E. 715, 40 L. R. A. 364; Roseberry *v.* Newport News, etc., R. Co., 39 S. W. 407, 19 Ky. L. Rep. 194; Carter *v.* Southern R. Co., 135 N. C. 498, 47 S. E. 614; Clegg *v.* Southern R. Co., 133 N. C. 303, 45 S. E. 657, 132 N. C. 292, 43 S. E. 836; Texas, etc., R. Co. *v.* McDonald, 99 Tex. 207, 88 S. W. 201; Houston, etc., R. Co. *v.* Smith, 77 Tex. 179, 13 S. W. 972 (holding that a person was guilty of contributory negligence in lying on a track at a place where there was no crossing and where he knew trains were accustomed to pass about that time); Smith *v.* International, etc., R. Co., 34 Tex. Civ. App. 209, 78 S. W. 556; Rozwadosfskie *v.* International, etc., R. Co., 1 Tex. Civ. App. 487, 20 S. W. 872.

A person lying on a railroad track is guilty of contributory negligence as a matter of law. Gulf, etc., R. Co. *v.* Matthews, 32 Tex. Civ. App. 137, 73 S. W. 413, 74 S. W. 803.

A license to use a railroad track as a footpath does not carry with it the right to impede the passage of a train by sitting or lying on the track. Norwood *v.* Raleigh, etc., R. Co., 111 N. C. 236, 16 S. E. 4.

Going to sleep on a railroad track in such a position as to be injured by a passing train is contributory negligence. Williams *v.* Southern Pac. R. Co., (Cal. 1886) 11 Pac. 849; Hughes *v.* Louisville, etc., R. Co., 67 S. W. 984, 23 Ky. L. Rep. 2288; Richardson *v.* Wilmington, etc., R. Co., 8 Rich. (S. C.) 120; Felder *v.* Louisville, etc., R. Co., 2 McMull. (S. C.) 403.

78. *Alabama.*— Mizzell *v.* Southern R. Co., 132 Ala. 504, 31 So. 86; Savannah, etc., R. Co. *v.* Meadors, 95 Ala. 137, 10 So. 141.

Arkansas.— Little Rock, etc., R. Co. *v.* Haynes, 47 Ark. 497, 1 S. W. 774.

District of Columbia.— Stearman *v.* Baltimore, etc., R. Co., 6 App. Cas. 46.

Georgia.— Central R., etc., Co. *v.* Smith, 78 Ga. 694, 3 S. E. 397, holding plaintiff to be guilty of gross negligence.

Illinois.— In this state it is held that a person using a railroad track as a highway is guilty of gross negligence. Roden *v.* Chicago, etc., R. Co., 133 Ill. 72, 24 N. E. 425, 23 Am. St. Rep. 585 [*affirming* 30 Ill. App. 354]; Blanchard *v.* Lake Shore, etc., R. Co., 126 Ill. 416, 18 N. E. 799, 9 Am. St. Rep.

especially where another safe way of traveling is readily accessible,[79] as where the track is laid in a public street or highway and there is no necessity for walking on the track,[80] and particularly where walking along railroad tracks, except at crossings or in streets or highways, by persons other than employees is prohibited by statute,[81] unless the railroad company is guilty of wanton, wilful, or reckless negligence,[82] or unless by the exercise of ordinary care it could have avoided the

630; Smith *v.* Chicago, etc., R. Co., 99 Ill. App. 296; Chicago, etc., R. Co. *v.* McKenna, 14 Ill. App. 472; Chicago, etc., R. Co. *v.* Olson, 12 Ill. App. 245.

Indiana.— Parker *v.* Pennsylvania Co., 134 Ind. 673, 34 N. E. 504, 23 L. R. A. 552.

Kentucky.— Hoskins *v.* Louisville, etc., R. Co., 30 S. W. 643, 17 Ky. L. Rep. 78.

Michigan.— Bresnaham *v.* Michigan Cent. R. Co., 49 Mich. 410, 13 N. W. 797.

Minnesota.— Lando *v.* Chicago, etc., R. Co., 31 Minn. 279, 83 N. W. 1089.

Missouri.— Skipton *v.* St. Joseph, etc., R. Co., 82 Mo. App. 134.

New York.— McCarty *v.* Delaware, etc., Canal Co., 17 Hun 74; Hickett *v.* New York, etc., R. Co., 10 N. Y. St. 398.

North Carolina.— Carter *v.* Southern R. Co., 135 N. C. 498, 47 S. E. 614; Clegg *v.* Southern R. Co., 133 N. C. 303, 45 S. E. 657, 132 N. C. 292, 43 S. E. 836.

Ohio.— Paine *v.* Columbus, etc., R. Co., 2 Ohio S. & C. Pl. Dec. 264, 7 Ohio N. P. 327.

Pennsylvania.— Heil *v.* Glanding, 42 Pa. St. 493, 82 Am. Dec. 537.

Texas.— Houston, etc., R. Co. *v.* Smith, 77 Tex. 179, 13 S. W. 972; Hoover *v.* Texas, etc., R. Co., 61 Tex. 503; St. Louis, etc., R. Co. *v.* Herrin, 6 Tex. Civ. App. 718, 26 S. W. 425.

West Virginia.— Spicer *v.* Chesapeake, etc., R. Co., 34 W. Va. 514, 12 S. E. 553, 11 L. R. A. 385.

Wisconsin.— McDonald *v.* Chicago, etc., R. Co., 75 Wis. 121, 43 N. W. 744.

United States.— Brennan *v.* Delaware, etc., R. Co., 83 Fed. 124, 27 C. C. A. 418; Grethen *v.* Chicago, etc., R. Co., 22 Fed. 609.

See 41 Cent. Dig. tit. "Railroads," § 1287.

Riding tricycle on track.—A trespasser who, before daylight and in a dense fog, is killed or injured while riding on a railroad tricycle, in a collision with a train running at usual speed and on regular time, is guilty of contributory negligence precluding a recovery. Dilas *v.* Chesapeake, etc., R. Co., 71 S. W. 492, 24 Ky. L. Rep. 1347.

A mere trespasser walking along an embankment on which a track is situated is guilty of contributory negligence as a matter of law. Louisville, etc., R. Co. *v.* McClish, 115 Fed. 268, 53 C. C. A. 60.

That the train was running on a track usually used for trains going in the opposite direction does not relieve the person injured from contributory negligence in walking on the track. Stearman *v.* Baltimore, etc., R. Co., 6 App. Cas. (D. C.) 46.

79. *Georgia.*— Western, etc., R. Co. *v.* Bloomingdale, 74 Ga. 604.

Illinois.— Chicago, etc., R. Co. *v.* Flint, 22 Ill. App. 502.

Kentucky.— Louisville, etc., R. Co. *v.* Howard, 82 Ky. 212; Gregory *v.* Louisville, etc., R. Co., 79 S. W. 238, 25 Ky. L. Rep. 1986.

Oregon.— Beck *v.* Portland, etc., R. Co., 25 Oreg. 32, 34 Pac. 753.

Texas.— Gulf, etc., R. Co. *v.* Matthews, 100 Tex. 63, 93 S. W. 1068 [*reversing* (Civ. App. 1905) 89 S. W. 983].

United States.— Tucker *v.* Baltimore, etc., R. Co., 59 Fed. 968, 8 C. C. A. 416.

Canada.— Phillips *v.* Grand Trunk R. Co., 1 Ont. L. Rep. 28.

See 41 Cent. Dig. tit. "Railroads," § 1287.

Although an implied permission to use a railroad track as a footpath relieves a person so using it from the imputation of being a trespasser, he is nevertheless guilty of contributory negligence as a matter of law, if he walks on the track when he could with equal convenience walk by the side of it and out of danger. Gulf, etc., R. Co. *v.* Matthews, 100 Tex. 63, 93 S. W. 1068 [*reversing* (Civ. App. 1905) 89 S. W. 983].

80. Louisville, etc., R. Co. *v.* Yniestra, 21 Fla. 700; Illinois Cent. R. Co. *v.* Hall, 72 Ill. 222; Coy *v.* Missouri Pac. R. Co., 74 Kan. 853, 86 Pac. 468; Atchison, etc., R. Co. *v.* Schwindt, 67 Kan. 8, 72 Pac. 573; Loughrey *v.* Pennsylvania R. Co., 201 Pa. St. 297, 50 Atl. 972. But see Rio Grande, etc., R. Co. *v.* Martinez, 39 Tex. Civ. App. 460, 87 S. W. 853.

81. Butler *v.* New York Cent., etc., R. Co., 152 Fed. 976. 82 C. C. A. 330, construing N. Y. Laws (1892), c. 676.

82. *Alabama.*— Mizzell *v.* Southern R. Co., 132 Ala. 504, 31 So. 86; Nave *v.* Alabama Great Southern R. Co., 96 Ala. 264, 11 So. 391.

Arkansas.— Little Rock, etc., R. Co. *v.* Haynes, 47 Ark. 497, 1 S. W. 774.

Georgia.— Western, etc., R. Co. *v.* Bloomingdale, 74 Ga. 604.

Illinois.— Roden *v.* Chicago, etc., R. Co., 133 Ill. 72, 24 N. E. 425, 23 Am. St. Rep. 585 [*affirming* 30 Ill. App. 286]; Blanchard *v.* Lake Shore, 126 Ill. 416, 18 N. E. 799, 9 Am. St. Rep. 630; Smith *v.* Chicago, etc., R. Co., 99 Ill. App. 296; Chicago, etc., R. Co. *v.* McKenna, 14 Ill. App. 472.

Kansas.— Coy *v.* Missouri Pac. R. Co., 74 Kan. 853, 86 Pac. 468.

Kentucky.— Louisville, etc., R. Co. *v.* Howard, 82 Ky. 212.

Pennsylvania.— Heil *v.* Glanding, 42 Pa. St. 493, 82 Am. Dec. 537.

West Virginia.— Spicer *v.* Chesapeake, etc., R. Co., 34 W. Va. 514, 12 S. E. 553, 11 L. R. A. 385.

See 41 Cent. Dig. tit. "Railroads," § 1317. And see *infra*, X, E, 4, a, (v).

injury, notwithstanding such contributory negligence.[83] The mere fact, however, that one goes upon a railroad track is not necessarily negligence, if he does so rightfully,[84] as where the tracks are laid in a public street or highway, and he goes upon the track as one of the public;[85] and if he could not by the exercise of ordinary care have avoided the consequence of the company's negligence his right to recover exists,[86] although it is otherwise if he might have avoided the consequence of such negligence, but failed to do so.[87]

(E) *Customary Use of Track.* The fact that the person injured, or others, have been in the habit of going upon or walking along the railroad tracks with the company's knowledge, does not relieve him from exercising ordinary care,[88] or, as it has been held, the utmost care and vigilance,[89] for his own protection while on the track. If such use amounts to a license, it must be on the condition that the pedestrian shall exercise ordinary care and diligence to avoid injury.[90]

(F) *Disregarding Warnings or Signals.* It is contributory negligence for a person to cross tracks in disregard of a sign or warning forbidding crossing at that point,[91] although persons were in the habit of crossing there,[92] particularly where a safe point of crossing is readily accessible.[93] So a person is guilty of contributory negligence where he goes or remains on the track in disregard of signals or other warning of an approaching train.[94]

(G) *Crossing Trestles or Bridges.* It is at least evidence of contributory negligence for a person wrongfully walking on a railroad track to attempt to cross a railroad trestle or bridge,[95] particularly where it is too high to jump therefrom to

83. Nave *v.* Alabama Great Southern R. Co., 96 Ala. 264, 11 So. 391; Roseberry *v.* Newport News, etc., R. Co., 39 S. W. 407, 19 Ky. L. Rep. 194; Paine *v.* Columbus, etc., R. Co., 2 Ohio S. & C. Pl. Dec. 135, 7 Ohio N. P. 327; Houston, etc., R. Co. *v.* Smith, 77 Tex. 179, 13 S. W. 972. And see *infra*, X, E, 6.

84. East St. Louis Connecting R. Co. *v.* Reames, 173 Ill. 582, 51 N. E. 68; Broadbent *v.* Chicago, etc., R. Co., 64 Ill. App. 231; Shetter *v.* Ft. Worth, etc., R. Co., (Tex. Civ. App. 1898) 46 S. W. 875; Toledo, etc., R. Co. *v.* Chisholm, 83 Fed. 652, 27 C. C. A. 663. See also Northern Cent. R. Co. *v.* State, 29 Md. 420, 96 Am. Dec. 545.

85. Smedis *v.* Brooklyn, etc., R. Co., 88 N. Y. 13; Mitchell *v.* Tacoma R., etc., Co., 9 Wash. 120, 37 Pac. 341.

86. Northern Cent. R. Co. *v.* State, 29 Md. 420, 96 Am. Dec. 545; Vicksburg, etc., R. Co. *v.* McGowan, 62 Miss. 682, 52 Am. Rep. 205.

87. Northern Cent. R. Co. *v.* State, 29 Md. 420, 96 Am. Dec. 545.

88. *Georgia.*— White *v.* Central R., etc., Co., 83 Ga. 595, 10 S. E. 273.

Indiana.— Scudder *v.* Indianapolis, etc., R. Co., Wils. 481.

North Carolina.— McIlhaney *v.* Southern R. Co., 122 N. C. 995, 30 S. E. 127 [*overruling* McIlhaney *v.* Southern R. Co., 120 N. C. 551, 26 S. E. 815].

Texas.— Lee *v.* International, etc., R. Co., 89 Tex. 583, 36 S. W. 63; Texas, etc., R. Co. *v.* Roberts, (Civ. App. 1897) 45 S. W. 218 [*affirmed* in 91 Tex. 535, 45 S. W. 309].

United States.— Louisville, etc., R. Co. *v.* McClish, 115 Fed. 268, 53 C. C. A. 60; King *v.* Illinois Cent. R. Co., 114 Fed. 855, 52 C. C. A. 489; Kirtley *v.* Chicago, etc., R. Co., 65 Fed. 386.

89. Hickett *v.* New York, etc., R. Co., 10 N. Y. St. 398, holding that a person has no such right to walk on a railroad track as will relieve him from exercising the utmost vigilance for his own protection because others have commonly used the walk as a pathway.

90. White *v.* Central R., etc., Co., 83 Ga. 595, 10 S. E. 273.

91. Pulley *v.* Chicago, etc., R. Co., 94 Iowa 565, 63 N. W. 328.

92. Pulley *v.* Chicago, etc., R. Co., 94 Iowa 565, 63 N. W. 328. But see Dublin, etc., R. Co. *v.* Slattery, 3 App. Cas. 1155, 39 L. T. Rep. N. S. 365, 27 Wkly. Rep. 191.

93. Pulley *v.* Chicago, etc., R. Co., 94 Iowa 565, 63 N. W. 328.

94. Chicago, etc., R. Co. *v.* Chancellor, 165 Ill. 438, 46 N. E. 269; Chinn *v.* Chesapeake, etc., R. Co., 74 S. W. 215, 24 Ky. L. Rep. 2350; McNulty *v.* New Orleans, etc., R. Co., 52 La. Ann. 1034, 27 So. 569; White *v.* Atchinson, etc., R. Co., 84 Mo. App. 411.

95. *Alabama.*— Glass *v.* Memphis, etc., R. Co., 94 Ala. 581, 10 So. 215.

Arkansas.— Adams *v.* St. Louis, etc., R. Co., 83 Ark. 300, 103 S. W. 725, holding that one struck by a train while walking on a railroad trestle was guilty of contributory negligence precluding a recovery.

California.— Tennenbrook *v.* South Pac. Coast R. Co., 59 Cal. 269.

Georgia.— Atlanta, etc., Air-Line R. Co. *v.* Leach, 91 Ga. 419, 17 S. E. 619, 44 Am. St. Rep. 47.

Louisiana.— Provost *v.* Yazoo, etc., R. Co., 52 La. Ann. 1894, 28 So. 305.

North Carolina.— Harris *v.* Atlantic Coast Line R. Co., 132 N. C. 160, 43 S. E. 589; Weeks *v.* Wilmington, etc., R. Co., 131 N. C. 78, 42 S. E. 541.

the ground in safety,[96] or where he goes thereon without looking or listening before entering,[97] or in disregard of a sign-board or other warning not to cross,[98] unless he is sure that he can safely stand thereon while a train passes.[99] If he knows that a train is momentarily expected thereon, it has been held that his going on the bridge or trestle is gross negligence,[1] or negligence as a matter of law.[2] Or if the bridge or trestle is of such height or surroundings that a person thereon could save himself by jumping, it is contributory negligence for him to fail to do so.[3] Even though one has a right to cross a railroad bridge or trestle on spaces provided for that purpose, he must use due care to avoid being injured by passing trains,[4] or by falling through the bridge or trestle.[5]

(H) *Standing or Passing Near Standing Trains or Cars.* For a person to wrongfully stand in a dangerous place between,[6] or near standing trains or cars,[7] or to attempt to pass over, under, or between such trains or cars which he knows or has reason to know are liable to be moved at any moment is contributory negligence which will prevent a recovery.[8]

(I) *Going on Track Near Approaching Trains or Cars.* A person is also guilty of such contributory negligence as will prevent a recovery for injuries sustained, where he heedlessly or carelessly goes or remains upon a railroad track in front of a train, locomotive, or car which he knows or has reason to know is approaching,[9] as where he goes or remains upon the track knowing that a train is due or is likely to pass at any time;[10] or where he goes or remains upon the

Virginia.— Virginia Midland R. Co. *v.* Barksdale, 82 Va. 330.

See 41 Cent. Dig. tit. "Railroads," § 1291.

Compare Hasie *v.* Alabama, etc., R. Co., 78 Miss. 413, 28 So. 941, 84 Am. St. Rep. 632.

96. Little *v.* Carolina Cent. R. Co., 119 N. C. 771, 26 S. E. 106; Clark *v.* Wilmington, etc., R. Co., 109 N. C. 430, 14 S. E. 43, 14 L. R. A. 749.

97. Provost *v.* Yazoo, etc., R. Co., 52 La. Ann. 1894, 28 So. 305.

98. Little *v.* Carolina Cent. R. Co., 119 N. C. 771, 26 S. E. 106.

99. Provost *v.* Yazoo, etc., R. Co., 52 La. Ann. 1894, 28 So. 305.

1. Bentley *v.* Georgia Pac. R. Co., 86 Ala. 484, 6 So. 37; Phillips *v.* East Tennessee, etc., R. Co., 87 Ga. 272, 13 S. E. 644.

2. Weeks *v.* Wilmington, etc., R. Co., 131 N. C. 78, 42 S. E. 541.

3. May *v.* Central R., etc., Co., 80 Ga. 363, 4 S. E. 330; Louisville, etc., R. Co. *v.* Cooper, 68 Miss. 368, 8 So. 747.

4. Skipton *v.* St. Joseph, etc., R. Co., 82 Mo. App. 134; Shannon *v.* Boston, etc., R. Co., 71 N. H. 286, 51 Atl. 1074; Texas Midland R. Co. *v.* Byrd, 41 Tex. Civ. App. 164, 90 S. W. 185.

5. McConkey *v.* Oregon R., etc., Co., 35 Wash. 55, 76 Pac. 526.

6. East Tennessee, etc., R. Co. *v.* King, 81 Ala. 177, 2 So. 152.

7. Lagerman *v.* New York Cent., etc., R. Co., 53 N. Y. App. Div. 283, 65 N. Y. Suppl. 764.

8. Wagner *v.* Chicago, etc., R. Co., 122 Iowa 360, 98 N. W. 141; Nichols *v.* Gulf, etc., R. Co., 83 Miss. 126, 36 So. 192; Murdock *v.* Yazoo, etc., R. Co., 77 Miss. 487, 29 So. 25; Gurley *v.* Missouri Pac. R. Co., 104 Mo. 211, 16 S. W. 11; International, etc., P. Co. *v.* Jackson, 41 Tex. App. 51, 90 S. W. 918; Rodriguez *v.* International, etc., R. Co., 27 Tex. Civ. App. 325, 64 S. W. 1005.

Sufficiency of knowledge on the part of one attempting to pass between standing cars that the train was liable to move at any moment see Rodriguez *v.* International, etc., R. Co., 27 Tex. Civ. App. 325, 64 S. W. 1005.

9. *Arkansas.*— St. Louis, etc., R. Co. *v.* Ferrell, 84 Ark. 270, 105 S. W. 263.

Indiana.— Scudder *v.* Indianapolis, etc., R. Co., Wils. 481.

Minnesota.—Carroll *v.* Minnesota Valley R. Co., 13 Minn. 30, 97 Am. Dec. 221.

Missouri.— Leduke *v.* St. Louis, etc., R. Co., 4 Mo. App. 485.

New York.— Ryan *v.* New York Cent., etc., R. Co., 17 N. Y. App. Div. 221, 45 N. Y. Suppl. 542, heedlessly stepping on tracks from between standing cars.

North Carolina.— Norwood *v.* Raleigh, etc., R. Co., 111 N. C. 236, 16 S. E. 4.

Oregon.— Beck *v.* Portland, etc., R. Co., 25 Oreg. 32, 34 Pac. 755.

See 41 Cent. Dig. tit. "Railroads," § 1293.

10. Illinois Cent. R. Co. *v.* James, 67 Ill. App. 649; Louisville, etc., R. Co. *v.* Redmon, 122 Ky. 385, 91 S. W. 722, 28 Ky. L. Rep. 1293; Louisville, etc., R. Co. *v.* Howard, 82 Ky. 212; Yates *v.* Illinois Cent. R. Co., 89 S. W. 161, 28 Ky. L. Rep. 75; Mills *v.* New York Cent., etc., R. Co., 5 N. Y. App. Div. 11, 39 N. Y. Suppl. 280; Mixell *v.* New York, etc., R. Co., 22 Misc. (N. Y.) 73, 49 N. Y. Suppl. 413, 27 N. Y. Civ. Proc. 56; Farve *v.* Louisville, etc., R. Co., 42 Fed. 441.

One traveling on a dark night on a railroad track knowing that a train is due and who is struck by such train is guilty of negligence which precludes a recovery. State *v.* Baltimore, etc., R. Co., 58 Md. 482 (holding that a person who walks on a railroad track for a distance of one and one-half miles on a dark night, knowing that it is about time for an express train to pass and not knowing

track in front of a train or car which he sees or hears approaching,[11] or which he must have seen or heard unless he was acting heedlessly,[12] although the railroad company itself is negligent in running the train at an excessive or unlawful rate of speed,[13] or in not giving the proper or required signals,[14] or in not using a proper headlight,[15] unless those in charge of the train or car could, by the use of ordinary diligence or care, have prevented the injury after discovering the injured party's peril.[16]

(J) *As Proximate Cause of Injury.* Within the meaning of the rule that the injured party cannot recover for injuries of which his negligence was the proximate cause,[17] his negligence is the proximate cause of the injury when by the exercise of ordinary care he might have avoided the consequences of the negligence of the railroad company,[18] that is, where his negligence is concurrent with or subsequent to that of the railroad company and continues up to the time of the injury, and but for which the injury would not have happened.[19] If his act is directly connected so as to be concurrent with that of the railroad company,

whether it has in fact passed, assumes the risk of injury); Houston, etc., R. Co. *v.* Richards, 59 Tex. 375 (without regard as to whether the engine failed to carry a headlight).

Negligence per se.— Where a person walks along a railroad track at a point where he can see an approaching train at a distance of over one half a mile, and where he can with perfect safety and convenience leave the track and walk by the side of it, and with knowledge that it is nearly train time he continues on the track until he is struck by a train coming from behind him, he is guilty of contributory negligence as a matter of law. International, etc., R. Co. *v.* Ploeger, (Tex. Civ. App. 1906) 90 S. W. 56.

11. *Arkansas.*— Burns *v.* St. Louis Southwestern R. Co., 76 Ark. 10, 89 S. W. 824, holding this to be true, although he thought that the approaching train was moving on another track.

Kentucky.— Illinois Cent. R. Co. *v.* Willis, 123 Ky. 636, 97 S. W. 21, 29 Ky. L. Rep. 1187; Craddock *v.* Louisville, etc., R. Co., 16 S. W. 125, 13 Ky. L. Rep. 18.

Maine.— State *v.* Maine Cent. R. Co., 77 Me. 538, 1 Atl. 673, holding that it is negligence for one seeing or hearing a train approaching at ordinary speed to attempt to cross directly in front of it.

Mississippi.— Green *v.* Louisville, etc., R. Co., (1893) 12 So. 826.

Missouri.— McManamee *v.* Missouri Pac. R. Co., 135 Mo. 440, 37 S. W. 119; Prewitt *v.* Eddy, 115 Mo. 283, 21 S. W. 742.

New York.— Ryan *v.* New York Cent., etc., R. Co., 30 N. Y. App. Div. 153, 51 N. Y. Suppl. 894.

North Carolina.— Glenn *v.* Norfolk, etc., R. Co., 128 N. C. 184, 38 S. E. 812.

Texas.— Galveston, etc., R. Co. *v.* Haas, 19 Tex. Civ. App. 645, 48 S. W. 540.

Washington.— Lewis *v.* Puget Sound Southern R. Co., 4 Wash. 188, 29 Pac. 1061.

United States.— Buckley *v.* New York, etc., R. Co., 148 Fed. 460.

See 41 Cent. Dig. tit. "Railroads," § 1293.

12. *Indiana.*— Ohio, etc., R. Co. *v.* Hill, 117 Ind. 56, 18 N. E. 461; Dull *v.* Cleveland, etc., R. Co., 21 Ind. App. 571, 52 N. E. 1013.

Michigan.— Pzolla *v.* Michigan Cent. R. Co., 54 Mich. 273, 20 N. W. 71.

Missouri.— Hutchinson *v.* Missouri Pac. R. Co., 195 Mo. 546, 93 S. W. 931.

New York.— Grathwohl *v.* New York Cent., etc., R. Co., 116 N. Y. App. Div. 176, 101 N. Y. Suppl. 667; Henavie *v.* New York Cent., etc., R. Co., 10 N. Y. App. Div. 64, 41 N. Y. Suppl. 935; Conway *v.* Troy, etc., R. Co., 1 N. Y. St. 587.

Texas.— Shetter *v.* Ft. Worth, etc., R. Co., 30 Tex. Civ. App. 536, 71 S. W. 31.

Vermont.— French *v.* Grand Trunk R. Co., 76 Vt. 441, 58 Atl. 722.

See 41 Cent. Dig. tit. "Railroads," § 1293; and *infra*, X, E, 4, a, (II), (B).

Negligence per se.— Where a trespasser is warned of a train approaching from the rear, which he could have seen and heard, and where he answers the warning indicating that he knows of its approach but notwithstanding the warning he fails to leave the track, he is guilty of contributory negligence as a matter of law. Bessent *v.* Southern R. Co., 132 N. C. 934, 34 S. E. 648.

13. Dull *v.* Cleveland, etc., R. Co., 21 Ind. App. 571, 52 N. E. 1013; Craddock *v.* Louisville, etc., R. Co., 16 S. W. 125, 13 Ky. L. Rep. 18; Prewitt *v.* Eddy, 115 Mo. 283, 21 S. W. 742; Galveston, etc., R. Co. *v.* Haas, 19 Tex. Civ. App. 645, 48 S. W. 540. And see *infra*, X, E, 4, a, (V).

14. McManamee *v.* Missouri Pac. R. Co., 135 Mo. 440, 37 S. W. 119; Leduke *v.* St. Louis, etc., R. Co., 4 Mo. App. 485; Glenn *v.* Norfolk, etc., R. Co., 128 N. C. 184, 38 S. E. 812; Galveston, etc., R. Co. *v.* Haas, 19 Tex. Civ. App. 645, 48 S. W. 540; Lewis *v.* Puget Sound Southern R. Co., 4 Wash. 188, 29 Pac. 1061. And see *infra*, X, E, 4, a, (V).

15. Houston, etc., R. Co. *v.* Richards, 59 Tex. 373.

16. Illinois Cent. R. Co. *v.* Willis, 123 Ky. 636, 97 S. W. 21, 29 Ky. L. Rep. 1187; Prewitt *v.* Eddy, 115 Mo. 283, 21 S. W. 742. And see *infra*, X, E, 6.

17. See *infra*, X, E, 4, a, (V).

18. Northern Cent. R. Co. *v.* Price, 29 Md. 420, 96 Am. Dec. 545.

19. *Arkansas.*— Little Rock, etc., R. Co. *v.* Parkhurst, 36 Ark. 371.

his negligence is the proximate cause of the injury and will bar his recovery.[20] But where his negligent act is a prior, distinct, and independent transaction from that of the railroad company, it is a remote cause of the injury and will not bar a recovery if the injury could have been prevented by the exercise of reasonable care, and prudence on the part of the railroad company.[21]

(II) *FAILURE TO LOOK AND LISTEN*[22] — (A) *In General.* Although a person crossing or traveling along a railroad track is not absolutely bound to see or hear an approaching train,[23] it is his duty to listen and keep a lookout for approaching trains or cars,[24] in both directions,[25] and to continue looking and listening

California.— Ryall *v.* Central Pac. R. Co., 76 Cal. 474, 18 Pac. 430.

Florida.— Seaboard Air Line R. Co. *v.* Smith, 53 Fla. 375, 43 So. 235.

Maryland.— Northern Cent. R. Co. *v.* State, 29 Md. 420, 96 Am. Dec. 545.

New Hampshire.— Shannon *v.* Boston, etc., R. Co., 71 N. H. 286, 51 Atl. 1074.

North Carolina.— Smith *v.* Norfolk, etc., R. Co., 114 N. C. 728, 19 S. E. 863, 923, 25 L. R. A. 287.

Texas.— Gulf, etc., R. Co. *v.* Bryant, (Civ. App. 1902) 66 S. W. 804.

See 41 Cent. Dig. tit. "Railroads," § 1296.

Contributory negligence must be subsequent to the discovery of the injured party's peril to constitute a defense, where the complaint counts on the railroad company's negligence in not observing due care after discovering his peril. Alabama Great Southern R. Co. *v.* Burgess, 116 Ala. 509, 22 So. 913.

20. Neal *v.* Carolina Cent. R. Co., 126 N. C. 634, 36 S. E. 117, 49 L. R. A. 684; Smith *v.* Norfolk, etc., R. Co., 114 N. C. 728, 19 S. E. 863, 923, 25 L. R. A. 287; Little Schuylkill Nav., etc., Co. *v.* Norton, 24 Pa. St. 465, 64 Am. Dec. 672.

21. Pollard *v.* Maine Cent. R. Co., 87 Me. 51, 32 Atl. 735; Fitzgibbons *v.* Manhattan R. Co., 88 N. Y. Suppl. 241; Smith *v.* Norfolk, etc., R. Co., 114 N. C. 728, 19 S. E. 863, 923, 25 L. R. A. 287. And see *infra*, X, E, 6.

22. **Duty of children and others under disability to look and listen** see *infra*, X, E, 4, a, (IV).

Duty of persons at crossings to look and listen see *infra*, X, F, 10, d.

23. Winslow *v.* Boston, etc., R. Co., 11 N. Y. St. 831.

24. *Colorado.*—Denver, etc., R. Co. *v.* Ryan, 17 Colo. 98, 28 Pac. 79.

Indiana.— Scudder *v.* Indianapolis, etc., R. Co., Wils. 481.

Maine.— State *v.* Maine Cent. R. Co., 77 Me. 538, 1 Atl. 673, holding that ordinary sense, prudence, and discretion require such vigilance of a traveler so far as he has an opportunity to look and listen.

Maryland.— Baltimore, etc., R. Co. *v.* Kean, 65 Md. 394, 5 Atl. 325.

New York.— Winslow *v.* Boston, etc., R. Co., 11 N. Y. St. 831.

Ohio.— Driscoll *v.* Cincinnati, etc., R. Co., 1 Ohio Cir. Ct. 493, 1 Ohio Cir. Dec. 274.

United States.— Garlich *v.* Northern Pac. R. Co., 131 Fed. 837, 67 C. C. A. 237.

See 41 Cent. Dig. tit. "Railroads," § 1305; and cases cited *infra*, notes 25–37.

Where the person is unable by any care to avoid the danger from an approaching train, the duty to look and listen does not devolve upon him. Baltimore, etc., R. Co. *v.* Kean, 65 Md. 394, 5 Atl. 325, holding this to be true where the injured party's foot had become so fastened that he could not escape from the impending danger.

Persons walking on tracks are bound to apprehend that locomotives may be swiftly approaching at any time and to be on the watch for them and leave the track in time to avoid injury. Copp *v.* Maine Cent. R. Co., 100 Me. 568, 62 Atl. 735.

Where the use of his senses is interfered with by obstructions or noises, ordinary care calls for proportionately increased vigilance. Garlich *v.* Northern Pac. R. Co., 131 Fed. 837, 67 C. C. A. 237.

25. *Arkansas.*— St. Louis, etc., R. Co. *v.* Taylor, 64 Ark. 364, 42 S. W. 831.

Colorado.— Denver, etc., R. Co. *v.* Ryan, 17 Colo. 98, 28 Pac. 79.

Illinois.— Austin *v.* Chicago, etc., R. Co., 91 Ill. 35; Southeast, etc., R. Co. *v.* Stotlar, 43 Ill. App. 94.

New York.— Ominger *v.* New York Cent., etc., R. Co., 4 Hun 159, 6 Thomps. & C. 498.

Virginia.— Norfolk, etc., R. Co. *v.* Denny, 106 Va. 383, 56 S. E. 321; Savage *v.* Southern R. Co., 103 Va. 422, 49 S. E. 484.

United States.— Owens *v.* Pennsylvania R. Co., 41 Fed. 187.

See 41 Cent. Dig. tit. "Railroads," § 1305.

One about to cross a railroad track is bound to select, if he can safely do so, such a point as will enable him to see along the track both ways. Owens *v.* Pennsylvania R. Co., 41 Fed. 187.

That cars are left in such a position as to obstruct the view in one direction does not excuse one about to cross from looking in that direction. Owens *v.* Pennsylvania R. Co., 41 Fed. 187.

The practice of running trains going in one direction on a certain track and of those going in an opposite direction on a certain other track does not excuse one who walks upon such tracks from the duty of looking in both directions for approaching trains. Lake Shore, etc., R. Co. *v.* Hart, 87 Ill. 529; Kinnare *v.* Chicago, etc., R. Co., 57 Ill. App. 153.

To walk along the middle of a track on a dark night without looking in both directions for a train and without listening is gross negligence. White *v.* Illinois Cent. R. Co., 114 La. 825, 38 So. 574.

until he is out of danger;[26] and if he goes along heedlessly with his head covered or his ears muffled,[27] or otherwise allows his attention to become so absorbed that he gives no heed to the danger by reason whereof he is injured, he is guilty of contributory negligence precluding a recovery,[28] unless the injury be wilfully

26. *Colorado.*— Denver, etc., R. Co. *v.* Buffehr, 30 Colo. 27, 69 Pac. 582.

New York.— Scott *v.* Pennsylvania R. Co., 130 N. Y. 679, 29 N. E. 289 [*reversing* 56 Hun 640, 9 N. Y. Suppl. 189]; Hudson *v.* Erie R. Co., 61 N. Y. App. Div. 134, 70 N. Y. Suppl. 350, holding that a person is guilty of contributory negligence in not looking in a certain direction when he is at such a distance from the track that such precaution would enable him to avoid the injury, although he had looked before.

Pennsylvania.— Culp *v.* Delaware, etc., R. Co., 9 Kulp 174.

Texas.— Gulf, etc., R. Co. *v.* Wilkins, (Civ. App. 1895) 32 S. W. 351.

Virginia.— Chesapeake, etc., R. Co. *v.* Rogers, 100 Va. 324, 41 S. E. 732.

Wisconsin.— Nolan *v.* Milwaukee, etc., R. Co., 91 Wis. 16, 64 N. W. 319.

United States.— Kansas City, etc., R. Co. *v.* Cook, 66 Fed. 115, 13 C. C. A. 364, 28 L. R. A. 181.

See 41 Cent. Dig. tit. "Railroads," § 1305.

27. *Colorado.*— Denver, etc., R. Co. *v.* Buffehr, 30 Colo. 27, 69 Pac. 582, holding that where a person walks between the rails in the same direction in which the train is going, with an umbrella over his shoulder and without looking around after going on the track, and the train which caused the injury started from a station on an up grade necessarily making a noise, he is guilty of contributory negligence as a matter of law.

Missouri.— Yancey *v.* Wabash, etc., R. Co., 93 Mo. 433, 6 S. W. 272.

New York.— Scott *v.* Pennsylvania R. Co., 130 N. Y. 679, 29 N. E. 289 [*reversing* 56 Hun 640, 9 N. Y. Suppl. 189].

Texas.— Gulf, etc., R. Co. *v.* York, 74 Tex. 364, 12 S. W. 68, holding that a person cannot recover for injuries received by being struck by an engine while walking on the ends of ties on a stormy night with his hat pulled over his eyes and looking straight down.

Wisconsin.— Rothe *v.* Milwaukee, etc., R. Co., 21 Wis. 256.

United States.— Reynolds *v.* Great Northern R. Co., 69 Fed. 808, 16 C. C. A. 435, 29 L. R. A. 695, verdict for defendant held properly directed.

See 41 Cent. Dig. tit. "Railroads," § 1310.

28. *Alabama.*— Louisville, etc., R. Co. *v.* Hairston, 97 Ala. 351, 12 So. 299, although he was not a trespasser.

California.— Trousclair *v.* Pacific Coast Steam-Ship Co., 80 Cal. 521, 22 Pac. 258.

Georgia.— Southern R. Co. *v.* Barfield, 112 Ga. 181, 37 S. E. 386; East Tennessee, etc., R. Co. *v.* Hartley, 73 Ga. 5.

Illinois.— Austin *v.* Chicago, etc., R. Co., 91 Ill. 35; Southeast, etc., R. Co. *v.* Stotlar, 43 Ill. App. 94.

Iowa.— Yeager *v.* Atchison, etc., R. Co., 94 Iowa 46, 62 N. W. 672; Bryson *v.* Chicago, etc., R. Co., 89 Iowa 677, 57 N. W. 430.

Kansas.— Limb *v.* Kansas, etc., R. Co., 73 Kan. 220, 84 Pac. 136.

Maryland.— Baltimore, etc., R. Co. *v.* State, 54 Md. 648.

Massachusetts.— Cole *v.* New York, etc., R. Co., 174 Mass. 537, 55 N. E. 1044.

Missouri.— Koegel *v.* Missouri Pac. R. Co., 181 Mo. 379, 80 S. W. 905; Burde *v.* Chicago, etc., R. Co., 123 Mo. App. 629, 100 S. W. 509.

New York.— Winslow *v.* Boston, etc., R. Co., 11 N. Y. St. 841.

North Carolina.— McAdoo *v.* Richmond, etc., R. Co., 105 N. C. 140, 11 S. E. 316.

Ohio.— Cleveland, etc., R. Co. *v.* Stein, 24 Ohio Cir. Ct. 643; Driscoll *v.* Cincinnati, etc., R. Co., 1 Ohio Cir. Ct. 493, 1 Ohio Cir. Dec. 274.

Pennsylvania.— Bourke *v.* Delaware, etc., R. Co., 1 Lack. Leg. Rec. 108.

Texas.— St. Louis Southwestern R. Co. *v.* Hunt, (Civ. App. 1907) 100 S. W. 968, holding that where decedent, not employed by defendant, got upon a locomotive in order to ride thereon, and jumped off without looking or listening, and immediately stepped upon another track in front of a moving car, which ran over him, he was guilty of contributory negligence.

Virginia.— Southern R. Co. *v.* Bruce, 97 Va. 92, 33 S. E. 548.

United States.— Kirtley *v.* Chicago, etc., R. Co., 65 Fed. 386; Missouri Pac. R. Co. *v.* Mosely, 57 Fed. 921, 6 C. C. A. 641.

See 41 Cent. Dig. tit. "Railroads," § 1305.

Illustrations.— Thus it is contributory negligence for a man in vigorous bodily and mental health, with good hearing and sight, with nothing to obstruct his vision, to step on or along a railroad track upon which part of a freight train is backing at a rate of eight miles an hour, whereby he is overtaken and killed (King *v.* Illinois Cent. R. Co., 114 Fed. 855, 52 C. C. A. 489); or for one who goes upon a platform built so close to a track that a passing locomotive projects over it and knowing such fact, to fail to keep a lookout for trains (Chicago, etc., R. Co. *v.* Reichert, 69 Ill. App. 91). So where a person sound in body and mind deliberately sits down in the way of a train and goes to sleep or becomes so mentally absorbed as not to keep a proper lookout he is guilty of gross negligence. Teel *v.* Ohio River R. Co., 49 W. Va. 85, 38 S. E. 518.

Persons walking in the middle of a track on a dark night taking no precaution for their safety cannot throw upon the trainmen the entire duty of securing their safety through unusual vigilance and extraordinary promptness. White *v.* Illinois Cent. R. Co., 114 La. 825, 38 So. 574.

or wantonly inflicted,[29] or unless the trainmen fail to exercise ordinary care to avoid injuring him after discovering his peril.[30] Thus a person is guilty of contributory negligence in going near, upon, or along a railroad track without looking or listening when he knows or has reason to know that a train or car is due or is likely to pass at any time.[31] But where a person is lawfully upon or near the tracks, it has been held that he is not bound to look and listen if there is nothing to suggest danger from any source.[32] It has been held that it is not negligence *per se* for a person going rightfully upon or along a railroad track to fail to look or listen for an approaching train,[33] as where he has reasonable cause to believe that he is in no danger from a passing train;[34] but on the other hand it has been held contributory negligence *per se* to fail to keep a lookout or to listen at a place where it is obvious that cars and engines are likely to be moving in either direction at any time.[35] It has also been held that one who, upon approaching, crossing, or standing upon a railroad track where cars are being run, fails to look for approaching trains is *prima facie* guilty of such negligence as will prevent a recovery,[36] and that this presumption can only be rebutted by facts and circumstances, showing that it was not reasonably practicable to make or keep such lookout, or such as would ordinarily induce persons of common prudence to omit that precaution.[37]

(B) *Opportunity to See or Hear Train.* Where a person, especially one who is familiar with the locality and the running of trains, voluntarily stands upon or walks across or along a railroad track without looking and listening at a point where his view or hearing is unobstructed and where he could see or hear an approaching train in time to avoid being injured,[38] or where, although he looks

29. Austin *v.* Chicago, etc., R. Co., 91 Ill. 35; Southeast, etc., R. Co. *v.* Stotlar, 43 Ill. App. 94; Bellefontaine R. Co. *v.* Snyder, 24 Ohio St. 670. And see *infra*, X, E, 4, a, (v).

30. East Tennessee, etc., R. Co. *v.* Hartley, 73 Ga. 5; Yeager *v.* Atchison, etc., R. Co., 94 Iowa 46, 62 N. W. 672; Engelking *v.* Atlantic City, etc., R. Co., 187 Mo. 158, 86 S. W. 89. And see *infra*, X, E, 6.

31. *Arkansas.*— St. Louis, etc., R. Co. *v.* Taylor, 64 Ark. 364, 42 S. W. 831; St. Louis, etc., R. Co. *v.* Dingman, 62 Ark. 245, 35 S. W. 219.

Iowa.— Buelow *v.* Chicago, etc., R. Co., 92 Iowa 240, 60 N. W. 617; Banning *v.* Chicago, etc., R. Co., 89 Iowa 74, 56 N. W. 277.

Kentucky.— Louisville, etc., R. Co. *v.* Taafe, 106 Ky. 535, 50 S. W. 850, 21 Ky. L. Rep. 64.

Maryland.— Chesapeake Beach R. Co. *v.* Donohue, 107 Md. 119, 68 Atl. 507.

Missouri.— Engelking *v.* Kansas City, etc., R. Co., 187 Mo. 158, 86 S. W. 89; Barker *v.* Hannibal, etc., R. Co., 98 Mo. 50, 11 S. W. 254.

Ohio.— Baltimore, etc., R. Co. *v.* Depew, 40 Ohio St. 121.

Pennsylvania.— Culp *v.* Delaware, etc., R. Co., 9 Kulp 174.

Texas.— Texas, etc., R. Co. *v.* Walker, (Civ. App. 1898) 49 S. W. 642; Gulf, etc., R. Co. *v.* Wilkins, (Civ. App. 1895) 32 S. W. 351.

Wisconsin.— Nolan *v.* Milwaukee, etc., R. Co., 91 Wis. 16, 64 N. W. 319.

See 41 Cent. Dig. tit. "Railroads," § 1305.

32. Helbig *v.* Michigan Cent. R. Co., 85 Mich. 359, 48 N. W. 589.

33. Chicago, etc., R. Co. *v.* Kelly, 182 Ill. 267, 54 N. E. 979 [*affirming* 80 Ill. App. 675]; Chicago, etc., R. Co. *v.* Woolridge, 72 Ill. App. 551.

34. Bradford *v.* Boston, etc., R. Co., 160 Mass. 392, 35 N. E. 1131.

35. Jordan *v.* Chicago, etc., R. Co., 58 Minn. 8, 59 N. W. 633, 49 Am. St. Rep. 486; Heffinger *v.* Minneapolis, etc., R. Co., 43 Minn. 503, 45 N. W. 1131; Northern Pac. R. Co. *v.* Jones, 144 Fed. 47, 75 C. C. A. 205; Kansas City, etc., R. Co. *v.* Cook, 66 Fed. 115, 13 C. C. A. 364, 28 L. R. A. 181.

36. Bellefontaine R. Co. *v.* Snyder, 24 Ohio St. 670.

37. Bellefontaine R. Co. *v.* Snyder, 24 Ohio St. 670.

38. *Alabama.*— Duncan *v.* St. Louis, etc., R. Co., 152 Ala. 118, 44 So. 418.

District of Columbia.— Edgerton *v.* Baltimore, etc., R. Co., 6 App. Cas. 516.

Florida.— Seaboard Air Line R. Co. *v.* Barwick, 51 Fla. 304, 41 So. 70.

Georgia.— Dowdy *v.* Georgia R. Co., 88 Ga. 726, 16 S. E. 62.

Indiana.— Pittsburgh, etc., R. Co. *v.* Seivers, 162 Ind. 234, 67 N. E. 680, 70 N. E. 133; Ohio, etc., R. Co. *v.* Hill, 117 Ind. 56, 18 N. E. 461; Louisville, etc., R. Co. *v.* Cronbach, 12 Ind. App. 666, 41 N. E. 15.

Kansas.— Carlson *v.* Atchison, etc., R. Co., 66 Kan. 768, 71 Pac. 587.

Kentucky.— Jacobs *v.* Ohio, etc., R. Co., 45 S. W. 509, 20 Ky. L. Rep. 189.

Louisiana.— Houston *v.* Vicksburg, etc., R. Co., 39 La. Ann. 796, 2 So. 562.

Massachusetts.— Legge *v.* New York, etc., R. Co., 197 Mass. 88, 83 N. E. 367; Byrnes *v.* New York, etc., R. Co., 195 Mass. 437, 81 N. E. 187; Tully *v.* Fitchburg R. Co., 134 Mass. 499.

and listens at such point, he fails to observe an approaching train,[39] he is guilty of contributory negligence precluding a recovery, in some cases as a matter of law,[40] notwithstanding the train was running at an excessive or unlawful rate of

Minnesota.— Irving *v.* Minneapolis, etc., R. Co., 71 Minn. 9, 73 N. W. 518.

Mississippi.— Illinois Cent. R. Co. *v.* Crockett, 78 Miss. 407, 29 So. 162; Mobile, etc., R. Co. *v.* Roberts, (1898) 23 So. 393; Mobile, etc., R. Co. *v.* Stroud, 64 Miss. 784, 2 So. 171.

Missouri.— Schmitt *v.* Missouri Pac. R. Co., 160 Mo. 43, 60 S. W. 1043; Vogg *v.* Missouri Pac. R. Co., 138 Mo. 172, 36 S. W. 646; Yancey *v.* Wabash, etc., R. Co., 93 Mo. 433, 6 S. W. 272; Powell *v.* Missouri Pac. R. Co., 76 Mo. 80.

New Hampshire.— Batchelder *v.* Boston, etc., R. Co., 72 N. H. 528, 57 Atl. 926; Davis *v.* Boston, etc., R. Co., 70 N. H. 519, 49 Atl. 108, nonsuit properly entered.

New Jersey.— Cranbuck *v.* Delaware, etc., R. Co., 74 N. J. L. 473, 65 Atl. 1031; Dwojakowski *v.* New Jersey Cent. R. Co., 69 N. J. L. 601, 55 Atl. 100.

New Mexico.— Candelaria *v.* Atchison, etc., R. Co., 6 N. M. 266, 27 Pac. 497.

New York.— Van Schaick *v.* Hudson River R. Co., 43 N. Y. 527; Winn *v.* New York Cent., etc., R. Co., 65 N. Y. App. Div. 572, 72 N. Y. Suppl. 899; Comby *v.* New York Cent., etc., R. Co., 25 N. Y. App. Div. 309, 49 N. Y. Suppl. 513; Riester *v.* New York Cent., etc., R. Co., 16 N. Y. App. Div. 216, 44 N. Y. Suppl. 739; Bernhardt *v.* Rensselaer, etc., R. Co., 18 How. Pr. 427 [*reversed* on the facts in 32 Barb. 165 (*affirmed* in 1 Abb. Dec. 131, 23 How. Pr. 166)].

North Carolina.— Pharr *v.* Southern R. Co., 133 N. C. 610, 45 S. E. 1021; Neal *v.* Carolina Cent. R. Co., 126 N. C. 634, 36 S. E. 117, 49 L. R. A. 684.

Ohio.— Cincinnati, etc., R. Co. *v.* Lally, 14 Ohio Cir. Ct. 333, 7 Ohio Cir. Dec. 711, although the engine had its tender forward, with no light thereon, where those in charge of the engine were not aware that the deceased would suddenly step on the track in this manner.

Pennsylvania.— Pennsylvania R. Co. *v.* Bell, 122 Pa. St. 58, 15 Atl. 561.

Texas.— Sabine, etc., R. Co. *v.* Dean, 76 Tex. 73, 13 S. W. 45; Hughes *v.* Galveston, etc., R. Co., 67 Tex. 595, 4 S. W. 219; Texas, etc., R. Co. *v.* Barfield, (1887) 3 S. W. 665; Texas, etc., R. Co. *v.* Shivers, (Civ. App. 1907) 106 S. W. 894; International, etc., R. Co. *v.* Jackson, 41 Tex. Civ. App. 51, 90 S. W. 918; Missouri, etc., R. Co. *v.* Cowles, 29 Tex. Civ. App. 156, 67 S. W. 1078; Texas, etc., R. Co. *v.* Zachery, (Civ. App. 1894) 27 S. W. 221.

Utah.— Teakle *v.* San Pedro, etc., R. Co., 32 Utah 276, 90 Pac. 402, 10 L. R. A. N. S. 486.

Virginia.— Rangeley *v.* Southern R. Co., 95 Va. 715, 30 S. E. 386.

Wisconsin.— Schmolze *v.* Chicago, etc., R. Co., 83 Wis. 659, 53 N. W. 743, 54 N. W. 106, holding that where, if he had looked, he could have seen the locomotive for a distance of eighty rods, plaintiff was guilty of contributory negligence, although he looked up the track when near, but before he reached that point.

United States.— Missouri Pac. R. Co. *v.* Moseley, 57 Fed. 921, 6 C. C. A. 641.

See 41 Cent. Dig. tit. "Railroads," § 1307.

Illustrations.— Thus one is guilty of contributory negligence where he starts across a railroad track so near an approaching train, which he could have seen, that he is struck before he gets across (Louisville, etc., R. Co. *v.* Mitchell, 134 Ala. 261, 32 So. 735); or where he looked in one direction only and while so doing was struck by a train coming in the other direction, which he could have seen if he had looked in that direction (Pittsburgh, etc., R. Co. *v.* Seivers, 162 Ind. 234, 67 N. E. 680, 70 N. E. 133).

Excuses.— That the wind is blowing in his face and that the noise of a waterfall deadens the sound of an approaching train only renders the use of his senses the more imperative and does not excuse his failure to look and listen. Northern Pac. R. Co. *v.* Jones, 144 Fed. 47, 75 C. C. A. 205.

39. *Indiana.*— Terre Haute, etc., R. Co. *v.* Graham, 46 Ind. 239.

Maryland.— Reidel *v.* Philadelphia, etc., R. Co., 87 Md. 153, 39 Atl. 507, 67 Am. St. Rep. 328.

Minnesota.— Rogstad *v.* St. Paul, etc., R. Co., 31 Minn. 208, 17 N. W. 287.

Texas.— Gulf, etc., R. Co. *v.* Miller, 30 Tex. Civ. App. 122, 70 S. W. 25.

United States.— St. Louis Southwestern R. Co. *v.* Purcell, 135 Fed. 499, 68 C. C. A. 211.

See 41 Cent. Dig. tit. "Railroads," § 1307.

40. *Alabama.*— Williams *v.* Georgia Cent. R. Co., (1905) 40 So. 145.

California.— Trousclair *v.* Pacific Coast Steam-Ship Co., 80 Cal. 521, 22 Pac. 258.

Colorado.— Colorado, etc., R. Co. *v.* Sonne, 34 Colo. 206, 83 Pac. 383.

Illinois.— Wilson *v.* Illinois Cent. R. Co., 210 Ill. 603, 71 N. E. 398 [*affirming* 109 Ill. App. 542].

Iowa.— Johnson *v.* Chicago, etc., R. Co., 91 Iowa 248, 59 N. W. 66.

Maryland.— Baltimore, etc., R. Co. *v.* State, 69 Md. 551, 16 Atl. 212.

Michigan.— Spaven *v.* Lake Shore, etc., R. Co., 130 Mich. 579, 90 N. W. 325.

Minnesota.— Rogstad *v.* St. Paul, etc., R. Co., 31 Minn. 208, 17 N. W. 287; Smith *v.* Minneapolis, etc., R. Co., 26 Minn. 419, 4 N. W. 782.

Missouri.— Tanner *v.* Missouri Pac. R. Co., 161 Mo. 497, 61 S. W. 826.

New York.— Keller *v.* Erie R. Co., 183 N. Y. 67, 75 N. E. 965 [*affirming* 98 N. Y. App. Div. 550, 100 N. Y. App. Div. 509, 90 N. Y. Suppl. 236].

Texas.— Gulf, etc., R. Co. *v.* Miller, 30 Tex. Civ. App. 122, 70 S. W. 25.

speed,[41] or without giving the required or proper signals;[42] unless those in charge of the train failed to exercise ordinary care to avoid injuring him after discovering his peril,[43] or unless they wilfully, wantonly, or recklessly caused the injury.[44] In the event of an injury in such cases, it will be presumed either that the party injured did not look or listen at all, or if he did so, that he did not heed what he saw or heard.[45] But where he looks and listens, and by reason of an obstruction to his view or hearing he fails to see or hear the train in time to avoid being injured by it, contributory negligence cannot be attributed to him,[46] unless such obstruction is voluntarily caused by himself.[47] It has been held that where such person's view is obstructed by steam and smoke, it is his duty to stop until the steam and smoke have disappeared and rendered approaching trains visible.[48]

(c) *Attention Attracted by Other Trains or Cars.* It is contributory negligence in one, particularly where he is familiar with the locality and running of trains, to allow his attention to become absorbed by other trains or cars so that he fails to observe the approaching train or car by which he is injured, and which by the exercise of ordinary care might have been discovered in time to avoid the injury.[49]

West Virginia.— Raines *v.* Chesapeake, etc., R. Co., 39 W. Va. 50, 19 S. E. 565, 24 L. R. A. 226.

United States.— Garlich *v.* Northern Pac. R. Co., 131 Fed. 837, 67 C. C. A. 237; Dunworth *v.* Grand Trunk Western R. Co., 127 Fed. 307, 62 C. C. A. 225.

See 41 Cent. Dig. tit. "Railroads," § 1307.

To stand on a railroad track for two or three minutes in front of an approaching train which can be seen for three fourths of a mile, without taking any precautions, whereby one is struck by such train, is contributory negligence as a matter of law. Dull *v.* Cleveland, etc., R. Co., 21 Ind. App. 571, 52 N. E. 1013.

41. Reidel *v.* Philadelphia, etc., R. Co., 87 Md. 153, 39 Atl. 507, 67 Am. St. Rep. 328; Baltimore, etc., R. Co. *v.* State, 69 Md. 551, 16 Atl. 212 (exceeding rate prescribed by ordinance); Mobile, etc., R. Co. *v.* Stroud, 64 Miss. 784, 2 So. 171; Yancey *v.* Wabash, etc., R. Co., 93 Mo. 433, 6 S. W. 272; Powell *v.* Missouri Pac. R. Co., 76 Mo. 80 (unusual rate of speed); Neal *v.* Carolina Cent. R. Co., 126 N. C. 634, 36 S. E. 117, 49 L. R. A. 684. And see *infra*, X, E, 4, a, (v).

Where a pedestrian walking along a track laid in a public street sees, or can, if he looks, see an approaching train in time to avoid it, the fact that the company fails to give the statutory signals and runs a train at an unlawful rate of speed does not excuse him from exercising proper care to avoid injury. Pittsburgh, etc., R. Co. *v.* Bennett. 9 Ind. App. 92, 35 N. E. 1033; Galveston, etc., R. Co. *v.* Haas, 19 Tex. Civ. App. 645, 48 S. W. 540.

42. *Georgia.*— Dowdy *v.* Georgia R. Co., 88 Ga. 726, 16 S. E. 62.

Missouri.— Schmitt *v.* Missouri Pac. R. Co., 160 Mo. 43, 60 S. W. 1043.

New Hampshire.— Davis *v.* Boston, etc., R. Co., 70 N. H. 519, 49 Atl. 108.

North Carolina.— Neal *v.* Carolina Cent. R. Co., 126 N. C. 634, 36 S. E. 117, 49 L. R. A. 684.

United States.— Missouri Pac. R. Co. *v.* Moseley, 57 Fed. 921, 6 C. C. A. 641.

See 41 Cent. Dig. tit. "Railroads," § 1307; and *infra*, X, E, 4, a, (v).

43. Terre Haute, etc., R. Co. *v.* Graham, 46 Ind. 239; Teakle *v.* San Pedro, etc., R. Co., 32 Utah 276, 90 Pac. 402, 10 L. R. A. N. S. 486. And see *infra*, X, E, 6.

44. Williams *v.* Georgia Cent. R. Co., (Ala. 1906) 40 So. 143; Spaven *v.* Lake Shore, etc., R. Co., 130 Mich. 579, 90 N. W. 325. And see *infra*, X, E, 4, a, (v).

45. Ohio, etc., R. Co. *v.* Hill, 117 Ind. 56, 18 N. E. 461.

Conclusiveness of presumption.—**Where** one is struck by a moving train which was plainly visible from the point he occupied when it became his duty to look and listen, he must be conclusively presumed to have disregarded the rule of law and of common prudence, and to have gone negligently into the obvious danger. Lien *v.* Chicago, etc., R. Co., 79 Mo. App. 475.

46. Chicago, etc., R. Co. *v.* Ryan, 70 Ill. 211.

47. Carlson *v.* Atchison, etc., R. Co., 66 Kan. 768, 71 Pac. 587; Kilbride *v.* New York Cent., etc., R. Co., 17 N. Y. App. Div. 177, 45 N. Y. Suppl. 302, holding that a person is guilty of contributory negligence where he walks in daylight on the side of a high wagon which obstructs his view of the railroad tracks and steps from behind the wagon on the track immediately in front of the engine which strikes him.

48. Keller *v.* Erie R. Co., 183 N. Y. 67, 75 N. E. 965 [*affirming* 98 N. Y. App. Div. 550, 100 N. Y. App. Div. 509, 90 N. Y. Suppl. 236].

49. *Alabama.*— Ensley R. Co. *v.* Chewning, 93 Ala. 24, 9 So. 458, 100 Ala. 493, 14 So. 204.

Illinois.— Austin *v.* Chicago, etc., R. Co., 91 Ill. 35.

Iowa.— Richards *v.* Chicago, etc., R. Co., 81 Iowa 426, 47 N. W. 63.

Kentucky.— Illinois Cent. R. Co. *v.* Dick, 91 Ky. 434, 15 S. W. 665, 12 Ky. L. Rep. 772.

Michigan.— Farmer *v.* Michigan Cent. R. Co., 99 Mich. 131, 58 N. W. 45; Mahlen *v.*

But it has been held that it is not negligence as a matter of law for a person to permit his attention to be diverted from the place where he is walking to an approaching train by reason of which his foot is caught in the rails and crushed by such train.[50]

(D) *Stepping on Track Behind Passing Trains or Cars.* To step on a railroad track immediately behind a passing train, engine, or car, without looking in both directions, by reason of which the person so doing is injured by a following train or car, or by the passing train or car immediately backing, is contributory negligence precluding a recovery,[51] where such person's peril is not discovered in time to stop the train or car and prevent the accident.[52]

(III) *Reliance Upon Precautions of Railroad Company.* It is a fact to be considered, in determining whether a person injured was himself in the exercise of ordinary care, that persons going rightfully upon or along a railroad track have a right to rely upon the presumption that the railroad company will operate its trains with the rightful and proper precautions,[53] as that it will give the usual or statutory signals or warnings,[54] and will not run its trains or cars at an excessive

Lake Shore, etc., R. Co., 49 Mich. 585, 14 N. W. 556.

Minnesota.— Johnson *v.* Truesdale, 46 Minn. 345, 48 N. W. 1136.

Missouri.— Eppstein *v.* Missouri Pac. R. Co., 197 Mo. 720, 94 S. W. 967; Maxey *v.* Missouri Pac. R. Co., 113 Mo. 1, 20 S. W. 654.

Texas.— Wilson *v.* Ft. Worth, etc., R. Co., (Civ. App. 1894) 26 S. W. 753.

Virginia.— Norfolk, etc., R. Co. *v.* Wilson, 90 Va. 263, 18 S. E. 35.

Wisconsin.— Delaney *v.* Milwaukee, etc., R. Co., 33 Wis. 67.

See 41 Cent. Dig. tit. "Railroads," § 1308.

To step from one track to avoid a passing train to another upon which an engine is approaching, without looking or listening, whereby an injury results, is contributory negligence. Michigan Cent. R. Co. *v.* Campau, 35 Mich. 468.

50. Goodrich *v.* Burlington, etc., R. Co., 103 Iowa 412, 72 N. W. 653.

51. Martin *v.* Georgia R., etc., Co., 95 Ga. 361, 22 S. E. 626 (nonsuit granted); Louisville, etc., R. Co. *v.* Schmetzer, 94 Ky. 424, 22 S. W. 603, 15 Ky. L. Rep. 194; Donaldson *v.* Milwaukee, etc., R. Co., 21 Minn. 293; Illinois Cent. R. Co. *v.* Lee, 71 Miss. 895, 16 So. 349.

52. Martin *v.* Georgia R., etc., Co., 95 Ga. 361, 22 S. E. 626; Louisville, etc., R. Co. *v.* Schmetzer, 94 Ky. 424, 22 S. W. 603, 15 Ky. L. Rep. 194.

53. Goodfellow *v.* Boston, etc., R. Co., 106 Mass. 461. And see CARRIERS, 6 Cyc. 643 text and note 85.

An employee of a railroad company has the right to act upon the presumption that another company using the track will conform to the rules of his company, as to signals and stops (Roll *v.* Northern Cent. R. Co., 15 Hun (N. Y. 496 [*affirmed* in 80 N. Y. 647]); as that it will comply with the rules of his company requiring a brakeman on cars set in motion to be in a position to enable him to perceive danger (Noonan *v.* New York Cent., etc., R. Co., 16 N. Y. Suppl. 678 [*affirmed* in 131 N. Y. 594, 30 N. E. 67], holding therefore that an employee working upon the track and omitting to pay attention to the movements of approaching trains in reliance upon such rules is not guilty of contributory negligence as a matter of law).

That its freight cars will be loaded in the usual mode, and not with timbers projecting beyond the sides, may be presumed. Kansas Pac. R. Co. *v.* Ward, 4 Colo. 30.

54. Sonier *v.* Boston, etc., R. Co., 141 Mass. 10, 6 N. E. 84 (holding that the mere fact that one having the right to cross the track relied upon such signals and did not look to see if a train was approaching is not conclusive of a want of due care on his part); Goodfellow *v.* Boston, etc., R. Co., 106 Mass. 461; Mark *v.* St. Paul, etc., R. Co., 32 Minn. 208, 20 N. W. 131; Carroll *v.* Minnesota Valley R. Co., 14 Minn. 57; Stanley *v.* Durham, etc., R. Co., 120 N. C. 514, 27 S. E. 27 (holding that a person walking at night on a railroad track along which the public were accustomed to walk is not required to be on the lookout for trains without lights and showing no signals); International, etc., R. Co. *v.* Woodward, 26 Tex. Civ. App. 389, 63 S. W. 1051.

A person rightfully on a track in a public street has a right to presume and act on the belief that the railroad company will not move its locomotives or cars thereon without giving the usual or statutory signals (Illinois Terminal R. Co. *v.* Mitchell, 214 Ill. 151, 73 N. E. 449; Toledo, etc., R. Co. *v.* Hammett, 115 Ill. App. 268 [*reversed* on other grounds in 220 Ill. 9, 77 N. E. 72]; Chicago, etc., R. Co. *v.* Murowski, 78 Ill. App. 661; McWilliams *v.* Detroit Cent. Mills Co., 31 Mich. 274; Solen *v.* Virginia, etc., R. Co., 13 Nev. 106); and where he is injured by the sudden backing of a standing train without warning, there would need to be very positive proof of negligence on his part to defeat his right of recovery (McWilliams *v.* Detroit Cent. Mills Co., *supra*).

Persons crossing a track where they have a right to cross, and where their presence should be anticipated, may rely upon the fact that some lookout will be kept or warning given of the approach of trains, and in

or unlawful rate of speed;[55] but this rule does not mean that such person may rely entirely upon a proper performance on the part of the railroad company of its duties, and omit the exercise of all ordinary care on his own part,[56] and no inference of due care on the part of such person can be drawn from the mere fact of negligence on the part of the company,[57] unless the company, by its conduct, has misled him and thereby in effect induced him into a position of peril.[58] If such a person fails to exercise ordinary care for his own safety he is not excused by the fact that the railroad company failed to give the proper or statutory signals,[59] or that the train was running at an excessive or unlawful rate of speed.[60] The fact that the person injured knew that the railroad company habitually violated the law in the running of its trains will not make him guilty of contributory negligence in not assuming that the train by which he was injured would be so run.[61]

(IV) *Children and Others Under Disability*[62] — (A) *Children* — (1) In General. A child going upon or near a railroad track is not required to exercise the same degree of care as is a person of mature years;[63] but he is bound to exercise such care and precaution as may be reasonably expected of a child of his age and capacity, under like circumstances,[64] and his failure to do so is

the absence of a warning signal it is not conclusive evidence of negligence to go upon the track, although by looking or listening an approaching train might have been seen or heard. Davis *v.* Louisville, etc., R. Co., 97 S. W. 1122, 30 Ky. L. Rep. 172, 99 S. W. 930, 30 Ky. L. Rep. 946.

A person on a foothpath near where pedestrians are accustomed to trespass on a railroad track in a city has a right to presume that a train will not be backed along the track without warning, especially when a fair or other cause of unusual congregating is in progress in the vicinity. Kansas Pac. R. Co. *v.* Ward, 4 Colo. 30.

A person walking over a railroad bridge cannot rely on signals which are for the use of the employees of the company in running its train and not for the benefit of the public. Chesapeake, etc., R. Co. *v.* Rodgers, 100 Va. 324, 41 S. E. 732.

55. Kellny *v.* Missouri Pac. R. Co., 101 Mo. 67, 13 S. W. 806, 8 L. R. A. 783.

A person traveling on a railroad track in a public street has a right to assume in the absence of any indication to the contrary that the railroad company will obey an ordinance limiting the speed of trains in the city. Illinois Terminal R. Co. *v.* Mitchell, 214 Ill. 151, 73 N. E. 449; Lake Erie, etc., R. Co. *v.* Brafford, (Ind. App. 1896) 43 N. E. 882; Kellny *v.* Missouri Pac. R. Co., 101 Mo. 67, 13 S. W. 806, 8 L. R. A. 783.

56. Garlich *v.* Northern Pac. R. Co., 131 Fed. 837, 67 C. C. A. 237.

57. Pittsburgh, etc., R. Co. *v.* Bennett, 9 Ind. App. 92, 35 N. E. 1033.

58. Pittsburgh, etc., R. Co. *v.* Bennett, 9 Ind. App. 92, 35 N. E. 1033.

59. Harty *v.* New Jersey Cent. R. Co., 42 N. Y. 468, holding that it is gross negligence for a person to step upon a railroad track in front of an approaching train without using the precaution of looking, even though no signal was given as required by law. And see *supra*, X, E, 4, a, (I), (H); X, E, 4, a, (II), (B).

60. Pittsburgh, etc., R. Co. *v.* Bennett, 9 Ind. App. 92, 35 N. E. 1033; Galveston, etc., R. Co. *v.* Haas, 19 Tex. Civ. App. 645, 48 S. W. 540.

That a train is being run at a greater rate of speed than allowed by ordinance does not relieve persons crossing or walking along the tracks from the exercise of ordinary care. Jelinski *v.* Belt R. Co., 86 Ill. App. 535; Garlich *v.* Northern Pac. R. Co., 131 Fed. 837, 67 C. C. A. 237, holding that while such violation may be evidence of the company's negligence, it does not affect the right of the company to set up the defense of contributory negligence in an action for the injury.

61. Hasie *v.* Alabama, etc., R. Co., 78 Miss. 413, 28 So. 941, 84 Am. St. Rep. 632.

62. **Accidents at crossings** see *infra*, X, F, 10, b.

Contributory negligence of children dependent upon age and capacity in general see Negligence, 29 Cyc. 535.

Contributory negligence of parent or custodian imputable to child see Negligence, 29 Cyc. 552.

Contributory negligence of parents preventing recovery for injuries to child see Parent and Child, 29 Cyc. 1643.

63. *Illinois.*— Chicago, etc., R. Co. *v.* Murray, 71 Ill. 601.

Kansas.— Atchison, etc., R. Co. *v.* Todd, 54 Kan. 551, 38 Pac. 804.

Nebraska.— Omaha, etc., R. Co. *v.* Morgan, 40 Nebr. 604, 59 N. W. 81.

New York.— Casey *v.* New York Cent., etc., R. Co., 6 Abb. N. Cas. 104 [*affirmed* in 78 N. Y. 518].

Utah.— Young *v.* Clark, 16 Utah 42, 52 Pac. 832.

See 41 Cent. Dig. tit. "Railroads," § 1297.

64. *Arkansas.*— St. Louis, etc., R. Co. *v.* Sparks, (1906) 99 S. W. 73.

Illinois.— Chicago, etc., R. Co. *v.* Murray, 71 Ill. 601; Illinois Cent. R. Co. *v.* Jernigan, 101 Ill. App. 1 [*affirmed* in 198 Ill. 297, 65 N. E. 88].

negligence which will defeat a recovery for any injury sustained thereby.[65] In such cases the question whether there is contributory negligence is to be determined from the age and intelligence of the child, and his ability to understand the dangers of the place where the injury occurred;[66] and it is ordinarily a question for the jury whether in a particular case a child was capable of contributory negligence,[67] and whether in view of his age and intelligence and the surrounding circumstances, he was guilty of such negligence;[66] although it may be declared

Kansas.— Atchison, etc., R. Co. *v.* Todd, 54 Kan. 551, 38 Pac. 804.

Kentucky.— Willis *v.* Maysville, etc., R. Co., 92 S. W. 604, 29 Ky. L. Rep. 178; East Tennessee Coal Co. *v.* Harshaw, 29 S. W. 289, 16 Ky. L. Rep. 526.

Missouri.— Graney *v.* St. Louis, etc., R. Co., 140 Mo. 89, 41 S. W. 246, 38 L. R. A. 633, 38 S. W. 969; Thompson *v.* Missouri, etc., R. Co., 93 Mo. App. 548, 67 S. W. 693.

Nebraska.— Omaha, etc., R. Co. *v.* Morgan, 40 Nebr. 604, 59 N. W. 81.

New York.— Casey *v.* New York Cent., etc., R. Co., 6 Abb. N. Cas. 104 [*affirmed* in 78 N. Y. 518].

Utah.— Young *v.* Clark, 16 Utah 42, 50 Pac. 832.

United States.— Fulton *v.* Aubrey, 74 Fed. 350, 20 C. C. A. 436; Cleveland, etc., R. Co. *v.* Tartt, 64 Fed. 830, 12 C. C. A. 625.

See 41 Cent. Dig. tit. "Railroads," § 1297.

A school-girl twelve years of age, while not presumed to have the judgment of an adult on many things, must know as well the dangers of walking on a railroad track. Smith *v.* Chicago, etc., R. Co., 99 Ill. App. 296.

Acts in emergencies.— If a child goes upon a railroad trestle or bridge to escape from cattle of which he is afraid, it is not contributory negligence on his part. Cassida *v.* Oregon R., etc., Co., 14 Oreg. 551, 13 Pac. 438.

65. *Georgia.*— Central R. Co. *v.* Brinson, 70 Ga. 207.

Indiana.— Cleveland, etc., R. Co. *v.* Adair, 12 Ind. App. 569, 39 N. E. 672, 40 N. E. 822.

Kansas.—Atchison, etc., R. Co. *v.* Todd, 54 Kan. 551, 38 Pac. 804.

Maryland.— McMahon *v.* Northern Cent. R. Co., 39 Md. 438.

Minnesota.— Fezler *v.* Willmar, etc., R. Co., 85 Minn. 252, 88 N. W. 746.

New Jersey.— Cranbuck *v.* Delaware, etc., R. Co., 74 N. J. L. 473, 65 Atl. 1031.

Ohio.— Cleveland Terminal, etc., R. Co. *v.* Heiman, 16 Ohio Cir. Ct. 487, 9 Ohio Cir. Dec. 222; Ficker *v.* Cleveland, etc., R. Co., 9 Ohio S. & C. Pl. Dec. 804, 6 Ohio N. P. 36, 7 Ohio N. P. 600.

Pennsylvania.— Mitchell *v.* Philadelphia, etc., R. Co., 132 Pa. St. 226, 19 Atl. 28; Moore *v.* Pennsylvania R. Co., 99 Pa. St. 301, 44 Am. Rep. 106.

United States.— Butler *v.* New York Cent., etc., R. Co., 152 Fed. 976, 82 C. C. A. 330.

See 41 Cent. Dig. tit. "Railroads," § 1297.

66. Pittsburgh, etc., R. Co. *v.* Simons, 168 Ind. 333, 79 N. E. 911 [*affirming* (App. 1906) 76 N. E. 883] (holding that the appreciation of danger will not be presumed in the case of a boy eight years old); Dull *v.* Cleveland, etc., R. Co., 21 Ind. App. 571, 52 N. E. 1013 (holding that a child over seven years old and of sufficient intelligence to know the difference between danger and safety is a person *sui juris* so as to be chargeable with contributory negligence); Atchison, etc., R. Co. *v.* Todd, 54 Kan. 551, 38 Pac. 804; Payne *v.* Chicago, etc., R. Co., (Mo. 1895) 30 S. W. 148; Lange *v.* Missouri Pac. R. Co., 115 Mo. App. 582, 91 S. W. 989.

Although a child has the intelligence, education, and experience common to those of his age and knows the danger of being on a track, he may lack the discretion on account of undeveloped judgment to appreciate the danger of attempting to cross a track as an engine is approaching, so as to be free from contributory negligence. Texas, etc., R. Co. *v.* Ball, (Tex. Civ. App. 1903) 73 S. W. 420 [*reversed* on other grounds in 96 Tex. 622, 75 S. W. 4].

67. Givens *v.* Louisville, etc., R. Co., 72 S. W. 320, 24 Ky. L. Rep. 1796 (evidence held sufficient to show the child capable of contributory negligence); Thompson *v.* Missouri, etc., R. Co., 93 Mo. App. 548, 67 S. W. 693; St. Louis, etc., R. Co. *v.* Christian, 8 Tex. Civ. App. 246, 27 S. W. 932 (holding that the court has no right to assume that a boy eight years old is too young to be guilty of contributory negligence in walking on a railroad track, and that such question should be submitted to the jury).

A boy eleven years of age is presumed to have sufficient discretion to understand the danger of playing along railroad tracks, and his act of going and remaining where he incurs such danger must be considered contributory negligence. Masser *v.* Chicago, etc., R. Co., 68 Iowa 602, 27 N. W. 776. But see Holtzinger *v.* Pennsylvania R. Co., 6 Pa. Dist. 430.

68. *Arkansas.*— St. Louis, etc., R. Co. *v.* Sparks, (1906) 99 S. W. 73.

Kansas.—Atchison, etc., R. Co. *v.* Todd, 54 Kan. 551, 38 Pac. 804.

Missouri.— Graney *v.* St. Louis, etc., R. Co., 140 Mo. 89, 41 S. W. 246, 38 L. R. A. 633, 38 S. W. 969; Hicks *v.* Pacific R. Co., 64 Mo. 430, 65 Mo. 34; Lange *v.* Missouri Pac. R. Co., 115 Mo. App. 582, 91 S. W. 989; Thompson *v.* Missouri, etc., R. Co., 93 Mo. App. 548, 67 S. W. 693.

New York.— Finn *v.* Delaware, etc., R. Co., 42 N. Y. App. Div. 524, 59 N. Y. Suppl. 771; Kenyon *v.* New York Cent., etc., R. Co., 5 Hun 479 [*affirmed* in 76 N. Y. 607].

as a matter of law that he was free from such negligence, where he is of such tender years as to be incapable of contributory negligence.[69]

(2) APPLICATIONS. It is contributory negligence precluding a recovery for a child who is of sufficient age and intelligence to understand the dangers of his position to sit or lie down upon railroad tracks and go to sleep,[70] or to fail to exercise the ordinary care which may be expected of one of his age and intelligence under the circumstances, in looking and listening,[71] or in crossing near approaching trains or cars.[72]

(B) *Persons Under Physical Disability* — (1) IN GENERAL. It is the duty of one physically deficient in going upon or near a railroad track to exercise caution

Rhode Island.— Sweet *v.* Providence, etc., R. Co., 20 R. I. 785, 40 Atl. 237.

Texas.— St. Louis Southwestern R. Co. *v.* Bolton, 36 Tex. Civ. App. 87, 81 S. W. 123.

Utah.— Young *v.* Clark, 16 Utah 42, 50 Pac. 832.

Wisconsin.— Townley *v.* Chicago, etc., R. Co., 53 Wis. 626, 11 N. W. 55.

See 41 Cent. Dig. tit. "Railroads," § 1297; and *infra*, X, E, 8, e, (I), (K), (2).

That a child nearly eight years old was playing in the public street through which defendant's train regularly ran does not show negligence *per se*. Louisville, etc., R. Co. *v.* Sears, 11 Ind. App. 654, 38 N. E. 837.

It may be declared, as a matter of law, that a child was guilty of contributory negligence, where it is clear that he did not exercise such care and precaution as should reasonably be expected of one of his age and intelligence under the same circumstances. Bess *v.* Atchison, etc., R. Co., 62 Kan. 299, 62 Pac. 996; Trudell *v.* Grand Trunk R. Co., 126 Mich. 73, 85 N. W. 250, 53 L. R. A. 271; Mann *v.* Missouri, etc., R. Co., 123 Mo. App. 486, 100 S. W. 566.

69. *Illinois.*— Illinois Cent. R. Co. *v.* Jernigan, 101 Ill. App. 1 [*affirmed* in 198 Ill. 297, 65 N. E. 88].

Iowa.— Thomas *v.* Chicago, etc., R. Co., 93 Iowa 248, 61 N. W. 967; Walters *v.* Chicago, etc., R. Co., 41 Iowa 71.

Michigan.— Keyser *v.* Chicago, etc., R. Co., 56 Mich. 559, 23 N. W. 311, 56 Am. Rep. 405, child two and one-half years old.

New York.—Prendegast *v.* New York Cent., etc., R. Co., 58 N. Y. 652, child two years old.

North Carolina.—Bottoms *v.* Seaboard, etc., R. Co., 114 N. C. 699, 19 S. E. 730, 41 Am. St. Rep. 799, 25 L. R. A. 784, infant twenty-two months old.

Pennsylvania.— McMullen *v.* Pennsylvania R. Co., 132 Pa. St. 107, 19 Atl. 27, 19 Am. St. Rep. 591.

Virginia.— Norfolk, etc., R. Co. *v.* Armsby, 27 Gratt. 455.

See 41 Cent. Dig. tit. "Railroads," § 1297.

70. Raden *v.* Georgia R. Co., 78 Ga. 47 (boys seventeen years old); Krenzer *v.* Pittsburg, etc., R. Co., 151 Ind. 587, 43 N. E. 649, 52 N. E. 220, 68 Am. St. Rep. 252 (holding that special findings that a boy seven and one-half years old went to sleep on a railroad track, and that he knew that trains were run thereon, and had capacity sufficient to understand that if he remained on the track he was liable to be run over, show contributory negligence so conclusively as to prevail over a general verdict for plaintiff); St. Louis Southwestern R. Co. *v.* Shiflet, 94 Tex. 131, 58 S. W. 945 [*reversing* (Civ. App. 1900) 56 S. W. 697] (holding that the negligence consists in the position he occupies and not in his liability to go asleep); Rudd *v.* Richmond, etc., R. Co., 80 Va. 546.

Where a child is injured by a train while asleep on the track, and the persons in charge of the train, although negligent in proceeding at excessive speed and in failing to ring the bell, did not know of his presence in time to avoid the injury, the company is not liable. Krenzer *v.* Pittsburg, etc., R. Co., 151 Ind. 587, 43 N. E. 649, 52 N. E. 220, 68 Am. St. Rep. 252.

71. *Missouri.*— Payne *v.* Chicago, etc., R. Co., (1895) 30 S. W. 148, although the train was running at an unlawful rate of speed.

New York.— Le Duc *v.* New York Cent., etc., R. Co., 92 N. Y. App. Div. 107, 87 N. Y. Suppl. 364.

North Carolina.— Meredith *v.* Richmond, etc., R. Co., 108 N. C. 616, 13 S. E. 137, nonsuit held proper.

Ohio.— Cleveland, etc., R. Co. *v.* Gahan, 24 Ohio Cir. Ct. 277.

Wisconsin.— Lofdahl *v.* Minneapolis, etc., R. Co., 88 Wis. 421, 60 N. W. 795.

United States.— Cleveland, etc., R. Co. *v.* Tartt, 64 Fed. 830, 12 C. C. A. 625, unless the injury was wilfully inflicted.

72. Greshem *v.* Louisville, etc., R. Co., 24 S. W. 869, 15 Ky. L. Rep. 599; Payne *v.* Chicago, etc., R. Co., 129 Mo. 405, 31 S. W. 885; McPhillips *v.* New York, etc., R. Co., 12 Daly (N. Y.) 365; Philadelphia, etc., R. Co. *v.* Spearen, 47 Pa. St. 300, 86 Am. Dec. 544.

That a child five years old, while walking on a path twenty-two feet wide between several railroad tracks, suddenly ran on one of the tracks in front of a moving freight car and was injured does not conclusively show contributory negligence. Ficker *v.* Cleveland, etc., R. Co., 9 Ohio S. & C. Pl. Dec. 804, 6 Ohio N. P. 36, 7 Ohio N. P. 600.

Presumption of speed.—A child on or near the track has no right to presume that the train which causes the injury is running at less than the rate limited by ordinance when by looking he could see that it is moving faster, where he is a bright boy and familiar with the movements and speed of trains at the place where the injury

and prudence in proportion to his defect.[73] If his hearing is defective he should exercise greater care and caution in the use of his remaining senses;[74] and if in view of such defect he fails to take proper precautions for his safety,[75] as in failing to use proper care in looking for approaching trains,[76] he is guilty of contributory negligence precluding a recovery, unless the railroad company was wilfully, grossly, or recklessly negligent,[77] or failed to exercise ordinary care to prevent the injury after discovering his peril.[78] So it is contributory negligence for an epileptic to walk upon railroad tracks, where he falls in a fit and is struck.[79]

(2) INTOXICATED PERSONS. The fact that a person is intoxicated does not excuse him from the consequences of his contributory negligence; and if a person in such condition goes or places himself upon or near a railroad track in such a position as to be in the way of passing trains, and by reason of his condition fails to exercise proper care and precaution for his safety, he cannot recover for injuries sustained,[80] unless those in charge of the train which caused the injury could have

occurs. Graney *v.* St. Louis, etc., R. Co., 157 Mo. 666, 57 S. W. 276, 50 L. R. A. 153.

73. See Galveston, etc., R. Co. *v.* Ryon, 80 Tex. 59, 15 S. W. 588.

One of defective eyesight and hearing is guilty of contributory negligence in walking upon a railroad track at a time when a train is known to be due. Maloy *v.* Wabash, etc., R. Co., 84 Mo. 270.

74. Louisville, etc., R. Co. *v.* McCombs, 54 S. W. 179, 21 Ky. L. Rep. 1232; Schexnaydre *v.* Texas, etc., R. Co., 46 La. Ann. 288, 14 So. 513, 49 Am. St. Rep. 321. See also Houston, etc., R. Co. *v.* Harvin, (Tex. Civ. App. 1899) 54 S. W. 629.

75. Laicher *v.* New Orleans, etc., R. Co., 28 La. Ann. 320.

Illustrations.— Thus it is contributory negligence precluding a recovery, for one who is very deaf to voluntarily go on a railroad track at a time when he must know that a train is approaching and without taking any precautions for his safety (McIver *v.* Georgia, etc., R. Co., 108 Ga. 306, 33 S. E. 901); or to go upon the track in full view of a rapidly approaching train in order to cross it at a private crossing, at which it is not the practice to give signals, although no signal is given (Johnson *v.* Louisville, etc., R. Co., 91 Ky. 651, 25 S. W. 754).

That the place at which the accident occurred was constantly used by the public as a pathway does not excuse a failure of one who is very deaf to exercise reasonable care. McIver *v.* Georgia, etc., R. Co., 108 Ga. 306, 33 S. E. 901. Thus where a very deaf man voluntarily walks on a track when a regular passenger train is due, and is killed, he is guilty of contributory negligence, although that part of the track is used by the public as a pathway. Roach *v.* Atlanta, etc., R. Co., 119 Ga. 98, 45 S. E. 963.

76. *Colorado.*— Kennedy *v.* Denver, etc., R. Co., 10 Colo. 493, 16 Pac. 210, struck from behind while walking on the track.

Kansas.—Atchison, etc., R. Co. *v.* Priest, 50 Kan. 16, 31 Pac. 674.

Maryland.— State *v.* Baltimore, etc., R. Co., 69 Md. 494, 16 Atl. 210, 9 Am. St. Rep. 436, holding that such a person is bound to exercise constant watchfulness.

Mississippi.— Hackney *v.* Illinois Cent. R. Co., (1903) 33 So. 723 (holding that where deceased, who was quite deaf, was walking against the wind and rain in open daylight, and attempted to cross the track without looking up, he was guilty of such contributory negligence as to bar a recovery, although the railroad company was negligent in not keeping a lookout at that point); Turner *v.* Yazoo, etc., R. Co., (1903) 33 So. 283.

Missouri.— Carrier *v.* Missouri Pac. R. Co., 175 Mo. 470, 74 S. W. 1002.

Texas.— Galveston, etc., R. Co. *v.* Ryon, 80 Tex. 59, 15 S. W. 588, holding that where a deaf man goes upon a track and stands there unobservant of an approaching train and is killed, he is guilty of contributory negligence precluding a recovery notwithstanding the negligence of the engineer in failing to keep a lookout for persons on the track.

Virginia.— Tyler *v.* Sites, 88 Va. 470, 13 S. E. 978.

Washington.— Hamlin *v.* Columbia, etc., R. Co., 37 Wash. 448, 79 Pac. 991, holding that such a person is bound to exercise continual vigilance.

See 41 Cent. Dig. tit. "Railroads," § 1303.

77. Schexnaydre *v.* Texas, etc., R. Co., 46 La. Ann. 248, 14 So. 513, 49 Am. St. Rep. 321 (holding that where a deaf-mute uses a railroad track as a highway he assumes the risks of danger, and to render the railroad company liable for his death gross negligence amounting to malice must be shown); Hamlin *v.* Columbia, etc., R. Co., 37 Wash. 448, 79 Pac. 991. And see *infra*, X, E, 4, a, (v).

78. Turner *v.* Yazoo, etc., R. Co., (Miss. 1903) 32 So. 283, holding, however, that his peril was discovered too late to prevent the injury. And see *infra*, X, E, 6.

79. Marks *v.* Atlantic Coast-Line Co., 133 N. C. 89, 45 S. E. 468; Tyler *v.* Kelley, 89 Va. 282, 15 S. E. 509, at a point other than a public crossing.

80. *Alabama.*— Columbus, etc., R. Co. *v.* Wood, 86 Ala. 164, 5 So. 463; Memphis, etc., R. Co. *v.* Womack, 84 Ala. 149, 4 So. 618.

Georgia.— Wilds *v.* Brunswick, etc., R. Co., 82 Ga. 667, 9 S. E. 595. Under Code, § 2972, if one becomes drunk and in that con-

avoided the injury by the exercise of reasonable care after discovering his condition and perilous position,[81] or unless they wilfully or recklessly cause his injury,[82] or are guilty of such gross negligence on their part as in law amounts to a wilful neglect of duty.[83] The mere fact, however, that the party injured had been drinking will not prevent a recovery if he was not under the influence of liquor to a degree that prevented his exercising ordinary care.[84]

(v) *Effect of Contributory Negligence Generally* — (A) *In General.* In the absence of statute otherwise, it is well settled that in an action for injuries caused to one going on or near a railroad track, contributory negligence on the part of the party injured will bar a recovery, notwithstanding negligence on the part of the railroad company,[85] as in running at an excessive or unlawful

dition places himself on a railroad track, he cannot recover for injuries received whether the railroad company has been negligent or not. Southwestern R. Co. *v.* Hankerson, 61 Ga. 114.

Illinois.— Toledo, etc., R. Co. *v.* Riley, 47 Ill. 514; Illinois Cent. R. Co. *v.* Hutchinson, 47 Ill. 408.

Maryland.— Price *v.* Philadelphia, etc., R. Co., 84 Md. 506, 36 Atl. 263, 36 L. R. A. 213, sitting on track intoxicated.

Michigan.— Marquette, etc., R. Co. *v.* Handford, 39 Mich. 537, holding that where the evidence shows that the party injured was familiar with the railroad track and knew that trains frequently passed and that they ran irregularly, and he was seen standing on the track about twilight in a drunken stupor, the case should be taken from the jury on the ground of contributory negligence.

Missouri.—Ayres *v.* Wabash R. Co., 190 Mo. 228, 88 S. W. 608, sitting on end of cross tie and sinking into a drunken stupor.

Nebraska.— Union Pac. R. Co. *v.* Smith, 3 Nebr. (Unoff.) 631, 99 N. W. 813.

New York.— Harder *v.* Rome, etc., R. Co., 2 N. Y. Suppl. 70.

North Carolina.— Norwood *v.* Raleigh, etc., R. Co., 111 N. C. 236, 16 S. E. 4.

Ohio.— Balser *v.* Chicago, etc., R. Co., 9 Ohio S. & C. Pl. Dec. 523, 7 Ohio N. P. 482.

Pennsylvania.— Iam *v.* Delaware, etc., Canal Co., 142 Pa. St. 617, 21 Atl. 1012.

Texas.— Smith *v.* Fordyce, (1891) 18 S. W. 663 (going upon a railroad track in a state of intoxication and sitting down upon the track and going to sleep); Houston, etc., R. Co. *v.* Sympkins, 54 Tex. 615, 38 Am. Rep. 632.

Virginia.— Norfolk, etc., R. Co. *v.* Harman, 83 Va. 553, 8 S. E. 251.

Wisconsin.—Anderson *v.* Chicago, etc., R. Co., 87 Wis. 195, 58 N. W. 79, 23 L. R. A. 203; McDonald *v.* Chicago, etc., R. Co., 75 Wis. 121, 43 N. W. 744.

See 41 Cent. Dig. tit. "Railroads," § 1304.

It is an elementary principle that intoxication will never excuse one for failure to exercise the measure of ordinary care and prudence which is due from a sober man under the same circumstances. Smith *v.* Norfolk, etc., R. Co., 114 N. C. 728, 19 S. E. 863, 923, 25 L. R. A. 287.

It is gross negligence for a person in a state of intoxication to lie down upon a railroad track. Williams *v.* Southern Pac. R. Co., (Cal. 1885) 9 Pac. 152.

81. Williams *v.* Southern Pac. R. Co., (Cal. 1885) 9 Pac. 152; Price *v.* Philadelphia, etc., R. Co., 84 Md. 506, 36 Atl. 263, 36 L. R. A. 213; Smith *v.* Fordyce, (Tex. 1891) 18 S. W. 663. See also Hord *v.* Southern R. Co., 129 N. C. 305, 40 S. E. 69; and *infra*, X, E, 6.

82. Illinois Cent. R. Co. *v.* Hutchinson, 47 Ill. 408; Houston, etc., R. Co. *v.* Sympkins, 54 Tex. 615, 38 Am. Rep. 632. And see *infra*, X, E, 4, a, (v).

83. Illinois Cent. R. Co. *v.* Hutchinson, 47 Ill. 408.

84. Balser *v.* Chicago, etc., R. Co., 9 Ohio S. & C. Pl. Dec. 523, 7 Ohio N. P. 482. See Houston, etc., R. Co. *v.* Reason, 61 Tex. 613; Gulf, etc., R. Co. *v.* Matthews, 28 Tex. Civ. App. 92, 66 S. W. 588, 67 S. W. 788.

85. *Alabama.*— Southern R. Co. *v.* Bush, 122 Ala. 470, 26 So. 168.

Arkansas.— St. Louis, etc., R. Co. *v.* Jordan, 65 Ark. 429, 47 S. W. 115 (violation of statute requiring a lookout); St. Louis, etc., R. Co. *v.* Ross, 61 Ark. 617, 33 S. W. 1054.

California.— Trousclair *v.* Pacific Coast Steam-Ship Co., 80 Cal. 521, 22 Pac. 258.

Illinois.— Chicago, etc., R. Co. *v.* Maney, 55 Ill. App. 588.

Nebraska.— Chicago, etc., R. Co. *v.* Lilley, 4 Nebr. (Unoff.) 286, 93 N. W. 1012.

New York.— Owen *v.* Hudson River R. Co., 7 Bosw. 329 [*affirmed* in 35 N. Y. 516].

North Carolina.— Lea *v.* Durham, etc., R. Co., 129 N. C. 459, 40 S. E. 212.

Ohio.— Ohio, etc., R. Co. *v.* Hunt, 6 Ohio Dec. (Reprint) 758, 7 Am. L. Rec. 739; Such *v.* Cleveland, etc., R. Co., 2 Ohio Dec. (Reprint) 352, 2 West. L. Month. 486; Balser *v.* Chicago, etc., R. Co., 9 Ohio S. & C. Pl. Dec. 523, 7 Ohio N. P. 482.

Pennsylvania.— Little Schuylkill Nav. R., etc., Co. *v.* Norton, 24 Pa. St. 465, 64 Am. Dec. 672.

Texas.— Missouri Pac. R. Co. *v.* McKernan, 82 Tex. 204, 17 S. W. 1057.

See 41 Cent. Dig. tit. "Railroads," § 1314.

If the negligence has been mutual and concurrent in the production of the injury, no action lies for the reason that as there can be no apportionment of damages, there can be no recovery. Northern Cent. R. Co. *v.* State, 29 Md. 420, 96 Am. Dec. 545.

rate of speed,[86] or without giving the proper or required signal,[87] unless it fails to use due care and diligence to avert the accident after discovering his peril,[88] or unless it wilfully, wantonly, or recklessly causes the injury.[89] While it has been held that the injured party cannot recover within the meaning of the above rule, for injuries to which his own negligence in any way contributes,[90] the weight of authority is to the effect that contributory negligence bars a recovery only where it is concurrent and forms the proximate cause of the injury complained of,[91] for if the negligence of the railroad company is the proximate and that of the party injured merely the remote cause of the injury, an action is maintainable therefor notwithstanding the party injured may not have been entirely free from fault.[92]

(B) *Under Statutes Imposing Liability on Railroad Company.* Contributory negligence as a defense in actions under the statutes imposing a liability for damages, where a railroad company fails to exercise the statutory precautions depends upon the wording of the statute.[93] Under some statutes it is held that

86. Illinois Cent. R. Co. *v.* Willis, 123 Ky. 636, 97 S. W. 21, 29 Ky. L. Rep. 1187; Hughes *v.* Louisville, etc., R. Co., 67 S. W. 984, 23 Ky. L. Rep. 2288; Louisville, etc., R. Co. *v.* McCombs, 54 S. W. 179, 21 Ky. L. Rep. 1232; Hoover *v.* Texas, etc., R. Co., 61 Tex. 503.

Running through a town, city, or village at a rate of speed forbidden by ordinance or statute does not render the railroad company liable to one who is injured by reason of his contributory negligence. St. Louis, etc., R. Co. *v.* Andres, 16 Ill. App. 292; Pennsylvania Co. *v.* Meyers, 136 Ind. 242, 36 N. E. 32; Collins *v.* Illinois Cent. R. Co., 77 Miss. 855, 27 So. 837; Strong *v.* Canton, etc., R. Co., (Miss. 1888) 3 So. 465.

87. *Alabama.*— Mizzell *v.* Southern R. Co., 132 Ala. 504, 31 So. 86.

Kentucky.— Hughes *v.* Louisville, etc., R. Co., 67 S. W. 984, 23 Ky. L. Rep. 2288.

Massachusetts.— Byrnes *v.* New York, etc., R. Co., 195 Mass. 437, 81 N. E. 187.

Missouri.— Dlauhi *v.* St. Louis, etc., R. Co., 105 Mo. 645, 16 S. W. 281.

Texas.— Hoover *v.* Texas, etc., R. Co., 61 Tex. 503.

88. Savannah, etc., R. Co. *v.* Meadors, 95 Ala. 137, 10 So. 141; Strong *v.* Canton, etc., R. Co., (Miss. 1888) 3 So. 465; Missouri Pac. R. Co. *v.* McKernan, 82 Tex. 204, 17 S. W. 1057. And see *infra*, X, E, 6.

89. *Alabama.*— Nave *v.* Alabama Great Southern R. Co., 96 Ala. 264, 11 So. 391; Georgia Pac. R. Co. *v.* O'Shields, 90 Ala. 29, 8 So. 248.

California.— Trousclair *v.* Pacific Coast Steam-Ship Co., 80 Cal. 521, 22 Pac. 258.

Georgia.— Rome R. Co. *v.* Barnett, 89 Ga. 718, 15 S. E. 639 (holding that where the party injured could have protected himself by the use of ordinary care, a railroad company can be held liable only in case the person in charge of the engine wilfully ran the train against him or was guilty of such gross negligence and recklessness as was equivalent to wilfulness); Western, etc., R. Co. *v.* Bloomingdale, 74 Ga. 604.

Illinois.— Lake Shore, etc., R. Co. *v.* Bodemer, 139 Ill. 596, 29 N. E. 692, 32 Am. St. Rep. 218 [*affirming* 33 Ill. App. 479].

Indiana.— Pennsylvania Co. *v.* Meyers, 136 Ind. 242, 36 N. E. 32; Pennsylvania Co. *v.* Sinclair, 62 Ind. 301, 30 Am. Rep. 185; Jeffersonville, etc., R. Co. *v.* Goldsmith, 47 Ind. 43.

Mississippi.— Vicksburg, etc., R. Co. *v.* Barmore, 87 Miss. 273, 39 So. 1013, holding that where an employee of defendant, who, knowing plaintiff's perilous situation, wantonly ran over him with a railroad tricycle, contributory negligence of plaintiff was no defense.

Ohio.— Such *v.* Cleveland, etc., R. Co., 2 Ohio Dec. (Reprint) 352, 2 West. L. Month. 486.

Texas.— McDonald *v.* International, etc., R. Co., (Civ. App. 1893) 21 S. W. 774.

West Virginia.— Carrico *v.* West Virginia Cent., etc., R. Co., 35 W. Va. 389, 14 S. E. 12.

What constitutes wilful, wanton, or gross negligence see *infra*, X, E, 7.

90. Patterson *v.* Philadelphia, etc., R. Co., 4 Houst. (Del.) 103.

91. *Arkansas.*— Little Rock, etc., R. Co. *v.* Pankhurst, 36 Ark. 371.

Maryland.— Northern Cent. R. Co. *v.* State, 29 Md. 420, 96 Am. Dec. 545.

Missouri.— Kennayde *v.* Pacific R. Co., 45 Mo. 255.

Texas.— San Antonio, etc., R. Co. *v.* Jazo, (Civ. App. 1894) 25 S. W. 712.

Virginia.— Virginia Midland R. Co. *v.* White, 84 Va. 498, 5 S. E. 573, 10 Am. St. Rep. 874.

As to when contributory negligence is proximate cause see *supra*, X, E, 4, a, (I), (J).

92. Northern Cent. R. Co. *v.* State, 29 Md. 420, 96 Am. Dec. 545; Fitzgibbons *v.* Manhattan R. Co., 88 N. Y. Suppl. 341. And see *infra*, X, E, 6.

If the accident could have been avoided had there been a lookout on the rear end of a backing train, as a city ordinance required, the party injured may recover notwithstanding he was negligent in going on the track without listening or looking. Bergman *v.* St. Louis, etc., R. Co., 88 Mo. 678, 1 S. W. 384.

93. See Pittsburgh, etc., R. Co. *v.* Methven, 21 Ohio St. 586.

contributory negligence is a good defense as at common law, notwithstanding a violation of such statute by the railroad company.[94] Under other statutes, while contributory negligence is no bar to the action, it is a good defense in mitigation of damages.[95] And under others contributory negligence is no defense unless it consists of a voluntary, deliberate, wilful, and reckless exposure to danger.[96]

(c) *Comparative Negligence.*[97] The common-law doctrine of comparative negligence either has never been recognized or has been abolished in probably all jurisdictions.[98] In some jurisdictions, however, there is a modification of this doctrine by statute, under which, while the party injured is debarred from recovering for injuries caused entirely by his negligence or by his consent,[99] yet where both parties are in fault and contribute to the injury, the contributory negligence

94. Murphy *v.* Chicago, etc., R. Co., 45 Iowa 661, under Laws (1862), c. 169, § 7.

Applications.— Contributory negligence has been held a good defense under a statute making a railroad company liable for all damages resulting from neglect to keep a constant lookout on its trains for persons or property on the track (Little Rock, etc., R. Co. *v.* Smith, (Ark. 1898) 43 S. W. 969 [Act of April 8, 1891]; St. Louis Southwestern R. Co. *v.* Dingman, 62 Ark. 245, 35 S. W. 219; St. Louis, etc., R. Co. *v.* Leathers, 62 Ark. 235, 35 S. W. 216); or under a statute providing that injuries resulting in running trains at a greater speed than is permitted by ordinance shall be presumed "to have been done by the negligence of the said corporation or their agents" (Chicago, etc., R. Co. *v.* Gunderson, 65 Ill. App. 638, Rev. St. c. 114, § 87); or under a statute requiring railroad companies to construct at points where the road crosses a public highway, safe crossings and cattle-guards, and making them liable for damages caused by neglect to do so, and providing that the injured party need only prove such neglect to authorize a recovery (Ford *v.* Chicago, etc., R. Co., 91 Iowa 179, 59 N. W. 5, 24 L. R. A. 657, under Code (1873), § 1288).

95. Under Tenn. Code, §§ 1166–1168 (Milliken & V. Code, §§ 1298–1300), making a railroad company liable in case of failure to observe the precautions required, although the party injured was negligent, contributory negligence, however gross, does not operate as an absolute bar to an action against a railroad company for injuries resulting from the non-observance of the statutory precautions; but such negligence goes only in mitigation of damages. Chesapeake, etc., R. Co. *v.* Foster, 88 Tenn. 671, 13 S. W. 694, 14 S. W. 428; and Tennessee cases cited *infra*, X, E, 4, a, (v), (c) text and note 1. Under such statute the failure of an engineer to sound the alarm whistle the instant he saw a person on the track as required by statute renders the company liable for injury to such person, although he himself was guilty of contributory negligence. Hill *v.* Louisville, etc., R. Co., 9 Heisk. (Tenn.) 823.

96. Pulliam *v.* Illinois Cent. R. Co., 75 Miss. 627, 23 So. 359.

In Mississippi, where the injured party's conduct is a voluntary, deliberate, wilful, and reckless exposure he cannot recover for a violation of Code (1892), § 3549, making railroad companies liable for every injury inflicted by trains or engines backing into a passenger depot when not preceded by a servant of the company to give warning "without regard to mere contributory negligence" of the person injured (Sledge *v.* Yazoo, etc., R. Co., 87 Miss. 566, 40 So. 13; Yazoo, etc., R. Co. *v.* Metcalf, 84 Miss. 242, 36 So. 259); nor for a violation of section 3548, declaring that in the case of injury from a flying switch within a municipality, the railroad company shall be liable without regard to "mere contributory negligence" of the person injured (Pulliam *v.* Illinois Cent. R. Co., 75 Miss. 627, 23 So. 359; Alabama, etc., R. Co. *v.* Jones, 73 Miss. 110, 19 So. 105, 55 Am. St. Rep. 488), although nothing short of such conduct will bar a right of recovery in such cases (Pulliam *v.* Illinois Cent. R. Co., *supra*; Alabama, etc., R. Co. *v.* Jones, *supra*).

97. Comparative negligence in general see NEGLIGENCE, 29 Cyc. 559.

98. Cleveland, etc., R. Co. *v.* Maxwell, 59 Ill. App. 673; Kinnare *v.* Chicago, etc., R. Co., 57 Ill. App. 153; O'Keefe *v.* Chicago, etc., R. Co., 32 Iowa 467; Mynning *v.* Detroit, etc., R. Co., 59 Mich. 257, 26 N. W. 514. See, generally, NEGLIGENCE, 29 Cyc. 560.

In Illinois where the doctrine of comparative negligence formerly prevailed, it was applied in the following cases: Chicago, etc., R. Co. *v.* Dickson, 88 Ill. 431; Galena, etc., R. Co. *v.* Jacobs, 20 Ill. 478; Chicago, etc., R. Co. *v.* Des Lauriers, 40 Ill. App. 654; St. Louis, etc., R. Co. *v.* Andres, 16 Ill. App. 292; Springfield City R. Co. *v.* De Camp, 11 Ill. App. 475.

99. Florida Cent., etc., R. Co. *v.* Foxworth, 41 Fla. 1, 25 So. 338, 79 Am. St. Rep. 149.

In Georgia under Code, § 2972, there can be no recovery if the party injured could by ordinary care have avoided the consequences of the railroad company's negligence (Fulcher *v.* Georgia Cent. R. Co., 110 Ga. 327, 35 S. E. 280; White *v.* Central R., etc., Co., 83 Ga. 595, 10 S. E. 273; Central R. Co. *v.* Thompson, 76 Ga. 770); nor under section 3034, if the injury to such person is done by his consent or is caused by his own negligence (White *v.* Central R., etc., Co., *supra*). The defenses under these two sections are not identical;

of the party injured does not wholly bar a recovery, but merely goes to diminish the amount of his damages in proportion to the fault attributable to him.[1]

b. Of Persons at Stations[2] — (i) *In General.* Although a person going upon or passing over grounds connected with railroad depots or stations assumes only such risks as are reasonably to be apprehended from the position in which he places himself,[3] he is presumed to know that the place is dangerous and is required to use care and prudence commensurate with the known dangers of the place; and if he fails to exercise such care whereby he is injured, he is guilty of contributory negligence precluding a recovery,[4] unless the railroad company wantonly, recklessly, or wilfully inflicts the injury,[5] or unless it fails to exercise ordinary care after discovering his peril to avoid injuring him.[6] Although such person goes upon station or depot premises through the inducement or upon the express or implied invitation of a railroad company, he is bound to exercise ordinary care and precaution for his own safety,[7] both from dangers incident to the running of trains,[8] and in respect to the condition of the platform or other prem-

and for a discussion of the distinction see Central R. Co. *v.* Harris, 76 Ga. 501.

1. Florida Cent., etc., R. Co. *v.* Foxworth, 41 Fla. 1, 25 So. 338, 79 Am. St. Rep. 149; Central R. Co. *v.* Harris, 76 Ga. 501 (under Code, § 3034).

Under a Tennessee statute (Milliken & V. Code, §§ 1298–1300) contributory negligence of the person injured does not bar a recovery, but it must be considered by the jury in mitigation of damages. Knoxville, etc., R. Co. *v.* Acuff, 92 Tenn. 26, 20 S. W. 348; Nashville, etc., R. Co. *v.* Smith, 9 Lea 470; Nashville, etc., R. Co. *v.* Nowlin, 1 Lea 523; Railroad Co. *v.* Walker, 11 Heisk. 383; Nashville, etc., R. Co. *v.* Smith, 6 Heisk. 174; Byrne *v.* Kansas City, etc., R. Co., 61 Fed. 605, 9 C. C. A. 666, 24 L. R. A. 693.

2. **Contributory negligence of passenger at station** see Carriers, 6 Cyc. 635 *et seq.*

3. Carver *v.* Minneapolis, etc., R. Co., 120 Iowa 346, 94 N. W. 862.

One who assumes the risks incident to throwing mail bags on a train while in motion does not thereby assume the risk of a mail bag being thrown from a train and striking him. Carver *v.* Minneapolis, etc., R. Co., 120 Iowa 346, 94 N. W. 862.

Assumption of risk.—A wife living with her husband in a railroad station and assisting him in the performance of his duties does not assume the risk of the railroad company's affirmative negligence in permitting the track to deteriorate, or of the negligence of the operatives of a train in running it at an excessive rate of speed. Croft *v.* Chicago, etc., R. Co., 134 Iowa 411, 109 N. W. 723.

4. *Illinois.*— Illinois Cent. R. Co. *v.* Hammer, 72 Ill. 347; Illinois Cent. R. Co. *v.* Brookshire, 3 Ill. App. 225.

Indiana.— Hill *v.* Indianapolis, etc., R. Co., 31 Ind. App. 98, 67 N. E. 276, walking near track ahead of train which the injured party knew would move in his direction, without looking or listening.

Kentucky.— Williams *v.* Louisville, etc., R. Co., 98 Ky. 247, 32 S. W. 934, 41 S. W. 1100, 17 Ky. L. Rep. 860.

Texas.— International, etc., R. Co. *v.* De Bajligethy, 9 Tex. Civ. App. 108, 28 S. W. 829.

United States.— Rich *v.* Chicago, etc., R. Co., 149 Fed. 79, 78 C. C. A. 663; Chattanooga, etc., R. Co. *v.* Downs, 106 Fed. 641, 45 C. C. A. 511, holding that where a person without looking for trains steps directly in front of an approaching engine from the platform of an express company's building which he has visited for express packages is guilty of a want of ordinary care under Ga. Code, §§ 2972, 3034.

See 41 Cent. Dig. tit. "Railroads," § 891.

The platform of a railroad company at its station is not a public highway, but is erected expressly for the accommodation of passengers; and other persons, although usually allowed to walk over it, are not entitled to recover for injuries received if they come upon it in such numbers that it breaks down with their weight. Gillis *v.* Pennsylvania R. Co., 59 Pa. St. 129, 98 Am. Dec. 317.

5. Chicago, etc., R. Co. *v.* Johnson, 53 Ill. App. 478; Illinois Cent. R. Co. *v.* Brookshire, 3 Ill. App. 225.

6. Little Rock, etc., R. Co. *v.* Cavenesse, 48 Ark. 106, 2 S. W. 505.

7. Atchison, etc., R. Co. *v.* Johns, 36 Kan. 769, 14 Pac. 237, 59 Am. Rep. 609.

Standing upon the platform of a station is not of itself such contributory negligence as will prevent a recovery for injuries received while standing thereon through the negligence of the railroad company. Atchison, etc., R. Co. *v.* Johns, 36 Kan. 769, 14 Pac. 237, 59 Am. Rep. 609.

Acts in emergencies.— Where a person, while at defendant's depot, is scalded by steam and hot water escaping from defendant's engine and in her fright and endeavor to escape she runs against a post and is injured, the fact that she acted wildly and negligently in order to save herself from the danger does not prevent a recovery. Gulf, etc., R. Co. *v.* Tullis, 41 Tex. Civ. App. 219, 91 S. W. 317.

8. Little Rock, etc., R. Co. *v.* Cavenesse, 48 Ark. 106, 2 S. W. 505; Esrey *v.* Southern Pac. Co., 88 Cal. 399, 26 Pac. 211 (standing

ises.[9] Thus it is contributory negligence precluding a recovery for a person to go along or to attempt to cross the tracks at a station near an approaching train without exercising proper care,[10] notwithstanding the train is being run at an excessive or illegal rate of speed,[11] or without giving the proper or statutory signals;[12] or to attempt to climb through or under trains or cars standing at the station and which are liable to be moved at any moment.[13] Likewise one whose duty it is to carry mail to and from trains is required to use ordinary care in doing so, both in going upon or near the tracks and along platforms and station premises.[14] But it has been held that where a railroad company stops a train where

between track and platform for a train to pass held contributory negligence); Zumault *v.* Kansas City Suburban Belt R. Co., 175 Mo. 288, 74 S. W. 1015 (holding that it is contributory negligence for a man in possession of all his faculties and familiar with the movements of trains, while momentarily expecting one's arrival, to sit on the station platform so near the tracks that a train could not pass without striking him, and to turn his face opposite to the direction in which the train was coming and either fall asleep or for some other cause become oblivious to his surroundings).

9. St. Louis, etc., R. Co. *v.* Fairbairn, 48 Ark. 491, 4 S. W. 50 (holding that the act of one in going at dusk upon a defective station platform to read a notice which the company was required by law to post there is not *per se* negligence); Hathaway *v.* New York, etc., R. Co., 182 Mass. 286, 65 N. E. 387; Archer *v.* Union Pac. R. Co., 110 Mo. App. 349, 85 S. W. 934 (holding that where a railroad company has placed a car for the use of a company traveling in it on an unobstructed walk leading directly to the steps, it is contributory negligence for one of such company to choose another way in approaching the car whereby he is injured); Renneker *v.* South Carolina R. Co., 20 S. C. 219.

10. *Massachusetts.*— Young *v.* Old Colony R. Co., 156 Mass. 178, 30 N. E. 560; Hinckley *v.* Cape Code R. Co., 120 Mass. 257; Bancroft *v.* Boston, etc., R. Corp., 97 Mass. 275.

Mississippi.— Crawley *v.* Richmond, etc., R. Co., 70 Miss. 340, 13 So. 74.

Pennsylvania.— Foreman *v.* Pennsylvania R. Co., 159 Pa. St. 541, 28 Atl. 358 [*affirming* 11 Pa. Co. Ct. 475]; Irey *v.* Pennsylvania R. Co., 132 Pa. St. 563, 19 Atl. 341.

Wisconsin.— Olson *v.* Chicago, etc., R. Co., 81 Wis. 41, 50 N. W. 412, 1096.

Canada.— Casey *v.* Canadian Pac. R. Co., 15 Ont. 574.

See 41 Cent. Dig. tit. "Railroads," § 891.

Where there is no other safe and convenient mode of reaching the highway it is not negligence for a person to cross the track of a railroad company after alighting at the station platform, in order to reach the highway (Hoffman *v.* New York Cent., etc., R. Co., 75 N. Y. 605 [*affirming* 13 Hun 589]), although it is otherwise where a safe and convenient way of crossing has been provided by the railroad company (Wilby *v.* Midland R. Co., 35 L. T. Rep. N. S. 244).

A remark by a station agent to the party injured that his train is coming is not an assurance or guaranty that the approaching train is the proper train, but is merely an inference based upon the course of events which the party injured himself could draw as well as such agent. White *v.* New York Cent., etc., R. Co., 68 N. Y. App. Div. 561, 73 N. Y. Suppl. 827 [*affirmed* in 174 N. Y. 543, 67 N. E. 1091].

That the railroad company violated its rule prohibiting freight trains from passing between a station house and a standing passenger train while receiving or discharging passengers does not render the company liable for an injury to a person carelessly walking upon the track several yards from the station. Lake Shore, etc., R. Co. *v.* Hart, 87 Ill. 529.

11. Crawley *v.* Richmond, etc., R. Co., 70 Miss. 340, 13 So. 74.

12. Barber *v.* Richmond, etc., R. Co., 34 S. C. 444, 13 S. E. 630.

13. Bartelson *v.* Chicago, etc., R. Co., 5 Dak. 313, 40 N. W. 531; Central R., etc., Co. *v.* Dixon, 42 Ga. 327; Chicago, etc., R. Co. *v.* Coss, 73 Ill. 394, holding that a person is guilty of contributory negligence precluding a recovery in attempting to pass between the cars of a freight train to which was attached an engine with steam up and which was liable to start at any moment, without permission or notice to any one in charge of the freight train who had authority over it, in order to reach a passenger train standing on the other side.

14. *Iowa.*— Mabbott *v.* Illinois Cent. R. Co., 116 Iowa 490, 89 N. W. 1076, holding that a mail carrier who uses a push cart in his work is negligent in placing his push cart so near the train as to be injured by its moving.

Michigan.— Tubbs *v.* Michigan Cent. R. Co., 107 Mich. 108, 64 N. W. 1061, 61 Am. St. Rep. 320, holding that whether the person relying upon the custom not to run trains between a depot and a standing train opposite it is guilty of contributory negligence in going on the intervening track to get mail or express from the train opposite without looking to see if another train is approaching is a question for the jury.

Missouri.— Moody *v.* Pacific R. Co., 68 Mo. 470.

New York.— White *v.* New York Cent., etc., R. Co., 68 N. Y. App. Div. 561, 73 N. Y. Suppl. 827 [*affirmed* in 174 N. Y. 543, 67 N. E. 1091].

other tracks are between it and the depot platform, passengers and other persons rightfully there have a right to presume that they will be protected from danger, and are under no obligation to look and listen in order to guard against the approach of other trains.[15]

(II) *Care of Horses and Teams.* It is the duty of one riding or driving a horse or team on station grounds to use proper care and precaution to prevent being injured by its becoming frightened; and if he fails to do so he cannot recover for injuries received,[16] unless those in charge of the train fail to exercise ordinary care to prevent the injury.[17] Ordinary care in this respect may require that those in charge of a horse or team should drive it away when it becomes restless instead of trying to control it,[18] and that parties in the vehicle to which the horse is hitched should alight.[19]

c. Of Persons Working On or About Tracks or Cars. Where a person is lawfully engaged on or about the tracks or cars of a railroad company in work which requires his attention, he is required to exercise an ordinary degree of care under the circumstances,[20] as in the care and control of horses or teams being used about

Pennsylvania.— Dell *v.* Phillips Glass Co., 169 Pa. St. 549 32 Atl. 601.

See 41 Cent. Dig. tit. "Railroads," § 891.

A mail carrier injured while standing at the end of a platform by being struck by a mail bag thrown from a moving train does not assume the risk of such injury, although he knew of the custom of the mail clerk to throw the mail bags from the train while in motion, where such custom was to throw the bags from the train at a different point on the platform. Carver *v.* Minneapolis, etc., R. Co., 120 Iowa 346, 94 N. W. 862.

Falling off platform.— Where a man employed to deliver the mail at night at a railroad station, knowing that the platform is unguarded by a rail, goes out of the depot in the dark to deliver the mail to the mail car without a lantern and falls off the platform and is injured, he is not entitled to recover from the railroad company. Sweet *v.* Union Pac. R. Co., 65 Kan. 812, 70 Pac. 883.

15. Atchison, etc., R. Co. *v.* McElroy, 76 Kan. 271, 91 Pac. 785, 123 Am. St. Rep. 134, 13 L. R. A. N. S. 620.

16. Flagg *v.* Chicago, etc., R. Co., 96 Mich. 30, 55 N. W. 444, 21 L. R. A. 835.

17. Ward *v.* Maine Cent. R. Co., 96 Me. 136, 51 Atl. 947.

18. Flagg *v.* Chicago, etc., R. Co., 96 Mich. 30, 55 N. W. 444, 21 L. R. A. 835, holding this to be true where a young horse standing at a railroad station at which it had never been before became restless at the sound of an approaching train before it had come in sight.

19. Flagg *v.* Chicago, etc., R. Co., 96 Mich. 30, 55 N. W. 444, 21 L. R. A. 835.

20. *Illinois.*— Illinois Cent. R. Co. *v.* Anderson, 184 Ill. 294, 56 N. E. 331 [*affirming* 81 Ill. App. 137].

Indiana.— St. Louis, etc., R. Co. *v.* Ridge, 20 Ind. App. 547, 49 N. E. 828.

Kentucky.— Cincinnati, etc., R. Co. *v.* Vaught, 78 S. W. 859, 25 Ky. L. Rep. 1766, 1870.

Maryland.— Baltimore, etc., R. Co. *v.* Charvat, 94 Md. 569, 51 Atl. 413.

Michigan.— Sheltrawn *v.* Michigan Cent. R. Co., 128 Mich. 669, 87 N. W. 893.

Missouri.— Ridings *v.* Hannibal, etc., R. Co., 33 Mo. App. 527.

New York.— German *v.* Suburban Rapid-Transit Co., 13 N. Y. Suppl. 897 [*affirmed* in 128 N. Y. 681, 29 N. E. 149].

Pennsylvania.— Noll *v.* Philadelphia, etc., R. Co., 163 Pa. St. 504, 30 Atl. 157.

Texas.— Weatherford, etc., R. Co. *v.* Duncan, 10 Tex. Civ. App. 479, 31 S. W. 562.

See 41 Cent. Dig. tit. "Railroads," § 895.

A shipper is bound in going about the premises of a railroad, in looking after his stock, to use ordinary care for his own safety, but need not anticipate danger (Southern R. Co. *v.* Goddard, 121 Ky. 567, 89 S. W. 675, 28 Ky. L. Rep. 523); and where the railroad company by its own act has put such shipper off his guard and given him good reason to believe that vigilance is not needed, the lack of such vigilance on his part is no bar to his claim for damages (Fowler *v.* Baltimore, etc., R. Co., 18 W. Va. 579).

The failure of a railroad employee to use a danger signal on a car which he is repairing, as required by the rules of the company, cannot be set up as contributory negligence in an action by such employee against another railroad company for injury caused by the backing of an engine of defendant against the car which he was repairing, when such engine was wrongfully on the tracks of the company which employed plaintiff. Ft. Worth, etc., R. Co. *v.* Bell, 5 Tex. Civ. App. 28, 23 S. W. 922.

A railroad brakeman engaged in coupling and uncoupling cars in the yard of the company is not guilty of contributory negligence in riding on a ladder on the side of a freight car, in going from one point to another in pursuance of his work. Martin *v.* Louisville, etc., R. Co., 95 Ky. 612, 26 S. W. 801, 16 Ky. L. Rep. 150.

A railroad fireman is not negligent as a matter of law in going under his engine and cleaning out the ashpan, in the performance of his duty, although while doing so cars are projected against the engine

the tracks or cars,[21] and if he fails to do so he is guilty of contributory negligence precluding a recovery.[22] But in exercising such care and precaution, such workman has a right to rely upon the assumption that the railroad company will exercise proper precautions for his protection,[23] and negligence cannot be imputed to him from the mere fact that he was on the track at the time the train or car which injured him came along;[24] nor, in the absence of special circumstances suggesting danger, is he required to exercise active vigilance for approaching trains,[25] except

through the negligence of the employees of another company (Chicago, etc., R. Co. *v.* Stephenson, 33 Ind. App. 95, 69 N. E. 270); and the rules of his company requiring car inspectors to place signals when inspecting cars are not applicable to him (Chicago, etc., R. Co. *v.* Stephenson, *supra*).

Where an inspection of brakes is no part of the duty of a certain railroad employee he is not negligent in failing to inspect them. Missouri Pac. R. Co. *v.* White, 80 Tex. 202, 15 S. W. 808.

21. Illinois Cent. R. Co. *v.* Keller, 77 Ill. App. 474 (holding that the question whether the person injured was negligent was for the jury); Hadley *v.* Lake Erie, etc., R. Co., 21 Ind. App. 675, 51 N. E. 337; Hicks *v.* Missouri Pac. R. Co., 46 Mo. App. 304.

22. *Arkansas.*— Bauer *v.* St. Louis, etc., R. Co., 46 Ark. 388, holding a car inspector negligent in being struck by a train which he might or should have avoided.

Illinois.— Chicago Belt R. Co. *v.* Skszypczak, 225 Ill. 242, 80 N. E. 113 (track repairer held guilty of contributory negligence as a matter of law); Wilson *v.* Illinois Cent. R. Co., 210 Ill. 603, 71 N. E. 398 [*affirming* 109 Ill. App. 542].

Iowa.— Platt *v.* Chicago, etc., R. Co., 84 Iowa 694, 51 N. W. 254.

Texas.— Wood *v.* St. Louis Southwestern R. Co., (Civ. App. 1908) 107 S. W. 563.

Virginia.— Risque *v.* Chesapeake, etc., R. Co., 104 Va. 476, 51 S. E. 730.

See 41 Cent. Dig. tit. "Railroads," § 895.

Illustrations.— Thus a person is guilty of contributory negligence precluding a recovery, where he is injured while working about a standing freight car, by other cars bumping against it, if such cars were put in motion by his own act in removing the brakes or uncoupling them from other cars (Stevenson *v.* Chicago, etc., R. Co., 18 Fed. 493, 5 McCrary 634); or where he voluntarily and unnecessarily places himself in a position of danger near or in front of moving cars (Johnson *v.* Minneapolis, etc., R. Co., 140 Mich. 292, 103 N. W. 594; Culbertson *v.* Milwaukee, etc., R. Co., 88 Wis. 567, 60 N. W. 998); or where he removes stakes and cross ties which support piles of lumber upon a car which he is unloading so that it falls and injures or kills him (Hulse *v.* New York, etc., R. Co., 71 Hun (N. Y.) 40, 24 N. Y. Suppl. 512). So where an employee of a warehouse company, familiar with the warehouse tracks and method of using them, notices cars on a track where there were none a few minutes before, but does not look to see whether they are moving, and steps upon the track and is injured by a car being pushed by a locomotive, he is guilty of contributory negligence as a matter of law, although it was customary for the engineer to ring a bell, upon which custom plaintiff relied, and no bell was rung on this occasion. Stacklie *v.* St. Paul, etc., R. Co., 73 Minn. 37, 75 N. W. 734.

Where a workman fails to observe the rules of his employer whereby he is injured, the defense of contributory negligence is available to the railroad company, although no contract relation exists between it and such workman. Smith *v.* Centennial Eureka Min. Co., 27 Utah 307, 75 Pac. 749.

23. Pittsburgh, etc., R. Co. *v.* Ives, 12 Ind. App. 602, 40 N. E. 923; Iltis *v.* Chicago, etc., R. Co., 40 Minn. 273, 41 N. W. 1040; El Paso, etc., R. Co. *v.* Darr, (Tex. Civ. App. 1906) 93 S. W. 166, holding that a car inspector engaged in inspecting cars for one company who knew that the yard-master of another company had seen him at his work had the right to assume that the yard-master would not run cars against those he was inspecting.

A shipper injured on account of an accumulation of ice on a stock chute is not guilty of contributory negligence in failing to spread sand or ashes upon the chute, unless it was glaringly dangerous; it being the duty of the railroad company to do so. Kincaid *v.* Kansas City, etc., R. Co., 62 Mo. App. 365.

Assumption of risk.—Where such workman stands under no contract relation with the railroad company, he cannot be held to assume the risk of negligence on the part of such company. Baltimore, etc., R. Co. *v.* Charvat, 94 Md. 569, 51 Atl. 413; Pearlstein *v.* New York, etc., R. Co., 192 Mass. 20, 77 N. E. 1024.

Where a person is injured by the unsoundness of an apron covering the space between a car which he is unloading and the platform, he is not guilty of contributory negligence in falling from the car on the apron, which he did not know, or could not have discovered by ordinary inspection, to be unsound, unless the fall from the car was the result of a want of care on his part. Cogdell *v.* Wilmington, etc., R. Co., 130 N. C. 313, 41 S. E. 541.

24. Hudson *v.* Atlantic Coast Line R. Co., 142 N. C. 198, 55 S. E. 103; Toledo, etc., R. Co. *v.* Chisholm, 83 Fed. 652, 27 C. C. A. 663; Stevenson *v.* Chicago, etc., R. Co., 18 Fed. 493, 5 McCrary 634.

25. *Indiana.*— Pittsburgh, etc., R. Co. *v.* Seivers, 162 Ind. 234, 67 N. E. 680, 70 N. E. 133.

when he is not at work demanding his attention;[26] and he even has the right to become so engrossed in his labor that he may become oblivious to the approach of trains.[27] Nor in cases of unexpected or immediate danger is he negligent if he makes a mistake of judgment in his movements.[28] Thus a person engaged in loading or unloading a car placed on a side-track for that purpose has the right to give his undivided attention to his duties and to act on the assumption that the car will not be molested by the company, or his position rendered hazardous, without some notice or warning;[29] and he is not negligent in failing to keep a constant lookout or otherwise exercise active vigilance to protect himself against trains or cars that may come in contact with the car on which he is working,[30] unless he knows or has reason to know of their approach and likelihood to molest his car.[31] Such a workman has a right to occupy the position for loading or unloading designated by an agent of the company, even if it be hazardous;[32]

Iowa.— McMarshall *v.* Chicago, etc., R. Co., 80 Iowa 757, 45 N. W. 1065, 20 Am. St. Rep. 445, holding that the rule that one going upon the track of a railroad company is required to look and listen for approaching trains does not apply to the conductor of a train who in a common switch yard steps on the adjacent track of another company for the purpose of signaling his engineer.

Michigan.— Helbig *v.* Michigan Cent. R. Co., 85 Mich. 359, 48 N. W. 589.

Minnesota.— Jordan *v.* Chicago, etc., R. Co., 58 Minn. 8, 59 N. W. 633, 49 Am. St. Rep. 486.

New York.— Ominger *v.* New York Cent., etc., R. Co., 4 Hun 159, 6 Thomps. & C. 498.

See 41 Cent. Dig. tit. "Railroads," § 1895.

26. Pittsburgh, etc., R. Co. *v.* Seivers, 162 Ind. 234, 67 N. E. 680, 70 N. E. 133.

27. Goodfellow *v.* Boston, etc., R. Co., 106 Mass. 461; Gessley *v.* Missouri Pac. R. Co., 32 Mo. App. 413.

28. Gulf, etc., R. Co. *v.* Bryant, 30 Tex. Civ. App. 4, 66 S. W. 804 (jumping from car because of fear of injury caused by a belief that his car would be struck by another car); St. Louis, etc., R. Co. *v.* Holmes, (Tex. Civ. App. 1899) 49 S. W. 658; Stevenson *v.* Chicago, etc., R. Co., 18 Fed. 493, 5 McCrary 634 (attempt to pass between cars).

29. *Illinois.*— Chicago, etc., R. Co. *v.* Goebel, 119 Ill. 515, 10 N. E. 369 [*affirming* 20 Ill. App. 163].

Indiana.— Pittsburgh, etc., R. Co. *v.* Ives, 12 Ind. App. 602, 40 N. E. 923; Toledo, etc., R. Co. *v.* Hauck, 8 Ind. App. 367, 35 N. W. 573.

Minnesota.— Iltis *v.* Chicago, etc., R. Co., 40 Minn. 273, 41 N. W. 1040.

Missouri.— Gessley *v.* Missouri Pac. R. Co., 32 Mo. App. 413.

New York.— Flynn *v.* New Jersey Cent. R. Co., 15 N. Y. Suppl. 328, 20 N. Y. Civ. Proc. 179, 27 Abb. N. Cas. 31 [*reversed* on other grounds in 142 N. Y. 439, 37 N. E. 514], attempt to pass through an opening purposely made to assist in loading.

Texas.— St. Louis Southwestern R. Co. *v.* Kennemore, (Civ. App. 1904) 81 S. W. 802.

United States.— Chicago, etc., R. Co. *v.* Shaw, 116 Fed. 621, 54 C. C. A. 71.

See 41 Cent. Dig. tit. "Railroads," § 895.

30. *Illinois.*— Illinois Cent. R. Co. *v.* Shultz, 64 Ill. 272.

Indiana.— Toledo, etc., R. Co. *v.* Hauck, 8 Ind. App. 367, 35 N. E. 573.

Minnesota.— Iltis *v.* Chicago, etc., R. Co., 40 Minn. 273, 41 N. W. 1040.

New York.— Barton *v.* New York Cent., etc., R. Co., 1 Thomps. & C. 297 [*affirmed* in 56 N. Y. 660].

Texas.— St. Louis Southwestern R. Co. *v.* Kennemore, (Civ. App. 1904) 81 S. W. 802.

Utah.— Copley *v.* Union Pac. R. Co., 26 Utah 261, 73 Pac. 517.

See 41 Cent. Dig. tit. "Railroads," § 1895.

31. Chicago, etc., R. Co. *v.* Petit, 209 Ill. 452, 70 N. E. 591; Rock Island, etc., R. Co. *v.* Dormady, 103 Ill. App. 127 (holding that men at work on freight cars in a freight yard and who know that in the customary method of switching there cars strike together, and that the force may overcome their natural equilibrium, and who see that switching is being done and that such striking is about to occur, are required to protect themselves from danger, and if they do not do so they assume the risk); Hadley *v.* Lake Erie, etc., R. Co., 21 Ind. App. 675, 51 N. E. 337, (App. 1897) 46 N. E. 935; Toledo, etc., R. Co. *v.* Hauck, 8 Ind. App. 367, 35 N. E. 573; Louisville, etc., R. Co. *v.* Smith, 84 S. W. 755, 27 Ky. L. Rep. 257.

Where workmen engaged in repairing a switch know of the danger of the locality and that engines are frequently passing, and they take no precautions by signal or otherwise, they are guilty of contributory negligence precluding a recovery. Tumalty *v.* New York, etc., R. Co., 170 Mass. 164, 49 N. E. 85.

Notice not to move car.— Notice to the conductor of a switching train that a car loaded with corn is leaking and not to move it any further as he wished to fix it does not excuse a person from crawling under the car and attempting to fix it without exercising proper care for his safety, where he is familiar with the method of switching at that point and knows that the conductor might receive orders to do additional switching. Chicago, etc., R. Co. *v.* Petit, 209 Ill. 452, 70 N. E. 591.

32. Pittsburgh, etc., R. Co. *v.* Ives, 12 Ind. App. 602, 40 N. E. 923; Pratt *v.* New York,

but it has been held that he has no right to rely upon the presumption that cars furnished are in safe repair, where he knows that other cars similarly furnished were defective.[33] Where a person is not lawfully working on or about such tracks or cars, he is held to the same degree of care as any other intruder,[34] as where, although lawfully loading or unloading cars, he unauthorizedly goes upon the track to move such cars.[35]

d. Of Persons on Trains — (1) *IN GENERAL.* Where a person, not a passenger, boards a train, although lawfully there, he is bound to exercise reasonable care and precaution to protect himself from injury; otherwise he is guilty of contributory negligence precluding a recovery,[36] as where he unnecessarily rides in a dangerous position,[37] such as on the foot-board of the engine,[38] notwithstanding he may have been invited to ride in such position, but by one having no authority to give such invitation.[39] It is contributory negligence precluding a recovery for a person on board a train voluntarily to attempt to alight while it is in motion, without notifying the employees in charge of the train of his presence and requesting them to arrest its progress,[40] unless he jumps upon the invitation or orders

etc., R. Co., 187 Mass. 5, 72 N. E. 328, going between rails while pushing a car with a bar furnished by defendant's agent not contributory negligence as a matter of law.

33. Roddy *v.* Missouri Pac. R. Co., 104 Mo. 234, 15 S. W. 1112, 24 Am. St. Rep. 333, 12 L. R. A. 746; Sykes *v.* St. Louis, etc., R. Co., 88 Mo. App. 193, 178 Mo. 693, 77 S. W. 723.

34. Richmond, etc., R. Co. *v.* Watts, 92 Ga. 88, 17 S. E. 983.

35. Southern R. Co. *v.* Morrison, 105 Ga. 543, 31 S. E. 564; Burns *v.* Boston, etc., R. Co., 101 Mass. 50.

36. Brown *v.* Sullivan, 71 Tex. 470, 10 S. W. 288 (holding that where plaintiff and his wife were keeping a boarding car in connection with a construction train, and just as the car was about to be moved she was standing with the conductor near the door to see where it would be placed, and the car started with a jerk whereby she was thrown upon the track, she was guilty of contributory negligence if she could by the exercise of ordinary care have avoided the consequences of defendant's negligence); San Jacinto, etc., R. Co. *v.* McLin, 26 Tex. Civ. App. 423, 64 S. W. 314 (evidence held to sustain a conclusion that the party injured was rightfully on the train and was not guilty of contributory negligence).

Inspection of brakes.— Where the foreman of a work train and his wife, who lived with him on the train, were injured by reason of a defective brake on one of the cars, his continuing to use the car after he might, by the exercise of reasonable diligence, have discovered the defect, will not defeat a recovery, unless it was a part of his duty to look after the condition of the brakes. Missouri Pac. R. Co. *v.* White, 80 Tex. 202, 15 S. W. 808.

In a suit by an employee of a company operating a leased track, for injuries received on account of negligence in the construction of bridges over the track, the fact that his death was caused by his violation of a rule of his employer will operate as a defense in favor of the owner of the track. Texas, etc., R. Co. *v.* Moore, 8 Tex. Civ. App. 289, 27 S. W. 962.

37. Menaugh *v.* Bedford Belt R. Co., 157 Ind. 20, 60 N. E. 694 (holding the party injured to be guilty of contributory negligence as a matter of law in riding on the tool box of the tender); Leonard *v.* Boston, etc., R. Co., 170 Mass. 318, 49 N. E. 621.

38. Lemasters *v.* Southern Pac. Co., 131 Cal. 105, 63 Pac. 128; Kansas City, etc., R. Co. *v.* Williford, 115 Tenn. 108, 88 S. W. 178; Gulf, etc., R. Co. *v.* Lovett, (Tex. Civ. App. 1903) 74 S. W. 570.

39. Wilcox *v.* San Antonio, etc., R. Co., 11 Tex. Civ. App. 487, 33 S. W. 379, holding that a person riding on the front foot-board of a switching engine at the invitation of the engineer is guilty of such contributory negligence as to prevent his recovery for injuries received on account of the engineer running the engine at a reckless rate of speed.

40. *Alabama.*— Georgia Cent. R., etc., Co. *v.* Letcher, 69 Ala. 106, 44 Am. Rep. 505.

Georgia.— Jarrett *v.* Atlanta, etc., R. Co., 83 Ga. 347, 9 S. E. 681.

Illinois.— Chicago, etc., R. Co. *v.* Hoffman, 82 Ill. App. 453.

Kentucky.— Thornton *v.* Louisville, etc., R. Co., 70 S. W. 53, 24 Ky. L. Rep. 854.

Michigan.— Burden *v.* Lake Shore, etc., R. Co., 104 Mich. 101, 62 N. W. 173.

Missouri.— De Bolt *v.* Kansas City, etc., R. Co., 123 Mo. 496, 27 S. W. 575.

New Jersey.— Under the act of March 27, 1874 (Gen. St. p. 2680, § 178), a person injured while jumping on or off a train while in motion is guilty of contributory negligence. Powell *v.* Erie R. Co., 70 N. J. L. 290, 58 Atl. 930.

Texas.— Houston, etc., R. Co. *v.* Leslie, 57 Tex. 83 (such rapid motion as to render the act of alighting manifestly unsafe); Cunningham *v.* Fort Worth, etc., R. Co., 28 Tex. Civ. App. 15, 66 S. W. 467; Texas, etc., R. Co. *v.* McGilvray, (Civ. App. 1894) 29 S. W. 67; Missouri, etc., R. Co. *v.* Miller, 8 Tex. Civ. App. 241, 27 S. W. 905.

See 41 Cent. Dig. tit. "Railroads," § 898.

of agents of the railroad company,[41] or to avoid some apparently threatened peril,[42] as where he jumps to avoid a wilful injury threatened by a railroad employee;[43] and this is true, although, where such person boards a train at a station, the railroad company is negligent in failing to give the required signals before and at the time of leaving the station,[44] or in not stopping at the station the required length of time.[45] Likewise it is contributory negligence for one to attempt to board a train while in motion,[46] although he makes the attempt with the knowledge of some of the railroad employees,[47] especially where it is made when the train is running across the country, at a distance from a station or depot, with all the surroundings plainly visible and forbidding in their character.[48] Where a person is injured by being forcibly ejected from a moving train, the fact that he was a trespasser on such train does not constitute contributory negligence which will deprive him of recovery.[49]

(II) *CHILDREN.* In accordance with the rules heretofore discussed,[50] a child is guilty of contributory negligence which will preclude a recovery for an injury if he fails to exercise the degree of care and prudence that may be expected of a child of his age, intelligence, and experience, in stealing a ride,[51] or in jumping

Excuses.— That the person injured is an experienced train-hand; that he supposed the train would stop; that he is a poor man and not knowing how he would get back if carried further; and that he is excited is no excuse for his jumping. Jarrett *v.* Atlanta, etc., R. Co., 83 Ga. 347, 9 S. E. 681.

It is not contributory negligence as a matter of law for a person who is riding on the step of an engine to jump therefrom without first looking for approaching trains. Lake Shore, etc., R. Co. *v.* Enright, 129 Ill. App. 223 [*affirmed* in 227 Ill. 103, 81 N. E. 374].

41. Jarrett *v.* Atlanta, etc., R. Co., 83 Ga. 347, 9 S. E. 681.

The physical infirmity of a trespasser upon a train may be taken into consideration in determining his negligence in alighting while the train is in motion; but his age and experience should not be taken into consideration where there is nothing to indicate that by reason thereof he was less able to exercise care and discretion for his own safety. Doggett *v.* Chicago, etc., R. Co., 134 Iowa 690, 112 N. W. 171.

42. Jarrett *v.* Atlanta, etc., R. Co., 83 Ga. 347, 9 S. E. 681; Gulf, etc., R. Co. *v.* Bryant, 30 Tex. Civ. App. 4, 66 S. W. 804. See also Burden *v.* Lake Shore, etc., R. Co., 104 Mich. 101, 62 N. W. 173.

43. Galveston, etc., R. Co. *v.* Zantzinger, 92 Tex. 365, 48 S. W. 563, 71 Am. St. Rep. 859, 44 L. R. A. 553, holding that where an engineer threw hot water upon a trespasser riding upon the foot-board of the engine, the act of such trespasser in jumping from the engine being induced by a wilful injury, is not negligence.

44. Georgia Cent. R., etc., Co. *v.* Letcher, 69 Ala. 106, 44 Am. Rep. 505.

45. Houston, etc., R. Co. *v.* Leslie, 57 Tex. 83, five minutes required by statute.

46. Blair *v.* Grand Rapids, etc., R. Co., 60 Mich. 124, 26 N. W. 855; Powell *v.* Erie R. Co., 70 N. J. L. 290, 58 Atl. 930, contributory negligence by statute under the act of March 27, 1874.

47. Gulf, etc., R. Co. *v.* Hall, 34 Tex. Civ. App. 535, 80 S. W. 133.

48. Ahern *v.* Chicago, etc., R. Co., 124 Ill. App. 36 (holding that plaintiff cannot recover in the absence of wantonness, wilfulness, or gross neglect); Blair *v.* Grand Rapids, etc., R. Co., 60 Mich. 124, 26 N. W. 855.

49. Johnson *v.* Chicago, etc., R. Co., 116 Iowa 639, 88 N. W. 811, 123 Iowa 224, 98 N. W. 642; Dorsey *v.* Kansas City, etc., R. Co., 104 La. 478, 29 So. 177, 52 L. R. A. 92.

50. See *supra*, X, E, 4, a, (IV).

51. State *v.* Baltimore, etc., R. Co., 24 Md. 84, 87 Am. Dec. 600 (holding this to be true, although by the exercise of extraordinary care on the part of the railroad company the accident might have been avoided); Southerland *v.* Texas, etc., R. Co., (Tex. Civ. App. 1897) 40 S. W. 193.

Illustrations.— Thus it is contributory negligence precluding a recovery, where an intelligent boy twelve years of age, familiar with the running of trains, and appreciating the danger of getting on or off a moving train, climbs on a slow moving train and is injured while getting down from one car, and attempting to climb on another (Wilson *v.* Atchison, etc., R. Co., 66 Kan. 183, 71 Pac. 282); or where a boy twelve years of age who steals a ride upon a freight train, with or without the knowledge of the trainmen, gets upon the front of an engine where he is killed by a collision, in which no one else is hurt (Ecliff *v.* Wabash, etc., R. Co., 64 Mich. 196, 31 N. W. 180); or where a well grown boy of good judgment, sixteen years of age, familiar with the operation of railroad trains and with knowledge that it is against the rule of the railroad company for him to ride on a freight train, does so at the invitation of the conductor and takes a position on a freight car and is killed by the negligence of the train crew in running the same at so high rate of speed that the train is derailed (Chicago, etc., R. Co. *v.* Martin, 35 Tex. Civ. App. 186, 79 S. W. 1101).

on,[52] or off moving trains,[53] unless the railroad company after discovering his peril could have avoided the injury by the exercise of ordinary care and diligence;[54] and where a child is injured solely through his own recklessness, as in attempting to jump upon a moving train from a position outside of the track where he is in no apparent danger, his immaturity of years or discretion has no bearing upon the question of the liability of the railroad company for his injury.[55] But where the child is not of sufficient age or discretion to appreciate the danger of his act, he is not guilty of contributory negligence in going upon a train.[56]

Negligence per se.—A boy over sixteen years of age who has lived at railway stations and has made trips in empty freight cars, and knows the danger of riding on box cars, and who on the occasion of his injury by falling from the top of a freight car takes the precaution to brace his foot against the handhold and hold to the running board, sufficiently apprehends the danger, making him guilty of contributory negligence as a matter of law. Cochrell *v.* Texas, etc., R. Co., 36 Tex. Civ. App. 559, 82 S. W. 529. So where a child twelve years old who has attended school for three years climbs upon a moving freight car and is injured, he is guilty of contributory negligence as a matter of law, where he does not claim that he did not know that it was wrong and dangerous so to climb upon such car, and where it appears by his own testimony that he was familiar with the railroad tracks and with the running of the cars thereon. Fitzgerald *v.* Chicago, etc., R. Co., 114 Ill. App. 118.

A Missouri statute, Rev. St. § 3927, making it a misdemeanor for any person to climb upon, hold to, or in any manner attach himself to a locomotive or car while the same is in motion, or while running in or from any city or town, precludes a recovery of damages by a child six years of age who is injured while stealing a ride on a railway car which is going through the railway company's freight yard. Barney *v.* Hannibal, etc., R. Co., 126 Mo. 372, 28 S. W. 1069, 26 L. R. A. 847.

52. Western R. Co. *v.* Mutch, 97 Ala. 194, 11 So. 894, 38 Am. St. Rep. 179, 21 L. R. A. 316; Chicago, etc., R. Co. *v.* Berg, 57 Ill. App. 521; Miles *v.* Receivers, 17 Fed. Cas. No. 9,544, 4 Hughes 172.

A boy eight years old whose mother permits him to play upon the street is presumably of sufficient intelligence to know the danger of attempting to jump upon the front of a moving locomotive, and is therefore capable of contributory negligence barring a recovery. Miles *v.* Receivers, 17 Fed. Cas. No. 9,544, 4 Hughes 172.

53. Powers *v.* Chicago, etc., R. Co., 57 Minn. 332, 59 N. W. 307 (holding that where a boy of thirteen years, familiar with the moving of trains, and warned not to get off or on while in motion, gets on a freight train and is killed in jumping off when in motion, the railroad company is not liable); Murray *v.* Richmond, etc., R. Co., 93 N. C. 92 (holding that a railroad company is not liable for an injury to a boy of eight years, who, after being warned not to do so, mounts an engine at a time when he is not seen and sustains an injury in jumping off after it begins to move).

It is negligence as a matter of law for a bright, active boy fifteen years old, a trespasser on a train, who knows the attendant danger, to voluntarily attempt to jump from a train which is running twenty miles an hour. Howell *v.* Illinois Cent. R. Co., 75 Miss. 242, 21 So. 746, 36 L. R. A. 545.

Where a child jumps from a moving train at the command of an employee, the question of his contributory negligence depends upon whether a person of ordinary prudence, similarly circumstanced, and of his age and discretion, would have made the attempt. Chicago, etc., R. Co. *v.* Graham, 84 Ill. App. 480; Texas, etc., R. Co. *v.* Mother, 5 Tex. Civ. App. 87, 24 S. W. 79.

54. Southerland *v.* Texas, etc., R. Co., (Tex. Civ. App. 1897) 40 S. W. 193; Miles *v.* Receivers, 17 Fed. Cas. No. 9,544, 4 Hughes 172.

The doctrine of discovered peril is not applicable so as to destroy the effect of a boy's contributory negligence, by the mere fact that an employee in charge of a freight train discovers a boy about sixteen years old riding on top of a freight car by bracing his foot against the hand hold and holding to the running board, and observes his apparent age and size and knows that his position there is more dangerous than in the caboose, as the danger of falling from the car is not imminent. Cochrell *v.* Texas, etc., R. Co., 36 Tex. Civ. App. 559, 82 S. W. 529.

55. Felton *v.* Aubrey, 74 Fed. 350, 20 C. C. A. 436.

56. St. Louis Southwestern R. Co. *v.* Abernathy, 28 Tex. Civ. App. 613, 68 S. W. 539.

Boarding train.—A youth eleven or twelve years old and of such immature judgment or discretion as not to appreciate the danger of boarding a train while moving out of a depot, as to which the employees of the company were negligent in failing to use ordinary care to prevent his making the attempt, is not guilty of contributory negligence. Missouri, etc., R. Co. *v.* Tonahill, (Tex. Civ. App. 1899) 54 S. W. 419.

Permission to ride.—If the servants of a railroad company have been in the habit of allowing or encouraging a deaf and dumb boy ten years old to ride on the freight cars, the company cannot, when sued for damages for injuries sustained by him while riding or attempting to ride in like manner, although without a special invitation or permission on the occasion of the injury, avail

5. Proximate Cause of Injury.[57] To render a railroad company liable for injuries sustained by one going upon or near its tracks, it is not sufficient merely that the company was negligent, but its negligence must have proximately caused or contributed to the injury sustained,[58] and it is not liable for injuries to which its negligence only remotely contributes;[59] or in other words there must be a

itself by way of defense, of a statute making it a misdemeanor to be upon the car without business or permission. Lammert *v.* Chicago, etc., R. Co., 9 Ill. App. 388.

57. Contributory negligence as proximate cause see *supra*, X, E, 4, a, (I), (J).

58. *Alabama.*— Louisville, etc., R. Co. *v.* Lewis, 141 Ala. 466, 37 So. 587.

Georgia.— Southern R. Co. *v.* Flynt, 2 Ga. App. 162, 58 S. E. 374.

Iowa.— Dougherty *v.* Chicago, etc., R. Co., 137 Iowa 257, 114 N. W. 902, 114 L. R. A. N. S. 590, holding the original wrong of certain section men, in inviting a boy on a hand-car, for which the company was not responsible, to be the proximate cause of the boy's injury by falling off the car.

Kansas.— Chicago, etc., R. Co. *v.* Parkinson, 56 Kan. 652, 44 Pac. 615.

Michigan.— Burden *v.* Lake Shore, etc., R. Co., 104 Mich. 101, 62 N. W. 173.

Missouri.— Harper *v.* St. Louis Merchants' Bridge Terminal Co., 187 Mo. 575, 86 S. W. 99; Norton *v.* Ittner, 56 Mo. 351.

New York.— Chrystal *v.* Troy, etc., R. Co., 124 N. Y. 519, 26 N. E. 1103.

Texas.— San Antonio, etc., R. Co. *v.* Jazo, (Civ. App. 1894) 25 S. W. 712.

Virginia.— Virginia Midland R. Co. *v.* White, 84 Va. 498, 5 S. E. 573, 10 Am. St. Rep. 874.

United States.— St. Louis, etc., R. Co. *v.* Miles, 79 Fed. 257, 24 C. C. A. 599.

See 41 Cent. Dig. tit. "Railroads," § 1319.

Negligence of company held proximate cause.— It has been held that the negligence of the railroad company was the proximate cause of the injury where the employees of one company sent a locomotive and cars against an engine under which a fireman of another company was working, resulting in his death (Chicago, etc., R. Co. *v.* Stephenson, 33 Ind. App. 95, 69 N. E. 270); or where a person in avoiding a runaway team stepped upon a railroad track and was injured by a hand-car, through the foreman's negligence to seasonably order the brakes to be applied (Moore *v.* Central R. Co., 47 Iowa 688); or where a trespasser on defendant's train was forcibly ejected by a brakeman while the train was moving rapidly, and in falling struck a clearance post by the side of the track and was thereby thrown under the car wheels and injured (Hayes *v.* Southern R. Co., 141 N. C. 195, 53 S. E. 847); or where a car escaped from control through negligence, and after running three quarters of a mile injured persons on the track (Adams *v.* Southern R. Co., 84 Fed. 596, 28 C. C. A. 494).

The accumulation of ice upon a stock chute has been held to be the proximate cause of an injury to a shipper who was driving cattle up the chute on to a car, when one of the animals, owing to the ice, slipped against another and the latter fell upon the shipper injuring him. Kincaid *v.* Kansas City, etc., R. Co., 62 Mo. App. 365.

The advice of a foreman of a gravel car to a boy to jump on a moving freight train to return to his home, in which effort he is injured, is the proximate cause of the injury to such boy, but as such advice is outside of such foreman's employment, the company is not liable. Keating *v.* Michigan Cent., etc., R. Co., 97 Mich. 154, 56 N. W. 346, 37 Am. St. Rep. 328.

That the person injured accidentally fell upon the track does not excuse the railroad company from the result of its negligence. International, etc., R. Co. *v.* Ormond, 64 Tex. 485. See also Pittsburgh, etc., R. Co. *v.* Cozatt, 39 Ind. App. 682, 79 N. E. 534.

Where an engine and cars which were unlawfully occupying a street injured a person in moving off, the moving of the train, which was a legitimate act, and not the unlawful occupation of the street, was the proximate cause of the injury. Armil *v.* Chicago, etc., R. Co., 70 Iowa 130, 30 N. W. 42.

59. *Illinois.*— Thompson *v.* Cleveland, etc., R. Co., 226 Ill. 542, 80 N. E. 1054, 9 L. R. A. N. S. 672 [*affirming* 123 Ill. App. 47], failing to provide proper cattle-guards held not to be the proximate cause of plaintiff's injury, by being struck by a train while driving calves off the track, which had gotten thereon by reason of insufficient cattle-guards.

Indiana.— Pittsburgh, etc., R. Co. *v.* Seivers, 162 Ind. 234, 67 N. E. 680, 70 N. E. 133.

Nebraska.— Meyer *v.* Midland Pac. R. Co., 2 Nebr. 319.

Texas.— Rozwadosfskie *v.* International, etc., R. Co., 1 Tex. Civ. App. 487, 20 S. W. 872.

United States.— Chicago, etc., R. Co. *v.* Elliot, 55 Fed. 949, 5 C. C. A. 347, 20 L. R. A. 582.

See 41 Cent. Dig. tit. "Railroads," § 1319.

A railroad company is not liable for insanity of an injured person, where it results from the fact that, subsequent to the accident and before commitment to the hospital, the person saw the bodies of persons killed and injured in other accidents, or where the insanity was a result of the accident and subsequent occurrences combined. Rooney *v.* New York, etc., R. Co., 173 Mass. 222, 53 N. E. 435.

Negligence of company not proximate cause.— It has been held that the negligence of the railroad company was not the proximate cause of the injury, where the engineer failed to stop or attempt to stop his train after discovering a person on the track, when it

causal connection between the railroad company's negligence, even though it be negligence *per se*, and the injury complained of.[60] This rule applies where the railroad company's negligence consists of defects in its road-bed [61] or equipment,[62]

was impossible to stop the train in time to avert the accident (Dull *v.* Cleveland, etc., R. Co., 21 Ind. App. 571, 52 N. E. 1013 (and he gave danger signals); Sinclair *v.* Chicago, etc., R. Co., 133 Mo. 233, 34 S. W. 76; Davidson *v.* Pittsburg, etc., R. Co., 41 W. Va. 407, 23 S. E. 593); or where the party injured stepped into a hole in a path along defendant's right of way which he took for the purpose of getting around defendant's cars which improperly obstructed certain street crossings (De la Pena *v.* International, etc., R. Co., 32 Tex. Civ. App. 241, 74 S. W. 58); or where a boy entered a railroad company's yards upon the invitation of a car-repairer and participated in the movement of the repairer's car, and after the work was done passed on to a highway crossing and was injured by reason of his jumping upon a passing car (Horn *v.* Chicago, etc., R. Co., 124 Iowa 281, 99 N. W. 1068); or where the conductor of a train stated to a trespassing boy that he would take him to a station and turn him over to an officer, whereupon the boy jumped and was killed (Burden *v.* Lake Shore, etc., R. Co., 104 Mich. 101, 62 N. W. 173).

Incompetency of the employees in charge of the engine or train causing the injury is immaterial, if such engine or train is properly handled. Armil *v.* Chicago, etc., R. Co., 70 Iowa 130, 30 N. W. 42.

60. Puckhaber *v.* Southern Pac. Co., 132 Cal. 363, 64 Pac. 480; Harper *v.* St. Louis, Merchants' Bridge Terminal Co., 187 Mo. 575, 86 S. W. 99; Norton *v.* Ittner, 56 Mo. 351.

Actual collision is not necessary to constitute such causal connection in an action for injuries caused by a train (Alabama Great Southern R. Co. *v.* Chapman, 80 Ala. 615, 2 So. 738); but such connection may be established by a succession of intervening circumstances, as where the train negligently strikes an animal which thereby bounces or is thrown against the party injured (Alabama Great Southern R. Co. *v.* Chapman, *supra*), or negligently collides with another train whereby a car is thrown against him (Southern R. Co. *v.* Williams, 143 Ala. 212, 38 So. 1013); or where it negligently causes him to fall from a bridge or trestle (McMillan *v.* Burlington, etc., R. Co., 46 Iowa 231).

61. Anderson *v.* Union Terminal R. Co., 161 Mo. 411, 61 S. W. 874 (holding that a railroad company's negligence in allowing a pile of cinders to remain on the side of its tracks whereby a boy stumbles over it and falls under a train without negligence on his part is the proximate cause of the injury); Grimmer *v.* Pennsylvania R. Co., 175 Pa. St. 1, 34 Atl. 210; Kelly *v.* Manayunk, etc., Incline Plane, etc., Co., 7 Pa. Cas. 624, 12 Atl. 598; McCandless *v.* Chicago, etc., R. Co., 71 Wis. 41, 36 N. W. 620 (failure to restore a street to its former state of usefulness held not to be the proximate cause of the injury).

Failure to maintain a fence along its track, although required by ordinance or statute, is not the proximate cause of injuries sustained by persons running along or jumping on moving trains (Griffin *v.* Chicago, etc., R. Co., 101 Ill. App. 284; Paquin *v.* Wisconsin Cent. R. Co., 99 Minn. 170, 108 N. W. 882; Fezler *v.* Willmar, etc., R. Co., 85 Minn. 252, 88 N. W. 746; Lake Shore, etc., R. Co. *v.* Liidtke, 69 Ohio St. 384, 69 N. E. 653); or where the person injured is pushed on the rails by a straying cow (Schreiner *v.* Great Northern R. Co., 86 Minn. 245, 90 N. W. 400, 58 L. R. A. 75). So it has been held that the failure of a railroad company to fence its tracks within the limits of a city and near one of its stations cannot be regarded as the proximate cause of the death of one who is struck by a train at a point some distance from the public crossing. Wickham *v.* Chicago, etc., R. Co., 95 Wis. 23, 69 N. W. 982.

62. Patton *v.* East Tennessee, etc., R. Co., 89 Tenn. 370, 15 S. W. 919, 12 L. R. A. 184; Galveston, etc., R. Co. *v.* Chambers, 73 Tex. 296, 11 S. W. 279.

Defective brakes.— Defective brakes have been held the proximate cause of an injury where the person injured while placing a car furnished by the railroad company discovered that the brake was defective, and in obedience to the conductor's command to block the car he swung from it and placed a block of wood under the wheels whereby the sudden stopping of the car threw a log therefrom and injured him. Sheltrawn *v.* Michigan Cent. R. Co., 128 Mich. 669, 87 N. W. 893. But the fact that the train was not equipped with air-brakes is not ground for recovery when it appears that even by the aid of such brakes the train could not have been stopped in time to avoid the accident. Chicago, etc., R. Co. *v.* Grablin, 38 Nebr. 90, 56 N. W. 796, 57 N. W. 522; Bookman *v.* Seaboard Air Line R. Co., 152 Fed. 686, 81 C. C. A. 612. So it has been held that where a child is run over by a train which might have been stopped in time if fitted with air-brakes, the failure to equip with air-brakes is only a remote cause of the accident; the proximate cause being the child's coming upon the road helpless and unattended. *Ex p.* Stell, 22 Fed. Cas. No. 13,358, 4 Hughes 157.

Failure to place a headlight on an engine at night as required by ordinance does not render a railroad company liable for the death of one killed from a cause in no way connected with the absence of the light. Puckhaber *v.* Southern Pac. Co., 132 Cal. 363, 64 Pac. 480; Chicago, etc., R. Co. *v.* Bednorz, 57 Ill. App. 309.

or in not giving the proper or required signals,[63] or in not keeping a proper lookout,[64] or in running at an excessive or unlawful rate of speed.[65]

6. Injury Avoidable Notwithstanding Contributory Negligence. Under what is commonly known as "the last clear chance" doctrine,[66] or, as it has been called, the doctrine of "discovered peril,"[67] notwithstanding a person injured upon or near railroad tracks may be guilty of contributory negligence in going into a dangerous position, the railroad company is nevertheless liable for injuries which may be avoided or lessened by the exercise of ordinary care on its part after his peril

63. St. Louis, etc., R. Co. *v.* Ferrell, 84 Ark. 270, 105 S. W. 263; Coleman *v.* Wrightsville, etc., R. Co., 114 Ga. 386, 40 S. E. 247; Grathwohl *v.* New York Cent., etc., R. Co., 116 N. Y. App. Div. 176, 101 N. Y. Suppl. 667 (failure to give warning of the approach of an engine held not proximate cause); Texas, etc., R. Co. *v.* Scarborough, (Tex. Civ. App. 1907) 104 S. W. 408 [*affirmed* in (1908) 108 S. W. 804] (failure to give signal to stop train held proximate cause of decedent's death).

Failure to ring a bell or sound a whistle for a public crossing as required by statute does not render the railroad company liable for an injury to a child of tender age, where the engineer used every effort to avert the accident after discovering the child, and there is nothing to show that the child's mother would have heard the signals or paid any attention to them had they been given. Chrystal *v.* Troy, etc., R. Co., 124 N. Y. 519, 26 N. E. 1103 [*reversing* 52 Hun 55, 4 N. Y. Suppl. 793].

Failure to enforce a rule requiring a blue flag to be displayed on certain cars is not the proximate cause of injuries received by an employee of a railway company while inspecting cars on a transfer track which is jointly used by his employer and defendant company, where it appears that such flag would not have been regarded by defendant if it had been displayed. El Paso, etc., R. Co. *v.* Darr, (Tex. Civ. App. 1906) 93 S. W. 166.

64. McClanahan *v.* Vicksburg, etc., R. Co., 111 La. 781, 35 So. 902; Arrowood *v.* South Carolina, etc., R. Co., 126 N. C. 629, 36 S. E. 151; Texas, etc., R. Co. *v.* Shivers, (Tex. Civ. App. 1907) 106 S. W. 894; St. Louis, etc., R. Co. *v.* Shifflet, (Tex. Civ. App. 1900) 56 S. W. 697; Malmstrom *v.* Northern Pac. R. Co., 20 Wash. 195, 55 Pac. 38.

The failure to keep a proper lookout can only be deemed the proximate cause of injuries to a person on the track where it appears that the keeping of such lookout would have prevented the injury. Missouri Pac. R. Co. *v.* Jaffi, 67 Kan. 81, 72 Pac. 535; Texas, etc., R. Co. *v.* Shoemaker, 98 Tex. 451, 84 S. W. 1049 [*reversing* (Civ. App. 1904) 81 S. W. 1019].

65. *Arkansas.*— St. Louis, etc., R. Co. *v.* Ferrell, 84 Ark. 270, 105 S. W. 263.

District of Columbia.— Baltimore, etc., R. Co. *v.* Golway, 6 App. Cas. 143.

Mississippi.— Alabama, etc., R. Co. *v.* Carter, 77 Miss. 511, 27 So. 993.

Missouri.— Jackson *v.* Kansas City, etc., R. Co., 157 Mo. 621, 58 S. W. 32, 80 Am. St. Rep. 650.

Texas.— Missouri, etc., R. Co. *v.* Owens, (Civ. App. 1903) 75 S. W. 579; International, etc., R. Co. *v.* Mitchell, (Civ. App. 1901) 60 S. W. 996 (holding defendant's negligence in suddenly cutting a switch engine loose and running it on to a switch track at an excessive rate of speed without warning to be the proximate cause of plaintiff's injury); Missouri, etc., R. Co. *v.* Cardena, 22 Tex. Civ. App. 300, 54 S. W. 312; Houston, etc., R. Co. *v.* Powell, (Civ. App. 1897) 41 S. W. 695 (holding also that an excessive rate of speed could not have been the proximate cause unless ordinary prudence admonished those operating the train that such excessive rate of speed would probably result in injury).

See 41 Cent. Dig. tit. "Railroads," §§ 1319–1323.

Running at a greater speed than permitted by ordinance is the proximate cause of an injury, only where the injury is the direct result of such excessive speed; in other words, only where there is a causal connection between the injury and such negligence. Kansas City Suburban Belt R. Co. *v.* Herman, 64 Kan. 546, 68 Pac. 46 [*affirmed* in 187 U. S. 63, 23 S. Ct. 24, 47 L. ed. 76]; Philadelphia, etc., R. Co. *v.* Stebbing, 62 Md. 504; Alabama, etc., R. Co. *v.* Carter, 77 Miss. 511, 27 So. 993; Tobin *v.* Missouri Pac. R. Co., (Mo. 1891) 18 S. W. 996; International, etc., R. Co. *v.* Jackson, 41 Tex. Civ. App. 51, 90 S. W. 918.

Where a person steps to one side on hearing an approaching train and falls over a pile of cinders on to the track and succeeds in removing only a portion of his body from the track by reason of the approaching train being operated in violation of a speed ordinance, such violation is the proximate cause of the injury, although the existence of the cinder pile may have been a concurring cause thereof. Missouri, etc., R. Co. *v.* Penny, 39 Tex. Civ. App. 358, 87 S. W. 718.

A boy injured while negligently jumping from a moving train on which he was a trespasser cannot recover because the speed of the train had been wilfully increased beyond the rate allowed by law, since there is no causal connection between that act and the injury. Howell *v.* Illinois Cent. R. Co., 75 Miss. 242, 21 So. 746, 36 L. R. A. 545.

66. Chicago, etc., R. Co. *v.* Lilley, 4 Nebr. (Unoff.) 286, 93 N. W. 1012. And see cases cited *infra* notes 67–75.

67. International, etc., R. Co. *v.* Ploeger,

is discovered and it fails to exercise such care,[68] as where, after discovering the peril of such person, it negligently causes the injury by failing to exercise proper care in regard to slackening the speed of the train,[69] or in stopping the train,[70]

(Tex. Civ. App. 1906) 93 S. W. 226, 96 S. W. 56.

68. *Alabama.*—Alabama Great Southern R. Co. *v.* Burgess, 116 Ala. 509, 22 So. 913.

Arkansas.— Adams *v.* St. Louis, etc., R. Co., 83 Ark. 300, 103 S. W. 725; St. Louis Southwestern R. Co. *v.* Cochran, 77 Ark. 398, 91 S. W. 747; St. Louis, etc., R. Co. *v.* Townsend, 69 Ark. 380, 63 S. W. 994; Little Rock, etc., R. Co. *v.* Smith, (1898) 43 S. W. 969; Little Rock, etc., R. Co. *v.* Pankhurst, 36 Ark. 371.

Illinois.— Peirce *v.* Walters, 164 Ill. 560, 45 N. E. 1068 (holding that the fact that plaintiff was attempting to rescue a child from danger at the time he was struck will not relieve the company from liability, if the engineer failed to exercise ordinary care after the discovery of plaintiff's peril); Lake Shore, etc., R. Co. *v.* Bodemer, 139 Ill. 596, 29 N. E. 692, 32 Am. St. Rep. 218 [*affirming* 33 Ill. App. 479]; Roden *v.* Chicago, etc., R. Co., 30 Ill. App. 354 [*affirmed* in 133 Ill. 72, 24 N. E. 425, 23 Am. St. Rep. 585].

Iowa.— Gregory *v.* Wabash R. Co., 126 Iowa 230, 101 N. W. 761.

Kentucky.— Dugan *v.* Chesapeake, etc., R. Co., 72 S. W. 291, 24 Ky. L. Rep. 1754.

Missouri.— Woods *v.* Wabash R. Co., 188 Mo. 229, 86 S. W. 1082.

Nebraska.— Union Pac. R. Co. *v.* Mertes, 39 Nebr. 448, 58 N. W. 105, 35 Nebr. 204, 52 N. W. 1099; Chicago, etc., R. Co. *v.* Lilley, 4 Nebr. (Unoff.) 286, 93 N. W. 1012.

North Carolina.— Baker *v.* Wilmington, etc., R. Co., 118 N. C. 1015, 24 S. E. 415; Smith *v.* Norfolk, etc., R. Co., 114 N. C. 728, 19 S. E. 863, 923, 25 L. R. A. 287; Clark *v.* Wilmington, etc., R. Co., 109 N. C. 430, 14 S. E. 43, 14 L. R. A. 749, holding that, admitting decedent's contributory negligence, such negligence was not the proximate cause of death if the engineer could have prevented it, after seeing the peril, without danger to persons and property in his charge.

Texas.— Houston, etc., R. Co. *v.* O'Donnell, 99 Tex. 636, 92 S. W. 409 [*reversing* (Civ. App. 1905) 90 S. W. 886]; Missouri Pac. R. Co. *v.* Weisen, 65 Tex. 443; International, etc., R. Co. *v.* Ploeger, (Civ. App. 1906) 93 S. W. 226, 96 S. W. 56; Houston, etc., R. Co. *v.* Ramsey, 36 Tex. Civ. App. 285, 81 S. W. 825; Kroeger *v.* Texas, etc., R. Co., 30 Tex. Civ. App. 87, 69 S. W. 809; Missouri, etc., R. Co. *v.* Haltom, (Civ. App. 1901) 62 S. W. 800; Houston, etc., R. Co. *v.* Wallace, 21 Tex. Civ. App. 394, 53 S. W. 77; Garza *v.* Texas Mexican R. Co., (Civ. App. 1897) 41 S. W. 172, holding that if the employees of the railroad company fail, after knowledge of the danger, to use all practicable means to prevent the injury, the railroad company is liable.

Utah.— Teakle *v.* San Pedro, etc., R. Co., 32 Utah 276, 90 Pac. 402, 10 L. R. A. N. S. 486.

Virginia.— Baltimore, etc., R. Co. *v.* Lee, 106 Va. 32, 55 S. E. 1; Seaboard, etc., R. Co. *v.* Joyner, 92 Va. 354, 23 S. E. 773.

Washington.— Dotta *v.* Northern Pac. R. Co., 36 Wash. 506, 79 Pac. 32.

United States.— See Northern Pac. R. Co. *v.* Jones, 144 Fed. 47, 75 C. C. A. 205.

See 41 Cent. Dig. tit. "Railroads," §§ 1324, 1325.

But see Pennsylvania Co. *v.* Sinclair, 62 Ind. 301, 30 Am. Rep. 185.

A failure to take reasonable precautions to avoid the injury need not have been wilful or wanton in such case to make the railroad company liable. Gregory *v.* Wabash R. Co., 126 Iowa 230, 101 N. W. 761.

Accident on bridge.— That a trespasser on a bridge might have jumped to the ground or that he might have lain down on the ties does not relieve the railroad company from liability if the employees neglected to exercise reasonable care to avoid the accident after they discovered him on the bridge. Purcell *v.* Chicago, etc., R. Co., 109 Iowa 628, 80 N. W. 682, 77 Am. St. Rep. 557.

Recovery for the death of a trespasser killed while sitting on a railroad track may be had, although he was guilty of contributory negligence, if those in charge of the train could, after discovering his peril, with proper care and due diligence, have avoided the accident. Seaboard, etc., R. Co. *v.* Joyner, 92 Va. 354, 23 S. E. 773.

69. St. Louis, etc., R. Co. *v.* Wilkerson, 46 Ark. 513; Donahoe *v.* Wabash, etc., R. Co., 83 Mo. 543; International, etc., R. Co. *v.* Smith, 62 Tex. 252, holding that where persons running a train, knowing that a man on the track is deaf, ran him down, the company is liable, notwithstanding he may also have been negligent.

70. *Iowa.*— Purcell *v.* Chicago, etc., R. Co., 109 Iowa 628, 80 N. W. 682, 77 Am. St. Rep. 557.

Missouri.— Hanlon *v.* Missouri Pac. R. Co., 104 Mo. 381, 16 S. W. 233; Isabel *v.* Hannibal, etc., R. Co., 60 Mo. 475.

New York.— Kenyon *v.* New York Cent., etc., R. Co., 5 Hun 479 [*affirmed* in 76 N. Y. 607].

Ohio.— Cincinnati, etc., R. Co. *v.* Murphy, 17 Ohio Cir. Ct. 223, 9 Ohio Cir. Dec. 703.

Texas.— Gulf, etc., R. Co. *v.* Walker, 70 Tex. 126, 7 S. W. 831, 8 Am. St. Rep. 582; Law *v.* Missouri, etc., R. Co., 29 Tex. Civ. App. 134, 67 S. W. 1025; Houston, etc., R. Co. *v.* Harvin, (Civ. App. 1899) 54 S. W. 629; Houston, etc., R. Co. *v.* Wallace, 21 Tex. Civ. App. 394, 53 S. W. 77; Galveston, etc., R. Co. *v.* Zantzinger, (Civ. App. 1899) 49 S. W. 677; Texas, etc., R. Co. *v.* Brown, 14 Tex. Civ. App. 697, 39 S. W. 140.

or in giving the proper signals or warnings.[71] The authorities, however, are conflicting as to what knowledge of the injured person's peril must be had by the railroad company before the doctrine applies. By the weight of authority this doctrine applies only where the railroad company has actual knowledge of the injured party's peril, in time to avert the accident by the exercise of ordinary care.[72] In some jurisdictions, however, the doctrine is held to apply also where the accident occurs at a point where the railroad company has a reason to apprehend that persons may be on or near the track, and therefore where it might have discovered the injured party and by the exercise of ordinary care prevented the injury.[73] In North Carolina the doctrine is held to apply

Virginia.— Green *v.* Southern R. Co., 102 Va. 791, 47 S. E. 819.

See 41 Cent. Dig. tit. "Railroads," §§ 1324, 1325.

Accident on bridge.— The negligence of the party injured in going upon a railroad bridge is no defense, if the engineer could have stopped his train in time to avoid the accident after he discovered his dangerous position but failed to do so. Purcell *v.* Chicago, etc., R. Co., 109 Iowa 628, 80 N. W. 682, 77 Am. St. Rep. 557; Sutzin *v.* Chicago, etc., R. Co., 95 Iowa 304, 63 N. W. 709.

71. St. Louis, etc., R. Co. *v.* Cain, (Ark. 1907) 104 S. W. 533; St. Louis, etc., R. Co. *v.* Evans, 74 Ark. 407, 86 S. W. 426; Chesapeake, etc., R. Co. *v.* Perkins, 105 S. W. 148, 31 Ky. L. Rep. 1350; Baltimore, etc., R. Co. *v.* State, 36 Md. 366; St. Louis Southwestern R. Co. *v.* Allen, 35 Tex. Civ. App. 355, 80 S. W. 240; Law *v.* Missouri, etc., R. Co., 29 Tex. Civ. App. 134, 67 S. W. 1025; Texas, etc., R. Co. *v.* Brown, 14 Tex. Civ. App. 697, 39 S. W. 140.

72. *Arizona.*— Santa Fé, etc., R. Co. *v.* Ford, (1906) 85 Pac. 1072.

Arkansas.— Barry *v.* Kansas City, etc., R. Co., 77 Ark. 401, 91 S. W. 748; St. Louis Southwestern R. Co. *v.* Cochran, 77 Ark. 398, 91 S. W. 747 (holding that the act of April 8, 1891, known as the Lookout Statute, is not applicable in suits for injuries to persons upon a railroad track, and guilty of contributory negligence); Little Rock, etc., R. Co. *v.* Smith, 64 Ark. 662, 43 S. W. 969.

Nebraska.— Chicago, etc., R. Co. *v.* Lilley, 4 Nebr. (Unoff.) 286, 93 N. W. 1012.

Texas.— Missouri, etc., R. Co. *v.* Haltom, 95 Tex. 112, 65 S. W. 625; Galveston, etc., R. Co. *v.* Ryon, 70 Tex. 56, 7 S. W. 687; Texas, etc., R. Co. *v.* Scarborough, (Civ. App. 1907) 104 S. W. 408 [*affirmed* in (1908) 108 S. W. 804]; International, etc., R. Co. *v.* Ploeger, (Civ. App. 1906) 93 S. W. 226, 96 S. W. 56; Gulf, etc., R. Co. *v.* Miller, 30 Tex. Civ. App. 122, 70 S. W. 25.

Washington.— Dotta *v.* Northern Pac. R. Co., 36 Wash. 506, 79 Pac. 32.

See 41 Cent. Dig. tit. "Railroads," § 1324.

In Texas it has been held that if the one injured is negligent, the railroad company cannot be held liable unless he was in a place of danger and the operatives saw and realized he was in a dangerous position and that he either could not or would not probably extricate himself (Houston, etc., R. Co. *v.* O'Donnell, 99 Tex. 636, 92 S. W. 409 [*reversing* (Civ. App. 1905) 90 S. W. 886]), although they saw him at some distance and failed to use ordinary care to discover whether he was in danger (Texas, etc., R. Co. *v.* Staggs, 90 Tex. 458, 39 S. W. 295 [*affirming* (Civ. App. 1896) 37 S. W. 609]; Texas, etc., R. Co. *v.* Breadow, 90 Tex. 26, 36 S. W. 410; Smith *v.* Houston, etc., R. Co., 17 Tex. Civ. App. 502, 43 S. W. 34).

Where the discovery of the injured party's peril did not occur until it was too late to prevent the accident, the railroad company is not liable. Houston, etc., R. Co. *v.* Ramsey, 36 Tex. Civ. App. 285, 81 S. W. 825; Houston, etc., R. Co. *v.* Hartnett, (Tex. Civ. App. 1898) 48 S. W. 773.

73. Denver, etc., R. Co. *v.* Buffehr, 30 Colo. 27, 69 Pac. 582; Chesapeake, etc., R. Co. *v.* Farrow, 106 Va. 137, 55 S. E. 569 (holding that the last clear chance doctrine has no application to the case of a bare licensee who is injured by stepping immediately in front of a moving train, in the absence of any evidence that the railroad company knew or could have known of his position of danger in time to have averted the accident); Blankenship *v.* Chesapeake, etc., R. Co., 94 Va. 449, 27 S. E. 20.

In Missouri, although some decisions have held that in such cases it should appear that the omission of the railroad company, after becoming aware of the danger to which the party injured was exposed, to use a proper degree of care to avoid injuring him (Yarnall *v.* St. Louis, etc., R. Co., 75 Mo. 575; Zimmerman *v.* Hannibal, etc., R. Co., 71 Mo. 476; Rains *v.* St. Louis, etc., R. Co., 71 Mo. 164, 36 Am. Rep. 459; Maher *v.* Atlantic, etc., R. Co., 64 Mo. 267 [*criticized* in Prewitt *v.* Eddy, 115 Mo. 283, 21 S. W. 742]), the doctrine in this state is generally stated to be, that notwithstanding the injured party may have been guilty of contributory negligence, the railroad company is still liable for the injuries, if they could have been prevented by the exercise of reasonable care on the part of the company after discovery of the danger in which the injured party stood; or if the company failed to discover the danger through its own recklessness, when the exercise of ordinary care should have discovered it and avoided the injury (Guenther *v.* St. Louis, etc., R. Co., 108 Mo. 18, 18 S. W. 846; Dahlstrom *v.* St. Louis, etc., R. Co., 96 Mo. 99, 8 S. W. 777; Kelly *v.* Union R., etc., Co., 95 Mo. 279, 8 S. W. 420 [*affirm-*

where the railroad company by taking proper precaution in keeping a proper lookout at any point could have discovered the injured party's peril in time to have averted the injury, and failed to do so.[74] But in any case the railroad company's negligence must have occurred subsequent to the negligence of the injured party before this doctrine applies.[75]

7. Wilful, Wanton, or Unauthorized Acts or Gross Negligence[76]— a. In General. Closely allied to the doctrine of "last clear chance"[77] is the well settled rule that notwithstanding a person injured upon or near railroad tracks is guilty of contributory negligence, even though he be a trespasser,[78] such negligence cannot be relied upon as a defense by the railroad company in any case where the action of the company is wanton, wilful, or reckless and the injury

ing 18 Mo. App. 151]; Dunkman *v.* Wabash, etc., R. Co., 95 Mo. 232, 4 So. 670; Bergman *v.* St. Louis, etc., R. Co., 88 Mo. 678, 1 S. W. 384; Scoville *v.* Hannibal, etc., R. Co., 81 Mo. 434; Smith *v.* Wabash R. Co., 129 Mo. App. 413, 107 S. W. 22; Mauerman *v.* St. Louis, etc., R. Co., 41 Mo. App. 348). In view of the fact, however, that the exercise of ordinary care to discover persons in such danger applies only where the railroad company is charged with such duty as in populous districts or other places where persons may be expected to be on or near the track (Chamberlain *v.* Missouri Pac. R. Co., 133 Mo. 587, 33 S. W. 437, 34 S. W. 842; Powell *v.* Missouri Pac. R. Co., 59 Mo. App. 626), the latter part of this rule — or what is in fact an extension of the general rule stated in the text — in respect to the railroad company's negligence after it should have discovered the injured party's peril, is held to apply only to persons or at places where the railroad company may apprehend persons to be on the tracks, as in populous districts (Chamberlain *v.* Missouri Pac. R. Co., *supra*; Schlereth *v.* Missouri Pac. R. Co., (1892) 19 S. W. 1134; Dunkman *v.* Wabash, etc., R. Co., 95 Mo. 232, 4 S. W. 670; Powell *v.* Missouri Pac. R. Co., 59 Mo. App. 626. And see cases cited, *supra*), especially where by ordinance precautions or safeguards are required to be observed in the management of trains within city limits (Kelly *v.* Union Pac. R. Co., 95 Mo. 279, 8 S. W. 420 [*affirming* 18 Mo. App. 151]; Dunkman *v.* Wabash, etc., R. Co., 95 Mo. App. 232, 4 S. W. 670).

74. Sawyer *v.* Roanoke R., etc., Co., 145 N. C. 24, 58 S. E. 598; Ray *v.* Aberdeen, etc., R. Co., 141 N. C. 84, 53 S. E. 622; Bogan *v.* Carolina Cent. R. Co., 129 N. C. 154, 39 S. E. 808, 55 L. R. A. 418. But it is held in this state that in order that there may be a recovery under this doctrine, the party injured must have been on the track in an apparently helpless condition and the railroad company must have discovered, or by keeping a reasonable lookout could have discovered, him in time to have prevented the injury, and that after it had discovered his position or could by a proper watchfulness have reasonable ground to believe that such was his condition it failed to use reasonable means to prevent the injury. Carter *v.* Southern R. Co., 135 N. C. 498, 47 S. E. 614; Clegg *v.* Southern R. Co., 132 N. C. 292, 43 S. E. 836, 133 N. C. 303, 45 S. E. 657; Upton *v.* South Carolina, etc., R. Co., 128 N. C. 173, 38 S. E. 736; Pharr *v.* Southern R. Co., 119 N. C. 751, 26 S. E. 149; Lloyd *v.* Albemarle, etc., Co., 118 N. C. 1010, 24 S. E. 805, 54 Am. St. Rep. 764; Pickett *v.* Wilmington, etc., R. Co., 117 N. C. 616, 23 S. E. 264, 53 Am. St. Rep. 611, 30 L. R. A. 257.

75. Anderson *v.* Minneapolis, etc., R. Co., 103 Minn. 224, 114 N. W. 1123; Smith *v.* Norfolk, etc., R. Co., 114 N. C. 728, 19 S. E. 863, 923, 25 L. R. A. 287.

76. As to injuries to persons at crossings see *infra*, X, F, 13.

Effect as excusing contributory negligence see *supra*, X, E, 4, a, (v), (A).

77. See *supra*, X, D, 6.

78. *Alabama.*— Mobile, etc., R. Co. *v.* Smith, 146 Ala. 312, 40 So. 763; Alabama Great Southern R. Co. *v.* Guest, 136 Ala. 348, 34 So. 968, 114 Ala. 373, 39 So. 654; Alabama Great Southern R. Co. *v.* Burgess, 114 Ala. 587, 22 So. 169; Central R., etc., Co. *v.* Vaughan, 93 Ala. 209, 9 So. 468, 30 Am. St. Rep. 50.

Colorado.— Denver, etc., R. Co. *v.* Buffehr, 30 Colo. 27, 69 Pac. 582.

Illinois.—Illinois Cent. R. Co. *v.* Leiner, 202 Ill. 624, 67 N. E. 398, 95 Am. St. Rep. 266 [*affirming* 103 Ill. App. 438]; Chicago Terminal Transfer R. Co. *v.* Gruss, 200 Ill. 195, 65 N. E. 693 [*affirming* 102 Ill. App. 439]; Chicago Terminal Transfer R. Co. *v.* Kotoski, 199 Ill. 383, 65 N. E. 350 [*affirming* 101 Ill. App. 300]; Lake Shore, etc., R. Co. *v.* Bodemer, 139 Ill. 596, 29 N. E. 692, 32 Am. St. Rep. 218 [*affirming* 33 Ill. App. 479]; O'Conner *v.* Illinois Cent. R. Co., 77 Ill. App. 22; Illinois Cent. R. Co. *v.* Beard, 49 Ill. App. 232.

Indiana.—Brooks *v.* Pittsburgh, etc., R. Co., 158 Ind. 62, 62 N. E. 694.

Mississippi.— Barmore *v.* Vicksburg, etc., R. Co., 85 Miss. 426, 38 So. 210, 70 L. R. A. 627; Stevens *v.* Yazoo, etc., R. Co., 81 Miss. 195, 32 So. 311.

Texas.— Texas, etc., R. Co. *v.* Woodall, 2 Tex. App. Civ. Cas. § 471.

See 41 Cent. Dig. tit. "Railroads," § 1326.

In determining what is wanton conduct as to an infant trespasser of tender years, due consideration must be given to the well-known indiscretions and limited ability of young persons to take adequate means to avoid dan-

complained of ensues as a result,[79] provided the railroad employees in doing or omitting such acts are acting within the line of their employment.[80] To constitute wilfulness, wantonness, or recklessness within the meaning of this rule, mere negligence is not sufficient,[81] but there must be either a design or purpose to inflict injury,[82] or conduct manifesting a reckless disregard of consequences under circumstances where the act done or omitted would probably or naturally result in injury,[83] or in other words an act done or omitted with the consciousness at the time that injury will naturally or probably result therefrom.[84] But an express intention to injure is not essential; it is sufficient if the employees inflicting the injury exhibit such wantonness and recklessness as to probable consequences as implies a willingness to inflict injury, or an indifference as to whether injury is inflicted.[85] It is held reckless, wilful, or wanton negligence within the meaner. Charleston, etc., R. Co. *v.* Johnson, 1 Ga. App. 441, 57 S. E. 1064.

79. *Alabama.*— Haley *v.* Kansas City, etc., R. Co., 113 Ala. 640, 21 So. 357.

Arkansas.—Adams *v.* St. Louis, etc., R. Co., (1907) 103 S. W. 725.

Illinois.— Lake Shore, etc., R. Co. *v.* Bodemer, 139 Ill. 596, 29 N. E. 692, 32 Am. St. Rep. 218 [*affirming* 33 Ill. App. 479]; Illinois Cent. R. Co. *v.* Beard, 49 Ill. App. 232.

Indiana.— Pennsylvania Co. *v.* Sinclair, 62 Ind. 301, 30 Am. Rep. 185.

Michigan.— Bouwmeester *v.* Grand Rapids, etc., R. Co., 63 Mich. 557, 30 N. W. 337.

Mississippi.— Barmore *v.* Vicksburg, etc., R. Co., 85 Miss. 426, 38 So. 210, 70 L. R. A. 627.

Missouri.— Zumault *v.* Kansas City Suburban Belt R. Co., 175 Mo. 288, 74 S. W. 1015; Tanner *v.* Missouri Pac. R. Co., 161 Mo. 497, 61 S. W. 826.

New York.— Greene *v.* New York, etc., R. Co., 102 N. Y. App. Div. 322, 92 N. Y. Suppl. 424.

See 41 Cent. Dig. tit. "Railroads," § 1326.

Where wanton and wilful negligence is charged and proved, it makes no difference to what extent the person killed or injured was guilty of want of care. Lake Shore, etc., R. Co. *v.* Bodemer, 139 Ill. 596, 29 N. E. 692, 32 Am. St. Rep. 218 [*affirming* 33 Ill. App. 479].

80. Greene *v.* New York, etc., R. Co., 102 N. Y. App. Div. 322, 92 N. Y. Suppl. 424.

Railroad agents and servants while engaged in running a train of cars are in the line of their duties and for their acts wilfully done while so engaged, resulting in injury to a person on or near the track the company is liable. Terre Haute, etc., R. Co. *v.* Graham, 46 Ind. 239.

81. Parker *v.* Pennsylvania Co., 134 Ind. 673, 34 N. E. 504, 23 L. R. A. 552; Redson *v.* Michigan Cent. R. Co., 120 Mich. 671, 79 N. W. 939.

Distinction between negligence and wilfulness.— Negligence and wilfulness are incompatible terms. Negligence arises from inattention, thoughtlessness, or heedlessness, while wilfulness cannot exist without a purpose or design, and negligence, it has been said, can never be of such a degree as to become wilfulness. Parker *v.* Pennsylvania Co., 134 Ind. 673, 34 N. E. 504, 23 L. R. A. 552.

82. Alabama Great Southern R. Co. *v.* Burgess, 114 Ala. 587, 22 So. 169, 116 Ala. 509, 22 So. 913; Parker *v.* Pennsylvania Co., 134 Ind. 673, 34 N. E. 504, 23 L. R. A. 552; Redson *v.* Michigan Cent. R. Co., 120 Mich. 671, 79 N. W. 939.

83. Peters *v.* Southern R. Co., 135 Ala. 533, 33 So. 332; Parker *v.* Pennsylvania Co., 134 Ind. 673, 34 N. E. 504, 23 L. R. A. 552; Everett *v.* Richmond, etc., R. Co., 121 N. C. 519, 27 S. E. 991.

Conduct held not wilful, wanton, or reckless so as to render the company liable notwithstanding the injured party's contributory negligence see Williams *v.* Georgia Cent. R. Co., (Ala. 1905) 40 So. 143; Illinois Cent. R. Co. *v.* Eicher, 202 Ill. 556, 67 N. E. 376 [*reversing* 100 Ill. App. 599]; Illinois Cent. R. Co. *v.* Beard, 49 Ill. App. 232; Pittsburgh, etc., R. Co. *v.* Judd, 10 Ind. App. 213, 36 N. E. 775; Finnegan *v.* Michigan Cent. R. Co., 127 Mich. 15, 86 N. W. 395 (failure to see person injured or give warning by bell or whistle); Johnson *v.* Truesdale, 46 Minn. 345, 48 N. W. 1136; Zumault *v.* Kansas City Suburban Belt R. Co., 175 Mo. 288, 74 S. W. 1015; Baltimore, etc., R. Co. *v.* Sherman, 30 Gratt. (Va.) 602. It is not wanton or wilful negligence to fail to comply with a statute providing that no railroad company shall permit a train of cars for the transportation of merchandise, etc., to run without a good and sufficient brake attached to the rear car of the train and without a trusty and skilful brakeman stationed on such car. Cleveland, etc., R. Co. *v.* Cline, 111 Ill. App. 416, 424.

The failure to build a platform and furnish a light when needed or to keep a lookout at a certain junction whereby one is injured is not sufficient to sustain a charge that the injury was caused by reckless, wanton, or intentional negligence. Ensley R. Co. *v.* Chewning, 93 Ala. 24, 9 So. 458.

Running past a station at which another train is stopping for passengers in violation of the rules of the company is not evidence of wilfulness. Louisville, etc., R. Co. *v.* Wurl, 62 Ill. App. 381.

84. Peters *v.* Southern R. Co., 135 Ala. 533, 33 So. 332; Alabama Great Southern R. Co. *v.* Burgess, 114 Ala. 587, 22 So. 169, 116 Ala. 509, 22 So. 913. And see cases cited *supra* note 83.

85. Alabama Great Southern R. Co. *v.* Bur-

ing of this rule to fail to exercise reasonable care to prevent the injury after becoming aware of the injured party's perilous position,[86] and in some jurisdictions the rule applies only where the company fails to exercise such care after it has actual knowledge of the injured party's peril,[87] although in other jurisdictions it also

gess, 119 Ala. 555, 25 So. 251, 72 Am. St. Rep. 943; East St. Louis Connecting R. Co. *v.* O'Hara, 150 Ill. 580, 37 N. E. 917 [*affirming* 49 Ill. App. 282] (holding that it is not necessary in order to raise such an inference to prove that the railroad's servants were actuated by any ill-will directed specifically to the person injured); Palmer *v.* Chicago, etc., R. Co., 112 Ind. 250, 14 N. E. 70; Manlove *v.* Cleveland, etc., R. Co., 29 Ind. App. 694, 65 N. E. 212.

What will constitute wanton, wilful, or reckless negligence has also been defined as a conscious failure on the part of the railroad company to use reasonable care to avoid the injury after discovering the danger (Alabama Great Southern R. Co. *v.* Burgess, 119 Ala. 555, 25 So. 251, 72 Am. St. Rep. 943 [*overruling* Alabama Great Southern R. Co. *v.* Burgess, 116 Ala. 509, 22 So. 913]); or as an intentional failure to perform a manifest duty in which the public has an interest or which is important to the person injured in either preventing or avoiding the injury (Kentucky Cent. R. Co. *v.* Gastineau, 83 Ky. 119); or as such gross want of care and regard for the rights of others as to show a disregard of consequences or a willingness to inflict injury (Lake Shore, etc., R. Co. *v.* Bodemer, 139 Ill. 596, 29 N. E. 692, 32 Am. St. Rep. 218 [*affirming* 33 Ill. App. 479]; Cleveland, etc., R. Co. *v.* Ricker, 116 Ill. App. 428, holding that gross negligence of an engineer is shown where an emergency signal is displayed and he did not stop the train until he had gone four hundred and sixty-five feet after receiving the signal; Cleveland, etc., R. Co. *v.* Cline, 111 Ill. App. 417).

Gross negligence is not as a matter of law wilfulness. Illinois Cent. R. Co. *v.* Beard, 49 Ill. App. 232; Terre Haute, etc., R. Co. *v.* Graham, 95 Ind. 286, 48 Am. Rep. 719. But the term "gross negligence" has been held practically synonymous with "wilful negligence," and defined as an intentional failure to perform a manifest duty in reckless disregard of consequences, or a thoughtless disregard of consequences without the exercise of an effort to avoid it. Finnegan *v.* Michigan Cent. R. Co., 127 Mich. 15, 86 N. W. 395; Redson *v.* Michigan Cent. R. Co., 120 Mich. 671, 79 N. W. 939, holding, however, that a mere failure to exercise due care or the means at hand is not gross negligence.

86. *Alabama.*—Alabama Great Southern R. Co. *v.* Burgess, 114 Ala. 587, 22 So. 169; Georgia Pac. R. Co. *v.* Ross, 100 Ala. 490, 14 So. 282; Ensley R. Co. *v.* Chewning, 93 Ala. 24, 9 So. 458.

Illinois.— Illinois Cent. R. Co. *v.* Beard, 49 Ill. App. 232.

Kansas.—Kansas City, etc., R. Co. *v.* Campbell, 6 Kan. App. 417, 49 Pac. 817.

Kentucky.— Louisville, etc., R. Co. *v.* Eaden, 122 Ky. 818, 93 S. W. 7, 29 Ky. L. Rep. 365, 6 L. R. A. N. S. 581.

Mississippi.— See Barmore *v.* Vicksburg, etc., R. Co., 85 Miss. 426, 38 So. 210, 70 L. R. A. 627.

See 41 Cent. Dig. tit. "Railroads," § 1326.

Illustrations.— Where the railroad servants in charge of a train discover a person on or near the tracks and in a dangerous position from which he apparently cannot or will not extricate himself in time to avoid being injured, it has been held wilful, wanton, or reckless negligence to run him down without giving him due warning of the train's approach (Central R., etc., Co. *v.* Denson, 84 Ga. 774, 11 S. E. 1039); and without using all reasonable means to slacken or stop the train in time to avoid the injury (Central R., etc., Co. *v.* Vaughan, 93 Ala. 209, 9 So. 468, 30 Am. St. Rep. 50; Central R., etc., Co. *v.* Denson, 84 Ga. 774, 11 S. E. 1039; Palmer *v.* Chicago, etc., R. Co., 112 Ind. 250, 14 N. E. 70; Lake Erie, etc., R. Co. *v.* Brafford, (Ind. App. 1896) 43 N. E. 882). But an engineer is not wilfully negligent in failing to stop while there is yet time to examine an object which he supposes to be a dog or something inanimate lying on the track, but which on closer approach is discerned to be a child. Louisville, etc., R. Co. *v.* Williams, 69 Miss. 631, 12 So. 957.

To warrant a recovery in such a case it must be shown that the person injured was on or so near the track as to be in danger of being struck by the engine; that he was seen by the engineer; that after he was seen his conduct was such that the engineer should have known he either did not hear the approaching engine or did not intend to get out of the way; and that after discovering that such person was not going to get out of the way the engineer made no effort to avert the injury by stopping or slackening the speed of the engine but recklessly and wantonly ran upon and injured him. McLaughlin *v.* Chicago, etc., R. Co., 115 Ill. App. 262.

87. Richmond, etc., R. Co. *v.* Didzoneit, 1 App. Cas. (D. C.) 482, 485, where the court said: "Negligence superimposed upon negligence does not amount to wilfulness; nor is the failure, superinduced by negligence, to have knowledge of a dangerous condition the equivalent of actual knowledge of such condition. And it is only when a defendant has actual knowledge of the plaintiff's danger, and could, by the exercise of ordinary care and prudence, have avoided the resulting injury, that the plaintiff is relieved from the liability of having his own negligence charged against him, and the defendant's negligence is regarded as the proximate and exclusive cause of the injury. The fact that it may have been negligence in the defendant not to have known the plaintiff's danger, and that the

applies where the railroad employees are guilty of recklessness or wantonness in failing to discover such peril and avert the accident, as in failing to discover such person at a point where it has reasonable grounds to believe that he or some other person will be on the track in a situation or condition of peril.[88] A railroad company is liable for injuries caused by acts of its employees while acting within the line of their employment, although the particular acts causing the injury are done in an improper manner or in a mode not contemplated by the railroad company,[89] even though such act be wilful or malicious; [90] but it is not liable if such acts are without the scope of the servant's employment.[91]

b. Signals and Lookouts. Where there is no special duty to keep a lookout, the failure to discover a trespasser or mere licensee upon or near the tracks in time to prevent his injury does not show wanton, wilful, or reckless negligence within the meaning of the above rule,[92] and it has been held that even a violation of a statutory requirement to maintain a lookout under certain circumstances does not show a reckless disregard of consequences so as to amount to wantonness.[93] Likewise the failure to give signals or warnings of an approaching train is not wilful or wanton negligence,[94] unless such failure is under the circumstances manifesting a reckless disregard of consequences.[95] So a mere failure to give signals required by statute or ordinance does not establish wanton or wilful negligence as to a trespasser,[96] even though those operating the train have knowledge that persons have been in the habit of crossing or walking upon the tracks at places other than public places or public crossings.[97]

defendant might have ascertained the danger by the exercise of due care, cannot be permitted to have the effect of actual knowledge, so as to charge the defendant with recklessness. To allow such an effect would result in the overthrow of the whole doctrine of contributory negligence. It would be impossible, upon such a theory, ever to hold any one to the consequences of his own misconduct. For if negligence to acquire knowledge were the equivalent of knowledge, in the contemplation of the law of torts, every act of negligence should be construed as an act of wilfulness."

Actual knowledge need not be positively and directly shown; but it may be inferred from such circumstances as that the track was straight and the view unobstructed, and that the engineer was in his seat, looking ahead, and that there was nothing to prevent him from seeing a person on the track ahead of the train. Southern R. Co. *v.* Bush, 122 Ala. 470, 26 So. 168.

88. Alabama Great Southern R. Co. *v.* Guest, 136 Ala. 348, 34 So. 968, 144 Ala. 373, 39 So. 654; Haley *v.* Kansas City, etc., R. Co., 113 Ala. 640, 21 So. 357; East St. Louis Connecting R. Co. *v.* O'Hara, 150 Ill. 580, 37 N. E. 917 [*affirming* 49 Ill. App. 282]; Lake Shore, etc., R. Co. *v.* Bodemer, 139 Ill. 596, 29 N. E. 692, 32 Am. St. Rep. 218 [*affirming* 33 Ill. App. 479]; Illinois Cent. R. Co. *v.* Beard, 49 Ill. App. 232. But see Glass *v.* Memphis, etc., R. Co., 94 Ala. 581, 10 So. 215.

Wilful act without knowledge of object injured.—A railroad company may be liable for the consequences of a wilful act without an actual knowledge of the presence of the object acted upon, but this liability never exists where the act or omission is one from which the injury could not reasonably have been anticipated as the natural and probable consequence of such act or omission. Parker *v.* Pennsylvania Co., 134 Ind. 673, 34 N. E. 504, 23 L. R. A. 552.

89. Pollard *v.* Maine Cent. R. Co., 87 Me. 51, 32 Atl. 735.

90. Texas, etc., R. Co. *v.* Black, 87 Tex. 160, 27 S. W. 118; Texas, etc., R. Co. *v.* Woodall, 2 Tex. Civ. App. Cas. § 471.

91. Texas, etc., R. Co. *v.* Black, 87 Tex. 160, 27 S. W. 118, assault by brakeman not in discharge of duty.

Unauthorized acts in removing a trespasser from a depot do not render a railroad company liable therefor. Weiler *v.* Pennsylvania R. Co., 12 Pittsb. Leg. J. N. S. (Pa.) 347.

92. *Alabama.*—Georgia Pac. R. Co. *v.* Ross, 100 Ala. 490, 14 So. 282.

Connecticut.—Nolan *v.* New York, etc., R. Co., 53 Conn. 461, 4 Atl. 106.

Illinois.—Janowicz *v.* Pittsburgh, etc., R. Co., 124 Ill. App. 149.

Missouri.—Carrier *v.* Missouri Pac. R. Co., 175 Mo. 470, 74 S. W. 1002.

United States.—King *v.* Illinois Cent. R. Co., 114 Fed. 855, 52 C. C. A. 489.

93. Eggmann *v.* St. Louis, etc., R. Co., 47 Ill. App. 507.

94. Janowicz *v.* Pittsburgh, etc., R. Co., 124 Ill. App. 149 (as to a trespasser); Mobile, etc., R. Co. *v.* Roberts, (Miss. 1908) 23 So. 393.

95. Greene *v.* New York, etc., R. Co., 102 N. Y. App. Div. 322, 92 N. Y. Suppl. 424, holding a railroad company liable for injuries caused by the wrongful and wilful act of its servant in charge of a locomotive in permitting it to run down on a person without warning.

96. Illinois Cent. R. Co. *v.* O'Connor, 189 Ill. 559, 59 N. E. 1098 [*reversing* 90 Ill. App. 142].

97. Illinois Cent. R. Co. *v.* O'Connor, 189

c. Rate of Speed. The fact that the train which caused the injury was running at an excessive or unlawful rate of speed,[98] as that it was running at a rate of speed in violation of an ordinance,[99] does not of itself show wanton, wilful, or reckless negligence; although it is otherwise if the train is going at such rate of speed under circumstances which show a disregard of the rights of others or of consequences, or a willingness to inflict injury.[1]

d. Inviting or Permitting Persons to Ride on Trains or Cars. A railroad company is liable for its negligence in causing injuries to one who is riding upon its train or cars by the invitation or permission of its employee, where such employee has authority to give such invitation or permission by virtue of the scope of his employment,[2] as by virtue of some rule of the company;[3] but it is not liable if such invitation or permission is given without authority,[4] and it does not appear

Ill. 559, 59 N. E. 1098 [*reversing* 90 Ill. App. 142].

98. Peters *v.* Southern R. Co., 135 Ala. 533, 33 So. 332 (fifty miles an hour through the outskirts of a city); Illinois Cent. R. Co. *v.* Beard, 49 Ill. App. 232.

Running a car through an archway at a high rate of speed, although there are usually a large number of people in the vicinity, is nothing more than negligence in the absence of actual knowledge by the company's operatives of the presence of the person injured in such archway, and is not uch wilfulness as renders the company liable notwithstanding such party's contributory negligence. Parker *v.* Pennsylvania Co., 134 Ind. 673, 34 N. E. 504, 23 L. R. A. 552.

99. Blanchard *v.* Lake Shore, etc., R. Co., 126 Ill. 416, 18 N. E. 799, 9 Am. St. Rep. 630; Illinois Cent. R. Co. . Hetherington, 83 Ill. 510; Louisville, etc., R. Co. *v.* Wurl, 62 Ill. App. 381; St. Louis, etc., R. Co. *v.* Andres, 16 Ill. App. 292; Brooks *v.* Pittsburgh, etc., R. Co., 158 Ind. 62, 62 N. E. 694; Tanner *v.* Missouri Pac. R. Co., 161 Mo. 497, 61 S. W. 826.

1. East St. Louis Connecting R. Co. *v.* O'Hara, 150 Ill. 580, 37 N. E. 917 [*affirming* 49 Ill. App. 282].

Running at an excessive or unlawful rate of speed and without giving signals or warnings through a city or other place where the railroad employees have reason to anticipate that persons may be on the track shows wilfulness, wantonness, or recklessness. Alabama Great Southern R. Co. *v.* Guest, 136 Ala. 348, 34 So. 968, 144 Ala. 373, 39 So. 654; East St. Louis Connecting R. Co. *v.* O'Hara, 150 Ill. 580, 37 N. E. 917 [*affirming* 49 Ill. App. 282]; Lake Shore, etc., R. Co. *v.* Bodemer, 139 Ill. 596, 29 N. E. 692, 32 Am. St. Rep. 218 [*affirming* 33 Ill. App. 479]; Southern R. Co. *v.* Drake, 107 Ill. App. 12; Illinois Cent. R. Co. *v.* Leiner, 103 Ill. App. 438 [*affirmed* in 202 Ill. 624, 67 N. E. 398, 95 Am. St. Rep. 266] (running a train at from fifteen to eighteen miles an hour at a place where there is, to the knowledge of the railroad company's servants, likelihood of a prior occupancy by another train); Illinois Cent. R. Co. *v.* Eicher, 100 Ill. App. 599 [*reversed* on the facts in 202 Ill. 556, 67 N. E. 376]; Illinois Cent. R. Co. *v.* Beard, 49 Ill. App. 232; Stevens *v.* Yazoo, etc., R. Co., 81 Miss. 195, 32 So. 311. But see Brooks *v.* Pittsburgh, etc., R. Co., 158 Ind. 62, 62 N. E. 694.

2. Alabama Great Southern R. Co. *v.* Yarbrough, 83 Ala. 238, 3 So. 447, 3 Am. St. Rep. 715; Mexican Nat. R. Co. *v.* Crum, 6 Tex. Civ. App. 702, 25 S. W. 1126.

A person riding by the invitation or permission of the conductor is not a trespasser, and is entitled to recover for injuries sustained by reason of the railroad company's negligence (Alabama Great Southern R. Co. *v.* Yarbrough, 83 Ala. 238, 3 So. 447, 3 Am. St. Rep. 715; Gradin *v.* St. Paul, etc., R. Co., 30 Minn. 217, 14 N. W. 881, holding this to be true, at least, where it is not shown that the conductor exceeded his authority in permitting such person to ride on the train. But see Cooper *v.* Lake Erie, etc., R. Co., 136 Ind. 366, 36 N. E. 272, holding a railroad company not liable for injury to a person engaged in working his passage under an arrangement with the conductor and brakeman, as they have no authority to employ assistance and there being no custom or regulations of the company permitting the payment of fare by work on the train), unless he knows that the conductor exceeded his authority in permitting or inviting him to ride (Alabama Great Southern R. Co. *v.* Yarbrough, *supra*).

Where a person is injured while riding on a hand-car on the invitation of the railroad company's employees, he is entitled to recover if such employees were acting within the scope of their authority; but if they were at the time of the accident using the hand-car for private business of their own in which the company had no interest, then they were not acting within the scope of their authority and the railroad company is not liable. Gulf, etc., R. Co. *v.* Dawkins, 77 Tex. 228, 13 S. W. 982.

3. Whitehouse *v.* Grand Trunk R. Co., 29 Fed. Cas. No. 17,565, 2 Hask. 189.

A rule forbidding persons to ride on the engine without the permission of the engineer authorizes such engineer to permit a person to ride upon the engine. Whitehouse *v.* Grand Trunk R. Co., 29 Fed. Cas. No. 17,565, 2 Hask. 189.

4. Snyder *v.* Hannibal, etc., R. Co., 60 Mo. 413; Gulf, etc., R. Co. *v.* Dawkins, 77 Tex. 228, 13 S. W. 982; Missouri, etc., R. Co. *v.*

that the invitation or permission is in furtherance of the interests of the company or connected in any manner with the service which the servant is employed to render,[5] particularly where such invitation or permission, and riding, is in violation of the rules of the company; [6] and the fact that such person or others have been in the habit of riding upon the train or cars without the employees in charge thereof taking any measures to prevent them from doing so does not create an obligation of care for their safety on the part of the company.[7]

e. Removal of Trespassers From Trains or Cars. The liability of a railroad company for the improper conduct of its employees in removing a trespasser from its trains or cars is founded on the law of agency,[8] and except where there is a statutory provision otherwise,[9] a railroad company is liable for injuries caused by the acts of its servants,[10] in removing trespassers from its trains or cars, even though such acts be wilful, wanton, or reckless, where such employees are at the time acting within the scope of their employment, and in furtherance of their duties; [11] but the company will not be liable where they are wilfully and maliciously

Tonahill, 16 Tex. Civ. App. 625, 41 S. W. 875 (holding this to be true in respect to a child of such a degree of intelligence as to appreciate the danger of his act); Mexican Nat. R. Co. *v.* Crum, 6 Tex. Civ. App. 702, 25 S. W. 1126.

The grossest carelessness in the operation of a train or car has been held not to give such persons any claim against the company for injuries suffered therefrom. Barkley *v.* Chicago, etc., R. Co., 37 Ill. App. 293; Dougherty *v.* Chicago, etc., R. Co., 137 Iowa 257, 114 N. W. 902, 14 L. R. A. N. S. 590. But see Reary *v.* Louisville, etc., R. Co., 40 La. Ann. 32, 3 So. 390, 8 Am. St. Rep. 497.

One riding by the invitation or permission of a brakeman is not entitled to recover where it does not appear that the brakeman was acting within the scope of his employment. Stringer *v.* Missouri Pac. R. Co., 96 Mo. 299, 9 S. W. 905; Cotter *v.* Frankford, etc., R. Co., 15 Phila. (Pa.) 255, 9 Wkly. Notes Cas. 477.

An engineer ordinarily acts beyond the scope of his employment in permitting a person to ride on the engine or train and the railroad company cannot be held liable therefor. Chicago, etc., R. Co. *v.* Casey, 9 Ill. App. 632. *Compare* Whitehouse *v.* Grand Trunk R. Co., 29 Fed. Cas. No. 17,565, 2 Hask. 189.

A baggage-master has no authority to invite or permit persons to ride in a coach, and it has been held that the railroad company is not liable for injuries which such persons may receive, unless for negligence or tortious acts on the part of the company. Reary *v.* Louisville, etc., R. Co., 40 La. Ann. 32, 3 So. 390, 8 Am. St. Rep. 497.

5. Snyder *v.* Hannibal, etc., R. Co., 60 Mo. 413; Gulf, etc., R. Co. *v.* Dawkins, 77 Tex. 228, 13 S. W. 982.

6. Barkley *v.* Chicago, etc., R. Co., 37 Ill. App. 293; Duff *v.* Allegheny Valley R. Co., 91 Pa. St. 458, 36 Am. Rep. 675 (holding that a boy permitted by a conductor to ride on the train to sell newspapers in violation of the regulations of the company is a mere trespasser and the company is not liable for his death in an accident); Gulf, etc., R. Co. *v.* Dawkins, 77 Tex. 228, 13 S. W. 982 (holding that the habitual disregard of the company's rules by consent of its officers and agents cannot be considered in determining whether such rules had been abandoned). *Compare* Missouri, etc., R. Co. *v.* Rodgers, (Tex. Civ. App. 1896) 35 S. W. 412.

A former fireman who accepts an invitation from one of the railroad company's engineers to ride on the engine with him is charged with notice of a rule of the company prohibiting any one but the engineer and certain employees from riding on the engine, and he is a mere trespasser and can derive no authority from the engineer or conductor for his act. Virginia Midland R. Co. *v.* Roach, 83 Va. 375, 5 S. E. 175.

7. Barkley *v.* Chicago, etc., R. Co., 37 Ill. App. 293; Gulf, etc., R. Co. *v.* Dawkins, 77 Tex. 228, 13 S. W. 982.

8. Farber *v.* Missouri Pac. R. Co., 116 Mo. 81, 22 S. W. 631, 20 L. R. A. 350.

9. See Smith *v.* Savannah, etc., R. Co., 100 Ga. 96, 27 S. E. 725, holding that under Civ. Code, § 2321, a railroad company is liable for injuries sustained by wilful acts of an employee in ejecting a trespasser from a train where he is at the time in the employment and service of the railroad company, whether ejecting trespassers is or is not within the scope of his employment.

10. Galveston, etc., R. Co. *v.* Neel, (Tex. Civ. App. 1894) 26 S. W. 788.

11. *Georgia.*— Savannah, etc., R. Co. *v.* Watson, 89 Ga. 110, 14 S. E. 890.

Illinois.— Northwestern R. Co. *v.* Hack, 66 Ill. 238, holding a railroad company to be liable where a servant whose business it was to clean cars and to keep persons out of the same in discharge of that duty kicked a boy trespassing on a moving car, thereby causing him to fall between the cars.

Indiana.— Baltimore, etc., R. Co. *v.* Norris, 17 Ind. App. 189, 46 N. E. 554, 60 Am. St. Rep. 166.

Mississippi.— Alabama Great Southern R. Co, *v.* Harris. 71 Miss. 74, 14 So. 263.

New York.— Rounds *v.* Delaware, etc., R. Co., 64 N. Y. 129, 21 Am. Rep. 597 [*affirming*

acting for some purpose of their own, and not in pursuance of their service for the railroad company,[12] or where they do not act wilfully, wantonly, or recklessly.[13] Thus where such servant or employee is at the time acting within the scope of his employment in removing a trespasser, a railroad company will be liable for injuries caused by the wilful, wanton, or reckless acts of a conductor,[14]

3 Hun 329, 5 Thomps. & C. 475]; Clark *v.* New York, etc., R. Co., 40 Hun 605, 3 N. Y. Suppl. 607 [*affirmed* in 113 N. Y. 670, 21 N. E. 1116].

North Carolina.— Cook *v.* Southern R. Co., 128 N. C. 333, 38 S. E. 925; Pierce *v.* North Carolina R. Co., 124 N. C. 83, 32 S. E. 399, 44 L. R. A. 316.

Texas.— House *v.* Blum, (Civ. App. 1900) 56 S. W. 82.

West Virginia.— Bess *v.* Chesapeake, etc., R. Co., 35 W. Va. 492, 14 S. E. 234, 29 Am. St. Rep. 820.

See 41 Cent. Dig. tit. "Railroads," §§ 906, 907.

Where a person is assaulted by a brakeman or flagman by reason of which he jumps from a moving train and is injured, the fact that the conductor is the only one authorized to eject a person from a train does not relieve the company from liability, since if the conductor has sole authority it is his duty to restrain those under him from assaulting even a trespasser. Cook *v.* Southern R. Co., 128 N. C. 333, 38 S. E. 925.

12. *Illinois.*— Chicago, etc., R. Co. *v.* Brackman, 78 Ill. App. 141, brakeman.

Indiana.— Smith *v.* Louisville, etc., R. Co., 124 Ind. 394, 24 N. E. 753.

Kentucky.— Smith *v.* Louisville, etc., R. Co., 95 Ky. 11, 23 S. W. 652, 15 Ky. L. Rep. 390, 22 L. R. A. 72.

New York.— Rounds *v.* Delaware, etc., R. Co., 64 N. Y. 129, 21 Am. Rep. 597 [*affirming* 3 Hun 329, 5 Thomps. & C. 475].

Ohio.— Whistler *v.* Cowan, 26 Ohio Cir. Ct. 511 [*affirmed* in 70 Obio St. 514, 72 N. E. 1167].

Texas.— International, etc., R. Co. *v.* Anderson, 82 Tex. 516, 17 S. W. 1039, 27 Am. St. Rep. 902; Texas, etc., R. Co. *v.* Mother, 5 Tex. Civ. App. 87, 24 S. W. 79; Texas, etc., R. Co. *v.* Moody, (Civ. App. 1893) 23 S. W. 41.

See 41 Cent. Dig. tit. "Railroads," §§ 906, 907.

Where a person bribes an employee to permit him to ride on a train or car, such employee and such person thereby become joint trespassers, and the employee's authority to represent the company in ejecting such person, if he had any, thereby ceases, so that the railroad company is not thereafter liable for his acts, although wilful or wanton, in ejecting such person (Brevig *v.* Chicago, etc., R. Co., 64 Minn. 168, 66 N. W. 401; Williams *v.* Mobile, etc., R. Co., (Miss. 1895) 19 So. 90; Alabama, etc., R. Co. *v.* McAfee, 71 Miss. 70, 14 So. 260; Grahn *v.* International, etc., R. Co., 100 Tex. 27, 93 S. W. 104, 123 Am. St. Rep. 767, 5 L. R. A. N. S. 1025), unless he afterward receives express authority to eject such person (Brevig *v.* Chicago, etc., R. Co., *supra*). Thus a railroad company is not liable for the act of a brakeman in pushing a trespasser under his train because he will not pay for the privilege of riding, the money not having been demanded for his fare and the brakeman having no authority to collect his fare. Illinois Cent. R. Co. *v.* Latham, 72 Miss. 32, 16 So. 757.

Where a trespasser is shot by a railroad employee after he has alighted from a train, the company is not liable. Southern Pac. R. Co. *v.* Kennedy, 9 Tex. Civ. App. 232, 29 S. W. 394. And although the shooting took place on the train in an effort to eject the trespasser, if the employee afterward throws the body on the track for the purpose of concealing his crime, the company is not liable for the mutilation of the body. Houston, etc., R. Co. *v.* Bowen, 36 Tex. Civ. App. 165, 81 S. W. 80.

13. Bjornquist *v.* Boston, etc., R. Co., 185 Mass. 130, 70 N. E. 53, 102 Am. St. Rep. 332.

Recklessness or wantonness in dealing with a trespasser is not to be inferred from the mere use of language intended to influence the trespasser's voluntary action, although the language used is not necessary or proper; but only where it is so unreasonable or improper in reference to its probable effect on the safety of the trespasser as to indicate a wanton and reckless disregard of probable dangerous consequences. Bjornquist *v.* Boston, etc., R. Co., 185 Mass. 130, 70 N. E. 53, 102 Am. St. Rep. 332; Bolin *v.* Chicago, etc., R. Co., 108 Wis. 333, 84 N. W. 446, 81 Am. St. Rep. 911.

14. The conductor of a train has authority to remove trespassers therefrom, and if, in exercising such authority, he wilfully, wantonly, or recklessly injures them the company is liable.

Georgia.— Savannah, etc., R. Co. *v.* Watson, 89 Ga. 110, 14 S. E. 890.

Indiana.— Baltimore, etc., R. Co. *v.* Norris, 17 Ind. App. 189, 46 N. E. 554, 60 Am. St. Rep. 166.

Iowa.— Hamilton *v.* Chicago, etc., R. Co., 119 Iowa 650, 93 N. W. 594.

Oklahoma.— Folley *v.* Chicago, etc., R. Co., 16 Okla. 32, 84 Pac. 1090.

Texas.— Southern Pac. R. Co. *v.* Kennedy, 9 Tex. Civ. App. 232, 29 S. W. 394, holding that a railroad company is liable for the act of a conductor in shooting a trespasser while he is in the act of alighting, unless the shooting is not done for the purpose of forcing the trespasser to get off, but merely from personal resentment.

United States.— Toledo, etc., R. Co. *v.* Gordon, 143 Fed. 95, 74 C. C. A. 289.

See 41 Cent. Dig. tit. "Railroads," §§ 906, 907.

flagman,[15] engineer,[16] or brakeman.[17] In some jurisdictions it is held that a brakeman has implied authority to remove trespassers by virtue of his employment, and that the railroad company is liable for his acts, although wilful, wanton, or reckless in doing so;[18] but in other jurisdictions a brakeman has no such implied authority, and in order to hold the railroad company liable for his wilful and wanton acts in removing a trespasser, it must be shown that authority to do so has been given or acquiesced in by the company.[19]

15. Southern R. Co. *v.* Hunter, 74 Miss. 444, 21 So. 304.

16. Chicago, etc., R. Co. *v.* West, 125 Ill. 320, 17 N. E. 788, 8 Am. St. Rep. 380 [*affirming* 24 Ill. App. 44] (engineer forcing boy to jump off engine while in motion); Palatty *v.* Charleston, etc., R. Co., 67 S. C. 391, 45 S. E. 932, 100 Am. St. Rep. 750 (throwing blocks of coal at trespasser causing him to fall to the ground).

Where one in charge of an engine has absolute possession of its machinery, he has authority to eject a trespasser from the engine thereby making the railroad company liable for excessive force used in such ejection. Galveston, etc., R. Co. *v.* Zantzinger, 93 Tex. 64, 53 S. W. 379, 77 Am. St. Rep. 829, 47 L. R. A. 282 [*affirming* (Civ. App. 1899) 49 S. W. 677].

17. *Alabama.*— Mobile, etc., R. Co. *v.* Seales, 100 Ala. 368, 13 So. 917.

Illinois.— Illinois Cent. R. Co. *v.* King, 179 Ill. 91, 53 N. E. 552, 70 Am. St. Rep. 93 [*affirming* 77 Ill. App. 581], holding that a railroad company is liable for injuries caused by the wilful act of a brakeman in pulling a trespasser off the train, and cursing and throwing stones at him, where he was instructed to put off any one who was found beating his way.

Iowa.— Marion *v.* Chicago, etc., R. Co., 64 Iowa 568, 21 N. W. 86, holding that under Code, § 1307, where a brakeman authorized to remove trespassers does so under circumstances of criminal brutality, the railroad company is liable although the brakeman is guilty of a felonious assault.

Missouri.—Krueger *v.* Chicago, etc., R. Co., 94 Mo. App. 458, 68 S. W. 220.

New York.— Lang *v.* New York, etc., R. Co., 51 Hun 603, 4 N. Y. Suppl. 565 [*affirmed* in 123 N. Y. 656, 25 N. E. 955].

Texas.— Galveston, etc., R. Co. *v.* Lester, 24 Tex. Civ. App. 467, 59 S. W. 946; Houston, etc., R. Co. *v.* Grigsby, 13 Tex. Civ. App. 639, 35 S. W. 815, 36 S. W. 496.

See 41 Cent. Dig. tit. "Railroads," §§ 906, 907.

Where a brakeman authorized to eject a trespasser shoots and kills him in doing so, the railroad company is liable therefor. Houston, etc., R. Co. *v.* Bowen, 36 Tex. Civ. App. 165, 81 S. W. 80.

Although a brakeman may have no authority to use physical force to expel trespassers, yet if he is clothed with authority to order them off, the company is liable for injuries to a trespasser who is compelled to leave the train while in motion by the brakeman's abusive language, threatening gestures, and threats of arrest. Texas, etc., R. Co. *v.* Mother, 5 Tex. App. 87, 24 S. W. 79.

18. *Kansas.*— O'Banion *v.* Missouri Pac. R. Co., 65 Kan. 352, 69 Pac. 353; Kansas City, etc., R. Co. *v.* Kelley, 36 Kan. 655, 14 Pac. 172, 59 Am. Rep. 596.

Kentucky.— Smith *v.* Louisville, etc., R. Co., 95 Ky. 11, 23 S. W. 652, 15 Ky. L. Rep. 390, 22 L. R. A. 72 (unless malicious); Illinois Cent. R. Co. *v.* McManus, 67 S. W. 1000, 24 Ky. L. Rep. 81; Elliot *v.* Louisville, etc., R. Co., 52 S. W. 833, 21 Ky. L. Rep. 630.

Massachusetts.— Bjornquist *v.* Boston, etc., R. Co., 185 Mass. 130, 70 N. E. 53, 102 Am. St. Rep. 332, brakeman in charge of cars.

Minnesota.— Brevig *v.* Chicago, etc., R. Co., 64 Minn. 168, 66 N. W. 401.

New Jersey.— West Jersey, etc., R. Co. *v.* Welsh, 62 N. J. L. 655, 42 Atl. 736, 72 Am. St. Rep. 659.

North Carolina.— Hayes *v.* Southern R. Co., 141 N. C. 195, 53 S. E. 847.

Washington.— Dixon *v.* Northern Pac. R. Co., 37 Wash. 310, 79 Pac. 943, 107 Am. St. Rep. 810, 68 L. R. A. 895, holding this to be true if the brakeman's acts are not accompanied by an independent malicious purpose of his own.

See 41 Cent. Dig. tit. "Railroads," §§ 906, 907.

Where a man appears wearing a brakeman's cap and jacket upon a train and assumes to act upon such train with authority, and is called by those who see him a brakeman, it may be presumed that he is in the employ of the railroad company as a brakeman so as to render the company liable for his negligence in removing a trespasser. Hughes *v.* New York, etc., R. Co., 36 N. Y. Super. Ct. 222.

The rules of the company requiring freight conductors not to permit unauthorized persons to ride on the trains does not overcome the implied authority of a brakeman to eject a trespasser from such a train. West Jersey, etc., R. Co. *v.* Welsh, 62 N. J. L. 655, 42 Atl. 736, 72 Am. St. Rep. 659.

Servants in charge of switching engines have implied authority to remove trespassers from the engine. Carter *v.* Louisville, etc., R. Co., 98 Ind. 552, 49 Am. Rep. 780.

19. *Illinois.*— Chicago, etc., R. Co. *v.* Ketchem, 99 Ill. App. 660; Chicago, etc., R. Co. *v.* Brackman, 78 Ill. App. 141, holding that a brakeman has no implied authority to expel trespassers where no such express authority has been given him, and there is a conductor in charge of the train who has such express authority.

f. Acts of Third Persons. A railroad company is not liable for injuries caused by the unauthorized acts of persons other than the railroad employees,[20] unless the company knows or is charged with knowledge of a dangerous practice by such persons and fails to exercise due care to prevent its continuation.[21]

8. Actions For Injuries[22] — a. Pleading — (I) *Declaration or Complaint* — (A) *Form and Sufficiency in General.* The pleadings in an action for injuries to one on or near railroad tracks other than at crossings are regulated by the rules governing pleadings in civil actions generally,[23] particularly those respecting negligence.[24] In such an action the declaration or complaint should allege with such clearness and certainty that defendant company may understand the nature of the charge it is called upon to answer,[25] all facts necessary to constitute plain-

Missouri.— Farber *v.* Missouri Pac. R. Co., 32 Mo. App. 378 [*affirmed* in 116 Mo. 81, 22 S. W. 631, 20 L. R. A. 350]; Krueger *v.* Chicago, etc., R. Co., 84 Mo. App. 358.

Ohio.— Whistler *v.* Cowan, 26 Ohio Cir. Ct. 511 [*affirmed* in 70 Ohio St. 514, 72 N. E. 1167].

Pennsylvania.— Towanda Coal Co. *v.* Heeman, 86 Pa. St. 418.

Texas.— Houston, etc., R. Co. *v.* Rutherford, 94 Tex. 518, 62 S. W. 1056; Texas, etc., R. Co. *v.* Black, 87 Tex. 160, 27 S. W. 118; International, etc., R. Co. *v.* Anderson, 82 Tex. 516, 17 S. W. 1039, 27 Am. St. Rep. 902; Texas, etc., R. Co. *v.* Moody, (Civ. App. 1893) 23 S. W. 41.

See 41 Cent. Dig. tit. "Railroads," §§ 906, 907.

A custom of brakemen to eject trespassers, of which the company knows or ought to know, is sufficient to show an implied authority in the brakeman to remove trespassers from the cars so as to render the company liable for the improper exercise of such authority. Texas, etc., R. Co. *v.* Mother, 5 Tex. Civ. App. 87, 24 S. W. 79; Chesapeake, etc., R. Co. *v.* Anderson, 93 Va. 650, 25 S. E. 947. So, notwithstanding there is a rule of the railroad company forbidding brakemen to eject trespassers, and providing that conductors alone shall have such authority, if such rule is usually and customarily violated to the knowledge of the superior officers of the company, and no attempt is made to enforce it, a jury is authorized in finding that a brakeman who kicked a trespasser from a car was acting within the scope of his authority. Houston, etc., R. Co. *v.* Rutherford, (Civ. App. 1901) 62 S. W. 1069 [*affirmed* in 94 Tex. 518, 62 S. W. 1056].

20. Williams *v.* Woodward Iron Co., 106 Ala. 254, 17 So. 517 (act of a stranger in closing a switch and causing a car to pass on to the main track, whereby a collision occurred); Ebright *v.* Mineral R., etc., Co., (Pa. 1888) 15 Atl. 709 (act of wrong-doer in taking off brakes on standing cars without knowledge of the company); Stevenson *v.* Chicago, etc., R. Co., 18 Fed. 493, 5 McCrary 634 (unauthorized act of third person in setting cars in motion whereby they bumped into other cars causing injury to a person who was lawfully working thereon).

21. See Galloway *v.* Chicago, etc., R. Co., 56 Minn. 346, 57 N. W. 1058, 45 Am. St. Rep. 468, 23 L. R. A. 442.

Liability for injuries caused by postal clerks in throwing mail bags from cars see *supra*, X, E, 2, a, (VI), text and note 32.

22. **Jurisdiction and venue** see, generally, Courts, 11 Cyc. 633; Venue.

23. See, generally, Pleading, 31 Cyc. 1.

Immaterial allegations may be stricken out. Paine *v.* Columbus, etc., R. Co., 2 Ohio S. & C. Pl. Dec. 257, 7 Ohio N. P. 327. Thus in an action for an injury occasioned by the moving of trains in a yard used by defendant railroad company exclusively for the switching of cars and making up trains, allegations of non-compliance with the municipal ordinances regulating the speed of trains and the exhibition of signals should be struck out, such ordinances not being applicable to railroad yards. Grube *v.* Missouri Pac. R. Co., (Mo. 1888) 10 S. W. 185.

An allegation which no facts are alleged to support is immaterial. Woodruff *v.* Northern Pac. R. Co., 47 Fed. 689, holding this to be true of an allegation of unlawful speed, where no facts are alleged to support it, and no reference is made to any statute fixing a lawful rate of speed.

Curing defect.—A declaration or complaint bad for the omission of material averments may be cured by the answer or other subsequent pleading of defendant supplying those averments. Chicago, etc., R. Co. *v.* Kerr, 74 Nebr. 1, 104 N. W. 49.

Construction.— While in a case of doubt, if the pleadings are ambiguous or where two different meanings present themselves, that construction must be adopted which is most unfavorable to the pleader; still if the expression is capable of two meanings, that one shall be taken which will support the declaration and not the other which will defeat it. Seymour *v.* Central Vermont R. Co., 69 Vt. 555, 38 Atl. 236.

24. See, generally, Negligence, 29 Cyc. 565.

25. Charleston, etc., R. Co. *v.* Johnson, 1 Ga. App. 441, 57 S. E. 1064; Pittsburgh, etc., R. Co. *v.* Simons, 168 Ind. 333, 79 N. E. 911 [*affirming* (App. 1906) 76 N. E. 883]; Brothers *v.* Rutland R. Co., 71 Vt. 48, 42 Atl. 980; Norfolk, etc., R. Co. *v.* Stegall, 105 Va. 538, 54 S. E. 19; Southern R. Co. *v.* Hansbrough, 105 Va. 527, 54 S. E. 17.

Motion to make more specific.— Where the

tiff's cause of action.[26] The declaration or complaint must aver plainly and distinctly all facts showing the injured party's right, if any, to be upon or near

allegations in the complaint are made in such a manner that defendant cannot respond intelligently, a motion to make the complaint more specific will lie. Cleveland, etc., R. Co. *v.* Berry, 152 Ind. 607, 53 N. E. 415, 46 L. R. A. 33; Pennsylvania Co. *v.* Dean, 92 Ind. 459; Rathburn *v.* Burlington, etc., R. Co., 16 Nebr. 441, 20 N. W. 390. But where, in an action for an injury maliciously inflicted, the manner and occasion of the injury are specifically set forth, it is not error to overrule a motion to make the complaint more specific by stating by what servant of the company the injury was inflicted, and at what time of day, and on what kind of a train, it occurred. Wabash R. Co. *v.* Savage, 110 Ind. 156, 9 N. E. 85.

Where the allegations are indefinite but the language shows a liability of defendant in favor of plaintiff, when it is given its ordinary meaning, the complaint is sufficient and a demurrer thereto on the ground that the facts do not constitute a cause of action should be overruled. Rathburn *v.* Burlington, etc., R. Co., 16 Nebr. 441, 20 N. W. 390.

26. Southern R. Co. *v.* Bunt, 131 Ala. 591, 32 So. 507; Georgia Pac. R. Co. *v.* Richardson, 80 Ga. 727, 7 S. E. 119; Charleston, etc., R. Co. *v.* Johnson, 1 Ga. App. 441, 57 S. E. 1064; Chicago, etc., R. Co. *v.* McDaniel, 134 Ind. 166, 32 N. E. 728, 33 N. E. 769; Baltimore, etc., R. Co. *v.* Sherman, 30 Gratt. (Va.) 602.

Complaint held sufficient.— In an action for injuries received by reason of the railroad company's negligence in running an engine or cars against the party injured while on the track (see Bullard *v.* Southern R. Co., 116 Ga. 644, 43 S. E. 39; Lake Shore, etc., R. Co. *v.* Enright, 227 Ill. 403, 81 N. E. 374 [*affirming* 192 Ill. App. 223]; Rider *v.* Cincinnati, etc., R. Co., 10 Ohio Cir. Ct. 299, 6 Ohio Cir. Dec. 603; Houston, etc., R. Co. *v.* O'Donnell, (Tex. Civ. App. 1905) 90 S. W. 886 [*reversed* on other grounds in 99 Tex. 636, 92 S. W. 409]), or against a car on or about which the injured party was working at the time of the accident (State *v.* Western Maryland R. Co., 98 Md. 125, 56 Atl. 394, 103 Am. St. Rep. 388; Greenman *v.* Chicago, etc., R. Co., 100 Wis. 188, 75 N. W. 998). In an action against two railroad companies, one of which was foreign, for injuries received by being struck by a lump of ice from a passing train. Maysville, etc., R. Co. *v.* Willis, 104 S. W. 1016, 31 Ky. L. Rep. 1249. Thus a declaration or complaint is sufficient where it alleges that plaintiff was on the track of defendant's road and without any warning to him or without any fault on his part defendant's locomotive was negligently run against him thereby causing the injury (Terre Haute, etc., R. Co. *v.* Graham, 46 Ind. 239); where it alleges that defendant on its railroad did carelessly and negligently and with great force and violence run and drive one of its engines and divers of its cars upon and against plaintiff's intestate thereby greatly wounding him so that he died and that his death was caused by the said wrongful act, neglect, and default of defendant (Norfolk, etc., R. Co. *v.* Harman, 83 Va. 553, 8 S. E. 251); where it alleges that defendant's train, starting from a station, negligently ran over deceased sitting on the track three hundred yards from the station, he being in plain view of those in charge of the engine from the time they left the station (Seaboard, etc., R. Co. *v.* Joyner, 92 Va. 354, 23 S. E. 773); where it alleges that deceased, while on the track of defendant, was carelessly and negligently pushed against and struck by a locomotive, engine, or cars belonging to defendant and in the control, custody, and management of its employees, and thereby received injuries from which he died (Bias *v.* Chesapeake, etc., R. Co., 46 W. Va. 349, 33 S. E. 240); or where it alleges that plaintiff was on the track by consent of the company, and was injured at night by cars being loaded with timbers projecting seven feet beyond the track (Baston *v.* Georgia R. Co., 60 Ga. 339).

Complaint held insufficient.— On general demurrer see Cleveland, etc., R. Co. *v.* Adair, 12 Ind. App. 569, 39 N. E. 672, 40 N. E. 822; Paine *v.* Columbus, etc., R. Co., 2 Ohio S. & C. Pl. Dec. 135, 7 Ohio N. P. 327; McIntyre *v.* Galveston, etc., R. Co., (Tex. Civ. App. 1894) 26 S. W. 632. On special demurrer see Kemp *v.* Georgia Cent. R. Co., 122 Ga. 559, 50 S. E. 465, under Civ. Code (1895), § 4960. Thus a complaint is insufficient in an action for injuries caused to a boy of ten years of age while attempting to get on the ladder of a moving freight car, where it does not allege that his attempt was known to any of the employees in charge thereof (Underwood *v.* Western, etc., R. Co., 105 Ga. 48, 31 S. E. 123); or where it states in effect that the engineer in charge of the train did not see deceased in time to stop the train before he was struck, but that he might or ought to have seen him (Mobile, etc., R. Co. *v.* Stroud, 64 Miss. 784, 2 So. 171); where, in an action for injuries caused by defendant's negligence in failing to keep a path between two railroads properly guarded, it fails to allege that the public had any right to use the path between the railroads or that deceased was using the path when he was hurt, or that defendant had erected the safeguard, thereby assuming the duty of maintaining such guard (Dorn *v.* Georgia, etc., R. Co., 58 S. C. 364, 36 S. E. 654); or where in an action for the death of a bare licensee on the track, it merely alleges that defendant was negligent in pushing its train of cars and engine across the trestle without any lookout on the end of the cars and at a rate of speed forbidden by the city ordinances (Norfolk, etc., R. Co. *v.* Stegall, 105 Va. 538, 54 S. E. 19).

the tracks, or cars,[27] as that he was on or near the track by invitation;[28] must directly and positively allege what duty was owing by defendant to the party injured, the failure to discharge which caused the injury complained of, or make such averments of facts as will show the existence of such duty;[29] and must allege a failure, or facts showing a failure, to perform such duty, or in other words, must allege negligence on the part of the railroad company,[30] and the injury sustained

A complaint under a statute should allege all facts sufficient to bring plaintiff's case within its provisions. Roundtree *v.* Stephens, 8 Ky. L. Rep. 433 (holding that in order that an administrator may recover for the loss of decedent's life under Gen. St. c. 57, pt. 1, he must allege that decedent was not in the employment of the railroad company by whose negligence the injury occurred); East Tennessee, etc., R. Co. *v.* Pratt, 85 Tenn. 9, 1 S. W. 618 (holding the allegations sufficient to bring the case within Code, § 1298).

Where knowledge of the act or omission is of the essence of the liability, such knowledge may be implied from an allegation that the railroad company by its servants made a practice of permitting and allowing the act to be done or omitted in a manner and at a place which subjected the person or persons who might chance to be lawfully upon the premises, to danger. Shaw *v.* Chicago, etc., R. Co., 123 Mich. 629, 82 N. W. 618, 49 L. R. A. 308. So, in an action for injuries caused by the falling of a car door while working on or about the car, an allegation that while plaintiff in a careful manner was opening the door he was injured in consequence of the negligence of defendant in failing to provide safe hinges and appliances for holding the door securely on said car and fastenings is equivalent to an allegation of knowledge or means of knowledge on the part of the railroad company of the defective condition of the door. Tateman *v.* Chicago, etc., R. Co., 96 Mo. App. 448, 70 S. W. 514.

27. *Alabama.*— Montgomery *v.* Alabama Great Southern R. Co., 97 Ala. 305, 12 So. 170.

Georgia.— Georgia Cent. R. Co. *v.* Brandenburg, 129 Ga. 115, 58 S. E. 658.

Illinois.— Lake Shore, etc., R. Co. *v.* Enright, 227 Ill. 403, 81 N. E. 374 [*affirming* 129 Ill. App. 223].

Indiana.— Chicago, etc., R. Co. *v.* McDaniel. 134 Ind. 166, 32 N. E. 728, 33 N. E. 769 (allegation held sufficient to show that plaintiff was lawfully on a car at the time of the injury); Pennsylvania Co. *v.* Dean, 92 Ind. 459; Wabash R. Co. *v.* Erb, 36 Ind. App. 650, 73 N. E. 939, 114 Am. St. Rep. 392.

Kentucky.— Dalton *v.* Louisville, etc., R. Co., 56 S. W. 657, 23 Ky. L. Rep. 97.

Michigan.— O'Neil *v.* Duluth, etc., R. Co., 101 Mich. 437, 59 N. W. 836.

Tennessee.— White *v.* Nashville, etc., R. Co., 108 Tenn. 739, 70 S. W. 1030.

Texas.— Lewis *v.* Galveston, etc., R. Co., 73 Tex. 504, 11 S. W. 528.

Virginia.— Norfolk, etc., R. Co. *v.* Wood, 99 Va. 156, 37 S. E. 846.

United States.—Adams *v.* Southern R. Co., 84 Fed. 596, 28 C. C. A. 494.

See 41 Cent. Dig. tit. "Railroads," §§ 1331–1336.

If a person's right to walk on a railroad track depends upon the fact that such road is a public highway he must allege that fact in his petition, in an action for injuries received from the alleged negligence of the railroad company. Murch *v.* Concord R. Corp., 29 N. H. 9, 61 Am. Dec. 631.

Relation to railroad.— Where the complaint states a good cause of action in that defendant did not use due care after discovering the party injured in a perilous position, it is not fatally defective because it does not aver whether the injured party's relation to the railroad company was that of a trespasser or servant. Reardon *v.* Missouri Pac. R. Co., 114 Mo. 384, 21 S. W. 731.

28. Mobile, etc., R. Co. *v.* George, 94 Ala. 199, 10 So. 145.

29. *Alabama.*— Southern R. Co. *v.* Stewart, (1907) 45 So. 51; Montgomery *v.* Alabama Great Southern R. Co., 97 Ala. 305, 12 So. 170.

Georgia.— Georgia Central R. Co. *v.* Brandenburg, 129 Ga. 115, 58 S. E. 658.

Indiana.—Evansville, etc., R. Co. *v.* Yeager, 170 Ind. 139, 83 N. E. 742 [*reversing* 40 Ind. App. 732, 82 N. E. 1135]; Pennsylvania Co. *v.* Dean, 92 Ind. 459.

Tennessee.— White *v.* Nashville, etc., R. Co., 108 Tenn. 739, 70 S. W. 1030.

Virginia.— Norfolk, etc., R. Co. *v.* Stegall, 105 Va. 538, 54 S. E. 19; Southern R. Co. *v.* Hansbrough, 105 Va. 527, 54 S. E. 17; Hortenstine *v.* Virginia-Carolina R. Co., 102 Va. 914, 47 S. E. 996.

See 41 Cent. Dig. tit. "Railroads," §§ 1331–1336.

Facts from which the court can see that defendant owed the party injured a legal duty must be alleged. Brothers *v.* Rutland R. Co., 71 Vt. 38, 42 Atl. 980.

In an action for injuries caused by a freight train running against a depot platform, where the declaration explains plaintiff's being in that position and his relations to the company only by the allegation that he was standing on the platform in pursuance of his lawful business and without fault on his part, the allegation is sufficient to show that he was not a trespasser and that he was entitled to such rights and considerations as were due to a licensee. Norfolk, etc., R. Co. *v.* Wood, 99 Va. 156, 37 S. E. 846.

30. *Georgia.*— Georgia Cent. R. Co. *v.* Brandenburg, 129 Ga. 115, 58 S. E. 658 (allegations held sufficient to put defendant on notice that the negligence claimed was the failure to equip the train with proper appli-

by plaintiff by reason thereof.[31] The complaint should allege either that the party injured was not a trespasser at the time,[32] or if he was, that the employees in charge of the train became or should have become aware of his perilous position and were thereafter guilty of actionable misconduct.[33] Where the complaint avers facts showing a duty on the part of the railroad company to exercise reasonable care and precaution to protect the party injured,[34] the act or omission constituting the negligence relied upon may be alleged in general terms without setting out in detail the particular acts constituting the negligence,[35] as that the

ances); Crawford *v.* Southern R. Co., 106 Ga. 870, 33 S. E. 826; Harden *v.* Georgia R. Co., 3 Ga. App. 344, 59 S. E. 1122; Georgia R., etc., Co. *v.* Williams, 3 Ga. App. 272, 59 S. E. 846, 60 S. E. 808. Ga. Civ. Code (1895), § 2321, providing that in case of injuries by a railroad a presumption of negligence arises, does not dispense with the necessary pleading of proper facts to show liability. Harden *v.* Georgia R. Co., 3 Ga. App. 344, 59 S. E. 1122.

Illinois.—Lake Shore, etc., R. Co. *v.* Enright, 227 Ill. 403, 81 N. E. 374 [*affirming* 129 Ill. App. 223].

Indiana.—Pennsylvania Co. *v.* Dean, 92 Ind. 459; Lake Erie, etc., R. Co. *v.* Hennessey, 38 Ind. App. 574, 78 N. E. 670; Chicago, etc., R. Co. *v.* Thrasher, 35 Ind. App. 58, 73 N. E. 829; Hall *v.* Cleveland, etc., R. Co., 15 Ind. App. 496, 44 N. E. 489; Pittsburgh, etc., R. Co. *v.* Bennett, 9 Ind. App. 92, 35 N. E. 1033.

Missouri.— Haley *v.* Missouri Pac. R. Co., 197 Mo. 15, 93 S. W. 1120, 114 Am. St. Rep. 743.

Texas.— Missouri, etc., R. Co. *v.* Snowden, 44 Tex. Civ. App. 509, 99 S. W. 865 (holding that where intestate was struck and killed by a train while walking along a path on defendant's track as a licensee, allegations that the train was running at a high and dangerous rate of speed, and that defendant failed to blow the whistle or ring the bell when the train approached decedent, as it should have done in the exercise of ordinary care, were proper averments of common-law negligence, although there was no statute regulating such speed or requiring signals); Houston, etc., R. Co. *v.* O'Donnell, (Civ. App. 1905) 90 S. W. 886 [*reversed* on other grounds in 99 Tex. 636, 92 S. W. 409]; Gulf, etc., R. Co. *v.* Holzheuser, (Civ. App. 1898) 45 S. W. 188; Douglas *v.* Central Texas, etc., R. Co., (Civ. App. 1894) 26 S. W. 892.

Virginia.— Norfolk, etc., R. Co. *v.* Stegall, 105 Va. 538, 54 S. E. 19; Southern R. Co. *v.* Hansbrough, 105 Va. 527, 54 S. E. 17; Hortenstine *v.* Virginia-Carolina R. Co., 102 Va. 914, 47 S. E. 996.

United States.— Reynolds *v.* Mink, 111 Fed. 692, 49 C. C. A. 549.

See 41 Cent. Dig. tit. "Railroads," §§ 1331–1336.

Insufficient allegation.—An allegation of negligence that the intestate was "by the negligence of the defendant and its servants, in that it failed to give any notice of its approach by whistle or bell or otherwise, run over by defendant's locomotive" while walking on his track is insufficient. Fulp *v.* Roanoke, etc., R. Co., 114 N. C. 697, 19 S. E. 362.

Joinder.— Several acts of negligence of the same nature, all of which may be true and either of which or all of which together may have caused the accident, may be pleaded in one count. Haley *v.* Missouri Pac. R. Co., 197 Mo. 15, 93 S. W. 1120, 114 Am. St. Rep. 743.

31. Murphy *v.* New York, etc., R. Co., 30 Conn. 184; Atlantic Coast Line R. Co. *v.* O'Neill, 127 Ga. 685, 56 S. E. 986 (amendments to petition held to meet objections by special demurrer; and petition sufficient as against general demurrer); Reynolds *v.* Mink, 111 Fed. 692, 49 C. C. A. 549.

32. Gadsden, etc., R. Co. *v.* Julian, 133 Ala. 371, 32 So. 135.

33. Gadsden, etc., R. Co. *v.* Julian, 133 Ala. 371, 32 So. 135; Macon, etc., R. Co. *v.* Parker, 127 Ga. 471, 56 S. E. 616; Hortenstine *v.* Virginia-Carolina R. Co., 102 Va. 914, 47 S. E. 996.

34. Mobile, etc., R. Co. *v.* George, 94 Ala. 199, 10 So. 145.

35. *Alabama.*— Southern R. Co. *v.* Stewart, (1907) 45 So. 51; Mobile, etc., R. Co. *v.* George, 94 Ala. 199, 10 So. 145.

Georgia.— Sims *v.* Western, etc., R. Co., 111 Ga. 820, 35 S. E. 696.

Indiana.— Cleveland, etc., R. Co. *v.* Berry, 152 Ind. 607, 53 N. E. 415, 46 L. R. A. 33; St. Louis, etc., R. Co. *v.* Mathias, 50 Ind. 65.

Oregon.— Cederson *v.* Oregon R., etc., Co., 38 Oreg. 343, 62 Pac. 637, 63 Pac. 763.

Tennessee.— Illinois Cent. R. Co. *v.* Davis, 104 Tenn. 442, 58 S. W. 296.

United States.— Chicago, etc., R. Co. *v.* Cox, 145 Fed. 157, 76 C. C. A. 127 (holding that plaintiff need not allege in terms that the negligence was that of an officer, agent, or servant, but it is sufficient that the negligence was that of the company); Anderson *v.* Hopkins, 91 Fed. 77, 33 C. C. A. 346.

See 41 Cent. Dig. tit. "Railroads," §§ 1331–1336.

Allegations held sufficient.—A declaration alleging that on a particular day and near a particular place defendant company wrongfully and negligently ran one of its engines and cars upon plaintiff is sufficient, and need not be made more specific by setting forth the hour at which the wrong occurred, the direction in which the train was moving, or which one of defendant's cars caused the injury. Crowley *v.* Cincinnati, etc., R. Co., 108 Tenn. 74, 65 S. W. 411.

Alternative allegations.—Essential and ma-

act stated as causing the injury was negligently or carelessly done or omitted.[36] But if the specific acts relied upon as constituting the alleged negligence are pleaded, such specific averments may overcome the general averments and render the pleading bad.[37] A demurrer should be sustained to the declaration or complaint where the allegations therein would not entitle plaintiff to recover if established;[38] or where they show on their face such contributory negligence as will prevent a recovery.[39]

(B) *Negativing Contributory Negligence.* As a general rule the declaration or complaint in an action for injuries caused by the negligence of a railroad company need not negative contributory negligence on the part of the person injured,[40] and this is expressly provided by statute in some jurisdictions,[41] and no adverse presumption arises from plaintiff's failure to do so.[42] Even where the negation of such negligence is made or required, a general averment of freedom from contributory negligence is sufficient as embracing all specific averments that might be made to that effect.[43]

(C) *Wilful, Wanton, or Reckless Injury.* Where the pleadings show that the party injured was a trespasser at the time of the injury, plaintiff must aver more than simple negligence in order to authorize a recovery,[44] and must aver that the injury was wilfully, wantonly, or recklessly inflicted.[45] To charge wilful, wanton,

terial allegations to recover when stated in the alternative are generally bad, but a general allegation that the act which caused the injury was negligently or carelessly done or omitted is sufficient without setting out the details of the negligence, particularly where the manner of the commission of the negligent act is peculiarly within the knowledge of defendant. Turney *v.* Southern Pac. R. Co., 44 Oreg. 280, 75 Pac. 144, 76 Pac. 1080.

36. Cleveland, etc., R. Co. *v.* Berry, 152 Ind. 607, 53 N. E. 415, 46 L. R. A. 33; Turney *v.* Southern Pac. R. Co., 44 Oreg. 280, 75 Pac. 144, 76 Pac. 1080.

37. Johnson *v.* Birmingham R., etc., Co., 149 Ala. 529, 43 So. 33; Cleveland, etc., R. Co. *v.* Berry, 152 Ind. 607, 53 N. E. 415, 46 L. R. A. 33.

38. Georgia Pac. R. Co. *v.* Richardson, 80 Ga. 727, 7 S. E. 119.

39. Georgia Pac. R. Co. *v.* Richardson, 80 Ga. 727, 7 S. E. 119; Ream *v.* Pittsburgh, etc., R. Co., 49 Ind. 93.

General allegations of want of contributory negligence will be controlled by specific averments in respect thereto (Wolfe *v.* Pierce, 24 Ind. App. 680, 57 N. E. 555; Louisville, etc., R. Co. *v.* Downey, 18 Ind. App. 140, 47 N. E. 494, holding general and specific averments not inconsistent); and if the specific averments overcome the general averments and show contributory negligence, the complaint is defective and a demurrer should be sustained (Wolfe *v.* Pierce, *supra*).

Complaint held demurrable as showing contributory negligence as a matter of law see Anderson *v.* Minneapolis, etc., R. Co., 103 Minn. 224, 114 N. W. 1123.

Complaint held not to show contributory negligence see Houston, etc., R. Co. *v.* Goodman, 38 Tex. Civ. App. 175, 85 S. W. 492; San Antonio, etc., R. Co. *v.* Jazo, (Tex. Civ. App. 1894) 25 S. W. 712.

40. Georgia Cent. R. Co. *v.* Brandenburg, 129 Ga. 115, 58 S. E. 658 (holding also that where such an averment is made defendant may either have it stricken out or require it to be proved, but cannot require any elaboration of it); Illinois Cent. R. Co. *v.* Davis, 104 Tenn. 442, 58 S. W. 296; Patton *v.* East Tennessee, etc., R. Co., 89 Tenn. 370, 15 S. W. 119, 12 L. R. A. 184 (holding this to be true under a statute which allows damages upon the failure of a railroad company to observe the precautions therein prescribed, regardless of the negligence of the party injured).

41. Southern Indiana R. Co. *v.* Peyton, 157 Ind. 690, 61 N. E. 722, under Acts (1899), p. 58, § 359. But see Chicago, etc., R. Co. *v.* McDaniel, 134 Ind. 166, 32 N. E. 728, 33 N. E. 769, holding otherwise prior to this statute.

42. Southern Indiana R. Co. *v.* Peyton, 157 Ind. 690, 61 N. E. 722.

43. Ohio, etc., R. Co. *v.* Levy, 134 Ind. 343, 32 N. E. 815, 34 N. E. 20; Chicago, etc., R. Co. *v.* McDaniel, 134 Ind. 166, 32 N. E. 728, 33 N. E. 769; Pittsburgh, etc., R. Co. *v.* Bennett, 9 Ind. App. 92, 35 N. E. 1033.

44. Southern R. Co. *v.* Bush, 122 Ala. 470, 26 So. 168; Savannah, etc., R. Co. *v.* Meadors, 95 Ala. 137, 10 So. 141.

Complaint held insufficient as charging simple negligence only in an action for wilful or wanton negligence see Alabama Great Southern R. Co. *v.* Burgess, 116 Ala. 509, 22 So. 913; Dull *v.* Cleveland, etc., R. Co., 21 Ind. App. 571, 52 N. E. 1013.

45. Haley *v.* Kansas City, etc., R. Co., 113 Ala. 640, 21 So. 357; Savannah, etc., R. Co. *v.* Meadors, 95 Ala. 137, 10 So. 141; Anderson *v.* Minneapolis, etc., R. Co., 103 Minn. 224, 114 N. W. 1123, complaint held insufficient.

Complaint held sufficient to authorize a recovery by a trespasser for wilful, wanton, or reckless injury (see Lake Shore, etc., R. Co. *v.* Bodemer, 139 Ill. 596, 29 N. E. 692, 32 Am. St. Rep. 218 [*affirming* 33 Ill. App. 479]), in alleging that plaintiff was wantonly and recklessly or intentionally injured by defend-

or reckless injury the declaration or complaint must aver an injury caused under circumstances showing that the railroad company had knowledge of the injured party's perilous position at the time,[46] and that it did, or omitted to do, the acts constituting the alleged negligence under circumstances showing a reckless disregard of consequences, and a probability that they would result in injury.[47] Unless such facts are alleged, the mere fact that the words "wilful," "careless," "wanton," or "unlawful" are made use of in the complaint is not sufficient,[48] nor does the use of the term "wilful" show that the act complained of was beyond the scope of the servant's employment;[49] and on the other hand, if the pleading does, in sufficiently apt terms, describe the act or omission as wilful or wanton, the word "wilful" need not be used,[50] and, although the act may in fact be

ant through its servant or agent (Highland Ave., etc., R. Co. *v.* Robinson, 125 Ala. 483, 28 So. 28. See Maysville, etc., R. Co. *v.* Willis, 104 S. W. 1016, 31 Ky. L. Rep. 1249, holding a petition not objectionable as failing to charge that the servant was acting within the scope of his authority).

The word "recklessly" used conjunctively with "wantonly" means something more than "negligently," and assignments of demurrer on the idea that the word "recklessly" so used in a complaint means "negligently" are without merit. Highland Ave., etc., R. Co. *v.* Robinson, 125 Ala. 483, 28 So. 28.

As against an exception of no cause of action filed by defendant, which admits the truth of plaintiff's allegations, allegations that deceased (a trespasser) was wholly without fault in the premises and his killing was due to the reckless and wanton negligence of defendant are sufficient. Davis *v.* Arkansas Southern R. Co., 117 La. 320, 41 So. 587.

46. Sherfey *v.* Evansville, etc., R. Co., 121 Ind. 427, 23 N. E. 273; Louisville, etc., R. Co. *v.* Eaden, 122 Ky. 818, 93 S. W. 7, 29 Ky. L. Rep. 365, 6 L. R. A. N. S. 581.

An averment that a brakeman saw plaintiff's peril and immediately signaled the engineer to stop the train is not a sufficient allegation that the engineer knew of plaintiff's peril to render the railroad company liable on the ground of wanton negligence in failing to stop its train. Evans *v.* Pittsburgh, etc., R. Co., 142 Ind. 264, 41 N. E. 537.

Complaint held insufficient in not showing that the engineer had actual knowledge of the injured party's peril (Louisville, etc., R. Co. *v.* Mitchell, 134 Ala. 261, 32 So. 735), or in not showing that the party injured was in a perilous condition when seen by the trainmen, or at what point the peril became manifest, or that at such perilous point the engineer failed to make every possible effort to stop the train (Ullrich *v.* Cleveland, etc., R. Co., 151 Ind. 358, 51 N. E. 95).

47. Haley *v.* Kansas City, etc., R. Co., 113 Ala. 640, 21 So. 357; Pittsburgh, etc., R. Co. *v.* Kinnare, 203 Ill. 388, 67 N. E. 826 [*affirming* 105 Ill. App. 566]; Indianapolis Union R. Co. *v.* Boettcher, 131 Ind. 82, 28 N. E. 551; Sherfey *v.* Evansville, etc., R. Co., 121 Ind. 427, 23 N. E. 273; Terre Haute, etc., R. Co. *v.* Graham, 46 Ind. 239; Louisville, etc., R. Co. *v.* Eaden, 122 Ky. 818, 93 S. W. 7, 29 Ky. L. Rep. 365, 6 L. R. A. N. S. 581.

Complaint held sufficient.—A complaint alleging that the engineer recklessly and wilfully, with knowledge of decedent's unconsciousness of danger, and without regard for consequences, ran his engine over decedent, states a cause of action whether decedent was a trespasser or not. Pittsburgh, etc., R. Co. *v.* Judd, 10 Ind. App. 213, 36 N. E. 775.

Failure to stop.— Where one placed in peril by a moving train by his own negligence seeks to recover for such injury as for wanton recklessness, in that the engineer knowing of plaintiff's peril failed to stop the train, he must allege that the train could have been stopped in time to avoid the injury. Evans *v.* Pittsburgh, etc., R. Co., 142 Ind. 264, 41 N. E. 537.

Authority to eject trespasser.— In an action for injuries caused by wanton negligence in ejecting a trespasser from a train, a petition stating that at the time plaintiff was injured by the locomotive it was in charge of and under the management and control of defendant's servants who were respectively fireman and engineer thereon, by implication alleges that the fireman had authority to eject trespassers therefrom. Chicago Great Western R. Co. *v.* Troup, 71 Kan. 843, 80 Pac. 30.

Pertinent and material averments should not be stricken out. Alabama Great Southern R. Co. *v.* Guest, 136 Ala. 348, 34 So. 968, holding that after alleging facts showing a wilful or wanton injury, a further averment that at the hour of the occurrence from thirty to fifty people walked along defendant's track at the place of the injury, and that such fact was well known to defendant's servants and agents was pertinent and material and should not have been stricken from the complaint.

An intention on the part of the railroad employees to inflict the injury, it has been held, must be directly and explicitly alleged, and an allegation of wilful negligence is not sufficient. Cleveland, etc., R. Co. *v.* Tartt, 99 Fed. 369, 39 C. C. A. 568, 49 L. R. A. 98.

48. Southern R. Co. *v.* Bush, 122 Ala. 470, 26 So. 168; Sherfey *v.* Evansville, etc., R. Co., 121 Ind. 427, 23 N. E. 273.

49. Smith *v.* Louisville, etc., R. Co., 95 Ky. 11, 23 S. W. 652, 22 L. R. A. 72.

50. See Johnson *v.* Chicago, etc., R. Co., 116 Iowa 639, 88 N. W. 811; Smith *v.* Wabash R. Co., 129 Mo. App. 413, 107 S. W. 22.

wilful, it need not necessarily be so designated but it may also properly be alleged as negligent.[51]

(II) *Answer and Subsequent Pleadings.* A plea in abatement is proper where the action is for a greater amount than is allowed by statute to be recovered.[52] A replication should be made to affirmative averments in the answer,[53] but more general averments are allowed in a replication than in a declaration.[54]

b. Issues, Proof, and Variance — (I) *Issues Raised and Matters to Be Proved.* Such matters only as are material and are properly put in issue by the pleadings and proof need be considered.[55] Plaintiff is entitled to recover only upon such cause of action as is properly alleged by him,[56] and upon proof

51. Johnson *v.* Chicago, etc., R. Co., 116 Iowa 639, 88 N. W. 811.

52. Slattery *v.* Pennsylvania R. Co., 21 Wkly. Notes Cas. (Pa.) 556, holding this to be true where an action for twenty-five thousand dollars is brought under the act of April 4, 1868, limiting the liability of railroad companies to five thousand dollars in such cases.

53. Smith *v.* Louisville, etc., R. Co., 95 Ky. 11, 23 S. W. 652, 15 Ky. L. Rep. 390, 22 L. R. A. 72, holding, however, that an allegation that plaintiff voluntarily swung himself off the train from which he alleges he was kicked is not such an affirmative averment as requires a reply.

A want of a reply is not material, where a special defense is set up with a general denial, and the facts of the special defense are admissible under the general issue. Valley R. Co. *v.* Roos, 9 Ohio Cir. Ct. 201, 6 Ohio Cir. Dec. 33.

54. Durand *v.* New Haven, etc., R. Co., 42 Conn. 211.

55. Colorado Midland R. Co. *v.* Robbins, 30 Colo. 449, 71 Pac. 371; Western, etc., R. Co. *v.* Holsomback, 112 Ga. 82, 37 S. E. 128; McMarshall *v.* Chicago, etc., R. Co., 80 Iowa 757, 45 N. W. 1065, 20 Am. St. Rep. 445; Thurman *v.* Louisville, etc., R. Co., 34 S. W. 893, 17 Ky. L. Rep. 1343.

Questions relating to defects in a platform held material on the issue of the company's negligence in respect thereto see Banderob *v.* Wisconsin Cent. R. Co., 133 Wis. 249, 113 N. W. 738.

Pleading charging the specific act of negligence as the running of a train in excess of the rate of speed prescribed by ordinance see Colorado Midland R. Co. *v.* Robbins, 30 Colo. 449, 71 Pac. 371.

That a defective brake was the proximate cause of the injury is the theory of a declaration setting out defendant's duty to provide a car equipped with a safe brake, the breach of such duty, and, in orderly sequence, the events which followed. Sheltrawn *v.* Michigan Cent. R. Co., 128 Mich. 669, 87 N. W. 893.

An allegation that the railroad company negligently maintained a pile of cinders which made the highway unsafe and caused the injury will authorize a recovery at common law for defendant's negligence, although the petition also alleges that the act was in violation of an ordinance. Anderson *v.* Union Terminal R. Co., 161 Mo. 411, 61 S. W. 874.

The issue whether a government inspector of customs was in the discharge of his official duties is raised by evidence showing that decedent was such an inspector charged with the duty of counting and inspecting railroad irons loaded on cars for shipment; that some of the cars had been loaded and inspected and a manifest given by decedent; that there was one car which had not been inspected and that decedent started to cross the track in the open space between the cars for the purpose of inspecting the latter and the cars were pushed together for the purpose of switching them. Galveston, etc., R. Co. *v.* Levy, 35 Tex. Civ. App. 107, 79 S. W. 879.

The proper issues in an action for the death of a trespasser on a train by the wrongful act of defendant's servants are whether plaintiff's intestate was killed by defendant's negligence, whether he contributed to his death by his own negligence, and whether defendant by the exercise of reasonable care and diligence could have avoided the accident notwithstanding intestate's contributory negligence. Pierce *v.* North Carolina R. Co., 124 N. C. 83, 32 S. E. 399, 34 L. R. A. 316.

An issue as to the last clear chance need not be considered by the jury, where it has found that deceased was killed by defendant's negligence, and was not guilty of contributory negligence. Harris *v.* Atlantic Coast Line R. Co., 132 N. C. 160, 43 S. E. 589.

The issue of an unusually high rate of speed is properly submitted under an allegation that plaintiff was unlawfully and recklessly run down by defendant's engine, which approached from behind, and that the engine was being run backward at a fast rate of speed, in violation of a city ordinance. Houston, etc., R. Co. *v.* Harvin, (Tex. Civ. App. 1899) 54 S. W. 629.

56. Pennington *v.* Detroit, etc., R. Co., 90 Mich. 505, 51 N. W. 634; Atwood *v.* Chicago, etc., R. Co., 72 Fed. 447.

Illustrations.— Thus where plaintiff bases his right of recovery on the ground that he was upon its cars by invitation and with the consent of defendant, he cannot recover if he was an intruder. Mexican Nat. R. Co. *v.* Crum, 6 Tex. Civ. App. 702, 25 S. W. 1126. So where a complaint merely alleges negligence on defendant's part and not wilful and wanton negligence, plaintiff

of all material matters therein;[57] and he cannot recover upon a cause of action materially different from that alleged in his complaint,[58] unless he amends his complaint to state such cause of action.[59] A count relying on the wilful acts of defendant's servants as distinguished from the acts of the company itself is in case;[60] but a count upon the wanton and wilful acts of defendant company and not upon the wrongs committed by its servants is in trespass,[61] and since it involves the affirmative participation of the railroad company and not merely its responsibility for the acts of its servants, proof to sustain it must show actual participation on the part of the company in the wrongful act,[62] and it is not supported by evidence that the injury was inflicted by defendant's servants.[63] Likewise defendant can rely only upon such matters of defense as are properly put in issue by his pleadings.[64] It cannot rely upon a defense which might have been put in issue only by special pleading, but was not so pleaded.[65]

(II) *EVIDENCE ADMISSIBLE.* Such evidence only is admissible on behalf of plaintiff as tends to prove matters put in issue by his pleadings;[66] and evidence as to matters not alleged or on which there is no issue is inadmis-

cannot recover on the ground that defendant's employees saw the injured party's dangerous position and failed to stop the train. Esrey *v.* Southern Pac. Co., 88 Cal. 399, 26 Pac. 211. But under allegations that plaintiff was knocked and kicked from defendant's train by its conductor, he may recover on proof that the conductor alarmed him to such an extent that he jumped off the train since the gravamen of the complaint is in forcing him off in an unlawful manner. Texas, etc., R. Co. *v.* Williams, 62 Fed. 440, 10 C. C. A. 463.

57. Brown *v.* St. Louis, etc., R. Co., 52 Ark. 120, 12 S. W. 203, holding that, where a complaint alleges that deceased was thrown from a freight train by defendant's servants, he must prove that deceased was thrown from defendant's train.

Immaterial allegations need not be proved. East St. Louis Connecting R. Co. *v.* Altgen, 210 Ill. 213, 71 N. E. 377 [*affirming* 112 Ill. App. 471], holding that where plaintiff was injured while lawfully upon a locomotive, he need not prove an immaterial allegation that he was on the locomotive in the performance of his duties as servant.

In an action for injuries by being struck by a mail pouch thrown from a moving train, where the complaint alleges that for more than two years it had been the custom of the company to knowingly permit large bags of mail to be thrown from the trains by mail clerks while the trains were in rapid motion, it is essential to a recovery to show that it was the custom to throw the mail where it was liable to do injury to some person, but it is not essential that the evidence should show that it was thrown off customarily at the exact spot where plaintiff was struck. Pittsburgh, etc., R. Co. *v.* Warrum, (Ind. App. 1907) 82 N. E. 934, (App. 1908) 84 N. E. 356.

58. Brown *v.* St. Louis, etc., R. Co., 52 Ark. 120, 12 S. W. 203; Missouri, etc., R. Co. *v.* Scruggs, (Tex. 1908) 107 S. W. 1198 [*affirming* (Civ. App. 1907) 106 S. W. 778]; Sanchez *v.* San Antonio, etc., R. Co., 88 Tex. 117, 30 S. W. 431.

59. Brown *v.* St. Louis, etc., R. Co., 52 Ark. 120, 12 S. W. 203.

60. Southern R. Co. *v.* Yancey, 141 Ala. 246, 37 So. 341.

61. Georgia Cent. R. Co. *v.* Freeman, 140 Ala. 581, 37 So. 387.

62. Georgia Cent. R. Co. *v.* Freeman, 140 Ala. 581, 37 So. 387.

63. Southern R. Co. *v.* Yancey, 141 Ala. 246, 37 So. 341; Georgia Cent. R. Co. *v.* Freeman, 140 Ala. 581, 37 So. 387.

64. See Texas, etc., R. Co. *v.* Black, 23 Tex. Civ. App. 119, 57 S. W. 230.

Defenses eliminated.— Where a count basing plaintiff's right to recover on the theory that he was a passenger on a freight train is dismissed, and the case is submitted on instructions asked by both parties, which declare that plaintiff was a trespasser, a defense that defendant is not liable, because of plaintiff's fraud in representing himself to be the owner of a mileage ticket issued to another which he induced the conductor to accept in payment of his fare, is thereby eliminated from the case (Mirrielees *v.* Wabash R. Co., 163 Mo. 470, 63 S. W. 718); nor can defendant contend that it is not liable because of a release contained in such mileage ticket, exempting it from liability for injuries sustained to the holder while riding on a freight train (Mirrielees *v.* Wabash R. Co., *supra*).

65. Texas, etc., R. Co. *v.* Black, 23 Tex. Civ. App. 119, 57 S. W. 330, holding that a defense that plaintiff knew of a rule forbidding him to ride and that the brakeman was acting for himself in taking plaintiff aboard and in ejecting him from the train cannot be considered because not specially pleaded.

66. Seaboard Air Line R. Co. *v.* Smith, 53 Fla. 375, 43 So. 235 (allegations held sufficient to authorize evidence that at the time and place of the injury plaintiff was walking on the track of defendant railroad company); Palmer *v.* Chicago, etc., R. Co., 112 Ind. 250, 14 N. E. 70; Jones *v.* Charleston, etc., R. Co., 65 S. C. 410, 43 S. E. 884 (ordinance held admissible); Atwood *v.* Chicago, etc., R. Co., 72 Fed. 447.

sible,[67] subject, however, to this qualification, that evidence of matters, although not alleged, may be introduced, not for the purpose of proving such matter, but for the purpose of showing the situation and surrounding circumstances at the time

Under a general averment of negligence evidence is admissible of any neglect or misconduct on the part of defendant tending to produce the injury complained of. Oldfield *v.* New York, etc., R. Co., 14 N. Y. 310 [*affirming* 3 E. D. Smith 103].

Evidence is admissible under an averment that servants of defendant caused an engine to be run at a greater rate of speed than ten miles an hour in violation of a city ordinance and that such violation contributed to the injury complained of, that such ordinance was then in force (St. Louis, etc., R. Co. *v.* Eggman, 161 Ill. 155, 43 N. E. 620 [*affirming* 60 Ill. App. 291]); or under an allegation that defendant negligently managed the train, that it was negligent in not stopping after the employees saw plaintiff on the track (Hanlon *v.* Missouri Pac. R. Co., 104 Mo. 381, 16 S. W. 233); or under an allegation of negligence in propelling a train "with great force," that the train was propelled with sufficient force to cause the injuries complained of (Illinois Cent. R. Co. *v.* Aland, 192 Ill. 37, 61 N. E. 450 [*affirming* 94 Ill. App. 428]); or under an allegation that the brakeman of the train was authorized to eject trespassers, and acted within the scope of his authority in attempting to expel plaintiff, that rules of the company forbidding brakemen to eject trespassers were mere pretexts, and that in practice brakemen were empowered to exercise such authority (Houston, etc., R. Co. *v.* Rutherford, 94 Tex. 518, 62 S. W. 1056 [*affirming* (Civ. App. 1901) 62 S. W. 1069]); or under an allegation that for more than two years it had been the custom of the company to permit bags of mail to be thrown from trains while in motion, that mail bags had been thrown off by mail clerks at other points than the particular spot where plaintiff was struck (Pittsburgh, etc., R. Co. *v.* Warrum, (Ind. App. 1907) 82 N. E. 934, (App. 1908) 84 N. E. 356); or under an allegation that plaintiff was injured while in one of defendant's freight cars unloading his machinery under defendant's direction, and while so engaged defendant so negligently propelled certain cars that they ran against the car in which plaintiff was working, and thereby knocked him against the machinery and injured him, that just prior to the accident defendant's station agent called plaintiff's attention to an insecure grain door tacked above his head, and that plaintiff was injured before he got another seat (St. Louis, etc., R. Co. *v.* Holmes, (Tex. Civ. App. 1899) 49 S. W. 658). Where a person is injured in the night-time while on a lawn adjacent to a depot platform, by being tripped by wires stretched across the lawn, the failure of the railroad to sufficiently light the place is material on the issue of its negligence. Banderob *v.* Wisconsin Cent. R. Co., 133 Wis. 249, 113 N. W. 738. Evidence of any act of negligence in conducting, managing, and propelling cars at the time and place of the accident is admissible under an allegation that defendant "so carelessly and negligently conducted, managed, and propelled said car that by such carelessness and negligence said car ran against, knocked down, and ran over [deceased] without any fault or neglect on his part." St. Louis, etc., R. Co. *v.* Taylor, 5 Tex. Civ. App. 668, 24 S. W. 975.

Evidence of the use of the track by pedestrians is admissible where such use is alleged. Jones *v.* Charleston, etc., R. Co., 65 S. C. 410, 43 S. E. 884.

67. *Illinois.*— Illinois Cent. R. Co. *v.* Anderson, 184 Ill. 294, 56 N. E. 331 [*affirming* 81 Ill. App. 137].

Indiana.—Pennsylvania Co. *v.* Davis, 4 Ind. App. 51, 29 N. E. 425.

Iowa.— Thomas *v.* Chicago, etc., R. Co., 114 Iowa 169, 86 N. W. 259.

Kentucky.— Dilas *v.* Chesapeake, etc., R. Co., 71 S. W. 492, 24 Ky. L. Rep. 1347.

Missouri.— Skipton *v.* St. Joseph, etc., R. Co., 82 Mo. App. 134.

New Mexico.— Murray *v.* Silver City, etc., R. Co., 3 N. M. 337, 9 Pac. 369.

See 41 Cent. Dig. tit. "Railroads," § 1339.

Evidence is inadmissible under an allegation that deceased was killed while walking on the track belonging exclusively to the railroad company by the wilful wrong of the servants of the company, that the place where the accident occurred was one which the company had licensed the public to use (Palmer *v.* Chicago, etc., R. Co., 112 Ind. 250, 14 N. E. 70); or under an allegation that for more than ten years defendant's track where the accident occurred had been used by the public as a thoroughfare with the knowledge of defendant and its employees, that such use of the track was by license from defendant (Burg *v.* Chicago, etc., R. Co., 90 Iowa 106, 57 N. W. 680, 48 Am. St. Rep. 419); or in an action for injuries caused by negligence in running cars, that the accident was caused by a defective brake (De Bolt *v.* Kansas City, etc., R. Co., 123 Mo. 496, 27 S. W. 575); or under an allegation that persons were carried on freight trains with full knowledge of defendant, that persons were in the habit of riding, without objection, on freight trains, regardless of defendant's rules (Feeback *v.* Missouri Pac. R. Co., 167 Mo. 206, 66 S. W. 965); or under an allegation of negligence in failing to blow a whistle, that the whistle was defective (Gulf, etc., R. Co. *v.* Scott, (Tex. Civ. App. 1894) 27 S. W. 827). So in an action for injuries caused by striking plaintiff's intestate while he was on a trestle, evidence that there was a good deal of travel over a plank walk over the trestle is inadmissible in the absence of an allegation that the company had negli-

and place of the accident, and therefore as tending to prove other matters alleged.[68] On behalf of defendant any evidence is admissible under a general denial which tends to disprove the matters put in issue by plaintiff's allegations;[69] but evidence as to matters of affirmative defense is admissible only where such matters are specially pleaded.[70]

(III) *VARIANCE.* Plaintiff in an action for injuries caused by the negligence of a railroad company is entitled to recover only where his proof corresponds with his pleadings, and any material variance between such pleadings and proof

gently allowed the public to use the walk. Smalley *v.* Southern R. Co., 57 S. C. 243, 35 S. E. 489. So, in an action by a trespasser for injuries received in jumping from a moving train, evidence as to whether the accident would have happened if the train had remained standing at the station the usual time is inadmissible since such a statutory regulation is for the benefit of passengers only. Carter *v.* Charleston, etc., R. Co., 64 S. C. 316, 42 S. E. 161. So under allegations of defendant's failure to fence its track, the neglect of those in charge of the engine to signal its approach by bell or whistle, that the train was not on schedule time, or that it was run at a high rate of speed, and that it was not equipped with air brakes, evidence that the engineer had he been exercising a careful lookout could have seen the party injured in time to have stopped the train is inadmissible. Chicago, etc., R. Co. *v.* Grablin, 38 Nebr. 90, 56 N. W. 796, 57 N. W. 522. So in an action for the death of a person while unloading goods from a car, due to the unsoundness of an apron covering the space between the car and platform, evidence that the apron, if sound, would have held the weight of the deceased is incompetent where there is no evidence tending to show that deceased stood on the apron at the time of the accident. Cogdell *v.* Wilmington, etc., R. Co., 130 N. C. 313, 41 S. E. 541.

A city ordinance regulating the giving of signals or the rate of speed at which a train should be run is inadmissible in the absence of any averment in the declaration of the existence of such ordinance. Blanchard *v.* Lake Shore, etc., R. Co., 126 Ill. 416, 18 N. E. 799, 9 Am. St. Rep. 630; Illinois Cent. R. Co. *v.* Godfrey, 71 Ill. 500, 22 Am. Rep. 112.

Where deceased was a trespasser on a freight train when killed, and was hiding between the cars, evidence that passengers were habitually allowed to ride on freight trains with the knowledge of defendant's employees is inadmissible. Feehack *v.* Missouri Pac. R. Co., 167 Mo. 206, 66 S. W. 965.

68. Illinois Cent. R. Co. *v.* Aland, 192 Ill. 37, 61 N. E. 450 [*affirming* 94 Ill. App. 428] (holding that under an allegation that defendant negligently propelled a train of cars against a motionless freight car which plaintiff was unloading, evidence that no warning of the approach of the train was given by ringing the bell or blowing the whistle does not tend to prove a distinct act of negligence not alleged, but is a circumstance proving that the train was negligently propelled); Helbig *v.* Michigan Cent. R. Co., 85 Mich. 359, 48 N. W. 589 (holding that in an action for injuries by being run over by a car, although the declaration does not allege negligence in not having a man stationed on top of the car, evidence that a man if on the car could have seen plaintiff is admissible to show the situation and surroundings at the time of the accident, where the court in its charge confines plaintiff to the negligence alleged in the declaration); Northern Pac. R. Co. *v.* Craft, 69 Fed. 124, 16 C. C. A. 175 (holding that it is proper to admit evidence that the person in charge of the engine which ran over decedent was intoxicated, although his intoxication is not pleaded as a specific act of negligence).

Rules adopted by a railroad company for the conduct of its business are admissible in evidence in actions for negligence, although not pleaded, since they bear on the conduct of the managers. White *v.* Atchison, etc., R. Co., 84 Mo. App. 411. But see Fink *v.* Ash, 99 Ga. 106, 24 S. E. 976.

Evidence in rebuttal.—Although the alleged negligence is the failure of defendant to ring the engine bell, it is proper to admit testimony that the engineer was not on the engine when the accident happened, after the engineer has testified that he was on the engine and that the bell was rung. Gulf, etc., R. Co. *v.* Calvert, 11 Tex. Civ. App. 297, 32 S. W. 246.

69. Werges *v.* St. Louis, etc., R. Co., 35 La. Ann. 641 (holding that where a petition charges defendant with running its cars through the street of a city "without any warrant of law or color of authority" defendant can, without specially pleading them, put in evidence private acts of the legislature and city ordinances purporting to authorize the acts complained of); Valley R. Co. *v.* Roos, 9 Ohio Cir. Ct. 201, 6 Ohio Cir. Dec. 33.

In an action for ejection of plaintiff by the company's agent, from a depot room, defendant may show under a general denial that the agent had provided two rooms, one for white and the other for colored persons, and had established a rule requiring them to purchase tickets in their respective rooms, and that plaintiff was ejected from the room not intended for her race. Smith *v.* Chamberlain, 38 S. C. 529, 17 S. E. 371, 19 L. R. A. 710.

70. Bluedorn *v.* Missouri Pac. R. Co., 121 Mo. 258, 25 S. W. 943, (1893) 24 S. W. 57, holding that in an action for injuries from a train on the ground that it was running at a rate of speed in excess of that fixed by

is fatal to a recovery.[71] An immaterial variance, however, which in no wise prejudices defendant's case, will not affect plaintiff's recovery.[72]

ordinance, defendant cannot show that the ordinance is unreasonable and invalid unless such defense is specially pleaded.

71. Feeback *v.* Missouri Pac. R. Co., 167 Mo. 206, 66 S. W. 965; Graney *v.* St. Louis, etc., R. Co., 157 Mo. 666, 57 S. W. 276, 50 L. R. A. 153; Atwood *v.* Chicago, etc., R. Co., 72 Fed. 447.

Variance has been held material between an allegation that the accident occurred within the city limits and proof that it happened beyond the limits (Highland Ave., etc., R. Co. *v.* Maddox, 100 Ala. 618, 13 So. 615); between allegations that plaintiff was a licensee upon defendant's railroad, and proof showing the relationship of master and servant (Alabama Great Southern R. Co. *v.* Burks, 148 Ala. 113, 41 So. 638); between an allegation that while intestate was ascending the side of a car he came in contact with a tank which had been erected too near the track to permit his body to pass between the same and the side of the car, and proof that he was standing on a platform between two cars with his back toward the tank and extending out but a little beyond the sides of the car (Hood *v.* Pioneer Min., etc., Co., 95 Ala. 461, 11 So. 10); between an allegation that plaintiff was upon defendant's track "at the instance and request of the defendant," and proof that plaintiff was on the track while in the discharge of his duty as a brakeman (Mobile, etc., R. Co. *v.* George, 94 Ala. 199, 10 So. 145); between an allegation that deceased was killed in a specified way by the negligent running of a particular train or engine, and proof that he was killed by another engine of the company and in a manner different from that alleged (Central R. Co. *v.* Hubbard, 86 Ga. 623, 12 S. E. 1020); between a charge of negligence as to the employment of an incompetent engineer, and proof of failure to furnish the engineer with assistance to maintain the necessary lookout to prevent accidents (Missouri, etc., R. Co. *v.* Shockman, 59 Kan. 774, 52 Pac. 446); between an allegation that as plaintiff was making a coupling he stepped between the cars and was injured by reason of defendant's neglect to ballast the track, and proof that he was standing with his arm against the stationary car where it was caught by the moving car (Mueller *v.* Lake Shore, etc., R. Co., 105 Mich. 487, 63 N. W. 416); between an allegation that the train of cars on which deceased was at work was moving down an incline track under control, and proof that the train was moving in the opposite direction by order of the conductor (Pennington *v.* Detroit, etc., R. Co., 90 Mich. 505, 51 N. W. 634); between a complaint claiming damages for a tortious expulsion in the night-time from a train, and proof of injury from exposure caused by an unreasonable detention, and the deprivation of proper facilities for care and shelter (Harding *v.* Chicago, etc., R. Co., 56 Mich. 628, 23 N. W. 445); between an allegation that the specific negligence which caused the injury was a failure to stop the train at the station long enough for plaintiff to alight, and proof that the injury was occasioned by a failure to keep the platform of the station lighted (Price *v.* St. Louis, etc., R. Co., 72 Mo. 414); between an allegation that the negligence consisted in having or using defective machinery and in running and managing its road and cars, and proof that the injury was caused by a broken frog (Waldhier *v.* Hannibal, etc., R. Co., 71 Mo. 514); between an allegation that the injuries were caused by defendant's negligently driving and managing its train, and proof that they were caused by the negligent building of the depot platform so close to the track that the car step struck plaintiff while standing on the platform (Murray *v.* Silver City, etc., R. Co., 3 N. M. 337, 9 Pac. 369); and between an allegation that "the conductor of said train, acting for defendant in directing the movements thereof, by giving signals to defendant's engineer, under whose control and management defendant had placed the aforesaid locomotive and construction train," and proof that a second foreman or "straw boss" of defendant's crew had the control and management of the movements of the train (Forge *v.* Houston, etc., R. Co., 41 Tex. Civ. App. 81, 90 S. W. 1118).

72. Pittsburgh, etc., R. Co. *v.* Cozatt, 39 Ind. App. 682, 79 N. E. 534; Tubbs *v.* Michigan Cent. R. Co., 107 Mich. 108, 64 N. W. 1061, 61 Am. St. Rep. 320; Houston, etc., R. Co. *v.* Ollis, 37 Tex. Civ. App. 231, 83 S. W. 850.

Variance has been held immaterial between an allegation that defendant was engaged in transporting mail and that it was customary for it to deliver the mail to plaintiff, and proof that the mail was thrown from the train by the United States mail agent (Tubbs *v.* Michigan Cent. R. Co., 107 Mich. 108, 64 N. W. 1061, 61 Am. St. Rep. 320); between an allegation that "there was no light on the rear part of said engine to indicate its approach" and proof that there was a light but it was questionable whether it was sufficient to give a proper warning (Baltimore, etc., R. Co. *v.* Cumberland, 12 App. Cas. (D. C.) 598); between an allegation that plaintiff was injured while in a freight car unloading freight into a wagon, and proof that he was injured while standing in a freight car with one foot out on the wagon, engaged in an effort to remove a piece of machinery from the car into the wagon (Louisville, etc., R. Co. *v.* Varner, 129 Ga. 844, 60 S. E. 162); between an allegation that plaintiff was employed as a switchman and was discharging his duty as such when injured, and proof that he was foreman of a switching crew and had control of the engine (Ashman *v.* Flint, etc., R. Co., 90 Mich. 567, 51 N. W. 645); between an allegation

c. Evidence — (I) *PRESUMPTIONS AND BURDEN OF PROOF* — (A) *In General.* In an action for injuries caused by a railroad company, the burden is on plaintiff in the first instance to prove all facts necessary to establish his alleged cause of action.[73] As a general rule there is no presumption of law in such cases that either party was guilty of negligence;[74] but on the other hand if there is any presumption at all, it is that all parties act with ordinary care, and such presumption continues until overthrown by evidence.[75] In the absence of statute or evidence to the contrary, the mere fact of an accident resulting in the injury complained of does not raise a presumption of negligence on the part of the railroad company;[76] and the burden of proof is on plaintiff to establish by a pre-

that plaintiff was thrown from the car, and proof that while in the act of falling he jumped in order to save himself from more serious anticipated injury (Gulf, etc., R. Co. *v.* Johnson, 83 Tex. 628, 19 S. W. 851); between allegations that the accident occurred "on or about September 20, 1887," and at a place on said railroad about seventy-five or one hundred yards distant from a certain station, and proof that it occurred on or about September 18, or between the sixteenth and twentieth of September, within one hundred and fifty yards of the station (Western R. Co. *v.* Sistrunk, 85 Ala. 352, 5 So. 79); between allegations that by defendant's regulations its trains were not allowed to run faster than six miles an hour in a city where plaintiff's decedent was injured and that there was such sign-board at the corporate limits, and proof that the sign-board was over a mile within the corporate limits (International, etc., R. Co. *v.* Knehn, 2 Tex. Civ. App. 210, 21 S. W. 58); between an allegation that the injury was caused by plaintiff's foot catching in the angle formed by a switch rail and the main rail, "which angle is called a frog," and proof that the accident occurred at a rail angle which was not a "frog" (San Antonio, etc., R. Co. *v.* Gillum, (Tex. Civ. App. 1895) 30 S. W. 697 [*affirmed* in (1895) 31 S. W. 356]); and between allegations that plaintiff's intestate while on a railroad train was violently ejected and thrown down from the cars by defendant and its agents and servants in the course of their employment, and in being thus forcibly ejected was thrown under the cars and run over and killed thereby, and proof that deceased was injured by this train and that about an hour afterward another train ran over his body (South Carolina R. Co. *v.* Nix, 68 Ga. 572).

Where defendant is negligent in running its train faster than allowed by ordinance and by reason thereof plaintiff is injured without fault on his part, he is entitled to recover, whether the injury occurred in the particular street named in the petition or elsewhere on defendant's road within the city. Prewitt *v.* Missouri, etc., R. Co., 134 Mo. 615, 36 S. W. 667.

73. Southern R. Co. *v.* Stewart, (Ala. 1907) 45 So. 51; Martin *v.* Chicago, etc., R. Co., 92 Ill. App. 133; and cases cited *infra* notes 77–80.

The fact that a person is on a railroad train does not necessarily raise the presumption that he is there rightfully (Pennsylvania Co. *v.* Coyer, 163 Ind. 631, 72 N. E. 875); but on the other hand it has been held that if the complaint does not allege whether he was a passenger, an employee, or a mere trespasser, it will be presumed that he was a trespasser as to whom defendant owed no duty except not to wantonly injure him (White *v.* Nashville, etc., R. Co., 108 Tenn. 739, 70 S. W. 1030); and in order for a person to recover for injuries received while traveling on a work train, it must be shown that he was lawfully there and that the railroad company owed him the duty of carrying him safely (Pennsylvania Co. *v.* Coyer, *supra*).

A trespasser suing for injuries caused by his expulsion by a brakeman has the burden of showing that the brakeman had power to expel him. Chicago, etc., R. Co. *v.* Brackman, 78 Ill. App. 141.

Where a boy is injured while attempting to board a moving freight train at the invitation of defendant's employees, who under the evidence had no authority to invite any one to ride on the train, if the boy had such a degree of intelligence that he could or should have appreciated the danger of his act, the burden is on him to show that the person who invited him to go on the train had authority to do so. Missouri, etc., R. Co. *v.* Tonahill, 16 Tex. Civ. App. 625, 41 S. W. 875.

74. Spears *v.* Chicago, etc., R. Co., 43 Nebr. 720, 62 N. W. 68; Toledo, etc., R. Co. *v.* Chisholm, 83 Fed. 652, 27 C. C. A. 653.

75. Spears *v.* Chicago, etc., R. Co., 43 Nebr. 720, 62 N. W. 68.

Where a lookout is placed on the rear of a backing train, the *prima facie* presumption is that he did his duty, and that defendant railroad company performed its duty in that respect. Johnson *v.* Rio Grande Western R. Co., 19 Utah 77, 57 Pac. 17.

76. *Iowa.*— Case *v.* Chicago, etc., R. Co., 69 Iowa 449, 29 N. W. 596, 64 Iowa 762, 21 N. W. 30.

Maryland.— Frech *v.* Philadelphia, etc., R. Co., 39 Md. 574.

North Carolina.— Clegg *v.* Southern R. Co., 132 N. C. 292, 43 S. E. 836.

Pennsylvania.— Hauseman *v.* Cornwall R. Co., 3 Lanc. L. Rev. 257.

Texas.— Rozwadosfskie *v.* International, etc., R. Co., 1 Tex. Civ. App. 487, 20 S. W. 872.

United States.— Lucas *v.* Richmond, etc., R. Co., 40 Fed. 566.

ponderance of evidence,[77] or by evidence sufficient to reasonably satisfy the jury,[78] the negligence of defendant relied on as a ground of recovery,[79] and that such negligence was the cause of the injury.[80] The burden is on defendant to estab-

See 41 Cent. Dig. tit. "Railroads," §§ 912, 1341, 1342.

That a person is found dead on a railroad right of way raises no presumption that he came to his death through the negligence of the railroad company (Louisville, etc., R. Co. *v.* Terry, 47 S. W. 588, 20 Ky. L. Rep. 803; Spears *v.* Chicago, etc., R. Co., 43 Nebr. 720, 62 N. W. 68), especially where such person was a trespasser (Louisville, etc., R. Co. *v.* Terry, *supra*).

That a person is run over and killed by a train raises no presumption of negligence on the part of the railroad company in the absence of any evidence as to the manner in which the accident occurred. Tucker *v.* International, etc., R. Co., (Tex. Civ. App. 1902) 67 S. W. 914.

77. Southern Indiana R. Co. *v.* Peyton, 157 Ind. 690, 61 N. E. 722. See also East Tennessee, etc., R. Co. *v.* Humphreys, 12 Lea (Tenn.) 200.

78. Alabama Great Southern R. Co. *v.* Burgess, 119 Ala. 525, 25 So. 251, 72 Am. St. Rep. 943, holding that an instruction to find for defendant unless the evidence satisfies the jury that its engineer wantonly injured plaintiff exacts too high a degree of proof, since plaintiff is not required to satisfy the jury absolutely of intentional wrong, but only to reasonably satisfy it.

79. *Arkansas.*— St. Louis, etc., R. Co. *v.* Ferrell, 84 Ark. 270, 105 S. W. 263.

Illinois.— Martin *v.* Chicago, etc., R. Co., 92 Ill. App. 133.

Iowa.— Case *v.* Chicago, etc., R. Co., 69 Iowa 449, 29 N. W. 596, 64 Iowa 762, 21 N. W. 30; Carlin *v.* Chicago, etc., R. Co., 37 Iowa 316.

Kentucky.— Thornton *v.* Louisville, etc., R. Co., 70 S. W. 53, 24 Ky. L. Rep. 854.

Maryland.— Frech *v.* Philadelphia, etc., R. Co., 39 Md. 574.

Massachusetts.— Johnson *v.* J. M. Guffey Petroleum Co., 197 Mass. 302, 83 N. E. 874; Bjornquist *v.* Boston, etc., R. Co., 185 Mass. 130, 70 N. E. 53, 102 Am. St. Rep. 332 (holding that in an action for injuries to a boy trespassing on a freight car, the burden is on plaintiff to show reckless and wanton misconduct on the part of defendant's servants); Robinson *v.* Fitchburg, etc., R. Co., 7 Gray 92.

Michigan.— Pzolla *v.* Michigan Cent. R. Co., 54 Mich. 273, 20 N. W. 71; Michigan Cent. R. Co. *v.* Coleman, 28 Mich. 440.

Missouri.— Koegel *v.* Missouri Pac. R. Co., 181 Mo. 379, 80 S. W. 905 (holding that in an action for injuries to a trespasser on the tracks, the burden is on plaintiff to show that he was on or so near to the track that the engineer in the exercise of ordinary care could have seen his peril in time to have avoided the injury); Burde *v.* Chicago, etc., R. Co., 123 Mo. App. 629, 100 S. W. 509.

Nebraska.— Spears *v.* Chicago, etc., R. Co., 43 Nebr. 720, 62 N. W. 68.

Pennsylvania.— Hauseman *v.* Cornwall R. Co., 3 Lanc. L. Rev. 257.

Texas.— Hutchens *v.* St. Louis Southwestern R. Co., 40 Tex. Civ. App. 245, 89 S. W. 24; Williams *v.* Cross, 19 Tex. Civ. App. 426, 47 S. W. 478 (holding that where a person is injured by a railroad train being backed against him at a place which is not a public crossing, the burden is on him to show that the engine was not provided with a proper bell); St. Louis, etc., R. Co. *v.* Sharp, 3 Tex. App. Civ. Cas. § 328.

Canada.— Dube *v.* Reg., 3 Can. Exch. 147.

See 41 Cent. Dig. tit. "Railroads," §§ 912, 1341, 1342.

In an action for wrongfully ejecting a person from a train, the law never presumes a wrongful attack of one person on another. Illinois Cent. R. Co. *v.* Berry, 81 Ill. App. 17.

That a moving car bumps into a stationary car about which a person is lawfully working is not presumptive evidence of negligence on the part of the railroad company, but the burden of proof is on the injured person to show that such car was set in motion by the negligence of the company. Stevenson *v.* Chicago, etc., R. Co., 18 Fed. 493, 5 McCrary 634.

A Florida statute (Acts (1887), c. 3744, § 1), relating to the recovery of damages against railroads, and providing that if plaintiff and the agents of the company are both at fault the damages shall be diminished in proportion to the amount of fault attributable to plaintiff, does not relieve plaintiff from the necessity of establishing defendant's negligence. Wilkinson *v.* Pensacola, etc., R. Co., 35 Fla. 82, 17 So. 71.

Where the person injured was a trespasser and could have seen the train for some distance, and was struck thereby, he was guilty of contributory negligence as a matter of law, casting on him the burden of showing that the employee in charge of the train saw him in time to have avoided the injury and negligently failed to use proper means to do so (Chicago, etc., R. Co. *v.* Bunch, 82 Ark. 522, 102 S. W. 369); or where the injury occurred on a trestle, the burden is on plaintiff to show that the trainmen discovered him in time to avoid injuring him, and wilfully and recklessly injured him (Adams *v.* St. Louis, etc., R. Co., 83 Ark. 300, 103 S. W. 725).

Where an intoxicated person on defendant's track falls down and is run over by a train, the burden is on him of proving his discovery by defendant's employees in time to avoid the injury. Luna *v.* Missouri, etc., R. Co., (Tex. Civ. App. 1903) 73 S. W. 1061.

80. *Arkansas.*— St. Louis, etc., R. Co. *v.* Townsend, 69 Ark. 380, 63 S. W. 994.

[X, E, 8, c, (I), (A)]

lish matters of affirmative defense;[81] and while defendant cannot be called upon to produce any evidence until plaintiff has brought sufficient proof to *prima facie* sustain his cause of action,[82] yet where a *prima facie* case of negligence on the part of the railroad company is made out, it then devolves upon it to exculpate itself by showing such matters as will avoid liability,[83] unless plaintiff's own proof shows contributory negligence on his part.[84] Plaintiff or defendant may be aided in establishing his or its part of the case by presumptions arising from the facts and the circumstances.[85] Thus in the absence of proof to the contrary, it will be presumed on behalf of plaintiff in an action for injuries caused by being ejected from a locomotive that the engineer was acting within the scope of his employment in putting a trespasser off his locomotive;[86] or it will be presumed in favor of defendant where the injured party could have seen or heard the approaching train which caused his injury in time to avoid the accident, that he did not look and listen, or that he did not heed what he saw or heard;[87] or in case of an injury to a trespasser that the company did not anticipate his being on the track.[88]

(B) *Under Statutory Provisions.* Under the statutes in some jurisdictions, proof of injury inflicted by the operation of a railroad raises a *prima facie* case of negligence on the part of the railroad company in reference thereto, and imposes upon it the burden of showing that it was not so negligent.[89] But this presumption

Georgia.— Mann *v.* Macon, etc., R. Co., 32 Ga. 345.

Illinois.— Illinois Cent. R. Co. *v.* Berry, 81 Ill. App. 17.

Indiana.— Southern Indiana R. Co. *v.* Peyton, 157 Ind. 690, 61 N. E. 722.

Maryland.— Philadelphia, etc., R. Co. *v.* Stebbing, 62 Md. 504.

Michigan.— Michigan Cent. R. Co. *v.* Coleman, 28 Mich. 440.

Canada.— Newell *v.* Canadian Pac. R. Co., 12 Ont. L. Rep. 21, 7 Ont. Wkly. Rep. 771.

See 41 Cent. Dig. tit. "Railroads," §§ 912, 1341, 1342; and cases cited in preceding note.

81. Valley R. Co. *v.* Roos, 9 Ohio Cir. Ct. 201, 6 Ohio Cir. Dec. 33.

82. Southern R. Co. *v.* Stewart, (Ala. 1907) 45 So. 51 (holding therefore that the failure of defendant to call its engineer or conductor as a witness in its behalf cannot be considered by the jury for the purpose of making out a *prima facie* case against defendant); Price *v.* Philadelphia, etc., R. Co., 84 Md. 506, 36 Atl. 263, 36 L. R. A. 213 (holding that no duty rests upon a railroad company when sued for a personal injury to introduce evidence as to the manner in which the injury occurred, since plaintiff has the privilege of using its employees as witnesses, and requiring their attendance); Texas, etc., R. Co. *v.* Shoemaker, 98 Tex. 451, 84 S. W. 1049 [*reversing* (Civ. App. 1904) 81 S. W. 1019].

83. Paducah, etc., R. Co. *v.* Hoehl, 12 Bush (Ky.) 41 (holding that where plaintiff has shown negligence of the company and the injury caused by it his cause of action is made out); Tateman *v.* Chicago, etc., R. Co., 96 Mo. App. 448, 70 S. W. 514.

That an engine is backed in depot grounds without a lookout and a person is injured is *prima facie* evidence of negligence, which defendant must explain away. Willis *v.* Vicksburg, etc., R. Co., 115 La. 53, 38 So. 892.

84. Paducah, etc., R. Co. *v.* Hoehl, 12 Bush (Ky.) 41.

85. See Chicago, etc., R. Co. *v.* Pritchard, 39 Ind. App. 701, 78 N. E. 1044 [*affirmed* in 168 Ind. 398, 79 N. E. 508, 81 N. E. 78, 9 L. R. A. N. S. 857]; and cases cited *infra* notes 86–88.

In Alabama, under Const. art. 1, § 24, and Code, § 1580, subd. 9, § 3207, a footpath stated in the complaint to be about five feet from the tracks will be presumed to be on the right of way. Haley *v.* Kansas City, etc., R. Co., 113 Ala. 640, 21 So. 357.

That the injured party was not seen does not raise a presumption that a proper lookout was not kept. Wickham *v.* Chicago, etc., R. Co., 95 Wis. 23, 69 N. W. 982.

Where there were no obstructions to their view, the jury may infer that railroad employees saw a person dangerously near to the track in time to avoid injuring him, notwithstanding their denials. Houston, etc., R. Co. *v.* Finn, (Tex. Civ. App. 1908) 107 S. W. 94 [*affirmed* in (1908) 109 S. W. 918].

86. Chicago, etc., R. Co. *v.* Doherty, 53 Ill. App. 282.

87. Lamport *v.* Lake Shore, etc., R. Co., 142 Ind. 269, 41 N. E. 586. And see *supra*, X, E, 4, a, (II), (B) text and note 45.

That no proof is offered to show that decedent stopped and looked for an approaching train before going on the track does not raise the presumption that he did not stop and look, unless the evidence shows that he must have seen the approaching train if he had looked. McVey *v.* Chesapeake, etc., R. Co., 46 W. Va. 111, 32 S. E. 1012.

88. Chenery *v.* Fitchburg R. Co., 160 Mass. 211, 35 N. E. 554, 22 L. R. A. 575.

89. Georgia Pac. R. Co. *v.* Blanton, 84 Ala. 154, 4 So. 621; Central R. Co. *v.* Brinson, 64 Ga. 475 (under Code, § 2321 [3033]); Harden *v.* Georgia R. Co., 3 Ga. App. 344, 59 S. E. 1122 (Code (1895), § 2321); Smith

may be rebutted by evidence either of plaintiff or defendant;[90] and the railroad company may rebut such presumption and relieve itself of liability by showing that its employees exercised all reasonable care to avoid the injury,[91] or that a compliance with the statutory regulations would not have availed to prevent the injury,[92] as that the injury was caused by the injured party's own lack of care.[93] Even under such statutes proof of contributory negligence establishes a sufficient defense unless other facts are shown, and defendant then being under no duty

v. Nashville, etc., R. Co., 6 Coldw. (Tenn.) 589.

Under an Arkansas statute (Sandels & H. Dig. § 6349) making railroad companies "responsible for all damages to persons and property done or caused by the running of trains in this state," the fact that a person was injured or killed along a railroad right of way is *prima facie* evidence of negligence on the part of the railroad company and the burden rests upon it to show the exercise of proper care as a defense (St. Louis, etc., R. Co. *v.* Townsend, 69 Ark. 380, 63 S. W. 994; St. Louis, etc., R. Co. *v.* Neely, 63 Ark. 636, 40 S. W. 130, 37 L. R. A. 616); but it is held under this statute that the burden of proof is on the railroad company only where the injuries are the result of the actual running of the trains (St. Louis, etc., R. Co. *v.* Cooksey, 70 Ark. 481, 69 S. W. 259, holding that the presumption arising in such cases does not apply where a person is scalded by a trainman engaged in wetting coal on the tender while the train is standing still). Thus it has been held that the fact that a person was killed by a train in the company's yards gives rise to a presumption of negligence against the railroad company, casting upon it the burden of establishing that a constant lookout was kept. St. Louis Southwestern R. Co. *v.* Graham, 83 Ark. 61, 102 S. W. 700.

Under Florida Laws (1891), c. 4071, the burden of proving personal injuries is on plaintiff, and when this is shown the burden of showing absence of negligence is on defendant. Seaboard Air Line R. Co. *v.* Smith, 53 Fla. 375, 43 So. 235.

In Georgia, where plaintiff shows that he was injured by the running of defendant's cars, the burden is then upon the railroad company to make out its defense, as there will then arise a presumption of law that the company was negligent as charged in plaintiff's petition (Gainesville, etc., Electric R. Co. *v.* Austin, 127 Ga. 120, 56 S. E. 254; Kemp *v.* Georgia Cent. R. Co., 122 Ga. 559, 50 S. E. 465); and this is true, although plaintiff may allege in different counts that the injury occurred in either one of two ways because of various acts of negligence on the part of the company (Gainesville, etc., Electric R. Co. *v.* Austin, *supra*). Code, §§ 2083, 3033, 3036, providing that the presumption in all cases is against the railroad company (Central R. Co. *v.* Brinson, 64 Ga. 475), is held not to apply in favor of an employee of a receiver (Robinson *v.* Huidekoper, 98 Ga. 306, 24 S. E. 440).

In Illinois, under 2 Starr & C. Annot. St. c. 114, § 187, an injury resulting from the running of a train in a city at a speed greater than that allowed by ordinance is presumed to have been caused by the negligence of the railroad company. Illinois Cent. R. Co. *v.* Ashline, 171 Ill. 313, 49 N. E. 521; McGuire *v.* Chicago, etc., R. Co., 120 Ill. App. 111.

Under a Mississippi statute (Rev. Code, (1880), § 1059), which provides that proof of injury inflicted by cars or locomotives while in motion shall be *prima facie* evidence of the want of reasonable skill and care on the part of the railroad company's servants in reference thereto, it is for the jury to decide the question of care or skill in reference to the particular injury. Vicksburg, etc., R. Co. *v.* Phillips, 64 Miss. 693, 2 So. 537. Although this statute was enacted primarily to meet cases where the manner of the injury inflicted is known only to the railroad servants, it is equally applicable where the injury is witnessed by many. Vicksburg, etc., R. Co. *v.* Phillips, *supra*. Under Annot. Code (1892), § 1808, where the evidence shows that a person was killed by the running of cars, the statute imposes a liability, unless the company exonerates itself by showing the facts connected with the injury. Yazoo, etc., R. Co. *v.* Landrum, 89 Miss. 399, 42 So. 675.

Under Tenn. Code, §§ 1167–1169, the fact of injury or death of a person on a railroad right of way is *prima facie* evidence of negligence on the part of the railroad company, and imposes upon it the burden of showing that it was not guilty of negligence; in other words that it observed the precautions prescribed by such statutes. Louisville, etc., R. Co. *v.* Connor, 9 Heisk. 19; Smith *v.* Nashville, etc., R. Co., 6 Coldw. 589. But it has been held that this need not be shown "by satisfactory affirmative evidence." Sommers *v.* Mississippi, etc., R. Co., 7 Lea 201.

90. Gainesville, etc., Electric R. Co. *v.* Austin, 127 Ga. 120, 56 S. E. 254; McGuire *v.* Chicago, etc., R. Co., 120 Ill. App. 111, holding that such a presumption of negligence is rebutted where it appears that plaintiff seeking to recover on the basis of such negligence was at the time of the injury a trespasser to whom defendant company owed no duty.

91. Central R. Co. *v.* Brinson, 64 Ga. 475; Smith *v.* Nashville, etc., R. Co., 6 Coldw. (Tenn.) 589.

92. Georgia Pac. R. Co. *v.* Blanton, 84 Ala. 154, 4 So. 621.

93. Central R. Co. *v.* Brinson, 64 Ga. 475; Illinois Cent. R. Co. *v.* Bartle, 94 Ill. App. 57.

to prove additional facts to exonerate itself from liability until the effect of the contributory negligence is overcome, the burden is shifted to plaintiff to prove that defendant by the exercise of ordinary care could have avoided the injury notwithstanding his contributory negligence, but failed to do so,[94] unless such fact is already shown by evidence adduced by defendant.[95]

(c) *Contributory Negligence.* In some jurisdictions, where the question of contributory negligence is raised,[96] the burden of proof is on plaintiff to show that the party injured was free from contributory negligence.[97] In other jurisdictions, however, except where plaintiff's own case discloses a presumption of contributory negligence,[98] or where a *prima facie* case of such negligence is established by all the facts and circumstances in the case,[99] if plaintiff shows negligence on the part of the railroad company,[1] he need not further prove freedom from contributory negligence,[2] but the burden of proof is then upon defendant to show contributory negligence as a matter of defense.[3]

(II) *ADMISSIBILITY OF EVIDENCE*[4] — (A) *In General.* Subject to the general rules regulating the competency, relevancy, and materiality of evidence in civil cases generally,[5] any evidence is admissible in an action for injuries to persons on or near railroad tracks which tends to prove or disprove plaintiff's

94. St. Louis, etc., R. Co. *v.* Townsend, 69 Ark. 380, 63 S. W. 994.

95. St. Louis, etc., R. Co. *v.* Townsend, 69 Ark. 380, 63 S. W. 994.

96. Moore *v.* Central R. Co., 24 N. J. L. 268, holding that plaintiff need not prove ordinary care on his part until the question is raised by some facts in the case.

97. *Iowa.*— Carlin *v.* Chicago, etc., R. Co., 37 Iowa 316.

Massachusetts.— Robinson *v.* Fitchburg, etc., R. Co., 7 Gray 92.

Michigan.— Pzolla *v.* Michigan Central R. Co., 54 Mich. 273, 20 N. W. 71; Michigan Cent. R. Co. *v.* Coleman, 28 Mich. 440.

New Jersey.— Moore *v.* Central R. Co., 24 N. J. L. 268.

New York.— Fitzgibbons *v.* Manhattan R. Co., 88 N. Y. Suppl. 341; Winslow *v.* Boston, etc., R. Co., 11 N. Y. St. 831.

Pennsylvania.— Hauseman *v.* Cornwall R. Co., 3 Lanc. L. Rev. 257.

See 41 Cent. Dig. tit. "Railroads," §§ 912, 1341, 1342.

98. Hunter *v.* Montana Cent. R. Co., 22 Mont. 525, 57 Pac. 140; Missouri, etc., R. Co. *v.* Scarborough, (Tex. Civ. App. 1902) 68 S. W. 196; Southern R. Co. *v.* Bruce, 97 Va. 92, 33 S. E. 548.

Plaintiff's own evidence held to show negligence on his part precluding a recovery see Atlanta, etc., R. Co. *v.* Loftin, 86 Ga. 43, 12 S. E. 186.

99. International, etc., R. Co. *v.* De Ollos, (Tex. Civ. App. 1903) 76 S. W. 222; Missouri, etc., R. Co. *v.* Scarborough, (Tex. Civ. App. 1902) 68 S. W. 196; Southern R. Co. *v.* Bruce, 97 Va. 92, 33 S. E. 548.

Under Ga. Code, § 3033, where the company shows itself without fault by proof that reasonable and ordinary care and diligence has been exercised by its employees, the burden of proving want of contributory negligence is on the party injured. Central R. Co. *v.* Moore, 61 Ga. 151.

Sufficiency of evidence.— Where it is shown that the accident occurred at night and no witnesses are produced who saw it, the mere fact that the company did not cause a bell to be rung or a light to be put up as required by law is not sufficient to relieve the deceased from the imputation of negligence where it is shown that the train made a noise which could be heard at some distance, that the switchman had lanterns which could easily be seen, and that the deceased was familiar with the track and its surroundings. Gulf, etc., R. Co. *v.* Riordan, (Tex. Civ. App. 1893) 22 S. W. 519.

1. Frech *v.* Philadelphia, etc., R. Co., 39 Md. 574.

2. Southern Indiana R. Co. *v.* Peyton, 157 Ind. 690, 61 N. E. 722; Texas, etc., R. Co. *v.* Shoemaker, 98 Tex. 451, 84 S. W. 1049 [*reversing* (Civ. App. 1904) 81 S. W. 1019]; International, etc., R. Co. *v.* Jackson, 41 Tex. Civ. App. 51, 90 S. W. 918; Kroeger *v.* Texas, etc., R. Co., 30 Tex. Civ. App. 87, 69 S. W. 809. *Compare* Lamport *v.* Lake Shore, etc., R. Co., 142 Ind. 269, 41 N. E. 586.

Where one not a trespasser is killed on the track by the negligence of employees operating the train, it is not incumbent on his administrator to prove that he was in the exercise of ordinary care after proving such negligence of the employees as will account for his death without fault on his part. Toledo, etc., R. Co. *v.* Chisholm, 83 Fed. 652, 27 C. C. A. 663.

3. *Kentucky.*— Paducah, etc., R. Co. *v.* Hoehl, 12 Bush 41.

Maryland.— Frech *v.* Philadelphia, etc., R. Co., 39 Md. 574.

Montana.— Hunter *v.* Montana Cent. R. Co., 22 Mont. 525, 57 Pac. 140.

Texas.— Missouri, etc., R. Co. *v.* Scarborough, (Civ. App. 1902) 68 S. W. 196.

Virginia.— Southern R. Co. *v.* Bruce, 97 Va. 92, 33 S. E. 548.

See 41 Cent. Dig. tit. "Railroads," §§ 912, 1341, 1342.

4. Evidence admissible under pleadings see *supra*, X, E, 8, b, (II).

5. See, generally, EVIDENCE, 16 Cyc. 821.

cause of action,[6] or defendant's matters of defense.[7] Thus, as tending to prove or disprove negligence, evidence is admissible which tends to show the surrounding circumstances or conditions existing at the time and place of the accident.[8] But evidence of facts which are irrelevant or immaterial is inadmissible either on

6. Oldfield *v.* Harlem, etc., R. Co., 14 N. Y. 310 [*affirming* 3 E. D. Smith 103]; Houston, etc., R. Co. *v.* O'Donnell, (Tex. Civ. App. 1905) 90 S. W. 886 [*reversed* on other grounds in 99 Tex. 636, 92 S. W. 409]; International, etc., R. Co. *v.* Quinones, (Tex. Civ. App. 1904) 81 S. W. 757; Over *v.* Missouri, etc., R. Co., (Tex. Civ. App. 1903) 73 S. W. 535.

Evidence held admissible: In an action for injuries from the explosion of a signal torpedo negligently left on a railroad track, a witness may identify the person who placed it there as "one of the train crew," although he did not know such person and did not describe him (Cleveland, etc., R. Co. *v.* Marsh, 17 Ohio Cir. Ct. 1, 9 Ohio Cir. Dec. 48); and in such case a witness may testify that an employee of the company got a torpedo from the station agent, although witness at the time did not know what the object was, but afterward learned it was a torpedo, having distinctly seen it at the time (Cleveland, etc., R. Co. *v.* Marsh, *supra*).

Evidence of rules and regulations of roads other than defendant is admissible when at the place where the injury occurred there are tracks used in common by defendant and such other roads. Chicago, etc., R. Co. *v.* O'Sullivan, 40 Ill. App. 369 [*affirmed* in 143 Ill. 48, 32 N. E. 398].

Evidence of the violation of a city ordinance regulating the operation of trains within city limits, at the time and place of the accident, is admissible as tending to show negligence. St. Louis, etc., R. Co. *v.* Mathias, 50 Ind. 65; Kelly *v.* Union R., etc., Co., 95 Mo. 279, 8 S. W. 420; Meek *v.* Pennsylvania Co., 38 Ohio St. 632.

Wilful or wanton injury.— Evidence of the conduct of railroad employees in the management of the train which caused the injury is admissible as tending to show that the injury was wilful and purposely inflicted. Indianapolis, etc., R. Co. *v.* McClaren, 62 Ind. 566.

Authority to remove trespasser.— Testimony of a railroad company's brakemen that if they found a trespasser on a car they would put him off, and that it was the custom of brakemen to put off trespassers, is admissible to prove a custom of the company's employees, although the company has a rule prohibiting any employee except the conductor to eject trespassers. Texas, etc., R. Co. *v.* Buch, (Tex. Civ. App. 1907) 102 S. W. 124 [*reversed* on other grounds in (1907) 105 S. W. 987].

7. Galveston, etc., R. Co. *v.* Washington, 94 Tex. 510, 63 S. W. 534 [*affirming* 25 Tex. Civ. App. 600, 63 S. W. 538].

Evidence is admissible in an action for injuries caused by being struck by a train, that the engineer in charge of the train was competent (Hasie *v.* Alabama, etc., R. Co., 78 Miss. 413, 28 So. 941, 84 Am. St. Rep. 632), or upon the issue whether a person run over by a railroad train was standing or walking on the track or lying on it when he was struck, that a train striking a man standing on the track would throw him off and would not run over him unless he was lying down (Gulf, etc., R. Co. *v.* Matthews, 28 Tex. Civ. App. 92, 66 S. W. 588, 67 S. W. 788).

Rebuttal.— Testimony that a trainman got from the station agent a torpedo which exploded and injured plaintiff may be rebutted by evidence that in the receptacle from which it was said to be taken there were car seals and car locks similar in appearance to torpedoes. Cleveland, etc., R. Co. *v.* Marsh, 17 Ohio Cir. Ct. 1, 9 Ohio Cir. Dec. 48.

8. *Illinois.*— Northwestern El. R. Co. *v.* O'Malley, 107 Ill. App. 599.

Mississippi.— Thompson *v.* Yazoo, etc., R. Co., 72 Miss. 715, 17 So. 229.

Missouri.— Spotts *v.* Wabash Western R. Co., 111 Mo. 380, 20 S. W. 190, 33 Am. St. Rep. 531.

Texas.— Houston, etc., R. Co. *v.* O'Donnell, (Civ. App. 1905) 90 S. W. 886 [*reversed* on other grounds in 99 Tex. 636, 92 S. W. 409].

West Virginia.— Bias *v.* Chesapeake, etc., R. Co., 46 W. Va. 349, 33 S. E. 240.

Wisconsin.— Banderob *v.* Wisconsin Cent. R. Co., 133 Wis. 249, 113 N. W. 738.

See 41 Cent. Dig. tit. "Railroads," § 1344.

For the purpose of showing the circumstances existing at the time and place of the accident, evidence is admissible in an action for injuries received in the night-time at the junction of two tracks that the company had no platform or station lights at that point, and that there were no lights at the junction (Ensley R. Co. *v.* Chewning, 93 Ala. 24, 9 So. 458); or in an action for injuries caused by being run over by defendant's cars that the engineer and fireman were in charge of the cars (Reardon *v.* Missouri Pac. R. Co., 114 Mo. 384, 21 S. W. 731); or that there were visitors in the cab of the engine at the time, contrary to a rule of the company (Marcott *v.* Marquette, etc., R. Co., 47 Mich. 1, 10 N. W. 53); or that no flagman was stationed at the highway crossing at the time of the accident, although, as a matter of law, it was not the duty of defendant to keep a flagman there (Reid *v.* New York, etc., R. Co., 17 N. Y. Suppl. 801). So in an action for injuries received by the unloading of a gravel train, evidence is admissible as to the manner of starting the engine which unloaded the train, and the character of the rope used for such purpose. Klugherz *v.* Chicago, etc., R. Co., 90 Minn. 17, 95 N. W. 586, 101 Am. St. Rep. 384. So in an action for injuries received at a station by being struck by an incoming train,

behalf of plaintiff,[9] or defendant.[10] Statements of a witness which are mere opinions and conclusions, and not statements of facts, upon matters directly in issue and which are for the jury to determine from the facts proved, are ordinarily inadmissible.[11] Declarations or statements not connected with the accident, made by a railroad employee, are inadmissible,[12] except for the purpose of impeaching his testimony.[13]

(B) *Other Accidents or Acts of Negligence.* As a general rule evidence of

where plaintiff claims that he was led to cross the track by information that the train was late, when as a matter of fact it was not late but on time, it is competent to prove that at the time of the accident the crossing was thronged with people. Lake Shore, etc., R. Co. *v.* Herrick, 49 Ohio St. 25, 29 N. E. 1052.

In an action for the injury or death of a transfer mail clerk who was run over by defendant's train while crossing a track at the station where he was employed, the rules of defendant regulating the movements of trains at stations, and a rule of the government regulating the conduct of clerks in the transfer of mail are admissible in evidence. Chicago, etc., R. Co. *v.* Kelly, 75 Ill. App. 490, 80 Ill. App. 675.

9. *Illinois.*— Cleveland, etc., R. Co. *v.* Davis, 56 Ill. App. 41.

Indiana.— Jordan *v.* Grand Rapids, etc., R. Co., 162 Ind. 464, 70 N. E. 524, 102 Am. St. Rep. 217.

Iowa.— Thomas *v.* Chicago, etc., R. Co., 114 Iowa 169, 86 N. W. 259.

Kentucky.— Louisville, etc., R. Co. *v.* Hunt, 13 S. W. 275, 11 Ky. L. Rep. 825.

Oregon.— Turney *v.* Southern Pac. R. Co., 44 Oreg. 280, 75 Pac. 144, 75 Pac. 1080.

Texas.— Over *v.* Missouri, etc., R. Co., (Civ. App. 1903) 73 S. W. 535.

See 41 Cent. Dig. tit. "Railroads," § 1344.

Evidence held inadmissible.— In an action for the death of plaintiff's decedent caused by his being run over while riding horseback on the track, it is inadmissible to prove "that there was danger to employees on the train in running over stock." Tanner *v.* Louisville, etc., R. Co., 60 Ala. 621. So in an action for the death of a railroad contractor who was struck by a train, evidence of conversations between such contractor and defendant's train despatcher and telegraph operator with reference to requiring all trains to slow down as they approached a bridge where the contractor was working is inadmissible in the absence of evidence that such servants had authority to bind defendant in the premises. Carpenter *v.* Chicago, etc., R. Co., 126 Iowa 94, 101 N. W. 758. In determining the question as to what effect a current of air from a running train produced upon a boy standing near by, evidence of the effect of the air upon mail sacks thrown from running trains is immaterial. Graney *v.* St. Louis, etc., R. Co., 140 Mo. 89, 41 S. W. 246, 38 L. R. A. 633.

Where a person is injured while walking along, and not across, defendant's tracks, evidence that the track crossed an old public highway near where plaintiff was injured and that the company had failed to construct a suitable crossing over it is immaterial. Candelaria *v.* Atkinson, etc., R. Co., 6 N. M. 266, 27 Pac. 497.

Under a Massachusetts statute, Pub. St. c. 112, § 208, providing that all railroad corporations shall give notice to the board of railroad commissioners of certain classes of accidents on their roads, and section 18, providing for investigations by the board, evidence that defendant failed to report the accident is inadmissible in an action for personal injuries to one wrongfully on its train. Devoy *v.* Boston, etc., R. Co., 156 Mass. 161, 30 N. E. 557.

An ordinance regulating the running of locomotives at street crossings is irrelevant in an action for injuries to persons on the track in a switch-yard. Blankenship *v.* Chesapeake, etc., R. Co., 94 Va. 449, 27 S. E. 20.

10. Baltimore, etc., R. Co. *v.* Deck, 102 Md. 669, 62 Atl. 958; Over *v.* Missouri, etc., R. Co., (Tex. Civ. App. 1903) 73 S. W. 535.

Evidence held inadmissible.— Evidence as to the custom and habits of other people, or as to what defendant's employees thought and believed concerning plaintiff or as to what they intended or did not intend to do, is not admissible in an action for injuries caused in ejecting a trespasser from a train. Johnson *v.* Chicago, etc., R. Co., 123 Iowa 224, 98 N. W. 642.

Evidence of plaintiff's purpose in boarding a train, except as indicated by his conduct or declarations at the time, is immaterial in an action for injuries to a trespasser caused by his ejection from a moving train. Johnson *v.* Chicago, etc., R. Co., 123 Iowa 224, 98 N. W. 642.

In an action for injuries to a child, evidence is inadmissible that he had been warned not to go upon defendant's track (Louisville, etc., R. Co. *v.* Chism, 47 S. W. 251, 20 Ky. L. Rep. 584), or as to what was said to witness by the child's parents when he told them that they must keep their child from jumping on trains (Over *v.* Missouri, etc., R. Co., (Tex. Civ. App. 1903) 73 S. W. 535).

11. Sherfey *v.* Evansville, etc., R. Co., 121 Ind. 427, 23 N. E. 273; Illinois Cent. R. Co. *v.* Watson, 117 Ky. 374, 78 S. W. 175, 25 Ky. L. Rep. 1360; Remer *v.* Long Island R. Co., 48 Hun (N. Y.) 352, 1 N. Y. Suppl. 124 [*affirmed* in 113 N. Y. 669, 21 N. E. 1116].

A brakeman cannot be asked whether certain acts are in the line of his duties, but he can state what he was directed to do, or that he had done certain acts, and how long he had been accustomed to do them. Krueger *v.* Chicago, etc., R. Co., 84 Mo. App. 358.

12. Krueger *v.* Chicago, etc., R. Co., 84 Mo. App. 358.

13. Nashville, etc., R. Co. *v.* Harris, 142 Ala. 249, 37 So. 794, 10 Am. St. Rep. 29.

accidents or acts of negligence at other places or on other occasions, previous or subsequent, is inadmissible to show negligence on the part of defendant at the time and place of the accident,[14] unless they are shown to be closely connected with the acts complained of in point of time, place, and circumstances,[15] even though, it has been held, such acts amount to a usage or practice.[16] But it is held that in an action for injuries caused by the negligent ejection of a mail pouch from a train, evidence of a mail agent's previous negligent acts in throwing out the pouch is admissible where the previous acts were such that in common prudence defendant should have anticipated that such an accident was liable to happen;[17] and it has been held that evidence that a person had been struck by such a pouch on a former occasion is admissible.[18]

(c) *Precautions Against Recurrence of Injury.* By the weight of authority evidence that precautions were taken by the railroad company after the accident complained of to prevent its recurrence, as in making repairs, or otherwise, is inadmissible as an admission of previous negligence in order to show negligence on its part at the time and place of the accident,[19] although it may be admitted

14. *Illinois.*— Ohio, etc., R. Co. *v.* Simms, 43 Ill. App. 260.

Kentucky.— Illinois Cent. R. Co. *v.* Watson, 117 Ky. 374, 78 S. W. 175, 25 Ky. L. Rep. 1360.

Maryland.— Bannon *v.* Baltimore, etc., R. Co., 24 Md. 108.

Massachusetts.— Robinson *v.* Fitchburg, etc., R. Co., 7 Gray 92.

New York.— Brady *v.* Manhattan R. Co., 127 N. Y. 46, 27 N. E. 368 [*reversing* 15 Daly 272, 6 N. Y. Suppl. 533].

15. Brady *v.* Manhattan R. Co., 127 N. Y. 46, 27 N. E. 368 [*reversing* 15 Daly 272, 6 N. Y. Suppl. 533]; Turney *v.* Southern Pac. Co., 44 Oreg. 280, 75 Pac. 144, 76 Pac. 1080; Galveston, etc., R. Co. *v.* Kutac, 76 Tex. 473, 13 S. W. 327.

That it is the general custom of railroads to make flying switches is irrelevant in an action for injuries caused by a flying switch, unless a custom of making them under the same conditions is shown. Weatherford, etc., R. Co. *v.* Duncan, 10 Tex. Civ. App. 479, 35 S. W. 562.

16. Bannon *v.* Baltimore, etc., R. Co., 24 Md. 108; Gahagan *v.* Boston, etc., R. Co., 1 Allen (Mass.) 187, 79 Am. Dec. 724; Weatherford, etc., R. Co. *v.* Duncan, 10 Tex. Civ. App. 479, 35 S. W. 562. But see Presby *v.* Grand Trunk R. Co., 66 N. H. 615, 22 Atl. 554, holding that in an action for injuries caused by plaintiff's horse being frightened by defendant's locomotive blowing off steam, it is proper to admit evidence that engines standing at the station frequently blew off steam and frightened horses, and that cars were frequently left on the side-track in such a position as to obstruct the view of a train at the station to a traveler on the adjacent highway.

17. Ohio, etc., R. Co. *v.* Simms, 43 Ill. App. 260; Pittsburg, etc., R. Co. *v.* Warrum, (Ind. App. 1907) 82 N. E. 934, (App. 1908) 84 N. E. 356; Shaw *v.* Chicago, etc., R. Co., 123 Mich. 629, 82 N. W. 618, 81 Am. St. Rep. 230, 49 L. R. A. 308.

18. Shaw *v.* Chicago, etc., R. Co., 123 Mich. 629, 82 N. W. 618, 81 Am. St. Rep. 230, 49 L. R. A. 308. But see Ohio, etc., R. Co. *v.* Simms, 43 Ill. App. 260.

19. *Georgia.*— Georgia Southern, etc., R. Co. *v.* Cartledge, 116 Ga. 164, 42 S. E. 405, 59 L. R. A. 118 [*overruling* Savannah, etc., R. Co. *v.* Flannagan, 82 Ga. 579, 9 S. E. 471, 14 Am. St. Rep. 183].

Minnesota.— Morse *v.* Minneapolis, etc., R. Co., 30 Minn. 465, 16 N. W. 358.

New Hampshire.—Aldrich *v.* Concord, etc., R. Co., 67 N. H. 250, 29 Atl. 408.

New York.— Dale *v.* Delaware, etc., R. Co., 73 N. Y. 468. *Compare* Brehm *v.* Great Western R. Co., 34 Barb. 256.

Texas.— Texas Trunk R. Co. *v.* Ayres, 83 Tex. 268, 18 S. W. 684; San Antonio, etc., R. Co. *v.* Lynch, 8 Tex. Civ. App. 513, 28 S. W. 252; Fordyce *v.* Chancey, 2 Tex. Civ. App. 24, 21 S. W. 181.

United States.—Isaacs *v.* Southern Pac. Co., 49 Fed. 797.

England.— Hart *v.* Lancashire, etc., R. Co., 21 L. T. Rep. N. S. 261.

But see St. Louis, etc., R. Co. *v.* Weaver, 35 Kan. 412, 11 Pac. 408, 57 Am. Rep. 176; West Chester, etc., R. Co. *v.* McElwee, 67 Pa. St. 311; Pennsylvania R. Co. *v.* Henderson, 51 Pa. St. 315, holding that, in an action for injuries caused by reason of a railroad company allowing a passenger platform to be improperly placed, evidence is admissible to show that the company's agent immediately after the accident telephoned to the superintendent the situation of the platform and that it ought to be removed, and that it was removed the next day.

Evidence that a defective platform was repaired after the accident is not admissible in an action for injuries caused by such platform to show previous negligence. Missouri, etc., R. Co. *v.* Wylie, (Tex. Civ. App. 1894) 26 S. W. 85.

In an action for injuries received by slipping on ice on defendant's platform, evidence that after the accident, sand, ashes, etc., were sprinkled on the ice is inadmissible. Timpson *v.* Manhattan R. Co., 1 N. Y. Suppl. 673.

Negligence in running a train at an undue speed at a certain point cannot be shown by

for some other purpose, as for the purpose of rebutting or explaining some other fact put in evidence.[20]

(D) *Right to Go On or Near Track.* For the purpose of showing the measure of care required of a railroad company, and the ultimate fact of negligence, evidence is admissible which tends to show whether or not the injured party was a trespasser or mere licensee, or in other words whether or not he was rightfully on or near the track at the time of the accident.[21] For this purpose evidence is admissible as to whether the public generally were in the habit of going upon or along the track with the company's knowledge.[22] In an action for injuries sustained by a person while walking along a railroad track laid in a public street or highway, a city ordinance is admissible to show that the railroad company had no right to the exclusive use of the street or highway,[23] as is also evidence of the fact that the company's officers and agents had made no claim to an exclusive right to that part of the highway, in conversations or negotiations in relation to the matter.[24]

(E) *Customary Use of Track.* For the purpose of showing the circumstances and conditions existing at the time and place of the accident complained of, and of charging the railroad company with notice thereof, and therefore as tending to show negligence on the part of the railroad company, by the weight of authority evidence is admissible as to the habit or custom of people in the neighborhood to go upon or along the tracks at that place.[25] But evidence as to a cus-

proof that a few days after the accident the trains went more slowly. Anderson *v.* Chicago, etc., R. Co., 87 Wis. 195, 58 N. W. 79, 23 L. R. A. 203.

20. San Antonio, etc., R. Co. *v.* Lynch, 8 Tex. Civ. App. 513, 28 S. W. 252; Fordyce *v.* Moore, (Tex. Civ. App. 1893) 22 S. W. 235; Fordyce *v.* Chancey, 2 Tex. Civ. App. 24, 21 S. W. 181; Fordyce *v.* Withers, 1 Tex. Civ. App. 540, 20 S. W. 766.

21. Chicago, etc., R. Co. *v.* Huston, 196 Ill. 480, 63 N. E. 1028 [*affirming* 95 Ill. App. 350]; Croft *v.* Chicago, etc., R. Co., 132 Iowa 687, 108 N. W. 1053; Murphy *v.* Chicago, etc., R. Co., 38 Iowa 539; Houston, etc., R. Co. *v.* O'Donnell, (Tex. Civ. App. 1905) 90 S. W. 886 [*reversed* on other grounds in 99 Tex. 636, 92 S. W. 409].

A local custom to the effect that a railroad company required shippers to repair leaks in its cars before they would be accepted for shipment is competent for the purpose of showing that one injured while engaged in such work was not a mere trespasser or licensee. Chicago, etc., R. Co. *v.* Pettit, 111 Ill. App. 172.

Where the party injured was a licensee on defendant's right of way at the time he was injured, evidence as to the place where he entered such right of way and how far he traveled thereon before he was injured is admissible as tending to prove that he was rightfully on the track. Houston, etc., R. Co. *v.* O'Donnell, (Tex. Civ. App. 1905) 90 S. W. 886 [*reversed* on other grounds in 99 Tex. 636, 92 S. W. 409].

A declaration or statement made by defendant's station agent in response to an inquiry by a person working in loading a car that there was no train coming and that he and his fellow workmen could go ahead and load the car is relevant as evidence of a license or permission to go upon the tracks to do the work. Chicago, etc., R. Co. *v.* Cox, 145 Fed. 157, 76 C. C. A. 127.

22. Murphy *v.* Chicago, etc., R. Co., 38 Iowa 539; Turney *v.* Southern Pac. Co., 44 Oreg. 280, 75 Pac. 144, 76 Pac. 1080, holding that where the railroad company contended that it had an exclusive right to that portion of the highway along which plaintiff was walking, evidence of the user of that part of the highway, by the public is competent.

Where defendant had knowingly permitted the public to use its road-bed at the place of the accident for a number of years as a pathway, evidence of defendant's general manager that defendant had never consented to such use by persons other than those having business with the company is inadmissible. Gulf, etc., R. Co. *v.* Matthews, 99 Tex. 160, 88 S. W. 192.

23. Goodrich *v.* Burlington, etc., R. Co., 103 Iowa 412, 72 N. W. 653.

24. Turney *v.* Southern Pac. Co., 44 Oreg. 280, 75 Pac. 144, 76 Pac. 1080.

25. *Alabama.*—Alabama Great Southern R. Co. *v.* Guest, 144 Ala. 373, 39 So. 654. But see Glass *v.* Memphis, etc., R. Co., 94 Ala. 581, 10 So. 215; Memphis, etc., R. Co. *v.* Womack, 84 Ala. 149, 4 So. 618.

Arkansas.— St. Louis, etc., R. Co. *v.* Sparks, 81 Ark. 187, 99 S. W. 73, holding that evidence that the railway track was in a populous town and that pedestrians, both young and old, frequently used it as a passway, is admissible to show the necessity for increased vigilance in keeping a lookout when cars were to be pushed or backed along such track.

Georgia.— Western, etc., R. Co. *v.* Meigs, 74 Ga. 857.

Illinois.— O'Connor *v.* Illinois Cent. R. Co., 77 Ill. App. 22, 90 Ill. App. 142 [*reversed*

tomary use of tracks at other places remote from the place of the accident is inadmissible.[26]

(F) *Defects in Road-Bed or Track.* Evidence tending to show the unsafe condition of the road-bed or track at the place where the accident occurred is admissible in an action for injuries caused by a train as tending to prove negligence on the part of those in charge of the train,[27] unless it appears that the particular defect referred to had no causal connection with the accident.[28] For the purpose of showing such defects, any evidence, subject to the general rules of evidence, is admissible which tends to show whether or not the road-bed or track was properly constructed and maintained.[29]

(G) *Signals and Lookouts.* As tending to show negligence, evidence is admissible in an action for injury caused by a train or cars, which tends to show that the train or cars in question did not give proper signals or warnings or display proper

on other grounds in 189 Ill. 559, 59 N. E. 1098] (holding that, in an action for injuries received while a trespasser on railroad tracks, evidence that great crowds of people with the company's knowledge were accustomed to cross the tracks each day at about the time of the accident is proper to be considered by the jury in determining as a matter of fact whether the act of the company's servants in running a train at such place without a light was not wilful and wanton); Wabash R. Co. *v.* Jones, 53 Ill. App. 125.

Missouri.—Eppstein *v.* Missouri Pac. R. Co., 197 Mo. 720, 94 S. W. 967; Eckert *v.* St. Louis, etc., R. Co., 13 Mo. App. 352.

New Hampshire.—Mitchell *v.* Boston, etc., R. Co., 68 N. H. 96, 34 Atl. 674.

New York.—Reid *v.* New York, etc., R. Co., 17 N. Y. Suppl. 801.

North Carolina.—Hord *v.* Southern R. Co., 129 N. C. 305, 40 S. E. 69; McCall *v.* Southern R. Co., 129 N. C. 298, 30 S. E. 67.

Ohio.—Ludtke *v.* Lake Shore, etc., R. Co., 24 Ohio Cir. Ct. 120, holding that, in an action for injuries to a child who has strayed on the track through an opening in the fence, evidence that the child was in the habit of playing at the end of the street which terminated at the track at the point where such opening was is competent as showing the notice the company had as to the situation and the liability of the child to pass through the opening in the fence and on the track.

South Carolina.—Jones *v.* Charleston, etc., R. Co., 61 S. C. 556, 39 S. E. 758, 65 S. C. 410, 43 S. E. 884.

Vermont.—Lindsay *v.* Canadian Pac. R. Co., 68 Vt. 556, 35 Atl. 513.

Wisconsin.—Whalen *v.* Chicago, etc., R. Co., 75 Wis. 654, 44 N. W. 849; Hoppe *v.* Chicago, etc., R. Co., 61 Wis. 357, 21 N. W. 227; Townley *v.* Chicago, etc., R. Co., 53 Wis. 626, 11 N. W. 55.

See 41 Cent. Dig. tit. "Railroads," § 1348.

But see Louisville, etc., R. Co. *v.* Woolfork, 99 S. W. 294, 30 Ky. L. Rep. 569 (holding that in an action for injury to a person by a train, while walking over a bridge of a railroad having no footway plank, and which, although within a city, was in a sparsely settled part, and was no part of, or near, any street or thoroughfare, testimony that many people habitually trespassed on the trestle making of it a passway is inadmissible); Hoskins *v.* Louisville, etc., R. Co., 30 S. W. 643, 17 Ky. L. Rep. 78; Louisville, etc., R. Co. *v.* Hunt, 13 S. W. 275, 11 Ky. L. Rep. 825.

Evidence held immaterial.—Where it appears that the party injured is actually seen in the place of danger by defendant's employees, evidence as to the custom of persons to be in such place with the knowledge of the employees is immaterial. Tully *v.* Philadelphia, etc., R. Co., 2 Pennew. (Del.) 537, 47 Atl. 1019, 82 Am. St. Rep. 425.

Evidence that other persons had been notified not to travel on the track is inadmissible. Tanner *v.* Louisville, etc., R. Co., 60 Ala. 621.

26. Glass *v.* Memphis, etc., R. Co., 94 Ala. 581, 10 So. 215.

In an action for injuries received while walking along the track, evidence that there was a path across the track one hundred yards or more from the place of the accident, along which people in the neighborhood were accustomed to pass, is inadmissible. Carrington *v.* Louisville, etc., R. Co., 88 Ala. 472, 6 So. 910.

27. Mann *v.* Missouri, etc., R. Co., 123 Mo. App. 486, 100 S. W. 566; Chicago, etc., R. Co. *v.* Clark, 26 Nebr. 645, 42 N. W. 703.

28. Skipton *v.* St. Joseph, etc., R. Co., 82 Mo. App. 134.

29. West Chester, etc., R. Co. *v.* McElwee, 67 Pa. St. 311.

In an action for injuries sustained by being struck by a train while the injured party's foot is fastened in the track, evidence is admissible to show how the track was constructed at the place of the accident and how other tracks are constructed, so that the jury may determine whether the track at the place of the accident was constructed properly (McKinney *v.* Long Island R. Co., 2 Silv. Sup. (N. Y.) 543, 6 N. Y. Suppl. 168); and for this purpose evidence that a certain device fastened between the rails at the frogs or switches had been in use on other railroads for four or five years, and that it prevented the danger of catching the foot in the switch, and that without some similar contrivance switches were not safe, is admissible (Gulf, etc., R. Co. *v.* Walker, 70 Tex. 126, 7 S. W. 831, 8 Am. St. Rep. 582).

[X, E, 8, c, (II), (G)]

lights at the time and place of the accident.[30] Thus a witness may testify that, although he could have seen or heard such signal or warning if it had been given or displayed, he did not hear it,[31] or see such lights displayed.[32] Where there is a duty on the part of the railroad company to keep a lookout,[33] evidence which tends to show a failure to do so is admissible.[34] Where, however, there is no such duty on the part of the railroad company, evidence that its employees in charge of a train could have seen the injured party in time to prevent the accident and failed to do so is inadmissible.[35]

(H) *Rate of Speed and Means of Controlling Train.* Likewise, as tending to show negligence, evidence is admissible in respect to the speed at which the train

30. Spotts *v.* Wabash Western R. Co., 111 Mo. 380, 20 S. W. 190, 33 Am. St. Rep. 531 (holding that where a person, while unloading cars, is struck by another car set in motion by a backing engine, evidence is admissible to show that no signal or warning was given of the intention to back the car); Mason *v.* Southern R. Co., 58 S. C. 70, 36 S. E. 440, 79 Am. St. Rep. 826, 53 L. R. A. 913, 58 S. C. 582, 37 S. E. 226 (evidence as to the omission of signals held admissible on the question of proximate cause); Hickey *v.* Rio Grande Western R. Co., 29 Utah 392, 82 Pac. 29 (holding that testimony of the failure to give signals or warnings when an engine was started and put in motion toward plaintiff's team is competent on the issue of an alleged act of negligence consisting of such failure to give signals).

Proof that lights were customarily placed on approaching engines at the place of the accident is admissible in an action for injuries caused by the party injured being struck in the night-time by a tender of a locomotive alleged to have approached without lights or a sign of warning, where no substituted warning was employed. Caffi *v.* New York Cent., etc., R. Co., 49 Misc. (N. Y.) 620, 96 N. Y. Suppl. 835.

Evidence held inadmissible.— In an action for injuries to one while walking by the side of defendant's track at a point between the whistling post and a crossing, where it is claimed that the statutory signals were not given, evidence that the view of the crossing was obstructed and that one approaching the same from the north could not see an approaching train until within a few yards of it, and that the train by which plaintiff was struck approached the crossing at a high and dangerous rate of speed without giving proper signals is inadmissible. Houston, etc., R. Co. *v.* O'Donnell, 99 Tex. 636, 92 S. W. 409 [*reversing* (Civ. App. 1905) 90 S. W. 886].

Custom of other company.— Where a railroad company at a certain junction is accustomed to use a side-track of another company, evidence that such other company was in the habit of ringing its bell when running its trains over the side-track is inadmissible in an action against the former company to recover damages for injury received while its cars were moving on such side-track. Detroit, etc., R. Co. *v.* Van Steinburg, 17 Mich. 99.

A rule of the company in respect to lights on cars is not admissible in an action by a person who does not know or who cannot be presumed to have knowledge of such rules. Chicago, etc., R. Co. *v.* Downey, 96 Ill. App. 398, holding this rule to apply where the party injured was neither directly nor indirectly in the service of the railroad company.

A city ordinance providing for danger signals within the city limits is admissible as tending to show negligence in failing to give such signals. St. Louis, etc., R. Co. *v.* Mathias, 50 Ind. 65; Kelly *v.* Union R., etc., Co., 95 Mo. 279, 8 S. W. 420. A city ordinance requiring a train backing in the night-time to have a conspicuous light on the rear car or engine is competent evidence where the party was injured by defendant's car kicked down the track at night without a light. Chicago, etc., R. Co. *v.* O'Neil, 172 Ill. 527, 50 N. E. 216 [*affirming* 64 Ill. App. 623].

31. Illinois Cent. R. Co. *v.* Slater, 139 Ill. 190, 28 N. E. 830 [*affirming* 39 Ill. App. 69].

32. Purnell *v.* Raleigh, etc., R. Co., 122 N. C. 832, 29 S. E. 953.

33. See *supra*, X, E, 2, a, (VIII).

34. Clampit *v.* Chicago, etc., R. Co., 84 Iowa 71, 50 N. W. 673 (holding that where plaintiff claimed that the engineer or fireman did not watch, it was proper to allow plaintiff to testify that he saw no one on the rear end of the tender); McMarshall *v.* Chicago, etc., R. Co., 80 Iowa 757, 45 N. W. 1065, 20 Am. St. Rep. 445 (holding that evidence that persons not specially charged with watching the track saw decedent before he was struck tends to show that the employees in charge of the locomotive did not "look out"); Bias *v.* Chesapeake, etc., R. Co., 46 W. Va. 349, 33 S. E. 240 (holding that evidence as to the distance at which it was possible to see a child of the size of decedent along or near the railroad track in the direction in which the train was coming is admissible).

Testimony of an experienced railroad man that if a fireman was looking out of the engine window on the inside of a curve he would have a better view of the track ahead than would the engineer on the opposite side is competent, although the witness was not acquainted with the track at that point, there being evidence that there were no obstructions to the view at that point. Galveston, etc., R. Co. *v.* Clark, 21 Tex. Civ. App. 167, 51 S. W. 276.

35. Central R., etc., Co. *v.* Vaughan, 93 Ala. 209, 9 So. 468, 30 Am. St. Rep. 50.

causing the injury was running, and the control which it was under, at the time and place of the accident.[36] For such purpose evidence is admissible as to how far the train ran after causing the injury,[37] or as to the brakes with which it was equipped.[38] Evidence of defendant's running time over the whole road is admissible to show the rate of speed at any given point.[39] The testimony of witnesses living near the railroad and habitually observing the passing of trains is competent evidence upon the velocity of a particular train;[40] and testimony is admissible as to the distance in which a train could be stopped when running at the same speed as the train which caused the injury,[41] except that evidence cannot be introduced as to the distance within which an engine or train of a different type could be stopped.[42]

(I) *Precautions as to Persons Seen On or Near Tracks.* On the question of negligence of an engineer or other employee in charge of a train or cars in failing to use proper precautions to avoid injuring a person seen on or near tracks, evidence is admissible which tends to show whether such employees saw the party injured in time to avoid the accident,[43] and whether, after seeing him, they employed

36. Pennsylvania Co. *v.* Conlan, 101 Ill. 93; Mann *v.* Missouri, etc., R. Co., 123 Mo. App. 486, 100 S. W. 566, evidence that the train was past due and running thirty-five miles an hour held admissible.

Ordinances.—An ordinance regulating the speed of trains in the city may be shown in evidence, together with the violation, in deciding the question of negligence. St. Louis, etc., R. Co. *v.* Mathias, 50 Ind. 165; Kelly *v.* Union R., etc., Co., 95 Mo. 279, 8 S. W. 420. Evidence of a failure to observe the requirements of an ordinance regulating the speed of trains across streets is admissible upon the question as to whether the railroad company was negligent in running its trains at a point not on the street. Jones *v.* Charleston etc., R. Co., 65 S. C. 410, 43 S. E. 884. But it has been held that such ordinances are inadmissible without first showing that they were accepted by the company. Anderson *v.* Union Terminal R. Co., 161 Mo. 411, 61 S. W. 874.

Evidence as to the distance within which a train might have been stopped after causing the injury is admissible, not only with respect to the duties owing from the engineer after he had knowledge of the injured party's peril, but also with respect to the duties owing to him from the train operatives continuing or intervening after the commission of the injured person's negligence, which had they been performed with reasonable care would have disclosed to the engineer the perilous situation in time to have avoided the fatality. Teakle *v.* San Pedro, etc., R. Co., 32 Utah 276, 90 Pac. 402, 10 L. R. A. N. S. 486.

37. Pennsylvania Co. *v.* Conlan, 101 Ill. 93.

38. Louisville, etc., R. Co. *v.* Orr, 121 Ala. 489, 26 So. 35; International, etc., R. Co. *v.* Munn, (Tex. Civ. App. 1907) 102 S. W. 442, holding that in an action for the death of a person killed by a train, evidence that the train was not equipped with a high-power emergency brake is properly admitted as bearing upon the question as to how far the train would run after the application of the brake it having a bearing upon the inquiry as to when the engineer applied the brake.

In favor of a mere trespasser, evidence tending to show that the accident might have been prevented had the company used certain improved air-brakes in general use on railways is not admissible. McKenna *v.* New York Cent., etc., R. Co., 8 Daly (N. Y.) 304.

39. Nutter *v.* Boston, etc., R. Co., 60 N. H. 483.

Usual rate.—Where the evidence is conflicting as to the rate of speed at which a train was running, and one witness testified that it was running at the usual rate, evidence as to such usual rate is admissible. Louisville, etc., R. Co. *v.* Goulding, 52 Fla. 327, 42 So. 854.

40. Nutter *v.* Boston, etc., R. Co., 60 N. H. 483.

The admissibility of evidence as to the rate of speed of defendant's train at other places and times than the time and place in question as tending to show the rate of speed there is a question of fact depending upon the remoteness of time and place and is to be determined by the court at the trial. Nutter *v.* Boston, etc., R. Co., 60 N. H. 483.

41. Vanarsdall *v.* Louisville, etc., R. Co., 65 S. W. 858, 23 Ky. L. Rep. 1666.

42. Carver *v.* Chicago, etc., R. Co., 104 Ill. App. 644.

43. Gregory *v.* Wabash R. Co., 126 Iowa 230, 101 N. W. 761.

The physical and topographical facts surrounding an injury and the place of the injury are admissible for the purpose of showing whether the injured party could have been seen in time to avoid the injury. Alabama Great Southern R. Co. *v.* Burgess, 114 Ala. 587, 22 So. 169; Mann *v.* Missouri, etc., R. Co., 123 Mo. App. 486, 100 S. W. 566; Texas, etc., R. Co. *v.* Syfan, (Tex. Civ. App. 1897) 43 S. W. 551; Bias *v.* Chesapeake, etc., R. Co., 46 W. Va. 349, 33 S. E. 240. Thus where the engineer testifies as to when he became aware of the injured party's presence, evidence is admissible that his view of the track was unobstructed for a considerable distance, in connection with his testimony that he was keeping a lookout, and the fact that alarm signals were given before the

all proper precautions to avoid causing him injury.[44] Thus in such case the fireman or other employee may testify as to whether the party injured had time to get off the track after the engineer had given the alarm signals, before he was struck.[45] So evidence is admissible which tends to show whether the engineer gave a signal of alarm after the injured party was seen,[46] or as to the distance in which a train, such as the one causing the injury, could be stopped.[47]

(J) *Contributory Negligence.* On the issue of contributory negligence, evidence of any material or relevant facts which tends to establish or disprove contributory negligence on the part of the person injured is admissible,[48] such as evidence of his knowledge of the customary mode of operating trains and cars at the place of the accident,[49] or of his right to go upon or near the railroad

time when according to his testimony he saw the injured party, as tending to show that he did see such party before the time testified to by him. Gregory *v.* Wabash R. Co., 126 Iowa 230, 101 N. W. 761.

That the engineer had had his eyes operated on shortly after the accident is admissible on cross-examination, where he testified that he saw an object on the track which he thought was a coat and did not identify it as a man, although his defective vision was not alleged in the petition. Gulf, etc., R. Co. *v.* Holzheuser, (Tex. Civ. App. 1898) 45 S. W. 188.

That other persons had occasionally trespassed on the track at the place of the accident is inadmissible in determining whether an injured trespasser was seen by the engineer in charge of the train. Thomas *v.* Chicago, etc., R. Co., 93 Iowa 248, 61 N. W. 967.

44. Choate *v.* Southern R. Co., 119 Ala. 611, 24 So. 373.

Expert testimony.— The testimony of an engineer or conductor as experts that they did all that could be done to avert the injury is admissible. Choate *v.* Southern R. Co., 119 Ala. 611, 24 So. 373. So the fireman on the train causing the injury may state that the engineer did all within his power to stop the train after plaintiff was seen on the track, except to sand the track, and if that had been done the injury could not have been prevented. Hasie *v.* Alabama, etc., R. Co., 78 Miss. 413, 28 So. 941, 84 Am. St. Rep. 632. Likewise an expert engineer may testify as to the effect of shutting off steam when the injured party was first discovered, such evidence being followed by an instruction that if defendant's engineer, as soon as he had reason to believe that the injured party was in a place of danger, took all means in his power to prevent the accident, that would be a discharge of his duty. Remer *v.* Long Island R. Co., 48 Hun (N. Y.) 352, 1 N. Y. Suppl. 124 [*affirmed* in 113 N. Y. 669, 21 N. E. 1116].

Evidence as to whether there were means at hand other than those resorted to, which could have been used in order to expedite the stopping of the engine or train, is admissible. Carver *v.* Chicago, etc., R. Co., 104 Ill. App. 644.

45. Kansas Pac. R. Co. *v.* Whipple, 39 Kan. 531, 18 Pac. 730.

46. Gregory *v.* Wabash R. Co., 126 Iowa 230, 101 N. W. 761 (holding this to apply where a child two years old was run over on a railroad track by a train); Young *v.* Clark, 16 Utah 42, 50 Pac. 832.

47. Beiser *v.* Chesapeake, etc., R. Co., 92 S. W. 928, 29 Ky. L. Rep. 249; Meagher *v.* Cooperstown, etc., R. Co., 75 Hun (N. Y.) 455, 27 N. Y. Suppl. 504; Davis *v.* Seaboard Air Line R. Co., 136 N. C. 115, 48 S. E. 591.

48. Andrews *v.* Mason City, etc., R. Co., 77 Iowa 669, 42 N. W. 513; Houston, etc., R. Co. *v.* O'Donnell, (Tex. Civ. App. 1905) 90 S. W. 886 [*reversed* on other grounds in 99 Tex. 636, 92 S. W. 409]; Hickey *v.* Rio Grande Western R. Co., 29 Utah 392, 82 Pac. 29.

Evidence is admissible where deceased was a railroad watchman stationed at the intersection of two roads, to show the rules of the company in charge of the switch, and which employed deceased, as to the duty of turning the switch at such intersection, and what was the customary mode of running trains at that point (Chicago, etc., R. Co. *v.* O'Sullivan, 143 Ill. 48, 32 N. E. 398 [*affirming* 40 Ill. App. 369)]; or where it is claimed that plaintiff should have used a narrow sidewalk instead of walking on the street on which the track was laid, plaintiff may show that the walk was dangerous because of its proximity to the track (Goodrich *v.* Burlington, etc., R. Co., 103 Iowa 412, 72 N. W. 653).

An ordinance which defendant was violating at the time of the injury is admissible as bearing upon the question of contributory negligence. Meek *v.* Pennsylvania Co., 38 Ohio St. 632.

49. Minot *v.* Boston, etc., R. Co., 74 N. H. 230, 66 Atl. 825 (holding that where the injured party's knowledge of the movement of trains at the place at which he was injured is material, evidence that the train's movements for four or five years prior to the accident had been the same as at that time is admissible); International, etc., R. Co. *v.* Brooks, (Tex. Civ. App. 1899) 54 S. W. 1056.

That it was the usual custom to signal for the station and for two road crossings between it and the place where plaintiff was struck is admissible as evidence on the issue as to whether plaintiff was guilty of contributory negligence in relying on the known custom of defendant without looking back for the approach of a train. International, etc., R. Co. *v.* Woodward, 26 Tex. Civ. App. 389, 63 S. W. 1051.

track.[50] It is inadmissible, however, to introduce evidence of facts which are immaterial or irrelevant.[51] Evidence as to the habits of the injured party in regard to trains, whether careful or careless, is generally inadmissible.[52]

(III) *WEIGHT AND SUFFICIENCY OF EVIDENCE*[53] — (A) *In General.* To warrant a recovery for injuries received by a person on or near railroad tracks, the evidence on plaintiff's behalf must be of such weight and sufficiency as will reasonably justify the jury in finding the existence of all facts necessary to constitute his cause of action.[54] The evidence should be sufficient to establish by what right, if any, the party injured was upon or near the tracks at the time and place of the accident and the consequent duty of defendant to protect him from injury;[55] the failure to discharge such duty, or in other words negligence on the part

That the injured party had never seen a car moved by "staking" is admissible in an action for injuries by being run over by a car moved by staking, as bearing upon his exercise of care. Helbig *v.* Michigan Cent. R. Co., 85 Mich. 359, 48 N. W. 589.

50. Townley *v.* Chicago, etc., R. Co., 53 Wis. 626, 11 N. W. 55; Chicago, etc., R. Co. *v.* Cox, 145 Fed. 157, 76 C. C. A. 127.

51. Mason *v.* Missouri Pac. R. Co., 27 Kan. 83, 41 Am. Rep. 405, holding that evidence of a custom of foot passengers to cross the trestle-work on which the injury occurred is improper.

That deceased was not of sufficient intelligence to go alone to a distant town is not admissible to establish his incapacity to appreciate the danger of his position on the track. St. Louis, etc., R. Co. *v.* Shiflet, 94 Tex. 131, 58 S. W. 945.

Evidence of a custom in operating double-track roads to run trains on the right-hand track is inadmissible in an action for injuries to a person on the track, where defendant has for two years before the accident run its train on the left-hand track. Holmes *v.* Southern Pac. Coast R. Co., 97 Cal. 161, 31 Pac. 834.

52. Glass *v.* Memphis, etc., R. Co., 94 Ala. 581, 10 So. 215; St. Louis, etc., R. Co. *v.* Sparks, (Ark. 1906) 99 S. W. 73 (holding that in an action for injuries to a boy, caused by a train backing down upon him, evidence that previous to the accident plaintiff had been in the habit of riding on cars is inadmissible, where there is no evidence that he attempted to jump upon or ride on the car by which he was injured); Maysville, etc., R. Co. *v.* Willis, 104 S. W. 1016, 31 Ky. L. Rep. 1249.

53. In actions for injuries at crossings see *infra*, X, F, 14, e, (III).

54. Evidence held sufficient: To authorize a finding or verdict for plaintiff for injuries received (Georgia Pac. R. Co. *v.* Blanton, 84 Ala. 154, 4 So. 621; Southern R. Co. *v.* Hill, 125 Ga. 354, 54 S. E. 113; Christie *v.* Chicago, etc., R. Co., 61 Minn. 161, 63 N. W. 482; Yazoo, etc., R. Co. *v.* Landrum, 89 Miss. 399, 42 So. 675; Fisher *v.* New York Dock Co., 91 N. Y. App. Div. 536, 87 N. Y. Suppl. 117; Sutliff *v.* Pennsylvania R. Co., 206 Pa. St. 267, 55 Atl. 973; International, etc., R. Co. *v.* Woodward, 26 Tex. Civ. App. 389, 63 S. W. 1051; Gulf, etc., R. Co. *v.* Marchand, 24 Tex. Civ. App. 47, 57 S. W. 860), from ejection from a moving train (Parker *v.* Louisiana, etc., R. Co., 120 La. 92, 44 So. 996; Chicago, etc., R. Co. *v.* Kerr, 74 Nebr. 1, 101 N. W. 49), or by a servant of a construction company riding a velocipede on the railroad track (Trinity, etc., R. Co. *v.* Simpson, (Tex. Civ. App. 1905) 86 S. W. 1034), or by being struck by cars backing up behind him (Houston, etc., R. Co. *v.* Finn, (Tex. Civ. App. 1908) 107 S. W. 94 [*affirmed* in (1908) 109 S. W. 918]). To sustain a verdict and judgment for plaintiff in an action for injuries received while visiting a depot to transact business. Georgia Cent. R. Co. *v.* Hunter, 128 Ga. 600, 58 S. E. 154. To sustain a finding that the engineer by the exercise of due care and prudence could have prevented the injury notwithstanding plaintiff's negligence. Marks *v.* Atlantic Coast-Line R. Co., 133 N. C. 89, 45 S. E. 468.

Evidence held insufficient: To sustain a verdict or finding for plaintiff. Atlanta, etc., R. Co. *v.* Fuller, 92 Ga. 482, 17 S. E. 643, 644; Chicago, etc., R. Co. *v.* McKenna, 14 Ill. App. 472; Cleveland, etc., R. Co. *v.* Berry, 152 Ind. 607, 53 N. E. 415, 46 L. R. A. 33; Union Pac. R. Co. *v.* Young, 57 Kan. 168, 45 Pac. 580; Joyce *v.* Great Northern R. Co., 100 Minn. 225, 110 N. W. 975, 8 L. R. A. N. S. 756; Murphy *v.* New York, etc., R. Co., 62 Hun (N. Y.) 587, 17 N. Y. Suppl. 302; Markham *v.* Raleigh, etc., R. Co., 119 N. C. 715, 25 S. E. 786; Gulf, etc., R. Co. *v.* Lovett, (Tex. Civ. App. 1903) 74 S. W. 570 [*affirmed* in 97 Tex. 436, 79 S. W. 514). To establish the fact that plaintiff was kicked from a train by an employee of defendant as against the positive evidence of all the operatives of the train at the time of the injury, which was uncontradicted and unquestioned. Johnson *v.* New York Cent., etc., R. Co., 173 N. Y. 79, 65 N. E. 946 [*reversing* 66 N. Y. App. Div. 617, 73 N. Y. Suppl. 1137].

55. Means *v.* Southern California R. Co., 144 Cal. 473, 77 Pac. 1001.

Evidence held sufficient to sustain a finding that plaintiff was a trespasser see St. Louis Southwestern R. Co. *v.* Mayfield, (Tex. Civ. App. 1904) 79 S. W. 365.

Evidence held insufficient to show that the party injured was anything more than a mere licensee (Means *v.* Southern Cal. R. Co., 144 Cal. 473, 77 Pac. 1001; Williamson *v.* Southern R. Co., 104 Va. 146, 51 S. E. 195, 113 Am. St. Rep. 1032, 70 L. R. A. 1007),

of defendant,[56] as in regard to giving proper warnings or signals,[57] or in regard to keeping a proper lookout to discover the party injured in time to avoid the injury;[58] and to show a causal connection between such negligence and the injury

or trespasser at the time of his injury (Dotta *v.* Northern Pac. R. Co., 36 Wash. 506, 79 Pac. 302).

56. Means *v.* Southern California R. Co., 144 Cal. 473, 77 Pac. 1001; Croft *v.* Chicago, etc., R. Co., 132 Iowa 687, 108 N. W. 1053, evidence held sufficient to show dangerous speed.

Evidence held sufficient to show actionable negligence.

Indiana.— Pittsburg, etc., R. Co. *v.* Warrum, (App. 1907) 82 N. E. 934, (App. 1908) 84 N. E. 356, in an action for injuries caused by a mail pouch thrown from a rapidly moving train.

Iowa.— Croft *v.* Chicago, etc., R. Co., 134 Iowa 411, 109 N. W. 723, in deterioration of track and operation of train.

Kentucky.— Perkins *v.* Chesapeake, etc., R. Co., 123 Ky. 229, 94 S. W. 636, 29 Ky. L. Rep. 660.

Minnesota.— Pettit *v.* Great Northern R. Co., 62 Minn. 530, 64 N. W. 1019.

Missouri.— Lange *v.* Missouri Pac. R. Co., 208 Mo. 458, 106 S. W. 660, in an action for injuries to child run over while on track.

New York.— Fisher *v.* New York Dock Co., 91 N. Y. App. Div. 526, 87 N. Y. Suppl. 117.

North Carolina.— Marks *v.* Atlantic Coast-Line R. Co., 133 N. C. 89, 45 S. E. 468.

Texas.— Missouri, etc., R. Co. *v.* Hammer, 34 Tex. Civ. App. 354, 78 S. W. 708; Texas, etc., R. Co. *v.* Phillips, (Civ. App. 1896) 37 S. W. 620; International, etc., R. Co. *v.* Hall, (Civ. App. 1894) 25 S. W. 52.

Utah.— Hickey *v.* Rio Grande Western R. Co., 29 Utah 292, 82 Pac. 29.

Wisconsin.— Banderob *v.* Wisconsin Cent. R. Co., 133 Wis. 249, 113 N. W. 738; Enting *v.* Chicago, etc., R. Co., 120 Wis. 651, 98 N. W. 944; Stuettgen *v.* Wisconsin Cent. R. Co., 80 Wis. 498, 50 N. W. 407.

See 41 Cent. Dig. tit. "Railroads," §§ 914, 1356.

Evidence held insufficient to show actionable negligence.

Alabama.— Louisville, etc., R. Co. *v.* Lewis, 141 Ala. 466, 37 So. 587.

Arkansas.— St. Louis, etc., R. Co. *v.* London, 82 Ark. 267, 102 S. W. 212, in an action for injuries to a person walking on the track.

Georgia.— Georgia Cent. R. Co. *v.* Floyd, 3 Ga. App. 257, 59 S. E. 826, defective platform.

Kansas.— Tennis *v.* Rapid-Transit R. Co., 45 Kan. 503, 25 Pac. 876.

Kentucky.— Louisville, etc., R. Co. *v.* Logsdon, 118 Ky. 600, 81 S. W. 657, 26 Ky. L. Rep. 457 [opinion in 78 S. W. 409, 25 Ky. L. Rep. 1656 withdrawn].

Massachusetts.— Johnson *v.* J. M. Guffey Petroleum Co., 197 Mass. 302, 83 N. E. 874.

New York.— Bernhardt *v.* Rensselaer, etc., R. Co., 18 How. Pr. 427 [*reversed* on the facts in 32 Barb. 165, 19 How. Pr. 199 (*affirmed* in 1 Abb. Dec. 131, 23 How. Pr. 166)].

Texas.— Missouri Pac. R. Co. *v.* Porter, 73 Tex. 304, 11 S. W. 324; Gonzales *v.* Galveston, etc., R. Co., (Civ. App. 1908) 107 S. W. 896; Gulf, etc., R. Co. *v.* Walters, (Civ. App. 1908) 107 S. W. 369 (licensee alighting from train); Jones *v.* Ft. Worth, etc., R. Co., (Civ. App. 1907) 105 S. W. 1007 (falling from freight car); Forge *v.* Houston, etc., R. Co., 41 Tex. Civ. App. 81, 90 S. W. 1118; Reichert *v.* International, etc., R. Co., (Civ. App. 1903) 72 S. W. 1031; St. Louis, etc., R. Co. *v.* Sharp, 3 Tex. App. Civ. Cas. § 328.

Utah.— Johnson *v.* Rio Grande Western R. Co., 19 Utah 77, 57 Pac. 17.

Virginia.— Chesapeake, etc., R. Co. *v.* Farrow, 106 Va. 137, 55 S. E. 569; Seaboard, etc., R. Co. *v.* Hickey, 102 Va. 394, 46 S. E. 392; Southern R. Co. *v.* Hall, 102 Va. 135, 45 S. E. 867.

Wisconsin.— Kleimenhagen *v.* Chicago, etc., R. Co., 65 Wis. 66, 26 N. W. 264.

United States.— Parks *v.* Southern R. Co., 143 Fed. 276, 74 C. C. A. 414.

See 41 Cent. Dig. tit. "Railroads," §§ 914, 1356.

Where there is no evidence as to an alleged brakeman's authority, the fact that a trespasser is thrown from a car while in rapid motion by a person carrying a lantern whom he supposes to be a brakeman is not sufficient to show liability for resulting injuries. Corcoran *v.* Concord, etc., R. Co., 56 Fed. 1014, 6 C. C. A. 231.

57. Evidence held sufficient: To sustain a finding that the operatives of the locomotive causing the injury were negligent in failing to give any warning. St. Louis Southwestern R. Co. *v.* Allen, 35 Tex. Civ. App. 355, 80 S. W. 240. To go to the jury on the question of no warning having been given. Baltimore, etc., R. Co. *v.* Charvat, 94 Md. 569, 51 Atl. 413. To charge defendant with negligence in failing to carry a light on the rear of the tender of an engine. Rich *v.* Chicago, etc., R. Co., 149 Fed. 79, 78 C. C. A. 663.

Evidence held insufficient to warrant a submission to the jury as to whether the proper signals were given see Texas-Mexican R. Co. *v.* Baldez, (Tex. Civ. App. 1897) 43 S. W. 564; Wickham *v.* Chicago, etc., R. Co., 95 Wis. 23, 69 N. W. 982.

58. Evidence held sufficient: To sustain a finding of negligence in not discovering the injured party's peril in time to avoid the injury. Illinois Cent. R. Co. *v.* Crockett, 79 S. W. 235, 25 Ky. L. Rep. 1989; International, etc., R. Co. *v.* Davis, (Tex. Civ. App. 1905) 84 S. W. 669; Texas, etc., R. Co. *v.* Harby, 28 Tex. Civ. App. 24, 67 S. W. 541; Craft *v.* Northern Pac. R. Co., 62 Fed. 735. To sustain a finding of negligence in backing an engine without a lookout. Willis

complained of.[59] The absence of proof of any of these facts is fatal to a recovery.[60] In the absence of eye-witnesses, defendant's negligence need not be shown by direct and positive proof, but may be inferred from the proof of such facts and circumstances as will sustain a finding of negligence;[61] but these circumstances must themselves be shown by direct testimony, and cannot be inferred from other circumstances.[62] Testimony of witnesses who were not paying attention to the engine which caused the injury at the time, and were not necessarily in a position to have heard any bell ring or whistle sound before the accident, that they heard neither bell nor whistle is insufficient to constitute a substantial conflict as against testimony that the bell was constantly rung, and will not warrant a finding that defendant was negligent in failing to ring the bell or sound the whistle.[63]

(B) *Existence of Defect or Happening of Injury.* In the absence of statute otherwise mere proof of the existence of a defect or of the happening of an accident or injury to a person upon railroad tracks or premises is not sufficient to establish actionable negligence on the part of the railroad company,[64] unless the

v. Vicksburg, etc., R. Co., 115 La. 53, 38 So. 892. To show that defendant had no notice that the track was used by pedestrians in the night-time. Frye *v.* St. Louis, etc., R. Co., 200 Mo. 377, 98 S. W. 566, 8 L. R. A. N. S. 1069.

Evidence held insufficient to show negligence in failing to discover the injured party's peril see Pennsylvania Co. *v.* Davis, 4 Ind. App. 51, 29 N. E. 425; Atchison, etc., R. Co. *v.* Smith, 28 Kan. 541; Chrystal *v.* Troy, etc., R. Co., 105 N. Y. 164, 11 N. E. 380.

Under an Arkansas statute, act April 8, 1891, evidence that a trespasser on a railway track was struck by a train without any of those in charge having seen him warrants a finding that they were negligent in not keeping a proper lookout. St. Louis Southwestern R. Co. *v.* Dingman, 62 Ark. 245, 35 S. W. 219.

59. Means *v.* Southern California R. Co., 144 Cal. 473, 77 Pac. 1001; Pittsburgh, etc., R. Co. *v.* Karns, 13 Ind. 87.

Evidence held sufficient to connect defendant's negligence with the accident and injury (Kansas City, etc., R. Co. *v.* Chiles, 86 Miss. 361, 38 So. 498; Jones *v.* Niagara Junction R. Co., 63 N. Y. App. Div. 607, 71 N. Y. Suppl. 647; Houston, etc., R. Co. *v.* Ollis, 37 Tex. Civ. App. 231, 83 S. W. 850), as against defendant's demurrer to the evidence (Southern R. Co. *v.* Leinart, 107 Tenn. 635, 64 S. W. 899).

Evidence held insufficient: To show that defendant's negligence was the proximate cause of the death or injury. Puckhaber *v.* Southern Pac. Co., 132 Cal. 363, 64 Pac. 480. To show a causal connection between the injured party's ejection from a train on which he was stealing a ride and the injury. Morgan *v.* Oregon Short Line R. Co., 27 Utah 92, 74 Pac. 523. To authorize a finding that the killing of a child on a railroad track by a train was through negligence of those in charge of the train. Freels *v.* Louisville, etc., R. Co., 89 S. W. 143, 28 Ky. L. Rep. 76. To show that the unfitness of the engineer for his position, caused by a defect of vision, or the failure to give statutory signals at a crossing, was the proximate cause of the injury. Texas, etc., R. Co. *v.* Shoemaker, 98 Tex. 451, 84 S. W. 1049 [*reversing* (Civ. App. 1904) 81 S. W. 1019].

60. Means *v.* Southern California R. Co., 144 Cal. 473, 77 Pac. 1001. And see cases cited *supra* notes 54–59.

Evidence held to sustain a verdict for defendant see Holston *v.* Southern R. Co., 116 Ga. 656, 43 S. E. 29.

61. Rine *v.* Chicago, etc., R. Co., 100 Mo. 228, 12 S. W. 640; Missouri Pac. R. Co. *v.* Porter, 73 Tex. 304, 11 S. W. 324; San Antonio, etc., R. Co. *v.* Gray, (Tex. Civ. App. 1901) 66 S. W. 229 [*reversed* on other grounds in 90 Tex. 424, 67 S. W. 763]; Craft *v.* Northern Pac. R. Co., 62 Fed. 735.

Where the evidence to prove a fact is direct and positive and satisfactory and the evidence to disprove it is purely negative, the positive proof must prevail. Wickham *v.* Chicago, etc., R. Co., 95 Wis. 23, 69 N. W. 982.

Circumstances may impeach direct evidence. — Thus where an engineer and fireman directly deny any negligence in keeping a lookout, if the circumstances attending the accident indicate such negligence it is error to direct a verdict for defendant and the question should be submitted to the jury for them to determine the credibility of the witnesses and the weight of the evidence. Shiflet *v.* St. Louis Southwestern R. Co., 18 Tex. Civ. App. 57, 44 S. W. 918.

62. Missouri Pac. R. Co. *v.* Porter, 73 Tex. 304, 11 S. W. 324.

63. Rich *v.* Chicago, etc., R. Co., 149 Fed. 79, 78 C. C. A. 663.

64. *Alabama.*— Louisville, etc., R. Co. *v.* Lewis, 141 Ala. 466, 37 So. 587, holding that proof of injury to a traveler on a street in a collision with a train operated thereon is not evidence of actionable negligence on the part of the railroad company.

Kentucky.— Louisville, etc., R. Co. *v.* Humphrey, 45 S. W. 503, 20 Ky. L. Rep. 642.

Louisiana.—Lloyd *v.* East Louisiana R. Co., 109 La. 446, 33 So. 556; Bryant *v.* Illinois Cent. R. Co., (1897) 22 So. 799, holding that the fact that a dead body was found on the track between a tender and a switch engine with the indication that two of the wheels

accident is of such a character that ordinarily it could not have happened but for negligence, in which case proof of an accident and injury is sufficient in the absence of explanatory proof on the part of defendant to raise a *prima facie* case of negligence on the part of defendant.[65] Under some statutes, however, mere proof of an injury by the operation of a railroad is sufficient to raise a presumption of negligence;[66] but this statutory presumption ceases to be controlling upon the introduction of testimony showing all the facts of the case,[67] and it is immaterial that one or more of the witnesses by whom the facts are shown are impeached if others who testify to all of the facts remain unimpeached.[68]

(c) *Precautions as to Persons Seen On or Near Tracks.* To warrant a recovery on the ground that defendant's engineer or other employee in charge of the engine or cars causing the injury failed to use proper precautions after discovering the injured party's peril, the evidence must be such as to reasonably justify the jury in finding that such engineer or employee saw or knew of the injured party's danger in time to avoid the accident,[69] and that thereafter such employee failed

had passed over the man does not authorize an inference of negligence on the part of the railroad employees.

Maryland.—State *v.* Baltimore, etc., R. Co., 58 Md. 221.

North Carolina.— Upton *v.* South Carolina, etc., R. Co., 128 N. C. 173, 38 S. E. 736.

Texas.— Texas, etc., R. Co. *v.* Shoemaker, 98 Tex. 451, 84 S. W. 81 [*reversing* on other grounds (Civ. App. 1904) 81 S. W. 1019]; Washington *v.* Missouri, etc., R. Co., 90 Tex. 314, 38 S. W. 764; Shifflet *v.* St. Louis, etc., R. Co., 18 Tex. Civ. App. 57, 44 S. W. 918.

Virginia.— Southern R. Co. *v.* Back, 103 Va. 778, 50 S. E. 257, holding that the mere fact that decedent was found in an injured condition on the right of way between the main and side-tracks is not sufficient to establish actionable negligence on the part of defendant.

Canada.— Dube *v.* Reg, 3 Can. Exch. 147.

And see *supra*, X, E, 8, c, (I).

Mere proof of an unexplained killing of persons on a railroad track, and of the fact that the engineer of the train suffered from an impairment of vision, does not overcome the presumption in favor of the railroad that a proper watch was kept by those on the engine. Texas, etc., R. Co. *v.* Shoemaker, 98 Tex. 451, 84 S. W. 1049 [*reversing* on other grounds (Civ. App. 1904) 81 S. W. 1019].

65. Howser *v.* Cumberland, etc., R. Co., 80 Md. 146, 30 Atl. 906, 45 Am. St. Rep. 332, 27 L. R. A. 154; Washington *v.* Missouri, etc., R. Co., 90 Tex. 314, 38 S. W. 764 [*reversing* (Civ. App. 1896) 36 S. W. 778.

Where the particular thing causing the injury is shown to be under the management of defendant or its servants, and the accident is such as in the ordinary course of events does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation, that the accident arose from want of care and the question should be submitted to the jury. Washington *v.* Missouri, etc., R. Co., 90 Tex. 314, 38 S. W. 764 [*reversing* (Civ. App. 1896) 36 S. W. 778].

66. Kemp *v.* Georgia Cent. R. Co., 122 Ga. 559, 50 S. E. 465 (holding that in view of the statutory presumption of negligence plaintiff proved her case when she established that her husband had been killed on defendant's track by its engine and cars); Korter *v.* Gulf, etc., R. Co., 87 Miss. 482, 40 So. 258. And see *supra*, X, E, 8, e, (I), (B).

67. Korter *v.* Gulf, etc., R. Co., 87 Miss. 482, 40 So. 258.

68. Korter *v.* Gulf, etc., R. Co., 87 Miss. 482, 40 So. 258.

69. Alabama Great Southern R. Co. *v.* Burgess, 114 Ala. 587, 22 So. 169; Sibley *v.* Ratliffe, 50 Ark. 477, 8 S. W. 686. See also St. Louis Southwestern R. Co. *v.* Bryant, 81 Ark. 368, 99 S. W. 693, article thrown from train.

Evidence held sufficient: To sustain a finding that the engineer or other employee in charge of the engine or cars discovered the injured party's danger in time to prevent the injury (St. Louis, etc., R. Co. *v.* Cain, (Ark. 1907) 104 S. W. 533; St. Louis, etc., R. Co. *v.* Evans, 74 Ark. 407, 86 S. W. 426; Sibley *v.* Ratliffe, 50 Ark. 477, 8 S. W. 686; Rine *v.* Chicago, etc., R. Co., 100 Mo. 228, 12 S. W. 640; Nacogdoches, etc., R. Co. *v.* Beene, (Tex. Civ. App. 1907) 106 S. W. 456; Gulf, etc., R. Co. *v.* Gibson, 41 Tex. Civ. App. 306, 93 S. W. 469), as in time by the exercise of due care and precaution to stop the engine or train and prevent the injury (St. Louis, etc., R. Co. *v.* Hill, 74 Ark. 478, 86 S. W. 303; Purcell *v.* Chicago, etc., R. Co., 117 Iowa 667, 91 N. W. 933). To sustain a finding that the engineer saw the injured boy on the track, although he denied that he saw him or that he looked back. Texas, etc., R. Co. *v.* Phillips, (Tex. Civ. App. 1897) 40 S. W. 344. Or to sustain a finding that a brakeman saw and knew plaintiff's position of danger, although the testimony of the brakeman is to the contrary. International, etc., R. Co. *v.* Tabor, 12 Tex. Civ. App. 283, 33 S. W. 894.

Evidence held insufficient: To sustain a finding that the injured party's danger was discovered in time to avoid the injury. Johnson *v.* Birmingham R., etc., Co., 149 Ala. 529, 43 So. 33; Johns *v.* Louisville, etc., R. Co., 10 S. W. 417, 10 Ky. L. Rep. 757; Chesapeake Beach R. Co. *v.* Donahue, 107 Md. 119, 68 Atl. 507; Burde *v.* Chicago, etc., R. Co., 123 Mo. App. 629, 100 S. W. 509. To show that

to use all reasonable and proper precautions which he might have used to avoid the injury.[70]

(D) *Contributory Negligence.* The fact of contributory negligence,[71] or due care, or in other words, freedom from contributory negligence on the part of the person injured on or near railroad tracks, may be shown either by direct evidence

plaintiff was at any time on or so close to the track that the engineer in the exercise of ordinary care could have seen him in peril in time to have checked the train and avoided the injury. Koegel *v.* Missouri Pac. R. Co., 181 Mo. 379, 80 S. W. 905.

That defendant's engineer saw the party injured or killed and made no effort to avoid striking him may be inferred in the absence of evidence to the contrary when the accident was in daylight, the track straight, and the view unobstructed and nothing was done to give warning or to stop the train until after the accident. White *v.* New York Cent., etc., R. Co., 20 N. Y. Suppl. 6.

The mere fact that the injured party might have been seen does not authorize the jury to infer that the engineer actually saw him. Chesapeake, etc., R. Co. *v.* Barhour, 93 S. W. 24, 29 Ky. L. Rep. 339.

Testimony that someone in the engine cah shouted to plaintiff to get out of the way, when the engine was on top of him, does not tend to prove that he was seen from the engine in time for its crew in the exercise of reasonable care to have prevented the injury, but rather tends to prove that he was seen too late for that purpose. Chesapeake Beach R. Co. *v.* Donahue, 107 Md. 119, 68 Atl. 507.

70. Evidence held sufficient: To sustain a finding or verdict on the ground that the engineer or other employee failed to exercise proper precautions after discovering the injured party's peril. Payne *v.* Humeston, etc., R. Co., 70 Iowa 584, 31 N. W. 886; Illinois Cent. R. Co. *v.* Murphy, 123 Ky. 787, 97 S. W. 729, 30 Ky. L. Rep. 93, 11 L. R. A. N. S. 352; Woods *v.* Wabash R. Co., 188 Mo. 229, 86 S. W. 1082; Mirrielees *v.* Wabash R. Co., 163 Mo. 470, 53 S. W. 718; Fitzgibbons *v.* Manhattan R. Co., 88 N. Y. Suppl. 341; Harris *v.* Atlantic Coast Line R. Co., 132 N. C. 160, 43 S. E. 589; Texas, etc., R. Co. *v.* Brannon, 43 Tex. Civ. App. 531, 96 S. W. 1095; St. Louis Southwestern R. Co. *v.* Allen, 35 Tex. Civ. App. 355, 80 S. W. 240; Missouri, etc., R. Co. *v.* Stone, 23 Tex. Civ. App. 106, 56 S. W. 933; Houston, etc., R. Co. *v.* Hartnett, (Tex. Civ. App. 1898) 48 S. W. 773; Ross *v.* Texas, etc., R. Co., 34 Fed. 44. To sustain a finding that the train operatives, after they discovered the peril of plaintiff, failed to use every means in their power consistent with the safety of those on the train, to avoid the injury. St. Louis Southwestern R. Co. *v.* Bolton, 36 Tex. Civ. App. 87, 81 S. W. 123. To warrant a finding that the engineer did not use the appliances at his command to stop the train immediately on discovering deceased. Gulf, etc., R. Co. *v.* Brown, 33 Tex. Civ. App. 269, 76 S. W. 794. To warrant a finding that no effort was made by the operatives of the train to stop the same before the accident. Houston, etc., R. Co. *v.* Ramsey, 43 Tex. Civ. App. 603, 97 S. W. 1067. To show that the company did all that was required of it to avoid running the injured party down after discovering his peril. Norfolk, etc., R. Co. *v.* Dean, 107 Va. 505, 59 S. E. 389.

Evidence held insufficient: To sustain a verdict or finding on the ground that the engineer or other employee failed to exercise proper care to avoid the accident after discovering the injured party's peril. East Tennessee, etc., R. Co. *v.* Harbuck, 91 Ga. 598, 18 S. E. 358; Louisville, etc., R. Co. *v.* Jolly, 90 S. W. 977, 28 Ky. L. Rep. 989; Lovett *v.* Gulf, etc., R. Co., 97 Tex. 436, 79 S. W. 514 [*affirming* (Civ. App. 1903) 74 S. W. 570]; Norfolk, etc., R. Co. *v.* Johnson, 103 Va. 787, 50 S. E. 268. To show negligence on the part of the train operatives in not stopping the train in time after discovering the injured party's peril. Burns *v.* St. Louis Southwestern R. Co., 76 Ark. 10, 88 S. W. 824; Chrystal *v.* Troy, etc., R. Co., 105 N. Y. 164, 11 N. E. 380; Burnes *v.* Staten Island Rapid Transit R. Co., 17 N. Y. Suppl. 741; Houston, etc., R. Co. *v.* Harris, (Tex. Civ. App. 1901) 64 S. W. 227.

Evidence that a train was running on an up grade at from twelve to fifteen miles an hour when plaintiff's danger was discovered is insufficient to show that the train could have been stopped without any evidence as to the state of the track, the weight of the train, the appliances, and other facts tending to show such possibility. Thornton *v.* Louisville, etc., R. Co., 70 S. W. 53, 24 Ky. L. Rep. 854.

Where a trespasser was walking on the tracks within the limits of a city in full view of the engineer of an approaching train for several hundred feet, it is not an unreasonable inference for the jury to find that the engineer actually saw him and failed to take proper measures to prevent injuring him. Crow *v.* Wabash, etc., R. Co., 23 Mo. App. 357.

Evidence held to warrant the direction of a verdict for defendant see Sheehan *v.* St. Paul, etc., R. Co., 76 Fed. 201, 22 C. C. A. 121.

71. Evidence held sufficient: To show contributory negligence generally (Chicago, etc., R. Co. *v.* Maney, 55 Ill. App. 588; Cogdell *v.* Wilmington, etc., R. Co., 130 N. C. 313, 41 S. E. 541; Tucker *v.* International, etc., R. Co., (Tex. Civ. App. 1902) 67 S. W. 914); in walking along or across tracks (Peters *v.* Southern R. Co., 135 Ala. 533, 33 So. 332; Michigan Cent. R. Co. *v.* Cudahy, 119 Ill. App. 328; Greenwood *v.* Chicago, etc., R. Co., 95 Minn. 284, 104 N. W. 3; Illinois Cent. R. Co. *v.* Jones, (Miss. 1903) 35 So. 193; Maher *v.* Atlantic, etc., R. Co., 64 Mo. 267; Gulf, etc., R. Co. *v.* Town-

or by showing facts and circumstances from which it may be fairly inferred.[72] If from an examination of all the circumstances under which the accident took place, and which are put in evidence, nothing is found in the conduct of plaintiff to which negligence can fairly be imputed, the mere absence of fault may justify the jury in finding due care on his part;[73] but if there is only a partial disclosure of the facts and no evidence is offered showing the conduct of the party injured, with regard to the matters specially requiring care on his part, the data for such an inference is not sufficient,[74] as it can only be warranted when circumstances are shown which fairly indicate care, or exclude the idea of negligence on his part.[75]

(E) *Wilful, Wanton, Reckless, or Unauthorized Acts.* The weight and sufficiency of evidence in regard to wilful, wanton, reckless, or unauthorized acts of railroad employees, whereby injury is caused to persons on or near the tracks, is governed by the rules of evidence which apply in civil cases generally.[76]

send, (Tex. Civ. App. 1904) 82 S. W. 804; Gulf, etc., R. Co. *v.* Matthews, 32 Tex. Civ. App. 137, 73 S. W. 413, 74 S. W. 803; St. Louis, etc., R. Co. *v.* Sharp, 3 Tex. App. Civ. Cas. § 328; Savage *v.* Southern R. Co., 103 Va. 422, 49 S. E. 484; Alexander *v.* Louisville, etc., R. Co., 114 Fed. 774); in failing to observe an approaching train (Illinois Cent. R. Co. *v.* McMillion, 129 Ill. App. 27, 37); precluding a recovery in the absence of proof that the company could by ordinary prudence have avoided the injury after discovering his peril (Barry *v.* Kansas City, etc., R. Co., 77 Ark. 401, 91 S. W. 748). To conclusively establish contributory negligence. Gibbons *v.* Northern Pac. R. Co., 99 Minn. 142, 108 N. W. 471. To justify a finding that the injury resulted from plaintiff's negligence either in jumping on or off a train while in motion, or in sitting on a cross tie while a train was approaching. Givens *v.* Louisville, etc., R. Co., 72 S. W. 320, 24 Ky. L. Rep. 1796. To authorize the court to assume as a matter of law that plaintiff knew that the conductor of a freight train on which he was riding when injured had no authority to allow him to ride on the train as a passenger. Grahn *v.* International, etc., R. Co., 100 Tex. 27, 93 S. W. 104, 123 Am. St. Rep. 767, 5 L. R. A. N. S. 1025. To warrant setting aside a verdict against the railroad company. Savannah, etc., R. Co. *v.* Stewart, 71 Ga. 427.

Evidence held insufficient to show contributory negligence generally (Keilt *v.* Staten Island Rapid Transit Co., 75 Hun (N. Y.) 579, 27 N. Y. Suppl. 847; Missouri Pac. R. Co. *v.* Porter, 73 Tex. 304, 11 S. W. 324); in an action for injuries to a pedestrian on a public street by being struck by a mail pouch thrown from a rapidly moving train (Pittsburgh, etc., R. Co. *v.* Warrum, (Ind. App. 1907) 82 N. E. 934, (App. 1908) 84 N. E. 356); on the part of a child seven years old (Baker *v.* Flint, etc., R. Co., 68 Mich. 90, 35 N. W. 836).

72. Winslow *v.* Boston, etc., R. Co., 11 N. Y. St. 831; Gulf, etc., R. Co. *v.* Riordan, (Tex. Civ. App. 1893) 22 S. W. 519.

Evidence held sufficient: To show due care generally (Douglass *v.* Northern Cent. R. Co., 59 N. Y. App. Div. 470, 69 N. Y. Suppl. 370; Missouri, etc., R. Co. *v.* Saunders, (Tex. Civ. App. 1907) 103 S. W. 457 [*reversed* on other grounds in (1908) 106 S. W. 321]; St. Louis Southwestern R. Co. *v.* Kilman, 39 Tex. Civ. App. 107, 86 S. W. 1050; St. Louis Southwestern R. Co. *v.* Allen, 35 Tex. Civ. App. 355, 80 S. W. 240; International, etc., R. Co. *v.* Brooks, (Tex. Civ. App. 1899) 54 S. W. 1056); in walking along or crossing tracks (Chicago, etc., R. Co. *v.* Kelly, 182 Ill. 267, 54 N. E. 979 [*affirming* 80 Ill. App. 675]; Keim *v.* Union R., etc., Co., 90 Mo. 314, 2 S. W. 427; Best *v.* New York Cent., etc., R. Co., 117 N. Y. App. Div. 739, 102 N. Y. Suppl. 957; Texas Pac. R. Co. *v.* Martin, 25 Tex. Civ. App. 204, 60 S. W. 803); in passing over a lawn adjacent to a depot platform (Banderob *v.* Wisconsin Cent. R. Co., 133 Wis. 249, 113 N. W. 738); or in riding a velocipede on a railroad track (Trinity, etc., R. Co. *v.* Simpson, (Tex. Civ. App. 1905) 86 S. W. 1034). To warrant a finding that plaintiff, a child eleven years of age, was not guilty of contributory negligence in failing to jump from a trestle when it discovered the approaching train. St. Louis Southwestern R. Co. *v.* Bolton, 36 Tex. Civ. App. 87, 81 S. W. 123.

Evidence held insufficient: To show due care. Moore *v.* Boston, etc., R. Co., 159 Mass. 399, 34 N. E. 366; Keeler *v.* New York Cent., etc., R. Co., 114 N. Y. App. Div. 807, 100 N. Y. Suppl. 235. To support a finding that the party injured, a boy of nine and one-half years, did not know that it was dangerous for him to ride upon the footboard of an engine. Oregon R., etc., Co. *v.* Egley, 2 Wash. 409, 26 Pac. 973, 26 Am. St. Rep. 860.

In the absence of all testimony it has been held that the jury may find that the party injured in obedience to the ordinary instincts of mankind exercised that care which a prudent man would under the circumstances of the case have made use of. Broadbent *v.* Chicago, etc., R. Co., 64 Ill. App. 231.

73. Gulf, etc., R. Co. *v.* Riordan, (Tex. Civ. App. 1893) 22 S. W. 519.

74. Gulf, etc., R. Co. *v.* Riordan, (Tex. Civ. App. 1893) 22 S. W. 519.

75. Gulf, etc., R. Co. *v.* Riordan, (Tex. Civ. App. 1893) 22 S. W. 519.

76. **Evidence held sufficient:** To show a wilful, wanton, or reckless injury to a trespasser on the tracks (Pittsburg, etc., R. Co. *v.* Kinnare, 203 Ill. 388, 67 N. E. 826 [*affirming* 105 Ill. App. 566]; Grand Trunk R. Co.

d. Damages. In an action for personal injuries caused by the negligence of a railroad company, ordinarily actual or compensatory damages only can be recovered;[77] and no punitive or exemplary damages can be recovered,[78] except where the injury was inflicted by reason of wanton, wilful, or reckless acts on the part of the company's servants,[79] and such acts were either authorized or ratified by the company.[80] Under statutes providing that contributory negligence will operate only in mitigation of damages, it has been held that,

v. Flagg, 156 Fed. 359, 84 C. C. A. 263), or in evicting (Johnson *v.* Chicago, etc., R. Co., 116 Iowa 639, 88 N. W. 811), or causing a trespasser to jump from a rapidly moving train (Illinois Cent. R. Co. *v.* Brown, (Miss. 1905) 39 So. 531). To justify a finding that defendant was grossly negligent in sending a car down the track without light or flagman on a dark evening and with a swinging door open whereby the injury was caused. Chicago, etc., R. Co. *v.* O'Neil, 172 Ill. 527, 50 N. E. 216 [*affirming* 64 Ill. App. 623]. To show as a matter of law that defendant was not guilty of wanton or wilful negligence in backing its train against plaintiff whose foot was caught in a switch rail. Cleveland, etc., R. Co. *v.* Cline, 111 Ill. App. 416, 424.

Evidence held insufficient: To show a wilful, wanton, or reckless injury generally (Illinois Cent. R. Co. *v.* Eicher, 202 Ill. 556, 67 N. E. 376 [*reversing* 100 Ill. App. 599]; Rhodes *v.* New York Cent., etc., R. Co., 8 Misc. (N. Y.) 366, 28 N. Y. Suppl. 691 [*affirmed* in 149 N. Y. 586, 44 N. E. 1128]; Dotta *v.* Northern Pac. R. Co., 36 Wash. 506, 79 Pac. 32); by sending a moving car against a standing car on which the party injured was rightfully at the time (Mobile, etc., R. Co. *v.* Smith, 146 Ala. 312, 40 So. 763; Williams *v.* Kansas City, etc., R. Co., 96 Mo. 275, 9 S. W. 573); or to a trespasser on the track (Bartlett *v.* Wabash R. Co., 220 Ill. 163, 77 N. E. 96). To authorize a finding that the conductor kicked the injured boy off the train or so threatened him that he jumped off (Georgia R., etc., Co. *v.* Frazier, 119 Ga. 331, 46 S. E. 451); or that he acted maliciously in so doing (Hoffman *v.* New York Cent., etc., R. Co., 44 N. Y. Super. Ct. 1); or that a brakeman acted within the general scope of his authority in ejecting the injured party (Texas, etc., R. Co. *v.* Moody, (Tex. Civ. App. 1893) 23 S. W. 41).

In an action for injuries caused to one while driving on defendant's track, by a passing train, evidence that the persons in charge of the train discovered the wagon box and seat which had fallen from the injured party's wagon near the track shortly before reaching such party and his team does not show gross negligence on their part in continuing at the usual rate of speed, so as to render the company liable. McDonald *v.* Chicago, etc., R. Co., 75 Wis. 121, 43 N. W. 744.

77. Warner *v.* Southern Pac. Co., 113 Cal. 105, 45 Pac. 187, 54 Am. St. Rep. 327; Givens *v.* Kentucky Cent. R. Co., 89 Ky. 231, 12 S. W. 257, 11 Ky. L. Rep. 452. See also, generally, DAMAGES, 13 Cyc. 22.

Injury to plaintiff's feelings by reason of any insult or indignity inflicted on him may be considered in determining the amount of damages. Gulf, etc., R. Co. *v.* Bates, (Tex. Civ. App. 1906) 95 S. W. 738.

Injuries caused by fright may be recovered for. Buchanan *v.* West Jersey R. Co., 52 N. J. L. 265, 19 Atl. 254. See also, generally, DAMAGES, 13 Cyc. 41.

In case of death which was not instantaneous, damages may be awarded under some statutes for the physical pain and suffering of decedent. Murphy *v.* New York, etc., R. Co., 29 Conn. 496. See also, generally, DEATH, 13 Cyc. 372. Evidence held insufficient to show physical suffering see Grand Trunk R. Co. *v.* Flagg, 156 Fed. 359, 84 C. C. A. 263.

78. Warner *v.* Southern Pac. Co., 113 Cal. 105, 45 Pac. 187, 54 Am. St. Rep. 327; Jacobs *v.* Louisville, etc., R. Co., 10 Bush (Ky.) 263; Hamilton *v.* Morgan's Louisiana, etc., R., etc., Co., 42 La. Ann. 824, 8 So. 586; International, etc., R. Co. *v.* McDonald, 75 Tex. 41, 12 S. W. 860.

79. Mobile, etc., R. Co. *v.* Seales, 100 Ala. 368, 13 So. 917; St. Louis, etc., R. Co. *v.* Reagan, 52 Ill. App. 488; Givens *v.* Kentucky Cent. R. Co., 89 Ky. 231, 12 S. W. 257, 11 Ky. L. Rep. 452; Jacobs *v.* Louisville, etc., R. Co., 10 Bush (Ky.) 263; Hayes *v.* Southern R. Co., 141 N. C. 195, 53 S. E. 847, holding also that the general principles of law relating to punitive damages apply to a brakeman acting in the scope of his agency in ejecting a trespasser, as well as to the train conductor. See Murphy *v.* New York, etc., R. Co., 29 Conn. 496.

Exemplary damages have been awarded where defendant railroad's servant wantonly and violently ejected a trespasser from the train while the train was rapidly moving, whereby such trespasser was injured (Hayes *v.* Southern R. Co., 141 N. C. 195, 53 S. E. 847); but such damages must not be excessive (Alabama, etc., R. Co. *v.* Livingston, 84 Miss. 1, 36 So. 256, holding that a judgment for two thousand dollars in favor of plaintiff who was expelled from a freight train between stations on a stormy night after he had offered to pay his fare is excessive).

80. Warner *v.* Southern Pac. Co., 113 Cal. 105, 45 Pac. 187, 54 Am. St. Rep. 327; International, etc., R. Co. *v.* McDonald, 75 Tex. 41, 12 S. W. 860; Gulf, etc., R. Co. *v.* Moore, 69 Tex. 157, 6 S. W. 681; Toledo, etc., R. Co. *v.* Gordon, 143 Fed. 95, 74 C. C. A. 289.

Retaining in employment.— The fact that a conductor who wilfully and wantonly ejected a trespasser from a moving train at a dangerous place was not discharged prior to the trial is not sufficient to constitute a ratification. Toledo, etc., R. Co. *v.* Gordon, 143 Fed. 95, 74 C. C. A. 289.

although in case of such negligence the jury may mitigate the damages to nominal damages only, it need not do so, but may fix them in accordance with the estimate of the relative negligence of the parties, where both are negligent.[81]

e. Questions For Court and For Jury — (I) *Injuries to Persons On or Near Tracks in General* — (A) *General Rule.* Questions of law are ordinarily to be determined by the court, and it is error to submit them to the jury.[82] Issues of fact or of mixed law and fact on the other hand, are ordinarily to be determined by the jury under proper instructions from the court.[83]

(B) *As Determined by the Evidence.* If there is any evidence from which the jury might justifiably find the existence or non-existence of the fact in issue,[84] and the evidence is conflicting,[85] or is such that reasonable men might arrive at different conclusions therefrom,[86] the issue should be submitted to the jury for determination; and in such a case it is error for the court to take the question from them by nonsuit, dismissal, direction of a verdict, or instruction.[87] If, however, there is no evidence on an issue of fact, or if the evidence of its existence or its non-existence, as the case may be, is so slight that a finding of its existence or non-existence would not be sustained, or if the evidence is conclusive of its existence or non-existence, then the question becomes one of law for the court and should not be submitted to the jury; [88] but the court may dispose of the case

81. Cincinnati, etc., R. Co. *v.* Davis, 127 Fed. 933, 62 C. C. A. 565 (construing Shannon Code Tenn. § 1574); Felton *v.* Newport, 105 Fed. 332, 44 C. C. A. 530.

82. Savannah, etc., R. Co. *v.* Daniels, 90 Ga. 608, 17 S. E. 647, 20 L. R. A. 416; *Ex p.* Stell, 22 Fed. Cas. No. 13,358, 4 Hughes 157.

Applicability of rule of railroad company left to jury.— Whether, in an action for personal injuries by one not a servant, a rule of a railroad company relating to running freight trains within ten minutes of the time of passenger trains applies to through freights or to switching cars in yards, and the applicability of a rule requiring a signal flag when cars are being inspected or repaired are properly left to the jury, as the construction of all writings is not for the court. Pittsburgh, etc., R. Co. *v.* Zipperlein, 9 Ohio S. & C. Pl. Dec. 634, 7 Ohio N. P. 524.

83. Ludtke *v.* Lake Shore, etc., R. Co., 24 Ohio Cir. Ct. 120 (as to whether a certain fence was a sufficient fence to turn stock under Rev. St. § 3324); Connell *v.* Southern R. Co., 91 Fed. 466, 33 C. C. A. 633.

What is reasonable care toward a trespasser on a railroad track is a question of fact determinable by the circumstances. Christian *v.* Illinois Cent. R. Co., 71 Miss. 237, 15 So. 71.

84. *Georgia.*— Cannon *v.* Georgia Cent. R. Co., 110 Ga. 139, 35 S. E. 311.

Illinois.— Elgin, etc., R. Co. *v.* Thomas, 215 Ill. 158, 74 N. E. 109; Illinois Terminal R. Co. *v.* Mitchell, 214 Ill. 151, 73 N. E. 449.

Mississippi.— Stevens *v.* Yazoo, etc., R. Co., 81 Miss. 195, 32 So. 311.

North Carolina.— Hord *v.* Southern R. Co., 129 N. C. 305, 40 S. E. 69 (whether he was killed by a train); Everett *v.* Richmond, etc., R. Co., 121 N. C. 519, 27 S. E. 991.

Texas.— Hutchens *v.* St. Louis Southwestern R. Co., 40 Tex. Civ. App. 245, 89 S. W. 24.

Wisconsin.— Euting *v.* Chicago, etc., R. Co., 116 Wis. 13, 92 N. W. 358, 96 Am. St. Rep. 936, 60 L. R. A. 158.

The weight of testimony, although largely hearsay, that the men who were in control of and operating an engine at the time of an accident were servants and employees of defendant, which was admitted without objection and without any motion being made to strike it out, is for the jury. East St. Louis Connecting R. Co. *v.* Altgen, 210 Ill. 213, 71 N. E. 377 [*affirming* 112 Ill. App. 471].

Where the course of the legal evidence is such as tends to support the averments of plaintiff's petition, it is the duty of the court to submit the issues of fact to the jury even though he should feel constrained to set aside any verdict for plaintiff, should such be returned and a motion for a new trial thereupon made. Shifflet *v.* St. Louis Southwestern R. Co., 18 Tex. Civ. App. 57, 44 S. W. 918.

85. Hansen *v.* Southern Pac. Co., 105 Cal. 379, 38 Pac. 957; Rader *v.* Louisville, etc., R. Co., 104 S. W. 774, 31 Ky. L. Rep. 1105; Everett *v.* Richmond, etc., R. Co., 121 N. C. 519, 27 S. E. 991.

86. Whitesides *v.* Southern R. Co., 128 N. C. 229, 38 S. E. 878, holding that where decedent was found beneath a trestle severely injured, and died shortly thereafter, and there was no direct evidence showing that he was on the trestle when defendant's train passed, the question whether he was in fact injured on the trestle was for the jury.

87. Kendrick *v.* Seaboard Air-Line R. Co., 121 Ga. 775, 49 S. E. 762; Cannon *v.* Georgia Cent. R. Co., 110 Ga. 139, 35 S. E. 311; Chicago, etc., R. Co. *v.* Dunleavy, 129 Ill. 132, 22 N. E. 15, refusal to give a peremptory instruction in favor of defendant held proper.

88. Coleman *v.* Wrightsville, etc., R. Co., 114 Ga. 386, 40 S. E. 247; Dewald *v.* Kansas City, etc., R. Co., 44 Kan. 586, 24 Pac. 1101; Marcott *v.* Marquette, etc., R. Co., 47 Mich. 1, 10 N. W. 53 (holding that a case must be absolutely free from conflict before it can be

without the intervention of the jury, as by dismissal or nonsuit,[89] sustaining a demurrer to the evidence,[90] or by directing a verdict for defendant.[91]

(c) *Care Required of Railroad Company in General.*[92] The question of negligence in injuries inflicted by railroad companies upon individuals depends upon such a variety of circumstances that it can rarely be absolutely defined as a matter of law.[93] Thus in accordance with the above rules,[94] although a mere scintilla of evidence of defendant's negligence is not sufficient,[95] yet where there is sufficient evidence to go to the jury, and it is conflicting or such that reasonable minds might arrive at different conclusions therefrom, it is a question for the jury whether or not the commission or omission of particular acts on the part of the railroad company was negligence as to the party injured,[96] and whether such negligence

taken from the jury); Hutchens *v.* St. Louis Southwestern R. Co., 40 Tex. Civ. App. 245, 80 S. W. 24.

A case cannot be taken from the jury unless it is plain upon the strongest showing made by any of the witnesses, that there is no cause of action. Marcott *v.* Marquette, etc., R. Co., 47 Mich. 1, 10 N. W. 53.

89. *Georgia.*— Coleman *v.* Wrightsville, etc., R. Co., 114 Ga. 386, 40 S. E. 247.

New York.— Malone *v.* Boston, etc., R. Co., 51 Hun 532, 4 N. Y. Suppl. 590; McEvoy *v.* Manhattan R. Co., 55 N. Y. Super. Ct. 567, 12 N. Y. St. 73; Bernhardt *v.* Rensselaer, 18 How. Pr. 427 [*reversed* on the facts in 32 Barb. 165, 19 How. Pr. 199 (*affirmed* in 1 Abb. Dec. 131, 23 How. Pr. 166)].

Pennsylvania.— Shvagzdys *v.* Pittsburg, etc., R. Co., 31 Pittsb. Leg. J. N. S. 126.

Texas.— Texas, etc., R. Co. *v.* Nicholson, (Civ. App. 1893) 22 S. W. 770.

Utah.— Morgan *v.* Oregon Short Line R. Co., 27 Utah 92, 74 Pac. 523.

Wisconsin.— Miller *v.* Chicago, etc., R. Co., 68 Wis. 184, 31 N. W. 479.

90. Dewald *v.* Kansas City, etc., R. Co., 44 Kan. 586, 24 Pac. 1101; Coatney *v.* St. Louis, etc., R. Co., 151 Mo. 35, 51 S. W. 1036; Kreis *v.* Missouri Pac. R. Co., 148 Mo. 321, 49 S. W. 877; Missouri, etc., R. Co. *v.* Richie, (Tex. Civ. App. 1896) 37 S. W. 868; Parks *v.* Southern R. Co., 143 Fed. 276, 74 C. C. A. 414.

91. *Georgia.*— Hall *v.* Western, etc., R. Co., 123 Ga. 213, 51 S. E. 211.

Illinois.— Cowley *v.* Chicago, etc., R. Co., 87 Ill. App. 123.

Kentucky.— Vanderpool *v.* Lexington, etc., R. Co., 46 S. W. 699, 20 Ky. L. Rep. 479.

Nebraska.— Huber *v.* Chicago, etc., R. Co., 73 Nebr. 478, 103 N. W. 51.

Texas.— Hancock *v.* Gulf, etc., R. Co., 99 Tex. 613, 92 S. W. 456; Washington *v.* Missouri, etc., R. Co., (Civ. App. 1896) 36 S. W. 778.

92. **Negligence generally as a question for the jury** see NEGLIGENCE, 29 Cyc. 627.

93. Marcott *v.* Marquette, etc., R. Co., 47 Mich. 1, 10 N. W. 53.

94. See *supra*, X, E, 8, e, (I), (A), (B).

95. Johnson *v.* New York Cent., etc., R. Co., 173 N. Y. 79, 65 N. E. 946 [*reversing* 66 N. Y. App. Div. 617, 73 N. Y. Suppl. 1137].

96. *Alabama.*— Stringer *v.* Alabama Mineral R. Co., 99 Ala. 397, 13 So. 75.

Arizona.— Arizona, etc., R. Co. *v.* Nevitt, 8 Ariz. 56, 68 Pac. 550.

Arkansas.— St. Louis Southwestern R. Co. *v.* Graham, 83 Ark. 61, 102 S. W. 700.

California.— Noyes *v.* Southern Pac. R. Co., 92 Cal. 285, 28 Pac. 288, (1890) 24 Pac. 927.

Delaware.— Tully *v.* Philadelphia, etc., R. Co., 2 Pennew. 537, 47 Atl. 1019, 82 Am. St. Rep. 425.

Georgia.— Alabama Midland R. Co. *v.* Hatcher, 116 Ga. 791, 43 S. E. 49; Atlanta, etc., R. Co. *v.* Bryant, 110 Ga. 247, 34 S. E. 350, holding that whether the commission by a railroad company in the running and operation of its trains, of acts other than those prohibited by statute, or the omission to perform those things prescribed by statute, constitutes negligence, is a question of fact for the jury.

Illinois.— Illinois Cent. R. Co. *v.* Hopkins, 200 Ill. 122, 65 N. E. 656 [*affirming* 100 Ill. App. 594]; Illinois Cent. R. Co. *v.* Jernigan, 198 Ill. 297, 65 N. E. 88 [*affirming* 101 Ill. App. 1].

Iowa.— McMarshall *v.* Chicago, etc., R. Co., 80 Iowa 757, 45 N. W. 1065, 20 Am. St. Rep. 445, as to whether the employee in charge of the locomotive causing the injury was incompetent.

Kansas.— Hurdle *v.* Missouri Pac. R. Co., 73 Kan. 769, 85 Pac. 287; Dewald *v.* Kansas City, etc., R. Co., 44 Kan. 586, 24 Pac. 1101.

Kentucky.— McCabe *v.* Maysville, etc., R. Co., 89 S. W. 683, 28 Ky. L. Rep. 536; Illinois Cent. R. Co. *v.* Wilson, 63 S. W. 608, 23 Ky. L. Rep. 684.

Maryland.— Northern Cent. R. Co. *v.* State, 29 Md. 420, 96 Am. Dec. 545; Baltimore, etc., R. Co. *v.* State, 29 Md. 252, 460, 96 Am. Dec. 528.

Michigan.— Labarge *v.* Pere Marquette R. Co., 134 Mich. 139, 95 N. W. 1073; Grand Rapids, etc., R. Co. *v.* Martin, 41 Mich. 667, 3 N. W. 173.

Minnesota.— Hepfel *v.* St. Paul, etc., R. Co., 49 Minn. 263, 51 N. W. 1049.

Nebraska.— Hicks *v.* Union Pac. R. Co., 76 Nebr. 496, 107 N. W. 798.

New Hampshire.— Brown *v.* Boston, etc., R. Co., 73 N. H. 568, 64 Atl. 194.

New York.— Loomis *v.* Lake Shore, etc., R. Co., 182 N. Y. 380, 75 N. E. 228.

North Carolina.— McArver *v.* Southern R. Co., 129 N. C. 380, 40 S. E. 94; Hord *v.* Southern R. Co., 129 N. C. 305, 40 S. E. 69;

was the proximate cause of the injury complained of;[97] and it is error for the court to dispose of such case without the intervention of the jury,[98] as by granting a nonsuit,[99] or by directing a verdict for defendant.[1] The question, however, should not be submitted to the jury where the evidence is legally insufficient or is undisputed and is such that reasonable minds can arrive at but one conclusion therefrom, in regard to defendant's negligence,[2] and as to whether such negligence was the proximate cause of the injury;[3] but in such cases the court should of itself dispose of the case either by granting or directing a nonsuit,[4] or by

Powell *v.* Southern R. Co., 125 N. C. 370, 34 S. E. 530; Cox *v.* Norfolk, etc., R. Co., 123 N. C. 604, 31 S. E. 848.

Pennsylvania.— Holt *v.* Pennsylvania R. Co., 206 Pa. St. 356, 55 Atl. 1055; Taylor *v.* Delaware, etc., Canal Co., 113 Pa. St. 162, 8 Atl. 43, 57 Am. Rep. 446; North Pennsylvania R. Co. *v.* Kirk, 90 Pa. St. 15.

South Carolina.— Jones *v.* Charleston, etc., R. Co., 61 S. C. 556, 39 S. E. 758.

South Dakota.— Edwards *v.* Chicago, etc., R. Co., (1907) 110 N. W. 832, negligence of operatives in charge of train, which struck a pedestrian.

Texas.— Washington *v.* Missouri, etc., R. Co., 90 Tex. 314, 38 S. W. 764 [*reversing* (Civ. App. 1896) 36 S. W. 778]; Houston, etc., R. Co. *v.* Finn, (Civ. App. 1908) 107 S. W. 94 [*affirmed* in (1908) 109 S. W. 918]; Davis *v.* St. Louis Southwestern R. Co., (Civ. App. 1906) 92 S. W. 831; Hutchens *v.* St. Louis Southwestern R. Co., 40 Tex. Civ. App. 245, 89 S. W. 24; Ott *v.* Johnson, 38 Tex. Civ. App. 491, 86 S. W. 649; Texas Midland R. Co. *v.* Crowder, 25 Tex. Civ. App. 536, 64 S. W. 90; Marchand *v.* Gulf, etc., R. Co., 20 Tex. Civ. App. 1, 48 S. W. 779.

Utah.— Leak *v.* Rio Grande Western R. Co., 9 Utah 246, 33 Pac. 1045.

United States.— Sealey *v.* Southern R. Co., 151 Fed. 736, 81 C. C. A. 282.

England.— Watkins *v.* Great Western R. Co., 46 L. J. C. P. 817, 37 L. T. Rep. N. S. 193, 25 Wkly. Rep. 905.

See 41 Cent. Dig. tit. "Railroads," § 1365.

97. *Alabama.*— Duncan *v.* St. Louis, etc., R. Co., 152 Ala. 118, 44 So. 418.

Illinois.— Wabash, etc., R. Co. *v.* Peyton, 106 Ill. 534, 46 Am. Rep. 705.

Indiana.— Chicago, etc., R. Co. *v.* Pritchard, 168 Ind. 398, 79 N. E. 508, 81 N. E. 78, 9 L. R. A. N. S. 857 [*affirming* 39 Ind. App. 701, 78 N. E. 1044].

Kentucky.— Davis *v.* Louisville, etc., R. Co., 97 S. W. 1122, 30 Ky. L. Rep. 172, 99 S. W. 930, 30 Ky. L. Rep. 946.

Maryland.— Cumberland, etc., R. Co. *v.* State, 73 Md. 74, 20 Atl. 785, 25 Am. St. Rep. 571; Northern Cent. R. Co. *v.* State, 29 Md. 420, 96 Am. Dec. 545.

Minnesota.— Monahan *v.* Chicago, etc., R. Co., 88 Minn. 325, 92 N. W. 1115, holding that it was a question of fact whether a minor was injured by being thrown down by a railroad car or by falling therefrom while he was stealing a ride.

Texas.— Hutchens *v.* St. Louis Southwestern R. Co., 40 Tex. Civ. App. 245, 89 S. W. 24.

See 41 Cent. Dig. tit. "Railroads," § 1365.

98. See Noyes *v.* Southern Pac. Co., 92 Cal. 285, 28 Pac. 288, (1890) 24 Pac. 927.

99. Noyes *v.* Southern Pac. Co., 92 Cal. 285, 28 Pac. 288, (1890) 24 Pac. 927; Jones *v.* Charleston, etc., R. Co., 61 S. C. 556, 39 S. E. 758.

Where the evidence authorizes a finding that the injury was caused by the running of defendant's train, this evidence, together with the legal presumption of negligence against defendant, imposed by Ga. Code, § 3033, is sufficient to take the case to the jury where there is no evidence to rebut such presumption or to show that defendant could have avoided the injury, and it is erroneous to grant a nonsuit. Sims *v.* Western, etc., R. Co., 111 Ga. 820, 35 S. E. 696; Strom *v.* Georgia R., etc., Co., 108 Ga. 758, 33 S. E. 30; Gammage *v.* Atlanta, etc., R. Co., 97 Ga. 62, 25 S. E. 207.

1. Shelby *v.* Cincinnati, etc., R. Co., 85 Ky. 224, 3 S. W. **157**, 8 Ky. L. Rep. 928; Dyche *v.* Vicksburg, etc., R. Co., 79 Miss. 361, 30 So. 711, error to give a peremptory instruction for defendant.

2. *Delaware.*— Tully *v.* Philadelphia, etc., R. Co., 2 Pennew. 537, 47 Atl. 1019, 82 Am. St. Rep. 425.

District of Columbia.— Stewart *v.* Washington, etc., Electric R. Co., 22 App. Cas. 496.

Kansas.— Dewald *v.* Kansas City, etc., R. Co., 44 Kan. 586, 24 Pac. 1101.

Kentucky.— Louisville, etc., R. Co. *v.* McCombs, 54 S. W. 179, 21 Ky. L. Rep. 1232.

Michigan.— Jakoboski *v.* Grand Rapids, etc., R. Co., 106 Mich. 440, 64 N. W. 461.

New York.— Percey *v.* Fitchburg R. Co., 27 N. Y. Suppl. 1040 [*affirmed* in 144 N. Y. 719, 39 N. E. 858].

North Carolina.— Pharr *v.* Southern R. Co., 133 N. C. 610, 45 S. E. 1021.

Texas.— Ft. Worth, etc., R. Co. *v.* Shetter, 94 Tex. 196, 59 S. W. 533; Douglass *v.* Central Texas, etc., R. Co., 90 Tex. 125, 36 S. W. 120, 37 S. W. 1132.

United States.— *Ex p.* Stell, 22 Fed. Cas. No. 13,358, 4 Hughes 157.

See 41 Cent. Dig. tit. "Railroads," § 1365.

3. Hughes *v.* Louisville, etc., R. Co., 67 S. W. 984, 23 Ky. L. Rep. 2288; Stidham *v.* Chesapeake, etc., R. Co., 64 S. W. 510, 23 Ky. L. Rep. 907.

4. Hyde *v.* Missouri Pac. R. Co., 110 Mo. 272, 19 S. W. 483; Clegg *v.* Southern R. Co., 132 N. C. 292, 43 S. E. 836; Upton *v.* South Carolina, etc., R. Co., 128 N. C. 173, 38 S. E. 736; Morgan *v.* Pennsylvania R. Co., 209 Pa. St. 25, 58 Atl. 116.

giving a peremptory instruction directing the jury to return a verdict in favor of defendant company.[5]

(D) *Right to Go On or Near Tracks.* On the issue of defendant's duty and consequent negligence it is ordinarily a question for the jury under all the evidence whether or not the injured party was rightfully on defendant's tracks or right of way at the time and place of the accident,[6] as whether or not the use of tracks or right of way at that place had been such as to import a license or invitation from the company.[7] Where, however, the evidence is undisputed the court may determine whether or not the injured party was at the place of the accident, upon the company's express or implied invitation.[8]

(E) *Failure to Fence Railroad.* It is ordinarily a question for the jury whether the place of the accident was one which the statute required to be fenced,[9] whether the fence maintained was a sufficient fence within the meaning of the statute,[10] or whether the absence of the required fence was the cause of the injury complained of.[11]

5. Stewart *v.* Washington, etc., Electric R. Co., 22 App. Cas. (D. C.) 496; Cowley *v.* Chicago, etc., R. Co., 87 Ill. App. 123; Louisville, etc., R. Co. *v.* McCombs, 54 S. W. 179, 21 Ky. L. Rep. 1232; Givens *v.* Kentucky Cent. R. Co., 15 S. W. 1057, 12 Ky. L. Rep. 950.

Where the evidence in an action for injuries to a trespasser fails to show that the injury was wantonly, wilfully, or recklessly inflicted, a verdict may be directed for defendant. Hastings *v.* Southern R. Co., 143 Fed. 260, 74 C. C. A. 398, 5 L. R. A. N. S. 775.

A peremptory instruction for defendant is proper where under the evidence the inference that the injury was due to defendant's negligence is no stronger than that it was due to the negligence of the person injured himself, or to other causes. Hughes *v.* Louisville, etc., R. Co., 67 S. W. 984, 23 Ky. L. Rep. 2288; Stidham *v.* Chesapeake, etc., R. Co., 64 S. W. 510, 23 Ky. L. Rep. 907.

6. Hansen *v.* Southern Pac. Co., 105 Cal. 379, 38 Pac. 957.

Whether or not the party injured was a trespasser at the time and place of the accident is a question of fact for the jury. Chicago Terminal Transfer R. Co. *v.* Kotoski, 199 Ill. 383, 65 N. E. 350 [*affirming* 101 Ill. App. 300]; Chicago, etc., R. Co. *v.* Murowski, 179 Ill. 77, 53 N. E. 572 [*affirming* 78 Ill. App. 661]; Union Stock Yard, etc., Co. *v.* Goodman, 91 Ill. App. 426; Scott *v.* St. Louis, etc., R. Co., 112 Iowa 54, 83 N. W. 818.

7. *California.*— Hansen *v.* Southern Pac. Co., 105 Cal. 379, 38 Pac. 957.

Indiana.— Pittsburgh, etc., R. Co. *v.* Simons, 168 Ind. 333, 79 N. E. 911 [*affirming* (App. 1906) 76 N. E. 883].

Iowa.— Croft *v.* Chicago, etc., R. Co., 132 Iowa 687, 108 N. W. 1053.

Massachusetts.— Chenery *v.* Fitchburg R. Co., 160 Mass. 211, 35 N. E. 554, 22 L. R. A. 575.

New York.— Larkin *v.* New York, etc., R. Co., 19 N. Y. Suppl. 479.

Oregon.— Cederson *v.* Oregon R., etc., Co., 38 Oreg. 343, 62 Pac. 637, 63 Pac. 763, holding the evidence to be sufficient to go to the jury on the question whether decedent was a licensee by invitation, to whom defendant owed the duty of active vigilance to avoid injury.

South Carolina.— Sentell *v.* Southern R. Co., 70 S. C. 183, 49 S. E. 215.

Wisconsin.— Johnson *v.* Lake Superior Terminal, etc., R. Co., 86 Wis. 64, 56 N. W. 161.

United States.— Tutt *v.* Illinois Cent. R. Co., 104 Fed. 741, 44 C. C. A. 320.

8. Hammill *v.* Pennsylvania R. Co., 56 N. J. L. 370, 29 Atl. 151, 24 L. R. A. 531, holding that, when the facts are undisputed, the court may determine whether defendant railroad company invited, by implication, deceased to use a footway by the side of its track, whereon he was injured.

9. Mattes *v.* Great Northern R. Co., 100 Minn. 34, 110 N. W. 98 (whether it was practicable to fence repair shops and yards, without materially impairing the usefulness of the yards); Baltimore, etc., R. Co. *v.* Cumberland, 176 U. S. 232, 20 S. Ct. 380, 44 L. ed. 447 [*affirming* 12 App. Cas. (D. C.) 598] (holding that the question whether a steam railroad track is "approximately even with the adjacent surface" of a street in which it is laid, within the meaning of the act of congress of Jan. 26, 1887, and joint resolution of Feb. 26, 1892, requiring fences on both sides of a track approximately even with the surface, must be submitted to the jury where the track was not more than two feet two inches higher than the level of the street).

10. Ludtke *v.* Lake Shore, etc., R. Co., 24 Ohio Cir. Ct. 120, holding that in an action for injuries to a child which had strayed upon defendant's track through an opening in a fence, the question as to whether the fence is a sufficient fence to turn stock, under Rev. St. § 3324, is a mixed question of law and fact, and must be submitted to the jury.

11. Ellington *v.* Great Northern R. Co., 96 Minn. 176, 104 N. W. 827 (holding that the question whether a properly constructed fence would have prevented a child of tender years from going on the right of way is a question of fact); Hayes *v.* Michigan Cent. R. Co., 111 U. S. 228, 4 S. Ct. 369, 28 L. ed. 410 (holding that where a child playing in a public park strayed upon the railway and was injured,

(F) *Defects in Road-Bed, Tracks, and Cars.* It is also ordinarily a question for the jury, under all the circumstances, whether or not the railroad company was negligent in permitting defects in its road-bed, tracks, or cars,[12] as whether it was negligent in failing to put up a bunter or other obstruction at the end of a spur track,[13] in leaving a "frog" unblocked,[14] or in constructing and maintaining an unguarded ditch in close proximity to a highway,[15] or in the inspection of the car which caused the injury,[16] and whether its negligence in that respect was the proximate cause of the injury.[17]

(G) *Articles Projecting, Falling, or Thrown From Trains.* Whether, under all the circumstances, the railroad company was negligent in permitting the articles which caused the injury to project,[18] fall, or be thrown[19] from its train or car, and whether the employee kicking or throwing such articles was acting within the scope of his employment,[20] are ordinarily questions for the jury.

(H) *Signals and Lookouts.* So where there is sufficient evidence to go to the jury and it is conflicting or is such that reasonable minds might arrive at different conclusions therefrom, it is a question for the jury whether the place where the accident occurred was one at which the employees in charge of the engine or cars had reason to know or anticipate that persons might be on or near the tracks, and therefore at which they were required to keep a proper lookout and give proper warnings of the train's approach;[21] and whether or not such employees exercised the proper degree of care under the circumstances at the time and place of the accident in giving signals or warnings,[22] in displaying proper lights

it is a question for the jury whether the absence of a fence, required under a city ordinance, was the cause of the injury).

12. See Shaw *v.* New York, etc., R. Co., 150 Mass. 182, 22 N. E. 884.

13. Shaw *v.* New York, etc., R. Co., 150 Mass. 182, 22 N. E. 884.

14. Pittsburgh, etc., R. Co. *v.* Simons, 168 Ind. 333, 79 N. E. 911 [*affirming* (App. 1906) 76 N. E. 883]; Turner *v.* Boston, etc., R. Co., 158 Mass. 261, 33 N. E. 520.

15. Thompson *v.* New York Cent., etc., R. Co., 41 N. Y. App. Div. 78, 58 N. Y. Suppl. 193.

16. Tateman *v.* Chicago, etc., R. Co., 96 Mo. App. 448, 70 S. W. 514 (holding that whether the car had been properly inspected, and whether it could have been without breaking the seal, is for the jury); Cederson *v.* Oregon R., etc., Co., 38 Oreg. 343, 62 Pac. 637, 63 Pac. 763; Gulf, etc., R. Co. *v.* Wittnebert, (Tex. Civ. App. 1907) 104 S. W. 424 [*reversed* on other grounds in (1908) 108 S. W. 150].

17. Mattes *v.* Great Northern R. Co., 100 Minn. 34, 110 N. W. 98, holding that whether, if a railroad company had performed its duty by erecting cattle-guards at an approach to its railway yards, a child injured by going upon the yard grounds would have escaped such injury is a question for the jury.

18. Kansas Pac. R. Co. *v.* Ward, 4 Colo. 30.

19. Willis *v.* Maysville, etc., R. Co., 119 Ky. 949, 85 S. W. 716, 27 Ky. L. Rep. 459, 122 Ky. 658, 92 S. W. 604, 29 Ky. L. Rep. 178, holding that the question whether a brakeman, kicking a piece of ice from the platform of a caboose, and injuring a boy, is negligent, is for the jury.

20. Willis *v.* Maysville, etc., R. Co., 119 Ky. 949, 85 S. W. 716, 27 Ky. L. Rep. 459, 122 Ky. 658, 92 S. W. 604, 29 Ky. L. Rep. 178; Polatty *v.* Charleston, etc., R. Co., 67 S. C. 391, 45 S. E. 932, 100 Am. St. Rep. 750.

21. *Missouri.*— Eppstein *v.* Missouri Pac. R. Co., 197 Mo. 720, 94 S. W. 967, holding it to be a question for the jury whether the operatives of the locomotive had reason to expect the presence of persons on the track at that point.

New York.— Froehlich *v.* Interborough Rapid Transit Co., 120 N. Y. App. Div. 474, 104 N. Y. Suppl. 910, holding that whether it is defendant's duty, in the absence of statute, to give a signal at a curve, of the approach of its train, is a question for the jury.

South Carolina.— Sentell *v.* Southern R. Co., 70 S. C. 183, 49 S. E. 215.

Texas.— Houston, etc., R. Co. *v.* Goodman, 38 Tex. Civ. App. 175, 85 S. W. 492, holding that whether it is the duty of an engineer to sound the whistle on approaching a curve to give warning to a licensee on the track at or near the curve is a question for the jury.

Wisconsin.— Mason *v.* Chicago, etc., R. Co., 89 Wis. 151, 61 N. W. 300.

United States.— Tutt *v.* Illinois Cent. R. Co., 104 Fed. 741, 44 C. C. A. 320.

See 41 Cent. Dig. tit. "Railroads," § 1373.

22. *Georgia.*— Morris *v.* Georgia R., etc., Co., 97 Ga. 312, 22 S. E. 903, nonsuit erroneously granted.

Kentucky.— Chesapeake, etc., R. Co. *v.* Keelin, 62 S. W. 261, 22 Ky. L. Rep. 1942.

Missouri.— White *v.* Atchison, etc., R. Co., 84 Mo. App. 411.

Texas.— Over *v.* Missouri, etc., R. Co., (Civ. App. 1903) 73 S. W. 535.

West Virginia.— Nuzum *v.* Pittsburgh, etc., R. Co., 30 W. Va. 228, 4 S. E. 242, finding for defendant held erroneously directed.

on the engine or cars,[23] or in keeping a proper lookout for persons on or in dangerous proximity to the track.[24]

(i) *Rate of Speed and Control of Train.* It is ordinarily a question for the jury

United States.— Northern Pac. R. Co. *v.* Craft, 69 Fed. 124, 16 C. C. A. 175.

See 41 Cent. Dig. tit. "Railroads," § 1373.

Illustrations.— It is a question for the jury where, during a strike of the employees of a railroad company, a militiaman was, at the company's request, placed on guard in its yard, and the cars in the yard were not moved for twenty-seven hours after he arrived at the yard, whether defendant, in moving its cars without warning to him, so that he was struck by them, used ordinary care (O'Harra *v.* New York Cent., etc., R. Co., 92 Hun (N. Y.) 56, 36 N. Y. Suppl. 567 [*affirmed* in 153 N. Y. 690, 48 N. E. 1106]); whether an engineer was negligent in running his train in the night across a bridge ordinarily used in part by foot passengers, so as to run alongside of a pedestrian without any warning, causing such pedestrian, in his fright, to collide with the train (Texas, etc., R. Co. *v.* Watkins, 88 Tex. 20, 29 S. W. 232); whether it was negligence to run without warning along an open way along a railway track upon which children are permitted to stroll (Ficker *v.* Cleveland, etc., R. Co., 9 Ohio S. & C. Pl. Dec. 804, 6 Ohio N. P. 36, 7 Ohio N. P. 600); or whether the failure of the engineer to ring the bell loud enough to give reasonable warning constituted negligence (Wabash R. Co. *v.* Fox, 20 Ohio Cir. Ct. 440, 11 Ohio Cir. Dec. 148).

While a railroad company is only required by statute to ring a bell or sound a whistle at a public highway, yet it is within the province of the jury to determine whether under the circumstances of the case it is not negligence not to give such a signal at another point. Winslow *v.* Boston, etc., R. Co., 11 N. Y. St. 831.

Whether in fact any signals were given at all or not is a question for the jury where the evidence is conflicting. McMarshall *v.* Chicago, etc., R. Co., 80 Iowa 757, 45 N. W. 1065, 20 Am. St. Rep. 445; Burke *v.* Brooklyn Wharf, etc., Co., 86 N. Y. App. Div. 296, 83 N. Y. Suppl. 795.

Crossing signals.— Whether the failure to give the statutory signals required for crossings is negligence as to persons on or near the tracks a short distance beyond the crossing has been held a question for the jury. Missouri, etc., R. Co. *v.* Saunders, (Tex. Civ. App. 1907) 103 S. W. 457 [*reversed* on other grounds in (1908) 106 S. W. 321]; Galveston, etc., R. Co. *v.* Levy, 35 Tex. Civ. App. 107, 79 S. W. 879; Texas, etc., R. Co. *v.* Short, (Tex. Civ. App. 1900) 58 S. W. 56.

Under a Tennessee statute, Shannon Code, § 1574, subd. 3, requiring the bell or whistle to be sounded on the approach of a railroad train to a "city or town," etc., which has been held to mean an "incorporated town," the fact of incorporation is a question for the jury, where the evidence is sufficient merely to raise a presumption of incorporation; and an instruction is erroneous which makes defendant liable if it fails to give the required signals, without requiring the jury to first find the fact of incorporation. Felton *v.* Newport, 92 Fed. 470, 34 C. C. A. 470.

23. Baltimore, etc., R. Co. *v.* Cumberland, 12 App. Cas. (D. C.) 598 (holding that whether a light displayed on the advancing end of defendant's train of cars was such a light as was required by a municipal ordinance is a question for the jury); Pennsylvania Co. *v.* Conlan, 101 Ill. 93 (holding that what is a "brilliant and conspicuous light," within the meaning of an ordinance, requiring such a light to be placed on locomotives, is a question for the jury).

24. *Missouri.*— Morgan *v.* Wabash R. Co., 159 Mo. 262, 60 S. W. 195; Chamberlain *v.* Missouri Pac. R. Co., 133 Mo. 587, 33 S. W. 437, 34 S. W. 842; Frick *v.* St. Louis, etc., R. Co., 75 Mo. 595, holding that a demurrer to evidence would not be sustained, but that the jury might find for plaintiff if they believed that the trainmen could, by the exercise of ordinary care, have seen plaintiff in time to have avoided injuring her.

New York.— Doll *v.* Lehigh Valley R. Co., 52 N. Y. App. Div. 575, 65 N. Y. Suppl. 454, nonsuit held erroneously granted.

North Carolina.— Lloyd *v.* Albemarle, etc., R. Co., 118 N. C. 1010, 24 S. E. 805, 54 Am. St. Rep. 764; Deans *v.* Wilmington, etc., R. Co., 107 N. C. 686, 12 S. E. 77, 22 Am. St. Rep. 902.

West Virginia.— Gunn *v.* Ohio River R. Co., 36 W. Va. 165, 14 S. E. 465, 32 Am. St. Rep. 842.

Wisconsin.— Townley *v.* Chicago, etc., R. Co., 53 Wis. 626, 11 N. W. 55.

United States.— Northern Pac. R. Co. *v.* Craft, 69 Fed. 124, 16 C. C. A. 175; Chicago, etc., R. Co. *v.* McArthur, 53 Fed. 464, 3 C. C. A. 594, verdict for defendant held properly refused.

See 41 Cent. Dig. tit. "Railroads," § 1373.

That a person was killed by a railway train, although the track was straight and clear, does not show a case of negligence sufficient to be submitted to a jury, where there is nothing to show how long he was on the track before being struck. Ward *v.* Southern Pac. Co., 25 Oreg. 433, 36 Pac. 166, 23 L. R. A. 715.

Under a Tennessee statute, Shannon Code, § 1574, subd. 4, requiring railroad companies to keep a lookout on all locomotives, and that "when any person . . . appears upon the road," etc., it is a question for the jury, where the evidence is such that reasonable minds might arrive at different conclusions, whether the party injured or killed had "appeared upon the road," and whether the railroad company discharged its duty of maintaining a proper lookout, and took the other prescribed

whether or not the train or cars causing the injury were running at an excessive or unlawful rate of speed at the time and place of the accident,[25] or whether, under the circumstances, the rate of speed at which it was running was negligent,[26] and whether such negligence was the proximate cause of the injury,[27] or whether the train or car was under proper control.[28] The question, however, as to whether a statute regulating speed applies to a particular place is for the court.[29]

(J) *Precautions as to Persons Seen On or Near Tracks.* Where the evidence is conflicting or is such that reasonable minds might draw different conclusions therefrom, it is a question for the jury whether the railroad company's servants in charge of the train or cars which caused the injury were notified or discovered,[30]

precautions. Felton *v.* Newport, 105 Fed. 332, 44 C. C. A. 530.

25. Cannon *v.* Georgia Cent. R. Co., 110 Ga. 139, 35 S. E. 311; Illinois Cent. R. Co. *v.* Keller, 77 Ill. App. 474, holding that, the evidence being conflicting, the question whether a train was run at a rate of speed prohibited by an ordinance is for the jury.

26. *Georgia.*— Shaw *v.* Georgia R. Co., 127 Ga. 8, 55 S. E. 960; Cannon *v.* Georgia Cent. R. Co., 110 Ga. 139, 35 S. E. 311.

Kentucky.— Illinois Cent. R. Co. *v.* Murphy, 123 Ky. 787, 97 S. W. 729, 30 Ky. L. Rep. 93, 11 L. R. A. N. S. 352 (holding that the question as to whether the speed of a train running through a populous community, where the track is commonly known to be used as a footway, is so great as to amount to negligence in any particular case, as against a trespasser, is for the jury); Rader *v.* Louisville, etc., R. Co., 104 S. W. 774, 31 Ky. L. Rep. 1105.

Louisiana.— Sundmaker *v.* Yazoo, etc., R. Co., 106 La. 111, 30 So. 285, holding that it is a question of fact, to be determined from the evidence, whether a railway train, moving within municipal limits, was being run at a speed unsafe and dangerous to the general public, so much so as to amount in law to an omission to use reasonable care to avoid accidents.

Missouri.— Haley *v.* Missouri Pac. R. Co., 197 Mo. 15, 93 S. W. 1120, 114 Am. St. Rep. 743; Frick *v.* St. Louis, etc., R. Co., 75 Mo. 595.

Texas.— Gulf, etc., R. Co. *v.* Wagley, 15 Tex. Civ. App. 308, 40 S. W. 538.

See 41 Cent. Dig. tit. "Railroads," § 1374.

In the absence of a statute or ordinance on the subject the question whether or not a given rate of speed of a train running through a populous city is negligent is ordinarily one of fact depending upon the conditions surrounding the act. Haley *v.* Missouri Pac. R. Co., 197 Mo. 15, 93 S. W. 1120, 114 Am. St. Rep. 743; Frick *v.* St. Louis, etc., R. Co., 75 Mo. 595.

Whether a special train can be run without negligence at such a rate as to make it difficult to check its speed within a reasonable time and distance is a question for the jury. Marcott *v.* Marquette, etc., R. Co., 47 Mich. 1, 10 N. W. 53.

27. Payne *v.* Chicago, etc., R. Co., 129 Mo. 405, 30 S. W. 148, 31 S. W. 885.

28. Cannon *v.* Georgia Cent. R. Co., 110 Ga. 129, 35 S. E. 311; Pittsburg, etc., R. Co. *v.* Bovard, 223 Ill. 176, 79 N. E. 128 [*affirming* 121 Ill. App. 49] (failure of employee to be on a caboose running loose); Shelby *v.* Cincinnati, etc., R. Co., 85 Ky. 224, 3 S. W. 157, 8 Ky. L. Rep. 928 (peremptory instruction for defendant held erroneous).

29. Savannah, etc., R. Co. *v.* Daniels, 90 Ga. 608, 17 S. E. 647, 20 L. R. A. 416, holding that the question whether Code, § 1689*p*, requiring railroad trains to "slow down to a speed of not more than four miles an hour before running on or crossing any drawbridge over a stream which is regularly navigated by vessels," so as to affect the liability of the railroad company for running over a boy on a trestle leading up to a drawbridge, applies to such trestles and approaches, is a question for the court, and not for the jury.

30. *Alabama.*—Alabama Great Southern R. Co. *v.* Burgess, 114 Ala. 587, 22 So. 169, children on the track.

Arkansas.— Chicago, etc., R. Co. *v.* Bunch, 82 Ark. 522, 102 S. W. 369.

Kansas.— Johnston *v.* Atchison, etc., R. Co., 56 Kan. 263, 43 Pac. 228.

Kentucky.— Becker *v.* Louisville, etc., R. Co., 110 Ky. 474, 61 S. W. 997, 22 Ky. L. Rep. 1893, 96 Am. St. Rep. 459, 53 L. R. A. 267; Wilmuth *v.* Illinois Cent. R. Co., 76 S. W. 193, 25 Ky. L. Rep. 671; Vanarsdall *v.* Louisville, etc., R. Co., 65 S. W. 858, 23 Ky. L. Rep. 1666.

Missouri.— Frick *v.* St. Louis, etc., R. Co., 75 Mo. 595; Crow *v.* Wabash, etc., R. Co., 23 Mo. App. 357.

North Carolina.— McArver *v.* Southern R. Co., 129 N. C. 380, 40 S. E. 94.

Texas.— Texas, etc., R. Co. *v.* Scarborough, (Civ. App. 1907) 104 S. W. 408 [*affirmed* in (1908) 108 S. W. 804]; Texas, etc., R. Co. *v.* Patterson, (Civ. App. 1907) 102 S. W. 138.

See 41 Cent. Dig. tit. "Railroads," §§ 1375, 1376.

A nonsuit is improper where the evidence shows that plaintiff's decedent was killed on a railroad track at a place other than a public crossing or a traveled place, and that the engineer saw the deceased on the track before his engine struck him. Haltiwanger *v.* Columbia, etc., R. Co., 64 S. C. 7, 41 S. E. 810.

Evidence held sufficient to raise the issue of discovered peril, and to warrant its submission to the jury see Gulf, etc., R. Co. *v.* Miller, 35 Tex. Civ. App. 116, 79 S. W. 1109 [*affirmed* in 98 Tex. 270, 83 S. W. 182];

or by the exercise of ordinary care could have discovered the injured party's peril in time to avoid the injury,[31] and whether or not after discovering his peril they could have avoided the injury by the exercise of due care, and hence as to whether or not such care was exercised,[32] as whether thereafter they used all proper precautions to give timely warning of the train's or car's approach,[33] or to check or stop it.[34] Where, however, the evidence is undisputed or is legally insufficient,

Texas, etc., R. Co. *v.* Yarbrough, (Tex. Civ. App. 1903) 73 S. W. 844.

Whether the injured party was in a place of peril, and whether the engineer or other employee should have recognized it as such, are questions of fact. White *v.* New York Cent., etc., R. Co., 20 N. Y. Suppl. 6.

The evidence requires a submission to the jury of the liability of the company, where it shows a failure of a station agent notified of the presence on the track of a trespasser in a state of helpless intoxication to inform the engineer thereof. Glinn *v.* Louisville, etc., R. Co., 105 S. W. 437, 32 Ky. L. Rep. 346.

31. Plemmons *v.* Southern R. Co., 140 N. C. 286, 52 S. E. 953; McArver *v.* Southern R. Co., 129 N. C. 380, 40 S. E. 94; Davis *v.* St. Louis Southwestern R. Co., (Tex. Civ. App. 1906) 92 S. W. 831. And see *supra*, X, E, 8, e, (I), (H).

32. *Alabama.*—Alabama Great Southern R. Co. *v.* Burgess, 114 Ala. 587, 22 So. 169; Glass *v.* Memphis, etc., R. Co., 94 Ala. 581, 10 So. 215, general charge in favor of defendant held properly refused.

Georgia.— Gammage *v.* Atlanta, etc., R. Co., 97 Ga. 62, 25 S. E. 207, nonsuit erroneously granted.

Iowa.— Neet *v.* Burlington, etc., R. Co., 106 Iowa 248, 76 N. W. 677.

Kentucky.— Louisville, etc., R. Co. *v.* Colman, 86 Ky. 556, 6 S. W. 438, 8 S. W. 875, 10 Ky. L. Rep. 81 (refusal of peremptory instruction for defendant held not error); Wren *v.* Louisville, etc., R. Co., 20 S. W. 215, 14 Ky. L. Rep. 324 (instruction to find for defendant held error).

Mississippi.— Watley *v.* Mobile, etc., R. Co., (1891) 9 So. 445 (peremptory instruction for defendant held error); Jamison *v.* Illinois Cent. R. Co., 63 Miss. 33.

Missouri.— Mann *v.* Missouri, etc., R. Co., 123 Mo. App. 486, 100 S. W. 566; Crow *v.* Wabash, etc., R. Co., 23 Mo. App. 357.

New York.— Spooner *v.* Delaware, etc., R. Co., 115 N. Y. 22, 21 N. E. 696 (holding that the question of an engineer's negligence is for the jury, although defendant's witnesses testify that plaintiff was playing on the track, and, after being driven off by a warning whistle, came back on, immediately in front of the engine, which was stopped as quickly as possible); Swift *v.* Staten Island Rapid Transit R. Co., 1 Silv. Sup. 375, 5 N. Y. Suppl. 316 [*affirmed* in 123 N. Y. 645, 25 N. E. 378].

North Carolina.— Plemmons *v.* Southern R. Co., 140 N. C. 286, 52 S. E. 953; Cox *v.* Norfolk, etc., R. Co., 126 N. C. 103, 35 S. E. 237.

Texas.— Davis *v.* St. Louis Southwestern R. Co., (Tex. Civ. App. 1906) 92 S. W. 831; Texas, etc., R. Co. *v.* Meeks, (Civ. App. 1903) 74 S. W. 329.

Virginia.— Norfolk, etc., R. Co. *v.* Dean, 107 Va. 505, 59 S. E. 389.

See 41 Cent. Dig. tit. "Railroads," §§ 1375, 1376.

33. Clemans *v.* Chicago, etc., R. Co., 128 Iowa 394, 104 N. W. 431; Illinois Cent. R. Co. *v.* Hocker, 55 S. W. 438, 21 Ky. L. Rep. 1398; Wilmurth *v.* Illinois Cent. R. Co., 76 S. W. 193, 25 Ky. L. Rep. 671; Louisville, etc., R. Co. *v.* Tinkham, 44 S. W. 439, 19 Ky. L. Rep. 1784; Texas Midland R. Co. *v.* Byrd, 41 Tex. Civ. App. 164, 90 S. W. 185.

34. *Alabama.*— Kansas City, etc., R. Co. *v.* Ferguson, 143 Ala. 512, 39 So. 348, refusal to direct a verdict held not error.

Arkansas.— Little Rock, etc., R. Co. *v.* Barker, 39 Ark. 491.

Georgia.— Clay *v.* Macon, etc., R. Co., 111 Ga. 839, 36 S. E. 233.

Illinois.— Martin *v.* Chicago, etc., R. Co., 194 Ill. 138, 62 N. E. 599 [*reversing* 92 Ill. App. 133].

Iowa.— Clemans *v.* Chicago, etc., R. Co., 128 Iowa 394, 104 N. W. 431; Walters *v.* Chicago, etc., R. Co., 41 Iowa 71, holding that whether or not the failure to stop a train when the engineer saw an infant playing in the vicinity of a railway track constitutes negligence is a question of fact to be determined by the jury.

Kentucky.— Wilmurth *v.* Illinois Cent. R. Co., 76 S. W. 193, 25 Ky. L. Rep. 671 (direction of verdict in favor of defendant held error); Louisville, etc., R. Co. *v.* Tinkham, 44 S. W. 439, 19 Ky. L. Rep. 1784.

Missouri.— Scullin *v.* Wabash R. Co., 184 Mo. 695, 83 S. W. 760; Reardon *v.* Missouri Pac. R. Co., 114 Mo. 384, 21 S. W. 731; Smith *v.* Wabash R. Co., 129 Mo. App. 413, 107 S. W. 22; Lang *v.* Missouri Pac. R. Co., 115 Mo. App. 582, 91 S. W. 989.

Nebraska.— O'Donnell *v.* Chicago, etc., R. Co., 65 Nebr. 612, 91 N. W. 566, holding that whether or not it is negligence for a locomotive engineer to fail to stop his train, moving at not exceeding three miles an hour, on seeing a boy of eight years jumping on and off a ladder at the side of a freight car, is a question for the jury.

New York.— Thayer *v.* New York Cent., etc., R. Co., 117 N. Y. App. Div. 318, 102 N. Y. Suppl. 135; Remer *v.* Long Island R. Co., 36 Hun 253.

Texas.— Texas, etc., R. Co. *v.* Scarborough, (Civ. App. 1907) 104 S. W. 408 [*affirmed* in (1908) 108 S. W. 804].

United States.— Baltimore, etc., R. Co. *v.* Hellenthal, 88 Fed. 116, 31 C. C. A. 414.

See 41 Cent. Dig. tit. "Railroads," §§ 1375, 1376.

such questions should not be submitted to the jury;[35] but in such cases the court should dispose of such questions without its intervention, as by nonsuit,[36] or by directing a verdict for defendant.[37]

(K) *Contributory Negligence* — (1) IN GENERAL. The question of contributory negligence or due care should be submitted to the jury, with proper instructions, where the evidence is sufficient to justify the jury in finding for or against such negligence, but is conflicting or is such that reasonable minds might arrive at different conclusions therefrom,[38] and in such a case it is error to withdraw it

35. Southern R. Co. *v.* Stewart, 153 Ala. 133, 45 So. 51; Williams *v.* Southern Pac. R. Co., 72 Cal. 120, 13 Pac. 219; Louisville, etc., R. Co. *v.* McCombs, 54 S. W. 179, 21 Ky. L. Rep. 1232 (holding that where the injury to plaintiff could not possibly have been averted by defendant after he was placed in peril, it is error to submit that question to the jury); Texas, etc., R. Co. *v.* Ball, 96 Tex. 622, 75 S. W. 4 [*reversing* on other grounds (Civ. App. 1903) 73 S. W. 420]; Missouri, etc., R. Co. *v.* Harrison, 44 Tex. Civ. App. 58, 99 S. W. 124.

Evidence held insufficient to justify its submission to the jury on the theory that the persons in charge of the engine saw deceased's peril in time to have averted the injury by the exercise of ordinary care see Dorsey *v.* Louisville, etc., R. Co., 80 S. W. 1131, 26 Ky. L. Rep. 232; Baltimore, etc., R. Co. *v.* State, 71 Md. 590, 18 Atl. 969; Tull *v.* St. Louis Southwestern R. Co., (Tex. Civ. App. 1905) 87 S. W. 910; Gulf, etc., R. Co. *v.* Johnson, (Tex. Civ. App. 1902) 67 S. W. 1040, holding that the question whether employees of defendant railroad company managing and operating the engine when it struck plaintiff saw him, or by the exercise of ordinary care could have seen him, in time to avoid the accident, as alleged in the complaint, is improperly left to the jury on testimony merely that an employee who was not an officer or manager, and had no control over or anything to do with the engine, saw plaintiff near the place of the accident a short time before it occurred.

36. Shaw *v.* Missouri Pac. R. Co., 104 Mo. 648, 16 S. W. 832; Whitesides *v.* Southern R. Co., 128 N. C. 229, 38 S. E. 878.

37. Bouwmeester *v.* Grand Rapids, etc., R. Co., 67 Mich. 87, 34 N. W. 414; Kelley *v.* Gulf, etc., R. Co., (Tex. Civ. App. 1907) 101 S. W. 1166, holding that where there is an entire absence of evidence that defendant's engineer discovered plaintiff's peril in time to avoid his injury, and it is conclusively shown that plaintiff was guilty of contributory negligence, which was the direct cause of his injury, a peremptory instruction for defendant is proper.

A verdict in favor of the railroad company, in an action against it by an administrator, is properly directed where the evidence shows that deceased was a trespasser walking on the track, that defendant's servants gave warning of the approach of the train as soon as they saw him, and did all they could to stop the train when they saw that instead of stepping from the track, as he might have done, he merely increased his speed and ran ahead of the train until it overtook him. Bartlett *v.* Wabash R. Co., 220 Ill. 163, 77 N. E. 96.

Where it is uncontradicted that the engineer and fireman did all within their power to stop the train on discovering the injured person's peril, and there is nothing from which the contrary could be inferred, an affirmative charge should be given for the company. Harris *v.* Nashville, etc., R. Co., (Ala. 1907) 44 So. 962.

38. *Alabama.*— Stringer *v.* Alabama Mineral R. Co., 99 Ala. 397, 13 So. 75; Alabama Great Southern R. Co. *v.* Chapman, 80 Ala. 615, 2 So. 738.

Arizona.—Arizona, etc., R. Co. *v.* Nevitt, 8 Ariz. 56, 68 Pac. 550.

Arkansas.— St. Louis Southwestern R. Co. *v.* Graham, 83 Ark. 61, 102 S. W. 700.

California.— Noyes *v.* Southern Pac. R. Co., 92 Cal. 285, 28 Pac. 288, (1890) 24 Pac. 927.

Colorado.— Kansas Pac. R. Co. *v.* Ward, 4 Colo. 30.

Illinois.— Lake Shore, etc., R. Co. *v.* Enright, 227 Ill. 403, 81 N. E. 374 [*affirming* 129 Ill. App. 223]; Elgin, etc., R. Co. *v.* Thomas, 215 Ill. 158, 74 N. E. 109; Chicago, etc., R. Co. *v.* Smith, 180 Ill. 453, 54 N. E. 325 [*affirming* 77 Ill. App. 492]; Pittsburgh, etc., R. Co. *v.* Callaghan, 157 Ill. 406, 41 N. E. 909 [*affirming* 50 Ill. App. 676]; Kingma *v.* Chicago, etc., R. Co., 85 Ill. App. 138.

Kansas.— Hurdle *v.* Missouri Pac. R. Co., 73 Kan. 769, 85 Pac. 287; Chicago Great Western R. Co. *v.* Troup, 69 Kan. 854, 76 Pac. 859.

Kentucky.— Oliver *v.* Roach, 102 S. W. 274, 31 Ky. L. Rep. 284; McCabe *v.* Maysville, etc., R. Co., 89 S. W. 683, 28 Ky. L. Rep. 536.

Michigan.— Grand Rapids, etc., R. Co. *v.* Martin, 41 Mich. 667, 3 N. W. 173.

Minnesota.— Mattes *v.* Great Northern R. Co., 95 Minn. 386, 104 N. W. 234.

Mississippi.— Kansas City, etc., R. Co. *v.* Chiles, 86 Miss. 361, 38 So. 498.

Missouri.— Haley *v.* Missouri Pac. R. Co., 197 Mo. 15, 93 S. W. 1120, 114 Am. St. Rep. 743; Mockowik *v.* Kansas City, etc., R. Co., 196 Mo. 550, 94 S. W. 256; Scoville *v.* Hannibal, etc., R. Co., 81 Mo. 434.

New Hampshire.— Minot *v.* Boston, etc., R. Co., 74 N. H. 230, 66 Atl. 825; Brown *v.* Boston, etc., R. Co., 73 N. H. 568, 64 Atl. 194.

New York.— Loomis *v.* Lake Shore, etc., R. Co., 182 N. Y. 380, 75 N. E. 228; Wood *v.* New York Cent., etc., R. Co., 93 N. Y. App. Div. 53, 86 N. Y. Suppl. 817; McCarty *v.*

from the jury,[39] as by granting or directing a nonsuit.[40] But on the other hand if the evidence is undisputed and is such that but one inference can be drawn from it by reasonable minds, the question whether or not the injured party was guilty of contributory negligence becomes one of law for the determination of the court,[41] and it is error to submit it to the jury; but the court should dispose of it, as by directing or granting a verdict for defendant.[42] In determining whether or not plaintiff, because of his own negligence, has a case upon which to go to the jury, defendant's testimony, where controverted, cannot be considered.[43] In such case plaintiff is entitled to the full force of all uncontroverted facts and to all his controverted evidence, and is to be allowed every reasonable and favorable inference of fact deducible from all the evidence.[44]

(2) CHILDREN AND OTHERS UNDER DISABILITY. It is ordinarily a question for the jury whether a child, which is injured on or near railroad tracks, exercised such care and prudence under the circumstances as would reasonably be expected of it, regard being had to its age and condition.[45] It is also ordinarily a ques-

New York Cent., etc., R. Co., 73 N. Y. App. Div. 34, 76 N. Y. Suppl. 321; Doll *v.* Lehigh Valley R. Co., 52 N. Y. App. Div. 575, 65 N. Y. Suppl. 454; Thompson *v.* New York Cent., etc., R. Co., 41 N. Y. App. Div. 78, 58 N. Y. Suppl. 193; Remer *v.* Long Island R. Co., 48 Hun 352, 1 N. Y. Suppl. 124 [*affirmed* in 113 N. Y. 669, 21 N. E. 1116].

Pennsylvania.— Holt *v.* Pennsylvania R. Co., 206 Pa. St. 356, 55 Atl. 1055; North Pennsylvania R. Co. *v.* Kirk, 90 Pa. St. 15.

Texas.— Gulf, etc., R. Co. *v.* Matthews, 99 Tex. 160, 88 S. W. 192; Missouri, etc., R. Co. *v.* Brown, (Civ. App. 1907) 101 S. W. 464; Texas Midland R. Co. *v.* Byrd, 41 Tex. Civ. App. 164, 90 S. W. 185; Gulf, etc., R. Co. *v.* Matthews, (Civ. App. 1905) 89 S. W. 983 [*reversed* on other grounds in 100 Tex. 63, 93 S. W. 1068]; Hutchens *v.* St. Louis Southwestern R. Co., 40 Tex. Civ. App. 245, 89 S. W. 24; International, etc., R. Co. *v.* Quinones, (Civ. App. 1904) 81 S. W. 757; Missouri, etc., R. Co. *v.* Owens, (Civ. App. 1903) 75 S. W. 579; Over *v.* Missouri, etc., R. Co., (Civ. App. 1903) 73 S. W. 535; Texas Midland R. Co. *v.* Crowder, 25 Tex. Civ. App. 536, 64 S. W. 90; Missouri, etc., R. Co. *v.* Cardena, 22 Tex. Civ. App. 300, 54 S. W. 312; Gulf, etc., R. Co. *v.* Wagley, 15 Tex. Civ. App. 308, 40 S. W. 538.

United States.— Sealey *v.* Southern R. Co., 151 Fed. 736, 81 C. C. A. 282; Thompson *v.* Northern Pac. R. Co., 93 Fed. 384, 35 C. C. A. 357.

See 41 Cent. Dig. tit. "Railroads," § 1377.

Crossing in front of train.— Where, in an action for injuries received while attempting to cross immediately in front of a train, the evidence is contradictory on the question whether the train was or was not in motion, the court may properly leave that question to the jury, and instruct them that if they find the train was then in motion, their verdict shall be for defendant. Conway *v.* Troy, etc., R. Co., 1 N. Y. St. 587.

Dangerous path.— Where the path by the side of defendant's railroad track on which plaintiff was traveling when struck by defendant's train was not at the time obviously dangerous, whether plaintiff was negligent in going that way, instead of some other equally as convenient, is for the jury. Missouri, etc., R. Co. *v.* Brown, (Tex. Civ. App. 1907) 101 S. W. 464.

39. Hicks *v.* Union Pac. R. Co., 76 Nebr. 496, 107 N. W. 798.

40. Noyes *v.* Southern Pac. R. Co., 92 Cal. 285, 28 Pac. 288, (1890) 24 Pac. 927.

41. Mockowik *v.* Kansas City, etc., R. Co., 196 Mo. 550, 94 S. W. 256; Haass *v.* Galveston, etc., R. Co., 24 Tex. Civ. App. 135, 57 S. W. 855.

42. Wade *v.* Louisville, etc., R. Co., 54 Fla. 277, 45 So. 472; McClaren *v.* Indianapolis, etc., R. Co., 83 Ind. 319; Gallagher *v.* Northern Pac. R. Co., 94 Minn. 64, 101 N. W. 942; Haass *v.* Galveston, etc., R. Co., 24 Tex. Civ. App. 135, 57 S. W. 855; Kuehn *v.* Missouri, etc., R. Co., 10 Tex. Civ. App. 649, 32 S. W. 88.

43. Mockowik *v.* Kansas City, etc., R. Co., 196 Mo. 550, 94 S. W. 256.

44. Mockowik *v.* Kansas City, etc., R. Co., 196 Mo. 550, 94 S. W. 256.

45. *California.*— Hynes *v.* San Francisco, etc., R. Co., 65 Cal. 316, 4 Pac. 28, 31.

Delaware.— Tully *v.* Philadelphia, etc., R. Co., 2 Pennew. 537, 47 Atl. 1019, 82 Am. St. Rep. 425.

Massachusetts.— O'Connor *v.* Boston, etc., R. Corp., 135 Mass. 352.

Minnesota.— Monahan *v.* Chicago, etc., R. Co., 88 Minn. 325, 92 N. W. 1115; Hepfel *v.* St. Paul, etc., R. Co., 49 Minn. 263, 51 N. W. 1049.

Mississippi.—Illinois Cent. R. Co. *v.* Varnadore, (1894) 15 So. 933.

Missouri.—Anderson *v.* Union Terminal R. Co., 161 Mo. 411, 61 S. W. 874; Tobin *v.* Missouri Pac. R. Co., (1891) 18 S. W. 996.

New York.— Corcoran *v.* New York El. R. Co., 19 Hun 368.

Ohio.— Ficker *v.* Cleveland, etc., R. Co., 9 Ohio S. & C. Pl. Dec. 804, 7 Ohio N. P. 600.

South Dakota.— Edwards *v.* Chicago, etc., R. Co., (1907) 110 N. W. 832, boy seven years old struck while walking on the track.

Wisconsin.— Whalen *v.* Chicago, etc., R. Co., 75 Wis. 654, 44 N. W. 849.

See 41 Cent. Dig. tit. "Railroads," § 1378.

Whether the injured child had sufficient discretion to be guilty of contributory negli-

tion for the jury whether or not a person hard of hearing,[46] or otherwise physically disabled, exercised proper care and precaution at the time and place of the injury.[47] Whether or not the injured party was intoxicated and unable to care for himself at the time is ordinarily a question of fact.[48]

(3) Looking or Listening. Where the evidence is conflicting or is such that different inferences might be drawn therefrom, whether or not the party injured exercised due care in looking or listening for the approaching train or car at the time of the accident is a question for the jury;[49] and it is error for the court to withdraw the question from their consideration.[50] Where, however, the evidence is undisputed and is such that but one conclusion can be reasonably drawn therefrom, it becomes a question of law for the court,[51] and it may be justified in directing a verdict for defendant.[52]

(4) Acts in Emergencies. Whether or not the injured party exercised due care and prudence to extricate himself from a position of sudden and unexpected peril is usually a question for the jury under all the circumstances.[53]

gence is a question for the jury. Davis *v.* St. Louis Southwestern R. Co., (Tex. Civ. App. 1906) 92 S. W. 831; St. Louis, etc., R. Co. *v.* Shifflet, (Tex. Civ. App. 1900) 56 S. W. 697.

46. Louisville, etc., R. Co. *v.* McCombs, 54 S. W. 179, 21 Ky. L. Rep. 1232; McKeown *v.* South Carolina, etc., R. Co., 68 S. C. 483, 47 S. E. 713.

47. See Kuehn *v.* Missouri, etc., R. Co., 10 Tex. Civ. App. 649, 32 S. W. 88.

48. Hankerson *v.* Southwestern R. Co., 59 Ga. 593; Northern Pac. R. Co. *v.* Craft, 69 Fed. 124, 16 C. C. A. 175.

49. *Alabama.*— Stringer *v.* Alabama Mineral R. Co., 99 Ala. 397, 13 So. 75.

Illinois.—Illinois Terminal R. Co. *v.* Mitchell, 214 Ill. 151, 73 N. E. 449; Illinois Cent. R. Co. *v.* Johnson, 123 Ill. App. 300 [*affirmed* in 221 Ill. 42, 77 N. E. 592]; Chicago, etc., R. Co. *v.* Jennings, 89 Ill. App. 335; Kingma *v.* Chicago, etc., R. Co., 85 Ill. App. 138.

Iowa.— Booth *v.* Union Terminal R. Co., 126 Iowa 8, 101 N. W. 147.

Kentucky.— Perkins *v.* Chesapeake, etc., R. Co., 123 Ky. 229, 94 S. W. 636, 29 Ky. L. Rep. 660.

New York.— Ominger *v.* New York Cent., etc., R. Co., 4 Hun 159, 6 Thomps. & C. 498; Collins *v.* New York, etc., R. Co., 55 N. Y. Super. Ct. 31, 8 N. Y. St. 164 [*affirmed* in 112 N. Y. 665, 20 N. E. 413].

North Carolina.— Ellerbe *v.* Carolina Cent. R. Co., 118 N. C. 1024, 24 S. E. 808.

Ohio.— Balser *v.* Chicago, etc., R. Co., 9 Ohio S. & C. Pl. Dec. 523, 7 Ohio N. P. 482.

Texas.— Gulf, etc., R. Co. *v.* Miller, 35 Tex. Civ. App. 116, 79 S. W. 1109 [*affirmed* in 98 Tex. 270, 83 S. W. 182]; Lumsden *v.* Chicago, etc., R. Co., 31 Tex. Civ. App. 604, 73 S. W. 428; Law *v.* Missouri, etc., R. Co., 29 Tex. Civ. App. 134, 67 S. W. 1025; Texas, etc., R. Co. *v.* Phillips, (Civ. App. 1896) 37 S. W. 620.

Wisconsin.— Johnson *v.* Lake Superior Terminal, etc., R. Co., 86 Wis. 64, 56 N. W. 161.

See 41 Cent. Dig. tit. "Railroads," § 1379.

[X, E, 8, e, (I), (K), (2)]

Whether a person injured by having his foot caught in a frog at a switch saw the frog, and knew it was dangerous, before stepping on it, or whether he did not see it until after he was caught, is for the jury. Illinois Cent. R. Co. *v.* Crockett, 79 S. W. 235, 25 Ky. L. Rep. 1989.

50. Illinois Terminal R. Co. *v.* Mitchell, 214 Ill. 151, 73 N. E. 449, holding that defendant was not entitled to a peremptory instruction.

51. Lamport *v.* Lake Shore, etc., R. Co., 142 Ind. 269, 41 N. E. 586; Keller *v.* Erie R. Co., 98 N. Y. App. Div. 550, 100 N. Y. App. Div. 509, 90 N. Y. Suppl. 236 [*affirmed* in 183 N. Y. 67, 75 N. E. 965].

52. Lamport *v.* Lake Shore, etc., R. Co., 142 Ind. 269, 41 N. E. 586 (holding that where, in an action against a railroad company for the death of a person on its track, there is evidence that the deceased could have seen the train in time to have avoided the accident, which is not overcome, it is proper to direct a verdict for defendant); Frech *v.* Philadelphia, etc., R. Co., 39 Md. 574; Lake Shore, etc., R. Co. *v.* Harris, 23 Ohio Cir. Ct. 400.

53. *Colorado.*— Colorado Midland R. Co. *v.* Robbins, 30 Colo. 449, 71 Pac. 371.

Illinois.— Chicago, etc., R. Co. *v.* Smith, 180 Ill. 453, 54 N. E. 325 [*affirming* 77 Ill. App. 492]; Pittsburgh, etc., R. Co. *v.* O'Donnell, 118 Ill. App. 335.

Mississippi.— Christian *v.* Illinois Cent. R. Co., (1893) 12 So. 710, holding it to be a question for the jury whether a party injured on a trestle was negligent after seeing the train and realizing his danger.

Missouri.— Neier *v.* Missouri Pac. R. Co., (1888) 6 S. W. 695.

New York.— Remer *v.* Long Island R. Co., 36 Hun 253.

If it is not necessary for plaintiff to decide suddenly and unexpectedly between different ways of escaping from danger but he has time and opportunity to observe his surroundings, and the exercise of what may be termed "common sense" would have been sufficient to have assured him of safety or warned him of danger and he deliberately adopts or adopts with-

(II) *Injuries to Persons at Stations.* Where in an action for injury to a person at a station, the evidence is conflicting or is such that different inferences might be drawn therefrom, the question whether defendant was negligent,[54] as in permitting a hole to remain in the platform,[55] or whether or not the party injured was guilty of contributory negligenee,[56] should be submitted to the jury under proper instructions from the court.[57] Where, however, the evidence is undisputed and is such that but one inference can reasonably be drawn therefrom, such questions should be determined and disposed of by the court.[58] The limit of time under all conditions under which a person may lawfully visit a station is a question of fact.[59]

(III) *Injuries to Persons Working On or Near Cars or Tracks.* In an action for injuries received by one who at the time was lawfully engaged in work upon or about a railroad company's tracks or cars, it is ordinarily a question for the jury under all the evidence, whether or not the company was negligent,[60]

out deliberation the course that is obviously dangerous, the question of his negligence is one of law for the court, and not one of fact for the jury. Chicago, etc., R. Co. *v.* Lilley, 4 Nebr. (Unoff.) 286, 93 N. W. 1012.

An error of judgment, in stepping upon a railroad track, in an emergency, if the proof is not clear as to the elements of time and space on which such judgment was based, should not be held negligence as matter of law, but the question should be left to the jury. Bernhardt *v.* Rensselaer, etc., R. Co., 1 Abb. Dec. (N. Y.) 131, 23 How. Pr. 166 [*affirming* 32 Barb. 165, 19 How. Pr. 199].

54. Pennsylvania Co. *v.* Reidy, 99 Ill. App. 477 [*affirmed* in 198 Ill. 9, 64 N. E. 698] (holding that the question as to whether a railroad company is guilty of negligence in the management of its trains in running them at a high rate of speed past a station, or stopping place on a railroad running parallel to it, at which another train has stopped for the purpose of discharging and receiving passengers is a question for the jury); Grand Rapids, etc., R. Co. *v.* Martin, 41 Mich. 607, 3 N. W. 173; Corcoran *v.* New York El. R. Co., 19 Hun (N. Y.) 368.

The questions, what grounds are reasonably near to the depot platform, and whether persons will naturally be likely to go thereon, requiring the railroad to keep the same in a safe condition, are generally for the jury. Banderob *v.* Wisconsin Cent. R. Co., 133 Wis. 249, 113 N. W. 738.

55. Janes *v.* Missouri Pac. R. Co., 107 Mo. 480, 18 S. W. 31.

56. *Alabama.*—Alabama Great Southern R. Co. *v.* Arnold, 84 Ala. 159, 4 So. 359, 5 Am. St. Rep. 354, holding that where there is evidence that plaintiff in leaving a ticket office was cautioned to "look out for the steps," and that he crossed the platform obliquely and fell to the right of them, the question of contributory negligence is for the jury.

Kansas.— Chicago, etc., R. Co. *v.* Parkinson, 56 Kan. 652, 44 Pac. 615, refusal to direct a verdict for defendant held proper.

Massachusetts.— Wheelock *v.* Boston, etc., R. Co., 105 Mass. 203.

New York.— Collis *v.* New York Cent. etc., R. Co., 71 Hun 504, 24 N. Y. Suppl. 1090; Conklin *v.* New York Cent., etc., R. Co., 17 N. Y. Suppl. 651.

United States.— Jones *v.* East Tennessee, etc., R. Co., 128 U. S. 443, 9 S. Ct. 118, 32 L. ed. 478, directing verdict for defendant held error.

See 41 Cent. Dig. tit. "Railroads," § 917.

57. Archer *v.* New York, etc., R. Co., 19 N. Y. Wkly. Dig. 10, holding that, in an action for injuries sustained by one who was standing on a depot platform and was struck by defendant's train, it is error to charge that the jury may determine for themselves what precaution defendant was bound to take, as what such precautions might be supposed to be should be defined by the court.

58. Martyn *v.* New York, etc., R. Co., 176 Mass. 401, 57 N. E. 671; Dell *v.* Phillips Glass Co., 169 Pa. St. 549, 32 Atl. 601 (contributory negligence); Chattanooga, etc., R. Co *v.* Downs, 106 Fed. 641, 45 C. C. A. 511 (contributory negligence).

59. Klugherz *v.* Chicago, etc., R. Co., 90 Minn. 17, 95 N. W. 586, 101 Am. St. Rep. 384, holding that it is error to instruct that a railroad company owes a duty of ordinary care to a person on its station grounds for a lawful purpose near the time when a train is about to arrive or depart, for the purpose of seeing a person whom he supposes is going away on the train, since it is for the jury to determine whether the length of time a person is at the station before train time is reasonable.

60. *Indiana.*— Pittsburgh, etc., R. Co. *v.* Cozatt, 39 Ind. App. 682, 79 N. E. 534.

Michigan.— Breeze *v.* Mackinnon Mfg. Co., 140 Mich. 372, 103 N. W. 908.

Mississippi.— Bell *v.* Southern R. Co., (1901) 30 So. 821.

Nebraska.— Chicago, etc., R. Co. *v.* Giffen, 70 Nebr. 66, 96 N. W. 1014.

New Hampshire.— Mitchell *v.* Boston, etc., R. Co., 68 N. H. 96, 34 Atl. 674.

New York.— Kowalewska *v.* New York, etc., R. Co., 72 Hun 611, 25 N. Y. Suppl. 184.

Utah.— Hickey *v.* Rio Grande Western R. Co., 29 Utah 392, 82 Pac. 29, holding that in an action for injuries to a teamster engaged in loading his dray from a freight car, such injuries being caused by his horses taking fright at a sudden escape of steam

as in starting or sending cars against the car on or about which the injured party was working,[61] or in not maintaining safe premises or appliances for loading or unloading cars,[62] or whether or not the injured party was guilty of contributory negligence at the time,[63] as whether or not he exercised due care and precaution for his safety while loading or unloading a car.[64]

(IV) *REMOVAL OF TRESPASSER.* In an action for injuries received by a trespasser in being removed from a train or car, it is ordinarily a question for the jury under all the evidence, whether such trespasser was in fact forcibly ejected

from a locomotive, whether the engineer was in the exercise of ordinary care or whether he heedlessly or negligently permitted the steam to escape is a question for the jury under the evidence.

United States.— Chicago, etc., R. Co. *v.* O'Brien, 153 Fed. 511, 82 C. C. A. 461 (whether a speed of seventy or seventy-five miles per hour, on a down grade and curve, whereby the train is derailed, and an express messenger killed, is negligence); Toledo, etc., R. Co. *v.* Connolly, 149 Fed. 398, 79 C. C. A. 218 (whether backing car into a switch without notice to the superintendent of a milling company, working near the track, is negligence).

See 41 Cent. Dig. tit. "Railroads," § 918.

A nonsuit is proper where there is no evidence from which the jury could have inferred the existence of the negligence relied upon as a ground for recovery. Coleman *v.* Wrightsville, etc., R. Co., 114 Ga. 386, 40 S. E. 247.

61. *Arkansas.*— Little Rock, etc., R. Co. *v.* Cross, 78 Ark. 220, 93 S. W. 981.

Georgia.—Atlanta, etc., R. Co. *v.* Roberts, 116 Ga. 505, 42 S. E. 753, motion for nonsuit held properly overruled.

Massachusetts.— Hartford *v.* New York, etc., R. Co., 184 Mass. 365, 68 N. E. 835.

Missouri.— Spotts *v.* Wabash Western R. Co., 111 Mo. 380, 20 S. W. 190, 33 Am. St. Rep. 531; Ridings *v.* Hannibal, etc., R. Co., 33 Mo. App. 527.

Nebraska.— Chicago, etc., R. Co. *v.* Giffen, 70 Nebr. 66, 96 N. W. 1014.

New York.— Murphy *v.* New York Cent., etc., R. Co., 118 N. Y. 527, 23 N. E. 812 [*affirming* 44 Hun 242]; Barton *v.* New York Cent., etc., R. Co., 1 Thomps. & C. 297 [*affirmed* in 56 N. Y. 660].

See 41 Cent. Dig. tit. "Railroads," § 918.

Question of delivery.— Where a car containing live stock on reaching its destination is backed down to a cattle chute which is the only place where the stock could be unloaded, and detached from the train, it is a question for the jury whether a delivery to the shipper, injured while unloading the car, was intended. Brown *v.* Pontiac, etc., R. Co., 133 Mich. 371, 94 N. W. 1050.

62. Southern R. Co. *v.* Goddard, 121 Ky. 567, 89 S. W. 675, 28 Ky. L. Rep. 523; Cogdell *v.* Wilmington, etc., R. Co., 124 N. C. 302, 32 S. E. 706; Ryan *v.* New York, etc., R. Co., 115 Fed. 197 [*affirmed* in 120 Fed. 1020, 56 C. C. A. 683].

63. Pittsburg, etc., R. Co. *v.* Bovard, 223 Ill. 176, 79 N. E. 128 [*affirming* 121 Ill. App. 49]; Chicago, etc., R. Co. *v.* Pettit, 111 Ill. App. 172 [*reversed* on the facts in 209 Ill. 452, 70 N. E. 591]; Pittsburgh, etc., R. Co. *v.* Cozatt, 39 Ind. App. 682, 79 N. E. 534; Chicago, etc., R. Co. *v.* Stephenson, 33 Ind. App. 95, 69 N. E. 270; Murray *v.* Fitchburg R. Co., 165 Mass. 448, 43 N. E. 190; Felch *v.* Concord R. Co., 66 N. H. 318, 29 Atl. 557.

Children.— Where a child is killed or injured while coupling cars at the request of an employee of a railroad, it is for the jury to determine whether he had sufficient discretion to recognize the danger and guard against it. Kentucky Cent. R. Co. *v.* Gastineau, 83 Ky. 119.

64. *Illinois.*— Chicago, etc., R. Co. *v.* Goebel, 20 Ill. App. 163 [*affirmed* in 119 Ill. 515, 10 N. E. 369].

Iowa.— Watson *v.* Wabash, etc., R. Co., 66 Iowa 164, 23 N. W. 380.

Kentucky.— Southern R. Co. *v.* Goddard, 121 Ky. 567, 89 S. W. 675, 28 Ky. L. Rep. 523; Cincinnati, etc., R. Co. *v.* Vaught, 78 S. W. 859, 25 Ky. L. Rep. 1766, 1870.

Massachusetts.— Hartford *v.* New York, etc., R. Co., 184 Mass. 365, 68 N. E. 835; Meguire *v.* Fitchburg R. Co., 146 Mass. 379, 15 N. E. 904.

Michigan.— Fitzpatrick *v.* Michigan Cent. R. Co., 149 Mich. 194, 112 N. W. 915; Brown *v.* Pontiac, etc., R. Co., 133 Mich. 371, 94 N. W. 1050; Chadderdon *v.* Michigan Cent. R. Co., 100 Mich. 293, 58 N. W. 998.

Mississippi.— Bell *v.* Southern R. Co., (1901) 30 So. 821.

New Hampshire.— Mitchell *v.* Boston, etc., R. Co., 68 N. H. 96, 34 Atl. 674.

New York.— Conlan *v.* New York Cent., etc., R. Co., 74 Hun 115, 26 N. Y. Suppl. 659 [*affirmed* in 148 N. Y. 748, 43 N. E. 986].

Pennsylvania.— Christman *v.* Philadelphia, etc., R. Co., 141 Pa. St. 604, 21 Atl. 738.

Texas.— Gulf, etc., R. Co. *v.* Wittnebert, (Civ. App. 1907) 104 S. W. 424 [*reversed* on other grounds in (1908) 108 S. W. 150]; St. Louis, etc., R. Co. *v.* Holmes, (Civ. App. 1899) 49 S. W. 658.

See 41 Cent. Dig. tit. "Railroads," § 918.

Care of team.— Whether or not the injured party was guilty of contributory negligence in the manner in which he managed and placed his team while loading or unloading a car is a question for the jury. Allen *v.* Florence, etc., R. Co., 15 Colo. App. 213, 61 Pac. 491; Illinois Cent. R. Co. *v.* Keller, 77 Ill. App. 474; Kalembach *v.* Michigan Cent. R. Co., 87 Mich. 509, 49 N. W. 1082; Hickey *v.* Rio Grande Western R. Co., 29 Utah 392, 82 Pac. 29.

by a railroad servant,[65] whether the act of removal was within the scope of the employee's authority,[66] whether or not under the circumstances the railroad company was negligent in forcibly removing,[67] or causing such trespasser to jump from a moving train or car,[68] and whether such negligence was the proximate cause of the injury,[69] or whether or not the trespasser was guilty of contributory negligence in jumping or otherwise attempting to get off the train or car while in motion, upon the orders of a servant in charge of the train.[70]

(v) *Wilful, Wanton, or Gross Negligence.* In accordance with the general rules above stated the question of wantonness and wilfulness,[71] or gross

Delivery of car.— Where a shipper of live stock agrees with the company's agent that when the car reaches its destination it shall be backed down to a cattle chute which is in fact done, it is a question for the jury whether the shipper, injured while unloading the car, had the right to assume that the car had been delivered to him. Brown *v.* Pontiac, etc., R. Co., 133 Mich. 371, 94 N. W. 1050.

65. Morris *v.* Louisville, etc., R. Co., 61 S. W. 41, 22 Ky. L. Rep. 1593; Parulo *v.* Philadelphia, etc., R. Co., 145 Fed. 664.

66. Chicago Great Western R. Co. *v.* Troup, 69 Kan. 854, 76 Pac. 859; O'Banion *v.* Missouri Pac. R. Co., 65 Kan. 352, 69 Pac. 353 (holding that it is a question for the jury whether a brakeman who forcibly ejected a trespasser from a car did so in the discharge of the duty he owed to the company to remove such persons, or for the purpose of extorting money from such trespasser, or out of resentment for his failure to pay on a demand for money made by the brakeman); Lang *v.* New York, etc., R. Co., 80 Hun (N. Y.) 275, 30 N. Y. Suppl. 137; Polatty *v.* Charleston, etc., R. Co., 67 S. C. 391, 45 S. E. 932, 100 Am. St. Rep. 750; Texas, etc., R. Co. *v.* Buch, (Tex. Civ. App. 1907) 102 S. W. 124 [*reversed* on other grounds in (1907) 105 S. W. 987]; Houston, etc., R. Co. *v.* Bowen, 36 Tex. Civ. App. 165, 81 S. W. 80.

Question for court.— Where the brakeman who ejected a trespasser and other brakemen testify that it was the brakeman's duty to put trespassers off, it is error to leave it to the jury to determine whether such ejection was a part of the duty of the brakeman. Farber *v.* Missouri Pac. R. Co., 130 Mo. 272, 40 S. W. 932.

Where there is evidence that the company's brakeman habitually violated a rule expressly denying brakemen authority to eject trespassers from trains, the question of the brakeman's authority to eject the person injured is for the jury. Texas, etc., R. Co. *v.* Buch, (Tex. Civ. App. 1907) 102 S. W. 124 [*reversed* on other grounds in (1907) 105 S. W. 987].

67. *Iowa.*— Johnson *v.* Chicago, etc., R. Co., 123 Iowa 224, 98 N. W. 642, holding that whether the ejection of a trespasser from a moving train is made under such circumstances as to endanger life or limb is a question of fact where the evidence of the speed of the train is conflicting, although there is some evidence that it was moving faster than a man could run.

Kentucky.— Morris *v.* Louisville, etc., R. Co., 61 S. W. 21, 22 Ky. L. Rep. 1593.

Missouri.— Brill *v.* Eddy, 115 Mo. 596, 22 S. W. 488.

New York.— Hill *v.* Baltimore, etc., R. Co., 75 N. Y. App. Div. 325, 78 N. Y. Suppl. 134.

Pennsylvania.— Pennsylvania R. Co. *v.* Vandiver, 42 Pa. St. 365, 82 Am. Dec. 520.

See 41 Cent. Dig. tit. "Railroads," § 920.

68. *Georgia.*— Branham *v.* Central R. Co., 78 Ga. 35, 1 S. E. 274.

Mississippi.— Thompson *v.* Yazoo, etc., R. Co., 72 Miss. 715, 17 So. 229.

North Carolina.— Cook *v.* Southern R. Co., 128 N. C. 333, 38 S. E. 925.

Pennsylvania.— Pollack *v.* Pennsylvania R. Co., 210 Pa. St. 631, 60 Atl. 311, 105 Am. St. Rep. 843.

Texas.— Texas, etc., R. Co. *v.* Buch, (1907) 105 S. W. 987 [*reversing* (Civ. App. 1907) 102 S. W. 124].

See 41 Cent. Dig. tit. "Railroads," § 920.

69. Hill *v.* Baltimore, etc., R. Co., 75 N. Y. App. Div. 325, 78 N. Y. Suppl. 134.

70. Kline *v.* Central Pac. R. Co., 37 Cal. 400, 99 Am. Dec. 282; Benton *v.* Chicago, etc., R. Co., 55 Iowa 496, 8 N. W. 330.

71. *Alabama.*— Mobile, etc., R. Co. *v.* Smith, (1907) 45 So. 57; Alabama Great Southern R. Co. *v.* Hamilton, 135 Ala. 343, 33 So. 157.

California.— Esrey *v.* Southern Pac. Co., 103 Cal. 541, 37 Pac. 500.

Georgia.— Forrest *v.* Georgia R., etc., Co., 128 Ga. 77, 57 S. E. 98, holding that where plaintiff was a trespasser on defendant's engine and was ordered by the engineer to alight therefrom, and the latter suddenly started the train and threw plaintiff to the ground, the question whether the engineer's conduct was wanton is for the jury.

Illinois.— Illinois Cent. R. Co. *v.* Leiner, 202 Ill. 624, 67 N. E. 398, 95 Am. St. Rep. 266 [*affirming* 103 Ill. App. 438]; Chicago, etc., R. Co. *v.* Murowski, 179 Ill. 77, 53 N. E. 572 [*affirming* 78 Ill. App. 661], holding that it cannot be said as a matter of law in an action for injuries to one struck by a train that the engineer's omission to give warning by ringing the bell or sounding the whistle as required by Hurd Rev. St. (1897) p. 1250, c. 114, § 70, is not evidence of wilful or wanton misconduct.

Indiana.— Evansville, etc., R. Co. *v.* Wolf, 59 Ind. 89, holding that what does or does not "necessarily involve or evince a willingness to inflict injury" cannot be stated as a proposition of law and is wholly a question for the jury.

negligence,[72] of a railroad company in causing the injury complained of is ordinarily a question for the jury, unless the evidence is undisputed and is insufficient to support an inference of wilful, wanton, or reckless misconduct, in which case the question should not be submitted to the jury,[73] but may be disposed of by the court without the intervention of the jury, as by directing a finding or verdict for defendant,[74] or by granting or directing a nonsuit.[75] Where plaintiff's own evidence shows contributory negligence and fails to establish *prima facie* wantonness, the question should not be submitted to the jury but a judgment of nonsuit should be entered.[76]

f. Instructions — (i) *Form and Sufficiency in General.* The general rules applicable to instructions in civil actions,[77] and particularly in actions for negligence,[78] apply in actions for injuries to persons on or near railroad tracks. In charging the jury in such an action, the court should correctly state the law of the case, applicable to defendant's negligence,[79] in definite and explicit terms,[80]

Kansas.— Chicago Great Western R. Co. *v.* Troup, 69 Kan. 854, 76 Pac. 859.

Kentucky.— Hammill *v.* Louisville, etc., R. Co., 93 Ky. 343, 20 S. W. 263, 14 Ky. L. Rep. 291.

United States.— McGhee *v.* Campbell, 101 Fed. 936, 42 C. C. A. 94, holding that upon an issue as to wanton and reckless negligence in the running of a railroad train which ran down a hand-car in the night and killed plaintiff's intestate, it is not error to refuse to direct a verdict for defendant after the testimony of several witnesses that the train was being run at a speed of twenty-five miles an hour with no headlight burning on the engine.

72. Louisville, etc., R. Co. *v.* Logsdon, 114 Ky. 746, 71 S. W. 905, 24 Ky. L. Rep. 1566; Hartford *v.* New York, etc., R. Co., 184 Mass. 365, 68 N. E. 835; Murray *v.* Fitchburg R. Co., 165 Mass. 448, 43 N. E. 190.

73. Nashville, etc., R. Co. *v.* Harris, 142 Ala. 249, 37 So. 794, 110 Am. St. Rep. 29.

74. Illinois Cent. R. Co. *v.* O'Connor, 189 Ill. 559, 59 N. E. 1098 [*reversing* 90 Ill. App. 142].

75. Kennedy *v.* Denver, etc., R. Co., 10 Colo. 493, 16 Pac. 210; Gregory *v.* Cleveland, etc., R. Co., 112 Ind. 385, 14 N. E. 228.

76. Kennedy *v.* Denver, etc., R. Co., 10 Colo. 493, 16 Pac. 210.

77. See, generally, TRIAL.

78. See, generally, NEGLIGENCE, 29 Cyc. 643.

79. Macon, etc., R. Co. *v.* Parker, 127 Ga. 471, 56 S. E. 616; Louisville, etc., R. Co. *v.* Brown, 107 S. W. 321, 32 Ky. L. Rep. 1002 (instruction held to require too great a degree of care of defendant to avoid injuring plaintiff at a station on the approach of a train); Houston, etc., R. Co. *v.* Adams, 44 Tex. Civ. App. 288, 98 S. W. 222 (holding an instruction to be erroneous for omitting to require some dereliction of duty, independent of the mere backing of a train against a car); St. Louis, etc., R. Co. *v.* Fenlaw, (Tex. Civ. App. 1896) 36 S. W. 295.

Instructions held proper or erroneously refused as to defendant's negligence in failing to exercise proper precautions after the injured party's peril was discovered (Alabama Great Southern R. Co. *v.* Guest, 144 Ala. 373, 39 So. 654; Lange *v.* Missouri Pac. R. Co., 208 Mo. 458, 106 S. W. 660; Houston, etc., R. Co. *v.* Finn, (Tex. Civ. App. 1908) 107 S. W. 94 [*affirmed* in (1908) 109 S. W. 918]; Nacogdoches, etc., R. Co. *v.* Beene, (Tex. Civ. App. 1907) 106 S. W. 456; Texas, etc., R. Co. *v.* Scarborough, (Tex. Civ. App. 1907) 104 S. W. 408 [*affirmed* in (1908) 108 S. W. 804]; International, etc., R. Co. *v.* Munn, (Tex. Civ. App. 1907) 102 S. W. 442; St. Louis Southwestern R. Co. *v.* Hunt, (Tex. Civ. App. 1907) 100 S. W. 968]); in failing to keep a proper lookout and give the proper signals (Rio Grande, etc., R. Co. *v.* Martinez, 39 Tex. Civ. App. 460, 87 S. W. 853); or as to the degree of care required to discover children on the track (Missouri, etc., R. Co. *v.* Hammer, 34 Tex. Civ. App. 354, 78 S. W. 708).

Instructions authorizing a recovery for negligence which was not the proximate cause of the injury are erroneous. Cogdell *v.* Wilmington, etc., R. Co., 130 N. C. 313, 41 S. E. 541; Rio Grande, etc., R. Co. *v.* Martinez, 39 Tex. Civ. App. 460, 87 S. W. 853.

In Georgia, in an action for injuries caused by being struck by defendant's engine while on its tracks, it is not error to give in the charge Code, § 3033, providing that for injuries inflicted in the operation of their roads, railroad companies shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in such cases being against the company. Western, etc., R. Co. *v.* Abbott, 74 Ga. 851.

In an action for injury from a train while plaintiff was trespassing on a trestle, the only instruction that should be given is to tell the jury that plaintiff was a trespasser and that defendant owed him no lookout duty but was bound only to exercise reasonable diligence after his peril was actually discovered to avoid injuring him. Louisville, etc., R. Co. *v.* Woolfork, 99 S. W. 294, 30 Ky. L. Rep. 569.

80. Johnson *v.* Chicago, etc., R. Co., 58 Iowa 348, 12 N. W. 329 (instructions in an action to recover damages for ejecting a trespasser from a railroad station house held to

defining, when necessary, the different terms or expressions used,[81] and applying the law to the facts of the case.[82] Such instructions should be applicable to the issues,[83] and to the facts which are admitted or which the evidence tends to prove,[84]

be sufficiently explicit); West Virginia Cent., etc., R. Co. *v.* State, 96 Md. 652, 54 Atl. 669, 61 L. R. A. 574.

81. Texas, etc., R. Co. *v.* Short, (Tex. Civ. App. 1900) 58 S. W. 56, holding that where the court charges that if defendant failed to use ordinary care, etc., and such want of ordinary care was a proximate cause of the injuries to plaintiff, it should also give an instruction defining the term "proximate cause" as used in the charge.

82. Texas, etc., R. Co. *v.* Short, (Tex. Civ. App. 1900) 58 S. W. 56.

83. See *infra*, X, E, 8, f, (III).

84. Baltimore, etc., R. Co. *v.* Charvat, 94 Md. 569, 51 Atl. 413; Anderson *v.* Union Terminal R. Co., 161 Mo. 411, 61 S. W. 874; Willis *v.* Atlantic, etc., R. Co., 122 N. C. 905, 29 S. E. 941; International, etc., R. Co. *v.* Jackson, 41 Tex. Civ. App. 51, 90 S. W. 918.

Instructions held proper or erroneously refused as being applicable to the facts of the case in respect to defendant's negligence and consequent liability, under Ga. Civ. Code, § 2321 (Atlanta, etc., R. Co. *v.* Roberts, 116 Ga. 505, 42 S. E. 753); in backing a train upon a side-track while cars are being loaded thereon without reasonable notice or warning to persons engaged in such loading (Missouri, etc., R. Co. *v.* Thomas, (Tex. Civ. App. 1909) 107 S. W. 868; Copley *v.* Union Pac. R. Co., 26 Utah 361, 73 Pac. 517); in removing a trespasser from a train (Lewis *v.* Norfolk, etc., R. Co., 132 N. C. 382, 43 S. E. 919; Houston, etc., R. Co. *v.* Rutherford, 94 Tex. 518, 62 S. W. 1056 [*affirming* (Civ. App. 1901) 62 S. W. 1069]); in failing to exercise proper precautions after discovering the injured party's peril (Prince *v.* Illinois Cent. R. Co., 99 S. W. 293, 30 Ky. L. Rep. 469; Brown *v.* Griffin, 71 Tex. 654, 9 S. W. 546; Missouri, etc., R. Co. *v.* Saunders, (Tex. Civ. App. 1907) 103 S. W. 457 [*reversed* on other grounds in (1908) 106 S. W. 321]; Texas, etc., R. Co. *v.* Patterson, (Tex. Civ. App. 1907) 102 S. W. 138; Texas, etc., R. Co. *v.* Ball, (Tex. Civ. App. 1903) 73 S. W. 420 [*reversed* on other grounds in 96 Tex. 622, 75 S. W. 4]).

Instructions held erroneous or properly refused: As not being applicable to the evidence in respect to defendant's negligence generally (Woodruff *v.* Georgia Pac. R. Co., 86 Ga. 318, 12 S. E. 749; Baltimore, etc., R. Co. *v.* Deck, 102 Md. 669, 62 Atl. 958); in not discovering the injured party's peril in time to prevent the injury (St. Louis, etc., R. Co. *v.* Jordan, 65 Ark. 429, 47 S. W. 115; Southern R. Co. *v.* Hill, 125 Ga. 354, 54 S. E. 113); in failing to use proper precautions after the injured party's peril was discovered (Smith *v.* Illinois Cent. R. Co., 90 S. W. 254, 28 Ky. L. Rep. 723; Woods *v.* Wabash R. Co., 188 Mo. 229, 86 S. W. 1082; Shetter *v.* Ft. Worth, etc., R. Co., (Tex. Civ. App. 1900) 58 S. W. 179, 30 Tex. Civ. App. 536, 71 S. W. 31; St. Louis, etc., R. Co. *v.* Brown, 30 Tex. Civ. App. 57, 69 S. W. 1010; International, etc., R. Co. *v.* Eason, (Tex. Civ. App. 1896) 35 S. W. 308; Tyler *v.* Sites, 88 Va. 470, 13 S. E. 978). As restricting the rights of the parties to immaterial facts. Pittsburgh, etc., R. Co. *v.* Cozatt, 39 Ind. App. 682, 79 N. E. 534. Thus an instruction to find for plaintiff, if from the evidence the jury believe the accident was caused by the improper construction of a car, is properly refused where there is evidence showing that it was caused by the rate of speed and there is no evidence tending to show a faulty construction. Missouri, etc., R. Co. *v.* Lyons, (Tex. Civ. App. 1899) 53 S. W. 96. So where there is no evidence that defendant saw or knew of the injured party's danger, an instruction that, although there was contributory negligence, yet if the injury could have been prevented by reasonable care on the part of the defendant's employees after discovering the danger, defendant is liable, is erroneous. Williams *v.* Kansas City, etc., R. Co., 96 Mo. 275, 9 S. W. 573. So where there is evidence warranting a finding that plaintiff was a trespasser, a request assuming that plaintiff owed defendant the duty of exercising ordinary care is properly refused. Hern *v.* Southern Pac. Co., 29 Utah 127, 81 Pac. 902.

Where the admitted facts require proof of wilful or wanton injury to authorize a recovery, and the declaration charges mere negligence, it is error to give an instruction authorizing a recovery upon proof of the negligence charged in the declaration (Illinois Cent. R. Co. *v.* Eicher, 202 Ill. 556, 67 N. E. 376 [*reversing* 100 Ill. App. 599]); and such error is not cured by an instruction given at defendant's request requiring proof of wilful or wanton injury (Illinois Cent. R. Co. *v.* Eicher, *supra*).

Unavoidable accident.— The failure of defendant to plead unavoidable accident does not defeat his right to an instruction thereon where there is evidence tending to show that the injury was a result of such accident. Galveston, etc., R. Co. *v.* Washington, 94 Tex. 510, 63 S. W. 534 [*affirming* 25 Tex. Civ. App. 600, 63 S. W. 538].

The issue as to whether defendant, by the exercise of reasonable care, after plaintiff's negligence could have avoided the injuries should be submitted, after submitting the issues as to the negligence of plaintiff and defendant, where there is evidence on which to base it. Baker *v.* Wilmington, etc., R. Co., 118 N. C. 1015, 24 S. E. 415.

An instruction based upon a hypothetical case not supported by the evidence or omitting material portions thereof, and which tends to mislead the jury, should not be given. Seaboard, etc., R. Co. *v.* Joyner, 92 Va. 354, 23 S. E. 773.

and should not be confusing or misleading,[85] argumentative,[86] or conflicting, inconsistent, or contradictory.[87] To be sufficient, the instruction should be complete in itself, but instructions are to be considered as a whole and the fact that one portion considered separately might be open to objection does not constitute error, if the charge is correct in its entirety:[88] An instruction which covers the case generally is ordinarily sufficient in the absence of a request for further instructions in detail.[89] Although it is error to refuse a proper request not sufficiently covered by other charges as given,[90] such request need not ordinarily be given in

85. **Instructions held misleading:** In general. Mobile, etc., R. Co. *v.* Blakely, 59 Ala. 471; Baltimore, etc., R. Co. *v.* Charvat, 94 Md. 569, 51 Atl. 413; Cederson *v.* Oregon R., etc., Co., 38 Oreg. 343, 62 Pac. 637, 63 Pac. 763; White *v.* Augusta, etc., R. Co., 30 S. Ct. 218, 9 S. E. 96; Sabine, etc., R. Co. *v.* Hanks, 79 Tex. 642, 15 S. W. 476; San Antonio, etc., R. Co. *v.* Jazo, (Tex. Civ. App. 1894) 25 S. W. 712. As to defendant's negligence in failing to use proper precautions to avoid a discovered peril. International, etc., R. Co. *v.* Garcia, 75 Tex. 583, 13 S. W. 223; Gulf, etc., R. Co. *v.* Hill, (Tex. Civ. App. 1900) 58 S. W. 255; Texas, etc., R. Co. *v.* Harby, 94 Fed. 303, 36 C. C. A. 353. As to defendant's negligence in failing to keep a lookout for children on the track. Thomas *v.* Chicago, etc., R. Co., 93 Iowa 248, 61 N. W. 967. In failing to state whether the engineer had reason to apprehend the presence of any one on the track, whether he saw deceased in time to stop his engine, and whether deceased used ordinary care in going on the track. Chicago, etc., R. Co. *v.* White, 26 Ill. App. 586. As to defendant's wantonness or recklessness. Louisville, etc., R. Co. *v.* Orr, 121 Ala. 489, 26 So. 35. On the issue whether proper care required defendant to warn persons working on the track, that a train was about to be moved. Chicago, etc., R. Co. *v.* Anderson, 166 Ill. 572, 46 N. E. 1125 [*affirming* 67 Ill. App. 386].

Instructions held not misleading: In general. Hughes *v.* Detroit, etc., R. Co., 78 Mich. 399, 44 N. W. 396. As to right of plaintiff to be in station. Croft *v.* Chicago, etc., R. Co., 132 Iowa 687, 108 N. W. 1053. As to defendant's negligence in failing to use proper precautions to avoid the discovered peril. International, etc., R. Co. *v.* Munn, (Tex. Civ. App. 1907) 102 S. W. 442; Olivares *v.* San Antonio, etc., R. Co., 37 Tex. Civ. App. 278, 84 S. W. 248; Missouri, etc., R. Co. *v.* Hammer, 34 Tex. Civ. App. 354, 78 S. W. 708. As to defendant's negligence in failing to have a lookout on the end of cars. Jaffi *v.* Missouri Pac. R. Co., 205 Mo. 450, 103 S. W. 1026.

An instruction mingling two theories of defense, as that intestate was walking along the tracks and was a trespasser, and was walking across the tracks at the station in a negligent manner, tends to mislead the jury. Chicago, etc., R. Co. *v.* Huston, 95 Ill. App. 350 [*affirmed* in 196 Ill. 480, 63 N. E. 1028].

The word "foresight," in a charge that if defendant "in the exercise of care, prudence, and foresight should have had the track protected so as to avoid danger therefrom," is not misleading. Gulf, etc., R. Co. *v.* Walker, 70 Tex. 126, 7 S. W. 831, 8 Am. St. Rep. 582.

86. Alabama Great Southern R. Co. *v.* Guest, 144 Ala. 373, 39 So. 654; Missouri, etc., R. Co. *v.* Owens, (Tex. Civ. App. 1903) 75 S. W. 579; Lumsden *v.* Chicago, etc., R. Co., 28 Tex. Civ. App. 225, 67 S. W. 168.

87. Thomas *v.* Chicago, etc., R. Co., 114 Iowa 169, 86 N. W. 259; Hughes *v.* Detroit, etc., R. Co., 78 Mich. 399, 44 N. W. 396; Lange *v.* Missouri Pac. R. Co., 115 Mo. App. 582, 91 S. W. 989; McCall *v.* Southern R. Co., 129 N. C. 298, 40 S. E. 67; Sabine, etc., R. Co. *v.* Hanks, 79 Tex. 642, 15 S. W. 476.

In Georgia it is error to charge, in immediate connection with each other, Code, §§ 2322 and 3830, without explanation of their different meanings; the former providing that no person shall recover when the injury is caused by his own negligence, and the latter that if plaintiff could have by ordinary care avoided the consequences of defendant's negligence he cannot recover. Western, etc., R. Co. *v.* Rogers, 104 Ga. 224, 30 S. E. 804.

88. Godfrey *v.* New York Cent., etc., R. Co., 161 N. Y. 565, 56 N. E. 77 [*affirming* 31 N. Y. App. Div. 634, 54 N. Y. Suppl. 1104]; Purnell *v.* Raleigh, etc., R. Co., 122 N. C. 832, 29 S. E. 953; Texas, etc., R. Co. *v.* Staggs, (Tex. Civ. App. 1896) 37 S. W. 609; San Antonio, etc., R. Co. *v.* Vaughn, 5 Tex. Civ. App. 195, 23 S. W. 745; Peltier *v.* Chicago, etc., R. Co., 88 Wis. 521, 60 N. W. 250.

An erroneous instruction is not cured by a subsequent correct charge which is in conflict with it. McCowan *v.* Gulf, etc., R. Co., (Tex. Civ. App. 1903) 73 S. W. 46.

89. Texas, etc., R. Co. *v.* Mother, 5 Tex. Civ. App. 87, 24 S. W. 79, holding that in an action for the death of a trespasser who was forcibly ejected from a car in motion, it is proper to charge that defendant is liable if he was compelled to leave by one of defendant's duly authorized servants at a time and under circumstances rendering it "dangerous" so to do, without charging specifically as to the degree of danger.

90. Galveston, etc., R. Co. *v.* Washington, 94 Tex. 510, 63 S. W. 534 [*affirming* 25 Tex. Civ. App. 600, 63 S. W. 538]; Houston, etc., R. Co. *v.* Jones, (Tex. Civ. App. 1904) 83 S. W. 29.

A charge on contributory negligence does not embrace the defenses that the accident was the result of unavoidable accident or occurred in a manner different from that alleged in the petition. Galveston, etc., R.

its exact language, but it is sufficient if it is covered in substance by the instructions as given;[91] and it is not error to refuse a requested instruction on matters already sufficiently covered by the charge as given,[92] or on immaterial or unessential matters,[93] or on matters not in issue.[94] Mere errors of form or phraseology in instructions, such as are not calculated to mislead the jury or to prejudice the rights of other parties, are immaterial.[95]

(II) *INVADING PROVINCE OF JURY.* Issues of fact must be submitted to the jury,[96] by instructions which clearly and fully state and define them;[97] and an instruction is erroneous which invades the province of the jury in commenting on the evidence,[98] as where it singles out and gives undue prominence to certain parts of the testimony,[99] or withdraws or excludes an issue of fact from the jury by charging on the weight of the evidence,[1] as by assuming as a matter of law the existence or non-existence of facts in issue,[2] or by assuming or charging that certain facts in evidence do or do not constitute negligence on the part of defendant.[3] But an instruction which defines negligence and leaves the facts

Co. *v.* Washington, 94 Tex. 510, 63 S. W. 534 [*affirming* 25 Tex. Civ. App. 600, 63 S. W. 538].

91. Harris *v.* Atlantic Coast Line R. Co., 132 N. C. 160, 43 S. E. 589; Hickey *v.* Rio Grande Western R. Co., 29 Utah 392, 82 Pac. 29; Hern *v.* Southern Pac. R. Co., 29 Utah 127, 81 Pac. 902.

92. *District of Columbia.*— McDermott *v.* Severe, 25 App. Cas. 276 [*affirmed* in 202 U. S. 600, 26 S. Ct. 709, 50 L. ed. 1162].

Maryland.— West Virginia Cent., etc., R. Co. *v.* State, 96 Md. 652, 54 Atl. 669, 61 L. R. A. 574.

New York.— Spooner *v.* Delaware, etc., R. Co., 115 N. Y. 22, 21 N. E. 696; Clark *v.* New York, etc., R. Co., 3 N. Y. Suppl. 607.

Texas.— Galveston, etc., R. Co. *v.* Levy, 35 Tex. Civ. App. 107, 79 S. W. 879; Gulf, etc., R. Co. *v.* Brown, 33 Tex. Civ. App. 269, 76 S. W. 794.

Utah.— Hickey *v.* Rio Grande Western R. Co., 29 Utah 392, 82 Pac. 29.

United States.— Rio Grande Western, etc., R. Co. *v.* Leak, 163 U. S. 280, 16 S. Ct. 1020, 41 L. ed. 160; Eason *v.* East Tennessee, etc., R. Co., 51 Fed. 935, 2 C. C. A. 549.

See 41 Cent. Dig. tit. "Railroads," §§ 921, 1382.

93. Chicago Great Western R. Co. *v.* Troup, 71 Kan. 843, 80 Pac. 30.

94. International, etc., R. Co. *v.* Brooks, (Tex. Civ. App. 1899) 54 S. W. 1056.

95. *Alabama.*—Alabama Great Southern R. Co. *v.* Guest, 144 Ala. 373, 39 So. 654.

Colorado.— Colorado Midland R. Co. *v.* Robbins, 30 Colo. 449, 71 Pac. 371.

Illinois.— Chicago, etc., R. Co. *v.* Anderson, 166 Ill. 572, 46 N. E. 1125 [*affirming* 67 Ill. App. 386].

Kentucky.— Givens *v.* Louisville, etc., R. Co., 72 S. W. 320, 24 Ky. L. Rep. 1796.

Missouri.— Anderson *v.* Union Terminal R. Co., 161 Mo. 411, 61 S. W. 874 (holding that an instruction is not erroneous because it authorizes a recovery if defendant's negligence was the cause of the injury, although "proximate cause" is the more accurate term); Frick *v.* St. Louis, etc., R. Co., 75 Mo. 595.

North Carolina.— McCall *v.* Southern R. Co., 129 N. C. 298, 40 S. E. 67.

Texas.— Gulf, etc., R. Co. *v.* Johnson, 99 Tex. 337, 90 S. W. 164 [*reversing* on other grounds 37 Tex. Civ. App. 99, 82 S. W. 822]; Galveston, etc., R. Co. *v.* Zantzinger, (Civ. App. 1899) 49 S. W. 677.

Utah.— Hern *v.* Southern Pac. Co., 29 Utah 127, 81 Pac. 902.

United States.— Parulo *v.* Philadelphia, etc., R. Co., 145 Fed. 664.

96. See *supra*, X, E, 8, e, (I), (A).

97. See John *v.* Louisville, etc., R. Co., 10 S. W. 317, 10 Ky. L. Rep. 757 (holding an instruction as to the duty of "those in charge of the train" not to be erroneous as precluding the jury from considering any negligence on the part of a brakeman or flagman thereon); Galveston, etc., R. Co. *v.* Levy, 35 Tex. Civ. App. 107, 79 S. W. 879; Missouri, etc., R. Co. *v.* Stone, 23 Tex. Civ. App. 106, 56 S. W. 933.

98. Curtis *v.* Southern R. Co., 130 N. C. 437, 41 S. E. 929.

99. Rio Grande, etc., R. Co. *v.* Martinez, 39 Tex. Civ. App. 460, 87 S. W. 853.

1. Duncan *v.* St. Louis, etc., R. Co., 152 Ala. 118, 44 So. 418; Alabama Great Southern R. Co. *v.* Hamilton, 135 Ala. 343, 33 So. 157; Macon, etc., R. Co. *v.* Parker, 127 Ga. 471, 56 S. E. 616; Missouri, etc., R. Co. *v.* Thomas, (Tex. Civ. App. 1908) 107 S. W. 868; San Antonio, etc., R. Co. *v.* Vaughn, 5 Tex. Civ. App. 195, 23 S. W. 745. And see cases cited *infra*, notes 2, 3.

2. Chicago, etc., R. Co. *v.* Flint, 22 Ill. App. 502; Houston, etc., R. Co. *v.* O'Donnell, (Tex. Civ. App. 1905) 90 S. W. 886 [*reversed* on other grounds in 99 Tex. 636, 92 S. W. 409].

3. *Arkansas.*— Little Rock, etc., R. Co. *v.* Cross, 23 S. W. 981.

Georgia.— Alabama Midland R. Co. *v.* Hatcher, 116 Ga. 791, 43 S. E. 49.

Illinois.— Chicago, etc., R. Co. *v.* Scranton, 78 Ill. App. 230.

Missouri.— James *v.* Missouri Pac. R. Co., 107 Mo. 480, 18 S. W. 31.

North Carolina.— Everett *v.* Richmond, etc., R. Co., 121 N. C. 519, 27 S. E. 191.

Pennsylvania.— Pennsylvania R. Co. *v.* Morgan, 82 Pa. St. 134.

of the case to be found by the jury and leaves them to say whether the facts found constitute negligence as defined is not a charge on the weight of the evidence.[4] An instruction which charges that certain acts, made negligence by law, constitute negligence,[5] or which assumes as a matter of law a fact of common knowledge[6] is not erroneous.

(III) *CONFORMITY TO PLEADINGS AND ISSUES.* The instructions must also conform and be confined to the issues made by the pleadings and evidence, and on which the case has been tried.[7] An instruction is erroneous which is not pertinent to the issues,[8] as where it charges upon a theory not in

Texas.— Rio Grande, etc., R. Co. *v.* Martinez, 39 Tex. Civ. App. 460, 87 S. W. 853; Over *v.* Missouri, etc., R. Co., (Civ. App. 1903) 73 S. W. 535; St. Louis Southwestern R. Co. *v.* Eicher, (Civ. App. 1903) 72 S. W. 205; Gulf, etc., R. Co. *v.* Bryant, 30 Tex. Civ. App. 4, 66 S. W. 804; Texas, etc., R. Co. *v.* Breadow, (Civ. App. 1896) 35 S. W. 490; Austin, etc., R. Co. *v.* McSween, (Civ. App. 1895) 32 S. W. 376; Collins *v.* Dillingham, 7 Tex. Civ. App. 93, 26 S. W. 87; San Antonio, etc., R. Co. *v.* Vaughn, 5 Tex. Civ. App. 195, 23 S. W. 745; Garteiser *v.* Galveston, etc., R. Co., 2 Tex. Civ. App. 230, 21 S. W. 631; Texas, etc., R. Co. *v.* Roberts, 2 Tex. Civ. App. 111, 20 S. W. 960.

United States.— Texas, etc., R. Co. *v.* Harby, 94 Fed. 303, 36 C. C. A. 353.

See 41 Cent. Dig. tit. "Railroads," § 1383.

Gross negligence.— What particular facts would constitute gross negligence on the part of defendant should not be stated in the charge, but should be determined by the jury with reference to all the circumstances disclosed by the evidence. Sabine, etc., R. Co. *v.* Hanks, 2 Tex. Civ. App. 306, 21 S. W. 947.

4. North Pennsylvania Co. *v.* Robinson, 44 Pa. St. 175; McCowen *v.* Gulf, etc., R. Co., (Tex. Civ. App. 1903) 73 S. W. 46; Houston, etc., R. Co. *v.* Harvin, (Tex. Civ. App. 1899) 54 S. W. 629; San Antonio, etc., R. Co. *v.* Vaughn, 5 Tex. Civ. App. 195, 23 S. W. 745.

5. See Alabama Midland R. Co. *v.* Hatcher, 116 Ga. 791, 43 S. E. 49; Gulf, etc., R. Co. *v.* Bryant, 30 Tex. Civ. App. 4, 66 S. W. 804.

6. Ostertag *v.* Pacific R. Co., 64 Mo. 421, holding that where a boy sitting on a trestle under one of a train of freight cars is run over and killed by the starting of the train, an instruction that as a matter of law his position was an unsafe one without leaving the question to the jury, is proper.

7. McMarshall *v.* Chicago, etc., R. Co., 80 Iowa 757, 45 N. W. 1065, 20 Am. St. Rep. 445 (holding that an allegation that defendant's employees "failed to see the intestate in time to give any alarm signal" authorizes a submission to the jury of the question as to whether such employees were on the lookout for persons on the track); Benton *v.* Chicago, etc., R. Co., 55 Iowa 496, 8 N. W. 330; Dahlstrom *v.* St. Louis, etc., R. Co., 96 Mo. 99, 8 S. W. 777; Hayes *v.* Southern R. Co., 141 N. C. 195, 53 S. E. 847; Curtis *v.* Southern R. Co., 130 N. C. 437, 41 S. E. 929.

Instructions held proper see Thomas *v.* Chicago, etc., R. Co., 114 Iowa 169, 86 N. W. 259; International, etc., R. Co. *v.* Quinones, (Tex. Civ. App. 1904) 81 S. W. 757. Thus where in an action against a railroad company for death by striking deceased on a bridge, the court submits the issue of discovered peril alone, withdraws other issues, and expressly restricts the right to recover to that issue, the contention that the jury were misled and the verdict was based on the withdrawn issues is without merit. Gulf, etc., R. Co. *v.* Brown, 33 Tex. Civ. App. 269, 76 S. W. 794. So where plaintiff alleges and proves that at the time he was injured he was lawfully on defendant's track near a public crossing and that defendant failed to give statutory signals, which failure was the proximate cause of his injury, it is proper for the court to charge as to defendant's statutory duty to sound a whistle or ring the bell. Houston, etc., R. Co. *v.* O'Donnell, (Tex. Civ. App. 1905) 90 S. W. 886 [*reversed* on other grounds in 99 Tex. 636, 92 S. W. 409].

Where the general issue is pleaded in an action of trespass for running over plaintiff, it is proper to instruct that, as the train had unquestionably run against plaintiff, plaintiff was entitled to recover unless defendant had shown that the requirements of law and common prudence were complied with, and that the injury could not thereby have been prevented. Clark *v.* Canadian Pac. R. Co., 69 Fed. 543.

Where the action is for carelessness in running, conducting, and directing a train and not for the failure to properly equip the road, it is error to instruct the jury that they may consider the condition of the brakes. Chicago, etc., R. Co. *v.* Magee, 60 Ill. 529.

8. Woods *v.* Wabash R. Co., 188 Mo. 229, 86 S. W. 1082.

Instructions held erroneous or properly refused: As not conforming to the issues. Alabama Great Southern R. Co. *v.* Guest, 144 Ala. 373, 39 So. 654; Louisville, etc., R. Co. *v.* Guyton, 47 Fla. 188, 36 So. 84; Louisville, etc., R. Co. *v.* Penrod, 108 Ky. 172, 56 S. W. 1, 22 Ky. L. Rep. 73; Missouri, etc., R. Co. *v.* Stone, 23 Tex. Civ. App. 106, 56 S. W. 933. As not conforming to the injury and negligence alleged and established. Dahlstrom *v.* St. Louis, etc., R. Co., 96 Mo. 99, 8 S. W. 777; Collins *v.* New York, etc., R. Co., 55 N. Y. Super. Ct. 31 [*affirmed* in 112 N. Y. 665, 20 N. E. 413];

issue,[9] or ignores or omits to charge upon a material matter in issue,[10] or where it unduly emphasizes a particular fact in issue.[11] But an instruction is not erroneous because it does not conform to an alleged theory of one of the parties, when such theory under the evidence submitted is itself erroneous.[12]

(iv) *CONTRIBUTORY NEGLIGENCE.* The above rules also apply to instructions on the question of contributory negligence and its effect.[13] The court in its instructions to the jury on such question should correctly and explicitly define

International, etc., R. Co. *v.* Jackson, 41 Tex. Civ. App. 51, 90 S. W. 918; Missouri, etc., R. Co. *v.* Mills, 27 Tex. Civ. App. 245, 65 S. W. 74; Missouri, etc., R. Co. *v.* Stone, 23 Tex. Civ. App. 106, 56 S. W. 933. Thus an instruction submitting the issue of negligence in failing to have lights or other signals of danger at the place of the injury is erroneous where the allegations only charge negligence in failing to have lights on the train. St. Louis Southwestern R. Co. *v.* Eitel, (Tex. Civ. App. 1903) 72 S. W. 205. So where the engineer admits that he saw plaintiff on the track when several bundred yards away, it is error to charge that it is the duty of trainmen to keep a lookout. Newport News, etc., R. Co. *v.* Deuser, 97 Ky. 92, 29 S. W. 973, 17 Ky. L. Rep. 113. So a charge as to the duties of railroad companies in operating trains over public crossings is inapplicable when the place where plaintiff was injured was not a public crossing. Ashworth *v.* East Tennessee, etc., R. Co., 94 Ga. 715, 20 S. E. 424. So where the declaration is based on the hypothesis that plaintiff was a passenger and the defense fairly raised the question whether he was such, an instruction allowing a recovery, although plaintiff was not a passenger, is error. Chicago, etc., R. Co. *v.* Mehlsack, 44 Ill. App. 124. So it is error to submit to the jury the issue whether the employees in charge of the train might have discovered deceased in time to have avoided the accident and failed to use care to do so, or having discovered him failed to use care in avoiding the accident, where such specific acts of negligence were not pleaded in the petition. Houston, etc., R. Co. *v.* Powell, (Tex. Civ. App. 1897) 41 S. W. 695. So where there is no evidence that the engineer saw plaintiff in time to avoid the injury, an instruction that if the engineer made no effort to stop the engine and gave no warning, defendant is liable is error. Gulf, etc., R. Co. *v.* York, 74 Tex. 364, 12 S. W. 68.

Gross negligence.— Where plaintiff does not charge gross negligence on the part of defendant and the testimony merely shows want of ordinary care, it is error to submit the question of defendant's gross negligence to the jury. Bertelson *v.* Chicago, etc., R. Co., 5 Dak. 313, 40 N. W. 531.

9. Duncan *v.* St. Louis, etc., R. Co., 152 Ala. 118, 44 So. 418; Illinois Cent. R. Co. *v.* Jernigan, 198 Ill. 297, 65 N. E. 88 [*affirming* 101 Ill. App. 1]; Woods *v.* Wabash R. Co., 188 Mo. 229, 86 S. W. 1082; Missouri, etc., R. Co. *v.* Cardena, 22 Tex. Civ. App. 300, 54 S. W. 312.

10. Croft *v.* Chicago, etc., R. Co., 132 Iowa 687, 108 N. W. 1053; Gunn *v.* Felton, 108 Ky. 561, 57 S. W. 15, 22 Ky. L. Rep. 268; Houston, etc., R. Co. *v.* O'Donnell, (Tex. Civ. App. 1905) 90 S. W. 886 [*reversed* on other grounds in 99 Tex. 636, 92 S. W. 409].

Instructions held erroneous or properly refused: As omitting to charge on the question of defendant's negligence generally (Pittsburgh, etc., R. Co. *v.* Cozatt, 39 Ind. App. 682, 79 N. E. 534; Lange *v.* Missouri Pac. R. Co., 115 Mo. App. 582, 91 S. W. 989); or in failing to give proper warning (St. Louis, etc., R. Co. *v.* Bryson, 41 Tex. Civ. App. 245, 91 S. W. 829). As omitting the element of safety in stopping. Houston, etc., R. Co. *v.* Ramsey, 36 Tex. Civ. App. 285, 81 S. W. 825. As excluding the issue of the company's negligence in failing to keep a proper lookout and confining the jury's consideration to the issue of discovered peril. Missouri, etc., R. Co. *v.* Hammer, 34 Tex. Civ. App. 354, 78 S. W. 708. As withdrawing the issue of discovered peril from the jury. Houston, etc., R. Co. *v.* O'Donnell, (Tex. Civ. App. 1905) 90 S. W. 886 [*reversed* on other grounds in 99 Tex. 636, 92 S. W. 409]. As ignoring the question of compulsion in ejecting a passenger. Houston, etc., R. Co. *v.* Urteaga, (Tex. Civ. App. 1894) 25 S. W. 1035. As ignoring the question of a servant's authority in ejecting a trespasser. Illinois Cent. R. Co. *v.* King, 179 Ill. 91, 53 N. E. 552, 70 Am. St. Rep. 93 [*affirming* 77 Ill. App. 581]; Krueger *v.* Chicago, etc., R. Co., 94 Mo. App. 458, 68 S. W. 220. As ignoring all causal relation between the negligence and the injury. Louisville, etc., R. Co. *v.* Kelton, 112 Ala. 533, 21 So. 819.

Wilful injury.—An instruction in an action against a railroad company for injuries sustained in being ejected by a brakeman from a moving train to find for plaintiff if the injury was wilfully inflicted as charged in the declaration is erroneous if it omits the requirement of proof that the brakeman was acting within the scope of his employment (Illinois Cent. R. Co. *v.* King, 179 Ill. 91, 53 N. E. 552, 70 Am. St. Rep. 93 [*affirming* 77 Ill. App. 581]); and such error is not cured by the use of the phrase "as charged in the declaration," since the reference is only to the wilful character of the act (Illinois Cent. R. Co. *v.* King, *supra*).

11. Curtis *v.* Southern R. Co., 130 N. C. 437, 41 S. E. 929; Lumsden *v.* Chicago, etc., R. Co., 28 Tex. Civ. App. 225, 67 S. W. 168; Rio Grande Western R. Co. *v.* Leak, 163 U. S. 280, 16 S. Ct. 1020, 41 L. ed. 160.

12. Chalkley *v.* Georgia Cent. R. Co., 120 Ga. 683, 48 S. E. 194.

13. See cases cited *infra*, notes 14–29.

contributory negligence and point out its application to the facts of the case,[14] and should also charge as to the standard of care required of the injured party.[15] The instructions should charge as to the injured party's right to rely upon the exercise of due care on the part of the railroad company,[16] as to his knowledge of the danger,[17] and as to any other important fact or element on the question of such negligence.[18] Such instructions should conform to the evidence,[19] and to the

14. See East St. Louis Connecting R. Co. *v.* Eggmann, 170 Ill. 538, 48 N. E. 981, 62 Am. St. Rep. 400 [*affirming* 65 Ill. App. 345]; Illinois Cent. R. Co. *v.* Jernigan, 101 Ill. App. 1 [*affirmed* in 198 Ill. 297, 65 N. E. 88] (holding that an instruction "that the plaintiff was at the time of receiving such injuries in the exercise of reasonable care for his own safety" is not improper as not being sufficiently comprehensive as to the time that plaintiff was under a duty to exercise care for his own safety); McManamee *v.* Missouri Pac. R. Co., 135 Mo. 440, 37 S. W. 119; Catawissa R. Co. *v.* Armstrong, 49 Pa. St. 186; Galveston, etc., R. Co. *v.* Levy, 35 Tex. Civ. App. 107, 79 S. W. 879.

Where the question of contributory negligence depends upon a variety of circumstances from which different minds may arrive at different conclusions, the instruction should have special reference to all the circumstances of the case; and the charge should distinctly point out what failure of the injured person in the duty of looking out for the train would render him *prima facie* guilty of such negligence as would prevent a recovery for an injury occasioned by the mere negligence or unskilfulness of the employees not amounting to wilfulness on their part. Hobbs *v.* Eastern R. Co., 66 Me. 572.

Knowledge of rules of company.— It is not permissible in instructing as to the rules of the railroad company for the government of hand-cars, to say more than that if there was proof of such rules, and it was shown that plaintiff knew, or by ordinary diligence might have known thereof, that fact might be considered in determining whether he had been guilty of negligence contributing to his injury. Garteiser *v.* Galveston, etc., R. Co., 2 Tex. Civ. App. 230, 21 S. W. 631.

15. Maglinchey *v.* Southern Pac. R. Co, (Cal. 1896) 44 Pac. 1021; Maysville, etc., R. Co. *v.* McCabe, 100 S. W. 219, 30 Ky. L. Rep. 1009; Baltimore, etc., R. Co. *v.* Charvat, 94 Md. 569, 51 Atl. 413; Texas Midland R. Co. *v.* Byrd, 41 Tex. Civ. App. 164, 90 S. W. 185; Rio Grande, etc., R. Co. *v.* Martinez, 39 Tex. Civ. App. 460, 87 S. W. 853.

An instruction which contains no requirement of care and caution on the part of the injured party in authorizing a recovery is erroneous (Peoria, etc., R. Co. *v.* O'Brien, 18 Ill. App. 28; O'Keefe *v.* Chicago, etc., R. Co., 32 Iowa 467; Graney *v.* St. Louis, etc., R. Co., 140 Mo. 89, 41 S. W. 246, 38 L. R. A. 633; St. Louis, etc., R. Co. *v.* Christian, 8 Tex. Civ. App. 246, 27 S. W. 932); and the error will not be cured by other instructions which do contain such requirement (Peoria, etc., R. Co. *v.* O'Brien, 18 Ill. App. 28).

16. Rio Grande, etc., R. Co. *v.* Martinez, 39 Tex. Civ. App. 460, 87 S. W. 853; Copley *v.* Union Pac. R. Co., 26 Utah 361, 73 Pac. 517.

17. Illinois Cent. R. Co. *v.* Anderson, 184 Ill. 294, 56 N. E. 331 [*affirming* 81 Ill. App. 137]; Lange *v.* Missouri Pac. R. Co., 115 Mo. App. 582, 91 S. W. 989; Pennsylvania R. Co. *v.* Henderson, 43 Pa. St. 449; Texas, etc., R. Co. *v.* Gay, (Tex. Civ. App. 1896) 38 S. W. 533.

18. Conlan *v.* New York Cent., etc., R. Co., 74 Hun (N. Y.) 115, 26 N. Y. Supp. 659 [*affirmed* in 148 N. Y. 748, 43 N. E. 986] (holding that, in an action for injuries received by plaintiff while placing cars on a side-track, an instruction "that if the plaintiff could have put himself in such a position where by looking he might have seen these cars coming and he did not put himself in such a position, and did not look, that it was negligence on his part," is properly refused because it omits the qualification that he could have so placed himself "while doing the work"); Texas, etc., R. Co. *v.* Gay, (Tex. Civ. App. 1896) 38 S. W. 533.

19. Chicago, etc., R. Co. *v.* O'Sullivan, 143 Ill. 48, 32 N. E. 398.

Instructions held proper or erroneously refused as being applicable to the evidence see Farber *v.* Missouri Pac. R. Co., 139 Mo. 272, 40 S. W. 932.

Instructions held erroneous or properly refused as not being applicable to or supported by the evidence see Louisville, etc., R. Co. *v.* Orr, 121 Ala. 489, 26 So. 35; Baltimore, etc., R. Co. *v.* Charvat, 94 Md. 569, 51 Atl. 413; Anderson *v.* Union Terminal R. Co., 161 Mo. 411, 61 S. W. 874; Jackson *v.* Kansas City, etc., R. Co., 157 Mo. 621, 58 S. W. 32, 80 Am. St. Rep. 650; El Paso, etc., R. Co. *v.* Darr, (Tex. Civ. App. 1906) 93 S. W. 166; Missouri, etc., R. Co. *v.* Lyons, (Tex. Civ. App. 1899) 53 S. W. 96. Thus in an action for the death of a person who had gone on a track in front of an approaching train to save the life of a child, a charge that no recovery can be had if the child was of such mental and physical vigor as to be able to avoid the danger without assistance is abstract, where the child was of tender years and there is no evidence that it was of sufficient mental and physical development to avoid the danger to which it was exposed. Louisville, etc., R. Co. *v.* Orr, 121 Ala. 489, 26 So. 35. So in an action for the death of one crossing a track near a station, an instruction that if the movements of a train at that point at that time of day were variable and uncertain, decedent was not justified in stepping upon the track without looking to see whether the train was in motion, is prop-

pleadings and issues,[20] and should not be argumentative,[21] or calculated to mislead the jury,[22] or invade the province of the jury by assuming certain facts as established,[23] or by charging that certain facts in evidence do or do not constitute contributory negligence.[24] The instructions are to be construed as a whole, and although one portion considered separately might be open to objection, it may be aided by other and more explicit instructions, and does not constitute error if the charge is correct in its entirety;[25] and it is not error to omit in one part of the instructions to charge upon a matter which is fully covered in another part.[26] A requested instruction covered by other instructions given may be properly refused;[27] but it is error to refuse to charge upon a theory of the case not sufficiently covered by other charges given.[28] An instruction which covers the case generally is ordinarily sufficient in the absence of a request for special instructions.[29]

erly refused as tending to divert the attention of the jury from testimony as to the company's rules requiring warning to be given when the locomotive is about to be moved and as to its control while in motion and the probable knowledge acquired by decedent regarding those matters from her habitual observations. Minot *v.* Boston, etc., R. Co., 74 N. H. 230, 66 Atl. 825. So it is reversible error to charge that, if deceased was guilty of gross negligence, the verdict should be for defendant unless death was caused by the wilful intention or wanton or reckless acts of defendant's servants, where there is no evidence that death was caused by such acts. Illinois Cent. R. Co. *v.* Hileman, 53 Ill. App. 57.

20. Instructions held proper or erroneously refused see Pittsburgh, etc., R. Co. *v.* Geltmaker, 30 S. W. 394, 16 Ky. L. Rep. 861; Missouri, etc., R. Co. *v.* Brown, (Tex. Civ. App. 1907) 101 S. W. 464.

Instructions held erroneous or properly refused: As not conforming to the issues. Louisville, etc., R. Co. *v.* Orr, 121 Ala. 489, 26 So. 35; Thurman *v.* Louisville, etc., R. Co., 34 S. W. 893, 17 Ky. L. Rep. 1343; Louisiana, etc., R. Co. *v.* McDonald, (Tex. Civ. App. 1899) 52 S. W. 649, holding that an instruction submitting the question of contributory negligence is erroneous where there is no issue except that of the negligence of defendant's servants in failing to exercise due care. As ignoring a material fact or theory in issue. Chicago, etc., R. Co. *v.* O'Sullivan, 143 Ill. 48, 32 N. E. 398; Minot *v.* Boston, etc., R. Co., 74 N. H. 230, 66 Atl. 825.

21. Chicago, etc., R. Co. *v.* O'Sullivan, 143 Ill. 48, 32 N. E. 398.

22. Instructions held not misleading see Santa Fe, etc., R. Co. *v.* Ford, (Ariz. 1906) 85 Pac. 1072.

Instructions held misleading see Toledo, etc., R. Co. *v.* Hammett, 220 Ill. 9, 77 N. E. 72 [*reversing* 115 Ill. App. 268]; Louisville, etc., R. Co. *v.* Vittitoe, 41 S. W. 269, 19 Ky. L. Rep. 612; Hasie *v.* Alabama, etc., R. Co., 78 Miss. 413, 28 So. 941, 84 Am. St. Rep. 632; East Tennessee, etc., R. Co. *v.* Winters, 85 Tenn. 240, 1 S. W. 790; Texas, etc., R. Co. *v.* Best, 66 Tex. 116, 18 S. W. 224; Texas, etc., R. Co. *v.* Breadow, (Tex. Civ. App. 1896) 35 S. W. 490; St. Louis, etc., R. Co. *v.* Christian, 8 Tex. Civ. App. 246, 27 S. W. 932; Galveston, etc., R. Co. *v.* Lewis, 5 Tex. Civ. App. 638, 25 S. W. 293; Hickey *v.* Rio Grande Western R. Co., 29 Utah 392, 82 Pac. 29.

23. Harris *v.* Atlantic Coast Line R. Co., 132 N. C. 160, 43 S. E. 589.

24. *Illinois.*— Chicago, etc., R. Co. *v.* Huston, 196 Ill. 480, 63 N. E. 1028 [*affirming* 95 Ill. App. 350]; Illinois Cent. R. Co. *v.* Anderson, 184 Ill. 294, 56 N. E. 331 [*affirming* 81 Ill. App. 137].

Maine.— Pollard *v.* Maine Cent. R. Co., 87 Me. 51, 32 Atl. 735.

Michigan.— Baker *v.* Flint, etc., R. Co., 68 Mich. 90, 35 N. W. 836, holding an instruction to be improper as making the court the judge of plaintiff's incapacity to appreciate the danger, and his manner of exercising it.

Missouri.— Graney *v.* St. Louis, etc., R. Co., 140 Mo. 89, 41 S. W. 246, 38 L. R. A. 633.

New Hampshire.— Ayers *v.* Boston, etc., R. Co., 68 N. H. 208, 39 Atl. 1021.

South Carolina.— White *v.* Augusta, etc., R. Co., 30 S. C. 218, 9 S. E. 96.

Texas.— Chicago, etc., R. Co. *v.* Martin, 35 Tex. Civ. App. 186, 79 S. W. 1101; St. Louis Southwestern R. Co. *v.* Eitel, (Civ. App. 1903) 72 S. W. 205; Kroeger *v.* Texas, etc., R. Co., 30 Tex. Civ. App. 87, 69 S. W. 809; Collins *v.* Dillingham, 7 Tex. Civ. App. 93, 26 S. W. 87.

An instruction assuming the injured party's negligence to be slight only is erroneous. Houston, etc., R. Co. *v.* Smith, 52 Tex. 178.

25. Little Rock, etc., R. Co. *v.* McQueeney, 78 Ark. 22, 92 S. W. 1120.

26. Chicago, etc., R. Co. *v.* O'Sullivan, 143 Ill. 48, 32 N. E. 398.

27. Illinois Cent. R. Co. *v.* Wilson, 63 S. W. 608, 23 Ky. L. Rep. 684; Anderson *v.* Union Terminal R. Co., 161 Mo. 411, 61 S. W. 874; St. Louis Southwestern R. Co. *v.* Everett, 40 Tex. Civ. App. 285, 89 S. W. 457; Hickey *v.* Rio Grande Western R. Co., 29 Utah 392, 82 Pac. 29.

28. International, etc., R. Co. *v.* Ploeger, (Tex. Civ. App. 1905) 93 S. W. 226; International, etc., R. Co. *v.* Hall, (Tex. Civ. App. 1905) 92 S. W. 996; International, etc., R. Co. *v.* Jackson, 41 Tex. Civ. App. 51, 90 S. W. 918.

29. Godfrey *v.* New York Cent., etc., R. Co., 161 N. Y. 565, 56 N. E. 77 [*affirming*

g. Verdict and Findings. The rules applicable in civil actions generally [30] govern general [31] and special [32] verdicts or findings, and findings by the court,[33] in actions for injuries to persons on or near railroad tracks. Every reasonable presumption will be made in aid of a general verdict,[34] and if the special findings can be reconciled therewith on any reasonable hypothesis,[35] or under any supposable state of facts provable under the issues,[36] the general verdict will control and judgment must be entered accordingly; but if the special findings are irreconcilable with the general verdict, they will control such verdict and judgment must be entered upon them notwithstanding the general verdict.[37] Special

31 N. Y. App. Div. 634, 54 N. Y. Suppl. 1104], holding that where there is no conflict in the evidence as to the purpose for which plaintiff's decedent was in defendant's railroad station when he was killed by the collapse of the building, and the court submits the question of his injury to the jury, and defendant makes no request to have any special question submitted, there is no error in a failure to submit the question as to defendant's purpose in being in the building.

30. See, generally, TRIAL.

31. Georgia Southern, etc., R. Co. *v.* George, 92 Ga. 760, 19 S. E. 813 (holding that in an action for the death of a person on the track, where the evidence shows that decedent was not on the track when the train approached him but must have been killed by attempting to board a car as the train was passing, a verdict for plaintiff is without support); Louisville, etc., R. Co. *v.* Daniel, 91 S. W. 691, 28 Ky. L. Rep. 1146, 3 L. R. A. N. S. 1190 (holding a verdict in favor of plaintiff to be ground for a new trial as palpably against the weight of the evidence); Chesapeake, etc., R. Co. *v.* Anderson, 93 Va. 650, 25 S. E. 947 (verdict held contrary to law and evidence).

Although a boy testified on cross-examination that he fell and was injured while trying to get on to a car, the jury is not precluded from basing a verdict on his direct examination, corroborated by other evidence, that a brakeman forced him to leave a car while the train was in motion and caused him to fall and sustain the injuries complained of. Texas, etc., R. Co. *v.* Buch, (Tex. Civ. App. 1907) 102 S. W. 124 [*reversed* on other grounds in (1907) 105 S. W. 987].

32. See Colorado Midland R. Co. *v.* Robbins, 30 Colo. 449, 71 Pac. 371 (special finding as to rate of speed held not to be contrary to the evidence); Chicago, etc., R. Co. *v.* Stephenson, 33 Ind. App. 95, 69 N. E. 270 (holding that in an action for the death of a fireman killed while beneath his engine in the discharge of his duties, by certain cars being projected against it by employees of another company, a finding that there is no evidence that decedent took any precaution to warn or notify the employees of his position is not equivalent to a finding that he did not take any such precaution the burden of establishing contributory negligence being upon the master of such employees); Smetanka *v.* New York Cent., etc., R. Co., 123 N. Y. App. Div. 323, 107 N. Y. Suppl. 973 (finding that decedent was not guilty of contributory negligence held against the weight of evidence).

Where several theories arise out of the evidence, any of them may be adopted by the jury, and they are not bound to find that the whole testimony is true. Clark *v.* Wilmington, etc., R. Co., 109 N. C. 430, 14 S. E. 43, 14 L. R. A. 749.

A question of a special verdict whether plaintiff sustained his injuries on depot grounds sufficiently submits the question whether a lawn, adjacent to the depot platform, was a part of the depot grounds, within the rule requiring a railroad company to keep in a safe condition its depot platform and approaches thereto and other portions of its depot grounds reasonably near. Banderob *v.* Wisconsin Cent. R. Co., 133 Wis. 249, 113 N. W. 738.

33. See Sullivan *v.* New York, etc., R. Co., 73 Conn. 203, 47 Atl. 131, holding that under a finding by the court that a trainman's lantern, without a reflector, hung on the back of the tender of a backing engine, is a proper light if the locomotive is properly managed and a proper lookout kept, the inference is that when no lookout is placed on the tender such light is not a sufficient one, and the finding is not an unqualified one that the light is a proper light.

34. Shoner *v.* Pennsylvania Co., 130 Ind. 170, 28 N. E. 616, 29 N. E. 775.

35. Shoner *v.* Pennsylvania Co., 130 Ind. 170, 28 N. E. 616, 29 N. E. 775.

A motion for a judgment on special findings notwithstanding the general verdict must be overruled where such findings are not in irreconcilable conflict with the general verdict. Cleveland, etc., R. Co. *v.* Berry, 152 Ind. 607, 53 N. E. 415, 46 L. R. A. 33; Chicago, etc., R. Co. *v.* Stephenson, 33 Ind. App. 95, 69 N. E. 270.

36. Shoner *v.* Pennsylvania Co., 130 Ind. 170, 28 N. E. 616, 29 N. E. 775.

The finding of a fact which it was probably necessary for the jury to find before they could find a verdict must be deemed by intendment to be included in a general verdict for plaintiff, as in regard to the train which caused the injury, and an answer by the jury to an interrogatory that they do not know what train it was does not necessarily contravene or overcome such presumption. Indianapolis Union R. Co. *v.* Neubaucher, 16 Ind. App. 21, 44 N. E. 669.

37. Pennsylvania Co. *v.* Meyers, 136 Ind. 242, 36 N. E. 32; Crowley *v.* Northern Pac. R. Co., 46 Wash. 85, 89 Pac. 471; Bess *v.* Chesapeake, etc., R. Co., 35 W. Va. 492, 14

findings, in order to support a judgment thereon, should contain all the facts upon which the judgment is to rest, nothing being taken by implication or intendment, and whatever is not found in them being supposed not to exist.[38] A judgment cannot be entered upon inconsistent findings,[39] except where one of such findings is a mere conclusion of law, in which case it must yield to special findings of fact inconsistent therewith.[40]

h. Appeal and Error. The same rules that apply to appeals in civil cases generally [41] govern questions of appeal and error in actions for injuries to persons on or near railroad tracks.[42] If there is any evidence to support a verdict or finding it will not be disturbed on appeal;[43] and a judgment will not be reversed for harmless error,[44] as in respect to the admission or exclusion of evidence,[45] or

S. E. 234, 29 Am. St. Rep. 820; Hogan *v.* Chicago, etc., R. Co., 59 Wis. 139, 17 N. W. 632.

38. St. Louis, etc., R. Co. *v.* Karns, 66 Kan. 802, 72 Pac. 234 (defendant held entitled to judgment on the special finding); Pittsburgh, etc., R. Co. *v.* Evans, 53 Pa. St. 250 (holding that it is not sufficient that the special verdict finds that there was negligence on the part of the railroad company, unless it is found that plaintiff was lawfully on the road, and not guilty of negligence).

A special verdict or finding that plaintiff was injured by the failure of defendant to exercise ordinary care in respect to some duty which it owed to plaintiff is insufficient to support a judgment against defendant, without a further finding, or unless it appears conclusively from the evidence that such injury was a natural and probable result of defendant's negligence, and one which in the light of attending circumstances a person of ordinary intelligence ought reasonably to have foreseen. Sheridan *v.* Bigelow, 93 Wis. 426, 67 N. W. 732.

Where wilfulness is necessary to a recovery and a special verdict fails to find that plaintiff's conduct was wilful, a judgment thereon is properly entered for defendant. Barr *v.* Chicago, etc., R. Co., 10 Ind. App. 433, 37 N. E. 814.

A failure to answer immaterial interrogatories is not fatal to a verdict. Whitlock *v.* Pennsylvania R. Co., 11 S. W. 208, 10 Ky. L. Rep. 966, holding that where the jury find specially that deceased was a trespasser, that the death was caused wholly by his negligence and through no fault of the servants of the company, and judgment is rendered for defendant, it is immaterial that they fail to agree upon the question whether it was defendant's duty to have a brakeman at the end of the train where deceased was killed and whether such brakeman would have prevented the accident.

39. Kearney *v.* Chicago, etc., R. Co., 47 Wis. 144, 2 N. W. 82; Haas *v.* Chicago, etc., R. Co., 41 Wis. 44.

40. Hogan *v.* Chicago, etc., R. Co., 59 Wis. 139, 17 N. W. 632, holding that where the alleged negligence is a failure to give proper warning, a finding that defendant was negligent must yield to special findings that the whistle was sounded and bell rung.

41. See, generally, APPEAL AND ERROR, 2 Cyc. 474.

42. See Alabama Great Southern R. Co. *v.* Burgess, 114 Ala. 587, 22 So. 169, holding that where evidence was admitted that a railroad engineer might with reasonable care have discovered the peril of a person injured by his train in time to have avoided the injury, it will be presumed on appeal that the trial court did not suffer the jury to make mere negligence in not discovering the peril, the basis of a recovery by plaintiff.

Nothing will be presumed in favor of special findings as against the general verdict on appeal. Indianapolis Union R. Co. *v.* Neubaucher, 16 Ind. App. 21, 43 N. E. 576, 44 N. E. 669.

Ruling of court.— It is reversible error for the court to change counsel's question to a witness so as to omit essential facts from view. Livingston *v.* Wabash R. Co., 170 Mo. 452, 71 S. W. 136.

43. *Missouri.*— Mirrielees *v.* Wabash R. Co., 163 Mo. 470, 63 S. W. 718.

New York.— Douglass *v.* Northern Cent. R. Co., 59 N. Y. App. Div. 470, 69 N. Y. Suppl. 370.

Tennessee.— Stacker *v.* Louisville, etc., R. Co., 106 Tenn. 450, 61 S. W. 766.

Texas.— Brown *v.* Griffin, 71 Tex. 654, 9 S. W. 546; Brown *v.* Sullivan, 71 Tex. 470, 10 S. W. 288; Texas, etc., R. Co. *v.* O'Donnell, 58 Tex. 27.

United States.— Owens *v.* Missouri Pac. R. Co., 38 Fed. 571.

Where the evidence is conflicting, the verdict of a jury or the finding of a court upon a question of fact will not be disturbed unless great injustice seems to have been done and there is a want of evidence to sustain it. Finney *v.* Northern Pac. R. Co., 3 Dak. 270, 16 N. W. 500.

44. See Kentucky, etc., Bridge Co. *v.* McKinney, 9 Ind. App. 213, 36 N. E. 448.

45. *Illinois.*— Lake Shore, etc., R. Co. *v.* Bodemer, 139 Ill. 596, 29 N. E. 692, 32 Am. St. Rep. 218 [*affirming* 33 Ill. App. 479], holding that where, in an action for the death of a trespasser on railroad tracks, the jury are instructed that plaintiff cannot recover on any count except one which charges that the injury was wantonly inflicted, the admission of evidence of ordinances governing the rate of speed of trains and providing for signals is not reversible error, although such ordinances are not mentioned in the said count, where defendant's counsel admits in his opening statement to the jury that the

in the giving or refusing of instructions.[46] But a judgment based on a verdict which is unsupported by the evidence will be set aside or reversed.[47]

F. Accidents at Crossings*[48]—1. Character of Crossings — a. In General. Railroad crossings within the meaning of the rules of law hereinafter considered, imposing a liability upon a railroad company for injuries caused thereat either by its trains or by the condition of the crossing itself, mean public crossings, or points at which public streets or highways cross the railroad tracks,[49] and

former ordinance was violated by defendant, and the latter ordinance is not read in the hearing of the jury.

Indiana.— Pittsburgh, etc., R. Co. *v.* Simons, 168 Ind. 333, 79 N. E. 911 [*affirming* (App. 1906) 76 N. E. 883]; Kentucky, etc., Bridge Co. *v.* McKinney, 9 Ind. App. 213, 36 N. E. 448, holding that in an action for injuries received by stepping off at a station in the night-time on the side of the track on which there was no platform and falling several feet, it is harmless error to admit evidence that after the accident defendant greatly extended its platform at that point on the south side of the track, since the injury was caused by plaintiff stepping off the north side and the rule excluding evidence of repairs made after the injury does not apply.

Kentucky.— Beiser *v.* Chesapeake, etc., R. Co., 92 S. W. 928, 29 Ky. L. Rep. 249, holding that plaintiff's rights are not prejudiced by the exclusion of evidence as to the distance within which a train could be stopped, where there is no evidence that the railroad employees actually saw plaintiff before he was hurt.

Massachusetts.— Robinson *v.* Fitchburg, etc., R. Co., 7 Gray 92.

Oregon.— Turney *v.* Southern Pac. Co., 44 Oreg. 280, 75 Pac. 144, 76 Pac. 1080.

Texas.— Hughes *v.* Galveston, etc., R. Co., 67 Tex. 595, 4 S. W. 219.

Wisconsin.— Banderob *v.* Wisconsin Cent. R. Co., 133 Wis. 249, 113 N. W. 738 (holding that in an action for injuries sustained on a railroad lawn adjacent to its depot platform, the use of the words "depot grounds," in questions asked a witness to identify the place, is not error); Whalen *v.* Chicago, etc., R. Co., 75 Wis. 654, 44 N. W. 849.

46. McCauley *v.* Tennessee Coal, etc., Co., 93 Ala. 356, 9 So. 611 (holding that in an action for a death alleged to have resulted from defendant's negligence, where it is shown that deceased was on defendant's car which was not for passengers, by mere license, and no wanton or intentional wrong is shown, an instruction that deceased was a mere trespasser is harmless error); Union Pac. R. Co. *v.* Ure, 56 Kan. 473, 43 Pac. 776 (holding that where the facts uphold a verdict against the railroad company, it is immaterial whether the court erred in its instructions in making a distinction as to the point of time when the duty of the company arises toward a conscious or unconscious trespasser upon its track); McAdoo *v.* Richmond, etc., R. Co., 105 N. C. 140, 11 S. E. 316 (holding that an error, if any, in refusing to tell the jury that a railroad company is required to exercise more than the usual amount of care in running its trains in populous towns is cured by a finding that the injury complained of was sustained through the negligence of the company); Forge *v.* Houston, etc., R. Co., 41 Tex. Civ. App. 81, 90 S. W. 1118.

Error cannot be assigned to such portion of a charge as is purely speculative and could not have affected the result. Petrie *v.* Columbia, etc., R. Co., 29 S. C. 303, 7 S. E. 515.

47. Finney *v.* Northern Pac. R. Co., 3 Dak. 270, 16 N. W. 500; East Tennessee, etc., R. Co. *v.* Harbuck, 91 Ga. 598, 18 S. E. 358; Hopkins *v.* Anderson, 73 Ill. App. 632; Jaffi *v.* Missouri Pac. R. Co., 205 Mo. 450, 103 S. W. 1026.

48. Collision of trains at railroad crossings see *supra*, X, D.

Companies and persons liable for injury see *supra*, X, C.

Criminal prosecution see *supra*, X, B, 8.

Validity or reasonableness of statutory and municipal regulations see *supra*, X, B, 1.

49. Louisville, etc., R. Co. *v.* Hubbard, 145 Ala. 45, 41 So. 814; Beatty *v.* Central Iowa R. Co., 58 Iowa 242, 12 N. W. 332. See also St. Louis, etc., R. Co. *v.* McMatthews, 34 Tex. Civ. App. 302, 79 S. W. 71.

That portion of the highway lying parallel to a railroad track from the point where the railroad first infringes upon the highway to the point of actual crossing cannot be regarded as part of the highway crossing. Beatty *v.* Central Iowa R. Co., 58 Iowa 242, 12 N. W. 332.

To prove that the place at which the accident occurred was in a highway, it is not enough to prove its dedication to the public, but it must be shown that the dedication was made by the owner, and has been accepted by the public authorities by user or otherwise. Such *v.* Cleveland, etc., R. Co., 2 Ohio Dec. (Reprint) 352, 2 West. L. Month. 486. See, generally, Dedication, 13 Cyc. 461.

Overhead crossing.— The statutory duties of a railroad company as to railroad crossings have no application where the street runs under the railroad. Houston, etc., R. Co. *v.* Sgalinski, 19 Tex. Civ. App. 107, 46 S. W. 113.

A road within the meaning of the Texas statute (Rev. St. art. 4232), relating to the liability of railroad companies for injuries to persons at a public crossing, is a road dedicated to the public use or commonly used and traveled by the public. Markham *v.* Houston, etc., R. Co., 1 Tex. App. Civ. Cas. § 81.

Public highway.— That the land, which

* By Henry H. Skyles.

such other places as have by license or custom become recognized and used by the public as public crossings.[50]

b. Crossings by License or Custom. Although a railroad crossing is not on a public street or highway, it becomes a public crossing so as to impose upon a railroad company the same liability as at a public crossing where the railroad company by some act or designation invites or induces persons to regard and use it as such;[51] or where, with the railroad company's acquiescence, it has been used as a public crossing for a long time.[52] But the mere fact that a number of

was the prolongation of a city street, and was used as a public way, had been made by a wharf company by solid filling, does not destroy the character of the highway, and render inapplicable thereto city ordinances protecting the public in the use of highways. Galveston, etc., R. Co. *v.* Levy, 35 Tex. Civ. App. 107, 79 S. W. 879.

50. See *infra*, X, F, 1, b.

51. *Florida.*— Morris *v.* Florida Cent., etc., R. Co., 43 Fla. 10, 29 So. 541.

Georgia.— Southern R. Co. *v.* Hooper, 110 Ga. 779, 36 S. E. 232 (holding that the building and keeping in repair by a railroad company of a bridge over or an approach to a private crossing is such an invitation to the public to use the same as renders the company liable for injuries resulting from defects negligently permitted to exist or remain in the structure); Central R., etc., Co. *v.* Robertson, 95 Ga. 430, 22 S. E. 551.

Illinois.— Illinois Central R. Co. *v.* Klein, 95 Ill. App. 220 (user by the public for more than twenty-five years without objection, and repairs by the railway company); Chicago, etc., R. Co. *v.* Reith, 65 Ill. App. 461 (holding that where a crossing is used by the public as a highway with the acquiescence of the railroad company, it is bound to treat it as a highway as to one who does not in fact see a sign-board warning persons crossing that way that they do so at their own peril).

Indiana.— Baltimore, etc., R. Co. *v.* Slaughter, 167 Ind. 330, 79 N. E. 186, 7 L. R. A. 597; Pittsburgh, etc., R. Co. *v.* Simons, (App. 1906) 76 N. E. 883 [*affirmed* in 168 Ind. 333, 79 N. E. 911].

Maine.— Webb *v.* Portland, etc., R. Co., 57 Me. 117, holding that if with the consent of the railroad company and of the owners of the fee in the land there has been a thoroughfare in open and continuous use by the public, and that use commenced before defendant commenced operations on its road and continued without objection to the time of the accident, the jury may infer the existence of a way such as will oblige the railway company to use the same care in running its trains as it would be bound to exercise if the highway had been legally located across the track at that point.

Massachusetts.— Murphy *v.* Boston, etc., R. Co., 133 Mass. 121.

Michigan.— Schindler *v.* Milwaukee, etc., R. Co., 87 Mich. 400, 49 N. W. 670, holding that the fact that the crossing is a private way is immaterial where it is commonly used with the knowledge of, and without objection by, the railroad employees, who have often opened trains standing on the crossing to allow the public to travel over it.

Missouri.— Gurley *v.* Missouri Pac. R. Co., 122 Mo. 141, 26 S. W. 953.

North Dakota.— Johnson *v.* Great Northern R. Co., 7 N. D. 284, 75 N. W. 250, holding that where a crossing has been used by the public for eight years and the company has planked it according to its custom at crossings, and has erected a sign-post warning travelers that there is a crossing at this place, the company is liable as at a public crossing, although the highway has not been laid out in strict accordance with law.

Pennsylvania.— Kay *v.* Pennsylvania R. Co., 65 Pa. St. 269, 3 Am. Rep. 628.

Texas.— Cowans *v.* Fort Worth, etc., R. Co., 40 Tex. Civ. App. 539, 89 S. W. 1116; Markham *v.* Houston, etc., R. Co., 1 Tex. App. Civ. Cas. § 81. See also St. Louis, etc., R. Co. *v.* Matthews, 34 Tex. Civ. App. 302, 79 S. W. 71.

Virginia.— Nichols *v.* Washington, etc., R. Co., 83 Va. 99, 5 S. E. 171, 5 Am. St. Rep. 257.

United States.— Garrett *v.* Illinois Cent. R. Co., 126 Fed. 406.

England.— See Rogers *v.* Rhymney R. Co., 26 L. T. Rep. N. S. 879, 21 Wkly. Rep. 21.

See 41 Cent. Dig. tit. "Railroads," § 955.

Recognizing a road which crosses the line of railway as a public road by establishing and keeping up a crossing thereon is sufficient to establish its public character. Texas, etc., R. Co. *v.* Anderson, 2 Tex. App. Civ. Cas. § 203; International, etc., R. Co. *v.* Jordan, 1 Tex. App. Civ. Cas. § 859; Markham *v.* Houston, etc., R. Co., 1 Tex. App. Civ. Cas. § 81.

52. *Illinois.*— St. Louis Nat. Stock Yards *v.* Brennan, 126 Ill. App. 601.

Kentucky.— Davis *v.* Louisville, etc., R. Co., 97 S. W. 1122, 30 Ky. L. Rep. 172, 99 S. W. 930, 30 Ky. L. Rep. 946, holding that one crossing a railroad track upon a pathway, not a public street, but which for twenty-five years has been used by from twenty-five to seventy-five persons daily in crossing from a street to a mill is not a trespasser, but is entitled to substantially the same care and warning as though on a public crossing.

Missouri.— Sites *v.* Knott, 197 Mo. 684, 96 S. W. 206; Easley *v.* Missouri Pac. R. Co., 113 Mo. 236, 20 S. W. 1073.

North Carolina.— Bradley *v.* Ohio River, etc., R. Co., 126 N. C. 735, 36 S. E. 181.

Pennsylvania.— Taylor *v.* Delaware, etc., Canal Co., 113 Pa. St. 162, 8 Atl. 43, 57 Am. Rep. 446.

persons are in the habit of using a certain place as a crossing where there is no public right of passage does not constitute such place a public crossing, or generally confer upon such persons a character or right other than that of trespassers;[53] and, although they so use such place with the mere passive acquiescence or permission of the railroad company, they are mere licensees, and as a general rule are entitled to no greater rights than are trespassers.[54] A person is not a trespasser in being on a track at a private crossing made by the company under a contract with the owner of the surrounding land when the road was built, and through whom such person acquires land near the track.[55]

2. Mutual Rights and Duties[56] — a. At Public Crossings. As a general rule the rights and duties of the public and a railroad company at a public crossing are mutual and reciprocal,[57] and both are charged with the mutual duty of keeping

Texas.— Missouri Pac. R. Co. *v.* Bridges, 74 Tex. 520, 12 S. W. 210, 15 Am. St. Rep. 856.

Vermont.— Seymour *v.* Central Vermont R. Co., 69 Vt. 555, 38 Atl. 236.

See 41 Cent. Dig. tit. "Railroads," § 955.

Permission to cross given by owner of the land before the railroad company became owner does not tend to show such permission by the railroad company. Central R., etc., Co. *v.* Pylee, 87 Ga. 491, 13 S. E. 584, 13 L. R. A. 634.

53. Illinois Cent. R. Co. *v.* Beard, 49 Ill. App. 232 (holding that where a railroad company constructs steps at the side of its freight house platform, which steps are essential to the use of the freight house, but are connected with no street, sidewalk, or public way, the fact that the public has used such steps in going to and from the depot does not make them a part of the public crossing); Sprow *v.* Boston, etc., R. Co., 163 Mass. 330, 39 N. E. 1024; Chenery *v.* Fitchburg R. Co., 160 Mass. 211, 35 N. E. 554, 22 L. R. A. 575; McCreary *v.* Boston, etc., R. Co., 153 Mass. 300, 26 N. E. 864, 11 L. R. A. 359; Matze *v.* New York Cent., etc., R. Co., 1 Hun (N. Y.) 417, 3 Thomps. & C. 513 (no license or acquiescence by defendant being shown).

54. Illinois Cent. R. Co. *v.* O'Connor, 189 Ill. 559, 59 N. E. 1098; Illinois Cent. R. Co. *v.* James, 67 Ill. App. 649; Atchison, etc., R. Co. *v.* Parsons, 42 Ill. App. 93; Atchison, etc., R. Co. *v.* Fuller, 72 Kan. 527, 84 Pac. 140; Sutton *v.* New York Cent., etc., R. Co., 66 N. Y. 243 [*reversing* 4 Hun 760]; Matze *v.* New York Cent., etc., R. Co., 1 Hun (N. Y.) 17, 3 Thomps. & C. 513. See also Bennett *v.* Grand Trunk R. Co., 3 Can. L. T. Occ. Notes 403.

Assumption of risk.—A licensee crossing at a place other than a public crossing assumes the risks of injuries from coming in contact with semaphore wires or any other stationary devices convenient or necessary for the safe operation of trains. Atchison, etc., R. Co. *v.* Fuller, 72 Kan. 527, 84 Pac. 140.

55. Hovius *v.* Cincinnati, etc., R. Co., 107 S. W. 214, 32 Ky. L. Rep. 786.

56. Duty to restore and maintain highway see *supra*, VI, D, 3; and *infra*, X, F, 3, b, h.

57. *Illinois.*— Illinois Cent. R. Co. *v.* Benton, 69 Ill. 174; Indianapolis, etc., R. Co. *v.* Stables, 62 Ill. 313; Galena, etc., R. Co. *v.* Dill, 22 Ill. 264 (holding that neither party has a superior right except as it results from the difficulties and necessities of the case); McGuire *v.* Chicago, etc., R. Co., 120 Ill. App. 111.

Indiana.— Pennsylvania Co. *v.* Krick, 47 Ind. 368; Hurley *v.* Jeffersonville, etc., R. Co., Wils. 295.

Kentucky.—Louisville, etc., R. Co. *v.* Goetz, 79 Ky. 442, 42 Am. Rep. 227; Chesapeake, etc., R. Co. *v.* Riddle, 72 S. W. 22, 24 Ky. L. Rep. 1687.

Minnesota.— Klotz *v.* Winona, etc., R. Co., 68 Minn. 341, 71 N. W. 257.

Missouri.— Esler *v.* Wabash R. Co., 109 Mo. App. 580, 83 S. W. 73.

Nebraska.— Riley *v.* Missouri Pac. R. Co., 69 Nebr. 82, 95 N. W. 20.

Nevada.— Cohen *v.* Eureka, etc., R. Co., 14 Nev. 376.

North Carolina.— Duffy *v.* Atlantic, etc., R. Co., 144 N. C. 26, 56 S. E. 557; Norton *v.* North Carolina R. Co., 122 N. C. 910, 29 S. E. 886.

Ohio.— Pittsburgh, etc., R. Co. *v.* Maurer, 21 Ohio St. 421.

Pennsylvania.— Pittsburg, etc., R. Co. *v.* Dunn, 56 Pa. St. 280; North Pennsylvania R. Co. *v.* Heileman, 49 Pa. St. 60, 88 Am. Dec. 482.

Texas.—International etc., R. Co. *v.* Glover, (Civ. App. 1905) 88 S. W. 515; St. Louis Southwestern R. Co. *v.* Matthews, 34 Tex. Civ. App. 302, 79 S. W. 71; Missouri, etc., R. Co. *v.* Cox, (Civ. App. 1894) 27 S. W. 1050. See Texas, etc., R. Co. *v.* Ball, 38 Tex. Civ. App. 279, 85 S. W. 456. But see Houston, etc., R. Co. *v.* Carson, 66 Tex. 345, 1 S. W. 107, holding that the right of a railway company to run its trains across a street is strictly subordinate to the public right of ordinary travel.

Virginia.— Southern R. Co. *v.* Torian, 95 Va. 453, 28 S. E. 569.

West Virginia.—Bowles *v.* Chesapeake, etc., R. Co., 61 W. Va. 272, 57 S. E. 131; Berkeley *v.* Chesapeake, etc., R. Co., 43 W. Va. 11, 26 S. E. 349.

United States.— Texas., etc., R. Co. *v.* Cody, 166 U. S. 606, 17 S. Ct. 703, 41 L. ed. 1132 [*affirming* 67 Fed. 71, 14 C. C. A. 310];

a careful lookout to avoid inflicting or receiving injury, the degree of diligence to be used on either side being such as a prudent person would exercise under the circumstances at the particular time and crossing in endeavoring to perform his duty.[58] A traveler is bound to use ordinary care in approaching the crossings

Baltimore, etc., R. Co. *v.* Anderson, 85 Fed. 413, 29 C. C. A. 235.

See 41 Cent. Dig. tit. "Railroads," § 956.

Any part of a public crossing may be used by a traveler thereon. The traveler may not only pass directly over the right of way, but he may also pass from one side of the highway to the other, using the right of way of the railroad company for that purpose for the entire or any part of the distance. McGuire *v.* Chicago, etc., R. Co., 120 Ill. App. 111; Louisville, etc., R. Co. *v.* Head, 80 Ind. 117 (holding that a person has a right to cross a railroad at a crossing anywhere within the highway even if a footwalk has been made across the railroad); Louisville, etc., R. Co. *v.* Price, 76 S. W. 836, 25 Ky. L. Rep. 1033 (holding that the fact that the person injured was walking diagonally over the crossing does not make him a trespasser); Conaty *v.* New York Cent., etc., R. Co., 164 Mass. 572, 42 N. E. 103 (holding that the law of the road requiring travelers and vehicles on meeting to turn to the right of the middle of the traveled part of the road does not apply in an action for injuries received in a collision of a vehicle with a locomotive at a highway crossing).

58. *Illinois.*— Illinois Cent. R. Co. *v.* Benton, 69 Ill. 174; Galena, etc., R. Co. *v.* Dill, 22 Ill. 264; Chicago, etc., R. Co. *v.* Still, 19 Ill. 499, 71 Am. Dec. 236; Chicago, etc., R. Co. *v.* Barber, 15 Ill. App. 630.

Indiana.— Indianapolis, etc., R. Co. *v.* McLin, 82 Ind. 435; Pennsylvania Co. *v.* Krick, 47 Ind. 368; Toledo, etc., R. Co. *v.* Goddard, 25 Ind. 185; Hurley *v.* Jeffersonville, etc., R. Co., Wils. 295.

Kansas.— Leavenworth, etc., R. Co. *v.* Rice, 10 Kan. 426.

Kentucky.— Louisville, etc., R. Co. *v.* Cummins, 111 Ky. 333, 63 S. W. 594, 23 Ky. L. Rep. 681 (holding that it is a duty of defendant company to exercise such care in regard to signals, speed, and lookonts as might usnally be expected of ordinarily prudent persons engaged in operating a railroad under like circumstances, and that it is the duty of plaintiff to use such care as might usually be expected of an ordinarily prudent person situated as he is to learn of the approach of the train, and to keep out of its way); Cincinnati, etc., R. Co. *v.* Champ, 104 S. W. 988, 31 Ky. L. Rep. 1054; Chesapeake, etc., R. Co. *v.* Riddle, 72 S. W. 22, 24 Ky. L. Rep. 1687.

Maine.— Whitney *v.* Maine Cent. R. Co., 69 Me. 208.

Maryland.— Baltimore, etc., R. Co. *v.* Owings, 65 Md. 502, 5 Atl. 329.

Massachusetts.— Shaw *v.* Boston, etc., R. Co., 8 Gray 45.

Missouri.— Lang *v.* Missonri Pac. R. Co., 115 Mo. App. 489, 91 S. W. 1012; Esler *v.* Wabash R. Co., 109 Mo. App. 580, 83 S. W. 73.

Nebraska.— Williams *v.* Chicago, etc., R. Co., 78 Nebr. 695, 111 N. W. 596, 14 L. R. A. N. S. 1224, 78 Nebr. 701, 13 N. W. 791; Riley *v.* Missouri Pac. R. Co., 69 Nebr. 82, 95 N. W. 20; Chicago, etc., R. Co. *v.* Roberts, 3 Nebr. (Unoff.) 425, 91 N. W. 707.

New Jersey.— Rafferty *v.* Erie R. Co., 66 N. J. L. 444, 49 Atl. 456.

New York.— Cook *v.* New York Cent. R. Co., 1 Abb. Dec. 430, 3 Keyes 476, 3 Transcr. App. 8.

North Carolina.— Cooper *v.* North Carolina R. Co., 140 N. C. 209, 52 S. E. 932, 3 L. R. A. N. S. 391; Norton *v.* North Carolina R. Co., 122 N. C. 910, 29 S. E. 886.

Ohio.— Pittsburgh, etc., R. Co. *v.* Maurer, 21 Ohio St. 421; Cleveland, etc., R. Co. *v.* Terry, 8 Ohio St. 570.

Texas.— Gulf, etc., R. Co. *v.* Smith, 87 Tex. 348, 28 S. W. 510; International, etc., R. Co. *v.* Glover, (Civ. App. 1905) 88 S. W. 515; Gulf, etc., R. Co. *v.* Younger, 10 Tex. Civ. App. 141, 29 S. W. 948; Missouri, etc., R. Co. *v.* Cox, (Civ. App. 1894) 27 S. W. 1050; Texas, etc., R. Co. *v.* Howard, 2 Tex. Unrep. Cas. 429.

Virginia.— Southern R. Co. *v.* Hansbrongh, 107 Va. 733, 60 S. E. 58.

West Virginia.— Berkeley *v.* Chesapeake, etc., R. Co., 43 W. Va. 11, 26 S. E. 349.

United States.— Texas, etc., R. Co. *v.* Cody, 166 U. S. 606, 17 S. Ct. 703, 41 L. ed. 1132 [*affirming* 67 Fed. 71, 14 C. C. A. 310]; Continental Imp. Co. *v.* Stead, 95 U. S. 161, 24 L. ed. 403; Morris *v.* Chicago, etc., R. Co., 26 Fed. 22; Tucker *v.* Duncan, 9 Fed. 867, 4 Woods 652.

See 41 Cent. Dig. tit. "Railroads," § 956.

Degree of care.— The duty of the railroad company when its trains are approaching and about to cross a public highway is greater in degree than under other circumstances. Illinois Cent. R. Co. *v.* Chicago Title, etc., Co., 79 Ill. App. 623. If the crossing is especially dangerous, it is incumbent on both parties to exercise increased care commensnrate with the danger. Louisville, etc., R. Co. *v.* Cummins, 111 Ky. 333, 63 S. W. 594, 23 Ky. L. Rep. 681; Sonthern R. Co. *v.* Hansbrongh, 107 Va. 733, 60 S. E. 58. The care and liability of the railroad company will correspond with that of all others passing, and doing bnsiness on the crossing. Central Military Track R. Co. *v.* Rockafellow, 17 Ill. 541.

Reliance on other's precautions.— Each party in regulating his conduct may presume that the other will exercise reasonable care. Loucks *v.* Chicago, etc., R. Co., 31 Minn. 526, 18 N. W. 651; Williams *v.* Chicago, etc., R. Co., 78 Nebr. 695, 701, 111 N. W. 596, 113 N. W. 791, 14 L. R. A. N. S. 1224.

and observing the approach of trains,[59] and the railroad company to use such care in giving proper and timely warning of their approach,[60] and to otherwise use what under the circumstances are reasonable precautions in approaching the crossing.[61] The above rule, however, is subject to the qualification that, by reason of the character and momentum of a railroad train and the requirements of public travel by means thereof, a moving train is entitled to the preference and right of way, provided reasonable and timely warning of its approach is given and reasonable care is used to avoid a collision.[62]

b. At Places Not Public Crossings. Where a crossing at a place other than a public street or highway is treated as a public crossing, by license or custom,[63] the rights and duties of the railroad company and the public thereat are the same as at a public crossing.[64] But where the crossing is such that a person thereon

59. Chicago, etc., R. Co. *v.* Pearson, 82 Ill. App. 605; Pennsylvania R. Co. *v.* Goodman, 62 Pa. St. 329.

60. Chicago, etc., R. Co. *v.* Pearson, 82 Ill. App. 605 (holding that the railroad company is required to use such care whether there is a statutory regulation upon the subject or not); Voehl *v.* Delaware, etc., R. Co., (N. J. Sup. 1905) 59 Atl. 1034; Pennsylvania R. Co. *v.* Goodman, 62 Pa. St. 329; Continental Imp. Co. *v.* Stead, 95 U. S. 161, 24 L. ed. 403. See also *infra*, X, F, 5, 7.

If a railroad uses due care it is not liable for the injury of a child which becoming frightened at its train runs on the track of another company, and is there injured. Illinois Cent. R. Co. *v.* Haecker, 110 Ill. App. 102.

A sign at a public crossing to the effect that the railroad company will not be responsible for injuries does not avoid its responsibility. Chicago, etc., R. Co. *v.* Reith, 65 Ill. App. 461.

61. Grenell *v.* Michigan Cent. R. Co., 124 Mich. 141, 82 N. W. 843; Texas, etc., R. Co. *v.* Anderson, 2 Tex. App. Civ. Cas. § 203.

The duty of an electric railroad company at railroad crossings is the same as that of steam railroads where such electric railroad company is organized under a general railroad act. Roy *v.* East St. Louis, etc., R. Co., 119 Ill. App. 313.

62. *Delaware.*— Ogle *v.* Philadelphia, etc., R. Co., 3 Houst. 267.

Illinois.— Illinois Cent. R. Co. *v.* Larson, 152 Ill. 326, 38 N. E. 784.

Indiana.— Indianapolis, etc., R. Co. *v.* McLin, 82 Ind. 435.

Maine.— Allen *v.* Boston, etc., R. Co., 94 Me. 402, 47 Atl. 917, holding that such rule does not apply to a train standing near the crossing.

Mississippi.— Alabama, etc., R. Co. *v.* Lowe, 73 Miss. 203, 19 So. 96.

Nebraska.— Riley *v.* Missouri Pac. R. Co., 69 Nebr. 82, 95 N. W. 20; Chicago, etc., R. Co. *v.* Roberts, 3 Nebr. (Unoff.) 425, 91 N. W. 707.

New Jersey.— Rafferty *v.* Erie R. Co., 66 N. J. L. 444, 49 Atl. 456.

New York.— Warner *v.* New York Cent. R. Co., 44 N. Y. 465 [*reversing* 45 Barb. 299]; Winslow *v.* Boston, etc., R. Co., 11 N. Y. St. 831.

North Carolina.— Duffy *v.* Atlantic, etc., R. Co., 144 N. C. 26, 56 S. E. 557; Norton *v.* North Carolina R. Co., 122 N. C. 910, 29 S. E. 886.

Ohio.— New York, etc., R. Co. *v.* Kistler, 66 Ohio St. 326, 64 N. E. 130.

Oregon.— Kunz *v.* Oregon R. Co., (1907) 93 Pac. 141, (1908) 94 Pac. 504, on a public road that intersects a railway at grade.

Virginia.— Southern R. Co. *v.* Torian, 95 Va. 453, 28 S. E. 569.

West Virginia.— Berkeley *v.* Chesapeake, etc., R. Co., 43 W. Va. 11, 26 S. E. 349.

United States.— Continental Imp. Co. *v.* Stead, 95 U. S. 161, 24 L. ed. 403; Morris *v.* Chicago, etc., R. Co., 26 Fed. 22. See Baltimore, etc., R. Co. *v.* Anderson, 85 Fed. 413, 29 C. C. A. 235.

See 41 Cent. Dig. tit. "Railroads," § 956.

Compare Texas, etc., R. Co. *v.* Huber, (Tex. Civ. App. 1906) 95 S. W. 568.

A standing train at a public crossing has no precedence over an ordinary traveler, their rights being equal, and each is bound to act with due regard to the other, and has a right to assume that the other will be controlled by such considerations as would influence the conduct of a man of ordinary care and prudence. Williams *v.* Chicago, etc., R. Co., 78 Nebr. 695, 701, 111 N. W. 596, 113 N. W. 791, 14 L. R. A. N. S. 1224.

63. See *supra*, X, F, 1, b.

64. *California.*— See Carraher *v.* San Francisco Bridge Co., 100 Cal. 177, 34 Pac. 828.

Delaware.— Weldon *v.* Philadelphia, etc., R. Co., 2 Pennew. 1, 43 Atl. 156.

Illinois.— Illinois Cent. R. Co. *v.* Clark, 83 Ill. App. 620, holding that it is incumbent upon the railroad company, in such case, to exercise substantially the same care for the safety of the public as the law requires of it when its train is approaching a public crossing, except perhaps in the matter of ringing a bell or sounding a whistle.

Indiana.— Pittsburgh, etc., R. Co. *v.* Simons, (App. 1906) 76 N. E. 883 [*affirmed* in 168 Ind. 333, 79 N. E. 911].

Kentucky.— Southern R. Co. *v.* Barbour, 51 S. W. 159, 21 Ky. L. Rep. 226.

Maine.— Boothby *v.* Boston, etc., R. Co., 90 Me. 313, 38 Atl. 155, holding that a railroad company is bound to be mindful of the danger of permitting the sudden escape of steam from a locomotive near a crossing that is used by the public with teams, although

is a trespasser or a mere licensee without invitation,[65] as a general rule the only duties the railroad company owes to such person are to use due care to avoid injury after knowledge of the impending danger, and not to wilfully or wantonly injure him.[66] The rights of the public in a crossing by license are subordinate to the rights of the railroad company.[67]

c. Statutory Provisions. In most jurisdictions the duties and liabilities of a railroad company as to injuries at crossings are now regulated by statutes and ordinances,[68] although such statutes and ordinances are not the sole standards for determining whether due care has been observed by a railroad company to guard against accidents at crossings.[69]

3. Defects and Obstructions[70] — a. Duty and Liability in General. As a general rule it is the duty of a railroad company, both by virtue of stat-

the fee is in the company and there is no regularly established road over it.

Missouri.— Sites *v.* Knott, 197 Mo. 684, 96 S. W. 206.

Nebraska.— Union Pac. R. Co. *v.* Connolly, 77 Nebr. 254, 109 N. W. 368.

Pennsylvania.— Metzler *v.* Philadelphia, etc., R. Co., 28 Pa. Super. Ct. 180.

United States.— Smith *v.* Pittsburgh, etc., R. Co., 90 Fed. 783.

See 41 Cent. Dig. tit. "Railroads," § 957.

One traveling on a road under a railroad bridge, commonly and habitually used by the public, with the knowledge of the railroad company, is more than a licensee, and the company owes him the duty of ordinary care. Missouri, etc., R. Co. *v.* Hollan, (Tex. Civ. App. 1908) 107 S. W. 642.

Where a railroad track is laid longitudinally along a street in a town or village, a person is not a trespasser who crosses a street in which it is laid, at a place other than at a public crossing or the intersection of other streets. Florida Cent., etc., R. Co. *v.* Foxworth, 41 Fla. 1, 25 So. 338, 79 Am. St. Rep. 149; Brunswick, etc., R. Co. *v.* Gibson, 97 Ga. 489, 25 S. E. 484.

65. See *supra*, X, F, 1, b.

66. *Alabama.*—Alabama Great Southern R. Co. *v.* Linn, 103 Ala. 134, 15 So. 508.

Delaware.— Weldon *v.* Philadelphia, etc., R. Co., 2 Pennew. 1, 43 Atl. 156.

Illinois.— Illinois Cent. R. Co. *v.* O'Connor, 189 Ill. 559, 59 N. E. 1098 [*reversing* 90 Ill. App. 142]; Illinois Cent. R. Co. *v.* James, 67 Ill. App. 649; Atchison, etc., R. Co. *v.* Parsons, 42 Ill. App. 93.

Indiana.— Chicago, etc., R. Co. *v.* McCandish, 167 Ind. 648, 79 N. E. 903; Pittsburgh, etc., R. Co. *v.* Simons, (App. 1906) 76 N. E. 883 [*affirmed* in 168 Ind. 333, 79 N. E. 911].

Massachusetts.— See O'Connor *v.* Boston, etc., R. Corp., 135 Mass. 352.

Michigan.— Clark *v.* Michigan Cent. R. Co., 113 Mich. 24, 71 N. W. 327, 67 Am. St. Rep. 442, holding that a licensee crossing the track of a railroad company, at a place other than a public crossing, for his own convenience, cannot recover for injuries received by falling over a semaphore wire along the track.

New York.— Matze *v.* New York Cent., etc., R. Co., 1 Hun 417, 3 Thomps. & C. 513.

England.— Wilby *v.* Midland R. Co., 35 L. T. Rep. N. S. 244; Harrison *v.* North Eastern R. Co., 29 L. T. Rep. N. S. 844, 22 Wkly. Rep. 335.

See 41 Cent. Dig. tit. "Railroads," § 957.

But *compare* Pomponio *v.* New York, etc., R. Co., 66 Conn. 528, 34 Atl. 491, 50 Am. St. Rep. 124, 32 L. R. A. 530 (holding that the duty of a railroad company not to injure, by its own act, a person at a crossing which is not a public crossing, is the same whether such person is there by implied invitation or is a mere licensee); St. Louis, etc., R. Co. *v.* Crosnoe, 72 Tex. 79, 10 S. W. 342 (holding that it cannot be said that persons crossing a switch track at a point commonly used by the public are not entitled to any care for their safety unless their danger be seen); Texas, etc., R. Co. *v.* McManus, 15 Tex. Civ. App. 122, 38 S. W. 241.

While ordinarily there is no duty to give signals at private crossings, yet when the crossing is peculiarly dangerous and the speed of the train great, it is a question for the jury whether the railroad company is not negligent in failing to give a signal of warning. Czech *v.* Great Northern R. Co., 68 Minn. 38, 70 N. W. 791, 64 Am. St. Rep. 452, 38 L. R. A. 302.

67. Matze *v.* New York Cent., etc., R. Co., 1 Hun (N. Y.) 417, 3 Thomps. & C. 513; Garrett *v.* Illinois Cent. R. Co., 126 Fed. 406.

68. See Crumpley *v.* Hannibal, etc., R. Co., 98 Mo. 34, 11 S. W. 244. And see *infra*, X, F, 5, d; X, F, 7, i; X, F, 8, d.

A statute making a railroad company liable for the death of "any passenger," caused by a defect in the railroad, does not include the death of one driving over the crossing. Crumpley *v.* Hannibal, etc., R. Co., 98 Mo. 34, 11 S. W. 244.

69. Kowalski *v.* Chicago Great Western R. Co., 84 Fed. 586. But *compare* Newman *v.* London, etc., R. Co., 55 J. P. 375, holding that defendant is not liable where the accident is caused by acts or omissions not in violation of any statutory regulations.

70. **Defects and obstructions as affecting liability for injuries to animals** see *infra*, X, H, 3, c.

Mode of construction at crossings in general see *supra*, VI, D, 2.

ute,[71] and under the principles of the common law, to use reasonable care to so construct and maintain in good repair crossings and approaches over all public streets and highways intersecting the line of its road that they will be reasonably

Duty to restore and maintain highways in general see *supra*, VI, D, 3.

Necessity and mode of construction of private crossings in general see *supra*, VI, E, 2.

Duty of railroad company to maintain highway as exonerating public see STREETS AND HIGHWAYS.

Liability of city for defects or obstructions in streets caused by railroad company see MUNICIPAL CORPORATIONS, 28 Cyc. 1354.

71. *Connecticut.*—Allen *v.* New Haven, etc., Co., 50 Conn. 215.

Illinois.— Illinois Cent. R. Co. *v.* Stewart, 230 Ill. 204, 82 N. E. 590; Elgin, etc., R. Co. *v.* Raymond, 148 Ill. 241, 35 N. E. 729; Rock Island, etc., R. Co. *v.* Kepple, 106 Ill. App. 303; Illinois Cent. R. Co. *v.* Truesdell, 68 Ill. App. 324, holding that a company is liable for injuries caused by a post left standing on an approach, and within the right of way, however distant from the track, and disconnected from dangers incident to the operation of trains. But a railroad company is not liable under Rev. St. (1874) p. 809, for injuries resulting from accidents not occurring on an approach to the crossing of a public street, nor within the right of way of such railroad. Chicago, etc., R. Co. *v.* Joliet, 96 Ill. App. 468.

Iowa.— Farley *v.* Chicago, etc., R. Co., 42 Iowa 234, holding that every corporation owning or operating a railway is required to construct crossings at all points where it intersects a public highway, and is liable for personal injuries resulting from a neglect of this duty.

Kansas.— Atchison, etc., R. Co. *v.* Henry, 60 Kan. 322, 56 Pac. 486.

Missouri.— Nixon *v.* Hannibal, etc., R. Co., 141 Mo. 425, 42 S. W. 942; Tetherow *v.* St. Joseph, etc., R. Co., 98 Mo. 74, 11 S. W. 310, 14 Am. St. Rep. 617; Harper *v.* Missouri, etc., R. Co., 70 Mo. App. 604; holding that a railroad company may enter a street crossing and tear up the planks and rails for the purpose of repair, but it is liable for injuries resulting from its failure to use proper care to protect the traveling public.

Nebraska.— Omaha, etc., R. Co. *v.* Ryburn, 40 Nebr. 87, 58 N. W. 541; Omaha, etc., R. Co. *v.* Brady, 39 Nebr. 27, 57 N. W. 767; Burlington, etc., R. Co. *v.* Koonce, 34 Nebr. 479, 51 N. W. 1033.

New Jersey.— Sonn *v.* Erie R. Co., 66 N. J. L. 428, 49 Atl. 458 [*affirmed* in 67 N. J. L. 350, 51 Atl. 1109].

New York.— Gale *v.* New York Cent., etc., R. Co., 76 N. Y. 594; Lowell *v.* Central Vermont R. Co., 15 N. Y. App. Div. 218, 44 N. Y. Suppl. 193; Hoyt *v.* New York, etc., R. Co., 6 N. Y. St. 7.

North Carolina.— Raper *v.* Wilmington, etc., R. Co., 126 N. C. 563, 36 S. E. 115, holding that a railroad company must maintain a safe and convenient crossing, making it as far as possible, as safe and convenient to the public, as it would have been had the railroad not been built.

Ohio.— Lynch *v.* Cleveland, etc., R. Co., 20 Ohio Cir. Ct. 248, 11 Ohio Cir. Dec. 243, construing Rev. St. §§ 3324, 3337. Under the act of May 1, 1854, making it the duty of a railroad company to restore a highway diverted in the construction of its road to "such condition as not to impair its former usefulness," the company is liable for injuries resulting from its neglect so to do; but having once fully restored the highway it is under no obligation to keep it in repair. Pittsburgh, etc., R. Co. *v.* Maurer, 21 Ohio St. 421.

Texas.— Galveston, etc., R. Co. *v.* Matula, 79 Tex. 577, 15 S. W. 573; Gulf, etc., R. Co. *v.* Greenlee, 62 Tex. 344 (holding that a railroad company in building its track across a highway is bound to leave the approaches of the highway in as good a condition as they were in before, even though the statute does not expressly so direct); St. Louis Southwestern R. Co. *v.* Smith, (Civ. App. 1908) 107 S. W. 638 (holding that under Rev. St. (1895) art. 4426, the failure of a railroad company to keep a highway crossing in repair is negligence *per se*); Missouri, etc., R. Co. *v.* Connelly, 14 Tex. Civ. App. 529, 39 S. W. 145 (holding that a railroad company is bound to so construct a public crossing, and the immediate approaches thereto, that vehicles may run over the rails without a severe jolt); International etc., R. Co. *v.* Douglas, 7 Tex. Civ. App. 554, 27 S. W. 793. Sayles Civ. St. art. 4170, making it the duty of a railroad company constructing its road across a street to restore the street to its former state renders a railroad company that has built its road across a street liable to one who, in using the street, is injured in consequence of the company's failure to so restore it. Galveston, etc., R. Co. *v.* White, (Civ. App. 1895) 32 S. W. 186.

Vermont.— Mann *v.* Central Vermont R. Co., 55 Vt. 484, 45 Am. Rep. 628.

Wisconsin.— Sutton *v.* Chicago, etc., R. Co., 98 Wis. 157, 73 N. W. 993; Washburn *v.* Chicago, etc., R. Co., 68 Wis. 474, 32 N. W. 234.

Canada.— Fairbanks *v.* Yarmouth, 24 Ont. App. 273. See also Atkin *v.* Hamilton, 24 Ont. App. 389 [*reversing* 28 Ont. 229].

See 41 Cent. Dig. tit. "Railroads," § 959.

The duty to keep the crossing in repair is absolute under some statutes. St. Louis Southwestern R. Co. *v.* Smith, (Tex. Civ. App. 1908) 107 S. W. 638, construing Rev. St. (1895) art. 4426.

Liability depends upon the care taken to avoid accident and a railroad company is not ordinarily liable for injuries sustained at a crossing on proof merely that it knowingly used a track "so constructed and maintained as to be dangerous to the public," it appear-

safe and convenient for the usual and ordinary purposes of the public; and its failure to do so renders it liable to one who is injured by reason thereof while making a proper, reasonable, and necessary use of the crossing; [72] and the railroad company is not relieved of this liability by the fact that the party injured also has a remedy therefor against certain county or municipal authorities; [73] nor is a railroad company relieved from such duty by the fact that a certain crossing was put in under

ing that such road was necessarily dangerous. Texas, etc., R. Co. *v.* Warren, (Tex. Civ. App. 1895) 32 S. W. 578.

A "crossing" includes only that part of the structure immediately over and across the tracks and a sufficient space on either side thereof to make a safe way. Lynch *v.* Cleveland, etc., R. Co., 20 Ohio Cir. Ct. 248, 11 Ohio Cir. Dec. 243, construing Rev. St. § 3324.

All the traveled portion of a highway outside of the tracks, but within the right of way, need not be kept safe and free from obstructions, but only such part thereof as may be included within the approaches to the tracks. Illinois Cent. R. Co. *v.* Truesdell, 68 Ill. App. 324.

A railroad company which violates an express statutory duty, in placing or causing an obstruction in a public highway at a crossing, will not be heard to say that it did not anticipate an injury resulting directly from such unlawful act. Evansville, etc., R. Co. *v.* Carvener, 113 Ind. 51, 14 N. E. 738.

Where a grade crossing is authorized by the state, neither the railroad, as charged with the maintenance of the railroad highway, nor the town or other corporation, as charged with the maintenance of the carriage highway, is responsible for the dangers resulting solely from such a construction of the two highways; the only duty they owe to travelers is the statutory duty of maintaining in a safe condition the highway as established. Keagy *v.* New York, etc., R. Co., 80 Conn. 58, 66 Atl. 1024; Cowles *v.* New York, etc., R. Co., 80 Conn. 48, 66 Atl. 1020, 12 L. R. A. N. S. 1067.

72. *Alabama.*— Louisville, etc., R. Co. *v.* Hubbard, 148 Ala. 45, 41 So. 814; Western R. Co. *v.* Cleghorn, 143 Ala. 392, 39 So. 133; Southern R. Co. *v.* Posey, 124 Ala. 486, 26 So. 914; Pratt Coal, etc., Co. *v.* Davis, 79 Ala. 308.

Indiana.— Louisville, etc., R. Co. *v.* Pritchard, 131 Ind. 564, 31 N. E. 358, 31 Am. St. Rep. 451; Hurley *v.* Jeffersonville, etc., R. Co., Wils. 295.

Kentucky.— Louisville, etc., R. Co. *v.* Bloyd, 55 S. W. 694, 21 Ky. L. Rep. 1469; Louisville, etc., R. Co. *v.* Smith, 44 S. W. 385, 19 Ky. L. Rep. 1693.

Maine.— Veazie *v.* Penobscot R. Co., 49 Me. 119.

Maryland.— Whitby *v.* Baltimore, etc., R. Co., 96 Md. 700, 54 Atl. 674.

Massachusetts.— Gillett *v.* Western R. Corp., 8 Allen 560.

Michigan.— Jeffrey *v.* Detroit, etc., R. Co., 108 Mich. 221, 65 N. W. 755, 31 L. R. A. 170; Tobias *v.* Michigan Cent. R. Co., 103 Mich. 330, 61 N. W. 514.

New York.— Gale *v.* New York Cent., etc., R. Co., 76 N. Y. 594; Hoyt *v.* New York, etc., R. Co., 6 N. Y. St. 7.

Oklahoma.—Choctaw, etc., R. Co. *v.* Wilker, 16 Okla. 384, 84 Pac. 1086, 3 L. R. A. N. S. 595.

Pennsylvania.— Pittsburg, etc., R. Co. *v.* Dunn, 56 Pa. St. 280.

Vermont.— Mann *v.* Central Vermont R. Co., 55 Vt. 484, 45 Am. Rep. 628.

Wisconsin.— Hughes *v.* Chicago, etc., R. Co., 122 Wis. 258, 99 N. W. 897.

United States.— Hogue *v.* Chicago, etc., R. Co., 32 Fed. 365.

England.— Oliver *v.* North Eastern R. Co., L. R. 9 Q. B. 409, 43 L. J. Q. B. 198.

See 41 Cent. Dig. tit. "Railroads," § 959.

Where a railroad company constructs an embankment across a street, it is bound not only to keep the portion of the street occupied by its tracks in a safe condition, but also the approaches to the crossing. Whitby *v.* Baltimore, etc., R. Co., 96 Md. 700, 54 Atl. 674.

Prior defects.— If the construction of an approach to the crossing does not make the street more dangerous than before the railroad was built, the railroad company is not required to correct defects that existed prior to the building of the road. Whitby *v.* Baltimore, etc., R. Co., 96 Md. 700, 54 Atl. 674.

The removal of snow from a sidewalk by means of a snow plow, drawn by horses, pursuant to a custom of long standing, cannot be said as a matter of law not to be a proper, necessary, and reasonable use of the crossing. Jeffrey *v.* Detroit, etc., R. Co., 108 Mich. 221, 65 N. W. 755, 31 L. R. A. 170.

That the repairing is done by an independent contractor does not relieve the railroad company from liability. Choctaw, etc., R. Co. *v.* Wilker, 16 Okla. 384, 84 Pac. 1086, 3 L. R. A. N. S. 595.

73. Rowe *v.* Baltimore, etc., R. Co., 82 Md. 493, 33 Atl. 761; Gillett *v.* Western R. Corp., 8 Allen (Mass.) 560; Hoyt *v.* New York, etc., R. Co., 6 N. Y. St. 7 (holding that the fact that the officials of a village have assumed the duty of keeping a railroad crossing in repair does not relieve the company from liability to persons passing over the crossing who are injured by defects therein); Gates *v.* Pennsylvania R. Co., 150 Pa. St. 50, 24 Atl. 638, 16 L. R. A. 554.

The liability of a railroad company to maintain a highway crossing is a continuing one, and exists independently of any obligation on the part of the municipality, for failure to fulfil which it is liable to a person injured. Adams *v.* Thief River Falls, 84 Minn. 30, 86 N. W. 767; Cunningham *v.* Thief River Falls, 84 Minn. 21, 86 N. W. 763.

the mandate of a municipal ordinance.[74] Some statutes expressly prescribe the manner in which such crossings shall be constructed and maintained,[75] in which case the railroad company can be relieved from liability for an injury caused at such crossing only by showing that the crossing was constructed and maintained in strict compliance with the statute.[76]

b. Character of Crossing. The crossings to which the above rule applies are generally such only as are at the intersection of legally established public streets and highways,[77] whether established before or after the railroad was built.[78] It does not apply where the way intersected is not legally established in accordance with law,[79] unless it has become as a public highway by invitation or custom,[80] as where the railroad company has assumed the duty of constructing and maintaining a proper crossing thereat, although it was not obliged to do so.[81] Thus

74. Illinois Cent. R. Co. *v.* Stewart, 230 Ill. 204, 82 N. E. 590, statutory duty.

75. Hogue *v.* Chicago, etc., R. Co., 32 Fed. 365, construing Mo. Laws (1885), p. 87.

76. Hogue *v.* Chicago, etc., R. Co., 32 Fed. 365.

Where the railroad company builds and maintains such a crossing as the statute prescribes its duty is performed without regard to its effectiveness to constitute a safe crossing; and an instruction that the railroad company is bound "to have and keep such crossing in a safe condition" is erroneous. Nixon *v.* Hannibal, etc., R. Co., 141 Mo. 425, 42 S. W. 942.

77. Louisville, etc., R. Co. *v.* Hubbard, 148 Ala. 45, 41 So. 814; Ohio, etc., R. Co. *v.* Cox, 26 Ill. App. 491 (under Starr & C. Annot. St. c. 114). And see *supra*, X, F, 1, a.

Estoppel.— Where a railroad obeys a direction prescribed by statute, as to the construction or repair of a crossing, it is estopped to deny, as against one injured by defects therein, that the road crossed is a highway. Ohio, etc., R. Co. *v.* Cox, 26 Ill. App. 491.

A public highway, which is torn up by a railroad company in constructing its track across it, remains a public highway, although it is never afterward restored, and the railroad company is bound to make the crossing and approaches thereto reasonably safe for travelers. Washburn *v.* Chicago, etc., R. Co., 68 Wis. 474, 32 N. W. 234.

78. Allen *v.* New Haven, etc., Co., 50 Conn. 215; Spooner *v.* Delaware, etc., R. Co., 1 N. Y. St. 558.

Where a railroad and a turnpike company have their routes located, by the requirements of their charters over and across the same ground, but the railroad's right accrues first by priority of its charter, although both are constructed at the same time, the turnpike company is responsible for injuries sustained by its travelers occasioned by the want of banisters and other safeguards at the crossing of the railroad, as in such case it is the duty of the turnpike company and not the railroad company to provide the same. Zuccarello *v.* Nashville, etc., R. Co., 3 Baxt. (Tenn.) 364.

79. Cox *v.* East Tennessee, etc., R. Co., 68 Ga. 446; Omaha, etc., R. Co. *v.* Martin, 14 Nebr. 295, 15 N. W. 696.

A road that has never been regularly laid out or opened by the proper authorities, and which is in fact unused, and is unfit for travel and closed against the public, is not a "highway," within the meaning of the provision of the railroad law which makes a company laying tracks across public highways liable for injuries resulting from neglect to restore them to a proper condition, even though the owners of land along the road have moved their fences back so as to open it as a highway, and have been paid for their lands by the township, and a bridge has been built upon it by the public authorities. Flint, etc., R. Co. *v.* Willey, 47 Mich. 88, 10 N. W. 120.

Spaces between the driveway and the footpaths across the ends of which the company has placed chains, but which pedestrians have without objection for a long time been in the habit of crossing diagonally from one end of the crossing to the other, are not bound to be repaired by the railroad company. San Antonio, etc., R. Co. *v.* Montgomery, 31 Tex. Civ. App. 491, 72 S. W. 616.

80. Retan *v.* Lake Shore, etc., R. Co., 94 Mich. 146, 53 N. W. 1094; Lillstrom *v.* Northern Pac. R. Co., 53 Minn. 464, 55 N. W. 624, 20 L. R. A. 587 (holding that where a road is openly used as a highway by the public, and is recognized by a railway company as such, by permitting the public to cross the track, and by assuming to maintain a crossing at that point, it is immaterial that the road has not been legally established where it is sought to hold the company liable for defects in the crossing); Moore *v.* Wabash, etc., R. Co., 84 Mo. 481; Missouri Pac. R. Co. *v.* Bridges, 74 Tex. 520, 12 S. W. 210, 15 Am. St. Rep. 856; Cowans *v.* Ft. Worth, etc., R. Co., 40 Tex. Civ. App. 539, 89 S. W. 1116.

Where a road under a railroad bridge is continually and habitually used by the public, and that fact is or could by the use of ordinary care be known by the railroad company, it owes a duty to keep the road safe, to a person using the road, regardless of whether it is a public highway or not. Missouri, etc., R. Co. *v.* Hollan, (Tex. Civ. App. 1908) 107 S. W. 642.

81. Central R., etc., Co. *v.* Robertson, 95 Ga. 430, 22 S. E. 551; Yazoo, etc., R. Co. *v.* Watson, 82 Miss. 89, 33 So. 942; Taylor, etc., R. Co. *v.* Warner, 88 Tex. 642, 32 S. W.

except by statute,[82] a railroad company is not responsible for failing to construct or keep in proper repair a private crossing,[83] except as to those who have a right to use the crossing in passing from one part of the adjacent land to another, under an express agreement with the railroad company,[84] or upon an implied invitation by it.[85]

c. Nature of Defect. A defect or obstruction for which a railroad company is responsible is one which is caused by its negligence,[86] and which makes the crossing unnecessarily unsafe and dangerous to persons having occasion to use the crossing, while in the exercise of ordinary care.[87] But the railroad company

868; Gulf, etc., R. Co. *v.* Montgomery, 85 Tex. 64, 19 S. W. 1015 (holding, however, that the fact that the railroad company puts an embankment across the road, and constructs no crossing, unless a way under a trestle constructed about seventy-five yards distant be considered such, is not conclusive that it intended such way to be used as a crossing); Taylor, etc., R. Co. *v.* Warner, (Tex. Civ. App. 1895) 31 S. W. 66 (holding that where a railroad company constructs a crossing at a point where the travel is, and not at the true line of the road, it is liable for a defect in the crossing as if it were on the true line of the highway); Texas, etc., R. Co. *v.* Neill, (Tex. Civ. App. 1895) 30 S. W. 369.

82. Cox *v.* East Tennessee, etc., R. Co., 68 Ga. 446; Baltimore, etc., R. Co. *v.* Keck, 185 Ill. 400, 57 N. E. 197 [*affirming* 84 Ill. App. 159, 89 Ill. App. 72]; Plester *v.* Grand Trunk R. Co., 32 Ont. 55.

Where crossing is put in under contract.—A railroad company is not liable to one not the owner of land through which the road passes for injuries caused by a defective farm crossing on its right of way, under a statute requiring farm crossings to be put in by railroad companies on the application of the owners of lands through which the road passes, where such crossing was put in under a contract with the owner, and no request was ever made for a crossing under the statute. Stewart *v.* Cincinnati, etc., R. Co., 80 Mich. 166, 44 N. W. 1116.

A farm crossing must be kept in safe repair for the use of the family of an occupant, and it is not sufficient that it be kept in safe repair for driving or hauling across it, and not for foot passengers. Baltimore, etc., R. Co. *v.* Keck, 84 Ill. App. 159 [*affirmed* in 185 Ill. 400, 57 N. E. 197].

A person using such a crossing by invitation of the owner is entitled to such protection. Plester *v.* Grand Trunk R. Co., 32 Ont. 55.

83. Atchison, etc., R. Co. *v.* Fuller, 72 Kan. 527, 84 Pac. 140 (path across its yards which the public has been in the habit of using without objection); Stewart *v.* Cincinnati, etc., R. Co., 80 Mich. 166, 44 N. W. 1116; Ferguson *v.* Virginia, etc., R. Co., 13 Nev. 184, holding that a railroad company is not chargeable with negligence in failing to keep in repair a private way over its track, constructed for its own benefit, although by its license used by other parties no act of misfeasance on the part of the company being shown, or the way shown to have been a public highway prior to the construction of the railroad.

Where a railroad company owes no duty to one to keep a private crossing in repair, he cannot recover for an injury caused by the crossing being out of repair. Mann *v.* Chicago, etc., R. Co., 86 Mo. 347; Cornell *v.* Skaneateles R. Co., 15 N. Y. Suppl. 581.

84. Stewart *v.* Cincinnati, etc., R. Co., 80 Mich. 166, 44 N. W. 1116.

85. Stewart *v.* Cincinnati, etc., R. Co., 80 Mich. 166, 44 N. W. 1116, 89 Mich. 315, 50 N. W. 852, 17 L. R. A. 539; Prince *v.* New York Cent., etc., R. Co., 14 N. Y. Suppl. 817. See also Cotton *v.* New York, etc., R. Co., 20 N. Y. Suppl. 347.

Where a railroad company voluntarily constructs a bridge over ditches along its right of way as a private way for the use and convenience of the occupants of the land abutting on its right of way, it is liable to one of the parties for whose use it was built, for injuries caused by its failure to keep the bridge in proper repair. Hall *v.* Texas, etc., R. Co., (Tex. Civ. App. 1896) 35 S. W. 321.

86. Retan *v.* Lake Shore, etc., R. Co., 94 Mich. 146, 53 N. W. 1094; Schneider *v.* Pennsylvania Co., 1 Pa. Cas. 290, 3 Atl. 26, holding that where a man is thrown from a buggy, and injured by reason of his horse's hoof catching between the rail and wooden guard of a railroad street crossing, he must show negligence on the part of the company before he is entitled to recover for bodily pain and suffering, and pecuniary loss.

Under Wis. Rev. St. § 1836, requiring every railway company to restore the highway to its former state or to such condition that its usefulness as such shall not be materially impaired, a railroad cannot be charged by showing the presence of a ditch in a highway at a crossing, causing an accident, but it must be shown that the ditch was constructed or caused by the building of the railroad. Sutton *v.* Chicago, etc., R. Co., 98 Wis. 157, 73 N. W. 993.

87. *Connecticut.*— Judson *v.* New York, etc., R. Co., 29 Conn. 434, uncovered culvert.

Illinois.— Toledo, etc., R. Co. *v.* Clark, 49 Ill. App. 17, leaving space between a fixed rail and a planking sufficient to catch and hold the foot of a person passing over it.

Missouri.— Tetherow *v.* St. Joseph, etc., R. Co., 98 Mo. 74, 11 S. W. 310, 14 Am. St. Rep. 617, leaving track neither planked nor level with the roadway over a portion or all of the width of the street.

New York.— Hoffman *v.* New York, etc., R.

is not responsible for a defect which is not caused by its negligence,[88] or which is not unnecessarily dangerous or unsafe under ordinary circumstances;[89] nor is it responsible for a defect that is beyond the limits of the street or highway.[90]

d. Bridges.[91] Where a railroad company is bound to construct and maintain a bridge either over its tracks or over a highway which it crosses, it will be liable if it fails to construct and maintain such bridge in a condition reasonably safe for persons using it for the purpose of crossing in the ordinary way,[92] as in constructing and maintaining it at the proper height,[93] and this rule applies where

Co., 75 N. Y. 605 [*affirming* 13 Hun 589] (holding that where a railroad company constructs its cattle-guard so that it projects three feet into a highway, and a person while crossing the track when the cattle-guard is filled with snow steps therein and is run over by a train, the railroad company is liable for injuries thereby resulting to him); Spooner *v.* Delaware, etc., R. Co., 1 N. Y. St. 558.

Texas.— Dillingham *v.* Fields, 9 Tex. Civ. App. 1, 29 S. W. 214, planking between tracks for only part of the width of a street, and filling the remainder with sand, in which a spike is left projecting from a tie.

Canada.— Fairbanks *v.* Great Western R. Co., 35 U. C. Q. B. 523.

See 41 Cent. Dig. tit. "Railroads," § 961.

Negligent construction means such an improper construction of the crossing, whether arising from negligence, indifference, or motives of economy, as unnecessarily increases the danger of using the public highway. Edwards *v.* Atlantic Coast Line R. Co., 129 N. C. 78, 39 S. E. 730.

Failure to provide suitable crossings for harvesting machines, whereby injuries result, is negligence, as railroad companies must know the requirements of harvesting machines in general use throughout the state, as to the width of crossings necessary to enable persons to drive them safely across. Atchison, etc., R. Co. *v.* Henry, 60 Kan. 322, 56 Pac. 486.

88. See Schneider *v.* Pennsylvania Co., 1 Pa. Cas. 290, 3 Atl. 26.

89. Meyer *v.* Midland Pac. R. Co., 2 Nebr. 319; Myers *v.* Chicago, etc., R. Co., 101 Fed. 915.

The mere fact that a crossing is dangerous does not necessarily impute negligence to the railroad company. Edwards *v.* Atlantic Coast Line R. Co., 129 N. C. 78, 39 S. E. 730. If a railroad crossing is so constructed as to be safe to one crossing the railroad, this is enough, although it may be dangerous to one walking along the railroad. Raper *v.* Wilmington, etc., R. Co., 126 N. C. 563, 36 S. E. 115.

That the railroad track is laid across a highway does not necessarily render it defective and unsafe, and it is not the intention of the statute (Conn. Gen. St. 232, § 10) to make the railroad company liable for every injury from the track without reference to the condition of the highway. Allen *v.* New Haven, etc., R. Co., 50 Conn. 215.

That a railroad track is so constructed as to cross a public street at grade is not such negligence as will render the company liable for personal injuries sustained at the crossing. Chicago, etc., R. Co. *v.* White, 46 Ill. App. 446.

That the plank which forms the approach is raised above the surface of the ground about the thickness of the plank does not make the crossing defective. Taylor *v.* Long Island R. Co., 16 N. Y. App. Div. 1, 44 N. Y. Suppl. 820.

90. Lynch *v.* Cleveland, etc., R. Co., 20 Ohio Cir. Ct. 248, 11 Ohio Cir. Dec. 243; San Antonio, etc., R. Co. *v.* Belt, (Tex. Civ. App. 1898) 46 S. W. 374, holding this to be true even though it was negligent in not filling at the intersection of the track with the street.

Failure to remove a bank of earth on the right of way, consisting almost entirely of a natural hill through the base of which the track is laid in a cut, and which obstructs the view of an approaching train from travelers on the highway, is not a failure to restore the highway to its former state of usefulness, as required by Rev. St. § 1836. Leitch *v.* Chicago, etc., R. Co., 93 Wis. 79, 67 N. W. 21.

91. Duty to maintain bridges in general see *supra*, VI, D, 3, d.

92. Titcomb *v.* Fitchburg R. Co., 12 Allen (Mass.) 254 (holding that where a railroad company is bound to keep in repair a railing approaching a bridge, and an injury happens by reason of the fright of a horse, although without any one's fault, and its running against and breaking through such fence, the company is liable if the fence was insufficient and out of repair, and the accident would not have occurred if it had been in proper repair); Gates *v.* Pennsylvania R. Co., 150 Pa. St. 50, 24 Atl. 638, 16 L. R. A. 554; Denison, etc., R. Co. *v.* Foster, 28 Tex. Civ. App. 578, 68 S. W. 299.

The railroad company should exercise watchful diligence to keep the bridge in repair, and it is chargeable with knowledge of every defect which such diligence would have discovered. South, etc., R. Co. *v.* McLendon, 63 Ala. 266.

Where the railroad company performs its duty to keep a foot-bridge in a state ordinarily safe for persons using it for the purpose of crossing over it in the ordinary way, it is not responsible to one who does not use it in such manner and is injured. Lay *v.* Midland R. Co., 30 L. T. Rep. N. S. 529, 34 L. T. Rep. N. S. 30.

93. Barron *v.* Chicago, etc., R. Co., 89 Wis. 79, 61 N. W. 303 (holding that Rev. St. § 1837, providing that bridges over streets shall be constructed so as to give a clear

the company undertakes to construct such a bridge, although it is under no obligation to do so.[94]

e. Changing Location of Highway. When a railroad company, authorized to change the location of a highway, does so in a negligent manner it will be liable for resulting injuries.[95] But where the change is made by the county authorities, without proper notice to the railroad company, the latter is not responsible.[96]

f. Obstructions at Crossings.[97] The fact that a railroad company obstructs a street or highway at a public crossing, as by letting a train or cars stand thereon for a reasonable or lawful length of time, and for proper purposes, is not negligence, and the company is not responsible for injuries caused thereby.[98] But a railroad company is liable for injuries caused by reason of such obstruction, where it amounts to negligence,[99] as where it allows its train or cars to remain

passageway of twenty feet, or two passageways of fourteen feet each, does not authorize a recovery by one injured under a street bridge in a passageway more than fourteen feet wide, on the ground that the other passageways were less than fourteen feet wide); Fairbanks *v.* Yarmouth, 24 Ont. App. 273.

Defect in height by raising street.— In the absence of statute, a railroad company is not negligent in failing to maintain the height of one of its bridges above a highway as it was when the bridge was built, where the vertical space between the road-bed and the bridge has been diminished by raising the street. Gray *v.* Danbury, 54 Conn. 574, 10 Atl. 198; Carson *v.* Weston, 1 Ont. L. Rep. 15.

Sufficiency of height.— It cannot be said, as a conclusion of law, that a railroad company is negligent in the construction of a bridge over a highway at a height of only ten and a half feet from the road-bed, where the company, the railroad commissioners, and the borough where the bridge was being built, considered the height sufficient, and where an injury complained of resulted from raising the street after the construction of the bridge. Gray *v.* Danbury, 54 Conn. 574, 10 Atl. 198.

94. Central R., etc., Co. *v.* Robertson, 95 Ga. 430, 2 S. E. 551; Missouri Pac. R. Co. *v.* Bridges, 74 Tex. 520, 12 S. W. 210, 15 Am. St. Rep. 856.

95. Rowe *v.* Baltimore, etc., R. Co., 82 Md. 493, 33 Atl. 761; Potter *v.* Bunnell, 20 Ohio St. 150 (negligence in not erecting proper barriers for guarding cuts and excavations made in the highway by the company); Pittsburgh, etc., R. Co. *v.* Moses, 1 Pa. Cas. 319, 2 Atl. 188 (holding that it is the duty of a railroad company, occupying part of a public road, and making a dangerous cut across it, when a new road is constructed, to erect and maintain for a reasonable time a proper barrier in front of the cut on the old road).

96. Hill *v.* Port Royal, etc., R. Co., 31 S. C. 393, 10 S. E. 91, 5 L. R. A. 349, holding that where under Gen. St. § 1535, providing that the county commissioners may lay out a highway across a railroad previously constructed after due notice to the railroad, the county commissioners, without such notice, change a highway so as to run it under a narrow span of a trestle, the railroad company is not liable for damages received from the narrowness of the span.

97. Injuries to property from obstructions see *supra*, X, A, 3, c.

98. Georgia Cent. R. Co. *v.* Owen, 121 Ga. 220, 48 S. E. 916; Brown *v.* Hannibal, etc., R. Co., 50 Mo. 461, 11 Am. Rep. 420; Chicago, etc., R. Co. *v.* Roberts, 3 Nebr. (Unoff.) 425, 91 N. W. 707. See also Chicago, etc., R. Co. *v.* Bednorz, 57 Ill. App. 309.

Where railroad employees honestly believe that they cannot move an obstructing car without help and they exercise ordinary care and prudence in that judgment, they are not negligent. Paine *v.* Grand Trunk R. Co., 58 N. H. 611.

That a railroad train is standing across a public street and obstructing the same so that a driver of a runaway horse is obliged to turn him out into an alley, before reaching the train, in doing which his vehicle is overturned and the driver is injured, does not of itself constitute negligence. Duffy *v.* Atlantic, etc., R. Co., 144 N. C. 26, 56 S. E. 557.

99. Brunswick, etc., R. Co. *v.* Hoover, 74 Ga. 426 (holding that it is negligence for a railroad company to leave a ditch near its tracks at a crossing which will impede the passage of wagons and prevent the driver from avoiding a collision with an approaching train); Pittsburgh, etc., R. Co. *v.* Sponier, 85 Ind. 165 (hand-car, negligently left on track at night by a section foreman of the company); Edwards *v.* Carolina, etc., R. Co., 140 N. C. 49, 52 S. E. 234.

Where dirt on a railroad crossing is piled upon the street by the railroad company under a license from the city, until the city shall remove it, and is left there at night without a light having been placed thereon, in violation of a city ordinance, the railroad company is liable for injuries suffered in consequence of the absence of a light. Lyon *v.* St. Louis, etc., R. Co., 6 Mo. App. 516.

Delay to fire apparatus.—An ordinance prohibiting the obstruction of a street so as to delay any company carrying its apparatus to or from any fire does not make a railroad company liable for injuries received by a person in going to a fire in the performance of his duties while crossing a street which the railroad company has obstructed, unless the obstruction is such as to delay a fire company in carrying its apparatus to or from

on the crossing unnecessarily, or for an unreasonable or unlawful length of time, by reason of which injuries are received by one who attempts, with due care, to cross or go around the obstruction;[1] and it has been held to make no difference in such cases whether the injuries were received upon the tracks of the railroad company or upon the property of an adjacent landowner.[2] But even though the obstruction is a lawful one, a traveler is not obliged to wait until the train is removed, and if he is obliged to cross at points other than the public crossing on account of such obstruction, the railroad company should use ordinary care and diligence to prevent injury to him.[3] As to what care should be exercised by a railroad company toward a traveler who attempts to cross over or through a train or cars causing such an obstruction, the authorities are conflicting. Some authorities hold that the railroad company is liable for resulting injuries to one who attempts to cross such train or cars, if it fails to use ordinary care and diligence to look out for such travelers and to give proper warnings before moving the train or cars.[4] Other cases, however, hold that a person attempting to cross

the fire. Southern R. Co. *v.* Pratber, 119 Ala. 588, 24 So. 836, 72 Am. St. Rep. 949.

1. *Delaware.*— McCoy *v.* Philadelphia, etc., R. Co., 5 Houst. 599.

Georgia.— Georgia Cent. R. Co. *v.* Owen, 121 Ga. 220, 48 S. E. 916; Central R. Co. *v.* Curtis, 87 Ga. 416, 13 S. E. 757 (violation of ordinance); Smith *v.* Savannah, etc., R. Co., 84 Ga. 698, 11 S. E. 455.

Illinois.— Mayer *v.* Chicago, etc., R. Co., 63 Ill. App. 309.

Nebraska.— Chicago, etc., R. Co. *v.* Roberts, 3 Nebr. (Unoff.) 425, 91 N. W. 707.

North Carolina.— Duffy *v.* Atlantic, etc., R. Co., 144 N. C. 26, 56 S. E. 557, holding that where in consequence of such an obstruction the driver of a vehicle drawn by a runaway horse is unable to pass, and in attempting to turn out is thrown from the vehicle and injured, the railroad company is guilty of negligence.

Pennsylvania.— Todd *v.* Philadelphia, etc., R. Co., 201 Pa. St. 558, 51 Atl. 332; Golden *v.* Pennsylvania R. Co., 187 Pa. St. 635, 41 Atl. 302.

Texas.— St. Louis Southwestern R. Co. *v.* Bowles, 32 Tex. Civ. App. 118, 72 S. W. 451 (holding that to leave cars so near a crossing that a coupling therewith cannot be made without forcing them on to the crossing, and to make the coupling without seeing whether the crossing is clear, is negligence); Galveston, etc., R. Co. *v.* Simon, (Civ. App. 1899) 54 S. W. 309.

See 41 Cent. Dig. tit. "Railroads," § 964.

A traveler has a right under such circumstances to leave the highway, and, with due care, to go around the obstruction, and if in the proper exercise of this right he is injured the responsibility must necessarily fall upon the company which has wrongfully obstructed the safe highway and forced the party injured to deviate and pass upon ground which is not safe. Georgia Cent. R. Co. *v.* Owen, 121 Ga. 220, 48 S. E. 916.

The occupation of a street crossing by railroad engines, without authority of law, constitues negligence *per se* on the part of the railroad company. Denver, etc., R. Co. *v.* Robbins, 2 Colo. App. 313, 30 Pac. 261; Central R. Co. *v.* Curtis, 87 Ga. 416, 13 S. E. 757.

A mere license to lay a track across a public street gives no authority to stand cars thereon, so as to obstruct the crossing, for such periods as may suit the company's convenience. Chicago, etc., R. Co. *v.* Prescott, 59 Fed. 237, 8 C. C. A. 109, 23 L. R. A. 654.

2. Georgia Cent. R. Co. *v.* Owen, 121 Ga. 220, 48 S. E. 916.

3. Brown *v.* Hannibal, etc., R. Co., 50 Mo. 461, 11 Am. Rep. 420.

4. Golden *v.* Pennsylvania R. Co., 187 Pa. St. 635, 41 Atl. 302 (cars started without warning); Philadelphia, etc., R. Co. *v.* Layer, 112 Pa. St. 414, 3 Atl. 874 (duty to give notice of starting); Pennsylvania R. Co. *v.* Kelly, 31 Pa. St. 372 (holding that where a railroad company unlawfully obstructs a street over which its cars run by leaving cars standing thereon, it will be liable for injuries to a child by the sudden and unexpected starting of the cars while it is creeping under one of the cars in an effort to pass along a highway); Rauch *v.* Lloyd, 31 Pa. St. 358, 72 Am. Dec. 747 (holding that where a child of tender years attempts to pass under a train of railroad cars negligently left standing on the crossing of a public street, by which he is injured, the owners of the cars are liable); Littlejohn *v.* Richmond, etc., R. Co., 49 S. C. 12, 26 S. E. 967 (holding that one who while attempting to climb between cars standing across a highway, his sole purpose being to cross the railroad track, has his foot crushed between them, the train having started up without signal, is within Rev. St. § 1692, prescribing a rule of liability where "a person is injured . . . by collision" with an engine or cars at a crossing). See also Phillips *v.* New York, etc., R. Co., 80 Hun (N. Y.) 404, 30 N. Y. Suppl. 333 (holding that it is a question for the jury whether the railroad company was guilty of negligence in starting a train which had been obstructing a crossing, without first looking to see whether any traveler on the highway whom it had put to an extraordinary and unusual means of crossing the tracks by reason of the long obstruction would be in

over or through such trains or cars is a trespasser, and that the company owes no other duty to him than not to wantonly or wilfully injure him;[5] and that it is not responsible for failing to look out for such a traveler, or for failing to give him warning, before moving the train or cars unless some person having control of the train knew of his attempt to cross,[6] or unless the trainmen saw and knew that people were crossing at the time of moving, and in danger of being hurt,[7] or otherwise had reason to anticipate the presence of persons who might be injured by the movements of the train,[8] as where persons, with the knowledge of the company, have been in the habit of crossing trains or cars at that place.[9] Thus

danger); Lake Erie, etc., R. Co. *v.* Mackey, 53 Ohio St. 370, 41 N. E. 980, 53 Am. St. Rep. 641, 29 L. R. A. 757 (holding that it is a question for the jury whether it was negligent, as to a person attempting to pass between cars, to move without warning a train which had been standing at the crossing in violation of a statute).

Statement of rule.— In Littlejohn *v.* Richmond, etc., R. Co., 49 S. C. 12, 18, 26 S. E. 967, the court by Mr. Justice Gary, said: "If a railroad company obstructs a highway for an unreasonable length of time, or for a longer time than the law permits, unless it is without fault, the railroad company thereupon becomes a trespasser; and if a person makes a reasonable use of its cars, without injury to them, at a crossing, for the sole purpose of crossing the railroad track, the railroad company is estopped from saying that he is a trespasser. Having brought about the necessity, it can not take advantage of its own wrong." And this rule is not changed or affected by Code (1902), § 1375, providing for a penalty in case of an unlawful obstruction of a crossing. Walker *v.* Southern R. Co., 77 S. C. 161, 57 S. E. 764.

Under a Pennsylvania statute (Act March 20, 1845), declaring the blocking of a public crossing with cars to be illegal, and prohibiting it under a penalty, the obstruction of a crossing with a train, in attempting to get over which a pedestrain is injured, is *prima facie* negligence. Todd *v.* Philadelphia, etc., R. Co., 201 Pa. St. 558, 51 Atl. 332.

5. See Hastings *v.* Southern R. Co., 143 Fed. 260, 74 C. C. A. 398, 5 L. R. A. N. S. 775.

6. *District of Columbia.*— Spencer *v.* Baltimore, etc., R. Co., 4 Mackey 138, 54 Am. Rep. 269.

Georgia.— Russell *v.* Georgia Cent. R. Co., 119 Ga. 705, 46 S. E. 858; Andrews *v.* Central R., etc., Co., 86 Ga. 192, 12 S. E. 213, 10 L. R. A. 58, holding that, although a standing train be an unauthorized obstruction of a public crossing, a person attempting to pass between the cars by climbing over the platform and bumpers, if injured thereby in consequence of the sudden movement of the train, cannot recover unless the engineer, conductor, or some other person having control of the train's movements knew of his attempt to cross or had notice of his exposed danger.

Kentucky.— Southern R. Co. *v.* Clark, 105 S. W. 384, 32 Ky. L. Rep. 69, 13 L. R. A. N. S. 1071 (holding that one who attempts by invitation of a brakeman to cross through a train standing without unnecessary delay on a public crossing is a trespasser to whom the railroad company owes no duty until his peril is discovered); Jones *v.* Illinois Cent. R. Co., 104 S. W. 258, 31 Ky. L. Rep. 825, 13 L. R. A. N. S. 1066 (holding that one attempting to cross a train standing on a private crossing which he is entitled to use, which train is liable to be moved at any time, acts at his peril and the railroad company is not liable for injury to him by moving the train while he is in a position of peril unless his danger is discovered in time to prevent the accident).

Maryland.— Lewis *v.* Baltimore, etc., R. Co., 38 Md. 588, 17 Am. Rep. 521.

Missouri.— Corcoran *v.* St. Louis, etc., R. Co., 105 Mo. 399, 16 S. W. 411, 24 Am. St. Rep. 394, holding that a person attempting to climb over a freight train standing across a highway, although in violation of a city ordinance, is a trespasser, and if the railroad employees are not aware of and have no reason to anticipate his perilous situation they are not bound to look for him before moving the train.

New Jersey.— Kriwinski *v.* Pennsylvania R. Co., 65 N. J. L. 392, 47 Atl. 447.

See 41 Cent. Dig. tit. "Railroads," § 964. And see *infra*, X, F, 10, c, (III).

Trainmen have no reason to anticipate the presence of a person between the cars and therefore are not bound to be on the lookout for him. Thompson *v.* Missouri, etc., R. Co., 93 Mo. App. 548, 67 S. W. 693.

7. San Antonio, etc., R. Co. *v.* Green, (Tex. Civ. App. 1898) 49 S. W. 672; San Antonio, etc., R. Co. *v.* Green, 20 Tex. Civ. App. 5, 49 S. W. 670.

8. Thompson *v.* Missouri, etc., R. Co., 93 Mo. App. 548, 67 S. W. 693; Gesas *v.* Oregon Short Line R. Co., 33 Utah 156, 93 Pac. 274, 13 L. R. A. N. S. 1074.

Duty to give warning.— Where trainmen in charge of a train obstructing a crossing, in the exercise of ordinary care ought to anticipate that persons might be in the act of crossing, or be on or between or about the cars, and that not to give warning before moving the train would result in injury, it is their duty to give such warning and a failure to do so is negligence. Gesas *v.* Oregon Short Line R. Co., 33 Utah 156, 93 Pac. 274, 13 L. R. A. N. S. 1074.

9. Grant *v.* Baltimore, etc., R. Co., 2 MacArthur (D. C.) 277; Sheridan *v.* Baltimore, etc., R. Co., 101 Md. 50, 60 Atl. 280; Gulf,

it has been held that where the obstruction is reasonable the railroad company owes no duty to a traveler attempting to pass over or between the cars until his peril is discovered;[10] but that where the obstruction is negligent, the negligence of the company in moving the train or cars without warning does not depend upon notice to the trainmen that the particular person injured is between or on the cars or that his position will be one of peril when the train is moved.[11]

g. Obstruction of View or Hearing. It is negligence for a railroad company to permit unnecessary obstructions upon its right of way at or near a railroad crossing so as to obstruct the view or hearing thereat either of its servants approaching on a train or of persons upon the highway,[12] as where it allows the right of way to become overgrown with bushes, weeds, grass, etc., so as to obstruct such view;[13] but this rule does not apply at a private crossing as to persons who have no right to the crossing.[14] It is not negligence *per se*, however, for a railroad company to maintain telegraph poles on its right of way,[15] or to allow cars to remain on a side-track,[16] or to have at a railroad crossing other structures or obstructions reasonably necessary to the conduct of its business,[17] although they

etc., R. Co. *v.* Grisom, 36 Tex. Civ. App. 630, 82 S. W. 671. But see Rumpel *v.* Oregon Short Line, etc., R. Co., 4 Ida. 13, 25 Pac. 700.

Where a railroad company habitually obstructs a street and travelers, to its knowledge, are accustomed to climb over, crawl through, and go around the trains at such times, it is the duty of the employees in charge of the train to move it with reference to such persons and to take due precautions to avoid injury to persons who may be attempting to cross. Atchison, etc., R. Co. *v.* Cross, 58 Kan. 424, 49 Pac. 599.

10. Southern R. Co. *v.* Clark, 105 S. W. 384, 32 Ky. L. Rep. 69, 13 L. R. A. 1071.

11. Gesas *v.* Oregon Short Line R. Co., 33 Utah 156, 93 Pac. 274, 13 L. R. A. N. S. 1074, holding further that one who remains at the crossing obstructed by a train about half an hour and then climbs on the cars for the purpose of crossing is not a trespasser to whom the company owes no duty until it discovers his danger.

12. *Illinois.*— Rockford, etc., R. Co. *v.* Hillmer, 72 Ill. 235.

Iowa.— Reed *v.* Chicago, etc., R. Co., 74 Iowa 188, 37 N. W. 149.

Kansas.— Chicago, etc., R. Co. *v.* Williams, 56 Kan. 333, 43 Pac. 246.

Kentucky.— Louisville, etc., R. Co. *v.* Breeden, 111 Ky. 729, 64 S. W. 667, 23 Ky. L. Rep. 1021, 1763, holding such obstructions to be improper if, by the exercise of ordinary care, they may be removed.

New York.— Grippen *v.* New York Cent. R. Co., 40 N. Y. 34; Beisiegel *v.* New York Cent. R. Co., 40 N. Y. 9; McGuire *v.* Hudson River R. Co., 2 Daly 76. See also Kissenger *v.* New York, etc., R. Co., 56 N. Y. 538.

Ohio.— Hine *v.* Erie R. Co., 27 Ohio Cir. Ct. 155.

See 41 Cent. Dig. tit. "Railroads," § 965. But see Cowles *v.* New York, etc., R. Co., 80 Conn. 48, 58, 66 Atl. 1020, 1024, 12 L. R. A. N. S. 1067.

13. Terre Haute, etc., R. Co. *v.* Barr, 31 Ill. App. 57; Chicago, etc., R. Co. *v.* Williams, 56 Kan. 333, 43 Pac. 246; Moberly *v.* Kansas City, etc., R. Co., 17 Mo. App. 518.

Bushes, weeds, etc., not growing on the right of way are not under the control of the railroad company and it therefore is not chargeable with negligence for failing to remove them. St. Louis, etc., R. Co. *v.* Rawley, 90 Ill. App. 653; New York, etc., R. Co. *v.* Kistler, 66 Ohio St. 326, 64 N. E. 130.

14. Atchison, etc., R. Co. *v.* Parsons, 42 Ill. App. 93, holding that a railroad company is not negligent in permitting dirt taken from a cut near a private crossing to be thrown up, or weeds to grow, on the right of way, so as to obstruct the view of trains by persons about to cross, at least so far as concerns those who have no right to the crossing.

15. Chicago, etc., R. Co. *v.* Pearson, 184 Ill. 386, 56 N. E. 633 [*affirming* 82 Ill. App. 605]; Chicago, etc., R. Co. *v.* Nelson, 59 Ill. App. 308.

16. *District of Columbia.*— Baltimore, etc., R. Co. *v.* Webster, 6 App. Cas. 182.

Illinois.— Chicago, etc., R. Co. *v.* Pearson, 184 Ill. 386, 56 N. E. 633 [*affirming* 82 Ill. App. 605]; Chicago, etc., R. Co. *v.* Johnson, 61 Ill. App. 464; Chicago, etc., R. Co. *v.* Nelson, 59 Ill. App. 308.

Michigan.— Willet *v.* Michigan Cent. R. Co., 114 Mich. 411, 72 N. W. 260; Guggenheim *v.* Lake Shore, etc., R. Co., 66 Mich. 150, 33 N. W. 161.

Nebraska.—Chicago, etc., R. Co. *v.* Roberts, 3 Nebr. (Unoff.) 425, 91 N. W. 707.

North Carolina.— Alexander *v.* Richmond, etc., R. Co., 112 N. C. 720, 16 S. E. 896; Herrell *v.* Albemarle, etc., R. Co., 110 N. C. 215, 14 S. E. 687.

Texas.— Galveston, etc., R. Co. *v.* Michalke, 90 Tex. 276, 38 S. W. 31; Galveston, etc., R. Co. *v.* Harris, 22 Tex. Civ. App. 16, 53 S. W. 599.

See 41 Cent. Dig. tit. "Railroads," § 965.

17. *Illinois.*— Toledo, etc., R. Co. *v.* Patterson, 94 Ill. App. 670, elevator and coal chutes.

Indiana.— Evansville, etc., R. Co. *v.* Clements, 32 Ind. App. 659, 70 N. E. 554.

obstruct the view or hearing. The existence of such obstructions merely devolves upon both the railroad company and a person on the highway a degree of care in approaching the crossing, in proportion to the increased danger, if any;[18] and is to be considered by the jury in determining whether or not there was negligence under all the circumstances, in permitting such obstruction,[19] or in operating the train which caused the accident,[20] or whether or not there was contributory negligence.[21]

h. Knowledge by Railroad Company of Defect or Obstruction. In order to charge a railroad company with negligence for defects or obstructions at a crossing which it is bound to keep in proper condition and repair, it must appear that the railroad company had notice of the defect or obstruction,[22] or should, under the circumstances, have had notice thereof,[23] especially where the defect or obstruc-

Kansas.— Chicago, etc., R. Co. *v.* Williams, 56 Kan. 333, 43 Pac. 246.

Kentucky.— Louisville, etc., R. Co. *v.* Lucas, 98 S. W. 308, 30 Ky. L. Rep. 359, 99 S. W. 959, 30 Ky. L. Rep. 539.

Minnesota.— Klotz *v.* Winona, etc., R. Co., 68 Minn. 341, 71 N. W. 257.

New York.— Cordell *v.* New York Cent., etc., R. Co., 70 N. Y. 119, 26 Am. Rep. 550, holding that the placing of wood-piles and other erections by a railroad company on its land near a crossing, so as to obstruct the view of the track which persons about to cross would otherwise have, is not of itself an independent ground of recovery in favor of one who is injured in attempting to cross.

Pennsylvania.— New Jersey Cent. R. Co. *v.* Feller, 84 Pa. St. 226.

Texas.— Missouri, etc., R. Co. *v.* Rogers, 91 Tex. 52, 40 S. W. 956 [*reversing* (Civ. App. 1897) 40 S. W. 849]; Houston, etc., R. Co. *v.* Stewart, (1891) 17 S. W. 33; Galveston, etc., R. Co. *v.* Harris, 22 Tex. Civ. App. 16, 53 S. W. 599 (water tanks, engine houses, etc.); San Antonio, etc., R. Co. *v.* Stolleis, (Civ. App. 1899) 49 S. W. 679 (holding that the fact that the view of the track of one approaching a crossing was obstructed does not give him a right of action for injury sustained by a collision at the crossing, where the railroad company exercised ordinary care).

See 41 Cent. Dig. tit. "Railroads," § 965.

Obstructing a highway at a crossing for the length of time allowed by law under circumstances of practical necessity is not negligence, although such obstruction hides the view of approaching trains that persons traveling on the highway would otherwise have. Chicago, etc., R. Co. *v.* Body, 85 Ill. App. 133.

A railroad company may use its right of way in any lawful manner, although the view of travelers is thereby obstructed, but is required to adopt all precautions necessary to prevent such obstructions from becoming dangerous. Nashville, etc., R. Co. *v.* Witherspoon, 112 Tenn. 128, 78 S. W. 1052.

Failure to remove cuts is not negligence, although the railroad was built after the highway was established. Louisville, etc., R. Co. *v.* Breeden, 111 Ky. 729, 64 S. W. 667, 23 Ky. L. Rep. 1021, 1763; Leitch *v.* Chicago, etc., R. Co., 93 Wis. 79, 67 N. W. 21.

An embankment on a railroad right of way, obstructing the view of a public crossing, is not negligence *per se.* San Antonio, etc., R. Co. *v.* Stolleis, (Tex. Civ. App. 1899) 49 S. W. 679.

18. Toledo, etc., R. Co. *v.* Patterson, 94 Ill. App. 670; Louisville, etc., R. Co. *v.* Breeden, 111 Ky. 729, 64 S. W. 667, 23 Ky. L. Rep. 1021, 1763; Chicago, etc., R. Co. *v.* Roberts, 3 Nebr. (Unoff.) 425, 91 N. W. 707; New Jersey Cent. R. Co. *v.* Feller, 84 Pa. St. 226.

19. Baltimore, etc., R. Co. *v.* Webster, 6 App. Cas. (D. C.) 182 (holding that it is for the jury to determine whether, under all the circumstances, it was negligence on the part of the company to leave cars so standing); Klotz *v.* Winona, etc., R. Co., 68 Minn. 341, 71 N. W. 257 (holding that whether a railroad company was guilty of negligence in pushing a car over a highway crossing in a city, using for that purpose an engine not customarily used for switching, where from its construction the engineer could not see any object on the track nearer the tender than about one hundred feet from it, is a question for the jury); Missouri, etc., R. Co. *v.* Rogers, 91 Tex. 52, 40 S. W. 956 [*reversing* (Civ. App. 1897) 40 S. W. 849]; Galveston, etc., R. Co. *v.* Michalke, 90 Tex. 276, 38 S. W. 31.

20. Willet *v.* Michigan Cent. R. Co., 114 Mich. 411, 72 N. W. 260 (holding that where a railroad company temporarily obstructs the view of its tracks by leaving freight cars on side-tracks, the question as to whether the company was negligent in not providing some method for giving notice of the approach of the trains should be submitted to the jury); Cordell *v.* New York Cent., etc., R. Co., 70 N. Y. 119, 26 Am. Rep. 550; Galveston, etc., R. Co. *v.* Harris, 22 Tex. Civ. App. 16, 53 S. W. 599.

21. Cordell *v.* New York Cent., etc., R. Co., 70 N. Y. 119, 26 Am. Rep. 550.

22. Peoria, etc., R. Co. *v.* Lyons, 9 Ill. App. 350; Nixon *v.* Hannibal, etc., R. Co., 141 Mo. 425, 42 S. W. 942; Mann *v.* Chicago, etc., R. Co., 86 Mo. 347.

23. Peoria, etc., R. Co. *v.* Lyons, 9 Ill. App. 350; Retan *v.* Lake Shore, etc., R. Co., 94 Mich. 146, 53 N. W. 1094; Matthews *v.* Missouri Pac. R. Co., 26 Mo. App. 75 (holding that a railroad company which continues a nuisance which obstructs a public highway

tion is caused by a third party;[24] and also that it failed within a reasonable time thereafter to repair or remove the same.[25]

4. Frightening Animals[26] — a. Liability in General. A railroad company's authority to operate a railroad includes the right to make any noise necessarily incident to the operation of its road and the movement and working of its engines;[27] and it is not liable therefore for injuries occasioned by horses taking fright at the ordinary movements, noise, or appearance of trains or cars,[28] or at other

is responsible for injuries resulting from such obstruction, without proof of notice to it of its existence); Stewart *v.* Cincinnati, etc., R. Co., 89 Mich. 315, 50 N. W. 852, 17 L. R. A. 539 (holding that a railroad company which has erected a bridge over a farm crossing must exercise ordinary care to see or ascertain the condition of the bridge, and is not entitled to notice of its condition as a prerequisite to its liability to one who is injured owing to the fact that the bridge is out of repair).

If by careful management the defect could have been discovered, the railroad company is liable, whether it had actual knowledge or not (Retan *v.* Lake Shore, etc., R. Co., 94 Mich. 146, 53 N. W. 1094); as where the defect existed for such a length of time that it might, by the exercise of ordinary care, have known of its existence (Louisville, etc., R. Co. *v.* Smith, 44 S. W. 385, 19 Ky. L. Rep. 1693; Mann *v.* Chicago, etc., R. Co., 86 Mo. 347). Where a plank is torn up from a farm crossing on a railroad by the wreck of a passenger train, and the crossing remains in such condition for more than six months, the company will be charged with knowledge that the spikes which secured the plank were left in a dangerous condition. Prince *v.* New York Cent., etc., R. Co., 60 Hun (N. Y.) 581, 14 N. Y. Suppl. 817.

If the defect could not have been discovered by ordinary care the railroad company is not responsible. Retan *v.* Lake Shore, etc., R. Co., 94 Mich. 146, 53 N. W. 1094.

Under Mo. Rev. St. (1889) § 2609, in terms imposing an absolute and continuing duty on railroad companies in respect to maintaining crossings, no liability for injury occasioned by defects therein arises unless the company has had actual or constructive notice of the defects, and has failed, within a reasonable time thereafter, to repair them. Nixon *v.* Hannibal, etc., R. Co., 141 Mo. 425, 42 S. W. 942.

In Illinois, under Hurd Rev. St. (1897) c. 114, §§ 62, 65, 66, requiring railroad companies to construct and maintain private crossings, and providing that if they fail so to do after notice has been given in writing by the occupant of adjoining lands, such occupant may build or repair such crossing and recover double the expense from the company, the fact that the company has not received notice of the defective condition of a crossing does not relieve it from liability for an injury occasioned thereby. Baltimore, etc., R. Co. *v.* Keck, 185 Ill. 400, 57 N. E. 197 [*affirming* 84 Ill. App. 159, 89 Ill. App. 72].

24. Peoria, etc., R. Co. *v.* Lyons, 9 Ill. App. 350.

25. Nixon *v.* Hannibal, etc., R. Co., 141 Mo. 425, 42 S. W. 942.

26. Injuries by frightening animals near tracks in general see *infra*, X, G, 3.

27. *Alabama.*— Stanton *v.* Louisville, etc., R. Co., 91 Ala. 382, 8 So. 798.

Georgia.— Georgia R. Co. *v.* Carr, 73 Ga. 557.

Maine.— Whitney *v.* Maine Cent. R. Co., 69 Me. 208.

North Carolina.—Morgan *v.* Norfolk Southern R. Co., 98 N. C. 247, 3 S. E. 506.

Virginia.— Southern R. Co. *v.* Torian, 95 Va. 453, 28 S. E. 569.

See 41 Cent. Dig. tit. "Railroads," § 968.

A person approaching in close proximity to an engine at a railroad crossing has no right to assume that it will remain quiet (San Antonio, etc., R. Co. *v.* Belt, 24 Tex. Civ. App. 281, 59 S. W. 607); but must be presumed to know of the railroad company's rights and act with reference thereto (Louisville, etc., R. Co. *v.* Schmidt, 134 Ind. 16, 33 N. E. 774).

28. *Alabama.*— Stanton *v.* Louisville, etc., R. Co., 91 Ala. 382, 8 So. 798.

California.— Carraher *v.* San Francisco Bridge Co., 100 Cal. 177, 34 Pac. 828.

Georgia.— Georgia R. Co. *v.* Carr, 73 Ga. 557.

Indiana.—Lake Shore, etc., R. Co. *v.* Butts, 28 Ind. App. 289, 62 N. E. 647.

Kentucky.— Louisville, etc., R. Co. *v.* Survant, 96 Ky. 197, 27 S. W. 999, 16 Ky. L. Rep. 545; Cincinnati, etc., R. Co. *v.* Champ, 104 S. W. 988, 31 Ky. L. Rep. 1054.

Massachusetts.— Favor *v.* Boston, etc., R. Corp., 114 Mass. 350, 19 Am. Rep. 364; Flint *v.* Norwich, etc., R. Co., 110 Mass. 222.

Nebraska.— Williams *v.* Chicago, etc., R. Co., 78 Nebr. 695, 111 N. W. 596, 14 L. R. A. N. S. 1224, 78 Nebr. 701, 113 N. W. 791.

Pennsylvania.— Joyce *v.* Pennsylvania R. Co., 5 Pa. Co. Ct. 392.

Virginia.— Southern R. Co. *v.* Cooper, 98 Va. 299, 36 S. E. 388; Southern R. Co. *v.* Torian, 95 Va. 453, 28 S. E. 569.

Wisconsin.— Crowley *v.* Chicago, etc., R. Co., 122 Wis. 287, 99 N. W. 1016.

Canada.— Howe *v.* Hamilton, etc., R. Co., 3 Ont. App. 336.

See 41 Cent. Dig. tit. "Railroads," § 968.

An approaching hand-car operated in the usual and ordinary manner is not negligence for which the railroad company is liable, although it frightens plaintiff's horse and injuries result therefrom. Lake Erie, etc., R. Co. *v.* Juday, 19 Ind. App. 436, 49 N. E. 843; Louisville, etc., R. Co. *v.* Howerton, 115 Ky. 89, 72 S. W. 760, 24 Ky. L. Rep. 1905, 103 Am. St. Rep. 295; Chicago,

noises necessary to the operation of its road,[29] unless under the circumstances of the particular case the railroad employees have reason to apprehend injury therefrom and fail to use due care to prevent it,[30] or unless they are otherwise so negligent in running the train or cars that their ordinary movement naturally frightens a horse.[31] But where the acts of the railroad employees in operating its trains, cars, or other apparatus are unnecessary, negligent, or wanton, and a horse is frightened thereby and injuries are caused without any fault on the part of the injured person, the railroad company is liable.[32]

b. By Signals and Escape of Steam — (i) *In General.* The usual and proper sounding of whistles or other signals,[33] or the proper escape of steam from

etc., R. Co. *v.* Roberts, 3 Nebr. (Unoff.) 425, 91 N. W. 707.

Failure to lower gates.—A railroad company is not liable for an injury caused by a horse becoming frightened at a locomotive operated by another company because of defendant's failure to lower the gates prior to the passage of a train operated by it which plaintiff had stopped to allow to pass when the engine operated by such other company came by, causing the fright, where there is no evidence that plaintiff would not have gone and remained where he did had the gates been down. Pittsburgh, etc., R. Co. *v.* Piper, 100 Ill. App. 356.

29. Courtney *v.* Minneapolis, etc., R. Co., 97 Minn. 69, 106 N. W. 90, noises caused by workmen repairing crossing.

30. Louisville, etc., R. Co. *v.* Penrod, 66 S. W. 1013, 1042, 24 Ky. L. Rep. 50; Williams *v.* Chicago, etc., R. Co., 78 Nebr. 695, 111 N. W. 596, 14 L. R. A. N. S. 1224, 78 Nebr. 701, 113 N. W. 791 (holding that where the conditions are such that noises incident to the operation of a railroad train would endanger a person at a crossing, which result could be avoided by temporarily suspending the noise without materially interfering with the operation of the train, ordinary care and prudence require that it be thus suspended until the danger is past); Morgan *v.* Norfolk Southern R. Co., 98 N. C. 247, 3 S. E. 506.

It is negligence to make the customary noises incident to the movement of a train where the servants in charge have reason to apprehend injury therefrom to the driver of a team near the track whose perilous position they have discovered, unless it is reasonably necessary to do so for the protection of the property and lives in their charge. Louisville, etc., R. Co. *v.* Penrod, 66 S. W. 1013, 1042, 24 Ky. L. Rep. 50.

Where the operators of a hand-car make no attempt to stop or retard the speed of the car, knowing that its operation is the cause of the frightened condition of a horse driven on a public highway, the railroad company is liable for the damages resulting therefrom. Lake Erie, etc., R. Co. *v.* Juday, 19 Ind. App. 436, 49 N. E. 843. But where one of the operators of the car testified that he did not know and another that he did not think that the horse was scared at the car, while the others gave no testimony on that point, there was nothing to support a finding that the operators knew that the car caused the fright. Lake Erie, etc., R. Co. *v.* Juday, *supra.*

31. Carraher *v.* San Francisco Bridge Co., 100 Cal. 177, 34 Pac. 828.

32. *Alabama.*— Stanton *v.* Louisville, etc., R. Co., 91 Ala. 382, 8 So. 798.

California.— Carraher *v.* San Francisco Bridge Co., 100 Cal. 177, 34 Pac. 828.

Georgia.— Georgia R. Co. *v.* Carr, 73 Ga. 557.

Illinois.— Illinois Cent. R. Co. *v.* Larson, 42 Ill. App. 264 [*affirmed* in 152 Ill. 326, 38 N. E. 784].

North Carolina.—Morgan *v.* Norfolk Southern R. Co., 98 N. C. 247, 3 S. E. 506.

Texas.— St. Louis Southwestern R. Co. *v.* Moore, (Civ. App. 1908) 107 S. W. 658; Paris, etc., R. Co. *v.* Calvin, (Civ. App. 1907) 103 S. W. 428 [*affirmed* in (1908) 106 S. W. 879] (unnecessary noises); Houston, etc., R. Co. *v.* Beard, 42 Tex. Civ. App. 427, 93 S. W. 532 (putting hand-car on track at private crossing); St. Louis, etc., R. Co. *v.* Stonecypher, 25 Tex. Civ. App. 569, 63 S. W. 946 (backing train at dangerous rate of speed without notice to plaintiff and without giving signal); San Antonio, etc., R. Co. *v.* Belt, 24 Tex. Civ. App. 281, 59 S. W. 607; Houston, etc., R. Co. *v.* Abrahams, (Civ. App. 1897) 40 S. W. 1034; Gulf, etc., R. Co. *v.* Younger, (Civ. App. 1897) 40 S. W. 423.

See 41 Cent. Dig. tit. "Railroads," § 968.

Shutting down gates across the road and striking plaintiff's horse and causing it to run shows negligence on the part of defendant. Phillips *v.* New York Cent., etc., R. Co., 3 Silv. Sup. (N. Y.) 5, 6 N. Y. Suppl. 621. Likewise suddenly lowering the gate as plaintiff's horse is about to go on the track is evidence of negligence. Gray *v.* New York Cent., etc., R. Co., 77 N. Y. App. Div. 1, 78 N. Y. Suppl. 653.

The acts of negligence need not be done wantonly and wilfully in order to create a liability therefor. St. Louis Southwestern R. Co. *v.* Stonecypher, 25 Tex. Civ. App. 569, 63 S. W. 946.

33. *California.*— Pepper *v.* Southern Pac. Co., 105 Cal. 389, 38 Pac. 974.

Indiana.—Cincinnati, etc., R. Co. *v.* Gaines, 104 Ind. 526, 4 N. E. 34, 5 N. E. 746, 54 Am. Rep. 334 (holding that the mere sounding of a whistle on a locomotive is not negligence *per se*, although blown in close proximity to a highway); Lake Erie, etc., R. Co. *v.* Fike, 35 Ind. App. 554, 74 N. E. 636.

Iowa.— Ochiltree *v.* Chicago, etc., R. Co.,

its engines,[34] is not negligence, and does not make the railroad company responsible for injuries caused by horses becoming frightened thereat. But where the employees unnecessarily, negligently, or wantonly blow the whistle,[35] or allow the steam to escape,[36] thereby causing horses to become frightened, the railroad

99 Iowa 373, 68 N. W. 832; Schaefert *v.* Chicago, etc., R. Co., 62 Iowa 624, 17 N. W. 893.

Maine.— Berry *v.* Boston, etc., R. Co., 102 Me. 213, 66 Atl. 386, blowing whistle to call brakeman.

Minnesota.— Heininger *v.* Great Northern R. Co., 59 Minn. 458, 61 N. W. 558.

See 41 Cent. Dig. tit. "Railroads," § 969.

If an engineer is justified as a reasonably prudent man, in concluding from the conduct of a team near a railroad crossing, that it will not be frightened by signals required for the management of the train, he is not negligent in giving them. Ochiltree *v.* Chicago, etc., R. Co., 93 Iowa 628, 62 N. W. 7, 96 Iowa 246, 64 N. W. 788.

34. *Alabama.*— Stanton *v.* Louisville, etc., R. Co., 91 Ala. 382, 8 So. 798.

Illinois.— Illinois Cent. R. Co. *v.* Klein, 95 Ill. App. 220, where the escape is not due to some negligent act.

Indiana.—Louisville, etc., R. Co. *v.* Schmidt, 134 Ind. 16, 33 N. E. 774, steam escaping from automatic safety valve.

Maryland.— Riley *v.* New York, etc., R. Co., 90 Md. 53, 44 Atl. 994 (holding that the railroad company is not liable if the noise is not of an extraordinary or unusual character or without its charter privileges); Philadelphia, etc., R. Co. *v.* Burkhardt, 83 Md. 516, 34 Atl. 1010; Duvall *v.* Baltimore, etc., R. Co., 73 Md. 516, 21 Atl. 496.

Massachusetts.— Kelsey *v.* New York, etc., R. Co., 181 Mass. 64, 63 N. E. 8.

New York.— Wilson *v.* New York Cent., etc., R. Co., 41 N. Y. App. Div. 36, 58 N. Y. Suppl. 617.

North Carolina.— Miller *v.* Wilmington etc., R. Co., 128 N. C. 26, 38 S. E. 29.

Texas.— Galveston, etc., R. Co. *v.* Simon, (Civ. App. 1899) 54 S. W. 309.

Vermont.— Powers *v.* Grand Trunk R. Co., 78 Vt. 436, 63 Atl. 139, facts held insufficient to establish defendant's negligence.

Wisconsin.— Cahoon *v.* Chicago, etc., R. Co., 85 Wis. 570, 55 N. W. 900.

See 41 Cent. Dig. tit. "Railroads," § 969.

The fact that there was no one on the engine at the time the steam escaped does not alter the case where it is shown that the engine when built was gauged to blow off at a certain pressure and that neither engineer nor fireman had any control over the valve. Duvall *v.* Baltimore, etc., R. Co., 73 Md. 516, 21 Atl. 496.

35. *Arkansas.*— Inabnett *v.* St. Louis, etc., R. Co., 69 Ark. 130, 61 S. W. 570.

Illinois.— Wabash R. Co. *v.* Speer, 156 Ill. 244, 40 N. E. 835 [*reversing* on other grounds 39 Ill. App. 599].

Indiana.— Cincinnati, etc., R. Co. *v.* Gaines, 104 Ind. 526, 4 N. E. 34, 5 N. C. 746, 54 Am. Rep. 334.

Iowa.— Ochiltree *v.* Chicago, etc., R. Co., 94 Iowa 732, 62 N. W. 11; Ochiltree *v.* Chicago, etc., R. Co., 93 Iowa 628, 62 N. W. 7, 96 Iowa 246, 64 N. W. 788.

Kansas.— Chicago, etc., R. Co. *v.* Parks, 59 Kan. 709, 54 Pac. 1052.

Pennsylvania.— Philadelphia, etc., R. Co. *v.* Killips, 88 Pa. St. 405.

Tennessee.—Beopple *v.* Illinois Cent. R. Co., 104 Tenn. 420, 58 S. W. 231.

Texas.— Gulf, etc., R. Co. *v.* Box, 81 Tex. 670, 17 S. W. 375; Paris, etc., R. Co. *v.* Calvin, (Civ. App. 1907) 103 S. W. 428 [*affirmed* in (1908) 106 S. W. 879] (whistling at street crossing); McGrew *v.* St. Louis, etc., R. Co., 32 Tex. Civ. App. 265, 74 S. W. 816 (holding that if the circumstances are such as to indicate to a person of ordinary prudence that the sounding of the whistle might and probably would frighten plaintiff's horse, the sounding of the same constitutes actionable negligence for which plaintiff is entitled to recover); Houston, etc., R. Co. *v.* Blan, (Civ. App. 1901) 62 S. W. 552.

United States.— Northern Pac. R. Co. *v.* Sullivan, 53 Fed. 219, 3 C. C. A. 506.

See 41 Cent. Dig. tit. "Railroads," § 969.

The unnecessary loud blowing need not have been wantonly done to entitle plaintiff to recover. Beopple *v.* Illinois Cent. R. Co., 104 Tenn. 420, 58 S. W. 231.

Sounding the whistle after it has become reasonably apparent that a team is being frightened is actionable negligence. Ochiltree *v.* Chicago, etc., R. Co., 93 Iowa 628, 62 N. W. 7, 96 Iowa 246, 64 N. W. 788; Houston, etc., R. Co. *v.* Blan, (Tex. Civ. App. 1901) 62 S. W. 552; Missouri, etc., R. Co. *v.* Weatherford, 26 Tex. Civ. App. 20, 62 S. W. 101; Texas, etc., R. Co. *v.* Moseley, (Tex. Civ. App. 1900) 58 S. W. 48; Gulf, etc., R. Co. *v.* Singer, (Tex. Civ. App. 1897) 40 S. W. 1004.

Blowing the whistle while passing under an overhead bridge on which a person is driving is negligence for which the railroad company is liable (Cleveland, etc., R. Co. *v.* David, 105 Ill. App. 69; Louisville, etc., R. Co. *v.* Shearer, 59 S. W. 330, 22 Ky. L. Rep. 929; Mitchell *v.* Nashville, etc., R. Co., 100 Tenn. 329, 45 S. W. 337, 40 L. R. A. 426. But see Kelsey *v.* New York, etc., R. Co., 181 Mass. 64, 63 N. E. 8), unless it is blown for some proper purpose (Louisville, etc., R. Co. *v.* Shearer, 59 S. W. 330, 22 Ky. L. Rep. 929; Phillips *v.* New York Cent., etc., R. Co., 84 Hun (N. Y.) 412, 32 N. Y. Suppl. 299; Farley *v.* Harris, 186 Pa. St. 440, 40 Atl. 798).

36. *Alabama.*— Stanton *v.* Louisville, etc., R. Co., 91 Ala. 382, 8 So. 798.

Arkansas.— Inabnett *v.* St. Louis, etc., R. Co., 69 Ark. 130, 61 S. W. 570.

Illinois.— Chicago, etc., R. Co. *v.* Heinrich, 157 Ill. 388, 41 N. E. 860 [*affirming* 57 Ill. App. 399]; Toledo, etc., R. Co. *v.* Harmon, 47 Ill. 298, 95 Am. Dec. 489; Illinois Cent. R. Co. *v.* Klein, 95 Ill. App. 220.

company is responsible for the resulting injury; and this is especially true where the acts are done in violation of statute.[37] Likewise a failure to give the usual or statutory signals by reason of which failure a team becomes frightened at an approaching or passing train and causes injury, without any fault on the part of the person injured, is negligence.[38]

Indiana.— Louisville, etc., R. Co. *v.* Schmidt, 147 Ind. 638, 46 N. E. 344.

Maine.— Boothby *v.* Boston, etc., R. Co., 90 Me. 313, 38 Atl. 155.

Maryland.— Riley *v.* New York, etc., R. Co., 90 Md. 53, 44 Atl. 994; Philadelphia, etc., R. Co. *v.* Burkhardt, 83 Md. 516, 34 Atl. 1010.

Michigan.— Hinchman *v.* Pere Marquette R. Co., 136 Mich. 341, 99 N. W. 277, 65 L. R. A. 553.

Nebraska.— Williams *v.* Chicago, etc., R. Co., 78 Nebr. 695, 111 N. W. 596, 14 L. R. A. N. S. 1224, 78 Nebr. 701, 113 N. W. 791.

Texas.— St. Louis Southwestern R. Co. *v.* Moore, (Civ. App. 1908) 107 S. W. 658; Texas Midland R. Co. *v.* Cardwell, (Civ. App. 1901) 67 S. W. 157; San Antonio, etc., R. Co. *v.* Belt, 24 Tex. Civ. App. 281, 59 S. W. 607.

Wisconsin.— Abbot *v.* Kalbus, 74 Wis. 504, 43 N. W. 367, 77 Wis. 621, 46 N. W. 810.

England.—Manchester South Junction, etc., R. Co. *v.* Fullarton, 14 C. B. N. S. 54, 11 Wkly. Rep. 754, 108 E. C. L. 54.

See 41 Cent. Dig. tit. "Railroads," § 969.

The test of negligence is not what the engineer did or knew, but what a reasonably prudent engineer would have known or done under the circumstances. Inabnett *v.* St. Louis, etc., R. Co., 69 Ark. 130, 61 S. W. 570.

Permitting a locomotive with glaring headlight and blowing off steam that necessarily would frighten horses to stand close to a crossing is negligence. Hine *v.* Erie R. Co., 27 Ohio Cir. Ct. 155.

To turn on steam of a locomotive standing at a public street crossing, without warning and without taking due precautions to discover whether there is any person on or near the crossing liable to be injured in consequence of such act, constitutes actionable negligence, in the absence of special circumstances justifying the act. Williams *v.* Chicago, etc., R. Co., 78 Nebr. 695, 111 N. W. 596, 14 L. R. A. N. S. 1224, 78 Nebr. 701, 113 N. W. 791.

37. Georgia R. Co. *v.* Carr, 73 Ga. 557 (holding that a railroad company is responsible for injuries caused by a horse becoming frightened at a whistle which was blown in violation of code, section 710, providing that within town limits whistles need not be blown at road crossings but that the bell shall be tolled instead); Northern Pac. R. Co. *v.* Sullivan, 53 Fed. 219, 3 C. C. A. 506.

38. *Georgia.*—Atlanta, etc., R. Co. *v.* Durham, 108 Ga. 547, 34 S. E. 332; Bowen *v.* Gainesville, etc., R. Co., 95 Ga. 688, 22 S. E. 695.

Illinois.— Chicago, etc., R. Co. *v.* McGaha, 19 Ill. App. 342.

Indiana.— Terre Haute, etc., R. Co. *v.* Brunker, 128 Ind. 542, 26 N. E. 178 (holding also that the railroad company is not exonerated by the fact that the horses were frightened by the lawful sounding of the whistle as a signal for the crossing of another highway, as well as by the moving train; or because it did not appear that the horses were docile, or that plaintiff could have heard the signals if sounded and would have stopped, and could have controlled his horses); Cleveland, etc., R. Co. *v.* Carey, 33 Ind. App. 275, 71 N. E. 244.

Iowa.— Lonergan *v.* Illinois Cent. R. Co., 87 Iowa 755, 49 N. W. 852, 53 N. W. 236, 17 L. R. A. 254, holding this to be true under the acts of the 20th general assembly of Iowa, chapter 104, providing that no railroad engine shall approach a highway crossing without giving a signal and making the neglect to give such signals a misdemeanor.

Massachusetts.— Pollock *v.* Eastern R. Co., 124 Mass. 158; Prescott *v.* Eastern R. Co., 113 Mass. 370 note; Norton *v.* Eastern R. Co., 113 Mass. 366. *Compare* Favor *v.* Boston, etc., R. Corp., 114 Mass. 350, 19 Am. Rep. 364; Flint *v.* Norwich, etc., R. Co., 110 Mass. 222.

Nebraska.— Chicago, etc., R. Co. *v.* Metcalf, 44 Nebr. 848, 63 N. W. 51, 28 L. R. A. 824, holding that where a crossing is provided at a railroad station, one whose team has been driven to a car on the side-track near the station, for the purpose of unloading the car, is within the protection of Comp. St. c. 16, § 104, requiring signals for crossings.

New Hampshire.— Presby *v.* Grand Trunk R. Co., 66 N. H. 615, 22 Atl. 554.

Texas.— Texas, etc., R. Co. *v.* Chapman, 57 Tex. 75; Missouri, etc., R. Co. *v.* Magee, (Civ. App. 1889) 49 S. W. 156 [*affirmed* in 92 Tex. 616, 50 S. W. 1013].

Canada.— Grand Trunk R. Co. *v.* Sibbald, 20 Can. Sup. Ct. 259 [*affirming* 18 Ont. App. 184]; Grand Trunk R. Co. *v.* Rosenberger, 9 Can. Sup. Ct. 311 [*affirming* 8 Ont. App. 482 (*affirming* 32 U. C. C. P. 349)]; Robertson *v.* Halifax Coal Co., 20 Nova Scotia 517; Henderson *v.* Canada Atlantic R. Co., 25 Ont. App. 437.

See 41 Cent. Dig. tit. "Railroads," §§ 970, 997.

Escaping steam.— Where the proper signals are not given and the horse is frightened by escaping steam from the passing engine the railroad company is responsible for the resulting injury (Presby *v.* Grand Trunk R. Co., 66 N. H. 615, 22 Atl. 554); and the fact that the steam escaped through an automatic valve, such as is generally used by railroad companies, not under the control of the railroad companies' employees in charge of the locomotive, is not an answer to the charge of negligence as a matter of law (Presby *v.* Grand Trunk R. Co., *supra*).

(II) *By Signals Required by Statute.* As a general rule the blowing of whistles and giving of other signals required by statute at a crossing whereby horses are frightened and injury is caused is not negligence for which the railroad company is responsible,[39] unless they are given negligently or wantonly.[40] But, in the absence of facts tending to show that injury to others at the crossing might result from the failure to give such signals,[41] even the giving of the statutory signals may constitute negligence if the railroad employee sees that a horse will be frightened and he can desist from giving them consistently with his duties.[42]

e. By Obstructions On or Near Tracks. A railroad company is also responsible for negligently allowing obstructions reasonably calculated to frighten ordinarily gentle horses,[43] to remain on its right of way at or near a crossing whereby horses are frightened and injury is caused without any fault on the part of the injured person.[44] But obstructions that are usual and necessary in the proper

39. Louisville, etc., R. Co. *v.* Stanger, 7 Ind. App. 179, 34 N. E. 688; Phillips *v.* New York Cent., etc., R. Co., 84 Hun (N. Y.) 412, 32 N. Y. Suppl. 299; Campbell *v.* New York Cent., etc., R. Co., 4 N. Y. Suppl. 265; Cahoon *v.* Chicago, etc., R. Co., 85 Wis. 570, 55 N. W. 900.

Under a statute (S. C. Gen. St. § 1529) making a railroad company liable only for damages caused by a "collision" with its engines or cars "at a crossing," where the prescribed statutory signals are not given, injuries received by being thrown from a vehicle where a horse becomes frightened at an approaching train are not caused by a collision and the railroad company is not liable under such statute. Kinard *v.* Columbia, etc., R. Co., 39 S. C. 514, 18 S. E. 119; Whilton *v.* Richmond, etc., R. Co., 57 Fed. 551.

40. Bittle *v.* Camden, etc., R. Co., 55 N. J. L. 615, 28 Atl. 305, 23 L. R. A. 283; Gulf, etc., R. Co. *v.* Box, 81 Tex. 670, 17 S. W. 375.

41. Gulf, etc., R. Co. *v.* Milner, 28 Tex. Civ. App. 86, 66 S. W. 574.

42. Nichols *v.* Baltimore, etc., R. Co., 33 Ind. App. 229, 70 N. E. 183, 71 N. E. 170 (holding that where the engineer observes a team near the crossing, frightened and becoming unmanageable, it is his duty to refrain from giving signals; but if the train has reached a point where the law requires signals to be given, and it is uncertain whether the train can be stopped before reaching the crossing, he must give the signals); St. Louis Southwestern R. Co. *v.* Kilman, 39 Tex. Civ. App. 107, 86 S. W. 1050; Gulf, etc., R. Co. *v.* Milner, 28 Tex. Civ. App. 86, 66 S. W. 574. *Compare* Louisville, etc., R. Co. *v.* Stanger, 7 Ind. App. 179, 34 N. E. 688.

43. Peterson *v.* Chicago, etc., R. Co., 64 Mich. 621, 31 N. W. 548 (holding that the company is liable if the driver used due care and the accident is not traceable to any vice of the horse); Texas, etc., R. Co. *v.* McManus, 15 Tex. Civ. App. 122, 38 S. W. 241 (holding that a railroad company is not liable for injuries caused by a horse taking fright at a hand-car in the absence of a showing that such an object near a crossing is reasonably calculated to frighten ordinarily gentle horses); Missouri, etc., R. Co. *v.* Jones, 13 Tex. Civ. App. 376, 35 S. W. 322. And see cases cited *infra*, note 44.

Where a railroad company leaves cars standing on its side-track for an unreasonable length of time and so near a street crossing which it is required to maintain that horses of ordinary gentleness are liable to be frightened thereby, the company is responsible therefor; and if the cars project over and impede the crossing itself the company is responsible regardless of the question whether the horse is a gentle horse or not, except so far as the disposition of the horse may affect the question of contributory negligence. Missouri Pac. R. Co. *v.* Clark, (Kan. App. 1897) 49 Pac. 799.

44. *Delaware.*—McCoy *v.* Philadelphia, etc., R. Co., 5 Houst. 599, box car on track at street crossing from ten o'clock at night until five o'clock the next morning.

Illinois.— Illinois Cent. R. Co. *v.* Griffin, 184 Ill. 9, 56 N. E. 337 [*affirming* 84 Ill. App. 152], holding the company to be responsible for cinders piled on a highway at a crossing intended to ballast the track, and left so as to frighten horses driven over the crossing.

Indiana.— Pittsburgh, etc., R. Co. *v.* Kitley, 118 Ind. 152, 20 N. E. 727, obstruction wrongful under Rev. St. (1881) §§ 1965, 2170.

Iowa.— Hanson *v.* Chicago, etc., R. Co., 94 Iowa 409, 62 N. W. 788, obstruction wrongful under Code, § 1288.

Kansas.— Missouri Pac. R. Co. *v.* Clark, (App. 1897) 49 Pac. 799.

Kentucky.— Louisville, etc., R. Co. *v.* Armstrong, 105 S. W. 473, 32 Ky. L. Rep. 252, holding that where a person is injured by his horses becoming frightened at a carcass lying on defendant's right of way near a crossing, plaintiff must show in order to recover that the carcass was on defendant's right of way in close proximity to the highway, and that defendant knew, or by the use of ordinary care could have known, of its presence within such time as would reasonably have enabled it to have removed the carcass before plaintiff received his injuries.

Michigan.— Peterson *v.* Chicago, etc., R. Co., 64 Mich. 621, 31 N. W. 548, car left at crossing so that it obstructs the highway for a time longer than allowed by statute.

Mississippi.— Vicksburg, etc., R. Co. *v.*

conduct of the railroad company's business and which are left only for a reasonable time do not constitute such negligence;[45] nor is a railroad company responsible for injuries caused by horses becoming frightened at obstructions placed on its right of way on or near a crossing by third persons,[46] unless it permits such obstructions to remain there for an unreasonable length of time.[47]

5. Sign-Boards, Signals, Flagmen, and Gates at Crossing[48] **— a. In General.** Although the track of a railroad is of itself a warning of danger to a person approaching it,[49] and notwithstanding the statutory regulations as to warnings at railroad crossings,[50] it is the duty of a railroad company to adopt a reasonably safe and

Alexander, 62 Miss. 496, train stopping at station for one hour with locomotive extending three and one-half feet across a public highway.

New Jersey.— Palys *v.* Jewett, 32 N. J. Eq. 302.

Texas.— Galveston, etc., R. Co. *v.* Simon, (Civ. App. 1899) 54 S. W. 309; Missouri, etc., R. Co. *v.* Jones, 13 Tex. Civ. App. 376, 35 S. W. 322. See also International, etc., R. Co. *v.* Douglas, 7 Tex. Civ. App. 554, 27 S. W. 793.

See 41 Cent. Dig. tit. "Railroads," § 971.

To leave a hand-car left standing on the right of way at a crossing at which a horse becomes frightened is negligence for which the railroad company is responsible. Baltimore, etc., R. Co. *v.* Slaughter, 167 Ind. 330, 79 N. E. 186, 7 L. R. A. N. S. 597; Ohio, etc., R. Co. *v.* Trowbridge, 126 Ind. 391, 26 N. E. 64; Sherman, etc., R. Co. *v.* Bridges, 16 Tex. Civ. App. 64, 40 S. W. 536. *Compare* Texas, etc., R. Co. *v.* McManus, 15 Tex. Civ. App. 122, 38 S. W. 241.

To maintain a derrick over a highway at the crossing so as naturally to frighten passing animals is negligence, although it is maintained for the purpose of loading and unloading freight. Jones *v.* Housatonic R. Co., 107 Mass. 261.

To leave a car so that a team cannot pass without the wheels or whiffletree of the wagon coming into contact with the bumper of the car is an obstruction of the highway rendering the company liable for injuries caused by a team becoming frightened thereby. Peterson *v.* Chicago, etc., R. Co., 64 Mich. 621, 31 N. W. 548.

That the railroad company has failed to provide itself with sufficient side-tracks for its business does not give it the right to place a "shanty car" on a track at a street crossing in such a position as to render it liable to frighten horses. Harrell *v.* Albemarle, etc., R. Co., 110 N. C. 215, 14 S. E. 687.

Mail crane.— The fact that a railroad company, in placing a mail crane at a highway crossing, constructed the same at the instance and request of the United States postal department and according to plans and specifications furnished by such department, and that the place where the crane was erected was selected by the department, and that a mail bag hung upon the crane was hung there by an agent of the United States government, to be delivered to another agent of the government, the company being under no duty in connection therewith except to forward the mails on its trains, and having nothing to do in any manner with the handling or control of the mail bag, constitutes no defense to an action against the company for injuries to a traveler on the highway whose mule is frightened at the crane and bag suspended therefrom. Western R. Co. *v.* Cleghorn, 143 Ala. 392, 39 So. 133.

45. *Illinois.*— Chicago Great Western R. Co. *v.* Kenyon, 70 Ill. App. 567, leaving a box car partially obstructing a highway crossing for five minutes.

Indiana.—Cleveland, etc., R. Co. *v.* Wynant, 114 Ind. 525, 17 N. E. 118, 5 Am. St. Rep. 644, box car not encroaching on the road.

Iowa.— O'Donnell *v.* Chicago, etc., R. Co., 69 Iowa 102, 28 N. W. 464.

New York.— Hohman *v.* New York Cent., etc., R. Co., 100 N. Y. App. Div. 17, 90 N. Y. Suppl. 882 [*affirmed* in 184 N. Y. 591, 77 N. E. 1189].

North Carolina.— Miller *v.* Wilmington, etc., R. Co., 128 N. C. 26, 38 S. E. 29.

Texas.— Texas, etc., R. Co. *v.* McManus, 15 Tex. Civ. App. 122, 38 S. W. 241.

See 41 Cent. Dig. tit. "Railroads," § 971.

46. Cleveland, etc., R. Co. *v.* Wynant, 114 Ind. 525, 17 N. E. 118, 5 Am. St. Rep. 644.

47. Cleveland, etc., R. Co. *v.* Wynant, 114 Ind. 525, 17 N. E. 118, 5 Am. St. Rep. 644.

48. **Criminal prosecutions for violation of regulations** see *supra*, X, B, 8.

Signals frightening animals see *supra*, X, F, 4, b.

Validity and reasonableness of statutory and municipal regulations see *supra*, X, B, 1.

49. Van Winkle *v.* New York, etc., R. Co., 34 Ind. App. 476, 73 N. E. 157; Maryland Cent. R. Co. *v.* Neubeur, 62 Md. 391.

50. Chicago, etc., R. Co. *v.* Perkins, 125 Ill. 127, 17 N. E. 1 (holding that Starr & C. Annot. St. c. 114, § 99, providing that where the municipal authorities give notice to that effect, railroad companies shall provide flagmen at the street crossings, does not relieve the company from adopting such other precautions as public safety and common prudence may dictate); Eichorn *v.* New Orleans, etc., R., etc., Co., 112 La. 236, 36 So. 335, 104 Am. St. Rep. 437 (holding that where the city council fails to pass an ordinance called for by existing conditions, the company should of its own motion make a proper regulation and notify their employees thereof); Grand Trunk R. Co. *v.* Ives, 144 U. S. 408, 12 S. Ct. 679, 36 L. ed. 485 [*affirming* 35 Fed. 176] (holding that the fact that a statute of Mich-

effective mode, commensurate with the danger at the particular crossing, of warning travelers of the approach of trains,[51] especially where the extraordinary character of the crossing is caused by the railroad company itself,[52] although the law does not require that the means adopted shall prove effective.[53] The failure of automatic bells, placed at a railroad crossing to signal approaching trains, to ring at the time of the accident is evidence of negligence,[54] unless the person injured knew that such a bell was no longer used.[55]

b. Sign-Boards. It is usually provided by statute that a railroad company shall maintain sign-boards or warning posts at its crossings over highways to warn travelers of the existence of the railway.[56] The violation of such a statute, while not creating an absolute liability on the part of the railroad company, may, under the circumstances, constitute such negligence as to make the railroad company liable for a resulting injury.[57] Even in the absence of statutory

igan (3 Howell Annot. St. § 3301) charges a railroad commissioner with the duty of determining the necessity of a flagman at any and all crossings in the state does not relieve the company from taking such other precautions as public safety and common prudence dictate).

51. Newport News, etc., Co. *v.* Stuart, 99 Ky. 496, 36 S. W. 528, 18 Ky. L. Rep. 347; Cincinnati, etc., R. Co. *v.* Champ, 104 S. W. 988, 31 Ky. L. Rep. 1054 (holding that where a crossing is unusually dangerous the company must employ such means as are reasonably necessary, considering its character, to warn travelers of the approach of trains); Eichorn *v.* New Orleans, etc., R., etc., Co., 112 La. 236, 36 So. 335, 104 Am. St. Rep. 437; Richardson *v.* New York Cent. R. Co., 45 N. Y. 846 (holding that where the crossing is such that persons traveling on the highway can neither see nor distinctly hear an approaching train until too late to avoid collision, sounding the whistle and ringing the bell in compliance with the statute does not excuse the company for failing to warn travelers by other means of the danger); Bleyle *v.* New York Cent., etc., R. Co., 11 N. Y. St. 585 [*affirmed* in 113 N. Y. 626, 20 N. E. 877]; *In re* Pennsylvania R. Co., 213 Pa. St. 373, 62 Atl. 986, 3 L. R. A. N. S. 140.

At crossings in a populous town or city the vigilance should be greater than at ordinary crossings in the country. Central Pass. R. Co. *v.* Kuhn, 86 Ky. 578, 6 S. W. 441, 9 Ky. L. Rep. 725, 9 Am. St. Rep. 309; Texas, etc., R. Co. *v.* Cody, 166 U. S. 606, 17 S. Ct. 703, 41 L. ed. 1132, holding that if a railroad crossing on a street in a city is not lit up on a dark night, then to the extent the danger is increased greater care is required both of the company and of the one crossing the track.

The absence of signal flags on a railroad is not negligence as regards travelers on a highway crossing, since such signals are merely for the guidance of engineers and other employees of the railroad company and are not required for the benefit of travelers by any rule of law or statute. Schwartz *v.* Hudson River R. Co., 4 Rob. (N. Y.) 347.

It is not required that the means employed shall prove "effective" but only that they shall be such as an ordinarily prudent person operating a railroad would adopt under like circumstances. Chesapeake, etc., R. Co. *v.* Gunter, 108 Ky. 362, 56 S. W. 527, 21 Ky. L. Rep. 1803.

52. Hires *v.* Atlantic City R. Co., 66 N. J. L. 30, 48 Atl. 1002.

53. Cincinnati, etc., R. Co. *v.* Champ, 104 S. W. 988, 31 Ky. L. Rep. 1054.

54. Hicks *v.* New York, etc., R. Co., 164 Mass. 424, 41 N. E. 721, 49 Am. St. Rep. 471; McSweeney *v.* Erie R. Co., 93 N. Y. App. Div. 496, 87 N. Y. Suppl. 836.

Failure to use ordinary care to keep an electric gong repaired at a crossing is negligence. Cleveland, etc., R. Co. *v.* Sivey, 27 Ohio Cir. Ct. 248.

55. Wellenhoffer *v.* New York, etc., R. Co., 21 N. Y. Suppl. 866.

56. Payne *v.* Chicago, etc., R. Co., 44 Iowa 236; Whittaker *v.* Boston, etc., R. Co., 7 Gray (Mass.) 98; East Tennessee, etc., R. Co. *v.* Feathers, 10 Lea (Tenn.) 103; Field *v.* Chicago, etc., R. Co., 14 Fed. 332, 4 McCrary 573.

A "traveled place" within the meaning of Mass. St. (1849) c. 222, § 2, requiring a railroad company to maintain a sign-board where its railroad crosses such places, includes an open and traveled street in a city, although not so laid out and established by the municipal authorities as to make the city responsible for damages occasioned by defects therein. Whittaker *v.* Boston, etc., R. Co., 7 Gray (Mass.) 98. But it does not include a foot-bridge built outside the limits of the highway for the use of the public, where the railroad company was lowering its grade so that a highway could pass overhead and had closed up the highway. Stewart *v.* New York, etc., R. Co., 170 Mass. 430, 49 N. E. 650, construing Pub. St. c. 112, §§ 164, 165.

Fla. Rev. St. (1892) § 2264, requiring sign-boards near crossings of highways, does not apply to the streets of an incorporated city. Seaboard Air Line R. Co. *v.* Smith, 53 Fla. 375, 43 So. 235.

57. Lewis *v.* Long Island R. Co., 162 N. Y. 52, 56 N. E. 548 [*reversing* 32 N. Y. App. Div. 627, 53 N. Y. Suppl. 1107]; Henn *v.* Long Island R. Co., 51 N. Y. App. Div. 292, 65 N. Y. Suppl. 21; Field *v.* Chicago, etc.,

requirement, it may be negligence not to place such a sign-board if the crossing is of an unusually dangerous character.[58] But since the object of such a sign-board is to warn travelers of the existence of the railroad crossing, the absence thereof does not make the company liable to a party familiar with the crossing and knowing of the existence of the railroad at the time of the accident.[59] Under a statute requiring the highway authorities to put up sign-boards at crossings and requiring the railroad company to give signals at all crossings so designated, such a sign-board is sufficient if it is in plain view of passing trains, although there is no lettering on the side toward the railroad.[60]

c. Gates, Lights, and Flagmen — (i) *IN GENERAL.* Unless required by statute[61] a railroad company is ordinarily under no duty to maintain a flagman, lights, or gates at a crossing, and negligence cannot be predicated upon a mere failure to do so,[62] particularly as to one who is familiar with the cross-

R. Co., 14 Fed. 332, 4 McCrary 573, holding that under the Iowa statute, Code, § 1288, the failure to provide such sign-boards is conclusive evidence of negligence on the part of the railroad company.

The universal use of a particular sign-board throughout the state but which is not in compliance with the statute does not absolve a railroad company from responsibility for the direct consequences resulting from an accident due to such violation. Henn *v.* Long Island R. Co., 51 N. Y. App. Div. 292, 65 N. Y. Suppl. 21. But in the absence of testimony showing that such violation was the proximate cause of the accident, such universal use of a sign-board renders a lack of compliance with the statute of no probative force on the question of negligence. Lewis *v.* Long Island R. Co., 31 Misc. (N. Y.) 546, 65 N. Y. Suppl. 595.

A slight variation of the sign from the statutory requirements, but which in no degree prevents a person from receiving warning at such crossing, is not such negligence as to render the railroad company liable for the injury. Wellbrock *v.* Long Island R. Co., 31 Misc. (N. Y.) 424, 65 N. Y. Suppl. 592.

58. Winstanley *v.* Chicago, etc., R. Co., 72 Wis. 375, 39 N. W. 856.

59. Haas *v.* Grand Rapids, etc., R. Co., 47 Mich. 401, 11 N. W. 216; New York, etc., R. Co. *v.* Kistler, 16 Ohio Cir. Ct. 316, 9 Ohio Cir. Dec. 277; Cleveland, etc., R. Co. *v.* Reiss, 13 Ohio Cir. Ct. 405, 7 Ohio Cir. Dec. 450.

60. Western, etc., R. Co. *v.* Roberson, 61 Fed. 592, 9 C. C. A. 646, holding that the designation of a railroad crossing is sufficient under Milliken & V. Code Tenn. §§ 1298, 1300, to render a railroad company liable for an accident at such crossing where the engineer fails to blow the whistle or ring the bell, although the sign is fifty feet from the crossing, is not lettered on the side toward the railroad and some of the letters have become obliterated.

61. Martin *v.* New York Cent., etc., R. Co., 20 Misc. (N. Y.) 363, 45 N. Y. Suppl. 925. See also *infra*, X, F, 5, d.

In New York a request of the authorities of a municipality that a railroad corporation shall erect gates at a crossing imposes no duty upon it to do so, and it is not chargeable with negligence for omitting to comply with the request, until an order of the supreme court requiring it has been obtained as authorized by Laws (1884), § 3, c. 439. Daniels *v.* Staten Island Rapid Transit Co., 125 N. Y. 407, 26 N. E. 466.

62. *District of Columbia.*— Baltimore, etc., R. Co. *v.* Adams, 10 App. Cas. 97.

Maryland.— Northern Cent. R. Co. *v.* Medairy, 86 Md. 168, 37 Atl. 796; State *v.* Philadelphia, etc., R. Co., 47 Md. 76.

Michigan.— Barnum *v.* Grand Trunk Western R. Co., 148 Mich. 370, 111 N. W. 1036; Freeman *v.* Duluth, etc., R. Co., 74 Mich. 86, 41 N. W. 872, 3 L. R. A. 594; Haas *v.* Grand Rapids, etc., R. Co., 47 Mich. 401, 11 N. W. 216.

Missouri.— Welsch *v.* Hannibal, etc., R. Co., 72 Mo. 451, 37 Am. Rep. 440.

New Jersey.— Pennsylvania R. Co. *v.* Matthews, 36 N. J. L. 531.

New York.— Culhane *v.* New York Cent., etc., R. Co., 60 N. Y. 133 (holding that a railroad company is not called upon to keep a flagman, and is only bound to operate its trains with the care called for by the peculiar circumstances); Weber *v.* New York Cent., etc., R. Co., 58 N. Y. 451; Cohn *v.* New York Cent., etc., R. Co., 6 N. Y. App. Div. 196, 39 N. Y. Suppl. 986; Case *v.* New York Cent., etc., R. Co., 75 Hun 527, 27 N. Y. Suppl. 496; Coyle *v.* Long Island R. Co., 33 Hun 37; Crawford *v.* Delaware, etc., R. Co., 55 N. Y. Super. Ct. 50; Schwartz *v.* Hudson River R. Co., 4 Rob. 347; Martin *v.* New York Cent., etc., R. Co., 20 Misc. 363, 45 N. Y. Suppl. 925; Brown *v.* Rome, etc., R. Co., 1 N. Y. Suppl. 286 [*affirmed* in 121 N. Y. 669, 24 N. E. 1094]; Heaney *v.* Long Island R. Co., 9 N. Y. St. 707. A railroad company is not required to keep a flagman at every crossing where a jury may be of the opinion that the travel is so great that ordinary prudence requires such precaution. Grippen *v.* New York Cent. R. Co., 40 N. Y. 34; Beisiegel *v.* New York Cent. R. Co., 40 N. Y. 9.

Ohio.— Lake Shore, etc., R. Co. *v.* Reynolds, 23 Ohio Cir. Ct. 199; Cleveland, etc., R. Co. *v.* Richerson, 19 Ohio Cir. Ct. 385, 10 Ohio Cir. Dec. 326; Cleveland, etc., R. Co. *v.* Reiss, 13 Ohio Cir. Ct. 405, 7 Ohio Cir. Dec. 450.

ing,[63] although such failure may, together with other circumstances, be considered as evidence of negligence in operating the road.[64] In most jurisdictions the rule is held to be that whether or not it is negligence to fail to provide such flagman, lights, or gates is a question for the jury, dependent upon the circumstances of the particular case,[65] although it has been held to be a question of law for the court,[66] and that such failure may constitute negligence where the conditions at the crossing are such that ordinary care or reasonable prudence requires that a flagman or gates should be maintained;[67] and this duty

Pennsylvania.— Seifred *v.* Pennsylvania R. Co., 206 Pa. St. 399, 55 Atl. 1061.

Texas.— Central Texas, etc., R. Co. *v.* Gibson, 35 Tex. Civ. App. 66, 79 S. W. 351.

England.— Stubley *v.* London, etc., R. Co., L. R. 1 Exch. 13, 4 H. & C. 83, 11 Jur. N. S. 954, 35 L. J. Exch. 3, 13 L. T. Rep. N. S. 376, 14 Wkly. Rep. 133.

Canada.— Quebec, etc., R. Co. *v.* Girard, 15 Quebec K. B. 48 [*reversing* 25 Quebec Super. Ct. 245].

See 41 Cent. Dig. tit. "Railroads," § 975.

Illustrations.— Unless required by statute, a railroad company is under no obligation to keep a flagman at the crossings of public country roads (Maryland Cent. R. Co. *v.* Neubeur, 62 Md. 391; Lake Shore, etc., R. Co. *v.* Gaffney, 9 Ohio Cir. Ct. 32, 6 Ohio Cir. Dec. 94; Christensen *v.* Oregon Short Line R. Co., 29 Utah 192, 80 Pac. 746; Grand Trunk R. Co. *v.* Ives, 144 U. S. 408, 12 S. Ct. 679, 36 L. ed. 485 [*affirming* 35 Fed. 176]); or at a crossing which is in a sparsely settled locality, and where the track for some distance up and down it can be seen by one approaching on the highway (Telfer *v.* Northern R. Co., 30 N. J. L. 188); or at a crossing in a small town or village (Evansville, etc., R. Co. *v.* Clements, 32 Ind. App. 659, 70 N. E. 554); or where, although the view is obstructed, the train can be seen by the person injured before he reaches the track, and the ordinary signals are adequate to apprise him of the danger (Louisville, etc., R. Co. *v.* Cummins, 111 Ky. 333, 63 S. W. 594, 23 Ky. L. Rep. 681).

63. Chicago, etc., R. Co. *v.* Clarkson, 147 Fed. 397, 77 C. C. A. 575, holding that where a railroad engineer who was killed at a crossing had knowledge that switching was habitually conducted over the crossing at about the time of the accident and was going on at the time and that no flagman was kept at that place, defendant was not guilty of negligence in failing to have a flagman at the crossing to warn pedestrians that the train was approaching.

64. *Illinois.*— Chicago, etc., R. Co. *v.* Lane, 130 Ill. 116, 22 N. E. 513; Lake Shore, etc., R. Co. *v.* Foster, 74 Ill. App. 387.

Iowa.— Hart *v.* Chicago, etc., R. Co., 56 Iowa 166, 7 N. W. 9, 9 N. W. 116, 41 Am. Rep. 93.

Michigan.— Barnum *v.* Grand Trunk Western R. Co., 148 Mich. 370, 111 N. W. 1036.

New York.— Crippen *v.* New York Cent. R. Co., 40 N. Y. 34; Beisiegel *v.* New York Cent. R. Co., 40 N. Y. 9; Friess *v.* New York Cent., etc., R. Co., 67 Hun 205, 22 N. Y. Suppl. 104 [*affirmed* in 140 N. Y. 639, 35 N. E. 892]; Coyle *v.* Long Island R. Co., 33 Hun 37; Brown *v.* Rome, etc., R. Co., 1 N. Y. Suppl. 286 [*affirmed* in 121 N. Y. 669, 24 N. E. 1094].

Pennsylvania.— Seifred *v.* Pennsylvania R. Co., 206 Pa. St. 399, 55 Atl. 1061.

Wisconsin.— Heddles *v.* Chicago, etc., R. Co., 74 Wis. 239, 42 N. W. 237, holding that the true question is whether, in view of such failure, the train was moved with prudence or negligence.

United States.— New York, etc., R. Co. *v.* Moore, 105 Fed. 725, 45 C. C. A. 21.

See 41 Cent. Dig. tit. "Railroads," § 975.

65. *Iowa.*— Pratt *v.* Chicago, etc., R. Co., 107 Iowa 287, 77 N. W. 1064; Annaker *v.* Chicago, etc., R. Co., 81 Iowa 267, 47 N. W. 68.

Massachusetts.— Hubbard *v.* Boston, etc., R. Co., 162 Mass. 132, 38 N. E. 366; Bailey *v.* New Haven, etc., R. Co., 107 Mass. 496.

Minnesota.— Bolinger *v.* St. Paul, etc., R. Co., 36 Minn. 418, 31 N. W. 856, 1 Am. St. Rep. 680.

Montana.— Riley *v.* Northern Pac. R. Co., 36 Mont. 545, 93 Pac. 948.

Ohio.— Cleveland, etc., R. Co. *v.* Richerson, 19 Ohio Cir. Ct. 385, 10 Ohio Cir. Dec. 326.

Texas.— Missouri, etc., R. Co. *v.* Magee, 92 Tex. 616, 50 S. W. 1013 [*affirming* (Civ. App. 1899) 49 S. W. 156].

United States.— Grand Trunk R. Co. *v.* Ives, 144 U. S. 408, 12 S. Ct. 679, 36 L. ed. 485 [*affirming* 35 Fed. 176].

England.— Stubley *v.* London, etc., R. Co., L. R. 1 Exch. 13, 4 H. & C. 83, 11 Jur. N. S. 954, 35 L. J. Exch. 3, 13 L. T. Rep. N. S. 376, 14 Wkly. Rep. 133.

Canada.— See Lake Erie, etc., R. Co. *v.* Barclay, 30 Can. Sup. Ct. 360.

See 41 Cent. Dig. tit. "Railroads," § 975. And see *infra*, X, F, 14, g, (VI).

But see Grippen *v.* New York Cent. R. Co., 40 N. Y. 34; Beisiegel *v.* New York Cent. R. Co., 40 N. Y. 9; Crawford *v.* Delaware, etc., R. Co., 55 N. Y. Super. Ct. 50.

The knowledge of a traveler that no flagman is stationed at the crossing at a certain hour, and his dependence, for that reason, upon his own sight and hearing to discover the approach of trains, will not excuse the railroad company for its negligence in not keeping a flagman stationed at the crossing at such hour. Annaker *v.* Chicago, etc., R. Co., 81 Iowa 267, 47 N. W. 68.

66. See Grand Trunk R. Co. *v.* Ives, 144 U. S. 408, 12 S. Ct. 679, 36 L. ed. 485 [*affirming* 35 Fed. 176].

67. *Illinois.*— Peoria, etc., R. Co. *v.* Her-

may exist independently of a statute regulating the signs and signals at crossings, if the situation of the crossing reasonably requires it.[68] But before a jury will be warranted in saying, in the absence of any statutory direction to that effect, that a railroad company should keep a flagman or gates at a crossing, it must be first shown that such crossing is more than ordinarily hazardous,[69] as for instance that it is in a thickly populated town or city,[70] that the view of the track is obstructed either by the company itself,[71] or by other objects proper in themselves,[72] or that the crossing is a much traveled one and the noise of approaching trains is rendered indistinct and the ordinary signals difficult to be heard by reason

man. 39 Ill. App. 287, holding that the failure to keep a flagman is not negligence unless under all the circumstances injury would result without it.

Kentucky.— Chesapeake, etc., R. Co. *v.* Gunter, 108 Ky. 362, 56 S. W. 527, 21 Ky. L. Rep. 1803.

Massachusetts.— Hubbard *v.* Boston, etc., R. Co., 162 Mass. 132, 38 N. E. 366; Com. *v.* Boston, etc., R. Co., 101 Mass. 201.

Ohio.— Cleveland, etc., R. Co. *v.* Reiss, 13 Ohio Cir. Ct. 405, 7 Ohio Cir. Dec. 450.

Pennsylvania.— Reeves *v.* Delaware, etc., R. Co., 30 Pa. St. 454, 72 Am. Dec. 713.

Texas.— Missouri, etc., R. Co. *v.* Magee, 92 Tex. 616, 50 S. W. 1013 [*affirming* (Civ. App. 1899) 49 S. W. 156].

United States.— Grand Trunk R. Co. *v.* Ives, 144 U. S. 408, 12 S. Ct. 679, 36 L. ed. 485 [*affirming* 35 Fed. 176].

See 41 Cent. Dig. tit. "Railroads," § 975.

Ordinary care is the extent of the company's duty to provide such safeguards. Cleveland, etc., R. Co. *v.* Sivey, 27 Ohio Cir. Ct. 248.

68. Chicago, etc., R. Co. *v.* Lane, 30 Ill. App. 437 (holding that the failure of a city to require a flagman to be placed at a crossing is no excuse for the failure of a railroad company to do so where reasonable care for the safety of the public requires it to be done); Chesapeake, etc., R. Co. *v.* Gunter, 108 Ky. 362, 56 S. W. 527, 21 Ky. L. Rep. 1803 (holding that the failure of the railroad commissioners to require a flagman at a crossing, as they may do under St. § 774, does not relieve the company from liability for failing to have a flagman, where the situation is such that common prudence requires the precaution to be taken; and that such failure on the part of the commissioners is not even admissible to show due care on the part of the company); Cincinnati, etc., R. Co. *v.* Champ, 104 S. W. 988, 31 Ky. L. Rep. 1054 (holding that the duty of ordinary care may require a flagman, although the railroad commission has not required one); Eaton *v.* Fitchburg R. Co., 129 Mass. 364; Com. *v.* Boston, etc., R. Co., 101 Mass. 201; Grand Trunk R. Co. *v.* Ives, 144 U. S. 408, 12 S. Ct. 679, 36 L. ed. 485 [*affirming* 35 Fed. 176].

That trains are run over the crossing at a high rate of speed does not alone require that a flagman should be stationed thereat. Latham *v.* Staten Island R. Co., 150 Fed. 235.

69. *District of Columbia.*— Baltimore, etc., R. Co. *v.* Adams, 10 App. Cas. 97.

Maryland.— State *v.* Philadelphia, etc., R. Co., 47 Md. 76.

Massachusetts.— Hubbard *v.* Boston, etc., R. Co., 162 Mass. 132, 38 N. E. 366, holding that there must be something in the configuration of the land, the construction of the railroad, the structures in the vicinity, the nature or amount of travel on the highway, or in other conditions which renders ringing the bell and sounding the whistle inadequate properly to warn the public of danger.

Michigan.— Haas *v.* Grand Rapids, etc., R. Co., 47 Mich. 401, 11 N. W. 216.

New Jersey.— Telfer *v.* Northern R. Co., 30 N. J. L. 188.

Texas.— Central Texas, etc., R. Co. *v.* Gibson, 35 Tex. Civ. App. 66, 79 S. W. 351.

United States.— Grand Trunk R. Co. *v.* Ives, 144 U. S. 408, 12 S. Ct. 679, 36 L. ed. 485 [*affirming* 35 Fed. 176].

See 41 Cent. Dig. tit. "Railroads," § 975.

70. *District of Columbia.*— Baltimore, etc., R. Co. *v.* Adams, 10 App. Cas. 97.

Illinois.— Baltimore, etc., R. Co. *v.* Stanley, 54 Ill. App. 215.

Kentucky.— Illinois Cent. R. Co. *v.* Coley, 121 Ky. 385, 89 S. W. 234, 28 Ky. L. Rep. 336, 1 L. R. A. N. S. 370; Central Pass. R. Co. *v.* Kuhn, 86 Ky. 578, 6 S. W. 441, 9 Ky. L. Rep. 725, 9 Am. St. Rep. 309.

Ohio.— Cleveland, etc., R. Co. *v.* Schneider, 45 Ohio St. 678, 17 N. E. 321.

Texas.— Missouri, etc., R. Co. *v.* Magee, 92 Tex. 616, 50 S. W. 1013 [*affirming* (Civ. App. 1899) 49 S. W. 156].

United States.— Grand Trunk R. Co. *v.* Ives, 144 U. S. 408, 12 S. Ct. 679, 36 L. ed. 485 [*affirming* 35 Fed. 176]; Chicago, etc., R. Co. *v.* Kowalski, 92 Fed. 310, 34 C. C. A. 1 [*affirming* 84 Fed. 586].

See 41 Cent. Dig. tit. "Railroads," § 975.

71. Baltimore, etc., R. Co. *v.* Adams, 10 App. Cas. (D. C.) 97; Guggenheim *v.* Lake Shore, etc., R. Co., 66 Mich. 150, 33 N. W. 161; Delaware, etc., R. Co. *v.* Shelton, 55 N. J. L. 342, 26 Atl. 937; Pennsylvania R. Co. *v.* Matthews, 36 N. J. L. 531; Grand Trunk R. Co. *v.* Ives, 144 U. S. 408, 12 S. Ct. 679, 36 L. ed. 485 [*affirming* 35 Fed. 176].

72. Baltimore, etc., R. Co. *v.* Adams, 10 App. Cas. (D. C.) 97; Newport News, etc., R. Co. *v.* Stuart, 99 Ky. 496, 36 S. W. 528, 18 Ky. L. Rep. 347; Louisville, etc., R. Co. *v.* Hackman, 30 S. W. 407, 17 Ky. L. Rep. 81; Freeman *v.* Duluth, etc., R. Co., 74 Mich. 86, 41 N. W. 872, 3 L. R. A. 594; Grand

of bustle and confusion incident to railroad or other business,[73] or by reason of some other such cause.[74] It has been held that unless the maintenance of a flagman or gates at such a crossing is the common and usual means of warning adopted by prudent railroad companies, a railroad company is not bound to maintain them.[75]

(II) *MANAGEMENT AFTER ESTABLISHMENT.* Where a flagman is employed or a gate established, whether such duty is imposed by statute or not, the person in charge is bound to perform his duties with reasonable care and prudence, and a failure to do so is negligence for which the railroad company is liable.[76] Where a flagman or watchman is employed at a public highway crossing, until the public has become accustomed to regard his presence or absence as one of the evidences of the approach of trains, or otherwise, it is part of the company's duty to keep a fit person there whose conduct will not be liable to mislead and deceive the traveling public;[77] and it is the duty of the flagman or watchman to use reasonable care to know and give timely warning of the near approach of trains, not only so as to avoid a collision,[78] but also to enable a traveler approaching a crossing, in the exercise of reasonable care, to protect himself against other accidents,[79] and the public have a right to rely upon a reasonable performance of that duty.[80] The public have a right, when the gates are open, or the flagman not in his accustomed place of duty, to presume, in the absence of knowledge to the contrary, that the gateman or flagman is properly discharging his duties, and it is negli-

Trunk R. Co. *v.* Ives, 144 U. S. 408, 12 S. Ct. 679, 36 L. ed. 485 [*affirming* 35 Fed. 176].

73. Baltimore, etc., R. Co. *v.* Adams, 10 App. Cas. (D. C.) 97; Hutcherson *v.* Louisville, etc., R. Co., 52 S. W. 955, 21 Ky. L. Rep. 733 (holding that the failure to keep a flagman at a crossing cannot be adjudged to be negligence, in the absence of evidence as to the number of people using the crossing); Grand Trunk R. Co. *v.* Ives, 144 U. S. 408, 12 S. Ct. 679, 36 L. ed. 485 [*affirming* 35 Fed. 176].

74. Baltimore, etc., R. Co. *v.* Adams, 10 App. Cas. (D. C.) 97; Grand Trunk R. Co. *v.* Ives, 144 U. S. 408, 12 S. Ct. 679, 36 L. ed. 485 [*affirming* 35 Fed. 176].

75. Welsch *v.* Hannibal, etc., R. Co., 72 Mo. 451, 37 Am. Rep. 440. But see Bailey *v.* New Haven, etc., R. Co., 107 Mass. 496, holding that a witness, called as an expert by defendants, cannot be asked what is the custom of railroads in maintaining a flagman at crossings similar to the one in question.

76. Chicago, etc., R. Co. *v.* Wright, 120 Ill. App. 218; State *v.* Boston, etc., R. Co., 80 Me. 430, 15 Atl. 36; Clarke *v.* Midland R. Co., 43 L. T. Rep. N. S. 381.

77. Warner *v.* New York Cent. R. Co., 45 Barb. (N. Y.) 299 [*reversed* on other grounds in 44 N. Y. 465].

A watchman at a crossing should be physically capable of reasonably discharging his duties, and if by reason of his age or any physical disability he is incapacitated to reasonably discharge his duties, and if by reason thereof he fails to warn a person in time to prevent a collision whereby such person is injured, the railroad company is liable therefor provided such person was free from contributory negligence. McNamara *v.* Chicago, etc., R. Co., 126 Mo. App. 152, 103 S. W. 1093.

78. Chicago, etc., R. Co. *v.* Clough, 134 Ill. 586, 25 N. E. 664, 29 N. E. 184; Pennsylvania Co. *v.* Fertig, 34 Ind. App. 459, 70 N. E. 834; Hart *v.* Chicago, etc., R. Co., 56 Iowa 166, 7 N. W. 9, 9 N. W. 116, 41 Am. Rep. 93; Wolcott *v.* New York, etc., R. Co., 68 N. J. L. 421, 53 Atl. 297.

Where a flagman discovers that his signal to a traveler is unobserved or unheeded by such traveler it is his duty to flag the approaching train, when this can be done before the danger is imminent. Alabama Great Southern R. Co. *v.* Anderson, 109 Ala. 299, 19 So. 516.

79. Pennsylvania Co. *v.* Fertig, 34 Ind. App. 459, 70 N. E. 834 (to afford opportunity to secure horses from taking fright); Hart *v.* Chicago, etc., R. Co., 56 Iowa 166, 7 N. W. 9, 9 N. W. 116, 41 Am. Rep. 93 (to prevent animals from being frightened); Wilkins *v.* St. Louis, etc., R. Co., 101 Mo. 93, 13 S. W. 893 (holding that where a city ordinance requires the presence at a railway crossing of a watchman, "who shall display at the cars, in the daytime, a red flag," it is not sufficient that a watchman is present with a flag at the crossing, but he must also warn passers of the danger from approaching trains); Bell *v.* Texas, etc., R. Co., (Tex. Civ. App. 1902) 70 S. W. 573.

It is the duty of a flagman to give the driver of a team such warning of the approach of a train as will enable him to stop his team at a point where an ordinarily well broken and gentle team would not become dangerously frightened, or where, if his horses were not ordinarily well broken and gentle, he would have time to turn around and drive to a point of safety. Louisville, etc., R. Co. *v.* Sights, 121 Ky. 203, 89 S. W. 132, 28 Ky. L. Rep. 186.

80. Chicago, etc., R. Co. *v.* Clough, 134 Ill. 586, 25 N. E. 664, 29 N. E. 184.

gence for a gatekeeper or flagman to leave his post, knowing that an engine is approaching, without giving some signal of danger.[81] If the flagman or watchman neglects to give any warning,[82] or does not give a warning until the traveler is in great danger,[83] especially where the view of the approaching train is obstructed,[84] and no signals are given by it,[85] the railroad company is responsible. Where gates are established, although there is no statute requiring their maintenance,[86] it is negligence if they are not constructed, attended, and maintained, with ordinary care and prudence, so as to give the proper warning of an approaching train,[87] or so as not to injure a passer-by by the manner in which they are maintained or closed.[88] Likewise it is negligence to leave them open when trains

81. *Illinois.*— Chicago, etc., R. Co. *v.* Wilson, 133 Ill. 55, 24 N. E. 555; St. Louis, etc., R. Co. *v.* Dunn, 78 Ill. 197.

Kentucky.— Sights *v.* Louisville, etc., R. Co., 117 Ky. 436, 78 S. W. 172, 25 Ky. L. Rep. 1548.

Michigan.— Evans *v.* Lake Shore, etc., R. Co., 88 Mich. 442, 50 N. W. 386, 14 L. R. A. 223; Richmond *v.* Chicago, etc., R. Co., 87 Mich. 374, 49 N. W. 621.

Minnesota.— Woehrle *v.* Minnesota Transfer R. Co., 82 Minn. 165, 84 N. W. 791, 52 L. R. A. 348.

Missouri.— Montgomery *v.* Missouri Pac. R. Co., 181 Mo. 477, 79 S. W. 930; Edwards *v.* Chicago, etc., R. Co., 94 Mo. App. 36, 67 S. W. 950.

New York.— Glushing *v.* Sharp, 96 N. Y. 676; Lindeman *v.* New York Cent. R. Co., 11 N. Y. St. 837. *Compare* McGrath *v.* New York Cent., etc., R. Co., 59 N. Y. 468, 17 Am. Rep. 359 [*reversing* 1 Thomps. & C. 243].

Ohio.— Cleveland, etc., R. Co. *v.* Schneider, 45 Ohio St. 678, 17 N. E. 321.

Rhode Island.— Wilson *v.* New York, etc., R. Co., 18 R. I. 491, 598, 29 Atl. 258, 300.

Wisconsin.—Burns *v.* North Chicago Rolling-mill Co., 65 Wis. 312, 27 N. W. 43.

See 41 Cent. Dig. tit. "Railroads," § 977.

82. Walsh *v.* Boston, etc., R. Co., 171 Mass. 52, 50 N. E. 453; Kissenger *v.* New York, etc., R. Co., 56 N. Y. 538.

The mere presence of a watchman at a crossing is insufficient to constitute a warning not to cross; travelers being entitled to a signal of danger, instead of being required to wait for a signal of safety. Montgomery *v.* Missouri Pac. R. Co., 181 Mo. 477, 79 S. W. 920.

Where it is apparent that the train or engine is not going to run over the crossing, a railroad company is not liable to one whose horses are frightened by the sight and sound of an engine, for a failure of a flagman at the crossing to notify him, when he was about to cross the tracks, that there was an engine switching in the vicinity. Walters *v.* Chicago, etc., R. Co., 104 Wis. 251, 80 N. W. 451.

Where it is apparent that plaintiff can cross in safety, the train being sufficiently far away, the failure to give a warning is not necessarily negligence. Bell *v.* Texas, etc., R. Co., (Tex. Civ. App. 1902) 70 S. W. 573.

83. Chicago, etc., R. Co. *v.* Clough, 134 Ill. 586, 25 N. E. 664, 29 N. E. 184; Sweeny *v.* Old Colony, etc., R. Co., 10 Allen (Mass.) 368, 87 Am. Dec. 644; Edwards *v.* Chicago, etc., R. Co., 94 Mo. App. 36, 67 S. W. 950.

84. Chicago, etc., R. Co. *v.* Clough, 134 Ill. 586, 25 N. E. 664, 29 N. E. 184.

85. Chicago, etc., R. Co. *v.* Clough, 134 Ill. 586, 25 N. E. 664, 29 N. E. 184.

86. State *v.* Boston, etc., R. Co., 80 Me. 430, 15 Atl. 36.

87. *Kentucky.*— Louisville, etc., R. Co. *v.* Wilson, 124 Ky. 836, 100 S. W. 302, 30 Ky. L. Rep. 1048.

Maine.— State *v.* Boston, etc., R. Co., 80 Me. 430, 15 Atl. 36.

Michigan.— Evans *v.* Lake Shore, etc., R. Co., 88 Mich. 442, 50 N. W. 386, 14 L. R. A. 223.

Mississippi.— See McKenna *v.* Alabama, etc., R. Co., 87 Miss. 652, 40 So. 426.

New Jersey.— Colgan *v.* Pennsylvania R. Co., 9 N. J. L. 299.

New York.— Recktenwald *v.* Erie R. Co., 114 N. Y. App. Div. 490, 99 N. Y. Suppl. 1094, holding that defendant must exercise reasonable care in the construction and inspection of the gates to maintain them in working order.

See 41 Cent. Dig. tit. "Railroads," § 977

Failure to have a gateman or flagman on the ground, instead of operating the gates by an attendant in a tower, who at the same time, by the same movement, operates another gate at another crossing, is not a negligent act, so as to render the company liable for the death of a person at the crossing, whose team, frightened at an automobile, runs away, dashing into and breaking the gate, which is down, and dropping deceased on the railroad track immediately in front of an approaching express train. Brooks *v.* Boston, etc., R. Co., 188 Mass. 416, 74 N. E. 670.

88. O'Keefe *v.* St. Louis, etc., R. Co., 108 Mo. App. 177, 83 S. W. 308; Smith *v.* Atlantic City R. Co., 66 N. J. L. 307, 49 Atl. 547; Feency *v.* Long Island R. Co., 116 N. Y. 375, 22 N. E. 402, 5 L. R. A. 544 [*affirming* 5 N. Y. St. 63]; Gray *v.* New York Cent., etc., R. Co., 77 N. Y. App. Div. 1, 78 N. Y. Suppl. 653.

Assurance of safety.— Open gates tended by a gate-keeper at a public crossing are an affirmative assurance to a traveler that his safety will not be imperiled in crossing by the descent of a gate arm. Sager *v.* Atchison, etc., R. Co., 70 Kan. 504, 79 Pac. 132. And the fact that the track crosses a public

or cars are passing,[89] except as to one who sees the train going in front of him,[90] and the mere fact that the flagman signaled the person injured not to cross does not free the railroad company from negligence,[91] unless such signal is given in time for such person by the exercise of reasonable care to avoid the injury.[92]

(III) *Persons Entitled to Protection.* The protection of the rule requiring a flagman or gates at a crossing extends only to persons crossing the railroad tracks at such crossing, by way of the highway,[93] or to persons lawfully on the right of way and approaching the crossing,[94] and not to persons approaching the crossing by wrongfully walking along the railroad track,[95] or to persons crossing

street is not a warning of danger from the negligence of the gate-keeper in allowing an arm of the gate to descend. Sager *v.* Atchison, etc., R. Co., *supra*.

Ordinary care requires the gateman to keep the gates under control at all times and to keep his eyes on the street while lowering them. O'Keefe *v.* St. Louis, etc., R. Co., 108 Mo. App. 177, 83 S. W. 308. He cannot presume that a pedestrian will not walk under a gate while it is being lowered. O'Keefe *v.* St. Louis, etc., R. Co., *supra*. Merely glancing at the street or highway as he begins to operate the machinery by which the gate is closed is not a sufficient performance of this duty. O'Keefe *v.* St. Louis, etc., R. Co., 108 Mo. App. 177, 83 S. W. 308.

Where a railroad company constructs a gate safe and ample for all ordinary purposes, it is not chargeable with negligence because the ground below the lower board of the gate has been worn down by the passage of stock and teams so as to leave a space of fifteen inches, through which a child can crawl when the gate is closed. Friend *v.* Chicago, etc., R. Co., 104 Wis. 663, 80 N. W. 934.

Strength of gate.— While under particular circumstances great strength in the gate may be required, a railroad company is not negligent in failing to maintain gates at an ordinary crossing of sufficient strength to successfully sustain the shock of a runaway team hitched to a vehicle on coming into contact therewith. Brooks *v.* Boston, etc., R. Co., 188 Mass. 416, 74 N. E. 670.

Light on gates.—Where a railroad company maintains gates over a grade crossing, it is not required to have a light on the arm extending over the sidewalk, if it otherwise provides a sufficient light to enable a person exercising ordinary care to see the arm of the gate. McDonald *v.* Covington, etc., El. R. Transfer, etc., Co., 107 S. W. 726, 32 Ky. L. Rep. 992.

Acts of stranger.— Where gates at a railroad crossing are raised by one not an employee of the railroad company without authority from the gate-keeper and without his knowledge while his back was turned for a moment, the railroad company is not liable for injuries caused to one crossing the tracks by the lowering of the gates by such stranger. Haines *v.* Atlantic City R. Co., 65 N. J. L. 27, 46 Atl. 595, 50 L. R. A. 862; Tuohy *v.* Long Island R. Co., 89 N. Y. App. Div. 198, 85 N. Y. Suppl. 824.

89. *Kentucky.*— Louisville, etc., R. Co. *v.* Wilson, 124 Ky. 836, 100 S. W. 302, 30 Ky. L. Rep. 1048.

New York.— Fitzgerald *v.* Long Island R. Co., 10 N. Y. St. 433.

Pennsylvania.— Hughes *v.* Delaware, etc., Canal Co., 1 Lack. Leg. N. 215.

Rhode Island.— Wilson *v.* New York, etc., R. Co., 18 R. I. 491, 29 Atl. 258.

Wisconsin.— Rohde *v.* Chicago, etc., R. Co., 86 Wis. 309, 56 N. W. 872.

United States.— Whelan *v.* New York, etc., R. Co., 38 Fed. 15.

England.— North Eastern R. Co. *v.* Wanless, L. R. 7 H. L. 12, 43 L. J. Q. B. 185, 30 L. T. Rep. N. S. 275, 22 Wkly. Rep. 561.

Canada.— Canadian Pac. R. Co. *v.* Fleming, 22 Can. Sup. Ct. 33.

See 41 Cent. Dig. tit. "Railroads," § 977.

90. Theobald *v.* Chicago, etc., R. Co., 75 Ill. App. 208, holding that gates are put at railroad crossings to give warning that trains are passing or are about to pass; and that when a passer-by sees the train itself going in front of him, he has all the warning the gates can give, and their condition is immaterial.

91. Chicago, etc., R. Co. *v.* Clough, 134 Ill. 586, 25 N. E. 664, 29 N. E. 184; Fitzgerald *v.* Long Island R. Co., 3 N. Y. Suppl. 230 [*affirmed* in 117 N. Y. 653, 22 N. E. 1133].

92. Chicago, etc., R. Co. *v.* Clough, 134 Ill. 586, 25 N. E. 664, 29 N. E. 184.

93. Chicago, etc., R. Co. *v.* Eininger, 114 Ill. 79, 29 N. E. 196; Strickland *v.* New York Cent., etc., R. Co., 88 N. Y. App. Div. 367, 84 N. Y. Suppl. 655; Matthews *v.* Philadelphia, etc., R. Co., 161 Pa. St. 28, 28 Atl. 936.

94. Chicago, etc., R. Co. *v.* Wise, 206 Ill. 453, 69 N. E. 500 [*affirming* 106 Ill. App. 174], holding that where an ordinance requiring gates at a crossing directs that the operator shall use every effort to notify and inform all teams and all and every person of the approach to the crossing of any locomotive engines, and lower the gates so as to obstruct the approach along the streets, a person on the inside of the gates, having loaded his wagon from a car on the track and seeing a gate open, has a right to presume the track is clear, and that the failure of the gateman to lower the gate is negligence.

95. Chicago, etc., R. Co. *v.* Eininger, 114 Ill. 79, 29 N. E. 196; Chicago Terminal Transfer R. Co. *v.* Korando, 129 Ill. App. 620; Matthews *v.* Philadelphia, etc., R. Co., 161 Pa. St. 28, 28 Atl. 936.

outside the limits of the highway,[96] or to other trespassers.[97] But the railroad company is not relieved from its duty to provide a flagman if required to do so, by the fact that a person approaching the crossing is familiar therewith,[98] or by the fact that the injured person drove on the crossing believing the train which caused the injury to be standing still.[99]

d. Effect of Statute or Ordinance. Where precautions for safety at public crossings are prescribed by statute or ordinance it is negligence not to use such precautions,[1] as where the railroad company fails to comply with a statute or ordinance in regard to having a flagman,[2] or gates,[3] and it has been held that such failure is evidence of negligence, although the person injured might have seen the train had he been looking.[4]

6. Mode of Running at Crossings in General[5] **— a. Care in Running Trains in General.** While a railroad company has the right as against one approaching

96. Spillane *v.* Missouri Pac. R. Co., 135 Mo. 414, 37 S. W. 198, 58 Am. St. Rep. 580; Strickland *v.* New York Cent., etc., R. Co., 88 N. Y. App. Div. 367, 84 N. Y. Suppl. 655.

97. Chicago, etc., R. Co. *v.* Roath, 35 Ill. App. 349.

98. Missouri, etc., R. Co. *v.* Magee, (Tex. Civ. App. 1899) 49 S. W. 156 [*affirmed* in 92 Tex. 616, 50 S. W. 1013].

99. Missouri, etc., R. Co. *v.* Magee, (Tex. Civ. App. 1899) 49 S. W. 156 [*affirmed* in 92 Tex. 616, 50 S. W. 1013].

1. Western, etc., R. Co. *v.* Young, 81 Ga. 397, 7 S. E. 912, 12 Am. St. Rep. 320; Williams *v.* Great Western R. Co., L. R. 9 Exch. 157, 43 L. J. Exch. 105, 31 L. T. Rep. N. S. 124, 22 Wkly. Rep. 531; Girouard *v.* Canadian Pac. R. Co., 19 Quebec Super. Ct. 529.

2. Murray *v.* Missouri Pac. R. Co., 101 Mo. 236, 13 S. W. 817, 20 Am. St. Rep. 601 (negligence *per se*); Wilson *v.* New York, etc., R. Co., 18 R. I. 598, 29 Atl. 300 (holding that an order by a town council requiring a railroad company to keep a flagman at a crossing, without specifying any time for so doing, requires a flagman by night as well as by day, if trains are then liable to pass).

Under a Maryland statute, Code, art. 23, § 194, providing that county commissioners may notify a railroad company to place a flagman at a crossing outside of the corporate limits of a city, if the commissioners believe such crossing to be dangerous, the failure of the company to voluntarily place a flagman at a crossing does not constitute negligence. Northern Cent. R. Co. *v.* Medairy, 86 Md. 168, 37 Atl. 796.

In Michigan, under Howell Annot. St. § 3365, providing that the railroad commissioners shall direct when a gate is to be maintained or a flagman stationed at a highway crossing, the absence of a flagman is no evidence of negligence on the part of the company, unless the necessity for stationing and maintaining such flagman at the particular crossing has been determined upon and required by the railroad commissioners. Battishill *v.* Humphreys, 64 Mich. 494, 31 N. W. 894.

3. Pittsburg, etc., R. Co. *v.* Banfill, 206 Ill. 553, 69 N. E. 499 [*affirming* 107 Ill. App. 254]. See also Jennings *v.* St. Louis, etc., R. Co., 99 Mo. 394, 11 S. W. 999.

Under a municipal ordinance which requires the person in charge of gates at a street crossing to lower the gates on the approach to the crossing of engines or cars, a person in charge of the gates who fails to lower the gates on the approach of an engine is guilty of negligence, although he saw no person approaching the tracks. Chicago, etc., R. Co. *v.* Wise, 206 Ill. 453, 69 N. E. 500 [*affirming* 106 Ill. App. 174].

In New York a violation of a city ordinance requiring a railroad company to close all gates at grade crossings one minute before a locomotive passes does not establish a cause of action against the railroad company for killing a person at such a crossing, although it is evidence bearing on the question of negligence. Rainey *v.* New York Cent. etc., R. Co., 68 Hun 495, 23 N. Y. Suppl. 80.

The power to determine whether gates shall be placed at a highway crossing, under the Dominion Railway Act (1888), §§ 197, 259, as amended by 55 & 56 Vict. c. 26, §§ 6, 8, rests with the Railway Committee of the Privy Council and not with a jury. Grand Trunk R. Co. *v.* McKay, 34 Can. Sup. Ct. 81, 3 Can. R. Cas. 52 [*reversing* 3 Can. R. Cas. 42, 5 Ont. L. Rep. 313, 2 Ont. Wkly. Rep. 57].

Gates required by statute are intended to serve as a warning as well as a physical obstruction where the statute also requires the gateman or flagman "to pay diligent attention and use every effort to notify and inform" all teams, vehicles, and persons of the approach of any locomotive or cars. Chicago, etc., R. Co. *v.* Wise, 206 Ill. 453, 69 N. E. 500 [*affirming* 106 Ill. App. 174].

Under Mass. Rev. Laws, c. 111, §§ 191, 192, a railroad company cannot be shown to have failed to perform its duty to erect gates or station a flagman, without proof of a request by the officers of the city or town in which the traveled place is crossed by the railroad. Giacomo *v.* New York, etc., R. Co., 196 Mass. 192, 81 N. E. 899.

4. North Eastern R. Co. *v.* Wanless, L. R. 7 H. L. 12, 43 L. J. Q. B. 185, 30 L. T. Rep. N. S. 275, 22 Wkly. Rep. 561.

5. Validity and reasonableness of statutory and municipal regulations see *supra*, X, B, 1.

a crossing to operate its engines and cars in the usual and ordinary way and to make such noises or movements as are usually and necessarily made by trains in motion under similar circumstances,[6] it is its duty through its engineers, firemen, and other employees to use such reasonable care and precaution in operating its trains and cars at crossings, to avoid injuring a person thereat, as the circumstances reasonably require, and if it fails to do so by reason whereof a person approaching or using the crossing with reasonable care is injured, it is liable therefor;[7] and this duty exists independently of and in addition to statutes or ordinances requiring a railroad company to perform certain precautionary acts in approaching a crossing.[8] The degree of care required is only what under the circumstances

6. Louisville, etc., R. Co. *v.* Sights, 121 Ky. 203, 89 S. W. 132, 28 Ky. L. Rep. 186; Texas-Mexican R. Co. *v.* Baldez, (Tex. Civ. App. 1897) 43 S. W. 564, holding that a railroad company is not liable where in moving a line of cars which have been standing for several weeks at a point where a footpath crosses the tracks, it injures a child playing under the cars, of whose presence the train employees are unaware.

7. *Illinois.*— Chicago, etc., R. Co. *v.* Dillon, 123 Ill. 570, 15 N. E. 181, 5 Am. St. Rep. 559; Lake Erie, etc., R. Co. *v.* Wills, 39 Ill. App. 649 [*affirmed* in 140 Ill. 614, 31 N. E. 122], negligence in running a handcar ahead of a freight train.

Indiana.—Nichols *v.* Baltimore, etc., R. Co., 33 Ind. App. 229, 70 N. E. 183, 71 N. E. 170.

Kansas.—Atchison, etc., R. Co. *v.* Wilkie, 77 Kan. 791, 90 Pac. 775, 11 L. R. A. N. S. 963.

Kentucky.— Louisville, etc., R. Co. *v.* Cummins, 111 Ky. 333, 63 S. W. 594, 23 Ky. L. Rep. 681 (holding that it is the duty of a railroad company to moderate the speed of its trains at a street crossing, and to take other reasonable precautions); Louisville, etc., R. Co. *v.* Goetz, 79 Ky. 442, 42 Am. Rep. 227; Southern R. Co. *v.* Winchester, 105 S. W. 167, 32 Ky. L. Rep. 19.

Montana.—Riley *v.* Northern Pac. R. Co., 36 Mont. 545, 93 Pac. 948.

New Hampshire.— Minot *v.* Boston, etc., R. Co., 73 N. H. 317, 61 Atl. 509.

New Jersey.— Salisbury *v.* Erie R. Co., 66 N. J. L. 233, 50 Atl. 117, 88 Am. St. Rep. 480, 55 L. R. A. 578.

Pennsylvania.— Crane *v.* Pennsylvania R. Co., 218 Pa. St. 560, 67 Atl. 877.

See 41 Cent. Dig. tit. "Railroads," § 981.

Running trains in such a manner as to make statutory signals unavailing is negligence. Chicago, etc., R. Co. *v.* Boggs, 101 Ind. 522, 51 Am. Rep. 761, holding that it is negligence in a railroad company to run trains so near together at a highway crossing as to make the statutory signals unavailing to warn travelers on the highway.

Opening a train at a public crossing when travelers are waiting to cross the track, who would naturally suppose it was done to allow them to cross, and then closing it without giving them time to cross, shows negligence whether signals are given or not. Ft. Worth, etc., R. Co. *v.* Dennis, (Tex. Civ. App. 1896) 33 S. W. 884.

Where trainmen have reason to believe that persons are exposed on the tracks at a crossing, they will be held to have knowledge of the consequences of not taking proper precautions and the company will be liable for a resulting injury notwithstanding there was negligence on the part of the person injured, and no fault on the part of the employees after discovering the danger. Eichorn *v.* New Orleans, etc., R., etc., Co., 112 La. 236, 36 So. 335, 104 Am. St. Rep. 437; Lake Shore, etc., R. Co. *v.* Reynolds, 23 Ohio Cir. Ct. 199, holding that the company is liable notwithstanding negligence on the part of the traveler, the true rule being that the engineer must have seen and known the perilous position of the traveler, and not that he might have seen and known it by the exercise of ordinary care.

The moving of cars near a street crossing, although done in the usual manner, may constitute negligence as to persons using the street. San Antonio, etc., R. Co. *v.* Peterson, 20 Tex. Civ. App. 495, 49 S. W. 924.

A failure to side-track a train in accordance with a previous custom which is known to a traveler who is struck by a train at a crossing beyond the station is not negligence. Rich *v.* Evansville, etc., R. Co., 31 Ind. App. 10, 66 N. E. 1028.

That the engine was operated by a brakeman, within the knowledge of the engineer or fireman, although without authority from the railroad company, does not relieve the company from liability. Houston, etc., R. Co. *v.* Stewart, (Tex. 1891) 17 S. W. 33; Dillingham *v.* Parker, 80 Tex. 572, 16 S. W. 335.

In running a train during a storm such as obscures the view and deadens the sound of a train's approach to a crossing, the employees in charge of the train must proceed with the greatest caution and exercise greater care than while running a train during ordinary weather. Louisville, etc., R. Co. *v.* Ueltschi, 97 S. W. 14, 29 Ky. L. Rep. 1136.

8. *Alabama.*— South Alabama, etc., R. Co. *v.* Thompson, 62 Ala. 494, holding that the observance of the requirements of Code (1876), § 1699, will not relieve a railroad company from liability, if in other respects it neglects those precautions which ordinary prudence suggests as necessary to avoid casualties.

Illinois.— Elgin, etc., R. Co. *v.* Lawlor, 229 Ill. 621, 82 N. E. 407 [*affirming* 132 Ill. App. 280].

Kentucky.— Louisville, etc., R. Co. *v.*

of the particular case is ordinary care; or in other words, such care as an ordinarily prudent person would exercise under like circumstances.[9] A railroad company, however, is not an insurer of the safety of travelers using a crossing, although

Ueltschi, 97 S. W. 14, 29 Ky. L. Rep. 1136.

Louisiana.— Curley *v.* Illinois Cent. R. Co., 40 La. Ann. 810, 6 So. 103.

Maine.— Webb *v.* Portland, etc., R. Co., 57 Me. 117, holding that Rev. St. c. 51, §§ 15, 19, prescribing the duties and liabilities of railroad companies at public or private crossings, do not define or point out all the precautions which reasonable and ordinary care may require the company to observe in crossing a crowded thoroughfare leading into a city.

Missouri.— Wilkins *v.* St. Louis, etc., R. Co., 101 Mo. 93, 13 S. W. 893.

New Hampshire.— State *v.* Boston, etc., R. Co., 58 N. H. 408, holding that Gen. St. c. 264, § 14, makes no distinction between negligence and gross negligence, and does not require less than reasonable care on the part of the proprietors of a railroad, nor more than reasonable care on the part of their servants as applied to an accident at a crossing.

Texas.— Missouri, etc., R. Co. *v.* Thomas, 87 Tex. 282, 28 S. W. 343.

United States.— Pennsylvania R. Co. *v.* Miller, 99 Fed. 529, 39 C. C. A. 642, holding that compliance with statutory requirements in regard to audible signals by approaching trains does not relieve a railroad company from liability, and that it must take such additional precautions as may be rendered necessary by the circumstances at the particular crossing.

The mere giving of the signals required to be given by trains approaching a highway crossing may not be sufficient when the surroundings reasonably demand more effective warning. Reed *v.* Queen Anne's R. Co., 4 Pennew. (Del.) 413, 57 Atl. 529; Moyer *v.* Grand Trunk R. Co., 3 Can. R. Cas. 1.

Where an engine starts toward a crossing within the distance at which statutory signals are required other precautions should be taken to warn the public of danger. Hollinger *v.* Canadian Pac. R. Co., 12 Can. L. T. Occ. Notes 169, 21 Ont. 705 [*affirmed* in 20 Ont. App. 244].

9. *Alabama.*— Gaynor *v.* Louisville, etc., R. Co., 136 Ala. 244, 33 So. 808.

Delaware.—Reed *v.* Queen Anne's R. Co., 4 Pennew. 413, 57 Atl. 529.

Georgia.— Western, etc., R. Co. *v.* King, 70 Ga. 261.

Illinois.— Cleveland, etc., R. Co. *v.* Doerr, 41 Ill. App. 530.

Indiana.— Toledo, etc., R. Co. *v.* Goddard, 25 Ind. 185.

Iowa.— Willoughby *v.* Chicago, etc., R. Co., 37 Iowa 432.

Kansas.— Chicago, etc., R. Co. *v.* Fisher, 49 Kan. 460, 30 Pac. 462.

Louisiana.— Ortolano *v.* Morgan's Louisiana, etc., R., etc., Co., 109 La. 902, 33 So. 914.

Maryland.— Baltimore, etc., R. Co. *v.* State, 29 Md. 252, 96 Am. Dec. 528.

Missouri.—Holmes *v.* Missouri Pac. R. Co., 207 Mo. 149, 105 S. W. 624.

New York.— Weber *v.* New York Cent., etc., R. Co., 58 N. Y. 451; Wilds *v.* Hudson River R. Co., 24 N. Y. 430 [*reversing* 33 Barb. 503]; Bailey *v.* Jourdan, 18 N. Y. App. Div. 387, 46 N. Y. Suppl. 399.

Pennsylvania.— Lehigh Valley R. Co. *v.* Brandtmaier, 113 Pa. St. 610, 6 Atl. 238.

South Carolina.— Bamberg *v.* Atlantic Coast Line R. Co., 72 S. C. 389, 51 S. E. 988.

Texas.— Gulf, etc., R. Co. *v.* Smith, 87 Tex. 348, 28 S. W. 520 (holding that it is reversible error to charge that great care and prudence is required at a crossing); Houston, etc., R. Co. *v.* Brin, 77 Tex. 174, 13 S. W. 886; San Antonio, etc., R. Co. *v.* Mertink, (Civ. App. 1907) 102 S. W. 153 [*reversed* on other grounds in (1907) 105 S. W. 485]; Chicago, etc., R. Co. *v.* James, (Civ. App. 1903) 75 S. W. 930; Galveston, etc., R. Co. *v.* Kief, (Civ. App. 1900) 58 S. W. 625; Texas, etc., R. Co. *v.* Curlin, 13 Tex. Civ. App. 505, 36 S. W. 1003; International, etc., R. Co. *v.* Sein, 11 Tex. Civ. App. 386, 33 S. W. 558 [*affirmed* in 89 Tex. 63, 33 S. W. 215] (holding that it is erroneous to charge that defendant must use "great" care in operating its trains when approaching a crossing); Austin, etc., R. Co. *v.* McElmurray, (Civ. App. 1894) 25 S. W. 324. *Compare* Galveston, etc., R. Co. *v.* Matula, 79 Tex. 577, 15 S. W. 573, holding that it is proper to charge that "the law requires those in charge of railway engines and trains to use great care and prudence in operating them so as to avoid damage and injury to the property and persons of other people."

United States.— Chicago, etc., R. Co. *v.* Caulfield, 63 Fed. 396, 11 C. C. A. 552.

Canada.— Girouard *v.* Canadian Pac. R. Co., 19 Quebec Super. Ct. 529.

See 41 Cent. Dig. tit. "Railroads," § 981.

The "ordinary care and diligence" which railroad companies are bound to exercise, as applied to the management of railroad engines and cars in motion, must be understood to import all care and circumspection, prudence, and discretion which the peculiar circumstances of the case reasonably require of such company or their servants; and this will be increased or diminished according as the ordinary liability of danger to others is increased or diminished in the movement or operation thereof. Andrews *v.* New York, etc., R. Co., 60 Conn. 293, 22 Atl. 566; Reed *v.* Queen Anne's R. Co., 4 Pennew. (Del.) 413, 57 Atl. 529; Parvis *v.* Philadelphia, etc., R. Co., 8 Houst. (Del.) 436, 17 Atl. 702; Ortolano *v.* Morgan's Louisiana, etc., R., etc., Co., 109 La. 902, 33 So. 914; New York, etc., R. Co. *v.* Randel, 47 N. J. L. 144 (holding that where extra danger is created by the manner in which the track is laid, extra precautions are due from the company); Stewart *v.* Long

in so doing they exercise ordinary care,[10] and it is not required to exercise the highest possible care,[11] or such care and skill as the most prudent are accustomed to exercise,[12] or such care as an ordinarily prudent person "could" have used.[13] Nor does this rule call for the performance of any act outside of or disconnected with the actual operation of the railroad.[14] The above care is required not only as to persons that may be on the track but also as to persons in close proximity thereto who may be about to cross.[15] The negligence causing the injury need not relate particularly to the party injured, but it is sufficient to render the railroad company liable if it is a failure to perform an obligation owing to the public generally;[16] nor can the question whether certain acts constitute negligence depend upon whether other railroad companies forbid or permit them.[17] Although a vehicle approaching the crossing should stop until the train has passed,[18] the train should not by stopping at the crossing or moving

Island R. Co., 54 N. Y. App. Div. 623, 66 N. Y. Suppl. 436 [*affirmed* in 166 N. Y. 604, 59 N. E. 1130] (holding that when the indications of danger are very slight the degree of care may not be so high, but that when the indications become a manifestation of approaching danger of collision, the prudence exercised must rise up to that manifestation); Johnson *v.* Hudson River R. Co., 6 Duer (N. Y.) 633 [*affirmed* in 20 N. Y. 65, 75 Am. Dec. 375]; Gulf, etc., R. Co. *v.* Smith, 87 Tex. 348, 28 S. W. 520.

That a railroad train is behind time does not show negligence on the part of the railroad company in approaching a crossing (Hatcher *v.* McDermott, 103 Md. 78, 63 Atl. 214; Northern Cent. R. Co. *v.* Medairy, 86 Md. 168, 37 Atl. 796; Guggenheim *v.* Lake Shore, etc., R. Co., 66 Mich. 150, 33 N. W. 161; Omaha, etc., R. Co. *v.* Talbot, 48 Nebr. 627, 67 N. W. 599; Keiser *v.* Lehigh Valley R. Co., 212 Pa. St. 409, 61 Atl. 903, 108 Am. St. Rep. 872); nor is a higher degree of care on the company's part required in such cases in approaching crossings (Toledo, etc., R. Co. *v.* Jones, 76 Ill. 311).

Where the railroad track crosses a much traveled street or highway the railroad company is bound to exercise a degree of care reasonably commensurate with the danger (Lehigh Valley R. Co. *v.* Brandtmaier, 113 Pa. St. 610, 6 Atl. 238), the degree of care required being greater in operating trains in city streets than in less frequented localities (Cleveland, etc., R. Co. *v.* Miles, 162 Ind. 646, 70 N. E. 985; Paducah, etc., R. Co. *v.* Hoehl, 12 Bush (Ky.) 41; Klotz *v.* Winona, etc., R. Co., 68 Minn. 341, 71 N. W. 257; Norfolk, etc., R. Co. *v.* Burge, 84 Va. 63, 4 S. E. 21). Under such circumstances the railroad company must use a high degree of care (Curley *v.* Illinois Cent. R. Co., 40 La. Ann. 810, 6 So. 103; Bleyle *v.* New York Cent., etc., R. Co., 11 N. Y. St. 585 [*affirmed* in 113 N. Y. 626, 20 N. E. 877]), or the utmost care and diligence to prevent injuries to passers on the streets (Johnson *v.* Hudson River R. Co., 6 Duer (N. Y.) 633 [*affirmed* in 20 N. Y. 65, 75 Am. Dec. 375]).

Where gates which have been erected are not working, the railroad company must take more than ordinary precautions to prevent the public, who have become accustomed to rely on the gates, from being injured. Fleming *v.* Canadian Pac. R. Co., 31 N. Brunsw. 318.

An engineer is to be judged by the circumstances as they appeared to him at the time, and not as they appear to others afterward. Andrews *v.* New York, etc., R. Co., 60 Conn. 293, 22 Atl. 566.

Character of crossing.— Whether the place used is the "crossing of a public highway," or "a place commonly used by the public for crossing the track," the measure of defendant's duty is the same. Galveston, etc., R. Co. *v.* Kief, (Tex. Civ. App. 1900) 58 S. W. 625.

10. Weaver *v.* Columbia, etc., R. Co., 76 Ohio St. 164, 81 N. E. 180; Chesapeake, etc., R. Co. *v.* Crews, 118 Tenn. 52, 99 S. W. 368.

Care which shall necessarily and in all cases be sufficient, efficient, and effective is not required, as the railroad company is not an insurer of the safety of travelers on the crossing. Chicago, etc., R. Co. *v.* Fisher, 49 Kan. 460, 30 Pac. 462.

11. Baltimore, etc., R. Co. *v.* Breinig, 25 Md. 378, 90 Am. Dec. 49 (utmost care and diligence not required); Chicago, etc., R. Co. *v.* Caulfield, 63 Fed. 396, 11 C. C. A. 552.

12. Houston, etc., R. Co. *v.* Brin, 77 Tex. 174, 13 S. W. 886, holding that all that is required is the exercise of such prudence as is shown by the mass of prudent persons in like business.

13. Chicago, etc., R. Co. *v.* James, (Tex. Civ. App. 1903) 75 S. W. 930.

14. Bleyle *v.* New York Cent., etc., R. Co., 11 N. Y. St. 585 [*affirmed* in 113 N. Y. 626, 20 N. E. 877].

15. McGrew *v.* St. Louis, etc., R. Co., 32 Tex. Civ. App. 265, 74 S. W. 816. See also Gesas *v.* Oregon Short Line R. Co., 33 Utah 156, 93 Pac. 274, 13 L. R. A. N. S. 1074.

That the person crossing had just previously been a trespasser on the railroad company's platform does not affect the duty of the railroad company. Daubert *v.* Delaware, etc., R. Co., 199 Pa. St. 345, 49 Atl. 72.

16. Pennsylvania Co. *v.* Langendorf, 48 Ohio St. 316, 28 N. E. 172, 29 Am. St. Rep. 553, 13 L. R. A. 190.

17. Gulf, etc., R. Co. *v.* Smith, 87 Tex. 348, 28 S. W. 520.

18. Wilson *v.* Southern Pac. Co., 13 Utah

backward and forward subject the vehicle to unreasonable delay.[19] "Staking cars" is not unlawful or negligence *per se*.[20]

b. "Kicking" Cars and Making "Flying Switches." As a general rule it is not negligence *per se* on the part of the railroad company to "kick" cars or to make "running" or "flying switches" over a highway crossing, when proper precautions are taken for the safety of travelers using the crossing.[21] But since such a practice is peculiarly dangerous, it creates a duty of unusual care on the part of the company; and there should be not only the usual signals of bell and whistle, but there should also be a flagman near the track or a watchman on the nearest approaching car as well as other reasonably necessary precautions;[22] and unless contributory negligence of a character to defeat a recovery intervenes,[23] such acts when performed without taking reasonable precautions to avoid injuries

352, 44 Pac. 1040, 57 Am. St. Rep. 766. See *supra*, X, F, 2, a.

19. Wilson *v.* Southern Pac. Co., 13 Utah 352, 44 Pac. 1040, 57 Am. St. Rep. 766.

20. Kelly *v.* Michigan Cent. R. Co., 65 Mich. 186, 31 N. W. 904, 8 Am. St. Rep. 876, holding that attaching a stake to an engine or tender on one track and extending it diagonally across to a car on another track for the purpose of shoving the car along by the engine, called "staking cars," across a public highway, is not unlawful or negligent *per se*.

21. Smith *v.* Maine Cent. R. Co., 87 Me. 339, 32 Atl. 967, holding that a railroad company is not negligent, where the cars are moved at a rate less than six miles an hour, and in addition to the signal lights placed thereon the front car is brightly lighted and the bell of the engine which follows the cars is ringing.

A "running" or "flying switch" is performed by attaching the cars designed to be thrown upon the side-track to the engine, after which the train is put in motion running toward the switch and before it is reached and when sufficient momentum to answer the purpose has been acquired the engine is detached and run ahead of the train, and after it passes the switch is changed and the cars thus detached are by the momentum thus acquired carried along the side-track to the point intended. Illinois Cent. R. Co. *v.* Baches, 55 Ill. 379.

22. *Illinois.*— Chicago, etc., R. Co. *v.* Gomes, 46 Ill. App. 255, only one brakeman on cars.

Kentucky.— Peltier *v.* Louisville, etc., R. Co., 29 S. W. 30, 16 Ky. L. Rep. 500, holding that it is gross negligence for a railroad company to allow its cars to be "kicked" across a crowded street crossing, where no watchman is stationed, without sounding a whistle or bell.

Maine.— Smith *v.* Maine Cent. R. Co., 87 Me. 339, 32 Atl. 967.

Missouri.— Baker *v.* Kansas City, etc., R. Co., 147 Mo. 140, 48 S. W. 838, holding that where cars are cut loose from the train and allowed to cross a highway by their own momentum at a speed of from five to seven miles per hour with no engine at either end, so that no bell could be rung or whistle sounded, the railroad company is guilty of negligence notwithstanding the conductor is on the cars yelling and whistling to one who is crossing the track.

Texas.— Missouri, etc., R. Co. *v.* Finch, (Civ. App. 1895) 31 S. W. 84.

Wisconsin.— Ward *v.* Chicago, etc., R. Co., 85 Wis. 601, 55 N. W. 771, holding that it is the duty of a railroad company to take special pains to give the public full warning of the danger, and that it is the duty of the conductor to see persons who are approaching the crossing unaware of the danger, and give them sufficient warning.

United States.—Texas, etc., R. Co. *v.* Nolan, 62 Fed. 552, 11 C. C. A. 202, no light on car after dark.

See 41 Cent. Dig. tit. "Railroads," §§ 984, 1000.

Degree of care.— It is the duty of a railroad company in such cases to use such precautions as are reasonably necessary to avoid striking a person crossing its track in the vicinity of the public crossing. Florida Cent., etc., R. Co. *v.* Foxworth, 41 Fla. 1, 25 So. 338, 79 Am. St. Rep. 149. The railroad company is only required, however, to provide signals and safeguards so timely and abundant that they may reasonably be expected to prove effectual in warning travelers who are themselves in the exercise of due care and vigilance; and is not bound to adopt such extraordinary measures as may be needful to warn travelers who are thoughtless and inattentive or reckless and venturesome. Smith *v.* Maine Cent. R. Co., 87 Me. 339, 32 Atl. 967. On the other hand, plaintiff in such cases is not bound to prove that defendant's employees in moving and operating a car by a flying switch did not care whether or not they killed a person in moving the same. Gulf, etc., R. Co. *v.* Letsch, (Tex. Civ. App. 1900) 55 S. W. 584 [*affirmed* in (1900) 56 S. W. 1134].

In operating trains in the streets of towns and villages and in the immediate vicinity of public crossings a railroad company is bound to keep a lookout when making "flying switches" or backing cars by the "kicking back" process (Florida Cent., etc., R. Co. *v.* Foxworth, 41 Fla. 1, 25 So. 388, 79 Am. St. Rep. 149), and this duty is not fulfilled if no precaution is taken other than ringing the engine bell (Florida Cent., etc., R. Co. *v.* Foxworth, *supra*).

23. Mitchell *v.* Illinois Cent. R. Co., 110 La. 630, 34 So. 714, 98 Am. St. Rep. 472.

to persons on or approaching the crossing constitute negligence for which the railroad company is liable,[24] especially where such acts are in violation of a statute or ordinance.[25] Where such acts are performed at a crossing in a populous town or city along which people are constantly accustomed to travel, it has been held to be negligence *per se*,[26] although signals of alarm are given from the engine employed in the switching.[27]

c. Backing or Running Unattended Cars Over Crossing. Backing engines or trains or running unattended cars over a crossing is not negligence if performed with proper precautions.[28] But since such acts are especially dangerous a railroad company is bound to exercise special precautions to avoid injuries to persons lawfully on or approaching the track,[29] and it is negligent if it backs its engines or trains or runs unattended cars without proper lookouts,[30] or without proper

24. *Indiana.*— Chicago Terminal Transfer R. Co. *v.* Walton, 165 Ind. 642, 74 N. E. 988; Louisville, etc., R. Co. *v.* Schmidt, 126 Ind. 290, 25 N. E. 149, 26 N. E. 45.

Louisiana.— Mitchell *v.* Illinois Cent. R. Co., 110 La. 630, 34 So. 714, 98 Am. St. Rep. 472, holding that where a railroad company is grossly negligent in making a running switch at a crossing without using proper precautions, the case is to be differentiated from one where a person is injured by his failure to observe necessary precautions against the ordinary dangers to be anticipated at a railroad crossing.

Missouri.— Baker *v.* Kansas City, etc., R. Co., 122 Mo. 533, 26 S. W. 20; O'Connor *v.* Missouri Pac. R. Co., 94 Mo. 150, 7 S. W. 106, 4 Am. St. Rep. 364; Pinney *v.* Missouri, etc., R. Co., 71 Mo. App. 577, holding that it is negligence to "kick" a car back across a street crossing without signal or without someone on such car to control it and give notice of its approach.

Texas.— Central Texas, etc., R. Co. *v.* Gibson, 35 Tex. Civ. App. 66, 79 S. W. 351; Texas, etc., R. Co. *v.* Carr, (Civ. App. 1897) 42 S. W. 126.

Wisconsin.— Ward *v.* Chicago, etc., R. Co., 85 Wis. 601, 55 N. W. 771.

See 41 Cent. Dig. tit. "Railroads," §§ 984, 1000.

Making a running switch in the night-time across a public highway at grade without any warning of the approach of the cars is negligence as a matter of law and not simply evidence of negligence. Delaware, etc., R. Co. *v.* Converse, 139 U. S. 469, 11 S. Ct. 569, 35 L. ed. 213; Texas, etc., R. Co. *v.* Nolan, 62 Fed. 552, 11 C. C. A. 202.

A custom of other railroad companies in like cases does not govern a railroad company's negligence or affect its liability in such cases. Gulf, etc., R. Co. *v.* Smith, 87 Tex. 348, 28 S. W. 520.

25. Alabama Great Southern R. Co. *v.* Anderson, 109 Ala. 299, 19 So. 516 (violation of Birmingham City Code, § 467); Wilson *v.* Atlantic Coast Line R. Co., 142 N. C. 333, 55 S. E. 257; Gulf, etc., R. Co. *v.* Hamilton, (Tex. Civ. App. 1894) 28 S. W. 906.

26. *Illinois.*— Illinois Cent. R. Co. *v.* Baches, 55 Ill. 379.

Mississippi.— Alabama, etc., R. Co. *v.* Summers, 68 Miss. 566, 10 So. 63.

Missouri.— Stevens *v.* Missouri Pac. R. Co., 67 Mo. App. 356.

New York.— Brown *v.* New York Cent. R. Co., 32 N. Y. 597, 88 Am. Dec. 353 [*affirming* 31 Barb. 385].

North Carolina.—Wilson *v.* Atlantic Coast Line Co., 142 N. C. 333, 55 S. E. 257.

Wisconsin.— See Ferguson *v.* Wisconsin Cent. R. Co., 63 Wis. 145, 23 N. W. 123, holding that it is the duty of a railroad company when making a runing switch where the track crosses public business streets in populous villages and towns to use the utmost care to avoid accidents.

See 41 Cent. Dig. tit. "Railroads," § 984.

27. Illinois Cent., etc., R. Co. *v.* Baches, 55 Ill. 379.

28. Pittsburgh, etc., R. Co. *v.* Puszdrakiewicz, 129 Ill. App. 295 (holding that a railroad company is not guilty of negligence in backing a train upon a person on a street crossing, where it had no notice or warning that such person was upon the track sufficiently long before the injury to form an intelligent opinion as to how the injury might be avoided and apply the means); Barnum *v.* Grand Trunk Western R. Co., 137 Mich. 580, 100 N. W. 1022 (holding that where an engine backs across a street just after a freight train going in the same direction has passed, which the engine is backing out to aid in crossing a grade, negligence cannot be inferred from the mere fact that the engine immediately followed the train); Battishill *v.* Humphreys, 64 Mich. 494, 31 N. W. 894 (holding that backing an engine with the tender in front and hauling a train behind the engine is no evidence of negligence); Hecker *v.* Oregon R. Co., 40 Oreg. 6, 66 Pac. 270.

29. Walter *v.* Baltimore, etc., R. Co., 6 App. Cas. (D. C.) 20; Battishill *v.* Humphreys, 64 Mich. 494, 31 N. W. 894; Klotz *v.* Winona, etc., R. Co., 68 Minn. 341, 71 N. W. 257, holding that this rule is especially applicable where the crossing is used infrequently and at irregular times as a sidetrack for switching purposes.

30. *Arkansas.*— St. Louis, etc., R. Co. *v.* Johnson, 74 Ark. 372, 86 S. W. 282.

Connecticut.— Sullivan *v.* New York, etc., R. Co., 73 Conn. 203, 47 Atl. 131.

Florida.— Florida Cent., etc., R. Co. *v.* Foxworth, 41 Fla. 1, 25 So. 338, 79 Am. St.

lights,[31] or other signals or warnings,[32] and without taking such other precau-

Rep. 149, holding that it is negligent to back a train without a brakeman at the rear end as a lookout, across the main thoroughfare of a village when there is no flagman at the crossing, even at a rate but little faster than a person walks.

Illinois.— Illinois Cent. R. Co. *v.* Ebert, 74 Ill. 399; Chicago, etc., R. Co. *v.* Garvy, 58 Ill. 83.

Indiana.— Baltimore, etc., R. Co. *v.* Peterson, 156 Ind. 364, 59 N. E. 1044; Baltimore, etc., R. Co. *v.* Reynolds, 33 Ind. App. 219, 71 N. E. 250; Lake Shore, etc., R. Co. *v.* Boyts, 16 Ind. App. 640, 45 N. E. 812.

Kentucky.— Illinois Cent. R. Co. *v.* Hays, 84 S. W. 338, 27 Ky. L. Rep. 91.

Michigan.— Smith *v.* Pere Marquette, 136 Mich. 224, 98 N. W. 1022; Cooper *v.* Lake Shore, etc., R. Co., 66 Mich. 261, 33 N. W. 306, 11 Am. St. Rep. 482. See also Barnum *v.* Grand Trunk Western R. Co., 148 Mich. 370, 111 N. W. 1036.

New York.— O'Brien *v.* New York Cent., etc., R. Co., 37 N. Y. App. Div. 547, 56 N. Y. Suppl. 236 [*affirmed* in 167 N. Y. 568, 60 N. E. 1117]; Cheney *v.* New York Cent., etc., R. Co., 16 Hun 415.

North Carolina.— Dixon *v.* Southern R. Co., 140 N. C. 201, 52 S. E. 673; Reid *v.* Atlanta, etc., Air Line R. Co., 140 N. C. 146, 52 S. E. 307.

Pennsylvania.— Cookson *v.* Pittsburg, etc., R. Co., 179 Pa. St. 184, 36 Atl. 194; Kay *v.* Pennsylvania R. Co., 65 Pa. St. 269, 3 Am. Rep. 628.

Texas.— Galveston, etc., R. Co. *v.* Eitzen, (Civ. App. 1897) 39 S. W. 625.

Wisconsin.— Duane *v.* Chicago, etc., R. Co., 72 Wis. 523, 40 N. W. 394, 7 Am. St. Rep. 879.

United States.— Mobile, etc., R. Co. *v.* Coerver, 112 Fed. 489, 50 C. C. A. 360; Chicago, etc., R. Co. *v.* Sharp, 63 Fed. 532, 11 C. C. A. 337.

Canada.— Lake Erie, etc., R. Co. *v.* Barclay, 30 Can. Sup. Ct. 360; Hollinger *v.* Canadian Pac. R. Co., 12 Can. L. T. Occ. Notes 169, 21 Ont. 705 [*affirmed* in 20 Ont. App. 244]. See also Grand Trunk R. Co. *v.* Daoust, 14 Quebec K. B. 548.

See 41 Cent. Dig. tit. "Railroads," §§ 985, 999, 1000. And see *infra*, X, F, 7, d.

That the person injured knew that the company was not accustomed to keep a lookout on the rear car does not affect the question of the company's negligence. Galveston, etc., R. Co. *v.* Eitzen, (Tex. Civ. App. 1897) 39 S. W. 625.

Whether backing to a private crossing, used to a considerable extent, without a lookout on the rear of the train is negligence is a question for the jury. Green *v.* Chicago, etc., R. Co., 110 Mich. 648, 68 N. W. 988.

31. *Arkansas.*— St. Louis, etc., R. Co. *v.* Johnson, 74 Ark. 372, 86 S. W. 282.

Connecticut.— Sullivan *v.* New York, etc., R. Co., 73 Conn. 203, 47 Atl. 131.

Illinois.— Chicago, etc., R. Co. *v.* Walsh, 157 Ill. 672, 41 N. E. 900 [*affirming* 57 Ill. App. 448]; Chicago, etc., R. Co. *v.* Garvy, 58 Ill. 83.

Kentucky.— Illinois Cent. R. Co. *v.* Hays, 84 S. W. 338, 27 Ky. L. Rep. 91.

New York.— Maginnis *v.* New York Cent., etc., R. Co., 52 N. Y. 215; Cheney *v.* New York Cent., etc., R. Co., 16 Hun 415, holding that in backing an engine at a street crossing on a dark night, the railroad company is bound to have such a light, and to have it so located, that a person reasonably diligent, and of natural powers of observation, may be able to discover it.

West Virginia.— Bowles *v.* Chesapeake, etc., R. Co., 61 W. Va. 272, 57 S. E. 131.

United States.— Chicago, etc., R. Co. *v.* Clarkson, 147 Fed. 397, 77 C. C. A. 575; Chicago, etc., R. Co. *v.* Sharp, 63 Fed. 532, 11 C. C. A. 337.

See 41 Cent. Dig. tit. "Railroads," §§ 985, 999, 1000. And see *infra*, X, F, 7, b.

32. *California.*— Robinson *v.* Western Pac. R. Co., 48 Cal. 409.

District of Columbia.— Walter *v.* Baltimore, etc., R. Co., 6 App. Cas. 20.

Illinois.— Pennsylvania Co. *v.* Ellett, 132 Ill. 654, 24 N. E. 559; Chicago, etc., R. Co. *v.* Garvy, 58 Ill. 83.

Indiana.— Lake Shore, etc., R. Co. *v.* Boyts, 16 Ind. App. 640, 45 N. E. 812.

Iowa.— Clampit *v.* Chicago, etc., R. Co., 84 Iowa 71, 50 N. W. 673.

Kentucky.—Louisville, etc., R. Co. *v.* Price, 76 S. W. 836, 25 Ky. L. Rep. 1033.

Michigan.— Smith *v.* Pere Marquette, etc., R. Co., 136 Mich. 224, 98 N. W. 1022.

Missouri.— Lang *v.* Missouri Pac. R. Co., 115 Mo. App. 489, 91 S. W. 1012; Reed *v.* St. Louis, etc., R. Co., 107 Mo. App. 238, 80 S. W. 919, holding that independently of any ordinance it is negligence to back cars over a street in a city, without either ringing the bell or blowing the whistle, under Rev. St. (1899) § 1102.

New York.— Maginnis *v.* New York Cent., etc., R. Co., 52 N. Y. 215; Berkery *v.* Erie R. Co., 55 N. Y. App. Div. 489, 67 N. Y. Suppl. 189 [*affirmed* in 172 N. Y. 636, 65 N. E. 1113].

North Carolina.— Dixon *v.* Southern R. Co., 140 N. C. 201, 52 S. E. 673; Reid *v.* Atlanta, etc., Air Line R. Co., 140 N. C. 146, 52 S. E. 307; Bradley *v.* Ohio River, etc., R. Co., 126 N. C. 735, 36 S. E. 181.

Texas.— Gulf, etc., R. Co. *v.* Hamilton, (Civ. App. 1894) 28 S. W. 906.

Virginia.— Norfolk, etc., R. Co. *v.* Burge, 84 Va. 63, 4 S. E. 21.

Washington.— Steele *v.* Northern Pac. R. Co., 21 Wash. 287, 57 Pac. 820, holding that a railroad company is negligent in sending over a constantly traveled crossing, without signal or notice, detached cars attended by brakemen who are not in position to observe the track.

West Virginia.— Bowles *v.* Chesapeake, etc., R. Co., 61 W. Va. 272, 57 S. E. 131.

Wisconsin.— Butler *v.* Milwaukee, etc., R. Co., 28 Wis. 487.

tions for the safety of travelers as the circumstances reasonably require.[33] In some jurisdictions the duty of observing such precautions is required by statute.[34]

7. Lights, Signals, and Lookouts on Trains or Cars[35] — a. In General. It is the common-law duty of those in charge of a train of cars, for a non-performance

United States.— Chicago, etc., R. Co. *v.* Sharp, 63 Fed. 532, 11 C. C. A. 337.

See 41 Cent. Dig. tit. "Railroads," §§ 985, 999, 1000.

Compare Sullivan *v.* Pennsylvania Co., 4 Pa. Cas. 205, 7 Atl. 177.

33. *District of Columbia.*— Walter *v.* Baltimore, etc., R. Co., 6 App. Cas. 20.

Illinois.— Wabash R. Co. *v.* Billings, 105 Ill. App. 111 [*reversed* on other grounds in 212 Ill. 37, 72 N. E. 2], holding that it is negligence to back an engine and cars toward and upon a crossing while another train is passing unless due care is taken to give warning of the danger.

Indiana.—Lake Shore, etc., R. Co. *v.* Boyts, 16 Ind. App. 640, 45 N. E. 812.

Kentucky.— Illinois Cent. R. Co. *v.* Coley, 121 Ky. 385, 89 S. W. 234, 28 Ky. L. Rep. 336, 1 L. R. A. N. S. 370, holding that an engineer who undertakes to back his engine on the track over a busy city crossing, at which he knows there is no watchman stationed, should exercise care in proportion to the danger attending the situation, and should keep his engine under control.

Michigan.— Davis *v.* Michigan Cent. R. Co., 142 Mich. 382, 105 N. W. 877, holding that striking a caboose standing in the street with an engine and backing it across a sidewalk without any warning is negligence.

Missouri.— Lang *v.* Missouri Pac. R. Co., 115 Mo. App. 489, 91 S. W. 1012.

New York.— O'Bierne *v.* New York Cent., etc., R. Co., 37 N. Y. App. Div. 547, 56 N. Y. Suppl. 236 [*affirmed* in 167 N. Y. 568, 60 N. E. 1117]; McCaffrey *v.* Delaware, etc., Canal Co., 16 N. Y. Suppl. 495.

Pennsylvania.—Cookson *v.* Pittsburg, etc., R. Co., 179 Pa. St. 184, 36 Atl. 194.

Texas.— Gulf, etc., R. Co. *v.* West, (Civ. App. 1896) 36 S. W. 101.

Canada.— Hollinger *v.* Canadian Pac. R. Co., 12 Can. L. T. Occ. Notes 169, 21 Ont. 705 [*affirmed* in 20 Ont. App. 244].

See 41 Cent. Dig. tit. "Railroads," § 985.

Merely ringing the engine bell does not necessarily absolve the company from the duty of taking other precautions against accidents at the crossing where the train is backing (McCaffrey *v.* Delaware, etc., Canal Co., 16 N. Y. Suppl. 495; Cookson *v.* Pittsburg, etc., R. Co., 179 Pa. St. 184, 36 Atl. 194; Missouri, etc., R. Co. *v.* O'Connell, (Tex. Civ. App. 1897) 43 S. W. 66), and the train is a long one (Eaton *v.* Erie R. Co., 51 N. Y. 544); as where by reason of the position of the engine signals by the engineer could not have been heard at the crossing (Cleveland, etc., R. Co. *v.* Carey, 33 Ind. App. 275, 71 N. E. 244; Schwanenfeldt *v.* Chicago, etc., R. Co., (Nebr. 1908) 115 N. W. 285).

34. Baltimore, etc., R. Co. *v.* Peterson, 156 Ind. 364, 59 N. E. 1044 (holding that it is negligence *per se* to run a train backward without a watchman on the rear thereof, in violation of a city ordinance); Baltimore, etc., R. Co. *v.* Reynolds, 33 Ind. App. 219, 71 N. E. 250 (violation of city ordinance enacted under Burns Annot. St. (1894) § 3541, subd. 42, negligence *per se*); Pittsburgh, etc., R. Co. *v.* McNeil, (Ind. App. 1903) 66 N. E. 777; Gass *v.* Missouri Pac. R. Co., 57 Mo. App. 574 (negligence in failing to ring bell and keep a man on front end of backing train in violation of ordinance); Iron Mountain R. Co. *v.* Dies, 98 Tenn. 655, 41 S. W. 860.

In Tennessee, Shannon's Code, §§ 1574–1576, does not render a railroad company absolutely liable for a collision in the daytime, while an engine is being operated backward with the tender in front, and it is error for the court to refuse to charge that if the engineer is actually on the lookout ahead of his engine, and sees plaintiff's vehicle as soon as it can be seen as it enters on the crossing and the engineer immediately blows the alarm whistle, puts down the brakes, and uses every possible means to stop the train and prevent an accident, plaintiff cannot recover, although the engine is being operated backward. Southern R. Co. *v.* Simpson, 131 Fed. 705, 65 C. C. A. 563 [*distinguishing* Iron Mountain R. Co. *v.* Dies, 98 Tenn. 655, 41 S. W. 860, where it was held that the railroad company's liability under such sections was absolute and could not be avoided by showing that it was impossible to observe such precautions or that the injury would have occurred even if they had been observed].

In Mississippi, Code (1892), § 1849, making a railroad company violating its provisions liable to a party injured within prescribed limits of a passenger depot by a backing train, was designed to afford protection to all persons within such limits, and therefore applies to a person injured by such a train while driving a team across the track. Illinois Cent. R. Co. *v.* McCalip, 76 Miss. 360, 25 So. 166.

An ordinary lantern in the hand of a brakeman on the top of a car does not meet the requirement of an ordinance requiring every train backing in the night-time to have a "conspicuous light" on the rear car so as to show in what direction the car is moving. Chicago, etc., R. Co. *v.* Walsh, 157 Ill. 672, 41 N. E. 900 [*affirming* 57 Ill. App. 448].

An engine and tender is not a "train of cars" within the meaning of Can. Rev. St. c. 38, § 29, requiring a lookout on the rear of a backing train of cars. Harris *v.* The King, 9 Can. Exch. 206. But see Hollinger *v.* Canadian Pac. R. Co., 12 Can. L. T. Occ. Notes 169, 21 Ont. 705 [*affirmed* in 20 Ont. App. 244].

35. As affecting liability for injuries to animals see *infra*, X, H, 7, 9.

of which the railroad company is responsible, when approaching a public crossing to give notice of their approach by all reasonable warnings, such as by blowing a whistle, ringing a bell, signal lights, or by such other devices as may be sufficient to give timely warning to travelers of their approach, so as to afford time for all approaching to stop in a place of safety or if on the track to get out of danger.[36] Beside ringing the bell and blowing the whistle they are bound, if necessary, to use all the usual and well-known means for preventing collisions with persons using the crossing.[37] This duty of giving timely warning exists notwithstanding there is no statute or ordinance requiring signals to be given at the crossing,[38] or in the particular case,[39] and independently of statutes or ordinances requiring certain signals to be given or to be given at certain places.[40]

Signals frightening animals see *supra*, X, F, 4, b.

Validity and reasonableness of statutory and municipal regulations see *supra*, X, B, 1.

36. *Delaware.*— Reed *v.* Queen Anne's R. Co., 4 Pennew. 413, 57 Atl. 529.

District of Columbia.— Johnson *v.* Baltimore, etc., R. Co., 6 Mackey 232.

Illinois.— Cleveland, etc., R. Co. *v.* Baker, 106 Ill. App. 500 (holding that such warning must be reasonable and timely, taking into consideration the location, situation, and surroundings existing at such crossing); Illinois Central R. Co. *v.* Scheffner, 106 Ill. App. 344 [*affirmed* in 209 Ill. 9, 70 N. E. 619]; Cleveland, etc., R. Co. *v.* Halbert, 75 Ill. App. 592.

Indiana.— Cleveland, etc., R. Co. *v.* Miles, 162 Ind. 646, 70 N. E. 985.

Kentucky.— Louisville, etc., R. Co. *v.* Taylor, 104 S. W. 76, 31 Ky. L. Rep. 1142; Louisville, etc., R. Co. *v.* Morris, 20 S. W. 539, 14 Ky. L. Rep. 466.

New York.— Berkery *v.* Erie R. Co., 55 N. Y. App. Div. 489, 67 N. Y. Suppl. 189 [*affirmed* in 172 N. Y. 626, 65 N. E. 1113].

Pennsylvania.— Crane *v.* Pennsylvania R. Co., 218 Pa. St. 560, 67 Atl. 877; Lehigh Valley R. Co. *v.* Brandtmaier, 113 Pa. St. 610, 6 Atl. 238; Pittsburg, etc., R. Co. *v.* Dunn, 56 Pa. St. 280; Philadelphia, etc., R. Co. *v.* Hagan, 47 Pa. St. 244, 86 Am. Dec. 541.

See 41 Cent. Dig. tit. "Railroads," § 988.

37. Paducah, etc., R. Co. *v.* Hoehl, 12 Bush (Ky.) 41; Stewart *v.* Long Island R. Co., 54 N. Y. App. Div. 623, 66 N. Y. Suppl. 436 [*affirmed* in 166 N. Y. 604, 59 N. E. 1130] (holding that, although the bell may have been rung in some manner, it may not have constituted a warning under all the surroundings); Vandewater *v.* New York, etc., R. Co., 74 Hun (N. Y.) 32, 26 N. Y. Suppl. 397; Bleyle *v.* New York Cent., etc., R. Co., 11 N. Y. St. 585 [*affirmed* in 113 N. Y. 626, 20 N. E. 877]; Kinney *v.* Crocker, 18 Wis. 74.

38. *Indiana.*— Cleveland, etc., R. Co. *v.* Miles, 162 Ind. 646, 70 N. E. 985.

Iowa.— Gates *v.* Burlington, etc., R. Co., 39 Iowa 45; Artz *v.* Chicago, etc., R. Co., 34 Iowa 153, holding that the fact that there is no statute requiring a railroad train to give signals when approaching a crossing does not necessarily excuse the company from all obligation to do so.

Michigan.— Guggenheim *v.* Lake Shore, etc., R. Co., 66 Mich. 150, 33 N. W. 161.

New York.—Vandewater *v.* New York, etc., R. Co., 74 Hun 32, 26 N. Y. Suppl. 397.

Texas.—San Antonio, etc., R. Co. *v.* Wagle, 9 Tex. Civ. App. 214, 29 S. W. 205.

United States.— Thomas *v.* Delaware, etc., R. Co., 8 Fed. 729, 19 Blatchf. 533.

See 41 Cent. Dig. tit. "Railroads," § 1005.

The repeal of a statute requiring signals to be given on the approach of a train to a highway crossing by the ringing of a bell or blowing of a whistle does not dispense with such warning as might afford reasonable notice to travelers on the highway of the approach of a train. Durkee *v.* Delaware, etc., Canal Co., 88 Hun (N. Y.) 471, 34 N. Y. Suppl. 978; Friess *v.* New York Cent., etc., R. Co., 67 Hun (N. Y.) 205, 22 N. Y. Suppl. 104 [*affirmed* in 140 N. Y. 639, 35 N. E. 892].

Wisconsin.— Piper *v.* Chicago, etc., R. Co., 77 Wis. 247, 46 N. W. 165.

39. Ohio, etc., R. Co. *v.* McDaneld, 5 Ind. App. 108, 31 N. E. 836, holding that, although Rev. St. (1881) § 4020, providing for signals by bell and whistle does not apply to a train of cars without an engine, those in charge of such train will not be relieved from taking other proper precautions.

40. *Florida.*— Florida Central, etc., R. Co. *v.* Foxworth, 41 Fla. 1, 25 So. 338, 79 Am. St. Rep. 149, holding that McClellan Dig. p. 287, § 33, requiring railroad companies to ring the engine bell before crossing the streets of an incorporated town, does not affect the common-law duty of the company to give notice of the approach of trains at all points of known or reasonably apprehended danger, although not within an incorporated town.

Illinois.— Toledo, etc., R. Co. *v.* Cline, 135 Ill. 41, 25 N. E. 846 [*reversing* 31 Ill. App. 563].

Kentucky.— Louisville, etc., R. Co. *v.* Lyon, 58 S. W. 434, 22 Ky. L. Rep. 544, holding that the fact that the law authorizes the railroad commissioners to compel railroad companies to establish gates or station flagmen or take other precautionary measures within a certain distance of towns and cities does not relieve railroad companies from the duty devolving upon them at other public

b. Lights. It is negligence for which a railroad company is liable to persons who while in the exercise of ordinary care are injured in consequence thereof to run a train or cars over a public crossing at night without a lighted headlight on the engine,[41] without a light to show in which direction it is moving,[42] or if the engine is not in front, without a light on the front end of the forward car.[43] In some jurisdictions the duty to maintain such lights is prescribed by statute or ordinance.[44]

c. Signals. In accordance with the above general rule, a railroad company is negligent and liable to one who is injured without any fault on his part, by reason of the employees in charge of a train failing to give reasonable and timely warning of its approach to a crossing by ringing the bell or sounding the whistle,[45]

crossings to use proper means to warn travelers of the approach of trains.

Louisiana.— Downing *v.* Morgan Louisiana, etc., R., etc., Co., 104 La. 508, 29 So. 207.

Texas.— Texas, etc., R. Co. *v.* Anderson, 2 Tex. App. Civ. Cas. § 203.

United States.— Chicago, etc., R. Co. *v.* Sharp, 63 Fed. 532, 11 C. C. A. 337.

Canada.— Hollinger *v.* Canadian Pac. R. Co., 20 Ont. App. 244; Ham *v.* Grand Trunk R. Co., 11 U. C. C. P. 86.

See 41 Cent. Dig. tit. "Railroads," § 1005. And *infra*, X, F, 7, j.

41. Baltimore, etc., R. Co. *v.* Alsop, 71 Ill. App. 54; Southern R. Co. *v.* Winchester, 105 S. W. 167, 32 Ky. L. Rep. 19; Becke *v.* Missouri Pac. R. Co., 102 Mo. 544, 13 S. W. 1053, 9 L. R. A. 157, holding that the court may declare such failure to be negligence as a matter of law when the engine is running twenty-five miles an hour through a thickly settled portion of the country in consequence of which a collision is occasioned and an injury occurs.

The omission to have the headlight lighted at about dusk will not warrant a recovery for the death of one run over by an engine at the crossing where the engine and cars as well as the reflection of the lights from the car windows were distinctly visible to persons near the crossing. Daniels *v.* Staten Island Rapid Transit R. Co., 125 N. Y. 407, 26 N. E. 466 [*reversing* 7 N. Y. Suppl. 725].

42. See Chicago, etc., R. Co. *v.* Stube, 15 Ill. App. 39; and *supra*, X, F, 6, c.

43. Lake Erie, etc., R. Co. *v.* Zoffinger, 107 Ill. 199; Texas, etc., R. Co. *v.* Nolan, 62 Fed. 552, 11 C. C. A. 202. And see *supra*, X, F, 6, b, c.

44. Chicago, etc., R. Co. *v.* Trayes, 33 Ill. App. 307.

A red lantern on the corner of the tender of the locomotive which is moving backward is not a compliance with an ordinance which requires locomotives within the city to carry "a brilliant and conspicuous light on the front end." Chicago, etc., R. Co. *v.* Trayes, 33 Ill. App. 307.

45. *Illinois.*— Lake Erie, etc., R. Co. *v.* Zoffinger, 107 Ill. 199; St. Louis, etc., R. Co. *v.* Dunn, 78 Ill. 197; Rochford, etc., R. Co. *v.* Hillmer, 72 Ill. 235.

Indiana.— Pittsburgh, etc., R. Co. *v.* Martin, 82 Ind. 476; Indianapolis, etc., R. Co. *v.* McLin, 82 Ind. 435; Evansville, etc., R. Co. *v.* Clements, 32 Ind. App. 659, 70 N. E. 554; Aurelius *v.* Lake Erie, etc., R. Co., 19 Ind. App. 584, 49 N. E. 857.

Kansas.— Atchison, etc., R. Co. *v.* Wilkie, 77 Kan. 791, 90 Pac. 775, 11 L. R. A. N. S. 963.

Kentucky.—Louisville, etc., R. Co. *v.* Goetz, 79 Ky. 442, 42 Am. Rep. 227; Louisville, etc., R. Co. *v.* Com., 13 Bush 388, 26 Am. Rep. 205; Paducah, etc., R. Co. *v.* Hoehl, 12 Bush 41 (holding that a failure to give such signal as will be sufficient to apprise those at or near the crossing of the approach of the train must be regarded as negligence); Southern R. Co. *v.* Winchester, 105 S. W. 167, 32 Ky. L. Rep. 19; Louisville, etc., R. Co. *v.* Cooper, 65 S. W. 795, 23 Ky. L. Rep. 1658; Louisville, etc., R. Co. *v.* Ward, 44 S. W. 1112, 19 Ky. L. Rep. 1900.

Nebraska.— Geist *v.* Missouri Pac. R. Co., 62 Nebr. 309, 87 N. W. 43.

North Carolina.— Butts *v.* Atlantic, etc., R. Co., 133 N. C. 82, 45 S. E. 472; Edwards *v.* Atlantic Coast Line R. Co., 132 N. C. 99, 43 S. E. 585.

Ohio.— Wheeling, etc., R. Co. *v.* Parker, 29 Ohio Cir. Ct. 1.

Wisconsin.— Piper *v.* Chicago, etc., R. Co., 77 Wis. 247, 46 N. W. 165.

United States.— Continental Imp. Co. *v.* Stead, 95 U. S. 161, 24 L. ed. 403; Morris *v.* Chicago, etc., R. Co., 26 Fed. 22.

England.— Gray *v.* North Eastern R. Co., 48 L. T. Rep. N. S. 904.

Canada.— Smith *v.* Niagara, etc., R. Co., 9 Ont. L. Rep. 158, 4 Ont. Wkly. Rep. 526; Beckett *v.* Grand Trunk R. Co., 13 Ont. App. 174 [*affirmed* in 16 Can. Sup. Ct. 713]; Peart *v.* Grand Trunk R. Co., 10 Ont. App. 191.

See 41 Cent. Dig. tit. "Railroads," § 990.

Crossing signals must be given at such times and places, taking into consideration the speed of the train, obstructions to sound, and all other circumstances as will enable a careful and prudent man to act upon the warning. Chesapeake, etc., R. Co. *v.* Steele, 84 Fed. 93, 29 C. C. A. 81.

Precautions as to bell.— It is the duty of a railroad company to supply an engine with a bell which is adequate for the purpose and its duty in this regard is not discharged if the bell is cracked or otherwise defective and does not sound loud enough to warn persons under ordinary circumstances. Northern Pac. R. Co. *v.* Krohne, 86 Fed. 230, 29 C. C. A. 674.

particularly where such signals or warnings are required by statute,[46] and the circumstances may be such that a failure to sound the whistle will be at least evidence of negligence notwithstanding the sounding of it is prohibited by statute or ordinance.[47] A bell should be rung not only before crossing a street but so long as there is danger of encountering passers-by;[48] but in the absence of statute it is not necessary to sound both bell and whistle,[49] or to sound them continuously while passing a public crossing.[50] In most jurisdictions the giving of signals is now regulated by statute or ordinance,[51] under which it is variously required that a bell shall be rung or a whistle sounded,[52] either being sufficient under some

The mere fact that the bell was rung does not show that sufficient warning was given, since it may have been rung in some manner and yet not have constituted a warning, under all the surroundings. Stewart *v.* Long Island R. Co., 54 N. Y. App. Div. 623, 66 N. Y. Suppl. 436 [*affirmed* in 166 N. Y. 604, 59 N. E. 1130].

Where a gate and flagman are maintained at the crossing there is no obligation upon the railroad company to ring a bell or sound a whistle if the gates are up and the engineer does not know it; but if he does know the fact or if from his position he ought to have known it, it is for the jury to determine whether his failure to ring the bell or sound the whistle is negligence. Edgerley *v.* Long Island R. Co., 46 N. Y. App. Div. 284, 61 N. Y. Suppl. 677, 44 N. Y. App. Div. 476, 60 N. Y. Suppl. 1062.

Failure to sound a bell or whistle is not negligence per se in the absence of statute; it is merely evidence of negligence to be considered by the jury in connection with other circumstances of the case. Brown *v.* Milwaukee, etc., R. Co., 22 Minn. 165; Vandewater *v.* New York, etc., R. Co., 135 N. Y. 583, 32 N. E. 636, 18 L. R. A. 771 [*reversing* 63 Hun 186, 17 N. Y. Suppl. 652]; Cordell *v.* New York Cent., etc., R. Co., 64 N. Y. 535 [*reversing* 6 Hun 461]; Hermans *v.* New York Cent., etc., R. Co., 17 N. Y. Suppl. 319 [*affirmed* in 137 N. Y. 558, 33 N. E. 337]; Austin *v.* Staten Island Rapid Transit Co., 14 N. Y. Suppl. 923; Bleyle *v.* New York Cent., etc., R. Co., 11 N. Y. St. 585 [*affirmed* in 113 N. Y. 626, 20 N. E. 877]; Butts *v.* Atlantic, etc., R. Co., 133 N. C. 82, 45 S. E. 472. But see Galena, etc., R. Co. *v.* Dill, 22 Ill. 265, holding that an omission to give a signal by sounding a bell or whistle is not of itself evidence of negligence.

46. *Illinois.*— Peoria, etc., R. Co. *v.* Siltman, 67 Ill. 72; Baltimore, etc., R. Co. *v.* Wetmore, 65 Ill. App. 292.

Indiana.— Cleveland, etc., R. Co. *v.* Carey, 33 Ind. App. 275, 71 N. E. 244.

Kentucky.— Louisville, etc., R. Co. *v.* Lucas, 98 S. W. 308, 99 S. W. 959, 30 Ky. L. Rep. 359, 539; Louisville, etc., R. Co. *v.* Sander, 92 S. W. 937, 29 Ky. L. Rep. 212.

New York.— Renwick *v.* New York Cent. R. Co., 36 N. Y. 132, 1 Transcr. App. 46, 34 How. Pr. 91.

South Carolina.— Mack *v.* South-Bound, 52 S. C. 323, 29 S. E. 905, 68 Am. St. Rep. 913, 40 L. R. A. 679, holding, however, that the omission of the statutory signals does not show a presence or want of ordinary care since the giving of the signals is a circumstance to be considered by the jury as proving negligence.

Texas.— Missouri, etc., R. Co. *v.* Magee, 92 Tex. 616, 50 S. W. 1013 [*affirming* (Civ. App. 1899) 49 S. W. 156]; Missouri, etc., R. Co. *v.* Brantley, 26 Tex. Civ. App. 11, 62 S. W. 94; Texas, etc., R. Co. *v.* Moseley, (Civ. App. 1900) 58 S. W. 48.

Canada.— Sibbald *v.* Grand Trunk R. Co., 11 Can. L. T. Occ. Notes 36, 18 Ont. App. 184 [*affirming* 19 Ont. 164].

See 41 Cent. Dig. tit. "Railroads," § 990. And see *infra*, X, F, 7, i.

47. Bracken *v.* Pennsylvania R. Co., 32 Pa. Super. Ct. 22, holding that where a railroad company runs a train at the rate of forty miles an hour within the limits of a city, and fails properly to operate the safety gates at a crossing, and an accident results, it may be shown that no whistle was sounded at the crossing, although an ordinance of the city prohibited the sounding of the whistle.

48. Whiton *v.* Chicago, etc., R. Co., 29 Fed. Cas. No. 17,597, 2 Biss. 282 [*affirmed* in 13 Wall. 270, 20 L. ed. 571].

49. Spencer *v.* Illinois Cent. R. Co., 29 Iowa 55; Edwards *v.* Atlantic Coast Line R. Co., 132 N. C. 99, 43 S. E. 585.

50. Paducah, etc., R. Co. *v.* Moehl, 12 Bush (Ky.) 41; Keller *v.* Philadelphia, etc., R. Co., 214 Pa. St. 82, 63 Atl. 413, holding that there is no imperative duty on a railroad company running its trains over public streets to continuously give danger signals.

A failure to keep the whistle "constantly" sounding between the whistle post and the crossing does not, under ordinary circumstances, constitute negligence, under a statute (Conn. Gen. St. § 3554), requiring the bell or whistle to be sounded occasionally within such distance, although the crossing is dangerous by reason of obstructions to view or hearing. Tessmer *v.* New York, etc., R. Co., 72 Conn. 208, 44 Atl. 38.

51. See cases cited *infra*, notes 52–61.

A municipal ordinance which prohibits a railroad company from sounding any whistles, but expressly provides that it shall not be prohibited from giving signals necessary for the protection of life and property, in no way affects the statutory duty on the part of the company to give signals of the approach of trains to a crossing. Cleveland, etc., R. Co. *v.* Carey, 33 Ind. App. 275, 71 N. E. 244.

52. East Tennessee, etc., R. Co. *v.* Deaver, 79 Ala. 216 (under Code, par. 1699); St.

statutes;[53] that a bell only shall be rung at certain crossings as in cities;[54] that such signals shall be given at or within a certain distance from the crossing, usually eighty rods;[55] and that the ringing shall continue,[56] or the bell or whistle be sounded continuously,[57] until the crossing is passed or reached.[58] Under a statute requiring a bell or whistle to be sounded at a certain distance from a crossing, sounding it only beyond that distance is negligence,[59] unless it is within such distance that a person at the crossing possessed of ordinarily good hearing could hear.[60] But an omission to ring the bell or sound the whistle after the crossing is passed is not negligence, where the statute requires the signal to be given only when approaching a crossing.[61]

Louis, etc., R. Co. *v.* Pflugmacher, 9 Ill. App. 300.

53. Chicago, etc., R. Co. *v.* Sack, 129 Ill. App. 58; St. Louis, etc., R. Co. *v.* Pflugmacher, 9 Ill. App. 300; Tyler *v.* Old Colony R. Co., 157 Mass. 336, 32 N. E. 227.

54. East Tennessee, etc., R. Co. *v.* Markens, 88 Ga. 60, 13 S. E. 855, 14 L. R. A. 281 (holding that the statute requires the bell to be tolled on approaching crossings in cities, towns, and villages without reference to the distance between the crossing and the point at which the train starts); Coffin *v.* St. Louis, etc., R. Co., 22 Mo. App. 601.

55. *Arkansas.*— St. Louis, etc., R. Co. *v.* Tomlinson, 78 Ark. 251, 94 S. W. 613.

Connecticut.— Andrews *v.* New York, etc., R. Co., 60 Conn. 293, 22 Atl. 566 (holding that the eighty rods from the crossing may be eighty rods in a direct line, instead of the curved line of the track); Bates *v.* New York, etc., R. Co., 60 Conn. 259, 22 Atl. 538.

Iowa.— Pratt *v.* Chicago, etc., R. Co., 107 Iowa 287, 77 N. W. 1064, holding that under Code, § 2072, requiring that a locomotive whistle be sounded sixty yards before a crossing is reached except in cities and towns unless required by an ordinance thereof, a railroad company is under no duty to sound the whistle within the limits of a town having no such ordinance.

Kansas.— Missouri Pac. R. Co. *v.* Pierce, 33 Kan. 61, 5 Pac. 378, holding that under Comp. Laws (1879), c. 23, § 60, requiring that a steam whistle shall be sounded three times, "at least eighty rods from the place where the railroad shall cross any public road or street, except in cities and villages," the omission of such signal in a city is not negligence.

Kentucky.— Nashville, etc., R. Co. *v.* Higgins, 92 S. W. 549, 29 Ky. L. Rep. 89, fifty rods.

Texas.— Hawkins *v.* Missouri, etc., R. Co., 36 Tex. Civ. App. 633, 83 S. W. 52; Galveston, etc., R. Co. *v.* Duelm, (Civ. App. 1893) 23 S. W. 596.

Virginia.— Norfolk, etc., R. Co. *v.* Scruggs, 105 Va. 166, 52 S. E. 834 (three hundred yards); Simons *v.* Southern R. Co., 96 Va. 152, 31 S. E. 7 (three hundred yards).

United States.— Texas, etc., R. Co. *v.* Bryant, 56 Fed. 799, 6 C. C. A. 138.

See 41 Cent. Dig. tit. "Railroads," § 990.

The real question, under such statutes, is, was the whistle sounded, and in a proper manner, and substantially at the place fixed by law and where it would be likely to be heard by those for whose benefit it is required. Andrews *v.* New York, etc., R. Co., 60 Conn. 293, 22 Atl. 566.

56. Hawkins *v.* Missouri, etc., R. Co., 36 Tex. Civ. App. 633, 83 S. W. 52; Galveston, etc., R. Co. *v.* Duelm. (Tex. Civ. App. 1893) 23 S. W. 596.

A statute providing that the whistle shall be sounded "at intervals" within a given distance does not require the whistle to be sounded "continuously" within that distance. Green *v.* Southern Pac. R. Co., 122 Cal. 563, 55 Pac. 577.

A statute requiring that the locomotive "whistle shall be blown or bell rung" at least eighty rods from a public crossing, and that the "bell shall be kept ringing" until the train shall have passed the crossing, does not require both the whistle to be blown and the bell rung; and it is sufficient that the whistle is blown at a distance of at least eighty rods before the crossing is reached without continuing the blowing until the crossing is passed. Missouri, etc., R. Co. *v.* Kirschoffer, (Tex. Civ. App. 1893) 24 S. W. 577.

57. St. Louis, etc., R. Co. *v.* Tomlinson, 78 Ark. 251, 94 S. W. 613; Toledo, etc., R. Co. *v.* Cline, 31 Ill. App. 563; Ohio, etc., R. Co. *v.* McDaneld, 5 Ind. App. 108, 31 N. E. 836.

58. Suburban R. Co. *v.* Balkwill, 195 Ill. 535, 63 N. E. 389 [*affirming* 94 Ill. App. 454].

The bell or whistle shall be sounded continuously or alternately until the engine has reached the highway, under Ky. St. (1903) § 786. Nashville, etc., R. Co. *v.* Higgins, 92 S. W. 549, 29 Ky. L. Rep. 89.

59. Bates *v.* New York, etc., R. Co., 60 Conn. 259, 22 Atl. 538; Simons *v.* Southern R. Co., 96 Va. 152, 31 S. E. 7, holding that sounding a loud long blast four hundred and eighty-four yards from a crossing cannot be said, as a matter of law, to be a sufficient substitute for at least two sharp blasts not less than three hundred yards from the crossing, as required by Acts Assembly (1893–1894), p. 827. But see Houston, etc., R. Co. *v.* O'Neal, 91 Tex. 671, 47 S. W. 95 [*reversing* (Civ. App. 1898) 45 S. W. 921].

60. Texas, etc., R. Co. *v.* Bryant, 56 Fed. 799, 6 C. C. A. 138. But see Havens *v.* Erie R. Co., 53 Barb. (N. Y.) 328 [*reversed* on other grounds in 41 N. Y. 296].

61. Wilson *v.* Rochester, etc., R. Co., 16 Barb. (N. Y.) 167.

d. Lookouts.[62] In addition to sounding the bell or whistle or giving other signals, it is also the duty of employees in charge of an engine or train to use ordinary care in keeping a proper lookout at a public crossing to prevent injury, and if they fail to do so, whereby an injury is caused, it is negligence for which the railroad company is liable,[63] and if they see or might by due care and precaution see an obstruction on the track, it is their duty to use every means in their power to prevent a collision.[64] This duty ordinarily devolves upon the engineer,[65] but it may also devolve upon the fireman,[66] and under some circumstances it

62. Lookouts on backing trains see *supra*, X, F, 6, c.

63. *Arkansas.*— St. Louis, etc., R. Co. *v.* Denty, 63 Ark. 177, 37 S. W. 719, holding that it is a question for the jury whether a failure to keep a proper lookout was the cause of the accident, it being admitted that the fireman was not keeping a lookout and the engineer testifying that, although keeping a lookout, he did not see the person injured.

California.— Robinson *v.* Western Pac. R. Co., 48 Cal. 409; Zipperlen *v.* Southern Pac. R. Co., 7 Cal. App. 206, 93 Pac. 1049.

Illinois.— Toledo, etc., R. Co. *v.* Cline, 31 Ill. App. 563.

Kentucky.— Louisville, etc., R. Co. *v.* Davis, 106 S. W. 304, 32 Ky. L. Rep. 580; Southern R. Co. *v.* Winchester, 105 S. W. 167, 32 Ky. L. Rep. 19; Louisville, etc., R. Co. *v.* Taylor, 104 S. W. 776, 31 Ky. L. Rep. 1142; Louisville, etc., R. Co. *v.* Dick, 78 S. W. 914, 25 Ky. L. Rep. 1831; Louisville, etc., R. Co. *v.* Cooper, 65 S. W. 795, 23 Ky. L. Rep. 1658; Crowley *v.* Louisville, etc., R. Co., 55 S. W. 434, 21 Ky. L. Rep. 1434, holding that it is gross negligence to run a train over a public crossing in a city at the rate of fifteen or sixteen miles an hour, without keeping a lookout in front, especially when the noise of a passenger train tends to obstruct the sound of the bell.

Maine.— Garland *v.* Maine Cent. R. Co., 85 Me. 519, 27 Atl. 615.

Missouri.— Holmes *v.* Missouri Pac. R. Co., 207 Mo. 149, 105 S. W. 624; Hilz *v.* Missouri Pac. R. Co., 101 Mo. 36, 13 S. W. 946.

North Carolina.— Bradley *v.* Ohio River, etc., R. Co., 126 N. C. 735, 36 S. E. 181 (holding that a failure of those in charge of a moving train to keep a lookout when approaching a crossing is negligence where such lookout would have saved life); Bullock *v.* Wilmington, etc., R. Co., 105 N. C. 180, 10 S. E. 988.

North Dakota.— Johnson *v.* Great Northern R. Co., 7 N. D. 284, 75 N. W. 250; Bishop *v.* Chicago, etc., R. Co., 4 N. D. 536, 62 N. W. 605.

Ohio.— Wheeling, etc., R. Co. *v.* Parker, 29 Ohio Cir. Ct. 1.

Pennsylvania.— Keller *v.* Philadelphia, etc., R. Co., 214 Pa. St. 82, 63 Atl. 413; Pittsburg, etc., R. Co. *v.* Dunn, 56 Pa. St. 280.

Texas.— Paris, etc., R. Co. *v.* Calvin, (Civ. App. 1907) 103 S. W. 428 [*affirmed* in (1908) 106 S. W. 879]; San Antonio, etc., R. Co. *v.* Mertink, (Civ. App. 1907) 102 S. W. 153 [*reversed* on other grounds in (1907) 105 S. W. 485]; Missouri, etc., R. Co. *v.* Jackson, (Civ. App. 1905) 90 S. W. 702, 88 S. W. 406; Galveston, etc., R. Co. *v.* Vollrath, 40 Tex. Civ. App. 46, 89 S. W. 279; Missouri, etc., R. Co. *v.* Matherly, 35 Tex. Civ. App. 604, 81 S. W. 589; Gulf, etc., R. Co. *v.* Pendery, 14 Tex. Civ. App. 60, 36 S. W. 793.

Virginia.— Virginia Midland R. Co. *v.* White, 84 Va. 498, 5 S. E. 573, 10 Am. St. Rep. 874.

See 41 Cent. Dig. tit. "Railroads," § 991.

Keeping a lookout on one side is insufficient where, on account of a curve in the road, it is also necessary to keep a lookout on the opposite side to protect persons passing over a crossing. St. Louis, etc., R. Co. *v.* Tomlinson, 78 Ark. 251, 94 S. W. 613.

64. Louisville, etc., R. Co. *v.* Dick, 78 S. W. 914, 25 Ky. L. Rep. 1831; Pittsburg, etc., R. Co. *v.* Dunn, 56 Pa. St. 280. And see *infra*, X, F, 9.

65. Robinson *v.* Western Pac. R. Co., 48 Cal. 409; Louisville, etc., R. Co. *v.* Creighton, 106 Ky. 42, 50 S. W. 227, 20 Ky. L. Rep. 1691, 1898 (holding that an engineer is negligent in withdrawing his attention even momentarily from the track in front of him in passing along the streets of a populous city); Cheney *v.* New York Cent., etc., R. Co., 16 Hun (N. Y.) 415; Wilds *v.* Hudson River R. Co., 33 Barb. (N. Y.) 503 [*reversed* on other grounds in 24 N. Y. 430]; Texas, etc., R. Co. *v.* Lowry, 61 Tex. 149 (holding that it is the duty of an engineer before starting his engine across a street not only to give timely warning of his intention but also to see whether his train will be likely to strike a traveler or scare his horses).

An engineer is chargeable with having seen whatever he would see while in the proper discharge of his respective duties. New York, etc., R. Co. *v.* Kistler, 66 Ohio St. 326, 64 N. E. 130.

An engineer is not expected to see anything on the sides of the right of way further than his eye may take in objects within the range of vision while looking ahead along the track. New York, etc., R. Co. *v.* Kistler, 66 Ohio St. 326, 64 N. E. 130.

If an engineer fails to give the usual signals it is his duty to keep a more vigilant watch along the track. Hinkle *v.* Richmond, etc., R. Co., 109 N. C. 472, 13 S. E. 884, 26 Am. St. Rep. 581.

66. St. Louis, etc., R. Co. *v.* Denty, 63 Ark. 177, 37 S. W. 719 (holding that a railway company cannot be said, as a matter of law, to be free from negligence where its fireman neglects to keep a lookout on his side of the track at a village crossing); Wilds *v.* Hudson River R. Co., 33 Barb. (N. Y.) 503

may be the duty of other employees in charge of or employed upon the train to keep a lookout.[67]

e. At What Crossings Required — (1) *In General.* As a general rule signals by bell and whistle are required only at crossings of properly established public highways,[68] but at such crossings they must be given notwithstanding the railroad company has established at such crossing a gate under the care of a flagman.[69] Under the various statutes it is required that such signals shall be given only at crossings over traveled public roads or streets,[70] or at which whistle posts

[*reversed* on other grounds in 24 N. Y. 430].

That the fireman in performing his duties got into a position where he could not look ahead cannot be regarded as negligence. Brammer *v.* Norfolk, etc., R. Co., 104 Va. 50, 51 S. E. 211 ("hooking" fire); O'Brien *v.* Wisconsin Cent. R. Co., 119 Wis. 7, 96 N. W. 424.

A fireman is not negligent in shoveling coal into the furnace instead of keeping a lookout as the engine passes along the streets of a city. Louisville, etc., R. Co. *v.* Creighton, 106 Ky. 42, 50 S. W. 227, 20 Ky. L. Rep. 1691, 1898.

67. Robinson *v.* Western Pac. R. Co., 48 Cal. 409, holding that the railroad company should provide a lookout upon whose signals that the track is clear the engineer may act.

Where trainmen have reason to anticipate the presence of persons who may be injured by the movements of the train, it is their duty to be on the alert to discover such persons and if an injury occurs by their failure to use care, the railroad company is liable; but where the railroad company has a right to anticipate a clear track there is no duty to be on the lookout. Thompson *v.* Missouri, etc., R. Co., 93 Mo. App. 548, 67 S. W. 693.

The failure of a flagman to keep a lookout is not negligence, that not being a part of his duty. Louisville, etc., R. Co. *v.* Creighton, 106 Ky. 42, 50 S. W. 227, 20 Ky. L. Rep. 1691, 1898.

68. *Illinois.*— Mobile, etc., R. Co. *v.* Davis, 130 Ill. 146, 22 N. E. 850 [*affirming* 31 Ill. App. 490]; Pennsylvania Co. *v.* Backes, 35 Ill. App. 375 [*affirmed* in 133 Ill. 255, 24 N. E. 563].

Kentucky.— Louisville, etc., R. Co. *v.* Survant, 96 Ky. 197, 27 S. W. 999, 16 Ky. L. Rep. 545.

Missouri.— Maxey *v.* Missouri Pac. R. Co., 113 Mo. 1, 20 S. W. 654.

Texas.— Missouri Pac. R. Co. *v.* Lee, 70 Tex. 496, 7 S. W. 857, holding that Rev. St. (1897) § 4231, applies equally to roads made public by dedication and to those established by statutory proceedings.

Canada.— Casey *v.* Canadian Pac. R. Co., 15 Ont. 574.

See 41 Cent. Dig. tit. "Railroads," § 993.

In Illinois under Rev. St. c. 114, § 68, the phrase, "any public highway," includes a much used and traveled highway whether or not it has been formerly and legally established (Cleveland, etc., R. Co. *v.* Baker, 106 Ill. App. 500), and does not apply only to roads defined to be public highways by c. 121, § 1, relating to roads and bridges (Chicago, etc., R. Co. *v.* Dillon, 24 Ill. App. 203 [*affirmed* in 123 Ill. 570, 15 N. E. 181, 5 Am. St. Rep. 559]).

Where a whistle post has been erected at a proper distance from a crossing by the railroad company in order to notify the engineer where to give warning and the public are led to believe that a signal will be given at the post it is negligence on the part of an engineer passing it to fail to sound the whistle at such post. Hinkle *v.* Richmond, etc., R. Co., 109 N. C. 472, 13 S. E. 884, 26 Am. St. Rep. 581.

A place in a railroad company's yard where the public have for a long time been accustomed to cross the track, solely by the sufferance of the company, is not a "public crossing" within the meaning of Mo. Rev. St. (1889) § 2608, relating to signals at crossings. Gurley *v.* Missouri Pac. R. Co., 104 Mo. 211, 16 S. W. 11.

69. Whelan *v.* New York, etc., R. Co., 38 Fed. 15.

70. State *v.* St. Joseph, etc., R. Co., 46 Mo. App. 466 (holding that under Rev. St. (1889) § 2608, a road which has been traveled and worked from ten to fifteen years is "a traveled public road"); Byrne *v.* New York Cent., etc., R. Co., 94 N. Y. 12 [*reversing* 28 Hun 438] (holding that the road or street must be traveled as well as public, and that therefore the company's failure to ring a bell at an alley crossing which is not used for travel does not *per se* render it liable for damages); Cordell *v.* New York Cent, etc., R. Co., 64 N. Y. 535 [*reversing* 6 Hun 461] (holding that a highway crossing a railroad track, although it has been regularly laid out, is not "a public traveled road or street" within the meaning of Laws (1854), c. 282, § 7, until the notice of its laying out has been served upon an officer of the railroad company as required by Laws (1853), c. 52); Ewen *v.* Chicago, etc., R. Co., 38 Wis. 613 (holding that the statutory requirements apply to all actually traveled streets within the city limits, although such only by user, and not merely to streets dedicated by recorded plats, or laid out and adopted by the municipal authorities).

A crossing provided by a railroad company across its own ground for ingress or egress from its depot is not a "traveled public road" within the meaning of Wagner St. p. 310, § 338, requiring a bell or whistle to be sounded at such crossing. Hodges *v.* St. Louis, etc., R. Co., 71 Mo. 50; Bauer *v.* Kansas Pac. R. Co., 69 Mo. 219.

That the crossing has been discontinued by the commissioners of highways on condi-

have been erected;[71] and under some statutes such signals are required whether the crossing is over a town or city street or over a public road in the country,[72] although other statutes apply only to public crossings in the country.[73] Under some statutes also such signals are required only at grade crossings, and not at crossings over or under the railroad,[74] unless the circumstances at the crossing are such that reasonable care and prudence require them to be given;[75] while under other statutes they are required where the railroad runs under the highway or crosses it by a bridge or other structure.[76]

tion that the railroad company shall open another road does not relieve it from the statutory duty of giving warning on the approach of trains so long as the new road is not prepared for travel. Rodrian *v.* New York, etc., R. Co., 7 N. Y. Suppl. 811 [*reversed* on other grounds in 125 N. Y. 526, 26 N. E. 741].

"A traveled place" under South Carolina Gen. St. § 1483, is not a mere crossing by sufferance, but a place where the public have a legal right to cross, if not by express grant, by adverse user (Hankinson *v.* Charlotte, etc., R. Co., 41 S. C. 1, 19 S. E. 206; Barber *v.* Richmond, etc., R. Co., 34 S. C. 444, 13 S. E. 630); and the mere fact that the company has left the crossing open when cars have remained there any length of time is not of itself proof of such acquisition (Hankinson *v.* Charlotte, etc., R. Co., *supra*). Nor is a bridge, which the public has been accustomed to pass over, but at the end of which there is a notice to keep off, and on which the president of the railroad has refused to allow a plank to be laid, a "traveled place" within the meaning of such statute. Ringstaff *v.* Lancaster, etc., R. Co., 64 S. C. 546, 43 S. E. 22.

In Massachusetts a road is not a "traveled place" within the meaning of Pub. St. c. 112, § 163, unless the railroad company has been requested, in writing, by the selectmen, or required by the county commissioners, to erect and maintain warning boards at the crossing. Coakley *v.* Boston, etc., R. Co., 159 Mass. 32, 33 N. E. 930.

A highway within section 256 of the English Railway Act (1888), requiring a bell to be rung or a whistle to be sounded on approaching a crossing over a highway, means a public highway which is so as of right. Royle *v.* Canadian Northern R. Co., 14 Manitoba 275. See also Schubrinck *v.* Canada Atlantic R. Co., 8 Can. L. T. Occ. Notes 438; Bennett *v.* Grand Trunk R. Co., 3 Ont. 446.

A railway side-track which crosses a public highway is included within a crossing statute requiring signals to be given. Bryson *v.* Southern R. Co., 3 Ga. App. 407, 59 S. E. 1124.

71. Nashville, etc., R. Co. *v.* Seaborn, 85 Tenn. 391, 4 S. W. 661 (construing Milliken & V. Code, § 1298, pts. 1, 2); Southern R. Co. *v.* Elder, 81 Fed. 791, 26 C. C. A. 615.

72. Mobile, etc., R. Co. *v.* Davis, 130 Ill. 146, 22 N. E. 850 [*affirming* 31 Ill. App. 490].

73. Louisville, etc., R. Co. *v.* French, 69 Miss. 121, 12 So. 338 (holding that Code, § 1048, does not apply to towns but to highways in the country); Bleyle *v.* New York Cent., etc., R. Co., 11 N. Y. St. 585 [*affirmed* in 113 N. Y. 626, 20 N. E. 877].

74. *Illinois.*— Cleveland, etc., R. Co. *v.* Halbert, 179 Ill. 196, 53 N. E. 623 [*reversing* 75 Ill. App. 592].

Massachusetts.— Com. *v.* Boston, etc., R. Co., 133 Mass. 383.

New York.— Skinner *v.* New York, etc., R. Co., 64 N. Y. Suppl. 325.

Pennsylvania.— Black *v.* Bessemer, etc., R. Co., 216 Pa. St. 173, 65 Atl. 405, 116 Am. St. Rep. 766; Farley *v.* Harris, 186 Pa. St. 440, 40 Atl. 798.

Texas.— Missouri, etc., R. Co. *v.* Thomas, 87 Tex. 282, 28 S. W. 343.

Virginia.— Norfolk, etc., R. Co. *v.* Scruggs, 105 Va. 166, 52 S. E. 834, holding that under Code (1904), § 1294*d*, subs. 24, 38, the company is no longer required to blow the whistle on approaching a place where the railroad crosses a highway by means of a bridge over the highway.

Wisconsin.— Barron *v.* Chicago, etc., R. Co., 89 Wis. 79, 61 N. W. 303; Jenson *v.* Chicago, etc., R. Co., 86 Wis. 589, 57 N. W. 359, 22 L. R. A. 680.

See 41 Cent. Dig. tit. "Railroads," § 993.

At common law it is not negligence to fail to give signals on approaching a highway which the railroad crosses on a trestle. Cooper *v.* Charleston, etc., R. Co., 65 S. C. 214, 43 S. E. 682.

Where a traveler has a clear view of a railroad for fifteen hundred feet while approaching an overhead crossing, the railroad company is under no duty to signal the approach of a train. Black *v.* Bessemer, etc., R. Co., 216 Pa. St. 173, 65 Atl. 405, 116 Am. St. Rep. 766.

75. Skinner *v.* New York, etc., R. Co., 64 N. Y. Suppl. 325 (holding that a railroad company owes no duty to give a warning where its road passes over a highway by an elevated structure, unless it observes that a person at or near the crossing is in a dangerous position); Farley *v.* Harris, 186 Pa. St. 440, 40 Atl. 798; Pennsylvania R. Co. *v.* Barnett, 59 Pa. St. 259, 98 Am. Dec. 346; Louisville, etc., R. Co. *v.* Sawyer, 114 Tenn. 84, 86 S. W. 386, 108 Am. St. Rep. 881, 69 L. R. A. 662 (holding that where a railroad crosses a public road on an overhead grade no absolute duty rests upon the company to give a warning to travelers of the approach of a train by the usual signals; but if the place is dangerous the company must warn travelers on the highway of such approach).

76. Rupard *v.* Chesapeake, etc., R. Co., 88

(II) *Private Crossings and Crossings by License or Custom.* As a general rule it is not negligence on the part of a railroad company either at common law or by statute to fail to give signals at a private crossing,[77] although the person injured is permitted by the railroad company to construct and use such crossing,[78] unless the conditions at the particular crossing are such that reasonable care and prudence require them to be given.[79] But where the railroad company has by its acts induced, invited, or permitted the public to use a crossing as a public crossing,[80] and has adopted the custom of giving the usual signals therefor

Ky. 280, 11 S. W. 70, 10 Ky. L. Rep. 1023, 7 L. R. A. 316; Chesapeake, etc., R. Co. Co. *v.* Ogles, 73 S. W. 751, 24 Ky. L. Rep. 2160; Toledo, etc., R. Co. *v.* Jump, 50 Ohio St. 651, 35 N. E. 1054, construing Rev. St. § 3336.

77. *Illinois.*— Wabash, etc., R. Co. *v.* Neikirk, 15 Ill. App. 172.

Iowa.— Hartman *v.* Chicago, etc., R. Co., 132 Iowa 582, 110 N. W. 10; Defrieze *v.* Illinois Cent. R. Co., (1903) 94 N. W. 505.

Kentucky.— Davis *v.* Chesapeake, etc., R. Co., 116 Ky. 144, 75 S. W. 275, 25 Ky. L. Rep. 342 [opinion in 70 S. W. 857, 24 Ky. L. Rep. 1125, withdrawn]; Early *v.* Louisville, etc., R. Co., 115 Ky. 13, 72 S. W. 348, 24 Ky. L. Rep. 1807; Louisville, etc., R. Co. *v.* Bodine, 109 Ky. 509, 59 S. W. 740, 23 Ky. L. Rep. 147, 56 L. R. A. 506; Louisville, etc., R. Co. *v.* Survant, 96 Ky. 197, 27 S. W. 999, 16 Ky. L. Rep. 545, 44 S. W. 88, 19 Ky. L. Rep. 1516; Johnson *v.* Louisville, etc., R. Co., 91 Ky. 651, 25 S. W. 754; Hoback *v.* Louisville, etc., R. Co., 99 S. W. 241, 30 Ky. L. Rep. 476, in a sparsely settled neighborhood in the country.

Maryland.—Annapolis, etc., R. Co. *v.* State, 104 Md. 659, 65 Atl. 434; Philadelphia, etc., R. Co. *v.* Fronk, 67 Md. 339, 10 Atl. 204, 307, 1 Am. St. Rep. 390.

Minnesota.— Locke *v.* St. Paul, etc., R. Co., 15 Minn. 350.

Missouri.— Sites *v.* Knott, 197 Mo. 684, 96 S. W. 206 (holding this to be true where the railroad company had not recognized the right of the public to cross the track, and did not by its conduct indicate a recognition of such right); Ayres *v.* Wabash R. Co., 190 Mo. 228, 88 S. W. 608; Maxey *v.* Missouri Pac. R. Co., 113 Mo. 1, 20 S. W. 654.

South Carolina.— Fletcher *v.* South Carolina, etc., R. Co., 57 S. C. 205, 35 S. E. 513; Barber *v.* Richmond, etc., R. Co., 34 S. C. 444, 13 S. E. 630.

United States.— Reynolds *v.* Great Northern R. Co., 69 Fed. 808, 16 C. C. A. 435, 29 L. R. A. 25, holding that N. D. Comp. Laws (1887), § 3016, does not require signals to be given at private crossings, although located on a section line which might under a statute be opened as a road.

See 41 Cent. Dig. tit. "Railroads," § 994.

78. Sanborn *v.* Detroit, etc., R. Co., 91 Mich. 538, 52 N. W. 153, 16 L. R. A. 119, not negligence as a matter of law.

79. Chicago, etc., R. Co. *v.* Sanders, 154 Ill. 531, 39 N. E. 481 [*affirming* 55 Ill. App. 87]; Hartman *v.* Chicago Great Western R. Co., 132 Iowa 582, 110 N. W. 10; Louisville, etc., R. Co. *v.* Bodine, 109 Ky. 509, 59 S. W. 740, 23 Ky. L. Rep. 147, 56 L. R. A. 506; Ayres *v.* Wabash, etc., R. Co., 190 Mo. 228, 88 S. W. 608, holding that, in the absence of statute, the failure of a railroad company to sound a bell or whistle on approaching a private crossing is not negligence *per se* but that whether it is negligence or not depends upon the circumstances of the case.

80. *Iowa.*— Hartman *v.* Chicago Great Western R. Co., 132 Iowa 582, 110 N. W. 10, holding that where a railroad company diverts travel to a private crossing by obstructing a public crossing, the private crossing must so far be treated as a public crossing as to require the use of statutory signals by approaching trains.

Kentucky.— Connell *v.* Chesapeake, etc., R. Co., 58 S. W. 374, 22 Ky. L. Rep. 501, holding that evidence that a certain part of a railroad track had for more than five years been notoriously used as a public passway from one part of the city to the other, with the acquiescence of the railroad company, is admissible to fix a duty upon the company to give signals on the approach of trains at that point and keep a lookout for persons on the track.

Minnesota.— Westaway *v.* Chicago, etc., R. Co., 56 Minn. 28, 5 N. W. 222; Locke *v.* St. Paul, etc., R. Co., 15 Minn. 350, holding that the fact that a railroad company spikes down heavy rails at a railroad crossing is not such a recognition of the public use of the road as will charge it with the duty of giving the statutory signals.

Missouri.— Sites *v.* Knott, 197 Mo. 684, 96 S. W. 206.

Nebraska.—Chicago, etc., R. Co. *v.* Metcalf, 44 Nebr. 848, 63 N. W. 51, 28 L. R. A. 824, holding that Comp. St. c. 16, § 104, relating to signals at railroad crossings, applies to roads used by the public, although not dedicated as public highways.

New York.— Byrne *v.* New York Cent., etc., R. Co., 104 N. Y. 362, 10 N. E. 539, 58 Am. Rep. 512 (holding that at a place where, although not a public highway, there is a crossing constantly and notoriously used as such by the public without objection on the part of the company, the company is bound to give some reasonable warning of the approach of trains, although not absolutely bound to ring a bell or blow a whistle); Cranston *v.* New York Cent., etc., R. Co., 57 Hun 590, 11 N. Y. Suppl. 215 [*affirmed* in 125 N. Y. 724, 26 N. E. 756]; Nash *v.* New York Cent., etc., R. Co., 51 Hun 594, 4 N. Y. Suppl. 525 [*reversed* on other grounds in 125 N. Y. 715, 26 N. E. 255].

North Carolina.— Hinkle *v.* Richmond, etc., R. Co., 109 N. C. 472, 13 S. E. 884, 26 Am. St. Rep. 581, holding that in the absence of

on the approach of its trains,[81] its failure to give signals thereat, whereby a traveler is injured without any fault on his part, is negligence. It has been held that a person using a private crossing in the vicinity of a public one has a right to rely upon the giving of proper signals at the public crossing, and that if the railroad company fails to give such signals thereat, it is negligence as to such person.[82]

f. Persons Entitled to Benefit of Signals.[83] The duty of giving signals and maintaining lookouts exists not only as to persons who, rightfully approaching the crossing, are on or near the track and in danger of collision,[84] but also as to persons approaching the crossing who may be in danger of their horses becoming

statute regulating the time and manner of giving signals, the failure of an engineer to ring a bell or sound a whistle at a point where the public have been habitually permitted to cross is evidence of negligence.

Texas.— International, etc., R. Co. *v.* Jordan, 1 Tex. App. Civ. Cas. § 859.

Canada.— Keith *v.* Intercolonial Coal Min. Co., 18 Nova Scotia 226.

See 41 Cent. Dig. tit "Railroads," § 994.

81. *Kentucky.*— Early *v.* Louisville, etc., R. Co., 115 Ky. 13, 72 S. W. 348, 24 Ky. L. Rep. 1807; Louisville, etc., R. Co. *v.* Bodine, 109 Ky. 509, 59 S. W. 740, 23 Ky. L. Rep. 147, 56 L. R. A. 506.

Minnesota.— Westaway *v.* Chicago, etc., R. Co., 56 Minn. 28, 57 N. W. 222, holding that where a railroad company has adopted the usual signals at such a crossing it cannot lawfully discontinue them without notice.

New York.— Nash *v.* New York Cent., etc., R. Co., 51 Hun 594, 4 N. Y. Suppl. 525 [*reversed* on other grounds in 125 N. Y. 715, 26 N. E. 266] (holding that where a railroad company has put up the usual signal posts and adopted the custom of giving signals at a certain place, its failure to give such signals is negligence *per se*); Nash *v.* New York Cent., etc., R. Co., 1 N. Y. Suppl. 269 [*affirmed* in 117 N. Y. 628, 22 N. E. 1128].

South Carolina.— See Fletcher *v.* South Carolina, etc., R. Co., 57 S. C. 205, 35 S. E. 513.

Texas.— International, etc., R. Co. *v.* Jordan, 1 Tex. App. Civ. Cas. § 859.

Canada.— Keith *v.* Intercolonial Coal Min. Co., 18 Nova Scotia 226.

See 41 Cent. Dig. tit. "Railroads," § 994.

82. Defrieze *v.* Illinois Cent. R. Co., (Iowa 1903) 94 N. W. 505; Chesapeake, etc., R. Co. *v.* Wilson, 102 S. W. 610, 31 Ky. L. Rep. 500 (although a mile distant); Wilson *v.* Chesapeake, etc., R. Co., 86 S. W. 690, 27 Ky. L. Rep. 778; Sanborn *v.* Detroit, etc., R. Co., 91 Mich. 538, 52 N. W. 153, 16 L. R. A. 119. But see Wabash, etc., R. Co. *v.* Neikirk, 15 Ill. App. 172; Annapolis, etc., R. Co. *v.* State, 104 Md. 659, 65 Atl. 434; Philadelphia, etc., R. Co. *v.* Holden, 93 Md. 417, 49 Atl. 625.

83. Animals and owners thereof entitled to benefit of signals see *infra*, X, H, 7, a.

84. *Illinois.*— Chicago, etc., R. Co. *v.* Pollock, 93 Ill. App. 483 (holding that a person walking upon a highway is entitled to the benefit of the statute requiring signals); Pennsylvania Co. *v.* Backes, 35 Ill. App. 375 [*affirmed* in 133 Ill. 255, 24 N. E. 563] (holding that the liability for failure to give the statutory signals applies where the injuries are caused a few feet from the crossing but still in sight of the highway over which the track is constructed).

Indiana.— Cleveland, etc., R. Co. *v.* Carey, 33 Ind. App. 275, 71 N. E. 244.

Michigan.— Sanborn *v.* Detroit, etc., R. Co., 91 Mich. 538, 52 N. W. 153, 16 L. R. A. 119.

Nebraska.— Chicago, etc., R. Co. *v.* Metcalf, 44 Nebr. 848, 63 N. W. 51, 28 L. R. A. 824.

Texas.— Missouri, etc., R. Co. *v.* Magee, 92 Tex. 616, 50 S. W. 1013 [*affirming* (Civ. App. 1899) 49 S. W. 156]; St. Louis, etc., R. Co. *v.* Matthews, 34 Tex. Civ. App. 302, 79 S. W. 71, pedestrians.

Canada.— Grand Trunk R. Co. *v.* Rosenberger, 9 Can. Sup. Ct. 311 [*affirming* 8 Ont. App. 482 (*affirming* 32 U. C. C. P. 349)].

See 41 Cent. Dig. tit. "Railroads," § 996.

That the person was not standing on the intersection between the railroad and the highway but had diverged from the line of the highway and was therefore a trespasser on the company's grounds does not excuse the railroad company from failure to ring a bell or sound a whistle on approaching the highway crossing as required by statute. Toledo, etc., R. Co. *v.* Furgusson, 42 Ill. 449; Missouri, etc., R. Co. *v.* Taff, 31 Tex. Civ. App. 657, 74 S. W. 89, holding that where plaintiff was rightfully on defendant's track, within several hundred feet of a crossing, and near enough to the crossing to have had the benefit of signals prescribed by statute, had they been given, the fact that he was not directly upon the crossing will not preclude a recovery.

Persons traveling on another road or street within the limits of a city or village are not entitled to the signals required by a statute providing that where a railroad company fails to sound the whistle of one of its engines at least eighty rods distant from the place where the engine is to cross a public road or street outside of a city or village, it is negligence as to persons who may be traveling upon that road or street. Clark *v.* Missouri Pac. R. Co., 35 Kan. 350, 11 Pac. 134; Missouri Pac. R. Co. *v.* Pierce, 33 Kan. 61, 5 Pac. 378.

That one reaches a public crossing by walking on the right of way between the tracks does not deprive him of the safeguards of signals demanded of the company for a person crossing the railroad on such public crossing. Bowles *v.* Chesapeake, etc., R. Co., 61 W. Va. 272, 57 S. E. 131.

frightened.[85] But since the purpose of signals is to give notice of the approach of trains to the crossing a failure to give the usual or statutory signals is not negligence as to one who is warned of,[86] or hears or sees, or by the exercise of reasonable diligence might hear or see,[87] the approaching train and by the exercise of reasonable care avoid the injury.

g. To What Trains or Cars Applicable. The above rules or statutes requiring signals, lights, etc., at crossings apply to all trains, engines, or cars, except handcars,[88] moving at or toward a public crossing, especially where the train is running behind time,[89] or is an irregular one.[90] Such rules or statutes apply to backing trains or running unattended cars,[91] and to "kicking" cars and making "flying switches" [92] over crossings, to starting up trains or cars which have been standing on or near a crossing,[93] and to shunting or switching in a railroad yard.[94] The statutes requiring the whistle or bell to be sounded at least eighty rods from a crossing apply to trains which start from a point less than that distance from the crossing,[95] as in shunting or other temporary movements.[96]

h. Obstructions of View or Hearing.[97] The duty of those in charge of an approaching train or locomotive to give a signal or warning of its approach to a public crossing, and the failure to give which constitutes negligence, exists particularly where the view or hearing of those in charge of the engine or of persons approaching along the highway is obstructed by obstructions at or near the crossing,[98]

85. See *supra*, X, F, 4.

86. Atchison, etc., R. Co. *v.* Judah, 65 Kan. 474, 70 Pac. 346.

87. Chicago, etc., R. Co. *v.* Vremeister, 112 Ill. App. 346; Hutchinson *v.* Missouri Pac. R. Co., 161 Mo. 246, 61 S. W. 635, 852, 84 Am. St. Rep. 710 (holding that it is immaterial that the statutory signal by bell was not given as to one who heard and recognized the whistle, and saw the headlight); Gosa *v.* Southern R. Co., 67 S. C. 347, 45 S. E. 810; Atlantic, etc., R. Co. *v.* Reiger, 95 Va. 418, 28 S. E. 590.

88. Louisville, etc., R. Co. *v.* Howerton, 72 S. W. 760, 24 Ky. L. Rep. 1905.

89. Guggenheim *v.* Lake Shore, etc., R. Co., 66 Mich. 150, 33 N. W. 161, holding that the fact that the train is off time increases the obligation to give such additional warnings of its approach to the street crossing as will afford persons in the street, who are not aware that it is off time, opportunity to guard against danger more carefully than they would from regular trains running on schedule time.

90. Roberts *v.* Alexandria, etc., R. Co., 83 Va. 312, 2 S. E. 518, holding that it is negligence to run an irregular train at an unusual and unexpected time across a public highway without signaling its approach.

91. See *supra*, X, F, 6, c.

A train of cars without an engine is not within Ind. Rev. St. (1881) § 4020, providing that where a locomotive engine approaches a highway crossing, the whistle shall be sounded and the bell rung continuously until the engine shall have passed the crossing. Ohio, etc., R. Co. *v.* McDaneld, 5 Ind. App. 108, 31 N. E. 836.

92. See *supra*, X, F, 6, b.

93. Cleveland, etc., R. Co. *v.* Keely, 138 Ind. 600, 37 N. E. 406; Ohio, etc., R. Co. *v.* Hill, 7 Ind. App. 255, 34 N. E. 646; Atchison, etc., R. Co. *v.* Plaskett, 47 Kan. 107, 112, 26 Pac. 401, 403, 27 Pac. 824; Sites *v.* Knott, 197 Mo. 684, 96 S. W. 206; Thompson *v.* Missouri, etc., R. Co., 93 Mo. App. 548, 67 S. W. 693; Schmitz *v.* St. Louis, etc., R. Co., 46 Mo. App. 380, 119 Mo. 256, 24 S. W. 472, 23 L. R. A. 250; Weaver *v.* Southern R. Co., 76 S. C. 49, 56 S. E. 657, 121 Am. St. Rep. 934. And see *supra*, X, F, 3, f.

94. Killian *v.* Chicago, etc., R. Co., 86 Mo. App. 473, holding, however, that the mere failure to give proper signals of the movements of an engine in a railroad yard will not create a liability for an injury, unless the failure is the proximate cause of the injury. But see Casey *v.* Canadian Pac. R. Co., 15 Ont. 574, holding that the statutory obligation to ring a bell or sound a whistle applies only to a highway crossing and not to an engine shunting on defendant's own premises.

95. Lake Shore, etc., R. Co. *v.* Johnsen, 135 Ill. 641, 26 N. E. 510; Herring *v.* Wabash R. Co., 80 Mo. App. 562; Littlejohn *v.* Richmond, etc., R. Co., 45 S. C. 181, 22 S. E. 789; Gulf, etc., R. Co. *v.* Hall, 34 Tex. Civ. App. 535, 80 S. W. 133; Ft. Worth, etc., R. Co. *v.* Greer, 32 Tex. Civ. App. 606, 75 S. W. 552; Central Texas, etc., R. Co. *v.* Nycum, (Tex. Civ. App. 1896) 34 S. W. 460.

For an engine to stop and move in the direction from which it has come at a distance of less than eighty roads from the street it has last crossed is not unlawful under Rev. St. (1809) providing that the whistle shall be blown eighty rods before a locomotive crosses a street. Cahoon *v.* Chicago, etc., R. Co., 85 Wis. 570, 55 N. W. 900.

96. Canada Atlantic R. Co. *v.* Henderson, 29 Can. Sup. Ct. 632 [*affirming* 25 Ont. App. 437].

97. Obstructions of view or hearing as negligence in general see *supra*, X, F, 3, g.

98. *California.*— Bilton *v.* Southern Pac. R. Co., 148 Cal. 443, 83 Pac. 440.

especially where such obstructions are caused or permitted by the railroad company itself.[99] A failure to give a signal or warning under such circumstances may constitute negligence although such signals are not required by statute or ordinance,[1] or the crossing is a private one,[2] and although those in charge of the engine use all possible efforts to stop the train.[3] If the obstruction is such that the sound of the bell and the whistle is obstructed, the railroad company is bound to employ some more efficient means of warning.[4]

1. Effect of Violation of Statutes or Ordinances.[5] By some decisions the failure of a railroad company to give the statutory signals and warnings on approaching a crossing is *prima facie* evidence of negligence,[6] and by others merely

Illinois.— Peoria, etc., R. Co. *v.* Siltman, 88 Ill. 529; Chicago, etc., R. Co. *v.* Triplett, 38 Ill. 482.

New York.— McSorley *v.* New York Cent., etc., R. Co., 60 N. Y. App. Div. 267, 70 N. Y. Suppl. 10; Heaney *v.* Long Island R. Co., 9 N. Y. St. 707.

Texas.— International, etc., R. Co. *v.* Knight, (Civ. App. 1898) 45 S. W. 167.

United States.— Northern Pac. R. Co. *v.* Spike, 121 Fed. 44, 57 C. C. A. 384, holding that where the view is entirely cut off by an embankment, it is imperatively necessary for the safety of travelers that trains give the statutory signals on approaching the crossing.

See 41 Cent. Dig. tit. "Railroads," § 1001.

Where obstructions to the view are permitted on the right of way, it is the duty of the railroad company to operate its trains with reference to such obstructions and in such manner that travelers crossing the track from the highway from which the view is so obstructed may by the exercise of ordinary care avoid injury from such trains. Chicago, etc., R. Co. *v.* Hinds, 56 Kan. 758, 44 Pac. 993; Weaver *v.* Columbus, etc., R. Co., 76 Ohio St. 164, 81 N. E. 180; Southern R. Co. *v.* Jones, 106 Va. 412, 56 S. E. 155.

99. *Iowa.*—Funston *v.* Chicago, etc., R. Co., 61 Iowa 452, 16 N. W. 518.

Kentucky.— Illinois Cent. R. Co. *v.* Morris, 90 S. W. 979, 28 Ky. L. Rep. 956, train standing on side-track.

Michigan.— Guggenheim *v.* Lake Shore, etc., R. Co., 66 Mich. 150, 32 N. W. 161, holding that the placing of cars so as to interrupt the view imposes upon the railroad company the duty of giving such additional warning as the danger thus increased may require.

North Carolina.— Hinkle *v.* Richmond, etc., R. Co., 109 N. C. 472, 13 S. E. 884, 26 Am. St. Rep. 581, holding that for a moving train to omit to give, within a reasonable time, some signal when approaching a highway from which the train is hidden by an embankment, cut, or curve is negligence *per se*.

Ohio.— Hine *v.* Erie R. Co., 27 Ohio Cir. Ct. 155. In this state it is held that where the obstruction is such as the railroad company has no control over, as in the case of trees, weeds, brush, shrubbery and the like, not on the right of way, it is not required to take them into consideration when approaching a crossing. New York, etc., R. Co. *v.* Kistler, 66 Ohio St. 326, 64 N. E. 130.

Texas.— Missouri Pac. R. Co. *v.* Lee, 70 Tex. 496, 7 S. W. 857; Houston, etc., R. Co. *v.* Poras, (Civ. App. 1895) 29 S. W. 945.

Wisconsin.— Roberts *v.* Chicago, etc., R. Co., 35 Wis. 679.

See 41 Cent. Dig. tit. "Railroads," § 1001.

1. Guggenheim *v.* Lake Shore, etc., R. Co., 66 Mich. 150, 33 N. W. 161; Eilert *v.* Greenbay, etc., R. Co., 48 Wis. 606, 4 N. W. 769; Thomas *v.* Delaware, etc., R. Co., 8 Fed. 729, 19 Blatchf. 533.

2. Thomas *v.* Delaware, etc., R. Co., 8 Fed. 729, 19 Blatchf. 533, holding that the jury may find it to be negligence to omit to ring a bell when approaching a private crossing at a high rate of speed, at a time when a view of the train is so obstructed by cars on a side track as to render the use of the crossing peculiarly hazardous.

3. Houston, etc., R. Co. *v.* Poras, (Tex. Civ. App. 1895) 29 S. W. 945.

4. Roberts *v.* Chicago, etc., R. Co., 35 Wis. 679.

5. **Presumptions and burden of proof** see *infra*, X, F, 14, e, (I), (C).

6. Walsh *v.* Boston, etc., R. Co., 171 Mass. 52, 50 N. E. 453, holding that it will be presumed in the absence of evidence to the contrary that the failure of a railroad company to give the required signals at a crossing contributes to an accident occurring there.

In Illinois the failure on the part of a railroad company to give the statutory signals when approaching a crossing is *prima facie* evidence of negligence (Chicago, etc., R. Co. *v.* Elmore, 67 Ill. 176; Galena, etc., R. Co. *v.* Loomis, 13 Ill. 538, 56 Am. Dec. 471; Elgin, etc., R. Co. *v.* Hoadley, 122 Ill. App. 165 [*affirmed* in 220 Ill. 462, 77 N. E. 151]; Mobile, etc., R. Co. *v.* Dugan, 103 Ill. App. 371; Terre Haute, etc., R. Co. *v.* Barr, 31 Ill. App. 57; Terre Haute, etc., R. Co. *v.* Black, 18 Ill. App. 45); although it is not sufficient of itself to render the railroad company liable (Chicago, etc., R. Co. *v.* Lee, 68 Ill. 576); but it must appear by just inference from the evidence that the injury was caused by such negligence (Chicago, etc., R. Co. *v.* Lee, *supra*). If such failure results in the injury complained of it is negligence *per se* (Terre Haute, etc., R. Co. *v.* Voelker, 129 Ill. 540, 22 N. E. 20 [*affirming* 31 Ill. App. 314]). In some cases such failure has been held to be gross negligence. Indianapolis,

evidence of negligence to be considered by the jury in connection with other circumstances.[7] By the great weight of authority, however, such failure is negligence *per se*, and the railroad company is liable therefor;[8] although such failure will not necessarily warrant a recovery by a person injured,[9] as the person injured must himself be in the exercise of reasonable care and prudence at the time of

etc., R. Co. *v.* Stables, 62 Ill. 313; Ohio, etc., R. Co. *v.* Eaves, 42 Ill. 288.

That the signal was not given in the manner required by statute is to be considered in connection with the peculiar mode in which the train was made up, the high rate of speed at which it was running, the dangerous character of the crossing, and the fact that the engineer saw the vehicle in which the person injured was riding approaching on the highway at the time the signal should have been given. Chicago, etc., R. Co. *v.* Triplett, 38 Ill. 482.

7. Kelsall *v.* New York, etc., R. Co., 196 Mass. 554, 82 N. E. 674; Giacomo *v.* New York, etc., R. Co., 196 Mass. 192, 81 N. E. 899; Chicago, etc., R. Co. *v.* Brady, 51 Nebr. 758, 71 N. W. 721; Missouri Pac. R. Co. *v.* Geist, 49 Nebr. 489, 68 N. W. 640; Omaha, etc., R. Co. *v.* Talbot, 48 Nebr. 627, 67 N. W. 599 (holding that the failure of a railroad company to cause a bell to be rung or whistle sounded as its engine approaches a crossing is evidence which tends to prove negligence on the part of the railroad company, but does not necessarily demand an inference of negligence); Omaha, etc., R. Co. *v.* O'Donnell, 22 Nebr. 475, 35 N. W. 235; Tucker *v.* Boston, etc., R. Co., 73 N. H. 132, 59 Atl. 943; Evans *v.* Concord R. Corp., 66 N. H. 194, 21 Atl. 105; Ernst *v.* Hudson River R. Co., 35 N. Y. 9, 90 Am. Dec. 761, 3 Abb. Pr. N. S. 82, 32 How. Pr. 61; McSorley *v.* New York Cent., etc., R. Co., 60 N. Y. App. Div. 267, 70 N. Y. Suppl. 10. See also Hine *v.* Erie R. Co., 27 Ohio Cir. Ct. 155.

Under N. Y. Pen. Code, § 421, providing that an engineer who fails to ring the bell or sound the whistle eighty rods before crossing a highway shall be guilty of a misdemeanor, the duty of giving such signals is imposed solely on the engineer, and his failure to give them is not negligence in law on the part of the railroad company. Vandewater *v.* New York, etc., R. Co., 135 N. Y. 583, 32 N. E. 636, 18 L. R. A. 771; Petrie *v.* New York Cent., etc., R. Co., 66 Hun 282, 21 N. Y. Suppl. 159.

8. *Georgia.*— Brunswick, etc., R. Co. *v.* Hoover, 74 Ga. 426; Atlanta, etc., R. Co. *v.* Wyly, 65 Ga. 120. *Compare* Combs *v.* Georgia R., etc., Co., 115 Ga. 1020, 42 S. E. 383.

Indiana.— Greenawaldt *v.* Lake Shore, etc., R. Co., 165 Ind. 219, 73 N. E. 910, 74 N. E. 1081; Baltimore, etc., R. Co. *v.* Peterson, 156 Ind. 364, 59 N. E. 1044; Baltimore, etc., R. Co. *v.* Conover, 149 Ind. 524, 48 N. E. 352, 49 N. E. 452; Baltimore, etc., R. Co. *v.* Walborn, 127 Ind. 142, 26 N. E. 207; Cincinnati, etc., R. Co. *v.* Butler, 103 Ind. 31, 2 N. E. 138; Chicago, etc., R. Co. *v.* Boggs, 101 Ind. 522; New York, etc., R. Co. *v.* Robbins, 38 Ind. App. 172, 76 N. E. 804; Baltimore, etc., R. Co. *v.* Reynolds, 33 Ind. App. 219, 71 N. E. 250; Pittsburgh, etc., R. Co. *v.* Shaw, 15 Ind. App. 173, 43 N. E. 957; Cincinnati, etc., R. Co. *v.* Grames, 8 Ind. App. 112, 34 N. E. 613, 37 N. E. 421.

Kansas.—Leavenworth, etc., R. Co. *v.* Rice, 10 Kan. 426.

Kentucky.— Cincinnati, etc., R. Co. *v.* Champ, 104 S. W. 988, 31 Ky. L. Rep. 1054.

Missouri.— Petty *v.* Hannibal, etc., R. Co., 88 Mo. 306; Johnson *v.* Chicago, etc., R. Co., 77 Mo. 546; Weinstein *v.* Toledo, etc., R. Co., 128 Mo. App. 224, 106 S. W. 1125; Reed *v.* St. Louis, etc., R. Co., 107 Mo. App. 238, 80 S. W. 919; Gass *v.* Missouri Pac. R. Co., 57 Mo. App. 574; McNown *v.* Wabash R. Co., 55 Mo. App. 585. See also Huckshold *v.* St. Louis, etc., R. Co., 90 Mo. 548, 2 S. W. 794.

Montana.— Hunter *v.* Montana Cent. R. Co., 22 Mont. 525, 57 Pac. 140.

South Carolina.— Davis *v.* Southern R. Co., 68 S. C. 446, 47 S. E. 723; Mercer *v.* Southern R. Co., 66 S. C. 246, 44 S. E. 750; Burns *v.* Southern R. Co., 65 S. C. 229, 43 S. E. 679; Davis *v.* Atlanta, etc., R. Co., 63 S. C. 370, 577, 41 S. E. 468, 892; Hutto *v.* South Bound R. Co., 61 S. C. 495, 39 S. E. 710; Bowen *v.* Southern R. Co., 58 S. C. 222, 36 S. E. 590; Strother *v.* South Carolina, etc., R. Co., 47 S. C. 375, 25 S. E. 272; Petrie *v.* Columbia, etc., R. Co., 29 S. C. 303, 7 S. E. 515.

Texas.— Houston, etc., R. Co. *v.* Wilson, 60 Tex. 142; Texas, etc., R. Co. *v.* Howard, 2 Tex. Unrep. Cas. 429; Galveston, etc., R. Co. *v.* Vollrath, 40 Tex. Civ. App. 46, 89 S. W. 279; McKerley *v.* Red River, etc., R. Co., (Civ. App. 1905) 85 S. W. 499, 99 Tex. 16, 86 S. W. 921; Missouri, etc., R. Co. *v.* Matherly, 35 Tex. Civ. App. 604, 81 S. W. 589; Houston, etc., R. Co. *v.* Rogers, 15 Tex. Civ. App. 680, 39 S. W. 1112; Gulf, etc., R. Co. *v.* Calvert, 11 Tex. Civ. App. 297, 32 S. W. 246; Texas, etc., R. Co. *v.* Anderson, 2 Tex. App. Civ. Cas. § 203. See also Gulf, etc., R. Co. *v.* Breitling, (1890) 12 S. W. 1121.

Utah.— Bitner *v.* Utah Cent. R. Co., 4 Utah 502, 11 Pac. 620.

Wisconsin.— Brown *v.* Chicago, etc., R. Co., 109 Wis. 384, 85 N. W. 271.

United States.— Lapsley *v.* Union Pac. R. Co., 50 Fed. 172.

See 41 Cent. Dig. tit. "Railroads," § 1002.

Such omission may in some cases be gross negligence; in others negligence simply. Leavenworth, etc., R. Co. *v.* Rice, 10 Kan. 426.

9. Brown *v.* Chicago, etc., R. Co., 109 Wis. 384, 85 N. W. 271.

the accident,[10] and if he is not and his negligence contributes to the accident as the proximate cause of the injury, the railroad company may explain its omission and show that under the peculiar circumstances it did not constitute negligence.[11]

j. Effect of Compliance With Statutes or Ordinances. The giving of signals or warnings required by statutes or ordinances in the manner prescribed ordinarily absolves the railroad company from negligence as far as such signals are concerned.[12] But such statutes or ordinances being generally intended merely to prescribe the minimum care which must be observed in all cases,[13] the fact that the railroad company has given such signals does not absolve it from giving such other and additional signals or warnings as ordinary care and prudence would dictate under the circumstances of the particular case,[14] the number and

10. Johnson *v.* Chicago, etc., R. Co., 77 Mo. 546; Mercer *v.* Southern R. Co., 66 S. C. 246, 44 S. E. 750.

11. Baltimore, etc., R. Co. *v.* Peterson, 156 Ind. 364, 59 N. E. 1044; Baltimore, etc., R. Co. *v.* Conoyer, 149 Ind. 524, 48 N. E. 352, 49 N. E. 452; Burns *v.* Southern R. Co., 65 S. C. 229, 43 S. E. 679; Davis *v.* Atlanta, etc., R. Co., 63 S. C. 370, 41 S. E. 468, 892; Hutto *v.* South Bound R. Co., 61 S. C. 495, 39 S. E. 710; Strother *v.* South Carolina, etc., R. Co., 47 S. C. 375, 25 S. E. 272.

12. Tessmer *v.* New York, etc., R. Co., 72 Conn. 208, 44 Atl. 88; Dyson *v.* New York, etc., R. Co., 57 Conn. 9, 17 Atl. 137, 14 Am. St. Rep. 82 (holding that the required danger signals having been given defendant is not negligent in not slackening speed and in not providing other signals in addition to those required by statute; the statutes specifically providing what signals shall be given and instructing the railroad commissioners to require other signals when they shall deem them necessary); Chicago, etc., R. Co. *v.* Dougherty, 110 Ill. 521 [*reversing* 14 Ill. App. 196]; Cox *v.* Chicago, etc., R. Co., 92 Ill. App. 15; Louisville, etc., R. Co. *v.* Ueltschi, 97 S. W. 14, 29 Ky. L. Rep. 1136; Hackett *v.* New York, etc., R. Co., 58 N. J. L. 4, 32 Atl. 265; New York, etc., R. Co. *v.* Leaman, 54 N. J. L. 202, 23 Atl. 691, 15 L. R. A. 426.

It is immaterial whether such signals are heard or heeded by persons attempting to cross, as the statute does not require the giving of such signals so as to enable others absolutely to ascertain the approach of the train or cars. Cox *v.* Chicago, etc., R. Co., 92 Ill. App. 15; New York, etc., R. Co. *v.* Leaman, 54 N. J. L. 202, 23 Atl. 691, 15 L. R. A. 426.

13. Missouri Pac. R. Co. *v.* Moffatt, 56 Kan. 667, 44 Pac. 607. See English *v.* Southern Pac. R. Co., 13 Utah 407, 45 Pac. 47, 57 Am. St. Rep. 772, 35 L. R. A. 155, holding that such a statute or ordinance does not fix the maximum measure of care to be exercised by the company at crossings.

14. *Connecticut.*— Tessmer *v.* New York, etc., R. Co., 72 Conn. 208, 44 Atl. 38.

Illinois.— Indianapolis, etc., R. Co. *v.* Stables, 62 Ill. 313.

Kansas.— Missouri Pac. R. Co. *v.* Moffatt, 56 Kan. 667, 44 Pac. 607; Atchison, etc., R. Co. *v.* Hague, 54 Kan. 284, 38 Pac. 257, 45 Am. St. Rep. 278.

Kentucky.— Southern R. Co. *v.* Winchester, 105 S. W. 167, 32 Ky. L. Rep. 19; Louisville, etc., R. Co. *v.* Lucas, 98 S. W. 308, 99 S. W. 959, 30 Ky. L. Rep. 359, 539.

Louisiana.— Ortolano *v.* Morgan Louisiana, etc., R., etc., Co., 109 La. 902, 33 So. 914, holding that persons in charge of a train do not discharge their whole duty by giving the statutory warning at a crossing where special circumstances call for additional warnings and signals.

Massachusetts.— Linfield *v.* Old Colony R. Corp., 10 Cush. 562, 57 Am. Dec. 124; Bradley *v.* Boston, etc., R. Co., 2 Cush. 539, holding that a compliance with the provisions of Rev. St. c. 39, §§ 78, 79, respecting the putting up of notices at railroad crossings and the ringing of a bell when engines are passing over the same, will not exempt the proprietors of a railroad company from their obligation to use reasonable care and diligence in other respects if the circumstances of the case render the use of other precautions reasonable.

Missouri.—Burger *v.* Missouri Pac. R. Co., 112 Mo. 238, 20 S. W. 439, 34 Am. St. Rep. 379.

New York.— Thompson *v.* New York Cent., etc., R. Co., 110 N. Y. 636, 17 N. E. 690; Dyer *v.* Erie R. Co., 71 N. Y. 228; Weber *v.* New York Cent., etc., R. Co., 67 N. Y. 587; Zimmer *v.* New York Cent., etc., R. Co., 7 Hun 52 [*affirmed* in 67 N. Y. 601]; Lindeman *v.* New York Cent., etc., R. Co., 11 N. Y. St. 837. But *compare* Grippen *v.* New York Cent., etc., R. Co., 40 N. Y. 34; Beisiegel *v.* New York Cent., etc., R. Co., 40 N. Y. 9.

North Dakota.—Coulter *v.* Great Northern R. Co., 5 N. D. 568, 67 N. W. 1046, holding that such statutes or ordinances are not the sole measure of the duty of a railroad company to protect persons and property at crossings and do not change the company's common-law obligation.

Ohio.— Wheeling, etc., R. Co. *v.* Parker, 29 Ohio Cir. Ct. 1.

Pennsylvania.— Bickel *v.* Pennsylvania R. Co., 217 Pa. St. 456, 66 Atl. 756.

South Carolina.— Kaminitsky *v.* Northeastern R. Co., 25 S. C. 53.

Texas.— Calhoun *v.* Gulf, etc., R. Co., 84

kind of signals required depending upon the character of the crossing, the speed of the train, and the surrounding circumstances, and being a question for the jury.[15] Under ordinary circumstances, in the open country, it will ordinarily be sufficient to give the signals required by statute.[16] Where, however, the crossing is a dangerous one, and where the road is constructed in such a way and place as to make it more than usually difficult to see the train and hear the signals which are given, additional signals may be required.[17]

k. Excuses For Failure to Give Signals. It is no excuse for a failure to give proper signals and warnings that the person injured had failed to hear or regard signals when given at a more remote point,[18] and might not have heard the signals if given,[19] or would not have understood them if heard;[20] or that travelers could inform themselves by other means of an approaching train;[21] or that the train made sufficient noise to warn the injured party of his danger, without also proving that he actually heard the noise in time to escape injury;[22] or that the engineer's attention at the time was given to some of the machinery,[23] unless such attention was required on account of an unexpected emergency.[24] Nor is it an excuse that another train was passing at the time on a different track,[25] or was obstructing the crossing;[26] or that gates were lowered over the highway at the

Tex. 226, 19 S. W. 341; Texas, etc., R. Co. *v.* Howard, 2 Tex. Unrep. Cas. 429, holding that the statutory requirement that a railroad company shall give signals on approaching a highway crossing is not the measure of care required of it and it will be liable for injuries resulting from its culpable negligence, although the signals were properly given.

Utah.— English *v.* Southern Pac. Co., 13 Utah 407, 45 Pac. 47, 57 Am. St. Rep. 772, 35 L. R. A. 155.

United States.— Clark *v.* Canadian Pac. R. Co., 69 Fed. 543; Chicago, etc., R. Co. *v.* Netolicky, 67 Fed. 665, 14 C. C. A. 615; Morris *v.* Chicago, etc., R. Co., 26 Fed. 22.

See 41 Cent. Dig. tit. "Railroads," § 1004.

Even a strictly literal compliance with the statute may not be enough where the circumstances are such that the highest degree of diligence may justly be required of a railroad company, especially where it is apparent that such compliance may be ineffectual (Andrews *v.* New York, etc., R. Co., 60 Conn. 293, 22 Atl. 566; Bates *v.* New York, etc., R. Co., 60 Conn. 259, 22 Atl. 538; Rowen *v.* New York, etc., R. Co., 59 Conn. 364, 21 Atl. 1073); or where the duty which the statute was intended to enforce did not originate in and is not measured by the statute but existed at common law (Bates *v.* New York, etc., R. Co., *supra*).

Where a compliance with the statute is rendered impracticable by reason of the changed conditions or changed construction of its engines, some substitute for that precaution must be provided by the company. Baltimore, etc., R. Co. *v.* Mali, 66 Md. 53, 5 Atl. 87.

15. Missouri Pac. R. Co. *v.* Moffatt, 56 Kan. 667, 44 Pac. 607; Thompson *v.* New York, etc., R. Co., 110 N. Y. 636, 17 N. E. 690; Lindeman *v.* New York Cent., etc., R. Co., 11 N. Y. St. 837. But see Grippen *v.* New York Cent. R. Co., 40 N. Y. 34; Beisiegel *v.* New York Cent. R. Co., 40 N. Y. 9.

16. Missouri Pac. R. Co. *v.* Moffatt, 56 Kan. 667, 44 Pac. 607.

17. Missouri Pac. R. Co. *v.* Moffatt, 56 Kan. 667, 44 Pac. 607.

18. Chicago, etc., R. Co. *v.* Triplett, 38 Ill. 482; Pittsburgh, etc., R. Co. *v.* Burton, 139 Ind. 357, 37 N. E. 150, 38 N. E. 594.

19. Lamb *v.* Missouri Pac. R. Co., 147 Mo. 171, 48 S. W. 659, 51 S. W. 81, holding that a railroad company is not absolved from liability for failure to ring a bell on a mere conjecture that the person injured would not have heard it because of the noise or confusion incident to the passing of another train over the crossing immediately before the accident.

20. Palmer *v.* Missouri Pac. R. Co., 53 Nebr. 611, 74 N. W. 66, holding that the railroad company is liable where the bell is not rung or the whistle sounded, although the injured party, by reason of her tender age, could not understand the meaning of such signals.

21. Chicago, etc., R. Co. *v.* Triplett, 38 Ill. 482.

22. Faust *v.* Philadelphia, etc., R. Co., 191 Pa. St. 420, 43 Atl. 329 (holding that it is no excuse that the rumbling of the train was so great that it could be heard for more than one-half a mile away); Missouri, etc., R. Co. *v.* Taff, 31 Tex. Civ. App. 657, 74 S. W. 89.

23. Petrie *v.* Columbia, etc., R. Co., 29 S. C. 303, 7 S. E. 515.

24. Petrie *v.* Columbia, etc., R. Co., 29 S. C. 303, 7 S. E. 515.

25. Chicago, etc., R. Co. *v.* Wilson, 133 Ill. 55, 24 N. E. 555, holding that the passing of a train on one of several parallel tracks is no notice that another train is approaching on a different track.

26. Brown *v.* Griffin, 71 Tex. 654, 9 S. W. 546, holding that an engineer running an

crossing at the time;[27] or that upon discovery of the traveler's peril all possible efforts were made to avoid the injury, which, however, could not then be averted;[28] nor is the failure to sound a signal at the distance required by statute cured by sounding it at a shorter distance.[29]

8. Rate of Speed and Control of Trains — a. Rate of Speed in General. In the absence of statutory or municipal regulations a railroad company has the right to use its discretion in establishing the speed of its trains,[30] and generally no rate of speed consistent with the safety of passengers and freight is negligence *per se*.[31] But under the rule of the common law that a railroad company is required to exercise its franchise with due regard to the safety of its passengers and such persons as may travel on a highway crossing railroad tracks, it is the duty of a railroad company in establishing the rate of speed at which its trains may be run, to exercise due regard not only to the safety of passengers, but also to all persons in the exercise of ordinary care traveling on the highway across its tracks,[32]

engine over a crossing from a side-track is not excused from ringing the bell and blowing the whistle by the fact that a train of cars standing on the main track obstructs the crossing.

27. Weaver *v.* Southern R. Co., 76 S. C. 49, 56 S. E. 657, 49 Am. St. Rep. 934, construing Civ. Code (1902), §§ 2132, 2139.

28. Cleveland, etc., R. Co. *v.* Carey, 33 Ind. App. 275, 71 N. E. 244; Ortolano *v.* Morgan's Louisiana, etc., R., etc., Co., 109 La. 902, 33 So. 914.

29. Atlantic, etc., R. Co. *v.* Rieger, 95 Va. 418, 28 S. E. 590.

30. Reed *v.* Queen Anne's R. Co., 4 Pennew. (Del.) 413, 57 Atl. 529; Partlow *v.* Illinois Cent. R. Co., 150 Ill. 321, 37 N. E. 663; Toledo, etc., R. Co. *v.* Smart, 116 Ill. App. 523; Boyd *v.* Chicago, etc., R. Co., 103 Ill. App. 199; Landon *v.* Chicago, etc., R. Co., 92 Ill. App. 216; Salter *v.* Utica, etc., R. Co., 88 N. Y. 42.

31. *Connecticut.*— Dyson *v.* New York, etc., R. Co., 57 Conn. 9, 17 Atl. 137, 14 Am. St. Rep. 82.

Illinois.— Partlow *v.* Illinois Cent. R. Co., 150 Ill. 321, 37 N. E. 663 [*affirming* 51 Ill. App. 597]; Chicago, etc., R. Co. *v.* Jamieson, 112 Ill. App. 69; Boyd *v.* Chicago, etc., R. Co., 103 Ill. App. 199 (holding that high speed is not negligence as a matter of law); Cox *v.* Chicago, etc., R. Co., 92 Ill. App. 15; Chicago, etc., R. Co. *v.* Florens, 32 Ill. App. 365; Chicago, etc., R. Co. *v.* Givens, 18 Ill. App. 404; Wabash, etc., R. Co. *v.* Neikirk, 15 Ill. App. 172.

Indiana.— Terre Haute, etc., R. Co. *v.* Clark, 73 Ind. 168.

Iowa.—Artz *v.* Chicago, etc., R. Co., 44 Iowa 284; McKonkey *v.* Chicago, etc., R. Co., 40 Iowa 205.

Maine.— Grows *v.* Maine Cent. R. Co., 67 Me. 100.

Maryland.— Hatcher *v.* McDermott, 103 Md. 78, 63 Atl. 214.

Missouri.— Young *v.* Hannibal, etc., R. Co., 79 Mo. 336; Powell *v.* Missouri Pac. R. Co., 76 Mo. 80.

New York.— Warner *v.* New York Cent. R. Co., 44 N. Y. 465; Hunt *v.* Fitchburg R. Co., 22 N. Y. App. Div. 212, 47 N. Y. Suppl. 1034

North Carolina.— Edwards *v.* Atlantic Coast Line R. Co., 129 N. C. 78, 39 S. E. 730.

Ohio.— New York, etc., R. Co. *v.* Kistler, 66 Ohio St. 326, 64 N. E. 130; Watson *v.* Erie R. Co., 10 Ohio S. & C. Pl. Dec. 454, 8 Ohio N. P. 18.

Texas.— McDonald *v.* International, etc., R. Co., 86 Tex. 1, 22 S. W. 939, 40 Am. St. Rep. 803 [*reversing* (Civ. App. 1892) 20 S. W. 847].

Virginia.— New York, etc., R. Co. *v.* Kellam, 83 Va. 851, 3 S. E. 703, holding that the mere speed of a train at a crossing and the fact that it is behind hand are not *per se* evidences of negligence.

Canada.— Grand Trunk R. Co. *v.* Daoust, 14 Quebec K. B. 548, no statutory obligation to slacken speed.

See 41 Cent. Dig. tit. "Railroads," § 1006.

32. *Alabama.*— South Alabama, etc., R. Co. *v.* Thompson, 62 Ala. 494, holding that a railroad train approaching a public crossing must not only give warnings and observe the other precautions required by statute, but the speed must be so slackened that the train may be more manageable in passing the crossing.

Delaware.— Reed *v.* Queen Anne's R. Co., 4 Pennew. 413, 57 Atl. 529.

Florida.— Seaboard Air Line R. Co. *v.* Smith, 53 Fla. 375, 43 So. 235, holding that there is no rule of law that it is not negligence to run a train within a city over a street crossing at twenty miles an hour if the bell is rung and the engine is under control and the engineer exercises such diligence as is necessary under the ordinary necessities of the company's business.

Illinois.— Partlow *v.* Illinois Cent. R. Co., 150 Ill. 321, 37 N. E. 663; Wabash R. Co. *v.* Henks, 91 Ill. 406; Rockford, etc., R. Co. *v.* Hillmer, 72 Ill. 235 (holding that railroad companies must so regulate the speed of their trains in crossing public highways that persons passing may avoid injury); Toledo, etc., R. Co. *v.* Smart, 116 Ill. App. 523; Boyd *v.* Chicago, etc., R. Co., 103 Ill. App. 199; Landon *v.* Chicago, etc., R. Co., 92 Ill. App. 216; Chicago, etc., R. Co. *v.* Tilton, 26 Ill. App. 362.

Kentucky.— Cincinnati, etc., R. Co. *v.* Champ, 104 S. W. 988, 31 Ky. L. Rep. 1054.

the rate of speed to be used in the particular case depending upon the nature of the crossing and other circumstances of the case, and the question whether or not the railroad company has exercised reasonable care and prudence in this respect being one of fact to be determined by the jury from all the circumstances existing at the time.[33] In running through cities and towns, where the presence of persons

Missouri.— Stepp *v.* Chicago, etc., R. Co., 85 Mo. 229.

New Hampshire.— Davis *v.* Concord, etc., R. Co., 68 N. H. 247, 44 Atl. 388, holding that the speed of the train over a crossing being an important element in determining whether ordinary care was observed by defendant, an instruction that the question is, whether persons of average prudence placed in the situation of defendant would have run the train at the speed at which defendant ran it, is proper.

New York.— Massoth *v.* Delaware, etc., Canal Co., 64 N. Y. 524; Wilds *v.* Hudson River R. Co., 24 N. Y. 430 [*reversing* 33 Barb. 503].

Ohio.— New York, etc., R. Co. *v.* Kistler, 66 Ohio St. 326, 64 N. E. 130; Lake Shore, etc., R. Co. *v.* Schade, 15 Ohio Cir. Ct. 424, 8 Ohio Cir. Dec. 316; Such *v.* Cleveland, etc., R. Co., 2 Ohio Dec. (Reprint) 352, 2 West. L. Month. 486, holding that the rate of speed is not material unless it exceeds the limitations of due care.

Pennsylvania.— Reeves *v.* Delaware, etc., R. Co., 30 Pa. St. 454, 72 Am. Dec. 713. See Philadelphia, etc., R. Co. *v.* Hagan, 47 Pa. St. 244, 86 Am. Dec. 541.

South Carolina.— Zeigler *v.* Northeastern R. Co., 5 S. C. 221.

United States.— Lapsley *v.* Union Pac. R. Co., 50 Fed. 172.

Canada.— Conell *v.* Reg., 5 Can. Exch. 74, holding that a conductor is guilty of negligence in running his train at a crossing where he is aware the watchman or flagman is not at his post, at so great a speed as to put it out of his power to prevent a collision with a vehicle which had attempted to pass over the crossing before the train was in sight.

See 41 Cent. Dig. tit. "Railroads," § 1006.

Running at a high rate of speed without giving signals, over a crossing whereby a traveler, while in the exercise of due care, is injured, establishes negligence on the part of the railroad company. Bilton *v.* Southern Pac. R. Co., 148 Cal. 443, 83 Pac. 440; Norris *v.* New York, etc., R. Co., 78 Conn. 314, 61 Atl. 1075 (forty miles an hour); Lake Erie, etc., R. Co. *v.* Zoffinger, 107 Ill. 199; Louisville, etc., R. Co. *v.* Goetz, 79 Ky. 442, 42 Am. Rep. 227; Branch *v.* New York Cent., etc., R. Co., 39 N. Y. App. Div. 435, 57 N. Y. Suppl. 344 (twenty-five miles an hour); Roberts *v.* Alexandria, etc., R. Co., 83 Va. 312, 2 S. E. 518 (holding that it is negligence to run an irregular train at an unusual and unexpected time and at an extraordinary rate of speed across a public highway without signaling its approach).

A rate of speed which renders unavailing a warning by whistle and bell is negligence. Martin *v.* New York Cent., etc., R. Co., 27 Hun (N. Y.) 532 [*affirmed* in 97 N. Y. 628]. See Cincinnati, etc., R. Co. *v.* Com., 104 S. W. 771, 31 Ky. L. Rep. 1113.

Speed to ascend grade.— That by running through a town at a high rate of speed will render it easier to ascend a grade just beyond will not justify a railroad company in running its train through the town so as to imperil human life unnecessarily. Louisville, etc., R. Co. *v.* Taylor, 104 S. W. 776, 31 Ky. L. Rep. 1142.

33. *Alabama.*— Gaynor *v.* Louisville, etc., R. Co., 136 Ala. 244, 33 So. 808, holding that a switch train running toward a crossing at the rate of but four miles an hour is not running at such a rate as to support a charge of wantonness and reckless disregard of life.

Illinois.— Illinois Cent. R. Co. *v.* Cragin, 71 Ill. 177 (holding that the jury may properly consider all the attending circumstances and determine therefrom whether the train by which deceased was killed was run at an improper speed in reference to the safety of deceased, but not in reference to other travelers unless run so recklessly as to imply a disregard for safety); Boyd *v.* Chicago, etc., R. Co., 103 Ill. App. 199; Landon *v.* Chicago, etc., R. Co., 92 Ill. App. 216; Lake Shore, etc., R. Co. *v.* Foster, 74 Ill. App. 387.

Indiana.— Chicago, etc., R. Co. *v.* Spilker, 134 Ind. 380, 33 N. E. 280, 34 N. E. 218; Louisville, etc., R. Co. *v.* Stommel, 126 Ind. 35, 25 N. E. 863; Terre Haute, etc., R. Co. *v.* Clark, 73 Ind. 168; Bellefontaine R. Co. *v.* Hunter, 33 Ind. 335, 5 Am. Rep. 201.

Iowa.— Artz *v.* Chicago, etc., R. Co., 44 Iowa 284.

Massachusetts.— Hicks *v.* New York, etc., R. Co., 164 Mass. 424, 41 N. E. 721, 49 Am. St. Rep. 471.

Nevada.— Cohen *v.* Eureka, etc., R. Co., 14 Nev. 376.

New York.— Salter *v.* Utica, etc., R. Co., 88 N. Y. 42; Martin *v.* New York Cent., etc., R. Co., 27 Hun 532 [*affirmed* in 97 N. Y. 628]; Miller *v.* New York Cent., etc., R. Co., 20 N. Y. Suppl. 163.

South Carolina.— Zeigler *v.* Northeastern R. Co., 5 S. C. 221.

Texas.— International, etc., R. Co. *v.* Graves, 59 Tex. 330; Texas, etc., R. Co. *v.* Tucker, (Civ. App. 1907) 106 S. W. 764; Galveston, etc., R. Co. *v.* Eaten, (Civ. App. 1898) 44 S. W. 562; Galveston, etc., R. Co. *v.* Duelm, (Civ. App. 1893) 23 S. W. 596.

United States.— Thomas *v.* Delaware, etc., R. Co., 8 Fed. 729, 19 Blatchf. 533.

Canada.— Grand Trunk R. Co. *v.* Beckett, 16 Can. Sup. Ct. 713 [*affirming* 13 Ont. App. 174]; Harris *v.* Rex, 9 Can. Exch. 206.

See 41 Cent. Dig. tit. "Railroads," § 1006. And see *infra*, X, F, 14, g, (IX).

Illustrations.— Thus it is negligence to run across a street at thirty miles an hour with-

on the track in the street or at crossings must be anticipated, the speed of the train should be moderated to a reasonable degree, so as to have it under reasonable control.[34] In many jurisdictions, however, the rate of speed of trains at public crossings is regulated by statute or ordinance,[35] under which it is provided that the engineer on reaching a whistle post shall give the required signals and check the train so that he may be able to stop at the crossing,[36] or that the train shall not go faster than a specified rate until the crossing or street is passed.[37]

b. Nature and Locality of Crossings. The above rules usually apply to cities and towns where the population is dense and the presence of persons may be anticipated on the track at crossings,[38] and in the absence of statute, and under ordi-

out a warning signal, while at the same time a long train of freight cars is running on a parallel track in the opposite direction, obstructing the view and drowning the noise of the locomotive (Cleveland, etc., R. Co. *v.* Miles, 162 Ind. 646, 70 N. E. 985); to run an extra freight train at an unusual time at night, through a thickly settled part of a town, at an unlawful rate of speed, and over frequented street crossings without giving any signal (New Orleans, etc., R. Co. *v.* Brooks, 85 Miss. 269, 38 So. 40); to run over a graded street crossing at a rate of speed prohibited by a city ordinance with the headlight of the engine extinguished and without giving any warning (Southern R. Co. *v.* Aldridge, 101 Va. 142, 43 S. E. 333); or to run at a speed four times that permitted under an ordinance of the city with no signals of its approach being given (Washington Southern R. Co. *v.* Lacey, 94 Va. 460, 26 S. E. 834). But where a railroad track is straight for a long distance before reaching a crossing and a train could easily be seen along the way for several hundred feet from the crossing, and the extent of the use of the crossing does not appear, a speed of eighteen miles an hour in the night-time cannot be said to be unreasonable. Giacomo *v.* New York, etc., R. Co., 196 Mass. 192, 81 N. E. 899.

The usual rate of speed may be negligence when approaching a highway crossing, if without observing the usual precautions and giving the required danger signals to warn the public of the approach of the train. Thayer *v.* Flint, etc., R. Co., 93 Mich. 150, 53 N. W. 216.

Where persons at or near a crossing have reasonable warning of the approach of a train, the railroad company is under no obligation to check its speed as it approaches the crossing. Pratt *v.* Chicago, etc., R. Co., 107 Iowa 287, 77 N. W. 1064.

34. Southern R. Co. *v.* Winchester, 105 S. W. 167, 32 Ky. L. Rep. 19; Louisville, etc., R. Co. *v.* Taylor, 104 S. W. 776, 31 Ky. L. Rep. 1142; Holmes *v.* Missouri Pac. R. Co., 207 Mo. 149, 105 S. W. 624; Crane *v.* Pennsylvania R. Co., 218 Pa. St. 560, 67 Atl. 877.

35. See Harris *v.* Central R. Co., 78 Ga. 525, 3 S. E. 355 (holding, however, that a statute regulating the speed of trains at public crossings does not apply to cases in which the train is started at or upon the crossing); Waldele *v.* New York Cent., etc., R. Co., 4 N. Y. App. Div. 549, 38 N. Y. Suppl. 1009. And see *infra*, X, F, 8, d, e.

Persons protected.— Every person who would be benefited by a compliance by a railroad company with a valid ordinance is entitled to the protection that obedience to such ordinance would furnish, and every such person has the right to assume that it will not be violated. Davenport, etc., R. Co. *v.* De Yaeger, 112 Ill. App. 537.

Grade crossings.— Statutory requirements as to the speed of trains at crossings apply only to grade crossings. Barron *v.* Chicago, etc., R. Co., 89 Wis. 79, 61 N. W. 303; Jenson *v.* Chicago, etc., R. Co., 86 Wis. 589, 57 N. W. 359, 22 L. R. A. 680.

A Canadian statute, 55 & 56 Vict. c. 27, § 8, limiting trains passing through a thickly peopled portion of a city, town, or village, to a maximum speed of six miles an hour, does not apply so long as railway fences on both sides of the track are maintained and turned into the cattle-guards at highway crossings as provided by section 6 of said act. Grand Trunk R. Co. *v.* McKay, 34 Can. Sup. Ct. 81, 3 Can. R. Cas. 52 [*reversing* 3 Can. R. Cas. 42, 5 Ont. L. R. 313, 2 Ont. Wkly. Rep. 57].

36. Crawley *v.* Georgia R., etc., Co., 82 Ga. 190, 8 S. E. 417, holding, however, that it is not necessary under such a statute to begin to check the speed before reaching the whistle post, although the track is down grade, especially where the evidence shows that the train could have been stopped before reaching the crossing. See also Combs *v.* Georgia R., etc., Co., 115 Ga. 1020, 42 S. E. 383.

A law requiring the checking of trains at road crossings applies as well to crossings of streets in cities. Central R. Co. *v.* Russell, 75 Ga. 810.

37. Ewen *v.* Chicago, etc., R. Co., 38 Wis. 613, holding that a statutory requirement that trains shall not go faster than six miles an hour until "they have passed all traveled streets of a city" applies to all actually traveled streets within the city limits, although such only by user. And see *infra*, X, F, 8, d, e.

A law or ordinance limiting the speed of "passenger trains" does not apply to an engine and tender. Lake Shore, etc., R. Co. *v.* Probeck, 33 Ill. App. 145.

38. Louisville, etc., R. Co. *v.* Molloy, 122 Ky. 219, 91 S. W. 685, 28 Ky. L. Rep. 1113. *Compare* Quebec, etc., R. Co. *v.* Girard, 15

nary circumstances, a railroad company is not guilty of negligence *per se* for running at a high rate of speed at crossings in the country outside of cities and villages,[39] or, although within the corporate limits, outside of the settled portion of the town,[40] especially where the proper signals for such crossings have been given and the view is unobstructed.[41] But when considered together with other circumstances existing at the time, such as the lack of proper signals, obstruction of view, or other like circumstances, it may be negligent for the railroad company to run at a high rate of speed even at such a crossing.[42] Likewise in the absence of statute or ordinance it is not negligence *per se* to run at a high rate of speed over crossings in a city or village,[43] although a rate of speed which would not be negligence at a crossing in the country may constitute negligence under the conditions existing at a crossing in a populous town or city, the question whether or not it is negligence depending upon the circumstances at the particular time and crossing and being for the jury to determine.[44] Where gates have been

Quebec K. B. 48, holding that a railroad company is under no legal obligation to slacken speed in passing through a town, if its tracks are properly fenced.

39. *Illinois.*— Chicago, etc., R. Co. *v.* Harwood, 80 Ill. 88; Toledo, etc., R. Co. *v.* Miller, 76 Ill. 278; Louisville, etc., R. Co. *v.* Pirschbacher, 63 Ill. App. 144, usual speed.

Indiana.— Lake Shore, etc., R. Co. *v.* Barnes, 166 Ind. 7, 76 N. E. 629, 3 L. R. A. N. S. 778 (holding that railroad companies are not guilty of negligence *per se* for running their trains over country crossings at any speed they choose consistent with the safety of the persons and property in their charge); Chicago, etc., R. Co. *v.* Spilker, 134 Ind. 380, 33 N. E. 280, 34 N. E. 218.

Iowa.— Hartman *v.* Chicago Great Western R. Co., 132 Iowa 582, 110 N. W. 10, holding that no rate of speed in a train moving in the open country is in itself negligence as to a person on a crossing, although it may become a factor when considered with reference to the circumstances of the particular case, in determining whether due care has been exercised.

Kansas.—Atchison, etc., R. Co. *v.* Judah, 65 Kan. 474, 70 Pac. 346, forty to fifty miles per hour.

Kentucky.— Louisville, etc., R. Co. *v.* Molloy, 91 S. W. 685, 28 Ky. L. Rep. 1113; Parkerson *v.* Louisville, etc., R. Co., 80 S. W. 468, 25 Ky. L. Rep. 2260.

Nebraska.— Omaha, etc., R. Co. *v.* Talbot, 48 Nebr. 627, 67 N. W. 599; Hajsek *v.* Chicago, etc., R. Co., 5 Nebr. (Unoff.) 67, 97 N. W. 327 [*reversing* 68 Nebr. 539, 94 N. W. 609].

New York.— Hunt *v.* Fitchburg R. Co., 22 N. Y. App. Div. 212, 47 N. Y. Suppl. 1034; Du Boise *v.* New York Cent., etc., R. Co., 88 Hun 10, 34 N. Y. Suppl. 279, fifty-five or sixty miles an hour.

Ohio.— Lake Shore, etc., R. Co. *v.* Johnston, 25 Ohio Cir. Ct. 41; Lake Shore, etc., R. Co. *v.* Schade, 15 Ohio Cir. Ct. 424, 8 Ohio Cir. Dec. 316.

Pennsylvania.— Keiser *v.* Lehigh Valley R. Co., 212 Pa. St. 409, 61 Atl. 903, 108 Am. St. Rep. 872 (holding that it is not negligence to run a fast passenger train in the night over a country crossing at the rate of thirty-five miles an hour); Childs *v.* Pennsylvania R. Co., 150 Pa. St. 73, 24 Atl. 341; Reading, etc., R. Co. *v.* Ritchie, 102 Pa. St. 425; Carman *v.* New Jersey Cent. R. Co., 10 Kulp 87.

Wisconsin.— Sutton *v.* Chicago, etc., R. Co., 98 Wis. 157, 73 N. W. 993.

United States.— Griffith *v.* Baltimore, etc., R. Co., 44 Fed. 574.

See 41 Cent. Dig. tit. "Railroads," § 1007.

40. Louisville, etc., R. Co. *v.* Molloy, 91 S. W. 685, 28 Ky. L. Rep. 1113. See also Andreas *v.* Canadian Pac. R. Co., 37 Can. Sup. Ct. 1.

41. Atchison, etc., R. Co. *v.* Judah, 65 Kan. 474, 70 Pac. 346; Newhard *v.* Pennsylvania R. Co., 153 Pa. St. 417, 26 Atl. 105, 19 L. R. A. 563.

42. Louisville, etc., R. Co. *v.* Molloy, 91 S. W. 685, 28 Ky. L. Rep. 1113; Lyman *v.* Boston, etc., R. Co., 66 N. H. 200, 20 Atl. 976, 11 L. R. A. 364; Hunt *v.* Fitchburg R. Co., 22 N. Y. App. Div. 212, 47 N. Y. Suppl. 1034; Schwarz *v.* Delaware, etc., R. Co., 218 Pa. St. 187, 67 Atl. 213; Ellis *v.* Lake Shore, etc., R. Co., 138 Pa. St. 506, 21 Atl. 140, 21 Am. St. Rep. 914 (holding that it is not only the duty of a railroad company to ring the bell and blow the whistle of a train approaching a grade crossing, but also to run the train at a rate of speed in proportion to the danger from the character of the crossing); Reading, etc., R. Co. *v.* Ritchie, 102 Pa. St. 425.

43. Golinvaux *v.* Burlington, etc., R. Co., 125 Iowa 652, 101 N. W. 465; Tobias *v.* Michigan Cent. R. Co., 103 Mich. 330, 61 N. W. 514 (holding that the running of a passenger train on schedule time across a highway in a city of seventeen thousand inhabitants, at a rate of twenty-five miles an hour, is not, in the absence of an ordinance limiting the speed to a lower rate, negligence *per se*); Burlington, etc., R. Co. *v.* Wendt, 12 Nebr. 76, 10 N. W. 456 (not gross negligence).

44. *Alabama.*— Louisville, etc., R. Co. *v.* Orr, 121 Ala. 489, 26 So. 35 (holding that a railroad company is guilty of recklessness and wantonness where it runs a train over a crossing which a large number of people are continually using, at a speed of forty

erected and a flagman stationed at a crossing, the railroad company has the right to operate its trains over the crossing at any rate of speed, provided it uses due care in operating the appliances intended to shut off the public;[45] but where the watchman is off duty and the gates open, it is its duty to slacken speed.[46]

c. Where View or Hearing Is Obstructed. Except where required by statute,[47] the fact that the view of the highway or of the train at a crossing is obstructed by intervening objects does not make it negligence not to slacken speed at such crossing, where the required danger signals have been given,[48] unless the conditions at the time and crossing are otherwise such as to require the railroad company, in the exercise of ordinary care, to slacken speed,[49] as where the crossing so obstructed is a much used one in a populous town or city,[50] the question whether the railroad company should slacken speed at a particular crossing so obstructed depending upon the circumstances thereat, and being a question for the jury.[51]

d. Effect of Statutes or Ordinances. Statutes or ordinances regulating the speed of trains do not change the general law on the subject, nor change the rights and duties of the parties growing out of obedience or disobedience to such a statute or ordinance.[52] Trains must conform their rate of speed to the safety of the public, according to the circumstances of each case, and irrespective of statute or ordi-

miles an hour, knowing that persons will probably be endangered thereby, although it does not become aware of the peril of deceased in time to stop the train); Memphis, etc., R. Co. *v.* Martin, 117 Ala. 367, 23 So. 231 (holding that a railroad company is not authorized to run its trains at a wanton and dangerous rate of speed over a public crossing in an incorporated town where people frequently cross).

Illinois.— Toledo, etc., R. Co. *v.* Miller, 76 Ill. 278; Chicago, etc., R. Co. *v.* Ohlsson, 70 Ill. App. 487.

Indiana.— Chicago, etc., R. Co. *v.* Spilker, 134 Ind. 380, 33 N. E. 280, 34 N. E. 218.

Iowa.— Golinvaux *v.* Burlington, etc., R. Co., 125 Iowa 652, 101 N. W. 465, holding that the running of a train at the rate of from sixty to sixty-five miles an hour in the suburbs of a city is not of itself negligence but is an element to be considered with other circumstances in determining the question of negligence.

Missouri.— Gruefel *v.* Wabash R. Co., 108 Mo. App. 548, 84 S. W. 170, holding that the running of a train over a street crossing, at the rate of twenty-five or thirty miles an hour, without warning signals, is gross negligence.

New York.— Zwack *v.* New York, etc., R. Co., 160 N. Y. 362, 54 N. E. 785 [*affirming* 8 N. Y. App. Div. 483, 40 N. Y. Suppl. 821]; De Loge *v.* New York Cent., etc., R. Co., 92 Hun 149, 36 N. Y. Suppl. 697 [*affirmed* in 157 N. Y. 688, 51 N. E. 1090].

Ohio.— Lake Shore, etc., R. Co. *v.* Johnston, 25 Ohio Cir. Ct. 41; Ludden *v.* Columbus, etc., R. Co., 9 Ohio S. & C. Pl. Dec. 793, 7 Ohio N. P. 196, holding that it is the duty of those in charge of a train approaching a public street crossing to so far reduce the speed of the train that it can be controlled and stopped in a reasonably short time and within a reasonable distance.

Pennsylvania.— Lehigh Valley R. Co. *v.* Brandtmaier, 113 Pa. St. 610, 6 Atl. 238; Delaware, etc., R. Co. *v.* Smith, 3 Leg. Gaz. 102, 28 Leg. Int. 101, holding that it is the duty of an engineer on approaching a public crossing in a populous neighborhood to moderate the speed of the train so that, by the application of the brakes or reversing the engine, he may stop it in time to avoid collision with persons at the crossing.

See 41 Cent. Dig. tit. "Railroads," § 1007. And see *infra*, X, F, 14, g, (IX).

45. Edgerley *v.* Long Island R. Co., 46 N. Y. App. Div. 284, 61 N. Y. Suppl. 677, 44 N. Y. App. Div. 476, 60 N. Y. Suppl. 1062; Custer *v.* Baltimore, etc., R. Co., 206 Pa. St. 529, 55 Atl. 1130. But see Whelan *v.* New York, etc., R. Co., 38 Fed. 15.

46. Schwarz *v.* Delaware, etc., R. Co., 211 Pa. St. 625, 60 Atl. 255.

47. East Tennessee, etc., R. Co. *v.* Deaver, 79 Ala. 216, holding, however, that Code, § 1699, requiring the engineer to reduce speed before entering a curve crossed by a public road in a cut where he cannot see at least one quarter of a mile ahead does not require him to reduce speed on approaching crossings not falling within such description.

48. Dyson *v.* New York, etc., R. Co., 57 Conn. 9, 17 Atl. 137, 14 Am. St. Rep. 82.

49. Schwartz *v.* Delaware, etc., R. Co., 211 Pa. St. 625, 61 Atl. 255; Reeves *v.* Delaware, etc., R. Co., 30 Pa. St. 454, 72 Am. Dec. 713.

50. Bilton *v.* Southern Pac. Co., 148 Cal. 443, 83 Pac. 440; Chesapeake, etc., R. Co. *v.* Dixon, 104 Ky. 608, 47 S. W. 615, 20 Ky. L. Rep. 792, 50 S. W. 252, 20 Ky. L. Rep. 1883; Hicks *v.* New York, etc., R. Co., 164 Mass. 424, 41 N. E. 721, 49 Am. St. Rep. 471; Close *v.* Lake Shore, etc., R. Co., 73 Mich. 647, 41 N. W. 828; Guggenheim *v.* Lake Shore, etc., R. Co., 66 Mich. 150, 33 N. W. 161.

51. Lake Shore, etc., R. Co. *v.* Schade, 15 Ohio Cir. Ct. 424, 8 Ohio Cir. Dec. 316. And see *infra*, X, F, 14, g, (IX).

52. Whelan *v.* New York, etc., R. Co., 38 Fed. 15.

nance;[53] and where the circumstances at a particular time and crossing are such that ordinary care and prudence require trains to be run at a less rate of speed than that limited by the statute or ordinance, the railroad company is bound to exercise such care and prudence,[54] it being a question of fact to be determined by the circumstances if the speed fixed by such statute or ordinance is consistent with due caution.[55]

e. Violation of Statutes or Ordinances. Where a train is run at a crossing at a rate of speed in excess of that limited by statute or ordinance, it is in most jurisdictions negligence *per se*,[56] for which the railroad company is liable if such speed is the proximate cause of the injury,[57] and there is no contributory

53. Wabash R. Co. *v.* Henks, 91 Ill. 406; Chicago, etc., R. Co. *v.* Spilker, 134 Ind. 380, 33 N. E. 280, 34 N. E. 218 (holding that the fact that a city ordinance forbids the running of trains in certain parts of the city in excess of a certain rate of speed does not authorize the company to run its trains in parts of the city not specified in the ordinance "at any rate of speed necessarily required by the business of the company"); Coulter *v.* Great Northern R. Co., 5 N. D. 568, 67 N. W. 1046 (holding that a city ordinance regulating the speed of trains does not change the company's common-law obligation to operate its trains with proper care).

54. Shaber *v.* St. Paul, etc., R. Co., 28 Minn. 103, 9 N. W. 575; Alabama, etc., R. Co. *v.* Phillips, 70 Miss. 14, 11 So. 602; Louisville, etc., R. Co. *v.* French, 69 Miss. 121, 12 So. 338; West *v.* New Jersey R., etc., Co., 32 N. J. L. 91 [*affirmed* in 33 N. J. L. 430], holding that a city ordinance authorizing a railroad company to run its trains over certain crossings at a certain rate of speed does not authorize the running of two trains on contiguous tracks in opposite directions so as to pass each other at the rate of speed mentioned at or near a crossing properly used for foot passengers.

55. Alabama, etc., R. Co. *v.* Phillips, 70 Miss. 14, 11 So. 602; Louisville, etc., R. Co. *v.* French, 69 Miss. 121, 12 So. 338.

56. *Delaware.*— Knopf *v.* Philadelphia, etc., R. Co., 2 Pennew. 392, 46 Atl. 747.

Georgia.— Georgia Cent. R. Co. *v.* Tribble, 112 Ga. 863, 38 S. E. 356. But see Western, etc., R. Co. *v.* King, 70 Ga. 261.

Illinois.— Chicago, etc., R. Co. *v.* Mochell, 193 Ill. 208, 61 N. E. 1028, 86 Am. St. Rep. 318 [*affirming* 96 Ill. App. 178]; Chicago, etc., R. Co. *v.* Pulliam, 111 Ill. App. 305 [*affirmed* in 208 Ill. 456, 70 N. E. 460]; Wabash R. Co. *v.* Kamradt, 109 Ill. App. 203; Chicago, etc., R. Co. *v.* Beaver, 96 Ill. App. 558 [*affirmed* in 199 Ill. 34, 65 N. E. 144]; Chicago, etc., R. Co. *v.* Fell, 79 Ill. App. 376 [*affirmed* in 182 Ill. 523, 55 N. E. 554]; Chicago, etc., R. Co. *v.* Gunderson, 74 Ill. App. 356; Chicago, etc., R. Co. *v.* Des Lauriers, 40 Ill. App. 654. Such excessive speed has been held in this state to be gross negligence. Chicago, etc., R. Co. *v.* Becker, 84 Ill. 483; St. Louis, etc., R. Co. *v.* Dunn, 78 Ill. 197.

Indiana.— Shirk *v.* Wabash R. Co., 14 Ind. App. 126, 42 N. E. 656.

Iowa.— Correll *v.* Burlington, etc., R. Co., 38 Iowa 120, 18 Am. Rep. 22.

Kansas.— Chicago, etc., R. Co. *v.* Kennedy, 2 Kan. App. 693, 43 Pac. 802.

Mississippi.— Illinois Cent. R. Co. *v.* Watson, (1905) 39 So. 69; Alabama, etc., R. Co. *v.* Phillips, 70 Miss. 14, 11 So. 602.

Missouri.— Stotler *v.* Chicago, etc., R. Co., 200 Mo. 107, 98 S. W. 509 (holding that the violation of a city ordinance limiting the rate of speed within the city limits constitutes negligence *per se* on the part of the railroad company whether it has accepted such ordinance or not); Schmidt *v.* Missouri Pac. R. Co., 191 Mo. 215, 90 S. W. 136, 3 L. R. A. N. S. 196; Hutchinson *v.* Missouri Pac. R. Co., 161 Mo. 246, 61 S. W. 635, 852, 84 Am. St. Rep. 710; Jackson *v.* Kansas City, etc., R. Co., 157 Mo. 621, 58 S. W. 32, 80 Am. St. Rep. 650; Easley *v.* Missouri Pac. R. Co., 113 Mo. 236, 20 S. W. 1073; Dahlstrom *v.* St. Louis, etc., R. Co., 108 Mo. 525, 18 S. W. 919; Keim *v.* Union R., etc., Co., 90 Mo. 314, 2 S. W. 427; Edwards *v.* Chicago, etc., R. Co., 94 Mo. App. 36, 67 S. W. 950.

Tennessee.— Louisville, etc., R. Co. *v.* Martin, 113 Tenn. 266, 87 S. W. 418, holding that such an ordinance is for the protection of a railroad crossing flagman as well as the public, and applicable to an action for his death while walking on the track, by being struck by a train.

Texas.— Texas, etc., R. Co. *v.* Ball, 38 Tex. Civ. App. 279, 85 S. W. 456 (holding the violation of such a speed ordinance to be actionable negligence); Missouri, etc., R. Co. *v.* Owens, (Civ. App. 1903) 75 S. W. 579. See Gulf, etc., R. Co. *v.* Breitling, (1890) 12 S. W. 1121; Texas, etc., R. Co. *v.* Moore, (Civ. App. 1900) 56 S. W. 248. The running of a locomotive backward over a public crossing at fifteen miles an hour, in violation of a city ordinance and without warning, is gross negligence. Texas, etc., R. Co. *v.* Brown, 14 Tex. Civ. App. 697, 39 S. W. 140 [*reaffirming* 2 Tex. Civ. App. 281, 21 S. W. 424].

Wisconsin.— Brown *v.* Chicago, etc., R. Co., 109 Wis. 384, 85 N. W. 271 (holding, however, that, although a failure to comply with statutory regulations as to the speed of trains is negligence *per se*, it is not necessarily actionable negligence); Piper *v.* Chicago, etc., R. Co., 77 Wis. 247, 46 N. W. 165.

See 41 Cent. Dig. tit. "Railroads," § 1009.

57. See *infra*, X, F, 11, e.

negligence on the part of the person injured;[58] and notwithstanding such statute or ordinance has never been enforced,[59] or the engineer or other person in charge of the train did all in his power to stop the train after discovering the danger of the person injured.[60] In some jurisdictions, however, an unlawful rate of speed at a crossing is held to be merely evidence of negligence to be considered by the jury together with other circumstances on the question of negligence,[61] although under some circumstances it may become negligence *per se*.[62]

f. Means of Controlling Trains. It is the duty of a railroad company to adopt well tested brakes or other appliances for the control of its trains; and it is liable for injuries caused, without any fault on the part of the person injured, by reason of its failure to supply or keep in repair such brakes or appliances,[63] and to have an employee on hand to apply them[64] at the proper time.[65]

9. Precautions as to Persons Seen At or Near Crossing[66] **— a. In General.** Where an engineer or other railroad employee in charge of a train sees a person

58. Knopf *v.* Philadelphia, etc., R. Co., 2 Pennew. (Del.) 392, 46 Atl. 747; Georgia Cent. R. Co. *v.* Tribble, 112 Ga. 863, 38 S. E. 356 (holding that in order to prevent a recovery in such a case it must be shown that the injury was done with the consent of the injured person, or that he could by the exercise of ordinary care have avoided the consequence of the negligence of the company); Illinois Cent. R. Co. *v.* Watson, (Miss. 1905) 39 So. 69; Gulf, etc., R. Co. *v.* Breitling, (Tex. 1890) 12 S. W. 1121.

59. Cleveland, etc., R. Co. *v.* Harrington, 131 Ind. 426, 30 N. E. 37, holding that the fact that defendant and others had never been prosecuted for violations of a city ordinance regulating the speed of trains within the city limits, and that practically the same had become obsolete, is no defense to an action for injuries received at a crossing caused by its violation.

60. Chicago, etc., R. Co. *v.* Smith, 77 Ill. App. 492.

61. Zwack *v.* New York, etc., R. Co., 160 N. Y. 362, 54 N. E. 785 [*affirming* 8 N. Y. App. Div. 483, 40 N. Y. Suppl. 821]; Crosby *v.* New York Cent., etc., R. Co., 88 Hun (N. Y.) 196, 34 N. Y. Suppl. 714; Edwards *v.* Atlantic Coast Line R. Co., 129 N. C. 78, 39 S. E. 730; Lake Shore, etc., R. Co. *v.* Johnston, 25 Ohio Cir. Ct. 41; Baltimore, etc., R. Co. *v.* Stoltz, 18 Ohio Cir. Ct. 93, 9 Ohio Cir. Dec. 638 [*affirming* 7 Ohio S. & C. Pl. Dec. 435]; Grand Trunk R. Co. *v.* Ives, 144 U. S. 408, 12 S. Ct. 679, 36 L. ed. 485 [*affirming* 35 Fed. 176]; Erie R. Co. *v.* Farrell, 147 Fed. 220, 77 C. C. A. 446. See also Massoth *v.* Delaware, etc., Canal Co., 64 N. Y. 524.

Evidence.— That a city ordinance forbids trains to be run at any higher than a given rate of speed may be considered in ascertaining whether or not the train was negligently run but such an ordinance is not of itself evidence of negligence Bracken *v.* Pennsylvania R. Co., 32 Pa. Super. Ct. 22.

62. Edwards *v.* Atlantic Coast Line R. Co 129 N. C. 78, 39 S. E. 730; Norton *v.* North Carolina R. Co., 122 N. C. 910, 29 S. E. 886, holding that it is negligence *per se* to run a train at a rate of speed in excess of the limit fixed by an ordinance, at a crossing in a populous part of a town, and where the view of the approaching train is cut off by a long line of box cars.

63. Parsons *v.* New York Cent., etc., R. Co., 113 N. Y. 355, 21 N. E. 145, 10 Am. St. Rep. 450, 3 L. R. A. 683 (holding that it is negligence to rely on a lever that is liable to be displaced); Bradley *v.* Ohio River, etc., R. Co., 126 N. C. 735, 36 S. E. 181 (holding that a railroad company is negligent in kicking a train over a crossing without having an engine attached to it and without having proper means to apply the brake and stop the train); Johnson *v.* Gulf, etc., R. Co., 2 Tex. Civ. App. 139, 21 S. W. 274 (holding that if decedent's death was caused by ordinary negligence of the company in permitting the use of a hand-car not supplied with the most efficient brakes, the company is liable for his death if such negligence was the proximate cause of his death, and he was not guilty of contributory negligence).

In Tennessee, under Shannon's Code, §§ 1574, 1575, a railroad company is absolutely liable for injuries sustained by reason of its brakes or other appliances being defective, or if it fails to observe any other statutory requirement, although plaintiff may not be able to show that the accident was caused by the specific defect or default. Chattanooga Rapid Transit Co. *v.* Walton, 105 Tenn. 415, 58 S. W. 737.

64. Illinois Cent. R. Co. *v.* Baches, 55 Ill. 379, holding that it is gross negligence on the part of a brakeman not to be at the brakes when making a running switch in a populous part of a city crossing, a traveled street so as to be able to respond to a signal for brakes given by the engineer.

65. Illinois Cent. R. Co. *v.* Baches, 55 Ill. 379; Great Western R. Co. *v.* Brown, 3 Can. Sup. Ct. 159, holding a railroad company to be negligent in not applying the air-brakes at a sufficient distance from the crossing to enable the train to be stopped by hand brakes in case of the air-brakes giving way.

66. Precautions as to teams in charge of drivers see *supra*, X, F, 4.

Injury avoidable notwithstanding contributory negligence see *infra*, X, F, 12.

in a position of eminent peril on or near a crossing, it is his duty to use all reasonable precautions and efforts to prevent a collision or otherwise to avert an accident; and if he fails to do so the railroad company is liable for the resulting injuries,[67] although such person is not actually on the track.[68] A railroad company, however, is not guilty of negligence because such employee fails to exercise the best judgment possible when confronted with a sudden contingency,[69] or fails to provide against unusual or unexpected contingencies;[70] and if upon discovering a person in peril at a crossing the engineer or other employee uses all reasonable precautions and efforts to avert an accident, such as by blowing the alarm whistle and applying the brakes, he performs his whole duty, and although such efforts are unavailing, there is no liability on the part of the railroad company.[71]

67. *Kentucky.*— Chesapeake, etc., R. Co. *v.* Wilson, 102 S. W. 810, 31 Ky. L. Rep. 500.

Missouri.— Boyce *v.* Chicago, etc., R. Co., 120 Mo. App. 168, 96 S. W. 670.

Montana.— Riley *v.* Northern Pac. R. Co., 36 Mont. 545, 93 Pac. 948.

New York.— Bump *v.* New York, etc., R. Co., 38 N. Y. App. Div. 60, 55 N. Y. Suppl. 962 [*affirmed* in 165 N. Y. 636, 59 N. E. 1119].

Texas.— International, etc., R. Co. *v.* Sein, 11 Tex. Civ. App. 386, 33 S. W. 558.

Wisconsin.— Piper *v.* Chicago, etc., R. Co., 77 Wis. 247, 46 N. W. 165; Heddles *v.* Chicago, etc., R. Co., 74 Wis. 239, 42 N. W. 237.

See 41 Cent. Dig. tit. "Railroads," § 1014.

The failure of a brakeman standing at a crossing to warn the person injured of the approach of an engine is not negligence for which the railroad company is responsible where it is not shown that he was stationed there to warn travelers. Young *v.* New York, etc., R. Co., 107 N. Y. 500, 14 N. E. 434.

Signals to engineer.—A brakeman seeing a person approaching the track is not bound to signal the engineer immediately on the appearance of danger, where he attempts to warn the approaching traveler to keep off the track. Mobile, etc., R. Co. *v.* Coerver, 112 Fed. 489, 50 C. C. A. 360.

A brakeman stationed at a crossing where a freight train has been cut in two is under the duty to exercise reasonable care to prevent injuring persons who may be in the act of passing over the track between the parts of the train. Boyce *v.* Chicago, etc., R. Co., 120 Mo. App. 168, 96 S. W. 670.

68. Highland Ave., etc., R. Co. *v.* Sampson, 91 Ala. 560, 8 So. 778, holding that the duty of using due care to avoid an accident after seeing the person's peril may arise before he is atually on the track.

Runaway team.— Where a person in charge of an engine sees or by the exercise of ordinary care could see that a team on a highway is unmanageahle and running off in the direction of the railroad crossing and the situation is such as to induce a person of ordinary prudence to believe that there is danger of a collision at the crossing, it is his duty to exercise ordinary care to prevent such a collision. Chesapeake, etc., R. Co. *v.* Pace, 106 S. W. 1176, 32 Ky. L. Rep. 806.

69. Lewis *v.* Long Island R. Co., 162 N. Y. 52, 56 N. E. 548 [*reversing* 32 N. Y. App. Div. 627, 53 N. Y. Suppl. 1107], holding that where only eight seconds elapsed between the time the engineer saw plaintiff's peril and the happening of the accident, it was error to instruct that if the engineer, after seeing such peril, omitted to do any act which might have prevented the accident or might have lessened the damage to plaintiff the railroad company was guilty of negligence.

70. Louisville, etc., R. Co. *v.* Schmidt, 134 Ind. 16, 33 N. E. 774, holding that a statement by train hands to the driver of a vehicle that the train would not pull out for some time to come is not an assurance against any contingency except the movement of the train; and in an action for personal injury sustained by being thrown from a wagon while driving over a railroad crossing owing to the fact that plaintiff's horse was frightened by the sudden escape of steam from the safety valve, the company cannot be held liable on the theory that it was negligence to invite the driver to cross the track, where there was evidence that the train bands were aware that the steam pressure was at the point of escaping through the safety valve.

71. *California.*— Green *v.* Los Angeles Terminal R. Co., 143 Cal. 31, 76 Pac. 719, 101 Am. St. Rep. 68, (1902) 69 Pac. 694.

District of Columbia.— McDermott *v.* Severe, 25 App. Cas. 276.

Illinois.— Glockner *v.* Wabash R. Co., 95 Ill. App. 550.

Indiana.— Indiana, etc., R. Co. *v.* Wheeler, 115 Ind. 253, 17 N. E. 563.

Kentucky.— Louisville, etc., R. Co. *v.* Creighton, 106 Ky. 42, 50 S. W. 227, 20 Ky. L. Rep. 1691, 1898.

Maryland.— Cowen *v.* Dietrick, 101 Md. 46, 60 Atl. 282; Baltimore, etc., R. Co. *v.* Roming, 96 Md. 67, 53 Atl. 672.

Missouri.— Eswin *v.* St. Louis, etc., R. Co., 96 Mo. 290, 9 S. W. 577; Neier *v.* Missouri Pac. R. Co., (1886) 1 S. W. 387.

Nebraska.— Meyer *v.* Midland Pac. R. Co., 2 Nebr. 319.

Tennessee.—Artenberry *v.* Southern R. Co., 103 Tenn. 266, 52 S. W. 878.

Vermont.— Guilmont *v.* Central Vermont R. Co., 78 Vt. 185, 62 Atl. 54.

Wisconsin.— Heddles *v.* Chicago, etc., R. Co., 74 Wis. 239, 42 N. W. 237.

b. Duty to Stop or Reduce Speed. Except where there is a statutory provision to the contrary,[72] an engineer or other employee in charge of a train ordinarily has the right to presume that a person on or approaching a crossing is in possession of his natural faculties,[73] and will take the precautions which the law requires him to take to insure his own safety, and that he is aware of the situation and will move to or remain in a place of safety; and the engineer or other employee seeing such person is generally under no obligation to stop or check the train,[74] unless the conduct of those in charge of the train induces one approaching the crossing to believe that the train will not proceed to the crossing or that those in charge of the train will yield the right of way.[75] Where, however, such railroad employee knows or has reason to apprehend that a person on or approaching the crossing is not in possession of ordinary ability to care for himself,[76] as that he is infirm

United States.—Byrne *v.* Kansas City, etc., R. Co., 61 Fed. 605, 9 C. C. A. 666, 24 L. R. A. 693, under Milliken & V. Code Tenn. § 1298, subs. 4.

See 41 Cent. Dig. tit. "Railroads," § 1019.

72. Nashville, etc., R. Co. *v.* Seaborn, 85 Tenn. 391, 4 S. W. 661, holding, however, that Milliken & V. Code, § 1298, par. 4, requiring that "when any person, animal, etc., appears upon the road, the alarm whistle shall be sounded, the brakes put down," etc., is not applicable to a collision caused by the tongue of a wagon catching in the locomotive, and drawing the wagon alongside; neither the wagon nor the mules that were pulling it having got upon the track before the accident occurred.

73. Green *v.* Los Angeles Terminal R. Co., 143 Cal. 31, 76 Pac. 719, 101 Am. St. Rep. 68, (1902) 69 Pac. 694.

74. *Alabama.*— Southern R. Co. *v.* Shelton, 136 Ala. 191, 34 So. 194; Georgia Cent. R. Co. *v.* Foshee, 125 Ala. 199, 27 So. 1006; Burson *v.* Louisville, etc., R. Co., 116 Ala. 198, 22 So. 457.

California.— Lambert *v.* Southern Pac. R. Co., 146 Cal. 231, 79 Pac. 873; Green *v.* Los Angeles Terminal R. Co., 143 Cal. 31, 76 Pac. 719, 101 Am. St. Rep. 68, (1902) 69 Pac. 694; Green *v.* Southern Pac. Co., 122 Cal. 563, 55 Pac. 577; Matteson *v.* Southern Pac. Co., 6 Cal. App. 318, 92 Pac. 101.

Connecticut.— Dyson *v.* New York, etc., R. Co., 57 Conn. 9, 17 Atl. 137, 14 Am. St. Rep. 82.

Georgia.— Georgia Midland, etc., R. Co. *v.* Evans, 87 Ga. 673, 13 S. E. 580.

Illinois.— Toledo, etc., R. Co. *v.* Jones, 76 Ill. 311; St. Louis, etc., R. Co. *v.* Manly, 58 Ill. 300; Chicago, etc., R. Co. *v.* Florens, 32 Ill. App. 365.

Indiana.— Ohio, etc., R. Co. *v.* Walker, 113 Ind. 196, 15 N. E. 234, 3 Am. St. Rep. 638.

Kentucky.— Cox *v.* Louisville, etc., R. Co., 104 S. W. 282, 31 Ky. L. Rep. 875, holding that an engineer has the right to assume that a person ten feet away from the track at a crossing and not apparently deaf will hear a whistle blown at a distance of eighty yards.

Missouri.— Porter *v.* Missouri Pac. R. Co., 199 Mo. 82, 97 S. W. 880; Sites *v.* Knott, 197 Mo. 684, 96 S. W. 206; Schmidt *v.* Missouri Pac. R. Co., 191 Mo. 215, 90 S. W. 136, 3 L. R. A. N. S. 196; Stepp *v.* Chicago, etc., R. Co., 85 Mo. 229.

New Hampshire.— Waldron *v.* Boston, etc., R. Co., 71 N. H. 362, 52 Atl. 443.

New Jersey.— Telfer *v.* Northern R. Co., 30 N. J. L. 188.

North Carolina.— Stewart *v.* North Carolina R. Co., 136 N. C. 385, 48 S. E. 793.

Ohio.— New York, etc., R. Co. *v.* Kistler, 66 Ohio St. 326, 64 N. E. 130 [*reversing* on other grounds 16 Ohio Cir. Ct. 316, 9 Ohio Cir. Dec. 277]; Cincinnati, etc., R. Co. *v.* Murphy, 18 Ohio Cir. Ct. 298, 10 Ohio Cir. Dec. 195.

South Carolina.— Gosa *v.* Southern R. Co., 67 S. C. 347, 45 S. E. 810; Fletcher *v.* South Carolina, etc., R. Co., 57 S. C. 205, 35 S. E. 513; Mack *v.* South Bound R. Co., 52 S. C. 323, 29 S. E. 905, 68 Am. St. Rep. 913, 40 L. R. A. 679.

Texas.— Missouri Pac. R. Co. *v.* Burnett, 3 Tex. App. Civ. Cas. § 236.

Washington.— Woolf *v.* Washington R., etc., Co., 37 Wash. 491, 79 Pac. 997.

Wisconsin.— Schmolze *v.* Chicago, etc., R. Co., 83 Wis. 659, 53 N. W. 743, 54 N. W. 106.

See 41 Cent. Dig. tit. "Railroads," §§ 1015, 1016.

That such person gives no evidence of knowledge of the approach of the train does not indicate that he is about to pass in front of it. Green *v.* Los Angeles Terminal R. Co., 143 Cal. 31, 76 Pac. 719, 101 Am. St. Rep. 68, (1902) 69 Pac. 694.

One approaching a railroad track is not in a position of peril so as to charge the engineer of an approaching train with notice thereof and with the duty of using every exertion to avoid injuring him, until he steps upon the track. Green *v.* Los Angeles Terminal R. Co., 143 Cal. 31, 76 Pac. 719, 101 Am. St. Rep. 68, (1902) 69 Pac. 694.

Unless there is something unusual about the actions of a team or the driver thereof, a train need not be stopped at a railroad crossing to enable such team to cross. Chicago, etc., R. Co. *v.* Sack, 129 Ill. App. 58.

75. Horton *v.* Houston, etc., R. Co., (Tex. Civ. App. 1907) 103 S. W. 467.

76. Green *v.* Southern Pac. R. Co., 122 Cal. 563, 55 Pac. 577 (holding that unless

or helpless,[77] or is a child of tender years,[78] or that, by reason of other circumstances, he apparently will not get or stay out of danger,[79] it is his duty to use

the railroad company knows or has reason to believe that a person at a crossing does not possess ordinary ability to care for himself, it may presume that he possesses that ability and will take ordinary precaution to protect himself from injury); Waldron *v.* Boston, etc., R. Co., 71 N. H. 362, 52 Atl. 443.

77. Dailey *v.* Richmond, etc., R. Co., 106 N. C. 301, 11 S. E. 320; Yoakum *v.* Mettasch, (Tex. Civ. App. 1894) 26 S. W. 129.

Where an idiot is crossing a railroad track and is seen by the engineer of an approaching locomotive in time to stop his train, there is no presumption of negligence in not doing so unless it is shown that the engineer knew him to be an idiot and with proper care might have recognized him. Daily *v.* Richmond, etc., R. Co., 106 N. C. 301, 11 S. E. 320.

That the person injured is partially deaf does not increase the responsibility of the railroad company as to the exercise of care on seeing him approach the track where his deafness is not known to the employees in charge of the train. Cleveland, etc., R. Co. *v.* Terry, 8 Ohio St. 570.

78. Meeks *v.* Southern Pac. R. Co., 56 Cal. 513, 38 Am. Rep. 67 (holding that a recovery is warranted where an infant six or seven years old lying insensible or asleep on the track of a highway crossing is injured by a train, the fireman and engineer of which perceived him in time to stop, but thought that he was a bunch of weeds or leaves until too late, and no warning signal was given); Sloniker *v.* Great Northern R. Co., 76 Minn. 306, 79 N. W. 168; Spooner *v.* Delaware, etc., R. Co., 1 N. Y. St. 558; Missouri, etc., R. Co. *v.* Nesbit, 43 Tex. Civ. App. 630, 97 S. W. 825. See also Green *v.* Maysville, etc., R. Co., 78 S. W. 439, 25 Ky. L. Rep. 1623. *Compare* Schwier *v.* New York Cent., etc., R. Co., 15 Hun (N. Y.) 572, holding that an engineer in taking his locomotive across a street at the rate of two miles an hour is not guilty of negligence in not stopping the locomotive when he sees a child three years old running alongside and beyond the engine.

A child nine years old or over is not presumed to be *non sui juris*, and where an employee in charge of a train sees such a child standing in a place of safety near the track he is not negligent in not stopping or slackening the speed of the train, where other proper warnings and signals have been given (Theobald *v.* Chicago, etc., R. Co., 75 Ill. App. 208; Cleveland, etc., R. Co. *v.* Klee, 154 Ind. 430, 56 N. E. 234; Galveston, etc., R. Co. *v.* Kieff, 94 Tex. 334, 60 S. W. 543), unless it appears that the child is not aware of his danger or the circumstances are such that the engineer is not warranted in presuming that he will move to or remain in a place of safety (Cleveland, etc., R. Co. *v.* Klee, *supra*).

Where a child seven years of age goes on a track at a railroad crossing in full view of the flagman while the gates are lowered, it is the duty of the railroad company to use care according to the circumstances to prevent injury to the child, its full duty not being done as to such child by merely lowering the gates; whether it uses the proper care in such case being a question for the jury. Jones *v.* Harris, 186 Pa. St. 469, 40 Atl. 791.

79. *Alabama.*— Tuscaloosa Belt R. Co. *v.* Fuller, 153 Ala. 288, 45 So. 156; Georgia Cent. R. Co. *v.* Foshee, 125 Ala. 199, 27 So. 1006.

California.— Rowe *v.* Southern California R. Co., 4 Cal. App. 1, 87 Pac. 220, holding, however, that an engineer is not guilty of gross or wanton negligence in failing to stop the train in time to avoid the injury where he makes reasonable efforts to do so after the injured person's peril is discovered.

Connecticut.— Dyson *v.* New York, etc., R. Co., 57 Conn. 9, 17 Atl. 137, 14 Am. St. Rep. 82.

Georgia.— See Georgia Midland, etc., R. Co. *v.* Evans, 87 Ga. 673, 13 S. E. 580, holding that a locomotive engineer is not entitled to assume in all cases that persons on a public crossing will get off in time to save themselves, but in running his train on a crossing in a city is bound to observe reasonable diligence before he discovers peril as well as afterward; and that the company is responsible for his negligent errors of judgment.

Illinois.— Illinois Cent. R. Co. *v.* Benton, 69 Ill. 174; St. Louis, etc., R. Co. *v.* Manly, 58 Ill. 300; Chicago, etc., R. Co. *v.* Hogarth, 38 Ill. 370.

Kansas.— Atchison, etc., R. Co. *v.* Walz, 40 Kan. 433, 19 Pac. 787.

Maine.— Garland *v.* Maine Cent. R. Co., 85 Me. 519, 27 Atl. 615 (where team has become stalled on or so near track as to be in danger); Purinton *v.* Maine Cent. R. Co., 78 Me. 569, 7 Atl. 707.

Missouri.— Sites *v.* Knott, 197 Mo. 684, 96 S. W. 206; Edwards *v.* Chicago, etc., R. Co., 94 Mo. App. 36, 67 S. W. 950.

Nevada.—Bunting *v.* Southern Pac. R. Co., 16 Nev. 277, holding that such liability attaches even though plaintiff contributed to the injury by his own carelessness and negligence.

New Hampshire.— Waldron *v.* Boston, etc., R. Co., 71 N. H. 362, 52 Atl. 443; Folsom *v.* Concord, etc., R. Co., 68 N. H. 454, 38 Atl. 209.

North Carolina.—Hinkle *v.* Richmond, etc., R. Co., 109 N. C. 472, 13 S. E. 884, 26 Am. St. Rep. 581; Bullock *v.* Wilmington, etc., R. Co., 105 N. C. 180, 10 S. E. 988.

Ohio.— New York, etc., R. Co. *v.* Kistler, 66 Ohio St. 326, 64 N. E. 130 [*reversing* on other grounds 16 Ohio Cir. Ct. 316, 9 Ohio Cir. Dec. 277].

all reasonable efforts to slacken the speed of the train, and if possible to stop it in time to avert an accident; and if he fails to do so the railroad company is liable for the resulting damages.

10. Contributory Negligence [80] **— a. In General —** (i) *Care Required in Going on Tracks in General.* As a general rule it is the duty of a person approaching or going on a railroad crossing to exercise ordinary care to learn of the approach of trains and keep out of the way, or otherwise to avoid being injured; that is, such care and prudence as would be exercised by a man of ordinary prudence under like circumstances,[81] and if he fails to do so, as the proximate

South Carolina.— Fletcher *v.* South Carolina, etc., R. Co., 57 S. C. 205, 35 S. E. 513; Mack *v.* South Bound R. Co., 52 S. C. 323, 29 S. E. 905.

Texas.— Houston, etc., R. Co. *v.* Carson, 66 Tex. 345, 1 S. W. 107 (holding that it is negligence to fail to bring a train to a full stop at a street crossing on discovering that an approaching team is frightened); Missouri, etc., R. Co. *v.* Magee, (Civ. App. 1899) 49 S. W. 156 [*affirmed* in 92 Tex. 616, 50 S. W. 1013]; International, etc., R. Co. *v.* Dalwigh, (Civ. App. 1898) 48 S. W. 527; Texas, etc., R. Co. *v.* Roberts, 14 Tex. Civ. App. 532, 37 S. W. 870.

Wisconsin.— Piper *v.* Chicago, etc., R. Co., 77 Wis. 247, 46 N. W. 165.

United States.— Continental Imp. Co. *v.* Stead, 95 U. S. 161, 24 L. ed. 103; Central Trust Co. *v.* Wabash, etc., R. Co., 27 Fed. 159, holding that where the gates at a railroad crossing in a populous city are open and a teamster not seeing an approaching train starts to drive across the tracks and the engineer in charge of the train sees him, it is the engineer's duty to stop his train and if he fails to do so the company is liable for the resulting damages to the wagon and team.

See 41 Cent. Dig. tit. "Railroads," §§ 1015, 1016.

The degree of apprehension in such cases is: Would a man of ordinary prudence in the place of the engineer have had a consciousness that, to run the engine on the crossing as the engine in question was run, would probably or was liable or likely to result in injury to somebody on the track at the crossing. Southern R. Co. *v.* Shelton, 136 Ala. 191, 34 So. 194.

80. **Imputed negligence** generally see Negligence, 29 Cyc. 542.

Injury avoidable notwithstanding contributory negligence see *infra*, X, F, 12.

81. *California.*— Hearne *v.* Southern Pac. R. Co., 50 Cal. 482.

Connecticut.— Norris *v.* New York, etc., R. Co., 78 Conn. 314, 61 Atl. 1075.

Delaware.— Reed *v.* Queen Anne's R. Co., 4 Pennew. 413, 57 Atl. 529.

Georgia.— Broyles *v.* Prisock, 97 Ga. 643, 25 S. E. 389.

Illinois.— Chicago, etc., R. Co. *v.* Hatch, 79 Ill. 137; Chicago, etc., R. Co. *v.* Bell, 70 Ill. 102; Chicago, etc., R. Co. *v.* Sack, 129 Ill. App. 58; Wabash R. Co. *v.* Jenkins, 84 Ill. App. 511; Chicago, etc., R. Co. *v.* Barnett, 56 Ill. App. 384.

Indiana.— Cleveland, etc., R. Co. *v.* Miller, 149 Ind. 490, 49 N. E. 445; Seybold *v.* Terre Haute, etc., R. Co., 18 Ind. App. 367, 46 N. E. 1054.

Iowa.— Defrieze *v.* Illinois Cent. R. Co., (1903) 94 N. W. 505; Lorenz *v.* Burlington, etc., R. Co., 115 Iowa 377, 88 N. W. 835, 56 L. R. A. 752.

Kansas.— Chicago, etc., R. Co. *v.* Fisher, 49 Kan. 460, 30 Pac. 462 (holding that a traveler in crossing a railroad is required to exercise that degree of care which "an ordinarily prudent person" would exercise under like circumstances and not any higher or lower degree of care or diligence); Wichita, etc., R. Co. *v.* Davis, 37 Kan. 743, 16 Pac. 78, 1 Am. St. Rep. 275.

Kentucky.—Southern R. Co. *v.* Winchester, 105 S. W. 167, 32 Ky. L. Rep. 19; Louisville, etc., R. Co. *v.* Taylor, 104 S. W. 776, 31 Ky. L. Rep. 1142; Louisville, etc., R. Co. *v.* Ueltschi, 97 S. W. 14, 29 Ky. L. Rep. 1136.

Louisiana.— Blackwell *v.* St. Louis, etc., R. Co., 47 La. Ann. 268, 16 So. 818, 49 Am. St. Rep. 371; White *v.* Vicksburg, etc., R. Co., 42 La. Ann. 990, 8 So. 475.

Massachusetts.— Fitzhugh *v.* Boston, etc., R. Co., 195 Mass. 202, 80 N. E. 792, holding that a traveler on a highway crossing a railway must exercise that high degree of care which the extreme danger of the place requires of every person of ordinary prudence.

Missouri.— Baker *v.* Kansas City, etc., R. Co., 147 Mo. 140, 48 S. W. 838; Easley *v.* Missouri Pac. R. Co., 113 Mo. 236, 20 S. W. 1073.

New Jersey.— Passman *v.* West Jersey, etc., R. Co., 68 N. J. L. 719, 54 Atl. 809, 96 Am. St. Rep. 573, 61 L. R. A. 609; Swanson *v.* New Jersey Cent. R. Co., 63 N. J. L. 605, 44 Atl. 852; Runyon *v.* Cent. R. Co., 25 N. J. L. 566; New Jersey Cent. R. Co. *v.* Moore, 24 N. J. L. 824.

New York.— Burke *v.* New York Cent. R. Co., 73 Hun 32, 25 N. Y. Suppl. 1009 (holding that a person crossing a railroad track is bound to exercise the care of a person of ordinary prudence, the exercise of "any" care not being sufficient); Johnson *v.* Hudson River R. Co., 6 Duer 633 [*affirmed* in 20 N. Y. 65, 75 Am. Dec. 375]; Beisegel *v.* New York Cent. R. Co., 14 Abb. Pr. N. S. 29.

Ohio.— Watson *v.* Erie R. Co., 10 Ohio S. & C. Pl. Dec. 454, 8 Ohio N. P. 18.

Pennsylvania.— Baker *v.* Pennsylvania R. Co., 182 Pa. St. 336, 37 Atl. 933.

South Carolina.— Zeigler *v.* Northeast R. Co., 5 S. C. 221.

result of which he is injured,[82] he is guilty of contributory negligence which precludes him from recovering damages.[83] An inflexible rule cannot be laid down as to what constitutes contributory negligence on the part of the person injured at a railroad crossing, but each case depends upon its own circumstances,[84] the amount of care required being in proportion to the degree of danger at the particular crossing,[85] and greater care or diligence being required accordingly as the peculiar

Texas.— Galveston, etc., R. Co. *v.* Matula, 79 Tex. 577, 15 S. W. 573, 19 S. W. 376; International, etc., R. Co. *v.* Dyer, 76 Tex. 156, 13 S. W. 377; Missouri Pac. R. Co. *v.* Lee, 70 Tex. 496, 7 S. W. 857; Missouri, etc., R. Co. *v.* Oslin, 26 Tex. Civ. App. 370, 63 S. W. 1039; Gudf, etc., R. Co. *v.* Marchand, 24 Tex. Civ. App. 47, 57 S. W. 860; Gulf, etc., R. Co. *v.* Shieder, (Civ. App. 1894) 26 S. W. 509; Texas, etc., R. Co. *v.* Anderson, 2 Tex. App. Civ. Cas. § 203.

Virginia.— Kimball *v.* Friend, 95 Va. 125, 27 S. E. 901.

West Virginia.— Meeks *v.* Ohio River R. Co., 52 W. Va. 99, 43 S. E. 118; Berkeley *v.* Chesapeake, etc., R. Co., 43 W. Va. 11, 26 S. E. 349.

United States.— Morris *v.* Chicago, etc., R. Co., 26 Fed. 22.

Canada.— Miller *v.* Grand Trunk R. Co., 25 U. C. C. P. 389.

See 41 Cent. Dig. tit. "Negligence," § 1022.

An employee of a railroad company is within this rule at the time when he is off duty and has no concern with the business or affairs of the company, and where the accident occurs on a public street remote from the place at which he renders service to the company. Savannah, etc., R. Co. *v.* Flannagan, 82 Ga. 579, 9 S. E. 471, 14 Am. St. Rep. 183.

Duty to seek safer crossing.— Crossing a railroad track on a public highway where there are a number of side-tracks is not negligence *per se*, although by going a few blocks out of his way the person might have crossed the track at a safer place. Chicago, etc., R. Co. *v.* Clough, 134 Ill. 586, 25 N. E. 664, 29 N. E. 184.

That the train which causes the collision is an extra does not relieve either party from the duty of exercising due care. Carlson *v.* Chicago, etc., R. Co., 96 Minn. 504, 105 N. W. 555, 113 Am. St. Rep. 655, 4 L. R. A. N. S. 349

The time when a person should exercise reasonable care is not limited to the time when he goes on the track, but also applies to his approach thereto. Wabash R. Co. *v.* Jensen, 99 Ill. App. 312.

The natural instincts of self-preservation may be considered in determining whether a person who is injured on a railroad crossing was guilty of contributory negligence. Elgin, etc., R. Co. *v.* Hoadley, 122 Ill. App. 165 [*affirmed* in 220 Ill. 462, 77 N. E. 151].

82. Gosa *v.* Southern R. Co., 67 S. C. 347, 45 S. E. 810. And see *infra*, X, F, 10, a, (VII).

83. *California.*— Hearne *v.* Southern Pac. R. Co., 50 Cal. 482.

Illinois.— Illinois Cent. R. Co. *v.* Farrell, 86 Ill. App. 426; Chicago, etc., R. Co. *v.* Barnett, 56 Ill. App. 384.

Iowa.— Payne *v.* Chicago, etc., R. Co., 108 Iowa 188, 78 N. W. 813.

Kansas.— Chicago, etc., R. Co. *v.* Bartley, (1898) 53 Pac. 66.

New Jersey.— Hoopes *v.* West Jersey, etc., R. Co., 65 N. J. L. 89, 47 Atl. 27; Runyon *v.* New Jersey Cent. R. Co., 25 N. J. L. 556.

New York.— Koehler *v.* Rochester, etc., R. Co., 66 Hun 566, 21 N. Y. Suppl. 844.

South Carolina.— Gosa *v.* Southern R. Co., 67 S. C. 347, 45 S. E. 810.

Texas.— Galveston, etc., R. Co. *v.* Matula, 79 Tex. 577, 15 S. W. 573, 19 S. W. 376; International, etc., R. Co. *v.* Dyer, 76 Tex. 156, 13 S. W. 377; Galveston, etc., R. Co. *v.* Polk, (Civ. App. 1901) 63 S. W. 343; Gulf, etc., R. Co. *v.* Shieder, (Civ. App. 1894) 26 S. W. 509.

United States.— McCann *v.* Chicago, etc., R. Co., 105 Fed. 480, 44 C. C. A. 566.

Canada.— Royle *v.* Canadian Northern R. Co., 14 Manitoba 275; Atkinson *v.* Grand Trunk R. Co., 17 Ont. 220.

See 41 Cent. Dig. tit. "Railroads," § 1022. And see *infra*, X, F, 10, a, (VIII), (A).

Where a person is injured by heedlessly attempting to catch hold of a train after he has crossed, he cannot recover. Payne *v.* Chicago, etc., R. Co., 136 Mo. 562, 38 S. W. 308.

The mere intention of one at a railroad crossing to board a train when not a passenger does not constitute him a trespasser so as to charge him with contributory negligence. Gulf, etc., R. Co. *v.* Hall, 34 Tex. Civ. App. 535, 80 S. W. 133.

The ground for precluding a recovery in such cases is the injured person's failure to use reasonable care, and not that of "assumed risk." Chicago, etc., R. Co. *v.* Randolph, 199 Ill. 126, 65 N. E. 142 [*affirming* 101 Ill. App. 121].

84. Louisville, etc., R. Co. *v.* Stewart, 128 Ala. 313, 29 So. 562; Chicago, etc., R. Co. *v.* Olson, 113 Ill. App. 320; Chicago, etc., R. Co. *v.* Smith, 77 Ill. App. 492; St. Louis, etc., R. Co. *v.* Knowles, 6 Kan. App. 790, 51 Pac. 230.

That the vehicle was on the track is not conclusive of contributory negligence in case of a collision therewith. Richey *v.* Missouri Pac. R. Co., 7 Mo. App. 150.

A person's situation or condition in life does not affect his exercise of reasonable care. Lake Shore, etc., R. Co. *v.* Miller, 25 Mich. 274.

85. *Delaware.*— Reed *v.* Queen Anne's R. Co., 4 Pennew. 413, 57 Atl. 429.

Indiana.— Louisville, etc., R. Co. *v.* Stommel, 126 Ind. 35, 25 N. E. 863; Cincinnati.

locality and the circumstances of the case seem to require greater caution,[86] although in any case such care only is required as under the circumstances is ordinary care.[87]

(II) *RATE OF SPEED IN APPROACHING CROSSING.*[88] Going over or approaching a railroad crossing at a rapid rate of speed, as for example faster than a walk, is not contributory negligence as a matter of law;[89] but it is a proper subject

etc., R. Co. *v.* Butler, 103 Ind. 31, 2 N. E. 138.

Iowa.— Goodrich *v.* Burlington, etc., R. Co., 97 Iowa 521, 66 N. W. 770.

Kansas.—St. Louis, etc., R. Co. *v.* Knowles, 6 Kan. App. 790, 51 Pac. 230, holding that the degree of care must depend upon the obstructions, location, surroundings, and existing circumstances of each particular case, and under proper instructions is ordinarily a question of fact for the determination of the jury.

Missouri.— Harlan *v.* St. Louis, etc., R. Co., 65 Mo. 22.

Nebraska.— Riley *v.* Missouri Pac. R. Co., 69 Nebr. 82, 95 N. W. 20.

New Jersey.— New Jersey Cent. R. Co. *v.* Moore, 24 N. J. L. 824.

New York.— Weber *v.* New York Cent., etc., R. Co., 58 N. Y. 451.

See 41 Cent. Dig. tit. "Railroads," § 1022.

86. Martin *v.* Baltimore, etc., R. Co., 2 Marv. (Del.) 123, 42 Atl. 442; Wabash, etc., R. Co. *v.* Wallace, 110 Ill. 114; Southern R. Co. *v.* Winchester, 105 S. W. 167, 32 Ky. L. Rep. 19; Morris *v.* Chicago, etc., R. Co., 26 Fed. 22.

Persons using a farm crossing over a railroad must exercise a higher degree of care and caution to avoid injury from trains than persons using a crossing at a public highway. Baltimore, etc., R. Co. *v.* Keck, 84 Ill. App. 159 [*affirmed* in 185 Ill. 400, 57 N. E. 197].

In open country.— Since a higher rate of speed in the movement of cars is permissible in the country than along the streets of a city, more caution is demanded of a person crossing tracks in the country than in a city. Phillips *v.* Washington, etc., R. Co., 104 Md. 455, 65 Atl. 422.

87. *Illinois.*— Chicago, etc., R. Co. *v.* Hutchinson, 120 Ill. 587, 11 N. E. 855; Chicago, etc., R. Co. *v.* Louderback, 125 Ill. App. 323.

Iowa.— Goodrich *v.* Burlington, etc., R. Co., 97 Iowa 521, 66 N. W. 770, extraordinary care not required.

Kansas.— Chicago, etc., R. Co. *v.* Fisher, 49 Kan. 460, 30 Pac. 462.

Kentucky.— Cincinnati, etc., R. Co. *v.* Champ, 104 S. W. 988, 31 Ky. L. Rep. 1054; Chesapeake, etc., R. Co. *v.* Wilson, 102 S. W. 810, 31 Ky. L. Rep. 500.

Louisiana.— Eichorn *v.* New Orleans, etc., R., etc., Co., 112 La. 226, 36 So. 335, 104 Am. St. Rep. 437.

Missouri.— Lowenstein *v.* Missouri Pac. R. Co., 117 Mo. App. 371, 93 S. W. 871; McNown *v.* Wabash R. Co., 55 Mo. App. 585, holding that a person approaching a railroad crossing is not required to adopt every possible precaution but it is sufficient if he uses that care which would be expected of a person of ordinary prudence.

Nebraska.— Riley *v.* Missouri Pac. R. Co., 69 Nebr. 82, 95 N. W. 20.

New York.— Lewis *v.* Long Island R. Co., 162 N. Y. 52, 56 N. E. 548; Kain *v.* New York, etc., R. Co., 3 N. Y. Suppl. 311.

South Carolina.— Kirby *v.* Southern R. Co., 63 S. C. 494, 41 S. E. 765.

Texas.— International, etc., R. Co. *v.* Mitchell, (Civ. App. 1901) 60 S. W. 996; Houston, etc., R. Co. *v.* Laskowski, (Civ. App. 1898) 47 S. W. 59; Missouri, etc., R. Co. *v.* Rogers, (Civ. App. 1897) 40 S. W. 849; Galveston, etc., R. Co. *v.* Cook, (Civ. App. 1894) 25 S. W. 455, holding that only ordinary care is required of one approaching a railroad crossing, although under Rev. St. art. 2899, an action for his death if he is killed can be maintained against the railroad company only in case it was guilty of gross negligence.

West Virginia.— Meeks *v.* Ohio River R. Co., 52 W. Va. 99, 43 S. E. 118.

See 41 Cent. Dig. tit. "Railroads," § 1022.

The non-performance of impossible things does not constitute negligence; and negligence therefore on the part of plaintiff cannot be conclusively presumed as a matter of law from his inability to control his horses or to prevent their running away when they become frightened by a train approaching a crossing toward which he is driving. Faber *v.* St. Paul, etc., R. Co., 29 Minn. 465, 13 N. E. 902.

A mere error of judgment on the part of the person passing over a railroad crossing is not of itself contributory negligence which will bar him from recovering. Hoyt *v.* New York, etc., R. Co., 6 N. Y. St. 7.

Limiting liability by signs.—A railroad company by posting signs forbidding the use of its depot and approaches as a thoroughfare cannot make a person injured on a public crossing, through the negligence of the company, guilty of contributory negligence when such person was in the exercise of ordinary care, as it cannot forbid such use of a public crossing. Gulf, etc., R. Co. *v.* Marchand, 24 Tex. Civ. App. 47, 57 S. W. 860.

88. **Rate of speed on a railroad crossing as affecting duty to stop, look, and listen** see *infra*, X, F, 10, d, (I), (L); X, F, 10, d, (II), (E).

89. Atchison, etc., R. Co. *v.* Shaw, 56 Kan. 519, 43 Pac. 1129; Richardson *v.* New York Cent., etc., R. Co., 15 N. Y. Suppl. 868 [*affirmed* in 133 N. Y. 563, 30 N. E. 1148].

That one driving cannot stop before reaching the crossing after discovering the approach of a train does not necessarily show negligence. Tyler *v.* New York, etc., R. Co., 137 Mass. 238.

of consideration for the jury,[90] and when taken together with carelessness of the traveler or other circumstances may constitute such negligence, barring his right of recovery.[91]

(III) *Wrongful and Unlawful Acts or Conduct.*[92] That a person injured at a railroad crossing is at the time of the accident engaged in some wrongful or unlawful act or conduct is not such negligence as will bar his right to recover,[93] unless such act or conduct contributes directly to the accident.[94]

(IV) *Care in Respect to Horses or Teams.* A person riding or driving near or over a railroad crossing is also bound to exercise ordinary care in respect to his horse or team to prevent it becoming frightened and causing injury;[95] and in determining whether he exercised proper care or not the character of the horse or team and the injured person's knowledge thereof should be considered.[96] But it is not contributory negligence that such person merely knows of the danger and knows that his horse or team may become frightened,[97] although the fact of such knowledge may have an important bearing upon the question,[98] and may constitute contributory negligence, where by reason of such knowledge the danger might have been easily avoided.[99]

90. Atchison, etc., R. Co. *v.* Shaw, 56 Kan. 519, 43 Pac. 1129; Kimball *v.* Friend, 95 Va. 125, 27 S. E. 901.

91. Toledo, etc., R. Co. *v.* Patterson, 94 Ill. App. 670; Western Maryland R. Co. *v.* Kehoe, 83 Md. 434, 35 Atl. 90; Chase *v.* Maine Cent. R. Co., 167 Mass. 383, 45 N. E. 911 (holding that evidence that the person injured was driving at a trot with the reins loose and attempted to stop the horse only when it reached the track is insufficient to show freedom from contributory negligence); McCanna *v.* New England R. Co., 20 R. I. 439, 39 Atl. 891.

Approaching at a speed which renders it difficult to avoid the accident, if not impossible to do so, after discovering the danger, is negligence, barring a recovery. Wilds *v.* Hudson River R. Co., 24 N. Y. 430, 23 How. Pr. 492 [*reversing* 33 Barb. 503]; Morse *v.* Erie R. Co., 65 Barb. (N. Y.) 490; Martin *v.* New York Cent., etc., R. Co., 21 N. Y. Suppl. 919.

92. Injuries received while violating Sunday laws see SUNDAY.

93. Pennsylvania Co. *v.* Frana, 112 Ill. 398 (going to work in a lumber yard kept in violation of a city ordinance); Louisville, etc., R. Co. *v.* Davis, 7 Ind. App. 222, 33 N. E. 451 (leaving horses unhitched on street in violation of city ordinance); Stevens *v.* Missouri Pac. Co., 67 Mo. App. 356 (holding that the fact that a person injured on a public crossing intended to pursue his journey on to the company's private grounds cannot affect his right to recover).

94. Weller *v.* Chicago, etc., R. Co., 120 Mo. 635, 23 S. W. 1061, 25 S. W. 532. See Kirby *v.* Southern R. Co., 63 S. C. 494, 41 S. E. 765.

95. St. Louis, etc., R. Co. *v.* Boback, 71 Ark. 427, 75 S. W. 473 (holding that it is not contributory negligence *per se* to jump from a vehicle and attempt to grasp the bridle and prevent the horse from running); Illinois Cent. R. Co. *v.* Griffin, 184 Ill. 9, 56 N. E. 337 [*affirming* 84 Ill. App. 152]; Illinois Cent. R. Co. *v.* Farrell, 86 Ill. App. 436; Wabash R. Co. *v.* Jenkins, 84 Ill. App. 511 (holding that a driver is bound to exercise ordinary care to ascertain whether or not a train is approaching); Paris, etc., R. Co. *v.* Calvin, (Tex. Civ. App. 1907) 103 S. W. 428 [*affirmed* in (1908) 106 S. W. 879].

That one drives within fifty feet of a crossing and the horse, frightened by the noise of a train, runs away and causes injury is not conclusive, as a matter of law, of a want of due care on the part of the driver. Herrick *v.* Sullivan, 120 Mass. 576.

An attempt to drive a horse near a box car negligently permitted to remain at a street crossing, after the driver sees that the horse has become frightened, is not such contributory negligence as to preclude him from recovering for injuries caused thereby, if it does not appear that he knew that it was dangerous to do so. Ft. Worth, etc., R. Co. *v.* Morris, (Tex. Civ. App. 1907) 101 S. W. 1038.

96. Atchison, etc., R. Co. *v.* Johnson, 7 Kan. App. 594, 52 Pac. 460; Whitby *v.* Baltimore, etc., R. Co., 96 Md. 700, 54 Atl. 674; Peterson *v.* Chicago, etc., R. Co., 64 Mich. 621, 31 N. W. 548.

A husband's knowledge of the unsafe and foolish character of a horse cannot be attributed to his wife, where he did not know that she was going to use the horse. Whitby *v.* Baltimore, etc., R. Co., 96 Md. 700, 54 Atl. 674.

97. Western R. Co. *v.* Cleghorn, 143 Ala. 392, 39 So. 133; Ohio, etc., R. Co. *v.* Trowbridge, 126 Ind. 391, 26 N. E. 64; Pittsburg, etc., R. Co. *v.* Taylor, 104 Pa. St. 306, 49 Am. Rep. 580; Sherman, etc., R. Co. *v.* Bridges, 16 Tex. Civ. App. 64, 40 S. W. 536; Missouri, etc., R. Co. *v.* Thomas, (Tex. Civ. App. 1892) 28 S. W. 139 [*reversed* on other grounds in 87 Tex. 282, 28 S. W. 343].

Driving horses near standing or approaching locomotives or cars see *infra*, X, F, 10, g.

Knowledge of danger in general see *infra*, X, F, 10, a, (v).

98. Ohio, etc., R. Co. *v.* Trowbridge, 126 Ind. 391, 26 N. E. 64.

99. Pittsburgh Southern R. Co. *v.* Taylor,

(v) *Knowledge of Danger.* Although a traveler on a public highway is bound to know that there is peril in attempting to cross over a railroad track, as such track is itself an admonition of danger on which he must act with at least ordinary prudence,[1] mere knowledge of danger on his part is not of itself conclusive evidence of contributory negligence;[2] but it is a circumstance to be considered, and, when taken together with other facts in the case, such as lack of ordinary care in other respects, may bar the injured person's right of recovery,[3] notwithstanding the railroad company itself is guilty of negligence.[4] Thus where a person knows or ought to know of the danger at a crossing in time to enable him to avoid it and fails to do so, he cannot recover for his injuries from the railroad company, although the latter fails to ring the bell or sound the whistle,[5] to maintain a sign-board at the crossing as required by law,[6] to have a flagman or

104 Pa. St. 306, 49 Am. Rep. 580, holding that where plaintiff knew that some cars had run off the track near the highway and that a neighbor's horse had been frightened by them, but nevertheless drove his horse along that road when he could have avoided it by going a short distance through his own field, and his horse took fright and injured him, he is guilty of contributory negligence.

1. Cleveland, etc., R. Co. *v.* Miller, 149 Ind. 490, 49 N. E. 445; Lowden *v.* Pennsylvania Co., 41 Ind. App. 614, 82 N. E. 941.

2. Ohio, etc., R. Co. *v.* Trowbridge, 126 Ind. 391, 26 N. E. 64; Annaker *v.* Chicago, etc., R. Co., 81 Iowa 267, 47 N. W. 68; Nohrden *v.* Northeastern R. Co., 59 S. C. 87, 37 S. E. 228, 82 Am. St. Rep. 826 (holding that the fact that a person injured at a railroad crossing knew of the train's approach in time to avoid the collision does not necessarily show gross negligence on his part); Gulf, etc., R. Co. *v.* Grisom, 36 Tex. Civ. App. 630, 82 S. W. 671 (holding that a minor injured while attempting to pass between two cars standing across a public city street, is not precluded from recovering by reason of his knowledge that there was some danger incident to his act).

3. *Georgia.*— Harris *v.* Southern R. Co., 129 Ga. 388, 58 S. E. 873.

Illinois.— Baltimore, etc., R. Co. *v.* Driskell, 101 Ill. App. 137 (holding that where a person voluntarily leaves a place of safety and attempts to extricate his property from a place of danger on a railroad crossing and is run over and killed, he is guilty of such a reckless exposure of himself as to preclude a recovery.

Indiana.— Wabash R. Co. *v.* Keister, 163 Ind. 609, 67 N. E. 521; Ohio, etc., R. Co. *v.* Trowbridge, 126 Ind. 391, 26 N. E. 64; Cleveland, etc., R. Co. *v.* Wuest, 40 Ind. App. 693, 82 N. E. 986, 41 Ind. App. 210, 83 N. E. 620; Towers *v.* Lake Erie, etc., R. Co., 18 Ind. App. 684, 48 N. E. 1046.

Kentucky.— Louisville, etc., R. Co. *v.* Armstrong, 105 S. W. 473, 32 Ky. L. Rep. 252 (contributory negligence as a matter of law); Cincinnati, etc., R. Co. *v.* Champ, 104 S. W. 988, 31 Ky. L. Rep. 1054.

Michigan.—Storrs *v.* Grand Trunk Western R. Co., 142 Mich. 375, 105 N. W. 764, holding that a person is guilty of contributory negligence where, seeing the steam from an engine and hearing the whistle, he whips up his horse to cross, although he cannot see the train.

Missouri.— Wilkins *v.* St. Louis, etc., R. Co., 101 Mo. 93, 13 S. W. 893.

Nebraska.— Riley *v.* Missouri Pac. R. Co., 69 Nebr. 82, 95 N. W. 20.

New York.— Meinrenken *v.* New York Cent., etc., R. Co., 81 N. Y. App. Div. 132, 80 N. Y. Suppl. 1074; De Jong *v.* Erie R. Co., 59 N. Y. App. Div. 168, 69 N. Y. Suppl. 78, holding one who after seeing an approaching train in time to stop in a place of safety attempts to cross and is struck by the locomotive is guilty of contributory negligence as a matter of law.

South Carolina.—Drawdy *v.* Atlantic Coast Line R. Co., 78 S. C. 374, 58 S. E. 980, contributory negligence warranting a nonsuit.

Washington.— Reynolds *v.* Northern Pac. R. Co., 22 Wash. 165, 60 Pac. 120, holding that a pedestrian who crosses a railroad, where there is a network of tracks, and which he knows to be unsafe, assumes the risk, so as to bar a recovery, where there is another safe crossing within fifty feet.

United States.— Casey *v.* Chicago, etc., R. Co., 157 Fed. 66, 84 C. C. A. 570, contributory negligence precluding a recovery as a matter of law regardless of the question of negligence of the railroad company.

See 41 Cent. Dig. tit. "Railroads," § 1026.

Descending gates.— A person who, while driving a gentle horse, over which he has full control, along a highway toward a railroad crossing, sees the gates thereto descending, knows he is likely to collide with them and makes no effort to avoid the danger or stop his horse, is guilty of contributory negligence as a matter of law. Brink *v.* Erie R. Co., 47 N. Y. App. Div. 483, 62 N. Y. Suppl. 408.

4. Atchison, etc., R. Co. *v.* Withers, 69 Kan. 620, 77 Pac. 542, 78 Pac. 451; Casey *v.* Chicago, etc., R. Co., 157 Fed. 66, 84 C. C. A. 570. And see *infra*, X, F, 10, a, (VIII).

5. Chicago, etc., R. Co. *v.* Bell, 70 Ill. 102; Telfer *v.* Northern R. Co., 30 N. J. L. 188; Pakalinsky *v.* New York Cent., etc., R. Co., 82 N. Y. 424; Missouri Pac. R. Co. *v.* Peay, (Tex. 1892) 20 S. W. 57; Houston, etc., R. Co. *v.* Nixon, 52 Tex. 19. See also O'Brien *v.* New Jersey Cent. R. Co., 60 N. Y. App. Div. 453, 69 N. Y. Suppl. 914. And see *infra*, X, F, 10, a, (VIII).

6. Haas *v.* Grand Rapids, etc., R. Co., 47

watchman at the crossing,[7] to have the gates closed,[8] or to have a light upon the engine in the night-time.[9]

(VI) *Acts in Emergencies.* Where a traveler without any fault on his part is placed in a position of eminent peril at a crossing the law makes allowance for such a person and will not hold him guilty of such negligence as to defeat his recovery if he does not select the very wisest course, and an honest mistake of judgment in such a sudden emergency will not of itself constitute contributory negligence, although another course might have been better and safer;[10] and this rule is especially applicable where the person is placed in such a perilous position by reason of the railroad company's negligence, as in failing to give the proper signals.[11] All that is required of a person in such an emergency is that he act with ordinary care under the circumstances, it being for the jury to determine whether such an emergency existed and whether the traveler acted with due care.[12] The above rule, however, does not apply where the injured person's perilous position is due

Mich. 401, 11 N. W. 216; Gulf, etc., R. Co. *v.* Greenlee, 62 Tex. 344.

7. Duncan *v.* Missouri Pac. R. Co., 46 Mo. App. 198; Pakalinsky *v.* New York Cent., etc., R. Co., 82 N. Y. 424. *Compare* Annaker *v.* Chicago, etc., R. Co., 81 Iowa 267, 47 N. W. 68.

8. Chicago, etc., R. Co. *v.* Sutherland, 88 Ill. App. 295; Bjork *v.* Illinois Cent. R. Co., 85 Ill. App. 269; Baltimore, etc., R. Co. *v.* Stumpf, 97 Md. 78, 54 Atl. 978.

That the gate is going up when a traveler starts to cross does not justify him in ignoring all other sights and sounds indicating that he cannot safely advance, and if in spite of such facts he attempts to cross and is injured by the descending gate, he can not recover. Briggs *v.* Boston, etc., R. Co., 188 Mass. 463, 74 N. E. 667.

9. Pakalinsky *v.* New York Cent., etc., R. Co., 82 N. Y. 424.

10. *California.*— Warren *v.* Southern California R. Co., (1901) 67 Pac. 1.

Indiana.— Pittsburgh, etc., R. Co. *v.* Burton, 139 Ind. 357, 37 N. E. 150, 38 N. E. 594; Peirce *v.* Jones, 22 Ind. App. 163, 53 N. E. 431; Grand Rapids, etc., R. Co. *v.* Cox, 8 Ind. App. 29, 35 N. E. 183; Louisville, etc., Consol. R. Co. *v.* Kelly, 6 Ind. App. 545, 33 N. E. 1103.

Kentucky.— Louisville, etc., R. Co. *v.* Molloy, 122 Ky. 219, 91 S. W. 685, 28 Ky. L. Rep. 1113.

Michigan.— Richfield *v.* Michigan Cent. R. Co., 110 Mich. 406, 68 N. W. 218.

Mississippi.—Alabama, etc., R. Co. *v.* Lowe, 73 Miss. 203, 19 So. 36.

New York.— Dyer *v.* Erie R. Co., 71 N. Y. 228 (holding that the fact that a traveler jumped from his vehicle when in imminent danger of a collision at a crossing does not bar a recovery, although he might have escaped injury had he remained quiet); Leonard *v.* New York Cent., etc., R. Co., 42 N. Y. Super. Ct. 225; Quill *v.* New York Cent., etc., R. Co., 16 Daly 313, 11 N. Y. Suppl. 80 [*affirmed* in 126 N. Y. 629, 27 N. E. 410]; Spooner *v.* Delaware, etc., R. Co., 1 N. Y. St. 558 (holding that a girl eight years old is not chargeable with contributory negligence in going on a railroad track in front of an approaching train at a crossing in an attempt to save other children if she is circumspect).

Ohio.— Wheeling, etc., R. Co. *v.* Parker, 29 Ohio Cir. Ct. 1 (holding that where a person in crossing a railroad track, his horse being on the track, discovers an engine approaching and urges his horse forward, such act does not constitute negligence on the part of such person); Lake Shore, etc., R. Co. *v.* Johnston, 25 Ohio Cir. Ct. 41.

Pennsylvania.— Pennsylvania R. Co. *v.* Werner, 89 Pa. St. 59; Delaware, etc., R. Co. *v.* Smith, 1 Walk. 88.

Texas.— Missouri, etc., R. Co. *v.* Oslin, 26 Tex. Civ. App. 370, 63 S. W. 1039; Bryant *v.* International, etc., R. Co., 19 Tex. Civ. App. 88, 46 S. W. 82.

11. Macon, etc., R. Co. *v.* Winn, 26 Ga. 250; Chesapeake, etc., R. Co. *v.* Ogles, 73 S. W. 751, 24 Ky. L. Rep. 2160; Bond *v.* New York Cent., etc., R. Co., 69 Hun (N. Y.) 476, 23 N. Y. Suppl. 450; International, etc., R. Co. *v.* Neff, 87 Tex. 303, 28 S. W. 283 (holding that the railroad company is not relieved from liability by the fact that such a person rashly jumped from his wagon when by remaining in it he would have escaped injury); Houston, etc., R. Co. *v.* Byrd, (Tex. Civ. App. 1901) 61 S. W. 147 (holding that whether or not plaintiff acted prudently or imprudently, her effort to escape the threatened danger would not affect her right to recover, she having been placed in a position of danger by the negligence of defendant's employees); Bryant *v.* International, etc., R. Co., 19 Tex. Civ. App. 88, 46 S. W. 82; International, etc., R. Co. *v.* Scin, 11 Tex. Civ. App. 386, 33 S. W. 558.

Although a person acts wildly and negligently in such a case the company is liable for an injury received since its negligence is the proximate cause of the injury. Bryant *v.* International, etc., R. Co., 19 Tex. Civ. App. 88, 46 S. W. 82.

12. *Alabama.*— Louisville, etc., R. Co. *v.* Stewart, 128 Ala. 313, 29 So. 562.

California.— Bilton *v.* Southern Pac. R. Co., 148 Cal. 443, 83 Pac. 440, holding that such a person need not exercise all the presence of mind and carefulness which are required of a prudent man under ordinary circumstances, but is only required to do

to his own negligence,[13] or where the accident results from a rash apprehension of danger which does not exist.[14]

(VII) *CONTRIBUTORY NEGLIGENCE AS PROXIMATE CAUSE OF INJURY.* To preclude a person from recovering for an injury received at a railroad crossing, his negligence must have been the proximate cause of his injury.[15] But notwithstanding such person is guilty of negligence to some extent, he may still recover if the direct and proximate cause of the injury is not his own negligence, but is the negligence of the railroad company,[16] or where, notwithstanding his

what is reasonable under the existing circumstances.

Indiana.— Peirce *v.* Jones, 22 Ind. App. 163, 53 N. E. 431; Grand Rapids, etc., R. Co. *v.* Cox, 8 Ind. App. 29, 35 N. E. 183; Louisville, etc., Consol. R. Co. *v.* Kelly, 6 Ind. App. 545, 33 N. E. 1103.

Minnesota.— King *v.* Chicago, etc., R. Co., 77 Minn. 104, 79 N. W. 611, holding that, although a person injured does not stop and listen before he attempts to cross, the question of his negligence is for the jury.

New Hampshire.— Folsom *v.* Concord. etc., R. Co., 68 N. H. 454, 38 Atl. 209.

See 41 Cent. Dig. tit. "Railroads," § 1027.

The conduct of a person in such an emergency must be considered in the light of the peril that he saw before him, of the state of mind that he must have been in in view of the very few seconds of time that he had to determine what would be the best course to pursue; and if he exercised ordinary care under all the circumstances he is not guilty of contributory negligence, although he may not in fact have done what was the very best thing to do at the time. Wheeling, etc., R. Co. *v.* Suhrwiar, 22 Ohio Cir. Ct. 560, 12 Ohio Cir. Dec. 809.

13. *Alabama.*— Georgia Cent. R. Co. *v.* Foshee, 125 Ala. 199, 27 So. 1006.

Connecticut.— Peck *v.* New York, etc., R. Co., 50 Conn. 379.

Michigan.— Richfield *v.* Michigan Cent. R. Co., 110 Mich. 406, 68 N. W. 218.

Ohio.— Cincinnati, etc., R. Co. *v.* Murphy, 18 Ohio Cir. Ct. 298, 10 Ohio Cir. Dec. 195, holding that where a person is wrongfully on the track without defendant's invitation, and being called on in a sudden emergency makes a mistake through an error of judgment as to the best course to pursue, he is not thereby relieved from his original negligence if it apparently contributed to the injury.

Wisconsin.— Liermann *v.* Chicago, etc., R. Co., 82 Wis. 286, 52 N. W. 91, 33 Am. St. Rep. 37.

See 41 Cent. Dig. tit. "Railroads," § 1027.

Voluntarily exposing oneself to danger at a railroad crossing is contributory negligence, although the exposure is made in saving cattle or other property. Morris *v.* Lake Shore, etc., R. Co., 148 N. Y. 182, 42 N. E. 579 [*reversing* 79 Hun 611, 29 N. Y. Suppl. 1147].

14. Macon, etc., R. Co. *v.* Winn, 26 Ga. 250.

15. *Alabama.*— Georgia Cent. R. Co. *v.* Hyatt, 150 Ala. 355, 43 So. 867, holding that if the engine which ran over and killed decedent could not have been seen or heard had he stopped, looked, and listened, then such failure on his part was not the proximate cause of his death.

Kentucky.— Helm *v.* Louisville, etc., R. Co., 33 S. W. 396, 17 Ky. L. Rep. 1004.

New Jersey.— New Jersey Cent. R. Co. *v.* Moore, 24 N. J. L. 824, holding that no recovery can be had if the injured person's negligence contributed in such a way that if he had been guilty of no negligence the accident would not have occurred.

North Carolina.— Norwood *v.* Raleigh, etc., R. Co., 111 N. C. 236, 16 S. E. 4; Clark *v.* Wilmington, etc., R. Co., 109 N. C. 430, 14 S. E. 43, 14 L. R. A. 749; Deans *v.* Wilmington, etc., R. Co., 107 N. C. 686, 12 S. E. 77, 22 Am. St. Rep. 902.

West Virginia.— Butcher *v.* West Virginia, etc., R. Co., 37 W. Va. 180, 16 S. E. 457, 18 L. R. A. 519.

Canada.— See Atkinson *v.* Grand Trunk R. Co., 17 Ont. 220.

See 41 Cent. Dig. tit. "Railroads," § 1028.

Contributory negligence held proximate cause of injury: See Studer *v.* Southern Pac. Co., 121 Cal. 400, 53 Pac. 942, 66 Am. St. Rep. 39 (climbing over couplings between cars, when train started backward without warning. But see Grant *v.* Baltimore, etc., R. Co., 2 MacArthur (D. C.) 277); Haecker *v.* Chicago, etc., R. Co., 91 Ill. App. 570 (recrossing track in front of moving train); Day *v.* Boston, etc., R. Co., 96 Me. 207, 52 Atl. 771, 90 Am. St. Rep. 335, 97 Me. 528, 55 Atl. 420 (where accident might have been avoided by reasonable diligence); McNab *v.* United R., etc., Co., 94 Md. 719, 51 Atl. 421; McKenna *v.* Alabama, etc., R. Co., 87 Miss. 652, 40 So. 426; McAnally *v.* Pennsylvania R. Co., 194 Pa. St. 464, 45 Atl. 326, 47 L. R. A. 788 (resisting gateman's attempt to keep him back, whereby he is thrown and has his leg cut off); Corbin *v.* Grand Trunk R. Co., 78 Vt. 458, 63 Atl. 138.

16. *Arkansas.*— Choctaw, etc., R. Co. *v.* Baskins, 78 Ark. 355, 93 S. W. 757.

District of Columbia.— Grant *v.* Baltimore, etc., R. Co., 2 MacArthur 277, holding the act of plaintiff in attempting to climb between the cars of a train obstructing a crossing, whereby he is injured by the sudden starting of the train without warning, not to be the proximate cause of the injury.

Georgia.— Brunswick, etc., R. Co. *v.* Hoover, 74 Ga. 426.

Illinois.— Elgin, etc., R. Co. *v.* Hoadley, 220 Ill. 462, 77 N. E. 151 [*affirming* 122 Ill. App. 165].

Texas.— Gulf, etc., R. Co. *v.* Melville, (Civ.

negligence, the injury could have been avoided by the exercise of proper care on the part of the railroad company.[17]

(VIII) *EFFECT OF CONTRIBUTORY NEGLIGENCE*[18]— (A) *In General.* As a general rule where a person approaching a railroad crossing fails to exercise due and ordinary care to avert an accident, and his negligence materially or proximately contributes to his injury, he cannot recover therefor, notwithstanding negligence on the part of the railroad company in the operation of its trains or road,[19] such as running its trains at an unlawful rate of speed,[20] or without

App. 1905) 87 S. W. 863, holding that the fact that one injured by being struck by moving railroad cars stumbled and fell on the track and for that reason could not escape does not relieve the railroad from liability if he was not guilty of contributory negligence in being on the track, although the operatives could not have avoided his injury after discovering his peril.

Wisconsin.— Winstanley *v.* Chicago, etc., R. Co., 72 Wis. 375, 39 N. W. 856.

See 41 Cent. Dig. tit. "Railroads," § 1028.

17. Norwood *v.* Raleigh, etc., R. Co., 111 N. C. 236, 16 S. E. 4; Clark *v.* Wilmington, etc., R. Co., 109 N. C. 430, 14 S. E. 43, 14 L. R. A. 749; Deans *v.* Wilmington, etc., R. Co., 107 N. C. 686, 12 S. E. 77, 22 Am. St. Rep. 902. And see *infra*, X, F, 12.

18. Effect of statutory liability see *infra*, X, F, 10, a, (VIII), (B).

19. *Alabama.*— Louisville, etc., R. Co. *v.* Richards, 100 Ala. 365, 13 So. 944.

California.— Hager *v.* Southern Pac. Co., 98 Cal. 309, 33 Pac. 119.

Colorado.— Chicago, etc., R. Co. *v.* Crisman, 19 Colo. 30, 34 Pac. 286.

Georgia.— Macon, etc., R. Co. *v.* Winn, 19 Ga. 440.

Illinois.— Rockford, etc., R. Co. *v.* Byam, 80 Ill. 528; Chicago, etc., R. Co. *v.* Jacobs, 63 Ill. 178; Cleveland, etc., R. Co. *v.* Huston, 125 Ill. App. 522.

Indiana.— Toledo, etc., R. Co. *v.* Shuckman, 50 Ind. 42; Ohio, etc., R. Co. *v.* Gullett, 15 Ind. 487; Evansville, etc., R. Co. *v.* Lowdermilk, 15 Ind. 120; Wamsley *v.* Cleveland, etc., R. Co., 41 Ind. App. 147, 82 N. E. 490, 83 N. E. 640; Cleveland, etc., R. Co. *v.* Wuest, 40 Ind. App. 693, 82 N. E. 986 (holding that there can be no recovery if plaintiff's negligence contributes in the slightest degree to his injury); Baltimore, etc., R. Co. *v.* Talmage, 15 Ind. App. 203, 43 N. E. 1019; Louisville, etc., R. Co. *v.* Stephens, 13 Ind. App. 145, 40 N. E. 148.

Iowa.— Sala *v.* Chicago, etc., R. Co., 85 Iowa 678, 52 N. W. 664.

Kentucky.— Louisville, etc., R. Co. *v.* Wilson, 124 Ky. 836, 100 S. W. 302, 30 Ky. L. Rep. 1048; Southern R. Co. *v.* Winchester, 105 S. W. 167, 32 Ky. L. Rep. 19; Meacham *v.* Louisville, etc., R. Co., 45 S. W. 363, 20 Ky. L. Rep. 112.

Maryland.— Cowen *v.* Dietrick, 101 Md. 46, 60 Atl. 282; Western Maryland R. Co. *v.* Kehoe, 83 Md. 434, 35 Atl. 90; Pennsylvania R. Co. *v.* McGirr, 61 Md. 108.

Michigan.— Mynning *v.* Detroit, etc., R. Co., 64 Mich. 93, 31 N. W. 147, 8 Am. St. Rep. 804.

Minnesota.— Arine *v.* Minneapolis, etc., R. Co., 76 Minn. 201, 78 N. W. 1108, 1119.

Missouri.— Butts *v.* St. Louis, etc., R. Co., 98 Mo. 272, 11 S. W. 754; Sims *v.* St. Louis, etc., R. Co., 116 Mo. App. 572, 92 S. W. 909.

New York.— Cox *v.* New York Cent., etc., R. Co., 69 N. Y. App. Div. 451, 74 N. Y. Suppl. 1011; Bieseigal *v.* New York Cent. R. Co., 33 Barb. 429 [*reversed* on the facts in 34 N. Y. 622, 90 Am. Dec. 741]; Sheffield *v.* Rochester, etc., R. Co., 21 Barb. 339.

Pennsylvania.— Beynon *v.* Pennsylvania R. Co., 168 Pa. St. 642, 32 Atl. 84; Gangawer *v.* Philadelphia, etc., R. Co., 168 Pa. St. 265, 32 Atl. 21; Groner *v.* Delaware, etc., Canal Co., 153 Pa. St. 390, 26 Atl. 7.

Texas.— Texas Midland R. Co. *v.* Tidwell, (Civ. App. 1899) 49 S. W. 641; San Antonio, etc., R. Co. *v.* Bergsland, 12 Tex. Civ. App. 97, 34 S. W. 155; Gulf, etc., R. Co. *v.* Scott, (Civ. App. 1894) 27 S. W. 827; Texas, etc., R. Co. *v.* Brown, 2 Tex. Civ. App. 281, 21 S. W. 424.

Utah.— Rogers *v.* Rio Grande Western R. Co., 32 Utah 367, 90 Pac. 1075.

Virginia.— Stokes *v.* Southern R. Co., 104 Va. 817, 52 S. E. 855; Hogan *v.* Tyler, 90 Va. 19, 17 S. E. 723.

United States.— Dunworth *v.* Grand Trunk Western R. Co., 127 Fed. 307, 62 C. C. A. 225; Walker *v.* Kinmare, 76 Fed. 101, 22 C. C. A. 75.

Canada.— Royle *v.* Canadian Northern R., 14 Manitoba 275.

See 41 Cent. Dig. tit. "Railroads," § 1084. And see *supra*, X, F, 10, a. (I).

20. *Georgia.*— Harris *v.* Southern R. Co., 129 Ga. 388, 58 S. E. 873; Thomas *v.* Georgia Cent. R. Co., 121 Ga. 38, 48 S. E. 683; Georgia Cent. R. Co. *v.* Tribble, 112 Ga. 863, 38 S. E. 356, holding that where it was conclusively shown that the speed at which the train was being run was higher than that prescribed by a valid municipal ordinance, and that no effort was made to so check the speed in passing over the crossing as to be able to stop if necessary to prevent injury to one attempting to cross, the company was, relatively to such person, negligent as a matter of law; and in order to prevent a recovery it must be shown that the injury was done with the consent of the injured person, or that he could, by the exercise of ordinary care, have avoided the consequences of the negligence of the company.

Illinois.— Chicago, etc., R. Co. *v.* Robinson, 9 Ill. App. 89.

Indiana.— Korrady *v.* Lake Shore, etc., R. Co., 131 Ind. 261, 29 N. E. 1069.

giving the customary or statutory signals,[21] unless the railroad company is guilty of such gross negligence or recklessness as to imply wantonness or a willingness to inflict injury.[22] This doctrine of contributory negligence applies only where

Iowa.— Nosler *v.* Chicago, etc., R. Co., 73 Iowa 268, 34 N. W. 850.

Kentucky.— Southern R. Co. *v.* Winchester, 105 S. W. 167, 32 Ky. L. Rep. 19; Meacham *v.* Louisville, etc., R. Co., 45 S. W. 363, 20 Ky. L. Rep. 112.

Maine.— Day *v.* Boston, etc., R. Co., 96 Me. 207, 52 Atl. 771, 90 Am. St. Rep. 335.

Missouri.— Green *v.* Missouri Pac. R. Co., 192 Mo. 131, 90 S. W. 805; Payne *v.* Chicago, etc., R. Co., 136 Mo. 562, 38 S. W. 308.

New York.— Keese *v.* New York, etc., R. Co., 67 Barb. 205, holding that where a person crossing a railroad track at a street crossing in a populous city contributes in any degree by his own negligence to a collision by which he is injured, the railroad company is not liable, although it is guilty of negligence in running its train over the crossing at too great a rate of speed.

Ohio.— Great China Tea Co. *v.* Norfolk, etc., R. Co., 27 Ohio Cir. Ct. 647.

Oregon.— Blackburn *v.* Southern Pac. Co., 34 Oreg. 215, 55 Pac. 225.

Wisconsin.— Schneider *v.* Chicago, etc., R. Co., 99 Wis. 378, 75 N. W. 169, holding that, although Laws (1891), c. 467, declares railroad companies liable to any person injured for all damages caused by trains running at excessive speed in cities, contributory negligence defeats recovery.

See 41 Cent. Dig. tit. "Railroads," § 1088. And see *infra*, X, F, 10, e, (IV).

21. *California.*— Meeks *v.* Southern Pac. R. Co., 52 Cal. 602.

Illinois.— Chicago, etc., R. Co. *v.* Robinson, 9 Ill. App. 89.

Indiana.— Louisville, etc., R. Co. *v.* Stommel, 126 Ind. 35, 25 N. E. 863; Cincinnati, etc., R. Co. *v.* Butler, 103 Ind. 31, 2 N. E. 138, holding that the fact that an approaching train fails to give the statutory signal will not excuse one who sustains injury at a crossing, if he neglects the diligent use of all available means to prevent such injury.

Kansas.— Atchison, etc., R. Co. *v.* Townsend, 39 Kan. 115, 17 Pac. 804.

Kentucky.— Southern R. Co. *v.* Winchester, 105 S. W. 167, 32 Ky. L. Rep. 19.

Mississippi.— Illinois Cent. R. Co. *v.* McLeod, 78 Miss. 334, 29 So. 76, 84 Am. St. Rep. 630, 52 L. R. A. 954.

Missouri.— Porter *v.* Missouri Pac. R. Co., 199 Mo. 82, 97 S. W. 880; Green *v.* Missouri Pac. R. Co., 192 Mo. 131, 90 S. W. 805; Baker *v.* Kansas City, etc., R. Co., 147 Mo. 140, 48 S. W. 838 (holding that if a traveler, when starting to cross a railroad track, has his attention called to approaching cars in time to keep out of their way, he cannot complain that no proper warning is given); Petty *v.* Hannibal, etc., R. Co., 88 Mo. 306.

New York.— Steves *v.* Oswego, etc., R. Co., 18 N. Y. 422; Miller *v.* New York Cent., etc., R. Co., 81 Hun 152, 30 N. Y. Suppl. 751; Dascomb *v.* Buffalo, etc., R. Co., 27 Barb. 221.

Ohio.— Great China Tea Co. *v.* Norfolk, etc., R. Co., 27 Ohio Cir. Ct. 647; Pennsylvania Co. *v.* Alburn, 23 Ohio Cir. Ct. 130.

Texas.— International, etc., R. Co. *v.* Graves, 59 Tex. 330.

Virginia.— Southern R. Co. *v.* Jones, 106 Va. 412, 56 S. E. 155.

Wisconsin.— Williams *v.* Chicago, etc., R. Co., 64 Wis. 1, 24 N. W. 422.

United States.— Texas, etc., R. Co. *v.* Cody, 166 U. S. 606, 17 S. Ct. 703, 41 L. ed. 1132.

See 41 Cent. Dig. tit. "Railroads," § 1087. And see *infra*, X, F, 10, e, (III).

22. *Alabama.*—Leak *v.* Georgia Pac. R. Co., 90 Ala. 161, 8 So. 245; Louisville, etc., R. Co. *v.* Crawford, 89 Ala. 240, 8 So. 243.

Colorado.— Chicago, etc., R. Co. *v.* Crisman, 19 Colo. 30, 34 Pac. 286. *Compare* Chicago, etc., R. Co. *v.* Nuney, 19 Colo. 36, 34 Pac. 288.

Illinois.— Lake Shore, etc., R. Co. *v.* Sunderland, 2 Ill. App. 307, holding, however, that the absence of a flagman from his post, or the failure to give warning by bell or whistle, is not such wilful or wanton negligence on the part of the railroad company as to charge it with liability for the accident.

Indiana.— Ohio, etc., R. Co. *v.* Gullett, 15 Ind. 487; Evansville, etc., R. Co. *v.* Lowdermilk, 15 Ind. 120.

Louisiana.— Lampkin *v.* McCormick, 105 La. 418, 29 So. 952, 83 Am. St. Rep. 245, holding that where a railroad company backs a train through points in a city where travelers are endangered, without providing any lookout or taking any precautions whatever, it is liable for an injury to a traveler, although he may not have been free from negligence.

Michigan.— Buckley *v.* Flint, etc., R. Co., 119 Mich. 583, 78 N. W. 655; Stewart *v.* Michigan Cent. R. Co., 119 Mich. 91, 77 N. W. 643; Battishill *v.* Humphreys, 64 Mich. 514, 38 N. W. 581, holding that where a railroad company is recklessly negligent in running its train without keeping a proper lookout, the question of contributory negligence does not arise.

Minnesota.—See Arine *v.* Minneapolis, etc., R. Co., 76 Minn. 201, 78 N. W. 1108, 1119.

See 41 Cent. Dig. tit. "Railroads," § 1085; and *infra*, X, F, 13.

But see Pennsylvania R. Co. *v.* McGirr, 61 Md. 108, holding that, notwithstanding the most culpable negligence on the part of the railroad company, the injured party cannot recover if the infliction of the injury would have been impossible had he observed due care and caution.

Mere inadvertence or inattention on the part of the railroad company does not constitute such wilful intention of inflicting injury as will entitle the person injured to damages although he is guilty of contributory negligence, where the circumstances are not

the negligent act of the injured party is concurrent in point of time with the negligent act of the railroad company so that the latter has no opportunity to act with reference to the act of the injured person,[23] and where the railroad company is not chargeable with negligence after the position of the injured party is discovered or by the exercise of reasonable care could have been discovered.[24] It has no application where the injured party's negligence is prior in point of time,[25] and where the railroad company by the exercise of reasonable care might have avoided the consequences of his negligence.[26] In some jurisdictions there has arisen by statute what is known as the modern doctrine of comparative negligence, by which the contributory negligence of the person injured does not wholly relieve the railroad company from liability but entitles it to a credit only in reduction of the amount of its liability.[27] Under these statutes where both the railroad company and the injured party are at fault in producing the injury, the injured party may recover, but the amount of such recovery is diminished in proportion to the amount of his fault;[28] but he can recover nothing if, notwith-

such that the railroad company ought to know that such inattention will almost necessarily produce the injury. Georgia Pac. R. Co. *v.* Lee, 92 Ala. 262, 9 So. 230.

The want of such care as very prudent men take of their own concerns does not constitute such gross negligence as will render the railroad company liable, if the person injured, by his own negligence contributes to his injury. Evansville, etc., R. Co. *v.* Lowdermilk, 15 Ind. 120.

In Kentucky "wilful neglect" applies only to actions for loss of life involving punitive damages; and in an action for injuries to a horse and wagon sustained by the negligent operation of a train at a crossing, contributory negligence of the driver is a good defense, although gross negligence on the part of the train employees in failing to give signals is shown. Chesapeake, etc., R. Co. *v.* Yost, 29 S. W. 326, 16 Ky. L. Rep. 834.

23. Spencer *v.* Baltimore, etc., R. Co., 4 Mackey (D. C.) 138, 54 Am. Rep. 269; Sims *v.* St. Louis, etc., R. Co., 116 Mo. App. 572, 92 S. W. 909; Owen *v.* Hudson River R. Co., 2 Bosw. (N. Y.) 374 (holding that if the collision and injury were caused by the concurrent negligence of both parties neither can recover from the other, and defendant is entitled to a verdict); Mercer *v.* Southern R. Co., 66 S. C. 246, 44 S. E. 750 (holding that if the railroad company is careless and negligent and a party killed at the crossing is also negligent and the admixture of the negligence of both brings about the injury, the railroad company is not liable).

24. Texas, etc., R. Co. *v.* Nolan, 62 Fed. 552, 11 C. C. A. 202.

25. Spencer *v.* Baltimore, etc., R. Co., 4 Mackey (D. C.) 138, 54 Am. Rep. 269; Mendenhall *v.* Philadelphia, etc., R. Co., 202 Pa. St. 427, 51 Atl. 1028, holding that, however negligent plaintiff may have been in crossing in front of the moving train, he having gotten safely across and his horse then being frightened by the escape of steam from the heating apparatus of the railroad company near the crossing and having backed in front of the engine, his negligence is not contributory.

26. Texas, etc., R. Co. *v.* Nolan, 62 Fed. 552, 11 C. C. A. 202. And see *infra*, X, F, 12.

27. Florida Cent., etc., R. Co. *v.* Williams, 37 Fla. 406, 20 So. 558.

28. Savannah, etc., R. Co. *v.* Cosens, 46 Fla. 237, 35 So. 398 (construing Laws (1891), § 2, c. 4071); Florida, etc., R. Co. *v.* Foxworth, 41 Fla. 1, 24 So. 338, 79 Am. St. Rep. 149; Florida Cent., etc., R. Co. *v.* Williams, 37 Fla. 406, 20 So. 558 (holding that in making the apportionment between the different parties' negligence, the jury should not take into consideration any negligence of either of the parties that did not directly or proximately contribute to the bringing about of the injury complained of); Atlantic Coast Line R. Co. *v.* Taylor, 125 Ga. 454, 54 S. E. 622; Atlanta, etc., R. Co. *v.* Gardner, 122 Ga. 82, 49 S. E. 818; Georgia Cent. R. Co. *v.* Tribble, 112 Ga. 863, 38 S. E. 356; Comer *v.* Barfield, 102 Ga. 485, 31 S. E. 89; Brunswick, etc., R. Co. *v.* Gibson, 97 Ga. 489, 25 S. E. 484; Americus, etc., R. Co. *v.* Luckie, 87 Ga. 6, 13 S. E. 105 (holding that if the injured party could not by the exercise of ordinary care have avoided the injury and the injury resulted from the railroad company's negligence, he can recover, although to some extent negligent himself, in which case the amount of the recovery should be diminished in proportion to the amount of his fault; and that this rule is not a qualification of the rule that the injured party cannot recover for the company's negligence if after such negligence commenced to exist he could, by ordinary care, have avoided the injury); Atlanta, etc., T. Co. *v.* Newton, 85 Ga. 517, 11 S. E. 776; Georgia R., etc., Co. *v.* Neely, 56 Ga. 540; Louisville, etc., R. Co. *v.* Martin, 113 Tenn. 266, 87 S. W. 418; Louisville, etc., R. Co. *v.* Howard, 90 Tenn. 144, 19 S. W. 116; Byrne *v.* Kansas City, etc., R. Co., 61 Fed. 605, 9 C. C. A. 666, 24 L. R. A. 693; Western, etc., R. Co. *v.* Roberson, 61 Fed. 592, 9 C. C. A. 646.

Where ordinary care is exercised in an endeavor to escape the consequences of the company's negligence after it is apparent that the railroad company is negligent, the in-

standing the company's negligence, the injury was caused entirely by his own negligence or by his consent,[29] or if he could by the exercise of ordinary care have avoided the injury;[30] or if the railroad company itself was in the exercise of reasonable and ordinary care.[31]

(B) *Effect of Statutory Provisions.* The rule of contributory negligence is ordinarily not changed or abrogated by reason of a statute or ordinance imposing a liability on account of the violation thereof, by which an injury results.[32] Thus where a person receives an injury at a crossing by reason of his own contributory negligence, he cannot recover therefor notwithstanding there is a statute or ordinance imposing a liability upon the railroad company for damages sustained by reason of its failure to give the statutory signals,[33] or to keep a proper lookout on its trains or cars,[34] or to maintain sign-boards at crossings,[35] or to maintain safe crossings,[36] unless the statute or ordinance imposes an absolute liability for the damages so caused.[37]

jured party is not necessarily precluded from recovering, although he may not have exercised ordinary care prior to his discovery of the railroad company's negligence. Macon, etc., R. Co. *v.* McLendon, 119 Ga. 297, 46 S. E. 106; Comer *v.* Barfield, 102 Ga. 485, 31 S. E. 89.

29. Savannah, etc., R. Co. *v.* Cosens, 46 Fla. 237, 35 So. 398; Florida Cent., etc., R. Co. *v.* Foxworth, 41 Fla. 1, 25 So. 238, 79 Am. St. Rep. 149; Florida Cent., etc., R. Co. *v.* Williams, 37 Fla. 406, 20 So. 558; Atlanta, etc., R. Co. *v.* Gardner, 122 Ga. 82, 49 S. E. 818; Georgia Cent. R. Co. *v.* Tribble, 112 Ga. 863, 38 S. E. 356; Comer *v.* Barfield, 102 Ga. 485, 31 S. E. 89; Atlanta, etc., R. Co. *v.* Newton, 85 Ga. 517, 11 S. E. 776; Georgia R., etc., Co. *v.* Neely, 56 Ga. 540.

30. Atlanta, etc., R. Co. *v.* Gardner, 122 Ga. 82, 49 S. E. 818; Georgia Cent., etc., R. Co. *v.* Tribble, 112 Ga. 863, 38 S. E. 356; Comer *v.* Barfield, 102 Ga. 485, 31 S. E. 89; Brunswick, etc., R. Co. *v.* Gibson, 97 Ga. 489, 25 S. E. 484; Americus, etc., R. Co. *v.* Luckie, 87 Ga. 6, 13 S. E. 105; Atlanta, etc., R. Co. *v.* Newton, 85 Ga. 517, 11 S. E. 776. See also Rowe *v.* Georgia Cent. R. Co., 115 Ga. 929, 42 S. E. 219.

31. Comer *v.* Barfield, 102 Ga. 485, 71 S. E. 89; Georgia R., etc., Co. *v.* Neely, 56 Ga. 540.

32. Texarkana, etc., R. Co. *v.* Bullington, (Ark. 1898) 47 S. W. 560; Weller *v.* Chicago, etc., R. Co., 120 Mo. 635, 23 S. W. 1061, 25 S. W. 532.

33. *California.*— Meeks *v.* Southern Pac. R. Co., 52 Cal. 602.

Illinois.— Toledo, etc., R. Co. *v.* Gallagher, 109 Ill. App. 67.

Indiana.— New York, etc., R. Co. *v.* Robbins, 38 Ind. App. 172, 76 N. E. 804; Pittsburgh, etc., R. Co. *v.* West, 34 Ind. App. 95, 69 N. E. 1017, holding that Burns Rev. St. (1901) § 359*a*, making contributory negligence a matter of defense, in no way relieves a traveler of his duty.

Iowa.— Sala *v.* Chicago, etc., R. Co., 85 Iowa 678, 52 N. W. 664.

Missouri.— Weller *v.* Chicago, etc., R. Co., 120 Mo. 635, 23 S. W. 1061, 25 S. W. 532.

South Carolina.— See Harbert *v.* Atlanta, etc., R. Co., 78 S. C. 537, 59 S. E. 644, construing Civ. Code (1902), § 2139.

United States.— Horn *v.* Baltimore, etc., R. Co., 54 Fed. 301, 4 C. C. A. 346; Saldana *v.* Galveston, etc., R. Co., 43 Fed. 862, holding that Tex. Rev. St. art. 4232, providing that locomotives shall whistle or ring before crossing a road, and that a railroad company neglecting this precaution shall "be liable for all damage which shall be sustained by any person, by reason of such neglect," does not render a company violating such statute liable for an injury to one who sees the approaching train in time to avoid it.

34. St. Louis, etc., R. Co. *v.* Dingman, 62 Ark. 245, 35 S. W. 219; St. Louis, etc., R. Co. *v.* Leathers, 62 Ark. 235, 35 S. W. 216. But see Southern R. Co. *v.* Simpson, 131 Fed. 705, 65 C. C. A. 563.

35. Lang *v.* Holiday Creek R., etc., Co., 49 Iowa 469; Dodge *v.* Burlington, etc., R. Co., 34 Iowa 276; Artz *v.* Chicago, etc., R. Co., 34 Iowa 153 (holding that the omission of a railroad company to have a sign-board at a highway crossing to warn people of approaching trains as provided by statute does not render the company absolutely liable to persons injured at such crossing, if such person's negligence contributes to the injury); Field *v.* Chicago, etc., R. Co., 14 Fed. 332, 4 McCrary 573 (holding that the liability of a railroad company for death or personal injuries caused by the failure to erect a sign-board does not attach absolutely under the statute where it appears that the damages sustained are the result of the injured party's own negligence and are not caused by the absence of the sign-board).

36. Hanson *v.* Chicago, etc., R. Co., 94 Iowa 409, 62 N. W. 788; Reeves *v.* Dubuque, etc., R. Co., 92 Iowa 32, 60 N. W. 243, each construing Code (1873), § 1288.

37. Louisville, etc., R. Co. *v.* Howard, 90 Tenn. 144, 19 S. W. 116; Southern R. Co. *v.* Simpson, 131 Fed. 705, 65 C. C. A. 563, holding that under Shannon Code Tenn. §§ 1574–1576, requiring every railroad company to keep some person on its locomotive on the lookout ahead, and certain other precautions, and rendering such company absolutely liable for injuries occasioned by a

(c) *Comparative Negligence.*[38] Under the doctrine of comparative negligence, which in most jurisdictions is either abolished or no longer recognized,[39] a person injured at a railroad crossing can recover, although negligent, if his negligence is slight and that of the railroad company is gross as compared therewith;[40] but if the injured party's negligence contributes to his injury he cannot recover unless he can prove a greater degree of negligence on the part of the railroad company.[41]

b. Children and Others Under Disability — (i) *In General* — (a) *Children.* Where a child incapable of knowing and avoiding danger is injured at a railroad crossing, by the negligence of the railroad company, the incapacity of the child shields it from responsibility for contributory negligence.[42] But where the child is shown to have sufficient mental capacity to appreciate danger, while ordinarily he is not bound to exercise the same degree of care and caution that an adult is bound to exercise in like circumstances,[43] he is at least bound to exercise such care and diligence as can be reasonably expected, under all the circumstances, from one of his age and intelligence,[44] or which he is shown to pos-

failure to comply with such sections, contributory negligence is no defense.

38. See, generally, NEGLIGENCE, 29 Cyc. 559.

Modern doctrine of comparative negligence see *supra*, X, F, 10, a, (VIII), (A), text and notes 27–31.

39. *Illinois.*— Cicero, etc., R. Co. *v.* Meixner, 160 Ill. 320, 43 N. E. 823, 31 L. R. A. 331; Chicago, etc., R. Co. *v.* Johnson, 61 Ill. App. 464. For earlier decisions in this state upholding the doctrine of comparative negligence see *infra*, notes 40, 41.

Indiana.— Cleveland, etc., R. Co. *v.* Miller, 149 Ind. 490, 49 N. E. 445.

Iowa.— Rietveld *v.* Wabash R. Co., 129 Iowa 249, 105 N. W. 515.

Kansas.— Howard *v.* Kansas City, etc., R. Co., 41 Kan. 403, 21 Pac. 267.

Michigan.— Matta *v.* Chicago, etc., R. Co., 69 Mich. 109, 37 N. W. 54.

Nebraska.— Riley *v.* Missouri Pac. R. Co., 69 Nebr. 82, 95 N. W. 20.

Ohio.— Pittsburgh, etc., R. Co. *v.* Peters, 1 Ohio Cir. Ct. 34, 1 Ohio Cir. Dec. 20 [*affirmed* in 17 Cinc. L. Bul. 247], holding that where a person injured at a railroad crossing is guilty of contributory negligence he cannot recover, although his negligence is slighter in degree than that of the railroad company.

See 41 Cent. Dig. tit. "Railroads," § 1089.

40. Wabash, etc., R. Co. *v.* Wallace, 110 Ill. 114; Peoria, etc., R. Co. *v.* Clayberg, 107 Ill. 644; Wabash R. Co. *v.* Henks, 91 Ill. 406; St. Louis, etc., R. Co. *v.* Dunn, 78 Ill. 197; Pittsburgh, etc., R. Co. *v.* Knutson, 69 Ill. 103; Chicago, etc., R. Co. *v.* Lee, 68 Ill. 576; Chicago, etc., R. Co. *v.* Elmore, 67 Ill. 176; Indianapolis, etc., R. Co. *v.* Stables, 62 Ill. 313; Chicago, etc., R. Co. *v.* Lee, 60 Ill. 501; St. Louis, etc., R. Co. *v.* Faitz, 23 Ill. App. 498; Chicago, etc., R. Co. *v.* Kuster, 22 Ill. App. 188. See also Burham *v.* St. Louis, etc., R. Co., 56 Mo. 338.

41. Chicago, etc., R. Co. *v.* Still, 19 Ill. 499, 71 Am. Dec. 236; Chicago, etc., R. Co. *v.* Langley, 2 Ill. App. 505; Lake Shore, etc., R. Co. *v.* Berlink, 2 Ill. App. 427.

42. Smeltz *v.* Pennsylvania R. Co., 186 Pa. St. 364, 40 Atl. 479; Kay *v.* Pennsylvania R. Co., 65 Pa. St. 269, 3 Am. Rep. 628.

43. Spillane *v.* Missouri Pac. R. Co., 135 Mo. 414, 37 S. W. 198, 58 Am. St. Rep. 580; Thompson *v.* Missouri, etc., R. Co., 93 Mo. App. 548, 67 S. W. 693; Wells *v.* New York Cent., etc., R. Co., 78 N. Y. App. Div. 1, 78 N. Y. Suppl. 991; McCarthy *v.* New York Cent., etc., R. Co., 37 N. Y. App. Div. 187, 55 N. Y. Suppl. 1013; Finkelstein *v.* New York Cent., etc., R. Co., 41 Hun (N. Y.) 34; Costello *v.* Syracuse, etc., R. Co., 65 Barb. (N. Y.) 92; Pennsylvania R. Co. *v.* Kelly, 31 Pa. St. 372; Texas, etc., R. Co. *v.* Ball, 38 Tex. Civ. App. 279, 85 S. W. 456.

44. Kentucky Cent. R. Co. *v.* Smith, 93 Ky. 449, 20 S. W. 392, 14 Ky. L. Rep. 455, 18 L. R. A. 63; Baltimore, etc., R. Co. *v.* Breinig, 25 Md. 378, 90 Am. Dec. 49; McNamara *v.* Chicago, etc., R. Co., 126 Mo. App. 152, 103 S. W. 1093; Thompson *v.* Missouri, etc., R. Co., 93 Mo. App. 548, 67 S. W. 693; Zwack *v.* New York, etc., R. Co., 160 N. Y. 362, 54 N. E. 785 [*affirming* 8 N. Y. App. Div. 483, 40 N. Y. Suppl. 821]; Thompson *v.* Buffalo R. Co., 145 N. Y. 196, 39 N. E. 709; Wendell *v.* New York Cent., etc., R. Co., 91 N. Y. 420; Wells *v.* New York Cent., etc., R. Co., 78 N. Y. App. Div. 1, 78 N. Y. Suppl. 791; McCarthy *v.* New York Cent., etc., R. Co., 37 N. Y. App. Div. 187, 55 N. Y. Suppl. 1013; Reynolds *v.* New York Cent., etc., R. Co., 2 Thomps. & C. (N. Y.) 644 [*reversed* on the facts in 58 N. Y. 248], holding that a boy about twelve years of age is bound to exercise only such care as a person of his age and of ordinary prudence would exercise under the same circumstances.

Evidence.—A remark by the child, a boy of nine years old, that he climbed over the drawhead instead of passing through the open space because he would get mashed if he passed between the cars, does not conclusively show that he appreciated the danger of his act, where his testimony, taken as a whole, renders the inference permissible that this remark was made in the light of subsequent events, and not because he anticipated what happened. Schmitz *v.* St. Louis, etc., R. Co., 46 Mo. App. 380.

sess;[45] and in some cases, as where the child is shown to have the same prudence, thoughtfulness, and discretion to avoid danger, as an ordinary adult, he may even be held to the same degree of care as an adult.[46] There is no arbitrary rule, however, as to the time at which an infant may be declared capable of understanding and avoiding dangers to be encountered on railroad tracks, such question depending upon the age and intelligence of the particular child, and ordinarily being one of fact for the jury,[47] as is also the question whether such a child was guilty of contributory negligence in a particular case,[48] although in some cases they may be held so guilty as a matter of law.[49] Thus it has been held that such knowledge and understanding cannot be expected of a child five,[50] six,[51] seven,[52] or even nine, or ten years of age.[53] But on the other hand, it has been held that a child twelve

45. Chicago, etc., R. Co. *v.* Becker, 76 Ill. 25; Spillane *v.* Missouri Pac. R. Co., 135 Mo. 414, 37 S. W. 198, 58 Am. St. Rep. 580.

46. Payne *v.* Chicago, etc., R. Co., 136 Mo. 562, 38 S. W. 308 (holding this to be true of a healthy, active, negro boy of eleven years, of good mind, good hearing, and good eyesight, who had attended school several sessions, and had lived in the vicinity of and was familiar with a railroad crossing and knew the dangers incident thereto); Gehring *v.* Atlantic City R. Co., (N. J. 1907) 68 Atl. 61 (boy thirteen years old); Tucker *v.* New York Cent., etc., R. Co., 124 N. Y. 308, 26 N. E. 916, 21 Am. St. Rep. 670; Texas, etc., R. Co. *v.* Ball, 38 Tex. Civ. App. 279, 85 S. W. 456. See also McCarthy *v.* New York Cent., etc., R. Co., 37 N. Y. App. Div. 187, 55 N. Y. Suppl. 1013.

47. *Illinois.*— Chicago, etc., R. Co. *v.* Becker, 76 Ill. 25.

Iowa.— Allen *v.* Ames, etc., R. Co., 106 Iowa 602, 76 N. W. 848.

Kentucky.— Kentucky Cent. R. Co. *v.* Smith, 93 Ky. 449, 20 S. W. 392, 14 Ky. L. Rep. 455, 18 L. R. A. 63.

Michigan.— Cooper *v.* Lake Shore, etc., R. Co., 66 Mich. 261, 33 N. W. 306, 11 Am. St. Rep. 482.

Nebraska.— Chicago, etc., R. Co. *v.* Russell, 72 Nebr. 114, 100 N. W. 156.

New York.— Zwack *v.* New York, etc., R. Co., 160 N. Y. 362, 54 N. E. 785 [*affirming* 8 N. Y. App. Div. 483, 40 N. Y. Suppl. 821] (as to child under twelve); McCarthy *v.* New York Cent., etc., R. Co., 37 N. Y. App. Div. 187, 55 N. Y. Suppl. 1013. *Compare* Tucker *v.* New York Cent., etc., R. Co., 124 N. Y. 308, 26 N. E. 916, 21 Am. St. Rep. 670.

Pennsylvania.— Philadelphia, etc., R. Co. *v.* Layer, 112 Pa. St. 414, 3 Atl. 874.

See 41 Cent. Dig. tit. "Railroads," § 1029; and *infra*, X, F, 14, g, (XI), (B).

48. *Indiana.*— Cleveland, etc., R. Co. *v.* Miles, 162 Ind. 646, 70 N. E. 985.

Iowa.— Allen *v.* Ames, etc., R. Co., 106 Iowa 602, 76 N. W. 848.

Kansas.— Chicago, etc., R. Co. *v.* Laughlin, 74 Kan. 567, 87 Pac. 749; Atchison, etc., R. Co. *v.* Cross, 58 Kan. 424, 49 Pac. 599; Chicago, etc., R. Co. *v.* Kennedy, 2 Kan. App. 693, 43 Pac. 802, holding that contributory negligence is not imputable, as a matter of law, to a child ten years of age, who is injured while attempting to cross a railroad track in front of an approaching train, at a public street crossing, from the mere fact that he is familiar with the crossing, knows that engines and trains are frequently passing and that it is dangerous to cross in front of a moving train, and fails to look before making the attempt.

Missouri.— Stotler *v.* Chicago, etc., R. Co., 200 Mo. 107, 98 S. W. 509; Schmitz *v.* St. Louis, etc., R. Co., 46 Mo. App. 380.

New York.— Tucker *v.* New York Cent., etc., R. Co., 124 N. Y. 308, 26 N. E. 916, 21 Am. St. Rep. 670; Wendell *v.* New York Cent., etc., R. Co., 91 N. Y. 420; Wells *v.* New York Cent., etc., R. Co., 78 N. Y. App. Div. 1, 78 N. Y. Suppl. 991; Costello *v.* Syracuse, etc., R. Co., 65 Barb. 92.

Wisconsin.— Carmer *v.* Chicago, etc., R. Co., 95 Wis. 513, 70 N. W. 560.

United States.— Atchison, etc., R. Co. *v.* Hardy, 94 Fed. 294, 37 C. C. A. 359.

See 41 Cent. Dig. tit. "Railroads," § 1029; and *infra*, X, F, 14, g, (XI), (B).

Evidence held sufficient to show that the injured child was not guilty of contributory negligence see Reynolds *v.* New York Cent., etc., R. Co., 58 N. Y. 248 [*reversing* 2 Thomps. & C. 644]; Wells *v.* New York Cent., etc., R. Co., 78 N. Y. App. Div. 1, 78 N. Y. Suppl. 991; Texas, etc., R. Co. *v.* Ball, 38 Tex. Civ. App. 279, 85 S. W. 456.

49. Anderson *v.* New Jersey Cent. R. Co., 68 N. J. L. 269, 53 Atl. 391.

50. Smeltz *v.* Pennsylvania R. Co., 186 Pa. St. 364, 40 Atl. 479.

51. Chicago, etc., R. Co. *v.* Body, 85 Ill. App. 133; Chicago, etc., R. Co. *v.* Ohlsson, 70 Ill. App. 487. But see Allen *v.* Ames, etc., R. Co., 106 Iowa 602, 76 N. W. 848.

52. Costello *v.* Syracuse, etc., R. Co., 65 Barb. (N. Y.) 92. But see McCarthy *v.* New York Cent., etc., R. Co., 37 N. Y. App. Div. 187, 55 N. Y. Suppl. 1013.

53. Metzler *v.* Philadelphia, etc., R. Co., 28 Pa. Super. Ct. 180, holding that where a railroad company laid its tracks longitudinally in the center of a street in the city, and maintained an opening in its platform through which the public were permitted to pass, and a boy between nine and ten years of age without stopping proceeded to go over the crossing, the court could say as a matter of law that on account of the child's age no question of contributory negligence arose in the case. But see Anderson *v.* New Jersey Cent. R. Co., 68 N. J. L. 269, 53 Atl. 391.

years old, must, in the absence of evidence to the contrary, be deemed *sui juris*, and chargeable with the same measure of caution as an adult.[54]

(B) *Old, Infirm, or Afflicted Persons.* A person who is aged and feeble,[55] or deaf,[56] has defective eyesight,[57] or is otherwise afflicted,[58] is bound to exercise ordinary care in approaching or going over a railroad crossing, taking into consideration his condition and the surrounding circumstances at the time. If some of his senses are defective he must be more vigilant in the use of his remaining senses,[59] and it has been held that his infirmity does not excuse him from exercising the same degree of care that an ordinarily prudent person in the possession of his natural faculties would have exercised under the circumstances.[60]

(C) *Intoxicated Persons.* That a person injured at a railroad crossing is intoxicated at the time does not absolve him from his contributory negligence in failing to exercise ordinary care in crossing the track,[61] and the fact that he is intoxicated may be a circumstance for the consideration of the jury in determining whether or not he used due care.[62]

54. Tucker *v.* New York Cent., etc., R. Co., 124 N. Y. 308, 26 N. E. 916, 21 Am. St. Rep. 670, holding that in the absence of evidence tending to show that a boy twelve years of age was not qualified to understand the danger and appreciate the necessity for observing that degree of caution in crossing a railroad track that an adult would, he must be deemed *sui juris* and chargeable with the same measure of caution as an adult. See also Zwack *v.* New York, etc., R. Co., 160 N. Y. 362, 54 N. E. 785 [*affirming* 8 N. Y. App. Div. 483, 40 N. Y. Suppl. 821].

55. Wilson *v.* New York Cent., etc., R. Co., 41 N. Y. App. Div. 36, 58 N. Y. Suppl. 617, holding that where an aged or feeble person familiar with railroad crossings and the liability of engines to eject steam attempts to drive in front of an engine standing in plain sight at a crossing, whereby his horse with which he is unacquainted becomes frightened by escaping steam, he is guilty of contributory negligence.

56. Toledo, etc., R. Co. *v.* Hammett, 220 Ill. 9, 77 N. E. 72 [*reversing* 115 Ill. App. 268]; Toledo, etc., R. Co. *v.* Smart, 116 Ill. App. 523; Oliver *v.* Iowa Cent. R. Co., 122 Iowa 217, 97 N. W. 1072 (holding that one slightly deaf is not relieved from the effect of his contributory negligence in standing on or near the tracks of a railroad, although the place where he is standing is one of the principal thoroughfares of a city); Schneider *v.* Northern Pac. R. Co., 81 Minn. 383, 84 N. W. 124 (holding that if one is unable to hear warning signals it is his duty to use his eyesight if that sense will disclose his danger); Cleveland, etc., R. Co. *v.* Terry, 8 Ohio St. 570 (holding that the fact that a person is partially deaf will not excuse him from the ordinary care which one with such infirmity, and conscious of it, should use).

In order to hold one partially deaf to that degree of care which prudent persons partially deaf should observe, it must also appear that he is conscious of his infirmity. Baltimore, etc., R. Co. *v.* Van Horn, 21 Ohio Cir. Ct. 337, 12 Ohio Cir. Dec. 106.

57. Florida Cent., etc., R. Co. *v.* Williams, 37 Fla. 406, 20 So. 558 (holding that it is gross negligence in a blind person to attempt to cross a network of railroad tracks at a public crossing unattended when he knows that trains are passing to and fro at the time); Toledo, etc., R. Co. *v.* Hammett, 220 Ill. 9, 77 N. E. 72 [*reversing* 115 Ill. App. 268]; Marks *v.* Petersburg R. Co., 88 Va. 1, 13 S. E. 299.

58. Gulf, etc., R. Co. *v.* Melville, (Tex. Civ. App. 1905) 87 S. W. 863.

59. Toledo, etc., R. Co. *v.* Hammett, 220 Ill. 9, 77 N. E. 72 [*reversing* 115 Ill. App. 268]; Toledo, etc., R. Co. *v.* Smart, 116 Ill. App. 523 (holding that the fact that a person is hard of hearing and short-sighted increases his obligation to be watchful while passing over railroad tracks); Fusili *v.* Missouri Pac. R. Co., 45 Mo. App. 535; Marks *v.* Petersburgh, 88 Va. 1, 13 S. E. 299 (holding that the fact that a person is blind in one eye imposes the duty of a higher degree of care to avoid danger). *Compare* Gulf, etc., R. Co. *v.* Melville, (Tex. Civ. App. 1905) 87 S. W. 863, holding that a person having an impediment in his walk is not required to exercise more care in looking and listening than one not so afflicted.

60. Toledo, etc., R. Co. *v.* Hammett, 220 Ill. 9, 77 N. E. 72 [*reversing* 115 Ill. App. 268].

61. Denman *v.* St. Paul, etc., R. Co., 26 Minn. 357, 4 N. W. 605; Stewart *v.* North Carolina R. Co., 136 N. C. 385, 48 S. E. 793; Mercer *v.* Southern R. Co., 66 S. C. 346, 44 S. E. 750, holding that if a person injured at a crossing is intoxicated at the time, and the intoxication actually contributes to the injury, the railroad company is not liable. See also Chicago, etc., R. Co. *v.* Bell, 70 Ill. 102.

Where drunkenness diminishes the physical ability of one approaching a railroad crossing to guard against injury, or blunts and renders his mental faculties less acute than they otherwise would be, and on that account he does not exercise reasonable care, the want of which is the proximate cause of the injury, there can be no recovery. Galveston, etc., R. Co. *v.* Harris, 22 Tex. Civ. App. 16, 53 S. W. 599.

62. Stewart *v.* North Carolina R. Co., 136

(II) *USE OF DEFECTIVE OR OBSTRUCTED CROSSING.* In accordance with the above rule a child, if of sufficient age and intelligence, may be guilty of contributory negligence in going over a defective or obstructed crossing, whether or not he is so negligent depending upon his age and intelligence and the circumstances at the particular time and crossing,[63] and ordinarily being a question for the jury.[64]

(III) *DUTY TO STOP, LOOK, AND LISTEN.* Likewise it is the duty of a child of sufficient age and intelligence to appreciate danger to use proper care in looking and listening before attempting to cross a railroad crossing, and a failure to do so, whereby injury results, is contributory negligence,[65] especially where there is an obstruction to the view or hearing at the particular time and crossing.[66]

N. C. 385, 48 S. E. 793; Houston, etc., R. Co. *v.* Waller, 56 Tex. 331, holding that the sobriety or intoxication of a person struck at a crossing by a switch engine is a proper subject for the consideration of the jury in determining whether he exercised due care or not.

63. Wallace *v.* New York, etc., R. Co., 165 Mass. 236, 42 N. E. 1125 (holding that a child thirteen years old is guilty of contributory negligence in attempting to pass between two sections of a train which was standing on the crossing, but which commenced to move before the child started to pass between them); Marden *v.* Boston, etc., R. Co., 159 Mass. 393, 34 N. E. 404 (holding that a child, familiar with the railroad crossing and in the habit of crossing it, is guilty of contributory negligence in attempting to cross while the gates are down); Lehman *v.* Eureka Iron, etc., Works, 114 Mich. 260, 72 N. W. 183; Cooper *v.* Lake Shore, etc., R. Co., 66 Mich. 261, 33 N. W. 306, 11 Am. St. Rep. 482; Henderson *v.* St. Paul, etc., R. Co., 52 Minn. 479, 55 N. W. 53 (holding that a boy eleven years old is not guilty of contributory negligence in attempting to climb over the bumpers between two freight cars of a standing train).

A child of tender years attempting to crawl under a train standing on a crossing, in a manner not imprudent for a child, is not guilty of contributory negligence. Golden *v.* Pennsylvania R. Co., 187 Pa. St. 635, 41 Atl. 302; Philadelphia, etc., R. Co. *v.* Layer, 112 Pa. St. 414, 3 Atl. 874; Pennsylvania R. Co. *v.* Kelly, 31 Pa. St. 372; Rauch *v.* Lloyd, 31 Pa. St. 358, 72 Am. Dec. 747.

64. Henderson *v.* St. Paul, etc., R. Co., 52 Minn. 479, 55 N. W. 53.

65. Shirk *v.* Wabash R. Co., 14 Ind. App. 126, 42 N. E. 656 (holding that a child twelve years old is guilty of contributory negligence in crossing, although it appears that the train was being run at a negligent rate of speed, but that the bell was rung and whistle sounded as it approached the crossing, and that the child when within five feet of the track could have seen the train approaching); Studley *v.* St. Paul, etc., R. Co., 48 Minn. 249, 51 N. W. 115 (holding that a girl of seventeen and of good faculties, who attempts to cross a crossing at a public highway, is negligent where the train could have been seen for some distance before it reached the crossing, and she lived near the crossing and knew of the passage of trains); Walker *v.* Wabash R. Co., 193 Mo. 453, 92 S. W. 83 (person injured held to be guilty of contributory negligence as a matter of law); Tucker *v.* New York Cent., etc., R. Co., 124 N. Y. 308, 26 N. E. 916, 21 Am. St. Rep. 670 [*reversing* 11 N. Y. Suppl. 692] (holding that a boy twelve years old who undertakes to cross a railroad track at a point where a number of tracks constantly in use cross a street is guilty of contributory negligence, where it appears that the engine by which he was killed could have been seen two blocks away, eleven feet before reaching the track, and for a mile when standing just at the side of it, and that the boy was not seen to turn his head in the direction of the approaching train after he got within eleven feet of the track); Serano *v.* New York Cent., etc., R. Co., 114 N. Y. App. Div. 684, 99 N. Y. Suppl. 1103 [*reversed* on the facts in 188 N. Y. 156, 80 N. E. 1025, 17 Am. St. Rep. 833]; Cox *v.* New York Cent. R. Co., 69 N. Y. App. Div. 451, 74 N. Y. Suppl. 1011. But see Haycroft *v.* Lake Shore, etc., R. Co., 2 Hun (N. Y.) 489, 5 Thomps. & C. 49 [*affirmed* in 64 N. Y. 636].

A boy twelve years old may have sufficient mental capacity to know that he ought to stop, look, and listen before going upon the tracks, and may be guilty of such contributory negligence as to bar a recovery for his death. Bracken *v.* Pennsylvania R. Co., 32 Pa. Super. Ct. 22.

66. Little Rock, etc., R. Co. *v.* Cullen, 54 Ark. 431, 16 S. W. 169; Martin *v.* Pennsylvania R. Co., 176 Pa. St. 444, 35 Atl. 183; Wilson *v.* Pennsylvania R. Co., 132 Pa. St. 37, 18 Atl. 1087 (holding, however, that plaintiff is not guilty of contributory negligence where, before going on the track, he looked both ways and listened, and neither saw nor heard a train approaching on that track, although there was another train passing over the crossing on another track between which and the place where he stood three other tracks intervened); Norfolk, etc., R. Co. *v.* Stone, 88 Va. 310, 13 S. E. 432 (holding that where a boy of thirteen years, familiar with the railroad crossing at which, on account of a deep cut, a train could not be seen until one was on the track, drives upon it with his ears covered up, although he had just been told that the train was late and would probably reach the crossing at about the same time he did, is

It is also contributory negligence on the part of a deaf person to attempt to cross without looking.[67]

(iv) *Effect of Directions of Railroad Employees.* Although a child has the capacity to appreciate the danger at a railroad crossing, yet where he attempts to cross in response to an invitation or direction of a railroad employee stationed by the railroad company to guard the crossing and to tell the public when to cross and when not, and is injured, he is not guilty of contributory negligence.[68]

c. Use of Defective or Obstructed Crossings[69] — (i) *In General.* One passing over a railroad crossing obstructed by cars or otherwise is bound to observe such care as a reasonably prudent man would exercise under the peculiar circumstances of the case; otherwise he will be guilty of contributory negligence.[70]

guilty of contributory negligence, although the train was running at a high rate of speed and the whistle was not sounded). *Compare* Elkins *v.* Boston, etc., R. Co., 115 Mass. 190, holding that the fact that a boy ten years old had the lappets of his cap tied over his ears, and had previous knowledge that the railroad crossed the highway at the place of the accident, but did not tell his companion of it, who was driving, nor look out for the train, is not conclusive against him on the issue of ordinary care, there being evidence that they did not know that they were at the crossing and had no warning by a sign-board, bell, or whistle.

67. *Alabama.*— Birmingham, R., etc., Co. *v.* Bowers, 110 Ala. 328, 20 So. 345.

Illinois.— Illinois Cent. R. Co. *v.* Buckner, 28 Ill. 299, 81 Am. Dec. 282, holding that it is negligence for a deaf person to drive an unmanageable horse across a railroad track when a train is approaching, it being his duty to keep a good lookout and avoid the danger; and that it is no excuse that the horse rushed upon the track near a crossing, or was driven there to avoid an engine.

Michigan.— Phillips *v.* Detroit, etc., R. Co., 111 Mich. 274, 69 N. W. 496, 66 Am. St. Rep. 392, holding that a deaf person, before driving across a railroad track, must look in both directions, although it is necessary to stand up in the vehicle to see over obstructions to the view of the tracks, and although another person has recently passed over the tracks in safety.

Minnesota.— Schneider *v.* Northern Pac. R. Co., 81 Minn. 383, 84 N. W. 124.

Missouri.—Hayden *v.* Missouri, etc., R. Co., 124 Mo. 566, 28 S. W. 74; Purl *v.* St. Louis, etc., R. Co., 72 Mo. 168.

South Carolina.— Osteen *v.* Southern R. Co., 76 S. C. 368, 57 S. E. 196, holding that a deaf man is only required to look to the extent necessary for the exercise of due care.

Wisconsin.— McKinney *v.* Chicago, etc., R. Co., 87 Wis. 282, 58 N. W. 386, (1894) 59 N. W. 499.

See 41 Cent. Dig. tit. "Railroads," § 1034.

Deafness is not an excuse for the negligence of a person who, when about to cross a track, sees the smoke of a locomotive, but without stopping to find in what direction it is coming drives on and is injured. Purl *v.* St. Louis, etc., R. Co., 72 Mo. 168; Zimmerman *v.* Hannibal, etc., R. Co., 71 Mo. 476.

68. Faulk *v.* Central R., etc., Co., 91 Ga. 360, 18 S. E. 304; Cleveland, etc., R. Co. *v.* Keely, 138 Ind. 600, 37 N. E. 406, holding that it is not negligence for a boy eleven years old to pass between uncoupled cars, he having seen the engineer leave his engine and being directed to pass through such opening by the flagman in charge of the crossing. *Compare* Texas, etc., R. Co. *v.* Hare, 4 Tex. Civ. App. 18, 23 S. W. 42, holding that the fact that a boy on a railroad track at a crossing became confused at the shouts and signals of a brakeman on a train trying to direct his attention to the engine following it, and that he stopped and stood on the track trying to understand him until too late, does not render the railroad company liable for the injury from the engine.

69. Duty where view and hearing is obstructed see *infra*, X, F, 10, d, (II).

70. *Arkansas.*— Martin *v.* Little Rock, etc., R. Co., 62 Ark. 156, 34 S. W. 545.

Illinois.— Chicago, etc., R. Co. *v.* Bednorz, 57 Ill. App. 309.

Indiana.— Quinn *v.* Chicago, etc., R. Co., 162 Ind. 442, 70 N. E. 526.

Kentucky.— Louisville, etc., R. Co. *v.* Lucas, 98 S. W. 308, 30 Ky. L. Rep. 359, 99 S. W. 959, 30 Ky. L. Rep. 539.

Michigan.— Sosnofski *v.* Lake Shore, etc., R. Co., 134 Mich. 72, 95 N. W. 1077; Buckley *v.* Flint, etc., R. Co., 119 Mich. 583, 78 N. W. 655.

New York.— Collins *v.* New York, etc., R. Co., 92 Hun 563, 26 N. Y. Suppl. 942 [*affirmed* in 154 N. Y. 740, 49 N. E. 1095].

Pennsylvania.— Rusterholtz *v.* New York, etc., R. Co., 191 Pa. St. 390, 43 Atl. 208 (holding that if plaintiff knew of another way, which was safe, he was bound to take it); Schmidt *v.* Philadelphia, etc., R. Co., 149 Pa. St. 357, 24 Atl. 218; Pennsylvania R. Co. *v.* McTighe, 46 Pa. St. 316.

Texas.—International, etc., R. Co. *v.* Locke, (Civ. App. 1902) 67 S. W. 1082, holding that an attempt to pass around a hand-car left standing on a railroad crossing, whereby the driver's team became frightened and he was thrown out and injured, does not show contributory negligence.

Wisconsin.— White *v.* Chicago, etc., R. Co., 102 Wis. 489, 78 N. W. 585.

(II) *USE OF DEFECTIVE CROSSING.* While the mere fact that a person uses a railroad crossing which he knows to be defective does not necessarily render him guilty of negligence,[71] one with such knowledge, in using a crossing, is bound to exercise ordinary care and prudence to avoid injury, and cannot recover for injuries which he could have avoided by the exercise of such care and prudence,[72]

See 41 Cent. Dig. tit. "Railroads," § 1037.

A person having urgent reasons to cross may depart from the street or highway and go around a blockade which is left on the crossing for an unreasonable time upon the private grounds of the company without thereby becoming a trespasser; nor does his continuing straight across the tracks instead of returning to the crossing make him such. Chicago, etc., R. Co. *v.* Mayer, 112 Ill. App. 149, holding also that the extreme coldness of the weather would furnish such an urgency.

A person about to cross has a right to assume that the entire width of the road is in proper condition, and where it does not appear that such person knows the condition of the crossing or that in the darkness he can see the defect which causes the accident, his deflection within the road from its usually traveled part is not negligence. Southern R. Co. *v.* Posey, 124 Ala. 486, 26 So. 914.

71. *Indiana.*— Chicago, etc., R. Co. *v.* Leachman, 161 Ind. 512, 69 N. E. 253.

Michigan.— Thayer *v.* Flint, etc., R. Co., 93 Mich. 150, 53 N. W. 216 (holding that the fact that a person knows of the defect does not relieve the railroad company from liability for an injury caused by his horse taking fright at the whistling of an engine and turning over the buggy owing to such defect); Maltby *v.* Chicago, etc., R. Co., 52 Mich. 108, 17 N. W. 717.

Minnesota.— Kelly *v.* Southern Minn. R. Co., 28 Minn. 98, 9 N. W. 588.

Missouri.— Nixon *v.* Hannibal, etc., R. Co., 141 Mo. 425, 42 S. W. 942; Harper *v.* Missouri, etc., R. Co., 70 Mo. App. 604, holding that, although a rider of a horse knows of the defective condition of a railroad crossing, he is not bound to abandon it unless its use is necessarily dangerous to an ordinarily careful man.

North Dakota.— Johnson *v.* Great Northern R. Co., 7 N. D. 284, 75 N. W. 250, holding that one who drives a loaded wagon over a defective crossing, and has his wagon broken down by such condition of the crossing, is not necessarily negligent.

Texas.— St. Louis Southwestern R. Co. *v.* Smith, (Civ. App. 1908) 107 S. W. 638 (holding that an attempt to cross a bridge at a crossing in the night-time, with knowledge of a hole therein, is not conclusive evidence of contributory negligence); Cowans *v.* Ft. Worth, etc., R. Co., 40 Tex. Civ. App. 539, 89 S. W. 116 (holding that a drayman using a crossing at the implied invitation of a railroad company may recover for injuries received by reason of a defect therein, where he exercised ordinary care under the circumstances, although he knew that there was danger attending the use thereof); Texas, etc., R. Co. *v.* Neill, (Civ. App. 1895) 30 S. W. 369; International, etc., R. Co. *v.* Robinson, (Civ. App. 1894) 27 S. W. 564 (holding that the jury should consider, in determining whether plaintiff is guilty of contributory negligence, not only whether he exercised sufficient care in driving over the crossing, but also whether under the circumstances an ordinarily prudent man would have attempted to cross there). *Compare* Houston, etc., R. Co. *v.* Evans, (Civ. App. 1906) 92 S. W. 1077, holding that one using a private crossing with knowledge that it is defective is guilty of contributory negligence barring a recovery.

See 41 Cent. Dig. tit. "Railroads," §§ 1038, 1041.

72. *Alabama.*— McAdory *v.* Louisville, etc., R. Co., 109 Ala. 636, 19 So. 905, holding that, although an excavation at a crossing is left unguarded, if the person injured knows of its location and that it is unguarded and without lights and signals of warning, and he could have avoided the injury by the exercise of reasonable care and diligence, he is chargeable with contributory negligence.

Georgia.— Evans *v.* Charleston, etc., R. Co., 108 Ga. 270, 33 S. E. 901, holding that where a person, notwithstanding his knowledge of the defect, undertakes to cross when there is no emergency or necessity for incurring the risk, he cannot recover.

Kansas.—Reynolds *v.* Missouri, etc., R. Co., 70 Kan. 340, 78 Pac. 801; Artman *v.* Kansas Cent. R. Co., 22 Kan. 296.

Missouri.— Schonhoff *v.* Jackson Branch R. Co., 97 Mo. 151, 10 S. W. 618 (holding that where one negligently drives into an excavation he cannot recover for injuries thereby sustained, although such excavation was left unguarded); Harper *v.* Missouri, etc., R. Co., 70 Mo. App. 604; Madison *v.* Missouri Pac. R. Co., 60 Mo. App. 599.

New Jersey.— Sonn *v.* Erie, etc., R. Co., 66 N. J. L. 428, 49 Atl. 458 [*affirmed* in 67 N. J. L. 350, 51 Atl. 1109].

Pennsylvania.— Gates *v.* Pennsylvania R. Co., 6 Pa. Co. Ct. 4; Gramlich *v.* Germantown Branch R. Co., 9 Phila. 78, holding that driving a loaded cart across a track where the ground is soft and without planking is negligence precluding a recovery.

Texas.— Gulf, etc., R. Co. *v.* Montgomery, 85 Tex. 64, 19 S. W. 1015; Dallas, etc., R. Co. *v.* Able, 72 Tex. 150, 9 S. W. 871 (holding that where a track-laying machine had passed a crossing for such a distance that plaintiff might reasonably have inferred that the track had been laid for a time more than sufficient to permit the crossing to be put in order, he is not negligent in going upon the

especially where the danger of crossing is exceedingly great and obvious.[73] A person is not guilty of contributory negligence for failing to discover and avoid a defect in the crossing of which he is ignorant, and which he would not be likely to see in an ordinary use of the crossing.[74]

(III) *Passing Over, Between, or Under Standing Trains or Cars.* As a general rule one attempting to pass over, between, or under trains or cars standing on a railroad crossing shows such lack of ordinary care and prudence as renders him guilty of contributory negligence and prevents him from recovering for injuries received thereby, although the railroad company itself is negligent in obstructing the crossing or in moving such trains or cars,[75] unless the railroad

track without stopping to inspect it); International, etc., R. Co. *v.* Lewis, (Civ. App. 1901) 63 S. W. 1091, (Civ. App. 1901) 64 S. W. 1011; Texas, etc., R. Co. *v.* Neill, (Civ. App. 1895) 30 S. W. 369.

See 41 Cent. Dig. tit. "Railroads," §§ 1038, 1041.

Where a vehicle becomes fastened or stalled on a crossing, by reason of a defect in the crossing, it is the duty of one in charge of such vehicle to look out and watch for a train, and use all of his efforts to warn one coming of his position and to extricate himself as soon as possible, and if he fails in any one of these requirements and such failure contributes to an injury resulting from such collision, he cannot recover. Pittsburgh, etc., R. Co. *v.* Dunn, 56 Pa. St. 280. But the fact that such person did not inspect the crossing to see whether defendant had discharged its duty to keep it repaired, and did not look at his watch to see if it was about train time, would not make him guilty of contributory negligence where it appears that the vehicle would not have been stalled had the crossing been in good condition. Bullock *v.* Wilmington, etc., R. Co., 105 N. C. 180, 10 S. E. 980.

That a person does not cross along that part of the street which is planked between the rails of the railroad does not render him guilty of contributory negligence, it not being obviously unsafe to cross at such point, that portion of the street being commonly used by the public, and the cause of his injury being a projecting spike of a railroad tie buried in the sand. Dillingham *v.* Fields, 9 Tex. Civ. App. 1, 29 S. W. 214.

That a horse not shown to be of bad character balked in attempting to draw a heavy load over a railroad crossing left in a very improper condition by the railroad company is not such negligence as to prevent plaintiff from recovering for an injury occasioned by a collision with the train. Stucke *v.* Milwaukee, etc., R. Co., 9 Wis. 202.

73. Evans *v.* Charleston, etc., R. Co., 108 Ga. 270, 33 S. E. 901.

74. Missouri, etc., R. Co. *v.* Howell, (Tex. Civ. App. 1894) 30 S. W. 98.

75. *Alabama.*— Pannell *v.* Nashville, etc., R. Co., 97 Ala. 298, 12 So. 236. But see Southern R. Co. *v.* Prather, 119 Ala. 588, 24 So. 836, 72 Am. St. Rep. 949, holding that it is not negligence *per se* to attempt to drive across a street which a railroad company has obstructed by pushing cars into it from opposite sides on different tracks, leaving a space so that by passing in front of a car on one track making a short turn and then passing the cars on the other side the street may be crossed without leaving it.

District of Columbia.— Spencer *v.* Baltimore, etc., R. Co., 4 Mackey 138, 54 Am. Rep. 269. But see Grant *v.* Baltimore, etc., R. Co., 2 MacArthur 277, holding that a pedestrian is neither a trespasser nor guilty of contributory negligence in climbing between the cars of a train which is obstructing the crossing where it would be necessary for him to walk two blocks in order to get around the obstruction.

Georgia.— Southern R. Co. *v.* Mouchet, 3 Ga. App. 266, 59 S. E. 927.

Idaho.— Rumpel *v.* Oregon Short Line, etc., R. Co., 4 Ida. 13, 35 Pac. 700, 22 L. R. A. 725, crawling under cars to which engine is attached.

Indiana.— McCollum *v.* Cleveland, etc., R. Co., 154 Ind. 97, 55 N. E. 1024.

Kentucky.— Jones *v.* Illinois Cent. R. Co., 104 S. W. 258, 31 Ky. L. Rep. 825, 13 L. R. A. N. S. 1066; Illinois Cent. R. Co. *v.* Broughton, 78 S. W. 876, 25 Ky. L. Rep. 1752.

Michigan.— Bird *v.* Flint, etc., R. Co., 86 Mich. 79, 48 N. W. 691, holding that a woman twenty-seven years old who endeavors to climb over the couplings of two cars of a freight train, with engine attached, and is killed by the sudden starting thereof is guilty of gross contributory negligence.

Missouri.— Wilkins *v.* St. Louis, etc., R. Co., 101 Mo. 93, 13 S. W. 893; Hudson *v.* Wabash Western R. Co, 101 Mo. 13, 14 S. W. 15 [*reversing* 32 Mo. App. 667], 123 Mo. 445, 27 S. W. 717; Stillson *v.* Hannibal, etc., R. Co., 67 Mo. 671, holding that the fact that a street is obstructed does not justify a pedestrian's attempt to pass between two trains of cars standing rear to rear on the same track.

New Jersey.— Kriwinski *v.* Pennsylvania R. Co., 65 N. J. L. 392. 47 Atl. 447, holding that a traveler in attempting to continue on his way by crossing over the cars without the knowledge of the trainmen assumes the risk of danger from the starting of the train and hence cannot recover for an injury caused thereby.

New York.— O'Mara *v.* Delaware, etc., Canal Co., 18 Hun 192.

Tennessee.— Barr *v.* Southern R. Co., 105 Tenn. 544, 58 S. W. 849.

Wisconsin.— Flynn *v.* Minnesota Eastern R. Co., 83 Wis. 238, 53 N. W. 494.

See 41 Cent. Dig. tit. "Railroads," § 1039.

company after seeing the danger could have avoided the consequences;[76] and this is true even though the obstruction is in violation of a statute or ordinance,[77] or is unnecessarily left on the crossing for a long time,[78] or no engine is attached to the train or cars.[79] In some cases such acts of a traveler are held to be contributory negligence as a matter of law.[80] But it is not contributory negligence for one to climb through a freight train after an assurance by the brakemen that he has plenty of time,[81] or to cross between cars in going to a fire.[82]

(IV) *Crossing While Gates Are Closed.* Where the gates across a highway at a railroad crossing are closed, a person attempting to cross generally has sufficient warning that the crossing is for the time being to be used for the passage of trains and if he is injured in such attempt he is ordinarily guilty of contributory negligence barring a recovery,[83] unless the circumstances at the particular time and crossing are such that the fact that the gates are closed is not a warning of danger.[84]

Cutting a train of cars on a side-track leaving some on one side and some on the other of a highway, whereby the track is partially obscured, is not an invitation to the public to cross, without using ordinary precautions. Passman *v.* West Jersey, etc., R. Co., 68 N. J. L. 719, 54 Atl. 869, 96 Am. St. Rep. 573, 61 L. R. A. 609.

76. Southern R. Co. *v.* Mouchet, 3 Ga. App. 266, 59 S. E. 927. And see *infra*, X, F, 12.

77. McCollum *v.* Cleveland, etc., R. Co., 154 Ind. 97, 55 N. E. 1024; Hudson *v.* Wabash Western R. Co., 101 Mo. 13, 14 S. W. 15 [*reversing* 32 Mo. App. 667], 123 Mo 445, 27 S. W. 717; Magoon *v.* Boston, etc., R. Co., 67 Vt. 177, 31 Atl. 156.

78. Magoon *v.* Boston, etc., R. Co., 67 Vt. 177, 31 Atl. 156.

79. Magoon *v.* Boston, etc., R. Co., 67 Vt. 177, 31 Atl. 156.

80. *Kansas.*— Howard *v.* Kansas City, etc., R. Co., 41 Kan. 403, 21 Pac. 267, holding a woman's attempt to climb over a freight train obstructing the crossing to be under the circumstances contributory negligence as a matter of law.

Maryland.— Lewis *v.* Baltimore, etc., R. Co., 38 Md. 588, 17 Am. Rep. 521, holding that one who attempts to pass between cars which block a public crossing in a large city without looking or inquiring whether an engine is attached to the train, when he could have crossed without risk by going one block further, is guilty of contributory negligence as a matter of law.

Minnesota.— Wherry *v.* Duluth, etc., R. Co., 64 Minn. 415, 67 N. W. 223, attempting to climb between cars of a train which it is apparent is liable to start at any moment.

Missouri.— Corcoran *v.* St. Louis, etc., R. Co., 105 Mo. 399, 16 S. W. 411, 24 Am. St. Rep. 394.

Vermont.— Magoon *v.* Boston, etc., R. Co., 67 Vt. 177, 31 Atl. 156.

See 41 Cent. Dig. tit. "Railroads," § 1039.

81. Scott *v.* St. Louis, etc., R. Co., 112 Iowa 54, 83 N. W. 818, holding also that the fact that the person injured is a trespasser does not relieve defendant from liability.

82. San Antonio, etc., R. Co. *v.* Green, 20 Tex. Civ. App. 5, 49 S. W. 670.

83. *Illinois.*— Ludolph *v.* Chicago, etc., R. Co., 116 Ill. App. 239 (holding that no one is justified, so long as the gates remain down no longer than a reasonable time, in crossing after one train has passed on the supposition that another train will not pass); Chicago, etc., R. Co. *v.* Fitzsimmons, 40 Ill. App. 360. *Compare* Chicago, etc., R. Co. *v.* Ptacek, 171 Ill. 9, 49 N. E. 191 [*affirming* 62 Ill. App. 375], holding that an attempt to cross on foot, in front of an approaching train, when the gates are down, is not necessarily negligence.

Massachusetts.— Granger *v.* Boston, etc., R. Co., 146 Mass. 276, 15 N. E. 619.

Michigan.— Sosnofski *v.* Lake Shore, etc., R. Co., 134 Mich. 72, 95 N. W. 1077.

Ohio.— Lake Shore, etc., R. Co. *v.* Ehlert, 63 Ohio St. 320, 58 N. E. 812.

Pennsylvania.— Sheehan *v.* Philadelphia, etc., R. Co., 166 Pa. St. 354, 31 Atl. 120 [*affirming* 3 Pa. Dist. 325]; Clearly *v.* Philadelphia, etc., R. Co., 140 Pa. St. 19, 21 Atl. 242 [*affirming* 8 Pa. Co. Ct. 96].

South Carolina.— Weaver *v.* Southern R. Co., 76 S. C. 49, 56 S. E. 657, 121 Am. St. Rep. 934, failure to heed such warning tends to show gross negligence.

Texas.— See Galveston, etc., R. Co. *v.* Walker, (Civ. App. 1907) 106 S. W. 705, holding that such an attempt is not negligence as a matter of law; but whether it is negligence depends upon the attendant circumstances.

Wisconsin.— Douglas *v.* Chicago, etc., R. Co., 100 Wis. 405, 76 N. W. 356, 69 Am. St. Rep. 930.

England.— Wyatt *v.* Great Western R. Co., 6 B. & S. 709, 11 Jur. N. S. 825, 34 L. J. Q. B. 204, 12 L. T. Rep. N. S. 568, 13 Wkly. Rep. 837, 118 E. C. L. 709.

See 41 Cent. Dig. tit. "Railroads," § 1040.

84. Baltimore, etc., R. Co. *v.* Landrigan, 191 U. S. 461, 24 S. Ct. 137, 48 L. ed. 262 [*affirming* 20 App. Cas. (D. C.) 135], holding that where the gates are generally kept down at night without regard to the presence or absence of passing trains and a pedestrian has knowledge of that fact, the circumstance that the gates are down when he is run over in attempting to cross the tracks at night is not of itself a warning to him of the presence of danger, and contributory negligence

d. Duty to Stop, Look, and Listen [85] — (i) *In General* — (a) *General Rule.* As a general rule a traveler on a highway approaching a railroad crossing is bound to exercise ordinary care and prudence, that is, such care and prudence as an ordinarily prudent man would exercise under like circumstances, in looking,[86] or listening,[87] or looking and listening,[88] for approaching trains before going on

cannot therefore be imputed to him from that fact alone.

85. As affected by directions of railroad employees see *infra*, X, F, 10, f.

Duty of children or persons under disability to look and listen see *supra*, X, F, 10, b, (III).

Where view or hearing is obstructed see *infra*, X, F, 10, d, (II).

86. *Arkansas.*— Martin *v.* Little Rock, etc., R. Co., 62 Ark. 156, 34 S. W. 545.

California.— Green *v.* Los Angeles Terminal R. Co., 143 Cal. 31, 76 Pac. 719, 101 Am. St. Rep. 68, (1902) 69 Pac. 694.

Delaware.— Knopf *v.* Philadelphia, etc., R. Co., 2 Pennew. 392, 46 Atl. 747.

Georgia.— Comer *v.* Shaw, 98 Ga. 543, 25 S. E. 733.

Illinois.— Rockford, etc., R. Co. *v.* Byam, 80 Ill. 528; Chicago, etc., R. Co. *v.* Hatch, 79 Ill. 137; Wabash, etc., R. Co. *v.* Hicks, 13 Ill. App. 407.

Indiana.— Chicago, etc., R. Co. *v.* Thomas, 155 Ind. 634, 58 N. E. 1040; Stout *v.* Indianapolis, etc., R. Co., Wils. 80.

Kentucky.— Sights *v.* Louisville, etc., R. Co., 117 Ky. 436, 78 S. W. 172, 25 Ky. L. Rep. 1548; Louisville, etc., R. Co. *v.* Survant, 44 S. W. 88, 19 Ky. L. Rep. 1576.

Maryland.— Northern Cent. R. Co. *v.* State, 54 Md. 113.

Michigan.— Bannister *v.* Lake Shore, etc., R. Co., 113 Mich. 530, 71 N. W. 861.

Minnesota.— Olson *v.* Northern Pac. R. Co., 84 Minn. 258, 87 N. W. 843; Harris *v.* Minneapolis, etc., R. Co., 37 Minn. 47, 33 N. W. 12.

New Jersey.— Morris, etc., R. Co. *v.* Haslan, 33 N. J. L. 147.

New York.— Day *v.* Flushing, etc., R. Co., 75 N. Y. 610; Gorton *v.* Erie R. Co., 45 N. Y. 660; Wilds *v.* Hudson River R. Co., 29 N. Y. 315; Brooks *v.* Buffalo, etc., R. Co., 1 Abb. Dec. 211, 27 Barb. 532 note [*affirming* 25 Barb. 600]; Coleman *v.* New York Cent., etc., R. Co., 98 N. Y. App. Div. 349, 90 N. Y. Suppl. 264; Waddell *v.* New York Cent., etc., R. Co., 98 N. Y. App. Div. 343, 90 N. Y. Suppl. 239 [*reversed* on other grounds in 184 N. Y. 530, 76 N. E. 1111]; Morse *v.* Erie R. Co., 65 Barb. 490; Havens *v.* Erie R. Co., 53 Barb. 328 [*affirmed* in 41 N. Y. 296]; Dascomb *v.* Buffalo, etc., R. Co., 27 Barb. 221.

Oklahoma.— Severy *v.* Chicago, etc., R. Co., 6 Okla. 153, 50 Pac. 162.

Pennsylvania.— Pennsylvania R. Co. *v.* Goodman, 62 Pa. St. 329; North Pennsylvania R. Co. *v.* Heileman, 49 Pa. St. 60, 88 Am. Dec. 482.

Texas.— Galveston, etc., R. Co. *v.* Bracken, 59 Tex. 71.

Virginia.— Ayers *v.* Norfolk, etc., R. Co., (1897) 27 S. E. 582.

Wisconsin.— Hansen *v.* Chicago, etc., R. Co., 83 Wis. 631, 53 N. W. 900; Williams *v.* Chicago, etc., R. Co., 64 Wis. 1, 24 N. W. 422; Langhoff *v.* Milwaukee, etc., R. Co., 23 Wis. 43.

United States.— Chicago, etc., R. Co. *v.* Houston, 95 U. S. 697, 24 L. ed. 542.

Canada.— Wright *v.* Grand Trunk R. Co., 4 Can. R. Cas. 202.

See 41 Cent. Dig. tit. "Railroads," § 1043.

Failure to look for hand-cars.— One struck by a hand-car while crossing the main line of a railroad at night, when hand-cars are prohibited by a regulation of the company from being on its main line except in cases of urgent necessity, is not chargeable with contributory negligence because he failed to look out especially for hand-cars, where he exercises the degree of care required in looking out for trains. Mott *v.* Detroit, etc., R. Co., 120 Mich. 127, 79 N. W. 3.

87. Chicago, etc., R. Co. *v.* Hatch, 79 Ill. 137; Weller *v.* Chicago, etc., R. Co., 120 Mo. 635, 23 S. W. 1061, 25 S. W. 532 (holding that if for some reason, as where the view is obstructed, he cannot see he should carefully listen); Coleman *v.* New York Cent., etc., R. Co., 98 N. Y. App. Div. 349, 90 N. Y. Suppl. 264; Waddell *v.* New York Cent., etc., R. Co., 98 N. Y. App. Div. 343, 90 N. Y. Suppl. 239 [*reversed* on other grounds in 184 N. Y. 530, 76 N. E. 1111]; Severy *v.* Chicago, etc., R. Co., 6 Okla. 153, 50 Pac. 162.

The circumstances may not require that a traveler both look and listen, but common prudence demands that he do either the one or the other, and a failure on his part to do so renders his act negligent in law. Weller *v.* Chicago, etc., R. Co., 120 Mo. 635, 23 S. W. 1061, 25 S. W. 532.

88. *Alabama.*—Leak *v.* Georgia Pac. R. Co., 90 Ala. 161, 8 So. 245; Louisville, etc., R. Co. *v.* Crawford, 89 Ala. 240, 8 So. 243; South Alabama, etc., R. Co. *v.* Thompson, 62 Ala. 494.

Arkansas.— Tiffin *v.* St Louis, etc., R. Co., 78 Ark. 55, 93 S. W. 564 (holding that a traveler who does not see the flagman and is not misled by his inaction is charged with such duty); Little Rock, etc., R. Co. *v.* Blewitt, 65 Ark. 235, 45 S. W. 548.

California.— Bilton *v.* Southern Pac. R. Co., 148 Cal. 443, 83 Pac. 440.

Georgia.— Broyles *v.* Prisock, 97 Ga. 643, 25 S. E. 389.

Illinois.— Chicago, etc., R. Co. *v.* Jacobs, 63 Ill. 178; Chicago, etc., R. Co. *v.* Weeks, 99 Ill. App. 518 [*affirmed* in 198 Ill. 551, 64 N. E. 1039]; Chicago, etc., R. Co. *v.* Stewart, 71 Ill. App. 647; Chicago, etc., R. Co. *v.* Thorson, 68 Ill. App. 288; Wabash, etc., R. Co. *v.* Neikirk, 15 Ill. App. 172.

Indiana.— Quinn *v.* Chicago, etc., R. Co., 162 Ind. 442, 70 N. E. 526; Malott *v.* Hawkins, 159 Ind. 127, 63 N. E. 308; Baltimore, etc., R. Co. *v.* Young, 153 Ind. 163, 54 N. E.

the crossing; and if he fails to do so, without a sufficient excuse therefor, whereby he is injured he is ordinarily guilty of contributory negligence barring a recovery,

791; Chicago, etc., R. Co. *v.* Spilker, 134 Ind. 380, 33 N. E. 280, 34 N. E. 218; Toledo, etc., R. Co. *v.* Shuckman, 50 Ind. 42; Chicago, etc., R. Co. *v.* Reed, 29 Ind. App. 94, 63 N. E. 878; Lake Shore, etc., R. Co. *v.* Boyts, (App. 1896) 43 N. E. 667, 16 Ind. App. 640, 45 N. E. 812. Burns Annot. St. (1901) § 359*a*, making contributory negligence a matter of defense does not change the rule that one about to cross a railroad track must look and listen. Wabash R. Co. *v.* Keister, 168 Ind. 609, 67 N. E. 521; Southern R. Co. *v.* Davis, 34 Ind. App. 377, 72 N. E. 1053.

Iowa.— Moore *v.* Chicago, etc., R. Co., 102 Iowa 595, 71 N. W. 569.

Kansas.— Atchison, etc., R. Co. *v.* Townsend, 39 Kan. 115, 17 Pac. 804; Wichita, etc., R. Co. *v.* Davis, 37 Kan. 743, 16 Pac. 78, 1 Am. St. Rep. 275; Clark *v.* Missouri Pac. R. Co., 35 Kan. 350, 11 Pac. 134.

Kentucky.— Wilson *v.* Chesapeake, etc., R. Co., 86 S. W. 690, 27 Ky. L. Rep. 778.

Louisiana.— Herlisch *v.* Louisville, etc., R. Co., 44 La. Ann. 280, 10 So. 628.

Maine.— Blumenthal *v.* Boston, etc., R. Co., 97 Me. 255, 54 Atl. 747; Day *v.* Boston, etc., R. Co., 96 Me. 207, 52 Atl. 771, 90 Am. St. Rep. 335; Giberson *v.* Bangor, etc., R. Co., 89 Me. 337, 36 Atl. 400; Lesan *v.* Maine Cent. R. Co., 77 Me. 85.

Maryland.— Western Maryland R. Co. *v.* Kehoe, 83 Md. 434, 35 Atl. 90; Maryland Cent. R. Co. *v.* Neubeur, 62 Md. 391.

Michigan.— Tucker *v.* Chicago, etc., R. Co., 122 Mich. 149, 80 N. W. 984; Matta *v.* Chicago, etc., R. Co., 69 Mich. 109, 37 N. W. 54.

Minnesota.— Judson *v.* Great Northern R Co., 63 Minn. 248, 65 N. W. 447; Magner *v.* Truesdale, 53 Minn. 436, 55 N. W. 607; Brown *v.* Milwaukee, etc., R. Co., 22 Minn. 165.

Mississippi.— New Orleans, etc., R. Co. *v.* Mitchell, 52 Miss. 808.

Missouri.— Hook *v.* Missouri Pac. R. Co., 162 Mo. 569, 63 S. W. 360 (holding that the mere existence of a railroad track is sufficient warning of the danger to render a person driving thereon in front of a train without looking or listening guilty of contributory negligence); Jennings *v.* St. Louis, etc., R. Co., 112 Mo. 268, 20 S. W. 490; Taylor *v.* Missouri Pac. R. Co., 86 Mo. 457; Kimes *v.* St. Louis, etc., R. Co., 85 Mo. 611; Stepp *v.* Chicago, etc., R. Co., 85 Mo. 229; Hixson *v.* St. Louis, etc., R. Co., 80 Mo. 335; Wands *v.* Chicago, etc., R. Co., 106 Mo. App. 96, 80 S. W. 18; Mayes *v.* St. Louis, etc., R. Co., 71 Mo. App. 140; Caldwell *v.* Kansas City, etc., R. Co., 58 Mo. App. 453; Damrill *v.* St. Louis, etc., R. Co., 27 Mo. App. 202.

Nebraska.— Omaha, etc., R. Co. *v.* Talbot, 48 Nebr. 627, 67 N. W. 599.

New Hampshire.— Davis *v.* Concord, etc., R. Co., 68 N. H. 247, 44 Atl. 388.

New Jersey.—Pennsylvania R. Co. *v.* Pfuelb, 60 N. J. L. 278, 37 Atl. 1100 [*affirmed* in 61 N. J. L. 287, 41 Atl. 1116]; Berry *v.* Pennsylvania R. Co., 48 N. J. L. 141, 4 Atl. 303; Blaker *v.* New Jersey Midland R. Co., 30 N. J. Eq. 240.

New York.— Tucker *v.* New York Cent., etc., R. Co., 124 N. Y. 308, 26 N. E. 916, 21 Am. St. Rep. 670; Cullen *v.* Delaware, etc., Canal Co., 113 N. Y. 667, 21 N. E. 716; Salter *v.* Utica, etc., R. Co., 75 N. Y. 273; Davis *v.* New York Cent., etc., R. Co., 47 N. Y. 400; Gonzales *v.* New York, etc., R. Co., 38 N. Y. 440, 98 Am. Dec. 58 [*reversing* 6 Rob. 93, 297]; Noakes *v.* New York Cent., etc., R. Co., 121 N. Y. App. Div. 716, 106 N. Y. Suppl. 522; York *v.* New York, etc., R. Co., 108 N. Y. App. Div. 126, 95 N. Y. Suppl. 1105; Wiedman *v.* Erie R. Co., 66 N. Y. App. Div. 347, 72 N. Y. Suppl. 683; Mitchell *v.* Third Ave. R. Co., 62 N. Y. App. Div. 371, 70 N. Y. Suppl. 1118; Dascomb *v.* Buffalo, etc., R. Co., 27 Barb. 221 (holding that it is to be regarded as very little short of recklessness for any one to drive on to the track of a railroad without first looking and listening to ascertain whether a moving locomotive is near); Winslow *v.* Boston, etc., R. Co., 11 N. Y. St. 831.

North Carolina.— Cooper *v.* North Carolina R. Co., 140 N. C. 209, 52 S. E. 932, 3 L. R. A. N. S. 391; Mesic *v.* Atlantic, etc., R. Co., 120 N. C. 489, 26 S. E. 633; Mayes *v.* Southern R. Co., 119 N. C. 758, 26 S. E. 148.

Ohio.— Pennsylvania Co. *v.* Rathgeb, 32 Ohio St. 66; Cleveland, etc., R. Co. *v.* Crawford, 24 Ohio St. 631, 15 Am. Rep. 633; Lake Shore, etc., R. Co. *v.* Landphair, 23 Ohio Cir. Ct. 435; Lake Shore, etc., R. Co. *v.* Reynolds, 23 Ohio Cir. Ct. 199 (holding that it is his unqualified duty to look and listen, where the crossing is unobstructed, and there is nothing to divert the attention of the traveler as he approaches the crossing); Pennsylvania Co. *v.* Alburn, 23 Ohio Cir. Ct. 130; Koester *v.* Toledo, etc., R. Co., 20 Ohio Cir. Ct. 475, 11 Ohio Cir. Dec. 283; Toledo, etc., R. Co. *v.* Eatherton, 20 Ohio Cir. Ct. 297, 11 Ohio Cir. Dec. 253; Pittsburgh, etc., R. Co. *v.* Peters, 1 Ohio Cir. Ct. 34, 1 Ohio Cir. Dec. 20; Didman *v.* Michigan Cent. R. Co., 5 Ohio S. & C. Pl. Dec. 140, 7 Ohio N. P. 380.

Oregon.— Blackburn *v.* Southern Pac. Co., 34 Oreg. 215, 55 Pac. 225; McBride *v.* Northern Pac. R. Co., 19 Oreg. 64, 23 Pac. 814.

Pennsylvania.— Pennsylvania R. Co. *v.* Peters, 116 Pa. St. 206, 9 Atl. 317; Lehigh Valley R. Co. *v.* Brandtmaier, 113 Pa. St. 610, 6 Atl. 238.

Texas.— International, etc., R. Co. *v.* Neff, 87 Tex. 303, 28 S. W. 283; Gulf, etc., R. Co. *v.* Greenlee, 70 Tex. 553, 8 S. W. 129; Houston, etc., R. Co. *v.* Wilson, 60 Tex. 142; Texas, etc., R. Co. *v.* Chapman, 57 Tex. 75; Ft. Worth, etc., R. Co. *v.* Wyatt, 35 Tex. Civ. App. 119, 79 S. W. 349; Galveston, etc., R. Co. *v.* Harris, 22 Tex. Civ. App. 16, 53 S. W. 599; Central Texas, etc., R. Co. *v.* Bush, 12 Tex. Civ. Anp. 291, 34 S. W. 133; Gulf, etc., R. Co. *v.* Scott, (Civ. App. 1894) 27 S. W. 827; Texas, etc., R. Co. *v.* Brown, 2 Tex. Civ. App. 281, 21 S. W. 424.

[X, F, 10, d, (I), (A)]

although the railroad company itself is guilty of negligence,[89] as in approaching the crossing at an unlawful or dangerous rate of speed,[90] or without giving the proper, customary, or statutory signals,[91] or in not providing a safe crossing,[92]

Virginia.— Smith *v.* Norfolk, etc., R. Co., 107 Va. 725, 60 S. E. 56; Johnson *v.* Chesapeake, etc., R. Co., 91 Va. 171, 21 S. E. 238; Hogan *v.* Tyler, 90 Va. 19, 17 S. E. 723.

West Virginia.— Berkeley *v.* Chesapeake, etc., R. Co., 43 W. Va. 11, 26 S. E. 349.

Wisconsin.— Guhl *v.* Whitcomb, 109 Wis. 69, 85 N. W. 142, 83 Am. St. Rep. 889.

United States.— Chicago, etc., R. Co. *v.* Houston, 95 U. S. 697, 24 L. ed. 542; Griffith *v.* Baltimore, etc., R. Co., 44 Fed. 574.

Canada.— Villeneuve *v.* Canadian Pac. R. Co., 21 Quebec Super. Ct. 422; Tanguay *v.* Grand Trunk R. Co., 20 Quebec Super. Ct. 90.

See 41 Cent. Dig. tit. "Railroads," § 1043.

A railroad crossing is of itself a warning to one about to go upon it to exercise care and vigilance, to the extent of his opportunity, in using his senses of sight and hearing, to discover an approaching train in time to avoid it. Brown *v.* Milwaukee, etc., R. Co., 22 Minn. 165. And this rule applies as well to a side-track as to a main line. Mynning *v.* Detroit, etc., R. Co., 59 Mich. 257, 26 N. W. 514.

Merely stopping without looking or listening is not sufficient. Day *v.* Boston, etc., R. Co., 96 Me. 207, 52 Atl. 771, 90 Am. St. Rep. 335.

89. Ring *v.* Chicago, etc., R. Co., (Iowa 1898) 75 N. W. 492; Tucker *v.* New York Cent., etc., R. Co., 124 N. Y. 308, 26 N. E. 916, 21 Am. St. Rep. 670; Ayers *v.* Norfolk, etc., R. Co., (Va. 1897) 27 S. E. 582; Chicago, etc., R. Co. *v.* Rossow, 117 Fed. 491, 54 C. C. A. 313.

90. *California.*— Green *v.* Los Angeles Terminal R. Co., 143 Cal. 31, 76 Pac. 719, 101 Am. St. Rep. 68, (1902) 69 Pac. 694.

Indiana.— St. Louis, etc., R. Co. *v.* Mathias, 50 Ind. 65.

Iowa.— Sala *v.* Chicago, etc., R. Co., 85 Iowa 678, 52 N. W. 664.

Missouri.— Jennings *v.* St. Louis, etc., R. Co., 112 Mo. 268, 20 S. W. 490; Taylor *v.* Missouri Pac. R. Co., 86 Mo. 457.

New York.— Collins *v.* New York, etc., R. Co., 92 Hun 563, 36 N. Y. Suppl. 942 [*affirmed* in 154 N. Y. 740, 49 N. E. 1095].

Ohio.— Lake Shore, etc., R. Co. *v.* Landphair, 23 Ohio Cir. Ct. 435.

Texas.— Texas, etc., R. Co. *v.* Fuller, 5 Tex. Civ. App. 660, 24 S. W. 1090; Missouri Pac. R. Co. *v.* Burnett, 3 Tex. App. Civ. Cas. § 236; Texas, etc., R. Co. *v.* Brown, 2 Tex. Civ. App. 281, 21 S. W. 424.

Canada.— Tanguay *v.* Grand Trunk R. Co., 20 Quebec Super. Ct. 90.

See 41 Cent. Dig. tit. "Railroads," § 1043.

91. *Alabama.*— Leak *v.* Georgia Pac. R. Co., 90 Ala. 161, 8 So. 245.

Georgia.— Comer *v.* Shaw, 98 Ga. 543, 25 S. E. 733.

Illinois.— Chicago, etc., R. Co. *v.* Lee, 68 Ill. 576.

Indiana.— Chicago, etc., R. Co. *v.* Thomas, 155 Ind. 634, 58 N. E. 1040; Miller *v.* Terre Haute, etc., R. Co., 144 Ind. 323, 43 N. E. 257; St. Louis, etc., R. Co. *v.* Mathias, 50 Ind. 65; Chicago, etc., R. Co. *v.* Reed, 29 Ind. App. 94, 63 N. E. 878, holding that a failure to give the statutory signals as a railroad train approaches a crossing is no excuse for plaintiff's contributory negligence.

Kansas.— Missouri, etc., R. Co. *v.* Bussey, 66 Kan. 735, 71 Pac. 261; Atchison, etc., R. Co. *v.* Holland, 60 Kan. 209, 56 Pac. 6.

Louisiana.— Brown *v.* Texas, etc., R. Co., 42 La. Ann. 350, 7 So. 682, 21 Am. St. Rep. 374.

Maine.— Giberson *v.* Bangor, etc., R. Co., 89 Me. 337, 36 Atl. 400.

Maryland.— Maryland Cent. R. Co. *v.* Neubeur, 62 Md. 391.

Massachusetts.— Butterfield *v.* Western R. Corp., 10 Allen 532, 87 Am. Dec. 678.

Michigan.— Matta *v.* Chicago, etc., R. Co., 69 Mich. 109, 37 N. W. 54.

Minnesota.— Judson *v.* Great Northern R. Co., 63 Minn. 248, 65 N. W. 447.

Missouri.— Stepp *v.* Chicago, etc., R. Co., 85 Mo. 229; Caldwell *v.* Kansas City, etc., R. Co., 58 Mo. App. 453; Drake *v.* Chicago, etc., R. Co., 51 Mo. App. 562; Damrill *v.* St. Louis, etc., R. Co., 27 Mo. App. 202.

Montana.— Hunter *v.* Montana Cent. R. Co., 22 Mont. 525, 57 Pac. 140.

New York.— Rodrian *v.* New York, etc., R. Co., 125 N. Y. 526, 26 N. E. 741 [*reversing* 55 Hun 606, 7 N. Y. Suppl. 811]; Cullen *v.* Delaware, etc., Canal Co., 113 N. Y. 667, 21 N. E. 716.

North Carolina.— Cooper *v.* North Carolina R. Co., 140 N. C. 209, 52 S. E. 932, 3 L. R. A. N. S. 391; Mesic *v.* Atlantic, etc., R. Co., 120 N. C. 489, 26 S. E. 633.

Ohio.— Lake Shore, etc., R. Co. *v.* Landphair, 23 Ohio Cir. Ct. 435.

Oklahoma.— Severy *v.* Chicago, etc., R. Co., 6 Okla. 153, 50 Pac. 162.

Texas.— Galveston, etc., R. Co. *v.* Kutac, 72 Tex. 643, 11 S. W. 127; Texas, etc., R. Co. *v.* Fuller, 5 Tex. Civ. App. 660, 24 S. W. 1090; Texas, etc., R. Co. *v.* Hare, 4 Tex. Civ. App. 18, 23 S. W. 42.

Virginia.— Johnson *v.* Chesapeake, etc., R. Co., 91 Va. 171, 21 S. E. 238.

West Virginia.— Berkeley *v.* Chesapeake, etc., R. Co., 43 W. Va. 11, 26 S. E. 349.

Wisconsin.— Steinhofel *v.* Chicago, etc., R. Co., 92 Wis. 123, 65 N. W. 852.

United States.— Chicago, etc., R. Co. *v.* Houston, 95 U. S. 697, 24 L. ed. 542; Griffith *v.* Baltimore, etc., R. Co., 44 Fed. 574.

Canada.— Wright *v.* Grand Trunk R. Co., 4 Can. R. Cas. 202; Weir *v.* Canadian Pac. R. Co., 16 Ont. App. 100.

See 41 Cent. Dig. tit. "Railroads," § 1043; and *infra*, X. F, 10, e, (III).

92. Rockford, etc., R. Co. *v.* Byam, 80 Ill. 528.

or gates or a watchman or flagman at the crossing,[93] or although its watchman or flagman does not properly attend to his duties,[94] unless the railroad company's negligence is so reckless and wanton as to be the legal equivalent of wilful or intentional.[95] The mere failure, however, to look or listen, or to look and listen before crossing, is not, as a general rule, negligence *per se* as a matter of law; but whether or not such failure is negligence usually depends upon the circumstances at the particular time and crossing and is a question for the jury to determine;[96] although it may be negligence as a matter of law under some circumstances,[97] and is held to be such negligence in some jurisdictions.[98] This rule, however, does not mean that a traveler is absolutely bound to see or hear an approaching train but only that he must make all reasonable efforts to do so;[99]

93. See *infra*, X, F, 10, e, (II).

94. Pennsylvania R. Co. *v.* Pfuelb, 60 N. J. L. 278, 37 Atl. 1100 [*affirmed* in 61 N. J. L. 287, 41 Atl. 1116]. And see *infra*, X, F, 10, e, (II).

95. Louisville, etc., R. Co. *v.* Crawford, 89 Ala. 240, 8 So. 243; Chicago, etc., R. Co. *v.* Hatch, 79 Ill. 137. And see *infra*, X, F, 13.

96. *Connecticut.*— Metcalf *v.* Central Vermont R. Co., 78 Conn. 614, 63 Atl. 633.

Georgia.— Bryson *v.* Southern R. Co., 3 Ga. App. 407, 59 S. E. 1124.

Illinois.— Toledo, etc., R. Co. *v.* Cline, 135 Ill. 41, 25 N. E. 846; Terre Haute, etc., R. Co. *v.* Voelker, 129 Ill. 540, 22 N. E. 20; Chicago Junction R. Co. *v.* McAnrow, 114 Ill. App. 501; Lake St. El. R. Co. *v.* Gormley, 108 Ill. App. 59; Chicago, etc., R. Co. *v.* Kelly, 80 Ill. App. 675; Lake Shore, etc., R. Co. *v.* Foster, 74 Ill. App. 387.

Kentucky.— Wilson *v.* Chesapeake, etc., R. Co., 86 S. W. 690, 27 Ky. L. Rep. 778.

Missouri.— Jennings *v.* St. Louis, etc., R. Co., 112 Mo. 268, 20 S. W. 490.

New Hampshire.— Stone *v.* Boston, etc., R. Co., 72 N. H. 206, 55 Atl. 359; Smith *v.* Boston, etc., R. Co., 70 N. H. 53, 47 Atl. 290, 85 Am. St. Rep. 596; Davis *v.* Concord, etc., R. Co., 68 N. H. 247, 44 Atl. 388; Lyman *v.* Boston, etc., R. Co., 66 N. H. 200, 20 Atl. 976, 11 L. R. A. 364.

New York.— Cranston *v.* New York Cent., etc., R. Co., 39 Hun 308 [*reversed* on other grounds in 103 N. Y. 614, 9 N. E. 500]; Havens *v.* Erie R. Co., 53 Barb. 328 [*affirmed* in 41 N. Y. 296].

Texas.— Houston, etc., R. Co. *v.* Wilson, 60 Tex. 142 (holding that in the absence of statute requiring one about to cross a railway to stop and listen, it cannot be declared as a matter of law that a failure to do so will constitute negligence in one who, while attempting to cross, is injured by a train the approach of which he is not aware of); Galveston, etc., R. Co. *v.* Harris, 22 Tex. Civ. App. 16, 53 S. W. 599; Galveston, etc., R. Co. *v.* Huebner, (Civ. App. 1897) 42 S. W. 1021.

See 41 Cent. Dig. tit. "Railroads," § 1043; and *infra*, X, F, 14, g, (XI), (D).

97. Chicago, etc., R. Co. *v.* Gertsen, 15 Ill. App. 614 (holding that an attempt to cross a railroad track in a thronged city without looking and listening is negligence as a matter of law); Bannister *v.* Lake Shore, etc., R. Co., 113 Mich. 530, 71 N. W. 861 (holding that contributory negligence appears as a matter of law where deceased, in the evening, but when it was light enough to see a considerable distance, approached a railroad crossing where the view down the track for several hundred yards was unobstructed, went on the track without looking, and was killed by a train carrying a headlight, although he was a stranger in the locality, and a train behind him was making some noise and emitting smoke which blew over the crossing).

98. Little Rock, etc., R. Co. *v.* Blewitt, 65 Ark. 235, 45 S. W. 548 (holding that a person approaching a railroad track must look and listen for approaching trains, and an instruction which charges that such is not an inflexible rule of law, but that it is a question of fact whether or not, from the particular circumstances of the case, the party injured acted as a reasonably prudent man in attempting to cross the track without first listening and looking, is error); Queen Anne's R. Co. *v.* Reed, (Del. 1905) 59 Atl. 860 (holding that a failure to make any effort to ascertain whether a train is approaching or to avoid the danger imminent at the time of attempting to pass over the tracks of a railroad at a crossing is contributory negligence, as matter of law); Malott *v.* Hawkins, 159 Ind. 127, 63 N. E. 308; Chase *v.* Maine Cent. R. Co., 78 Me. 346, 5 Atl. 771 (negligence *per se*).

99. *Alabama.*— Birmingham Southern R. Co. *v.* Lintner, 141 Ala. 420, 38 So. 363, 109 Am. St. Rep. 40 (holding that when a person stops and listens for a train at a crossing, contributory negligence cannot be based on a mere failure of such person to hear an approaching train); Kansas City, etc., R. Co. *v.* Weeks, 135 Ala. 614, 34 So. 16.

Indiana.—Toledo, etc., R. Co. *v.* Shuckman, 50 Ind. 42.

Michigan.— Klanowski *v.* Grand Trunk R. Co., 57 Mich. 525, 24 N. W. 801, holding that where the injured party stopped and looked and listened, but could not see or hear the train, he is not guilty of contributory negligence.

New York.— Wiedman *v.* Erie R. Co., 66 N. Y. App. Div. 347, 72 N. Y. Suppl. 683; Mitchell *v.* Third Ave. R. Co., 62 N. Y. App. Div. 371, 70 N. Y. Suppl. 1118; Keese *v.* New York, etc., R. Co., 67 Barb. 205 (holding that the law does not require that the sight and ears of a person crossing a railroad

nor is it of universal application, but has exceptions under exceptional circumstances which may excuse the traveler for his failure,[1] as where he is misled or deceived without his fault by appearances likely to deceive or mislead an ordinarily prudent person,[2] where his efforts would have been unavailing and the injury would not have been avoided by the use of such precautions on his part,[3] where the surroundings otherwise excuse such failure,[4] or where the injury could have been avoided notwithstanding the contributory negligence.[5]

(B) *Opportunity to See or Hear Trains.* The above general rule is especially applicable where the conditions at the particular time and crossing are such that a traveler approaching the crossing has an opportunity to see or hear an approaching train in time to stop in a place of safety or to safely retreat. It is his duty under such circumstances, particularly where he is familiar with the crossing, to look and listen when such opportunity presents itself and if he fails to do so, or if he looks or listens but fails to see or hear the approaching train, he is guilty of contributory negligence barring a recovery.[6] The fact that the

track shall be infallible, but merely that he shall use them to avoid injury); Winslow *v.* Boston, etc., R. Co., 11 N. Y. St. 831.

North Carolina.— Mayes *v.* Southern R. Co., 119 N. C. 758, 26 S. E. 148.

Texas.— Missouri, etc., R. Co. *v.* Oslin, 26 Tex. Civ. App. 370, 63 S. W. 1039; Galveston, etc., R. Co. *v.* Eaten, (Civ. App. 1898) 44 S. W. 562.

See 41 Cent. Dig. tit. "Railroads," § 1043.

1. Jennings *v.* St. Louis, etc., R. Co., 112 Mo. 268, 20 S. W. 490; Omaha, etc., R. Co. *v.* Talbot, 48 Nebr. 627, 67 N. W. 599; McGovern *v.* New York Cent., etc., R. Co., 67 N. Y. 417 (holding that the rule requiring persons, before crossing a railroad track, to look to see whether trains are approaching is not applied inflexibly in all cases, without regard to age or other circumstances); Noakes *v.* New York Cent., etc., R. Co., 121 N. Y. App. Div. 716, 106 N. Y. Suppl. 522.

Where a reasonably careful and prudent man would attempt to cross without looking and listening, a failure to look and listen before crossing is not negligence. Funston *v.* Chicago, etc., R. Co., 61 Iowa 452, 16 N. W. 518.

2. Illinois Cent. R. Co. *v.* Finfrock, 103 Ill. App. 232; Chicago, etc., R. Co. *v.* Fennimore, 99 Ill. App. 174 [*affirmed* in 199 Ill. 9, 64 N. E. 985]; Malott *v.* Hawkins, 159 Ind. 127, 63 N. E. 308; Chicago, etc., R. Co. *v.* Hedges, 105 Ind. 398, 7 N. E. 801; Dublin, etc., R. Co. *v.* Slattery, 3 App. Cas. 1155, 39 L. T. Rep. N. S. 365, 27 Wkly. Rep. 191.

3. Noakes *v.* New York Cent., etc., R. Co., 121 N. Y. App. Div. 716, 106 N. Y. Suppl. 522; Goodell *v.* New York Cent., etc., R. Co., 67 N. Y. App. Div. 271, 73 N. Y. Suppl. 428; Cranston *v.* New York Cent., etc., R. Co., 39 Hun (N. Y.) 308 [*reversed* on other grounds in 103 N. Y. 614, 9 N. E. 500]; Leonard *v.* New York Cent., etc., R. Co., 42 N. Y. Super. Ct. 225; McGuire *v.* Hudson River R. Co., 2 Daly (N. Y.) 76 (not negligence not to attempt to look where one cannot see); Cleveland, etc., R. Co. *v.* Crawford, 24 Ohio St. 631, 15 Am. Rep. 633; McCanna *v.* New England R. Co., 20 R. I. 439, 39 Atl. 891; Norfolk, etc., R. Co. *v.* Burge, 84 Va. 63, 4 S. E. 21. See also Grand Trunk R. Co. *v.* Beckett, 16 Can. Sup. Ct. 713.

4. Lake St. El. R. Co. *v.* Gormley, 108 Ill. App. 59; Illinois Cent. R. Co. *v.* Finfrock, 103 Ill. App. 232; Chicago City R. Co. *v.* Fennimore, 99 Ill. App. 174 [*affirmed* in 199 Ill. 9, 64 N. E. 985].

That one has the rights of a passenger, as regards protection by the railway company, and is killed while taking the only way open to her destination, affords no excuse for such contributory negligence. Steber *v.* Chicago, etc., R. Co., 115 Wis. 200, 91 N. W. 654.

5. See Lake Shore, etc., R. Co. *v.* Landphair, 23 Ohio Cir. Ct. 435, holding, however, that there can be no recovery by a person who attempted to cross a railroad track in broad daylight at a point where there was an unobstructed view of the track for a mile in the direction from whence the train came, without an exercise of any of the vigilance required by law at such places, and it does not appear that anything could have been done to save such person after he was seen by servants of the railway company, notwithstanding the train may have been running at an unlawful rate of speed, and although no bell or whistle was sounded. And see *infra*, X, F, 12.

6. *Alabama.*— Louisville, etc., R. Co. *v.* Pearce, 142 Ala. 680, 39 So. 72; Gaynor *v.* Louisville, etc., R. Co., 136 Ala. 244, 33 So. 808; Georgia Cent. R. Co. *v.* Foshee, 125 Ala. 199, 27 So. 1006; Louisville, etc., R. Co. *v.* Richards, 100 Ala. 365, 13 So. 944.

Arkansas.— St. Louis, etc., R. Co. *v.* Crabtree, 69 Ark. 134, 62 S. W. 64; Little Rock, etc., R. Co. *v.* Cullen, 54 Ark. 431, 16 S. W. 169.

California.— Martin *v.* Southern Pac. Co., 150 Cal. 124, 88 Pac. 701; Green *v.* Southern Pac. Co., 132 Cal. 254, 64 Pac. 255; Glascock *v.* Central Pac. R. Co., 73 Cal. 137, 14 Pac. 518.

Connecticut.— Peck *v.* New York, etc., R. Co., 50 Conn. 379.

Illinois.— Chicago, etc., R. Co. *v.* Zapp, 209 Ill. 339, 70 N. E. 623 [*affirming* 110 Ill. App. 553]; Chicago, etc., R. Co. *v.* Harwood, 80 Ill. 88; Chicago, etc., R. Co. *v.* Lee, 68 Ill.

traveler is injured under such circumstances raises a presumption that he did

576; Ravatt *v.* Cleveland, etc., R. Co., 128 Ill. App. 220; Chicago, etc., R. Co. *v.* Vremeister, 112 Ill. App. 346; Toledo, etc., R. Co. *v.* Christy, 111 Ill. App. 247 (holding this to be true where there are no circumstances or conditions which justify such a failure, and there are no obstructions to the view); Illinois Cent. R. Co. *v.* Batson, 81 Ill. App. 142; Chicago, etc., R. Co. *v.* Florens, 32 Ill. App. 365.

Indiana.— Chicago, etc., R. Co. *v.* Thomas, (1900) 55 N. E. 861; Louisville, etc., R. Co. *v.* Stommel, 126 Ind. 35, 25 N. E. 863; Cones *v.* Cincinnati, etc., R. Co., 114 Ind. 328, 16 N. E. 638; Indiana, etc., R. Co. *v.* Hammock, 113 Ind. 1, 14 N. E. 737; Pittsburgh, etc., R. Co. *v.* Martin, 82 Ind. 476; Chicago, etc., R. Co. *v.* Reed, 29 Ind. App. 94, 63 N. E. 878; Cleveland, etc., R. Co. *v.* Heine, 28 Ind. App. 163, 62 N. E. 455; Hancock *v.* Lake Erie, etc., R. Co., 21 Ind. App. 10, 51 N. E. 369; Louisville, etc., R. Co. *v.* Stephens, 13 Ind. App. 145, 40 N. E. 148.

Iowa.— Crawford *v.* Chicago, etc., R. Co., 109 Iowa 433, 80 N. W. 519; Payne *v.* Chicago, etc., R. Co., 108 Iowa 188, 78 N. W. 813; Ring *v.* Chicago, etc., R. Co., (1898) 75 N. W. 492; Moore *v.* Keokuk, etc., R. Co., 89 Iowa 223, 56 N. W. 430; Sala *v.* Chicago, etc., R. Co., 85 Iowa 678, 52 N. W. 664; Pence *v.* Chicago, etc., R. Co., 63 Iowa 746, 19 N. W. 785; Benton *v.* Central R. Co., 42 Iowa 192; Artz *v.* Chicago, etc., R. Co., 34 Iowa 153.

Kansas.— Missouri, etc., R. Co. *v.* Bussey, 66 Kan. 735, 71 Pac. 261; Walker *v.* Mercer, 61 Kan. 736, 60 Pac. 736 [*reversing* (1899) 58 Pac. 27]; Atchison, etc., R. Co. *v.* Holland, 60 Kan. 209, 56 Pac. 6.

Louisiana.— Brown *v.* Texas, etc., R. Co., 42 La. Ann. 350, 7 So. 682, 21 Am. St. Rep. 374.

Maryland.— Phillips *v.* Washington, etc., R. Co., 104 Md. 455, 65 Atl. 422; Anderson *v.* Baltimore, etc., R. Co., 101 Md. 487, 61 Atl. 575; Cowen *v.* Wietrick, 101 Md. 46, 60 Atl. 282; Northern Cent. R. Co. *v.* McMahon, 97 Md. 483, 55 Atl. 627; Union R. Co. *v.* State, 72 Md. 153, 19 Atl. 449.

Massachusetts.— Allen *v.* Boston, etc., R. Co., 197 Mass. 298, 83 N. E. 863; Raymond *v.* New York, etc., R. Co., 182 Mass. 337, 65 N. E. 399; Sprow *v.* Boston, etc., R. Co., 163 Mass. 330, 39 N. E. 1024, private crossing.

Michigan.— Smith *v.* Detroit, etc., R. Co., 136 Mich. 282, 99 N. W. 15; Tucker *v.* Chicago, etc., R. Co., 122 Mich. 149, 80 N. W. 984; Braudy *v.* Detroit, etc., R. Co., 107 Mich. 100, 64 N. W. 1056; Grostick *v.* Detroit, etc., R. Co., 90 Mich. 594, 51 N. W. 667; Freeman *v.* Duluth, etc., R. Co., 74 Mich. 86, 41 N. W. 872, 3 L. R. A. 594; Matta *v.* Chicago, etc., R. Co., 69 Mich. 109, 37 N. W. 54.

Minnesota.—Wardner *v.* Great Northern R. Co., 96 Minn. 382, 104 N. W. 1084; Schmidt *v.* Great Northern R. Co., 83 Minn. 105, 85 N. W. 935; Nelson *v.* St. Paul, etc., R. Co., 76 Minn. 189, 78 N. W. 1041, 79 N. W. 530; Burau *v.* Great Northern R. Co., 67 Minn. 434, 67 N. W. 1149; Carney *v.* Chicago, etc., R. Co., 46 Minn. 220, 48 N. W. 912.

Missouri.— Statler *v.* Chicago, etc., R. Co., 204 Mo. 619, 103 S. W. 1; Mockowik *v.* Kansas City, etc., R. Co., 196 Mo. 550, 94 S. W. 256; Sanguinette *v.* Mississippi River, etc., R. Co., 196 Mo. 466, 95 S. W. 386; Schmidt *v.* Missouri Pac. R. Co., 191 Mo. 215, 90 S. W. 136, 3 L. R. A. N. S. 196; Payne *v.* Chicago, etc., R. Co., 136 Mo. 562, 38 S. W. 308; Taylor *v.* Missouri Pac. R. Co., 86 Mo. 457; Sims *v.* St. Louis, etc., R. Co., 116 Mo. App. 572, 92 S. W. 909; Killian *v.* Chicago, etc., R. Co., 86 Mo. App. 473; Drake *v.* Chicago, etc., R. Co., 51 Mo. App. 562.

Nebraska.—Hajsek *v.* Chicago, etc., R. Co., 5 Nebr. (Unoff.) 67, 97 N. W. 327, 68 Nebr. 539, 94 N. W. 609.

New Hampshire.— Waldron *v.* Boston, etc., R. Co., 71 N. H. 362, 52 Atl. 443.

New Jersey.— Van Riper *v.* New York, etc., R. Co., 71 N. J. L. 345, 59 Atl. 26; Beeg *v.* New York, etc., R. Co., 70 N. J. L. 56, 56 Atl. 169; Dotty *v.* Atlantic City R. Co., 64 N. J. L. 710, 46 Atl. 772; Pennsylvania R. Co. *v.* Leary, 56 N. J. L. 705, 29 Atl. 678.

New York.— Mehegan *v.* New York Cent., etc., R. Co., 125 N. Y. 768, 26 N. E. 936; Cullen *v.* Delaware, etc., Canal Co., 113 N. Y. 667, 21 N. E. 716; Connelly *v.* New York Cent., etc., R. Co., 88 N. Y. 346; Cordell *v.* New York Cent., etc., R. Co., 75 N. Y. 330; Leary *v.* Fitchburg R. Co., 53 N. Y. App. Div. 52, 65 N. Y. Suppl. 699; Berzevizy *v.* Delaware, etc., R. Co., 19 N. Y. App. Div. 309, 46 N. Y. Suppl. 27; Hennessy *v.* Northern Cent., R. Co., 17 N. Y. App. Div. 162, 45 N. Y. Suppl. 147; Belch *v.* New York Cent., etc., R. Co., 90 Hun 477, 36 N. Y. Suppl. 56; Du Boise *v.* New York Cent., etc., R. Co., 88 Hun 10, 34 N. Y. Suppl. 279; Miller *v.* New York Cent., etc., R. Co., 81 Hun 152, 30 N. Y. Suppl. 751; Shires *v.* Fonda, etc., R. Co., 80 Hun 92, 30 N. Y. Suppl. 175; Crandall *v.* Lehigh Val. R. Co., 72 Hun 431, 25 N. Y. Suppl. 151 [*affirmed* in 151 N. Y. 642, 45 N. E. 1131]; Bomboy *v.* New York Cent. R. Co., 47 Hun 425; Mitchell *v.* New York Cent., etc., R. Co., 2 Hun 535, 5 Thomps. & C. 122 [*affirmed* in 64 N. Y. 655]; Spencer *v.* Utica, etc., R. Co., 5 Barb. 337; Haupt *v.* New York Cent., etc., R. Co., 18 Misc. 594, 42 N. Y. Suppl. 477 [*reversed* on the facts in 20 Misc. 291, 45 N. Y. Suppl. 666]; O'Donnell *v.* New York Cent., etc., R. Co., 12 N. Y. St. 206.

North Carolina.— See Scott *v.* Wilmington, etc., R. Co., 96 N. C. 428, 2 S. E. 151.

Ohio.— Baltimore, etc., R. Co. *v.* McPeek, 16 Ohio Cir. Ct. 87, 8 Ohio Cir. Dec. 742; New York, etc., R. Co. *v.* Swartout, 14 Ohio Cir. Ct. 582, 6 Ohio Cir. Dec. 768.

Pennsylvania.—Sellers *v.* Philadelphia, etc., R. Co., 214 Pa. St. 298, 63 Atl. 606 (nonsuit held proper); Harvey *v.* Erie R. Co., 210 Pa. St. 95, 97, 59 Atl. 691, 1119; Fox *v.* Pennsylvania R. Co., 195 Pa. St. 538, 46 Atl.

[X, F, 10, d, (I), (B)]

not take the required precautions,[7] that is, that either he did not look or listen,[8] or that if he did either, he did not heed what he saw or heard;[9] or if he fails to look it will be presumed that he would have seen the approaching train had he looked.[10] The failure to look or listen, or to look and listen, or to heed what he sees or hears under such circumstances, is generally held to be negligence *per se*,[11] or negligence as a matter of law,[12] although the circumstances of the particular

106 (although the track is a private siding); Baker *v.* Pennsylvania R. Co., 182 Pa. St. 336, 37 Atl. 933; Gangawer *v.* Philadelphia, etc., R. Co., 168 Pa. St. 265, 32 Atl. 21; Groner *v.* Delaware, etc., Canal Co., 153 Pa. St. 390, 26 Atl. 7.

South Carolina.— Gosa *v.* Southern R., 67 S. C. 347, 45 S. E. 810.

Texas.— Missouri Pac. R. Co. *v.* Peay, (1892) 20 S. W. 57; Galveston, etc., R. Co. *v.* Kutac, 72 Tex. 643, 11 S. W. 127; Texas, etc., R. Co. *v.* Huber, (Civ. App. 1906) 95 S. W. 568.

Virginia.— Southern R. Co. *v.* Hansbrough, 107 Va. 733, 60 S. E. 58; Stokes *v.* Southern R. Co., 104 Va. 817, 52 S. E. 855 (holding that it is the duty of a traveler to look and listen for the approach of trains before going on a railroad crossing, when his looking and listening would be necessarily effective); Childress *v.* Chesapeake, etc., R. Co., 94 Va. 186, 26 S. E. 424.

Wisconsin.— Marshall *v.* Green Bay, etc., R. Co., 125 Wis. 96, 103 N. W. 249; Brown *v.* Chicago, etc., R. Co., 109 Wis. 384, 85 N. W. 271 (holding that a person about to enter on a railway track is chargeable with knowledge of such dangers as he may reasonably discover by the use of his sight and hearing); Koester *v.* Chicago, etc., R. Co., 106 Wis. 460, 82 N. W. 295; Walters *v.* Chicago, etc., R. Co., 104 Wis. 251, 80 N. W. 451.

United States.— Illinois Cent. R. Co. *v.* Ackerman, 144 Fed. 959, 76 C. C. A. 13; Kallmerten *v.* Cowen, 111 Fed. 297, 49 C. C. A. 346; Philadelphia, etc., R. Co. *v.* Peebles, 67 Fed. 591, 14 C. C. A. 555.

England.— Davey *v.* London, etc., R. Co., 12 Q. B. D. 70, 48 J. P. 279, 53 L. J. Q. B. 58, 49 L. T. Rep. N. S. 739.

Canada.— Weir *v.* Canadian Pac. R. Co., 16 Ont. App. 100; Johnston *v.* Northern R. Co., 34 U. C. Q. B. 432.

See 41 Cent. Dig. tit. "Railroads," § 1044.

7. Green *v.* Southern Pac. Co., 132 Cal. 254, 64 Pac. 255; Herbert *v.* Southern Pac. Co., 121 Cal. 227, 53 Pac. 651.

Applies only in clear cases.—The presumption of contributory negligence which arises where one goes on a railroad track in front of a moving train which he might have seen if he had looked applies only to clear cases, where the facts are free from doubt. Beach *v.* Pennsylvania R. Co., 212 Pa. St. 567, 61 Atl. 1106.

8. Cleveland, etc., R. Co. *v.* Miller, 149 Ind. 490, 49 N. E. 445; Hook *v.* Missouri Pac. R. Co., 162 Mo. 569, 63 S. W. 360.

9. Toledo, etc., R. Co. *v.* Gallagher, 109 Ill. App. 67 (holding that where a person while approaching a railroad crossing is able to see along an unobstructed track and does look but fails to see an approaching train, the law considers him as not having looked at all); Cleveland, etc., R. Co. *v.* Miller, 149 Ind. 490, 49 N. E. 445; Wamsley *v.* Cleveland, etc., R. Co., 41 Ind. App. 147, 82 N. E. 490, 83 N. E. 640; Blackwell *v.* St. Louis, etc., R. Co., 47 La. Ann. 268, 16 So. 818, 49 Am. St. Rep. 371; Hook *v.* Missouri Pac. R. Co., 162 Mo. 569, 63 S. W. 360.

10. Wabash R. Co. *v.* Smillie, 97 Ill. App. 7, holding that where other witnesses saw the train by which plaintiff was injured approaching the crossing at the time of the collision and plaintiff did not look in the direction the train was approaching and ought to have done so, it is to be presumed that he would have seen what the others saw and he cannot recover.

11. Burns *v.* Louisville, etc., R. Co., 136 Ala. 522, 33 So. 891; Chicago, etc., R. Co. *v.* Thomas, (Ind. 1900) 55 N. E. 861 (holding that a failure to listen can only be said to be contributory negligence *per se* when the exercise of that faculty would have avoided injury); Dryden *v.* Pennsylvania R. Co., 211 Pa. St. 620, 61 Atl. 249 (holding that where the evidence shows that the person injured could not have looked and listened at any reasonable place before driving on the track without seeing the train, the speed of the train, the distance at which it might have been seen from the crossing, and that the crossing was particularly dangerous, are immaterial); Glein *v.* Harris, 181 Pa. St. 387, 37 Atl. 515. But see Frugia *v.* Texarkana, etc., R. Co., 36 Tex. Civ. App. 648, 82 S. W. 814 (holding that the mere fact that if a person injured while crossing a railroad had looked and listened before going on the track, he would have seen or heard the approach of the train by which he was injured in time to have avoided the injury does not necessarily charge such person with contributory negligence); Turner *v.* Ft. Worth, etc., R. Co., (Tex. Civ. App. 1895) 30 S. W. 253 (holding that a failure to look under such circumstances cannot be said to constitute negligence *per se* so as to relieve from liability defendant company which has neglected to signal as required by law).

12. *Indiana.*— Miller *v.* Terre Haute, etc., R. Co., 144 Ind. 323, 43 N. E. 257; Louisville, etc., R. Co. *v.* Stommel, 126 Ind. 35, 25 N. E. 863; Chicago, etc., R. Co. *v.* Reed, 28 Ind. App. 629, 63 N. E. 878.

Iowa.— Artz *v.* Chicago, etc., R. Co., 34 Iowa 153.

Kansas.— Chicago, etc., R. Co. *v.* Wheelbarger, 75 Kan. 811, 88 Pac. 531.

Michigan.— Bond *v.* Lake Shore, etc., R. Co., 117 Mich. 652, 76 N. W. 102; Tobias *v.*

case may be such as to make it a question which should be submitted to the determination of the jury.[13]

(c) *Knowledge of Crossing.* A traveler's knowledge or familiarity with a railroad crossing and his knowledge of the schedule of the approach of trains have an important bearing on the question of his contributory negligence. So it may be contributory negligence for him to go on a crossing with which he is familiar without looking or listening for approaching trains,[14] where under

Michigan Cent. R. Co., 103 Mich. 330, 61 N. W. 514.

Minnesota.— Kemp *v.* Northern Pac. R. Co., 89 Minn. 139, 94 N. W. 439; Burau *v.* Great Northern R. Co., 67 Minn. 434, 69 N. W. 1149.

Missouri.— Mockowik *v.* Kansas City, etc., R. Co., 196 Mo. 550, 94 S. W. 256; Sanguinette *v.* Mississippi River, etc., R. Co., 196 Mo. 466, 95 S. W. 386; Schmidt *v.* Missouri Pac. R. Co., 191 Mo. 215, 90 S. W. 136, 3 L. R. A. N. S. 196.

New Hampshire.— Waldron *v.* Boston, etc., R. Co., 71 N. H. 362, 52 Atl. 443.

New York.— Westervelt *v.* New York Cent., etc., R. Co., 86 N. Y. App. Div. 316, 83 N. Y. Suppl. 827; Swart *v.* New York Cent., etc., R. Co., 81 N. Y. App. Div. 402, 80 N. Y. Suppl. 906 [*affirmed* in 177 N. Y. 529, 69 N. E. 1131]; Burns *v.* New York Cent., etc., R. Co., 13 N. Y. App. Div. 483, 43 N. Y. Suppl. 391.

North Carolina.— Allen *v.* Atlanta, etc., R. Co., 141 N. C. 340, 53 S. E. 866.

Pennsylvania.— Seamans *v.* Delaware, etc., R. Co., 174 Pa. St. 421, 34 Atl. 568.

Washington.— Woolf *v.* Washington R., etc., Co., 37 Wash. 491, 79 Pac. 997.

Wisconsin.— Steber *v.* Chicago, etc. R. Co., 115 Wis. 200, 91 N. W. 654; Koester *v.* Chicago, etc., R. Co., 106 Wis. 460, 82 N. W. 295.

United States.— Northern Pac. R. Co. *v.* Freeman, 174 U. S. 379, 19 S. Ct. 763, 43 L. ed. 1014 [*reversing* 83 Fed. 82, 27 C. C. A. 457]; Rollins *v.* Chicago, etc., R. Co., 139 Fed. 639, 71 C. C. A. 615; Tomlinson *v.* Chicago, etc., R. Co., 134 Fed. 233, 67 C. C. A. 218; Chicago, etc., R. Co. *v.* Rossow, 117 Fed. 491, 54 C. C. A. 313.

See 41 Cent. Dig. tit. "Railroads," § 1044; and *infra*, X, F, 14, g. (XI), (D), (2).

A nonsuit is proper where the evidence shows that plaintiff went on the track without looking, or looking and listening, or if looking, without heeding, where he had an opportunity to see or hear an approaching train, by which he was injured. Lyman *v.* Philadelphia, etc., R. Co., 4 Houst. (Del.) 583 (private crossing); Blumenthal *v.* Boston, etc., R. Co., 97 Me. 255, 54 Atl. 747; Pennsylvania R. Co. *v.* Leary, 56 N. J. L. 705, 29 Atl. 678; Hamilton *v.* Delaware, etc., R. Co., 50 N. J. L. 263, 13 Atl. 29; Brooks *v.* Buffalo, etc., R. Co., 1 Abb. Dec. (N. Y.) 211, 27 Barb. 532 note [*affirming* 25 Barb. 600]; Jencks *v.* Lehigh Valley R. Co., 33 N. Y. App. Div. 635, 53 N. Y. Suppl. 625; Lees *v.* Philadelphia, etc., R. Co., 154 Pa. St. 46, 25 Atl. 1041; Vant *v.* Chicago, etc., R. Co., 101 Wis. 363, 77 N. W. 713; Johnston *v.* Northern R. Co., 34 U. C. Q. B. 432.

A directed verdict for defendant is proper where the evidence shows that plaintiff went on the track without looking for an approaching train when he had an opportunity to see its approach. Brooks *v.* Buffalo, etc., R. Co., 1 Abb. Dec. (N. Y.) 211, 27 Barb. 532 note [*affirming* 25 Barb. 600].

13. Moore *v.* Chicago, etc., R. Co., 102 Iowa 595, 71 N. W. 569, holding that whether plaintiff in approaching a railroad crossing was guilty of contributory negligence because after looking in one direction he saw no engine approaching and then looked in the other direction but did not look in the former direction again until he was struck by a train, although he could have seen it if he had looked again is a question for the jury, where he had no reason to expect the other train from the former rather than the latter direction and had a right to presume that an engine would not be running at a greater speed than that prescribed by an ordinance.

14. *California.*— Green *v.* Southern Pac. Co., 132 Cal. 254, 64 Pac. 255, familiarity of person injured with crossing and knowledge that train is due at about the time he attempts to cross.

Illinois.— Chicago, etc., R. Co. *v.* Hatch, 79 Ill. 137.

Iowa.— Payne *v.* Chicago, etc., R. Co., 108 Iowa 188, 78 N. W. 813, holding that plaintiff is guilty of contributory negligence, although he is familiar with the crossing and knows that no train is scheduled to pass.

Kansas.— Atchison, etc., R. Co. *v.* Holland, 60 Kan. 209, 56 Pac. 6.

Michigan.— Brinker *v.* Michigan Cent. R. Co., 121 Mich. 283, 80 N. W. 28, holding that a traveler who is familiar with the surroundings and has knowledge of the approach of the train is guilty of contributory negligence in not stopping and ascertaining which track the train is on.

Montana.— Hunter *v.* Montana Cent. R. Co., 22 Mont. 525, 57 Pac. 140.

Ohio.— Baltimore, etc., R. Co. *v.* Whitacre, 35 Ohio St. 687 (holding that where a person familiar with a dangerous railroad crossing neglects the exercise of any care to ascertain if a passing train is near, and in consequence of such neglect is injured by a collision with the train, he is guilty of negligence, and the mere fact that he had forgotten that he was in the vicinity of the crossing will not excuse such neglect); Toledo, etc., R. Co. *v.* Eatherton, 20 Ohio Cir. Ct. 297, 11 Ohio Cir. Dec. 253.

Texas.— St. Louis, etc., R. Co. *v.* Branom, (Civ. App. 1903) 73 S. W. 1064, familiar

similar circumstances it would not be contributory negligence in a person who was a stranger to the crossing to do so.[15]

(D) *Duty of Pedestrians.* A pedestrian on the highway has the duty of looking and listening before going on a railroad crossing as well as other travelers; and if he fails to do so he is guilty of contributory negligence barring recovery,[16] especially where there is an opportunity to see or hear the approaching train before going on the track.[17] A pedestrian, however, is not usually bound to stop as well as to look and listen before going on a railroad crossing.[18]

(E) *Duty to Both Look and Listen.* Under the rule that it is contributory negligence for a traveler to fail to look and listen before going on a railroad crossing, it is not sufficient that the traveler either looks or listens before going on the track, but he must make use of all his faculties to discover the approaching train, that is, he must both look and listen;[19] and where the use of either of these facul-

with crossing and having knowledge that trains are about due.

United States.— Mobile, etc., R. Co. *v.* Coerver, 112 Fed. 489, 50 C. C. A. 360 (holding that, where a man of mature years and unimpaired faculties, who is familiar with a railroad crossing and its usage in the running and switching of the trains, drives on to the track at such crossing in front of a string of cars attached to the engine, while a regular freight train is engaged in its customary switching operations, and with nothing to distract his attention, without stopping or looking, and is injured, he is conclusively guilty of contributory negligence and the court should so instruct the jury); Kallmerten *v.* Cowen, 102 Fed. 297, 29 C. C. A. 346.

15. Cohen *v.* Eureka, etc., R. Co., 14 Nev. 376 (holding that it is proper for the jury in an action against a railroad company for injury at a railroad crossing to consider whether plaintiff was a stranger in the city and was not aware that he was approaching a crossing); Baltimore, etc., R. Co. *v.* Whitacre, 35 Ohio St. 627.

16. Stewart *v.* New York, etc., R. Co., 170 Mass. 430, 49 N. E. 650; Passman *v.* West Jersey, etc., R. Co., 68 N. J. L. 719, 54 Atl. 809, 96 Am. St. Rep. 573, 61 L. R. A. 609 (holding that a pedestrian on a highway, about to cross a railroad track, must make reasonable use of his senses to ascertain if such crossing can be safely made); Cantrell *v.* Erie R. Co., 64 N. J. L. 277, 43 Atl. 881; Berkeley *v.* Chesapeake, etc., R. Co., 43 W. Va. 11, 26 S. E. 349 (holding that it is the duty of a pedestrian at a street crossing of a railway to look carefully for approaching trains and if the view is obstructed to listen before attempting to cross the track); Guhl *v.* Whitcomb, 109 Wis. 69, 85 N. W. 142, 83 Am. St. Rep. 889.

A traveler on a bicycle is required to use the same care before crossing a railroad track as is a pedestrian. Passman *v.* West Jersey, etc., R. Co., 68 N. J. L. 719, 54 Atl. 809, 96 Am. St. Rep. 573, 61 L. R. A. 609.

Doubt as to safety.— Where a pedestrian after looking and listening is impressed or should be impressed by what he sees or hears with a doubt whether it is safe to go forward, he will be chargeable with contributory negligence if he at once proceeds without using reasonable precautions to determine whether his doubt is well founded. Burke *v.* New Jersey Cent. R. Co., 64 N. J. L. 576, 46 Atl. 775.

17. Schneider *v.* Northern Pac. R. Co., 81 Minn. 383, 83 N. W. 124 (holding that a pedestrian cannot be excused for his failure to look in such a case by the failure of the railroad company to comply with an ordinance requiring the maintenance of gates and a flagman at that point); Pennsylvania R. Co. *v.* Pfuelb, 60 N. J. L. 278, 37 Atl. 1100 (holding that when if a pedestrian had looked and listened he could not have failed to see the coming train the fact that he walked on the track in front of a train is conclusive evidence that he did not look, so that he is chargeable with contributory negligence and a verdict should be directed for defendant); Fisher *v.* Central Vermont R. Co., 109 N. Y. App. Div. 449, 95 N. Y. Suppl. 693; Stack *v.* New York Cent., etc., R. Co., 96 N. Y. App. Div. 575, 89 N. Y. Suppl. 112; Bates *v.* New York Cent., etc., R. Co., 84 Hun (N. Y.) 287, 32 N. Y. Suppl. 337.

18. Zimmerman *v.* Hannibal, etc., R. Co., 71 Mo. 476, holding that a pedestrian is not bound as a matter of law to stop, look, and listen for an approaching train. But see Aiken *v.* Pennsylvania R. Co., 130 Pa. St. 380, 18 Atl. 619, 17 Am. St. Rep. 775, holding that the rule that a man before crossing a railroad track must stop and look and listen is a positive one of law and applies to pedestrians as well as to others.

19. *Illinois.*— Chicago, etc., R. Co. *v.* Gertsen, 15 Ill. App. 614.

Indiana.— Bellefontaine R. Co. *v.* Hunter, 33 Ind. 335, 5 Am. Rep. 201.

Michigan.— Thomas *v.* Chicago, etc., R. Co., 86 Mich. 496, 49 N. W. 547, holding that if either faculty cannot be available obligation to use the other is the stronger, and that neglect to use either is negligence *per se*.

Texas.— Gulf, etc., R. Co. *v.* Moss, 4 Tex. Civ. App. 318, 23 S. W. 475.

Virginia.— Brammer *v.* Norfolk, etc., R. Co., (1905) 61 S. E. 211; Johnson *v.* Chesapeake, etc., R. Co., 91 Va. 171, 21 S. E. 238.

And see cases cited *supra*, X, F, 10, d, (I), (A), note 88.

ties would have given sufficient warning to enable him to avoid the danger, injury is conclusive proof of contributory negligence.[20]

(F) *Duty to Look in Both Directions.* As a general rule it is not sufficient that the traveler looks in one direction only, but he is guilty of negligence if he goes upon the track without looking and listening in both directions; and if by reason of such failure he receives an injury which he might have avoided had he looked prudently, he cannot recover damages even though the railroad company failed to give the proper signals or was otherwise negligent.[21] Such a failure, however, is not necessarily contributory negligence *per se*, as it may be excused by the particular circumstances of the case,[22] and where the danger is more to be apprehended from one direction, he may, to that extent, relax his vigilance in the opposite direction.[23]

20. Bellefontaine R. Co. *v.* Hunter, 33 Ind. 335, 5 Am. Rep. 201.

21. *Arkansas.*— St. Louis, etc., R. Co. *v.* Dillard, 78 Ark. 520, 94 S. W. 617; Choctaw, etc., R. Co. *v.* Baskins, 78 Ark. 355, 93 S. W. 757.

Illinois.— Chicago, etc., R. Co. *v.* Hatch, 79 Ill. 137; Chicago, etc., R. Co. *v.* Van Patten, 74 Ill. 91 (failure to look in direction from which defendant's train was coming); Illinois Cent. R. Co. *v.* Goddard, 72 Ill. 567; Chicago, etc., R. Co. *v.* Bell, 70 Ill. 102; Chicago, etc., R. Co. *v.* Van Patten, 64 Ill. 510; Wabash R. Co. *v.* Monegan, 94 Ill. App. 82 (holding that it is culpable negligence to cross the track of a railroad company without looking in every direction that the rails run, to make sure that the way is clear); Toledo, etc., R. Co. *v.* Cline, 31 Ill. App. 563.

Indiana.—Cincinnati, etc., R. Co. *v.* Duncan, 143 Ind. 524, 42 N. E. 37; Thornton *v.* Cleveland, etc., R. Co., 131 Ind. 492, 31 N. E. 185; Mann *v.* Belt R., etc., Co., 128 Ind. 138, 26 N. E. 819; St. Louis, etc., R. Co. *v.* Mathias, 50 Ind. 65; Cleveland, etc., R. Co. *v.* Wuest, 41 Ind. App. 210, 83 N. E. 620.

Iowa.— Nixon *v.* Chicago, etc., R. Co., 84 Iowa 331, 51 N. W. 157; Benton *v.* Central R. Co., 42 Iowa 192; Haines *v.* Illinois Cent. R. Co., 41 Iowa 227.

Maine.— Day *v.* Boston, etc., R. Co., 96 Me. 207, 52 Atl. 771, 90 Am. St. Rep. 335, holding that a traveler approaching a railroad crossing should listen for the sound of a train and look both ways.

Massachusetts.— Allerton *v.* Boston, etc., R. Co., 146 Mass. 241, 15 N. E. 621.

Michigan.— Guta *v.* Lake Shore, etc., R. Co., 81 Mich. 291, 45 N. W. 821.

Missouri.— Porter *v.* Missouri Pac. R. Co., 199 Mo. 82, 97 S. W. 880; Taylor *v.* Missouri Pac. R. Co., 86 Mo. 547; Fletcher *v.* Atlantic, etc., R. Co., 64 Mo. 484.

Nebraska.— Chicago, etc., R. Co. *v.* Yost, 61 Nebr. 530, 85 N. W. 561.

New Jersey.— Gehring *v.* Atlantic City R. Co., (1907) 68 Atl. 61; Pennsylvania R. Co. *v.* Righter, 42 N. J. L. 180, holding that the fact that when plaintiff was about to cross he heard a whistle from a train about to start from a station a quarter of a mile north did not relieve him from the duty of looking to see whether any train was coming from the south.

New York.— Rodrian *v.* New York, etc., R. Co., 125 N. Y. 526, 26 N. E. 741 [*reversing* 7 N. Y. Suppl. 811]; Young *v.* New York, etc., R. Co., 107 N. Y. 500, 14 N. E. 434; Gorton *v.* Erie R. Co., 45 N. Y. 660; Ernst *v.* Hudson River R. Co., 39 N. Y. 61, 6 Transcr. App. 35, 36 How. Pr. 84, 100 Am. Dec. 405; Manley *v.* New York Cent., etc., R. Co., 39 N. Y. App. Div. 144, 57 N. Y. Suppl. 182; Collins *v.* New York, etc., R. Co., 92 Hun 563, 36 N. Y. Suppl. 942; Lortz *v.* New York Cent., etc., R. Co., 83 Hun 271, 31 N. Y. Suppl. 1033; Stackus *v.* New York Cent., etc., R. Co., 7 Hun 559; Haight *v.* New York Cent. R. Co., 7 Lans. 11. But see Bieseigal *v.* New York Cent. R. Co., 34 N. Y. 622, 90 Am. Dec. 741 [*reversing* 33 Barb. 429].

Ohio.— Cleveland, etc., R. Co. *v.* Elliott, 28 Ohio St. 340.

Oregon.— Kunz *v.* Oregon R. Co., (1907) 93 Pac. 141, (1908) 94 Pac. 504; Hecker *v.* Oregon R. Co., 4 Oreg. 6, 66 Pac. 270.

Pennsylvania.— Harvey *v.* Erie R. Co., 210 Pa. St. 95, 97, 59 Atl. 691, 1119; Hartman *v.* Harris, 182 Pa. St. 172, 37 Atl. 942.

Rhode Island.— Ormsbee *v.* Boston, etc., R. Corp., 14 R. I. 102, 51 Am. Rep. 354.

Texas.— Galveston, etc., R. Co. *v.* Kutac, 72 Tex. 643, 11 S. W. 127; Missouri Pac. R. Co. *v.* Burnett, 3 Tex. App. Civ. Cas. § 236.

Wisconsin.— Nelson *v.* Duluth, etc., R. Co., 88 Wis. 392, 60 N. W. 703.

See 41 Cent. Dig. tit. "Railroads," § 1048.

Although a train may not be reasonably expected in a certain direction, a person will not be absolved from looking in that direction. Toledo, etc., R. Co. *v.* Cline, 31 Ill. App. 563.

22. Chicago, etc., R. Co. *v.* Pullian, 111 Ill. App. 305 [*affirmed* in 208 Ill. 456, 70 N. E. 460].

There is no inflexible rule requiring a person to look in both directions for an approaching train but the rule is that every person is bound to take reasonable precautions to avoid injury. Nash *v.* New York Cent., etc., R. Co., 14 N. Y. St. 531.

23. St. Louis, etc., R. Co. *v.* Dillard, 78 Ark. 520, 94 S. W. 617; Choctaw, etc., R. Co. *v.* Baskins, 78 Ark. 355, 93 S. W. 757; St. Louis, etc., R. Co. *v.* Tomlinson, 78 Ark. 251, 94 S. W. 613.

(G) *Time of Running of Trains.* While a traveler approaching a railroad crossing is not bound to inquire as to the schedules or the time when trains are expected to pass,[24] he is guilty of contributory negligence if he goes upon the track without looking and listening when he knows a train is about due or is about to pass.[25] He is bound to exercise ordinary care and prudence in looking and listening for approaching trains, whether or not he might reasonably expect one to pass at the time,[26] although if he knows or has reason to suppose that a train is not due or has just passed he is not bound to use the same degree of care as though the train were just due,[27] especially where there are obstructions interfering with sight and sound.[28] This rule applies, although the train is running behind time,[29] or is an irregular or extra one,[30] particularly when from all the circumstances the traveler must have known the fact.[31]

(H) *Duty to Stop Before Reaching Crossing.*[32] Although some cases seem to hold that it is the duty of a traveler to stop, as well as to look and listen, in all cases before going on a crossing,[33] by the weight of authority it is not necessarily

24. South, etc., R. Co. *v.* Thompson, 62 Ala. 494.

25. Comer *v.* Shaw, 98 Ga. 543, 25 S. E. 733; Roach *v.* St. Joseph, etc., R. Co., 55 Kan. 654, 41 Pac. 964; Sullivan *v.* Old Colony R. Co., 153 Mass. 118, 26 N. E. 240.

26. Smith *v.* Wabash R. Co., 141 Ind. 92, 40 N. E. 270 (holding that the belief that all passenger trains stopped at a depot before reaching a railroad crossing will not excuse neglect to look and listen for a train before driving on the crossing); Vincent *v.* Morgan's Louisiana, etc., R., etc., Co., 48 La. Ann. 933, 20 So. 207, 55 Am. St. Rep. 287 (holding that, although a person approaching a railroad track may know that no regular train is then due, it is no less a duty to stop and look and listen before attempting to cross; and a failure to do so when such precaution would have disclosed a train approaching is negligence so contributing to the injury as to prevent a recovery therefor, no negligence on the part of the railroad company appearing); Brendell *v.* Buffalo, etc., R. Co., 27 Barb. (N. Y.) 534 note (where view is obstructed); Guhl *v.* Whitcomb, 109 Wis. 69, 85 N. W. 142, 83 Am. St. Rep. 889.

That a person is misled by his own clock as to the time of arrival of a train at the crossing does not excuse him for relying on such clock, and driving his team to the crossing, with the view of the track obstructed by his cart cover. Murray *v.* Pontchartrain R. Co., 31 La. Ann. 490.

27. Guggenheim *v.* Lake Shore, etc., R. Co., 66 Mich. 150, 33 N. W. 161; Bower *v.* Chicago, etc., R. Co., 61 Wis. 457, 21 N. W. 536.

Where a traveler knows that it is not the usual train time and does not hear the signals which he knows it is customary for the company to give and for him to hear, it is not necessarily negligence for him to go upon the track without looking. Cahill *v.* Cincinnati, etc., R. Co., 92 Ky. 345, 18 S. W. 2, 13 Ky. L. Rep. 714. *Compare* Vincent *v.* Morgan's Louisiana, etc., R., etc., Co., 48 La. Ann. 933, 20 So. 207, 55 Am. St. Rep. 287.

28. Bower *v.* Chicago, etc., R. Co., 61 Wis. 457, 21 N. W. 536.

29. Toledo, etc., R. Co. *v.* Jones, 76 Ill. 311; Cincinnati, etc., R. Co. *v.* Howard, 124 Ind. 280, 24 N. E. 892, 19 Am. St. Rep. 96, 8 L. R. A. 593; Tucker *v.* Chicago, etc., R. Co., 122 Mich. 149, 80 N. W. 984; Salter *v.* Utica, etc., R. Co., 75 N. Y. 273; Howard *v.* Northern Cent. R. Co., 1 N. Y. Suppl. 528.

30. Judson *v.* Great Northern R. Co., 63 Minn. 248, 65 N. W. 447; Salter *v.* Utica, etc., R. Co., 75 N. Y. 273; Dascomb *v.* Buffalo, etc., R. Co., 27 Barb. (N. Y.) 221; Schofield *v.* Chicago, etc., R. Co., 114 U. S. 615, 5 S. Ct. 1125, 29 L. ed. 224 [*affirming* 8 Fed. 488, 2 McCrary 268].

31. Howard *v.* Northern Cent. R. Co., 1 N. Y. Suppl. 528.

32. Where view or hearing is obstructed see *infra*, X, F, 10, d, (II), (B).

33. Georgia Cent. R. Co. *v.* Barnett, 151 Ala. 407, 44 So. 392; Georgia Cent. R. Co. *v.* Hyatt, 151 Ala. 355, 43 So. 867 (holding, however, that it is not negligence to fail to stop, look, and listen, before attempting to cross a track, if one is not in a position to do so, or if the conditions are such that he could not see or hear the approaching train by doing so); Southern R. Co. *v.* Hobbs, 151 Ala. 335, 43 So. 844; Georgia Cent. R. Co. *v.* Freeman, 134 Ala. 354, 32 So. 778; Georgia Cent. R. Co. *v.* Foshee, 125 Ala. 199, 27 So. 1006; Barnhill *v.* Texas, etc., R. Co., 109 La. 43, 33 So. 63; Becker *v.* Pennsylvania R. Co., 10 Pa. Super. Ct. 19, 44 Wkly. Notes Cas. 343. See Western R. Co. *v.* Cleghorn, 143 Ala. 392, 39 So. 133. See also Dunning *v.* Bond, 38 Fed. 813, holding that it is the duty of a person approaching a railroad crossing to stop and look in both directions for approaching trains and also to listen for the same purpose, particularly when he has reason to believe a train is likely soon to pass and that if he fails to perform this duty, or sees an approaching train and does not wait for it to pass, he assumes the risk of accident and cannot recover.

Drivers of fire engines and hose carts are not excepted from the operation of the rule

negligence on the part of one about to cross a railroad track to fail to stop in addition to looking and listening for trains,[34] unless under the existing circumstances he cannot listen without stopping;[35] but whether such a traveler must stop in addition to looking and listening depends upon the facts and circumstances of each particular case and so is usually a question for the jury.[36]

requiring drivers to stop, look, and listen. Thompson *v.* Pennsylvania R. Co., 215 Pa. St. 113, 64 Atl. 323.

In Pennsylvania the distinction is made that, although the rule of law is absolute that the failure to stop, look, and listen before going on a railroad track is negligenee *per se* (Cohen *v.* Philadelphia, etc., R. Co., 211 Pa. St. 227, 60 Atl. 729; Ihrig *v.* Erie R. Co., 210 Pa. St. 98, 59 Atl. 686; Ritzman *v.* Philadelphia, etc., R. Co., 187 Pa. St. 337, 40 Atl. 975; Deeker *v.* Lehigh Valley R. Co., 181 Pa. St. 465, 37 Atl. 570), yet such failure after going on the tracks may or may not be negligence according to the circumstances (Cohen *v.* Philadelphia, etc., R. Co., 211 Pa. St. 227, 60 Atl. 729).

A "bicycler's stop" by circling on a bicycle is not a stop within the meaning of the rule which requires a person approaching a railroad traek at a public crossing to stop, look, and listen before going upon the tracks. Robertson *v.* Pennsylvania R. Co., 180 Pa. St. 43, 36 Atl. 403, 57 Am. St. Rep. 620.

34. *Connecticut.*— Metcalf *v.* Central Vermont R. Co., 78 Conn. 614, 63 Atl. 633.

Illinois.— Terre Haute, etc., R. Co. *v.* Barr, 31 Ill. App. 57.

Kentucky.— Cineinnati, etc., R. Co. *v.* Champ, 104 S. W. 988, 31 Ky. L. Rep. 1054; Louisville, etc., R. Co. *v.* Lueas, 98 S. W. 308, 99 S. W. 959, 30 Ky. L. Rep. 359, 539; Louisville, etc., R. Co. *v.* Price, 76 S. W. 836, 25 Ky. L. Rep. 1033, the last two cases holding that the rule that one about to eross a railroad track must stop, look, and listen does not obtain in Kentucky.

Minnesota.— Shaber *v.* St. Paul, etc., R. Co., 28 Minn. 103, 9 N. W. 575.

Nebraska.—Sehwanenfeldt *v.* Chieago, etc., R. Co., (1908) 115 N. W. 285 (holding that the rule that a traveler must stop, look, and listen before going over an ordinary crossing has not been adopted in Nebraska, and eertainly should not be applied to a crossing of a railroad switch laid in a public street); Union Pae. R. Co. *v.* Ruzieka, 65 Nebr. 621, 91 N. W. 543 (holding that, in the absence of visible or audible evidence of danger, there is no requirement that a passer stop, as well as look and listen before attempting to cross).

Nevada.— Bunting *v.* Central Pac. R. Co., 14 Nev. 351.

New York.— Lewis *v.* Long Island R. Co., 162 N. Y. 52, 56 N. E. 548 [*reversing* 32 N. Y. App. Div. 627, 53 N. Y. Suppl. 1107] (not required to stop as a matter of law): Judson *v.* Central Vermont R. Co., 158 N. Y. 597, 53 N. E. 514 [*reversing* 91 Hun 1, 36 N. Y. Suppl. 83]; Ernst *v.* Hudson River R. Co., 35 N. Y. 9, 90 Am. Dec. 761, 3 Abb. Pr. N. S. 82, 32 How. Pr. 61; Neudoerffer *v.* Brooklyn Heights R. Co., 9 N. Y. App. Div. 66, 41 N. Y. Suppl. 50.

Ohio.— Baltimore, etc., R. Co. *v.* Van Horn, 21 Ohio Cir. Ct. 337, 12 Ohio Cir. Dec. 106, holding that the supreme court of Ohio has not yet adopted the absolute rule that a party must show that he has stopped, looked, and listened in order to free himself from the charge of eontributory negligence at a railway crossing in case of injury.

Texas.— Galveston, etc., R. Co. *v.* Duelm, (Civ. App. 1893) 24 S. W. 334, holding that one approaching a railroad crossing is not bound to stop his team, but it is enough that he listens carefully for an approaching train and looks along the traek in both directions.

Vermont.—Manley *v.* Delaware, etc., Canal Co., 69 Vt. 101, 37 Atl. 279, not obliged to stop as a matter of law.

See 41 Cent. Dig. tit. "Railroads," § 1050.

In the absence of statute the failure of a person driving to stop before crossing the railroad erossing does not render him guilty of contributory negligenee as a matter of law, especially where trains are required by statute to give signals on approaching the crossing. Houston, etc., R. Co. *v.* Wilson, 60 Tex. 142; Texas, etc., R. Co. *v.* Anderson, 2 Tex. App. Civ. Cas. § 203.

35. Kelly *v.* Chicago, etc., R. Co., 88 Mo. 534.

36. *Illinois.*— Cleveland, etc., R. Co. *v.* Smith, 78 Ill. App. 429.

Indiana.— Cleveland, etc., R. Co. *v.* Wuest, 40 Ind. App. 693, 82 N. E. 986, 41 Ind. App. 210, 83 N. E. 620; Nichols *v.* Baltimore, etc., R. Co., 33 Ind. App. 229, 70 N. E. 183, 71 N. E. 170. See also Malott *v.* Hawkins, 159 Ind. 127, 63 N. E. 308, holding that a traveler attempting to cross in front of an approaching train is negligent as a matter of law in failing to look and listen unless there is a flagman to signal the traveler to eross the tracks; but that the question whether he is required to stop is usually a mixed question of law and fact.

Kansas.— Missouri, etc., R. Co. *v.* Jenkins, 74 Kan. 487, 87 Pac. 702; Walker *v.* Mercer, 61 Kan. 736, 60 Pac. 735 [*reversing* (App. 1899) 58 Pac. 27]; Atchison, etc., R. Co. *v.* Willey, 60 Kan. 819, 58 Pae. 472.

Maryland.— Hatcher *v.* McDermott, 103 Md. 78, 63 Atl. 214.

Minnesota.— Shaber *v.* St. Paul, etc., R. Co., 28 Minn. 103, 9 N. W. 575.

Missouri.— Kenney *v.* Hannibal, etc., R. Co., 105 Mo. 270, 15 S. W. 983, 16 S. W. 837. See also Wands *v.* Chicago, etc., R. Co., 106 Mo. App. 96, 80 S. W. 18.

New York.— Lewis *v.* Long Island R. Co.,

So it is held that a person need not stop before going on the track if he can look and listen effectively without doing so.[37]

(I) *Time and Place For Looking and Listening.*[38] The rule requiring a traveler to look and listen, or to stop, look, and listen before going on a railroad crossing is not arbitrary as to the time when or the distance at which such precautions shall be taken;[39] but it requires him to use ordinary care in selecting a time and place for looking and listening, reasonably calculated to afford full opportunity for seeing and hearing an approaching train in time to avoid an accident.[40]

162 N. Y. 52, 56 N. E. 548 [*reversing* 32 N. Y. App. Div. 627, 53 N. Y. Suppl. 1107]; Judson *v.* Central Vermont R. Co., 158 N. Y. 597, 53 N. E. 514 [*reversing* 91 Hun 1, 36 N. Y. Suppl. 83].

Texas.— Texas, etc., R. Co. *v.* Anderson, 2 Tex. App. Civ. Cas. § 203.

See 41 Cent. Dig. tit. "Railroads," § 1050; and *infra*, X, F, 14, g, (XI), (D), (3).

That by reason of the sun in his eyes a person does not see an approaching train ordinarily visible from the highway does not excuse his failure to stop and listen. Osborn *v.* Detroit, etc., R. Co., 115 Mich. 102, 72 N. W. 1114.

Where the right to cross exists merely by permission of the railroad company it has been held negligence as a matter of law to attempt to cross without stopping to see that all of the tracks are clear. Garrett *v.* Illinois Cent. R. Co., 126 Fed. 406.

37. Esler *v.* Wabash R. Co., 109 Mo. App. 580, 83 S. W. 73, holding that a person slowly approaching a railroad track in a noiseless vehicle need not stop to look and listen.

Where a traveler can reasonably hear, as where his hearing is not interfered with by noise and other causes, he is not required to stop, although his view may be more or less obstructed. Russell *v.* Atchison, etc., R. Co., 70 Mo. App. 88; Masterson *v.* Chicago, etc., R. Co., 58 Mo. App. 572.

38. Where view or hearing is obstructed see *infra*, X, F, 10, d, (II), (D).

39. Greenawaldt *v.* Lake Shore, etc., R. Co., (Ind. 1905) 73 N. E. 910, 165 Ind. 219, 74 N. E. 1081; Malott *v.* Hawkins, 159 Ind. 127, 63 N. E. 308, holding that it is not ordinarily possible as a matter of law to fix the precise number of feet from the crossing where a traveler must look and listen.

40. *Alabama.*—Georgia Cent. R. Co. *v.* Barnett, 151 Ala. 407, 44 So. 392; Southern R. Co. *v.* Hobbs, 151 Ala. 335, 43 So. 844.

Indiana.— Greenawaldt *v.* Lake Shore, etc., R. Co., (1905) 73 N. E. 910, 165 Ind. 219, 74 N. E. 1081; Malott *v.* Hawkins, 159 Ind. 127, 63 N. E. 308.

Iowa.— Nosler *v.* Chicago, etc., R. Co., 73 Iowa 268, 34 N. W. 850; Schaefert *v.* Chicago, etc., R. Co., 62 Iowa 624, 17 N. W. 893, holding that, where a person listens at a distance of eighteen rods from a crossing, and then without further stopping drives his team at a trot to and across the track, he is guilty of contributory negligence preventing recovery.

Missouri.— Moberly *v.* Kansas City, etc., R. Co., 98 Mo. 183, 11 S. W. 569, need not select "best possible place."

New Jersey.— Gehring *v.* Atlantic City R. Co., (1907) 68 Atl. 61; Conkling *v.* Erie R. Co., 63 N. J. L. 338, 43 Atl. 666.

New York.— Haight *v.* New York Cent. R. Co., 7 Lans. 11, holding that a neglect to look and listen until too late to avoid collision will bar a recovery.

Ohio.— Koester *v.* Toledo, etc., R. Co., 20 Ohio Cir. Ct. 475, 11 Ohio Cir. Dec. 283.

Oregon.— Hecker *v.* Oregon R. Co., 40 Oreg. 6, 66 Pac. 270.

Pennsylvania.— Born *v.* Philadelphia, etc., R. Co., 198 Pa. St. 409, 48 Atl. 263 (holding that stopping at a distance of three hundred and twenty feet from a crossing is not sufficient where it appears that at almost any point between there and the crossing there could be seen three thousand six hundred and seventy-five feet of the track from the crossing in the direction from which the train was coming); Lehigh Valley R. Co. *v.* Brandtmaier, 113 Pa. St. 610, 6 Atl. 238 (stopping, looking, and listening held sufficient).

Rhode Island.— McCanna *v.* New England R. Co., 20 R. I. 439, 39 Atl. 891.

Virginia.— Washington Southern R. Co. *v.* Lacey, 94 Va. 460, 26 S. E. 834, holding that stopping and looking at a point two hundred and fifty feet from the crossing where only a partial view of the track could be had, when plaintiff could have seen the train after leaving such point if he had looked, is not sufficient.

United States.— Chicago Great Western R. Co. *v.* Smith, 141 Fed. 930, 73 C. C. A. 164; Owens *v.* Pennsylvania R. Co., 41 Fed. 187, holding that it is a traveler's duty to select, if he can do so, such a point as will enable him to see along the track both ways.

See 41 Cent. Dig. tit. "Railroads," § 1051.

Where there are but two places to look and listen for trains, one near the crossing and the other further away, each having its advantages and disadvantages, it is not negligence *per se* for a person to choose the remoter point in accordance with the habits of the public at that crossing. Cookson *v.* Pittsburg, etc., R. Co., 179 Pa. St. 184, 36 Atl. 194. See Toban *v.* Lehigh, etc., Coal Co., 24 Pa. Super. Ct. 475, holding that where plaintiff made a stop and observation at a place recognized by travelers on that road as a proper one, and then proceeded with his team without making another stop, the question of negligence is for the jury and

Although ordinary care does not usually require a traveler to look and listen constantly at all points in his passage,[41] it does require that he should look just before going upon the track or so near thereto as to enable him to go across before a train within the range of his view going at the usual rate of speed would reach the crossing,[42] or in case he is riding or driving at such a distance that he can check his horse or team in the event of its becoming frightened.[43] Likewise ordinary care may require a traveler not only to look and listen once but where the circumstances at the particular time and crossing reasonably require it, to look and listen again before crossing,[44] or even a number of times,[45] as where his first looking and listening is at such a distance that a train which could not then be seen or heard would have time to advance before he reached the crossing so as to endanger him;[46] the question of negligence in failing to look and listen again depending upon the circumstances of the particular case and ordinarily being a question for the jury,[47] although under some circumstances it may be negligence as a matter of law.[48]

(J) *After Passing of Train.*[49] A failure to look and listen before going on a crossing is not excused by the fact that a train has recently passed in the same direction or on the same track.[50]

a verdict and judgment for plaintiff will be sustained.

Where stopping at a certain point in itself involves danger, it is not a traveler's duty to stop, look, and listen at such point. Chesapeake, etc., R. Co. *v.* Steele, 84 Fed. 93, 29 C. C. A. 81.

41. Defrieze *v.* Illinois Cent. R. Co., (Iowa 1903) 94 N. W. 505; Winey *v.* Chicago, etc., R. Co., 92 Iowa 622, 61 N. W. 218; Kenney *v.* Hannibal, etc., R. Co., 105 Mo. 270, 15 S. W. 983, 16 S. W. 837; Kain *v.* New York, etc., R. Co., 3 N. Y. Suppl. 311.

42. New York, etc., R. Co. *v.* Kistler, 66 Ohio St. 326, 64 N. E. 130.

43. Rhoades *v.* Chicago, etc., R. Co., 58 Mich. 263, 25 N. W. 182; Coppuck *v.* Philadelphia, etc., R. Co., 191 Pa. St. 172, 43 Atl. 70.

A driver is not negligent for not looking for approaching trains before he discovers a crossing, but it is sufficient if after discovering the crossing he uses ordinary diligence to avoid danger. Gulf, etc., R. Co. *v.* Greenlee, 70 Tex. 553, 8 S. W. 129.

44. *Alabama.*—Georgia Cent. R. Co. *v.* Barnett, 151 Ala. 407, 44 So. 392.

Arkansas.— Griffie *v.* St. Louis, etc., R. Co., 80 Ark. 186, 96 S. W. 750.

California.— Green *v.* Los Angeles, etc., R. Co., (1902) 69 Pac. 694, holding, however, that a traveler is not guilty of contributory negligence as a matter of law, in failing to stop or look again.

Indiana.— Baltimore, etc., R. Co. *v.* Reynolds, 33 Ind. App. 219, 71 N. E. 250.

Maryland.— Hattcher *v.* McDermot, 103 Md. 78, 63 Atl. 214.

Michigan.— Proper *v.* Lake Shore, etc., R. Co., (1904) 99 N. W. 283; Graf *v.* Chicago, etc., R. Co., 94 Mich. 579, 54 N. W. 388.

Minnesota.— Sandberg *v.* St. Paul, etc., R. Co., 80 Minn. 442, 83 N. W. 411.

New York.— McAuliffe *v.* New York Cent., etc., R. Co., 85 N. Y. App. Div. 187, 83 N. Y. Suppl. 200; Manley *v.* New York Cent., etc., R. Co., 39 N. Y. App. Div. 144, 57 N. Y. Suppl. 182; Smith *v.* New York Cent., etc., R. Co., 17 N. Y. Suppl. 400 [*affirmed* in 137 N. Y. 562, 33 N. E. 338].

North Carolina.— Hinkle *v.* Richmond, etc., R. Co., 109 N. C. 472, 13 S. E. 884, 26 Am. St. Rep. 581.

Pennsylvania.— Harvey *v.* Erie R. Co., 210 Pa. St. 95, 97, 59 Atl. 691, 1159; Ayres *v.* Pittsburg, etc., R. Co., 201 Pa. St. 124, 50 Atl. 958.

Wisconsin.— Lenz *v.* Whitcomb, 96 Wis. 310, 71 N. W. 377.

United States.— Pyle *v.* Clark, 75 Fed. 644.

See 41 Cent. Dig. tit. "Railroads," § 1051.

45. St. Louis, etc., R. Co. *v.* Dillard, 78 Ark. 520, 94 S. W. 617 (holding that one should continue his vigilance in respect to looking and listening until the danger is passed); Choctaw, etc., R. Co. *v.* Baskins, 78 Ark. 355, 93 S. W. 757; St. Louis, etc., R. Co. *v.* Johnson, 74 Ark. 372, 86 S. W. 282 (holding that a person about to cross a railroad track is bound not only to look and listen but to continue to use his eyes and ears until he has completed the crossing and passed out of danger).

46. Winter *v.* New York, etc., R. Co., 66 N. J. L. 677, 50 Atl. 339.

47. Manley *v.* New York Cent., etc., R. Co., 39 N. Y. App. Div. 144, 57 N. Y. Suppl. 182; Ayres *v.* Pittsburg, etc., R. Co., 201 Pa. St. 124, 50 Atl. 958; Galveston, etc., R. Co. *v.* Huebner, (Tex. Civ. App. 1897) 42 S. W. 1021; Misener *v.* Wabash R. Co., 12 Ont. L. Rep. 71, 7 Ont. Wkly. Rep. 651. And see *infra*, X, F, 14, g, (XI), (D), (4).

48. Green *v.* Los Angeles Terminal R. Co., 143 Cal. 31, 76 Pac. 719, 101 Am. St. Rep. 68, (1902) 69 Pac. 694.

49. **Where view of train is obstructed** see *infra*, X, F, 10, d, (II), (F).

50. *Indiana.*— Smith *v.* Wabash R. Co., 141 Ind. 92, 40 N. E. 270 (holding this to be true where plaintiff had time after the passing of such train to cross the track and drive a block and return and recross the track

(K) *Attention Diverted.* That a traveler's attention is diverted by other matters, such as the fright of his team, the danger arising therefrom, and his efforts to control it also has an important bearing upon the question of contributory negligence and may, under some circumstances, excuse his failure to look and listen for an approaching train,[51] where the diversion is something that threatens danger and confuses and perplexes the traveler and irresistibly deprives him of the opportunity to look and listen.[52] Thus where a traveler's failure to see and hear the train by which he is injured is caused by his attention being attracted to another train which he is trying to avoid, he is not guilty of contributory negligence.[53] The mere fact, however, that another train is approaching or passing or has passed the crossing is not such a diversion as will excuse a traveler from going on a crossing without looking or listening,[54] the question of negligence in

and was injured while attempting to cross the track for the third time); Baltimore, etc., R. Co. *v.* Talmage, 15 Ind. App. 203, 43 N. E. 1019 (holding that where there is no obstruction to the view the fact that the train by which deceased was killed followed an engine within a minute does not excuse deceased from failing to look and listen where he crosses the track immediately after the passing of the engine without looking for any trains in the direction in which the train is approaching; and that a failure to do so is contributory negligence as a matter of law).

Mississippi.— Jackson *v.* Mobile, etc., R. Co., 89 Miss. 32, 42 So. 236.

Missouri.— Stevens *v.* Missouri Pac. R. Co., 67 Mo. App. 356, holding that it is a question for the jury whether he acted as an ordinarily prudent man. But see Baker *v.* Kansas City, etc., R. Co., 147 Mo. 140, 48 S. W. 838.

Pennsylvania.— Robertson *v.* Pennsylvania R. Co., 180 Pa. St. 43, 36 Atl. 403, 57 Am. St. Rep. 620, holding that a bicycler is negligent in attempting to cross a railroad track after a passing train without dismounting to look and listen.

Rhode Island.— Ormsbee *v.* Boston, etc., R. Corp., 14 R. I. 102, 51 Am. Rep. 354, holding that the duty of looking both ways is not relieved by the fact that the company has just made a flying switch over the crossing.

Texas.— Texas, etc., R. Co. *v.* Hare, 4 Tex. Civ. App. 18, 23 S. W. 42.

United States.— Holland *v.* Chicago, etc., R. Co., 18 Fed. 243, 5 McCrary 549, holding this to be true where the view in the direction from which the train came was uninterrupted for some distance.

Compare Duame *v.* Chicago, etc., R. Co., 72 Wis. 523, 40 N. W. 394, 7 Am. St. Rep. 879, holding that the stop look and listen rule is inapplicable where a train has passed the crossing while the person injured is within a few rods of it and has passed on out of sight so as to induce the belief that it is continuing on and he has no reason to believe that it will immediately return.

51. Pratt *v.* Chicago, etc., R. Co., 107 Iowa 287, 77 N. W. 1064.

That the person injured was absorbed in reflection at the time of the accident, and stepped directly in front of an engine, shows that he was not in the exercise of ordinary care. Chicago, etc., R. Co. *v.* Fell, 71 Ill. App. 89.

52. Bush *v.* Union Pac. R. Co., 62 Kan. 709, 64 Pac. 624; Lee *v.* Chicago, etc., R. Co., 68 Minn. 49, 70 N. W. 857 (holding, however, that where plaintiff knew that a train was about due and the track was in plain sight he cannot recover for injuries received because his attention was taken up with an attempt to control his team so that he did not give proper care to the approach of the train); Guhl *v.* Whitcomb, 109 Wis. 69, 85 N. W. 142, 83 Am. St. Rep. 889 (holding that the only "diversion of attention" which will excuse a failure to look and listen before crossing a railroad track is where the attention is so irresistibly forced to something else as to deprive a traveler of the opportunity to look and listen).

53. West *v.* New Jersey R., etc., Co., 32 N. J. L. 91 [*affirmed* in 33 N. J. L. 430] (holding that a person crossing a railroad for a proper purpose is not *prima facie* guilty of negligence because he happens to be on the track when the train passes where it appears that he is carefully watching and keeping out of the way of another train approaching in the opposite direction); Leonard *v.* New York Cent., etc., R. Co., 42 N. Y. Super. Ct. 225; Pennsylvania R. Co. *v.* Werner, 89 Pa. St. 59. See Sullivan *v.* New York, etc., R. Co., 73 Conn. 203, 47 Atl. 131; Texas, etc., R. Co. *v.* Lively, (Tex. Civ. App. 1896) 38 S. W. 370.

54. *Arkansas.*— St. Louis, etc., R. Co. *v.* Martin, 61 Ark. 549, 33 S. W. 1070, holding that it is contributory negligence as a matter of law to stand on one track without looking or listening for a train approaching thereon while another train is passing on another track.

Kansas.— Bush *v.* Union Pacific Co., 62 Kan. 709, 64 Pac. 624.

Michigan.— Duvall *v.* Michigan Cent. R. Co., 105 Mich. 386, 63 N. W. 437; Gardner *v.* Detroit, etc., R. Co., 97 Mich. 240, 56 N. W. 603; Gebhard *v.* Detroit, etc., R. Co., 79 Mich. 586, 44 N. W. 1045.

Missouri.— Butts *v.* St. Louis, etc., R. Co., 98 Mo. 272, 11 S. W. 754.

New York.— Woodard *v.* New York, etc., R. Co., 106 N. Y. 369, 13 N. E. 424, holding defendant entitled to a nonsuit.

such cases depending upon the circumstances of the particular case and usually being a question for the jury.[55]

(L) *Speed of Person Injured in Approaching Crossing.*[56] The above rules, making it contributory negligence to go upon a crossing without looking and listening, are especially applicable where a traveler carelessly or recklessly goes upon a crossing at a rapid rate of speed,[57] as where, when there is an opportunity to ascertain the approach of a train by the use of proper precautions, he drives rapidly upon the crossing without looking,[58] looking and listening,[59] or without stopping, looking, and listening.[60]

(M) *Occupant of Vehicle Driven by Another.*[61] As a general rule the negligence of a driver of a vehicle approaching a railroad crossing, in failing to look and listen for approaching trains, cannot be imputed to an occupant of the vehicle who is without personal fault,[62] unless such driver is the servant or agent of the occupant,[63] unless they are engaged in a joint enterprise whereby responsibility

Pennsylvania.— Muscarro *v.* New York Cent., etc., R. Co., 192 Pa. St. 8, 33 Atl. 527; Snell *v.* Railroad Co., 1 C. Pl. 24.

Wisconsin.— Guhl *v.* Whitcomb, 109 Wis. 69, 85 N. W. 142, 83 Am. St. Rep. 889.

United States.— McClary *v.* Chicago, etc., R. Co., 46 Fed. 343.

See 41 Cent. Dig. tit. "Railroads," § 1053.

55. Chicago, etc., R. Co. *v.* Pearson, 184 Ill. 386, 56 N. E. 633 [*affirming* 82 Ill. App. 605]; St. Louis, Southwestern R. Co. *v.* Matthews, 34 Tex. Civ. App. 302, 79 S. W. 71. And see *infra*, X, F, 14, g, (XI), (D), (6).

56. Where view or hearing is obstructed see *infra*, X, F, 10, d, (II), (E).

57. Morse *v.* Erie R. Co., 65 Barb. (N. Y.) 490; Dascomb *v.* Buffalo, etc., R. Co., 27 Barb. (N. Y.) 221.

58. Koch *v.* Southern California R. Co., 148 Cal. 677, 84 Pac. 176, 113 Am. St. Rep. 332, 4 L. R. A. N. S. 521 (although the gates were open); Moore *v.* Keokuk, etc., R. Co., 89 Iowa 223, 56 N. W. 430; Baltimore, etc., R. Co. *v.* McPeek, 16 Ohio Cir. Ct. 87, 8 Ohio Cir. Dec. 742; Johnston *v.* Northern R. Co., 34 U. C. Q. B. 432.

59. Engrer *v.* Ohio, etc., R. Co., 142 Ind. 618, 42 N. E. 217; Cones *v.* Cincinnati, etc., R. Co., 114 Ind. 328, 16 N. E. 638; Western Maryland R. Co. *v.* Kehoe, 83 Md. 434, 35 Atl. 90 (holding that the person injured cannot recover in such a case, although the cars were being moved without the showing of any light or the ringing of any bell); Nash *v.* New York Cent., etc., R. Co., 125 N. Y. 715, 26 N. E. 266 [*reversing* 51 Hun 594, 4 N. Y. Suppl. 525].

60. Chicago, etc., R. Co. *v.* Stewart, 71 Ill. App. 647; Reeves *v.* Dubuque, etc., R. Co., 92 Iowa 32, 60 N. W. 243; Chicago, etc., R. Co. *v.* Palmer, (Kan. 1900) 60 Pac. 736; Union Pac. R. Co. *v.* Adams, 33 Kan. 427, 6 Pac. 529 (holding that it is contributory negligence to drive a team at a trot across a railroad track without stopping to look or listen when such stopping would have avoided the accident); Cullen *v.* Delaware, etc., Canal Co., 113 N. Y. 667, 21 N. E. 716.

61. Imputed negligence generally see NEGLIGENCE, 29 Cyc. 542.

62. Peck *v.* New York, etc., R. Co., 50 Conn. 379; East Tennessee, etc., R. Co. *v.* Markens, 88 Ga. 60, 13 S. E. 855, 14 L. R. A. 281; Brunswick, etc., R. Co. *v.* Hoover, 74 Ga. 426; Miller *v.* Louisville, etc., R. Co., 128 Ind. 97, 27 N. E. 339, 25 Am. St. Rep. 416; Terre Haute, etc., R. Co. *v.* McMurray, 98 Ind. 358, 59 Am. Rep. 752; Lake Shore, etc., R. Co. *v.* Boyts, (Ind. App. 1896) 43 N. E. 667, 16 Ind. App. 640, 45 N. E. 812; Jones *v.* Lehigh, etc., R. Co., 202 Pa. St. 81, 51 Atl. 590. But see Payne *v.* Chicago, etc., R. Co., 39 Iowa 523 (holding that where it appears that the team is driven by another and plaintiff is a passenger, he must rely on the diligence of the driver for a recovery and the driver's negligence will defeat his right); Bracken *v.* Pennsylvania R. Co., 32 Pa. Super. Ct. 22; Morris *v.* Chicago, etc., R. Co., 26 Fed. 22; Boggs *v.* Great Western R. Co., 23 U. C. C. P. 573; Rastrick *v.* Great Western R. Co., 27 U. C. Q. B. 396; Nicholls *v.* Great Western R. Co., 27 U. C. Q. B. 382; Tanguay *v.* Grand Trunk R. Co., 20 Quebec Super. Ct. 90.

Where the railroad company is guilty of no negligence toward the occupants of a vehicle which is struck by a train at a crossing, the question whether the carelessness of the driver of the vehicle can be imputed to the one riding with him is immaterial. Atchison, etc., R. Co. *v.* Judah, 65 Kan. 474, 70 Pac. 346.

Husband and wife.— The negligence of a husband in driving a team at a railroad crossing without looking and listening cannot be imputed to his wife, who is with him in the vehicle at the time she is injured. Peck *v.* New York, etc., R. Co., 50 Conn. 379; Lake Shore, etc., R. Co. *v.* McIntosh, 140 Ind. 261, 38 N. E. 476; Chicago, etc., R. Co. *v.* Spilker, 134 Ind. 380, 33 N. E. 280, 34 N. E. 218; Louisville, etc., R. Co. *v.* Creek, 130 Ind. 139, 29 N. E. 481, 14 L. R. A. 733; Finley *v.* Chicago, etc., R. Co., 71 Minn. 471, 74 N. W. 174 (where the husband is not the wife's agent or servant); Galveston, etc., R. Co. *v.* Kutac, 76 Tex. 473, 13 S. W. 327. But see Gulf, etc., R. Co. *v.* Greenlee, 62 Tex. 344; Morris *v.* Chicago, etc., R. Co., 26 Fed. 22.

63. Cahill *v.* Cincinnati, etc., R. Co., 92 Ky. 345, 18 S. W. 2, 13 Ky. L. Rep. 714; Omaha, etc., R. Co. *v.* Talbot, 48 Nebr. 627,

for each other's acts exists,[64] or unless the occupant is under the driver's care or control [65] or has the right to direct and control the driver's actions,[66] or where the driver is of obvious or known imprudence or incompetency.[67] This rule that negligence of the driver is not imputable to an occupant only applies to cases in which the relation of master and servant or principal and agent does not exist between the parties,[68] or where the occupant has no right to direct or control the driver's actions,[69] as where the occupant is a guest of the owner or driver,[70] or where the occupant is seated away from the driver or is separated

67 N. W. 599; Galveston, etc., R. Co. *v.* Kutac, 72 Tex. 643, 11 S. W. 127.

64. Roach *v.* Western, etc., R. Co., 93 Ga. 785, 21 S. E. 67; Cahill *v.* Cincinnati, etc., R. Co., 92 Ky. 345, 18 S. W. 2, 13 Ky. L. Rep. 714; Galveston, etc., R. Co. *v.* Kutac, 72 Tex. 643, 11 S. W. 127; Johnson *v.* Gulf, etc., R. Co., 2 Tex. Civ. App. 139, 21 S. W. 274.

65. Toledo, etc., R. Co. *v.* Miller, 76 Ill. 278 (holding that the parents of a boy cannot recover for his death caused by the negligence of one, having the temporary charge of the child in driving a team behind which the boy is riding); Johnson *v.* Gulf, etc., R. Co., 2 Tex. Civ. App. 139, 21 S. W. 274 (holding that where one of his own volition intrusts himself to the care of another who is driving a vehicle toward a crossing, the negligence of the custodian is imputable to him).

The negligence of a parent in driving a vehicle across a railroad track at the crossing of a highway is imputable to his children who are occupants of the vehicle. Kyne *v.* Wilmington, etc., R. Co., 8 Houst. (Del.) 185, 14 Atl. 922; Slater *v.* Burlington, etc., R. Co., 71 Iowa 209, 32 N. W. 264; Morris *v.* Chicago, etc., R. Co., 26 Fed. 22. But see Griffith *v.* Baltimore, etc., R. Co., 44 Fed. 574.

66. Roach *v.* Western, etc., R. Co., 93 Ga. 785, 21 S. E. 67; Larkin *v.* Burlington, etc., R. Co., 85 Iowa 492, 52 N. W. 480; Callahan *v.* Sharp, 27 Hun (N. Y.) 85 [*affirmed* in 95 N. Y. 672]; Bradley *v.* Ohio River, etc., R. Co., 126 N. C. 735, 36 S. E. 181.

67. Roach *v.* Western, etc., R. Co., 93 Ga. 785, 27 S. E. 67. See also Lake Shore, etc., R. Co. *v.* Boyts, (Ind. App. 1896) 43 N. E. 667, 16 Ind. App. 640, 45 N. E. 812.

A passenger in a public hack is under no duty to supervise the driver at a public crossing nor to look or listen for approaching trains unless he has reason to distrust the diligence of the driver himself in respect to these matters. East Tennessee, etc., R. Co. *v.* Markens, 88 Ga. 60, 13 S. E. 855, 14 L. R. A. 281.

68. Metropolitan St. R. Co. *v.* Powell, 89 Ga. 601, 16 S. E. 118; Bricknell *v.* New York Cent., etc., R. Co., 120 N. Y. 290, 24 N. E. 449, 17 Am. St. Rep. 648 [*affirming* 12 N. Y. St. 450].

69. *Georgia.*— Roach *v.* Western, etc., R. Co., 93 Ga. 785, 21 S. E. 67; Metropolitan St. R. Co. *v.* Powell, 89 Ga. 601, 16 S. E. 118.

Maine.— State *v.* Boston, etc., R. Co., 80 Me. 430, 15 Atl. 36.

Maryland.—Baltimore, etc., R. Co. *v.* State, 79 Md. 235, 29 Atl. 518, 47 Am. St. Rep. 415.

Mississippi.— Alabama, etc., R. Co. *v.* Davis, 69 Miss. 444, 13 So. 693.

New York.— Cosgrove *v.* New York Cent., etc., R. Co., 13 Hun 329 [*reversed* on other grounds in 87 N. Y. 88, 41 Am. Rep. 343]; Bennett *v.* New York, etc., R. Co., 16 N. Y. Suppl. 765. See also Brown *v.* New York Cent., etc., R. Co., 32 N. Y. 597, 88 Am. Dec. 353 [*affirming* 31 Barb. 385].

Texas.— Galveston, etc., R. Co. *v.* Kutac, 72 Tex. 643, 11 S. W. 127.

United States.— Little *v.* Hackett, 116 U. S. 366, 6 S. Ct. 391, 29 L. ed. 652; Union Pac. R. Co. *v.* Lapsley, 51 Fed. 174, 2 C. C. A. 149, 16 L. R. A. 800 [*affirming* 50 Fed. 172].

See 41 Cent. Dig. tit. "Railroads," § 1055.

70. *Georgia.*— Roach *v.* Western, etc., R. Co., 93 Ga. 785, 27 S. E. 67.

Indiana.— Lake Shore, etc., R. Co. *v.* Boyts, (App. 1896) 43 N. E. 667, 16 Ind. App. 640, 45 N. E. 812, holding this to be true where the occupant has reason to believe that the driver is a careful and prudent one.

Kentucky.— Cahill *v.* Cincinnati, etc., R. Co., 92 Ky. 345, 18 S. W. 2, 13 Ky. L. Rep. 714.

Maryland.— Baltimore, etc., R. Co. *v.* State, 79 Md. 335, 29 Atl. 518, 47 Am. St. Rep. 415; Philadelphia, etc., R. Co. *v.* Hogeland, 66 Md. 149, 7 Atl. 105, 59 Am. Rep. 159.

Mississippi.— Alabama, etc., R. Co. *v.* Davis, 69 Miss. 444, 15 So. 693, where he has no reason to believe the driver imprudent.

New York.— Dyer *v.* Erie R. Co., 71 N. Y. 228 (holding that in such case no relation of principal and agent arises and the occupant is not responsible for the negligence of the driver, although he so travels voluntarily and gratuitously); Robinson *v.* New York Cent., etc., R. Co., 66 N. Y. 11, 23 Am. Rep. 1 (holding that a female who accepts an invitation to take a ride with a person in every way fit and competent to manage a horse is not chargeable with his contributory negligence); McCaffrey *v.* Delaware, etc., Canal Co., 16 N. Y. Suppl. 495.

Texas.— Galveston, etc., R. Co. *v.* Kutac, 72 Tex. 643, 11 S. W. 127.

Virginia.— Atlantic, etc., R. Co. *v.* Ironmonger, 95 Va. 625, 29 S. E. 319.

United States.— Pyle *v.* Clark, 79 Fed. 744, 25 C. C. A. 190 [*affirming* 75 Fed. 644]; Union Pac. R. Co. *v.* Lapsley, 51 Fed. 174, 2 C. C. A. 149, 16 L. R. A. 800 [*affirming* 50 Fed. 172].

See 41 Cent. Dig. tit. "Railroads," § 1055.

from him by an inclosure so that he is without opportunity to discover danger and inform the driver thereof.[71] This rule, however, does not relieve the occupant from using ordinary care to avoid injury,[72] and hence where he has an opportunity to do so, it is no less his duty than that of the driver to learn of danger and avoid it if possible; and if he is familiar with the crossing or is in a position to look or look and listen for himself, he is guilty of contributory negligence barring recovery if he fails to use proper care to do so and to inform the driver of the danger,[73] the question whether or not he is in such a position and is negligent in not ascertaining the danger depending upon the circumstances of the particular case and usually being a question for the jury.[74]

71. Brickell *v.* New York Cent., etc., R. Co., 120 N. Y. 290, 24 N. E. 449, 17 Am. St. Rep. 648 [*affirming* 12 N. Y. St. 450].

72. Miller *v.* Louisville, etc., R. Co., 128 Ind. 97, 27 N. E. 339, 25 Am. St. Rep. 416; Bennett *v.* New York Cent., etc., R. Co., 16 N. Y. Suppl. 765; Galveston, etc., R. Co. *v.* Kutac, 72 Tex. 643, 11 S. W. 127; Griffith *v.* Baltimore, etc., R. Co., 44 Fed. 574.

73. *Illinois.*— Chicago, etc., R. Co. *v.* Bentz, 38 Ill. App. 485.

Indiana.— Miller *v.* Louisville, etc., R. Co., 128 Ind. 97, 27 N. E. 339, 25 Am. St. Rep. 416; Aurelius *v.* Lake Erie, etc., R. Co., 19 Ind. App. 584, 49 N. E. 857; Lake Shore, etc., R. Co. *v.* Boyts, (App. 1896) 43 N. E. 667, 16 Ind. App. 640, 45 N. E. 812.

Iowa.— Willfong *v.* Omaha, etc., R. Co., 116 Iowa 548, 90 N. W. 358, holding that the court cannot properly instruct that, if a wife relies upon her husband to look and listen and to exercise reasonable care, she is relieved from doing so herself since she is bound to the same degree of care as her husband.

Maine.— Wood *v.* Maine Cent. R. Co., 101 Me. 469, 64 Atl. 833; Smith *v.* Maine Cent. R. Co., 87 Me. 339, 32 Atl. 967.

Massachusetts.— Allyn *v.* Boston, etc., R. Co., 105 Mass. 77.

Minnesota.— Finley *v.* Chicago, etc., R. Co., 71 Minn. 471, 74 N. W. 174.

Mississippi.— Alabama, etc., R. Co. *v.* Davis, 69 Miss. 444, 13 So. 693.

New York.— Brickell *v.* New York Cent., etc., R. Co., 120 N. Y. 290, 24 N. E. 449, 17 Am. St. Rep. 648 [*affirming* 12 N. Y. St. 450]; Noakes *v.* New York Cent., etc., R. Co., 121 N. Y. App. Div. 716, 106 N. Y. Suppl. 522; Durkee *v.* Delaware, etc., Canal Co., 88 Hun 471, 34 N. Y. Suppl. 978; Bronk *v.* New York, etc., R. Co., 5 Daly 454.

Pennsylvania.— Dean *v.* Pennsylvania R. Co., 129 Pa. St. 514, 18 Atl. 718, 15 Am. St. Rep. 733, 6 L. R. A. 143.

Virginia.— Atlantic, etc., R. Co. *v.* Ironmonger, 95 Va. 625, 29 S. E. 319.

United States.— Pyle *v.* Clark, 79 Fed. 744, 25 C. C. A. 190 [*affirming* 75 Fed. 644].

See 41 Cent. Dig. tit. "Railroads," § 1055.

One knowing that he is approaching a track cannot assume that the driver will be careful, but must look out for himself; and if he does not know such fact he must use such care as one with his knowledge would ordinarily exercise. Crawford *v.* Delaware, etc., R. Co., 56 N. Y. Super. Ct. 607, 1 N. Y. Suppl. 339 [*affirmed* in 121 N. Y. 652, 24 N. E. 1092].

An occupant of a motor vehicle who is in such a position therein as to be able to see and hear an approaching train before going on a crossing, and who is able to appreciate the danger, is under a duty to look and listen to ascertain whether a train is approaching before crossing the track, and his failure to do so is contributory negligence precluding a recovery for his injury or death. Read *v.* New York Cent., etc., R. Co., 123 N. Y. App. Div. 228, 107 N. Y. Suppl. 1068 (holding this rule to apply to an occupant of an automobile who had he looked at any time while the train was covering two thousand feet from the point at which it was visible from the crossing must have seen the train and an exclamation from him would have sufficed to cause the chauffeur to stop in time to avoid the accident); Noakes *v.* New York Cent., etc., R. Co., 121 N. Y. App. Div. 716, 106 N. Y. Suppl. 522.

74. Willfong *v.* Omaha, etc., R. Co., 116 Iowa 548, 90 N. W. 358; Finley *v.* Chicago, etc., R. Co., 71 Minn. 471, 74 N. W. 174; Crawford *v.* Delaware, etc., R. Co., 56 N. Y. Super. Ct. 607, 1 N. Y. Suppl. 339 [*affirmed* in 121 N. Y. 652, 24 N. E. 1092]; Pyle *v.* Clark, 79 Fed. 744, 25 C. C. A. 190 [*affirming* 75 Fed. 644]. And see *infra*, X, F, 14, g, (XI). (D), (7).

A woman riding with her husband is not guilty of contributory negligence as a matter of law in failing to look around her husband to observe the approach of a train from his side of a buggy. Heater *v.* Delaware, etc., R. Co., 90 N. Y. App. Div. 495, 85 N. Y. Suppl. 524.

An occupant unfamiliar with the highway and crossing has a right to assume that dangerous places will be pointed out and in the absence of warning that he is approaching a railroad crossing cannot be regarded as negligent as a matter of law if he exercises that degree of prudence which an ordinarily prudent person would exercise under the circumstances, although it is his duty to warn the driver of approaching obvious danger. Henn *v.* Long Island R. Co., 51 N. Y. App. Div. 292, 65 N. Y. Suppl. 21. Nor is such a person necessarily guilty of contributory negligence in failing to request the driver to stop, look, and listen for approaching trains. Wilson *v.* New York, etc., R. Co., 18 R. I. 598, 29 Atl. 300.

(II) *Where View or Hearing Is Obstructed* [75] — (A) *In General.* Where the view or hearing of a traveler approaching a railroad crossing is obstructed, he is under the duty of using greater care and prudence in looking and listening for approaching trains than where there is no obstruction.[76] The degree of care which he must exercise in such cases, particularly where he is familiar with the crossing, must be in proportion to the increase of danger and must be such care and prudence in looking and listening as an ordinarily prudent man would exercise under like circumstances of obstructions to view or hearing; [77] and if he fails to use such care, whereby he is injured, he is guilty of contributory negligence barring a recovery,[78] although the obstructions to sight or hearing

75. As affected by precautions of railroad employees see *infra*, X, F, 10, e.

Children and persons under physical disability see *supra*, X, F, 10, b.

76. *California.*— Bilton *v.* Southern Pac. R. Co., 148 Cal. 443, 83 Pac. 440.

Colorado.— Chicago, etc., R. Co. *v.* Crisman, 19 Colo. 30, 34 Pac. 286.

Delaware.— Knopf *v.* Philadelphia, etc., R. Co., 2 Pennew. 392, 46 Atl. 747.

Indiana.— Cincinnati, etc., R. Co. *v.* Howard, 124 Ind. 280, 24 N. E. 892, 19 Am. St. Rep. 96, 8 L. R. A. 593; Cleveland, etc., R. Co. *v.* Wnest, 40 Ind. App. 693, 82 N. E. 986, 41 Ind. App. 210, 83 N. E. 620.

Kansas.— Chicago, etc., R. Co. *v.* Williams, 56 Kan. 333, 43 Pac. 246; Atchison, etc., R. Co. *v.* Townsend, 39 Kan. 115, 17 Pac. 804.

Mississippi.— Jobe *v.* Memphis, etc., R. Co., 71 Miss. 734, 15 So. 129; Louisville, etc., R. Co. *v.* French, 69 Miss. 121, 12 So. 338.

Oregon.— McBride *v.* Northern Pac. R. Co., 19 Oreg. 64, 23 Pac. 814.

Tennessee.— Louisville, etc., R. Co. *v.* Satterwhite, 112 Tenn. 185, 79 S. W. 106.

United States.— Chicago, etc., R. Co. *v.* Andrews, 130 Fed. 65, 64 C. C. A. 399.

See 41 Cent. Dig. tit. "Railroads," § 1057.

77. *Arkansas.*— St. Louis, etc., R. Co. *v.* Tippett, 56 Ark. 457, 20 S. W. 161.

Delaware.— Knopf *v.* Philadelphia, etc., R. Co., 2 Pennew. 392, 46 Atl. 747.

Indiana.— Louisville, etc., R. Co. *v.* Stommel, 126 Ind. 35, 25 N. E. 863; Cincinnati, etc., R. Co. *v.* Howard, 124 Ind. 280, 24 N. E. 892, 19 Am. St. Rep. 96, 8 L. R. A. 593; Evansville, etc., R. Co. *v.* Clements, 32 Ind. App. 659, 70 N. E. 554.

Iowa.— Golinvaux *v.* Burlington, etc., R. Co., 125 Iowa 652, 101 N. W. 465; Schulte *v.* Chicago, etc., R. Co., 114 Iowa 89, 86 N. W. 63.

Kentucky.— Louisville, etc., R. Co. *v.* Lucas, 98 S. W. 308, 30 Ky. L. Rep. 359, 99 S. W. 959, 30 Ky. L. Rep. 539.

Louisiana.— Barnhill *v.* Texas, etc., R. Co., 109 La. 43, 33 So. 63.

Maine.— Robinson *v.* Rockland, etc., St. R. Co., 99 Me. 47, 58 Atl. 57 (holding that where a traveler about to cross an electric railway in the country cannot see an approaching car on account of an intervening bank, he cannot in the exercise of ordinary prudence assume that it is impossible for a car to be behind such bank); Day *v.* Boston, etc., R. Co., 96 Me. 207, 52 Atl. 771, 90 Am. St. Rep. 335.

Michigan.— Haas *v.* Grand Rapids, etc., R. Co., 47 Mich. 401, 11 N. W. 216.

New Jersey.— Fuchs *v.* Lehigh Valley R. Co., (Sup. 1905) 61 Atl. 1, holding that where there are obstructions to view, the traveler is bound to exercise greater care than merely looking, and that he should also listen.

New York.— Wilds *v.* Hudson River R. Co., 29 N. Y. 315 (holding that if it is necessary for the traveler to come near the track to make his observation, this circumstance, so far from excusing him in the duty of looking at all, will only render that duty more imperative); Mackey *v.* New York Cent. R. Co., 27 Barb. 528.

North Carolina.—Scott *v.* Wilmington, etc., R. Co., 96 N. C. 428, 2 S. E. 151.

Pennsylvania.— Pennsylvania R. Co. *v.* Ackerman, 74 Pa. St. 265; Pennsylvania R. Co. *v.* Beale, 73 Pa. St. 504, 13 Am. Rep. 753.

Virginia.— Southern R. Co. *v.* Jones, 106 Va. 412, 56 S. E. 155.

United States.— Thomas *v.* Delaware, etc., R. Co., 8 Fed. 729, 19 Blatchf. 533.

See 41 Cent. Dig. tit. "Railroads," § 1057.

Where a crossing is particularly dangerous and requires extraordinary effort to ascertain whether it is safe to cross, one familiar with the locality and the danger surrounding it must use care proportioned to the probable danger. Louisville, etc., R. Co. *v.* Stommel, 126 Ind. 35, 25 N. E. 863; Cincinnati, etc., R. Co. *v.* Butler, 103 Ind. 31, 2 N. E. 138.

Passing from a place where the view is unobstructed to a place where it is obstructed is not of itself contributory negligence. Scott *v.* Wilmington, etc., R. Co., 96 N. C. 428, 2 S. E. 151.

78. *Alabama.*— Gothard *v.* Alabama Great Southern R. Co., 67 Ala. 114.

Maine.— Robinson *v.* Rockland, etc., St. R. Co., 99 Me. 47, 58 Atl. 57.

Michigan.— Haas *v.* Grand Rapids, etc., R. Co., 47 Mich. 401, 11 N. W. 216.

New Jersey.— Sulder *v.* Pennsylvania R. Co., (Sup. 1903) 56 Atl. 124, holding that a person is guilty of gross negligence in failing to listen, where the view is obstructed.

New York.— Thompson *v.* New York Cent., etc., R. Co., 33 Hun 16 [*reversed* on other grounds in 2 Silv. App. 82], holding also that it is immaterial that the traveler did not hear the bell which the statute requires

are caused or permitted by the railroad company itself.[79] Under such circumstances it is the traveler's duty not only to look and listen but to resort to other means to ascertain whether a train is approaching,[80] and to so dispose himself as to make those powers of observation more effective,[81] and perhaps to stop.[82] If, however, the traveler exercises such care, he is not guilty of contributory negligence,[83] and has a right to assume that the railroad company will use proper precautions on its part,[84] such as giving the proper signals.[85] The question whether or not a traveler exercises proper care and prudence in looking and listening where there is an obstruction depends upon the circumstances at the particular time and crossing and is usually for the jury,[86] although the circumstances may be such as to make his acts contributory negligence as a matter of law.[87]

(B) *Duty to Stop Before Reaching Crossing.* Where the view or hearing of a traveler approaching a railroad crossing is so obstructed that he cannot otherwise satisfy himself whether it is prudent to cross, it is his duty, where he is familiar with the crossing or aware of such facts, to stop and look or listen before going upon the tracks,[88] particularly where the obstruction to sight or hearing is caused

to be rung, the presumption being that it was rung.

Ohio.— Pittsburgh, etc., R. Co. *v.* Peters, 1 Ohio Cir. Ct. 34, 1 Ohio Cir. Dec. 20 [*affirmed* in 17 Cinc. L. Bul. 247].

Pennsylvania.— Ayers *v.* Pittsburg, etc., R. Co., 201 Pa. St. 124, 50 Atl. 958.

Texas.— Gulf, etc., R. Co. *v.* Dodson, 3 Tex. App. Civ. Cas. § 394.

See 41 Cent. Dig. tit. "Railroads," § 1057; and cases cited *supra*, notes 76, 77.

79. Fulton County Narrow Gauge R. Co. *v.* Butler, 48 Ill. App. 301; Evansville, etc., R. Co. *v.* Clements, 32 Ind. App. 659, 70 N. E. 554 (holding that a pedestrian approaching a railroad crossing is not excused from looking and listening for an approaching train because of buildings placed by the railroad company on its right of way obstructing the pedestrian's view); Chicago, etc., R. Co. *v.* Williams, 59 Kan. 700, 54 Pac. 1047 (holding this to be true, although needless obstructions to the view of the track are negligently permitted by the railroad company to remain on its right of way); Calhoun *v.* Gulf, etc., R. Co., 84 Tex. 226, 19 S. W. 341. *Compare* Chicago, etc., R. Co. *v.* Lee, 87 Ill. 454.

80. Colorado, etc., R. Co. *v.* Thomas, 33 Colo. 517, 81 Pac. 801, 70 L. R. A. 681.

81. Fuchs *v.* Lehigh Valley R. Co., (N. J. Sup. 1905) 61 Atl. 1.

82. Bilton *v.* Southern Pac. R. Co., 148 Cal. 443, 83 Pac. 440. And see *infra*, X, F, 10, d, (II), (B).

83. Bates *v.* New York, etc., R. Co., 60 Conn. 259, 22 Atl. 538; Davis *v.* Kansas City Belt R. Co., 46 Mo. App. 180; Chicago, etc., R. Co. *v.* Starmer, 26 Nebr. 630, 42 N. W. 706; Manley *v.* New York Cent., etc., R. Co., 39 N. Y. App. Div. 144, 57 N. Y. Suppl. 182; Larkin *v.* New York, etc., R. Co., 19 N. Y. Suppl. 479 [*affirmed* in 138 N. Y. 634, 33 N. E. 1084].

84. Malott *v.* Hawkins, 159 Ind. 127, 63 N. E. 308. And see *infra*, X, F, 10, e, (I).

85. Malott *v.* Hawkins, 159 Ind. 127, 63 N. E. 308; Cleveland, etc., R. Co. *v.* Carey, 33 Ind. App. 275, 71 N. E. 244; Branch *v.* New York Cent., etc., R. Co., 39 N. Y. App. Div. 435, 57 N. Y. Suppl. 344; Brown *v.* Rome, etc., R. Co., 1 N. Y. Suppl. 286. And see *infra*, X, F, 10, e, (III).

86. *Indiana.*— Louisville, etc., R. Co. *v.* Williams, 20 Ind. App. 576, 51 N. E. 128.

Michigan.— Willet *v.* Michigan Cent. R. Co., 114 Mich. 411, 72 N. W. 260.

Missouri.— Frazier *v.* Wabash R. Co., 75 Mo. App. 253.

New York.— Lewin *v.* Lehigh Valley R. Co., 41 N. Y. App. Div. 89, 58 N. Y. Suppl. 113; McGuire *v.* Hudson River R. Co., 2 Daly 76.

Pennsylvania.— Davidson *v.* Lake Shore, etc., R. Co., 179 Pa. St. 227, 36 Atl. 291.

Texas.— Missouri, etc., R. Co. *v.* Rogers, 91 Tex. 52, 40 S. W. 956 [*reversing* (Civ. App. 1897) 40 S. W. 849]; Calhoun *v.* Gulf, etc., R. Co., 84 Tex. 226, 19 S. W. 341; Galveston, etc., R. Co. *v.* Tirres, 33 Tex. Civ. App. 362, 76 S. W. 806; Missouri, etc., R. Co. *v.* Brantley, 26 Tex. Civ. App. 11, 62 S. W. 94; Gulf, etc., R. Co. *v.* Creeland, (Civ. App. 1894) 26 S. W. 153.

Virginia.— Simons *v.* Southern R. Co., 96 Va. 152, 31 S. E. 7; Southern R. Co. *v.* Bryant, 95 Va. 212, 28 S. E. 183.

See 41 Cent. Dig. tit. "Railroads," § 1057. And see *infra*, X, F, 14, g, (XI), (D), (8), (a).

87. See Louisville, etc., R. Co. *v.* Williams, 20 Ind. App. 576, 51 N. E. 128.

88. *Alabama.*— Robinette *v.* Alabama, etc., R. Co., 132 Ala. 501, 31 So. 18.

Colorado.—Colorado, etc., R. Co. *v.* Thomas, 33 Colo. 517, 81 Pac. 801, 70 L. R. A. 681; Chicago, etc., R. Co. *v.* Crisman, 19 Colo. 30, 34 Pac. 286.

Illinois.— Pennsylvania Co. *v.* Frana, 112 Ill. 398.

Iowa.— Moore *v.* Chicago, etc., R. Co., 102 Iowa 595, 71 N. W. 569; Nosler *v.* Chicago, etc., R. Co., 73 Iowa 268, 34 N. W. 850.

Kansas.— Atchison, etc., R. Co. *v.* Willey, 60 Kan. 819, 58 Pac. 472.

Maryland.— Philadelphia, etc., R. Co. *v.* Holden, 93 Md. 417, 49 Atl. 625, holding that where the view of a traveler is in any manner obstructed, he is negligent in going on

by means under the traveler's control.[89] Although there are some decisions to the contrary,[90] the mere failure to stop to look or listen is not as a general rule contributory negligence *per se*, but whether or not it is such negligence is a question to be determined by the jury depending upon all the circumstances of the case,[91] although if by stopping he can see or hear an approaching train or other-

the track without stopping, looking, and listening.

Massachusetts.— Donnelly *v.* Boston, etc., R. Co., 151 Mass. 210, 24 N. E. 38.

Michigan.— Lau *v.* Lake Shore, etc., R. Co., 120 Mich. 115, 79 N. W. 13; Stewart *v.* Michigan Cent. R. Co., 119 Mich. 91, 77 N. W. 643; Jensen *v.* Michigan Cent. R. Co., 102 Mich. 176, 60 N. W. 57; Houghton *v.* Chicago, etc., R. Co., 99 Mich. 308, 58 N. W. 314 (not stopping to listen for a train which he knows is due); Brady *v.* Toledo, etc., R. Co., 81 Mich. 616, 45 N. W. 1110.

Minnesota.— Clark *v.* Northern Pac. R. Co., 47 Minn. 380, 50 N. W. 365.

Missouri.— Stepp *v.* Chicago, etc., R. Co., 85 Mo. 229.

Montana.—Hunter *v.* Montana Cent. R. Co., 22 Mont. 525, 57 Pac. 140.

New Jersey.— Keyley *v.* New Jersey Cent. R. Co., 64 N. J. L. 355, 45 Atl. 811.

Pennsylvania.— Mann *v.* Philadelphia, etc., R. Co., 1 Dauph. Co. Rep. 51; Allegheny Transfer, etc., Co. *v.* Railroad Co., 36 Pittsb. Leg. J. N. S. 286.

Vermont.— Carter *v.* Central Vermont R. Co., 72 Vt. 190, 47 Atl. 797.

Wisconsin.— Seefeld *v.* Chicago, etc., R. Co., 70 Wis. 216, 35 N. W. 278, 5 Am. St. Rep. 168.

United States.— Littaur *v.* Narragansett Pier R. Co., 61 Fed. 591; Tucker *v.* Duncan, 9 Fed. 867, 4 Woods 652.

See 41 Cent. Dig. tit. "Railroads," § 1058.

But see Judson *v.* Central Vermont R. Co., 158 N. Y. 597, 53 N. E. 514 [*reversing* 91 Hun 1, 36 N. Y. Suppl. 83]; Davis *v.* New York Cent., etc., R. Co., 47 N. Y. 400 (holding that a person approaching a railroad crossing where his view of approaching trains is obstructed is not required to stop for the purpose of listening for trains); Mackay *v.* New York Cent. R. Co., 35 N. Y. 75 [*overruling* Mackey *v.* New York Cent. R. Co., 27 Barb. 528].

89. *California.*— Bilton *v.* Southern Pac. R. Co., 148 Cal. 443, 83 Pac. 440; Pepper *v.* Southern Pac. Co., 105 Cal. 389, 38 Pac. 974.

Maine.— Chase *v.* Maine Cent. R. Co., 78 Me. 346, 5 Atl. 771, riding with bells attached to sleigh.

Massachusetts.— Rogers *v.* Boston, etc., R. Co., 187 Mass. 217, 72 N. E. 945, holding that it is contributory negligence in the driver of a cart, the noise of which he knows will prevent his hearing an approaching train, to fail to stop and listen before driving on the track.

New Jersey.— Keyley *v.* New Jersey Cent. R. Co., 64 N. J. L. 355, 45 Atl. 811 (holding that, where there is an obstruction to vision, ordinary prudence requires a traveler to stop the noise of his horse and wagon when he is near enough to the unseen track to ascertain, by the use of his hearing, whether there is danger in crossing); Merkle *v.* New York, etc., R. Co., 49 N. J. L. 473, 9 Atl. 680 (holding that a person driving a wagon loaded with boxes of empty bottles across a railroad track at a point where it is impossible to perceive an approaching train until close to the track is guilty of contributory negligence in not stopping and listening where the rattling of the bottles prevents his hearing the noise of the trains.

Oregon.— Blackburn *v.* Southern Pac. R. Co., 34 Oreg. 215, 55 Pac. 225, holding that the failure to stop is contributory negligence as a matter of law.

See 41 Cent. Dig. tit. "Railroads," § 1058.

90. State *v.* Western Maryland R. Co., 102 Md. 257, 62 Atl. 754, holding that one who without stopping, looking, and listening drives upon railroad tracks at a point where his view of the track is obstructed is guilty of contributory negligence as a matter of law.

91. *Indiana.*— Cleveland, etc., R. Co. *v.* Penketh, 27 Ind. App. 210, 60 N. E. 1095.

Iowa.— Reed *v.* Chicago, etc., R. Co., 74 Iowa 188, 37 N. W. 149; Nosler *v.* Chicago, etc., R. Co., 73 Iowa 268, 34 N. W. 850.

Kansas.— Atchison, etc., R. Co. *v.* Powers, 58 Kan. 544, 50 Pac. 452 (holding that whether the surroundings of a railroad crossing are such as to render it incumbent upon a person about to cross to stop to ascertain whether a train of cars is approaching is a question of fact to be determined by the jury); Chicago, etc., R. Co. *v.* Williams, 56 Kan. 333, 43 Pac. 246.

Kentucky.— Illinois Cent. R. Co. *v.* Mizell, 100 Ky. 235, 38 S. W. 5, 18 Ky. L. Rep. 738, holding that where a woman on horseback is about to cross a railroad at a crossing where a deep cut prevents a view of an approaching train, it is not contributory negligence *per se* to only bring her horse to a slow walk to listen for a train instead of stopping.

Missouri.— Petty *v.* Hannibal, etc., R. Co., 88 Mo. 306 (holding that a failure to stop and look is not negligence where the circumstances are such that had the traveler looked he could not have seen the train); Mayes *v.* St. Louis, etc., R. Co., 71 Mo. App. 140.

North Carolina.— Alexander *v.* Richmond, etc., R. Co., 112 N. C. 720, 16 S. E. 896.

Ohio.— Cleveland, etc., R. Co. *v.* Sivey, 27 Ohio Cir. Ct. 248.

Texas.— Texas, etc., R. Co. *v.* Anderson, 2 Tex. App. Civ. Cas. § 203.

Utah.— Peck *v.* Oregon Short Line R. Co., 25 Utah 21, 69 Pac. 153.

Virginia.— Southern R. Co. *v.* Bryant, 95 Va. 212, 28 S. E. 183, not contributory negligence *per se*.

wise avoid the injury his failure to do so is contributory negligence as a matter of law.[92]

(c) *Duty to Go Ahead to Look and Listen.* Ordinary precaution may also require that a driver of a vehicle should not only stop to look and listen where his view or hearing is obstructed, but that he should get out of his vehicle and approach the track and look along it in both directions for approaching trains.[93] This precaution, however, is not required as a matter of law; but whether or not it should be taken is usually a question for the jury dependent upon the circumstances at the particular time and crossing;[94] and ordinarily, if a driver exercises due care in other respects, as in looking or listening, he is not bound to go ahead of his vehicle for that purpose,[95] although it has been held that if by the exercise of such precaution the approaching train could have been seen, a failure to do so is contributory negligence as a matter of law.[96]

(d) *Time and Place For Looking and Listening.* It is the duty of a traveler approaching a railroad crossing to look and listen for approaching trains wherever an opportunity of seeing or hearing such trains presents itself;[97] and although he looks and listens or stops, looks, and listens at a point where there are obstructions to the sight or hearing, if he subsequently reaches a point where an approaching train can be seen or heard, it is his duty to look and listen again, and his failure to do so is such negligence as will bar him from recovering for his injury.[98] But

United States.— New York, etc., R. Co. *v.* Moore, 105 Fed. 725, 45 C. C. A. 21.

See 41 Cent. Dig. tit. "Railroads," § 1058. And see *infra*, X, F, 14, g, (xi), (d), (8), (b).

92. Atchison, etc., R. Co. *v.* Willey, 60 Kan. 819, 58 Pac. 472; Blackburn *v.* Southern Pac. Co., 34 Oreg. 215, 55 Pac. 225; Carter *v.* Central Vermont R. Co., 72 Vt. 190, 47 Atl. 797 (verdict for defendant directed); Shatto *v.* Erie R. Co., 121 Fed. 678, 59 C. C. A. 1 (holding that the failure of a person about to cross a railway track to stop to look and listen where the view of the track is obstructed or there is a noise which may prevent his hearing the train is negligence as a matter of law); Neininger *v.* Cowan, 101 Fed. 787, 42 C. C. A. 20.

93. Chicago, etc., R. Co. *v.* Thomas, 155 Ind. 634, 58 N. E. 1040; Mankewicz *v.* Lehigh Valley R. Co., 214 Pa. St. 386, 63 Atl. 604 [*affirming* 31 Pa. Co. Ct. 565]; Kinter *v.* Pennsylvania R. Co., 204 Pa. St. 497, 54 Atl. 276, 93 Am. St. Rep. 795 (holding that if necessary the driver should get out of his wagon and lead his horse); Pennsylvania R. Co. *v.* Ackerman, 74 Pa. St. 265; Pennsylvania R. Co. *v.* Beale, 73 Pa. St. 504, 13 Am. Rep. 753.

Where a traveler stops but cannot see by looking from his vehicle any distance up the track, he should get out and walk to a place where he can see. Mankewicz *v.* Lehigh Valley R. Co., 214 Pa. St. 386, 63 Atl. 604.

94. Huckshold *v.* St. Louis, etc., R. Co., 90 Mo. 548, 2 S. W. 794; Lang *v.* Missouri Pac. R. Co., 115 Mo. App. 489, 91 S. W. 1012; Dolan *v.* Delaware, etc., Canal Co., 71 N. Y. 285; Davis *v.* New York Cent., etc., R. Co., 47 N. Y. 400; Kelsey *v.* Staten Island Rapid Transit R. Co., 78 Hun (N. Y.) 208, 28 N. Y. Suppl. 974, holding that it is not, as a matter of law, negligence for a person crossing a railroad track at a place where the track cannot be seen except when one is only a few feet distant, to attempt to drive across without first walking on the track and looking for a train. And see *infra*, X, F, 14, g, (xi), (d), (8), (c).

95. *Michigan.*— Guggenheim *v.* Lake Shore, etc., R. Co., 66 Mich. 150, 33 N. W. 161.

Minnesota.— Kelly *v.* St. Paul, etc., R. Co., 29 Minn. 1, 11 N. W. 67.

Missouri.— Mitchell *v.* St. Louis, etc., R. Co., 122 Mo. App. 50, 97 S. W. 552.

North Carolina.— Alexander *v.* Richmond, etc., R. Co., 112 N. C. 720, 16 S. E. 896; Hinkle *v.* Richmond, etc., R. Co., 109 N. C. 472, 13 S. E. 884, 26 Am. St. Rep. 581.

Wisconsin.— Duffy *v.* Chicago, etc., R. Co., 32 Wis. 269.

See 41 Cent. Dig. tit. "Railroads," § 1059.

96. Kinter *v.* Pennsylvania R. Co., 204 Pa. St. 497, 54 Atl. 276, 93 Am. St. Rep. 795; Ellis *v.* Lake Shore, etc., R. Co., 138 Pa. St. 506, 21 Atl. 140, 21 Am. St. Rep. 914, holding that it is the duty of a traveler, if necessary, to get out and lead his horse and that his omission to do so is negligence *per se*.

97. See *supra*, X, F, 10, d, (i), (b), (i).

98. *Illinois.*— Atchison, etc., R. Co. *v.* Booth, 53 Ill. App. 303.

Iowa.— Hinken *v.* Iowa Cent. R. Co., 97 Iowa 603, 66 N. W. 882.

Michigan.— Shufelt *v.* Flint, etc., R. Co., 96 Mich. 327, 55 N. W. 1013, holding that where the view of defendant's track is obstructed between one hundred feet and twenty feet from the crossing, the failure of a person who looks just before reaching the obstruction to stop, look, and listen after passing it is contributory negligence.

Mississippi.— Jobe *v.* Memphis, etc., R. Co., 71 Miss. 734, 15 So. 129.

Missouri.— Hook *v.* Missouri Pac. R. Co., 162 Mo. 569, 63 S. W. 360 (holding that where the view of the track is obstructed to within ten feet thereof, a traveler who knows

a traveler is not obliged to look where the view is so obscured that he could not see a train, or to listen if the conditions are such that he could not hear one, since under such circumstances he could gain nothing thereby.[99]

(E) *Speed of Person Injured in Approaching Crossing.* It is especially negligent in one whose view or hearing is obstructed to ride or drive on a railroad crossing, without exercising proper care in looking or listening for an approaching train, at a speed which not only interferes with his hearing an approaching train, but also makes it difficult or impossible for him to stop after discovery of his peril,[1] although the railroad company itself is negligent in running the train at an unlawful rate of speed,[2] or in failing to give the proper signals of its approach.[3] Under such circumstances the traveler should approach the crossing so slowly and carefully as to give him an opportunity to look or listen for an approaching train, or to give him complete control of his team or vehicle and enable him to stop instantly if the occasion should require.[4]

(F) *Crossing Behind Passing Train.* An attempt to cross a railroad track immediately behind a passing train, where the traveler's view or hearing is obstructed by such train or otherwise, without exercising due care in looking and listening for approaching trains or cars, is contributory negligence barring a recovery,[5] especially where the traveler is familiar with the crossing and knows

that it is but two or three minutes after the time of the regular train is not freed from contributory negligence by stopping thirty-five feet from the track and listening and then driving forward, but that he should stop and listen when about to cross the track); Kelsay *v.* Missouri Pac. R. Co., 129 Mo. 362, 30 S. W. 339; Turner *v.* Hannibal, etc., R. Co., 74 Mo. 602.

New York.— Salter *v.* Utica, etc., R. Co., 75 N. Y. 273.

Pennsylvania.— Mankewicz *v.* Lehigh Valley R. Co., 214 Pa. St. 386, 63 Atl. 604 [*affirming* 31 Pa. Co. Ct. 565]; Plummer *v.* New York Cent., etc., R. Co., 168 Pa. St. 62, 31 Atl. 887; Derk *v.* Northern Cent. R. Co., 164 Pa. St. 243, 30 Atl. 231; Urias *v.* Pennsylvania R. Co., 152 Pa. St. 326, 25 Atl. 566.

Virginia.— Southern R. Co. *v.* Jones, 106 Va. 412, 56 S. E. 155.

Wisconsin.— Schneider *v.* Chicago, etc., R. Co., 99 Wis. 378, 75 N. W. 169.

United States.— St. Louis, etc., R. Co. *v.* Barker, 77 Fed. 810, 23 C. C. A. 475, holding, however, that such a failure is not conclusive evidence of contributory negligence but that the question is for the jury.

See 41 Cent. Dig. tit. "Railroads," § 1061.

99. Allen *v.* Boston, etc., R. Co., 197 Mass. 298, 83 N. E. 863.

1. Pepper *v.* Southern Pac. Co., 105 Cal. 389, 38 Pac. 974; Hager *v.* Southern Pac. Co., 98 Cal. 309, 33 Pac. 119; Conkling *v.* Erie R. Co., 63 N. J. L. 338, 43 Atl. 666; Powell *v.* New York Cent., etc., R. Co., 109 N. Y. 613, 15 N. E. 891 (attempting to cross a track at the rate of about ten miles an hour while a strong wind is blowing and snow is falling fast, thereby obstructing sight and hearing); Salter *v.* Utica, etc., R. Co., 75 N. Y. 273 (holding that it is contributory negligence to drive a team over a railroad crossing at a fast trot, where a view of the approaching train is obstructed, although the driver may be using his senses to apprehend the approach of the train); Knox *v.* Philadelphia, etc., R. Co., 202 Pa. St. 504, 52 Atl. 90 (holding that testimony that a person stopped at a point sixty to one hundred and twenty-five feet from the crossing and then drove rapidly in a heavy rain through the intervening space where the view was obstructed and was struck just as he was crossing the track shows contributory negligence); Filiatrault *v.* Canadian Pac. R. Co., 18 Quebec Super. Ct. 491.

2. Hager *v.* Southern Pac. Co., 98 Cal. 309, 33 Pac. 119.

3. Hager *v.* Southern Pac. Co., 98 Cal. 309, 33 Pac. 119.

4. Pepper *v.* Southern Pac. Co., 105 Cal. 389, 38 Pac. 974; Powell *v.* New York Cent., etc., R. Co., 109 N. Y. 613, 15 N. E. 891.

Rider of bicycle.— Where the view or hearing of one approaching a railroad crossing on a bicycle is obstructed, such person should not proceed across a track without having his bicycle under such control that he can stop and thus avoid an accident if necessary. Waddell *v.* New York Cent., etc., R. Co., 98 N. Y. App. Div. 343, 90 N. Y. Suppl. 239 [*reversed* on other grounds in 184 N. Y. 520, 76 N. E. 1111].

5. *Minnesota.*— Marty *v.* Chicago, etc., R. Co., 38 Minn. 108, 35 N. W. 670, passing immediately upon the crossing as soon as the way is clear without waiting to look and listen for the approach of a train in the opposite direction.

New Jersey.— New Jersey Cent. R. Co. *v.* Smalley, 61 N. J. L. 277, 39 Atl. 695, nonsuit held proper.

New York.—Daniels *v.* Staten Island Rapid Transit Co., 125 N. Y. 407, 26 N. E. 466 [*reversing* 7 N. Y. Suppl. 725] (stepping on to an adjoining track immediately after the passage of a train and being run over by a train which he could have seen had he stopped to look); Purdy *v.* New York Cent., etc., R. Co., 87 Hun 97, 33 N. Y. Suppl. 952 (holding that it is contributory negligence to go on a

of the frequency and speed with which trains pass at that crossing,[6] or knows that a train is about due.[7] But if the traveler exercises such care and prudence in looking and listening before crossing as a reasonably prudent man would exercise under like circumstances he is free from contributory negligence.[8] Whether or not a traveler is so negligent is usually a question for the jury dependent upon the circumstances of the particular case.[9]

(G) *Noises Preventing Hearing of Train.* A failure to hear an approaching train may be excused by noises which prevent one from hearing it,[10] such as the noise caused by a wagon,[11] a steam sawmill,[12] falling waters,[13] or by another train.[14] The fact of such noises, however, increases the traveler's obligation to look for approaching trains.[15]

railroad where there are double tracks, after a train has just passed, without waiting until it has gone sufficiently far to give a view of the other track); Bieseigal *v.* New York Cent. R. Co., 33 Barb. 429 [*reversed* on the facts in 34 N. Y. 622, 90 Am. Dec. 741]; Hamm *v.* New York Cent., etc., R. Co., 50 N. Y. Super. Ct. 78; Moore *v.* New York Cent., etc., R. Co., 17 N. Y. Suppl. 205.

Oregon.— Durbin *v.* Oregon R., etc., Co., 17 Oreg. 5, 17 Pac. 5, 11 Am. St. Rep. 778, holding that one who is familiar with the crossing and who has always used great care in looking for trains is guilty of contributory negligence in not stopping to look or listen before crossing immediately after a passing train.

Pennsylvania.— Hovenden *v.* Pennsylvania R. Co., 180 Pa. St. 244, 36 Atl. 731 [*affirming* 13 Montg. Co. Rep. 9]; Hughes *v.* Delaware, etc., Canal Co., 176 Pa. St. 254, 35 Atl. 190 (crossing when the view of a track is cut off by a train passing on another track without waiting to see if any other train is coming, which train could have been seen if the traveler had waited but a short time after the receding train had cleared the view); Kraus *v.* Pennsylvania R. Co., 139 Pa. St. 272, 20 Atl. 993.

Wisconsin.— Schlimgen *v.* Chicago, etc., R. Co., 90 Wis. 186, 62 N. W. 1045.

United States.—Stowell *v.* Erie R. Co., 98 Fed. 520, 39 C. C. A. 145, failing to wait until a passing train which obstructed the view of an approaching train had passed sufficiently far to clear the view and then looking before attempting to cross.

See 41 Cent. Dig. tit. "Railroads," § 1063.

6. Benson *v.* Chicago, etc., R. Co., 41 Ill. App. 227.

7. Fletcher *v.* Fitchburg R. Co., 149 Mass. 127, 21 N. E. 302, 3 L. R. A. 743.

8. *Illinois.*— Wabash R. Co. *v.* Smith, 162 Ill. 583, 44 N. E. 856, holding that evidence that deceased waited on one side of a track at a public crossing until a train had passed, his view of the opposite track in the immediate vicinity being obstructed by such train and by a building, and then started to cross when a train coming from the opposite direction on the other track and approaching at a greater speed than allowed by ordinance, struck and killed him, is sufficient to justify a finding that deceased was free from contributory negligence.

Iowa.— Funston *v.* Chicago, etc., R. Co., 61 Iowa 452, 16 N. W. 518, holding that where plaintiff undertook to cross immediately after the passing of a train, following the team of a person ahead, and was struck by a train running wild which gave no signals, and which was completely hidden from the highway by obstructions left there by defendant, the usual intervals between trains being not less than a mile, he was not guilty of negligence in failing to stop and look and listen.

New York.— Carr *v.* New York Cent., etc., R. Co., 60 N. Y. 633; Crone *v.* New York Cent., etc., R. Co., 20 N. Y. Suppl. 529 [*affirmed* in 141 N. Y. 604, 36 N. E. 740].

Tennessee.— Iron Mountain R. Co. *v.* Dies, 98 Tenn. 655, 41 S. W. 860.

Texas.—International, etc., R. Co. *v.* Knight, (Civ. App. 1899) 52 S. W. 640; International, etc., R. Co. *v.* Sein, 11 Tex. Civ. App. 386, 33 S. W. 558.

See 41 Cent. Dig. tit. "Railroads," § 1063.

9. Lamb *v.* Missouri Pac. R. Co., 147 Mo. 171, 48 S. W. 659, 51 S. W. 81; Stevens *v.* Missouri Pac. R. Co., 67 Mo. App. 356; Fejdowski *v.* Delaware, etc., Canal Co., 12 N. Y. App. Div. 589, 43 N. Y. Suppl. 84; Heaney *v.* Long Island R. Co., 9 N. Y. St. 707; Williamsport, etc., R. Co. *v.* Weiss, 2 Walk. (Pa.) 217, holding that a man who stops at a railroad crossing where the view is obstructed and waits until an engine and some cars have passed and then, not hearing anything, drives on and is struck by cars which have become detached from the train is not necessarily guilty of contributory negligence. And see *infra*, X, F, 14, g, (XI), (D), (8), (e).

10. Leonard *v.* New York Cent., etc., R. Co., 42 N. Y. Super. Ct. 225.

11. Leonard *v.* New York Cent., etc., R. Co., 42 N. Y. Super. Ct. 225.

12. Leonard *v.* New York Cent., etc., R. Co., 42 N. Y. Super. Ct. 225.

13. Leonard *v.* New York Cent., etc., R. Co., 42 N. Y. Super. Ct. 225.

14. Leonard *v.* New York Cent., etc., R. Co., 42 N. Y. Super. Ct. 225; Pittsburgh, etc., R. Co. *v.* Peters, 1 Ohio Cir. Ct. 34, 1 Ohio Cir. Dec. 20 [*affirmed* in 17 Cinc. L. Bul. 247]; Muscarro *v.* New York Cent., etc., R. Co., 192 Pa. St. 8, 43 Atl. 527 (holding, however, that whether a noise of another train excuses one for not hearing the one which strikes him at a crossing is a question for the jury); Grand Trunk R. Co. *v.* Hainer, 36 Can. Sup. Ct. 180.

15. Pittsburgh, etc., R. Co. *v.* Peters, 1 Ohio Cir. Ct. 34, 1 Ohio Cir. Dec. 20 [*affirmed*

(H) *Darkness or Stormy Weather.* That the weather is dark or stormy does not excuse a traveler approaching a railroad crossing from looking or listening for approaching trains; and if he fails to exercise ordinary care in this respect, whereby he is injured,[16] as where, notwithstanding the weather is dark and stormy, he fails to look for or see an approaching train or cars which are plainly visible at some distance by reason of a headlight, or other lights or signals thereon,[17] he cannot recover damages, although the railroad company is itself guilty of negligence,[18] as in failing to give the proper signals,[19] or in running at an unlawful rate of speed.[20] Whether or not the traveler is guilty of contributory negligence in such cases is usually a question for the jury depending upon the circumstances of the particular case.[21]

(I) *Smoke, Dust, or Steam.* Where a traveler's view at a railroad crossing is obstructed by dust, smoke, or steam from a passing train or otherwise, it is his duty to wait until his view becomes unobstructed before going upon the tracks; and it is contributory negligence for him to attempt to cross without waiting for the smoke or dust to clear away,[22] or without stopping to listen for approaching

in 17 Cinc. L. Bul. 247]; Baker *v.* Tacoma Eastern R. Co., 44 Wash. 575, 87 Pac. 826; Schmolze *v.* Chicago, etc., R. Co., 83 Wis. 659, 53 N. W. 743, 54 N. W. 106, holding that the fact that the noise made by a steam sawmill running near a railroad track interferes with the hearing of a person walking thereon increases his obligation to look for approaching trains.

16. Butterfield *v.* Western Union R. Corp., 10 Allen (Mass.) 532, 87 Am. Dec. 678 (failure of a traveler upon a highway on a stormy night approaching a railroad track, knowing that a train is about due and that he is near the crossing, to look up to see if the train is coming); Mynning *v.* Detroit, etc., R. Co., 64 Mich. 93, 31 N. W. 147, 8 Am. St. Rep. 804 (holding that a person in full possession of his senses who crosses a railroad track at a crossing with which he is well acquainted on a dark and stormy night without stopping to look or listen is guilty of such contributory negligence as will defeat a recovery); Morrow *v.* North Carolina R. Co., 146 N. C. 14, 59 S. E. 158; Blight *v.* Camden, etc., R. Co., 143 Pa. St. 10, 21 Atl. 995 (holding a traveler who approaches a railroad crossing on a rainy afternoon carrying an umbrella without looking and listening before going on the track, where an engine could have been seen two or three blocks off, is guilty of contributory negligence).

17. *Iowa.*— Bloomfield *v.* Burlington, etc., R. Co., 74 Iowa 607, 38 N. W. 431; Starry *v.* Dubuque, etc., R. Co., 51 Iowa 419, 1 N. W. 605, verdict directed for defendant.

Michigan.— Kwiotkowski *v.* Chicago, etc., R. Co., 70 Mich. 549, 38 N. W. 463, verdict properly directed for defendant.

Minnesota.— Brown *v.* Milwaukee, etc., R. Co., 22 Minn. 165, verdict directed for defendant.

New York.— Tolman *v.* Syracuse, etc., R. Co., 98 N. Y. 198, 50 Am. Rep. 649 [*reversing* 31 Hun 397] (nonsuit held proper); Howard *v.* Northern Cent. R. Co., 1 N. Y. Suppl. 528 (nonsuit); Whalen *v.* New York Cent., etc., R. Co., 15 N. Y. Suppl. 941 [*affirming* 58 Hun 431, 12 N. Y. Suppl. 527].

Wisconsin.— Steinhofel *v.* Chicago, etc., R. Co., 92 Wis. 123, 65 N. W. 852; Haetsch *v.* Chicago, etc., R. Co., 87 Wis. 304, 58 N. W. 393.

Canada.— See Grand Trunk R. Co. *v.* Hainer, 36 Can. Sup. Ct. 180.

See 41 Cent. Dig. tit. "Railroads," § 1065.

18. Mynning *v.* Detroit, etc., R. Co., 64 Mich. 93, 31 N. W. 147, 8 Am. St. Rep. 804.

19. Butterfield *v.* Western Union R. Corp., 10 Allen (Mass.) 532, 87 Am. Dec. 678; Steinhofel *v.* Chicago, etc., R. Co., 92 Wis. 123, 65 N. W. 852.

20. Kwiotskowski *v.* Chicago, etc., R. Co., 70 Mich. 549, 38 N. W. 463.

21. Harper *v.* Barnard, 99 Iowa 159, 68 N. W. 599 (circumstances held sufficient to warrant a finding that the traveler was not negligent); Muscarro *v.* New York Cent., etc., R. Co., 192 Pa. St. 8, 23 Atl. 527; Pennsylvania R. Co. *v.* Miller, 99 Fed. 529, 39 C. C. A. 642 (holding that where plaintiff was struck by a train while driving across a railroad track in the night-time during a storm of rain and sleet, the question whether he was negligent in failing to see the train is properly left to the jury, although there is evidence that in the daytime under ordinary circumstances an approaching train could be seen for a considerable distance). And see *infra*, X, F, 14, g, (XI), (D), (8), (g).

22. *Illinois.*— Chicago, etc., R. Co. *v.* Hansen, 166 Ill. 623, 46 N. E. 1071.

Indiana.— Oleson *v.* Lake Shore, etc., R. Co., 143 Ind. 405, 42 N. E. 736, 32 L. R. A. 149.

Kansas.— Chicago, etc., R. Co. *v.* Fisher, 49 Kan. 460, 30 Pac. 462.

New Jersey.— West Jersey R. Co. *v.* Ewan, 55 N. J. L. 574, 27 Atl. 1064, nonsuit proper.

New York.— Heaney *v.* Long Island R. Co., 112 N. Y. 122, 19 N. E. 422 [*reversing* 9 N. Y. St. 707] (as a matter of law); Vahue *v.* New York Cent., etc., R. Co., 18 N. Y. App. Div. 452, 46 N. Y. Suppl. 359 (nonsuit proper); Manley *v.* New York Cent., etc., R. Co., 18 N. Y. App. Div. 420, 45 N. Y. Suppl.

trains,[23] particularly where the traveler is familiar with the crossing and knows that trains frequently pass and are likely to pass at any moment.[24] It has been held, however, that a failure to wait until the smoke and dust have cleared away is not negligence as a matter of law.[25]

(J) *Standing Cars.* Where the view of a traveler is obstructed by standing cars, he is negligent if he attempts to cross without exercising proper care in looking and listening, or if necessary, in stopping to look and listen for an approaching train as soon as it can be seen,[26] as immediately after passing the standing cars which obstruct his view,[27] although the question whether or not he is so negligent depends upon the circumstances of the particular case and is usually for the jury.[28]

(K) *Covering Head or Muffling Ears.* If the obstruction to a traveler's sight

1108 (nonsuit); Lortz *v.* New York Cent., etc., R. Co., 83 Hun 271, 31 N. Y. Suppl. 1033; Foran *v.* New York Cent., etc., R. Co., 64 Hun 510, 19 N. Y. Suppl. 417 [*affirmed* in 147 N. Y. 718, 42 N. E. 722] (holding that where one drives on a railroad crossing when the smoke which has suddenly descended from a neighboring factory obscures the view which he would otherwise have of an approaching train, he cannot recover for injuries from a collision with the train); McNamara *v.* New York Cent., etc., R. Co., 19 N. Y. Suppl. 497 (nonsuit); Whalen *v.* New York Cent., etc., R. Co., 15 N. Y. Suppl. 941 [*affirming* 58 Hun 431, 12 N. Y. Suppl. 527].

Ohio.— Baltimore, etc., R. Co. *v.* McClellan, 69 Ohio St. 142, 68 N. E. 816 (verdict for defendant directed); Pittsburgh, etc., R. Co. *v.* Peters, 1 Ohio Cir. Ct. 34, 1 Ohio Cir. Dec. 20 [*affirmed* in 17 Wkly. L. Bul. 247] (holding that such conditions impose greater care on the traveler to use his senses to ascertain whether a train is approaching).

Pennsylvania.— Hovenden *v.* Pennsylvania R. Co., 180 Pa. St. 244, 36 Atl. 731 [*affirming* 13 Montg. Co. Rep. 9] (nonsuit proper); Beynon *v.* Pennsylvania R. Co., 168 Pa. St. 642, 32 Atl. 84 [*affirming* 3 Pa. Dist. 308] (holding that a traveler who attempts to cross without waiting for the smoke to rise cannot recover for his injuries, although the train is running forty miles an hour without warning or headlight, it being at dusk).

Washington.— Baker *v.* Tacoma Eastern R. Co., 44 Wash. 575, 87 Pac. 826, contributory negligence as a matter of law.

United States.— McCrory *v.* Chicago, etc., R. Co., 31 Fed. 531, nonsuit.

See 41 Cent. Dig. tit. "Railroads," § 1066.

23. Flemming *v.* Western Pac. R. Co., 49 Cal. 253.

24. Oleson *v.* Lake Shore, etc., R. Co., 143 Ind. 435, 42 N. E. 736, 32 L. R. A. 149; Chicago, etc., R. Co. *v.* Fisher, 49 Kan. 460, 30 Pac. 462.

25. Chicago, etc., R. Co. *v.* Hansen, 166 Ill. 623, 46 N. E. 1071.

26. Gulf, etc., R. Co. *v.* Younger, (Tex. Civ. App. 1897) 40 S. W. 423, holding that, notwithstanding the presence of box cars on a side-track obstructing the view of one approaching the crossing, such person cannot recover for a collision if his failure to look for a train as soon as he could have seen one was a want of ordinary care under the circumstances and contributed to the accident.

27. *Arkansas.*— St. Louis, etc., R. Co. *v.* Hitt, 76 Ark. 227, 88 S. W. 908, 990; Little Rock, etc., R. Co. *v.* Cullen, 54 Ark. 431, 16 S. W. 169.

Georgia.— Ashworth *v.* East Tennessee, etc., R. Co., 97 Ga. 306, 23 S. E. 86.

Michigan.— Lau *v.* Lake Shore, etc., R. Co., 120 Mich. 115, 79 N. W. 13, failure of bicycle rider to alight, and look and listen.

Minnesota.— Weyl *v.* Chicago, etc., R. Co., 40 Minn. 350, 42 N. W. 24, failure to see train, although having opportunity to do so after passing cars.

Missouri.— Harlan *v.* St. Louis, etc., R. Co., 64 Mo. 480.

North Carolina.— Daily *v.* Richmond, etc., R. Co., 106 N. C. 301, 11 S. E. 320, verdict directed for defendant, where plaintiff did not stop or look up after passing cars, although there was a clear space before reaching track.

Pennsylvania.— Mankewicz *v.* Lehigh Valley R. Co., 214 Pa. St. 386, 63 Atl. 604 [*affirming* 31 Pa. Co. Ct. 565]; Keppleman *v.* Philadelphia, etc., R. Co., 190 Pa. St. 333, 42 Atl. 697 (without stopping and looking); Damikas *v.* Standard Steel Car Co., 15 Pa. Dist. 719.

United States.— Hines *v.* Texas, etc., R. Co., 119 Fed. 157, 55 C. C. A. 654, negligence as a matter of law.

See 41 Cent. Dig. tit. "Railroads," § 1067.

28. White *v.* Southern Pac. Co., 122 Cal. 305, 54 Pac. 956; Louisville, etc., R. Co. *v.* Patchen, 167 Ill. 204, 613, 47 N. E. 368, 828 [*affirming* 66 Ill. App. 206] (holding that it is not error to refuse to charge that if there were on side-tracks cars which obstructed the view of an approaching train, such fact imposed on deceased the duty of exercising higher care and that if he failed to do so plaintiff cannot recover, since the question of deceased's negligence is for the jury); Cleveland, etc., R. Co. *v.* Penketh, 27 Ind. App. 210, 60 N. E. 1095 (holding that a bicycle rider whose view is obstructed by standing cars is not guilty of contributory negligence as a matter of law, in failing to stop and alight); Haupt *v.* New York Cent., etc., R. Co., 20 Misc. (N. Y.) 291, 45 N. Y. Suppl. 666 [*reversing* 18 Misc. 594, 42 N. Y. Suppl. 477]. And see *infra*, X, F, 14, g, (XI), (D), (8), (g).

or hearing is caused by coverings or mufflers over his head or ears, his duty of looking or listening for approaching trains is proportionately increased; and if he fails to exercise ordinary care under the circumstances in looking or listening,[29] particularly where there is an opportunity to see or hear the approaching train,[30] he cannot recover damages, although the railroad company is negligent in failing to give the proper signals,[31] or in running at an unlawful rate of speed.[32]

(L) *Riding in Covered Vehicle.* That one is traveling in a covered vehicle which interferes with his sight or hearing does not excuse him from looking or listening for approaching trains, but rather increases his duty in this respect; and if in such a case he fails to exercise ordinary care in the use of his senses to ascertain an approaching train, he is guilty of contributory negligence,[33] as where he drives on the crossing at a rapid rate of speed without looking or listening

Circumstances not showing contributory negligence as to looking and listening when passing standing cars see Pittsburgh, etc., R. Co. *v.* Burton, 139 Ind. 357, 37 N. E. 150, 38 N. E. 594; Cincinnati, etc., R. Co. *v.* Grames, 8 Ind. App. 112, 34 N. E. 613, 37 N. E. 421; Van Nostrand *v.* Long Island R. Co., 51 N. Y. App. Div. 608, 64 N. Y. Suppl. 77 (obeying instructions of fellow workman stationed to look and listen); Ingersoll *v.* New York Cent., etc., R. Co., 4 Hun (N. Y.) 277, 6 Thomps. & C. 416 [*affirmed* in 66 N. Y. 612]; Houston, etc., R. Co. *v.* Byrd, (Tex. Civ. App. 1901) 61 S. W. 147; Houston, etc., R. Co. *v.* Pereira, (Tex. Civ. App. 1898) 45 S. W. 767 (holding that driving upon the track at a slow gallop while talking and laughing with companions and failing to stop before driving upon the track does not necessarily constitute contributory negligence); Northern Pac. R. Co. *v.* Holmes, 3 Wash. Terr. 202, 543, 14 Pac. 688, 18 Pac. 76 (holding that a failure to stop, look, and listen before crossing, where the traveler's view is partly obstructed by the cars, is not in itself such contributory negligence as will take the case from the jury).

29. *Illinois.*— Chicago, etc., R. Co. *v.* Barber, 15 Ill. App. 630, failing to look where ears are covered.

New York.— Nicholson *v.* Erie R. Co., 41 N. Y. 525, holding that one familiar with the locality is guilty of negligence in approaching and stopping upon a track during a high wind with his hat over his face and without looking in the direction from which he is struck.

Pennsylvania.— Hanover R. Co. *v.* Coyle, 55 Pa. St. 396, holding that a failure of a muffled traveler to look out or stop at a place where one could not see up and down the track until within sixteen feet of it is negligence.

Wisconsin.— Phillips *v.* Milwaukee, etc., R. Co., 77 Wis. 349, 46 N. W. 543, 9 L. R. A. 521 (holding, however, that where the day was cold and stormy and the traveler had a shawl about his head and had already passed several cars going in the opposite direction from those that struck him, and had no reason to suppose that they would return so shortly on another track, the jury was justified in finding that he was not in want of ordinary care when he undertook to cross the track); Gunn *v.* Wisconsin, etc., R. Co., 70 Wis. 203, 35 N. W. 281 (holding that a muffled driver is guilty of gross contributory negligence in driving on a crossing with his back turned in the direction of the most dangerous approach to the crossing).

United States.— Shatto *v.* Erie R. Co., 121 Fed. 678, 59 C. C. A. 1, holding that a failure to stop where the traveler's ears are covered up and his view is obstructed is contributory negligence as a matter of law.

See 41 Cent. Dig. tit. "Railroads," § 1068.

30. Blaker *v.* New Jersey Midland R. Co., 30 N. J. Eq. 240; Salter *v.* Utica, etc., R. Co., 75 N. Y. 273 [*reversing* 13 Hun 187] (holding that it is contributory negligence for one with his ears covered up to fail to look until too late, where with uncovered ears he could have heard the rumbling of a train twelve hundred feet distant); Texas, etc., R. Co. *v.* Fuller, 5 Tex. Civ. App. 660, 24 S. W. 1090 (failure to look for approaching engine in plain view for one half a mile where the traveler's ears are covered up).

31. Texas, etc., R. Co. *v.* Fuller, 5 Tex. Civ. App. 660, 24 S. W. 1090.

32. Texas, etc., R. Co. *v.* Fuller, 5 Tex. Civ. App. 660, 24 S. W. 1090.

33. Smith *v.* Maine Cent. R. Co., 87 Me. 329, 32 Atl. 967 (holding that it is contributory negligence for one while driving in a covered wagon on a rainy evening to fail to stop to look and listen); Brickell *v.* New York Cent., etc., R. Co., 120 N. Y. 290, 24 N. E. 449, 17 Am. St. Rep. 648 [*affirming* 12 N. Y. St. 450]; Whalen *v.* New York Cent., etc., R. Co., 58 Hun (N. Y.) 431, 12 N. Y. Suppl. 527 [*affirmed* in 15 N. Y. Suppl. 941] (failure to stop before crossing or to make some effort to see otherwise than straight ahead); Glendening *v.* Sharp, 22 Hun (N. Y.) 78 (nonsuit proper); New York, etc., R. Co. *v.* Kellam, 83 Va. 851, 3 S. E. 703 (holding that where the traveler neglected to look out from his covered carriage until the horse was on the track, an instruction that no failure on the part of the railroad company to do its duty could excuse the failure of such traveler to use his sense of sight and hearing, is proper); Nash *v.* Richmond, etc., R. Co., 82 Va. 55; Work *v.* Chicago, etc., R. Co., 105 Fed. 874, 45 C. C. A. 101.

Failure to let down a buggy top before starting up after stopping at a sign-board of a railroad crossing and looking both ways for trains is not negligence as a matter of law. Stakus *v.* New York Cent., etc., R. Co., 79 N. Y. 464.

for approaching trains.[34] This rule is especially applicable where the traveler in such vehicle is familiar with the crossing and with the running of trains thereat,[35] and there is an opportunity to see or hear an approaching train in time to stop in a place of safety.[36]

e. Reliance Upon Precautions of Railroad Company — (I) *In General.* As a general rule a traveler approaching a railroad crossing in the exercise of ordinary care is not bound to anticipate negligence on the part of the railroad company;[37] but on the other hand he has a right to assume that the company will operate its road or trains with the care and vigilance required by law or custom,[38] unless the circumstances indicate that it will not do so.[39] This right, however, is not an unqualified one; and if the traveler goes upon the crossing without taking proper precautions under ordinary circumstances, the fact that he relies upon the usual or proper precautions on the part of the railroad company will not excuse him,[40] as where he fails to exercise ordinary care and prudence in looking and listening for an approaching train in reliance upon a custom of the company to side-track its trains at that point,[41] or in reliance upon the usual custom of the company as to the order of running its trains.[42]

34. Keesey *v.* Lake Erie, etc., R. Co., 104 Ill. App. 619; Terre Haute, etc., R. Co. *v.* Clark, 73 Ind. 168. And see *supra*, X, F, 10, d, (II), (E).

35. Swanger *v.* Chicago, etc., R. Co., 132 Iowa 32, 109 N. W. 308 (contributory negligence as a matter of law); Rheiner *v.* Chicago, etc., R. Co., 36 Minn. 170, 30 N. W. 548; Allen *v.* New York Cent., etc., R. Co., 92 Hun (N. Y.) 589, 36 N. Y. Suppl. 624; Horn *v.* Baltimore, etc., R. Co., 54 Fed. 301, 4 C. C. A. 346.

36. Allen *v.* Maine Cent. R. Co., 82 Me. 111, 19 Atl. 105; Rheiner *v.* Chicago, etc., R. Co., 36 Minn. 170, 30 N. W. 548; Brickell *v.* New York Cent., etc., R. Co., 120 N. Y. 290, 24 N. E. 449, 17 Am. St. Rep. 648 [*affirming* 12 N. Y. St. 450]; Allen *v.* New York Cent., etc., R. Co., 92 Hun (N. Y.) 589, 36 N. Y. Suppl. 624; Glendening *v.* Sharp, 22 Hun (N. Y.) 78; Work *v.* Chicago, etc., R. Co., 105 Fed. 874, 45 C. C. A. 101.

37. Atlanta, etc., R. Co. *v.* Lovelace, 121 Ga. 487, 49 S. E. 607; O'Connor *v.* Missouri Pac. R. Co., 94 Mo. 150, 7 S. W. 106, 4 Am. St. Rep. 364 (holding that a traveler must use his eyes and ears as an ordinarily prudent person, but is not bound to anticipate an act of negligence on the part of the railroad company); Lang *v.* Missouri Pac. R. Co., 115 Mo. App. 489, 91 S. W. 1012.

38. *Alabama.*— Birmingham Southern R. Co. *v.* Powell, 136 Ala. 232, 33 So. 875.

Illinois.— Chicago, etc., R. Co. *v.* Pulliam, 111 Ill. App. 305 [*affirmed* in 208 Ill. 456, 70 N. E. 460]; Chicago, etc., R. Co. *v.* Kelly, 80 Ill. App. 675. *Compare* Illinois Cent. R. Co. *v.* Batson, 69 Ill. App. 233.

Missouri.— Lang *v.* Missouri Pac. R. Co., 115 Mo. App. 489, 91 S. W. 1012.

Nebraska.— Schwanenfeldt *v.* Chicago, etc., R. Co., (1908) 115 N. W. 285.

New York.— Cranch *v.* Brooklyn Heights R. Co., 107 N. Y. App. Div. 341, 95 N. Y. Suppl. 169.

Ohio.— Wheeling, etc., R. Co. *v.* Parker, 29 Ohio Cir. Ct. 1; Baltimore, etc., R. Co. *v.* Van Horn, 21 Ohio Cir. Ct. 337, 12 Ohio Cir. Dec. 106; Watson *v.* Erie R. Co., 10 Ohio S. & C. Pl. Dec. 454, 8 Ohio N. P. 18.

Texas.— International, etc., R. Co. *v.* Mitchell, (Civ. App. 1901) 60 S. W. 996.

Washington.— Steele *v.* Northern Pac. R. Co., 21 Wash. 287, 57 Pac. 820, holding that a railway company cannot impute a want of vigilance to one injured by it, if that want of vigilance is in consequence of an omission of its duty.

United States.— Wabash, etc., R. Co. *v.* Central Trust Co., 23 Fed. 738.

Where a railroad company expressly or impliedly invites a drayman engaged in unloading a car to use a certain crossing, the drayman is under no obligation to exercise ordinary care in selecting a crossing; he having a right, in the absence of knowledge to the contrary, to assume that the company has made the crossing reasonably safe. Cowans *v.* Ft. Worth, etc., R. Co., 40 Tex. Civ. App. 539, 89 S. W. 1116.

Where view is obstructed.—A person approaching a private crossing where the view is obstructed by cars standing on a side-track has a right to assume that the railroad company will use more than ordinary care in approaching the crossing. Thomas *v.* Delaware, etc., R. Co., 8 Fed. 729, 19 Blatchf. 533.

39. Birmingham Southern R. Co. *v.* Powell, 136 Ala. 232, 33 So. 875.

40. *California.*— Hutson *v.* Southern California R. Co., 150 Cal. 701, 89 Pac. 1093.

Louisiana.— White *v.* Vicksburg, etc., R. Co., 42 La. Ann. 990, 8 S. W. 475.

Massachusetts.— Walsh *v.* Boston, etc., R. Co., 171 Mass. 52, 50 N. E. 453, holding that negligence on the part of the servants of a railroad corporation will not excuse negligence on the part of the person injured by the corporation.

Ohio.— Watson *v.* Erie R. Co., 10 Ohio S. & C. Pl. Dec. 454, 8 Ohio N. P. 18.

Virginia.— Smith *v.* Norfolk, etc., R. Co., 107 Va. 725, 60 S. E. 56.

United States.— Wabash, etc., R. Co. *v.* Central Trust Co., 23 Fed. 738.

41. Rich *v.* Evansville, etc., R. Co., 31 Ind. App. 10, 66 N. E. 1028.

42. Nixon *v.* Chicago, etc., R. Co., 84 Iowa

(II) *SIGNALS, FLAGMEN, AND GATES AT CROSSINGS.* Where a railroad company maintains a flagman, gates, or other signals or warnings at a railroad crossing whether voluntarily,[43] or by law or custom, the public generally has a right to presume that these safeguards will be reasonably maintained and attended,[44] and in the absence of knowledge to the contrary,[45] the fact that the gates are open,[46] or automatic bells not ringing,[47] or that the flagmen is absent from his post or if present is not giving a warning of danger,[48] is an assurance of safety and an implied invitation to cross upon which a traveler familiar with the crossing may rely and act within reasonable limits, on the presumption that it is safe for him to go on the crossing. The extent to which a traveler may rely

331, 51 N. W. 157; Bush *v.* Union Pac. R. Co., 62 Kan. 709, 64 Pac. 624, holding that one who is familiar with and relies on a rule of the company which prohibits trains from following one another within ten minutes is guilty of contributory negligence in going on the track without looking and listening for an approaching train, although the train which causes the injury is "a wild train," and following the preceding one within one or two minutes.

43. Dolph *v.* New York, etc., R. Co., 74 Conn. 538, 51 Atl. 525; Martin *v.* Baltimore, etc., R. Co., 2 Marv. (Del.) 123, 42 Atl. 442.

44. Chicago, etc., R. Co. *v.* Blaul, 175 Ill. 183, 51 N. E. 895 [*affirming* 70 Ill. App. 518]; Chicago, etc., R. Co. *v.* Clough, 134 Ill. 586, 25 N. E. 664, 29 N. E. 184; Chicago, etc., R. Co. *v.* Wright, 120 Ill. App. 218; Pittsburg, etc., R. Co. *v.* Smith, 110 Ill. App. 154 [*reversed* on other grounds in 207 Ill. 486, 69 N. E. 873], holding that it is the flagman's duty to know of the approach of trains and to give timely warning to all persons attempting to cross the railroad tracks and that the public have a right to rely upon a reasonable performance of that duty.

45. Chicago, etc., R. Co. *v.* Blaul, 175 Ill. 183, 51 N. E. 895 [*affirming* 70 Ill. App. 518]; Sights *v.* Louisville, etc., R. Co., 117 Ky. 436, 78 S. W. 172, 25 Ky. L. Rep. 1548.

46. *Illinois.*— Chicago, etc., R. Co. *v.* Redmond, 70 Ill. App. 119; Pennsylvania Co. *v.* Swan, 37 Ill. App. 83.

Indiana.— Pennsylvania Co. *v.* Stegemeier, 118 Ind. 305, 20 N. E. 843, 10 Am. St. Rep. 136; Indianapolis Union R. Co. *v.* Neubaucher, 16 Ind. App. 21, 23 N. E. 476, 44 N. E. 669.

Kentucky.— Sights *v.* Louisville, etc., R. Co., 117 Ky. 436, 78 S. W. 172, 25 Ky. L. Rep. 1548.

Minnesota.— Stegner *v.* Chicago, etc., R. Co., 94 Minn. 166, 102 N. W. 205; Woehrle *v.* Minnesota Transfer R. Co., 82 Minn. 165, 84 N. W. 791, 52 L. R. A. 348.

New York.— Kane *v* New York, etc., R. Co., 132 N. Y. 160, 30 N. E. 256 [*affirming* 9 N. Y. Suppl. 879]; Oldenburg *v.* New York Cent., etc., R. Co., 124 N. Y. 414, 26 N. E. 1021 [*affirming* 9 N. Y. Suppl. 419, 11 N. Y. Suppl. 689]; Lindeman *v.* New York Cent., etc., R. Co., 11 N. Y. St. 837; Fitzgerald *v.* Long Island R. Co., 10 N. Y. St. 433.

Ohio.— Cleveland, etc., R. Co. *v.* Schneider, 45 Ohio St. 678, 17 N. E. 321.

Pennsylvania.— Conway *v.* Philadelphia, etc., R. Co., 17 Phila. 71.

Texas.— San Antonio, etc., R. Co. *v.* Votaw, (Civ. App. 1904) 81 S. W. 130.

See 41 Cent. Dig. tit. "Railroads," § 1072.

47. Cleveland, etc., R. Co. *v.* Heine, 28 Ind. App. 163, 62 N. E. 455.

48. *Connecticut.*— Dolph *v.* New York, etc., R. Co., 74 Conn. 538, 51 Atl. 525.

Delaware.— Martin *v.* Baltimore, etc., R. Co., 2 Marv. 123, 42 Atl. 442.

Illinois.— Chicago, etc., R. Co. *v.* Blaul, 175 Ill. 183, 51 N. E. 895 [*affirming* 70 Ill. App. 518]; Chicago Junction R. Co. *v.* McAnrow, 114 Ill. App. 501, holding that where the flagman is at his post with his flag in his hand a traveler approaching a crossing has the right to rely upon the presence of such flagman and his failure to warn him of an approaching train as a notice to him that no train is close at hand and as an invitation to make the crossing so far as an approaching train is concerned.

Indiana.— Pennsylvania Co. *v.* Stegemeier, 118 Ind. 305, 20 N. E. 843, 10 Am. St. Rep. 136.

Kentucky.— Sights *v.* Louisville, etc., R. Co., 117 Ky. 436, 78 S. W. 172, 25 Ky. L. Rep. 1548.

Massachusetts.— Robbins *v.* Fitchburg R. Co., 161 Mass. 145, 36 N. E. 752, holding that one is not guilty of contributory negligence as a matter of law in going upon a railroad crossing if he sees as he approaches the crossing a flagman whom he knows to be stationed there, standing at the crossing without a flag.

Minnesota.— Woehrle *v.* Minnesota Transfer R. Co., 82 Minn. 165, 84 N. W. 791, 52 L. R. A. 348.

Missouri.— McNamara *v.* Chicago, etc., R. Co., 126 Mo. App. 152, 103 S. W. 1093.

New Jersey.— Berry *v.* Pennsylvania R. Co., 48 N. J. L. 141, 4 Atl. 303.

New York.— Leonard *v.* New York Cent., etc., R. Co., 42 N. Y. Super. Ct. 225; Manley *v.* New York Cent., etc., R. Co., 18 Misc. 502, 42 N. Y. Suppl. 1076. But see McGrath *v.* New York Cent., etc., R. Co., 59 N. Y. 468, 17 Am. Rep. 359.

Ohio.— Lake Shore, etc., R. Co. *v.* Johnston, 25 Ohio Cir. Ct. 41, holding that where a person approaches a crossing after the watchman at that point has gone off duty and is misled by the absence of signals or warnings from the watchman whom he believes to be still stationed at the crossing and omits the exercise of extraordinary vigilance before at-

on such assurance is a question of fact,[49] and while ordinarily the same degree of care and vigilance is not required of a traveler under such circumstances as otherwise,[50] he has no right to rely exclusively upon such circumstances,[51] nor will such presumption or assurance excuse the traveler from using every reasonable precaution that an ordinarily prudent man would use under like circumstances.[52] Such facts as the absence or presence of a flagman, or that the gates are open,[53] or that the automatic bells are ringing or not ringing,[54] are merely facts to be considered in determining whether the traveler exercises the

tempting to cross, he is not for that reason guilty of contributory negligence.

See 41 Cent. Dig. tit. "Railroads," § 1072.

49. *Arkansas.*— St. Louis, etc., R. Co. *v.* Amos, 54 Ark. 159, 15 S. W. 362.

Illinois.— Illinois Cent. R. Co. *v.* Lindgren, 80 Ill. App. 609.

Iowa.— Spencer *v.* Illinois Cent. R. Co., 29 Iowa 55, holding that a flagman's signal or other indications from the movements of the passers in the thoroughfare may be sufficient to justify an attempt to cross without stopping to look and listen.

Massachusetts.— Walsh *v.* Boston, etc., R. Co., 171 Mass. 52, 50 N. E. 453; Tilton *v.* Boston, etc., R. Co., 169 Mass. 253, 47 N. E. 998.

Minnesota.— Woehrle *v.* Minnesota Transfer R. Co., 82 Minn. 165, 84 N. W. 791, 52 L. R. A. 348.

Missouri.— O'Keefe *v.* St. Louis, etc., R. Co., 108 Mo. App. 177, 83 S. W. 308, holding that where a traveler, after looking and seeing the gates up and motionless and no train in sight and hearing no bell rung attempts to cross and is struck by the gates being lowered, he is not guilty of contributory negligence as a matter of law.

Ohio.— Cincinnati, etc., R. Co. *v.* Taylor, 27 Ohio Cir. Ct. 757.

Pennsylvania.— Fennell *v.* Harris, 184 Pa. St. 578, 39 Atl. 491.

See 41 Cent. Dig. tit. "Railroads," § 1072; and *infra*, X, F, 14, g, (XI), (E).

50. Kane *v.* New York, etc., R. Co., 132 N. Y. 160, 30 N. E. 256 [*affirming* 9 N. Y. Suppl. 879]; Rangeley *v.* Southern R. Co., 95 Va. 715, 30 S. E. 386.

51. Smith *v.* Wabash R. Co., 141 Ind. 92, 40 N. E. 270 (holding that one approaching a railroad crossing has no right to rely for his protection solely on the custom of the company to have a flagman at the crossing); Woehrle *v.* Minnesota Transfer R. Co., 82 Minn. 165, 84 N. W. 791, 52 L. R. A. 348.

52. *Delaware.*— Martin *v.* Baltimore, etc., R. Co., 2 Marv. 123, 42 Atl. 442.

Illinois.— Wabash R. Co. *v.* Smillie, 97 Ill. App. 7, holding that the mere fact that a flagman is kept by a railroad company at a crossing in a city will not alone excuse the want of ordinary care in other respects by a person about to pass over the track if the circumstances are such that an ordinary person would naturally use his senses of sight and hearing to observe other indications of the approach of a train in the absence of signals by the flagman.

Indiana.— Pennsylvania Co. *v.* Stegemeier, 118 Ind. 305, 20 N. E. 843, 10 Am. St. Rep. 136.

Ohio.— Cincinnati, etc., R. Co. *v.* Levy, 28 Ohio Cir. Ct. 23.

Virginia.— Rangeley *v.* Southern R. Co., 95 Va. 715, 30 S. E. 386.

See 41 Cent. Dig. tit. "Railroads," § 1072.

Descending gates.— Where a traveler in a buggy at a railroad crossing has passed over the track and one arm of the gate in front of him is allowed by the gate-keeper to descend across the buggy, the fact of his contributory negligence should be confined to the care exercised by him to avoid the injury at and after the time when the gate arm began to descend. Sager *v.* Atchison, etc., R. Co., 70 Kan. 504, 79 Pac. 132.

53. *District of Columbia.*— Baltimore, etc., R. Co. *v.* Carrington, 3 App. Cas. 101.

Indiana.— Pennsylvania Co. *v.* Stegemeier, 118 Ind. 305, 20 N. E. 843, 10 Am. St. Rep. 136.

Kentucky.— Louisville Bridge Co. *v.* Moroney, 106 S. W. 870, 32 Ky. L. Rep. 705.

Maine.— Hooper *v.* Boston, etc., R. Co., 81 Me. 260, 17 Atl. 64; State *v.* Boston, etc., R. Co., 80 Me. 430, 15 Atl. 36.

Maryland.— Baltimore, etc., R. Co. *v.* Stumpf, 97 Md. 78, 54 Atl. 978.

Massachusetts.— Ellis *v.* Boston, etc., R. Co., 169 Mass. 600, 48 N. E. 839; Conaty *v.* New York, etc., R. Co., 164 Mass. 572, 42 N. E. 103.

Minnesota.— Stegner *v.* Chicago, etc., R. Co., 94 Minn. 166, 102 N. W. 205.

Missouri.— O'Keefe *v.* St. Louis, etc., R. Co., 108 Mo. App. 177, 83 S. W. 308.

New Jersey.— Shafer *v.* Lehigh Valley R. Co., (Sup. 1907) 66 Atl. 1072.

New York.— Scaggs *v.* Delaware, etc., Canal Co., 145 N. Y. 201, 39 N. E. 716; Kane *v.* New York, etc., R. Co., 132 N. Y. 160, 30 N. E. 256 [*affirming* 9 N. Y. Suppl. 879].

Pennsylvania.— Roberts *v.* Delaware, etc., Canal Co., 177 Pa. St. 183, 35 Atl. 723; Lake Shore, etc., R. Co. *v.* Frantz, 127 Pa. St. 297, 18 Atl. 22, 4 L. R. A. 389.

Virginia.— Rangeley *v.* Southern R. Co., 95 Va. 715, 30 S. E. 386.

See 41 Cent. Dig. tit. "Railroads," § 1072.

That gates were up at another crossing cannot be relied upon as a warning. Harvey *v.* Erie R. Co., 210 Pa. St. 95, 97, 59 Atl. 691, 1119.

54. Cleveland, etc., R. Co. *v.* Heine, 28 Ind. App. 163, 62 N. E. 455; Cincinnati, etc., R. Co. *v.* Champ, 104 S. W. 988, 31 Ky. L. Rep. 1054; Tobias *v.* Michigan Cent. R. Co., 110 Mich. 440, 68 N. W. 254.

degree of care required in attempting to cross. Thus it has been held that the presence of a flagman, gates, or other signals at a crossing and their indication of safety does not relieve a traveler from looking and listening,[55] or stopping, looking, and listening,[56] before crossing, although in some jurisdictions it is held otherwise.[57] Nor will such circumstances excuse a traveler for not avoiding a danger of which he is conscious or which he has an opportunity of avoiding,[58] as where he hears or sees the approaching train and attempts to cross without taking the proper precautions,[59] or where he has notice that the gates are not being operated,[60] or he has only seen a flagman at the crossing occasionally,[61] or where he misinterprets signals given by a flagman stationed at the crossing.[62]

Where the electric warning bell is out of order at the time of the accident, it is error to refuse to charge that if deceased is not aware of the bell's faulty condition, such fact may be considered by the jury as bearing upon the question of his contributory negligence. Tobias *v.* Michigan Cent. R. Co., 110 Mich. 440, 68 N. W. 234.

55. *Iowa.*— Sala *v.* Chicago, etc., R. Co., 85 Iowa 678, 52 N. W. 664.

Kentucky.— Dick *v.* Louisville, etc., R. Co., 64 S. W. 725, 23 Ky. L. Rep. 1068, holding, however, that a failure to look and listen is not negligence *per se* where the railroad company keeps a watchman and gates at the crossing and the gates are up.

Maine.— Romeo *v.* Boston, etc., R. Co., 87 Me. 540, 33 Atl. 24, holding that where a foot traveler's view of the tracks is unobstructed and before attempting to cross he neither looks nor listens, he cannot recover, although gates maintained at the crossing are temporarily in disuse and open.

Maryland.— Northern Cent. R. Co. *v.* State, 100 Md. 404, 60 Atl. 19, 107 Am. St. Rep. 439; Baltimore, etc., R. Co. *v.* Stumpf, 97 Md. 78, 54 Atl. 978, holding, however, that it is negligence as a matter of law to fail to stop as well as to look and listen.

Massachusetts.— Ellis *v.* Boston, etc., R. Co., 169 Mass. 600, 48 N. E. 839; Merrigan *v.* Boston, etc., R. Co., 154 Mass. 189, 28 N. E. 149.

Minnesota.— Schneider *v.* Northern Pac. R. Co., 81 Minn. 383, 84 N. W. 124.

New Jersey.— Shafer *v.* Lehigh Valley R. Co., (Sup. 1907) 66 Atl. 1072; Van Riper *v.* New York, etc., R. Co., 71 N. J. L. 345, 59 Atl. 26; Pennsylvania R. Co. *v.* Pfuelb, 60 N. J. L. 278, 37 Atl. 1100 [*affirmed* in 61 N. J. L. 287, 41 Atl. 1116] (holding that the fact that the flagman at the gates has neglected to let them down before the traveler walks across does not absolve the traveler from the duty of looking and listening); Berry *v.* Pennsylvania R. Co., 48 N. J. L. 141, 4 Atl. 303.

New York.— Palmer *v.* New York Cent., etc., R. Co., 5 N. Y. St. 436 [*affirmed* in 112 N. Y. 234, 19 N. E. 678].

North Carolina.— Hodgin *v.* Southern R. Co., 143 N. C. 93, 55 S. E. 413.

United States.— Union Pac. R. Co. *v.* Rosewater, 157 Fed. 168, 84 C. C. A. 616.

See 41 Cent. Dig. tit. "Railroads," § 1072.

The failure of an automatic gong to ring as usual when the train approaches a crossing will not relieve a traveler from his duty to look and listen if he has opportunity to do so. Conkling *v.* Erie R. Co., 63 N. J. L. 338, 43 Atl. 666.

56. Oldenburg *v.* New York Cent., etc., R. Co., 124 N. Y. 414, 26 N. E. 1021 [*affirming* 9 N. Y. Suppl. 419, 11 N. Y. Suppl. 689]; Greenwood *v.* Philadelphia, etc., R. Co., 124 Pa. St. 572, 17 Atl. 188, 10 Am. St. Rep. 614, 3 L. R. A. 44; Crossman *v.* Pennsylvania, etc., R. Co., 2 Chest. Co. Rep. (Pa.) 350.

57. Chicago, etc., R. Co. *v.* Clough, 134 Ill. 586, 25 N. E. 664, 29 N. E. 184 (holding that where a flagman is stationed at the crossing to give warning of approaching trains, travelers have a right to rely upon the reasonable performance of his duty and need not look and listen before going on the crossing); Cleveland, etc., R Co. *v.* Schneider, 45 Ohio St. 678, 17 N. E. 321 (holding that where the gates are open the traveler need not stop to look and listen); Smith *v.* South Eastern R. Co., [1896] 1 Q. B. 178, 60 J. P. 148, 65 L. J. Q. B. 219, 73 L. T. Rep. N. S. 614, 44 Wkly. Rep. 291 (holding that where a traveler is misled by a gatekeeper's neglect of duty into thinking that no train is coming and that he is justified therefore in paying no attention to whether a train is coming, he is not guilty of want of reasonable care).

58. Chicago, etc., R. Co. *v.* Sutherland, 88 Ill. App. 295; Cadwallader *v.* Louisville, etc., R. Co., 128 Ind. 518, 27 N. E. 161; Lamb *v.* New York Cent., etc., R. Co., 18 N. Y. App. Div. 579, 46 N. Y. Suppl. 404.

59. Chicago, etc., R. Co. *v.* Sutherland, 88 Ill. App. 295; Bjork *v.* Illinois Cent. R. Co., 85 Ill. App. 269; Boutell *v.* Michigan Cent. R. Co., 133 Mich. 486, 95 N. W. 568; Dawe *v.* Flint, etc., R. Co., 102 Mich. 307, 60 N. W. 838. And see *infra*, X, F, 10, g, (II).

60. Stack *v.* New York Cent., etc., R. Co., 96 N. Y. App. Div. 575, 89 N. Y. Suppl. 112; Weed *v.* New York Cent., etc., R. Co., 91 Hun (N. Y.) 293, 36 N. Y. Suppl. 98, holding that one familiar with the locality and having knowledge of the fact that the railroad company is not accustomed to operate its gates between certain hours who crosses the track between those hours cannot rely upon the open gates as an assurance of safety.

61. Whalen *v.* New York Cent., etc., R. Co., 58 Hun (N. Y.) 431, 12 N. Y. Suppl. 527 [*affirmed* in 15 N. Y. Suppl. 941].

62. Crossman *v.* Pennsylvania, etc., R. Co., 2 Chest. Co. Rep. (Pa.) 350.

(III) *LIGHTS AND SIGNALS FROM TRAINS OR CARS.* A person approaching a railroad crossing with ordinary care has, in the absence of some evidence to the contrary, a right to presume that the customary or statutory lights or signals of the approach or movement of trains or cars will be given,[63] such as the sounding of a bell or whistle,[64] or having a headlight or other proper light or signal upon the engine or cars;[65] or that a train or cars standing on or near the crossing will not be moved without the proper signals being given;[66] and if the traveler is misled by the lack of signals,[67] as where having exercised due care and employed his senses of sight and hearing he can neither see nor hear an approaching train, he may presume that he can safely pass over and is not guilty of contributory negligence in attempting to cross upon that assumption.[68] This right, however,

63. *California.*— Robinson *v.* Western Pac. R. Co., 48 Cal. 409.

Illinois.— Cleveland, etc., R. Co. *v.* Bruce, 63 Ill. App. 233. See also Chicago, etc., R. Co. *v.* Robinson, 8 Ill. App. 140 [*reversed* on other grounds in 106 Ill. 142].

Indiana.— Baltimore, etc., R. Co. *v.* Conoyer, 149 Ind. 524, 48 N. E. 352, 49 N. E. 452; Evansville, etc., R. Co. *v.* Marohn, 6 Ind. App. 646, 34 N. E. 27.

Iowa.— Harper *v.* Barnards, 99 Iowa 159, 68 N. W. 599.

Massachusetts.— Lamoureux *v.* New York, etc., R. Co., 169 Mass. 338, 47 N. E. 1009.

Missouri.— Crumpley *v.* Hannibal, etc., R. Co., 111 Mo. 152, 19 S. W. 820; Tabor *v.* Missouri Valley R. Co., 46 Mo. 353, 2 Am. Rep. 517; Kennayde *v.* Pacific R. Co., 45 Mo. 255; Lang *v.* Missouri Pac. R. Co., 115 Mo. App. 489, 91 S. W. 1012.

Nevada.— Bunting *v.* Central Pac. R. Co., 14 Nev. 351, where view is obstructed.

New York.— Ernst *v.* Hudson River R. Co., 35 N. Y. 9, 90 Am. Dec. 761, 3 Abb. Pr. N. S. 82, 32 How. Pr. 61.

Pennsylvania.— Philadelphia, etc., R. Co. *v.* Hagan, 47 Pa. St. 244, 86 Am. Dec. 541.

South Dakota.— Dougherty *v.* Chicago, etc., R. Co., 20 S. D. 46, 104 N. W. 672, holding that one hearing no train because of an omission of the crossing signal and seeing none because of obstructions to view is not guilty of contributory negligence in assuming that no train is near and driving on the track.

Texas.— International, etc., R. Co. *v.* Graves, 59 Tex. 330; Riviere *v.* Missouri, etc., R. Co., (Civ. App. 1897) 40 S. W. 1074.

Virginia.— Smith *v.* Norfolk, etc., R. Co., 107 Va. 725, 60 S. E. 56.

See 41 Cent. Dig. tit. "Railroads," § 1073.

64. Elgin, etc., R. Co. *v.* Hoadley, 220 Ill. 462, 77 N. E. 151 [*affirming* 122 Ill. App. 165]; Chicago, etc., R. Co. *v.* Gunderson, 174 Ill. 495, 51 N. E. 708 [*affirming* 74 Ill. App. 356]; Chicago, etc., R. Co. *v.* Pulliam, 111 Ill. App. 305 [*affirmed* in 208 Ill. 456, 70 N. E. 228]; St. Louis, etc., R. Co. *v.* Rawley, 106 Ill. App. 550; Pittsburgh, etc., R. Co. *v.* McNeil, 34 Ind. App. 310, 69 N. E. 471 (holding that where a city ordinance makes it unlawful for persons managing a train of cars to cause it to be run backward in or through a city without providing a watchman on the rear end thereof, one traveling on a street in the city has a right, in the absence of some warning or evidence to the contrary, to assume that the company will obey the ordinance and cause a bell to be rung to give warning of the movement of the train); Weller *v.* Chicago, etc., R. Co., 164 Mo. 180, 64 S. W. 141, 86 Am. St. Rep. 592; Smith *v.* Boston, etc., R. Co., 70 N. H. 53, 47 Atl. 290, 85 Am. St. rep. 596. And see cases cited *supra*, note 63.

65. Weller *v.* Chicago, etc., R. Co., 164 Mo. 180, 64 S. W. 141, 86 Am. St. Rep. 592; Chicago, etc., R. Co. *v.* Sharp, 63 Fed. 532, 11 C. C. A. 337, holding that a traveler approaching a crossing on a dark night and hearing a locomotive at a considerable distance is not bound to surmise that it may be backing a train of flat cars toward the crossing without lights or signals thereon.

66. See *infra*, X, F, 10, g, (I).

67. Russell *v.* Carolina Cent. R. Co., 118 N. C. 1098, 24 S. E. 512 (holding that the failure to give the usual whistle on approaching a crossing is not only negligence on the part of the railroad company, but relieves one approaching the crossing from the imputation of contributory negligence if by reason thereof he is misled into exposing himself to danger and induced to cross the track believing it safe without stopping to look and listen); Hinkle *v.* Richmond, etc., R. Co., 109 N. C. 472, 13 S. E. 884, 26 Am. St. Rep. 581 (holding that where the person injured would not have ventured upon the track but for the negligence of the engineer in failing to give warning, the railroad company is liable, although such person may have been careless in exposing himself); Schweinfurth *v.* Cleveland, etc., R. Co., 60 Ohio St. 215, 54 N. E. 89; Baltimore, etc., R. Co. *v.* Van Horn, 21 Ohio Cir. Ct. 337, 12 Ohio Cir. Dec. 106; Pennsylvania R. Co. *v.* Ogier, 35 Pa. St. 60, 78 Am. Dec. 322 (holding that the railroad company is liable for injuries to a traveler under such circumstances, although the latter had a full view of the track for some distance before reaching it).

68. Baltimore, etc., R. Co. *v.* Conoyer, 149 Ind. 524, 48 N. E. 352, 49 N. E. 452; Chicago, etc., R. Co. *v.* La Porte, 33 Ind. App. 691, 71 N. E. 166; Hoggatt *v.* Evansville, etc., R. Co., 3 Ind. App. 437, 29 N. E. 941; Lang *v.* Missouri Pac. R. Co., 115 Mo. App. 489, 91 S. W. 1012; Evans *v.* Concord R. Corp., 66 N. H. 194, 21 Atl. 105; Ernst *v.* Hudson River R. Co., 35 N. Y. 9, 90 Am. Dec. 761, 3 Abb. Pr. N. S. 82, 32 How. Pr. 61; Pruey *v.* New York Cent., etc., R. Co., 41 N. Y. App. Div. 158, 58 N. Y. Suppl. 797 [*affirmed* in

to presume that customary or statutory signals will be given is merely a circumstance to be considered in determining whether or not a traveler acted with proper care under the circumstances, and does not relieve him from exercising ordinary care to ascertain whether or not he can cross in safety,[69] such as looking and listening,[70] or if necessary stopping, looking, and listening for approaching

166 N. Y. 616, 59 N. E. 1129]; Donovan *v.* Long Island R. Co., 67 Hun (N. Y.) 73, 22 N. Y. Suppl. 62; Skinner *v.* Prospect Park, etc., R. Co., 22 N. Y. Suppl. 30 [*affirmed* in 140 N. Y. 621, 35 N. E. 891]. See also International, etc., R. Co. *v.* Graves, 59 Tex. 330, holding that if relying on such presumption, a traveler attempts to cross, without knowledge or means of knowledge of a train's approach, and is injured by the train by reason of the failure to give proper signals, he is entitled to recover.

69. *Illinois.*— Wabash, etc., R. Co. *v.* Wallace, 110 Ill. 114.

Indiana.— New York, etc., R. Co. *v.* Robbins, 38 Ind. App. 172, 76 N. E. 804; Van Winkle *v.* New York Cent., etc., R. Co., 34 Ind. App. 476, 73 N. E. 157; Pittsburgh, etc., R. Co. *v.* McNeil, 34 Ind. App. 310, 69 N. E. 471; Cleveland, etc., R. Co. *v.* Carey, 33 Ind. App. 275, 71 N. E. 244; Evansville, etc., R. Co. *v.* Clements, 32 Ind. App. 659, 70 N. E. 554; Louisville, etc., R. Co. *v.* Williams, 20 Ind. App. 576, 51 N. E. 128.

Kansas.— Atchison, etc., R. Co. *v.* Hague, 54 Kan. 284, 38 Pac. 257, 45 Am. St. Rep. 278.

Kentucky.— Louisville, etc., R. Co. *v.* Cleaver, 89 S. W. 494, 28 Ky. L. Rep. 497, holding that one driving upon a railroad crossing has no right to rely exclusively upon the operatives of a train looking out for his safety and giving him notice of his danger, but that he must also look out for his own safety.

Massachusetts.— Hamblin *v.* New York, etc., R. Co., 195 Mass. 555, 81 N. E. 258.

Michigan.— Thomas *v.* Chicago, etc., R. Co., 86 Mich. 496, 49 N. W. 547.

Minnesota.— Carlson *v.* Chicago, etc., R. Co., 96 Minn. 504, 105 N. W. 555, 113 Am. St. Rep. 655, 4 L. R. A. N. S. 349.

Missouri.— Weller *v.* Chicago, etc., R. Co., 164 Mo. 180, 64 S. W. 141, 86 Am. St. Rep. 592; Gratiot *v.* Missouri Pac. R. Co., 116 Mo. 450, 21 S. W. 1094, 16 L. R. A. 189, (1891) 16 S. W. 384.

New Hampshire.— Smith *v.* Boston, etc., R. Co., 70 N. H. 53, 47 Atl. 290, 85 Am. St. Rep. 596.

New Jersey.— Swanson *v.* New Jersey Cent. R. Co., 63 N. J. L. 605, 44 Atl. 852.

New York.— Eaton *v.* Erie R. Co., 51 N. Y. 544; Baxter *v.* Troy, etc., R. Co., 41 N. Y. 502; Havens *v.* Erie R. Co., 41 N. Y. 296; Wilcox *v.* Rome, etc., R. Co., 39 N. Y. 358, 100 Am. Dec. 440; Ernst *v.* Hudson River R. Co., 39 N. Y. 61, 100 Am. Dec. 405, 6 Transcr. App. 35, 36 How. Pr. 84; Larsen *v.* U. S. Mortgage, etc., Co., 104 N. Y. App. Div. 76, 93 N. Y. Suppl. 610; Krauss *v.* Wallkill Valley R. Co., 69 Hun (N. Y.) 482, 23 N. Y. Suppl. 432; Nash *v.* New York Cent., etc., R. Co., 1 N. Y. Suppl. 269 [*affirmed* in 117 N. Y. 628, 22 N. E. 1128].

Ohio.— Cleveland, etc., R. Co. *v.* Elliott, 28 Ohio St. 340, holding that the omission to ring the bell or sound the whistle is not sufficient to authorize a recovery, if, notwithstanding such omission, the party injured might, by the exercise of ordinary care, have avoided the accident.

Pennsylvania.— Philadelphia, etc., R. Co. *v.* Hagan, 47 Pa. St. 244, 86 Am. Dec. 541.

South Carolina.— Harbert *v.* Atlanta, etc., R. Co., 78 S. C. 537, 59 S. E. 644; Gosa *v.* Southern R. Co., 67 S. C. 347, 45 S. E. 810.

Texas.— Missouri Pac. R. Co. *v.* Peay, (1892) 20 S. W. 57; Gulf, etc., R. Co. *v.* Hamilton, 17 Tex. Civ. App. 76, 42 S. W. 358; Austin, etc., R. Co. *v.* McElmurry, (Civ. App. 1895) 33 S. W. 249.

Virginia.— Smith *v.* Norfolk, etc., R. Co., 107 Va. 725, 60 S. E. 56; Johnson *v.* Chesapeake, etc., R. Co., 91 Va. 171, 21 S. E. 238.

West Virginia.— Beyel *v.* Newport News, etc., R. Co., 34 W. Va. 538, 12 S. E. 532.

United States.— Cleveland, etc., R. Co. *v.* Morton, 120 Fed. 936, 57 C. C. A. 226; Texas, etc., R. Co. *v.* Spradling, 72 Fed. 152, 18 C. C. A. 496.

See 41 Cent. Dig. tit. "Railroads," § 1073.

Where it is the custom of all trains to stop before coming to a certain point, a person crossing the track at that point is justified in assuming that a train passing the point with unabated speed will give warning of such a course, and an omission to give any warning may be considered on the question of his negligence in attempting to cross. Cranch *v.* Brooklyn Heights R. Co., 107 N. Y. App. Div. 341, 95 N. Y. Suppl. 169.

70. *California.*— Matteson *v.* Southern Pac. R. Co., 6 Cal. App. 318, 92 Pac. 101.

Indiana.— Pittsburgh, etc., R. Co. *v.* West, 34 Ind. App. 95, 69 N. E. 1017; Rich *v.* Evansville, etc., R. Co., 31 Ind. App. 10, 66 N. E. 1028.

Maryland.—Annapolis, etc., R. Co. *v.* State, 104 Md. 659, 65 Atl. 434.

Minnesota.— Carlson *v.* Chicago, etc., R. Co., 96 Minn. 504, 105 N. W. 555, 113 Am. St. Rep. 622, 1 L. R. A. N. S. 835.

Missouri.— Weller *v.* Chicago, etc., R. Co., 120 Mo. 635, 23 S. W. 1061, 25 S. W. 532, holding that where the defense is contributory negligence and the evidence is almost conclusive that deceased drove recklessly on the track, it is error to instruct that he had a right to presume that the employees of the company would use ordinary care in moving trains and that he was not bound to anticipate the company's failure to ring the bell or carry a light.

New Jersey.— Swanson *v.* Southern R. Co., 63 N. J. L. 605, 44 Atl. 852, holding that the

trains.[71] The question whether or not the traveler exercised such care under the circumstances is usually a question for the jury.[72] It has been held that a person using a private crossing over a railroad in the vicinity of a public crossing has the right to rely upon a giving of proper signals at the public crossing.[73]

(IV) *RATE OF SPEED OF TRAIN.* A person approaching the tracks at a public crossing also has a right to presume, until the contrary is made apparent,[74] that a train approaching the crossing will comply with a statute or ordinance limiting its rate of speed thereat, and that it will not run at a greater rate of speed.[75]

neglect of a railroad company to give warning of the approach of its trains even when so gross as to amount to a declaration that the way is safe for travelers upon the highway does not absolve a person about to cross from the duty of making an independent observation for the purpose of ascertaining whether or not a train is coming to the crossing; and a failure in that regard is ordinarily a failure to exercise that reasonable degree of prudence which the law requires of all persons when approaching these places of known danger.

New York.— Cullen *v.* Delaware, etc., Canal Co., 113 N. Y. 667, 21 N. E. 716; Baxter *v.* Troy, etc., R. Co., 41 N. Y. 502; Havens *v.* Erie R. Co., 41 N. Y. 296; Grippen *v.* New York Cent., etc., R. Co., 40 N. Y. 34; Beisiegel *v.* New York Cent. R. Co., 40 N. Y. 9; Fisher *v.* Central Vermont R. Co., 109 N. Y. App. Div. 449, 95 N. Y. Suppl. 693.

Ohio.— Watson *v.* Erie R. Co., 10 Ohio S. & C. Pl. Dec. 454, 8 Ohio N. P. 18, holding that a traveler at a crossing cannot rely upon the presumption that the employees of a railroad company will give the statutory signals where a look would reveal to him that his supposition is not true, that the train is near him, and that his danger is imminent.

South Carolina.— Gosa *v.* Southern R. Co., 67 S. C. 347, 45 S. E. 810; Edwards *v.* Southern R. Co., 63 S. C. 271, 41 S. E. 458.

Texas.— International, etc., R. Co. *v.* Edwards, 100 Tex. 22, 93 S. W. 106 [*reversing* (Civ. App. 1905) 91 S. W. 640].

West Virginia.— Beyel *v.* Newport News, etc., R. Co., 34 W. Va. 538, 12 S. E. 532.

Canada.— Miller *v.* Grand Trunk R. Co., 25 U. C. C. P. 389.

See 41 Cent. Dig. tit. "Railroads," § 1073.

71. Chesapeake, etc., R. Co. *v.* Vaughn, 97 S. W. 774, 30 Ky. L. Rep. 215 (not contributory negligence *per se*); Hearn *v.* New York, etc., R. Co., 89 Md. 762, 43 Atl. 59 (holding that the failure of trainmen to give required signals does not excuse a traveler in a closed vehicle from stopping, looking, and listening before attempting to cross); Gahagan *v.* Boston, etc., R. Co., 70 N. H. 441, 50 Atl. 146, 55 L. R. A. 426; Beyel *v.* Newport News, etc., R. Co., 34 W. Va. 538, 12 S. E. 532.

72. *Indiana.*— Cincinnati, etc., R. Co. *v.* Howard, 124 Ind. 280, 24 N. E. 892, 19 Am. St. Rep. 96, 8 L. R. A. 593.

Kentucky.— Pittsburgh, etc., R. Co. *v.* Lewis, 38 S. W. 482, 18 Ky. L. Rep. 957, holding that a failure to stop, look, and listen in reliance on the duty and custom of a railroad company to ring bells is not negligence *per se.*

Michigan.— Bond *v.* Lake Shore, etc., R. Co., 117 Mich. 652, 76 N. W. 102, holding, however, that in the particular case there was not sufficient contradiction of testimony to justify a submission to the jury.

Nevada.— Bunting *v.* Central Pac. R. Co., 14 Nev. 351.

United States.— St. Louis, etc., R. Co. *v.* Barker, 77 Fed. 810, 23 C. C. A. 475 [*affirmed* in 172 U. S. 643, 19 S. Ct. 879, 43 L. ed. 1181].

See 41 Cent. Dig. tit. "Railroads," § 1073; and *infra*, X, F, 14, g, (XI), (E).

Although one knows of the approach of a train which he cannot see on account of obstructions, he is not guilty of contributory negligence as a matter of law in proceeding to cross a track in the belief that he can do so before there is any probability of the train reaching the point, and in reliance upon its stopping at the crossing and giving the signals required by law and running at a lawful rate of speed. St. Louis, etc., R. Co. *v.* Matthews, 34 Tex. Civ. App. 302, 79 S. W. 71.

73. Defrieze *v.* Illinois Cent. R. Co., (Iowa 1903) 94 N. W. 505. And see *supra*, X, F, 7, e, (II), text and note 82.

74. Stotler *v.* Chicago, etc., R. Co., 204 Mo. 619, 103 S. W. 1; Payne *v.* Chicago, etc., R. Co., 129 Mo. 405, 31 S. W. 885 (holding that where it appears that plaintiff lived near the crossing and knew that the company habitually violated the ordinance as to the rate of speed and that at the time of the accident the train which was a regular scheduled one was moving at its usual rate of speed, which was greater than that allowed by ordinance, an instruction that plaintiff had a right to presume that defendant would not run its train at an unlawful rate of speed was erroneous, such presumption being rebutted by the evidence); Sullivan *v.* Missouri Pac. R. Co., 117 Mo. 214, 23 S. W. 149; Southern R. Co. *v.* Stockdon, 106 Va. 693, 56 S. E. 713; Langhoff *v.* Milwaukee, etc., R. Co., 19 Wis. 489.

If one sees or has reason to believe that the train is running at a rate in excess of that permitted by ordinance, he has no right to risk his life on a presumption that the ordinance is being observed. Green *v.* Missouri Pac. R. Co., 192 Mo. 131, 90 S. W. 805.

75. *Illinois.*— Chicago, etc., R. Co. *v.* Gunderson, 174 Ill. 495, 51 N. E. 708 [*affirming* 74 Ill. App. 356]; Baltimore, etc., R. Co. *v.* Then, 159 Ill. 535, 42 N. E. 971 [*affirming* 59 Ill. App. 561]; Chicago, etc., R. Co. *v.* Wilson, 128 Ill. App. 88 [*affirmed* in 225 Ill. 50, 80 N. E. 56, 116 Am. St. Rep. 102]; Chi-

But the existence of such an ordinance or statute does not relieve a traveler approaching the crossing from exercising ordinary care,[76] nor does the fact that a train is run at an unlawful speed have this effect but is merely to be considered in determining the question of his negligence,[77] the question whether or not the traveler is negligent under such circumstances being a question for the jury.[78]

f. Effect of Directions of Railroad Employees[79] — (i) *Employees in Charge of Train Obstructing Crossing.* That a person attempting to go over a railroad crossing which is obstructed by standing trains or cars is directed or assured that it is safe to do so by a brakeman, conductor, or other employee in charge of the train is also a matter to be considered in determining whether the traveler exercised due care and caution in attempting to cross; and if in reliance upon such direction or invitation he exercises reasonable care in going over the crossing he is not guilty of contributory negligence.[80] But even such an assur-

cago, etc., R. Co. *v.* Pulliam, 111 Ill. App. 305 [*affirmed* in 208 Ill. 456, 70 N. E. 460].

Iowa.— Schmidt *v.* Burlington, etc., R. Co., 75 Iowa 606, 39 N. W. 916 (holding that a person who is a resident of a city in which there is an ordinance limiting the rate of speed of trains will be presumed to know the ordinance and that he has a right to presume that it will be obeyed and is not negligent in attempting to cross after seeing the approaching train where he could have passed safely had the train not been running faster than allowed by such ordinance); Correll *v.* Burlington, etc., R. Co., 38 Iowa 120, 18 Am. Rep. 22.

Missouri.— Mockowik *v.* Kansas City, etc., R. Co., 196 Mo. 550, 94 S. W. 256; Sullivan *v.* Missouri Pac. R. Co., 117 Mo. 214, 23 S. W. 149.

North Carolina.— Norton *v.* North Carolina R. Co., 122 N. C. 910, 29 S. E. 886.

Ohio.— Hart *v.* Devereux, 41 Ohio St. 565; Baltimore, etc., R. Co. *v.* Van Horn, 21 Ohio Cir. Ct. 337, 12 Ohio Cir. Dec. 106; Stoltz *v.* Baltimore, etc., R. Co., 7 Ohio S. & C. Pl. Dec. 435, holding that where a person believing that he can make the crossing with safety and assuming that the train is not running faster than allowed by ordinance undertakes to cross he is not negligent.

Oregon.— Kunz *v.* Oregon R. Co., (1907) 93 Pac. 141, (1908) 94 Pac. 504.

Virginia.—Southern R. Co. *v.* Stockdon, 106 Va. 693, 56 S. E. 713.

Wisconsin.— Langhoff *v.* Milwaukee, etc., R. Co., 19 Wis. 489.

United States.— Farrell *v.* Erie R. Co., 138 Fed. 28, 70 C. C. A. 396.

See 41 Cent. Dig. tit. "Railroads," § 1074.

Compare Studley *v.* St. Paul, etc., R. Co., 48 Minn. 249, 51 N. W. 115, holding that a traveler has no right to attempt to cross a railroad track in front of an approaching train at what is nothing more than a common country crossing, although it is within the limits of a city, or to use a part of the right of way within such limits as a footpath, relying on the belief that the trains will be run so as not to exceed the speed fixed by ordinance.

76. Westerkamp *v.* Chicago, etc., R. Co., 41 Colo. 290, 92 Pac. 687; Korrady *v.* Lake Shore, etc., R. Co., 131 Ind. 261, 29 N. E. 1069; Nosler *v.* Chicago, etc., R. Co., 73 Iowa 268, 34 N. W. 850.

77. *Colorado.*— Chicago, etc., R. Co. *v.* Crisman, 19 Colo. 30, 34 Pac. 286.

Illinois.— Wabash, etc., R. Co. *v.* Weisbeck, 14 Ill. App. 525; Chicago, etc., R. Co. *v.* Robinson, 9 Ill. App. 89.

Missouri.— Stotler *v.* Chicago, etc., R. Co., 204 Mo. 619, 103 S. W. 1; Schmidt *v.* Missouri Pac. R. Co., 191 Mo. 215, 90 S. W. 136, 3 L. R. A. N. S. 196; Weller *v.* Chicago, etc., R. Co., 120 Mo. 635, 23 S. W. 1061, 21 S. W. 532, holding that where a person drove recklessly on the track at a railroad crossing, it is error to instruct that he had a right to presume that the employees of the company would use reasonable care in moving trains and that he was not bound to anticipate the company's failure to run its train within a limited rate of speed. See also Duffy *v.* Missouri Pac. R. Co., 19 Mo. App. 380.

New York.— Calligan *v.* New York Cent., etc., R. Co., 59 N. Y. 651, holding that a traveler has no right to omit the exercise of proper care in crossing a railroad track upon the assumption that a train is being run precisely in obedience to a city ordinance.

Wisconsin.— Langhoff *v.* Milwaukee, etc., R. Co., 19 Wis. 489.

See 41 Cent. Dig. tit. "Railroads," §§ 1074, 1088.

78. Baltimore, etc., R. Co. *v.* Then, 159 Ill. 535, 42 N. E. 971 [*affirming* 59 Ill. App. 561]; Farrell *v.* Erie R. Co., 138 Fed. 28, 70 C. C. A. 396, holding that a traveler is not chargeable with negligence as a matter of law in attempting to cross, if in view of the distance at which the track seems to be clear he would have time to cross before a train going at the usual and lawful rate of speed would reach the crossing. And see *infra*, X, F, 14, g, (XI), (E).

79. As affecting children see *supra*, X, F, 10, b, (IV).

80. *Arkansas.*— St. Louis, etc., R. Co. *v.* Hitt, 76 Ark. 227, 88 S. W. 908, 990, 76 Ark. 224, 88 S. W. 911, holding that where a brakeman standing at a crossing which was blocked by a standing freight train told plaintiffs who were waiting to drive over the crossing that it would soon be clear and when the train cleared the crossing the brakeman was standing near by and in a position where

ance or direction will not excuse a traveler who attempts to cross when the danger in crossing is obvious,[81] as where he knows or might know by using his natural faculties that the train is liable to start at any moment.[82]

(II) *Employees in Charge of Signals and Gates at Crossings.* Likewise where a person approaching a railroad crossing is signaled by a flagman or watchman that it is safe to cross, he has a right to rely upon such assurance and the same degree of care is not required of him as if there had been no such direction or invitation,[83] especially where such signal is by statute or ordinance an assurance of safety; [84] and it is usually at most a question of fact whether or not one who attempts to cross in reliance upon such signal or direction is guilty of contributory negligence.[85] But he cannot implicitly rely upon the judgment

he could better see the tracks than plaintiffs could, plaintiffs could take into consideration that the brakeman was in a favorable position to see any danger and would doubtless give them warning thereof.

Illinois.— Chicago, etc., R. Co. *v.* Sykes, 1 Ill. App. 520.

Iowa.— Scott *v.* St. Louis, etc., R. Co., 112 Iowa 54, 83 N. W. 818.

Minnesota.— Plaunt *v.* Railway Transfer Co., 86 Minn. 506, 91 N. W. 19, holding that where the engineer of a standing train assured plaintiff that he would hold the engine until he had passed, but when plaintiff stepped upon the track the engineer started, and for fear of being run over plaintiff hurried forward and fell upon the rails, she was not guilty of contributory negligence as a matter of law.

New York.— Keech *v.* Rome, etc., R. Co., 13 N. Y. Suppl. 149. See also Phillips *v.* New York, etc., R. Co., 80 Hun 404, 30 N. Y. Suppl. 333.

North Carolina.— Bradley *v.* Ohio River, etc., R. Co., 126 N. C. 735, 36 S. E. 181.

Texas.— St. Louis, etc., R. Co. *v.* Stonecypher, 25 Tex. Civ. App. 569, 63 S. W. 946 (holding that where a brakeman signaled plaintiff to cross the track after a freight train had cleared the crossing, and plaintiff in attempting to do so was injured by his team becoming frightened by the sudden backing of the train, plaintiff was not guilty of contributory negligence); International, etc., R. Co. *v.* Bryant, (Civ. App. 1899) 54 S. W. 364. See also Irvin *v.* Gulf, etc., R. Co., (Civ. App. 1897) 42 S. W. 661.

See 41 Cent. Dig. tit. "Railroads," § 1075.

That employees had frequently assisted persons to pass under and between cars cannot be considered as an invitation to do so. Bird *v.* Flint, etc., R. Co., 86 Mich. 79, 48 N. W. 691.

An invitation to cross by a brakeman does not relieve a traveler from contributory negligence in climbing between standing cars, since the conductor is the representative of the road in charge of the train, and a brakeman has no authority to extend such invitation. Southern R. Co. *v.* Clark, 105 S. W. 384, 32 Ky. L. Rep. 69, 13 L. R. A. N. S. 1071.

81. Lake Shore, etc., R. Co. *v.* Pinchin, 112 Ind. 592, 13 N. E. 677; Southern R. Co. *v.* Clark, 105 S. W. 384, 32 Ky. L. Rep. 69, 13 L. R. A. N. S. 1071; Eddy *v.* Powell, 49 Fed. 814, 1 C. C. A. 448; Renner *v.* Northern Pac. R. Co., 46 Fed. 344, holding that a person traveling in a public street and finding it obstructed by a freight train at full stop to which a locomotive is attached, who, relying upon the assurance of a brakeman that he can safely climb over and pass between the cars as the train will remain stationary for some time, attempts to do so and while in the act suffers an injury by the train being started suddenly without warning, is guilty of such contributory negligence as will prevent his recovery for the injury.

82. Lake Shore, etc., R. Co. *v.* Pinchin, 112 Ind. 592, 13 N. E. 677.

83. Missouri, etc., R. Co. *v.* Ray, 25 Tex. Civ. App. 567, 63 S. W. 912.

84. Alabama Great Southern R. Co. *v.* Anderson, 109 Ala. 299, 19 So. 516, holding that the driver of a vehicle who at the signal of a street flagman which, by Birmingham city code, section 465, is an assurance that the railroad track may be crossed in safety, goes upon the track without stopping his team in order to look and listen is not chargeable with negligence.

85. *Alabama.*— Louisville, etc., R. Co. *v.* Stewart, 128 Ala. 313, 29 So. 562.

Colorado.— Denver, etc., R. Co. *v.* Gustafson, 21 Colo. 393, 41 Pac. 505.

Indiana.— Lake Erie, etc., R. Co. *v.* Fike, 35 Ind. App. 554, 74 N. E. 636, holding that a driver approaching a crossing has a right to rely upon the assurance of a flagman that he will incur no danger from approaching trains.

Massachusetts.— Clark *v.* Boston, etc., R. Co., 164 Mass. 434, 41 N. E. 666 (holding that an instruction that plaintiff was negligent if he approached the crossing with a heavy load at a trot, although the gates were up, is properly refused where there is evidence that the gateman by nodding to plaintiff invited him to cross); Bayley *v.* Eastern R. Co., 125 Mass. 62.

Missouri.— Edwards *v.* Chicago, etc., R. Co., 94 Mo. App. 36, 67 S. W. 950, holding that a traveler is not guilty of contributory negligence as a matter of law in obeying a flagman's signal to cross.

New York.— Bond *v.* New York Cent., etc., R. Co., 69 Hun 476, 23 N. Y. Suppl. 450; Callaghan *v.* Delaware, etc., R. Co., 52 Hun 276, 5 N. Y. Suppl. 285; Borst *v.* Lake Shore, etc., R. Co., 4 Hun 346 [*affirmed* in 66 N. Y. 639]; Henning *v.* Caldwell, 18 N. Y.

of the flagman or watchman as to his safety in crossing, but aside from such assurance he must use the prudence and caution that a reasonably prudent man would use in like circumstances, and if he fails to do so he is guilty of contributory negligence,[86] as where he fails to look and listen when by so doing the approaching train could have been discovered.[87] That the flagman at the crossing is a third person acting in place of the regular flagman who is absent and is not an employee of the railroad company is immaterial in determining whether a traveler is guilty of contributory negligence in attempting to cross in reliance on the assurance of safety given by such person.[88]

(III) *Disregarding Warnings, Signals, and Directions.* An attempt to cross a railroad track at a crossing in disregard of warnings, signals, or directions given by a flagman, watchman, or other employee of the railroad company that it is unsafe to do so is contributory negligence barring a recovery,[89] provided the person injured hears and understands the signals.[90]

g. Crossing Near Standing or Approaching Trains or Cars [91] — (I) *Crossing Near Standing Trains or Cars.* Where there are trains or cars standing on or near a crossing, a person approaching the crossing has a right to assume that they will not be moved without proper warnings or signals, and if he attempts to cross with reasonable care and prudence, he is not necessarily guilty of contributory negligence, the question whether or not he is so negligent usually being one of fact.[92] It is contributory negligence for a person to attempt to cross near

Suppl. 339 [*affirmed* in 137 N. Y. 553, 33 N. E. 337].

Pennsylvania.— Ayers *v.* Pittsburg, etc., R. Co., 201 Pa. St. 124, 50 Atl. 958, holding that a person who attempts to cross without looking, upon a flagman's signal that it is safe to do so, is not guilty of contributory negligence as a matter of law.

Texas.— Missouri, etc., R. Co. *v.* Ray, 25 Tex. Civ. App. 567, 63 S. W. 912.

United States.— Chicago, etc., R. Co. *v.* Prescott, 59 Fed. 237, 8 C. C. A. 109, 23 L. R. A. 654.

See 41 Cent. Dig. tit. "Railroads," § 1076; and *infra*, X, F, 14, g, (XI), (F).

One who uses a dangerous crossing instead of a safer one a little farther away is not as a matter of law guilty of negligence where he has been invited to use the crossing by the railroad company and is led to believe by defendant's flagman that there is no danger in crossing the track at the particular time. St. Louis, etc., R. Co. *v.* Gill, (Tex. Civ. App. 1900) 55 S. W. 386.

86. Ivy *v.* East Tennessee, etc., R. Co., 88 Ga. 71, 13 S. E. 947 (holding a nonsuit proper); Pittsburgh, etc., R. Co. *v.* Puszdrakiewicz, 129 Ill. App. 295; Chicago, etc., R. Co. *v.* Spring, 13 Ill. App. 174; Missouri, etc., R. Co. *v.* Ray, (Tex. Civ. App. 1901) 63 S. W. 912.

87. Denver, etc., R. Co. *v.* Gustafson, 21 Colo. 393, 41 Pac. 505; Union Pac. R. Co. *v.* Rosewater, 157 Fed. 168, 84 C. C. A. 616.

88. Waldele *v.* New York Cent., etc., R. Co., 4 N. Y. App. Div. 549, 38 N. Y. Suppl. 1009.

89. *Illinois.*—Chicago, etc., R. Co. *v.* Rosenfeld, 70 Ill. 272; Chicago, etc., R. Co. *v.* Williams, 87 Ill. App. 511; Chicago, etc., R. Co. *v.* Nichols, 74 Ill. App. 197.

Massachusetts.— Doyle *v.* Boston, etc., R. Co., 145 Mass. 386, 14 N. E. 461, holding, however, that where a person has driven half way across when the gates are closed and the gateman shouts to him to stop, whereupon he whips up his horse and the gateman then shouts to him to come on at the same time opening the gate, he is not guilty of such gross or wilful negligence as a matter of law after the first warning as will, under Pub. St. c. 112, § 213, relating to the liability of railroad companies for negligence at crossings, preclude a recovery.

Missouri.— Fox *v.* Missouri Pac. R. Co., 85 Mo. 679.

New Jersey.— Hanson *v.* Pennsylvania R. Co., 62 N. J. L. 391, 41 Atl. 868.

New York.— Wilber *v.* New York Cent., etc., R. Co., 17 N. Y. App. Div. 623, 45 N. Y. Suppl. 761; Salmon *v.* New York Cent., etc., R. Co., 1 Silv. Sup. 237, 5 N. Y. Suppl. 225 (direction of verdict for defendant held justified); Mulligan *v.* New York Cent., etc., R. Co., 11 N. Y. Suppl. 452.

Pennsylvania.— Oberdorfer *v.* Philadelphia, etc., R. Co., 149 Pa. St. 6, 27 Atl. 304 (holding that where the flagman called to the traveler to stop and attempted to hold him when he broke away and was struck by the train while crossing, such traveler was properly nonsuited); Baltimore, etc., R. Co. *v.* Colvin, 118 Pa. St. 230, 12 Atl. 337.

90. Union R. Co. *v.* State, 72 Md. 153, 19 Atl. 449, holding that it is proper to refuse to instruct that if defendant's watchman at the crossing waved his light and hallooed to deceased to stop plaintiff cannot recover, as it must further appear that deceased heard and understood such signals, in order to defeat a recovery.

91. **Where obstructing crossing** see *supra*, X, F, 10, c, (III).

92. *California.*— Robinson *v.* Western Pac. R. Co., 48 Cal. 409, holding that one is not guilty of contributory negligence in crossing

such trains or cars without using reasonable care and prudence in doing so,[93] as where he attempts to cross when he knows or has reason to know that the trains or cars are liable to be moved at any moment,[94] or where he does not know for certain that the trains or cars are stationary, although he believes them to be so.[95] A driver of a team who starts across a railroad track near standing trains or cars as a general rule assumes the risk of his horse becoming frightened at noises made in the ordinary handling of trains,[96] although it is not necessarily negligent to make such attempt where the horse or team is used to the cars and is reasonably steady and gentle,[97] and it becomes frightened at unexpected and unnecessary

over back of a train which has just passed the crossing and stopped and who is injured by the sudden backing of the train without notice.

Illinois.— Chicago Junction R. Co. *v.* McGrath, 107 Ill. App. 100 [*affirmed* in 203 Ill. 511, 68 N. E. 69]; Illinois Steel Co. *v.* Szutenbach, 64 Ill. App. 642, holding that where one approaches a single track used only for switching on which freight cars are standing to which no engine is attached, he is not negligent in assuming that to pass over the track is reasonably safe.

Kansas.— St. Louis, etc., R. Co. *v.* Dawson, 64 Kan. 99, 67 Pac. 521 (holding that a traveler on a city street passing in front of an engine standing without the bounds of a highway but so near to it that from the cab windows the street can be plainly seen has a right to assume that the engineer will not without warning start his locomotive and run over her before she can, in the exercise of ordinary care, cross the tracks); Williams *v.* Atchison, etc., R. Co., (1898) 53 Pac. 834.

Kentucky.— Illinois Cent. R. Co. *v.* Hays, 84 S. W. 338, 27 Ky. L. Rep. 91.

Missouri.— Pinney *v.* Missouri, etc., R. Co., 71 Mo. App. 577 (holding that one is not guilty of contributory negligence as a matter of law in crossing in the rear of a freight train without looking further and who is hurt by a car that is "kicked" back without warning); Fusili *v.* Missouri Pac. R. Co., 45 Mo. App. 535.

New York.— Maginnis *v.* New York Cent., etc., R. Co., 52 N. Y. 215.

South Carolina.— Littlejohn *v.* Richmond, etc., R. Co., 49 S. C. 12, 26 S. E. 967, holding that whether one injured by the starting up without signal of cars between which, while standing across a highway, he is attempting to climb, is guilty of gross or wilful negligence is to be determined by the jury, from a consideration not merely of the fact that he assumed the company would give the statutory signals, but of all the surrounding facts.

West Virginia.— Meeks *v.* Ohio River R. Co., 52 W. Va. 99, 43 S. E. 118.

United States.— Chicago, etc., R. Co. *v.* Prescott, 59 Fed. 237, 8 C. C. A. 109, 23 L. R. A. 654.

See 41 Cent. Dig. tit. "Railroads," § 1079; and *infra*, X, F, 14, g, (XI), (G).

93. Scaggs *v.* Delaware, etc., Canal Co., 145 N. Y. 201, 39 N. E. 716 [*reversing* 74 Hun 198, 26 N. Y. Suppl. 323].

94. Chicago Terminal Transfer R. Co. *v.* Korando, 129 Ill. App. 620; Chicago Terminal Transfer Co. *v.* Helbreg, 124 Ill. App. 113; Chicago Junction R. Co. *v.* McGrath, 107 Ill. App. 100 [*affirmed* in 203 Ill. 511, 68 N. E. 69]; Lake Shore, etc., R. Co. *v.* Clemens, 5 Ill. App. 77; Kennedy *v.* Chicago, etc., R. Co., 68 Iowa 559, 27 N. W. 743; Mehegan *v.* New York Cent., etc., R. Co., 19 N. Y. Suppl. 444; Hoffman *v.* Pennsylvania R. Co., 215 Pa. St. 62, 64 Atl. 331; Ash *v.* Wilmington, etc., R. Co., 148 Pa. St. 133, 23 Atl. 898, holding that a person is guilty of contributory negligence in going upon a siding without stopping, looking, and listening, where he knows that the siding is across his path, that two cars are upon it, and that they are to be moved at some time during that day.

95. Ohio, etc., R. Co. *v.* Maisch, 29 Ill. App. 640, holding that where plaintiff admits that he saw the headlight of the engine which struck him when twenty-five feet from the track, but believing it to be stationary did not stop to ascertain with certainty and continued to drive across, he is guilty of gross negligence.

96. *Indiana.*— Lake Erie, etc., R. Co. *v.* Fike, 35 Ind. App. 554, 74 N. E. 636.

Kansas.— Union Pac. R. Co. *v.* Hutchinson, 39 Kan. 485, 488, 18 Pac. 705, 706, 40 Kan. 51, 19 Pac. 312, holding that a person who undertakes to drive a team of horses immediately in front of an engine that has temporarily stopped on a crossing, making the usual noises by the escape of steam, and who knows and appreciates the danger, cannot recover for injuries caused by his team running away.

Maine.— Whitney *v.* Marine Cent. R. Co., 69 Me. 208, holding this to be especially true where the driver is acquainted with the manner in which trains are usually managed at that point.

North Carolina.— Miller *v.* Wilmington, etc., R. Co., 128 N. C. 26, 38 S. E. 29.

Texas.— Ft. Worth, etc., R. Co. *v.* Taliaferro, (App. 1892) 19 S. W. 432.

See 41 Cent. Dig. tit. "Railroads," § 1079.

97. *Michigan.*— Geveke *v.* Grand Rapids, etc., R. Co., 57 Mich. 589, 24 N. W. 675, not negligence *per se*.

Mississippi.— Vicksburg, etc., R. Co. *v.* Alexander, 62 Miss. 496.

New York.— Eaton *v.* Erie R. Co., 51 N. Y. 544.

Texas.— Texas Midland R. Co. *v.* Cardwell, (Civ. App. 1901) 67 S. W. 157, holding that where a horse is frightened by the blowing off of steam, in the absence of anything to show that plaintiff knew that

noises.[98] But a driver is under no greater obligation to use care to prevent injury by fright of his horse at a hand-car standing on or near the crossing than he would be under while passing any other object at any other point on the road.[99]

(II) *Crossing Near Approaching Trains or Cars* [1] — (A) *In General.* Where a person approaching a railroad crossing sees or knows of an approaching train or by the exercise of reasonable diligence could see or know of its approach in time to prevent an accident, it is his duty to stop until the train has passed,[2] or if he is already on the track when he discovers the approaching train, it is his duty to exercise reasonable care to leave it;[3] and if he fails to do so but voluntarily and unnecessarily attempts to cross in front of the approaching train, he assumes the risk of so doing, and if injured thereby is guilty of contributory negligence precluding a recovery,[4] unless he is compelled by an imperious

the engine was liable to blow off steam, he cannot be held to have assumed that risk.

Wisconsin.— Kalbus *v.* Abbot, 77 Wis. 621, 46 N. W. 810, holding that the fact that the team had once before run away and was easily frightened did not make it contributory negligence on plaintiff's part to cross a track on which an engine was standing, unless the disposition of the team was such that a person of ordinary prudence would not have attempted to drive it across the track at that time.

United States.— Chicago, etc., R. Co. *v.* Prescott, 59 Fed. 237, 8 C. C. A. 109, 23 L. R. A. 654.

See 41 Cent. Dig. tit. "Railroads," § 1079.

98. San Antonio, etc., R. Co. *v.* Belt, 24 Tex. Civ. App. 281, 59 S. W. 607.

99. Atchison, etc., R. Co. *v.* Morrow, 4 Kan. App. 199, 45 Pac. 956.

1. Disregarding directions of railroad employees see *supra*, X, F, 10, f, (III).

Reliance on precautions as to rate of speed and management of trains see *supra*, X, F, 10, e, (IV).

2. *Illinois.*— Toledo, etc., R. Co. *v.* Jones, 76 Ill. 311 (holding that it is not the duty of an engineer on nearing a railroad crossing to stop his train to avoid a collision with a wagon which he sees approaching the crossing, although by applying the brakes he could do so in time to prevent a collision, but it is the duty of the person in charge of the team, in obedience to the known custom of the country, to stop his team and not attempt to pass in front of an advancing train); Illinois Cent. R. Co. *v.* Benton, 69 Ill. 174.

Indiana.— Ohio, etc., R. Co. *v.* Walker, 113 Ind. 196, 15 N. E. 234, 3 Am. St. Rep. 638, holding that a railroad company is not bound to stop its trains or slacken their speed on approaching public crossings, and that the traveler who attempts to cross must be held to be aware of this rule and must act with reference to it.

Iowa.— Black *v.* Burlington, etc., R. Co., 38 Iowa 515.

Pennsylvania.— Lehigh Valley R. Co. *v.* Brandtmaier, 113 Pa. St. 610, 6 Atl. 238.

Utah.— Wilson *v.* Southern Pac. Co., 13 Utah 352, 44 Pac. 1040, 57 Am. St. Rep. 766.

Wisconsin.— Brunette *v.* Chicago, etc., R. Co., 86 Wis. 197, 56 N. W. 478.

United States.— Southern R. Co. *v.* Carroll, 138 Fed. 638, 71 C. C. A. 88, holding that a traveler is bound to give way to a train which is in sight or hearing and moving so rapidly as to make it doubtful whether he can cross in perfect safety.

See 41 Cent. Dig. tit. "Railroads," § 1080.

3. East St. Louis Connecting R. Co. *v.* Eggmann, 71 Ill. App. 32; Galveston, etc., R. Co. *v.* Porfert, 72 Tex. 344, 10 S. W. 207.

4. *Alabama.*— Georgia Cent. R. Co. *v.* Foshee, 125 Ala. 199, 27 So. 1006; Memphis, etc., R. Co. *v.* Martin, 117 Ala. 367, 23 So. 231; Highland Ave., etc., R. Co. *v.* Fennell, 111 Ala. 356, 21 So. 324; Leak *v.* Georgia Pac. R. Co., 90 Ala. 161, 8 So. 245.

Arkansas.— St. Louis, etc., R. Co. *v.* Tippett, 56 Ark. 457, 20 S. W. 161; Little Rock, etc., R. Co. *v.* Cullen, 54 Ark. 431, 16 S. W. 169.

California.— Lambert *v.* Southern Pac. R. Co., 146 Cal. 231, 79 Pac. 873; Green *v.* Southern California R. Co., 138 Cal. 1, 70 Pac. 926, (1901) 67 Pac. 49; Herbert *v.* Southern Pac. Co., 121 Cal. 227, 53 Pac. 651; Pepper *v.* Southern Pac. Co., 105 Cal. 389, 38 Pac. 974.

Delaware.— Mullin *v.* Philadelphia, etc., R. Co., 5 Pennew. 156, 63 Atl. 26; Reed *v.* Queen Anne's R. Co., 4 Pennew. 413, 57 Atl. 529.

District of Columbia.— Cullen *v.* Baltimore, etc., R. Co., 8 App. Cas. 69.

Georgia.— Harris *v.* Southern R. Co., 129 Ga. 388, 58 S. E. 873; Hopkins *v.* Southern R. Co., 110 Ga. 85, 35 S. E. 307, verdict for defendant sustained.

Illinois.— Toledo, etc., R. Co. *v.* Miller, 76 Ill. 278; Chicago, etc., R. Co. *v.* Fears, 53 Ill. 115; Ludolph *v.* Chicago, etc., R. Co., 116 Ill. App. 239; Patterson *v.* Chicago, etc., R. Co., 111 Ill. App. 441; Wabash R. Co. *v.* Monegan, 94 Ill. App. 82; Chicago, etc., R. Co. *v.* Williams, 87 Ill. App. 511; Chicago, etc., R. Co. *v.* McElhaney, 87 Ill. App. 420; Chicago, etc., R. Co. *v.* Nichols, 74 Ill. App. 197; Chicago, etc., R. Co. *v.* Patrick, 71 Ill. App. 632; Chicago, etc., R. Co. *v.* Holdom, 66 Ill. App. 201; Cleveland, etc., R. Co. *v.* Arbaugh, 47 Ill. App. 360; Lake Shore, etc., R. Co. *v.* Sunderland, 2 Ill. App. 207.

Indiana.— Korrady *v.* Lake Shore, etc., R. Co., 131 Ind. 261, 29 N. E. 1069; Southern R. Co. *v.* Davis, 34 Ind. App. 377, 72 N. E. 1053; Lake Erie, etc., R. Co. *v.* Pence, 24 Ind. App. 12, 55 N. E. 1036; Baltimore, etc., R. Co. *v.* Musgrave, 24 Ind. App. 295, 55

necessity due to the situation in which he is placed to make the attempt to cross the

N. E. 496; Pittsburgh, etc., R. Co. *v.* Bennett, 9 Ind. App. 92, 35 N. E. 1033. *Compare* Pittsburg, etc., R. Co. *v.* Burton, 139 Ind. 357, 37 N. E. 150, 38 N. E. 594; Chicago, etc., R. Co. *v.* Butler, 10 Ind. App. 244, 38 N. E. 1.

Iowa.— Griffin *v.* Chicago, etc., R. Co., 68 Iowa 638, 27 N. W. 792; Pence *v.* Chicago, etc., R. Co., 63 Iowa 746, 19 N. W. 785; Black *v.* Burlington, etc., R. Co., 38 Iowa 515; Artz *v.* Chicago, etc., R. Co., 34 Iowa 153.

Kansas.— Missouri Pac. R. Co. *v.* Trahern, 77 Kan. 803, 91 Pac. 48; Brown *v.* Edgerton, (1897) 49 Pac. 159.

Kentucky.— Louisville, etc., R. Co. *v.* Molloy, 122 Ky. 385, 91 S. W. 685, 28 Ky. L. Rep. 1113; Smith *v.* Louisville, etc., R. Co., 30 S. W. 209, 16 Ky. L. Rep. 887.

Louisiana.— Blackwell *v.* St. Louis, etc., R. Co., 47 La. Ann. 268, 16 So. 818, 49 Am. St. Rep. 371.

Maine.— Day *v.* Boston, etc., R. Co., 96 Me. 207, 52 Atl. 771, 90 Am. St. Rep. 335, 97 Me. 528, 55 Atl. 420; State *v.* Maine Cent. R. Co., 76 Me. 357, 49 Am. Rep. 622 (holding that one who while in the full possession of his faculties attempts to cross a track when a train is approaching and is struck by it is *prima facie* guilty of negligence); Grows *v.* Maine Cent. R. Co., 67 Me. 100, 69 Me. 412.

Maryland.— Baltimore, etc., R. Co. *v.* Roming, 96 Md. 67, 53 Atl. 672; McNab *v.* United R., etc., Co., 94 Md. 719, 51 Atl. 421; State *v.* Baltimore, etc., R. Co., 73 Md. 374, 21 Atl. 62, 11 L. R. A. 442; Baltimore, etc., R. Co. *v.* Mali, 66 Md. 53, 5 Atl. 87.

Massachusetts.— Emery *v.* Boston, etc., R. Co., 173 Mass. 136, 53 N. E. 278, holding that an attempt to cross under such circumstances is gross negligence within Pub. St. c. 112, § 213, so as to bar recovery.

Michigan.— Tobias *v.* Michigan Cent. R. Co., 103 Mich. 330, 61 N. W. 514 (holding also that, although the crossing is improperly constructed, that fact has no bearing on the case); Potter *v.* Flint, etc., R. Co., 62 Mich. 22, 28 N. W. 714.

Minnesota.— Carney *v.* Chicago, etc., R. Co., 46 Minn. 220, 48 N. W. 912.

Mississippi.— Pugh *v.* Illinois Cent. R. Co., (1898) 23 So. 356.

Missouri.— Porter *v.* Missouri Pac. R. Co., 199 Mo. 82, 97 S. W. 880 (contributory negligence as a matter of law); Green *v.* Missouri Pac. R. Co., 192 Mo. 131, 90 S. W. 805; Peterson *v.* St. Louis, etc., R. Co., 156 Mo. 552, 57 S. W. 709; Lane *v.* Missouri Pac. R. Co., 132 Mo. 4, 33 S. W. 645, 1128; Taylor *v.* Missouri Pac. R. Co., 86 Mo. 457; Fox *v.* Missouri Pac. R. Co., 85 Mo. 679.

Nebraska.— Stephens *v.* Omaha, etc., R. Co., 41 Nebr. 167, 59 N. W. 557.

New Jersey.— Fuchs *v.* Lehigh Valley R. Co., (Sup. 1905) 61 Atl. 1; Green *v.* Erie R. Co., 65 N. J. L. 301, 47 Atl. 418; Burnee *v.* Easton, etc., R. Co., 61 N. J. L. 373, 39 Atl. 663; Delaware, etc., R. Co. *v.* Hefferan, 57 N. J. L. 149, 30 Atl. 578; Moore *v.* Central R. Co., 24 N. J. L. 268 (holding that a stage driver who is injured while attempting to drive across a railroad track in front of a rapidly approaching train is guilty of contributory negligence where it appears that he was familiar with the crossing, saw the train coming, and increased his speed in order to pass in front of it); Blaker *v.* New Jersey Midland R. Co., 30 N. J. Eq. 240.

New York.— Cranch *v.* Brooklyn Heights R. Co., 186 N. Y. 310, 78 N. E. 1078 [*reversing* 107 N. Y. App. Div. 341, 95 N. Y. Suppl. 169] (contributory negligence as a matter of law); McAuliffe *v.* New York Cent., etc., R. Co., 181 N. Y. 537, 73 N. E. 1126 [*affirming* 88 N. Y. App. Div. 356, 84 N. Y. Suppl. 607]; Getman *v.* Delaware, etc., R. Co., 162 N. Y. 21, 56 N. E. 553 [*reversing* 37 N. Y. App. Div. 630, 56 N. Y. Suppl. 1108]; Wilds *v.* Hudson River R. Co., 29 N. Y. 315; Hood *v.* Lehigh Valley R. Co., 109 N. Y. App. Div. 418, 96 N. Y. Suppl. 431 [*affirmed* in 186 N. Y. 517, 78 N. E. 1105]; Milliman *v.* New York Cent., etc., R. Co., 109 N. Y. App. Div. 139, 95 N. Y. Suppl. 1097; Turck *v.* New York Cent., etc., R. Co., 108 N. Y. App. Div. 142, 95 N. Y. Suppl. 1100; Henavie *v.* New York Cent., etc., R. Co., 44 N. Y. App. Div. 641, 60 N. Y. Suppl. 752 [*reversed* on the facts in 166 N. Y. 280, 59 N. E. 901]; Lamb *v.* New York Cent., etc., R. Co., 18 N. Y. App. Div. 579, 46 N. Y. Suppl. 404; Mackey *v.* New York Cent. R. Co., 27 Barb. 528 (nonsuit warranted); Winslow *v.* Boston, etc., R. Co., 11 N. Y. St. 831; Smith *v.* New York Cent., etc., R. Co., 11 N. Y. St. 795.

Ohio.— Pennsylvania Co. *v.* Morel, 40 Ohio St. 338; Lake Shore, etc., R. Co. *v.* Geiger, 8 Ohio Cir. Ct. 41, 4 Ohio Cir. Dec. 307.

Pennsylvania.— Ellis *v.* Pennsylvania R. Co., 216 Pa. St. 415, 65 Atl. 803; Hess *v.* Williamsport, etc., R. Co., 181 Pa. St. 492, 37 Atl. 568; Sheehan *v.* Philadelphia, etc., R. Co., 166 Pa. St. 354, 31 Atl. 120; Myers *v.* Baltimore, etc., R. Co., 150 Pa. St. 386, 24 Atl. 747; Aiken *v.* Pennsylvania R. Co., 130 Pa. St. 380, 18 Atl. 619, 17 Am. Rep. 775; Kelly *v.* Pennsylvania R. Co., (1887) 8 Atl. 856; Lehigh Valley R. Co. *v.* Brandtmaier, 113 Pa. St. 610, 6 Atl. 238; Gerety *v.* Philadelphia, etc., R. Co., 81 Pa. St. 274; Allen *v.* Pennsylvania R. Co., 9 Pa. Cas. 382, 12 Atl. 493 (nonsuit proper).

Rhode Island.— McGoran *v.* New York, etc., R. Co., 25 R. I. 387, 55 Atl. 929, direction of verdict for railroad company warranted.

Texas.— Houston, etc., R. Co. *v.* Kauffmann, (Civ. App. 1907) 101 S. W. 817; St. Louis Southwestern R. Co. *v.* Matthews, 34 Tex. Civ. App. 302, 79 S. W. 71 (holding that there can be no recovery for injuries to one who goes on a railroad crossing in such close proximity to an approaching train that it cannot be stopped in time to avoid injury to him); Gulf, etc., R. Co. *v.* Wilson, (Civ. App. 1900) 59 S. W. 589, 60 S. W. 438; Gulf, etc., R. Co. *v.* Abendroth, (Civ. App. 1900) 55 S. W. 1122; Houston, etc., R. Co. *v.* Knip-

track,[5] or unless the railroad company, after discovering the traveler's apparent intention to cross, fails to use means reasonably within its power to prevent injury,[6] or wantonly or intentionally injures him.[7] This rule applies, although the person approaching the crossing believes that he can cross in safety, but miscalculates his danger;[8] and although the railroad company is itself negligent in the management of its train,[9] as in failing to give the proper signals of its approach,[10] or

stein, (Civ. App. 1900) 55 S. W. 754; Gulf, etc., R. Co. *v.* Younger, (Civ. App. 1897) 40 S. W. 423; Houston, etc., R. Co. *v.* Lovett, 1 Tex. App. Civ. Cas. § 137.

Vermont.— Guilmont *v.* Central Vermont R. Co., 78 Vt. 185, 62 Atl. 54.

Virginia.— Smith *v.* Norfolk, etc., R. Co., 107 Va. 725, 60 S. E. 56; Stokes *v.* Southern R. Co., 104 Va. 817, 52 S. E. 855; Baltimore, etc., R. Co. *v.* Few, 94 Va. 82, 26 S. W. 406; Campbell *v.* Richmond, etc., R. Co., (1895) 21 S. E. 480; Marks *v.* Petersburgh R. Co., 88 Va. 1, 13 S. E. 299; New York, etc., R. Co. *v.* Kellam, 83 Va. 851, 3 S. E. 703.

Washington.— Woolf *v.* Washington R., etc., Co., 37 Wash. 491, 79 Pac. 997.

Wisconsin.— Groesbeck *v.* Chicago, etc., R. Co., 93 Wis. 505, 67 N. W. 1120; Dullea *v.* Chicago, etc., R. Co., 86 Wis. 173, 56 N. W. 477; Schilling *v.* Chicago, etc., R. Co., 71 Wis. 255, 37 N. W. 414, 40 N. W. 616.

United States.— Chicago, etc., R. Co. *v.* Houston, 95 U. S. 697, 24 L. ed. 542; Gipson *v.* Southern R. Co., 140 Fed. 410; St. Louis, etc., R. Co. *v.* Chapman, 140 Fed. 129, 71 C. C. A. 523; Southern R. Co. *v.* Carroll, 138 Fed. 638, 71 C. C. A. 88; Gilbert *v.* Erie R. Co., 97 Fed. 747, 38 C. C. A. 408; Pyle *v.* Clark, 79 Fed. 744, 25 C. C. A. 190 [*affirming* 75 Fed. 644]; Walker *v.* Kinnare, 76 Fed. 101, 22 C. C. A. 75; Dunning *v.* Bond, 38 Fed. 813. See also Chicago, etc., R. Co. *v.* Clarkson, 147 Fed. 397, 77 C. C. A. 575.

See 41 Cent. Dig. tit. "Railroads," § 1080.

A deaf man who drives upon a railroad crossing where the view is obstructed, when a train is approaching at a high rate of speed in plain sight, and so close that it cannot be stopped in time to prevent a collision, cannot recover for injuries sustained. Chicago, etc., R. Co. *v.* Pounds, 82 Fed. 217, 27 C. C. A. 112.

5. Myers *v.* Baltimore, etc., R. Co., 150 Pa. St. 386, 24 Atl. 747; Texas, etc., R. Co. *v.* Giddings, (Tex. Civ. App. 1894) 24 S. W. 1125.

6. Memphis, etc., R. Co. *v.* Martin, 117 Ala. 367, 23 So. 231; St. Louis, etc., R. Co. *v.* Taylor, 64 Ark. 364, 42 S. W. 831; Guenther *v.* St. Louis, etc., R. Co., 95 Mo. 286, 8 S. W. 371; Dunning *v.* Bond, 38 Fed. 813. And see *infra*, X, F, 12.

7. Louisville, etc., R. Co. *v.* Orr, (Ala. 1899) 26 So. 35; Memphis, etc., R. Co. *v.* Martin, 117 Ala. 367, 23 So. 231; Leak *v.* Georgia Pac. R. Co., 90 Ala. 161, 8 So. 245. And see *infra*, X, F, 13.

8. *Georgia.*— Southern R. Co. *v.* Blake, 101 Ga. 217, 29 S. E. 288.

Illinois.— Toledo, etc., R. Co. *v.* Jones, 76 Ill. 311.

Indiana.— Sutherland *v.* Cleveland, etc., R. Co., 148 Ind. 308, 47 N. E. 624; Bellefontaine R. Co. *v.* Hunter, 33 Ind. 335, 5 Am. Rep. 201.

Kentucky.— Smith *v.* Louisville, etc., R. Co., 30 S. W. 209, 16 Ky. L. Rep. 887.

Michigan.— Tobias *v.* Michigan Cent. R. Co., 103 Mich. 330, 61 N. W. 514.

Missouri.— Kelley *v.* Hannibal, etc., R. Co., 75 Mo. 138, holding that one who crosses in front of an engine, thinking that he can cross without harm if the engine runs at its usual and lawful rate of speed, but who in consequence of its running faster is struck and injured, cannot recover therefor.

New York.— Hood *v.* Lehigh Valley R. Co., 109 N. Y. App. Div. 418, 96 N. Y. Suppl. 431 [*affirmed* in 186 N. Y. 517, 78 N. E. 1105].

Ohio.— Pennsylvania Co. *v.* Morel, 40 Ohio St. 338.

Texas.—International, etc., R. Co. *v.* Kuehn, 70 Tex. 582, 8 S. W. 484.

Vermont.— Guilmont *v.* Central Vermont R. Co., 78 Vt. 185, 62 Atl. 54.

United States.— Cobleigh *v.* Grand Trunk R. Co., 75 Fed. 247, holding that the question of contributory negligence is for the jury.

See 41 Cent. Dig. tit. "Railroads," § 1080.

9. *Indiana.*— Korrady *v.* Lake Shore, etc., R. Co., 131 Ind. 261, 29 N. E. 1069.

Kentucky.— Illinois Cent. R. Co. *v.* Jackson, 65 S. W. 342, 23 Ky. L. Rep. 1405.

Maryland.— State *v.* Baltimore, etc., R. Co., 73 Md. 374, 21 Atl. 62, 11 L. R. A. 442.

Virginia.— Marks *v.* Petersburg, etc., R. Co., 88 Va. 1, 15 S. E. 299.

Washington.— Woolf *v.* Washington R., etc., Co., 37 Wash. 491, 79 Pac. 997.

United States.— Gipson *v.* Southern R. Co., 140 Fed. 410.

See 41 Cent. Dig. tit. "Railroads," § 1080.

10. *Alabama.*— Georgia Cent. R. Co. *v.* Foshee, 125 Ala. 199, 27 So. 1006; Leak *v.* Georgia Pac. R. Co., 90 Ala. 161, 8 So. 245.

Arkansas.— Little Rock, etc., R. Co. *v.* Cullen, 54 Ark. 431, 16 S. W. 169.

California.— Herbert *v.* Southern Pac. Co., 121 Cal. 227, 53 Pac. 651.

Illinois.— Chicago, etc., R. Co. *v.* Bell, 70 Ill. 102; Lake Shore, etc., R. Co. *v.* Sunderland, 2 Ill. App. 307.

Kansas.— Missouri Pac. R. Co. *v.* Trahern, (1907) 91 Pac. 48.

Louisiana.— Blackwell *v.* St. Louis, etc., R. Co., 47 La. Ann. 268, 16 So. 818, 49 Am. St. Rep. 371.

New York.— M'Auliffe *v.* New York Cent., etc., R. Co., 181 N. Y. 537, 76 N. E. 1126 [*affirming* 88 N. Y. App. Div. 356, 84 N. Y. Suppl. 607]; Milliman *v.* New York Cent., etc., R. Co., 109 N. Y. App. Div. 139, 95 N. Y. Suppl. 1097.

in running at an excessive or unlawful rate of speed,[11] or although it is negligent in obscuring the view by cars on parallel tracks,[12] or in failing to have a flagman at the crossing,[13] or although the flagman is not properly attending to his duties.[14] It is not necessarily contributory negligence, however, for a traveler to attempt to cross, although he knows of the approaching train, if it reasonably appears that he will have time to do so;[15] and ordinarily it is a question of fact whether an attempt to cross before an approaching train is contributory negligence,[16] although the circumstances may be such as to make it negligence as a matter of law,[17] as where it appears that the approaching train is so near and running at such a rate of speed that it is reasonably apparent that the train will reach the crossing before the person can get across.[18]

(B) *Intervening Incidents Causing Delay.* Where a person approaching a crossing knows that the slightest delay or mishap in crossing will put him in extreme peril, his attempt to cross is contributory negligence, although his failure to get across in safety is caused by some intervening incident causing the delay,[19]

Ohio.— Lake Shore, etc., R. Co. *v.* Geiger, 8 Ohio Cir. Ct. 41, 4 Ohio Cir. Dec. 307.

Texas.— International, etc., R. Co. *v.* Edwards, 100 Tex. 22, 93 S. W. 106; Gulf, etc., R. Co. *v.* Abendroth, (Civ. App. 1900) 55 S. W. 1122; Chicago, etc., R. Co. *v.* Williams, (Civ. App. 1897) 41 S. W. 501.

United States.— Gilbert *v.* Erie R. Co., 97 Fed. 747, 38 C. C. A. 408.

See 41 Cent. Dig. tit. "Railroads," § 1080.

11. *Alabama.*— Georgia Cent. R. Co. *v.* Foshee, 125 Ala. 199, 27 So. 1006.

Arkansas.— Little Rock, etc., R. Co. *v.* Cullen, 54 Ark. 431, 16 S. W. 169.

California.— Pepper *v.* Southern Pac. R. Co., 105 Cal. 89, 38 Pac. 974.

Indiana.— Lake Erie, etc., R. Co. *v.* Pence, 24 Ind. App. 12, 55 N. E. 1036.

Mississippi.— Pugh *v.* Illinois Cent. R. Co., (1898) 23 So. 356.

Missouri.— Peterson *v.* St. Louis, etc., R. Co., 156 Mo. 552, 57 S. W. 709; Taylor *v.* Missouri Pac. R. Co., 86 Mo. 457.

United States.— Gilbert *v.* Erie R. Co., 97 Fed. 747, 38 C. C. A. 408.

See 41 Cent. Dig. tit. "Railroads," § 1080.

12. Lake Shore, etc., R. Co. *v.* Geiger, 8 Ohio Cir. Ct. 41, 4 Ohio Cir. Dec. 307.

13. Lake Shore, etc., R. Co. *v.* Geiger, 8 Ohio Cir. Ct. 41, 4 Ohio Cir. Dec. 307; Walker *v.* Kinnare, 76 Fed. 101, 22 C. C. A. 75.

14. Lake Shore, etc., R. Co. *v.* Sunderland, 2 Ill. App. 207.

15. Baltimore, etc., R. Co. *v.* Keck, 185 Ill. 400, 57 N. E. 197 [*affirming* 84 Ill. App. 159]; Chicago, etc., R. Co. *v.* Ptacek, 171 Ill. 9, 49 N. E. 191 [*affirming* 62 Ill. App. 375].

Bare knowledge of an approaching train does not make one guilty of contributory negligence, regardless of the rate of speed and the manner in which the train is running. St. Louis, etc., R. Co. *v.* Matthews, 34 Tex. Civ. App. 302, 79 S. W. 71.

16. Brown *v.* Edgerton, (Kan. 1897) 49 Pac. 159; Houston, etc., R. Co. *v.* Laskowski, (Tex. Civ. App. 1898) 47 S. W. 59. And see *infra*, X, F, 14, g, (XI), (A).

That the person injured heard the whistle at a sufficient distance to have stopped in time to avoid a collision does not make his attempt to cross necessarily negligence, as the whistling might have been heard when the train was at such a distance that a prudent man would believe that he could safely cross. Cleveland, etc., R. Co. *v.* Reiss, 13 Ohio Cir. Ct. 405, 7 Ohio Cir. Dec. 450.

17. Lambert *v.* Southern Pac. R. Co., 146 Cal. 231, 79 Pac. 873; Patterson *v.* Chicago, etc., R. Co., 111 Ill. App. 441 (holding that where a person undertakes to cross while a train is rapidly approaching, and the view of such person is not obstructed and no extenuating circumstances appear, contributory negligence appears as a matter of law); Sheehan *v.* Philadelphia, etc., R. Co., 166 Pa. St. 354, 31 Atl. 120 (holding that for one to go on to a railroad track immediately in front of an approaching train is negligence as a matter of law, notwithstanding his assertion that he stopped, looked, and listened); Myers *v.* Baltimore, etc., R. Co., 150 Pa. St. 386, 24 Atl. 747; Gipson *v.* Southern R. Co., 140 Fed. 410.

18. *California.*— Green *v.* Southern California R. Co., 138 Cal. 1, 70 Pac. 926, (1901) 67 Pac. 4.

Maine.— Grows *v.* Maine Cent. R. Co., 67 Me. 100, 69 Me. 412.

Maryland.— Baltimore, etc., R. Co. *v.* Romeng, 96 Md. 67, 53 Atl. 672; State *v.* Baltimore, etc., R. Co., 73 Md. 374, 21 Atl. 62, 11 L. R. A. 442; Baltimore, etc., R. Co. *v.* Mali, 66 Md. 53, 5 Atl. 87.

Michigan.— Mott *v.* Detroit, etc., R. Co., 120 Mich. 127, 79 N. W. 3.

Pennsylvania.— Aiken *v.* Pennsylvania R. Co., 130 Pa. St. 380, 18 Atl. 619, 17 Am. St. Rep. 775.

Rhode Island.— McGoran *v.* New York, etc., R. Co., 25 R. I. 387, 55 Atl. 929.

Wisconsin.— Dullea *v.* Chicago, etc., R. Co., 86 Wis. 173, 56 N. W. 477.

See 41 Cent. Dig. tit. "Railroads," § 1080.

19. Palys *v.* Erie R. Co., 30 N. J. Eq. 604 [*reversed* on the facts in 32 N. J. Eq. 302]; Wilds *v.* Hudson River R. Co., 29 N. Y. 315; Schwartz *v.* Hudson River R. Co., 4 Rob. (N. Y.) 347. *Compare* Lake Shore, etc., R. Co. *v.* Beall, 13 Ohio Cir. Ct. 605, 6 Ohio Cir. Dec. 250, holding that it is not negligence on the part of one driving sheep across a rail-

as where he stumbles or falls,[20] or where his horse balks when on the track.[21] It has been held, however, that where under ordinary circumstances there is time to cross in safety, the traveler is not chargeable with contributory negligence for failure to anticipate an unusual occurrence, such as a horse pulling back, or his falling upon the track, unless there is reason to anticipate such an occurrence from the circumstances.[22]

11. Proximate Cause of Injury[23] — a. In General. A railroad company is not responsible for an injury which is the result of accident alone without negligence or fault on the part of it or its servants;[24] and even where a railroad company is negligent, in order to hold it responsible for an accident at a railroad crossing on that ground, it must appear that such negligence is the natural and proximate cause of the injury.[25] The company's negligence, however, need not be the sole or immediate cause of the injury, or the nearest in point of time or sequence of events.[26] If the negligence of the railroad company is the last negligent act contributing to the injury without which it would not have occurred, its negligence is the proximate cause of the injury, although some other incidental

road crossing to go back on the track in the face of an approaching train to save some of the sheep that had become frightened and run back on to the crossing, where in doing so his foot caught in a defective plank in such crossing and he was killed by the approaching train.

20. Collins *v.* Long Island R. Co., 10 N. Y. Suppl. 701; O'Donnell *v.* New York Cent., etc., R. Co., 12 N. Y. St. 206.

21. State *v.* Cumberland, etc., R. Co., 87 Md. 183, 39 Atl. 610; Palys *v.* Erie R. Co., 30 N. J. Eq. 604; Rigler *v.* Charlotte, etc., R. Co., 94 N. C. 604; Brunette *v.* Chicago, etc., R. Co., 86 Wis. 197, 56 N. W. 478.

22. Johnson *v.* Gulf, etc., R. Co., 2 Tex. Civ. App. 139, 21 S. W. 274.

23. Contributory negligence as proximate cause of injury see *supra*, X, F, 10, a, (VII).

24. Zeigler *v.* Northeastern R. Co., 5 S. C. 221; Atkin *v.* Hamilton, 24 Ont. App. 389 [*reversing* 28 Ont. 229].

25. *Alabama.*— Southern R. Co. *v.* Hobbs, 151 Ala. 335, 43 So. 844; Kansas City, etc., R. Co. *v.* Lackey, 114 Ala. 152, 21 So. 454, backing a train immediately after it had passed over a crossing held proximate cause of injury.

California.— Rowe *v.* Southern Cal. R. Co., 4 Cal. App. 1, 87 Pac. 220.

Indiana.— Baltimore, etc., R. Co. *v.* Young, 153 Ind. 163, 54 N. E. 163; Baltimore, etc., R. Co. *v.* Conoyer, 149 Ind. 524, 48 N. E. 352, 49 N. E. 452; Evansville, etc., R. Co. *v.* Welch, 25 Ind. App. 308, 58 N. E. 88, 81 Am. St. Rep. 102.

Kentucky.— Pedigo *v.* Louisville, etc., R. Co., 68 S. W. 462, 24 Ky. L. Rep. 338.

Missouri.— Boyce *v.* Chicago, etc., R. Co., 120 Mo. App. 168, 96 S. W. 670.

Nebraska.— Meyer *v.* Midland Pac. R. Co., 2 Nebr. 319.

New Hampshire.— Duggan *v.* Boston, etc., R. Co., 74 N. H. 250, 66 Atl. 829.

North Carolina.— Butts *v.* Atlantic, etc., R. Co., 133 N. C. 82, 45 S. E. 472.

Ohio.— Cincinnati, etc., R. Co. *v.* Murphy, 18 Ohio Cir. Ct. 298, 10 Ohio Cir. Dec. 195.

South Carolina.— Harbert *v.* Atlanta, etc., Air Line R. Co., 78 S. C. 537, 59 S. E. 644; Edwards *v.* Southern R. Co., 63 S. C. 271, 41 S. E. 458.

Texas.— Galveston, etc., R. Co. *v.* Eaten, (Civ. App. 1898) 44 S. W. 562.

Virginia.— Southern R. Co. *v.* Hansbrough, 107 Va. 733, 60 S. E. 58, holding that the negligence of the company must be the sole proximate cause, to authorize a recovery against it.

Washington.— Baker *v.* Tacoma Eastern R. Co., 44 Wash. 575, 87 Pac. 826.

Canada.— Winckler *v.* Great Western R. Co., 18 U. C. C. P. 250.

Concurrent acts.— Where two acts of negligence, on the part of a railroad company, combined with one lawful act on its part, are shown to be the proximate cause of an injury sustained by one who is without fault on his part, and the result of the wrongful acts, independent of the rightful act, cannot be separated and determined, the railroad is liable for the damages resulting from such combined wrongful and rightful acts. Louisville, etc., R. Co. *v.* Davis, 7 Ind. App. 222, 33 N. E. 451. Likewise where there are two proximate causes of the injury, one the negligence of the railroad company, and the other an occurrence happening without fault on the part of the person injured, the railroad company is liable. Phillips *v.* New York Cent., etc., R. Co., 127 N. Y. 657, 27 N. E. 978 [*affirming* 3 Silv. Sup. 5, 6 N. Y. Suppl. 621].

26. Georgia Cent. R. Co. *v.* Hyatt, 151 Ala. 355, 43 So. 867; Florida Cent., etc., R. Co. *v.* Foxworth, 41 Fla. 1, 25 So. 338, 79 Am. St. Rep. 149 (holding that, although a person about to cross a railroad track at or near a public crossing may be guilty of contributory negligence, yet if the company by omitting any act required by the circumstances directly contributes to the injury, it will be liable in damages); Wabash R. Co. *v.* Billings, 212 Ill. 37, 72 N. E. 2 [*reversing* 105 Ill. App. 111]; Cleveland, etc., R. Co. *v.* Klee, 154 Ind. 430, 56 N. E. 234; Lake Shore, etc., R. Co. *v.* McIntosh, 140 Ind. 261, 38 N. E. 476.

cause ensues, without contributory negligence on the part of the person injured, which may in some degree aid in inflicting the injury.[27] In addition to other kinds of negligence, the above rule applies where the railroad company is negligent in violating a statute or ordinance requiring the maintenance of gates,[28] or a flagman,[29] at certain crossings.

b. Defects or Obstructions at Crossings. In accordance with the above rule a railroad company is liable for an injury, because of its negligently causing or permitting defects or obstructions at a crossing, only where such defects or obstructions are the proximate cause of the injury,[30] and not where they are not the proximate cause thereof.[31]

27. Wabash R. Co. *v.* Billings, 212 Ill. 37, 72 N. E. 2 [*reversing* 105 Ill. App. 111]; Hinchman *v.* Pere Marquette R. Co., 136 Mich. 341, 99 N. W. 277, 65 L. R. A. 553; Wood *v.* New York Cent., etc., R. Co., 83 N. Y. App. Div. 604, 82 N. Y. Suppl. 160 [*affirmed* in 179 N. Y. 557, 71 N. E. 1142]; Putman *v.* New York Cent., etc., R. Co., 47 Hun (N. Y.) 439.

28. Smith *v.* Michigan Cent. R. Co., 35 Ind. App. 188, 73 N. E. 928.

29. Pennsylvania Co. *v.* Hensil, 70 Ind. 569, 36 Am. Rep. 188, holding that the omission to keep a watchman at a street crossing in accordance with an ordinance will not render the company liable unless it is the proximate cause of an injury.

Failure to maintain a flagman as proximate cause see Houston, etc., R. Co. *v.* Byrd, (Tex. Civ. App. 1901) 61 S. W. 147; Kowalski *v.* Chicago, etc., R. Co., 84 Fed. 586, holding that a court cannot say as a matter of law that because the driver of a wagon failed to hear or heed the signals given by a train on approaching a crossing, and was negligent in faling to keep a proper lookout, the absence of a flagman at the crossing did not proximately contribute to the collision.

30. Atchison, etc., R. Co. *v.* Pitts, 123 Ill. App. 607 (standing cars); Porter *v.* Missouri Pac. R. Co., 199 Mo. 82, 97 S. W. 880; Chicago, etc., R. Co. *v.* Roberts, 3 Nebr. (Unoff.) 425, 91 N. W. 707 (holding that in order to hold a railroad company liable for an injury received at a crossing where cars were suffered to stand upon the highway longer than necessary, it must appear that the negligence in so leaving them was the proximate cause of the injury).

Defects and obstructions held proximate cause of injury: Oakland R. Co. *v.* Fielding, 48 Pa. St. 320; St. Louis, etc., R. Co. *v.* Byas, 12 Tex. Civ. App. 657, 35 S. W. 22; San Antonio, etc., R. Co. *v.* Bergsland, 12 Tex. Civ. App. 97, 34 S. W. 155. Encroaching upon and maintaining obstructions in the highway at a crossing which, concurring with the movements of a passing train, produces the collision resulting in the injury. Lake Shore, etc., R. Co. *v.* McIntosh, 140 Ind. 261, 38 N. E. 476. Constructing a cattle-guard so that it projected into the highway so that plaintiff stepped into it while it was filled with snow, and was run over by a train. Hoffman *v.* New York Cent., etc., R. Co., 75 N. Y. 605 [*affirming* 13 Hun 589]. Piling dirt in the highway from a ditch which was being dug on defendants' right of way, whereby plaintiff's horse becoming frightened he was unable to get across in time to avoid an approaching train. Parks *v.* Southern R. Co., 124 N. C. 136, 32 S. E. 387.

The doctrine of remote and proximate cause is not applicable where the conductor of a train permitted it to stand on a public crossing, and absented himself from it, and a teamster employed by the owner of the train attached horses to it and removed it, whereby an injury ensued. Rauch *v.* Lloyd, 31 Pa. St. 358, 72 Am. Dec. 747.

31. Kyne *v.* Wilmington, etc., R. Co., 8 Houst. (Del.) 185, 14 Atl. 922 (holding that the failure to observe a requirement of a statute that no approach to a grade crossing shall be heavier than five degrees is presumptive evidence of negligence, but will not render the company liable for an injury not resulting from such unlawful grade); Chicago, etc., R. Co. *v.* Scranton, 95 Ill. App. 619 (holding that under Rev. St. c. 114, § 77, requiring railroad companies to maintain highway crossings so that they at all times shall be safe as to persons and property, the railroad company is not liable for an injury occasioned by a team taking fright at the carcass of an animal that had been killed near the crossing about two hours before plaintiff was injured, since the injury is not the proximate result of the company's negligence); Barkley *v.* Missouri Pac. R. Co., 96 Mo. 367, 9 S. W. 793; Pittsburgh, etc., R. Co. *v.* Staley, 41 Ohio St. 118, 52 Am. Rep. 74.

Defects and obstructions held not proximate cause of injury: Chicago, etc., R. Co. *v.* Stamps, 26 Ill. App. 219; Kemp *v.* Northern Pac. R. Co., 89 Minn. 139, 94 N. W. 439. Falling of a defective bridge, where it appears that no injury is done by such falling, but that the injury is caused by an engine passing over the railroad. Brown *v.* Spartanburg, etc., R. Co., 57 S. C. 433, 35 S. E. 731. The giving away of a box drain across a public road, put in by a railroad company, where it appears that plaintiff's horse shied and he was thrown to the ground, sustaining the injury of which he complains. Leo *v.* Texas, etc., R. Co., 110 La. 213, 34 So. 417.

A ridge of earth on the side of the tracks at which plaintiff's horse becomes frightened and plaintiff is thrown out of the buggy and injured is not the proximate cause of the injury, where it appears that the railroad

c. Fright or Unmanageableness of Team. Likewise where the injury is caused by reason of the injured party's horse or team becoming frightened or unmanageable, the railroad company is responsible therefor only where such fright or unmanageableness is a proximate result of negligence on its part;[32] and

company is not negligent in permitting the ridge to exist, it not rendering the highway unsafe for ordinary travel. Myers *v.* Chicago, etc., R. Co., 101 Fed. 915.

A defect in a gate at a railroad crossing is not the proximate cause of an injury received by one who, after passing the gate, sees a train approaching but tries to cross the track and gets his foot caught and is consequently injured. Baltimore, etc., R. Co. *v.* Anderson, 75 Fed. 811, 22 C. C. A. 415.

That safety gates at a railroad crossing have been down for a longer time than allowed by ordinance is not the proximate cause of an injury occasioned by the frightening of a horse by the escape of steam from an engine, and the blowing of a whistle. Simmons *v.* Pennsylvania R. Co., 199 Pa. St. 232, 48 Atl. 1070.

The wrongful obstruction of a crossing by trains or cars is not the proximate cause of an injury merely because, but for the standing train, plaintiff would have crossed the tracks before the arrival of another train which caused the injury (DuBoise *v.* New York Cent., etc., R. Co., 88 Hun (N. Y.) 10, 34 N. Y. Suppl. 279); or where the injury is caused by reason of plaintiff, in attempting to climb over the cars, having his foot caught in a stirrup of the car and thereby being thrown to the ground and injured (Montgomery *v.* East Tennessee, etc., R. Co., 94 Ga. 332, 21 S. E. 571); or by reason of his horse becoming frightened by the noise of an engine (Wabash R. Co. *v.* Coker, 81 Ill. App. 660), or of a passing train (Stanton *v.* Louisville, etc., R. Co., 91 Ala. 382, 8 So. 798; Selleck *v.* Lake Shore, etc., R. Co., 58 Mich. 195, 24 N. W. 774); or by reason of plaintiff, a pedestrian, receiving a fall caused by a defect in the street, while making a detour to pass around the train (Enochs *v.* Pittsburgh, etc., R. Co., 145 Ind. 635, 44 N. E. 658); or by reason of his horse, which had never before taken fright at cars, becoming frightened at a caboose while passing around it (Atchison, etc., R. Co. *v.* Morris, 64 Kan. 411, 67 Pac. 837); or by reason of his undertaking to cross at a point where defendant is not bound to keep the right of way safe for travel (Kelly *v.* Texas, etc., R. Co., 97 Tex. 619, 80 S. W. 1197 [*affirming* (Civ. App. 1904) 78 S. W. 372]); or by reason of his undertaking to drive across at a dangerous place, whereby his vehicle is tipped over and he is injured (Jackson *v.* Nashville, etc., R. Co., 13 Lea (Tenn.) 491, 49 Am. Rep. 663); or by reason of his being injured by the backing of cars that had been standing on the crossing in violation of an ordinance (Boyd *v.* Cross, (Tex. Civ. App. 1898) 47 S. W. 478).

32. *Indiana.*— Cleveland, etc., R. Co. *v.* Wynant, 134 Ind. 681, 34 N. E. 569 (holding that where it appears that the horses were frightened both by a car standing on the crossing and by a noise at the car, for which neither plaintiff nor defendant is responsible, defendant is liable); Cleveland, etc., R. Co. *v.* Carey, 33 Ind. App. 275, 71 N. E. 244.

Kentucky.— Illinois Cent. R. Co. *v.* Mizell, 100 Ky. 235, 38 S. W. 5, 18 Ky. L. Rep. 738, failure to give signals held proximate cause.

Michigan.— Hinchman *v.* Pere Marquette R. Co., 136 Mich. 341, 99 N. W. 277, 65 L. R. A. 553, holding that a railroad company is not liable for injuries from the frightening of a horse by the emission of steam from its engine, although the engine was and for five minutes had been obstructing a crossing in violation of Comp. Laws (1897), §§ 6234 (5), unless the injuries were the proximate result of such unlawful act or of some other wrong done by defendant.

Mississippi.— Louisville, etc., R. Co. *v.* Crominarity, 86 Miss. 464, 38 So. 633.

New York.— Wood *v.* New York Cent., etc., R. Co., 83 N. Y. App. Div. 604, 82 N. Y. Suppl. 160 [*affirmed* in 179 N. Y. 557, 71 N. E. 1142]; Putman *v.* New York Cent., etc., R. Co., 47 Hun 439 (holding that where the accident would not have happened but for the frightening of the horse, defendant is liable, although the bad condition of plaintiff's harness promoted the injury, unless it amounted to negligence); Barringer *v.* New York Cent., etc., R. Co., 18 Hun 398 (holding that it must be shown that the company's negligence or wrong-doing was the proximate cause of the accident and not the driver's inability to control his horse).

See 41 Cent. Dig. tit. "Railroads," § 1092.

Negligence of railroad company held the proximate cause of injuries resulting from a team becoming frightened or unmanageable see Southern R. Co. *v.* Tankersley, 3 Ga. App. 548, 60 S. E. 297; Atchison, etc., R. Co. *v.* Wilkie, 77 Kan. 791, 90 Pac. 775, 11 L. R. A. N. S. 963; Mitchell *v.* St. Louis, etc., R. Co., 122 Mo. App. 50, 97 S. W. 552 (failing to give signals); Schemerhorn *v.* New York Cent., etc., R. Co., 33 N. Y. App. Div. 17, 53 N. Y. Suppl. 279; Putman *v.* New York Cent., etc., R. Co., 47 Hun (N. Y.) 439 (holding that where negligence of defendant in lowering a gate caused the gate to strike plaintiff's horse and frightened him so that he ran away and a rein broke, and plaintiff was thrown out of the wagon and injured, the jury may find that the frightening of the horse and not the breaking of the rein was the proximate cause of the injury); Beopple *v.* Illinois Cent. R. Co., 104 Tenn. 420, 58 S. W. 231; Sherman, etc., R. Co. *v.* Eaves, 25 Tex. Civ. App. 409, 61 S. W. 550; Belt *v.* San Antonio, etc., R. Co., (Tex. Civ. App. 1896) 37 S. W. 362; Texas, etc., R. Co. *v.* Anderson, 2 Tex. App. Civ. Cas. § 203; Allibone *v.* Texas, etc., R.

not where its negligence is only the remote cause thereof,[33] or where there is no causal connection between the negligence for which a recovery is sought and the fright or unmanageableness of the team.[34]

d. Failure to Give Signals From Train. A failure to give the customary or statutory signals on approaching a crossing will make the railroad company liable for an injury sustained by an accident at the crossing, only where it is shown that such failure is the cause of the injury.[35] It is not liable if there is no causal

Co., 2 Tex. App. Civ. Cas. § 64; Fay *v.* Minneapolis, etc., R. Co., 131 Wis. 639, 111 N. W. 683.

In determining the cause of an accident the jury may use their general knowledge as to the habits of horses and their liability to become frightened by moving trains. State *v.* Maine Cent. R. Co., 86 Me. 309, 29 Atl. 1086.

33. Stanton *v.* Louisville, etc., R. Co., 91 Ala. 382, 8 So. 798; Stahl *v.* Lake Shore, etc., R. Co., 117 Mich. 273, 75 N. W. 629; Ft. Worth, etc., R. Co. *v.* Neely, (Tex. Civ. App. 1900) 60 S. W. 282 [questions certified answered in 96 Tex. 274, 72 S. W. 159].

34. *Delaware.*— Reed *v.* Queen Anne's R. Co., 4 Pennew. 413, 57 Atl. 529.

Georgia.— Georgia Southern, etc., R. Co. *v.* Williams, 93 Ga. 253, 18 S. E. 825.

Indiana.— Baltimore, etc., R. Co. *v.* Musgrave, 24 Ind. App. 295, 55 N. E. 496, holding that running at an unlawful speed or without signals is not the proximate cause of an injury, caused by plaintiff's team becoming frightened at the head-light.

Iowa.— Pratt *v.* Chicago, etc., R. Co., 107 Iowa 287, 77 N. W. 1064.

Kentucky.— Louisville, etc., R. Co. *v.* Armstrong, 105 S. W. 473, 32 Ky. L. Rep. 252; Pedigo *v.* Louisville, etc., R. Co., 68 S. W. 462, 24 Ky. L. Rep. 338.

Michigan.— Murphy *v.* Michigan Cent. R. Co., 107 Mich. 627, 65 N. W. 753; Lambeck *v.* Grand Rapids, etc., R. Co., 106 Mich. 512, 64 N. W. 479, holding that where a horse becomes frightened while being driven along a street and runs away and collides with a car standing on the street, such fright is the proximate cause of the injuries resulting to the driver from such collision.

Missouri.— Killian *v.* Chicago, etc., R. Co., 86 Mo. App. 473, failure to give signal not proximate cause of injury, where horse took fright at escaping steam.

New York.— Cosgrove *v.* New York Cent., etc., R. Co., 13 Hun 329 [*reversed* on other grounds in 87 N. Y. 88, 41 Am. Rep. 355].

Texas.— Houston, etc., R. Co. *v.* Carruth, (Civ. App. 1899) 50 S. W. 1036, failure to give signals not proximate cause.

Virginia.— Richmond, etc., R. Co. *v.* Yeamans, 86 Va. 860, 12 S. E. 946, 90 Va. 752, 19 S. E. 787, holding that where plaintiff who was driving a wagon had crossed defendant's railroad track where an engine was shifting cars, and when the engine approached the horse, instead of going forward backed into the train and plaintiff was injured, the unusual conduct of the horse could not have been foreseen and defendant is not liable for the injury.

Wisconsin.— Walters *v.* Chicago, etc., R. Co., 104 Wis. 251, 80 N. W. 451.

See 41 Cent. Dig. tit. "Railroads," § 1092.

Injury to third person.— It has been held that where a horse approaches a railroad crossing very rapidly and is frightened by an engine which is standing some distance within the street and by reason of such fright runs against and injures another, the latter's injury is not the proximate result of the railroad company's negligence in permitting the engine to stand on the crossing. Burns *v.* Delaware, etc., Co., 110 N. Y. App. Div. 592, 96 N. Y. Suppl. 509.

35. *Colorado.*— Chicago, etc., R. Co. *v.* Crisman, 19 Colo. 30, 34 Pac. 286.

Illinois.— Toledo, etc., R. Co. *v.* Cline, 135 Ill. 41, 25 N. E. 846; Chicago, etc., R. Co. *v.* Harwood, 90 Ill. 425; Toledo, etc., R. Co. *v.* Durkin, 76 Ill. 395; Toledo, etc., R. Co. *v.* Jones, 76 Ill. 311; Illinois Cent. R. Co. *v.* Benton, 69 Ill. 174; Chicago, etc., R. Co. *v.* Lee, 68 Ill. 576; Peoria, etc., R. Co. *v.* Siltman, 67 Ill. 72; Chicago, etc., R. Co. *v.* Van Patten, 64 Ill. 510; Chicago, etc., R. Co. *v.* McDaniels, 63 Ill. 122; Indianapolis, etc., R. Co. *v.* Blackman, 63 Ill. 117; Galena, etc., R. Co. *v.* Loomis, 13 Ill. 548, 56 Am. Dec. 471; Elgin, etc., R. Co. *v.* Hoadley, 122 Ill. App. 165 [*affirmed* in 220 Ill. 462, 77 N. E. 151]; Illinois Cent., etc., R. Co. *v.* Klein, 95 Ill. App. 220; Cleveland, etc., R. Co. *v.* Richey, 43 Ill. App. 247; Chicago, etc., R. Co. *v.* Wells, 42 Ill. App. 26; Chicago, etc., R. Co. *v.* Hanley, 26 Ill. App. 351, holding that, although a failure to give such signals is *prima facie* negligence, it will not be presumed that such failure caused the injury.

Indiana.— Baltimore, etc., R. Co. *v.* Conoyer, 149 Ind. 524, 48 N. E. 352, 49 N. E. 452; Baltimore, etc., R. Co. *v.* Musgrave, 24 Ind. App. 295, 55 N. E. 496; Leavitt *v.* Terre Haute, etc., R. Co., 5 Ind. App. 513, 31 N. E. 860, 32 N. E. 866.

Kentucky.— Illinois Cent. R. Co. *v.* Mizell, 100 Ky. 235, 38 S. W. 5, 18 Ky. L. Rep. 738.

Mississippi.— Louisville, etc., R. Co. *v.* Crominarity, 86 Miss. 464, 38 So. 633.

Missouri.— Lloyd *v.* St. Louis, etc., R. Co., 128 Mo. 595, 29 S. W. 153, 31 S. W. 110 (where it appears that obedience to the statute would have prevented the injury); Kelley *v.* Hannihal, etc., R. Co., 75 Mo. 138.

New York.— Browne *v.* New York Cent., etc., R. Co., 87 N. Y. App. Div. 206, 83 N. Y. Suppl. 1028, 13 N. Y. Annot. Cas. 409 [*affirmed* in 179 N. Y. 582, 72 N. E. 1140]; Schermerhorn *v.* New York Cent., etc., R. Co., 33 N. Y. App. Div. 17, 53 N. Y. Suppl. 279.

North Carolina.— Edwards *v.* Atlantic Coast Line R. Co., 129 N. C. 78, 39 S. E.

connection between the failure to give the signals and the injury sustained by reason of the accident.[36]

730; Parker *v.* Wilmington, etc., R. Co., 86 N. C. 221.

Ohio.— Cleveland, etc., R. Co. *v.* Richerson, 19 Ohio Cir. Ct. 385, 10 Ohio Cir. Dec. 326; Cincinnati, etc., R. Co. *v.* Murphy, 18 Ohio Cir. Ct. 298, 10 Ohio Cir. Dec. 195.

South Carolina.— Mercer *v.* Southern R. Co., 66 S. C. 246, 44 S. E. 750 (holding that, where signals are not given at a crossing and a person is killed, the company is liable unless such person by his own carelessness contributes to his injury and his negligence is a proximate cause of the injury); Bishop *v.* Southern R. Co., 63 S. C. 532, 41 S. E. 808. Under Rev. St. (1893) § 1692, it is held that the railroad company's liability does not depend upon whether its failure to give the prescribed signals is the proximate cause of the injury to a person at the crossing, but it is equally liable if such failure contributed thereto. Strother *v.* South Carolina, etc., R. Co., 47 S. C. 375, 25 S. E. 272; Wragge *v.* South Carolina, etc., R. Co., 47 S. C. 105, 25 S. E. 76, 58 Am. St. Rep. 870, 33 L. R. A. 191.

Texas.— Sherman, etc., R. Co. *v.* Eaves, 25 Tex. Civ. App. 409, 61 S. W. 550; Central Texas, etc., R. Co. *v.* Nycum, (Civ. App. 1896) 34 S. W. 460.

Virginia.— Simons *v.* Southern R. Co., 96 Va. 152, 31 S. E. 7, holding that there must be a causal connection between the breach of duty and the injury.

Wisconsin.— Morey *v.* Lake Superior Terminal, etc., R. Co., 125 Wis. 148, 103 N. W. 271.

See 41 Cent. Dig. tit. "Railroads," § 1094.

Failure to give signals held to be proximate cause of injury see Cleveland, etc., R. Co. *v.* Carey, 33 Ind. App. 275, 71 N. E. 244; Illinois Cent. R. Co. *v.* Bethea, 88 Miss. 119, 40 So. 813; Louisville, etc., R. Co. *v.* Crominarity, 86 Miss. 464, 38 So. 633; Browne *v.* New York Cent., etc., R. Co., 87 N. Y. App. Div. 206, 83 N. Y. Suppl. 1028, 13 N. Y. Annot. Cas. 409 [*affirmed* in 179 N. Y. 582, 72 N. E. 1140]; Houston, etc., R. Co. *v.* Byrd, (Tex. Civ. App. 1901) 61 S. W. 147; Allibone *v.* Texas, etc., R. Co., 2 Tex. App. Civ. Cas. § 64; Morey *v.* Lake Superior Terminal, etc., R. Co., 125 Wis. 148, 103 N. W. 271, holding that where, by reason of a train's approach at an unlawful speed and without warning, a traveler who had approached within two or three feet of the track became overcome with fear, producing unconsciousness and loss of control over his actions, which caused him to fall forward and partly on the track where the train struck him, the railroad company's negligence was the proximate cause of the injury.

Where plaintiff is injured in jumping from a street car to escape a threatened collision with a railroad train, and the railroad company fails to ring the bell as the train is approaching the crossing as required by statute (Sayles Annot. Civ. St. (1897) art. 4507) such company is not relieved from liability because the train is actually stopped before collision after causing the injury. Galveston, etc., R. Co. *v.* Vollrath, 40 Tex. Civ. App. 46, 89 S. W. 279.

Where a miscarriage is caused by fright from a passing train, plaintiff can recover if her fright ought to have been foreseen as a natural and probable consequence of the failure to give signals, although the consequent miscarriage could not have been foreseen, as fright naturally tends to produce a miscarriage. St. Louis Southwestern R. Co. *v.* Mitchell, 25 Tex. Civ. App. 197, 60 S. W. 891.

36. *Arkansas.*— St. Louis, etc., R. Co. *v.* Denty, 63 Ark. 177, 37 S. W. 719.

California.— Lambert *v.* Southern Pac. R. Co., 146 Cal. 231, 79 Pac. 873.

Florida.— Florida Cent., etc., R. Co. *v.* Foxworth, 41 Fla. 1, 25 So. 338, 79 Am. St. Rep. 149.

Georgia.— Georgia Southern, etc., R. Co. *v.* Williams, 93 Ga. 253, 18 S. E. 825.

Illinois.— Toledo, etc., R. Co. *v.* Durkin, 76 Ill. 395.

Kentucky.— Louisville, etc., R. Co. *v.* Survant, 44 S. W. 88, 19 Ky. L. Rep. 1576.

Michigan.— Stahl *v.* Lake Shore, etc., R. Co., 117 Mich. 273, 75 N. W. 629.

Missouri.— Killian *v.* Chicago, etc., R. Co., 86 Mo. App. 473.

New York.— Bosko *v.* Delaware, etc., R. Co., 91 Hun 320, 36 N. Y. Suppl. 261; Cosgrove *v.* New York Cent., etc., R. Co., 13 Hun 329 [*reversed* on other grounds in 87 N. Y. 88, 41 Am. Rep. 355].

Texas.— McDonald *v.* International, etc., R. Co., 86 Tex. 1, 22 S. W. 939, 40 Am. St. Rep. 803 [*reversing* (Civ. App. 1892) 20 S. W. 847]; Texas, etc., R. Co. *v.* Wright, 62 Tex. 515; Houston, etc., R. Co. *v.* Carruth, (Civ. App. 1899) 50 S. W. 1036.

Virginia.— Brammer *v.* Norfolk, etc., R. Co., 104 Va. 50, 51 S. E. 211.

West Virginia.— Butcher *v.* West Virginia, etc., R. Co., 37 W. Va. 180, 16 S. E. 457, 18 L. R. A. 519.

See 41 Cent. Dig. tit. "Railroads," § 1094.

Failure to give signals held not to be proximate cause of the injury see St. Louis, etc., R. Co. *v.* Denty, 63 Ark. 177, 37 S. W. 719 (where a child four years old approaching crossing breaks away from the person in whose charge it is and runs in front of the train); Louisville, etc., R. Co. *v.* Survant, 44 S. W. 88, 19 Ky. L. Rep. 1576 (holding that a failure to give signals at a public crossing is not the proximate cause of the fright of plaintiff's horse after crossing the track at a private crossing a mile distant); Barkley *v.* Missouri Pac. R. Co., 96 Mo. 367, 97 S. W. 793 (holding that a failure to give a signal of the starting of a freight train which has been standing on a crossing does not make the company liable for the injury of one who, having started to cross in front of the train, sees it begin to move, starts

e. Unlawful Rate of Speed. Negligence in running a train at a rate of speed in violation of a statute or ordinance does not make the railroad company liable for injuries caused by the train, unless the unlawful speed is the proximate cause of the injury.[37] It is not liable on that ground where such negligence is not the proximate cause of the injury for which recovery is sought.[38]

12. Injury Avoidable Notwithstanding Contributory Negligence. Although a person injured at a railroad crossing may be guilty of negligence which to some extent contributes to his injury, yet the railroad company is liable, if notwithstanding such contributory negligence it could by the exercise of ordinary care and diligence have avoided the injury, but fails to do so,[39] after it sees or

back toward the rear of the train, stumbles, and falls under the cars); Bosko *v.* Delaware, etc., R. Co., 91 Hun (N. Y.) 320, 36 N. Y. Suppl. 261 (where plaintiff's foot caught in the track and he was unable to extricate it); Brammer *v.* Norfolk, etc., R. Co., 104 Va. 50, 51 S. W. 211 (driving on track without looking or listening for the approach of a train which was plainly visible); Schubrinck *v.* Canada Atlantic R. Co., 8 Can. L. T. Occ. Notes 438.

Where plaintiff actually sees or knows of the approach of the train when he is some distance from the crossing, the failure of the engineer to sound the whistle or ring the bell has no causal connection with an ensuing collision. Lambert *v.* Southern Pac. R. Co., 146 Cal. 231, 79 Pac. 873; Louisville, etc., R. Co. *v.* Pirschbacher, 63 Ill. App. 144; McDonald *v.* International, etc., R. Co., 86 Tex. 1, 22 S. W. 939, 40 Am. St. Rep. 803 [*reversing* (Civ. App. 1892) 20 S. W. 847].

37. *Delaware.*— Knopf *v.* Philadelphia, etc., R. Co., 2 Pennew. 392, 46 Atl. 747.

Indiana.— Lake Erie, etc., R. Co. *v.* Mikesell, 23 Ind. App. 395, 55 N. E. 488.

Kansas.— Chicago, etc., R. Co. *v.* Kennedy, 2 Kan. App. 693, 43 Pac. 802.

Maine.— State *v.* Maine Cent. R. Co., 77 Me. 538, 1 Atl. 673, holding that unlawful speed is not of itself sufficient to establish negligence or to warrant a recovery, but that it must be shown affirmatively that the accident was occasioned by such unauthorized speed, without any contributory negligence on the part of the person injured.

Mississippi.— Illinois Cent. R. Co. *v.* Watson, (1905) 39 So. 69.

Missouri.— Kelley *v.* Hannibal, etc., R. Co., 75 Mo. 138; Duffy *v.* Missouri Pac. R. Co., 19 Mo. App. 380.

Ohio.— Cincinnati, etc., R. Co. *v.* Murphy, 18 Ohio Cir. Ct. 298, 10 Ohio Cir. Dec. 195.

Oregon.— Kunz *v.* Oregon R. Co., (1907) 93 Pac. 141, 94 Pac. 504.

Tennessee.— Louisville, etc., R. Co. *v.* Martin, 113 Tenn. 266, 87 S. W. 418.

Texas.— Texas, etc., R. Co. *v.* Ball, 38 Tex. Civ. App. 279, 85 S. W. 456.

Virginia.—Southern R. Co. *v.* Hansbrough, 107 Va. 733, 60 S. E. 58.

Unlawful speed held to be proximate cause of injury see Chicago, etc., R. Co. *v.* Mochell, 193 Ill. 208, 61 N. E. 1028, 86 Am. St. Rep. 318 [*affirming* 96 Ill. App. 178]; Smith *v.* Michigan Cent. R. Co., 35 Ind. App. 188, 73 N. E. 928.

Where the accident would not have happened but for such unlawful speed, such speed is the proximate cause of the injury, although the person injured was also negligent. Duffy *v.* Missouri Pac. R. Co., 19 Mo. App. 380; Winstanley *v.* Chicago, etc., R. Co., 72 Wis. 375, 39 N. W. 856.

38. *Georgia.*— Georgia Southern, etc., R. Co. *v.* Williams, 93 Ga. 253, 18 S. E. 825.

Indiana.— Evansville, etc., R. Co. *v.* Welch, 25 Ind. App. 308, 58 N. E. 88 (holding that negligently running at a high and dangerous rate of speed whereby one person is struck and hurled against another and injures him is not the proximate cause of the latter's injury); Baltimore, etc., R. Co. *v.* Musgrave, 24 Ind. App. 295, 55 N. E. 496.

Kentucky.— Pedigo *v.* Louisville, etc., R. Co., 68 S. W. 462, 24 Ky. L. Rep. 338.

Michigan.— Stahl *v.* Lake Shore, etc., R. Co., 117 Mich. 273, 75 N. W. 629.

Wisconsin.— Walters *v.* Chicago, etc., R. Co., 104 Wis. 251, 80 N. W. 451.

Unlawful speed is not the proximate cause of an injury, where the train has passed and plaintiff is struck by a train on an adjoining track (Whiton *v.* Chicago, etc., R. Co., 29 Fed. Cas. No. 17,597, 2 Biss. 282 [*affirmed* in 13 Wall. 270, 20 L. ed. 571]); or where he attempts to cross at a place, where the view of the track is obstructed, without stopping to look or listen for an approaching train, although familiar with the crossing in question and aware of the fact that it is then about the time for a train to pass (Blackburn *v.* Southern Pac. R. Co., 34 Oreg. 215, 55 Pac. 225).

39. *Arkansas.*— Griffie *v.* St. Louis, etc., R. Co., 80 Ark. 186, 96 S. W. 750.

California.— Zipperlen *v.* Southern Pac. R. Co., 7 Cal. App. 206, 93 Pac. 1049.

Georgia.— See Comer *v.* Barfield, 102 Ga. 485, 31 S. E. 89.

Indian Territory.—Atchison, etc., R. Co. *v.* Baker, (1907) 104 S. W. 1182 [*reversed* on other grounds in (Okla. 1908) 95 Pac. 433].

Kentucky.— Louisville, etc., R. Co. *v.* Taylor, 104 S. W. 776, 31 Ky. L. Rep. 1142; Pittsburgh, etc., R. Co. *v.* Lewis, 38 S. W. 482, 18 Ky. L. Rep. 957; Louisville, etc., R. Co. *v.* Krey, 29 S. W. 869, 16 Ky. L. Rep. 797; Louisville, etc., R. Co. *v.* Schuster, 7 S. W. 874, 10 Ky. L. Rep. 65, as by checking the train or by giving warning by whistle.

Maryland.— Western Maryland R. Co. *v.* Kehoe, 86 Md. 43, 37 Atl. 799; Kean *v.*

knows of such person's peril in time to avert the injury,[40] or by the weight of authority, after it discovers, or by the exercise of reasonable care might discover, the injured party's peril in time to avert the injury.[41] This rule applies only

Baltimore, etc., R. Co., 61 Md. 154, holding that one injured while drunk at a railroad crossing by a train may maintain an action or not according to whether the train hands might or might not in the exercise of reasonable care and diligence have avoided the injury.

Missouri.— Sullivan *v.* Missouri Pac. R. Co., 117 Mo. 214, 23 S. W. 149; Kellny *v.* Missouri Pac. R. Co., 101 Mo. 67, 13 S. W. 806, 8 L. R. A. 783; Meyers *v.* Chicago, etc., R. Co., 59 Mo. 223.

North Carolina.—Dixon *v.* Southern R. Co., 140 N. C. 201, 53 S. E. 673; Reid *v.* Atlanta, etc., R. Co., 140 N. C. 146, 52 S. E. 307; Norton *v.* North Carolina R. Co., 122 N. C. 910, 29 S. E. 886.

Ohio.— Lake Shore, etc., R. Co. *v.* Ehlert, 19 Ohio Cir. Ct. 177, 10 Ohio Cir. Dec. 443; Lake Shore, etc., R. Co. *v.* Schade, 15 Ohio Cir. Ct. 424, 8 Ohio Cir. Dec. 316.

Oklahoma.— Atchison, etc., R. Co. *v.* Baker, (1908) 95 Pac. 433 [*reversing* on other grounds (Indian Terr. 1907) 104 S. W. 1182].

Texas.— Texas, etc., R. Co. *v.* Staggs, 90 Tex. 458, 39 S. W. 295.

Virginia.— Baltimore, etc., R. Co. *v.* Few, 94 Va. 82, 26 S. E. 406.

United States.— Baltimore, etc., R. Co. *v.* Anderson, 85 Fed. 413, 29 C. C. A. 235 (where the train might have been stopped and the injury thus avoided); Dunning *v.* Bond, 38 Fed. 813.

Canada.— Moyer *v.* Grand Trunk R. Co., 3 Can. R. Cas. 1.

See 41 Cent. Dig. tit. "Railroads," §§ 1096–1098.

That such negligence is the proximate cause of the injury is generally held to be the rule. Lake Shore, etc., R. Co. *v.* Ehlert, 19 Ohio Cir. Ct. 177, 10 Ohio Cir. Dec. 443; Lake Shore, etc., R. Co. *v.* Schade, 15 Ohio Cir. Ct. 424, 8 Ohio Cir. Dec. 316. But see Kellny *v.* Missouri Pac. R. Co., 101 Mo. 67, 13 S. W. 806, 8 L. R. A. 783, holding that in such case a recovery is allowed not on the ground that defendant's second act of negligence is the sole cause of injury but on the ground that defendant is estopped by its recklessness from asserting plaintiff's contributory negligence.

40. *Alabama.*— Pannell *v.* Nashville, etc., R. Co., 97 Ala. 298, 12 So. 236; Highland Ave., etc., R. Co. *v.* Sampson, 91 Ala. 560, 8 So. 778.

Indiana.— Cleveland, etc., R. Co. *v.* Klee, 154 Ind. 430, 56 N. E. 234.

Louisiana.— Ross *v.* Sibley, etc., R. Co., 116 La. 789, 41 So. 93.

Maryland.— Western Maryland R. Co. *v.* Kehoe, 86 Md. 43, 37 Atl. 799; Maryland Cent. R. Co. *v.* Neubeur, 62 Md. 391.

Missouri.— Van Bach *v.* Missouri Pac. R. Co., 171 Mo. 338, 71 S. W. 358; Harlan *v.* St. Louis, etc., R. Co., 65 Mo. 22.

New York.— Wall *v.* New York Cent., etc., R. Co., 56 N. Y. App. Div. 599, 67 N. Y. Suppl. 519, holding that the company is liable in such case for any injury resulting either directly or indirectly.

Texas.— Texas, etc., R. Co. *v.* Staggs, 90 Tex. 458, 39 S. W. 295; Gulf, etc., R. Co. *v.* Lankford, 88 Tex. 499, 31 S. W. 355 [*affirming* 9 Tex. Civ. App. 593, 29 S. W. 933]; Galveston, etc., R. Co. *v.* Matula, 79 Tex. 577, 15 S. W. 573, (1892) 19 S. W. 376; Galveston, etc., R. Co. *v.* Murray, (Civ. App. 1906) 99 S. W. 144; Central Texas, etc., R. Co. *v.* Gibson, 35 Tex. Civ. App. 66, 79 S. W. 351.

Wisconsin.— Valin *v.* Milwaukee, etc., R. Co., 82 Wis. 1, 51 N. W. 1084, 33 Am. St. Rep. 17, holding that the negligence of a railroad company in such case, to warrant a recovery, need not be gross.

United States,— Dunning *v.* Bond, 38 Fed. 813.

See 41 Cent. Dig. tit. "Railroads," § 1097.

Child of tender years.— In an action for the negligent killing of a child of six years while playing on the track, plaintiff may recover, notwithstanding the parents of the child were negligent in not keeping him away from the track or the child negligent in going and remaining thereon, if the child was "of tender years" and the engineer saw him on the track and after seeing him failed to exercise ordinary care to save him, and if the exercise of ordinary care on the engineer's part would have saved him. Tobin *v.* Missouri Pac. R. Co., (Mo. 1891) 18 S. W. 996.

41. *Kentucky.*— Hovius *v.* Cincinnati, etc., R. Co., 107 S. W. 214, 32 Ky. L. Rep. 786; Crowley *v.* Louisville, etc., R. Co., 55 S. W. 434, 21 Ky. L. Rep. 1434; Pittsburg, etc., R. Co. *v.* Lewis, 38 S. W. 482, 18 Ky. L. Rep. 957; Louisville, etc., R. Co. *v.* Krey, 29 S. W. 869, 16 Ky. L. Rep. 797.

Michigan.— Sasnofski *v.* Lake Shore, etc., R. Co., 134 Mich. 72, 95 N. W. 1077.

Missouri.— Sites *v.* Knott, 197 Mo. 684, 96 S. W. 206; Dlauhi *v.* St. Louis, etc., R. Co., 139 Mo. 291, 40 S. W. 890; Lloyd *v.* St. Louis, etc., R. Co., 128 Mo. 595, 29 S. W. 153, 31 S. W. 110; Sullivan *v.* Missouri Pac. R. Co., 117 Mo. 214, 23 S. W. 149; Kellny *v.* Missouri Pac. R. Co., 101 Mo. 67, 13 S. W. 806, 8 L. R. A. 783; Hilz *v.* Missouri Pac. R. Co., 101 Mo. 36, 13 S. W. 946; Donohue *v.* St. Louis, etc., R. Co., 91 Mo. 357, 2 S. W. 424, 3 S. W. 848; Keim *v.* Union R., etc., Co., 90 Mo. 314, 2 S. W. 427; Kelley *v.* Hannibal, etc., R. Co., 75 Mo. 138; Gass *v.* Missouri Pac. R. Co., 57 Mo. App. 574; White *v.* Wabash Western R. Co., 34 Mo. App. 57.

New Hampshire.— Yeaton *v.* Boston, etc., R. Co., 73 N. H. 285, 61 Atl. 522.

North Carolina.— Fulp *v.* Roanoke, etc., R. Co., 120 N. C. 525, 27 S. E. 74.

Ohio.— Cincinnati St. R. Co. *v.* Jenkins,

where the railroad employees had reason to know of the injured person's perilous position in time to prevent the injury.[42] It has no application where the injured person's perilous position was not discoverable until it was too late,[43] and in some jurisdictions is held not to apply where the injured party's presence or peril is unknown to those in charge of the train,[44] or merely because the railroad company fails to discover his peril.[45] Nor does it apply where the contributory negligence of the person injured is later in time than the negligence of the railroad company;[46] or where the railroad company is unable, after the discovery of such peril, by the exercise of ordinary care, to avoid the injury,[47] unless its inability to avoid the injury is caused by its own negligence, as in running its train at an unlawful rate of speed.[48] Mere knowledge of the presence of a person on or near a crossing, without knowledge of his actual peril does not make a railroad company responsible for its failure to avoid injuring him,[49] since the railroad company has a right to presume, in the absence of knowledge to the contrary, that a person seen on or near a crossing is *sui juris* and will exercise ordinary care in stopping or in retiring to a place of safety in time to avoid being injured.[50]

13. Wilful, Wanton, and Unauthorized Acts — a. Wilful or Wanton Acts.[51] Where the servants or employees of a railroad company are guilty of wantonness or wilfulness in inflicting an injury at a railroad crossing, the railroad company is liable therefor,[52] notwithstanding contributory negligence on the part of the

20 Ohio Cir. Ct. 256, 11 Ohio Cir. Dec. 130; Lake Shore, etc., R. Co. *v.* Ehlert, 19 Ohio Cir. Ct. 177, 10 Ohio Cir. Dec. 443; Lake Shore, etc., R. Co. *v.* Schade, 15 Ohio Cir. Ct. 424, 8 Ohio Cir. Dec. 316.

Virginia.— Baltimore, etc., R. Co. *v.* Few, 94 Va. 82, 26 S. W. 406.

United States.— Baltimore, etc., R. Co. *v.* Anderson, 85 Fed. 413, 29 C. C. A. 235; Dunning *v.* Bond, 38 Fed. 813.

See 41 Cent. Dig. tit. "Railroads," § 1098.

42. Illinois Cent. R. Co. *v.* Ackerman, 144 Fed. 959, 76 C. C. A. 13.

43. Philadelphia, etc., R. Co. *v.* Holden, 93 Md. 417, 49 Atl. 625.

44. Burns *v.* Louisville, etc., R. Co., 136 Ala. 522, 33 So. 891; Dunworth *v.* Grand Trunk Western R. Co., 127 Fed. 307, 62 C. C. A. 225.

45. Texas, etc., R. Co. *v.* Staggs, 90 Tex. 458, 39 S. W. 295 (holding that where the person injured is guilty of negligence in not discovering and avoiding the train there can be no recovery on account of the railroad company's failure to discover his peril in time to avoid injuring him); Texas Midland R. Co. *v.* Tidwell, (Tex. Civ. App. 1899) 49 S. W. 641 (holding that an injured party if guilty of contributory negligence cannot recover by showing that by use of ordinary care and prudence the railroad company might have seen him and avoided the injury). But see Galveston, etc., R. Co. *v.* Matula, 79 Tex. 577, 15 S. W. 573, 19 S. W. 376.

46. McNab *v.* United R., etc., Co., 94 Md. 719, 51 Atl. 421; Cincinnati St. R. Co. *v.* Jenkins, 20 Ohio Cir. Ct. 256, 11 Ohio Cir. Dec. 130.

47. *Kentucky.*— Louisville, etc., R. Co. *v.* Mollay, 91 S. W. 685, 28 Ky. L. Rep. 1113.

Louisiana.—Barnhill *v.* Texas, etc., R. Co., 109 La. 43, 33 So. 63.

Missouri.— Sullivan *v.* Missouri Pac. R. Co., 117 Mo. 214, 23 S. W. 149.

Texas.— Missouri etc., R. Co. *v.* Eyer, 96 Tex. 72, 70 S. W. 529 (holding that the railroad company is not liable where after the danger was discovered the train could not have been stopped in time to avoid the accident, although its previous negligence contributed to the injury); Galveston, etc., R. Co. *v.* Matula, 79 Tex. 577, 15 S. W. 573, (1892) 19 S. W. 376.

Virginia.— Brammer *v.* Norfolk, etc., R. Co., 104 Va. 50, 51 S. E. 211 (where everything possible was done to prevent the collision); Baltimore, etc., R. Co. *v.* Few, 94 Va. 82, 26 S. E. 406.

United States.— Dunworth *v.* Grand Trunk Western R. Co., 127 Fed. 307, 62 C. C. A. 225; Garrett *v.* Illinois Cent. R. Co., 126 Fed. 406.

48. Sullivan *v.* Missouri Pac. R. Co., 117 Mo. 214, 23 S. W. 149.

49. Cleveland, etc., R. Co. *v.* Klee, 154 Ind. 430, 56 N. E. 234; Van Bach *v.* Missouri Pac. R. Co., 171 Mo. 338, 71 S. W. 358 (holding that the effect of contributory negligence of a traveler in a buggy is not avoided because the trainmen, although seeing his approach, fail to suspend operations until he passes, as they have the right to assume that he will see the danger and guard against it); Illinois Cent. R. Co. *v.* Ackerman, 144 Fed. 959, 76 C. C. A. 13; Garrett *v.* Illinois Cent. R. Co., 126 Fed. 406 (holding that if defendant's servants who saw plaintiff approaching defendant's railroad crossing had no reason to think that he would attempt to cross until plaintiff had gotten on the tracks in front of an approaching train and at that time such servants acted promptly and efficiently, defendant is not liable.

50. See *supra*, X, F, 9, b.

51. See, generally, Master and Servant, 26 Cyc. 1527.

52. Birmingham, etc., R. Co. *v.* Gerganous,

person injured,[53] unless, as it has been held, such contributory negligence continues up to the time of the injury and is a contributing and efficient cause thereof.[54] Whether or not a railroad company's servants or employees are guilty of wantonness or wilfulness in inflicting an injury is usually a question for the jury, to be determined from the circumstances of the particular case.[55] Thus the injury may be wantonly or wilfully inflicted by running a train at a high or unlawful rate of speed and without giving the proper signals, when approaching a crossing over a much traveled street or highway, and where the view is obstructed,[56] and the engineer saw or might have seen the person injured, and prevented the injury;[57] or by sending cars across a public crossing, under no control, and without precautions or warnings;[58] or by unnecessarily blowing the whistle, when it is apparent

142 Ala. 238, 37 So. 929; Texas, etc., R. Co. *v.* Hill, 71 Tex. 451, 9 S. W. 351.

53. Georgia Cent. R. Co. *v.* Hyatt, 151 Ala. 355, 43 So. 867; Georgia Cent. R. Co. *v.* Partridge, 136 Ala. 587, 34 So. 927; Gaynor *v.* Louisville, etc., R. Co., 136 Ala. 244, 33 So. 808; Birmingham Southern R. Co. *v.* Powell, 136 Ala. 232, 33 So. 875; Elgin, etc., R. Co. *v.* Duffy, 191 Ill. 489, 61 N. E. 432 [*affirming* 93 Ill. App. 463] (holding that in an action for an injury received at a railroad crossing if defendant inflicted the injury wilfully and maliciously, contributory negligence is no defense); Harbert *v.* Atlanta, etc., R. Co., 78 S. C. 537, 59 S. E. 644 (construing Civ. Code (1902), § 2139); Lacey *v.* Louisville, etc., R. Co., 152 Fed. 134, 81 C. C. A. 352. See also Arine *v.* Minneapolis, etc., R. Co., 76 Minn. 201, 78 N. W. 1108, 1119; and *supra*, X, F, 10, a, (VIII), (A).

Assumption of risk on the part of plaintiff is no defense in an action for an alleged intentional injury of plaintiff at a railroad crossing. Birmingham Southern R. Co. *v.* Powell, 136 Ala. 232, 33 So. 875.

54. Sego *v.* Southern Pac. R. Co., 137 Cal. 405, 70 Pac. 279, holding that, although a railroad company is wilfully and wantonly negligent in running a train at excessive speed over a crossing greatly used by the public where there is no flagman, yet where a traveler negligently attempts to cross in front of such train and is killed, the company is not liable in damages.

55. Georgia Cent., etc., R. Co. *v.* Partridge, 136 Ala. 587, 34 So. 927; Southern R. Co. *v.* Shelton, 136 Ala. 191, 34 So. 194; Memphis, etc., R. Co. *v.* Martin, 117 Ala. 367, 23 So. 231 (where deceased was injured at a public crossing which was used on an average of once in every ten minutes, and the testimony as to the rate of speed was conflicting); Ruddell *v.* Seaboard Air Line R. Co., 75 S. C. 290, 55 S. E. 528 (holding that the fact that railroad company dug a hole on its premises close to a frequented path, leaving it open, is some evidence of a wanton disregard of the safety of those using the path); Gulf, etc., R. Co. *v.* Letsch, (Tex. Civ. App. 1900) 55 S. W. 584 [*affirmed* in (1900) 56 S. W. 1134]. And see *infra*, X, F, 14, g, (XIV).

To constitute wilfulness or wantonness the railroad employees must have done the negligent acts with the knowledge and consciousness that injury would probably result. Louisville, etc., R. Co. *v.* Muscat, (Ala. 1906) 41 So. 302.

Facts not constituting wilfulness or wantonness see Southern R. Co. *v.* Shelton, 136 Ala. 191, 34 So. 194 (where it appears that when the engine approached the street crossing, its bell was constantly being rung and its headlight burning brightly and that its speed was not over five miles an hour); Chicago, etc., R. Co. *v.* Barber, 15 Ill. App. 630; Indiana, etc., R. Co. *v.* Wheeler, 115 Ind. 253, 17 N. E. 63; Baltimore, etc., R. Co. *v.* Reynolds, 33 Ind. App. 219, 71 N. E. 250; Hancock *v.* Erie, etc., R. Co., 21 Ind. App. 10, 51 N. E. 369; Baker *v.* Tacoma Eastern R. Co., 44 Wash. 575, 87 Pac. 826.

Where a rapidly moving train is in plain sight of a path used by the public as a convenience at a crossing, the engineer is justified in thinking that a person whom he sees on the path near and approaching the track will not attempt to cross in front of the train, so that his failure to attempt to stop the train until it is too late will not constitute wilful negligence. Birmingham R., etc., Co. *v.* Bowers, 110 Ala. 328, 20 So. 345.

Wilful injury is not supported by a finding that the injury was the result of gross negligence.— Cleveland, etc., R. Co. *v.* Miller, 149 Ind. 490, 49 N. E. 445.

That the injury was caused by gross negligence see Kansas Pac. R. Co. *v.* Pointer, 14 Kan. 37.

Wanton negligence distinguished from wilful injury.— Where a person, from his knowledge of existing circumstances and conditions, is conscious that his conduct will probably result in injury, and yet, with reckless indifference, or in disregard of the natural or probable consequences, but without having the intent to injure, does the act, or fails to act, he is guilty of wanton negligence. A purpose or intent to injure is not an ingredient of wanton negligence, and if either of these exists, and damage ensues, the injury is wilful. Birmingham R., etc., Co. *v.* Bowers, 110 Ala. 328, 20 So. 345.

56. Georgia Pac. R. Co. *v.* Lee, 92 Ala. 262, 9 So. 230; Elgin, etc., R. Co. *v.* Duffy, 191 Ill. 489, 61 N. E. 432 [*affirming* 93 Ill. App. 463]; Chicago, etc., R. Co. *v.* Payne, 59 Ill. 534.

57. Georgia Cent. R. Co. *v.* Partridge, 136 Ala. 587, 34 So. 927.

58. Lake Shore, etc., R. Co. *v.* Johnson, 35

to those in charge of the engine that horses at the crossing will become frightened thereat.[59] But an injury is not wantonly or wilfully inflicted by the mere fact that the train which inflicts it is being run in violation of a statute or ordinance,[60] as at an unlawful rate of speed,[61] or without giving the proper signals;[62] nor is the starting of a standing train while a person is attempting to climb between the cars such wantonness or wilfulness,[63] unless the railroad company has notice at the time that he is in a position where such movement of the cars will be very dangerous.[64]

b. Unauthorized Acts.[65] Where an act or omission of a railroad employee which causes an injury at a railroad crossing is within the general scope of his employment the railroad company is responsible therefor notwithstanding the particular act or omission is unauthorized,[66] as where a flagman who has been stationed at a crossing neglects to warn travelers or absents himself from his post;[67] and notwithstanding it is done wantonly or maliciously.[68] But unless the railroad company expressly or impliedly assents thereto,[69] it is not responsible for unauthorized acts or omissions not within the general scope of a servant's employment.[70]

Ill. App. 430; Mitchell *v.* Illinois Cent. R. Co., 110 La. 630, 34 So. 714, 98 Am. St. Rep. 472; Schindler *v.* Milwaukee, etc., R. Co., 87 Mich. 400, 49 N. W. 670, where the employees knew that the driver of a team was approaching the crossing.

59. Gulf, etc., R. Co. *v.* Box, 81 Tex. 670, 17 S. W. 375.

Mere knowledge of the proximity of a team is not conclusive evidence of wilfulness in blowing the whistle, notwithstanding the whistling is needless. Wabash R. Co. *v.* Speer, 156 Ill. 244, 40 N. E. 835.

60. Brown *v.* Chicago, etc., R. Co., 109 Wis. 384, 85 N. W. 271, holding that the mere intentional running of a railroad train contrary to police regulations does not constitute either an actual or constructive intent to inflict an injury on a person, so as to authorize him if he is injured thereby to recover damages regardless of his contributory negligence.

The absence of the flagman on the front of an engine in crossing a street in violation of a city ordinance does not render the conduct of those in charge of the engine wanton or wilful. Southern R. Co. *v.* Shelton, 136 Ala. 191, 34 So. 194.

61. *Alabama.*— Georgia Pac. R. Co. *v.* Lee, 92 Ala. 262, 9 So. 230.

Illinois.— Chicago, etc., R. Co. *v.* Stone, 109 Ill. App. 517.

Indiana.— Huff *v.* Chicago, etc., R. Co., 24 Ind. App. 492, 56 N. E. 932, 79 Am. St. Rep. 274. See Pittsburg, etc., R. Co. *v.* Ferrell, 39 Ind. App. 515, 78 N. E. 988, 80 N. E. 425.

Missouri.— Schmidt *v.* Missouri Pac. R. Co., 191 Mo. 215, 90 S. W. 136, 3 L. R. A. N. S. 196, holding that the fact that a train was running through a city at the rate of twenty-five or thirty miles an hour when the speed prescribed by ordinance was five miles an hour does not show recklessness, the brakes being set for the station and the engineer and fireman at their posts, observing the track.

Wisconsin.—Brown *v.* Chicago, etc., R. Co., 109 Wis. 384, 85 N. W. 271.

United States.— Gipson *v.* Southern R. Co., 140 Fed. 410.

See 41 Cent. Dig tit. "Railroads," §§ 1100, 1101.

62. Alabama Great Southern R. Co. *v.* Linn, 103 Ala. 134, 15 So. 508; Georgia Pac. R. Co. *v.* Lee, 92 Ala. 262, 9 So. 230; Huff *v.* Chicago, etc., R. Co., 24 Ind. App. 492, 56 N. E. 932, 79 Am. St. Rep. 274; Olson *v.* Northern Pac. R. Co., 84 Minn. 258, 87 N. W. 843; Gipson *v.* Southern R. Co., 140 Fed. 410.

63. Chicago, etc., R. Co. *v.* Surowieski, 67 Ill. App. 682.

64. Chicago, etc., R. Co. *v.* Surowieski, 67 Ill. App. 682.

65. See, generally, MASTER AND SERVANT, 26 Cyc. 1533.

66. See Finkelstein *v.* New York Cent., etc., R. Co., 41 Hun (N. Y.) 34; Branch *v.* International, etc., R. Co., (Tex. Civ. App. 1899) 48 S. W. 891.

That at the time of the accident the engine is in charge of a brakeman, whose duty does not include the management of an engine, does not relieve the railroad company from liability where it appears that the engineer or fireman is on the engine, consenting to its movement by the brakeman. Houston, etc., R. Co. *v.* Stewart, (Tex. 1891) 17 S. W. 33; Dillingham *v.* Parker, 80 Tex. 572, 16 S. W. 335.

67. Dolan *v.* Delaware, etc., Canal Co., 71 N. Y. 285; Waldele *v.* New York Cent., etc., R. Co., 4 N. Y. App. Div. 549, 38 N. Y. Suppl. 1009; Finkelstein *v.* New York Cent., etc., R. Co., 41 Hun (N. Y.) 34. And see *supra*, X, F, 5, c, (II).

68. Nashville, etc., R. Co. *v.* Starnes, 9 Heisk. (Tenn.) 2, 24 Am. Rep. 296, holding that a railroad company is liable for injuries caused by the tortious acts of its servants in maliciously sounding the whistle on an engine for the purpose of frightening horses on the highway.

69. Peck *v.* Michigan Cent. R. Co., 57 Mich. 3, 23 N. W. 466.

70. Illinois Cent. R. Co. *v.* Downey, 18 Ill.

14. Actions For Injuries — a. In General — (i) *Jurisdiction and Venue.* In the absence of statute otherwise, an action for injuries to a person at a railroad crossing is transitory in its nature and may be brought in a state other than that in which the cause of action arose in which defendant operates its road,[71] and in any county through which the road runs.[72] Under some statutes an action for injuries caused by an act of omission, such as a defective crossing, must be brought at the domicile of the company,[73] although if the injury is caused by an act of commission the action may be brought in the parish or county where the injury was received.[74]

(ii) *Form of Action.* In the absence of statute prescribing a particular form, the proper form of action for injuries at a crossing caused by the unskilfulness or negligence of railroad employees is an action on the case,[75] and not trespass, unless the acts causing the injury are done by the command or with the assent of the company.[76]

(iii) *Conditions Precedent.* In some jurisdictions the statutes provide that a prescribed notice of the injury must be given to the railroad company before bringing the action,[77] as where the injury is received by reason of a defect in the track at the crossing.[78]

(iv) *Limitations.*[79] In some jurisdictions there are special statutory provisions regulating limitations of actions for personal injuries against railroad companies,[80] and these provisions generally apply to actions for injuries at crossings.[81]

b. Parties. Where an injury at a railroad crossing is occasioned by the combined negligence of a railroad company and another, plaintiff may sue either or both of them.[82]

259 (holding that a railroad company is not liable for injuries caused by the wilful act of its servants not in the ordinary course of their employment); Chicago, etc., R. Co. *v.* Halleck, 13 Ill. App. 643.

71. Atchison, etc., R. Co. *v.* Keller, 33 Tex. Civ. App. 358, 76 S. W. 801; McLeod *v.* Connecticut, etc., R. Co., 58 Vt. 727, 6 Atl. 648.

Where the statute under which the cause of action arose is remedial and not penal in its nature, the action may be brought in another state. Gardner *v.* New York, etc., R. Co., 17 R. I. 790, 24 Atl. 831.

72. Atchison, etc., R. Co. *v.* Keller, 35 Tex. Civ. App. 358, 76 S. W. 801.

73. Caldwell *v.* Vicksburg, etc., R. Co., 40 La. Ann. 753, 5 So. 17, construing Code Pr. art. 165, subd. 9.

74. Caldwell *v.* Vicksburg, etc., R. Co., 40 La. Ann. 753, 5 So. 17, construing Code Pr. art. 165, subd. 9.

75. Philadelphia, etc., R. Co. *v.* Wilt, 4 Whart. (Pa.) 143.

76. Philadelphia, etc., R. Co. *v.* Wilt, 4 Whart. (Pa.) 143.

77. Fields *v.* Hartford, etc., R. Co., 54 Conn. 9, 4 Atl. 105.

"Maintained" as used in a statute providing that no action for personal injuries shall be maintained against a railroad company unless written notice of the claim shall have been given to defendant within four months after the alleged negligence has reference to a suit yet to be instituted. Gumpper *v.* Waterbury Traction Co., 68 Conn. 424, 36 Atl. 806, construing Pub. Acts (1895), c. 176.

78. Fields *v.* Hartford, etc., R. Co., 54 Conn. 9, 4 Atl. 105 (construing Laws (1883), p. 283); Nickerson *v.* New York, etc., R. Co., 178 Mass. 193, 59 N. E. 636 (holding that under Pub. St. c. 52, §§ 18, 19, notice must be given within thirty days after the injury); Mack *v.* Boston, etc., R. Co., 164 Mass. 393, 41 N. E. 653 (holding that the railroad company is entitled to notice of an injury caused by insufficient planking of the tracks at a highway crossing).

79. Limitation of actions for injuries to persons generally see Limitations of Actions, 25 Cyc. 1047 *et seq.*

80. See Mobile, etc., R. Co. *v.* Crenshaw, 65 Ala. 566 (one year); Nicholson *v.* Mobile, etc., R. Co., 49 Ala. 205; Lehigh Valley R. Co. *v.* Comar, 151 Fed. 559, 81 C. C. A. 39 (construing N. J. Pub. Laws (1881), p. 257); and the statutes of the several states.

81. Browne *v.* Brockville, etc., R. Co., 20 U. C. Q. B. 202, holding that the action should be instituted within six months after the time the damage is sustained or if there be a continuation of damage, then within six months after the doing or committing of such damage ceases. See also Zimmer *v.* Grand Trunk R. Co., 19 Ont. App. 693.

82. Chicago, etc., R. Co. *v.* Hines, 82 Ill. App. 488 (holding that the fact that the injury is occasioned by the combined negligence of a railroad company and a street car company cannot avail the railroad company in a suit for damages); Illinois Cent. R. Co. *v.* Coley, 121 Ky. 385, 89 S. W. 234, 28 Ky. L. Rep. 336, 1 L. R. A. N. S. 370 (holding that a railroad company and its engineer when jointly liable for injuries caused by the negligence of the latter may be sued jointly for the injuries).

c. Pleading — (i) *Complaint, Declaration, or Petition* — (A) *Form and Sufficiency* — (1) In General. The rules of pleading in an action for injuries at a railroad crossing are generally regulated by the general rules of pleading in civil actions,[83] particularly those relating to actions for negligence.[84] The complaint, declaration, or petition should allege facts showing plaintiff's peril or danger from being on or near the tracks;[85] and should allege a legal duty and negligence on the part of the railroad company;[86] that the acts or omissions constituting negligence were in the line of the agent's or employee's employment;[87] and that the negligence complained of was the proximate cause of injury for which a recovery is sought.[88] But it need not allege unnecessary or immaterial

83. See Atlantic Coast Line R. Co. *v.* Taylor, 125 Ga. 454, 54 S. E. 622; and, generally, Pleading, 31 Cyc. 1.

84. See Seaboard Air-Line R. Co. *v.* Randolph, 126 Ga. 238, 55 S. E. 47; and, generally, Negligence, 29 Cyc. 565.

85. Southern Indiana R. Co. *v.* Corps, 37 Ind. App. 586, 76 N. E. 902 (holding that an allegation that plaintiff's intestate approached the crossing and that the locomotive struck his team and wagon on the crossing sufficiently shows that he had driven on the track); Texas Midland R. Co. *v.* Booth, 35 Tex. Civ. App. 322, 80 S. W. 121 (allegations held sufficient to show actual danger).

86. *Indiana.*— Chicago, etc., R. Co. *v.* McCandish, 167 Ind. 648, 79 N. E. 903; Baltimore, etc., R. Co. *v.* Young, 146 Ind. 374, 45 N. E. 479; Wabash R. Co. *v.* De Hart, 32 Ind. App. 62, 65 N. E. 192; Pittsburgh, etc., R. Co. *v.* Adams, 25 Ind. App. 164, 56 N. E. 101.

Nebraska.— Chicago, etc., R. Co. *v.* Clinebell, 5 Nebr. (Unoff.) 603, 99 N. W. 839, holding that the petition must allege negligence in terms or equivalent terms, or facts constituting negligence as a matter of law.

Ohio.— Baltimore, etc., R. Co. *v.* McPeek, 16 Ohio Cir. Ct. 87, 8 Ohio Cir. Dec. 742, holding that there should be averments of negligence in respect to any alleged facts separately, or that there should be an averment of the ultimate fact of negligence taken from the facts collectively.

Texas.— Sanders *v.* Texas-Mexican R. Co., (Civ. App. 1904) 83 S. W. 871, holding that a complaint alleging that plaintiff's husband in attempting to cross defendant's track at a point where the public was wont to cross and near where the railroad company had previously voluntarily maintained a crossing which it had discontinued was jolted from his wagon as he was passing and fell to the ground sustaining injuries is demurrable for want of facts.

United States.— Matz *v.* Chicago, etc., R. Co., 88 Fed. 770, holding that negligence must be distinctly alleged.

See 41 Cent. Dig. tit. "Railroads," § 1107.

Plaintiff's right to be on the crossing at the time, and defendant's duty to exercise ordinary care for his protection, must be alleged. Chicago, etc., R. Co. *v.* McCandish, 167 Ind. 648, 79 N. E. 903.

87. Cincinnati, etc., R. Co. *v.* Voght, 26 Ind. App. 665, 60 N. E. 797 (holding that a complaint alleging that defendant's engine in charge of its agents and employees negligently approached the crossing does not charge defendant with negligence, it not being shown that its agents at the time were acting in the line of their employment); Pittsburgh, etc., R. Co. *v.* Adams, 25 Ind. App. 164, 56 N. E. 101.

88. Chicago, etc., R. Co. *v.* Thomas, 147 Ind. 35, 46 N. E. 73; Baltimore, etc., R. Co. *v.* Young, 146 Ind. 374, 45 N. E. 479, 153 Ind. 163, 54 N. E. 791 (holding that it must affirmatively appear from the facts pleaded that the negligence of defendant was the proximate cause of the injury); Ohio, etc., R. Co. *v.* Engrer, 4 Ind. App. 261, 30 N. E. 924; Chicago, etc., R. Co. *v.* Clinebell, 5 Nebr. (Unoff.) 603, 99 N. W. 839; Baltimore, etc., R. Co. *v.* McPeek, 16 Ohio Cir. Ct. 87, 8 Ohio Cir. Dec. 742. See also Johnson *v.* St. Paul, etc., R. Co., 31 Minn. 283, 17 N. W. 622, holding that a complaint which sets forth acts of negligence on the part of defendant and consequent injury to plaintiff states a cause of action, although it is not apparent from the complaint in what way the injury resulted from the negligence.

Allegations sufficient to show defendant's negligence as the proximate cause of the injury see Greenawaldt *v.* Lake Shore, etc., R. Co., 165 Ind. 219, 74 N. E. 1081, (1905) 73 N. E. 902; Southern Indiana R. Co. *v.* Corps, 37 Ind. App. 586, 76 N. E. 902; Pennsylvania Co. *v.* Fertig, 34 Ind. App. 459, 70 N. E. 834; Cleveland, etc., R. Co. *v.* Coffman, 30 Ind. App. 462, 64 N. E. 233, 66 N. E. 179; Pittsburgh, etc., R. Co. *v.* Carlson, 24 Ind. App. 559, 56 N. E. 251.

Allegations insufficient to show defendant's negligence as the proximate cause of the injury see Cincinnati, etc., R. Co. *v.* Voght, 26 Ind. App. 665, 60 N. E. 797.

In an action for injuries caused by plaintiff's horse taking fright at a hand-car standing near a crossing, the declaration is demurrable where it fails to show that the hand-car was by its nature an object calculated to frighten horses of ordinary gentleness. Norfolk, etc., R. Co. *v.* Gee, 104 Va. 806, 52 S. E. 572, 3 L. R. A. N. S. 111. *Compare* Baltimore, etc., R. Co. *v.* Slaughter, 167 Ind. 330, 79 N. E. 186, 7 L. R. A. N. S. 597.

Negligence constituting a part of the res gestæ, although not the proximate cause, may be alleged and proved in connection with the negligence through which the injury occurred.

matters, as that defendant had knowledge of facts, with knowledge of which it was charged by law.[89] In most states it is sufficient to make such allegations in general terms without specifying the particular physical acts of negligence,[90] or without specifying which of defendant's employees were negligent,[91] unless there is a motion to make more specific.[92] The pleadings must be construed most strongly against the pleader;[93] and the complaint or petition is bad if it discloses contributory negligence on the part of plaintiff,[94] unless it also shows that defendant

Charleston, etc., R. Co. *v.* Camp, 3 Ga. App. 232, 59 S. E. 710.

89. See Davidson *v.* Chicago, etc., R. Co., 98 Mo. App. 142, 71 S. W. 1069; Galveston, etc., R. Co. *v.* Fry, 37 Tex. Civ. App. 552, 84 S. W. 664.

An immaterial averment in the complaint does not make it demurrable. Beopple *v.* Illinois Cent. R. Co., 104 Tenn. 420, 58 S. W. 231.

90. *Alabama.*— Southern R. Co. *v.* Hobbs, 151 Ala. 335, 43 So. 844.

Illinois.— Boyd *v.* Chicago, etc., R. Co., 103 Ill. App. 199.

Indiana.— Pittsburgh, etc., R. Co. *v.* Kitley, 118 Ind. 152, 20 N. E. 727; Baltimore, etc., R. Co. *v.* Reynolds, 33 Ind. App. 219, 71 N. E. 250.

Kentucky.— Louisville, etc., R. Co. *v.* Case, 9 Bush 728 (holding that the petition need not state the circumstances from which the neglect is to be inferred, and that it is sufficient to allege the extent of the injury and the manner of its infliction and to charge negligence in general terms); Nashville, etc., R. Co. *v.* Higgins, 92 S. W. 549, 29 Ky. L. Rep. 89; Louisville, etc., R. Co. *v.* Dick, 78 S. W. 914, 25 Ky. L. Rep. 1831; Connell *v.* Chesapeake, etc., R. Co., 58 S. W. 374, 22 Ky. L. Rep. 501.

Minnesota.— Clark *v.* Chicago, etc., R. Co., 28 Minn. 69, 9 N. W. 75.

Missouri.— Davidson *v.* Chicago, etc., R. Co., 98 Mo. App. 142, 71 S. W. 1069, holding that it need not be further alleged that the engineer, in charge of the train causing the injury, was warned in sufficient time to stop the train and avoid the injury, or, by the exercise of reasonable care, could have done so.

See 41 Cent. Dig. tit. "Railroads," § 1107.

But *compare* Wilson *v.* New York, etc., R. Co., 18 R. I. 491, 29 Atl. 258, holding that a complaint charging negligence whereby a traveler on a highway was killed at the crossing, but which fails to state any particular act or omission of defendant constituting negligence, is demurrable.

Allegations of negligence held sufficient see Southern R. Co. *v.* Douglass, 144 Ala. 351, 39 So. 268 (that the company, through its servants, "negligently and carelessly ran" a train against plaintiff injuring him); Cahill *v.* Chicago, etc., R. Co., 74 Fed. 285, 20 C. C. A. 184 (holding that an averment that defendant company did "negligently, wilfully, recklessly, wantonly and carelessly" run its engine and cars upon plaintiff at a crossing, etc., is a good charge of negligent injury).

In an action for negligently and unlawfully leaving a car standing on a highway at which plaintiff's horse became frightened and caused her personal injuries, it is unnecessary to explain in the complaint how the horse became frightened or to allege that there was anything unusual about the car calculated to produce such a fright. Pittsburgh, etc., R. Co. *v.* Kitley, 118 Ind. 152, 20 N. E. 727. And where it is alleged that the animal was "well broken and not fractious or balky," it need not be alleged that it was of ordinary gentleness. Baltimore, etc., R. Co. *v.* Slaughter, 167 Ind. 330, 79 N. E. 186, 7 L. R. A. N. S. 597.

91. Pittsburgh, etc., R. Co. *v.* Kitley, 118 Ind. 152, 20 N. E. 727.

92. Baltimore, etc., R. Co. *v.* Reynolds, 33 Ind. App. 219, 71 N. E. 250.

A motion to make more specific is the proper remedy where the complaint is merely uncertain, and not demurrer. Cleveland, etc., R. Co. *v.* Wynant, 119 Ind. 539, 20 N. E. 730.

93. Davis *v.* Chesapeake, etc., R. Co., 75 S. W. 275, 25 Ky. L. Rep. 342 [opinion in 70 S. W. 857, 24 Ky. L. Rep. 1125 withdrawn], holding that an allegation in a petition that plaintiff's intestate was "at or near" the private crossing should be construed to mean that she was killed at a place on the track other than the crossing and hence was a trespasser.

94. Cleveland, etc., R. Co. *v.* Schneider, 40 Ind. App. 38, 80 N. E. 985 (complaint held not to be demurrable as showing contributory negligence); Van Winkle *v.* New York, etc., R. Co., 34 Ind. App. 476, 73 N. E. 157 (complaint disclosing that defendant was guilty of contributory negligence as a matter of law, and therefore demurrable); Rich *v.* Evansville, etc., R. Co., 31 Ind. App. 10, 66 N. E. 1028 (holding that where the complaint shows contributory negligence, it is insufficient, notwithstanding Acts (1899), p. 58, c. 41, providing that plaintiff shall not be required to allege or prove freedom from contributory negligence); Gividen *v.* Louisville, etc., R. Co., 32 S. W. 612, 17 Ky. L. Rep. 789; International, etc., R. Co. *v.* Kuehn, 2 Tex. Civ. App. 210, 21 S. W. 58 (allegations not showing contributory negligence); Southern R. Co. *v.* Stockdon, 106 Va. 693, 56 S. E. 713 (holding that allegations that plaintiff drove upon the track without looking, when he might have done so do not show affirmatively that he was guilty of contributory negligence, and are not bad on demurrer). See also Southern R. Co. *v.* Crenshaw, 136 Ala. 573, 34 So. 913.

Where other inferences may be deduced from all the facts alleged than that the injury was caused by plaintiff's negligence, a

might have avoided the injury notwithstanding plaintiff's negligence.[95] It is also bad if it contains allegations in the alternative,[96] or avers merely conclusions of law,[97] or if one count in the complaint or petition embraces two distinct and independent acts of negligence.[98] In an action for a wanton or wilful injury, a general averment that defendant's servants by certain acts or omissions wantonly or wilfully caused the injury is usually sufficient; [99] but it is not sufficient to allege facts which merely show negligence on the part of the railroad company.[1]

(2) CHARACTER AND DESCRIPTION OF CROSSING. The declaration or complaint should also describe the crossing with certainty, as by name, location, or

demurrer on the ground that the complaint shows contributory negligence is properly overruled. Burns *v.* Southern R. Co., 65 S. C. 229, 43 S. E. 679.

95. Blankenship *v.* Galveston, etc., R. Co., 15 Tex. Civ. App. 82, 38 S. W. 216; Missouri Pac. R. Co. *v.* Peay, 7 Tex. Civ. App. 400, 26 S. W. 768.

96. Tyler *v.* Kelley, 89 Va. 282, 15 S. E. 509, holding, however, that a declaration is not bad on this ground in alleging the place of the accident in an alternative form as that the deceased was struck "at, near or upon the crossing."

97. Clark *v.* Chicago, etc., R. Co., 28 Minn. 69, 9 N. W. 75 (holding, however, that in this case the complaint was not objectionable as stating merely conclusions of law); Matz *v.* Chicago, etc., R. Co., 88 Fed. 770.

98. Georgia Cent. R. Co. *v.* Freeman, 134 Ala. 354, 32 So. 778; New York, etc., R. Co. *v.* Robbins, 38 Ind. App. 172, 76 N. E. 804 (holding the particular complaint not to be demurrable on that ground); Matz *v.* Chicago, etc., R. Co., 88 Fed. 770.

Election.—A motion to compel plaintiff to elect on which cause of action he will rely may be made in such a case. Matz *v.* Chicago, etc., R. Co., 88 Fed. 770.

Where the several charges of negligence are not separable in the sense that one only would be the proximate cause of the injury, the complaint or petition is sufficient on general demurrer. Lake Erie, etc., R. Co. *v.* Mackey, 53 Ohio St. 370, 41 N. E. 980, 53 Am. St. Rep. 641, 29 L. R. A. 757. Where the petition alleges that defendant negligently and unlawfully stopped a freight train across a public street, and that while plaintiff was attempting to cross such street between two cars of such train defendant without warning backed the train thereby causing plaintiff's injury, the two alleged causes of injury are not separable or independent causes of action in the sense that one only would be a proximate cause of such injury. Burger *v.* Missouri Pac. R. Co., 112 Mo. 238, 20 S. W. 439, 34 Am. St. Rep. 379.

99. Southern R. Co. *v.* Crenshaw, 136 Ala. 573, 34 So. 913; Georgia Cent. R. Co. *v.* Forshee, 125 Ala. 199, 27 So. 1006; Memphis, etc., R. Co. *v.* Martin, 117 Ala. 367, 23 So. 231, holding that a complaint alleging that defendant "in the management, conduct and running of one of its freight trains . . . with reckless, unwarranted and dangerous rate of speed, did wantonly and recklessly strike and run over plaintiff's intestate at a public crossing" sufficiently avers that the injury was wantonly inflicted.

Necessity of alleging knowledge.— Where plaintiff undertakes to recite the facts constituting such wantonness or wilfulness, and adds to the general statement an allegation that defendant's employees while approaching a crossing where it was probable that people would be passing recklessly and wantonly ran a train at such a speed that it could not be stopped before reaching the crossing, after they had attained a point from which they could see persons at the crossing, the count is rendered bad as to wantonness or wilfulness or even negligence unless it alleges that the trainmen knew of such crossing. Georgia Cent. R. Co. *v.* Forshee, 125 Ala. 199, 27 So. 1006. So where a paragraph of the complaint alleges that the engine and cars could have been stopped within the space of a foot and that those in charge of the engine could have seen plaintiff had they been on the lookout, it is insufficient to charge a wilful injury unless it alleges that defendant's employees did see plaintiff or that they knew he was on the track at the time. Van Winkle *v.* New York Cent., etc., R. Co., 34 Ind. App. 476, 73 N. E. 157.

Special averments giving the conditions and circumstances under which the act of wantonness or wilfulness was committed, and emphasizing the general allegation, do not make the general allegation of wantonness or wilfulness bad. Baltimore, etc., R. Co. *v.* Reynolds, 33 Ind. App. 219, 71 N. E. 250.

1. Duncan *v.* St. Louis, etc., R. Co., 152 Ala. 118, 44 So. 418; Southern R. Co. *v.* Haywood, (Ala. 1906) 41 So. 949; Louisville, etc., R. Co. *v.* Orr, 121 Ala. 489, 26 So. 35; Southern R. Co. *v.* Prather, 119 Ala. 588, 24 So. 836, 72 Am. St. Rep. 949 (holding that an averment that the injury was caused by the wantonness, recklessness, or wilfulness of defendant's agents or servants in failing or refusing to perform an alleged duty, the nonperformance of which as alleged is simple negligence, does not show wanton negligence); Baltimore, etc., R. Co. *v.* Young, 153 Ind. 163, 54 N. E. 791; Pennsylvania Co. *v.* Sinclair, 62 Ind. 301, 30 Am. Rep. 185 (holding that an allegation that defendant was running the train "at a reckless and grossly negligent rate of speed" in violation of an ordinance does not sufficiently charge wilful injury to exclude conceded contributory negligence as a defense); Hancock *v.* Erie, etc., R. Co., 21 Ind. App. 10, 51 N. E. 369; Louisville, etc., R. Co. *v.* Davis, 7 Ind. App. 222,

its termini, so that the railroad company will be apprised of the place where the alleged offense was committed.[2] In an action for injuries while crossing defendant's track on a way customarily used, the complaint should aver knowledge on the part of the railroad company of the existence of such way,[3] although it need not aver definitely the length of time that the use of such way had been acquiesced in by the railroad company, where it alleges such acquiescence for a long time prior to the accident.[4]

(3) DEFECTS AND OBSTRUCTIONS AT CROSSINGS. In an action for injuries caused by defects or obstructions at a railroad crossing, the declaration or complaint should allege facts showing with certainty a breach on the part of the railroad company of its duty to maintain the crossing in a reasonable and convenient condition for use by those traveling on the public highway,[5] and that plaintiff's injury was in consequence of such negligent construction and main-

33 N. E. 451 (holding allegations of wilfulness to be surplusage).

2. Chicago, etc., R. Co. *v.* Howard, 38 Ill. 414 (*qui tam* action); Wabash R. Co. *v.* De Hart, 32 Ind. App. 62, 65 N. E. 192 (holding that in an action for injuries owing to a defective sidewalk on defendant's right of way, an averment that the sidewalk was on the southwesterly side of the street is sufficient); Klanowski *v.* Grand Trunk R. Co., 64 Mich. 279, 31 N. W. 275.

That the accident occurred upon a crossing of a highway at grade must be alleged under Mass. Pub. St. (1874) c. 372, § 164. Wright *v.* Boston, etc., R. Co., 129 Mass. 440. See also Allerton *v.* Boston, etc., R. Co., 146 Mass. 241, 15 N. E. 621.

3. Cahill *v.* Chicago, etc., R. Co., 74 Fed. 285, 20 C. C. A. 184, holding that an averment that a path by which plaintiff was crossing the tracks was well known and generally and publicly used is a sufficient averment, in the absence of special demurrer, of knowledge on the part of the railroad company of the existence of the patb.

4. Armstrong *v.* New York, etc., R. Co., 20 R. I. 791, 29 Atl. 448.

5. Southern R. Co. *v.* Posey, 124 Ala. 486, 26 So. 914; Lake Erie, etc., R. Co. *v.* Mackey, 53 Ohio St. 370, 41 N. E. 980, 53 Am. St. Rep. 641, 29 L. R. A. 757. See also Allen *v.* New Haven, etc., R. Co., 50 Conn. 215.

Allegations held sufficient see Southern R. Co. *v.* Posey, 124 Ala. 486, 26 So. 914 (that a plank between the rails at a crossing did not extend clear across the crossing, but left an open space thereon which was not flush and level with the main rail, but was lower than the other part of the crossing, causing plaintiff's wheel to be deflected into the space between the main and guard rails and that while he was exercising reasonable efforts to extricate the wagon it was struck by defendant's train); Baltimore etc., R. Co. *v.* Faith, 71 Ill. App. 59 (holding that an allegation that the company negligently placed and left one of its freight cars upon and nearly across a public highway, and that said car was an object highly calculated to frighten teams passing over said highway at said crossing, is substantially an averment of an obstruction of the highway); Cleveland, etc., R. Co. *v.* Wynant, 119 Ind. 539, 20 N. E. 730; Indianapolis, etc., R. Co. *v.* Stout, 53 Ind. 143; Wabash R. Co. *v.* De Hart, 32 Ind. App. 62, 65 N. E. 192; Cincinnati, etc., R. Co. *v.* Claire, 6 Ind. App. 390, 33 N. E. 918 (holding that the complaint states a cause of action against a railroad company whether its liability is joint or separate, where the negligence charged consists in its failing to restore the highway to its former state, as required by Rev. St. (1881) § 3903); Pennsylvania Co. *v.* Frund, 4 Ind. App. 469, 30 N. E. 1116 (holding a complaint not to be demurrable on the ground that it failed to show that the injury to plaintiff occurred in the street at a point where it was defendant's duty to maintain a safe crossing); Lehnertz *v.* Minneapolis, etc., R. Co., 31 Minn. 214, 17 N. W. 376 (motion to make more definite and certain refused); Schneider *v.* Wisconsin Cent. R. Co., 81 Wis. 356, 51 N. W. 582 (motion to take more definite and certain refused).

Allegations held insufficient see Norfolk, etc., R. Co. *v.* Gee, 104 Va. 806, 52 S. E. 572, 3 L. R. A. N. S. 111, holding that a declaration against a railroad company for personal injuries sustained at a crossing, alleging as negligence defendant's failure to keep its right of way at the crossing sufficiently smooth and level to admit of safe and speedy travel over the crossing as required by Va. Code (1904), p. 669, § 1294*d*, is demurrable where it fails to state the nature of the defects complained of.

Petition held insufficient to show negligence on the part of the railroad company in an action for injuries caused by a team becoming frightened at a carcass lying on defendant's right of way near a crossing see Louisville, etc., R. Co. *v.* Armstrong, 105 S. W. 473, 32 Ky. L. Rep. 252.

Duration of obstruction.— Where plaintiff, to avoid the obstruction of a street crossing by a standing train, has gone upon private property and been injured by an obstruction there, a petition to recover therefor should aver the length of time the cars had been on the crossing, or that defendant did not have the right to stop its trains on the crossing for such length of time as it required to transact its legitimate business. Eads *v.* Louisville, etc., R. Co., 42 S. W. 1135, 19 Ky. L. Rep. 1138.

tenance.[6] If such breach of duty is in violation of a statute or ordinance, it has been held that so much of the statute or ordinance should be set out as is relied upon to support the cause of action.[7] The declaration or complaint, however, need not allege notice on the part of the railroad company of the condition of the crossing;[8] nor need it allege the name of the servant or employee whose negligence permitted the obstruction,[9] or the exercise of ordinary care on plaintiff's part.[10] In an action for injuries caused by a train which was standing on a crossing starting up without warning and injuring plaintiff who was attempting to cross at the time, the declaration should allege that some person in control of the train knew of plaintiff's attempt to cross or had notice of his exposure to danger.[11]

(4) MODE OF RUNNING TRAINS. In an action for injury caused by the negligent running of a train or cars approaching a crossing, the declaration or petition must allege the acts or omissions constituting such negligence with sufficient certainty to inform defendant of the negligence charged,[12] as that the train caus-

6. Lake Shore, etc., R. Co. *v.* McIntosh, 140 Ind. 261, 38 N. E. 476 (holding that an allegation "that by reason of the unlawful, negligent and wrongful acts and omissions of the defendant, as herein set out, the said decedent was run over and upon by said train at said crossing" sufficiently alleges that the injuries were in consequence of defendant's negligent construction and maintenance of the crossing); Indianapolis, etc., R. Co. *v.* Stout, 53 Ind. 143; Wabash R. Co. *v.* De Hart, 32 Ind. App. 62, 65 N. E. 192; Beopple *v.* Illinois Cent. R. Co., 104 Tenn. 420, 58 S. W. 231; Norfolk, etc., R. Co. *v.* Gee, 104 Va. 806, 52 S. E. 572, 3 L. R. A. N. S. 111.

7. Southern R. Co. *v.* Prather, 119 Ala. 588, 24 So. 836, 72 S. W. 949, holding that an allegation that an ordinance of the city prohibited railroad companies from allowing cars to stand in the street longer than five minutes at a time does not sufficiently set forth the ordinance. But see Denver, etc., R. Co. *v.* Robbins, 2 Colo. App. 313, 30 Pac. 261 (holding that a complaint is sufficient which alleges that defendant railroad company was unlawfully and negligently occupying a street crossing in violation of a city ordinance and that by reason of that fact and without any negligence on plaintiff's part the injury resulted); Eakins *v.* Chicago, etc., R. Co., 126 Iowa 324, 102 N. W. 104 (holding that an allegation that the town had by ordinance prohibited the obstruction of streets by cars is properly stricken out where there is no allegation that the street alleged to have been obstructed extended over the railroad right of way).

8. Wabash R. Co. *v.* De Hart, 32 Ind. App. 62, 65 N. E. 192.

9. Southern R. Co. *v.* Prather, 119 Ala. 588, 34 So. 836, 72 Am. St. Rep. 949.

10. Louisville, etc., R. Co. *v.* Smith, 44 S. W. 385, 19 Ky. L. Rep. 1693, holding that where one is injured at a railroad crossing by driving his horse into a hole, which it is alleged had been permitted to remain there by the negligence of the company, it is not necessary to allege that he was driving with ordinary care.

11. Andrews *v.* Central R., etc., Co., 86 Ga. 192, 12 S. E. 213, 10 L. R. A. 58; San Antonio, etc., R. Co. *v.* Green, 20 Tex. Civ. App. 5, 49 S. W. 670, allegations held sufficient. See also Southern R. Co. *v.* Mouchet, 3 Ga. App. 266, 59 S. E. 927.

12. Southern R. Co. *v.* Douglass, 144 Ala. 351, 39 So. 268; Georgia Cent. R. Co. *v.* Freeman, 134 Ala. 354, 32 So. 778; Georgia Cent. R. Co. *v.* Forshee, 125 Ala. 199, 27 So. 1006; Chicago, etc., R. Co. *v.* Spilker, 134 Ind. 380, 33 N. E. 280, 34 N. E. 218 (holding that an allegation that defendant's servants when approaching the crossing with the train did not attempt to check it but negligently ran it at a dangerous speed sufficiently informs defendant of the facts charged as constituting negligence); Pittsburgh, etc., R. Co. *v.* Conn, 104 Ind. 64, 3 N. E. 636; Baltimore, etc., R. Co. *v.* Reynolds, 33 Ind. App. 219, 71 N. E. 250; Louisville, etc., R. Co. *v.* Dick, 78 S. W. 914, 25 Ky. L. Rep. 1831 (holding that a general charge of negligence, carelessness, and recklessness in the management and operation of the train, whereby plaintiff was run over and injured, gives defendant sufficient notice that the method and manner of operating the train will be brought into question on the trial, without specifying the particular acts of negligence on the part of those in charge of the train); White *v.* Wabash Western R. Co., 34 Mo. App. 57. *Compare* Baltimore, etc., R. Co. *v.* McPeek, 16 Ohio Cir. Ct. 87, 8 Ohio Cir. Dec. 742, holding that a petition alleging that the injury was caused by an irregular train running at a great speed, and that it failed to give proper warning of its approach to the crossing, but failing to specifically allege negligence, fails to state a cause of action.

Sufficient allegations of negligence as to mode of running trains see Georgia Cent. R. Co. *v.* Forshee, 125 Ala. 199, 27 So. 1006 (holding that an allegation that defendants so negligently and carelessly conducted themselves that the said engine was caused to run against plaintiff's intestate at a street crossing, although very general, yet when taken with the averment as to the place where the collision occurred, sufficiently shows that defendant was under duty to keep a lookout and the complaint is sufficient on demurrer); Atlantic Coast Line R. Co. *v.* Taylor, 125 Ga. 454, 54 S. E. 622; Chicago, etc., R. Co. *v.* Redmond, 171

ing the accident was negligently run at a dangerous and unusual rate of speed,[13] without giving any warning of its approach;[14] and must show with reasonable certainty that such negligence was the proximate cause of the injury.[15] But it is not necessary to allege what were defendant's rules for the management of its trains.[16]

(5) VIOLATION OF STATUTES OR ORDINANCES. In an action for injuries at a railroad crossing caused by some act or omission of the company which is in violation of a statute or ordinance, the declaration or complaint is sufficient if it alleges with certainty the facts showing such violation,[17] and that it caused the

Ill. 347, 49 N. E. 541 [*affirming* 70 Ill. App. 119] (that defendant by its servants so carelessly and improperly drove and managed its locomotive and train that by the negligence and improper conduct of defendant or its servants said locomotive and train ran into and struck with great force and violence against plaintiff, etc.); Rothars *v.* Illinois Cent. R. Co., (Miss. 1899) 25 So. 665 (that at that hour of the day the crossing was always used by a great number of people and that the locomotive was being handled without warning and without any lookout being kept, and that the intestate attempted to go over the crossing just as it had passed and when it was about twenty-five feet away when it suddenly started back causing the accident complained of); Race *v.* East., etc., R. Co., 62 N. J. L. 536, 41 Atl. 710 (holding that a declaration simply averring that by reason of the negligent and improper running of defendant's train and blowing the whistle of its locomotive a horse was frightened, that the horse overturned the wagon, and that plaintiff was thereby thrown out and injured, although not specific enough for good pleading, may stand as against a general demurrer); Chesapeake, etc., R. Co. *v.* Crews. 118 Tenn. 52, 99 S. W. 368 (under Shannon Code, § 1574, subs. 4); Chattanooga Rapid Transit Co. *v.* Walton, 105 Tenn. 415, 58 S. W. 737 (that defendant "did wrongfully and negligently run one of its engines and cars upon, over, and against the plaintiff"); Beopple *v.* Illinois Cent. R. Co., 104 Tenn. 420, 58 S. W. 231 (holding that an allegation that the train was wrongfully managed and that it made unnecessary noise is not demurrable as not alleging that the whistling was "needlessly, wantonly, and wrongfully done" since it need not allege that it was wantonly done, and an allegation of making unnecessary noise is equivalent to alleging that it was needlessly made); Gulf, etc., R. Co. *v.* Smith, (Tex. Civ. App. 1894) 26 S. W. 644.

Insufficient allegations of negligence as to mode of running trains see Lake Shore, etc., R. Co. *v.* Barnes, 166 Ind. 7, 76 N. E. 629, 3 L. R. A. N. S. 778 (allegations held to be insufficient to characterize the crossing as so extra-hazardous as to require a railroad company to restrict the speed of its trains in passing over the same); Schindler *v.* Milwaukee, etc., R. Co., 77 Mich. 136, 43 N. W. 911 (holding that an allegation that defendant by its servants "so carelessly and improperly managed the said locomotive engine and train" that by its "negligence and improper conduct" the train struck the vehicle containing plaintiff, etc., does not allege the wrong with requisite certainty).

13. Nashville, etc., R. Co. *v.* Reynolds, (Ala. 1906) 41 So. 1001; Chicago, etc., R. Co. *v.* Spilker, 134 Ind. 380, 33 N. E. 280, 34 N. E. 218; Pittsburgh, etc., R. Co. *v.* Martin, 82 Ind. 476; Ohio, etc., R. Co. *v.* Davis, 23 Ind. 553, 85 Am. Dec. 477; Chicago, etc., R. Co. *v.* Butler, 10 Ind. App. 244, 38 N. E. 1.

14. Chicago, etc., R. Co. *v.* Adler, 56 Ill. 344 (holding that in an action for injuries caused by an omission to give signals, it is not necessary to specify in the declaration the trains the engineers of which were guilty of a violation of the statute); Pittsburgh, etc., R. Co. *v.* Martin, 82 Ind. 476; Ohio, etc., R. Co. *v.* Davis, 23 Ind. 553, 85 Am. Dec. 477; Chicago, etc., R. Co. *v.* Butler, 10 Ind. App. 244, 38 N. E. 1.

15. Pittsburgh, etc., R. Co. *v.* Conn, 104 Ind. 64, 3 N. E. 636 (holding that this is not shown by an averment that the company with gross negligence caused its locomotive to rapidly approach such crossing without giving warning); Lake Erie, etc., R. Co. *v.* Moore, (Ind. App. 1907) 81 N. E. 85 (complaint held fatally defective); Chicago, etc., R. Co. *v.* Butler, 10 Ind. App. 244, 38 N. E. 1. And see cases cited *supra*, notes 12–14.

16. Gulf, etc., R. Co. *v.* Smith, (Tex. Civ. App. 1894) 26 S. W. 644, holding that a complaint for injuries received at a street crossing from a car making a flying switch need not allege defendant's rules for making flying switches and for managing its trains.

17. Highland Ave., etc., R. Co. *v.* South, 112 Ala. 642, 20 So. 1003.

Sufficient allegations of negligence in violating a statute or ordinance see Birmingham Belt R. Co. *v.* Gerganous, 142 Ala. 238, 37 So. 929; Southern R. Co. *v.* Posey, 124 Ala. 486, 26 So. 914 (holding that an allegation that the train was running at a high rate of speed without blowing the whistle or ringing the bell at a crossing and that by reason of such negligence the injuries complained of were caused states a cause of action against the railroad company for failing in its statutory duty to sound the whistle or bell at short intervals when approaching a public crossing); Baltimore, etc., R. Co. *v.* Musgrave, 24 Ind. App. 295, 55 N. E. 496 (that defendant was running its train through the city at the time the accident occurred at a speed beyond the limits fixed by ordinance, that the statutory signals on approaching the crossing were not given, that the accident occurred by reason of such negli-

injury.[18] While it usually must be alleged that the statute or ordinance is in force and that the particular acts or omissions are in violation thereof,[19] it is sufficient to state the existence of the statute or ordinance without setting out a copy thereof as a part of the complaint;[20] and if the complaint sets up a good cause of action both at common law and under the statute, the statute need not be referred to.[21] Where the violation of the statute or ordinance constitutes negligence *per se*, it is not necessary to expressly describe such failure as negligence.[22] Where the statute or ordinance is satisfied by either ringing a bell or blowing a whistle, an allegation of a failure to do either is sufficient.[23]

gence on the part of defendant, and that plaintiff was exercising due care); Chicago, etc., R. Co. *v.* Miller, 46 Mich. 532, 9 N. W. 841 (holding that an allegation that defendant negligently drove a locomotive upon the railroad up to, upon, and across a certain public highway at the crossing of the same and the said railroad, without giving the necessary statutory signals, is a sufficiently specific averment of defendant's negligence when taken in connection with the averment of consequential injury).

Statements concerning the ordinance and its violation are material allegations where the theory of the complaint is that the company was negligent in running its train through a city in violation of an ordinance. Lake Erie, etc., R. Co. *v.* Mikesell, 23 Ind. App. 395, 55 N. E. 488.

A declaration under Mass. Pub. St. c. 112, § 212, holding a railroad liable for injuries to passengers through its negligence and to one not a passenger while such person is in the exercise of due diligence, is not sufficient to bring the case within section 213 of the same chapter, holding a railroad liable for injuries to persons at grade crossings caused by its cars or engines by reason of its failure to ring a bell or blow a whistle, where it is nowhere alleged that the accident occurred at a highway crossing or was caused by a collision with cars or engines. Allerton *v.* Boston, etc., R. Co., 146 Mass. 241, 15 N. E. 621. That the accident occurred upon the crossing of a highway at grade, that the signals required by statute were neglected, and that the neglect contributed to the injury, must be alleged under Mass. St. (1874) c. 372, § 160. Wright *v.* Boston, etc., R. Co., 129 Mass. 440.

18. Wilson *v.* Louisville, etc., R. Co., 146 Ala. 285, 40 So. 941, 8 L. R. A. N. S. 987 (complaint held demurrable as not showing any causal connection between the violation of an ordinance forbidding the blockading of any public street, and the injuries); Birmingham Belt R. Co. *v.* Gerganous, 142 Ala. 238, 37 So. 929; Southern R. Co. *v.* Posey, 124 Ala. 486, 26 So. 914; Denver, etc., R. Co. *v.* Robbins, 2 Colo. App. 313, 30 Pac. 261. *Compare* Southern R. Co. *v.* Stockdon, 106 Va. 693, 56 S. E. 713.

Sufficient allegations of violation of statute or ordinance as being proximate cause of injury see Baltimore, etc., R. Co. *v.* Young, 146 Ind. 374, 45 N. E. 479, 153 Ind. 163, 54 N. E. 791; Southern Indiana R. Co. *v.* Corps, 37 Ind. App. 586, 76 N. E. 902; Baltimore, etc., R. Co. *v.* Reynolds, 33 Ind. App. 219, 71 N. E. 250 (holding that an allegation that the injuries were caused by defendant's violation of a city ordinance requiring it to keep a watchman on the rear car of a train being operated backward, to ring the bell and not to run at more than a stated rate of speed, is sufficient without stating plaintiff's conduct at the time); Lake Erie, etc., R. Co. *v.* Pence, 24 Ind. App. 12, 55 N. E. 1036 (holding that a complaint alleging that plaintiff was injured at a crossing by reason of the negligence of defendant in operating its trains at a speed greater than that allowed by ordinance and without any fault or negligence on his part is not demurrable for the reason that it does not allege that if said train had not been operated at such prohibited rate of speed plaintiff would not have been injured).

Where the violation of a statute or ordinance is merely one of several elements charged as negligence, the failure to show that such violation was a proximate cause of plaintiff's injury does not make the complaint demurrable. Cleveland, etc., R. Co. *v.* Klee, 154 Ind. 430, 56 N. E. 234.

19. Lake Erie, etc., R. Co. *v.* Mikesell, 25 Ind. App. 395, 55 N. E. 488. *Compare* Warren *v.* Southern California R. Co., (Cal. 1901) 67 Pac. 1.

20. Lake Erie, etc., R. Co. *v.* Hancock, 15 Ind. App. 104, 43 N. E. 659. *Compare* Southern R. Co. *v.* Prather, 119 Ala. 588, 24 So. 836, 72 Am. St. Rep. 949.

21. Southern R. Co. *v.* Stockton, 106 Va. 693, 56 S. E. 713 (holding that where the complaint states a good cause of action independently of a statute or ordinance, it is immaterial that the ordinance or statute is unconstitutional, or that the complaint fails to allege that its violation was the proximate cause of the injury); Southern R. Co. *v.* Simpson, 131 Fed. 705, 65 C. C. A. 563.

Tenn. St. Shannon Code, § 1574, subs. 4, providing that every railroad shall keep the engineer on the lookout ahead and when any obstruction appears on the road the whistle shall be sounded, brakes put down to stop the train, etc., is declaratory of the common law so far as it goes, and a declaration in an action against a railroad company for injuries caused by a collision, framed under the statute, which goes further and includes averments of additional common-law negligence, will be treated as one wholly under the common law. Chesapeake, etc., R. Co. *v.* Crews, 118 Tenn. 52, 99 S. W. 368.

22. Pennsylvania Co. *v.* Fertig, 34 Ind. App. 459, 70 N. E. 834.

23. Highland Ave., etc., R. Co. *v.* South, 112

(6) NEGATIVING CONTRIBUTORY NEGLIGENCE. By the weight of authority contributory negligence is a matter of defense, and it is not necessary for plaintiff in an action for injuries at a railroad crossing to allege that he was in the exercise of due care, or without fault, or to otherwise negative contributory negligence,[24] unless he alleges facts showing contributory negligence,[25] although it has been held otherwise,[26] except where plaintiff is *non sui juris*.[27] But even where it is necessary to negative contributory negligence, a general averment that plaintiff was without fault on his part, or an allegation of facts showing freedom from fault, is generally sufficient,[28] unless facts specially pleaded clearly show that he was guilty of contributory negligence;[29] and if defendant desires a more particular statement of facts his remedy, if any, is by motion to make the complaint more specific.[30]

(B) *Amendment.* The complaint, declaration, or petition may be amended during the progress of the trial so as to conform the pleadings to the evidence.[31] The allowance of such amendment, however, is within the discretion of the court, and it does not abuse such discretion in refusing to allow the amendment where it contains a material change or departure in the issues,[32] as where it states a new cause of action.[33]

Ala. 642, 20 So. 1003, holding that an allegation that those operating a train were negligent in failing to blow the whistle and ring the bell at short intervals is demurrable since the statute (Code, § 1144) is satisfied by either warning. But *compare* Terry *v.* St. Louis, etc., R. Co., 89 Mo. 586, 1 S. W. 746.

24. Louisville, etc., R. Co. *v.* Hubbard, 148 Ala. 45, 41 So. 814; Southern R. Co. *v.* Crenshaw, 136 Ala. 573, 34 So. 913; Georgia, etc., R. Co. *v.* Evans, 87 Ga. 673, 13 S. E. 580 (holding that since under the code negligence of a railroad company is presumed when injury is shown, it is not necessary for plaintiff to allege that he was in the exercise of due care); Bamberg *v.* Atlantic Coast Line R. Co., 72 S. C. 389, 51 S. E. 988 (holding that plaintiff need not allege that he did not hear or see the approaching train); Gulf, etc., R. Co. *v.* Shieder, 88 Tex. 152, 30 S. W. 902, 28 L. R. A. 538; Blankenship *v.* Galveston, etc., R. Co., 15 Tex. Civ. App. 82, 38 S. W. 216.

In Indiana under Acts (1899), p. 59, c. 41 (Burns Annot. St. (1901) § 359*a*) the complaint need not allege want of contributory negligence. New York, etc., R. Co. *v.* Robbins, 38 Ind. App. 172, 76 N. E. 804; Southern Indiana R. Co. *v.* Corps, 37 Ind. App. 586, 76 N. E. 902; Chicago, etc., R. Co. *v.* La Porte, 33 Ind. App. 691, 71 N. E. 166; Wabash R. Co. *v.* De Hart, 32 Ind. App. 62, 65 N. E. 192, holding this statute to apply to a case commenced after the statute took effect, although the cause of action accrued prior thereto. It was otherwise in this state prior to the statute. See cases cited *infra*, notes 26–30.

25. Blankenship *v.* Galveston, etc., R. Co., 15 Tex. Civ. App. 82, 38 S. W. 216.

26. Baltimore, etc., R. Co. *v.* Young, 146 Ind. 374, 45 N. E. 479; Ohio, etc., R. Co. *v.* Walker, 113 Ind. 196, 15 N. E. 234, 3 Am. St. Rep. 638; Pittsburgh, etc., R. Co. *v.* Carlson, 24 Ind. App. 559, 56 N. E. 251. But it is otherwise now in Indiana by statute. See *supra*, note 24.

27. Cleveland, etc., R. Co. *v.* Klee, 154 Ind. 430, 56 N. E. 234, holding that a complaint alleging that plaintiff, a boy nine years old, was of such immature age and experience that he did not appreciate the danger of being struck by defendant's engine and was incapable of negligence is not demurrable for a failure to allege that plaintiff was free from contributory negligence.

28. Pennsylvania Co. *v.* Horton, 132 Ind. 189, 31 N. E. 45; Ohio, etc., R. Co. *v.* Walker, 113 Ind. 196, 15 N. E. 234, 3 Am. St. Rep. 638; Peirce *v.* Ray, 24 Ind. App. 302, 56 N. E. 776. See Southern Indiana R. Co. *v.* Corps, 37 Ind. App. 586, 76 N. E. 902.

Allegations insufficient to show want of contributory negligence see Chicago, etc., R. Co. *v.* Thomas, 147 Ind. 35, 46 N. E. 73; Lake Erie, etc., R. Co. *v.* Hancock, 15 Ind. App. 104, 43 N. E. 659.

29. Pittsburgh, etc., R. Co. *v.* Burton, 139 Ind. 357, 37 N. E. 150, 38 N. E. 594; Indianapolis, etc., R. Co. *v.* Wilson, 134 Ind. 95, 33 N. E. 793; Pennsylvania Co. *v.* Horton, 132 Ind. 189, 31 N. E. 45; Ohio, etc., R. Co. *v.* Walker, 113 Ind. 196, 15 N. E. 234, 3 Am. St. Rep. 638; Ohio, etc., R. Co. *v.* McDaneld, 5 Ind. App. 108, 31 N. E. 836, holding, however, that the special averments did not show contributory negligence and were not inconsistent with general allegations of absence of fault or negligence.

30. Pennsylvania Co. *v.* Horton, 132 Ind. 189, 31 N. E. 45.

31. Raleigh, etc., R. Co. *v.* Bradshaw, 113 Ga. 862, 39 S. E. 555; Southern R. Co. *v.* Elder, 81 Fed. 791, 26 C. C. A. 615. See Chicago, etc., R. Co. *v.* Reilly, 75 Ill. App. 125.

32. Chun *v.* Kentucky, etc., Bridge Co., 64 S. W. 649, 23 Ky. L. Rep. 1092; Southern R. Co. *v.* Simpson, 131 Fed. 705, 65 C. C. A. 563, amendment held not to constitute departure.

33. See Raleigh, etc., R. Co. *v.* Bradshaw, 113 Ga. 862, 39 S. E. 555; Chicago, etc., R. Co. *v.* Reilly, 75 Ill. App. 125; Louisville, etc., R. Co. *v.* Case, 9 Bush (Ky.) 728.

(II) *Answer and Subsequent Pleadings.* The answer and subsequent pleadings, in an action for injuries at a railroad crossing, are also regulated by the rules of pleading governing civil actions generally,[34] and particularly those relating to actions for negligence.[35] Thus special pleas in such an action which amount to general issues are bad;[36] but a special plea containing matter of avoidance is good,[37] and its disallowance is not a matter of discretion.[38] A replication in such an action should reply to the material allegations of the plea or answer,[39] and must not depart from the cause of action averred in the complaint,[40] or repeat matters already alleged.[41] A replication to a plea of contributory negligence should aver facts negativing such negligence.[42] A surrejoinder should not allege matters which amount to a departure from the complaint.[43]

d. Issues, Proof, and Variance — (I) *Issues Raised in General.* Only such matters are in issue, in an action for injuries at a railroad crossing, as are properly put in issue by the pleadings and proof in the case.[44] Thus only such matters of negligence as are properly put in issue by the pleadings and proof can be relied upon by plaintiff as grounds of recovery,[45] and the same rule

34. See, generally, Pleading, 31 Cyc. 126, 241.

35. See Nashville, etc., R. Co. *v.* Reynolds, (Ala. 1906) 41 So. 1001; and generally, Negligence, 29 Cyc. 580, 583.

36. Allen *v.* New Haven, etc., R. Co., 49 Conn. 243, holding that in an action for injuries at a highway crossing which defendant company is bound to maintain, a special plea that the highway was not legally laid out amounts to the general issue and is bad.

37. Allen *v.* New Haven, etc., R. Co., 49 Conn. 243.

Plea of estoppel, in an action for injuries by team becoming frightened, held demurrable see Louisville, etc., R. Co. *v.* Armstrong, 105 S. W. 473, 32 Ky. L. Rep. 252.

38. Allen *v.* New Haven, etc., R. Co., 49 Conn. 243.

39. Highland Ave., etc., R. Co. *v.* South, 112 Ala. 642, 20 So. 1003, holding that a replication which simply avoids immaterial averments without replying to other allegations is demurrable.

A replication which takes issue on or presents the general issue to a plea is not demurrable. Southern R. Co. *v.* Hobbs, 151 Ala. 335, 43 So. 844.

40. Southern R. Co. *v.* Crenshaw, 136 Ala. 573, 34 So. 913; Highland Ave., etc., R. Co. *v.* South, 112 Ala. 642, 20 So. 1003.

41. Highland Ave., etc., R. Co. *v.* South, 112 Ala. 642, 20 So. 1003.

42. Southern R. Co. *v.* Hobbs, 151 Ala. 335, 43 So. 844 (replication bad for stating conclusions only); Louisville, etc., R. Co. *v.* Orr, 121 Ala. 489, 26 So. 35.

43. Louisville, etc., R. Co. *v.* Orr, 121 Ala. 489, 26 So. 35.

44. Baltimore, etc., R. Co. *v.* Slaughter, 167 Ind. 330, 79 N. E. 186, 7 L. R. A. N. S. 597 (holding that whether the act of placing a hand-car within the limits of a crossing is so calculated to frighten passing teams as to render it negligent to do such an act is presented by the issue formed on the allegation that the act was negligently done); Louisville, etc., R. Co. *v.* Clark, 105 Ky. 571, 49 S. W. 323, 20 Ky. L. Rep. 1375 (holding that it is error to instruct the jury as to the duty of defendant to erect sign-boards as required by statute, where there is no averment in the petition that defendant failed to perform this duty or that the injury was caused by such failure); Lewis *v.* New York, etc., R. Co., 1 Silv. Sup. (N. Y.) 393, 5 N. Y. Suppl. 313 (holding that an allegation that the crossing was "extensively and notoriously used by the public at the time of said accident, and for many years prior to the knowledge of the defendant" is sufficient to raise the issue whether the crossing is a public highway within the statute requiring signals); Missouri, etc., R. Co. *v.* Matherly, 35 Tex. Civ. App. 604, 81 S. W. 589; Texas, etc., R. Co. *v.* Knox, (Tex. Civ. App. 1903) 75 S. W. 543 (holding that where the pleadings do not raise the issue of discovered peril, the submission of such issue to the jury is reversible error).

In an action for injuries at a private crossing, near a public crossing, where there is no averment that signals usually given on the approach of trains to the public crossing could be heard at the private crossing, and the distance between the crossings is not given, but the bare statement that they were "near" together, the question of defendant's negligence in failing to give signals at the public crossing on which plaintiff could rely is not raised. Davis *v.* Chesapeake, etc., R. Co., 75 S. W. 275, 25 Ky. L. Rep. 342 [opinion in 70 S. W. 857, 24 Ky. L. Rep. 1125 withdrawn].

An allegation of wilful negligence in an action against a railroad company includes all inferior grades in Kentucky. Louisville, etc., R. Co. *v.* Case, 9 Bush (Ky.) 728.

45. *Indiana.*— Chicago, etc., R. Co. *v.* Spilker, 134 Ind. 380, 33 N. E. 280, 34 N. E. 218.

Kansas.— Missouri Pac. R. Co. *v.* Griffith, 69 Kan. 130, 76 Pac. 436, holding that where plaintiff alleges as grounds of recovery, specified acts of negligence by a railroad company in failing to give proper signals and the running at a reckless rate of speed, the court is not warranted in submitting as an addi-

applies to matters which can be relied upon by defendant company as grounds of defense.[46]

(II) *MATTERS TO BE PROVED.* Negligence, or other matters material to sustain the cause of action or defense, must be proved in the manner alleged in the declaration or other pleading.[47] Every allegation which is descriptive of the cause of action,[48] or of what is material,[49] even though unnecessary,[50] must be proved as alleged. But matters not in issue need not be proved;[51] nor is proof of averments which are not material essential.[52]

tional ground of recovery negligence of defendant in permitting obstructions to the view to remain on its right of way.

Kentucky.— Louisville, etc., R. Co. *v.* Clark, 105 Ky. 571, 49 S. W. 323, 20 Ky. L. Rep. 1375; McCain *v.* Louisville, etc., R. Co., 18 S. W. 537, 13 Ky. L. Rep. 809.

Massachusetts.— Legge *v.* New York, etc., R. Co., 197 Mass. 88, 83 N. E. 367, holding that where one was killed by a locomotive before he reached a highway crossing there can be no recovery under a count alleging that he was killed on a highway crossing.

Michigan.— Thomas *v.* Chicago, etc., R. Co., 86 Mich. 496, 49 N. W. 547.

Texas.—San Antonio, etc., R. Co. *v.* Stolleis, (Civ. App. 1899) 49 S. W. 679, holding that where the petition alleges negligence only in failing to blow the whistle and ring the bell as required by statute, there can be no recovery because of the engineer's failure to keep a lookout.

United States.— Southern R. Co. *v.* Elder, 81 Fed. 791, 26 C. C. A. 615, holding that where plaintiff alleges in her declaration that the road where the accident occurred was "a public road" she cannot without amending her declaration be heard to claim that the road was a private one even if it should be conceded that that is material.

Failure to maintain the statutory warning post at a crossing must be averred in order to insist upon it as a substantive cause of action. New York, etc., R. Co. *v.* Kistler, 16 Ohio Cir. Ct. 316, 9 Ohio Cir. Dec. 277.

Where the complaint charges wantonness in failing to use preventive means on discovery of plaintiff's peril, a recovery cannot be had on proof of wantonness consisting in running a train, without proper appliances for stopping it, at a high rate of speed. Burke *v.* Alabama Midland R. Co., 124 Ala. 604, 26 So. 947.

46. Missouri, etc., R. Co. *v.* Matherly, 35 Tex. Civ. App. 604, 81 S. W. 589 (holding that, where the railroad company desires to raise the question as to whether a city ordinance constitutes an unreasonable restriction on railroads, the issue must be presented by proper pleadings and proof); Houston, etc., R. Co. *v.* Byrd, (Tex. Civ. App. 1901) 61 S. W. 147 (holding that in an action for injuries sustained by plaintiff being thrown from his carriage at a crossing in attempting to avoid a collision with an approaching train, whether or not there was contributory negligence in not stopping the horse after the train was seen cannot be determined where it is not alleged in the answer).

47. Indianapolis Union R. Co. *v.* Neubaucher, 16 Ind. App. 21, 43 N. E. 576, 44 N. E. 669; Thomas *v.* Chicago, etc., R. Co., 86 Mich. 496, 49 N. W. 547.

In trespass.— Where a count for personal injuries avers that defendant railroad company wantonly and intentionally caused or allowed a railroad train to run against plaintiff's vehicle, since it involves the actual participation of defendant in the act of running the train and not merely defendant's responsibility for the act of a servant, it is in trespass, and not in case, and to sustain it proof of such actual participation in the tort on the part of defendant is essential. Birmingham Belt R. Co. *v.* Gerganous, 142 Ala. 238, 37 So. 929.

Where separable acts of negligence are alleged plaintiff may recover upon proof of either. Louisville, etc., R. Co. *v.* Shearer, 59 S. W. 330, 22 Ky. L. Rep. 929; Erickson *v.* Kansas City, etc., R. Co., 171 Mo. 647, 71 S. W. 1022.

48. Wabash R. Co. *v.* Billings, 212 Ill. 37, 72 N. E. 2 [*reversing* 105 Ill. App. 111].

49. Wabash R. Co. *v.* Billings, 212 Ill. 37, 72 N. E. 2 [*reversing* 105 Ill. App. 111]; Illinois Cent. R. Co. *v.* Chicago Title, etc., Co., 79 Ill. App. 623 (holding that, in an action against a railroad company for negligently causing the death of a person at a public highway crossing, the averment that the place in question is a public highway crossed by the company's right of way and tracks is a material averment and proof of it is necessary to a recovery); Indianapolis Union R. Co. *v.* Neubaucher, 16 Ind. App. 21, 43 N. E. 576, 44 N. E. 669 (holding that where the gist of the negligence alleged is that defendant did or omitted to do acts which induced plaintiff to go upon a railroad crossing when it was unsafe by reason of an approaching train, and violated the city ordinances as to maintaining gates, and concerning the rate of speed at which trains should run, a general verdict for plaintiff is supported by evidence that defendant did not maintain gates at the crossing and that its failure so to do was negligent); Beyel *v.* Newport News, etc., R. Co., 34 W. Va. 538, 12 S. E. 532 (holding that where the gist of the action is the negligent frightening of plaintiff's horse, it is not necessary to prove actual physical contact between the engine and the wagon).

50. Wabash R. Co. *v.* Billings, 212 Ill. 37, 72 N. E. 2 [*reversing* 105 Ill. App. 111]; Chicago, etc., R. Co. *v.* Morkenstein, 24 Ill. App. 128.

51. Holmes *v.* Missouri Pac. R. Co., 207 Mo. 149, 105 S. W. 624.

52. Southern R. Co. *v.* Morris, (Ala. 1906)

(III) *EVIDENCE ADMISSIBLE.* Any legal evidence, in an action for injuries at a railroad crossing, which corresponds with the allegations, and is restricted to the issues, is admissible;[53] but evidence not conforming thereto is generally inadmissible.[54] Where the allegations of negligence are specific, the proof must

42 So. 19 (holding that the failure of plaintiff, in an action for injuries from defendant's omission to keep in repair an approach to its tracks at a public crossing, to prove the averment of the complaint that defendant constructed the approach is immaterial, since it is defendant's duty to keep it in repair without regard to who constructed it); Illinois Steel Co. *v.* Szutenbach, 64 Ill. App. 642 (holding that where plaintiff alleges that it was necessary for him to cross the track it is not incumbent upon him to prove such necessity); Indianapolis Union R. Co. *v.* Neubaucher, 16 Ind. App. 21, 43 N. E. 576, 44 N. E. 669; Hopkins *v.* Grand Rapids, etc., R. Co., 147 Mich. 339, 110 N. W. 1064.

In a common-law action plaintiff is not required to prove matters necessary only to statutory relief, although the declaration contains allegations which might be rejected as surplusage, from which it might be inferred that plaintiff relied upon the statutory relief. Chicago, etc., R. Co. *v.* Dillon, 123 Ill. 570, 15 N. E. 181, 5 Am. St. Rep. 559.

53. Overtoom *v.* Chicago, etc., R. Co., 80 Ill. App. 515 (holding that where it is alleged that a crossing is in a populous neighborhood and much used, evidence to support such allegation is admissible); Missouri Pac. R. Co. *v.* Hennessey, 75 Tex. 155, 12 S. W. 608.

Evidence is admissible respecting the brakes on a locomotive as compared with those of other locomotives belonging to the same company, under an allegation that the locomotive was not supplied with proper brakes (Savannah, etc., R. Co. *v.* Flannagan, 82 Ga. 579, 9 S. E. 471, 14 Am. St. Rep. 183); or to show the speed at which the train was running, where one of the acts of negligence alleged is that the train was running at a high and dangerous rate of speed (Illinois Cent. R. Co. *v.* Slater, 129 Ill. 91, 21 N. E. 575, 16 Am. St. Rep. 242, 6 L. R. A. 418 [*affirming* 28 Ill. App. 73]); or to show that the crossing was used by footmen, where the petition alleges that "it was a public crossing or footway for footmen" (Clampit *v.* Chicago, etc., R. Co., 84 Iowa 71, 50 N. W. 673); or under an allegation that the view of the road approaching the track was greatly obstructed by an embankment, it is admissible to show that there was a fence on the embankment (San Antonio, etc., R. Co. *v.* Stolleis, (Tex. Civ. App. 1899) 49 S. W. 679).

Collision with street car.— Where a petition for injuries sustained by a passenger on a street car as the result of a collision between the street car and a railroad car alleges that defendants failed to keep a reasonable and necessary lookout and observe the approach of the railroad car, it is admissible to show the negligence of a watchman employed to warn street cars of the approach of railroad cars, as well as that of servants in charge of the street cars in failing to take proper precautions to apprise themselves of danger before sending the car across the railroad tracks. Hamilton *v.* Metropolitan St. R. Co., 114 Mo. App. 504, 89 S. W. 893.

An ordinance regulating the speed of a train is admissible under a pleading reciting the substance of such an ordinance and charging a railroad company with negligence in its violation. International, etc., R. Co. *v.* Dalwigh, (Tex. Civ. App. 1898) 48 S. W. 527.

In a common-law action for injuries at a crossing, an ordinance making it the duty of the company to station a man on the rear of trains while backing, although not pleaded, is admissible to show negligence. Mulderig *v.* St. Louis, etc., R. Co., 116 Mo. App. 655, 94 S. W. 801.

54. *California.*— Matteson *v.* Southern Pac. Co., 6 Cal. App. 318, 92 Pac. 101, holding that where the issue relates only to the existence of lights on the rear car and a witness testifies in regard to lights on that car, it is proper to refuse to permit him to testify as to whether he saw any lights on any other cars

Georgia.— Snowball *v.* Seaboard Air Line R. Co., 130 Ga. 83, 60 S. E. 189, holding that where the allegation is that plaintiff's husband was killed on the public road crossing, evidence that the railroad company had impliedly licensed the general public in using a path on its right of way is properly excluded.

Illinois.— Toledo, etc., R. Co. *v.* Jones, 76 Ill. 311, holding that evidence of the condition of a crossing is inadmissible, where the gravamen of the action is the neglect to give the statutory signal of warning before reaching the crossing, and neglect in not slackening the speed of a train.

Michigan.— Britton *v.* Michigan Cent. R. Co., 122 Mich. 359, 81 N. W. 253, holding that, where plaintiff avers that as he approached the crossing he looked and listened and slowed his horse down to a very slow walk and continued to look and listen for an approaching train, it is inadmissible for him to show that he stopped his horse, and leaned forward, and looked aut at the side of his carriage.

Pennsylvania.— Penusylvania R. Co. *v.* Weber, 72 Pa. St. 27, holding that in an action for killing a man by the negligent management of an engine at a crossing, evidence that the highway had been made by defendant is inadmissible.

See 41 Cent. Dig. tit. "Railroads," § 1115.

Evidence that an electric alarm bell was not in operation on the day of the accident is inadmissible where no count in the declaration refers to sueh bell. Chicago, etc., R. Co. *v.* Pearson, 71 Ill. App. 622.

also be specific as to the facts alleged;[55] but where the negligence on the part of defendant is averred in general terms plaintiff is not confined in his evidence to any one particular act of negligence,[56] and evidence of any fact which is a circumstance tending to show the negligence alleged is admissible, although no mention of such fact is made in the pleading.[57] Thus a general allegation of negligence as to the mode of running or operating trains or cars is sufficient to admit proof of negligence in running a train,[58] and under such allegation it is admissible to show that the brakes on defendant's train were defective,[59] that

In determining whether an employee did all in his power to avoid the accident, after he discovered plaintiff's peril, the jury cannot consider facts tending to show negligence on his part before discovering such peril. Alabama, etc., R. Co. *v.* Phillips, 70 Miss. 14, 11 So. 602.

Under an allegation of negligence in failing to keep a proper lookout, evidence of a failure to give crossing signals should not be considered. Missouri, etc., R. Co. *v.* Nesbit, 40 Tex. Civ. App. 209, 88 S. W. 891.

55. Missouri Pac. R. Co. *v.* Hennessey, 75 Tex. 155, 12 S. W. 608, holding that where the facts alleged as constituting negligence are a failure to ring the bell, sound the whistle, give signals to stop the train, and running too fast, a failure of defendant to have a light at the place of the accident when it occurred cannot be proven to show the company's negligence.

56. Southern R. Co. *v.* Douglass, 144 Ala. 351, 39 So. 268.

57. Louisville, etc., R. Co. *v.* Davis, 106 S. W. 304, 32 Ky. L. Rep. 580; Rogers *v.* West Jersey, etc., R. Co., (N. J. 1907) 68 Atl. 148; Baltimore, etc., R. Co. *v.* Whittaker, 24 Ohio St. 642 (that no sign-board was up as required by law); Spires *v.* South Bound R. Co., 47 S. C. 28, 24 S. E. 992; Kaminitsky *v.* Northeastern R. Co., 25 S. C. 53 (holding that the provisions of the act of 1878 (16 St. at L. p. 363), requiring a guard to be kept at a certain railroad crossing, and of Gen. St. §§ 1483, 1529, relating to signals to be given by an engine on approaching a crossing, did not supersede other proper signals, or give a new cause of action under the statutes; and that therefore in an ordinary action for damages alleging negligence the omission of the statutory signals may be given in evidence, although not alleged in the complaint).

Evidence is admissible in an action for injuries resulting from a collision at a street crossing, to show the number of residences near the crossing, although there is no allegation in the petition that by reason of the peculiar surroundings defendant company was required to operate its trains, at the point where the accident occurred, with greater care than usual (Nosler *v.* Chicago, etc., R. Co., 73 Iowa 268, 34 N. W. 850); and where it appears that plaintiff was struck by a locomotive on a crossing, evidence is admissible to show that he was thrown into a ditch in which the water was deep enough to drown a man, although there is no specific averment in regard either to the ditch or the water (International, etc., R. Co. *v.* Brett, 61 Tex. 483).

The absence of a flagman and safety gates at a crossing may be shown, as tending to show negligence in running a locomotive or train at that particular time and place, although such fact is not alleged. Kansas Pac. R. Co. *v.* Richardson, 25 Kan. 391; Lesan *v.* Maine Cent. R. Co., 77 Me. 85 (holding this to be true in the absence of state or city regulation requiring a flagman at a railroad crossing); Atlantic, etc., R. Co. *v.* Reiger, 95 Va. 418, 28 S. E. 590.

Evidence of a flagman's intoxication is admissible to show the condition of his mind, and the facilities he had for knowing what happened. International, etc., R. Co. *v* Dyer, 76 Tex. 156, 13 S. W. 377.

Ordinance as evidence.— Under a general allegation of negligence the violation of a city ordinance may be shown (Warren *v.* Southern Cal. R. Co., (Cal. 1901) 67 Pac. 1); such as an ordinance limiting the speed of trains within the city limits (Faber *v.* St. Paul, etc., R. Co., 29 Minn. 465, 13 N. W. 902; Oldenburg *v.* New York Cent., etc., R. Co., 9 N. Y. Suppl. 419, 11 N. Y. Suppl. 689 [*affirmed* in 124 N. Y. 414, 26 N. E. 1021]); or requiring the stationing of a watchman at a certain crossing and prescribing his duties (Fusili *v.* Missouri Pac. R. Co., 45 Mo. App. 535). Where there are two ordinances, one regulating the rate of speed allowed for railroad trains within city limits, and the other regulating the lowering of gates at street crossings, but one only of such ordinances is pleaded in the petition, both ordinances may be admitted in evidence. Lake Shore, etc., R. Co. *v.* Ehlert, 19 Ohio Cir. Ct. 177, 10 Ohio Cir. Dec. 443.

A Tennessee statute, Shannon's Code, § 1574, subs. 2, 3, requiring every railroad company on approaching a crossing to sound the whistle or ring the bell and that on approaching a city the bell or whistle shall be sounded when at a distance of one mile and at short intervals until it reaches its depot, is not declaratory of the common-law obligation of a railroad company but prescribes statutory precautions; and therefore under a count declaring under the statute it is proper to prove a non-compliance with the precautions while such evidence is inadmissible under a count charging negligence at common law. Chesapeake, etc., R. Co., *v.* Crews, 118 Tenn. 52, 99 S. W. 368.

58. Gratiot *v.* Missouri Pac. R. Co., (Mo. 1891) 16 S. W. 384.

59. Chattanooga Rapid Transit Co. *v.* Walton, 105 Tenn. 415, 58 S. W. 737.

the train failed to give the proper signals,[60] that the company's servants in charge of the engine or train discovered plaintiff's peril in time to have avoided the injury,[61] and failed to take all means in their command to stop the train or lessen its speed after discovering such peril;[62] but not that crossing gates were not properly maintained or attended.[63] So under a general allegation of negligence as to a defective crossing it is admissible to show that it is defective by reason of the planks being laid too far apart.[64] On a general allegation of contributory negligence, any evidence is admissible on behalf of defendant to show the existence of such negligence;[65] and on behalf of plaintiff any evidence negativing its existence is admissible, although not pleaded.[66]

(IV) *VARIANCE.* The allegations and proof in an action for injuries at a railroad crossing must correspond,[67] and any material variance between the proof and allegations is fatal to a recovery,[68] unless waived by a failure to call the

60. Mack *v.* South Bound R. Co., 52 S. C. 323, 29 S. E. 905, 68 Am. St. Rep. 913, 40 L. R. A. 679; Spires *v.* South Bound R. Co., 47 S. C. 28, 24 S. E. 992; Manley *v.* Delaware, etc., Canal Co., 69 Vt. 101, 37 Atl. 279.

61. Lake Shore, etc., R. Co. *v.* Foster, 74 Ill. App. 387; Dickson *v.* Missouri Pac. R. Co., 104 Mo. 491, 16 S. W. 381; Texas, etc., R. Co. *v.* Spradling, 72 Fed. 152, 18 C. C. A. 496.

62. Georgia Cent. R. Co. *v.* Foshee, 125 Ala. 199, 27 So. 1006; Galveston, etc., R. Co. *v.* Duelm, (Tex. Civ. App. 1893) 24 S. W. 334.

63. Atchison, etc., R. Co. *v.* Shaw, 56 Kan. 519, 43 Pac. 1129, holding that where the only negligence charged is in the management of the engines and cars by the employees of the company, it is not proper to admit testimony showing that the company was required by a city ordinance to maintain automatic gates at the crossing and that it failed to do so. But see Chicago, etc., R. Co. *v.* Redmond, 70 Ill. App. 119 [*affirmed* in 171 Ill. 347, 49 N. E. 541].

64. East Line, etc., R. Co. *v.* Brinker, 68 Tex. 500, 3 S. W. 99.

65. Missouri, etc., R. Co. *v.* Moore, (Tex. App. 1891) 15 S. W. 714.

66. Gulf, etc., R. Co. *v.* Anderson, 76 Tex. 244, 13 S. W. 196; Chicago, etc., R. Co. *v.* Beaver, 199 Ill. 34, 65 N. E. 144 [*affirming* 96 Ill. App. 558]; Texas, etc., R. Co. *v.* Nelson, 50 Fed. 814, 1 C. C. A. 688.

67. Wabash R. Co. *v.* Billings, 212 Ill. 37, 72 N. E. 2 [*reversing* 105 Ill. App. 111]; Lang *v.* Missouri Pac. R. Co., 115 Mo. App. 489, 91 S. W. 1012. And see *supra*, X, F, 14, d, (III).

68. Gurley *v.* Missouri Pac. R. Co., 93 Mo. 445, 6 S. W. 218 (demurrer to evidence sustained); Barron *v.* Chicago, etc., R. Co., 89 Wis. 79, 61 N. W. 303 (holding that where plaintiff alleges that her injury was caused by the lack of a signal from defendant's train and the jury finds that the whistle was sounded, and that such signal by frightening her horse was one of the causes of plaintiff's injury, she cannot recover, there being no finding or proof that the whistle was negligently sounded).

The variance is material between an allegation that noises caused by steam escaping from the engine, etc., were made while the engine was approaching the crossing and testimony that the noises were made after the engine had passed the crossing and was returning after being reversed in the direction of the crossing (Alabama Great Southern R. Co. *v.* Fulton, 150 Ala. 300, 43 So. 832); an allegation that while plaintiff was driving over defendant's crossing, an engine struck plaintiff's vehicle whereby he was thrown out and injured, and proof that a car struck the vehicle, but that he was not then thrown out, but the horse ran away and plaintiff was thrown out and injured (Wabash R. Co. *v.* Billings, 212 Ill. 37, 72 N. E. 2 [*reversing* 105 Ill. App. 111]); an allegation that the injuries were received at a crossing and proof that they were received not while passing over the crossing but while alighting from a freight train (Louisville, etc., R. Co. *v.* Wilson, 124 Ky. 836, 100 S. W. 302, 30 Ky. L. Rep. 1048); an allegation that the engineer of the train which struck plaintiff discovered plaintiff's peril in time to prevent the injury, and proof that the fireman and not the engineer saw plaintiff's danger (Chun *v.* Kentucky, etc., Bridge Co., 64 S. W. 649, 23 Ky. L. Rep. 1092); an allegation that defendant's servant then and there in charge of the engine caused the discharge of steam, and proof that the engineer was not in the engine, and that the fireman did not turn on the cylinder cocks (Riley *v.* New York, etc., R. Co., 90 Md. 53, 44 Atl. 994); and an allegation that the injury was caused by a certain freight train with locomotive attached, etc., and proof that the cars were not handled by the engine, but detached and shoved backward (Schindler *v.* Milwaukee, etc., R. Co., 77 Mich. 136, 43 N. W. 911).

Place of accident.— Where the accident is laid at one crossing and plaintiff shows it to have happened at another, the variance is fatal. Klanowski *v.* Grand Trunk R. Co., 64 Mich. 279, 31 N. W. 275. Thus where the accident is alleged to have happened at a public highway and the evidence shows that plaintiff was a trespasser in defendant's freight yard when he was injured, the variance is fatal. Chicago, etc., R. Co. *v.* Morkenstein, 24 Ill. App. 128. So where the accident is alleged to have happened at the crossing

attention of the court thereto,[69] or cured by an amendment of the pleading.[70] But where the proof substantially supports the pleading, the fact that it varies therefrom on some immaterial matter is not a fatal variance,[71] if defendant is not misled thereby.[72]

e. Evidence — (I) *PRESUMPTIONS AND BURDEN OF PROOF* — (A) *In General.* As a general rule the law does not presume negligence and the burden is on a person who charges a breach of duty or negligence to prove it.[73] The burden of proof, in an action for injuries at a railroad crossing, is in the first instance on plaintiff to show by a preponderance of evidence the alleged negligence on the part of the railroad company or its employees,[74] the fact of the

of a public road, proof that it occurred at a private crossing on the company's land is insufficient, although the actual place may be known to both parties. Schindler *v.* Milwaukee, etc., R. Co., 77 Mich. 136, 43 N. W. 911.

69. Wabash R. Co. *v.* Billings, 212 Ill. 37, 72 N. E. 2 [*reversing* 105 Ill. App. 111]; Gulf, etc., R. Co. *v.* Anderson, 76 Tex. 244, 13 S. W. 196, holding that, although the petition alleges that the accident occurred on a street crossing, proof that it occurred on a trestle at some distance from the crossing will not defeat plaintiff's recovery, where the answer alleges that it occurred at the latter place. And see, generally, TRIAL.

70. Wabash R. Co. *v.* Billings, 212 Ill. 37, 72 N. E. 2 [*reversing* 105 Ill. App. 111]. And see *supra*, X, F, 14, c, (I), (B).

71. *California.*—Carraher *v.* San Francisco Bridge Co., 81 Cal. 98, 22 Pac. 480.

Georgia.— Southern R. Co. *v.* Tankersley, 3 Ga. App. 548, 60 S. W. 297.

Illinois.— Illinois Cent. R. Co. *v.* Kief, 111 Ill. App. 354.

New York.— Pollard *v.* New York, etc., R. Co., 7 Bosw. 437.

Texas.— Texarkana, etc., R. Co. *v.* Frugia, 43 Tex. Civ. App. 48, 95 S. W. 563; International, etc., R. Co. *v.* Locke, (Civ. App. 1902) 67 S. W. 1082; Texas, etc., R. Co. *v.* Hightower, 12 Tex. Civ. App. 41, 33 S. W. 541.

United States.— Baltimore, etc., R. Co. *v.* Cumberland, 176 U. S. 232, 20 S. Ct. 380, 44 L. ed. 447, holding that an averment that there was no light on the rear part of an engine is satisfied by proof that there was no such light as the law required.

See 41 Cent. Dig. tit. "Railroads," § 1116.

Variance held immaterial.— Where it appears that all the trains at the crossing in question were operated by defendant, and that it was just as responsible for one as the other, it is not a material variance where the proof shows that a train other than the one described in the complaint committed the wrongful act. Indianapolis, etc., R. Co. *v.* Neubaucher, 16 Ind. App. 21, 43 N. E. 576, 44 N. E. 669. Where the gist of the complaint is that the injury was caused by the negligence of defendant in propelling unguarded cars against other detached cars, forcing them over the crossing, it is not a material variance where the proof shows that the injury was not caused by a "flying switch" as alleged, especially where the description following such allegation shows that a "flying switch" was not meant. International, etc., R. Co. *v.* Dyer, 76 Tex. 156, 13 S. W. 377. So also there is no material variance between an allegation that the engineer reversed his engine and started in the direction of the crossing at a rapid rate of speed, and proof that after reversing his engine he caused it to move slowly over the track to the point where the accident occurred (Leavitt *v.* Terre Haute, etc., R. Co., 5 Ind. App. 513, 31 N. E. 860, 32 N. E. 866); between an allegation that plaintiff was injured at a crossing at a public highway over defendant's railroad track, and proof that the highway was not legally laid out for defendant's right of way but that defendant by its acts and acquiescence in the public use of the crossing as a public highway had made such crossing a highway as to the public (Coulter *v.* Great Northern R. Co., 5 N. D. 568, 67 N. W. 1046); between an allegation that a hand-car by which plaintiff's team became frightened was negligently left on a farm crossing and proof that the car was not within the traveled way of the crossing (Baltimore, etc., R. Co. *v.* Slaughter, 167 Ind. 330, 79 N. E. 186, 7 L. R. A. N. S. 597).

Time of accident.— It is not a fatal variance that the injury is proved to have been sustained on a day different from that alleged. Augusta, etc., R. Co. *v.* McElmurry, 24 Ga. 75.

72. Illinois Cent. R. Co. *v.* Kief, 111 Ill. App. 354, holding that notwithstanding a variance as to the place of an accident appears, and the point has been properly and duly raised, yet such variance is immaterial where defendant is not misled thereby and the place of the accident is not a material issue in the case.

73. Stewart *v.* North Carolina R. Co., 136 N. C. 385, 48 S. E. 793.

74. *Alabama.*— Georgia Cent. R. Co. *v.* Foshee, 125 Ala. 199, 27 So. 1006.

Illinois.— Chicago, etc., R. Co. *v.* Appell, 103 Ill. App. 185; Cleveland, etc., R. Co. *v.* Richey, 43 Ill. App. 247.

Iowa.— Crawford *v.* Chicago Great Western R. Co., 109 Iowa 433, 80 N. W. 519; Willoughby *v.* Chicago, etc., R. Co., 37 Iowa 432.

Maine.— Lesan *v.* Maine Cent. R. Co., 77 Me. 85.

Maryland.— Riley *v.* New York, etc., R. Co., 90 Md. 53, 44 Atl. 994; State *v.* Philadelphia, etc., R. Co., 47 Md. 76.

injuries,[75] and that such negligence was the proximate cause of the injuries;[76] and in some jurisdictions that the person injured was free from contributory negligence.[77] But where plaintiff, by his evidence, makes out a *prima facie* case,[78] the burden is then on defendant to show that it was not negligent,[79] or that the accident was attributable to some other and excusing cause;[80] and if defendant overcomes plaintiff's *prima facie* case it is then incumbent upon plaintiff to give further evidence.[81] There is a presumption in such actions that a flagman stationed at the crossing by the company knew of a fact which it was his duty to know and by which fact his conduct as narrated by him was prompted;[82] but the fact that the train is behind the usual time raises no presumption of negligence in the event of an accident at a crossing.[83]

(B) *Existence of Defect or Happening of Accident or Injury.* In the absence of statute or evidence to the contrary, proof of the mere fact of an accident at a railroad crossing whereby plaintiff is injured does not raise a presumption of negligence on defendant's part so as to warrant a recovery by plaintiff, but the burden is upon plaintiff to show further that the accident was due to some negligence on the part of defendant,[84] and so it is not sufficient where it is merely

New Jersey.— Siracusa *v.* Atlantic City R. Co., 68 N. J. L. 446, 53 Atl. 547.

New York.— Kelsey *v.* Jewett, 28 Hun 51; Spencer *v.* Utica, etc., R. Co., 5 Barb. 337.

North Carolina.— Duffy *v.* Atlantic, etc., R. Co., 144 N. C. 26, 56 S. E. 557; Kearns *v.* Southern R. Co., 139 N. C. 470, 52 S. E. 131.

Pennsylvania.— Black *v.* Bessemer, etc., R. Co., 216 Pa. St. 173, 65 Atl. 405, 116 Am. St. Rep. 766.

Virginia.— Richmond, etc., R. Co. *v.* Yeamans, 86 Va. 860, 12 S. E. 946, holding that negligence by the railroad company causing injury to a person at the crossing must be proved; and that plaintiff is bound to do more than merely raise a reasonable presumption of negligence on its part.

United States.— Morris *v.* Chicago, etc., R. Co., 26 Fed. 22.

See 41 Cent. Dig. tit. "Railroads," § 1117.

Additional signals.— The burden is on plaintiff to prove affirmatively the facts which impose upon a railroad company the duty of giving a cautionary signal in addition to that required by statute. Siracusa *v.* Atlantic City R. Co., 68 N. J. L. 446, 53 Atl. 547.

That it is not shown that the engineer had knowledge of the conditions at the crossing does not preclude a recovery, since it will be presumed that the railroad company informed the engineer of all the perils and dangers incident to the operation of the train. Georgia Cent. R. Co. *v.* Partridge, 136 Ala. 587, 34 So. 927.

Wilful or wanton misconduct on the part of defendant need not be proved by plaintiff in an action for negligence. Southern R. Co. *v.* Reynolds, 126 Ga. 657, 55 S. E. 1039.

75. Willoughby *v.* Chicago, etc., R. Co., 37 Iowa 432.

76. *Delaware.*— Martin *v.* Baltimore, etc., R. Co., 2 Marv. 123, 42 Atl. 442.

Illinois.— Cleveland, etc., R. Co. *v.* Richey, 43 Ill. App. 247.

Iowa.— Willoughby *v.* Chicago, etc., R. Co., 37 Iowa 432.

Maine.— Lesan *v.* Maine Cent. R. Co., 77 Me. 85.

Maryland.— Baltimore, etc., R. Co. *v.* Stumpf, 97 Md. 78, 54 Atl. 978; State *v.* Philadelphia, etc., R. Co., 47 Md. 76.

Michigan.— Thomas *v.* Chicago, etc., R. Co., 86 Mich. 496, 49 N. W. 547.

New York.— Kelsey *v.* Jewett, 28 Hun 51; Culhane *v.* New York Cent., etc., R. Co., 67 Barb. 562.

North Carolina.— Duffy *v.* Atlantic, etc., R. Co., 144 N. C. 26, 56 S. E. 557; Kearns *v.* Southern R. Co., 139 N. C. 470, 52 S. E. 131.

See 41 Cent. Dig. tit. "Railroads," § 1117.

77. See *infra*, X, F, 14, e, (I), (D).

78. Denison, etc., R. Co. *v.* Foster, 28 Tex. Civ. App. 578, 68 S. W. 299.

79. Corbally *v.* Erie R. Co., 97 N. Y. App. Div. 21, 89 N. Y. Suppl. 577; Wakefield *v.* Connecticut, etc., R. Co., 37 Vt. 330, 86 Am. Dec. 711, holding that, if there is an omission to ring the bill or sound the whistle on approaching a highway crossing and an injury is occasioned thereby, the burden is upon the company to show that such omission was reasonable and prudent, and the liability of the company depends upon whether in the judgment of the jury, on all the evidence, in view of the actual condition of things at the time, the omission was reasonable and prudent.

80. Hollins *v.* New Orleans, etc., R. Co., 119 La. 418, 44 So. 159.

81. Dougherty *v.* Chicago, etc., R. Co., 20 S. D. 46, 104 N. W. 672.

82. Chicago, etc., R. Co. *v.* Clough, 33 Ill. App. 129, holding that such a flagman is presumed to know that a train is approaching.

83. State *v.* Philadelphia, etc., R. Co., 47 Md. 76.

84. *Illinois.*—Chicago, etc., R. Co. *v.* Reilly, 212 Ill. 506, 72 N. E. 454, 103 Am. St. Rep. 243. See also Illinois Cent. R. Co. *v.* McCollum, 122 Ill. App. 531.

Maine.— Lesan *v.* Maine Cent. R. Co., 77 Me. 85.

Nebraska.— Atchison, etc., R. Co. *v.* Loree, 4 Nebr. 446, holding that it is not sufficient to show that the horse causing the injury was frightened at the sight of railroad property.

shown that plaintiff was injured by a train at a crossing without proof of negligence in running the train;[85] although under some statutes proof that plaintiff was injured by the operation of a train is sufficient to make out a *prima facie* case and impose upon defendant the burden of showing that the injuries were not the result of negligence on its part,[86] unless the presumption of negligence arising from the fact of the injury is rebutted by plaintiff's own evidence.[87] But where the evidence which shows the injury discloses in itself that defendant in relation to the causal act or omission did not exercise that degree of care which the law requires, plaintiff has discharged the burden of proving negligence,[88] as where it is shown that the accident was due to a defective crossing, which it is the company's duty to maintain.[89]

(c) *Violation of Statutes.* In an action for injuries at a railroad crossing caused by the violation of a statute or ordinance, the burden of proof is upon plaintiff to show the existence of such statute or ordinance;[90] and, although it is held in some jurisdictions that where a person is injured at a railroad crossing, the burden is on defendant to show a compliance with the statutes or ordinances as to the giving of signals, etc.,[91] in most jurisdictions the burden of showing a

New York.— Burk *v.* Delaware, etc., Canal Co., 86 Hun 519, 33 N. Y. Suppl. 986.

Pennsylvania.— Pennsylvania R. Co. *v.* Goodman, 62 Pa. St. 329.

Texas.— Gulf, etc., R. Co. *v.* Shieder, 88 Tex. 152, 30 S. W. 902, 28 L. R. A. 538.

United States.— St. Louis, etc., R. Co. *v.* Chapman, 140 Fed. 129, 71 C. C. A. 523.

See 41 Cent. Dig. tit. "Railroads," § 1119.

That a person is found dead beneath a railroad engine raises no presumption that those operating the engine were negligent or in fault. St. Louis, etc., R. Co. *v.* Chapman, 140 Fed. 129, 71 C. C. A. 523.

That the person injured is found on the track near a crossing, with no evidence of how he came there, raises no presumption that the railroad company's negligence in guarding the crossing was the cause of his injury, or that he was lawfully on the crossing. Welsh *v.* Erie, etc., R. Co., 181 Pa. St. 461, 37 Atl. 513.

85. Reed *v.* Queen Anne's R. Co., 4 Penew. (Del.) 413, 57 Atl. 529; Illinois Cent. R. Co. *v.* Cragin, 71 Ill. 177; Atchison, etc., R. Co. *v.* McFarland, 2 Kan. App. 662, 43 Pac. 788 (holding that, in an action to recover for the death of a child killed at a railroad crossing, negligence on the part of the operatives of the train cannot be presumed from the fact that the child was injured, in the absence of evidence that it was in such a position on the track that the engineer could have seen it); Griffith *v.* Baltimore, etc., R. Co., 44 Fed. 574.

The doctrine of res ipsa loquitur cannot be applied where it appears that a person standing at the street crossing was struck by timbers projecting from a passing car, where there is no evidence as to how, when, or where the car was loaded, or how long the timber had been projecting or whether defendant had notice of such condition. Chicago, etc., R. Co. *v.* Reilly, 212 Ill. 506, 72 N. E. 454, 103 Am. St. Rep. 243.

86. St. Louis, etc., R. Co. *v.* Evans, 80 Ark. 19, 96 S. W. 616; Little Rock, etc., R. Co. *v.* Blewitt, 65 Ark. 235, 45 S. W. 548 (construing Sandels & H. Dig. § 6349); Savannah, etc., R. Co. *v.* Smith, 86 Ga. 229, 12 S. E. 579 (construing Civ. Code, § 3033); Dougherty *v.* Chicago, etc., R. Co., 20 S. D. 46, 104 N. W. 672.

Where the injury is inflicted by the running of defendant's train the statutory presumption that the injury was the result of defendant's negligence can only be rebutted by clear proof by defendant of facts exonerating it from blame. New Orleans, etc., R. Co. *v.* Brooks, 85 Miss. 269, 38 So. 40.

87. Moon *v.* Fink, 102 Ga. 526, 28 S. E. 980.

88. Chicago, etc., R. Co. *v.* Reilly, 212 Ill. 506, 72 N. E. 454, 103 Am. St. Rep. 243.

89. Wabash R. Co. *v.* De Hart, 32 Ind. App. 62, 65 N. E. 192, holding that such proof is *prima facie* evidence of negligence.

A want of knowledge on the part of the railroad company of the defective condition of a crossing which it was its duty to maintain is *prima facie* evidence. Wabash R. Co. *v.* De Hart, 32 Ind. App. 62, 65 N. E. 192.

In an action for injuries caused by a defect in a bridge, plaintiff by proof tending to show that the bridge was not in safe repair makes out a *prima facie* case and defendant has the burden of proving that the defect was due to a stranger removing a plank from it if it relies upon such fact to relieve it from liability. Denison, etc., R. Co. *v.* Foster, 28 Tex. Civ. App. 578, 68 S. W. 299.

A dangerous condition of the crossing is *prima facie* evidence of the company's negligence under N. C. Code, § 1957. Raper *v.* Wilmington, etc., R. Co., 126 N. C. 563, 36 S. E. 115.

90. Wabash R. Co. *v.* Mahoney, 79 Ill. App. 53.

91. Birmingham, etc., R. Co. *v.* Lintner, 141 Ala. 420, 38 So. 363, 109 Am. St. Rep. 40 (construing Code (1896), § 3443, as to failure to comply with statute requiring certain signals to be given and burden of proof thereunder); South Alabama, etc., R. Co. *v.* Thompson, 62 Ala. 494. But see Clements *v.* East Tennessee, etc., R. Co., 77 Ala. 533.

violation of the statute or ordinance, as that the statutory signals were not given, is upon plaintiff.[92] But where the fact of the inquiry and the violation of the statute or ordinance is shown, the presumption arises in some jurisdictions that such negligence was the cause of the injury,[93] and the burden of proof is then upon defendant to show the contrary, as that it was not caused by the failure to give the statutory signals,[94] or by its running at an unlawful speed;[95] or to otherwise relieve itself from liability for the neglect of duty,[96] as by showing contributory negligence on the part of plaintiff;[97] and it is not incumbent upon plaintiff to prove that defendant's speed was reckless or unlawful,[98] or that the train

In Tennessee under Milliken & V. Code, § 1298, the burden of proof is on plaintiff to prove that a public crossing has been designated by danger signals as one, on approaching which, the bell or whistle be sounded; but where plaintiff has proved this fact the statute requires a railroad company to show that the bell and whistle were sounded as prescribed. Alabama, etc., R. Co. *v.* McDonough, 97 Tenn. 255, 37 S. W. 15.

92. Hubbard *v.* Boston, etc., R. Co., 159 Mass. 320, 34 N. E. 459; Gulf, etc., R. Co. *v.* Hall, 34 Tex. Civ. App. 535, 80 S. W. 133.

Where there is a conflict in the evidence as to whether the company gave the statutory signals, the court should instruct that the burden is on plaintiff to establish the company's negligence. Texas, etc., R. Co. *v.* Scrivener, (Tex. Civ. App. 1899) 49 S. W. 649.

93. Strother *v.* South Carolina, etc., R. Co., 47 S. C. 375, 25 S. E. 272.

94. McNulty *v.* St. Louis, etc., R. Co., 203 Mo. 475, 101 S. W. 1082; Crumpley *v.* Hannibal, etc., R. Co., 111 Mo. 152, 19 S. W. 820 (under Rev. St. (1889) § 2608); Drawdy *v.* Atlantic Coast Line R. Co., 78 S. C. 374, 58 S. E. 980; Wakefield *v.* Connecticut, etc., R. Co., 37 Vt. 330, 86 Am. Dec. 711 (burden on defendant to show that failure to give signals was prudent and reasonable).

Ordinarily plaintiff makes out a prima facie case when he shows that the statutory signal was not given and that the accident occurred, and, having done that, the burden is then shifted to defendant to show that the failure to give the signal was not the cause of the accident. Stotler *v.* Chicago, etc., R. Co., 200 Mo. 107, 98 S. W. 509 (so held under Rev. St. (1899) § 1102); Green *v.* Missouri Pac. R. Co., 192 Mo. 131, 90 S. W. 805.

In Illinois, Nebraska, and Utah, however, it has been held that plaintiff must also show that the injury was caused by defendant's failure to give the statutory signals. Chicago, etc., R. Co. *v.* Van Patten, 64 Ill. 510; Galena, etc., R. Co. *v.* Loomis, 13 Ill. 538, 56 Am. Dec. 471; Omaha, etc., R. Co. *v.* Talbot, 48 Nebr. 627, 67 N. W. 599; Rogers *v.* Rio Grande Western R. Co., 32 Utah 367, 90 Pac. 1075.

95. Augusta, etc., R. Co. *v.* McElmurry, 24 Ga. 75; Chicago, etc., R. Co. *v.* Fell, 79 Ill. App. 376; Chicago, etc., R. Co. *v.* Smith, 77 Ill. App. 492; Chicago, etc., R. Co. *v.* Gunderson, 74 Ill. App. 356.

The presumption of negligence arising from excessive speed is merely prima facie and subject to be rebutted (Chicago, etc., R. Co. *v.* Jamieson, 112 Ill. App. 69; Wabash R. Co. *v.* Kamradt, 109 Ill. App. 203; Chicago, etc., R. Co. *v.* Fell, 79 Ill. App. 376; Chicago, etc., R. Co. *v.* Gunderson, 74 Ill. App. 356; Chicago, etc., R. Co. *v.* Carpenter, 45 Ill. App. 294. But see Chicago, etc., R. Co. *v.* Mochell, 193 Ill. 208, 61 N. E. 1028, 86 Am. St. Rep. 318 [*affirming* 96 Ill. App. 178]); but in the absence of proof rsbutting the statutory presumption it becomes conclusive (Chicago, etc., R. Co. *v.* Fell, 79 Ill. App. 376; Chicago, etc., R. Co. *v.* Gunderson, 74 Ill. App. 356).

96. Illinois Cent. R. Co. *v.* Benton, 69 Ill. 174.

Proof of public highway.— Where the evidence shows that a road intersected by a railroad was traveled by the public and had been worked and repaired by the authority having charge of public highways this is *prima facie* evidence that it was a public highway legally established and is sufficient to require a railroad company when sued for an injury caused by a neglect to ring a bell or sound a whistle when approaching the same to show that it was not legally established in order to excuse itself from liability for the neglect of this duty. Illinois R. Co. *v.* Benton, 69 Ill. 174.

In an action for injuries caused by a defect in the construction of a road at a highway crossing, the burden of proving that the railroad company is exempt from the provisions of the statute imposing the duty of constructing safe crossings is on the company. Farley *v.* Chicago, etc., R. Co., 42 Iowa 234.

97. Bryson *v.* Southern R. Co., 3 Ga. App. 407, 59 S. E. 1124 (holding that where those in charge of a train fail to give the statutory signals when approaching a highway and a person on the crossing is injured, the only defenses are that the injury was done by the consent of the party injured or by his contributory negligence and the burden is on the company to prove the same); McKelvy *v.* Burlington, etc., R. Co., 84 Iowa 455, 51 N. W. 172.

Iowa Code, § 1288, providing that the neglect or refusal of a railroad company to keep highway crossings sufficient and safe renders it liable for injuries caused by reason thereof without other proof than of such neglect and refusal, does not preclude the company from showing that an injury complained of resulted from other causes, including plaintiff's negligence. McKelvy *v.* Burlington, etc., R. Co., 84 Iowa 455, 51 N. W. 172.

98. Augusta, etc., R. Co. *v.* McElmurry, 24 Ga. 75.

could have been stopped before reaching the crossing.[99] But where plaintiff in proving the accident also proves that it was not caused by a failure to give the signal or other violation of a statute, or that the person injured was guilty of negligence that directly contributed to the accident, there is nothing for defendant to prove.[1]

(D) *Contributory Negligence* — (1) IN GENERAL. In some jurisdictions there is a presumption that one injured at a railroad crossing was not in the exercise of due care at the time, and to warrant a recovery for such injuries it is incumbent upon plaintiff to prove, by a preponderance of evidence, a want of contributory negligence on the part of the person injured,[2] although the railroad company was,

99. Augusta, etc., R. Co. *v.* McElmurry, 24 Ga. 75.

1. Green *v.* Missouri Pac. R. Co., 192 Mo. 131, 90 S. W. 805.

2. *Illinois.*— Illinois Cent. R. Co. *v.* Nowicki, 148 Ill. 29, 35 N. E. 358 [*affirming* 46 Ill. App. 566]; Wabash R. Co. *v.* Kamradt, 109 Ill. App. 203; Imes *v.* Chicago, etc., R. Co., 105 Ill. App. 37; Chicago, etc., R. Co. *v.* Appell, 103 Ill. App. 185; Cleveland, etc., R. Co. *v.* Richey, 43 Ill. App. 247. *Compare* Kahl *v.* Chicago, etc., R. Co., 125 Ill. App. 294.

Iowa.— Payne *v.* Chicago, etc., R. Co., 44 Iowa 236; Benton *v.* Central R. Co., 42 Iowa 192; Willoughby *v.* Chicago, etc., R. Co., 37 Iowa 432; Dodge *v.* Burlington, etc., R. Co., 34 Iowa 276. In this state it is held that, although in the absence of evidence to the contrary there is a presumption of due care on the part of the person injured arising from the instinct of self-preservation, it is not a conclusive presumption, but must be taken in connection with the rule that plaintiff must show the exercise of reasonable care on his part (Reitveld *v.* Wabash R. Co., 129 Iowa 249, 105 N. W. 515; Crawford *v.* Chicago Great Western R. Co., 109 Iowa 433, 80 N. W. 519); and it cannot prevail against direct evidence which shows that he could not have exercised due care (Golinvaux *v.* Burlington, etc., R. Co., 125 Iowa 652, 101 N. W. 465; Crawford *v.* Chicago Great Western R. Co., *supra*), as where it appears from the whole evidence that the person injured in the exercise of ordinary care could have avoided the collision by stopping, looking, and listening (Dalton *v.* Chicago, etc., R. Co., 114 Iowa 257, 86 N. W. 272).

Maine.— Day *v.* Boston, etc., R. Co., 96 Me. 207, 52 Atl. 771, 90 Am. St. Rep. 335; Lesan *v.* Maine Cent. R. Co., 77 Me. 85; Chase *v.* Maine Cent. R. Co., 77 Me. 62, 52 Am. Rep. 744.

Massachusetts.— Wheelwright *v.* Boston, etc., R. Co., 135 Mass. 225; Chaffee *v.* Boston, etc., R. Corp., 104 Mass. 108. Under Rev. Laws, c. 111, § 268, where a person is killed at a railway crossing and no negligence on the part of the railroad company is shown, it will not be presumed that deceased took the necessary precautions to avoid the accident (Livermore *v.* Fitchburg R. Co., 163 Mass. 132, 39 N. E. 789); but if defendant relies on the gross negligence of the person injured, it has the burden of proving such negligence (Kelsall *v.* New York, etc., R. Co., 196 Mass. 554, 82 N. E. 674; Kenny *v.* Boston, etc., R. Co., 188 Mass. 127, 74 N. E. 309; Brusseau *v.* New York, etc., R. Co., 187 Mass. 84, 72 N. E. 348; McDonald *v.* New York Cent., etc., R. Co., 186 Mass. 474, 72 N. E. 55; Copley *v.* New Haven, etc., Co., 136 Mass. 6).

Michigan.—Thomas *v.* Chicago, etc., R. Co., 86 Mich. 496, 49 N. W. 547; Guggenheim *v.* Lake Shore, etc., R. Co., 66 Mich. 150, 33 N. W. 161.

New Hampshire.— Wright *v.* Boston, etc., R. Co., 74 N. H. 128, 65 Atl. 687; Waldron *v.* Boston, etc., R. Co., 71 N. H. 362, 52 Atl. 443; Gahagan *v.* Boston, etc., R. Co., 70 N. H. 441, 50 Atl. 146, 55 L. R. A. 426.

New York.— Wieland *v.* Delaware, etc., Canal Co., 167 N. Y. 19, 60 N. E. 234, 82 Am. St. Rep. 707 [*reversing* 42 N. Y. App. Div. 627, 59 N. Y. Suppl. 1117]; Rodrian *v.* New York, etc., R. Co., 125 N. Y. 526, 26 N. E. 741 [*reversing* 7 N. Y. Suppl. 811]; Wiwirowski *v.* Lake Shore, etc., R. Co., 124 N. Y. 420, 26 N. W. 1023 [*reversing* 58 Hun 40, 11 N. Y. Suppl. 361]; Coleman *v.* New York Cent., etc., R. Co., 98 N. Y. App. Div. 349, 90 N. Y. Suppl. 264 (by a fair preponderance of evidence); McAuliffe *v.* New York Cent., etc., R. Co., 85 N. Y. App. Div. 187, 83 N. Y. Suppl. 200 (holding also that where the circumstances point as much to negligence as to its absence or point in neither direction, a nonsuit should be ordered); Meinrenken *v.* New York Cent., etc., R. Co., 81 N. Y. App. Div. 132, 80 N. Y. Suppl. 1074; Krauss *v.* Wallkill Valley R. Co., 69 Hun 482, 23 N. Y. Suppl. 432; Spencer *v.* Utica, etc., R. Co., 5 Barb. 337. See also Cosgrove *v.* New York Cent., etc., R. Co., 87 N. Y. 88, 41 Am. Rep. 355; Donohue *v.* Lake Shore, etc., R. Co., 19 N. Y. Suppl. 961.

Virginia.— See Southern R. Co. *v.* Hansbrough, 107 Va. 733, 60 S. E. 58; Washington Southern R. Co. *v.* Lacey, 94 Va. 460, 26 S. E. 834.

See 41 Cent. Dig. tit. "Railroads," § 1121.

The death of a witness who could have testified to the due care of the person injured does not change the rule that absence of evidence of due care on the part of such person will defeat the action. Day *v.* Boston, etc., R. Co., 96 Me. 207, 52 Atl. 771, 90 Am. St. Rep. 335.

Degree of proof.— It is incumbent upon plaintiff to produce evidence sufficient to justify the conclusion that he was in the exercise of due care in respect to the occurrence from which his injury arose; and he is

at the time of the accident, violating a statute or ordinance regulating the giving of signals, or the speed of the train causing the injury.[3] In other jurisdictions, however, except where contributory negligence is at least *prima facie* established by plaintiff's complaint or petition,[4] or by his evidence alone,[5] or by undisputed evidence adduced on the trial,[6] or where the attendant facts explained by any hypothesis that they will admit of show that such was not the case,[7] contributory negligence is a matter of defense, and the law presumes that the person injured exercised due care in approaching the crossing, and plaintiff is not required to prove it as a part of his case; but on the other hand if defendant relies upon contributory negligence as a defense, the burden of proof is upon defendant to show it by a preponderance of the evidence.[8] A default by a railroad company in an action against it for injuries at a crossing operates as a *prima facie* admission

not entitled to have his case submitted to the jury unless his freedom from fault is proved directly and affirmatively or is established by inference clearly deducible from the circumstances. Gahagan *v.* Boston, etc., R. Co., 70 N. H. 441, 50 Atl. 146, 55 L. R. A. 426.

Preponderance does not mean more and better evidence, but either is sufficient. Chicago, etc., R. Co. *v.* Pollock, 195 Ill. 156, 62 N. E. 831 [*affirming* 93 Ill. App. 483].

Although the natural disposition of a man to avoid injuries under such circumstances is evidence tending to show that the person injured was not negligent, yet, when the direct evidence shows what he did or omitted to do for his protection, the evidence derived from such disposition cannot be used to prove that he was not negligent but only furnishes a test for the reasonableness of his conduct. Waldron *v.* Boston, etc., R. Co., 71 N. H. 362, 52 Atl. 443; Gahagan *v.* Boston, etc., R. Co., 70 N. H. 441, 50 Atl. 146, 55 L. R. A. 426.

Non sui juris.— In an action by an infant against a railroad company for injuries through being struck by a train while crossing defendant's track, plaintiff has the burden of proving that he was *non sui juris*. Simkoff *v.* Lehigh Valley R. Co., 190 N. Y. 256, 83 N. E. 15 [*affirming* 118 N. Y. App. Div. 918, 103 N. Y. Suppl. 1142].

3. Imes *v.* Chicago, etc., R. Co., 105 Ill. App. 37; Dodge *v.* Burlington, etc., R. Co., 34 Iowa 276.

4. Gulf, etc., R. Co. *v.* Shieder, 88 Tex. 152, 30 S. W. 902, 28 L. R. A. 538, as a matter of law.

5. Van Winkle *v.* New York, etc., R. Co., 34 Ind. App. 476, 73 N. E. 157; Stepp *v.* Chicago, etc., R. Co., 85 Mo. 229; Washington Southern R. Co. *v.* Lacey, 94 Va. 460, 26 S. E. 834.

6. Gulf, etc., R. Co. *v.* Schieder, 88 Tex. 152, 30 S. W. 902, 38 L. R. A. 538.

Where the circumstances of the accident are detailed by eye-witnesses the presumption that a traveler at a railroad crossing exercised due care is inapplicable. Reed *v.* Queen Anne's R. Co., 4 Pennew. (Del.) 413, 57 Atl. 529; E. Bradford Clarke Co. *v.* Baltimore, etc., R. Co., 27 Pa. Super. Ct. 251.

7. Woolf *v.* Washington R., etc., Co., 37 Wash. 491, 79 Pac. 997. See Wabash R. Co. *v.* De Tar, 141 Fed. 932, 73 C. C. A. 166, 4 L. R. A. N. S. 352.

The natural instinct of self-preservation is the basis of the presumption of the exercise of due care and caution at railroad crossings; but this presumption cannot exist where it is incompatible with the conduct of the person, which may be shown by the testimony of eye-witnesses, or by evidence of the physical surroundings and other conditions at the time. Wabash R. Co. *v.* De Tar, 141 Fed. 932, 73 C. C. A. 166, 4 L. R. A. N. S. 352.

8. *California.*— Heckle *v.* Southern Pac. Co., 123 Cal. 441, 56 Pac. 56.

Delaware.— Reed *v.* Queen Anne's R. Co., 4 Pennew. 413, 57 Atl. 529. See also Martin *v.* Baltimore, etc., R. Co., 2 Marv. 123, 42 Atl. 442.

Georgia.— Georgia Cent. R. Co. *v.* North, 129 Ga. 106, 58 S. E. 647, construing Civ. Code, § 2322.

Indiana.— Under Burns Rev. St. (1901) § 359*a*, the burden of proof of contributory negligence in an action for injury at a crossing is on defendant, and no independent presumption of contributory negligence attaches to plaintiff from the mere fact that the injuries occurred at a crossing. Lowden *v.* Pennsylvania Co., 41 Ind. App. 614, 82 N. E. 941; Pittsburgh, etc., R. Co. *v.* Reed, 36 Ind. App. 67, 75 N. E. 50; Southern R. Co. *v.* Davis, 34 Ind. App. 377, 72 N. E. 1053; Nichols *v.* Baltimore, etc., R. Co., 33 Ind. App. 229, 71 N. E. 170, 70 N. E. 183. See Chicago, etc., R. Co. *v.* Turner, 33 Ind. App. 264, 69 N. E. 484. Prior to this statute, however, the rule was different in this state. See Louisville, etc., R. Co. *v.* Stommel, 126 Ind. 35, 25 N. E. 863; Cincinnati, etc., R. Co. *v.* Howard, 124 Ind. 280, 24 N. E. 892, 19 Am. St. Rep. 96, 8 L. R. A. 593; Indiana, etc., R. Co. *v.* Greene, 106 Ind. 279, 6 N. E. 603, 55 Am. Rep. 736; Cincinnati, etc., R. Co. *v.* Butler, 103 Ind. 31, 2 N. E. 138; Indianapolis Union R. Co. *v.* Neubaucher, 16 Ind. App. 21, 43 N. E. 576, 44 N. E. 669.

Kansas.— Missouri Pac. R. Co. *v.* Moffatt, 60 Kan. 113, 55 Pac. 837, 72 Am. St. Rep. 343; Chicago, etc., R. Co. *v.* Hinds, 56 Kan. 758, 44 Pac. 993; Kansas Pac. R. Co. *v.* Pointer, 14 Kan. 37.

Kentucky.— See Louisville, etc., R. Co. *v.* Clark, 49 S. W. 323, 20 Ky. L. Rep. 1375.

by the company of the truth of allegations of the complaint that the person injured was in the exercise of due care and throws upon the railroad company the burden of disproving such allegations.[9]

(2) Duty to Stop, Look, and Listen. In accordance with the above rule, in some jurisdictions, the burden of proof, in the absence of evidence to the contrary, is upon plaintiff to show that he looked and listened, or if necessary stopped, looked, and listened, before attempting to cross;[10] and the presumption of negligence arising from the fact that the injured party neglected to look and listen can be rebutted only by facts and circumstances showing that it was not reasonably practicable to take such precautions, or that the circumstances were such as would ordinarily induce persons of common prudence to omit such precautions.[11] In other jurisdictions, however, in the absence of direct evidence that the person injured did not stop, look, and listen before crossing, the presumption under ordinary circumstances is that he observed such precautions, and the burden of proving otherwise is on defendant.[12] This presumption, however, may

Maryland.— Baltimore, etc., R. Co. *v.* Stumpf, 97 Md. 78, 54 Atl. 978.

Missouri.— Weller *v.* Chicago, etc., R. Co., 164 Mo. 180, 64 S. W. 141, 86 Am. St. Rep. 592; Crumpley *v.* Hannibal, etc., R. Co., 111 Mo. 152, 19 S. W. 820; Stepp *v.* Chicago, etc., R. Co., 85 Mo. 229.

New Jersey.— See Smith *v.* Atlantic City R. Co., 66 N. J. L. 307, 49 Atl. 547.

North Carolina.— Stewart *v.* North Carolina R. Co., 136 N. C. 385, 48 S. E. 793; Fulp *v.* Roanoke, etc., R. Co., 120 N. C. 525, 27 S. E. 74.

Ohio.— Tansky Com. Yeast Co. *v.* Pittsburg, etc., R. Co., 9 Ohio Dec. (Reprint) 145, 11 Cinc. L. Bul. 145, holding that it is not incumbent on plaintiff to show the exercise of ordinary care on his part, unless there is evidence tending to show the want of such care.

Pennsylvania.— E. Bradford Clarke Co. *v.* Baltimore, etc., R. Co., 27 Pa. Super. Ct. 251. *Compare* Pennsylvania R. Co. *v.* McTighe, 46 Pa. St. 316.

South Carolina.— Thomasson *v.* Southern R. Co., 72 S. C. 1, 51 S. E. 443; Bishop *v.* Southern R. Co., 63 S. C. 532, 41 S. E. 808. Under Rev. St. § 1692, holding that plaintiff is not bound to negative by testimony such conduct on his part as would defeat recovery, but that the burden of showing contributory negligence is on defendant. Nohrden *v.* Northeastern R. Co., 59 S. C. 87, 37 S. E. 228, 82 Am. St. Rep. 826.

Texas.— Gulf, etc., R. Co. *v.* Shieder, 88 Tex. 152, 30 S. W. 902, 28 L. R. A. 538 [*affirming* (Civ. App. 1894) 26 S. W. 509]; Galveston, etc., R. Co. *v.* Matula, 79 Tex. 577, 15 S. W. 573; Ft. Worth, etc., R. Co. *v.* Morris, (Civ. App. 1907) 101 S. W. 1038; Gulf, etc., R. Co. *v.* Hall, 34 Tex. Civ. App. 535, 80 S. W. 133; International, etc., R. Co. *v.* Brooks, (Civ. App. 1899) 54 S. W. 1056; International, etc., R. Co. *v.* Dalwigh, (Civ. App. 1898) 48 S. W. 527; Houston, etc., R. Co. *v.* Laskowski, (Civ. App. 1898) 47 S. W. 59; Texas, etc., R. Co. *v.* Anderson, 2 Tex. App. Civ. Cas. § 203.

Utah.— Rogers *v.* Rio Grande Western R. Co., 32 Utah 367, 90 Pac. 1075, holding that the presumption that a traveler exercised due care prevails in the absence of evidence to the contrary.

Wisconsin.— Hoye *v.* Chicago, etc., R. Co., 67 Wis. 1, 29 N. W. 646.

United States.— Wabash R. Co. *v.* De Tar, 141 Fed. 932, 73 C. C. A. 166, 4 L. R. A. N. S. 352; Rollins *v.* Chicago, etc., R. Co., 139 Fed. 639, 71 C. C. A. 615; Northern Pac. R. Co. *v.* Spike, 121 Fed. 44, 57 C. C. A. 384; Chesapeake, etc., R. Co. *v.* Steele, 84 Fed. 93, 29 C. C. A. 81.

See 41 Cent. Dig. tit. "Railroads," § 1121.

Proof sufficient to satisfy the jury that the person injured was guilty of contributory negligence is not required. Cleveland, etc., R. Co. *v.* Sivey, 27 Ohio Cir. Ct. 248.

The above presumption has the probative force and weight of affirmative evidence, although there is substantial evidence tending to explain the actual occurrence. Wabash R. Co. *v.* De Tar, 141 Fed. 932, 73 C. C. A. 166, 4 L. R. A. N. S. 352.

9. Norris *v.* New York, etc., R. Co., 78 Conn. 314, 61 Atl. 1075, evidence held insufficient to sustain the burden of proof in such case.

10. Rodrian *v.* New York, etc., R. Co., 125 N. Y. 526, 26 N. E. 741 [*reversing* 7 N. Y. Suppl. 811]; Fisher *v.* Central Vermont R. Co., 118 N. Y. App. Div. 446, 103 N. Y. Suppl. 513.

11. Bellefontaine R. Co. *v.* Snyder, 24 Ohio St. 670.

Direct evidence that the person injured looked and listened need not be introduced. Illinois Cent. R. Co. *v.* Nowicki, 148 Ill. 29, 35 N. E. 358 [*affirming* 46 Ill. App. 566].

12. *Arkansas.*— Choctaw, etc., R. Co. *v.* Baskins, 78 Ark. 355, 93 S. W. 757.

District of Columbia.— Cowen *v.* Merriman, 17 App. Cas. 186.

Indiana.— Under Burns Annot. St. (1901) § 359*a*, the burden of establishing that the person injured did not stop, look, and listen, if necessary, is on defendant. Pittsburgh, etc., R. Co. *v.* Reed, 36 Ind. App. 67, 75 N. E. 50. But see Pittsburgh, etc., R. Co. *v.* Fraze, 150 Ind. 576, 50 N. E. 576, 65 Am. St. Rep. 377, prior to the statute.

Kansas.— Atchison, etc., R. Co. *v.* Baum-

be rebutted,[13] but can be overcome only by evidence that the person injured failed to exercise such precautions,[14] as by evidence that he was struck by a moving train the instant he stepped upon the track, and that the view was unobstructed.[15] Where a person approaching a railroad crossing could by looking or listening have seen or heard an approaching train in time to avoid the danger, it will be presumed, even in jurisdictions in which the burden of proof is upon defendant, in case of an accident, that either he did not look or listen, or if he did so, that he did not heed what he saw or heard,[16] and if such circumstances

gartner, 74 Kan. 148, 85 Pac. 822; Chicago, etc., R. Co. *v.* Hinds, 56 Kan. 758, 44 Pac. 993.

Minnesota.— See Hendrickson *v.* Great Northern R. Co., 49 Minn. 245, 51 N. W. 1044, 32 Am. St. Rep. 540, 16 L. R. A. 261.

Missouri.— Porter *v.* Missouri Pac. R. Co., 199 Mo. 82, 97 S. W. 880; Weller *v.* Chicago, etc., R. Co., 164 Mo. 180, 64 S. W. 141, 86 Am. St. Rep. 592.

Oregon.— McBride *v.* Northern Pac. R. Co., 19 Oreg. 64, 23 Pac. 814.

Pennsylvania.— Schwarz *v.* Delaware, etc., R. Co., 218 Pa. St. 187, 67 Atl. 213 (holding that the presumption that a person killed at a railroad crossing looked and listened is not overcome by testimony of the engineer of the train that he did not see him stop, where his evidence shows that he was not in a position to see whether he did or not); Hanna *v.* Philadelphia, etc., R. Co., 213 Pa. St. 157, 62 Atl. 643, 4 L. R. A. N. S. 344; Weiss *v.* Pennsylvania R. Co., 79 Pa. St. 387.

Texas.— Dalwigh *v.* International, etc., R. Co., (Civ. App. 1897) 42 S. W. 1009, holding that, where no signals were given before reaching a crossing and the view of the tracks was obstructed, the fact that the traveler did not stop to look and listen does not cast on him the burden of proving absence of contributory negligence.

Washington.— Steele *v.* Northern Pac. R. Co., 21 Wash. 287, 57 Pac. 820.

United States.— Baltimore, etc., R. Co. *v.* Landrigan, 191 U. S. 461, 24 S. Ct. 137, 48 L. ed. 262 [*affirming* 20 App. Cas. 135]; Baltimore, etc., R. Co. *v.* Griffith, 159 U. S. 603, 16 S. Ct. 105, 40 L. ed. 274; Continental Imp. Co. *v.* Stead, 95 U. S. 161, 24 L. ed. 403; St. Louis, etc., R. Co. *v.* Chapman, 140 Fed. 129, 71 C. C. A. 523; Rollins *v.* Chicago, etc., R. Co., 139 Fed. 639, 71 C. C. A. 615; Chesapeake, etc., R. Co. *v.* Steele, 84 Fed. 93, 29 C. C. A. 81.

See 41 Cent. Dig. tit. "Railroads," § 1122.

Where defendant contends that plaintiff did not stop at the right place to look and listen, it has the burden of showing that there was a better place. Downey *v.* Pittsburg, etc., Traction Co., 161 Pa. St. 131, 28 Atl. 1019.

One presumption of fact cannot, in law, become the basis of another presumption of fact; and hence the above presumption will not warrant the jury in assuming, in order to account for the injured person's going upon the crossing, that his team became frightened and that he lost control. Atchison, etc., R. Co. *v.* Baumgartner, 74 Kan. 148, 85 Pac. 822.

13. Schum *v.* Pennsylvania R. Co., 107 Pa. St. 8, 52 Am. Rep. 468.

14. Hanna *v.* Philadelphia, etc., R. Co., 213 Pa. St. 157, 62 Atl. 643, 4 L. R. A. N. S. 344. See also Blauvelt *v.* Delaware, etc., R. Co., 206 Pa. St. 141, 55 Atl. 857.

Evidence not sufficient to overcome presumption see Weiss *v.* Pennsylvania R. Co., 79 Pa. St. 387.

15. Pennsylvania R. Co. *v.* Mooney, 126 Pa. St. 244, 17 Atl. 590.

16. *Arkansas.*— St. Louis, etc., R. Co. *v.* Wyatt, 79 Ark. 241, 96 S. W. 376.

Illinois.— Chicago, etc., R. Co. *v.* De Freitas, 109 Ill. App. 104. But see Chicago, etc., R. Co. *v.* Dunleavy, 129 Ill. 132, 22 N. E. 15.

Indiana.— Under Burns Annot. St. (1901) § 359*a*, in an action for injuries received in attempting to cross a track, it will be presumed that the person injured saw and heard what he could have seen or heard if he had looked and listened before attempting to cross. Malott *v.* Hawkins, 159 Ind. 127, 63 N. E. 308; Southern R. Co. *v.* Davis, 34 Ind. App. 377, 72 N. E. 1053.

Iowa.— Dalton *v.* Chicago, etc., R. Co, 114 Iowa 257, 86 N. W. 272; Crawford *v.* Chicago, etc., R. Co., 109 Iowa 433, 80 N. W. 519.

Kansas.— Bressler *v.* Chicago, etc., R. Co., 74 Kan. 256, 86 Pac. 472.

Minnesota.— Carlson *v.* Chicago, etc., R. Co., 96 Minn. 504, 105 N. W. 555, 113 Am. St. Rep. 655, 4 L. R. A. N. S. 349; Brown *v.* Milwaukee, etc., R. Co., 22 Minn. 165.

Missouri.— Porter *v.* Missouri Pac. R. Co., 199 Mo. 82, 97 S. W. 880.

New Jersey.— Pennsylvania R. Co. *v.* Righter, 42 N. J. L. 180.

New York.— Wilcox *v.* Rome, etc., R. Co., 39 N. Y. 358, 100 Am. Dec. 440; McAuliffe *v.* New York Cent., etc., R. Co., 85 N. Y. App. Div. 187, 83 N. Y. Suppl. 200; Burke *v.* New York Cent., etc., R. Co., 73 Hun 32, 25 N. Y. Suppl. 1009.

Pennsylvania.— Link *v.* Philadelphia, etc., R. Co., 165 Pa. St. 75, 30 Atl. 820, 822; Myers *v.* Baltimore, etc., R. Co., 150 Pa. St. 386, 24 Atl. 747. See also Weiss *v.* Pennsylvania R. Co., 79 Pa. St. 387.

Utah.— Rogers *v.* Rio Grande Western R. Co., 32 Utah 367, 90 Pac. 1075.

Washington.— Woolf *v.* Washington, etc., R. Co., 37 Wash. 491, 79 Pac. 997.

Wisconsin.— Hoye *v.* Chicago, etc., R. Co., 67 Wis. 1, 29 N. W. 646, presumption not conclusive.

are shown by direct or undisputed evidence the presumption will be conclusive.[17] This presumption, however, does not arise from the mere fact that a railroad crossing is a place of danger.[18]

(II) *ADMISSIBILITY OF EVIDENCE* — (A) *In General.* The admissibility of evidence in actions for injuries at railroad crossings is controlled by the general rules of evidence governing the competency, relevancy, and materiality of evidence in civil actions.[19] Subject to these rules any evidence showing the situation of the parties and the circumstances immediately attending the accident,[20]

United States.— Northern Pac. R. Co. *v.* Freeman, 174 U. S. 379, 19 S. Ct. 763, 43 L. ed. 1014; Rollins *v.* Chicago, etc., R. Co., 139 Fed. 639, 71 C. C. A. 615.

See 41 Cent. Dig. tit. "Railroads," § 1122.

17. Carlson *v.* Chicago, etc., R. Co., 96 Minn. 504, 105 N. W. 555, 113 Am. St. Rep. 655, 4 L. R. A. N. S. 349; Miller *v.* Truesdale, 56 Minn. 274, 57 N. W. 661; Kelsay *v.* Missouri Pac. R. Co., 129 Mo. 362, 30 S. W. 339; Browne *v.* New York Cent., etc., R. Co., 87 N. Y. App. Div. 206, 83 N. Y. Suppl. 1028, 13 N. Y. Annot. Cas. 409 [*affirmed* in 179 N. Y. 582, 72 N. E. 1140]; Sullivan *v.* New York, etc., R. Co., 175 Pa. St. 361, 34 Atl. 798.

18. Guggenheim *v.* Lake Shore, etc., R. Co., 66 Mich. 150, 33 N. W. 161.

19. See, generally, EVIDENCE, 16 Cyc. 821.

Opinion of skilled witness as to railroad operation generally see EVIDENCE, 17 Cyc. 77, 208, 240.

Competency of witness see WITNESSES.

Entries in shop-books.— Entries made in the usual course of business by a third person who repaired plaintiff's vehicle after the accident are admissible, such person being dead, to show the character and extent of the injury, and thereby tending to show that the vehicle was broken by the collision. Lassone *v.* Boston, etc., R. Co., 66 N. H. 345, 24 Atl. 902, 17 L. R. A. 525. Entries in shop-books as evidence generally see EVIDENCE, 17 Cyc. 355 *et seq.*

20. *Alabama.*— Louisville, etc., R. Co. *v.* Hubbard, 148 Ala. 45, 41 So. 814.

Illinois.— Illinois Cent. R. Co. *v.* Slater, 129 Ill. 91, 21 N. E. 575, 16 Am. St. Rep. 242, 6 L. R. A. 418 [*affirming* 28 Ill. App. 73]; Aurora, etc., R. Co. *v.* Gary, 123 Ill. App. 163 [*reversed* on other grounds in 221 Ill. 29, 77 N. E. 465]; Chicago, etc., R. Co. *v.* Mayer, 112 Ill. App. 149.

Michigan.— Stewart *v.* Cincinnati, etc., R. Co., 89 Mich. 315, 50 N. W. 852, 17 L. R. A. 539, agreement of defendant to maintain private crossing competent to show that plaintiff was lawfully on the premises.

New York.— McSorley *v.* New York Cent., etc., R. Co., 60 N. Y. App. Div. 267, 70 N. Y. Suppl. 10.

North Carolina.— Baker *v.* Norfolk, etc., R. Co., 144 N. C. 36, 56 S. E. 553.

Texas.— Horton *v.* Houston, etc., R. Co., (Civ. App. 1907) 103 S. W. 467 (collision between engine and street car); Missouri, etc., R. Co. *v.* Nesbit, 43 Tex. Civ. App. 630, 97 S. W. 825; San Antonio, etc., R. Co. *v.* Green, 20 Tex. Civ. App. 5, 49 S. W. 670.

Evidence is admissible, where a person is injured or killed by a backing train, that a hack and the body of a companion of deceased were pushed back by the train, as showing that the train was detached and kicked back, and was only stopped by such obstructions (Bradley *v.* Ohio River, etc., R. Co., 126 N. C. 735, 36 S. E. 181); or where the injury is caused by a team becoming frightened at a hand-car, to show the nearness of the hand-car to the team as it passed in front of them (Henze *v.* International, etc., R. Co., (Tex. Civ. App. 1903) 75 S. W. 822); or where the injuries are caused by moving a train standing at a crossing, while the person injured is passing between the cars, evidence is admissible that other persons were also crossing at the time to the knowledge of defendant's servants, who knew that persons were in danger when they moved the train (San Antonio, etc., R. Co. *v.* Green, 20 Tex. Civ. App. 5, 49 S. W. 670).

Evidence showing how long the company had been running trains after the erection of a mill near the track from the platform of which plaintiff ran across the track at the time of the accident is competent to show the locality of the accident, the conditions making the crossing dangerous, and a knowledge of these conditions on the part of the company. Southern R. Co. *v.* Douglass, 144 Ala. 351, 39 So. 268.

Evidence of the appearance of the injuries after the accident is admissible as a statement in part of the accident, and also as a means of determining from the character of the wounds the injured person's position when he was struck. Oldenburg *v.* New York Cent., etc., R. Co., 9 N. Y. Suppl. 419, 11 N. Y. Suppl. 689 [*affirmed* in 124 N. Y. 414, 26 N. E. 1021].

A diagram or plat proved to be correct and purporting to show the location and surroundings and the place where the accident occurred is admissible. Pennsylvania Co. *v.* Reidy, 72 Ill. App. 343, holding, however, that a plat which is not drawn to scale, on which the distances are not marked, and which is inaccurate in several important particulars is inadmissible. And see 17 Cyc. 413 note 93.

Identification of train.— Testimony that plaintiff heard a train whistle before leaving his home is admissible where there is testimony tending to show that several trains passed about that time, as it might serve to identify the train which struck his team. Southern R. Co. *v.* Hobbs, 151 Ala. 335, 43 So. 844.

such as the fact that the track was not fenced,[21] or that the accident occurred at a time when there was usually the greatest amount of travel on the crossing,[22] is competent. Entries from telegraphic train report sheets,[23] and rules of the company,[24] are admissible as bearing upon the company's negligence. But evidence that is irrelevant, immaterial, or incompetent is inadmissible.[25] The declarations of an engineer[26] or station agent[27] as to facts attending the accident are inadmissible, except in rebuttal of other testimony given by such agent or engineer on the trial.[28]

(B) *Customary Methods and Acts.* Where the negligence of a railroad company is in issue, evidence as to what is usually done by it under the same circumstances is admissible to show whether or not the particular acts in question are negligent,[29] but not for the purpose of showing whether or not such acts occurred.[30] Thus as bearing upon the negligence of defendant evidence is admissible which tends to show that defendant was in the habit of running its trains past a crossing at an excessive or unlawful rate of speed,[31] or without sounding

21. Cuming *v.* Brooklyn City R. Co., 5 N. Y. Suppl. 476.

22. Metzler *v.* Philadelphia, etc., R. Co., 28 Pa. Super. Ct. 180.

23. Donovan *v.* Boston, etc., R. Co., 158 Mass. 450, 33 N. E. 583, holding that such entries, together with the testimony of the train despatcher that the entries of the time at which all trains passed the several stations were made by despatches received by him from the station operators, is admissible in rebuttal of plaintiff's testimony that a passenger train was standing at the station near the crossing at the time of the accident, whereby his view was obstructed.

24. Chicago, etc., R. Co. *v.* Gretzner, 46 Ill. 74; Illinois Cent. R. Co. *v.* Bethea, 88 Miss. 119, 40 So. 813, rule requiring one of train crew to protect crossing while switching.

Where printed rules of the company are introduced by plaintiff for the purpose of showing the company's negligence, the company may show by testimony of the proper officer that such rules had no application to the crossing in question. Chicago, etc., R. Co. *v.* Gretzner, 46 Ill. 74.

Secondary evidence.— Where, on cross-examination of the fireman on the engine causing the accident, plaintiff has called out the fact that several persons were allowed to get on the engine shortly before the accident, plaintiff, in order to ascertain whether the fireman's attention was not diverted from his duties, may further ask whether this was not forbidden by defendant's rules, although the rules themselves are the best evidence. Oldenburg *v.* New York Cent., etc., R. Co., 9 N. Y. Suppl. 419, 11 N. Y. Suppl. 689 [*affirmed* in 124 N. Y. 414, 26 N. E. 1021].

25. Matteson *v.* Southern Pac. R. Co., 6 Cal. App. 318, 92 Pac. 101; Illinois Cent. R. Co. *v.* Slater, 129 Ill. 91, 21 N. E. 575, 16 Am. St. Rep. 242, 6 L. R. A. 418 [*affirming* 28 Ill. App. 73]; Cleveland, etc., R. Co. *v.* Coffman, 30 Ind. App. 462, 64 N. E. 233, 66 N. E. 179, record of yard clerk as to number of cars on switch-track held to be inadmissible.

Evidence of the financial standing of a father who sues as administrator for the death of a boy nine years old, who was killed while driving over the track at a crossing, is inadmissible either for the purpose of showing want of care, or for the purpose of mitigating damages. Illinois Cent. R. Co. *v.* Slater, 129 Ill. 91, 21 N. E. 575, 16 Am. St. Rep. 242, 6 L. R. A. 418 [*affirming* 28 Ill. App. 73].

That plaintiff had left his home in one state to sue in another is inadmissible, either for the purpose of affecting his good faith, or to discredit his testimony as a witness. Atchison, etc., R. Co. *v.* Keller, 33 Tex. Civ. App. 358, 76 S. W. 801.

26. Cole *v.* New York, etc., R. Co., 174 Mass. 537, 55 N. E. 1044, holding that admissions of an engineer made some time after the accident that he saw plaintiff some time before he sounded the whistle and that he saw him before he was struck are immaterial as well as incompetent. And see EVIDENCE, 16 Cyc. 1022 note 68.

Admissions or declarations of agents for railroad generally see EVIDENCE, 16 Cyc. 1021 *et seq.*

27. Tyler *v.* Old Colony R. Co., 157 Mass. 236, 32 N E. 227. And see EVIDENCE, 16 Cyc. 1022 note 69.

28. Tyler *v.* Old Colony, etc., R. Co., 157 Mass. 336, 32 N. E. 227.

29. Stewart *v.* Galveston, etc., R. Co., 34 Tex. Civ. App. 370, 78 S. W. 979.

30. Stewart *v.* Galveston, etc., R. Co., 34 Tex. Civ. App. 370, 78 S. W. 979. But see Hall *v.* Brown, 58 N. H. 93.

31. International, etc., R. Co. *v.* Kuehn, 2 Tex. Civ. App. 210, 21 S. W. 58, holding that evidence of such negligence is pertinent as it gives plaintiff the right to regulate his conduct by it. And see *infra*, X, F, 14, e, (II), (C). *Compare* Aiken *v.* Pennsylvania R. Co., 130 Pa. St. 380, 13 Atl. 619, 17 Am. St. Rep. 775.

The daily custom of defendant in running the same engine over the same road at an unlawful rate of speed is admissible in an action for the death of a person in an accident at a public crossing. McKerley *v.* Red

the bell or whistle;[33] to show its custom as to keeping a flagman at the crossing;[33] or to show the custom of defendant and the public in using the crossing.[34] As tending to show whether or not care and skill was used by defendant in constructing and maintaining a particular crossing, evidence of the manner in which such crossings are generally constructed is admissible,[35] although evidence of such custom does not preclude evidence as to whether or not the particular crossing was properly constructed or kept in sufficient repair.[36] Evidence of the general custom of other companies in the matter of construction, maintenance, and operation of their roads is not ordinarily admissible,[37] and even when admissible on the question of negligence, it is neither conclusive nor of especially great weight.[38]

(c) *Other Accidents or Acts of Negligence.* As tending to prove a railroad company's negligence on a particular occasion, evidence of other accidents or of other acts of negligence on its part is inadmissible,[39] unless the essential conditions surrounding the different occasions are the same,[40] or the acts of negligence

River, etc., R. Co., (Tex. Civ. App. 1905) 85 S. W. 499 [application for writ of error dismissed in 86 S. W. 921].

32. See *infra*, X, F, 14, e, (II), (H).

33. Casey *v.* New York Cent., etc., R. Co., 78 N. Y. 518 [*affirming* 6 Abb. N. Cas. 104].

Evidence of the company's custom to keep a flagman at the crossing is competent in an accident for injuries at the crossing at which there was no flagman at the time of the accident. Casey *v.* New York Cent., etc., R. Co., 78 N. Y. 518 [*affirming* 6 Abb. N. Cas. 104].

Evidence that it is customary to post a flagman at crossings similar to the one at which the injury was sustained is not admissible. Bailey *v.* New Haven, etc., R. Co., 107 Mass. 496.

34. Bradley *v.* Ohio River, etc., R. Co., 126 N. C. 735, 36 S. E. 181, holding that, where plaintiff's intestate was killed on a crossing by being struck by a backing train after it stopped and discharged its passengers, plaintiff may show defendant's custom as to where it stopped its trains for the discharge of passengers, and the custom of defendant and the public in using the crossing as bearing on defendant's negligence in backing its trains, as to the notice to be given, and whether intestate was negligent.

Evidence that it was the custom of defendant to habitually block the crossing, and that it had long been the custom of people generally to climb between or to pass around cars so obstructing the crossing, is admissible on the issue of negligence on the part of the company. Leary *v.* Fitchburg R. Co., 53 N. Y. App. Div. 52, 65 N. Y. Suppl. 699; Gulf, etc., R. Co. *v.* Grisom, 36 Tex. Civ. App. 630, 82 S. W. 671.

Evidence of the manner in which the cars were usually operated at that point is admissible on the question of whether defendant's cars obstructed the highway. Hall *v.* Brown, 58 N. H. 93.

35. Hurley *v.* Jeffersonville, etc., R. Co., Wils. (Ind.) 295; Kelly *v.* Southern Minnesota R. Co., 28 Minn. 98, 9 N. W. 588.

36 Hurley *v.* Jeffersonville, etc., R. Co., Wils. (Ind.) 295.

37. McDermott *v.* Severe, 25 App. Cas. (D. C.) 276 [*affirmed* in 202 U. S. 600, 26 S. Ct. 709, 50 L. ed. 1162].

Evidence that defendant did not use a contrivance devised to suppress the noise of escaping steam, although such device is in general use on railroads, is not admissible in an action for injuries caused by the frightening of plaintiff's horse at a crossing by the escape of steam from defendant's engine. Duvall *v.* Baltimore, etc., R. Co., 73 Md. 516, 21 Atl. 496.

38. McDermott *v.* Severe, 25 App. Cas. (D. C.) 276 [*affirmed* in 202 U. S. 600, 26 S. Ct. 709, 50 L. ed. 1162].

39. *Arkansas.*— Tiffin *v.* St. Louis, etc., R. Co., 78 Ark. 55, 93 S. W. 564.

New York.— Cohn *v.* New York Cent., etc., R. Co., 6 N. Y. App. Div. 196, 39 N. Y. Suppl. 986, evidence that an accident occurred to plaintiff at the crossing eight years before.

Ohio.— Lake Shore, etc., R. Co. *v.* Gaffney, 9 Ohio Cir. Ct. 32, 6 Ohio Cir. Dec. 94, evidence that other persons had previously been injured by passing trains at the same crossing.

Texas.— Texas, etc., R. Co. *v.* Payne, (Civ. App. 1896) 35 S. W. 297.

Virginia.— Stokes *v.* Southern R. Co., 104 Va. 817, 52 S. E. 855, evidence relating to the crossing of a wagon in front of a freight train more than thirty years before.

See 41 Cent. Dig. tit. "Railroads," § 1127.

Evidence as to how lights were maintained at the other street crossings is inadmissible in an action for injuries resulting from a collision on a street crossing. Missouri, etc., R. Co. *v.* Matherly, 35 Tex. Civ. App. 604, 81 S. W. 589.

Evidence that gates were not maintained at other crossings than the one where an accident occurred does not tend to establish negligence at the place of the accident. Bracken *v.* Pennsylvania R. Co., 32 Pa. Super. Ct. 22.

40. Phelps *v.* Winona, etc., R. Co., 37 Minn. 485, 35 N. W. 273, 5 Am. St. Rep. 867, holding that, in an action for damages resulting from the negligence of defendant in obstructing a highway crossing with snow thrown from a railroad track, evidence of the difficulties experienced by other travelers in attempting to pass the crossing prior to the accident and while the highway was in substantially the same condition is admissible.

are continuous in their nature and are near in point of time.[41] As bearing on defendant's negligence in running at an excessive or unlawful rate of speed at the time of the accident, evidence is admissible as to the speed at which the same train is habitually run at the same crossing,[42] or at which defendant habitually runs its engines under like circumstances,[43] but not as to the speed at which the train was run on a particular occasion.[44] Or, as bearing on defendant's negligence in respect to giving signals, evidence is admissible that defendant's train habitually neglected to sound the bell or whistle at the crossing,[45] or that it failed to give such signals at a similar crossing near the place of the accident,[46] but not that the signals were not given on other particular occasions at the crossing,[47] or by other trains,[48] or that other accidents had happened at the crossing.[49] Where the fright of horses at certain objects or noises, such as escaping steam or the blowing of the whistle, is in issue, evidence is admissible as to what effect such objects or noises produced upon other horses at the same time and place,[50] or under similar circumstances,[51] or what was their effect at that place upon ordinary horses,[52] but not as to what effect other objects or noises at other times had upon horses at the crossing.[53]

(D) *Conditions and Precautions After Accident.* Where it appears that the condition of a railroad crossing has not been materially changed since the accident, evidence of its condition immediately after the accident is admissible for the purpose of showing its condition at the time of the accident.[54] Where it is charged that the crossing or its approaches were defective or unsafe at the time

Opportunity and conditions must be shown to be similar.— Texas, etc., R. Co. *v.* Payne, (Tex. Civ. App. 1896) 35 S. W. 297.

41. Baltimore, etc., R. Co. *v.* Carrington, 3 App. Cas. (D. C.) 101.

Evidence that a watchman was asleep two and one-half hours prior to the accident is admissible on the issue that he was asleep at the time of the accident, and for that reason failed to close the gate when the train approached. Baltimore, etc., R. Co. *v.* Carrington, 3 App. Cas. (D. C.) 101.

Witnesses familiar with the locality may tell of narrow escapes they have had to show the nature of the crossing and the danger to travelers. Chicago, etc., R. Co. *v.* Netolicky, 67 Fed. 665, 14 C. C. A. 615.

Evidence as to management and speed three quarters of a mile away is admissible as tending to show the train's management and speed at the place of the accident. Lyman *v.* Boston, etc., R. Co., 66 N. H. 200, 20 Atl. 976, 11 L. R. A. 364.

42. Savannah, etc., R. Co. *v.* Flannagan, 82 Ga. 579, 9 S. E. 471, 14 Am. St. Rep. 183; Chicago, etc., R. Co. *v.* Spilker, 134 Ind. 380, 33 N. E. 280, 34 N. E. 218.

43. Shaber *v.* St. Paul, etc., R. Co., 28 Minn. 103, 9 N. W. 575.

44. Shaber *v.* St. Paul, etc., R. Co., 28 Minn. 103, 9 N. W. 575.

Evidence that the train was not exceeding the usual rate of freight trains through the town is not admissible. Louisville, etc., R. Co. *v.* Taylor, 104 S. W. 776, 31 Ky. L. Rep. 1142.

45. Savannah, etc., R. Co. *v.* Flannagan, 82 Ga. 579, 9 S. E. 471, 14 Am. St. Rep. 183.

46. Bower *v.* Chicago, etc., R. Co., 61 Wis. 457, 21 N. W. 536. But see Chicago, etc., R. Co. *v.* Durand, 65 Kan. 380, 69 Pac. 356 [*overruling* Atchison, etc., R. Co. *v.* Hague, 54 Kan. 284, 38 Pac. 257, 45 Am. St. Rep. 278].

47. Illinois Cent. R. Co. *v.* Borders, 61 Ill. App. 55; Southern R. Co. *v.* Winchester, 105 S. W. 167, 32 Ky. L. Rep. 19.

48. Eskridge *v.* Cincinnati, etc., R. Co., 89 Ky. 367, 12 S. W. 580, 11 Ky. L. Rep. 557; Chicago, etc., R. Co. *v.* Porterfield, 92 Tex. 442, 49 S. W. 361 [*affirming* 19 Tex. Civ. App. 225, 46 S. W. 919].

49. Hutcherson *v.* Louisville, etc., R. Co., 52 S. W. 955, 21 Ky. L. Rep. 733; Menard *v.* Boston, etc., R. Co., 150 Mass. 386, 23 N. E. 214; Burke *v.* New York Cent., etc., R. Co., 20 N. Y. Suppl. 808.

50. Hill *v.* Portland, etc., R. Co., 55 Me. 438, 92 Am. Dec. 601 (sound of whistle); Lewis *v.* Eastern R. Co., 60 N. H. 187; Gordon *v.* Boston, etc., R. Co., 58 N. H. 396; Harrell *v.* Albemarle, etc., R. Co., 110 N. C. 215, 14 S. E. 687 (day before); International, etc., R. Co. *v.* Mercer, (Tex. Civ. App. 1904) 78 S. W. 562. But see Cleveland, etc., R. Co. *v.* Wynant, 114 Ind. 525, 17 N. E. 918, 5 Am. St. Rep. 644.

51. Folsom *v.* Concord, etc., R. Co., 68 N. H. 454, 38 Atl. 209.

52. Hill *v.* Portland, etc., R. Co., 55 Me. 438, 92 Am. Dec. 601.

53. Cleveland, etc., R. Co. *v.* Wynant, 114 Ind. 525, 17 N. E. 118, 5 Am. St. Rep. 644; Lewis *v.* Southern R. Co., 60 N. H. 187, holding that, on the question whether a locomotive emitting steam and stationed near a highway is an object dangerous to public travel as liable to frighten horses of ordinary gentleness, evidence that other horses had been frightened by locomotives and cars passing near the same crossing is not admissible.

54. Martin *v.* Baltimore, etc., R. Co., 2 Marv. (Del.) 123, 42 Atl. 442 (holding that

of the accident, in some jurisdictions evidence of repairs made at the crossing soon after the accident is admissible as tending to show antecedent negligence,[55] although in other jurisdictions it is held otherwise.[56] Likewise it is admissible in some jurisdictions, as tending to show antecedent negligence, to introduce proof that after an accident had occurred at a certain crossing defendant took certain precautions in respect to the operation of its trains at such crossing;[57] but by the weight of authority subsequent precautions are regarded merely as improvements in the mode of operating the railroad, and not as evidence of antecedent negligence,[58] as where defendant after the accident puts a light,[59] or places a watchman,[60] or an automatic bell,[61] at the place of the accident. Evidence that after striking plaintiff at the crossing the train ran on to the next station without stopping is immaterial on the question of negligence before the accident.[62]

(E) *Character and Description of Crossing.* Upon the question of defendant's

the company may show the range of vision at a crossing at the time of the trial); Fleissner *v.* New York Cent., etc., R. Co., 16 N. Y. Suppl. 18; Milwaukee, etc., R. Co. *v.* Hunter, 11 Wis. 167, 78 Am. Dec. 699.

Testimony of a witness who passed the scene of the accident at six o'clock in the morning after the accident which occurred during the preceding evening that cars were standing near on a side-track is admissible to prove that the cars were there at the time of the accident, thereby obstructing plaintiff's view of the engine at the crossing. Missouri, etc., R. Co. *v.* Oslin, 26 Tex. Civ. App. 370, 63 S. W. 1039.

Where there is evidence that the arrangement of lights has not been materially changed, evidence of the arrangement of the lights on a different night of the same sort after the accident is admissible. Houston, etc., R. Co. *v.* Waller, 56 Tex. 331.

55. Ohio, etc., R. Co. *v.* Cox, 26 Ill. App. 491; Tetherow *v.* St. Joseph, etc., R. Co., 98 Mo. 74, 11 S. W. 310, 14 Am. St. Rep. 617, holding such evidence to be admissible where witness for defendant had testified that no other accident had ever happended at the crossing. See also Cleveland, etc., R. Co. *v.* Doerr, 41 Ill. App. 530.

Where there is evidence that an electric bell at the crossing was out of order and failed to give notice of the train's approach and that before the accident it rang so slightly that a person within fifteen feet of it could not hear it, it is admissible to show that defendant repaired such bell a day or two after the accident. Link *v.* Philadelphia, etc., R. Co., 165 Pa. St. 75, 30 Atl. 820, 822.

Where it is contended that the accident was not on the approach to the crossing but on the highway, evidence as to how the crossing and approaches were originally built, and their condition at various times before the accident, and repairs on the approach after the accident, is relevant. Ohio, etc., R. Co. *v.* Cox, 26 Ill. App. 491.

56. Terre Haute, etc., R. Co. *v.* Clem, 123 Ind. 15, 23 N. E. 965, 18 Am. St. Rep. 303, 7 L. R. A. 588; Hudson *v.* Chicago, etc., R. Co., 59 Iowa 581, 13 N. W. 735, 44 Am. Rep. 692; Stouter *v.* Manhattan R. Co., 127 N. Y. 661, 27 N. E. 805 [*affirming* 3 Silv. Sup. 413, 6 N. Y. Suppl. 163]; Payne *v.* Troy, etc., R. Co., 9 Hun (N. Y.) 526.

57. Lederman *v.* Pennsylvania R. Co., 165 Pa. St. 118, 30 Atl. 725, 44 Am. St. Rep. 644, holding that evidence that defendant soon after the accident erected gates at the crossing at which it occurred is admissible, particularly where the jury is permitted to view the premises and see the gates.

Evidence that a night watchman was placed at the crossing after the accident is irrelevant where the accident happened in the daytime. Derk *v.* Northern Cent. R. Co., 164 Pa. St. 243, 30 Atl. 231.

58. Georgia Southern, etc., R. Co. *v.* Cartledge, 116 Ga. 164, 42 S. E. 405, 59 L. R. A. 118 [*overruling* Savannah, etc., R. Co. *v.* Flannagan, 82 Ga. 579, 9 S. E. 471, 14 Am. St. Rep. 183]; Cleveland, etc., R. Co. *v.* Doerr, 41 Ill. App. 430; Terre Haute, etc., R. Co. *v.* Clem, 123 Ind. 15, 23 N. E. 965, 18 Am. St. Rep. 303, 7 L. R. A. 588; Morse *v.* Minneapolis, etc., R. Co., 30 Minn. 465, 16 N. W. 358 [*overruling* Shaber *v.* St. Paul, etc., R. Co., 28 Minn. 103, 9 N. W. 575].

Removal of building.— Where one of the negligent acts alleged was in permitting a building to remain on a right of way which obstructed the vision and hearing of persons crossing the track, and the evidence showed that there was no negligence in such act, it is error to allow plaintiff to show that the building has been removed since the accident. Thompson *v.* Toledo, etc., R. Co., 91 Mich. 255, 51 N. W. 995.

59. Missouri Pac. R. Co. *v.* Hennessey, 75 Tex. 155, 12 S. W. 608.

60. Cleveland, etc., R. Co. *v.* Doerr, 41 Ill. App. 530.

61. Hager *v.* Southern Pac. Co., 98 Cal. 309, 33 Pac. 119.

62. Southern R. Co. *v.* Hobbs, 151 Ala. 335, 43 So. 844 (holding that evidence as to whether the engine was brought back to the place of the accident is immaterial); Griffith *v.* Baltimore, etc., R. Co., 44 Fed. 574 (holding this to be true where the engineer and fireman testified that they did not see plaintiff and there is no evidence of wanton negligence on defendant's part).

negligence it is proper, as bearing upon the degree of care which defendant should exercise, to show the general character and description of the crossing at which the accident happened.[63] For this purpose any evidence which is otherwise competent, indicating the nature, surroundings, and general character of the crossing,[64] such as evidence of the length of time for which the highway has existed,[65] the frequency with which the crossing is used by travelers on the highway [66] or by trains passing over the railroad tracks,[67] whether or not there were gates,[68] whether signals were customarily given there,[69] the erection of sign-posts at the

63. McSorley *v.* New York Cent., etc., R. Co., 60 N. Y. App. Div. 267, 70 N. Y. Suppl. 10; Harbert *v.* Atlanta, etc., Air Line R. Co., 78 S. C. 537, 59 S. E. 644, holding that evidence as to a pathway along the railroad from a switch to the crossing in question is admissible as explanatory of the locality where the injury was sustained.

Evidence that the road or street had been abandoned by the public when plaintiff was hurt, and was not then being commonly used by the public at a crossing, is admissible; but testimony that the railroad company was not prosecuted for obstructing the street in question, that the city council had closed up the street and granted the company the exclusive use of it, and testimony as to acts after plaintiff was injured tending to show that the road after the accident was abandoned is inadmissible; where the city council has no authority to close a street and grant the railroad company the exclusive use of it, an ordinance closing the street is inadmissible. Gulf, etc., R. Co. *v.* Garrett, (Tex. Civ. App. 1906) 99 S. W. 162.

64. Indianapolis Union R. Co. *v.* Boettcher, 131 Ind. 82, 28 N. E. 551; Tetherow *v.* St. Joseph, etc., R. Co., 98 Mo. 74, 11 S. W. 310, 14 Am. St. Rep. 617 (holding that evidence to show the condition of a track crossed by deceased before reaching the one on which he was injured is admissible as a description of the surroundings); Texarkana, etc., R. Co. *v.* Frugia, 43 Tex. Civ. App. 48, 95 S. W. 563; Baltimore, etc., R. Co. *v.* Hellenthal, 88 Fed. 116, 31 C. C. A. 414 (holding that testimony of a witness acquainted with the situation that a railroad track is straight at a certain point, and a crossing in plain view for a certain distance is competent).

Invalid ordinance.— In an action against a railroad company to recover for injuries at a railroad crossing, where the railroad is a dividing line between a city and a township, an invalid ordinance of the city requiring the railroad company to erect a safety gate on the township side of the crossing is inadmissible even to show the dangerous character of the crossing. Burns *v.* Pennsylvania R. Co., 210 Pa. St. 90, 59 Atl. 687.

The number of persons killed at a crossing is not admissible as tending to establish its dangerous character. Tiffin *v.* St. Louis, etc., R. Co., 78 Ark. 55, 93 S. W. 564.

A deed of the land at the place of the accident to the railroad company, reciting that the grantor's warranty is not to extend to any right of way the public may have acquired in streets, ways, or roads over the premises is not admissible in an action for injuries sustained while crossing defendant's tracks to show that plaintiff had a right to cross the tracks, since the limitation of the warranty was not to give notice that the public had acquired a right of way over the land, but merely to limit the grantor's liability in case such a right should afterward be asserted. Central R., etc., Co. *v.* Rylee, 87 Ga. 491, 13 S. E. 584, 13 L. R. A. 634.

To show that the crossing is at a public way, the public records of the county commissioners dealing with it as a highway, under the jurisdiction given them by statute (Mass. Pub. St. c. 112, § 123), is admissible. Nickerson *v.* New York, etc., R. Co., 178 Mass. 195, 59 N. E. 636.

Farm crossing.—As to whether or not defendant recognized a farm crossing as such, and whether its appearance was such as to invite its use for that purpose, evidence of instructions given by defendant to its trackmen as to keeping farm crossings in repair, and acts done by the trackmen in pursuance of such instructions with respect to the particular crossing in question, is admissible. Stewart *v.* Cincinnati, etc., R. Co., 89 Mich. 315, 50 N. W. 852, 17 L. R. A. 539.

65. Delaware, etc., R. Co. *v.* Converse, 139 U. S. 469, 11 S. Ct. 569, 35 L. ed. 213, holding that evidence that a highway had existed for over thirty years is admissible to show defendant's knowledge of the fact.

66. Chicago, etc., R. Co. *v.* Gunderson, 174 Ill. 495, 51 N. E. 708 [*affirming* 74 Ill. App. 356]; Indianapolis Union R. Co. *v.* Boettcher, 131 Ind. 82, 28 N. E. 551; Christensen *v.* Oregon Short Line R. Co., 29 Utah 192, 80 Pac. 746.

67. New York, etc., R. Co. *v.* Luebeck, 157 Ill. 595, 41 N. E. 897 [*affirming* 54 Ill. App. 551].

68. Cleveland, etc., R. Co. *v.* Chinsky, 92 Ill. App. 50, holding that evidence that there were no gates at the crossing is admissible for the purpose of showing the physical condition and surroundings at the place where the accident occurred. And see *infra*, X, F, 14, e, (II), (G).

That there were no gates at the next crossing when the accident occurred may be shown by plaintiff, as bearing on the character of the crossing at which the accident occurred, where defendant develops on cross-examination that there were safety gates at the next crossing. Metzler *v.* Philadelphia, etc., R. Co., 28 Pa. Super. Ct. 180.

69. Galveston, etc., R. Co. *v.* Eaten, (Tex.

crossing,[70] or that the highway is crossed by the tracks of several companies is admissible.[71] Such circumstances may be shown by any witness familiar with the crossing,[72] but such witness may state only the facts disclosing the location and surroundings[73] and cannot give his opinion as to the dangerous character of the crossing.[74]

(F) *Defects and Obstructions at Crossings.* As a circumstance indicating the degree of care which the railroad company is required to exercise in approaching the crossing in question, and as showing whether or not it was negligent in that respect in the particular case, evidence is admissible which tends to show that the injured person's view was obstructed at such crossing,[75] or that the condition of the crossing was defective and unsafe,[76] and that the railroad company had knowledge thereof.[77] Where negligence in the construction and maintenance of a crossing is in question, evidence of any circumstances tending to show negligence in this respect is admissible;[78] but that no similar accident had ever before occurred

Civ. App. 1898) 44 S. W. 562, holding that evidence that trains customarily gave certain signals when approaching a certain crossing which were required by statute is admissible to show that the company regarded the road as public.

70. Louisville, etc., R. Co. *v.* Hubbard, 148 Ala. 45, 41 So. 814.

71. New York, etc., R. Co. Lueheck, 157 Ill. 595, 41 N. E. 897 [*affirming* 54 Ill. App. 551].

72. Baltimore, etc., R. Co. *v.* Hellenthal, 88 Fed. 116, 31 C. C. A. 414.

73. King *v.* Missouri Pac. R. Co., 98 Mo. 235, 11 S. W. 563.

74. King *v.* Missouri Pac. R. Co., 98 Mo. 235, 11 S. W. 563.

75. Memphis, etc., R. Co. *v.* Martin, 117 Ala. 367, 23 So. 231 (evidence of the location of houses and cars near the crossing); Wheeling, etc., R. Co. *v.* Parker, 29 Ohio Cir. Ct. 1; International, etc., R. Co. *v.* Kuehn, 2 Tex. Civ. App. 210, 21 S. W. 58 (evidence that there were trees and other obstructions which prevented a view from the highway of an approaching train); Stokes *v.* Southern R. Co., 104 Va. 817, 52 S. E. 855 (evidence that the company's right of way at or near the crossing had on it undergrowth which obstructed the view).

Where the view is obstructed by standing cars, evidence is admissible to show how long the cars had been allowed to stand at the crossing prior to the occurrence of the accident. Thomas *v.* Delaware, etc., R. Co., 8 Fed. 729, 19 Blatchf. 533.

Evidence that a natural hill existed on a railroad right of way which interfered with the view of approaching trains is admissible as bearing on the alleged failure of the company to give proper signals, but is not an independent ground of negligence. Leitch *v.* Chicago, etc., R. Co., 93 Wis. 79, 67 N. W. 21.

A town ordinance prohibiting the blocking of street crossings by railroad companies beyond a specified time is admissible in evidence where it is claimed that a violation of such ordinance in connection with other acts of negligence was the cause of the accident. Southern R. Co. *v.* Mouchet, 3 Ga. App. 266, 59 S. E. 927.

Opportunity for observation.— Where one of defendant's witnesses who had gone to the point where the accident occurred on a switch engine and taken observations from the engine testifies as to the conditions and surroundings, and that the engine could be seen from the road, it is proper upon cross-examination to show that the opportunity for observation was as good for the engineer as for the person injured. Georgia Cent. R. Co. *v.* Hyatt, 151 Ala. 355, 43 So. 867.

Evidence that the railroad company should have erected certain buildings on the opposite side from where they were located, thereby removing them as obstructions and rendering the crossing more safe, is incompetent. Louisville, etc., R. Co. *v.* Lucas, 98 S. W. 308, 30 Ky. L. Rep. 359, 99 S. W. 959, 30 Ky. L. Rep. 539.

76. Funston *v.* Chicago, etc., R. Co., 61 Iowa 452, 61 N. W. 518; Thomas *v.* Chicago, etc., R. Co., 86 Mich. 496, 49 N. W. 547.

77. Chicago, etc., R. Co. *v.* Thomas, (Ind. 1900) 55 N. E. 861.

78. Denison, etc., R. Co. *v.* Foster, 28 Tex. Civ. App. 578, 68 S. W. 299, holding that, in an action for injuries sustained by a traveler's horse stepping into a hole in a bridge, evidence to the effect that the bridge appeared to be constructed of good material and that witnesses when traveling over it saw nothing which rendered it unsafe is admissible.

Evidence not admissible see Taylor *v.* Wabash R. Co., 112 Iowa 157, 83 N. W. 892.

Where the injured person's foot was caught between the main rail and the guard rail it is competent to show the defective and dangerous construction resulting in the accident; but it is incompetent for that purpose to show that at another crossing a different construction is in use, although it is competent to show that at another crossing a similar construction is in use and that people have got their feet caught in it between the main rail and guard rail. Raper *v.* Wilmington, etc., R. Co., 126 N. C. 563, 36 S. E. 115.

Evidence that another person's horse caught its hoof at the same place shortly before is admissible in an action for injuries sustained at a railroad crossing by reason of plaintiff's pony getting its hoof caught between the rail and the board next to it. Dunham *v.* Wabash R. Co., 126 Mo. App. 643, 105 S. W. 21.

within the knowledge of defendant, even if admissible, is of no weight in determining the question of negligent construction.[79]

(G) *Sign-Boards, Signals, Flagmen, and Gates at Crossings.* As bearing upon the railroad company's negligence in the operation of its train at the time and crossing in question, it is admissible to show what safeguards if any it has provided at such crossing to avert accidents.[80] When taken together with other circumstances evidence is admissible for this purpose that at the time of the accident there was no flagman,[81] gates,[82] sign-boards,[83] lights,[84] or automatic sig-

Under Tex. Rev. St. (1895) art. 4426, requiring railroad companies to keep highway crossings in repair, the condition of a highway at other places is immaterial in determining whether a railroad company kept a certain highway crossing in repair. St. Louis Southwestern R. Co. *v.* Smith, (Civ. App. 1908) 107 S. W. 638.

79. McDermott *v.* Severe, 25 App. Cas. (D. C.) 276 [*affirmed* in 202 U. S. 600, 26 S. Ct. 709, 50 L. ed. 1162].

80. McSorley *v.* New York Cent., etc., R. Co., 60 N. Y. App. Div. 267, 70 N. Y. Suppl. 10.

Evidence that the flagman at the crossing was lame is admissible. Tucker *v.* New York Cent., etc., R. Co., 11 N. Y. Suppl. 692 [*reversed* on other grounds in 124 N. Y. 308, 26 N. E. 916, 21 Am. St. Rep. 670].

A statute or ordinance requiring railroad companies to keep flagmen at certain crossings is admissible. Western, etc., R. Co. *v.* Meigs, 74 Ga. 857. But it is inadmissible to show that the municipal authorities of an adjacent borough passed an ordinance before the accident requiring the company to maintain a flagman at the crossing at all times and notified the company thereof. West Jersey R. Co. *v.* Paulding, 58 N. J. L. 178, 33 Atl. 381.

81. *Illinois.*— Chicago, etc., R. Co. *v.* Gunderson, 174 Ill. 495, 51 N. E. 708 [*affirming* 74 Ill. App. 356]; New York, etc., R. Co. *v.* Luebeck, 157 Ill. 595, 41 N. E. 897 [*affirming* 54 Ill. App. 551]; Chicago, etc., R. Co. *v.* Lane, 130 Ill. 116, 22 N. E. 513; Aurora, etc., R. Co. *v.* Gary, 123 Ill. App. 163 [*reversed* on other grounds in 221 Ill. 29, 77 N. E. 465].

Kansas.— Union Pac. R. Co. *v.* Henry, 36 Kan. 565, 14 Pac. 1.

Massachusetts.—Tyler *v.* Old Colony R. Co., 157 Mass. 336, 32 N. E. 227.

Missouri.— Schmitz *v.* St. Louis, etc., R. Co., 119 Mo. 256, 24 S. W. 472, 23 L. R. A. 250.

New York.— McGrath *v.* New York Cent., etc., R. Co., 63 N. Y. 522; Harrington *v.* Erie R. Co., 79 N. Y. App. Div. 26, 79 N. Y. Suppl. 930; Friess *v.* New York Cent., etc., R. Co., 67 Hun 205, 22 N. Y. Suppl. 104 [*affirmed* in 140 N. Y. 639, 35 N. E. 892]; Cuming *v.* Brooklyn City R. Co., 5 N. Y. Suppl. 476.

Utah.— Christensen *v.* Oregon Short Line R. Co., 29 Utah 192, 80 Pac. 746.

Vermont.— Carrow *v.* Barre R. Co., 74 Vt. 176, 52 Atl. 537.

Wisconsin.— Abbot *v.* Dwinnell, 74 Wis. 514, 43 N. W. 496; Hoye *v.* Chicago, etc., R. Co., 67 Wis. 1, 29 N. W. 646.

See 41 Cent. Dig. tit. "Railroads," § 1131.

The absence of a flagman may be shown, as bearing upon the question of care in running trains, in connection with the amount of travel (Chicago, etc., R. Co. *v.* Johnson, 61 Ill. App. 464), or in connection with evidence that a flagman had always been kept at the crossing (McGrath *v.* New York Cent., etc., R. Co., 63 N. Y. 522).

Where an injury is caused by a backing train on a public street of a city on a dark night and no flagman is present at the crossing, that fact is competent to be submitted to the jury, where it is also shown that no one was on the rear end of the train and no signal or warning was given before backing the train. Union Pac. R. Co. *v.* Henry, 36 Kan. 565, 14 Pac. 1.

That a flagman was maintained at a crossing twelve years before the accident in compliance with an application of the selectmen of a town in which the crossing is situated is no proof that due care required that a flagman should have been stationed there at the time of the accident. Tyler *v.* Old Colony R. Co., 157 Mass. 336, 32 N. E. 227.

The record of county commissioners stating that in their opinion no flagman at the crossing was necessary is not competent evidence of due care on the part of the railroad company in an action for injuries occasioned by its locomotive at a place where the county commissioners had authorized the company upon certain conditions to cross upon a level. Shaw *v.* Boston, etc., R. Co., 8 Gray (Mass.) 45.

Testimony showing the danger of the crossing and its locality and use in a populous locality is proper to be submitted to the jury under a guarded instruction as bearing upon the question of negligence of the company in not providing flagman or gates at such crossing to protect travelers. English *v.* Southern Pac. R. Co., 13 Utah 407, 45 Pac. 47, 57 Am. St. Rep. 772, 35 L. R. A. 155.

82. New York, etc., R. Co. *v.* Luebeck, 157 Ill. 595, 41 N. E. 897 [*affirming* 54 Ill. App. 551]; Cohen *v.* Chicago, etc., R. Co., 104 Ill. App. 314; Cleveland, etc., R. Co. *v.* Chinsky, 92 Ill. App. 50; Davis *v.* Pennsylvania R. Co., 34 Pa. Super. Ct. 388; Christensen *v.* Oregon Short Line R. Co., 29 Utah 192, 80 Pac. 746; English *v.* Southern Pac. R. Co., 13 Utah 407, 45 Pac. 47, 57 Am. St. Rep. 772, 35 L. R. A. 155.

83. Shaber *v.* St. Paul, etc., R. Co., 28 Minn. 103, 9 N. W. 575; Heddles *v.* Chicago, etc., R. Co., 77 Wis. 228, 46 N. W. 115, 20 Am. St. Rep. 106.

84. Easley *v.* Missouri Pac. R. Co., 113 Mo. 236, 20 S. W. 1073, holding that, where

nals [85] at the crossing in question, although the railroad company is under no legal duty to provide such safeguards.[86]

(H) *Lights, Signals, and Lookouts From Trains.*[87] For the same purpose proof of any fact otherwise competent is admissible which tends to show that the train in question did not at the time and place of the accident display the proper lights,[88] or give the proper signals,[89] or that the employees in charge of the

plaintiff is injured at night by the alleged negligent operation of a train at a public crossing, it is not error to admit evidence that there was no light about the place since this fact is part of the *res gestæ*.

A **municipal ordinance** requiring railroad companies to provide lights where the streets cross railroads is admissible in evidence. Missouri, etc., R. Co. *v.* Matherly, 35 Tex. Civ. App. 604, 81 S. W. 589.

Evidence as to how lights were maintained at other crossings is inadmissible. Missouri, etc., R. Co. *v.* Matherly, 35 Tex. Civ. App. 604, 81 S. W. 589.

85. Cleveland, etc., R. Co. *v.* Coffman, 30 Ind. App. 462, 64 N. E. 233, 66 N. E. 179.

Want of repair.— Evidence that an automatic gong or bell which had been maintained at a crossing was allowed to be out of repair at the time of the accident is admissible as tending to show negligence. Cleveland, etc., R. Co. *v.* Coffman, 30 Ind. App. 462, 64 N. E. 233, 66 N. E. 179; Henn *v.* Long Island R. Co., 51 N. Y. App. Div. 292, 65 N. Y. Suppl. 21.

Evidence that the operation of an automatic bell was intermittent, at times ringing for one train and not ringing for the next, is admissible in rebuttal of testimony that it was in working order at the time of the accident. Metcalf *v.* Central Vermont R. Co., 78 Conn. 614, 63 Atl. 633.

Evidence that the railroad company maintained electric signals at other crossings is inadmissible to show negligence in not maintaining such signals at the scene of the accident. McGovern *v.* Smith, 73 Vt. 52, 50 Atl. 549.

86. Shaber *v.* St. Paul, etc., R. Co., 28 Minn. 103, 9 N. W. 575; Harrington *v.* Erie R. Co., 79 N. Y. App. Div. 26, 79 N. Y. Suppl. 930; Friess *v.* New York Cent., etc., R. Co., 67 Hun (N. Y.) 205, 22 N. Y. Suppl. 104 [*affirmed* in 140 N. Y. 639, 39 N. E. 892]; Carrow *v.* Barre R. Co., 74 Vt. 176, 52 Atl. 737; Hoye *v.* Chicago, etc., R. Co., 67 Wis. 1, 29 N. W. 646.

87. **Other acts of negligence** see *supra*, X, F, 14, e, (II), (C).

88. Matteson *v.* Southern Pac. R. Co., 6 Cal. App. 318, 92 Pac. 101, holding that, in an action for the death of a pedestrian struck by a backing train at a crossing, evidence as to whether or not there was a lantern on the end of the train is admissible.

89. Osteen *v.* Southern R. Co., 76 S. C. 368, 57 S. E. 196 (holding that, although plaintiff's intestate who was killed at a railroad crossing was hard of hearing, it is proper to admit evidence that no signals were given at the crossing); Davis *v.* Southern R. Co., 68 S. C. 446, 47 S. E. 723; McDonald *v.* International, etc., R. Co., (Tex. Civ. App. 1892) 20 S. W. 847 (holding that evidence of a failure to ring the bell or blow the whistle is admissible, although the person injured was aware of the presence of the train).

An ordinance requiring persons in charge of trains while passing through a city to sound the bell on approaching any street crossing and keep it ringing until the crossing is passed and making a violation thereof a misdemeanor is admissible in an action for personal injuries alleged to have resulted from the violation of the ordinance. Reed *v.* St. Louis, etc., R. Co., 107 Mo. App. 238, 80 S. W. 919.

Rules of the railroad company requiring a bell to be rung for a certain distance before reaching a crossing are admissible on the question whether such precaution was reasonably necessary and whether a failure to ring the bell was negligence on the part of the company. Hecker *v.* Oregon R. Co., 40 Oreg. 6, 66 Pac. 270.

Evidence that plaintiff saw others crossing between the cars before him is admissible in an action for an injury sustained while attempting to pass between the cars of a train standing on a street crossing, for the purpose of showing defendant's negligence in starting the train without warning. Schmitz *v.* St. Louis, etc., R. Co., 119 Mo. 256, 24 S. W. 472, 23 L. R. A. 250; Burger *v.* Missouri Pac. R. Co., 112 Mo. 238, 20 S. W. 439, 34 Am. St. Rep. 379; Weaver *v.* Southern R. Co., 76 S. C. 49, 56 S. E. 657, 121 Am. St. Rep. 934.

Where defendant's failure to sound a whistle could not have contributed to the accident, evidence of such failure is inadmissible. Ohio Valley R. Co. *v.* Young, 39 S. W. 415, 19 Ky. L. Rep. 158.

In rebuttal of evidence that the proper signals were given at the whistling post, required by statute (Mo. Rev. St. (1899) § 1102) to be eighty rods from the crossing, evidence is admissible that the post was nearly one hundred and sixty rods and not eighty rods from the crossing. Walker *v.* Wabash R. Co., 193 Mo. 453, 92 S. W. 83.

Evidence of the engineer and fireman that they thought the whistle was sounded when the train approached a public crossing near a private one is inadmissible, in an action for the death of plaintiff's intestate at the private crossing, where the engineer and fireman admitted that they did not remember about it. Chesapeake, etc., R. Co. *v.* Wilson, 102 S. W. 810, 31 Ky. L. Rep. 500.

Testimony as to what kind of whistle was blown at the whistling post is admissible in a railroad crossing collision case. Southern R. Co. *v.* Hobbs, 151 Ala. 335, 43 So. 844.

train failed to keep a proper lookout.[90] For the purpose of showing that proper signals were not given the testimony of a person who at the time of the accident was in close proximity to the train and crossing, to the effect that he heard no signals, is evidence tending to prove that fact,[91] although the witness cannot say positively that they were not given,[92] as where he testifies that at the time of the accident he was near the crossing but did not hear any bell or whistle and that in his opinion if the signals had been given they could have been heard by him.[93] Evidence as to defendant's custom or habit in giving signals at that crossing is inadmissible on the question whether the signals were in fact given at the time,[94] although it is admissible for the purpose of showing that by giving them it has recognized the crossing as public, and that it was its duty to give signals at that crossing.[95] As tending to show that the proper signals were given at the time of the accident, or to excuse a failure to give the same, defendant may introduce any competent evidence,[96] as that the engine was constructed with an automatic bell-ringing device which was in operation, so that the bell rang for such distance before reaching the crossing as to be within plaintiff's hearing if he had been listening;[97] or it may introduce in evidence an ordinance prohibiting the use of a bell or whistle at the crossing in question,[98] or a rule of the company requiring the engine bell to be rung at certain times and places;[99] but testimony of

90. Chicago, etc., R. Co. *v.* Mayer, 112 Ill. App. 149; Arrowood *v.* South Carolina, etc., R. Co., 126 N. C. 629, 36 S. E. 151, holding that the testimony of the engineer that he could have seen deceased if he had made an effort to obtain a view of the track, and that failing to make the effort he did not see him, is competent evidence to go to the jury in behalf of plaintiff as showing that the engineer failed in his duty to observe deceased.

91. Chicago, etc., R. Co. *v.* Pulliam, 111 Ill. App. 305 [*affirmed* in 208 Ill. 456, 70 N. E. 460]; McDonald *v.* New York Cent., etc., R. Co., 186 Mass. 474, 72 N. E. 55; Walsh *v.* Boston, etc., R. Co., 171 Mass. 52, 50 N. E. 453; E. B. Clarke Co. *v.* Baltimore, etc., R. Co., 27 Pa. Super. Ct. 251.

A witness at work three quarters of a mile from a railroad crossing who testifies that he heard the whistle every day previously and that on the day of the accident the wind was blowing in his direction from the crossing may testify that no signals which he heard were given on the day of the accident. Sanborn *v.* Detroit, etc., R. Co., 99 Mich. 1, 57 N. W. 1047.

In rebuttal of the theory that on account of certain noises the witness might not have heard the signals, it is permissible for him to testify that prior to the accident with the same noises around he had heard the signals. Southern R. Co. *v.* Douglass, 144 Ala. 351, 39 So. 268.

Testimony of plaintiff that he had previously crossed at the same place and heard the signals given is admissible as tending to show that his hearing was good enough to detect the signal if it had been given at the time of the accident, but not as tending to show negligence in that respect at the time complained of. St. Louis, etc., R. Co. *v.* Mitchell, 25 Tex. Civ. App. 197, 60 S. W. 891.

92. Walsh *v.* Boston, etc., R. Co., 171 Mass. 52, 50 N. E. 453.

93. Chicago, etc., R. Co. *v.* Dillon, 123 Ill. 570, 15 N. E. 181, 5 Am. St. Rep. 559 [*affirming* 24 Ill. App. 203]; Cleveland, etc., R. Co. *v.* Beard, 106 Ill. App. 486.

94. Chicago, etc., R. Co. *v.* Downey, 85 Ill. App. 175; Gulf, etc., R. Co. *v.* Garrett, (Tex. Civ. App. 1906) 99 S. W. 162; Stewart *v.* Galveston, etc., R. Co., 34 Tex. Civ. App. 370, 78 S. W. 979.

95. Chicago, etc., R. Co. *v.* Downey, 85 Ill. App. 175; Gurley *v.* Missouri Pac. R. Co., 122 Mo. 141, 26 S. W. 953; Galveston, etc., R. Co. *v.* Eaten, (Tex. Civ. App. 1898) 44 S. W. 562. See also International, etc., R. Co. *v.* Kuehn, 2 Tex. Civ. App. 210, 21 S. W. 58; Gray *v.* North Eastern R. Co., 48 L. T. Rep. N. S. 904.

96. See Dolph *v.* New York, etc., R. Co., 74 Conn. 438, 51 Atl. 525.

To reinforce the accuracy of his recollection as to the giving of signals, a witness may be allowed to state that he made a remark at the time about the occurrence he is testifying to but not what his remark was. Dolph *v.* New York, etc., R. Co., 74 Conn. 438, 51 Atl. 525.

Evidence to show the points on the track at which signals were usually given is admissible where there is previous testimony that the usual signals were given before deceased was struck by the train. Galveston, etc., R. Co. *v.* Harris, (Tex. Civ. App. 1896) 36 S. W. 776.

Evidence of a failure to sound the whistle at any other crossing than that at which the injury occurred is inadmissible. Stewart *v.* North Carolina, etc., R. Co., 136 N. C. 385, 48 S. E. 793.

97. Threlkeld *v.* Wabash R. Co., 68 Mo. App. 127.

98. Pennsylvania Co. *v.* Hensil, 70 Ind. 569, 36 Am. Rep. 188.

99. Minot *v.* Boston, etc., R. Co., 73 N. H. 317, 61 Atl. 509, holding that a rule of a railroad company requiring a bell to be rung when the engine is about to move is admissi-

the engineer and fireman that it was their habit or custom to ring the bell and blow the whistle at the place where the accident occurred is inadmissible.[1]

(I) *Rate of Speed.*[2] While the high or unusual speed of a railroad train does not of itself constitute negligence, evidence of such fact is admissible as a circumstance in determining whether or not the railroad company was negligent in the particular instance.[3] As a circumstance tending to show whether or not a train was run at a negligent rate of speed at the time of the accident, evidence is admissible that the crossing was in a populous neighborhood and that a large number of people continually used it,[4] or that it was little used by the public to the knowledge of the railroad company,[5] or to show the grade of the track at or near the crossing,[6] or what the speed was on the company's property just before reaching the crossing.[7] In connection with other testimony evidence is also admissible of ordinances regulating the rate of speed at which trains shall pass a crossing,[8] as is also a contract of the railroad company with a city under which it obtains the grant of its right of way, and which regulates the speed at which trains shall run through the city.[9]

(J) *Contributory Negligence* — (1) IN GENERAL. Upon the question of contributory negligence on the part of one who is injured at a railroad crossing, it is competent to show, in addition to the difficulty of perceiving danger,[10] all the

ble for the purpose of establishing the precautions required.

1. Texas, etc., R. Co. *v.* Frank, 40 Tex. Civ. App. 86, 88 S. W. 383.

2. **Other acts of negligence** see *supra*, X, F, 14, e, (II), (C).

Opinion of ordinary observer as to rate of speed generally see EVIDENCE, 17 Cyc. 106 text and note 94.

3. Artz *v.* Chicago, etc., R. Co., 44 Iowa 284; McDonald *v.* International, etc., R. Co., (Tex. Civ. App. 1892) 20 S. W. 847; Olson *v.* Oregon Short Line R. Co., 24 Utah 460, 68 Pac. 148, holding that in an action for death from a collision on a dark night on a crossing exclusively used as a thoroughfare and somewhat obscured by trees preventing the train from being seen, evidence as to the speed of the train is admissible.

Where the speed of a train is shown by a train record made by the conductor at the time, as at a certain rate per hour, testimony of a witness that the train was running very fast but not fixing any standard by which the speed could be estimated is immaterial. Keiser *v.* Lehigh Valley R. Co., 212 Pa. St. 409, 61 Atl. 903, 108 Am. St. Rep. 872.

4. Louisville, etc., R. Co. *v.* Orr, 121 Ala. 489, 26 So. 35; Overtoom *v.* Chicago, etc., R. Co., 181 Ill. 323, 54 N. E. 898 [*reversing* 80 Ill. App. 515]; Olson *v.* Oregon Short Line R. Co., 24 Utah 460, 68 Pac. 148.

5. Lake Shore, etc., R. Co. *v.* Reynolds, 21 Ohio Cir. Ct. 402, 11 Ohio Cir. Dec. 701.

6. San Antonio, etc., R. Co. *v.* Bowles, (Tex. Civ. App. 1895) 30 S. W. 89.

7. Savannah, etc., R. Co. *v.* Flannagan, 82 Ga. 579, 9 S. E. 471, 14 Am. St. Rep. 183; Galveston, etc., R. Co. *v.* Murray, (Tex. Civ. App. 1906) 99 S. W. 144, holding that testimony as to the speed of the train between different stations when nearing the point where the accident occurred is admissible as circumstantial evidence tending to show the rate of speed at the time of the accident.

8. Western, etc., R. Co. *v.* Meigs, 74 Ga. 857; St. Louis, etc., R. Co. *v.* Mathias, 50 Ind. 65; Duval *v.* Atlantic, etc., R. Co., 134 N. C. 331, 46 S. E. 750, 101 Am. St. Rep. 830, 65 L. R. A. 722; Southern R. Co. *v.* Stockdon, 106 Va. 693, 56 S. E. 713, holding that an ordinance is admissible even though by law it was only open for inspection to the voters of the town.

An ordinance making it a penal offense to run an engine or train at greater than a certain rate of speed over a certain crossing is admissible. Beisegel *v.* New York Cent. R. Co., 14 Abb. Pr. N. S. (N. Y.) 29; Missouri, etc., R. Co. *v.* Reynolds, (Tex. Civ. App. 1894) 26 S. W. 879.

Ordinance in violation of statute.— Where, after the passage of an ordinance limiting the speed of trains within a city to a certain rate, an act of the legislature prohibits the passage of an ordinance limiting the rate of speed to less than a higher rate than that prescribed by the ordinance, the ordinance is inadmissible in evidence; but plaintiff may nevertheless show that the company was negligent, although running its train at less than the rate of speed allowed by statute. Chicago, etc., R. Co. *v.* Dougherty, 12 Ill. App. 181.

An ordinance limiting the speed of trains within certain specified limits which does not include the place where the accident occurred is not competent evidence. Calligan *v.* New York Cent., etc., R. Co., 59 N. Y. 651.

9. Duval *v.* Atlantic, etc., Coast Line R. Co., 134 N. C. 331, 46 S. E. 750, 101 Am. St. Rep. 830, 65 L. R. A. 722.

10. McSorley *v.* New York Cent., etc., R. Co., 60 N. Y. App. Div. 267, 70 N. Y. Suppl. 10.

Other acts.—Evidence tending to show that on other occasions, when the train was being backed toward the crossing in the same manner as when the accident occurred, travelers approaching the crossing as did decedent could not or might not hear the train until they

surrounding circumstances and conditions under which the person injured acted at the time of the accident,[11] and everything relating to the highway as a thoroughfare,[12] the extent of travel upon it,[13] and whether at that point many persons were obliged to cross at all times of the day.[14] It is competent to show whether the gates at the crossing were up or down,[15] whether a flagman was stationed were almost upon it, is competent on the question of the negligence of decedent. Newstrom *v.* St. Paul, etc., R. Co., 61 Minn. 78, 63 N. W. 253.

The dazzling effect of the headlight on another train facing the person injured as he approached the track may be shown. Shaber *v.* St. Paul, etc., R. Co., 28 Minn. 103, 9 N. W. 575 (holding that it is competent to show how long the eye requires after looking at a brilliant light to recover its natural power of sight); Weller *v.* Chicago, etc., R. Co., 164 Mo. 180, 64 S. W. 141, 86 Am. St. Rep. 592.

Evidence of a statement by plaintiff that he did not observe the train until he was struck in contradiction of his testimony is admissible as bearing on his credibility and contributory negligence. De Jong *v.* Erie R. Co., 43 N. Y. App. Div. 427, 60 N. Y. Suppl. 125.

11. Southern R. Co. *v.* Hobbs, 151 Ala. 335, 43 So. 844; Chicago, etc., R. Co. *v.* Gunderson, 174 Ill. 495, 51 N. E. 708 [*affirming* 74 Ill. App. 356]; Chicago, etc., R. Co. *v.* Pearson, 82 Ill. App. 605; Tyler *v.* Concord, etc., R. Co., 68 N. H. 331, 44 Atl. 524 (evidence showing that the person injured, a deaf man, misunderstood the signals); McSorley *v.* New York Cent., etc., R. Co., 60 N. Y. App. Div. 267, 70 N. Y. Suppl. 10.

Evidence held admissible see Cincinnati, etc., R. Co. *v.* Howard, 124 Ind. 280, 24 N. E. 892, 19 Am. St. Rep. 96, 8 L. R. A. 593 (that no whistle was sounded when the train passed the crossing a mile distant from the one on which the accident occurred; that the person driving plaintiff's buggy was "a safe hand"; and that they were on their way to church when the accident occurred); Chicago, etc., R. Co. *v.* Russell, 72 Nebr. 114, 100 N. W. 156 (that plaintiff saw others crossing through an opening between the cars, and that it was the custom of the company to leave openings of similar character); Thomasson *v.* Southern R. Co., 72 S. C. 1, 51 S. E. 443 (that plaintiff and others were laborers who had gone home for dinner and had only a few minutes to return to their work and that plaintiff's foot was crushed while attempting to pass between standing cars); International, etc., R. Co. *v.* Ives, 31 Tex. Civ. App. 272, 71 S. W. 772.

Evidence held inadmissible see Williams *v.* Southern R. Co., 68 S. C. 369, 47 S. E. 706, holding that evidence as to other boys playing on the crossing is incompetent in an action for killing a minor.

Evidence that the person injured was in the habit of jumping on moving trains in that vicinity is admissible in an action defended on the theory that the person was contributorily negligent in jumping on a moving train, and where the evidence as to how the accident occurred is conflicting. Pittsburgh, etc., R. Co. *v.* McNeil, (Ind. App. 1903) 66 N. E. 777.

That the person injured was not driving at the time is proper to be considered in determining whether she was negligent in not alighting from the wagon and going forward to see if a train was approaching. Kansas City, etc., R. Co. *v.* Weeks, 135 Ala. 614, 34 So. 16.

Defective crossing.— Evidence that other crossings in the town were also in a bad condition on the day of the accident is admissible in an action for injuries caused by a defective crossing to show why plaintiff who knew of the condition of the crossing before he attempted to cross did not cross the track at some other place. Galveston, etc., R. Co. *v.* Matula, (Tex. 1892) 19 S. W. 376. Likewise evidence of the existence of another crossing near at hand, which is reasonably accessible to plaintiff, is admissible to show contributory negligence in using a defective crossing. Harper *v.* Missouri Pac. R. Co., 70 Mo. App. 604.

Rules of the company relating to the rate of speed permitted at the place where the accident occurred, and as to the duty of brakemen being ready to act instantly, are competent on the question of plaintiff's care in attempting to cross the tracks. Davis *v.* Concord, etc., R. Co., 68 N. H. 247, 44 Atl. 388.

Experiments.— Evidence of experiments carefully made to ascertain how long it will take a team of horses to walk from a certain fixed and well-known point to the crossing is admissible where the main controversy is as to the contributory negligence of plaintiff's employee in approaching a crossing with a team; the point being well known and permanent and the experiments made by timing an approaching train with a stop watch, and a team of horses walking from the point to the place where the accident occurred. Nosler *v.* Chicago, etc., R. Co., 73 Iowa 268, 34 N. W. 850 [*distinguishing* Klanowski *v.* Grand Trunk R. Co., 64 Mich. 279, 31 N. W. 275]. Experiments as evidence generally see EVIDENCE, 17 Cyc. 283.

Evidence to show at what points the train could have been seen if plaintiff had looked so as to determine whether or not he might have avoided the collision is admissible. Southern R. Co. *v.* Hobbs, 151 Ala. 335, 43 So. 844.

12. McSorley *v.* New York Cent., etc., R. Co., 60 N. Y. App. Div. 267, 70 N. Y. Suppl. 10.

13. McSorley *v.* New York Cent., etc., R. Co., 60 N. Y. App. Div. 267, 70 N. Y. Suppl. 10.

14. McSorley *v.* New York Cent., etc., R. Co., 60 N. Y. App. Div. 267, 70 N. Y. Suppl. 10.

15. Overtoom *v.* Chicago, etc., R. Co., 181

there a short time before the accident,[16] or whether or not there were gates at the crossing;[17] or to show the custom and habits of the flagman at the crossing in giving signals to those about to cross,[18] to show the rate of speed of the train,[19] or that the proper signals were not given,[20] and that other trains passing the crossing at or about the same time had all given the required signals,[21] except where plaintiff's own evidence discloses contributory negligence.[22] But it is not competent to show a custom of people to crawl under cars blockading the crossing,[23] or to show a custom of the company, subsequent to the collision, to blow the whistle at such crossing.[24] As tending to repel any inference of contributory negligence arising from the fact that the person injured was on the track and was struck, it is competent to show that such person was of careful and sober habits,[25] and that he had previously been in the habit of exercising due care in passing over the crossing,[26] except where there is an eye-witness of the occurrence, and there is direct evidence of the conduct of the person injured at the time of the accident.[27]

(2) KNOWLEDGE OF DANGER OR METHODS OF OPERATION. Evidence tending to show that the person injured had knowledge of the danger in crossing,[28] such

Ill. 323, 54 N. E. 898 [*reversing* 80 Ill. App. 515], holding that a witness who had crossed shortly ahead of deceased may testify whether the gates were up or down when he crossed.

16. Wilbur *v.* Delaware, etc., R. Co., 85 Hun (N. Y.) 155, 32 N. Y. Suppl. 479, where there is no flagman at the crossing at the time of the accident.

17. Cohen *v.* Chicago, etc., R. Co., 104 Ill. App. 314.

18. Lingreen *v.* Illinois Cent. R. Co., 61 Ill. App. 174.

19. Line *v.* Grand Rapids, etc., R. Co., 143 Mich. 163, 106 N. W. 719; McDonald *v.* International, etc., R. Co., (Tex. Civ. App. 1892) 20 S. W. 847. See also International, etc., R. Co. *v.* Kuehn, 2 Tex. Civ. App. 210, 21 S. W. 58.

20. Covell *v.* Wabash R. Co., 82 Mo. App. 180, holding that where an injury occurred at a crossing in the heart of a city evidence that no whistle was sounded is admissible, although there was no city ordinance or statute requiring the whistle to be sounded.

21. Galveston, etc., R. Co. *v.* Garteiser, 9 Tex. Civ. App. 456, 29 S. W. 939.

22. Philadelphia, etc., R. Co. *v.* Holden, 93 Md. 417, 49 Atl. 625, holding that where it is shown that the person injured knew the regular hours for running the trains, and went on the track at a private crossing, the view of which was obstructed, without looking and listening, the failure to give the required signals at a public crossing which might have been heard at the private crossing is not admissible upon the question of plaintiff's contributory negligence. See also Aiken *v.* Pennsylvania R. Co., 130 Pa. St. 380, 18 Atl. 619, 17 Am. St. Rep. 775.

23. Rumpel *v.* Oregon Short Line, etc., R. Co., 4 Ida. 13, 35 Pac. 700, 22 L. R. A. 725.

24. Southern R. Co. *v.* Simpson, 131 Fed. 705, 65 C. C. A. 563, holding this to be true where the railroad company was not required by statute (Shannon Code, § 1574) to blow the whistle or ring the bell at the crossing at which plaintiff was injured.

25. Chicago, etc., R. Co. *v.* Gunderson, 174 Ill. 495, 51 N. E. 708 [*affirming* 74 Ill. App. 356]; Cleveland, etc., R. Co. *v.* Moss, 89 Ill. App. 1; Indiana, etc., R. Co. *v.* Koons, 72 Ill. App. 497; Missouri Pac. R. Co. *v.* Moffatt, 60 Kan. 113, 55 Pac. 837, 72 Am. St. Rep. 343.

Evidence that when deceased was picked up his breath smelled of liquor, that he had drunk beer shortly before the injury, and was drunk between eleven and twelve o'clock of the day on which he was injured is admissible (Wabash R. Co. *v.* Prast, 101 Ill. App. 167), but not that he drank after the accident (Crowder *v.* St. Louis, etc., R. Co., 39 Tex. Civ. App. 314, 87 S. W. 166).

Such testimony is admissible only as a matter of necessity in the absence of better proof. Indiana, etc., R. Co. *v.* Koons, 72 Ill. App. 497.

26. Missouri Pac. R. Co. *v.* Moffatt, 60 Kan. 113, 55 Pac. 837, 72 Am. St. Rep. 343; Tucker *v.* Boston, etc., R. Co., 73 N. H. 132, 59 Atl. 943; Stone *v.* Boston, etc., R. Co., 72 N. H. 206, 55 Atl. 359 (that in passing the crossing on previous occasions deceased had remarked upon its dangerous character and taken precautions against collision); Smith *v.* Boston, etc., R. Co., 70 N. H. 53, 47 Atl. 290, 85 Am. St. Rep. 596 (habit for many years of checking his horse and looking and listening for trains at that crossing). *Compare* Louisville, etc., R. Co. *v.* Taylor, 104 S. W. 776, 31 Ky. L. Rep. 1142, holding that evidence that deceased was by custom reckless in driving across the railroad is not admissible.

Evidence to show contributory negligence. — On the other hand it has been held that evidence is not admissible to show that plaintiff had been guilty of a similar act of negligence or habitually negligent upon similar occasions. Wheeling, etc., R. Co. *v.* Parker, 29 Ohio Cir. Ct. 1; International, etc., R. Co. *v.* Ives, 31 Tex. Civ. App. 272, 71 S. W. 772; Delaware, etc., R. Co. *v.* Converse, 139 U. S. 469, 11 S. Ct. 569, 35 L. ed. 213.

27. Cleveland, etc., R. Co. *v.* Moss, 89 Ill. App. 1; Indiana, etc., R. Co. *v.* Koons, 72 Ill. App. 497; Minot *v.* Boston, etc., R. Co., 73 N. H. 317, 61 Atl. 509; Tucker *v.* Boston, etc., R. Co., 73 N. H. 132, 59 Atl. 943.

28. Wheeling, etc., R. Co. *v.* Parker, 29

as that he was in the habit of crossing over the track at that place frequently,[29] and had knowledge of the maintenance of gates and the presence of a flagman at the time,[30] or of the customary manner of operating trains,[31] or of an ordinance regulating the running of trains [32] at that place is admissible upon the question of contributory negligence. But it has been held that evidence to show general knowledge on the part of the public as to the danger in crossing where plaintiff was injured is inadmissible.[33]

(3) PERSONS UNDER DISABILITY. It is also competent to show as one of the circumstances bearing on the question of contributory negligence, that at the time of the accident the person injured was under some disability, as that he was partially deaf,[34] or was drunk,[35] but not that he was given to the habit of intoxication.[36]

(III) *WEIGHT AND SUFFICIENCY OF EVIDENCE* [37]— (A) *In General.* The weight and sufficiency of evidence in actions for injuries at railroad crossings is controlled by the rules of evidence governing in civil actions generally; [38] and

Ohio Cir. Ct. 1; Carraway *v.* Houston, etc., R. Co., 31 Tex. Civ. App. 184, 71 S. W. 769, holding that testimony of plaintiff whose team, which he was driving, was struck at a railroad crossing in a town by a rapidly moving train, that he was frequently in the town and was familiar with the usual speed of trains therein is admissible in connection with an ordinance regulating the running of trains, on the question of contributory negligence.

Defective crossing.— Evidence of proceedings of the county commissioners relative to the construction of a retaining wall near the highway which were taken at plaintiff's instance is admissible to show his knowledge of the condition of the highway. Seybold *v.* Terre Haute, etc., R. Co., 18 Ind. App. 367, 46 N. E. 1054.

Evidence too vague and indefinite to show that plaintiff had notice of the location of the crossing see Stewart *v.* Long Island R. Co., 54 N. Y. App. Div. 623, 66 N. Y. Suppl. 436 [*affirmed* in 166 N. Y. 604, 59 N. E. 1130].

Contradictory testimony.— Evidence that the person injured was not familiar with the danger incident to crossing between cars is inadmissible where he testifies that he would not have attempted to cross if the brakeman had not assured him that he had plenty of time. Scott *v.* St. Louis, etc., R. Co., 112 Iowa 54, 83 N. W. 818.

29. Chicago, etc., R. Co. *v.* Notzki, 66 Ill. 455.

30. Illinois Cent. R. Co. *v.* Bartle, 94 Ill. App. 57.

Evidence that a flagman customarily stationed at the crossing had been withdrawn without the injured person's knowledge is admissible. Pittsburgh, etc., R. Co. *v.* Yundt, 78 Ind. 373, 41 Am. Rep. 580.

Custom.— Where it is pertinent to determine how far plaintiff might have been influenced in his conduct by the fact that crossing gates were frequently permitted to remain closed at a time when trains were not passing or about to pass, it is competent to show such occasions when the gates were so left down which came to the knowledge of plaintiff either by personal observation or by information received from others; but it is not competent to show any occasion when such gates were so left down of which plaintiff had no knowledge either personal or by hearsay prior to the injury to him. Chicago, etc., R. Co. *v.* Keegan, 112 Ill. App. 338.

31. Chicago, etc., R. Co. *v.* Natzki, 66 Ill. 455; International, etc., R. Co. *v.* Eason, (Tex. Civ. App. 1896) 35 S. W. 208.

32. Moore *v.* Chicago, etc., R. Co., 102 Iowa 595, 71 N. W. 569.

33. Savannah, etc., R. Co. *v.* Evans, 121 Ga. 391, 49 S. E. 308.

34. Cleveland, etc., R. Co. *v.* Terry, 8 Ohio St. 570.

35. Illinois Cent. R. Co. *v.* Cragin, 71 Ill. 177, holding that the testimony of a surgeon who saw the injured person immediately after the accident that he was then grossly intoxicated is competent as tending to show contributory negligence.

36. Lane *v.* Missouri Pac. R. Co., 132 Mo. 4, 33 S. W. 645, 1128.

37. **As raising question for court or jury** see *infra*, X, F, 14, g.

Degree of proof see *supra*, X, F, 14, e, (I).

38. See, generally, EVIDENCE, 17 Cyc. 753 *et seq.*

Evidence held sufficient in an action for injuries at a crossing: To sustain a verdict or finding for plaintiff. Southern R. Co. *v.* Douglass, 144 Ala. 351, 39 So. 268; Jonesboro, etc., R. Co. *v.* Moody, (Ark. 1907) 102 S. W. 375; St. Louis, etc., R. Co. *v.* Evans, 80 Ark. 19, 96 S. W. 616; Zipperlen *v.* Southern Pac. Co., 7 Cal. App. 206, 93 Pac. 1049; Georgia Cent. R. Co. *v.* North, 129 Ga. 106, 58 S. E. 647; Southern R. Co. *v.* King, 128 Ga. 383, 57 S. E. 687, 11 L. R. A. N. S. 829; Cleveland, etc., R. Co. *v.* Stewart, 161 Ind. 242, 68 N. E. 170; Pence *v.* Chicago, etc., R. Co., 79 Iowa 389, 44 N. W. 686; Holmes *v.* Missouri Pac. R. Co., 207 Mo. 149, 105 S. W. 624 (on the issue of defendant's negligence); Chicago, etc., R. Co. *v.* Russell, 72 Nebr. 114, 100 N. W. 156; Sayer *v.* King, 21 N. Y. App. Div. 624, 47 N. Y. Suppl. 420; Bennett *v.* New York Cent., etc., R. Co., 16 N. Y. Suppl. 765 [*affirmed* in 133 N. Y. 563, 30 N. E. 1149]; Corrigan *v.* Pennsylvania Co., 218 Pa. St. 336, 67 Atl. 619; Byron *v.* New Jersey Cent. R. Co., 215 Pa. St. 82, 64 Atl. 328;

these rules apply to evidence in actions for injuries caused by defects or obstructions,[39] excessive or unlawful speed,[40] or by negligence in maintaining signals,

McCarthy *v.* Philadelphia, etc., R. Co., 211 Pa. St. 193, 60 Atl. 778; Nashville, etc., R. Co. *v.* Lawson, 105 Tenn. 639, 58 S. W. 480; Galveston, etc., R. Co. *v.* Matula, 79 Tex. 577, 15 S. W. 573, 19 S. W. 376; Gulf, etc., R. Co. *v.* Holland, 27 Tex. Civ. App. 397, 66 S. W. 68. For injuries caused by horses taking fright at a box car standing on the highway at a crossing. Cleveland, etc., R. Co. *v.* Wynant, 134 Ind. 681, 34 N. E. 569. For death of plaintiff's intestate. Georgia Cent. R. Co. *v.* Henson, 121 Ga. 462, 49 S. E. 278; Emmons *v.* Minneapolis, etc., R. Co., 92 Minn. 521, 100 N. W. 364; Towns *v.* Rome, etc., R. Co., 4 Silv. Sup. (N. Y.) 332, 8 N. Y. Suppl. 137 [*affirmed* in 124 N. Y. 642, 27 N. E. 412]. To sustain a finding that the air-brakes were defective, and that defendant was guilty of negligence under Shannon Code Tenn. §§ 1574, 1575. Chattanooga Rapid Transit Co. *v.* Walton, 105 Tenn. 415, 58 S. W. 737. To justify a finding that after defendant's employees discovered plaintiff's peril they failed to do all in their power to prevent a collision. Central Texas, etc., R. Co. *v.* Gibson, (Tex. Civ. App. 1904) 83 S. W. 862. To show that the operatives of the engine saw plaintiff crossing the track, and were guilty of negligence in operating the engine at the time, by reason of which plaintiff's team was frightened and ran away. St. Louis Southwestern R. Co. *v.* Moore, (Tex. Civ. App. 1908) 107 S. W. 658. To justify a finding that defendant was otherwise negligent. Pittsburg, etc., R. Co. *v.* Robson, 204 Ill. 254, 68 N. E. 468; Chesapeake, etc., R. Co. *v.* Clark, 74 S. W. 705, 25 Ky. L. Rep. 150; Hinchman *v.* Pere Marquette, 136 Mich. 341, 99 N. W. 277, 65 L. R. A. 553; Kelly *v.* St. Paul, etc., R. Co., 29 Minn. 1, 11 N. W. 67; Shaber *v.* St. Paul, etc., R. Co., 28 Minn. 103, 9 N. W. 575; Chicago, etc., R. Co. *v.* Starmer, 26 Nebr. 630, 42 N. W. 706; McAuliffe *v.* New York Cent., etc., R. Co., 88 N. Y. App. Div. 356, 84 N. Y. Suppl. 607 [*affirmed* in 181 N. Y. 537, 73 N. E. 1126]; Daubert *v.* Delaware, etc., R. Co., 199 Pa. St. 345, 49 Atl. 72; International, etc., R. Co. *v.* Dalwigh, (Tex. Civ. App. 1898) 48 S. W. 527; Heath *v.* Stewart, 90 Wis. 418, 63 N. W. 1051; McLeod *v.* Windsor, etc., R. Co., 23 Nova Scotia 69.

Evidence held insufficient: To sustain a verdict or finding for plaintiff. Southern R. Co. *v.* Mouchet, 3 Ga. App. 266, 59 S. E. 927; Chicago, etc., R. Co. *v.* Roberts, 72 Nebr. 539, 101 N. W. 2; Schooler *v.* New York Cent., etc., R. Co., 80 N. Y. Suppl. 800; Grant *v.* Philadelphia, etc., R. Co., 215 Pa. St. 265, 64 Atl. 463; Connor *v.* New York, etc., R. Co., 28 R. I. 560, 68 Atl. 481; Chicago, etc., R. Co. *v.* Clarkson, 147 Fed. 397, 77 C. C. A. 575; Church *v.* Northern Pac. R. Co., 31 Fed. 529. To show negligence on the part of defendant. Keller *v.* Philadelphia, etc., R. Co., 214 Pa. St. 82, 63 Atl. 413; Houston, etc., R. Co. *v.* Carruth, (Tex. Civ. App. 1899) 50 S. W. 1036; Martin *v.* Richmond, etc., R. Co., 101 Va. 406, 44 S. E. 695. To justify a finding of actionable negligence notwithstanding plaintiff's contributory negligence. Sosnofski *v.* Lake Shore, etc., R. Co., 134 Mich. 72, 95 N. W. 1077. To show that the engineer did not stop the train as soon as he reasonably might have stopped it after being warned. Hummer *v.* Lehigh Valley R. Co., (N. J. 1907) 67 Atl. 1061.

Evidence held sufficient on demurrer to evidence to sustain a verdict or judgment for plaintiff see Demaine *v.* Washington Southern R. Co., (Va. 1897) 27 S. E. 437; Vance *v.* Ravenswood, etc., R. Co., 53 W. Va. 338, 44 S. E. 461.

39. Evidence held sufficient: To support a verdict for plaintiff for injuries received by reason of a defect or obstruction of a railroad crossing. Georgia, etc., R. Co. *v.* Parks, 93 Ga. 228, 18 S. E. 652; Louisville, etc., R. Co. *v.* Pritchard, 131 Ind. 564, 31 N. E. 358, 31 Am. St. Rep. 451; Metzler *v.* Philadelphia, etc., R. Co., 28 Pa. Super. Ct. 180. To support a finding that the crossing was not so constructed as was reasonably necessary for the use of the railroad company or reasonably safe for pedestrians. Elgin, etc., R. Co. *v.* Raymond, 148 Ill. 241, 35 N. E. 729. To support a finding that defendant was negligent in permitting the crossing to remain in the condition in which it was at the time of the accident. Criss *v.* Chicago, etc., R. Co., 88 Iowa 741, 55 N. W. 523; St. Louis Southwestern R. Co. *v.* Smith, (Tex. Civ. App. 1908) 107 S. W. 638. To charge defendant with knowledge of the defect. Retan *v.* Lake Shore, etc., R. Co., 94 Mich. 146, 53 N. W. 1094, where the defect had existed for several months; many persons had noticed it; and several persons before the accident had been caught in the same way as plaintiff and in the same defect. To support a finding that plaintiff was impliedly invited by the company to use the tracks at that point imposing on the company the duty of exercising ordinary care in keeping the crossing in repair. Cowans *v.* Ft. Worth, etc., R. Co., 40 Tex. Civ. App. 539, 89 S. W. 1116.

Existence of highway.— Testimony of witnesses that they were acquainted with the highway at the crossing before the railroad was built and that it was traveled then is at least *prima facie* evidence that the railroad was constructed over the highway so as to impose upon the company the statutory duty of restoring it to its former condition; an introduction of the record of the laying out of the highway not being necessary in the absence of testimony to the contrary. Sutton *v.* Chicago, etc., R. Co., 98 Wis. 157, 73 N. W. 993.

That others had passed over the crossing does not show that it was in a safe condition. Sasnofski *v.* Lake Shore, etc., R. Co., 134 Mich. 72, 95 N. W. 1077.

40. Evidence held sufficient: To support

gates, or flagmen [41] at the crossing. Defendant's negligence may be proved like any other fact by circumstantial evidence, and direct, positive evidence is not necessary.[42] To fix liability upon defendant, however, upon the ground of negligence there must be proof of the essential facts constituting such negligence,[43] and this proof must consist of some reasonable evidence of well-defined acts of negligence.[44] A mere probability or possibility that someone was wanting in care is not sufficient to justify a finding of negligence,[45] unless such probability or possibility is based upon rational grounds and is supported by the facts proved.[46] It is not sufficient if such probability or inference is based upon any inference

a verdict for plaintiff for injury caused by a train running at an unlawful speed. Piper *v.* Chicago, etc., R. Co., 77 Wis. 247, 46 N. W. 165. To show that the train in running at a rate of speed of thirty-five miles an hour at the place in question was negligently operated. Bilton *v.* Southern Pac. R. Co., 148 Cal. 443, 83 Pac. 440.

Evidence held insufficient to sustain a complaint for running at a dangerous rate of speed without giving proper notice see McCain *v.* Louisville, etc., R. Co., 18 S. W. 537, 13 Ky. L. Rep. 809.

That the train did not stop until it was three hundred yards past the crossing at which it caused the injury complained of is not by itself sufficient evidence that the train passed the crossing at an unreasonable rate of speed. Tully *v.* Fitchburg R. Co., 134 Mass. 499.

Where the view is obstructed, evidence that the train causing the injuries ran three hundred feet past the crossing before it stopped is sufficient to justify a finding that forty miles per hour was an unreasonable rate of speed at that crossing. Hicks *v.* New York, etc., R. Co., 164 Mass. 424, 41 N. E. 721, 49 Am. St. Rep. 471.

Testimony that the train could be stopped within a given distance after the brakes were applied is of no weight as a basis for showing negligence in running at a certain rate of speed at the crossing, when such testimony is based upon the supposition that the train was running at a specified rate at a distance of five hundred and seventy feet from the crossing, and the only testimony as to the speed of the train is that it was running at such specified rate when it reached the crossing after every possible effort had been made to check its speed while running the intervening distance. Jones *v.* Lehigh, etc., R. Co., 202 Pa. St. 81, 51 Atl. 590.

That an engine was traveling twenty or thirty miles an hour across a public grade road in a city where the lawful speed was six miles an hour is a circumstance from which the railroad's negligence might reasonably be inferred, especially where, in consequence of obstructions to a view of the train, a person was prevented from seeing a locomotive at any great distance until he came within about fifty feet of the crossing. Kunz *v.* Oregon R. Co., (Oreg. 1907) 93 Pac. 141, 94 Pac. 504.

41. Evidence held insufficient: To sustain a finding that there was no flagman at the crossing at the time of the accident. Chicago, etc., R. Co. *v.* Gretzner, 46 Ill. 74; Taylor *v.* Long Island R. Co., 16 N. Y. App. Div. 1, 44 N. Y. Suppl. 820, where six witnesses testified that they saw the flagman on the crossing giving the signal, while two other witnesses testified that they did not see him at the time, and another witness testified that the flagman was not there. To show negligence on the part of defendant in not providing a gate and gateman at the crossing. Vallance *v.* Boston, etc., R. Co., 55 Fed. 364. To show that plaintiff was injured while upon the street at the crossing at which the flagman was stationed. Strickland *v.* New York Cent., etc., R. Co., 88 N. Y. App. Div. 367, 84 N. Y. Suppl. 655.

Admission of unsafety.— The erection of gates by a railroad company shortly after an order passed by the mayor and aldermen of a city requesting it to erect such gates is communicated to the company may be treated as an admission, unless explained, that the gates were reasonably necessary for public safety. Merrigan *v.* Boston, etc., R. Co., 154 Mass. 189, 28 N. E. 149.

That the stationing of flagmen by defendant was sufficient to warn persons of approaching danger is not conclusively shown by the fact that it did not appear that at any time previous to the accident in question an accident had occurred at that place. Quill *v.* New York Cent., etc., R. Co., 16 Daly (N. Y.) 313, 11 N. Y. Suppl. 80 [*affirmed* in 126 N. Y. 629, 27 N. E. 410].

Where gates across a public crossing are not used after a certain hour in the evening and no flagman was stationed after that hour, the inference, if any, to be drawn therefrom is that after that time such precautions were unnecessary. Giacomo *v.* New York, etc., R. Co., 196 Mass. 192, 81 N. E. 899.

42. Illinois Cent. R. Co. *v.* Clark, 83 Ill. App. 620.

43. Riley *v.* New York, etc., R. Co., 90 Md. 53, 44 Atl. 994.

44. Riley *v.* New York, etc., R. Co., 90 Md. 53, 44 Atl. 994.

Proof of due care on the part of the person injured does not of itself show that defendant was in fault. Shaw *v.* Boston, etc., R. Co., 8 Gray (Mass.) 45.

45. Atchison, etc., R. Co. *v.* Morris, 64 Kan. 411, 67 Pac. 837; Riley *v.* New York, etc., R. Co., 90 Md. 53, 44 Atl. 994.

46. Atchison, etc., R. Co. *v.* Morris, 64 Kan. 411, 67 Pac. 837; Lillstrom *v.* Northern Pac. R. Co., 53 Minn. 464, 55 N. W. 624, 20 L. R. A. 587.

or presumption, and has no immediate connection with or relation to established facts from which it is made.[47]

(B) *Place and Cause of Injury.* Circumstantial evidence is sufficient to show that the injury happened at a railroad crossing,[48] over a public highway.[49] That defendant's negligence was the proximate cause of plaintiff's injury may also be shown by circumstantial evidence,[50] which must be of such strength and char-

47. Glick *v.* Kansas City, etc., R. Co., 57 Mo. App. 97.

48. See Louisville, etc., R. Co. *v.* Roberts, 8 S. W. 459, 10 Ky. L. Rep. 528.

Evidence held sufficient: To show that plaintiff was struck at a railroad crossing. Louisville, etc., R. Co. *v.* Ueltschi, 97 S. W. 14, 29 Ky. L. Rep. 1136; Louisville, etc., R. Co. *v.* Roberts, 8 S. W. 459, 10 Ky. L. Rep. 528; Smedis *v.* Brooklyn, etc., R. Co., 88 N. Y. 13. To show that the crossing was within the limits of a city. Mitchell *v.* St. Louis, etc., R. Co., 122 Mo. App. 50, 97 S. W. 552. To show that the accident happened at a point within the corporate limits where defendant was bound to observe a speed ordinance. Texas, etc., R. Co. *v.* Ball, 38 Tex. Civ. App. 279, 85 S. W. 456. To support a finding that the way at which the collision occurred was a highway within the meaning of Mass. Rev. Laws, c. 111, §§ 188, 190, requiring a bell to be rung or whistle blown at any highway or townway crossed by a railroad at the same level. Giacomo *v.* New York, etc., R. Co., 196 Mass. 192, 81 N. E. 899. To support a finding that plaintiff was killed at a sidewalk where he had a right to be. Phillips *v.* Milwaukee, etc., R. Co., 77 Wis. 349, 46 N. W. 543, 9 L. R. A. 521, holding this to be true where the body of deceased was found near a sidewalk crossing, and from the blood marks on the track it appeared that he was struck while crossing the track on the sidewalk, and was dragged several feet beyond it, although he was last seen alive walking through defendant's yards.

Evidence held insufficient to sustain a finding that the accident occurred at a highway crossing see Recktenwald *v.* Erie R. Co., 114 N. Y. App. Div. 490, 99 N. Y. Suppl. 1094; Tereszko *v.* New York Cent., etc., R. Co., 96 N. Y. App. Div. 615, 88 N. Y. Suppl. 561; Ogden *v.* Pennsylvania R. Co., (Pa. 1889) 16 Atl. 353.

The right of the public to go directly across a track at a particular place and the assent of the company thereto, rendering it a public crossing, may be established by circumstantial evidence. Houston, etc., R. Co. *v.* Adams, 44 Tex. Civ. App. 288, 98 S. W. 222.

49. Baltimore, etc., R. Co. *v.* Faith, 175 Ill. 58, 51 N. E. 807 [*affirming* 71 Ill. App. 59], holding that evidence that a traveled public way crossed a railroad track at the point in question, that cattle-guards had been constructed in the track on either side of the way, and that public funds and road labor had been expended on the road is *prima facie* sufficient to establish the existence of a public way at such point.

50. Lillstrom *v.* Northern Pac. R. Co., 53 Minn. 464, 55 N. W. 624, 20 L. R. A. 587.

Evidence held sufficient: To sustain a verdict or finding that the injury was due to the negligence of the railroad company (Elgin, etc., R. Co. *v.* Hoadley, 220 Ill. 462, 77 N. E. 151 [*affirming* 122 Ill. App. 165]; Stone *v.* Boston, etc., R. Co., 72 N. H. 206, 55 Atl. 359; Gerringer *v.* North Carolina R. Co., 146 N. C. 32, 59 S. E. 152; Gulf, etc., R. Co. *v.* Dolson, 38 Tex. Civ. App. 324, 85 S. W. 444; Ritter *v.* Chicago, etc., R. Co., 128 Wis. 276, 106 N. W. 1103; Schaidler *v.* Chicago, etc., R. Co., 102 Wis. 564, 78 N. W. 732; Heath *v.* Stewart, 90 Wis. 418, 63 N. W. 1051), although plaintiff's evidence was directly contradicted in every essential particular (Link *v.* Philadelphia, etc., R. Co., 165 Pa. St. 75, 30 Atl. 820, 822). To sustain a finding that plaintiff was injured as a proximate result of defendant's failure to give due warning of an approaching train backing over the crossing. Union Pac. R. Co. *v.* Connolly, 77 Nebr. 254, 109 N. W. 368. To justify a finding that deceased was struck by a passenger train at the crossing. Chicago, etc., R. Co. *v.* Gunderson, 174 Ill. 495, 51 N. E. 708 [*affirming* 74 Ill. App. 356]. To show that the injuries arose from a collision between defendant's train and plaintiff's vehicle. Hintz *v.* Michigan Cent. R. Co., 140 Mich. 565, 104 N. W. 23. To justify a finding that the unlawful speed of defendant's train was the proximate cause of the injury. Warmsley *v.* Cleveland, etc., R. Co., 41 Ind. App. 147, 82 N. E. 490, 83 N. E. 640; Illinois Cent. R. Co. *v.* Watson, (Miss. 1905) 39 So. 69; Stotler *v.* Chicago, etc., R. Co., 200 Mo. 107, 98 S. W. 509. To justify the jury in inferring that defendant's negligence in frightening plaintiff's horse was the proximate cause of the injury. Hinchman *v.* Pere Marquette R. Co., 136 Mich. 341, 99 N. W. 277, 65 L. R. A. 552.

Evidence held insufficient: To show that the injury was caused by the railroad company's negligence generally (Custer *v.* Baltimore, etc., R. Co., 19 Pa. Super. Ct. 365); in failing to give the proper signals (Bryant *v.* Southern R. Co., 137 Ala. 488, 34 So. 562); or in failing to stop its engine sooner than it did (Kearns *v.* Southern R. Co., 139 N. C. 470, 52 S. E. 131). To sustain a verdict or finding that the death of a person killed by a railroad train while driving over a railroad crossing was due to his being delayed or held on the crossing by reason of a defect thereon. Chicago, etc., R. Co. *v.* Donaldson, 157 Fed. 821, 85 C. C. A. 185. To show that the injury was caused by a failure to keep a passageway over the tracks in proper repair. Gladney *v.* Pennsylvania R. Co., (N. J. 1907) 67 Atl. 111; Piver *v.* Pennsylvania R. Co., 74 N. J. L. 619, 67 Atl. 109, 70 Atl. 834. To

acter as to warrant an inference or reasonable probability, from the facts proved, that defendant's negligence caused the injury;[51] and such evidence is not sufficient if it merely raises a surmise or conjecture that such was the fact,[52] as where the inference or probability that the injury was caused by defendant's negligence has no immediate connection with, or relation to, the established facts from which it is made.[53]

(c) *Lights, Signals, or Lookouts From Trains.* The fact that defendant's engine or train was not operated with proper lights, signals, or lookouts on approaching a crossing need not be proved by direct and positive testimony, but may be sufficiently shown by the circumstances existing at the time.[54] The failure of defendant's trains to give the proper signals on approaching a crossing may be sufficiently shown by circumstantial evidence.[55] All other things being equal the positive testimony of witnesses that the proper signals were given at the time of the accident is, as a general rule, entitled to greater weight and cannot be overcome by the negative testimony of witnesses that they did not hear

show that the injury was caused by a defective bridge. Gardinier *v.* New York Cent. R. Co., 103 N. Y. 674, 9 N. E. 182.

51. Lillstrom *v.* Northern Pac. R. Co., 53 Minn. 464, 55 N. W. 624, 20 L. R. A. 587; Kearns *v.* Southern R. Co., 139 N. C. 470, 52 S. E. 131.

52. Kearns *v.* Southern R. Co., 139 N. C. 470, 52 S. E. 131.

53. Glick *v.* Kansas City, etc., R. Co., 57 Mo. App. 97; Vallance *v.* Boston, etc., R. Co., 55 Fed. 364. See also Kearns *v.* Southern R. Co., 139 N. C. 470, 52 S. E. 131.

54. Evidence held sufficient: To show negligence of defendant in failing to keep a proper lookout. Battishill *v.* Humphreys, 64 Mich. 514, 38 N. W. 581; Schleiger *v.* Northern Terminal Co., 43 Oreg. 4, 72 Pac. 324; Houston, etc., R. Co. *v.* Kauffmann, (Tex. Civ. App. 1907) 101 S. W. 817. To justify a finding that the peril of the person injured was discovered in time to avoid the injury. Farrell *v.* Chicago, etc., R. Co., 123 Iowa 690, 99 N. W. 578. To sustain findings that defendant's employees had knowledge that plaintiff was on the track prior to the injury, and that defendant's rules required that an employee should be stationed at the end of the car nearest the street to see that the track was clear before giving the signal to move. Galveston, etc., R. Co. *v.* Fry, 37 Tex. Civ. App. 552, 84 S. W. 664. To show that the whistle was not negligently blown. Houston, etc., R. Co. *v.* Carruth, (Tex. Civ. App. 1899) 50 S. W. 1036. To show that, although a running switch was a remote cause of the accident, the direct cause was the failure of the brakeman who was sent to the public street crossing over which the running switch had been made to give the warning he was sent there to give. Mitchell *v.* Illinois Cent. R. Co., 110 La. 630, 34 So. 714, 98 Am. St. Rep. 472.

55. Illinois Cent., etc., R. Co. *v.* Slater, 129 Ill. 91, 21 N. E. 575, 16 Am. St. Rep. 242, 6 L. R. A. 418.

Evidence held sufficient: To sustain a verdict for plaintiff on the ground that defendant failed to give the proper signals. Corbs *v.* Michigan Cent. R. Co., 144 Mich. 73, 107 N. W. 892; Smith *v.* Lehigh Valley R. Co., 61 N. Y. App. Div. 46, 69 N. Y. Suppl. 1112 [*reversed* on other grounds in 170 N. Y. 394, 63 N. E. 338]; Anderson *v.* New York, etc., R. Co., 2 Silv. Sup. (N. Y.) 9, 6 N. Y. Suppl. 182 [*affirmed* in 125 N. Y. 701, 26 N. E. 752]. To justify a finding of negligence on the part of the railroad company in failing to give the proper signals. Chicago, etc., R. Co. *v.* Ryan, 70 Ill. 211; Louisville, etc., R. Co. *v.* Ueltschi, 97 S. W. 14, 29 Ky. L. Rep. 1136; Lamoureux *v.* New York, etc., R. Co., 169 Mass. 338, 47 N. E. 1009; Galveston, etc., R. Co. *v.* Tirres, 33 Tex. Civ. App. 362, 76 S. W. 806. To raise an inference that if the statutory signals had been given, the witnesses would have heard them. Rogers *v.* West Jersey, etc., R. Co., 75 N. J. L. 568, 68 Atl. 148. To justify a finding that defendant's negligence in failing to give the proper signals was the cause of (Cooper *v.* Los Angeles Terminal R. Co., 137 Cal. 229, 70 Pac. 11; Voak *v.* Northern Cent. R. Co., 75 N. Y. 320; Dougherty *v.* Chicago, etc., R. Co., 20 S. D. 46, 104 N. W. 672) or contributed to the injury (Brusseau *v.* New York, etc., R. Co., 187 Mass. 84, 72 N. E. 348). To show that the persons in charge of the train gave a proper and sufficient notice of its approach. Columbia, etc., R. Co. *v.* State, 105 Md. 34, 65 Atl. 625.

Evidence held insufficient: To justify a verdict or judgment for plaintiff on the ground of negligence on the part of defendant in failing to give the proper signals. Miller *v.* New York Cent., etc., R. Co., 66 N. Y. App. Div. 114, 72 N. Y. Suppl. 863; Culhane *v.* New York Cent., etc., R. Co., 67 Barb. (N. Y.) 562; Jones *v.* Lehigh, etc., R. Co., 202 Pa. St. 81, 51 Atl. 590. To sustain a finding that the proper signals were not given. Eissing *v.* Erie R. Co., 73 N. J. L. 343, 63 Atl. 856; Du Boise *v.* New York Cent., etc., R. Co., 88 Hun (N. Y.) 10, 34 N. Y. Suppl. 279; Blake *v.* Canadian Pac. R. Co., 17 Ont. 177.

Evidence that the engine bell was ringing after the accident is not proof that it was ringing before. Eissing *v.* Erie R. Co., 73 N. J. L. 343, 63 Atl. 856.

such signals,[56] especially where a greater number of credible witnesses testify to the fact that the signals were given.[57] This rule, however, is not a conclusive one but may be greatly modified in a given case by the character and interest of the witnesses, their means of knowledge, manner of testifying, and other circumstances.[58] If the attention of the negative witnesses is specially directed to the fact, or it can be legitimately inferred that they were alert and were in a position to have heard the signals had they been given, their testimony that the signals were not given is not necessarily weaker than the opposing positive testimony that they were given, but generally is of as much value as the testimony of those that they were sounded,[59] and may indeed be entitled to more weight

56. *Iowa.*— Annaker *v.* Chicago, etc., R. Co., 81 Iowa 267, 47 N. W. 68.

Kansas.— Missouri Pac. R. Co. *v.* Moffatt, 56 Kan. 667, 44 Pac. 607.

New York.— Rainey *v.* New York Cent., etc., R. Co., 68 Hun 495, 23 N. Y. Suppl. 80.

Utah.— Olsen *v.* Oregon Short Line, etc., R. Co., 9 Utah 129, 33 Pac. 623.

Wisconsin.— Urbanek *v.* Chicago, etc., R. Co., 47 Wis. 59, 1 N. W. 464.

United States.— Griffith *v.* Baltimore, etc., R. Co., 44 Fed. 574.

See 41 Cent. Dig. tit. "Railroads," § 1142.

But *compare* Ohio, etc., R. Co. *v.* Buck, 130 Ind. 300, 30 N. E. 19; Cleveland, etc., R. Co. *v.* Wuest, 40 Ind. App. 693, 82 N. E. 986, 41 Ind. App. 210, 83 N. E. 620; Cleveland, etc., R. Co. *v.* Schneider, 40 Ind. App. 524, 82 N. E. 538.

Positive and negative testimony generally see EVIDENCE, 17 Cyc. 800 *et seq.*

Evidence held insufficient to support a verdict or finding for plaintiff as based upon the comparative weight of positive and negative testimony see Eissing *v.* Erie R. Co., 73 N. J. L. 343, 63 Atl. 856; Frank *v.* Pennsylvania R. Co., (N. J. Sup. 1903) 55 Atl. 691; Smith *v.* New York Cent., etc., R. Co., 41 N. Y. App. Div. 614, 58 N. Y. Suppl. 63; Seibert *v.* Erie R. Co., 49 Barb. (N. Y.) 583; Ward *v.* Richmond, etc., R. Co., 43 Fed. 422.

The positive testimony of a single witness whose credibility is unimpeached that he heard the signals given will ordinarily outweigh that of a number of equally credible witnesses who with the same opportunity testify that they did not hear such signals. Southern R. Co. *v.* Bryant, 95 Va. 212, 28 S. E. 183.

57. Bond *v.* Lake Shore, etc., R. Co., 128 Mich. 577, 87 N. W. 755; Durkee *v.* Delaware, etc., Canal Co., 88 Hun (N. Y.) 471, 34 N. Y. Suppl. 978; Wellbrock *v.* Long Island R. Co., 31 Misc. (N. Y.) 424, 65 N. Y. Suppl. 592.

Conclusiveness of evidence.— Where fourteen witnesses testified that the signals were given and nine testified that they did not hear the signals, it was held that the fact that these duties were performed was conclusively established. Keiser *v.* Lehigh Valley R. Co., 212 Pa. St. 409, 61 Atl. 903, 108 Am. St. Rep. 872.

Mere scintilla of evidence.— So it has been held that the simple statement of plaintiff that he did not hear any whistle or bell is a mere scintilla of evidence as against the positive testimony of six other witnesses who did hear them. Hauser *v.* Central R. Co., 147 Pa. St. 440, 23 Atl. 766.

58. Scott *v.* Pennsylvania R. Co., 9 N. Y. Suppl. 189 [*reversed* on other grounds in 130 N. Y. 679, 29 N. E. 289]; Urbanek *v.* Chicago, etc., R. Co., 47 Wis. 59, 1 N. W. 464.

59. *Illinois.*— Rockford, etc., R. Co. *v.* Hillmer, 72 Ill. 235, holding that the testimony of witnesses that they were in a situation to have heard a bell rung or whistle sounded if there had been any rung or sounded and that they did not hear any cannot be regarded as negative testimony.

Iowa.— Mackerall *v.* Omaha, etc., R. Co., 111 Iowa 547, 82 N. W. 975 (holding that the testimony of witnesses who were near a train at the time of the accident that they heard neither the whistle nor bell until the train passed the crossing is not merely negative, but is sufficient to show that the proper signals were not given); Annaker *v.* Chicago, etc., R. Co., 81 Iowa 267, 47 N. W. 68.

Kansas.— Missouri Pac. R. Co. *v.* Johnson, 44 Kan. 660, 24 Pac. 1116; Kansas City, etc., R. Co. *v.* Lane, 33 Kan. 702, 7 Pac. 587.

Missouri.— Young *v.* Missouri, etc., R. Co., 72 Mo. App. 263, holding that where two witnesses, each of whom was at a favorable point for observation and who seem to have been giving special attention to the matter, testify that they heard no signals, the evidence, although to a certain extent of a negative character, is sufficient to take the question to the jury.

New York.— Rainey *v.* New York Cent., etc., R. Co., 68 Hun 495, 25 N. Y. Suppl. 80.

Pennsylvania.— Jones *v.* Lehigh, etc., R. Co., 202 Pa. St. 81, 51 Atl. 590, holding that the testimony of a witness who was listening that he did not hear is not of a purely negative character.

Virginia.— Southern R. Co. *v.* Bryant, 95 Va. 212, 28 S. E. 183.

Wisconsin.— Eilert *v.* Green Bay, etc., R. Co., 48 Wis. 606, 4 N. W. 769; Urbanek *v.* Chicago, etc., R. Co., 47 Wis. 59, 1 N. W. 464, holding this rule to apply where persons testifying that no whistle was blown by an approaching train were in full view of it, and had their attention directed to it, while those testifying that a whistle was blown were less favorably situated to acquire positive knowledge.

See 41 Cent. Dig. tit. "Railroads," § 1142.

But *compare* Evison *v.* Chicago, etc., R. Co., 45 Minn. 370, 48 N. W. 6, 11 L. R. A.

than the latter.[60] Where there is no evidence that proper signals were given the testimony of a single witness may be sufficient to show that they were not given.[61]

(D) *Contributory Negligence* — (1) IN GENERAL. Except where there were eye-witnesses to the accident, and direct and positive testimony on the subject is possible,[62] it is not required that the question of contributory negligence should be proved by direct testimony; but it is sufficient if facts and circumstances are shown from which there might be a reasonable inference of due care,[63] or want

434, holding that testimony of a fireman whose duty it is to ring the bell when the engine is in motion "that, although he had no independent recollection of ringing it on a certain occasion, yet it was his uniform and invariable habit to ring it, so that it had become second nature with him to do so, and that from these facts he was able to state positively that he did ring it on the occasion referred to," is sufficient to justify the jury in finding that the bell was rung notwithstanding the testimony of other witnesses that they were in position to have heard it if it had been rung, and that it was not rung.

Evidence held sufficient to support a verdict for plaintiff, based on the negligence of a railroad company in not causing the proper signals to be given, as shown by positive and negative testimony see Maricopa, etc., R. Co. *v.* Dean, 7 Ariz. 104, 60 Pac. 871; Hughes *v.* Chicago, etc., R. Co., 88 Iowa 404, 55 N. W. 470; Tucker *v.* Boston, etc., R. Co., 73 N. H. 132, 59 Atl. 943; Westervelt *v.* New York Cent., etc., R. Co., 86 N. Y. App. Div. 316, 83 N. Y. Suppl. 827 (holding that where defendant introduced no evidence of any signal of the approach of a train to a crossing, and two witnesses having no relation to either party who were sufficiently close to the train to have heard a whistle or bell if it had been sounded testified that they heard neither whistle nor bell, the evidence was sufficient to justify a finding of negligence on the part of defendant); McGrath *v.* New York Cent., etc., R. Co., 1 Thomps. & C. (N. Y.) 243; Perkins *v.* Buffalo, etc., R. Co., 10 N. Y. Suppl. 356 [*affirmed* in 125 N. Y. 776, 27 N. E. 409]; International, etc., R. Co. *v.* Dalwigh, (Tex. Civ. App. 1898) 48 S. W. 527.

Testimony of witnesses who do not show that they would likely have heard the signals if sounded that they did not hear them is not sufficient to show that the signals were not given. Ohio, etc., R. Co. *v.* Reed, 40 Ill. App. 47; Hubbard *v.* Austin, etc., R. Co., 159 Mass. 320, 39 N. E. 459; Clark *v.* New York Cent., etc., R. Co., 17 Misc. (N. Y.) 113, 40 N. Y. Suppl. 730.

The rule of comparative value does not apply where witnesses testify positively to the fact that the signals were given and other witnesses testify positively to the fact that they were not given, and the only question is as to which side, under all the circumstances, the greater credit is due. Racine *v.* Erie R. Co., 69 N. Y. App. Div. 437, 74 N. Y. Suppl. 977, holding that where plaintiff's witnesses, for the most part disinterested, testify positively that no whistle was sounded or bell rung and defendant's witnesses equally entitled to be believed testify positively to the contrary, a judgment for plaintiff will not be disturbed.

60. Browne *v.* New York Cent., etc., R. Co., 87 N. Y. App. Div. 206, 83 N. Y. Suppl. 1028, 13 N. Y. Annot. Cas. 409 [*affirmed* in 179 N. Y. 582, 72 N. E. 1140] (holding that, although the engineer and fireman on the locomotive which caused the injury testified that its bell was rung and its whistle sounded as it approached the crossing, there is sufficient evidence for the jury to find that such signals were not given in the testimony of one who was one hundred and fifty feet away and saw the accident and observed and detailed all the circumstances and testified that he did not hear the bell rung or the whistle blown, although stating that he was not paying any attention to the bell); Smith *v.* Rio Grande, etc., R. Co., 9 Utah 141, 33 Pac. 626.

61. Schwarz *v.* Delaware, etc., R. Co., 218 Pa. St. 187, 67 Atl. 213 (holding that where a witness testified that he was near a railroad crossing and was listening for an approaching train and that he heard no whistle, his testimony if believed is proof that no whistle was sounded); Haverstick *v.* Pennsylvania R. Co., 171 Pa. St. 101, 32 Atl. 1128.

62. Wieland *v.* Delaware, etc., Canal Co., 167 N. Y. 19, 60 N. E. 234, 82 Am. St. Rep. 707 [*reversing* 42 N. Y. App. Div. 627, 59 N. Y. Suppl. 1117]; McSorley *v.* New York Cent., etc., R. Co., 60 N. Y. App. Div. 267, 70 N. Y. Suppl. 10.

Where direct and positive testimony is possible a mere inference from the surrounding circumstances will not amount to adequate and preponderating proof of the absence of contributory negligence. Seidman *v.* Long Island R. Co., 104 N. Y. App. Div. 4, 93 N. Y. Suppl. 209.

63. Chicago, etc., R. Co. *v.* Gunderson, 174 Ill. 495, 51 N. E. 708 [*affirming* 74 Ill. App. 356]; Chicago, etc., R. Co. *v.* Carey, 115 Ill. 115, 3 N. E. 519; St. Louis, etc., R. Co. *v.* Rawley, 106 Ill. App. 550; Wieland *v.* Delaware, etc., Canal Co., 167 N. Y. 19, 60 N. E. 234, 82 Am. St. Rep. 707 [*reversing* 42 N. Y. Suppl. 627, 59 N. Y. Suppl. 1117]; Wiwirowski *v.* Lake Shore, etc., R. Co., 124 N. Y. 420, 26 N. W. 1023 [*reversing* 58 Hun 40, 11 N. Y. Suppl. 361]; McSorley *v.* New York Cent., etc., R. Co., 60 N. Y. App. Div. 267, 70 N. Y. Suppl. 10.

Evidence held sufficient to show that the person injured was free from contributory negligence see Elgin, etc., R. Co. *v.* Hoadley, 220 Ill. 462, 77 N. E. 151 [*affirming* 122 Ill.

of due care,[64] on the part of the person injured. It has been held, however, that it is only where the accident results in death and where there are no eye-witnesses of the occurrence,[65] or where the danger is so remote that if seen it nevertheless may be disregarded in the exercise of proper care,[66] that freedom from contributory negligence may be established by circumstantial evidence. These rules apply to evidence tending to show whether or not the person injured exercised proper care in crossing where his view or hearing was obstructed,[67] or in reliance on

App. 165]; Pittsburg, etc., R. Co. *v.* Robson, 204 Ill. 254, 68 N. E. 468; Chicago, etc., R. Co. *v.* Carey, 115 Ill. 115, 3 N. E. 519; Chicago Great Western R. Co. *v.* Mohan, 88 Ill. App. 151 [*affirmed* in 187 Ill. 281, 58 N. E. 395]; Baltimore, etc., R. Co. *v.* Rosborough, 40 Ind. App. 14, 80 N. E. 869; Louisville, etc., R. Co. *v.* Ueltschi, 97 S. W. 14, 29 Ky. L. Rep. 1136; Chesapeake, etc., R. Co. *v.* Clark, 74 S. W. 705, 25 Ky. L. Rep. 150; Shepard *v.* Lewiston, etc., R. Co., 101 Me. 591, 65 Atl. 20; Illinois Cent. R. Co. *v.* Watson, (Miss. 1905) 39 So. 69; Union Pac. R. Co. *v.* Connolly, 77 Nebr. 254, 109 N. W. 368; Sherwood *v.* New York Cent., etc., R. Co., 120 N. Y. App. Div. 639, 105 N. Y. Suppl. 547 (crossing track in automobile); Gerringer *v.* North Carolina R. Co., 146 N. C. 32, 59 S. E. 152; St. Louis Southwestern R. Co. *v.* Moore, (Tex. Civ. App. 1908) 107 S. W. 658 (driver of team); St. Louis Southwestern R. Co. *v.* Smith, (Tex. Civ. App. 1908) 107 S. W. 638 (in stepping in hole in bridge); Gulf, etc., R. Co. *v.* Dolson, 38 Tex. Civ. App. 324, 85 S. W. 444; International, etc., R. Co. *v.* Dalwigh, (Tex. Civ. App. 1898) 48 S. W. 527; Schaidler *v.* Chicago, etc., R. Co., 102 Wis. 564, 78 N. W. 732.

Evidence held insufficient to show that the person injured was free from contributory negligence see Briggs *v.* Boston, etc., R. Co., 188 Mass. 463, 74 N. E. 667; Wright *v.* Boston, etc., R. Co., 74 N. H. 128, 65 Atl. 687, 8 L. R. A. N. S. 832; Wieland *v.* Delaware, etc., Canal Co., 167 N. Y. 19, 60 N. E. 234, 82 Am. St. Rep. 707 [*reversing* 42 N. Y. App. Div. 627, 59 N. Y. Suppl. 1117]; Meinrenken *v.* New York Cent., etc., R. Co., 92 N. Y. App. Div. 618, 86 N. Y. Suppl. 1075, 103 N. Y. App. Div. 319, 92 N. Y. Suppl. 1015; Martin *v.* New York Cent., etc., R. Co., 30 Misc. (N. Y.) 691, 64 N. Y. Suppl. 364 [*affirmed* in 53 N. Y. App. Div. 650, 66 N. Y. Suppl. 1137].

An inference of due care may not be drawn simply from a presumption that a person exposed to danger will exercise care and prudence in regard to his own safety. Wiwirowski *v.* Lake Shore, etc., R. Co., 124 N. Y. 420, 26 N. E. 1023 [*reversing* 58 Hun 40, 11 N. Y. Suppl. 361].

That the person injured was familiar with the crossing and was of careful and sober habits is sufficient to justify a finding that he was in the exercise of due care at the time of the accident. Illinois Cent. R. Co. *v.* Nowicki, 148 Ill. 29, 35 N. E. 358 [*affirming* 46 Ill. App. 566]; McNulta *v.* Lockridge, 32 Ill. App. 86. See also Cleveland, etc., R. Co. *v.* Oliver, 83 Ill. App. 64.

When from all the circumstances nothing is found to which negligence of plaintiff can fairly be imputed, the mere absence of fault may justify the jury in finding due care on his part. Lyman *v.* Boston, etc., R. Co., 66 N. H. 200, 20 Atl. 976, 11 L. R. A. 364.

Instinct of self-preservation as proof.— Freedom from contributory negligence is not proven by presenting no evidence thereon and relying on plaintiff's instinct of self-preservation as proof that he exercised due care; the absence of evidence of what he did at the time cannot be supplied by conjecture or by the theory that the instinct of self-preservation is evidence that his acts were those of an ordinarily prudent person. Wright *v.* Boston, etc., R. Co., 74 N. H. 128, 65 Atl. 687, 8 L. R. A. N. S. 32.

64. **Evidence held sufficient** to show that the person injured was guilty of contributory negligence see Baltimore, etc., R. Co. *v.* State, 75 Md. 526, 24 Atl. 14; Gaffney *v.* New York Cent., etc., R. Co., 123 N. Y. App. Div. 674, 108 N. Y. Suppl. 169; Seaboard, etc., R. Co. *v.* Vaughan, 104 Va. 113, 51 S. E. 452.

Evidence held insufficient: To show that the person injured was guilty of contributory negligence. Clampit *v.* Chicago, etc., R. Co., 84 Iowa 71, 50 N. W. 673. To show contributory negligence sufficiently to warrant a reversal of a judgment for plaintiff on appeal. Maricopa, etc., R. Co. *v.* Dean, 7 Ariz. 104, 60 Pac. 871. To conclusively establish that a boy eleven years of age was guilty of contributory negligence when injured while crossing defendant's track on a public highway. Olsen *v.* Minneapolis, etc., R. Co., 102 Minn. 395, 113 N. W. 1010. To affirmatively show as a matter of law that plaintiff was guilty of gross or wilful negligence within Mass. Pub. St. (1882) c. 112, § 213. Kenny *v.* Boston, etc., R. Co., 188 Mass. 127, 74 N. E. 309.

That the person injured was found outside the street limits does not of itself show contributory negligence. Hassenyer *v.* Michigan Cent. R. Co., 48 Mich. 205, 12 N. W. 155, 42 Am. Rep. 470.

65. Seidman *v.* Long Island R. Co., 104 N. Y. App. Div. 4, 93 N. Y. Suppl. 209

66. Seidman *v.* Long Island R. Co., 104 N. Y. App. Div. 4, 93 N. Y. Suppl. 209.

67. **Evidence held sufficient where view or hearing was obstructed:** To support a verdict for plaintiff as being free from contributory negligence in looking and listening. Davis *v.* Kansas City Belt R. Co., 46 Mo. App. 180. To support a finding that the person injured took the proper precautions before crossing. Louisville, etc., Consol. R. Co. *v.* Kelly, 6

precautions on the part of the railroad company,[68] or on the directions of its employees.[69]

(2) Duty to Stop, Look, and Listen. The fact of an injured person's freedom from contributory negligence in stopping, looking, or listening before going on a crossing should be proved by direct and positive testimony where possible,[70] as where there were eye-witnesses of the occurrence.[71] But where there is no direct and positive testimony as to such fact,[72] as where the injured person is dead and there were no eye-witnesses of the occurrence,[73] or where the injured person could not for any reason have seen the train and he failed to look because of such circumstance,[74] his freedom from contributory negligence in stopping, looking, or listening may be proved by circumstantial evidence,[75] as by evi-

Ind. App. 545, 33 N. E. 1103; Shaber *v.* St. Paul, etc., R. Co., 28 Minn. 103, 9 N. W. 575; Nash *v.* New York Cent., etc., R. Co., 51 Hun (N. Y.) 594, 4 N. Y. Suppl. 525 [*reversed* on other grounds in 125 N. Y. 715, 26 N. E. 266]; Parshall *v.* New York, etc., R. Co., 21 N. Y Suppl. 354; Stott *v.* New York, etc., R. Co., 21 N. Y. Suppl. 353; Larkin *v.* New York, etc., R. Co., 19 N. Y. Suppl. 479 [*affirmed* in 138 N. Y. 634, 33 N. E. 1084]; Hermans *v.* New York Cent., etc., R. Co., 17 N. Y. Suppl. 319 [*affirmed* in 137 N. Y. 558, 33 N. E. 337]; Heath *v.* Stewart, 90 Wis. 418, 63 N. W. 1051.

Evidence held insufficient where view or hearing was obstructed to show that the person injured was free from contributory negligence see Bremiller *v.* Buffalo, etc., R. Co., 90 Hun (N. Y.) 226, 35 N. Y. Suppl. 561.

68. Evidence held sufficient to show that the person injured was not guilty of contributory negligence in relying on precautions on the part of the railroad company see Lamoureux *v.* New York, etc., R. Co., 169 Mass. 338, 47 N. E. 1009; Donovan *v.* Long Island R. Co., 67 Hun (N. Y.) 73, 22 N. Y. Suppl. 62; Skinner *v.* Prospect Park, etc., R. Co., 22 N. Y. Suppl. 30 [*affirmed* in 140 N. Y. 621, 35 N. E. 891].

69. Boyce *v.* Chicago, etc., R. Co., 120 Mo. App. 168, 96 S. W. 670, evidence sufficient to sustain a finding that defendant's brakeman told plaintiff that she might pass between the parts of the train which caused the injury. See Bayley *v.* Eastern R. Co., 125 Mass. 62.

70. Seidman *v.* Long Island R. Co., 104 N. Y. App. Div. 4, 93 N. Y. Suppl. 209.

Where plaintiff could have seen the approaching train, and he testifies that he actually looked for it, and concededly heard its noise, it is incumbent on him to testify expressly as to whether or not he saw the train, and his freedom from contributory negligence as dependent upon that fact cannot be established by circumstantial evidence. Seidman *v.* Long Island R. Co., 104 N. Y. App. Div. 4, 93 N. Y. Suppl. 209.

Contradictory testimony.— Where upon all the testimony plaintiff is entitled to recover, the mere fact that his own testimony is contradictory as to whether he stopped just before he attempted to cross should not bar a recovery, as the most that can be said is that such way of testifying may be due to his confusion which existed at the time of the accident. Baker *v.* Kansas City, etc., R. Co., 147 Mo. 140, 48 S. W. 838.

71. Rainey *v.* New York Cent., etc., R. Co., 68 Hun (N. Y.) 495, 23 N. Y. Suppl. 80.

Evidence held insufficient to sustain the burden of showing that deceased was free from contributory negligence see Rainey *v.* New York Cent., etc., R. Co., 68 Hun (N. Y.) 495, 23 N. Y. Suppl. 80.

72. Tucker *v.* Boston, etc., R. Co., 73 N. H. 132, 59 Atl. 943.

73. Seidman *v.* Long Island R. Co., 104 N. Y. App. Div. 4, 93 N. Y. Suppl. 209.

74. Seidman *v.* Long Island R. Co., 104 N. Y. App. Div. 4, 93 N. Y. Suppl. 209.

Evidence held sufficient to sustain a special finding that if deceased while approaching the track had looked he would not have been able to have seen the train from the time he passed an obstruction to his view until he reached the crossing (see Pratt *v.* Chicago, etc., R. Co., 107 Iowa 287, 77 N. W. 1064); or to sustain a finding that plaintiff could not see the train while between twenty and forty feet from the crossing (Hughes *v.* Chicago, etc., R. Co., 88 Iowa 404, 55 N. W. 470).

75. Seidman *v.* Long Island R. Co., 104 N. Y. App. Div. 4, 93 N. Y. Suppl. 209; Du Boise *v.* New York Cent., etc., R. Co., 88 Hun (N. Y.) 10, 34 N. Y. Suppl. 279.

Evidence held sufficient: To sustain a verdict for plaintiff notwithstanding the issue as to contributory negligence in looking and listening. Kansas City, etc., R. Co. *v.* Weeks, 135 Ala. 614, 34 So. 16; Towns *v.* Rome, etc., R. Co., 4 Silv. Sup. (N. Y.) 332, 8 N. Y. Suppl. 137 [*affirmed* in 124 N. Y. 642, 27 N. E. 412]. To support a finding of freedom from contributory negligence in such respect. Chicago, etc., R. Co., *v.* Gunderson, 174 Ill. 495, 51 N. E. 708 [*affirming* 74 Ill. App. 356]; Lyman *v.* Boston, etc., R. Co, 66 N. H. 200, 20 Atl. 976, 11 L. R. A. 364; Central Texas, etc., R. Co. *v.* Gibson, 35 Tex. Civ. App. 66, 79 S. W. 351; St. Louis, etc., R. Co. *v.* Carwile, 28 Tex. Civ. App. 208, 67 S. W. 160.

Evidence held sufficient on demurrer to evidence to show freedom from contributory negligence see Missouri, etc., R. Co. *v.* Young, 8 Kan. App. 525, 56 Pac. 542.

Evidence held insufficient to show freedom from contributory negligence in stopping, looking, or listening see Lake Erie, etc., R. Co. *v.* Stick, 143 Ind. 449, 41 N. E. 365; Cleveland, etc., R. Co. *v.* Coffman, 30 Ind.

dence that he was familiar with the crossing and that it was his habit and custom to stop, look, and listen for trains when approaching the crossing where the accident occurred.[76] Testimony that the person injured looked and listened before crossing is legally insufficient to establish freedom from contributory negligence where it appears that it was physically impossible not to see or hear if he had looked or listened,[77] since such testimony is incredible as a matter of law,[78] although uncontradicted by the direct testimony of other witnesses,[79] and does not even create a conflict of evidence.[80] That the person injured was guilty of contributory negligence in failing to stop, look, or listen should also be established by direct testimony where possible,[81] although in its absence circumstantial evidence may be sufficient.[82] But it is only where it appears from the evidence that he might have seen if he had looked or might have heard if he had listened that the jury is authorized to find that the person injured did not look and listen.[83]

App. 462, 64 N. E. 233, 66 N. E. 179; Wiwirowski *v.* Lake Shore, etc., R. Co., 124 N. Y. 420, 26 N. E. 1023 [*reversing* 58 Hun 40, 11 N. Y. Suppl. 361]; McSweeney *v.* Erie R. Co., 93 N. Y. App. Div. 496, 87 N. Y. Suppl. 836; Hatch *v.* New York Cent., etc., R. Co., 42 Misc. (N. Y.) 152, 85 N. Y. Suppl. 995 [*affirmed* in 118 N. Y. App. Div. 912, 103 N. Y. Suppl. 1128]; Nolan *v.* New York Cent., etc., R. Co., 16 N. Y. Suppl. 826; Fleissner *v.* New York Cent., etc., R. Co., 16 N. Y. Suppl. 18; Ft. Worth, etc., R. Co. *v.* Wyatt, 35 Tex. Civ. App. 119, 79 S. W. 349.

That another person in company with deceased looked and listened but did not see or hear the approaching train does not establish that deceased would have failed also had he looked and listened. Wiwirowski *v.* Lake Shore, etc., R. Co., 124 N. Y. 420, 26 N. E. 1023 [*reversing* 58 Hun 40, 11 N. Y. Suppl. 361].

76. Tucker *v.* Boston, etc., R. Co., 73 N. H. 132, 59 Atl. 943.

77. O'Connor *v.* New York, etc., R. Co., 189 Mass. 361, 75 N. E. 614.

Where a collision takes place at the moment when a person goes upon a railroad track, he cannot recover, no matter what his testimony may be as to stopping, looking, and listening, because the fact of the immediate collision conclusively proves that he did not exercise his senses as to the approaching train. Holden *v.* Pennsylvania R. Co., 169 Pa. St. 1, 32 Atl. 103.

78. Chicago, etc., R. Co. *v.* Kirby, 86 Ill. App. 57; Northern Cent. R. Co. *v.* Medairy, 86 Md. 168, 37 Atl. 796; Dolfini *v.* Erie R. Co., 178 N. Y. 1, 70 N. E. 68 [*reversing* 82 N. Y. App. Div. 643, 81 N. Y. Suppl. 1124]; Chicago, etc., R. Co. *v.* Andrews, 130 Fed. 65, 64 C. C. A. 399; Southern R. Co. *v.* Smith, 86 Fed. 292, 30 C. C. A. 58, 40 L. R. A. 746.

79. Chicago, etc., R. Co. *v.* Kirby, 86 Ill. App. 57.

80. Bloomfield *v.* Burlington, etc., R. Co., 74 Iowa 607, 38 N. W. 431.

81. Golinvaux *v.* Burlington, etc., R.. Co., 125 Iowa 652, 101 N. W. 465.

Direct testimony held sufficient to show contributory negligence in failing to look or listen see Golinvaux *v.* Burlington, etc., R. Co., 125 Iowa 652, 101 N. W. 465; Britton *v.* Michigan Cent. R. Co., 122 Mich. 359, 81 N. W. 253.

82. Hoopes *v.* Atchison, etc., R. Co., 72 Kan. 422, 83 Pac. 987; Potter *v.* Pere Marquette R. Co., 140 Mich. 362, 103 N. W. 808; Drain *v.* St. Louis, etc., R. Co., 86 Mo. 574 [*reversing* 10 Mo. App. 531].

Evidence held sufficient to show that plaintiff was guilty of contributory negligence in not discovering the approach of a train and stopping his automobile see Spencer *v.* New York Cent., etc., R. Co., 123 N. Y. App. Div. 789, 108 N. Y. Suppl. 245.

Evidence held insufficient to show that deceased did not listen as he approached the crossing see Potter *v.* Pere Marquette R. Co., 140 Mich. 362, 103 N. W. 808.

The mere fact that the person injured was not seen by witnesses of the accident to stop or turn his head to look and listen is not conclusive of contributory negligence, so as to require a withdrawal of the case from the jury where there are other circumstances indicating that he may have seen the train as soon as it was possible to do so from the conformation of the ground and that he attempted to get out of its way. Northern Pac. R. Co. *v.* Freeman, 83 Fed. 82, 27 C. C. A. 457.

That from certain points in the highway defendant's road could be seen for certain distances does not sufficiently show that the approaching train could have been seen by decedent if he had looked for it so as to warrant the disturbing of a verdict in plaintiff's favor on the question of contributory negligence. New York, etc., R. Co. *v.* Robbins, 38 Ind. App. 172, 76 N. E. 804.

That the person injured walked on the track in front of the train which was plainly visible is conclusive evidence that he did not look so that he is chargeable with contributory negligence, and a verdict should be directed for defendant. Pennsylvania R. Co. *v.* Pfuelb, 60 N. J. L. 278, 37 Atl. 1100 [*affirmed* in 61 N. J. L. 287, 41 Atl. 1116].

83. Smedis *v.* Brooklyn, etc., R. Co., 88 N. Y. 13; Chicago, etc., R. Co. *v.* Donaldson, 157 Fed. 821, 85 C. C. A. 185.

Evidence held to establish as a matter of law that there was sufficient light at the point in question to enable plaintiff to have seen the arm of a gate with which she col-

f. Damages. While in some jurisdictions the measure of damages for injuries received in an accident at a railroad crossing is regulated by statute,[84] in the absence of statute the rules governing damages in civil cases generally control the question of damages in such actions.[85] As a general rule the damages should be merely compensatory for the injuries received,[86] taking into consideration the injured person's expenses, his loss of time, his diminished capacity for labor, and his suffering,[87] and deducting for proper matters of mitigation.[88] Exemplary or punitive damages may be recovered where the railroad employees were guilty of wilful or wanton negligence or malice,[89] and where such acts were authorized by the company or were subsequently ratified by it with full knowledge of all the facts;[90] but not where the company is guilty of mere ordinary negligence.[91]

g. Questions For Court and For Jury — (i) *In General.* As a general rule in actions for injuries at crossings, questions of law are for the court,[92] while issues of fact are to be determined by the jury.[93]

(ii) *As Determined by the Evidence.* In an action for injuries at a

lided if she had exercised ordinary care see McDonald *v.* Covington, etc., El. R. Transfer, etc., Bridge Co., 107 S. W. 726, 32 Ky. L. Rep. 992.

84. See Kenney *v.* Hannibal, etc., R. Co., 105 Mo. 270, 15 S. W. 983, 16 S. W. 837.

In Missouri under Rev. St. (1889) § 2608, the measure of damages for which a railroad company is liable, for the death of a person resulting from the negligence of an employee running any locomotive or train of cars is five thousand dollars. Kenney *v.* Hannibal, etc., R. Co., 105 Mo. 270, 15 S. W. 983, 16 S. W. 837; Crumpley *v.* Hannibal, etc., R. Co., 98 Mo. 34, 11 S. W. 244.

85. See, generally, Damages, 13 Cyc. 1 *et seq.*

Damages which are problematical, indirect, and remote cannot be recovered. Filiatrault *v.* Canadian Pac. R. Co., 18 Quebec Super. Ct. 491.

86. St. Louis, etc., R. Co. *v.* Hall, 53 Ark. 7, 13 S. W. 138; Chicago, etc., R. Co. *v.* McKean, 40 Ill. 218.

Where a vehicle is so injured as to be rendered useless, its total value can be recovered, but nothing for the usable weekly value of another vehicle which the owner hired to replace the injured one. Reis *v.* Long Island R. Co., 88 N. Y. App. Div. 611, 84 N. Y. Suppl. 881.

87. St. Louis, etc., R. Co. *v.* Hall, 53 Ark. 7, 13 S. W. 138. See also Macon, etc., R. Co. *v.* McLendon, 119 Ga. 297, 46 S. E. 106.

Damages for any permanent injuries sustained by plaintiff which resulted from defendant's negligence should be given. Chicago, etc., R. Co. *v.* Filler, 195 Ill. 9, 62 N. E. 919.

Pleading.—An expenditure of money for medical expenses and the like can be recovered for only where properly alleged. Baltimore, etc., R. Co. *v.* Schell, 122 Ill. App. 346.

Exhibition of injury.—Plaintiff in an action against a railroad company for bodily injuries may exhibit them to the jury for the purpose of having the nature and extent of the damage explained by a medical witness. Sornberger *v.* Canadian Pac. R. Co., 24 Ont. App. 263.

88. See, generally, Damages, 13 Cyc. 66 *et seq.*

The amount of life insurance on the life of a person killed cannot be deducted from the damages assessed. Grand Trunk R. Co. *v.* Beckett, 16 Can. Sup. Ct. 713. And see, generally, Damages, 13 Cyc. 70.

89. St. Louis, etc., R. Co. *v.* Hall, 53 Ark. 7, 13 S. W. 138; Chicago, etc., R. Co. *v.* McKean, 40 Ill. 218; Louisville, etc., R. Co. *v.* Foulks, 103 S. W. 266, 31 Ky. L. Rep. 632; Louisville, etc., R. Co. *v.* Dickinson, 103 S. W. 265, 31 Ky. L. Rep. 633; Louisville, etc., R. Co. *v.* Kessee, 103 S. W. 261, 31 Ky. L. Rep. 617; Hart *v.* Charlotte, etc., R. Co., 33 S. C. 427, 12 S. E. 9, 10 L. R. A. 794. See also Louisville, etc., R. Co. *v.* Penrod, 66 S. W. 1013, 1042, 24 Ky. L. Rep. 50.

Under S. C. Civ. Code (1902), § 2139, punitive damages may be awarded for a wilful or reckless failure to give the signals required by section 2132. Osteen *v.* Southern R. Co., 76 S. C. 368, 57 S. E. 196; Cole *v.* Blue Ridge R. Co., 75 S. C. 156, 55 S. E. 126.

90. Nashville, etc., R. Co. *v.* Starnes, 9 Heisk. (Tenn.) 52, 24 Am. Rep. 296; International, etc., R. Co. *v.* McDonald, 75 Tex. 41, 12 S. W. 860; Gulf, etc., R. Co. *v.* Moore, 69 Tex. 157, 6 S. W. 631.

91. Chicago, etc., R. Co. *v.* McKean, 40 Ill. 218; Louisville, etc., R. Co. *v.* Roberts, 8 S. W. 459, 10 Ky. L. Rep. 528.

Where there is only a brief opportunity for seeing a person before he is struck punitive damages cannot be recovered. Louisville, etc., R. Co. *v.* Creighton, 106 Ky. 42, 50 S. W. 227, 20 Ky. L. Rep. 1691, 1898.

92. See Wilson *v.* New York, etc., R. Co., 18 R. I. 598, 29 Atl. 300; and, generally, Trial.

93. See Webb *v.* Portland, etc., R. Co., 57 Me. 117; Bradley *v.* Boston, etc., R. Co., 2 Cush. (Mass.) 539; Beckwith *v.* New York Cent., etc., R. Co., 54 Hun (N. Y.) 446, 7 N. Y. Suppl. 719, 721 [*affirmed* in 125 N. Y. 759, 27 N. E. 408]; and, generally, Trial.

Whether a railroad fireman was an active employee of the company at the time of the accident is a question for the jury. Davis *v.* Atlanta, etc., R. Co., 63 S. C. 370, 577, 41 S. E. 468, 892.

railroad crossing as in other civil cases, the evidence has a two-fold sufficiency, a sufficiency in law and a sufficiency in fact. Of the former the court is the exclusive judge, and of the latter the jury is.[94] The measure and quantity of proof is a question for the court, but when submitted to the jury its weight and sufficiency to establish the fact is for them.[95] If there is any evidence, although doubtful or confusing, from which the jury might reasonably find the existence of the fact in issue, the issue as to whether or not the railroad company was guilty of negligence,[96] or the person injured of contributory negligence,[97] should be submitted to the jury for determination. Accordingly if the evidence is conflicting or not conclusive the issue as to whether the railroad company was guilty of

94. Kearns *v.* Southern R. Co., 139 N. C. 470, 52 S. E. 131.

95. Kearns *v.* Southern R. Co., 139 N. C. 470, 52 S. E. 131.

Where the facts are simple, and the evidence by which they are presented is involved in no uncertainty, their legal value is for the court to determine. Davidson *v.* Lake Shore, etc., R. Co., 171 Pa. St. 522, 33 Atl. 86.

96. *Iowa.*— Hartman *v.* Chicago Great Western R. Co., 132 Iowa 582, 110 N. W. 10; Kowalski *v.* Chicago Great Western R. Co., (1901) 87 N. W. 409.

Maryland.— Northern Cent. R. Co. *v.* State, 100 Md. 404, 60 Atl. 19, 108 Am. St. Rep. 439.

Michigan.— Mott *v.* Detroit, etc., R. Co., 120 Mich. 127, 79 N. W. 3; Underhill *v.* Chicago, etc., R. Co., 81 Mich. 43, 45 N. W. 508.

Mississippi.— Dennis *v.* New Orleans, etc., R. Co., (1902) 32 So. 914.

Pennsylvania.— Mosten *v.* Lake Shore, etc., R. Co., 218 Pa. St. 392, 67 Atl. 740; Daubert *v.* Delaware, etc., R. Co., 199 Pa. St. 345, 49 Atl. 72; Davidson *v.* Lake Shore, etc., R. Co., 171 Pa. St. 522, 33 Atl. 86; Lederman *v.* Pennsylvania R. Co., 165 Pa. St. 118, 30 Atl. 725, 44 Am. St. Rep. 644; Pennsylvania R. Co. *v.* Coon, 111 Pa. St. 430, 3 Atl. 234; Davis *v.* Pennsylvania R. Co., 34 Pa. Super. Ct. 388; Metzler *v.* Philadelphia, etc., R. Co., 28 Pa. Super. Ct. 180.

Texas.— Branch *v.* International, etc., R. Co., (Civ. App. 1899) 48 S. W. 891.

Utah.— Christensen *v.* Oregon Short Line R. Co., 29 Utah 192, 80 Pac. 746.

Virginia.— Massey *v.* Southern R. Co., 106 Va. 515, 56 S. E. 275; Norfolk, etc., R. Co. *v.* Carr, 106 Va. 508, 56 S. E. 276.

United States.— Texas, etc., R. Co. *v.* Cody, 166 U. S. 606, 17 S. Ct. 703, 41 L. ed. 1132.

Canada.— Lake Erie, etc., R. Co. *v.* Barclay, 30 Can. Sup. Ct. 360.

See 41 Cent. Dig. tit. "Railroads," § 1152.

Evidence held to make a case for the jury on the issue as to the railroad company's negligence see Johnson *v.* Center, 4 Cal. App. 616, 88 Pac. 727; Williams *v.* Southern R. Co., 126 Ga. 710, 55 S. E. 948; Golinvaux *v.* Burlington, etc., R. Co., 125 Iowa 652, 101 N. W. 465; Louisville, etc., R. Co. *v.* Taylor, 104 S. W. 776, 31 Ky. L. Rep. 1142; Wilson *v.* Chesapeake, etc., R. Co., 86 S. W. 690, 27 Ky. L. Rep. 778; Barnum *v.* Grand Trunk Western R. Co., 148 Mich. 370, 111 N. W. 1036; Potter *v.* Pere Marquette R. Co., 140 Mich. 362, 103 N. W. 808; Montgomery *v.* Missouri Pac. R. Co., 181 Mo. 477, 79 S. W. 930; Roberts *v.* Boston, etc., R. Co., 69 N. H. 354, 45 Atl. 94; Smedis *v.* Brooklyn, etc., R. Co., 88 N. Y. 13; Whalen *v.* New York Cent., etc., R. Co., 39 N. Y. App. Div. 642, 57 N. Y. Suppl. 194; Unger *v.* Philadelphia, etc., R. Co., 217 Pa. St. 106, 66 Atl. 235; Laib *v.* Pennsylvania R. Co., 180 Pa. St. 503, 37 Atl. 96; Brown *v.* Pennsylvania R. Co., 15 Phila. (Pa.) 321. Thus there is sufficient evidence of negligence to be submitted to the jury where it is sworn that the person injured was seen approaching the railroad track in a vehicle just before the passing of a train; that immediately after the train passed he and the horses were found dead at the crossing; and that the statutory signals were not given. Johnson *v.* Grand Trunk R. Co., 25 Ont. 64 [*affirmed* in 21 Ont. App. 408].

Evidence held insufficient to take the case to the jury see Custer *v.* Baltimore, etc., R. Co., 206 Pa. St. 529, 55 Atl. 1130; Ellis *v.* Great Western R. Co., L. R. 9 C. P. 551, 43 L. J. C. P. 304, 30 L. T. Rep. N. S. 874.

A scintilla of evidence or a mere surmise that there may have been negligence on the part of the railroad company will not justify the submission of the case to the jury. Riley *v.* New York, etc., R. Co., 90 Md. 53, 44 Atl. 994.

Where there is doubt as to the inference to be drawn from the facts or where the measure of duty is ordinary and reasonable care and the degree of care required varies with the circumstances, the question of the negligence is necessarily for the jury. Pyne *v.* Delaware, etc., R. Co., 212 Pa. St. 143, 61 Atl. 817; Cohen *v.* Philadelphia, etc., R. Co., 211 Pa. St. 227, 60 Atl. 729; Rusterholtz *v.* New York, etc., R. Co., 191 Pa. St. 390, 43 Atl. 208.

Where a statute provides that contributory negligence shall not preclude a recovery but shall be taken in mitigation of damages and the jury may find under the evidence that defendant railroad company in such case is at fault, it is not error for the court to refuse to direct a general verdict for defendant. Louisville, etc., R. Co. *v.* Summers, 125 Fed. 719, 60 C. C. A. 487.

97. Northern Cent., etc., R. Co. *v.* State, 100 Md. 404, 60 Atl. 19, 108 Am. St. Rep. 439; Mott *v.* Detroit, etc., R. Co., 120 Mich. 127, 79 N. W. 3. And see *infra*, X, F, 14, g, (XI).

negligence or the person injured of contributory negligence is for the jury to determine.[98] Nor can the court declare a fact established as a matter of law where the evidence is such that reasonable men might come to a different conclusion as to the existence of the fact.[99] If, however, there is no conflict or the evidence is legally insufficient to justify the jury in finding that a fact exists the issue should not be submitted to them; but the court may dismiss or nonsuit, or direct a verdict or judgment, or otherwise dispose of the case without the intervention of the jury.[1]

(III) *Character of Crossing.* In accordance with the above rule where there is sufficient evidence tending to establish such fact, it is a question for the jury whether or not the railroad crossing at which the accident occurred is a public crossing,[2] as whether it is a public crossing by dedication [3] or prescription,[4]

98. *Georgia.*— Snowball *v.* Seaboard Air Line R. Co., 130 Ga. 83, 60 S. E. 189.

Illinois.— Elgin, etc., R. Co. *v.* Lawlor, 229 Ill. 621, 82 N. E. 407 [*affirming* 132 Ill. App. 280].

Indiana.— Cleveland, etc., R. Co. *v.* Schneider, 40 Ind. App. 38, 80 N. E. 985.

Iowa.— Wesley *v.* Chicago, etc., R. Co., 84 Iowa 441, 51 N. W. 163.

Kentucky.— Louisville, etc., R. Co. *v.* Molloy, 107 S. W. 217, 32 Ky. L. Rep. 745; Chesapeake, etc., R. Co. *v.* Dupee, 67 S. W. 15, 23 Ky. L. Rep. 2349.

Michigan.— Haines *v.* Lake Shore, etc., R. Co., 129 Mich. 475, 89 N. W. 349; Underhill *v.* Chicago, etc., R. Co., 81 Mich. 43, 45 N. W. 508.

Missouri.— McNamara *v.* Chicago, etc., R. Co., 126 Mo. App. 152, 103 S. W. 1093.

New Jersey.— Hummer *v.* Lehigh Valley R. Co., 74 N. J. L. 196, 65 Atl. 126.

New York.— Lewis *v.* Long Island R. Co., 30 N. Y. App. Div. 410, 51 N. Y. Suppl. 558 [*reversed* on other grounds in 162 N. Y. 52, 56 N. E. 548].

Pennsylvania.— Howard *v.* Baltimore, etc., R. Co., 219 Pa. St. 358, 68 Atl. 848; Meyers *v.* New Jersey Cent. R. Co., 218 Pa. St. 305, 67 Atl. 620; Kreamer *v.* Perkiomen R. Co., 214 Pa. St. 219, 63 Atl. 597.

Wisconsin.— Hoye *v.* Chicago, etc., R. Co., 67 Wis. 1, 29 N. W. 646.

See 41 Cent. Dig. tit. "Railroads," § 1152.

99. Chicago, etc., R. Co. *v.* Harley, 74 Nebr. 462, 104 N. W. 862; Chicago, etc., R. Co. *v.* Pollard, 53 Nebr. 730, 74 N. W. 331; Stone *v.* Boston, etc., R. Co., 72 N. H. 206, 55 Atl. 359; Baltimore, etc., R. Co. *v.* Dandrigan, 191 U. S. 461, 24 S. Ct. 137, 48 L. ed. 262 [*affirming* 20 App. Cas. (D. C.) 135]; Chicago, etc., R. Co. *v.* Prescott, 59 Fed. 237, 8 C. C. A. 109, 23 L. R. A. 654.

1. Bjork *v.* Illinois Cent., etc., R. Co., 85 Ill. App. 269; Stewart *v.* Michigan Cent. R. Co., 119 Mich. 91, 77 N. W. 643; Underhill *v.* Chicago, etc., R. Co., 81 Mich. 43, 45 N. W. 508; Heaney *v.* Long Island R. Co., 112 N. Y. 122, 19 N. E. 422; Kearns *v.* Southern R. Co., 139 N. C. 470, 52 S. E. 131.

If the evidence fails to establish all the essential facts, either directly or by rational deduction, as where there is a failure of evidence in respect to any material fact involved in the issue, the evidence is not legally sufficient to justify a finding upon the issue that it is offered to sustain, and it becomes the plain duty of the judge to instruct accordingly, for in such case the jury has no duty to perform. Kearns *v.* Southern R. Co., 139 N. C. 470, 52 S. E. 131.

Evidence held insufficient to be submitted to the jury on the issue of defendant's negligence see Northern Cent. R. Co. *v.* Medairy, 86 Md. 168, 37 Atl. 796; Northern Cent. R. Co. *v.* State, 54 Md. 113; Rogers *v.* Boston, etc., R. Co., 187 Mass. 217, 72 N. E. 945.

2. Pittsburg, etc., R. Co. *v.* Robson, 204 Ill. 254, 68 N. E. 468 (as to whether or not the crossing was over a street within the meaning of Chicago Rev. Code, art. 2, § 1736): Chicago, etc., R. Co. *v.* Heinrich, 157 Ill. 388, 41 N. E. 860 [*affirming* 57 Ill. App. 399]; Tereszko *v.* New York Cent., etc., R. Co., 96 N. Y. App. Div. 615, 88 N. Y. Suppl. 561; Texas, etc., R. Co. *v.* Wagley, 91 Fed. 860, 34 C. C. A. 114.

Whether the crossing was on a public traveled road is a question for the jury where the evidence tends to show such a user of the crossing by the public for more than twenty years as would have justified a record of the road as a highway by the proper authorities, if they had performed their duty. Lewis *v.* New York, etc., R. Co., 123 N. Y. 496, 26 N. E. 357 [*affirming* 1 Silv. Sup. 393, 5 N. Y. Suppl. 313].

Whether a certain public road crossing a railroad is a legal highway is a question for the jury under instructions as to what facts establish the existence of a highway. Baltimore, etc., R. Co. *v.* Faith, 71 Ill. App. 59.

Where there is evidence that the place at which the accident occurred is used by pedestrians as a crossing, it is proper to submit to the jury the question whether it is a public crossing, although there is no evidence that it was established as such by law. Gulf, etc., R. Co. *v.* Johnson, (Tex. Civ. App. 1905) 86 S. W. 34.

3. McCarthy *v.* Lake Shore, etc., R. Co., 76 N. Y. 592.

4. McCarthy *v.* Lake Shore, etc., R. Co., 76 N. Y. 592.

Whether the crossing is a highway by prescription should be submitted to the jury where there is evidence that at the place there is planking between the tracks, that for more than twenty years it has been in

or by the acquiescence and consent of the railroad company;[5] and whether an inducement has been held out by the railroad company to the public to use the crossing.[6] It is also a question for the jury to determine the width of the crossing or traveled place, when in issue,[7] or to determine whether or not the crossing is a dangerous one,[8] or whether or not the place at which the accident occurred is a part of the crossing.[9]

(IV) *DEFECTS AND OBSTRUCTIONS AT CROSSINGS.* Except where the evidence is clear and undisputed,[10] it is likewise a question for the jury as to whether or not the railroad company was negligent in the construction and maintenance of the crossing,[11] or in allowing standing engines or cars,[12] or other obstruc-

the same condition, and that it had been used continuously by the public, together with the offer of evidence that from three thousand to five thousand persons pass there daily. Johanson *v.* Boston, etc., R. Co., 153 Mass. 57, 26 N. E. 426.

5. Ruddell *v.* Seaboard Air Line R. Co., 75 S. C. 290, 55 S. E. 528; Cahill *v.* Chicago, etc., R. Co., 74 Fed. 285, 20 C. C. A. 184, holding it to be a question of fact whether there has been, with the acquiescence of the railroad company, such a public and customary use of the alleged crossing as to justify the presence upon the track of the person injured.

Whether or not a "trodden path" across a railroad has been so continuously and notoriously used by the public as to constitute an acquiescence on the part of the railroad company in such use so as to affect the degree of care which it must exercise as to persons using such path is a question for the jury. Larkin *v.* New York, etc., R. Co., 19 N. Y. Suppl. 479 [*affirmed* in 138 N. Y. 634, 33 N. E. 1084].

Whether a road under a railroad bridge had been commonly and habitually used for travel by the public with the knowledge and acquiescence of the railroad company so as to impose on it the duty of exercising ordinary care toward travelers thereon is a question for the jury. Missouri, etc., R. Co. *v.* Hollan, (Tex. Civ. App. 1908) 107 S. W. 642.

6. Hanks *v.* Boston, etc., R. Co., 147 Mass. 495, 18 N. E. 218; Gulf, etc., R. Co. *v.* Montgomery, 85 Tex. 64, 19 S. W. 1015.

7. Davis *v.* Atlanta, etc., R. Co., 63 S. C. 370, 577, 41 S. E. 468, 892.

8. Louisville, etc., R. Co. *v.* Sawyer, 114 Tenn. 84, 86 S. W. 386, 69 L. R. A. 662; Missouri, etc., R. Co. *v.* Oslin, 26 Tex. Civ. App. 370, 63 S. W. 1039.

9. Cleveland, etc., R. Co. *v.* Johns, 106 Ill. App. 427.

10. See Hughes *v.* Chicago, etc., R. Co., 122 Wis. 258, 99 N. W. 897.

Where the jury finds specially that a certain crossing is defective, and it appears that the defect, if any, is the result of wear and use, and plainly to be seen by any person who goes near it, the court may direct the jury to answer another question, as to whether the railroad company has notice of the defect, in the affirmative. Hughes *v.* Chicago, etc., R. Co., 122 Wis. 258, 99 N. W. 897.

11. *Delaware.*— Kyne *v.* Wilmington, etc., R. Co., 8 Houst. 185, 14 Atl. 1, delay in putting up railings to approaches.

Indiana.— Cincinnati, etc., R. Co. *v.* Claire, 6 Ind. App. 390, 33 N. E. 918, raising grade, putting in steps, and leaving them unprotected.

Maryland.— Whitby *v.* Baltimore, etc., R. Co., 96 Md. 700, 54 Atl. 674.

Michigan.— Logan *v.* Lake Shore, etc., R. Co., 148 Mich. 603, 112 N. W. 506.

Missouri.— Brown *v.* Hannibal, etc., R. Co., 99 Mo. 310, 12 S. W. 655; Camp *v.* Wabash R. Co., 94 Mo. 272, 68 S. W. 96.

New York.— Durr *v.* New York Cent., etc., R. Co., 184 N. Y. 320, 77 N. E. 397 [*reversing* 97 N. Y. App. Div. 643, 90 N. Y. Suppl. 1094] (whether a hole or depression at the crossing was such a defect as to render the company negligent); Spooner *v.* Delaware, etc., R. Co., 115 N. Y. 22, 21 N. E. 696; Rembe *v.* New York, etc., R. Co., 102 N. Y. 721, 7 N. E. 797.

Texas.— St. Louis Southwestern R. Co. *v.* Smith, (Civ. App. 1908) 107 S. W. 638; St. Louis, etc., R. Co. *v.* Byas, 12 Tex. Civ. App. 657, 35 S. W. 22.

See 41 Cent. Dig. tit. "Railroads," § 1154.

Where the rails are an inch higher than the planking and cinder beds forming the roadway, it cannot be said as a matter of law that the railroad crossing is not defective. McDermott *v.* Chicago, etc., R. Co., 91 Wis. 38, 64 N. W. 430.

Whether maintaining an open frog in the sidewalk is negligence is a question for the jury. Friess *v.* New York Cent., etc., R. Co., 67 Hun (N. Y.) 205, 22 N. Y. Suppl. 104 [*affirmed* in 140 N. Y. 639, 35 N. E. 892].

Whether keeping the crossing covered with snow is included in the railroad company's duty to keep the highway in a safe condition for public use is a question for the jury. Dickey *v.* Boston, etc., R. Co., 70 N. H. 34, 47 Atl. 79.

Whether taking up during the winter the planks next the rails so as to leave a space of ten inches between the rail and the planking, whereby plaintiff's cutter is overthrown, is negligence is a question for the jury, where such space is left to prevent the derailing of trains by the formation of ice between the planking and the rail, and it does not appear that less space would not have sufficed. Lowell *v.* Central Vermont R. Co., 15 N. Y. App. Div. 218, 44 N. Y. Suppl. 193.

12. Atchison, etc., R. Co. *v.* Morris, 64 Kan. 411, 67 Pac. 837; Lewless *v.* Detroit,

tions to remain on or near the crossing;[13] or whether it used the proper degree of care and diligence in respect to persons attempting to pass through, over, or around such obstructions.[14] But where the evidence shows that the obstruction could have been avoided by the exercise of proper care and diligence such question should not be submitted to the jury, as it is the duty of the court in such case to instruct the jury as a matter of law that such obstruction is unauthorized and illegal.[15]

(v) *FRIGHTENING ANIMALS.* Where in an action for injuries resulting from the frightening of a horse or team at a railroad crossing the evidence as to such fact is conflicting, or there is some doubt as to the inferences to be drawn, it is a question for the jury as to whether or not the railroad company was negligent in respect to the particular act or omission in the management of its trains or road which caused the fright,[16] such as whether it was negligent in suddenly driving its engines or trains over the crossing without giving the proper signals,[17] or in sounding the whistle,[18] or permitting steam to escape,[19] or in permitting cars [20]

etc., R. Co., 65 Mich. 292, 32 N. W. 790 (where there is a conflict in the testimony as to whether there was any real obstruction); Welborne *v.* Gulf, etc., R. Co., 35 Tex. Civ. App. 401, 80 S. W. 653; Locke *v.* International, etc., R. Co., 25 Tex. Civ. App. 145, 60 S. W. 314.

Permitting an engine to extend slightly over a street line for a longer period than five consecutive minutes is not negligence as a matter of law. Burns *v.* Delaware, etc., Co., 110 N. Y. App. Div. 592, 92 N. Y. Suppl. 509.

Where the circumstances are such that reasonable persons might entertain different views as to whether the obstruction was justifiable the question whether or not the obstruction was negligent is a question for the jury. Chicago, etc., R. Co. *v.* Prescott, 59 Fed. 237, 8 C. C. A. 109, 23 L. R. A. 654.

Whether cars were permitted to stand in such a way as to obstruct the view at a crossing is a question for the jury where the evidence is conflicting. Chapman *v.* New York Cent., etc., R. Co., 41 N. Y. App. Div. 618, 58 N. Y. Suppl. 728.

13. Atchison, etc., R. Co. *v.* Willey, 57 Kan. 764, 48 Pac. 25.

Whether allowing a hedge or grove of trees of sufficient height and density to obstruct the view and prevent the hearing of trains by travelers on the highway to remain on the right of way at a country highway crossing is negligence is a question for the jury. Atchison, etc., R. Co. *v.* Willey, 57 Kan. 764, 48 Pac. 25.

14. Smith *v.* Savannah, etc., R. Co., 84 Ga. 698, 11 S. E. 455; Gesas *v.* Oregon Short Line R. Co., 33 Utah 156, 93 Pac. 274, 13 L. R. A. N. S. 1074.

15. Ranch *v.* Lloyd, 31 Pa. St. 358, 72 Am. Dec. 747.

16. Illinois Cent. R. Co. *v.* Slater, 139 Ill. 190, 28 N. E. 830; Courtney *v.* Minneapolis, etc., R. Co., 97 Minn. 69, 106 N. W. 90, 100 Minn. 434, 111 N. W. 399; Chicago, etc., R. Co. *v.* Harley, 74 Nebr. 462, 104 N. W. 862; Pennsylvania R. Co. *v.* Horst, 110 Pa. St. 226, 1 Atl. 217 (sudden noises); Pennsylvania R. Co. *v.* Barnett, 59 Pa. St. 259, 98 Am. Dec. 346.

What is the proper measure or standard of care in the management of a train as well as whether it has been complied with in the particular case is a question for the jury in such an action. Pennsylvania R. Co. *v.* Barrett, 59 Pa. St. 259, 98 Am. Dec. 346.

17. Sights *v.* Louisville, etc., R. Co., 117 Ky. 436, 78 S. W. 172, 25 Ky. L. Rep. 1548; Philadelphia, etc., R. Co. *v.* Hogeland, 66 Md. 149, 7 Atl. 105, 59 Am. Rep. 159; Green *v.* Eastern R. Co., 52 Minn. 79, 53 N. W. 808; Laible *v.* New York Cent., etc., R. Co., 13 N. Y. App. Div. 574, 43 N. Y. Suppl. 1003 [*affirmed* in 163 N. Y. 621, 57 N. E. 1114]; Missouri, etc., R. Co. *v.* Magee, (Tex. Civ. App. 1899) 49 S. W. 156.

18. Hill *v.* Portland, etc., R. Co., 55 Me. 438, 92 Am. Dec. 601; Cowen *v.* Watson, 91 Md. 344, 46 Atl. 996; Philadelphia, etc., R. Co. *v.* Hogeland, 66 Md. 149, 7 Atl. 105, 59 Am. Rep. 159; Paris, etc., R. Co. *v.* Calvin, (Tex. 1908) 106 S. W. 879 [*affirming* (Civ. App. 1907) 103 S. W. 428]; St. Louis Southwestern R. Co. *v.* Kilman, 39 Tex. Civ. App. 107, 86 S. W. 1050; Southern R. Co. *v.* Torian, 95 Va. 453, 28 S. E. 569.

Whether the whistle was blown in an unnecessary and extraordinary manner and whether the accident was caused thereby is a question for the jury. Philadelphia, etc., R. Co. *v.* Killips, 88 Pa. St. 405.

Whether sounding the whistle after the team is discovered to be frightened, thereby tending to increase the fright, is negligence, is a question for the jury. Nichols *v.* Baltimore, etc., R. Co., 33 Ind. App. 229, 70 N. E. 183, 71 N. E. 170; Pratt *v.* Chicago, etc., R. Co., 107 Iowa 287, 77 N. W. 1064.

19. Boothby *v.* Boston, etc., R. Co., 90 Me. 313, 38 Atl. 155; Geveke *v.* Grand Rapids, etc., R. Co., 57 Mich. 589, 24 N. W. 675; Omaha, etc., R. Co. *v.* Clark, 35 Nebr. 867, 53 N. W. 970, 23 L. R. A. 504; San Antonio, etc., R. Co. *v.* Belt, 24 Tex. Civ. App. 281, 59 S. W. 607; Missouri, etc., R. Co. *v.* Cloninger, (Tex. Civ. App. 1897) 42 S. W. 632.

Evidence held insufficient to take the case to the jury see Scaggs *v.* Delaware, etc., Canal Co., 145 N. Y. 201, 39 N. E. 716 [*reversing* 74 Hun 198, 26 N. Y. Suppl. 323].

20. Young *v.* Detroit, etc., R. Co., 56 Mich.

or other obstructions to remain on or near the crossing,[21] whereby the horse or team was frightened.

(VI) *Sign-Boards, Signals, Flagmen, and Gates at Crossings.* Whether or not the railroad company used proper care in the maintenance of sign-boards,[22] signals, or warnings,[23] or flagmen and gates at the crossing at the time of the accident, is ordinarily a question for the jury.[24] Thus, except in an extreme case, it is ordinarily a question for the jury, in the absence of statute, whether, under all the circumstances of the particular case, such as the amount of travel over the crossing, obstructions, etc., the railroad company was negligent in not having a flagman or gates at the crossing at the time of the accident,[25] even where the facts respecting the situation are undisputed;[26] although the construction of a statute or ordinance requiring a railroad company to keep a flagman or gates at the crossing is for the court alone.[27] Likewise it is a question for the jury whether or not a flagman or gateman stationed at the crossing exercised the proper degree of care in the performance of his duties at the time of the accident.[28]

430, 23 N. W. 67; Rusterholtz *v.* New York, etc., R. Co., 191 Pa. St. 390, 43 Atl. 208.

21. Tinker *v.* New York, etc., R. Co., 71 Hun (N. Y.) 431, 24 N. Y. Suppl. 977, holding that the question whether timber left by defendant on its right of way by the side of the highway is calculated to frighten horses of ordinary gentleness is for the jury.

22. See Winstanley *v.* Chicago, etc., R. Co., 72 Wis. 375, 39 N. W. 856.

23. Clark *v.* Boston, etc., R. Co., 164 Mass. 434, 41 N. E. 666.

What was the object of a red flag placed on the track below the crossing, and what effect it should have had on those in charge of the train and the gateman, are questions of fact for the jury. Clark *v.* Boston, etc., R. Co., 164 Mass. 434, 41 N. E. 666.

Whether a railroad company should warn persons of the danger of passing a crossing when a locomotive near by is emitting steam is a question of fact. Lewis *v.* Eastern R. Co., 60 N. H. 187.

24. Lederman *v.* Pennsylvania R. Co., 165 Pa. St. 118, 30 Atl. 725, 34 Am. St. Rep. 644.

That the railroad company knew that the gate at the crossing was out of repair is some evidence for the jury that the company was guilty of negligence. Brooks *v.* London, etc., R. Co., 33 Wkly. Rep. 167.

25. *Illinois.*— Chicago, etc., R. Co. *v.* Lane, 30 Ill. App. 437.

Iowa.— Tierney *v.* Chicago, etc., R. Co., 84 Iowa 641, 51 N. W. 175.

Maine.— Lesen *v.* Maine Cent. R. Co., 77 Me. 85.

Massachusetts.—Boucher *v.* New York, etc., R. Co., 196 Mass. 355, 82 N. E. 15, 13 L. R. A. N. S. 1177, even though the railroad company had not been ordered to maintain gates at the particular crossing, under Rev. Laws, c. 111, § 192.

Michigan.— Staal *v.* Grand Rapids, etc., R. Co., 57 Mich. 239, 23 N. W. 795.

Minnesota.— Bolinger *v.* St. Paul, etc., R. Co., 36 Minn. 418, 31 N. W. 856, 1 Am. St. Rep. 680.

Montana.— Riley *v.* Northern Pac. R. Co., 36 Mont. 545, 93 Pac. 948.

Nebraska.— Omaha, etc., R. Co. *v.* Brady, 39 Nebr. 27, 57 N. W. 767, in the absence of a municipal ordinance or express statutory requirement on the subject.

New Hampshire.— Huntress *v.* Boston, etc., R. Co., 66 N. H. 185, 34 Atl. 154, 49 Am. St. Rep. 600.

United States.— Lapsley *v.* Union Pac. R. Co., 50 Fed. 172.

Canada.— Lett *v.* St. Lawrence, etc., R. Co., 1 Ont. 545.

See 41 Cent. Dig. tit. "Railroads," §§ 1156–1159.

But *compare* Houghkirk *v.* Delaware, etc., Canal Co., 92 N. Y. 219, 44 Am. Rep. 370 [*reversing* 28 Hun 407]; Grippen *v.* New York Cent. R. Co., 40 N. Y. 34; Beisiegel *v.* New York Cent. R. Co., 40 N. Y. 9.

Illustration.— It is a question for the jury whether or not a flagman should have been kept at a much used crossing where the view is obstructed. Chicago, etc., R. Co. *v.* Perkins, 26 Ill. App. 67; Annaker *v.* Chicago, etc., R. Co., 81 Iowa 267, 47 N. W. 68; Central Texas, etc., R. Co. *v.* Gibson, (Tex. Civ. App. 1904) 83 S. W. 862; International, etc., R. Co. *v.* Jones, (Tex. Civ. App. 1901) 60 S. W. 978.

Evidence held insufficient to take the case to the jury on the question whether or not a railroad company should have placed a watchman upon a lawful highway crossing see Lake Erie, etc., R. Co. *v.* Barclay, 30 Can. Sup. Ct. 360.

26. Lesan *v.* Maine Cent. R. Co., 77 Me. 85.

27. Wilson *v.* New York, etc., R. Co., 18 R. I. 598, 29 Atl. 300.

28. *Illinois.*— Chicago, etc., R. Co. *v.* Clough, 134 Ill. 586, 25 N. E. 664, 29 N. E. 184.

Iowa.— Buchanan *v.* Chicago, etc., R. Co., 75 Iowa 393, 39 N. W. 663.

Massachusetts.—Marks *v.* Fitchburg R. Co., 155 Mass. 493, 29 N. E. 1148.

Michigan.— Steel *v.* Chicago, etc., R. Co., 107 Mich. 516, 65 N. W. 573.

Missouri.— Hamilton *v.* Metropolitan St. R. Co., 114 Mo. App. 504, 89 S. W. 893, evidence of negligence held sufficient to take the case to the jury.

(VII) *MODE OF RUNNING AT CROSSINGS IN GENERAL.* Whether or not the railroad company used proper care and precautions in the management or operation of its train or cars in approaching or passing over a crossing at the time of the accident is generally a question for the jury to determine from all the circumstances of the particular case.[29] Thus it is a question for the jury whether under all the circumstances the railroad company was negligent in approaching a crossing at a rapid or unlawful rate of speed without giving the proper signals;[30] or whether, in addition to giving the customary or statutory signals, it should have, in the exercise of reasonable care, taken other precautions to avoid injuries to travelers.[31]

(VIII) *LIGHTS, SIGNALS, AND LOOKOUTS FROM THE TRAINS OR CARS* — (A) *In General.* Where there is evidence tending to show such fact, but it is

New Jersey.— Record *v.* Pennsylvania R. Co., (Sup. 1907) 67 Atl. 1040 (absence of lights on gates); Wolcott *v.* New York, etc., R. Co., 68 N. J. L. 421, 53 Atl. 297; Tubello *v.* Delaware, etc., R. Co., 67 N. J. L. 581, 52 Atl. 561; Smith *v.* Atlantic City R. Co., 66 N. J. L. 307, 49 Atl. 547.

New York.— Hurley *v.* New York Cent., etc., R. Co., 90 Hun 1, 35 N. Y. Suppl. 351; Snultz *v.* New York Cent., etc., R. Co., 69 Hun 515, 23 N. Y. Suppl. 509 [*affirmed* in 143 N. Y. 670, 39 N. E. 21]; Oldenburg *v.* New York Cent., etc., R. Co., 9 N. Y. Suppl. 419 [*affirmed* in 124 N. Y. 414, 26 N. E. 1021]; Enders *v.* Lake Shore, etc., R. Co., 2 N. Y. Suppl. 719 [*affirmed* in 117 N. Y. 640, 22 N. E. 1130].

Pennsylvania.— Philadelphia, etc., R. Co. *v.* Killips, 88 Pa. St. 405.

Vermont.—Germond *v.* Central Vermont R. Co., 65 Vt. 126, 26 Atl. 401, evidence held sufficient to warrant a submission to the jury.

Virginia.— Southern R. Co. *v.* Stockdon, 106 Va. 693, 56 S. E. 713, holding that whether a watchman stationed at the crossing gave the proper warning of the approach of the train is a question for the jury, although the preponderance of the evidence is that he did give warning.

England.— See Clarke *v.* Midland R. Co., 43 L. T. Rep. N. S. 381.

See 41 Cent. Dig. tit. "Railroads," § 1158.

Compare Chicago, etc., R. Co. *v.* Durand, 65 Kan. 380, 69 Pac. 356.

Whether allowing the gate to be open is negligence on the part of the railroad company is a question for the jury (Haywood *v.* New York Cent., etc., R. Co., 13 N. Y. Suppl. 177; Philadelphia, etc., R. Co. *v.* Killips, 88 Pa. St. 405; Bracken *v.* Pennsylvania R. Co., 32 Pa. Super. Ct. 22), even where it is opened by a stranger (Haywood *v.* New York Cent., etc., R. Co., *supra*).

Additional precautions.— Where gates have been placed at a crossing before the accident, but there is no proof that they have been rendered necessary by any act of the company, it is error to charge that it is a question for the jury as to what precautions are reasonably necessary for the safety of the public in addition to the proper operation of the gates. Siracusa *v.* Atlantic City R. Co., 68 N. J. L. 446, 53 Atl. 547.

29. *Illinois.*— Elgin, etc., R. Co. *v.* Lawlor, 229 Ill. 621, 82 N. E. 407 [*affirming* 132 Ill. App. 280]; Cleveland, etc., R. Co. *v.* Chinsky, 92 Ill. App. 50.

Kentucky.— Cincinnati, etc., R. Co. *v.* Champ, 104 S. W. 988, 31 Ky. L. Rep. 1054.

Maine.— Webb *v.* Portland, etc., R. Co., 57 Me. 117.

Massachusetts.— Bradley *v.* Boston, etc., R. Co., 2 Cush. 539.

Minnesota.— Bolinger *v.* St. Paul, etc., R. Co., 36 Minn. 418, 31 N. W. 856, 1 Am. St. Rep. 680.

New York.— St. John *v.* New York Cent., etc., R. Co., 165 N. Y. 241, 59 N. E. 3 [*reversing* 24 N. Y. App. Div. 626, 49 N. Y. Suppl. 1142]; Doyle *v.* Pennsylvania, etc., Canal, etc., Co., 139 N. Y. 637, 34 N. E. 1063; McPeak *v.* New York Cent., etc., R. Co., 85 Hun 107, 32 N. Y. Suppl. 647; White *v.* New York Cent., etc., R. Co., 16 N. Y. Suppl. 788.

Pennsylvania.— Metzler *v.* Philadelphia, etc., R. Co., 28 Pa. Super. Ct. 180.

See 41 Cent. Dig. tit. "Railroads," § 1160.

Evidence held sufficient to require submission to the jury of the question of the company's negligence in operating a train see Chicago, etc., R. Co. *v.* Schmitz, 211 Ill. 446, 71 N. E. 1050 [*affirming* 113 Ill. App. 295].

Where the engine is in charge of a fireman only, who did not, on approaching the crossing, ring the bell or blow the whistle, as required by statute, it is for the jury to determine the question of the railroad company's negligence. O'Mara *v.* Hudson River R. Co., 38 N. Y. 445, 98 Am. Dec. 61.

Whether a train is "well manned with experienced brakemen at their posts" within the meaning of a city ordinance is a question for the jury. Dahlstrom *v.* St. Louis, etc., R. Co., 108 Mo. 525, 18 S. W. 919.

30. Moore *v.* Chicago, etc., R. Co., 93 Iowa 484, 61 N. W. 992; Nelson *v.* Long Island R. Co., 109 N. Y. App. Div. 626, 96 N. Y. Suppl. 246; Flanagan *v.* New York Cent., etc., R. Co., 70 N. Y. App. Div. 505, 75 N. Y. Suppl. 225 [*affirmed* in 173 N. Y. 631, 66 N. E. 1108]; Goodell *v.* New York Cent., etc., R. Co., 67 N. Y. App. Div. 271, 73 N. Y. Suppl. 428; Wilcox *v.* New York, etc., R. Co., 88 Hun (N. Y.) 263, 34 N. Y. Suppl. 744; Shatto *v.* Erie R. Co., 121 Fed. 678, 59 C. C. A. 1.

31. Cincinnati, etc., R. Co. *v.* Champ, 104 S. W. 988, 31 Ky. L. Rep. 1054; Struck *v.* Chicago, etc., R. Co., 58 Minn. 298, 59 N. W. 1022.

conflicting or there is some doubt as to the inferences to be drawn from the facts proven, it is a question of fact for the jury whether or not the train which caused the injury gave the proper or statutory signals as it approached the crossing at the time of the accident.[32] Thus where some witnesses testify that the proper signals were given and plaintiff or others testify that they were not given or that they did not hear them, although they were listening or were in a position to hear them had they been given, the question whether or not the bell was rung or the whistle sounded is one of fact and should be submitted to the jury.[33] So it is a

32. *Illinois.*— Chicago Great Western R. Co. *v.* Mohan, 88 Ill. App. 151 [*affirmed* in 187 Ill. 281, 58 N. E. 395].

Iowa.— Lorenz *v.* Burlington, etc., R. Co., 115 Iowa 377, 88 N. W. 835, 56 L. R. A. 752.

Kentucky.— Paducah, etc., R. Co. *v.* Hoehl, 12 Bush 41; Southern R. Co. *v.* Winchester, 105 S. W. 167, 32 Ky. L. Rep. 19; Chesapeake, etc., R. Co. *v.* Dupee, 67 S. W. 15, 23 Ky. L. Rep. 2349; Mobile, etc., R. Co. *v.* Roper, 58 S. W. 518, 22 Ky. L. Rep. 666.

Maryland.— Philadelphia, etc., R. Co. *v.* Hogeland, 66 Md. 149, 7 Atl. 105, 59 Am. Rep. 159.

Massachusetts.—Fitzhugh *v.* Boston, etc., R. Co., 195 Mass. 202, 80 N. E. 792; McDonald *v.* New York Cent., etc., R. Co., 186 Mass. 474, 72 N. E. 55 (holding that the positive testimony of two witnesses who were near that the signals were not given and testimony of other persons similarly situated that they did not hear the signals requires the submission of the question to the jury); Dalton *v.* New York, etc., R. Co., 184 Mass. 344, 68 N. E. 830; Johanson *v.* Boston, etc., R. Co., 153 Mass. 57, 26 N. E. 426; Menard *v.* Boston, etc., R. Co., 150 Mass. 386, 23 N. E. 214 (where six witnesses testified that they heard neither bell nor whistle until danger signals were sounded close by the crossing).

Michigan.— Line *v.* Grand Rapids, etc., R. Co., 143 Mich. 163, 106 N. W. 719; Grinnell *v.* Michigan Cent. R. Co., 124 Mich. 141, 82 N. W. 843.

Minnesota.— Beanstrom *v.* Northern Pac. R. Co., 46 Minn. 193, 48 N. W. 778.

Missouri.— Weller *v.* Chicago, etc., R. Co., 164 Mo. 180, 64 S. W. 141, 86 Am. St. Rep. 592.

New Jersey.— Goodwin *v.* New Jersey Cent. R. Co., 73 N. J. L. 576, 64 Atl. 134; Rafferty *v.* Erie R. Co., 66 N. J. L. 444, 49 Atl. 456.

New York.— Doyle *v.* Pennsylvania, etc., Canal, etc., Co., 139 N. Y. 637, 34 N. E. 1063; Ernst *v.* Hudson River R. Co., 39 N. Y. 61, 6 Transcr. App. 35, 36 How. Pr. 84, 100 Am. Dec. 405 [*affirming* 32 Barb. 159, 19 How. Pr. 205]; Lewis *v.* Long Island R. Co., 30 N. Y. App. Div. 410, 51 N. Y. Suppl. 558 [*reversed* on other grounds in 162 N. Y. 52, 56 N. E. 548]; Wilcox *v.* New York, etc., R. Co., 88 Hun 263, 34 N. Y. Suppl. 744; Beckwith *v.* New York Cent., etc., R. Co., 54 Hun 446, 7 N. Y. Suppl. 719, 721 [*affirmed* in 125 N. Y. 759, 27 N. E. 408]; Enders *v.* Lake Shore, etc., R. Co., 2 N. Y. Suppl. 719 [*affirmed* in 117 N. Y. 640, 22 N. E. 1130]; Collins *v.* New York, etc., R. Co., 4 N. Y. St. 874.

Ohio.— Wells *v.* Cincinnati, etc., R. Co., 9 Ohio Cir. Ct. 340, 6 Ohio Cir. Dec. 137.

Pennsylvania.— Bickel *v.* Pennsylvania R. Co., 217 Pa. St. 456, 66 Atl. 756; Kreamer *v.* Perkiomen R. Co., 214 Pa. St. 219, 63 Atl. 597; Pyne *v.* Delaware, etc., R. Co., 212 Pa. St. 143, 61 Atl. 817; Quigley *v.* Delaware, etc., Canal Co., 142 Pa. St. 388, 21 Atl. 827, 24 Am. St. Rep. 504; Pennsylvania R. Co. *v.* Coon, 111 Pa. St. 430, 3 Atl. 234.

South Carolina.— Bamberg *v.* Atlantic Coast Line R. Co., 72 S. C. 389, 51 S. E. 988.

Texas.— Galveston, etc., R. Co. *v.* Murray, (Civ. App. 1906) 99 S. W. 144; International, etc., R. Co. *v.* Dalwigh, (Civ. App. 1900) 56 S. W. 136; Galveston, etc., R. Co. *v.* Harris, 22 Tex. Civ. App. 16, 53 S. W. 599.

United States.—Southern R. Co. *v.* Carroll, 138 Fed. 638, 71 C. C. A. 88.

England.— Dublin, etc., R. Co. *v.* Slattery, 3 App. Cas. 1155, 39 L. T. Rep. N. S. 365, 27 Wkly. Rep. 191.

See 41 Cent. Dig. tit. "Railroads," § 1161.

Where the testimony of defendant's own witnesses tends to show that the signals were not given, the question is properly submitted to the jury, although no testimony to such effect is offered by plaintiff. Keim *v.* Union R., etc., Co., 90 Mo. 314, 2 S. W. 427.

Although the great preponderance of evidence shows that the signals were given the question whether or not they were in fact given is a question for the jury, where there is some evidence that they were not given. Nash *v.* New York Cent., etc., R. Co., 125 N. Y. 715, 26 N. E. 266 [*reversing* 51 Hun 594, 4 N. Y. Suppl. 525]. *Compare* Sutherland *v.* New York Cent., etc., R. Co., 41 N. Y. Super. Ct. 17.

Evidence held insufficient to go to the jury see Columbia, etc., R. Co. *v.* State, 105 Md. 34, 65 Atl. 625; Hatcher *v.* McDermott, 103 Md. 78, 63 Atl. 214; Holmes *v.* Pennsylvania R. Co., 74 N. J. L. 469, 66 Atl. 412.

33. *Illinois.*— Chicago, etc., R. Co. *v.* Pulliam, 208 Ill. 456, 70 N. E. 460; Atchison, etc., R. Co. *v.* Feehan, 149 Ill. 202, 36 N. E. 1036 [*affirming* 47 Ill. App. 66].

Iowa.— Annaker *v.* Chicago, etc., R. Co., 81 Iowa 267, 47 N. W. 68; Lee *v.* Chicago, etc., R. Co., 80 Iowa 172, 45 N. W. 739; Reed *v.* Chicago, etc., R. Co., 74 Iowa 188, 37 N. W. 149.

Kentucky.— Louisville, etc., R. Co. *v.* Walden, 74 S. W. 694, 25 Ky. L. Rep. 1.

Massachusetts.— Daniels *v.* New York, etc., R. Co., 183 Mass. 393, 67 N. E. 424.

question for the jury as to whether proper lights were displayed,[31] or whether the employees in charge of the engine or cars kept a proper lookout.[35] Likewise it is usually a question for the jury whether under the circumstances of the particular case the railroad company was negligent in failing to give the proper or customary signals,[36] although it was not required to give signals by statute or

Michigan.— McDuffie *v.* Lake Shore, etc., R. Co., 98 Mich. 356, 57 N. W. 248.

Missouri.— Weller *v.* Chicago, etc., R. Co., 164 Mo. 180, 64 S. W. 141, 86 Am. St. Rep. 592; Dickson *v.* Missouri Pac. R. Co., 104 Mo. 491, 16 S. W. 381; Hanlon *v.* Missouri Pac. R. Co., 104 Mo. 381, 16 S. W. 233.

New York.— Salter *v.* Utica, etc., R. Co., 59 N. Y. 631; Roach *v.* Flushing, etc., R. Co., 58 N. Y. 626; Stewart *v.* Long Island R. Co., 54 N. Y. App. Div. 623, 66 N. Y. Suppl. 436 [*affirmed* in 166 N. Y. 604, 59 N. E. 1130]; Degraw *v.* Erie R. Co., 49 N. Y. App. Div. 29, 63 N. Y. Suppl. 296; Moore *v.* New York Cent., etc., R. Co., 75 Hun 381, 27 N. Y. Suppl. 449 [*affirmed* in 142 N. Y. 652, 37 N. E. 569]; Puff *v.* Lehigh Valley R. Co., 71 Hun 577, 24 N. Y. Suppl. 1068; Campbell *v.* New York Cent., etc., R. Co., 3 N. Y. Suppl. 649 [*affirmed* in 121 N. Y. 669, 24 N. E. 1094]; Halsey *v.* Rome, etc., R. Co., 12 N. Y. St. 319.

Pennsylvania.— Crane *v.* Pennsylvania R. Co., 218 Pa. St. 560, 67 Atl. 877; Winterbottom *v.* Philadelphia, etc., R. Co., 217 Pa. St. 574, 66 Atl. 864; Kuntz *v.* New York, etc., R. Co., 206 Pa. St. 162, 55 Atl. 915.

Texas.— International, etc., R. Co. *v.* Sein, 11 Tex. Civ. App. 386, 33 S. W. 558.

Wisconsin.— Roedler *v.* Chicago, etc., R. Co., 129 Wis. 270, 109 N. W. 88.

See 41 Cent. Dig. tit. "Railroads," § 1161.

To warrant the submission of the question to the jury, where positive evidence is adduced to the fact that the signals were given, there must be something more than the testimony of witnesses that they did not hear the signals, and it must appear that their attention was attracted to the fact so that their evidence would tend to negative that of defendant. Stewart *v.* Michigan Cent. R. Co., 119 Mich. 91, 77 N. W. 643 (evidence held insufficient); Glennon *v.* Erie R. Co., 86 N. Y. App. Div. 397, 83 N. Y. Suppl. 875 [*affirmed* in 180 N. Y. 562, 73 N. E. 1124] (evidence held insufficient); Bleyle *v.* New York Cent., etc., R. Co., 11 N. Y. St. 585 [*affirmed* in 113 N. Y. 626, 20 N. E. 877]; Newhard *v.* Pennsylvania R. Co., 153 Pa. St. 417, 26 Atl. 105, 19 L. R. A. 563. The testimony of a passenger that no whistle was blown or bell rung at the regular distance from the crossing — that he did not hear any — is not enough to go to the jury on the question as against the testimony of engineer, fireman, conductor, and brakemen. Knox *v.* Philadelphia, etc., R. Co., 202 Pa. St. 504, 52 Atl. 90.

Where the evidence is contradictory as to whether the approaching train gave a signal, the case should be submitted to the jury with proper explanations as to the relative value of the testimony of those who said positively that they had heard the signal and the negative testimony of those who simply testified that they had not heard it. Missouri Pac. R. Co. *v.* Moffatt, 56 Kan. 667, 44 Pac. 607; Salathe *v.* Delaware, etc., R. Co., 28 Pa. Super. Ct. 1. Although as a matter of law, where witnesses are of equal credit, positive evidence that a signal was given is entitled to more weight than that of witnesses who say that they did not hear the signals, yet the position and situation of the witnesses, the attention they were giving and their credibility are questions for the jury and it is within their province to weigh the evidence and determine its value. Murray *v.* Missouri Pac. R. Co., 101 Mo. 236, 13 S. W. 817, 20 Am. St. Rep. 601; E. B. Clark Co. *v.* Baltimore, etc., R. Co., 27 Pa. Super. Ct. 251.

34. Annacker *v.* Chicago, etc., R. Co., 81 Iowa 267, 47 N. W. 68; Line *v.* Grand Rapids, etc., R. Co., 143 Mich. 163, 106 N. W. 719; Weller *v.* Chicago, etc., R. Co., 164 Mo. 180, 64 S. W. 141, 86 Am. St. Rep. 592; De Graw *v.* Erie R. Co., 49 N. Y. App. Div. 29, 63 N. Y. Suppl. 296.

35. Leavitt *v.* Terre Haute, etc., R. Co., 5 Ind. App. 513, 31 N. E. 860, 32 N. E. 866; Tierney *v.* Chicago, etc., R. Co., 84 Iowa 641, 51 N. W. 175.

36. *Illinois.*— Chicago, etc., R. Co. *v.* Corson, 198 Ill. 98, 64 N. E. 739 [*affirming* 101 Ill. App. 115] (whether defendant's failure to give any signal misled deceased and caused her to drive on the right of way under the belief that no train was approaching); Chicago, etc., R. Co. *v.* Smith, 180 Ill. 453, 54 N. E. 325 [*affirming* 77 Ill. App. 492].

Kansas.— Roach *v.* St. Joseph, etc., R. Co., 35 Kan. 654, 41 Pac. 964, in the neighborhood of a dangerous private crossing.

Kentucky.— Louisville, etc., R. Co. *v.* Lucas, 98 S. W. 308, 99 S. W. 959, 30 Ky. L. Rep. 359, 539.

Minnesota.— Loucks *v.* Chicago, etc., R. Co., 31 Minn. 526, 18 N. W. 651.

Missouri.— Erickson *v.* Kansas City, etc., R. Co., 171 Mo. 647, 71 S. W. 1022.

New York.— O'Mara *v.* Hudson River R. Co., 38 N. Y. 445, 98 Am. Dec. 61; Swart *v.* New York Cent., etc., R. Co., 81 N. Y. App. Div. 402, 80 N. Y. Suppl. 906 [*affirmed* in 177 N. Y. 529, 69 N. E. 1131 (where the train was running at a speed of fifty miles an hour)]; Sauerborn *v.* New York Cent., etc., R. Co., 69 Hun 429, 23 N. Y. Suppl. 478 [*affirmed* in 141 N. Y. 553, 36 N. E. 343]; Johnson *v.* Hudson River R. Co., 6 Duer 633 [*affirmed* in 20 N. Y. 65, 75 Am. Dec. 375].

Texas.— Houston, etc., R. Co. *v.* Boozer, 70 Tex. 530, 8 S. W. 119, 8 Am. St. Rep. 615; Texas, etc., R. Co. *v.* Tucker, (Civ. App. 1907) 106 S. W. 764; Shoemaker *v.* Texas, etc., R. Co., 29 Tex. Civ. App. 578, 69 S. W. 990.

ordinance,[37] or in failing to display proper lights,[38] or to keep a proper lookout from its train or cars;[39] although it has been held that a failure to give the statutory signals is negligence *per se* and the court may so charge,[40] and even in the absence of statute, the court may charge that it was negligence to fail to give signals, under the circumstances of the particular case, as where the undisputed facts show that it was clearly dangerous for the particular train to approach without signals, and no excuse is shown for the omission.[41] So it is a question for the jury as to what signals ordinary care would require under the circumstances of the particular case,[42] or whether or not the signals which were given,[43] or the lights which were displayed,[44] were sufficient.

See 41 Cent. Dig. tit. "Railroads," § 1161.

Whether or not the failure to give a signal at an overhead crossing is negligence is for the jury. Chesapeake, etc., R. Co. *v.* Ogles, 73 S. W. 751, 24 Ky. L. Rep. 2160; Louisville, etc., R. Co. *v.* Shearer, 59 S. W. 330, 22 Ky. L. Rep. 929.

Where an engine starts toward a crossing from a distance of less than eighty rods, it is a question for the jury whether it is negligence not to blow the whistle. Gulf, etc., R. Co. *v.* Hall, 34 Tex. Civ. App. 535, 80 S. W. 133.

Gross negligence.— It is proper to submit to the jury the question whether the failure to give a signal of an approach of a train at a street crossing and to keep a lookout for persons on the street is gross negligence so as to authorize punitive damages. Louisville, etc., R. Co. *v.* Cooper, 65 S. W. 795, 23 Ky. L. Rep. 1658.

37. Hodges *v.* St. Louis, etc., R. Co., 71 Mo. 50 (when approaching a switch crossing); Winstanley *v.* Chicago, etc., R. Co., 72 Wis. 375, 39 N. W. 856.

Although the statute only provides for whistling a quarter of a mile from a crossing, it is a question for the jury whether a failure to sound it after the engine is nearer the crossing is negligence. Missouri, etc., R. Co. *v.* Oslin, 26 Tex. Civ. App. 370, 63 S. W. 1039.

38. Erickson *v.* Kansas City, etc., R. Co., 171 Mo. 647, 71 S. W. 1022; Johnson *v.* Hudson River R. Co., 6 Duer (N. Y.) 633 [*affirmed* in 20 N. Y. 65, 75 Am. Dec. 375]; Wells *v.* Cincinnati, etc., R. Co., 9 Ohio Cir. Ct. 340, 6 Ohio Cir. Dec. 137; International, etc., R. Co. *v.* Jones, (Tex. Civ. App. 1901) 60 S. W. 978.

39. Tierney *v.* Chicago, etc., R. Co., 84 Iowa 641, 51 N. W. 175; Louisville, etc., R. Co. *v.* Cooper, 65 S. W. 795, 23 Ky. L. Rep. 1658; Houston, etc., R. Co. *v.* Boozer, 70 Tex. 530, 8 S. W. 119, 8 Am. St. Rep. 615; St. Louis Southwestern R. Co. *v.* Elledge, (Tex. Civ. App. 1906) 93 S. W. 499 (in the absence of statute making it negligence to fail to keep a lookout); Shoemaker *v.* Texas, etc., R. Co., 29 Tex. Civ. App. 578, 69 S. W. 990; International, etc., R. Co. *v.* Jones, (Tex. Civ. App. 1901) 60 S. W. 978; Schlimgen *v.* Chicago, etc., R. Co., 90 Wis. 186, 62 N. W. 1045.

40. Galveston, etc., R. Co. *v.* Harris, 22 Tex. Civ. App. 16, 53 S. W. 599. See St. Louis Southwestern R. Co. *v.* Elledge, (Tex. Civ. App. 1906) 93 S. W. 499, as to statutory requirement of lookouts.

41. Loucks *v.* Chicago, etc., R. Co., 31 Minn. 526, 18 N. W. 651.

42. Johnson *v.* Baltimore, etc., R. Co., 6 Mackey (D. C.) 232; Georgia R., etc., Co. *v.* Cromer, 106 Ga. 296, 31 S. E. 759.

Although the statute only requires the signals to be given on approaching a public highway, it is within the province of the jury to determine whether, under the circumstances of a particular case, it is negligence not to give such a signal at another point. Winslow *v.* Boston, etc., R. Co., 11 N. Y. St. 831.

Whether the whistle ought to have been sounded at any particular point or not is a question for the jury. Ellis *v.* Great Western R. Co., L. R. 9 C. P. 551, 43 L. J. C. P. 304, 30 L. T. Rep. N. S. 874.

43. Byrne *v.* New York Cent., etc., R. Co., 104 N. Y. 362, 10 N. E. 539, 58 Am. Rep. 512; Bradley *v.* Ohio River, etc., R. Co., 126 N. C. 735, 36 S. E. 181 (whether the sounding of a whistle when the train was fifty feet from the crossing was timely); Childs *v.* Pennsylvania R. Co., 150 Pa. St. 73, 24 Atl. 341 (holding that where the evidence shows that an approaching train could not be seen until within nine hundred feet, and the train was running at the rate of forty-five to fifty miles per hour, the question whether the ringing of the bell gave sufficient warning is properly one for the jury); Griffith *v.* Baltimore, etc., R. Co. 44 Fed. 574.

Whether ringing the bell without blowing the whistle is negligence is a question for the jury. Longenecker *v.* Pennsylvania R. Co., 105 Pa. St. 328.

Where the view was obstructed and the train was running at a high rate of speed, it is a question for the jury whether the customary signals, if given, were adequate or whether any signals which might have been given were sufficient. Petrie *v.* New York Cent., etc., R. Co., 171 N. Y. 638, 63 N. E. 1121 [*affirming* 63 N. Y. App. Div. 473, 71 N. Y. Suppl. 866].

44. Chicago, etc., R. Co. *v.* Condon, 108 Ill. App. 639.

Whether a light on a train is a conspicuous light within the meaning of a city ordinance requiring a conspicuous light on all moving trains at night is a question of fact for the jury. Chicago, etc., R. Co. *v.* Condon, 108 Ill. App. 639.

(B) *Method of Moving Trains or Cars.* It is also a question of fact for the jury where the evidence is conflicting or doubtful whether defendant company exercised due care in moving a train or cars which had been standing at the crossing,[45] as whether there were proper lights on the cars at the time,[46] or proper signals were given before starting; [47] or whether or not it was negligence to move the train or cars without a previous signal or warning.[48] Likewise it is a question for the jury whether a backing train gave the proper signals,[49] or had a proper lookout on the car furthest from the engine; [50] or whether under the circumstances the railroad company was negligent in backing an engine or cars,[51] or in kicking or running unattended cars,[52] or in making a flying switch,[53] over the crossing without the proper lights, signals, or lookouts.

(C) *Where View or Hearing Is Obstructed.* Where there is evidence that the

45. Chicago, etc., R. Co. *v.* Carey, 115 Ill. 115, 3 N. E. 519; Carmer *v.* Chicago, etc., R. Co., 95 Wis. 513, 70 N. W. 560.

Whether defendant's engineer had knowledge of plaintiff's attempt to cross before the train was started is a question for the jury, where there is evidence that plaintiff had been waiting at the crossing for some time in full view of the engineer, and that there was no other crossing within half a mile. Irvin *v.* Gulf, etc., R. Co., (Tex. Civ. App. 1897) 42 S. W. 661.

46. Chicago, etc., R. Co. *v.* Carey, 115 Ill. 115, 3 N. E. 519.

47. Chicago, etc., R. Co. *v.* Carey, 115 Ill. 115, 3 N. E. 519; Carmer *v.* Chicago, etc., R. Co., 95 Wis. 513, 70 N. W. 560.

48. *Missouri.*— Burger *v.* Missouri Pac. R. Co., 112 Mo. 238, 20 S. W. 439, 34 Am. St. Rep. 379.

Nebraska.— Williams *v.* Chicago, etc., R. Co., 78 Nebr. 695, 701, 111 N. W. 596, 113 N. W. 791, 14 L. R. A. N. S. 1224.

New York.— Chadbourne *v.* Delaware, etc., R. Co., 6 Daly 215.

Ohio.— Lake Erie, etc., R. Co. *v.* Mackey, 53 Ohio St. 370, 41 N. E. 980, 53 Am. St. Rep. 641, 29 L. R. A. 757.

Pennsylvania.— Philadelphia, etc., R. Co. *v.* Layer, 112 Pa. St. 414, 3 Atl. 874.

See 41 Cent. Dig. tit. "Railroads," § 1162.

49. Kelly *v.* Union R., etc., Co., 95 Mo. 279, 8 S. W. 420.

Evidence held insufficient to take the case to the jury see Bohan *v.* Milwaukee, etc., R. Co., 61 Wis. 391, 21 N. W. 241.

50. Kelly *v.* Union R., etc., Co., 95 Mo. 279, 8 S. W. 420.

51. *Illinois.*— Chicago, etc., R. Co. *v.* Filler, 195 Ill. 9, 62 N. E. 919; Chicago, etc., R. Co. *v.* McDonnell, 194 Ill. 82, 62 N. E. 308 [*affirming* 91 Ill. App. 488].

Maryland.— State *v.* Union R. Co., 70 Md. 69, 18 Atl. 1032.

Nebraska.— Union Pac. R. Co. *v.* Connolly, 77 Nebr. 254, 109 N. W. 368; Chicago, etc., R. Co. *v.* Russell, 72 Nebr. 114, 100 N. W. 156, holding that it is a question for the jury whether it was negligence for the railroad company to back a train without special warning.

New York.— Wiwirowski *v.* Lake Shore, etc., R. Co., 58 Hun 40, 11 N. Y. Suppl. 361 [*reversed* on other grounds in 124 N. Y. 420, 26 N. E. 1023]; Waldele *v.* New York Cent., etc., R. Co., 19 Hun 69.

Pennsylvania.— Cohen *v.* Philadelphia, etc., R. Co., 211 Pa. St. 227, 60 Atl. 729; Fisher *v.* Monongahela Connecting R. Co., 131 Pa. St. 292, 18 Atl. 1016.

See 41 Cent. Dig. tit. "Railroads," §§ 1160, 1162.

Whether defendant was negligent in running a train backward under the circumstances is a question for the jury, although defendant's expert witnesses who testify that such was the only practical way are uncontradicted. Carrow *v.* Barre R. Co., 74 Vt. 176, 52 Atl. 537.

52. *Illinois.*— Chicago Junction R. Co. *v.* McGrath, 203 Ill. 511, 68 N. E. 69 [*affirming* 107 Ill. App. 100].

Indiana.— Ohio, etc., R. Co. *v.* McDaneld, 5 Ind. App. 108, 31 N. E. 836.

Michigan.— Lehman *v.* Eureka Iron, etc., Wks., 114 Mich. 260, 72 N. W. 183.

New York.— Bowen *v.* New York Cent., etc., R. Co., 89 Hun 594, 35 N. Y. Suppl. 540.

Texas.— Texas, etc., R. Co. *v.* Carr, (Civ. App. 1897) 42 S. W. 126.

See 41 Cent. Dig. tit. "Railroads," §§ 1160, 1162.

Where the mode of running cars by "kicking" is explained to the jury, with the situation of the tracks where cars were so run across a street at night, and the character of the night as to darkness, and of the street as to the extent to which it was traveled, the question whether that mode of running the cars was more dangerous or any more convenient than running them with the engine is a proper question to be submitted to the jury. Howard *v.* St. Paul, etc., R. Co., 32 Minn. 214, 20 N. W. 93.

Where cars were shoved in on a side-track resulting in the death of a boy who was crawling through standing cars which were moved thereby, the question of the company's liability is for the jury, where the street across which the cars were standing, although not graded or paved, was used by the public and persons in the neighborhood were accustomed to creeping under the cars. Hoffer *v.* Southern R. Co., 53 S. W. 665, 21 Ky. L. Rep. 1020.

53. York *v.* Maine Cent. R. Co., 84 Me. 117, 24 Atl. 790, 18 L. R. A. 60.

injured person's view or hearing at the crossing at which the accident occurred was obstructed, and that the train which caused the accident approached the crossing at a rapid or unlawful rate of speed without giving any or the proper signals, the question of defendant's negligence is for the jury,[54] including the question whether or not the view or hearing was in fact obstructed,[55] and the question whether or not any signal was given.[56]

(IX) *RATE OF SPEED.* Where the evidence is conflicting or doubtful it is a question for the jury to determine at what rate of speed the train was running at the time of the accident,[57] and whether or not, under the circumstances existing at the particular time and crossing, such rate of speed, although not in violation of a statute or ordinance,[58] was negligent,[59] as whether or not it was negligent to

54. *California.*— Nehrbas *v.* Central Pac. R. Co., 62 Cal. 320.

Illinois.— Chicago, etc., R. Co. *v.* Sanders, 154 Ill. 531, 39 N. E. 481 [*affirming* 55 Ill. App. 87].

Iowa.— Pratt *v.* Chicago, etc., R. Co., 98 Iowa 563, 67 N. W. 402.

Kansas.— Missouri Pac. R. Co. *v.* Johnson, 44 Kan. 666, 24 Pac. 1116.

Kentucky.— Louisville, etc., R. Co. *v.* Walden, 74 S. W. 694, 25 Ky. L. Rep. 1.

Minnesota.— Beanstrom *v.* Northern Pac. R. Co., 46 Minn. 193, 48 N. W. 778.

Missouri.— Keim *v.* Union R., etc., Co., 90 Mo. 314, 2 S. W. 427.

New York.— Robson *v.* Nassau Electric R. Co., 80 N. Y. App. Div. 301, 80 N. Y. Suppl. 698; Petrie *v.* New York Cent., etc., R. Co., 63 N. Y. App. Div. 473, 71 N. Y. Suppl. 866 [*affirmed* in 171 N. Y. 638, 63 N. E. 1121]; Hickey *v.* New York Cent., etc., R. Co., 8 N. Y. App. Div. 123, 40 N. Y. Suppl. 484; Miller *v.* New York Cent., etc., R. Co., 82 Hun 164, 31 N. Y. Suppl. 317 [*affirmed* in 146 N. Y. 367, 41 N. E. 90]; Austin *v.* Long Island R. Co., 69 Hun 67, 23 N. Y. Suppl. 193 [*affirmed* in 140 N. Y. 639, 35 N. E. 892]; Rodrian *v.* New York, etc., R. Co., 55 Hun 606, 7 N. Y. Suppl. 811 [*reversed* on other grounds in 125 N. Y. 526, 26 N. E. 741]; Crawford *v.* Delaware, etc., R. Co., 54 N. Y. Super. Ct. 262 [*affirmed* in 121 N. Y. 652, 24 N. E. 1092]; Schlee *v.* New York Cent., etc., R. Co., 13 Misc. 649, 34 N. Y. Suppl. 928; Moore *v.* New York Cent., etc., R. Co., 2 Misc. 23, 21 N. Y. Suppl. 436; Cook *v.* New York Cent., etc., R. Co., 15 N. Y. Suppl. 45 [*affirmed* in 128 N. Y. 635, 29 N. E. 147]; Crawford *v.* Delaware, etc., R. Co., 1 N. Y. Suppl. 339 [*affirmed* in 121 N. Y. 652, 24 N. E. 1092].

Pennsylvania.— Laib *v.* Pennsylvania R. Co., 180 Pa. St. 503, 37 Atl. 96; McGill *v.* Pittsburgh, etc., R. Co., 152 Pa. St. 331, 25 Atl. 540; Summers *v.* Bloomsburg, etc., R. Co., 24 Pa. Super. Ct. 615.

United States.— Chicago, etc., R. Co. *v.* Netolicky, 67 Fed. 665, 14 C. C. A. 615; Pearce *v.* Humphreys, 34 Fed. 282.

55. Klanowski *v.* Grand Trunk R. Co., 57 Mich. 525, 24 N. W. 801.

56. Klanowski *v.* Grand Trunk R. Co., 57 Mich. 525, 24 N. W. 801.

57. Chicago, etc., R. Co. *v.* Perkins, 26 Ill. App. 67; Chicago, etc., R. Co. *v.* Sporer, 69 Nebr. 8, 94 N. W. 991; Schwarz *v.* Delaware, etc., R. Co., 211 Pa. St. 625, 61 Atl. 255; Galveston, etc., R. Co. *v.* Murray, (Tex. Civ. App. 1906) 99 S. W. 144. Thus it is a question for the jury whether the train ran over the crossing at which plaintiff was injured at a speed exceeding six miles per hour in violation of a city ordinance, where several witnesses testified that the train was running at the rate of twenty miles an hour, and none of the trainmen were called as witnesses, although a passenger on the train testified that it was not running over six miles an hour. Zwack *v.* New York, etc., R. Co., 160 N. Y. 362, 54 N. E. 785 [*affirming* 8 N. Y. App. Div. 483, 40 N. Y. Suppl. 821].

Where there are data furnished by which the rate of speed can be determined, the evidence upon the proposition whether the train was run at an unlawful rate of speed will properly go to the jury. Watson *v.* Erie R. Co., 10 Ohio S. & C. Pl. Dec. 454, 8 Ohio N. P. 18.

Whether the rate of speed at one point was the same as at another point is a question of fact. Kirby *v.* Southern R. Co., 63 S. C. 494, 41 S. E. 765.

58. McGrath *v.* New York Cent., etc., R. Co., 1 Thomps. & C. (N. Y.) 243; International, etc., R. Co. *v.* Graves, 59 Tex. 330; Heath *v.* Stewart, 90 Wis. 418, 63 N. W. 1051.

59. *California.*— Bilton *v.* Southern Pac. R. Co., 148 Cal. 443, 83 Pac. 440 (where the circumstances are such that reasonable and impartial men may differ as to the conclusion to be drawn from the evidence); Nehrbas *v.* Northern Pac. R. Co., 62 Cal. 320.

Illinois.— Cleveland, etc., R. Co. *v.* Baddeley, 150 Ill. 328, 36 N. E. 965; Chicago, etc., R. Co. *v.* Perkins, 26 Ill. App. 67.

Indiana.— Louisville, etc., R. Co. *v.* Stommel, 126 Ind. 25, 25 N. E. 863.

Maine.— Wood *v.* Maine Cent. R. Co., 101 Me. 469, 64 Atl. 833.

Minnesota.— Lammers *v.* Great Northern R. Co., 82 Minn. 120, 84 N. W. 728; Bolinger *v.* St. Paul, etc., R. Co., 36 Minn. 418, 31 N. W. 856, 1 Am. St. Rep. 680; Howard *v.* St. Paul, etc., R. Co., 32 Minn. 214, 20 N. W. 93.

Mississippi.— Staggs *v.* Mobile, etc., R. Co., 77 Miss. 507, 27 So. 597.

Missouri.— Klockenbrink *v.* St. Louis, etc., R. Co., 81 Mo. App. 351, 409.

run over a crossing where the view or hearing was obstructed at a given rate of speed.[60] Whether special circumstances existed rendering necessary the slackening of the speed of a train at a crossing is a question for the jury.[61]

Nebraska.— Chicago, etc., R. Co. *v.* Sporer, 69 Nebr. 8, 94 N. W. 991.

New Hampshire.— Huntress *v.* Boston, etc., R. Co., 66 N. H. 185, 34 Atl. 154, 49 Am. St. Rep. 600.

New York.—Serano *v.* New York, etc., R. Co., 188 N. Y. 156, 80 N. E. 1025, 117 Am. St. Rep. 833 [*reversing* 114 N. Y. App. Div. 684, 99 N. Y. Suppl. 1103]; Massoth *v.* Delaware, etc., Canal Co., 64 N. Y. 524 [*affirming* 6 Hun 314]; Wilds *v.* Hudson River R. Co., 29 N. Y. 315 (holding that it is generally a question of fact in each case whether the actual rate was excessive or dangerous, which will depend to some extent upon the safeguards adopted to prevent accidents); Frederick *v.* Fonda, etc., Co., 52 N. Y. App. Div. 603, 65 N. Y. Suppl. 440; Lewin *v.* Lehigh Valley R. Co., 41 N. Y. App. Div. 89, 58 N. Y. Suppl. 113; Miller *v.* New York Cent., etc., R. Co., 20 N. Y. Suppl. 163; Richardson *v.* New York Cent., etc., R. Co., 15 N. Y. Suppl. 868 [*affirmed* in 133 N. Y. 563, 30 N. E. 1148].

North Carolina.— Norton *v.* North Carolina R. Co., 122 N. C. 910, 29 S. E. 886.

Ohio.— Wheeling, etc., R. Co. *v.* Parker, 29 Ohio Cir. Ct. 1, given rate of speed across a street in a populous city.

Pennsylvania.— Pennsylvania R. Co. *v.* Brooks, 2 Walk. 122; Delaware, etc., R. Co. *v.* Smith, 1 Walk. 88.

South Carolina.—Kirby *v.* Southern R. Co., 63 S. C. 494, 41 S. E. 765; Zeigler *v.* Northeastern R. Co., 5 S. C. 221.

Texas.— In the absence of a statute or ordinance prescribing the rate of speed at which a train may run, it is a question for the jury to determine whether or not under any circumstances the speed of the train was negligence. Missouri, etc., R. Co. *v.* Melugin, (Civ. App. 1901) 63 S. W. 338.

United States.— Shatto *v.* Erie R. Co., 121 Fed. 678, 59 C. C. A. 1, speed in violation of ordinance.

See 41 Cent. Dig. tit. "Railroads," § 1164½.

It is not in every case where a fault in respect to speed is alleged that the question must be submitted to the jury; but if it be clearly shown that on the occasion in question the rate of speed was not greater than that which had been usually practised before, with the tacit consent of the community and without accident, it should not be considered an open question whether running at that rate was negligence. Wilds *v.* Hudson River R. Co., 29 N. Y. 315.

Evidence held insufficient to take the case to the jury.— There is no evidence to go to the jury that a train was running at too high a speed at the crossing of a country road where the only testimony as to excessive speed is that of a passenger who, after saying that he could not tell how many miles an hour it was running, as he had no way of measuring it, said that it was running sixty miles an hour, and this is opposed to the schedule of the train, and the positive testimony of the engineer. Knox *v.* Philadelphia, etc., R. Co., 202 Pa. St. 504, 52 Atl. 90. So proof of a high rate of speed at a crossing when accompanied by an exhibition of facts showing proper safeguards for the customary and ordinary use of the crossing is insufficient to take the case to the jury. Custer *v.* Baltimore, etc., R. Co., 19 Pa. Super. Ct. 365 [*affirmed* in 206 Pa. St. 529, 55 Atl. 1130].

The court cannot instruct the jury that a given rate of speed does or does not constitute negligence on the part of the railroad company. Kirby *v.* Southern R. Co., 63 S. C. 494, 41 S. E. 765.

Illustrations.— Thus it is a question for the jury whether or not the railroad company was negligent in running an engine and tender through a town at a high rate of speed (Risinger *v.* Southern R. Co., 59 S. C. 429, 38 S. E. 1); or in running through a small village at the rate of thirty-five miles an hour (Wabash, etc., R. Co. *v.* Hicks, 13 Ill. App. 407); or in running over a much traveled street at the rate of forty (Waldele *v.* New York Cent., etc., R. Co., 4 N. Y. App. Div. 549, 38 N. Y. Suppl. 1009); or twenty-five miles an hour (De Lode *v.* New York Cent., etc., R. Co., 92 Hun (N. Y.) 149, 36 N. Y. Suppl. 697 [*affirmed* in 157 N. Y. 688, 51 N. E. 1090]; or in running at forty miles an hour over a graded crossing without maintaining a flagman (Huntress *v.* Boston, etc., R. Co., 66 N. H. 185, 34 Atl. 154, 49 Am. St. Rep. 600); and such question cannot be decided by the court on a motion for a nonsuit (Risinger *v.* Southern R. Co., 59 S. C. 429, 38 S. E. 1).

60. Nehrbas *v.* Northern Pac. R. Co., 62 Cal. 320; Chicago, etc., R. Co. *v.* Perkins, 26 Ill. App. 67; Pratt *v.* Chicago, etc., R. Co., 98 Iowa 563, 67 N. W. 402; Noble *v.* New York Cent., etc., R. Co., 20 N. Y. App. Div. 40, 46 N. Y. Suppl. 645 [*affirmed* in 161 N. Y. 620, 55 N. E. 1098]; Bleyle *v.* New York Cent., etc., R. Co., 11 N. Y. St. 585 [*affirmed* in 113 N. Y. 626, 20 N. E. 877].

Illustrations.— It is a question for the jury whether it was negligent for the railroad company to run through a fog at a crossing at the rate of eighteen miles an hour (Denton *v.* Brooklyn Heights R. Co., 75 N. Y. App. Div. 619, 78 N. Y. Suppl. 157), or to run a train over a public crossing in a town at twenty miles an hour, when the view of the track was obstructed for a considerable distance (International, etc., R. Co. *v.* Starling, 16 Tex. Civ. App. 365, 41 S. W. 181).

61. Zeigler *v.* Northeastern R. Co., 5 S. C 221.

(x) *Precautions as to Persons Seen At or Near Crossing.* Except where there is no evidence, or it is legally insufficient, as where it is too speculative or uncertain, to justify its submission to the jury,[62] it is a question for the jury whether or not defendant's engineer and other employees in charge of the engine or train causing the accident were negligent in not discovering plaintiff's peril in time to avoid injuring him,[63] or whether or not after discovering plaintiff's peril they used all reasonable means within their power to avoid injuring him,[64] as whether they used all reasonable endeavors to slacken the speed,[65] or to stop the train,[66] in time to avoid the injury. But where the evidence conclusively shows that it was impossible for the engineer or other employee to avoid the collision, after he discovered plaintiff's peril, by the exercise of the utmost degree of care, it is error for the court to submit the issue of defendant's negligence to the jury.[67]

62. Morris *v.* Lake Shore, etc., R. Co., 148 N. Y. 182, 42 N. E. 579; Sherwin *v.* Rutland R. Co., 74 Vt. 1, 51 Atl. 1089.

Evidence held insufficient to require submission to the jury on the question whether the engineer ought to have foreseen plaintiff's negligence and then have avoided the accident see Gahagan *v.* Boston, etc., R. Co., 70 N. H. 441, 50 Atl. 146, 55 L. R. A. 426.

Where there is no evidence that those in charge of the locomotive saw plaintiff in time to avoid the accident, in an action for injury sustained by one guilty of contributory negligence, the question as to defendant's negligence cannot be submitted to the jury. Northern Cent. R. Co. *v.* McMahon, 97 Md. 483, 55 Atl. 627.

63. *Montana.*— Riley *v.* Northern Pac. R. Co., 36 Mont. 545, 93 Pac. 948.

New Hampshire.— Gahagan *v.* Boston, etc., R. Co., 70 N. H. 441, 50 Atl. 146, 55 L. R. A. 426.

New York.— Morris *v.* Lake Shore, etc., R. Co., 148 N. Y. 182, 42 N. E. 579.

North Carolina.— Baker *v.* Norfolk, etc., R. Co., 144 N. C. 36, 56 S. E. 553.

Texas.— Texas, etc., R. Co. *v.* Chapman, 57 Tex. 75.

64. *Arkansas.*— Griffie *v.* St. Louis, etc., R. Co., 80 Ark. 186, 96 S. W. 750.

Kentucky.— Newport News, etc., R. Co. *v.* Deuser, 97 Ky. 92, 29 S. W. 973, 17 Ky. L. Rep. 113.

Maryland.— Western Maryland R. Co. *v.* Kehoe, 86 Md. 43, 37 Atl. 799.

Mississippi.— Staggs *v.* Mobile, etc., R. Co., 77 Miss. 507, 27 So. 597.

New Hampshire.— Gahagan *v.* Boston, etc., R. Co., 70 N. H. 441, 50 Atl. 146, 55 L. R. A. 426.

New Jersey.— Rafferty *v.* Erie R. Co., 66 N. J. L. 444, 49 Atl. 456.

Texas.— Galveston, etc., R. Co. *v.* Murray, (Civ. App. 1906) 99 S. W. 144.

65. Pennsylvania Co. *v.* Reidy, 198 Ill. 1, 64 N. E. 698 [*affirming* 99 Ill. App. 477].

Where there is evidence that defendant's trainmen could have slackened the speed of the train if they had acted when they knew or ought to have known of the injured person's attempt to cross in front of the train, but did not do so, whether they could or ought to have done so is for the jury. Yeaton *v.* Boston, etc., R. Co., 73 N. H. 285, 61 Atl. 522.

66. *Alabama.*— Tuscaloosa Belt R. Co. *v.* Fuller, (1907) 45 So. 156; Georgia Cent. R. Co. *v.* Forshee, 125 Ala. 199, 27 So. 1006.

Kansas.— Chicago, etc., R. Co. *v.* Prouty, 55 Kan. 503, 40 Pac. 909.

Kentucky.— Chesapeake, etc., R. Co. *v.* Pace, 106 S. W. 1176, 32 Ky. L. Rep. 806, runaway team.

New York.— Henn *v.* Long Island R. Co., 51 N. Y. App. Div. 292, 65 N. Y. Suppl. 21; Boll *v.* Adirondack R. Co., 4 N. Y. Suppl. 769.

North Dakota.—Johnson *v.* Great Northern R. Co., 7 N. D. 284, 75 N. W. 250.

Texas.— Jones *v.* Probasco, 18 Tex. Civ. App. 699, 45 S. W. 1036; International, etc., R. Co. *v.* Knight, (Civ. App. 1898) 45 S. W. 167.

Vermont.— Willey *v.* Boston, etc., R. Co., 72 Vt. 120, 47 Atl. 398.

United States.— Louisville, etc., R. Co. *v.* Truett, 111 Fed. 876, 50 C. C. A. 42.

A failure to reverse the engine is sufficient to warrant the jury in finding that defendant might have reduced the speed of the train so as to avoid the collision. Georgia Cent. R. Co. *v.* Forshee, 125 Ala. 199, 27 So. 1006.

Evidence held insufficient to go to the jury see Sites *v.* Knott, 197 Mo. 684, 96 S. W. 206; Walker *v.* Wabash R. Co., 193 Mo. 453, 92 S. W. 83.

67. Colorado, etc., R. Co. *v.* Thomas, 33 Colo. 517, 81 Pac. 801, 70 L. R. A. 681; Cox *v.* Louisville, etc., R. Co., 104 S. W. 282, 31 Ky. L. Rep. 875.

Error of judgment.— Where the evidence shows that the engineer was unable to avoid a collision after discovering plaintiff's peril, and that he had the alternative of putting on full steam and striking the horses or applying the brakes and striking the vehicle and he does the latter, the question as to whether or not he was negligent should not be submitted to the jury as the facts show that his doing so was a mere error of judgment on which negligence cannot be imputed. Wellbrock *v.* Long Island R. Co., 31 Misc. (N. Y.) 424, 65 N. Y. Suppl. 592.

Evidence held insufficient to show as a matter of law that the brakeman should have an-

(xi) *Contributory Negligence* — (a) *In General.* The rule is well established that where the evidence upon such issue is conflicting,[68] or where the case is not free from doubt, and candid and intelligent men might reach different conclusions upon the facts,[69] it is not for the court to lay down as a matter of law what precautions a person injured at a railroad crossing should have taken, or to direct a verdict for defendant or grant a nonsuit; but whether or not under all the circumstances such person was guilty of contributory negligence is a question of fact for the jury.[70] In like manner where the evidence is conflicting or

ticipated a pedestrian's purpose to cross in front of a backing train, and attempted sooner to stop the train see Matteson *v.* Southern Pac. Co., 6 Cal. App. 318, 92 Pac. 101.

68. *District of Columbia.*— Cowen *v.* Merriman, 17 App. Cas. 186.

Kansas.— Wichita, etc., R. Co. *v.* Davis, 37 Kan. 743, 16 Pac. 78, 1 Am. St. Rep. 275.

Kentucky.—Louisville, etc., R. Co. *v.* Lucas, 98 S. W. 308, 99 S. W. 959, 30 Ky. L. Rep. 359, 539.

Michigan.— Haines *v.* Lake Shore, etc., R. Co., 129 Mich. 475, 89 N. W. 349.

Mississippi.— Fulmer *v.* Illinois Cent. R. Co., 68 Miss. 355, 8 So. 517.

North Carolina.— Frazier *v.* Southern R. Co., 130 N. C. 355, 41 S. E. 941.

Canada.— Sims *v.* Grand Trunk R. Co., 10 Ont. L. Rep. 330. 5 Ont. Wkly. Rep. 664.

See 41 Cent. Dig. tit. "Railroads," § 1166.

69. *Arkansas.*— Scott *v.* St. Louis, etc., R. Co., 79 Ark. 137, 95 S. W. 490, 116 Am. St. Rep. 67.

District of Columbia.—Cowen *v.* Merriman, 17 App. Cas. 186.

Illinois.— Elgin, etc., R. Co. *v.* Duffy, 191 Ill. 139, 61 N. E. 432 [*affirming* 93 Ill. App. 463]; Chicago, etc., R. Co. *v.* Lewandowski, 190 Ill. 301, 60 N. E. 497.

Indiana.— Greenawaldt *v.* Lake Shore, etc., R. Co., 165 Ind. 219, 74 N. E. 1081, 73 N. E. 910; Malott *v.* Hawkins, 159 Ind. 127, 63 N. E. 308; Cleveland, etc., R. Co. *v.* Harrington, 131 Ind. 426, 30 N. E. 37.

Iowa.— Defrieze *v.* Illinois Cent. R. Co., (1903) 94 N. W. 505.

Michigan.— Haines *v.* Lake Shore, etc., R. Co., 129 Mich. 475, 89 N. W. 349.

Missouri.— Montgomery *v.* Missouri Pac. R. Co., 181 Mo. 477, 79 S. W. 930.

Nebraska.— Chicago, etc., R. Co. *v.* Featherly, 64 Nebr. 323, 89 N. W. 792.

New Hampshire.— Gahagan *v.* Boston, etc., R. Co., 70 N. H. 441, 50 Atl. 146, 55 L. R. A. 426; Roberts *v.* Boston, etc., R. Co., 69 N. H. 354, 45 Atl. 94.

New York.— Smedis *v.* Brooklyn, etc., R. Co., 88 N. Y. 13 [*affirming* 23 Hun 279]; Massoth *v.* Delaware, etc., Canal Co., 64 N. Y. 524 [*affirming* 6 Hun 314]; Woodworth *v.* New York Cent., etc., R. Co., 55 N. Y. App. Div. 23, 66 N. Y. Suppl. 1072 [*affirmed* in 170 N. Y. 589, 63 N. E. 1123]; Noble *v.* New York Cent., etc., R. Co., 20 N. Y. App. Div. 40, 46 N. Y. Suppl. 645 [*affirmed* in 161 N. Y. 620, 55 N. E. 1098]; Nash *v.* New York Cent., etc., R. Co., 14 N. Y. St. 531.

Pennsylvania.— Cohen *v.* Philadelphia, etc., R. Co., 211 Pa. St. 227, 60 Atl. 729; Laib *v.* Pennsylvania R. Co., 180 Pa. St. 503, 37 Atl. 96; Pennsylvania R. Co. *v.* Fortney, 90 Pa. St. 323.

Texas.— Galveston, etc., R. Co. *v.* Harris, 22 Tex. Civ. App. 16, 53 S. W. 599.

Utah.— Steed *v.* Rio Grande Western R. Co., 29 Utah 448, 82 Pac. 476.

Wisconsin.— Schroeder *v.* Wisconsin Cent. R. Co., 117 Wis. 33, 93 N. W. 837.

United States.— Baltimore, etc., R. Co. *v.* Connell, 137 Fed. 8, 69 C. C. A. 570; Lynch *v.* Northern Pac. R. Co., 69 Fed. 86, 16 C. C. A. 151.

See 41 Cent. Dig. tit. "Railroads," § 1166.

70. Contributory negligence held a question for the jury see the following cases:

Alabama.— Louisville, etc., R. Co. *v.* Stewart, 128 Ala. 313, 29 So. 562.

Arkansas.—St. Louis, etc., R. Co. *v.* Wyatt, 79 Ark. 241, 96 S. W. 376; Choctaw, etc., R. Co. *v.* Baskins, 78 Ark. 355, 93 S. W. 757; St. Louis, etc., R. Co. *v.* Dawson, 68 Ark. 1, 56 S. W. 46.

California.— Hutson *v.* Southern Cal. R. Co., 150 Cal. 701, 89 Pac. 1093; Whalen *v.* Arcata, etc., R. Co., 92 Cal. 669, 28 Pac. 833; Nehrbas *v.* Central Pac. R. Co., 62 Cal. 320; Johnson *v.* Center, 4 Cal. App. 616, 88 Pac. 727.

Georgia.— Atlanta, etc., R. Co. *v.* Lovelace, 121 Ga. 487, 49 S. E. 607; Richmond, etc., R. Co. *v.* Johnston, 89 Ga. 560, 15 S. E. 908.

Illinois.— Illinois Southern R. Co. *v.* Hamill, 226 Ill. 88, 80 N. E. 745 [*affirming* 128 Ill. App. 152]; Toledo, etc., R. Co. *v.* Hammett, 220 Ill. 9, 77 N. E. 72 [*reversing* 115 Ill. App. 268]; Pittsburg, etc., R. Co. *v.* Banfill, 206 Ill. 553, 69 N. E. 499 [*affirming* 107 Ill. App. 254]; Chicago Junction R. Co. *v.* McGrath, 203 Ill. 511, 68 N. E. 69 [*affirming* 107 Ill. App. 100]; Chicago, etc., R. Co. *v.* Beaver, 109 Ill. 34, 65 N. E. 144 [*affirming* 96 Ill. App. 558]; Chicago, etc., R. Co. *v.* Gunderson, 174 Ill. 495, 51 N. E. 708 [*affirming* 74 Ill. App. 356]; Chicago, etc., R. Co. *v.* Lane, 130 Ill. 116, 22 N. E. 513; Chicago, etc., R. Co. *v.* Hutchinson, 120 Ill. 587, 11 N. E. 855; Chicago, etc., R. Co. *v.* Louderback, 125 Ill. App. 323; Chicago, etc., R. Co. *v.* Urbaniac, 106 Ill. App. 325; Cleveland, etc., R. Co. *v.* Chinsky, 92 Ill. App. 50; Chicago Great Western R. Co. *v.* Mohan, 88 Ill. App. 151 [*affirmed* in 187 Ill. 281, 58 N. E. 395].

Indiana.— Greenawaldt *v.* Lake Shore, etc., R. Co., 165 Ind. 219, 74 N. E. 1081, 73 N. E. 910; Pittsburgh, etc., R. Co. *v.* Carlson, 24 Ind. App. 559, 56 N. E. 251.

Iowa.—Kowalski *v.* Chicago Great Western R. Co., (1901) 87 N. W. 409.

Kansas.— St. Louis, etc., R. Co. *v.* Brock, 69 Kan. 448, 77 Pac. 86.

different inferences may be drawn therefrom the existence of the facts relied upon as

Kentucky.— Chesapeake, etc., R. Co. *v.* Vaughn, 97 S. W. 774, 30 Ky. L. Rep. 215.
Massachusetts.— Fitzhugh *v.* Boston, etc., R. Co., 195 Mass. 202, 80 N. E. 792.
Michigan.— Wilbur *v.* Michigan Cent. R. Co., 145 Mich. 344, 108 N. W. 713; Corbs *v.* Michigan Cent. R. Co., 144 Mich. 73, 107 N. W. 892; Hintz *v.* Michigan Cent. R. Co., 140 Mich. 565, 104 N. W. 23; Potter *v.* Pere Marquette R. Co., 140 Mich. 362, 103 N. W. 808; Barnum *v.* Grand Trunk Western R. Co., 137 Mich. 580, 100 N. W. 1022; Smith *v.* Pere Marquette R. Co., 136 Mich. 224, 98 N. W. 1022; Haines *v.* Lake Shore, etc., R. Co., 129 Mich. 475, 89 N. W. 349; Evans *v.* Lake Shore, etc., R. Co., 88 Mich. 442, 50 N. W. 386, 14 L. R. A. 223.
Minnesota.— Courtney *v.* Minneapolis, etc., R. Co., 97 Minn. 69, 106 N. W. 90, 100 Minn. 434, 111 N. W. 399; Stegner *v.* Chicago, etc., R. Co., 94 Minn. 166, 102 N. W. 205, 97 Minn. 511, 107 N. W. 559.
Mississippi.— New Orleans, etc., R. Co. *v.* Brooks, 85 Miss. 269, 38 So. 40.
Missouri.— Montgomery *v.* Missouri Pac. R. Co., 181 Mo. 477, 79 S. W. 930; Weinstein *v.* Toledo, etc., R. Co., 128 Mo. App. 224, 106 S. W. 1125; Mitchell *v.* St. Louis, etc., R. Co., 122 Mo. App. 50, 97 S. W. 552; Lang *v.* Missouri Pac. R. Co., 115 Mo. App. 489, 91 S. W. 1012; Reed *v.* St. Louis, etc., R. Co., 107 Mo. App. 238, 80 S. W. 919.
Nebraska.— Chicago, etc., R. Co. *v.* Featherly, 64 Nebr. 323, 89 N. W. 792.
New Jersey.— Davis *v.* Central R. Co., 67 N. J. L. 660, 52 Atl. 561; New Jersey R., etc., Co. *v.* West, 33 N. J. L. 430.
New York.— Serano *v.* New York Cent., etc., R. Co., 188 N. Y. 156, 80 N. E. 1025, 117 Am. St. Rep. 833 [*reversing* 114 N. Y. App. Div. 684, 99 N. Y. Suppl. 1103]; Smith *v.* New York Cent., etc., R. Co., 177 N. Y. 224, 69 N. E. 427; St. John *v.* New York Cent., etc., R. Co., 165 N. Y. 241, 59 N. E. 3 [*reversing* 24 N. Y. App. Div. 626, 49 N. Y. Suppl. 1142]; Smedis *v.* Brooklyn, etc., R. Co., 88 N. Y. 13 [*affirming* 23 Hun 279]; Johnson *v.* Hudson River R. Co., 20 N. Y. 65, 75 Am. Dec. 375 [*affirming* 6 Duer 633]; Morse *v.* New York Cent., etc., R. Co., 102 N. Y. App. Div. 495, 92 N. Y. Suppl. 657; Whalen *v.* New York Cent., etc., R. Co., 39 N. Y. App. Div. 642, 57 N. Y. Suppl. 194; Goodell *v.* New York Cent., etc., R. Co., 67 N. Y. App. Div. 271, 73 N. Y. Suppl. 428; O'Bierne *v.* New York Cent., etc., R. Co., 37 N. Y. App. Div. 547, 56 N. Y. Suppl. 236 [*affirmed* in 167 N. Y. 568, 60 N. E. 1117]; Wieland *v.* Delaware, etc., Canal Co., 30 N. Y. App. Div. 85, 51 N. Y. Suppl. 776; Lockwood *v.* Poughkeepsie, etc., R. Co., 28 N. Y. App. Div. 589, 51 N. Y. Suppl. 194; Northrup *v.* New York, etc., R. Co., 37 Hun 295; Halsey *v.* Rome, etc., R. Co., 12 N. Y. St. 319.
Ohio.— Cincinnati, etc., R. Co. *v.* Levy, 28 Ohio Cir. Ct. 23.
Oregon.— Kunz *v.* Oregon R. Co., (1907) 93 Pac. 141, 94 Pac. 504; Hecker *v.* Oregon R. Co., 40 Oreg. 6, 66 Pac. 270.
Pennsylvania.—Cohen *v.* Philadelphia, etc., R. Co., 211 Pa. St. 227, 60 Atl. 729; McCarthy *v.* Philadelphia, etc., R. Co., 211 Pa. St. 193, 60 Atl. 778; Cromley *v.* Pennsylvania R. Co., 208 Pa. St. 445, 57 Atl. 832, 211 Pa. St. 429, 60 Atl. 1007; Seifred *v.* Pennsylvania R. Co., 206 Pa. St. 399, 55 Atl. 1061; Kuntz *v.* New York, etc., R. Co., 206 Pa. St. 162, 55 Atl. 915; Lehigh Valley R. Co. *v.* Hall, 61 Pa. St. 361; Pennsylvania R. Co. *v.* McTighe, 46 Pa. St. 316.
South Carolina.— Osteen *v.* Southern R. Co., 76 S. C. 368, 57 S. E. 196; Strother *v.* South Carolina, etc., R. Co., 47 S. C. 375, 25 S. E. 272 (holding that under Rev. St. § 1692, prohibiting a recovery for the injury of a person at a railroad crossing where he was guilty of gross or wilful negligence contributing to the injury, it is the province of the jury to determine the question of such contributory negligence); Kaminitsky *v.* Northeastern R. Co., 25 S. C. 53.
Texas.— Boyd *v.* St. Louis Southwestern R. Co., (1908) 108 S. W. 813 [*reversing* (Civ. App. 1907) 105 S. W. 519]; Gulf, etc., R. Co. *v.* Moore, 69 Tex. 157, 6 S. W. 631; San Antonio, etc., R. Co. *v.* Mertink, (Civ. App. 1907) 102 S. W. 153 [*reversed* on other grounds in (1907) 105 S. W. 485]; Frugia *v.* Texarkana, etc., R. Co., 36 Tex. Civ. App. 648, 82 S. W. 814, 43 Tex. Civ. App. 48, 95 S. W. 563; International, etc., R. Co. *v.* Ives, 34 Tex. Civ. App. 49, 78 S. W. 36; Atchison, etc., R. Co. *v.* Keller, 33 Tex. Civ. App. 358, 76 S. W. 801.
Utah.— Steed *v.* Rio Grande Western R. Co., 29 Utah 448, 82 Pac. 476; Christensen *v.* Oregon Short Line R. Co., 29 Utah 192, 80 Pac. 746.
Virginia.— Southern R. Co. *v.* Hansbrough, 107 Va. 733, 60 S. E. 58; Massey *v.* Southern R. Co., 106 Va. 515, 56 S. E. 275.
Wisconsin.— Eilert *v.* Green Bay, etc., R. Co., 48 Wis. 606, 4 N. W. 769.
United States.— Texas, etc., R. Co. *v.* Cody, 166 U. S. 606, 17 S. Ct. 703, 41 L. ed. 1132.
Canada.— Sims *v.* Grand Trunk R. Co., 10 Ont. L. Rep. 330, 5 Ont. Wkly. Rep. 664.
See 41 Cent. Dig. tit. "Railroads," § 1166.

Illustrations.— It has been held a question for the jury whether the injured person was guilty of contributory negligence in crossing the track at a different angle from that at which it was usually crossed (Whelan *v.* Arcata, etc., R. Co., 92 Cal. 669, 28 Pac. 833); in driving up to the crossing at a slow trot (Totten *v.* New York, etc., R. Co., 10 N. Y. Suppl. 572); in not descending from his vehicle and leading his horses across the tracks, where he starts to drive a team over eleven tracks at a grade crossing (Newton *v.* Pittsburg, etc., R. Co., 18 Pa. Super. Ct. 18); or in driving his automobile toward the crossing at about fifteen miles an hour at the time of the collision (Record *v.* Pennsylvania R. Co., (N. J. Sup. 1907) 67 Atl. 1040).

What an ordinarily prudent man would do on reaching a railroad crossing under the circumstances is a question for the jury. At-

constituting such negligence is for the jury.[71] Where, however, the fact that the person injured did not use the proper degree of care so clearly appears from the circumstances and undisputed evidence as to leave no inference or fact in doubt,[72] as where such fact appears from plaintiff's own unrebutted testimony or evidence,[73] and there is no evidence of wilfulness or wantonness on the part

lanta, etc., R. Co. *v.* Lovelace, 121 Ga. 487, 49 S. E. 607; Massoth *v.* Delaware, etc., Canal Co., 64 N. Y. 524 [*affirming* 6 Hun 314].

Prima facie proof of contributory negligence is not sufficient to withdraw the case from the jury as the question of contributory negligence is not one which the judge should determine on *prima facie* proof. Kaminitsky *v.* Northeastern R. Co., 25 S. C. 53.

Whether a parent's negligence contributed to the death of his child whom he allowed to go visiting unattended, without having been specially cautioned, when he knew such child would have to pass the railroad tracks, where it was injured, is a question for the jury. St. Louis, etc., R. Co. *v.* Dawson, 68 Ark. 1, 56 S. W. 46.

Gross negligence.— Whether the person injured was guilty of gross negligence under the Massachusetts statute is a question for the jury. Brusseau *v.* New York, etc., R. Co., 187 Mass. 84, 72 N. E. 348.

In case of emergency.— Whether or not the person injured acted with the proper degree of care and prudence after he was upon the railroad company's right of way has been held a question for the jury. Chicago, etc., R. Co. *v.* Corson, 198 Ill. 98, 64 N. E. 739 [*affirming* 101 Ill. App. 115]; St. Louis, etc., R. Co. *v.* Brock, 69 Kan. 448, 77 Pac. 86; Hoffmeister *v.* Pennsylvania R. Co., 160 Pa. St. 568, 28 Atl. 945.

71. Gulf, etc., R. Co. *v.* Moore, 69 Tex. 151, 6 S. W. 631.

The rate of speed at which the person injured approached the crossing is a question for the jury. Schwarz *v.* Delaware, etc., R. Co., 211 Pa. St. 625, 61 Atl. 255.

Whether the person injured had his horse under proper control is a question of fact for the jury. Cranston *v.* New York Cent., etc., R. Co., 11 N. Y. Suppl. 215.

Whether a train was out of sight and hearing when plaintiff started to cross is a question for the jury where the evidence on the issue is conflicting. Grenell *v.* Michigan Cent. R. Co., 124 Mich. 141, 82 N. W. 843.

Whether the condition of the crossing was a warning of danger is a question for the jury. Lowenstein *v.* Missouri Pac. R. Co., 117 Mo. App. 371, 93 S. W. 871.

72. *California.*— Bygum *v.* Southern Pac. Co., (1894) 36 Pac. 415; Nehrbas *v.* Central Pac. R. Co., 62 Cal. 320; Matteson *v.* Southern Pac. Co., 6 Cal. App. 318, 92 Pac. 101.

District of Columbia.—Cowen *v.* Merriman, 17 App. Cas. 186.

Florida.— Atlantic Coast Line R. Co. *v.* Miller, 53 Fla. 246, 44 So. 247.

Illinois.— Chicago, etc., R. Co. *v.* Blake, 125 Ill. App. 336; Bjork *v.* Illinois Cent. R. Co., 85 Ill. App. 269.

Maryland.— Columbia, etc., R. Co. *v.* State, 105 Md. 34, 65 Atl. 625.

Massachusetts.— Gahagan *v.* Boston, etc., R. Co., 1 Allen 187, 79 Am. Dec. 724.

Missouri.— Sims *v.* St. Louis, etc., R. Co., 116 Mo. App. 572, 92 S. W. 909; Herring *v.* Wabash R. Co., 80 Mo. App. 562; Young *v.* Missouri, etc., R. Co., 72 Mo. App. 263.

New Hampshire.— Gahagan *v.* Boston, etc., R. Co., 70 N. H. 441, 50 Atl. 146, 55 L. R. A. 426.

New Jersey.— Gehring *v.* Atlantic City R. Co., 75 N. J. L. 490, 68 Atl. 61, 12 L. R. A. N. S. 443; New Jersey R., etc., Co. *v.* West, 33 N. J. L. 430.

New York.— Whalen *v.* New York Cent., etc., R. Co., 39 N. Y. App. Div. 642, 57 N. Y. Suppl. 194; Halsey *v.* Rome, etc., R. Co., 12 N. Y. St. 319. See Krauss *v.* Walkill Valley R. Co., 69 Hun 482, 23 N. Y. Suppl. 432.

North Carolina.— Miller *v.* Wilmington, etc., R. Co., 128 N. C. 26, 38 S. E. 29.

Pennsylvania.— Mankewicz *v.* Lehigh Valley R. Co., 214 Pa. St. 386, 63 Atl. 604; Fleschhut *v.* Lehigh Valley R. Co., 206 Pa. St. 348, 55 Atl. 1039; Pennsylvania R. Co. *v.* Fortney, 90 Pa. St. 323; Billet *v.* York Southern R. Co., 11 York Leg. Rec. 173.

Utah.— Steed *v.* Rio Grande Western R. Co., 29 Utah 448, 82 Pac. 476.

Virginia.— Smith *v.* Norfolk, etc., R. Co., 107 Va. 725, 60 S. E. 56.

United States.— Garrett *v.* Illinois Cent. R. Co., 126 Fed. 406 (holding this to be true, although the court may doubt if the case should be taken from the jury); Southern Pac. Co. *v.* Harada, 109 Fed. 379, 48 C. C. A. 423.

See 41 Cent. Dig. tit. "Railroads," § 1166.

Gross negligence.— Where in an action under Mass. Rev. Laws, c. 111, § 268, the only reasonable conclusion to be drawn from the evidence is that the person injured or killed was guilty of gross negligence or was engaged in committing an unlawful act, the court should order a verdict for defendant. McDonald *v.* New York Cent., etc., R. Co., 186 Mass. 474, 72 N. E. 55.

Whether the presumption of due care on the part of a person killed at a railroad crossing has been rebutted is for the jury, unless the evidence to the contrary is so clear as to justify the court in holding that a verdict against defendant must be set aside as a matter of law. Unger *v.* Philadelphia, etc., R. Co., 217 Pa. St. 106, 66 Atl. 235.

73. Steele *v.* Georgia Cent. R. Co., 123 Ga. 237, 51 S. E. 438; Atchison, etc., R. Co. *v.* Baker, (Indian Terr. 1907) 104 S. W. 1182 [*modified* in (Okla. 1908) 95 Pac. 433]; Baltimore, etc., R. Co. *v.* McClellan, 69 Ohio St. 142, 68 N. E. 816; St. Louis Southwestern R. Co. *v.* Branom, (Tex. Civ. App. 1903) 73 S. W. 1064.

of defendant,[74] the question of contributory negligence is one of law for the court and it may grant a nonsuit, direct a verdict for defendant, or otherwise dispose of the case. Contributory negligence is also a question of law for the court where there is no evidence of such negligence, or where the undisputed evidence shows that the person injured was not guilty of contributory negligence.[75]

(B) *Contributory Negligence of Children and Others Under Disability.* The contributory negligence of a child, under all the circumstances, including his age, capacity, and understanding,[76] or of any other person under disability [77] who is

Where it appears from plaintiff's own testimony that he could by ordinary care have avoided the injuries, it is not error to grant a nonsuit. Southern R. Co. *v.* Barfield, 115 Ga. 724, 42 S. E. 95, 118 Ga. 256, 45 S. E. 282.

74. Sims *v.* St. Louis, etc., R. Co., 116 Mo. App. 572, 92 S. W. 909.

75. Longenecker *v.* Pennsylvania R. Co., 105 Pa. St. 328; Texas, etc., R. Co. *v.* Wright, 31 Tex. Civ. App. 249, 71 S. W. 760; McIntosh *v.* Chicago, etc., R. Co., 36 Fed. 661.

76. Contributory negligence of child held a question for the jury see the following cases:

Arkansas.— St. Louis, etc., R. Co. *v.* Tomlinson, 78 Ark. 251, 94 S. W. 613.

California.— Bygum *v.* Southern Pac. R. Co., (1894) 36 Pac. 415; Nehrbas *v.* Central Pac. R. Co., 62 Cal. 320, where the view was obstructed and the train was running at an unusual speed without giving signals.

Indiana.— Baltimore, etc., R. Co. *v.* Hickman, 40 Ind. App. 315, 81 N. E. 1086; Pittsburg, etc., R. Co. *v.* McNeil, 34 Ind. App. 310, 69 N. E. 471.

Massachusetts.— McDonald *v.* New York Cent., etc., R. Co., 186 Mass. 474, 72 N. E. 55 (wilful or gross negligence); Johanson *v.* Boston, etc., R. Co., 153 Mass. 57, 26 N. E. 426; Copley *v.* New Haven, etc., R. Co., 136 Mass. 6.

Michigan.— Fehnrich *v.* Michigan Cent. R. Co., 87 Mich. 606, 49 N. W. 890.

Missouri.— Gruebel *v.* Wabash R. Co., 108 Mo. App. 348, 84 S. W. 170; Anna *v.* Missouri Pac. R. Co., 96 Mo. App. 543, 70 S. W. 398.

New Hampshire.— Duggan *v.* Boston, etc., R. Co., 74 N. H. 250, 66 Atl. 829.

New Jersey.—Anderson *v.* New Jersey Cent. R. Co., 68 N. J. L. 269, 53 Atl. 391.

New York.— Simkoff *v.* Lehigh Valley R. Co., 190 N. Y. 256, 83 N. E. 15 [*affirming* 118 N. Y. App. Div. 918, 103 N. Y. Suppl. 1142]; Haycroft *v.* Lake Shore, etc., R. Co., 64 N. Y. 636 [*affirming* 2 Hun 489, 5 Thomps. & C. 49]; Friess *v.* New York Cent., etc., R. Co., 67 Hun 205, 22 N. Y. Suppl. 104 (catching foot in open frog); Beckwith *v.* New York Cent., etc., R. Co., 54 Hun 446, 7 N. Y. Suppl. 719, 721 [*affirmed* in 125 N. Y. 759, 27 N. E. 408].

Ohio.— Lake Erie, etc., R. Co. *v.* Mackey, 53 Ohio St. 370, 41 N. E. 980, 53 Am. St. Rep. 641, 29 L. R. A. 757.

Oregon.— Schleiger *v.* Northern Terminal Co., 43 Oreg. 4, 72 Pac. 324.

Pennsylvania.— Byron *v.* New Jersey Cent. R. Co., 215 Pa. St. 82, 64 Atl. 328; Wilson *v.* Pennsylvania R. Co., 132 Pa. St. 27, 18 Atl. 1087; Davis *v.* Pennsylvania R. Co., 34 Pa. Super. Ct. 388.

Texas.— Texas, etc., R. Co. *v.* Ball, (Civ. App. 1903) 73 S. W. 420 [*reversed* on other grounds in 96 Tex. 622, 75 S. W. 4].

Virginia.— Norfolk, etc., R. Co. *v.* Carr, 106 Va. 508, 56 S. E. 276.

Washington.— Steele *v.* Northern Pac. R. Co., 21 Wash. 287, 57 Pac. 820, stepping on one track in attempting to avoid a collision with an engine on another.

Wisconsin.— Johnson *v.* Chicago, etc., R. Co., 49 Wis. 529, 5 N. W. 886; Ewen *v.* Chicago, etc., R. Co., 38 Wis. 613.

United States.— Illinois Cent. R. Co. *v.* Jones, 95 Fed. 370, 37 C. C. A. 106.

See 41 Cent. Dig. tit. "Railroads," § 1167.

Illustrations.— This rule has been applied where the injury was caused to a child while attempting to cross without stopping, looking, or listening (Illinois Cent. R. Co. *v.* Jones, 95 Fed. 370, 37 C. C. A. 106); in attempting to cross behind a passing train (Louisville, etc., R. Co. *v.* Rush, 127 Ind. 545, 26 N. E. 1010; McGovern *v.* New York Cent., etc., R. Co., 67 N. Y. 417; Powell *v.* New York Cent., etc., R. Co., 22 Hun (N. Y.) 56; Smeltz *v.* Pennsylvania R. Co., 186 Pa. St. 364, 40 Atl. 479); or in attempting to cross between or over standing cars (Lehman *v.* Eureka Iron, etc., Works, 114 Mich. 260, 72 N. W. 183; Burger *v.* Missouri Pac. R. Co., 112 Mo. 238, 20 S. W. 439, 34 Am. St. Rep. 379; Lake Erie, etc., R. Co. *v.* Mackey, 53 Ohio St. 370, 41 N. E. 980, 53 Am. St. Rep. 641, 29 L. R. A. 757; Todd *v.* Philadelphia, etc., R. Co., 201 Pa. St. 558, 51 Atl. 332; Pennsylvania R. Co. *v.* Brooks, 2 Walk. (Pa.) 122; Gesas *v.* Oregon Short Line R. Co., 32 Utah 156, 93 Pac. 274, 13 L. R. A. N. S. 1074). Whether the presence of the standing train was notice to a child who was attempting to cross that the train was likely to start at any moment is a question for the jury. Lake Erie, etc., R. Co. *v.* Mackey, 53 Ohio St. 370, 41 N. E. 980, 53 Am. St. Rep. 641, 29 L. R. A. 757.

77. See Schlee *v.* New York Cent., etc., R. Co., 13 Misc. (N. Y.) 649, 34 N. Y. Suppl. 928, where the evidence was conflicting as to whether the person injured was drunk at the time.

Contributory negligence of a deaf person held a question for the jury see Chicago, etc., R. Co. *v.* Pounds, 1 Indian Terr. 51, 35 S. W. 249; Chicago, etc., R. Co. *v.* Miller, 46 Mich. 532, 9 N. W. 841 (attempt to cross before approaching train); Rembe *v.* New York, etc., R. Co., 102 N. Y. 721, 7 N. E. 797 (crossing defective crossing); Waldele *v.*

injured at a railroad crossing, is ordinarily a question for the jury, unless the undisputed evidence clearly shows that such person failed to exercise ordinary care,[78] or that he exercised such care.[79] Thus it is ordinarily a question for the jury whether under the circumstances the injured child used such care as a child of his age and intelligence should have used,[80] whether he was of sufficient maturity to be adjudged guilty of negligence,[81] or whether the particular child was chargeable with the same degree of care as an adult.[82]

(c) *Use of Defective or Obstructed Crossing.* It is also a question for the jury whether under all the circumstances the person injured was justified in using a defective crossing;[83] and whether he used due care in passing over such a crossing,[84] notwithstanding he knew of its defective condition,[85] provided it was not necessarily dangerous.[86] Likewise whether or not the injured person used due care in crossing an obstructed crossing,[87] as in passing between, over, or around standing

New York Cent., etc., R. Co., 19 Hun (N. Y.) 69 (attempt to cross behind passing train); Arnold *v.* Philadelphia, etc., R. Co., 161 Pa. St. 1, 28 Atl. 941; Canadian Pac. R. Co. *v.* Clark, 73 Fed. 76, 20 C. C. A. 447 (attempt to cross past a standing train); New York, etc., R. Co. *v.* Blessing, 67 Fed. 277, 14 C. C. A. 394.

78. Tyler *v.* Old Colony R. Co., 157 Mass. 336, 32 N. E. 227, holding that a verdict for a defendant is properly directed where it is shown that a slightly lame person who lived near the crossing attempted to cross without looking to see if a train was coming.

Contributory negligence of child held a question of law for the court see Tucker *v.* New York Cent., etc., R. Co., 124 N. Y. 308, 26 N. E. 916, 21 Am. St. Rep. 670 [*reversing* 11 N. Y. Suppl. 692]. Where the child's acts expose him to peril which he must have appreciated and his personal safety could be secured by means plain to the most immature judgment, his exposure to such peril without any precaution leaves no question for the jury. Anderson *v.* New Jersey Cent. R. Co., 68 N. J. L. 269, 53 Atl. 391.

Contributory negligence of deaf person held a question of law for the court see Tierney *v.* Chicago, etc., R. Co., 84 Iowa 641, 51 N. W. 175.

79. See McGee *v.* Pennsylvania R. Co., 33 Wkly. Notes Cas. (Pa.) 15.

80. Cooper *v.* Lake Shore, etc., R. Co., 66 Mich. 261, 33 N. W. 606, 11 Am. St. Rep. 482 (where the evidence is conflicting); Payne *v.* Chicago, etc., R. Co., 129 Mo. 405, 31 S. W. 885; Schleiger *v.* Northern Terminal Co., 43 Oreg. 4, 72 Pac. 324; McGuire *v.* Chicago, etc., R. Co., 37 Fed. 54.

81. Holmes *v.* Missouri Pac. R. Co., 207 Mo. 149, 105 S. W. 624; Bracken *v.* Pennsylvania R. Co., 32 Pa. Super. Ct. 22.

82. Haycroft *v.* Lake Shore, etc., R. Co., 2 Hun (N. Y.) 489, 5 Thomps. & C. 49 [*affirmed* in 64 N. Y. 636].

83. St. Louis, etc., R. Co. *v.* Box, 52 Ark. 368, 12 S. W. 757; St. Louis Southwestern R. Co. *v.* Smith, (Tex. Civ. App. 1908) 107 S. W. 638, crossing bridge with a hole in it in the night-time.

84. **Contributory negligence in use of defective crossing held a question for the jury** see the following cases:

Arkansas.— St. Louis, etc., R. Co. *v.* Box, 52 Ark. 368, 12 S. W. 757.

Indiana.— Chicago, etc., R. Co. *v.* Gallion, 39 Ind. App. 604, 80 N. E. 547; Cincinnati, etc., R. Co. *v.* Claire, 6 Ind. App. 390, 33 N. E. 918.

Michigan.— Thayer *v.* Flint, etc., R. Co., 93 Mich. 150, 53 N. W. 216.

Missouri.— Meyers *v.* Chicago, etc., R. Co., 59 Mo. 223; Camp *v.* Wabash R. Co., 94 Mo. App. 272, 68 S. W. 96.

New York.— Kelly *v.* New York Cent., etc., R. Co., 9 N. Y. Suppl. 90.

North Carolina.— Lay *v.* Richmond, etc., R. Co., 106 N. C. 404, 11 S. E. 412.

See 41 Cent. Dig. tit. "Railroads," § 1168.

Whether driving across without slackening speed, at the rate of five or six miles an hour, the defect being unknown to the person injured, is negligence is a question for the jury. Whalen *v.* Arcata, etc., R. Co., 92 Cal. 669, 28 Pac. 833.

85. St. Louis, etc., R. Co. *v.* Box, 52 Ark. 368, 12 S. W. 757; Taylor *v.* Wabash R. Co., 112 Iowa 157, 83 N. W. 892; Meyers *v.* Chicago, etc., R. Co., 59 Mo. 223; Kelly *v.* New York Cent., etc., R. Co., 9 N. Y. Suppl. 90.

Question for court.—An issue as to the injured person's knowledge of the existence of the defect should not be submitted to the jury where there is no conflict in the evidence as to such fact. International, etc., R. Co. *v.* Lewis, (Tex. Civ. App. 1901) 64 S. W. 1011, 63 S. W. 1091.

86. St. Louis, etc., R. Co. *v.* Box, 52 Ark. 368, 12 S. W. 757.

87. See Lewless *v.* Detroit, etc., R. Co., 65 Mich. 292, 32 N. W. 790.

Frightening animals.— Thus it has been held a question for the jury whether or not the person injured used due care in riding or driving over a crossing whereby he was injured by his horse becoming frightened at cinders piled in the highway (Illinois Cent., etc., R. Co. *v.* Griffin, 184 Ill. 9, 56 N. E. 337 [*affirming* 84 Ill. App. 152]), or at cars standing on the crossing (Young *v.* Detroit, etc., R. Co., 56 Mich. 430, 23 N. W. 67; Welborne *v.* Gulf, etc., R. Co., 35 Tex. Civ. App. 401, 80 S. W. 653; International, etc., R. Co. *v.* Mercer, (Tex. Civ. App. 1904) 78 S. W. 562; Locke *v.* International, etc., R.

cars,[88] is usually a question for the jury, unless the whole evidence upon which plaintiff rests his case shows that the injured person did not use due care in such attempt.[89]

(D) *Duty to Stop, Look, and Listen* — (1) IN GENERAL. Where the evidence is conflicting, or the question is not free from doubt from the facts proved, it is a question for the jury whether under all the circumstances the person injured used due care in looking and listening for an approaching train before going on the crossing,[90] or whether or not his failure to look and listen before crossing was

Co., 25 Tex. Civ. App. 145, 60 S. W. 314); or whether plaintiff was guilty of contributory negligence in returning by a public crossing obstructed by defendant's cars where he was injured by his horse shying, where there is evidence that when he crossed it a short time before the horse had also shied (Rusterholtz *v.* New York, etc., R. Co., 191 Pa. St. 390, 43 Atl. 208).

88. Contributory negligence in passing between, over, or around standing cars held a question for the jury see the following cases:

District of Columbia.— Grant *v.* Baltimore, etc., R. Co., 2 MacArthur 277.

Illinois.— Chicago, etc., R. Co. *v.* Filler, 195 Ill. 9, 62 N. E. 919.

Kansas.— Weber *v.* Atchison, etc., R. Co., 54 Kan. 389, 38 Pac. 569.

Maryland.— Baltimore, etc., R. Co. *v.* Fitzpatrick, 35 Md. 32.

Michigan.— Adams *v.* Iron Cliffs Co., 78 Mich. 271, 44 N. W. 270, 18 Am. St. Rep. 441.

Missouri.— Boyce *v.* Chicago, etc., R. Co., 120 Mo. App. 168, 96 S. W. 670.

New York.— Mahar *v.* Grand Trunk R. Co., 19 Hun 32.

Pennsylvania.— Stover *v.* Pennsylvania R. Co., 195 Pa. St. 616, 46 Atl. 132.

South Carolina.—Burns *v.* Southern R. Co., 61 S. C. 404, 39 S. E. 567.

Wisconsin.— Fay *v.* Minneapolis, etc., R. Co., 131 Wis. 639, 111 N. W. 683.

See 41 Cent. Dig. tit. "Railroads," § 1168.

Whether it is gross negligence to attempt to pass between the cars of a train occupying a public crossing, in an emergency, and in reliance on the duty of the company to give the statutory signals before moving the train, is a question for the jury. Walker *v.* Southern R. Co., 77 S. C. 161, 57 S. E. 764.

Trespasser.— Whether one making a reasonable use of cars at a crossing for the sole purpose of crossing the tracks is a trespasser, where the cars have obstructed the highway for a longer time than the law allows, is a question for the jury. Littlejohn *v.* Richmond, etc., R. Co., 49 S. C. 12, 26 S. E. 967. Likewise whether one who in passing around standing cars continues straight across the right of way instead of returning to the crossing is a trespasser is a question for the jury. Mayer *v.* Chicago, etc., R. Co., 63 Ill. App. 309.

89. Gahagan *v.* Boston, etc., R. Co., 1 Allen (Mass.) 187, 79 Am. Dec. 724, holding that an attempt to pass between cars in motion propelled by an engine, if no reason appears to justify the attempt, shows such want of care as to justify the court in instructing the jury as a matter of law that the action cannot be maintained.

An attempt at night to cross over a freight train, to which an engine is attached while the train is blocking the way, whereby his heel becomes caught between the bumpers is negligence as a matter of law. Southern R. Co. *v.* Clark, 105 S. W. 384, 32 Ky. L. Rep. 69, 13 L. R. A. N. S. 1071.

90. Contributory negligence in looking and listening held a question for the jury see the following cases:

Illinois.— Chicago, etc., R. Co. *v.* Gomes, 46 Ill. App. 255.

Indiana.— Wamsley *v.* Cleveland, etc., R. Co., 41 Ind. App. 147, 82 N. E. 490, 83 N. E. 640.

Iowa.— Selensky *v.* Chicago Great Western R. Co., 120 Iowa 113, 94 N. W. 272.

Kentucky.— Louisville, etc., R. Co. *v.* Molloy, 107 S. W. 217, 32 Ky. L. Rep. 745; Hutcherson *v.* Louisville, etc., R. Co., 52 S. W. 955, 21 Ky. L. Rep. 733; Peltier *v.* Louisville, etc., R. Co., 29 S. W. 30, 16 Ky. L. Rep. 500.

Michigan.— Garran *v.* Michigan Cent. R. Co., 144 Mich. 26, 107 N. W. 284.

New Jersey.— Bonnell *v.* Delaware, etc., R. Co., 39 N. J. L. 189.

New York.— Henavie *v.* New York Cent., etc., R. Co., 166 N. Y. 280, 59 N. E. 901 [*reversing* 44 N. Y. App. Div. 641, 60 N. Y. Suppl. 752]; Reis *v.* Long Island R. Co., 88 N. Y. App. Div. 611, 84 N. Y. Suppl. 881; De Graw *v.* Erie R. Co., 49 N. Y. App. Div. 29, 63 N. Y. Suppl. 296; Pitts *v.* New York Cent., etc., R. Co., 79 Hun 546, 29 N. Y. Suppl. 871 (holding this to be true, although there is no evidence that the person injured looked both ways and listened).

Ohio.— Cincinnati, etc., R. Co. *v.* Levy, 28 Ohio Cir. Ct. 23; Wells *v.* Cincinnati, etc., R. Co., 9 Ohio Cir. Ct. 340, 6 Ohio Cir. Dec. 137.

Pennsylvania.— Becker *v.* Pennsylvania R. Co., 10 Pa. Super. Ct. 19, 44 Wkly. Notes Cas. 343.

Texas.— Hammon *v.* San Antonio, etc., R. Co., 13 Tex. Civ. App. 633, 35 S. W. 872.

United States.— Southern Pac. R. Co. *v.* Harada, 109 Fed. 379, 48 C. C. A. 423.

See 41 Cent. Dig. tit. "Railroads," § 1169.

Whether or not the injured person ought to have discovered the approaching train and avoided the collision is a question for the jury where the evidence shows that he looked in both directions on approaching the crossing. Keese *v.* New York, etc., R. Co., 67 Barb. (N. Y.) 205.

contributory negligence.[91] But where the evidence clearly shows that the injured person could by the exercise of ordinary care in looking and listening have avoided the injury, the question of his contributory negligence is one of law for the court, and it may direct a verdict for defendant, grant a nonsuit, dismiss, or otherwise dispose of the case.[92]

(2) Opportunity to See or Hear Train. Where the evidence clearly shows that the injured person's opportunity for seeing or hearing the approaching train at the time of the accident was such that he could not fail to have seen or heard it in time to avert the accident if he had used due care in looking and listening, his contributory negligence in this respect should not be submitted to the jury but is a question for the court and it may direct a verdict for defendant, grant a nonsuit, dismiss, or otherwise dispose of the case without the intervention of the jury,[93] even though plaintiff testifies that he stopped, looked, and listened,

91. Contributory negligence in failing to look and listen held a question for the jury see the following cases.

Alabama.— Georgia Cent. R. Co. *v.* Hyatt, 151 Ala. 355, 43 So. 867, stop, look, and listen.

Arkansas.— Scott *v.* St. Louis, etc., R. Co., 79 Ark. 137, 95 S. W. 490, 116 Am. St. Rep. 67.

Georgia.— Southern R. Co. *v.* Tankersley, 3 Ga. App. 548, 60 S. E. 297.

Illinois.— Elgin, etc., R. Co. *v.* Lawlor, 229 Ill. 621, 82 N. E. 407 [*affirming* 132 Ill. App. 280]; Toledo, etc., R. Co. *v.* Hammett, 220 Ill. 9, 77 N. E. 72 [*reversing* 115 Ill. App. 268]; Chicago, etc., R. Co. *v.* Wilson, 133 Ill. 55, 24 N. E. 555 [*affirming* 35 Ill. App. 346]; Chicago, etc., R. Co. *v.* Barrows, 128 Ill. App. 11; Cleveland, etc., R. Co. *v.* Beard, 106 Ill. App. 486.

Indiana.— Stoy *v.* Louisville, etc., R. Co., 160 Ind. 144, 66 N. E. 615; New York, etc., R. Co. *v.* Robbins, 38 Ind. App. 172, 76 N. E. 804.

Iowa.— Lorenz *v.* Burlington, etc., R. Co., 115 Iowa 377, 88 N. W. 835, 56 L. R. A. 752.

Kentucky.— Wright *v.* Cincinnati, etc., R. Co., 94 Ky. 114, 21 S. W. 581, 14 Ky. L. Rep. 788; Wilson *v.* Chesapeake, etc., R. Co., 86 S. W. 690, 27 Ky. L. Rep. 778.

Massachusetts.— Manley *v.* Boston, etc., R. Co., 159 Mass. 493, 34 N. E. 951.

Missouri.— King *v.* Missouri Pac. R. Co., 98 Mo. 235, 11 S. W. 563; Petty *v.* Hannibal, etc., R. Co., 88 Mo. 306.

New Jersey.— Goodwin *v.* New Jersey Cent. R. Co., 73 N. J. L. 576, 64 Atl. 134.

New York.— Doyle *v.* Pennsylvania, etc., R. Co., 139 N. Y. 637, 34 N. E. 1063.

Ohio.— Baltimore, etc., R. Co. *v.* Stoltz, 18 Ohio Cir. Ct. 93, 9 Ohio Cir. Dec. 638, holding that where the evidence fails to show that the person injured looked and listened before crossing, but does tend to prove each allegation of plaintiff's petition, the case must go to the jury.

Texas.— Gulf, etc., R. Co. *v.* Anderson, 76 Tex. 244, 13 S. W. 196; Missouri, etc., R. Co. *v.* Balliet, (Civ. App. 1908) 107 S. W. 906; Gulf, etc., R. Co. *v.* Melville, (Civ. App. 1905) 87 S. W. 863; Gulf, etc., R. Co. *v.* Dolson, 38 Tex. Civ. App. 324, 85 S. W. 444; International, etc., R. Co. *v.* Eason, (Civ. App. 1896) 35 S. W. 208.

See 41 Cent. Dig. tit. "Railroads," § 1169.

Compare Pyle *v.* Clark, 75 Fed. 644.

Gross negligence.— Whether it is gross negligence, under the provisions of Mass. Pub. St. c. 112, §§ 163, 213, for a person who is familiar with the crossing, and the time when trains are due to pass, to attempt to drive over it at about train time, without looking for approaching trains, is a question for the jury when considered with other circumstances. Manley *v.* Boston, etc., R. Co., 159 Mass. 493, 34 N. E. 951.

92. Contributory negligence in looking and listening held a question for the court see the following cases:

Arkansas.— Scott *v.* St. Louis, etc., R. Co., 79 Ark. 137, 95 S. W. 490, 116 Am. St. Rep. 67.

Georgia.— Jenkins *v.* Central R., etc., Co., 89 Ga. 756, 15 S. E. 655.

Iowa.— Laverenz *v.* Chicago, etc., R. Co., 56 Iowa 689, 10 N. W. 268.

Kentucky.— McCain *v.* Louisville, etc., R. Co., 18 S. W. 537, 13 Ky. L. Rep. 809.

Minnesota.— Griswold *v.* Great Northern R. Co., 86 Minn. 67, 90 N. W. 2.

New York.— Campbell *v.* Union R. Co., 9 Misc. 484, 30 N. Y. Suppl. 246.

Pennsylvania.— Canfield *v.* Baltimore, etc., R. Co., 208 Pa. St. 372, 376, 57 Atl. 763, 1134; Irey *v.* Pennsylvania R. Co., 132 Pa. St. 563, 19 Atl. 341.

United States.— See Pyle *v.* Clark, 75 Fed. 644.

See 41 Cent. Dig. tit. "Railroads," § 1169.

93. *Georgia.*— Randolph *v.* Brunswick, etc., R. Co., 120 Ga. 969, 48 S. E. 396.

Illinois.— Bjork *v.* Illinois Cent. R. Co., 85 Ill. App. 269.

Indian Territory.— Atchison, etc., R. Co. *v.* Baker, (1907) 104 S. W. 1182 [*reversed* on other grounds in (Okla.) 95 Pac. 433].

Kansas.— Young *v.* Chicago, etc., R. Co., 57 Kan. 144, 45 Pac. 583.

Kentucky.— Early *v.* Louisville, etc., R. Co., 115 Ky. 13, 72 S. W. 348, 24 Ky. L. Rep. 1807.

Maine.— Blumenthal *v.* Boston, etc., R. Co., 97 Me. 255, 54 Atl. 747.

Massachusetts.— Allen *v.* Boston, etc., R. Co., 197 Mass. 298, 83 N. E. 863.

or that he looked or listened but did not see or hear the train.[94] Where, however, the possibility of having been able to see or hear the approaching train is uncertain, either because the evidence in respect thereto is conflicting,[95] or because there is doubt as to the inferences to be drawn from the facts shown,[96] the issue of contributory negligence should be submitted to the jury.

(3) DUTY TO STOP BEFORE REACHING CROSSING.[97] Although in some jurisdictions the failure of a person injured at a railroad crossing to stop and look and listen before going on the crossing is negligence *per se* and a question for the court,[98] in most jurisdictions, unless the evidence clearly shows that had he exercised such precautions the injury could have been averted,[99] it is a question for the jury whether under the circumstances it was contributory negligence for

Michigan.— Straugh *v.* Detroit, etc., R. Co., 65 Mich. 706, 36 N. W. 161.

Missouri.— Huggart *v.* Missouri Pac. R. Co., 134 Mo. 673, 26 S. W. 220 (holding that a demurrer to the evidence should have been sustained); Hinze *v.* St. Louis, etc., R. Co., 71 Mo. 636; Jones *v.* Barnard, 63 Mo. App. 501.

New Jersey.— Diele *v.* Erie R. Co., 70 N. J. L. 138, 56 Atl. 156.

New York.— Morris *v.* Lake Shore, etc., R. Co., 148 N. Y. 182, 42 N. E. 579; Swart *v.* New York Cent., etc., R. Co., 81 N. Y. App. Div. 402, 80 N. Y. Suppl. 906 [*affirmed* in 177 N. Y. 529, 69 N. E. 1131]; Ward *v.* New York Cent., etc., R. Co., 78 N. Y. App. Div. 402, 80 N. Y. Suppl. 161 [*affirmed* in 177 N. Y. 526, 69 N. E. 1132]; Fowler *v.* New York Cent., etc., R. Co., 74 Hun 141, 26 N. Y. Suppl. 218 [*affirmed* in 147 N. Y. 717, 42 N. E. 722], holding that a verdict was properly directed for defendant in such a case, although there was evidence that the train was running at a rate of speed exceeding that authorized by city ordinance.

Ohio.— Baltimore, etc., R. Co. *v.* McPeek, 16 Ohio Cir. Ct. 87, 8 Ohio Cir. Dec. 742.

Pennsylvania.— Blotz *v.* Lehigh Valley R. Co., 212 Pa. St. 154, 61 Atl. 832; Corcoran *v.* Pennsylvania R. Co., 203 Pa. St. 380, 53 Atl. 240; Connerton *v.* Delaware, etc., Canal Co., 169 Pa. St. 339, 32 Atl. 416; Smith *v.* Philadelphia, etc., R. Co., 160 Pa. St. 117, 28 Atl. 641; Butler *v.* Gettysburg, etc., R. Co., 126 Pa. St. 160, 19 Atl. 37; Marland *v.* Pittsburgh, etc., R. Co., 123 Pa. St. 487, 16 Atl. 624, 10 Am. St. Rep. 541.

United States.— Blount *v.* Grand Trunk R. Co., 61 Fed. 375, 9 C. C. A. 526.

See 41 Cent. Dig. tit. "Railroads," § 1170.

But *compare* Winchell *v.* Abbot, 77 Wis. 371, 46 N. W. 665.

Gross or wilful negligence.— Whether a failure to look at a point at which there was an opportunity of seeing an approaching train was gross or wilful negligence is a question for the jury. Sullivan *v.* New York, etc., R. Co., 154 Mass. 524, 28 N. E. 911.

94. *Colorado.*— Westerkamp *v.* Chicago, etc., R. Co., 41 Colo. 290, 92 Pac. 687.

Kansas.— Young *v.* Chicago, etc., R. Co., 57 Kan. 144, 45 Pac. 583.

Maine.— Blumenthal *v.* Boston, etc., R. Co., 97 Me. 255, 54 Atl. 747.

Missouri.— Hook *v.* Missouri Pac. R. Co., 162 Mo. 569, 63 S. W. 360.

New York.— Spencer *v.* New York Cent., etc., R. Co., 123 N. Y. App. Div. 789, 108 N. Y. Suppl. 245; Swart *v.* New York Cent., etc., R. Co., 81 N. Y. App. Div. 402, 80 N. Y. Suppl. 906 [*affirmed* in 177 N. Y. 529, 69 N. E. 1131]; Fiddler *v.* New York Cent., etc., R. Co., 64 N. Y. App. Div. 95, 71 N. Y. Suppl. 721; Stopp *v.* Fitchburg R. Co., 80 Hun 178, 29 N. Y. Suppl. 1008 (holding that a nonsuit should be granted in such a case, although plaintiff testifies that she stopped before going on the track, looked and listened and continued to look until she went on the track); Fowler *v.* New York Cent., etc., R. Co., 74 Hun 141, 26 N. Y. Suppl. 218 [*affirmed* in 147 N. Y. 717, 42 N. E. 722].

Pennsylvania.— Butler *v.* Gettysburg, etc., R. Co., 126 Pa. St. 160, 19 Atl. 37; Marland *v.* Pittsburgh, etc., R. Co., 123 Pa. St. 487, 16 Atl. 624, 10 Am. St. Rep. 541.

See 41 Cent. Dig. tit. "Railroads," § 1170.

95. Chesapeake, etc., R. Co. *v.* Dupee, 67 S. W. 15, 23 Ky. L. Rep. 2349; Goldsboro *v.* New Jersey Cent. R. Co., 60 N. J. L. 49, 37 Atl. 433; Miles *v.* Fonda, etc., R. Co., 86 Hun (N. Y.) 508, 33 N. Y. Suppl. 729 [*affirmed* in 155 N. Y. 679, 50 N. E. 1119]; Collins *v.* New York, etc., R. Co., 4 N. Y. St. 874.

96. Weller *v.* Chicago, etc., R. Co., 120 Mo. 635, 23 S. W. 1061, 25 S. W. 532; Davis *v.* New York Cent., etc., R. Co., 47 N. Y. 400; Texas, etc., R. Co. *v.* Fuller, 13 Tex. Civ. App. 151, 36 S. W. 319.

Where there is evidence that the approaching train could not have been seen in time to avert the collision if the person injured had looked and listened and there is no direct evidence to prove that he did look and listen, the question of his contributory negligence is for the jury. Struck *v.* Chicago, etc., R. Co., 58 Minn. 298, 59 N. W. 1022.

97. **Where view or hearing is obstructed** see *infra*, X, F, 14, g. (XI), (D), (8), (b).

98. Pennsylvania R. Co. *v.* Peters, 116 Pa. St. 206, 9 Atl. 317; Reading, etc., R. Co. *v.* Ritchie, 102 Pa. St. 425; Pennsylvania R. Co. *v.* Beale, 73 Pa. St. 504, 13 Am. Rep. 753.

99. Henze *v.* St. Louis, etc., R. Co., 71 Mo. 636, plaintiff's own testimony.

That the court may declare it negligence as a matter of law for one to fail to stop, there must be such an evident necessity under the circumstances that he should stop that the minds of reasonable men would not differ in regard to it. St. Louis, etc., R. Co. *v.* Knowles, 6 Kan. App. 790, 51 Pac. 230.

the injured person to fail to stop and look and listen before going on the crossing,[1] or whether he exercised due care in stopping and looking and listening at the proper place and time.[2] Whether or not such person did in fact stop and look and listen is a question for the jury where the evidence is conflicting.[3] So whether the presumption that the person injured stopped, looked, and listened before crossing is rebutted is for the jury,[4] unless the evidence to the contrary is either uncontradicted or is so undisputable that a verdict against it would be set aside as a matter of law.[5]

(4) TIME, PLACE, AND DIRECTION FOR LOOKING AND LISTENING.[6] Where the undisputed facts establish that the person injured did not look and listen, or stop, look, and listen, at a proper time and place for ascertaining the approach of trains his contributory negligence is a question of law for the court.[7] But where the evidence is conflicting, or the facts are left in doubt, it is a question for the jury whether under the circumstances he used due care in looking and listening,[8]

1. **Contributory negligence in failing to stop and look and listen** held a question for the jury see the following cases:

District of Columbia.— Baltimore, etc., R. Co. *v.* Carrington, 3 App. Cas. 101.

Illinois.— Chicago City R. Co. *v.* Barker, 209 Ill. 321, 70 N. E. 624; Chicago, etc., R. Co. *v.* Reith, 65 Ill. App. 461.

Iowa.— Hartman *v.* Chicago Great Western R. Co., 132 Iowa 582, 110 N. W. 10; Selensky *v.* Chicago Great Western R. Co., 120 Iowa 113, 94 N. W. 272; Willfong *v.* Omaha, etc., R. Co., 116 Iowa 548, 90 N. W. 358.

Kansas.—St. Louis, etc., R. Co. *v.* Knowles, 6 Kan. App. 790, 51 Pac. 230.

Kentucky.—Louisville, etc., R. Co. *v.* Lucas, 98 S. W. 308, 99 S. W. 959, 30 Ky. L. Rep. 359, 539; Davis *v.* Louisville, etc., R. Co., 97 S. W. 1122, 99 S. W. 930, 30 Ky. L. Rep. 172, 946; Cincinnati, etc., R. Co. *v.* Wright, 34 S. W. 526, 17 Ky. L. Rep. 1277.

New York.— Kellogg *v.* New York Cent., etc., R. Co., 79 N. Y. 72; Smith *v.* Lehigh Valley R. Co., 61 N. Y. App. Div. 46, 69 N. Y. Suppl. 1112 [*reversed* on other grounds in 170 N. Y. 394, 63 N. E. 338].

Ohio.— Wheeling, etc., R. Co. *v.* Suhrwiar, 22 Ohio Cir. Ct. 560, 12 Ohio Cir. Dec. 809.

South Carolina.— Bamberg *v.* Atlantic Coast Line R. Co., 72 S. C. 389, 51 S. E. 988.

Texas.— Austin, etc., R. Co. *v.* Duty, (Civ. App. 1894) 28 S. W. 463; Gulf, etc., R. Co. *v.* Daniels, (Civ. App. 1893) 24 S. W. 337.

Utah.— Peck *v.* Oregon Short Line R. Co., 25 Utah 21, 69 Pac. 153.

Virginia.— Southern R. Co. *v.* Aldridge, 101 Va. 142, 43 S. E. 333.

Wisconsin.— Eilert *v.* Green Bay, etc., R. Co., 48 Wis. 606, 4 N. W. 769.

United States.— Louisville, etc., R. Co. *v.* Summers, 125 Fed. 719, 60 C. C. A. 487; Whiton *v.* Chicago, etc., R. Co., 29 Fed. Cas. No. 17,597, 2 Biss. 282 [*affirmed* in 13 Wall. 270, 20 L. ed. 571].

See 41 Cent. Dig. tit. "Railroads," § 1172.

2. See *infra*, X, F, 14, g, (XI), (D), (4).

3. Coolbroth *v.* Pennsylvania R. Co., 209 Pa. St. 433, 58 Atl. 808; Holden *v.* Pennsylvania R. Co., 7 Kulp (Pa.) 52; Hughes *v.* Delaware, etc., Canal Co., 1 Lack. Leg. N. (Pa.) 215.

4. Kreamer *v.* Perkiomen R. Co., 214 Pa. St. 219, 63 Atl. 597; Patterson *v.* Pittsburg, etc., R. Co., 210 Pa. St. 47, 59 Atl. 318.

5. Kreamer *v.* Perkiomen R. Co., 214 Pa. St. 219, 63 Atl. 597; Patterson *v.* Pittsburg, etc., R. Co., 210 Pa. St. 47, 59 Atl. 318; Holden *v.* Pennsylvania R. Co., 7 Kulp (Pa.) 52.

6. **Where view or hearing is obstructed** see *infra*, X, F, 14, g, (XI), (D), (8), (d).

7. Wojochoski *v.* New Jersey Cent. R. Co., 10 Pa. Super. Ct. 469.

Where the evidence most favorable to plaintiff establishes that he stopped at a place where he could not see and then drove on passing a point with which he was familiar, from which he could have seen the track for a considerable distance, and where reasonable prudence dictated that he should have stopped, looked, and listened, the question of contributory negligence is one of law and the court should take the case from the jury. Wojochoski *v.* New Jersey Cent. R. Co., 10 Pa. Super. Ct. 469.

8. *Indiana.*— Cleveland, etc., R. Co. *v.* Harrington, 131 Ind. 426, 30 N. E. 37.

New York.— Greany *v.* Long Island R. Co., 101 N. Y. 419, 5 N. E. 425, whether the person injured looked exactly at the right moment or from the place most likely to afford information.

Ohio.— Wheeling, etc., R. Co. *v.* Parker, 29 Ohio Cir. Ct. 1.

Oregon.— Hecker *v.* Oregon R. Co., 40 Oreg. 6, 66 Pac. 270.

United States.— Lynch *v.* Northern Pac. R. Co., 69 Fed. 86, 16 C. C. A. 151.

See 41 Cent. Dig. tit. "Railroads," § 1173.

Whether the omission to look at the instant of stepping on the track was negligence is a question for the jury. Plummer *v.* Eastern R. Co., 73 Me. 591.

That from a certain point on the road the person injured could see an approaching train at a distance of one-half a mile is not ground for taking the case from the jury, when there is evidence tending to show that at the respective rates of speed of such person and the train he must have passed that point before the train came within view therefrom. Hendrickson *v.* Great Northern R. Co., 52 Minn. 340, 54 N. W. 189.

or in stopping, looking, and listening,[9] at a proper time and place. Likewise where such person has looked and listened at one place, whether he was negligent in not looking and listening, or in not stopping, looking, and listening again, is a question for the jury.[10] Whether he used due care in looking in both directions is also a question for the jury,[11] unless the evidence shows that he looked only in one direction, when the approaching train could have been discovered if he had looked also in the opposite direction.[12]

(5) Crossing After Passing Trains.[13] Whether a person is negligent in crossing immediately after a passing train without looking or listening for a following train or cars,[14] or whether in such case he used due care in stopping, looking, and listening for approaching trains before crossing,[15] is ordinarily a question for the jury.

9. Bilton *v.* Southern Pac. Co., 148 Cal. 443, 83 Pac. 440; Renwick *v.* New York Cent. R. Co., 36 N. Y. 132, 1 Transcr. App. 46, 34 How. Pr. 91; Gilmore *v.* Cape Fear, etc., R. Co., 115 N. C. 657, 20 S. E. 371; Crane *v.* Pennsylvania R. Co., 218 Pa. St. 560, 67 Atl. 877; Messinger *v.* Pennsylvania R. Co., 215 Pa. St. 497, 64 Atl. 682, 114 Am. St. Rep. 970; Hanna *v.* Philadelphia, etc., R. Co., 213 Pa. St. 157, 62 Atl. 643, 4 L. R. A. N. S. 344; Armstrong *v.* Pennsylvania R. Co., 212 Pa. St. 228, 61 Atl. 831; Cromley *v.* Pennsylvania R. Co., 208 Pa. St. 445, 57 Atl. 852, 211 Pa. St. 429, 60 Atl. 1007; Ely *v.* Pittsburgh, etc., R. Co., 158 Pa. St. 233, 27 Atl. 970; Newton *v.* Pittsburg, etc., R. Co., 18 Pa. Super. Ct. 18; Wojochoski *v.* New Jersey Cent. R. Co., 10 Pa. Super. Ct. 469.

Whether the customary stopping place for drivers was a proper place is a question for the jury. Whitman *v.* Pennsylvania R. Co., 156 Pa. St. 175, 27 Atl. 290; Fry *v.* Pennsylvania R. Co., 24 Pa. Super. Ct. 147.

Whether there was another and better place for ascertaining the approach of trains than that at which plaintiff stopped to look and listen, and whether he failed to stop at such place so as to be guilty of contributory negligence, is a question for the jury. Newman *v.* Delaware, etc., R. Co., 203 Pa. St. 530, 53 Atl. 345.

The precise number of feet from the crossing at which he should stop in the exercise of reasonable care is for the jury to determine. Chicago, etc., R. Co. *v.* Turner, 33 Ind. App. 264, 69 N. E. 484.

10. *Iowa.*— Hartman *v.* Chicago Great Western R. Co., 132 Iowa 582, 110 N. W. 10.

Kentucky.— Wright *v.* Cincinnati, etc., R. Co., 94 Ky. 114, 21 S. W. 581, 14 Ky. L. Rep. 788; Louisville, etc., R. Co. *v.* Cooper, 65 S. W. 795, 23 Ky. L. Rep. 1658.

New York.— Frederick *v.* Fonda, etc., R. Co., 52 N. Y. App. Div. 603, 65 N. Y. Suppl. 440.

Pennsylvania.—Cromley *v.* Pennsylvania R. Co., 208 Pa. St. 445, 57 Atl. 842; Bracken *v.* Pennsylvania R. Co., 32 Pa. Super. Ct. 22.

United States.— Union Pac. R. Co. *v.* Rosewater, 157 Fed. 168, 84 C. C. A. 616, 15 L. R. A. N. S. 803.

See 41 Cent. Dig. tit. "Railroads," § 1173.

Reversing train.— Whether a person seeing that an engine had passed the crossing to the eastward, and was still moving to the east when she was a few steps from the track, was guilty of contributory negligence in going on the track without looking again for the engine, or should have heard the engine reverse, is a question for the jury, the engine, while making a loud noise from escaping steam, having suddenly reversed and moved rapidly forward striking her while on the track. Berkery *v.* Erie R. Co., 55 N. Y. App. Div. 489, 67 N. Y. Suppl. 189 [*affirmed* in 172 N. Y. 636, 65 N. E. 1113].

11. Martin *v.* Southern Pac. Co., 150 Cal. 124, 88 Pac. 701; Guggenheim *v.* Lake Shore, etc., R. Co., 57 Mich. 488, 24 N. W. 827; Minot *v.* Boston, etc., R. Co., 73 N. H. 317, 61 Atl. 509; Greaney *v.* Long Island R. Co., 101 N. Y. 419, 5 N. E. 425; Ernst *v.* Hudson River R. Co., 39 N. Y. 61, 100 Am. Dec. 405, 6 Transcr. App. 35, 36 How. Pr. 84; Lewis *v.* New York, etc., R. Co., 1 Silv. Sup. (N. Y.) 393, 5 N. Y. Suppl. 313. *Compare* Ernst *v.* Hudson River R. Co., 24 How. Pr. (N. Y.) 97.

12. Jones *v.* Barnard, 63 Mo. App. 501.

13. Where view or hearing is obstructed see *infra*, X, F, 14, g, (xi), (d), (8), (e).

14. *Indiana.*— Grand Rapids, etc., R. Co. *v.* Cox, 8 Ind. App. 29, 35 N. E. 183, following train running twelve seconds behind the first at fifteen miles an hour without any signal.

Maine.— York *v.* Maine Cent. R. Co., 84 Me. 117, 25 Atl. 790, 18 L. R. A. 60.

Massachusetts.—French *v.* Taunton Branch R. Co., 116 Mass. 537.

Michigan.— Breckenfelder *v.* Lake Shore, etc., R. Co., 79 Mich. 560, 44 N. W. 957.

Missouri.— Drain *v.* St. Louis, etc., R. Co., 86 Mo. 574 [*reversing* 10 Mo. App. 531].

United States.— McGhee *v.* White, 66 Fed. 502, 13 C. C. A. 608.

Question for court.— Contributory negligence in going on a crossing behind a passing train, without looking or listening, held a question for the court see Abbett *v.* Chicago, etc., R. Co., 30 Minn. 482, 16 N. W. 266.

15. Turell *v.* Erie R. Co., 63 N. Y. App. Div. 619, 71 N. Y. Suppl. 502; Puff *v.* Lehigh Valley R. Co., 71 Hun (N. Y.) 577, 24 N. Y. Suppl. 1068; Pennsylvania R. Co. *v.* Fortney, 90 Pa. St. 323; Wolfe *v.* Pennsylvania R. Co., 22 Pa. Super. Ct. 335.

(6) ATTENTION ATTRACTED BY OTHER TRAIN.[16] Whether a person is negligent in failing to observe the approaching train or cars which injured him while his attention was attracted to other trains or cars is a question for the jury, where the evidence is conflicting or the facts are in doubt.[17]

(7) OCCUPANT OF VEHICLE DRIVEN BY ANOTHER. Whether or not an occupant of a vehicle driven by another used due care in looking or listening or in taking other proper precautions at the time of the accident is ordinarily a question for the jury.[18]

(8) WHERE VIEW OR HEARING IS OBSTRUCTED — (a) IN GENERAL. Whether a person who was injured at a crossing at which his view or hearing of approaching trains was obstructed exercised proper care and precaution in going on the track,[19]

16. **Where view or hearing is obstructed** see *infra*, X, F, 14, g, (XI), (8), (f).

17. **Contributory negligence in failing to observe approaching train by reason of attention being attracted by other train** held a question for the jury see the following cases:

Colorado.—Kansas Pac. R. Co. *v.* Twombly, 3 Colo. 125.

Illinois.— Lake Shore, etc., R. Co. *v.* Johnsen, 135 Ill. 641, 26 N. E. 510.

Kentucky.— Crowley *v.* Louisville, etc., R. Co., 55 S. W. 434, 21 Ky. L. Rep. 1434.

Michigan.— Palmer *v.* Detroit, etc., R. Co., 56 Mich. 1, 22 N. W. 88.

Minnesota.— Hutchinson *v.* St. Paul, etc., R. Co., 32 Minn. 398, 21 N. W. 212.

Missouri.— Jennings *v.* St. Louis, etc., R. Co., 112 Mo. 268, 20 S. W. 490.

New York.— Bowen *v.* New York Cent., etc., R. Co., 89 Hun 594, 35 N. Y. Suppl. 540.

Pennsylvania.— Davidson *v.* Lake Shore, etc., R. Co., 171 Pa. St. 522, 33 Atl. 86.

See 41 Cent. Dig. tit. "Railroads," § 1175.

18. **Contributory negligence of occupant held a question for the jury** see the following cases:

Illinois.— Illinois Southern R. Co. *v.* Hamill, 128 Ill. App. 152 [*affirmed* in 226 Ill. 88, 80 N. E. 745].

Kentucky.— Cahill *v.* Cincinnati, etc., R. Co., 92 Ky. 345, 18 S. W. 2, 13 Ky. L. Rep. 714, in the absence of direct testimony.

Maine.— Wood *v.* Maine Cent. R. Co., 101 Me. 469, 64 Atl. 833.

Minnesota.— Lammers *v.* Great Northern R. Co., 82 Minn. 120, 84 N. W. 728; Hutchinson *v.* St. Paul, etc., R. Co., 32 Minn. 398, 21 N. W. 212.

Mississippi.— Allen *v.* Kansas City, etc., R. Co., (1902) 32 So. 3.

Nebraska.— Union Pac. R. Co. *v.* Ruzicka, 65 Nebr. 621, 91 N. W. 543.

New York.— Hoag *v.* New York Cent., etc., R. Co., 111 N. Y. 199, 18 N. E. 648; Noakes *v.* New York Cent., etc., R. Co., 121 N. Y. App. Div. 716, 106 N. Y. Suppl. 522 (occupant of automobile); Smith *v.* New York Cent., etc., R. Co., 4 N. Y. App. Div. 493, 38 N. Y. Suppl. 666, 39 N. Y. Suppl. 1119; Crawford *v.* Delaware, etc., R. Co., 54 N. Y. Super. Ct. 262 [*affirmed* in 121 N. Y. 652, 24 N. E. 1092]; McCaffrey *v.* Delaware, etc., Canal Co., 16 N. Y. Suppl. 495.

Where the occupant has no control over the driver or his management of the team, in the absence of evidence that such occupant knows that the driver is incompetent or not keeping a proper lookout for trains, the question of his negligence is for the jury, although it appears that if he had looked and listened he would have discovered the train in time to have avoided the accident. Howe *v.* Minneapolis, etc., R. Co., 62 Minn. 71, 64 N. W. 102, 54 Am. St. Rep. 616, 30 L. R. A. 684.

Where it does not appear that the occupant was guilty of affirmative negligence or coöperated with any affirmative negligent act of the driver, the question of whether such occupant was negligent in trusting to the driver's diligence is one of fact. De Loge *v.* New York Cent. etc., R. Co., 92 Hun (N. Y.) 149, 36 N. Y. Suppl. 697 [*affirmed* in 157 N. Y. 688, 51 N. E. 1090].

19. *Arizona.*— Southern Pac. Co. *v.* Tomlinson, 4 Ariz. 126, 33 Pac. 710.

California.— Bilton *v.* Southern Pac. R. Co., 148 Cal. 443, 83 Pac. 440; Warren *v.* Southern California R. Co., (1901) 67 Pac. 1; Strong *v.* Sacramento, etc., R. Co., 61 Cal. 326.

Kansas.—Atchison, etc., R. Co. *v.* Hill, 57 Kan. 139, 45 Pac. 581.

Kentucky.— Eskridge *v.* Cincinnati, etc., R. Co., 89 Ky. 367, 12 S. W. 580, 11 Ky. L. Rep. 557.

Massachusetts.— Hanks *v.* Boston, etc., R. Co., 147 Mass. 495, 18 N. E. 218; Cleaves *v.* Pigeon Hill Granite Co., 145 Mass. 541, 14 N. E. 646.

Michigan.— Coffee *v.* Pere Marquette R. Co., 139 Mich. 378, 102 N. W. 953 (failure to ask person standing in a position to have seen the approaching train whether it was safe to cross); Crane *v.* Michigan Cent. R. Co., 107 Mich. 511, 65 N. W. 527.

Minnesota.— Hendrickson *v.* Great Northern R. Co., 49 Minn. 245, 51 N. W. 1044, 32 Am. St. Rep. 540, 16 L. R. A. 261.

Missouri.— Kenney *v.* Hannibal, etc., R. Co., 105 Mo. 270, 15 S. W. 983, 16 S. W. 837; Donohue *v.* St. Louis, etc., R. Co., 91 Mo. 357, 2 S. W. 424, 3 S. W. 848.

New York.— Salter *v.* Utica, etc., R. Co., 88 N. Y. 42; Woodworth *v.* New York Cent., etc., R. Co., 55 N. Y. App. Div. 23, 66 N. Y. Suppl. 1072 [*affirmed* in 170 N. Y. 589, 63 N. E. 1123]; Haywood *v.* New York Cent., etc., R. Co., 13 N. Y. Suppl. 177.

Ohio.— Hine *v.* Erie R. Co., 27 Ohio Cir. Ct. 155.

as whether under the circumstances he used due care and precaution in looking and listening,[20] or in stopping, looking, and listening,[21] before going on the crossing; or whether a failure to exercise such precautions was negligence under the circumstances,[22] or whether there were such obstructions to view or hearing,[23] are questions for the jury, unless the evidence of contributory negligence is so clear that reasonable minds can draw but one conclusion therefrom.[24]

(b) Duty to Stop Before Reaching the Crossing. It is ordinarily a question for the jury whether under the circumstances of the particular case a person was negligent in failing to stop to look and listen before going on a crossing at which his view or hearing was obstructed;[25] or whether, if he did stop to look

Pennsylvania.— Beach *v.* Pennsylvania R. Co., 212 Pa. St. 567, 61 Atl. 1106.

Wisconsin.— Morey *v.* Lake Superior Terminal, etc., Co., 125 Wis. 148, 103 N. W. 271.

United States.— Atchison, etc., R. Co. *v.* McClurg, 59 Fed. 860, 8 C. C. A. 322, where there is much contradiction as to the care exercised by plaintiff.

See 41 Cent. Dig. tit. "Railroads," § 1177.

Whether an omission to wait until certain that puffing heard by plaintiff was not from an engine approaching on defendant's track is negligence is a question for the jury. Coffee *v.* Pere Marquette R. Co., 139 Mich. 378, 102 N. W. 953.

20. Contributory negligence in looking and listening where view or hearing is obstructed held a question for the jury see the following cases:

California.— Warren *v.* Southern California R. Co., (1901) 67 Pac. 1.

Illinois.— Illinois Cent. R. Co. *v.* Scheffner, 209 Ill. 9, 70 N. E. 619; Chicago, etc., R. Co. *v.* Pulliam, 208 Ill. 456, 70 N. E. 460; Pennsylvania Co. *v.* Reidy, 198 Ill. 9, 64 N. E. 698 [*affirming* 99 Ill. App. 477].

Indiana.— Peirce *v.* Ray, 24 Ind. App. 302, 56 N. E. 776.

Iowa.— Artz *v.* Chicago, etc., R. Co., 34 Iowa 153, 44 Iowa 284.

Kentucky.— Ramsey *v.* Louisville, etc., R. Co., 89 Ky. 99, 20 S. W. 162, 12 Ky. L. Rep. 559.

Minnesota.— Howard *v.* St. Paul, etc., R. Co., 32 Minn. 214, 20 N. W. 93.

Missouri.— Gratiot *v.* Missouri Pac. R. Co., (1891) 16 S. W. 384; Kenney *v.* Hannibal, etc., R. Co., 105 Mo. 270, 15 S. W. 983, 16 S. W. 837.

Nebraska.— Chicago, etc., R. Co. *v.* Pollard, 53 Nebr. 730, 74 N. W. 331.

New Hampshire.— Roberts *v.* Boston, etc., R. Co., 69 N. H. 354, 45 Atl. 94.

New Jersey.— Goodenough *v.* Pennsylvania R. Co., 55 N. J. L. 596, 27 Atl. 931.

New York.— Canning *v.* Buffalo, etc., R. Co., 168 N. Y. 555, 61 N. E. 901; Massoth *v.* Delaware, etc., Canal Co., 64 N. Y. 524 [*affirming* 6 Hun 314]; Tingley *v.* Long Island R. Co., 109 N. Y. App. Div. 793, 96 N. Y. Suppl. 865; Flanagan *v.* New York Cent., etc., R. Co., 70 N. Y. App. Div. 505, 75 N. Y. Suppl. 225 [*affirmed* in 173 N. Y. 631, 66 N. E. 1108]; Wiedman *v.* Erie R. Co., 66 N. Y. App. Div. 347, 72 N. Y. Suppl. 683; Canfield *v.* New York Cent., etc., R. Co., 19 N. Y. Suppl. 839; Boll *v.* Adirondack R. Co., 4 N. Y. Suppl. 769.

Texas.— Michalke *v.* Galveston, etc., R. Co., (Civ. App. 1894) 27 S. W. 164.

Wisconsin.— Hahn *v.* Chicago, etc., R. Co., 78 Wis. 396, 47 N. W. 620.

United States.— Delaware, etc., R. Co. *v.* Devore, 122 Fed. 791, 58 C. C. A. 543; Northern Pac. R. Co. *v.* Spike, 121 Fed. 44, 57 C. C. A. 384; Hemingway *v.* Illinois Cent. R. Co., 114 Fed. 843, 52 C. C. A. 477; Chicago, etc., R. Co. *v.* Netolicky, 67 Fed. 665, 14 C. C. A. 615.

See 41 Cent. Dig. tit. "Railroads," § 1177.

Where it is doubtful whether the approaching train could have been seen by the person injured owing to the existence of obstructions the question of contributory negligence is for the jury, although there is no direct evidence that the person injured did look and listen for the train. Lewis *v.* Erie R. Co., 105 N. Y. App. Div. 292, 94 N. Y. Suppl. 765; Enders *v.* Lake Shore, etc., R. Co., 2 N. Y. Suppl. 719 [*affirmed* in 117 N. Y. 640, 22 N. E. 1130].

21. See *infra*, X, F, 14, g, (XI), (D), (8), (b).

22. Laverenz *v.* Chicago, etc., R. Co., 56 Iowa 689, 10 N. W. 268; Dickson *v.* Missouri Pac. R. Co., 104 Mo. 491, 16 S. W. 381; Smith *v.* Boston, etc., R. Co., 70 N. H. 53, 47 Atl. 290, 85 Am. St. Rep. 596.

Where the noise of a flour mill drowned that of an approaching train and cars on a side-track obstructed the view of it, it is a question for the jury whether a person driving across the track was negligent in failing to look and listen for the train. Louisville, etc., R. Co. *v.* Satterwhite, 112 Tenn. 185, 79 S. W. 106.

23. Artz *v.* Chicago, etc., R. Co., 44 Iowa 284.

24. Illinois Cent. R. Co. *v.* Finfrock, 103 Ill. App. 232; Northern Pac. R. Co. *v.* Austin, 64 Fed. 211, 12 C. C. A. 97.

25. Contributory negligence in failing to stop, look, and listen at an obstructed crossing held a question for the jury see the following cases:

Illinois.— Chicago, etc., R. Co. *v.* Lane, 130 Ill. 116, 22 N. E. 513; Illinois Cent. R. Co. *v.* Fishell, 32 Ill. App. 41.

Iowa.— Pratt *v.* Chicago, etc., R. Co., 98 Iowa 563, 67 N. W. 402.

Kansas.— Chicago, etc., R. Co. *v.* Hinds, 56 Kan. 758, 44 Pac. 993.

Michigan.— Van Auken *v.* Chicago, etc., R.

and listen, he exercised proper care in doing so,[26] as whether he stopped at a proper place,[27] or whether, although he stopped at one point, he should have stopped again at another point to look and listen.[28]

(c) Duty of Driver to Go Ahead and Look and Listen. Whether a driver of a vehicle on approaching a crossing at which his view or hearing is obstructed should get out of his vehicle and go ahead to a more favorable point for the purpose of ascertaining whether a train is approaching is a question for the jury under all the circumstances.[29]

(d) Time and Place For Looking and Listening. Likewise it is a question for the jury whether under the circumstances the person injured looked and listened at the proper time and place,[30] or whether he stopped and looked and listened at a proper place,[31] or whether having looked and listened at one point he should have again exercised such precautions at another point.[32]

(e) Crossing Behind Passing Train. Whether a person whose view or hearing was obstructed at the time used due care in stopping, looking, or listening for approaching trains before going on the crossing behind a passing train,[33] as whether

Co., 96 Mich. 307, 55 N. W. 971, 22 L. R. A. 33.

Minnesota.— Woehrle *v.* Minnesota Transfer R. Co., 82 Minn. 165, 84 N. W. 791, 52 L. R. A. 348; Beanstrom *v.* Northern Pac. R. Co., 46 Minn. 193, 48 N. W. 778.

Mississippi.— Louisville, etc., R. Co. *v.* Crominarity, 86 Miss. 464, 38 So. 633.

Texas.— Michalke *v.* Galveston, etc., R. Co., (Civ. App. 1894) 27 S. W. 164.

Wisconsin.— Bower *v.* Chicago, etc., R. Co., 61 Wis. 457, 21 N. W. 536.

United States.— Cincinnati, etc., R. Co. *v.* Farra, 66 Fed. 496, 13 C. C. A. 602; Pearce *v.* Humphreys, 34 Fed. 282.

See 41 Cent. Dig. tit. "Railroads," § 1178.

26. Contributory negligence in stopping, looking, and listening where the view or hearing is obstructed held a question for the jury see the following cases:

Indiana.— Cincinnati, etc., R. Co. *v.* Grames, 136 Ind. 39, 34 N. E. 714.

Missouri.— Young *v.* Missouri, etc., R. Co., 72 Mo. App. 263.

New Jersey.— Ellis *v.* Erie R. Co., 66 N. J. L. 451, 49 Atl. 437 [*affirmed* in 67 N. J. L. 352, 51 Atl. 1109]; Hires *v.* Atlantic City R. Co., 66 N. J. L. 30, 48 Atl. 1002.

New York.— Nelson *v.* Long Island R. Co., 109 N. Y. App. Div. 626, 96 N. Y. Suppl. 246; Kelsey *v.* Staten Island Rapid Transit Co., 78 Hun 208, 28 N. Y. Suppl. 974.

Pennsylvania.—Hanna *v.* Philadelphia, etc., R. Co., 213 Pa. St. 157, 62 Atl. 643, 4 L. R. A. N. S. 344; Neiman *v.* Delaware, etc., Canal Co., 149 Pa. St. 92, 24 Atl. 96; McNeal *v.* Pittsburgh, etc., R. Co., 131 Pa. St. 184, 18 Atl. 1026; Schum *v.* Pennsylvania R. Co., 107 Pa. St. 8, 52 Am. Rep. 468; Summers *v.* Bloomsburg, etc., R. Co., 24 Pa. Super. Ct. 615.

Vermont.— Sherwin *v.* Rutland R. Co., 74 Vt. 1, 51 Atl. 1069.

United States.— Baltimore, etc., R. Co. *v.* Griffith, 159 U. S. 603, 16 S. Ct. 105, 40 L. ed. 274; Cowen *v.* Grabow, 120 Fed. 258, 57 C. C. A. 39; Northern Pac. R. Co. *v.* Austin, 64 Fed. 211, 12 C. C. A. 97.

See 41 Cent. Dig. tit. "Railroads," §§ 1177, 1178.

27. Mackerall *v.* Omaha, etc., R. Co., 111 Iowa 547, 82 N. W. 975; Muckinhaupt *v.* Erie R. Co., 196 Pa. St. 213, 46 Atl. 364; Smith *v.* Baltimore, etc., R. Co., 158 Pa. St. 82, 27 Atl. 847; McWilliams *v.* Philadelphia, etc., R. Co., (Pa. 1888) 15 Atl. 654.

Whether a person stopped at a place where he could best see an approaching train is a question for the jury. Link *v.* Philadelphia, etc., R. Co., 165 Pa. St. 75, 30 Atl. 820, 822; McGill *v.* Pittsburgh, etc., R. Co., 152 Pa. St. 331, 25 Atl. 540; Ellis *v.* Lake Shore, etc., R. Co., 138 Pa. St. 506, 21 Atl. 140, 21 Am. St. Rep. 914; Lehigh, etc., Coal Co. *v.* Lear, 6 Pa. Cas. 272, 9 Atl. 267; Pennsylvania, etc., R. Co. *v.* Huff, 6 Pa. Cas. 60, 8 Atl. 789.

28. Cincinnati, etc., R. Co. *v.* Grames, 136 Ind. 39, 34 N. E. 714; Mackerall *v.* Omaha, etc., R. Co., 111 Iowa 547, 82 N. W. 975; Coffee *v.* Pere Marquette R. Co., 139 Mich. 378, 102 N. W. 953; Confer *v.* Pennsylvania R. Co., 209 Pa. St. 425, 58 Atl. 811.

29. *Alabama.*— Louisville, etc., R. Co. *v.* Bryant, 141 Ala. 292, 37 So. 370; Georgia Pac. R. Co. *v.* Lee, 92 Ala. 262, 9 So. 230.

Indiana.— Pittsburgh, etc., R. Co. *v.* Wright, 80 Ind. 236; Chicago, etc., R. Co. *v.* Turner, 33 Ind. App. 264, 69 N. E. 484.

Missouri.— Elliott *v.* Chicago, etc., R. Co., 105 Mo. App. 523, 80 S. W. 270.

New York.— Dolan *v.* Delaware, etc., Canal Co., 71 N. Y. 285.

Canada.— Bennett *v.* Grand Trunk R. Co., 7 Ont. App. 470.

30. St. Louis, etc., R. Co. *v.* Dillard, 78 Ark. 520, 94 S. W. 617; Faber *v.* St. Paul, etc., R. Co., 29 Minn. 465, 13 N. W. 902; Nash *v.* New York Cent., etc., R. Co., 1 N. Y. Suppl. 269.

31. See *supra*, X, F, 14, g, (xi), (8), (b).

32. Austin *v.* Long Island R. Co., 69 Hun (N. Y.) 67, 23 N. Y. Suppl. 193 [*affirmed* in 140 N. Y. 639, 35 N. E. 892].

33. Contributory negligence in crossing behind passing train where view or hearing was obstructed held a question for the jury see the following cases:

Illinois.— Chicago, etc., R. Co. *v.* Randolph, 199 Ill. 126, 65 N. E. 142 [*affirming*

he should have waited until the passing train had gone far enough to permit a clear and unobstructed view,[34] is a question for the jury.

(f) Attention Attracted by Other Trains or Objects. It is also a question for the jury whether under all the circumstances the person used due care in looking and listening before crossing where, in addition to his view or hearing being obstructed, his attention was attracted at the time by other trains or cars,[35] or by other objects.[36]

(g) Other Obstructions. In accordance with the above rules it is ordinarily a question for the jury whether the person injured exercised due care in looking and listening where his view or hearing was obstructed by darkness,[37]

101 Ill. App. 121]; Chicago, etc., R. Co. *v.* Lewandowski, 190 Ill. 301, 60 N. E. 497.

Indiana.—Neubacher *v.* Indianapolis Union R. Co., 134 Ind. 25, 33 N. E. 798.

Massachusetts.— Hubbard *v.* Boston, etc., R. Co., 162 Mass. 132, 38 N. E. 366.

Michigan.— Grenell *v.* Michigan Cent. R. Co., 124 Mich. 141, 82 N. W. 843.

New York.— McNamara *v.* New York Cent., etc., R. Co., 136 N. Y. 650, 32 N. E. 765 [*reversing* 19 N. Y. Suppl. 497, and *distinguishing* Heaney *v.* Long Island R. Co., 112 N. Y. 122, 19 N. E. 422]; Casey *v.* New York Cent., etc., R. Co., 78 N. Y. 518 [*affirming* 8 Daly 220]; Wilbur *v.* Delaware, etc., R. Co., 85 Hun 155, 32 N. Y. Suppl. 479; Miller *v.* New York Cent., etc., R. Co., 82 Hun 164, 31 N. Y. Suppl. 317 [*affirmed* in 146 N. Y. 367, 41 N. E. 90]; Meddaugh *v.* New York, etc., R. Co., 33 N. Y. Suppl. 793 [*affirmed* in 153 N. Y. 659, 48 N. E. 1105]; Suiter *v.* New York, etc., R. Co., 7 N. Y. St. 687.

North Carolina.— Morrow *v.* North Carolina R. Co., 146 N. C. 14, 59 S. E. 158.

Vermont.— Boyden *v.* Fitchburg R. Co., 72 Vt. 89, 47 Atl. 409.

Wisconsin.— Ferguson *v.* Wisconsin Cent. R. Co., 63 Wis. 145, 23 N. W. 123; Gower *v.* Chicago, etc., R. Co., 45 Wis. 182.

United States.— Farrell *v.* Erie R. Co., 138 Fed. 28, 70 C. C. A. 396.

See 41 Cent. Dig. tit. "Railroads," § 1181.

34. Indianapolis Union R. Co. *v.* Neubaucher, 16 Ind. App. 21, 43 N. E. 576, 44 N. E. 669; Gray *v.* Pennsylvania R. Co., 172 Pa. St. 383, 33 Atl. 697; Philadelphia, etc., R. Co. *v.* Carr, 99 Pa. St. 505; Boyden *v.* Fitchburg R. Co., 72 Vt. 89, 47 Atl. 409.

35. *Illinois.*— New York, etc., R. Co. *v.* Luebeck, 157 Ill. 595, 41 N. E. 897 [*affirming* 54 Ill. App. 551].

Indiana.— Chicago, etc., R. Co. *v.* Hedges, 105 Ind. 398, 7 N. E. 801.

Kentucky.— Newport News, etc., Co. *v.* Stuart, 99 Ky. 496, 36 S. W. 528, 18 Ky. L. Rep. 347.

Nebraska.— Chicago, etc., R. Co. *v.* Pollard, 53 Nebr. 730, 74 N. W. 331.

New York.— Beisiegel *v.* New York Cent., etc., R. Co., 34 N. Y. 622, 90 Am. Dec. 741 [*reversing* 33 Barb. 429]; McPeak *v.* New York Cent., etc., R. Co., 85 Hun 107, 32 N. Y. Suppl. 647. See also Rodrian *v.* New York, etc., R. Co., 125 N. Y. 526, 26 N. E. 741 [*reversing* 7 N. Y. Suppl. 811].

See 41 Cent. Dig. tit. "Railroads," § 1182.

36. Northern Pac. R. Co. *v.* Peterson, 55 Fed. 940, 5 C. C. A. 338.

37. Contributory negligence in ascertaining approaching trains or other dangers where the view was obstructed by darkness held a question for the jury see the following cases:

Arkansas.— St. Louis, etc., R. Co. *v.* Johnson, 74 Ark. 372, 86 S. W. 282, dusk.

Maryland.— Western Maryland R. Co. *v.* Kehoe, 86 Md. 43, 37 Atl. 799.

Michigan.—Schremms *v.* Pere Marquette R. Co., 145 Mich. 190, 108 N. W. 698, 116 Am. St. Rep. 291; Van Auken *v.* Chicago, etc., R. Co., 96 Mich. 307, 55 N. W. 971, 22 L. R. A. 33; Thompson *v.* Toledo, etc., R. Co., 91 Mich. 255, 51 N. W. 995.

Missouri.— Weller *v.* Chicago, etc., R. Co., 164 Mo. 180, 64 S. W. 141, 86 Am. St. Rep. 592.

New Jersey.— Ellis *v.* Erie R. Co., 66 N. J. L. 451, 49 Atl. 437 [*affirmed* in 67 N. J. L. 352, 51 Atl. 1109].

New York.— Feeney *v.* Long Island R. Co., 116 N. Y. 375, 22 N. E. 402, 5 L. R. A. 544 (injury caused by descending gate on dark, rainy night); Blaiser *v.* New York, etc., R. Co., 110 N. Y. 638, 17 N. E. 692; Flanagan *v.* New York Cent., etc., R. Co., 70 N. Y. App. Div. 505, 75 N. Y. Suppl. 225 [*affirmed* in 173 N. Y. 631, 66 N. E. 1108]; Crosby *v.* New York Cent., etc., R. Co., 88 Hun 196, 35 N. Y. Suppl. 714; Wiwirowski *v.* Lake Shore, etc., R. Co., 58 Hun 10, 11 N. Y. Suppl. 361 [*reversed* on the facts in 124 N. Y. 420, 26 N. E. 1023]; Beckwith *v.* New York Cent., etc., R. Co., 54 Hun 446, 70 N. Y. Suppl. 719, 721 [*affirmed* in 125 N. Y. 759, 27 N. E. 408]; Zoliewski *v.* New York Cent., etc., R. Co., 1 Misc. 438, 21 N. Y. Suppl. 916 [*affirmed* in 140 N. Y. 621, 35 N. E. 891] (early hour of morning when it was quite dark).

Pennsylvania.— Doud *v.* Delaware, etc., R. Co., 203 Pa. St. 327, 52 Atl. 249 (wet, foggy, dark night); Bard *v.* Philadelphia, etc., R. Co., 199 Pa. St. 94, 48 Atl. 684; McCusker *v.* Pennsylvania R. Co., 198 Pa. St. 540, 48 Atl. 491. *Compare* Hauser *v.* New Jersey Cent. R. Co., 147 Pa. St. 440, 23 Atl. 766, holding that where plaintiff's own testimony shows that he was able to see another train at a much greater distance than the one which caused the injury, his negligence was such that the court ought to have withdrawn the case from the jury.

Wisconsin.— Roedler *v.* Chicago, etc., R.

foggy,[38] or stormy weather,[39] smoke,[40] escaping steam,[41] dust,[42] standing cars,[43] coverings on his head,[44] or by his ears being muffled.[45]

(E) *Reliance on Precautions of Railroad Company.* Except where the evidence is undisputed, or the inferences to be drawn from the facts proved are free from doubt,[46] it is a question for the jury whether under the circumstances a person injured at a railroad crossing exercised due care in going on the crossing in reliance upon the assumption that the railroad company would exercise proper care and precaution in approaching the crossing with its trains or cars.[47] It is ordinarily a question for the jury whether the person injured exercised proper care and precaution in attempting to cross, where the train which caused the injury approached the crossing without giving the customary or proper signals,[48] dis-

Co., 129 Wis. 270, 109 N. W. 88; Regan *v.* Chicago, etc., R. Co., 85 Wis. 43, 54 N. W. 623.

Canada.— Champaigne *v.* Grand Trunk R. Co., 9 Ont. L. Rep. 589, 5 Ont. Wkly. Rep. 218.

See 41 Cent. Dig. tit. "Railroads," § 1183.

38. Meyer *v.* Chicago, etc., R. Co., 134 Iowa 722, 112 N. W. 194; Thompson *v.* Toledo, etc., R. Co., 91 Mich. 255, 51 N. W. 995; Covell *v.* Wabash R. Co., 82 Mo. App. 180 (dark, foggy, stormy morning); Turell *v.* Erie R. Co., 49 N. Y. App. Div. 94, 63 N. Y. Suppl. 402; Wilcox *v.* New York, etc., R. Co., 88 Hun (N. Y.) 263, 34 N. Y. Suppl. 744.

39. Atchison, etc., R. Co. *v.* Morgan, 43 Kan. 1, 22 Pac. 995 (heavy snow falling); Valin *v.* Milwaukee, etc., R. Co., 82 Wis. 1, 51 N. W. 1084, 33 Am. St. Rep. 17 (snow falling and a strong wind blowing in a direction to carry all sound of the approaching train from the person injured).

40. Randall *v.* Connecticut River R. Co., 132 Mass. 269; McDuffie *v.* Lake Shore, etc., R. Co., 98 Mich. 356, 57 N. W. 248; Sherry *v.* New York Cent., etc., R. Co., 104 N. Y. 652, 10 N. E. 128 (holding that where in consequence of the smoke of the engine and of the curvature of the tracks it would be difficult to know on which track the train was coming and a train came at about the same time from the opposite direction, and other circumstances might have confused the person injured, it was a question for the jury whether he was guilty of contributory negligence); Crosby *v.* New York Cent., etc., R. Co., 88 Hun (N. Y.) 196, 34 N. Y. Suppl. 714; Canfield *v.* New York Cent., R. Co., 19 N. Y. Suppl. 839.

Whether plaintiff should have waited for the smoke to disappear is a question for the jury. Dalton *v.* New York, etc., R. Co., 184 Mass. 344, 68 N. E. 830.

Whether the person injured was able to distinguish the smoke from the mist and overhanging clouds existing at the time is a question for the jury. Lortz *v.* New York Cent., etc., R. Co., 7 N. Y. App. Div. 515, 40 N. Y. Suppl. 253.

41. McDuffie *v.* Lake Shore, etc., R. Co., 98 Mich. 356, 57 N. W. 248; Campbell *v.* New York Cent., etc., R. Co., 3 N. Y. Suppl. 694; Link *v.* Philadelphia, etc., R. Co., 165 Pa. St. 75, 30 Atl. 820, 822; Neiman *v.* Delaware, etc., Canal Co., 149 Pa. St. 92, 24 Atl. 96.

42. See Chicago, etc., R. Co. *v.* Fisher, 49 Kan. 460, 30 Pac. 462.

43. Hopson *v.* Kansas City, etc., R. Co., 87 Miss. 789, 40 So. 872; Chapman *v.* New York Cent., etc., R. Co., 41 N. Y. App. Div. 618, 58 N. Y. Suppl. 728; Petrie *v.* New York Cent., etc., R. Co., 66 Hun (N. Y.) 282, 21 N. Y. Suppl. 159; Perkins *v.* Buffalo, etc., R. Co., 57 Hun (N. Y.) 586, 10 N. Y. Suppl. 356; Schlee *v.* New York Cent., etc., R. Co., 13 Misc. (N. Y.) 649, 34 N. Y. Suppl. 928; Beisegel *v.* New York Cent. R. Co., 14 Abb. Pr. N. S. (N. Y.) 29; Cohen *v.* Philadelphia, etc., R. Co., 211 Pa. St. 227, 60 Atl. 729; Elston *v.* Delaware, etc., R. Co., 196 Pa. St. 595, 46 Atl. 938; Link *v.* Philadelphia, etc., R. Co., 165 Pa. St. 75, 30 Atl. 820, 822; Bare *v.* Pennsylvania R. Co., 135 Pa. St. 95, 19 Atl. 935; Goggin *v.* Pennsylvania R. Co., 26 Pittsb. Leg. J. N. S. (Pa.) 151.

Evidence held insufficient to justify a submission to the jury of the question of contributory negligence in such a case see Krauss *v.* Wallkill Valley R. Co., 69 Hun (N. Y.) 482, 23 N. Y. Suppl. 432.

44. Lammers *v.* Great Northern R. Co., 82 Minn. 120, 84 N. W. 728; Alabama, etc., R. Co. *v.* Summers, 68 Miss. 566, 10 So. 63 (bundle on head); Petrie *v.* Columbia, etc., R. Co., 29 S. C. 303, 7 S. E. 515 (head wrapped in shawl).

45. Baker *v.* Kansas City, etc., R. Co., 122 Mo. 533, 26 S. W. 20; Perkins *v.* Buffalo, 57 Hun (N. Y.) 586, 10 N. Y. Suppl. 356; Siegel *v.* Milwaukee, etc., R. Co., 79 Wis. 404, 48 N. W. 488.

46. See Louisville, etc., R. Co. *v.* Webb, 90 Ala. 195, 8 So. 518, 11 L. R. A. 674.

47. Cleveland, etc., R. Co. *v.* Harrington, 131 Ind. 426, 30 N. E. 37; State *v.* Union R. Co., 70 Md. 69, 18 Atl. 1032; Startz *v.* Pennsylvania, etc., Canal, etc., Co., 16 N. Y. Suppl. 810.

48. *Indiana.*— Wabash R. Co. *v.* Biddle, 27 Ind. App. 161, 59 N. E. 284, 60 N. E. 12.

Iowa.— Hartman *v.* Chicago Great Western R. Co., 132 Iowa 582, 110 N. W. 10.

Kentucky.— Louisville, etc., R. Co. *v.* Taylor, 104 S. W. 776, 31 Ky. L. Rep. 1142.

Maryland.— State *v.* Union R. Co., 70 Md. 69, 18 Atl. 1032.

Minnesota.— Hendrickson *v.* Great Northern R. Co., 49 Minn. 245, 51 N. W. 1044, 32 Am. St. Rep. 540, 16 L. R. A. 261.

Missouri.— Profit *v.* Chicago Great Western R. Co., 91 Mo. App. 369.

playing the proper lights,[49] or while running at an unlawful rate of speed;[50] or whether he exercised proper care in attempting to cross in reliance upon the fact that the automatic bells were not ringing,[51] or that the watchman or gateman at the crossing was not giving any warning,[52] or was not present on the crossing;[53] or that the gates were open,[54] and the warnings usually given when the gates were open were not displayed.[55] Where to the knowledge of the person injured the gates at the particular crossing were operated irregularly, it being the custom to frequently leave the gates down for long periods when no train was passing

Nebraska.— Riley *v.* Missouri Pac. R. Co., 69 Nebr. 82, 95 N. W. 20.

New Jersey.—Delaware, etc., R. Co. *v.* Shelton, 55 N. J. L. 342, 26 Atl. 937.

New York.— Palmer *v.* New York Cent., etc., R. Co., 112 N. Y. 234, 19 N. E. 678; House *v.* Erie R. Co., 26 N. Y. App. Div. 559, 50 N. Y. Suppl. 434; Wilber *v.* New York Cent., etc., R. Co., 8 N. Y. App. Div. 138, 40 N. Y. Suppl. 471; Lindeman *v.* New York Cent., etc., R. Co., 42 Hun 306; Startz *v.* Pennsylvania, etc., Canal Co., 16 N. Y. Suppl. 812.

Pennsylvania.— Lake Shore, etc., R. Co. *v.* Frantz, 127 Pa. St. 297, 18 Atl. 22, 4 L. R. A. 389.

Texas.— International, etc., R. Co. *v.* Edwards, (Civ. App.) 91 S. W. 640 [*reversed* on other grounds in 100 Tex. 22, 93 S. W. 106] (failure to look or listen); Gulf, etc., R. Co. *v.* Melville, (Civ. App. 1905) 87 S. W. 863.

Washington.— Ladouceur *v.* Northern Pac. R. Co., 4 Wash. 38, 29 Pac. 942, 6 Wash. 280, 33 Pac. 556, 1080.

Canada.— Vallee *v.* Grand Trunk R. Co., 1 Ont. L. Rep. 224; Morrow *v.* Canadian Pac. R. Co., 21 Ont. App. 149.

See 41 Cent. Dig. tit. "Railroads," § 1187.

49. State *v.* Union R. Co., 70 Md. 69, 18 Atl. 1032; Lindeman *v.* New York Cent., etc., R. Co., 42 Hun (N. Y.) 306.

50. *Indiana.*— Cleveland, etc., R. Co. *v.* Harrington, 131 Ind. 426, 30 N. E. 37.

Michigan.— Detroit, etc., R. Co. *v.* Van Steinburg, 17 Mich. 99.

Missouri.— Hutchinson *v.* Missouri Pac. R. Co., 161 Mo. 246, 61 S. W. 635, 852, 84 Am. St. Rep. 710; Gratiot *v.* Missouri Pac. R. Co., 116 Mo. 450, 21 S. W. 1094, 16 L. R. A. 189, (1891) 16 S. W. 384, 19 S. W. 31.

New York.— Startz *v.* Pennsylvania, etc., Canal, etc., Co., 16 N. Y. Suppl. 810.

North Carolina.— Norton *v.* North Carolina R. Co., 122 N. C. 910, 29 S. E. 886.

Wisconsin.— Piper *v.* Chicago, etc., R. Co., 77 Wis. 247, 46 N. W. 165.

See 41 Cent. Dig. tit. "Railroads," § 1187.

51. Southern Indiana R. Co. *v.* Corps, 37 Ind. App. 586, 76 N. E. 902; Hicks *v.* New York, etc., R. Co., 164 Mass. 424, 41 N. E. 721, 49 Am. St. Rep. 471.

52. State *v.* Union R. Co., 70 Md. 69, 18 Atl. 1032; Wilber *v.* New York Cent., etc., R. Co., 8 N. Y. App. Div. 138, 40 N. Y. Suppl. 471.

53. Delaware, etc., R. Co. *v.* Shelton, 55 N. J. L. 542, 26 Atl. 937.

54. *Illinois.*— Chicago, etc., R. Co. *v.* Schmitz, 211 Ill. 446, 71 N. E. 1050 [*affirming* 113 Ill. App. 295] (without looking and listening); Chicago, etc., R. Co. *v.* Zapp, 209 Ill. 339, 70 N. E. 623 [*affirming* 110 Ill. App. 553]; Chicago, etc., R. Co. *v.* Olson, 113 Ill. App. 320; Pittsburg, etc., R. Co. *v.* Smith, 110 Ill. App. 154.

Kentucky.— Louisville, etc., R. Co. *v.* Wilson, 100 S. W. 302, 30 Ky. L. Rep. 1048.

Maryland.— Jenkins *v.* Baltimore, etc., R. Co., 98 Md. 402, 56 Atl. 966.

New Jersey.— Smith *v.* Atlantic City R. Co., 66 N. J. L. 307, 49 Atl. 547; Delaware, etc., R. Co. *v.* Shelton, 55 N. J. L. 342, 26 Atl. 937.

New York.— Oldenburg *v.* New York Cent., etc., R. Co., 124 N. Y. 414, 26 N. E. 1021 [*affirming* 9 N. Y. Suppl. 419, 11 N. Y. Suppl. 689]; Palmer *v.* New York Cent., etc., R. Co., 112 N. Y. 234, 19 N. E. 678; House *v.* Erie R. Co., 26 N. Y. App. Div. 559, 50 N. Y. Suppl. 434; Shultz *v.* New York Cent., etc., R. Co., 69 Hun 515, 23 N. Y. Suppl. 509 [*affirmed* in 143 N. Y. 670, 39 N. E. 21]; Lindeman *v.* New York Cent., etc., R. Co., 42 Hun 306.

Pennsylvania.— Messinger *v.* Pennsylvania R. Co., 215 Pa. St. 497, 64 Atl. 682, 114 Am. St. Rep. 970; Lake Shore, etc., R. Co. *v.* Frantz, 127 Pa. St. 297, 18 Atl. 22, 4 L. R. A. 389.

See 41 Cent. Dig. tit. "Railroads," § 1187.

Where upon seeing the gates go up one attempts to cross but is shut in on the track by the opposite gate being lowered his contributory negligence is a question for the jury. Warren *v.* Boston, etc., R. Co., 163 Mass. 484, 40 N. E. 895; Kane *v.* New York, etc., R. Co., 132 N. Y. 160, 30 N. E. 256 [*affirming* 9 N. Y. Suppl. 879].

Whether an attempt to cross while the nearer gates are open, although the opposite gates are closed, is negligence is a question for the jury. Haywood *v.* New York Cent., etc., R. Co., 13 N. Y. Suppl. 177 (holding that it is for the jury to determine whether the person injured might not prudently have regarded the fact that the gate was open as an assurance that while it was in that position no train would pass; and whether he had reasonable grounds for supposing that the opposite gate would be open when reached by him); Startz *v.* Pennsylvania, etc., Canal, etc., Co., 16 N. Y. Suppl. 810.

55. Craig *v.* New York, etc., R. Co., 118 Mass. 431, where there was no flag or lantern at the crossing as was usual when a train or engine was about to pass while the gates were open.

or about to pass, his contributory negligence in attempting to cross while the gates are closed is a question for the jury.[56]

(F) *Effect of Directions of Railroad Employees.* Where the evidence is conflicting or the inferences to be drawn therefrom are in doubt, it is a question for the jury whether the person injured exercised proper care in attempting to cross upon the signal, invitation, or direction of a railroad employee,[57] as upon a signal of safety by the watchman or gateman;[58] or whether he exercised proper care in attempting to cross in spite of a warning of danger, but which he misunderstood.[59]

(G) *Crossing Near Standing or Approaching Trains or Cars.* Except where the evidence is undisputed, or the only inference that can be drawn therefrom is that the person injured did not exercise ordinary care,[60] it is a question for the jury whether under the circumstances, such person exercised due care in attempting to cross near standing cars which were suddenly moved,[61] or in front of approaching trains or cars.[62]

56. Baltimore, etc., R. Co. *v.* Landrigan, 20 App. Cas. (D. C.) 135; Chicago, etc., R. Co. *v.* Keegan, 112 Ill. App. 338; Chicago, etc., R. Co. *v.* Urbaniac, 106 Ill. App. 325.

57. Chicago, etc., R. Co. *v.* Sykes, 96 Ill. 162; Scott *v.* St. Louis, etc., R. Co., 112 Iowa 54, 83 N. W. 818 (passing through standing train upon direction of brakeman); Sheridan *v.* Baltimore, etc., R. Co., 101 Md. 50, 60 Atl. 280 (attempting to cross by going upon the bumpers between cars, on a statement by a brakeman that there was plenty of time); Wall *v.* New York Cent., etc., R. Co., 56 N. Y. App. Div. 599, 67 N. Y. Suppl. 519; Phillips *v.* New York, etc., R. Co., 80 Hun (N. Y.) 404, 30 N. Y. Suppl. 333 (climbing over cars).

Where an engineer notified a traveler that he would hold the engine until such traveler had crossed, it is a question of fact for the jury whether an unexpected movement of the engine justified the traveler in going forward instead of turning back. Plannt *v.* Railway Transfer Co., 86 Minn. 506, 91 N. W. 19.

58. Fusili *v.* Missouri Pac. R. Co., 45 Mo. App. 535; Waldele *v.* New York Cent., etc., R. Co., 4 N. Y. App. Div. 549, 38 N. Y. Suppl. 1009; Hurley *v.* New York Cent., etc., R. Co., 90 Hun (N. Y.) 1, 35 N. Y. Suppl. 351; Richardson *v.* New York Cent., etc., R. Co., 15 N. Y. Suppl. 868 [*affirmed* in 133 N. Y. 563, 30 N. E. 1148]; Coleman *v.* Pennsylvania R. Co., 195 Pa. St. 485, 46 Atl. 66 (holding that evidence that plaintiff's attempt to drive across the track was induced by a signal of the flagman who on discovering his error gave the proper signal when too late to avoid the collision; that no signal was given by bell or whistle; and that the train was going unusually fast is sufficient to carry the question of contributory negligence to the jury); Union Pac. R. Co. *v.* Rosewater, 157 Fed. 168, 84 C. C. A. 616; Chicago, etc., R. Co. *v.* Prescott, 59 Fed. 237, 8 C. C. A. 109, 23 L. R. A. 654.

Whether one was negligent in attempting to cross without looking or listening upon the signal or invitation of the flagman or gateman is a question for the jury. Gray *v.* New York Cent., etc., R. Co., 77 N. Y. App. Div. 1, 78 N. Y. Suppl. 653.

59. Baltimore, etc., R. Co. *v.* Walborn, 127 Ind. 142, 26 N. E. 207; New York, etc., R. Co. *v.* Randel, 47 N. J. L. 144. See also Southern R. Co. *v.* Stockdon, 106 Va. 693, 56 S. E. 713.

60. Patterson *v.* Chicago, etc., R. Co., 111 Ill. App. 441 (holding that where a person undertakes to cross railroad tracks while a train is rapidly approaching and the view of such person is not obstructed and no extenuating circumstances appear a verdict for defendant should be directed); Boyle *v.* Illinois Cent. R. Co., 88 Ill. App. 255; Underhill *v.* Chicago, etc., R. Co., 81 Mich. 43, 45 N. W. 508; Neier *v.* Missouri Pac. R. Co., (Mo. 1886) 1 S. W. 387.

61. Atchison, etc., R. Co. *v.* Wilkie, 77 Kan. 791, 90 Pac. 775, 11 L. R. A. N. S. 963; Davis *v.* Michigan Cent. R. Co., 142 Mich. 382, 105 N. W. 877; Harrington *v.* Erie R. Co., 79 N. Y. App. Div. 26, 79 N. Y. Suppl. 930; Chadbourne *v.* Delaware, etc., R. Co., 6 Daly (N. Y.) 215 (passing a standing car which was suddenly started without notice or warning); St. Louis Southwestern R. Co. *v.* Bowles, 32 Tex. Civ. App. 118, 72 S. W. 451.

An attempt to cross in front of an engine standing near a crossing is not so inherently dangerous as to prevent a recovery for damages if the engine is unexpectedly started forward, but the question whether the person injured was guilty of negligence where such an engine is moved without giving any signal is for the jury. St. Louis, etc., R. Co. *v.* Dawson, 64 Kan. 99, 67 Pac. 521.

An attempt to cross between cars which were moving but which fact plaintiff did not discover, although he looked before he attempted to cross, does not sufficiently show contributory negligence to warrant withdrawing the case from the jury. Dahlstrom *v.* St. Louis, etc., R. Co., 108 Mo. 525, 18 S. W. 919.

62. Contributory negligence in crossing in front of approaching trains or cars held a question for the jury see the following cases:

Arkansas.— St. Louis, etc., R. Co. *v.* Hitt, 76 Ark. 227, 88 S. W. 908, 990.

California.—Warren *v.* Southern California R. Co., (1901) 67 Pac. 1.

Illinois.— Chicago, etc., R. Co. *v.* Wilson, 133 Ill. 55, 24 N. E. 555 [*affirming* 35 Ill. App. 346].

(XII) *PROXIMATE CAUSE OF INJURY.* Where the evidence is conflicting or the state of facts is such that different minds might reasonably draw different inferences, the proximate cause of the injury, whether the railroad company's negligence,[63] or the injured person's contributory negligence,[64] is a question for the jury. But where the evidence is legally insufficient, as where it merely shows

Iowa.— Cummings *v.* Chicago, etc., R. Co., 114 Iowa 85, 86 N. W. 40.

Kansas.— Chicago, etc., R. Co. *v.* Prouty, 55 Kan. 503, 40 Pac. 909.

Kentucky.— Louisville, etc., R. Co. *v.* Taylor, 104 S. W. 776, 31 Ky. L. Rep. 1142.

Massachusetts.— Robbins *v.* Fitchburg R. Co., 161 Mass. 145, 36 N. E. 752; Tyler *v.* New York, etc., R. Co., 137 Mass. 238.

Michigan.— Welch *v.* Michigan Cent. R. Co., 147 Mich. 207, 110 N. W. 1069; Retan *v.* Lake Shore, etc., R. Co., 94 Mich. 146, 53 N. W. 1094.

Minnesota.— Loucks *v.* Chicago, etc., R. Co., 31 Minn. 526, 18 N. W. 651.

Missouri.— Hutchinson *v.* Missouri Pac. R. Co., 161 Mo. 246, 61 S. W. 635, 852, 84 Am. St. Rep. 710; Dunham *v.* Wabash R. Co., 126 Mo. App. 643, 105 S. W. 21; Lang *v.* Missouri Pac. R. Co., 115 Mo. App. 489, 91 S. W. 1012.

Nebraska.— Omaha, etc., R. Co. *v.* O'Donnell, 22 Nebr. 475, 35 N. W. 235.

New Hampshire.— Huntress *v.* Boston, etc., R. Co., 66 N. H. 185, 34 Atl. 154, 49 Am. St. Rep. 600.

New Jersey.— Wolcott *v.* New York, etc., R. Co., 68 N. J. L. 421, 53 Atl. 297.

New York.— Henavie *v.* New York Cent., etc., R. Co., 166 N. Y. 280, 59 N. E. 901 [*reversing* 44 N. Y. App. Div. 641, 60 N. Y. Suppl. 752].

Pennsylvania.— Philpott *v.* Pennsylvania R. Co., 175 Pa. St. 570, 34 Atl. 856; Smith *v.* Baltimore, etc., R. Co., 158 Pa. St. 82, 27 Atl. 847.

Texas.— International, etc., R. Co. *v.* Starling, 16 Tex. Civ. App. 365, 41 S. W. 181.

Wisconsin.— Bower *v.* Chicago, etc., R. Co., 61 Wis. 457, 21 N. W. 536; Bohan *v.* Milwaukee, etc., R. Co., 58 Wis. 30, 15 N. W. 801.

See 41 Cent. Dig. tit. "Railroads," § 1189.

It is not necessarily gross negligence as a matter of law for a person to attempt to drive over a crossing in front of a train which he sees approaching. Manley *v.* Boston, etc., R. Co., 159 Mass. 493, 34 N. E. 951.

63. Allen *v.* Boston, etc., R. Co., 94 Me. 402, 47 Atl. 917; Johnston *v.* New York, etc., R. Co., 65 N. J. L. 421, 47 Atl. 586; Prue *v.* New York, etc., R. Co., 18 R. I. 360, 27 Atl. 450; Christensen *v.* Oregon Short Line R. Co., 29 Utah 192, 80 Pac. 746.

Applications.— This rule has been applied in case of a defective crossing (San Antonio, etc., R. Co. *v.* Belt, 24 Tex. Civ. App. 281, 59 S. W. 607), or bridge (Georgia R., etc., Co. *v.* Mayo, 92 Ga. 223, 17 S. E. 1000); failure to give the customary or statutory signals (Illinois Southern R. Co. *v.* Hamill, 226 Ill. 88, 80 N. E. 745 [*affirming* 128 Ill. App. 152]; Illinois Cent. R. Co. *v.* Benton, 69 Ill. 174; Chicago, etc., R. Co. *v.* Notzki, 66 Ill. 455; Indianapolis, etc., R. Co. *v.* Holloway, 63 Ill. 121; Indianapolis, etc., R. Co. *v.* Blackman, 63 Ill. 117; Defrieze *v.* Illinois Cent. R. Co., (Iowa 1903) 94 N. W. 505; Ward *v.* Chicago, etc., R. Co., 97 Iowa 50, 65 N. W. 999; Doyle *v.* Boston, etc., R. Co., 145 Mass. 386, 14 N. E. 461; Gass *v.* Missouri Pac. R. Co., 57 Mo. App. 574; Hutto *v.* South Bound R. Co., 61 S. C. 495, 39 S. E. 710; St. Louis, etc., R. Co. *v.* Mitchell, 25 Tex. Civ. App. 197, 60 S. W. 891; Galveston, etc., R. Co. *v.* Harris, 22 Tex. Civ. App. 16, 53 S. W. 599); unnecessary and extraordinary blowing of whistle (Philadelphia, etc., R. Co. *v.* Killips, 88 Pa. St. 405); excessive or unlawful speed (Bygum *v.* Southern Pac. Co., (Cal. 1894) 36 Pac. 415; Chicago, etc., R. Co. *v.* Mochell, 96 Ill. App. 178 [*affirmed* in 193 Ill. 208, 61 N. E. 1028, 86 Am. St. Rep. 318]; failure to keep man on front end of backing train (Gass *v.* Missouri Pac. R. Co., 57 Mo. App. 574); failure to erect a sign-board at the crossing (Texas, etc., R. Co. *v.* Tucker, (Tex. Civ. App. 1907) 106 S. W. 764); obstruction of crossing by train or engine (Selleck *v.* Lake Shore, etc., R. Co., 93 Mich. 375, 53 N. W. 556, 18 L. R. A. 154 [*distinguishing* Selleck *v.* Lake Shore, etc., R. Co., 58 Mich. 195, 24 N. W. 774]; Burns *v.* Delaware, etc., Co., 110 N. Y. App. Div. 592, 96 N. Y. Suppl. 509; Laible *v.* New York Cent., etc., R. Co., 13 N. Y. App. Div. 574, 43 N. Y. Suppl. 1003 [*affirmed* in 162 N. Y. 621, 57 N. E. 1114]; Welborne *v.* Gulf, etc., R. Co., 35 Tex. Civ. App. 401, 80 S. W. 653); or starting of an engine after notice that it would not be started until plaintiff had crossed (Plaunt *v.* Railway Transfer Co., 86 Minn. 506, 91 N. W. 19).

64. *Alabama.*— Georgia Cent. R. Co. *v.* Hyatt, 151 Ala. 355, 43 So. 867, failure to stop, look, and listen.

California.— Whalen *v.* Arcata, etc., R. Co., 92 Cal. 669, 28 Pac. 833.

Nebraska.— Chicago, etc., R. Co. *v.* Harley, 74 Nebr. 462, 104 N. W. 862.

Texas.— Gulf, etc., R. Co. *v.* Melville, (Civ. App. 1905) 87 S. W. 863; Galveston, etc., R. Co. *v.* Harris, 22 Tex. Civ. App. 16, 53 S. W. 599. See Gulf, etc., R. Co. *v.* Moore, 69 Tex. 157, 6 S. W. 631.

England.— Reg. *v.* Strange, 16 Cox C. C. 552.

See 41 Cent. Dig. tit. "Railroads," § 1190.

Where the testimony indicates that plaintiff might have been negligent in several ways in going on the crossing, and yet that such negligence was not the proximate cause of the injury, and the question as to what was the proximate cause is directly at issue, it is properly submitted to the jury. San Antonio, etc., R. Co. *v.* Votaw, (Tex. Civ. App. 1904) 81 S. W. 130.

that it was possible that defendant's negligence caused the injury,[65] or merely raises a conjecture that it was so,[66] or where no inference can be drawn from the evidence that defendant's negligence contributed to the injury,[67] it should not be submitted to the jury.

(XIII) *INJURY AVOIDABLE NOTWITHSTANDING CONTRIBUTORY NEGLIGENCE.* Whether, notwithstanding negligence or imprudence on the part of the person injured, the railroad company could have avoided the injury by the exercise of reasonable care and diligence is ordinarily a question for the jury.[68]

(XIV) *WILFUL, WANTON, OR GROSS NEGLIGENCE.* It is also a question for the jury whether negligence on the part of the railroad company's employees is such as to make it guilty of wanton, wilful,[69] or gross [70] negligence, unless the evidence in respect thereto is undisputed.[71]

h. Instructions [72] — (I) *FORM AND SUFFICIENCY IN GENERAL.* Instructions in an action for injuries at a railroad crossing are governed by the rules applying in civil cases generally.[73] In accordance with such rules the instructions must be in conformity with the evidence,[74] and with the pleadings and

65. Kearns *v.* Southern R. Co., 139 N. C. 470, 52 S. E. 131.

66. Kearns *v.* Southern R. Co., 139 N. C. 470, 52 S. E. 131.

67. Daniels *v.* Staten Island Rapid Transit Co., 125 N. Y. 407, 26 N. E. 466 [*reversing* 7 N. Y. Suppl. 725].

68. *Georgia.*— Macon, etc., R. Co. *v.* Davis, 18 Ga. 679.

Kentucky.— Cahill *v.* Cincinnati, etc., R. Co., 92 Ky. 345, 18 S. W. 2, 13 Ky. L. Rep. 714, whether those in charge of the train could by reasonable diligence have discovered the danger of a collision in time to prevent it by checking the train or sounding the whistle.

Maryland.— Western Maryland R. Co. *v.* Kehoe, 86 Md. 43, 37 Atl. 799; State *v.* Baltimore, etc., R. Co., 69 Md. 339, 14 Atl. 685, 688.

Mississippi.— Cottrell *v.* Southern R. Co., 80 Miss. 610, 32 So. 1.

Missouri.— Duncan *v.* Missouri Pac. R. Co., 46 Mo. App. 198.

Montana.— Riley *v.* Northern Pac. R. Co., 36 Mont. 545, 93 Pac. 948.

Wisconsin.— Johnson *v.* Chicago, etc., R. Co., 49 Wis. 529, 5 N. W. 886.

See 41 Cent. Dig. tit. "Railroads," § 1191.

69. Birmingham Southern R. Co. *v.* Powell, 136 Ala. 232, 33 So. 875 (running unattended cars over crossing in violation of ordinance); Memphis, etc., R. Co. *v.* Martin, 131 Ala. 269, 30 So. 827 (excessive speed at much used crossing); Louisville, etc., R. Co. *v.* Webb, 97 Ala. 308, 12 So. 374 (unlawful speed at frequently used street crossing in a populous city); Kelsall *v.* New York, etc., R. Co., 196 Mass. 554, 82 N. E. 674 (under Rev. Laws, c. 111, § 188); Burns *v.* Delaware, etc., Co., 110 N. Y. App. Div. 592, 96 N. Y. Suppl. 509 (whether the company wilfully obstructed the street); Lacey *v.* Louisville, etc., R. Co., 152 Fed. 134, 81 C. C. A. 352 [*affirmed* in 156 Fed. 1022] (kicking unattended cars over crossing).

70. Chicago, etc., R. Co. *v.* Sykes, 96 Ill. 162.

Whether the failure of an engineer to obey a warning placed on a sign-board by the company directing him not to exceed a certain rate of speed at such point constitutes gross negligence is for the jury. International, etc., R. Co. *v.* Kuehn, 11 Tex. Civ. App. 21, 31 S. W. 322.

71. Baltimore, etc., R. Co. *v.* Reynolds, 33 Ind. App. 219, 71 N. E. 250, holding that where there is no conflict in the evidence relative to the question of wilfulness, its decision is for the court.

72. Harmless error see *infra*, X, F, 14, j, text and note 63.

73. See, generally, TRIAL.

Estoppel.— Where a party asks and the court gives an irrelevant instruction, he is estopped from objecting to an amendment by the court of another instruction tendered by him, which amendment does nothing more than to add to the objectionable charge asked in the first instance. Baltimore, etc., R. Co. *v.* Conoyer, 149 Ind. 524, 48 N. E. 352, 49 N. E. 452.

74. See Southern R. Co. *v.* Douglass, 144 Ala. 351, 39 So. 268 (as to place of accident); Savannah, etc., R. Co. *v.* Slater, 92 Ga. 391, 17 S. E. 350; Chicago, etc., R. Co. *v.* Filler, 195 Ill. 9, 62 N. E. 919 (holding that where there is evidence as to whether the accident was caused by the negligence of defendant's brakeman alone or together with that of the engineer, an instruction limiting plaintiff's right to recover for the negligence of the engineer alone is properly refused); Atchison, etc., R. Co. *v.* Hague, 54 Kan. 284, 38 Pac. 257, 45 Am. St. Rep. 278 (holding that it is error to instruct that plaintiff can recover in case of recklessness on the part of those in charge of the train, although he was himself negligent, where there is no evidence of such recklessness); Gass *v.* Missouri Pac. R. Co., 57 Mo. App. 574; Missouri Pac. R. Co. *v.* Peay, (Tex. 1892) 20 S. W. 57; Richmond, etc., R. Co. *v.* Yeamans, 86 Va. 860, 12 S. E. 946.

Where the proximate cause of the injury is shown to be the frightening of a team, it is error to instruct that defendant is liable if the accident was caused either by the engineer negligently blowing off steam or by defendant's negligence in not keeping the

issues,[75] and must not invade the province of the jury,[76] or be misleading,[77] too general,[78] argumentative,[79] ambiguous,[80] or contradictory,[81] or ignore any material element of the case.[82] The instructions must be read together and considered with reference to each other, and if when taken as a whole they correctly state the law applicable to the case, they are sufficient, although separate instructions may be defective.[83] A requested instruction may be refused where the theory upon which it is based is substantially embodied in other instructions given by the court,[84] or where it is incorrect in part;[85] but it is error to refuse a proper requested instruction upon a matter in issue not already covered.[86] Where the

crossing in repair. St. Louis, etc., R. Co. *v.* Roberts, 56 Ark. 387, 19 S. W. 1055.

Where the evidence shows that the negligence may be attributed to either of two causes, or may have happened at either of two places, the instructions should be framed so as to meet the case in either of its aspects. Lake Erie, etc., R. Co. *v.* Zoffinger, 10 Ill. App. 252.

75. See *infra*, X, F, 14, h, (III).

76. See *infra*, X, F, 14, h, (II).

77. *Alabama.*— Kansas City, etc., R. Co. *v.* Lackey, 114 Ala. 152, 21 So. 444.

California.—Johnson *v.* Center, 4 Cal. App. 616, 88 Pac. 727.

Illinois.— Chicago, etc., R. Co. *v.* Coggins, 212 Ill. 369, 72 N. E. 376; Illinois Cent. R. Co. *v.* Slater, 139 Ill. 190, 28 N. E. 830; Chicago, etc., R. Co. *v.* Keely, 87 Ill. App. 346.

Ohio.— Cincinnati, etc., R. Co. *v.* Taylor, 27 Ohio Cir. Ct. 757.

Texas.— Gulf, etc., R. Co. *v.* Garrett, (Civ. App. 1906) 99 S. W. 162; Texas, etc., R. Co. *v.* Scrivener, (Civ. App. 1899) 49 S. W. 649.

An instruction which singles out and gives undue prominence to particular facts, which might be varied by other facts proved, is misleading. Chicago, etc., R. Co. *v.* Coggins, 212 Ill. 369, 72 N. E. 376; Lingreen *v.* Illinois Cent. R. Co., 61 Ill. App. 174; Sherwin *v.* Rutland R. Co., 74 Vt. 1, 51 Atl. 1089; Rio Grande Western R. Co. *v.* Leak, 163 U. S. 280, 16 S. Ct. 1020, 41 L. ed. 160.

In an action by an administratrix of a minor child an instruction that no duty existed on the part of defendant to "plaintiff" either as to speed or as to efforts to stop the train, is misleading in the use of the word "plaintiff," as the administratrix was not present at the time of the accident and had no connection with it. Louisville, etc., R. Co. *v.* Robinson, 141 Ala. 325, 37 So. 431.

Time of injury.— The phrase "at the time of his death" used in an instruction notwithstanding the fact that the date of the death was five days after the accident is not misleading but clearly refers to the time of the injury. Cleveland, etc., R. Co. *v.* Alfred, 113 Ill. App. 236.

78. See Montgomery *v.* Missouri Pac. R. Co., 181 Mo. 477, 79 S. W. 930.

79. Toledo, etc., R. Co. *v.* Cline, 135 Ill. 41, 25 N. E. 846.

80. St. Louis, etc., R. Co. *v.* Spearman, 64 Ark. 332, 42 S. W. 406; Heckle *v.* Southern Pac. Co., 123 Cal. 441, 56 Pac. 56; Texas, etc., R. Co. *v.* Scrivener, (Tex. Civ. App. 1899) 49 S. W. 649.

81. St. Louis, etc., R. Co. *v.* Spearman, 64 Ark. 332, 42 S. W. 406; Edwards *v.* Carolina, etc., R. Co., 140 N. C. 49, 52 S. E. 234 (as to the degree of care required of defendant); Southern R. Co. *v.* Hansbrough, 107 Va. 733, 60 S. E. 58.

82. Chicago, etc., R. Co. *v.* Appell, 103 Ill. App. 185; Lingreen *v.* Illinois Cent. R. Co., 61 Ill. App. 174; Atchison, etc., R. Co. *v.* Combs, 25 Kan. 729; Cleveland, etc., R. Co. *v.* Morton, 120 Fed. 936, 57 C. C. A. 226.

83. *Arkansas.*— St. Louis, etc., R. Co. *v.* Evans, 80 Ark. 19, 96 S. W. 616.

California.—Johnson *v.* Center, 4 Cal. App. 616, 88 Pac. 727.

Illinois.— St. Louis, etc., R. Co. *v.* Odum, 156 Ill. 78, 40 N. E. 559 [*affirming* 52 Ill. App. 519].

Indiana.— Chicago, etc., R. Co. *v.* Spilker, 134 Ind. 380, 33 N. E. 280, 34 N. E. 218.

Missouri.—Montgomery *v.* Missouri Pac. R. Co., 181 Mo. 508, 79 S. W. 938; Esler *v.* Wabash R. Co., 109 Mo. App. 580, 83 S. W. 73.

New York.— Lewis *v.* New York, etc., R. Co., 1 Silv. Sup. 393, 5 N. Y. Suppl. 313 [*affirmed* in 123 N. Y. 496, 26 N. E. 357].

South Carolina.— Harbert *v.* Atlanta, etc., Air Line R. Co., 78 S. C. 537, 59 S. E. 644, as to burden of proof.

84. *Illinois.*— Baltimore, etc., R. Co. *v.* Stanley, 158 Ill. 396, 41 N. E. 1012 [*affirming* 54 Ill. App. 215], holding that where the declaration alleges that the accident occurred at a certain public crossing and the court of its own motion instructs the jury that plaintiff cannot recover unless it did occur at that place, it is proper to refuse as unnecessary instructions as to the law governing accidents at places other than crossings.

Indiana.— Baltimore, etc., R. Co. *v.* Young, 153 Ind. 163, 54 N. E. 791; Cleveland, etc., R. Co. *v.* Wynant, 134 Ind. 681, 34 N. E. 569.

Kentucky.— Louisville, etc., R. Co. *v.* Krey, 29 S. W. 869, 16 Ky. L. Rep. 797.

North Carolina.— Mayes *v.* Southern R. Co., 119 N. C. 758, 26 S. E. 148.

Utah.— Olsen *v.* Oregon Short Line, etc., R. Co., 9 Utah 129, 33 Pac. 623.

United States.— Whilton *v.* Richmond, etc., R. Co., 57 Fed. 551.

See 41 Cent. Dig. tit. "Railroads," § 1193.

85. See Cleveland, etc., R. Co. *v.* Wynant, 134 Ind. 681, 34 N. E. 569.

86. Baker *v.* Norfolk, etc., R. Co., 144 N. C. 36, 56 S. E. 553; Nashville, etc., R. Co. *v.* Eggerton, 98 Tenn. 541, 41 S. W. 1035.

When requested by correct instructions a party is entitled to have the facts establish-

defect in an instruction is one of form it can be reached only by specific objection,[87] or by a requested instruction correcting the defect.[88]

(II) *Province of Court and Jury.* It is the province of the court, in an action for injuries received at a railroad crossing, to accurately charge the law governing the facts in the case,[89] as by charging as to the care and precaution that should be taken at a railroad crossing by defendant,[90] or by the person injured;[91] but in the absence of statute or other provision to the contrary it is ordinarily erroneous for the court to invade the province of the jury by charging on the weight of the evidence,[92] as by assuming a given state of facts to exist, or not to exist, and charging that they do or do not constitute negligence on the part of defendant,[93] or do or do not constitute contributory negligence on the part of the

ing his cause of action or ground of defense, with the law applicable to them, affirmatively stated by the court to the jury. St. Louis Southwestern R. Co. *v.* Hall, 98 Tex. 480, 85 S. W. 786.

Requested special instructions should be given where they are based upon a theory not covered by the general charge. Gulf, etc., R. Co. *v.* Johnson, 98 Tex. 76, 81 S. W. 4 [*reversing* (Civ. App. 1903) 77 S. W. 648].

87. St. Louis, etc., R. Co. *v.* Pritchett, 66 Ark. 46, 48 S. W. 809.

88. St. Louis, etc., R. Co. *v.* Pritchett, 66 Ark. 46, 48 S. W. 809.

89. Pennsylvania Co. *v.* Frana, 112 Ill. 398 (holding that it is proper to give an instruction merely informing the jury that it is a question of fact for their determination from the evidence what a person approaching a railroad crossing should do in order to constitute care for his safety and what the train operators should do to constitute ordinary care for the safety of others); Chicago, etc., R. Co. *v.* Elmore, 67 Ill. 176. Thus an instruction that the law makes a railroad company liable *per se* where that is the inevitable result is not an erroneous charge, although the statute does not use those words. Smith *v.* Southern R. Co., 53 S. C. 121, 30 S. E. 697.

An instruction which restricts the inquiry to the instant when the accident occurred is erroneous. Illinois Cent. R. Co. *v.* Kief, 111 Ill. App. 354.

All the essential elements of the negligence charged upon should be stated in the instructions. Peoria, etc., R. Co. *v.* Clayberg, 107 Ill. 644; Landon *v.* Chicago, etc., R. Co., 92 Ill. App. 216. An instruction which omits no fundamental principle or indispensable condition to a recovery, or which omits matters merely suppletory in their character, which might properly be presented in a separate instruction, is not erroneous. Peoria, etc., R. Co. *v.* Clayberg, *supra*. An instruction which merely gives the rule as to the measure of damages is not erroneous because it omits the necessary elements of plaintiff's case, since the instruction does not purport to state hypothetically the elements necessary to constitute a cause of action. Chicago, etc., R. Co. *v.* O'Sullivan, 143 Ill. 48, 32 N. E. 398.

90. See Chicago, etc., R. Co. *v.* Dillon, 123 Ill. 570, 15 N. E. 181, 5 Am. St. Rep. 559 [*affirming* 24 Ill. App. 203]; Loucks *v.* Chicago, etc., R. Co., 31 Minn. 526, 18 N. W. 651.

Instructions held sufficient as not imposing a greater degree of care on the railroad company than on travelers on the highway see Delaware, etc., R. Co. *v.* Devore, 122 Fed. 791, 58 C. C. A. 543.

Instructions held erroneous: As imposing too great a degree of care on defendant. Carraher *v.* San Francisco Bridge Co., 81 Cal. 98, 22 Pac. 480; Toledo, etc., R. Co. *v.* Cline, 135 Ill. 41, 25 N. E. 846 [*reversing* 31 Ill. App. 563]. As authorizing a verdict for plaintiff if defendant's servants "failed to do any duty they were required to do," without specifying the duty required. Louisville, etc., R. Co. *v.* Clark, 49 S. W. 323, 20 Ky. L. Rep. 1375. As charging that "greater care" is required in approaching a dangerous public crossing, without defining those words. Louisville, etc., R. Co. *v.* Clark, *supra*. An instruction requiring "ordinary" care of a traveler and "a high degree of care" of the company is erroneous. Atchison, etc., R. Co. *v.* McClurg, 59 Fed. 860, 8 C. C. A. 322.

91. See *infra*, X, F, 14, h, (IV), (E).

92. Carraher *v.* San Francisco Bridge Co., 81 Cal. 98, 22 Pac. 480; Riley *v.* Northern Pac. R. Co., 36 Mont. 545, 93 Pac. 948; Burns *v.* Southern R. Co., 65 S. C. 229, 43 S. E. 679.

93. *Alabama.*— Georgia Cent. R. Co. *v.* Hyatt, 151 Ala. 355, 43 So. 867; Scholze *v.* Sloss-Sheffield Steel, etc., Co., 138 Ala. 339, 35 So. 321.

Illinois.—Louisville, etc., R. Co. *v.* Patchen, 167 Ill. 204, 47 N. E. 368 [*affirming* 66 Ill. App. 206]; Illinois Cent. R. Co. *v.* Slater, 139 Ill. 190, 28 N. E. 830; Toledo, etc., R. Co. *v.* Cline, 135 Ill. 41, 25 N. E. 846; Pennsylvania Co. *v.* Frana, 112 Ill. 398.

Maryland.—Western Maryland R. Co. *v.* Kehoe, 83 Md. 434, 34 Atl. 90, 86 Md. 43, 37 Atl. 799.

Pennsylvania.— Philadelphia, etc., R. Co. *v.* Hagan, 47 Pa. St. 244, 86 Am. Dec. 541.

South Carolina.— Brown *v.* Southern R. Co., 65 S. C. 260, 43 S. E. 794.

Texas.—Dillingham *v.* Parker, 80 Tex. 572, 16 S. W. 335; Texas, etc., R. Co. *v.* Howard, 2 Tex. Unrep. Cas. 429; Garteiser *v.* Galveston, etc., R. Co., 2 Tex. Civ. App. 230, 21 S. W. 631; Texas, etc., R. Co. *v.* Kirby, 1 Tex. App. Civ. Cas. § 564.

See 41 Cent. Dig. tit. "Railroads," § 1194.

person injured,[94] unless the measure of duty is fixed by law and is the same under all circumstances,[95] or the evidence is undisputed,[96] or unless there is such an obvious disregard of duty and safety as amounts to misconduct.[97]

(III) *CONFORMITY TO PLEADINGS AND ISSUES.* The instructions must conform to the pleadings and issues in the case.[98] Thus an instruction is erroneous if it ignores some of the grounds of recovery relied on,[99] or if it submits to the

Compare Hunter *v.* Montana Cent. R. Co., 22 Mont. 525, 57 Pac. 140.

Instructions held not erroneous as being on the weight of the evidence see St. Louis, etc., R. Co. *v.* Odum, 156 Ill. 78, 40 N. E. 559 [*affirming* 52 Ill. App. 519]; Gulf, etc., R. Co. *v.* Lankford, 9 Tex. Civ. App. 593, 29 S. W. 933; Norfolk, etc., R. Co. *v.* Carr, 106 Va. 508, 56 S. E. 276.

Where it is alleged and proved that the injury occurred by stepping into a hole in a bridge built by defendant railroad, over a ditch on its right of way along the side of the track at a highway crossing, the court may assume that the bridge was a part of the crossing and so treat it in giving instructions. St. Louis Southwestern R. Co. *v.* Smith, (Tex. Civ. App. 1908) 107 S. W. 638.

94. See *infra*, X, F, 14, h, (IV), (E).

95. Chicago, etc., R. Co. *v.* Tilton, 29 Ill. App. 95. See also Galveston, etc., R. Co. *v.* Porfort, 72 Tex. 344, 10 S. W. 207.

96. Galveston, etc., R. Co. *v.* Kief, (Tex. Civ. App. 1900) 58 S. W. 625.

97. Chicago, etc., R. Co. *v.* Tilton, 29 Ill. App. 95.

98. See San Antonio, etc., R. Co. *v.* Bergsland, 12 Tex. Civ. App. 97, 34 S. W. 155.

Instructions held proper under the pleadings and issues see Annaker *v.* Chicago, etc., R. Co., 81 Iowa 267, 47 N. W. 68 (as to speed at which train was running); McKerley *v.* Red River, etc., R. Co., (Tex. Civ. App. 1905) 85 S. W. 499, 99 Tex. 16, 86 S. W. 921; Texas, etc., R. Co. *v.* Spradling, 72 Fed. 152, 18 C. C. A. 496. Thus where it is alleged that plaintiff's intestate was killed at or near a street crossing, it is not error to instruct the jury that it is not necessary that it should appear that deceased when killed was exactly and technically on the crossing provided he was substantially using it and it was his purpose to cross there in the ordinary and usual way. Cowen *v.* Merriman, 17 App. Cas. (D. C.) 186. So an instruction setting forth the negligence of a railroad company in backing a train and then stopping and backing further is not inapplicable by reason of the fact that nothing is said in the declaration about the stoppage, and the backing is charged merely as one act. Illinois Cent. R. Co. *v.* Larson, 42 Ill. App. 264.

Instructions held improper as not conforming to the pleadings and issues see Cowen *v.* Merriman, 17 App. Cas. (D. C.) 186; Southern R. Co. *v.* Reynolds, 126 Ga. 657, 55 S. E. 1039; Southern R. Co. *v.* Chatman, 124 Ga. 1026, 53 S. E. 692, 3 L. R. A. N. S. 283; Toledo, etc., R. Co. *v.* Cline, 135 Ill. 41, 25 N. E. 846 [*reversing* 31 Ill. App. 563]; Hamilton *v.* Metropolitan St. R. Co., 114 Mo. App. 504, 89 S. W. 893; Missouri Pac. R. Co. *v.* Peay, (Tex. 1892) 20 S. W. 57. Thus where the issue is whether bushes on the right of way obstructed the view, an instruction that the law does not require a railroad company to prevent bushes from growing on its right of way so as to obstruct the view of persons using the crossing is erroneous. Chicago, etc., R. Co. *v.* Sanders, 154 Ill. 531, 39 N. E. 481 [*affirming* 55 Ill. App. 87]. So where it is alleged that no headlight was burning, that no whistle was sounded or bell rung, the question of speed may be material and a charge that it is immaterial is properly refused. Thomas *v.* Chicago, etc., R. Co., 86 Mich. 496, 49 N. W. 547.

Wilful or wanton negligence.— Under an allegation that defendant "wilfully, wantonly, and recklessly" did the acts complained of, an instruction authorizing a recovery for negligence alone is erroneous. Proctor *v.* Southern R. Co., 61 S. C. 170, 39 S. E. 351. An instruction on the theory of wilful or wanton negligence is erroneous where it is not alleged or proved that defendant was wilfully or wantonly negligent. Wabash R. Co. *v.* Larrick, 84 Ill. App. 520; Atchison, etc., R. Co. *v.* Baker, (Indian Terr. 1907) 104 S. W. 1182 [*reversed* on other grounds in (Okla. 1908) 95 Pac. 433].

Error cured.—An instruction defining what the statute requires of railroad companies as to the weight and use of bells is not prejudicial error, although the weight of the bell was not in issue, where all the clauses of the charge submitting the issues authorize a verdict for plaintiff only in case of the negligence of defendant's employees. Texas Cent., etc., R. Co. *v.* Bush, 12 Tex. Civ. App. 291, 24 S. W. 133.

An instruction responsive to the testimony, although on an issue not raised by the pleadings, is not erroneous. Harbert *v.* Atlanta, etc., R. Co., 78 S. C. 537, 59 S. E. 644.

99. Louisville, etc., R. Co. *v.* Hubbard, 148 Ala. 45, 41 So. 814; Louisville, etc., R. Co. *v.* Robinson, 141 Ala. 325, 37 So. 431; Central R. Co. *v.* Harris, 76 Ga. 501; Elgin, etc., R. Co. *v.* Raymond, 148 Ill. 241, 35 N. E. 729; Pennsylvania Co. *v.* Marshall, 119 Ill. 399, 10 N. E. 220; Texas Cent., etc., R. Co. *v.* Gibson, (Tex. Civ. App. 1904) 83 S. W. 862; St. Louis Southwestern R. Co. *v.* Matthews, 34 Tex. Civ. App. 302, 79 S. W. 71.

An instruction which ignores the negligence of defendant is erroneous. Atchison, etc., R. Co. *v.* Combs, 25 Kan. 729; Houston, etc., R. Co. *v.* Dillard, (Tex. Civ. App. 1906) 94 S. W. 426 (postulating plaintiff's right to recover on his freedom from contributory negligence, without reference to negligence on the part of defendant); Gulf, etc., R. Co. *v.* Welch, (Tex. Civ. App. 1894) 25 S. W. 166.

jury questions of negligence not raised by the pleadings and evidence,[1] or not relied upon as a ground of recovery or defense.[2] Where the court substantially charges the law covering the case an omission to charge on some matters in issue is not reversible error in the absence of a properly prepared requested instruction.[3]

(IV) *APPLICATIONS OF RULES* — (A) *In General.* The above rules apply to instructions in actions for injuries caused by horses or teams becoming frightened at a crossing through defendant's negligence;[4] or for injuries caused by defendant's negligence in respect to sign-boards,[5] signals,[6] flagmen or watch-

1. *Alabama.*— Georgia Cent. R. Co. *v.* Hyatt, 151 Ala. 355, 43 So. 867.

Illinois.—Wabash, etc., R. Co. *v.* Coble, 113 Ill. 115; Illinois Cent. R. Co. *v.* Chicago Title, etc., Co., 79 Ill. App. 623.

Kansas.— Chicago, etc., R. Co. *v.* Assman, 72 Kan. 378, 83 Pac. 1091; Missouri Pac. R. Co. *v.* Haggart, 9 Kan. App. 393, 58 Pac. 796.

Missouri.— Gurley *v.* Missouri Pac. R. Co., 93 Mo. 445, 6 S. W. 218; Hamilton *v.* Metropolitan St. R. Co., 114 Mo. App. 504, 89 S. W. 893.

New York.— Van Raden *v.* New York, etc., R. Co., 56 Hun 96, 8 N. Y. Suppl. 914.

See 41 Cent. Dig. tit. "Railroads," § 1195.

Illustrations.— Thus an instruction that if defendant's cars were left at the crossing so as to be apt to frighten horses of ordinary gentleness, the jury would be warranted in finding defendant negligent is erroneous in the absence of an allegation or proof that the cars were likely to frighten horses of ordinary gentleness. Fisk *v.* Chicago, etc., R. Co., 74 Iowa 424, 38 N. W. 132. So where the only negligence charged in the pleadings is a failure to ring a bell or blow a whistle as the train approached the crossing, plaintiff is not entitled to have the question whether defendant was bound to use extra precautions for the safety of travelers on the crossing because of its unusually dangerous character, submitted to the jury. Holmes *v.* Pennsylvania R. Co., 74 N. J. L. 469, 69 Atl. 412. So where it is alleged that defendant's negligence consisted in running its train at a rate of speed greater than that fixed by ordinance and permitting the crossing to be in an unsafe condition, and in failing to give the usual signals, it is error to submit to the jury the issue of defendant's negligence in not discovering the presence of deceased on the track in time to avoid striking him. Galveston, etc., R. Co. *v.* Harris, (Tex. Civ. App. 1896) 36 S. W. 776.

A charge on common-law negligence is proper where the complaint contains allegations both of common law and statutory negligence and there is evidence in support of both allegations. Chattanooga Rapid Transit Co. *v.* Walton, 105 Tenn. 415, 58 S. W. 737.

2. Louisville, etc., R. Co. *v.* Clever, 89 S. W. 494, 28 Ky. L. Rep. 497; Kane *v.* New York, etc., R. Co., 132 N. Y. 160, 30 N. E. 256 [*affirming* 9 N. Y. Suppl. 879]; Gulf, etc., R. Co. *v.* Letsch, (Tex. Civ. App. 1900) 55 S. W. 584 [*affirmed* in (1900) 56 S. W. 1134].

3. Central R. Co. *v.* Harris, 76 Ga. 501; Missouri, etc., R. Co. *v.* Ferris, 23 Tex. Civ. App. 215, 55 S. W. 1119.

4. Instructions held proper: In general. St. Louis Southwestern R. Co. *v.* Hall, 98 Tex. 480, 85 S. W. 786; Houston, etc., R. Co. *v.* Blan, (Tex. Civ. App. 1901) 62 S. W. 552; San Antonio, etc., R. Co. *v.* Belt, 24 Tex. Civ. App. 281, 59 S. W. 607; Northern Pac. R. Co. *v.* Sullivan, 53 Fed. 219, 3 C. C. A. 506 (as to blowing whistle); Abbot *v.* Kalbus, 74 Wis. 504, 33 N. W. 367. As sustained by the evidence. St. Louis Southwestern R. Co. *v.* Moore, (Tex. Civ. App. 1908) 107 S. W. 658.

Instructions held erroneous: As being misleading. Kansas City, etc., R. Co. *v.* Lackey, 114 Ala. 152, 21 So. 444; St. Louis, etc., R. Co. *v.* Boback, 71 Ark. 427, 75 S. W. 473; Inabnett *v.* St. Louis, etc., R. Co., 69 Ark. 130, 61 S. W. 570; Houston, etc., R. Co. *v.* Carruth, (Tex. Civ. App. 1899) 50 S. W. 1036. As ignoring material issues. Myers *v.* Richmond, etc., R. Co., 87 N. C. 345. As not conforming to the evidence (Inabnett *v.* St. Louis, etc., R. Co., 69 Ark. 130, 61 S. W. 570; St. Louis, etc., R. Co. *v.* Roberts, 56 Ark. 387, 19 S. W. 1055; Wabash R. Co. *v.* Wilson, 81 Ill. App. 21; St. Louis Southwestern R. Co. *v.* Stonecypher, 25 Tex. Civ. App. 569, 63 S. W. 946; Richmond, etc., R. Co. *v.* Yeamans, 86 Va. 860, 12 S. E. 946); or to the pleading and issues (Fisk *v.* Chicago, etc., R. Co., 74 Iowa 424, 38 N. W. 132; Chesapeake, etc., R. Co. *v.* Gunter, 108 Ky. 362, 56 S. W. 527, 21 Ky. L. Rep. 1803; Louisville, etc., R. Co. *v.* Cleaver, 89 S. W. 494, 28 Ky. L. Rep. 497).

Defective instructions cured by subsequent ones see Houston, etc., R. Co. *v.* Blan, (Tex. Civ. App. 1901) 62 S. W. 552.

The refusal of an instruction the substance of which is embraced in other instructions given is not error. Cleveland, etc., R. Co., *v.* Wynant, 134 Ind. 681, 34 N. E. 560.

5. See Gulf, etc., R. Co. *v.* Hamilton, 17 Tex. Civ. App. 76, 42 S. W. 358, holding that it is erroneous to charge that it was defendant's duty to provide a sign-board at the crossing and discover the danger of plaintiff if it could be done by the exercise of ordinary diligence, if such grounds of recovery were not stated in the petition.

Conformity to issues.— It is error to instruct as to the duty of defendant to erect sign-boards at the crossing as required by statute where there is no averment that defendant failed to perform this duty or that the injury was caused by such failure. Louisville, etc., R. Co. *v.* Clark, 105 Ky. 571, 49 S. W. 323, 20 Ky. L. Rep. 1375.

6. See Hart *v.* Chicago, etc., R. Co., 56 Iowa 166, 7 N. W. 9, 9 N. W. 116, 41 Am. Rep. 93.

men,[7] or gates,[8] at crossings; or by negligence in running its trains,[9] as by negligence in respect to lights, signals, and lookouts, from approaching trains,[10] or in running at an excessive or unlawful rate of speed,[11] or by reason of employees

7. See Schmidt *v.* Burlington, etc., R. Co., 75 Iowa 606, 39 N. W. 916 (holding that allegations that the injury was caused by defendant not giving a proper warning or signal of the approach of its train, and by its not keeping a flagman at the crossing to give such warning, are broad enough to warrant a submission of the question whether ordinary care did not require a flagman to be kept at the crossing, irrespective of any municipal regulation); Shaw *v.* Boston, etc., R. Co., 8 Gray (Mass.) 45 (holding that it is erroneous for the judge in his instructions to omit to distinguish between circumstances which could be reasonably anticipated and those in their nature extraordinary but which would make unusual precautions proper if they could have been foreseen); Buchanan *v.* Missouri, etc., R. Co., (Tex. Civ. App. 1907) 107 S. W. 552 (failure of flagman to give warning).

Requested instructions on issues presented by the petition and evidence held erroneously refused see Crowder *v.* St. Louis Southwestern R. Co., 39 Tex. Civ. App. 314, 87 S. W. 166.

Misleading.— The omission of the words "carelessly" and "negligently" in an instruction which began with the words, "If the jury believe from the evidence that a flagman of defendant improperly and inopportunely signaled the plaintiff's team," etc., is not a misleading inaccuracy. Pennsylvania Co. *v.* Sloan, 125 Ill. 72, 17 N. E. 37, 8 Am. St. Rep. 337.

The applicability of an ordinance requiring a flagman at certain crossings to the circumstances of the particular case should be charged by the court. Pennsylvania Co. *v.* Frana, 112 Ill. 398, instruction held not erroneous.

Where the evidence shows that the railroad crossing was in a populous neighborhood and was much used by the general public and the railway company in the operation of its trains, a charge predicating negligence on the failure to keep a watchman at the crossing is proper, although there is no evidence showing the duties of a watchman at such place, or the purpose for which he is kept. St. Louis Southwestern R. Co. *v.* Moore, (Tex. Civ. App. 1908) 107 S. W. 658.

8. See Baltimore, etc., R. Co. *v.* Stumpf, 97 Md. 78, 54 Atl. 978.

Misleading instructions: See Bracken *v.* Pennsylvania R. Co., 32 Pa. Super. Ct. 22. An instruction that it is the railroad company's duty to erect and maintain gates on both sides of its "track" at a street crossing is misleading where there are many tracks at such crossing and the city ordinance only requires "gates on both sides of its tracks" at the crossing. Jennings *v.* St. Louis, etc., R. Co., 99 Mo. 394, 11 S. W. 999.

Conformity with pleading.—An instruction that the jury may base a verdict for plaintiff on the failure of defendant to maintain gates or keep a flagman at a crossing, where a failure to do so is not charged in the petition and has not been relied upon at the trial as a ground of recovery, is erroneous. Atchison, etc., R. Co. *v.* Powers, 58 Kan. 544, 50 Pac. 452.

9. **Instructions held proper:** As to the degree of care required of defendant in approaching the crossing. Ohio, etc., R. Co. *v.* Buck, 130 Ind. 300, 30 N. E. 19; Barnum *v.* Grand Trunk Western R. Co., 148 Mich. 370, 111 N. W. 1036; Montgomery *v.* Missouri Pac. R. Co., 181 Mo. 477, 79 S. W. 930, backing train. As conforming to the pleadings. Davidson *v.* Chicago, etc., R. Co., 98 Mo. App. 142, 71 S. W. 1069. As not being misleading. Ohio, etc., R. Co. *v.* Buck, 130 Ind. 300, 30 N. E. 19; St. Louis Southwestern R. Co. *v.* Stonecypher, 25 Tex. Civ. App. 569, 63 S. W. 946; Gulf, etc., R. Co. *v.* Letsch, (Tex. Civ. App. 1900) 55 S. W. 584 [*affirmed* in (1900) 56 S. W. 1134].

Instructions held erroneous: As requiring too high a degree of care of defendant. Western, etc., R. Co. *v.* King, 70 Ga. 261; Baltimore, etc., R. Co. *v.* Brenig, 25 Md. 378, 90 Am. Dec. 49; Gulf, etc., R. Co. *v.* Smith, 87 Tex. 348, 28 S. W. 520. As not conforming to the evidence. Chesapeake, etc., R. Co. *v.* Crews, 118 Tenn. 52, 99 S. W. 368. As being too indefinite or misleading. Central Texas, etc., R. Co. *v.* Bush, 12 Tex. Civ. App. 291, 34 S. W. 133.

Statutory precautions.—A statutory provision requiring trains to be checked on approaching public crossings may be given in a charge to the jury. Georgia Cent. R. Co. *v.* Hall, 109 Ga. 367, 34 S. E. 605. And a refusal to charge that the company's failure to take the statutory precautions in running a train constitutes negligence is error. Louisville, etc., R. Co. *v.* Martin, 113 Tenn. 266, 87 S. W. 418. A failure to charge as to what particular acts in addition to the statutory signals might be required of defendant is erroneous, as it might mislead the jury. Jones *v.* Utica, etc., R. Co., 36 Hun (N. Y.) 115.

Where the cause of action is on the theory of non-compliance with statutory precautions, the better practice is to give a charge based on the statute without undertaking to instruct as to the common-law duties of the company. Chesapeake, etc., R. Co. *v.* Crews, 118 Tenn. 52, 99 S. W. 368.

10. See *infra*, X, F, 14, h, (IV), (D).

11. Chicago, etc., R. Co. *v.* Appell, 103 Ill. App. 185; Annacker *v.* Chicago, etc., R. Co., 81 Iowa 267, 47 N. W. 68; Riley *v.* Northern Pac. R. Co., 36 Mont. 545, 93 Pac. 948.

Instructions must conform to evidence.— An instruction as to a railroad company's liability for running its train at a dangerous rate of speed is improper where there is no evidence that the speed of the train was dangerous. Atchison, etc., R. Co. *v.* Hague, 54 Kan. 284, 38 Pac. 257, 45 Am. St. Rep. 278.

on its trains not taking the proper precautions as to persons seen at or near a crossing.[12]

(B) *Character of Crossing and Rights and Duties of Parties Therein.* Where such matters are in issue, an instruction should inform the jury of the rights of the railroad company and the persons using the crossing as to priority in going on the crossing,[13] distinguishing between the degree of care required at public and at private crossings.[14] It is also proper to distinguish between the degree of care which a railroad company is bound to exercise toward a mere traveler on its tracks and those who have occasion to cross them at a place commonly used and resorted to for that purpose.[15] Whether there is a public highway is a mixed

Instructions must conform to issues.— It is proper to refuse an instruction that the evidence fails to show an unlawful or reckless rate of speed where there is no issue as to whether the train was running at an unlawful rate of speed. Cooper *v.* Los Angeles Terminal R. Co., 137 Cal. 229, 70 Pac. 11. So where a case is tried on the theory that no whistle was blown, it is error to charge that the jury may find for plaintiff simply because the train was running at a high rate of speed. Schwarz *v.* Delaware, etc., R. Co., 218 Pa. St. 187, 67 Atl. 213. So where there is no averment or proof that the speed of the train which killed deceased was unlawful or negligent, the trial court is not justified in enlarging the issues and submitting to the jury the question of whether the company was guilty of negligence in running the train at a high rate of speed. Missouri Pac. R. Co. *v.* Moffatt, 56 Kan. 667, 44 Pac. 607.

An instruction withdrawing from the jury the question whether the speed was dangerously negligent is erroneous. Cooper *v.* Los Angeles Terminal R. Co., 137 Cal. 229, 70 Pac. 11; International, etc., R. Co. *v.* Starling, 16 Tex. Civ. App. 365, 41 S. W. 181.

Misleading instructions see Davenport, etc., R. Co. *v.* De Yaeger, 112 Ill. App. 537; Wabash R. Co. *v.* Stewart, 87 Ill. App. 446.

Contradictory instructions see Klanowski *v.* Grand Trunk R. Co., 64 Mich. 279, 31 N. W. 275; Southern R. Co. *v.* Stockdon, 106 Va. 693, 56 S. E. 713, instructions held not conflicting or contradictory.

12. See Illinois Cent. R. Co. *v.* Maffit, 67 Ill. 431 (instructions held confusing); Galveston, etc., R. Co. *v.* Murray, (Tex. Civ. App. 1907) 99 S. W. 144.

Instructions held erroneous.—As not being in conformity with the evidence. Guyer *v.* Missouri Pac. R. Co., 174 Mo. 344, 73 S. W. 584; Texas, etc., R. Co. *v.* Lowry, 61 Tex. 149; Central Texas, etc., R. Co. *v.* Gibson, 35 Tex. Civ. App. 66, 79 S. W. 351. As being misleading. Chicago, etc., R. Co. *v.* Van Patten, 64 Ill. 510; Lake Erie, etc., R. Co. *v.* Stick, 143 Ind. 449, 41 N. E. 365. As not conforming to the pleadings and issues. Missouri, etc., R. Co. *v.* Nesbit, 40 Tex. Civ. App. 209, 88 S. W. 891; Houston, etc., R. Co. *v.* Mathis, (Tex. Civ. App. 1898) 48 S. W. 625. As ignoring a material question. Missouri, etc., R. Co. *v.* Eyer, (Tex. Civ. App. 1902) 69 S. W. 453. As omitting the element of defendant's duty to take reasonable care to avoid the accident, notwithstanding the injured party's contributory negligence. Riley *v.* Northern Pac. R. Co., 36 Mont. 545, 93 Pac. 948. As ignoring plaintiff's duty to look and listen. Atchison, etc., R. Co. *v.* Baker, (Indian Terr. 1907) 104 S. W. 1182 [*reversed* on other grounds in (Okla. 1908) 95 Pac. 433]. As invading the province of the jury. Pennsylvania Co. *v.* Frana, 112 Ill. 398; Stewart *v.* Long Island R. Co., 54 N. Y. App. Div. 623, 66 N. Y. Suppl. 436 [*affirmed* in 166 N. Y. 604, 59 N. E. 1130]. As assuming that plaintiff did not keep a reasonable lookout and as announcing as a matter of law that the engineer might presume certain facts. Chicago, etc., R. Co. *v.* Sanders, 154 Ill. 531, 39 N. E. 481 [*affirming* 55 Ill. App. 87].

An instruction covered by other instructions may be properly refused. See Fletcher *v.* South Carolina, etc., R. Co., 57 S. C. 205, 35 S. E. 513; Texas, etc., R. Co. *v.* Roberts, 91 Tex. 535, 45 S. W. 309 [*affirming* (Civ. App. 1897) 45 S. W. 218].

13. Chicago, etc., R. Co. *v.* Spilker, 134 Ind. 380, 33 N. E. 280, 34 N. E. 218 (instruction held sufficient); Washington Southern R. Co. *v.* Lacey, 94 Va. 460, 26 S. E. 834.

Misleading.— An instruction is defective and misleading which charges that the rights of the railroad company and the public are not equal, but that the right of the company is superior to the right of the traveling public on all parts of its track, even at crossings. Texas, etc., R. Co. *v.* Cody, 67 Fed. 71, 14 C. C. A. 310.

Conformity to issues.— Where there is no controversy as to whether the person injured by the train was entitled to cross first, it is not error to refuse an instruction as to the rights of priority in going on the crossing. Louisville, etc., R. Co. *v.* Patchen, 167 Ill. 204, 47 N. E. 368.

14. Lewis *v.* New York, etc., R. Co., 1 Silv. Sup. (N. Y.) 393, 5 N. Y. Suppl. 313 [*affirmed* in 123 N. Y. 496, 26 N. E. 357].

Conformity to evidence.—An instruction implying that the highway at the crossing was a city street and not a country road and not governed by the same rules of law as the latter is erroneous, where the evidence indisputably shows that the crossing was outside of the city limits and was a country road although called an avenue. Cleveland, etc., R. Co. *v.* Sivey, 27 Ohio Cir. Ct. 248.

15. Baltimore, etc., R. Co. *v.* Golway, 6 App. Cas. (D. C.) 143.

question of fact and law, and it is error to submit such question to the jury without instructing them as to how a public highway may be constituted.[16]

(c) *Defects and Obstructions at Crossings.* Where the question of defects and obstructions at crossings is in issue the instruction should accurately state the railroad company's duties as to constructing and keeping the crossing in a safe condition,[17] and as to keeping it free from obstructions to the view or hearing of employees in charge of an approaching train or of travelers on the highway approaching the crossing,[18] or as to permitting other obstructions at or near the crossing.[19]

16. Baltimore, etc., R. Co. *v.* Faith, 175 Ill. 58, 51 N. E. 807 [*affirming* 71 Ill. App. 59]; Illinois Cent. R. Co. *v.* Chicago Title, etc., Co., 79 Ill. App. 623.

The instructions may assume that a certain city street exists and crosses defendant's track, where the uncontradicted evidence shows such facts and the instruction submits to the jury as to whether the point of intersection was used by the public as a crossing. Galveston, etc., R. Co. *v.* Kief, (Tex. Civ. App. 1900) 58 S. W. 625.

17. **Instructions held proper** see Atchison, etc., R. Co. *v.* Townsend, 71 Kan. 524, 81 Pac. 205 (held not misleading); Edwards *v.* Carolina, etc., R. Co., 140 N. C. 49, 52 S. E. 234; St. Louis Southwestern R. Co. *v.* Smith, (Tex. Civ. App. 1908) 107 S. W. 638; Denison, etc., R. Co. *v.* Foster, 28 Tex. Civ. App. 578, 68 S. W. 299; Houston, etc., R. Co. *v.* Weaver, (Tex. Civ. App. 1897) 41 S. W. 846; Missouri, etc., R. Co. *v.* Connelly, 14 Tex. Civ. App. 529, 39 S. W. 145 (not misleading). Thus an instruction that "it is not sufficient that the crossing is so constructed that it is possible to safely pass over it, but it should be so constructed and maintained in such condition as to be reasonably safe and convenient for public travel by persons exercising ordinary care" is correct and not argumentative. Brown *v.* Hannibal, etc., R. Co., 99 Mo. 310, 12 S. W. 655. So where there is some evidence that the crossing was defective an instruction which submits as an element of negligence the improper construction of the crossing as well as a failure to maintain it in repair is not error. Taylor, etc., R. Co. *v.* Warner, (Tex. Civ. App. 1900) 60 S. W. 442.

Instructions held erroneous see San Antonio, etc., R. Co. *v.* Belt, 24 Tex. Civ. App. 281, 59 S. W. 607, failing to recognize defendant's right to repair its tracks.

Instruction held misleading in using the word "unnecessarily" in place of the word "materially" in regard to impairing the usefulness of the public road, etc., see Louisville, etc., R. Co. *v.* Hubbard, 148 Ala. 45, 41 So. 814.

Conformity to pleadings and issues.—An instruction that it is defendant's duty to maintain a crossing which is "reasonably safe and convenient" is not erroneous or a departure from a petition alleging a failure to maintain "a good and sufficient crossing." Brown *v.* Hannibal, etc., R. Co., 99 Mo. 310, 12 S. W. 655. It is erroneous to instruct the jury as to the duty of protecting crossings at public county roads in an action for injuries at a private crossing. Taylor, etc., R. Co. *v.* Warner, 88 Tex. 642, 32 S. W. 868 [*reversing* (Civ. App. 1895) 31 S. W. 66].

Inconsistency.—An instruction that the crossing should be "reasonably safe and convenient" is not inconsistent with one that it should be "reasonably safe." Brown *v.* Hannibal, etc., R. Co., 99 Mo. 310, 12 S. W. 655.

Under a statute requiring railroad companies to keep highway crossings in repair, it is not necessary in an action for injuries resulting from a defective crossing to instruct as to what would constitute a keeping of the crossing in repair. St. Louis Southwestern R. Co. *v.* Smith, (Tex. Civ. App. 1908) 107 S. W. 638, under Rev. St. 1895, art. 4426.

18. **Instructions held proper** see Chicago, etc., R. Co. *v.* Tilton, 26 Ill. App. 362 (not misleading); Pence *v.* Chicago, etc., R. Co., 79 Iowa 389, 44 N. W. 686 (instructions as to obstructions upon the right of way held without prejudice, although there was no evidence that they were upon the right of way); Calhoun *v.* Gulf, etc., R. Co., 84 Tex. 226, 19 S. W. 341 (instruction held not to prevent the jury from considering the presence of cars on a side-track, in determining the degree of care required by the operatives of the train); Galveston, etc., R. Co. *v.* Michalke, 14 Tex. Civ. App. 495, 37 S. W. 480.

Instructions held erroneous: As not conforming to the evidence. International, etc., R. Co. *v.* Knight, 91 Tex. 660, 45 S. W. 556 [*reversing* (Civ. App. 1898) 45 S. W. 167]; International, etc., R. Co. *v.* Kuehn, 70 Tex. 582, 8 S. W. 484. As not conforming to the pleading. Chicago, etc., R. Co. *v.* Assman, 72 Kan. 378, 83 Pac. 1091. As invading the province of the jury. Dillingham *v.* Parker, 80 Tex. 572, 16 S. W. 335.

Where the undisputed evidence shows that a view of the track was partially obstructed, it is not error for the court to assume in its charge that there were obstructions to sight and hearing of an approaching train. Pratt *v.* Chicago, etc., R. Co., 107 Iowa 287, 77 N. W. 1064.

19. See Paine *v.* Grand Trunk R. Co., 58 N. H. 611 (instruction held sufficiently favorable to defendant); Galveston, etc., R. Co. *v.* Simon, (Tex. Civ. App. 1899) 54 S. W. 309 (holding an instruction which withdrew from the jury the issue as to whether or not defendant was guilty of negligence in permitting a car to stand in the street, and if negligent whether such negligence was the proximate cause of plaintiff's injury, properly refused).

(D) *Lights, Signals, and Lookouts From Trains.* Likewise the principles announced in the preceding sections [20] apply to instructions in respect to lights,[21] lookouts,[22] and signals [23] from approaching trains. Thus the instructions in regard to such precautions must not be misleading,[24] must be in conformity with the

Misleading.—Although it is not negligence *per se* to leave cars on the tracks close to the crossing if they are not on the highway, it would be misleading to so instruct the jury in a case where the negligence complained of was in leaving the cars upon the tracks close to the crossing and starting a locomotive from behind them without warning. Cleveland, etc., R. Co. *v.* Richerson, 19 Ohio Cir. Ct. 385, 10 Ohio Cir. Dec. 326.

20. See *supra*, X, F, 14, h, (I), (II), (III).

21. See Illinois Cent. R. Co. *v.* Coley, 121 Ky. 385, 89 S. W. 234, 28 Ky. L. Rep. 336, 1 L. R. A. N. S. 370.

22. See St. Louis, etc., R. Co. *v.* Spearman, 64 Ark. 332, 42 S. W. 406 (held ambiguous and contradictory); Illinois Cent. R. Co. *v.* Coley, 121 Ky. 385, 89 S. W. 234, 28 Ky. L. Rep. 336, 1 L. R. A. N. S. 370; Missouri, etc., R. Co. *v.* Sisson, (Tex. Civ. App. 1905) 88 S. W. 371.

Where the cause of action is based on a failure to comply with the statutory duty with respect to keeping a lookout, sounding the whistle, etc., it is error to charge anything on the common-law liability of the company except in so far as the statute is concurrent with the common law. Chesapeake, etc., R. Co. *v.* Crews, 118 Tenn. 52, 99 S. W. 368.

Conformity to evidence.—An instruction that if by the use of ordinary care the employees of defendant company could have seen plaintiff in time to have prevented the injury complained of and failed through carelessness, their failure to do so was negligence, is erroneous if there is no evidence that the employees could have discovered plaintiff in time to prevent the injury. Gulf, etc., R. Co. *v.* Johnson, 91 Tex. 569, 44 S. W. 1067.

The refusal of an instruction substantially covered by other instructions is not erroneous. Hughes *v.* Chicago, etc., R. Co., 122 Wis. 258, 99 N. W. 397.

23. **Instructions held proper** as to the duty of defendant in regard to giving signals upon the approach of its train to a crossing see Chicago, etc., R. Co. *v.* Dillon, 123 Ill. 570, 15 N. E. 181, 5 Am. St. Rep. 559 [*affirming* 24 Ill. App. 203]; Louisville, etc., R. Co. *v.* Sander, 92 S. W. 937, 29 Ky. L. Rep. 212; Duggan *v.* New England R. Co., 172 Mass. 337, 52 N. E. 519; St. Louis Southwestern R. Co. *v.* Elledge, (Tex. Civ. App. 1906) 93 S. W. 499; Galveston, etc., R. Co. *v.* Eaten, (Tex. Civ. App. 1898) 44 S. W. 562.

Instructions held erroneous: Generally. Bowen *v.* Southern R. Co., 58 S. C. 222, 36 S. E. 590 (under Rev. St. §§ 1685, 1692). As laying too much emphasis on particular circumstances. Galveston, etc., R. Co. *v.* Kutac, 76 Tex. 473, 13 S. W. 327. As being argumentative. Toledo, etc., R. Co. *v.* Cline, 135 Ill. 41, 25 N. E. 846. As being too general. Smith *v.* Lehigh Valley R. Co., 77 N. Y. App. Div. 43, 79 N. Y. Suppl. 106. As omitting a material element of the statutory duty relative to giving signals. Kahl *v.* Chicago, etc., R. Co., 125 Ill. App. 294.

Instructions held not erroneous as authorizing an inference from a probability rather than from a fact see Chicago, etc., R. Co. *v.* Thomas, (Ind. 1900) 55 N. E. 861.

A defective instruction held cured when read in connection with the whole charge of which it is a part see Chicago, etc., R. Co. *v.* Pearson, 184 Ill. 386, 56 N. E. 633 [*affirming* 82 Ill. App. 605]; Louisville, etc., R. Co. *v.* Price, 76 S. W. 836, 25 Ky. L. Rep. 1033; Van Auken *v.* Chicago, etc., R. Co., 96 Mich. 307, 55 N. W. 971, 22 L. R. A. 33; Esler *v.* Wabash R. Co., 109 Mo. App. 580, 83 S. W. 73; Texas, etc., R. Co. *v.* Bailey, 83 Tex. 19, 18 S. W. 481; Galveston, etc., R. Co. *v.* Tirres, 33 Tex. Civ. App. 362, 76 S. W. 806.

The refusal of an instruction embraced in another instruction given is not erroneous. Houston, etc., R. Co. *v.* Rogers, 15 Tex. Civ. App. 680, 39 S. W. 1112.

Statutory signals.— Where a statute requires that a railroad company shall give the usual signals "at least" at a certain distance from crossings, the company has the right to have the words "at least" inserted in an instruction as to the requirements of such statute. Galveston, etc., R. Co. *v.* Harris, (Tex. Civ. App. 1896) 36 S. W. 776.

As to what signals should have been given to absolve a railway company from the charge of negligence should be charged by the court and a general submission of that question to the jury without qualification or limitation is error. Dyer *v.* Erie R. Co., 71 N. Y. 228; Hollender *v.* New York Cent., etc., R. Co., 14 Daly (N. Y.) 219, 6 N. Y. St. 352, 19 Abb. N. Cas. 18; Semel *v.* New York, etc., R. Co., 9 Daly (N. Y.) 321 [*affirmed* in 91 N. Y. 657].

A failure to include the element that the jury must find that the failure of the train operatives to give signals was the cause of the injury is not erroneous, where the instruction is not given with a view to specifying all the elements which plaintiff must prove to entitle him to recover, but is designed to inform the jury that if plaintiff found himself in a perilous position by reason of the failure of defendant to give the statutory signals, and while endeavoring to extricate himself from his perilous position he acted as a reasonably prudent man would act, he may recover. Illinois Southern R. Co. *v.* Hamill, 226 Ill. 88, 80 N. E. 745 [*affirming* 128 Ill. App. 152].

24. **Instructions held misleading:** As to giving signals. Chicago, etc., R. Co. *v.* Robinson, 106 Ill. 142 [*reversing* 8 Ill. App. 140]; St. Louis, etc., R. Co. *v.* Rawley, 90 Ill. App. 653; Wabash R. Co. *v.* Stewart, 87 Ill. App. 446; Peoria, etc., R. Co. *v.* Berry, 15 Ill. App. 155; Lake Shore, etc., R. Co.

evidence,[25] and with the pleadings and issues,[26] and should not invade the province of the jury in charging on the facts.[27]

(E) *Contributory Negligence* — (1) IN GENERAL. Where contributory negligence is in issue the court should instruct specifically as to the duties of the injured person in regard to exercising reasonable care in approaching and attempting to cross the tracks.[28] Such instructions must be in accordance with the principles

v. Elson, 15 Ill. App. 80; Lake Shore, etc., R. Co. *v.* Reynolds, 21 Ohio Cir. Ct. 402, 11 Ohio Cir. Dec. 701; Texas, etc., R. Co. *v.* Stoker, (Tex. Civ. App. 1907) 103 S. W. 1183; International, etc., R. Co. *v.* Ives, 31 Tex. Civ. App. 272, 71 S. W. 772; Missouri, etc., R. Co. *v.* Melugin, (Tex. Civ. App. 1901) 63 S. W. 338; Texas, etc., R. Co. *v.* Scrivener, (Tex. Civ. App. 1899) 49 S. W. 649. An instruction that a failure of defendant either to ring the bell or blow the whistle at a distance of at least eighty rods from the crossing renders it criminally liable is misleading and reversible error where the statute merely imposes a penalty. Missouri Pac. R. Co. *v.* Geist, 49 Nebr. 489, 68 N. W. 640.

Instruction held not misleading as to signals see Chicago, etc., R. Co. *v.* Pollock, 195 Ill. 156, 62 N. E. 831 [*affirming* 93 Ill. App. 483]; Louisville, etc., R. Co. *v.* Patchen, 167 Ill. 204, 47 N. E. 368; Cleveland, etc., R. Co. *v.* Asbury, 120 Ind. 289, 22 N. E. 140 (under Rev. St. § 4020); Evansville, etc., R. Co. *v.* Clements, 32 Ind. App. 659, 70 N. E. 554; Chesapeake, etc., R. Co. *v.* Crews, 118 Tenn. 52, 99 S. W. 368 (under Shannon Code, § 1574, subs. 3).

25. Instructions held erroneous under the evidence.—As to signals. Donahue *v.* New York Cent., etc., R. Co., 15 Misc. (N. Y.) 256, 36 N. Y. Suppl. 441; Gulf, etc., R. Co. *v.* Welch, (Tex. Civ. App. 1894) 27 S. W. 166. Where the evidence shows that the engine was within eighty yards of the crossing, it is error to instruct that defendant was negligent unless a whistle was sounded at least eighty yards from the crossing. Ft. Worth, etc., R. Co. *v.* Neely, (Tex. Civ. App. 1900) 60 S. W. 282.

Instructions held not erroneous under the evidence.—As to signals. Chicago, etc., R. Co. *v.* Smith, 77 Ill. App. 492; O'Dair *v.* Missouri, etc., R. Co., 14 Tex. Civ. App. 539, 38 S. W. 242. Testimony of a witness that he heard a bell rung very low is a sufficient basis for an instruction as to the adequacy of the bell when ringing to give notice of the approach of the train. Weller *v.* Chicago, etc., R. Co., 164 Mo. 180, 64 S. W. 141, 86 Am. St. Rep. 592.

26. Instructions held not in conformity with the pleadings and issues see Wabash R. Co. *v.* Stewart, 87 Ill. App. 446; Lake Shore, etc., R. Co. *v.* Reynolds, 21 Ohio Cir. Ct. 402, 11 Ohio Cir. Dec. 701; International, etc., R. Co. *v.* Sein, 11 Tex. Civ. App. 386, 33 S. W. 558.

Where the only issue is as to whether the whistle was blown at all or not, the jury should not be charged upon the question of the proximity to the crossing at which the whistle should have been blown. Missouri, etc., R. Co. *v.* Melugin, (Tex. Civ. App. 1901) 63 S. W. 338.

Instructions held in conformity with pleadings and issues see Missouri, etc., R. Co. *v.* Jackson, (Tex. Civ. App. 1905) 88 S. W. 406, error to refuse. A charge that plaintiff claims and defendant denies that the injury was caused by defendant's failure to sound the whistle or ring the bell when nearing a crossing is not erroneous where there is no evidence authorizing a charge on any other issue of negligence, although the petition alleges other grounds of negligence. O'Dair *v.* Missouri, etc., R. Co., 14 Tex. Civ. App. 539, 38 S. W. 242.

Although the pleadings do not specifically raise the question whether defendant kept a proper lookout for travelers at the crossing, or gave due warning signals of danger, a charge requiring such care by defendant is not erroneous where it is responsive to the testimony. Harbert *v.* Atlanta, etc., R. Co., 78 S. C. 537, 59 S. E. 644.

An instruction which is a mere statement of a general principle that might properly be charged in all cases arising under a statute requiring signals at highway crossings is not erroneous, although no such issue is particularly raised by the pleadings. Harbert *v.* Atlanta, etc., R. Co., 78 S. C. 537, 59 S. E. 644.

27. Instructions held erroneous as charging on the facts see Toledo, etc., R. Co. *v.* Cline, 135 Ill. 41, 25 N. E. 846; Profit *v.* Chicago Great Western R. Co., 91 Mo. App. 369; Riley *v.* Northern Pac. R. Co., 36 Mont. 545, 93 Pac. 948; Edwards *v.* Southern R. Co., 63 S. C. 271, 41 S. E. 458; Texas, etc., R. Co. *v.* Stoker, (Tex. Civ. App. 1907) 103 S. W. 1183; Central Texas, etc., R. Co. *v.* Gibson, 35 Tex. Civ. App. 66, 79 S. W. 351.

Instructions held not erroneous as stating that certain proof is conclusive on the question of negligence see Baltimore, etc., R. Co. *v.* Young, 153 Ind. 163, 54 N. E. 791.

28. Malott *v.* Hawkins, 159 Ind. 127, 63 N. E. 308; Chicago, etc., R. Co. *v.* Turner, 33 Ind. App. 264, 69 N. E. 484; Rietveld *v.* Wabash R. Co., 129 Iowa 249, 105 N. W. 515; New Orleans, etc., R. Co. *v.* Mitchell, 52 Miss. 808; Texas, etc., R. Co. *v.* Huber, 33 Tex. Civ. App. 75, 75 S. W. 547. But see Richmond, etc., R. Co. *v.* Howard, 79 Ga. 44, 3 S. E. 423, holding that the court cannot point out specifically the ways of the prudent.

Instructions held erroneous: Generally. Pittsburgh, etc., R. Co. *v.* Fitzpatrick, 112 Ill. App. 152. For not defining the injured person's duty in approaching the crossing.

heretofore announced,[29] as that they must conform to the evidence,[30] and to the pleadings and issues,[31] and must not be misleading,[32] ignore or omit material

Southern R. Co. *v.* Winchester, 105 S. W. 167, 32 Ky. L. Rep. 19. Thus it is error to charge on defendant's negligence without charging as to the injured party's duty to exercise due care (Chicago, etc., R. Co. *v.* Harwood, 80 Ill. 88), and this error will not be cured by other instructions which do contain such requirement (Chicago, etc., R. Co. *v.* Harwood, *supra*).

Instructions held not erroneous see Petrie *v.* Columbia, etc., R. Co., 29 S. C. 303, 7 S. E. 515, under Gen. St. § 1529. An instruction that if the jury find that the train of defendant was not running on schedule time, they may consider that circumstance in determining whether the deceased had reason to apprehend danger at such time is not erroneous. Wrightsville, etc., R. Co. *v.* Gornto, 129 Ga. 204, 58 S. E. 769.

A refusal to charge on contributory negligence is error where there is evidence tending to show such negligence. Lennon *v.* New York Cent., etc., R. Co., 65 Hun (N. Y.) 578, 20 N. Y. Suppl. 557; Cleveland, etc., R. Co. *v.* Terry, 8 Ohio St. 570; Galveston, etc., R. Co. *v.* Simon, (Tex. Civ. App. 1899) 54 S. W. 309; Houston, etc., R. Co. *v.* Sloan, (Tex. Civ. App. 1895) 32 S. W. 85; Gulf, etc., R. Co. *v.* Hamilton, (Tex. Civ. App. 1894) 28 S. W. 906.

Instructions under Ga. Civ. Code (1895), §§ 2322, 3830 see Wrightsville, etc., R. Co. *v.* Gornto, 129 Ga. 204, 58 S. E. 769 (not erroneous); Atlanta, etc., R. Co. *v.* Gardner, 122 Ga. 82, 49 S. E. 818.

An instruction that gross negligence is the absence of slight care, and if, at the time of a collision, deceased did not exercise slight care to avoid a collision and such negligence contributed to his injury, plaintiff cannot recover, covers the proposition that wilful negligence on the part of deceased will be a defense in an action for wilful failure to give statutory signals at crossings. Osteen *v.* Southern R. Co., 76 S. C. 368, 57 S. E. 196.

29. See *supra*, X, F, 14, h, (I), (II), (III).

Instructions held erroneous: As being abstract and irrelevant. Highland Ave., etc., R. Co. *v.* Sampson, 91 Ala. 560, 8 So. 778. As being too abstruse. Scott *v.* Pennsylvania R. Co., 9 N. Y. Suppl. 189 [*reversed* on other grounds in 130 N. Y. 679, 29 N. E. 289].

Error cured by other instructions see Spillane *v.* Missouri Pac. R. Co., 135 Mo. 414, 37 S. W. 198, 58 Am. St. Rep. 580; Dickson *v.* Missouri Pac. R. Co., 104 Mo. 491, 16 S. W. 381.

30. *Iowa.*— Dalton *v.* Chicago, etc., R. Co., 114 Iowa 257, 86 N. W. 272, held not erroneous.

Kansas.— Wichita, etc., R. Co. *v.* Cook, 7 Kan. App. 599, 52 Pac. 456.

Missouri.— Kenney *v.* Hannibal, etc., R. Co., 105 Mo. 270, 15 S. W. 983, 16 S. W. 837, holding that it is not error to refuse an instruction calling for a finding as to plaintiff's mental condition when he approached the crossing, where there is no evidence of such mental condition.

Montana.— Riley *v.* Northern Pac. R. Co., 36 Mont. 545, 93 Pac. 948.

Pennsylvania.— Bracken *v.* Pennsylvania R. Co., 32 Pa. Super. Ct. 22.

Texas.— International, etc., R. Co. *v.* Dyer, 76 Tex. 156, 13 S. W. 377 (held erroneous); El Paso, etc., R. Co. *v.* Campbell, (Civ. App. 1907) 100 S. W. 170; Galveston, etc., R. Co. *v.* Murray, (Civ. App. 1907) 99 S. W. 144.

Where there is evidence that a watchman invited deceased to cross, and it is sufficient to warrant the conclusion that he was acting upon such invitation when killed, a requested charge that it is wholly immaterial as bearing on defendant's negligence whether the watchman invited him to cross is properly refused. Galveston, etc., R. Co. *v.* Walker, (Tex. Civ. App. 1907) 106 S. W. 705.

31. See Grenell *v.* Michigan Cent R. Co., 124 Mich. 141, 82 N. W. 843 (as to the degree of care required of a boy thirteen years old); Galveston, etc., R. Co. *v.* Fry, 37 Tex. Civ. App. 552, 84 S. W. 664; Gulf, etc., R. Co. *v.* Letsch, (Tex. Civ. App. 1900) 55 S. W. 584 [*affirmed* in (1900) 56 S. W. 1134] (held erroneous). Thus where it is not alleged that the driver was unskilful and the accident resulted therefrom, but only that he was negligent in not driving the horse away from the engine, an instruction for defendant on the ground of unskilfulness is properly refused. St. Louis, etc., R. Co. *v.* Freedman, 18 Tex. Civ. App. 553, 46 S. W. 101.

32. Instructions held misleading: Generally. Toledo, etc., R. Co. *v.* Hammett, 220 Ill. 9, 77 N. E. 72 [*reversing* 115 Ill. App. 268] (as to contributory negligence of a deaf person); Chicago, etc., R. Co. *v.* Coggins, 212 Ill. 369, 72 N. E. 376; Chicago, etc., R. Co. *v.* Eininger, 114 Ill. 79, 29 N. E. 196; Baltimore, etc., R. Co. *v.* Schell, 122 Ill. App. 346; Cincinnati, etc., R. Co. *v.* Taylor, 27 Ohio Cir. Ct. 757 (holding that an instruction that persons crossing, knowing that they are absolutely sure to be injured, assume the risk, is erroneous as liable to mislead the jury to believe that any danger of a less degree, although known, would not make them guilty of contributory negligence). In failing to state the law of contributory negligence fully. Spencer *v.* Illinois Cent. R. Co., 29 Iowa 55. As authorizing the inference that, although plaintiff was guilty of contributory negligence, he could recover if his act was anything less than foolhardy. Hinchman *v.* Pere Marquette R. Co., 136 Mich. 341, 99 N. W. 277, 65 L. R. A. 553.

Instructions held not misleading: Generally. Chicago, etc., R. Co. *v.* Pearson, 184 Ill. 386, 56 N. E. 633 [*affirming* 82 Ill. App. 605]; Chicago, etc., R. Co. *v.* Jamieson, 112 Ill. App. 69; Cleveland, etc., R. Co. *v.* Wuest, 40 Ind.

questions or facts,[33] or invade the province of the jury by charging on the facts which constitute contributory negligence.[34] It is not error to refuse a requested instruction on contributory negligence which is substantially embraced in other instructions given.[35]

(2) Duty to Stop, Look, and Listen. Likewise where such question is in issue the court should specifically instruct the jury as to the injured person's duty in stopping, looking, and listening before crossing, and as to the law applicable thereto.[36] Such instructions must be in conformity with the evi-

App. 693, 82 N. E. 986, 41 Ind. App. 210, 83 N. E. 620 (as to contributory negligence of boy sixteen years old); Cleveland, etc., R. Co. *v.* Schneider, 40 Ind. App. 38, 80 N. E. 985; Cleveland, etc., R. Co. *v.* Penketh, 27 Ind. App. 210, 60 N. E. 1095; Gulf, etc., R. Co. *v.* Box, 81 Tex. 670, 17 S. W. 375. As leading to the application of the doctrine of comparative negligence. Texas, etc., R. Co. *v.* Carr, (Tex. Civ. App. 1897, 42 S. W. 126. Under Ga. Civ. Code (1895), §§ 2322, 3830. Atlanta, etc., R. Co. *v.* Gardner, 122 Ga. 82, 49 S. E. 818.

Instructions held not erroneous as limiting the inquiry to the precise moment when the person injured was struck by the train and not taking into consideration his approach to the crossing see Chicago, etc., R. Co. *v.* Corson, 198 Ill. 98, 64 N. E. 739 [*affirming* 101 Ill. App. 115]; Cleveland, etc., R. Co. *v.* Keenan, 190 Ill. 217, 60 N. E. 107 [*affirming* 92 Ill. App. 430]; McNulta *v.* Lockridge, 137 Ill. 270, 27 N. E. 452, 31 Am. St. Rep. 362 [*affirming* 32 Ill. App. 86]. But see Peoria, etc., R. Co. *v.* Herman, 39 Ill. App. 287.

33. See Chicago, etc., R. Co. *v.* Clough, 134 Ill. 586, 25 N. E. 664, 29 N. E. 184; Chicago, etc., R. Co. *v.* Gallion, 39 Ind. App. 604, 80 N. E. 547; Missouri, etc., R. Co. *v.* Oslin, (Tex. Civ. App. 1901) 63 S. W. 1039; St. Louis Southwestern R. Co. *v.* Mitchell, 25 Tex. Civ. App. 197, 60 S. W. 891; Southern R. Co. *v.* Hansbrough, 107 Va. 733, 60 S. E. 58; Southern R. Co. *v.* Stockdon, 106 Va. 693, 56 S. E. 713.

34. *Illinois.*— Pittsburgh, etc., R. Co. *v.* Banfill, 206 Ill. 553, 69 N. E. 499 [*affirming* 107 Ill. App. 254]; Pennsylvania Co. *v.* Frana, 112 Ill. 398; Chicago, etc., R. Co. *v.* Burton, 53 Ill. App. 69; Chicago, etc., R. Co. *v.* Mueller, 44 Ill. App. 461; Chicago, etc., R. Co. *v.* Tilton, 26 Ill. App. 362; Garland *v.* Chicago, etc., R. Co., 8 Ill. App. 571.

Indiana.— Chicago, etc., R. Co. *v.* Gallion, 39 Ind. App. 604, 80 N. E. 547; Lake Shore, etc., R. Co. *v.* Anthony, 12 Ind. App. 126, 38 N. E. 831.

New York.— Palmer *v.* New York Cent., etc., R. Co., 5 N. Y. St. 436. *Compare* McPhillips *v.* New York, etc., R. Co., 13 N. Y. Suppl. 917 [*affirmed* in 14 N. Y. Suppl. 928], holding that contributory negligence upon a conceded or supposed state of facts is a question of law for the court.

North Carolina.— Hinkle *v.* Richmond, etc., R. Co., 109 N. C. 472, 13 S. E. 884, 26 Am. St. Rep. 581.

South Carolina.— Petrie *v.* Columbia, etc., R. Co., 29 S. C. 303, 7 S. E. 515.

Texas.— Calhoun *v.* Gulf, etc., R. Co., 84 Tex. 226, 19 S. W. 341; International, etc., R. Co. *v.* Dyer, 76 Tex. 156, 13 S. W. 377; Galveston, etc., R. Co. *v.* Porfert, 72 Tex. 344, 10 S. W. 207; Missouri, etc., R. Co. *v.* Sisson, (Civ. App. 1905) 92 S. W. 271, (Civ. App. 1905) 88 S. W. 371; Texas, etc., R. Co. *v.* Kirby, 1 Tex. App. Cas. § 564.

Wisconsin.—Abbot *v.* Dwinnell, 74 Wis. 519, 43 N. W. 496.

See 41 Cent. Dig. tit. "Railroads," §§ 1194, 1204.

Instructions held erroneous or properly refused see Chicago, etc., R. Co. *v.* Pollock, 195 Ill. 156, 62 N. E. 831 [*affirming* 93 Ill. App. 483]; Illinois Cent. R. Co. *v.* Griffin, 184 Ill. 9, 56 N. E. 337 [*affirming* 84 Ill. App. 152]; St. Louis, etc., R. Co. *v.* Pflugmacher, 9 Ill. App. 300; Louisville, etc., R. Co. *v.* Clark, 49 S. W. 323, 20 Ky. L. Rep. 1375; Geist *v.* Missouri Pac. R. Co., 62 Nebr. 309, 87 N. W. 43; De Loge *v.* New York Cent., etc., R. Co., 92 Hun (N. Y.) 149, 36 N. Y. Suppl. 697 [*affirmed* in 157 N. Y. 688, 51 N. E. 1090]; Edwards *v.* Southern R. Co., 63 S. C. 271, 41 S. E. 458; Missouri, etc., R. Co. *v.* Taff, 31 Tex. Civ. App. 657, 74 S. W. 89; St. Louis, etc., R. Co. *v.* Gill, (Tex. Civ. App. 1900) 55 S. W. 386; Riviere *v.* Missouri, etc., R. Co., (Tex. Civ. App. 1897) 40 S. W. 1074.

Instructions held not erroneous see Missouri, etc., R. Co. *v.* Oslin, 26 Tex. Civ. App. 370, 63 S. W. 1039; Bower *v.* Chicago, etc., R. Co., 61 Wis. 457, 21 N. W. 536.

35. *Arkansas.*— St. Louis, etc., R. Co. *v.* Dillard, 78 Ark. 520, 94 S. W. 617.

Iowa.—Selensky *v.* Chicago Great Western R. Co., 120 Iowa 113, 94 N. W. 272; Andrews *v.* Mason City, etc., R. Co., 77 Iowa 669, 42 N. W. 513.

Kentucky.—Chesapeake, etc., R. Co. *v.* Wilson, 102 S. W. 810, 31 Ky. L. Rep. 500.

Missouri.— Erickson *v.* Kansas City, etc., R. Co., 171 Mo. 647, 71 S. W. 1022.

New York.— Puff *v.* Lehigh Valley R. Co., 71 Hun 577, 24 N. Y. Suppl. 1068; Scott *v.* Pennsylvania R. Co., 9 N. Y. Suppl. 189 [*reversed* on other grounds in 130 N. Y. 679, 29 N. E. 289].

North Carolina.— Mayes *v.* Southern R. Co., 119 N. C. 758, 26 S. E. 148.

Texas.— St. Louis Southwestern R. Co. *v.* Elledge, (Civ. App. 1906) 93 S. W. 499, holding this to be true where in addition the requested instruction is not strictly correct.

Wisconsin.— Hughes *v.* Chicago, etc., R. Co., 126 Wis. 525, 106 N. W. 526.

See 41 Cent. Dig. tit. "Railroads," § 1204.

36. See Union R. Co. *v.* State, 72 Md. 153, 19 Atl. 449 (holding that defendant is en-

dence,[37] and with the pleadings and issues;[38] must not be contradictory;[39] and must not limit the inquiry to the precise moment of time when the injury occurred,[40] nor be otherwise misleading;[41] nor should they comment on the evidence,[42] or give undue prominence to particular facts,[43] nor ignore material elements;[44] nor should they invade the province of the jury by assuming certain acts of negligence as

titled to have the facts relied on specifically referred to); New York, etc., R. Co. *v.* Swartout, 14 Ohio Cir. Ct. 582, 6 Ohio Cir. Dec. 768; Grand Trunk R. Co. *v.* Cobleigh, 78 Fed. 784, 24 C. C. A. 342 (holding that defendant is entitled to have the jury specifically instructed as to the duty of plaintiff under the circumstances to look and listen for a train before attempting to cross the track, especially when plaintiff's own testimony suggests that he may have been negligent in this respect; and that a general charge that plaintiff was bound to act as a prudent man would do under the circumstances, leaving it for the jury to fix the standard of prudence is not sufficient). But see Richmond, etc., R. Co. *v.* Howard, 79 Ga. 44, 3 S. E. 426, holding that it is not incumbent upon the court to instruct the jury that it is the duty of one who attempts or intends to cross to use his senses of hearing and seeing before stepping on the track.

Instruction held erroneous: As acquitting plaintiff of negligence in failing to look and listen until the danger is past, instead of charging him with such negligence and leaving it for the jury to determine whether there were sufficient facts and circumstances to relieve a reasonably prudent person of such a sense of precaution. St. Louis, etc., R. Co. *v.* Hitt, 76 Ark. 227, 88 S. W. 908, 990. As being argumentative. Riley *v.* Northern Pac. R. Co., 36 Mont. 545, 93 Pac. 948.

Instructions held not erroneous see Illinois Cent. R. Co. *v.* Bethea, 88 Miss. 119, 40 So. 813; Missouri, etc., R. Co. *v.* Ferris, 23 Tex. Civ. App. 215, 55 S. W. 1119; Rangeley *v.* Southern R. Co., 95 Va. 715, 30 S. E. 386.

Omission as to direction.—An instruction which states that it is the duty of a person at a railroad crossing to look and listen for approaching trains is not erroneous because of the omission to state the direction in which such person is required to look, especially where a more specific instruction is not asked by the complaining party. Union Pac. R. Co. *v.* Connolly, 77 Nebr. 254, 109 N. W. 368.

Where the question of contributory negligence depends upon a variety of circumstances from which different minds may arrive at different conclusions, an instruction should have special reference to all the circumstances of the case, and the charge should distinctly point out what failure of the injured person in the duty of looking out for the train would render him *prima facie* guilty of such negligence as would prevent a recovery for an injury occasioned by the mere negligence or unskilfulness of the railroad employees, not amounting to wilfulness on their part. Chicago, etc., R. Co. *v.* Dammrell, 81 Ill. 450; Bellefontaine R. Co. *v.* Snyder, 24 Ohio St. 670; Baltimore, etc., R. Co. *v.* Whittaker, 24 Ohio St. 642; Cleveland, etc., R. Co. *v.* Crawford, 24 Ohio St. 631, 15 Am. Rep. 633; Pittsburg, etc., R. Co. *v.* Krickbaum, 24 Ohio St. 119.

37. **Instructions held erroneous** as not being in conformity with the evidence see Pennsylvania Co. *v.* Marshall, 119 Ill. 399, 10 N. E. 220; Chicago, etc., R. Co. *v.* Halsey, 31 Ill. App. 601; Fedjowske *v.* Delaware, etc., Canal Co., 168 N. Y. 500, 61 N. E. 888 [*reversing* 64 N. Y. Suppl. 1135]; Tucker *v.* New York Cent., etc., R. Co., 11 N. Y. Suppl. 692 [*reversed* on other grounds in 124 N. Y. 308, 26 N. E. 916, 21 Am. St. Rep. 670]; Southern R. Co. *v.* Aldridge, 101 Va. 142, 43 S. E. 333; Texas, etc., R. Co. *v.* Gentry, 163 U. S. 353, 16 S. Ct. 1104, 41 L. ed. 186.

38. International, etc., R. Co. *v.* Ives, 31 Tex. Civ. App. 272, 71 S. W. 772, instruction properly refused.

39. Southern R. Co. *v.* Hansbrough, 107 Va. 733, 60 S. E. 58.

40. McNulta *v.* Lockridge, 137 Ill. 270, 27 N. E. 452, 31 Am. St. Rep. 362; Chicago, etc., R. Co. *v.* Halsey, 133 Ill. 248, 23 N. E. 1028.

41. **Instructions held misleading** see Lake Shore, etc., R. Co. *v.* Gaffney, 9 Ohio Cir. Ct. 32, 6 Ohio Cir. Dec. 94; Carraway *v.* Houston, etc., R. Co., 31 Tex. Civ. App. 184, 71 S. W. 769; Southern R. Co. *v.* Hansbrough, 107 Va. 733, 60 S. E. 58; Norfolk, etc., R. Co. *v.* Burge, 84 Va. 63, 64 S. E. 21; Abbot *v.* Dwinnell, 74 Wis. 514, 43 N. W. 496.

Instructions held not misleading see Guggenheim *v.* Lake Shore, etc., R. Co., 66 Mich. 150, 33 N. W. 161; Gulf, etc., R. Co. *v.* Melville, (Tex. Civ. App. 1905) 87 S. W. 863.

42. Steele *v.* Northern Pac. R. Co., 21 Wash. 287, 57 Pac. 820.

43. St. Louis, etc., R. Co. *v.* Hitt, 76 Ark. 227, 88 S. W. 908, 990 (not erroneous); Norton *v.* North Carolina R. Co., 122 N. C. 910, 29 S. E. 886; Sherwin *v.* Rutland R. Co., 74 Vt. 1, 51 Atl. 1089; Boyden *v.* Fitchburg R. Co., 72 Vt. 89, 47 Atl. 409; Rio Grande Western R. Co. *v.* Leak, 163 U. S. 280, 16 S. Ct. 1020, 41 L. ed. 160 (holding that it is not error to refuse an instruction which singles out particular circumstances and omits all reference to others of importance).

44. Denver, etc., R. Co. *v.* Gustafson, 21 Colo. 393, 41 Pac. 505; Baltimore, etc., R. Co. *v.* Stumpf, 97 Md. 78, 54 Atl. 978; Texas Cent., etc., R. Co. *v.* Gibson, (Tex. Civ. App. 1904) 83 S. W. 862; St. Louis Southwestern R. Co. *v.* Stonecypher, 25 Tex. Civ. App. 569, 63 S. W. 946; Chesapeake, etc., R. Co. *v.* Steele, 84 Fed. 93, 29 C. C. A. 81. See Atchison, etc., R. Co. *v.* Baker, (Okla. 1908) 95 Pac. 433 [*reversing* (Indian Terr. 1907) 104 S. W. 1182]. *Compare* Missouri, etc., R. Co. *v.* Ferris, 23 Tex. Civ. App. 215, 55 S. W. 1119.

proved, thereby withdrawing such question from the jury.[45] A defective instruction may be cured by other instructions given,[46] and it is not error for the court to refuse to charge further on a question that is fully covered by other instructions given.[47] But it is error to refuse an instruction properly stating the law applicable to the facts in the case and not covered by instructions given,[48] or to improperly qualify such a requested instruction.[49]

(F) *Proximate Cause of Injury.* The principles announced above[50] also apply to instructions on the issue of the proximate cause of the injury.[51]

i. Verdict, Findings, and Judgment. Questions as to the verdict, findings, and judgment in an action for injuries at railroad crossings are governed by the rules applicable in civil cases generally.[52] Thus the verdict or findings in such

45. *Illinois.*— Chicago, etc., R. Co. *v.* Pollock, 195 Ill. 156, 62 N. E. 831 [*affirming* 93 Ill. App. 483]; Chicago, etc., R. Co. *v.* Mueller, 44 Ill. App. 461; Garland *v.* Chicago, etc., R. Co., 8 Ill. App. 571.

Indiana.— Lake Shore, etc., R. Co. *v.* Anthony, 12 Ind. App. 126, 38 N. E. 831.

Kentucky.— Chesapeake, etc., R. Co. *v.* Gunter, 108 Ky. 362, 56 S. W. 527, 21 Ky. L. Rep. 1803.

Maryland.— Western Maryland R. Co. *v.* Kehoe, 86 Md. 43, 37 Atl. 799.

New York.— Noakes *v.* New York Cent., etc., R. Co., 121 N. Y. App. Div. 716, 106 N. Y. Suppl. 522 (negligence of passenger in an automobile); Palmer *v.* New York Cent., etc., R. Co., 5 N. Y. St. 436 [*affirmed* in 112 N. Y. 234, 19 N. E. 678].

North Carolina.— Hinkle *v.* Richmond, etc., R. Co., 109 N. C. 472, 13 S. E. 884, 26 Am. St. Rep. 581.

Texas.— Missouri, etc., R. Co. *v.* Rogers, 91 Tex. 52, 40 S. W. 956 [*reversing* (Civ. App. 1897) 40 S. W. 849]; Carraway *v.* Houston, etc., R. Co., 31 Tex. Civ. App. 184, 71 S. W. 769; Galveston, etc., R. Co. *v.* Harris, 22 Tex. Civ. App. 16, 53 S. W. 599.

See 41 Cent. Dig. tit. "Railroads," §§ 1194, 1208.

46. Cleveland, etc., R. Co. *v.* Penketh, 27 Ind. App. 210, 60 N. E. 1095; Guggenheim *v.* Lake Shore, etc., R. So., 66 Mich. 150, 33 N. W. 161; Cooper *v.* North Carolina R. Co., 140 N. C. 209, 52 S. E. 932, erroneous instruction not cured.

47. Weber *v.* New York Cent., etc., R. Co., 67 N. Y. 587; Manley *v.* New York Cent., etc., R. Co., 39 N. Y. App. Div. 144, 57 N. Y. Suppl. 182; International, etc., R. Co. *v.* Dyer, 76 Tex. 156, 13 S. W. 377; St. Louis Southwestern R. Co. *v.* Stonecypher, 25 Tex. Civ. App. 569, 63 S. W. 946; Peck *v.* Oregon Short Line R., 25 Utah 21, 69 Pac. 153; Olsen *v.* Oregon Short-Line R. Co., 9 Utah 129, 33 Pac. 623; Rio Grande Western R. Co. *v.* Leak, 163 U. S. 280, 16 S. Ct. 1020, 41 L. ed. 160; Delaware, etc., R. Co. *v.* Devore, 122 Fed. 791, 58 C. C. A. 543; Texas, etc., R. Co. *v.* Cody, 67 Fed. 71, 14 C. C. A. 310.

A refusal to give a specific instruction correctly and clearly applying the law to the facts of the case, even though the law is in a general way covered by the charge given, is error unless it appears that no prejudice resulted from the refusal. St. Louis, etc., R. Co. *v.* Crabtree, 69 Ark. 134, 62 S. W. 64; St. Louis, etc., R. Co. *v.* Spearman, 64 Ark. 332, 42 S. W. 406; Union R. Co. *v.* State, 72 Md. 153, 19 Atl. 449.

48. St. Louis, etc., R. Co. *v.* Brock, 64 Kan. 90, 67 Pac. 538; Wichita, etc., R. Co. *v.* Cook, 7 Kan. App. 599, 52 Pac. 456; Hewett *v.* New York Cent. R. Co., 3 Lans. (N. Y.) 83.

49. Hewett *v.* New York Cent. R. Co., 3 Lans. (N. Y.) 83.

50. See *supra*, X, F, 14, h, (I), (II), (III).

51. Instructions held erroneous or properly refused: Generally. Logan *v.* Lake Shore, etc., R. Co., 148 Mich. 603, 112 N. W. 506. As not being sufficiently clear, as not showing that defendant's negligence must have been the proximate cause of the injury. Texas, etc., R. Co. *v.* Scrivener, (Tex. Civ. App. 1899) 49 S. W. 649. As being misleading. Elgin, etc., R. Co. *v.* Duffy, 191 Ill. 489, 61 N. E. 432 [*affirming* 93 Ill. App. 463]. As ignoring certain conditions, and proceeding on the wrong theory of inevitable accident. Lake Shore, etc., R. Co. *v.* Anthony, 12 Ill. App. 126, 38 N. E. 831. As invading the province of the jury. Carraher *v.* San Francisco Bridge Co., 81 Cal. 98, 22 Pac. 480. As being without any facts to which it is applicable. Louisville, etc., R. Co. *v.* Howard, 90 Tenn. 144, 19 S. W. 116.

Instructions held not erroneous: Generally. Illinois Cent. R. Co. *v.* Bethea, 88 Miss. 119, 40 So. 813; Murray *v.* Missouri Pac. R. Co., 101 Mo. 236, 13 S. W. 817, 20 Am. St. Rep. 601. As not suggesting a hypothetical case. Kaminitsky *v.* Northeastern R. Co., 25 S. C. 53. As not assuming certain facts. Galveston, etc., R. Co. *v.* Kief, (Tex. Civ. App. 1900) 58 S. W. 625.

Error cured.—A failure to instruct as to defendant's negligence being the proximate cause of the injury is cured by instructing that to entitle him to recover the jury must find that defendant was negligent; that such negligence caused plaintiff's injury; and that plaintiff was not negligent. Pittsburgh, etc., R. Co. *v.* Carlson, 24 Ind. App. 559, 56 N. E. 251.

Where there is evidence of negligence on both sides, it is not error to instruct the jury to consider whether the failure to give the statutory signals was the cause of the accident, although the person injured saw the approaching train. Osteen *v.* Southern R. Co., 76 S. C. 368, 57 S. E. 196.

52. Judgments generally see JUDGMENTS, 23 Cyc. 623.

an action must be specific and certain,[53] must find facts and not conclusions,[54] must be pertinent to the issues,[55] and must find all the facts essential to a recovery or as grounds of defense.[56] Where the special findings are inconsistent and in irreconcilable conflict with the general verdict, the former control, and judgment should be entered on the special findings notwithstanding the general verdict.[57] A judgment cannot be entered upon special findings inconsistent with each other.[58]

j. Appeal and Error. Questions of appeal and error in actions for injuries at crossings are governed by the rules applicable in other civil cases.[59] If

Verdict and findings generally see TRIAL.

Special interrogatories.— In an action for the death of a traveler while crossing an electric railroad in which plaintiff pleaded gross negligence see Wilson *v.* Chippewa Valley Electric R. Co., (Wis. 1908) 114 N. W. 462, 115 N. W. 330. It is not error to refuse to submit interrogatories substantially included in other interrogatories already submitted. Schroeder *v.* Wisconsin Cent. R. Co., 117 Wis. 33, 93 N. W. 837. Nor is it error to refuse to submit an interrogatory which presents no issue. Schroeder *v.* Wisconsin Cent. R. Co., *supra*.

Answers to interrogatories in an action against a railroad company and a street railroad company for injuries caused by their concurrent negligence held not to show that the negligence of each defendant in approaching the crossing was not a proximate cause of the injury see Indianapolis Union R. Co. *v.* Waddington, 169 Ind. 448, 82 N. E. 1030.

53. See Kansas Pac. R. Co. *v.* Pointer, 14 Kan. 37, holding, however, that where the jury find that defendant was guilty of gross negligence immediately causing the injury, and that plaintiff was guilty of negligence contributing to the injury but without specifying what degree of negligence or whether proximately or remotely contributory, and it is apparent from the other findings and the instructions of the court that the jury intended to find that plaintiff was guilty of only such slight negligence as would not defeat his right to recover, a verdict in favor of plaintiff will not be set aside.

54. See Missouri, etc., R. Co. *v.* Bussey, 66 Kan. 735, 71 Pac. 261.

55. See Evansville, etc., R. Co. *v.* Taft, 2 Ind. App. 237, 38 N. E. 443.

56. See Slaats *v.* Chicago Great Western R. Co., 110 Iowa 202, 81 N. W. 457; Missouri, etc., R. Co. *v.* Bussey, 66 Kan. 735, 71 Pac. 261; Nettersheim *v.* Chicago, etc., R. Co., 58 Minn. 10, 59 N. W. 632; Hughes *v.* Chicago, etc., R. Co., 122 Wis. 258, 99 N. W. 897.

A general verdict in favor of a person injured in a collision with a train at a street crossing is a finding that such person exercised ordinary care. Lowden *v.* Pennsylvania Co., 41 Ind. App. 614, 82 N. E. 941.

57. Special findings held to be inconsistent with the general verdict see Morford *v.* Chicago, etc., R. Co., 158 Ind. 494, 63 N. E. 857 (under Burns Rev. St. (1901) § 556); Chicago, etc., R. Co. *v.* Hedges, 118 Ind. 5, 20 N. E. 530; Lake Erie, etc., R. Co. *v.* Graver, 23 Ind. App. 678, 55 N. E. 968; Missouri, etc., R. Co. *v.* Bussey, 66 Kan. 735, 71 Pac. 261.

Special findings held not inconsistent with the general verdict see Lake Shore, etc., R. Co. *v.* Johnsen, 135 Ill. 641, 26 N. E. 510; Dimick *v.* Chicago, etc., R. Co., 80 Ill. 338; Chicago, etc., R. Co. *v.* Thomas, (Ind. 1900) 55 N. E. 861; Louisville, etc., R. Co. *v.* Schmidt, 134 Ind. 16, 33 N. E. 774; Toledo, etc., R. Co. *v.* Adams, 131 Ind. 38, 30 N. E. 794; Lowden *v.* Pennsylvania Co., 41 Ind. App. 614, 82 N. E. 941; Wendel *v.* Cleveland, etc., R. Co., 41 Ind. App. 460, 82 N. E. 469; Lake Erie, etc., R. Co. *v.* Graver, 23 Ind. App. 678, 55 N. E. 968; Schulte *v.* Chicago, etc., R. Co., 114 Iowa 89, 86 N. W. 63; Mercer *v.* Walker, (Kan. App. 1899) 58 Pac. 27. A general verdict finding that plaintiff exercised due care is not overcome by answers to interrogatories showing that he could have discovered the danger in time to avoid it had he looked in a certain direction at a certain time, since the facts specially returned do not exclude the existence of circumstances warranting the conclusion that he exercised due care. Baltimore, etc., R. Co. *v.* Rosborough, 40 Ind. App. 14, 80 N. E. 869. So a general verdict for injuries caused by a failure to give the statutory signals is not overcome by special findings that plaintiff did not look or listen before reaching an opening in a hedge extending alongside of the highway, and that before reaching such opening there was a point where plaintiff could have known of the train if she had looked and listened. Case *v.* Chicago, etc., R. Co., 100 Iowa 487, 69 N. W. 538.

Where the answers to interrogatories are merely contradictory or not conclusive the general verdict will stand. Chicago, etc., R. Co. *v.* Spilker, 134 Ind. 380, 33 N. E. 280, 34 N. E. 218.

58. See Haas *v.* Chicago, etc., R. Co., 41 Wis. 44. *Compare* Atchison, etc., R. Co. *v.* Moore, 10 Kan. App. 510, 63 Pac. 458.

Findings held not inconsistent with each other see Hahn *v.* Chicago, etc., R. Co., 78 Wis. 396, 47 N. W. 620.

59. See Swift *v.* Staten Island Rapid Transit Co., 17 N. Y. Suppl. 654 [*affirmed* in 135 N. Y. 650, 32 N. E. 647]. And see, generally, APPEAL AND ERROR, 2 Cyc. 474.

Where the record presents no error of law, findings of fact will not be reviewed on appeal. Dundon *v.* New York, etc., R. Co., 67 Conn. 266, 34 Atl. 1041; Pomponio *v.* New York, etc., R. Co., 66 Conn. 528, 34 Atl. 491, 50 Am. St. Rep. 124, 32 L. R. A. 530. And see, generally, APPEAL AND ERROR, 3 Cyc. 345 *et seq.*

Objections not raised in the lower court cannot be made for the first time on appeal.

there is sufficient evidence to support a verdict or finding, although the evidence is conflicting, the verdict or finding will not be disturbed on appeal,[60] although it is otherwise where the verdict or finding is clearly contrary to the weight of evidence,[61] and is manifestly against right and justice.[62] Nor will a verdict or judgment be reversed or set aside for a harmless error.[63]

Louisville, etc., R. Co. *v.* Patchen, 167 Ill. 204, 613, 47 N. W. 368, 167 Ill. 613, 48 N. E. 828; Steel *v.* Chicago, etc., R. Co., 107 Mich. 516, 65 N. W. 573.

Parties are concluded by their own instructions whether abstractly correct or not. Jenning *v.* St. Louis, etc., R. Co., 99 Mo. 394, 11 S. W. 999.

Where two causes of action have been set up in the petition, a verdict and judgment for plaintiff will be set aside where one of such causes of action is not within the application of the statute under which the action is brought and the record on appeal fails to state on which ground the finding is based. Crumpley *v.* Hannibal, etc., R. Co., 98 Mo. 34, 11 S. W. 244.

Where contradictory instructions on a material point have been given the verdict should be set aside. Southern R. Co. *v.* Hansbrough, 107 Va. 733, 60 S. E. 58.

60. Verdict and findings not disturbed as being supported by the evidence see the following cases:

California.— Carraher *v.* San Francisco Bridge Co., 100 Cal. 177, 34 Pac. 828.

Georgia.— Savannah, etc., R. Co. *v.* Bryan, 94 Ga. 632, 21 S. E. 57.

Illinois.— Chicago, etc., R. Co. *v.* Adler, 129 Ill. 335, 21 N. E. 846 [*affirming* 28 Ill. App. 102].

Indiana.— Pennsylvania Co. *v.* Fertig, 34 Ind. App. 459, 70 N. E. 834.

New York.— Hoffman *v.* Fitchburg R. Co., 84 Hun 144, 32 N. Y. Suppl. 437 [*affirmed* in 155 N. Y. 636, 49 N. E. 1098]; McPhillips *v.* New York, etc., R. Co., 14 N. Y. Suppl. 928 [*affirming* 13 N. Y. Suppl. 917]; Anderson *v.* New York, etc., R. Co., 6 N. Y. Suppl. 182 [*affirmed* in 125 N. Y. 701, 26 N. E. 752].

Texas.— Houston, etc, R. Co. *v.* Stewart, (1891) 17 S. W. 33.

Utah.— Smith *v.* Rio Grande Western R. Co., 9 Utah 141, 33 Pac. 626.

United States.— Delaware, etc., R. Co. *v.* Converse, 139 U. S. 469, 11 S. Ct. 569, 35 L. ed. 213.

England.— Gray *v.* North Eastern R. Co., 48 L. T. Rep. N. S. 904.

Canada.— Grand Trunk R. Co. *v.* Beckett, 16 Can. Sup. Ct. 713; Grand Trunk R. Co. *v.* Rosenberger, 9 Can. Sup. Ct. 311 [*affirming* 8 Ont. App. 482]; Wright *v.* Grand Trunk R. Co., 12 Ont. L. Rep. 114, 7 Ont. Wkly. Rep. 636; Peart *v.* Grand Trunk R. Co., 10 Ont. L. Rep. 753; Wilton *v.* Northern R. Co., 5 Ont. 490.

See 41 Cent. Dig. tit. "Railroads," § 1218.

Sufficiency of evidence.— The expression that "the verdict on appeal cannot be disturbed . when the evidence tends to support it" was never intended to hold that less than sufficient legal evidence to establish the issues, or the truth of the verdict or finding, would suffice, excluding from consideration all evidence conflicting therewith. If the evidence, besides merely tending to support the verdict, be such that if every fact proved, and every fact which could be logically and reasonably deduced therefrom, were admitted to be true and these facts embraced every fact essential to the existence and truth of the verdict, then and not until then is the evidence sufficient to support the verdict no matter how great the contradictions of evidence. Cleveland, etc., R. Co. *v.* Wynant, 134 Ind. 681, 34 N. E. 569.

Proof that a child ten years old failed to stop and look when between two tracks is not sufficient to overthrow a general verdict for plaintiff suing for his death. Baltimore, etc., R. Co. *v.* Hickman, 40 Ind. App. 315, 81 N. E. 1086.

61. See Green *v.* Los Angeles Terminal R. Co., (Cal. 1902) 69 Pac. 694, holding that to set aside a finding that there was no contributory negligence such negligence must affirmatively appear as a conclusion of law from the undisputed facts.

Verdicts or findings set aside as being contrary to the weight of the evidence see Chicago, etc., R. Co. *v.* Gretzner, 46 Ill. 74; Louisville, etc., R. Co. *v.* Daniel, 104 S. W. 344, 31 Ky. L. Rep. 944; Hintz *v.* Michigan Cent. R. Co., 132 Mich. 305, 93 N. W. 634; Meinrenken *v.* New York Cent., etc., R. Co., 81 N. Y. App. Div. 132, 80 N. Y. Suppl. 1074; Martin *v.* New York Cent., etc., R. Co., 30 Misc. (N. Y.) 691, 64 N. Y. Suppl. 364 [*affirmed* in 53 N. Y. App. Div. 650, 66 N. Y. Suppl. 1137]; Schooler *v.* New York Cent., etc., R. Co., 80 N. Y. Suppl. 800; Sims *v.* Grand Trunk R. Co., 12 Ont. L. Rep. 39, 7 Ont. Wkly. Rep. 648.

62. Chicago, etc., R. Co. *v.* Gretzner, 46 Ill. 74; Smith *v.* Rio Grande Western R. Co., 9 Utah 141, 33 Pac. 626.

63. Atchison, etc., R. Co. *v.* Shaw, 56 Kan. 519, 43 Pac. 1129 (holding that, where it is clear that the injury was caused by negligence in the management of the engines and cars and that testimony with reference to the absence of gates did not influence the jury, the verdict will not be set aside because of the failure of plaintiff to allege in her petition the failure to maintain gates as a ground of negligence); Henning *v.* Caldwell, 18 N. Y. Suppl. 339 [*affirmed* in 137 N. Y. 553, 33 N. E. 337]; Halsey *v.* Rome, etc., R. Co., 12 N. Y. St. 319.

Error in instructions held harmless: Generally. Donaldson *v.* Mississippi, etc., R. Co., 18 Iowa 280, 87 Am. Dec. 391; Illinois Cent. R. Co. *v.* Coley, 121 Ky. 385, 89 S. W. 234, 28 Ky. L. Rep. 336, 1 L. R. A. N. S. 370; Titcomb *v.* Fitchburg R. Co., 12 Allen (Mass.)

G. Injuries to Persons on Highways or Private Premises Near Tracks*—1. In General.[84] The mere fact that a railroad is constructed and operated on or in close proximity to a street or highway, although it may render the use of the highway less safe, does not of itself constitute negligence on the part of the company;[65] and if the railroad company operates its road in a lawful manner without negligence or malice, it is not responsible for resulting injuries.[66] Where the railroad is situated upon or along a public street or highway, the public has the right to use the street as well as the railroad company, and the rights of each therein must be exercised with due regard to the rights of the other.[67] A person upon such a street or highway is not a trespasser or mere licensee;[68] and it is the duty of the railroad company in such a case to exercise reasonable care

254; Gratiot *v.* Missouri Pac. R. Co., (Mo. 1891) 16 S. W. 384; Missouri Pac. R. Co. *v.* Geist, 49 Nebr. 489, 68 N. W. 640; Smith *v.* Southern R. Co., 53 S. C. 121, 30 S. E. 697; Missouri Pac. R. Co. *v.* Peay, 7 Tex. Civ. App. 400, 20 S. W. 768. As to the giving of signals from a train. East Tennessee, etc., R. Co. *v.* Deaver, 79 Ala. 216; Atchison, etc., R. Co. *v.* Walz, 40 Kan. 433, 19 Pac. 787; Illinois Cent. R. Co. *v.* Coley, 121 Ky. 385, 89 S. W. 234, 28 Ky. L. Rep. 336, 1 L. R. A. N. S. 370; Kentucky Cent. R. Co. *v.* Smith, 93 Ky. 449, 20 S. W. 392, 14 Ky. L. Rep. 455, 18 L. R. A. 63; Rupard *v.* Chesapeake, etc., R. Co., 88 Ky. 280, 11 S. W. 70, 10 Ky. L. Rep. 1023, 7 L. R. A. 316; Loucks *v.* Chicago, etc., R. Co., 31 Minn. 526, 18 N. W. 651; Kenney *v.* Hannibal, etc., R. Co., 105 Mo. 270, 15 S. W. 983, 16 S. W. 837; Lewis *v.* New York, etc., R. Co., 123 N. Y. 496, 26 N. E. 357 [*affirming* 5 N. Y. Suppl. 313]; Gulf, etc., R. Co. *v.* Anderson, 76 Tex. 244, 13 S. W. 196. As to defects or obstructions at crossings. Missouri, etc., R. Co. *v.* Connelly, 14 Tex. Civ. App. 529, 39 S. W. 145. As to the degree of care required of a boy while crossing a railroad. Spillane *v.* Missouri Pac. R. Co., 135 Mo. 414, 37 S. W. 198, 58 Am. St. Rep. 580.

Errors in admission of evidence held harmless: Generally. Chicago, etc., R. Co. *v.* Thomas, (Ind. 1900) 55 N. E. 861; Illinois Cent. R. Co. *v.* Bethea, 88 Miss. 119, 40 So. 813. As to the custom of persons to cross the tracks at the place of the accident. International, etc., R. Co. *v.* Tabor, 12 Tex. Civ. App. 283, 33 S. W. 894. As to who traveled the crossing, its character, the character of other crossings on the same road, and as to the company working the crossing. Mack *v.* South Bound R. Co., 52 S. C. 323, 29 S. E. 905, 68 Am. St. Rep. 913, 40 L. R. A. 679. As to the construction and maintenance of the crossing. Illinois Cent. R. Co. *v.* Ashline, 171 Ill. 313, 49 N. E. 521; Hinkle *v.* Richmond, etc., R. Co., 109 N. C. 472, 13 S. E. 884, 26 Am. St. Rep. 581. As to signals from trains. Dolph *v.* New York, etc., R. Co., 74 Conn. 538, 51 Atl. 525; Illinois Cent. R. Co. *v.* Ashline, 171 Ill. 313, 49 N. E. 521; Willfong *v.* Omaha, etc., R. Co., 116 Iowa 548, 90 N. W. 358; Holland *v.* Oregon Short Line R. Co., 26 Utah 209, 72 Pac. 940; Heddles *v.* Chicago, etc., R. Co., 77 Wis. 228, 46 N. W. 115, 20 Am. St. Rep. 106. As to signals by flagman. Chicago, etc., R. Co. *v.* Clough, 134 Ill. 586, 25 N. E. 664, 29 N. E. 184; Quill *v.* New York Cent., etc., R. Co., 16 Daly (N. Y.) 313, 11 N. Y. Suppl. 80 [*affirmed* in 126 N. Y. 629, 27 N. E. 410]. Thus it has been held that defendant was not prejudiced by evidence that there was no flagman at the crossing, where the jury was not instructed in regard thereto, and the crossing was one which in fact required a flagman. Chesapeake, etc., R. Co. *v.* Dixon, 104 Ky. 608, 47 S. W. 615, 20 Ky. L. Rep. 792, 50 S. W. 252, 20 Ky. L. Rep. 1883. So it has been held that in an action for death at a crossing error in admitting evidence that deceased was a man of careful habits will not warrant a reversal. Illinois Cent. R. Co. *v.* Ashline, 171 Ill. 313, 49 N. E. 521.

Error in striking out evidence held harmless see Woodward Iron Co. *v.* Andrews, 114 Ala. 243, 21 So. 440 (as to signals from trains); Slaats *v.* Chicago Great Western R. Co., 110 Iowa 202, 81 N. W. 457.

Error held prejudicial see Chesapeake, etc., R. Co. *v.* Riddle, 72 S. W. 22, 24 Ky. L. Rep. 1687, holding that, where a railroad track at the place of the accident was used by two different companies, the admission of evidence that after the accident witness crossed the track at that place and listened for a whistle or bell and heard none and did not perceive or hear the train until it was within twenty feet of the crossing is prejudicial error.

64. **Injuries to persons at crossings** see *supra*, X, F.

Injuries to trespassers, licensees, and others on railroad premises other than at crossings see *supra*, X, E.

65. Beatty *v.* Central Iowa R. Co., 58 Iowa 242, 12 N. W. 332.

66. Coy *v.* Utica, etc., R. Co., 23 Barb. (N. Y.) 643; Fares *v.* Rio Grande Western R. Co., 28 Utah 132, 77 Pac. 230.

67. St. Louis, etc., R. Co. *v.* Neely, 63 Ark. 636, 40 S. W. 130, 37 L. R. A. 616; Johnson *v.* Texas, etc., R. Co., (Tex. Civ. App. 1907) 100 S. W. 206.

68. St. Louis, etc., R. Co. *v.* Neely, 63 Ark. 636, 40 S. W. 130, 37 L. R. A. 616; Louisville, etc., R. Co. *v.* Downey, 18 Ind. App. 140, 47 N. E. 494; Turney *v.* Southern Pac. Co., 44 Oreg. 280, 75 Pac. 144, 76 Pac. 1080.

* By Henry H. Skyles.

and diligence to keep its road-bed in proper repair so as not to injure travelers on the highway,[69] and to otherwise exercise ordinary care and prudence to prevent injuring such a traveler.[70] A railroad company also owes this duty to persons who may be on private premises near the track and liable to be injured by the operation of the railroad.[71] This duty on the part of the railroad company to

69. See Volkmar *v.* Manhattan R. Co., 134 N. Y. 418, 41 N. E. 870, 30 Am. St. Rep. 678.

Where a bolt or bar drops from an elevated railroad and injures a traveler on the highway thereunder, the railroad company is liable in the absence of proof that the track was properly inspected. Hogan *v.* Manhattan R. Co., 149 N. Y. 23, 43 N. E. 403 [*affirming* 6 Misc. 295, 26 N. Y. Suppl. 792]; Volkmar *v.* Manhattan R. Co., 134 N. Y. 418, 41 N. E. 870, 30 Am. St. Rep. 678.

Bridge.—A railroad company is bound to use due care in keeping a bridge over a highway in proper repair, so as not to injure persons going along the highway, as by the fall of a brick from the bridge. Kearney *v.* London, etc., R. Co., L. R. 5 Q. B. 411, 39 L. J. Q. B. 200, 22 L. T. Rep. N. S. 886, 18 Wkly. Rep. 1000 [*affirmed* in L. R. 6 Q. B. 759, 40 L. T. Rep. N. S. 285, 24 L. T. Rep. N. S. 913, 20 Wkly. Rep. 24].

Fences.— The provisions of a railroad act imposing upon railroad companies the duty of erecting and maintaining fences on the sides of railroads do not apply to fences for the protection of persons traveling on a highway. Ditchett *v.* Spuyten Duyvil, etc., R. Co., 67 N. Y. 425; Ryan *v.* Rochester, etc., R. Co., 9 How. Pr. (N. Y.) 453. But where a railroad company voluntarily constructs a fence, it is under the duty of maintaining the fence strong and safe enough to resist such forces and conditions as could reasonably have been foreseen; although it is not bound to construct and maintain a fence sufficiently strong to provide against a contingency arising by reason of a crowd of trespassers coming on the property inclosed and pushing the fence over. Grogan *v.* Pennsylvania R. Co., 213 Pa. St. 340, 62 Atl. 924, holding that in such a case a railroad company is not liable to a person walking on the street on whom the fence is pushed, although some of the trespassers were employees of the railroad.

70. St. Louis, etc., R. Co. *v.* Neely, 63 Ark. 636, 40 S. W. 130, 37 L. R. A. 616; Beatty *v.* Central Iowa R. Co., 58 Iowa 242, 12 N. W. 332.

Illustrations.— Thus a person on a street or highway near a railroad track has been held to be entitled to recover for injuries caused by being struck by a piece of ice kicked by a brakeman from the platform of a passing caboose (Willis *v.* Maysville, etc., R. Co., 119 Ky. 949, 85 S. W. 716, 27 Ky. L. Rep. 459); for an injury resulting from the negligence of the company's servants in knocking off nuts and bolts from the rails of its track (Chesapeake, etc., R. Co. *v.* Bercaw, 65 S. W. 434, 23 Ky. L. Rep. 1509); or for an injury caused by the explosion by a train of a torpedo placed on the track contrary to the rules of the company (Illinois Cent. R. Co. *v.* Schultz, 87 Miss. 321, 39 So. 1005).

Where the right of way is parallel with and adjoining a public street the company is not bound to use the same care in running trains over such right of way as if the track lay in the street itself, although the track is used by the public habitually as a footway. McVey *v.* Chesapeake, etc., R. Co., 46 W. Va. 111, 32 S. E. 1012.

Unloading cars.—A railroad company whose line occupies a public street is liable for its failure to use reasonable means and exercise reasonable care in the unloading of its cars to avoid injuring a person passing along the street. St. Louis Southwestern R. Co. *v.* Underwood, 74 Ark. 610, 86 S. W. 804.

The construction of a barbed wire fence on its own land near a road is not unlawful, and hence the railroad company is not liable for injuries sustained by one accidentally riding into it. Bishop *v.* Gulf, etc., R. Co., (Tex. Civ. App. 1903) 75 S. W. 1086.

Knowledge of company.— Where articles are thrown from a train by railroad employees, it is not necessary, in an action against the company for injuries, to show that the railroad company knew of such fact or that it was done by its direction; but it is sufficient to show by reasonable inference that the servant was acting within the scope of his authority. Willis *v.* Maysville, etc., R. Co., 119 Ky. 949, 85 S. W. 716, 27 Ky. L. Rep. 459. That the officers or agents of a railroad company have knowledge of the existence of a custom of its employees on returning at night from their work, to throw off into the highway pieces of wood and timber to be carried to their homes, while not of itself sufficient to charge the company with negligence as a matter of law, is yet such proof of negligence as to make it a question for the jury. Fletcher *v.* Baltimore, etc., R. Co., 168 U. S. 135, 18 S. Ct. 35, 42 L. ed. 411.

71. Wabash, etc., R. Co. *v.* Peyton, 106 Ill. 534, 46 Am. Rep. 705; West Virginia Cent., etc., R. Co. *v.* State, 96 Md. 652, 54 Atl. 669, 61 L. R. A. 574.

The emission from a locomotive of a cinder larger than could escape from an engine in proper condition is *prima facie* evidence of negligence rendering the company liable to a person in a neighboring house whose eye is struck and destroyed by the cinder. Texarkana, etc., R. Co. *v.* O'Kelleher, 21 Tex. Civ. App. 96, 51 S. W. 54.

Under Nev. Comp. Laws, § 988, subd. 10, the power of railroad companies "to erect and maintain all necessary and convenient buildings, stations, depots, and fixtures and machinery for the accommodation and use of their passengers, freight, and business," etc., does not protect the company in such a use

prevent injuring persons on adjacent highways or premises ordinarily arises only after it has become aware of the person's presence and peril;[72] and the company ordinarily is under no duty to keep a lookout for persons on adjacent premises,[73] or for travelers on an adjacent highway,[74] particularly where the highway is not a public thoroughfare.[75] Where a railroad company's charter requires the location of its road with respect to a certain turnpike to be approved by commissioners, the company is liable for injuries received by a traveler on the turnpike by the construction of the road, if such approval was procured by fraud.[76]

2. By Derailment of Trains. Where the trains or cars of a railroad company are derailed through its negligence, and run on to adjacent premises causing injuries to persons thereon, the company is liable therefor,[77] unless the injured party was guilty of contributory negligence;[78] but not where the injury was caused by unavoidable accident.[79]

3. By Frightening Animals[80] — a. In General. Where a railway and highway

of a steam whistle in its shops as to frighten horses and thereby injure others. Powell *v.* Nevada, etc., R. Co., 28 Nev. 40, 78 Pac. 978.

72. Alabama Great Southern R. Co. *v.* Fulton, 144 Ala. 332, 39 So. 282.

73. Louisville, etc., R. Co. *v.* Penrod, 108 Ky. 172, 56 S. W. 1, 22 Ky. L. Rep. 73.

74. Southern R. Co. *v.* Flynt, 2 Ga. App. 162, 58 S. E. 374; Louisville, etc., R. Co. *v.* McCandless, 123 Ky. 121, 93 S. W. 1041, 29 Ky. L. Rep. 563; Louisville, etc., R. Co. *v.* Smith, 107 Ky. 178, 53 S. W. 269, 21 Ky. L. Rep. 857; Lamb *v.* Old Colony R. Co., 140 Mass. 79, 2 N. E. 932, 54 Am. Rep. 449; Hargis *v.* St. Louis, etc., R. Co., 75 Tex. 19, 12 S. W. 953; Gulf, etc., R. Co. *v.* Hord, 39 Tex. Civ. App. 319, 87 S. W. 848; Houston, etc., R. Co. *v.* Carruth, (Tex. Civ. App. 1899) 50 S. W. 1036; Fares *v.* Rio Grande Western R. Co., 28 Utah 132, 77 Pac. 230. But see St. Louis, etc., R. Co. *v.* Lewis, 60 Ark. 409, 30 S. W. 765, 1135.

75. Alabama Great Southern R. Co. *v.* Fulton, 144 Ala. 332, 39 So. 282.

76. Durand *v.* New Haven, etc., Co., 42 Conn. 211.

77. *Kentucky.*— Illinois Cent. R. Co. *v.* Watson, 117 Ky. 374, 78 S. W. 175, 25 Ky. L. Rep. 1360 [*distinguishing* Holland *v.* Sparks, 92 Ga. 753, 18 S. E. 990].

Louisiana.— Lane *v.* Illinois Cent. R. Co., 43 La. Ann. 833, 9 So. 560.

Maryland.— West Virginia Cent., etc., R. Co. *v.* State, 96 Md. 652, 54 Atl. 669, 61 L. R. A. 574.

Michigan.— Black *v.* Michigan Cent. R. Co., 146 Mich. 568, 109 N. W. 1052.

Minnesota.— Mahan *v.* Union Depot R., etc., Co., 34 Minn. 29, 24 N. W. 293.

Missouri.— Harper *v.* St. Louis Merchants' Bridge Terminal Co., 187 Mo. 575, 86 S. W. 99 (holding that where a rear brakeman on a freight train was stationed on the side of the rear car his duty to give a warning signal on the derailment of a car did not require that he remain on the car in a position of danger and apply the brakes in order to shorten the stop after derailment); Walsh *v.* Missouri Pac. R. Co., 102 Mo. 582, 14 S. W. 873, 15 S. W. 757.

New Jersey.— Tuttle *v.* Atlantic City R. Co., 66 N. J. L. 327, 49 Atl. 450, 88 Am. St. Rep. 491, 54 L. R. A. 582, holding that where a woman seeing a car which had been derailed coming out of the limits of a freight yard and across a public street at great speed toward the place where she was standing ran for safety and fell, injuring herself, she was entitled to recover damages for such injury.

Pennsylvania.— See Ewing *v.* Pittsburgh, etc., R. Co., 147 Pa. St. 40, 23 Atl. 340, 30 Am. St. Rep. 709, 14 L. R. A. 666, holding, however, that the injured party in such case is not entitled to recover for fright alone not resulting from or accompanied by some physical injury to the person.

The failure of a railroad company to keep its cars on its right of way is itself negligence and one injured need not show that there had been antecedent negligence producing the ultimate negligent act. West Virginia Cent., etc., R. Co. *v.* State, 96 Md. 652, 54 Atl. 669, 61 L. R. A. 574.

The absence of a watchman from a crossing is immaterial in an action for the negligent death of one standing near a railroad right of way caused by the derailment of a train where deceased was not on a crossing and the absence of the watchman had nothing to do with his injury. Illinois Cent. R. Co. *v.* Watson, 117 Ky. 374, 78 S. W. 175, 25 Ky. L. Rep. 1360.

Excessive speed.— Where the injury to deceased was caused by cars jumping from the track and demolishing the house in which he was sleeping, and it appears that the train was running in violation of the city ordinance, at a speed of fifteen or twenty miles an hour, the jury is warranted in finding that the injury was due to the excessive speed of the train. Walsh *v.* Missouri Pac. R. Co., 102 Mo. 582, 14 S. W. 873, 15 S. W. 757.

78. Lane *v.* Illinois Cent. R. Co., 43 La. Ann. 833, 9 So. 560.

79. West Virginia Cent., etc., R. Co. *v.* State, 96 Md. 652, 54 Atl. 669, 61 L. R. A. 574.

80. Frightening animals at crossings see *supra*, X, F, 4.

Injuries to animals frightened see *infra*, X, H, 2.

are parallel and near together, a traveler on the highway and the railroad's servants should each regard the probabilities of the other using their respective places of travel near the same place at the same time, and should each use reasonable care according to the situation in managing their respective vehicles.[81] Ordinarily it is not incumbent upon the servants of the railroad company to keep a lookout for teams near the track and to operate the train so as not to frighten them,[82] although the circumstances may be such as to require such employees to keep a lookout; [83] nor are they obliged to keep the trains so under control that they can be stopped if a team is found at a point of danger on such highway.[84] But on the other hand the company has a right to expect that persons in control of a team will exercise care in approaching the railroad tracks and will not unnecessarily stop near them, and therefore is not required to take steps to provide against the failure to do so.[85] A railroad company is not liable therefore for injuries caused by horses upon a street, highway, or other premises near a railroad track becoming frightened at the ordinary appearance and movements of a train or cars under prudent and careful management.[86] But it is liable where the fright

81. Brown *v.* Missouri Pac. R. Co., 89 Mo. App. 192; Johnson *v.* Texas, etc., R. Co., (Tex. Civ. App. 1907) 100 S. W. 206, holding that where, in an action for injuries to a traveler in consequence of her horse becoming frightened by an approaching train, the evidence shows that the passenger did not make any attempt to discover whether any train was in sight before going on a crossing and passing on to a road parallel to the track and near it, the fact that a clump of trees had been allowed to grow upon the right of way near the crossing which might have obstructed the view of the track is immaterial as the presence of the trees did not operate as a contributing cause to the accident.

82. Chicago, etc., R. Co. *v.* Stickman, 95 Ill. App. 4; Louisville, etc., R. Co. *v.* McCandless, 123 Ky. 121, 93 S. W. 1041, 29 Ky. L. Rep. 563; Louisville, etc., R. Co. *v.* Penrod, 108 Ky. 172, 56 S. W. 1, 22 Ky. L. Rep. 73; Louisville, etc., R. Co. *v.* Smith, 107 Ky. 178, 53 S. W. 269, 21 Ky. L. Rep. 857 (holding that the fact that the servants in charge of an engine might by the exercise of ordinary care have discovered that a team on a highway parallel with the railroad had become frightened by the sounding of the whistle for a crossing does not make the company liable for injuries resulting from the failure to substitute the ringing of the bell for the further blowing of the whistle); Lamb *v.* Old Colony R. Co., 140 Mass. 79, 2 N. E. 932, 54 Am. Rep. 449; Hargis *v.* St. Louis, etc., R. Co., 75 Tex. 19, 12 S. W. 953; Gulf, etc., R. Co. *v.* Hord, 39 Tex. Civ. App. 319, 87 S. W. 848; Houston, etc., R. Co. *v.* Carruth, (Tex. Civ. App. 1899) 50 S. W. 1036; Fares *v.* Rio Grande Western R. Co., 28 Utah 132, 77 Pac. 230.

83. Feeney *v.* Wabash R. Co., 123 Mo. App. 420, 99 S. W. 477; Johnson *v.* Texas, etc., R. Co., (Tex. Civ. App. 1907) 100 S. W. 206 (holding that if the circumstances required the engineer in the exercise of ordinary care to keep a lookout for danger to persons traveling on the highway and he failed to do so and the accident was the proximate cause thereof, the railroad is liable unless the traveler was guilty of contributory negligence); Missouri, etc., R. Co. *v.* Belew, 26 Tex. Civ. App. 8, 62 S. W. 99 (holding that where the road had been used by the public for ten years and was so situated that the engineer could have seen plaintiff in time to have lessened the speed and noise of the train and probably prevented the accident, it was negligence on the part of defendant not to see plaintiff and check its train in time to prevent the accident.

On streets.— It cannot be said as a matter of law that persons operating a locomotive are under no duty to keep a lookout for teams on a street close to and parallel with the railroad so as not to frighten them by excessive speed and unnecessary whistling. Missouri, etc., R. Co. *v.* Sanders, 42 Tex. Civ. App. 545, 94 S. W. 149. Thus it has been held that where a railroad has its tracks in a street, it is the duty of the trainmen in charge of an engine thereon getting up steam by the use of a blower to be on the lookout for danger to travelers and to stop the noise when it becomes obvious that control of horses is being lost by reason of fright caused thereby. Feeney *v.* Wabash R. Co., 123 Mo. App. 420, 99 S. W. 477.

84. Fares *v.* Rio Grande Western R. Co., 28 Utah 132, 77 Pac. 230.

85. Hargis *v.* St. Louis, etc., R. Co., 75 Tex. 19, 12 S. W. 953.

86. *California.*— Hahn *v.* Southern Pac. R. Co., 51 Cal. 605.

Connecticut.— Bailey *v.* Hartford, etc., R. Co., 56 Conn. 444, 16 Atl. 234.

Georgia.— Brunswick, etc., R. Co. *v.* Hoodenpyle, 129 Ga. 174, 58 S. E. 705.

Iowa.— Beatty *v.* Central Iowa R. Co., 58 Iowa 242, 12 N. W. 332.

Missouri.— Brown *v.* Missouri Pac. R. Co., 89 Mo. App. 192.

Nebraska.— Clinebell *v.* Chicago, etc., R. Co., 77 Nebr. 538, 110 N. W. 347, 77 Nebr. 542, 111 N. W. 577; Hendricks *v.* Freemont, etc., R. Co., 67 Nebr. 120, 93 N. W. 141.

North Carolina.— Everett *v.* Richmond, etc., R. Co., 121 N. C. 519, 27 S. E. 991.

and consequent injury is caused by some negligent or unnecessary act or omission on the part of the company,[87] as where it fails to use all reasonable means at hand, such as abating noise, or stopping engines, if practicable to do so, which a man of ordinary prudence would use to allay the fright of the animal after seeing it and knowing or having reason to believe that it would become frightened or unmanageable and cause the injury,[88] or where the acts of the servants causing the fright are wanton or malicious.[89]

b. By Smoke, Noise, and Escape of Steam. In accordance with the above

Utah.— Fares *v.* Rio Grande Western R. Co., 28 Utah 132, 77 Pac. 230, holding that a railroad company is not liable to travelers whose horses become frightened by the appearance of its engines or trains if the same are operated prudently and without unnecessary noise or wilful disregard for the traveler's perilous position, after it has been discovered by the servants of the company.

Wisconsin.— Walters *v.* Chicago, etc., R. Co., 104 Wis. 251, 80 N. W. 451 [*overruling* so far as inconsistent Ransom *v.* Chicago, etc., R. Co., 62 Wis. 178, 22 N. W. 147, 51 Am. Rep. 718]; Dewey *v.* Chicago, etc., R. Co., 99 Wis. 455, 75 N. W. 74.

England.— Simkin *v.* London, etc., R. Co., 21 Q. B. D. 453, 53 J. P. 85, 59 L. T. Rep. N. S. 797.

See 41 Cent. Dig. tit. "Railroads," § 1241.

Degree of care.—An engineer is not required to stop his engine merely because he sees a person driving up a street parallel with the track; and if the horse appears to be gentle and there is nothing to indicate that it will get frightened and collide with the cars, and the engineer manages the train with such care and prudence as a reasonably prudent man would observe under the circumstances, the railroad company is not liable. Gulf, etc., R. Co. *v.* Hodges, 76 Tex. 90, 13 S. W. 64.

Relative to travelers on adjacent highways when the crossing law is not applicable, railroad companies are under no duty to travelers to regulate the speed of trains to prevent horses from becoming frightened at the sight of moving trains and noise produced thereby and are not liable for injuries resulting from horses becoming frightened at their trains and the noises usual and incident to the running of the same. Southern R. Co. *v.* Flynt, 2 Ga. App. 162, 58 S. E. 374.

The moving of a freight car by gravity on a track running along a street in charge of a brakeman at a slow rate of speed is not negligence so as to give a cause of action in favor of a person riding along a street parallel with the moving car, whose horses are frightened and run away. Everett *v.* Great Northern R. Co., 100 Minn. 309, 111 N. W. 281, 9 L. R. A. N. S. 703.

87. Hudson *v.* Louisville, etc., R. Co., 14 Bush (Ky.) 303; Brown *v.* Missouri Pac. R. Co., 89 Mo. App. 192; Canadian Pac. R. Co. *v.* Lawson, Cass. Dig. (Can.) 729.

Where a bridge company operates trains on one side of its bridge and the other is used by it as a toll highway for persons on foot and in vehicles, it is the duty of its servants in charge of trains to keep a lookout for teams on the bridge and, in the event that they are discovered to have become so frightened as to become unmanageable, to cause no more noise than is necessary under the circumstances; greater care being required in such a case than is required as to persons driving on an ordinary highway parallel with the railroad. Kentucky, etc., Bridge Co. *v.* Montgomery, 67 S. W. 1008, 68 S. W. 1097, 24 Ky. L. Rep. 167, 57 L. R. A. 781.

Leaving the carcass of an animal killed by the railroad company in the highway so as to frighten teams passing it is negligence for which the railroad company is liable. Baxter *v.* Chicago, etc., R. Co., 87 Iowa 488, 54 N. W. 350.

88. *Alabama.*—Alabama Great Southern R. Co. *v.* Fulton, 144 Ala. 332, 39 So. 282.

Arkansas.— Choctaw *v.* Coker, 77 Ark. 174, 90 S. W. 999.

Georgia.— Brunswick, etc., R. Co. *v.* Hoodenpyle, 129 Ga. 174, 58 S. E. 705; Southern R. Co. *v.* Flynt, 2 Ga. App. 162, 58 S. E. 374.

Kentucky.— Louisville, etc., R. Co. *v.* Penrod, 108 Ky. 172, 56 S. W. 1, 22 Ky. L. Rep. 73; Kentucky, etc., Bridge Co. *v.* Montgomery, 67 S. W. 1008, 68 S. W. 1097, 24 Ky. L. Rep. 167, 57 L. R. A. 781.

Missouri.— Moore *v.* Kansas City, etc., R. Co., 126 Mo. 265, 29 S. W. 9; Feeney *v.* Wabash R. Co., 123 Mo. App. 420, 99 S. W. 477, holding that persons in charge of a locomotive on a track in a street getting up steam by the use of a blower causing a loud and continuous noise are negligent in failing to use reasonable care to ascertain the perilous position of a team frightened by the noise and to make reasonable efforts to avoid the accident, and that the railroad company is liable for the injuries from the runaway caused thereby, notwithstanding the negligense of the occupants of the vehicle in getting into the perilous position.

Texas.— Johnson *v.* Texas, etc., R. Co., (Civ. App. 1907) 100 S. W. 206 (holding that operatives of a train who discover the peril of a person driving along a road parallel to the railroad track and from fifteen to twenty-five feet distant, due to her horse becoming frightened by the train, must do everything in their power consistent with the safety of the train to stop it or decrease its speed and avoid the danger of increasing the fright of the horse); Houston, etc., R. Co. *v.* Carruth, (Civ. App. 1899) 50 S. W. 1036.

See 41 Cent. Dig. tit. "Railroads," § 1241.

89. Oxford Lake Line *v.* Stedham, 101 Ala. 376, 13 So. 553.

rule, a railroad company ordinarily is not liable for personal injuries caused by horses or teams on adjacent streets, highways, or other premises becoming frightened at the usual noises,[90] smoke,[91] or escaping steam [92] necessarily incident to the operation of trains in an ordinarily careful and proper manner. But where the employees in charge of the train or cars know of or have reason to anticipate the frightening of teams in close proximity to the track,[93] the railroad company is liable if such employees cause an unusual and unnecessary discharge or escape of steam,[94]

90. *Arkansas.*— Choctaw, etc., R. Co. *v.* Coker, 77 Ark. 174, 90 S. W. 999.

California.— Hahn *v.* Southern Pac. R. Co., 51 Cal. 605.

Georgia.— Brunswick, etc., R. Co. *v.* Hoodenpyle, 129 Ga. 174, 58 S. E. 705; Chalkley *v.* Georgia Cent. R. Co., 120 Ga. 683, 48 S. E. 194; Georgia Cent. R. Co. *v.* Black, 114 Ga. 389, 40 S. E. 247 (noises made from falling timbers with which a car on defendant's track was being loaded); Coleman *v.* Wrightsville, etc., R. Co., 114 Ga. 386, 40 S. E. 247; Whistenant *v.* Southern States Portland Cement Co., 2 Ga. App. 598, 59 S. E. 920.

Illinois.— Chicago, etc., R. Co. *v.* Stickman, 95 Ill. App. 4.

Kentucky.— Louisville, etc., R. Co. *v.* Penrod, 108 Ky. 172, 56 S. W. 1, 22 Ky. L. Rep. 73; Ohio Valley R. Co. *v.* Young, 39 S. W. 415, 19 Ky. L. Rep. 158.

Massachusetts.— Lamb *v.* Old Colony R. Co., 140 Mass. 79, 2 N. E. 932, 54 Am. Rep. 449.

Michigan.— Foster *v.* East Jordan Lumber Co., 141 Mich. 316, 104 N. W. 617.

North Carolina.— Everett *v.* Richmond, etc., R. Co., 121 N. C. 519, 27 S. E. 991.

Pennsylvania.— Ryan *v.* Pennsylvania R. Co., 132 Pa. St. 304, 19 Atl. 81.

Utah.— Fares *v.* Rio Grande Western R. Co., 28 Utah 132, 77 Pac. 230.

Wisconsin.— Walters *v.* Chicago, etc., R. Co., 104 Wis. 251, 80 N. W. 451; Dewey *v.* Chicago, etc., R. Co., 99 Wis. 455, 75 N. W. 74.

See 41 Cent. Dig. tit. "Railroads," § 1242.

91. Leavitt *v.* Terre Haute, etc., R. Co., 5 Ind. App. 513, 31 N. E. 860, 32 N. E. 866; Lamb *v.* Old Colony R. Co., 140 Mass. 79, 2 N. E. 932, 54 Am. Rep. 449; Webb *v.* Philadelphia, etc., R. Co., 202 Pa. St. 511, 52 Atl. 5.

92. *Alabama.*— Oxford Lake Line *v.* Stedham, 101 Ala. 376, 13 So. 553, steam allowed to escape in order to slow up.

California.— Hahn *v.* Southern Pac. R. Co., 51 Cal. 605.

Georgia.— Coleman *v.* Wrightsville, etc., R. Co., 114 Ga. 386, 40 S. E. 247.

Kansas.— Culp *v.* Atchison, etc., R. Co., 17 Kan. 475.

Massachusetts.— Howard *v.* Union Freight R. Co., 156 Mass. 159, 30 N. E. 479.

Nebraska.— Omaha, etc., R. Co. *v.* Clark, 35 Nebr. 867, 53 N. W. 970, 23 L. R. A. 504, 39 Nebr. 65, 57 N. W. 545.

Pennsylvania.— Webb *v.* Philadelphia, etc., R. Co., 202 Pa. St. 511, 52 Atl. 5.

Texas.— St. John *v.* St. Louis Southwestern R. Co., (Civ. App. 1904) 79 S. W. 603.

See 41 Cent. Dig. tit. "Railroads," § 1242.

Permitting steam to escape from an automatic safety valve attached to a locomotive, frightening a horse, is not negligence rendering the company liable for injuries received by one thrown from the vehicle, where it appears that the use of the safety valve is necessary for the safety of the locomotive and that there is no practicable method of reducing the pressure on the valve. Louisville, etc., R. Co. *v.* Schmidt, 134 Ind. 16, 33 N. E. 774.

93. Alabama Great Western R. Co. *v.* Fulton, 144 Ala. 332, 39 So. 282; Choctaw, etc., R. Co. *v.* Coker, 76 Ark. 174, 90 S. W. 999 (holding that a railroad company is liable for damages occasioned by the failure of the train operatives on discovering that a horse attached to a plow is frightened and attempting to run away to refrain from doing any unnecessary or wanton act which would increase the fright or danger); Louisville, etc., R. Co. *v.* Penrod, 108 Ky. 172, 56 S. W. 1, 22 Ky. L. Rep. 73; Gulf, etc., R. Co. *v.* Hord, 39 Tex. Civ. App. 319, 87 S. W. 848; Ft. Worth, etc., R. Co. *v.* Partin, 33 Tex. Civ. App. 173, 76 S. W. 236 (holding that it is the duty of railroad employees to exercise ordinary care not to frighten teams by unnecessary noise, notwithstanding they have no actual knowledge of the proximity of the teams); Texas, etc., R. Co. *v.* Kennedy, 29 Tex. Civ. App. 94, 69 S. W. 227 (holding that the trainmen's duty toward an approaching rider will not be affected by the fact that they did not perceive the peril occasioned by their negligence in opening cylinder cocks); Missouri, etc., R. Co. *v.* Traub, 19 Tex. Civ. App. 125, 47 S. W. 282 (holding that where the employees of a railroad company in control of an engine near a thoroughfare negligently permit it to pop off steam and make an unusual noise, knowing that teams may be frightened thereby, the owner of a team so frightened may recover from the company for resulting damages, although the employees did not see the team).

94. *Arkansas.*— St. Louis, etc., R. Co. *v.* Lewis, 60 Ark. 409, 30 S. W. 765, 1135.

Georgia.— Coleman *v.* Wrightsville, etc., R. Co., 114 Ga. 386, 40 S. E. 247.

Illinois.—Terre Haute, etc., R. Co. *v.* Doyle, 56 Ill. App. 78.

Missouri.— Brown *v.* Missouri Pac. R. Co., 89 Mo. App. 192.

Nebraska.— Omaha, etc., R. Co. *v.* Clark, 35 Nebr. 867, 53 N. W. 970, 23 L. R. A. 504, 39 Nebr. 65, 57 N. W. 545, holding that where a locomotive engineer in a city where teams are constantly passing needlessly opens a valve of his engine and permits the steam to escape whereby plaintiff's horses are fright-

or cause other unusual and unnecessary noises reasonably calculated to frighten horses of ordinary gentleness;[95] or where such employees needlessly and negligently make such noises as are usually incident to the operation of the train,[96] providing the party injured was himself free from contributory negligence.[97] It is also liable where the noise or escaping steam is recklessly or wantonly caused by the employees.[98]

c. By Signals From Trains. The mere sounding of a whistle, bell, or other signal in close proximity to horses, whereby they become frightened and cause the injury complained of, is not of itself negligence,[99] even though they are given unnecessarily.[1] Thus a railroad company ordinarily is not liable for injuries caused by teams on adjacent highways or premises becoming frightened at the usual or statutory signals given in an ordinarily careful and proper manner,[2]

ened and run away doing him injury, the company is liable.

Texas.— Texas, etc., R. Co. *v.* Kennedy, 29 Tex. Civ. App. 94, 69 S. W. 227 (holding that it is the duty of trainmen operating an engine along a track running parallel to a road to refrain from unnecessarily opening cylinder cocks of an engine so as to frighten the horse of an approaching rider if a prudent person could have anticipated the result; and that the trainmen's duty is not confined to the shutting off of the escape of the steam after they have discovered that the opening of cylinder cocks has frightened horses); Missouri, etc., R. Co. *v.* Traub, 19 Tex. Civ. App. 125, 47 S. W. 282; Texas, etc., R. Co. *v.* Syfan, (Civ. App. 1897) 43 S. W. 551.

Virginia.— Petersburg R. Co. *v.* Hite, 81 Va. 767.

See 41 Cent. Dig. tit. "Railroads," § 1242.

Although a parallel public highway is on the railroad's right of way which has not been condemned for a public road, such fact will not relieve the railroad company from liability for injuries caused by its servants in permitting a sudden escape of steam and frightening plaintiff's horses, if it has been used as a public highway without protest on the part of the company. Brown *v.* Missouri Pac. R. Co., 89 Mo. App. 192.

An intention of the servants to frighten the team is not necessary to the company's liability where such servants permit a sudden escape of steam just as plaintiff is opposite the engine thereby frightening his team. Brown *v.* Missouri Pac. R. Co., 89 Mo. App. 192.

It is negligence as a matter of law to unnecessarily let off steam in close proximity to a team. Toledo, etc., R. Co. *v.* Crittenden, 42 Ill. App. 469.

95. *Alabama.*—Alabama Great Southern R. Co. *v.* Fulton, 144 Ala. 332, 39 So. 282.

Arkansas.— Choctaw, etc., R. Co. *v.* Coker, 76 Ark. 174, 90 S. W. 999.

Georgia.— Brunswick, etc., R. Co. *v.* Hoodenpyle, 129 Ga. 174, 58 S. E. 705; Chalkley *v.* Georgia Cent. R. Co., 120 Ga. 683, 48 S. E. 194.

Kansas.— Culp *v.* Atchison, etc., R. Co., 17 Kan. 475.

Michigan.— Foster *v.* East Jordan Lumber Co., 141 Mich. 316, 104 N. W. 617.

Texas.— Gulf, etc., R. Co. *v.* Hord, 39 Tex. Civ. App. 319, 87 S. W. 848.

See 41 Cent. Dig. tit. "Railroads," § 1242.

That the noise was unnecessary is not sufficient, but it must have been made under such circumstances as to show a neglect to exercise that degree of care which a reasonably prudent man would have exercised. Omaha, etc., R. Co. *v.* Brady, 39 Nebr. 27, 57 N. W. 767.

96. Petersburg R. Co. *v.* Hite, 81 Va. 767.

Whether such noises are needlessly or negligently made depends upon the circumstances of the particular case. Petersburg R. Co. *v.* Hite, 81 Va. 767.

97. Omaha, etc., R. Co. *v.* Clark, 35 Nebr. 867, 53 N. W. 970, 23 L. R. A. 504, 39 Nebr. 65, 57 N. W. 545. And see *infra*, X, G, 4.

98. Oxford Lake Line *v.* Stedham, 101 Ala. 376, 13 So. 553; Everett *v.* Richmond, etc., R. Co., 121 N. C. 519, 27 S. E. 991.

99. Cincinnati, etc., R. Co. *v.* Gaines, 104 Ind. 526, 4 N. E. 34, 5 N. E. 746, 54 Am. Rep. 334; Hudson *v.* Louisville, etc., R. Co., 14 Bush (Ky.) 303; Webb *v.* Philadelphia, etc., R. Co., 202 Pa. St. 511, 52 Atl. 5; St. John *v.* St. Louis Southwestern R. Co., (Tex. Civ. App. 1904) 79 S. W. 603, holding that the facts that the injury was caused by reason of a team becoming frightened at the whistle or escaping steam from a locomotive incident to starting a train up a heavy grade, and the engineer, at the time of starting the engine saw neither plaintiff nor the team, are insufficient to establish negligence on the part of the railroad company.

1. Toledo, etc., R. Co. *v.* Crittenden, 42 Ill. App. 469.

2. *Arkansas.*— Choctaw, etc., R. Co. *v.* Coker, 77 Ark. 174, 90 S. W. 999; St. Louis, etc., R. Co. *v.* Lewis, 60 Ark. 409, 30 S. W. 765, 1135.

Connecticut.— Bailey *v.* Hartford, etc., R. Co., 56 Conn. 444, 16 Atl. 234, holding also that the fact that the engineer did not begin to blow his whistle as far back as the law required and that plaintiff, if it had been so blown, would have been warned of the approach of the train in time to have waited in a safe place for it to pass, is not negligence.

Illinois.— Illinois Cent. R. Co. *v.* Schmitt, 100 Ill. App. 490.

Kansas.— Atchison, etc., R. Co. *v.* Walkenshaw, 71 Kan. 742, 81 Pac. 463.

Minnesota.— Gendreau *v.* Minneapolis, etc., R. Co., 99 Minn. 38, 108 N. W. 814.

particularly where the engineer had no knowledge of or reason to apprehend the presence of teams before the signal was given.[3] But where the circumstances attending the giving of the signal are such that a prudent regard for the rights of others forbids it, the giving of such signal may constitute actionable negligence on the part of the railroad company,[4] as where, at the time, the engineer knows or has reason to apprehend that teams are near and are frightened or likely to become frightened and cause injury if the signal is given or continued,[5] unless it was necessary to do so to avoid some other danger which could not have been otherwise prevented;[6] and this has been held true even in respect to the giving of statutory signals where they can be omitted consistently with the engineer's duties.[7] The company will also be liable if signals of an unusual nature are given,[8] or if the whistle is sounded wantonly or maliciously.[9] A mere omission to give

North Carolina.—Everett *v.* Richmond, etc., R. Co., 121 N. C. 519, 27 S. E. 991.

Pennsylvania.— Philadelphia, etc., R. Co. *v.* Stinger, 78 Pa. St. 219; Fouhy *v.* Pennsylvania R. Co., 1 Pa. Cas. 377, 2 Atl. 536.

See 41 Cent. Dig. tit. "Railroads," § 1243.

Whistling "off brakes" in the proper operation of a train when it is known that a team is about two hundred feet away on an adjacent highway is not negligence unless the engineer should have known from the conduct of the team at the time and its proximity that the whistle would probably frighten it and lead to injury of the people in the vehicle. Ochiltree *v.* Chicago, etc., R. Co., 93 Iowa 628, 62 N. W. 7, 96 Iowa 246, 64 N. W. 788.

3. Atchison, etc., R. Co. *v.* Walkenshaw, 71 Kan. 742, 81 Pac. 463; Louisville, etc., R. Co. *v.* McCandless, 123 Ky. 121, 93 S. W. 1041, 29 Ky. L. Rep. 563.

4. Cincinnati, etc., R. Co. *v.* Gaines, 104 Ind. 526, 4 N. E. 34, 5 N. E. 746, 54 Am. Rep. 334; Hudson *v.* Louisville, etc., R. Co., 14 Bush (Ky.) 303; Flynn *v.* Boston, etc., R. Co., 169 Mass. 305, 47 N. E. 1012.

5. Choctaw, etc., R. Co. *v.* Coker, 77 Ark. 174, 90 S. W. 999; Akridge *v.* Atlanta, etc., R. Co., 90 Ga. 232, 16 S. E. 81; Rogers *v.* Baltimore, etc., R. Co., 150 Ind. 397, 49 N. E. 453 (holding that a railroad company is liable for frightening horses by unnecessarily blowing its whistles in the populous parts of a city); Hargis *v.* St. Louis, etc., R. Co., 75 Tex. 19, 12 S. W. 953; Puppovich *v.* Galveston, etc., R. Co., (Tex. Civ. App. 1907) 99 S. W. 1143; Ft. Worth, etc., R. Co. *v.* Partin, 33 Tex. Civ. App. 173, 76 S. W. 236 (holding also that it is not requisite to a recovery in such case that the signal should have been sounded both wantonly and wilfully).

Substitution of bell for whistle.— Under a statute requiring either the whistle to be sounded or the bell to be rung in approaching a public crossing, the ringing of the bell should be substituted for the further blowing of the whistle after it becomes apparent to the servants on the engine that a team on the highway has become frightened. Louisville, etc., R. Co. *v.* Smith, 107 Ky. 178, 53 S. W. 269, 21 Ky. L. Rep. 857.

6. Puppovich *v.* Galveston, etc., R. Co., (Tex. Civ. App. 1907) 99 S. W. 1143.

7. Louisville, etc., R. Co. *v.* Stanger, (Ind. App. 1892) 32 N. E. 209 (holding that where an engineer in approaching a point where it is his duty to sound the whistle under a statute observes near by a man struggling with a team, and can see from the surroundings that sounding the whistle will render the team unmanageable and greatly endanger life, it is his duty to desist until the danger point is past or to stop his train); Louisville, etc., R. Co. *v.* McCandless, 123 Ky. 121, 93 S. W. 1041, 29 Ky. L. Rep. 563; St. Louis Southwestern R. Co. *v.* Kilman, 39 Tex. Civ. App. 107, 86 S. W. 1050 (holding that where an engineer sees that the horse of a traveler on a road adjacent to the right of way and near the public crossing will be frightened by the blowing of the engine whistle for the crossing, and that the traveler will probably be injured unless he desists from blowing the whistle, and he can do so consistently with his duties, and without damage to the railroad company, it is his duty to refrain for a reasonable time from blowing the whistle notwithstanding Rev. St. (1895) art. 4507, requiring the whistle to be blown for the crossing); Gulf, etc., R. Co. *v.* Spence, (Tex. Civ. App. 1895) 32 S. W. 329.

8. Brown *v.* Missouri Pac. R. Co., 89 Mo. App. 192.

9. *Georgia.*— Georgia R. Co. *v.* Newsome, 60 Ga. 492.

Illinois.— Chicago, etc., R. Co. *v.* Dickson, 63 Ill. 151, 14 Am. Rep. 114, holding that where the servants of a railroad company, while in the discharge of their duties, unnecessarily sound the whistle of the locomotive while passing a team on a highway running parallel with the tracks for the wanton and malicious purpose of frightening such team, the railroad company is liable for injuries resulting from the team becoming frightened and running away.

North Carolina.— Brendle *v.* Spencer, 125 N. C. 474, 34 S. E. 634, holding that a railroad company is liable where the whistle is blown at an unusual place for the purpose of frightening horses which are being watered in a stream at one side.

Texas.— Hargis *v.* St. Louis, etc., R. Co., 75 Tex. 19, 12 S. W. 953.

United States.— Texas, etc., R. Co. *v.* Scoville, 62 Fed. 730, 10 C. C. A. 479, 27 L. R. A. 179, holding that the wanton and malicious use of a steam whistle by servants of a railroad company in charge of a locomotive while

signals or warning is not negligence,[10] except where the company has reasonable grounds to apprehend that teams on a highway near the track will become frightened by the passing train and cause injury if the party in charge of such team is not warned in time to get his team under control or to a place of safety.[11] In some jurisdictions it is held that the omission to give a statutory signal for a crossing is not negligence as to travelers with teams on adjacent highways or premises not intending to use the crossing, although their horses are frightened and cause injury by reason of such omission.[12] In other jurisdictions, however, such statutory signals are held to be for the benefit of all persons who may be exposed to danger by an approaching engine, and their omission is negligence if thereby teams are frightened by the passing train and cause injury.[13]

d. By Standing Cars, Engines, or Other Obstacles. A railroad company may also be liable for resulting injuries where it negligently permits cars or engines,[14] or other objects or obstacles reasonably calculated to frighten horses, to stand or remain on its right of way in an exposed position near a highway for an unreasonable length of time,[15] whereby horses are frightened and the injuries complained

it is in use is an act within the scope of their employment so as to charge the company with liability for an injury caused thereby.

See 41 Cent. Dig. tit. "Railroads," § 1243.

10. Southern R. Co. *v.* Flynt, 2 Ga. App. 162, 58 S. E. 374 (holding that railroads are not required, where the crossing law does not apply, to give any warning signals to travelers on the adjacent highway of the approach of the train); Fares *v.* Rio Grande Western R. Co., 28 Utah 132, 77 Pac. 230 (holding this to be true where plaintiff testifies that the engine was in plain view and that he saw it when it started and that the sounding of the bell or whistle might have added to the fright of his horses).

11. Hudson *v.* Louisville, etc., R. Co., 14 Bush (Ky.) 303.

12. *Illinois.*— Williams *v.* Chicago, etc., R. Co., 135 Ill. 491, 26 N. E. 661, 25 Am. St. Rep. 397, 11 L. R. A. 352 [*affirming* 32 Ill. App. 339] (holding that the negligent omission to whistle or ring a bell when approaching a crossing as required by Rev. St. (1889) c. 114, § 54, does not render the company liable to a farmer who is plowing in his field near the crossing and who is injured through his horses taking fright at the train, since the statutory requirement is only intended to benefit travelers on the highway); Louisville, etc., R. Co. *v.* Lee, 47 Ill. App. 384 (person driving on a highway parallel with the track and not intending to cross the same).

Indiana.—New York, etc., R. Co. *v.* Martin, 35 Ind. App. 669, 72 N. E. 654, holding that a railroad company is not liable under Burns Rev. St. (1901) §§ 5307, 5308, to a person who was approaching a railroad crossing without intending to cross, when his horse was frightened by the approach of a train without giving the signals for the crossing.

Kansas.— St. Louis, etc., R. Co. *v.* Morrison, 73 Kan. 265, 85 Pac. 295.

Minnesota.— Everett *v.* Great Northern R. Co., 100 Minn. 309, 111 N. W. 281, 9 L. R. A. N. S. 703.

Missouri.— Melton *v.* St. Louis, etc., R. Co., 99 Mo. App. 282, 73 S. W. 231.

New York.— Lampman *v.* New York Cent., etc., R. Co., 72 N. Y. App. Div. 363, 76 N. Y. Suppl. 492 [*affirmed* in 179 N. Y. 536, 71 N. E. 1132].

Tennessee.— East Tennessee, etc., R. Co. *v.* Feathers, 10 Lea 103.

See 41 Cent. Dig. tit. "Railroads," § 1243.

That the place where the horse was frightened was one of peculiar danger because the road was confined in a narrow lane by a barbed wire fence paralleling the roadway does not make the railroad company liable where a horse is frightened after the driver has passed through a private subway under the track by the approach of a train giving no signals. St. Louis, etc., R. Co. *v.* Morrison, 73 Kan. 265, 85 Pac. 295.

13. Mitchell *v.* Union Terminal R. Co., 122 Iowa 237, 97 N. W. 1112; Louisville, etc., R. Co. *v.* Penrod, 108 Ky. 172, 56 S. W. 1, 22 Ky. L. Rep. 73 (holding that the failure to give signals of the approach of trains to street crossings in cities is negligence not only as to persons about to use the crossings, but as to persons in charge of teams on adjacent premises); Louisville, etc., R. Co. *v.* Davis, 96 S. W. 533, 29 Ky. L. Rep. 846; Johnson *v.* Texas, etc., R. Co., (Tex. Civ. App. 1907) 100 S. W. 206; Ransom *v.* Chicago, etc., R. Co., 62 Wis. 178, 22 N. W. 147, 51 Am. Rep. 718. See also Grand Trunk R. Co. *v.* Sibbald, 20 Can. Sup. Ct. 259; Vanwart *v.* New Brunswick R. Co., 27 N. Brunsw. 59.

14. Atchison, etc., R. Co. *v.* Morrow, 4 Kan. App. 199, 45 Pac. 956 (holding that a railroad company is liable to a traveler riding a horse of ordinary gentleness which takes fright at a hand-car loaded with tools, buckets, and coats at the side of the track within the margin of the highway near the traveled road in such a position as to be manifestly calculated to frighten horses of ordinary gentleness); Bussian *v.* Milwaukee, etc., R. Co., 56 Wis. 325, 14 N. W. 452 (holding that the leaving of a car on a switch track within the limits of a street and near to the traveled part thereof for several days shows negligence on the part of the railroad company so as to render it liable for the frightening of horses thereby).

15. *Delaware.*— Kyne *v.* Wilmington, etc., R. Co., 8 Houst. 185, 14 Atl. 922.

of are caused. But it is not negligence if such cars or objects are not left so near the highway as to frighten an ordinarily gentle and quiet horse passing on the highway,[16] or if they are not allowed to remain there for an unreasonable length of time.[17]

4. Contributory Negligence.[18] To warrant a recovery for injuries received by a person on an adjacent street, highway, or other premises through the negligence of a railroad company, the injured party himself must have been exercising ordinary care and prudence at the time for his own safety.[19] Thus if a traveler on a street or highway who is injured by his team becoming frightened at the operation of a train or cars fails to exercise such care and prudence as would have been exercised by men of ordinary prudence under the circumstances, whereby his injuries result, he is guilty of contributory negligence precluding a recovery.[20] It is the duty of such a traveler to exercise reasonable care and pru-

Illinois.— Chicago, etc., R. Co. *v.* Scranton, 78 Ill. App. 230, holding that in an action against a railroad company for a death caused by the fright of deceased's team when it approached a cow killed by a train, the jury should consider the time of day when the cow was killed and the time when the accident occurred and that the company knew that the body of the cow was deposited in the place alleged.

Iowa.— Baxter *v.* Chicago, etc., R. Co., 87 Iowa 488, 54 N. W. 350.

Maine.— Witham *v.* Bangor, etc., R. Co., 96 Me. 326, 52 Atl. 764.

Pennsylvania.— Pittsburgh Southern R. Co. *v.* Taylor, 104 Pa. St. 306, 49 Am. Rep. 580.

The maintenance of a mail crane in or near a highway which from its appearance when a mail bag is hung on it is calculated to frighten horses of ordinary gentleness driven on the highway, and does so, injurying the driver, is negligence. Cleghorn *v.* Alabama Western R. Co., 134 Ala. 601, 33 So. 10, 60 L. R. A. 269.

16. Kyne *v.* Wilmington, etc., R. Co., 8 Houst. (Del.) 185, 14 Atl. 922.

17. Howard *v.* Union Freight R. Co., 156 Mass. 159, 30 N. E. 479, holding that the fact that a dummy engine is left standing at one place in the street for half an hour where it frightened plaintiff's horse is no evidence of negligence, since it might have been necessary in the transaction of the owner's business.

Leaving culvert pipe for four days on a railroad company's right of way and within seventeen feet of the highway, such pipe being intended to be used in a culvert for a bridge, is not an unreasonable length of time in view of the nature of the repairs and the regular use of defendant's road for public use, so as to render the railroad company liable where a horse is frightened thereby. Witham *v.* Bangor, etc., R. Co., 96 Me. 326, 52 Atl. 764.

18. As affecting liability for injuries to animals see *infra*, X, H, 10.

19. Willis *v.* Maysville, etc., R. Co., 119 Ky. 949, 85 S. W. 716, 27 Ky. L. Rep. 459, holding that where a boy standing on a street is injured by being struck by a piece of ice kicked by a brakeman from the platform of a passing caboose, the boy is not guilty of contributory negligence because of his position near the train.

20. *Alabama.*—Alabama Great Southern R. Co. *v.* Fulton, 144 Ala. 332, 39 So. 282, in getting out of vehicle.

Arkansas.— St. Louis, etc., R. Co. *v.* Neely, 63 Ark. 636, 40 S. W. 130, 37 L. R. A. 616.

Colorado.—Colorado Midland R. Co. *v.* Robbins, 30 Colo. 449, 71 Pac. 371, holding that where plaintiff alighted from his wagon which he was driving on a street encumbered by railroad tracks as soon as he saw a train approaching and took the horses by the head and endeavored to turn them into a cross street and could have done so had not the train been running at an excessive rate of speed, a finding that he was not guilty of contributory negligence was proper.

Iowa.— Beatty *v.* Iowa Cent. R. Co., 58 Iowa 242, 12 N. W. 332.

Maryland.— Cowen *v.* Watson, 91 Md. 344, 46 Atl. 996.

Missouri.— Prewitt *v.* Missouri, etc., R. Co., 134 Mo. 615, 36 S. W. 667.

Texas.— Gulf, etc., R. Co. *v.* Box, 81 Tex. 670, 17 S. W. 375; Texas, etc., R. Co. *v.* Kennedy, 29 Tex. Civ. App. 94, 69 S. W. 227; Texas, etc., R. Co. *v.* Hamilton, (Civ. App. 1901) 66 S. W. 797, holding that evidence that decedent's mule was of average docility; that it manifested some signs of uneasiness when it discovered the train, but was controlled by its rider until the unusual noises just opposite it; and that the saddle turned when it jumped out of the road, but it did not appear that the saddle was defectively fastened, does not show contributory negligence as a matter of law on decedent's part in failing to dismount.

Wisconsin.— Bussian *v.* Milwaukee, etc., R. Co., 56 Wis. 325, 14 N. W. 452.

See 41 Cent. Dig. tit. "Railroads," § 1291½.

One who places himself in a street beside a railroad track at a point where the cars could not pass without a collision, knowing his peril, is guilty of contributory negligence and cannot recover, whatever be the negligence of the company operating the line. Ferguson *v.* Philadelphia Traction Co., 20 Phila. (Pa.) 249.

Acts in emergencies.— The fact that the driver of a horse which is frightened by the act of defendant makes a mistake of judgment will not relieve defendant from liability. Feeney *v.* Wabash R. Co., 123 Mo.

dence in keeping his team in hand so as to control it on the approach of a train,[21] and in looking and listening for approaching trains before taking his team in close proximity to the track.[22] If he unnecessarily drives or stops his team in a position of danger, knowing that trains are likely to pass and that his horses are afraid of the cars,[23] or leaves his team unhitched in close proximity to the railroad track at a time when trains are likely to pass,[24] and afterward, when they become frightened, attempts to rescue or control them,[25] he is guilty of contributory negligence precluding a recovery, except where the fright is caused by some wanton or wilful act on the part of the railroad company.[26]

5. Proximate Cause of Injury. To render a railroad company liable for injuries to a person on an adjacent highway or other premises, it is also essential that the proximate cause of the injuries must have been the company's negligence in the derailment of the train or car which caused the injury,[27] or in case of injuries by frightening teams, the negligence complained of in causing the horse or team to become frightened;[28] and conversely to preclude a recovery on the

App. 420, 99 S. W. 477; Lowery *v.* Manhattan R. Co., 99 N. Y. 158, 1 N. E. 608, 52 Am. Rep. 12.

Where a bridge company operates a railroad and a toll highway bridge, persons using the highway part of the bridge are charged with notice of the right of the bridge company in operating its trains over the bridge, to make all usual and reasonable noises incident thereto, and they must act for their own safety with reference to such right. Kentucky, etc., Bridge Co. *v.* Montgomery, 67 S. W. 1008, 68 S. W. 1097, 24 Ky. L. Rep. 167, 57 L. R. A. 781.

21. Brown *v.* Missouri Pac. R. Co., 89 Mo. App. 192.

22. Cowen *v.* Watson, 91 Md. 344, 46 Atl. 996; Yazoo, etc., R. Co. *v.* Eakin, 79 Miss. 735, 31 So. 414; Richmond, etc., R. Co. *v.* Yeamans, 86 Va. 860, 12 S. E. 946.

Reliance on signals or other warnings.— Where a driver, injured by the frightening of his team by an approaching train while he was loading his wagon at the curb, looked for trains on stopping at the curb, he is not guilty of contributory negligence as a matter of law, in failing to keep a constant lookout, he having a right to rely on the trainmen sounding a warning signal on approaching the street crossing near such point. Mitchell *v.* Union Terminal R. Co., 122 Iowa 237, 97 N. W. 1112.

23. Moore *v.* Kansas City, etc., Rapid Transit R. Co., 126 Mo. 265, 29 S. W. 9 (holding that one driving along a street beside railroad tracks thereon, with knowledge that a train is likely to pass and that his horses are afraid of cars, cannot recover for injuries caused by the frightening of the horses; where he had an opportunity to lead them to a safe distance and failed to do so); Philadelphia, etc., R. Co. *v.* Stinger, 78 Pa. St. 219 (holding that one who drives an unbroken and vicious horse which is easily frightened by locomotives along a public road running parallel with a railroad track does so at his peril and if he is injured by his horse taking fright at a passing train, he cannot recover from the railroad company); Hargis *v.* St. Louis, etc., R. Co., 75 Tex. 19, 12 S. W. 953.

24. Deville *v.* Southern Pac. R. Co., 50 Cal. 383; Louisville, etc., R. Co. *v.* Penrod, 108 Ky. 172, 56 S. W. 1, 22 Ky. L. Rep. 73; McManamee *v.* Missouri Pac. R. Co., 135 Mo. 440, 37 S. W. 119; Gray *v.* Second Avenue R. Co., 65 N. Y. 561 [*affirming* 34 N. Y. Super. Ct. 519]. *Compare* Mitchell *v.* Union Terminal R. Co., 122 Iowa 237, 97 N. W. 1112 (holding that, where the driver of a wagon looked for trains on stopping at the curb, he is not guilty of contributory negligence as a matter of law because for a brief moment after descending from the wagon he laid down the reins without taking the precaution to tie his horses); Wasmer *v.* Delaware, etc., R. Co., 80 N. Y. 212, 36 Am. Rep. 608.

25. Deville *v.* Southern Pac. R. Co., 50 Cal. 383; McManamee *v.* Missouri Pac. R. Co., 135 Mo. 440, 37 S. W. 119. But see Mitchell *v.* Union Terminal R. Co., 122 Iowa 237, 97 N. W. 1112; Wasmer *v.* Delaware, etc., R. Co., 80 N. Y. 212, 36 Am. Rep. 608.

26. Texas, etc., R. Co. *v.* Syfan, (Tex. Civ. App. 1897) 43 S. W. 551, holding that the fact that the party injured improvidently drove his horse in a private lane near a railroad track while an engine was approaching does not prevent a recovery where the horse was frightened by the intentional blowing off of steam by the engineer.

27. Chicago, etc., R. Co. *v.* Hunerberg, 16 Ill. App. 387.

28. Douglas *v.* East Tennessee, etc., R. Co., 88 Ga. 282, 14 S. E. 616 (holding that where the cause of the fright is the headlight of the engine and not the speed of the train, the failure of the engineer to comply with the statute by blowing the whistle and checking the train will not render the railroad company liable for the injury); Louisville, etc., R. Co. *v.* Stanger, (Ind. App. 1892) 32 N. E. 209; Coy *v.* Utica, etc., R. Co., 23 Barb. (N. Y.) 643; Pittsburgh, etc., R. Co. *v.* Hood, 94 Fed. 618, 36 C. C. A. 423.

Negligence in delaying an engine in a street for an unreasonable length of time is the proximate cause of an injury occurring by reason of plaintiff's team becoming frightened while passing the engine by the escape of steam therefrom. Andrews *v.* Mason City, etc., R. Co., 77 Iowa 669, 42 N. W. 513.

ground of the injured party's negligence, such negligence must have been the proximate cause of the injury.[29]

6. Actions — a. Pleading. The general rules governing pleading in civil actions,[30] particularly in actions for negligence,[31] apply in actions for injuries to persons on adjacent highways or other premises by a railroad company's negligence in the derailment of its train or cars,[32] or in frightening horses or teams.[33] Thus in an action for injuries caused by horses becoming frightened at the operation of a railroad, the complaint should allege facts sufficient to show negligence on the part of defendant by reason of which the horses became frightened,[34] and to show a direct connection between such negligence and the injury complained of.[35]

Escape of steam.— Where a horse is frightened by steam negligently permitted to escape and runs on a pile of sewer pipes lying near by in the street and thereby injures plaintiff, the negligence in permitting the escape of the steam is the proximate cause of the injury and not the pile of sewer pipes. Chicago, etc., R. Co. *v.* Bailey, 66 Kan. 115, 71 Pac. 246.

That the noise arising from the use of a blower in getting up steam in a locomotive was what frightened a team of horses finally causing them to become unmanageable when opposite the standing engine is sufficiently shown by evidence that they were well broken and accustomed to be driven close to engines and cars. Feeney *v.* Wabash R. Co., 123 Mo. App. 420, 90 S. W. 477.

Excessive speed.— Where horses become frightened by the approach of a train running at an excessive rate of speed and blowing off steam by reason of which plaintiff is injured, and plaintiff when he saw the train approaching endeavored to turn the team into another street, and could have done so if the train had been running at the prescribed speed, the excessive speed is the proximate cause of the injury. Colorado Midland R. Co. *v.* Robbins, 30 Colo. 449, 71 Pac. 371.

29. Hord *v.* Gulf, etc., R. Co., 33 Tex. Civ. App. 163, 76 S. W. 227, holding that where the death of an intestate by being thrown from his buggy is caused by his horse becoming frightened by the puffing and blowing off of steam from defendant's locomotive, and there is evidence that such puffing and blowing occurred after intestate had gotten control of his horse, his previous negligence, if any, in getting into the buggy is not the proximate cause of his death and therefore will not preclude a recovery.

30. See, generally, PLEADING, 31 Cyc. 1.

31. See, generally, NEGLIGENCE, 29 Cyc. 565.

32. See Chicago Terminal Transfer R. Co. *v.* Vandenberg, 164 Ind. 470, 73 N. E. 990.

33. See Cooper *v.* Charleston, etc., R. Co., 65 S. C. 214, 43 S. E. 682, holding that a complaint alleging that while plaintiff was driving near a place where defendant's track and a trestle crosses the highway defendant ran one of its trains without any warning of its approach, on such trestle frightening plaintiff's mule to her injury, states a cause of action for negligence at common law and not a cause of action for failure to give statutory signals.

Complaint held sufficient to charge wilful injury in frightening horses see Indianapolis Union R. Co. *v.* Boettcher, 131 Ind. 82, 28 N. E. 551.

Complaint held insufficient to charge wanton wrong in frightening plaintiff's mule which he was driving see Alabama Great Southern R. Co. *v.* Fulton, 150 Ala. 300, 43 So. 832.

34. See Gulf, etc., R. Co. *v.* Hodges, 76 Tex. 90, 13 S. W. 64.

Complaint held sufficient to show negligence on the part of defendant in frightening horses see Brunswick, etc., R. Co. *v.* Hoodenpyle, 129 Ga. 174, 58 S. E. 705; Indianapolis Union R. Co. *v.* Boettcher, 131 Ind. 82, 28 N. E. 551; Evansville, etc., R. Co. *v.* Crist, 116 Ind. 446, 19 N. E. 310, 9 Am. St. Rep. 865, 2 L. R. A. 450. Thus a complaint is sufficient which alleges that plaintiff's mule was frightened at the unnecessary noise of defendant's train near a highway and "owing to the negligence of the defendant's employees running and managing said cars." Oxford Lake Line Co. *v.* Stedham, 101 Ala. 376, 13 So. 553. So a complaint alleging that death was caused by the negligent and unnecessary sounding of a locomotive's whistle which frightened deceased's horses is good on demurrer. Chicago, etc., R. Co. *v.* Cummings, 24 Ind. App. 192, 53 N. E. 1026. So an allegation that defendant "negligently, wrongfully and unlawfully" blew off steam from its engine whereby plaintiff's horses were frightened and ran away causing the injury complained of implies that steam was blown off needlessly and unnecessarily and where no objection is made to the petition by demurrer will be sufficient after verdict. Omaha, etc., R. Co. *v.* Clark, 35 Nebr. 867, 53 N. W. 970, 23 L. R. A. 504.

Complaint held insufficient see Levin *v.* Memphis, etc., R. Co., 109 Ala. 332, 19 So. 395. Thus a declaration which avers that defendant "carelessly, improperly, and recklessly" operated its hand-car with a noisy, disorderly, and boisterous crew, whereby plaintiff's horse was frightened and she was injured, is insufficient, if the various acts complained of are stated and these do not separately or as a whole show negligence. McCerrin *v.* Alabama, etc., R. Co., 72 Miss. 1013, 18 So. 420.

35. Dugan *v.* St. Paul, etc., R. Co., 40

b. Evidence. The rules of evidence governing in civil cases generally [36] apply to the presumptions and burden of proof,[37] and to the admissibility,[38] and weight and sufficiency [39] of evidence in an action for injuries to persons on adjacent highways or other premises.

Minn. 544, 42 N. W. 538, complaint held sufficient to show on its face that the wrongful act of defendant in negligently, wantonly, and recklessly causing the whistle of its locomotive to be blown off near a team of horses, etc., was the proximate cause of the injury complained of.

36. See, generally, EVIDENCE, 16 Cyc. 821.

37. See Chicago, etc., R. Co. *v.* Hunerberg, 16 Ill. App. 387 (evidence in an action for injuries by derailment of car held *prima facie* to show negligence on the part of defendant); Butler *v.* Easton, etc., R. Co., 74 N. J. L. 245, 65 Atl. 872 (holding that where the complaint alleges that defendant negligently permitted a certain locomotive engine and tender to stand upon a public highway, which locomotive and tender were of great size and unusual color and shape, such as was naturally calculated to frighten horses of ordinary gentleness, plaintiff is required to prove that the engine and tender were of great and unusual size, and of unusual color and shape, so as to be naturally calculated to frighten horses of ordinary gentleness); Fares *v.* Rio Grande Western R. Co., 28 Utah 132, 77 Pac. 230 (holding that where plaintiff, suing for personal injuries, alleges that the railroad company was negligent in the construction and operation of its railroad so close to a highway that a team could not pass in safety but offers no proof to sustain the allegations, it will be assumed that the railroad was lawfully constructed at such point).

Under an Arkansas statute, Sandels & H. Dig. § 6349, making railroads "responsible for all damages to persons and property done or caused by the running of trains in this state" the fact that a person in a street is injured by the falling upon him of a door from a car in a moving train is *prima facie* evidence of negligence on the part of the railroad company. St. Louis, etc., R. Co. *v.* Neely, 63 Ark. 636, 40 S. W. 130, 37 L. R. A. 616.

38. See Illinois Cent. R. Co. *v.* Watson, 117 Ky. 374, 78 S. W. 175, 25 Ky. L. Rep. 1360, holding that in an action for a negligent death caused by the derailment of a train, evidence as to what the witness thought in regard to the possibility of stopping the train sooner or as to a statement by the engineer which was not a statement of any fact is inadmissible.

For the purpose of showing the gentleness of the horse which had become frightened at escaping steam and caused the injury, it is admissible to show that the horse had been used since the accident and had acted properly. Indianapolis, etc., R. Co. *v.* Boettcher, 131 Ind. 82, 28 N. E. 551.

Evidence that other horses were frightened by the noise of escaping steam from a locomotive is admissible on the question as to whether such noise is liable to frighten horses. Gordon *v.* Boston, etc., R. Co., 58 N. H. 396.

An ordinance forbidding the letting off of steam unnecessarily from an engine within the city limits is admissible in an action for injuries received by a horse taking fright from escaping steam from an engine. Chicago Great Western R. Co. *v.* Bailey, 66 Kan. 115, 71 Pac. 246.

A statute requiring signals to be given by a railroad train approaching a crossing is not admissible for defendant in an action against the company for damages caused by frightening a team on an adjacent highway, it being the duty of the court to instruct the jury as to the law. Louisville, etc., R. Co. *v.* Smith, 107 Ky. 178, 53 S. W. 269, 21 Ky. L. Rep. 857.

Temperament of horse.— Where in an action against a railroad company for injuries to a traveler on a highway running parallel to the track and near thereto in consequence of her horse becoming frightened by an approaching train, there is evidence that the horse shortly before had been frightened by another train, testimony of a witness as to the temperament of the horse and that he was afraid of trains is admissible as corroborative evidence. Johnson *v.* Texas, etc., R. Co., (Tex. Civ. App. 1907) 100 S. W. 206.

39. **Evidence held sufficient:** To warrant a verdict for plaintiff in an action for injuries received by reason of a team becoming frightened at escaping steam (Houston, etc., R. Co. *v.* Taylor, 20 Tex. Civ. App. 654, 49 S. W. 1055), or at negligent whistling (Texas, etc., R. Co. *v.* Hamilton, (Tex. Civ. App. 1901) 66 S. W. 797). To sustain a finding that steam was emitted at the time and that defendant was negligent in regard thereto. Chicago, etc., R. Co. *v.* Jones, 39 Tex. Civ. App. 480, 88 S. W. 445. To show that the engineer saw plaintiff in the highway and that he knew or should have known that the whistle would endanger her. Ft. Worth, etc., R. Co. *v.* Partin, 33 Tex. Civ. App. 173, 76 S. W. 236.

Evidence held insufficient: To sustain a finding of negligence in an action for injuries alleged to have been caused by the sounding of a whistle and frightening horses near the track. Gendreau *v.* Minneapolis, etc., R. Co., 99 Minn. 38, 108 N. W. 814. To sustain a judgment for plaintiff in an action for injuries received by the fright of plaintiff's team at the operation of a train on defendant's road. Clinebell *v.* Chicago, etc., R. Co., 77 Nebr. 538, 542, 110 N. W. 347, 111 N. W. 577. To establish that defendant by the exercise of ordinary care could have stopped the train in time to have avoided striking deceased, in an action for the death of a licensee caused by the swing-

c. Questions For Court and For Jury. The general rules governing in civil cases that questions of law are for the court,[40] and questions of fact for the jury,[41] apply in actions against railroad companies for injuries to persons on a street, highway, or private premises near the track.[42] Thus, where in an action for injuries caused by frightened horses, the evidence is sufficient to go to the jury, but is disputed or is such that reasonable minds might arrive at different conclusions therefrom, it is a question for the jury whether the fright was in fact caused by an act or omission on the part of the railroad company,[43] and whether or not such act or omission was negligence,[44] such as whether or not, under the circumstances, the sounding of the whistle,[45] allowing steam to escape,[46] permitting engines, cars, or other obstacles to stand an unreasonable length of time in a position where they might naturally frighten horses on streets or highways,[47] or failing to give warning of the train's approach,[48] whereby a horse or team was frightened, was negligence; and whether or not due care was used by the party injured to avoid the injury.[49] So in accordance with the above rule it is ordinarily a ques-

ing around of a derailed car. Harper *v.* St. Louis Merchants' Bridge Terminal Co., 187 Mo. 575, 86 S. W. 99.

A violation of a city ordinance limiting the speed of trains passing through the city is evidence of negligence in an action for injuries by a derailment of a train and its collision with a building near the track. Mahan *v.* Union Depot, etc., Co., 34 Minn. 29, 24 N. W. 293.

40. See, generally, TRIAL.

41. See, generally, TRIAL.

42. See Reyner *v.* Kansas City, etc., R. Co., 86 Mo. App. 521, holding that where an injury complained of was caused by plaintiff's team taking fright while on a traveled way parallel to defendant's road and running away across the track, colliding with an engine of whose approach plaintiff had knowledge, and it does not appear that the engineer saw the team in time to avert the accident, it is error to refuse to direct a verdict for defendant.

43. Feeney *v.* Wabash R. Co., 123 Mo. App. 420, 99 S. W. 477 (holding that whether the trainmen in charge of an engine and a car in a street could by the exercise of reasonable care have discovered the peril of persons with a team in time to have avoided the accident by stopping the noise of the engine is a question for the jury under the evidence); St. Louis Southwestern R. Co. *v.* Everett, 40 Tex. Civ. App. 285, 89 S. W. 457 (holding that in an action for injuries alleged to have been caused by plaintiff's horses becoming frightened at a hand-car, the question whether it was the car that frightened them was for the jury).

44. Chicago, etc., R. Co. *v.* Scranton, 78 Ill. App. 230, holding that it is a question for the jury whether the killing of a cow and permitting her to remain near the track for several hours thereby frightening decedent's horse was negligence.

Evidence held sufficient to take the question of defendant's negligence in frightening horses and causing the injury to the jury see Kentucky, etc., Bridge Co. *v.* Montgomery, 67 S. W. 1008, 68 S. W. 1097, 24 Ky. L. Rep. 167, 57 L. R. A. 781; Gibbs *v.* Chicago, etc., R. Co., 26 Minn. 427, 4 N. W. 819; Dunn *v.* Wilmington, etc., R. Co., 124 N. C. 252, 32 S. E. 711.

Lookout.— Whether operatives of a train with knowledge that a public highway runs parallel with the track at a distance therefrom of from fifteen to twenty-five feet are required by the exercise of ordinary care to keep a lookout for dangers to persons using the highway in consequence of their horses becoming frightened at trains is for the jury. Johnson *v.* Texas, etc., R. Co., (Tex. Civ. App. 1907) 100 S. W. 206.

45. *Arkansas.*— Weil *v.* St. Louis Southwestern R. Co., 64 Ark. 535, 43 S. W. 967.

Minnesota.— Gibbs *v.* Chicago, etc., R. Co., 26 Minn. 427, 4 N. W. 819.

New Hampshire.— Walker *v.* Boston, etc., R. Co., 64 N. H. 414, 13 Atl. 649.

New Jersey.— Mumma *v.* Easton, etc., R. Co., 73 N. J. L. 653, 65 Atl. 208.

Pennsylvania.— Lott *v.* Frankford, etc., Pass. R. Co., 159 Pa. St. 471, 28 Atl. 299.

Texas.— Puppovich *v.* Galveston, etc., R. Co., (Civ. App. 1907) 99 S. W. 1143.

46. Foster *v.* East Jordan Lumber Co., 141 Mich. 316, 104 N. W. 617 (holding that whether a railroad company placing its locomotive near a traveled street is guilty of actionable negligence in unnecessarily allowing steam to escape therefrom thereby frightening the horse of a traveler and causing it to run away is for the jury); Dunn *v.* Wilmington, etc., R. Co., 124 N. C. 252, 32 S. E. 711.

47. Dunn *v.* Wilmington, etc., R. Co., 124 N. C. 252, 32 S. E. 711.

48. Hudson *v.* Louisville, etc., R. Co., 14 Bush (Ky.) 303.

49. Chicago, etc., R. Co. *v.* Steckman, 224 Ill. 500, 79 N. E. 602 [*affirming* 125 Ill. App. 299] (holding that in an action for injuries to the driver of a team which became frightened by whistling and escaping steam from defendant's engine, whether the driver was negligent in driving the team while seated on a packing box loaded on the front of his wagon without any chance to brace himself is a question for the jury); Walker *v.* Boston, etc., R. Co., 64 N. H. 414, 30 Atl. 649; Stamm *v.* Southern R. Co., 1 Abb. N. Cas.

tion for the jury as to whether or not defendant was negligent in regard to the derailment of the train or car which caused the injury complained of.[50]

d. Instructions. The instructions in an action against a railroad company for injuries to persons on highways or on private premises near the railroad company's tracks are governed by the rules applicable to instructions in civil cases generally.[51] In accordance with such rules, the instructions should clearly and accurately state the law of the case with respect to defendant's negligence,[52] or the injured party's contributory negligence.[53] Such instructions must be applicable to the pleadings and issues,[54] and to the evidence;[55] and should not be confusing or

(N. Y.) 438; Louisville, etc., R. Co. *v.* Morley, 86 Fed. 240, 30 C. C. A. 6.

50. Illinois Cent. R. Co. *v.* Watson, 117 Ky. 374, 78 S. W. 175, 25 Ky. L. Rep. 1360 (peremptory instruction for defendant held properly refused); Mahan *v.* Union Depot Street R., etc., Co., 34 Minn. 29, 24 N. W. 293 (holding that there was evidence of substantial negligence on the part of defendant which should have been submitted to the jury).

51. See, generally, TRIAL.

52. Alabama Great Southern R. Co. *v.* Fulton, 144 Ala. 332, 43 So. 832 (holding that where, in an action for injuries to a traveler in consequence of his mule becoming frightened by a train, the evidence established without dispute that the engineer who alone had charge of the train did not see the mule until it had become frightened, the court erred in refusing to charge that there could be no recovery under a count alleging that the engineer unnecessarily caused steam to escape from the engine or the whistle thereof to be sounded and thereby frightened the animal, etc.). See also Akridge *v.* Atlanta, etc., R. Co., 90 Ga. 232, 16 S. E. 81 (holding that, although an action for injuries resulting from plaintiff's horse being frightened by a whistle may be subject to some exception to a general rule of law, the court in charging a jury may state the general rule to enable the jury to understand and properly apply the exception); Chicago, etc., R. Co. *v.* Stickman, 95 Ill. App. 4 (holding that, in an action for injuries occasioned by plaintiff's team taking fright by a passing train, it is error to instruct the jury to determine whether the engineer saw plaintiff or by the exercise of ordinary care could have seen him and his team on the highway and within a short distance of the track, without explanation as to the engineer's duty under the circumstances); Chicago, etc., R. Co. *v.* Scranton, 78 Ill. App. 230 (holding that in an action for death caused by the fright of deceased's team when it approached a cow killed by defendant's train, it is error to charge that giving notice to defendant of the killing of the cow was unnecessary if its agents in exercising ordinary care should have known that the cow was killed, as the instruction failed to state the element of time to justify an implication of notice).

53. Chicago, etc., R. Co. *v.* Scranton, 78 Ill. App. 230 (holding that in an action for death caused by the fright of deceased's team, it is error to charge that there can be no recovery if deceased's negligence "caused" his death, as merely contributory negligence precludes a recovery); Yazoo, etc., R. Co. *v.* Eakin, 79 Miss. 735, 31 So. 414 (holding that a requested instruction that if plaintiff's own negligence contributed to her injury she could not recover unless the disaster occurred because defendant's employees "knowingly or intentionally" did something or refrained from some duty, should have been given without the interpolation of the words "or negligently").

An instruction that if decedent knew that a train was approaching in time to have taken such action to avoid injury as a person of ordinary prudence would have done and failed to do so and such failure contributed to the injury the company is not liable is a sufficient charge on contributory negligence in the absence of other correct charges asked by defendant. Texas, etc., R. Co. *v.* Hamilton, (Tex. Civ. App. 1901) 66 S. W. 797.

A charge requiring a verdict for defendant regardless of whether the acts of negligence on the part of the party injured caused or contributed to the injury is erroneous and properly refused. Texas, etc., R. Co. *v.* Hamilton, (Tex. Civ. App. 1901) 66 S. W. 797.

54. Southern R. Co. *v.* Hill, 125 Ga. 354, 54 S. E. 113 (holding that where plaintiff contends that his team was frightened and caused to run away by the negligence and wanton acts of defendant's engineer, an instruction for defendant designating the occurrence as "an accident" is properly refused); Chalkley *v.* Georgia Cent. R. Co., 120 Ga. 683, 48 S. E. 194 (instruction held erroneous as to defendant's negligence in blowing the whistle).

55. See Colorado Midland R. Co. *v.* Robbins, 30 Colo. 449, 71 Pac. 371; Southern R. Co. *v.* Hill, 125 Ga. 354, 54 S. E. 113 (charge as to punitive damages held supported by the evidence); Akridge *v.* Atlanta, etc., R. Co., 90 Ga. 232, 16 S. E. 81 (holding that in an action for injuries alleged to have been caused by an engineer sounding the whistle and frightening a horse, there being no direct evidence of plaintiff's want of skill or that the horse was vicious, and no circumstances from which the facts were fairly inferable, it is error to charge the jury that if "the sole and real cause of plaintiff's injury was the wild, vicious, and refractory disposition of the horse he drove, and the plaintiff's inability to control him, or the plaintiff's want of care or skill in the management of him, the plaintiff cannot recover"); Chicago, etc.,

misleading,[56] and should not invade the province of the jury by charging on the weight of the evidence.[57] The instructions should be construed as a whole and the fact that a separate portion thereof is objectionable does not affect the instructions if they are correct in their entirety.[58]

e. Verdict, Findings, and Review. The rules applying in civil cases generally govern questions in regard to the verdict or findings,[59] and questions of appeal and

R. Co. *v.* Yorty, 158 Ill. 321, 42 N. E. 64 [*affirming* 56 Ill. App. 242] (evidence held to warrant an instruction basing defendant's liability on the hypothesis that the engineer saw plaintiff and then negligently or wantonly sounded the whistle and blew off steam); Mitchell *v.* Union Terminal R. Co., 122 Iowa 237, 97 N. W. 1112; Andrews *v.* Mason City, etc., R. Co., 77 Iowa 669, 42 N. W. 513 (evidence held to warrant an instruction that if the fireman was left by the engineer in temporary charge of the engine and while so in charge, or while employed in the discharge of his duties as fireman he negligently let off steam and caused the injury, the company is liable, although the engineer testified that he did not leave the fireman "in charge of" but to "watch" the engine); Dunn *v.* Wilmington, etc., R. Co., 126 N. C. 343, 35 S. E. 606 (instruction held erroneously refused on the question of contributory negligence); St. Louis, etc., R. Co. *v.* Everett, 40 Tex. Civ. App. 285, 89 S. W. 457 (holding that where there is evidence warranting an inference that both plaintiff and defendant were negligent, it is error to refuse an instruction that if defendant was guilty of the negligence which caused the injury and plaintiff was guilty of contributory negligence which was the proximate cause or contributed to bring about the injury, the verdict should be for defendant); Texas, etc., R. Co. *v.* Hamilton, (Tex. Civ. App. 1901) 66 S. W. 797.

That the violation of a city ordinance providing that no person shall leave a team on a street without being fastened, etc., is pleaded does not make it necessary to instruct upon the issue so tendered if upon the trial no evidence is offered upon which the plea can be upheld. Mitchell *v.* Union Terminal R. Co., 122 Iowa 237, 97 N. W. 1112.

56. Mitchell *v.* Union Terminal R. Co., 122 Iowa 237, 97 N. W. 1112 (instruction held not misleading as to the duty of the trainmen operating locomotives in a city street to ring the bell continuously); Johnson *v.* Texas, etc., R. Co., (Tex. Civ. App. 1907) 100 S. W. 206 (holding that an instruction, in an action for injury to a traveler in consequence of her horse becoming frightened by an approaching train, that it was the traveler's duty to use her senses in ascertaining the approach of the train, although coupled with a charge requiring her to exercise ordinary care, is misleading, because calculated to lead the jury to understand that it was incumbent upon the traveler in the exercise of ordinary care to use her senses in ascertaining the approach of the train); St. Louis Southwestern R. Co. *v.* Everett, 40 Tex. Civ. App. 285, 89 S. W. 457 (holding that where, in an action for injuries to plaintiff owing to his horses becoming frightened at a hand-car, the court did not in the main charge define proximate cause, an instruction that if the car was running faster than seven miles an hour it was negligence is erroneous, as the deduction could be drawn that if the car was running faster than seven miles an hour it would constitute negligence and warrant a finding for plaintiff without determining whether the approach or speed of the hand-car was the cause of the team becoming frightened).

57. Missouri, etc., R. Co. *v.* Weathersford, 26 Tex. Civ. App. 20, 62 S. W. 101 (holding that a charge that if the jury believed "that because of such failure, if any there was, to ring the bell, plaintiff had no warning of the approach of said train . . until he arrived near to said crossing and at a point where his team would be frightened by . . said train," and if they further found that had the bell been rung "plaintiff would have been warned . . in time to have kept a safe distance from the track and crossing," etc., was not on the weight of the evidence in that it assumed that plaintiff had arrived at a point where his team would necessarily be frightened by the train and that the point at which plaintiff had arrived before hearing the train was not a place of safety.

58. Chalkley *v.* Central Georgia R. Co., 120 Ga. 683, 48 S. E. 194 (instructions held not erroneous as to negligence in blowing whistle); Everett *v.* Richmond, etc., R. Co., 121 N. C. 519, 27 S. E. 991 (holding that it is not error to charge that plaintiff cannot recover unless a locomotive engineer blows a whistle negligently, wantonly, or maliciously for the purpose of frightening plaintiff's horses, as the word "negligently" is used in such a connection as to be clear that the court meant thereby such a degree of gross negligence as would be nearly akin to wantonness or malice).

59. See Indianapolis Union R. Co. *v.* Boettcher, 131 Ind. 82, 28 N. E. 551, holding that the answers of the jury to interrogatories showing that defendant's employees in charge of the engine allowed the steam to escape and blew the whistle at an unusual time and negligently and wilfully blew the whistle are not inconsistent with a general verdict for plaintiff, and that therefore a motion by defendant for judgment on the answers to the interrogatories notwithstanding the general verdict was properly refused.

Verdict and findings generally see TRIAL.

Special finding and verdict in an action for the death of a person by being thrown from a buggy by reason of the horse becoming frightened by a train and running away see Wil-

error,[60] in actions against railroad companies for injuries to persons on streets, highways, or private premises near the tracks.

H. Injuries to Animals On or Near Tracks* — 1. Care Required and Liability as to Animals — a. In General. In the absence of statute, the liability of railroad companies for injuries to animals depends upon the same principles as that of private persons.[61] Although entitled to the exclusive and unobstructed use of their roads, they are subject to the general rule that every person must so use his own property as not unnecessarily to injure another;[62] but as the running of trains is in itself a lawful act, they are not liable for injuries resulting therefrom unless the right is exercised in an improper or unlawful manner,[63] and they will not, in the absence of statute, be liable for injuries to animals unless due to the negligence or misconduct of their employees.[64] With regard to injuries to animals railroad companies are not held to the highest degree of care,[65] but only

liams *v.* San Francisco, etc., R. Co., 6 Cal. App. 715, 93 Pac. 122.

An answer to one interrogatory that the whistle was blown negligently is not inconsistent with the answer to another interrogatory that the whistle was blown wilfully in that the same act was found to be negligent and wilful, there being no finding that the whistle was blown but once. Indianapolis Union R. Co. *v.* Boettcher, 131 Ind. 82, 28 N. E. 551.

A failure to answer special interrogatories is not ground for setting aside a verdict in a suit for injuries received by a team taking fright by the sudden escape of steam where such interrogatories do not call for facts without which the verdict cannot be sustained. Andrews *v.* Mason City, etc., R. Co., 77 Iowa 669, 42 N. W. 513.

60. Appeal and error generally see Appeal and Error, 2 Cyc. 474.

A verdict or finding will not be disturbed on appeal where there was sufficient evidence to justify the jury in its findings. St. Louis, etc., R. Co. *v.* Lewis, 60 Ark. 409, 30 S. W. 765, 1135; Gibbs *v.* Chicago, etc., R. Co., 26 Minn. 427, 4 N. W. 819.

A judgment in favor of plaintiff will not be disturbed on appeal on the ground that the engineer was not acting within the scope of his employment in blowing a whistle and letting off steam where he testifies that the acts complained of were done for the purpose of moving the cars in the course of his duty, although according to plaintiff's testimony such acts were wilful and malicious. Van Inwegen *v.* New York, etc., R. Co., 76 Hun (N. Y.) 53, 28 N. Y. Suppl. 169.

Harmless error.— Where plaintiff's horse is frightened by an approaching train while she is driving it across a railway and toll highway bridge, an instruction that it was the duty of the bridge company in operating its train on the bridge to exercise the highest degree of care usually exercised by prudently managed corporations of the same character to prevent injuries to passengers on foot or in vehicles in effect requires of defendant only the exercise of ordinary care and is not prejudicial. Kentucky, etc., Bridge Co. *v.* Montgomery, 67 S. W. 1008, 68 S. W. 1097, 24 Ky. L. Rep. 167, 57 L. R. A. 781.

61. Stucke *v.* Milwaukee, etc., R. Co., 9 Wis. 202.

Railroad companies are not liable for every injury done by their trains, nor could they be constitutionally made so. They are responsible for injuries caused by their negligence or want of skill or care; but there is no reason in law or morals for holding them to a stricter accountability for inevitable misfortunes than would be exacted from natural persons for injuries which resulted from unavoidable accident. New Orleans, etc., R. Co. *v.* Bourgeois, 66 Miss. 3, 5 So. 629, 14 Am. St. Rep. 534.

62. Vicksburg, etc., R. Co. *v.* Patton, 31 Miss. 156, 66 Am. Dec. 552; Gorman *v.* Pacific R. Co., 26 Mo. 441, 72 Am. Dec. 220; Kerwhaker *v.* Cleveland, etc., R. Co., 3 Ohio St. 172, 62 Am. Dec. 246; Blaine *v.* Chesapeake, etc., R. Co., 9 W. Va. 252.

63. Williams *v.* Michigan Cent. R. Co., 2 Mich. 259, 55 Am. Dec. 59.

But if a railroad company without acquiring a right of way constructs and operates its road through the land of another it is *prima facie* a trespasser and liable for all injuries done to the stock of such owner in the prosecution of its unlawful act. Mathews *v.* St. Paul, etc., R. Co., 18 Minn. 434.

64. *Michigan.*— Williams *v.* Michigan Cent. R. Co., 2 Mich. 259, 55 Am. Rep. 59.

Mississippi.— Mobile, etc., R. Co. *v.* Hudson, 50 Miss. 572.

Missouri.— Turner *v.* St. Louis, etc., R. Co., 76 Mo. 261.

New York.— Altreuter *v.* Hudson River R. Co., 2 E. D. Smith 151.

Pennsylvania.— New York, etc., R. Co. *v.* Skinner, 19 Pa. St. 298, 57 Am. Dec. 654.

Wyoming.— Schenck *v.* Union Pac. R. Co., 5 Wyo. 430, 40 Pac. 840.

See 41 Cent. Dig. tit. "Railroads," § 1693.

Running cars upon the left-hand track, where there are double tracks, is not wrongful and is not of itself sufficient to render the railroad company liable for injuries done by such cars. Altreuter *v.* Hudson River R. Co., 2 E. D. Smith (N. Y.) 151.

65. St. Louis, etc., R. Co. *v.* Vincent, 36 Ark. 451; Mississippi Cent. R. Co. *v.* Miller, 40 Miss. 45; Molair *v.* Port Royal, etc., R. Co., 29 S. C. 152, 7 S. E. 60.

* By James A. Gywn.

to the exercise of ordinary care.[66] But on the other hand, except in the case of trespassing animals,[67] it is not necessary in order to render them liable that there should be gross negligence or wanton or wilful injury.[68] Railroad companies must procure and use good and safe machinery and appliances,[69] employ skilful and competent servants,[70] and in operating their trains must exercise ordinary or reasonable care,[71] such as an ordinarily prudent man would use under the circumstances,[72] considering the dangerous character of the agency employed,[73] and having a proper regard both for the safety of the train and its passengers, and that of the animal,[74] the duty as to the train and passengers being paramount to that of avoiding injury to animals.[75] What will constitute ordinary or reasonable care varies according to the circumstances of the particular case,[76] and may under different conditions be made by varying degrees of diligence and precaution.[77] The care required in avoiding such injuries also varies materially according to whether the animal was at the time of the injury rightfully or wrongfully upon the track.[78] Railroad companies are not required to provide places

66. *Arkansas.*— Little Rock, etc., R. Co. *v.* Henson, 39 Ark. 413; St. Louis, etc., R. Co. *v.* Vincent, 36 Ark. 451.

California.— Richmond *v.* Sacramento Valley R. Co., 18 Cal. 351.

Georgia.— Georgia Cent. R. Co. *v.* Hughes, 127 Ga. 593, 56 S. E. 770.

Kentucky.— Beattyville, etc., R. Co. *v.* Maloney, 49 S. W. 545, 20 Ky. L. Rep. 1541.

Mississippi.— Mississippi Cent. R. Co. *v.* Miller, 40 Miss. 45.

South Carolina.—Molair *v.* Port Royal, etc., R. Co., 29 S. C. 152, 7 S. E. 60.

See 41 Cent. Dig. tit. "Railroads," § 1693.

Only such care as an ordinarily prudent man would use under the circumstances of the particular case is required. Mississippi Cent. R. Co. *v.* Miller, 40 Miss. 45.

67. See *infra*, X, H, 1, c.

68. Rockford, etc., R. Co. *v.* Rafferty, 73 Ill. 58; Illinois Cent. R. Co. *v.* Middlesworth, 46 Ill. 494 [*overruling* Great Western R. Co. *v.* Thompson, 17 Ill. 131; Chicago, etc., R. Co. *v.* Patchin, 16 Ill. 198, 61 Am. Dec. 65]; Shuman *v.* Indianapolis, etc., R. Co., 11 Ill. App. 472; Simkins *v.* Columbia, etc., R. Co., 20 S. C. 258; Richmond, etc., R. Co. *v.* Noell, 86 Va. 19, 9 S. E. 473.

69. Alabama, etc., R. Co. *v.* Jones, 71 Ala. 487.

Means of controlling trains see *infra*, X, H, 8, b.

70. New Orleans, etc., R. Co. *v.* Field, 46 Miss. 573; Vicksburg, etc., R. Co. *v.* Patton, 31 Miss. 156, 66 Am. Dec. 552.

71. *California.*— Richmond *v.* Sacramento Valley R. Co., 18 Cal. 351.

Delaware.— Burton *v.* Philadelphia, etc., R. Co., 4 Harr. 252.

Illinois.— Rockford, etc., R. Co. *v.* Rafferty, 73 Ill. 58; Illinois Cent. R. Co. *v.* Middlesworth, 46 Ill. 494; Shuman *v.* Indianapolis, etc., R. Co., 11 Ill. App. 472.

Iowa.— Alger *v.* Mississippi, etc., R. Co., 10 Iowa 268.

Kansas.— Prickett *v.* Atchison, etc., R. Co., 33 Kan. 748, 7 Pac. 611.

Mississippi.— New Orleans, etc., R. Co. *v.* Field, 46 Miss. 573.

Ohio.—Kerwhaker *v.* Cleveland, etc., R. Co., 3 Ohio St. 172, 62 Am. Dec. 246.

Virginia.— Richmond, etc., R. Co. *v.* Noell, 86 Va. 19, 9 S. E. 473.

West Virginia.— Blaine *v.* Chesapeake, etc., R. Co., 9 W. Va. 252.

United States.— Gulf, etc., R. Co. *v.* Washington, 49 Fed. 347, 1 C. C. A. 286.

Canada.— Smith *v.* Niagara, etc., R. Co., 9 Ont. L. R. 158, 4 Ont. Wkly. Rep. 526.

See 41 Cent. Dig. tit. "Railroads," § 1693.

72. New Orleans, etc., R. Co. *v.* Field, 46 Miss. 573; Gorman *v.* Pacific R. Co., 26 Mo. 441, 72 Am. Dec. 220; Simkins *v.* Columbia, etc., R. Co., 20 S. C. 258.

73. Gorman *v.* Pacific R. Co., 26 Mo. 441, 72 Am. Dec. 220.

74. New Orleans, etc., R. Co. *v.* Field, 46 Miss. 573; Witherell *v.* Milwaukee, etc., R. Co., 24 Minn. 410.

75. Louisville, etc., R. Co. *v.* Ballard, 2 Metc. (Ky.) 177; Witherell *v.* Milwaukee, etc., R. Co., 24 Minn. 410.

But so far as is consistent with this paramount duty they are required to exercise ordinary care to prevent injuries to animals upon the track. Kerwhaker *v.* Cleveland, etc., R. Co., 3 Ohio St. 172, 62 Am. Dec. 246; Blaine *v.* Chesapeake, etc., R. Co., 9 W. Va. 252.

76. Central R. Co. *v.* Summerford, 87 Ga. 626, 13 S. E. 588; Kerwhaker *v.* Cleveland, etc., R. Co., 3 Ohio St. 172, 62 Am. Dec. 246; Simkins *v.* Columbia, etc., R. Co., 20 S. C. 258; Smith *v.* Niagara, etc., R. Co., 9 Ont. L. R. 158, 4 Ont. Wkly. Rep. 526.

A higher degree of care is required of a railroad company in running a train at a high rate of speed through a town than when running a train through an open country, and the engineer while passing through a town should be constantly on the alert and prepared for instant action in case stock should go upon the track. St. Louis, etc., R. Co. *v.* Kimberlain, 76 Ark. 100, 88 S. W. 599.

77. Central R. Co. *v.* Summerford, 87 Ga. 626, 13 S. E. 588.

78. Toledo, etc., R. Co. *v.* Barlow, 71 Ill. 640; International, etc., R. Co. *v.* Cocke, 64 Tex. 151.

Care required as to trespassing animals see *infra*, X, H, 1, c.

where stock wandering upon the track might leave it if overtaken by trains,[79] or to keep their rights of way clear of obstructions so that animals can pass over and across the tracks freely,[80] or to keep the necessary ditches or excavations along the sides of its track free from accumulations of water or ice,[81] or at a public crossing to cover such ditches for the full width of the highway,[82] or to keep flagmen at crossings,[83] or to construct fences or barriers to prevent stock from falling down embankments;[84] but a railroad company will be liable for injury to stock occasioned by its maintaining a barbed wire fence on or along its right of way if it is so negligently constructed as to be a source of danger to stock.[85]

b. Statutes Imposing Liability. The common-law duties and liabilities of railroad companies with regard to injuries to animals have in many jurisdictions been greatly modified by statutes requiring railroad companies to fence their tracks and construct cattle-guards,[86] to maintain gates or bars at private or farm crossings,[87] to exercise certain precautions as to the giving of signals and maintaining a lookout for stock on the track,[88] regulating the speed of trains in certain localities,[89] and making proof of injury *prima facie* evidence of negligence, and placing the burden of proof on the company to show the absence of negligence.[90] The company will be liable for injuries due to a failure to comply with the requirements of the statutes, although not otherwise negligent,[91] or if negligent, although the statutory requirements were complied with,[92] and plaintiff may elect to sue upon either ground;[93] but the company cannot be held liable where there has been neither negligence or misconduct on the part of its employees, nor a failure to comply with any duty imposed by statute,[94] and statutes imposing an absolute liability for injuries to stock under such circumstances have uniformly been held to be unconstitutional.[95] Statutory provisions in the jurisdiction where the action is instituted have no application to cases where the cause of action occurred in another jurisdiction.[96]

c. Trespassing Animals.[97] There are statements in some of the cases to the effect that a railroad company must exercise ordinary or reasonable care even as to animals wrongfully upon the track,[98] and on the other hand that the company

79. Gilman *v.* Sioux City, etc., R. Co., 62 Iowa 299, 17 N. W. 520.

80. Arkansas, etc., R. Co. *v.* Sanders, 69 Ark. 619, 65 S. W. 428.

81. Peoria, etc., R. Co. *v.* McClenahan, 74 Ill. 435.

82. Whitsky *v.* Chicago, etc., R. Co., 62 Mich. 245, 28 N. W. 811.

83. Martin *v.* New York Cent., etc., R. Co., 20 Misc. (N. Y.) 363, 45 N. Y. Suppl. 925.

84. Sinard *v.* Southern R. Co., 101 Tenn. 473, 48 S. W. 227.

85. Winkler *v.* Carolina, etc., R. Co., 126 N. C. 370, 35 S. E. 621, 78 Am. St. Rep. 663, holding that while the mere act of constructing a fence of barbed wire is not negligence, the company will be liable for an injury due to its defective or improper condition.

Character of fences where companies are required to fence their tracks see *infra*, X, H, 4, c, (I), (A).

86. See *infra*, X, H, 4, a.

87. See *infra*, X, H, 5, b.

88. See *infra*, X, H, 7.

89. See *infra*, X, H, 8, a.

90. See *infra*, X, H, 15, i, (III).

91. *Alabama.*— Nashville, etc., R. Co. *v.* Comans, 45 Ala. 437.

Illinois.— Toledo, etc., R. Co. *v.* Logan, 71 Ill. 191.

Missouri.— Smith *v.* St. Louis, etc., R. Co., 91 Mo. 58, 3 S. W. 836.

New Hampshire.— Smith *v.* Eastern R. Co., 35 N. H. 356.

New York.— Suydam *v.* Moore, 8 Barb. 358.

Texas.— International, etc., R. Co. *v.* Leuders, 1 Tex. App. Civ. Cas. § 314.

See 41 Cent. Dig. tit. "Railroads," § 1394.

92. Nashville, etc., R. Co. *v.* Comans, 45 Ala. 437; Austin, etc., R. Co. *v.* Saunders, (Tex. Civ. App. 1894) 26 S. W. 128.

93. Rockford, etc., R. Co. *v.* Phillips, 66 Ill. 548.

The statutory liability is merely cumulative and does not displace the common law in cases to which it applies. Hill *v.* Missouri Pac. R. Co., 49 Mo. App. 520.

94. Nashville, etc., R. Co. *v.* Comans, 45 Ala. 437; Jensen *v.* Union Pac. R. Co., 6 Utah 235, 21 Pac. 994, 4 L. R. A. 724.

95. See CONSTITUTIONAL LAW, 8 Cyc. 1100.

96. Atchison, etc., R. Co. *v.* Betts, 10 Colo. 431, 15 Pac. 821, holding further that it cannot be presumed that the law in the jurisdiction where the injury occurred is the same as that where the action is instituted.

97. Affecting duty to keep lookout for animals see *infra*, X, H, 7, b.

Affecting precautions as to animals seen on or near the tracks see *infra*, X, H, 9, b.

Involved with failure to fence railroad see *infra*, X, H, 4, a, (XII), (B).

98. Baltimore, etc., R. Co. *v.* Mulligan, 45 Md. 486; Roberts *v.* Richmond, etc., R. Co.,

will not be liable for injuries to trespassing animals even in case of gross negligence, but only for wilful and intentional injury,[99] both of which have been expressly disapproved.[1] What is apprehended to be the sounder rule and supported by the weight of authority is that a railroad company is not obliged to exercise even ordinary care as to trespassing animals,[2] and will not be liable for injuries to such animals in the absence of gross negligence or wanton or wilful injury,[3] or failure to exercise due care to prevent the injury after the animals are discovered upon the track;[4] but that even a trespassing animal cannot be wantonly injured,[5] and that the company will be liable for gross negligence, although the injury was not intentional,[6] and that after an animal, although a trespasser, is discovered upon the track reasonable care must be exercised to avoid injury.[7]

d. Species of Animals Injured.[8] It has been held that the rules as to the liability of railroad companies for the negligent injury or killing of cattle should not be applied to animals not purely domestic, such as dogs, or fowls;[9] and it has also been held that a dog is property only in such a restricted sense that the owner cannot maintain an action for injuries caused by negligence;[10] but on

88 N. C. 560; Cincinnati, etc., R. Co. *v.* Smith, 22 Ohio St. 227, 10 Am. St. Rep. 729; Cranston *v.* Cincinnati, etc., R. Co., 1 Handy (Ohio) 193, 12 Ohio Dec. (Reprint) 97; Simkins *v.* Columbia, etc., R. Co., 20 S. C. 258.

99. Terry *v.* New York Cent. R. Co., 22 Barb. (N. Y.) 574; Clark *v.* Syracuse, etc., R. Co., 11 Barb. (N. Y.) 112; Tonawanda R. Co. *v.* Munger, 5 Den. (N. Y.) 253, 49 Am. Dec. 239 [*affirmed* in 4 N. Y. 349, 53 Am. Dec. 384].

1. Stucke *v.* Milwaukee, etc., R. Co., 9 Wis. 202.

2. Vanhorn *v.* Burlington, etc., R. Co., 63 Iowa 67, 18 N. W. 679; Russell *v.* Maine Cent. R. Co., 100 Me. 406, 61 Atl. 899; Maynard *v.* Boston, etc., R. Co., 115 Mass. 458, 15 Am. Rep. 119; Simmons *v.* Poughkeepsie, etc., R. Co., 2 N. Y. App. Div. 117, 37 N. Y. Suppl. 532; Tonawanda R. Co. *v.* Munger, 5 Den. (N. Y.) 255, 49 Am. Dec. 239 [*affirmed* in 4 N. Y. 349, 52 Am. Dec. 384].

3. *Illinois.*— Illinois Cent. R. Co. *v.* Reedy, 17 Ill. 580; Delta Electric Co. *v.* Whitcamp, 58 Ill. App. 141.

Indiana.— Indianapolis, etc., R. Co. *v.* McClure, 26 Ind. 370, 89 Am. Dec. 467.

Iowa.— Vanhorn *v.* Burlington, etc., R. Co., 63 Iowa 67, 18 N. W. 679.

Kentucky.— Louisville, etc., R. Co. *v.* Ballard, 2 Metc. 177.

Massachusetts.— Darling *v.* Boston, etc., R. Co., 121 Mass. 118; Maynard *v.* Boston etc., R. Co., 115 Mass. 458, 15 Am. Rep. 119 [*distinguishing* Eames *v.* Salem, etc., R. Co., 98 Mass. 560, 96 Am. Dec. 676].

New York.—Simmons *v.* Poughkeepsie, etc., R. Co., 2 N. Y. App. Div. 117, 37 N. Y. Suppl. 532; Magilton *v.* New York Cent. R. Co., 82 Hun 308, 31 N. Y. Suppl. 241; Boyle *v.* New York, etc., R. Co., 39 Hun 171 [*affirmed* in 115 N. Y. 636, 21 N. E. 724]; Talmadge *v.* Rensselaer, etc., R. Co., 13 Barb. 493; Tonawanda R. Co. *v.* Munger, 5 Den. 255, 49 Am. Dec. 239 [*affirmed* in 4 N. Y. 349, 53 Am. Dec. 384].

See 41 Cent. Dig. tit. "Railroads," § 1395.

4. Illinois Cent. R. Co. *v.* Noble, 142 Ill. 578, 32 N. E. 684; Toledo, etc., R. Co. *v.* Barlow, 71 Ill. 640; Delta Electric Co. *v.* Whitcamp, 58 Ill. App. 141; Hooper *v.* Chicago, etc., R. Co., 37 Minn. 52, 33 N. W. 314; Canadian Pac. R. Co. *v.* Eggleston, 36 Can. Sup. Ct. 641; Auger *v.* Ontario, etc., R. Co., 9 U. C. C. P. 164.

There is no duty to exercise even ordinary care as to a trespassing animal, until after it is discovered on the track. Illinois Cent. R. Co. *v.* Noble, 142 Ill. 578, 32 N. E. 684.

5. Stucke *v.* Milwaukee, etc., R. Co., 9 Wis. 202; Pritchard *v.* La Crosse, etc., R. Co., 7 Wis. 232; Campbell *v.* Great Western R. Co., 15 U. C. Q. B. 498.

Wanton or wilful injury see *infra*, X, H, 12, a.

6. Stucke *v.* Milwaukee, etc., R. Co., 9 Wis. 202. See also Toledo, etc., R. Co. *v.* McGinnis, 71 Ill. 346.

7. See *infra*, X, H, 9, b.

8. As affecting duty to fence railroad see *infra*, X, H, 4, a, (XII), (A).

9. Wilson *v.* Wilmington, etc., R. Co., 10 Rich. (S. C.) 52, 54, where the court said: "It would indeed be a startling doctrine to hold, that a train of cars . . . should be arrested in its progress, and compelled at the hazard of responsibility, to come to a dead halt, whenever a domestic fowl, or perchance a yelping cur, should happen to take its stand upon the track." See also Richardson *v.* Florida Cent., etc., R. Co., 55 S. C. 334, 33 S. E. 466.

A goose is not an "animal or obstruction" within the application of the Tennessee statute requiring the alarm whistle to be sounded and the brakes to be put down and every possible means employed to stop the train and prevent an accident when an "animal or obstruction" appears on the track. Nashville, etc., R. Co. *v.* Davis, (Tenn. 1902) 78 S. W. 1050.

10. Strong *v.* Georgia R., etc., Co., 118 Ga. 515, 45 S. E. 366; Jennison *v.* Southwestern R. Co., 75 Ga. 444, 58 Am. Rep. 476 (holding that the property in a dog is of such a character that while the owner might maintain an action of trespass for wantonly or maliciously killing it, he cannot maintain case for its unintentional, although negligent destruction).

the other hand, it has been held that a railroad company must exercise ordinary care to prevent injuries to dogs and that it will be liable for an injury due to negligence as well as where the injury was wilful,[11] and that, although the dog was a trespasser, the company will be liable if the injury could by the exercise of ordinary care have been avoided,[12] but not where the dog was a trespasser, if the proper signals were given and due care was exercised after it was discovered to avoid the injury.[13] Dogs are not "stock" within the application of statutes making railroad companies liable without proof of negligence for injuries to stock where their roads are not fenced,[14] or within the application of statutes making proof of the injury by a railroad train to "any cattle or other live stock" *prima facie* evidence of negligence,[15] but are within the application of statutes requiring that the whistle shall be sounded when animals are seen upon the track.[16]

e. Effect of Stock Laws or Fence Laws — (I) *PERMITTING ANIMALS TO RUN AT LARGE.*[17] It has been held that where there is a municipal ordinance permitting stock to run at large, trains must be operated with reference to the right of the owner to do so and that the company must exercise at least ordinary care to avoid injuries;[18] but on the other hand it has been held that where the common-law rule as to stock running at large prevails, the local regulations of a town or county cannot authorize a trespass upon a railroad right of way,[19] or impose any additional obligations upon the company,[20] and that, although stock were at large pursuant to such a regulation, the company will not be liable in the absence of gross negligence or wilful misconduct.[21]

(II) *PROHIBITING ANIMALS FROM RUNNING AT LARGE.* In localities where there are statutes or ordinances prohibiting stock from running at large, railroad companies have a right to presume that such animals will not be upon the track,[22] and are not required to exercise the same degree of care as in localities where it is lawful for stock to run at large.[23] Stock running at large in violation

Nature of property in dogs see ANIMALS, 2 Cyc. 305.

11. Georgia Cent. R. Co. *v.* Martin, 150 Ala. 388, 43 So. 563; St. Louis, etc., R. Co. *v.* Stanfield, 63 Ark. 643, 40 S. W. 126, 37 L. R. A. 659; Jones *v.* Illinois Cent. R. Co., (Miss. 1898) 23 So. 358; St. Louis, etc., R. Co. *v.* Hauks, 78 Tex. 300, 14 S. W. 691, 11 L. R. A. 383. *Compare* Mobile, etc., R. Co. *v.* Holliday, 79 Miss. 294, 30 So. 820.

12. Georgia Cent. R. Co. *v.* Martin, 150 Ala. 388, 43 So. 563; St. Louis, etc., R. Co. *v.* Hauks, 78 Tex. 300, 14 S. W. 691, 11 L. R. A. 383.

13. Fink *v.* Evans, 95 Tenn. 413, 32 S. W. 307.

14. Texas, etc., R. Co. *v.* Scott, (Tex. 1891) 17 S. W. 1116.

15. Moore *v.* Charlotte Electric R., etc., Co., 136 N. C. 554, 48 S. E. 822, 67 L. R. A. 470.

16. Fink *v.* Evans, 95 Tenn. 413, 32 S. W. 307.

17. **Affecting duty to erect fence** see *infra*, X, H, 4, a, (XIII).

Affecting duty to keep lookout see *infra*, X, H, 7, b.

18. Fritz *v.* First Div. St. Paul, etc., R. Co., 22 Minn. 404.

19. Williams *v.* Michigan Cent. R. Co., 2 Mich. 259, 55 Am. Dec. 59; Tonawanda R. Co. *v.* Munger, 5 Den. (N. Y.) 255, 49 Am. Dec. 239 [*affirmed* in 4 N. Y. 349, 53 Am. Dec. 384]; Rathwell *v.* Canadian Pac. R. Co., 9 Can. L. T. Occ. Notes 413.

20. Hanna *v.* Terre Haute, etc., R. Co., 119 Ind. 316, 21 N. E. 903; Michigan Southern, etc., R. Co. *v.* Fisher, 27 Ind. 96.

The effect of such a regulation is merely to protect the owner from liability for allowing his animals to run at large and does not impose any additional duties upon the railroad company or authorize the owner of animals to subject them to the risk of injury and recover therefor, although the railroad company may have been negligent. Hanna *v.* Terre Haute, etc., R. Co., 119 Ind. 316, 21 N. E. 903.

21. Hanna *v.* Terre Haute, etc., R. Co., 119 Ind. 316, 21 N. E. 903; Tonawanda R. Co. *v.* Munger, 5 Den. (N. Y.) 255, 49 Am. Dec. 239 [*affirmed* in 4 N. Y. 349, 55 Am. Dec. 384].

22. Denver, etc., R. Co. *v.* Olsen, 4 Colo. 239; Molair *v.* Port Royal, etc., R. Co., 29 S. C. 152, 7 S. E. 60; International, etc., R. Co. *v.* Dunham, 68 Tex. 231, 4 S. W. 472, 2 Am. St. Rep. 484; Missouri, etc., R. Co. *v.* Scofield, (Tex. Civ. App. 1906) 98 S. W. 435; Missouri, etc., R. Co. *v.* Tolbert, (Tex. Civ. App. 1905) 90 S. W. 508; Houston, etc., R. Co. *v.* Atlas Press Brick Works, 36 Tex. Civ. App. 368, 81 S. W. 792.

Although a railroad company has failed to fence its tracks it has a right to presume that stock will not be upon the track where it is unlawful for them to run at large. Evans *v.* Sherman, etc., R. Co., 14 Tex. Civ. App. 437, 37 S. W. 93.

23. Denver, etc., R. Co. *v.* Stewart, 1 Colo. App. 227, 28 Pac. 658; Averill *v.* Santa Fé R.

of such provisions are trespassers,[24] and the railroad company will not be liable except for gross negligence or injuries wantonly or wilfully inflicted,[25] or failure to exercise ordinary care after discovering the animal upon the track.[26] In jurisdictions, however, where proof of the injury raises a presumption of negligence which must be rebutted by the railroad company the existence of stock laws prohibiting animals from running at large does not affect this presumption,[27] but is a material fact bearing upon the effort of defendant to overcome the presumption.[28]

2. Frightening or Attracting Animals — a. Frightening Animals.[29] A railroad company is not liable for injuries to animals due to fright caused by the noises necessarily incident to the operation of trains, such as the escape of smoke and steam and the use of whistles and bells as signals, unless its servants were negligent in their use;[30] but the company will be liable if such noises were made

Co., 72 Mo. App. 243; Harley *v.* Eutawville R. Co., 31 S. C. 151, 9 S. E. 782; Molair *v.* Port Royal, etc., R. Co., 29 S. C. 152, 7 S. E. 60; Joyner *v.* South Carolina R. Co., 26 S. C. 49, 1 S. E. 52; International, etc., R. Co. *v.* Dunham, 68 Tex. 231, 4 S. W. 472, 2 Am. St. Rep. 484.

If the injury is sustained in plaintiff's inclosure, used by him as a pasture and through which the railroad company has merely a right of way, the existence of a stock law in the county cannot affect the case. Simkins *v.* Columbia, etc., R. Co., 20 S. C. 258.

In Georgia it is held that under the statute the "degree" of care must in all cases be "ordinary and reasonable" but that what constitutes this degree of care depends upon the circumstances, including the application of stock laws in the particular locality, and that in such localities it may be met although less vigilance and watchfulness is used than would be required in others. Central R. Co. *v.* Summerford, 87 Ga. 626, 13 S. E. 588. See also Atlanta, etc., R. Co. *v.* Hudson, 2 Ga. App. 352, 58 S. E. 500.

24. Vanhorn *v.* Burlington, etc., R. Co., 63 Iowa 67, 18 N. W. 679; Cumming *v.* Great Northern R. Co., 15 N. D. 611, 108 N. W. 798; Missouri, etc., R. Co. *v.* Scofield, (Tex. Civ. App. 1906) 98 S. W. 535; Red River, etc., R. Co. *v.* Dooley, 35 Tex. Civ. App. 364, 80 S. W. 566; Missouri, etc., R. Co. *v.* Russell, (Tex. Civ. App. 1897) 43 S. W. 576.

Stock upon a highway even upon the owner's premises, if roaming at large upon the highway and not in any manner under restraint or control, are "at large" in violation of the statute. Johnson *v.* Minneapolis, etc., R. Co., 43 Minn. 207, 45 N. W. 152.

25. *Colorado.*— Denver, etc., R. Co. *v.* Olsen, 4 Colo. 239; Denver, etc., R. Co. *v.* Stewart, 1 Colo. App. 227, 28 Pac. 658.

Iowa.—Vanhorn *v.* Burlington, etc., R. Co., 63 Iowa 67, 18 N. W. 679.

Kansas.— Kansas City, etc., R. Co. *v.* McHenry, 24 Kan. 501.

Missouri.— Windsor *v.* Hannibal, etc., R. Co., 45 Mo. App. 123.

Texas.— International, etc., R. Co. *v.* Dunham, 68 Tex. 231, 4 S. W. 472, 2 Am. St. Rep. 484; Missouri, etc., R. Co. *v.* Scofield, (Civ. App. 1906) 98 S. W. 435; Red River, etc., R. Co. *v.* Dooley, 35 Tex. Civ. App. 364, 80 S. W. 566; Missouri, etc., R. Co. *v.* Russell, (Civ. App. 1897) 43 S. W. 576; Houston, etc., R. Co. *v.* Nichols, (Tex. Civ. App. 1897) 39 S. W. 954.

See 41 Cent. Dig. tit. "Railroads," § 1401.

But see Roberts *v.* Richmond, etc., R. Co., 88 N. C. 560; Simkins *v.* Columbia, etc., R. Co., 20 S. C. 258.

If the statute does not expressly prohibit an animal from running at large but merely provides that where a bull is allowed to run at large any person may castrate the animal if not taken up within a certain time after notice to the owner, such animals are not to be regarded as unlawfully at large. Mumpower *v.* Hannibal, etc., R. Co., 59 Mo. 245; Schwarz *v.* Hannibal, etc., R. Co., 58 Mo. 207; Owens *v.* Hannibal, etc., R. Co., 58 Mo. 386.

The fact that the animal escaped from a good inclosure without the fault of the owner is immaterial. Missouri, etc., R. Co. *v.* Tolbert, (Tex. Civ. App. 1905) 90 S. W. 508.

But if an animal is killed wantonly or by gross negligence the company will be liable notwithstanding it was unlawfully at large. Denver, etc., R. Co. *v.* Olsen, 4 Colo. 239.

26. Cumming *v.* Great Northern R. Co., 15 N. D. 611, 108 N. W. 798.

27. Central R. Co. *v.* Summerford, 87 Ga. 626, 13 S. E. 588; Roberds *v.* Mobile, etc., R. Co., 74 Miss. 324, 21 So. 10; Roberts *v.* Richmond, etc., R. Co., 88 N. C. 560; Joyner *v.* South Carolina R. Co., 26 S. C. 49, 1 S. E. 52; Jones *v.* Columbia, etc., R. Co., 20 S. C. 249.

28. Harley *v.* Eutawville R. Co., 31 S. C. 151, 9 S. E. 782.

It is therefore error for the court to charge that such laws do not affect the case. Molair *v.* Port Royal, etc., R. Co., 29 S. C. 152, 7 S. E. 60.

29. **Accidents at crossings** due to frightening animal see *supra*, X, F, 4.

Where involved with failure to fence track see *infra*, X, H, 4, a, (XV).

30. *Alabama.*— Louisville, etc., R. Co. *v.* Lee, 136 Ala. 182, 33 So. 897, 96 Am. St. Rep. 24.

Delaware.— Burton *v.* Philadelphia, etc., R. Co., 4 Harr. 252.

Georgia.— Southern R. Co. *v.* Duckett, 121

negligently and unnecessarily or wantonly,[31] and in such cases will be liable not only for injuries to the animals frightened but also for injuries done by them in their flight to other animals.[32] So if the acts are not done in an unusual or improper manner the railroad company will not be liable for injuries caused by animals being frightened by the crossing signals which it is the duty of the company to give,[33] or where as a proper precaution to frighten animals away from the track and prevent their being injured by the train the engineer blows an alarm signal or lets off steam and the animal is injured by running into a fence or other obstruction.[34] Where animals are frightened merely by the approach of trains the company will not be liable in the absence of any negligence in the operation of the train or failure to exercise ordinary care to avoid the injury;[35] but it will be liable if the fright of the animal was due to the train being operated in a negligent manner,[36] or if after discovering the fright and danger of the animal the injury could, by the exercise of ordinary care, have been avoided.[37] It is also the duty of the

Ga. 511, 49 S. E. 589; Morgan *v.* Central R. Co., 77 Ga. 788.

Illinois.— Indiana, etc., R. Co. *v.* Schertz, 12 Ill. App. 304.

Mississippi.—Lowe *v.* Alabama, etc., R. Co., 81 Miss. 9, 32 So. 907.

New York.—Mayer *v.* New York Cent., etc., R. Co., 8 N. Y. Suppl. 461 [*affirmed* in 132 N. Y. 579, 30 N. E. 867].

Texas.— Galveston, etc., R. Co. *v.* Graham, (Civ. App. 1907) 101 S. W. 846.

United States.— Buster *v.* Humphreys, 34 Fed. 507.

See 41 Cent. Dig. tit. "Railroads," § 1403.

Where a train becomes uncoupled and animals are frightened by the engineer's signal for brakes and are injured in attempting to run between the two sections of the train, the company is not liable where there was no negligence with regard to the breaking of the coupling or stopping of the train and the signal given was the usual one in such cases. Buster *v.* Humphreys, 34 Fed. 507.

31. *Arkansas.*— Earl *v.* St. Louis, etc., R. Co., 84 Ark. 507, 106 S. W. 675.

Georgia.— Southern R. Co. *v.* Pool, 108 Ga. 808, 34 S. E. 141.

Illinois.— Louisville, etc., R. Co. *v.* Upton, 18 Ill. App. 605.

Indiana.— Billman *v.* Indianapolis, etc., R. Co., 76 Ind. 166, 40 Am. Rep. 230.

South Carolina.— Cobb *v.* Columbia, etc., R. Co., 37 S. C. 194, 15 S. E. 878.

See 41 Cent. Dig. tit "Railroads," § 1403.

But the mere fact that it was not necessary to blow the whistle or let off steam will not render the railroad company liable for injuries to animals frightened thereby, if it was not done for that purpose and the trainmen did not know of the presence of the animals or have any reason to foresee the result of the acts complained of. Gibson *v.* Louisville, etc., R. Co., 106 S. W. 838, 32 Ky. L. Rep. 769.

32. Billman *v.* Indianapolis, etc., R. Co., 76 Ind. 166, 40 Am. Rep. 230.

33. Southern R. Co. *v.* Puryear, 2 Ga. App. 75, 58 S. E. 306; Manhattan, etc., R. Co. *v.* Stewart, 30 Kan. 226, 2 Pac. 151; Galveston, etc., R. Co. *v.* Graham, (Tex. Civ. App. 1907) 101 S. W. 846.

Effect of statutes as to signals.— It is not negligence to blow a whistle at points where such signals are expressly required by statute, and it is error for the court in instructing the jury not to distinguish between such signaling and the unnecessary blowing of whistles at other points. Manhattan, etc., R. Co. *v.* Stewart, 30 Kan. 226, 2 Pac. 151. A statute requiring the blowing of a whistle or ringing of a bell at certain places, but excepting street crossings in cities, does not prohibit the blowing of a whistle at such crossings, and the company will not be liable for so doing unless the act was improper under all the circumstances of the particular case. Mayer *v.* New York Cent., etc., R. Co., 8 N. Y. Suppl. 461 [*affirmed* in 132 N. Y. 579, 30 N. E. 867].

34. St. Louis, etc., R. Co. *v.* Conger, 84 Ark. 421, 105 S. W. 1177; Southern R. Co. *v.* Puryear, 2 Ga. App. 75, 58 S. E. 306.

35. *Georgia.*— Gay *v.* Wadley, 86 Ga. 103, 12 S. E. 298; Southern R. Co. *v.* Puryear, 2 Ga. App. 75, 58 S. E. 306.

Illinois.— Chicago, etc., R. Co. *v.* Taylor, 8 Ill. App. 108.

Mississippi.—Georgia Pac. R. Co. *v.* Money, (1891) 8 So. 646; New Orleans, etc., R. Co. *v.* Thornton, 65 Miss. 256, 3 So. 654.

South Carolina.— Brothers *v.* South Carolina R. Co., 5 S. C. 55.

Texas.— Beaumont Pasture Co. *v.* Sabine, etc., R. Co., (Civ. App. 1897) 41 S. W. 190.

Wisconsin.—Lynch *v.* Northern Pac. R. Co., 84 Wis. 348, 54 N. W. 610.

Canada.— Hurd *v.* Grand Trunk R. Co., 15 Ont. App. 58.

See 41 Cent. Dig. tit. "Railroads," § 1403.

Telling a person to drive up to the station for the purpose of unloading freight will not render the railroad company liable for injuries to the team due to becoming frightened by a passing train, where there was no negligence in the management of the train and the company's agent did not know that the team was afraid of trains and the driver knowing this fact drove up to the station without objection. Morgan *v.* Central R. Co., 77 Ga. 788.

36. Texas, etc., R. Co. *v.* Anderson, 2 Tex. App. Civ. Cas. § 203.

37. Newman *v.* Vicksburg, etc., R. Co., 64 Miss. 115, 8 So. 172.

railroad company in arranging its depot grounds to take into consideration the liability of teams to be frightened by passing trains and to use reasonable care in guarding against this danger.[38]

b. Attracting Animals. It is negligence on the part of a railroad company to leave upon its tracks anything, such as salt, hay, or grain, calculated to attract animals to the track,[39] or if it fails to exercise ordinary care in discovering and thereafter removing within a reasonable time such substances if left upon the track by persons not connected with the railroad company.[40] But a railroad company will not be liable merely for leaving cars loaded with such substances for shipment standing upon its tracks if they are not left for an unreasonable time,[41] or because it leases a portion of its right of way to be used for the purpose of a grain elevator,[42] or uses salt as a solvent for thawing out snow and ice from its switches,[43] or where animals are attracted to the track by salt or foodstuffs left exposed by third persons at buildings upon the right of way which are not used by or under the control of the railroad company.[44]

3. Place of Accident — a. In General. A railroad company is liable for injuries to stock due to the negligence of its servants or agents wherever they may occur,[45] and the care to be exercised at particular places must be commensurate with the danger reasonably to be apprehended.[46] A railroad company will also be liable for injuries to animals due to a failure to keep its stations and grounds about them safe for the approach and use of persons doing business at such places,[47] or a failure to provide a safe and proper place for the delivery of freight,[48] or where its tracks are laid in the streets of a town or city, for injuries due either to a failure

Where an animal is running toward a trestle in front of a train and the circumstances are such as to make it probable that it will not leave the track but run upon the trestle, it is the duty of the engineer to stop the train. Alabama Great Southern R. Co. *v.* Hall, 133 Ala. 362, 32 So. 259.

Where a railroad track is inclosed with a barbed wire fence the railroad company must use diligence corresponding to the danger of precipitating live stock by fright upon the fence and wounding them. Atlanta, etc., R. Co. *v.* Hudson, 62 Ga. 679.

38. Rill *v.* Rome, etc., R. Co., 23 N. Y. Wkly. Dig. 416, holding that where the place constructed for receiving freight is upon a high and narrow embankment, close to the main track, the company is liable for injuries to a team which is frightened by a passing train and runs down the side of the embankment and into a wire fence upon the grounds below.

39. Little Rock, etc., R. Co. *v.* Dick, 52 Ark. 402, 12 S. W. 785, 20 Am. St. Rep. 190; Crafton *v.* Hannibal, etc., R. Co., 55 Mo. 580; Morrow *v.* Hannibal, etc., R. Co., 29 Mo. App. 432; Brown *v.* Hannibal, etc., R. Co., 27 Mo. App. 394; Page *v.* North Carolina R. Co., 71 N. C. 222.

It constitutes a prima facie case of negligence where food calculated to attract animals is left upon the track, and the burden is upon defendant to show that it used reasonable care to avoid the injury. Little Rock, etc., R. Co. *v.* Dick, 52 Ark. 402, 12 S. W. 785, 20 Am. St. Rep. 190.

It is not contributory negligence on the part of the owner of animals to permit them to run at large where it is lawful to do so knowing that there are substances upon the track calculated to attract them, since it is the duty of the railroad company to remove such substances and he has a right to presume that it will do so. Crafton *v.* Hannibal, etc., R. Co., 55 Mo. 580; Brown *v.* Hannibal, etc., R. Co., 27 Mo. App. 394.

40. Brown *v.* Hannibal, etc., R. Co., 27 Mo. App. 394. See also Morrow *v.* Hannibal, etc., R. Co., 29 Mo. App. 432.

41. Schooling *v.* St. Louis, etc., R. Co., 75 Mo. 518; Harlan *v.* Wabash, etc., R. Co., 18 Mo. App. 483.

42. Gilliland *v.* Chicago, etc., R. Co., 19 Mo. App. 411.

43. Louisville, etc., R. Co. *v.* Phillips, (Miss. 1893) 12 So. 825; Kirk *v.* Norfolk, etc., R. Co., 41 W. Va. 722, 24 S. E. 639, 56 Am. St. Rep. 899, 32 L. R. A. 416.

44. Burger *v.* St. Louis, etc., R. Co., 123 Mo. 679, 27 S. W. 393 [*reversing* 52 Mo. App. 119]; Whitsides *v.* St. Louis, etc., R. Co., 58 Mo. App. 655.

45. Mobile, etc., R. Co. *v.* Williams, 53 Ala. 595.

46. Bishop *v.* Chicago, etc., R. Co., 4 N. D. 536, 62 N. W. 605.

47. Central R. Co. *v.* Gleason, 72 Ga. 742, 69 Ga. 200; Chicago, etc., R. Co. *v.* De Baum, 2 Ind. App. 281, 28 N. E. 447; Rill *v.* Rome, etc., R. Co., 23 N. Y. Wkly. Dig. 416.

But the company will not be liable if it keeps its grounds in a safe condition to the extent and limits of their use by the public, for an injury to plaintiff's team caused by an attempt to drive it over a portion of the grounds not designated for that purpose. Central R. Co. *v.* Gleason, 69 Ga. 200.

48. Bachant *v.* Boston, etc., R. Co., 187 Mass. 392, 73 N. E. 642, 105 Am. St. Rep. 408.

to lay them properly or to keep them in repair.[49] So also where a person stands a team for the purpose of transacting business with the railroad company at a place designated by its agent, the company will be liable for injury to the team by trains under its control.[50]

b. Accidents at Public Crossings.[51] In operating a railroad across a public highway the company must exercise ordinary care and diligence to prevent injury to animals rightfully upon the highway,[52] and if the company by the mode of constructing its tracks or adjacent buildings unnecessarily makes a crossing particularly dangerous it must adopt corresponding precautions to prevent injuries.[53] If a railroad company is required by a city ordinance to construct gates at street crossings and keep them closed when trains are passing, a failure to do so is negligence which will render the company liable for any injuries to animals occasioned thereby;[54] but in the absence of statute or an order made pursuant to statutory authority, a railroad company is under no obligation to maintain gates or a flagman at a crossing.[55]

c. Defects in or Obstructions at Crossings. Where a railroad crosses a public highway it is the duty of the company to make and maintain a good and sufficient crossing,[56] and in case of failure to do so it will be liable for injuries to animals due to defects in the crossing itself,[57] or injuries done by its trains at crossings owing to the improper construction or condition of the crossing.[58] The company

49. Worster *v.* Forty-Second St., etc., Ferry R. Co., 50 N. Y. 203.

50. Bachant *v.* Boston, etc., R. Co., 187 Mass. 392, 73 N. E. 642, 105 Am. St. Rep. 408.

But if the person had no right or authority to be at the place at the time of the injury and was there without the knowledge of the company, it owes him no duty except to use due care to prevent an injury after the dangerous position of his team is discovered. Texas, etc., R. Co. *v.* Harbison, (Tex. Civ. App. 1905) 88 S. W. 414.

51. Liability under statutes relating to fencing see *infra*, X, H, 4, a, (XI), (B).

Signals and lookouts see *infra*, X, H, 7.

Rate of speed and means of controlling trains see *infra*, X, H, 8.

52. Louisville, etc., R. Co. *v.* Ousler, 15 Ind. App. 232, 36 N. E. 290; Balcom *v.* Dubuque, etc., R. Co., 21 Iowa 102; Lane *v.* Kansas City, etc., R. Co., 31 Kan. 525, 3 Pac. 341; White *v.* Concord R. Co., 30 N. H. 188.

Gross negligence is not necessary to render the company liable if the animal injured was rightfully upon the crossing. Balcom *v.* Dubuque, etc., R. Co., 21 Iowa 102; Lane *v.* Kansas City, etc., R. Co., 31 Kan. 525, 3 Pac. 341; White *v.* Concord, etc., R. Co., 30 N. H. 188.

53. Pennsylvania R. Co. *v.* Matthews, 36 N. J. L. 531.

54. Missouri Pac. R. Co. *v.* Hackett, 54 Kan. 316, 38 Pac. 294, 28 L. R. A. 696, holding that a railroad company in case of failure to construct such gates is liable for injuries caused by a runaway team running into a train which is crossing the street.

55. Martin *v.* New York Cent., etc., R. Co., 20 Misc. (N. Y.) 363, 45 N. Y. Suppl. 925.

56. Evansville, etc., R. Co. *v.* Carvener, 113 Ind. 51, 14 N. E. 738; Atchison, etc., R. Co. *v.* Miller, 39 Kan. 419, 18 Pac. 486; Burlington, etc., R. Co. *v.* Koonce, 34 Nebr. 479, 51 N. W. 1033; Gulf, etc., R. Co. *v.* Holtcamp, 3 Tex. App. Civ. Cas. § 437.

A crossing is sufficient to protect the railroad company from liability for injuries to animals at the crossing if it is so constructed that the public can cross with teams and vehicles with reasonable safety and convenience. Peoria, etc., R. Co. *v.* Miller, 11 Ill. App. 375; Meeker *v.* Chicago, etc., R. Co., 64 Iowa 641, 21 N. W. 120.

The charter of the North Carolina railroad in its provisions as to the repair of public crossings applies only to public highways recognized as such by the appointment of overseers and hands to work and keep them in repair for the use of a whole community, and the company will not be liable by reason of the provision of the charter for failing to repair the crossing of a road used by the public but which has never been so recognized as a public highway. Coon *v.* North Carolina R. Co., 65 N. C. 507, where, however, the court expressly avoided any decision as to the liability of the company to persons using such roads apart from that imposed by the provisions of its charter.

57. *Indiana.*— Evansville, etc., R. Co. *v.* Carevener, 113 Ind. 51, 14 N. E. 738.

Nebraska.— Burlington, etc., R. Co. *v.* Koonce, 34 Nebr. 479, 51 N. W. 1033.

New York.— Worster *v.* Forty-Second St., etc., Ferry R. Co., 50 N. Y. 203; Cuddeback *v.* Jewett, 20 Hun 187.

North Carolina.— Tankard *v.* Roanoke R., etc., Co., 117 N. C. 558, 23 S. E. 46.

Canada.— Moggy *v.* Canadian Pac. R. Co., 3 Manitoba 209.

See 41 Cent. Dig. tit. "Railroads," § 1407.

Where a person is directed to drive over a crossing by the servants of the company who are engaged in repairing the same without any warning as to its condition, the company will be liable for an injury to a horse caused by stepping on an exposed spike on the crossing. Terre Haute, etc., R. Co. *v.* Grandfield, 58 Ill. App. 136.

58. Atchison, etc., R. Co. *v.* Miller, 39 Kan.

will also be liable for injuries to animals due to its wrongfully obstructing the crossing of a public highway,[59] as by leaving its trains standing upon a crossing for an unreasonable length of time.[60] A railroad company is not, however, liable to a mere licensee for injuries to animals due to the condition of its track or roadbed at places other than such crossings as it is the duty of the company to maintain.[61]

4. Fences and Cattle-Guards — a. Duty to Erect and Maintain — (i) *In General.* Unless required to do so by the terms of its charter or express statutory provision a railroad company is not obliged to fence its tracks,[62] or to construct cattle-guards,[63] and consequently a failure to do so will not render the company liable for injuries to animals in the absence of negligence or misconduct on the part of its employees.[64] This duty is, however, in some cases imposed by the charter of the company,[65] and in many jurisdictions by statutes which either

419, 18 Pac. 486; Kimes *v.* St. Louis, etc., R. Co., 85 Mo. 611; Cotton *v.* New York, etc., R. Co., 20 N. Y. Suppl. 347; Gulf, etc., R. Co. *v.* Holtcamp, 3 Tex. App. Civ. Cas. § 437.

59. Alabama Great Southern R. Co. *v.* Clark, 126 Ala. 141, 27 So. 916; Murray *v.* South Carolina R. Co., 10 Rich. (S. C.) 227, 70 Am. Dec. 219.

It is not necessary that the particular injury should have been foreseen in order to render the company liable for wrongfully obstructing a public highway, but it is sufficient if it was reasonably to be expected that an injury might result to some person while exercising a legal right in an ordinarily careful manner. Grimes *v.* Louisville, etc., R. Co., 3 Ind. App. 573, 30 N. E. 200.

60. Grimes *v.* Louisville, etc., R. Co., 3 Ind. App. 573, 30 N. E. 200; Murray *v.* South Carolina R. Co., 10 Rich. (S. C.) 227, 70 Am. Dec. 219.

Where cars are left standing near a crossing but not so as in any way to obstruct it, the company will not be liable for injury to an animal which goes between such cars and a moving train on another track where there is no negligence in the operation of the train. Hyer *v.* Chamberlain, 46 Fed. 341.

61. Pratt Coal, etc., Co. *v.* Davis, 79 Ala. 308; Ott *v.* Kansas City, etc., R. Co., 58 Mo. App. 502; Truax *v.* Chicago, etc., R. Co., 83 Wis. 547, 53 N. W. 842.

62. *Connecticut.*— Campbell *v.* New York, etc., R. Co., 50 Conn. 128.

Florida.— Savannah, etc., R. Co. *v.* Geiger, 21 Fla. 669, 58 Am. Rep. 697.

Indian Territory.— Chicago, etc., R. Co. *v.* Woodworth, 1 Indian Terr. 20, 35 S. W. 238.

Kentucky.— Louisville, etc., R. Co. *v.* Ballard, 2 Metc. 177.

Louisiana.— Day *v.* New Orleans Pac. R. Co., 36 La. Ann. 244; Stevenson *v.* New Orleans Pac. R. Co., 35 La. Ann. 498; Knight *v.* New Orleans, etc., R. Co., 15 La. Ann. 105.

Massachusetts.— Morss *v.* Boston, etc., R. Co., 2 Cush. 536.

Michigan.— Continental Imp. Co. *v.* Phelps, 47 Mich. 299, 11 N. W. 167; Williams *v.* Michigan Cent. R. Co., 2 Mich. 259, 55 Am. Dec. 59.

Mississippi.— New Orleans, etc., R. Co. *v.* Field, 46 Miss. 573; Memphis, etc., R. Co. *v.* Orr, 43 Miss. 279.

New Hampshire.— Towns *v.* Cheshire R. Co., 21 N. H. 363.

Ohio.— Cleveland, etc., R. Co. *v.* Elliott, 4 Ohio St. 474.

Oklahoma.— McCook *v.* Bryan, 4 Okla. 488, 46 Pac. 506.

Pennsylvania.— New York, etc., R. Co. *v.* Skinner, 19 Pa. St. 298, 57 Am. Dec. 654.

Vermont.— Hurd *v.* Rutland, etc., R. Co., 25 Vt. 116. But see Throw *v.* Vermont Cent. R. Co., 24 Vt. 487, 58 Am. Dec. 191; Quimby *v.* Vermont Cent. R. Co., 23 Vt. 387.

West Virginia.— Layne *v.* Ohio River R. Co., 35 W. Va. 438, 14 S. E. 123; Blaine *v.* Chesapeake, etc., R. Co., 9 W. Va. 252.

Wisconsin.— Stucke *v.* Milwaukee, etc., R. Co., 9 Wis. 202.

Wyoming.— Martin *v.* Chicago, etc., R. Co., 15 Wyo. 493, 89 Pac. 1025.

See 41 Cent. Dig. tit. "Railroads," § 1409.

The fact that a railroad company has voluntarily erected fences is not evidence of any duty to make and maintain such fences. Morss *v.* Boston, etc., R. Co., 2 Cush. (Mass.) 536.

63. St. Louis, etc., R. Co. *v.* Douglass, 152 Ala. 197, 44 So. 677; Towns *v.* Cheshire R. Co., 21 N. H. 363.

A railroad company may remove cattle-guards which it has constructed at a point at which it is under no legal obligation to maintain them. McKee *v.* Cincinnati, etc., R. Co., 102 Ky. 253, 43 S. W. 241, 19 Ky. L. Rep. 1270.

64. *Florida.*— Savannah, etc., R. Co. *v.* Geiger, 21 Fla. 669, 58 Am. Rep. 697.

Kentucky.— Louisville, etc., R. Co. *v.* Ballard, 2 Metc. 177.

Louisiana.— Day *v.* New Orleans, etc., R. Co., 36 La. Ann. 244.

Michigan.— Williams *v.* Michigan Cent. R. Co., 2 Mich. 259, 55 Am. Dec. 59.

Ohio.— Cleveland, etc., R. Co. *v.* Elliott, 4 Ohio St. 474.

Pennsylvania.— New York, etc., R. Co. *v.* Skinner, 19 Pa. St. 298, 57 Am. Dec. 654.

Wisconsin.— Stucke *v.* Milwaukee, etc., R. Co., 9 Wis. 202.

Wyoming.— Martin *v.* Chicago, etc., R. Co., 15 Wyo. 493, 89 Pac. 1025.

Canada.— Graham *v.* Canadian Pac. R. Co., 9 Can. L. T. Occ. Notes 252.

See 41 Cent. Dig. tit. "Railroads," § 1409.

65. Hurd *v.* Rutland, etc., R. Co., 25 Vt. 116.

expressly require the construction of fences or make railroad companies liable for all injuries to animals where their roads are not fenced.[66] The statutes in some cases expressly require the construction of cattle-guards;[67] but statutes requiring the erection and maintenance of fences impose without any express provision relating thereto the duty of constructing suitable cattle-guards,[68] and end or wing fences from such cattle-guards to the main or lateral fences.[69] The obligation, being purely statutory, comes into existence, is modified, or goes out of existence by the enactment, change, or repeal of the statutes.[70]

(II) *AGREEMENT OF RAILROAD COMPANY TO CONSTRUCT AND MAINTAIN.* Where a railroad company in consideration of the grant of a right of way or other

66. *California.*— Enright *v.* San Francisco, etc., R. Co., 33 Cal. 230.

Florida.— Jacksonville, etc., R. Co. *v.* Prior, 34 Fla. 271, 15 So. 760.

Illinois.— Toledo, etc., R. Co. *v.* Logan, 71 Ill. 191.

Indiana.—Jeffersonville, etc., R. Co. *v.* Dunlap, 112 Ind. 93, 13 N. E. 403; Baltimore, etc., R. Co. *v.* Kreiger, 90 Ind. 380.

Iowa.— Young *v.* St. Louis, etc., R. Co., 44 Iowa 172.

Kansas.—Atchison, etc., R. Co. *v.* Shaft, 33 Kan. 521, 6 Pac. 908.

Michigan.— Continental Imp. Co. *v.* Phelps, 47 Mich. 299, 11 N. W. 167.

Missouri.— Gorman *v.* Pacific R. Co., 26 Mo. 441, 72 Am. Dec. 220; McIntosh *v.* Hannibal, etc., R. Co., 26 Mo. App. 377.

Nebraska.— Union Pac. R. Co. *v.* Schwenck, 13 Nebr. 478, 14 N. W. 376.

New Hampshire.— Smith *v.* Eastern R. Co., 35 N. H. 356.

New York.— Kelver *v.* New York, etc., R. Co., 126 N. Y. 365, 27 N. E. 553; Klock *v.* New York Cent., etc., R. Co., 62 Hun 291, 17 N. Y. Suppl. 120; Graham *v.* Delaware, etc., Canal Co., 46 Hun 386.

Ohio.— Gill *v.* Atlantic, etc., R. Co., 27 Ohio St. 240.

Oregon.— Sullivan *v.* Oregon R., etc., Co., 19 Oreg. 319, 24 Pac. 408.

Vermont.— Congdon *v.* Central Vermont R. Co., 56 Vt. 390, 48 Am. Rep. 793.

Virginia.— Norfolk, etc., R. Co. *v.* Johnson, 91 Va. 661, 22 S. E. 505; Norfolk, etc., R. Co. *v.* McGavock, 90 Va. 507, 18 S. E. 909.

Wisconsin.— Heller *v.* Abbot, 79 Wis. 409, 48 N. W. 598.

Canada.— Fensom *v.* Canadian Pac. R. Co., 8 Ont. L. Rep. 688, 4 Ont. Wkly. Rep. 373 [*affirming* 7 Ont. L. Rep. 254, 3 Ont. Wkly. Rep. 227].

See 41 Cent. Dig. tit. "Railroads," § 1409.

The duty of fencing is imposed by implication by statutes making railroad companies liable for injuries to animals where their tracks are not fenced (Sullivan *v.* Oregon R., etc., Co., 19 Oreg. 319, 24 Pac. 408), or permitting adjoining owners after notice to the company to construct fences upon failure of the railroad company to do so and to recover from the railroad company the expenses of such construction (Cornwall *v.* Sullivan R. Co., 28 N. H. 161).

The Massachusetts statute of 1846 expressly applied only to roads thereafter constructed, the prior statutes not requiring railroad companies to maintain fences but providing for compensation for fences to be included in the damages recovered by landowners (Baxter *v.* Boston, etc., R. Co., 102 Mass. 383; Stearns *v.* Old Colony, etc., R. Co., 1 Allen 493), and did not apply to roads located and begun but not completed at the time of the passage of that act (Baxter *v.* Boston, etc., R. Co., *supra*).

Powers of provincial legislature.— The provision in the British Columbia Cattle Protection Act (1891), as amended in 1895, to the effect that a dominion railway company, unless they erect proper fences on their railway, shall be responsible for cattle injured or killed thereon, is *ultra vires* of the provincial parliament. Madden *v.* Nelson, etc., R. Co., [1899] A. C. 626, 68 L. J. C. P. 148, 15 T. L. R. 484 [*affirming* 5 Brit. Col. 541].

At what places required see *infra*, X, H, 4, b.

67. *Michigan.*— Lafferty *v.* Chicago, etc., R. Co., 71 Mich. 35, 38 N. W. 660.

Minnesota.— Greely *v.* St. Paul, etc., R. Co., 33 Minn. 136, 22 N. W. 179, 53 Am. Rep. 16.

New York.— Bradley *v.* Buffalo, etc., R. Co., 34 N. Y. 427.

Ohio.— Railroad Co. *v.* Newbrander, 40 Ohio St. 15.

Texas.— Horan *v.* Taylor, etc., R. Co., 3 Tex. App. Civ. Cas. § 435.

Canada.— Huist *v.* Buffalo, etc., R. Co., 16 U. C. Q. B. 299.

See 41 Cent. Dig. tit. "Railroads," § 1409.

68. *Idaho.*— Patrie *v.* Oregon Short-Line R. Co., 6 Ida. 448, 56 Pac. 82.

Illinois.— Toledo, etc., R. Co. *v.* Franklin, 53 Ill. App. 632.

Indiana.— Wabash, etc., R. Co. *v.* Tretts, 96 Ind. 450; Pittsburgh, etc., R. Co. *v.* Ehrhart, 36 Ind. 118; New Albany, etc., R. Co. *v.* Pace, 13 Ind. 411.

Kansas.— Union Pac. R. Co. *v.* Harris, 28 Kan. 206.

Texas.— International, etc., R. Co. *v.* Searight, 8 Tex. Civ. App. 593, 28 S. W. 39.

See 41 Cent. Dig. tit. "Railroads," § 1409.

69. Louisville, etc., R. Co. *v.* Thomas, 106 Ind. 10, 5 N. E. 198; Union Pac. R. Co. *v.* Harris, 28 Kan. 206; Edwards *v.* Kansas City, etc., R. Co., 74 Mo. 117.

70. Campbell *v.* New York, etc., R. Co., 50 Conn. 128, holding that where a statute requiring fences is repealed and a new statute enacted requiring fencing only when

valuable consideration contracts with an adjoining landowner to fence its tracks, it is liable to such owner for injury to animals occasioned by its failure to construct or maintain such fences in accordance with the terms of its agreement.[71] A compliance with an existing statute as to fencing will not exonerate the company from liability irrespective of the terms of the contract,[72] nor will an agreement on the part of the company as to the construction of certain fences and crossings, unless such an intention clearly appears, relieve the company from any of its duties in this regard imposed by statute.[73]

(III) *DUTY OF ADJOINING LANDOWNER TO ASSIST.* Statutes requiring railroad companies to fence are not partition fence laws,[74] and in the absence of special statute or agreement an adjoining landowner is not required to erect or assist in maintaining any part thereof,[75] or to construct fences on his own land abutting on the railroad;[76] nor, on the other hand, is the railroad company obliged to construct fences, which if constructed would inclose no part of its track, between places such as depot grounds which it may leave unfenced and the lands of adjoining owners.[77] Statutes providing that upon failure of the railroad company to construct fences the landowner may do so and recover the value thereof from the railroad company impose no duty upon the landowner to do so, and do not affect the liability of the railroad company under other statutes expressly requiring it to fence.[78]

(IV) *DELEGATION OF DUTY TO THIRD PERSONS.* A railroad company cannot avoid its liability for injuries to animals occasioned by the absence or defective condition of fences or cattle-guards by showing that it had contracted with some third person to construct or maintain them and that the injury was due to a failure of such person to comply with his agreement,[79] unless the owner of

the railroad commissioners order it, the company is not liable for failure to erect fences where the commissioners have not so ordered.

71. Evans *v.* Southern R. Co., 133 Ala. 482, 32 So. 138; Fernow *v.* Dubuque, etc., R. Co., 22 Iowa 528; Gulf, etc., R. Co. *v.* Washington, 49 Fed. 347, 1 C. C. A. 286.

An agreement to fence within a reasonable time "after the completion" of the railroad will be construed as referring to the completion of the part running through the lands agreed to be fenced and not to the completion of the entire road, where the completed parts of the road are being operated in advance of the completion of the whole. Baltimore, etc., R. Co. *v.* McClellen, 59 Ind. 440.

Form of action.— Where the duty to fence is not imposed by law but by contract, the owner of animals injured cannot maintain an action of tort based solely upon a breach of this duty, but in the absence of such negligence in the management of the train as to render the company liable the remedy of the owner must be an action for damages for breach of the contract. Drake *v.* Philadelphia, etc., R. Co., 51 Pa. St. 240. But see Gulf, etc., R. Co. *v.* Washington, 49 Fed. 347, 1 C. C. A. 286.

72. Thompson *v.* New York, etc., R. Co., 1 Thomps. & C. (N. Y.) 411.

73. Poler *v.* New York Cent. R. Co., 16 N. Y. 476, holding that under a deed of a right of way providing that the company shall construct a good and sufficient fence on each side of the strip conveyed and maintain two crossings, but making no provision as to the maintenance of gates and bars at such crossings, the statutory duty of the company to do so is not affected.

74. Smith *v.* Minneapolis, etc., R. Co., 37 Minn. 103, 33 N. W. 316; Busby *v.* St. Louis, etc., R. Co., 81 Mo. 43.

75. Busby *v.* St. Louis, etc., R. Co., 81 Mo. 43.

The Kentucky statute of 1903 requires railroad companies to construct and maintain fences on one half of the distance of the division line between the right of way and the adjoining land, and requires the landowner to fence the other half; but where the landowner erects the part required of him the railroad company is bound to erect the other half without notice from the landowner to do so. Parish *v.* Louisville, etc., R. Co., 78 S. W. 186, 25 Ky. L. Rep. 1524.

In Ohio under the act of 1859 landowners through or along whose lands a railroad was constructed were required to assist in building and maintaining fences as in the case of partition fences (Sandusky, etc., R. Co. *v.* Sloan, 27 Ohio St. 341), but under the later statute of 1874 this duty rests entirely upon the railroad company (Pittsburg, etc., R. Co. *v.* Smith, 38 Ohio St. 410).

76. Fontaine *v.* Southern Pac. R. Co., 54 Cal. 645.

77. Smith *v.* Minneapolis, etc., R. Co., 37 Minn. 103, 33 N. W. 316.

78. Toledo, etc., R. Co. *v.* Pence, 68 Ill. 524; Pittsburg, etc., R. Co. *v.* Smith, 38 Ohio St. 410.

79. Indianapolis, etc., R. Co. *v.* Thomas, 84 Ind. 194 [*disapproving* Indianapolis, etc.,

the injured animal is the same person who assumed the duty of maintaining the fences or is a party to or otherwise bound by his agreement.[80]

(v) *WAIVER OR AGREEMENT OF ADJOINING LANDOWNER.* The construction of fences and cattle-guards, although required by statute, may be waived by an adjoining landowner,[81] or he may agree with the company that he will himself construct and maintain them,[82] and in such cases cannot maintain any action against the railroad company for injuries to animals due to the absence of such fences or cattle-guards;[83] but agreements of this character are not binding upon persons not parties to the contract or assenting thereto,[84] although it has

R. Co. *v.* Adkins, 23 Ind. 340]; Cincinnati, etc., R. Co. *v.* Ridge, 54 Ind. 39; Warren *v.* K. & D. M. R. Co., 41 Iowa 484; Corwin *v.* New York, etc., R. Co., 13 N. Y. 42; Pittsburg, etc., R. Co. *v.* Allen, 40 Ohio St. 206; Gill *v.* Atlantic, etc., R. Co., 27 Ohio St. 240.

Where a railroad is built by a construction company under contract with defendant, the fact that the construction company neglected to build cattle-guards does not affect the liability of the railroad company for injuries to stock occasioned by their absence. Chicago, etc., R. Co. *v.* Hutchinson, 45 Kan. 186, 25 Pac. 576.

80. See *infra*, X, H, 4, a, (v).

81. Enright *v.* San Francisco, etc., R. Co., 33 Cal. 230; Whittier *v.* Chicago, etc., R. Co., 24 Minn. 394; San Antonio, etc., R. Co. *v.* Adams, (Tex. Civ. App. 1898) 45 S. W. 844.

But a failure of the landowner to demand that the company comply with the law is not a waiver of its failure to do so, nor does the fact that for a long period of time it neglected its duty give it any prescriptive right to continue in wrong-doing or immunity against the statutory penalty. Parks *v.* Hannibal, etc., R. Co., 20 Mo. App. 440.

Contracts not releasing liability.— The liability for injuries to animals due to a failure to maintain fences as required by law is not released by a release in the grant of a right of way of all damages and claims "occasioned by, the location, construction, and operation" of the road over the premises conveyed (Stoutimore *v.* Chicago, etc., R. Co., 39 Mo. App. 257), or by a release of liability for damages resulting from "the location or construction of said work, or the repairing thereof" (Cleveland, etc., R. Co. *v.* Crossley, 36 Ind. 370).

82. Terre Haute, etc., R. Co. *v.* Smith, 16 Ind. 102 [*distinguishing* New Albany, etc., R. Co. *v.* Maiden, 12 Ind. 10]; Warren *v.* K. & D. M. R. Co., 41 Iowa 484; Ells *v.* Pacific R. Co., 48 Mo. 231; Talmadge *v.* Rensselaer, etc., R. Co., 13 Barb. (N. Y.) 493.

Where the railroad company employs the landowner to construct the fence and he acts merely as its agent, the liability of the company is not affected by the contract, it being only in cases where the duty is assumed by the landowner that the company is released. Illinois Cent. R. Co. *v.* Swearingen, 33 Ill. 289.

The contract need not be in writing in order to bind the landowner and release the railroad company as to him from liability. Talmadge *v.* Rensselaer, etc., R. Co., 13 Barb. (N. Y.) 493.

83. Enright *v.* San Francisco, etc., R. Co., 33 Cal. 230; Terre Haute, etc., R. Co. *v.* Smith, 16 Ind. 102; Whittier *v.* Chicago, etc., R. Co., 24 Minn. 394; Ells *v.* Pacific R. Co., 48 Mo. 231.

The landowner cannot set up the statute of limitations as relieving him from the consequences of his own neglect where he has neglected for a number of years to comply with his contract to construct a fence. Talmadge *v.* Rensselaer, etc., R. Co., 13 Barb. (N. Y.) 493.

84. *Illinois.*— St. Louis, etc., R. Co. *v.* Todd, 36 Ill. 409.

Indiana.— Indianapolis, etc., R. Co. *v.* Thomas, 84 Ind. 194 [*disapproving* Indianapolis, etc., R. Co. *v.* Adkins, 23 Ind. 340]; Cincinnati, etc., R. Co. *v.* Hildreth, 77 Ind. 504; Cincinnati, etc., R. Co. *v.* Ridge, 54 Ind. 39.

Iowa.— Warren *v.* K. & D. M. R. Co., 41 Iowa 484.

Maine.— Gilman *v.* European, etc., R. Co., 60 Me. 235.

Michigan.— Neversorry *v.* Duluth, etc., R. Co., 115 Mich. 146, 73 N. W. 125.

Missouri.—Rinehart *v.* Kansas City Southern R. Co., 204 Mo. 269, 102 S. W. 918 [*affirming* 126 Mo. App. 446, 80 S. W. 910]; Berry *v.* St. Louis, etc., R. Co., 65 Mo. 172; Perry *v.* Quincy, etc., R. Co., 122 Mo. App. 177, 99 S. W. 14.

New York.— Corwin *v.* New York, etc., R. Co., 13 N. Y. 42.

Ohio.— Pittsburg, etc., R. Co. *v.* Allen, 40 Ohio St. 206.

Oregon.— Brown *v.* Southern Pac. R. Co., 36 Oreg. 128, 58 Pac. 1104, 78 Am. St. Rep. 761, 47 L. R. A. 409.

England.— Corry *v.* Great Western R. Co., 7 Q. B. D. 322, 45 J. P. 712, 50 L. J. Q. B. 386, 44 L. T. Rep. N. S. 701, 29 Wkly. Rep. 623.

See 41 Cent. Dig. tit. "Railroads," § 1424.

Persons pasturing animals upon the land of a landowner who has agreed to maintain fences are not precluded by such agreement from maintaining an action against the railroad company for injuries to animals due to the absence of such fences. Warren *v.* K. & D. M. R. Co., 41 Iowa 484.

Where it is the duty of a railroad company to maintain a gate at a farm crossing for the

been held that a tenant of the landowner will be bound thereby.[85] A covenant in a deed of a right of way by which the landowner agrees to maintain the necessary fences runs with the land and estops all persons holding through or under him from maintaining such actions to the same extent as the grantor himself;[86] but a mere parol agreement does not run with the land or bind a subsequent owner,[87] nor do covenants in a deed with regard to the maintenance of fences bind persons who are strangers thereto.[88]

(VI) *Effect of Award of Damages to Landowners For Fencing.*[89] It is ordinarily held that a railroad company is relieved from any liability for failing to maintain fences to a landowner who in the award of damages for the taking of his land is allowed compensation for this purpose,[90] and in some jurisdictions there are statutory provisions relieving the railroad company from liability as to owners who have been paid compensation for fencing,[91] and in one jurisdiction the statute has been held to apply not only as between the railroad company and the landowner but as to injuries to animals of third persons.[92]

benefit of several adjacent owners, a waiver by one owner of a defective condition of such gate does not affect the other owners. Parks *v.* Hannibal, etc., R. Co., 20 Mo. App. 440.

85. Indianapolis, etc., R. Co. *v.* Petty, 25 Ind. 413 (holding that an agreement of the landowner to maintain a fence is binding upon his tenant); Clayton *v.* Great Western R. Co., 23 U. C. C. P. 137 (holding that, where a fence along the railroad at a certain place is omitted at the request of the landowner, a tenant of the landowner cannot recover for injuries to stock which go upon the track at such place). See also Kilmer *v.* Great Western R. Co., 35 U. C. Q. B. 595, holding that a person using the land as a mere licensee of the owner cannot recover on account of the absence of fences which had been removed with the consent of the landowner. But see Thomas *v.* Hannibal, etc., R. Co., 82 Mo. 538 (holding that an agreement of the landowner that the company need not maintain fences is not binding upon a tenant without notice of the agreement); Corry *v.* Great Western R. Co., 7 Q. B. D. 322, 45 J. P. 712, 50 L. J. Q. B. 386, 44 L. T. Rep. N. S. 701, 29 Wkly. Rep. 623.

A covenant in a deed binding the grantor to maintain the fences required has been held to estop any tenant or other occupant holding under such grantor from maintaining an action for injuries due to the absence of fences without regard to the liability of the tenant or occupant to perform the conditions of the covenant (Duffy *v.* New York, etc., R. Co., 2 Hilt. (N. Y.) 496); but where the landowner in order to aid the construction of a railroad executed a conveyance of the right of way with a release of any obligation on the part of the company to fence the same, it was held that as the landowner had not agreed to construct the fences the release did not affect the right of his tenant to recover for injuries to his animals, as it imposed no duty upon the land which the tenant was bound to perform (Cincinnati, etc., R. Co. *v.* Hildreth, 77 Ind. 504).

86. Satterly *v.* Erie R. Co., 113 N. Y. App. Div. 462, 99 N. Y. Suppl. 309; Duffey *v.* New York, etc., R. Co., 2 Hilt. (N. Y.) 496.

87. St. Louis, etc., R. Co. *v.* Todd, 36 Ill. 409; Wilder *v.* Maine Cent. R. Co., 65 Me. 332, 20 Am. Rep. 698; Meadows *v.* Chicago, etc., R. Co., 82 Mo. App. 83.

88. Cincinnati, etc., R. Co. *v.* Ridge, 54 Ind. 39; Corwin *v.* New York, etc., R. Co., 13 N. Y. 42.

89. Express agreement of landowner to fence see *supra*, X, H, 4, a, (V).

90. Rockford, etc., R. Co. *v.* Lynch, 67 Ill. 149; Terre Haute, etc., R. Co. *v.* Smith, 16 Ind. 102; Stearns *v.* Old Colony, etc., R. Corp., 1 Allen (Mass.) 493; Johnson *v.* Milwaukee, etc., R. Co., 19 Wis. 137. But see Baltimore, etc., R. Co. *v.* Johnson, 59 Ind. 188.

If compensation was received by the landowner prior to the statute requiring railroad companies to fence, the duty of fencing as between the railroad company and such owner rests upon the latter and is not affected by the statute (Stearns *v.* Old Colony, etc., R. Co., 1 Allen (Mass.) 493; Johnson *v.* Milwaukee, etc., R. Co., 19 Wis. 137); and the same rule applies if the railroad was located and begun under a statute allowing the landowner to recover compensation for fencing as a part of his damages, although the road was not completed at the time of the enactment of the statute requiring railroad companies to fence (Baxter *v.* Boston, etc., R. Co., 102 Mass. 383).

91. Louisville, etc., R. Co. *v.* Belcher, 89 Ky. 193, 12 S. W. 195, 11 Ky. L. Rep. 393; Horn *v.* Atlantic, etc., R. Co., 35 N. H. 169; Cornwall *v.* Sullivan, etc., R. Co., 28 N. H. 161; Baltimore, etc., R. Co. *v.* Wood, 47 Ohio St. 431, 24 N. E. 1077.

Under the Kentucky statute to enable an occupant of adjoining lands to recover in the absence of negligence it must appear that neither he nor the owner of the lands had received compensation from the railroad company for fencing. Louisville, etc., R. Co. *v.* Belcher, 89 Ky. 193, 12 S. W. 195, 11 Ky. L. Rep. 393.

92. Baltimore, etc., R. Co. *v.* Wood, 47 Ohio St. 431, 24 N. E. 1077.

(VII) *TIME FOR CONSTRUCTION.* The statutory liability of a railroad company for injuries to animals due to the absence of fences commences as soon as it begins to run its cars over the road,[93] unless the statute expressly allows a certain time for such construction after the road is open for use,[94] or after the passage of the act creating the liability,[95] in which case to recover under the statute it is necessary for plaintiff to show that this time had elapsed at the time of the injury complained of,[96] and if it has not, there can be no recovery unless actionable negligence in the operation of the train is shown.[97]

(VIII) *PERSONS ENTITLED TO BENEFIT OF FENCING.* The statutes requiring railroad companies to maintain fences and cattle-guards are in some jurisdictions construed as being only for the benefit of adjoining landowners,[98] includ-

93. Cobb *v.* Kansas City, etc., R. Co., 43 Mo. App. 313.

Where no time is specified by the statute for the construction of the fences, they must be built at least as soon as the company shall commence operating its road; and it seems that under the same circumstances a proper regard for the rights of adjoining landowners would require that they should be built before or as soon as the construction of the road is begun. Holden *v.* Rutland, etc., R. Co., 30 Vt. 297.

94. Colorado, etc., R. Co. *v.* Neville, 41 Colo. 393, 92 Pac. 956; Chicago, etc., R. Co. *v.* Diehl, 52 Ill. 441; Ohio, etc., R. Co. *v.* Jones, 27 Ill. 41; Ohio, etc., R. Co. *v.* Meisenheimer, 27 Ill. 30; Wabash, etc., R. Co. *v.* Neikirk, 13 Ill. App. 387.

The Illinois statute requires that the fences shall be constructed within six months after the road is open for use, but the term "open for use" does not mean open to public or general use, and the company will be liable for injuries in case of a failure to fence within six months after beginning to run trains on the track for construction purposes, and this notwithstanding the road is still under the control of contractors. Rockford, etc., R. Co. *v.* Heflin, 65 Ill. 366.

A failure to keep a fence in repair will not render the railroad company liable where it has voluntarily constructed the fence and the injury occurs prior to the time within which the statute requires its construction. Toledo, etc., R. Co. *v.* Miller, 45 Ill. 42.

95. Baltimore, etc., R. Co. *v.* McElroy, 35 Ohio St. 147.

96. Colorado, etc., R. Co. *v.* Neville, 41 Colo. 393, 92 Pac. 956; Ohio, etc., R. Co. *v.* Jones, 27 Ill. 41; Ohio, etc., R. Co. *v.* Meisenheimer, 27 Ill. 30; Peoria, etc., R. Co. *v.* Purviance, 15 Ill. App. 112.

The point where the animal entered and not the place of injury fixes the liability of the company, and it must be shown that the road had been open at that point for such time as to make it the duty of the company to maintain a fence there. Toledo, etc., R. Co. *v.* Darst, 51 Ill. 365.

97. Gilman, etc., R. Co. *v.* Spencer, 76 Ill. 192.

98. *Maine.*— Allen *v.* Boston, etc., R. Co., 87 Me. 326, 32 Atl. 963.

Massachusetts.— Gerry *v.* New York, etc., R. Co., 194 Mass. 35, 79 N. E. 783; McDonnell *v.* Pittsfield, etc., R. Corp., 115 Mass. 564; Eames *v.* Salem, etc., R. Co., 98 Mass 560, 96 Am. Dec. 676.

Nevada.— Walsh *v.* Virginia, etc., R. Co., 8 Nev. 110.

New Hampshire.—Morse *v.* Boston, etc., R. Co., 66 N. H. 148, 28 Atl. 286; Giles *v.* Boston, etc., R. Co., 55 N. H. 552.

Vermont.— Delphia *v.* Rutland R. Co., 76 Vt. 84, 56 Atl. 279; Jackson *v.* Rutland, etc., R. Co., 25 Vt. 150, 60 Am. Dec. 246.

West Virginia.— Maynard *v.* Norfolk, etc., R. Co., 40 W. Va. 331, 21 S. E. 733.

England.— Corry *v.* Great Western R. Co., 7 Q. B. D. 322, 45 J. P. 712, 50 L. J. Q. B. 386, 44 L. T. Rep. N. S. 701, 29 Wkly. Rep. 623; Ricketts *v.* East India, etc., Docks, etc., Co., 12 C. B. 160, 16 Jur. 1072, 21 L. J. C. P. 201, 9 R. & Can. Cas. 295, 74 E. C. L. 160.

Canada.— McIntosh *v.* Grand Trunk R. Co., 30 U. C. Q. B. 601; Dolrey *v.* Ontario, etc., R. Co., 11 U. C. Q. B. 600.

See 41 Cent. Dig. tit. "Railroads," § 1426.

In Michigan the statute of 1871 expressly limits the liability of the railroad company to "adjacent occupants or proprietors" and supersedes the statute of 1869 under which the liability was general. Continental Imp. Co. *v.* Phelps, 47 Mich. 299, 11 N. W. 167.

The provision of the Missouri statute requiring railroad companies to fence their tracks where they pass through uninclosed lands is for the benefit of the general public and not for adjoining owners only (Jackson *v.* St. Louis, etc., R. Co., 43 Mo. App. 324; Duke *v.* Kansas City, etc., R. Co., 39 Mo. App. 105; Young *v.* Kansas City, etc., R. Co., 39 Mo. App. 52); and while the provisions requiring fencing where the road passes through inclosed or cultivated fields has been held to be only for the benefit of adjoining owners (Berry *v.* St. Louis, etc., R. Co., 65 Mo. 172; Geiser *v.* St. Louis, etc., R. Co., 61 Mo. App. 459; Ferris *v.* St. Louis, etc., R. Co., 30 Mo. App. 122; Carpenter *v.* St. Louis, etc., R. Co., 25 Mo. App. 110), this construction of the statute has been in later cases expressly limited and modified (Rinehart *v.* Kansas City Southern R. Co., 126 Mo. App. 446, 80 S. W. 910 [*affirmed* in 204 Mo. 269, 102 S. W. 918]); and it is now well settled that the requirement inures to the benefit of any person whose animals are on the adjoining premises by permission or with the consent of the landowner (Farm-

ing, however, within their protection, animals rightfully upon such lands with the express or implied consent of the landowner,[99] while in others the statutes are held to be in the nature of police regulations for the benefit of the public generally.[1]

ers' Bank *v.* Chicago, etc., R. Co., 109 Mo. App. 165, 83 S. W. 76; Brown *v.* Missouri, etc., R. Co., 104 Mo. App. 691, 78 S. W. 273; Payne *v.* Current River R. Co., 75 Mo. App. 14), or which stray upon the adjoining lands if such lands are not inclosed by a lawful fence (Rinehart *v.* Kansas City Southern R. Co., *supra*; Litton *v.* Chicago, etc., R. Co., 111 Mo. App. 140, 85 S. W. 978; Growney *v.* Wabash R. Co., 102 Mo. App. 442, 76 S. W. 671); but if such lands are inclosed by a lawful fence on all sides except next to the railroad track, this is all the protection that persons other than the landowner are entitled to (Johnson *v.* Missouri Pac. R. Co., 80 Mo. 620); and if the animals of third persons break over such lawful fences and go upon the track and are injured, there can be no recovery, although the railroad company failed to fence along the track (Johnson *v.* Missouri Pac. R. Co., *supra*; Harrington *v.* Chicago, etc., R. Co., 71 Mo. 384).

The English statute requires fencing for the benefit of "occupiers" as well as owners of adjacent lands, and a tenant is an occupier within the application of the statute (Dawson *v.* Midland R. Co., L. R. 8 Exch. 8, 42 L. J. Exch. 49, 21 Wkly. Rep. 56); and it is also held that a person lawfully using an adjacent highway for the purpose of driving his stock along it is for the time being an occupier within the application of the statute (Midland R. Co. *v.* Dakin, 17 C. B. 126, 25 L. J. C. P. 73, 42 Wkly. Rep. 16, 84 E. C. L. 126); but if animals are merely straying upon the adjacent highway the company is under no obligation to fence against them (Manchester, etc., R. Co. *v.* Wallis, 14 C. B. 213, 2 C. L. R. 573, 18 Jur. 268, 23 L. J. C. P. 85, 7 R. & Can. Cas. 709, 2 Wkly. Rep. 194, 78 E. C. L. 213).

In Canada under the statute of 1883, an "occupant" of adjoining lands is entitled to the protection of fences, but the occupation must be of land adjoining the railroad, and the company is only required to fence across the land or portion of a lot actually occupied (Conway *v.* Canadian Pac. R. Co., 12 Ont. App. 708 [*affirming* 7 Ont. 673]); but a person in possession as locatee of public lands is an occupant, although his location is subject to forfeiture for breach of conditions provided the crown has taken no steps to insist upon the forfeiture (Davis *v.* Canadian Pac. R. Co., 12 Ont. App. 724).

99. *California.*— McCoy *v.* Southern Pac. Co., (1891) 26 Pac. 629.

Kansas.— St. Louis, etc., R. Co. *v.* Dudgeon, 28 Kan. 283.

Massachusetts.— Sawyer *v.* Vermont, etc., R. Co., 105 Mass. 196.

Missouri.— Summers *v.* Hannibal, etc., R. Co., 29 Mo. App. 41.

New York.— French *v.* Western New York, etc., R. Co., 72 Hun 469, 25 N. Y. Suppl. 229.

Wisconsin.— Veerhusen *v.* Chicago, etc., R. Co., 53 Wis. 689, 11 N. W. 433.

Canada. Daigle *v.* Temiscouta R. Co., 37 N. Brunsw. 219; McAlpine *v.* Grand Trunk R. Co., 38 U. C. Q. B. 446; Quebec Cent. Co. *v.* Pellerin, 12 Quebec K. B. 152. *Compare* Auger *v.* Ontario, etc., R. Co., 16 U. C. Q. B. 92.

See 41 Cent. Dig. tit. "Railroads," § 1426.

The plaintiff must show, however, to entitle him to the benefit of the statute, that the animal was rightfully upon the land of the adjoining owner. Summers *v.* Hannibal, etc., R. Co., 29 Mo. App. 41.

1. *Idaho.*— Johnson *v.* Oregon Short-Line R. Co., 7 Ida. 355, 63 Pac. 112, 53 L. R. A. 744.

Indiana.— Indianapolis, etc., R. Co. *v.* McKinney, 24 Ind. 283; Indianapolis, etc., R. Co. *v.* Snelling, 16 Ind. 435; New Albany, etc., R. Co. *v.* Aston, 13 Ind. 545; Jeffersonville R. Co. *v.* Dougherty, 10 Ind. 549; Indianapolis, etc., R. Co. *v.* Meek, 10 Ind. 502; Jeffersonville R. Co. *v.* Applegate, 10 Ind. 49; Indianapolis, etc., R. Co. *v.* Townsend, 10 Ind. 38.

Kansas.— Missouri Pac. R. Co. *v.* Roads, 33 Kan. 640, 7 Pac. 213.

Minnesota.— Gillam *v.* Sioux City, etc., R. Co., 26 Minn. 268, 3 N. W. 353.

New York.— Corwin *v.* New York, etc., R. Co., 13 N. Y. 42.

Ohio.— Pittsburgh, etc., R. Co. *v.* Allen, 40 Ohio St. 206.

Texas.— Horan *v.* Taylor, etc., R. Co., 3 Tex. App. Civ. Cas. § 435.

Virginia.— Sanger *v.* Chesapeake, etc., R. Co., 102 Va. 86, 45 S. E. 750.

Wisconsin.— McCall *v.* Chamberlain, 13 Wis. 637. See also Veerhusen *v.* Chicago, etc., R. Co., 53 Wis. 689, 11 N. W. 433.

See 41 Cent. Dig. tit. "Railroads," § 1426.

Where a railroad passes along a highway it is held, under the Missouri statute, that the requirement as to fencing is a police regulation for the benefit of the public generally. Brown *v.* Quincy, etc., R. Co., 127 Mo. App. 614, 106 S. W. 551.

The Virginia statute as originally enacted required railroad tracks to be fenced where they passed "through all inclosed lands or lots," but the statute, having been construed as for the benefit of adjoining landowners only, was amended in 1898 by striking out the words quoted, and as amended is held to be not for the benefit of adjoining owners only, but for the general public. Sanger *v.* Chesapeake, etc., R. Co., 102 Va. 86, 45 S. E. 750.

A railroad company is not liable to its own tenant occupying land of the railroad company adjoining its track for injuries to his animals due to a failure to fence between

(IX) *EFFECT OF FAILURE TO ERECT AND MAINTAIN.* Where animals go upon a railroad right of way by reason of the failure of the company to maintain fences or cattle-guards as required by law and are injured, the company is liable regardless of any question of negligence in the operation of its trains.[2] It is therefore unnecessary for plaintiff to offer any proof of such negligence,[3] nor can defendant avoid liability by proof of the absence of negligence,[4] or that as regards the management of the train the accident was unavoidable.[5]

(X) *EFFECT OF MAINTENANCE AS TO LIABILITY AND CARE REQUIRED.* Where a railroad company constructs and maintains sufficient fences and cattle-guards as required by law, it is not liable for injuries to animals in the absence of proof of negligence;[6] but the fact that fences and cattle-guards are maintained

its own land and the track. Potter *v.* New York Cent., etc., R. Co., 60 Hun (N. Y.) 313, 15 N. Y. Suppl. 12.

2. *Illinois.*— Cairo, etc., R. Co. *v.* Murray, 82 Ill. 76; Illinois Cent. R. Co. *v.* Bull, 72 Ill. 537; Toledo, etc., R. Co. *v.* Delehanty, 71 Ill. 615; Toledo, etc., R. Co. *v.* Logan, 71 Ill. 191; Toledo, etc., R. Co. *v.* Pence, 68 Ill. 524; Toledo, etc., R. Co. *v.* Crane, 68 Ill. 355; St. Louis, etc., R. Co. *v.* Linder, 39 Ill. 433, 89 Am. Dec. 319; Galena, etc., R. Co. *v.* Crawford, 25 Ill. 529.

Indiana.— Jeffersonville, etc., R. Co. *v.* Ross, 37 Ind. 545; Indianapolis, etc., R. Co. *v.* Parker, 29 Ind. 471; Indianapolis, etc., R. Co. *v.* Marshall, 27 Ind. 300; Indianapolis, etc., R. Co. *v.* Guard, 24 Ind. 222, 87 Am. Dec. 327; McKinney *v.* Ohio, etc., R. Co., 22 Ind. 99; New Albany, etc., R. Co. *v.* Pace, 13 Ind. 411; Lafayette, etc., R. Co. *v.* Shriner, 6 Ind. 141; Williams *v.* New Albany, etc., R. Co., 5 Ind. 111; Terre Haute, etc., R. Co. *v.* Schaefer, 5 Ind. App. 86, 31 N. E. 557.

Iowa.— Mikesell *v.* Wabash R. Co., 134 Iowa 736, 112 N. W. 201.

Kansas.— Hopkins *v.* Kansas Pac. R. Co., 18 Kan. 462.

Michigan.— Talbot *v.* Minneapolis, etc., R. Co., 82 Mich. 66, 45 N. W. 1113.

Missouri.— Smith *v.* St. Louis, etc., R. Co., 91 Mo. 58, 3 S. W. 836; Powell *v.* Hannibal, etc., R. Co., 35 Mo. 457; Miles *v.* Hannibal, etc., R. Co., 31 Mo. 407; Burton *v.* North Missouri R. Co., 30 Mo. 372; Gorman *v.* Pacific R. Co., 26 Mo. 441, 72 Am. Dec. 220; Brown *v.* Quincy, etc., R. Co., 127 Mo. App. 614, 106 S. W. 551; Cowgil *v.* Hannibal, etc., R. Co., 33 Mo. App. 677.

New Hampshire.— Smith *v.* Eastern R. Co., 35 N. H. 356.

New York.— Suydam *v.* Moore, 8 Barb. 358; Fanning *v.* Long Island R. Co., 2 Thomps. & C. 585.

Tennessee.— Cincinnati, etc., R. Co. *v.* Stonecipher, 95 Tenn. 311, 32 S. W. 208.

Texas.— Ft. Worth, etc., R. Co. *v.* Swan, 97 Tex. 338, 78 S. W. 920; Gulf, etc., R. Co. *v.* Hudson, 77 Tex. 494, 14 S. W. 158; Gulf, etc., R. Co. *v.* Keith, 74 Tex. 287, 11 S. W. 1117; Galveston, etc., R. Co. *v.* Kropp, (Civ. App. 1906) 91 S. W. 819; Houston, etc., R. Co. *v.* Loughbridge, 1 Tex. App. Civ. Cas. § 1300; International, etc., R. Co. *v.* Leuders, 1 Tex. App. Civ. Cas. § 314; Galveston, etc., R. Co. *v.* Davis, 1 Tex. App. Civ. Cas. § 147.

Virginia.— Norfolk, etc., R. Co. *v.* Johnson, 91 Va. 661, 22 S. E. 505.

Wisconsin.— Heller *v.* Abbot, 79 Wis. 409, 48 N. W. 598; McCall *v.* Chamberlain, 13 Wis. 637.

See 41 Cent. Dig. tit. "Railroads," § 1411.

Limitation of rule.— This rule would not apply where the injury resulted from the wilful or wanton act of the owner of the animal or to injuries at such places as public crossings and depot grounds which are not required to be fenced; but in cases where stock get upon the track at places which should be but are not fenced, and through no wanton or wilful act of the owner, the railroad company is liable without regard to the question of negligence. Hopkins *v.* Kansas Pac. R. Co., 18 Kan. 462.

Although the statute does not expressly provide that a failure to fence shall render a railroad company liable for injury to stock resulting from such failure, it will nevertheless be so liable. Parish *v.* Louisville, etc., R. Co., 78 S. W. 186, 25 Ky. L. Rep. 1524.

Under the New Mexico statute as amended by the laws of 1901, it is held that the mere failure of the railroad company to fence as required by the statute is not of itself such negligence as to render the company liable, but that the statute merely makes proof of the injury and failure to fence *prima facie* evidence of negligence, and places the burden of proof upon the railroad company. Pecos Valley, etc., R. Co. *v.* Cazier, 13 N. M. 131, 79 Pac. 714.

3. Toledo, etc., R. Co. *v.* Logan, 71 Ill. 191; Nall *v.* St. Louis, etc., R. Co., 59 Mo. 112.

If the action is not brought under the statute but is an action on the case at common law it is necessary that negligence should be shown. Terre Haute, etc., R. Co. *v.* Augustus, 21 Ill. 186; Campbell *v.* Indianapolis, etc., Traction Co., 39 Ind. App. 66, 79 N. E. 223.

4. Gorman *v.* Pacific R. Co., 26 Mo. 441, 72 Am. Dec. 220; Cincinnati, etc., R. Co. *v.* Stonecipher, 95 Tenn. 311, 32 S. W. 208; Norfolk, etc., R. Co. *v.* Johnson, 91 Va. 661, 22 S. E. 505.

5. Williams *v.* New Albany, etc., R. Co., 5 Ind. 111; Smith *v.* Eastern R. Co., 35 N. H. 356; Suydam *v.* Moore, 8 Barb. (N. Y.) 358; Cincinnati, etc., R. Co. *v.* Stonecipher, 95 Tenn. 311, 32 S. W. 208.

6. Toledo, etc., R. Co. *v.* Thomas, 18 Ind.

does not relieve the railroad company from liability on the ground of negligence in the operation of its trains,[7] and can in no way justify an injury wantonly inflicted,[8] although if the animal was a trespasser the company will not be liable unless the injury was wantonly or wilfully inflicted.[9]

(XI) *CARE AND LIABILITY WHERE FENCING NOT REQUIRED* — (A) *Where No Fencing Is Required.* Where railroad companies are not required by law to construct any fences they must exercise ordinary care to avoid injury to animals which while lawfully at large may wander upon the track,[10] and although not required to fence must in case of a failure to do so exercise a higher degree of care than if their tracks were fenced in jurisdictions where stock may lawfully be permitted to run at large;[11] but where it is unlawful for stock to run at large no greater degree of care is required than if the tracks were fenced,[12] and the company will not be liable for injuries to animals wrongfully upon the track except in case of gross negligence or wilful or intentional injury.[13]

(B) *At Particular Places Not Required to Be Fenced.* Where animals go upon a railroad track at places where the company is not obliged to fence or construct cattle-guards and are killed or injured, the case must be decided upon common-law principles as if no statute on the subject of fencing existed,[14] and there can be no recovery against the railroad company in the absence of proof that the injury was caused by its negligence,[15] as where the accident occurs upon the station

215; Northern Indiana R. Co. *v.* Martin, 10 Ind. 460; Warren *v.* Chicago, etc., R. Co., 59 Mo. App. 367; Austin, etc., R. Co. *v.* Saunders, (Tex. Civ. App. 1894) 26 S. W. 128; Galveston, etc., R. Co. *v.* Moeser, 3 Tex. App. Civ. Cas. § 243. See also Indianapolis, etc., R. Co. *v.* Irish, 26 Ind. 268.

7. South Alabama, etc., R. Co. *v.* Williams, 65 Ala. 74; Illinois Cent. R. Co. *v.* Baker, 47 Ill. 295; Louisville, etc., R. Co. *v.* Simmons, 85 Ky. 151, 3 S. W. 10, 8 Ky. L. Rep. 896; Austin, etc., R. Co. *v.* Saunders, (Tex. Civ. App. 1894) 26 S. W. 128.

In Tennessee it is held that if the track is properly fenced the company will not be liable for injury to animals unless the injury was done intentionally or by gross negligence. Greer *v.* Nashville, etc., R. Co., 104 Tenn. 242, 56 S. W. 850.

8. New Albany, etc., R. Co. *v.* McNamara, 11 Ind. 543.

9. Chicago, etc., R. Co. *v.* Tice, 111 Ill. App. 161.

10. *Iowa.*— Alger *v.* Mississippi, etc., R. Co., 10 Iowa 268.

Mississippi.— Vicksburg, etc., R. Co. *v.* Patton, 31 Miss. 156, 66 Am. Dec. 552.

Ohio.— Cleveland, etc., R. Co. *v.* Elliott, 4 Ohio St. 474; Kerwhaker *v.* Cleveland, etc., R. Co., 3 Ohio St. 172, 62 Am. Dec. 246.

West Virginia.— Baylor *v.* Baltimore, etc., R. Co., 9 W. Va. 270; Blaine *v.* Chesapeake, etc., R. Co., 9 W. Va. 252.

United States.— Gulf, etc., R. Co. *v.* Washington, 49 Fed. 347, 1 C. C. A. 286.

See 41 Cent. Dig. tit. "Railroads," § 1413.

Where railroad companies are not required to fence and it is lawful for stock to run at large, the owner of animals by permitting them to run at large takes the risk of any injury by unavoidable accident, and the railroad company by leaving its road unfenced takes the risk of animals at large getting thereon without any remedy against the owner, but the company must use at least ordinary care and diligence to avoid any unnecessary injury to such animals. Kernhaker *v.* Cleveland, etc., R. Co., 3 Ohio St. 172, 62 Am. Dec. 246; Blaine *v.* Chesapeake, etc., R. Co., 9 W. Va. 252.

11. See Gorman *v.* Pacific R. Co., 26 Mo. 441, 72 Am. Dec. 220.

12. Locke *v.* First Div. St. Paul, etc., R. Co., 15 Minn. 350.

13. Louisville, etc., Turnpike Road Co. *v.* Ballard, 2 Metc. (Ky.) 177; Locke *v.* First Div. St. Paul, etc., R. Co., 15 Minn. 350.

14. Peoria, etc., R. Co. *v.* Dugan, 10 Ill. App. 233; Jeffersonville, etc., R. Co. *v.* Beatty, 36 Ind. 15; Indianapolis, etc., R. Co. *v.* Caldwell, 9 Ind. 397; Lafayette, etc., R. Co. *v.* Shriner, 6 Ind. 141; Clary *v.* Burlington, etc., R. Co., 14 Nebr. 232, 15 N. W. 220.

15. *Illinois.*— Illinois Cent. R. Co. *v.* Bull, 72 Ill. 537; Chicago, etc., R. Co. *v.* Rice, 71 Ill. 567; Chicago, etc., R. Co. *v.* McMorrow, 67 Ill. 218; Logansport, etc., R. Co. *v.* Caldwell, 38 Ill. 280; Great Western R. Co. *v.* Morthland, 30 Ill. 451; Illinois Cent. R. Co. *v.* Phelps, 29 Ill. 447; St. Louis, etc., R. Co. *v.* Stapp, 53 Ill. App. 600; Ohio, etc., R. Co. *v.* Gross, 41 Ill. App. 561; Terre Haute, etc., R. Co. *v.* Tuterwiler, 16 Ill. App. 197; Peoria, etc., R. Co. *v.* Dugan, 10 Ill. App. 233.

Indiana.— Bachdolt *v.* Grand Rapids, etc., R. Co., 113 Ind. 343, 15 N. E. 686.

Maine.— Perkins *v.* Eastern R. Co., 29 Me. 307, 50 Am. Dec. 589.

Minnesota.— Hooper *v.* Chicago, etc., R. Co., 37 Minn. 52, 33 N. W. 314.

Missouri.— Davis *v.* Missouri, etc., R. Co., 65 Mo. 441; Robertson *v.* Atlantic, etc., R. Co., 64 Mo. 412; Musick *v.* Atlantic, etc., R. Co., 57 Mo. 134; Wasson *v.* McCook, 70 Mo. App. 393; Long *v.* St. Louis, etc., R. Co., 23 Mo. App. 178; Robinson *v.* St. Louis, etc., R. Co., 21 Mo. App. 141; Fitzgerald *v.* Chicago, etc., R. Co., 18 Mo. App. 391.

grounds,[16] or at the crossing of a public highway.[17] The degree of care required and consequent liability varies according to whether the animal injured was rightfully or wrongfully upon the track,[18] the company being liable for injuries due to a failure to exercise ordinary care and diligence,[19] unless the animal was unlawfully at large or a trespasser upon the track, in which case the company will be liable only for gross negligence or injuries wantonly or wilfully inflicted,[20] or for failure to use due care to prevent the injury after discovering the danger.[21]

(XII) *CHARACTER AND SPECIES OF ANIMAL INJURED* — (A) *In General.* Statutes requiring railroad companies to maintain fences or rendering them liable for injuries to animals where no fences are maintained are designed for the protection of all domestic animals and will be liberally construed to this effect and not restricted to the particular animals mentioned;[22] nor will a statute making a railroad company liable for injuries to "animals" killed or injured, without specifying the kind or size of such animals, be limited to those of such size as would endanger the

Nebraska.— Clary *v.* Burlington, etc., R. Co., 14 Nebr. 232, 15 N. W. 220.

Nevada.— Walsh *v.* Virginia, etc., R. Co., 8 Nev. 110.

Oregon.— Eaton *v.* McNeill, 31 Oreg. 128, 49 Pac. 875.

Texas.— Texas, etc., R. Co. *v.* Langham, (Civ. App. 1906) 95 S. W. 686; Texas, etc., R. Co. *v.* Scrivener, (Civ. App. 1899) 49 S. W. 649; Gulf, etc., R. Co. *v.* Blankenbeckler, 13 Tex. Civ. App. 249, 35 S. W. 331; San Antonio, etc., R. Co. *v.* Flores, (Civ. App. 1895) 30 S. W. 375; Missouri, etc., R. Co. *v.* Palmer, (Civ. App. 1894) 27 S. W. 889; Galveston, etc., R. Co. *v.* Moeser, 3 Tex. App. Civ. Cas. § 243; International, etc., R. Co. *v.* Leuders, 1 Tex. App. Civ. Cas. § 314.

Canada.— McFie *v.* Canadian Pac. R. Co., 2 Manitoba 6.

See 41 Cent. Dig. tit. "Railroads," § 1413.

In Indiana the statute making railroad companies liable for injuries to animals without regard to any question of negligence provides that it shall not apply to any railroads securely fenced in and such fence properly maintained (Jeffersonville, etc., R. Co. *v.* Brevoort, 30 Ind. 324; Lafayette, etc., R. Co. *v.* Shriner, 6 Ind. 141); and this statute is construed as relieving the company from liability in the absence of negligence for accidents at places where it could not lawfully maintain a fence (Indianapolis, etc., R. Co. *v.* Caudle, 60 Ind. 112; Jeffersonville, etc., R. Co. *v.* Huber, 42 Ind. 173; Indianapolis, etc., R. Co. *v.* Warner, 35 Ind. 515; Jeffersonville, etc., R. Co. *v.* Brevoort, *supra*; Lafayette, etc., R. Co. *v.* Shriner, *supra*); or where the construction of a fence would be improper (Indiana, etc., R. Co. *v.* Leak, 89 Ind. 596; Indianapolis, etc., R. Co. *v.* Kinney, 8 Ind. 402); and the act of 1885 expressly requiring railroad companies to fence their tracks, except at public crossings, and within such portions of cities, towns, and villages as are laid out and platted into lots and blocks and where the road runs through unimproved and uninclosed lands (see Jeffersonville, etc., R Co. *v.* Dunlap, 112 Ind. 93, 13 N. E. 403), although not expressly requiring fences in such places, does not affect the liability of the railroad company under former statutes for failure to construct them (Jeffersonville, etc., R. Co. *v.* Dunlap, *supra*; New York, etc., R. Co. *v.* Zumbaugh, 11 Ind. App. 107 38 N. E. 531; Ohio, etc., R. Co. *v.* Wrape, 4 Ind. App. 108, 30 N. E. 427; Louisville, etc., R. Co. *v.* Hart, 2 Ind. App. 130, 28 N. E. 218); or in other words, the company is liable for injuries where it has a right to construct fences, although not expressly required by the later act so to do (Jeffersonville, etc., R. Co. *v.* Dunlap, *supra*).

16. Robertson *v.* Atlantic, etc., R. Co., 64 Mo. 412.

17. Chicago, etc., R. Co. *v.* McMorrow, 67 Ill. 218; Logansport, etc., R. Co. *v.* Caldwell, 38 Ill. 280; Bechdolt *v.* Grand Rapids, etc., R. Co., 113 Ind. 343, 15 N. E. 686; San Antonio, etc., R. Co. *v.* Clark, 26 Tex. Civ. App. 280, 62 S. W. 546; Houston, etc., R. Co. *v.* Huffhines, (Tex. Civ. App. 1897) 39 S. W. 625; San Antonio, etc., R. Co. *v.* Flores, (Tex. Civ. App. 1895) 30 S. W. 375; Galveston, etc., R. Co. *v.* Moeser, 3 Tex. App. Civ. Cas. § 243.

18. International, etc., R. Co. *v.* Cocke, 64 Tex. 151.

19. Whitbeck *v.* Dubuque, etc., R. Co., 21 Iowa 103; Prickett *v.* Atchison, etc., R. Co., 33 Kan. 748, 7 Pac. 611; Renaud *v.* Great Western R. Co., 12 U. C. Q. B. 408.

20. St. Louis, etc., R. Co. *v.* Stapp, 53 Ill. App. 600; Indianapolis, etc., R. Co. *v.* McClure, 26 Ind. 370, 89 Am. Dec. 467; International, etc., R. Co. *v.* Cooke, 64 Tex. 151; Missouri Pac. R. Co. *v.* Lawler, 3 Tex. App. Civ. Cas. § 19.

If animals are trespassing upon the track the duty to exercise care as to them arises only after discovering them upon the track. St. Louis, etc., R. Co. *v.* Stapp, 53 Ill. App. 600.

But for inexcusable or gross negligence the company will be liable, although the animal injured was wrongfully upon the track. Indianapolis, etc., R. Co. *v.* Caldwell, 9 Ind. 397; Renaud *v.* Great Western R. Co., 12 U. C. Q. B. 408.

21. Hooper *v.* Chicago, etc., R. Co., 37 Minn. 52, 33 N. W. 314.

22. Ohio, etc., R. Co. *v.* Brubaker, 47 Ill. 462; Henderson *v.* Wabash, etc., R. Co., 81 Mo. 605.

safety of trains in case of a collision.[23] So a statute requiring such companies to maintain fences sufficient to exclude "cattle, horses, sheep and hogs" will be construed to include asses[24] and mules;[25] the term "cattle" will be construed to include horses;[26] the words "horses, cattle, mules or other animals" to include hogs;[27] and the term "stock" will be applied to any live stock, including hogs as well as cattle and horses,[28] but not dogs.[29] Under a statute making railroad companies liable for all animals killed or injured except where the road is "enclosed by a good and lawful fence" the company must fence against all animals as to which a good and lawful fence would be any protection,[30] including hogs which such a fence would exclude,[31] but not against animals which a good and lawful fence as defined by the general fence laws would not exclude,[32] the burden, however, being upon defendant to show that the animal injured was within the exception.[33] In Iowa the statute provides that railroad companies must fence against, or otherwise be liable for injuries to, "live stock running at large."[34]

(B) *Trespassing Animals.* In an action based upon the failure of a railroad company to maintain fences when required by law to do so, it is no defense that the animal injured was trespassing upon the right of way.[35]

23. Indianapolis, etc., R. Co. *v.* Marshall, 27 Ind. 300, holding that the statute making railroad companies liable without regard to negligence where their roads are not fenced, for "animals killed or injured," includes sheep as well as larger animals.

24. Ohio, etc., R. Co. *v.* Brubaker, 47 Ill. 462.

25. Toledo, etc., R. Co. *v.* Cole, 50 Ill. 184.

26. McAlpine *v.* Grand Trunk R. Co., 38 U. C. Q. B. 446.

27. Henderson *v.* Wabash, etc., R. Co., 81 Mo. 605.

28. Lee *v.* Minneapolis, etc., R. Co., 66 Iowa 131, 23 N. W. 299.

29. Texas, etc., R. Co. *v.* Scott, (Tex. App. 1891) 17 S. W. 1116.

30. Missouri Pac. R. Co. *v.* Bradshaw, 33 Kan. 533, 6 Pac. 917. See also Halverson *v.* Minneapolis, etc., R. Co., 32 Minn. 88, 19 N. W. 392.

31. Missouri Pac. R. Co. *v.* Roads, 33 Kan. 640, 7 Pac. 213; Missouri Pac. R. Co. *v.* Bradshaw, 33 Kan. 533, 6 Pac. 917. See also Halverson *v.* Minneapolis, etc., R. Co., 32 Minn. 88, 19 N. W. 392.

32. Atchison, etc., R. Co. *v.* Yates, 21 Kan. Kan. 613, holding that in particular townships where hogs are not permitted to run at large and in which townships a lawful fence as defined by the general fence laws may be constructed with the bottom rail or plank two feet above the ground, a railroad company is not liable for injuries to hogs merely because it has neglected to fence, since what would be a lawful fence would not exclude them. But see Fernow *v.* Dubuque, etc., R. Co., 22 Iowa 528.

In Iowa the rule is otherwise, the statute requiring railroad companies to fence against "stock," and further providing that no law of the state in relation to fences of farmers and landowners shall be applicable to railroad tracks unless so specifically stated in the regulation. Lee *v.* Minneapolis, etc., R. Co., 66 Iowa 131, 23 N. W. 299.

33. Missouri Pac. R. Co. *v.* Bradshaw, 33 Kan. 533, 6 Pac. 917.

34. Inman *v.* Chicago, etc., R. Co., 60 Iowa 459, 15 N. W. 286; Hinman *v.* Chicago, etc., R. Co., 28 Iowa 491.

The words "running at large" as used in this statute import that the stock are not under the control of the owner; that they are not confined by inclosures to a certain field or place, nor under the immediate care of a shepherd or herdsman; that they are left to roam wherever they may go (Vallean *v.* Chicago, etc., R. Co., 73 Iowa 723, 36 N. W. 760; Hinman *v.* Chicago, etc., R. Co., 28 Iowa 491); and have been held to apply to a horse which had escaped from the control of the owner, although having on a halter and bridle (Welsh *v.* Chicago, etc., R. Co., 53 Iowa 632, 6 N. W. 13); a young colt which had wandered away from its mother, although the mother was under the owner's control (Smith *v.* Kansas City, etc., R. Co., 58 Iowa 622, 12 N. W. 619); a steer which during the temporary absence of a herdsman had strayed away from the rest of the herd and been left behind without the herdsman's knowledge (Vallean *v.* Chicago, etc., R. Co., *supra*); a team of horses harnessed to a wagon which had broken away from where they had been hitched and escaped from the owner (Inman *v.* Chicago, etc., R. Co., 60 Iowa 459, 15 N. W. 286); but have been held not to apply to a team of horses in charge of a driver, although the driver had fallen asleep from intoxication and the team was wandering away from the road (Grove *v.* Burlington, etc., R. Co., 75 Iowa 163, 39 N. W. 248).

35. New Albany, etc., R. Co. *v.* Maiden, 12 Ind. 10; New Albany, etc., R. Co. *v.* Tilton, 12 Ind. 3, 74 Am. Dec. 195; Holland *v.* West End Narrow Gauge R. Co., 16 Mo. App. 172; Curry *v.* Chicago, etc., R. Co., 43 Wis. 665.

The fact that plaintiff had previously trespassed upon the railroad right of way by driving the same stock upon or across it will not affect the liability of the railroad company where this trespass had no connection with the subsequent acts by which they

(XIII) *EFFECT OF STOCK LAWS.* Stock laws prohibiting domestic animals from running at large do not relieve railroad companies from their statutory duty to maintain fences and cattle-guards or their liability for injuries due to their failure to do so;[36] but where railroad companies are not required to fence and animals are unlawfully at large in violation of such laws, the company will not be liable except for gross negligence or injuries wantonly or wilfully inflicted.[37]

(XIV) *PLACE OF ENTRY OF ANIMAL UPON TRACK* — (A) *In General.* In an action against a railroad company for injury to animals due to a failure to maintain fences, it is the place where the animal entered upon the track and not the place of the accident which fixes the liability.[38] If the entry was at a place where there should have been a fence but was not the company is liable,[39] although

were killed. Sika *v.* Chicago, etc., R. Co., 21 Wis. 370.

The New York statute of 1890 omits the absolute liability of a clause contained in the act of 1848 in so far as it applies to cattle-guards, and it is held that if a trespassing animal comes upon the track over a cattle-guard and is injured, the company is only subject to the ordinary common-law liability and will not be liable unless the injury was wilfully or recklessly inflicted. Bateman *v.* Rutland R. Co., 54 Misc. 312, 105 N. Y. Suppl. 970.

36. *Illinois.*—Cairo, etc., R. Co. *v.* Woosley, 85 Ill. 370; Cairo, etc., R. Co. *v.* Murray, 82 Ill. 76; Rockford, etc., R. Co. *v.* Irish, 72 Ill. 404; Ewing *v.* Chicago, etc., R. Co., 72 Ill. 25; Ohio, etc., R. Co. *v.* Jones, 63 Ill. 472; Rabberman *v.* Hunt, 88 Ill. App. 625; Wabash R. Co. *v.* Perbex, 57 Ill. App. 62.

Indiana.— Jeffersonville, etc., R. Co. *v.* O'Connor, 37 Ind. 95; Terre Haute, etc., R. Co. *v.* Schaefer, 5 Ind. App. 86, 31 N. E. 557.

Iowa.— Fritz *v.* Milwaukee, etc., R. Co., 34 Iowa 337; Spence *v.* Chicago, etc., R. Co., 25 Iowa 139.

Kansas.—Atchison, etc., R. Co. *v.* Riggs, 31 Kan. 622, 3 Pac. 305.

Missouri.— Stanley *v.* Missouri Pac. R. Co., 84 Mo. 625; Growney *v.* Wabash, R. Co., 102 Mo. App. 442, 76 S. W. 671; Cole *v.* Chicago, etc., R. Co., 47 Mo. App. 624; Boyle *v.* Missouri Pac. R. Co., 21 Mo. App. 416; Morrow *v.* Missouri Pac. R. Co., 17 Mo. App. 103; Holland *v.* West End Narrow Gauge R. Co., 16 Mo. App. 172.

Nebraska.— Chicago, etc., R. Co. *v.* Sims, 17 Nebr. 691, 24 N. W. 388; Burlington, etc., R. Co. *v.* Brinkman, 14 Nebr. 70, 15 N. W. 197.

See 41 Cent. Dig. tit. "Railroads," § 1419.

Under the Iowa statute the company is liable if its road is not fenced, notwithstanding the animal injured was unlawfully at large, "unless the injury complained of is occasioned by the wilful act of the owner or his agent" (Krebs *v.* Minneapolis, etc., R. Co., 64 Iowa 670, 21 N. W. 131); but the qualification quoted implies something more than mere negligence on the part of the owner (Krebs *v.* Minneapolis, etc., R. Co., *supra*); and merely permitting stock to run at large in proximity to an unfenced railroad track is not sufficient to defeat a recovery (Lee *v.* Minneapolis, etc., R. Co., 66 Iowa 131, 23 N. W. 299).

In Texas it is held that the statute providing that after the adoption of the stock law in any county "no person within the county" shall be required to fence against stock not permitted to run at large exempts a railway company from the obligation to fence its tracks in a county in which the stock law has been adopted, the word "person" in the statute including corporations. Missouri, etc., R. Co. *v.* Tolbert, (Civ. App. 1905) 90 S. W. 508. See also Houston, etc., R. Co. *v.* Nussbaum, 43 Tex. Civ. App. 410, 94 S. W. 1101. But see Ft. Worth, etc., R. Co. *v.* Polson, (Civ. App. 1907) 106 S. W. 429.

37. Missouri Pac. R. Co. *v.* Lawler, 3 Tex. App. Civ. Cas. § 19.

38. Great Western R. Co. *v.* Hanks, 36 Ill. 281; Wabash, etc., R. Co. *v.* Tretts, 96 Ind. 450; Jeffersonville, etc., R. Co. *v.* Lyon, 72 Ind. 107; Foster *v.* St. Louis, etc., R. Co., 90 Mo. 116, 2 S. W. 138; Moore *v.* Wabash, etc., R. Co., 81 Mo. 499; Sowders *v.* St. Louis, etc., R. Co., 127 Mo. App. 119, 104 S. W. 1122; Kirkpatrick *v.* Illinois Southern R. Co., 120 Mo. App. 416, 96 S. W. 1036; Redmond *v.* Missouri, etc., R. Co., 104 Mo. App. 651, 77 S. W. 768; Ehret *v.* Kansas City, etc., R. Co., 20 Mo. App. 251; Chicago, etc., R. Co. *v.* Sevcek, 72 Nebr. 793, 101 N. W. 981, 110 N. W. 639. But see Toledo, etc., R. Co. *v.* Delliplane, 119 Ill. App. 122.

Under the Oregon statute making railroad companies liable for stock killed or injured "on or near any unfenced track" the company is liable if the injury occurred at a point where it had neglected to fence, and the point of entry is material only where the accident occurred at a place where the company was not required to fence. Sullivan *v.* Oregon, R., etc., Co., 19 Oreg. 319, 24 Pac. 408.

39. Louisville, etc., R. Co. *v.* Thomas, 106 Ind. 10, 5 N. E. 198; Louisville, etc., R. Co. *v.* Hart, 2 Ind. App. 130, 28 N. E. 218; Snider *v.* St. Louis, etc., R. Co., 73 Mo. 465.

Reëntry after leaving track.— If an animal after entering and wandering upon a railroad track subsequently entirely leaves it and then reënters at another point where fences should be maintained, and is injured, the company is liable, notwithstanding the original entry was at a point where no fence was required (Atchison, etc., R. Co. *v.* Cash, 27 Kan. 587), or where a proper fence was maintained over which the animal entered

the accident occurred at a point where no fencing was required,[40] or where a sufficient fence was maintained;[41] while on the other hand the company is not liable if the animal entered by breaking or jumping over a sufficient fence or cattle-guard,[42] or entered at a place where the company was not required to fence,[43] although the accident occurred where the company should have maintained a fence but failed to do so,[44] unless the passage of the animal along the track from the place of entry, which was not a place required to be fenced, to the place of injury was due to the absence of cattle-guards which it was the duty of the company to maintain.[45] To recover on this ground it is therefore not sufficient for plaintiff to show merely that there was no fence where a fence was necessary, but it must further appear that the injured animal entered at such a place.[46]

(B) *Entry From Highway.* Where railroad companies are required by law to maintain fences and cattle-guards, the company will be liable for injuries to animals which go upon the track from a highway running parallel therewith, where no fence is maintained,[47] or which enter at the intersection of a highway owing to the absence of or defective condition of cattle-guards,[48] or end or wing fence connecting therewith.[49] Under some of the statutes the company is liable without regard to whether at the time of entry the animals were rightfully or wrongfully upon the highway;[50] but under others if the animal injured was unlawfully at large and wrongfully upon the highway at the time of entry, the company is not liable, although sufficient fences or cattle-guards were not maintained,[51] unless, as at common law, the injury was wantonly, recklessly, or wil-

(Louisville, etc., R. Co. *v.* Thomas, 106 Ind. 10, 5 N. E. 198).

40. *Illinois.*— Alsop *v.* Ohio, etc., R. Co., 19 Ill. App. 292.

Indiana.— Wabash R. Co. *v.* Forshee, 77 Ind. 158.

Kansas.—Kansas City, etc., R. Co. *v.* Burge, 40 Kan. 736, 21 Pac. 589.

Missouri.— Snider *v.* St. Louis, etc., R. Co., 73 Mo. 465; Kimball *v.* St. Louis, etc., R. Co., 99 Mo. App. 335, 73 S. W. 224; Warden *v.* Missouri, etc., R. Co., 78 Mo. App. 664.

Oregon.— Sullivan *v.* Oregon R., etc., Co., 19 Oreg. 319, 24 Pac. 408.

See 41 Cent. Dig. tit. "Railroads," § 1429.

41. Jeffersonville, etc., R. Co. *v.* Avery, 31 Ind. 277; Louisville, etc., R. Co. *v.* Etzler, 3 Ind. App. 562, 30 N. E. 32; Green *v.* St. Paul, etc., R. Co., 60 Minn. 134, 61 N. W. 1130; Sappington *v.* Chicago, etc., R. Co., 95 Mo. App. 387, 69 S. W. 32.

42. Chicago, etc., R. Co. *v.* Farrelly, 3 Ill. App. 60.

43. *Illinois.*— Great Western R. Co. *v.* Morthland, 30 Ill. 451.

Indiana.— Indiana, etc., R. Co. *v.* Quick, 109 Ind. 295, 9 N. E. 788, 925.

Kansas.— Missouri Pac. R. Co. *v.* Leggett, 27 Kan. 323.

Missouri.— Moore *v.* Wabash, etc., R. Co., 81 Mo. 499; Nance *v.* St. Louis, etc., R. Co., 79 Mo. 196; Cecil *v.* Pacific R. Co., 47 Mo. 246; Roberts *v.* Quincy, etc., R. Co., 49 Mo. App. 164; Pearson *v.* Chicago, etc., R. Co., 33 Mo. App. 543.

Oregon.— Eaton *v.* McNeill, 31 Oreg. 128, 49 Pac. 875.

Wisconsin.— Bennett *v.* Chicago, etc., R. Co., 19 Wis. 145.

See 41 Cent. Dig. tit. "Railroads," §§ 1429, 1432.

44. St. Louis, etc., R. Co. *v.* Linder, 39 Ill. 433, 89 Am. Dec. 319; Chicago, etc., R. Co. *v.* Farrelly, 3 Ill. App. 60; Missouri Pac. R. Co. *v.* Leggett, 27 Kan. 323; Redmond *v.* Missouri, etc., R. Co., 104 Mo. App. 651, 77 S. W. 768. See also Bremmer *v.* Green Bay, etc., R. Co., 61 Wis. 114, 20 N. W. 687.

45. Chicago, etc., R. Co. *v.* Blair, 75 Ill. App. 659; Wabash R. Co. *v.* Pickrell, 72 Ill. App. 601; Nashville, etc., R. Co. *v.* Hughes, 94 Tenn. 450, 29 S. W. 723.

46. Illinois Cent. R. Co. *v.* Finney, 42 Ill. App. 390; Bremmer *v.* Green Bay, etc., R. Co., 61 Wis. 114, 20 N. W. 687; Bennett *v.* Chicago, etc., R. Co., 19 Wis. 145.

47. Emmerson *v.* St. Louis, etc.. R. Co., 35 Mo. App. 621, holding that the fact that the right of way occupies a part of the public highway does not relieve the railroad company from the duty of placing fences between the highway and the track.

48. McGhee *v.* Guyn, 98 Ky. 209, 32 S. W. 615, 17 Ky. L. Rep. 794; Oyler *v.* Quincy, etc., R. Co., 113 Mo. App. 375, 88 S. W. 162; White *v.* Utica, etc., R. Co., 15 Hun (N. Y.) 333; Sheaf *v.* Utica, etc., R. Co., 2 Thomps. & C. (N. Y.) 388; Dunkirk, etc., R. Co. *v.* Mead, 90 Pa. St. 454.

49. Jeffersonville, etc., R. Co. *v.* Avery, 31 Ind. 277.

50. Corwin *v.* New York, etc., R. Co., 13 N. Y. 42; Sheaf *v.* Utica, etc., R. Co., 2 Thomps. & C. (N. Y.) 388; Quimby *v.* Boston, etc., R. Co., 71 Vt. 301, 45 Atl. 223.

51. Darling *v.* Boston, etc., R. Co., 121 Mass. 118; Flint *v.* Boston, etc., R. Co., 73 N. H. 141, 59 Atl. 938; Hill *v.* Concord, etc., R. Co., 67 N. H. 449, 32 Atl. 766; Woolson *v.* Northern R. Co., 19 N. H. 267; Luscombe *v.* Great Western R. Co., [1899] 2 Q. B. 313, 68 L. J. Q. B. 711, 81 L. T. Rep. N. S. 183; Grand Trunk R. Co. *v.* James, 31 Can. Sup. Ct. 420 [*reversing* 1 Ont. L. Rep. 127 (*af-*

fully inflicted.[52] If a cattle-guard sufficient to turn ordinary stock is maintained the company is not liable for an injury to an animal which enters from a highway by jumping over such cattle-guard.[53]

(c) *Entry From Lands Where Trespassing.* The liability of railroad companies for injuries to animals due to the absence of or defects in fences, where the animals are wrongfully upon the premises from which they enter upon the railroad track, depends upon the application of the particular statute under which the action is brought.[54] Under some of the statutes it is held that the duty to fence is only for the benefit of adjoining owners or those whose animals are rightfully upon the premises from which they enter, and that if the animal is a trespasser or wrongfully upon such premises the owner cannot recover, although a proper fence was not maintained,[55] unless the animals escaped to such premises

firming 31 Ont. 672)]; Daniels *v.* Grand Trunk R. Co., 11 Ont. App. 471.

But an animal is not wrongfully upon a highway as regards the railroad company if it got there by escaping from an inclosure through a defect in the railroad fence at some other point. Davidson *v.* Grand Trunk R. Co., 2 Can. R. Cas. 371, 5 Ont. L. Rep. 574, 2 Ont. Wkly. Rep. 185.

The New York statute of 1890 omits the absolute liability clause of the act of 1848 in so far as it applies to cattle-guards, and if the entry of the animal was over a defective cattle-guard instead of a fence, and it was wrongfully at large and a trespasser upon the highway, the company will not be liable unless as at common law the injury was wilfully or recklessly inflicted. Bateman *v.* Rutland R. Co., 54 Misc. 312, 105 N. Y. Suppl. 970.

In Canada it has been held that if an animal is wrongfully upon a highway running parallel with the railroad, the case is the same as if the animal was trespassing upon other adjacent land, and the owner cannot recover, although the railroad was not fenced as required by law (Daniels *v.* Grand Trunk R. Co., 11 Ont. App. 471); but that if the animal got upon the track at a crossing by reason of the failure of the railroad company to construct cattle-guards, the company will be liable regardless of whether the animal was rightfully or wrongfully upon the highway (Huist *v.* Buffalo, etc., R. Co., 16 U. C. Q. B. 299 [*distinguishing* Jack *v.* Ontario, etc., R. Co., 14 U. C. Q. B. 328]).

52. Darling *v.* Boston, etc., R. Co., 121 Mass. 118; Bateman *v.* Rutland R. Co., 54 Misc. (N. Y.) 312, 105 N. Y. Suppl. 970.

53. Chicago, etc., R. Co. *v.* Farrelly, 3 Ill. App. 60.

54. Eames *v.* Salem, etc., R. Co., 98 Mass. 560, 96 Am. Dec. 676 [*distinguishing* Browne *v* Providence, etc., R. Co., 12 Gray (Mass.) 55, 71 Am. Dec. 736; Corwin *v.* New York, etc., R. Co., 13 N. Y. 42].

55. *Maine.*— Russell *v.* Maine Cent. R. Co., 100 Me. 406, 61 Atl. 899; Allen *v.* Boston, etc., R. Co., 87 Me. 326, 32 Atl. 963.

Massachusetts.— McDonnell *v.* Pittsfield, etc., R. Corp., 115 Mass. 564; Eames *v.* Salem, etc., R. Co., 98 Mass. 560, 96 Am. Dec. 676.

Missouri.— Ferris *v.* St. Louis, etc., R. Co., 30 Mo. App. 122; Carpenter *v.* St. Louis, etc., R. Co., 25 Mo. App. 110.

New Hampshire.— Morse *v.* Boston, etc., R. Co., 66 N. H. 148, 28 Atl. 286; Giles *v.* Boston, etc., R. Co., 55 N. H. 552; Mayberry *v.* Concord R. Co., 47 N. H. 391.

Texas.— Houston, etc., R. Co. *v.* Hollingsworth, 29 Tex. Civ. App. 306, 68 S. W. 724.

Vermont.— Bemis *v.* Connecticut, etc., R. Co., 42 Vt. 375, 1 Am. Rep. 339; Morse *v.* Rutland, etc., R. Co., 27 Vt. 49.

England.— Luscombe *v.* Great Western R. Co., [1899] 2 Q. B. 313, 68 L. J. Q. B. 711, 81 L. T. Rep. N. S. 183; Ricketts *v.* East India, etc., Docks, etc., Co., 12 C. B. 160, 16 Jur. 1072, 21 L. J. C. P. 201, 7 R. & Can. Cas. 295, 74 E. C. L. 160.

Canada.— Rathwell *v.* Canadian Pac. R. Co., 9 Can. L. T. Occ. Notes 413; Duncan *v.* Canadian Pac. R. Co., 21 Ont. 355; McLennan *v.* Grand Trunk R. Co., 8 U. C. C. P. 411; Wilson *v.* Northern R. Co., 28 U. C. Q. B. 274; Gillis *v.* Great Western R. Co., 12 U. C. Q. B. 427; Dolrey *v.* Ontario, etc., R. Co., 11 U. C. Q. B. 600.

See 41 Cent. Dig. tit. "Railroads," § 1430.

Animals are wrongfully upon the land, within the application of this rule, if without the authority or consent of the owner of the land, although under circumstances which might not be sufficient to sustain an action of trespass by him. McDonnell *v.* Pittsfield, etc., R. Corp., 115 Mass. 564, holding that a railroad company is not liable for injuries to animals which, while being driven along a highway, escape upon adjoining lands, from which they pass upon the track at a place where the company has failed to fence.

If the animal was rightfully upon the premises from which it entered upon the track, the railroad company is liable, although it was not the property of the adjoining landowner, as in the case of animals which such landowner is pasturing for others (Smith *v.* Barre R. Co., 64 Vt. 21, 23 Atl. 632); but it is incumbent upon plaintiff to show this fact (Smith *v.* St. Louis, etc., R. Co., 25 Mo. App. 113).

Where animals are left in the custody of the railroad company for shipment and escape from defendant's cattle pens, they are not trespassers either upon the railroad company's other property or upon the highway from which they stray upon the right of way. Flint *v.* Boston, etc., R. Co., 73 N. H. 141, 59 Atl. 938.

In Missouri the statute requiring railroad

through a defect in some other fence which it was the duty of the company to maintain;[56] but under others it is held that the duty is general, and that if the animals get upon the track because of a failure to maintain a proper fence, the railroad company is liable regardless of whether they were rightfully or wrongfully upon the land from which they entered.[57] Under the former rule if the railroad company itself owns the adjoining lands it is not obliged to fence against itself, and will not be liable for injuries to animals which, while trespassing upon its lands, go upon the track,[58] but under the latter the fact that the entry was from lands belonging to the railroad company is immaterial.[59]

(xv) *Nature and Cause of Injury.* Under some of the statutes prescribing the liability of railroad companies for injuries to animals due to a failure to maintain fences, there can be no recovery under the statute where the injury is not caused by actual contact or collision of the train with the animal injured,[60]

companies to fence tracks running through inclosed or cultivated fields is held to be only for the benefit of the adjoining owners (Peddicord *v.* Missouri Pac. R. Co., 85 Mo. 160; Harrington *v.* Chicago, etc., R. Co., 71 Mo. 384; Berry *v.* St. Louis, etc., R. Co., 65 Mo. 172; Hendrix *v.* St. Joseph, etc., R. Co., 38 Mo. App. 520; Carpenter *v.* St. Louis, etc., R. Co., 25 Mo. App. 110), or owners of animals rightfully upon such land (Farmers' Bank *v.* Chicago, etc., R. Co., 109 Mo. App. 165, 83 S. W. 76; Brown *v.* Missouri, etc., R. Co., 104 Mo. App. 691, 78 S. W. 273; Payne *v.* Current River R. Co., 75 Mo. App. 14; Smith *v.* St. Louis, etc., R. Co., 25 Mo. App. 113); but it is not unlawful to permit stock to run at large (Ells *v.* Pacific R. Co., 55 Mo. 278); and such animals are not trespassers in going upon the lands of others which are uninclosed or not inclosed by lawful fences (Kaes *v.* Missouri Pac. R. Co., 6 Mo. App. 397); so if the lands from which they entered were not inclosed by a lawful fence the railroad company is liable (Rinehart *v.* Kansas City Southern R. Co., 204 Mo. 269, 102 S. W. 958 [*affirming* 126 Mo. App. 446, 80 S. W. 910]; Smith *v.* Chicago, etc., R. Co., 127 Mo. App. 160, 105 S. W. 10; Peery *v.* Quincy, etc., R. Co., 122 Mo. App. 177, 99 S. W. 14; Oyler *v.* Quincy, etc., R. Co., 113 Mo. App. 375, 88 S. W. 162; Litton *v.* Chicago, etc., R. Co., 111 Mo. App. 140, 85 S. W. 978; Growney *v.* Wabash R. Co., 102 Mo. App. 442, 76 S. W. 671; Dean *v.* Omaha, etc., R. Co., 54 Mo. App. 647; Kaes *v.* Missouri Pac. R. Co., *supra*); but if inclosed except along the track by a lawful fence the railroad company is not liable to outside owners, although it has failed to fence along the track, and it is incumbent upon plaintiff to show that the lands were not so inclosed (Peddicord *v.* Missouri Pac. R. Co., *supra*; Harrington *v.* Chicago, etc., R. Co., *supra*; Hendrix *v.* St. Joseph, etc., R. Co., 38 Mo. App. 520; Carpenter *v.* St. Louis, etc., R. Co., *supra*. But see Rinehart *v.* Kansas City Southern R. Co., *supra*), or that the animals were upon such lands with the consent of the owner thereof (Smith *v.* St. Louis, etc., R. Co., *supra*).

In Canada it was formerly held that as the requirement as to fencing was for the benefit only of adjoining landowners and persons whose animals were rightfully upon such lands, there could be no recovery if the animal entered upon the railroad track from lands where it was trespassing, but the statute of 1890 provides that "no animal allowed by law to run at large shall be held to be trespassing on a place adjoining the railway merely for the reason that the owner or occupant of such place has not permitted it to be there," and so if there is a municipal by-law permitting animals to run at large, although such by-law cannot authorize a trespass upon private property, yet notwithstanding that as regards the landowner the animal would be a trespasser, it will not be so considered as regards the railroad company. Fenson *v.* Canadian Pac. R. Co., 8 Ont. L. Rep. 688, 4 Ont. Wkly. Rep. 373 [*affirming* 7 Ont. L. Rep. 254, 3 Ont. Wkly. Rep. 227].

56. Gilman *v.* European, etc., R. Co., 60 Me. 235; Keliher *v.* Connecticut River R. Co., 107 Mass. 411; Davidson *v.* Grand Trunk R. Co., 2 Can. R. Cas. 371, 5 Ont. L. Rep. 574, 2 Ont. Wkly. Rep. 185.

57. *Indiana.*— Indianapolis, etc., R. Co. *v.* Townsend, 10 Ind. 38.

Kansas.— Missouri Pac. R. Co. *v.* Roads, 33 Kan. 640, 7 Pac. 213.

Minnesota.— Gillam *v.* Sioux City, etc., R. Co., 26 Minn. 268, 3 N. W. 353.

New York.— Corwin *v.* New York, etc., R. Co., 13 N. Y. 42.

Ohio.—See Marietta, etc., R. Co. *v.* Stephenson, 24 Ohio St. 48.

Wisconsin.— McCall *v.* Chamberlain, 13 Wis. 637.

See 41 Cent. Dig. tit. "Railroads," § 1430.

58. Cornwall *v.* Sullivan R. Co., 28 N. H. 161.

59. Bellefontaine R. Co. *v.* Reed, 33 Ind. 476.

60. *Illinois.*— Schertz *v.* Indianapolis, etc., R. Co., 107 Ill. 577 [*affirming* 12 Ill. App. 304].

Indiana.— Jeffersonville, etc., R. Co. *v.* Dunlap, 112 Ind. 93, 13 N. E. 403; Louisville, etc., R. Co. *v.* Thomas, 106 Ind. 10, 5 N. E. 198; Jeffersonville, etc., R. Co. *v.* Downey, 61 Ind. 287; Louisville, etc., R. Co. *v.* Smith, 58 Ind. 575; Indianapolis, etc., R. Co. *v.* McBrown, 46 Ind. 229; Childers *v.* Louisville, etc., R. Co., 12 Ind. App. 686, 41 N. E. 21.

Missouri.— Foster *v.* St. Louis, etc., R. Co., 90 Mo. 116, 2 S. W. 138; Seibert *v.* Missouri, etc., R. Co., 72 Mo. 565; Lafferty *v.* Hannibal, etc., R. Co., 44 Mo. 291.

as where animals upon the right of way are frightened by approaching trains and are injured in jumping from the track,[61] or by running upon bridges or trestles,[62] or against wire fences,[63] or in an attempt to jump a cattle-guard,[64] or go upon the right of way and are injured by falling into a cut, pit, or well,[65] or are injured by the employees of the railroad company in extricating them from a bridge or trestle;[66] but, although not liable under the statute by reason of the absence of any contact or collision with the train, the company may still be liable on the ground of negligence.[67] Under the statutes in other jurisdictions it is not necessary that there should be any actual collision,[68] the company being liable whenever the injury is the natural and proximate result of its neglect of its duty in regard to fencing,[69] as where animals on the right of way are injured by being frightened

New York.— Hyatt *v.* New York, etc., R. Co., 64 Hun 542, 19 N. Y. Suppl. 461. See also Knight *v.* New York, etc., R. Co., 99 N. Y. 25, 1 N. E. 108 [*reversing* 30 Hun 415]. But see Graham *v.* Delaware, etc., Canal Co., 46 Hun 386.

Tennessee.— Sinard *v.* Southern R. Co., 101 Tenn. 473, 48 S. W. 227; Nashville, etc., R. Co. *v.* Sadler, 91 Tenn. 508, 19 S. W. 618, 30 Am. St. Rep. 896.

Texas.— International, etc., R. Co. *v.* Hughes, 68 Tex. 290, 4 S. W. 492; Railway Co. *v.* Ritter, (App. 1890) 16 S. W. 909; Houston, etc., R. Co. *v.* Harris, 3 Tex. App. Civ. Cas. § 224.

Canada.— McKellar *v.* Canadian Pac. R. Co., 14 Manitoba 614.

See 41 Cent. Dig. tit. "Railroads," § 1427.

Where two animals are tied together and only one of them is struck but both dragged along the track and killed, plaintiff can recover under the statute only for the one actually struck by the train. Jeffersonville, etc., R. Co. *v.* Downey, 61 Ind. 287.

61. Peru, etc., R. Co. *v.* Hasket, 10 Ind. 409, 71 Am. Dec. 335; Lafferty *v.* Hannibal, etc., R. Co., 44 Mo. 291.

62. *Illinois.*— Stump *v.* Chicago, etc., R. Co., 84 Ill. App. 28; Chicago, etc., R. Co. *v.* Taylor, 8 Ill. App. 108.

Indiana.—Baltimore, etc., R. Co. *v.* Thomas, 60 Ind. 107.

Missouri.— Foster *v.* St. Louis, etc., R. Co., 90 Mo. 116, 2 S. W. 138.

New York.— Hyatt *v.* New York, etc., R. Co., 64 Hun 542, 19 N. Y. Suppl. 461

Tennessee.— Nashville, etc., R. Co. *v.* Sadler, 91 Tenn. 580, 19 S. W. 618, 30 Am. St. Rep. 896.

Texas.— International, etc., R. Co. *v.* Hughes, 68 Tex. 290, 4 S. W. 492; San Antonio, etc., R. Co. *v.* Tamborello, (Civ. App. 1902) 67 S. W. 926.

See 41 Cent. Dig. tit. "Railroads," §§ 1427, 1428.

The Missouri statute as amended in 1885 is said to authorize a recovery where animals, in the absence of fences, are injured by becoming frightened by moving trains and running into obstructions near the track, but the statute will not authorize a recovery on the ground that by reason of the absence of fences cattle escaped from adjoining fields and were frightened by a train and ran and in consequence lost flesh. Dooley *v.* Missouri Pac. R. Co., 36 Mo. App. 381.

63. Schertz *v.* Indianapolis, etc., R. Co., 107 Ill. 577 [*affirming* 12 Ill. App. 304]; Texas, etc., R. Co. *v.* Mitchell, (Tex. App. 1891) 17 S. W. 1079; McKellar *v.* Canadian Pac. R. Co., 14 Manitoba 614. See also Leach *v.* Newport News, etc., Co., 16 Ky. L. Rep. 287.

64. Schertz *v.* Indianapolis, etc., R. Co., 107 Ill. 577 [*affirming* 12 Ill. App. 304]; Ohio, etc., R. Co. *v.* Cole, 41 Ind. 331.

65. Illinois Cent. R. Co. *v.* Carraher, 47 Ill. 333; Hughes *v.* Hannibal, etc., R. Co., 66 Mo. 325; Jones *v.* Nashville, etc., R. Co., 104 Tenn. 119, 56 S. W. 852; Sinard *v.* Southern R. Co., 101 Tenn. 473, 48 S. W. 227.

66. Seibert *v.* Missouri, etc., R. Co., 72 Mo. 565.

67. Louisville, etc., R. Co. *v.* Upton, 18 Ill. App. 605; Indianapolis, etc., R. Co. *v.* McBrown, 46 Ind. 229; Boggs *v.* Missouri Pac. R. Co., 18 Mo. App. 274; Houston, etc., R. Co. *v.* Harris, 3 Tex. App. Civ. Cas. § 224.

68. *Iowa.*— Liston *v.* Central Iowa R. Co., 70 Iowa 714, 29 N. W. 445; Kraus *v.* Burlington, etc., R. Co., 55 Iowa 338, 7 N. W. 598.

Kansas.— Atchison, etc., R. Co. *v.* Jones, 20 Kan. 527.

Minnesota.— Nelson *v.* Chicago, etc., R. Co., 30 Minn. 74, 14 N. W. 360.

Nebraska.— Chicago, etc., R. Co. *v.* Cox, 51 Nebr. 479, 71 N. W. 37 [*disapproving* Burlington, etc., R. Co. *v.* Shoemaker, 18 Nebr. 369, 25 N. W. 365]; Fremont, etc., R. Co. *v.* Pounder, 36 Nebr. 247, 54 N. W. 509.

Oregon.— Meier *v.* Northern Pac. R. Co., (1908) 93 Pac. 691; Meeker *v.* Northern Pac. R. Co., 21 Oreg. 513, 28 Pac. 639, 28 Am. St. Rep. 758, 14 L. R. A. 841.

See 41 Cent. Dig. tit. "Railroads," § 1427.

69. Mikesell *v.* Wabash R. Co., 134 Iowa 736, 112 N. W. 201; Young *v.* St. Louis, etc., R. Co., 44 Iowa 172; Missouri Pac. R. Co. *v.* Eckel, 49 Kan. 794, 31 Pac. 693; Atchison, etc., R. Co. *v.* Jones, 20 Kan. 527; Maher *v.* Winona, etc., R. Co., 31 Minn. 401, 18 N. W. 105; Nelson *v.* Chicago, etc., R. Co., 30 Minn. 74, 14 N. W. 360; Meeker *v.* Northern Pac. R. Co., 21 Oreg. 513, 28 Pac. 639, 28 Am. St. Rep. 758, 14 L. R. A. 841.

The injury may be said to be due to the want of a fence whenever the want of a fence in connection with the acts of defendant is the proximate cause of the injury. Young *v.* St. Louis, etc., R. Co., 44 Iowa 172.

Escape and loss of stock.— Under the Missouri Double Damage Act the company is lia-

by approaching trains and running upon bridges or trestles,[70] or into wire fences,[71] or are injured by the negligence of the servants of the company in extricating them when caught in bridges or trestles; [72] but the company is not absolutely liable for all injuries which would not have occurred had a fence been constructed, but only for such as are the natural and proximate result of its neglect to do so.[73] Where fences are constructed the company will be liable for injuries to animals not caused by the operation of its trains but by the fence itself owing to its dangerous or defective structure or condition.[74]

b. At What Places Required — (i) *In General.* In some cases the statutes requiring fencing expressly except certain places from their operation; [75] but in the absence of such express provision the statutes will be given a reasonable construction according to their object and intention,[76] and an exception will be implied as to places where the maintenance of fences or cattle-guards would be unlawful,[77] would interfere with the necessities and convenience of the public in travel or in transacting business with the railroad,[78] would unreasonably interfere with the railroad company in the proper use of its own property or in trans-

ble for damages occasioned by failure to fence either where the damage is caused by the company's agents, engines, or cars, or by stock escaping from the adjoining lands; and under the latter provision a landowner may recover for stock that escape and are lost if such loss was the proximate consequence of the failure of the company to construct or maintain fences as required by the statute. Boggs *v.* Missouri, etc., R. Co., 156 Mo. 389, 57 S. W. 550.

70. Mikesell *v.* Wabash R. Co., 134 Iowa 736, 112 N. W. 201; Liston *v.* Central Iowa R. Co., 70 Iowa 714, 29 N. W. 445; Kraus *v.* Burlington, etc., R. Co., 55 Iowa 338, 7 N. W. 598; Young *v.* St. Louis, etc., R. Co., 44 Iowa 172; Atchison, etc., R. Co. *v.* Jones, 20 Kan. 527; Chicago, etc., R. Co. *v.* Cox, 51 Nebr. 479, 71 N. W. 37 [*disapproving* Burlington, etc., R. Co. *v.* Shoemaker, 18 Nebr. 369, 25 N. W. 365]; Meeker *v.* Northern Pac. R. Co., 21 Oreg. 513, 28 Pac. 639, 28 Am. St. Rep. 758, 14 L. R. A. 841.

71. Missouri Pac. R. Co. *v.* Eckel, 49 Kan. 794, 31 Pac. 693; Missouri Pac. R. Co. *v.* Gill, 49 Kan. 441, 30 Pac. 414; Meier *v.* Northern Pac. R. Co., (Oreg. 1908) 93 Pac. 691.

In Missouri there is a statute which expressly provides that where animals go upon a railroad track where it is not properly fenced and are frightened by any passing locomotive or train on the road and are injured by running into fences or other obstructions, the company shall be liable. Henson *v.* Williamsville, etc., R. Co., 110 Mo. App. 595, 85 S. W. 597, holding, however, that a "speeder" or contrivance similar to a handcar except that it is propelled by a gasoline engine, is not a "locomotive" within the application of the statute, and that the railroad company will not be liable for injuries to stock frightened thereby.

72. Atchison, etc., R. Co. *v.* Edwards, 20 Kan. 531, holding that such an injury is an injury done "in operating" the road, within the application of the statute making railroad companies liable for injuries so done to stock where their roads are not fenced.

73. Nelson *v.* Chicago, etc., R. Co., 30 Minn. 74, 14 N. W. 360. See also Gordon *v.* Chicago, etc., R. Co., 44 Mo. App. 201.

74. Louisville, etc., R. Co. *v.* Shelton, 43 Ill. App. 220; Gould *v.* Bangor, etc., R. Co., 82 Me. 122, 19 Atl. 84; Rehler *v.* Western New York, etc., R. Co., 8 N. Y. Suppl. 286.

75. Illinois Cent. R. Co. *v.* Bull, 72 Ill. 537; Chicago, etc., R. Co. *v.* Hogan, 27 Nebr. 801, 43 N. W. 1148; Peters *v.* Stewart, 72 Wis. 133, 39 N. W. 380; Bennett *v.* Chicago, etc., R. Co., 19 Wis. 145.

Charter provisions.— The charter of the Hudson River Railroad, N. Y. Laws (1846), expressly relieves the company from any obligation to maintain fences "where their railroad is constructed in the river." Schermerhorn *v.* Hudson River R. Co., 38 N. Y. 103, holding that the different channels or creeks separating and flowing around intervening islands in the stream, although in local usage receiving different names, are a part of "the river" and within the exception of the provision.

76. *Connecticut.*— Gallagher *v.* New York, etc., R. Co., 57 Conn. 442, 18 Atl. 786, 5 L. R. A. 737.

Indiana.— Lafayette, etc., R. Co. *v.* Shriner, 6 Ind. 141.

Iowa.— Davis *v.* Burlington, etc., R. Co., 26 Iowa 549.

Missouri.— Lloyd *v.* Pacific R. Co., 49 Mo. 199.

Oregon.— Moses *v.* Southern Pac. R. Co., 18 Oreg. 385, 23 Pac. 498, 8 L. R. A. 135.

See 41 Cent. Dig. tit. "Railroads," §§ 1433–1435.

77. Lafayette, etc., R. Co. *v.* Shriner, 6 Ind. 141.

78. Bechdolt *v.* Grand Rapids, etc., R. Co., 113 Ind. 343, 15 N. E. 86; Evansville, etc., R. Co. *v.* Willis, 93 Ind. 507; Hillman *v.* Grays Point Terminal R. Co., 99 Mo. App. 271, 73 S. W. 220; Dolan *v.* Newburgh, etc., R. Co., 120 N. Y. 571, 24 N. E. 824; Hyatt *v.* New York, etc., R. Co., 64 Hun (N. Y.) 542, 19 N. Y. Suppl. 461; International, etc., R. Co. *v.* Cocke, 64 Tex. 151; Gulf, etc., R. Co. *v.*

acting its business with the public,[79] or would endanger the lives of its employees engaged in switching or operating its trains; [80] or in other words wherever, in view of these considerations, the maintenance of a fence would be unreasonable or improper,[81] although the company might have a legal right to do so.[82] But the interest and convenience of the public and not that of the railroad company is the controlling consideration,[83] and the company will not be relieved from fencing merely on the ground that it would be inconvenient to the company,[84] or that the construction of a fence would be difficult [85] or expensive.[86] Where railroad companies are required by law to fence their roads it is not the province or policy of the courts to create exceptions to the rule,[87] and they will not do so except in view of some paramount public interest or paramount duty on the part of the company which would render the maintenance of fences improper,[88] and in the absence of such considerations if the company has a right to fence and fails to do so it will be liable for any injury to animals occasioned thereby.[89] At places where the company is not obliged to fence it is not required to maintain cattle-guards,[90] but at the limits of such places where the duty of fencing begins they must be constructed to prevent animals from passing from such unfenced places upon the tracks beyond.[91] The Kentucky statute requires railroad companies to

Wallace, 2 Tex. Civ. App. 270, 21 S. W. 973.

79. Evansville, etc., R. Co. *v.* Willis, 93 Ind. 507; Cincinnati, etc., R. Co. *v.* Wood, 82 Ind. 593; Ohio, etc., R. Co. *v.* Rowland, 50 Ind. 349; Jeffersonville, etc., R. Co. *v.* Beatty, 36 Ind. 15.

80. Lake Erie, etc., R. Co. *v.* Kneadle, 94 Ind. 454; Evansville, etc., R. Co. *v.* Willis, 93 Ind. 507; Pennsylvania Co. *v.* Lindley, 2 Ind. App. 111, 28 N. E. 106; Gilpin *v.* Missouri, etc., R. Co., 197 Mo. 319, 94 S. W. 869; Jennings *v.* St. Joseph R. Co., 37 Mo. App. 651; Pearson *v.* Chicago, etc., R. Co., 33 Mo. App. 543; Chicago, etc., R. Co. *v.* Sevcek, 72 Nebr. 793, 101 N. W. 981, 110 N. W. 639; Chicago, etc., R. Co. *v.* Hogan, 30 Nebr. 686, 46 N. W. 1015.

81. Cincinnati, etc., R. Co. *v.* Wood, 82 Ind. 593; Ohio, etc., R. Co. *v.* Rowland, 50 Ind. 349; Latty *v.* Burlington, etc., R. Co., 38 Iowa 250; Davis *v.* Burlington, etc., R. Co., 26 Iowa 549; McDonald *v.* Minneapolis, etc., R. Co., 113 Mich. 484, 71 N. W. 859.

Cities, towns, and villages see *infra*, X, H, 4, b, (II).

Highways see *infra*, X, H, 4, b, (V).

82. Davis *v.* Burlington, etc., R. Co., 26 Iowa 549; Gulf, etc., R. Co. *v.* Wallace, 2 Tex. Civ. App. 270, 21 S. W. 973.

83. Davis *v.* Burlington, 26 Iowa 549; Atchison, etc., R. Co. *v.* Shaft, 33 Kan. 521, 6 Pac. 908; Greeley *v.* St. Paul, etc., R. Co., 33 Minn. 136, 22 N. W. 179, 53 Am. St. Rep. 16.

Any exceptions based upon an interference with the business of the railroad are not intended to advance the private interests of railroad companies, but to promote the public good by enabling them to discharge their duties to the public. Wabash, etc., R. Co. *v.* Tretts, 96 Ind. 450.

84. *Illinois.*— Toledo, etc., R. Co. *v.* Franklin, 159 Ill. 99, 42 N. E. 319; Wabash R. Co. *v.* Howard, 57 Ill. App. 66.

Kansas.— Atchison, etc., R. Co. *v.* Shaft, 33 Kan. 521, 6 Pac. 908.

Minnesota.— Greeley *v.* St. Paul, etc., R. Co., 33 Minn. 136, 22 N. W. 179, 53 Am. St. Rep. 16.

New York.— Tracy *v.* Troy, etc., R. Co., 38 N. Y. 433, 98 Am. Dec. 54; Bradley *v.* Buffalo, etc., R. Co., 34 N. Y. 427.

Texas.— Houston, etc., R. Co. *v.* Simpson, 2 Tex. App. Civ. Cas. § 670.

See 41 Cent. Dig. tit. "Railroads," §§ 1433–1435.

85. Ft. Wayne, etc., R. Co. *v.* Herbold, 99 Ind. 91; Greeley *v.* St. Paul, etc., R. Co., 33 Minn. 136, 22 N. W. 179, 53 Am. Rep. 16.

If a fence can be constructed it must be done and where there is evidence to sustain a finding that it could be done a judgment against the company will be sustained. Louisville, etc., R. Co. *v.* Zink, 85 Ind. 219.

86. Ft Wayne, etc., R. Co. *v.* Herbold, 99 Ind. 91.

87. Pittsburgh, etc., R. Co. *v.* Laufman, 78 Ind. 319; Atchison, etc., R. Co. *v.* Shaft, 33 Kan. 521, 6 Pac. 908; Atchison, etc., R. Co. *v.* Ash, (Kan. App. 1899) 58 Pac. 235.

88. Atchison, etc., R. Co. *v.* Shaft, 33 Kan. 521, 6 Pac. 908; Chicago, etc., R. Co. *v.* Green, 4 Kan. App. 133, 46 Pac. 200.

89. Iowa Cent. R. Co. *v.* Gunshee, 49 Ill. App. 609; Banister *v.* Pennsylvania Co., 98 Ind. 220; Toledo, etc., R. Co. *v.* Fly, 8 Ind. App. 602, 36 N. E. 215; Jeffersonville, etc., R. Co. *v.* Peters, 1 Ind. App. 69, 27 N. E. 299; Atchison, etc., R. Co. *v.* Shaft, 33 Kan. 521, 6 Pac. 908; Hurt *v.* St. Paul, etc., R. Co., 39 Minn. 485, 40 N. W. 613; Greeley *v.* St. Paul, etc., R. Co., 33 Minn. 136, 22 N. W. 179, 53 Am. Rep. 16.

90. Stern *v.* Michigan Cent. R. Co., 76 Mich. 591, 43 N. W. 587; Robertson *v.* Atlantic, etc., R. Co., 64 Mo. 412.

91. Illinois Cent. R. Co. *v.* Davidson, 225 Ill. 618, 80 N. E. 250 [*affirming* 125 Ill. App. 420]; Iola Electric R. Co. *v.* Jackson, 70 Kan. 791, 79 Pac. 662; Fuller *v.* Lake Shore, etc., R. Co., 108 Mich. 690, 66 N. W. 593; Nashville, etc., R. Co. *v.* Hughes, 94 Tenn. 450, 29 S. W. 723.

construct cattle-guards at all terminal points of fences constructed along their lines, except where such lines are not required to be fenced on both sides, and at public crossings.[92] Where a road crosses a watercourse it is sufficient if the fences are constructed upon either side up to and connected with the bridge, trestle, or culvert, so as to prevent animals from going upon the track, and it is not necessary to fence across the stream so as to prevent their escape under the track from an adjoining inclosure.[93]

(II) *CITIES, TOWNS, AND VILLAGES* — (A) *In General.* In some cases the statutes requiring fencing expressly except where the road runs through a city, town, or village,[94] but in the absence of such provision railroad companies are not relieved from fencing merely because the road is within the limits of a city, town, or village,[95] but must fence within such limits at all places where the main-

At stations, switch-yards, and depot grounds see *infra*, X, H, 4, b, (III), (D).

92. Parish *v.* Louisville, etc., R. Co., 78 S. W. 186, 25 Ky. L. Rep. 1524; Younger *v.* Louisville, etc., R. Co., 41 S. W. 25, 19 Ky. L. Rep. 506.

Construction of statute.— The "terminal points" referred to in the statute are not points where division fences of property-owners cross or come up to the right of way, but terminal points of the fences running parallel with the road (McKee *v.* Cincinnati, etc., R. Co., 43 S. W. 241, 19 Ky. L. Rep. 1270); but the statute applies to all terminal points in such lateral fences and not merely where they terminate at public or private crossings (Parish *v.* Chicago, etc., R. Co., 78 S. W. 186, 25 Ky. L. Rep. 1524).

93. Cagwin *v.* Chicago, etc., R. Co., 113 Iowa 175, 84 N. W. 1032; Grand Trunk R. Co. *v.* James, 31 Can. Sup. Ct. 420 [*reversing* 1 Ont. L. Rep. 127 (*affirming* 31 Ont. 672)].

If animals escape under a bridge from an adjoining inclosure and afterward go upon the track at a public crossing where the company is not required to fence and are injured, the company will not be liable. Cagwin *v.* Chicago, etc., R. Co., 113 Iowa 175, 84 N. W. 1032.

94. Illinois Cent. R. Co. *v.* Bull, 72 Ill. 537; Chicago, etc., R. Co. *v.* Hogan, 27 Nebr. 801, 43 N. W. 1148; Clary *v.* Burlington, etc., R. Co., 14 Nebr. 232, 15 N. W. 220.

The word "town" in a statute relating to fencing and operating railroads means a collection of houses larger than a village and smaller than a city, and has no reference to territory incorporated as a town under the township organization laws. Cleveland, etc., R. Co. *v.* Green, 65 Ill. App. 414.

What constitutes a village.—Any small assembly of houses for dwellings or business or both, in the country, constitutes a village whether they are situated upon regularly laid out streets and alleys or not (Toledo, etc., R. Co. *v.* Spangler, 71 Ill. 568; Illinois, etc., R. Co. *v.* Williams, 27 Ill. 48); but it will be presumed, in the absence of evidence to the contrary, that the houses compose the village and that an injury occurring beyond them was outside of the village limits (Ewing *v.* Chicago, etc., R. Co., 72 Ill. 25).

A place, although outside of the platted limits of a village, is within the application of the exception if it is open public ground or so used by the public as practically to constitute it a part of the village. Toledo, etc., R. Co. *v.* Chapin, 66 Ill. 504, holding that where a railroad switch is located outside of the limits of a village but so located that it could not be reached by teams in loading and unloading if a fence were constructed there, the railroad company will not be liable for failing to do so.

95. *Indiana.*— Toledo, etc., R. Co. *v.* Owing, 43 Ind. 405; Toledo, etc., R. Co. *v.* Howell, 38 Ind. 447; Jeffersonville, etc., R. Co. *v.* Parkhurst, 34 Ind. 501; Indianapolis, etc., R. Co. *v.* Parker, 29 Ind. 471.

Iowa.— Coyle *v.* Chicago, etc., R. Co., 62 Iowa 518, 17 N. W. 771.

Kansas.— Union Pac. R. Co. *v.* Dyche, 28 Kan. 200.

Minnesota.— La Paul *v.* Truesdale, 44 Minn. 275, 46 N. W. 363; Greeley *v.* St. Paul, etc., R. Co., 33 Minn. 136, 22 N. W. 179, 53 Am. Rep. 16.

Missouri.— Wymore *v.* Hannibal, etc., R. Co., 79 Mo. 247 [*disapproving* Wallace *v.* St. Louis, etc., R. Co., 74 Mo. 594]; Young *v.* Hannibal, etc., R. Co., 79 Mo. 336; Ells *v.* Pacific R. Co., 48 Mo. 231.

New York.— Crawford *v.* New York Cent., etc., R. Co., 18 Hun 108.

Ohio.— Cleveland, etc., R. Co. *v.* McConnell, 26 Ohio St. 57.

Tennessee.— Nashville, etc., R. Co. *v.* Hughes, 94 Tenn. 450, 29 S. W. 723.

See 41 Cent. Dig. tit. "Railroads," §§ 1436, 1437.

In Missouri there are two separate statutes, the first not expressly requiring railroad companies to fence at any place, but making them liable for injuries to stock without proof of negligence where their roads are not fenced, and the second expressly requiring them to fence where their roads pass through, along, or adjoining inclosed or cultivated fields or uninclosed lands (Edwards *v.* Hannibal, etc., R. Co., 66 Mo. 567); and in an action brought under the latter statute there can be no recovery for failure to fence where the road passes through a city, town, or village (Rhea *v.* St. Louis, etc., R. Co., 84 Mo. 345; Elliott *v.* Hannibal, etc., R. Co., 66 Mo. 683); but the exception does not apply where the road is located along the edge of a town and neither the streets nor limits of the town

tenance of a fence would not be unlawful or an unreasonable or improper interference with the operation of the road or the necessities and convenience of the public.[96] It has been held that railroad companies need not fence in portions of towns or cities where their tracks are intersected and crossed by streets and alleys;[97] but on the contrary it has been held that where the road runs along or across vacant lots they must fence between the streets,[98] and construct cattle-guards at the crossings;[99] and it is uniformly held that they must fence at places within the corporate limits where there are no intersecting streets and alleys,[1] or at places which are used for agricultural purposes,[2] or are located on the outskirts of the town where the land is open and not occupied with buildings.[3]

(B) *Streets and Crossings.*[4] A railroad company is not required to fence its tracks at the crossing of a street,[5] as the fence would constitute an unlawful obstruction,[6] and this rule applies although the street has not been opened to public travel,[7] or is not in a condition to be used except by persons on foot;[8] nor for the same reason is a railroad company required to fence its tracks where they run along instead of across a street, and are subject to the public easement;[9] but

extend beyond it (Kirkland *v.* Missouri, etc., R. Co., 82 Mo. 466; Brandenburg *v.* St. Louis, etc., R. Co., 44 Mo. App. 224); and under the former statute an action may be maintained for injuries sustained within such limits at places where the company has a right to fence and fails to do so (Young *v.* Hannibal, etc., R. Co., 79 Mo. 336; Wymore *v.* Hannibal, etc., R. Co., 79 Mo. 247).

In Washington it is held that the statute of 1893 providing that, in actions for injuries to stock by collision with moving trains, the failure of a railroad company to fence its track shall be *prima facie* evidence of negligence does not apply to tracks in incorporated towns. Ryan *v.* Northern Pac. R. Co., 19 Wash. 533, 53 Pac. 824.

96. Wabash, etc., R. Co. *v.* Forshee, 77 Ind. 158; Indianapolis, etc., R. Co. *v.* Lindley, 75 Ind. 426; Jeffersonville, etc., R. Co. *v.* Parkhurst, 34 Ind. 501; Indianapolis, etc., R. Co. *v.* Parker, 29 Ind. 471; Toledo, etc., R. Co. *v.* Cupp, 9 Ind. App. 244, 36 N. E. 445; Wymore *v.* Hannibal, etc., R. Co., 79 Mo. 247; Cleveland, etc., R. Co. *v.* McConnell, 26 Ohio St. 57; Nashville, etc., R. Co. *v.* Hughes, 94 Tenn. 450, 29 S. W. 723.

97. Gibson *v.* Iowa Cent. R. Co., 136 Iowa 415, 113 N. W. 927; Blanford *v.* Minneapolis, etc., R. Co., 71 Iowa 310, 32 N. W. 357, 60 Am. Rep. 795; Gerren *v.* Hannibal, etc., R. Co., 60 Mo. 405; Hurd *v.* Chappell, 91 Mo. App. 317. But see Union Pac. R. Co. *v.* Dyche, 28 Kan. 200, and cases cited *infra*, note 98.

The fact that the town is not incorporated is immaterial if it is regularly laid out and the track is crossed by streets and alleys. Gerren *v.* Hannibal, etc., R. Co., 60 Mo. 405 [*distinguishing* Iba *v.* Hannibal, etc., R. Co., 45 Mo. 469]; Vanderworker *v.* Missouri Pac. R. Co., 48 Mo. App. 654.

Under the New York statute of 1892, requiring every railroad company to fence the sides of its road to keep out cattle, horses, sheep, etc., but declaring that no railroad need be fenced "when not necessary to prevent horses, cattle, sheep and hogs from going upon its track from the adjoining lands," a railroad company is not bound to fence its right of way within the city of New York to keep out the horses pastured on certain city blocks, where a public highway intervenes between such property and the railroad's right of way. Lee *v.* Brooklyn Heights R. Co., 97 N. Y. App. Div. 111, 89 N. Y. Suppl. 652.

98. Indianapolis, etc., R. Co. *v.* Lindley, 75 Ind. 426; Rubein *v.* Brooklyn Heights R. Co., 61 N. Y. App. Div. 478, 70 N. Y. Suppl. 577; Crawford *v.* New York Cent. R. Co., 18 Hun (N. Y.) 108. See also Pittsburgh, etc., R. Co. *v.* Laufman, 78 Ind. 319; Cleveland, etc., R. Co. *v.* McConnell, 26 Ohio St. 57.

99. See *infra*, X, H, 4, b, (II), (B).

1. *Indiana.*— Wabash, etc., R. Co. *v.* Forshee, 77 Ind. 158; Toledo, etc., R. Co. *v.* Howell, 38 Ind. 447.

Iowa.— Coyle *v.* Chicago, etc., R. Co., 62 Iowa 518, 17 N. W. 771.

Minnesota.— Nelson *v.* Great Northern R. Co., 52 Minn. 276, 53 N. W. 1129.

Missouri.— Wymore *v.* Hannibal, etc., R. Co., 79 Mo. 247; Ells *v.* Pacific R. Co., 48 Mo. 231; Vanderworker *v.* Missouri Pac. R. Co., 51 Mo. App. 166; Lane *v.* Chicago, etc., R. Co., 18 Mo. App. 555.

Tennessee.— Nashville, etc., R. Co. *v.* Hughes, 94 Tenn. 450, 29 S. W. 723.

See 41 Cent. Dig. tit. "Railroads," §§ 1436, 1437.

2. Toledo, etc., R. Co. *v.* Owen, 43 Ind. 405; Iola Electric R. Co. *v.* Jackson, 70 Kan. 791, 79 Pac. 662.

3. Brady *v.* Rensselaer, etc., R. Co., 1 Hun (N. Y.) 378, 3 Thomps. & C. 537.

4. Highways in general see *infra*, X, H, 4, b, (V).

5. Lafayette, etc., R. Co. *v.* Shriner, 6 Ind. 141; Long *v.* Central Iowa R. Co., 64 Iowa 657, 21 N. W. 122; International, etc., R. Co. *v.* Leuders, 1 Tex. App. Civ. Cas. § 314.

6. Lafayette, etc., R. Co. *v.* Shriner, 6 Ind. 141.

7. Jeffersonville, etc., R. Co. *v.* Douherty, 10 Ind. 549; Long *v.* Cent. Iowa R. Co., 64 Iowa 657, 21 N. W. 122.

8. Lathrop *v.* Central Iowa R. Co., 69 Iowa 105, 28 N. W. 465.

9. Indianapolis, etc., R. Co. *v.* Warner,

the rights of the public extend no further than the street, and the fact that streets or alleys abut on and terminate at a railroad track is no objection to fencing.[10] The rule requiring the construction of cattle-guards at public crossings applies to street crossings,[11] except where the crossing is within an open space, such as the depot grounds, which is not required to be fenced,[12] or where the track runs along one street which is crossed by other streets so that cattle-guards would form an obstruction to travel.[13]

(III) *STATIONS, SWITCH-YARDS, AND DEPOT GROUNDS* — (A) *In General.* A railroad company is not required to fence such grounds at its depots or stations as the necessities or convenience of the public and the proper conduct of the business or the road at such places require to be left open and unobstructed.[14] In

35 Ind. 515; Union Pac. R. Co. *v.* Dyche, 28 Kan. 200; Rippe *v.* Chicago, etc., R. Co., 42 Minn. 34, 43 N. W. 652, 5 L. R. A. 864.

10. Toledo, etc., R. Co. *v.* Cary, 37 Ind. 172.

11. *Indiana.*— Pittsburgh, etc., R. Co. *v.* Laufman, 78 Ind. 319.

Michigan.— Lafferty *v.* Chicago, etc., R. Co., 71 Mich. 35, 38 N. W. 660.

Minnesota.— Greeley *v.* St. Paul, etc., R. Co., 33 Minn. 136, 22 N. W. 179, 53 Am. Rep. 16.

New York.— Tracy *v.* Troy, etc., R. Co., 38 N. Y. 433, 98 Am. Dec. 54; Brace *v.* New York Cent. R. Co., 27 N. Y. 269 [*disapproving* Parker *v.* Rensselaer, etc., R. Co., 16 Barb. 315; Vanderkar *v.* Rensselaer, etc., R. Co., 13 Barb. 390]; Crawford *v.* New York Cent., etc., R. Co., 18 Hun 108; Brady *v.* Rensselaer, etc., R. Co., 1 Hun 378, 3 Thomps. & C. 537.

Tennessee.— Nashville, etc., R. Co. *v.* Hughes, 94 Tenn. 450, 29 S. W. 723.

See 41 Cent. Dig. tit. "Railroads," § 1438.

An objection that the numerous cattle-guards would weaken the road-bed and thus increase the danger is not available in the absence of proof that such would be the case. Pittsburgh, etc., R. Co. *v.* Laufman, 78 Ind. 319.

12. Stern *v.* Michigan Cent. R. Co., 76 Mich. 591, 43 N. W. 587.

13. See Brace *v.* New York Cent. R. Co., 27 N. Y. 269.

14. *Colorado.*— Chicago, etc., R. Co. *v.* Campbell, 34 Colo. 380, 83 Pac. 138.

Illinois.— Chicago, etc., R. Co. *v.* Hans, 111 Ill. 114 [*modifying* Chicago, etc., R. Co. *v.* Dumser, 109 Ill. 402]; Galena, etc., R. Co. *v.* Griffin, 31 Ill. 303; Cleveland, etc., R. Co. *v.* Umphenour, 63 Ill. App. 642; Terre Haute, etc., R. Co. *v.* Grissom, 60 Ill. App. 114.

Indiana.— Bechdolt *v.* Grand Rapids, etc., R. Co., 113 Ind. 343, 15 N. E. 686; Indiana, etc., R. Co. *v.* Quick, 109 Ind. 295, 9 N. E. 788, 925; Indianapolis, etc., R. Co. *v.* Crandall, 58 Ind. 365; Indianapolis, etc., R. Co. *v.* Christy, 43 Ind. 143.

Iowa.— Packard *v.* Illinois Cent. R. Co., 30 Iowa 474; Davis *v.* Burlington, etc., R. Co., 26 Iowa 549.

Michigan.— Stewart *v.* Grand Rapids, etc., R. Co., 147 Mich. 48, 110 N. W. 126; Grondin *v.* Duluth, etc., R. Co., 100 Mich. 598, 59 N. W. 229; Chicago, etc., R. Co. *v.* Campbell, 47 Mich. 265, 11 N. W. 152.

Minnesota.— Smith *v.* Minneapolis, etc., R. Co., 37 Minn. 103, 33 N. W. 316; Hooper *v.* Chicago, etc., R. Co., 37 Minn. 52, 33 N. W. 314.

Missouri.— Swearingen *v.* Missouri, etc., R. Co., 64 Mo. 73; Lloyd *v.* Pacific R. Co., 49 Mo. 199; McGuire *v.* St. Louis, etc., R. Co., 113 Mo. App. 79, 87 S. W. 564; Crenshaw *v.* St. Louis, etc., R. Co., 54 Mo. App. 233.

Ohio.— Pierce *v.* Andrews, 13 Ohio Cir. Ct. 513, 7 Ohio Cir. Dec. 105.

Oregon.— Wilmot *v.* Oregon R. Co., 48 Oreg. 494, 87 Pac. 528, 7 L. R. A. N. S. 202; Fisk *v.* Northern Pac. R. Co., 19 Oreg. 163, 23 Pac. 898; Moses *v.* Southern Pac. R. Co., 18 Oreg. 385, 23 Pac. 498, 8 L. R. A. 135.

Texas.— International, etc., R. Co. *v.* Dunham, 68 Tex. 231, 4 S. W. 472, 2 Am. St. Rep. 484; Gulf, etc., R. Co. *v.* Ogg, 8 Tex. Civ. App. 285, 28 S. W. 347; Swanson *v.* Melton, (App. 1891) 17 S. W. 1088.

England.— Roberts *v.* Great Western R. Co., 4 C. B. N. S. 506, 4 Jur. N. S. 1240, 27 L. J. C. P. 266, 93 E. C. L. 506.

See 41 Cent. Dig. tit. "Railroads," § 1439.

Depot grounds have been defined as follows: "The grounds necessary or useful and used for the purposes of the freight and passenger business of the road, which includes all the business in which the public are interested." Plunkett *v.* Minneapolis, etc., R. Co., 79 Wis. 222, 225, 48 N. W. 519. "A depot is a place where passengers get on and off the cars, and where goods are loaded and unloaded; and all grounds necessary or convenient and actually used for these purposes are included in depot grounds." Fowler *v.* Farmers' L. & T. Co., 21 Wis. 77, 79.

The number of passengers or amount of freight received or delivered is not decisive of the duty to fence, and the company is not obliged to do so if the place is a station to which tickets are sold and where freight and passengers are received and discharged, although so used only at certain seasons and for a small portion of the year. Stewart *v.* Pennsylvania Co., 2 Ind. App. 142, 28 N. E. 211, 50 Am. St. Rep. 231.

The fact that the station is not in an incorporated town, village, or city does not make it necessary that the station grounds should be fenced. Louisville, etc., Consol. R. Co. *v.* Scott, 34 Ill. App. 635. See also Chicago, etc., R. Co. *v.* Blair, 75 Ill. App. 659.

one jurisdiction at least the statute expressly excepts depot grounds,[15] but in the absence of such provision this exception will be implied from the necessities of the case.[16] At station grounds which may be left unfenced the company is not obliged to build a fence, which incloses no part of the road, between the station grounds and the land of an adjoining owner.[17]

(B) *Character of Place and Business Transacted.* In order to constitute a point upon a railroad a station within the application of the rule exempting railroad companies from the duty of fencing at stations, it is not necessary to have a depot and station agent there, but the receipt and discharge of freight and passengers and the maintenance of a platform are sufficient,[18] and so the exception has been held to apply to a mere flag station,[19] notwithstanding the railroad company did not have a building or keep an agent at such station.[20] The exemption from the duty of fencing at depots and station grounds applies also to approaches to such grounds which could not be fenced without inconvenience to the public,[21] such as switches, sidings, and platforms where freight or passengers are received and discharged;[22] grounds necessary for access by the public and convenience of shipment about an adjacent mill,[23] hay press,[24] storage house, or grain elevator;[25] lots used for storing, loading, and unloading lumber;[26] and grounds in the immediate vicinity of the company's engine house or machine

15. Peters *v.* Stewart, 72 Wis. 133, 39 N. W. 380; Bennett *v.* Chicago, etc., R. Co., 19 Wis. 145.

16. Davis *v.* Burlington, etc., R. Co., 26 Iowa 549; Stewart *v.* Grand Rapids, etc., R. Co., 147 Mich. 48, 110 N. W. 126; Lloyd *v.* Pacific R. Co., 49 Mo. 199; Moses *v.* Southern Pac. R. Co., 18 Oreg. 385, 23 Pac. 498, 8 L. R. A. 135.

17. Smith *v.* Minneapolis, etc., R. Co., 37 Minn. 103, 33 N. W. 316.

18. McGuire *v.* St. Louis, etc., R. Co., 113 Mo. App. 79, 87 S. W. 564.

What is essential to constitute a given place a station is a question depending largely upon the facts of each case. It does not depend upon an office and agent being maintained but rather upon the business done, not with two or three individuals or firms but with the public, and whether trains stop regularly or on signal to receive and discharge passengers and freight, and whether inducements are held out and accommodations afforded to the public to enter into reciprocal business relations. Acord *v.* St. Louis Southwestern R. Co., 113 Mo. App. 84, 87 S. W. 537.

Place not exempt as station.— Where a railroad company kept in a pasture of thirty sections across which its road ran a station consisting of its section-house, stock-yards, side-tracks, and switch-yard, used for shipping cattle and other business, but without an agent or depot, it was held not to be a station (Southern Kansas R. Co. *v.* McKay, (Tex. Civ. App. 1898) 47 S. W. 479); and a point where passengers are permitted to get on and off but from and to which no tickets are sold and at which freight is sometimes thrown off but there is no agent to take charge of it is not a station (Duncan *v.* St. Louis, etc., R. Co., 111 Mo. App. 193, 85 S. W. 661).

19. Schneekloth *v.* Chicago, etc., R. Co., 108 Mich. 1, 65 N. W. 663; Chicago, etc., R. Co. *v.* Sevcek, 72 Nebr. 793, 101 N. W. 981, 110 N. W. 639; Gulf, etc., R. Co. *v.* Wallace, 2 Tex. Civ. App. 270, 21 S. W. 973.

20. Schneekloth *v.* Chicago, etc., R. Co., 108 Mich. 1, 65 N. W. 663. *Contra*, Hurt *v.* St. Paul, etc., R. Co., 39 Minn. 485, 40 N. W. 613; Anderson *v.* Stewart, 76 Wis. 43, 44 N. W. 1091.

21. Chicago, etc., R. Co. *v.* Hans, 111 Ill. 114; Chicago, etc., R. Co. *v.* Campbell, 47 Mich. 265, 11 N. W. 152.

22. Terre Haute, etc., R. Co. *v.* Grissom, 60 Ill. App. 114; Cleveland, etc., R. Co. *v.* Myers, 43 Ill. App. 251; Cleveland, etc., R. Co. *v.* Abney, 43 Ill. App. 92; Bechdolt *v.* Grand Rapids, etc., R. Co., 113 Ind. 343, 15 N. E. 686; Indiana, etc., R. Co. *v.* Sawyer, 109 Ind. 342, 10 N. E. 105; Indiana, etc., R. Co. *v.* Quick, 109 Ind. 295, 9 N. E. 788, 925; Wabash, etc., R. Co. *v.* Nice, 99 Ind. 152; Ohio, etc., R. Co. *v.* Rowland, 50 Ind. 349; Indianapolis, etc., R. Co. *v.* Christy, 43 Ind. 143; Jeffersonville, etc., R. Co. *v.* Beatty, 36 Ind. 15; Cornell *v.* Manistee, etc., R. Co., 117 Mich. 238, 75 N. W. 472; Hyatt *v.* New York, etc., R. Co., 64 Hun (N. Y.) 542, 19 N. Y. Suppl. 461.

A side-track used for loading a single commodity and only occasionally used and not located at a station or depot is not within the application of the exception. Jaeger *v.* Chicago, etc., R. Co., 75 Wis. 130, 43 N. W. 732.

23. Wabash, etc., R. Co. *v.* Nice, 99 Ind. 152; Ohio, etc., R. Co. *v.* Rowland, 50 Ind. 349; Pittsburgh, etc., R. Co. *v.* Bowyer, 45 Ind. 496; Indianapolis, etc., R. Co. *v.* Kinney, 8 Ind. 402; Dolan *v.* Newburgh, etc., R. Co., 120 N. Y. 571, 24 N. E. 824.

24. Ohio, etc., R. Co. *v.* Rowland, 50 Ind. 349.

25. Wabash, etc., R. Co. *v.* Nice, 99 Ind. 152.

26. Ohio, etc., R. Co. *v.* Rowland, 50 Ind. 349; Jeffersonville, etc., R. Co. *v.* Beatty, 36 Ind. 15; Hyatt *v.* New York, etc., R. Co., 64 Hun (N. Y.) 542, 19 N. Y. Suppl. 461.

shops,[27] or its coal or wood yards; [28] or tracks where cars are stored and inspected.[29] The exception also applies to such switches and switch limits as the public convenience and proper handling of trains require to be left unfenced,[30] but no further than is necessary for such purposes,[31] although it is ordinarily held that no fence need be constructed within the switch limits where to make the fence effective would also require the construction of cattle-guards which would endanger the lives of the company's employees.[32]

(c) *Extent and Limits of Grounds.* It is not necessary that a railroad company should make any formal separation or dedication of its station grounds or put up notices as to their limits; [33] nor, on the other hand, can the company, by purchasing or appropriating any particular amount of ground, acquire the right to leave unfenced any more than may be necessary for the purposes of the public and the business there transacted.[34] The exemption from the duty of fencing extends to whatever limits the public necessities and convenience and the proper conduct of the business there transacted require; [35] but this necessity is also the

27. Indianapolis, etc., R. Co. *v.* Oestel, 20 Ind. 231.

28. Ohio, etc., R. Co. *v.* Rowland, 50 Ind. 349; Jeffersonville, etc., R. Co. *v.* Beatty, 36 Ind. 15; Grondin *v.* Duluth, etc., R. Co., 100 Mich. 598, 59 N. W. 229.

29. Bird *v.* Michigan Cent. R. Co., 145 Mich. 706, 108 N. W. 1100.

30. *Illinois.*— Cleveland, etc., R. Co. *v.* Roper, 47 Ill. App. 320; Cleveland, etc., R. Co. *v.* Myers, 43 Ill. App. 251.

Indiana.— Evansville, etc., R. Co. *v.* Willis, 93 Ind. 507.

Michigan.— McDonald *v.* Minneapolis, etc., R. Co., 113 Mich. 484, 71 N. W. 859; Grondin *v.* Duluth, etc., R. Co., 100 Mich. 598, 59 N. W. 229.

Missouri.— Pearson *v.* Chicago, etc., R. Co., 33 Mo. App. 543.

Texas.— Swanson *v.* Melton, (Civ. App. 1891) 17 S. W. 1088.

See 41 Cent. Dig. tit. "Railroads," § 1441.

31. Toledo, etc., R. Co. *v.* Franklin, 159 Ill. 99, 42 N. E. 319 [*affirming* 53 Ill. App. 632]; Toledo, etc., R. Co. *v.* Fly, 8 Ind. App. 602, 36 N. E. 215; Jeffersonville, etc., R. Co. *v.* Peters, 1 Ind. App. 69, 27 N. E. 299; Morris *v.* St. Louis, etc., R. Co., 58 Mo. 78; Smith *v.* St. Louis, etc., R. Co., 111 Mo. App. 410, 85 S. W. 972; Vanderworker *v.* Missouri Pac. R. Co., 51 Mo. App. 166; Chouteau *v.* Hannibal, etc., R. Co., 28 Mo. App. 556; Johnson *v.* Chicago, etc., R. Co., 27 Mo. App. 379. *Compare* Gulf, etc., R. Co. *v.* Ogg, 8 Tex. Civ. App. 285, 28 S. W. 347.

The mere existence of a switch does not necessarily make it impracticable to fence and the company is not relieved from fencing except as to such switch grounds as are necessary to remain open for the use of the public and the necessary transaction of business at the station (Vanderworker *v.* Missouri Pac. R. Co., 51 Mo. App. 166); or in other words places within the switch limits as elsewhere cannot be left unfenced unless they fall within some of the exceptions to the general rule requiring the road to be fenced (Jeffersonville, etc, R. Co. *v.* Peters, 1 Ind. App. 69, 27 N. E. 299).

A switch used for storing cars and maintained only for the convenience of the railroad company must be fenced. Choteau *v.* Hannibal, etc., R. Co., 28 Mo. App. 556; Russell *v.* Hannibal, etc., R. Co., 26 Mo. App. 368.

A switch maintained only for the accommodation of a mill, mine, or quarry at a point on the line of road does not make such place a station or relieve the company from the duty of fencing, although trains may sometimes stop and receive or discharge passengers at such points. Foster *v.* Kansas City Southern R. Co., 112 Mo. App. 67, 87 S. W. 57.

32. Evansville, etc., R. Co. *v.* Willis, 93 Ind. 507; Pennsylvania Co. *v.* Lindley, 2 Ind. App. 111, 28 N. E. 106; Schafer *v.* St. Louis, etc., R. Co., 65 Mo. App. 201; Wright *v.* Atchison, etc., R. Co., 56 Mo. App. 367; Chicago, etc., R. Co. *v.* Sevcek, 72 Nebr. 793, 101 N. W. 981, 110 N. W. 639; Chicago, etc., R. Co. *v.* Hogan, 30 Nebr. 686, 46 N. W. 1015; Gulf, etc., R. Co. *v.* Blankenbeckler, 13 Tex. Civ. App. 249, 35 S. W. 331. But see Nelson *v.* Northern R. Co., 52 Minn. 276, 53 N. W. 1129.

Where a switch is crossed by a public road so that the entire switch cannot be fenced and the construction of wing fences and cattle-guards would endanger the lives of the employees engaged in switching and operating the trains, the company need not fence any part of the switch. Wright *v.* Atchison, etc., R. Co., 56 Mo. App. 367.

33. Grondin *v.* Duluth, etc., R. Co., 100 Mich. 598, 59 N. W. 229.

34. Cox *v.* Minneapolis, etc., R. Co., 41 Minn. 101, 42 N. W. 924; Fowler *v.* Farmers' L. & T. Co., 21 Wis. 73. *Compare* McGrath *v.* Detroit, etc., R. Co., 57 Mich. 555, 24 N. W. 854.

35. *Illinois.*— Terre Haute, etc., R. Co. *v.* Bowles, 16 Ill. App. 261.

Michigan.— Grondin *v.* Duluth, etc., R. Co., 100 Mich. 598, 59 N. W. 229.

Minnesota.— Smith *v.* Minneapolis, etc., R. Co., 37 Minn. 103, 33 N. W. 316.

Nebraska.— Chicago, etc., R. Co. *v.* Sevcek, 72 Nebr. 793, 101 N. W. 981, 110 N. W. 639.

Oregon.— Wilmot *v.* Oregon R. Co., 48 Oreg. 494, 87 Pac. 528, 7 L. R. A. N. S. 202.

See 41 Cent. Dig. tit. "Railroads," § 1442.

limit of the exception,[33] and is not affected by the mere convenience of the company.[37] So if a greater amount of ground than necessary is left unfenced and animals are injured thereon, the company will be liable,[38] notwithstanding such grounds were in fact used by the railroad company.[39]

(D) *Cattle-Guards.* The same principle that excuses a railroad company from fencing at stations and depot grounds applies to the maintenance of cattle-guards.[40] So it is not necessary to construct cattle-guards where a street or highway crosses the track within such grounds,[41] where they would inconvenience the public in reaching the station or transacting business with the railroad company,[42] or where they would endanger the lives of the company's employees engaged in switching, coupling, or operating its trains;[43] but the company must maintain cattle-guards

36. Atchison, etc., R. Co. *v.* Shaft, 33 Kan. 521, 6 Pac. 908; Kobe *v.* Northern Pac. R. Co., 36 Minn. 518, 32 N. W. 783; Morris *v.* St. Louis, etc., R. Co., 58 Mo. 78; Acord *v.* St. Louis Southwestern R. Co., 113 Mo. App. 84, 87 S. W. 537.

It is not left to the arbitrary judgment of a railroad company as to how much ground is necessary for the use of the public and the transaction of the business at the station. Vanderworker *v.* Missouri Pac. R. Co., 51 Mo. App. 166; Johnson *v.* Chicago, etc., R. Co., 27 Mo. App. 379.

37. Wabash R. Co. *v.* Howard, 57 Ill. App. 66; Prickett *v.* Atchison, etc., R. Co., 33 Kan. 748, 7 Pac. 611; Atchison, etc., R. Co. *v.* Shaft, 33 Kan. 521, 6 Pac. 908.

The theory of exemption from the statutes requiring fences has always been founded upon the relation of the company to the public and not upon any other consideration. Peyton *v.* Chicago, etc., R. Co., 70 Iowa 522, 30 N. W. 877.

38. *Illinois.*— Wabash R. Co. *v.* Howard, 57 Ill. App. 66; Toledo, etc., R. Co. *v.* Franklin, 53 Ill. App. 632; Iowa Cent. R. Co. *v.* Gushee, 49 Ill. App. 609.

Iowa.— Peyton *v.* Chicago, etc., R. Co., 70 Iowa 522, 30 N. W. 877.

Kansas.— Prickett *v.* Atchison, etc., R. Co., 33 Kan. 748, 7 Pac. 611; Atchison, etc., R. Co. *v.* Shaft, 33 Kan. 521, 6 Pac. 908; Chicago, etc., R. Co. *v.* Green, 4 Kan. App. 133, 46 Pac. 200.

Minnesota.—Moser *v.* St. Paul, etc., R. Co., 42 Minn. 480, 44 N. W. 530; Cox *v.* Minneapolis, etc., R. Co., 41 Minn. 101, 42 N. W. 924.

Missouri.— Downey *v.* Mississippi River, etc., R. Co., 94 Mo. App. 137, 67 S. W. 945; Ellis *v.* Mississippi River, etc., R. Co., 89 Mo. App. 241; Vanderworker *v.* Missouri Pac. R. Co., 51 Mo. App. 166.

Nebraska.—Union Pac. R. Co. *v.* Knowlton, 43 Nebr. 751, 62 N. W. 203.

New York.—Dixon *v.* New York Cent., etc., R. Co., 4 N. Y. Suppl. 296.

Texas.— Texas, etc., R. Co. *v.* Billingsley, (Civ. App. 1896) 37 S. W. 27.

Wisconsin.— Plunkett *v.* Minneapolis, etc., R. Co., 79 Wis. 222, 48 N. W. 519.

See 41 Cent. Dig. tit. "Railroads," § 1442.

Only so much as is reasonably necessary for the transaction of the business at the depot should be left open. Vanderworker *v.* Missouri Pac. R. Co., 51 Mo. App. 166.

Where a hotel is located near a depot the fact that an open space between the hotel and the depot, which is not properly a part of the depot grounds, is sometimes used by passengers in going to and from the hotel is not sufficient to relieve the company from the duty to fence it. Dixon *v.* New York Cent. R. Co., 4 N. Y. Suppl. 296.

Where it is fairly debatable under the evidence whether it was necessary for the railroad company to leave unfenced a part of its road near a depot in a town to avoid danger to its employees and for the safe and convenient transaction of its business with the public, it cannot be held as a matter of law that the company is relieved from its obligation to fence that part of the road. Brandenburg *v.* St. Louis, etc., R. Co., 44 Mo. App. 224.

39. Atchison, etc., R. Co. *v.* Shaft, 33 Kan. 521, 6 Pac. 908.

40. Robertson *v.* Atlantic, etc., R. Co., 64 Mo. 412.

41. Stern *v.* Michigan Cent. R. Co., 76 Mich. 591, 43 N. W. 587.

42. Robertson *v.* Atlantic, etc., R. Co., 64 Mo. 412.

43. Lake Erie, etc., R. Co. *v.* Kneadle, 94 Ind. 454; Pennsylvania Co. *v.* Lindley, 2 Ind. App. 111, 28 N. E. 106; Gilpin *v.* Missouri, etc., R. Co., (Mo. App. 1903) 77 S. W. 118; Hurd *v.* Chappell, 91 Mo. App. 317; Jennings *v.* St. Joseph R. Co., 37 Mo. App. 651.

Public policy requires in consideration of the safety to life and limb of employees who are compelled to pass over the tracks on foot in coupling cars, turning switches, and other duties, both in the daytime and at night, and often in the most hurried manner, that there shall be no pitfalls or cattle-guards on the tracks or grounds over which they are required to pass in the performance of their duties. Gulf, etc., R. Co. *v.* Blankenbecker, 13 Tex. Civ. App. 249, 35 S. W. 331.

If the cattle-guards are located as near as possible to the head of the switch without endangering the lives of the company's employees the company will not be liable. Grant *v.* Atchison, etc., R. Co., 56 Mo. App. 65; Pearson *v.* Chicago, etc., R. Co., 33 Mo. App. 543.

But if the company creates the necessity for a cattle-guard at a particular place by failing to fence at some other place where it should have done so, it must meet the necessity at its own risk of the danger to its

where the station grounds end and the duty of fencing begins,[44] and along its side-tracks or switches where the considerations of safety and public convenience do not apply,[45] mere inconvenience to the company being insufficient to excuse the omission.[46]

(iv) *Improved, Inclosed, Unimproved, and Uninclosed Lands.* Where the statute merely requires in general terms that railroad companies must fence their tracks, they must fence along their tracks where the road passes through inclosed as well as uninclosed land.[47] In some cases the statutes expressly require railroad companies to fence where the road passes through "enclosed or improved and," [48] "lands owned and settled or occupied by private owners," [49] "private property or enclosed land in the actual possession of another," [50] or through, along, or adjoining "inclosed or cultivated fields, or uninclosed prairie lands." [51] The provision of the Missouri statute as to inclosed lands applies to timber lands if inclosed as well as other inclosed lands,[52] and under the provision as to uninclosed lands the company is liable for failure to fence without proof of negligence

employees. Toledo, etc., R. Co. *v.* Thompson, 48 Ill. App. 36.

44. *Illinois.*— Terre Haute, etc., R. Co. *v.* McCullough, 65 Ill. App. 444.

Michigan.— Stewart *v.* Grand Rapids, etc., R. Co., 147 Mich. 48, 110 N. W. 126; Fuller *v.* Lake Shore, etc., R. Co., 108 Mich. 690, 66 N. W. 593.

Minnesota.— Kobe *v.* Northern Pac. R. Co., 36 Minn. 518, 32 N. W. 783.

Ohio. — Railroad Co. *v.* Newbrander, 40 Ohio St. 15; Norfolk, etc., R. Co. *v.* Vallery, 27 Ohio Cir. Ct. 658.

Tennessee.—Nashville, etc., R. Co. *v.* Hughes, 94 Tenn. 450, 29 S. W. 723.

See 41 Cent. Dig. tit. "Railroads," § 1440.

45. Railroad Co. *v.* Newbrander, 40 Ohio St. 15.

46. Bradley *v.* Buffalo, etc., R. Co., 34 N. Y. 427.

47. Louisville, etc., R. Co. *v.* Patton, 104 Tenn. 40, 54 S. W. 984.

48. Osborne *v.* Canadian Pac. R. Co., 87 Me. 303, 32 Atl. 902.

"Improved" is not a technical word having a precise legal meaning but may mean land that is occupied. As generally understood "improved land" is that which is occupied or made better by care or cultivation or which is employed for advantage. The statute requiring railroads to be fenced where they run through such lands applies to land constituting part of a village lot appurtenant to a dwelling-house and barn, although no part of it is cultivated (Osborne *v.* Canadian Pac. R. Co., 87 Me. 303, 32 Atl. 902), and to land used partly as a mill yard and which is also mowed and occasionally used for grazing (Wilder *v.* Maine Cent. R. Co., 65 Me. 332, 20 Am. Rep. 698).

Lands neither improved nor inclosed, such as lands constituting uninclosed commons, are not within the application of the statute. Perkins *v.* Eastern R. Co., 29 Me. 307, 50 Am. Dec. 589.

The Virginia statute formerly required fencing where the road passes "through all enclosed lands or lots," but was amended in 1898 by striking out the words quoted, and the requirement now applies to all places except public crossings, depot grounds, etc., which are expressly excepted by a subsequent section of the statute Sanger *v.* Chesapeake, etc., R. Co., 102 Va. 86, 45 S. E. 750.

In Kentucky the duty of a railroad company under the statute of 1903 to construct a fence half the distance of the division line between the right of way and the land of an adjoining owner, when the landowner has constructed a fence for the other half, is limited by sections 1791, 1792, 1795, 1784, so that the land must be improved, or if unimproved, must be inclosed on the other three sides, and the company must be notified in writing to construct its fence. Parrish *v.* Louisville, etc., R. Co., 104 S. W. 690, 31 Ky. L. Rep. 1020, 78 S. W. 186, 25 Ky. L. Rep. 1524.

49. Stimpson *v.* Union Pac. R. Co., 9 Utah 123, 33 Pac. 369, holding that the statute applies so as to render the company liable where the land in the vicinity of where the accident occurred was settled upon and occupied by farmers, although in the immediate vicinity it was not under actual cultivation but formed a part of tracts which were under cultivation.

50. Johnson *v.* Oregon Short Line R. Co., 7 Ida. 355, 63 Pac. 112, 53 L. R. A. 744, holding that a homestead entry after it is entered is private property within the meaning of the statute.

It is not necessary that the private property should be fenced by the owner thereof in order to make it the duty of the railroad company to fence its tracks where the railroad passes through or along such land. Patrie *v.* Oregon Short Line R. Co., 6 Ida. 448, 56 Pac. 82.

51. Cary *v.* St. Louis, etc., R. Co., 60 Mo. 209; Tiarks *v.* St. Louis, etc., R. Co., 58 Mo. 45.

The fact that an adjoining owner fails to fence up to his line does not affect the duty of the railroad company to fence its road where it passes through uninclosed prairie lands. Hamilton *v.* Missouri Pac. R. Co., 87 Mo. 85.

52. Sparr *v.* St. Louis, etc., R. Co., 57 Mo. 152; Saunders *v.* St. Louis, etc., R. Co., 57 Mo. 117; Slattery *v.* St. Louis, etc., R. Co., 55 Mo. 362.

if the injury was on land uninclosed and also prairie land;[53] but the provision does not apply to any uninclosed land except prairie land,[54] and uninclosed timber land from which the timber has been cleared off is not prairie land within the application of the statute.[55] Lands, in order to be "inclosed," need not be inclosed by lawful fences.[56] Under some of the statutes it is only where the adjoining lands have been inclosed upon the other three sides that the railroad company is required to complete the inclosure by fencing along its right of way.[57]

(v) *HIGHWAYS* — (A) *In General.* A railroad company is not required to fence its road where it crosses a public highway,[58] whether a public highway *de facto* or *de jure*,[59] or to construct gates or other obstructions at such crossings to prevent animals from going upon the crossing;[60] but the exception does not apply to private ways.[61] Where the crossing is a public highway and not required to be fenced the company must, in order to prevent animals from passing from the highway along the railroad track, construct and maintain suitable cattle-guards and wing fences,[62] which must be located at the point of intersection and as near as practicable to the highway,[63] otherwise they add to rather than diminish the

53. Shelton *v.* St. Louis, etc., R. Co., 60 Mo. 412.

54. Cary *v.* St. Louis, etc., R. Co., 60 Mo. 209.

55. Schable *v.* Hannibal, etc., R. Co., 60 Mo. 91; Buxton *v.* St. Louis, etc., R. Co., 58 Mo. 55; Tiarks *v.* St. Louis, etc., R. Co., 58 Mo. 45.

56. Biggerstaff *v.* St. Louis, etc., R. Co., 60 Mo. 567; Kimball *v.* Carter, 95 Va. 77, 27 S. E. 823, 38 L. R. A. 570.

57. McCook *v.* Bryan, 4 Okla. 488, 46 Pac. 506; Crary *v.* Louisville, etc., R. Co., 18 S. D. 237, 100 N. W. 18.

Under the Kentucky statutes if the lands are unimproved the railroad company is not required to fence along its track unless the adjoining landowner has inclosed his lands on the other three sides. Parrish *v.* Louisville, etc., R. Co., 104 S. W. 690, 31 Ky. L. Rep. 1020, 78 S. W. 186, 25 Ky. L. Rep. 1524.

In Canada the statute provides that "whenever the railway passes through any locality in which the lands on either side of the railway are not improved or settled, and inclosed, the company shall not be required to erect and maintain such fences, gates and cattle-guards unless the Board otherwise orders or directs." Phair *v.* Canadian Northern R. Co., 5 Can. R. Cas. 334, 6 Ont. Wkly. Rep. 137, holding that the statute means that the lands must not only be either improved or settled but if either must also be inclosed.

58. *Illinois.*— Chicago, etc., R. Co. *v.* McMorrow, 67 Ill. 218; Terre Haute, etc., R. Co. *v.* Tuterwiler, 16 Ill. App. 197.

Indiana.— Becholdt *v.* Grand Rapids, etc., R. Co., 113 Ind. 343, 15 N. E. 686; Louisville, etc., R. Co. *v.* Hurst, 98 Ind. 330; Croy *v.* Louisville, etc., R. Co , 97 Ind. 126.

Iowa.— Soward *v.* Chicago, etc., R. Co., 30 Iowa 551.

Kansas.— Atchison, etc., R. Co. *v.* Griffis, 28 Kan. 539.

Missouri.— Luckie *v.* Chicago, etc., R. Co., 76 Mo. 639; Sikes *v.* St. Louis, etc., R. Co., 127 Mo. App. 326, 105 S. W. 700; Smith *v.* St. Louis, etc., R. Co., 125 Mo. App. 15, 102 S. W. 593.

Texas.— Texas, etc., R. Co. *v.* Glenn, 8 Tex. Civ. App. 301, 30 S. W. 845; Galveston, etc., R. Co. *v.* O'Neal, (Civ. App. 1890) 16 S. W. 537.

See 41 Cent. Dig. tit. "Railroads," § 1445.

59. See *infra*, X, H, 4, b, (v), (B).

60. Martin *v.* New York Cent., etc., R. Co., 20 Misc. (N. Y.) 363, 45 N. Y. Suppl. 925. But see McDowell *v.* Great Western R. Co., 6 U. C. C. P. 180; Parnell *v.* Great Western R. Co., 4 U. C. C. P. 517.

61. Terre Haute, etc., R. Co. *v.* Elam, 20 Ill. App. 603.

Private crossings, gates, and bars see *infra*, X, H, 5.

62. Cleveland, etc., R. Co. *v.* Green, 65 Ill. App. 414; Evansville, etc., R. Co. *v.* Barbee, 74 Ind. 169; Pittsburgh, etc., R. Co. *v.* Ehrhart, 36 Ind. 118; Louisville, etc., R. Co. *v.* McAfee, 15 Ind. App. 442, 43 N. E. 36; Ohio, etc., R. Co. *v.* Neady, 5 Ind. App. 328, 32 N. E. 213, (App. 1891) 28 N. E. 212; International, etc., R. Co. *v.* Searight, 8 Tex. Civ. App. 593, 28 S. W. 39.

If the highway was not legally established across its tracks the company will not be liable for stock injured because of its failure to maintain cattle-guards at such place. Hunter *v.* Chicago, etc., R. Co., 99 Wis. 613, 75 N. W. 977.

63. Jeffersonville, etc., R. Co. *v.* Morgan, 38 Ind. 190; Parker *v.* Lake Shore, etc., R. Co., 93 Mich. 607, 53 N. W. 834.

At an oblique crossing where the railroad and highway form an acute angle, it is not sufficient to fence along the right of way to where it first intersects the highway and place a cattle-guard opposite this point, thus leaving a part of the track on either side of the highway unprotected, but in such cases the company must fence along the line of the highway to where it intersects the track and construct the cattle-guards at this point. Andre *v.* Chicago, etc., R. Co., 30 Iowa 107. See also Peoria, etc., R. Co. *v.* Shelly, 25 Ill. App. 141.

A highway acquired by user only extends no further than it has been used, and if the railroad company constructs its cattle-guards and wing fences on the assumption that it occupies the wider space prescribed for high-

danger,[64] and if located unnecessarily distant from the highway the company will be liable for animals injured upon the intervening space.[65] If, however, an animal goes upon the track at the crossing and is injured upon the crossing itself, the absence of fences or cattle-guards cannot affect the case and will not render the company liable.[66]

(B) *Character and Establishment of Highway.* The rule that railroad companies are not required to fence their roads at public crossings applies to highways *de facto* as well as to highways *de jure*.[67] So if a crossing is used and traveled by the public generally as a highway the company need not fence at the crossing, although it is not a regularly laid out and established highway,[68] and not worked or improved by the county,[69] or the route traveled is outside of the survey or line of the highway as established by the county authorities;[70] nor, on the other hand, need the railroad company maintain fences where the road crosses a strip of land which has been legally dedicated to the public as a highway, although it has not been reduced to actual use by the public;[71] but wherever the crossing is such that it is not required to be fenced the company must construct cattle-guards to prevent animals from passing from the intersecting highway on either side along the tracks,[72] and whenever a crossing is abandoned and ceases to be a public highway the company must then construct fences at that point.[73]

(C) *Highways Parallel With Railroad.* The fact that a railroad right of way

ways regularly established pursuant to statute, it will be liable for animals injured upon the intervening space between the highway and cattle-guard. Coleman *v.* Flint, etc., R. Co., 64 Mich. 160, 31 N. W. 47.

64. Jeffersonville, etc., R. Co. *v.* Morgan, 38 Ind. 190; Parker *v.* Lake Shore, etc., R. Co., 93 Mich. 607, 53 N. W. 834.

65. Ft. Wayne, etc., R. Co. *v.* Herbold, 99 Ind. 91; Louisville, etc., R. Co. *v.* Porter, 97 Ind. 267; Evansville, etc., R. Co. *v.* Barbee, 74 Ind. 169; Indianapolis, etc., R. Co. *v.* Bonnell, 42 Ind. 539; Jeffersonville, etc., R. Co. *v.* Morgan, 38 Ind. 190; Sarver *v.* Chicago, etc., R. Co., 104 Iowa 59, 73 N. W. 498; Mundhenk *v.* Central Iowa R. Co., 57 Iowa 718, 11 N. W. 656; Andre *v.* Chicago, etc., R. Co., 30 Iowa 107; Parker *v.* Lake Shore, etc., R. Co., 93 Mich. 607, 53 N. W. 834.

66. Mobile, etc., R. Co. *v.* Moore, 34 Ill. App. 519.

67. Soward *v.* Chicago, etc., R. Co., 33 Iowa 386; Atchison, etc., R. Co. *v.* Griffis, 28 Kan. 539; Luckie *v.* Chicago, etc., R. Co., 76 Mo. 639; Sikes *v.* St. Louis, etc., R. Co., 127 Mo. App. 326, 105 S. W. 700; Dow *v.* Kansas City Southern R. Co., 116 Mo. App. 555, 92 S. W. 744; Jackson *v.* Kansas City, etc., R. Co., 66 Mo. App. 506; Giltz *v.* St. Louis Southwestern R. Co., 65 Mo. App. 445; Roberts *v.* Quincy, etc., R. Co., 43 Mo. App. 287; Brown *v.* Kansas City, etc., R. Co., 20 Mo. App. 427; Chicago, etc., R. Co. *v.* Dowhower, 74 Nebr. 600, 104 N. W. 1070.

A road used and traveled for over ten years by the public is a public highway, and a railroad company is not required to fence at the crossings of such a road. Dow *v.* Kansas City Southern R. Co., 116 Mo. App. 555, 92 S. W. 744.

68. Missouri Pac. R. Co. *v.* Kocber, 46 Kan. 272, 26 Pac. 731; Atchison, etc., R. Co. *v.* Griffis, 28 Kan. 539; Berry *v.* St. Louis, etc., R. Co., 124 Mo. App. 436, 101 S. W. 714.

69. Sikes *v.* St. Louis, etc., R. Co., 127 Mo. App. 326, 105 S. W. 700; Carter *v.* Kansas City, etc., R. Co., 69 Mo. App. 295; Roberts *v.* Quincy, etc., R. Co., 43 Mo. App. 287.

"Private roads" which are by statute free to be traveled by all persons as public roads and are so termed by the statute merely to distinguish them from public roads which are maintained at public expense need not be fenced by railroad companies where they intersect the railroad. Walton *v.* St. Louis, etc., R. Co., 67 Mo. 56.

70. Soward *v.* Chicago, etc., R. Co., 33 Iowa 386; Luckie *v.* Chicago, etc., R. Co., 76 Mo. 639.

71. Meyer *v.* North Missouri R. Co., 35 Mo. 352, holding that where land has been legally dedicated by the owner as a street, it becomes a public highway which the railroad company could not fence without unlawfully interfering with the rights of the public, and that it is not required to fence at the crossing of such land, although the land is not at the time in such condition that it can be used as a street.

72. Louisville, etc., R. Co. *v.* Etzler, 3 Ind. App. 562, 30 N. E. 32; Brown *v.* Kansas City, etc., R. Co., 20 Mo. App. 427.

73. Louisville, etc., R. Co. *v.* Shanklin, 94 Ind. 297; Jeffersonville, etc., R. Co. *v.* O'Connor, 37 Ind. 95.

What constitutes abandonment see, generally, STREETS AND HIGHWAYS.

Non-user for two years without any removal by competent authority will not defeat the right of the public to resume the use of the crossing, and therefore does not impose upon the railroad company any duty to fence at such crossing. Indiana Cent. R. Co. *v.* Gapen, 10 Ind. 292.

Where a railroad crosses an abandoned canal on an embankment constructed in the bed of the canal, it must be protected by

runs parallel with and adjoining a public highway does not exempt the company from its statutory duty to fence,[74] but on the contrary rather increases the necessity;[75] nor does the fact that the right of way overlaps the highway affect this duty if there is sufficient room for constructing a fence upon the right of way between the highway and the tracks;[78] but the company is not obliged to fence if the location of the railroad with reference to the highway is such that a fence cannot be constructed without obstructing the latter,[77] unless the use of the highway as such has been abandoned by the public.[78] Where railroad companies are not required by law to construct fences, it is not negligence for them not to construct fences between their tracks and highways running parallel with and in close proximity thereto.[79]

(VI) *FENCES ALREADY CONSTRUCTED.* It has been held that a railroad company which fails to fence its tracks as required by law is liable for stock killed upon the road, although a good and sufficient fence is maintained by the adjoining landowner along the road;[80] but on the contrary it has been held that it is immaterial who constructs the fences so long as they are sufficient,[81] and that if an adjoining owner voluntarily constructs and maintains such a fence the company is not liable because it did not construct another fence along the same line.[82] It will still, however, be the duty of the company to see that the fence is kept in repair and to restore it if removed by the owner,[83] and the company will be liable in the

fences. White Water Valley R. Co. *v.* Quick, 31 Ind. 127.

74. Evansville, etc., R. Co. *v.* Tipton, 101 Ind. 197; Indianapolis, etc., R. Co. *v.* McKinney, 24 Ind. 283; Indianapolis, etc., R. Co. *v.* Guard, 24 Ind. 222, 87 Am. Dec. 327; Missouri Pac. R. Co. *v.* Eckel, 49 Kan. 794, 31 Pac. 693; Morris *v.* Hannibal, etc., R. Co., 79 Mo. 367 [*distinguishing* Walton *v.* St. Louis, etc., R. Co., 67 Mo. 56]; Rozzelle *v.* Hannibal, etc., R. Co., 79 Mo. 349; Rutledge *v.* Hannibal, etc., R. Co., 78 Mo. 286.

Where a railroad runs between two farms which are fenced and the right of way there forms a lane which the company permits to be used as a public road, it is under duty to fence the space between such road and its tracks. Jones *v.* St. Louis Southwestern R. Co., 65 Mo. App. 442.

In the absence of statute requiring fencing it is not negligence for a railroad company not to construct a fence where its road runs through a cut or excavation parallel with a highway, and the company is not liable for injuries occasioned by an animal falling from the highway into the cut. Collier *v.* Georgia R. Co., 76 Ga. 611.

75. Indianapolis, etc., R. Co. *v.* McKinney, 24 Ind. 283; Robinson *v.* Chicago, etc., R. Co., 57 Mo. 494.

This is for the reason that it is as much the duty of the company to fence against animals upon the highway as upon adjoining lands (Evansville, etc., R. Co. *v.* Tipton, 101 Ind. 197); and that the requirement is also in the nature of a police regulation to promote the safety of persons and property passing along the road (Robinson *v.* Chicago, etc., R. Co., 57 Mo. 494).

76. Evansville, etc., R. Co. *v.* Tipton, 101 Ind. 197; Louisville, etc., R. Co. *v.* Shanklin, 94 Ind. 297; Wabash R. Co. *v.* Forshee, 77 Ind. 158; Jeffersonville, etc., R. Co. *v.* Sweeney, 32 Ind. 430; Lake Erie, etc., R. Co. *v.* Rooker, 13 Ind. App. 600, 41 N. E. 470; Emmerson *v.* St. Louis, etc., R. Co., 35 Mo. App. 621; Ft. Worth, etc., R. Co. *v.* Roberts, 29 Tex. Civ. App. 566, 69 S. W. 985; Gulf, etc., R. Co. *v.* Cole, (Tex. Civ. App. 1896) 35 S. W. 525.

It is the road and not the right of way which the law requires to be fenced and the fact that the right of way encroaches upon the highway does not affect the duty to fence between the highway and the tracks. Emmerson *v.* St. Louis, etc., R. Co., 35 Mo. App. 621.

Although the track occupies a part of the public highway by permission of the highway authorities, the railroad company must fence between its tracks and the remainder of the highway which is used by the public. Illinois Cent. R. Co. *v.* Trowbridge, 31 Ill. App. 190.

77. Louisville, etc., R. Co. *v.* Hurst, 98 Ind. 330; Louisville, etc., R. Co. *v.* Francis, 58 Ind. 389.

78. Louisville, etc., R. Co. *v.* Shanklin, 94 Ind. 297; Louisville, etc., R. Co. *v.* White, 94 Ind. 257.

Where a railroad is located on the towpath of a canal which has been abandoned as a thoroughfare, the company must fence between the track and the canal. White Water Valley R. Co. *v.* Quick, 31 Ind. 127.

79. Coy *v.* Utica, etc., R. Co., 23 Barb. (N. Y.) 643 [*overruling* Moshier *v.* Utica, etc., R. Co., 8 Barb. (N. Y.) 427].

80. Norfolk, etc., R. Co. *v.* McGavock, 90 Va. 507, 18 S. E. 909. See also Wilson *v.* Ontario, etc., R. Co., 12 U. C. Q. B. 463.

81. Hovorka *v.* Minneapolis, etc., R. Co., 31 Minn. 221, 17 N. W. 376.

82. Hovorka *v.* Minneapolis, etc., R. Co., 31 Minn. 221, 17 N. W. 376; Haxton *v.* Pittsburgh, etc., R. Co., 26 Ohio St. 214.

83. See Hovorka *v.* Minneapolis, etc., R. Co., 31 Minn. 221, 17 N. W. 376.

absence of any evidence as to the character and sufficiency of the fences maintained by the adjoining owners.[84] Where the road runs through a field or pasture which is fenced the company must still fence on each side of its right of way through such field.[85]

(VII) *FENCES ON BOTH SIDES OF TRACK.* Ordinarily where railroads are required to be fenced they must be fenced on both sides of the track;[86] but if from the character or use of the adjoining premises on one side the company is not required to fence upon that side, it has been held that it need not fence upon the opposite side.[87] A statute requiring railroad companies to fence "either or both" sides of their property does not contemplate that the matter shall be optional with the railroad company but means either or both sides as the circumstances may demand.[88]

(VIII) *RAILROADS ADJOINING LANDS OF COMPANY OR TRACKS OF OTHER RAILROAD.* Where a railroad company owns land adjoining its road it must fence between its own land and the track,[89] except where the statutes requiring fences are construed as being for the benefit of adjoining owners only.[90] Where two railroads run parallel with each other neither can rely upon the duty of the other but each must see that its own road is properly fenced;[91] and where no fence is constructed between the tracks the company upon whose road an animal is injured cannot avoid liability on the ground that the animal got upon its road by crossing the unfenced tracks of the other road;[92] but in such case the company

84. Louisville, etc., R. Co. *v.* White, 94 Ind. 257.

85. San Antonio, etc., R. Co. *v.* Peterson, 8 Tex. Civ. App. 367, 27 S. W. 969.

86. Tredway *v.* Sioux City, etc., R. Co., 43 Iowa 527; Walther *v.* Pacific, etc., R. Co., 55 Mo. 271; Smith *v.* Eastern R. Co., 35 N. H. 356.

Under a statute requiring fencing where the road passes "along or adjoining" lands of a certain description, both sides of the track must be fenced, although it adjoins lands of the character mentioned only upon one side. Walther *v.* Pacific R. Co., 55 Mo. 271.

87. Wabash, etc., R. Co. *v.* Nice, 99 Ind. 152; Indiana, etc., R. Co. *v.* Leak, 89 Ind. 596; Indianapolis, etc., R. Co. *v.* Warner, 35 Ind. 515; Chicago, etc., R. Co. *v.* Hogan, 27 Nebr. 801, 43 N. W. 1148. *Contra*, Cleveland, etc., R. Co. *v.* Capoot, 69 Ill. App. 163.

The reason for this rule is that a fence on only one side would increase rather than diminish the danger to stock by permitting an entrance from one side and preventing any escape from the other. Indiana, etc., R. Co. *v.* Leak, 89 Ind. 596.

88. Walsh *v.* Virginia, etc., R. Co., 8 Nev. 110, holding, however, that the statute is for the benefit of adjoining owners only, and that where a railroad runs between occupied lands on one side and unoccupied and unclaimed public land on the other, the company need not fence on the side next to the unoccupied public land.

89. Bellefontaine R. Co. *v.* Reed, 33 Ind. 476; Klock *v.* New York, etc., R. Co., 62 Hun (N. Y.) 291, 17 N. Y. Suppl. 120 [*distinguishing* Potter *v.* New York, etc., R. Co., 60 Hun (N. Y.) 313, 15 N. Y. Suppl. 12]. But see Chicago, etc., R. Co. *v.* Tice, 111 Ill. App. 161, holding that where a railroad company owns a strip of land adjoining its right of way, and this strip, together with the right of way, is inclosed by a fence of such character as the law requires, it is not necessary that the company should maintain another fence between this strip and the right of way proper.

90. Cornwall *v.* Sullivan R. Co., 28 N. H. 161.

91. Shepard *v.* Buffalo, etc., R. Co., 35 N. Y. 641. See also Rozzelle *v.* Hannibal, etc., R. Co., 79 Mo. 349.

92. Rozzelle *v.* Hannibal, etc., R. Co., 79 Mo. 349; Kelver *v.* New York, etc., R, Co., 126 N. Y. 365, 27 N. E. 553 [*affirming* 12 N. Y. Suppl. 723]; Shepard *v.* Buffalo, etc., R. Co., 35 N. Y. 641. *Contra*, Gallagher *v.* New York, etc., R. Co., 57 Conn. 442, 18 Atl. 786, 5 L. R. A. 737.

The fact that the tracks are too close together to permit the construction of a fence between them without endangering the safety of passengers or railroad employees does not relieve the liability of the company, since having voluntarily located its tracks in this manner it cannot set up its own voluntary act as an excuse for neglecting a statutory duty. Kelver *v.* New York, etc., R. Co., 126 N. Y. 365, 27 N. E. 553.

If the statute is only for the benefit of adjoining landowners, as some of the statutes are construed to be (see *supra*, X, H, 4, a, (VIII)), a railroad company will not be liable for an animal injured upon its track because of a failure to fence between its track and the parallel track of another company, if the animal came upon the track where it was injured by crossing the track of the other railroad from lands beyond, since by reason of the intervening track the owner of the lands from which the animal came was not an owner of lands adjoining the road where it was injured. Douglass *v.* Grand Trunk R. Co., 5 Ont. App. 585.

over whose tracks the animal first entered will not be liable for the injury occurring upon the other road.[93] Where two railroads intersect and the companies are required to fence their tracks, each company must construct cattle-guards and wing fences at the crossing.[94]

c. Sufficiency, Defects, and Repairs — (I) *SUFFICIENCY* — (A) *Of Fences.* In some cases the statutes requiring fencing expressly prescribe the height and character of the fence,[95] while others merely require that the fence shall be good and sufficient,[96] legal and sufficient,[97] suitable,[98] lawful,[99] or suitable and sufficient to prevent cattle, horses, sheep, and hogs from getting upon the railroad.[1] It has been held that a statute requiring a good and sufficient fence should be construed as referring to the standard established by the general fence laws,[2] but it has also been held that a fence of this character may not be sufficient as a railroad fence;[3] and on the other hand that a railroad fence may in some places be "suitable," although not of the character prescribed for adjoining proprietors of improved land.[4] The fence need not be such as to constitute an impassable barrier to all stock without regard to how breachy or vicious they may be,[5] but need only be such as is reasonably sufficient to prevent animals from going upon the track;[6] but unless reasonably sufficient for this purpose the company will be liable for animals injured in consequence.[7] A wire fence properly constructed

93. Frisch *v.* Chicago Great Western R. Co., 95 Minn. 398, 104 N. W. 228; Bear *v.* Chicago, etc., R. Co., 141 Fed. 25, 72 C. C. A. 513.

94. Illinois Cent. R. Co. *v.* Davidson, 225 Ill. 618, 80 N. E. 250 [*affirming* 125 Ill. App. 420], holding that as neither company can fence across the right of way of the other, the general rule applies that cattle-guards and wing fences must be constructed wherever the duty of constructing lateral fences begins and ends, and this, notwithstanding the lateral fences of the two roads connect and the necessity for wing fences and cattle-guards on either road can only arise out of neglect on the part of the other road to maintain proper lateral fences, since neither company can avoid liability on the ground of the failure of the other to perform its legal duties.

95. Moeckley *v.* Chicago, etc., R. Co., 92 Iowa 748, 61 N. W. 227.

In New York the statute of 1850 provided that the fences should be "of the height and strength of a division fence required by law" (Leyden *v.* New York Cent., etc., R. Co., 55 Hun 114, 8 N. Y. Suppl. 187; Tallman *v.* Syracuse, etc., R. Co., 4 Abb. Dec. 351, 4 Keyes 128); but the railroad law of 1890 provides that they shall be "of height and strength sufficient to prevent cattle, horses, sheep and hogs from going upon its road" (see Connolly *v.* Central Vermont R. Co., 4 N. Y. App. Div. 221, 38 N. Y. Suppl. 587 [*affirmed* in 158 N. Y. 675, 52 N. E. 1124]).

Repairing fence — Iowa statute.—The Iowa statute of 1888 expressly prescribing the height and character of fences to be constructed by railroad companies "which have not already erected a lawful fence," and providing that other companies when they rebuild or repair their fences shall build them as provided by that act, applies only to such repairs as constitute a virtual rebuilding of a portion of the fence and which involve the height and structure of the fence and not to the mere replacing of a defective board or boards or nailing fast boards that have become loose. Moeckley *v.* Chicago, etc., R. Co., 92 Iowa 748, 61 N. W. 227.

96. Enright *v.* San Francisco, etc., R. Co., 33 Cal. 230.

97. Cotton *v.* Wiscasset, etc., R. Co., 98 Me. 511, 57 Atl. 785, holding that a "legal and sufficient" fence must be such as will turn sheep as well as larger domestic animals.

98. Eames *v.* Salem, etc., R. Co., 98 Mass. 560, 96 Am. Dec. 676.

99. Russell *v.* Hannibal, etc., R. Co., 83 Mo. 507.

Under the Missouri statute a fence of posts and planks four and one-half feet high is a lawful fence. King *v.* Chicago, etc., R. Co., 79 Mo. 328.

1. Chicago, etc., R. Co. *v.* Umphenour, 69 Ill. 198; Chicago, etc., R. Co. *v.* James, 26 Nebr. 188, 41 N. W. 992; Connolly *v.* Central Vermont R. Co., 4 N. Y. App. Div. 221, 38 N. Y. Suppl. 587 [*affirmed* in 158 N. Y. 675, 57 N. E. 1124]; Bessant *v.* Great Western R. Co., 8 C. B. N. S. 368, 98 E. C. L. 368.

2. Enright *v.* San Francisco, etc., R. Co., 33 Cal. 230.

3. Lee *v.* Minneapolis, etc., R. Co., 66 Iowa 131, 23 N. W. 299; Chicago, etc., R. Co. *v.* James, 26 Nebr. 188, 41 N. W. 992.

4. Eames *v.* Salem, etc., R. Co., 98 Mass. 560, 96 Am. Dec. 676.

5. Shellabarger *v.* Chicago, etc., R. Co., 66 Iowa 18, 23 N. W. 158; Dietrich *v.* Hannibal, etc., R. Co., 89 Mo. App. 36.

Where a horse runs away and in its fright breaks through a fence which is sufficient for turning stock under all ordinary circumstances and gets upon the track and is injured, the railroad company will not be liable in the absence of negligence. Chicago, etc., R. Co. *v.* Utley, 38 Ill. 410.

6. Shellabarger *v.* Chicago, etc., R. Co., 66 Iowa 18, 23 N. W. 158.

7. Chicago, etc., R. Co. *v.* Umphenour, 69 Ill. 198; Chicago, etc., R. Co. *v.* James, 26

is sufficient; [8] but, although sufficient to turn stock, the fence must not be of such a character as of itself to be a source of danger,[9] and a barbed wire fence may or may not be a proper fence according to the circumstances.[10] So also a steep bluff, hedge, ditch, wall, or the like may constitute a lawful fence if of equal security with a lawful fence as defined by statute; [11] but such natural obstructions must be sufficient to serve the purposes of a fence,[12] and must be properly connected with the railroad fences where they begin and terminate.[13] The fence must not be so constructed as to form a *cul de sac* or trap into which animals are liable to wander and become injured.[14]

(B) *Of Cattle-Guards.* A railroad company will be liable for injuries to animals due to a failure to construct cattle-guards reasonably sufficient to exclude ordinary stock,[15] or to maintain them in a proper state of repair,[16] or where they are located in the wrong place,[17] or so constructed as to be a trap or snare for stock,[18]

Nebr. 188, 41 N. W. 992; Leyden *v.* New York Cent., etc., R. Co., 55 Hun (N. Y.) 114, 8 N. Y. Suppl. 187; Bessant *v.* Great Western R. Co., 8 C. B. N. S. 368, 98 E. C. L. 368.

The sufficiency of the fence is to be determined by an examination of the fence itself and not by the previous conduct of animals which have been pastured on ground which it in part incloses. Chicago, etc., R. Co. *v.* Umphenour, 69 Ill. 198.

It is not sufficient that the fence is of the required height unless its character and strength is such as to turn stock. Colyer *v.* Missouri Pac. R. Co., 93 Mo. App. 147.

Where a railroad passes over a culvert through which water is backed by a mill pond so as effectually to prevent the escape of animals through the culvert, if the pond is subsequently drawn off suitable barriers must be constructed at the culvert to prevent animals passing through it. Keliher *v.* Connecticut River R. Co., 107 Mass. 411.

8. Halverson *v.* Minneapolis, etc., R. Co., 32 Minn. 88, 19 N. W. 392.

9. Louisville, etc., R. Co. *v.* Shelton, 43 Ill. App. 220; Gould *v.* Bangor, etc., R. Co., 82 Me. 122, 19 Atl. 84; Rehler *v.* Western New York R. Co., 8 N. Y. Suppl. 286.

10. Guilfoos *v.* New York Cent., etc., R. Co., 69 Hun (N. Y.) 593, 23 N. Y. Suppl. 925 (holding that a barbed wire fence is not necessarily dangerous or a nuisance *per se*, but that it may or may not be such according to the character and use of the lands inclosed); Plath *v.* Grand Forks, etc., R. Co., 3 Can. R. Cas. 331, 10 Brit. Col. 299 (holding that a barbed wire fence, although without any board on top, is not necessarily improper, the test being whether the fence is dangerous to ordinary stock under ordinary conditions); Hillyard *v.* Grand Trunk R. Co., 8 Ont. 583 (holding that a barbed wire fence between a railroad and an ordinary country highway is not a nuisance).

In New York the statute of 1891, while authorizing the use of wire fences, prohibits the use of barbed wire, but the statute does not apply to fences constructed before the act took effect; nor is a fence made of Buckthorn wire, consisting of flat iron twisted ribbons with teeth one and one-half inches apart a barbed wire fence within the meaning of the statute. Stisser *v.* New York Cent. R. Co., 32 N. Y. App. Div. 98, 52 N. Y. Suppl. 861. See also Stisser *v.* New York Cent., etc., R. Co., 19 N. Y. App. Div. 528, 46 N. Y. Suppl. 1014.

11. Hilliard *v.* Chicago, etc., R. Co., 37 Iowa 442.

12. Toledo, etc., R. Co. *v.* Sweeney, 41 Ill. 226; Taylor *v.* Spokane Falls, etc., R. Co., 32 Wash. 450, 73 Pac. 499.

Where the level of land is raised by natural accretions so that the height of a stone abutment formerly serving the purpose of a fence is so decreased that it will not prevent animals from going upon the track, it is the duty of the railroad company to fence at such place. Chicago, etc., R. Co. *v.* Hand, 113 Ill. App. 144.

13. Taylor *v.* Spokane Falls, etc., R. Co., 32 Wash. 450, 73 Pac. 499.

14. Wabash R. Co. *v.* Crews, 65 Ill. App. 442.

15. Pennsylvania Co. *v.* Newby, 164 Ind. 109, 72 N. E. 1043; New York, etc., R. Co. *v.* Zumbaugh, 17 Ind. App. 171, 46 N. E. 548; Wabash R. Co. *v.* Ferris, 6 Ind. App. 30, 32 N. E. 112; Campbell *v.* Iowa Cent. R. Co., 124 Iowa 248, 99 N. W. 1061; Ham *v.* Newburgh, etc., R. Co., 69 Hun (N. Y.) 137, 23 N. Y. Suppl. 197. See also Whitewater R. Co. *v.* Bridgett, 94 Ind. 216.

In the absence of any statutory plan or specification for cattle-guards they should be constructed in such manner as an ordinarily prudent man would construct them with a view to prevent injury to his stock and at the same time to prevent the depredations of stock upon his inclosure. Horan *v.* Taylor, etc., R. Co., 3 Tex. App. Civ. Cas. § 435.

The construction of a cattle-guard of the kind in general use by first class railroads is not a compliance with the statute, unless it is in fact sufficient to turn stock. Pittsburgh, etc., R. Co. *v.* Newsom, 35 Ind. App. 299, 74 N. E. 21.

16. Pittsburgh, etc., R. Co. *v.* Ehy, 55 Ind. 567; Miller *v.* Northern Pac. R. Co., 36 Minn. 296, 30 N. W. 892.

17. Ft. Wayne, etc., R. Co. *v.* Herbold, 99 Ind. 91; Louisville, etc., R. Co. *v.* Porter, 97 Ind. 267; Indianapolis, etc., R. Co. *v.* Bonnell, 42 Ind. 539.

Location with reference to highway see *supra*, X, H, 4, b, (V), (A).

18. Carrollton Short Line R. Co. *v.* Lip-

or the adjacent fences do not extend up so as to prevent the passage of stock between the fence and the cattle-guards.[19] But cattle-guards to be sufficient need not be so constructed as to constitute an impassable barrier so that under no circumstances could an animal cross them,[20] or so as to turn stock which are wild, breachy, or in the habit of fence jumping,[21] or when under fright or excitement,[22] but need only be such as are reasonably sufficient to turn ordinary stock;[23] and if an animal goes upon the track by jumping over such a cattle-guard and is injured the company will not be liable in the absence of negligence.[24]

(II) *DEFECTS AND REPAIRS* — (A) *Duty to Repair.* It has been held that where there is no law requiring railroad companies to fence they will not be liable for failing to maintain and repair fences which they may have voluntarily constructed,[25] and that if there is a gap in such fence through which animals enter,

scy, 150 Ala. 570, 43 So. 836; Horan *v.* Taylor, etc., R. Co., 3 Tex. App. Civ. Cas. § 435, where the court said: "The cattle-guard must be so constructed as not to be a trap or snare to stock. It should be so constructed as that stock could easily see the danger of attempting to cross it, so that under ordinary circumstances an animal would not undertake to cross it."

A bridge used as a cattle-guard, consisting of stringers on which are laid sawed cross ties seven inches wide on top and six inches apart, would be more likely to entice stock upon the track than to turn them back, and is insufficient. Ham *v.* Newburgh, etc., R. Co., 69 Hun (N. Y.) 137, 23 N. Y. Suppl. 197.

Allowing grass to grow up in a cattle-guard so as to induce stock to go upon it may constitute such negligence as to render the company liable for a resulting injury, although the cattle-guard is constructed in a proper manner. Louisville, etc., R. Co. *v.* Beauchamp, 108 Ky. 47, 55 S. W. 716, 21 Ky. L. Rep. 1476; Saine *v.* Missouri, etc., R. Co., (Tex. Civ. App. 1905) 85 S. W. 487.

19. Johnson *v.* Detroit, etc., R. Co., 139 Mich. 287, 102 N. W. 744.

20. St. Louis, etc., R. Co. *v.* Busick, 74 Ark. 589, 86 S. W. 674; Campbell *v.* Iowa Cent. R. Co., 124 Iowa 248, 99 N. W. 1061; Jones *v.* Chicago, etc., R. Co., 59 Mo. App. 137; Cole *v.* Chicago, etc., R. Co., 47 Mo. App. 624; Wait *v.* Bennington, etc., R. Co., 61 Vt. 268, 17 Atl. 284.

Under the Michigan statute of 1899, requiring railroad companies to construct cattle-guards, and providing that any cattle-guard which shall have the written approval and indorsement of the railroad commissioner shall be a legal cattle-guard, the sufficiency of a cattle-guard of a kind prescribed in writing by the commissioner and which is in good condition and repair cannot be questioned. Clement *v.* Pere Marquette R. Co., 138 Mich. 57, 100 N. W. 999.

21. Chicago, etc., R. Co. *v.* Evans, 45 Ill. App. 79; Smead *v.* Lake Shore, etc., R. Co., 58 Mich. 200, 24 N. W. 761; Cole *v.* Chicago, etc., R. Co., 47 Mo. App. 624.

22. Wait *v.* Bennington, etc., R. Co., 61 Vt. 268, 17 Atl. 284.

23. Chicago, etc., R. Co. *v.* Evans, 45 Ill. App. 79; Smead *v.* Lake Shore, etc., R. Co., 58 Mich. 200, 24 N. W. 761; Jones *v.* Chicago, etc., R. Co., 59 Mo. App. 137; Cole *v.* Chicago, etc., R. Co., 47 Mo. App. 624.

Approval by railroad commissioners.— Under the Michigan statute providing that any cattle-guard which shall have the lawful approval and indorsement of the railroad commissioner shall be a legal cattle-guard, it is not necessary that the commissioner should inspect and approve every cattle-guard, but the company is protected in the use of a cattle-guard which has been approved by the commissioner by definite description or by a name where the name applies to a cattle-guard of a definite and fixed description. La Flamme *v.* Detroit, etc., R. Co., 109 Mich. 509, 67 N. W. 556.

24. Chicago, etc., R. Co. *v.* Farrelly, 3 Ill. App. 60; Cole *v.* Chicago, etc., R. Co., 47 Mo. App. 624.

The fact that an animal passed or jumped over a cattle-guard is not of itself evidence of its improper construction or insufficiency (Barnhart *v.* Chicago, etc., R. Co., 97 Iowa 654, 66 N. W. 902); but if there is other evidence as to the character or insufficiency of the cattle-guard, the jury may consider this fact in connection with such other evidence (Timins *v.* Chicago, etc., R. Co., 72 Iowa 94, 33 N. W. 379).

25. *Arkansas.*— St. Louis, etc., R. Co. *v.* Ferguson, 57 Ark. 16, 20 S. W. 545, 38 Am. St. Rep. 217, 18 L. R. A. 110.

Georgia.— Georgia, etc., R. Co. *v.* Wisenbacker, 113 Ga. 604, 38 S. E. 956.

Indian Territory.— Chicago, etc., R. Co. *v.* Woodworth, 1 Indian Terr. 20, 35 S. W. 238.

South Dakota.— Crary *v.* Chicago, etc., R. Co., 18 S. D. 237, 100 N. W. 18.

Wyoming.— Martin *v.* Chicago, etc., R. Co., 15 Wyo. 493, 89 Pac. 1025.

See 41 Cent. Dig. tit. "Railroads," § 1451.

Cattle-guards.— Where a railroad company is not required to construct cattle-guards to prevent animals from going upon the track, it will not be liable for failing to keep cattle-guards which it may have constructed in repair. St. Louis, etc., R. Co. *v.* Douglass, 152 Ala. 197, 44 So. 677.

A contrary doctrine has, however, been maintained upon the ground that if a railroad company voluntarily constructs a fence when under no legal obligation to do so, it must not by its act increase the danger to animals, and that such danger is increased if the fence is allowed to become defective

no greater degree of care is required to avoid injury to such animals than would otherwise be necessary to avoid liability;[26] but on the contrary it has been held with regard to particular places, such as station grounds which are not within the application of the statutes, that if the company constructs fences or cattle-guards at such places it is its duty to keep them in a proper state of repair.[27] If required by law to construct fences it is as much their duty to maintain and repair as to construct them in the first instance, and they will be held equally liable for injuries to animals occasioned by their failure to do so;[28] and this rule applies no matter by whom the fence was originally built,[29] as in the case of fences already constructed by adjoining owners and adopted by the railroad company,[30] and notwithstanding the adjoining owner has been accustomed voluntarily to keep the fences in repair.[31]

so that animals may enter at a certain point and after entering cannot escape at any other. Denver, etc., R. Co. *v.* Robinson, 6 Colo. App. 432, 40 Pac. 840, holding, however, that in such cases it must be shown that the railroad company is responsible for the existence of the fence in question, before it can be held liable for the consequences of its existence.

Where a railroad company proceeds to fence without the statutory notice required by the Oklahoma statute of 1893, it will be deemed to have waived the notice and will be liable for injuries due to allowing such fence to get out of repair. Choctaw, etc., R. Co. *v.* Deparade, 12 Okla. 367, 71 Pac. 629.

26. Illinois Cent. R. Co. *v.* Walker, 63 Miss. 13.

27. Chicago, etc., R. Co. *v.* Guertin, 115 Ill. 466, 4 N. E. 507; Chicago, etc., R. Co. *v.* Reid, 24 Ill. 144; Hathaway *v.* Detroit, etc., R. Co., 124 Mich. 610, 83 N. W. 598.

28. *Illinois.*— Chicago, etc., R. Co. *v.* Nevitt, 122 Ill. App. 505.

Indiana.— Lake Erie, etc., R. Co. *v.* Fishback, 5 Ind. App. 403, 32 N. E. 346.

Iowa.— Bennett *v.* Wabash, etc., R. Co., 61 Iowa 355, 16 N. W. 210.

Maine.— Norris *v.* Androscoggin R. Co., 39 Me. 273, 63 Am. Dec. 621.

Minnesota.— Coe *v.* Northern Pac. R. Co., 101 Minn. 12, 111 N. W. 651, 11 L. R. A. N. S. 228; Varco *v.* Chicago, etc., R. Co., 30 Minn. 18, 13 N. W. 921.

Missouri.— Davis *v.* Hannibal, etc., R. Co., 19 Mo. App. 425.

Nebraska.— Union Pac. R. Co. *v.* Blum, 23 Nebr. 404, 36 N. W. 589; Union Pac. R. Co. *v.* Schwenck, 13 Nebr. 478, 14 N. W. 376.

New Jersey.— Hendrickson *v.* Philadelphia, etc., R. Co., 68 N. J. L. 612, 54 Atl. 831.

New York.— McDowell *v.* New York Cent. R. Co., 37 Barb. 195; Munch *v.* New York Cent. R. Co., 29 Barb. 647.

Ohio.— Pittsburg, etc., R. Co. *v.* Smith, 38 Ohio St. 410.

Texas.— Missouri, etc., R. Co. *v.* Tolbert, 100 Tex. 483, 101 S. W. 206; Texas, etc., R. Co. *v.* Sproles, (Civ. App. 1907) 105 S. W. 521; Ft. Worth, etc., R. Co. *v.* Hickox, (Civ. App. 1907) 103 S. W. 202.

Vermont.— Congdon *v.* Central Vermont R. Co., 56 Vt. 390, 48 Am. Rep. 793.

Wisconsin.— Brown *v.* Milwaukee, etc., R. Co., 21 Wis. 39, 91 Am. Dec. 456.

Canada.— Studer *v.* Buffalo, etc., R. Co., 25 U. C. Q. B. 160; Huot *v.* Quebec R., etc., Co., 21 Quebec Super. Ct. 427.

See 41 Cent. Dig. tit. "Railroads," § 1451.

The fence is not a partition fence, and an adjoining owner is, in the absence of statute, under no obligation to assist in keeping the fence in repair; nor will such obligation arise out of a mere permission given by the railroad company to an adjoining owner to connect his other fences with the railroad fence. Busby *v.* St. Louis, etc., R. Co., 81 Mo. 43.

Although a fence constructed by the railroad company is not on the line of the right of way but upon the land of an adjoining owner, if it has been maintained and treated by the company as a part of that which the law requires it to build, it cannot allow it to get out of repair without notice to the landowner that it will no longer maintain and repair it. Chicago, etc., R. Co. *v.* Guertin, 115 Ill. 466, 4 N. E. 507.

Where a railroad company maintains two parallel fences on the same side of its road, the one nearest the track being a continuous fence and the other terminating at a highway and leaving a lane between them open at the highway, the fence nearest the track is the railroad fence, and the company will be liable for injury to an animal passing from the open lane through a defect in such fence upon the track. Dailey *v.* Chicago, etc., R. Co., 121 Iowa 254, 96 N. W. 778.

No exception can be made on the ground that it is the winter season when cattle are not accustomed to run at large, or that during previous winters the company had been accustomed to leave openings in the fence for convenience in hauling wood to the railroad. Laude *v.* Chicago, etc., R. Co., 33 Wis. 640.

In Ohio under the statute of 1859 adjoining landowners were required to assist in keeping the railroad fences in repair as in the case of division fences (Sandusky, etc., R. Co. *v.* Sloan, 27 Ohio St. 341); but under the statute of 1874 the duty rests entirely upon the railroad company (Cleveland, etc., R. Co. *v.* Scudder, 40 Ohio St. 173).

29. New Albany, etc., R. Co. *v.* Pace, 13 Ind. 411; Norris *v.* Androscoggin R. Co., 39 Me. 273, 63 Am. Dec. 621.

30. Jeffersonville, etc., R. Co. *v.* Sullivan, 38 Ind. 262; Hovorka *v.* Minneapolis, etc., R. Co., 34 Minn. 281, 25 N. W. 595.

31. Jeffersonville, etc., R. Co. *v.* Nichols, 30 Ind. 321.

(B) *Care Required and Extent of Liability.* Where railroad companies are required to construct fences they must use reasonable care and diligence to discover any defects that may occur therein,[32] and to maintain them in a safe and proper condition.[33] They are not, however, absolute insurers of the fences which they are required to build,[34] or absolutely liable for injuries to animals occasioned by defects occurring therein;[35] but where fences such as the law requires have been constructed they are only bound to use reasonable care and diligence in maintaining them and in discovering and repairing defects subsequently occurring.[36] The terms "ordinary" or "reasonable" care are, however, in such cases to be applied in view of the extra hazard and the public duty involved,[37] and mean a higher degree of care than an ordinarily careful landowner would be expected to exercise in keeping up his own fences,[38] but it is not necessary that a patrol should at all times be maintained along the road to see the condition of the fences.[39]

(C) *Knowledge of Defect and Opportunity to Repair.* Where fences such as the law requires have been constructed a railroad company will not be liable for injuries to animals due to defects subsequently occurring therein, unless it had either actual or constructive notice of the defect and an opportunity to repair it.[40]

32. Galveston, etc., R. Co. *v.* Walter, (Tex. Civ. App. 1894) 25 S. W. 163.

33. Antisdel *v.* Chicago, etc., R. Co., 26 Wis. 145, 7 Am. Rep. 44.

34. Rutledge *v.* Hannibal, etc., R. Co., 78 Mo. 286; Case *v.* St. Louis, etc., R. Co., 75 Mo. 668.

35. *Illinois.*— Peirce *v.* Rabberman, 77 Ill. App. 619.

Iowa.— Lemmon *v.* Chicago, etc., R. Co., 32 Iowa 151.

Michigan.— Grand Rapids, etc., R. Co. *v.* Monroe, 47 Mich. 152, 10 N. W. 179.

New York.— Murray *v.* New York Cent. R. Co., 3 Abb. Dec. 339, 4 Keyes 274.

Ohio.— Baltimore, etc., R. Co. *v.* Schultz, 43 Ohio St. 270, 1 N. E. 324.

Texas.— Galveston, etc., R. Co. *v.* Reitz 27 Tex. Civ. App. 411, 65 S. W. 1088.

See 41 Cent. Dig. tit. "Railroads," § 1452.

The liability for injuries arising from defects in the fences is not the same as if no fence had been constructed, but depends upon whether the railroad company has used ordinary care or has been negligent in the performance of its duty of repairing and maintaining it. Gulf, etc., R. Co. *v.* Cash, 8 Tex. Civ. App. 569, 28 S. W. 387.

Even under a statutory provision that "when not in good repair" the company shall be liable for injuries to stock, the statute will not be construed as creating an absolute liability regardless of any neglect of duty on the part of the company in discovering or repairing defects. Murray *v.* New York Cent. R. Co., 3 Abb. Dec. 339, 4 Keyes 274.

36. *Illinois.*— Illinois Cent. R. Co. *v.* Dickerson, 27 Ill. 55, 79 Am. Dec. 394.

Iowa.— McCormick *v.* Chicago, etc., R. Co., 41 Iowa 193; Lemmon *v.* Chicago, etc., R. Co., 32 Iowa 151.

Michigan.— Grand Rapids, etc., R. Co. *v.* Monroe, 47 Mich. 152, 10 N. W. 179.

Minnesota.— Coe *v.* Northern Pac. R. Co., 101 Minn. 12, 111 N. W. 651, 11 L. R. A. N. S. 228.

Missouri.— Rutledge *v.* Hannibal, etc., R. Co., 78 Mo. 286; Case *v.* St. Louis, etc., R. Co., 75 Mo. 668.

Texas.— Gulf, etc., R. Co. *v.* Cash, 8 Tex. Civ. App. 569, 28 S. W. 387.

See 41 Cent. Dig. tit. "Railroads," § 1452.

37. Rutledge *v.* Hannibal, etc., R. Co., 78 Mo. 286.

38. Rutledge *v.* Hannibal, etc., R. Co., 78 Mo. 286; Antisdel *v.* Chicago, etc., R. Co., 26 Wis. 145, 7 Am. Rep. 44.

The frequency with which fences should be inspected depends upon the circumstances bearing upon the probability of the fences being thrown down or destroyed and the consequences which might naturally ensue. Evans *v.* St. Paul, etc., R. Co., 30 Minn. 489, 16 N. W. 271.

39. Chicago, etc., R. Co. *v.* Barrie, 55 Ill. 226; Illinois Cent. R. Co. *v.* Swearingen, 33 Ill. 289; Illinois Cent. R. Co. *v.* Dickerson, 27 Ill. 55, 79 Am. Dec. 394.

40. Indianapolis, etc., R. Co. *v.* Hall, 88 Ill. 368; Chicago, etc., R. Co. *v.* Umphenour, 69 Ill. 198; Illinois Cent. R. Co. *v.* Swearingen, 47 Ill. 206; Illinois Cent. R. Co. *v.* Swearingen, 33 Ill. 289; Brentner *v.* Chicago, etc., R. Co., 58 Iowa 625, 12 N. W. 615; Davis *v.* Chicago, etc., R. Co., 40 Iowa 292; Hilliard *v.* Chicago, etc., R. Co., 37 Iowa 442; Dewey *v.* Chicago, etc., R. Co., 31 Iowa 373; Aylesworth *v.* Chicago, etc., R. Co., 30 Iowa 459; Townsley *v.* Missouri Pac. R. Co., 89 Mo. 31, 1 S. W. 15; Young *v.* Hannibal, etc., R. Co., 82 Mo. 427; Vinyard *v.* St. Louis, etc., R. Co., 80 Mo. 92; Heaston *v.* Wabash, etc., R. Co., 18 Mo. App. 403; Hodge *v.* New York Cent., etc., R. Co., 27 Hun (N. Y.) 394; Wheeler *v.* Erie R. Co., 2 Thomps. & C. (N. Y.) 634.

To render the company liable there must be either actual or constructive notice of the defect and a failure to repair within a reasonable time after notice of the defect or after the company should, in the exercise of reasonable care and diligence, have known of it. Heaston *v.* Wabash, etc., R. Co., 18

The company is entitled to a reasonable time to discover the defect,[41] and to make the necessary repairs.[42] The notice of the defect, however, may be either actual or constructive,[43] and the company will be liable where by the exercise of reasonable care and diligence it could have known of the defect,[44] or if it has existed for such a length of time prior to the accident that it ought to have been discovered,[45] or if the necessary repairs are not made within a reasonable time after notice of the defect,[46] or after the company should, by the exercise of reasonable care and diligence, have known of it.[47] If the fence as originally constructed was defective it is not necessary to show any knowledge on the part of the company of the defect in order to render the company liable.[48]

(D) *Defects Caused by Third Persons.* Where a railroad company has constructed sufficient fences, and animals are injured by reason of a breach therein, made by persons not in the employ or under the control of the company and without its knowledge or authority, the company will not be liable in the absence of any negligence in failing to discover and repair the defect within a reasonable time;[49] but, although the defect was so caused, the company will be liable if it is not repaired within a reasonable time.[50]

(E) *Defects Caused by Fire, Wind, or Storms.* Where a proper fence is constructed a railroad company will not be liable if not negligent in discovering and repairing the defect for injuries due to defects therein caused by fire,[51] or wind

Mo. App. 403; Hodge *v.* New York Cent., etc., R. Co., 27 Hun (N. Y.) 394.

41. Indianapolis, etc., R. Co. *v.* Hall, 88 Ill. 368; Chicago, etc., R. Co. *v.* Barrie, 55 Ill. 226; Toledo, etc., R. Co. *v.* Eder, 45 Mich. 329, 7 N. W. 898; Colyer *v.* Missouri Pac. R. Co., 93 Mo. App. 147.

42. Illinois Cent. R. Co. *v.* Swearingen, 33 Ill. 289; McCormick *v.* Chicago, etc., R. Co., 41 Iowa 193; Stephenson *v.* Grand Trunk R. Co., 34 Mich. 323; Young *v.* Hannibal, etc., R. Co., 82 Mo. 427; Clardy *v.* St. Louis, etc., R. Co., 73 Mo. 576; Dietrich *v.* Hannibal, etc., R. Co., 89 Mo. App. 36.

43. Wheeler *v.* Erie R. Co., 2 Thomps. & C. (N. Y.) 634.

44. Lainiger *v.* Kansas City, etc., R. Co., 41 Mo. App. 165; Galveston, etc., R. Co. *v.* Walter, (Tex. Civ. App. 1894) 25 S. W. 163.

45. Ohio, etc., R. Co. *v.* Clutter, 82 Ill. 123; Terre Haute, etc., R. Co. *v.* McCord, 56 Ill. App. 173; Evans *v.* St. Paul, etc., R. Co., 30 Minn. 489, 16 N. W. 271; Varco *v.* Chicago, etc., R. Co., 30 Minn. 18, 13 N. W. 921; Schlotzhauer *v.* Missouri, etc., R. Co., 89 Mo. App. 65; Peery *v.* Quincy, etc., R. Co., 122 Mo. App. 177, 99 S. W. 14; Davis *v.* Hannibal, etc., R. Co., 19 Mo. App. 425; Baltimore, etc., R. Co. *v.* Schultz, 43 Ohio St. 270, 1 N. E. 324.

Plaintiff should therefore be permitted to show the length of time that the fence had been out of repair so as to render the company chargeable with implied notice of the defect. Jones *v.* Chicago, etc., R. Co., 49 Wis. 352, 5 N. W. 854.

If the special defect which caused the injury was due to a generally defective condition of the fence which had existed for a considerable length of time, the company will be liable, although without notice of the special defect. Baltimore, etc., R. Co. *v.* Schultz, 43 Ohio St. 270, 1 N. E. 324.

46. *Indiana.*— Cleveland, etc., R. Co. *v.* Brown, 45 Ind. 90; Toledo, etc., R. Co. *v.* Cohen, 44 Ind. 444.

Iowa.— Fritz *v.* Kansas City, etc., R. Co., 61 Iowa 323, 16 N. W. 144.

Missouri.—Wilson *v.* St. Louis, etc., R. Co., 87 Mo. 431; Maberry *v.* Missouri Pac. R. Co., 83 Mo. 667.

New York.— Wheeler *v.* Erie R. Co., 2 Thomps. & C. 634.

Wisconsin.— Laude *v.* Chicago, etc., R. Co., 33 Wis. 640.

See 41 Cent. Dig. tit. "Rilroads," § 1543.

In computing the reasonable time within which repairs must be made, if trains are run on Sunday, the company cannot claim that it is not required to make repairs on that day. Toledo, etc., R. Co. *v.* Cohen, 44 Ind. 444.

The fact that a fence was in proper condition the afternoon before the night of the accident does not necessarily show that the company may not be liable for the killing of an animal which was found dead upon the right of way the next morning. Anderson *v.* Chicago, etc., R. Co., 93 Iowa 561, 61 N. W. 1058.

47. Maberry *v.* Missouri Pac. R. Co., 83 Mo. 667.

48. Morrison *v.* Burlington, etc., R. Co., 84 Iowa 663, 51 N. W. 75.

49. Chicago, etc., R. Co. *v.* Saunders, 85 Ill. 288; Chicago, etc., R. Co. *v.* Barrie, 55 Ill. 226; Toledo, etc., R. Co. *v.* Fowler, 22 Ind. 316; Walthers *v.* Missouri Pac. R. Co., 78 Mo. 617; Didman *v.* Michigan Cent. R. Co., 5 Ohio S. & C. Pl. Dec. 140, 7 Ohio N. P. 380.

50. Munch *v.* New York Cent. R. Co., 29 Barb. (N. Y.) 647.

51. Indianapolis, etc., R. Co. *v.* Truitt, 24 Ind. 162; Toledo, etc., R. Co. *v.* Daniels, 21 Ind. 256; Stephenson *v.* Grand Trunk R. Co., 34 Mich. 323.

storms;[52] but it will be liable if the defect is not repaired within a reasonable time,[53] unless it was the duty of the adjoining landowner to repair it.[54] Railroad companies are not required to build their fences so high that the fall or drift of snow will never cover them,[55] nor are they required to remove the snow and drifts from their fences so as to prevent animals passing over them;[56] but it is held in most jurisdictions that railroad companies must exercise reasonable care and diligence to keep their cattle-guards free from accumulations of ice and snow which would render them ineffective,[57] and that they will be liable for injuries to animals due to a failure to remove such accumulations within a reasonable time.[58]

5. Private Crossings, Gates, and Bars — a. In General. Where a landowner's premises are divided by a railroad right of way and there is no highway or ordinary passway to enable him to get from one portion to the other, he has a right to cross the railroad with his animals,[59] and where a railroad company is required to construct a private or farm crossing it must be constructed and maintained in a safe and proper condition;[60] but where a person who is a mere licensee crosses a railroad track at a place other than such crossings as the company is required

52. Robinson *v.* Grand Trunk R. Co., 32 Mich. 322.

53. Cleveland, etc., R. Co. *v.* Brown, 45 Ind. 90.

54. Terry *v.* New York Cent. R. Co., 22 Barb. (N. Y.) 574, holding that if it is the duty of the landowner to maintain the fence under a condition in the award of damages made when the land was taken for the purpose of the railroad, the company is not obliged to repair the fence, although it is injured by fire communicated by its locomotives, and that while the company might be liable for damages for burning the fence it will not be liable for injuries to animals occasioned by a failure to repair it.

55. Patten *v.* Chicago, etc., R. Co., 75 Iowa 459, 39 N. W. 708.

56. Patten *v.* Chicago, etc., R. Co., 75 Iowa 459, 39 N. W. 708. See also Blais *v.* Minneapolis, etc., R. Co., 34 Minn. 57, 24 N. W. 558, 57 Am. Rep. 36.

57. Paul *v.* Chicago, etc., R. Co., 120 Iowa 224, 94 N. W. 498; Robinson *v.* Chicago, etc., R. Co., 79 Iowa 495, 44 N. W. 718; Grahlman *v.* Chicago, etc., R. Co., 78 Iowa 564, 43 N. W. 529, 5 L. R. A. 813 [*distinguishing* Patten *v.* Chicago, etc., R. Co., 75 Iowa 459, 39 N. W. 708].

It is the duty of railroad companies in winter as well as other seasons to use reasonable diligence to make their cattle-guards answer the purposes of their construction and they will be liable for failure to do so. Indiana, etc., R. Co. *v.* Drum, 21 Ill. App. 331.

58. *Illinois.*— Indiana, etc., R. Co. *v.* Drum, 21 Ill. App. 331.

Indiana.— Pittsburgh, etc., R. Co. *v.* Eby, 55 Ind. 567.

Iowa.— Giger *v.* Chicago, etc., R. Co., 80 Iowa 492, 45 N. W. 906; Grahlman *v.* Chicago, etc., R. Co., 78 Iowa 564, 43 N. W. 529, 5 L. R. A. 813.

New York.— Schuyler *v.* Fitchburg R. Co., 20 N. Y. Suppl. 287. See also Hance *v.* Cayuga, etc., R. Co., 26 N. Y. 428.

Wisconsin.— Dunnigan *v.* Chicago, etc., R. Co., 18 Wis. 28, 86 Am. Dec. 471.

See 41 Cent. Dig. tit. "Railroads," § 1455.

But the railroad company is entitled to a reasonable time, and where there is an unusual storm and the company uses due diligence to clear its tracks as soon as possible, and animals are injured before it can be done, the company will not be liable. Chicago, etc., R. Co. *v.* Kennedy, 22 Ill. App. 308.

The test of liability is not whether the cattle-guards are clear of snow and ice, but whether in their maintenance the company has been negligent, which must be determined by the jury under all the circumstances of the case, taking into consideration the location of the road, position and condition of the cattle-guard, the number of animals probably at large, prevailing storms, condition of the weather, and all other facts bearing upon the question. Wait *v.* Bennington, etc., R. Co., 61 Vt. 268, 17 Atl. 284.

In Minnesota it is held that except under exceptional and extraordinary circumstances, reasonable care and diligence do not require a railroad company to remove the natural accumulations of snow and ice from its cattle-guards (Stacey *v.* Winona, etc., R. Co., 42 Minn. 158, 43 N. W. 905; Blais *v.* Minneapolis, etc., R. Co., 34 Minn. 57, 24 N. W. 558, 57 Am. St. Rep. 36), the decisions being based upon the ground that in that state the winters are so severe that cattle are not permitted to run at large, and the snows are so frequent that the work of removal would be almost impracticable, so that the burden would be greatly disproportionate to any benefits derived from its performance and not subservient to any public interest (Blais *v.* Minneapolis, etc., R. Co., *supra*).

59. Housatonic R. Co. *v.* Waterbury, 23 Conn. 101, holding that in so doing the landowner is not necessarily a trespasser upon the rights of the company, but that this will depend upon whether he was in the reasonable exercise of his right of passing at the time of the injury.

60. Cotton *v.* New York, etc., R. Co., 20 N. Y. Suppl. 347.

to maintain, he must take it as he finds it and cannot recover for injuries to his animals due to the condition of the crossing.[61]

b. Duty to Construct. The exemption from the duty of fencing at the crossing of public highways does not apply to private ways and farm crossings,[62] and such places if not fenced across must be otherwise adequately protected.[63] It has been said that the company may determine whether this protection shall consist of gates or other structures provided the protection afforded is reasonable; [64] but it is ordinarily required that at such crossings suitable gates or bars shall be constructed,[65] and it has been held that cattle-guards alone are not sufficient; [66] and if neither gates or bars nor cattle-guards are maintained the company is clearly liable.[67] A railroad company will not, however, be liable for failing to construct gates or bars as to any landowner who forbids their construction,[68] or who requests or consents to an open crossing,[69] or agrees to construct the gates himself,[70] although such a request or agreement will not affect its liability with respect to third

61. Pratt Coal, etc., Co. *v.* Davis, 79 Ala. 308; Truax *v.* Chicago, etc., R. Co., 83 Wis. 547, 53 N. W. 842.

62. *Indiana.*— Indianapolis, etc., R. Co. *v.* Thomas, 84 Ind. 194 [*modifying* Indianapolis, etc., R. Co. *v.* Lowe, 29 Ind. 545]; Indiana Cent. R. Co. *v.* Leamon, 18 Ind. 173.

Iowa.— McKinley *v.* Chicago, etc., R. Co., 47 Iowa 76.

Missouri.— Jenkins *v.* Chicago, etc., R. Co., 27 Mo. App. 578 [*distinguishing* Walton *v.* St. Louis, etc., R. Co., 67 Mo. 56, where it was held that a railroad company could not lawfully fence across a "private road" so called merely to distinguish it from a road maintained at the public expense but which was by statute free to be traveled by all persons as a public road].

Ohio.— Pittsburgh R. Co. *v.* Cunnington, 39 Ohio St. 327.

Vermont.— Hurd *v.* Rutland, etc., R. Co., 25 Vt. 116.

See 41 Cent. Dig. tit. "Railroads," § 1460.

In Tennessee the contrary is held by reason of a statute which prohibits the obstruction of private ways. Mobile, etc., R. Co. *v.* Thompson, 101 Tenn. 197, 47 S. W. 151.

63. Peoria, etc., R. Co. *v.* Barton, 80 Ill. 72; Pittsburgh R. Co. *v.* Cunnington, 39 Ohio St. 327; Caldon *v.* Chicago, etc., R. Co., 85 Wis. 527, 5 N. W. 955.

64. Pittsburgh R. Co. *v.* Cunnington, 39 Ohio St. 327.

65. *Illinois.*— Peoria, etc., R. Co. *v.* Barton, 80 Ill. 72.

Iowa.— Claus *v.* Chicago Great Western R. Co., 136 Iowa 7, 111 N. W. 15; McKinley *v.* Chicago, etc., R. Co., 47 Iowa 76.

Nebraska.— Fremont, etc., R. Co. *v.* Pounder, 36 Nebr. 247, 54 N. W. 509.

New Hampshire.— Horn *v.* Atlantic, etc., R. Co., 35 N. H. 169.

New York.— Poler *v.* New York Cent. R. Co., 16 N. Y. 476.

See 41 Cent. Dig. tit. "Railroads," § 1460.

Either bars or gates may be constructed. Hurd *v.* Rutland, etc., 25 Vt. 116.

Under N. Y. St. (1890), as amended in 1891, requiring railroad companies to maintain fences with openings or gates or bars therein at farm crossings "for the use of the owner or occupants of the adjoining lands," the company is liable for failing to maintain gates or bars, although the owner of the animal injured is not an adjoining proprietor. Dayton *v.* New York, etc., R. Co., 81 Hun 284, 30 N. Y. Suppl. 783.

Where three parallel lines of railroad run through a farm and a private crossing passes over all three, and gates have been erected between each track but the two inner gates are removed by the landowner leaving a gate on each side of the right of way, and an animal of a third person comes upon the track at such crossing, the company on whose track the animal is injured is not liable for failure to maintain a gate between its track and the middle track. Fowhel *v.* Wabash, etc., R. Co., 125 Iowa 215, 100 N. W. 1121.

66. Indianapolis, etc., R. Co. *v.* Thomas, 84 Ind. 194; Indiana Cent. R. Co. *v.* Leamon, 18 Ind. 173. But see Eames *v.* Worcester, etc., R. Co., 105 Mass. 193; Caldon *v.* Chicago, etc., R. Co., 85 Wis. 527, 55 N. W. 955.

67. Peoria, etc., R. Co. *v.* Barton, 80 Ill. 72; Pittsburgh R. Co. *v.* Cunnington, 39 Ohio St. 327; Caldon *v.* Chicago, etc., R. Co., 85 Wis. 527, 55 N. W. 955.

68. Hurd *v.* Rutland, etc., R. Co., 25 Vt. 116.

69. Eames *v.* Worcester, etc., R. Co., 105 Mass. 193; Whittier *v.* Chicago, etc., R. Co., 26 Minn. 484, 5 N. W. 372; Tombs *v.* Rochester, etc., R. Co., 18 Barb. (N. Y.) 583; Missouri, etc., R. Co. *v.* Chenault, 24 Tex. Civ. App. 481, 60 S. W. 55; Gulf, etc., R. Co. *v.* Mitchell, 18 Tex. Civ. App. 380, 45 S. W. 819.

Where plaintiff maintains a lane closed at each end by gates so that the lane fences and gates form as effectual a barrier to stock outside of the lane as if the gates were on the line of the railroad, and such gates are maintained by plaintiff apparently for the purpose of enjoying an open crossing, the company will be justified in assuming that he preferred an open crossing and will not be liable for failing to construct other gates upon the line of the railroad Tyson *v.* K., etc., R. Co., 43 Iowa 207.

70. Texas, etc., R. Co. *v.* Smith, (Tex. Civ. App. 1897) 41 S. W. 83.

parties.[71] In Indiana the act of 1885 expressly makes it the duty of the owner of the crossing to construct and maintain the gates or bars and the railroad company is not liable to third parties for his failure to do so.[72]

c. Sufficiency, Defects, and Repairs. As affecting the duties and liabilities of railroad companies with regard to fencing, the gates or bars at private or farm crossings constitute a part of the fence,[73] and must be sufficient to serve the purposes of such a fence as they are required to construct and maintain.[74] The gates must be provided with suitable and sufficient fastenings to keep them securely closed,[75] and the bars must not only be of sufficient strength but so arranged as not easily to be displaced or thrown down by stock.[76] A gate is not necessarily improperly constructed because hung so as to open toward the right of way,[77] or constructed as a sliding gate instead of being hung on hinges,[78] or because the

71. Indianapolis, etc., R. Co. *v.* Thomas, 84 Ind. 194.

72. Louisville, etc., R. Co. *v.* Etzler, 119 Ind. 39, 21 N. E. 466, (1889) 19 N. E. 615; Crum *v.* Conover, 14 Ind. App. 264, 40 N. E. 644, 42 N. E. 1029.

The statute does not apply to crossings other than farm crossings. Louisville, etc., R. Co. *v.* Consolidated Tank Line Co., 4 Ind. App. 40, 30 N. E. 159.

73. *Illinois.*— Chicago, etc., R. Co. *v.* Morton, 55 Ill. App. 144; Chicago, etc., R. Co. *v.* O'Brien, 34 Ill. App. 155.

Iowa.— Payne *v.* Kansas City, etc., R. Co., 72 Iowa 214, 33 N. W. 633; Mackie *v.* Central R. Co., 54 Iowa 540, 6 N. W. 723.

Maine.— Estes *v.* Atlantic, etc., R. Co., 63 Me. 308.

Missouri.— Freet *v.* Kansas City, etc., R. Co., 63 Mo. App. 548.

Nebraska.— Fremont, etc., R. Co. *v.* Pounder, 36 Nebr. 247, 54 N. W. 509.

See 41 Cent. Dig. tit. "Railroads," §§ 1461, 1468.

74. *Iowa.*— Claus *v.* Chicago Great Western R. Co., 136 Iowa 7, 111 N. W. 15.

Maine.— Estes *v.* Atlantic, etc., R. Co., 63 Me. 308.

Nebraska.— Fremont, etc., R. Co. *v.* Pounder, 36 Nebr. 247, 54 N. W. 509.

Tennessee.— Mobile, etc., R. Co. *v.* Tiernan, 102 Tenn. 704, 52 S. W. 179.

England.— Charman *v.* South Eastern R. Co., 21 Q. B. D. 524, 53 J. P. 86, 57 L. J. Q. B. 597, 37 Wkly. Rep. 8.

See 41 Cent. Dig. tit. "Railroads," §§ 1461. 1468.

The mode of construction if not prescribed by statute is not material, provided they are sufficient to turn ordinary stock. Payne *v.* Kansas City, etc., R. Co., 72 Iowa 214, 33 N. W. 633. See also Wirstlin *v.* Chicago, etc., R. Co., 124 Iowa 170, 99 N. W. 697.

If a lawful fence would not have prevented the injury, as in case of animals which could pass under such a fence as defined by statute, the company will not be liable, although the bottom plank of the gate under which they passed was higher than the bottom plank or wire of a lawful fence. Leebrick *v.* Republican Valley, etc., R. Co., 41 Kan. 756, 21 Pac. 796.

75. *Iowa.*— Mackie *v.* Central R. Co., 54 Iowa 540, 6 N. W. 723; McKinley *v.* Chicago, etc., R. Co., 47 Iowa 76.

Kansas.— St. Louis, etc., R. Co. *v.* Kinman, 9 Kan. App. 633, 58 Pac. 1037.

Missouri.— Bumpas *v.* Wabash R. Co., 103 Mo. App. 202, 77 S. W. 115; Freet *v.* Kansas City, etc., R. Co., 63 Mo. App. 548; Parks *v.* Hannibal, etc., R. Co., 20 Mo. App. 440.

Nebraska.— Fremont, etc., R. Co. *v.* Pounder, 36 Nebr. 247, 54 N. W. 509.

England.— Dickinson *v.* London, etc., R. Co., Harr. & R. 399.

Canada.— Dunsford *v.* Michigan Cent. R. Co., 20 Ont. App. 577; McMichael *v.* Grand Trunk R. Co., 12 Ont. 547.

See 41 Cent. Dig. tit. "Railroads," §§ 1460, 1465.

At places where the railroad company is not required to maintain a fence it will not be liable for failure to maintain a proper fastening upon a gate which it has erected. Vaughn *v.* Missouri Pac. R. Co., 17 Mo. App. 4.

The fastening need not be such that stock cannot possibly open it under any circumstances but it is sufficient if the company uses such fastenings as are commonly adopted by persons of reasonable care and prudence and regarded by them as safe for the purpose. Chicago, etc., R. Co. *v.* Buck, 14 Ill. App. 394.

In Minnesota the statute of 1877 provides that the railroad company may provide a lock for a gate at a farm crossing and deliver the key to the landowner, and that the company will not thereafter be liable for injuries due to the gate being left open; but the statute is not mandatory, and if the company omits this precaution its liability will depend upon whether the injury was proximately due to any neglect on the part of the company with regard to the gate being left open or unfastened. Sather *v.* Chicago, etc., R. Co., 40 Minn. 91, 41 N. W. 458.

In Missouri the statute requires that the gates shall be provided with latches or hooks. Duncan *v.* St. Louis, etc., R. Co., 91 Mo. 67, 3 S. W. 835.

76. Davidson *v.* Michigan Cent. R. Co., 49 Mich. 428, 13 N. W. 304.

77. Payne *v.* Kansas City, etc., R. Co., 72 Iowa 214, 33 N. W. 633.

78. Mears *v.* Chicago, etc., R. Co., 103 Iowa 203, 72 N. W. 509; Kavanaugh *v.* Atchison, etc., R. Co., 75 Mo. App. 78.

The Missouri statute requiring that gates

hook or fastening is on the inside, next to the pasture or land inclosed,[79] but the fastening is not sufficient if the gate would open by mere pressure against it.[80] It is also the duty of the railroad company to exercise reasonable care and diligence to keep the gates or bars in repair,[81] whether the duty of constructing them is imposed upon the company by statute or agreement,[82] or whether bound to construct farm crossings or not;[83] and while it will not ordinarily be liable for failing to repair defects of which it has no knowledge,[84] it will be liable where the defect has existed for such a length of time that it should by reasonable care and diligence have been discovered.[85] In Indiana by the act of 1885 the duty both of constructing and maintaining the gates and bars is imposed upon the owner of the crossing, and the railroad company is not liable to third parties for his failure

at farm crossings must be "hung" so that they may be easily opened and shut does not require that the gates be hung on hinges, the important requirement being that such a gate should be hung so as to be easily opened and closed. Kavanaugh *v.* Atchison, etc., R. Co., 75 Mo. App. 78.

79. Payne *v.* Kansas City, etc., R. Co., 72 Iowa 214, 33 N. W. 633; Butler *v.* Chicago, etc., R. Co., 71 Iowa 206, 32 N. W. 262.

This fact may be considered by the jury in connection with other evidence in determining whether the gate was negligently constructed, but is not of itself sufficient to render the company liable in the absence of other evidence tending to show that the gate became open by reason of this fact. Butler *v.* Chicago, etc., R. Co., 71 Iowa 206, 32 N. W. 262.

80. Payne *v.* Kansas City R. Co., 72 Iowa 214, 33 N. W. 633.

81. *Illinois.*— Toledo, etc., R. Co. *v.* Nelson, 77 Ill. 160; Chicago, etc., R. Co. *v.* Morton, 55 Ill. App. 144; Louisville, etc., R. Co. *v.* Shelton, 43 Ill. App. 220.

Iowa.— Claus *v.* Chicago Great Western R. Co., 136 Iowa 7, 111 N. W. 15.

Kansas.— Missouri Pac. R. Co. *v.* Pfrang, 7 Kan. App. 1, 51 Pac. 911.

Maine.— Estes *v.* Atlantic, etc., R. Co., 63 Me. 308.

Massachusetts.— Taft *v.* New York, etc., R. Co., 157 Mass. 297, 32 N. E. 168.

Minnesota.— Hovorka *v.* Minneapolis, etc., R. Co., 34 Minn. 281, 25 N. W. 595.

Missouri.— Freet *v.* Kansas City, etc., R. Co., 63 Mo. App. 548; Morrison *v.* Kansas City, etc., R. Co., 27 Mo. App. 418; Parks *v.* Hannibal, etc., R. Co., 20 Mo. App. 440.

New Jersey.— Vanduser *v.* Lehigh, etc., R. Co., 58 N. J. L. 8, 32 Atl. 376.

Texas.— Cole *v.* St. Louis Southwestern R. Co., 43 Tex. Civ. App. 419, 94 S. W. 1128.

England.— Charman *v.* Southeastern R. Co., 21 Q. B. D. 524, 53 J. P. 86, 57 L. J. Q. B. 597, 37 Wkly. Rep. 8; Page *v.* Great Eastern R. Co., 24 L. T. Rep. N. S. 585.

Canada.— Dunsford *v.* Michigan Cent. R. Co., 20 Ont. App. 577; Murphy *v.* Grand Trunk R. Co., 1 Ont. 619.

See 41 Cent. Dig. tit. "Railroads," § 1461.

Although not obliged to construct a crossing yet if the railroad company undertakes either at the request of the landowner or upon its own motion to do so and constructs gates, cattle-guards, and wing fences, it must maintain them in sufficient repair to accomplish the purpose for which they were intended. Miller *v.* Chicago, etc., R. Co., 66 Iowa 546, 24 N. W. 36.

The fact that the landowner has made some temporary repairs where the railroad company has neglected to do so cannot shift the burden of keeping the gates in repair from the company to the landowner. Peoria, etc., R. Co. *v.* Babbs, 23 Ill. App. 454.

In Texas it is held to be the duty of the landowner for whose benefit the gates were constructed to repair such trivial defects occurring from the use of the gate as can be remedied with slight labor and at a trifling expense. Missouri, etc., R. Co. *v.* Bradshaw, (Civ. App. 1904) 83 S. W. 897; St. Louis, etc., R. Co. *v.* Adams, 24 Tex. Civ. App. 231, 58 S. W. 1035.

82. Toledo, etc., R. Co. *v.* Burgan, 9 Ind. App. 604, 37 N. E. 31.

83. Murphy *v.* Grand Trunk R. Co., 1 Ont. 619, holding that where railroad companies are required to fence their tracks if they put in a farm crossing with gates, although not required to do so, the gates constitute a part of the fence which it is the duty of the company to keep in repair.

84. Laney *v.* Kansas City, etc., R. Co., 83 Mo. 466; Fitterling *v.* Missouri Pac. R. Co., 79 Mo. 504.

The rule as to the repairing of defective gates is that a railroad company will not be liable for injuries to stock owing to the fact that the gates at a private crossing have become defective by decay, unless it had actual notice of the defects, or ought, in the exercise of reasonable care, to have had such notice, and a sufficient time has elapsed to repair them. Wirstlin *v.* Chicago, etc., R. Co., 124 Iowa 170, 99 N. W. 697.

If the defect is in the original construction so that the gate never has been such as the law requires, the rule that the company has a reasonable time to discover its condition has no application. Duncan *v.* St. Louis, etc., R. Co., 91 Mo. 67, 3 S. W. 835; McMillan *v.* Chicago, etc., R. Co., 70 Mo. App. 568.

85. Lake Erie, etc., R. Co. *v.* Beam, 60 Ill. App. 68; Morrison *v.* Kansas City, etc., R. Co., 27 Mo. App. 418; Chisholm *v.* Northern Pac. R. Co., 53 Minn. 122, 54 N. W. 1061; Hovorka *v.* Minneapolis, etc., R. Co., 34 Minn. 281, 25 N. W. 595.

to do so;[86] but the statute does not affect or impair any existing contract rights between the company and a landowner as to crossings already constructed.[87] It is also the duty of the railroad company to keep the crossing itself in a safe and proper state of repair.[88]

d. Duty to Keep Gates and Bars Closed. In the absence of statute or agreement to the contrary a railroad company must ordinarily exercise reasonable care to see that the gates or bars at private or farm crossings are kept closed,[89] the duty being included in that of maintaining a sufficient fence of which the gates or bars constitute a part.[90] If the crossing is also used by the railroad company or its customers the company will be liable for injuries due to the gate being left open through the negligence of its servants [91] or persons transacting business with the company;[92] but in other cases only reasonable care on the part of the railroad company is required,[93] and if the gates or bars are properly constructed

86. Pennsylvania Co. *v.* Spaulding, 112 Ind. 47, 13 N. E. 268; Hunt *v.* Lake Shore, etc., R. Co., 112 Ind. 69, 13 N. E. 263.

Prior to the statute of 1885 it was held that as between the railroad company and the owner of the crossing the duty of repairing the gates and bars rested upon the latter (Evansville, etc., R. Co. *v.* Mosier, 114 Ind. 447, 17 N. E. 109; Indianapolis, etc., R. Co. *v.* Shimer, 17 Ind. 295); and that a tenant of such owner occupying the land and using the crossing had no greater rights as against the company than the owner of the crossing (Indianapolis, etc., R. Co. *v.* Shimer, *supra*).

87. Toledo, etc., R. Co. *v.* Burgan, 9 Ind. App. 604, 37 N. E. 31, holding that, where a railroad company had contracted, in consideration of a right of way, to construct a crossing, and had constructed and maintained a crossing with cattle-guards and wing fences, it was the duty of the company to also keep the crossing in repair, and that it could not shift this duty upon the landowner by taking out the cattle-guards without his consent and constructing a gate.

88. Plester *v.* Grand Trunk R. Co., 32 Ont. 55, holding further that a person using the crossing for a proper purpose with the consent of the landowner may recover for an injury to an animal due to the unsafe condition of the crossing.

89. *Illinois.*— Wabash R. Co. *v.* Perbex, 57 Ill. App. 62.

Iowa.— Wait *v.* Burlington, etc., R. Co., 74 Iowa 207, 37 N. W. 159; Bartlett *v.* Dubuque, etc., R. Co., 20 Iowa 188.

Missouri.— West *v.* Missouri Pac. R. Co., 26 Mo. App. 344.

New York.— Connolly *v.* Central Vermont R. Co., 4 N. Y. App. Div. 221, 38 N. Y. Suppl. 587 [*affirmed* in 158 N. Y. 675, 52 N. E. 1124].

Texas.— Missouri, etc., R. Co. *v.* Bellows, (Civ. App. 1897) 39 S. W. 1000.

Wisconsin.— Atkinson *v.* Chicago, etc., R. Co., 119 Wis. 176, 96 N. W. 529.

England.— Marfell *v.* South Wales R. Co., 8 C. B. N. S. 525, 7 Jur. N. S. 290, 29 L. J. C. P. 315, 2 L. T. Rep. N. S. 629, 8 Wkly. Rep. 765, 98 E. C. L. 525.

See 41 Cent. Dig. tit. "Railroads," § 1465.

A section hand on a railroad may recover for injuries to his stock caused by the company's failure to close a gate, although he frequently passed the gate while it was open if it was not his duty to close the gate unless instructed to do so by the foreman of the section crew. May *v.* Chicago, etc., R. Co., 102 Wis. 673, 79 N. W. 31.

90. Wabash R. Co. *v.* Perbex, 57 Ill. App. 62; West *v.* Missouri Pac. R. Co., 26 Mo. App. 344; Connolly *v.* Central Vermont R. Co., 4 N. Y. App. Div. 221, 38 N. Y. Suppl. 587 [*affirmed* in 158 N. Y. 675, 52 N. E. 1124].

91. Spinner *v.* New York Cent., etc., R. Co., 4 Thomps. & C. (N. Y.) 595; Henderson *v.* Grand Trunk R. Co., 20 U. C. Q. B. 602.

If the railroad company itself leaves the gate open for its own convenience while making repairs, it is its duty to see that it is closed after the purpose for which it was opened has been accomplished, without regard to the question of whose duty it is to keep the gate closed under ordinary circumstances. Baltimore, etc., R. Co. *v.* Zollman, 40 Ind. App. 233, 80 N. E. 40.

92. Spinner *v.* New York Cent., etc., R. Co., 67 N. Y. 153 [*affirming* 6 Hun 600].

93. Peoria, etc., R. Co. *v.* Babbs, 23 Ill. App. 454; Chicago, etc., R. Co. *v.* Sierer, 13 Ill. App. 261; Henderson *v.* Chicago, etc., R. Co., 39 Iowa 220; Perry *v.* Dubuque Southwestern R. Co., 36 Iowa 102; Atchison, etc., R. Co. *v.* Kavanaugh, 163 Mo. 54, 63 S. W. 374.

A railroad company is not required to keep a patrol along the line of its road to see that the gates or bars at farm crossings are kept closed. Illinois Cent. R. Co. *v.* McKee, 43 Ill. 119; Chicago, etc., R. Co. *v.* Sierer, 13 Ill. App. 261.

Although gates are frequently and habitually left open by persons passing through them, and this fact is known to the company, it is not obliged to station a watchman at the gates to see that they are kept closed in order to avoid responsibility for any damages that may ensue, but is only required to exercise reasonable care and diligence. Henderson *v.* Chicago, etc., R. Co., 43 Iowa 620.

Where the landowner promises to close the gate at a crossing which he is using, on being cautioned by an employee of the railroad company to do so, the company is justified in relying upon his promise and

and are left open by the landowner or by strangers without the knowledge of the company, it will not ordinarily be liable,[94] the company being entitled to a reasonable time to discover that they are open and to close them;[95] but the company will be liable if they have remained open for such length of time that it should in the exercise of reasonable care have discovered their condition.[96] As between the railroad company and the person for whose benefit the crossing is maintained the duty of keeping the gates closed rests primarily upon the owner of the crossing,[97]

will not be liable for injury to an animal of a third person which subsequently passes through the open gate and is injured. Whaley *v.* Erie R. Co., 181 N. Y. 448, 74 N. E. 417.

94. *Illinois.*— Peoria, etc., R. Co. *v.* Aten, 43 Ill. App. 68; Peoria, etc., R. Co. *v.* Babbs, 23 Ill. App. 454; Chicago, etc., R. Co. *v.* Sierer, 13 Ill. App. 261.

Iowa.— Harding *v.* Chicago, etc., R. Co., 100 Iowa 677, 69 N. W. 1019; Henderson *v.* Chicago, etc., R. Co., 39 Iowa 220; Perry *v.* Dubuque Southwestern R. Co., 36 Iowa 102; Aylesworth *v.* Chicago, etc., R. Co., 30 Iowa 459.

Michigan.— Lemon *v.* Chicago, etc., R. Co., 59 Mich. 618, 26 N. W. 791.

Minnesota.— Mooers *v.* Northern Pac. R. Co., 80 Minn. 24, 82 N. W. 1085; Sather *v.* Chicago, etc., R. Co., 40 Minn. 91, 41 N. W. 458.

Missouri.— Binicker *v.* Hannibal, etc., R. Co., 83 Mo. 660.

New Hampshire.— Hook *v.* Worcester, etc., R. Co., 58 N. H. 251.

Ohio.— Didman *v.* Michigan Cent. R. Co., 5 Ohio S. & C. Pl. Dec. 140, 7 Ohio N. P. 380.

Tennessee.— Greer *v.* Nashville, etc., R. Co., 104 Tenn. 242, 56 S. W. 850; Mobile, etc., R. Co. *v.* Tiernan, 102 Tenn. 704, 52 S. W. 179.

Texas.— St. Louis Southwestern R. Co. *v.* Adams, 24 Tex. Civ. App. 231, 58 S. W. 1035; Texas, etc., R. Co. *v.* Glenn, 8 Tex. Civ. App. 301, 30 S. W. 845.

Wisconsin.— Davenport *v.* Chicago, etc., R. Co., 76 Wis. 399, 45 N. W. 215.

See 41 Cent. Dig. tit. "Railroads," §§ 1465, 1467.

The company is not liable unless it has either actual or constructive notice that the gates or bars are open and neglects to close them. Peoria, etc., R. Co. *v.* Babbs, 23 Ill. App. 454; Aylesworth *v.* Chicago, etc., R. Co., 30 Iowa 459.

The condition of the fastening is immaterial if the gate was propped open by third parties without the knowledge of the railroad company and the animals entered while it was thus open. Binicker *v.* Hannibal, etc., R. Co., 83 Mo. 660.

95. Chicago, etc., R. Co. *v.* Patterson, 72 Ill. App. 428; Chicago, etc., R. Co. *v.* Sierer, 13 Ill. App. 261; Aylesworth *v.* Chicago, etc., R. Co., 30 Iowa 459; Atchison, etc., R. Co. *v.* Kavanaugh, 163 Mo. 54, 63 S. W. 374.

But if the gate is in a defective condition so that it can only be closed with such difficulty that leaving it open is a probable or habitual consequence of its condition, of which the railroad company has or is chargeable with notice, it will be liable, although left open by third persons, and the accident occurs thereafter before the company has notice or time to discover that it is open. Chisholm *v.* Northern Pac. R. Co., 53 Minn. 122, 54 N. W. 1061; Morrison *v.* Kansas City, etc., R. Co., 27 Mo. App. 418.

96. *Illinois.*— Illinois Cent. R. Co. *v.* Arnold, 47 Ill. 173; Lake Erie, etc., R. Co. *v.* Beam, 60 Ill. App. 68.

Iowa.— Wait *v.* Burlington, etc., R. Co., 74 Iowa 207, 37 N. W. 159.

Missouri.— Bumpas *v.* Wabash R. Co., 103 Mo. App. 202, 77 S. W. 115; Nicholson *v.* Atchison, etc., R. Co., 55 Mo. App. 593; West *v.* Missouri Pac. R. Co., 26 Mo. App. 344.

New York.— Connolly *v.* Central Vermont R. Co., 4 N. Y. App. Div. 221, 38 N. Y. Suppl. 587 [*affirmed* in 158 N. Y. 675, 52 N. E. 1124].

Tennessee.— Mobile, etc., R. Co. *v.* Tiernan, 102 Tenn. 704, 52 S. W. 179.

See 41 Cent. Dig. tit. "Railroads," § 1465.

The company is not relieved as a matter of law from liability to third persons because the gates or bars were left open by the landowner or persons other than the employees of the company, as reasonable care must be exercised by the company regardless of by whom they were left open. Bartlett *v.* Dubuque, etc., R. Co., 20 Iowa 188.

97. *Kansas.*—Adams *v.* Atchison, etc., R. Co., 46 Kan. 161, 26 Pac. 439.

Minnesota.— Mooers *v.* Northern Pac. R. Co., 80 Minn. 24, 82 N. W. 1085; Swanson *v.* Chicago, etc., R. Co., 79 Minn. 398, 82 N. W. 670, 49 L. R. A. 625.

New Hampshire.— Hook *v.* Worcester, etc., R. Co., 58 N. H. 251.

New York.— Diamond Brick Co. *v.* New York Cent., etc., R. Co., 58 Hun 396, 12 N. Y. Suppl. 22.

Ohio.— Didman *v.* Michigan Cent. R. Co., 5 Ohio S. & C. Pl. Dec. 140, 7 Ohio N. P. 380.

Texas.— International, etc., R. Co. *v.* Russell, (Civ. App. 1907) 106 S. W. 438; San Antonio, etc., R. Co. *v.* Robinson, 17 Tex. Civ. App. 400, 43 S. W. 76; Texas, etc., R. Co. *v.* Glenn, 8 Tex. Civ. App. 301, 30 S. W. 845.

Canada.— Vilaire *v.* Great Western R Co., 11 U. C. C. P. 509.

See 41 Cent. Dig. tit. "Railroads," § 1465.

As between a tenant of the landowner and the railroad company the duty of keeping the gates closed rests upon the tenant. Missouri, etc., R. Co. *v.* Hanacik, 23 Tex. Civ. App. 394, 56 S. W. 938.

who cannot recover if he himself left the gates open,[98] although the company knew of it and failed to close them,[99] or if they were left open by persons using the crossing and gates with his permission;[1] nor where the gates are left open by the landowner is the company liable for animals which at the time of entry were trespassing upon his premises.[2] In Indiana the statute of 1885 requires that all gates and bars at farm crossings must be kept closed by the owner of the crossing, and the company is not liable to third persons for injuries due to the failure of the owner of the crossing to do so;[3] but this provision does not apply to openings other than farm crossings,[4] or to cases where the gate at a farm crossing is opened and left open by the servants of the railroad company.[5]

e. Cattle-Guards at Private or Farm Crossings.[6] In the absence of express requirement railroad companies are not obliged to construct cattle-guards at private or farm crossings,[7] the gates or bars required at such crossings being held

98. *Indiana.*— Bond *v.* Evansville, etc., R. Co., 100 Ind. 301.

Massachusetts.— Eames *v.* Boston, etc., R. Corp., 14 Allen 151.

New Hampshire.— Hook *v.* Worcester, etc., R. Co., 58 N. H. 251.

New York.— Diamond Brick Co. *v.* New York Cent., etc., R. Co., 58 Hun 396, 12 N. Y Suppl. 22.

Canada.— Vilaire *v.* Great Western R. Co., 11 U. C. C. P. 509.

See 41 Cent. Dig. tit. "Railroads," § 1465.

The owner of an animal being pastured upon land of the owner of the crossing cannot recover from the railroad company if the gate was left open by the landowner. Diamond Brick Co. *v.* New York Cent., etc., R. Co., 5 Silv. Sup. (N. Y.) 321, 7 N. Y. Suppl. 868.

99. Diamond Brick Co. *v.* New York Cent., etc., R. Co., 58 Hun (N. Y.) 396, 12 N. Y. Suppl. 22.

1. Box *v.* Atchison, etc., R. Co., 58 Mo. App. 359.

2. Adams *v.* Atchison, etc., R. Co., 46 Kan. 161, 26 Pac. 439; Rouse *v.* Osborne, 3 Kan. App. 139, 42 Pac. 843; Harrington *v.* Chicago, etc., R. Co., 71 Mo. 384; Brooks *v.* New York, etc., R. Co., 13 Barb. (N. Y.) 594.

3. Chicago, etc., R. Co. *v.* Ramsey, 168 Ind. 390, 81 N. E. 79 [*reversing* (App. 1907) 79 N. E. 1065, (App. 1906) 78 N. E. 669); Hunt *v.* Lake Shore, etc., R. Co., 112 Ind. 69, 13 N. E. 263; Pennsylvania Co. *v.* Spaulding, 112 Ind. 47, 13 N. E. 268; Louisville, etc., R. Co. *v.* Thomas, 1 Ind. App. 131, 27 N. E. 302.

Although the animal first entered where the railroad company had failed to fence, as required by statute, if it subsequently leaves the track and after crossing the lands of other persons goes upon the track a second time through a gate at a farm crossing, which it was the duty of the owner of the crossing to keep closed, the entries will be regarded as separate and distinct and the railroad company will not be liable to the owner of the animal in the absence of negligence in the operation of the train. Chicago, etc., R. Co. *v.* Ramsey, 168 Ind. 390, 81 N. E. 79 [*reversing* (App. 1907) 79 N. E. 1065, (App. 1906) 78 N. E. 669].

If the animal did not come upon the crossing through the gate which the owner of the crossing is required to maintain the company is liable. Louisville, etc., R. Co. *v.* Consolidated Tank Line Co., 4 Ind. App. 40, 30 N. E. 159.

Crossings constructed prior to the statute are within its application as well as those thereafter constructed. Hunt *v.* Lake Shore, etc., R. Co., 112 Ind. 69, 13 N. E. 263.

Prior to this statute it was held that so far as concerned the person for whose benefit the crossing was maintained the company was not obliged to keep the gates closed (Louisville, etc., R. Co. *v.* Goodbar, 102 Ind. 596, 2 N. E. 337, 3 N. E. 162; Evansville, etc., R. Co. *v.* Mosier, 101 Ind. 597, 1 N. E. 197; Bond *v.* Evansville, etc., R. Co., 100 Ind. 301), but that the company would be liable to third persons (Wabash R. Co. *v.* Williamson, 104 Ind. 154, 3 N. E. 814; Baltimore, etc., R. Co. *v.* Kreiger, 90 Ind. 308).

4. Wabash R. Co. *v.* Williamson, 3 Ind. App. 190, 29 N. E. 455; Louisville, etc., R. Co. *v.* Hughes, 2 Ind. App. 68, 28 N. E. 158.

5. Baltimore, etc., R. Co. *v.* Zollman, 40 Ind. App. 233, 80 N. E. 40.

6. **At public crossings** see *supra*, X, H, 4, b, (v).

7. *Indiana.*— Pennsylvania Co. *v.* Spaulding, 112 Ind. 47, 13 N. E. 268 [*disapproving* Grand Rapids, etc., R. Co. *v.* Jones, 81 Ind. 523].

Iowa.— Bartlett *v.* Dubuque, etc., R. Co., 20 Iowa 188.

Minnesota.—Satber *v.* Chicago, etc., R. Co., 40 Minn. 91, 41 N. W. 458.

Missouri.— Dent *v.* St. Louis, etc., R. Co., 83 Mo. 496; Fitterling *v.* Missouri Pac. R. Co., 79 Mo. 504.

Nebraska.— Omaha, etc., R. Co. *v.* Severin, 30 Nebr. 318, 46 N. W. 842.

New York.— Brooks *v.* New York, etc., R. Co., 13 Barb. 594.

Texas.— Missouri, etc., R. Co. *v.* Hanacek, 93 Tex. 446, 55 S. W. 1117; San Antonio, etc., R. Co. *v.* Robinson, 17 Tex. Civ. App. 400, 43 S. W. 76.

Wisconsin.— Cook *v.* Milwaukee, etc., R. Co., 36 Wis. 45.

See 41 Cent. Dig. tit. "Railroads," § 1462.

The reason for a different rule in the case of public and private ways is that the former

to be a sufficient protection to prevent animals from going upon the tracks at such places.[8]

f. Gates or Openings at Places Other Than Farm Crossings. The statutes requiring fencing do not preclude the use of gates or bars at places other than farm crossings, and the company has a right to permit them or to construct them itself if it shall deem it advisable to do so;[9] but they must be so constructed and maintained as to serve the purposes of a fence,[10] and the company must see that they are kept closed.[11] If the railroad company for its own purposes makes an opening in the fence through which animals enter and are injured, it will be liable,[12] and if it knowingly permits others to make or use openings in the fence it will be liable to third persons whose animals enter through such openings and are injured,[13] but not to the person by whom or for whose use and convenience the opening was made or permitted,[14] unless the railroad company had expressly agreed to construct a gate at such opening and failed to do so within a reasonable time.[15]

g. Liability of Owner of Crossing to Owner of Animal Injured. As to third persons the duty of maintaining gates and bars and keeping them closed rests primarily upon the railroad company, and it will not as a matter of law be relieved from liability merely because they were left open by the landowner or persons

cannot be fenced across or obstructed and therefore cattle-guards are necessary, but at the latter the gates or bars which constitute a part of the fence are a sufficient protection. Sather *v.* Chicago, etc., R. Co., 40 Minn. 91, 41 N. W. 458.

Statutes are construed as applying only to public crossings, and not to private ways or farm crossings, which in terms require the construction of cattle-guards at "all wagon crossings" (Sather *v.* Chicago, etc., R. Co., 40 Minn. 91, 41 N. W. 458), "all railroad crossings" (Omaha, etc., R. Co. *v.* Severin, 30 Nebr. 318, 46 N. W. 842), or "all road crossings" (Brooks *v.* New York, etc., R. Co., 13 Barb. (N. Y.) 594).

In Indiana, although by the act of 1885 the duty of keeping gates and bars at farm crossings closed is expressly imposed upon the owner of the crossing, and the railroad company relieved from liability in case of his failure to do so, it is still unnecessary for the company to maintain cattle-guards at such crossings. Pennsylvania Co. *v.* Spaulding, 112 Ind. 47, 13 N. E. 268.

In New Hampshire the statute requires cattle-guards at farm crossings. Chapin *v.* Sullivan R. Co., 39 N. H. 564, 75 Am. Dec. 237.

8. Pennsylvania Co. *v.* Spaulding, 112 Ind. 47, 12 N. E. 268; Sather *v.* Chicago, etc., R. Co., 40 Minn. 91, 41 N. W. 458; Dent *v.* St. Louis, etc., R. Co., 83 Mo. 496; Brooks *v.* New York Cent. R. Co., 13 Barb. (N. Y.) 594.

9. Detroit, etc., R. Co. *v.* Hayt, 55 Mich. 347, 21 N. W. 367, 911.

10. Jacksonville, etc., R. Co. *v.* Harris, 33 Fla. 217, 14 So. 726, 39 Am. St. Rep. 127; Hill *v.* Missouri Pac. R. Co., 66 Mo. App. 184.

11. Jacksonville, etc., R. Co. *v.* Harris, 33 Fla. 217, 14 So. 726, 39 Am. St. Rep. 127; Cleveland, etc., R. Co. *v.* Swift, 42 Ind. 119; Galveston, etc., R. Co. *v.* Wessendorf, (Tex. Civ. App. 1896) 39 S. W. 132.

Gates not on right of way.— Where certain coal lands abutted on a right of way and the company instead of fencing between this land and the railroad ran its fence around the coal lands and put in a gate for the use of the coal company, through which an animal entered and passed upon the track where it was injured, it was held that the company was not liable for failing to keep the gate closed, but that plaintiff's cause of action, if any, must be based upon the failure of the company to fence its right of way at the place where the animal entered upon the track. Davis *v.* Wabash R. Co., 46 Mo. App. 477.

12. Indianapolis, etc., R. Co. *v.* Logan, 19 Ind. 294; Brady *v.* Rensselaer, etc., R. Co., 1 Hun (N. Y.) 378, 3 Thomps. & C. 537; Missouri, etc., R. Co. *v.* Armstrong, (Tex. Civ. App. 1907) 99 S. W. 431.

13. Jacksonville, etc., R. Co. *v.* Prior, 34 Fla. 271, 15 So. 760; Cleveland, etc., R. Co. *v.* Swift, 42 Ind. 119; McDowell *v.* New York Cent. R. Co., 37 Barb. (N. Y.) 195; International, etc., R. Co. *v.* Richmond, 28 Tex. Civ. App. 513, 67 S. W. 1029.

14. McCoy *v.* Southern Pac. R. Co., 94 Cal. 568, 29 Pac. 1110; Clark *v.* Chicago, etc., R. Co., 62 Mich. 358, 28 N. W. 914.

But if the animal entered at a different opening from that used by plaintiff and which the railroad company should have kept closed, the fact that there was an opening in the immediate vicinity which was used by plaintiff and through which his animals could have entered and come upon the track will not affect the liability of the company. Accola *v.* Chicago, etc., R. Co., 70 Iowa 185, 30 N. W. 503.

15. McCoy *v.* Southern Pac. R. Co., 94 Cal. 568, 29 Pac. 1110, holding that if the railroad company expressly agrees to construct a gate at an opening made by the landowner for his own use it must do so within a reasonable time or be liable in the same manner as if it had left the opening without the landowner's consent when it constructed the fence.

other than the employees of the company;[16] but if the gates are properly constructed and without any fault on the part of the railroad company the owner of the crossing wilfully leaves them open, by reason of which the animals of a third person rightfully upon such premises are injured, he will be liable to the owner of the animal injured.[17] Under a statute expressly requiring the owner of the crossing to maintain the gates or bars and relieving the railroad company from any liability by reason of his failure to do so, the landowner is not liable to the owner of animals which were wrongfully upon his premises.[18]

h. Care and Liability as to Animals On or Near Crossing. In approaching private or farm crossings those in charge of the train must keep a lookout to avoid injury to animals which might be lawfully upon the crossing;[19] but the company is not required to subordinate the operation of its road to the landowner's privilege of a crossing, and is not required to slow up or stop its trains in order to ascertain if animals are upon or near the crossing.[20]

6. Injury by Running on Road-Bed, Bridges, or Trestles — a. In General.[21] In the absence of statute a railroad company is not required to floor bridges or trestles or to erect railings or other safeguards at dangerous places to prevent accidents to animals which might wander upon the right of way,[22] and apart from any liability imposed by statutes requiring fencing will not, in the absence of negligence in the operation of its trains or on the part of its servants, be liable for injuries due to animals going upon bridges or trestles,[23] or falling into pitfalls upon its property.[24]

b. Negligence in Extricating Animals. Where animals are injured in being extricated from bridges and trestles, if the action is based upon the neglect of the railroad company to fence its track the liability will depend upon whether under the particular statute an actual collision between the train and animal is necessary to render the company liable.[25] In an action not based upon these statutes plaintiff may recover if the injury was due to negligence on the part of the company's servants;[26] but the company will not be liable if reasonable care and diligence was used, although by extraordinary diligence and the use

16. Bartlett *v.* Dubuque, etc., R. Co., 20 Iowa 188.

17. Russell *v.* Hanley, 20 Iowa 219, 89 Am. Dec. 535.

18. Crum *v.* Conover, 14 Ind. App. 264, 40 N. E. 644, 42 N. E. 1029.

19. Bishop *v.* Chicago, etc., R. Co., 4 N. D. 536, 62 N. W. 605; Bender *v.* Canada Southern R. Co., 37 U. C. Q. B. 25.

The owner of a farm divided by a railroad over which is constructed and maintained a private way is not in the lawful use thereof a trespasser, but has the same rights thereon as the public have on a public highway, and it is the duty of the railroad company to keep a lookout for animals which he may be driving across the crossing and to exercise due care to avoid injuring them. Atchison, etc., R. Co. *v.* Conlon, 9 Kan. App. 116, 57 Pac. 1063.

20. Whittier *v.* Chicago, etc., R. Co., 26 Minn. 484, 5 N. W. 372, holding that where by agreement with the landowner an open crossing is maintained the railroad company may, in the absence of any agreement as to precautions for preventing accidents, run its trains as if no such privilege existed, subject only to the duty of keeping a reasonable lookout and exercising due care to avoid any injury to animals after they are discovered upon the track.

21. After being frightened by train or attracted to right of way see *supra*, X, H, 2, a.

Where involved with failure to fence track see *supra*, X, H, 4, a, (xv).

22. Memphis, etc., R. Co. *v.* Lyon, 62 Ala. 71; Denver, etc., R. Co. *v.* Chandler, 8 Colo. 371, 8 Pac. 571; Padgitt *v.* Missouri, etc., R. Co., (Tex. Civ. App. 1905) 90 S. W. 67.

23. *Alabama.*— Memphis, etc., R. Co. *v.* Lyon, 62 Ala. 71.

Arkansas.— St. Louis, etc., R. Co. *v.* Scott, 68 Ark. 415, 59 S. W. 762.

Colorado.— Denver, etc., R. Co. *v.* Chandler, 8 Colo. 371, 8 Pac. 571.

Georgia.— East Tennessee, etc., R. Co. *v.* Watters, 77 Ga. 69.

Indiana.— Pittsburgh, etc., R. Co. *v.* Stuart, 71 Ind. 500.

Iowa.— Barnhart *v.* Chicago, etc., R. Co., 97 Iowa 654, 66 N. W. 902.

Tennessee.— Southern R. Co. *v.* Phillips, 100 Tenn. 130, 42 S. W. 925.

See 41 Cent. Dig. tit. "Railroads," § 1474.

24. Ilinois Cent. R. Co. *v.* Carraher, 47 Ill. 333. But see Nelson *v.* Central R., etc., Co., 48 Ga. 152.

25. See *supra*, X, H, 4, a, (xv).

26. Seibert *v.* Missouri Pac. R. Co., 72 Mo. 565.

of different means it might have been possible to extricate the animal without injury.[27]

7. Signals, Lookouts, Lights, and Obstructions of View — a. Duty to Give Signals. It has been held that statutes requiring the giving of signals by blowing a whistle or ringing a bell on approaching crossings are intended only as a warning to persons and have no application to unattended animals;[28] but by the weight of authority these signals are intended as a protection to animals as well as to persons,[29] and if not given the railroad company will be liable for any injuries to animals occasioned thereby,[30] without regard to the care exercised to prevent the injury after the animal was discovered.[31] The statutes are, however, intended only for the protection of persons and property at the crossing, and a failure to give a crossing signal will not render the company liable for animals injured if not at the crossing;[32] nor do the statutes apply to private or farm cross-

27. Richmond, etc., R. Co. *v.* Buice, 88 Ga. 180, 14 S. E. 205.

28. Fisher *v.* Pennsylvania R. Co., 126 Pa. St. 293, 17 Atl. 607; Toudy *v.* Norfolk, etc., Co., 38 W. Va. 694, 18 S. E. 896; Mills, etc., Lumber Co. *v.* Chicago, etc., R. Co., 94 Wis. 336, 68 N. W. 996.

This doctrine is stated in a leading case as follows: "If it was the duty of the engineer to blow the whistle as notice to the mule, I do not see why the mule should not be held to the rule, to 'stop, look and listen.' To apply rules to dumb animals which were intended only for reasonable beings brings us dangerously near to the realm of absurdity." Fisher *v.* Pennsylvania R. Co., 126 Pa. St. 293, 297, 17 Atl. 607.

29. *Arkansas.*— St. Louis, etc., R. Co. *v.* Hendricks, 53 Ark. 201, 13 S. W. 699.

Illinois.— Chicago, etc., R. Co. *v.* Reid, 24 Ill. 144.

Indiana.— Cincinnati, etc., R. Co. *v.* Hiltzhauer, 99 Ind. 486; Chicago, etc., R. Co. *v.* Fenn, 3 Ind. App. 250, 29 N. E. 790.

Iowa.— Graybill *v.* Chicago, etc., R. Co., 112 Iowa 738, 84 N. W. 946.

Minnesota.— Palmer *v.* St. Paul, etc., R. Co., 38 Minn. 415, 38 N. W. 100.

Mississippi.— Young *v.* Illinois Cent. R. Co., 89 Miss. 446, 40 So. 870.

Missouri.— Howenstein *v.* Pacific R. Co., 55 Mo. 33.

Texas.— Texas, etc., R. Co. *v.* Crutcher, (Civ. App. 1904) 82 S. W. 341; Houston, etc., R. Co. *v.* Red Cross Stock Farm, 22 Tex. Civ. App. 114, 53 S. W. 834.

See 41 Cent. Dig. tit. "Railroads," § 1476.

The statutes are intended for whatever purpose they may naturally or reasonably subserve, including the frightening of animals from the track (St. Louis, etc., R. Co. *v.* Hendricks, 53 Ark. 201, 13 S. W. 699; Palmer *v.* St. Paul, etc., R. Co., 38 Minn. 415, 38 N. W. 100), it being a matter of common knowledge that such signals do often have this effect and are frequently resorted to by engineers for this purpose (Palmer *v.* St. Paul, etc., R. Co., *supra*).

30. *Arkansas.*— St. Louis, etc., R. Co. *v.* Hendricks, 53 Ark. 201, 13 S. W. 699.

Illinois.— Illinois Cent. R. Co. *v.* Gillis, 68 Ill. 317; Chicago, etc., R. Co. *v.* Henderson, 66 Ill. 494; St. Louis, etc., R. Co. *v.* Terhune, 50 Ill. 151, 99 Am. Dec. 504; Great Western R. Co. *v.* Geddis, 33 Ill. 304 [*distinguishing* Illinois Cent. R. Co. *v.* Goodwin, 30 Ill. 117; Illinois Cent. R. Co. *v.* Phelps, 29 Ill. 447]; Chicago, etc., R. Co. *v.* Reid, 24 Ill. 144.

Iowa.— Heise *v.* Chicago Great Western R. Co., (1907) 114 N. W. 180; Graybill *v.* Chicago, etc., R. Co., 112 Iowa 738, 84 N. W. 946.

Kansas.— Missouri Pac. R. Co. *v.* Stevens, 35 Kan. 622, 12 Pac. 25.

Minnesota.— Palmer *v.* St. Paul, etc., R. Co., 38 Minn. 415, 38 N. W. 100.

Missouri.— Persinger *v.* Wabash, etc., R. Co., 82 Mo. 196; Howenstein *v.* Pacific R. Co., 55 Mo. 33; Barr *v.* Hannibal, etc., R. Co., 30 Mo. App. 248.

Pennsylvania.— Rehman *v.* Railroad Co., 5 Phila. 450. *Contra*, Fisher *v.* Pennsylvania R. Co., 126 Pa. St. 293, 17 Atl. 607.

Texas.— Texas, etc., R. Co. *v.* Crutcher, (Civ. App. 1904) 82 S. W. 341; Texas, etc., R. Co. *v.* Cunningham, 4 Tex. Civ. App. 262, 23 S. W. 332.

Canada.— Tyson *v.* Grand Trunk R. Co., 20 U. C. Q. B. 256.

See 41 Cent. Dig. tit. "Railroads," § 1476.

Where it is required by a city ordinance that a bell shall be rung at all times while the train is in motion within city limits, the railroad company will be liable for an injury to an animal at a street crossing occasioned by failure to do so. Fritz *v.* First Div. St. Paul, etc., R. Co., 22 Minn. 404.

31. Milligan *v.* Chicago, etc., R. Co., 79 Mo. App. 393.

32. *Alabama.*— Nashville, etc., R. Co. *v.* Hembree, 85 Ala. 481, 5 So. 173.

Georgia.— Southern R. Co. *v.* New, 105 Ga. 481, 30 S. E. 665; Georgia R., etc., Co. *v.* Clary, 103 Ga. 639, 30 S. E. 433; Georgia R., etc., Co. *v.* Burke, 93 Ga. 319, 20 S. E. 318.

Illinois.— Illinois Cent. R. Co. *v.* Goodwin, 30 Ill. 117; Wabash, etc., R. Co. *v.* Neikirk, 15 Ill. App. 172.

Missouri.—Wasson *v.* McCook, 80 Mo. App. 483; Ravenscraft *v.* Missouri Pac. R. Co., 27 Mo. App. 617.

Texas.— Missouri, etc., R. Co. *v.* Parker, (Civ. App. 1898) 46 S. W. 280.

ings,[33] or to trespassing animals,[34] or to injuries done by cars other than those drawn by an engine and under the control of an engineer.[35] If the statute requires the ringing of the bell "or" blowing of the whistle, either is sufficient, and the company will not be liable unless it is shown that both were omitted.[36] Even where crossing signals are not required by statute, ordinary care may under some circumstances require that they should be given,[37] or if required by statute that they should be given at a greater distance from the crossing than the statute provides.[38] So also a failure to give signals as a warning of the approach of trains at a place where men and teams are known to be at work about the track, while not negligence *per se*, may be negligence as matter of fact,[39] or under the circumstances of the particular case it may be negligence to back a train without giving a warning signal.[40]

b. Duty to Keep Lookout. Except where animals are wrongfully upon the right of way, it is as much the duty of a railroad company to exercise ordinary care in discovering their presence as in avoiding injury after they are discovered.[41] Those in charge of the train must keep a lookout for stock on or near the track, and if they fail to do so and animals are injured which could have been discovered in time to avoid the injury the company will be liable,[42] without regard to the

See 41 Cent. Dig. tit. "Railroads," § 1479.

Where a team is hitched near a railroad track but not at a crossing, the owner intending to go to it on hearing the signal required for a crossing some distance away, he cannot recover for injuries to the team on the ground that the signal was not given. St. Louis, etc., R. Co. *v.* Payne, 29 Kan. 166.

In case of injury to a dog which happens to be hunting in the vicinity of a crossing the person in charge of the dog has no right to rely upon the statutory crossing signals being given. Fowles *v.* Seaboard Air Line R. Co., 73 S. C. 306, 53 S. E. 534.

But it is not necessary that the animal shall be on the actual intersection of the railroad and highway, and the company will be liable if the animal is on the track and so close to the highway that the accident may be fairly attributed to the neglect to give the signal. Toledo, etc., R. Co. *v.* Furgusson, 42 Ill. 449.

33. *Georgia.*— Georgia R. Co. *v.* Cox, 61 Ga. 455.

Illinois.— Toledo, etc., R. Co. *v.* Head, 62 Ill. 233; Wahash, etc., R. Co. *v.* Neikirk, 13 Ill. App. 387.

Iowa.— Nichols *v.* Chicago, etc., R. Co., 125 Iowa 236, 100 N. W. 1115.

Maryland.— Annapolis, etc., R. Co. *v.* Pumphrey, 72 Md. 82, 19 Atl. 8.

Minnesota.— Locke *v.* First Div. St. Paul, etc., R. Co., 15 Minn. 350.

Texas.— San Antonio, etc., R. Co. *v.* Aycock, (Civ. App. 1902) 68 S. W. 1001.

See 41 Cent. Dig. tit. "Railroads," § 1478.

The Georgia statute applies to "private ways established pursuant to law" but not to private ways not established by law. Willingham *v.* Macon, etc., R. Co., 113 Ga. 374, 38 S. E. 843.

If a railroad company obstructs a public crossing and thereby knowingly diverts the travel therefrom to a private crossing in the same vicinity, it is the duty of the company to give the signals required by statute at the private crossing so long as this condition continues. Hartman *v.* Chicago Great Western R. Co., 132 Iowa 582, 110 N. W. 10.

34. Locke *v.* First Div. St. Paul, etc., R. Co., 15 Minn. 350.

But an animal is not a trespasser within the application of this rule, although it is not lawful for stock to be at large, if it has escaped without any fault on the part of the owner, and is upon the crossing where the right of the railroad company is not exclusive (Louisville, etc., R. Co. *v.* Ousler, 15 Ind. App. 232, 36 N. E. 290; Chicago, etc., R. Co. *v.* Fenn, 3 Ind. App. 250, 29 N. E. 790), or merely because in crossing it has deviated slightly outside of the line of the highway (Toledo, etc., R. Co. *v.* Furgusson, 42 Ill. 449).

35. Montgomery, etc., R. Co. *v.* Perryman, 91 Ala. 413, 8 So. 699, holding that the statute does not apply to an injury done by the escape of a detached car which had been left standing upon a side-track.

36. East Tennessee, etc., R. Co. *v.* Deaver, 79 Ala. 216; Halferty *v.* Wabash, etc., R. Co., 82 Mo. 90; Turner *v.* Kansas City, etc., R. Co., 78 Mo. 578; Van Note *v.* Hannibal, etc., R. Co., 70 Mo. 641; Cathcart *v.* Hannibal, etc., R. Co., 19 Mo. App. 113.

37. Indianapolis, etc., R. Co. *v.* Hamilton, 44 Ind. 76; Croft *v.* Chicago Great Western R. Co., 72 Minn. 47, 74 N. W. 898, 80 N. W. 628; Texas, etc., R. Co. *v.* Anderson, 2 Tex. App. Civ. Cas. § 203.

38. Kinyon *v.* Chicago, etc., R. Co., 118 Iowa 349, 92 N. W. 40, 96 Am. St. Rep. 382.

39. O'Leary *v.* Chicago, etc., R. Co., (Iowa 1905) 103 N. W. 362.

40. Texarkana, etc., R. Co. *v.* Bell, (Tex. Civ. App. 1907) 101 S. W. 1167.

41. Central R., etc., Co. *v.* Lee, 96 Ala. 444, 11 So. 424; Missouri Pac. R. Co. *v.* Gedney, 44 Kan. 329, 24 Pac. 464, 21 Am. St. Rep. 286; Layne *v.* Ohio River R. Co., 35 W. Va. 438, 14 S. E. 123; Gulf, etc., R. Co. *v.* Washington, 49 Fed. 347, 1 C. C. A. 286.

42. *Alabama.*— Chattanooga Southern R. Co. *v.* Wilson, 124 Ala. 444, 27 So. 486;

efforts subsequently made to avoid the injury.[43] In some jurisdictions the duty of maintaining a lookout is expressly enjoined by statute.[44] The duty of keeping a lookout for stock is a relative duty, to be performed with regard to the other duties of those in charge of the train, which may often prevent a constant lookout,[45] or interfere with its effectiveness;[46] but the lookout must be as nearly con-

Louisville, etc., R. Co. *v.* Brinkerhoff, 119 Ala. 606, 24 So. 892; Louisville, etc., R. Co. *v.* Rice, 101 Ala. 676, 14 So. 639; Louisville, etc., R. Co. *v.* Posey, 96 Ala. 262, 11 So. 423; Mobile, etc., R. Co. *v.* Kimbrough, 96 Ala. 127, 11 So. 307; Kansas City, etc., R. Co. *v.* Watson, 91 Ala. 483, 8 So. 793; East Tennessee, etc., R. Co. *v.* Watson, 90 Ala. 41, 7 So. 813.

Arkansas.— Kansas City Southern R. Co. *v.* Ingram, 80 Ark. 239, 97 S. W. 55; Little Rock, etc., R. Co. *v.* Finley, 37 Ark. 562. But see Kansas City, etc., R. Co. *v.* Shaver, (1890) 14 S. W. 864; Memphis, etc., R. Co. *v.* Kerr, 52 Ark. 162, 12 S. W. 329, 20 Am. St. Rep. 159, 5 L. R. A. 429.

Colorado.— Colorado Cent. R. Co. *v.* Caldwell, 11 Colo. 545, 19 Pac. 542.

Georgia.— Georgia R., etc., Co. *v.* Churchill, 113 Ga. 12, 38 S. E. 336.

Illinois.— Toledo, etc., R. Co. *v.* Ingraham, 58 Ill. 120; Chicago, etc., R. Co. *v.* Cauffman, 38 Ill. 424; Chicago, etc., R. Co. *v.* Legg, 32 Ill. App. 218.

Kansas.— Missouri Pac. R. Co. *v.* Gedney, 44 Kan. 329, 24 Pac. 464, 21 Am. St. Rep. 286.

Kentucky.— Louisville, etc., R. Co. *v.* Kice, 109 Ky. 786, 60 S. W. 705, 22 Ky. L. Rep. 1462; Kentucky Cent. R. Co. *v.* Lebus, 14 Bush 518; Troutwine *v.* Louisville, etc., R. Co., 105 S. W. 142, 32 Ky. L. Rep. 5.

Louisiana.— Fossier *v.* Morgan's Louisiana, etc., R., etc., Co., McGloin 349.

Missouri.— Hill *v.* Missouri Pac. R. Co., 121 Mo. 477, 26 S. W. 576 [*affirming* 49 Mo. App. 520, and *disapproving* Hoffman *v.* Missouri Pac. R. Co., 24 Mo. App. 546; Welch *v.* Hannibal, etc., R. Co., 20 Mo. App. 477]; Spencer *v.* Missouri, etc., R. Co., 90 Mo. App. 91; Brooks *v.* Hannibal, etc., R. Co., 35 Mo. App. 571; Buster *v.* Hannibal, etc., R. Co., 18 Mo. App. 578.

Nebraska.—Stading *v.* Chicago, etc., R. Co., 78 Nebr. 566, 111 N. W. 460.

North Carolina.— Carlton *v.* Wilmington, etc., R. Co., 104 N. C. 365, 10 S. E. 516; Wilson *v.* Norfolk, etc., R. Co., 90 N. C. 69; Pippen *v.* Wilmington, etc., R. Co., 75 N. C. 54.

West Virginia.— Robbins *v.* Baltimore, etc., R. Co., 62 W. Va. 535, 59 S. E. 512; Layne *v.* Ohio River R. Co., 35 W. Va. 438, 14 S. E. 123.

United States.— Gulf, etc., R. Co. *v.* Ellis, 54 Fed. 481, 4 C. C. A. 454; Gulf, etc., R. Co. *v.* Johnson, 54 Fed. 474, 4 C. C. A. 447; Gulf, etc., R. Co. *v.* Washington, 49 Fed. 347, 1 C. C. A. 286; Gulf, etc., R. Co. *v.* Ellidge, 49 Fed. 356, 1 C. C. A. 295.

See 41 Cent. Dig. tit. "Railroads," § 1477.

43. East Tennessee, etc., R. Co. *v.* Watson, 90 Ala. 41, 7 So. 813.

Impossibility to stop the train after discovering the animal is no defense where there was negligence beforehand which created the impossibility. Brooks *v.* Hannibal, etc., R. Co., 35 Mo. App. 571.

44. Prescott, etc., R. Co. *v.* Brown, 74 Ark. 606, 86 S. W. 809; St. Louis Southwestern R. Co. *v.* Russell, 62 Ark. 182, 34 S. W. 1059; Mobile, etc., R. Co. *v.* House, 96 Tenn. 552, 35 S. W. 561.

The Arkansas statute of 1891 requiring a "constant lookout," but not providing who shall keep the lookout, is construed as intending the engineer or fireman, but not both, except at places where the engineer cannot see the track from his side of the engine, in which case the fireman must keep a lookout from the other side. St. Louis Southwestern R. Co. *v.* Russell, 62 Ark. 182, 34 S. W. 1059.

In Tennessee the statute of 1855 was construed as requiring some person whose undivided duty it was to be always on the lookout (Memphis, etc., R. Co. *v.* Dean, 5 Sneed 291); but the statute as amended in 1857 requires the company to keep "the engineer, fireman, or someone else always on the lookout ahead" (Louisville, etc., R. Co. *v.* Stone, 7 Heisk. 468).

A lookout must be kept for animals near as well as directly on the track notwithstanding the statute in terms relates to persons and property "upon the track." St. Louis Southwestern R. Co. *v.* Russell, 64 Ark. 236, 41 S. W. 807.

45. Western R. Co. *v.* Lazarus, 88 Ala. 453, 6 So. 877; Howard *v.* Louisville, etc., R. Co., 67 Miss. 247, 7 So. 216, 19 Am. St. Rep. 302.

Reasonable diligence and caution in keeping a lookout is all that is required and it is not essential to avoid liability that the engineer should keep his eyes constantly on the track in front of him. Cincinnati, etc., R. Co. *v.* Burgess, 84 S. W. 760, 27 Ky. L. Rep. 252.

Where the fireman is necessarily engaged in supplying the engine with fuel and the train rounds a curve so that the boiler and smoke-stack obstruct the view of the engineer from his side of the engine, the company will not be liable for injury to an animal because the fireman was not keeping a lookout or because no third employee was kept upon the engine to maintain a lookout in such cases. Rogers *v.* Georgia R. Co., 100 Ga. 699, 28 S. E. 457, 62 Am. St. Rep. 351 [*overruling* Northeastern R. Co. *v.* Martin, 78 Ga. 603, 3 S. E. 701].

46. Cantrell *v.* Kansas City, etc., R. Co., (Miss. 1899) 24 So. 871, holding that where the fireman on a locomotive running at night had opened the fire box to throw in coal so that the light from the box "killed the light" in front of the engine and prevented the

tinuous as such other duties will permit,[47] and it is not sufficient that the engineer was on the lookout at the time of the accident, if by proper care the animal could have been discovered sooner and in time to avoid the injury;[48] but a failure to keep a constant lookout even under a statute so requiring will not render the company liable if a proper lookout was maintained during the time affecting the particular injury complained of.[49] In the case of trespassing animals, the only duty of a railroad company is to avoid injuring them after they are discovered, and it is not necessary to keep a lookout for them;[50] and the fact that the injury occurs upon the crossing of a public highway in no way affects the application of the rule if the animal was wrongfully upon the highway.[51] Railroad companies also have a right to presume that animals will not be upon the track and so need not keep a lookout for them in localities where it is unlawful for them to run at large,[52] and where their roads are properly fenced as required by law,[53] except at places such as public crossings and station grounds, which are not required to be fenced;[54] and whenever animals are without the fault of the railroad company at places where they have no right to be and the company has no reason to antici-

engineer from seeing plaintiff's animals until too late to avoid injuring them, there was no negligence authorizing a recovery.

47. Georgia Cent. R. Co. *v.* Dumas, 131 Ala. 172, 30 So. 867; Mobile, etc., R. Co. *v.* Kimbrough, 96 Ala. 127, 11 So. 307; East Tennessee, etc., R. Co. *v.* Baker, 94 Ala. 632, 10 So. 211.

A failure on the part of the fireman to keep a lookout may be considered by the jury in the absence of any evidence that the engineer alone was charged with this duty. Kansas City, etc., R. Co. *v.* Wagand, 134 Ala. 388, 32 So. 744.

48. East Tennessee, etc., R. Co. *v.* Baker, 94 Ala. 632, 10 So. 211.

49. Louisville, etc., R. Co. *v.* Stone, 7 Heisk. (Tenn.) 468.

50. *Illinois.*— Illinois Cent. R. Co. *v.* Noble, 142 Ill. 578, 32 N. E. 684 [*reversing* 42 Ill. App. 509, and *disapproving* Illinois Cent. R. Co. *v.* Middlesworth, 46 Ill. 494]; Leslie *v.* Wabash R. Co., 118 Ill. App. 606.

Iowa.— Mears *v.* Chicago, etc., R. Co., 103 Iowa 203, 72 N. W. 509.

Maine.— Russell *v.* Maine Cent. R. Co., 100 Me. 406, 61 Atl. 899.

Minnesota.— Stacey *v.* Winona, etc., R. Co., 42 Minn. 158, 43 N. W. 905; Palmer *v.* Northern Pac. R. Co., 37 Minn. 223, 33 N. W. 707, 5 Am. St. Rep. 839; Locke *v.* First Div. St. Paul, etc., R. Co., 15 Minn. 350.

Missouri.— Jewett *v.* Kansas City, etc., R. Co., 38 Mo. App. 48.

South Carolina.— Cook *v.* Southern R. Co., 78 S. C. 527, 59 S. E. 361.

South Dakota.— Harrison *v.* Chicago, etc., R. Co., 6 S. D. 100, 60 N. W. 405.

See 41 Cent. Dig. tit. "Railroads," §§ 1477, 1480, 1481.

Contra.— Stading *v.* Chicago, etc., R. Co., 78 Nebr. 566, 111 N. W. 460; Omaha, etc., R. Co. *v.* Wright, 47 Nebr. 886, 66 N. W. 842; Cincinnati, etc., R. Co. *v.* Smith, 22 Ohio St. 227, 10 Am. Rep. 729.

The duty to keep a lookout for the safety of passengers, although not performed, cannot avail the owner of the trespassing animal. Locke *v.* St. Paul, etc., R. Co., 15 Minn. 350.

If a person takes a dog upon a trestle without any right to use the trestle as a footpath, he cannot recover for an injury to the dog upon the ground that those in charge of the train failed to keep a lookout and discover it. Cook *v.* Southern R. Co., 78 S. C. 527, 59 S. E. 361.

51. Palmer *v.* Northern Pac. R. Co., 37 Minn. 223, 33 N. W. 707, 5 Am. St. Rep. 839. *Compare* Chicago, etc., R. Co. *v.* Nash, (Ind. 1890) 24 N. E. 884.

It is a duty as to animals rightfully on the highway to keep a lookout to avoid injuring them, but a breach of this duty will not render the company liable for injury to an animal wrongfully upon the highway. Palmer *v.* Northern Pac. R. Co., 37 Minn. 223, 33 N. W. 707, 5 Am. St. Rep. 839.

52. Denver, etc., R. Co. *v.* Olsen, 4 Colo. 239; Stacey *v.* Winona, etc., R. Co., 42 Minn. 158, 43 N. W. 905; Locke *v.* St. Paul, etc., R. Co., 15 Minn. 350; International, etc., R. Co. *v.* Dunham, 68 Tex. 231, 4 S. W. 472, 2 Am. St. Rep. 484; Ft. Worth, etc., R. Co. *v.* Hudgens, 43 Tex. Civ. App. 201, 94 S. W. 378; Missouri, etc., R. Co. *v.* Tolbert, (Tex. Civ. App. 1905) 90 S. W. 508; Houston, etc., R. Co. *v.* Jones, 16 Tex. Civ. App. 179, 40 S. W. 745. But see Seaboard Air-Line R. Co. *v.* Collier, 118 Ga. 463, 45 So. 300; Davis *v.* Southern R. Co., 68 S. C. 446, 47 S. E. 723.

53. Illinois Cent. R. Co. *v.* Noble, 142 Ill. 578, 32 N. E. 684 [*reversing* 42 Ill. App. 509]; Leslie *v.* Wabash R. Co., 118 Ill. App. 606; Mears *v.* Chicago, etc., R. Co., 103 Iowa 203, 72 N. W. 509; Buckman *v.* Missouri, etc., R. Co., 83 Mo. App. 129; Hill *v.* Missouri Pac. R. Co., 66 Mo. App. 184. But see Ohio, etc., R. Co. *v.* Stribling, 38 Ill. App. 17; Missouri, etc., R. Co. *v.* Rodgers, (Tex. Civ. App. 1905) 86 S. W. 625.

54. Chicago, etc., R. Co. *v.* Nash, (Ind. 1890) 24 N. E. 884; Mobile, etc., R. Co. *v.* House, 96 Tenn. 552, 35 S. W. 561.

At places not required to be fenced the duty to keep a lookout for stock is not absolute, but only to exercise ordinary care in so doing. Houston, etc., R. Co. *v.* Van Ness, (Tex. Civ. App. 1907) 101 S. W. 265.

pate their presence, no liability attaches except for failure to exercise a proper degree of care after the animal is discovered.[55]

e. Lights on Locomotive or Cars. A railroad company has an unqualified right to carry a headlight on its locomotives whenever necessary or even conducive to the safety of the train and its passengers, although its effect may be to increase rather than diminish the danger to animals on the track;[56] and the company must in operating trains at night carry a good and sufficient headlight for the purpose of discovering stock upon the track.[57] It is also negligence for a railroad company to back trains at night without any warning of their approach and without lights upon the rear of the train.[58] If the headlight is sufficient and the injury is due to its light being obscured by natural causes, such as fog or snow, the company will not be liable if a proper degree of care under the circumstances is exercised.[59]

d. Obstructions of View. It has been held that a railroad company owes no duty to owners of stock to keep its right of way in such condition as to afford its employees a view of it;[60] but by the weight of authority it is negligence not to keep the right of way free from weeds, bushes, or anything which would conceal from those in charge of the train the presence of animals on or near the track, and the company will be liable for injury to animals which but for such obstructions of view could have been discovered in time to avoid the injury.[61] Where an injury is occasioned by an obstruction of view due to natural causes over which the company has no control, it will not be liable if the train was equipped with proper lights and its servants were proceeding with a proper degree of care.[62]

8. Rate of Speed and Means of Controlling Trains — a. Rate of Speed — (1) *In General.* In the absence of statutory or municipal regulation railroad companies may ordinarily adopt whatever rate of speed they may deem advisable

55. Leslie *v.* Wabash R. Co., 118 Ill. App. 606; Castor *v.* Kansas City, etc., R. Co., 65 Mo. App. 359; Jewett *v.* Kansas City, etc., R. Co., 50 Mo. App. 547; Senate *v.* Chicago, etc., R. Co., 41 Mo. App. 295; Jewett *v.* Kansas City, etc., R. Co., 38 Mo. App. 48; Brooks *v.* Hannibal, etc., R. Co., 27 Mo. App. 573; Ft. Worth, etc., R. Co. *v.* Hudgens, 43 Tex. Civ. App. 201, 94 S. W. 378; Missouri, etc., R. Co. *v.* Tolbert, (Tex. Civ. App. 1905) 90 S. W. 508.

56. Bellefontaine, etc., R. Co. *v.* Schruyhart, 10 Ohio St. 116, holding that it is not negligence to carry a headlight in the twilight of the evening if a proper precaution to avoid collisions with other trains, although it tends to contract the engineer's range of vision and prevent him from seeing animals upon the track as soon as he could otherwise have done.

57. Alabama Great Southern R. Co. *v.* Moody, 92 Ala. 279, 9 So. 238; Joneshoro, etc., R. Co. *v.* Guest, 81 Ark. 267, 99 S. W. 71.

Sufficiency of headlight.— The headlight should be the best in use, which is not to be determined by the mere fact of its adoption on railroads which are generally best equipped, but by its actual utility or superiority as demonstrated by use. Alabama Great Southern R. Co. *v.* Moody, 92 Ala. 279, 9 So. 238 [*explaining* Alabama Great Southern R. Co. *v.* Jones, 71 Ala. 487].

58. Hollender *v.* New York Cent., etc., R. Co., 14 Daly (N. Y.) 219, 6 N. Y. St. 352, 19 Abb. N. Cas. 18.

59. Alabama Great Southern R. Co. *v.* Jones, 71 Ala. 487; Louisville, etc., R. Co. *v.* Melton, 2 Lea (Tenn.) 262.

60. Kansas City, etc., R. Co. *v.* Kirksey, 48 Ark. 366, 3 S. W. 190, holding that a railroad company is not liable for injury to an animal which was standing behind a clump of bushes growing on the right of way and concealed by them until too late to stop the train.

Where cars are left standing near a crossing but not so as to obstruct it, the company will not be liable for injury to an animal coming from behind these cars and struck by a train approaching on another track, which could not be stopped after the animal came into view. Hyer *v.* Chamberlain, 46 Fed. 341.

61. Curry *v.* Southern R. Co., 148 Ala. 57, 42 So. 447; Ohio, etc., R. Co. *v.* Clutter, 82 Ill. 123; Indianapolis, etc., R. Co. *v.* Smith, 78 Ill. 112; Ward *v.* Wilmington, etc., R. Co., 113 N. C. 566, 18 S. E. 211.

The clearing away of obstructions of view must extend to the outer bank of the side ditches which drain the track, or all of the ground over which the company is exercising actual control for corporate purposes (Ward *v.* Wilmington, etc., R. Co., 113 N. C. 566, 18 S. E. 211), but the company need not keep the entire right of way clear of bushes or other growth beyond these limits (Ward *v.* Wilmington, etc., R. Co., 109 N. C. 358, 13 S. E. 926).

62. Alabama Great Southern R. Co. *v.* McAlpine, 75 Ala. 113; Alabama Great Southern R. Co. *v.* Jones, 71 Ala. 487.

provided it is reasonably safe,[63] the primary consideration being the safety of the passengers and property intrusted to their care.[64] If the convenience and business of the public demands rapid transportation they are not restrained from meeting this requirement because of the increased danger to animals which might be upon the track,[65] and will not be liable for such injuries on account of the rate of speed adopted if not otherwise at fault.[66] But whatever rate of speed is adopted the company must exercise a proper degree of care to avoid injuries to animals,[67] which varies according to the danger of injury at a given place,[68] and existing conditions making it easy or difficult to perceive obstructions upon the track; [69] and

63. *Alabama.*— East Tennessee, etc., R. Co. *v.* Deaver, 79 Ala. 216.

Colorado.— Chicago, etc., R. Co. *v.* Campbell, 34 Colo. 380, 83 Pac. 138.

Illinois.— Chicago, etc., R. Co. *v.* Bunker, 81 Ill. App. 616; Wabash, etc., R. Co. *v.* Neikirk, 15 Ill. App. 172.

Ohio.— Central Ohio R. Co. *v.* Lawrence, 13 Ohio St. 66, 82 Am. Dec. 434.

South Dakota.— Miller *v.* Chicago, etc., R. Co., (1907) 111 N. W. 553.

See 41 Cent. Dig. tit. "Railroads," § 1484.

64. New Orleans, etc., R. Co. *v.* Field, 46 Miss. 573; Ohio Cent. R. Co. *v.* Lawrence, 13 Ohio St. 66, 82 Am. Dec. 434; Bemis *v.* Connecticut, etc., R. Co., 42 Vt. 375, 1 Am. Rep. 339.

65. New Orleans, etc., R. Co. *v.* Field, 46 Miss. 573; Doggett *v.* Richmond, etc., R. Co., 81 N. C. 459; Central Ohio R. Co. *v.* Lawrence, 13 Ohio St. 66, 82 Am. Dec. 434. See also Western R. Co. *v.* Sistrunk, 85 Ala. 352, 5 So. 79.

The benefits of a regular and rapid train service to the whole country greatly outweigh any considerations of occasional injury to stock, and it would be an unwise policy to hamper and diminish its usefulness by needless restraints in this regard. Doggett *v.* Richmond, etc., R. Co., 81 N. C. 459.

66. *Illinois.*— Terre Haute, etc., R. Co. *v.* Jenuine, 16 Ill. App. 209; Wabash, etc., R. Co. *v.* Neikirk, 15 Ill. App. 172; Wabash, etc., R. Co. *v.* Neikirk, 13 Ill. App. 387.

Indiana.— Cleveland, etc., R. Co. *v.* Baker, 24 Ind. App. 152, 54 N. E. 814.

Iowa.— Plaster *v.* Illinois Cent. R. Co., 35 Iowa 449.

Michigan.— Stern *v.* Michigan Cent. R. Co., 76 Mich. 591, 43 N. W. 587.

Missouri.— Main *v.* Hannibal, etc., R. Co., 18 Mo. App. 388.

Nebraska.— Grand Island, etc., R. Co. *v.* Phipps, 48 Nebr. 493, 67 N. W. 441; Chicago, etc., R. Co. *v.* Clark, 26 Nebr. 645, 42 N. W. 703.

North Carolina.— Seawell *v.* Raleigh, etc., R. Co., 106 N. C. 272, 10 S. E. 1045; Doggett *v.* Richmond, etc., R. Co., 81 N. C. 459.

Ohio.— Ohio Cent. R. Co. *v.* Lawrence, 13 Ohio St. 66, 82 Am. Dec. 434.

South Carolina.— Zeigler *v.* Northeastern R. Co., 7 S. C. 402.

South Dakota.— Miller *v.* Chicago, etc., R. Co., (1907) 111 N. W. 553.

Texas.— Galveston, etc., R. Co. *v.* Cassinelli, (Civ. App. 1904) 78 S. W. 247; Missouri, etc., R. Co. *v.* Parker, (Civ. App. 1898) 46 S. W. 280; Galveston, etc., R. Co. *v.* Wink, (Civ. App. 1895) 31 S. W. 326.

Vermont.— Bemis *v.* Connecticut, etc., R. Co., 42 Vt. 375, 1 Am. Rep. 339.

See 41 Cent. Dig. tit. "Railroads," § 1484.

The fact that a train was running faster than schedule time in an effort to make up time will not render the company liable where those in charge of the train used all means in their power to avoid the accident. St. Louis, etc., R. Co. *v.* Felton, (Tex. App. 1889) 14 S. W. 1072.

67. New Orleans, etc., R. Co. *v.* Field, 46 Miss. 573; Campbell *v.* Missouri, etc., R. Co., 59 Mo. App. 151. See also Louisville, etc., R. Co. *v.* Cochran, 105 Ala. 354, 16 So. 797.

68. Alabama Midland R. Co. *v.* McGill, 121 Ala. 230, 25 So. 731, 77 Am. St. Rep. 52; Chicago, etc., R. Co. *v.* Engle, 84 Ill. 397; Kinyon *v.* Chicago, etc., R. Co., 118 Iowa 349, 92 N. W. 40, 96 Am. St. Rep. 382.

At crossings trains should be operated with greater care to avoid injury to animals which might rightfully be upon the track (Chicago, etc., R. Co. *v.* Cauffman, 38 Ill. 424); but even at crossings no particular rate of speed can be held to be negligence *per se*, the question depending upon the locality of the crossing and the amount of travel (East Tennessee, etc., R. Co. *v.* Deaver, 79 Ala. 216); and at the crossing of an ordinary public highway it is not negligence on the part of a railroad company *not* to reduce its customary rate of speed in the absence of any special circumstances charging its servants with knowledge that an obstruction at such crossing was likely to be encountered (Zeigler *v.* Northeastern R. Co., 7 S. C. 402; Missouri, etc., R. Co. *v.* Morris, (Tex. Civ. App. 1901) 63 S. W. 888).

In passing through cities, towns, and villages trains should be run with a greater degree of care and at a less rate of speed (Lafayette, etc., R. Co. *v.* Shriner, 6 Ind. 141); but no arbitrary rule can be laid down as to the rate of speed which would apply to all parts of the town, since what would be unreasonable speed in one portion might be entirely proper in another and less thickly populated portion (Burlington, etc., R. Co. *v.* Wendt, 12 Nebr. 76, 10 N. W. 456); and the mere fact of a train passing a small station at which it was not required to stop without slackening its speed is not sufficient to show negligence (Texas, etc., R. Co. *v.* Langham, (Tex. Civ. App. 1906) 95 S. W. 686).

69. Western R. Co. *v.* Mitchell, 148 Ala.

it has been held to be negligence for a railroad company to run a train at a dangerous rate of speed at a place where those in charge of the train knew that animals were accustomed to congregate and be upon the track,[70] or through a village where animals are permitted to run at large and are liable to be upon the track.[71] So, in the absence of statute or municipal regulation, no particular rate of speed is negligence *per se*,[72] but depends upon the facts and circumstances of the particular case,[73] and therefore may be considered as an element of negligence in connection with other circumstances.[74]

(II) *Violation of Statutes or Ordinances.* There are in some jurisdictions statutes, and in many towns and cities ordinances, limiting the speed at which trains may be operated at different places.[75] In some cases the statutes expressly provide that operating trains at a speed in excess of the limit prescribed shall be deemed negligence,[76] or shall render the company liable for any injuries occurring while trains are so operated;[77] but independently of such express pro-

35, 41 So. 427, holding that where a bank of fog appears ahead of a train and across the track so as to hide from view objects that might be beyond it on or near the track, it is negligence for an engineer not to regulate the speed of the train in accordance with the danger.

70. Campbell *v.* Missouri, etc., R. Co., 59 Mo. App. 151. *Compare* Chicago, etc., R. Co. *v.* Clark, 26 Nebr. 645, 42 N. W. 703.

71. Chicago, etc., R. Co. *v.* Engle, 84 Ill. 397.

72. *Alabama.*—Western R. Co. *v.* Sistrunk, 85 Ala. 352, 5 So. 79; East Tennessee, etc., R. Co. *v.* Deaver, 79 Ala. 216.

Colorado.— Chicago, etc., R. Co. *v.* Campbell, 34 Colo. 380, 83 Pac. 138.

Georgia.— Georgia Cent. R. Co. *v.* Williams Buggy Co., 121 Ga. 293, 48 S. E. 939.

Iowa.— Flattes *v.* Chicago, etc., R. Co., 35 Iowa 191.

Missouri.— Young *v.* Hannibal, etc., R. Co., 79 Mo. 336; Wallace *v.* St. Louis, etc., R. Co., 74 Mo. 594; Wasson *v.* McCook, 80 Mo. App. 483; Main *v.* Hannibal, etc., R. Co., 18 Mo. App. 388.

Nebraska.— Burlington, etc., R. Co. *v.* Wendt, 12 Nebr. 76, 10 N. W. 456.

Texas.— Gulf, etc., R. Co. *v.* Anson, (1907) 105 S. W. 989.

Vermont.— Morse *v.* Rutland, etc., R. Co., 27 Vt. 49.

See 41 Cent. Dig. tit. "Railroads," § 1484.

In operating trains at night the rule in Alabama is that it is negligence on the part of a railroad company to run trains at such a rate of speed that they could not be stopped by the use of the ordinary means and appliances within the distance that the engineer can see stock upon the track by the aid of the headlight (Louisville, etc., R. Co. *v.* Christian Moerlein Brewing Co., 150 Ala. 390, 43 So. 723; Western R. Co. *v.* Stone, 145 Ala. 663, 39 So. 723; Southern R. Co. *v.* Pogue, 145 Ala. 444, 40 So. 565; Georgia Cent. R. Co. *v.* Main, 143 Ala. 149, 42 So. 108; Alabama Midland R. Co. *v.* McGill, 121 Ala. 230, 25 So. 731, 77 Am. St. Rep. 52; Louisville, etc., R. Co. *v.* Kelton, 112 Ala. 533, 21 So. 819; Central R., etc., Co. *v.* Ingram, 98 Ala. 395, 12 So. 801; Birmingham Mineral R. Co. *v.* Harris, 98 Ala. 326, 13 So. 377; Memphis, etc., R. Co. *v.* Lyon, 62 Ala. 71), unless from unknown causes the machinery and appliances have in the course of travel become defective, or the intervention of natural causes has rendered it inefficient, as where the light cast from a proper headlight is obscured by fog, rain, or snow (Alabama Great Southern R. Co. *v.* Jones, 71 Ala. 487); but elsewhere this rule has been expressly disproved as seriously and needlessly impairing the usefulness of railroad transportation at night (Winston *v.* Raleigh, etc., R. Co., 90 N. C. 66).

73. Young *v.* Hannibal, etc., R. Co., 79 Mo. 336; Burlington, etc., R. Co. *v.* Wendt, 12 Nebr. 76, 10 N. W. 456; Louisville, etc., R. Co. *v.* Milam, 9 Lea (Tenn.) 223.

74. *Arkansas.*— Ford *v.* St. Louis, etc., R. Co., 66 Ark. 363, 50 S. W. 864.

Iowa.— Hartman *v.* Chicago Great Western R. Co., 132 Iowa 582, 110 N. W. 10; Kinyon *v.* Chicago, etc., R. Co., 118 Iowa 349, 92 N. W. 40, 96 Am. St. Rep. 382.

Missouri.— Campbell *v.* Missouri, etc., R. Co., 59 Mo. App. 151.

Tennessee.— Louisville, etc., R. Co. *v.* Milam, 9 Lea 223.

Texas.— Gulf, etc., R. Co. *v.* Anson, (Civ. App. 1904) 82 S. W. 785.

See 41 Cent. Dig. tit. "Railroads," § 1484.

75. See *supra*, X, B, 4, c; and cases cited *infra*, notes 76–81.

76. See Monahan *v.* Keokuk, etc., R. Co., 45 Iowa 523.

The Iowa statute which provides that operating trains upon depot grounds where no fences are built at over eight miles per hour shall be deemed negligence and render the company liable for injuries to live stock applies only to stock running at large. Strever *v.* Chicago, etc., R. Co., 106 Iowa 137, 76 N. W. 513; Johnson *v.* Chicago, etc., R. Co., 75 Iowa 157, 39 N. W. 242.

77. Bell *v.* Kansas City, etc., R. Co., (Miss. 1891) 9 So. 289; New Orleans, etc., R. Co. *v.* Toulmé, 59 Miss. 284.

The fact that the train had been slowed down so that at the instant of the collision the speed was within the prescribed limit does not relieve the company from liability if just previously the train was exceeding the limit and the accident was due to this fact. Illinois Cent. R. Co. *v.* Jordan, 63 Miss.

visions a violation of such speed regulations is negligence *per se*,[78] and renders the railroad company liable for injuries to stock occurring within the limits to which the statutes or ordinances apply and which are directly due to such excessive speed,[79] or to a failure to slow up on approaching the crossing as required by statute.[80] If the injury occurs outside of the territory to which the speed regulations apply, the company is not liable unless otherwise negligent.[81]

(III) *EFFECT OF STOCK LAWS.* If an animal is suffered to run at large in violation of law and is killed or injured while unlawfully upon a railroad track, the fact that the train was being run at a high rate of speed or without proper care in other respects will not render the company liable unless its servants, after discovering the animal, could by the exercise of proper care have avoided the injury.[82]

(IV) *INCREASING SPEED WHERE COLLISION IS INEVITABLE.* If animals appear upon the track at a point so near a train as to make a collision inevitable, the company is not liable because the engineer increases the speed in order to diminish the danger to the train,[83] although the speed is increased beyond the

458; New Orleans, etc., R. Co. *v.* Toulmé, 59 Miss. 284.

78. Bowman *v.* Chicago, etc., R. Co., 85 Mo. 533; Backenstoe *v.* Wabash, etc., R. Co., 23 Mo. App. 148; Chicago, etc., R. Co. *v.* Erwin, (Tex. Civ. App. 1901) 65 S. W. 496; Texas, etc., R. Co. *v.* Cockrell, 2 Tex. App. Civ. Cas. § 717. But see Southern R. Co. *v.* Wood, 52 S. W. 796, 21 Ky. L. Rep. 575.

A prima facie case is made by proof that at the time of the accident the train was running at a prohibited rate of speed. Ohio, etc., R. Co. *v.* O'Donnell, 26 Ill. App. 348.

If the statute or ordinance is not pleaded and does not furnish the ground of action a violation of its provisions is evidence of negligence but in such case it is not negligence *per se*. Windsor *v.* Hannibal, etc., R. Co., 45 Mo. App. 123.

79. *Alabama.*— Louisville, etc., R. Co. *v.* Christian Moerlein Brewing Co., 150 Ala. 390, 43 So. 723.

Illinois.— Lake Erie, etc., R. Co. *v.* Norris, 60 Ill. App. 112.

Iowa.— O'Leary *v.* Chicago, etc., R. Co., (1905) 103 N. W. 362.

Minnesota.— Fritz *v.* First Div. St. Paul, etc., R. Co., 22 Minn. 404.

Missouri.— Bowman *v.* Chicago, etc., R. Co., 85 Mo. 533; Backenstoe *v.* Wabash, etc., R. Co., 23 Mo. App. 148.

New Hampshire.— Clark *v.* Boston, etc., R. Co., 64 N. H. 323, 10 Atl. 676.

Texas.— Houston, etc., R. Co. *v.* Terry, 42 Tex. 451; Texas, etc., R. Co. *v.* Cockrell, 2 Tex. App. Civ. Cas. § 717.

See 41 Cent. Dig. tit. "Railroads," § 1485.

Territory embraced.—A statute prohibiting the running of trains at over a certain speed "through any town, city or village" applies to all violations of its terms within the legal or corporate limits of such city, town, or village, without regard to the irregular and variable lines of settlement and improvement. Illinois Cent. R. Co. *v.* Jordan, 63 Miss. 458. See also Bell *v.* Kansas City, etc., R. Co., (Miss. 1891) 9 So. 289.

The speed at the point of entering the territory to which the statute or ordinance applies must be within the prescribed limit and the speed in approaching such territory must be regulated accordingly. Lake Erie, etc., R. Co. *v.* Norris, 60 Ill. App. 112.

The fact that an ordinance provides for a fine for running trains in violation of its provisions does not affect the right of action based on negligence in running over an animal on the tracks. Backenstoe *v.* Wabash, etc., R. Co., 23 Mo. App. 148.

Regulations of railroad commissioners in regard to the speed of trains have been held to be designed merely for the safety of trains and not to affect the duty of the railroad company to a person who leaves a horse standing near a railroad track. Gerry *v.* New York, etc., R. Co., 194 Mass. 35, 79 N. E. 783.

Under the Canadian statute the speed limit of six miles per hour while passing through a thickly populated portion of a city, town, or village does not apply if the road is properly fenced and cattle-guards provided at crossings. Grand Trunk R. Co. *v.* McKay, 34 Can. Sup. Ct. 81 [*reversing* 5 Ont. L. Rep. 313, 2 Ont. Wkly. Rep. 57].

80. Charleston, etc., R. Co. *v.* Camp, 3 Ga. App. 232, 59 S. E. 710.

81. Nashville, etc., R. Co. *v.* Hembree, 85 Ala. 481, 5 So. 173; Western R. Co. *v.* Sistrunk, 85 Ala. 352, 5 So. 79; Monahan *v.* Keokuk, etc., R. Co., 45 Iowa 523.

An exception to this rule is made where the injury, although occurring outside of the limits to which the statute or ordinance applies, is the proximate result of a violation of the speed regulations within such limits, as where animals are driven by a train running at an unlawful speed from within such limits to a point beyond where they are overtaken and killed. Story *v.* Chicago, etc., R. Co., 79 Iowa 402, 44 N. W. 690.

82. Toledo, etc., R. Co. *v.* Barlow, 71 Ill. 640.

But if a train is running in violation of an ordinance limiting its rate of speed and on this account kills or injures an animal, the company will be liable, although the animal was unlawfully running at large, if it had been confined and escaped without the owner's knowledge or consent. Bowman *v.* Chicago, etc., R. Co., 85 Mo. 533.

83. Chicago, etc., R. Co. *v.* Jones, 59 Miss.

limit fixed by statute as rendering the company liable for injuries caused while so running.[84]

b. Means of Controlling Trains. It is the duty of railroad companies to equip their trains with sufficient brakes to stop the train within a reasonable time and distance,[85] and to employ a sufficient number of brakemen properly to operate them,[86] and they will be liable for injuries to animals which in the absence of such neglect could have been prevented;[87] but railroad companies are not obliged to procure the best appliances regardless of cost for the management of their trains but only such as are usually and reasonably sufficient.[88] It is also negligent to leave cars standing on a descending grade without being securely fastened, and the company will be liable for injuries to stock caused by such cars escaping and running down the grade.[89]

9. Precautions as to Animals Seen On or Near Tracks — a. In General. When animals are seen on or in dangerous proximity to a railroad track, it is the duty of those in charge of the train to exercise ordinary care to avoid injuring them and a failure to do so will render the company liable for any injuries occasioned thereby.[90] What will amount to such care depends upon the circumstances of the particular case,[91] and those in charge of the train are only required to do what

465; Owens *v.* Hannibal, etc., R. Co., 58 Mo. 386; Cranston *v.* Cincinnati, etc., R. Co., 1 Handy (Ohio) 193, 12 Ohio Dec. (Reprint) 97; Bunnell *v.* Rio Grande Western R. Co., 13 Utah 314, 44 Pac. 927.

A collision with an animal is less dangerous to the safety of the train if at a high rate of speed than at a low one. Cranston *v.* Cincinnati, etc., R. Co., 1 Handy (Ohio) 193, 12 Ohio Dec. (Reprint) 97.

84. Chicago, etc., R. Co. *v.* Jones, 59 Miss. 465.

85. Vicksburg, etc., R. Co. *v.* Patton, 31 Miss. 156, 66 Am. Dec. 552; Forbes *v.* Atlantic, etc., R. Co., 76 N. C. 454.

Inability to stop within the distance shown by the headlight at the speed at which the train is operated is not sufficient to render the company liable if after discovering the animal upon the track everything possible was done to avoid the injury. Winston *v.* Raleigh, etc., R. Co., 90 N. C. 66.

86. Toledo, etc., R. Co. *v.* McGinnis, 71 Ill. 346; McDonald *v.* Chicago, etc., R. Co., 51 Mich. 628, 17 N. W. 210.

87. Toledo, etc., R. Co. *v.* McGinnis, 71 Ill. 346; McDonald *v.* Chicago, etc., R. Co., 51 Mich. 628, 17 N. W. 210; Forbes *v.* Atlantic, etc., R. Co., 76 N. C. 454.

88. Natchez, etc., R. Co. *v.* McNeil, 61 Miss. 434.

Air-brakes.— The fact that a train was not equipped with air-brakes is not sufficient to charge the company with liability for stock killed or injured. Bartley *v.* Georgia, etc., R. Co., 60 Ga. 182; Grundy *v.* Louisville, etc., R. Co., 2 S. W. 899, 8 Ky. L. Rep. 689.

89. Battle *v.* Wilmington, etc., R. Co., 66 N. C. 343.

90. *Arkansas.*— Kansas City, etc., R. Co. *v.* Ingram, 80 Ark. 269, 97 S. W. 55.

California.— Richmond *v.* Sacramento Valley R. Co., 18 Cal. 351.

Colorado.— Denver, etc., R. Co. *v.* Nye, 9 Colo. App. 94, 47 Pac. 654.

Illinois.— Lake Erie, etc., Co. *v.* Norris, 60 Ill. App. 112; Cleveland, etc., R. Co. *v.* Rice, 48 Ill. App. 51; Shuman *v.* Indianapolis, etc., R. Co., 11 Ill. App. 472.

Iowa.— Lawson *v.* Chicago, etc., R. Co., 57 Iowa 672, 11 N. W. 633.

Kentucky.— Kentucky Cent. R. Co. *v.* Lebus, 14 Bush 518; Kean *v.* Chenault, 41 S. W. 24, 19 Ky. L. Rep. 448.

Missouri.— Young *v.* Hannibal, etc., R. Co., 79 Mo. 336; Kendig *v.* Chicago, etc., R. Co., 79 Mo. 207; Buster *v.* Hannibal, etc., R. Co., 18 Mo. App. 578.

North Dakota.— Bostwick *v.* Minneapolis, etc., R. Co., 2 N. D. 440, 51 N. W. 781.

Texas.— San Antonio, etc., R. Co. *v.* Harris, (Civ. App. 1904) 79 S. W. 841; Missouri, etc., R. Co. *v.* Meithvein, (Civ. App. 1896) 33 S. W. 1093.

Virginia.— Trout *v.* Virginia, etc., R. Co., 23 Gratt. 619.

West Virginia.— Blankenship *v.* Kanawha, etc., R. Co., 43 W. Va. 135, 27 S. E. 355.

United States.— Eddy *v.* Evans, 58 Fed. 151, 7 C. C. A. 129.

See 41 Cent. Dig. tit. "Railroads," § 1489.

91. Cranston *v.* Cincinnati, etc., R. Co., 1 Handy (Ohio) 193, 12 Ohio Dec. (Reprint) 97; Bemis *v.* Connecticut, etc., R. Co., 42 Vt. 375, 1 Am. Rep. 339.

A different degree of care and precaution is required according to whether an animal is actually on or merely in the vicinity of the track (Western R. Co. *v.* Lazarus, 88 Ala. 453, 16 So. 877; Savannah, etc., R. Co. *v.* Rice, 23 Fla. 575, 3 So. 170); whether the animal is grazing quietly or moving toward the track (Chicago, etc., R. Co. *v.* Kellam, 92 Ill. 245, 34 Am. Rep. 128); whether on the approach of the train it moves away quietly or runs about in the vicinity of the track in an excited manner (Wilson *v.* Norfolk, etc., R. Co., 90 N. C. 69); and whether its means of egress from the vicinity of the track is clear or obstructed by fences or embankments (Little Rock, etc., R. Co. *v.* Trotter, 37 Ark. 593; Warren *v.* Chicago, etc., R. Co., 59 Mo. App. 367).

an ordinarily prudent and skilful person would be expected to do under the circumstances.[92] It is not necessary when animals are seen, to guard against every possible contingency which might result in injury to them, but only such as are reasonably to be apprehended;[93] and all precautions as to avoiding injury to stock are to be exercised subject to the paramount duty of caring for the safety of persons and property upon the train.[94] But where an injury to an animal is reasonably to be apprehended, all efforts consistent with the safety of the train should be made to avoid it,[95] and it is clearly negligence where animals are seen upon the track, for the engineer to proceed without giving any alarm or attempting to stop or check the speed of the train if there is opportunity to do so.[96] In emergencies something must be left to the discretion of the engineer, both as to what precautions would be best calculated to prevent the injury,[97] and also as to what if anything may prudently be done consistently with the safety of the train and its passengers,[98] particularly where the animal is wrongfully upon the track,[99] and infallibility can neither be expected nor required.[1] In some juris-

92. Hot Springs R. Co. *v.* Newman, 36 Ark. 607; Wabash R. Co. *v.* Aarvig, 66 Ill. App. 146; Yazoo, etc., R. Co. *v.* Wright, 78 Miss. 125, 28 So. 806; Cantrell *v.* Kansas City, etc., R. Co., 69 Miss. 435, 10 So. 580.

No particular act or precaution can be said to be necessary in every case and under all circumstances, as the same precaution which in some cases might be proper would in others be useless or even mischievous. Cantrell *v.* Kansas City, etc., R. Co., 69 Miss. 435, 10 So. 580.

The fact that the engineer jumped from the train will not render the company liable where the alarm was sounded, the brakes applied, and the engine reversed, and he did not abandon his post until everything was done which could be to stop the train. Yazoo, etc., R. Co. *v.* Brumfield, 64 Miss. 637, 1 So. 905.

93. Chicago, etc., R. Co. *v.* Bradfield, 63 Ill. 220.

Where a runaway team crosses the track in front of a train and there is no reason to believe that it will change its course and come again upon the track, it is not necessary to alter the speed of the train in anticipation of such a contingency. Judd *v.* Wabash, etc., R. Co., 23 Mo. App. 56; Watson *v.* Philadelphia, etc., R. Co., 2 Walk. (Pa.) 456 [*affirming* 7 Phila. 249].

It is not always sufficient, however, for the engineer to guard against what he believes will happen, but he must also provide against what he apprehends may happen. Grimmell *v.* Chicago, etc., R. Co., 73 Iowa 93, 34 N. W. 758.

94. Witherell *v.* Milwaukee, etc., R. Co., 24 Minn. 410; Cranston *v.* Cincinnati, etc., R. Co., 1 Handy (Ohio) 193, 12 Ohio Dec. (Reprint) 97; Bunnell *v.* Rio Grande Western R. Co., 13 Utah 314, 44 Pac. 927; Bemis *v.* Connecticut, etc., R. Co., 42 Vt. 375, 1 Am. Rep. 339.

The essential inquiry therefore is not whether every possible effort was made to stop the train and avoid the accident, but whether that which was done was what ordinary care and skill and reasonable prudence demanded in view of the safety of the train, and the circumstances of the particular case. Bunnell *v.* Rio Grande Western R. Co., 13 Utah 314, 44 Pac. 927. See also Wallace *v.* St. Louis, etc., R. Co., 74 Mo. 594.

95. Parker *v.* Dubuque, etc., R. Co., 34 Iowa 399; Louisville, etc., R. Co. *v.* Kice, 109 Ky. 786, 60 S. W. 705, 22 Ky. L. Rep. 1462; Troutwine *v.* Louisville, etc., R. Co., 105 S. W. 142, 32 Ky. L. Rep. 5; Eddy *v.* Evans, 58 Fed. 151, 7 C. C. A. 129.

If an engineer takes chances on the consequences of an act apparently dangerous, and with full opportunity of avoiding all danger, he does so at the risk of the company. Elmsley *v.* Georgia Pac. R. Co., (Miss. 1891) 10 So. 41.

A reversal of the engine is not required if it would endanger the safety of persons upon the train (Nashville, etc., R. Co. *v.* Troxlee, 1 Lea (Tenn.) 520); but cannot be excused merely on the ground that it might be injurious to the machinery of the engine (East Tennessee, etc., R. Co. *v.* Selcer, 7 Lea (Tenn.) 557).

96. Springfield, etc., R. Co. *v.* Andrews, 68 Ill. 56; Chicago, etc., R. Co. *v.* Barrie, 55 Ill. 226; Missouri Pac. R. Co. *v.* Wilson, 28 Kan. 637; Illinois Cent. R. Co. *v.* Person, 65 Miss. 319, 3 So. 375; Jones *v.* North Carolina R. Co., 70 N. C. 626; Aycock *v.* Wilmington, etc., R. Co., 51 N. C. 231.

97. Mobile, etc., R. Co. *v.* Caldwell, 83 Ala. 196, 3 So. 445; New Orleans, etc., R. Co. *v.* Bourgeois, 66 Miss. 3, 5 So. 629, 14 Am. St. Rep. 534; Bemis *v.* Connecticut, etc., R. Co., 42 Vt. 375, 1 Am. Rep. 339.

98. Cramston *v.* Cincinnati, etc., R. Co., 1 Handy (Ohio) 193, 12 Ohio Dec. (Reprint) 97; Bemis *v.* Connecticut, etc., R. Co., 42 Vt. 375, 1 Am. Rep. 339.

99. Bemis *v.* Connecticut, etc., R. Co., 42 Vt. 375, 1 Am. Rep. 339.

1. Mobile, etc., R. Co. *v.* Caldwell, 83 Ala. 196, 3 So. 445; New Orleans, etc., R. Co. *v.* Bourgeois, 66 Miss. 3, 5 So. 629, 14 Am. St. Rep. 534.

Where the case requires the exercise of judgment and discretion, negligence cannot be inferred merely because the result shows that some other course might have been better than the one actually taken (Wattson *v.* Philadelphia, etc., R. Co., 7 Phila. (Pa.) 249

dictions the statutes specifically require certain precautions to be taken when animals are seen upon the track;[2] but they do not require an attempt of the impossible,[3] or contemplate that any action should be taken which, under the circumstances of the particular case, would endanger the safety of the train,[4] or render the company liable for failure to observe all of such precautions where there was not sufficient time to do so,[5] provided that if there was sufficient time for some of them that was done which was best calculated to avoid the accident.[6]

b. Trespassing Animals. The weight of authority is undoubtedly to the effect that as a general rule a railroad company is not liable for injuries to trespassing animals in the absence of gross negligence or wilful or intentional injury;[7] but it has been held that in the application of this rule a distinction should be made between a failure to observe such precautions as are designed to guard generally against possible injuries, and precautions to avoid a particular injury where the danger is known,[8] and that while it is not necessary to maintain a lookout for trespassing animals,[9] the fact that animals are wrongfully upon a railroad track does not relieve the railroad company after their presence and peril are discovered from exercising ordinary care to prevent injuring them;[10] but it has been held

[*affirmed* in 2 Walk. 456]; but the company must employ persons of reasonable skill and judgment to manage their trains, and the mere fact that the injury was due to a mistake of judgment is not necessarily sufficient to relieve the company from liability (Parker *v.* Dubuque Southwestern R. Co., 34 Iowa 399).

2. Mobile, etc., R. Co. *v.* Malone, 46 Ala. 391; Memphis, etc., R. Co. *v.* Scott, 87 Tenn. 494, 11 S. W. 317.

The statute applies only to injuries due to direct collision with the train and the omission of some prescribed precaution will not render the company liable for an injury done by an animal to itself because of fright. Holder *v.* Chicago, etc., R. Co., 11 Lea (Tenn.) 176.

The terms "on the track" and "upon the road" as used in the statutes prescribing the precautions to be taken do not apply to the entire right of way, but mean being actually on the track or in such a position as to be struck or injured by the train while moving on the rails, and if the animal when seen is upon some other portion of the right of way the statutes do not apply and the case depends upon common-law principles. East Tennessee, etc., R. Co. *v.* Bayliss, 77 Ala. 429, 54 Am. Rep. 69; Louisville, etc., R. Co. *v.* Reidmond, 11 Lea (Tenn.) 205 [*modifying* Nashville, etc., R. Co. *v.* Anthony, 1 Lea (Tenn.) 516].

3. East Tennessee, etc., R. Co. *v.* Deaver, 79 Ala. 216; East Tennessee, etc., R. Co. *v.* Bayliss, 77 Ala. 429, 54 Am. Rep. 69; Mobile, etc., R. Co. *v.* Thompson, 101 Tenn. 197, 47 S. W. 151.

4. East Tennessee, etc., R. Co. *v.* Deaver, 79 Ala. 216; Nashville, etc., R. Co. *v.* Troxlee, 1 Lea (Tenn.) 520.

5. Mobile, etc., R. Co. *v.* Caldwell, 83 Ala. 196, 3 So. 445; Mobile, etc., R. Co. *v.* Thompson, 101 Tenn. 197, 47 S. W. 151; East Tennessee, etc., R. Co. *v.* Scales, 2 Lea (Tenn.) 688 [*disapproving* Memphis, etc., R. Co. *v.* Smith, 9 Heisk. (Tenn.) 860; Nashville, etc., R. Co. *v.* Thomas, 5 Heisk. (Tenn.) 262].

6. Memphis, etc., R. Co. *v.* Scott, 87 Tenn. 494, 11 S. W. 317.

7. See *supra*, X, H, 1, c.

8. Bostwick *v.* Minneapolis, etc., R. Co., 2 N. D. 440, 51 N. W. 781, where the court said that the rule limiting the liability of the company to cases of gross negligence or wanton injury should be confined to cases where the negligence consisted in a failure to keep a lookout, the speed of the train, omission of signals, or some act of a kindred nature having no reference to any known obstruction or danger, and that the cases establishing the general rule were in fact of this character.

9. See *supra*, X, H, 7, b.

10. *Illinois.*— Chicago, etc., R. Co. *v.* Smedley, 65 Ill. App. 644; Cleveland, etc., R. Co. *v.* Aherns, 42 Ill. App. 434.

Kansas.— Leavenworth, etc., R. Co. *v.* Forbes, 37 Kan. 445, 15 Pac. 595.

Minnesota.— Mooers *v.* Northern Pac. R. Co., 69 Minn. 90, 71 N. W. 905; Witherell *v.* Milwaukee, etc., R. Co., 24 Minn. 410.

Mississippi.— Roberds *v.* Mobile, etc., R. Co., 74 Miss. 334, 21 So. 10.

North Dakota.— Bostwick *v.* Minneapolis, etc., R. Co., 2 N. D. 440, 51 N. W. 781.

South Dakota.— Borneman *v.* Chicago, etc., R. Co., 19 S. D. 459, 104 N. W. 208.

Texas.— Galveston, etc., R. Co. *v.* Balkam, (Civ. App. 1892) 20 S. W. 860.

Canada.— Campbell *v.* Great Western R. Co., 15 U. C. Q. B. 498.

See 41 Cent. Dig. tit. "Railroads," § 1494.

What will amount to ordinary care with regard to trespassing animals depends upon a variety of circumstances, and is always subject to the paramount duty of providing for the safety of persons and property on the train or otherwise lawfully upon the track. Bemis *v.* Connecticut, etc., R. Co., 42 Vt. 375, 1 Am. Rep. 339.

If all reasonable means are used consistent with the safety of the train as soon as such animals are discovered the company will not be liable. Jewett *v.* Kansas City, etc., R. Co., 50 Mo. App. 547.

that a railroad company is not obliged to stop or to slacken the speed of its trains as a precaution against injury to trespassing animals.[11]

c. Duty to Stop or Slacken Speed. The public interests involved in rapid transportation and regular connections, as well as the safety of the train itself, demand that the progress of trains should not unnecessarily be interfered with,[12] and it is not always necessary to stop or reduce speed because animals are discovered near the track,[13] or that this should always be done immediately even where the animals are discovered upon the track,[14] nor is it necessary in any case to attempt to stop or reduce speed if it would endanger the safety of the train and its passengers.[15] As to animals discovered on the track, however, the same presumption cannot be indulged as in the case of persons that they will understand a warning signal and leave the track,[16] and ordinarily the speed of the train should be reduced and if necessary to avoid the accident it should be stopped if it can be done with safety to the train.[17] Where animals are seen not on but

11. Darling *v.* Boston, etc., R. Co., 121 Mass. 118; Magilton *v.* New York Cent., etc., R. Co., 82 Hun (N. Y.) 308, 31 N. Y. Suppl. 241; Boyle *v.* New York, etc., R. Co., 39 Hun (N. Y.) 171 [*affirmed* in 115 N. Y. 636, 21 N. E. 724]. But see Toledo, etc., R. Co. *v.* Bray, 57 Ill. 514.

If the usual alarm signals are given this is all that can be required in the case of trespassing animals, although the train might have been stopped in time to avoid the injury. Boyle *v.* New York, etc., R. Co., 39 Hun (N. Y.) 171 [*affirmed* in 115 N. Y. 636, 21 N. E. 724].

12. *Arkansas.*— Little Rock, etc., R. Co. *v.* Trotter, 37 Ark. 593.

Florida.— Savannah, etc., R. Co. *v.* Rice, 23 Fla. 575, 3 So. 170.

Illinois.— Chicago, etc., R. Co. *v.* Bradfield, 63 Ill. 220.

Mississippi.— New Orleans, etc., R. Co. *v.* Bourgeois, 66 Miss. 3, 5 So. 629, 14 Am. St. Rep. 534.

Pennsylvania.— Wattson *v.* Philadelphia, etc., R. Co., 7 Phila. 249 [*affirmed* in 2 Walk. 456].

Tennessee.— Louisville, etc., R. Co. *v.* Reidmond, 11 Lea 205.

See 41 Cent. Dig. tit. "Railroads," §§ 1496, 1497.

13. Savannah, etc., R. Co. *v.* Rice, 23 Fla. 575, 3 So. 170; Illinois Cent. R. Co. *v.* Wren, 43 Ill. 77; Yazoo, etc., R. Co. *v.* Wright, 78 Miss. 125, 28 So. 806; New Orleans, etc., R. Co. *v.* Bourgeois, 66 Miss. 3, 5 So. 629, 14 Am. St. Rep. 534; Yazoo, etc., R. Co. *v.* Brumfield, 64 Miss. 637, 1 So. 905; Louisville, etc., R. Co. *v.* Reidmond, 11 Lea (Tenn.) 205.

Whether the speed of a train should be slackened where animals are seen near the track depends upon whether there is any indication or reason to believe that they will come upon the track and also upon whether it can be done without endangering the safety of the train. Grant *v.* Hannibal, etc., R. Co., 25 Mo. App. 227.

14. Little Rock, etc., R. Co. *v.* Trotter, 37 Ark. 593; Hot Springs R. Co. *v.* Newman, 36 Ark. 607; Warren *v.* Chicago, etc., R. Co., 59 Mo. App. 367.

Where an animal is in charge of a person, the engineer has a right to presume that the warning signals will be heeded by such person and the animal driven from the track, and the company will not be liable where this is not done and the animal is abandoned after it is too late to stop the train and avoid the injury. Wabash, etc., R. Co. *v.* Krough, 13 Ill. App. 431.

The mere fact that an engineer sees a team hitched to a load of logs standing on a crossing over a mile away is not sufficient to warn him that the load is fast upon the track so that the team cannot move it, and it is not necessary for him to check the speed of the train until signaled to do so or until near enough to see the danger for himself. Frost *v* Milwaukee, etc., R. Co., 96 Mich. 470, 56 N. W. 19.

15. *Colorado.*— Denver, etc., R. Co. *v.* Divelbiss, 13 Colo. App. 304, 57 Pac. 743.

Ohio.— Cranston *v.* Cincinnati, etc., R. Co., 1 Handy 193, 12 Ohio Dec. (Reprint) 97.

Texas.— Texas, etc., R. Co. *v.* Langham, (Civ. App. 1906) 95 S. W. 686.

Utah.— Bunnell *v.* Rio Grande Western R. Co., 13 Utah 314, 44 Pac. 927.

Vermont.— Bemis *v.* Connecticut, etc., R. Co., 42 Vt. 375, 1 Am. Rep. 339.

See 41 Cent. Dig. tit. "Railroads," §§ 1496, 1497.

16. Alabama Great Southern R. Co. *v.* Powers, 73 Ala. 244.

17. *Arkansas.*— St. Louis, etc., R. Co. *v.* Carlisle, 75 Ark. 560, 88 S. W. 584.

Illinois.— Paris, etc., R. Co. *v.* Mullins, 66 Ill. 526; Chicago, etc., R. Co. *v.* Barrie, 55 Ill. 226; St. Louis, etc., R. Co. *v.* Russell, 39 Ill. App. 443; Shuman *v.* Indianapolis, etc., R. Co., 11 Ill. App. 472.

Iowa.— Lawson *v.* Chicago, etc., R. Co., 57 Iowa 672, 11 N. W. 633.

Kansas.— Missouri Pac. R. Co. *v.* Wilson, 28 Kan. 637.

Kentucky.—Kentucky Cent. R. Co. *v.* Lebus, 14 Bush 518; Mobile, etc., R. Co. *v.* Morrow, 97 S. W. 389, 30 Ky. L. Rep. 83.

Louisiana.— Fossier *v.* Morgan's Louisiana, etc., R., etc., Co., McGloin 349.

Mississippi.— Newman *v.* Vicksburg, etc., R. Co., 64 Miss. 115, 8 So. 172.

Missouri.— Pryor *v.* St. Louis, etc., R. Co., 69 Mo. 215; Beall *v.* Chicago, etc., R. Co., 97 Mo. App. 111, 71 S. W. 101.

merely in the vicinity of the track it is not necessary to stop or reduce speed if there are no circumstances making it probable that they will come upon the track or be injured,[18] as where they are grazing quietly or manifesting no indication of coming upon the track;[19] but such circumstances do not relieve those in charge of the train from the duty of maintaining a careful lookout as to their subsequent movements;[20] and if it can safely be done the train should be slowed down or stopped whenever there is apparent danger of injury,[21] as where the animal is in dangerous proximity to the track,[22] or is seen moving toward the track,[23] or running along the side of the track under circumstances making it probable that it will come upon it,[24] or the circumstances are such as to make it probable that the animal will run upon a bridge, trestle, or culvert and be injured,[25] or its escape from the immediate vicinity of the track would be difficult or impossible because of the presence of fences, embankments, or other obstructions;[26] and in such cases the fact that the train could not be stopped after the animal actually

North Carolina.— Aycock *v.* Wilmington, etc., R. Co., 51 N. C. 231.

Virginia.— Trout *v.* Virginia, etc., R. Co., 23 Gratt. 619.

See 41 Cent. Dig. tit. "Railroads," §§ 1496, 1497.

It is not sufficient merely to blow the alarm whistle where there is apparent danger, without making any effort to stop the train, if there is time to do so with safety. Shuman *v.* Indianapolis, etc., R. Co., 11 Ill. App. 472; Trout *v.* Virginia, etc., R. Co., 23 Gratt. (Va.) 619.

Where a horse is running toward a trestle in front of a train, and the surrounding circumstances are such as to make it probable that the animal will not leave the track but run upon the trestle, it is the duty of the engineer to stop the train. Alabama Great Southern R. Co. *v.* Hall, 133 Ala. 362, 32 So. 259.

Species of animal on track.— It is not necessary to stop the train as a precaution against injury to a dog (Richardson *v.* Florida Cent. R. Co., 55 S. C. 334, 33 S. E. 466; Wilson *v.* Wilmington, etc., R. Co., 10 Rich. (S. C.) 52), or a goose (Nashville, etc., R. Co. *v.* Davis, (Tenn. 1902) 78 S. W. 1050).

18. *Alabama.*— Western R. Co. *v.* Lazarus, 88 Ala. 453, 16 So. 877.

Florida.— Savannah, etc., R. Co. *v.* Rice, 23 Fla. 575, 3 So. 170.

Illinois.— Peoria, etc., R. Co. *v.* Champ, 75 Ill. 577; Chicago, etc., R. Co. *v.* Bradfield, 63 Ill. 220; Illinois Cent. R. Co. *v.* Wren, 43 Ill. 77; Wabash, etc., R. Co. *v.* Aarvig, 66 Ill. App. 146.

Kentucky.— Cincinnati, etc., R. Co. *v.* Bagby, 29 S. W. 320, 16 Ky. L. Rep. 533.

Mississippi.— Yazoo, etc., R. Co. *v.* Whittington, 74 Miss. 410, 21 So. 249; New Orleans, etc., R. Co. *v.* Bourgeois, 66 Miss. 3, 5 So. 629, 14 Am. St. Rep. 534; Yazoo, etc., R. Co. *v.* Brumfield, (1888) 4 So. 341; Yazoo, etc., R. Co. *v.* Brumfield, 64 Miss. 637, 1 So. 905.

Missouri.— Young *v.* Hannibal, etc., R. Co., 79 Mo. 336; Grant *v.* Hannibal, etc., R. Co., 25 Mo. App. 227.

Utah.— Bunnell *v.* Rio Grande Western R. Co., 13 Utah 314, 44 Pac. 927.

See 41 Cent. Dig. tit. "Railroads," §§ 1496, 1497.

19. Western R. Co. *v.* Lazarus, 88 Ala. 453, 16 So. 877; Illinois Cent. R. Co. *v.* Wren, 43 Ill. 77; Bunnell *v.* Rio Grande Western R. Co., 13 Utah 314, 44 Pac. 927.

20. Louisville, etc., R. Co. *v.* Rice, 101 Ala. 676, 1 So. 639; Missouri Pac. R. Co. *v.* Reynolds, 31 Kan. 132, 1 Pac. 150.

21. *Alabama.*— South Alabama, etc., R. Co. *v.* Jones, 56 Ala. 507.

Arkansas.— Paragould Southeastern R. Co. *v.* Crunk, 81 Ark. 35, 98 S. W. 682; St. Louis, etc., R. Co. *v.* Hagan, 42 Ark. 122.

Illinois.— Chicago, etc., R. Co. *v.* Kellam, 92 Ill. 245, 34 Am. Rep. 128.

Mississippi.— Illinois Cent. R. Co. *v.* Person, 65 Miss. 319, 3 So. 375.

North Carolina.— Snowden *v.* Norfolk Southern R. Co., 95 N. C. 93; Wilson *v.* Norfolk, etc., R. Co., 90 N. C. 69.

North Dakota.— Bostwick *v.* Minneapolis, etc., R. Co., 2 N. D. 440, 51 N. W. 781.

Tennessee.— Nashville, etc., R. Co. *v.* Anthony, 1 Lea 516.

West Virginia.— Heard *v.* Chesapeake, etc., R. Co., 26 W. Va. 455.

See 41 Cent. Dig. tit. "Railroads," §§ 1496, 1497.

22. Snowden *v.* Norfolk Southern R. Co., 95 N. C. 93.

23. Chattanooga, etc., R. Co. *v.* Daniel, 122 Ala. 362, 25 So. 197; St. Louis, etc., R. Co. *v.* Hagan, 42 Ark. 122; Chicago, etc., R. Co. *v.* Kellan, 92 Ill. 245, 34 Am. Rep. 128; Illinois Cent. R. Co. *v.* Person, 65 Miss. 319, 3 So. 375.

24. South Alabama, etc., R. Co. *v.* Jones, 56 Ala. 507; Toledo, etc., R. Co. *v.* Milligan, 52 Ind. 505.

25. Paragould Southeastern R. Co. *v.* Crunk, 81 Ark. 35, 98 S. W. 682.

26. Denver, etc., R. Co. *v.* Nye, 9 Colo. App. 94, 47 Pac. 654; Bostwick *v.* Minneapolis, etc., R. Co., 2 N. D. 440, 51 N. W. 781; Heard *v.* Chesapeake, etc., R. Co., 26 W. Va. 455.

An engineer should not take chances on being able to run past a herd of horses without frightening them without reducing the speed of the train, where they are seen near the right of way and between the fences on

got upon the track will not relieve the company from liability if reasonable care demanded that other precautions should have been previously taken.[27]

d. Stock Alarms. Whether a failure to blow the whistle or ring the bell to frighten animals away from a railroad track is negligence depends upon the circumstances of the particular case,[28] as situations may arise when such alarms would tend rather to increase than diminish the danger.[29] Ordinarily it is the duty of the engineer to use such precautions to frighten animals as soon as they are discovered on the track,[30] or if they are in dangerous proximity to the track,[31] or the circumstances make it probable that they will come upon it;[32] but if the animal is not on the track and there is no apparent danger, no alarm is necessary.[33] In Tennessee the statute expressly requires the alarm whistle to be sounded wherever an animal is seen upon the road.[34]

e. Where Collision Is Inevitable.[35] Railroad companies are not liable for unavoidable injuries to animals,[36] nor is it necessary in order to avoid liability that they should attempt to do the impossible.[37] So if animals come suddenly and unexpectedly upon the track so near to the train, or without any fault on the part of the company are not discovered until so near, that the accident cannot be avoided the company will not be liable,[38] and if it appears that the accident

either side thereof. Denver, etc., R. Co. *v.* Nye, 9 Colo. App. 94, 47 Pac. 654.

27. South Alabama, etc., R. Co. *v.* Jones, 56 Ala. 507; East Tennessee, etc., R. Co. *v.* Selcer, 7 Lea (Tenn.) 557.

28. Flattes *v.* Chicago, etc., R. Co., 35 Iowa 191.

29. Chicago, etc., R. Co. *v.* Bradfield, 63 Ill. 220; Mears *v.* Chicago, etc., R. Co., 103 Iowa 203, 72 N. W. 509; Flattes *v.* Chicago, etc., R. Co., 35 Iowa 191; Yazoo, etc., R. Co. *v.* Wright, 78 Miss. 125, 28 So. 806.

30. *Illinois.*— Springfield, etc., R. Co. *v.* Andrews, 68 Ill. 56.

Iowa.— Parker *v.* Dubuque, etc., R. Co., 34 Iowa 399.

Louisiana.— Lapine *v.* New Orleans, etc., R. Co., 20 La. Ann. 158.

North Carolina.— Aycock *v.* Wilmington, etc., R. Co., 51 N. C. 231.

West Virginia.— Blankenship *v.* Kanawha, etc., R. Co., 43 W. Va. 135, 27 S. E. 355.

United States.— Eddy *v.* Evans, 58 Fed. 151, 7 C. C. A. 129.

See 41 Cent. Dig. tit. "Railroads," § 1500.

But if an animal is moving rapidly across the track in the direction soonest likely to put it beyond danger, it is not negligence to fail to give the alarm, as it would be more likely to change the course of the animal and increase the danger. Flattes *v.* Chicago, etc., R. Co., 35 Iowa 191.

31. East Tennessee, etc., R. Co. *v.* Watson, 90 Ala. 41, 7 So. 813.

32. Alabama Great Southern R. Co. *v.* Powers, 73 Ala. 244; South Alabama, etc., R. Co. *v.* Jones, 56 Ala. 507; Illinois Cent. R. Co. *v.* Person, 65 Miss. 319, 3 So. 375; San Antonio, etc., R. Co. *v.* Harris, (Tex. Civ. App. 1904) 79 S. W. 841.

33. Chicago, etc., R. Co. *v.* Bradfield, 63 Ill. 220; Cleveland, etc., R. Co. *v.* Rice, 48 Ill. App. 51; Louisville, etc., R. Co. *v.* Bowen, 39 S. W. 31, 18 Ky. L. Rep. 1099; Grant *v.* Hannibal, etc., R. Co., 25 Mo. App. 227.

34. Memphis, etc., R. Co. *v.* Scott, 87 Tenn. 494, 11 S. W. 317.

A dog is within the application of the statute requiring the alarm whistle to be sounded. Fink *v.* Evans, 95 Tenn. 413, 32 S. W. 307, holding, however, that it is not necessary to blow a separate signal for each one of a pack of dogs.

35. Proximate cause of injury see *infra*, X, H, 11, b.

36. *Alabama.*— Nashville, etc., R. Co. *v.* Hembree, 85 Ala. 481, 5 So. 173; Mobile, etc., R. Co. *v.* Caldwell, 83 Ala. 196, 3 So. 445.

Kentucky.— Gordon *v.* Louisville, etc., R. Co., 29 S. W. 321, 16 Ky. L. Rep. 713.

Missouri.— Sloop *v.* St. Louis, etc., R. Co., 22 Mo. App. 593.

North Carolina.— Montgomery *v.* Wilmington, etc., R. Co., 51 N. C. 464.

West Virginia.— Toudy *v.* Norfolk, etc., R. Co., 38 W. Va. 694, 18 S. E. 896.

See 41 Cent. Dig. tit. "Railroads," § 1499.

37. Nashville, etc., R. Co. *v.* Hembree, 85 Ala. 481, 5 So. 173.

38. *Alabama.*— Southern R. Co. *v.* Hoge, 141 Ala. 351, 37 So. 439; Louisville, etc., R. Co. *v.* Brinkerhoff, 119 Ala. 606, 24 So. 892; Kansas City, etc., R. Co. *v.* Watson, 91 Ala. 483, 8 So. 793; East Tennessee, etc., R. Co. *v.* Bayliss, 77 Ala. 429, 54 Am. Rep. 69.

Colorado.— Chicago, etc., R. Co. *v.* Roberts, 35 Colo. 498, 84 Pac. 68.

Georgia.— Georgia R., etc., Co. *v.* Burke, 93 Ga. 319, 20 S. E. 318; Moyne *v.* Wrightsville, etc., R. Co., 83 Ga. 669, 10 S. E. 441.

Illinois.— Illinois Cent. R. Co. *v.* Wren, 43 Ill. 77; Galena, etc., R. Co. *v.* Griffin, 31 Ill. 303; Terre Haute, etc., R. Co. *v.* Jenuine, 16 Ill. App. 209.

Kentucky.— Mobile, etc., R. Co. *v.* Morrow, 97 S. W. 389, 30 Ky. L. Rep. 83; Louisville, etc., R. Co. *v.* Bowen, 39 S. W. 31, 18 Ky. L. Rep. 1099.

Louisiana.— Mongogna *v.* Illinois Cent. R. Co., 115 La. 597, 39 So. 699.

Mississippi.— Raiford *v.* Mississippi Cent. R. Co., 43 Miss. 233.

Missouri.— Sloop *v.* St. Louis, etc., R. Co., 22 Mo. App. 593.

could not possibly have been prevented the company will not be liable, although no efforts were made to prevent it,[39] particularly if by attempting the impossible the chances of injury to the train and its passengers would have been increased.[40] In such cases it is not necessary to attempt to stop or slacken the speed of the train,[41] but on the contrary the speed may be increased if the danger of injury to the train would thereby be lessened.[42]

10. Contributory Negligence of Owner — a. Effect of Contributory Negligence as a Defense — (i) *In General.* In actions for injuries to animals the general rule prevails that plaintiff cannot recover where his own negligent or wrongful act has contributed directly to the injury complained of,[43] and this rule applies in the absence of statute in all cases where the mutual faults contributing to the injury are of a similar nature and are equally the efficient and proximate cause of the injury;[44] but to preclude a recovery plaintiff's negligence must be a proximate cause of the injury,[45] or in other words there must be mutual negligence in the sense of equivalent acts simultaneously occurring to produce the injury complained of.[46] If plaintiff's negligence is proximate and that of defendant

Nebraska.— Hansberry *v.* Chicago, etc., R. Co., 79 Nebr. 120, 112 N. W. 292.

Tennessee.— East Tennessee, etc., R. Co. *v.* Scales, 2 Lea 688.

Texas.— Missouri, etc., R. Co. *v.* Palmer, (Civ. App. 1894) 27 S. W. 889.

West Virginia.— Kirk *v.* Norfolk, etc., R. Co., 41 W. Va. 722, 24 S. E. 639, 56 Am. St. Rep. 899, 32 L. R. A. 416; Toudy *v.* Norfolk, etc., R. Co., 38 W. Va. 694, 18 S. E. 896.

See 41 Cent. Dig. tit. "Railroads," § 1499.

39. Nashville, etc., R. Co. *v.* Hembree, 85 Ala. 481, 5 So. 173; Gilman, etc., R. Co. *v.* Spencer, 76 Ill. 192; Hawker *v.* Baltimore, etc., R. Co., 15 W. Va. 628, 36 Am. Rep. 825.

40. East Tennessee, etc., R. Co. *v.* Bayliss, 75 Ala. 466; Cleveland *v.* Chicago, etc., R. Co., 35 Iowa 220.

41. *Alabama.*—Alabama Great Southern R. Co. *v.* Moody, 92 Ala. 279, 9 So. 238.

Colorado.— Denver, etc., R. Co. *v.* Divelbiss, 13 Colo. App. 304, 57 Pac. 743.

Iowa.— Cleaveland *v.* Chicago, etc., R. Co., 35 Iowa 220.

Ohio.— Cranston *v.* Cincinnati, etc., R. Co., 1 Handy 193, 12 Ohio Dec. (Reprint) 97.

Utah.— Bunnell *v.* Rio Grande Western R. Co., 13 Utah 314, 44 Pac. 927.

See 41 Cent. Dig. tit. "Railroads," § 1499.

Duty to stop or slacken speed in general see *supra*, X, H, 9, c.

42. See *supra*, X, H, 8, a, (IV).

43. *California.*— Flemming *v.* Western R. Co., 49 Cal. 253.

Georgia.— Macon, etc., R. Co. *v.* Davis, 13 Ga 68.

Illinois.— Chicago, etc., R. Co. *v.* Cauffman, 28 Ill. 513; Cleveland, etc., R. Co. *v.* Ducharme, 49 Ill. App. 520.

Indiana.—Louisville, etc., R. Co. *v.* Schmidt, 81 Ind. 264; Toledo, etc., R. Co. *v.* Thomas, 18 Ind. 215.

Maryland.— Baltimore, etc., R. Co. *v.* Lamborn, 12 Md. 257.

Missouri.— Milburn *v.* Kansas City, etc., R. Co., 86 Mo. 104.

New Jersey.— Price *v.* New Jersey R., etc., Co., 31 N. J. L. 229.

New York.— Munger *v.* Tonawanda R. Co., 4 N. Y. 349, 53 Am. Dec. 384.

Ohio.— Baltimore, etc., R. Co. *v.* McIlyar, 77 Ohio St. 391, 83 N. E. 497; Pittsburgh, etc., R. Co. *v.* Methven, 21 Ohio St. 586.

Rhode Island.— Tower *v.* Providence, etc., R. Co., 2 R. I. 404.

South Carolina.— Guess *v.* South Carolina R. Co., 30 S. C. 163, 9 S. E. 18.

Tennessee.—Nashville, etc., R. Co. *v.* Spence, 99 Tenn. 218, 41 S. W. 934.

Utah.— Bunnell *v.* Rio Grande Western R. Co., 13 Utah 314, 44 Pac. 927.

Wisconsin.— Fisher *v.* Farmers' L. & T. Co., 21 Wis. 73.

England.— Haigh *v.* London, etc., R. Co., 1 F. & F. 646, 8 Wkly. Rep. 6.

See 41 Cent. Dig. tit. "Railroads," §§ 1501, 1506.

44. Pittsburgh, etc., R. Co. *v.* Methven, 21 Ohio St. 586.

45. *Alabama.*— Southern R. Co. *v.* Dickens, (1907) 45 So. 215; Alabama Great Southern R. Co. *v.* McAlpine, 71 Ala. 545.

California.— Orcutt *v.* Pacific Coast R. Co., 85 Cal. 291, 24 Pac. 661; Richmond *v.* Sacramento Valley R. Co., 18 Cal. 351.

Connecticut.— Isbell *v.* New York, etc., R. Co., 27 Conn. 393, 71 Am. Dec. 78.

Missouri.— Kirkpatrick *v.* Missouri, etc., R. Co., 71 Mo. App. 263.

North Carolina.— Roberts *v.* Richmond, etc., R. Co., 88 N. C. 560.

Ohio.— Cleveland, etc., R. Co. *v.* Elliott, 4 Ohio St. 474.

Oregon.— Moses *v.* Southern Pac. R. Co., 18 Oreg. 385, 23 Pac. 498, 8 L. R. A. 135.

South Carolina.— Sauls *v.* D. W. Alderman, etc., Co., 55 S. C. 395, 33 S. E. 467.

West Virginia.— Washington *v.* Baltimore, etc., R. Co., 17 W. Va. 190.

See 41 Cent. Dig. tit. "Railroads," §§ 1506, 1510.

Although plaintiff's act is illegal it will not preclude a recovery unless a proximate cause of the injury. Alabama Great Southern R. Co. *v.* McAlpine, 71 Ala. 545.

46. Isbell *v.* New York, etc., R. Co., 27 Conn. 393, 71 Am. Dec. 78; Moses *v.* South-

remote or consisting of some other matter than what occurred at the time of the injury, plaintiff cannot recover;[47] nor can plaintiff recover where the mutual negligence of the parties is the remote cause of the injury and there is no lack of ordinary care at the time of its happening;[48] but on the other hand if the negligence of defendant is proximate and that of plaintiff remote, the action may be maintained, although plaintiff is not entirely without fault.[49] So although plaintiff was negligent he may recover if at the time the injury occurred it might have been avoided by defendant in the exercise of ordinary care,[50] or if, although the animal was a trespasser, the injury might have been avoided by such care after the animal was discovered.[51] The owner of animals as well as the railroad company must exercise ordinary care to prevent their injury,[52] and whether the railroad company has been negligent and whether plaintiff has been guilty of a want

ern Pac. R. Co., 18 Oreg. 385, 23 Pac. 498, 8 L. R. A. 135.

47. See Trow *v.* Vermont Cent. R. Co., 24 Vt. 487, 58 Am. Dec. 191.

48. Central Branch R. Co. *v.* Lea, 20 Kan. 353; Pittsburgh, etc., R. Co. *v.* Methven, 21 Ohio St. 586; Trow *v.* Vermont Cent. R. Co., 24 Vt. 487, 58 Am. Dec. 191.

An illustration of this rule is where plaintiff has permitted his stock to run at large in violation of a stock law and defendant has neglected its statutory duty to fence but has not been guilty of any negligence in the operation of its trains at the time of the injury. Central Branch R. Co. *v.* Lea, 20 Kan. 353.

49. *California.*— Orcutt *v.* Pacific Coast R. Co., 85 Cal. 291, 24 Pac. 661; Needham *v.* San Francisco, etc., R. Co., 37 Cal. 409.

Connecticut.— Isbell *v.* New York, etc., R. Co., 27 Conn. 393, 71 Am. Dec. 78.

Missouri.— Kirkpatrick *v.* Missouri, etc., R. Co., 71 Mo. App. 263.

North Carolina.— Horner *v.* Williams, 100 N. C. 230, 5 S. E. 734; Farmer *v.* Wilmington, etc., R. Co., 88 N. C. 564.

Ohio.— Cleveland, etc., R. Co. *v.* Elliott, 4 Ohio St. 474.

Oregon.— Moses *v.* Southern Pac. R. Co., 18 Oreg. 385, 23 Pac. 498, 8 L. R. A. 135.

South Carolina.— Sauls *v.* D. W. Alderman, etc., Co., 55 S. C. 395, 33 S. E. 467.

West Virginia.— Blaine *v.* Chesapeake, etc., R. Co., 9 W. Va. 252.

See 41 Cent. Dig. tit. "Railroads," §§ 1506, 1510.

50. *Georgia.*— Central R., etc., Co. *v.* Davis, 19 Ga. 457.

Illinois.— Rockford, etc., R. Co. *v.* Irish, 72 Ill. 404; Rockford, etc., R. Co. *v.* Lewis, 58 Ill. 49; Chicago, etc., R. Co. *v.* Phillips, 14 Ill. App. 265.

Iowa.— Barnard *v.* Chicago, etc., R. Co., 133 Iowa 185, 110 N. W. 439; Wooster *v.* Chicago, etc., R. Co., 74 Iowa 593, 38 N. W. 425.

Maryland.— Western Maryland R. Co. *v.* Carter, 59 Md. 306; Baltimore, etc., R. Co. *v.* Mulligan, 45 Md. 486.

North Carolina.— Farmer *v.* Wilmington, etc., R. Co., 88 N. C. 564.

North Dakota.— Carr *v.* Minneapolis, etc., R. Co., 16 N. D. 217, 112 N. W. 972.

Ohio.— Cincinnati, etc., R. Co. *v.* Smith, 22 Ohio St. 227, 10 Am. Rep. 729.

West Virginia.— Washington *v.* Baltimore, etc., R. Co., 17 W. Va. 190.

United States.— Wabash, etc., R. Co. *v.* Central Trust Co., 23 Fed. 738.

Canada.— Campbell *v.* Great Western R. Co., 15 U. C. Q. B. 498.

See 41 Cent. Dig. tit. "Railroads," § 1511.

51. Cleveland, etc., R. Co. *v.* Ahrens, 42 Ill. App. 434; Witherell *v.* Milwaukee, etc., R. Co., 24 Minn. 410.

52. *Dakota.*— Williams *v.* Northern Pac. R. Co., 3 Dak. 168, 14 N. W. 97.

Indiana.— Louisville, etc., R. Co. *v.* Schmidt, 81 Ind. 264; Indianapolis, etc., R. Co. *v.* Wright, 13 Ind. 213.

Missouri.— Milburn *v.* Kansas City, etc., R. Co., 86 Mo. 104.

Ohio.— Cranston *v.* Cincinnati, etc., R. Co., 1 Handy 193, 12 Ohio Dec. (Reprint) 97.

Oregon.— Keeney *v.* Oregon R., etc., Co., 19 Oreg. 291, 24 Pac. 233.

Utah.— Silcock *v.* Rio Grande Western R. Co., 22 Utah 179, 61 Pac. 565; Bunnell *v.* Rio Grande Western R. Co., 13 Utah 314, 44 Pac. 927.

See 41 Cent. Dig. tit. "Railroads," § 1501.

It is contributory negligence to leave a team standing upon a railroad track at night while the teamster is in a freight car where he cannot see or hear an approaching train (Pennsylvania Co. *v.* Edwards, 14 Ill. App. 81); or to attempt to lead a horse across a railroad track in front of an engine after seeing that the animal is greatly frightened (Louisville, etc., R. Co. *v.* Schmidt, 81 Ind. 264); or to leave a team unhitched and unattended at a station, particularly where the team has previously run away at the same place (Galveston, etc., R. Co. *v.* Graham, (Tex. Civ. App. 1907) 101 S. W. 846).

One who knows the danger and voluntarily assumes the risk of driving a team into a dangerous situation cannot recover for a resulting injury. Miner *v.* Connecticut River R. Co., 153 Mass. 398, 26 N. E. 994.

But where the owner acts upon instructions of the company's agent in standing a team at a particular place for the unloading of freight, he is entitled to assume that while so engaged his team will not be run down by the company's trains and is not required to keep a constant lookout to prevent such an accident. Bachant *v.* Boston, etc., R. Co., 187 Mass. 392, 73 N. E. 642, 105 Am. St. Rep. 408.

of ordinary care contributing directly to the injury complained of are ordinarily questions of fact for the jury.[53]

(II) *In Actions Based on Statutory Liability.* Contributory negligence is a good defense to an action for injury to animals whether the action is based upon common-law or statutory grounds, except where the statute imposes the liability by way of a penalty or otherwise clearly restricts the application of the doctrine.[54] So it is held that contributory negligence is a defense under statutes in terms making a railroad company liable for all damages to stock done by its cars or locomotives,[55] or damages due to a failure to give signals,[56] or making proof of the injury *prima facie* evidence of negligence and placing the burden of proof upon the company to show that the injury was not due to its negligence.[57] Under the statutes relating to the fencing of railroads the authorities are conflicting as to whether the liability of the company is absolute or whether contributory negligence is a defense, but the difference in the wording of the statutes is sufficient to justify the difference in the conclusions.[58] Under some of the statutes it is held that contributory negligence on the part of the owner is no defense,[59] either in actions based upon a total failure to fence or a failure to keep the fences constructed in a proper state of repair.[60] This rule does not permit a recovery where a person wilfully abandons an animal to destruction or voluntarily exposes it to a known danger,[61] but mere negligence on the part of the owner

53. *California.*— Richmond *v.* Sacramento Valley R. Co., 18 Cal. 351.

Connecticut.— Fritts *v.* New York, etc., R. Co., 62 Conn. 503, 26 Atl. 347; Beers *v.* Housatonic R. Co., 19 Conn. 566.

Dakota.—Williams *v.* Northern Pac. R. Co., 3 Dak. 168, 14 N. W. 97.

Illinois.— Toledo, etc., R. Co. *v.* Delliplane, 119 Ill. App. 122.

Iowa.— Reifsnyder *v.* Chicago, etc., R. Co., 90 Iowa 76, 57 N. W. 692.

South Dakota.— Hutchinson *v.* Chicago, etc., R. Co., 9 S. D. 5, 67 N. W. 853.

Texas.— Ft. Worth, etc., R. Co. *v.* Roberts, 37 Tex. Civ. App. 108, 83 S. W. 250; Southern Kansas R. Co. *v.* McKay, (Civ. App. 1898) 47 S. W. 479.

See 41 Cent. Dig. tit. "Railroads," §§ 1506, 1510.

54. Baltimore, etc., R. Co. *v.* McIlyar, 77 Ohio St. 391, 83 N. E. 497; Pittsburgh, etc., R. Co. *v.* Methven, 21 Ohio St. 586; Curry *v.* Chicago, etc., R. Co., 43 Wis. 665.

55. Macon, etc., R. Co. *v.* Davis, 13 Ga. 68.

56. Cincinnati, etc., R. Co. *v.* Hiltzhauer, 99 Ind. 486.

57. Norfolk, etc., R. Co. *v.* Smith, 104 Md. 72, 64 Atl. 317; Western Maryland R. Co. *v.* Carter, 59 Md. 306; Keech *v.* Baltimore, etc., R. Co., 17 Md. 32; Baltimore, etc., R. Co. *v.* Lamborn, 12 Md. 257.

58. Pittsburgh, etc., R. Co. *v.* Methven, 21 Ohio St. 586; Curry *v.* Chicago, etc., R. Co., 43 Wis. 665.

59. *Indiana.*— Louisville, etc., R. Co. *v.* Whitesell, 68 Ind. 297; Louisville, etc., R. Co. *v.* Cahill, 63 Ind. 340; Indianapolis, etc., R. Co. *v.* Wolf, 47 Ind. 250; Jeffersonville, etc., R. Co. *v.* Ross, 37 Ind. 545; Toledo, etc., R. Co. *v.* Cary, 37 Ind. 172; Bellefontaine R. Co. *v.* Reed, 33 Ind. 476; Jeffersonville, etc., R. Co. *v.* Dunlap, 29 Ind. 426; Jeffersonville R. Co. *v.* Applegate, 10 Ind. 49; Indianapolis, etc., R. Co. *v.* Townsend, 10 Ind. 38; Chicago, etc., R. Co. *v.* Brannegan, 5 Ind. App. 540, 32 N. E. 790; Terre Haute, etc., R. Co. *v.* Schaefer, 5 Ind. App. 86, 31 N. E. 557.

Kansas.— Atchison R. Co. *v.* Paxton, 75 Kan. 197, 88 Pac. 1082.

Michigan.— La Flamme *v.* Detroit, etc., R. Co., 109 Mich. 509, 67 N. W. 556; Grand Rapids, etc., R. Co. *v.* Cameron, 45 Mich. 451, 8 N. W. 99; Flint, etc., R. Co. *v.* Lull, 28 Mich. 510.

Nebraska.— Burlington, etc., R. Co. *v.* Webb, 18 Nebr. 215, 24 N. W. 706, 53 Am. Rep. 809; Burlington, etc., R. Co. *v.* Franzen, 15 Nebr. 365, 18 N. W. 511.

New York.— Corwin *v.* New York, etc., R. Co., 13 N. Y. 42 [*disapproving* Marsh *v.* New York, etc., R. Co., 14 Barb. 364].

Vermont.— Harwood *v.* Bennington, etc., R. Co., 67 Vt. 664, 32 Atl. 721; Congdon *v.* Central Vermont R. Co., 56 Vt. 390, 48 Am. Rep. 793; Mead *v.* Burlington, etc., R. Co., 52 Vt. 278.

See 41 Cent. Dig. tit. "Railroads," § 1507.

The ground of these decisions is that the statutes are police regulations adopted for the safety of passengers as well as the protection of property, and that they are not intended merely to compensate the owner of the property injured but to enforce against the railroad company an obligation which it owes to the public. Flint, etc., R. Co. *v.* Lull, 28 Mich. 510.

If the accident occurs at a place not required to be fenced the rule as stated in the text does not apply and contributory negligence on the part of plaintiff is a good defense. Lafayette, etc., R. Co. *v.* Shriner, 6 Ind. 141.

60. Brady *v.* Rensselaer, etc., R. Co., 1 Hun (N. Y.) 378, 3 Thomps. & C. 537; Harwood *v.* Bennington, etc., R. Co., 67 Vt. 664, 32 Atl. 721; Congdon *v.* Central Vermont R. Co., 56 Vt. 390, 48 Am. Rep. 793. *Compare* Hance *v.* Cayuga, etc., R. Co., 26 N. Y. 428.

61. Welty *v.* Indianapolis, etc., R. Co., 105

not amounting to such conduct will not defeat a recovery.[62] Under other statutes it is held that contributory negligence is a good defense to an action based upon a failure to keep fences once constructed in a proper state of repair,[63] or even in case of a total failure to fence.[64] In Iowa the statute provides that every railroad company failing to fence its tracks against stock running at large shall be liable for all injuries unless occasioned by the "wilful act of the owner or his agent," [65] and under this statute mere negligence on the part of the owner will not defeat a recovery;[66] but this absolute liability, in the absence of a wilful act, applies only to stock running at large and not when under the control of the owner.[67]

(III) *COMPARATIVE NEGLIGENCE.* Under the doctrine of comparative negligence, which in most jurisdictions is not now recognized,[68] plaintiff may recover if his negligence is slight and that of defendant is gross in comparison therewith;[69] but if plaintiff is guilty of negligence contributing to the injury he cannot recover unless defendant's negligence is gross in comparison with his own.[70] In a few

Ind. 55, 4 N. E. 410; Knight *v.* Toledo, etc., R. Co., 24 Ind. 402.

Wilful and intentional acts of owner see *infra*, X, H, 10, a, (v).

62. Jeffersonville, etc., R. Co. *v.* Dunlap, 29 Ind. 426; Toledo, etc., R. Co. *v.* Jackson, 5 Ind. App. 547, 32 N. E. 793; Corwin *v.* New York, etc., R. Co., 13 N. Y. 42.

63. Lawrence *v.* Milwaukee, etc., R. Co., 42 Wis. 322; Jones *v.* Sheboygan, etc., R. Co., 42 Wis. 306 [*overruling* Brown *v.* Milwaukee, etc., R. Co., 21 Wis. 39, 91 Am. Dec. 456].

In Wisconsin the statute as amended in 1881 expressly provides that after the fences and cattle-guards have been constructed the liability of the company "shall not extend to damages occasioned in part by contributory negligence." Martin *v.* Stewart, 73 Wis. 553, 41 N. W. 538.

64. *Minnesota.*— Whittier *v.* Chicago, etc., R. Co., 24 Minn. 394.

Missouri.— Gee *v.* St. Louis, etc., R. Co., 122 Mo. App. 358, 99 S. W. 506.

Ohio.— Pittsburgh, etc., R. Co. *v.* Methven, 21 Ohio St. 586.

Texas.— Southern Kansas R. Co. *v.* McKay, (Civ. App. 1898) 47 S. W. 479.

Wisconsin.— Curry *v.* Chicago, etc., R. Co., 43 Wis. 665 [*disapproving* Brown *v.* Milwaukee, etc., R. Co., 21 Wis. 39, 91 Am. Dec. 456, and *distinguishing* Antisdel *v.* Chicago, etc., R. Co., 26 Wis. 145, 7 Am. Rep. 44; McCall *v.* Chamberlain, 13 Wis. 637]. But see Martin *v.* Stewart, 73 Wis. 553, 41 N. W. 538, quoting the Wisconsin statute of 1881 which amends the previous statutes in regard to fencing and under which it seems that in case of a total failure to fence the liability of the company is absolute.

See 41 Cent. Dig. tit. "Railroads," § 1507.

In Tennessee and Oregon the statutes expressly provide that contributory negligence may be set up as a defense to an action under the statute. Keeney *v.* Oregon R., etc., Co., 19 Oreg. 291, 24 Pac. 233; Hindman *v.* Oregon R., etc., Co., 17 Oreg. 614, 22 Pac. 116; Nashville, etc., R. Co. *v.* Spence, 99 Tenn. 218, 41 S. W. 934.

65. Krebs *v.* Minneapolis, etc., R. Co., 64 Iowa 670, 21 N. W. 131; Inman *v.* Chicago, etc., R. Co., 60 Iowa 459, 15 N. W. 286; Stewart *v.* Burlington, etc., R. Co., 32 Iowa 561.

66. Enix *v.* Iowa Cent. R. Co., 114 Iowa 508, 87 N. W. 417; Anderson *v.* Chicago, etc., R. Co., 93 Iowa 561, 61 N. W. 1058; Inman *v.* Chicago, etc., R. Co., 60 Iowa 459, 15 N. W. 286.

To constitute a wilful act within the application of the statute there must be something more than mere negligence. There must be a positive act in some way connected with the injury, such as driving stock upon the track or permitting them to escape for the purpose of going upon the track (Krebs *v.* Minneapolis, etc., R. Co., 64 Iowa 670, 21 N. W. 131), or in other words an obstinate, stubborn, or perverse act, done with a set purpose, and not mere passiveness on the part of the owner (Stewart *v.* Burlington, etc., R. Co., 32 Iowa 561).

It is not a wilful act to turn a colt out in a highway for the purpose of driving it across a railway track to a pasture (Smith *v.* Kansas City, etc., R. Co., 58 Iowa 622, 12 N. W. 619); to leave stock on land adjoining a railroad track knowing that a gate in the railroad fence is defective (Enix *v.* Iowa Cent. R. Co., 114 Iowa 508, 87 N. W. 417); to allow stock to run at large upon the owner's premises in close proximity to a railroad track (Lee *v.* Minneapolis, etc., R. Co., 66 Iowa 131, 23 N. W. 299); or to permit stock to be at large in violation of stock laws (Krebs *v.* Minneapolis, etc., R. Co., 64 Iowa 670, 21 N. W. 131; Spence *v.* Chicago, etc., R. Co., 25 Iowa 139).

But plaintiff cannot recover if he stands by and wilfully refuses to drive an animal from the track when a train is approaching when he has ample time and opportunity to do so. Moody *v.* Minneapolis, etc., R. Co., 77 Iowa 29, 41 N. W. 477.

67. Smith *v.* Chicago, etc., R. Co., 34 Iowa 96.

68. See NEGLIGENCE, 29 Cyc. 559.

69. Indianapolis, etc., R. Co. *v.* Peyton, 76 Ill. 340; Toledo, etc., R. Co. *v.* McGinnis, 71 Ill. 346.

70. Illinois Cent. R. Co. *v.* Middlesworth, 43 Ill. 64; Illinois Cent. R. Co. *v.* Goodwin, 30 Ill. 117; Peoria, etc., R. Co. *v.* Miller, 11 Ill. App. 375.

jurisdictions there is a statutory modification of this rule which authorizes the negligence of the parties to be compared, not for the purpose of wholly relieving either party where both are negligent, but with the effect of reducing the amount of plaintiff's damages according to the extent to which his own negligence has contributed to the injury; [71] but under these statutes plaintiff can recover nothing if his own negligence was the sole cause of the injury,[72] or if defendant was in the exercise of ordinary care.[73] Elsewhere the doctrine of comparative negligence has been expressly disapproved.[74]

(iv) *Wilful, Wanton, or Gross Negligence.* If animals are injured through the wanton or wilful misconduct of the railroad company's employees, the company will be liable therefor notwithstanding the owner may have been negligent,[75] or permitted his animals to be unlawfully at large.[76]

(v) *Wilful and Intentional Acts of Owner.* A person cannot recover for injuries to an animal which he willingly abandons to destruction or voluntarily exposes to a known danger,[77] or where he makes no effort to avert an impending injury which he has time and opportunity to do; [78] and this rule applies to cases based upon a statutory liability where ordinary contributory negligence on the part of plaintiff is not a defense ;[79] nor is the rule affected by the fact that the exposure of the animal was due to the intoxication of the person having it in charge.[80]

b. Driving Animals Over or Along Tracks. It is the duty of a person in charge of animals to exercise ordinary care and before attempting to drive them across a railroad track to look and listen for approaching trains,[81] and if he fails to exer-

71. Savannah, etc., R. Co. *v.* Cosens, 46 Fla. 237, 35 So. 398; Georgia R., etc., Co. *v.* Neely, 56 Ga. 540.

72. Savannah, etc., R. Co. *v.* Cosens, 46 Fla. 237, 35 So. 398.

73. Georgia R., etc., Co. *v.* Neely, 56 Ga. 540, holding that the company is not to be deemed in fault at all unless shown to have failed to exercise ordinary care or reasonable diligence, and that for failure to exercise a higher degree of care it is not required to contribute anything.

74. Atchison, etc., R. Co. *v.* Morgan, 31 Kan. 77, 1 Pac. 298.

75. McDonald *v.* Chicago, etc., R. Co., 51 Mich. 628, 17 N. W. 210; Clem *v.* Wabash R. Co., 72 Mo. App. 433; Holstine *v.* Oregon, etc., R. Co., 8 Oreg. 163; Wabash, etc., R. Co. *v.* New York Cent. Trust Co., 23 Fed. 738.

76. Louisville, etc., R. Co. *v.* Dulaney, 43 Ill. App. 297; Detroit, etc., R. Co. *v.* Barton, 61 Ind. 293; Lafayette, etc., R. Co. *v.* Shriner, 6 Ind. 141; Windsor *v.* Hannibal, etc., R. Co., 45 Mo. App. 123; Pritchard *v.* La Crosse, etc., R. Co., 7 Wis. 232.

77. *Idaho.*— McDonald *v.* Great Northern R. Co., 5 Ida. 8, 46 Pac. 766.

Indiana.— Ft. Wayne, etc., R. Co. *v.* Woodward, 112 Ind. 118, 13 N. E. 260; Welty *v.* Indianapolis, etc., R. Co., 105 Ind. 55, 4 N. E. 410; Knight *v.* Toledo, etc., R. Co., 24 Ind. 402.

North Dakota.— West *v.* Northern Pac. R. Co., 13 N. D. 221, 100 N. W. 254; Wright *v.* Minneapolis, etc., R. Co., 12 N. D. 159, 96 N. W. 324.

Ohio.— Cranston *v.* Cincinnati, etc., R. Co., 1 Handy 193, 12 Ohio Dec. (Reprint) 97.

Oregon.— Keeney *v.* Oregon R., etc., Co., 19 Oreg. 291, 24 Pac. 233.

Utah.— Bunnell *v.* Rio Grande Western R. Co., 13 Utah 314, 44 Pac. 927.

Washington.— Dickey *v.* Northern Pac. R. Co., 19 Wash. 350, 53 Pac. 347.

See 41 Cent. Dig. tit. "Railroads," § 1505.

This rule applies to turning out stock directly upon a railroad right of way (McDonald *v.* Great Northern R. Co., 5 Ida. 8, 46 Pac. 766), or permitting a blind animal to run at large in the vicinity of a railroad track (Knight *v.* Toledo, etc., R. Co., 24 Ind. 402).

78. Moody *v.* Minneapolis, etc., R. Co., 77 Iowa 29, 41 N. W. 477; Milburn *v.* Kansas City, etc., R. Co., 86 Mo. 104.

79. Welty *v.* Indianapolis, etc., R. Co., 105 Ind. 55, 4 N. E. 410; Knight *v.* Toledo, etc., R. Co., 24 Ind. 402; Moody *v.* Minneapolis, etc., R. Co., 77 Iowa 29, 41 N. W. 477.

80. Welty *v.* Indianapolis, etc., R. Co., 105 Ind. 55, 4 N. E. 410.

81. *Alabama.*— Highland Ave., etc., R. Co. *v.* Sampson, 91 Ala. 560, 8 So. 778.

California.— Flemming *v.* Western Pac. R. Co., 49 Cal. 253.

Iowa.— McGill *v.* Minneapolis, etc., R. Co., 113 Iowa 358, 85 N. W. 620.

Kansas.— Union Pac. R. Co. *v.* Entsminger, 76 Kan. 746, 92 Pac. 1095.

New Jersey.— Nolan *v.* Central R. Co., 67 N. J. L. 124, 50 Atl. 348.

North Dakota.— West *v.* Northern Pac. R. Co., 13 N. D. 221, 100 N. W. 254.

Pennsylvania.— Salathe *v.* Delaware, etc., R. Co., 28 Pa. Super. Ct. 1.

Texas.— Gulf, etc., R. Co. *v.* Dodson, 3 Tex. App. Civ. Cas. § 394.

See 41 Cent. Dig. tit. "Railroads," § 1503.

The fact that the regular trains have passed does not excuse a person from looking

cise ordinary care and thereby contributes to the injury complained of he cannot recover;[82] but he has a right to presume that the railroad company will operate its trains in a lawful and proper manner,[83] and that at public crossings the crossing itself will be in a safe condition,[84] and if plaintiff has exercised all ordinary or reasonable care under the circumstances of the case he may recover for the negligence of the railroad company.[85] What constitutes ordinary care depends upon the circumstances of the particular case,[86] and the question of negligence, both as to plaintiff and defendant, is ordinarily a question for the jury.[87]

and listening before driving stock upon the track. McGill *v.* Minneapolis, etc., R. Co., 113 Iowa 358, 85 N. W. 620.

There is no particular distance from the crossing at which a person must look and listen, each case depending upon its own circumstances (Thompson *v.* New York, etc., R. Co., 110 N. Y. 636, 17 N. E. 690); but extra precautions must be observed where there are other noises which would interfere with such person's hearing approaching trains (Flemming *v.* Western Pac. R. Co., 49 Cal. 253), or where the view of the track in either direction is obstructed before reaching the point of danger (West *v.* Northern Pac. R. Co., 13 N. D. 221, 100 N. W. 254); and where the view of the track is so obstructed it is the duty of a person driving a drove of animals along the road before him to go forward and look for approaching trains before attempting to cross (Snell *v.* Minneapolis, etc., R. Co., 87 Minn. 253, 91 N. W. 1108).

82. *Arkansas.*— St. Louis, etc., R. Co. *v.* Portis, 81 Ark. 325, 99 S. W. 66.

California.— Flemming *v.* Western Pac. R. Co., 49 Cal. 253.

Connecticut.— Beers *v.* Housatonuc R. Co., 19 Conn. 566.

Illinois.— Toledo, etc., R. Co. *v.* Head, 62 Ill. 233; Ohio, etc., R. Co. *v.* Eaves, 42 Ill. 288; Chicago Bd. of Underwriters *v.* Chicago, etc., R. Co., 44 Ill. App. 253.

Iowa.— McGill *v.* Minneapolis, etc., R. Co., 113 Iowa 358, 85 N. W. 620.

Kansas.— Union Pac. R. Co. *v.* Entsminger, 76 Kan. 746, 92 Pac. 1095.

Minnesota.— Snell *v.* Minneapolis, etc., R. Co., 87 Minn. 253, 91 N. W. 1108.

New Jersey.— Nolan *v.* Central R. Co., 67 N. J. L. 124, 50 Atl. 348.

New York.— Clark *v.* Syracuse, etc., R. Co., 11 Barb. 112.

North Carolina.— Forbes *v.* Atlantic, etc., R. Co., 76 N. C. 454.

North Dakota.— West *v.* Northern Pac. R. Co., 13 N. D. 221, 100 N. W. 254.

Ohio.— Norfolk, etc., R. Co. *v.* Great China Tea Co., 26 Ohio Cir. Ct. 547; Balser *v.* Chicago, etc., R. Co., 9 Ohio S. & C. Pl. Dec. 523, 7 Ohio N. P. 482.

Pennsylvania.— Reeves *v.* Delaware, etc., R. Co., 30 Pa. St. 454, 72 Am. Dec. 713.

Texas.— Gulf, etc., R. Co. *v.* Dodson, 3 Tex. App. Civ. Cas. § 394.

See 41 Cent. Dig. tit. "Railroads," § 1503.

To drive a team at such a high rate of speed at night upon a railroad crossing as to make it impossible to avoid collision with others rightfully thereon is such contributory negligence as will bar a recovery for injuries caused by the team running into a train upon the crossing, although the crossing lights indicated that the crossing was open. Chicago Bd. of Underwriters *v.* Chicago, etc., R. Co., 44 Ill. App. 253.

To drive stock on a railroad track not for the purpose of crossing but for the purpose of subsequently driving them along the track between the right-of-way fences is culpable negligence on the part of the owner. Davidson *v.* Central Iowa R. Co., 75 Iowa 22, 39 N. W. 163.

The age of plaintiff's servant cannot be considered in determining the question of reasonable care as plaintiff is chargeable with the negligence of the servant having his animals in charge regardless of his age. McGill *v.* Minneapolis, etc., R. Co., 113 Iowa 358, 85 N. W. 620.

If plaintiff was under the influence of liquor to such an extent as to be unable to exercise that degree of care which an ordinarily prudent man should exercise under the circumstances, and this fact contributed to the injury, he cannot recover. Balser *v.* Chicago, etc., R. Co., 9 Ohio S. & C. Pl. Dec. 523, 7 Ohio N. P. 482.

83. Reeves *v.* Delaware, etc., R. Co., 30 Pa. St. 454, 72 Am. Dec. 713.

Persons do not have an unqualified right to act upon the presumption that trains will be operated with the care required by law or custom and to go upon crossings or other dangerous places without any precautions against negligence on the part of the railroad company, but each case must be determined upon its own circumstances. Wabash, etc., R. Co. *v.* Central Trust Co., 23 Fed. 738.

84. Tankard *v.* Roanoke R., etc., Co., 117 N. C. 558, 23 S. E. 46.

85. Beers *v.* Housatonuc R. Co., 19 Conn. 566; Indianapolis, etc., R. Co. *v.* Hamilton, 44 Ind. 76; Snook *v.* Clark, 20 Mont. 230, 50 Pac. 718.

Ordinary care does not require that plaintiff should anticipate that the train will be operated in an improper manner or that before starting to cross the track with a drove of cattle he should send persons out along the track to signal approaching trains. Reeves *v.* Delaware, etc., R. Co., 30 Pa. St. 454, 72 Am. Dec. 713.

86. Tuthill *v.* Northern Pac. R. Co., 50 Minn. 113, 52 N. W. 384; Clark *v.* Syracuse, etc., R. Co., 11 Barb. (N. Y.) 112.

87. Beers *v.* Housatonuc R. Co., 19 Conn. 566; Tuthill *v.* Northern Pac. R. Co., 50 Minn. 113, 52 N. W. 384; Thompson *v.* New York, etc., R. Co., 110 N. Y. 636, 17 N. E. 690.

c. Use of Owner's Own Premises Adjoining Unfenced Railroad. Where a railroad company is required by law to fence its tracks an adjoining landowner cannot be deprived of the lawful and proper use of his own premises by its neglect to do so,[88] and it is not contributory negligence on the part of such landowner, although knowing the road to be unfenced, to turn stock into his inclosure or pasture them upon his own fields through or along which the railroad runs.[89] In the absence of any statute or agreement as to fences the existence of a right of way through the premises of a landowner does not deprive him of the use of such premises as a pasture for his stock nor does it impose on either him or the railroad company any duty to fence the tracks,[90] and it is ordinarily held not to be contributory negligence to allow his stock to run upon his own land at places where they might wander upon the tracks,[91] although the circumstances of the particular case may be such as to preclude a recovery.[92] The existence of a stock law does not affect the right of a landowner to permit his stock to run upon his own inclosed premises.[93]

d. Fences, Gates, and Bars Inclosing Railroad — (1) *DUTY TO ERECT AND MAINTAIN.* In the absence of any statute or agreement as to fencing, a landowner is not obliged to fence against a railroad which runs through or along his own land,[94] nor where railroad companies are required by law to fence their tracks can their failure to do so impose upon an adjoining landowner the necessity for constructing them or else abandoning the use of his own adjacent premises as pasturage for his stock,[95] even though the statute provides that in such cases he may construct the fences and recover the value thereof from the railroad company.[96] If, however, the landowner has expressly agreed to construct, maintain, or repair the fences or gates he cannot recover for injuries to his animals due to a failure to comply with his agreement,[97] and this without regard to whether

88. Wilder *v.* Maine Cent. R. Co., 65 Me. 332, 20 Am. Rep. 698; Schubert *v.* Minneapolis, etc., R. Co., 27 Minn. 360, 7 N. W. 366; Donovan *v.* Hannibal, etc., R. Co., 89 Mo. 147, 1 S. W. 232; Shepard *v.* Buffalo, etc., R. Co., 35 N. Y. 641.

89. *California.*— McCoy *v.* California Pac. R. Co., 40 Cal. 532, 6 Am. Rep. 623.

Kansas.— Atchison, etc., R. Co. *v.* Gabbert, 34 Kan. 132, 8 Pac. 218.

Maine.— Wilder *v.* Maine Cent. R. Co., 65 Me. 332, 20 Am. Rep. 698.

Minnesota.— Schubert *v.* Minneapolis, etc., R. Co., 27 Minn. 360, 7 N. W. 366.

Missouri.— Donovan *v.* Hannibal, etc., R. Co., 89 Mo. 147, 1 S. W. 232.

New Hampshire.— Cressey *v.* Northern R. Co., 59 N. H. 564, 47 Am. Rep. 227.

New York.— Shepard *v.* Buffalo, etc., R. Co., 35 N. Y. 641.

Canada.— Davis *v.* Canadian Pac. R. Co., 12 Ont. App. 724.

See 41 Cent. Dig. tit. "Railroads," § 1502.

The owner may allow his stock to graze on a highway if the highway is upon his own land. Cressey *v.* Northern R. Co., 59 N. H. 564, 47 Am. Rep. 227.

Where a farm crossing is constructed without gates it is not contributory negligence on the part of the landowner to permit his stock to run upon his own lands adjacent to such crossing without a herdsman and without keeping any lookout for passing trains. Horn *v.* Atlantic, etc., R. Co., 35 N. H. 169; White *v.* Concord R. Co., 30 N. H. 188.

To turn horses out with blind bridles on might under the circumstances of the particular case be such negligence on the part of the owner as would preclude a recovery, although the railroad company had neglected to fence its tracks. St. Louis, etc., R. Co. *v.* Todd, 36 Ill. 409.

90. Birmingham Mineral R. Co. *v.* Harris, 98 Ala. 326, 13 So. 377; Louisville, etc., R. Co. *v.* Milton, 14 B. Mon. (Ky.) 75, 58 Am. Dec. 647.

91. Birmingham Mineral R. Co. *v.* Harris, 98 Ala. 326, 13 So. 377; Horner *v.* Williams, 100 N. C. 230, 5 S. E. 734; Harmon *v.* Columbia, etc., R. Co., 32 S. C. 127, 10 S. E. 877, 17 Am. St. Rep. 843.

92. Ft. Wayne, etc., R. Co. *v.* Woodward, 112 Ind. 118, 13 N. E. 260.

It is a question for the jury whether it is contributory negligence to turn a horse out upon the owner's premises near an unfenced railroad track at a time when trains are accustomed to pass. Sinkling *v.* Illinois Cent. R. Co., 10 S. D. 560, 74 N. W. 1029.

93. Iola Electric R. Co. *v.* Jackson, 70 Kan. 791, 79 Pac. 662; Atchison, etc., R. Co. *v.* Gabbert, 34 Kan. 132, 8 Pac. 218; Horner *v.* Williams, 100 N. C. 230, 5 S. E. 734; Simkins *v.* Columbia, etc., R. Co., 20 S. C. 258.

94. Birmingham Mineral R. Co. *v.* Harris, 98 Ala. 326, 13 So. 377.

95. Donovan *v.* Hannibal, etc., R. Co., 89 Mo. 147, 1 S. W. 232; Shepard *v.* Buffalo, etc., R. Co., 35 N. Y. 641. See also *supra*, X, H, 10, c.

96. Donovan *v.* Hannibal, etc., R. Co., 89 Mo. 147, 1 S. W. 232.

97. *Indiana.*— Indianapolis, etc., R. Co. *v.* Petty, 25 Ind. 413.

the railroad company is required by statute to fence its tracks,[98] as this duty even when expressly imposed by statute may be waived or assumed by the adjoining landowner in so far as it affects himself or those in privity with him.[99] In such cases plaintiff's animals are wrongfully upon the track by virtue of his own default and the company will not be liable in the absence of gross negligence or wilful injury,[1] and this rule is not affected by the fact that the defect in the fence which occasioned the injury was caused by accident or casualty without any fault on the part of plaintiff,[2] or was occasioned by fire communicated from the locomolives of the railroad company.[3] So also where by statute it is the duty of the landowner to assist in constructing and maintaining the railroad fences as division fences he cannot recover where his neglect in this regard has contributed to the injury.[4]

(II) *Knowledge of Defect and Notice to Company.* Where railroad companies are required by statute to fence their tracks it is equally their duty to exercise reasonable care in keeping the fences and cattle-guards in repair,[5] and by the weight of authority it is not contributory negligence for an adjoining landowner to turn his stock upon his own premises adjacent to such fences, although he knows that they are out of repair,[6] or knows that the cattle-

Missouri.— Ells *v.* Pacific R. Co., 48 Mo. 231.

New York.— Terry *v.* New York Cent. R. Co., 22 Barb. 574; Talmadge *v.* Rensselaer R. Co., 13 Barb. 493; Duffy *v.* New York, etc., R. Co., 2 Hilt. 496.

Ohio.— Lake Erie, etc., R. Co. *v.* Weisel, 55 Ohio St. 155, 44 N. E. 923; Pittsburg, etc., R. Co. *v.* Smith, 26 Ohio St. 124; Cincinnati, etc., R. Co. *v.* Waterson, 4 Ohio St. 424.

Texas.— Texas, etc., R. Co. *v.* Owens, 36 Tex. Civ. App. 54, 81 S. W. 62.

See 41 Cent. Dig. tit. "Railroads," § 1512.

A covenant by the grantor of a railroad right of way obligating himself to maintain the fences along the right of way runs with the land and precludes any subsequent grantee from recovering against the railroad company for an injury to stock which get on the right of way because of his failure to keep the fences in repair. Satterly *v.* Erie R. Co., 113 N. Y. App. Div. 462, 99 N. Y. Suppl. 309.

Where plaintiff acts only as agent of the company in constructing the fences, his act is that of the company and if the construction is defective his default cannot be set up by the company as a defense after its adoption of the fence. Norris *v.* Androscoggin, etc., R. Co., 39 Me. 273, 63 Am. Dec. 621. *Compare* Robbermann *v.* Pierce, 77 Ill. App. 405.

Where the railroad company removes a fence originally built by plaintiff under an agreement with the company to build and keep the same in repair, and constructs a substitute therefor of different material and upon a different location, which is accepted by plaintiff without objection, the respective rights and duties under the original contract remain and plaintiff cannot recover for injuries to his stock due to a failure to keep the substituted fence in repair. Pittsburg, etc., R. Co. *v.* Heiskell, 38 Ohio St. 666.

98. Ells *v.* Pacific R. Co., 48 Mo. 231. But see Southern R. Co. *v.* Dickens, 153 Ala. 283, 45 So. 215.

99. See *supra*, X, H, 4, a, (v).

1. Talmadge *v.* Rensselaer, etc., R. Co., 13 Barb. (N. Y.) 493; Pittsburg, etc., R. Co. *v.* Smith, 26 Ohio St. 124; Cincinnati, etc., R. Co. *v.* Waterson, 4 Ohio St. 424. But see Southern R. Co. *v.* Dickens, 153 Ala. 283, 45 So. 215.

2. Pittsburgh, etc., R. Co. *v.* Smith, 26 Ohio St. 124.

3. Terry *v.* New York Cent. R. Co., 22 Barb. (N. Y.) 574, holding that in such case the railroad company is not required to restore the fence but will only be liable for its destruction, and that it is contributory negligence on the part of plaintiff to fail to repair the fence and permit his stock to remain where they can pass upon the tracks and be injured.

4. Dayton, etc., R. Co. *v.* Miami County Infirmary, 32 Ohio St. 566; Sandusky, etc., R. Co. *v.* Sloan, 27 Ohio St. 341.

In Ohio the statute of 1859 provided that fences separating a railroad track from adjacent lands should be treated and maintained as division fences, but the statute of 1874 requires that they shall be kept in repair by the railroad company. Cleveland, etc., R. Co. *v.* Scudder, 40 Ohio St. 173.

5. See *supra*, X, H, 4, c, (II).

6. *Illinois.*— Baltimore, etc., R. Co. *v.* Seitzinger, 116 Ill. App. 55; Chicago, etc., R. Co. *v.* Bourne, 105 Ill. App. 27; Terre Haute, etc., R. Co. *v.* McCord, 56 Ill. App. 173 [*distinguishing* Chicago, etc., R. Co. *v.* Seirer, 60 Ill. 295].

Indiana.— Bellefontaine R. Co. *v.* Reed, 33 Ind. 476.

Massachusetts.— Rogers *v.* Newburyport R. Co., 1 Allen 16.

Minnesota.— Evans *v.* St. Paul, etc., R. Co., 30 Minn. 489, 16 N. W. 271; Johnson *v.* Chicago, etc., R. Co., 29 Minn. 425, 13 N. W. 673; Holtz *v.* Minneapolis, etc., R. Co., 29 Minn. 384, 13 N. W. 147.

Missouri.— Donovan *v.* Hannibal, etc., R. Co., 89 Mo. 147, 1 S. W. 232.

Nebraska.— See Union Pac. R. Co. *v.* Schwenck, 13 Nebr. 478, 14 N. W. 376.

guards are defective,[7] or that the gates or bars in such fences which it is the duty of the company to maintain are defective or insecure.[8] Nor is it necessary for plaintiff to make any effort to repair such defect,[9] or to request the company to do so,[10] or even to notify the company of its existence.[11] Plaintiff cannot, however, recover where the road was properly fenced by the railroad company and the defect which occasioned the injury was made by him-

New York.— Shepard *v.* Buffalo, etc., R. Co., 35 N. Y. 641; Brady *v.* Rensselaer, etc., R. Co., 1 Hun 378, 3 Thomps. & C. 537.

Ohio.— Cleveland, etc., R. Co. *v.* Scudder, 40 Ohio St. 173; Pittsburg, etc., R. Co. *v.* Smith, 38 Ohio St. 410.

Texas.— Gulf, etc., R. Co. *v.* Cash, 8 Tex. Civ. App. 569, 28 S. W. 387.

Vermont.— Congdon *v.* Central Vermont R. Co., 56 Vt. 390, 48 Am. Rep. 793.

See 41 Cent. Dig. tit. "Railroads," §§ 1513, 1514.

Contra.— Scowden *v.* Erie R. Co., 26 Pa. Super. Ct. 15; Perrault *v.* Minneapolis, etc., R. Co., 117 Wis. 520, 94 N. W. 348; Petersen *v.* Northern Pac. R. Co., 86 Wis. 206, 56 N. W. 689; Martin *v.* Stewart, 73 Wis. 553, 41 N. W. 538.

The reason of this rule is that the statute requiring railroad companies to maintain fences cannot be nullified and the landowner deprived of the ordinary and proper use of his own land by a failure on the part of the railroad company to perform its duty. Donovan *v.* Hannibal, etc., R. Co., 89 Mo. 147, 1 S. W. 233; Cleveland, etc., R. Co. *v.* Scudder, 40 Ohio St. 173; Gulf, etc., R. Co. *v.* Cash, 8 Tex. Civ. App. 569, 28 S. W. 387.

Although the animal is breachy contributory negligence will not be inferred in the absence of evidence that the character of the animal contributed to its escape. Congdon *v.* Central Vermont R. Co., 56 Vt. 390, 48 Am. Rep. 793.

Although plaintiff's animals had previously escaped through defects in the railroad fence it is not contributory negligence for the owner with knowledge of this fact to allow them to remain in a pasture adjacent to such fence (Rogers *v.* Newburyport R. Co., 1 Allen (Mass.) 16; Johnson *v.* Chicago, etc., R. Co., 29 Minn. 425, 13 N. W. 673), but is a fact which may be submitted to the jury (Johnson *v.* Chicago, etc., R. Co., *supra*).

Inclosing animals by an insufficient fence in a field from which they escape into another inclosure of plaintiff adjoining a railroad track, which was known not to be securely fenced by defendant, is not contributory negligence. Missouri, etc., R. Co. *v.* Dunnaway, 43 Tex. Civ. App. 350, 95 S. W. 760.

In Wisconsin it is held to be contributory negligence to leave stock where they can go upon the track through an opening in a railroad fence of which the owner has knowledge (Martin *v.* Stewart, 73 Wis. 553, 41 N. W. 538), or even to turn them out upon land adjacent to a railroad fence without first ascertaining its condition after there has been a severe storm (Carey *v.* Chicago, etc., R. Co., 61 Wis. 71, 20 N. W. 648), or a forest fire by which it might have been injured or destroyed (McCann *v.* Chicago, etc., R. Co., 96 Wis. 664, 71 N. W. 1054).

7. Texas, etc., R. Co. *v.* Sproles, (Tex. Civ. App. 1907) 105 S. W. 521.

8. Toledo, etc., R. Co. *v.* Burgan, 9 Ind. App. 604, 37 N. E. 31; Enix *v.* Iowa Cent. R. Co., 114 Iowa 508, 87 N. W. 417.

Where the railroad company is bound by contract, although not by statute, to maintain a safe crossing for the benefit of an adjoining landowner, knowledge on the part of the landowner that the company has failed to comply with its agreement and that the gates provided are insufficient will not defeat a recovery for injuries caused thereby. Toledo, etc., R. Co. *v.* Burgan, 9 Ind. App. 604, 37 N. E. 31.

Where a person is pasturing stock on the land of another the fact that he turned his stock into a pasture through a gate in the right of way fence and had an opportunity of inspecting its condition is not such contributory negligence as will prevent him from recovering for an injury to his animals which escape because the fastenings on the gate are insecure. Missouri Pac. R. Co. *v.* Pfrang, 7 Kan. App. 1, 51 Pac. 911.

9. Terre Haute, etc., R. Co. *v.* McCord, 56 Ill. App. 173; Chicago, etc., R. Co. *v.* Finch, 42 Ill. App. 90; Wilson *v.* St. Louis, etc., R. Co., 87 Mo. 431; Ft. Worth, etc., R. Co. *v.* Hickox, (Tex. Civ. App. 1907) 103 S. W. 202; Dunsford *v.* Michigan Cent. R. Co., 20 Ont. App. 577.

Even though the statute allows the landowner to repair the fence in case the railroad company after notice neglects to do so, he is not guilty of contributory negligence in failing to avail himself of the right to make such repairs. Terre Haute, etc., R. Co. *v.* McCord, 56 Ill. App. 173.

But if the defect could be easily repaired without any considerable cost or labor and a failure to do so would probably result in an injury to plaintiff's stock, it is but reasonable to require that he should do so or otherwise protect himself against the threatened danger (Chicago, etc., R. Co. *v.* Buck, 14 Ill. App. 394; Magilton *v.* New York Cent. R. Co., 11 N. Y. App. Div. 373, 42 N. Y. Suppl. 231); and in such case the question of plaintiff's contributory negligence is for the jury (Magilton *v.* New York Cent. R. Co, *supra*).

10. Terre Haute, etc., R. Co. *v.* McCord, 56 Ill. App. 173; Taft *v.* New York, etc., R. Co., 157 Mass. 297, 32 N. E. 168.

11. Terre Haute, etc., R. Co. *v.* McCord, 56 Ill. App. 173 [*distinguishing* Chicago, etc., R. Co. *v.* Serier, 60 Ill. 295]; Chicago, etc., R. Co. *v.* Finch, 42 Ill. App. 90; Dunn *v* Chicago, etc., R. Co., 58 Iowa 674, 12 N. W. 734; Dunsford *v.* Michigan Cent. R. Co., 20

self,[12] or where he knew of the defect and was required by statute to assist in keeping the fence in repair as a division fence,[13] or had expressly agreed with the railroad company that he would keep it in repair,[14] or where, although not required to do so, he voluntarily undertook to repair it without notice to the railroad company and did so in such a manner as to conceal without effectively remedying the defect.[15]

(III) *Opening and Closing Gates and Bars.*[16] It is the duty of a landowner when using a private or farm crossing maintained for his convenience to close the gates or bars,[17] and if he fails to do so and his animals escape and are injured by reason of such neglect, he cannot recover therefor.[18] This rule applies not only to the landowner but to any person using a gate in a railroad fence whose animals are injured by reason of his own neglect to close it,[19] and the fact that he found it open will not excuse his failure to close it after passing through.[20]

e. Allowing Animals to Go at Large — (I) *In General.* As to whether permitting animals to run at large is contributory negligence which will preclude a recovery by the owner, the authorities are not agreed; but there is a line of distinction which accounts for this difference on principle growing out of whether the common-law rule which requires owners of stock to keep them upon their

Ont. App. 577. *Compare* Polcr *v.* New York Cent. R. Co., 16 N. Y. 476.

12. Chicago, etc., R. Co. *v.* Dannel, 48 Ill. App. 251; Koutz *v.* Toledo, etc., R. Co., 54 Ind. 515; Davidson *v.* Central Iowa R. Co., 75 Iowa 22, 39 N. W. 163.

Plaintiff must exercise reasonable care in the use of the fences and gates provided in order to hold the railroad company responsible for failing to keep them in repair, and if his failure to do so is the cause of his animal's escape he ought not to recover. Magilton *v.* New York Cent. R. Co., 11 N. Y. App. Div. 373, 42 N. Y. Suppl. 231.

A railroad company is not liable to a tenant of the owner of the adjoining premises for injuries to his stock, where the stock enter on the right of way through a panel of the fence chopped down by his landlord's son. Best *v.* Ulster, etc., R. Co., 35 N. Y. App. Div. 623, 54 N. Y. Suppl. 305.

13. Dayton, etc., R. Co. *v.* Miami County Infirmary, 32 Ohio St. 566; Sandusky, etc., R. Co. *v.* Sloan, 27 Ohio St. 341.

14. Texas, etc., R. Co. *v.* Owens, 36 Tex. Civ. App. 54, 81 S. W. 62.

15. Chicago, etc., R. Co. *v.* Seirer, 60 Ill. 295.

Where the landowner substitutes a different fastening on a gate from that placed upon it by the railroad company, and uses it without any objection made to the company, he cannot recover if his animals escape through the gate and are injured. Francis *v.* Quincy, etc., R. Co., 118 Mo. App. 435, 93 S. W. 876.

16. **Duty to keep gates or bars closed in general** see *supra*, X, H, 5, d.

17. St. Louis, etc., R. Co. *v.* Fankboner, 128 Ill. App. 284; Eames *v.* Boston, etc., R. Corp., 14 Allen (Mass.) 151; Diamond Brick Co. *v.* New York Cent., etc., R. Co., 58 Hun (N. Y.) 396, 12 N. Y. Suppl. 22.

18. *Illinois.*— St. Louis, etc., R. Co. *v.* Fankboner, 128 Ill. App. 284; Ranny *v.* Chicago, etc., R. Co., 59 Ill. App. 130.

Indiana.— Bond *v.* Evansville, etc., R. Co., 100 Ind. 301.

Iowa.— Manwell *v.* Burlington, etc., R. Co., 80 Iowa 662, 45 N. W. 568.

Massachusetts.— Eames *v.* Boston, etc., R. Corp., 14 Allen 151.

Minnesota.— Swanson *v.* Chicago, etc., R. Co., 79 Minn. 398, 82 N. W. 670, 49 L. R. A. 625.

New York.— Diamond Brick Co. *v.* New York Cent., etc., R. Co., 58 Hun 396, 12 N. Y. Suppl. 22.

Utah.— Clark *v.* Oregon Short Line R. Co., 20 Utah 401, 59 Pac. 92.

Wisconsin.— Richardson *v.* Chicago, etc., R. Co., 56 Wis. 347, 14 N. W. 176.

Canada.— Vilaire *v.* Great Western R. Co., 11 U. C. C. P. 509.

See 41 Cent. Dig. tit. "Railroads," § 1515.

Under the Iowa statutes if the gate provided is such as the law requires plaintiff cannot recover if he leaves the gate open either wilfully or negligently; but if the gate is not up to the required standard mere negligence will not defeat a recovery, and the railroad company will be liable unless the injury was due to a "wilful" act of the owner. Claus *v.* Chicago Great Western R. Co., 136 Iowa 7, 111 N. W. 15.

Where it appears that a gate is out of repair and it is claimed that its being left open was due to the difficulty in closing it in that condition, the questions whether plaintiff exercised proper care in using the gate and whether defendant's negligence in failing to keep it in repair was the cause of the injury, are properly left to the jury. Taft *v.* New York, etc., R. Co., 157 Mass. 297, 32 N. E. 168.

19. Dickinson *v.* Wabash R. Co., 103 Mo. App. 332, 77 S. W. 88.

But if the gate has been opened and closed by others between the time when it was left open by plaintiff and the time of the accident his negligence in leaving it open cannot be said to have contributed to the injury. Atkinson *v.* Chicago, etc., R. Co., 119 Wis. 176, 96 N. W. 529.

20. Dickinson *v.* Wabash R. Co., 103 Mo. App. 332, 77 S. W. 88.

own premises prevails in the particular jurisdiction.[21] The question also usually relates only to cases where railroad companies are not required to fence their tracks or to accidents occurring at places not within the application of the statutes requiring them to do so,[22] as it is ordinarily held in actions based upon these statutes that merely allowing stock to run at large will not defeat a recovery,[23] and in some jurisdictions in such actions contributory negligence of any character not amounting to a wilful or intentional exposure to injury is not a defense.[24] In jurisdictions where the common-law rule does not prevail it is ordinarily held that the owner of stock in permitting them to run at large is in the exercise of a lawful right and is not chargeable with contributory negligence in case they stray upon a railroad track and are injured through a want of ordinary care on the part of the railroad company.[25] The owner in permitting his stock to run at

21. Moses *v.* Southern Pac. R. Co., 18 Oreg. 385, 23 Pac. 498, 8 L. R. A. 135.

Common-law rule as to animals running at large and jurisdictions in which it does or does not apply see ANIMALS, 2 Cyc. 392–395.

22. Moses *v.* Southern Pac. R. Co., 18 Oreg. 385, 23 Pac. 498, 8 L. R. A. 135.

Places within the application of statutes requiring tracks to be fenced see *supra*, X, H, 4, b.

23. *Indiana.*— Jeffersonville, etc., R. Co. *v.* Dunlap, 29 Ind. 426.

Kansas.— Atchison, etc., R. Co. *v.* Shaft, 33 Kan. 521, 6 Pac. 908.

Minnesota.— Sarja *v.* Great Northern R. Co., 99 Minn. 332, 109 N. W. 600.

Missouri.— Nolan *v.* Chicago, etc., R. Co., 23 Mo. App. 353.

New York.— Corwin *v.* New York, etc., R. Co., 13 N. Y. 42 [*disapproving* Marsh *v.* New York, etc., R. Co., 14 Barb. 364]; Munch *v.* New York Cent. R. Co., 29 Barb. 647. *Compare* Halloran *v.* New York, etc., R. Co., 2 E. D. Smith 257.

See 41 Cent. Dig. tit. "Railroads," § 1521.

In Minnesota it is held that stock may be permitted to run at large at such places and under such circumstances as to constitute contributory negligence even where the railroad company has failed to fence its tracks as required by law (Moser *v.* St. Paul, etc., R. Co., 42 Minn. 480, 44 N. W. 530), but that the defense is not available unless the circumstances were such that the injury was the natural and proximate result of so doing and that this is ordinarily a question for the jury (Sarja *v.* Great Northern R. Co, 99 Minn. 332, 109 N. W. 600; Ericson *v.* Duluth etc., R. Co., 57 Minn. 26, 58 N. W. 822).

Where it is lawful for stock to run at large and the railroad company fails to fence its tracks as required by law, the company is liable, and the question of contributory negligence does not arise. Ohio, etc., R. Co. *v.* Fowler, 85 Ill. 21.

24. See *supra*, X, H, 10, a, (II).

25. *Alabama.*— Louisville, etc., R. Co. *v.* Williams, 105 Ala. 379, 16 So. 795; Alabama Great Southern R. Co. *v.* Powers, 73 Ala. 244; Alabama Great Southern R. Co. *v.* Jones, 71 Ala. 487; Mobile, etc., R. Co. *v.* Williams, 53 Ala. 595.

Arkansas.— Little Rock, etc., R. Co. *v.* Finley, 37 Ark. 562.

California.— Richmond *v.* Sacramento Valley R. Co., 18 Cal. 351; Waters *v.* Moss, 12 Cal. 535, 73 Am. Dec. 561.

Georgia.— Macon, etc., R. Co. *v.* Lester, 30 Ga. 911.

Illinois.— Chicago, etc., R. Co. *v.* Engle, 84 Ill. 397; Rockford, etc., R. Co. *v.* Rafferty, 73 Ill. 58 [*distinguishing* Illinois Cent. R. Co. *v.* Phelps, 29 Ill. 447; Chicago, etc., R. Co. *v.* Cauffman, 28 Ill. 513]; Chicago, etc., R. Co. *v.* Cauffman, 38 Ill. 424.

Iowa.— Kuhn *v.* Chicago, etc., R. Co., 42 Iowa 420; Searles *v.* Milwaukee, etc., R. Co., 35 Iowa 490; Alger *v.* Mississippi, etc., R. Co., 10 Iowa 268.

Kansas.— Prickett *v.* Atchison, etc., R. Co., 33 Kan. 748, 7 Pac. 611; Missouri Pac. R. Co. *v.* Wilson, 28 Kan. 637. But see Union Pac. R. Co. *v.* Rollins, 5 Kan. 167.

Kentucky.— Kentucky Cent. R. Co. *v.* Lebus, 14 Bush 518.

Mississippi.— New Orleans, etc., R. Co. *v.* Field, 46 Miss. 573.

Missouri.— Turner *v.* Kansas City, etc., R. Co., 78 Mo. 578; Apitz *v.* Missouri Pac. R. Co., 17 Mo. App. 419.

Montana.— McMaster *v.* Montana Union R. Co., 12 Mont. 163, 30 Pac. 268.

North Carolina.— Bethea *v.* Raleigh, etc., R. Co., 106 N. C. 279, 10 S. E. 1045; Farmer *v.* Wilmington, etc., R. Co., 88 N. C. 564; Laws *v.* North Carolina R. Co., 52 N. C. 468.

Ohio.— Cleveland, etc., R. Co. *v.* Elliott, 4 Ohio St. 474.

Oregon.— Moses *v.* Southern Pac. R. Co., 18 Oreg. 385, 23 Pac. 498, 8 L. R. A. 135.

Tennessee.— Memphis, etc., R. Co. *v.* Smith, 9 Heisk. 860.

Texas.— Texas, etc., R. Co. *v.* Seay, (Civ. App. 1902) 69 S. W. 177; Texas, etc., R. Co. *v.* Cockrell, 2 Tex. App. Civ. Cas. § 717.

Washington.— Timm *v.* Northern Pac. R. Co., 3 Wash. Terr. 299, 13 Pac. 415.

West Virginia.— Layne *v.* Ohio River R. Co., 35 W. Va. 438, 14 S. E. 123; Baylor *v.* Baltimore, etc., R. Co., 9 W. Va. 270; Blaine *v.* Chesapeake, etc., R. Co., 9 W. Va. 252.

United States.— Eddy *v.* Evans, 58 Fed. 151, 7 C. C. A. 129.

See 41 Cent. Dig. tit. "Railroads," § 1521.

Persons living in the vicinity of a railroad have the same right as persons living in more remote localities to permit their stock to run at large and are not chargeable with contributory negligence in so doing. New

large of course assumes the risk of all unavoidable accidents,[26] but assumes no risk as to accidents which the company might avoid by the exercise of ordinary care.[27] The conduct of the owner while in a sense negligence is ordinarily the remote and not the proximate cause of the injury,[28] although stock may be turned out under circumstances that will preclude a recovery.[29] In jurisdictions where the common-law rule prevails it is ordinarily held that allowing stock to run at large is such negligence on the part of the owner as will preclude a recovery,[30] the animals being considered as trespassers and the company not liable in

Orleans, etc., R. Co. *v.* Field, 46 Miss. 573; Turner *v.* Kansas City, etc., R. Co., 78 Mo. 578; Apitz *v.* Missouri Pac. R. Co., 17 Mo. App. 419.

This rule is not affected by the fact that the animals got at large through the negligence of the owner in permitting them to escape (South Alabama, etc., R. Co. *v.* Williams, 65 Ala. 74), or that knowing of their escape he did not recapture and confine them (Louisville, etc., R. Co. *v.* Williams, 105 Ala. 379, 16 So. 795).

Where a railroad company has voluntarily constructed cattle-guards when not required to do so, the owner of animals is not guilty of contributory negligence in allowing his stock to run at large, although he knows that the cattle-guards are defective so that stock could pass over them and go upon the track between the right of way fences. St. Louis, etc., R. Co. *v.* Donglass, 152 Ala. 197, 44 So. 677.

Although plaintiff knows that salt is on the track calculated to attract stock, which has been left there by the negligence of the railroad company, he is not guilty of contributory negligence in allowing his stock to run at large. Brown *v.* Hannibal, etc., R. Co., 27 Mo. App. 394.

In Oregon and Tennessee the statutes provide that allowing stock to run at large on the common unfenced range or upon inclosed lands of the owner shall not be deemed or held to be contributory negligence; but this does not apply to stock not running loose but which are in charge of some person. Keeney *v.* Oregon R., etc., Co., 19 Oreg. 391, 24 Pac. 233; Nashville, etc., R. Co. *v.* Spence, 99 Tenn. 218, 41 S. W. 934.

26. Raiford *v.* Mississippi Cent. R. Co., 43 Miss. 233; Memphis, etc., R. Co. *v.* Blakeney, 43 Miss. 218.

The term "unavoidable accident" as used in the application of this rule is not confined to such accidents as are physically impossible to prevent, but includes all accidents not voidable by the exercise of ordinary care on the part of the railroad company. Memphis, etc., R. Co. *v.* Blakeney, 43 Miss. 218.

27. *Arkansas.*— Little Rock, etc., R. Co. *v.* Finley, 37 Ark. 562.

Iowa.— Kuhn *v.* Chicago, etc., R. Co., 42 Iowa 420; Alger *v.* Mississippi, etc., R. Co., 10 Iowa 268.

Mississippi.— New Orleans, etc., R. Co. *v.* Field, 46 Miss. 573.

Oregon.— Moses *v.* Southern Pac. R. Co., 18 Oreg. 385, 23 Pac. 498, 8 L. R. A. 135.

West Virginia.— Blaine *v.* Chesapeake, etc., R. Co., 9 W. Va. 252.

See 41 Cent. Dig. tit. "Railroads," § 1521.

28. *North Carolina.*— Farmer *v.* Wilmington, etc., R. Co., 88 N. C. 564.

Ohio.— Cleveland, etc., R. Co. *v.* Elliott, 4 Ohio St. 474.

Oregon.— Moses *v.* Southern Pac. R. Co., 18 Oreg. 385, 23 Pac. 498, 8 L. R. A. 135.

South Carolina.— Sauls *v.* D. W. Alderman, etc., Co., 55 S. C. 395, 33 S. E. 467.

West Virginia.— Blaine *v.* Chesapeake, etc., R. Co., 9 W. Va. 252.

See 41 Cent. Dig. tit. "Railroads," § 1521.

29. Williams *v.* Northern Pac. R. Co., 3 Dak. 168, 14 N. W. 97; McDonald *v.* Great Northern R. Co., 5 Ida. 8, 46 Pac. 766; Hindman *v.* Oregon R., etc., Co., 17 Oreg. 614, 22 Pac. 116.

But to preclude a recovery they must have been turned out under such circumstances as to show a want of ordinary care on the part of the owner which contributed directly to produce the injury complained of. There is a clear distinction between allowing stock to run at large where there is a mere possibility of their straying upon a railroad track and turning them out directly upon the right of way or station grounds where the danger is constant and imminent. Moses *v.* Southern Pac. R. Co., 18 Oreg. 385, 23 Pac. 498, 8 L. R. A. 135.

In the vicinity of crossings, station grounds, and other places not required to be fenced see *infra*, X, H, 10, e, (II).

To turn out a blind animal at a distance of over a mile from a place where the railroad track is unfenced is not contributory negligence as a matter of law but whether it is such negligence is a question for the jury. Hammond *v.* Sioux City, etc., R. Co., 49 Iowa 450.

30. *Colorado.*—Atchison, etc., R. Co. *v.* Betts, 10 Colo. 431, 15 Pac. 821.

Indiana.— Lyons *v.* Terre Haute, etc., R. Co., 101 Ind. 419; Cincinnati, etc., R. Co. *v.* Hiltzhauer, 99 Ind. 486; Cincinnati, etc., R. Co. *v.* Street, 50 Ind. 225; Jeffersonville, etc., R. Co. *v.* Underhill, 48 Ind. 389; Indianapolis, etc., R. Co. *v.* Harter, 38 Ind. 557; Lafayette, etc., R. Co. *v.* Shriner, 6 Ind. 141.

Maryland.— Baltimore, etc., R. Co. *v.* Lamborn, 12 Md. 257.

Michigan.— Robinson *v.* Flint, etc., R. Co., 79 Mich. 323, 44 N. W. 779, 19 Am. St. Rep. 174; Williams *v.* Michigan Cent. R. Co., 2 Mich. 259, 55 Am. Dec. 59.

New Jersey.— Price *v.* New Jersey R., etc., Co., 32 N. J. L. 19; Vandegrift *v.* Rediker, 22 N. J. L. 185, 51 Am. Dec. 262.

New York.— Bowman *v.* Troy, etc., R. Co., 37 Barb. 516.

the absence of wanton or wilful injury or such gross negligence as is equivalent thereto.[31]

(II) *Near Crossings, Stations, and Other Places Not Required to Be Fenced.* In a number of cases it has been held without express reference to the rightfulness or wrongfulness of permitting stock to run at large that it is contributory negligence to do so in the immediate vicinity of public crossings, station grounds, and other places where the railroad company is not required to fence its tracks,[32] and this rule of course applies where it is held generally to be contributory negligence to permit stock to run at large;[33] but in jurisdictions where stock may lawfully run at large it has been held that it is not necessarily contributory negligence to allow animals to run at large even in the vicinity of station grounds and public crossings,[34] but that it is a question of whether plaintiff's conduct shows a want of ordinary care under the circumstances which has contributed directly to the injury complained of,[35] and is properly a question for the jury.[36] In Canada the statutes of 1857 and 1888 expressly provided that stock should not be permitted to be at large upon a highway within one-half mile of a grade crossing of a railroad unless in charge of some person, and that if stock so at large should go upon the railroad and be killed the owner should have no right of action against the railroad company.[37] This statute was held

Pennsylvania.— Horricks *v.* Philadelphia, etc., R. Co., 1 Phila. 28.

Rhode Island.— Tower *v.* Providence, etc., R. Co., 2 R. I. 404.

Vermont.— Jackson *v.* Rutland, etc., R. Co., 25 Vt. 150, 60 Am. Dec. 246.

See 41 Cent. Dig. tit. "Railroads," § 1521.

In Minnesota where the common-law rule is in force (see Moser *v.* St. Paul, etc., R. Co., 42 Minn. 480, 44 N. W. 530), it is held that the mere fact that stock are unlawfully at large does not, as between the owner and the railroad company, constitute contributory negligence *per se* (Green *v.* St. Paul, etc., R. Co., 55 Minn. 192, 56 N. W. 752), and that plaintiff will not be precluded from recovery unless they were allowed to run at large under such circumstances that the injury complained of was the natural and proximate result of so doing (Sarja *v.* Great Northern R. Co., 99 Minn. 332, 109 N. W. 600; Ericson *v.* Duluth, etc., R. Co., 57 Minn. 26, 58 N. W. 822 [*distinguishing* Moser *v.* St. Paul, etc., R. Co., *supra*]).

31. Lafayette, etc., R. Co. *v.* Shriner, 6 Ind. 141; Vandegrift *v.* Rediker, 22 N. J. L. 185, 51 Am. Dec. 262; Jackson *v.* Rutland, etc., R. Co., 25 Vt. 150, 60 Am. Dec. 246.

Liability as to trespassing animals in general see *supra*, X, H, 1, c.

32. *Illinois.*— Illinois Cent. R. Co. *v.* Phelps, 29 Ill. 447. See also Chicago, etc., R. Co. *v.* Cauffman, 28 Ill. 513.

Indiana.— Hanna *v.* Terre Haute, etc., R. Co., 119 Ind. 316, 21 N. E. 903; Wabash, etc., R. Co. *v.* Nice, 99 Ind. 152; Cincinnati, etc., R. Co. *v.* Street, 50 Ind. 225; Jeffersonville, etc., R. Co. *v.* Underhill, 48 Ind. 389; Jeffersonville, etc., R. Co. *v.* Adams, 43 Ind. 402.

Michigan.—Schneekloth *v.* Chicago, etc., R. Co., 108 Mich. 1, 65 N. W. 663; Niemann *v.* Michigan Cent. R. Co., 80 Mich. 197, 44 N. W. 1049.

Nebraska.— Burlington, etc., R. Co. *v.* Wendt, 12 Nebr. 76, 10 N. W. 456.

New York.— Clark *v.* Syracuse, etc., R. Co., 11 Barb. 112.

Utah.— Bunnell *v.* Rio Grande Western R. Co., 13 Utah 314, 44 Pac. 927.

Wisconsin.— McCandless *v.* Chicago, etc., R. Co., 45 Wis. 365; Bennett *v.* Chicago, etc., R. Co., 19 Wis. 145.

See 41 Cent. Dig. tit. "Railroads," § 1522.

It is prima facie contributory negligence to allow stock to run at large in the vicinity of depot grounds, and plaintiff cannot recover in the absence of facts shown making such conduct consistent with ordinary care and prudence. Moser *v.* St. Paul, etc., R. Co., 42 Minn. 480, 44 N. W. 530.

In Illinois, under the statute of 1871, which made it unlawful for stock to run at large except when authorized by a vote of the county, it was held to be contributory negligence to allow stock to run at large at places where the railroad company was not required to fence. Toledo, etc., R. Co. *v.* Barlow, 71 Ill. 640.

33. Indianapolis, etc., R. Co. *v.* Harter, 38 Ind. 557; Robinson *v.* Flint, etc., R. Co., 79 Mich. 323, 44 N. W. 779, 19 Am. St. Rep. 174; Bowman *v.* Troy, etc., R. Co., 37 Barb. (N. Y.) 516.

34. Miller *v.* Chicago, etc., R. Co., 59 Iowa 707, 13 N. W. 859; Kuhn *v.* Chicago, etc., R. Co., 42 Iowa 420 [*explaining* Smith *v.* Chicago, etc., R. Co., 34 Iowa 506]; Moses *v.* Southern Pac. R. Co., 18 Oreg. 385, 23 Pac. 498, 8 L. R. A. 135.

35. Miller *v.* Chicago, etc., R. Co., 59 Iowa 707, 13 N. W. 859; Moses *v.* Southern Pac. R. Co., 18 Oreg. 385, 23 Pac. 498, 8 L. R. A. 135. See also Cincinnati, etc., R. Co. *v.* Ducharme, 4 Ill. App. 178.

36. Miller *v.* Chicago, etc., R. Co., 59 Iowa 707, 13 N. W. 859.

37. Thompson *v.* Grand Trunk R. Co., 22 Ont. App. 453; Thompson *v.* Grand Trunk R. Co., 18 U. C. Q. B. 92.

What constitutes being at large.—Animals were held to be at large and not under con-

to bar any right of action for stock so killed notwithstanding the railroad company was negligent,[38] or the animal was not killed upon the crossing,[39] and reached the place upon the track where the injury occurred through a failure of the railroad company to construct or properly maintain cattle-guards,[40] and regardless of whether the animal was at large with the knowledge or through the fault of the owner or not.[41] Under the statute of 1903, however, the owner may recover unless the animal was at large through his negligent or wilful act,[42] and the burden is upon the railroad company to establish this fact;[43] but if the animal was at large through the negligence or wilful act of the owner he cannot recover.[44]

(III) *Effect of Stock Laws.* Where the common-law rule prevails as to animals running at large, and it is held to be contributory negligence to permit them to do so, it has been held that the rule is not affected by a municipal regulation permitting stock to run at large in the locality where the accident occurred;[45] and conversely it has been held that where except for a special statute prohibiting it in a particular locality it is not unlawful or contributory negligence to allow stock to run at large, the existence of such a stock law will not make it so.[46] While the weight of authority seems to be that stock allowed to run at large in violation of stock laws are trespassers and that the company will not be liable in actions for their injury in the absence of gross negligence or wilful injury,[47] it has been held in a number of cases that the fact that they are at large in violation of such laws is not necessarily such contributory negligence as will defeat a recovery,[48] but

trol so that a recovery was barred by the statute where a person left four horses without bridles or halters standing in a road near a crossing while he went to open a gate leading into a neighboring field (Thompson *v.* Grand Trunk R. Co., 18 U. C. Q. B. 92); where a person riding one horse was driving another before him which was loose and sixty to one hundred feet in front of him (Markham *v.* Great Western R. Co., 25 U. C. Q. B. 572); where a person drove three horses along a road before him to a watering place without halters, bridles, or other means of control (Cooley *v.* Grand Trunk R. Co., 18 U. C. Q. B. 96); and where a person left a herd of cattle standing in a road while he went after one which had run away and got so far from the herd that he could not prevent their going upon the crossing where they stopped and were injured (Thompson *v.* Grand Trunk R. Co., 22 Ont. App. 453).

38. McGee *v.* Great Western R. Co., 23 U. C. Q. B. 293.

39. Cooley *v.* Grand Trunk R. Co., 18 U. C. Q. B. 96; Simpson *v.* Great Western R. Co., 17 U. C. Q. B. 57; Ferris *v.* Grand Trunk R. Co., 16 U. C. Q. B. 474.

40. Nixon *v.* Grand Trunk R. Co., 23 Ont. 124; Cooley *v.* Grand Trunk R. Co., 18 U. C. Q. B. 96; Simpson *v.* Great Western R. Co., 17 U. C. Q. B. 57. See also Whitman *v.* W. & A. R. Co., 6 Can. L. T. Occ. Notes 451.

41. Simpson *v.* Great Western R. Co., 17 U. C. Q. B. 57.

42. Daigle *v.* Temisconta R. Co., 37 N. Brunsw. 219; Lebu *v.* Grand Trunk R. Co., 12 Ont. L. Rep. 590, 8 Ont. Wkly. Rep. 418; Bacon *v.* Grand Trunk R. Co., 12 Ont. L Rep. 196, 7 Ont. Wkly. Rep. 753; Arthur *v.* Central Ontario R. Co., 11 Ont. L. Rep. 537, 7 Ont. Wkly. Rep. 527.

Place of injury.— If the animal was at large within one-half mile of the crossing and was injured directly upon the crossing, it seems that there could be no recovery, but if at any other point and the railroad company has failed to fence or construct cattle-guards as required by statute, the owner may recover unless the company can show that the animal was at large by reason of the negligence or wilful act of the owner. Arthur *v.* Central Ontario R. Co., 11 Ont. L. R. 537, 7 Ont. Wkly. Rep. 527.

43 Bacon *v.* Grand Trunk R. Co., 12 Ont. L. Rep. 196, 7 Ont. Wkly. Rep. 753.

44. Phair *v.* Canadian Northern R. Co., 5 Can. R. Cas. 334, 6 Ont. Wkly. Rep. 137.

45. Hanna *v.* Terre Haute, etc., R. Co., 119 Ind. 316, 21 N. E. 903; Michigan Southern, etc., R. Co. *v.* Fisher, 27 Ind. 96; Williams *v.* Michigan Cent. R. Co., 2 Mich. 259, 55 Am. Dec. 59; Tonawanda R. Co. *v.* Munger, 5 Den. (N. Y.) 255, 49 Am. Dec. 239 [*affirmed* in 4 N. Y. 349, 53 Am. Dec. 384]. But see Fritz *v.* St. Paul, etc., R. Co., 22 Minn. 404.

The effect of such a regulation is merely to relieve the owner of the animal from liability for damages done by it while at large and not to alter the common-law rule as between the owner and the railroad company. Hanna *v.* Terre Haute, etc., R. Co., 119 Ind. 316, 21 N. E. 903.

46. Alabama Great Southern R. Co. *v.* McAlpine, 71 Ala. 545.

The illegality must have contributed as a proximate cause of the injury in order to preclude a recovery, and the act of allowing stock to run at large is no more a proximate cause of the injury when illegal than when legal. Alabama Great Southern R. Co. *v.* McAlpine, 71 Ala. 545; Roberts *v.* Richmond, etc., R. Co., 88 N. C. 560.

47. See *supra*, X, H, 1, e, (II).

48. *Alabama.*— Alabama Great Southern R. Co. *v.* McAlpine, 71 Ala. 545.

that it may be such under the circumstances of the particular case,[49] and therefore is properly a question for the jury.[50] Where railroad companies are required by law to fence their tracks, the question of stock laws in particular localities does not affect this duty.[51] In some cases it has been held, however, that where stock are allowed to run at large in violation of law and the railroad company has neglected its statutory duty to fence its tracks but is not guilty of any other negligence, plaintiff cannot recover;[52] but in other cases where there was a failure to fence it has been held that the mere fact that stock were at large in violation of law is not sufficient to charge plaintiff with contributory negligence, but that it is a question for the jury under the circumstances of the particular case,[53] plaintiff being entitled to recover unless the circumstances were such that it was a natural and probable consequence that the stock would be injured,[54] and the fact of allowing them to run at large contributed directly to the injury complained of.[55]

f. Escape of Animals From Inclosure or Control — (i) *IN GENERAL.* It is held in some jurisdictions that if animals escape from the owner's inclosure or control without any fault on his part he is not chargeable with contributory negligence;[56] and this rule has been expressly held to apply in jurisdictions where

California.— Orcutt *v.* Pacific Coast R. Co., 85 Cal. 291, 24 Pac. 661.

Georgia.— Central R. Co. *v.* Hamilton, 71 Ga. 461; Atlanta, etc., R. Co. *v.* Hudson, 2 Ga. App. 352, 58 S. E. 500.

Illinois.— Atchison, etc., R. Co. *v.* Cupello, 61 Ill. App. 432.

Missouri.— Kirkpatrick *v.* Missouri Pac. R. Co., 71 Mo. App. 263.

North Carolina.—Roberts *v.* Richmond, etc., R. Co., 88 N. C. 560.

See 41 Cent. Dig. tit. "Railroads," § 1523.

49. Wright *v.* Minneapolis, etc., R. Co., 12 N. D. 159, 96 N. W. 324, holding that it is contributory negligence to allow stock to run at large in violation of a stock law, knowing that they are in the habit of going upon the tracks and frequenting places of known danger.

50. Atlanta, etc., R. Co. *v.* Hudson, 2 Ga. App. 352, 58 S. E. 500; Atchison, etc., R. Co. *v.* Cupello, 61 Ill. App. 432.

51. See *supra*, X, H, 4, a, (XIII).

52. Peoria, etc., R. Co. *v.* Champ, 75 Ill. 577; Kansas Pac. R. Co. *v.* Landis, 24 Kan. 406; Atchison, etc., R. Co. *v.* Hegwir, 21 Kan. 622; Central Branch R. Co. *v.* Lea, 20 Kan. 353; Pittsburgh, etc., R. Co. *v.* Methven, 21 Ohio St. 586. See also Missouri Pac. R. Co. *v.* McGrath, 7 Kan. App. 710, 51 Pac. 921.

The ground of these decisions is that plaintiff and defendant have contributed equally, although remotely, to the injury complained of in that each has neglected a statutory duty, which fact will preclude a recovery in the absence of any other negligence on the part of defendant directly connected with the injury complained of. Central Branch R. Co. *v.* Lea, 20 Kan. 353; Pittsburgh, etc., R. Co. *v.* Methven, 21 Ohio St. 586.

In Iowa the statute requiring railroad companies to fence their tracks makes the railroad company liable for all injuries where they have failed to do so unless caused by the "wilful act of the owner or his agent," and permitting stock to run at large in violation of stock laws is held not to be a wilful act within the application of the statute. Lee *v.* Minneapolis, etc., R. Co., 66 Iowa 131, 23 N. W. 299; Krebs *v.* Minneapolis, etc., R. Co., 64 Iowa 670, 21 N. W. 131.

Where a railroad runs through a pasture the existence of a stock law in the locality does not affect the duty of the railroad company to construct and maintain the fences along its right of way within the inclosure, and stock running upon the pasture are not considered as being at large. Gulf, etc., R. Co. *v.* Coffin, (Tex. Civ. App. 1906) 97 S. W. 1066.

53. Cairo, etc., R. Co. *v.* Woosley, 85 Ill. 370; Ewing *v.* Chicago, etc., R. Co., 72 Ill. 25; Watier *v.* Chicago, etc., R. Co., 31 Minn. 91, 16 N. W. 537.

54. Cairo, etc., R. Co. *v.* Woosley, 85 Ill. 370; Ewing *v.* Chicago, etc., R. Co., 72 Ill. 25.

55. Ewing *v.* Chicago, etc., R. Co., 72 Ill. 25; Watier *v.* Chicago, etc., R. Co., 31 Minn. 91, 16 N. W. 537.

56. *Illinois.*— Toledo, etc., R. Co. *v.* Johnston, 74 Ill. 83.

Kansas.— Atchison, etc., R. Co. *v.* Davis, 31 Kan. 645, 3 Pac. 301; Pacific R. Co. *v.* Brown, 14 Kan. 469.

Maryland.—Western Maryland R. Co. *v.* Carter, 59 Md. 306.

Michigan.— Parker *v.* Lake Shore, etc., R. Co., 93 Mich. 607, 53 N. W. 834.

Minnesota.— Hohl *v.* Chicago, etc., R. Co., 61 Minn. 321, 63 N. W. 742, 52 Am. St. Rep. 598; Nelson *v.* Great Northern R. Co., 52 Minn. 276, 53 N. W. 1129.

Missouri.— Williams *v.* Missouri Pac. R. Co., 74 Mo. 453.

New Hampshire.— Clark *v.* Boston, etc., R. Co., 64 N. H. 323, 10 Atl. 676.

Wisconsin.— Herrell *v.* Chicago, etc., R. Co., 114 Wis. 605, 90 N. W. 1071.

See 41 Cent. Dig. tit. "Railroads," § 1516.

If the owner leaves his stock in a properly fenced pasture adjoining the railroad track and they escape and go upon the track by reason of a trespasser leaving a gate in the fence open, the owner is not chargeable with

the common-law rule prevails, and voluntarily permitting animals to run at large would preclude a recovery;[57] but if the owner knows that his animals have escaped and makes no effort to reclaim them it will be held that they are at large with his consent.[58] In other jurisdictions where the common-law rule prevails it is held that the owner must see at his peril that his animals are kept on his own premises, and that, although they escape without any actual fault on his part, they are nevertheless trespassers and the owner is chargeable with negligence,[59] and that there can be no recovery in the absence of gross negli ence or intentional injury on the part of the railroad company.[60] A distinction has, however, been made between the escape of animals from the owner's inclosure and escape from his control when being driven along a highway,[61] it being held that while the owner cannot recover in the former case,[62] he may in the latter;[63] and it has also been held that plaintiff may recover where the injury occurs upon a public crossing,[64] on the ground that the animal is not to be regarded as a trespasser if at large without the fault of the owner and at a point where the right of the railroad co mpany is not exclusive.[65]

(II) *LEA VING HORSES UNHITCHED OR UNATTENDED.* To leave horses or teams unhitched or unattended in the immediate vicinity of a railroad track is ordinarily held to be such contributory negligence as will defeat a recovery,

contributory negligence because at the time of the accident he had gone out of the state without leaving any one to look after his stock. Toledo, etc., R. Co. *v.* Milligan, 52 Ind. 505.

57. Parker *v.* Lake Shore, etc., R. Co., 93 Mich. 607, 53 N. W. 834; Hohl *v.* Chicago, etc., R. Co., 61 Minn. 321, 63 N. W. 742, 52 Am. St. Rep. 598.

58. Cincinnati, etc., R. Co. *v.* Street, 50 Ind. 225.

But if it is lawful for stock to run at large a failure to reclaim and confine animals which have escaped is no more than a consent that they should be at large and is not contributory negligence. Louisville, etc., R. Co. *v.* Williams, 105 Ala. 379, 16 So. 795.

59. *Indiana.*— Cincinnati, etc., R. Co. *v.* Stanley, (App. 1891) 27 N. E. 316. But see Dennis *v.* Louisville, etc., R. Co., 116 Ind. 42, 18 N. E. 179, 1 L. R. A. 448; Pittsburgh, etc., R. Co. *v.* Shaw, 15 Ind. App. 173, 43 N. E. 957.

New Jersey.— Case *v.* Cent. R. Co., 59 N. J. L. 471, 37 Atl. 65, 59 Am. St. Rep. 617; Price *v.* New Jersey R., etc., Co., 31 N. J. L. 229.

New York.— Munger *v.* Tonawanda R. Co., 4 N. Y. 349, 53 Am. Dec. 384; Mentges *v.* New York, etc., R. Co., 1 Hilt. 425; Tonawanda R. Co. *v.* Munger, 5 Den. 255, 49 Am. Dec. 239 [*affirmed* in 4 N. Y. 349, 53 Am. Dec. 384]. But see Waldron *v.* Rensselaer R. Co., 8 Barb. 390.

Pennsylvania.— North Pennsylvania R. Co. *v.* Rehman, 49 Pa. St. 101, 88 Am. Dec. 491.

Wisconsin.— Fisher *v.* Farmers' L. & T. Co., 21 Wis. 73.

See 41 Cent. Dig. tit. "Railroads," § 1516.

This doctrine has been expressly disapproved as being a wrong application of the common-law rule, it being held that while the owner will be liable for any damages done by his stock, regardless of whether they escape without his fault, yet it is a material consideration in actions for injuries to such stock caused by the negligence of another. Hohl *v.* Chicago, etc., R. Co., 61 Minn. 321, 63 N. W. 742, 52 Am. St. Rep. 598.

If the railroad company has failed to fence its tracks or keep the fence in repair as required by law and the statute applies to animals wrongfully as well as rightfully at large, plaintiff's negligence in allowing them to escape will not defeat an action based upon the statute. Sheaf *v.* Utica, etc., R. Co., 2 Thomps. & C. (N. Y.) 388.

60. Price *v.* New Jersey R., etc., Co., 32 N. J. L. 19; Northern Pac. R. Co. *v.* Rehman, 49 Pa. St. 101, 88 Am. Dec. 491; Fisher *v.* Farmers' L. & T. Co., 21 Wis. 73.

61. Amstein *v.* Gardner, 132 Mass. 28, 42 Am. Rep. 421.

62. Darling *v.* Boston, etc., R. Co., 121 Mass. 118.

63. Amstein *v.* Gardner, 132 Mass. 28, 42 Am. Rep. 421. See also Taft *v.* New York, etc., R. Co., 157 Mass. 297, 32 N. E. 168.

Whether the animal was driven in a negligent manner upon the highway is a question for the jury. Towne *v.* Nashua, etc., R. Co., 124 Mass. 101.

64. Louisville, etc., R. Co. *v.* Ousler, 15 Ind. App. 232, 36 N. E. 290; Pittsburgh, etc., R. Co. *v.* Shaw, 15 Ind. App. 173, 43 N. E. 957; Ohio, etc., R. Co. *v.* Craycraft, 5 Ind. App. 335, 32 N. E. 297; Chicago, etc., R. Co. *v.* Fenn, 3 Ind. App. 250, 29 N. E. 790; Chicago, etc., R. Co. *v.* Nash, 1 Ind. App. 298, 27 N. E. 564; Rehman *v.* Railroad Co., 5 Phila. (Pa.) 450. *Contra*, Northern Pennsylvania R. Co. *v.* Rehman, 49 Pa. St. 101, 88 Am. Dec. 491, holding that the fact that an animal was upon a public crossing when injured is entirely immaterial if the animal was at large and not properly using the highway for the ordinary purpose of travel.

65. Louisville, etc., R. Co. *v.* Ousler, 15 Ind. App. 232, 36 N. E. 290.

although the railroad company was negligent,[66] or its track was not fenced as required by law;[67] but under some circumstances it may not necessarily be contributory negligence but a question for the jury.[68]

(III) *Effect of Stock Laws.* Stock laws making it unlawful for stock to run at large do not impose an absolute requirement that the owner must keep them upon his own premises, but only require that his fences shall be reasonably sufficient to restrain them and that he shall exercise reasonable precautions to prevent their being at large,[69] and if without the knowledge or fault of the owner they escape from his inclosure or control he is not chargeable with contributory negligence which will preclude a recovery where the railroad company has been negligent in the operation of its trains,[70] or has failed to fence its tracks as required by law,[71] or failed to keep its fences in repair or the gates therein closed;[72] but it will be presumed where animals are at large in violation of a stock law that they are at large with the consent of the owner.[73]

(IV) *Defects in Fence Around Inclosure.* If plaintiff's animals escape from his inclosure by reason of his failure to keep his fence in repair and his neglect in this respect contributed to the injury complained of, he cannot recover.[74]

11. Proximate Cause of Injury — a. In General. Only such negligence is actionable as causes or directly contributes to the injury complained of,[75] and although a railroad company may have been negligent in the operation of its trains or may have done or omitted some act prohibited or enjoined by statute, it must further affirmatively appear, in order to render the company liable, that

66. *Indiana.*— Louisville, etc., R. Co. *v.* Eves, 1 Ind. App. 224, 27 N. E. 580.

Kentucky.—Weingartner *v.* Louisville, etc., R. Co., 42 S. W. 839, 19 Ky. L. Rep. 1023.

Pennsylvania.— Edwards *v.* Philadelphia, etc., R. Co., 148 Pa. St. 531, 23 Atl. 894.

Texas.— Galveston, etc., R. Co. *v.* Graham, (Civ. App. 1907) 101 S. W. 846.

Utah.— Silcock *v.* Rio Grande Western R. Co., 22 Utah 179, 61 Pac. 565.

Wisconsin.— Olson *v.* Chicago, etc., R. Co., 81 Wis. 41, 50 N. W. 412, 1096.

See 41 Cent. Dig. tit. "Railroads," § 1517.

67. Chicago, etc., R. Co. *v.* Totten, 1 Kan. App. 558, 42 Pac. 269.

68. Southworth *v.* Old Colony, etc., R. Co., 105 Mass. 342, 7 Am. Rep. 528, holding that to leave a horse hitched to a delivery wagon standing unattended in a street for a short time, where the horse was accustomed to be left in this manner and was not afraid of trains, is not necessarily contributory negligence but a question for the jury.

69. Story *v.* Chicago, etc., R. Co., 79 Iowa 402, 44 N. W. 690; Missouri Pac. R. Co. *v.* Johnston, 35 Kan. 58, 10 Pac. 103; Kansas Pac. R. Co. *v.* Wiggins, 24 Kan. 588; Pittsburgh, etc., R. Co. *v.* Howard, 40 Ohio St. 6. But see Red River, etc., R. Co. *v.* Dooley, 35 Tex. Civ. App. 364, 80 S. W. 566.

Although an animal is breachy the owner may recover if he has exercised ordinary care in restraining it. Pittsburgh, etc., R. Co. *v.* Howard, 40 Ohio St. 6.

70. Isbell *v.* New York, etc., R. Co., 27 Conn. 393, 71 Am. Dec. 78; Story *v.* Chicago, etc., R. Co., 79 Iowa 402, 44 N. W. 690; Doran *v.* Chicago, etc., R. Co., 73 Iowa 115, 34 N. W. 619; Moriarty *v.* Central Iowa R. Co., 64 Iowa 696, 21 N. W. 143; Pearson *v.* Milwaukee, etc., R. Co., 45 Iowa 497; Roberts *v.* Richmond, etc., R. Co., 88 N. C. 560. But see Red River, etc., R. Co. *v.* Dooley, 35 Tex. Civ. App. 364, 80 S. W. 566.

71. Bulkley *v.* New York, etc., R. Co., 27 Conn. 479; Kansas Pac. R. Co. *v.* Wiggins, 24 Kan. 588; Missouri Pac. R. Co. *v.* Johnston, 35 Kan. 58, 10 Pac. 103; Union Pac. R. Co. *v.* High, 14 Nebr. 14, 14 N. W. 547; Pittsburgh, etc., R. Co. *v.* Howard, 40 Ohio St. 6.

72. Chicago, etc., R. Co. *v.* Harris, 54 Ill. 528. But see Texas, etc., R. Co. *v.* Huffman, (Tex. Civ. App. 1903) 71 S. W. 779.

73. Kansas City, etc., R. Co. *v.* McHenry, 24 Kan. 501; Atchison, etc., R. Co. *v.* Hegwir, 21 Kan. 622.

74. Wabash R. Co. *v.* Warren, 113 Ill. App. 172; Stearns *v.* Old Colony, etc., R. Corp., 1 Allen (Mass.) 493; Jackson *v.* Rutland, etc., R. Co., 25 Vt. 150, 60 Am. Dec. 246.

But if the animal had to break through other fences of other landowners before reaching the railroad track, the fact that plaintiff's fences were not in good repair is not sufficient to show such contributory negligence on his part as to defeat a recovery. Wabash R. Co. *v.* Perbex, 57 Ill. App. 62.

If there is a stock law in force and plaintiff puts animals in an inclosure, the fence of which is known to be insufficient, animals escaping therefrom are wrongfully at large and trespassers if they go upon the railroad track. Houston, etc., R. Co. *v.* Hollingsworth, 29 Tex. Civ. App. 306, 68 S. W. 724.

75. Nashville, etc., R. Co. *v.* Hembree, 85 Ala. 481, 5 So. 173.

its act or omission was the proximate cause of the injury.[76] It is not necessary that it should be the sole cause, it being sufficient if it is one of several concurring efficient causes, other than negligence on the part of plaintiff, which coöperate directly to produce the injury,[77] but a direct causal connection must be established between defendant's negligence or misconduct and the injury complained of.[78] So also it is not always sufficient that but for defendant's act the injury would not have happened, as the liability extends only to injuries which are the direct and natural consequence of such act;[79] nor will the company be liable, although negligent, where the immediate cause of the injury is an independent intervening agency;[80] but where the intervening agency is set in motion by the original wrong of the company it will be liable for all damages which follow in the natural and ordinary course of events as the result thereof,[81] and the test is not whether the particular injury might have been foreseen but whether it is the natural and proximate result of the negligent act or omission complained of.[82] Whether the negligence or misconduct of the railroad company was the proximate cause of the injury is ordinarily a question of fact for the jury.[83]

b. Inevitable Accident.[84] Railroad companies cannot be held liable merely because an animal is killed or injured by its trains where the injury is the result of unavoidable accident.[85] So if animals come upon the track so suddenly in

76. *Alabama.*— Louisville, etc., R. Co. *v.* Davis, 91 Ala. 487, 8 So. 552.

Florida.— Savannah, etc., R. Co. *v.* Cosens, 46 Fla. 237, 35 So. 398.

Georgia.— Southern R. Co. *v.* Puryear, 2 Ga. App. 75, 58 S. E. 306.

Mississippi.— Vicksburg, etc., R. Co. *v.* Hart, 61 Miss. 468.

Missouri.— Rowen *v.* Chicago Great Western R. Co., 198 Mo. 654, 96 S. W. 1009; Holman *v.* Chicago, etc., R. Co., 62 Mo. 562; Stoneman *v.* Atlantic, etc., R. Co., 58 Mo. 503; Smith *v.* Hannibal, etc., R. Co., 47 Mo. App. 546.

Ohio.— Bellefontaine, etc., R. Co. *v.* Bailey, 11 Ohio St. 333.

Tennessee.— Holder *v.* Chicago, etc., R. Co., 11 Lea 176.

Texas.— International, etc., R. Co. *v.* Russell, (Civ. App. 1907) 106 S. W. 438.

See 41 Cent. Dig. tit. "Railroads," § 1527.

The injury may have been due to plaintiff's own negligence or the fault of some third person or the result of sheer accident, in which cases the company will not be liable. Bellefontaine, etc., R. Co. *v.* Bailey, 11 Ohio St. 333.

A failure to blow the alarm whistle as required by statute to frighten animals from the track is not the proximate cause of an injury where the animal was already frightened and running away from the train and was not hit by the train but injured itself in its flight. Holder *v.* Chicago, etc., R. Co., 11 Lea (Tenn.) 176.

Gates at farm crossings.—Although a gate at a farm crossing does not conform to the requirements of the statute or is in a defective condition, the company will not be liable if its defective condition was not the proximate cause of the injury, as where the animal came upon the track by reason of some third person leaving the gate open (Rowen *v.* Chicago Great Western R. Co., 198 Mo. 654, 96 S. W. 1009); and a failure of the railroad company to keep gates closed at a crossing is not the proximate cause of an injury to an animal if the landowner himself securely fastened the gate on the night when the injury occurred and it was subsequently without the knowledge of the railroad company or any negligence on its part left open by some third person (International, etc., R. Co. *v.* Russell, (Tex. Civ. App. 1907) 106 S. W. 438).

77. Western R. Co. *v.* Sistrunk, 85 Ala. 352, 5 So. 79; Southwestern Tel., etc., Co. *v.* Krause, (Tex. Civ. App. 1906) 92 S. W. 431.

78. Vicksburg, etc., R. Co. *v.* Hart, 61 Miss. 468; Holman *v.* Chicago, etc., R. Co., 62 Mo. 562; Smith *v.* Hannibal, etc., R. Co., 47 Mo. App. 546.

79. Nelson *v.* Chicago, etc., R. Co., 30 Minn. 74, 14 N. W. 360; Holden *v.* Rutland, etc., R. Co., 30 Vt. 297.

80. Frisch *v.* Chicago Great Western R. Co., 95 Minn. 398, 104 N. W. 228; Brown *v.* Wabash, etc., R. Co., 20 Mo. App. 222.

81. Billman *v.* Indianapolis, etc., R. Co., 76 Ind. 166, 40 Am. Rep. 230, holding that where by the negligence of a railroad company a horse is frightened and caused to run away, the company will be liable for injuries inflicted upon other animals by this horse in the course of his flight.

82. Mikesell *v.* Wabash R. Co., 134 Iowa 736, 112 N. W. 201.

83. Ford *v.* St. Louis, etc., R. Co., 66 Ark. 363, 50 S. W. 864; Louisville, etc., R. Co. *v.* Caster, (Miss. 1899) 5 So. 388.

Questions for jury see *infra*, X, H, 15, m, (XI).

84. Precautions as to animals seen on track where collision is inevitable see *supra*, X, H, 9, e.

85. *Alabama.*— Nashville, etc., R. Co. *v.* Hemhree, 85 Ala. 481, 5 So. 173.

Arkansas.— Little Rock, etc., R. Co. *v.* Holland, 40 Ark. 336.

Georgia.— Macon, etc., R. Co. *r.* Vaughn, 48 Ga. 464.

front of a train which is properly equipped and operated in a lawful and proper manner, or without any fault on the part of those in charge of the train is not seen until too late to stop the train or otherwise avoid the injury, the company will not be liable;[86] nor can a failure to make any effort to avoid the injury be held a proximate cause thereof if it appears that nothing which might have been done would under the circumstances of the case have been successful.[87]

c. Frightening Animals. Where animals are frightened by the negligent operation of a train this negligence will be held to be the proximate cause of resulting injuries sustained either by the frightened animal,[88] or inflicted by it upon other animals in the course of its flight;[89] but the company will not be liable for injuries sustained by frightened animals where the fright was not due to any negligence on the part of its servants in the operation of the train.[90]

d. Fences and Cattle-Guards. To entitle plaintiff to recover under statutes making railroad companies liable for injuries to animals occasioned by a failure to construct or maintain fences, it must appear that the failure to do so caused or directly contributed to the injury complained of.[91] The absence of a fence

North Carolina.— Garris *v.* Portsmouth, etc., R. Co., 24 N. C. 324.

West Virginia.— Lovejoy *v.* Chesapeake, etc., R. Co., 41 W. Va. 693, 24 S. E. 599.

See 41 Cent. Dig. tit. "Railroads," § 1528.

86. *Alabama.*—Alabama Great Southern R. Co. *v.* Moody, 90 Ala. 46, 8 So. 57; Nashville, etc., R. Co. *v.* Hembree, 85 Ala. 481, 5 So. 173; East Tennessee, etc., R. Co. *v.* Bayliss, 75 Ala. 466.

Arkansas.— Little Rock, etc., R. Co. *v.* Turner, 41 Ark. 161; Little Rock, etc., R. Co. *v.* Holland, 40 Ark. 336.

Dakota.— Gay *v.* Fremont, etc., R. Co., 5 Dak. 514, 41 N. W. 757.

Georgia.— Western, etc., R. Co. *v.* Trimmier, 84 Ga. 112, 10 S. E. 503.

Illinois.— Chicago, etc., R. Co. *v.* Patterson, 72 Ill. App. 428.

Indian Territory.— St. Louis, etc., R. Co. *v.* Zachary, 2 Indian Terr. 536, 53 S. W. 327.

Kentucky.— Louisville, etc., R. Co. *v.* Wainscott, 3 Bush 149.

Mississippi.— Kansas City, etc., R. Co. *v.* Myers, (1890) 7 So. 321; Yazoo, etc., R. Co. *v.* Brumfield, (1888) 4 So. 341; New Orleans, etc., R. Co. *v.* Burkett, (1887) 2 So. 253.

North Carolina.— Proctor *v.* Wilmington, etc., R. Co, 72 N. C. 579; Garris *v.* Portsmouth, etc., R. Co., 24 N. C. 324.

South Dakota.— Lewis *v.* Fremont, etc., R. Co., 7 S. D. 183, 63 N. W. 781; Hebron *v.* Chicago, etc., R. Co., 4 S. D. 538, 57 N. W. 494.

West Virginia.— Lovejoy *v.* Chesapeake, etc., R. Co., 41 W. Va. 693, 24 S. E. 599.

See 41 Cent. Dig. tit. "Railroads," § 1528.

87. Nashville, etc., R. Co. *v.* Hembree, 85 Ala. 481, 5 So. 173; East Tennessee, etc., R. Co. *v.* Bayliss, 75 Ala. 466.

88. Texas, etc., R. Co. *v.* Anderson, 2 Tex. App. Civ. Cas. § 203; Sneesby *v.* Lancashire, etc., R. Co., 1 Q. B. D. 42, 45 L. J. Q. B. 1, 33 L. T. Rep. N. S. 372, 24 Wkly. Rep. 99.

89. Billman *v.* Indianapolis, etc., R. Co., 76 Ind. 166, 40 Am. Rep. 230.

90. Lowry *v.* St. Louis, etc., R. Co., 40 Mo. App. 554; Lynch *v.* Northern Pac. R. Co., 84 Wis. 348, 54 N. W. 610.

91. *Iowa.*— Norman *v.* Chicago, etc., R. Co., 110 Iowa 283, 81 N. W. 597.

Minnesota.— Frisch *v.* Chicago Great Western R. Co., 95 Minn. 398, 104 N. W. 228.

Missouri.—Montgomery *v.* Wabash, etc., R. Co., 90 Mo. 446, 2 S. W. 409.

Texas.— Gulf, etc., R. Co. *v.* Simpson, 41 Tex. Civ. App. 125, 91 S. W. 874.

Wisconsin.— Perrault *v.* Minneapolis, etc., R. Co., 117 Wis. 520, 94 N. W. 348; Cook *v.* Minneapolis, etc., R. Co., 98 Wis. 624, 74 N. W. 561, 67 Am. St. Rep. 830, 40 L. R. A. 457; Lawrence *v.* Milwaukee, etc., R. Co., 42 Wis. 322.

Canada.— Grand Trunk R. Co. *v.* James, 31 Can. Sup. Ct. 420 [*reversing* 1 Ont. L. Rep. 127 (*affirming* 31 Ont. 672)].

See 41 Cent. Dig. tit. "Railroads," § 1530.

The absence of the fence is not the cause of the injury if a fence such as the company is required to construct would not have excluded the animal injured (Leavenworth, etc., R. Co. *v.* Forbes, 37 Kan. 445, 15 Pac. 595; Atchison, etc., R. Co. *v.* Yates, 21 Kan. 613); or where the fence if constructed would inevitably have been destroyed by a fire so recently before the accident that it could not have been restored in time to prevent the injury (Cook *v.* Minneapolis, etc., R. Co., 98 Wis. 624, 74 N. W. 561, 67 Am. St. Rep. 830, 40 L. R. A. 457); nor is the defective condition of a railroad fence the proximate cause of the injury if the animal came upon the track through an open gate which it was the duty of the landowner to keep closed (Ft. Worth, etc., R. Co. *v.* Worsham, (Tex. Civ. App. 1907) 105 S. W. 853).

Where two railroads run parallel, and neither is properly fenced, and stock pass over one to the other and are there injured, the proximate cause of the injury is the failure to fence on the part of the company upon whose track the stock are injured and the company upon whose track they first entered will not be liable. Frisch *v.* Chicago

at the place of the injury is not the proximate cause of the injury if the animal did not enter there but came upon the track at some other point where the road was properly fenced or was not required to be fenced;[92] but it is the proximate cause if the animal got upon the track by reason of the failure to fence, although injured at a point where no such breach of duty is shown to exist.[93] Under some of the statutes the liability for failure to fence applies only to injuries resulting from collisions with trains, while under others it applies to all injuries resulting from such omission.[94] Under the latter statutes the company is not liable for all injuries which would not have occurred had the road been fenced but only such as are the direct and natural consequence of the failure to do so,[95] but the company will be liable if the failure to fence in connection with other acts of the company was the cause of the injury.[96]

e. Signals and Lookouts. It is held in most jurisdictions that statutes requiring the giving of signals on approaching public crossings are intended for the benefit of animals as well as persons; [97] but in order to render a railroad company liable for injuries to animals on the ground that such signals were not given it must affirmatively appear that the omission was the cause of the injury complained of,[98]

Great Western R. Co., 95 Minn. 398, 104 N. W. 228.

92. St. Louis, etc., R. Co. *v.* Linder, 39 Ill. 433, 89 Am. Dec. 319; Missouri Pac. R. Co. *v.* Leggett, 27 Kan. 323; Bremmer *v.* Green Bay, etc., R. Co., 61 Wis. 114, 20 N. W. 687.

Place of entry as determining liability see *supra*, X, H, 4, a, (XIV).

93. Kirkpatrick *v.* Illinois Southern R. Co., 120 Mo. App. 416, 96 S. W. 1036; Sappington *v.* Chicago, etc., R. Co., 95 Mo. App. 387, 69 S. W. 32.

Although an animal leaves the track after entering through a defect in the railroad fence, and is injured at a different place after crossing intervening lands and coming upon the track at a highway, the defective condition of the fence at the original place of entry is the proximate cause of the injury. Davidson *v.* Grand Trunk R. Co., 5 Ont. L. Rep. 574, 2 Ont. Wkly. Rep. 185. *Compare* Grand Trunk R. Co. *v.* James, 31 Can. Sup. Ct. 420 [*reversing* 1 Ont. L. Rep. 127 (*affirming* 31 Ont. 672)].

Where an animal enters from a highway over a defective cattle-guard the company will be liable, although the animal afterward recrosses the cattle-guard and is on the highway crossing when injured, if it appears that the immediate cause of its being there was the defective condition of the cattle-guard. Riley *v.* Chicago, etc., R. Co., 104 Iowa 235, 73 N. W. 488.

94. See *supra*, X, H, 4, a, (XV).

95. Chicago, etc., R. Co. *v.* Hotz, 47 Kan. 627, 28 Pac. 695; Nelson *v.* Chicago, etc., R. Co., 30 Minn. 74, 14 N. W. 360; Gordon *v.* Chicago, etc., R. Co., 44 Mo. App. 201; Holden *v.* Rutland, etc., R. Co., 30 Vt. 297.

96. Mikesell *v.* Wabash R. Co., 134 Iowa 736, 112 N. W. 201, holding that the company is liable where an animal comes upon the track by reason of the absence of fences and is injured by running on a trestle on being frightened by a hand-car operated by the servants of defendant.

97. See *supra*, X, H, 7, a.

98. *Alabama.*— Hilliker-Krebs Bldg., etc., Co. *v.* Birmingham R., etc., Co., 100 Ala. 424, 14 So. 200; Memphis, etc., R. Co. *v.* Bibb, 37 Ala. 699.

Arkansas.— St. Louis Southwestern R. Co. *v.* Conger, 84 Ark. 421, 105 S. W. 1177.

Georgia.— Georgia, etc., R. Co. *v.* Cook, 114 Ga. 760, 40 S. E. 718.

Illinois.— Quincy, etc., R. Co. *v.* Wellhoener, 72 Ill. 60; Rockford, etc., R. Co. *v.* Linn, 67 Ill. 109; Illinois Cent. R. Co. *v.* Phelps, 29 Ill. 447; Galena, etc., R. Co. *v.* Loomis, 13 Ill. 548, 56 Am. Dec. 471; Terre Haute, etc., R. Co. *v.* Jenuine, 16 Ill. App. 209; Terre Haute, etc., R. Co. *v.* Tuterwiler, 16 Ill. App. 197.

Indiana.— Louisville, etc., R. Co. *v.* Ousler, 15 Ind. App. 232, 36 N. E. 290; Chicago, etc., R. Co. *v.* Fenn, 3 Ind. App. 250, 29 N. E. 790.

Kansas.— Atchison, etc., R. Co. *v.* Morgan, 31 Kan. 77, 1 Pac. 298.

Missouri.— Braxton *v.* Hannibal, etc., R. Co., 77 Mo. 455; Wallace *v.* St. Louis, etc., R. Co., 74 Mo. 594; Holman *v.* Chicago, etc., R. Co., 62 Mo. 562; Stoneman *v.* Atlantic, etc., R. Co., 58 Mo. 503.

Nebraska.— Grand Island, etc., R. Co. *v.* Phipps, 48 Nebr. 493, 67 N. W. 441.

North Dakota.— West *v.* Northern Pac. R. Co., 13 N. D. 221, 100 N. W. 254.

South Dakota.— Miller *v.* Chicago, etc., R. Co., (1907) 111 N. W. 553; Mankey *v.* Chicago, etc., R. Co., 14 S. D. 468, 85 N. W. 1013.

Texas.— Missouri, etc., R. Co. *v.* Parker, (Civ. App. 1896) 37 S. W. 973.

See 41 Cent. Dig. tit. "Railroads," § 1531.

It is not a proximate cause of the injury that no crossing signal was given where the animal injured was in charge of a person who was already informed of the approach of the train. West *v.* Northern Pac. R. Co., 13 N. D. 221, 100 N. W. 254.

A special verdict in an action based upon a failure to give the statutory signal will not sustain a judgment for plaintiff in the

and whether it was such is ordinarily a question for the jury.[99] So also negligence on the part of the engineer as to keeping a lookout for stock must have caused or contributed directly to the injury complained of.[1]

f. Rate of Speed and Means of Controlling Trains. Unless such negligence is shown to have been the cause of the injury complained of a railroad company will not be liable merely because at the time of the accident the train was running at a prohibited,[2] or dangerous rate of speed,[3] or the speed was not checked as required by statute on approaching a public crossing,[4] or the brakemen were not at their posts.[5]

12. Wilful, Wanton, and Unauthorized Acts — a. Wilful or Wanton Injury. Railroad companies are liable for injuries to animals caused by the wilful, wanton, or reckless conduct of their employees in the performance of their duties,[6] notwithstanding the animal injured may have been a trespasser,[7] or the owner guilty of contributory negligence.[8]

b. Unauthorized Acts of Company's Employees.[9] In actions for injuries to animals a railroad company is liable for the acts of its servants if within the general scope of their employment, although the specific act is not authorized,[10] or is done

absence of any finding that the omission was the cause of the injury. Louisville, etc., R. Co. *v.* Ousler, 15 Ind. App. 232, 36 N. E. 290.

Under the Missouri statute as amended in 1881 where the injury is sustained at a public crossing proof that the statutory signals were not given makes a *prima facie* case for plaintiff, but defendant may show that its failure to give such signals was not the cause of the injury. Barr *v.* Hannibal, etc., R. Co., 30 Mo. App. 248; Smith *v.* Wabash, etc., R. Co., 19 Mo. App. 120.

A failure to ring a bell while passing through a city as required by statute will not render the company liable unless the omission was the proximate cause of the injury. Louisville, etc., R. Co. *v.* Mertz, (Ala. 1905) 40 So. 60.

99. Ford *v.* St. Louis, etc., R. Co., 66 Ark. 363, 50 S. W. 864; Chicago, etc., R. Co. *v.* Fenn, 3 Ind. App. 250, 29 N. E. 790; McGill *v.* Minneapolis, etc., R. Co., 113 Iowa 358, 85 N. W. 620; Alexander *v.* Hannibal, etc., R. Co., 76 Mo. 494; Goodwin *v.* Chicago, etc., R. Co., 75 Mo. 73; Stoneman *v.* Atlantic, etc., R. Co., 58 Mo. 503.

Questions for jury see *infra*, X, H, 15, m, (XI).

1. Choate *v.* Southern R. Co., 119 Ala. 611, 24 So. 373; Kansas City, etc., R. Co. *v.* Watson, 91 Ala. 483, 8 So. 793.

If the train could not have been stopped so as to avoid the injury within the distance between the point of injury and the point where it was first possible to see the animal, it is immaterial whether it was discovered at the earliest opportunity or not. Hebron *v.* Chicago, etc., R. Co., 4 S. D. 538, 57 N. W. 494.

2. *Illinois.*— Chicago, etc., R. Co. *v.* Crose, 113 Ill. App. 547 [*affirmed* in 214 Ill. 602, 73 N. E. 865, 105 Am. St. Rep. 135].

Massachusetts.— Gerry *v.* New York, etc., R. Co., 194 Mass. 35, 79 N. E. 783.

Mississippi.— Louisville, etc., R. Co. *v.* Caster, (1889) 5 So. 388.

Missouri.— Lowry *v.* St. Louis, etc., R. Co., 40 Mo. App. 554; Harlan *v.* Wabash, etc., R. Co., 18 Mo. App. 483; Evans, etc., Fire Brick Co. *v.* St. Louis, etc., R. Co., 17 Mo. App. 624.

Texas.— San Antonio, etc., R. Co. *v.* Clark, 26 Tex. Civ. App. 280, 62 S. W. 546.

See 41 Cent. Dig. tit. "Railroads," § 1532.

3. Ford *v.* St. Louis, etc., R. Co., 66 Ark. 363, 50 S. W. 864.

4. Georgia Cent. R. Co. *v.* Duggan, 124 Ga. 493, 52 S. E. 768; Georgia, etc., R. Co. *v.* Cook, 114 Ga. 760, 40 S. E. 718; Georgia Cent. R. Co. *v.* Neidlinger, 110 Ga. 329, 35 S. E. 364; Western, etc., R. Co. *v.* Main, 64 Ga. 649.

5. Vicksburg, etc., R. Co. *v.* Hart, 61 Miss. 468.

6. *Illinois.*— Illinois Cent. R. Co. *v.* Wren, 43 Ill. 77; Louisville, etc., R. Co. *v.* Dulaney, 43 Ill. App. 297.

Indiana.— Detroit, etc., R. Co. *v.* Barton, 61 Ind. 293; Indianapolis, etc., R. Co. *v.* McBrown, 46 Ind. 229; New Albany, etc., R. Co. *v.* McNamara, 11 Ind. 543; Lafayette, etc., R. Co. *v.* Shriner, 6 Ind. 141; Ft. Wayne, etc., R. Co. *v.* O'Keefe, 4 Ind. App. 249, 30 N. E. 916.

Michigan.— McDonald *v.* Chicago, etc., R. Co., 51 Mich. 628, 17 N. W. 210.

Missouri.— Clem *v.* Wabash R. Co., 72 Mo. App. 433.

Oregon.— Holstine *v.* Oregon, etc., R. Co., 8 Oreg. 163.

South Carolina.— Cobb *v.* Columbia, etc., R. Co., 37 S. C. 194, 15 S. E. 878.

Wisconsin.— Pritchard *v.* La Crosse, etc., R. Co., 7 Wis. 232.

United States.— Wabash, etc., R. Co. *v.* New York Cent. Trust Co., 23 Fed. 738.

See 41 Cent. Dig. tit. "Railroads," §§ 1534–1536.

7. See *supra*, X, H, 1, c.

8. See *supra*, X, H, 10, a, (IV).

9. See Master and Servant, 26 Cyc. 1518 *et seq.*

10. Banister *v.* Pennsylvania Co., 98 Ind. 220; Philadelphia, etc., R. Co. *v.* Brannen, 1 Pa. Cas. 369, 2 Atl. 429.

at a time or in a manner contrary to an express order of the company,[11] or is done wilfully and maliciously;[12] but the company will not be liable where the servant was not engaged about the business of the company at the time of the injury but was upon business of his own or another entirely disconnected from the service which he had engaged to render,[13] or where, although at the time of the injury the servant was engaged in the performance of the services which he had engaged to render, the act which occasioned the injury did not pertain to the duties of that employment.[14]

13. Persons Entitled to Damages. A person, although not the absolute owner of an animal, may have a special property therein which will entitle him to sue for its injury by a railroad company,[15] without making the real owner a party,[16] and recover not only his special interest but the full value,[17] notwithstanding the statute in terms gives the right of action to the owner.[18] So also a tenant or lessee of land may recover for injuries to his animals caused by a failure of the railroad company to fence its tracks, although the statute gives the right of action to owners of animals through or along whose "property" the road runs,[19] or for

11. Philadelphia, etc., R. Co. *v.* Brannen, 1 Pa. Cas. 369, 2 Atl. 429.

12. Cobb *v.* Columbia, etc., R. Co., 37 S. C. 194, 15 S. E. 878.

13. Cousins *v.* Hannibal, etc., R. Co., 66 Mo. 572, holding that where a yard hand without any authority takes an engine to make a trip on personal business and negligently injures an animal, the company is not liable.

But if it is the servant's duty to perform extra labor under the terms of his employment without being specially requested to do so in case he sees anything amiss after the expiration of his regular hours of labor, which duty would include the repairing of defects discovered in a fence, the company will be liable for an injury due to a defect in one of its fences made by such servant himself and not repaired, although at the time it was made his regular hours of labor were over and he was engaged upon his own private business. Chapman *v.* New York Cent. R. Co., 33 N. Y. 369, 88 Am. Dec. 392 [*affirming* 31 Barb. 399].

14. Cousins *v.* Hannibal, etc., R. Co., 66 Mo. 572; Cobb *v.* Columbia, etc., R. Co., 37 S. C. 194, 15 S. E. 878.

15. St. Louis, etc., R. Co. *v.* Biggs, 50 Ark. 169, 6 S. W. 724; New York, etc., R. Co. *v.* Auer, 106 Ind. 219, 6 N. E. 330, 55 Am. Rep. 734; Union Pac. R. Co. *v.* Meyer, 76 Nebr. 549, 107 N. W. 793; Southern R. Co. *v.* Hall, 107 Tenn. 512, 64 S. W. 481.

An action may be maintained by a person who at the time of the injury had the animal in his possession under an agreement to return it in good condition or to be responsible for any injury thereto while in his possession (St. Louis, etc., R. Co. *v.* Biggs, 50 Ark. 169, 6 S. W. 724; New York, etc., R. Co. *v.* Auer, 106 Ind. 219, 6 N. E. 330, 55 Am. Rep. 734); or having the animal in his possession on trial under a contract to purchase it if satisfactory (St. Louis, etc., R. Co. *v.* Taylor, 57 Ark. 136, 20 S. W. 1083); or as a bailee for the purpose of sale, having incurred expenses in the care of the animal which he was to deduct from the proceeds of the sale when made (St. Louis, etc., R. Co. *v.* Norton, 71 Ark. 314, 73 S. W. 1095); or having the actual and exclusive possession of an animal which had been found abandoned and the true owner of which was unknown (Southern R. Co. *v.* Hall, 107 Tenn. 512, 64 S. W. 481); or where the animals injured were a part of the undivided increase of a flock in plaintiff's possession under a contract to care for them for a part of the increase (New York, etc., R. Co. *v.* Auer, 106 Ind. 219, 6 N. E. 330, 55 Am. Rep. 734); or where plaintiff was a mortgagor of the animal in possession, although after breach of the condition of the mortgage (Illinois Cent. R. Co. *v.* Hawkins, 65 Miss. 200, 3 So. 410; Huss *v.* Wabash R. Co., 84 Mo. App. 111); in one of which cases, however, the decision was based upon a statute expressly providing that after breach of condition but before sale the legal title should be deemed to be in the mortgagor (Illinois Cent. R. Co. *v.* Hawkins, *supra*).

In Arkansas the statute expressly provides that any person owning stock in his own right or who has a "special ownership" therein may maintain an action for their injury by a railroad company. St. Louis, etc., R. Co. *v.* Norton, 71 Ark. 314, 73 S. W. 1095.

16. St. Louis, etc., R. Co. *v.* Biggs, 50 Ark. 169, 6 S. W. 724.

17. St. Louis, etc., R. Co. *v.* Norton, 71 Ark. 314, 73 S. W. 1095; St. Louis, etc., R. Co. *v.* Biggs, 50 Ark. 169, 6 S. W. 724; Illinois Cent. R. Co. *v.* Hawkins, 65 Miss. 200, 3 So. 410.

18. New York, etc., R. Co. *v.* Auer, 106 Ind. 219, 6 N. E. 330, 55 Am. Rep. 734, holding that a person is an owner within the application of the statute who is in possession of an animal under a contract making him accountable to the real owner in case of injury or who is in possession of the undivided increase of a flock to part of which he is entitled as compensation for caring for the whole.

19. Walther *v.* Sierra R. Co., 141 Cal. 288, 74 Pac. 840, holding that the term "property" is used in the sense of "estate" and

injuries due to the defective condition of a gate at a crossing which the statute provides shall be maintained for the use of the "proprietors or owners" of the adjoining lands;[20] but a judgment for plaintiff cannot be sustained where there is no evidence whatever that he was either the owner or in possession of the animal injured.[21]

14. Proceedings For Recovery of Damages — a. Notice of Claim or Demand For Payment — (i) *In General.* Some of the statutes provide for a notice of the injury or demand for payment of the claim therefor to be made upon the company within a certain time after the injury is sustained or prior to the action to recover therefor,[22] or provide in the alternative that a claim shall be presented or suit thereon commenced within a certain time after the injury.[23] The object of the statutes requiring a notice or demand is to inform the company of the injury and afford it an opportunity to investigate the circumstances and to settle the claim without litigation or prepare its defense.[24] Some of the statutes further provide that, if the damages are not paid within a certain time after the notice or demand, plaintiff may recover double the actual damages sustained,[25] or a reasonable attorney's fee,[26] or such attorney's fee together with a certain rate of interest upon the amount of actual damages from the date of presentment of the claim,[27] and such provisions are not unconstitutional.[28] Under some of the statutes the notice or demand is a condition precedent to a right to maintain an action,[29] and knowledge on the part of the company's officers or agents of the

that a tenant or lessee has a property in the land which entitles him to sue.

20. Huss *v.* Wabash R. Co., 84 Mo. App. 111, holding that a tenant of the owner is a "proprietor" within the application of the statute.

21. Ohio, etc., R. Co. *v.* Saxton, 27 Ill. 426; Alexander *v.* Hannibal, etc., R. Co., 76 Mo. 494; Turner *v.* St. Louis, etc., R. Co., 76 Mo. 261.

22. *Florida.*— Jacksonville, etc., R. Co. *v.* Harris, 33 Fla. 217, 14 So. 726, 39 Am. St. Rep. 127.

Georgia.— Jones *v.* Central R., etc., Co., 18 Ga. 247.

Indiana.— New Albany, etc., R. Co. *v.* Welsh, 9 Ind. 479.

Kansas.— St. Louis, etc., R. Co. *v.* Kinman, 49 Kan. 627, 31 Pac. 126; Kansas Pac. R. Co. *v.* Ball, 19 Kan. 535.

Oregon.— Brown *v.* Southern Pac. R. Co., 36 Oreg. 128, 58 Pac. 1104, 78 Am. St. Rep. 761, 47 L. R. A. 409.

Wisconsin.— Weed, etc., Mfg. Co. *v.* Whitcomb, 101 Wis. 226, 77 N. W. 175.

See 41 Cent. Dig. tit. "Railroads," § 1540.

23. Alabama Great Southern R. Co. *v.* Killian, 69 Ala. 277; South Alabama, etc., R. Co. *v.* Reid, 66 Ala. 250.

If suit is commenced within six months after the injury complained of it is not necessary that any claim should be presented. South Alabama, etc., R. Co. *v.* Bees, 82 Ala. 340, 2 So. 782; South Alabama, etc., R. Co. *v.* Morris, 65 Ala. 193.

24. *Alabama.*—South Alabama, etc., R. Co. *v.* Brown, 53 Ala. 651.

Iowa.— Boyer *v.* Chicago, etc., R. Co., 123 Iowa 248, 98 N. W. 764.

Kansas.— Union Pac. R. Co. *v.* Shelley, 49 Kan. 667, 31 Pac. 304; Wichita, etc., R. Co. *v.* Hart, 7 Kan. App. 550, 51 Pac. 933.

Oregon.— Brown *v.* Southern Pac. R. Co., 36 Oreg. 128, 58 Pac. 1104, 78 Am. St. Rep. 761, 47 L. R. A. 409.

Wisconsin.— Weed, etc., Mfg. Co. *v.* Whitcomb, 101 Wis. 226, 77 N. W. 175.

See 41 Cent. Dig. tit. "Railroads," § 1540.

25. Boyer *v.* Chicago, etc., R. Co., 123 Iowa 248, 98 N. W. 764; Hammans *v.* Chicago, etc., R. Co., 83 Iowa 287, 48 N. W. 978.

Defendant cannot avoid liability for double damages on the ground that it had always been willing to settle the claim, unless an actual tender was made and refused or plaintiff was otherwise legally in fault for the non-payment (Hammans *v.* Chicago, etc., R. Co., 83 Iowa 287, 48 N. W. 978); nor will an actual tender of less than the full amount of actual damage found by the jury affect the right of plaintiff to recover the full amount (Brandt *v.* Chicago, etc., R. Co., 26 Iowa 114).

26. Missouri Pac. R. Co. *v.* Abney, 30 Kan. 41, 1 Pac. 385; Kansas Pac. R. Co. *v.* Ball, 19 Kan. 535.

27. Jacksonville, etc., R. Co. *v.* Harris, 33 Fla. 217, 14 So. 726, 39 Am. St. Rep. 127.

28. Mackie *v.* Iowa Cent. R. Co., 54 Iowa 540, 6 N. W. 723; Welsh *v.* Chicago, etc., R. Co., 53 Iowa 632, 6 N. W. 13.

29. St. Louis, etc., R. Co. *v.* Kinman, 49 Kan. 627, 31 Pac. 126; Kansas Pac. R. Co. *v.* Ball, 19 Kan. 535; Ryan *v.* Chicago, etc., R. Co., 101 Wis. 506, 77 N. W. 894; Weed, etc., Mfg. Co. *v.* Whitcomb, 101 Wis. 226, 77 N. W. 175.

In Georgia the notice prescribed relates only to the special remedy given by the code which is merely cumulative, and a failure to give such notice does not affect the right to maintain a common-law action in a court of general jurisdiction. Wallace *v.* Cason, 42 Ga. 435.

injury does not dispense with the necessity of giving the prescribed notice;[30] but in Iowa it seems to be merely a condition precedent to the right to recover double damages where the claim is not paid within a certain time after demand.[31]

(II) *Form and Sufficiency.* The statutes usually require that the notice or demand shall be in writing,[32] and in one jurisdiction that it shall be accompanied by an affidavit of the injury;[33] but in the absence of such express requirement an oral demand is sufficient.[34] Where the statute prescribes a form of notice requiring certain essential allegations, its provisions must be complied with,[35] and if it requires the "time and place" of the injury to be stated the notice should do so as directly and plainly as practicable.[36] Although not required by the letter of the statute, the notice should as far as practicable inform the company of such material facts as will enable it to investigate the claim and decide upon its course of action;[37] but ordinarily in the absence of express requirements the notice will be held good if reasonably sufficient to serve the purpose for which it is required to be given,[38] or in other words if the company is enabled thereby to make an investigation of the facts upon which the claim is based and decide as to its liability.[39] Where the statute requires the notice to be "accompanied by an affidavit of the injury" it need not be separate but may be embodied in the same paper with the notice,[40] but it is not sufficient where the notice is accompanied by a copy of the affidavit instead of the original.[41] In the absence of express provision to the contrary the affidavit need not be made by plaintiff himself but may be made by some other person cognizant of the facts,[42] and need

30. Ryan *v.* Chicago, etc., R. Co., 101 Wis. 506, 77 N. W. 894.

31. See Campbell *v.* Chicago, etc., R. Co., 35 Iowa 334.

32. *Alabama.*—Alabama Great Southern R. Co. *v.* Killian, 69 Ala. 277.

Florida.— Jacksonville, etc., R. Co. *v.* Harris, 33 Fla. 217, 14 So. 726, 39 Am. St. Rep. 127.

Iowa.— Brammer *v.* Wabash R. Co., 112 Iowa 375, 83 N. W. 1048.

Oregon.— Brown *v.* Southern Pac. R. Co., 36 Oreg. 128, 58 Pac. 1104, 78 Am. St. Rep. 761, 47 L. R. A. 409.

Wisconsin.— Weed, etc., Mfg. Co. *v.* Whitcomb, 101 Wis. 226, 77 N. W. 175.

See 41 Cent. Dig. tit. "Railroads," § 1541.

33. McNaught *v.* Chicago, etc., R. Co., 30 Iowa 336.

34. Missouri, etc., R. Co. *v.* Russell, 64 Kan. 884, 67 Pac. 451.

A statement made to a claim agent of the company by plaintiff that he wants pay for the killing of his stock is a sufficient demand. St. Louis, etc., R. Co. *v.* Kinman, 9 Kan. App. 633, 58 Pac. 1037.

35. Jones *v.* Central R., etc., Co., 18 Ga. 247; Ryan *v.* Chicago, etc., R. Co., 101 Wis. 506, 77 N. W. 894.

36. Ryan *v.* Chicago, etc., R. Co., 101 Wis. 506, 77 N. W. 894, holding that a notice is insufficient which designates the place merely by the township and range, where there are three miles of the railroad within such limits.

But if the notice is reasonably definite and certain as to the place of injury, it is sufficient. May *v.* Chicago, etc., R. Co., 102 Wis. 673, 79 N. W. 31.

37. Manwell *v.* Burlington, etc., R. Co., 80 Iowa 662, 45 N. W. 568.

38. Boyer *v.* Chicago, etc., R. Co., 123 Iowa 248, 98 N. W. 764; Union Pac. R. Co. *v.* Shelley, 49 Kan. 667, 31 Pac. 304; Brown *v.* Southern Pac. R. Co., 36 Oreg. 128, 58 Pac. 1104, 78 Am. St. Rep. 761, 47 L. R. A. 409.

Purpose of requirement as to notice see *supra*, X, H, 14, a, (I).

It has been held a sufficient demand where plaintiff made out a bill in writing, stating an account in favor of himself and against the company, for the value of the animal killed and stating the date of the accident and presented it to the company within the time limited (Ft. Scott, etc., R. Co. *v.* Holman, 45 Kan. 167, 25 Pac. 585); or where he stated his demand to a station agent, giving a description of the animal and its value, which was taken down by the agent and transmitted by him to the company within the time limited (Union Pac. R. Co. *v.* Shelley, 49 Kan. 667, 31 Pac. 304).

It is not necessary to specify the particular breach of duty, such as a failure to maintain a fence, which plaintiff will rely on as fixing the liability. The petition or bill of particulars must be looked to for a statement of the facts constituting the cause of action. Wichita, etc., R. Co. *v.* Hart, 7 Kan. App. 550, 51 Pac. 933.

A sufficient "claim in writing" may consist of two letters to the company, one notifying the company of the injury and the other of the amount of damages claimed. Jacksonville, etc., R. Co. *v.* Harris, 33 Fla. 217, 14 So. 726, 39 Am. St. Rep. 127.

39. Boyer *v.* Chicago, etc., R. Co., 123 Iowa 248, 98 N. W. 764.

40. Mendell *v.* Chicago, etc., R. Co., 20 Iowa 9.

41. McNaught *v.* Chicago, etc., R. Co., 30 Iowa 336.

42. Henderson *v.* St. Louis, etc., R. Co., 36 Iowa 387.

not contain anything more than the statement of the claim and the fact of injury.[43] A notice or demand is not invalid because it states the value of the animal at more than it is actually worth,[44] or claims a greater amount of damages than that subsequently claimed in the complaint unless it was done in bad faith or for a fraudulent purpose;[45] nor where defendant was not misled thereby is the right of recovery affected by a variance between the notice and the complaint or proof as to the description of the animal,[46] or the cause of injury,[47] or a slight inaccuracy in the designation of the company.[48]

(III) *Service or Presentation.* In the absence of express provision it is not material by whom the notice is served or the claim presented, provided it is in proper form and within the time prescribed.[49] The statutes usually designate certain officers or agents of the railroad company upon whom the notice or demand shall or may be served,[50] and to constitute a valid notice or demand it must be shown to have been made upon a proper officer or agent.[51] Where the statute provides that it shall be made upon one of certain named officers or agents it must be so made;[52] but a statute providing that demand "may" be made upon any ticket or station agent is not mandatory,[53] and does not preclude a valid demand upon a general officer of the company,[54] or an agent expressly authorized to settle such claims;[55] but it is not sufficient where the only evidence is that the demand was made upon a person representing himself as an agent of the company without showing what kind of an agent,[56] or without any further proof that he was in fact an agent of the company.[57] Where the statute authorizes

43. Mundhenk *v.* Central Iowa R. Co., 57 Iowa 718, 11 N. W. 656; Mackie *v.* Iowa Cent. R. Co., 54 Iowa 540, 6 N. W. 723.

44. Missouri Pac. R. Co. *v.* Abney, 30 Kan. 41, 1 Pac. 385.

45. Valleau *v.* Chicago, etc., R. Co., 73 Iowa 723, 36 N. W. 760.

But the damages will be limited by the amount stated in the notice and affidavit, and plaintiff cannot recover in case the claim is not paid more than double that amount. Manwell *v.* Burlington, etc., R. Co., 80 Iowa 662, 45 N. W. 568.

46. Brammer *v.* Wabash R. Co., 112 Iowa 375, 83 N. W. 1048.

47. Boyer *v.* Chicago, etc., R. Co., 123 Iowa 248, 98 N. W. 764, holding that where the notice stated the cause of injury as a failure to fence and the complaint as a defective condition of cattle-guards, the variance was not material.

48. Black *v.* Minneapolis, etc., R. Co., 122 Iowa 32, 96 N. W. 984; Martin *v.* Central Iowa R. Co., 59 Iowa 411, 13 N. W. 424.

49. South Alabama, etc., R. Co. *v.* Brown, 53 Ala. 651; Mundhenk *v.* Central Iowa R. Co., 57 Iowa 718, 11 N. W. 656.

The notice may be served by plaintiff himself (Mundhenk *v.* Central Iowa R. Co., 57 Iowa 718, 11 N. W. 656); or the claim presented by stating it to any employee of the company if it is taken down and transmitted by him in proper form to the company (South Alabama, etc., R. Co. *v.* Brown, 53 Ala. 651).

50. Alabama Great Southern R. Co. *v.* Killian, 69 Ala. 277; Mobile, etc., R. Co. *v.* Malone, 46 Ala. 391; Jacksonville, etc., R. Co. *v.* Harris, 33 Fla. 217, 14 So. 726, 39 Am. St. Rep. 127; Brockert *v.* Central Iowa R. Co., 82 Iowa 369, 47 N. W. 1026; St. Louis, etc., R. Co. *v.* Kinman, 49 Kan. 627, 31 Pac. 126.

The general attorney of a railroad company will, in the absence of evidence to the contrary, be deemed "a general agent or officer" within the application of the statute, to whom a notice or claim may be given. Jacksonville, etc., R. Co. *v.* Harris, 33 Fla. 217, 14 So. 726, 39 Am. St. Rep. 127.

Where a road is operated by a receiver service of notice upon the receiver and upon a station agent of the company is sufficient. Brockert *v.* Central Iowa R. Co., 82 Iowa 369, 47 N. W. 1026.

51. St. Louis, etc., R. Co. *v.* Kinman, 49 Kan. 627, 31 Pac. 126; Chicago, etc., R. Co. *v.* Totten, 1 Kan. App. 558, 42 Pac. 269.

52. Alabama Great Southern R. Co. *v.* Killian, 69 Ala. 277, holding that under the Alabama statute it is not sufficient to present a claim to a "section boss."

But where some other person is acting temporarily with the sanction of the company as one of the officers or agents named in the statute, the claim may be presented to such person in the absence of the regular officer or agent. Mobile, etc., R. Co. *v.* Malone, 46 Ala. 391.

53. Central Branch R. Co. *v.* Ingram, 20 Kan. 66; Union Trust Co. *v.* Kendall, 20 Kan. 515.

54. Central Branch R. Co. *v.* Ingram, 20 Kan. 66, holding that the demand may be made upon the general superintendent of the road.

55. Union Trust Co. *v.* Kendall, 20 Kan. 515.

56. St. Louis, etc., R. Co. *v.* Kinman, 49 Kan. 627, 31 Pac. 126; Chicago, etc., R. Co. *v.* Totten, 1 Kan. App. 558, 42 Pac. 269.

57. St. Louis, etc., R. Co. *v.* Kinman, 49 Kan. 627, 31 Pac. 126.

service upon any officer, or station or ticket agent "employed in the management of the business of the corporation," it is sufficient where it is shown that service was made upon a certain station agent without further proof that he was employed in the management of the business of the corporation.[58] The notice may, in the absence of express provision, be served simply by delivering the notice without reading it,[59] or by reading the original and delivering a copy,[60] or delivering the original;[61] but the affidavit accompanying the notice must be the original and not a copy.[62] Proof of service may be made by a copy of the notice served accompanied by the oath of the person who made the service,[63] or by an officer's indorsement upon the notice or by affidavit,[64] or, it seems, by oral evidence upon the trial.[65]

b. Appraisal of Damages. In some jurisdictions provision is made for an appraisal of the damages sustained prior to instituting an action to recover therefor,[66] and proof of such appraisal must be made in order to maintain an action under the statute;[67] but it is not essential to enable one to maintain an action for the negligent injury of his animals,[68] being merely cumulative of the common-law remedy,[69] and the only effect of its omission being to deprive plaintiff of any benefits provided by the statute in addition to the actual damages sustained in the event of the appraised value not being voluntarily paid.[70] Notice must be given to the company by plaintiff of his intention to apply for the appointment of appraisers,[71] which must state when such application will be made,[72] and the proceedings before the appraisers must be in strict conformity with the statute.[73]

c. Summary Proceedings. In Georgia the statute authorizes a summary proceeding subject to the right of appeal before a justice upon notice in writing

58. Schlengener *v.* Chicago, etc., R. Co., 61 Iowa 235, 16 N. W. 103; Smith *v.* Chicago, etc., R. Co., 60 Iowa 512, 15 N. W. 308; Welsh *v.* Chicago, etc., R. Co., 53 Iowa 632, 6 N. W. 13.

59. Brentner *v.* Chicago, etc., R. Co., 68 Iowa 530, 23 N. W. 245, 27 N. W. 605.

60. Van Slyke *v.* Chicago, etc., R. Co., 80 Iowa 620, 45 N. W. 396; McNaught *v.* Chicago, etc., R. Co., 30 Iowa 336.

61. Mendell *v.* Chicago, etc., R. Co., 20 Iowa 9.

62. Campbell *v.* Chicago, etc., R. Co., 35 Iowa 334; McNaught *v.* Chicago, etc., R. Co., 30 Iowa 336.

63. McLenon *v.* Kansas City, etc., R. Co., 69 Iowa 320, 28 N. W. 619.

64. Brandt *v.* Chicago, etc., R. Co., 26 Iowa 114.

65. See Mendell *v.* Chicago, etc., R. Co., 20 Iowa 9. But see Central Branch Union Pac. R. Co. *v.* Walters, 24 Kan. 504, holding that while a demand may be made orally yet if made in writing it cannot be proved by secondary evidence unless the non-production of the original paper is properly accounted for.

66. See Union Pac. R. Co. *v.* Sternberg, 13 Colo. 141, 21 Pac. 1021; Volkman *v.* Chicago, etc., R. Co., 5 Dak. 69, 37 N. W. 731; Newport News, etc., R. Co. *v.* Thomas, 96 Ky. 613, 29 S. W. 437, 16 Ky. L. Rep. 706; Campbell *v.* Louisville, etc., R. Co., 98 Tenn. 148, 38 S. W. 732.

The Tennessee statute of 1891 provides that the owner of animals killed on an unfenced railroad may on notice to the company apply to a justice of the peace for the appointment of appraisers whose report shall be *prima facie* evidence of the value, and that if the claim as appraised is not paid within sixty days after presentment plaintiff may, in case he successfully litigates such claim, recover in addition to the amount thereof a reasonable attorney's fee. Cincinnati, etc., R. Co. *v.* Russell, 92 Tenn. 108, 20 S. W. 784.

67. Union Pac. R. Co. *v.* Sternberg, 13 Colo. 141, 21 Pac. 1021.

But if no objection is made or plea in abatement entered by defendant the objection will be deemed to be waived. Atchison, etc., R. Co. *v.* Lujan, 6 Colo. 338.

68. Denver, etc., R. Co. *v.* Henderson, 10 Colo. 1, 13 Pac. 910; Volkman *v.* Chicago, etc., R. Co., 5 Dak. 69, 37 N. W. 731; Cincinnati, etc., R. Co. *v.* Russell, 92 Tenn. 108, 20 S. W. 784.

69. Denver, etc., R. Co. *v.* Henderson, 10 Colo. 1, 13 Pac. 910.

70. Cincinnati, etc., R. Co. *v.* Russell, 92 Tenn. 108, 20 S. W. 784.

71. Newport News, etc., R. Co. *v.* Thomas, 96 Ky. 613, 29 S. W. 437, 16 Ky. L. Rep. 706.

The Tennessee statute requires that the notice shall be given to "the nearest station agent of the company," which is construed as meaning the agent nearest to the place of accident without regard to where such agent lives. Illinois Cent. R. Co. *v.* Tilman, 98 Tenn. 573, 41 S. W. 937.

72. Newport News, etc., R. Co. *v.* Thomas, 96 Ky. 613, 29 S. W. 437, 16 Ky. L. Rep. 706.

73. Campbell *v.* Louisville, etc., R. Co., 98 Tenn. 148, 38 S. W. 732.

to the company to recover for injuries to stock where the damages claimed do not exceed thirty dollars.[74]

15. Actions For Injuries to Animals — a. Nature and Form of Remedy. In a common-law action against a railroad company for injury to animals the proper form of action is an action on the case and not trespass,[75] unless the act which directly occasioned the injury was done by the command or with the assent of the corporation.[76] Where a railroad company having failed to fence its tracks as required by law negligently injures an animal, plaintiff may elect according to the facts of his case to base his action upon the statute or upon common-law grounds;[77] and where there are two statutes, one expressly requiring fencing at certain places and allowing double damages, and the other merely making the company liable for actual damages without proof of negligence where its road is not fenced,[78] if the injury occurred at a place unfenced and within the application of the former statute, plaintiff may bring his action under either statute.[79] A statute prescribing a particular form of action before a justice but authorizing the action to be brought in a circuit court, without designating the form of action, does not require the same form of action in that court.[80] Under a statute requiring railroad companies to construct cattle-guards, and providing a penalty for failure to do so, to be recovered by any person aggrieved by such failure, an action for the penalty is the only remedy open to one whose animals are killed in consequence of a violation of the statute.[81]

b. Defenses. In an action against a railroad company for injury to animals the company cannot set up a counter-claim for damages to the train caused by the collision based upon the wrongful presence of the animal upon the track.[82] It

74. Jones *v.* Americus, etc., R. Co., 80 Ga. 803, 7 S. E. 117, holding, however, that a claim for thirty dollars damages cannot be united with a claim for double damages based upon a failure of the overseer or track mender to report the injury as required by statute, and a judgment for sixty dollars recovered before the justice, but that while each claim may be enforced in the same manner, it must be in a separate proceeding and upon a different notice.

75. *Alabama.*— Selma, etc., R. Co. *v.* Webb, 49 Ala. 240.

Illinois.— Illinois Cent. R. Co. *v.* Reedy, 17 Ill. 580.

New Jersey.— Price *v.* New Jersey R., etc., Co., 31 N. J. L. 229.

Pennsylvania.— Philadelphia, etc., R. Co. *v.* Wilt, 4 Whart. 143.

England.— Sharrod *v.* London, etc., R. Co., 4 Exch. 580, 14 Jur. 23.

See 41 Cent. Dig. tit. "Railroads," § 1545.

Trespass would lie against the servant in charge of the train whose wrongful act directly occasioned the injury, but not against the corporation unless it ordered it to be done. Illinois Cent. R. Co. *v.* Reedy, 17 Ill. 580.

Amendment after verdict.— Under the New Jersey statute of amendments it has been held that where the action was improperly brought in trespass but was in fact tried as an action on the case the proceedings could be amended after verdict so as to adapt the form of remedy to the case made on the trial. Price *v.* New Jersey R., etc., Co., 31 N. J. L. 229.

76. See Selma, etc., R. Co. *v.* Webb, 49 Ala. 240; Price *v.* New Jersey R., etc., Co., 31 N. J. L. 229; Philadelphia, etc., R. Co. *v.* Wilt, 4 Whart. (Pa.) 143.

A conductor or engineer or other subordinate officer cannot so represent the corporation as to make an injury due to his negligence ground for an action of trespass against the company. Selma, etc., R. Co. *v.* Webb, 49 Ala. 240.

77. Rockford, etc., R. Co. *v.* Phillips, 66 Ill. 548.

78. See Edwards *v.* Hannibal, etc., R. Co., 66 Mo. 567.

79. Radcliffe *v.* St. Louis, etc., R. Co., 90 Mo. 127, 2 S. W. 277; Meadows *v.* Chicago, etc., R. Co., 82 Mo. App. 83.

80. Chicago, etc., R. Co. *v.* Reidy, 66 Ill. 43, holding that a statute providing for an action of debt or assumpsit before a justice but authorizing plaintiff to elect to sue in the circuit court, where the claim is over twenty dollars, without naming the form of action, leaves the party free to select any appropriate remedy, and that he may maintain an action on the case in that court.

81. St. Louis, etc., R. Co. *v.* Rowland, (Ark. 1905) 88 S. W. 994; St. Louis, etc., R. Co. *v.* Busick, 74 Ark. 589, 86 S. W. 674.

82. Terre Haute, etc., R. Co. *v.* Pierce, 95 Ind. 496; Louisville, etc., R. Co. *v.* Simmons, 85 Ky. 151, 3 S. W. 10, 8 Ky. L. Rep. 896; Tarwater *v.* Hannibal, etc., R. Co., 42 Mo. 193; Simkins *v.* Columbia, etc., R. Co., 20 S. C. 258. But see Central Branch Union Pac. R. Co. *v.* Walters, 24 Kan. 504.

The causes of action are separate and independent of each other and, although the circumstances are such as to give the company a right of action for injury to the train, it is not a proper subject for a counter-claim.

is no defense to an action for injury to an animal that it was abandoned and not turned over to the railroad company, but plaintiff can recover only to the extent of the injury and not the full value.[83] The fact that a railroad company acted in good faith in failing to fence its tracks, believing the locality in question to be depot grounds, does not affect its liability for failure to fence.[84]

c. Jurisdiction and Venue.[85] In the absence of statutory provision to the contrary, an action against a railroad company for injury to animals is transitory,[86] and may be brought in any county through which the road runs,[87] or wherever jurisdiction may be had of defendant company,[88] and so an action may be brought in one state for an injury occurring in another state;[89] but the statutes in some jurisdictions require that the action must be brought in the county where the injury occurred,[90] or if brought before a justice that it must be brought in the township in which the injury occurred,[91] or either in such township or an adjoining township;[92] but in the absence of such express requirement it may

Terre Haute, etc., R. Co. *v.* Pierce, 95 Ind. 496; Simkins *v.* Columbia, etc., R. Co., 20 S. C. 258.

83. Jackson *v.* St. Louis, etc., R. Co., 74 Mo. 526.

84. Cole *v.* Duluth, etc., R. Co., 104 Wis. 460, 80 N. W. 736.

85. See, generally, VENUE.

86. *Arkansas.*— Kansas City Southern R. Co. *v.* Ingram, 80 Ark. 269, 97 S. W. 55.

Illinois.— Illinois Cent. R. Co. *v.* Swearingen, 33 Ill. 289.

Indiana.— Toledo, etc., R. Co. *v.* Milligan, 52 Ind. 505.

Iowa.— Boyce *v.* Wabash R. Co., 63 Iowa 70, 18 N. W. 673, 50 Am. Rep. 730.

Texas.— Porter *v.* El Paso Southwestern R. Co., (Civ. App. 1908) 107 S. W. 927.

See 41 Cent. Dig. tit. "Railroads," § 1547.

87. Toledo, etc., R. Co. *v.* Milligan, 52 Ind. 505.

In Mississippi the statute expressly provides that the action may be brought in any county in which any part of the road is located. Louisville, etc., R. Co. *v.* Saucier, (1887) 1 So. 511.

88. Kansas City Southern R. Co. *v.* Ingram, 80 Ark. 269, 97 S. W. 55.

89. Boyce *v.* Wabash R. Co., 63 Iowa 70, 18 N. W. 673, 50 Am. St. Rep. 730, holding that an action may be maintained in one state for an injury to an animal in another state whether the liability is at common law or under a statute of the latter state.

90. Little Rock, etc., R. Co. *v.* Jamison, 70 Ark. 346, 68 S. W. 23; Little Rock, etc., R. Co. *v.* Clifton, 38 Ark. 205; Louisville, etc., R. Co. *v.* Breckenridge, 64 Ind. 113; Evansville, etc., R. Co. *v.* Epperson, 59 Ind. 438; Indianapolis, etc., R. Co. *v.* Solomon, 23 Ind. 534; Indianapolis, etc., R. Co. *v.* Renner, 17 Ind. 135; Chicago, etc., R. Co. *v.* Spencer, 23 Ind. App. 605, 55 N. E. 882; St. Louis, etc., R. Co. *v.* Byron, 24 Kan. 350; Hadley *v.* Central Branch Union Pac. R. Co., 22 Kan. 359.

In Georgia the action must be brought either in the county where the injury occurs, or if there is no agent of the company in this county in the county where the principal office of defendant is located. Southern R. Co. *v.* Brock, 115 Ga. 721, 42 S. E. 65.

Under the Illinois statute of 1853 the action is required to be brought in the county where the injury occurred only in cases where service cannot be had by summons and is by publication. Illinois Cent. R. Co. *v* Swearingen, 33 Ill. 289.

In Indiana if the action is based upon the statutory liability for failure to fence it must be brought in the county where the injury occurred, but if upon the common-law liability for negligence, it may be brought in any county through which the road runs. Toledo, etc., R. Co. *v.* Milligan, 52 Ind. 505.

Under a charter provision of a railroad company that it shall be sued only at its domicile "except in actions of trespass," which may be brought in the parish where the trespass is committed, the term "trespass" has no reference to the technical distinction between trespass and trespass on the case, and an action for negligent injury to an animal may be brought in the parish where the injury occurred. State *v.* Judge Twenty-Sixth Judicial Dist. Ct., 33 La. Ann. 954.

But the court will take judicial notice where the place of injury is designated with reference to a certain town or towns that said towns or points between them or within a certain distance therefrom are within the county. St. Louis, etc., R. Co. *v.* James, 70 Ark. 387, 68 S. W. 153; Terre Haute, etc., R. Co. *v.* Pierce, 95 Ind. 496 [*overruling* Louisville, etc., R. Co. *v.* Breckenridge, 64 Ind. 113]; Indianapolis, etc., R. Co. *v.* Stephens, 28 Ind. 429; Indianapolis, etc., R. Co. *v.* Moore, 16 Ind. 43; Kansas City, etc., R. Co. *v.* Burge, 40 Kan. 736, 21 Pac. 589.

91. Haggard *v.* Atlantic, etc., R. Co., 63 Mo. 302; Hansberger *v.* Pacific R. Co., 43 Mo. 196.

The Missouri statute formerly required the action to be brought in the township where the injury occurred but was subsequently so amended as to permit the action to be brought either in such township or any adjoining township. Mitchell *v.* Missouri Pac. R. Co., 82 Mo. 106; and cases cited *infra*, note 92.

92. Briggs *v.* St. Louis, etc., R. Co., 111 Mo. 168, 20 S. W. 32; King *v.* Chicago, etc., R. Co., 90 Mo. 520, 8 S. W. 217; Backenstoe

be brought before a justice of any township within the county where the injury occurred.[93] In the absence of statute actions for injuries to animals may be maintained in any court having jurisdiction of the subject-matter of the action which can obtain jurisdiction of the parties,[94] and a statutory action which is maintainable only by an adjoining landowner may be brought in a court not having jurisdiction of actions involving title to land; [95] but where animals are killed at different times the causes of action are separate and distinct, and if separately they are within the exclusive jurisdiction of a justice of the peace they cannot be combined so as to give a higher court jurisdiction.[96] Under the original Indiana statute claims based upon a failure of the company to fence its tracks were enforceable only in an action before a justice of the peace,[97] but by a later statute jurisdiction was extended to the common pleas and circuit courts in cases where the damage exceeded fifty dollars,[98] the jurisdiction of the justice, however, remaining exclusive as to claims not exceeding that amount.[99]

d. Limitations.[1] In some jurisdictions there are special statutes of limitation for actions against railroad companies for injuries to animals,[2] and a similar limitation has been incorporated into the charters of some railroad companies.[3] In

v. Wabash, etc., R. Co., 86 Mo. 492; Geltz *v.* St. Louis, etc., R. Co., 38 Mo. App. 579; Jewett *v.* Kansas City, etc., R. Co., 38 Mo. App. 48; Wright *v.* Hannibal, etc., R. Co., 25 Mo. App. 236; Creason *v.* Wabash, etc., R. Co., 17 Mo. App. 111.

The adjoining township must be of the same county as the township in which the injury occurred. Creason *v.* Wabash, etc., R. Co., 17 Mo. App. 111.

The court will not take judicial notice that a certain town where an injury is alleged to have occurred is in a particular township where township lines are made and altered at the discretion of the county courts. Backenstoe *v.* Wabash, etc., R. Co., 86 Mo. 492.

If the injury occurred in another state the action is transitory and subject only to the statutory limitation as to amount. Heiter *v.* East St. Louis Connecting R. Co., 53 Mo. App. 331.

93. Cincinnati, etc., R. Co. *v.* Parker, 109 Ind. 235, 9 N. E. 787.

94. Boyce *v.* Wabash R. Co., 63 Iowa 70, 18 N. W. 673, 50 Am. St. Rep. 730. See also, generally, COURTS, 11 Cyc. 661 *et seq.*

95. Choctaw, etc., R. Co. *v.* Deperade, 12 Okla. 367, 71 Pac. 629, holding that an action based upon the failure of the railroad company to fence may be brought in a probate court as the ownership of the land goes only to the qualification of the party to maintain the action, and the question of title is merely incidental to the right of recovery.

96. Louisville, etc., R. Co. *v.* Quade, 101 Ind. 364; Jeffersonville, etc., R. Co. *v.* Brevoort, 30 Ind. 324; Toledo, etc., R. Co. *v.* Tilton, 27 Ind. 71; Indianapolis, etc., R. Co. *v.* Kercheval, 24 Ind. 139; Indianapolis, etc., R. Co. *v.* Elliott, 20 Ind. 430.

97. Indianapolis, etc., R. Co. *v.* Fisher, 15 Ind. 203; Toledo, etc., R. Co. *v.* Hibbert, 14 Ind. 509; Evansville, etc., R. Co. *v.* Roos, 12 Ind. 446; Indianapolis, etc., R. Co. *v.* Taffe, 11 Ind. 458; Jeffersonville R. Co. *v.* Martin, 10 Ind. 416.

The effect of this statute was to limit the recovery upon the statutory liability to one hundred dollars, the extent of the justice's jurisdiction, whatever may have been the value of the property. Indianapolis, etc., R. Co. *v.* Kercheval, 16 Ind. 84.

98. Evansville, etc., R. Co. *v.* Roos, 12 Ind. 446.

The statute is prospective only and does not apply to actions for animals killed before it took effect. Indianapolis, etc., R. Co. *v.* Elliott, 20 Ind. 430; Wright *v.* Indianapolis, etc., R. Co., 18 Ind. 168; Indianapolis, etc., R. Co. *v.* Kercheval, 16 Ind. 84.

99. Louisville, etc., R. Co. *v.* Quade, 101 Ind. 364; Toledo, etc., R. Co. *v.* Tilton, 27 Ind. 71; Chicago, etc., R. Co. *v.* Spencer, 23 Ind. App. 605, 55 N. E. 882.

1. See, generally, LIMITATION OF ACTIONS, 25 Cyc. 963.

2. Alabama, etc., R. Co. *v.* Killian, 69 Ala. 277; South Alabama, etc., R. Co. *v.* Reid, 66 Ala. 250; Hill *v.* Missouri Pac. R. Co., 66 Mo. App. 184.

The Alabama statute provides that either a claim in writing must be presented or suit commenced within six months after the injury, and if the claim is properly presented within six months the bar of the statute is avoided although suit is not begun until after the expiration thereof. East Tennessee, etc., R. Co. *v.* Bayliss, 74 Ala. 150.

The Arkansas statute providing that actions for killing or injuring stock shall be brought "within twelve months after the killing or wounding occurred" is held to apply only to injuries caused by actual contact or collision with trains and not to injuries resulting from an animal being frightened by a train. Earl *v.* St. Louis, etc., R. Co., 84 Ark. 507, 106 S. W. 675.

The Missouri statute applies only to actions based upon the statutory liability for failure to fence and not to common-law actions for negligence. Hill *v.* Missouri Pac. R. Co., 66 Mo. App. 184.

3. Louisville, etc., R. Co. *v.* Williams, 103 Ky. 375, 45 S. W. 229, 20 Ky. L. Rep. 77;

the absence of any limitation relating specifically to such actions an action based upon the statutory liability of a railroad company for failure to fence its tracks is governed by the limitation relating to liabilities created by statute other than a penalty or forfeiture,[4] and is not barred by the statutes relating to actions to recover a penalty,[5] or common-law actions *ex delicto*.[6]

e. Parties. An action for injury to an animal brought under a statute allowing plaintiff to recover double damages where the road is not fenced is not an action for a penalty which must be brought in the name of the state, but is properly brought in the name of the owner of the animal.[7] A person having a special property, such as that of a bailee, in the animal may sue without making the real owner a party plaintiff.[8] In an action to subject a railroad operated by a lessee to seizure and sale to satisfy a judgment for damages for injury to animals, both the lessor and lessee, having interests to be affected by the sale, should be made parties defendant.[9]

f. Process.[10] In Indiana the statute provides that in actions for injuries to animals service on the company may be made by copy on any conductor of any train passing through the county,[11] and service upon a conductor is good where the action is against the railroad company, although operated by a receiver,[12] but will not authorize a judgment, where there is no appearance, against an individual operating the road as a lessee.[13] A return is sufficient which states that service was made upon a certain conductor without stating that he was conductor of a train passing through the county,[14] or which states that it was served upon defendant by handing a copy to the station agent at a certain station without stating that he was an agent of defendant.[15] The fact that the summons describes the animal as the property of plaintiff is immaterial if he was in the actual and exclusive possession thereof and entitled to maintain the action.[16]

g. Pleading[17] — (i) *Form and Sufficiency in General.* In a common-law action for injuries to animals the complaint must allege negligence on the part

Mortimer *v.* Louisville, etc., R. Co., 10 Bush (Ky.) 485; O'Bannon *v.* Louisville, etc., R. Co., 8 Bush (Ky.) 348; Lucas *v.* Kentucky Cent. R. Co., 14 S. W. 965, 12 Ky. L. Rep. 652; Stuart *v.* Louisville, etc., R. Co., 10 Ky. L. Rep. 542.

Where a road is operated by a different company from that by which it was originally constructed and owned, and it does not appear in what manner or upon what terms it was acquired, it will be presumed that it is operated under the authority of the charter incorporating the original company, and if such charter contains no limitation as to actions against the company such a provision in the charter of another company under which defendant claims title as its immediate successor will not apply. Kentucky Cent. R. Co. *v.* Kenney, 8 S. W. 201, 10 Ky. L. Rep. 251.

It is competent for the legislature to incorporate such a provision in the charter of a railroad company (O'Bannon *v.* Louisville, etc., R. Co., 8 Bush (Ky.) 348; Lucas *v.* Kentucky Cent. R. Co., 14 S. W. 965, 12 Ky. L. Rep. 652), or subsequently to repeal it (Louisville, etc., R. Co. *v.* Williams, 103 Ky. 375, 45 S. W. 229, 20 Ky. L. Rep. 77).

4. Seymore *v.* Pittsburgh, etc., R. Co., 44 Ohio St. 12, 4 N. E. 236.

5. Ohio, etc., R. Co. *v.* Erwin, 45 Ill. App. 558.

6. Seymore *v.* Pittsburgh, etc., R. Co., 44 Ohio St. 12, 4 N. E. 236.

7. Seaton *v.* Chicago, etc., R. Co., 55 Mo. 416; Fickle *v.* St. Louis, etc., R. Co., 54 Mo. 219; Hudson *v.* St. Louis, etc., R. Co., 53 Mo. 525.

8. St. Louis, etc., R. Co. *v.* Biggs, 50 Ark. 169, 6 S. W. 724.

Persons entitled to damages see *supra*, X, H, 13.

9. Little Rock, etc., R. Co. *v.* Daniels, 68 Ark. 171, 56 S. W. 874.

10. See, generally, PROCESS, 32 Cyc. 412.

Notice of claim see *supra*, X, H, 14, a.

11. Louisville, etc., R. Co. *v.* Cauble, 46 Ind. 277.

The statute does not require that service must be made by copy on a conductor and therefore does not render insufficient service upon any agent of the corporation as authorized by the general statutes relating to service of process. Jeffersonville, etc., R. Co. *v.* Dunlap, 29 Ind. 426.

12. Louisville, etc., R. Co. *v.* Cauble, 46 Ind. 277.

13. Wright *v.* Gossett, 15 Ind. 119.

14. Ohio, etc., R. Co. *v.* Quier, 16 Ind. 440; New Albany, etc., R. Co. *v.* Powell, 13 Ind. 373.

15. Talbot *v.* Minneapolis, etc., R. Co., 82 Mich. 66, 45 N. W. 1113.

16. Southern R. Co. *v.* Hall, 107 Tenn. 512, 64 S. W. 481.

17. See, generally, PLEADING, 31 Cyc. 1.

Statement in justice's court see JUSTICES OF THE PEACE, 24 Cyc. 556.

of defendant,[18] even, according to some of the authorities, where the statute makes proof of the injury *prima facie* evidence of negligence and places the burden of proof upon defendant;[19] but in most jurisdictions it is held that a general allegation of negligence on the part of defendant in the operation of its trains is sufficient without setting forth the specific acts constituting such negligence,[20] although there are a few decisions to the contrary.[21] Plaintiff may if he chooses set out and describe the particular acts complained of and then allege that they were negligently done,[22] but by stating specific acts of negligence he will be confined in his evidence and right of recovery to the issues thus tendered.[23] The complaint need not allege in express terms that defendant's negligence was the proximate cause of the injury, but it is sufficient if it alleges that the injury occurred by reason of the negligence of defendant in the manner specified.[24] The complaint must allege plaintiff's ownership of the animal injured,[25] and that the train by which the animal was injured belonged to defendant or was being operated over its road,[26] and if the action is based upon the negligence of defendant's serv-

18. *Alabama.*— Simpson *v.* Memphis, etc., R. Co., 66 Ala. 85; South Alabama, etc., R. Co. *v.* Hagood, 53 Ala. 647; Mobile, etc., R. Co. *v.* Williams, 53 Ala. 595.

Colorado.— Denver, etc., R. Co. *v.* Thompson, 12 Colo. App. 1, 54 Pac. 402.

Florida.— Savannah, etc., R. Co. *v.* Geiger, 21 Fla. 669, 58 Am. Rep. 697.

Indiana.— Pittsburgh, etc., R. Co. *v.* Troxell, 57 Ind. 246; Toledo, etc., R. Co. *v.* Weaver, 34 Ind. 298.

Virginia.— Orange, etc., R. Co. *v.* Miles, 76 Va. 773.

See 41 Cent. Dig. tit. "Railroads," §§ 1551, 1562.

19. Mobile, etc., R. Co. *v.* Williams, 53 Ala. 595; Burlington, etc., R. Co. *v.* Campbell, 14 Colo. App. 141, 59 Pac. 424. *Contra*, St. Louis, etc., R. Co. *v.* Brown, 49 Ark. 253, 4 S. W. 781; State *v.* Foster, 106 La. 425, 31 So. 57; Bates *v.* Fremont, etc., R. Co., 4 S. D. 394, 57 N. W. 72.

20. *Alabama.*— Western R. Co. *v.* McPherson, 146 Ala. 427, 40 So. 934; Southern R. Co. *v.* Hoge, 141 Ala. 351, 37 So. 439; Georgia Cent. R. Co. *v.* Edmondson, 135 Ala. 336, 33 So. 480; Alabama Great Southern R. Co. *v.* Hall, 133 Ala. 362, 32 So. 259; East Tennessee, etc., R. Co. *v.* Watson, 90 Ala. 41, 7 So. 813; East Tennessee, etc., R. Co. *v.* Carloss, 77 Ala. 443; South Alabama, etc., R. Co. *v.* Thompson, 62 Ala. 494.

Florida.—Jacksonville, etc., R. Co. *v.* Jones, 34 Fla. 286, 15 So. 924; Jacksonville, etc., R. Co. *v.* Garrison, 30 Fla. 557, 11 So. 929.

Indiana.— Chicago, etc., R. Co. *v.* Nash, (1890) 24 N. E. 884; Ohio, etc., R. Co. *v.* Craycraft, 5 Ind. App. 335, 32 N. E. 297.

Iowa.— Grinde *v.* Milwaukee, etc., R. Co., 42 Iowa 376.

Minnesota.— Clark *v.* Chicago, etc., R. Co., 28 Minn. 69, 9 N. W. 75.

Missouri.— Schneider *v.* Missouri Pac. R. Co., 75 Mo. 295; McPheeters *v.* Hannibal, etc., R. Co., 45 Mo. 22.

Nebraska.— Omaha, etc., R. Co. *v.* Wright, 49 Nebr. 456, 68 N. W. 618 [*disapproving* 47 Nebr. 886, 66 N. W. 842].

New Hampshire.— Smith *v.* Eastern R. Co., 35 N. H. 356.

Texas.— Galveston, etc., R. Co. *v.* Dyer, (Civ. App. 1896) 38 S. W. 218.

Vermont.— Cooley *v.* Brainerd, 38 Vt. 394.

West Virginia.— Robbins *v.* Baltimore, etc., R. Co., 62 W. Va. 535, 59 S. E. 512.

United States.— Gulf, etc., R. Co. *v.* Washington, 49 Fed. 347, 1 C. C. A. 286.

See 41 Cent. Dig. tit. "Railroads," §§ 1561, 1562.

It need not be alleged that the animal was on the track where the complaint alleges that defendant so negligently managed its locomotive as to run the same upon and against the animal. Housatonic R. Co. *v.* Waterbury, 23 Conn. 101.

21. Southern R. Co. *v.* Pope, 129 Ga. 842, 60 S. E. 157; South Georgia R. Co. *v.* Ryals, 123 Ga. 330, 51 S. E. 428; Macon, etc., R. Co. *v.* Stewart, 120 Ga. 890, 48 S. E. 354.

Allegations sufficient as to specific acts of negligence see Georgia Cent. R. Co. *v.* Bagley, 121 Ga. 781, 49 S. E. 780.

If the demurrer is general and not special it seems that a general allegation of negligence in the operation of the train is sufficient. See Georgia Cent. R. Co. *v.* Weathers, 120 Ga. 475, 47 S. E. 956.

22. Hill *v.* Missouri Pac. R. Co., 49 Mo. App. 520.

23. See *infra*, X, H, 15, h.

24. Curry *v.* Southern R. Co., 148 Ala. 57, 42 So. 447.

25. South Georgia R. Co. *v.* Ryals, 123 Ga. 330, 51 S. E. 428.

An allegation that the animals were "the property of petitioners" is sufficient as to the character of ownership, the necessary inference from the allegation being a joint ownership in each of the animals referred to in the petition. Georgia Cent. R. Co. *v.* Bagley, 121 Ga. 781, 49 S. E. 780.

In an action before a justice judgment will not be reversed because the summons did not directly allege plaintiff's ownership of the animal, but the better practice would be to amend the summons so as to make the allegation distinct and unequivocal. Southern R. Co. *v.* Varn, 102 Ga. 764, 29 S. E. 822.

26. Toledo, etc., R. Co. *v.* Weaver, 34 Ind. 298; McKnight *v.* Oregon Short Line R. Co., 33 Mont. 40, 82 Pac. 661.

ants it must be alleged that they were acting in the line of their employment;[27] but it is not necessary to allege the names of the employees in charge of the train by which the animal was injured.[28] In actions based upon the statutory liability for failure to fence no allegation of negligence is necessary, but the complaint must allege facts bringing the case within the provisions of the statute;[29] so in any case the complaint must either allege negligence or facts making such allegations unnecessary,[30] and where it neither alleges negligence nor a failure to fence it does not state a cause of action either at common law or under the statute;[31] and if the company is not required to fence, a complaint alleging only a failure to fence, and not alleging any negligence in the operation of the train by which the animal was killed or injured, does not state a cause of action.[32] The complaint should be so worded that it can be ascertained therefrom whether plaintiff's cause of action is founded upon defendant's negligence in the operation of its trains or upon the statutory liability for failure to fence;[33] but as there is no inconsistency plaintiff may allege in the same complaint both negligence and a failure to fence, and if the facts warrant it, may recover on either ground;[34] and where the complaint contains allegations both of negligence and a failure to fence, but the allegations are not sufficient as to one of these grounds, he may still recover if the allegations constitute a good statement of a cause of action either at common law,[35] or under the statute,[36] and the other allegations may be stricken out or disregarded as surplusage.[37] Separate causes of action for injuries to animals at different times may be joined in the same complaint,[38] but each injury should be stated in a separate paragraph,[39] although allegations applicable to the different counts need not be repeated in each but may be stated with reference to such counts.[40] Where the action is based upon a statute of another state the statute must be pleaded.[41]

(II) *Time and Place of Injury.*[42] In actions for injuries to animals the complaint should state with as much definiteness and certainty as possible

27. Campbell *v.* Indianapolis, etc., Traction Co., 39 Ind. App. 66, 79 N. E. 223.

28. Western R. Co. *v.* Stone, 145 Ala. 663, 39 So. 723.

29. See *infra*, X, H, 15, g, (IV).

30. West *v.* Hannibal, etc., R. Co., 34 Mo. 177; Dyer *v.* Pacific R. Co., 34 Mo. 127; Quick *v.* Hannibal, etc., R. Co., 31 Mo. 399; Smith *v.* Missouri Pac. R. Co., 29 Mo. App. 65.

31. Baltimore, etc., R. Co. *v.* Anderson, 58 Ind. 413; Toledo, etc., R. Co. *v.* Eidson, 51 Ind. 67; Toledo, etc., R. Co. *v.* Weaver, 34 Ind. 298; Indianapolis, etc., R. Co. *v.* Brucey, 21 Ind. 215; Indianapolis, etc., R. Co. *v.* Williams, 15 Ind. 486; Indianapolis, etc., R. Co. *v.* Sparr, 15 Ind. 440.

32. Martin *v.* Chicago, etc., R. Co., 15 Wyo. 493, 89 Pac. 1025.

33. Baker *v.* Southern California R. Co., 126 Cal. 516, 58 Pac. 1055.

34. Stewart *v.* Manhattan, etc., R. Co., 27 Kan. 631; Wright *v.* Quincy, etc., R. Co., 119 Mo. App. 469, 95 S. W. 293; Atterberry *v.* Wabash R. Co., 110 Mo. App. 608, 85 S. W. 114; Gulf, etc., R. Co. *v.* Washington, 49 Fed. 347, 1 C. C. A. 286; Jack *v.* Ontario, etc., R. Co., 14 U. C. Q. B. 328.

Where the complaint is in three counts, the first charging common-law negligence, the second a failure to give the statutory signals, and the third a failure to fence at the place where the animal went upon the track, plaintiff should not be required to elect at the opening of the trial upon which count he will proceed. Atterberry *v.* Wabash R. Co., 110 Mo. App. 608, 85 S. W. 114.

35. *Illinois.*— Rockford, etc., R. Co. *v.* Phillips, 66 Ill. 548; Chicago, etc., R. Co. *v.* Carter, 20 Ill. 390.

Missouri.—Garner *v.* Hannibal, etc., R. Co., 34 Mo. 235; Riley *v.* St. Louis Southwestern R. Co., 84 Mo. App. 495.

Vermont.— Cooley *v.* Brainerd, 38 Vt. 394.

Wisconsin.— Antisdel *v.* Chicago, etc., R. Co., 26 Wis. 145, 7 Am. Rep. 44.

Canada.— Chisholm *v.* Great Western R. Co., 10 U. C. C. P. 324.

See 41 Cent. Dig. tit. "Railroads," §§ 1551, 1562.

36. Jeffersonville, etc., R. Co. *v.* Lyon, 55 Ind. 477; Cleveland, etc., R. Co. *v.* De Bolt, 10 Ind. App. 174, 37 N. E. 737.

37. Rockford, etc., R. Co. *v.* Phillips, 66 Ill. 548; Chicago, etc., R. Co. *v.* Carter, 20 Ill. 390; Jeffersonville, etc., R. Co. *v.* Lyon, 55 Ind. 477; Garner *v.* Hannibal, etc., R. Co., 34 Mo. 235.

38. Bricker *v.* Missouri Pac. R. Co., 83 Mo. 391.

39. Jeffersonville, etc., R. Co. *v.* Brevoort, 30 Ind. 324.

40. Bricker *v.* Missouri Pac. R. Co., 83 Mo. 391.

41. McKnight *v.* Oregon Short Line R. Co., 33 Mont. 40, 82 Pac. 661.

42. Variance between allegation and proof see *infra*, X, H, 15, h, (IV).

the time and place of the injury;[43] and where the statute expressly requires that the complaint shall specify the time and place of the injury, each must be designated with reasonable certainty, and it is not sufficient merely to state the month and the county.[44] In the absence of statute the complaint need not be more specific as to the place of injury than to state the county in which it occurred,[45] but if the action is based upon a statute of the state where it is instituted the complaint must show that the railroad is located within that state.[46] Where the statutes expressly restrict the venue according to the county or township where the injury occurred,[47] such facts are jurisdictional,[48] and the complaint must allege in conformity with such provisions that the injury occurred in the county in which the action is brought,[49] or in the township,[50] or either in that or an adjoining township;[51] but it is not necessary that this should be directly and positively alleged, it being sufficient if it appears from the averments of the complaint that the injury occurred in such county[52] or township.[53]

(III) *NATURE AND EXTENT OF INJURY OR DAMAGE.* Where plaintiff only seeks to recover for the damages naturally resulting from the negligent acts complained of, the particulars in respect to which plaintiff has been damaged need not be stated;[54] but to recover for a specific act not so necessarily resulting

43. Little Rock, etc., R. Co. *v.* Smith, 66 Ark. 278, 50 S. W. 502.

It is sufficiently shown that the animal was on the track where the complaint alleges that defendant ran its train "at and against the animal, at a point on its line of railroad . . . which point on said railroad of contact and killing was" in a certain named township of the state. Chicago, etc., R. Co. *v.* Nash, 1 Ind. App. 298, 27 N. E. 564.

A complaint is sufficiently specific which alleges that on a certain date the animal came upon the track at a point "immediately north of" a certain city in a certain county (Louisville, etc., R. Co. *v.* Consolidated Tank Line Co., 4 Ind. App. 40, 30 N. E. 159), or which alleges that defendant was operating its road on a certain date and within the county and that "at the time and place aforesaid" the animal came upon the track and was injured (St. Louis, etc., R. Co. *v.* Kilpatrick, 61 Ill. 457).

44. East Tennessee, etc., R. Co. *v.* Carloss, 77 Ala. 443, holding that the time must be alleged as a specified day of a given month and year and the place designated by describing its distance from some station or other known point.

A complaint is sufficient which designates the time as "on or about" a certain day of a specified month and year and the place as "at a place on said railroad about seventy-five or one hundred yards distant from" a certain station in a certain county. Western R. Co. *v.* Sistrunk, 85 Ala. 352, 5 So. 79.

It is only in an action brought under the statute which is in terms restricted to an injury caused by cars or locomotives that the statutory requirement as to alleging the time and place of injury applies. South Alabama, etc., R. Co. *v.* Schafner, 78 Ala. 567.

The Alabama statute is now repealed by its omission from the codes adopted subsequent to 1876, and there is no statutory requirement that the time and place of injury must be alleged. Western R. Co. *v.* McPherson, 146 Ala. 427, 40 So. 934.

45. Jacksonville, etc., R. Co. *v.* Wellman, 26 Fla. 344, 7 So. 845.

46. Toledo, etc., R. Co. *v.* Bookless, 55 Ill. 230.

47. See *supra*, X, H, 15, c.

48. Chicago, etc., R. Co. *v.* Wheeler, 14 Ind. App. 62, 42 N. E. 489; Kansas City, etc., R. Co. *v.* Burge, 40 Kan. 734, 19 Pac. 791; Mitchell *v.* Missouri Pac. R. Co., 82 Mo. 106.

49. Toledo, etc., R. Co. *v.* Milligan, 52 Ind. 505; Indianapolis, etc., R. Co. *v.* Wilsey, 20 Ind. 229; Chicago, etc., R. Co. *v.* Wheeler, 14 Ind. App. 62, 42 N. E. 489; Kansas City, etc., R. Co. *v.* Burge, 40 Kan. 734, 19 Pac. 791; St. Louis, etc., R. Co. *v.* Byron, 24 Kan. 350; Hadley *v.* Central Branch Union Pac. R. Co., 22 Kan. 359.

50. Haggard *v.* Atlantic, etc., R. Co., 63 Mo. 302.

But where the action may be brought before any justice in the county where the injury occurred, such allegation is unnecessary. Cincinnati, etc., R. Co. *v.* Parker, 109 Ind. 235, 9 N. E. 787.

51. Ellis *v.* Missouri Pac. R. Co., 83 Mo. 372; Mitchell *v.* Missouri Pac. R. Co., 82 Mo. 106.

If the complaint alleges that the injury occurred in a particular township, which is not the township where the action is instituted, it must be alleged that the township named is an adjoining township. Ellis *v.* Missouri Pac. R. Co., 83 Mo. 372.

52. Louisville, etc., R. Co. *v.* Wilkerson, 83 Ind. 153; Louisville, etc., R. Co. *v.* Davis, 83 Ind. 89; White Water Valley R. Co. *v.* Quick, 30 Ind. 384; Pittsburg, etc., R. Co. *v.* Newsom, 35 Ind. App. 299, 74 N. E. 21; Chicago, etc., R. Co. *v.* Spencer, 23 Ind. App. 605, 55 N. E. 882; Lake Erie, etc., R. Co. *v.* Rinker, 16 Ind. App. 334, 45 N. E. 80; Wichita, etc., R. Co. *v.* Gibbs, 47 Kan. 274, 27 Pac. 991.

53. Cummings *v.* St. Louis, etc., R. Co., 70 Mo. 570; Young *v.* Kansas City, etc., R. Co., 39 Mo. App. 52.

54. Dooley *v.* Missouri Pac. R. Co., 36 Mo. App. 381.

from the negligence alleged, that defendant could be expected to meet it without having it pointed out directly, a general allegation of damages done to plaintiff's stock without showing how or when the damage was done or to what number or kind of animals, is not sufficient;[55] and where it is alleged that an animal belonging to plaintiff was negligently killed by defendant, the value of the animal must be stated.[56] A complaint is sufficient, however, which alleges that plaintiff's animal was "killed or disabled" without showing which,[57] or which alleges that the animal was killed and was of a certain value without a direct allegation that the injury was to plaintiff's damage,[58] or which states the number and character of the animals killed and their value and the time and place of injury;[59] and when the statute allows plaintiff to recover a reasonable attorney's fee it is not necessary to allege that the employment of an attorney in the case was necessary.[60] Since the action is in tort it is not necessary to allege that plaintiff's claim is due and unpaid,[61] nor can defendant demand a bill of particulars.[62]

(IV) *FENCES AND CATTLE-GUARDS* — (A) *In General.* In actions based upon the statutory liability of a railroad company for failure to fence its tracks no allegation of negligence is necessary;[63] but the complaint must allege facts sufficient to bring the case within the provisions of the statute,[64] and greater strictness is required under the statutes allowing plaintiff to recover double dam-

55. Grand Rapids, etc., R. Co. *v.* Southwick, 30 Mich. 444.

56. Connors *v.* Great Western R. Co., 13 U. C. Q. B. 401.

57. Southern R. Co. *v.* Hoge, 141 Ala. 351, 37 So. 439.

58. Louisville, etc., R. Co. *v.* Argenbright, 98 Ind. 254.

59. Southern R. Co. *v.* Sheffield, 127 Ga. 569, 56 S. E. 838.

60. Kansas City, etc., R. Co. *v.* Burge, 40 Kan. 736, 21 Pac. 589.

61. Louisville, etc., R. Co. *v.* Argenbright, 90 Ind. 254.

62. Dooley *v.* Missouri Pac. R. Co., 36 Mo. App. 381.

63. Talbot *v.* Minneapolis, etc., R. Co., 82 Mich. 66, 45 N. W. 1113; Mumpower *v.* Hannibal, etc., R. Co., 59 Mo. 245; Burton *v.* North Missouri R. Co., 30 Mo. 372; Beaudin *v.* Oregon Short Line R. Co., 31 Mont. 238, 78 Pac. 303; Houston, etc., R. Co. *v.* Loughbridge, 1 Tex. App. Civ. Cas. § 1300.

But where a particular court has exclusive jurisdiction of actions to enforce the statutory liability, as was the case in Indiana prior to the amendment of the statute (Indianapolis, etc., R. Co. *v.* Fisher, 15 Ind. 203), if the action is brought in a different court it will be treated as a common-law action and plaintiff cannot recover in the absence of an allegation of negligence (Terre Haute, etc., R. Co. *v.* Smith, 19 Ind. 42; Evansville, etc., R. Co. *v.* Ross, 12 Ind. 446; Jeffersonville R. Co. *v.* Martin, 10 Ind. 416).

Where animals are injured at a place not required to be fenced plaintiff cannot recover for such injury unless negligence is alleged in the complaint. Peoria, etc., R. Co. *v.* Barton, 80 Ill. 72.

64. Rockford, etc., R. Co. *v.* Phillips, 66 Ill. 548; Ohio, etc., R. Co. *v.* Brown, 23 Ill. 94; Manz *v.* St. Louis, etc., R. Co., 87 Mo. 278; Miles *v.* Hannibal, etc., R. Co., 31 Mo. 407; Beaudin *v.* Oregon Short Line R. Co., 31 Mont. 238, 78 Pac. 303; Baltimore, etc., R. Co. *v.* Wilson, 31 Ohio St. 555.

The complaint must negative any exceptions as to defendant's liability which are contained in the enacting clause of the statute (Galena, etc., R. Co. *v.* Sumner, 24 Ill. 631; Russell *v.* Hannibal, etc., R. Co., 83 Mo. 507), but need not negative exceptions contained in other parts of the statute (Toledo, etc., R. Co. *v.* Lavery, 71 Ill. 522; Great Western R. Co. *v.* Hanks, 36 Ill. 281 [*disapproving* Great Western R. Co. *v.* Bacon, 30 Ill. 347, 83 Am. Dec. 199]), or which are not expressly contained in the statute but might exist from the fact that the road could not lawfully or properly be fenced at certain places (Jeffersonville, etc., R. Co. *v.* Brevoort, 30 Ind. 324; Missouri Pac. R. Co. *v.* Borrer, 3 Kan. App. 284, 45 Pac. 133).

The complaint must allege an actual collision under those statutes which are construed as authorizing a recovery for failure to fence only where the injury is so inflicted. Colbert *v.* Missouri Pac. R. Co., 78 Mo. App. 176; Geiser *v.* St. Louis, etc., R. Co., 61 Mo. App. 459.

Ownership or possession of adjoining lands. — Under statutes where the company is liable for failure to fence only to the owners or persons in possession of the lands through or along which the road runs, the complaint must allege the fact of plaintiff's ownership or possession at the place where the animal came upon the track (Metlen *v.* Oregon Short Line R. Co., 33 Mont. 45, 81 Pac. 737; Beaudin *v.* Oregon Short Line R. Co., 31 Mont. 238, 78 Pac. 303); and where the statute is construed as being only for the benefit of adjoining landowners or the owner of animals lawfully on such premises, if plaintiff was not the owner of the premises adjoining the railroad at the place where the animal entered, the complaint should allege that the animal was upon such premises either because they were not inclosed by a lawful

ages than in ordinary cases;[65] but it is sufficient if the necessary allegations appear either by direct averment or by necessary implication from the facts stated.[66] It must of course be alleged that the road was not fenced,[67] although the allegation need not be in the exact language of the statute if words of equivalent import and meaning are used;[68] but such allegation must be made with express reference to the time when the injury occurred,[69] and to the place where the animal came upon the track.[70] Ordinarily it is sufficient if the complaint follows the language of the statute;[71] but it need not expressly refer to the statute, it being sufficient if the facts alleged show a liability thereunder;[72] and it is not necessary for the

fence or by permission of the owner thereof (Wages *v.* Quincy, etc., R. Co., 110 Mo. App. 230, 85 S. W. 104; Farmers' Bank *v.* Chicago, etc., R. Co., 109 Mo. App. 165, 83 S. W. 76); but it has been held that such allegation is not absolutely essential (Wages *v.* Quincy, etc., R. Co., *supra*; Seidel *v.* Quincy, etc., R. Co., 109 Mo. App. 160, 83 S. W. 77); particularly where the action is brought before a justice of the peace (Wages *v.* Quincy, etc., R. Co., *supra*); and if the animal came upon the track from uninclosed lands where it was lawful for it to be at large no allegation of plaintiff's ownership of such lands is necessary (Board *v.* St. Louis, etc., R. Co., 36 Mo. App. 151).

In an action based upon a failure to maintain cattle-guards the complaint should allege: (1) That there was a certain crossing over defendant's right of way at a certain place; (2) that adjacent to such crossing defendant had failed to maintain a proper cattle-guard sufficient to prevent stock from going on the track; and (3) that by reason of such insufficient cattle-guard plaintiff's animal passed from said crossing upon defendant's track and was there struck and injured by its locomotives or cars. Jones *v.* Chicago, etc., R. Co., 52 Mo. App. 381.

After verdict in the absence of a demurrer a complaint should be sustained as sufficient if by a liberal construction of the language used there is not a total failure to state a cause of action under the statute (Jackson *v.* Wabash R. Co., 85 Mo. App. 443); so after verdict an allegation that the road was not fenced "as the law directs" will be regarded as equivalent to an allegation that at the place in question the road ran through or along lands of the character where fencing is required (Nicholson *v.* Hannibal, etc., R. Co., 82 Mo. 73).

65. Manz *v.* St. Louis, etc., R. Co., 87 Mo. 278.

66. Ringo *v.* St. Louis, etc., R. Co., 91 Mo. 667, 4 S. W. 396; Lainiger *v.* Kansas City, etc., R. Co., 41 Mo. App. 165.

67. Toledo, etc., R. Co. *v.* Weaver, 34 Ind. 298; St. Louis, etc., R. Co. *v.* Hoff, 76 Kan. 506, 92 Pac. 539.

An allegation that the road was not fenced by defendant "or any other person at its special instance or request" does not by the unnecessary words added create any implication that the road was fenced by some person not at the instance or request of the company and is a sufficient allegation that it was unfenced. Ft. Wayne, etc., R. Co. *v.* Mussetter, 48 Ind. 286.

68. Louisville, etc., R. Co. *v.* Hixon, 101 Ind. 337; Evansville, etc., R. Co. *v.* Tipton, 101 Ind. 197; Louisville, etc., R. Co. *v.* Shanklin, 94 Ind. 297; Terre Haute, etc., R. Co. *v.* Penn, 90 Ind. 284.

So under the Indiana statute which provides that the absolute liability without regard to negligence "shall not apply to any railroad securely fenced in, and such fence properly maintained" (Indianapolis, etc., R. Co. *v.* Bishop, 29 Ind. 202), it is not material that the complaint uses the words "right of way" instead of "railroad" (Louisville, etc., R. Co. *v.* Hixon, 101 Ind. 337), or "sufficiently" instead of "securely" (Evansville, etc., R. Co. *v.* Tipton, 101 Ind. 197); and it is sufficient if it alleges that at the point where the animal entered the road was "not securely fenced," omitting the word "in" (Terre Haute, etc., R. Co. *v.* Penn, 90 Ind. 284; Louisville, etc., R. Co. *v.* Overman, 88 Ind. 115; Detroit, etc., R. Co. *v.* Blodgett, 61 Ind. 315; Toledo, etc., R. Co. *v.* Harris, 49 Ind. 119), or if it alleges merely that at such point the road "was not fenced" (Louisville, etc., R. Co. *v.* Shanklin, 94 Ind. 297; Louisville, etc., R. Co. *v.* Harrigan, 94 Ind. 245; Indianapolis, etc., R. Co. *v.* McKinney, 24 Ind. 283), or "was not fenced at all" (Louisville, etc., R. Co. *v.* Detrick, 91 Ind. 519), or was "not securely fenced as required by law" (Indianapolis, etc., R. Co. *v.* Lyon, 48 Ind. 119; Jeffersonville, etc., R. Co. *v.* Chenoweth, 30 Ind. 366), or was "not securely fenced as by law required" (Pittsburgh, etc., R. Co. *v.* Brown, 44 Ind. 409); but it is not sufficient merely to allege that the road was "not fenced as required by law" (Jeffersonville, etc., R. Co. *v.* Underhill, 40 Ind. 229; Indianapolis, etc., R. Co. *v.* Bishop, 29 Ind. 202 [*overruling* Toledo, etc., R. Co. *v.* Fowler, 22 Ind. 316]), or "not fenced according to law" (Indianapolis, etc., R. Co. *v.* Robinson, 35 Ind. 380), or not fenced "in manner and form as in the statute provided" (Pittsburgh, etc., R. Co. *v.* Keller, 49 Ind. 211), as such allegations state merely a conclusion of law (Jeffersonville, etc., R. Co. *v.* Underhill, *supra*).

69. Baker *v.* Southern California R. Co., 114 Cal. 501, 46 Pac. 604; Hadley *v.* Central Branch Union Pac. R. Co., 22 Kan. 359.

70. See *infra*, X, H, 15, g, (IV), (D).

71. Smith *v.* Chicago, etc., R. Co., 127 Mo. App. 160, 105 S. W. 10; Marion *v.* St. Louis, etc., R. Co., 127 Mo. App. 129, 104 S. W. 1125.

72. Morrison *v.* Burlington, etc., R. Co., 84 Iowa 663, 51 N. W. 75; Grand Rapids, etc.,

complaint to set out or define what constitutes a lawful fence within the application of the statute,[73] or to state in what particular respect the fence in question was unlawful.[74] Where the statute expressly requires the road to be fenced at certain designated places the complaint must show either by direct allegation or necessary implication that the place in question was one which the statute required to be fenced.[75] This may be done either by an affirmative allegation expressly designating the place as one within the provisions of the statute,[76] or by negativing that it was at any of the places, specifying them, which are not within its application;[77] but it is not sufficient if it omits the necessary affirmative allegation and does not negative all of the places not included.[78] If the statute expressly excepts certain places the complaint must show that the place was not within the exception,[79] but the allegation need not be in express terms if this fact suffi-

R. Co. *v.* Southwick, 30 Mich. 444; Jenkins *v.* Chicago, etc., R. Co., 32 Mo. App. 552.

Although there have been changes in the statute during the period covered by the injuries complained of, the complaint will be sustained as good if not demurred to, although containing no specific reference to the statutes. Continental Imp. Co. *v.* Ives, 30 Mich. 448.

73. Marion *v.* St. Louis, etc., R. Co., 127 Mo. App. 129, 104 S. W. 1125.

74. Till *v.* St. Louis, etc., R. Co., 124 Mo. App. 281, 101 S. W. 624.

75. Ward *v.* St. Louis, etc., R. Co., 91 Mo. 168, 3 S. W. 481; Manz *v.* St. Louis, etc., R. Co., 87 Mo. 278; Morrow *v.* Missouri Pac. R. Co., 82 Mo. 169; Asher *v.* St. Louis, etc., R. Co., 79 Mo. 432; Schulte *v.* St. Louis, etc., R. Co., 76 Mo. 324; Bates *v.* St. Louis, etc., R. Co., 74 Mo. 60; Rowland *v.* St. Louis, etc., R. Co., 73 Mo. 619; Davis *v.* Missouri, etc., R. Co., 65 Mo. 441; Brassfield *v.* Patton, 32 Mo. App. 572.

Under the Missouri Double Damage Act the complaint must allege or show that the animal came upon the track where the road passes through, along, or adjoining inclosed or cultivated fields or uninclosed lands. Ward *v.* St. Louis, etc., R. Co., 91 Mo. 168, 3 S. W. 481; Manz *v.* St. Louis, etc., R. Co., 87 Mo. 278; Wood *v.* Kansas City, etc., R. Co., 39 Mo. App. 63.

76. Ringo *v.* St. Louis, etc., R. Co., 91 Mo. 667, 4 S. W. 396; Mayfield *v.* St. Louis, etc., R. Co., 91 Mo. 296, 3 S. W. 201; Tickell *v.* St. Louis, etc., R. Co., 90 Mo. 296, 2 S. W. 407; Jantzen *v.* Wabash, etc., R. Co., 83 Mo. 171; Meyers *v.* Union Trust Co., 82 Mo. 237; Briggs *v.* Missouri Pac. R. Co., 82 Mo. 37; Williams *v.* Hannibal, etc., R. Co., 80 Mo. 597; Rozzelle *v.* Hannibal, etc., R. Co., 79 Mo. 349; Campbell *v.* Missouri Pac. R. Co., 78 Mo. 639; Perriquez *v.* Missouri Pac. R. Co., 78 Mo. 91; Lainiger *v.* Kansas City, etc., R. Co., 41 Mo. App. 165; Kinney *v.* Hannibal, etc., R. Co., 27 Mo. App. 610; Dorman *v.* Missouri Pac. R. Co., 17 Mo. App. 337.

Under the Missouri Double Damage Act it is sufficient to allege in the language of the statute that the animal came upon the track where the road "passes through, along, or adjoining inclosed or cultivated fields or uninclosed lands," which sufficiently negatives that the place was a public crossing, depot ground, or within the limits of a town or city. Ringo *v.* St. Louis, etc., R. Co., 91 Mo. 667, 4 S. W. 396; Meyers *v.* Union Trust Co., 82 Mo. 237; Williams *v.* Hannibal, etc., R. Co., 80 Mo. 597; Lainiger *v.* Kansas City, etc., R. Co., 41 Mo. App. 165; Kinney *v.* Hannibal, etc., R. Co., 27 Mo. App. 610.

77. Fraysher *v.* Mississippi River, etc., R. Co., 66 Mo. App. 573; McGuire *v.* St. Louis, etc., R. Co., 43 Mo. App. 354.

Under the Missouri Double Damage Act which is construed as applying to all places along the road except at public crossings, depot grounds, and within the limits of incorporated towns and cities (Morris *v.* Hannibal, etc., R. Co., 79 Mo. 367), it is sufficient to allege that the place where the animal came upon the track was not at any of these places (McGuire *v.* St. Louis, etc., R. Co., 43 Mo. App. 354).

78. Summers *v.* Hannibal, etc., R. Co., 29 Mo. App. 41; Briscoe *v.* Missouri Pac. R. Co., 25 Mo. App. 468; Moreland *v.* Missouri Pac. R. Co., 17 Mo. App. 77.

79. Illinois Cent. R. Co. *v.* Williams, 27 Ill. 48; Galena, etc., R. Co. *v.* Sumner, 24 Ill. 631; Ohio, etc., R. Co. *v.* Brown, 23 Ill. 94; Chicago, etc., R. Co. *v.* Carter, 20 Ill. 390; Russell *v.* Hannibal, etc., R. Co., 83 Mo. 507; Smith *v.* Missouri Pac. R. Co., 29 Mo. App. 65.

Under the Illinois statute the complaint must allege that the place where the animal came upon the track was not a public crossing or within the limits of a city, town, or village (Illinois Cent. R. Co. *v.* Williams, 27 Ill. 48; Chicago, etc., R. Co. *v.* Carter, 20 Ill. 390), but it is not necessary to allege that it was not at a private or farm crossing (Great Western R. Co. *v.* Helm, 27 Ill. 198, 81 Am. Dec. 226).

Under the Missouri statute which authorizes the recovery of single damages for injuries to animals "without any proof of negligence," but which provides that "this section shall not apply to any accident occurring on any portion of such road that may be inclosed by a lawful fence, or in the crossing of any public highway" (Radcliffe *v.* St. Louis, etc., R. Co., 90 Mo. 127, 2 S. W. 277; Burton *v.* Northern Pac. R. Co., 30 Mo. 372), the provision "may be inclosed" states an exception which must be negatived (Russell *v.* Hannibal, etc., R. Co., 83 Mo. 507); and the complaint must show both that the place was one which the company might lawfully

ciently appears from the facts stated.[80] If the statute does not contain any express exception but merely makes the company liable without regard to negligence for all damages to stock where its road is not fenced, it is sufficient merely to allege that the animal came upon the track where the road was not fenced and was injured without alleging that the place was one which should have been fenced,[81] and if the place was in fact one which the company could not lawfully or properly have fenced, such as a public crossing or depot grounds, this is a matter of defense which need not be negatived in the complaint.[82] If the statute provides that the company shall be liable for damages caused or occasioned by or which may result from the failure to fence, the complaint must allege or show that the injury was so caused;[83] but it is not necessary to employ the exact term used in the statute,[84] or that it should be in the form of an express allegation,[85] it being sufficient if it appears by necessary or reasonable implication from the facts stated;[86] and in the absence of such a provision in the statute an allegation to this effect is not necessary.[87]

(B) *Time For Construction of Fences.* Where the statute allows a certain time after the road or a part thereof is completed or put in operation within which the fence required may be constructed, the complaint must allege that such time had elapsed at the time of the injury complained of,[88] and such allegation must

have fenced and also that it was not a public crossing (Clarkson *v.* Wabash, etc., R. Co., 84 Mo. 583; Russell *v.* Hannibal, etc., R. Co., *supra*; Smith *v.* Missouri Pac. R. Co., 29 Mo. App. 65).

It is only as to the place of entry that the rule applies, and it is not necessary to allege that the place of injury was not one of the places not required to be fenced. Great Western R. Co. *v.* Hanks, 36 Ill. 281.

A verbal inaccuracy in stating the place excepted cannot be taken advantage of by defendant where the pleading states the exception larger than it really is and is therefore to defendant's advantage. Illinois Cent. R. Co. *v.* Wade, 46 Ill. 115.

If the action is based upon the dangerous character of the fence and the negligence of the company in maintaining it in that condition, it is not necessary to allege that it was the duty of the company to fence at the place in question. Baltimore, etc., R. Co. *v.* Seitzinger, 116 Ill. App. 55.

80. Radcliffe *v.* St. Louis, etc., R. Co., 90 Mo. 127, 2 S. W. 277; Meadows *v.* Chicago, etc., R. Co., 82 Mo. App. 83.

81. Louisville, etc., R. Co. *v.* Hall, 93 Ind. 245; Terre Haute, etc., R. Co. *v.* Penn, 90 Ind. 284; Louisville, etc., R. Co. *v.* Kiouse, 82 Ind. 357; Jeffersonville, etc., R. Co. *v.* Lyon, 72 Ind. 107; Ohio, etc., R. Co. *v.* McClure, 47 Ind. 317; Jeffersonville, etc., R. Co. *v.* Vancant, 40 Ind. 233; Jeffersonville, etc., R. Co. *v.* Brevoort, 30 Ind. 324; Lake Erie, etc., R. Co. *v.* Rooker, 13 Ind. App. 600, 41 N. E. 470; Chicago, etc., R. Co. *v.* Brannegan, 5 Ind. App. 540, 32 N. E. 790; Lake Erie, etc., R. Co. *v.* Fishback, 5 Ind. App. 403, 32 N. E. 346; Terre Haute, etc., R. Co. *v.* Schaeffer, 5 Ind. App. 86, 31 N. E. 557; Louisville, etc., R. Co. *v.* Hart, 2 Ind. App. 130, 28 N. E. 218; Louisville, etc., R. Co. *v.* Hughes, 2 Ind. App. 68, 28 N. E. 158; Missouri Pac. R. Co. *v.* Borrer, 3 Kan. App. 284, 45 Pac. 133.

82. Jeffersonville, etc., R. Co. *v.* Lyon, 72 Ind. 107; Ft. Wayne, etc., R. Co. *v.* Mussetter, 48 Ind. 286; Ohio, etc., R. Co. *v.* McClure, 47 Ind. 317; Jeffersonville, etc., R. Co. *v.* Brevoort, 30 Ind. 324; Chicago, etc., R. Co. *v.* Brannegen, 5 Ind. App. 540, 32 N. E. 790; Louisville, etc., R. Co. *v.* Hart, 2 Ind. App. 130, 28 N. E. 218; Missouri Pac. R. Co. *v.* Borrer, 3 Kan. App. 284, 45 Pac. 133.

83. Hudgens *v.* Hannibal, etc., R. Co., 79 Mo. 418; Dryden *v.* Smith, 79 Mo. 525; Johnson *v.* St. Louis, etc., R. Co., 76 Mo. 553; Morrow *v.* Kansas City, etc., R. Co., 74 Mo. 82; Sloan *v.* Missouri Pac. R. Co., 74 Mo. 47; Rowland *v.* St. Louis, etc., R. Co., 73 Mo. 619; Cunningham *v.* Hannibal, etc., R. Co., 70 Mo. 202; Luckie *v.* Chicago, etc., R. Co., 67 Mo. 245; Cecil *v.* Pacific R. Co., 47 Mo. 246; Menard *v.* Montana Cent. R. Co., 22 Mont. 340, 56 Pac. 592; Baltimore, etc., R. Co. *v.* Wilson, 31 Ohio St. 555.

84. Williams *v.* Missouri Pac. R. Co., 74 Mo. 453.

85. Bowen *v.* Hannibal, etc., R. Co., 75 Mo. 426.

86. Thomas *v.* Hannibal, etc., R. Co., 82 Mo. 538; Campbell *v.* Missouri Pac. R. Co., 78 Mo. 639; Perriquez *v.* Missouri Pac. R. Co., 78 Mo. 91; Kronski *v.* Missouri Pac. R. Co., 77 Mo. 362; Terry *v.* Missouri Pac. R. Co., 77 Mo. 254; Belcher *v.* Missouri Pac. R. Co., 75 Mo. 514; Rowen *v.* Chicago Great Western R. Co., 82 Mo. App. 24; Jones *v.* St. Louis, etc., R. Co., 44 Mo. App. 15.

87. Radcliffe *v.* St. Louis, etc., R. Co., 90 Mo. 127, 2 S. W. 277. See also Ohio, etc., R. Co. *v.* Neady, 5 Ind. App. 328, 32 N. E. 213. But see Chicago, etc., R. Co. *v.* King, 76 Nebr. 591, 107 N. W. 981.

88. Toledo, etc., R. Co. *v.* Bookless, 55 Ill. 230; Galena, etc., R. Co. *v.* Sumner, 24 Ill. 631; Baltimore, etc., R. Co. *v.* Wilson, 31 Ohio St. 555. But see Pittsburgh, etc., R. Co. *v.* Newsom, 35 Ind. App. 299, 74 N. E. 21.

A complaint is sufficient which follows substantially the language of the statute and alleges that "more than six months after said railroad was in use, to wit" upon a

be made with express reference to the place where the animal came upon the track.[89]

(c) *Contracts Relating to Fencing.* Where plaintiff relies upon a failure of the railroad company to fence its tracks according to contract that fact should be alleged in the complaint,[90] but it is not necessary that the contract or a copy thereof should be filed with the pleading;[91] nor since the breaches of the contract may be several and continuing is it necessary that the complaint should state when the contract was first broken,[92] or in an action for failure on the part of a railroad company to maintain fences already constructed by its predecessor under a written contract to construct and maintain them, that the complaint should allege that defendant had knowledge of such contract.[93] Where the statute relieves the railroad company from liability where the landowner has agreed to maintain the fence or received pay for so doing when the right of way was acquired, it is not necessary to negative this exception if it is not contained in the enacting clause of the statute.[94]

(d) *Place of Entry Upon Track.* Since in actions based upon the failure of a railroad company to fence its tracks it is the place where the animal came upon the track and not the place of injury which determines the liability,[95] it is not necessary that the complaint should allege that the track was not fenced at the place where the animal was injured,[96] but it is necessary that it should be alleged that it was not fenced at the place where the animal came upon it,[97] and it is not sufficient merely to allege that it was not fenced at the place of injury;[98] and if

specified date "the said defendant neglected to erect," etc. Great Western R. Co. *v.* Hanks, 36 Ill. 281.

89. Toledo, etc., R. Co. *v.* Darst, 51 Ill. 365.

90. Gulf, etc., R. Co. *v.* Washington, 49 Fed. 347, 1 C. C. A. 286.

91. Toledo, etc., R. Co. *v.* Fenstemaker, 3 Ind. App. 151, 29 N. E. 440. See also Indianapolis Northern Traction Co. *v.* Harbaugh, 38 Ind. App. 115, 78 N. E. 80.

92. Evans *v.* Southern R. Co., 133 Ala. 482, 32 So. 138.

93. Toledo, etc., R. Co. *v.* Fenstemaker, 3 Ind. App. 151, 29 N. E. 440.

94. Toledo, etc., R. Co. *v.* Lavery, 71 Ill. 522; Great Western R. Co. *v.* Hanks, 36 Ill. 281 [*disapproving* Great Western R. Co. *v.* Bacon, 30 Ill. 347, 83 Am. Dec. 199].

95. Toledo, etc., R. Co. *v.* Darst, 51 Ill. 365; Louisville, etc., R. Co. *v.* Quade, 91 Ind. 295; Nance *v.* St. Louis, etc., R. Co., 79 Mo. 196; Wilson *v.* Wabash, etc., R. Co., 18 Mo. App. 258.

96. Wabash R. Co. *v.* Forshee, 77 Ind. 158.

97. Toledo, etc., R. Co. *v.* Darst, 51 Ill. 365; Louisville, etc., R. Co. *v.* Quade, 91 Ind. 295; Bellefontaine R. Co. *v.* Suman, 29 Ind. 40; Ward *v.* St. Louis, etc., R. Co., 91 Mo. 168, 3 S. W. 481; Manz *v.* St. Louis, etc., R. Co., 87 Mo. 278; Nance *v.* St. Louis, etc., R. Co., 79 Mo. 196; Brassfield *v.* Patton, 32 Mo. App. 572; Wilson *v.* Wabash, etc., R. Co., 18 Mo. App. 258.

It need not be alleged directly if the fact appears by necessary inference from the other allegations. Briscoe *v.* Missouri Pac. R. Co., 25 Mo. App. 468. See also Moore *v.* Wabash, etc., R. Co., 81 Mo. 490.

It is a sufficient equivalent to a direct allegation that the animal came upon the track at the point where it was not fenced to allege that at a certain place defendant "neglected and failed to maintain a fence and cattle guard" and that defendant's animal "then and there, by reason of the failure of said defendant to fence," etc., went upon the road and was injured (Wabash R. Co. *v.* Ferris, 6 Ind. App. 30, 32 N. E. 112); or to allege that the damages were "occasioned solely on account of the defendant's failure to maintain fences," as such allegation excludes every other implication than that the animal got on the track where it was not fenced (Fields *v.* Wabash, etc., R. Co., 80 Mo. 203).

98. Toledo, etc., R. Co. *v.* Darst, 51 Ill. 365; Louisville, etc., R. Co. *v.* Quade, 91 Ind. 295; Ward *v.* St. Louis, etc., R. Co., 91 Mo. 168, 3 S. W. 481; Nance *v.* St. Louis, etc., R. Co., 79 Mo. 196; Wilson *v.* Wabash, etc., R. Co., 18 Mo. App. 258. But see Jeffersonville, etc., R. Co. *v.* Chenoweth, 30 Ind. 366.

In Indiana it has been held that if the action is before a justice a complaint is sufficient which alleges merely that the track was not fenced at the place of injury without an allegation that it was not fenced where the animal came upon it (Louisville, etc., R. Co. *v.* Argenbright, 98 Ind. 254; Indianapolis, etc., R. Co. *v.* Sims, 92 Ind. 496; Toledo, etc., R. Co. *v.* Stevens, 63 Ind. 337; Ohio, etc., R. Co. *v.* Miller, 46 Ind. 215; Indianapolis, etc., R. Co. *v.* Adkins, 23 Ind. 340); but in a recent case which sustains this rule on the ground of former decisions the court directly admitted that the rule was well settled to the contrary as to actions in the circuit court and that it could see no reason why such allegation was not necessary in order to state a cause of action under the same statute in an action before a justice (Indianapolis, etc., R. Co. *v.* Sims, *supra*).

Under the Oregon statute it seems that it

the statute expressly requires the fence at certain points or expressly excepts certain places the place of entry must be so designated as to bring it within the application of the statute.[99]

(E) *Defects in Fences and Cattle-Guards.* In an action for injuries due to defects in fences and cattle-guards a complaint is sufficient which alleges that the injury was due to a failure to maintain a good and sufficient fence,[1] without any more specific reference to the particular defect,[2] or where the circumstances alleged are equivalent to an averment that the railroad fence was not properly maintained,[3] and that the injury complained of was occasioned thereby.[4] The complaint need not allege that plaintiff had not agreed to maintain the fence or received pay for so doing,[5] or that the defect had been permitted to exist for an unnecessary length of time;[6] but where a railroad company is only required to put in cattle-guards at particular places, a complaint based upon a failure to keep a cattle-guard in repair must allege that it was one which it was the duty of defendant to maintain,[7] or was located at one of the places where the statute required it to be maintained.[8]

(V) *NEGATIVING CONTRIBUTORY NEGLIGENCE.* In most jurisdictions it is not necessary for the complaint to negative contributory negligence on the part of plaintiff;[9] but in some it has been held necessary to do so in a common-law action,[10] although not necessary where the action is based upon the statutory liability for failure on the part of the railroad company to fence its tracks,[11] or where it is alleged that the injury was wilfully inflicted.[12]

(VI) *WILFUL OR INTENTIONAL INJURY.* A complaint states a good cause of action if the facts alleged show that the injury was purposely and intentionally

is sufficient to allege that plaintiff's animal was killed or injured by a moving train upon defendant's unfenced railroad track, without alleging that it was not fenced at the point where the animal came upon it. Eaton *v.* Oregon R., etc., Co., 19 Oreg. 371, 24 Pac. 413.

99. See *supra*, X, H, 15, g, (IV), (A).

1. McCoy *v.* Southern Pac. Co., (Cal. 1891) 26 Pac. 629; Busby *v.* St. Louis, etc., R. Co., 81 Mo. 43; Chubbuck *v.* Hannibal, etc., R. Co., 77 Mo. 591.

An allegation that the road was not "securely fenced" is equivalent to an allegation that it was not inclosed by a good and lawful fence as required by statute. Missouri Pac. R. Co. *v.* Morrow, 36 Kan. 495, 13 Pac. 789.

2. McCoy *v.* Southern Pac. Co., (Cal. 1891) 26 Pac. 629. *Compare* Smead *v.* Lake Shore, etc., R. Co., 58 Mich. 200, 24 N. W. 761.

3. Indianapolis, etc., R. Co. *v.* Truitt, 24 Ind. 162; Downs *v.* Central Vermont R. Co., 14 N. Y. Suppl. 573.

The complaint need not allege in positive form that defendant did not repair its fence, it being sufficient to allege that by reason of defendant's neglect to repair its fence plaintiff's animals came upon the track and were injured. Downs *v.* Central Vermont R. Co., 14 N. Y. Suppl. 573.

4. Marrett *v.* Hannibal, etc., R. Co., 84 Mo. 413; Edwards *v.* Kansas City, etc., R. Co., 74 Mo. 117.

Where the complaint alleges that the animal escaped through a defective gate upon the railroad track and that the gate was negligently and improperly constructed, it sufficiently shows that the animal was at large and was injured through want of a sufficient fence. Morrison *v.* Burlington, etc., R. Co., 84 Iowa 663, 51 N. W. 75.

5. Toledo, etc., R. Co. *v.* Lavery, 71 Ill. 522.

6. Chubbuck *v.* Hannibal, etc., R. Co., 77 Mo. 591.

7. Southern R. Co. *v.* Harrell, 104 Ga. 602, 30 S. E. 821.

8. Gibson *v.* Louisville, etc., R. Co., 106 S. W. 838, 32 Ky. L. Rep. 769.

9. Smith *v.* Eastern R. Co., 35 N. H. 356. See also, generally, NEGLIGENCE, 29 Cyc. 575.

10. Jeffersonville, etc., R. Co. *v.* Lyon, 72 Ind. 107; Jeffersonville, etc., R. Co. *v.* Underhill, 40 Ind. 229; Indianapolis, etc., R. Co. *v.* Robinson, 35 Ind. 380; Toledo, etc., R. Co. *v.* Bevin, 26 Ind. 443; Cincinnati, etc., R. Co. *v.* Stanley, 4 Ind. App. 364, 30 N. E. 1103. See also, generally, NEGLIGENCE, 29 Cyc 576.

Excuse for animal being at large.— Where the common-law rule in regard to animals running at large is in force a complaint is bad which does not aver any excuse for not confining the animal injured to plaintiff's own land. Campbell *v.* Indianapolis, etc., Traction Co., 39 Ind. App. 66, 79 N. E. 223.

The fact that the action originated before a justice of the peace does not affect this rule, and while great liberality will be indulged in support of such complaints, there must at least be facts pleaded from which an inference may be drawn that plaintiff was free from fault. Cincinnati, etc., R. Co. *v.* Stanley, (Ind. App. 1891) 27 N. E. 316.

11. See Jeffersonville, etc., R. Co. *v.* Underhill, 40 Ind. 229.

12. Chicago, etc., R. Co. *v.* Nash, 1 Ind. App. 298, 27 N. E. 564.

inflicted,[13] or if it alleges without setting out the facts connected with the injury that the injurious act was purposely done with intent to inflict the injury complained of,[14] and the term "wilful" is sufficient to characterize the act in connection with which it is used as intentionally and tortiously done.[15] Where the complaint is based upon a violation of the statutory duty to fence, and the only allegations of negligence and wilfulness relate to the question of fencing and not to the management of the train, they may be disregarded as surplusage.[16]

(VII) *ACTS OR OMISSIONS OF AGENTS OR EMPLOYEES.* To render a railroad company liable for injuries to animals done by an employee the complaint must allege that such employee was acting in the line of his employment or under the direction of the company.[17]

(VIII) *ANSWER.*[18] The answer in an action for injuries to animals must be framed with such clearness and certainty as to show whether defendant intends to deny the complaint or to confess and avoid it.[19] An answer to traverse the allegations of the complaint must do so expressly and not argumentatively or by implication,[20] and a plea of avoidance must allege facts and not merely matters of evidence;[21] and where the complaint in separate paragraphs alleges different grounds of liability, an answer which assumes to answer the entire complaint is bad if it contains nothing which would constitute a defense to one of the grounds of liability charged.[22] An answer alleging that plaintiff was a servant of defendant whose duty it was to keep animals off the track must allege that such duty applied to the place where the animal in question came upon it;[23] if it alleges that the injury was due to the gross negligence of plaintiff himself it must state in what such gross negligence consisted;[24] and if it alleges that plaintiff negligently turned his animal out in the vicinity of a station, it must further allege that the animal went upon the track at such place where it was not the duty of the company to fence;[25] but where defendant denies plaintiff's allegation of negligence and sets up a counterclaim for injury to the train it is not necessary affirmatively to allege that defendant was free from all fault or negligence.[26]

(IX) *AMENDMENT OF PLEADINGS.*[27] The complaint in an action for injuries

13. Indiana, etc., R. Co. *v.* Overton, 117 Ind. 253, 20 N. E. 147, holding, however, that while the complaint is good on demurrer, if it is based upon the theory of intentional injury plaintiff cannot, without other pleadings, recover on the ground of negligence.

14. Louisville, etc., R. Co. *v.* Hart, 2 Ind. App. 130, 28 N. E. 218.

15. Chicago, etc., R. Co. *v.* Nash, 1 Ind. App. 298, 27 N. E. 564, (1890) 24 N. E. 884, holding that a complaint is sufficient which alleges that the injury was done "wilfully and willingly" without an express allegation that it was intentional or wrongful.

16. Cleveland, etc., R. Co. *v.* De Bolt, 10 Ind. App. 174, 37 N. E. 737.

17. Cleveland, etc., R. Co. *v.* Wasson, 33 Ind. App. 316, 66 N. E. 1020, 70 N. E. 821; Wabash R. Co. *v.* Linton, 26 Ind. App. 596, 60 N. E. 313.

In an action against a railroad company and a person named as an officer thereof the complaint does not state any cause of action as against the latter where it fails to state what office he holds or to allege that he was in command of the train or present at the time of the injury complained of. Young *v.* Vanmeter, 33 S. W. 941, 17 Ky. L. Rep. 1144.

But if the complaint alleges that the act was wrongful and that defendant's servants "acted in the line of their duty . . . and under the directions and instructions of defendant," it states a good cause of action against the company. Banister *v.* Pennsylvania Co., 98 Ind. 220.

18. See, generally, PLEADING, 31 Cyc. 126.

19. Jeffersonville, etc., R. Co. *v.* Dunlap, 29 Ind. 426.

20. McDowell *v.* Great Western R. Co., 5 U. C. C. P. 130.

21. Pennsylvania Co. *v.* Zwick, 1 Ind. App. 280, 27 N. E. 508, holding that an answer purporting to show that defendant could not lawfully or properly have fenced its tracks at the place in question must allege this fact and not merely set out the facts showing the situation of such place from which this fact might be inferred.

22. Louisville, etc., R. Co. *v.* Hart, 2 Ind. App. 130, 28 N. E. 218.

23. Louisville, etc., R. Co. *v.* Skelton, 94 Ind. 222.

24. Jeffersonville, etc., R. Co. *v.* Dunlap, 29 Ind. 426.

25. Louisville, etc., R. Co. *v.* Skelton, 94 Ind. 222.

26. Central Branch Union Pac. R. Co. *v.* Walters, 24 Kan. 504.

27. See, generally, PLEADING, 31 Cyc. 359.

to animals, if defective, may be amended if the amendment does not change or introduce a different cause of action,[28] and is no more than a particularization of the more general allegations of the original statement;[29] and where the action is originally brought before a justice such amendment may be made on appeal in the circuit court;[30] but the complaint cannot be so amended as to change the cause of action.[31] The Missouri statute now expressly allows the complaint to be amended in the circuit court on appeal,[32] but provides that no new item or cause of action not embraced or intended to be included in the original statement shall be added by the amendment.[33]

h. Issues, Proof, and Variance — (i) *Issues Raised and Matters Determinable.* Only such matters may be adjudicated or made a basis of recovery as are put in issue by the pleadings,[34] and while an immaterial variance between the allegations and the proof may be disregarded,[35] plaintiff cannot state a particular cause of action and recover upon an entirely different ground of liability,[36] or set out particular acts of negligence and recover upon proof of negligence in other respects than those alleged.[37] So where the complaint charges only a wilful and intentional injury plaintiff cannot, without further pleadings, recover on the ground of negligence;[38] and if the complaint alleges only a failure to fence plaintiff cannot recover on the ground of negligence in the operation of the train,[39] or in the manner of constructing a bridge or trestle on which an animal is injured,[40] or on the ground of negligence in allowing a gate in the fence to be open;[41] or if it alleges only a failure to construct cattle-guards he cannot recover on the ground of a failure to fence;[42] but where the statute requires the maintenance of both fences and cattle-guards a complaint alleging a failure as to both states but a single cause of action, and proof of either with proof of the other

28. Western R. Co. *v.* Sistrunk, 85 Ala. 352, 5 So. 79 (holding that it may he amended to allege that the railroad company is a body corporate); Simpson *v.* Memphis, etc., R. Co., 66 Ala. 85 (holding that it may be amended by adding an allegation of negligence); Louisville, etc., R. Co. *v.* Beauchamp, 108 Ky. 47, 55 S. W. 716, 21 Ky. L. Rep. 1476 (holding that it may be amended hy alleging additional acts of negligence connected with the injury complained of).

Under the Kentucky statute which provides that plaintiff may recover the full value of an animal killed hy the negligence of defendant or half the value of any animal killed where the track adjoins lands of the owner thereof who has not received from the railroad company compensation for fencing such land, both remedies being provided hy the same section of the statute, plaintiff may amend hy alleging that he had not received compensation for fencing without being required to elect. Louisville, etc., R. Co. *v.* Kice, 109 Ky. 786, 60 S. W. 705, 22 Ky. L. Rep. 1462.

29. Peery *v.* Quincy, etc., R. Co., 122 Mo. App. 177, 99 S. W. 14.

30. Rowland *v.* St. Louis, etc., R. Co., 73 Mo. 619.

31. Hansberger *v.* Pacific R. Co., 43 Mo. 196.

32. Minter *v.* Hannihal, etc., R. Co., 82 Mo. 128; Mitchell *v.* Missouri Pac. R. Co., 82 Mo. 106; King *v.* Chicago, etc., R. Co., 79 Mo. 328.

33. Gregory *v.* Wahash, etc., R. Co., 20 Mo. App. 448, holding that a common-law action for negligence cannot be changed by amendment into a statutory action for douhle damages.

34. Illinois Cent. R. Co. *v.* McKee, 43 Ill. 119; Asbach *v.* Chicago, etc., R. Co., 74 Iowa 248, 37 N. W. 182; Chicago, etc., R. Co. *v.* Wheeler, 70 Kan. 755, 79 Pac. 673.

35. See *infra*, X, H, 15, h, (IV).

36. Illinois Cent. R. Co. *v.* McKee, 43 Ill. 119.

37. Mobile, etc., R. Co. *v.* Ladd, 92 Ala. 287, 9 So. 169; Chicago, etc., R. Co. *v.* Wheeler, 70 Kan. 755, 79 Pac. 673; Wallace *v.* San Antonio, etc., R. Co., (Tex. Civ. App. 1897) 42 S. W. 865; Hawker *v.* Baltimore, etc., R. Co., 15 W. Va. 628, 36 Am. Rep. 825.

38. Indiana, etc., R. Co. *v.* Overton, 117 Ind. 253, 20 N. E. 147.

39. Ohio, etc., R. Co. *v.* Brown, 23 Ill. 94; Sullivan *v.* Hannihal, etc., R. Co., 72 Mo. 195; Edwards *v.* Hannibal, etc., R. Co., 66 Mo. 567; Crutchfield *v.* St. Louis, etc., R. Co., 64 Mo. 255; Cary *v.* St. Louis, etc., R. Co., 60 Mo. 209.

40. Ashbach *v.* Chicago, etc., R. Co., 74 Iowa 248, 37 N. W. 182.

41. Illinois Cent. R. Co. *v.* McKee, 43 Ill. 119; Stonebraker *v.* Chicago, etc., R. Co., 110 Mo. App. 497, 85 S. W. 631. But see Litton *v.* Chicago, etc., R. Co., 111 Mo. App. 140, 85 S. W. 978, holding that where the evidence as to a gate being left open is admitted without objection and the question is treated by both parties as an essential issue under the pleadings, plaintiff may recover on that ground.

42. Parker *v.* Rensselaer, etc., R. Co., 16 Barb. (N. Y.) 315.

necessary allegations will entitle plaintiff to recover.[43] Where there are two fencing statutes, one expressly requiring fencing at certain places and allowing double damages, and the other merely making the company liable for actual damages without proof of negligence where its track is not fenced, if the action is based upon the former statute and the place unfenced is not within the application of that statute, there can be no recovery under the latter;[44] but if it does not clearly appear that the action is based upon the former statute the mere fact that the complaint prays for double damages will not prevent the recovery of actual damages if it states a good cause of action under the latter statute,[45] or at common law.[46] Plaintiff is, however, entitled to go to the jury upon every fact of negligence alleged in his complaint and denied by the answer in so far at least as evidence has been produced tending to sustain them.[47]

(II) *EVIDENCE ADMISSIBLE UNDER PLEADINGS* — (A) *In General.* As in other actions the evidence must correspond with the allegations and be restricted to the issues.[48] If, as it is permissible to do,[49] negligence is alleged in general terms without specifying the particular acts constituting such negligence, evidence is admissible of any act or omission which tends to support the pleading,[50] or of any degree of negligence necessary to entitle plaintiff to recover,[51] and if the action is at common law and not based upon the statute evidence is admissible of statutory negligence,[52] such as a failure to give crossing signals,[53] or running at a prohibited rate of speed,[54] and if it merely alleges a negligent killing or injury and the form of allegation is not objected to, the evidence is not limited to negligence in the operation of the train,[55] but plaintiff may show negligence on the part of the company consisting in the obstruction of a crossing,[56] or failure to fence its tracks.[57] If, however, plaintiff voluntarily limits his allegation of negligence to specific acts, evidence of negligence in other respects than those alleged is not admissible.[58] So if the complaint charges a failure to fence evidence is not admis-

43. Duncan *v.* St. Louis, etc., R. Co., 91 Mo. 67, 3 S. W. 835; Woods *v.* Missouri, etc., R. Co., 51 Mo. App. 500.

44. Edwards *v.* Hannibal, etc., R. Co., 66 Mo. 567.

In Missouri if an animal is killed in a town or city at a place where the company has not but might lawfully have fenced, plaintiff cannot sue under section 43 of the railroad law but must bring his action either under section 5 of the damage act or at common law. Elliott *v.* Hannibal, etc., R. Co., 66 Mo. 683.

45. Scott *v.* St. Louis, etc., R. Co., 75 Mo. 136; Geiser *v.* St. Louis, etc., R. Co., 61 Mo. App. 459.

46. Scott *v.* St. Louis, etc., R. Co., 75 Mo. 136.

47. Kinyon *v.* Chicago, etc., R. Co., 118 Iowa 349, 92 N. W. 40, 96 Am. St. Rep. 382.

48. *Arkansas.*— St. Louis, etc., R. Co. *v.* Kimmons, 61 Ark. 209, 32 S. W. 505.

Idaho.— Haner *v.* Northern Pac. R. Co., 7 Ida. 305, 62 Pac. 1028.

Illinois.— Illinois Cent. R. Co. *v.* McKee, 43 Ill. 119.

Indiana.— Toledo, etc., R. Co. *v.* Reed, 23 Ind. 101.

Missouri.— Collins *v.* Atlantic, etc., R. Co., 65 Mo. 230; Milburn *v.* Hannibal, etc., R. Co., 21 Mo. App. 426.

Washington.— Dickey *v.* Northern Pac. R. Co., 19 Wash. 350, 53 Pac. 347.

See 41 Cent. Dig. tit. "Railroads," § 1570.

49. See *supra*, X, H, 15, g, (I).

50. Braxton *v.* Hannibal, etc., R. Co., 77 Mo. 455; Mack *v.* St. Louis, etc., R. Co., 77 Mo. 232; Omaha, etc., R. Co. *v.* Wright, 49 Nebr. 456, 68 N. W. 618 [*disapproving* 47 Nebr. 886, 66 N. W. 842].

51. Rockford, etc., R. Co. *v.* Phillips, 66 Ill. 548, holding that where plaintiff has merely alleged negligence and there is proof of contributory negligence he may introduce evidence of gross negligence on the part of defendant and recover under his complaint.

52. Barr *v.* Hannibal, etc., R. Co., 30 Mo. App. 248.

53. Braxton *v.* Hannibal, etc., R. Co., 77 Mo. 455; Goodwin *v.* Chicago, etc., R. Co., 75 Mo. 73; Barr *v.* Hannibal, etc., R. Co., 30 Mo. App. 248.

54. Robertson *v.* Wabash, etc., R. Co., 84 Mo. 119; Riley *v.* Wabash, etc., R. Co., 18 Mo. App. 385.

55. Mack *v.* St. Louis, etc., R. Co., 77 Mo. 232.

56. Mack *v.* St. Louis, etc., R. Co., 77 Mo. 232.

57. Minter *v.* Hannibal, etc., R. Co., 82 Mo. 128; Calvert *v.* Hannibal, etc., R. Co., 38 Mo. 467.

58. Chicago, etc., R. Co. *v.* Wheeler, 70 Kan. 755, 79 Pac. 673; Braxton *v.* Hannibal, etc., R. Co., 77 Mo. 455; Ravenscraft *v.* Missouri Pac. R. Co., 27 Mo. App. 617.

In an action based upon a failure to give signals at crossings evidence is not admissible of negligence in leaving substances on the track calculated to attract animals. Braxton *v.* Hannibal, etc., R. Co., 77 Mo. 455.

sible of negligence in the operation of the train,[59] or a defective condition of a crossing,[60] or a failure to give crossing signals as required by statute;[61] nor if it charges a failure to keep the fences in repair is evidence admissible of negligence in leaving open a gate.[62] Under a general allegation of negligence in the operation of the train not specifying the particular acts constituting such negligence plaintiff may introduce evidence of any negligence connected with the operation of the train,[63] and evidence is admissible of negligence in failing to keep a proper lookout for stock,[64] or of failure to use due care to avoid the injury after they were discovered,[65] or of negligence consisting in a failure to give signals at crossings as required by law,[66] or operating the train at a prohibited rate of speed,[67] or without ringing a bell while running through city limits as required by an ordinance,[68] provided the action is at common law and not based specifically upon the statute or ordinance prescribing the regulation;[69] but under such allegation the evidence must be confined to acts connected with the operation of the train,[70] and evidence is not admissible of a failure to fence,[71] or of a defective condition of a crossing,[72] or of the equipment of the train,[73] or failure to post notices of the injury as required by law,[74] or that a gate in the fence was left open,[75] or that the company had allowed the view of the track to become obstructed by bushes growing on the right of way,[76] or allowed substances calculated to attract animals to remain upon the track.[77] An allegation that plaintiff's animal was killed by collision

The phrase "as hereinafter more specifically mentioned and described" following a general allegation of negligence in the operation of the train limits the evidence to the specific matters thereinafter set out. Chicago, etc., R. Co. *v.* Wheeler, 70 Kan. 755, 79 Pac. 673.

But if the complaint alleges that defendant was "otherwise" negligent, stating that the injury was caused by certain specific acts of negligence on the part of defendant, and by "otherwise negligently and carelessly operating its locomotive and cars," evidence is admissible of other acts of negligence than those specifically alleged. Edwards *v.* Chicago, etc., R. Co., 76 Mo. 399.

59. Collins *v.* Atlantic, etc., R. Co., 65 Mo. 230; Cary *v.* St. Louis, etc., R. Co., 60 Mo. 209.

60. Davidson *v.* Central Iowa R. Co., 75 Iowa 22, 39 N. W. 163.

61. Collins *v.* Atlantic, etc., R. Co., 65 Mo. 230.

62. Illinois Cent. R. Co. *v.* McKee, 43 Ill. 119; Megrue *v.* Lennox, 59 Ohio St. 479, 52 N. E. 1022.

63. Omaha, etc., R. Co. *v.* Wright, 49 Nebr. 456, 68 N. W. 618 [*disapproving* holding on former hearing in 47 Nebr. 886, 66 N. W. 842].

64. Omaha, etc., R. Co. *v.* Wright, 49 Nebr. 456, 68 N. W. 618 [*disapproving* holding on former hearing in 47 Nebr. 886, 66 N. W. 842].

65. Galveston, etc., R. Co. *v.* Dyer, (Tex. Civ. App. 1896) 38 S. W. 218.

66. Mapes *v.* Chicago, etc., R. Co., 76 Mo. 367 [*distinguishing* Collins *v.* Atlantic, etc., R. Co., 65 Mo. 230]; Schneider *v.* Missouri Pac. R. Co., 75 Mo. 295; Goodwin *v.* Chicago, etc., R. Co., 75 Mo. 73; Barr *v.* Hannibal, etc., R. Co., 30 Mo. App. 248. But see Haner *v.* Northern Pac. R. Co., 7 Ida. 305, 62 Pac. 1028; Meyer *v.* Atlantic, etc., R. Co., 64 Mo. 542.

67. Robertson *v.* Wabash, etc., R. Co., 84 Mo. 119; Windsor *v.* Hannibal, etc., R. Co., 45 Mo. App. 123; Judd *v.* Wabash, etc., R. Co., 23 Mo. App. 56; Nutter *v.* Chicago, etc., R. Co., 22 Mo. App. 328; Borneman *v.* Chicago, etc., R. Co., 19 S. D. 459, 104 N. W. 208.

68. Borneman *v.* Chicago, etc., R. Co., 19 S. D. 459, 104 N. W. 208.

69. See Robertson *v.* Wabash, etc., R. Co., 84 Mo. 119; Goodwin *v.* Chicago, etc., R. Co., 75 Mo. 73; Judd *v.* Wabash, etc., R. Co., 23 Mo. App. 56.

70. Jehant *v.* Central Pac. R. Co., 74 Cal. 9, 15 Pac. 362.

71. Haner *v.* Northern Pac. R. Co., 7 Ida. 305, 62 Pac. 1028; Toledo, etc., R. Co. *v.* Reed, 23 Ind. 101; Dickey *v.* Northern Pac. R. Co., 19 Wash. 350, 53 Pac. 327.

In Missouri it has been held that under a general allegation of negligence not specifying its character, evidence is admissible of a failure to fence (Minter *v.* Hannibal, etc., R. Co., 82 Mo. 128; Calvert *v.* Hannibal, etc., R. Co., 38 Mo. 467); and on the authority of these decisions it has been held in later cases that evidence of a failure to fence is admissible where the complaint alleges generally negligence in the operation of the train, although in each case a doubt was expressed as to the correctness of the holding under this form of allegation (Hurley *v.* Missouri Pac. R. Co., 57 Mo. App. 675; Boone *v.* Wabash, etc., R. Co., 20 Mo. App. 232).

72. Davidson *v.* Central Iowa R. Co., 75 Iowa 22, 39 N. W. 163.

73. Western R. Co. *v.* Stone, 145 Ala. 663, 39 So. 723.

74. St. Louis, etc., R. Co. *v.* Kimmons, 61 Ark. 200, 32 S. W. 505.

75. Jahant *v.* Central Pac. R. Co., 74 Cal. 9, 15 Pac. 362.

76. Choate *v.* Southern R. Co., 119 Ala. 611, 24 So. 373.

77. Ravenscroft *v.* Missouri Pac. R. Co.,

with defendant's train is sufficiently broad to admit evidence that it was so injured by the collision as to necessitate its being killed;[78] but since where animals are killed at different times the causes of action are separate and distinct, if the complaint charges only one occurrence evidence is not admissible of injuries to animals at a time different from that alleged in the complaint.[79] An allegation that plaintiff sustained damages in a specific sum is tantamount to an allegation of value, and in the absence of demurrer is sufficient to permit evidence of the market value of the animals killed.[80]

(B) *Under General Denial or General Issue.* In a common-law action on the case defendant under a plea of the general issue may not only put plaintiff upon proof of the whole charge contained in the complaint but may give in evidence any justification or excuse.[81] In a statutory action based upon a failure to fence defendant may show under a general denial that at the point where the animal came upon the track it could not lawfully have maintained a fence,[82] but the general denial only puts in issue defendant's right to fence at the place in question,[83] and unless such affirmative defense is specially pleaded defendant cannot show a limitation or release of liability growing out of a provision of its charter,[84] or conduct on the part of plaintiff amounting to an estoppel.[85] Contributory negligence on the part of plaintiff to be available as a defense must be specially pleaded,[86] unless the complaint alleges that plaintiff was without fault or negligence.[87]

(III) *MATTERS TO BE PROVED UNDER PLEADINGS.* To enable plaintiff to recover he must prove each and every allegation of the complaint which is not admitted and which is necessary to establish the cause of action alleged,[88] but not an allegation which is mere surplusage and not essential to make out his case.[89] In a common-law action the allegation of negligence is material and must be proved.[90] In an action under the statute plaintiff must prove the allegation that the road was not fenced,[91] and such other allegations as are necessary to bring the case within the provisions of the particular statute sued on,[92] such as that the place was one which the statute required to be fenced,[93] or was not one

27 Mo. App. 617; Milburn *v.* Hannibal, etc., R. Co., 21 Mo. App. 426.

78. Shepard *v.* Kansas City, etc., R. Co., 65 Mo. App. 353.

79. Indianapolis, etc., R. Co. *v.* Sims, 92 Ind. 496.

80. Ft. Worth *v.* Hickox, (Tex. Civ. App. 1907) 103 S. W. 202.

81. Cincinnati, etc., R. Co. *v.* Goodson, 101 Ill. App. 123, holding that where plaintiff alleged that a certain road was owned and operated by defendant and the general issue was pleaded, defendant should be allowed to show that it was not operating the road in question.

Unauthorized act of employee.— Under the general issue evidence is admissible that the locomotive causing the damage was at the time of the injury being operated by a servant of the company without authority and outside of the scope of his employment. Cousins *v.* Hannibal, etc., R. Co., 66 Mo. 572.

82. Jeffersonville, etc., R. Co. *v.* Lyon, 55 Ind. 477.

But if a tender of damages is pleaded as a distinct defense to the liability for double damages it admits that the company ought to have fenced, although a general denial in an other count covers such issue and the statute allows inconsistent defenses. Taylor *v.* Chicago, etc., R. Co., 76 Iowa 753, 40 N. W. 84.

83. Kingsbury *v.* Chicago, etc., R. Co., 104 Iowa 63, 73 N. W. 477.

84. Kirby *v.* Wabash R. Co., 85 Mo. App. 345.

85. Kingsbury *v.* Chicago, etc., R. Co., 104 Iowa 63, 73 N. W. 477.

86. St. Louis, etc., R. Co. *v.* Philpot, 72 Ark. 23, 77 S. W. 901.

87. Long *v.* Southern R. Co., 50 S. C. 49, 27 S. E. 531.

88. Ohio, etc., R. Co. *v.* Brown, 23 Ill. 94.

An allegation as to the place of injury if not material as affecting plaintiff's cause of action, but only with respect to locating where the injury occurred, need not be proved strictly as alleged. Western R. Co. *v.* McPherson, 146 Ala. 427, 40 So. 934.

89. Radcliffe *v.* St. Louis, etc., R. Co., 90 Mo. 127, 2 S. W. 277.

90. Terre Haute, etc., R. Co. *v.* Augustus, 21 Ill. 186; Calvert *v.* Hannibal, etc., R. Co., 34 Mo. 242.

91. Pittsburgh, etc., R. Co. *v.* Hackney, 53 Ind. 488; Indianapolis, etc., R. Co. *v.* Wharton, 13 Ind. 509.

92. Ohio, etc., R. Co. *v.* Brown, 23 Ill. 94

Material allegations in actions based on failure to fence see *supra*, X, H, 15, g, (IV).

93. Cary *v.* St. Louis, etc., R. Co., 60 Mo. 209.

of the places excepted,[94] that the time allowed by statute for the construction of the fences had elapsed,[95] and that the failure to fence occasioned the injury complained of;[96] but in an action under the statute an allegation of negligence is unnecessary and if made need not be proved.[97]

(IV) *VARIANCE BETWEEN ALLEGATIONS AND PROOF.* As in other actions the allegations and proof must correspond,[98] and any material variance is fatal to a recovery;[99] but a variance as to matters not materially affecting the cause of action and by which defendant has not been misled to his prejudice may be disregarded as immaterial,[1] or in such cases the complaint may be amended

94. Ohio, etc., R. Co. *v.* Brown, 23 Ill. 94.

95. Chicago, etc., R. Co. *v.* Taylor, 40 Ill. 280; Ohio, etc., R. Co. *v.* Brown, 23 Ill. 94.

But where the statute merely allows the landowner to construct the fences if not constructed by the railroad company within a certain time after the completion of the road, it does not affect the liability of the company for failure sooner to construct them and it is not necessary for plaintiff to show that such time had elapsed at the time of the injury. Blewett *v.* Wyandotte, etc., R. Co., 72 Mo. 583.

96. Schmitt *v.* Chicago, etc., R. Co., 99 Iowa 425, 68 N. W. 715; Montgomery *v.* Wabash, etc., R. Co., 90 Mo. 446, 2 S. W. 409.

97. Radcliffe *v.* St. Louis, etc., R. Co., 90 Mo. 127, 2 S. W. 277.

98. Ohio, etc., R. Co. *v.* Brown, 23 Ill. 94; Central Military Tract R. Co. *v.* Rockafellow, 17 Ill. 541; Hawker *v.* Baltimore, etc., R. Co., 15 W. Va. 628, 36 Am. Rep. 825.

99. Ohio, etc., R. Co. *v.* Brown, 23 Ill. 94.

Variance material.—An allegation that defendant failed to keep a fence in repair is not sustained by proof of negligence in failing to keep a gate in the fence closed (Illinois Cent. R. Co. *v.* McKee, 43 Ill. 119); or an allegation of a failure to fence by proof that a gate in a fence actually constructed was negligently left open (High *v.* Southern Pac. Co., 49 Oreg. 98, 88 Pac. 961); or an allegation of negligence in the conduct and management of the train by proof of making up a train too heavy to be managed and controlled by the engine attached thereto (Central Military Tract R. Co. *v.* Rockafellow, 17 Ill. 541); and where the statute requires the time of the injury to be stated it has been held a material variance where the complaint alleges that the injury occurred on the twenty-first day of a certain month and the evidence shows that it occurred on or about the first of the month (East Tennessee, etc., R. Co. *v.* Carloss, 77 Ala. 443).

1. *Indiana.*— Louisville, etc., R. Co. *v.* Overman, 88 Ind. 115.

Minnesota.— Moser *v.* St. Paul, etc., R. Co., 42 Minn. 480, 44 N. W. 530.

Missouri.— Reed *v.* Chicago, etc., R. Co., 112 Mo. App. 575, 87 S. W. 65.

Montana.— Poindexter, etc., Live Stock Co. *v.* Oregon Short Line R. Co., 33 Mont. 338, 83 Pac. 886.

Texas.— St. Louis, etc., R. Co. *v.* Evans, 78 Tex. 369, 14 S. W. 798.

See 41 Cent. Dig. tit. "Railroads," § 1573.

The variance is immaterial between an allegation that defendant killed an animal and proof that it was only wounded and was killed by defendant to stop its suffering but that it would have died from the injuries received (Atchison, etc., R. Co. *v.* Ireland, 19 Kan. 405; Poindexter, etc., Live Stock Co. *v.* Oregon Short Line R. Co., 33 Mont. 338, 83 Pac. 886); an allegation that the animal was an Ayrshire and proof that it was part Ayrshire and part Durham (St. Louis, etc., R. Co. *v.* Pickens, (Tex. App. 1889) 14 S. W. 1071); an allegation that the injury occurred in March and proof that it was in August (Texas, etc., R. Co. *v.* Virginia Ranch, etc., R. Co., (Tex. 1887) 7 S. W. 341); an allegation that the injury was in April, 1886, and proof that it was in April, 1889, where the allegation in the complaint was a clerical error which did not mislead defendant (St. Louis, etc., R. Co. *v.* Evans, 78 Tex. 369, 14 S. W. 798); an allegation that the animal injured was a "horse" and proof that it was a mare, the term "horse" being applicable to both sexes (Southern R. Co. *v.* Pogue, 145 Ala. 444, 40 So. 565); an allegation that plaintiff's animal escaped from his close into the close of divers other persons between plaintiff's land and the railroad and proof that there was but one intermediate close (Underhill *v.* New York, etc., R. Co., 21 Barb. (N. Y.) 489); an allegation that the value of each of two animals killed was one hundred dollars and proof that one was worth one hundred and fifty dollars and the other fifty (Louisville, etc., R. Co. *v.* Overman, 88 Ind. 115); an allegation that defendant failed to maintain fences "on the sides of its road" and proof that it had failed to maintain a cross fence connecting the main fence with the cattle-guard (Foster *v.* St. Louis, etc., R. Co., 44 Mo. App. 11); an allegation that the road was "unfenced" and proof that a fence had been constructed and destroyed and not rebuilt (Fritz *v.* Kansas City, etc., R. Co., 61 Iowa 323, 16 N. W. 144); an allegation that the road was not securely fenced in and proof that the animal came upon the track over an insufficient cattle-guard (Chicago, etc., R. Co. *v.* Brown, 33 Ind. App. 603, 71 N. E. 908. But see Clement *v.* Pere Marquette R. Co., 138 Mich. 57, 100 N. W. 999); and an allegation that defendant had been negligent in not providing a gate with proper fastenings and proof that after the gate was constructed the fastenings had been allowed to become insecure (Missouri Pac. R. Co. *v.* Pfrang, 7 Kan. App. 1, 51 Pac. 911).

after the introduction of evidence so as to make it correspond with the facts as proved.[2]

i. Presumptions and Burden of Proof — (i) *IN GENERAL.* In actions for injuries to animals as in other actions, the burden is upon plaintiff to show every fact necessary to establish his cause of action,[3] and he must of course show that the injury complained of was done by the railroad company.[4] In the absence of statute negligence on the part of the company will not be presumed,[5] but on the contrary it will be presumed that the train was operated with ordinary care and diligence,[6] particularly where the animal injured was a trespasser,[7] and the burden is upon plaintiff to show negligence on the part of the railroad company or its employees,[8] and that such negligence was the cause of the injury complained of,[9] even where the negligence consists in the omission of some statutory duty.[10] So also in those jurisdictions where railroad companies are required to fence their tracks if the animal came upon the track at a place not required to be fenced the case must be determined on common-law principles,[11] and the burden is upon plaintiff to show negligence,[12] and the same rule applies in cases where the

2. Louisville, etc., R. Co. *v.* Overman, 88 Ind. 115.

3. Knight *v.* New Orleans, etc., R. Co., 15 La. Ann. 105; Smead *v.* Lake Shore, etc., R. Co., 58 Mich. 200, 24 N. W. 761; Missouri, etc., R. Co. *v.* Kennedy, 33 Tex. Civ. App. 445, 76 S. W. 943.

4. Gibson *v.* Iowa Cent. R. Co., 136 Iowa 415, 113 N. W. 927.

5. Louisville, etc., R. Co. *v.* Mertz, (Ala. 1905) 40 So. 60; Grand Rapids, etc., R. Co. *v.* Judson, 34 Mich. 506.

6. Jewett *v.* Kansas City, etc., R. Co., 50 Mo. App. 547; Campbell *v.* Receivers, 4 Fed. Cas. No. 2,367, 4 Hughes 170.

7. Campbell *v.* Receivers, 4 Fed. Cas. No. 2,367, 4 Hughes 170.

8. *Colorado.*— Burlington, etc., R. Co. *v.* Shelter, 6 Colo. App. 246, 40 Pac. 157.

Georgia.— Georgia R., etc., Co. *v.* Anderson, 33 Ga. 110.

Illinois.— Quincy, etc., R. Co. *v.* Wellhoener, 72 Ill. 60.

Iowa.— Gibson *v.* Iowa Cent. R. Co., 136 Iowa 415, 113 N. W. 927.

Michigan.— Grand Rapids, etc., R. Co. *v.* Judson, 34 Mich. 506.

Mississippi.— Memphis, etc., R. Co. *v.* Orr, 43 Miss. 279; Memphis, etc., R. Co. *v.* Blakeney, 43 Miss. 218.

Missouri.— Wasson *v.* McCook, 70 Mo. App. 393; Norville *v.* St. Louis, etc., R. Co., 60 Mo. App. 414; Jewett *v.* Kansas City, etc., R. Co., 50 Mo. App. 547.

North Carolina.— Jones *v.* North Carolina R. Co., 67 N. C. 122.

Ohio.— Ruffner *v.* Cincinnati, etc., R. Co., 5 Ohio Dec. (Reprint) 569, 6 Am. L. Rec. 685; Didman *v.* Michigan Cent. R. Co., 5 Ohio S. & C. Pl. Dec. 140, 7 Ohio N. P. 380.

Oregon.— Eaton *v.* Oregon R., etc., Co., 19 Oreg. 391, 24 Pac. 415.

Texas.— Bethje *v.* Houston, etc., R. Co., 26 Tex. 604; Gulf, etc., R. Co. *v.* Ellidge, (Civ. App. 1894) 28 S. W. 912.

West Virginia.— Talbott *v.* West Virginia, etc., R. Co., 42 W. Va. 560, 26 S. E. 311; Maynard *v.* Norfolk, etc., R. Co., 40 W. Va. 331, 21 S. E. 733.

See 41 Cent. Dig. tit. "Railroads," § 1576.

In an action for injury due to a horse being frightened by the escape of steam, signals, or other noises incident to the operation of a train, the burden is upon plaintiff to show that such noises at the time and place of the injury were unnecessary to a skilful operation of the train. Louisville, etc., R. Co. *v.* Mertz, (Ala. 1905) 40 So. 60; Louisville, etc., R. Co. *v.* Lee, 126 Ala. 182, 30 So. 897, 96 Am. St. Rep. 24.

9. Quincy, etc., R. Co. *v.* Wellhoener, 72 Ill. 60; Memphis, etc., R. Co. *v.* Blakeney, 43 Miss. 218; Norville *v.* St. Louis, etc., R. Co., 60 Mo. App. 414; Didman *v.* Michigan Cent. R. Co., 5 Ohio S. & C. Pl. Dec. 140, 7 Ohio N. P. 380.

10. Holman *v.* Chicago, etc., R. Co., 62 Mo. 562; Didman *v.* Michigan Cent. R. Co., 5 Ohio S. & C. Pl. Dec. 140, 7 Ohio N. P. 380.

11. Jeffersonville, etc., R. Co. *v.* Beatty, 36 Ind. 15; Clary *v.* Burlington, etc., R. Co., 14 Nebr. 232, 15 N. W. 220; International, etc., R. Co. *v.* Smith, 1 Tex. App. Civ. Cas. § 844.

No inference of negligence arises from the absence of a fence at a place not required to be fenced (Wier *v.* St. Louis, etc., R. Co., 48 Mo. 558), or from the mere fact of killing an animal at such place (Swearingen *v.* Missouri, etc., R. Co., 64 Mo. 73).

12. Terre Haute, etc., R. Co. *v.* Tuterwiler, 16 Ill. App. 197; Swearingen *v.* Missouri, etc., R. Co., 64 Mo. 73; Wier *v.* St. Louis, etc., R. Co., 48 Mo. 558; Redmond *v.* Missouri, etc., R. Co., 104 Mo. App. 651, 77 S. W. 768; International, etc., R. Co. *v.* Dunham, 68 Tex. 231, 4 S. W. 472, 2 Am. St. Rep. 484; International, etc., R. Co. *v.* Carr, (Tex. Civ. App. 1905) 91 S. W. 858; Houston, etc., R. Co. *v.* McMillan, 37 Tex. Civ. App. 483, 84 S. W. 296; Galveston, etc., R. Co. *v.* Cassinelli, (Tex. Civ. App. 1904) 78 S. W. 247; Southern Kansas R. Co. *v.* Cooper, 32 Tex. Civ. App. 592, 75 S. W. 328; Missouri, etc., R. Co. *v.* Willis, 17 Tex. Civ. App. 228, 42 S. W. 371; International, etc., R. Co. *v.* Smith, 1 Tex. App. Civ. Cas. § 844.

animal came upon the track by breaking over a sufficient fence or properly constructed cattle-guard.[13]

(II) *FACT OF KILLING OR INJURY* — (A) *In General.* In the absence of statute the mere fact that an animal is killed or injured by a train raises no presumption of negligence on the part of the railroad company or its servants, and the burden is upon plaintiff to show the existence of such negligence.[14]

(B) *Finding Dead or Injured Animal Near Track.* The mere fact that an animal is found dead or injured in the vicinity of a railroad track raises no legal presumption that it was killed or injured by a train and the burden is upon plaintiff to establ sh this fact.[15]

(III) *STATUTORY PROVISIONS.* In a number of jurisdictions the common-law rule as to the burden of proof has been changed by statutes which make proof of the injury to an animal by a railroad train *prima facie* evidence of negligence, placing the burden upon the company to rebut the presumption of negligence,[16]

13. Chicago, etc., R. Co. *v.* Utley, 38 Ill. 410.

14. *Arkansas.*— Kansas City Southern R. Co. *v.* Lewis, 80 Ark. 396, 97 S. W. 56.

Colorado.—Atchison, etc., R. Co. *v.* Adcock, 38 Colo. 369, 88 Pac. 180; Denver, etc., R. Co. *v.* Henderson, 10 Colo. 1, 13 Pac. 910.

Georgia.— Georgia R., etc., Co. *v.* Anderson, 33 Ga. 110. *Compare* Georgia R., etc., Co. *v.* Willis, 28 Ga. 317.

Illinois.— Chicago, etc., R. Co. *v.* Engle, 58 Ill. 381.

Indiana.— Indianapolis, etc., R. Co. *v.* Means, 14 Ind. 30.

Indian Territory.— Missouri, etc., R. Co. *v.* McCoy, 7 Indian Terr. 288, 104 S. W. 620.

Iowa.— Gibson *v.* Iowa Cent. R. Co., 136 Iowa 415, 113 N. W. 927; Schneir *v.* Chicago, etc., R. Co., 40 Iowa 337.

Louisiana.— Knight *v.* New Orleans, etc., R. Co., 15 La. Ann. 105.

Mississippi.— Mobile, etc., R. Co. *v.* Hudson, 50 Miss. 572.

Missouri.— McKissock *v.* St. Louis, etc., R. Co., 73 Mo. 456; Brown *v.* Hannibal, etc., R. Co., 33 Mo. 309; Wasson *v.* McCook, 70 Mo. App. 393.

Nebraska.— Burlington, etc., R. Co. *v.* Wendt, 12 Nebr. 76, 10 N. W. 456.

New Mexico.— Atchison, etc., R. Co. *v.* Walton, 3 N. M. 319, 9 Pac. 351.

North Carolina.— Scott *v.* Wilmington, etc., R. Co., 49 N. C. 432.

Wyoming.— Martin *v.* Chicago, etc., R. Co., 15 Wyo. 493, 89 Pac. 1025.

United States.— Eddy *v.* Lafayette, 49 Fed. 798, 1 C. C. A. 432.

See 41 Cent. Dig. tit. "Railroads," § 1578.

In South Carolina the contrary rule prevails, it being held, even in the absence of statute, that proof of the injury is *prima facie* evidence of negligence and places the burden upon the railroad company to show the exercise of due care (Joyner *v.* South Carolina R. Co., 26 S. C. 49, 1 S. E. 52; Walker *v.* Columbia, etc., R. Co., 25 S. C. 141; Roof *v.* Charlotte, etc., R. Co., 4 S. C. 61; Murray *v.* South Carolina R. Co., 10 Rich. 227, 70 Am. Dec. 219; Danner *v.* South Carolina R. Co., 4 Rich. 329, 55 Am. Dec. 678), and that the presumption applies notwithstanding the existence of a stock law in the county where the injury occurred (Davis *v.* Florida Cent., etc., R. Co., 47 S. C. 390, 25 S. E. 224), and is not limited to cases where defendant introduces no testimony, but when once established by proof of the injury can be rebutted only by evidence on the part of defendant sufficiently strong affirmatively to overcome it (Joyner *v.* South Carolina R. Co., *supra*); but it has been held that the presumption should not be applied in cases of injuries to animals not purely domestic, such as dogs (Fowles *v.* Seaboard Air Line R. Co., 73 S. C. 306, 53 S. E. 534; Wilson *v.* Wilmington, etc., R. Co., 10 Rich. 52).

In Wisconsin it has been held that proof of the injury makes a *prima facie* case of negligence, but that where the animal was wrongfully at large plaintiff's negligence in permitting the animal to be at large counterbalances the presumption of negligence arising from the fact of injury, and that the burden is upon plaintiff to show such gross negligence or wilful misconduct as will entitle him to recover under such circumstances. Galpin *v.* Chicago, etc., R. Co., 19 Wis. 604.

15. *Arkansas.*— St. Louis, etc., R. Co. *v.* Parks, 60 Ark. 187, 29 S. W. 464; St. Louis, etc., R. Co. *v.* Sageley, 56 Ark. 549, 20 S. W. 413; St. Louis, etc., R. Co. *v.* Hagan, 42 Ark. 122.

Colorado.— Union Pac. R. Co. *v.* Bullis, 6 Colo. App. 64, 39 Pac. 897.

Georgia.— Southern R. Co. *v.* McMillan, 101 Ga. 116, 28 S. E. 599.

Iowa.— Gibson *v.* Iowa Cent. R. Co., 136 Iowa 415, 113 N. W. 927.

Kentucky.— Southern R. Co. *v.* Forsyth, 64 S. W. 506, 23 Ky. L. Rep. 942.

See 41 Cent. Dig. tit. "Railroads," § 1580.

16. *Alabama.*— Georgia Cent. R. Co. *v.* Turner, 145 Ala. 441, 40 So. 355; Birmingham Mineral R. Co. *v.* Harris, 98 Ala. 326, 13 So. 377 [*overruling* Montgomery, etc., R. Co. *v.* Perryman, 91 Ala. 413, 8 So. 699]; Louisville, etc., R. Co. *v.* Barker, 96 Ala. 435, 11 So. 453; Louisville, etc., R. Co. *v.* Kelsey, 89 Ala. 287, 7 So. 648; South Alabama, etc., R. Co. *v.* Bees, 82 Ala. 340, 2 So. 752.

Arkansas.— Kansas City Southern R. Co. *v.* Wyatt, 80 Ark. 382, 97 So. 656; St. Louis, etc., R. Co. *v.* Norton, 71 Ark. 314, 73 S. W. 1095; St. Louis, etc., R. Co. *v.* Russell, 64

or where certain duties and precautions are prescribed by statute to show that the statutory requirements were complied with,[17] or that under the circumstances and without fault on the part of the company's employees, such compliance was impossible.[18] The statutes, however, raise no presumption that the railroad company did the killing or injury, which fact must be affirmatively shown by plaintiff,[19] nor do they raise any presumption of wantonness or wilful injury in cases where plaintiff's own evidence shows circumstances which would prevent his recovering merely on the ground of negligence;[20] and if the complaint specifies the particular acts of negligence relied on the presumption extends only to the particular negligence alleged.[21] The statutory presumption has been held to

Ark. 236, 41 S. W. 807; St. Louis, etc., R. Co. *v.* Taylor, 57 Ark. 136, 20 S. W. 1083; Little Rock, etc., R. Co. *v.* Dick, 52 Ark. 402, 12 S. W. 785, 20 Am. St. Rep. 190; Kansas City, etc., R. Co. *v.* Summers, 45 Ark. 295; Little Rock, etc., R. Co. *v.* Jones, 41 Ark. 157; Little Rock, etc., R. Co. *v.* Finley, 37 Ark. 562; Memphis, etc., R. Co. *v.* Jones, 36 Ark. 87.

Colorado.— Burlington, etc., R. Co. *v.* Shelter, 6 Colo. App. 246, 40 Pac. 157.

Florida.— Jacksonville, etc., R. Co. *v.* Garrison, 30 Fla. 567, 11 So. 926.

Georgia.— Atlantic, etc., R. Co. *v.* Smith, 123 Ga. 423, 51 S. E. 344; Alabama Midland R. Co. *v.* Gassett, 100 Ga. 85, 26 S. E. 83; Georgia R. Co. *v.* Fisk, 65 Ga. 714; Georgia R., etc., Co. *v.* Monroe, 49 Ga. 373.

Kentucky.— Louisville, etc., R. Co. *v.* Brown, 13 Bush 475; Troutwine *v.* Chicago, etc., R. Co., 105 S. W. 142, 32 Ky. L. Rep. 5; Cincinnati, etc., R. Co. *v.* Burgess, 84 S. W. 760, 27 Ky. L. Rep. 252.

Louisiana.— Mire *v.* Yazoo, etc., R. Co., 105 La. 462, 29 So. 935.

Maryland.—Northern Cent. R. Co. *v.* Ward, 63 Md. 362; Western Maryland R. Co. *v.* Carter, 59 Md. 306.

Mississippi.— Young *v.* Illinois Cent. R. Co., 88 Miss. 446, 40 So. 870; Vicksburg, etc., R. Co. *v.* Hamilton, 62 Miss. 503.

North Carolina.— Randall *v.* Richmond, etc., R. Co., 104 N. C. 410, 10 S. E. 691; Roberts *v.* Richmond, etc., R. Co., 88 N. C. 560; Battle *v.* Wilmington, etc., R. Co., 66 N. C. 343.

North Dakota.— Wright *v.* Minneapolis, etc., R. Co., 12 N. D. 159, 96 N. W. 324.

Tennessee.— Memphis, etc., R. Co. *v.* Smith, 9 Heisk. 860; Horne *v.* Memphis, etc., R. Co., 1 Coldw. 72.

See 41 Cent. Dig. tit. "Railroads," §§ 1577, 1578.

The Arkansas statute is construed as making proof of the injury *prima facie* evidence of negligence and placing the burden upon defendant to show the exercise of due care, although it does not expressly so provide, such being "the nearest approach to the legislative intent that the court was able to extract from it, consistent with the constitution." St. Louis, etc., R. Co. *v.* Taylor, 57 Ark. 136, 20 S. W. 1083.

The existence of a stock law in the county where the injury occurred does not prevent the application of the statutory presumption. Roberts *v.* Richmond, etc., R. Co., 88 N. C. 560.

If no precautions were taken to prevent the injury the burden is upon the company to show to the satisfaction of the jury that its failure in this regard did not bring about the injury. Atlantic Coast Line R. Co. *v.* Williams, 120 Ga. 1042, 48 S. E. 404.

In North Carolina it has been stated that the presumption applies only when the facts are not known or when from the testimony they are uncertain (Mesic *v.* Atlantic, etc., R. Co., 120 N. C. 489, 26 S. E. 633; Durham *v.* Wilmington, etc., R. Co., 82 N. C. 352; Doggett *v.* Richmond, etc., R. Co., 81 N. C. 459); but in more recent cases the expression has been criticized as misleading and construed as meaning merely that the presumption may be rebutted and that it is overcome where the undisputed facts show that there was no negligence on the part of defendant, it being held that the statutory presumption applies in all cases of injury to stock by a railroad and that if defendant introduces evidence tending to show the absence of negligence it is a question for the jury whether the presumption has been overcome (Baker *v.* Roanoke, etc., R. Co., 133 N. C. 31, 45 N. E. 347; Hardison *v.* Atlantic, etc., R. Co., 120 N. C. 492, 26 S. E. 630).

17. Georgia Cent. R. Co. *v.* Wood. 129 Ala. 483, 29 So. 775; Southern R. Co. *v.* Reaves, 129 Ala. 457, 29 So. 594; Chattanooga, etc., R. Co. *v.* Daniel, 122 Ala. 362, 25 So. 197; Louisville, etc., R. Co. *v.* Posey, 96 Ala. 262, 11 So. 423; East Tennessee, etc., R. Co. *v.* Deaver, 79 Ala. 216; South Alabama, etc., R. Co. *v.* Williams, 65 Ala. 74; South Alabama, etc., R. Co. *v.* Thompson, 62 Ala. 494; Mobile, etc., R. Co. *v.* Williams, 53 Ala. 595; Memphis, etc., R. Co. *v.* Smith, 9 Heisk. (Tenn.) 860.

Under the Alabama statute the burden is upon plaintiff to show the injury and then upon the railroad company to negative negligence by showing that the statutory requirements were complied with. Louisville, etc., R. Co. *v.* Christian Moerlein Brewing Co., 150 Ala. 390, 43 So. 723.

18. Louisville, etc., R. Co. *v.* Posey, 96 Ala. 262, 11 So. 423.

19. Kansas City, etc., R. Co. *v.* Walker, (Ark. 1903) 71 S. W. 660; Southern R. Co. *v.* McMillan, 101 Ga. 116, 28 S. E. 599; Southern R. Co. *v.* Forsythe, 64 S. W. 506, 23 Ky. L. Rep. 924.

20. St. Louis, etc., R. Co. *v.* Taylor, 57 Ark. 136, 20 S. W. 1083.

21. Georgia Cent. R. Co. *v.* Weathers, 120 Ga. 475, 47 S. E. 956.

apply to cases of injury as well as where the animal was killed,[22] and without regard to whether the injury was mortal or otherwise,[23] and also to cases of injury to animals in the custody or under the control of the owner or some other person as well as animals running at large;[24] but under some of the statutes the presumption applies only to injuries inflicted at certain places,[25] or inflicted directly by the cars or locomotive,[26] or where the action is instituted within a certain time after the injury;[27] and if the case, by reason of the circumstances of the injury or the time of instituting the action, is not within the application of the statute, the burden is upon plaintiff to show negligence on the part of the railroad company or its servants.[28]

(iv) *Evidence Rebutting Statutory Presumption.* Where plaintiff proves the killing or injury of his animal by a railroad train and the company introduces no evidence to rebut the statutory presumption of negligence arising therefrom, plaintiff is entitled to recover;[29] but the presumption is not conclusive but may be rebutted and overcome by evidence,[30] and where defendant introduces evidence to rebut the presumption an issue arises which should be submitted to the jury.[31] In order to rebut the presumption, however, defendant must show affirmatively that there was no negligence or that by the exercise of ordinary and reasonable care the injury could not have been avoided,[32] and it is not sufficient to show merely that there was probably no negligence,[33] or that those in charge of the train knew nothing of the happening of the injury,[34] or to show the exercise of due care in one respect only,[35] as that all efforts were made to avoid the injury after discovery of the animal without showing that a proper lookout was main-

22. St. Louis, etc., R. Co. *v.* Hagan, 42 Ark. 122.

23. St. Louis, etc., R. Co. *v.* Hagan, 42 Ark. 122.

24. St. Louis, etc., R. Co. *v.* Taylor, 57 Ark. 136, 20 S. W. 1083; Randall *v.* Richmond, etc., R. Co., 107 N. C. 748, 12 S. E. 605, 11 L. R. A. 460, 104 N. C. 410, 10 S. E. 691. *Contra*, Annapolis, etc., R. Co. *v.* Pumphrey, 72 Md. 82, 19 Atl. 8.

25. Kansas City, etc., R. Co. *v.* Henson, 132 Ala. 528, 31 So. 590; Alabama Great Southern R. Co. *v.* Boyd, 124 Ala. 525, 27 So. 408.

In Alabama the statutory presumption formerly applied without regard to the place of injury, but under Code (1896), § 3443, the burden of proof is upon the company only where the injury was inflicted "at any one of the places specified in the three preceding sections"; namely, at or near a public crossing, the crossing of two railroads, a regular station or stopping place, or in a village, town, or city. Alabama Great Southern R. Co. *v.* Boyd, 124 Ala. 525, 27 S. W. 408.

26. Lowe *v.* Alabama, etc., R. Co., 81 Miss. 9, 32 So. 907; Ramsbottom *v.* Atlantic, etc., R. Co., 138 N. C. 38, 50 S. E. 448. *Contra*, St. Louis, etc., R. Co. *v.* Bragg, 66 Ark. 248, 50 S. W. 273.

27. Jones *v.* North Carolina R. Co., 67 N. C. 122.

28. Kansas City, etc., R. Co. *v.* Henson, 132 Ala. 528, 31 So. 590; Alabama Great Southern R. Co. *v.* Boyd, 124 Ala. 525, 27 So. 408; Lowe *v.* Alabama, etc., R. Co., 81 Miss. 9, 32 So. 907; Ramsbottom *v.* Atlantic, etc., R. Co., 138 N. C. 38, 50 S. E. 448; Jones *v.* North Carolina R. Co., 67 N. C. 122.

29. South Alabama, etc., R. Co. *v.* Bees, 82 Ala. 340, 2 So. 752. See also Huber *v.* Chicago, etc., R. Co., 6 Dak. 392, 43 N. W. 819; Chicago, etc., R. Co. *v.* Packwood, 59 Miss. 280.

30. Mobile, etc., R. Co. *v.* Caldwell, 83 Ala. 196, 3 So. 445; Little Rock, etc., R. Co. *v.* Payne, 33 Ark. 816, 34 Am. Rep. 55; Savannah, etc., R. Co. *v.* Gray, 77 Ga. 440, 3 S. E. 158; New Orleans R. Co. *v.* Bourgeois, 66 Miss. 3, 5 So. 629, 14 Am. St. Rep. 534.

31. Hardison *v.* Atlantic, etc., R. Co., 120 N. C. 492, 26 S. E. 630.

32. *Arkansas.*— Kansas City, etc., R. Co. *v.* Summers, 45 Ark. 295.

Georgia.— Western, etc., R. Co. *v.* Steadly, 65 Ga. 263; Atlantic, etc., R. Co. *v.* Griffin, 61 Ga. 11.

Kentucky.— Kentucky Union R. Co. *v.* Conner, 31 S. W. 467, 17 Ky. L. Rep. 426.

Mississippi.— Mobile, etc., R. Co. *v.* Dale, 61 Miss. 206.

North Carolina.—Wilson *v.* Norfolk, etc., R. Co., 90 N. C. 69; Pippen *v.* Wilmington, etc., R. Co., 75 N. C. 54; Clark *v.* Western North Carolina R. Co., 60 N. C. 109.

See 41 Cent. Dig. tit. "Railroads," § 1581.

Where particular acts of negligence are alleged the presumption applies only to the negligence alleged, and if it is shown by uncontradicted testimony that there was no negligence in this regard the presumption is overcome. Georgia Cent. R. Co. *v.* Bagley, 121 Ga. 781, 49 S. E. 780.

33. Clark *v.* Western North Carolina R. Co., 60 N. C. 109.

34. Louisville, etc., R. Co. *v.* Montgomery, 32 S. W. 738, 14 Ky. L. Rep. 807.

35. Mobile, etc., R. Co. *v.* Dale, 61 Miss. 206.

tained,[36] or the crossing signals given,[37] or where negligence might be imputed to the company from the acts or omissions of two or more of its servants to show the exercise of due care on the part of only one of them.[38] The presumption is effectually overcome, however, whenever it is satisfactorily shown that those in charge of the train used all ordinary and reasonable care to avoid the injury,[39] and that all the statutory requirements were complied with or would not under the circumstances have been effectual to prevent the injury,[40] or that there was no negligence as to keeping a lookout and after the animal was discovered all possible precautions were taken,[41] or that under the circumstances nothing which might have been done could have avoided the accident.[42] Where defendant introduces such evidence which if true satisfactorily overcomes the presumption of negligence and such evidence is not contradicted, a verdict for plaintiff cannot be sustained,[43] although the only witnesses for defendant are its employees;[44]

36. Central R., etc., Co. *v.* Lee, 96 Ala. 444, 11 So. 424; St. Louis, etc., R. Co. *v.* Costello, 68 Ark. 32, 56 S. W. 270; Atlantic, etc., R. Co. *v.* Griffin, 61 Ga. 11; Pippen *v.* Wilmington, etc., R. Co., 75 N. C. 54.

37. St. Louis, etc., R. Co. *v.* Hendricks, 53 Ark. 201, 13 S. W. 699.

38. Little Rock, etc., R. Co. *v.* Chriscoe, 57 Ark. 192, 21 S. W. 431; Kentucky Union R. Co. *v.* Conner, 31 S. W. 467, 17 Ky. L. Rep. 426; Yazoo, etc., R. Co. *v.* Lambuth, 74 Miss. 758, 21 So. 801.

Where the evidence shows that no lookout was being kept because the engineer was necessarily engaged in the performance of other duties and the fireman was engaged in sweeping up coal from the floor of the engine, it not being shown that it was necessary for him to do so at this particular time when the engineer was otherwise engaged, the presumption of negligence is not rebutted. Louisville, etc., R. Co. *v.* Swann, 120 Ga. 695, 48 S. E. 117.

39. *Arkansas.*— Lane *v.* Kansas City Southern R. Co., 78 Ark. 234, 95 S. W. 460; St. Louis, etc., R. Co. *v.* Bragg, 66 Ark. 248, 50 S. W. 273.

Georgia.— Western, etc., R. Co. *v.* Robinson, 114 Ga. 159, 39 S. E. 950; Georgia, etc., R. Co. *v.* Bowman, 108 Ga. 798, 33 S. E. 984; Macon, etc., R. Co. *v.* Cochran, 107 Ga. 751, 33 S. E. 658; Southern R. Co. *v.* Early, 105 Ga. 512, 31 S. E. 187; Savannah, etc., R. Co. *v.* McConnell, 94 Ga. 352, 21 S. E. 568; Crawley *v.* Georgia R., etc., Co., 82 Ga. 190, 8 S. E. 417; Macon, etc., R. Co. *v.* Newell, 74 Ga. 809.

Kentucky.— Kentucky Cent. R. Co. *v.* Talbot, 78 Ky. 621; Grundy *v.* Louisville, etc., R. Co., (1887) 2 S. W. 899.

Louisiana.— Mongogna *v.* Illinois Cent. R. Co., 115 La. 597, 39 So. 699.

North Dakota.— Hodgins *v.* Minneapolis, etc., R. Co., 3 N. D. 382, 56 N. W. 139.

South Dakota.— Miller *v.* Chicago, etc., R. Co., (1907) 111 N. W. 553.

See 41 Cent. Dig. tit. "Railroads," § 1581.

40. Mobile, etc., R. Co. *v.* Caldwell, 83 Ala. 196, 3 So. 445; Alabama Great Southern R. Co. *v.* McAlpine, 80 Ala. 73.

41. St. Louis, etc., R. Co. *v.* Cline, (Ark. 1901) 65 S. W. 427; Kansas City, etc., R. Co. *v.* King, 66 Ark. 439, 51 S. W. 319; St. Louis, etc., R. Co. *v.* Basham, 47 Ark. 321, 1 S. W. 555; Little Rock, etc., R. Co. *v.* Henson, 39 Ark. 413; Western, etc., R. Co. *v.* Clark, 121 Ga. 419, 49 S. E. 290; Macon, etc., R. Co. *v.* Revis, 119 Ga. 332, 46 S. E. 418; Georgia Southern, etc., R. Co. *v.* Sanders, 111 Ga. 128, 36 S. E. 458; Georgia R., etc., Co. *v.* Parks, 91 Ga. 71, 16 S. E. 266; Georgia Midland, etc., R. Co. *v.* Harris, 83 Ga. 393, 9 S. E. 786; Georgia R., etc., Co. *v.* Wall, 80 Ga. 202, 7 S. E. 639; Georgia R. Co. *v.* Wilhoit, 78 Ga. 714, 3 S. E. 698; McGhee *v.* Gaines, 98 Ky. 182, 32 S. W. 602, 17 Ky. L. Rep. 748; Keilbach *v.* Chicago, etc., R. Co., 11 S. D. 468, 78 N. W. 951.

42. Mobile, etc., R. Co. *v.* Caldwell, 83 Ala. 196, 3 So. 445; Georgia R., etc., Co. *v.* Middlebrooks, 91 Ga. 76, 16 S. E. 989; Savannah, etc., R. Co. *v.* Gray, 77 Ga. 440, 3 S. E. 158.

43. *Arkansas.*— Memphis, etc., R. Co. *v.* Shoecraft, 53 Ark. 96, 13 S. W. 422; St. Louis, etc., R. Co. *v.* Basham, 47 Ark. 321, 1 S. W. 535.

Dakota.— Huber *v.* Chicago, etc., R. Co., 6 Dak. 392, 43 N. W. 819.

Georgia.—Southern R. Co. *v.* Cook, 121 Ga. 416, 49 S. E. 287; Southern R. Co. *v.* Harrell, 119 Ga. 521, 46 S. E. 637; Seaboard Air Line R. Co. *v.* Walthour, 117 Ga. 427, 43 S. E. 720; Southern R. Co. *v.* Adkins, 114 Ga. 135, 39 S. E. 949; South Carolina, etc., R. Co. *v.* Powell, 108 Ga. 437, 33 S. E. 994; Macon, etc., R. Co. *v.* Newell, 74 Ga. 809.

Kentucky.— McGhee *v.* Guyn, 98 Ky. 209, 32 S. W. 615, 17 Ky. L. Rep. 794; Mobile, etc., R. Co. *v.* Whayne, 64 S. W. 723, 23 Ky. L. Rep. 1070; Grundy *v.* Louisville, etc., R. Co., 2 S. W. 899, 8 Ky. L. Rep. 689.

Mississippi.—Mobile, etc., R. Co. *v.* Weems, 72 Miss. 513, 21 So. 306; Chicago, etc., R. Co. *v.* Packwood, 59 Miss. 280.

North Dakota.— Hodgins *v.* Minneapolis, etc., R. Co., 3 N. D. 382, 56 N. W. 139.

See 41 Cent. Dig. tit. "Railroads," § 1581.

44. St. Louis, etc., R. Co. *v.* Landers, 67 Ark. 514, 55 S. W. 940; St. Louis, etc., R. Co. *v.* Basham, 47 Ark. 321, 1 S. W. 555; Georgia Cent. R. Co. *v.* Dich, 121 Ga. 65, 48 S. E. 683; Western, etc., R. Co. *v.* Robinson, 114 Ga. 159, 39 S. E. 950; Georgia Southern, etc., R. Co. *v.* Sanders, 111 Ga. 128, 36 S. E. 458; Alabama Great Southern R. Co. *v.* Blevins,

but if there is any testimony in rebuttal tending to contradict that of defendant's wi nesses and to support the presumption of negligence, the question is for the jury,[45] and a verdict for plaintiff based upon such conflicting evidence will not ordinarily be interfered with,[46] although plaintiff's evidence is entirely circumstantial,[47] or not of a very conclusive character.[48]

(v) *PLACE OF INJURY AND VENUE.* Where the statutes restrict the venue of actions for injury to animals according to the place of injury this fact is jurisdictional and must be affirmatively proved,[49] and the burden is upon plaintiff to show according to the provision of the particular statute that the injury occurred in the county where the action is instituted,[50] or in the township or an adjoining township.[51]

(vi) *FENCES AND CATTLE-GUARDS* — (A) *In General.* In an action based upon the failure of a railroad company to fence its tracks no proof of negligence is necessary,[52] as the law attributes to the mere fact of not fencing at places where

92 Ga. 522, 17 S. E. 836; Georgia R., etc., Co. *v.* Wilhoit, 78 Ga. 714, 3 S. E. 698; Macon, etc., R. Co. *v.* Wood, 3 Ga. App. 197, 59 S. E. 595; McGhee *v.* Gaines, 98 Ky. 182, 32 S. W. 602, 17 Ky. L. Rep. 748; Kentucky Cent. R. Co. *v.* Talbot, 78 Ky. 621; Mobile, etc., R. Co. *v.* Morrow, 97 S. W. 389, 30 Ky. L. Rep. 83.

But the jury may disregard the evidence of defendant's employees and find a verdict for plaintiff, although such employees testify that the injury was unavoidable, if their testimony is improbable or inconsistent (Kansas City Southern R. Co. *v.* Cash, 80 Ark. 284, 96 S. W. 1062; St. Louis, etc., R. Co. *v.* Hutchinson, 79 Ark. 247, 96 S. W. 374; St. Louis, etc., R. Co. *v.* Chambliss, 54 Ark. 214, 15 S. W. 469); or if their testimony is contradicted by the circumstances of the case (Louisville, etc., R. Co. *v.* Montgomery, 32 S. W. 738, 17 Ky. L. Rep. 807).

Defendant need not produce every employee who was acquainted with the facts in order to rebut the presumption (Savannah, etc., R. Co. *v.* Gray, 77 Ga. 440, 3 S. E. 158); but it is better that all of the employees stationed on the engine should be called (East Tennessee, etc., R. Co. *v.* Culler, 75 Ga. 704).

45. *Arkansas.*— Kansas City Southern R. Co. *v.* Wayt, 80 Ark. 382, 97 S. W. 656; St. Louis, etc., R. Co. *v.* Norton, 71 Ark. 314, 73 S. W. 1095; Ford *v.* St. Louis, etc., R. Co., 66 Ark. 363, 50 S. W. 864.

Georgia.—Western, etc., R. Co. *v.* Clark, 2 Ga. App. 346, 58 S. E. 510.

Kentucky.— Mobile, etc., R. Co. *v.* Morrow, 97 S. W. 389, 30 Ky. L. Rep. 83.

North Carolina.—Wilson *v.* Norfolk, etc., R. Co., 90 N. C. 69.

South Dakota.— Schimke *v.* Chicago, etc., R. Co., 11 S. D. 471, 78 N. W. 951; Sheldon *v.* Chicago, etc., R. Co., 6 S. D. 606, 62 N. W. 955.

United States.— Jones *v.* Bond, 40 Fed. 281.

See 41 Cent. Dig. tit. "Railroads," § 1581.

46. *Alabama.*— Chattanooga Southern R. Co. *v.* Daniel, 122 Ala. 362, 25 So. 197; Memphis, etc., R. Co. *v.* Davis, (1894) 14 So. 643.

Arkansas.— St. Louis, etc., R. Co. *v.* Thompson, 83 Ark. 631, 104 S. W. 223; Kansas City Southern R. Co. *v.* Blair, 80 Ark. 363, 97 S. W. 296.

Florida.— Jacksonville, etc., R. Co. *v.* Garrison, 30 Fla. 567, 11 So. 926.

Georgia.— Berry *v.* Southern R. Co., 126 Ga. 426, 55 S. E. 239; Georgia R., etc., Co. *v.* Andrews, 125 Ga. 85, 54 S. E. 76; Georgia Cent. R. Co. *v.* McWhorter, 121 Ga. 465, 49 S. E. 264; Georgia Southern, etc., R. Co. *v.* Young Inv. Co., 119 Ga. 513, 46 S. E. 644; Georgia Cent. R. Co. *v.* Woolsey, 117 Ga. 838, 45 S. E. 267; Southern R. Co. *v.* Moore, 115 Ga. 793, 42 S. E. 82; Southern R. Co. *v.* Camp, 115 Ga. 661, 42 S. E. 56; Georgia R., etc., Co. *v.* Phillips, 78 Ga. 619, 3 S. E. 449.

Kentucky.— Newport News, etc., R. Co. *v.* Hazelip, 34 S. W. 904, 17 Ky. L. Rep. 1361.

Louisiana.— Mire *v.* Yazoo, etc., R. Co., 105 La. 462, 29 So. 935.

North Carolina.— Williams *v.* Norfolk, etc., R. Co., 90 N. C. 69.

See 41 Cent. Dig. tit. "Railroads," § 1581.

47. Atlanta, etc., R. Co. *v.* Clute, 3 Ga. App. 508, 60 S. E. 277.

48. Georgia Cent. R. Co. *v.* Dozier, 117 Ga. 793, 45 S. E. 67; Georgia R., etc., Co. *v.* Phillips, 78 Ga. 619, 3 S. E. 449.

49. Evansville, etc., R. Co. *v.* Epperson, 59 Ind. 438; Kansas City, etc., R. Co. *v.* Burge, 40 Kan. 734, 19 Pac. 791; Backenstoe *v.* Wabash, etc., R. Co., 86 Mo. 492; Jewett *v.* Kansas City, etc., R. Co., 38 Mo. App. 48.

50. Evansville, etc., R. Co. *v.* Epperson, 59 Ind. 438; Indianapolis, etc., R. Co. *v.* Wilsey, 20 Ind. 229; Indianapolis, etc., R. Co. *v.* Renner, 17 Ind. 135; Kansas City, etc., R. Co. *v.* Burge, 40 Kan. 734, 19 Pac. 791.

51. Briggs *v.* St. Louis, etc., R. Co., 111 Mo. 168, 20 S. W. 32; King *v.* Chicago, etc., R. Co., 90 Mo. 520, 3 S. W. 217; Ellis *v.* Missouri, etc., R. Co., 83 Mo. 372; Mitchell *v.* Missouri Pac. R. Co., 82 Mo. 106; Porter *v.* St. Louis, etc., R. Co., 66 Mo. App. 623.

52. Toledo, etc., R. Co. *v.* Logan, 71 Ill. 191; Nall *v.* St. Louis, etc., R. Co., 59 Mo. 112; Acord *v.* St. Louis Southwestern R. Co., 113 Mo. App. 84, 87 S. W. 537; Smith *v.* Eastern R. Co., 35 N. H. 356; Texas, etc., R. Co. *v.* Mitchell, 2 Tex. App. Civ. Cas. § 373.

it ought to do so such negligence as will render the company liable,[53] so that ordinarily a *prima facie* case for plaintiff is made by proof of plaintiff's ownership, the injury, and a failure to fence at the place in question,[54] and the burden is upon defendant to show any facts or circumstances relieving it from this duty,[55] unless such facts appear from plaintiff's evidence.[56] The burden is, however, upon plaintiff to show that the road was not fenced,[57] at the place where the animal came upon the track,[58] his ownership or possession of the animal injured,[59] defendant's ownership or operation of the road where the injury occurred,[60] and every fact necessary to bring the case within the application of the particular statute upon which the action is based.[61] So if the statute only requires fencing at certain places or excepts certain places the burden is upon plaintiff to show that the place in question was one which the company was required to fence,[62] or was not one of the places excepted;[63] but if the statute contains no exceptions plaintiff is not required to show that the place was not one to which the statutes have been

53. Acord *v.* St. Louis Southwestern R. Co., 113 Mo. App. 84, 87 S. W. 537; International, etc., R. Co. *v.* Cocke, 64 Tex. 151; Texas, etc., R. Co. *v.* Mitchell, 2 Tex. App. Civ. Cas. § 373.

54. *California.*— McCoy *v.* California Pac. R. Co., 40 Cal. 532, 6 Am. Rep. 623.

Illinois.— Rockford, etc., R. Co. *v.* Lynch, 67 Ill. 149.

Iowa.— Daily *v.* Chicago, etc., R. Co., 121 Iowa 254, 96 N. W. 778.

Kansas.— Missouri Pac. R. Co. *v.* Baxter, 45 Kan. 520, 26 Pac. 49; Missouri Pac. R. Co. *v.* Bradshaw, 33 Kan. 533, 6 Pac. 917.

Missouri.— Cox *v.* Atchison, etc., R. Co., 128 Mo. 362, 31 S. W. 3; Walther *v.* Pacific R. Co., 55 Mo. 271; Acord *v.* St. Louis Southwestern R. Co., 113 Mo. App. 84, 87 S. W. 537.

See 41 Cent. Dig. tit. "Railroads," § 1583.

55. Hamilton *v.* Missouri Pac. R. Co., 87 Mo. 85.

56. Gilpin *v.* Missouri, etc., R. Co., 197 Mo. 319, 94 S. W. 869; Spooner *v.* St. Louis Southwestern R. Co., 66 Mo. App. 32.

57. Evansville, etc., R. Co. *v.* Mosier, 101 Ind. 597, 1 N. E. 197; Indianapolis, etc., R. Co. *v.* Lindley, 75 Ind. 426; Indianapolis, etc., R. Co. *v.* Means, 14 Ind. 30.

In Iowa the statute making railroad companies liable for injuries to stock occasioned by its failure to fence provides that "in order to recover it shall only be necessary for the owner to prove the injury or destruction of his property," and under this provision it has been held that proof of the injury makes a *prima facie* case for plaintiff and places the burden upon defendant to show the building of a good and sufficient fence (Brentner *v.* Chicago, etc., R. Co., 68 Iowa 530, 23 N. W. 245, 27 N. W. 605); but in later cases without expressly deciding what is essential to establish a *prima facie* case for plaintiff, it has been held that the provision quoted must be construed with other parts of the statute and that it is not sufficient merely for plaintiff to prove the injury or destruction of the property (Wall *v.* Des Moines, etc., R. Co., 89 Iowa 193, 56 N. W. 436; Manwell *v.* Burlington, etc., R. Co., 80 Iowa 662, 45 N. W. 568).

The Texas statute is construed as placing the burden of proof upon defendant to show that the road was fenced (Texas Cent. R. Co. *v.* Childress, 64 Tex. 346; Texas, etc., R. Co. *v.* Miller, 1 Tex. App. Civ. Cas. § 262); the burden being upon plaintiff to show his ownership of the animal, the fact of injury and its value, and upon defendant to show that the road was fenced or that the place in question was one not required to be fenced, or that the owner unlawfully permitted the animal to be upon the track, which being shown the burden is upon plaintiff to show negligence on the part of the railroad company (Louisiana Western Extension R. Co. *v.* Deon, (Civ. App. 1900) 56 S. W. 104).

58. See *infra*, X, H, 15, i, (VI), (C).

59. Turner *v.* St. Louis, etc., R. Co., 76 Mo. 261.

60. Ohio, etc., R. Co. *v.* Taylor, 27 Ill. 207.

61. Baxter *v.* Boston, etc., R. Corp., 102 Mass. 383; Summers *v.* Hannibal, etc., R. Co., 29 Mo. App. 41.

Frightening animals.— Under the Missouri statute making railroad companies liable where their tracks are not fenced for injuries due to animals being frightened by passing trains and running upon bridges or trestles or into fences or other obstructions, the burden is upon plaintiff to show: (1) That the animal went upon the track at a place not fenced as required by law; (2) that it was frightened by a locomotive or train of cars; and (3) that it was injured by running upon or against one of the places or obstructions named. Yeager *v.* Chicago, etc., R. Co., 61 Mo. App. 594, holding that where an animal was injured by going on defendant's bridge plaintiff could not recover in the absence of proof that it was frightened by a train and went upon the bridge for that reason.

62. Clardy *v.* St. Louis, etc., R. Co., 73 Mo. 576.

63. Ohio, etc., R. Co. *v.* Taylor, 27 Ill. 207.

But it will be presumed where the statute excepts towns and villages that the houses compose the town or village and that where it is shown that the animal was killed beyond them that it was beyond the village limits. Ohio, etc., R. Co. *v.* Irvin, 27 Ill. 178.

construed as not applying,[64] and if the place was one which could not lawfully or properly have been fenced the burden is upon defendant to show this fact,[65] and this notwithstanding the place was within the limits of a town or city.[66] Where the statute is not for the benefit of the public generally, plaintiff must show that he is a person entitled to the benefit of the statute,[67] and if the statute provides that the company shall be liable for damages occasioned by its failure to fence the burden is upon plaintiff to show that the injury was a consequence of the absence of the fence.[68] If plaintiff has agreed to maintain the fence or received compensation for so doing, the burden is upon defendant to show such fact in defense.[69] It will also be presumed that a good and lawful fence such as the company is required to construct will exclude all domestic animals,[70] and where it is claimed that such a fence would not if constructed have excluded the particular animal injured, the burden is upon defendant to show this fact.[71]

(B) *Effect of Existence of Lawful Fence.* Where a railroad company has properly fenced its tracks no presumption of negligence arises from the mere fact that an animal is injured thereon,[72] and the burden is upon plaintiff to show that there was actual negligence on the part of the company which caused the injury

64. Chicago, etc., R. Co. *v.* Modesitt, 124 Ind. 212, 24 N. E. 986; Ft. Wayne, etc., R. Co. *v.* Herbold, 99 Ind. 91; Jeffersonville, etc., R. Co. *v.* O'Connor, 37 Ind. 95; International, etc., R. Co. *v.* Cocke, 64 Tex. 151.

Places not required to be fenced see *supra*, X, H, 4, b.

65. Cincinnati, etc., R. Co. *v.* Parker, 109 Ind. 235, 9 N. E. 787; Evansville, etc., R. Co. *v.* Mosier, 101 Ind. 597, 1 N. E. 197; Ft. Wayne, etc., R. Co. *v.* Herbold, 99 Ind. 91; Louisville, etc., R. Co. *v.* Clark, 94 Ind. 111; Indianapolis, etc., R. Co. *v.* Lindley, 75 Ind. 426; Louisville, etc., R. Co. *v.* Whitesell, 68 Ind. 297; Indianapolis, etc., R. Co. *v.* Penry, 48 Ind. 128; Jeffersonville, etc., R. Co. *v.* O'Connor, 37 Ind. 95; Cleveland, etc., R. Co. *v.* Miller, 40 Ind. App. 165, 81 N. E. 517; Toledo, etc., R. Co. *v.* Jackson, 5 Ind. App. 547, 32 N. E. 793; Pennsylvania Co. *v.* Lindley, 2 Ind. App. 111, 28 N. E. 106; Union Pac. R. Co. *v.* Dyche, 28 Kan. 200; Flint, etc., R. Co. *v.* Lull, 28 Mich. 510; International, etc., R. Co. *v.* Cocke, 64 Tex. 151; Missouri, etc., R. Co. *v.* Willis, (Tex. Civ. App. 1899) 52 S. W. 625; Gulf, etc., R. Co. *v.* Weems, (Tex. Civ. App. 1897) 38 S. W. 1028; Texas, etc., R. Co. *v.* Mitchell, 2 Tex. App. Civ. Cas. § 373.

If it would endanger the lives or safety of the company's employees engaged in switching or operating the trains to maintain fences or cattle-guards at the place in question the burden is upon defendant to show this fact (Chicago, etc., R. Co. *v.* Modesitt, 124 Ind. 212, 24 N. E. 986; Pennsylvania Co. *v.* Lindley, 2 Ind. App. 111, 28 N. E. 106; Cox *v.* Atchison, etc., R. Co., 128 Mo. 362, 31 S. W. 3), unless this fact appears from plaintiff's own evidence (Spooner *v.* St. Louis Southwestern R. Co., 66 Mo. App. 32).

Where a railroad bridge abuts directly upon a highway so that a cattle-guard could not be constructed outside of the bridge without obstructing the highway, the burden is upon defendant to show that in the construction of the bridge it had adopted all precautions to prevent animals passing thereon from the highway consistent with the proper conduct of its business and the safety of its trains and passengers. Cincinnati, etc., R. Co. *v.* Jones, 111 Ind. 259, 12 N. E. 113.

In Iowa it has been held that the burden is upon plaintiff to show that the place in question was one where the company was required to fence its tracks. Kyser *v.* Kansas City, etc., R. Co., 56 Iowa 207, 9 N. W. 133; Comstock *v.* Des Moines Valley R. Co., 32 Iowa 376. But see Brentner *v.* Chicago, etc., R. Co., 68 Iowa 530, 23 N. W. 245, 27 N. W. 605.

66. Flint, etc., R. Co. *v.* Lull, 28 Mich. 510; International, etc., R. Co. *v.* Cocke, 64 Tex. 151; Gulf, etc., R. Co. *v.* Adams, (Tex. Civ. App. 1894) 24 S. W. 834; Texas, etc., R. Co. *v.* Mitchell, 2 Tex. App. Civ. Cas. § 373.

67. Summers *v.* Hannibal, etc., R. Co., 29 Mo. App. 41.

68. Lawrence *v.* Milwaukee, etc., R. Co., 42 Wis. 322. See also Montgomery *v.* Wabash, etc., R. Co., 90 Mo. 446, 2 S. W. 409.

But it will be presumed where it is shown that the animal was killed or injured at a point where the road was not fenced and should have been fenced that it came upon the track and was injured on account of the absence of the fence. Walther *v.* Pacific R. Co., 55 Mo. 271; Lantz *v.* St. Louis, etc., R. Co., 54 Mo. 228; Fickle *v.* St. Louis, etc., R. Co., 54 Mo. 219; Wood *v.* Kansas City, etc., R. Co., 43 Mo. App. 294.

69. Toledo, etc., R. Co. *v.* Pence, 71 Ill. 174; Toledo, etc., R. Co. *v.* Pence, 68 Ill. 524; Cincinnati, etc., R. Co. *v.* Hoffhines, 46 Ohio St. 643, 22 N. E. 871.

70. Missouri Pac. R. Co. *v.* Baxter, 45 Kan. 520, 26 Pac. 49.

71. Missouri Pac. R. Co. *v.* Baxter, 45 Kan. 520, 26 Pac. 49; Missouri Pac. R. Co. *v.* Roads, 33 Kan. 640, 7 Pac. 213; Missouri Pac. R. Co. *v.* Bradshaw, 33 Kan. 533, 6 Pac. 917.

72. Warren *v.* Chicago, etc., R. Co., 59 Mo. App. 367.

complained of,[73] and that there was such negligence after the animal was discovered upon the track.[74]

(c) *Place of Entry of Animal on Track.* Since the place of entry governs the liability the burden is upon plaintiff to show that the animal came upon the track at a place where it was not fenced,[75] but notwithstanding the liabil ty is so determined,[76] it will be presumed in the absence of evidence to the contrary that the animal came upon the track at the place where it was killed or injured,[77] and consequently that if this was a place which should have been fenced the company is liable;[78] but on the other hand, if there is no evidence as to the place of entry and it is shown that the place of injury was one not required to be fenced, it must also be presumed that the company was not required to fence where the animal entered.[79] The presumption that the place of injury was also the place of entry is a rebuttable one,[80] and can be entertained only in cases where there is no evidence as to the place where the animal actually came upon the track.[81]

(d) *Defects in Fences and Cattle-Guards.* In an action based upon a failure of the railroad company to maintain fences and cattle-guards in a proper state of repair, the burden is upon plaintiff to show their insufficiency,[82] that the animal came upon the track through or over such fence or cattle-guard,[83] and under statutes merely requiring fences at certain places, that the place where the animal came upon the track by reason of such defect was one which the company was required to fence;[84] but this being shown the burden is upon defendant to show a sufficient reason for failing properly to maintain them at the place in question.[85] Negligence on the part of the railroad company in failing to repair a fence or cattle-guard will be presumed without proof of actual notice of the defect where it is shown to have existed for an unreasonable length of time,[86] and where it is shown that an animal escaped from an adjoining inclosure through a fence which defendant was bound to maintain and which at some places was defective and at others sufficient, it will be presumed in the absence of evidence to the contrary that the animal escaped at the place where the fence was insufficient.[87]

(vii) *Crossings, Gates, and Bars.* In an action for injury to an animal based upon the defective condition of a crossing, the burden is upon plaintiff to show that the injury occurred at the crossing and by reason of its defective con-

73. Warren *v.* Chicago, etc., R. Co., 59 Mo. App. 367; International, etc., R. Co. *v.* Cocke, 64 Tex 151; International, etc., R. Co. *v.* Samora, 1 Tex. App. Civ. Cas. § 155.

74. Perse *v.* Atchison, etc., R. Co., 51 Mo. App. 171.

75. Louisville, etc., R. Co. *v.* Goodbar, 102 Ind. 596, 2 N. E. 337, 3 N. E. 162; Lake Erie, etc., R. Co. *v.* Kneadle, 94 Ind. 454.

Plaintiff need not prove by positive evidence the place of entry, but it is sufficient if circumstances are proved from which the fact can be legitimately inferred. Evansville, etc., R. Co. *v.* Mosier, 101 Ind. 597, 1 N. E. 197.

76. St. Louis, etc., R. Co. *v.* Casner, 72 Ill. 384; Acord *v.* St. Louis Southwestern R. Co., 113 Mo. App. 84, 87 S. W. 537.

77. St. Louis, etc., R. Co. *v.* Casner, 72 Ill. 384; Jantzen *v.* Wabash, etc., R. Co., 83 Mo. 171; Acord *v.* St. Louis Southwestern R. Co., 113 Mo. App. 84, 87 S. W. 537; Ellis *v.* Mississippi River, etc., R. Co., 89 Mo. App. 241; Fraysher *v.* Mississippi River, etc., R. Co., 66 Mo. App. 573; Kinion *v.* Kansas City, etc., R. Co., 39 Mo. App. 382.

78. St. Louis, etc., R. Co. *v.* Casner, 72 Ill. 384; Lepp *v.* St. Louis, etc., R. Co., 87 Mo. 139; Jantzen *v.* Wabash, etc., R. Co., 83 Mo. 171; Kinion *v.* Kansas City, etc., R. Co., 39 Mo. App. 574; Duke *v.* Kansas City, etc., R. Co., 39 Mo. App. 105; McGuire *v.* Missouri Pac. R. Co., 23 Mo. App. 325.

79. Lake Erie, etc., R. Co. *v.* Kneadle, 94 Ind. 454.

80. Sowders *v.* St. Louis, etc., R. Co., 127 Mo. App. 119, 104 S. W. 1122.

81. Sowders *v.* St. Louis, etc., R. Co., 127 Mo. App. 119, 104 S. W. 1122; Bumpas *v.* Wabash, etc., R. Co., 103 Mo. App. 202, 77 S. W. 115; Kimball *v.* St. Louis, etc., R. Co., 99 Mo. App. 335, 73 S. W. 224.

82. Smead *v.* Lake Shore, etc., R. Co., 58 Mich. 200, 24 N. W. 761; Morrison *v.* New York, etc., R. Co., 32 Barb. (N. Y.) 568.

83. Morrison *v.* New York, etc., R. Co., 32 Barb. (N. Y.) 568.

84. Clardy *v.* St. Louis, etc., R. Co., 73 Mo. 576.

85. Cincinnati, etc., R. Co. *v.* Ford, 89 Ind. 92.

86. Varco *v.* Chicago, etc., R. Co., 30 Minn. 18, 13 N. W. 921.

87. Leyden *v.* New York Cent. R. Co., 55 Hun (N. Y.) 114, 8 N. Y. Suppl. 187.

dition.[88] In an action for injury to animals which went upon the track through a gate or bars in the railroad fence, the burden of proof is upon plaintiff to show that it was open through defendant's fault,[89] by showing that it was left open by defendant,[90] or was open by reason of a defective condition which was known or should have been known to defendant,[91] or if left open by some third person that it had been allowed to remain open for such length of time after the company knew or should have known of it as to charge the company with negligence in not closing it.[92]

(VIII) *SIGNALS AND LOOKOUTS.* In an action based upon a failure to give crossing signals as required by statute, the burden is upon plaintiff to show that the signal was not given,[93] and also that such omission was the cause of the injury complained of,[94] unless by statute the burden is placed upon defendant to show that the omission was not the cause of the injury.[95] Under statutes making proof of the injury *prima facie* evidence of negligence and placing the burden of proof upon the company to show that all the statutory requirements were complied with,[96] the burden is upon the company to show that the signals were given,[97] and that a proper lookout was maintained; [98] and in the absence of statute it has been held sufficient to constitute a *prima facie* case to show that the animal was on the track where it could have been seen, if a proper lookout had been maintained, for a distance within which the train might have been stopped.[99]

88. Croddy *v.* Chicago, etc., R. Co., 91 Iowa 598, 60 N. W. 214.

89. Johnson *v.* Chicago, etc., R. Co., 55 Iowa 707, 8 N. W. 664; St. Louis, etc., R. Co. *v.* Adams, 24 Tex. Civ. App. 231, 58 S. W. 1035. *Compare* Chicago, etc., R. Co. *v.* Barnes, 116 Ind. 126, 18 N. E. 459.

It does not make a prima facie case for plaintiff to show that the bars had been left down by some third person and that an animal went through them upon the track and was injured, but plaintiff must go further and show that defendant negligently permitted them to remain down. Perry *v.* Dubuque Southwestern R. Co., 36 Iowa 102.

90. Ridenore *v.* Wabash, etc., R. Co., 81 Mo. 227.

91. Johnson *v.* Chicago, etc., R. Co., 55 Iowa 707, 8 N. W. 664, holding that the fact that the gate was defectively constructed or out of repair, it being shown to have been securely fastened a short time before the accident, raises no presumption that it was open by reason of its defective condition.

92. Perry *v.* Dubuque Southwestern R. Co., 36 Iowa 102; Ridenore *v.* Wabash, etc., R. Co., 81 Mo. 227.

93. Quincy, etc., R. Co. *v.* Wellhoener, 72 Ill. 60.

If the statute requires a bell "or" whistle to be sounded plaintiff must show that both were omitted. Summerville *v.* Hannibal, etc., R. Co., 29 Mo. App. 48.

94. Quincy, etc., R. Co. *v.* Wellhoener, 72 Ill. 60; St. Louis, etc., R. Co. *v.* Hurst, 25 Ill. App. 181; Terre Haute, etc., R. Co. *v.* Tuterwiler, 16 Ill. App. 197.

95. Orcutt *v.* Pacific Coast R. Co., 85 Cal. 291, 24 Pac. 661; Roberts *v.* Wabash, etc., R. Co., 113 Mo. App. 6, 87 S. W. 601; Barr *v.* Hannibal, etc., R. Co., 30 Mo. App. 248.

Under the Missouri statute as amended in 1881 proof that an animal was injured by a train at a public crossing and that the statutory signals were not given makes a *prima facie* case for plaintiff and places the burden upon defendant to show that the omission was not the proximate cause of the injury (Roberts *v.* Walker, 113 Mo. App. 6, 87 S. W. 601; Atterberry *v.* Wabash, etc., R. Co., 110 Mo. App. 608, 85 S. W. 114; Barr *v.* Hannibal, etc., R. Co., 30 Mo. App. 248; Smith *v.* Wabash, etc., R. Co., 19 Mo. App. 120); unless of course plaintiff's own testimony discloses this fact (Atterberry *v.* Wabash, etc., R. Co., *supra*); but the presumption may be rebutted and whether it has been overcome by defendant's evidence is a question for the jury (Barr *v.* Hannibal, etc., R. Co., *supra*). Prior to this amendment it was held that the burden was upon plaintiff to show some connection between the omission to give the signal and the injury complained of (Holman *v.* Chicago, etc., R. Co., 62 Mo. 562; Stoneman *v.* Atlantic, etc., R. Co., 58 Mo. 503 [*distinguishing* Howenstein *v.* Pacific R. Co., 55 Mo. 33]); but that if there was any evidence tending to show this it became a question for the jury (Alexander *v.* Hannibal, etc., R. Co., 76 Mo. 494; Goodwin *v.* Chicago, etc., R. Co., 75 Mo. 73); and it was subsequently held sufficient to make a *prima facie* case for plaintiff to show that the signals were not given and that the animal was in a position to have escaped if they had been given (Taylor *v.* St. Louis, etc., R. Co., 83 Mo. 386; Turner *v.* Kansas City, etc., R. Co., 78 Mo. 578).

96. See *supra*, X, H, 15, i, (III).

97. Alabama Great Southern R. Co. *v.* Malpin, 80 Ala. 73.

98. Birmingham Mineral R. Co. *v.* Harris, 98 Ala. 326, 13 So. 377.

99. Kelly *v.* Oregon Short Line, etc., R. Co., 4 Ida. 190, 38 Pac. 404, holding that where

(IX) *RATE OF SPEED.* In an action to recover for injury to an animal on the ground of negligence in running a train at a rate of speed in violation of an ordinance plaintiff has the burden of proving that the ordinance was in force at the time of the injury,[1] and in the absence of statute that the injury was directly due to such excessive rate of speed;[2] but in some jurisdictions where it is shown that an animal was injured by a train while running at a prohibited rate of speed, a presumption arises that the injury was the result of the company's negligence,[3] and the burden is upon the railroad company to rebut it.[4] In the absence of statute or ordinance no particular rate of speed is negligence as matter of law.[5]

(X) *PRECAUTIONS AS TO ANIMALS SEEN ON OR NEAR TRACK.* In the absence of statute if the animal injured was wrongfully upon the track the burden is upon plaintiff to show negligence on the part of the railroad company after the animal was discovered,[6] and ordinarily in any case where the question is whether defendant was negligent in failing to stop the train after discovering the animal upon the track, the burden of proof is upon plaintiff;[7] but it has been held that where the evidence shows that an animal ran along the track in front of the train for a distance within which a train could ordinarily be stopped, if there were any circumstances in the particular case making it unsafe or impracticable to stop the train the burden is upon defendant to show this fact.[8]

(XI) *CONTRIBUTORY NEGLIGENCE.* The rule varies in different jurisdictions as to whether plaintiff must allege and prove the absence of contributory negligence on his part or whether it is a matter of defense to be proved by defendant;[9] so in actions for injuries to animals it is held in some jurisdictions that plaintiff must show that he was not guilty of contributory negligence,[10] and in others that the burden of proving contributory negligence is upon defendant.[11]

it is shown that the track was straight for over a mile, the animal black, and snow upon the ground, and the tracks of the animal showed that it had wandered along the track for a considerable distance before being struck, this is sufficient to put defendant upon proof of any circumstances which might have prevented its servants from avoiding the injury.

1. Chicago, etc., R. Co. *v.* Engle, 76 Ill. 317.

2. Didman *v.* Michigan Cent. R. Co., 5 Ohio S. & C. Pl. Dec. 140, 7 Ohio N. P. 380.

3. Toledo, etc., R. Co. *v.* Deacon 63 Ill. 91; Cleveland, etc., R. Co. *v.* Ahrens, 42 Ill. App. 434; St. Louis, etc., R. Co. *v.* Morgan, 12 Ill. App. 256; Union Pac. R. Co. *v.* Rassmussen, 25 Nebr. 810, 41 N. W. 778, 13 Am. St. Rep. 527. See also Correll *v.* Burlington, etc., R. Co., 38 Iowa 120, 18 Am. Rep. 22.

The presumption is not conclusive but is a mere *prima facie* presumption which may be overcome by evidence. Chicago, etc., R. Co. *v.* Zerbe, 110 Ill. App. 171.

4. Toledo, etc., R. Co. *v.* Deacon, 63 Ill. 91; Chicago, etc., R. Co. *v.* Smedley, 65 Ill. App. 644; St. Louis, etc., R. Co. *v.* Morgan, 12 Ill. App. 256.

5. Potter *v.* Hannibal, etc., R. Co., 18 Mo. App. 694.

6. Locke *v.* First Div. St. Paul, etc., R. Co., 15 Minn. 350.

7. Illinois Cent. R. Co. *v.* Weathersby, 63 Miss. 581.

8. Gulf, etc., R. Co. *v.* Ellis, 54 Fed. 481, 4 C. C. A. 454.

9. See NEGLIGENCE, 29 Cyc. 601.

10. Haner *v.* Northern Pac. R. Co., 7 Ida. 305, 62 Pac. 1028; Illinois Cent. R. Co. *v.* Trowbridge, 31 Ill. App. 190; Indianapolis, etc., R. Co. *v.* Caudle, 60 Ind. 112; Perkins *v.* Eastern R. Co., 29 Me. 307, 50 Am. Dec. 580.

In Illinois it is held that where the animal injured was in charge or under the control of the owner or some person representing him the burden is upon plaintiff to show the absence of contributory negligence (Illinois Cent. R. Co. *v.* Trowbridge, 31 Ill. App. 190); but that merely allowing an animal to run at large is not contributory negligence unless done under such circumstances that the natural and probable consequence would be that it would go upon the track and be injured, and that in such cases the burden of proving contributory negligence where it does not otherwise appear is upon the railroad company (Cairo, etc., R. Co. *v.* Woosley, 85 Ill. 370).

Where the animal injured was at large which under the general law was unlawful unless authorized by the town where the injury occurred, the burden of showing such an exemption from the operation of the general law is upon plaintiff. Perkins *v.* Eastern R. Co., 29 Me. 307, 50 Am. Dec. 589.

11. Vinson *v.* Chicago, etc., R. Co., 47 Minn. 265, 50 N. W. 228; Jackson *v.* Sumpter Valley R. Co., 50 Oreg. 455, 93 Pac. 356; Johnson *v.* Baltimore, etc., R. Co., 25 W. Va. 570.

In Iowa the burden of proving that the owner of an animal injured caused the injury by his own "wilful act" within the

(XII) *OWNERSHIP OR POSSESSION OF ANIMAL INJURED.*[12] The burden is upon plaintiff to show either ownership or possession of the animal injured,[13] but proof of plaintiff's possession of the animal is *prima facie* evidence of his ownership thereof.[14]

j. Admissibility of Evidence — (I) *IN GENERAL.*[15] In actions for injury to animals the general rules as to the relevancy and admissibility of evidence in civil actions apply.[16] Ordinarily evidence is admissible of all facts and circumstances which reasonably tend to establish or disprove the matters in issue,[17] but evidence which is irrelevant and could throw no light upon the subject under investigation is inadmissible.[18] It is also proper to exclude evidence as to general matters

meaning of the statute is upon the railroad company. Stewart *v.* Burlington, etc., R. Co., 32 Iowa 561.

12. Persons entitled to damages see *supra*, X, H, 13.

13. Ohio, etc., R. Co. *v.* Saxton, 27 Ill. 426; Welsh *v.* Chicago, etc., R. Co., 53 Iowa 632, 6 N. W. 13; Alexander *v.* Hannibal, etc., R. Co., 76 Mo. 494; Turner *v.* St. Louis, etc., R. Co., 76 Mo. 261. See also Little Rock, etc., R. Co. *v.* Locke, (Ark. 1898) 45 S. W. 909.

Where the parties suing claim as joint owners they should be held to reasonably strict proof of such ownership. Illinois Cent. R. Co. *v.* Finnigan, 21 Ill. 646.

14. Toledo, etc., R. Co. *v.* Stevens, 63 Ind. 337.

15. Evidence admissible under pleadings see *supra*, X, H, 15, h, (II).

Competency, examination, and credibility of witnesses see WITNESSES.

16. See, generally, EVIDENCE, 16 Cyc. 1119 *et seq.*

17. Alabama Great Southern R. Co. *v.* Moody, 92 Ala. 279, 9 So. 238; International, etc., R. Co. *v.* Hughes, 81 Tex. 184, 16 S. W. 875.

Evidence admissible.— Where defendant seeks to show that the cattle were killed at a crossing it is competent for plaintiff to show as evidence of the place of injury that there were cattle tracks along the road at the place where he claimed the injury occurred without proof that they were made by the animals actually killed. Ohio, etc., R. Co. *v.* Wrape, 4 Ind. App. 108, 30 N. E. 427. Where the question whether the animal injured was struck by a train is in issue evidence is admissible that on the same day at a station beyond where the injury occurred fresh blood and hair were seen upon the cow-catcher of the engine. International, etc., R. Co. *v.* Hughes, 81 Tex. 184, 16 S. W. 875. In an action for injury to a team while unloading freight evidence is admissible of instructions given by the station agent to other consignees of freight as to the place for stopping teams to show that plaintiff's conduct was in accordance with the company's general course of business with others and should therefore have been anticipated by defendant. Bachant *v.* Boston, etc., R. Co., 187 Mass. 392, 73 N. E. 642, 105 Am. St. Rep. 408. In an action based upon a failure to maintain cattle-guards at the crossing of a road claimed by plaintiff to be a public highway it is error to exclude the testimony of a witness that the road had been used as a highway for thirty-eight years and worked as a public road, as such evidence tended to prove a highway by dedication or prescription. Burbank *v.* Grand Trunk R. Co., 70 N. H. 398, 48 Atl. 280. Where plaintiff's witnesses testified that the cattle killed were of a certain breed and value, it is error to exclude the evidence of a witness for defendant who testified that he was familiar with the cattle killed and the market value of the cattle and that they did not have the appearance of cattle of the breed testified to and were of much less value than claimed by plaintiff's witnesses. Missouri, etc., R. Co. *v.* Lane, (Tex. Civ. App. 1904) 80 S. W. 534. Evidence as to the validity of a stock law election is admissible, as the existence of such a law would affect the degree of care in the operation of trains. Missouri, etc., R. Co. *v.* Tolbert, (Tex. Civ. App. 1907) 101 S. W. 1014. In an action for negligently frightening a team evidence is admissible of the distance at which the team was standing from the track. Louisville, etc., R. Co. *v.* Mertz, (Ala. 1905) 40 So. 60.

18. Georgia Cent. R. Co. *v.* Edmondson, 135 Ala. 336, 33 So. 480; Memphis, etc., R. Co. *v.* Lyon, 62 Ala. 71; Hudson *v.* Chicago, etc., R. Co., 59 Iowa 581, 13 N. W. 735, 44 Am. Rep. 692; Collins *v.* Atlantic, etc., R. Co., 65 Mo. 230; Gulf, etc., R. Co. *v.* Ogg, 8 Tex. Civ. App. 285, 28 S. W. 347.

Evidence inadmissible.— In an action for negligent injury the fact that the people of a certain section had held a mass meeting and agreed to disregard a stock law does not repeal the law, and evidence of such fact is inadmissible. Georgia R., etc., Co. *v.* Walker, 87 Ga. 204, 13 S. E. 511. Evidence that a section foreman was a competent and careful man is too remote to show the condition of a gate, particularly where it is not shown that he personally had the care of the gate at the time. Chicago, etc., R. Co. *v.* O'Brien, 34 Ill. App. 155. Where there was but one set of tracks on the roadbed near the place of accident which led directly to where the animal was killed, evidence as to whether there were other animals in the field where the injury occurred is properly excluded as immaterial. Georgia Cent. R. Co. *v.* Edmonston, 135 Ala. 336, 33 So. 480. On the issue as to whether an animal was killed by the train or was

which are sufficiently within the knowledge of the jury,[19] or as to facts which being conceded would not affect defendant's liability in the particular case.[20] A witness may testify as to his opinion or conclusion where the matter to which the testimony relates could not be reproduced or described to the jury as it appeared to the witness at the time,[21] or where it involves technical knowledge and experience;[22] but not where the facts can be clearly stated and the jury is competent to draw its own conclusions.[23] Upon the question of damages evidence as to the quantity and value of the milk given by the cows killed is admissible for the purpose of determining their market value,[24] and testimony as to what plaintiff paid for the animal injured is admissible as evidence of its value;[25] and where the statute provides for a penalty only for a failure to construct cattle-guards to be fixed within certain limits by the jury, evidence of the value of the animal is admissible to aid the jury in determining the amount of the penalty to be imposed.[26]

(II) *Customary Methods and Acts.* Whether negligence exists must ordinarily be determined by the facts in the particular case in which the question arises, and it is not admissible to show customary or habitual conduct of defendant in order to show the existence or absence of negligence at the particular time.[27] So evidence of the usual speed of defendant's train at the place of injury before and after the injury complained of is not admissible as evidence of negligence at the time of the injury;[28] and in an action based upon the alleged insufficiency of fences, gates, or cattle-guards, it has been held that evidence is not admissible that the cattle-guard in question was the same as those in general use on defendant's road,[29] or that the fastenings on the gate in question were like those in general use;[30] but it has been held that evidence that the same make of cattle-guard was in general use among well equipped railroads and was regarded as the best known make is admissible as tending to show the sufficiency of the cattle-guard in question, although not conclusive of such fact.[31]

(III) *Similar Facts or Transactions.* In actions for injury to animals

placed upon the track, it appearing that its head was cut off but the body was without indications of having been struck by a train, the testimony of a witness that he had previously seen a horse on one side of the track and its head on the other is incompetent where he did not see it struck or know how it was killed. St. Louis, etc., R. Co. *v.* Terry, 22 Tex. Civ. App. 176, 54 S. W. 431.

19. Clark *v.* Kansas City, etc., R. Co., 55 Iowa 455, 8 N. W. 328.

20. Grimmell *v.* Chicago, etc., R. Co., 73 Iowa 93, 34 N. W. 758, holding that where it is undisputed that the animal was seen in time to stop the train but the engineer did not consider it necessary to do so in order to avoid the accident, it is not error to exclude evidence as to the exact time when the animal was discovered.

21. Ohio, etc., R. Co. *v.* Wrape, 4 Ind. App. 108, 30 N. E. 427; Craig *v.* Wabash R. Co., 121 Iowa 471, 96 N. W. 965.

A witness may testify that the tracks upon the road were those of a horse and that they showed whether he was running, walking, or jumping. Craig *v.* Wabash R. Co., 121 Iowa 471, 96 N. W. 965.

22. Grimmell *v.* Chicago, etc., R. Co., 73 Iowa 93, 34 N. W. 758, holding that a fireman of four years' experience may testify as to the time or distance within which a given train under a given state of circumstances can be stopped.

23. Indiana, etc., R. Co. *v.* Hale, 93 Ind. 79; St. Louis, etc., R. Co. *v.* Ritz, 33 Kan. 404, 6 Pac. 533.

24. Western R. Co. *v.* Stone, 145 Ala. 663, 39 So. 723; Taylor *v.* Spokane, etc., R. Co., 32 Wash. 450, 73 Pac. 499.

25. Gulf, etc., R. Co. *v.* Anson, (Tex. Civ. App. 1904) 82 S. W. 785.

26. St. Louis, etc., R. Co. *v.* Busick, 74 Ark. 589, 86 S. W. 674.

27. Houston, etc., R. Co. *v.* Jones, 16 Tex. Civ. App. 179, 40 S. W. 745.

28. Houston, etc., R. Co. *v.* Jones, 16 Tex. Civ. App. 179, 40 S. W. 745. But see Gulf, etc., R. Co. *v.* Anson, (Tex. Civ. App. 1904) 82 S. W. 785.

29. Chicago, etc., R. Co. *v.* Bryant, 29 Ill. App. 17; Schuyler *v.* Fitchburgh, etc., R. Co., 20 N. Y. Suppl. 287, holding that such evidence has no tendency to establish the sufficiency of the cattle-guard since defendant's entire system may have been an improper one.

30. Payne *v.* Kansas City, etc., R. Co., 72 Iowa 214, 33 N. W. 633, holding that such evidence is inadmissible where no offer is made to show that such fastenings in general use had been applied to gates in the same way, that all the material circumstances were alike, and that such fastenings had proved sufficient.

31. Lake Erie, etc., R. Co. *v.* Murray, 69 Ill. App. 274. See also Horan *v.* Taylor, etc., R. Co., 3 Tex. App. Civ. Cas. § 435.

the evidence must ordinarily be limited to the facts and circumstances of the particular injury complained of,[32] and in an action for negligent injury evidence is not admissible of negligence in the operation of other of defendant's trains at different times,[33] or of injuries to other animals at the same place at different times,[34] or even at the same time;[35] or in an action based upon the defective condition of a crossing that other animals had been injured on the same crossing,[36] unless expressly admitted only for the purpose of charging the company with notice of the defect.[37] It has been held, however, as tending to show the insufficiency of a fence or cattle-guard, that evidence is admissible that other animals had previously gotten over the fence at the same place,[38] or over a different cattle-guard if it was shown to be of the same kind and character as the one in question,[39] or that similar fastenings for gates had proved insufficient where the court instructed the jury that before such evidence could be considered it must be shown not only that the fastenings were similar but that the manner in which they were put on and the gates hung were in all respects alike;[40] but on the contrary it has been held that evidence offered on the part of defendant that other cattle-guards similar to the one in question had proved sufficient is inadmissible.[41]

(IV) *SUBSEQUENT REPAIRS OR PRECAUTIONS.* In an action based upon the defective condition of fences, crossings, or station grounds, evidence of repairs made subsequently to the injury complained of is not admissible as an admission on the part of defendant of prior insufficiency or for the purpose of showing past negligence;[42] but is admissible for the purpose of showing that the defect was one which it was defendant's duty to repair,[43] or that the company regarded the place

32. Hogue *v.* Southern R. Co., 146 Ala. 384, 41 So. 425; Louisville, etc., R. Co. *v.* Mertz, (Ala. 1905) 40 So. 60; Mississippi Cent. R. Co. *v.* Miller, 40 Miss. 45; Gulf, etc., R. Co. *v.* Ogg, 8 Tex. Civ. App. 285, 28 S. W. 347.

33. Mississippi Cent. R. Co. *v.* Miller, 40 Miss. 45. But see Anson *v.* Gulf, etc., R. Co., 42 Tex. Civ. App. 437, 94 S. W. 94, holding that such testimony is admissible on cross-examination for the purpose of discrediting the previous testimony of one of defendant's witnesses.

34. Georgia Cent. R. Co. *v.* Ross, 107 Ga. 73, 32 S. E. 904; Georgia R., etc., Co. *v.* Walker, 87 Ga. 204, 13 S. E. 511; Croddy *v.* Chicago, etc., R. Co., 91 Iowa 598, 60 N. W. 214; Gulf, etc., R. Co. *v.* Ogg, 8 Tex. Civ. App. 285, 28 S. W. 347.

35. Hogue *v.* Southern R. Co., 146 Ala. 384, 41 So. 425.

36. Croddy *v.* Chicago, etc., R. Co., 91 Iowa 598, 60 N. W. 214; Hudson *v.* Chicago, etc., R. Co., 59 Iowa 581, 13 N. W. 735, 44 Am. Rep. 692. But see Kelly *v.* Southern Minnesota, R. Co., 28 Minn. 98, 9 N. W. 588.

37. Toledo, etc., R. Co. *v.* Milligan, 2 Ind. App. 578, 28 N. E. 1019.

38. Chicago, etc., R. Co. *v.* Hart, 22 Ill. App. 207; Bowen *v.* Flint, etc., R. Co., 110 Mich. 445, 68 N. W. 230 [*distinguishing* Jebb *v.* Chicago, etc., R. Co., 67 Mich. 160, 34 N. W. 538, where the evidence offered related to several months prior to the injury complained of and was not confined to any particular part of the fence].

39. Lake Erie, etc., R. Co. *v.* Murray, 69 Ill. App. 274; Lake Erie, etc., R. Co. *v.* Helmericks, 38 Ill. App. 141; New York, etc., R. Co. *v.* Zumbaugh, 11 Ind. App. 107, 38 N. E. 531.

40. Payne *v.* Kansas City, etc., R. Co., 72 Iowa 214, 33 N. W. 633.

41. Downing *v.* Chicago, etc., R. Co., 43 Iowa 96.

42. Wabash R. Co. *v.* Kime, 42 Ill. App. 272; Hudson *v.* Chicago, etc., R. Co., 59 Iowa 581, 13 N. W. 735, 44 Am. Rep. 692; Morse *v.* Minneapolis, etc., R. Co., 30 Minn. 465, 16 N. W. 358 [*overruling* Kelly *v.* Southern Minnesota R. Co., 28 Minn. 98, 9 N. W. 588]. See also Woods *v.* Missouri, etc., R. Co., 51 Mo. App. 500. But see Page *v.* Great Eastern R. Co., 24 L. T. Rep. N. S. 585.

Where the place of entry is in issue plaintiff claiming that the animal entered through a defective railroad fence and the company claiming that it entered through a gate left open by plaintiff, testimony of a witness that he found fresh breaks in the boards of the fence and boards nailed on with new nails and hair upon the broken boards is admissible as tending to show an entry through the fence. Townsend *v.* Northern Pac. R. Co., 29 Wash. 185, 69 Pac. 750.

In Georgia it was formerly held that evidence of repairs made subsequent to the injury was admissible (see Central R. Co. *v.* Gleason, 69 Ga. 200), but the earlier decisions to this effect have been expressly overruled (Georgia Southern, etc., R. Co. *v.* Cartledge, 116 Ga. 164, 42 S. E. 405, 59 L. R. A. 118).

43. Woods *v.* Missouri, etc., R. Co., 51 Mo. App. 500, holding further that if defendant desires such evidence restricted to the purpose for which alone it is admissible, an instruction must be asked to that effect.

in question as one which might lawfully be fenced;[44] and where there is any evidence of condition shortly after the injury different from that claimed to exist at the time of the injury, it is competent to show that such condition was a changed one made better by repairs after the injury occurred.[45] Evidence that after the injury complained of sign-boards were erected and signals given at the crossing where the injury occurred is not admissible.[46]

(v) *Fences and Cattle-Guards*—(a) *In General.* In actions based upon a failure to construct and maintain proper fences and cattle-guards, witnesses can ordinarily be permitted to testify only as to the facts and not matters of opinion.[47] It is competent to show the facts as to the condition of the tracks, their location, and the uses made of them at the place in question;[48] but the opinions of witnesses are not admissible as to whether defendant could properly fence at the place in question,[49] or whether the construction of cattle-guards at such places would endanger the lives or limbs of defendant's employees,[50] or whether the fences or cattle-guards constructed were properly constructed and sufficient for the purpose intended.[51] In an action based upon the statutory liability for failure to fence, evidence of negligence in the operation of the train is irrelevant and inadmissible;[52] but in an action based upon negligence in the operation of the train, evidence of the absence of fences or cattle-guards is admissible as bearing upon the degree of care to be exercised;[53] and conversely it is competent for the railroad company to show that the owner of the animal injured had been paid for constructing and maintaining the fence at the place where the animal came upon the track.[54] In an action based upon a failure to fence where it is claimed that the injury occurred upon defendant's depot grounds, a deed of the land purchased for such ground is inadmissible,[55] and where the railroad tracks do not intersect the streets of an adjoining town the plat of such town is not admissible.[56]

(b) *Condition of Fences and Cattle-Guards.* The liability of a railroad company for a defective condition of its fences or cattle-guards depends upon their condition at the time of the injury alleged to have resulted therefrom, and only such evidence is admissible as tends to show the condition at that time;[57] but whether evidence of their condition at other times is admissible for this purpose depends upon the circumstances.[58] Evidence of their condition at a time sub-

44. Toledo, etc., R. Co. *v.* Owen, 43 Ind. 405.

45. See Wabash R. Co. *v.* Kime, 42 Ill. App. 272.

46. Louisville, etc., R. Co. *v.* Bowen, 39 S. W. 31, 18 Ky. L. Rep. 1099.

47. Indiana, etc., R. Co. *v.* Hale, 93 Ind. 79; St. Louis, etc., R. Co. *v.* Ritz, 33 Kan. 404, 6 Pac. 533.

A question as to the time usually required to fill a cattle-guard with snow is properly excluded on the ground that it is seeking to elicit an opinion of the witness rather than the statement of a fact. Grahlman *v.* Chicago, etc., R. Co., 78 Iowa 564, 43 N. W. 529, 5 L. R. A. 813.

48. See Chicago, etc., R. Co. *v.* Modesitt, 124 Ind. 212, 24 N. E. 986.

49. Indiana, etc., R. Co. *v.* Hale, 93 Ind. 79.

50. Chicago, etc., R. Co. *v.* Modesitt, 124 Ind. 212, 24 N. E. 986; Chicago, etc., R. Co. *v.* Clonch, 2 Kan. App. 728, 43 Pac. 1140.

51. Chicago, etc., R. Co. *v.* O'Brien, 34 Ill. App. 155; St. Louis, etc., R. Co. *v.* Ritz, 33 Kan. 404, 6 Pac. 533.

52. Collins *v.* Atlantic, etc., R. Co., 65 Mo. 230.

But in an action for frightening animals under a statute making railroad companies liable for injuries to animals where their roads are not fenced occasioned by their being frightened by trains and running into bridges, fences, or other obstructions, evidence as to how the train was operated is relevant and material. Briggs *v.* St. Louis, etc., R. Co., 111 Mo. 168, 20 S. W. 32.

53. Rafferty *v.* Portland, etc., R. Co., 32 Wash. 259, 73 Pac. 382. See also Gorman *v.* Pacific R. Co., 26 Mo. 441, 72 Am. Dec. 220.

54. Georgia R., etc., Co. *v.* Anderson, 33 Ga. 110.

55. Fowler *v.* Farmers' L. & T. Co., 21 Wis. 77, holding that what constitutes the depot grounds must be determined by evidence as to what premises are actually in use for such purposes and that therefore a deed showing the land purchased for depot grounds is irrelevant and inadmissible.

56. Prather *v.* Kansas City, etc., Connecting R. Co., 84 Mo. App. 86.

57. Wabash R. Co. *v.* Kime, 42 Ill. App. 272; Brentner *v.* Chicago, etc., R. Co., 58 Iowa 625, 12 N. W. 615.

58. Miller *v.* Northern Pac. R. Co., 36 Minn. 296, 30 N. W. 892.

sequent to the injury is not ordinarily admissible in the absence of other evidence showing that there had been no change of condition in the meanwhile;[59] but evidence is admissible of a defective condition at a time prior to the injury if accompanied by evidence that such condition had continued up to the time of the injury,[60] or of a defective condition subsequent to the injury if accompanied by evidence that there had been no change during the interval.[61] Evidence is also admissible as to the condition very shortly after the injury,[62] unless there is evidence tending to show a change of condition,[63] and where there is evidence that the bars were improperly constructed, evidence that they had frequently been down and defendant's servants had sometimes put them up is admissible to show knowledge on the part of the company of the defect.[64] The liability of the company also depends upon the condition of the fence at the place where the animal came upon the track and the evidence should ordinarily be limited accordingly,[65] and it has been held that evidence is not admissible as to the condition of the fences at the place of injury;[66] but it is competent to show, in addition to a defective condition at the place of entry, that the fence was defective at other places in the vicinity as tending to show such a general defective condition as to charge defendant with knowledge thereof.[67]

(VI) *CROSSINGS, GATES, AND BARS.* In an action based upon negligence on the part of the railroad company in leaving open a gate in the railroad fence, evidence is not admissible that on a former occasion defendant's agent was seen to pass through the gate without closing it;[68] but where the sufficiency of the gate and its fastenings is in issue, evidence that the calves of the cows injured were in a pasture on the other side of the track opposite to the gate is admissible as tending to show that the gate was opened by pressure of the cows against it instead of being left open by some third person as claimed by defendant.[69] The opinion of a witness is not admissible as to the sufficiency of the fastenings of a gate;[70] but the testimony of a witness that almost any animal could throw the gate down is not objectionable as an opinion or as invading the province of the jury,[71] and testimony as to experiments made by witnesses with the gate shortly after the

59. Brentner *v.* Chicago, etc., R. Co., 58 Iowa 625, 12 N. W. 315; Colyer *v.* Missouri Pac. R. Co., 93 Mo. App. 147. But see Grahlman *v.* Chicago, etc., R. Co., 78 Iowa 564, 43 N. W. 529, 5 L. R. A. 813.

60. Chicago, etc., R. Co. *v.* Chipman, 87 Ill. App. 292.

61. Morrison *v.* Chicago, etc., R. Co., 117 Iowa 587, 91 N. W. 793.

62. Wabash R. Co. *v.* Kime, 42 Ill. App. 272; Mackie *v.* Iowa Cent. R. Co., 54 Iowa 540, 6 N. W. 723; Miller *v.* Northern Pac. R. Co., 36 Minn. 296, 30 N. W. 892.

63. Colyer *v.* Missouri Pac. R. Co., 93 Mo. App. 147, holding that evidence is not admissible as to the condition of a fence only a few hours after the injury where it appears that defendant's servants had gone to the place and commenced to make repairs and it is not shown that the condition had not been changed.

64. Neversorry *v.* Duluth, etc., R. Co., 115 Mich. 146, 73 N. W. 125.

65. Chicago, etc., R. Co. *v.* Farrelly, 3 Ill. App. 60.

Where the animal went upon the track at a crossing evidence of the condition of the railroad fence at a point near the crossing and not shown to have any connection with the injury is not admissible. Galveston, etc., R. Co. *v.* Dyer, (Tex. Civ. App. 1898) 46 S. W. 841.

If defendant's evidence tends to show that the track could not be fenced without danger to its employees as near to the end of the switch as where the animal came upon it, plaintiff may show in rebuttal that defendant had fenced nearer than this at the other end of the switch, although the fence at such place had nothing to do with the injury. Texas, etc., R. Co. *v.* Seay, (Tex. Civ. App. 1902) 69 S. W. 177.

Harmless error.—The evidence should properly be confined to the condition of the fence at the place where the animal came upon the track, but if there is no dispute as to the fact that the fence was defective at such place the admission of evidence as to a defective condition at other places is not prejudicial error. Price *v.* Barnard, 70 Mo. App. 175.

66. Chicago, etc., R. Co. *v.* Farrelly, 3 Ill. App. 60. But see Mayherry *v.* Missouri Pac. R. Co., 83 Mo. 664.

67. McGuire *v.* Ogdensburgh, etc., R. Co., 18 N. Y. Suppl. 313.

68. Chicago, etc., R. Co. *v.* Hodge, 55 Ill. App. 166.

69. Payne *v.* Kansas City, etc., R. Co., 72 Iowa 214, 33 N. W. 633.

70. Payne *v.* Kansas City, etc., R. Co., 72 Iowa 214, 33 N. W. 633.

71. Chicago, etc., R. Co. *v.* O'Brien, 34 Ill. App. 155.

injury is admissible to show its condition.[72] Where the action is based upon a failure to maintain a gate at a crossing, evidence offered on the part of defendant tending to show that it was not required to maintain cattle-guards also is irrelevant.[73]

(VII) *Mode of Running Trains.* In an action for injury to animals due to negligence in the operation of a train, evidence is admissible as to the speed of the train,[74] a failure to give signals,[75] the distance that an animal could be seen at the time and place of the injury,[76] whether the view of the track was obstructed,[77] and experiments made by witnesses as to the distance an animal could be seen,[78] or as to the existence or effect of any obstruction of view,[79] provided such experiments were made at the place and under conditions similar to those existing at the time of the injury,[80] the character and equipment of the locomotive,[81] and if the injury was at night the character of headlight carried,[82] and where the engineer testifies that it was a very dark night, plaintiff may introduce in rebuttal evidence of the phase of the moon and the hour at which it rose.[83] Testimony of the engineer is admissible on the part of defendant that after the animal was seen he could not have stopped the train without endangering its safety and that of the passengers; [84] but the testimony of other witnesses as to whether the engineer could have done anything more than he did to avoid the injury is inadmissible, being a question for the jury to determine from the facts shown.[85]

(VIII) *Violation of Statutes and Ordinances.* Since the statutes requiring crossing signals are intended for the benefit of animals as well as persons,[86] in an action for injury to an animal rightfully upon a highway crossing, evidence of a failure to give such signals is admissible on the question of defendant's negligence.[87] So also in actions for negligent injury to animals in a town

72. Brown *v.* Quincy, etc., R. Co., 127 Mo. App. 614, 106 S. W. 551.

73. Taft *v.* New York, etc., R. Co., 157 Mass. 297, 32 N. E. 168.

74. Colorado, etc., R. Co. *v.* Webb, 36 Colo. 224, 85 Pac. 683; Edson *v.* Central R. Co., 40 Iowa 47; Taylor *v.* St. Louis, etc., R. Co., 83 Mo. 386; Borneman *v.* Chicago, etc., R. Co., (S. D. 1905) 104 N. W. 208. But see Mills, etc., Lumber Co. *v.* Chicago, etc., R. Co., 94 Wis. 336, 68 N. W. 996.

Evidence is admissible on the part of defendant that the train was running at its usual and ordinary rate of speed in rebuttal of plaintiff's evidence that the rate of speed was high and unusual. Chicago, etc., R. Co. *v.* Bunker, 81 Ill. App. 616.

Evidence that the train was behind time is admissible to show that there was a motive for not stopping or for making rapid speed where the question is in dispute whether or not the train slackened speed at a given point where an animal was injured and if so to what extent. Southern R. Co. *v.* Puryear, 127 Ga. 88, 56 S. E. 73.

75. Edson *v.* Central R. Co., 40 Iowa 47.

It is not error to allow witnesses to state that they could have heard the bell or whistle if it had been sounded (Elgin, etc., R. Co. *v.* Reese, 70 Ill. App. 463), or that they did not hear it (Texarcana, etc., R. Co. *v.* Bell, (Tex. Civ. App. 1907) 101 S. W. 1167).

76. Kansas City Southern R. Co. *v.* Lewis, 80 Ark. 396, 97 S. W. 56; Missouri, etc., R. Co. *v.* Ward, 1 Indian Terr. 670, 43 S. W. 954; Borneman *v.* Chicago, etc., R. Co., (S. D. 1905) 104 N. W. 208; Sheldon *v.* Chicago, etc., R. Co., 6 S. D. 606, 62 N. W. 955; Gulf, etc., R. Co. *v.* Washington, 49 Fed. 347, 1 C. C. A. 286.

77. Kansas City Southern R. Co. *v.* Lewis, 80 Ark. 396, 97 S. W. 56; Chicago, etc., R. Co. *v.* Legg, 32 Ill. App. 218.

78. Elgin, etc., R. Co. *v.* Reese, 70 Ill. App. 463.

79. Chicago, etc., R. Co. *v.* Legg, 32 Ill. App. 218.

80. Chicago, etc., R. Co. *v.* Crose, 214 Ill. 602, 73 N. E. 865, 105 Am. St. Rep. 135.

81. Georgia Cent. R. Co. *v.* Hardin, 114 Ga. 548, 40 S. E. 738.

82. Georgia Cent. R. Co. *v.* Hardin, 114 Ga. 548, 40 S. E. 738.

Evidence as to the condition of the headlight at a point four or five miles from the place of injury is admissible where its condition at the time and place of injury is material. Georgia Cent. R. Co. *v.* Hughes, 127 Ga. 593, 56 S. E. 770.

83. Mobile, etc., R. Co. *v.* Ladd, 92 Ala. 287, 9 So. 169.

84. Chicago, etc., R. Co. *v.* Bunker, 81 Ill. App. 616.

85. Johnson *v.* Rio Grande Western R. Co., 7 Utah 346, 26 Pac. 926.

86. Palmer *v.* St. Paul, etc., R. Co., 38 Minn. 415, 38 N. W. 100. See also *supra*, X, H, 7, a.

87. Hohl *v.* Chicago, etc., R. Co., 61 Minn. 321, 63 N. W. 742, 52 Am. St. Rep. 598; Palmer *v.* St. Paul, etc., R. Co., 38 Minn. 415, 38 N. W. 100. *Contra*, Mills, etc., Lumber Co. *v.* Chicago, etc., R. Co., 94 Wis. 336, 68 N. W. 996.

Although the animal was not directly on the crossing and the signals are intended for

or city an ordinance is admissible which limits the rate of speed within the corporate limits,[88] or requires a bell to be continuously rung while passing through such limits;[89] and an ordinance prohibiting stock from running at large is admissible upon the question of contributory negligence on the part of plaintiff,[90] although neither is conclusive evidence of negligence on the part of either of the parties.[91]

(IX) *CONTRIBUTORY NEGLIGENCE OF OWNER.* Where the animal injured escaped from plaintiff's field through a defective railroad fence which it was defendant's duty to maintain, evidence of notice to the owner that the animal had on previous occasions escaped and been upon the track is immaterial,[92] but it is competent for defendant to show that plaintiff's animals were frequently at large and that they escaped over plaintiff's fence.[93] Where the defense is contributory negligence in allowing stock to run at large in a city, an ordinance prohibiting stock from running at large is admissible on the part of the defendant,[94] and evidence is admissible on the part of plaintiff which would tend to establish that the stock were at large without his fault.[95] In an action for injury to a team while being driven over a crossing evidence of the speed of the train is admissible as bearing upon the question of plaintiff's negligence.[96]

k. Weight and Sufficiency of Evidence — (I) *IN GENERAL.* In actions for injury to animals the general rules as to the weight and sufficiency of evidence in civil actions apply,[97] and there must be a preponderance of evidence on behalf of plaintiff to connect defendant with the injury complained of,[98] and except where by statute the mere fact of injury raises a presumption of negligence and places the burden upon defendant to rebut it,[99] to show the existence of negligence,[1]

the protection of persons and property at the crossing, evidence of a failure to give such signals and slow up the speed of the train as required by statute is admissible as evidence of negligence in an action for injury to an animal in the immediate vicinity of the crossing. Western, etc., R. Co. *v.* Jones. 65 Ga. 631.

But evidence as to whether the animal would probably have been frightened away from the track by such signals is immaterial and incompetent. Kendrick *v.* Chicago, etc., R. Co., 81 Mo. 521.

88. Cleveland, etc., R. Co. *v.* Ahrens, 42 Ill. App. 434; Chicago, etc., R. Co. *v.* Richardson, 28 Nebr. 118, 44 N. W. 103; Union Pac. R. Co. *v.* Rassmussen, 25 Nebr. 810, 41 N. W. 778, 13 Am. St. Rep. 527; Borneman *v.* Chicago, etc., R. Co., (S. D. 1905) 104 N. W. 208. *Contra,* Southern R. Co. *v.* Wood, 52 S. W. 796, 21 Ky. L. Rep. 575.

If the ordinance applies only to a particular railroad company other than defendant, the ordinance is not admissible in the absence of any other evidence that defendant was a lessee or was operating its train over the tracks of that road. Fell *v.* Burlington, etc., R. Co., 43 Iowa 177.

89. Borneman *v.* Chicago, etc., R. Co., (S. D. 1905) 104 N. W. 208.

90. Chicago, etc., R. Co. *v.* Richardson, 28 Nebr. 118, 44 N. W. 103.

91. Chicago, etc., R. Co. *v.* Richardson, 28 Nebr. 118, 44 N. W. 103.

92. Rogers *v.* Newburyport R. Co., 1 Allen (Mass.) 16.

93. Bowen *v.* Flint, etc., R. Co., 110 Mich. 445, 68 N. W. 230, holding, however, that it is proper to exclude a question as to whether the witness knew of plaintiff's animals being out and being taken up in consequence, the place where they came out and the time not being designated.

94. Van Horn *v.* Burlington, etc., R. Co., 59 Iowa 33, 12 N. W. 752.

95. Louisville, etc., R. Co. *v.* Hall, 106 Ga. 786, 32 S. E. 860.

96. Frazier *v.* Wabash, etc., R. Co., 75 Mo. App. 253.

97. See, generally, EVIDENCE, 17 Cyc. 753.

98. Ohio, etc., R. Co. *v.* Atteberry, 43 Ill. App. 80; Shaw *v.* St. Louis, etc., R. Co., 110 Mo. App. 561, 85 S. W. 611; Beaumont, etc., R. Co. *v.* Langford, (Tex. Civ. App. 1907) 104 S. W. 920; McMillan *v.* Manitoba, etc., R. Co., 4 Manitoba 220.

Defendant's operation of road.— There must be some evidence tending to show that defendant was operating the road upon which the injury occurred. Burlington, etc., R. Co. *v.* Campbell, 14 Colo. App. 141, 59 Pac. 424. Evidence held sufficient to show that defendant owned and operated the train causing the injury see Cleveland, etc., R. Co. *v.* Miller, 40 Ind. App. 165, 81 N. E. 517.

Cause of injury see *infra,* X, H, 15, k, (II).

99. See *supra,* X, H, 15, i, (III).

Sufficiency of evidence to rebut presumption see *supra,* X, H, 15, i, (III), (IV).

1. *Alabama.*—Alabama Great Southern R. Co. *v.* Franklin, 151 Ala. 376, 44 So. 373.

Colorado.— Denver, etc., R. Co. *v.* Coulter, 41 Colo. 445, 92 Pac. 906.

Illinois.— Peoria, etc., R. Co. *v.* Aten, 43 Ill. App. 68.

Ohio.— Pittsburgh, etc., R. Co. *v.* McMillan, 37 Ohio St. 554.

Texas.— Mahler *v.* Missouri, etc., R. Co., (Civ. App. 1905) 90 S. W. 206; Henry *v.* Missouri, etc., R. Co., (Civ. App. 1901) 65 S. W. 644.

and that such negligence was the proximate cause of the injury complained of,[2] and that plaintiff was the owner of the animal injured.[3] The facts necessary to sustain a recovery may, however, be established either by direct testimony or by proof of circumstances from which they may be reasonably inferred by the jury.[4] Plaintiff may by circumstantial evidence alone establish both the fact of injury by defendant's train,[5] and also the fact of negligence,[6] and plaintiff's case is strongly fortified by failure of defendant to introduce the testimony of its employees who were present at the accident;[7] but to sustain the verdict on circumstantial evidence there must be some connection between the facts proved and the fact at issue,[8] and the circumstances sufficiently strong and connected to create more than a mere conjecture or suspicion.[9] A mere scintilla of proof

Canada.— McMillan *v.* Manitoba, etc., R. Co., 4 Manitoba 220.

See 41 Cent. Dig. tit. "Railroads," § 1608.

Negligence must be clearly established by plaintiff and a jury cannot base a verdict upon conjecture and inference nor upon the theory that the bare fact of killing is sufficient. Denver, etc., R. Co. *v.* Priest, 9 Colo. App. 103, 47 Pac. 653.

To reasonably satisfy the jury is the measure of proof required. Southern R. Co. *v.* Riddle, 126 Ala. 244, 28 So. 422.

Evidence held insufficient to show negligence on the part of defendant see the following cases: Chicago, etc., R. Co. *v.* Roberts, 35 Colo. 498, 84 Pac. 68; Robinson *v.* Denver, etc., R. Co., 24 Colo. 98, 49 Pac. 37; Jones *v.* Oregon Short-Line R. Co., 6 Ida. 441, 56 Pac. 76; Cincinnati, etc., R. Co. *v.* Bartlett, 58 Ind. 572; Missouri, etc., R. Co. *v.* Webb, 6 Indian Terr. 280, 97 S. W. 1010; Chicago, etc., R. Co. *v.* Huggins, 4 Indian Terr. 194, 69 S. W. 845; Mobile, etc., R. Co. *v.* Morrow, 97 S. W. 389, 30 Ky. L. Rep. 83; Louisville, etc., R. Co. *v.* Bonner, (Miss. 1893) 14 So. 462; Chicago, etc., R. Co. *v.* Dowhower, 74 Nebr. 600, 104 N. W. 1070; Cumming *v.* Great Northern R. Co., 15 N. D. 611, 108 N. W. 798; Missouri, etc., R. Co. *v.* Baker, 99 Tex. 452, 90 S. W. 869; Texas, etc., R. Co. *v.* Langham, (Tex. Civ. App. 1906) 95 S. W. 686; Missouri, etc., R. Co. *v.* Baker, 42 Tex. Civ. App. 74, 93 S. W. 211; Texas Cent. R. Co. *v.* Harbison, (Tex. Civ. App. 1905) 88 S. W. 414; Houston, etc., R. Co. *v.* McMillan, 37 Tex. Civ. App. 483, 84 S. W. 296; Texas Cent. R. Co. *v.* Harbison, (Tex. Civ. App. 1903) 75 S. W. 549; St. Louis Southwestern R. Co. *v.* Adams, 24 Tex. Civ. App. 231, 58 S. W. 1035.

Evidence held sufficient.— To show negligence in the operation of the train. Kansas City Southern R. Co. *v.* Buckner, 80 Ark. 415, 97 S. W. 439; Kansas City, etc., R. Co. *v.* Rockwell, 74 Kan. 840, 85 Pac. 802; Best *v.* Great Northern R. Co., 95 Minn. 67, 103 N. W. 709; Croft *v.* Chicago Great Western R. Co., 72 Minn. 47, 74 N. W. 898, 80 N. W. 628; Woodland *v.* Union Pac. R. Co., (Utah 1891) 26 Pac. 298; Johnson *v.* Baltimore, etc., R. Co., 25 W. Va. 570. To show negligence in using an inferior headlight. Jonesboro, etc., R. Co. *v.* Guest, 81 Ark. 267, 99 S. W. 71; St. Louis, etc., R. Co. *v.* Shannon, 76 Ark. 166, 88 S. W. 851.

2. Terre Haute, etc., R. Co. *v.* Tuterwiler, 16 Ill. App. 197; Pittsburgh, etc., R. Co. *v.* McMillan, 37 Ohio St. 554; Gulf, etc., R. Co. *v.* Blake, 43 Tex. Civ. App. 180, 95 S. W. 593.

3. St. Louis, etc., R. Co. *v.* Miller, 84 Ark. 495, 106 S. W. 484, holding, however, that where several witnesses agree in testifying that the animal belonged to plaintiff, and plaintiff testifies that one of his animals has been missing since the date when the animal referred to by the witness was killed, the evidence is sufficient, although the testimony of the witness differs as to the description of the animal's color.

4. St. Louis, etc., R. Co. *v.* Casner, 72 Ill. 384, holding that direct testimony is not necessary even as to the fact of plaintiff's ownership of the animal injured.

5. See *infra*, X, H, 15, k, (II).

6. Gulf, etc., R. Co. *v.* Washington, 49 Fed. 347, 1 C. C. A. 286.

Circumstances constituting admission of negligence.— Under the Montana statute, which provides that in case of injury to animals the body of the animal shall belong to the company unless the owner shall elect to take it in whole or in part for damages, if an animal is injured and an agent of the company, acting within the scope of his authority and knowing the circumstances of the injury, orders it to be killed and the meat sold for the benefit of the company, this is sufficient to establish a *prima facie* admission of negligence. McCauley *v.* Montana Cent. R. Co., 11 Mont. 483, 28 Pac. 729.

7. Day *v.* New Orleans Pac. R. Co., 35 La. Ann. 694.

8. Shaw *v.* St. Louis, etc., R. Co., 110 Mo. App. 561, 85 S. W. 611.

9. Denver, etc., R. Co. *v.* Priest, 9 Colo. App. 103, 47 Pac. 653; Gibson *v.* Iowa Cent. R. Co., 136 Iowa 415, 113 N. W. 927; Bothwell *v.* Chicago, etc., R. Co., 59 Iowa 192, 13 N. W. 78; Shaw *v.* St. Louis, etc., R. Co., 110 Mo. App. 561, 85 S. W. 611; Magilton *v.* New York Cent., etc., R. Co., 11 N. Y. App. Div. 373, 42 N. Y. Suppl. 231.

The circumstances shown must negative every other reasonable hypothesis save that of defendant's negligence. Gibson *v.* Iowa Cent. R. Co., 136 Iowa 415, 113 N. W. 927. *Contra*, Meier *v.* Northern Pac. R. Co., (Oreg. 1908) 93 Pac. 691, holding that it is only necessary that the conclusion desired should be the more probable hypothesis.

[X, H, 15, k, (I)]

is not sufficient,[10] nor is it sufficient for plaintiff merely to show the fact of injury,[11] or the fact of injury and also the omission of some statutory duty without any evidence tending to show that such omission was the cause of the injury.[12] Where the only direct testimony as to the circumstances of the injury is that of defendant's servants who testify positively that there was no negligence and they are not in any wise contradicted or discredited, a verdict for plaintiff cannot be sustained.[13]

(II) *CAUSE OF INJURY.* The fact that an animal was killed or injured by being struck by defendant's cars or locomotives may be proved by circumstantial evidence without the direct testimony of any eye-witness,[14] it being sufficient to show circumstances from which this fact may be fairly and justly inferred,[15] such as the character of the injury, the presence of blood or hair upon the road or locomotive, hoof prints of the animal, and any marks upon the track or road-bed indicating that an animal had been struck or dragged by the train,[16] and these circumstances may be of such a character as to warrant the jury without any direct evidence on the part of plaintiff in disregarding the positive testimony of defendant's servants that the animal was not injured by the train.[17] It is not sufficient, how-

10. Annapolis, etc., R. Co. *v.* Pumphrey, 72 Md. 82, 19 Atl. 8.

11. *Colorado.*— Denver, etc., R. Co. *v.* Coulter, 41 Colo. 445, 92 Pac. 906; Denver, etc., R. Co. *v.* Wheatley, 7 Colo. App. 284, 43 Pac. 450.

Illinois.—Terre Haute, etc., R. Co. *v.* Tuterwiler, 16 Ill. App. 197.

Nebraska.— Kennedy *v.* Chicago, etc., R. Co., (1907) 114 N. W. 165.

New York.— Craft *v.* Peekskill Lighting, etc., Co., 121 N. Y. App. Div. 549, 106 N. Y. Suppl. 232.

Ohio.— Pittsburgh, etc., R. Co. *v.* McMillan, 37 Ohio St. 554.

Texas.— Gulf, etc., R. Co. *v.* Anson, (1907) 105 S. W. 989 [*reversing* 102 S. W. 136]; Henry *v.* Missouri, etc., R. Co., (Civ. App. 1901) 65 S. W. 644.

West Virginia.— Kirk *v.* Norfolk, etc., R. Co., 41 W. Va. 722, 24 S. E. 639, 56 Am. St. Rep. 899, 32 L. R. A. 416.

See 41 Cent. Dig. tit. "Railroads," § 1608.

12. Peoria, etc., R. Co. *v.* Aten, 43 Ill. App. 68.

Signals and lookouts see *infra*, X, H, 15, k, (VII).

13. St. Louis, etc., R. Co. *v.* Vanover, 14 Ill. App. 522; Kennedy *v.* Chicago, etc., R. Co., (Nebr. 1907) 114 N. W. 165; Craft *v.* Peekskill Lighting, etc., Co., 121 N. Y. App. Div. 549, 106 N. W. Snppl. 232.

14. *Arkansas.*— St. Louis, etc., R. Co. *v.* Stites, 80 Ark. 72, 95 S. W. 1004.

Colorado.— Burlington, etc., R. Co. *v.* Campbell, 14 Colo. App. 141, 59 Pac. 424.

Indiana.— Whitewater R. Co. *v.* Bridgett, 94 Ind. 216; Indianapolis, etc., R. Co. *v.* Thomas, 84 Ind. 194.

Missouri.— Halferty *v.* Wabash, etc., R. Co., 82 Mo. 90; Combs *v.* St. Louis, etc., R. Co., 58 Mo. App. 467.

South Dakota.— Sweet *v.* Chicago, etc., R. Co., 6 S. D. 281, 60 N. W. 77.

United States.— Gulf, etc., R. Co. *v.* Washington, 49 Fed. 347, 1 C. C. A. 286.

See 41 Cent. Dig. tit. "Railroads," § 1608½.

15. Little Rock, etc., R. Co. *v.* Wilson, 66 Ark. 414, 50 S. W. 995; Whitewater R. Co. *v.* Bridgett, 94 Ind. 216; Indianapolis, etc., R. Co. *v.* Thomas, 84 Ind. 194; Harbeston *v.* Kansas City, etc., R. Co., 65 Mo. App. 160; Chicago, etc., R. Co. *v.* Hildebrand, 42 Nebr. 33, 60 N. W. 335.

Although there are no external marks of violence the jury may be justified in finding from the position and appearance of the animal that it was injured by being struck by a train. Chicago, etc., R. Co. *v.* Dement, 44 Ill. 74.

The evidence is sufficient to sustain a finding that an animal was killed by defendant's cars where the animal was seen on the eighteenth of the month and found dead beside the track on the twentieth, and the engineer admits that on the nineteenth he struck an animal at that place which answered the description of the animal injured. Chicago, etc., R. Co. *v.* Roberts, 10 Colo. App. 87, 49 Pac. 428.

16. *Illinois.*— Toledo, etc., R. Co. *v.* Pineo, 56 Ill. 308.

Indiana.— Louisville, etc., R. Co. *v.* Hixon, 101 Ind. 337.

Iowa.— Brockert *v.* Central Iowa R. Co., 82 Iowa 369, 47 N. W. 1026; Clark *v.* Kansas City, etc., R. Co., 55 Iowa 455, 8 N. W. 328; Stutsman *v.* Burlington, etc., R. Co., 53 Iowa 760, 6 N. W. 63.

Missouri.— Halferty *v.* Wahash, etc., R. Co., 82 Mo. 90; Harberston *v.* Kansas City, etc., R. Co., 65 Mo. App. 160; Combs *v.* St. Louis, etc., R. Co., 58 Mo. App. 467; Morrow *v.* Hannibal, etc., R. Co., 29 Mo. App. 432.

Nebraska.— Chicago, etc., R. Co. *v.* Hildebrand, 42 Nebr. 33, 60 N. W. 335.

Texas.— International, etc., R. Co. *v.* Hughes, 81 Tex. 184, 16 S. W. 875.

United States.— Gulf, etc., R. Co. *v.* Washington, 49 Fed. 347, 1 C. C. A. 286.

See 41 Cent. Dig. tit. "Railroads," § 1608½.

17. New Orleans, etc., R. Co. *v.* Toulmé, 59 Miss. 284; Buckman *v.* Missouri, etc., R. Co., 100 Mo. App. 30, 73 S. W. 270; International, etc., R. Co. *v.* Hughes, 81 Tex. 184, 16 S. W. 875.

ever, to show merely that the animal was found dead near the track without any signs of violence or indications of having been struck by a train.[18] There must be substantial facts shown from which it may be reasonably inferred that the animal was killed by the train,[19] as it cannot be said that there is a preponderance of evidence for plaintiff where the circumstances shown are equally consistent with some other cause of injury;[20] and where defendant's servants testify positively that no animal was struck and their testimony is not contradicted and the circumstantial evidence is not inconsistent therewith, the jury cannot disregard their testimony.[21]

(III) *NATURE AND EXTENT OF INJURY OR DAMAGE.* To sustain a recovery for the killing of an animal there must be some evidence of its value,[22] which must be of its actual or market value and not merely what plaintiff considers it worth to him;[23] and where an animal is merely injured there must be evidence of its value after as well as before the injury.[24] Where the evidence merely shows that an animal was injured and there is no evidence as to whether it subsequently died, a judgment for its full value cannot be sustained.[25]

(IV) *FENCES AND CATTLE-GUARDS* — (A) *In General.* To sustain a recovery under the statutes requiring railroad companies to fence their tracks, there must be some evidence reasonably tending to establish every material fact necessary to be proved.[26] So there must be some evidence that the road was not fenced,[27] and if the statute only requires fencing at certain places or excepts certain places there must be some evidence that the place in question was one required to be fenced,[28]

18. Jenicke *v.* Minneapolis, etc., R. Co., 27 Minn. 359, 7 N. W. 363; Texas, etc., R. Co. *v.* King, (Tex. Civ. App. 1907) 99 S. W. 1030; Galveston, etc., R. Co. *v.* Blau, 31 Tex. Civ. App. 644, 73 S. W. 1074.

19. Brockert *v.* Central Iowa R. Co., 75 Iowa 529, 39 N. W. 871; Louisville, etc., R. Co. *v.* Van Eton, (Miss. 1892) 11 So. 111; New Orleans, etc., R. Co. *v.* Jones, (Miss. 1888) 3 So. 653; Lindsay *v.* Kansas City, etc., R. Co., 36 Mo. App. 51; Gilbert *v.* Missouri Pac. R. Co., 23 Mo. App. 65; Gulf, etc., R. Co. *v.* Anson, (Tex. 1907) 105 S. W. 989 [*reversing* (Civ. App. 1907) 102 S. W. 136]; Beaumont, etc., R. Co. *v.* Langford, (Tex. Civ. App. 1907) 104 S. W. 920; Railway Co. *v.* Leal, (Tex. App. 1890) 16 S. W. 909; Missouri Pac. R. Co. *v.* Earle, (Tex. App. 1889) 14 S. W. 1068.

20. Ohio, etc., R. Co. *v.* Atteberry, 43 Ill. App. 80; Southern R. Co. *v.* Forsythe, 64 S. W. 506, 23 Ky. L. Rep. 942; Beaudin *v.* Oregon Short Line R. Co., 31 Mont. 238, 78 Pac. 303; Railway Co. *v.* Leal, (Tex. 1890) 16 S. W. 909.

21. Wrightsville, etc., R. Co. *v.* Walker, 108 Ga. 262, 33 S. E. 978; Ohio, etc., R. Co. *v.* Atteberry, 43 Ill. App. 80; Meade *v.* Kansas City, etc., R. Co., 45 Iowa 699.

22. Southern R. Co. *v.* Varn, 102 Ga. 764, 29 S. E. 822.

23. Galveston, etc., R. Co. *v.* Schrader, 1 Tex. App. Civ. Cas. § 1147, holding that where the only evidence as to the value of the animals killed is the testimony of plaintiff that they were worth a certain amount to him and that he had paid a certain amount for a similar animal, the evidence is not sufficient.

24. Dietrich *v.* Hannibal, etc., R. Co., 89 Mo. App. 36; Smith *v.* Kansas City, etc., R. Co., 60 Mo. App. 591.

Proof of the amount for which the animal was sold several months after the injury and of the amount expended by plaintiff in its care and attention is not sufficient as to its value immediately after the injury. Dietrich *v.* Hannibal, etc., R. Co., 89 Mo. App. 36.

25. St. Louis, etc., R. Co. *v.* Evans, 78 Tex. 369, 14 S. W. 798.

26. Ohio, etc., R. Co. *v.* Brown, 23 Ill. 94; Yeager *v.* Chicago, etc., R. Co., 61 Mo. App. 594; Summers *v.* Hannibal, etc., R. Co., 29 Mo. App. 41.

Evidence held sufficient: To sustain a finding that the road was not securely fenced as required by law. Louisville, etc., R. Co. *v.* Zink, 95 Ind. 345. To sustain a verdict for plaintiff on the ground that defendant left a greater distance within switch limits unfenced and placed its cattle-guard further from the end of the switch than the safety of its employees engaged in the switching of cars required. Glasscock *v.* Missouri, etc., R. Co., 82 Mo. App. 146. To sustain a finding made with reference to the size of the animal that a lawful fence if constructed would have excluded it from the track. Schimmele *v.* Chicago, etc., R. Co., 34 Minn. 216, 25 N. W. 247. To sustain a finding that the road could have been fenced at the place in question without inconvenience to the public or danger to defendant's employees. Eaton *v.* Illinois Southern R. Co., 119 Mo. App. 640, 95 S. W. 271. To show ownership of adjoining lands necessary under the Utah St. (1890). Stimpson *v.* Union Pac. R. Co., 8 Utah 349, 31 Pac. 449.

27. Indianapolis, etc., R. Co. *v.* Means, 14 Ind. 30.

28. Cary *v.* St. Louis, etc., R. Co., 60 Mo. 209; Goodwin *v.* Kansas City, etc., R. Co., 43 Mo. App. 359.

or was not one of the places excepted,[29] and if the statute allows a certain time after the road is in operation for the construction of fences that such time had elapsed at the time of the injury complained of.[30]

(B) *Nature and Cause of Injury.*[31] In actions based upon a failure to fence, the liability of the company depends not only upon the absence of a fence, but also upon the nature and cause of the injury,[32] and there must be some evidence either direct or circumstantial to show this fact.[33] It may, however, be shown by circumstantial as well as by direct evidence that the animal was injured by direct collision with a train or locomotive,[34] or otherwise in such a manner as to render the company liable for the injury as a direct and proximate result of its failure to fence;[35] and if the jury could with reasonable certainty have inferred from the circumstances shown that the animal was injured in such manner as to render the company liable, a verdict for plaintiff will not be disturbed;[36] but to sustain a verdict on circumstantial evidence alone, the circumstances shown must have some connection with the facts in issue, and must not be equally consistent with some other theory as to the cause of the injury under whi h defendant would not be liable.[37]

(C) *Place of Entry Upon Track.* In actions based upon the statutory lia-

It is not sufficient where the evidence merely shows that the place of injury was not a public crossing. Sayer *v.* Kansas City, etc., R. Co., 43 Mo. App. 360.

29. Ohio, etc., R. Co. *v.* Brown, 23 Ill. 94.

30. Colorado, etc., R. Co. *v.* Neville, 41 Colo. 393, 92 Pac. 956; Denver, etc., R. Co. *v.* Kelso, 40 Colo. 84, 90 Pac. 65; Chicago, etc., R. Co. *v.* Taylor, 40 Ill. 280; Ohio, etc., R. Co. *v.* Brown, 23 Ill. 94.

Where animals are killed at different times the fact that the road had been in operation for a sufficient length of time to render the company liable for failure to fence may be inferred, at least as to a part of the injuries, from the evidence as to the time intervening between the different injuries. Rockford, etc., R. Co. *v.* Spillers, 67 Ill. 167.

31. Nature and cause of injury in general see *supra*, X, H, 15, k, (II).

32. See *supra*, X, H, 4, a, (XV).

33. Logan *v.* St. Louis, etc., R. Co., 111 Mo. App. 674, 86 S. W. 565.

34. Mayfield *v.* St. Louis, etc., R. Co., 91 Mo. 296, 3 S. W. 201; Dees *v.* St. Louis, etc., R. Co., 127 Mo. App. 353, 104 S. W. 485; Payne *v.* Quincy, etc., R. Co., 113 Mo. App. 609, 88 S. W. 164; Oyler *v.* Quincy, etc., R. Co., 113 Mo. App. 375, 88 S. W. 162; Reed *v.* Chicago, etc., R. Co., 112 Mo. App. 575, 87 S. W. 65; Keltenbaugh *v.* St. Louis, etc., R. Co., 34 Mo. App. 147; Vaughan *v.* Kansas City, etc., R. Co., 34 Mo. App. 141; Ft. Worth, etc., R. Co. *v.* Polson, (Tex. Civ. App. 1907) 106 S. W. 429.

Evidence held sufficient: To show that the injury was caused by direct collision with a train. Illinois Cent. R. Co. *v.* Whalen, 42 Ill. 396; Lake Erie, etc., R. Co. *v.* Mattix, 4 Ind. App. 176, 30 N. E. 811; Cox *v.* Burlington, etc., R. Co., 77 Iowa 478, 42 N. W. 429; Jackson *v.* St. Louis, etc., R. Co., 36 Mo. App. 170. To show that an animal found injured beneath a bridge was not injured by falling from the bridge, but was struck by a locomotive which carried it upon and dropped it from the bridge. Kennedy *v.* Chicago, etc., R. Co., 90 Iowa 754, 57 N. W. 862.

35. Van Slyke *v.* Chicago, etc., R. Co., 80 Iowa 620, 45 N. W. 396; Central Branch Union Pac. R. Co. *v.* Pate, 21 Kan. 539; Hobbs *v.* St. Louis, etc., R. Co., 113 Mo. App. 126, 87 S. W. 525; Meier *v.* Northern Pac. R. Co., (Oreg. 1908) 93 Pac. 691.

Frightening animals.— The facts necessary to sustain a recovery under the Missouri statute making railroad companies liable for injuries to animals due to their being frightened by trains, where the road is not fenced, may be shown by circumstances as well as direct evidence. Hobbs *v.* St. Louis, etc., R. Co., 113 Mo. App. 126, 87 S. W. 525; Brown *v.* Missouri, etc., R. Co., 104 Mo. App. 691, 78 S. W. 273; Doughty *v.* St. Louis, etc., R. Co., 92 Mo. App. 494. See also Shaw *v.* St. Louis, etc., R. Co., 110 Mo. App. 561, 85 S. W. 611 (holding evidence insufficient to sustain a recovery); Carlos *v.* Missouri Pac. R. Co., 106 Mo. App. 574, 80 S. W. 965; Matney *v.* Kansas City, etc., R. Co., 30 Mo. App. 507 (holding evidence sufficient to sustain a recovery under the statute).

36. Lake Erie, etc., R. Co. *v.* Mattix, 4 Ind. App. 176, 30 N. E. 811; Harned *v.* Missouri Pac. R. Co., 51 Mo. App. 482.

37. Asbach *v.* Chicago, etc., R. Co., 74 Iowa 248, 37 N. W. 182 (holding that the circumstances shown were insufficient to sustain a finding that an animal that had fallen from a bridge was driven thereon by a train, instead of going upon the bridge of its own accord); Moore *v.* Burlington, etc., R. Co., 72 Iowa 75, 33 N. W. 371 (holding that the circumstances were not sufficient to sustain a finding that an animal injured in a cattle-guard was driven into the cattle-guard by one of defendant's trains); Perkins *v.* St. Louis, etc., R. Co., 103 Mo. 52, 15 S. W. 320, 11 L. R. A. 426 (holding that the circumstances were not sufficient to sustain a finding that the death of an animal found tangled in a wire fence was due to the animal being frightened by one of defendant's trains);

bility of a railroad company for failure to fence, there must be some evidence that the animal came upon the track at a place where the company was required to fence or maintain cattle-guards;[38] but this need not be shown by direct testimony but may be established by circumstantial evidence,[39] such as the condition of the fence, hoof prints, and other marks or circumstances indicating that the animal entered at such place,[40] and these circumstances may be sufficiently strong to sustain a finding that the animal came upon the track at such place notwithstanding the positive testimony of defendant's servants that it was at a public crossing or other place not required to be fenced,[41] particularly where other facts are shown discrediting their testimony in other respects as to the circumstances of the injury;[42] but a verdict for plaintiff cannot be sustained where there is no direct testimony as to whether the animal came upon the track through a break in the fence or from a neighboring crossing and the circumstances are equally consistent with the latter theory,[43] or where defendant's servants testify positively that the animal came upon the track at a public crossing or depot and their testimony is not impeached or contradicted by plaintiff's witnesses or by circumstantial evidence.[44]

(D) *Defects in Fences and Cattle-Guards.* In order to sustain a recovery on the ground of defects in crossings, fences, or cattle-guards there must be some evidence either direct or from which the jury may reasonably infer the existence of a defective condition,[45] that such condition existed at the time of the injury,[46] that the animal came upon the track at the defective place,[47] and where the defect

Hesse *v.* St. Louis, etc., R. Co., 36 Mo. App. 163 (holding that the circumstances shown were not sufficient to sustain a finding that the animal was injured by collision with a train).

38. Colorado, etc., R. Co. *v.* Neville, 41 Colo. 393, 92 Pac. 956.

39. Louisville, etc., R. Co. *v.* McCullom, 54 Ill. App. 69; Lepp *v.* St. Louis, etc., R. Co., 87 Mo. 139; Gee *v.* St. Louis, etc., R. Co., 80 Mo. 283; McBride *v.* Kansas City, etc., R. Co., 20 Mo. App. 216; Herrell *v.* Chicago, etc., R. Co., 114 Wis. 605, 90 N. W. 1071.

40. McBride *v.* Kansas City, etc., R. Co., 20 Mo. App. 216; Sands *v.* Chicago, etc., R. Co., 78 Nebr. 299, 110 N. W. 855; Missouri Pac. R. Co. *v.* Metzger, 24 Nebr. 90, 38 N. W. 27.

Evidence held sufficient: To show that the animal entered through a gap in the railroad fence instead of from a highway crossing. Terre Haute, etc., R. Co. *v.* Penn, 90 Ind. 284; Daugherty *v.* Chicago, etc., R. Co., 87 Iowa 276, 54 N. W. 219. To sustain a finding that the animal escaped from plaintiff's adjoining premises through defects in the railroad fence. Holtz *v.* Minneapolis, etc., R. Co., 29 Minn. 384, 13 N. W. 147. To show that the animal came upon the right of way over a defective cattle-guard. Herrell *v.* Chicago, etc., R. Co., 114 Wis. 605, 90 N. W. 1071. To show that an animal found injured at a point where the road was fenced was frightened by a train at a place where the road was not fenced and driven over a cattle-guard to a place where it was injured. Green *v.* St. Paul, etc., R. Co., 60 Minn. 134, 61 N. W. 1130.

41. Klay *v.* Chicago, etc., R. Co., 126 Iowa 671, 102 N. W. 526; Craig *v.* Wabash R. Co., 121 Iowa 471, 96 N. W. 965; King *v.* Chicago, etc., R. Co., 88 Iowa 704, 54 N. W. 204; Keyser *v.* Kansas City, etc., R. Co., 56 Iowa 440, 9 N. W. 338; Kansas City, etc., R. Co. *v.* Foster, 39 Kan. 329, 18 Pac. 285; Union Pac. R. Co. *v.* Blum, 23 Nebr. 404, 36 N. W. 589.

42. Vincent *v.* Current River R. Co., 53 Mo. App. 616, where defendant's servants testified that the animal came upon the track at a crossing and was struck on the right side by a west-bound train, and the rebuttal testimony was that no train had passed west at the time of the accident and that the animal was injured on the left side.

43. Rhines *v.* Chicago, etc., R. Co., 75 Iowa 597, 39 N. W. 912.

44. King *v.* Chicago, etc., R. Co., 88 Iowa 704, 54 N. W. 204; Henderson *v.* St. Louis, etc., R. Co., 36 Mo. App. 109; Eaton *v.* McNeil, 31 Oreg. 128, 49 Pac. 875.

45. Illinois Cent. R. Co. *v.* Phalen, 42 Ill. 396; Schmitt *v.* Chicago, etc., R. Co., 99 Iowa 425, 68 N. W. 715; Strong *v.* Chicago, etc., R. Co., 95 Iowa 278, 63 N. W. 699.

Where the height of a fence is shown to be only two feet eight inches in places, no evidence is necessary to show that it is insufficient as the jury may act from their own knowledge of such fact. Leyden *v.* New York Cent., etc., R. Co., 55 Hun (N. Y.) 114, 8 N. Y. Suppl. 187.

Evidence held sufficient to show a defective condition of fences and cattle-guards see International, etc., R. Co. *v.* Barton, (Tex. Civ. App. 1898) 54 S. W. 797.

46. Illinois Cent. R. Co. *v.* Whalen, 42 Ill. 396, holding that evidence that there was a defect in the fence two days after the injury complained of will not alone justify the inference that it was defective when the injury occurred.

47. Peoria, etc., R. Co. *v.* Aten, 43 Ill. App. 68.

The evidence is insufficient to sustain a verdict for plaintiff where it fails to show

is not in the original construction that the company had either actual or constructive notice thereof.[48] These facts, however, may be shown by circumstantial as well as by direct evidence,[49] and proof of actual notice of the defect is not necessary where facts are shown from which it appears that the defect had existed for such time or under such circumstances as to charge the company with constructive notice thereof.[50] So also proof that an animal which was not breachy entered upon the track over a fence that was generally insecure obviates the necessity of showing that it was insecure at the particular point where the animal entered.[51] Where there is direct evidence on both sides and the evidence is conflicting the question is for the jury.[52]

(v) *Crossings, Gates, and Bars.* Where an animal is injured by coming upon a railroad track through an open gate in a railroad fence, a verdict for plaintiff cannot be sustained where there is no evidence as to how the gate came to be open;[53] or, where it is not claimed that defendant's servants opened the gate or had actual notice of its condition, that it had been open for such length of time as to charge the company with notice;[54] nor can a verdict be sustained upon proof of the defective condition of a gate where there is no evidence that the animal injured passed through the gate.[55]

(vi) *Rate of Speed.* Since in the absence of statute or municipal regulation no rate of speed is negligence *per se*, it is not sufficient to support a finding of negligence to show merely the fact of injury and the speed of the train,[56] or to

whether the animal came upon the track through defects in the railroad fence or through an open gate constructed for plaintiff's accommodation and under his control. Missouri, etc., R. Co. *v.* Johnson, (Tex. Civ. App. 1897) 39 S. W. 323.

48. Townsley *v.* Missouri Pac. R. Co., 89 Mo. 31, 1 S. W. 15, holding that it is not sufficient merely to show the existence of a defect in the fence at the place where the animal came upon the track.

49. Scheerer *v.* Chicago, etc., R. Co., 12 Ind. App. 157, 39 N. E. 756; Mikesell *v.* Wabash R. Co., 134 Iowa 736, 112 N. W. 201; Mayfield *v.* St. Louis, etc., R. Co., 91 Mo. 296, 3 S. W. 201; Missouri, etc., R. Co. *v.* Cassinoba, 44 Tex. Civ. App. 625, 99 S. W. 888.

Evidence held sufficient: To show that the railroad fence was inadequate in strength. Archibald *v.* New York Cent. R. Co., 14 N. Y. Suppl. 801. To show that cattle-guards were insufficient. New York, etc., R. Co. *v.* Zumbaugh, 11 Ind. 107, 38 N. E. 531. To show that the animal came upon the track by passing over a cattle-guard and that the cattle-guard was defective. Scheerer *v.* Chicago, etc., R. Co., 12 Ind. App. 157, 39 N. E. 756. To show negligence is not repairing a defect in the fence between the time of notice of the defect and the time of injury. Peet *v.* Chicago, etc., R. Co., 88 Iowa 520, 55 N. W. 508. To show that the animal was killed by reason of getting its foot caught in a defective crossing. Criss *v.* Chicago, etc., R. Co., 88 Iowa 741, 55 N. W. 523. To show that the animal got on the track through a defect at a place where defendant was required to fence and by reason of a failure to repair such defect after ample notice. Mayfield *v.* St. Louis, etc., R. Co., 91 Mo. 296, 3 S. W. 201. To show that the animal came upon the track by reason of defects in the railroad fence. Colyer *v.* Missouri Pac. R. Co., 113 Mo. App. 457, 87 N. W. 572; Schlotzhauer *v.* Missouri, etc., R. Co., 89 Mo. App. 65. To show that the animal came upon the track through a defective fence instead of through a gate. Texas, etc., R. Co. *v.* Owens, (Tex. Civ. App. 1905) 87 S. W. 846. To show that the animals came upon the track at a point where the fence was defective instead of over the fence at a point where it was sufficient. Mikesell *v.* Wabash R. Co., 134 Iowa 736, 112 N. W. 201.

50. Indiana, etc., R. Co. *v.* Dooling, 42 Ill. App. 63; Schlotzhauer *v.* Missouri, etc., R. Co., 89 Mo. App. 65; Foster *v.* St. Louis, etc., R. Co., 44 Mo. App. 11; McGuire *v.* Ogdensburgh, etc., R. Co., 18 N. Y. Suppl. 313.

51. Louisville, etc., R. Co. *v.* Spain, 61 Ind. 460; Leyden *v.* New York Cent., etc., R. Co., 55 Hun (N. Y.) 114, 8 N. Y. Suppl. 187.

52. Myron *v.* Michigan Cent. R. Co., 61 Mich. 387, 28 N. W. 146.

53. Bothwell *v.* Chicago, etc., R. Co., 59 Iowa 192, 13 N. W. 78; Simmons *v.* Poughkeepsie, etc., R. Co., 2 N. Y. App. Div. 117, 37 N. Y. Suppl. 532.

Evidence that defendant's employees had sometimes used the gate in coming to plaintiff's barn to get out of storms is not sufficient to justify a verdict for plaintiff where no witness was able to state that they had used the gate within a month prior to the injury. Simmons *v.* Poughkeepsie, etc., R. Co., 2 N. Y. App. Div. 117, 37 N. Y. Suppl. 532.

54. Chicago, etc., R. Co. *v.* Sierer, 13 Ill. App. 261.

55. Koenigs *v.* Chicago, etc., R. Co., 98 Iowa 569, 65 N. W. 314, 67 N. W. 399.

56. Lord *v.* Chicago, etc., R. Co., 82 Mo. 139; Texas, etc., R. Co. *v.* Langham, (Tex. Civ. App. 1906) 95 S. W. 686.

show merely that the train was running faster than its usual rate of speed,[57] or that the usual rate of speed was not reduced on approaching an ordinary public crossing in an open country;[58] but the rate of speed is proper to be considered in connection with other facts in determining the question of negligence, and proof that the train was running at a high rate of speed under circumstances known to defendant's servants, making a greater degree of precaution necessary, will justify a finding of negligence.[59] Where the issue is merely as to whether the speed of the train was in excess of that allowed by a statute or ordinance, evidence that the train was running "very fast" will justify a finding that it was over eight miles per hour,[60] and where there is a direct conflict between defendant's and plaintiff's witnesses and the preponderance of oral testimony is in favor of defendant, a finding that the rate of speed was over eight miles per hour will be sustained where plaintiff's witnesses are strongly corroborated by the physical circumstances of the case.[61]

(VII) *SIGNALS, LOOKOUTS, AND PRECAUTIONS.* Where the negligence relied on is a failure on the part of the railroad company to give the statutory signals, it is not sufficient for plaintiff to show the fact of injury and the omission of the signal, but there must be some evidence tending to show that the injury was the result of such omission.[62] Upon the issue as to whether the signal was given, the purely negative testimony of witnesses that they did not hear the signal is entitled to little weight, particularly if the witness was not paying any attention to the train or was a considerable distance away,[63] and such evidence is entitled to much less weight than positive testimony of competent witnesses for defendant that such signals were given;[64] but where the attention of the witness was directed to the train at the time or the circumstances were such that he would naturally have heard the signal, his negative testimony is entitled to greater weight and in the absence of contradictory testimony from the engineer or fireman is sufficient to sustain a finding of negligence in this regard,[65] and if plaintiff's witnesses testify positively that the signal was not given, a finding to this effect may be sustained, although defendant's servants in charge of the train testify to the contrary.[66] Where the ground of recovery relied on is a failure to maintain a proper lookout or to exercise proper care to avoid injury to animals seen on or near the track, there must be some evidence reasonably tending to show such negligence;[67] but a finding of negligence in failing to maintain a proper

57. Plaster *v.* Illinois Cent. R. Co., 35 Iowa 449.

58. Connyers *v.* Sioux City, etc., R. Co., 78 Iowa 410, 43 N. W. 267.

59. Baker *v.* Chicago, etc., R. Co., 73 Iowa 389, 35 N. W. 460.

60. Indianapolis, etc., R. Co. *v.* Peyton, 76 Ill. 340.

61. Story *v.* Chicago, etc., R. Co., 79 Iowa 402, 44 N. W. 690, holding that a finding that a train was running at over eight miles per hour upon the station grounds will be sustained where one witness for plaintiff testified that the speed was twenty-five miles per hour and four of defendant's employees testified that it was less than eight, but the evidence further showed that five horses were killed or wounded by actual contact with the train and that two others whose tracks showed that they were running at full speed before the train were overtaken by it and killed.

62. Peoria, etc., R. Co. *v.* Aten, 43 Ill. App. 68; Moore *v.* Chicago, etc., R. Co., 62 Mo. 584; Holman *v.* Chicago, etc., R. Co., 62 Mo. 562.

Evidence held insufficient to support a finding that the failure to give the signal was the cause of the injury see Atchison, etc., R. Co. *v.* Bell, 52 Kan. 134, 34 Pac. 350.

Evidence held sufficient to support a verdict for plaintiff on the ground that the failure to give the signal was the proximate cause of the injury see Southern Kansas R. Co. *v.* Schmidt, 44 Kan. 374, 24 Pac. 496.

63. Summerville *v.* Hannibal, etc., R. Co., 29 Mo. App. 48; Cathcart *v.* Hannibal, etc., R. Co., 19 Mo. App. 113.

64. St. Louis, etc., R. Co. *v.* Manly, 58 Ill. 300; Missouri, etc., R. Co. *v.* McCoy, 7 Indian Terr. 288, 104 S. W. 620; Missouri Pac. R. Co. *v.* Pierce, 39 Kan. 391, 18 Pac. 305; Summerville *v.* Hannibal, etc., R. Co., 29 Mo. App. 48; Cathcart *v.* Hannibal, etc., R. Co., 19 Mo. App. 113.

65. Lockhart *v.* Missouri, etc., R. Co., 89 Mo. App. 100.

66. Heise *v.* Chicago Great Western R. Co., (Iowa 1907) 114 N. W. 180.

67. Howard *v.* Louisville, etc., R. Co., 67 Miss. 247, 7 So. 216, 19 Am. St Rep. 302; Raiford *v.* Mississippi Cent. R. Co., 43 Miss.

lookout may be sustained where it is shown that the animal could have been seen for a sufficient distance within which to stop the train.[68] Where defendant's servants testify positively that there was no negligence or that under the circumstances the injury was unavoidable and they are not impeached or contradicted by plaintiff's witness or by the circumstances of the case, a judgment for plaintiff cannot be sustained;[69] but a verdict for plaintiff is warranted, although defendant's engineer testifies that everything possible was done to avoid the accident if there are facts admitted by him or testified to by others which make the correctness of his opinion fairly disputable.[70]

(VIII) *CONTRIBUTORY NEGLIGENCE OF OWNER.* A judgment for plaintiff cannot be sustained where the undisputed facts show that plaintiff's animals would not have sustained the injuries complained of but for his own negligence directly contributing to produce them,[71] as where it clearly appears that plaintiff

233; Davis *v.* Wabash R. Co., 46 Mo. App. 477.

Evidence held sufficient.— To show negligence in failing to keep a proper lookout. Georgia Cent. R. Co. *v.* Cox, 124 Ga. 143, 52 S. E. 161; Gulf, etc., R. Co. *v.* Josey, (Tex. Civ. App. 1906) 95 S. W. 688; Missouri, etc., R. Co. *v.* Willis, (Tex. Civ. App. 1897) 42 S. W. 371. To show either that the engineer was not keeping a lookout or was guilty of such gross negligence as to be equivalent to intentional injury. Kansas, etc., R. Co. *v.* Hawkins, 82 Miss. 209, 34 So. 323. To sustain a finding that defendant's servants saw the animals upon the track in time to have avoided the injury. Mooers *v.* Northern Pac. R. Co., 69 Minn. 90, 71 N. W. 905. To show that the engineer was warned of the presence of an animal on the track in time to have avoided the injury. Potter, etc., Co. *v.* New York Cent., etc., R. Co., 22 Misc. (N. Y.) 10, 48 N. Y. Suppl. 446. To show negligence in failing to stop or slacken the speed of the train after discovery of the animal upon the track. Johnson *v.* Chicago, etc., R. Co., 122 Iowa 556, 98 N. W. 312; Buckman *v.* Missouri, etc., R. Co., 100 Mo. App. 30, 73 S. W. 270; Missouri, etc., R. Co. *v.* Rodgers, (Tex. Civ. App. 1905) 86 S. W. 625.

68. *Colorado.*— Colorado, etc., R. Co. *v.* Charles, 36 Colo. 221, 84 Pac. 67.

Illinois.— Toledo, etc., R. Co. *v.* Ingraham, 58 Ill. 120.

Kansas.— Kansas City, etc., R. Co. *v.* Hines, 32 Kan. 619, 5 Pac. 172.

Kentucky.— Louisville, etc., R. Co. *v.* Jones, 52 S. W. 938, 21 Ky. L. Rep. 749.

Nebraska.— Stading *v.* Chicago, etc., R. Co., 78 Nebr. 566, 111 N. W. 460.

Tennessee.— Illinois Cent. R. Co. *v.* Abernathey, 106 Tenn. 722, 64 S. W. 3.

Texas.—San Antonio, etc., R. Co. *v.* Yeager, (Civ. App. 1897) 43 S. W. 25.

See 41 Cent. Dig. tit. "Railroads," § 1618.

In the absence of any evidence as to when the animal went upon the track the mere fact that at the place where it was killed an animal could have been seen for a sufficient distance to stop the train is not sufficient to show negligence. Kansas City, etc., R. Co. *v.* Bolson, 36 Kan. 534, 14 Pac. 5.

If the evidence is conflicting as to the character of the night and the distance that an animal could be seen but there is evidence to sustain the finding of the jury, a verdict for plaintiff will not be disturbed. Jacksonville, etc., R. Co. *v.* Hunter, 26 Fla. 308, 8 So. 450.

69. *Alabama.*— Central R., etc., Co. *v.* Ingram, 95 Ala. 152, 10 So. 516.

Kansas.— Union Pac. R. Co. *v.* Shannon, 38 Kan. 476, 16 Pac. 836; Kansas City, etc., R. Co. *v.* Bolson, 36 Kan. 534, 14 Pac. 5.

Kentucky.— Newport News, etc., R. Co. *v.* Mitchell, (1896) 33 S. W. 622, 17 Ky. L. Rep. 1086.

Mississippi.— Louisville, etc., R. Co. *v.* Tate, 70 Miss. 348, 12 So. 333; Kansas City, etc., R. Co. *v.* Deaton, (1891) 9 So. 828.

United States.— Jones *v.* Bond, 40 Fed. 281.

See 41 Cent. Dig. tit. "Railroads," § 1618.

70. Mobile, etc., R. Co. *v.* Gunn, 68 Miss. 366, 8 So. 648.

Where the engineer testifies that both animals killed came suddenly upon the track, immediately in front of the engine, and his testimony is directly contradicted by circumstantial evidence showing from the location of the bodies, etc., that the animals were, when injured, one hundred yards apart, and on a straight track the view of which was unobscured, a verdict for plaintiff will be sustained. Peirce *v.* Wright, 73 Ill. App. 512.

71. Damrill *v.* St. Louis, etc., R. Co., 27 Mo. App. 202.

Where defendant shunted cars on to a side-track by means of a flying switch from a train which passed at a certain hour each day, which fact was known to plaintiff, who did not remove his horses from the track at the time the cars were shunted in, he claiming that the train was ahead of time and that he had no reason to expect it, a judgment for plaintiff cannot be sustained where defendant's servants testify positively and without any substantial contradiction that the train was not ahead of time. Good *v.* New York, etc., R. Co., 2 N. Y. Suppl. 419.

Driving cattle across track at time for train to pass.— Where the evidence shows that plaintiff habitually drove up a herd of cattle in the evening so that they would be crossing the track at about the usual time for defendant's train to pass, and that he had been repeatedly warned of the danger, he cannot recover for injuries thereto. Cranston *v.*

failed to stop, look, and listen before driving the animals upon the crossing,[72] and in such cases the court should direct a verdict for defendant or sustain a demurrer to the evidence;[73] but the fact that a horse or team was left unhitched and unattended in the vicinity of a railroad track is not conclusive evidence of such contributory negligence on the part of plaintiff as to bar a recovery,[74] and it is error for the court to direct a verdict for defendant upon such evidence.[75]

(IX) *WILFUL, WANTON, OR GROSS NEGLIGENCE.* A verdict based upon the ground of gross negligence or wilful injury cannot be sustained where the engineer testifies, without being contradicted either by direct testimony or the circumstances, that the injury was not intentional and the circumstances do not show gross negligence in the operation of the train,[76] or where the animal was a trespasser and there is no evidence that it was seen by the engineer who testifies that he did not see it.[77]

l. Damages — (I) *IN GENERAL.*[78] In the absence of statute or of any circumstances of aggravation or mitigation the measure of damages is the actual or market value of the animal at the time of the injury if it was killed outright,[79] or so badly injured as to necessitate its being killed.[80] If the animal was merely wounded it has been held that the measure of damages is the difference in the market value of the animal immediately before and after the injury;[81] but in other decisions this rule has been expressly disapproved,[82] and it is held that plaintiff should recover the diminution in market value after the animal was cured or restored to usefulness so far as a cure was effected,[83] and in addition thereto the amount reasonably expended in caring for the animal and attempting to cure the injury,[84] and also the value of the use of the animal during such period

Cincinnati, etc., R. Co., 1 Handy (Ohio) 193, 12 Ohio Dec. (Reprint) 97.

72. Damrill *v.* St. Louis, etc., R. Co., 27 Mo. App. 202; Brennan *v.* Pennsylvania R. Co., 73 N. J. L. 147, 62 Atl. 177; Mesic *v.* Atlantic, etc., R. Co., 120 N. C. 489, 26 S. E. 633.

73. Damrill *v.* St. Louis, etc., R. Co., 27 Mo. App. 202.

74. O'Leary *v.* Chicago, etc., R. Co., (Iowa 1905) 103 N. W. 362; Southworth *v.* Old Colony, etc., R. Co., 105 Mass. 342, 7 Am. Rep. 528; Texas Cent. R. Co. *v.* Harbison, (Tex. Civ. App. 1903) 75 S. W. 549.

75. Southworth *v.* Old Colony, etc., R. Co., 105 Mass. 342, 7 Am. Rep. 528.

76. Indiana, etc., R. Co. *v.* Overton, 117 Ind. 253, 20 N. E. 147; Lynch *v.* Northern Pac. R. Co., 84 Wis. 348, 54 N. W. 610; Jones *v.* Chicago, etc., R. Co., 77 Wis. 585, 46 N. W. 884.

77. Russell *v.* Maine Cent. R. Co., 100 Me. 406, 61 Atl. 899.

78. See, generally, DAMAGES, 13 Cyc. 1.

79. Lapine *v.* New Orleans, etc., R. Co., 20 La. Ann. 158; Houston, etc., R. Co. *v.* Loughbridge, 1 Tex. Civ. App. § 1300; Texas, etc., R. Co. *v.* Lanham, 1 Tex. App. Civ. Cas. § 251.

The test is not what the owner or some particular individual might give or take for the animal, but what it was intrinsically worth. Galveston, etc., R. Co. *v.* Davis, 1 Tex. App. Civ. Cas. § 147.

A verdict for a sum between the highest and lowest values put upon the stock by the different witnesses will be sustained, although no witness testified to the exact amount found. Western, etc., R. Co. *v.* Brown, 58 Ga. 534.

Where a railroad company is bound by contract to maintain certain fences and cattle-guards and fails to do so, the measure of damages for stock killed in consequence is the value of the stock and not the cost of erecting and maintaining such fences and cattle-guards. Chicago, etc., R. Co. *v.* Barnes, 116 Ind. 126, 18 N. E. 459.

80. Indianapolis, etc., R. Co. *v.* Mnstard, 34 Ind. 50; Atchison, etc., R. Co. *v.* Ireland, 19 Kan. 405.

81. St. Louis, etc., R. Co. *v.* Biggs, 50 Ark. 169, 6 S. W. 724; Illinois Cent. R. Co. *v.* Finnigan, 21 Ill. 646.

If the owner abandons an animal without notice to the railroad company, where it is merely wounded and it strays away and is lost or stolen, he cannot recover the full value thereof. Jackson *v.* St. Louis, etc., R. Co., 74 Mo. 526.

82. Gillett *v.* Western R. Corp., 8 Allen (Mass.) 560; Pittsburg, etc., R. Co. *v.* Kelly, 12 Ohio Cir. Ct. 341, 5 Ohio Cir. Dec. 662.

83. Gillett *v.* Western R. Corp., 8 Allen (Mass.) 560; Keyes *v.* Minneapolis, etc., R. Co., 36 Minn. 290, 30 N. W. 888; Pittsburg, etc., R. Co. *v.* Kelly, 12 Ohio Cir. Ct. 341, 5 Ohio Cir. Dec. 662.

84. Gillett *v.* Western R. Corp., 8 Allen (Mass.) 560; Keyes *v.* Minneapolis, etc., R. Co., 36 Minn. 290, 30 N. W. 888; Pittsburg, etc., R. Co. *v.* Kelly, 12 Ohio Cir. Ct. 341, 6 Ohio Cir. Dec. 662; International, etc., R. Co. *v.* Cocke, 64 Tex. 151.

If the value immediately after the injury is used in computing the decrease in market value, plaintiff cannot also be allowed compensation for expenses incurred in curing the

as the owner was deprived thereof,[85] provided the whole damages do not exceed the original value of the animal.[86] It has also been held that, although the owner's efforts are unsuccessful and the animal dies, he may still recover in addition to the value of the animal the amount expended in caring therefor,[87] provided his efforts were in good faith and there was reasonable ground to believe that the animal could be cured or restored to usefulness.[88] In determining the value of an animal the jury may consider all of its qualities and all the circumstances that would affect its actual or market value,[89] but not matters peculiar to plaintiff growing out of the character of his business.[90]

(II) *DOUBLE DAMAGES.* In some jurisdictions there are statutes authorizing plaintiff to recover double damages for injuries to animals occasioned by a failure of the railroad company to fence its tracks,[91] or for injuries due to a failure to fence where the claim is not paid within a certain time after presentation,[92] or where the company fails to post notices of the injury as required by law;[93] but these statutes are so far penal that they will not be construed as applicable to cases not clearly within their scope and intent.[94] Either the court or the jury may

injury. Louisville, etc., R. Co. *v.* Schweitzer, 11 Ky. L. Rep. 310. But see Smith *v.* Chicago, etc., R. Co., 127 Mo. App. 160, 105 S. W. 10; Hax *v.* Quincy, etc., R. Co., 123 Mo. App. 172, 100 S. W. 693, each holding that the measure of damages is the difference in value before and immediately after the injury, together with the expense incurred or value of the time spent in a reasonable endeavor to cure the animal injured.

85. Fritts *v.* New York, etc., R. Co., 62 Conn. 503, 26 Atl. 347; Keyes *v.* Minneapolis, etc., R. Co., 36 Minn. 290, 30 N. W. 888; Pittsburg, etc., R. Co. *v.* Kelly, 12 Ohio Cir. Ct. 341, 5 Ohio Cir. Dec. 662.

86. Gillett *v.* Western R. Corp., 8 Allen (Mass.) 560; Keyes *v.* Minneapolis, etc., R. Co., 36 Minn. 290, 30 N. W. 888.

87. Finch *v.* Iowa Cent. R. Co., 42 Iowa 304; St. Louis Southwestern R. Co. *v.* Chambliss, (Tex. Civ. App. 1899) 54 S. W. 401. *Contra*, Cully *v.* Louisville, etc., R. Co., 101 Ky. 319, 41 S. W. 21, 19 Ky. L. Rep. 490.

88. St. Louis Southwestern R. Co. *v.* Chambliss, (Tex. Civ. App. 1899) 54 S. W. 401.

89. Central Branch Union Pac. R. Co. *v.* Nichols, 24 Kan. 242.

The fact that a mare was with foal at the time she was killed may properly be regarded as increasing her value and considered in estimating the damages sustained. Boyer *v.* Chicago, etc., R. Co., 123 Iowa 248, 98 N. W. 764.

Runaway team.— Plaintiff is entitled to recover the decrease in the market value of a team due to its having run away after being negligently frightened by defendant's trains. Fritts *v.* New York, etc., R. Co., 62 Conn. 503, 26 Atl. 347.

90. Parrin *v.* Montana Cent. R. Co., 22 Mont. 290, 56 Pac. 315.

91. Lafferty *v.* Hannibal, etc., R. Co., 44 Mo. 291; Kelteuhaugh *v.* St. Louis, etc., R. Co., 34 Mo. App. 147.

There must be an actual collision with the train in order to enable plaintiff to recover under the Missouri Double Damage Act. Siebert *v.* Missouri, etc., R. Co., 72 Mo. 565; Lowry *v.* St. Louis, etc., R. Co., 40 Mo. App. 554.

92. Boyer *v.* Chicago, etc., R. Co., 123 Iowa 248, 98 N. W. 764; Black *v.* Minneapolis, etc., R. Co., 122 Iowa 32, 96 N. W. 984; Hammans *v.* Chicago, etc., R. Co., 83 Iowa 287, 48 N. W. 978; Manwell *v.* Burlington, etc., R. Co., 80 Iowa 662, 45 N. W. 568.

An affidavit of the injury stating that it occurred because defendant had "fenced up the crossing" estops plaintiff to claim double damages which the statute allows only in cases of injuries due to a want of a fence. Davis *v.* Chicago, etc., R. Co., 40 Iowa 292.

A tender of damages does not affect defendant's liability for double damages unless the full value as subsequently found by the jury is tendered. Brandt *v.* Chicago, etc., R. Co., 26 Iowa 114.

93. St. Louis, etc., R. Co. *v.* Wright, 57 Ark. 327, 21 S. W. 476; Memphis, etc., R. Co. *v.* Carlley, 39 Ark. 246.

Under a statute authorizing the recovery of double damages if notice of the injury is not posted by the company such damages may be recovered, although the owner has actual notice of the injury (Memphis, etc., R. Co. *v.* Carlley, 39 Ark. 246); the posting of such notice at any public place at the nearest station house is sufficient (St. Louis, etc., R. Co. *v.* Wright, 57 Ark. 327, 21 S. W. 476); the burden is upon plaintiff to show that such notice was not posted (Kansas, etc., R. Co. *v.* Summers, 45 Ark. 295); but it is sufficient to make a *prima facie* case to show that on several examinations of defendant's station no notice was found either at the usual place of posting or in front of the building (St Louis, etc., R. Co. *v.* Wright, 57 Ark. 327, 21 S. W. 476. But see St. Louis, etc., R. Co. *v.* Markham, 66 Ark. 297, 50 S. W. 516, holding that evidence that no notice was posted at the time of an examination made six hours before the expiration of the time allowed for posting is not sufficient to sustain a judgment for double damages).

94. Moriarty *v.* Central Iowa R. Co., 64 Iowa 696, 21 N. W. 143 (holding that the statute authorizing double damages for injuries due to a failure to fence, where the claim is not paid within thirty days, does not apply to an injury due to a defective con-

double the actual damages found to have been sustained,[95] and the owner may recover not only double the depreciation in value of his animal because of the injury, but also double damages for the care, attention, medicine, and other expenses directly resulting therefrom;[96] but he cannot recover more than the amount of damages as stated in his notice of the injury.[97]

(III) *ATTORNEY'S FEES AND COSTS.*[98] In the absence of statute attorney's fees cannot be recovered in an action for injuries to animals;[99] but under some of the statutes plaintiff may recover in addition to his actual damages a reasonable attorney's fee in actions based upon a failure of the railroad company to fence its tracks,[1] or where the statutes provide for a demand or notice of claim to be served upon the company and the same is not paid within a certain time after presentation.[2] Plaintiff's right to attorney's fees is not affected by his claiming a larger amount of damages in his notice than that subsequently awarded,[3] nor is defendant's liability for double the full amount affected by a tender of any less amount.[4] The attorney's fee may be recovered in the action for damages without bringing a separate action,[5] and may be recovered for a second as well as the first trial,[6] and the amount should be determined by the jury instead of the court unless a jury is waived.[7] Where the action is originally brought before a justice of the peace and plaintiff successfully prosecutes an appeal from a judgment for defendant, he is entitled to recover for the services of his attorney before the justice,[8] but he is only entitled to such fees where a judgment for damages is rendered against the company, and a mere reversal in an appellate court of a judgment against plaintiff does not entitle him to attorney's fees unless he is successful on the subsequent trial.[9] Under a Minnesota statute plaintiff may recover double costs unless prior to the institution of an action defendant makes a tender of the damages sustained, provided the action is not instituted before the expiration of the thirty days allowed for making such tender.[10]

dition of a cattle-guard); Miller *v.* Chicago, etc., R. Co., 59 Iowa 707, 13 N. W. 859 (holding that this statute does not apply to injuries due to running trains on depot grounds at a prohibited rate of speed).

95. Memphis, etc., R. Co. *v.* Carlley, 39 Ark. 246.

96. Manwell *v.* Burlington, etc., R. Co., 80 Iowa 662, 45 N. W. 568. But see Huss *v.* Wabash, etc., R. Co., 84 Mo. App. 111, holding that plaintiff cannot recover double damages for the damage to the harness on a horse at the time of the injury.

97. Manwell *v.* Burlington, etc., R. Co., 80 Iowa 662, 45 N. W. 568.

98. See, generally, COSTS, 11 Cyc. 1104.

99. Florida Cent. R. Co. *v.* Seymour, 44 Fla. 557, 33 So. 424, holding that St. (1891) authorizing the recovery of attorney's fees in certain cases does not apply to cases where the road is fenced.

1. Wabash, etc., R. Co. *v.* Levieux, 14 Ill. App. 469; Dilly *v.* Omaha, etc., R. Co., 55 Mo. App. 123.

It is only in actions based upon a failure to fence that the attorney's fee is allowable (Wabash, etc., R. Co. *v.* Lavieux, 14 Ill. App. 469; Wabash, etc., R. Co. *v.* Neikirk, 13 Ill. App. 387. See also Wabash, etc., R. Co. *v.* Crews, 65 Ill. App. 442); so in an action upon four counts, some charging a failure to fence and others negligence in the operation of the train, a general verdict based upon such declaration will not support an allowance of attorney's fees (Chicago, etc., R. Co. *v.* Truitt, 68 Ill. App. 76); but in an action based upon a failure to fence the fact that the evidence also shows negligence in the operation of the train does not take the case out of the statute or affect the right to recover attorney's fees (Central Branch Union Pac. R. Co. *v.* Nichols, 24 Kan. 242).

2. Pensacola, etc., R. Co. *v.* Braxton, 34 Fla. 471, 16 So. 317; Missouri Pac. R. Co. *v.* Abney, 30 Kan. 41, 1 Pac. 385; Kansas Pac. R. Co. *v.* Ball, 19 Kan. 535.

The Florida statute of 1891 providing for the recovery of attorney's fees was not repealed by the act of 1893. Florida, etc., R. Co. *v.* Hazel, 43 Fla. 263, 31 So. 272.

3. Pensacola, etc., R. Co. *v.* Braxton, 34 Fla. 471, 16 So. 317; Missouri Pac. R. Co. *v.* Abney, 30 Kan. 41, 1 Pac. 385; Missouri Pac. R. Co. *v.* Borrer, 3 Kan. App. 284, 45 Pac. 133.

4. Pensacola, etc., R. Co. *v.* Braxton, 34 Fla. 471, 16 So. 317.

5. Wabash, etc., R. Co. *v.* Lavieux, 14 Ill. App. 469.

6. Indianapolis, etc., R. Co. *v.* Buckles, 21 Ill. App. 181.

7. Lake Erie, etc., R. Co. *v.* Helmericks, 38 Ill. App. 141; Kauffman *v.* Kansas City, etc., R. Co., 67 Mo. App. 156; Dilly *v.* Omaha, etc., R. Co., 55 Mo. App. 123.

8. Missouri River, etc., R. Co. *v.* Shirley, 20 Kan. 660.

9. Rabbermann *v.* Pierce, 77 Ill. App. 405.

10. Hooper *v.* Chicago, etc., R. Co., 37 Minn. 52, 33 N. W. 314, holding that if the action

(IV) *INTEREST.*[11] In some jurisdictions it is held that interest may be recovered on the amount of damages from the date of the injury,[12] but in others no interest prior to the rendition of judgment is allowed.[13]

(V) *DISPOSITION OF CARCASS OF ANIMAL.* Even where animals are killed outright their value is not always the measure of damages, the actual damages being the difference in value between the animal alive and the net value of the dead carcass.[14] The amount of damages must therefore be proportionately reduced where plaintiff appropriates or disposes of the carcass,[15] or where it was valuable for beef or other purposes and he could have profitably disposed of it,[16] it being plaintiff's duty to exercise reasonable care to make such disposition in order to reduce the amount of damages;[17] but only the net value is to be deducted, plaintiff being entitled to reasonable compensation for his time and expenses.[18] Plaintiff must also be allowed a reasonable time to dispose of the carcass,[19] and where from its location or condition when found it would be impracticable to dispose of it plaintiff is not required to make any effort to do so but may sue for and recover the full value.[20]

(VI) *EXEMPLARY DAMAGES.* Exemplary damages may be awarded where the injury is due to gross negligence or wanton or wilful misconduct on the part of the company's employees;[21] but in the absence of such circumstances only

is instituted prior to the expiration of this period such costs cannot be recovered.

11. See DAMAGES, 13 Cyc. 88.

12. *Alabama.*— Georgia Pac. R. Co. *v.* Fullerton, 79 Ala. 298; Alabama Great Southern R. Co. *v.* McAlpine, 75 Ala. 113.

Arkansas.— St. Louis, etc., R. Co. *v.* Biggs, 50 Ark. 169, 6 S. W. 724.

Minnesota.— Varco *v.* Chicago, etc., R. Co., 30 Minn. 18, 13 N. W. 921.

New York.—Lackin *v.* Delaware, etc., Canal Co., 22 Hun 309.

Ohio.— Baltimore, etc., R. Co. *v.* Schutz, 43 Ohio St. 270, 1 N. E. 324, 50 Am. Rep. 805.

See 41 Cent. Dig. tit. "Railroads," § 1621.

In Florida the statute provides that in actions based upon a failure to fence if plaintiff serves a notice of his claim upon defendant and the same is not paid within thirty days he may recover in addition to the actual damages interest thereon at the rate of fifty per cent from the date of presentment of the claim. Pensacola, etc., R. Co. *v.* Braxton, 34 Fla. 471, 16 So. 317.

In Georgia it is held that the jury may allow interest but are not obliged to do so, and that it is error for the court to instruct the jury that they should add interest to the damages found. Western, etc., R. Co. *v.* Calhoun, 104 Ga. 384, 30 S. E. 868.

In Utah it is held that interest is allowable at the legal rate to be computed from the time of instituting suit. Woodland *v.* Union Pac. R. Co., (1891) 26 Pac. 298.

13. *Illinois.*— Toledo, etc., R. Co. *v.* Johnston, 74 Ill. 83.

Iowa.— Brentner *v.* Chicago, etc., R. Co., 68 Iowa 530, 23 N. W. 245, 27 N. W. 605.

Kansas.— Atchison, etc., R. Co. *v.* Gabbert, 34 Kan. 132, 8 Pac. 218.

Missouri.— Meyer *v.* Atlantic, etc., R. Co., 64 Mo. 542.

Texas.— St. Louis, etc., R. Co. *v.* Chambliss, 93 Tex. 62, 53 S. W. 343; Houston, etc., R. Co. *v.* Muldrow, 54 Tex. 233; International, etc., R. Co. *v.* Barton, (Civ. App. 1899) 54 S. W. 797; St. Louis, etc., R. Co. *v.* Terry, 22 Tex. Civ. App. 176, 54 S. W. 431; Galveston, etc., R. Co. *v.* Downey, (Civ. App. 1894) 28 S. W. 109. But see Texas, etc., R. Co. *v.* Scrivener, (Civ. App. 1899) 49 S. W. 649; Houston, etc., R. Co. *v.* Jones, 16 Tex. Civ. App. 179, 40 S. W. 745; Gulf, etc., R. Co. *v.* Dunman, 6 Tex. Civ. App. 101, 24 S. W. 995.

Wisconsin.— See Dean *v.* Chicago, etc., R. Co., 43 Wis. 305.

See 41 Cent. Dig. tit. "Railroads," § 1621.

14. Georgia Pac. R. Co. *v.* Fullerton, 79 Ala. 298; Roberts *v.* Richmond, etc., R. Co., 88 N. C. 560.

15. Case *v.* St. Louis, etc., R. Co., 75 Mo. 668.

16. Illinois Cent. R. Co. *v.* Finnigan, 21 Ill. 646; Roberts *v.* Richmond, etc., R. Co., 88 N. C. 560.

17. Georgia Pac. R. Co. *v.* Fullerton, 79 Ala. 298; Illinois Cent. R. Co. *v.* Finnigan, 21 Ill. 646; Roberts *v.* Richmond, etc., R. Co., 88 N. C. 560. *Compare* Indianapolis, etc., R. Co. *v.* Mustard, 34 Ind. 50, holding that where plaintiff's animal was so badly injured as to necessitate it being killed, the damages could not be reduced on account of the value of the dead animal unless plaintiff in some way derived an actual benefit or did some act evincing an election to appropriate it to himself.

18. Georgia Pac. R. Co. *v.* Fullerton, 79 Ala. 298; Dean *v.* Chicago, etc., R. Co., 43 Wis. 305.

19. Toledo, etc., R. Co. *v.* Parker, 49 Ill. 385.

20. Rockford, etc., R. Co. *v.* Lynch, 67 Ill. 149; Toledo, etc., R. Co. *v.* Sweeney, 41 Ill. 226.

21. Vicksburg, etc., R. Co. *v.* Patton, 31 Miss. 156, 66 Am. Dec. 552. But see Galveston, etc., R. Co. *v.* Davis, 1 Tex. App. Civ. Cas. § 147, holding that, although the killing of an animal is the wanton or malicious act of the engineer or other employee the com-

compensatory damages can be allowed, as where the injury is due merely to ordinary negligence,[22] or a failure of the railroad company to fence its tracks.[23]

m. Questions For Jury — (i) *In General.* In actions for injury to animals as in other civil actions questions of law are for the determination of the court and issues of fact are for the jury.[24] The case should be submitted to the jury whenever there is any evidence from which they might justifiably find the existence of a material fact in issue,[25] or where the evidence is conflicting or of such a character that different conclusions as to a fact in issue might reasonably be drawn therefrom;[26] but whether there is any competent evidence is a question for the court,[27] and an issue should not be submitted to the jury where there is no evidence to support it,[28] or where the evidence is legally insufficient to sustain a verdict if rendered;[29] and if the evidence is not conflicting and is of such a character that only one inference can be drawn therefrom, it is not error for the court affirmatively to instruct the jury in accordance with such inference.[30]

(ii) *Fact or Cause of Injury.* It is not necessary that there should be any direct evidence that the injury complained of was done by defendant's trains, but the case should be submitted to the jury if there is any circumstantial evidence reasonably tending to show that it was so inflicted.[31]

pany will not be liable for exemplary damages unless it authorized or approved the act.

22. Yazoo, etc., R. Co. *v.* Brumfield, (Miss. 1888) 4 So. 341; Chicago, etc., R. Co. *v.* Jarrett, 59 Miss. 470.

23. Toledo, etc., R. Co. *v.* Johnston, 74 Ill. 83; Toledo, etc., R. Co. *v.* Arnold, 43 Ill. 418.

24. See, generally, Trial.

25. Brinkley *v.* Wilmington, etc., R. Co., 126 N. C. 88, 35 S. E. 238; Boing *v.* Raleigh, etc., R. Co., 87 N. C. 360.

26. *Alabama.*— Louisville, etc., R. Co. *v.* Lancaster, 121 Ala. 471, 25 So. 733.

Indiana.— Overton *v.* Indiana, etc., R. Co., 1 Ind. App. 436, 27 N. E. 651.

New York.— Payne *v.* Troy, etc., R. Co., 83 N. Y. 572.

Oregon.— Jackson *v.* Sumpter Valley R. Co., 50 Oreg. 455, 93 Pac. 356.

Utah.— Wines *v.* Rio Grande Western R. Co., 9 Utah 228, 33 Pac. 1042.

See 41 Cent. Dig. tit. "Railroads," § 1627.

Wanton or wilful injury.— Where there is evidence on the part of plaintiff that the track was straight and the engineer was looking in the direction of an animal upon the track and that the speed of the train was increased and no alarm signal given or attempt made to frighten the animal, it is a question for the jury whether the injury was wilful. Overton *v.* Indiana, etc., R. Co., 1 Ind. App. 436, 27 N. E. 651.

Attracting animals to track.— Where the evidence shows that the animal was attracted by salt upon the track and that it had been there for over a day before the accident during which time defendant's employees had passed over the track at that place and might have seen it, there is sufficient evidence of defendant's negligence to go to the jury. Brown *v.* Hannibal, etc., R. Co., 27 Mo. App. 394.

Safety of station grounds.— Whether a railroad company has used reasonable care to guard against frightening teams which are being used to unload cars at its station grounds, and whether an injury to a team resulting from such fright was due to want of such care, are questions for the jury. Rill *v.* Rome, etc., R. Co., 23 N. Y. Wkly. Dig. 416.

Presentation of claim.— Evidence of presentation of a claim for damages to a railroad company's agent who promised to forward it and who had previously received similar claims and paid them, is sufficient to go to the jury on the question of proper presentation, although there is evidence that the agent had in fact no such authority. Alabama Great Southern R. Co. *v.* Roebuck, 76 Ala. 277.

The sufficiency of the service of a notice of stock killed by defendant railroad company is a question of law for the court where the proof is in writing or the facts uncontradicted, but if the fact of service or the authority of the agent upon whom it is served is in issue, these are questions of fact for the jury. Cole *v.* Chicago, etc., R. Co., 38 Iowa 311.

Where defendant voluntarily fences its tracks and leaves a gap in the fence for its own convenience through which an animal enters and is killed by a train, it is a question for the jury, since the animal entered and its egress was obstructed by the act of the company, whether the railroad company was negligent, although it appears that those in charge of the train adopted the ordinary precautions to avoid the injury after the animal was discovered. Tyler *v.* Illinois Cent. R. Co., 61 Miss. 445.

27. Boing *v.* Raleigh, etc., R. Co., 87 N. C. 360.

28. Burlington, etc., R. Co. *v.* Campbell, 20 Colo. App. 360, 78 Pac. 1072; Flannery *v.* Kansas City, etc., R. Co., 23 Mo. App. 120 [*affirmed* in 97 Mo. 192, 10 S. W. 894].

29. Walton *v.* Wabash R. Co., 32 Mo. App. 634; International, etc., R. Co. *v.* Hall, 12 Tex. Civ. App. 11, 33 S. W. 127.

30. Anderson *v.* Birmingham Mineral R. Co., 109 Ala. 128, 19 So. 519.

31. *Alabama.*— Louisville, etc., R. Co. *v.* Lancaster, 121 Ala. 471, 25 So. 733.

(III) *Character and Condition of Crossings.* Where the evidence is conflicting or different conclusions might reasonably be drawn therefrom, it is a question for the jury whether the crossing at the intersection of a public highway was constructed and maintained by defendant in a safe and proper condition.[32]

(IV) *Negligent Operation of Trains.* Whether a railroad company has been negligent, or in other words has failed to exercise ordinary and reasonable care under the circumstances of the particular case is ordinarily a question of fact for the jury.[33] The issue should be submitted to the jury if there is any evidence reasonably tending to show negligence,[34] or where the evidence relating thereto is conflicting,[35] or is of such a character that different conclusions or inferences might reasonably be drawn therefrom;[36] but the case should not be submitted

Georgia.— Central R., etc., Co. *v.* Bryant, 89 Ga. 457, 15 S. E. 537.

Mississippi.— Johnson *v.* Illinois Cent. R. Co., (1906) 39 So. 780.

North Carolina.— Boing *v.* Raleigh, etc., R. Co., 87 N. C. 360.

South Carolina.— Rowe *v.* Greenville, etc., R. Co., 7 S. C. 167.

See 41 Cent. Dig. tit. "Railroads," §§ 1628, 1629.

As connected with failure to fence tracks see *infra*, X, H, 15, m, (VI), (A).

32. Perdue *v.* St. Louis Southwestern R. Co., 82 Ark. 172, 100 S. W. 901; Payne *v.* Troy, etc., R. Co., 83 N. Y. 572; Yates *v.* New York Cent., etc., R. Co., 107 N. Y. App. Div. 629, 95 N. Y. Suppl. 497; Thompson *v.* Seaboard Air Line R. Co., 78 S. C. 384, 58 S. E. 1094.

Where the approaches to a crossing are not constructed exactly opposite to each other, it is a question for the jury whether it is such a defect as to render the company liable for animals alleged to have been injured by reason of the condition of the crossing. Meeker *v.* Chicago, etc., R. Co., 64 Iowa 641, 21 N. W. 120.

The fact that a spike had become loose which held a rail to a tie at the crossing and had worked up so that a mule caught his shoe upon it and was injured is not sufficient to establish negligence as a matter of law. Perdue *v.* St. Louis Southwestern R. Co., 82 Ark. 172, 100 S. W. 901.

33. *Alabama.*—Southern R. Co. *v.* Pogue, 145 Ala. 444, 40 So. 565; Alabama Great Southern R. Co. *v.* Jones, 71 Ala. 487.

Arkansas.— Arkansas, etc., R. Co. *v.* Sanders, 81 Ark. 604, 99 S. W. 1109; St. Louis, etc., R. Co. *v.* Lewis, 60 Ark. 409, 30 S. W. 765, 1135.

Georgia.—Savannah, etc., R. Co. *v.* Stewart, 72 Ga. 207.

Illinois.— Toledo, etc., R. Co. *v.* Foster, 43 Ill. 415.

Iowa.—Edson *v.* Central R. Co., 40 Iowa 47.

Maryland.— Norfolk, etc., R. Co. *v.* Smith, 104 Md. 72, 64 Atl. 317.

Mississippi.— McMillan *v.* Southern R. Co., 75 Miss. 490, 23 So. 182.

New Mexico.— Pecos Valley, etc., R. Co. *v.* Cazier, 13 N. M. 131, 79 Pac. 714.

North Dakota.— Bishop *v.* Chicago, etc., R. Co., 4 N. D. 536, 62 N. W 605.

See 41 Cent. Dig. tit. "Railroads," §§ 1627, 1637.

Negligence becomes a question for the court only when the facts are undisputed and the deductions or inferences to be drawn from them are indisputable, or when the standard and measure of duty are fixed and defined by law and are the same under all circumstances. Alabama Great Southern R. Co. *v.* Jones, 71 Ala. 487.

34. Haardt *v.* Georgia Cent. R. Co., 152 Ala. 193, 44 So. 547; Hogue *v.* Southern R. Co., 146 Ala. 384, 41 So. 425; Georgia Cent. R. Co. *v.* Main, 143 Ala. 149, 42 So. 108; East Tennessee, etc., R. Co. *v.* Baker, 94 Ala. 632, 10 So. 211; Denver, etc., R. Co. *v.* Henderson, 10 Colo. 1, 13 Pac. 910; Kansas City, etc., R. Co. *v.* Cravens, 43 Kan. 650, 23 Pac. 1044; Brinkley *v.* Wilmington, etc., R. Co., 126 N. C. 88, 35 S. E. 238.

Plaintiff is entitled to go to the jury on every element of negligence charged which there is evidence tending to support. Kinyon *v.* Chicago, etc., R. Co., 118 Iowa 349, 92 N. W. 40, 96 Am. St. Rep. 382.

Whether the testimony is positive or negative the credibility of the witnesses and the weight to be given to their testimony and the conclusions to be drawn therefrom are under proper instructions matters wholly within the province of the jury. Missouri Pac. R. Co. *v.* McCullough, (Kan. 1902) 70 Pac. 364.

35. *Alabama.*— Georgia Cent. R. Co. *v.* Larkins, 142 Ala. 375, 37 So. 660; Georgia Cent. R. Co. *v.* Sport, 141 Ala. 369, 37 So. 344; Southern R. Co. *v.* Riddle, 126 Ala. 244, 28 So. 422; East Tennessee, etc., R. Co. *v.* Bayliss, 74 Ala. 150; Alabama Great Southern R. Co. *v.* Jones, 71 Ala. 487.

Indian Territory.— Missouri, etc., R. Co. *v.* Farrington, 1 Indian Terr. 646, 43 S. W. 946.

Mississippi.— Quinn *v.* Southern R. Co., (1896) 21 So. 6; Robertson *v.* Illinois Cent. R. Co., (1894) 17 So. 235.

North Dakota.— Bishop *v.* Chicago, etc., R. Co., 4 N. D. 536, 62 N. W. 605.

Utah.— Johnson *v.* Rio Grande Western R. Co., 7 Utah 346, 26 Pac. 926.

Washington.— Curtis *v.* Oregon R., etc., Co., 36 Wash. 55, 78 Pac. 133; Rafferty *v.* Portland, etc., R. Co., 32 Wash. 259, 73 Pac. 382.

See 41 Cent. Dig. tit. "Railroads," §§ 1627, 1637.

36. Louisville, etc., R. Co. *v.* Mertz, etc., Co., (Ala. 1905) 40 So. 60; East Tennessee, etc., R. Co. *v.* Bayliss, 74 Ala. 150; Alabama

to the jury if there is no evidence of negligence,[37] or where the evidence is of such a character that a verdict if rendered would be set aside by the court and a new trial granted on the ground of the insufficiency of the evidence to support the verdict.[38]

(v) *Rebuttal of Statutory Presumption of Negligence.* Where by statute proof of the injury raises a presumption of negligence which must be rebutted by defendant, it is ordinarily a question for the jury whether defendant's evidence is sufficient to overcome the statutory presumption.[39] If defendant should introduce no evidence, it would be the duty of the court to direct a verdict for plaintiff;[40] and conversely, if plaintiff, relying upon the statutory presumption, introduces no evidence tending to show negligence, while defendant introduces testimony which if true shows conclusively that there was no negligence on its part, and such testimony is in no way impeached or contradicted, the court should direct a verdict for defendant;[41] but the question is for the determination of the jury if plaintiff introduces evidence tending to contradict that of defendant or to show the existence of negligence,[42] although such evidence is merely circum-

Great Southern R. Co. *v.* Jones, 71 Ala. 487; Bowen *v.* Mobile, etc., R. Co., (Miss. 1903) 33 So. 441; Robertson *v.* Illinois Cent. R. Co., (Miss. 1894) 17 So. 235; Ramsbottom *v.* Atlantic Coast Line R. Co., 138 N. C. 38, 50 S. E. 448; Anson *v.* Gulf, etc., R. Co., 42 Tex. Civ. App. 437, 94 S. W. 94.

Disregarding plaintiff's signal to stop.— Where plaintiff, whose horse had fallen on a track at a place near a public crossing, attempted to stop the train by going on the track and waving his hat, and the engineer testified that persons had been in the habit of going on the track and jumping off as the train approached, it is a question for the jury whether the engineer was negligent under the circumstances in disregarding plaintiff's signal and failing to stop the train. Memphis, etc., R. Co. *v.* Sanders, 43 Ark. 225.

37. Kansas City Southern R. Co. *v.* Lewis, 80 Ark. 396, 97 S. W. 56; Burlington, etc., R. Co. *v.* Campbell, 20 Colo. App. 360, 78 Pac. 1072; Colorado, etc., R. Co. *v.* Beeson, 19 Colo. App. 241, 74 Pac. 345; Carman *v.* Montana Cent. R. Co., 32 Mont. 137, 79 Pac. 690; Flannery *v.* Kansas City, etc., R. Co., 23 Mo. App. 120 [*affirmed* in 97 Mo. 192, 10 S. W. 894].

Although there is evidence tending to show that the injury was caused by a train, a demurrer to the evidence should be sustained if there is no evidence of any negligence in the operation of the train. Flannery *v.* Kansas City, etc., R. Co., 23 Mo. App. 120 [*affirmed* in 97 Mo. 192, 10 S. W. 894].

38. International, etc., R. Co. *v.* Hall, 12 Tex. Civ. App. 11, 33 S. W. 127.

39. Southern R. Co. *v.* Hill, 116 Ga. 470, 42 S. E. 728; Illinois Cent. R. Co. *v.* Stanley, 96 S. W. 846, 29 Ky. L. Rep. 1054; Davis *v.* Seaboard Air Line R. Co., 134 N. C. 300, 46 S. E. 515; Baker *v.* Roanoke, etc., R. Co., 133 N. C. 31, 45 S. E. 347; Hardison *v.* Atlantic, etc., R. Co., 120 N. C. 492, 26 S. E. 630.

40. See Hardison *v.* Atlantic, etc., R. Co., 120 N. C. 492, 26 S. E. 630.

41. *Alabama.*— Louisville, etc., R. Co. *v.* Gentry, 103 Ala. 635, 16 So. 9 [*overruling* Savannah, etc., R. Co. *v.* Jarvis, 95 Ala. 149, 10 So. 323]; Central R., etc., Co. *v.* Ingram, 95 Ala. 152, 10 So. 516.

Dakota.— Huber *v.* Chicago, etc., R. Co., 6 Dak. 392, 43 N. W. 819.

Georgia.— Taylor *v.* Atlantic, etc., R. Co., 119 Ga. 610, 46 S. E. 834.

Kentucky.—Illinois Cent. R. Co. *v.* Gholson, 66 S. W. 1018, 23 Ky. L. Rep. 2209; Felton *v.* Anderson, 66 S. W. 182, 23 Ky. L. Rep. 1809.

Mississippi.— Southern R. Co. *v.* Murry, (1905) 39 So. 478; Alabama, etc., R. Co. *v.* Boyles, (1904) 37 So. 498; Alabama, etc., R. Co. *v.* Stacy, (1903) 35 So. 137; Yazoo, etc., R. Co. *v.* Smith, 68 Miss. 359, 8 So. 508; Louisville, etc., R. Co. *v.* Smith, 67 Miss. 15, 7 So. 212.

South Dakota.— Crary *v.* Chicago, etc., R. Co., 18 S. D. 237, 100 N. W. 18.

See 41 Cent. Dig. tit. "Railroads," §§ 1627, 1637.

42. *Alabama.*— Louisville, etc., R. Co. *v.* Davis, 103 Ala. 661, 16 So. 10.

Arkansas.— St. Louis, etc., R. Co. *v.* Minor, 85 Ark. 121, 107 S. W. 171; Kansas City Southern R. Co. *v.* Wayt, 80 Ark. 382, 97 S. W. 656; Kansas City Southern R. Co. *v.* Edwards, 80 Ark. 273, 96 S. W. 1061; St. Louis, etc., R. Co. *v.* Courtney, 77 Ark. 431, 92 S. W. 251; St. Louis, etc., R. Co. *v.* Shaver, (1905) 88 S. W. 961; St. Louis, etc., R. Co. *v.* Thompson, etc., Co., 76 Ark. 37, 88 S. W. 593; St. Louis, etc., R. Co. *v.* Satterfield, 75 Ark. 61, 86 S. W. 821.

Georgia.— Georgia, etc., R. Co. *v.* Wisenbacker, 120 Ga. 656, 48 S. E. 146; Southern R. Co. *v.* Loughridge, 114 Ga. 173, 39 S. E. 882; Louisville, etc., R. Co. *v.* Hall, 110 Ga. 49, 35 S. E. 159.

Kentucky.—Louisville, etc., R. Co. *v.* Moore, 84 S. W. 1144, 27 Ky. L. Rep. 293; Cincinnati, etc., R. Co. *v.* Burgess, 84 S. W. 760, 27 Ky. L. Rep. 252; Illinois Cent. R. Co. *v.* Gholson, 66 S. W. 1022, 23 Ky. L. Rep. 2211; Faulkner *v.* Kean, (1895) 32 S. W. 265.

Mississippi.—Young *v.* Illinois Cent. R. Co., 88 Miss. 446, 40 So. 870; Baird *v.* Georgia Pac. R. Co., (1896) 19 So. 661; Robertson *v.* Illinois Cent. R. Co., (1894) 17 So. 235; Scott *v.* Yazoo, etc., R. Co., 72 Miss. 37, 16

stantial,[43] or if the testimony of defendant's own witnesses fails to show that every thing was done which might have been to avoid the accident,[44] or discloses facts relating thereto from which the existence of the negligence alleged might reasonably be inferred.[45]

(VI) *FENCES AND CATTLE-GUARDS* — (A) *In General.* Where from the evidence it is uncertain where the animal injured came upon the track, it is a question for the jury whether the place of entry was at a point where the company had failed to construct or properly maintain its fences or cattle-guards,[46] or whether the animal entered through a gate or bars which it was the duty of defendant to keep closed.[47] In order to warrant the submission of the case to the jury it is not necessary that there should be any direct evidence that the animal entered at such place, but it is sufficient if there are circumstances reasonably tending to show this fact.[48] Under statutes where the company is liable for failure to fence only in case of injuries due to actual collision with a train, a demurrer to the evidence should be sustained where there is no evidence that the injury was so caused;[49] but direct evidence is not necessary, it being sufficient to warrant a submission of the case to the jury if there is any circumstantial evidence from which an injury by collision might reasonably be inferred.[50] Where an actual collision is not necessary and the animal was not struck by the train it is a question for the jury whether the company's failure to fence was the cause of the injury.[51] Where the liability applies only to animals running at large and it is held that an animal is at large if not under the control of the owner, and there is evidence that the

So. 205; Cantrell *v.* Kansas City, etc., R. Co., 69 Miss. 435, 10 So. 580; Cage *v.* Louisville, etc., R. Co., (1890) 7 So. 509; Kansas City, etc., R. Co. *v.* Doggett, 67 Miss. 250, 7 So. 278; Ross *v.* Natchez, etc., R. Co., 62 Miss. 23.

North Dakota.— Carr *v.* Minneapolis, etc., R. Co., 16 N. D. 217, 112 N. W. 972.

South Dakota.— Sheldon *v.* Chicago, etc., R. Co., 6 S. D. 606, 62 N. W. 955.

See 41 Cent. Dig. tit. "Railroads," §§ 1627, 1637.

Although plaintiff's evidence is weak and inconclusive, if it is relevant and tends to contradict that of defendant the court should not direct a verdict for defendant. Louisville, etc., R. Co. *v.* Davis, 103 Ala. 661, 16 So. 10.

43. Louisville, etc., R. Co. *v.* Moore, 84 S. W. 1144, 27 Ky. L. Rep. 293.

44. Bedford *v.* Louisville, etc., R. Co., 65 Miss. 385, 4 So. 121.

45. Louisville, etc., R. Co. *v.* Gentry, 103 Ala. 635, 16 So. 9; Mobile, etc., R. Co. *v.* Holt, 62 Miss. 170.

46. Agnew *v.* Michigan Cent. R. Co., 56 Mich. 56, 22 N. W. 108; Schlotzhauer *v.* Missouri, etc., R. Co., 89 Mo. App. 65; Miller *v.* Wabash R. Co., 47 Mo. App. 630; Jones *v.* St. Louis, etc., R. Co., 44 Mo. App. 15; McGuire *v.* Ogdensburg, etc., R. Co., 18 N. Y. Suppl. 313.

47. McDonald *v.* Minneapolis, etc., R. Co., 105 Mich. 659, 63 N. W. 966.

48. Louisville, etc., R. Co. *v.* McCullom, 54 Ill. App. 69; Lepp *v.* St. Louis, etc., R. Co., 87 Mo. 139; Field *v.* Missouri Pac. R. Co., 46 Mo. App. 449; Dinwoodie *v.* Chicago, etc., R. Co., 70 Wis. 160, 35 N. W. 296.

Proof that an animal was killed or injured at a place where the company had neglected its duty to fence is sufficient to take the case to the jury (Lepp *v.* St. Louis, etc., R. Co., 87 Mo. 139); but if there is no evidence that the animal entered where the fence was defective other than the mere fact that it was injured near such a place, and there is other evidence tending to show that it entered through a gate at a private crossing, a demurrer to the evidence should be sustained (Walton *v.* Wabash Western R. Co., 32 Mo. App. 634).

Although the engineer testifies positively that the animal came upon the track at a public crossing, if there are circumstances shown tending to prove that it entered through a defect in the fence near the crossing the place of entry is a question for the jury. Kimball *v.* St. Louis, etc., R. Co., 99 Mo. App. 335, 73 S. W. 224.

49. Hesse *v.* St. Louis, etc., R. Co., 36 Mo. App. 163.

50. Payne *v.* Quincy, etc., R. Co., 113 Mo. App. 609, 88 S. W. 164; Batman *v.* Kansas City, etc., R. Co., 53 Mo. App. 13; Vaughan *v.* Kansas City, etc., R. Co., 34 Mo. App. 141 [*distinguishing* Gilbert *v.* Missouri Pac. R. Co., 23 Mo. App. 65].

51. Kraus *v.* Burlington, etc., R. Co., 55 Iowa 338, 7 N. W. 598.

Frightening animals.— Under the Missouri statute making railroad companies liable where their tracks are not fenced for injuries due to animals being frightened by trains, if the evidence shows that the animal was seen on the right of way near a defective place in the fence, that the alarm whistle was afterward heard, and the tracks of the animal were found leading from the roadbed to where it was found dead and entangled in a wire fence, it is sufficient to go to the jury as to whether the animal came upon the track by reason of the defective fence and was injured in consequence of being fright-

animal injured had escaped from the owner, it is a question for the jury whether it was running at large.[52]

(B) *At What Places Required.* Where the statute designates the places to be fenced, the obligation of a railroad company to fence its tracks at a particular point is a question of law for the court.[53] The court may also declare as a matter of law that the company is not liable for failure to fence at certain places, such as public crossings and depot grounds, which are impliedly excepted from the operation of the statutes,[54] and it is the duty of the court to do so;[55] but where the place of accident brings into controversy the proper extent or limits of such places, it is a question of fact for the jury whether the company has left unfenced more than the proper conduct of its business and the public use and convenience require,[56] whether it could have fenced at the place in question without endangering the lives of its employees engaged in switching and operating its trains,[57] or whether, without endangering the safety of its employees, it could have located its cattle-guards nearer to the head of its switch limits than was done.[58] Where the company is relieved from constructing cattle-guards at a public crossing by reason of the fact that it is within its station grounds, it is a question for the jury whether the company has constructed them at the nearest point that would not interfere with the proper operation of the road and the convenience of the

ened. Hobbs *v.* St. Louis, etc., R. Co., 113 Mo. App. 126, 87 S. W. 525.

52. Morris *v.* Chicago Great Western R. Co., 133 Iowa 28, 110 N. W. 154.

53. Illinois Cent. R. Co. *v.* Whalen, 42 Ill. 396.

54. *Indiana.*—Stewart *v.* Pennsylvania Co., 2 Ind. App. 142, 28 N. E. 211, 50 Am. St. Rep. 231.

Iowa.— Gibson *v.* Iowa Cent. R. Co., 136 Iowa 415, 113 N. W. 927.

Missouri.— Smith *v.* St. Louis, etc., R. Co., 125 Mo. App. 15, 102 S. W. 593.

New York.— Hyatt *v.* New York, etc., R. Co., 19 N. Y. Suppl. 461.

Oregon.— Harvey *v.* Southern Pac. Co., 46 Oreg. 505, 80 Pac. 1061.

See 41 Cent. Dig. tit. "Railroads," § 1634.

55. Smith *v.* St. Louis, etc., R. Co., 125 Mo. App. 15, 102 S. W. 593.

56. *Illinois.*— Wabash R. Co. *v.* Howard, 57 Ill. App. 66; Toledo, etc., R. Co. *v.* Franklin, 53 Ill. App. 632; Toledo, etc., R. Co. *v.* Thompson, 48 Ill. App. 36.

Iowa.— Rhines *v.* Chicago, etc., R. Co., 75 Iowa 597, 39 N. W. 912.

Minnesota.— Snell *v.* Minneapolis, etc., R. Co., 87 Minn. 253, 91 N. W. 1108.

Missouri.—Acord *v.* St. Louis Southwestern R. Co., 113 Mo. App. 84, 87 S. W. 537; McGuire *v.* St. Louis, etc., R. Co., 113 Mo. App. 79, 87 S. W. 564; Downey *v.* Mississippi River, etc., R. Co., 94 Mo. App. 137, 67 S. W. 945; Riley *v.* St. Louis Southwestern R. Co., 89 Mo. App. 375; Prather *v.* Kansas City, etc., Connecting R. Co., 84 Mo. App. 86; Straub *v.* Eddy, 47 Mo. App. 189; Bean *v.* St. Louis, etc., R. Co., 20 Mo. App. 641.

Nebraska.— Rosenberg *v.* Chicago, etc., R. Co., 77 Nebr. 663, 110 N. W. 641.

Oregon.—Jackson *v.* Sumpter Valley R. Co., 50 Oreg. 455, 93 Pac. 356; High *v.* Southern Pac. R. Co., 49 Oreg. 98, 88 Pac. 961; Wilmot *v.* Oregon R. Co., 48 Oreg. 494, 87 Pac. 528, 7 L. R. A. N. S. 202.

Texas.— Southern Kansas R. Co. *v.* West, (Civ. App. 1907) 102 S. W. 1174.

Wisconsin.— Cole *v.* Duluth, etc., R. Co., 104 Wis. 460, 80 N. W. 736; Grosse *v.* Chicago, etc., R. Co., 91 Wis. 482, 65 N. W. 185; McDonough *v.* Milwaukee, etc., R. Co., 73 Wis. 223, 40 N. W. 806; Dinwoodie *v.* Chicago, etc., R. Co., 70 Wis. 160, 35 N. W. 296.

See 41 Cent. Dig. tit. "Railroads," § 1634.

Compare McGrath *v.* Detroit, etc., R. Co., 57 Mich. 555, 24 N. W. 854.

But where the evidence shows without contradiction that the animal was killed upon grounds used for depot or switching purposes, and that the limits of such grounds were reasonable, and that they could not have been fenced at the place of injury without interfering with the public convenience, the proper operation of the trains, or the safety of the company's employees, the question as to the extent of such grounds should not be submitted to the jury. Webster *v.* Atchison, etc., R. Co., 57 Mo. App. 451. See also Rinear *v.* Grand Rapids, etc., R. Co., 70 Mich. 620, 38 N. W. 599.

If only one conclusion could be drawn, as where the evidence shows that the accident was so close to the station house that there could be no question that it was included within the proper limits of defendant's station grounds, the court may properly direct a verdict for defendant. Harvey *v.* Southern Pac. Co., 46 Oreg. 505, 80 Pac. 1061.

57. Toledo, etc., R. Co. *v.* Woody, 5 Ind. App. 331, 30 N. E. 1099; Terre Haute, etc., R. Co. *v.* Schaefer, 5 Ind. App. 86, 31 N. E. 557; Pennsylvania Co. *v.* Lindley, 2 Ind. App. 111, 28 N. E. 106; Acord *v.* St. Louis Southwestern R. Co., 113 Mo. App. 84, 87 S. W. 537; Prather *v.* Kansas City, etc., Connecting R. Co., 84 Mo. App. 86.

58. Glasscock *v.* Missouri, etc., R. Co., 82 Mo. App. 146; Welsh *v.* Hannibal, etc., R. Co., 55 Mo. App. 599.

public;[59] and where the company relies for its failure to fence upon the existence of natural obstructions making a fence unnecessary, the question whether the obstructions are of such a character as to relieve the company from the duty of fencing is one of fact for the jury.[60]

(c) *Sufficiency, Defects, and Repairs.* It is ordinarily a question of fact for the jury whether the fences and cattle-guards constructed are reasonably sufficient for the purposes intended,[61] or so constructed as to be in themselves a source of danger,[62] and also whether the railroad company has exercised reasonable care in maintaining them in a proper state of repair.[63] So it is a question for the jury whether the company has been negligent in failing to discover defects,[64] or in failing sooner to repair the same after they were discovered.[65]

(VII) *PRIVATE CROSSINGS, GATES, AND BARS.* It is a question for the jury whether the gates or bars in a railroad fence are sufficient,[66] whether the railroad company has exercised proper care in keeping them in repair,[67] and in keeping

59. Railroad Co. *v.* Newbrander, 40 Ohio St. 15.

60. Klock *v.* New York Cent., etc., R. Co., 62 Hun (N. Y.) 291, 17 N. Y. Suppl. 120; Meier *v.* Northern Pac. R. Co., (Oreg. 1908) 93 Pac. 691.

61. *Iowa.*— Campbell *v.* Iowa Cent. R. Co., 124 Iowa 248, 99 N. W. 1061; Timins *v.* Chicago, etc., R. Co., 72 Iowa 94, 33 N. W. 379.

Kansas.— Meador *v.* Missouri Pac. R. Co., (1900) 61 Pac. 442.

Michigan.— Parker *v.* Lake Shore, etc., R. Co., 93 Mich. 607, 53 N. W. 834; Grand Rapids, etc., R. Co. *v.* Judson, 34 Mich. 506.

Missouri.— Jones *v.* Chicago, etc., R. Co., 59 Mo. App. 137; Cole *v.* Chicago, etc., R. Co., 47 Mo. App. 624.

New York.— Schuyler *v.* Fitchburgh R. Co., 20 N. Y. Suppl. 287.

Texas.— Saine *v.* Missouri, etc., R. Co., (Civ. App. 1905) 85 S. W. 487.

Wisconsin.— Welch *v.* Abbot, 72 Wis. 512, 40 N. W. 223.

See 41 Cent. Dig. tit. "Railroads," § 1635.

Where the statute specifies the character of fence which "shall be deemed a good and sufficient fence," but does not provide that the fence must be as specified in order to be sufficient, a fence constructed according to the statutory specifications is sufficient as a matter of law but the sufficiency of a fence otherwise constructed is a question of fact for the jury. Perrault *v.* Minneapolis, etc., R. Co., 117 Wis. 520, 94 N. W. 348.

62. Carrollton Short Line R. Co. *v.* Lipsey, 150 Ala. 570, 43 So. 836, holding that it is a question for the jury whether a cattle-guard is so constructed as to be inviting to stock and in itself a source of danger.

Whether a barbed wire fence was such a source of danger to plaintiff's animals running in a field adjoining defendant's road as to charge defendant with negligence in erecting such a fence is a question for the jury. Rehler *v.* Western New York, etc., R. Co., 8 N. Y. Suppl. 286.

63. Estes *v.* Atlantic, etc., R. Co., 63 Me. 308; Church *v.* Chicago, etc., R. Co., 102 Minn. 295, 113 N. W. 886; Hendrickson *v.* Philadelphia, etc., R. Co., 68 N. J. L. 612, 54 Atl. 831; Wines *v.* Rio Grande Western R. Co., 9 Utah 228, 33 Pac. 1042.

Repairs by landowner.—In Texas it is held to be the duty of an adjoining landowner to make any slight repairs necessary to prevent his animals from going upon a railroad track if such repairs can be made without any considerable labor or expense, and whether the defect is of such a character that it could be so repaired is a question for the jury. Missouri, etc., R. Co. *v.* Dunnaway, 43 Tex. Civ. App. 350, 95 S. W. 760.

64. Morris *v.* Chicago Great Western R. Co., 133 Iowa 28, 110 N. W. 154; Evans *v.* St. Paul, etc., R. Co., 30 Minn. 489, 16 N. W. 271; Hendrickson *v.* Philadelphia, etc., R. Co., 68 N. J. L. 612, 54 Atl. 831.

Whether the company is chargeable with notice of defects in a fence by reason of the length of time that they have existed is a question of fact for the jury. Hendrickson *v.* Philadelphia, etc., R. Co., 68 N. J. L. 242, 52 Atl. 232.

65. Bell *v.* Chicago, etc., R. Co., 64 Iowa 321, 20 N. W. 456; Crosby *v.* Detroit, etc., R. Co., 58 Mich. 458, 25 N. W. 463; Graves *v.* Chicago, etc., R. Co., 47 Minn. 429, 50 N. W. 474.

What is reasonable time for repairing a fence that has been accidentally destroyed is a question for the jury, depending upon the circumstances of the particular case. Bell *v.* Chicago, etc., R. Co., 64 Iowa 321, 20 N. W. 456.

Where a fence has been washed away by a flood which the evidence shows without contradiction had not subsided at the time of the accident so as to leave the entire line of fence at the place in question uncovered, the question of defendant's negligence in not sooner repairing the same should not be submitted to the jury as defendant is free from negligence as a matter of law. Goddard *v.* Chicago, etc., R. Co., 54 Wis. 548, 11 N. W. 593.

66. Titus *v.* Chicago, etc., R. Co., 128 Iowa 194, 103 N. W. 343; Kling *v.* Chicago, etc., R. Co., 115 Iowa 133, 88 N. W. 355; McKenly *v.* Chicago, etc., R. Co., 43 Iowa 641; Welch *v.* Abbot, 72 Wis. 512, 40 N. W. 223.

67. Wirstlin *v.* Chicago, etc., R. Co., 124 Iowa 170, 99 N. W. 697; Estes *v.* Atlantic,

them closed,[68] and where the injury is caused by their being left open, whether they had been open for sufficient time to charge the company with notice of their condition.[69]

(VIII) *SIGNALS, LOOKOUTS, AND PRECAUTIONS.* It is ordinarily a question for the jury whether under the circumstances defendant was negligent in regard to keeping a proper lookout for animals,[70] or in failing to take proper precautions to avoid the injury after the animal was discovered on or near the track;[71] and the question should be submitted to the jury whenever there is any evidence from which it might reasonably be inferred that if a proper lookout had been maintained the animal could have been seen in time to avoid the injury.[72] It is a question for the jury whether under the circumstances defendant's servants were negligent in failing to sound the alarm whistle when an animal was seen on or near the track,[73] or in failing to stop or slacken the speed of a

etc., R. Co., 63 Me. 308; Peery *v.* Quincy, etc., R. Co., 122 Mo. App. 177, 99 S. W. 14.

68. Atkinson *v.* Chicago, etc., R. Co., 119 Wis. 176, 96 N. W. 529.

69. Wait *v.* Burlington, etc., R. Co., 74 Iowa 207, 37 N. W. 159; Perry *v.* Dubuque Southwestern R. Co., 36 Iowa 102; Box *v.* Atchison, etc., R. Co., 58 Mo. App. 359.

But there may be cases where the time intervening between the leaving open of the gate and the escape of the animal through it is so short that the court may declare as a matter of law that there was no negligence in failing to discover it. Box *v.* Atchison, etc., R. Co., 58 Mo. App. 359.

70. *Alabama.*— East Tennessee, etc., R. Co. *v.* Bayliss, 74 Ala. 150.

Colorado.— Denver, etc., R. Co. *v.* Robinson, 6 Colo. App. 432, 40 Pac. 840.

Indian Territory.— Missouri, etc., R. Co. *v.* McClendon, 1 Indian Terr. 537, 42 S. W. 283.

Kentucky.— Louisville, etc., R. Co. *v.* Rhoads, 90 S. W. 219, 28 Ky. L. Rep. 692.

Mississippi.— Kent *v.* New Orleans, etc., R. Co., 67 Miss. 608, 7 So. 391.

Nebraska.— Missouri Pac. R. Co. *v.* Vandeventer, 28 Nebr. 112, 44 N. W. 93.

Texas.— Cockburn *v.* St. Louis, etc., R. Co., (Civ. App. 1907) 102 S. W. 740; Texarkana, etc., R. Co. *v.* Bell, (Civ. App. 1907) 101 S. W. 1167.

See 41 Cent. Dig. tit. "Railroads," § 1637.

71. *Alabama.*— Louisville, etc., R. Co. *v.* Mertz, (1905) 40 So. 60; Kansas City, etc., R. Co. *v.* Wagand, 134 Ala. 388, 32 So. 744.

Illinois.— Chicago, etc., R. Co. *v.* Hill, 24 Ill. App. 619.

Indian Territory.— Missouri, etc., R. Co. *v.* McClendon, 1 Indian Terr. 537, 42 S. W. 283.

Michigan.— Granby *v.* Michigan Cent. R. Co., 104 Mich. 403, 62 N. W. 579.

Missouri.— Wright *v.* Quincy, etc., R. Co., 119 Mo. App. 469, 95 S. W. 293.

See 41 Cent. Dig. tit. "Railroads," § 1637.

Whether the animal came upon the track so suddenly and so near to the engine that the trainmen could not by reasonable care prevent the injury is a question for the jury. Louisville, etc., R. Co. *v.* Rice, 101 Ala. 676, 14 So. 639.

Where the engine was not reversed and there is evidence that the engineer had time to do so in addition to sounding the stock alarm and putting on brakes, the question of defendant's negligence is for the jury. Southern R. Co. *v.* Shirley, 128 Ala. 595, 29 So. 687.

Frightening horse with railroad bicycle.— Where a tie inspector traveling upon a railroad bicycle encountered a horse and followed it as it ran down the track until it ran upon a trestle, and there were obstructions along the track, making it difficult for the animal to escape therefrom, it is a question for the jury whether under the circumstances it was negligence not to have stopped in order to allow the animal to escape before reaching the trestle. Alabama, etc., R. Co. *v.* Moore, 81 Miss. 14, 32 So. 908.

72. *Alabama.*—Georgia Cent. R. Co. *v.* Larkins, 142 Ala. 375, 37 So. 660; Kansas City, etc., R. Co. *v.* Wagand, 134 Ala. 388, 32 So. 744; Kansas City, etc., R. Co. *v.* Childers, 132 Ala. 611, 32 So. 717; Southern R. Co. *v.* Posten, 131 Ala. 671, 31 So. 21; Alabama Great Southern R. Co. *v.* Boyd, 124 Ala. 525, 27 So. 408; East Tennessee, etc., R. Co. *v.* Baker, 94 Ala. 632, 10 So. 211.

Colorado.— Denver, etc., R. Co. *v.* Henderson, 10 Colo. 4, 13 Pac. 912; Denver, etc., R. Co. *v.* Henderson, 10 Colo. 1, 13 Pac. 910; Union Pac., etc., R. Co. *v.* Patterson, 4 Colo. App. 575, 36 Pac. 913.

Kansas.— Kansas City, etc., R. Co. *v.* Cravens, 43 Kan. 650, 23 Pac. 1044.

Kentucky.— Louisville, etc., R. Co. *v.* Moore, 84 S. W. 1144, 27 Ky. L. Rep. 293; Cincinnati, etc., R. Co. *v.* Burgess, 84 S. W. 760, 27 Ky. L. Rep. 252.

Missouri.— White *v.* St. Louis, etc., R. Co., 20 Mo. App. 564.

Montana.— McMaster *v.* Montana Union R. Co., 12 Mont. 163, 30 Pac. 268.

South Dakota.— Borneman *v.* Chicago, etc., R. Co., 19 S. D. 459, 104 N. W. 208.

See 41 Cent. Dig. tit. "Railroads," § 1637.

73. *Arkansas.*—Arkansas, etc., R. Co. *v.* Sanders, 81 Ark. 604, 99 S. W. 1109; St. Louis, etc., R. Co. *v.* Kimberlain, 76 Ark. 100, 88 S. W. 599.

Georgia.— Darien, etc., R. Co. *v.* Thomas, 125 Ga. 801, 54 S. E. 692.

Iowa.— Edson *v.* Central R. Co., 40 Iowa 47.

train,[74] or in not attempting to stop sooner than was done.[75] Where the evidence is conflicting it is a question for the jury whether the crossing signals were given,[76] or the alarm whistle sounded,[77] although plaintiff's evidence is of a negative character, providing the witness was in a position to have heard the signal if it had been given.[78]

(IX) *RATE OF SPEED.* Whether the speed at which the train was being operated at the time of the injury was under the circumstances of the particular case so excessive or reckless as to constitute negligence is ordinarily a question of fact for the jury.[79]

(X) *CONTRIBUTORY NEGLIGENCE OF OWNER.* Whether the owner of the animal injured has been guilty of contributory negligence is ordinarily a question of fact for the jury,[80] and can only become a question of law when the evidence is so clear that only one conclusion could reasonably be drawn therefrom.[81] It is a question for the jury whenever the evidence is conflicting,[82] or reasonable minds might arrive at different conclusions as to whether plaintiff under the circum-

Mississippi.— Mitchell *v.* New Orleans, etc., R. Co., (1904) 36 So. 1.

Tennessee.— Louisville, etc., R. Co. *v.* Reidmond, 11 Lea 205.

See 41 Cent. Dig. tit. "Railroads," § 1637.

The sufficiency of the engineer's excuse for failing to sound the stock alarm to frighten animals seen upon the track, where he testifies that he could not do so and also signal for brakes, is a question for the jury. Mobile, etc., R. Co. *v.* Caldwell, 83 Ala. 196, 3 S. W. 445.

Where the engineer blew off steam, instead of sounding the alarm whistle, claiming that it was a more effective means of frightening an animal from the track, the question of negligence is for the jury. Terre Haute, etc., R. Co. *v.* Jones, 11 Ill. App. 322.

74. *Alabama.*— Louisville, etc., R. Co. *v.* Mertz, 149 Ala. 561, 43 So. 7; Alabama Great Southern R. Co. *v.* Hall, 133 Ala. 362, 32 So. 259; Moody *v.* Alabama Great Southern R. Co., 99 Ala. 553, 13 So. 233.

Illinois.— Chicago, etc., R. Co. *v.* Hill, 24 Ill. App. 619.

Indiana.— Chicago, etc., R. Co. *v.* Ramsey, 168 Ind. 390, 81 N. E. 79 [*reversing* (App. 1907) 79 N. E. 1065].

Iowa.— Edson *v.* Central R. Co., 40 Iowa 47.

Mississippi.— Yazoo, etc., R. Co. *v.* Brumfield, 64 Miss. 637, 1 So. 905.

North Carolina.— Ramsbottom *v.* Atlantic Coast Line R. Co., 138 N. C. 38, 50 S. E. 448.

See 41 Cent. Dig. tit. "Railroads," § 1637.

75. Johnson *v.* Rio Grande Western R. Co., 7 Utah 346, 26 Pac. 926.

76. Lee *v.* Chicago, etc., R. Co., 80 Iowa 172, 45 N. W. 739; Salathe *v.* Delaware, etc., R. Co., 28 Pa. Super. Ct. 1; Worthington *v.* Philadelphia, etc., R. Co., 23 Pa. Super. Ct. 195; Tyson *v.* Grand Trunk R. Co., 20 U. C. Q. B. 256.

77. Mobile, etc., R. Co. *v.* Ladd, 92 Ala. 287, 9 So. 169; Bishop *v.* Chicago, etc., R. Co., 4 N. D. 536, 62 N. W. 605.

78. Roberts *v.* Wabash R. Co., 113 Mo. App. 6, 87 S. W. 601.

79. *Alabama.*— East Tennessee, etc., R. Co. *v.* Bayliss, 74 Ala. 150.

Illinois.— Toledo, etc., R. Co. *v.* Foster, 43 Ill. 415.

Iowa.— Courson *v.* Chicago, etc., R. Co., 71 Iowa 28, 32 N. W. 8.

Missouri.— Taylor *v.* St. Louis, etc., R. Co., 83 Mo. 386.

Ohio.— Central Ohio R. Co. *v.* Lawrence, 13 Ohio St. 66, 82 Am. Dec. 434.

Vermont.— Morse *v.* Rutland, etc., R. Co., 27 Vt. 49.

Washington.— Rafferty *v.* Portland, etc., R. Co., 32 Wash. 259, 73 Pac. 382.

See 41 Cent. Dig. tit. "Railroads," § 1638

In Illinois operating a train at a rate in violation of a speed ordinance is *prima facie* evidence of negligence, and it is a question for the jury whether defendant's evidence is sufficient under the circumstances to rebut the presumption of negligence. Chicago, etc., R. Co. *v.* Crose, 214 Ill. 602, 73 N. E. 865, 105 Am. St. Rep. 135.

80. Chicago, etc., R. Co. *v.* Crose, 214 Ill. 602, 73 N. E. 865, 105 Am. St. Rep. 135; Illinois Cent. R. Co. *v.* Gillis, 68 Ill. 317; Foss *v.* Chicago, etc., R. Co., 33 Minn. 392, 23 N. W. 553; Ellis *v.* London, etc., R. Co., 2 H. & N. 424, 3 Jur. N. S. 1008, 26 L. J. Exch. 349, 5 Wkly. Rep. 682.

81. Chicago, etc., R. Co. *v.* Crose, 214 Ill. 602, 73 N. E. 865, 105 Am. St. Rep. 135; Carr *v.* Minneapolis, etc., R. Co., 16 N. D. 217, 112 N. W. 972.

But if the evidence is undisputed and no inference of negligence on the part of plaintiff can be drawn therefrom, the question is one of law for the court and no issue of contributory negligence should be submitted to the jury. France *v.* Salt Lake, etc., R. Co., 31 Utah 302, 88 Pac. 1.

82. *Illinois.*— Chicago, etc., R. Co. *v.* Crose, 214 Ill. 602, 73 N. E. 865, 105 Am. St. Rep. 135.

Missouri.— Spiller *v.* St. Louis, etc., R. Co., 112 Mo. App. 491, 87 S. W. 43.

Pennsylvania.— Salathe *v.* Delaware, etc., R. Co., 28 Pa. Super. Ct. 1.

Utah.— Wines *v.* Rio Grande Western R. Co., 9 Utah 228, 33 Pac. 1042.

Canada.— McGunnighal *v.* Grand Trunk R. Co., 6 Ont. Pr. 209.

See 41 Cent. Dig. tit. "Railroads," § 1639.

stances was in the exercise of due care.[83] So it is a question for the jury under the circumstances of the particular case whether plaintiff was guilty of contributory negligence in leaving a team unhitched and unattended near a railroad track,[84] in turning an animal loose in the vicinity of a railroad track where it is unfenced,[85] or near station grounds which the company is not required to fence;[86] in permitting animals to run at large in violation of law,[87] or in particularly dangerous places,[88] or in keeping them in an inclosure where the fences are insufficient to prevent their escape,[89] or adjoining a railroad fence known to be defective,[90] or in failing to notify the railroad company of the existence of such defect;[91] or whether under the circumstances plaintiff was guilty of contributory negligence in regard to stopping, looking, and listening for trains before driving animals upon a railroad crossing.[92] So also where by statute a railroad company is liable, in case of a failure to fence, unless the injury was occasioned by the "wilful act" of the owner himself, it is ordinarily a question for the jury whether a given act is wilful or otherwise.[93]

(xi) *Proximate Cause of Injury.*[94] Although a railroad company may have been negligent in the operation of its trains or in doing or omitting some act prohibited or required by statute, it is still ordinarily a question for the jury whether such negligent act or omission was the proximate cause of the injury complained of.[95] So it is a question for the jury whether the injury was due to the

83. Chicago, etc., R. Co. *v.* Crose, 214 Ill. 602, 73 N. E. 865, 105 Am. St. Rep. 135.

It is a question for the jury whether under the circumstances of the case it was contributory negligence for plaintiff to attempt to drive outside of the highway and around a car which defendant had left obstructing the crossing (Corey *v.* Northern Pac. R. Co., 32 Minn. 457, 21 N. W. 479); to cross a railroad track driving one team and leading another horse hitched to a wagon (Egan *v.* Fitchburg, etc., R. Co., 101 Mass. 315); to camp over night with a drove of cattle near a railroad track (Ft. Smith, etc., R. Co. *v.* Roberts, 37 Tex. Civ. App. 108, 83 S. W. 250); to drive a horse along a highway and over a crossing without confining it (Towne *v.* Nashua, etc., R. Co., 124 Mass. 101); and where animals escape through a gate which defendant had failed to keep in repair and which plaintiff admits he habitually left open because of the difficulty in closing it, and the evidence is conflicting as to whether its condition was due to plaintiff's negligence in the use of the gate, the question of his contributory negligence is for the jury (Taft *v.* New York, etc., R. Co., 157 Mass. 297, 32 N. E. 168).

84. *Iowa.*— O'Leary *v.* Chicago, etc., R. Co., (1905) 103 N. W. 362.

Massachusetts.— Southworth *v.* Old Colony, etc., R. Co., 105 Mass. 342, 7 Am. Rep. 528.

Michigan.— Bankman *v.* Pere Marquette R. Co., 142 Mich. 202, 105 N. W. 154.

Missouri.— Gee *v.* St. Louis, etc., R. Co., 122 Mo. App. 358, 99 S. W. 506.

New York.—Potter *v.* New York Cent., etc., R. Co., 22 Misc. 10, 48 N. Y. Suppl. 446.

Texas.— Texas Cent. R. Co. *v.* Harbison, (Civ. App. 1903) 75 S. W. 549.

See 41 Cent. Dig. tit. "Railroads," § 1629.

85. Choctaw, etc., R. Co. *v.* Ingram, 71 Ark. 394, 75 S. W. 3; Courson *v.* Chicago, etc., R. Co., 71 Iowa 28, 32 N. W. 8; Carr *v.* Minneapolis, etc., R. Co., 16 N. D. 217, 112 N. W. 972; Jackson *v.* Sumpter Valley R. Co., 50 Oreg. 455, 93 Pac. 356.

86. Wilmot *v.* Oregon R. Co., 48 Oreg. 494, 87 Pac. 528, 7 L. R. A. N. S. 202.

87. Atlanta, etc., R. Co. *v.* Hudson, 2 Ga. App. 352, 58 S. E. 500; Rockford, etc., R. Co. *v.* Irish, 72 Ill. 404; Jarvis *v.* Bradford, 88 Ill. App. 685; Rabberman *v.* Hunt, 88 Ill. App. 625; Sarja *v.* Great Northern R. Co., 99 Minn. 332, 109 N. W. 600.

88. Williams *v.* Northern Pac. R. Co., 3 Dak. 168, 14 N. W. 97.

89. Rabberman *v.* Hunt, 88 Ill. App 625; Timins *v.* Chicago, etc., R. Co., 72 Iowa 94, 33 N. W. 379; Sarja *v.* Great Northern R. Co., 99 Minn. 332, 109 N. W. 600.

90. Poler *v.* New York Cent. R. Co., 16 N. Y. 476.

91. Poler *v.* New York Cent. R. Co., 16 N. Y. 476.

92. *Iowa.*— Heise *v.* Chicago Great Western R. Co., (1907) 114 N. W. 180; Kuehl *v.* Chicago, etc., R. Co., 126 Iowa 638, 102 N. W. 512; Lee *v.* Chicago, etc., R. Co., 80 Iowa 172, 45 N. W. 739.

Michigan.— Brunick *v.* Ann Arbor R. Co., 132 Mich. 219, 93 N. W. 433.

Minnesota.— Westaway *v.* Chicago, etc., R. Co., 56 Minn. 28, 57 N. W. 222.

Missouri.— Keenig *v.* Missouri Pac. R. Co., 19 Mo. App. 327.

Pennsylvania.— Salathe *v.* Delaware etc., R. Co., 28 Pa. Super. Ct. 1; Worthington *v.* Philadelphia, etc., R. Co., 23 Pa. Super. Ct. 195.

South Dakota.— Bates *v.* Fremont, etc., R. Co., 4 S. D. 394, 57 N. W. 72.

See 41 Cent. Dig. tit. "Railroads," § 1639.

93. Claus *v.* Chicago Great Western R. Co., 136 Iowa 7, 111 N. W. 15.

94. Proximate cause of injury see, generally, *supra*, X, H, 11.

95. Ford *v.* St. Louis, etc., R. Co., 66 Ark.

train being operated at a high or unusual rate of speed,[96] or at a speed in violation of a statute or ordinance,[97] or to a failure to give crossing signals,[98] or to keep a proper lookout,[99] or to sound an alarm signal,[1] or to construct fences or cattle-guards as required by law,[2] or to maintain them in a proper state of repair,[3] or due to the negligent construction of a bridge at a highway crossing.[4]

n. Instructions — (i) *In General.*[5] In actions for injuries to animals the general rules as to instructions in civil actions apply.[6] The instructions must be sufficiently full and specific properly to serve as a guide to the jury in determining the case,[7] must conform to the issues and evidence,[8] be based upon all of the evidence,[9] must not be confusing or misleading,[10] argumentative,[11] or contradictory,[12] must not assume the existence of facts not in evidence,[13] or intimate

363, 50 S. W. 864; Sprague *v.* Freemont, etc., R. Co., 6 Dak. 86, 50 N. W. 617; Kuehl *v.* Chicago, etc., R. Co., 126 Iowa 638, 102 N. W. 512; Jackson *v.* Chicago, etc., R. Co., 36 Iowa 451; Louisville, etc., R. Co. *v.* Caster, (Miss. 1889) 5 So. 388.

96. Ford *v.* St. Louis, etc., R. Co., 66 Ark. 363, 50 S. W. 864.

97. Jones *v.* Illinois Cent. R. Co., 75 Miss. 970, 23 So. 358; Louisville, etc., R. Co. *v.* Caster, (Miss. 1889) 5 So. 388; Jeffs *v.* Rio Grande Western R. Co., 9 Utah 374, 35 Pac. 505.

98. *Arkansas.*— Ford *v.* St. Louis, etc., R. Co., 66 Ark. 363, 50 S. W. 864.

Indiana.— Chicago, etc., R. Co. *v.* Fenn, 3 Ind. App. 250, 29 N. E. 790.

Iowa.— Heise *v.* Chicago Great Western R Co., (1907) 114 N. W. 180; Kuehl *v.* Chicago, etc., R. Co., 126 Iowa 638, 102 N. W. 512; McGill *v.* Minneapolis, etc., R. Co., 113 Iowa 358, 85 N. W. 620.

Missouri.— Goodwin *v.* Chicago, etc., R. Co., 75 Mo. 73; McCormick *v.* Kansas City, etc., R. Co., 50 Mo. App. 109.

Utah.— Jeffs *v.* Rio Grande Western R. Co., 9 Utah 374, 35 Pac. 505.

See 41 Cent. Dig. tit. "Railroads," § 1640.

Under the Missouri statute of 1881 placing the burden of proof upon defendant to show that its failure to give the statutory signals did not cause the injury complained of, it is a question for the jury whether the *prima facie* case of negligence created by the statute is overcome or rebutted by the evidence placed before them. Barr *v.* Hannibal, etc., R. Co., 30 Mo. App. 248.

99. Kansas City, etc., R. Co. *v.* Watson, 91 Ala. 483, 8 So. 793.

1. Texarkana, etc., R. Co. *v.* Bell, (Tex. Civ. App. 1907) 101 S. W. 1167.

2. Savage *v.* Chicago, etc., R. Co., 31 Minn. 419, 18 N. W. 272; Holden *v.* Rutland, etc., R. Co., 30 Vt. 297.

Whether the animal injured would have been excluded by a lawful fence as defined by statute and such as the company was required to build is a question of fact for the jury. Alexander *v.* Chicago, etc., R. Co., 41 Minn. 515, 43 N. W. 489.

Where a railroad company improperly locates its cattle-guards and wing fences at a considerable distance from the line of a highway and so as to leave an unnecessary amount of the track exposed, it is a question for the jury whether this fact was the proximate cause of the injury. Parker *v.* Lake Shore, etc., R. Co., 93 Mich. 607, 53 N. W. 834.

3. Morris *v.* Chicago Great Western R. Co., 133 Iowa 28, 110 N. W. 154; Paul *v.* Chicago, etc., R. Co., 120 Iowa 224, 94 N. W. 498; Giger *v.* Chicago, etc., R. Co., 80 Iowa 492, 45 N. W. 906; Holden *v.* Rutland, etc., R. Co., 30 Vt. 297.

Where cattle-guards have been allowed to become filled with snow and ice, it is a question for the jury whether their condition was the proximate cause of the injury. Giger *v.* Chicago, etc., R. Co., 80 Iowa 492, 45 N. W. 906.

4. Thompson *v.* Seaboard Air Line R. Co., 78 S. C. 384, 58 S. E. 1094 [*overruling* Brown *v.* Spartanburg, etc., R. Co., 57 S. C. 433, 35 S. E. 731].

5. **Requests for instructions** see Trial.

Harmless error see *infra*, X, H, 15, p, (iii).

6. See, generally, Trial.

7. Goodwin *v.* Chicago, etc., R. Co., 75 Mo. 73; Ward *v.* Wilmington, etc., R. Co., 109 N. C. 358, 13 S. E. 926.

8. See *infra*, X, H, 15, n, (ii).

9. Kinyon *v.* Chicago, etc., R. Co., 118 Iowa 349, 92 N. W. 40, 96 Am. St. Rep. 382; Houston, etc., R. Co. *v.* Rippetoe, (Tex. Civ. App. 1901) 64 S. W. 1016.

10. *Alabama.*— Western R. Co. *v.* Stone, 145 Ala. 663, 39 So. 723.

Arkansas.—Arkansas, etc., R. Co. *v.* Sanders, 69 Ark. 619, 65 S. W. 428.

Georgia.— Georgia R., etc., Co. *v.* Partee, 107 Ga. 789, 33 S. E. 668.

Illinois.— Chicago, etc., R. Co. *v.* Jones, 13 Ill. App. 634.

Indiana.— Louisville, etc., R. Co. *v.* Stommel, 126 Ind. 35, 25 N. E. 863.

Indian Territory.— Missouri, etc., R. Co. *v.* Webb, 6 Indian Terr. 280, 97 S. W. 1010.

Mississippi.— Illinois Cent. R. Co. *v.* Greaves, 75 Miss. 360, 22 So. 804

Missouri.— Motch *v.* Chicago Great Western R. Co., 82 Mo. App. 50.

Texas.— Gulf, etc., R. Co. *v.* Hudson, 77 Tex. 494, 14 S. W. 158.

See 41 Cent. Dig. tit. "Railroads," § 1642.

11. Johnson *v.* Atchison, etc., R. Co., 117 Mo. App. 308, 93 S. W. 866.

12. Heiter *v.* East St. Louis Connecting R. Co., 53 Mo. App. 331; Saine *v.* Missouri, etc., R. Co., (Tex. Civ. App. 1905) 85 S. W. 487.

13. Johnson *v.* Atchison, etc., R. Co., 117 Mo. App. 308, 93 S. W. 866.

an opinion upon the merits of the case.[14] The instructions must not submit to the jury the determination of questions of law,[15] or, on the other hand, invade the province of the jury in determining issues of fact.[16] The instructions must not impose upon defendant a higher degree of care and diligence than the rule of ordinary care which the law requires,[17] or in stating the conditions authorizing a recovery omit any essential element necessary to establish plaintiff's cause of action,[18] as that the negligence shown must have been the proximate cause of the injury,[19] or, on the other hand, authorize a verdict for defendant upon a finding that certain duties were properly performed to the exclusion of other grounds of liability involved in the case.[20] Requested instructions which state the law correctly as to material issues which there is evidence tending to support should be given,[21] but the refusal of such instructions is not error where they are covered by the general charge given.[22] So also instructions which have no other purpose than to aid the jury in weighing the evidence are largely discretionary with the court and where the court might rightfully have thought such instructions unnecessary it will not be held error to refuse them.[23] Where there is evidence as to the value of the animal at different times, it is error if the instructions fail to restrict the damages to its value at the time of the injury.[24]

(II) *Conformity to Issues and Evidence.* The instructions must conform to and be limited by the issues made by the pleadings and evidence,[25] and

14. Texas, etc., R. Co. *v.* Kirby, 1 Tex. App. Civ. Cas. § 564.

15. Chicago, etc., R. Co. *v.* Jones, 13 Ill. App. 634; Carpenter *v.* Chicago, etc., R. Co., 119 Mo. App. 204, 95 S. W. 985; Neely *v.* Charlotte, etc., R. Co., 33 S. C. 136, 11 S. E. 636.

16. See *infra*, X, H, 15, n, (III).

17. Atlantic Coast Line R. Co. *v.* White, 129 Ga. 668, 59 S. E. 898 (holding that an instruction is erroneous which imposes upon the railroad company the exercise of all possible care to avoid an injury to stock); Atlantic Coast Line R. Co. *v.* Waycross Electric Light, etc., Co., 123 Ga. 613, 51 S. E. 621 (holding that it is error to instruct the jury that the statutory presumption of negligence may be rebutted by defendant by showing that "everything was done by its agents and servants which could have been done" to avoid the injury); Atlantic, etc., R. Co. *v.* Hudson, 123 Ga. 108, 51 S. E. 29 (holding that an instruction submitting to the jury whether defendant "did use all the means at its command" to avoid the injury declares too stringent a rule); Georgia Southern, etc., R. Co. *v.* Jones, 121 Ga. 822, 49 S. E. 729 (holding that an instruction that where animals are on the track ordinary care require the company "to do all that they could to slow up or stop their train" is erroneous); Savannah, etc., R. Co. *v.* Wideman, 99 Ga. 245, 25 S. E. 400 (holding that it is error to instruct the jury that defendant should have used "every effort" to prevent the injury); Louisville, etc., R. Co. *v.* Rhoads, 90 S. W. 219, 28 Ky. L. Rep. 692 (holding that it is error to instruct the jury to find for plaintiff unless they find that the injury was caused "without any negligence" on the part of defendant's employees); Beattyville, etc., R. Co. *v.* Maloney, 49 S. W. 545, 20 Ky. L. Rep. 1541 (holding that an instruction is erroneous which holds defendant responsible if the injury could have been prevented instead of could have been prevented by reasonable care); Yazoo, etc., R. Co. *v.* Wright, 78 Miss. 125, 28 So. 806 (holding that it is error to instruct the jury to find for plaintiff unless the injury was "unavoidable").

If the court expressly corrects an instruction given in which the degree of care is erroneously stated, and restates the instruction as it should have been given, the error is cured. Atlantic, etc., R. Co. *v.* Smith, 2 Ga. App. 294, 58 S. E. 542.

18. Brentner *v.* Chicago, etc., R. Co., 68 Iowa 530, 23 N. W. 245, 27 N. W. 605; Montgomery *v.* Wabash, etc., R. Co., 90 Mo. 446, 2 S. W. 409; Henson *v.* St. Louis, etc., R. Co., 34 Mo. App. 636.

19. Louisville, etc., R. Co. *v.* Christian Moerlein Brewing Co., 150 Ala. 390, 43 So. 723; Louisville, etc., R. Co. *v.* Mertz, 149 Ala. 561, 43 So. 7.

20. Southern R. Co. *v.* Reaves, 129 Ala. 457, 29 So. 594; Ohio, etc., R. Co. *v.* Stribling, 38 Ill. App. 17; Louisville, etc., R. Co. *v.* Suddoth, 70 Miss. 265, 12 So. 205; Carlton *v.* Wilmington, etc., R. Co., 104 N. C. 365, 10 S. E. 516.

21. Louisville, etc., R. Co. *v.* Stommel, 126 Ind. 35, 25 N. E. 863; Midgett *v.* St. Louis, etc., R. Co., 124 Mo. App. 540, 102 S. W. 56.

22. Buckman *v.* Missouri, etc., R. Co., 100 Mo. App. 30, 73 S. W. 270; Hoskins *v.* Chicago, etc., R. Co., 19 Mo. App. 96; Missouri etc., R. Co. *v.* Cassinoha, 44 Tex. Civ. App. 625, 99 S. W. 888; International, etc., R. Co. *v.* Barton, (Tex. Civ. App. 1899) 54 S. W. 797; Texas, etc., R. Co. *v.* Mitchell, 2 Tex. App. Civ. Cas. § 373.

23. Taylor *v.* Chicago, etc., R. Co., 76 Iowa 753, 40 N. W. 84.

24. Texas, etc., R. Co. *v.* Billingsley, (Tex. Civ. App. 1896) 37 S. W. 27.

25. *Alabama.*— Georgia Cent. R. Co. *v.* Main, 143 Ala. 149, 42 So. 108.

Illinois.— Chicago, etc., R. Co. *v.* Jones, 13 Ill. App. 634.

it is error to submit to the jury issues not presented by the pleadings,[26] or not supported by the evidence.[27] So also it is error for the court to withdraw from the consideration of the jury any material matter properly presented by the pleadings and evidence,[28] or to refuse to instruct the jury if requested that where particular acts of negligence or a particular ground of liability is alleged there can be no recovery on other grounds.[29]

(III) *INVADING PROVINCE OF JURY.* The instructions of the court must not invade the province of the jury,[30] and so must not assume the existence of

Iowa.— Dunn *v.* Chicago, etc., R. Co., 58 Iowa 674, 12 N. W. 734.

Missouri.— Roberts *v.* Chicago, etc., R. Co., 119 Mo. App. 372, 94 S. W. 838.

Texas.— Gulf, etc., R. Co. *v.* Cash, 8 Tex. Civ. App. 569, 28 S. W. 387.

See 41 Cent. Dig. tit. "Railroads," § 1643.

26. Chicago, etc., R. Co. *v.* Wells, 42 Ill. App. 26; Chicago, etc., R. Co. *v.* Jones, 13 Ill. App. 634; Houston, etc., R. Co. *v.* Terry, 42 Tex. 451; Gulf, etc., R. Co. *v.* Cash, 8 Tex. Civ. App. 569, 28 S. W. 387.

An instruction is not a substantial departure from the petition where the petition alleges that defendant suffered the fence "to be and remain insecure, rotted down and out of repair," and the court charges that defendant is liable if the fence through which the animal escaped was "defective, insecure and insufficient to turn stock" (Lainiger *v.* Kansas City, etc., R. Co., 41 Mo. App. 165): and where among other acts of negligence, it is alleged that defendant's servants failed to stop the train, it is not error for the court to charge the jury that they may consider the rate of speed, although negligence in running the train too fast is not charged, since the rate of speed is proper to be considered in determining whether the train could have been stopped in time to avoid the injury (Brown *v.* Sioux City, etc., R. Co., 94 Iowa 309, 62 N. W. 737).

27. *California.*— Boyd *v.* Southern California R. Co., 126 Cal. 571, 58 Pac. 1046.

Colorado.—Atchison, etc., R. Co. *v.* Adcock, 38 Colo. 369, 88 Pac. 180.

Illinois.— St. Louis, etc., R. Co. *v.* Nelson, 41 Ill. App. 606; Chicago, etc., R. Co. *v.* Jones, 13 Ill. App. 634.

Missouri.— Sweeney *v.* St. Louis, etc., R. Co., 38 Mo. App. 154.

Texas.— Gulf, etc., R. Co. *v.* Simpson, 41 Tex. Civ. App. 125, 91 S. W. 874; Missouri, etc., R. Co. *v.* Kennedy, 33 Tex. Civ. App. 445, 76 S. W. 943; Gulf, etc., R. Co. *v.* Cash, 8 Tex. Civ. App. 569, 28 S. W. 387.

See 41 Cent. Dig. tit. "Railroads," § 1643.

If there is no evidence that the animal was killed by a train, an instruction is erroneous which makes the railroad company liable if the conductor in charge of its train failed to stop the train or sound the whistle. Richmond, etc., R. Co. *v.* Chandler, (Miss. 1903) 13 So. 267.

Condition of crossing.— There is no error in not submitting to the jury an issue as to the condition of a crossing, although it is shown to be defective, where there is no evidence that the animal was injured at the crossing or by reason of its condition. Croddy *v.* Chicago, etc., R. Co., 91 Iowa 598, 60 N. W. 214.

28. Kinyon *v.* Chicago, etc., R. Co., 118 Iowa 349, 92 N. W. 40, 96 Am. St. Rep. 382; Baughman *v.* Shenango, etc., R. Co., 92 Pa. St. 335, 37 Am. Rep. 690.

In an action based upon a failure to keep fences in repair where the animal was killed on a public crossing but plaintiff claimed that it got there by reason of defendant's failure properly to fence its tracks, it is proper to refuse to instruct the jury that if the animal was struck on the highway plaintiff could not recover since it excludes the idea that defendant's negligence might have been the cause of the animal being on the highway or contributed to its being there. Jebb *v.* Chicago, etc., R. Co., 67 Mich. 160, 34 N. W. 538.

Matters admitted by the pleading need not be submitted the jury. Scott *v.* Chicago, etc., R. Co., 78 Iowa 199, 42 N. W. 645, holding that where the injury is admitted and defendant pleads a tender of payment, such plea is a sufficient admission of plaintiff's ownership of the animal.

29. Mobile, etc., R. Co. *v.* Ladd, 92 Ala. 287, 9 So. 169; White *v.* Utica, etc., R. Co., 15 Hun (N. Y.) 333.

30. *Alabama.*—Alabama Great Southern R. Co. *v.* Roebuck, 76 Ala. 277; Memphis, etc., R. Co. *v.* Lyon, 62 Ala. 71; Memphis, etc., R. Co. *v.* Bibb, 37 Ala. 699.

Georgia.— Southern R. Co. *v.* Sheffield, 127 Ga. 569, 56 S. E. 838.

Illinois.— Chicago, etc., R. Co. *v.* Bunker, 81 Ill. App. 616.

Texas.— Texas, etc., R. Co. *v.* Kirby, 1 Tex. App. Civ. Cas. § 564.

Virginia.— Richmond, etc., R. Co. *v.* Noell, 86 Va. 19, 9 S. E. 473.

See 41 Cent. Dig. tit. "Railroads," § 1644.

It is proper to refuse to instruct the jury that running a train at thirty or forty miles per hour constitutes no element of negligence (Louisville, etc., R. Co. *v.* Stommell, 126 Ind. 35, 25 N. E. 863); or to instruct the jury as a matter of law that under the circumstances shown the accident was unavoidable (Selma, etc., R. Co. *v.* Fleming, 48 Ga. 514); or to instruct the jury that the inspection of a fence every two days was a sufficient exercise of diligence (Evans *v.* St. Paul, etc., R. Co., 30 Minn. 489, 16 N. W. 271).

What acts do or do not constitute negligence is a question for the jury except where a particular act is declared to be negligence either by statute or a valid municipal ordinance, and it is error for the court to instruct the jury as to what ordinary care re-

material facts in issue which the jury must find from the evidence,[31] draw inferences of fact from the evidence,[32] or pass upon the credibility of witnesses or the weight of evidence.[33]

(IV) *PRESUMPTIONS AND BURDEN OF PROOF.* The court must correctly instruct the jury upon the law as to the burden of proof,[34] and in such terms as not to be calculated to confuse or mislead them,[35] but the instruction need not refer in express terms to the burden of proof if it is so worded that the jury could not fail to understand the law upon the subject.[36] Where by statute proof of the injury is *prima facie* evidence of negligence, an instruction is erroneous which places the burden of proving negligence on plaintiff.[37] In such cases it is proper to instruct the jury that if they are satisfied of the fact of injury by defendant's train the burden is on defendant to show facts exculpating it from liability,[38] and to refuse an instruction that, although plaintiff makes a *prima facie* case by proof of the injury that they cannot find for plaintiff unless the evidence shows negligence on the part of the railroad company;[39] but it is proper to instruct, after stating the law as to the burden of proof, that where all the facts and circumstances surrounding the injury are in evidence the jury will determine the case from the evidence and not upon the statutory presumption of negligence.[40]

(V) *FENCES AND CATTLE-GUARDS* — (A) *In General.* In actions based upon the statutory liability of railroad companies for failure to construct and maintain fences and cattle-guards, an instruction is erroneous which lays down a rule of liability different from that prescribed by the statute,[41] or which in stating what must be found to authorize a recovery omits any essential element necessary to establish plaintiff's cause of action under the particular statute,[42]

quires to be done in a particular case. Atlanta, etc., R. Co. *v.* Hudson, 123 Ga. 108, 51 S. E. 29.

31. Louisville, etc., R. Co. *v.* Christian Brewing Co., 150 Ala. 390, 43 So. 723; Chicago, etc., R. Co. *v.* Jones, 13 Ill. App. 634; Kinyon *v.* Chicago, etc., R. Co., 118 Iowa 349, 92 N. W. 40, 96 Am. St. Rep. 382; Richmond, etc., R. Co. *v.* Noell, 86 Va. 19, 9 S. E. 473.

32. Memphis, etc., R. Co. *v.* Bibb, 37 Ala. 699.

33. Boyd *v.* South California R. Co., 126 Cal. 571, 58 Pac. 1046; Louisville, etc., R. Co. *v.* Stommel, 126 Ind. 35, 25 N. E. 863; Texas, etc., R. Co. *v.* Kirby, 1 Tex. App. Civ. Cas. § 564; Richmond, etc., R. Co. *v.* Noell, 86 Va. 19, 9 S. E. 473.

It is proper to refuse to instruct the jury that the positive testimony given by one witness is entitled to more weight than the negative testimony given by another. Louisville, etc., R. Co. *v.* Stommel, 126 Ind. 35, 25 N. E. 863.

34. Chicago, etc., R. Co. *v.* Mertz, (Ala. 1907) 43 So. 7; Western R. Co. *v.* McPherson, 146 Ala. 427, 40 So. 934; Croddy *v.* Chicago, etc., R. Co., 91 Iowa 598, 60 N. W. 214.

35. Chicago, etc., R. Co. *v.* Zerbe, 110 Ill. App. 171; Missouri, etc., R. Co. *v.* Kennedy, 33 Tex. Civ. App. 445, 76 S. W. 943.

An instruction given in the language of the statute that where an animal is killed by a train operated at a speed in violation of a municipal ordinance it shall be presumed to have been done by the negligence of the company cannot be held to be erroneous, although somewhat objectionable since the jury might have understood therefrom that the presumption was conclusive instead of a mere *prima facie* presumption. Chicago, etc., R. Co. *v.* Haggerty, 67 Ill. 113.

36. Scott *v.* Chicago, etc., R. Co., 78 Iowa 199, 42 N. W. 645; Dunn *v.* Chicago, etc., R. Co., 58 Iowa 674, 12 N. W. 734.

37. Troutwine *v.* Louisville, etc., R. Co., 105 S. W. 142, 32 Ky. L. Rep. 5.

38. Southern R. Co. *v.* Hays, 78 Miss. 319, 28 So. 939. See also Southern R. Co. *v.* Murray, 91 Miss. 546, 44 So. 785.

It is not error after instructing the jury that if they believe defendant's evidence they must find for defendant to also charge at the instance of plaintiff that they are not obliged to find for defendant at all events, and if they do not believe the evidence tending to acquit defendant of negligence they may find a verdict for plaintiff, since the credibility of defendant's witness is a question for the jury. Alabama Great Southern R. Co. *v.* Moody, 92 Ala. 279, 9 So. 238.

In South Carolina it is held independently of statute that proof of the injury is *prima facie* evidence of negligence, and that the presumption of negligence remains throughout the case until overcome by proof on the part of defendant, and that an instruction that defendant's explanation of the accident requires plaintiff to then show negligence by a preponderance of evidence is properly refused. Fuller *v.* Port Royal, etc., R. Co., 24 S. C. 132.

39. Louisville, etc., R. Co. *v.* Smith, 67 Miss. 15, 7 So. 212.

40. Hamlin *v.* Yazoo, etc., R. Co., 72 Miss. 39, 16 So. 877.

41. Brentner *v.* Chicago, etc., R. Co., 68 Iowa 530, 23 N. W. 245, 27 N. W. 605.

42. Montgomery *v.* Wabash R. Co., 90 Mo. App. 446, 2 S. W. 409.

such as the duty of defendant to fence at the place in question,[43] the necessity that the animal must have come upon the track at a place where the company should have fenced and had neglected to do so,[44] or at the place where the company had permitted its fence to become defective,[45] that the animal must have been running at large where the statute so provides,[46] and that the failure to fence must have been the cause of the injury;[47] but where it is alleged that the road was not properly fenced and there is evidence tending to support the allegations, it is proper to charge that to entitle plaintiff to recover it is not necessary to find negligence in the operation of the train.[48] Whether the place in question was one which defendant was required by the statute to fence is a question of law and should not be submitted to the jury;[49] but where there is no statute requiring railroad companies to fence, the court should, if requested, instruct the jury that it is not the duty of the railroad company to do so.[50] The instructions must conform to the issues and evidence,[51] and be based upon all the evidence,[52] must

But the same exactness as is necessary in the pleadings is not required in instructions stating the conditions authorizing a recovery, as the instructions are to be considered with reference to all the evidence in the case which it is not permissible to set out in the pleadings. Moore *v.* Missouri Pac. R. Co., 73 Mo. 438.

Error not prejudicial.—Although an instruction erroneously states that to entitle plaintiff to recover he need only prove certain facts, yet if other portions of the charge fully and correctly state the conditions upon which alone plaintiff could recover, so that the jury could not reasonably have been misled, the error is not prejudicial. Karr *v.* Chicago, etc., R. Co., 87 Iowa 298, 54 N. W. 144.

43. Smith *v.* Kansas City, etc., R. Co., 58 Iowa 622, 12 N. W. 619; Mumpower *v.* Hannibal, etc., R. Co., 59 Mo. 245.

44. Henson *v.* St. Louis, etc., R. Co., 34 Mo. App. 636.

Where the evidence tends to show an entry through an open gate which it was not the duty of defendant to keep closed, an instruction is erroneous which authorizes the jury to find for plaintiff without negligence in the operation of the train if the fence was defective, although the animal entered through the gate (International, etc., R. Co. *v.* Erwin, (Tex. Civ. App. 1902) 67 S. W. 466); and where there is no evidence of either actual or constructive notice on the part of defendant that the gate was open, it is error to refuse to instruct the jury that if the animal came upon the track through the gate defendant is not liable (Hungerford *v.* Syracuse, etc., R. Co., 46 Hun (N. Y.) 339).

45. Ft. Worth, etc., R. Co. *v.* Worsham, (Tex. Civ. App. 1907) 105 S. W. 853.

46. Brentner *v.* Chicago, etc., R. Co., 68 Iowa 530, 23 N. W. 245, 27 N. W. 605.

47. Montgomery *v.* Wabash R. Co., 90 Mo. 446, 2 S. W. 409; Ridenore *v.* Wabash, etc., R. Co., 81 Mo. 227.

But an instruction may be sufficient, although not informing the jury in express terms that the failure to fence must have caused the injury where from the statements made, considered in connection with the evidence, the jury could not be misled but would infer that they must so find. Morrison *v.* Chicago, etc., R. Co., 117 Iowa 587, 91 N. W. 793; Terry *v.* Missouri Pac. R. Co., 77 Mo. 254; Williams *v.* Missouri Pac. R. Co., 74 Mo. 453; Moore *v.* Missouri Pac. R. Co., 73 Mo. 438; Reed *v.* Chicago, etc., R. Co., 112 Mo. App. 575, 87 S. W. 65.

Proximate and remote cause.—The instruction should distinguish between a direct and remote connection between the want of a fence and the injury complained of, and it is error to instruct that plaintiff should recover if the jury find a "clear connection" between the one and the other, since they might find a clear connection and yet one so remote as not to furnish a legal ground of liability. Holden *v.* Rutland, etc., R. Co., 30 Vt. 297.

48. Galveston, etc., R. Co. *v.* Walter, (Tex. Civ. App. 1894) 25 S. W. 163.

49. Fraysher *v.* Mississippi River, etc., R. Co., 66 Mo. App. 573.

50. Gulf, etc., R. Co. *v.* Ellidge, 49 Fed. 356, 1 C. C. A. 295.

51. Robinson *v.* Denver, etc., R. Co., 24 Colo. 98, 49 Pac. 37 (holding that, where it appeared that defendant's right of way was fenced at the place of accident, an instruction is erroneous which assumed to define defendant's duty with respect to the appropriateness of fences voluntarily constructed by it, where there is no evidence that defendant built, maintained, or exercised any control over the fences); McGill *v.* Minneapolis, etc., R. Co., 113 Iowa 358, 85 N. W. 620 (holding that it is error to submit to the jury an issue as to defendant's negligence in failing to construct cattle-guards where there is no evidence that such failure caused or contributed to the injury complained of); Wichita, etc., R. Co. *v.* Hart, 7 Kan. App. 554, 51 Pac. 932 (holding that the court properly refused to give an instruction for defendant based upon the impracticability of fencing at the place in question, where there was no evidence tending to prove that a fence could not have been constructed and maintained there); Gulf, etc., R. Co. *v.* Simpson, 41 Tex. Civ. App. 125, 91 S. W. 874 (holding that an instruction is erroneous which would authorize a recovery upon the ground that the road was not fenced at the place in question, where the evidence shows that the accident occurred upon a public crossing).

52. Schlotzhauer *v.* Missouri, etc., R. Co.,

not be confusing or misleading,[53] must not be conflicting,[54] or invade the province of the jury.[55] If the complaint charges only negligence in the operation of the train, it is error to submit any charge tending to hold defendant liable because its track was not fenced at the place in question.[56]

(B) *Sufficiency, Defects, and Repairs.* An instruction is erroneous which imposes upon a railroad company the duty of maintaining fences and cattle-guards sufficient to exclude stock from the track without qualifying the term as meaning merely reasonably sufficient or sufficient to turn ordinary stock under ordinary circumstances,[57] or where a lawful fence is required, which fails to instruct the jury as to what constitutes a lawful fence,[58] or which makes the duty of keeping them in repair absolute instead of merely to exercise ordinary care in this regard,[59] or which excludes the questions as to whether the alleged defect was due to a want of repair,[60] or whether the company had either actual or constructive notice of the defect,[61] or a reasonable time thereafter in which to make the

89 Mo. App. 65, holding that an instruction is erroneous which singles out certain facts shown by the evidence and fixes defendant's liability thereby.

53. Motch *v.* Chicago, etc., R. Co., 82 Mo. App. 50 (holding that where it is conceded that the animal came upon the track over the cattle-guards and the question is as to their sufficiency, but evidence has been erroneously admitted as to the condition of the fences, an instruction based upon the hypothesis of their entry through the fence where defective is misleading and erroneous); Southern Kansas City, etc., R. Co. *v.* Cooper, 32 Tex. Civ. App. 592, 75 S. W. 328 (holding that an instruction that if the company "had no right" to fence at the place in question, then plaintiff to recover must show negligence, is erroneous and should have been to the effect that if the company "was not required" to fence, etc., as the jury would probably understand that although the company was not required to fence yet if it had a right to do so it would be liable irrespective of other acts of negligence); Missouri, etc., R. Co. *v.* Coleman, (Tex. Civ. App. 1898) 46 S. W. 371 (holding that in an action for the negligent injury of an animal within defendant's switch limits, an instruction as to the statutory liability for failure to fence is erroneous as misleading, since the statute does not apply to such places).

Instruction not misleading.— Under a statute making railroad companies liable for stock killed, unless the track is inclosed by a good and lawful fence "to prevent" animals from being on the track, an instruction that the company is not liable where the track is inclosed by a good and lawful fence "which prevents" animals from being on the track is not misleading. Missouri Pac. R. Co. *v.* Eckel, 49 Kan. 794, 31 Pac. 693.

54. Saine *v.* Missouri, etc., R. Co., (Tex. Civ. App. 1905) 85 S. W. 487.

55. Boyd *v.* Southern California R. Co., 126 Cal. 571, 58 Pac. 1046, holding that an instruction that if the jury find that the animal was killed at a place where the railroad company had failed to fence or maintain a sufficient fence, they are justified in presuming and authorized to find that it came upon the track at that place, is erroneous in that it invades the province of the jury in determining the value and weight of evidence.

56. Gulf, etc., R. Co. *v.* Anson, (Tex. Civ. App. 1904) 82 S. W. 785.

57. Jones *v.* Chicago, etc., R. Co., 59 Mo. App. 137; Cole *v.* Chicago, etc., R. Co., 47 Mo. App. 624.

But it is not error to charge in the words of the statute that a railroad company is bound to maintain sufficient cattle-guards, if the jury is further instructed that the statute only requires that the cattle-guards should be reasonably sufficient or sufficient to turn ordinary stock under ordinary circumstances. Baltimore, etc., R. Co. *v.* Abbott, 59 Ill. App. 609.

58. Clem *v.* Quincy, etc., R. Co., 119 Mo. App. 245, 96 S. W. 226.

59. Missouri, etc., R. Co. *v.* Bradshaw, (Tex. Civ. App. 1904) 83 S. W. 897.

60. Brentner *v.* Chicago, etc., R. Co., 58 Iowa 625, 12 N. W. 615.

61. Brentner *v.* Chicago, etc., R. Co., 58 Iowa 625, 12 N. W. 615.

An instruction is sufficiently favorable to defendant which informs the jury that plaintiff can only recover upon proof of a want of repair known to defendant or which had existed such a length of time that knowledge should be imputed. Klay *v.* Chicago, etc., R. Co., 126 Iowa 671, 102 N. W. 526.

Defects in original construction.—Where there is no evidence that fences as originally constructed were sufficient, but on the contrary the evidence all tends to show that they never did meet the requirements of the law, an instruction is not erroneous which fails to require the jury to find that defendant had notice of such defect. Dooley *v.* Missouri Pac. R. Co., 36 Mo. App. 381.

Notice to laboring hands.— An instruction that notice to laboring hands employed by defendant would not be sufficient, but that to bind the company the notice must have come to some agent of the company or person connected with the keeping in repair of fences, is properly refused both because it assumes that a laboring hand could not be charged with the repairing of fences and also because it is calculated to mislead the jury by creating the impression that defendant was not required to make repairs unless notified of their neces-

necessary repairs,[62] or whether the animal came upon the track and was injured by reason of such defects;[63] while on the other hand an instruction that defendant would not be liable unless it caused or knew of the defect is erroneous in that it would relieve the company of the duty of exercising ordinary care to discover defects.[64] Where there is evidence that some of the animals injured passed over a portion of a cattle-guard which was not defective, it is error to refuse to charge that under such circumstances defendant would not be liable for such animals.[65] A charge that cattle-guards are intended to secure the safety of passengers as well as animals is not erroneous as misleading.[66]

(VI) *PRIVATE CROSSINGS, GATES, AND BARS.* In an action based upon the negligent construction or maintenance of a gate the court should instruct the jury as to the standard of care required of defendant,[67] and as in other cases the instructions must conform to and be limited by the issues presented by the pleadings and evidence,[68] and cover each element of the liability involved.[69] Where the statute requires the construction of gates at "necessary" farm crossings, the question of the necessity of the crossing is a mixed question of law and of fact and should not be submitted to the jury without proper guidance as to the circumstances constituting such necessity.[70]

sity. Indianapolis, etc., R. Co. *v.* Truitt, 24 Ind. 162.

62. Brentner *v.* Chicago, etc., R. Co., 58 Iowa 625, 12 N. W. 615.

An instruction that the railroad company must at all times maintain a sufficient fence is not erroneous as misleading where the court further charges that where a fence has been once properly constructed negligence cannot be imputed to the company until it has had a reasonable time to make the repairs after notice, which will be implied after a reasonable time. Varco *v.* Chicago, etc., R. Co., 30 Minn. 18, 13 N. W. 921.

63. Missouri, etc., R. Co. *v.* Bradshaw, (Tex. Civ. App. 1904) 83 S. W. 897. See also Price *v.* Barnard, 70 Mo. App. 175, where the instruction was held sufficiently to submit to the jury whether the injury was caused by the negligence of defendant as to keeping its fences in repair.

But where there is positive evidence in an action for failing to keep a fence in repair that the animal came upon the right of way through the fence, a charge that if it would be as reasonable to presume that it entered through the gate as through the defective fence the jury should find for defendant is properly refused, since from the state of the evidence the matter is one of testimony and not of presumption. Texas, etc., R. Co. *v.* Owens, (Tex. Civ. App. 1905) 87 S. W. 846.

64. Galveston, etc., R. Co. *v.* Walter, (Tex. Civ. App. 1894) 25 S. W. 163.

65. Johnson *v.* Detroit, etc., R. Co., 135 Mich. 353, 97 N. W. 760.

66. Wait *v.* Bennington, etc., R. Co., 61 Vt. 268, 17 Atl. 284, holding that in an action for injury to an animal based upon the defective condition of a cattle-guard, plaintiff cannot object to such a charge as the jury could not have understood therefrom that if the company performed its duty with respect to its passengers it was relieved from liability as to animals upon the track.

67. Wirstlin *v.* Chicago, etc., R. Co., 124 Iowa 170, 99 N. W. 697, holding that an instruction is erroneous which leaves the jury to infer that the duty of maintaining sufficient gates is absolute instead of merely to exercise ordinary care in this regard.

Where the defective fastening of a gate is relied on as the cause of the injury, it is proper to instruct the jury that the principal questions are whether the fastening was reasonably sufficient, and if sufficient whether the animal got upon the track and was injured by reason thereof, and also whether the fastening was such as would be considered safe by a man of ordinary prudence. Payne *v.* Kansas City, etc., R. Co., 72 Iowa 214, 33 N. W. 633.

68. Wirstling *v.* Chicago, etc., R. Co., 124 Iowa 170, 99 N. W. 697; Gulf, etc., R. Co. *v.* Cash, 8 Tex. Civ. App. 569, 28 S. W. 387.

Where plaintiff was not an adjoining landowner and the gates were not erected for his benefit, a special charge as to the gates being left open is properly refused as inapplicable to the facts. International, etc., R. Co. *v.* Barton, (Tex. Civ. App. 1899) 54 S. W. 797.

Where plaintiff's teamsters kept the gate open for their own convenience and this is shown by the evidence, it is not the duty of defendant's servants to shut it, and it is error to instruct the jury that defendant will be liable if the gate had been open for such length of time that the fact could, by the exercise of ordinary care upon the part of defendant, have been discovered and the gate closed. Box *v.* Atchison, etc., R. Co., 58 Mo. App. 359.

69. Rowen *v.* Chicago Great Western R. Co., 82 Mo. App. 24, holding that an instruction asked by defendant was properly refused which left out of consideration conceded facts as to the improper construction of the gate which the jury might have found to be the proximate cause of the injury.

70. Rowen *v.* Chicago Great Western R. Co., 82 Mo. App. 24; Miller *v.* Quincy, etc., R. Co., 56 Mo. App. 72.

Where the necessity for the crossing is not put in issue by the railroad company, special

(VII) *SIGNALS, LOOKOUTS, AND PRECAUTIONS.* An instruction is erroneous which would authorize a verdict for defendant upon a finding that proper care was exercised at the time of the injury without reference to any preceding negligence,[71] as where the instruction ignores the duty of maintaining a lookout for stock,[72] or whether the train was properly equipped,[73] or which, in instructing the jury as to the duty of maintaining a lookout, limits such duty to the engineer alone,[74] or to the time of the accident without reference to whether the animal might have been discovered sooner,[75] or to animals seen actually upon the track without reference to those in dangerous proximity thereto,[76] or which would relieve defendant if a lookout was being maintained and the accident could not have been avoided after the animal was seen without reference to whether the train was being operated at a negligent rate of speed or without a proper headlight;[77] while on the other hand, an instruction is erroneous which bases plaintiff's right to recover upon the mere fact that defendant was negligent as to keeping a lookout, without requiring that such negligence must have been the cause of the injury,[78] or which in cases where the animal was a trespasser or the owner guilty of contributory negligence imposes upon the company the same duty as to discovering the animal as in other cases instead of limiting its liability to the question of whether due care was exercised to avoid the injury after the danger was discovered.[79] An instruction that it is the duty of all persons running trains in the state to keep a constant lookout for stock is not objectionable as appearing to mean that each and every member of the train crew must keep such a lookout.[80] An instruction as to defendant's liability for failure to give the statutory crossing signal must not omit the requirement that the injury must have occurred at a public crossing,[81] and as a result of the omission of the signals,[82] nor should such issue be submitted to the jury at all where the injury did not occur at a public crossing,[83] or where there is no evidence tending to show that the omission of the signals was the cause of the injury,[84] or where the complaint specifies the acts of negligence

instructions in regard to determining such necessity are unnecessary and may therefore properly be omitted. Kavanaugh *v.* Atchison, etc., R. Co., 75 Mo. App. 78. See also Roberts *v.* Chicago, etc., R. Co., 119 Mo. App. 372, 94 S. W. 838.

71. Southern R. Co. *v.* Reaves, 129 Ala. 457, 29 So. 594; Ohio, etc., R. Co. *v.* Stribling, 38 Ill. App. 17; Louisville, etc., R. Co. *v.* Suddoth, 70 Miss. 265, 12 So. 205.

An instruction that if the train could not have been stopped after the animal was seen defendant would not be liable is properly qualified as applying only in case there was no preceding negligence contributing to the injury, such as a failure to keep a lookout or give the statutory signals. Kansas City, etc., R. Co. *v.* Lane, 33 Kan. 702, 7 Pac. 587.

72. Southern R. Co. *v.* Pogue, 145 Ala. 444, 40 So. 565; Georgia Cent. R. Co. *v.* Turner, 145 Ala. 441, 40 So. 355; Kansas City, etc., R. Co. *v.* Simmons, (Ala. 1906) 40 So. 573; Southern R. Co. *v.* Reaves, 129 Ala. 457, 29 So. 594; Southern R. Co. *v.* Riddle, 126 Ala. 244, 28 So. 422; Georgia Cent. R. Co. *v.* Stark, 126 Ala. 365, 28 So. 411; Ohio, etc., R. Co. *v.* Stribling, 38 Ill. App. 17; Carlton *v.* Wilmington, etc., R. Co., 104 N. C. 365, 10 S. E. 516.

73. Southern R. Co. *v.* Pogue, 145 Ala. 444, 40 So. 565; Georgia Cent. R. Co. *v.* Turner, 145 Ala. 441, 40 So. 355; Georgia Cent. R. Co. *v.* Brister, 145 Ala. 432, 40 So. 512.

74. Southern R. Co. *v.* Riddle, 126 Ala. 244, 28 So. 422.

75. East Tennessee, etc., R. Co. *v.* Baker, 94 Ala. 632, 10 So. 211.

76. Georgia Cent. R. Co. *v.* Sport, 141 Ala. 369, 37 So. 344.

77. Western R. Co. *v.* Stone, 145 Ala. 663, 39 So. 723.

78. Alabama Great Southern R. Co. *v.* Moody, 92 Ala. 279, 9 So. 238; Kansas City, etc., R. Co. *v.* Watson, 91 Ala. 483, 8 So. 793.

79. Houston, etc., R. Co. *v.* Rippetoe, (Tex. Civ. App. 1901) 64 S. W. 1016.

80. St. Louis, etc., R. Co. *v.* Ewing, 85 Ark. 53, 107 S. W. 191.

81. Morris *v.* Missouri, etc., R. Co., 99 Mo. App. 455, 73 S. W. 1004.

82. Louisville, etc., R. Co. *v* Christian Moerlein Brewing Co., 150 Ala. 390, 43 So. 723; Louisville, etc., R. Co. *v.* Mertz, (Ala. 1905) 40 So. 60.

83. Atlantic Coast Line R. Co. *v.* Waycross Electric Light, etc., Co., 123 Ga. 613, 51 S. E. 621; Georgia R., etc., Co. *v.* Partee, 107 Ga. 789, 33 S. E. 668; Houston, etc., R. Co. *v.* Wilson, 37 Tex. Civ. App. 405, 84 S. W. 274.

If the injury occurred at a private crossing as shown by the evidence, an instruction as to the duty of railroad companies to give signals at public crossings is erroneous. Missouri, etc., R. Co. *v.* Hunt, (Tex. Civ. App. 1898) 47 S. W. 70.

84. Missouri, etc., R. Co. *v.* Hunt, (Tex. Civ. App. 1898) 47 S. W. 70.

relied on and it is not alleged that the signals were not given.[85] An instruction as to the efforts to be exercised to prevent injuries to animals seen is erroneous if it ignores the duty to exercise such preventive effort as to animals in dangerous proximity to as well as upon the track,[86] or which would relieve defendant if its servants acted in good faith without regard to whether their conduct was in fact negligent,[87] or which on the other hand tends to make the liability of defendant for failing to stop the train absolute if it were possible to do so without reference to whether ordinary care under the circumstances demanded such a precaution,[88] or where the evidence does not show that the animal was injured by a train,[89] or which informs the jury that defendant would be liable if the train could not have been stopped in time to avoid the injury by reason of the speed at which it was operated, since it ignores the question as to whether the rate of speed was unreasonable or dangerous or was the proximate cause of the injury.[90] Where there is evidence tending to show certain facts which indicate that the ordinary precautions were not taken, the court may instruct the jury hypothetically in case they should so find from the evidence;[91] and where there is evidence suggestive of such a theory the court may instruct the jury that if the whistle was blown for the purpose of wrongfully frightening an animal and not to keep it from the track this fact may be considered.[92] Where the precautionary measures to prevent injuries to animals are prescribed by statute, an instruction is erroneous which adds to them and imposes a higher degree of care,[93] or which ignores the principle that, although some required precaution was omitted, the company would not be liable if under the circumstances the injury was unavoidable and could not, even by the exercise of such precaution, have been prevented.[94]

(VIII) *CONTRIBUTORY NEGLIGENCE OF OWNER.* Where there is evidence of a want of ordinary care on the part of plaintiff, it is proper to instruct the jury that there can be no recovery if the injury complained of was the result of plaintiff's negligence or the negligence of both plaintiff and defendant and without any intentional wrong on the part of defendant,[95] unless the action is based upon a ground of liability where contributory negligence is not a defense;[96] and where the question of contributory negligence is put in issue by the pleadings and there is evidence tending to show negligence on the part of plaintiff, it is error for the court not to submit the issue to the jury;[97] but the rule is otherwise where there

85. Houston, etc., R. Co. *v.* Red Cross Stock Farm, 22 Tex. Civ. App. 114, 53 S. W. 834.

86. Georgia Cent. R. Co. *v.* Dumas, 131 Ala. 172, 30 So. 867.

A charge is misleading which informs the jury that where an animal is seen grazing in the vicinity of the track it is not necessary to take any preventive measures until it starts to cross the track, since it would indicate that no precautionary measures were necessary, although the animal might have been approaching the track in a manner indicating a disposition to cross it unless frightened away. Southern R. Co. *v.* Shirley, 128 Ala. 595, 29 So. 687.

87. Arkansas, etc., R. Co. *v.* Sanders, 81 Ark. 604, 99 S. W. 1109.

88. Houston, etc., R. Co. *v.* Red Cross Stock Farm, 22 Tex. Civ. App. 114, 53 S. W. 834.

89. Richmond, etc., R. Co. *v.* Chandler, (Miss. 1893) 13 So. 267.

90. Fullerton *v.* Grand Rapids, etc., R. Co., 101 Iowa 156, 70 N. W. 106.

91. Bullington *v.* Newport News, etc., R. Co., 32 W. Va. 436, 9 S. E. 876.

92. Central R., etc., Co. *v.* Hollinshead, 81 Ga. 208, 7 S. E. 172.

93. Alabama Great Southern R. Co. *v.* Chapman, 80 Ala. 615, 2 So. 738, holding that where the statute requires the engineer to adopt certain precautions and to use all means within his power known to skilful engineers to avoid the injury, an instruction is erroneous which omits the statutory element that the means to be used must be within his power.

94. Alabama Great Southern R. Co. *v.* Smith, 85 Ala. 208, 3 So. 795.

95. Aurora Branch R. Co. *v.* Grimes, 13 Ill. 585.

96. Hathaway *v.* Detroit, etc., R. Co., 124 Mich. 610, 83 N. W. 598, holding that in an action based upon a failure of the railroad company to fence or construct cattle-guards, contributory negligence is no defense, and that an instruction that plaintiff cannot recover if guilty of contributory negligence is properly refused.

Contributory negligence as a defense in actions based upon the statutory liability see *supra*, X, H, 10, a, (II).

97. Johnston *v.* Atchison, etc., R. Co., 117 Mo. App. 308, 93 S. W. 866; Habenicht *v.* Chicago, etc., R. Co., 126 Wis. 521, 105 N. W. 910.

is no evidence of any negligence on the part of plaintiff.[98] Instructions as to contributory negligence must conform to the issues presented by the pleadings and evidence,[99] must not be misleading,[1] or assume the existence of facts not in evidence,[2] and must be based upon all the evidence and not single out a particular fact and instruct the jury without reference to the other circumstances in evidence that it constitutes such negligence on the part of plaintiff as to preclude recovery.[3] An instruction is erroneous which would authorize a recovery by plaintiff notwithstanding the jury might find the issue of contributory negligence to be established by the evidence,[4] and an instruction is also erroneous which makes the question of contributory negligence dependent upon any degree of comparison with the negligence of defendant,[5] except where the doctrine of comparative negligence is recognized,[6] or which omits the essential element that plaintiff's negligence to preclude a recovery must have contributed to the injury complained of,[7] or informs the jury without reference to plaintiff's negligence in the particular case that he cannot recover if he was habitually negligent in a certain regard,[8] or which would authorize a recovery upon a finding that plaintiff was not negligent regardless of the question of defendant's negligence.[9]

o. Verdict, Findings, and Judgment — (i) *In General.*[10] A special verdict to sustain a judgment for plaintiff must contain every fact essential to entitle him to recover,[11] for if a special verdict is silent upon any material point it will

98. St. Louis, etc., R. Co. *v.* Scott, (Ark. 1907) 104 S. W. 1103; Colorado, etc., R. Co. *v.* Webb, 36 Colo. 224, 85 Pac. 683.

99. Union Pac. R. Co. *v.* Ogilvy, 18 Nebr. 638, 26 N. W. 464; Saine *v.* Missouri, etc., R. Co., (Tex. Civ. App. 1905) 85 S. W. 487.

Instruction erroneous.—Where the evidence shows that plaintiff's animals were being driven along an open road from one place to another, this does not constitute running at large, and an instruction that plaintiff had a right to let his animals run at large near defendant's tracks is erroneous as unsupported by the evidence and tending to obscure the real issue. Union Pac. R. Co. *v.* Ogilvy, 18 Nebr. 638, 26 N. W. 464.

1. Bunnell *v.* Rio Grande Western R. Co., 13 Utah 314, 44 Pac. 927, holding that where the evidence shows that plaintiff had voluntarily left his animals upon a highway between two railroad tracks and near a dangerous crossing, an instruction is misleading and erroneous which informs the jury that plaintiff, as well as the rest of the public, had a right to the highway for his stock or for his individual crossing, since his right was only to a proper use of the highway and not to recklessly expose his animals thereon near a dangerous crossing.

2. Union Pac. R. Co. *v.* Ogilvy, 18 Nebr. 638, 26 N. W. 464.

3. Central R. Co. *v.* Hamilton, 71 Ga. 461; Kinyon *v.* Chicago, etc., R. Co., 118 Iowa 349, 92 N. W. 40, 96 Am. St. Rep. 382.

4. Houston, etc., R. Co. *v.* Rippetoe, (Tex. Civ. App. 1901) 64 S. W. 1016.

5. Jeffersonville, etc., R. Co. *v.* Foster, 63 Ind. 342, holding that an instruction is erroneous which implies that plaintiff might recover, although guilty of some negligence if it was less in degree than that of defendant, since a recovery is barred by any negligence on the part of plaintiff which contributes as a proximate cause of the injury.

6. Central R. Co. *v.* Gleason, 69 Ga. 200.

Comparative negligence see, generally, Negligence, 29 Cyc. 559.

7. Kinyon *v.* Chicago, etc., R. Co., 118 Iowa 349, 92 N. W. 40, 96 Am. St. Rep. 382.

8. Jeffersonville, etc., R. Co. *v.* Foster, 63 Ind. 342, holding that an instruction is erroneous which informs the jury that plaintiff cannot recover if he was habitually negligent in permitting his stock to run at large in the immediate vicinity of the railroad track. See also Ohio, etc., R. Co. *v.* Craycraft, 5 Ind. App. 335, 32 N. E. 297, holding a similar instruction to be erroneous where the evidence showed clearly that in the particular case the animal injured was at large without the knowledge of fault of plaintiff.

9. Altreuter *v.* Hudson River R. Co., 2 E. D. Smith (N. Y.) 151.

10. See, generally, Trial.

Form of verdict.— Where an instruction as to the form of verdict if found for plaintiff read, "We the jury find for plaintiff in the sum of $——," and defendant contended that it should have read, "We, the jury find for plaintiff and assess his damages at the sum of $——." claiming that under the form given by the court the jury were at liberty to find for plaintiff more than his damage, it was held that the objection was not well taken. Wages *v.* Quincy, etc., R. Co., 110 Mo. App. 230, 85 S. W. 104.

11. Cleveland, etc., R. Co. *v.* Dugan, 18 Ind. App. 435, 48 N. E. 238.

A finding that the animal entered upon the railroad track through a defective gate erected by the company in the fence inclosing its tracks for the convenience of an adjacent landowner, but which is uncertain as to whether there was a farm crossing at the point where the gate was erected, in which case the company would not be liable, is insufficient. Louisville, etc., R. Co. *v.* Thomas, 1 Ind. App. 131, 27 N. E. 302.

be held as to that point to be against the party upon whom is the burden of proof,[12] and the facts found must support the theory of the complaint.[13] So a special verdict will not sustain a judgment for plaintiff where it merely finds that the crossing signals were not given and does not also find that the omission was the cause of the injury,[14] or if the track was fenced so that there was no duty to keep a lookout for stock, it fails to find that the animal injured was seen by those in charge of the train,[15] or where it finds merely that the railroad fence was out of repair without any finding that defendant was negligent in failing to repair it within a reasonable time,[16] or, if the complaint alleges that the animal was injured at a crossing by reason of a failure to give crossing signals, it does not state where the injury occurred;[17] and where the burden is upon plaintiff to show freedom from contributory negligence, a special verdict which does not find that plaintiff was free from contributory negligence will not support a judgment in his favor.[18] Where there is a general verdict with special findings of fact, it is only where the findings are so inconsistent with the general verdict that the two cannot stand that the general verdict will be set aside, and if they can by any hypothesis be reconciled with the general verdict, the latter will control and the court should render judgment thereon;[19] but the verdict should be set aside where the special findings show that the case was decided solely upon an erroneous theory induced by misleading instructions and not supported by the evidence,[20] or where the special findings show a palpable bias in the minds of the jury against the unsuccessful party,[21] or that the jury disregarded the instructions of the court.[22] In an action for the entire damage for injury to several of plaintiff's animals by separate trains of defendant, there need be no special findings as to the number and value of animals injured by each train unless the jury find that there was negligence in the operation of one but not in the other.[23] Where the complaint contains allegations which if proved would authorize a verdict for double damages on the ground of a failure to fence or actual damages for negligence in the operation of the train, a special finding of negligence in the latter regard will sustain a verdict for full damages apart from the question of sufficient fences.[24] Where the

12. Louisville, etc., R. Co. *v.* Green, 120 Ind. 367, 22 N. E. 327; Dennis *v.* Louisville, etc., R. Co., 116 Ind. 42, 18 N. E. 179, 1 L. R. A. 448; Lake Shore, etc., R. Co. *v.* Van Auken, 1 Ind. App. 492, 27 N. E. 119.

13. Cleveland, etc., R. Co. *v.* Dugan, 18 Ind. App. 435, 48 N. E. 238; Butler *v.* Easton, etc., R. Co., 72 N. J. L. 27, 60 Atl. 218.

14. Louisville, etc., R. Co. *v.* Green, 120 Ind. 367, 22 N. E. 327; Louisville, etc., R. Co. *v.* Ousler, 15 Ind. App. 232, 56 N. E. 290.

15. Dennis *v.* Louisville, etc., R. Co., 116 Ind. 42, 18 N. E. 179, 1 L. R. A. 448.

16. Cleveland, etc., R. Co. *v.* Dugan, 18 Ind. App. 435, 48 N. E. 238.

17. Lake Shore, etc., R. Co. *v.* Van Auken, 1 Ind. App. 492, 27 N. E. 119.

18. Hartzell *v.* Louisville, etc., R. Co., 15 Ind. App. 417, 44 N. E. 315.

19. Chicago, etc., R. Co. *v.* Brannegan, 5 Ind. App. 540, 32 N. E. 790.

Where the sense of the finding is clear and the bill of exceptions furnishes conclusive proof by which it can be amended the fact that it fails to declare specifically that defendant company is a corporation owning and occupying the road in question or coming within the railroad laws will not be held a fatal omission. Continental Imp. Co. *v.* Ives, 30 Mich. 448.

Character of crossing.— A finding that the animal entered on the track at "a cart-way or private way, known as McQuiddy's Crossing," will be construed to mean a "driveway" within the meaning of a statute authorizing the construction of "wagon and driveways," and providing that the railroad company shall not be liable for injury to animals which come upon the track at such crossings unless caused by negligence in the operation of the train. Louisville, etc., R. Co. *v.* Etzler, 119 Ind. 39, 21 N. E. 466.

Wanton misconduct.— Where the jury answers in the negative a special interrogatory as to whether the engineer used all means in his power to avoid the injury after the animals were seen, such finding amounts to a finding of wanton recklessness and sustains a general verdict for plaintiff, whether he was a trespasser on the track or a licensee. Curtis *v.* Oregon R., etc., Co., 36 Wash. 55, 78 Pac. 133.

20. Atchison, etc., R. Co. *v.* Hawkins, 42 Kan. 355, 22 Pac. 322.

21. Damrill *v.* St. Louis, etc., R. Co., 27 Mo. App. 202.

22. Chicago, etc., R. Co. *v.* Campbell, 34 Colo. 380, 83 Pac. 138.

23. Lawson *v.* Chicago, etc., R. Co., 57 Iowa 672, 11 N. W. 633.

24. Baker *v.* Chicago, etc., R. Co., 73 Iowa 389, 35 N. W. 460.

complaint is in several counts and plaintiff has a verdict on one and is not entitled to recover on the others, judgment is properly entered for plaintiff on the one count and for defendant on the others.[25] In an action brought under a statute allowing double damages where plaintiff alleges that he has been damaged in a certain amount for which he asks judgment and for all other and proper relief according to the statute, the court may render judgment for double the actual damages assessed by the jury, although there was no formal prayer in the complaint for double damages.[26]

(II) *ENFORCEMENT OF JUDGMENT.* In the absence of any special statutory provision, the general rules as to the enforcement of judgments in civil actions apply.[27] In Indiana there is a special statutory provision that if the action is brought in the circuit court of the county where the injury occurred the court may, upon motion and notice to the company, order any agent to appear and answer as to the amount of money in his hands belonging to the company, and order him to make payment therefrom in satisfaction of the judgment and costs;[28] and that where the action is brought before a justice, plaintiff, upon filing a certified transcript of the judgment rendered with the clerk of the circuit court, shall upon motion and notice be entitled to the same order and proceedings.[29] The proceeding is in the nature of an original action,[30] wherein an answer may be filed and issues formed as in civil actions,[31] and the motion is in effect a complaint the sufficiency of which may be tested by a demurrer,[32] and must therefore allege every material fact necessary to entitle plaintiff to the benefit of the statutory proceeding.[33] The motion or complaint must show that the judgment was entered of record,[34] that the certified transcript was properly filed with the clerk,[35] and must also allege facts showing the jurisdiction of the justice,[36] or else, as is permissible under the statute, allege that the judgment or decision of the justice "was duly given or made."[37] Where the case is instituted in the circuit court of the county of the injury and the venue is changed, the proceedings may be brought in the court where the judgment was rendered.[38] The notice to the company need not be served upon the particular agent whom plaintiff moves to be

25. Buckman *v.* Missouri, etc., R. Co., 100 Mo. App. 30, 73 S. W. 270.

26. Carpenter *v.* Chicago, etc., R. Co., 119 Mo. App. 204, 95 S. W. 985.

27. See, generally, EXECUTIONS, 17 Cyc. 878; JUDGMENTS, 23 Cyc. 1431, 1502.

28. Louisville, etc., R. Co. *v.* Thompson, 62 Ind. 87; Chicago, etc., R. Co. *v.* Coulter, 18 Ind. App. 512, 48 N. E. 388.

A judgment rendered on an appeal to the circuit court from the judgment of a justice, although not provided for in the express letter of the law, is within its spirit and intention and may be enforced in the same manner as if the action had been originally brought in that court. Ft. Wayne, etc., R. Co. *v.* Clark, 59 Ind. 191.

29. Chicago, etc., R. Co. *v.* Browers, 27 Ind. App. 628, 61 N. E. 958; Chicago, etc., R. Co. *v.* Adams, 12 Ind. App. 317, 39 N. E. 877.

30. Chicago, etc., R. Co. *v.* Summers, 113 Ind. 10, 14 N. E. 733, 3 Am. St. Rep. 616; Chicago, etc., R. Co. *v.* Adams, 26 Ind. App. 443, 59 N. E. 1087; Chicago, etc., R. Co. *v.* Harris, 19 Ind. App. 137, 46 N. E. 1010.

The proceeding was formerly regarded as merely ancillary, but it is now held to be in the nature of an independent civil action and the motion to be a complaint. Chicago, etc., R. Co. *v.* Adams, 26 Ind. App. 443, 59 N. E. 1087.

31. Chicago, etc., R. Co. *v.* Summers, 113 Ind. 10, 14 N. E. 733, 3 Am. St. Rep. 616.

32. Chicago, etc., R. Co. *v.* Browers, 27 Ind. App. 628, 61 N. E. 958; Chicago, etc., R. Co. *v.* Adams, 26 Ind. App. 443, 59 N. E. 1087.

33. Chicago, etc., R. Co. *v.* Harris, 19 Ind. App. 137, 46 N. E. 1010; Chicago, etc., R. Co. *v.* Adams, 12 Ind. App. 317, 39 N. E. 877.

An allegation that the judgment was for stock killed by defendant railroad company which came upon the railroad track at a point where the road was not securely fenced as required by statute is sufficient on demurrer without an allegation that the animals killed were struck by a train. Chicago, etc., R. Co. *v.* Harris, 19 Ind. App. 137, 46 N. E. 1010.

34. Chicago, etc., R. Co. *v.* Adams, 12 Ind. App. 317, 39 N. E. 877.

35. Chicago, etc., R. Co. *v.* Browers, 27 Ind. App. 628, 61 N. E. 958. *Compare* Logansport, etc., R. Co. *v.* Byrd, 51 Ind. 525.

36. Chicago, etc., R. Co. *v.* Browers, 27 Ind. App. 628, 61 N. E. 958; Chicago, etc., R. Co. *v.* Adams, 26 Ind. App. 443, 59 N. E. 1087; Chicago, etc., R. Co. *v.* Harris, 19 Ind. App. 137, 46 N. E. 1010.

37. Chicago, etc., R. Co. *v.* Adams, 26 Ind. App. 443, 59 N. E. 1087.

38. Chicago, etc., R. Co. *v.* Coulter, 18 Ind. App. 512, 48 N. E. 388.

required to appear and answer, but may be served in the manner provided by statute for the service of a summons on a railroad company;[39] and where the action is in the circuit court and the motion is made at the time the judgment is rendered, the parties all being present, no notice to the company is necessary.[40]

p. Appeal and Error — (I) *IN GENERAL.* In actions for injuries to animals the general rules as to appeals in civil actions apply.[41] Questions not urged in the lower court and not properly presented for review will not be considered on appeal,[42] and in the absence of record evidence to the contrary all presumptions are in favor of the correctness of the proceedings and rulings of the trial court.[43] Where a statutory action for injuries to animals is required to be brought in the county or township where the injury occurred this fact is jurisdictional and must affirmatively appear from the record or a judgment for plaintiff cannot be sustained,[44] but no proof that the person before whom the action was brought was a justice of such county or township is necessary other than recitals in the record to this effect.[45] The local or territorial jurisdiction of such actions cannot be conferred by consent, and the question may be raised for the first time on appeal.[46] Where plaintiff is permitted in certain cases to recover attorney's fees, in order to sustain a judgment for plaintiff including such an allowance the record on appeal must show that the case was one in which the allowance was proper;[47] and a court of appellate jurisdiction only will not hear and determine primarily the question of fact as to what is a reasonable attorney's fee to be allowed in that court but will leave plaintiff to seek his remedy in a court of original jurisdiction.[48]

(II) *QUESTIONS OF FACT, VERDICT, AND FINDINGS.* The verdict or finding of a jury upon matters of fact will not be disturbed by an appellate court if there is any evidence reasonably tending to support it or the evidence relating thereto is conflicting,[49] although the weight of evidence may seem to the appellate

39. Louisville, etc., R. Co. *v.* Thompson, 62 Ind. 87.

40. Chicago, etc., R. Co. *v.* Coulter, 18 Ind. App. 512, 48 N. E. 388.

41. See, generally, APPEAL AND ERROR, 2 Cyc. 474.

On an appeal from a judgment of a justice of the peace to a county court where judgment for plaintiff was reversed, it was held on appeal to the supreme court that as plaintiff had introduced in the justice's court evidence sufficient to make out "a pretty fair case," although possibly not going far enough in his proof to sustain a recovery, and defendant had introduced no evidence whatever, plaintiff ought not to be shut out by a mere reversal, and that the judgment of the county court should be so modified as to grant plaintiff a new trial in the justice's court. Hathaway *v.* Fitchburgh R. Co., 20 N. Y. Suppl. 917.

42. Jackson *v.* St. Louis, etc., R. Co., 36 Mo. App. 170; Union Pac. R. Co. *v.* Meyer, 76 Nebr. 549, 107 N. W. 793.

43. Vaughan *v.* Kansas City, etc., R. Co., 34 Mo. App. 141.

44. Lindsay *v.* Kansas City, etc., R. Co., 36 Mo. App. 51.

45. Kinion *v.* Kansas City, etc., R. Co., 39 Mo. App. 382; Duke *v.* Kansas City, etc., R. Co., 39 Mo. App. 105.

46. St. Louis, etc., R. Co. *v.* Gray, 72 Ark. 376, 80 S. W. 748.

47. Wabash, etc., R. Co. *v.* Lavieux, 14 Ill. App. 469.

48. Chicago, etc., R. Co. *v.* Kemp, 25 Ill. App. 39.

49. *Arkansas.*— St. Louis, etc., R. Co. *v.* Taylor, 57 Ark. 136, 20 S. W. 1083.

Florida.— Jacksonville, etc., R. Co. *v.* Wellman, 26 Fla. 344, 7 So. 845.

Georgia.— Atlantic Coast Line R. Co. *v.* Strickland, 125 Ga. 352, 54 S. E. 168; Georgia Cent. R. Co. *v.* McKenzie, 125 Ga. 222, 53 S. E. 591; East Tennessee, etc., R. Co. *v.* Powell, 94 Ga. 524, 19 S. E. 889.

Illinois.— Peoria, etc., R. Co. *v.* Powell, 32 Ill. App. 53; Chicago, etc., R. Co. *v.* Kemp, 25 Ill. App. 39.

Indiana.— Pennsylvania Co. *v.* Mitchell, 124 Ind. 473, 24 N. E. 1065; Indianapolis, etc., R. Co. *v.* Snelling, 16 Ind. 435; Indianapolis, etc., R. Co. *v.* Clay, 4 Ind. App. 282, 28 N. E. 567, 30 N. E. 916.

Kansas.— Kansas City, etc., R. Co. *v.* Grimes, 50 Kan. 655, 32 Pac. 376.

Missouri.— Conrad *v.* Illinois Southern R. Co., 116 Mo. App. 517, 92 S. W. 752.

New York.— Hungerford *v.* Syracuse, etc., R. Co., 4 N. Y. Suppl. 643 [*affirmed* in 127 N. Y. 647, 27 N. E. 856].

South Dakota.— Kielbach *v.* Chicago, etc., R. Co., 13 S. D. 629, 84 N. W. 192.

See 41 Cent. Dig. tit. "Railroads," § 1655.

On appeal from a judgment of a justice, where it appears that the place where the animal was injured was near defendant's depot grounds and that there was no fence there, but it does not appear by the return of the justice that any evidence was introduced to prove that it was within the depot grounds, judgment for plaintiff will not be disturbed, the burden of proof being upon defendant to show this fact. Wilder *v.* Chi-

court to be against the verdict,[50] and the same rule applies to findings of fact by the court in actions tried without a jury;[51] but where there is no evidence whatever to support the verdict a judgment founded thereon will be reversed.[52]

(III) *HARMLESS ERROR.* A party will not be heard to complain of an erroneous ruling by which he was not prejudiced,[53] or which was to his own advantage,[54] and where prejudice to the complaining party is not shown a judgment will not be reversed for error in the admission or rejection of evidence,[55] or in the court's instructions to the jury.[56]

I. Fires[57]* — **1. DUTIES AND LIABILITIES IN GENERAL — a. General Rule.** As a general rule a railroad company is liable for damages, including damages for personal injuries,[58] resulting from fire caused by the operation of its road, where it fails to use ordinary and reasonable care and precaution to prevent the setting out or spread of such fire,[59] but if such care has been used the company will not

cago, etc., R. Co., 70 Mich. 382, 28 N. W. 289.

50. Colorado, etc., R. Co. *v.* Webb, 36 Colo. 224, 85 Pac. 683; Kansas City, etc., R. Co. *v.* Grimes, 50 Kan. 655, 32 Pac. 376.

51. Fritts *v.* New York, etc., R. Co., 62 Conn. 503, 26 Atl. 347.

52. *Arkansas.*— Fink *v.* Nelson, (1898) 48 S. W. 897.

Georgia.— Western, etc., R. Co. *v.* Strickland, 114 Ga. 133, 39 S. E. 943.

Illinois.— Terre Haute, etc., R. Co. *v.* Augustus, 21 Ill. 186; Chicago, etc., R. Co. *v.* Sierer, 13 Ill. App. 261.

Missouri.— Calvert *v.* Hannibal, etc., R. Co., 34 Mo. 242.

Ohio.— Pittsburgh, etc., R. Co. *v.* McMillan, 37 Ohio St. 554.

See 41 Cent. Dig. tit. "Railroads," § 1655.

53. Keyser *v.* Kansas City, etc., R. Co., 56 Iowa 440, 9 N. W. 338; Illinois Cent. R. Co. *v.* Person, 65 Miss. 319, 3 So. 375.

54. Box *v.* Atchison, etc., R. Co., 58 Mo. App. 359; Molair *v.* Port Royal, etc., R. Co., 31 S. C. 510, 10 S. E. 243.

55. Illinois Cent. R. Co. *v.* Person, 65 Miss. 319, 3 So. 375; Buckman *v.* Missouri, etc., R. Co., 100 Mo. App. 30, 73 S. W. 270.

But if the evidence had a tendency to prejudice the party against whom and over whose objection it was erroneously introduced, its admission is ground for reversal. Georgia Cent. R. Co. *v.* Ross, 107 Ga. 73, 32 S. E. 904.

56. *Georgia.*— East Tennessee, etc., R. Co. *v.* Burney, 85 Ga. 635, 11 S. E. 1028.

Kansas.— Leavenworth, etc., R. Co. *v.* Forbes, 37 Kan. 445, 15 Pac. 595.

Missouri.— Hax *v.* Quincy, etc., R. Co., 123 Mo. App. 172, 100 S. W. 693; Clem *v.* Quincy, etc., R. Co., 119 Mo. App. 245, 96 S. W. 226; Vaughan *v.* Kansas City, etc., R. Co., 34 Mo. App. 141; Matney *v.* Kansas City, etc., R. Co., 30 Mo. App. 507.

Nebraska.— Burlington, etc., R. Co. *v.* Gorsuch, 47 Nebr. 767, 66 N. W. 831.

Tennessee.— Louisville, etc., R. Co. *v.* Patton, 104 Tenn. 40, 54 S. W. 984.

Texas.— Gulf, etc., R. Co. *v.* Rowland, (Civ. App. 1893) 23 S. W. 421.

United States.— St. Louis, etc., R. Co. *v.* O'Loughlin, 49 Fed. 440, 1 C. C. A. 311.

See 41 Cent. Dig. tit. "Railroads," § 1656.

An instruction is not prejudicial to defendant under the Iowa fencing statute which omits the condition that to render defendant liable the animal must have been running at large, where the evidence shows without conflict that it was running at large at the time of the injury (Brentner *v.* Chicago, etc., R. Co., 68 Iowa 530, 23 N. W. 245, 27 N. W. 605); or which informs the jury that a railroad company has a right to fence all places except highway crossings, thus failing to except station grounds, where defendant claims that the injury occurred at a crossing and there is no claim or evidence that it occurred at or near a station (Keyser *v.* Kansas City, etc., R. Co., 56 Iowa 440, 9 N. W. 338).

57. Fires generally see FIRES, 19 Cyc. 977.

Fires by street railroads see STREET RAILROADS.

Danger from fire from operation of railroad as element of compensation for property taken or injured see EMINENT DOMAIN, 15 Cyc. 752.

58. Rajnowski *v.* Detroit, etc., R. Co., 74 Mich. 20, 41 N. W. 847, 78 Mich. 681, 44 N. W. 335 (loss of life); McTavish *v.* Great Northern R. Co., 8 N. D. 333, 79 N. W. 443; Seale *v.* Gulf, etc., R. Co., 65 Tex. 274, 57 Am. Rep. 602; Gulf, etc., R. Co. *v.* Johnson, (Tex. Civ. App. 1899) 51 S. W. 531.

Personal injuries that directly resulted to plaintiff and his family from suffocation, and from cold in being compelled to leave the burning building at night, thinly clad, may be recovered, but not injuries resulting from sleeping on a roof. Serafina *v.* Galveston, etc., R. Co., (Tex. Civ. App. 1897) 42 S. W. 142.

59. *California.*— Clark *v.* San Francisco, etc., R. Co., 142 Cal. 614, 76 Pac. 507.

Delaware.— Jefferis *v.* Philadelphia, etc., R. Co., 3 Houst. 447.

Florida.— Gracy *v.* Atlantic Coast Line R. Co., 53 Fla. 350, 42 So. 903.

Georgia.— Southern R. Co. *v.* Thompson, 129 Ga. 367, 58 S. E. 1044.

Illinois.— Bass *v.* Chicago, etc., R. Co., 28 Ill. 9, 81 Am. Dec. 254.

Mississippi.— Mississippi Home Ins. Co. *v.* Louisville, etc., R. Co., 70 Miss. 119, 12 So. 156.

* By Henry H. Skyles.

be liable.[60] In determining the degree of precaution required in such cases, due regard must be had to the character of the season,[61] or weather, as where

Nebraska.—Burlington, etc., R. Co. *v.* Westover, 4 Nebr. 268.

Pennsylvania.— Lackawanna, etc., R. Co. *v.* Doak, 52 Pa. St. 379, 91 Am. Dec. 166; Huyett *v.* Philadelphia, etc., R. Co., 23 Pa. St. 373.

South Dakota.— Cronk *v.* Chicago, etc., R. Co., 3 S. D. 93, 52 N. W. 420.

Texas.— Martin *v.* Texas, etc., R. Co., 87 Tex. 117, 26 S. W. 1052; Gulf, etc., R. Co. *v.* Reagan, (Civ. App. 1895) 32 S. W. 846; Fischer *v.* Bonner, (Civ. App. 1893) 22 S. W. 755.

United States.— Grand Trunk R. Co. *v.* Richardson, 91 U. S. 454, 23 L. ed. 356.

England.— Smith *v.* London, etc., R. Co., L. R. 6 C. P. 14, 40 L. J. C. P. 21, 23 L. T. Rep. N. S. 678, 19 Wkly. Rep. 230.

Canada.— Canada Southern R. Co. *v.* Phelps, 14 Can. Sup. Ct. 132. The statutes of 6 Anne, c. 3, subs. 6, 7, and 14 Geo. III, c. 78, § 86, relieving persons from liability for fires accidentally started by them, does not relieve a railroad company from liability for fires negligently begun. Canada Southern R. Co. *v.* Phelps, 14 Can. Sup. Ct. 132; Holmes *v.* Midland R. Co., 35 U. C. Q. B. 253; McCallum *v.* Grand Trunk R. Co., 31 U. C. Q. B. 527 [*affirming* 30 U. C. Q. B. 122]; Jaffrey *v.* Toronto, etc., R. Co., 23 U. C. C. P. 553.

See 41 Cent. Dig. tit. "Railroads," § 1657.

Ordinary care is such as a person of ordinary prudence would commonly exercise under like circumstances; and the degree of care required in each case is proportional to the amount of danger likely to result from a failure to exercise care. Martin *v.* Texas, etc., R. Co., 87 Tex. 117, 26 S. W. 1052; St. Louis Southwestern R. Co. *v.* Connally, (Tex. Civ. App. 1906) 93 S. W. 206. It is such care as reasonably careful and prudent railway companies generally exercise under circumstances entirely similar to those surrounding the particular case. Abrams *v.* Seattle, etc., R. Co., 27 Wash. 507, 68 Pac. 78. It is not necessary to use the utmost care. Sherrell *v.* Louisville, etc., R. Co., (Ala. 1905) 44 So. 153.

A conveyance of land for railroad purposes, or an assessment of its value in condemnation proceedings, does not affect the liability of a railroad company for injuries by fire set out by its engines. Delaware, etc., R. Co. *v.* Salmon, 39 N. J. L. 299, 23 Am. Rep. 214.

A fire caused by the negligent act of a fireman or other agent or servant, within the scope of his employment, makes the railroad company liable for the resulting damages. Spaulding *v.* Chicago, etc., R. Co., 33 Wis. 582.

The heating of freight cars, when necessary for the safe transportation of freight, is part of the operation of a railroad, and cannot be delegated by it to others; and where a railroad company intrusts the heating of a freight car to a shipper, it is responsible for damages to adjacent property from fire caused by the shipper's negligence. Rolfe *v.* Boston, etc., R. Co., 69 N. H. 476, 45 Atl. 251.

A statute requiring a railroad company to place on its locomotives certain contrivances to guard against the emission of sparks except during certain months does not exempt such railroad company from the exercise of reasonable care in the operation of its road. Toledo, etc., R. Co. *v.* Wickenden, 11 Ohio Cir. Ct. 378, 5 Ohio Cir. Dec. 171.

A direction by the adjoining owner to sectionmen not to burn grass on his land, but which does not direct them not to remove the grass in some other way, does not relieve the company from liability for setting fire thereto by its engines. Great Northern R. Co. *v.* Coats, 115 Fed. 452, 53 C. C. A. 382.

60. *Connecticut.*—Burroughs *v.* Housatonic R. Co., 15 Conn. 124, 38 Am. Dec. 64.

Iowa.— Libby *v.* Chicago, etc., R. Co., 52 Iowa 92, 2 N. W. 982; Small *v.* Chicago, etc., R. Co., 50 Iowa 338.

New Jersey.— Morris, etc., R. Co. *v.* State, 36 N. J. L. 553.

New York.— Fero *v.* Buffalo, etc., R. Co., 22 N. Y. 209, 78 Am. Dec. 178.

South Carolina.— Brown *v.* Atlanta, etc., Air Line R. Co., 19 S. C. 39.

Texas.— St. Louis Southwestern R. Co. *v.* Knight, (Civ. App. 1897) 41 S. W. 416, holding that where fire originates outside the right of way, and there is no negligence as to appliances to prevent the escape of fire, or in the manner of their use the railroad company is not liable.

England.— Canadian Pac. R. Co. *v.* Roy, [1902] A. C. 220, 71 L. J. P. C. 51, 86 L. T. Rep. N. S. 127, 18 T. L. R. 200, 50 Wkly. Rep. 415 [*affirming* 12 Quebec K. B. 543, which *reversed* 9 Quebec Q. B. 551].

See 41 Cent. Dig. tit. "Railroads," § 1657.

A railroad company is not an insurer against loss or damage that may occur by reason of fire escaping from its engines without negligence on its part. Creighton *v.* Chicago, etc., R. Co., 68 Nebr. 456, 94 N. W. 527.

If sparks go beyond defendant's right of way and ignite such matter over which defendant has no control, defendant will not be chargeable with negligence, nor will it be so chargeable if the fire originated outside the right of way from some other cause, communicating itself to the right of way and then to plaintiff's premises. Moore *v.* Wilmington, etc., R. Co., 124 N. C. 338, 32 S. E. 710.

A contiguous owner assumes the risk of accidental loss through fires not occasioned through negligence or wilfulness on the part of the railroad company. Wabash R. Co. *v.* Miller, 18 Ind. App. 549, 48 N. E. 663.

61. Pittsburgh, etc., R. Co. *v.* Noel, 77 Ind. 110 (holding that if the season is unusually dry the railroad company is bound to take extra precautions against fire); Louisville, etc., R. Co. *v.* Fort, 112 Tenn. 432, 80 S. W.

winds are blowing,[62] and to the place at which the engine or train is being operated.[63]

b. Statutory Liability[64] — (i) *In General.* In many jurisdictions there are statutes expressly imposing a liability upon a railroad company for damages caused by the setting out or spread of fire originating on its right of way, or from the operation of its locomotives.[65] Under some of these statutes this liability is imposed upon the railroad company regardless of the question of negligence,[66]

429 (holding that where the running of trains is attended with unusual danger from sparks, such as result from a drought and wind, the law requires of a railroad company ordinary care commensurate with the risk or hazard). *Compare* Tribette *v.* Illinois Cent. R. Co., 71 Miss. 212, 13 So. 899, holding that the fact that the season is unusually dry does not make it incumbent on the railroad company to procure and use tarpaulins or to keep on hand appliances for the extinguishment of fire.

62. Jacksonville, etc., R. Co. *v.* Peninsular Land, etc., Co., 27 Fla. 1, 157, 9 So. 661, 17 L. R. A. 33, 65; Fero *v.* Buffalo, etc., R. Co., 22 N. Y. 209, 78 Am. Dec. 178.

The spread of fire by winds which are usual at the season and place must be reasonably provided against by the railroad company. Palmer *v.* Missouri Pac. R. Co., 76 Mo. 217.

63. Jacksonville, etc., R. Co. *v.* Peninsular Land, etc., Co., 27 Fla. 1, 157, 9 So. 661, 17 L. R. A. 33, 65; Fero *v.* Buffalo, etc., R. Co., 22 N. Y. 209, 78 Am. Dec. 178, holding that more care must be used in a city or village than is necessary in the country.

64. Constitutional guaranty against deprivation of property as applied to statutes creating liability for fire set by locomotives see CONSTITUTIONAL LAW, 8 Cyc. 1099.

65. *Kansas.*—St. Louis, etc., R. Co. *v.* Madden, 77 Kan. 80, 93 Pac. 586, construing Gen. St. (1901) § 5923.

Maine.— Boston Excelsior Co. *v.* Bangor, etc., R. Co., 93 Me. 52, 44 Atl. 138, 47 L. R. A. 82; Stearns *v.* Atlantic, etc., R. Co., 46 Me. 95, holding that such a statute (St. (1842) c. 9, § 5), impliedly imposes upon the railroad company such a degree of care as will prevent the communication of fires from its locomotives.

Mississippi.— Mobile, etc., R. Co. *v.* Gray, 62 Miss. 383, holding that such statute (Code (1880), § 1054) is but declaratory of a principle of the common law.

Missouri.— Lumbermen's Mut. Ins. Co. *v.* Kansas City, etc., R. Co., 149 Mo. 165, 50 S. W. 281.

Ohio.— Baltimore, etc., R. Co. *v.* Kreager, 61 Ohio St. 312, 56 N. E. 203; Lake Erie, etc., R. Co. *v.* Falk, 16 Ohio Cir. Ct. 125, 8 Ohio Cir. Dec. 765.

Rhode Island.— Gorham Mfg. Co. *v.* New York, etc., R. Co., 27 R. I. 35, 60 Atl. 638.

South Carolina.— Brown *v.* Carolina Midland R. Co., 67 S. C. 481, 46 S. E. 283, 100 Am. St. Rep. 756.

See 41 Cent. Dig. tit. "Railroads," § 1658.

The words "right of way," as used in South Carolina Code Laws (1902), § 2135, rendering a railroad company liable for fire communicated by its locomotives or originating on its right of way, do not refer to the title of the company, but are used to designate the locality from which a fire must originate to render the company liable. Brown *v.* Carolina Midland R. Co., 67 S. C. 481, 46 S. E. 283, 100 Am. St. Rep. 756. Where a building on the right of way is set on fire and the fire is communicated to an adjoining building, the fire originates on defendant's right of way within the meaning of such a statute. Martz *v.* Cincinnati, etc., R. Co., 12 Ohio Cir. Ct. 144, 5 Ohio Cir. Dec. 451.

"Property-owners" within a statute providing that a railroad company shall be liable to pay property-owners for all damages by fire from its engines include not only those whose lands are traversed by the roadbed, but also those whose lands are sufficiently near thereto to be damaged by such fire. MacDonald *v.* New York, etc., R. Co., 23 R. I. 558, 51 Atl. 578.

A sub-boss of a railroad bridge and trestle crew while using a boarding car as a place to sleep during the night, when he is not on duty, is neither an agent or employee of a railroad company, and hence the company is not liable for damages caused by a fire started by his negligence, under S. C. Civ. Code (1902), § 2135, which provides that every railroad corporation shall be responsible in damages to any person or corporation whose building or other property shall be injured by fire . . . originating within the limits of the railroad's right of way in consequence of the act of any of its authorized agents or employees. Southern R. Co. *v.* Power Fuel Co., 152 Fed. 917, 82 C. C. A. 65, 12 L. R. A. N. S. 472.

66. *Colorado.*— Denver, etc., R. Co. *v.* DeGraff, 2 Colo. App. 42, 29 Pac. 664.

Connecticut.— Martin *v.* New York, etc., R. Co., 62 Conn. 331, 25 Atl. 239.

Missouri.— Wabash R. Co. *v.* Ordelheide, 172 Mo. 436, 72 S. W. 684; Campbell *v.* Missouri Pac. R. Co., 121 Mo. 340, 25 S. W. 936, 42 Am. St. Rep. 530, 25 L. R. A. 175; Mathews *v.* St. Louis, etc., R. Co., 121 Mo. 298, 24 S. W. 591, 25 L. R. A. 161.

Ohio.— Baltimore, etc., R. Co. *v.* Kreager, 61 Ohio St. 312, 56 N. E. 203; Martz *v.* Cincinnati, etc., R. Co., 12 Ohio Cir. Ct. 144, 5 Ohio Cir. Dec. 451.

Rhode Island.— MacDonald *v.* New York, etc., R. Co., 23 R. I. 558, 51 Atl. 578.

South Carolina.— Hunter *v.* Columbia, etc., R. Co., 41 S. C. 86, 19 S. E. 197; Thompson *v.* Richmond, etc., R. Co., 24 S. C. 366.

Canada.— Grant *v.* Canadian Pac. R. Co., 36 N. Brunsw. 528.

See 41 Cent. Dig. tit. "Railroads," § 1658.

if there is no contributory negligence on the part of the party injured.[67] Under other statutes, however, it is held that they do not eliminate negligence as an essential element of the company's liability,[68] but that they make the fact of injury so accruing *prima facie* evidence of negligence and lay upon the company the burden of disproving it,[69] and hence do not apply where there is no want of care or skill in the construction or operation of the road or locomotive.[70]

(II) *PROPERTY INJURED OR DESTROYED.* Property for the loss of or injury to which a railroad company is liable under the above statutes includes personal as well as real property,[71] except personal property in the railroad company's possession under a contract of carriage,[72] or deposited temporarily near its track and liable to be moved at any time.[73]

(III) *STATUTES GIVING RAILROAD COMPANY INSURABLE INTEREST.* Under some statutes imposing a liability upon a railroad company for damages caused to buildings or other property by fires communicated by its locomotives,[74] an additional provision is made, giving the railroad company an insurable interest in the property along its route in close proximity to the railroad.[75] Under this provision, in some states, it is held that the company's liability extends to all kinds

Under an Ohio statute (91 Ohio Laws, p. 187), where the fire originates on defendant's land it is absolutely liable for the loss or damage, and the fact that it so originated is *prima facie* evidence that it was caused by operating the road; but where it originates on adjacent land defendant is liable only when the fire was caused in whole or in part by sparks from an engine on or passing over the road, and the fact that the fire was so caused is *prima facie* evidence of negligence on the part of defendant. Baltimore, etc., R. Co. *v.* Kreager, 61 Ohio St. 312, 56 N. E. 203.

67. Martin *v.* New York, etc., R. Co., 62 Conn. 331, 25 Atl. 239. And see *infra*, X, I, 4, b.

68. Continental Trust Co. *v.* Toledo, etc., R. Co., 89 Fed. 637, construing the Ohio act of April 26, 1894.

69. Small *v.* Chicago, etc., R. Co., 50 Iowa 338; Baltimore, etc., R. Co. *v.* Dorsey, 37 Md. 19; Baltimore, etc., R. Co. *v.* Woodruff, 4 Md. 242, 59 Am. Dec. 72; Mahoney *v.* St. Paul, etc., R. Co., 35 Minn. 361, 29 N. W. 6. And see *infra*, X, I, 6, d, (I), (B), (1), (a).

70. Missouri, etc., R. Co. *v.* Davidson, 14 Kan. 349.

71. Martin *v.* New York, etc., R. Co., 62 Conn. 331, 25 Atl. 239; Grissell *v.* Housatonic R. Co., 54 Conn. 447, 9 Atl. 137, 1 Am. St. Rep. 138 (fences, growing trees, and herbage); Pratt *v.* Atlantic, etc., R. Co., 42 Me. 579; Haseltine *v.* Concord R. Co., 64 N. H. 545, 15 Atl. 143 (wood, coal, etc., on adjoining land used by a dealer as his stock in trade); Dent *v.* South-Bound R. Co., 61 S. C. 329, 39 S. E. 527. land.

A Rhode Island statute, Act June 25, 1836, amending the charter of the New York, etc., R. Co., and providing in section 2 that the company shall be liable to property-owners for the burning of "houses, wood, hay, or any other substance whatever," caused by fires from its engines, is held broad enough to cover all kinds of property so burned. Spink *v.* New York, etc., R. Co., 24 R. I. 560, 54 Atl. 47.

72. Bassett *v.* Connecticut River R. Co., 145 Mass. 129, 13 N. E. 370, 1 Am. St. Rep. 443; Blackmore *v.* Missouri Pac. R. Co., 162 Mo. 455, 62 S. W. 993, baggage in depot.

73. Lowney *v.* New Brunswick R. Co., 78 Me. 479, 7 Atl. 381; Pratt *v.* Atlantic, etc., R. Co., 42 Me. 579.

74. See *supra*, X, I, 1, b, (I).

75. Boston Excelsior Co. *v.* Bangor, etc., R. Co., 93 Me. 52, 44 Atl. 138, 47 L. R. A. 82; Martin *v.* Grand Trunk R. Co., 87 Me. 411, 32 Atl. 976; Chapman *v.* Atlantic, etc., R. Co., 37 Me. 92; Wall *v.* Platt, 169 Mass. 398, 48 N. E. 270 (holding that the company's liability under such statute (Pub. St. c. 112, § 214) is that of an insurer, being indemnity for the loss actually sustained); Lumberman's Mut. Ins. Co. *v.* Kansas City, etc., R. Co., 149 Mo. 165, 50 S. W. 281; St. Louis, etc., R. Co. *v.* Mathews, 165 U. S. 1, 17 S. Ct. 243, 41 L. ed. 611 (holding that such a statute is not unconstitutional); Grand Trunk R. Co. *v.* Richardson, 91 U. S. 454, 24 L. ed. 356.

"Along its route," as used in such a statute, means by the side of, alongside, along the line of, lengthwise of, or near to the chartered limits of the roadway as surveyed and located, and not within, upon, over, or across the route. Grand Trunk R. Co. *v.* Richardson, 91 U. S. 454, 23 L. ed. 356. It applies to buildings near and adjacent to the railroad, so as to be exposed to the danger of fire from the engines (Martin *v.* Grand Trunk R. Co., 87 Me. 411, 32 Atl. 976; Pratt *v.* Atlantic, etc., R. Co., 42 Me. 579), such as a building separated by a street (Pratt *v.* Atlantic, etc., R. Co., *supra*); and to growing timber three hundred feet from the track (Pratt *v.* Atlantic, etc., R. Co., *supra*); and to property not immediately adjoining the right of way (Lumberman's Mut. Ins. Co. *v.* Kansas City, etc., R. Co., 149 Mo. 165, 50 S. W. 281).

Construction.— Such statutes being remedial in their nature should be liberally construed. Wall *v.* Platt, 169 Mass. 398, 48 N. E. 270.

of property and is not limited to such property as is usually regarded as insurable.[76] In other states, however, it is held that the company's liability under such provision is limited to property permanently located upon or near the railroad, and which is insurable.[77]

c. Setting Fire on Right of Way. A railroad company is not liable for damages resulting from a spread of fire from its property to adjacent property where it sets out such fire on its own premises for a lawful purpose, as for cleaning the right of way from weeds, grass, etc., if it uses reasonable care and prudence in setting it out and in preventing its escape.[78] But it is otherwise where the setting out of the fire is a positive wrong either in itself or by reason of the surrounding circumstances,[79] or where its agents or employees do not use proper care and diligence in setting it out or preventing its spreading.[80]

d. Prevention of Spread of Fire. The failure to use reasonable care to prevent the spread of fire which has started on a railroad company's property or on adjacent property by its engines or trains, although started without any negligence on its part, as a general rule renders the company liable for resulting dam-

76. Grissell *v.* Housatonic R. Co., 54 Conn. 447, 9 Atl. 137, 1 Am. St. Rep. 138; Ross *v.* Boston, etc., R. Co., 6 Allen (Mass.) 87; Trask *v.* Hartford, etc., R. Co., 16 Gray (Mass.) 71 (machinery, tools, patterns, and lumber in a building near its road, or a fence by the side of the track); Campbell *v.* Missouri Pacific R. Co., 121 Mo. 340, 25 S. W. 936, 42 Am. St. Rep. 530, 25 L. R. A. 175 (shrubs, trees, and flowers); Mathews *v.* St. Louis, etc., R. Co., 121 Mo. 298, 24 S. W. 591, 25 L. R. A. 161; Dean *v.* Charleston, etc., R. Co., 55 S. C. 504, 33 S. E. 579.

77. Pierce *v.* Bangor, etc., R. Co., 94 Me. 171, 47 Atl. 144; Thatcher *v.* Maine Cent. R. Co., 85 Me. 502, 27 Atl. 519; Pratt *v.* Atlantic, etc., R. Co., 42 Me. 579 (holding that the statute is sufficiently comprehensive to embrace growing trees); Chapman *v.* Atlantic, etc., R. Co., 37 Me. 92.

As to property not insurable or having a permanent location the railroad company is still liable upon common-law principles. Chapman *v.* Atlantic, etc., R. Co., 37 Me. 92.

78. Pittsburgh, etc., R. Co. *v.* Culver, 60 Ind. 469; Atchison, etc., R. Co. *v.* Dennis, 38 Kan. 424, 13 Pac. 153 (holding that Comp. Laws (1885), c. 118, § 2, does not authorize recovery in such a case); Cole *v.* Lake Shore, etc., R. Co., 105 Mich. 549, 63 N. W. 647 (holding that the company's liability is dependent upon whether the fire was set under circumstances customary with prudent men).

That combustibles are negligently allowed to accumulate on the right of way does not make the railroad company liable for damages caused by a fire started thereon, if such fire is set out and watched in a prudent and careful manner, and the question of negligence in setting out the fire is the only point in issue. Gulf, etc., R. Co. *v.* Cusenberry, 86 Tex. 525, 26 S. W. 43 [*reversing* 5 Tex. Civ. App. 114, 23 S. W. 851].

A statute (Sandels & H. Dig. Ark. § 7362) providing that any person who shall set on fire any grass or other combustible material within his inclosure shall make satisfaction in damages to any other person injured has no application to injury caused by a fire set on a railroad right of way. Clark *v.* Kansas City, etc., R. Co., 129 Fed. 341, 64 C. C. A. 19.

79. Louisville, etc., R. Co. *v.* Nitsche, 126 Ind. 229, 26 N. E. 51, 22 Am. St. Rep. 582, 9 L. R. A. 750 (holding that the act of the railroad company in starting a fire on a bed of peat upon which its track is laid in a season of great drought is a positive wrong which renders it liable for injury to adjacent property); Grant *v.* Omaha, etc., P. Co., 94 Mo. App. 312, 68 S. W. 91 (holding that it is negligence to light a fire on the right of way running through plaintiff's land, at a time when it is very dry and there is a high wind blowing). See also Rabberman *v.* Callaway, 63 Ill. App. 154.

Setting out fire on a windy day on a right of way covered with dry grass, and adjoining plaintiff's premises, on which there was also dry grass, supports a finding of negligence. Mobile, etc., R. Co. *v.* Stinson, 74 Miss. 453, 21 So. 14, 522.

80. Tien *v.* Louisville, etc., R. Co., 15 Ind. App. 304, 44 N. E. 45; Missouri, etc., R. Co. *v.* Fithian, 73 Kan. 784, 85 Pac. 594; Missouri Pac. R. Co. *v.* Cady, 44 Kan. 633, 24 Pac. 1088 (holding that the injury thus inflicted is within Laws (1885), c. 155); Gould *v.* Northern Pac. R. Co., 50 Minn. 516, 52 N. W. 924; Brister *v.* Illinois Cent. R. Co., 84 Miss. 33, 36 So. 142 (holding that it is incumbent on the company to guard the fire as long as it exists). See also Grant *v.* Canadian Pac. R. Co., 36 N. Brunsw. 528.

A statute making it a misdemeanor to set fire to woods and prairie (Nebr. Cr. Code, § 62) does not apply to fire negligently or carelessly set to material on a railroad right of way, which spread and destroyed plaintiff's property. Kansas City, etc., R. Co. *v.* Rogers, 48 Nebr. 653, 67 N. W. 602.

Negligence of independent contractor.—The burning of a fire guard along a railroad right of way being from its nature dangerous, the railroad company is bound to see that measures are taken to prevent injury, and cannot avoid the obligation by letting the work to

ages to adjacent property,[81] although it has been held otherwise where there is no negligence on the part of the railroad company in starting the fire.[82] If the company was negligent in permitting the fire to start, it is liable for resulting damages whether it or its employees did or did not exercise ordinary care to prevent the fire from spreading.[83] Such negligence of an employee, it has been held, exists only where the employee is not at the time engaged in some other duty owing from the company to the public.[84]

e. Contracts For Exemption From Liability. A railroad company cannot contract for exemption, wholly or partially, from liability for damages caused by fire, in derogation of its duty to the public as common carrier;[85] but it is not contrary to public policy to provide for such exemption as a consideration for permitting another to place or erect and use property on its premises where such agreement does not embrace property for the injury or destruction of which the company is liable as common carrier.[86] This exemption, however, does not

an independent contractor. St. Louis, etc., R. Co. *v.* Madden, 77 Kan. 80, 93 Pac. 586.

81. *Arkansas.*— St. Louis Southwestern R. Co. *v.* Ford, 65 Ark. 96, 45 S. W. 55; St. Louis, etc., R. Co. *v.* Hecht, 38 Ark. 357.

California.— Clark *v.* San Francisco, etc., R. Co., 142 Cal. 614, 76 Pac. 507.

Indiana.— Chicago, etc., R. Co. *v.* Burden, 14 Ind. App. 512, 43 N. E. 155.

New York.— Bevier *v.* Delaware, etc., Canal Co., 13 Hun 254 (holding, however, that the railroad company is not bound to use extraordinary means to extinguish or prevent the spread of the fire); Eighme *v.* Rome, etc., R. Co., 10 N. Y. Suppl. 600.

Texas.— Missouri Pac. R. Co. *v.* Platzer, 73 Tex. 117, 11 S. W. 160, 15 Am. St. Rep. 771, 3 L. R. A. 639; International, etc., R. Co. *v.* McIver, (Civ. App. 1897) 40 S. W. 438.

Wyoming.— Union Pac. R. Co. *v.* Gilland, 4 Wyo. 395, 34 Pac. 953.

Canada.— Ball *v.* Grand Trunk R. Co., 16 U. C. C. P. 252.

See 41 Cent. Dig. tit. "Railroads," § 1661.

A watchman need not be stationed to protect adjoining property and extinguish any fire that may be kindled by unavoidable accident. Indianapolis, etc., R. Co. *v.* Paramore, 31 Ind. 143; Chicago, etc., R. Co. *v.* Burden, 14 Ind. App. 512, 43 N. E. 155; Brown *v.* Atlanta, etc., Air Line R. Co., 19 S. C. 39.

Sufficiency of fire-guard.— Whether a fire-guard along a right of way in most places fixed by congress at four hundred feet is sufficient to prevent the escape of fire from locomotives cannot, as a matter of law, be determined from the fact that the local statutes fix one hundred feet as the maximum width of a railroad right of way. Buck *v.* Union Pac. R. Co., 59 Kan. 328, 52 Pac. 866.

Subject to public duty.—The duty of trainmen to leave the train to extinguish a fire started on contiguous property by sparks from a locomotive is subject to the greater duty to the public to operate the company's trains with reasonable speed and on schedule time. Pittsburgh, etc., R. Co. *v.* Brough, 168 Ind. 378, 81 N. E. 57, 12 L. R. A. N. S. 401.

82. Atlantic Coast Line R. Co. *v.* Benedict Pineapple Co., 52 Fla. 165, 42 So. 529 (holding that, to constitute actionable negligence in allowing a burning by fire communicated from a locomotive, there must be negligence in the communication or other circumstances that would cast a duty on the railroad company to put out the fire); Baltimore, etc., R. Co. *v.* Shipley, 39 Md. 251; Kenney *v.* Hannibal, etc., R. Co., 70 Mo. 252 [*overruling* Kenney *v.* Hannibal, etc., R. Co., 63 Mo. 99].

83. Pittsburgh, etc., R. Co. *v.* Wise, 36 Ind. App. 59, 74 N. E. 1107; Pittsburgh, etc., R. Co. *v.* Iddings, 28 Ind. App. 504, 62 N. E. 112 (holding that negligence in suffering the escape of fire from the right of way may be established by proof of the setting fire by sparks to dry grass and rubbish which had accumulated on the right of way, so that by the natural progress of the fire it spread beyond the right of way, without any proof of the escape of the fire from the right of way); Chicago, etc., R. Co. *v.* Luddington, 10 Ind. App. 636, 38 N. E. 342; Missouri Pac. R. Co. *v.* Platzer, 73 Tex. 117, 11 S. W. 160, 15 Am. St. Rep. 771, 3 L. R. A. 639; Austin *v.* Chicago, etc., R. Co., 93 Wis. 496, 67 N. W. 1129.

84. Missouri Pac. R. Co. *v.* Donaldson, 73 Tex. 124, 11 S. W. 163; Galveston, etc., R. Co. *v.* Chittim, 31 Tex. Civ. App. 40, 71 S. W. 294, holding that it is not negligence for a train crew to fail to leave the train to extinguish the fire.

Failure to stop train.—A failure to stop a gravel train the engine of which started a fire along the company's right of way, which was known to the railroad company's servants in charge of the train, and to leave men to extinguish the flames, is negligence which renders the company liable (Rolke *v.* Chicago, etc., R. Co., 26 Wis. 537), although it may be otherwise in case of the failure to stop a passenger train under such circumstances (Rolke *v.* Chicago, etc., R. Co., *supra*).

85. See Griswold *v.* Illinois Cent. R. Co., 90 Iowa 265, 57 N. W. 843, 24 L. R. A. 647, (1892) 53 N. W. 295.

Contract limiting common-law liability as carrier in case of loss by fire see CARRIERS, 6 Cyc. 386.

86. *California.*— King *v.* Southern Pac. Co., 109 Cal. 96, 41 Pac. 786, 29 L. R. A. 755; Stephens *v.* Southern Pac. Co., 109 Cal.

extend to property of the same owner not included in the contract,[87] nor does it apply as between the railroad company and third persons, using the property, who are not in privity with the contracting parties.[88] It has also been held that the right to exemption may be presumed from the nature of the contract by which a railroad company purchases property for its right of way from another.[89]

86, 41 Pac. 783, 50 Am. St. Rep. 17, 29 L. R. A. 751.

Georgia.— Blitch *v.* Georgia Cent. R. Co., 122 Ga. 711, 50 S. E. 945, holding that the company is exempt under such a contract where it is not alleged or proved that the fire was caused by the gross negligence of the company.

Iowa.— Griswold *v.* Illinois Cent. R. Co., 90 Iowa 265, 57 N. W. 843, 24 L. R. A. 647.

Michigan.— Mann *v.* Pere Marquette R. Co., 135 Mich. 210, 97 N. W. 721.

Minnesota.— James Quirk Milling Co. *v.* Minneapolis, etc., R. Co., 98 Minn. 22, 107 N. W. 742, 116 Am. St. Rep. 336.

Missouri.— Ordelheide *v.* Wabash R. Co., 175 Mo. 337, 75 S. W. 149, 172 Mo. 436, 72 S. W. 684 [*affirming* 80 Mo. App. 357]; Hahn *v.* Missouri, etc., R. Co., 80 Mo. App. 411, holding that such a contract is not in violation of public policy.

Ohio.— Mansfield Mut. Ins. Co. *v.* Cleveland, etc., R. Co., 74 Ohio St. 30, 77 N. E. 269.

Rhode Island.— Richmond *v.* New York, etc., R. Co., 26 R. I. 225, 58 Atl. 767, holding that the exemption is not limited to fires arising from sparks from an engine on a spur track, built under the contract, but also applies to fires caused by sparks from an engine on the main line.

South Carolina.— See German-American Ins. Co. *v.* Southern R. Co., 77 S. C. 467, 58 S. E. 337, holding that where cotton is deposited on the premises of a railroad company under an agreement that it remain on the premises of the company without its consent at the sole risk of the shipper until tendered and accepted for shipment, the carrier is not liable for loss by fire from its locomotive under Civ. Code (1902), § 2135.

Tennessee.— Cincinnati, etc., R. Co. *v.* Saulsbury, 115 Tenn. 402, 90 S. W. 624.

Texas.— Missouri, etc., R. Co. *v.* Carter, 95 Tex. 461, 68 S. W. 159 (contract to build and maintain a side-track for the convenience of a sawmill owner, in consideration of the latter releasing the company from all damages by fire); Wooldridge *v.* Ft. Worth, etc., R. Co., 38 Tex. Civ. App. 551, 86 S. W. 942 (holding that a railroad company leasing part of its right of way for a coal house is not acting in the capacity of common carrier, and may stipulate that it shall be exempt from liability for loss by fire communicated by sparks or otherwise); Woodward *v.* Ft. Worth, etc., R. Co., 35 Tex. Civ. App. 14, 79 S. W. 896.

United States.— Hartford F. Ins. Co. *v.* Chicago, etc., R. Co., 175 U. S. 91, 20 S. Ct. 33, 44 L. ed. 84 [*affirming* 70 Fed. 201, 17 C. C. A. 62, 30 L. R. A. 193, 62 Fed. 904]; Savannah F. & M. Ins. Co. *v.* Pelzer Mfg. Co., 60 Fed. 39.

A statute (Tex. Rev. St. art. 320), providing that railroad companies and other common carriers shall not limit their liability as it exists at common law does not render such a contract invalid. Missouri, etc., R. Co. *v.* Carter, 95 Tex. 461, 68 S. W. 159.

87. Kansas City, etc., R. Co. *v.* Blaker, 68 Kan. 244, 75 Pac. 71, 64 L. R. A. 81, holding that the fact that the railroad company was exempt from liability for the loss of property on the right of way does not relieve it from liability for the burning of other property connected with it.

Loss to partnership property is not exempt under such a contract with one of the partners as to individual property. Ordelheide *v.* Wabash R. Co., 80 Mo. App. 507.

That the owners of goods burned in a warehouse are stock-holders in the warehouse company, it being a corporation, does not relieve the railroad company from liability for the burning, although the warehouse company by its lease from the railroad company waived all claims for damages from destruction of the warehouse by acts of the railroad company. Orient Ins. Co. *v.* Northern Pac. R. Co., 31 Mont. 502, 78 Pac. 1036.

88. King *v.* Southern Pac. Co., 109 Cal. 96, 41 Pac. 786, 29 L. R. A. 755 (holding that an employee of a lessee of certain property of a railroad with a provision for exemption from damages by fire who had stored goods in the lessee's warehouse which was destroyed by fire caused by the railroad company's negligence, is entitled to recover therefor, although he had knowledge of such provision in the lease); Walker *v.* Missouri Pac. R. Co., 68 Mo. App. 465; McAdams *v.* Missouri, etc., R. Co., 19 Tex. Civ. App. 82, 45 S. W. 936 (even though such third persons had knowledge of the contract); Texas, etc., R. Co. *v.* Watson, 190 U. S. 287, 23 S. Ct. 681, 47 L. ed. 1057 [*affirming* 112 Fed. 402, 50 C. C. A. 230.]

A subtenant of a lessee of the railroad company is not subject to such a provision in the lease. Wooldridge *v.* Ft. Worth, etc., R. Co., 38 Tex. Civ. App. 551, 86 S. W. 942.

An assignee of a lease is bound by such a provision in the lease. Wooldridge *v.* Ft. Worth, etc., R. Co., 38 Tex. Civ. App. 551, 86 S. W. 942.

Contract between owner and third person. —A railroad company cannot take advantage of a contract of exemption entered into between the person whose goods are injured or destroyed and a third person whose warehouse is on the company's property, and in which the goods were at the time of injury. Edwards *v.* Bonner, 12 Tex. Civ. App. 236, 33 S. W. 761.

89. Rood *v.* New York, etc., R. Co., 18

f. Persons Entitled to Damages. Damages caused by a railway fire may as a general rule be recovered by one who is the general or special owner of the property injured.[90] Such damages may be recovered by one who has an absolute title to the property;[91] and one who is in possession of the property injured under a claim of right *prima facie* has sufficient ownership for this purpose as against the railroad company,[92] as where he is in possession under a lease;[93] and it has been held that even one in possession as a trespasser may recover.[94]

2. Defects in and Management of Engines or Trains — a. Defects in Equipment — (i) *In General.* As a general rule it is the duty of a railroad company to use reasonable precautions to provide locomotives so constructed and equipped as to avoid the unnecessary communication of fire to premises adjoining its road; otherwise it will be guilty of negligence and liable for resulting damages.[95] In

Barb. (N. Y.) 80, holding that where a person conveys a strip of land the value of which does not exceed sixty dollars to a railroad company for which he receives one thousand six hundred dollars, it is fair to presume that he contemplated the risk of fire from engines running on the road.

90. Alabama Great Southern R. Co. *v.* Clark, 136 Ala. 450, 34 So. 917 (equitable owner); Adams *v.* St. Louis, etc., R. Co., 138 Mo. 242, 28 S. W. 496, 29 S. W. 836; Laird *v.* Connecticut, etc., R. Co., 62 N. H. 254, 13 Am. St. Rep. 564; Woodward *v.* Northern Pac. R. Co., 16 N. D. 38, 111 N. W. 627 (holding that a nonsuit is properly entered where the evidence shows that a third person and not plaintiff was the owner of the property injured by a fire set by defendant company); Mathews *v.* Great Northern R. Co., 7 N. D. 81, 72 N. W. 1085. See Reed *v.* Chicago, etc., R. Co., 71 Wis. 399, 37 N. W. 225. *Compare* Murphy *v.* Sioux City, etc., R. Co., 55 Iowa 473, 8 N. W. 320, 39 Am. Rep. 175, where complainant had neither ownership nor possession.

A licensee in the use of land belonging to a railroad company has the same rights as to property which he has piled on such land and which is injured by fire from a locomotive as if he were owner of the land. Boston Excelsior Co. *v.* Bangor, etc., R. Co., 93 Me. 52, 44 Atl. 138, 47 L. R. A. 82.

Where there are several owners of the property injured, the interest of each must be shown. Comer *v.* Newman, 95 Ga. 434, 22 S. E. 634.

An owner of cars leased to a railroad company may maintain an action for their negligent destruction by fire. Peoria, etc., R. Co. *v.* U. S. Rolling Stock Co., 28 Ill. App. 79.

Separate actions for damages caused by a railway fire cannot be maintained by both the owner and an insurance company which paid part of the loss. Post *v.* Buffalo, etc., R. Co., 2 Walk. (Pa.) 464.

That title to the property destroyed was in the tenant of plaintiff cannot be contended by defendant, where such tenant has testified in the case and made no claim thereto. Toledo, etc., R. Co. *v.* Farris, 117 Ill. App. 108.

91. Bean *v.* Atlantic, etc., R. Co., 58 Me. 82, holding this to be true, although such owner held the title as security for a debt under an agreement that upon payment of the debt he should reconvey.

92. *Iowa.*— Bullis *v.* Chicago, etc., R. Co., 76 Iowa 680, 39 N. W. 245.

Massachusetts.— Blaisdell *v.* Connecticut River R. Co., 145 Mass. 132, 13 N. E. 373.

Minnesota.— McClellan *v.* St. Paul, etc., R. Co., 58 Minn. 104, 59 N. W. 978; Carner *v.* Chicago, etc., R. Co., 43 Minn. 375, 45 N. W. 713.

New York.— Van Inwegen *v.* Port Jervis, etc., R. Co., 41 N. Y. App. Div. 628, 58 N. Y. Suppl. 405, holding that plaintiff sufficiently establishes a legal title to the property involved, where, in addition to a paper title, he shows actual possession and acts of ownership for a considerable length of time, under a contract of purchase.

South Carolina.— Busby *v.* Florida Cent., etc., R. Co., 45 S. C. 312, 23 S. E. 50, adverse possession for statutory period.

Texas.— International, etc., R. Co. *v.* Timmermann, 61 Tex. 660.

Washington.— Spurlock *v.* Port Townsend Southern R. Co., 13 Wash. 29, 42 Pac. 520.

Wisconsin.— Moore *v.* Chicago, etc., R. Co., 78 Wis. 120, 47 N. W. 273; McNarra *v.* Chicago, etc., R. Co., 41 Wis. 69, holding that one in actual possession and occupancy of the property may recover without proof of a paper title, unless defendant shows an outstanding adverse title to the property higher than a mere possessory one.

See 41 Cent. Dig. tit. "Railroads," § 1666.

Compare Mathews *v.* Great Northern R. Co., 7 N. D. 81, 72 N. W. 1085.

93. Johnson *v.* Chicago, etc., R. Co., 77 Iowa 666, 42 N. W. 512; Anthony *v.* New York, etc., R. Co., 162 Mass. 60, 37 N. E. 780; International, etc., R. Co. *v.* Searight, 8 Tex. Civ. App. 593, 28 S. W. 39, holding this to be true even though the lease is a verbal one.

94. Northern Pac. R. Co. *v.* Lewis, 51 Fed. 658, 2 C. C. A. 446.

One in possession contrary to the terms of a lease held by a third party from defendant may recover for goods consumed by fire communicated to the building by the railroad company. England *v.* Wabash R. Co., 114 Mo. App. 546, 90 S. W. 111.

95. *Georgia.*— Southern R. Co. *v.* Thompson, 129 Ga. 367, 58 S. E. 1044.

Illinois.— Toledo, etc., R. Co. *v.* Larmon, 67 Ill. 68.

accordance with this rule it is held under the various statutes imposing a liability upon railroads for damages by fire that a railroad company is negligent unless it uses reasonable care and diligence to procure and equip its locomotives with the most effective modern practical appliances for preventing the escape of sparks of fire,[96] or with the best or most approved appliances then known to it and in general practical use,[97] and which under the circumstances it is reasonable to

Indiana.— Indianapolis, etc., R. Co. *v.* Paramore, 31 Ind. 143.

Nebraska.— Burlington, etc., R. Co. *v.* Westover, 4 Nebr. 268.

New Jersey.— King *v.* Morris, etc., R. Co., 18 N. J. Eq. 397.

New York.— Bedell *v.* Long Island R. Co., 44 N. Y. 367, 4 Am. Rep. 688 (holding that where it is shown that a particular engine cannot be used with safety without a screen, it is negligence to remove such screen, although it might not be customary to use it on that class of engines); White *v.* New York Cent., etc., R. Co., 90 N. Y. App. Div. 356, 85 N. Y. Suppl. 497 [*affirmed* in 181 N. Y. 577, 74 N. E. 1126) (holding that a railroad company is not liable unless it has negligently used an engine not fitted with appliances capable of preventing the escape of sparks of an unusual size or in unnecessary quantities).

North Carolina.— Williams *v.* Atlantic Coast Line R. Co., 140 N. C. 623, 53 S. E. 448.

Oregon.— Hawley *v.* Sumpter R. Co., 49 Oreg. 509, 90 Pac. 1106, 12 L. R. A. N. S. 526.

Texas.—Allibone *v.* Texas, etc., R. Co., 2 Tex. App. Civ. Cas. § 64.

Vermont.— Cleaveland *v.* Grand Trunk R. Co., 42 Vt. 449.

Virginia.— Norfolk, etc., R. Co. *v.* Perrow, 101 Va. 345, 43 S. E. 614.

United States.— Missouri Pac. R. Co. *v.* Texas, etc., R. Co., 41 Fed. 917, holding that a locomotive that throws sparks to a height of fifty feet and to a distance of one hundred to one hundred and fifty feet is not equipped with a proper spark arrester.

See 41 Cent. Dig. tit. "Railroads," § 1668.

96. Meyer *v.* Vicksburg, etc., R. Co., 41 La. Ann. 639, 6 So. 218, 17 Am. St. Rep. 408.

97. *Arkansas.*— St. Louis, etc., R. Co. *v.* Thompson-Hailey Co., 79 Ark. 12, 94 S. W. 707; St. Louis, etc., R. Co. *v.* Dawson, 77 Ark. 434, 92 S. W. 27, holding that the company is not absolutely bound to use the safest and best appliances to prevent the escape of sparks.

Florida.— Jacksonville, etc., R. Co. *v.* Peninsular Land, etc., Co., 27 Fla. 1, 157, 9 So. 661, 17 L. R. A. 33, 65.

Georgia.— Southern R. Co. *v.* Thompson, 129 Ga. 367, 58 S. E. 1044, best appliances in general use consistent with the practical operation of its engines.

Illinois.— Illinois Cent. R. Co. *v.* Bailey, 222 Ill. 480, 78 N. E. 833 [*affirming* 127 Ill. App. 41]; Chicago, etc., R. Co. *v.* Goyette, 133 Ill. 21, 24 N. E. 549 [*affirming* 32 Ill. App. 574]; Chicago, etc., R. Co. *v.* Pennell, 94 Ill. 448; Toledo, etc., R. Co. *v.* Corn, 71 Ill. 493; Chicago, etc., R. Co. *v.* Quaintance, 58 Ill. 389; Toledo, etc., R. Co. *v.* Pindar, 53 Ill. 447, 5 Am. Rep. 57; Illinois Cent. R. Co. *v.* McClelland, 42 Ill. 355; St. Louis, etc., R. Co. *v.* Gilham, 39 Ill. 455; Bass *v.* Chicago, etc., R. Co., 28 Ill. 9, 81 Am. Dec. 254; Chicago, etc., R. Co. *v.* American Strawboard Co., 91 Ill. App. 635 [*affirmed* in 190 Ill. 268, 60 N. E. 518] (holding this to be true, although the device had not been adopted many years, and as used on different railroads it differed as to some of its details); Forest Glen Brick, etc., Co. *v.* Chicago, etc., R. Co., 33 Ill. App. 565; Chicago, etc., R. Co. *v.* Hunt, 24 Ill. App. 644.

Indiana.— Toledo, etc., R. Co. *v.* Wand, 48 Ind. 476.

Iowa.— Metzgar *v.* Chicago, etc., R. Co., 76 Iowa 387, 41 N. W. 49, 14 Am. St. Rep. 224; Jackson *v.* Chicago, etc., R. Co., 31 Iowa 176, 7 Am. Rep. 120.

Kansas.— St. Louis, etc., R. Co. *v.* Hoover, 3 Kan. App. 577, 43 Pac. 854.

Kentucky.— Mills *v.* Louisville, etc., R. Co., 116 Ky. 309, 76 S. W. 29, 25 Ky. L. Rep. 488; Louisville, etc., R. Co. *v.* Taylor, 92 Ky. 55, 17 S. W. 198, 13 Ky. L. Rep. 373, most effectual known preventives of practical use.

Maryland.— Baltimore, etc., R. Co. *v.* Woodruff, 4 Md. 242, 59 Am. Dec. 72.

Michigan.— Hagan *v.* Chicago, etc., R. Co., 86 Mich. 615, 49 N. W. 509.

Mississippi.— Clisby *v.* Mobile, etc., R. Co., 78 Miss. 937, 29 So. 913, holding that the company is not required to provide the safest and best known appliances, but may provide those in common use, of approved pattern, and in reasonably good repair.

Missouri.— Fitch *v.* Pacific R. Co., 45 Mo. 322.

Nevada.— Watt *v.* Nevada Cent. R. Co., 23 Nev. 154, 44 Pac. 423, 46 Pac. 52, 726, 62 Am. St. Rep. 772; Longabaugh *v.* Virginia City, etc., R. Co., 9 Nev. 271.

New Jersey.— Wiley *v.* West Jersey R. Co., 44 N. J. L. 247.

New York.— Flinn *v.* New York Cent., etc., R. Co., 142 N. Y. 11, 36 N. E. 1046; Steinweg *v.* Erie R. Co., 43 N. Y. 123, 3 Am. Rep. 673; Bevier *v.* Delaware, etc., Canal Co., 13 Hun 254 ("the known and recognized means for preventing the escape of sparks from a locomotive, and such as are best adapted to that purpose"); Carley *v.* New York, etc., R. Co., 1 N. Y. Suppl. 63; O'Neill *v.* New York, etc., R. Co., 10 N. Y. St. 147.

North Carolina.— Bottoms *v.* Seaboard Air Line R. Co., 136 N. C. 472, 49 S. E. 348, not with the "best approved" appliances, but merely with such approved appliances as are in general use.

Ohio.— Cleveland, etc., R. Co. *v.* Freden-

require the company to adopt,[98] or unless it adopts appliances which are in every respect as good as those generally used.[99] This rule does not mean, however, that the railroad company is bound to adopt any particular kind of appliance for the prevention of fire and if the kind it has adopted has been approved and in general use it is not guilty of negligence for failing to adopt appliances of a different kind;[1] nor does it mean that the company is bound to at once adopt

bur, 3 Ohio Cir. Ct. 23, 2 Ohio Cir. Dec. 15.

Oregon.—Anderson *v.* Oregon R. Co., 45 Oreg. 211, 77 Pac. 119.

Pennsylvania.— Frankford, etc., Turnpike Co. *v.* Philadelphia, etc., R. Co., 54 Pa. St. 345, 93 Am. Dec. 708.

South Carolina.— Brown *v.* Atlanta, etc., Air Line R. Co., 19 S. C. 39.

South Dakota.— White *v.* Chicago, etc., R. Co., 1 S. D. 326, 47 N. W. 146, 9 L. R. A. 824.

Texas.— Missouri Pac. R. Co. *v.* Bartlett, 81 Tex. 42, 16 S. W. 638; Rost *v.* Missouri Pac. R. Co., 76 Tex. 168, 12 S. W. 1131; Gulf, etc., R. Co. *v.* Benson, 69 Tex. 407, 5 S. W. 822, 5 Am. St. Rep. 74; St. Louis Southwestern R. Co. *v.* Connally, (Civ. App. 1906) 93 S. W. 206; St. Louis Southwestern R. Co. *v.* Gentry, (Civ. App. 1903) 74 S. W. 607; Paris, etc., R. Co. *v.* Neshitt, 11 Tex. Civ. App. 608, 33 S. W. 280; Gulf, etc., R. Co. *v.* Reagan, (Civ. App. 1895) 32 S. W. 846; Dillingham *v.* Whitaker, (Civ. App. 1894) 25 S. W. 723. See Texas, etc., R. Co. *v.* Levi, 59 Tex. 674.

Virginia.— Brighthope R. Co. *v.* Rogers, 76 Va. 443.

See 41 Cent. Dig. tit. "Railroads," § 1670.

The phrase "the best-known appliances" is susceptible of different interpretations. It may be taken to mean the best appliances known, or the best approved or acknowledged appliances, or those appliances which are best known. Hagan *v.* Chicago, etc., R. Co., 86 Mich. 615, 49 N. W. 509.

When an invention has been tested and has been approved as better than those it is using, a railroad company is required to adopt and use the better machinery. Toledo, etc., R. Co. *v.* Corn, 71 Ill. 493.

If the appliance is one that is known or shown to be the best available to prevent the escape of fire from engines, it is the duty of the railroad company to use it whether or not other companies use the same appliances. Metzgar *v.* Chicago, etc., R. Co., 76 Iowa 387, 41 N. W. 49, 14 Am. St. Rep. 224.

To be approved such appliances must not only be constructed but must be so far used as to be approved over others before a company can be required to adopt them. Toledo, etc., R. Co. *v.* Corn, 71 Ill. 493.

Diligence required.— In this, as in the discharge of its other duties, a railroad can only be required to employ reasonable diligence to provide itself with the best appliances and cannot be held to unreasonable and ruinous efforts to prevent injury. Toledo, etc., R. Co. *v.* Corn, 71 Ill. 493; Metzgar *v.* Chicago, etc., R. Co., 76 Iowa 387, 41 N. W. 49, 14 Am. St. Rep. 224; Anderson *v.* Oregon R. Co., 45 Oreg. 211, 77 Pac. 119; Missouri, etc., R. Co. *v.* Carter, 95 Tex. 461, 68 S. W. 159; Houston, etc., R. Co. *v.* Laforge, (Tex. Civ. App. 1905) 84 S. W. 1072 (holding that a charge imposing on defendant the absolute burden of equipping its engines with the latest and best approved appliances is erroneous, the company being chargeable only with ordinary care in this regard); Missouri, etc., R. Co. *v.* Jordon, (Tex. Civ. App. 1904) 82 S. W. 791; Missouri, etc., R. Co. *v.* Hopkins, (Tex. Civ. App. 1904) 80 S. W. 414; St. Louis Southwestern R. Co. *v.* Crabb, (Tex. Civ. App. 1904) 80 S. W. 408; St. Louis Southwestern R. Co. *v.* Gentry, (Tex. Civ. App. 1903) 74 S. W. 607; St. Louis Southwestern R. Co. *v.* Goodnight, 32 Tex. Civ. App. 256, 74 S. W. 583; Lesser Cotton Co. *v.* St. Louis, etc., R. Co., 114 Fed. 133, 52 C. C. A. 95 (holding also that the company is not an insurer of their completeness or perfection); Eddy *v.* Lafayette, 49 Fed. 807, 1 C. C. A. 441.

98. Spaulding *v.* Chicago, etc., R. Co., 30 Wis. 110, 11 Am. Rep. 550.

New appliances are not required to the extent of materially impairing the reasonable use of a locomotive. Longabaugh *v.* Virginia City, etc., R. Co., 9 Nev. 271.

99. Frace *v.* New York, etc., R. Co., 143 N. Y. 182, 38 N. E. 102 [*reversing* 68 Hun 325, 22 N. Y. Suppl. 958]; Cleveland, etc., R. Co. *v.* Fredenbur, 3 Ohio Cir. Ct. 23, 2 Ohio Cir. Dec. 15.

1. Vallaster *v.* Atlantic City R. Co., 72 N. J. L. 334, 62 Atl. 993; Menominee River Sash, etc., Co. *v.* Milwaukee, etc., R. Co., 91 Wis. 447, 65 N. W. 176.

A railroad company is not an insurer against fire, and an instruction therefore that it ought "to employ such machinery and other agencies for safety to property as might be necessary to avoid accidental destruction, whether such machinery was in common use on railroads or not," is erroneous. Toledo, etc., R. Co. *v.* Larmon, 67 Ill. 68.

That another railroad used a different kind of spark arrester from that used by defendant is not proof of defendant's negligence. Cleveland, etc., R. Co. *v.* McKelvey, 12 Ohio Cir. Ct. 426, 5 Ohio Cir. Dec. 561.

The mere fact that the spark arrester used on a certain locomotive was not as good as that used on some of its other locomotives is not sufficient to show negligence on the part of the company where both have been in common use and approved by experience, and the company, after the exercise of due care and skill, has adopted both, convinced that they are equally good, and uncertain which is the better. Vallaster *v.* Atlantic City R. Co., 72 N. J. L. 334, 62 Atl. 993.

every new or possible appliance,[2] or test every new device,[3] or adopt appliances which are mere experiments;[4] but it is entitled to a reasonable time for trial and experiment and to make the necessary changes.[5] In determining negligence in this respect, regard must also be had to the time and place, as certain appliances might be used in certain seasons and localities whose use at other times and places would be negligence.[6] But the mere fact that defendant's engine was not equipped with a spark arrester, although negligence, does not make it liable for a fire without proof that it set the fire.[7]

(II) *Effect of Adoption of Appliances or Precautions.* If a railroad company exercises reasonable diligence in obtaining and putting such appliances into practical use,[8] or if it adopts and uses such appliances and they are in good condition and repair and the locomotive is operated with a due degree of care as regards the escape of fire, it is not liable for injuries to property caused by the communication of fire escaping from its locomotives unless it is shown to have been otherwise guilty of negligence by reason of which the fire escaped,[9] as

2. Albany, etc., R. Co. *v.* Wheeler, 3 Ga. App. 414, 59 S. E. 1116 (holding that ordinary care does not require that a railroad company shall have its locomotive equipped with a spark arrester "of the latest approved pattern in general use"); Toledo, etc., R. Co. *v.* Corn, 71 Ill. 493; Chicago, etc., R. Co. *v.* American Strawboard Co., 91 Ill. App. 635 [*affirmed* in 190 Ill. 268, 60 N. E. 518]; Farrington *v.* Rutland R. Co., 72 Vt. 24, 47 Atl. 171.

Test.— Such appliances as in the progress of science and improvement have been shown by experience to be the best, and which are generally known, are the only ones a railroad company is bound to adopt and use. Hagan *v.* Chicago, etc., R. Co., 86 Mich. 615, 49 N. W. 509. A railroad company is not required to provide and use the best known appliances that mechanical skill and ingenuity have been able to devise and construct to prevent the escape of sparks from its locomotives without reference to whether the company could by any degree of effort know of any such invention or not or whether they have been tested and proved to be the best. Toledo, etc., R. Co. *v.* Corn, 71 Ill. 493; Steinweg *v.* Erie R. Co., 43 N. Y. 123, 3 Am. Rep. 673.

3. Chicago, etc., R. Co. *v.* American Strawboard Co., 91 Ill. App. 635 [*affirmed* in 190 Ill. 268, 60 N. E. 518].

4. Chicago, etc., R. Co. *v.* American Strawboard Co., 91 Ill. App. 635 [*affirmed* in 190 Ill. 268, 60 N. E. 518].

5. Flinn *v.* New York Cent., etc., R. Co., 142 N. Y. 11, 36 N. E. 1046, holding that a railroad company is not negligent in failing to supply all of its one thousand engines with an improved spark arrester within four years after it came into use.

6. Metzgar *v.* Chicago, etc., R. Co., 76 Iowa 387, 41 N. W. 49, 14 Am. St. Rep. 224.

7. Cheek *v.* Oak Grove Lumber Co., 134 N. C. 225, 46 S. E. 488, 47 S. E. 400.

8. Anderson *v.* Oregon R. Co., 45 Oreg. 211, 77 Pac. 119.

9. *Alabama.*— Louisville, etc., R. Co. *v.* Sullivan Timber Co., 138 Ala. 379, 35 So. 327.

Arkansas.— St. Louis, etc., R. Co. *v.* Coombs, 76 Ark. 132, 88 S. W. 595.

California.— Smyth *v.* Stockton, etc., R. Co., (1884) 4 Pac. 505.

Delaware.—Jefferis *v.* Philadelphia, etc., R. Co., 3 Houst. 447.

Georgia.— Inman *v.* Elberton Air-Line R. Co., 90 Ga. 663, 16 S. E. 958, 35 Am. St. Rep. 232.

Illinois.— Chicago, etc., R. Co. *v.* Quaintance, 58 Ill. 389; Toledo, etc., R. Co. *v.* Pindar, 53 Ill. 447, 5 Am. Rep. 57; Chicago, etc., R. Co. *v.* Madison, 81 Ill. App. 393; Chicago, etc., R. Co. *v.* Smith, 11 Ill. App. 348.

Indiana.— New York, etc., R. Co. *v.* Baltz, 141 Ind. 661, 36 N. E. 414, 38 N. E. 402.

Iowa.— See Greenfield *v.* Chicago, etc., R. Co., 83 Iowa 270, 49 N. W. 95.

Kansas.— Union Pac. R. Co. *v.* Motzner, 2 Kan. App. 342, 43 Pac. 785.

Kentucky.— Louisville, etc., R. Co. *v.* Samuels, 57 S. W. 235, 22 Ky. L. Rep. 401.

Louisiana.— Meyer *v.* Vicksburg, etc., R. Co., 41 La. Ann. 639, 6 So. 218, 17 Am. St. Rep. 408.

Maryland.—Baltimore, etc., R. Co. *v.* Woodruff, 4 Md. 242, 59 Am. Dec. 72.

Michigan.— Peter *v.* Chicago, etc., R. Co., 121 Mich. 324, 80 N. W. 295, 80 Am. St. Rep. 500, 46 L. R. A. 224.

New Jersey.— Goodman *v.* Lehigh Valley R. Co., (Sup. 1907) 68 Atl. 63; Hoff *v.* West Jersey R. Co., 45 N. J. L. 201.

New York.— Flinn *v.* New York Cent., etc., R. Co., 142 N. Y. 11, 36 N. E. 1046; Collins *v.* New York Cent., etc., R. Co., 5 Hun 503 [*affirmed* in 71 N. Y. 609]; Wheeler *v.* New York Cent., etc., R. Co., 22 N. Y. Suppl. 561.

North Carolina.— Williams *v.* Atlantic Coast Line R. Co., 140 N. C. 623, 53 S. E. 448; Moore *v.* Wilmington, etc., R. Co., 124 N. C. 338, 32 S. E. 710, holding that where it is admitted that defendant's engine was in good condition and had a proper spark arrester, and was skilfully operated, the question of negligence in having defective machinery is eliminated, and if sparks should escape from such an engine thus managed and ignite combustible matter along the right

where it negligently fails to prevent the spread of a fire kindled by one of its engines properly equipped and managed.[10]

b. Management of Engines or Trains. The mere fact alone that a railroad company uses on its locomotives the best or most approved appliances is not sufficient to relieve it from liability for damages caused by fire therefrom,[11] It is also necessary that the locomotives and such appliances be constructed and kept in proper repair with a reasonable degree of care and skill;[12] and that they be operated by skilful engineers, firemen, or other servants in such a prudent and careful manner as the circumstances of the case demand,[13] taking into con-

of way, defendant would be liable for injuries resulting, not because the sparks escaped, but for allowing inflammable matter to remain on its premises.

Pennsylvania.— Philadelphia, etc., R. Co. *v.* Schultz, 93 Pa. St. 341; Philadelphia, etc., R. Co. *v.* Hendrickson, 80 Pa. St. 182, 21 Am. Rep. 97; Philadelphia, etc., R. Co. *v.* Yierger, 73 Pa. St. 121; Gowen *v.* Glazer, 2 Pa. Cas. 250, 10 Atl. 417.

South Carolina.— Wilson *v.* Atlanta, etc., Airline R. Co., 16 S. C. 587.

South Dakota.— White *v.* Chicago, etc., R. Co., 1 S. D. 326, 47 N. W. 146, 9 L. R. A. 824.

Texas.— Martin *v.* Texas, etc., R. Co., 87 Tex. 117, 26 S. W. 1052; Rost *v.* Missouri Pac. R. Co., 76 Tex. 168, 12 S. W. 1131; St. Louis Southwestern R. Co. *v.* Lindley, (Civ. App. 1895) 29 S. W. 1101; Dillingham *v.* Whitaker, (Civ. App. 1894) 25 S. W. 723; Allibone *v.* Texas, etc., R. Co., 2 Tex. App. Civ. Cas. § 64; Houston, etc., R. Co. *v.* McDonough, 1 Tex. App. Civ. Cas. § 651.

Virginia.— Atlantic Coast Line R. Co. *v.* Watkins, 104 Va. 154, 51 S. E. 172; White *v.* New York, etc., R. Co., 99 Va. 357, 38 S. E. 180.

England.— Vaughan *v.* Taff Vale R. Co., 5 H. & N. 679, 6 Jur. N. S. 899, 29 L. J. Exch. 247, 2 L. T. Rep. N. S. 394. *Compare* Jones *v.* Festiniog R. Co., L. R. 3 Q. B. 733, 9 B. & S. 835, 37 L. J. Q. B. 214, 18 L. T. Rep. N. S. 902, 17 Wkly. Rep. 28.

Canada.— Ball *v.* Grand Trunk R. Co., 16 U. C. C. P. 252; Hill *v.* Ontario, etc., R. Co., 13 U. C. Q. B. 503; Hewitt *v.* Ontario, etc., R. Co., 11 U. C. Q. B. 604.

See 41 Cent. Dig. tit. "Railroads," § 1671.

If the engine is sufficient for the service and properly equipped and operated, the fact that the use of a larger engine would decrease the danger from fire does not make the use of the smaller engine negligence. Rosen *v.* Chicago, etc., R. Co., 83 Fed. 300, 27 C. C. A. 534.

10. Missouri Pac. R. Co. *v.* Platzer, 73 Tex. 117, 11 S. W. 160, 15 Am. St. Rep. 771, 3 L. R. A. 639. And see *supra*, X, I, 1, d.

11. Pittsburgh, etc., R. Co. *v.* Nelson, 51 Ind. 150. See also West Jersey R. Co. *v.* Abbott, 60 N. J. L. 150, 37 Atl. 1104, holding that such regulations by the legislature define and limit the duty of the railroad company in respect to the precautions required.

12. *Arkansas.*— St. Louis, etc., R. Co. *v.* Thompson-Hailey Co., 79 Ark. 12, 94 S. W. 707.

Georgia.— Southern R. Co. *v.* Thompson, 129 Ga. 367, 58 S. E. 1044; East Tennessee, etc., R. Co. *v.* Hester, 90 Ga. 11, 15 S. E. 828.

Illinois.— Chicago, etc., R. Co. *v.* Goyette, 133 Ill. 21, 24 N. E. 549 [*affirming* 32 Ill. App. 574]; Chicago, etc., R. Co. *v.* Quaintance, 58 Ill. 389.

Indiana.— Cleveland, etc., R. Co. *v.* Hayes, 167 Ind. 454, 79 N. E. 448 (holding that a railroad company cannot escape liability for failure to make a reasonably careful inspection of its spark arresters, by merely showing that it had employed a competent servant to make such inspection, but must show that a reasonably careful inspection was made); Pittsburgh, etc., R. Co. *v.* Noel, 77 Ind. 110; Pittsburgh, etc., R. Co. *v.* Nelson, 51 Ind. 150.

Kansas.— St. Louis, etc., R. Co. *v.* Hoover, 3 Kan. App. 577, 43 Pac. 854.

Kentucky.— Louisville, etc., R. Co. *v.* Taylor, 92 Ky. 55, 17 S. W. 198, 13 Ky. L. Rep. 373, negligent failure to have spark arrester properly adjusted or in proper order.

Maryland.— Baltimore, etc., R. Co. *v.* Woodruff, 4 Md. 242, 59 Am. Dec. 72.

Ohio.— Cleveland, etc., R. Co. *v.* Fredenbur, 3 Ohio Cir. Ct. 23, 2 Ohio Cir. Dec. 15.

Texas.— Gulf, etc., R. Co. *v.* Benson, 69 Tex. 407, 5 S. W. 822, 5 Am. St. Rep. 74; St. Louis Southwestern R. Co. *v.* Connally, (Civ. App. 1906) 93 S. W. 206; St. Louis Southwestern R. Co. *v.* Crabb, (Civ. App. 1904) 80 S. W. 408; St. Louis Southwestern R. Co. *v.* Gentry, (Civ. App. 1903) 74 S. W. 607; Dillingham *v.* Whitaker, (Civ. App. 1894) 25 S. W. 723.

Vermont.— Cleaveland *v.* Grand Trunk R. Co., 42 Vt. 449.

Canada.— Hewitt *v.* Ontario, etc., R. Co., 11 U. C. Q. B. 604.

See 41 Cent. Dig. tit. "Railroads," § 1672.

13. *Alabama.*— Sherrell *v.* Louisville, etc., R. Co., 148 Ala. 1, 44 So. 153.

Florida.— Jacksonville, etc., R. Co. *v.* Peninsular Land, etc., Co., 27 Fla. 1, 157, 9 So. 661, 17 L. R. A. 33, 65.

Georgia.— Southern R. Co. *v.* Thompson, 129 Ga. 367, 58 S. E. 1044; East Tennessee, etc., R. Co. *v.* Hester, 90 Ga. 11, 15 S. E. 828.

Illinois.— Illinois Cent. R. Co. *v.* Bailey, 222 Ill. 480, 78 N. E. 833 [*affirming* 127 Ill. App. 41]; Chicago, etc., R. Co. *v.* Goyette, 133 Ill. 21, 24 N. W. 549 [*affirming* 32 Ill. App. 574]; Chicago, etc., R. Co. *v.* Clampit, 63 Ill. 95; Toledo, etc., R. Co. *v.* Pindar, 53 Ill. 447, 5 Am. Rep. 57; Louisville, etc., R. Co. *v.* Black, 54 Ill. App. 82.

sideration, together with other circumstances then prevailing, the speed of the train,[14] the condition of the track and the nature of the cargo,[15] the condition of the weather, as where it is dry and windy,[16] the inflammable character of prop-

Indiana.— Lake Erie, etc., R. Co. *v.* McFall, (1904) 72 N. E. 552; Indianapolis, etc., R. Co. *v.* Paramore, 31 Ind. 143.

Kansas.— St. Louis, etc., R. Co. *v.* Hoover, 3 Kan. App. 577, 43 Pac. 854.

Kentucky.— Louisville, etc., R. Co. *v.* Dalton, 102 Ky. 290, 43 S. W. 431, 19 Ky. L. Rep. 1318; Southern R. Co. *v.* McGeoughey, 102 S. W. 270, 31 Ky. L. Rep. 291; Chesapeake, etc., R. Co. *v.* Richardson, 99 S. W. 642, 30 Ky. L. Rep. 786.

Maryland.— Baltimore, etc., R. Co. *v.* Woodruff, 4 Md. 242, 59 Am. Dec. 72.

Mississippi.— Brookhaven Lumber, etc., Co. *v.* Illinois Cent. R. Co., 68 Miss. 432, 10 So. 66.

Missouri.— Fitch *v.* Pacific R. Co., 45 Mo. 322.

Nebraska.— Burlington, etc., R. Co. *v.* Westover, 4 Nebr. 268.

North Carolina.— Williams *v.* Atlantic Coast Line R. Co., 140 N. C. 623, 53 S. E. 448.

Oregon.— Hawley *v.* Sumpter R. Co., 49 Oreg. 509, 90 Pac. 1106, 12 L. R. A. N. S. 526.

South Carolina.— Brown *v.* Atlanta, etc., Air Line R. Co., 19 S. C. 39; Wilson *v.* Atlanta, etc., Airline R. Co., 16 S. C. 587.

South Dakota.— Cronk *v.* Chicago, etc., R. Co., 3 S. D. 93, 52 N. W. 420.

Texas.— Gulf, etc., R. Co. *v.* Benson, 69 Tex. 407, 5 S. W. 822, 5 Am. St. Rep. 74; Texas, etc., R. Co. *v.* Medaris, 64 Tex. 92; St. Louis Southwestern R. Co. *v.* Connally, (Civ. App. 1906) 93 S. W. 206; Allibone *v.* Texas, etc., R. Co., 2 Tex. App. Civ. Cas. § 64. See Edwards *v.* Bonner, 12 Tex. Civ. App. 236, 33 S. W. 761.

Wisconsin.— Martin *v.* Western Union R. Co., 23 Wis. 437, 99 Am. Dec. 189.

United States.— Grand Trunk R. Co. *v.* Richardson, 91 U. S. 454, 23 L. ed. 356; Missouri Pac. R. Co. *v.* Texas, etc., R. Co., 41 Fed. 917.

See 41 Cent. Dig. tit. "Railroads," § 1672.

It is not negligence per se for a railroad company to permit sparks to escape from its locomotives and this fact alone will not render the company liable. Texas, etc., R Co. *v.* Medaris, 64 Tex. 92.

The degree of care imposed on a railway company to prevent the escape of fire from its locomotives is such care and caution as an ordinarily prudent person would have exercised under the same or similar circumstances, rather than "all reasonable care and caution." St. Louis, etc., R. Co. *v.* Knight, 20 Tex. Civ. App. 477, 49 S. W. 250. It has been held to be such as good specialists in this department are accustomed to exercise (Musselwhite *v.* Receivers, 17 Fed. Cas. No. 9,972, 4 Hughes 166); or as great a degree of care to protect the public against damage by fire as it exercises in favor of its patrons (Babcock *v.* Fitchburg R. Co., 67 Hun (N. Y.) 69, 22 N. Y. Suppl. 449).

Whether or not damage caused by fire communicated by a locomotive was the result of negligence on the part of the railroad company depends upon the facts as to whether or not it used such caution and diligence as was demanded by the circumstances of the case, and not upon the usual conduct of other companies in the vicinity. Grand Trunk R. Co. *v.* Richardson, 91 U. S. 454, 23 L. ed. 356.

That an engine became out of repair at a point on the line where there were no facilities for repairing will not justify the action of the engineer in running the engine with increased danger to the next repair shop instead of stopping at the next station. Texas, etc., R. Co. *v.* Tankersley, 63 Tex. 57.

14. Lake Erie, etc., R. Co. *v.* Lowder, 7 Ind. App. 537, 34 N. E. 447, 747; Martin *v.* Western Union R. Co., 23 Wis. 437, 99 Am. Dec. 189.

A high rate of speed is not of itself negligence which will render the company liable for injury to property by fire ignited by sparks from its locomotive (Hagan *v.* Chicago, etc., R. Co., 86 Mich. 615, 49 N. W. 509), unless it appears that the fire would not have occurred but for such unlawful speed (Clisby *v.* Mobile, etc., R. Co., 78 Miss. 937, 29 So. 913; Bennett *v.* Missouri, etc., R. Co., 11 Tex. Civ. App. 423, 32 S. W. 834. See Norfolk, etc., R. Co. *v.* Fritts, 103 Va. 687, 49 S. E. 971, 106 Am. St. Rep. 911, 68 L. R. A. 864). In regulating the speed of its trains a railroad company must consider the dryness of the season, the strength and direction of the wind, the danger to adjacent property, and the surrounding circumstances which increase the danger from fire thrown out by the engines; and a high rate of speed, when taken in connection with the circumstances, may be negligence. Norfolk, etc., R. Co. *v.* Fritts, *supra*. There is no duty on a railroad company, as to owners of isolated buildings near its tracks, to stop or diminish the customary speed of its trains as they pass on a dry and windy day, in the absence of fires previously set or other evidence of the danger of setting a fire. Woodward *v.* Chicago, etc., R. Co., 145 Fed. 577, 75 C. C. A. 591.

15. Lake Erie, etc., R. Co. *v.* Lowder, 7 Ind. App. 537, 34 N. E. 447, 747, holding that it is negligence for a railroad company to run a train loaded with oil over a track which is defective, at a rate of speed forbidden by an ordinance, whereby the train is wrecked and the oil flows on to adjoining premises and causes a fire.

16. *Indiana.*—Lake Erie, etc., R. Co. *v.* McFall, (1904) 72 N. E. 552.

Kansas.— Atchison, etc., R. Co. *v.* Huitt, 1 Kan. App. 788, 41 Pac. 1051, holding that it is negligence under such circumstances for an engineer to use an unusual and unnecessary amount of steam, which forces large sparks out of the smoke-stack.

erty near the track,[17] the fuel used,[18] and the use of an unusual amount of steam whereby an undue quantity of sparks is emitted.[19] Due consideration must also be given to the necessities of the railway service, and the duty of the company to its patrons and the public.[20]

3. Combustibles on Railroad Property[21] — a. Duty to Keep Premises Free From Combustibles — (i) *In General.* As a general rule it is the duty of a railroad company to use a reasonable degree of diligence and prudence to keep its right of way and other property reasonably free from inflammable material whereby fire from sparks can be communicated to the premises of others; and if it fails to perform this duty and allows such materials to accumulate in such quantity, at such places, and at such seasons as renders it liable to become ignited and cause damage to adjacent property it is guilty of negligence, and liable for resulting damages.[22] It has been held that leaving such matter exposed to sparks

Minnesota.— Riley *v.* Chicago, etc., R. Co., 71 Minn. 425, 74 N. W. 171, speed and direction of the wind.

New York.— Webb *v.* Rome, etc., R. Co., 49 N. Y. 420, 10 Am. Rep. 389.

Texas.— Ft. Worth, etc., R. Co. *v.* Dial, 38 Tex. Civ. App. 260, 85 S. W. 22.

Virginia.— Norfolk, etc., R. Co. *v.* Fritts, 103 Va. 687, 49 S. E. 971, 106 Am. St. Rep. 911, 68 L. R. A. 864.

But see Michigan Cent. R. Co. *v.* Anderson, 20 Mich. 244 (holding that the care which a railroad company must exercise in running trains is not contingent upon such circumstances as the force and direction of the wind, or the dryness of the weather); West Jersey R. Co. *v.* Abbott, 60 N. J. L. 150, 37 Atl. 1104.

17. Riley *v.* Chicago, etc., R. Co., 71 Minn. 425, 74 N. W. 171.

18. Chicago, etc., R. Co. *v.* Pennell, 94 Ill. 448 (wood); Chicago, etc., R. Co. *v.* Quaintance, 58 Ill. 389 (holding that the use of wood in a coal burning engine at a dry and windy time is indicative of gross carelessness); Chicago, etc., R. Co. *v.* Ostrander, 116 Ind. 259, 15 N. E. 227, 19 N. E. 110 (wood in coal burning engine); St. Joseph, etc., R. Co. *v.* Chase, 11 Kan. 47 (wood); Baltimore, etc., R. Co. *v.* Woodruff, 4 Md. 242, 59 Am. Dec. 72. *Compare* New Brunswick R. Co. *v.* Robinson, 11 Can. Sup. Ct. 688, holding that the use of wood as fuel is not of itself evidence of negligence.

The use of any ordinary fuel to make steam in engines on a railroad is legal (Collins *v.* New York Cent., etc., R. Co., 5 Hun (N. Y.) 499), where the latest practical improvements in the management of the engine are used (Lackawanna, etc., R. Co. *v.* Doak, 52 Pa. St. 379, 91 Am. Dec. 166), unless such fuel is of a dangerous or hazardous quality (Collins *v.* New York Cent., etc., R. Co., 5 Hun (N. Y.) 499). The fact that the use of anthracite coal lessens the danger of throwing sparks does not make it negligence not to use such coal. Raleigh Hosiery Co. *v.* Raleigh, etc., R. Co., 131 N. C. 238, 42 S. E. 602.

19. Great Western R. Co. *v.* Haworth, 39 Ill. 346; Atchison, etc., R. Co. *v.* Huitt, 1 Kan. App. 788, 41 Pac. 1051. *Compare* McGibbon *v.* Northern, etc., R. Co., 11 Ont. 307 [*reversed* on the facts in 14 Ont. App. 91].

Running a train too heavily laden on an up grade, when there is a strong wind, and causing an unusual quantity of sparks is negligence making the railroad company liable for damages caused by the resulting fire. North Shore R. Co. *v.* McWillie, 17 Can. Sup. Ct. 511.

20. Riley *v.* Chicago, etc., R. Co., 71 Minn. 425, 74 N. W. 171.

21. **Contributory negligence of owner of property** see *infra*, X, I, 4, d.

22. *Florida.*— St. Johns, etc., R. Co. *v.* Ransom, 33 Fla. 406, 14 So. 892.

Georgia.— Southern R. Co. *v.* Thompson, 129 Ga. 367, 58 S. E. 1044.

Indiana.— Pittsburgh, etc., R. Co. *v.* Indiana Horseshoe Co., 154 Ind. 322, 56 N. E. 766 (holding that the railroad company is liable for a fire starting in such combustibles and escaping to plaintiff's property, although it had no knowledge of the fire); Chicago, etc., R. Co. *v.* Burger, 124 Ind. 275, 24 N. E. 981; Baltimore, etc., R. Co. *v.* O'Brien, 38 Ind. App. 143, 77 N. E. 1131.

Kansas.— St. Louis, etc., R. Co. *v.* Ludlum, 63 Kan. 719, 66 Pac. 1045; Union Pac. R. Co. *v.* Buck, 3 Kan. App. 671, 44 Pac. 904.

Michigan.— Briant *v.* Detroit, etc., R. Co., 104 Mich. 307, 62 N. W. 365; Jones *v.* Michigan Cent. R. Co., 59 Mich. 437, 26 N. W. 662.

Minnesota.— Sibilrud *v.* Minneapolis, etc., R. Co., 29 Minn. 58, 11 N. W. 146, holding that the fact that a railroad runs through a prairie country does not relieve the company from its duty to cut wild grass on its right of way.

Nevada.— Watt *v.* Nevada Cent. R. Co., 23 Nev. 154, 44 Pac. 423, 46 Pac. 52, 726, 62 Am. St. Rep. 772; Longabaugh *v.* Virginia City, etc., R. Co., 9 Nev. 271.

New Jersey.— Waters *v.* Atlantic City R. Co., (Sup. 1899) 43 Atl. 670 (holding that it is not the absolute duty of a railroad company to keep its road-bed free from combustible materials, but it is sufficient if reasonable care is exercised in that regard); Salmon *v.* Delaware, etc., R. Co., 38 N. J. L. 5, 20 Am. Rep. 356.

New York.— Hoffman *v.* King, 160 N. Y. 618, 55 N. E. 401, 73 Am. St. Rep. 715, 46 L. R. A. 672 [*reversing* 30 N. Y. App. Div. 621, 52 N. Y. Suppl. 1143]; O'Neill *v.* New York, etc., R. Co., 115 N. Y. 579, 22 N. E.

coming from locomotives is negligence *per se*;[23] but the weight of authority is that while it is not negligence *per se*, it may become negligence when taken in connection with other circumstances that render its presence there a cause of damage to others.[24] The above rule does not apply, however, where the danger arises

217, 5 L. R. A. 591 [*affirming* 45 Hun 458]; Webb *v.* Rome, etc., R. Co., 49 N. Y. 420, 10 Am. Rep. 389.

North Carolina.— Craft *v.* Albemarle Timber Co., 132 N. C. 151, 43 S. E. 597 (holding that a company operating a private logging railroad is liable for such negligence); Hamburg-Bremen F. Ins. Co. *v.* Atlantic Coast Line R. Co., 132 N. C. 75, 43 S. E. 548 (bales of cotton on platform); Shields *v.* Norfolk, etc., R. Co., 129 N. C. 1, 39 S. E. 582; Blue *v.* Aberdeen, etc., R. Co., 117 N. C. 644, 23 S. E. 275 (holding that this duty extends even to the full width of the right of way); Black *v.* Aberdeen, etc., R. Co., 115 N. C. 667, 20 S. E. 713, 909; Aycock *v.* Raleigh, etc., Air-Line R. Co., 89 N. C. 321; Troxler *v.* Richmond, etc., R. Co., 74 N. C. 377.

Oregon.— Hawley *v.* Sumpter R. Co., 49 Oreg. 509, 90 Pac. 1106, 12 L. R. A. N. S. 526.

Pennsylvania.— Elder Tp. School Dist. *v.* Pennsylvania R. Co., 26 Pa. Super. Ct. 112.

Texas.— Rost *v.* Missouri Pac. R. Co., 76 Tex. 168, 12 S. W. 1131; Ft. Worth, etc., R. Co. *v.* Dial, 38 Tex. Civ. App. 260, 85 S. W. 22; Gulf, etc., R. Co. *v.* Reagan, (Civ. App. 1895) 32 S. W. 846; Dillingham *v.* Whitaker, (Civ. App. 1894) 25 S. W. 723; Gulf, etc., R. Co. *v.* France, 2 Tex. App. Civ. Cas. § 701; Gulf, etc., R. Co. *v.* Lowe, 2 Tex. App. Civ. Cas. § 648.

Utah.— Smith *v.* Ogden, etc., R. Co., 33 Utah 129, 93 Pac. 185.

Virginia.— Atlantic Coast Line R. Co. *v.* Watkins, 104 Va. 154, 51 S. E. 172; New York, etc., R. Co. *v.* Thomas, 92 Va. 606, 24 S. E. 264; Brighthope R. Co. *v.* Rogers, 76 Va. 443; Richmond, etc., R. Co. *v.* Medley, 75 Va. 499, 40 Am. Rep. 734.

Washington.— Fireman's Fund Ins. Co. *v.* Northern Pac. R. Co., 46 Wash. 635, 91 Pac. 13.

Wisconsin.— Knickel *v.* Chicago, etc., R. Co., 123 Wis. 327, 101 N. W. 690; Moore *v.* Chicago, etc., R. Co., 78 Wis. 120, 47 N. W. 273.

United States.— Eddy *v.* Lafayette, 163 U. S. 456, 16 S. Ct. 1082, 41 L. ed. 225 [*affirming* 49 Fed. 807, 1 C. C. A. 441].

Canada.— Grand Trunk R. Co. *v.* Rainville, 29 Can. Sup. Ct. 201 [*affirming* 25 Ont. App. 242 (*affirming* 28 Ont. 625)].

See 41 Cent. Dig. tit. "Railroads," § 1673.

The ordinary care which a railroad company is required to use to keep its right of way clear of combustible material is the ordinary care of an expert engineer or railroad servant. Diamond *v.* Northern Pac. R. Co., 6 Mont. 580, 13 Pac. 367.

That a railroad company has laid merely a temporary side-track under a license does not relieve it from the duty to keep the track reasonably free from combustible material. Kurz, etc., Ice Co. *v.* Milwaukee, etc., R. Co., 84 Wis. 171, 53 N. W. 850.

Right to keep wood at stations.—A railroad company has a right to keep at its stations supplies of wood for present and future use, and is not responsible for a loss by fire communicated from one of its woodpiles, which has been set on fire by a spark from an engine belonging to the company, unless the damage results from the gross negligence of its employees. Macon, etc., R. Co. *v.* McConnell, 31 Ga. 133, 76 Am. Dec. 685; Macon, etc., R. Co. *v.* McConnell, 27 Ga. 481.

That the railroad company leases a portion of its right of way to a private person does not absolve it from keeping such right of way free from combustible material. Sprague *v.* Atchison, etc., R. Co., 70 Kan. 359, 78 Pac. 828.

Care as to licensee.— Where property piled on defendant's right of way near its track is allowed to remain there solely for the accommodation of the owner, it not being there for shipment, and defendant company having no interest in its being on its right of way, the owner of such property is a mere licensee as to whom defendant owes no duty to remove dry grass and combustible material which has been allowed to accumulate around such property. Connelly *v.* Erie R. Co., 68 N. Y. App. Div. 542, 74 N. Y. Suppl. 277.

Where a railroad track is maintained on a public highway, such portions of the highway as are occupied and used in the operation of the railroad, and such portions as may be properly regarded as its right of way, must be kept free from combustible material by the railroad company. Smith *v.* Ogden, etc., R. Co., 33 Utah 129, 93 Pac. 185.

23. Diamond *v.* Northern Pac. R. Co., 6 Mont. 580, 13 Pac. 367, under statute.

24. *Florida.*— St. Johns, etc., R. Co. *v.* Ransom, 33 Fla. 406, 14 So. 892.

Indiana.— Toledo, etc., R. Co. *v.* Wand, 48 Ind. 476.

Kansas.— St. Louis, etc., R. Co. *v.* Richardson, 47 Kan. 517, 28 Pac. 183.

Kentucky.— Cincinnati, etc., R. Co. *v.* Barker, 94 Ky. 71, 21 S. W. 347, 14 Ky. L. Rep. 750.

Minnesota.— Cantlon *v.* Eastern R. Co., 45 Minn. 481, 48 N. W. 22; Clarke *v.* Chicago, etc., R. Co., 33 Minn. 359, 23 N. W. 536.

Texas.— Texas, etc., R. Co. *v.* Levine, (Civ. App. 1894) 29 S. W. 514.

Virginia.— Brighthope R. Co. *v.* Rogers, 76 Va. 443; Richmond, etc., R. Co. *v.* Medley, 75 Va. 499, 40 Am. Rep. 734.

West Virginia.— Snyder *v.* Pittsburgh, etc., R. Co., 11 W. Va. 14.

Wisconsin.— Abbot *v.* Gore, 74 Wis. 509, 43 N. W. 365; Kellogg *v.* Chicago, etc., R. Co., 26 Wis. 223, 7 Am. Rep. 69.

See 41 Cent. Dig. tit. "Railroads," § 1673.

from inflammable property stored in the usual way on defendant's platform near the tracks, and which it is under a duty to receive.[25]

(II) *STATUTORY LIABILITY.* In some jurisdictions the railroad company is expressly required by statute to keep its right of way clear from dead grass, weeds, and other combustible material,[26] and a failure to comply with such a statute is *prima facie* evidence of negligence.[27]

(III) *GRASS, WEEDS, OR OTHER VEGETATION.* The mere failure of a railroad company to clear its right of way of dry grass, weeds, and other combustible matter which are the natural accumulations of the soil is not negligence *per se*; and the company will not be guilty of negligence and liable for losses resulting from fire occasioned by sparks igniting such accumulations, unless the accumulations were such as would not have been permitted by a cautious or ordinarily prudent man on his own premises if exposed to the same hazard.[28]

b. Effect of Precautions in Construction and Management of Engines. The fact that the railroad company has used the proper precautions in constructing,

25. Tribette *v.* Illinois Cent. R. Co., 71 Miss. 212, 13 So. 899.

26. Lake Erie, etc., R. Co. *v.* Middlecoff, 150 Ill. 27, 37 N. E. 660; Chicago, etc., R. Co. *v.* Goyette, 133 Ill. 21, 24 N. E. 549; Indiana, etc., R. Co. *v.* Nicewander, 21 Ill. App. 305; Spencer *v.* Montana Cent. R. Co., 11 Mont. 164, 27 Pac. 681; Diamond *v.* Northern Pac. R. Co., 6 Mont. 580, 13 Pac. 367.

In Wyoming, the act of Jan. 8, 1891, requiring railroad companies between September 1 and November 1 in every year to burn the vegetation on their rights of way as a guard against fire and making them liable for damages resulting from a failure to do so, does not authorize a recovery for fire occurring Oct. 20, 1891. Union Pac. R. Co. *v.* Gilland, 4 Wyo. 395, 34 Pac. 953.

A city street, so far as actually used and occupied by a railroad company for railroad purposes, constitutes part of its "right of way," within the meaning of a statute requiring railroad companies to keep their rights of way clear of combustible material. Lake Erie, etc., R. Co. *v.* Middlecoff, 150 Ill. 27, 37 N. E. 660.

A grain elevator standing on the right of way of a railroad company is not "combustible material," within the meaning of a statute requiring the company to keep its right of way free from "weeds, high grass, decayed timber, and combustible material." Martz *v.* Cincinnati, etc., R. Co., 12 Ohio Cir. Ct. 144, 5 Ohio Cir. Dec. 451.

Two causes for the damage are essential to create a liability under such a statute; the operating of the railroad and the failure to keep the right of way clear of combustible matter. Spencer *v.* Montana Cent. R. Co., 11 Mont. 164, 27 Pac. 681.

A railway company in the use of a railroad as lessee, or otherwise, is guilty of negligence if it fails to keep its right of way clear from all dead grass, weeds, etc., and for such neglect is liable for injuries to others from the escape and transmission of fire from its engines. Pittsburgh, etc., R. Co. *v.* Campbell, 86 Ill. 443.

27. Baltimore, etc., R. Co. *v.* Perryman, 95 Ill. App. 199 (negligence *per se*); Diamond *v.* Northern Pac. R. Co., 6 Mont. 580, 13 Pac. 367. *Compare* Chicago, etc., R. Co. *v.* Goyette, 133 Ill. 21, 24 N. E. 549 (holding that it is not negligence *per se* under Act (1874), § 2, unless the combustible material is dangerous); Indiana, etc., R. Co. *v.* Nicewander, 21 Ill. App. 305.

28. *Alabama.*— Louisville, etc., R. Co. *v.* Miller, 109 Ala. 500, 19 So. 989.

California.— Steele *v.* Pacific Coast R. Co., 74 Cal. 323, 15 Pac. 851; Perry *v.* Southern Pac. R. Co., 50 Cal. 578; Henry *v.* Southern Pac. R. Co., 50 Cal. 176.

Illinois.— Rockford, etc., R. Co. *v.* Rogers, 62 Ill. 346; Ohio, etc., R. Co. *v.* Shanefelt, 47 Ill. 497, 95 Am. Dec. 504; Illinois Cent. R. Co. *v.* Mills, 42 Ill. 407. But see Baltimore, etc., R. Co. *v.* Perryman, 95 Ill. App. 199.

Indiana.— Pittsburgh, etc., R. Co. *v.* Jones, 86 Ind. 496, 44 Am. Rep. 334; Pittsburgh, etc., R. Co. *v.* Nelson, 51 Ind. 150; Terre Haute, etc., R. Co. *v.* Walsh, 11 Ind. App. 13, 38 N. E. 534.

Iowa.— Kesee *v.* Chicago, etc., R. Co., 30 Iowa 78, 6 Am. Rep. 643.

Kansas.— Kansas Pac. R. Co. *v.* Butts, 7 Kan. 308.

Nebraska.— Burlington, etc., R. Co. *v.* Westover, 4 Nebr. 268.

New Jersey.— Salmon *v.* Delaware, etc., R. Co., 38 N. J. L. 5, 20 Am. Rep. 356.

North Carolina.— Black *v.* Aberdeen, etc., R. Co., 115 N. C. 667, 20 S. E. 713, 909.

Pennsylvania.— Taylor *v.* Pennsylvania Schuylkill Valley R. Co., 174 Pa. St. 171, 34 Atl. 457.

Texas.— Texas, etc., R. Co. *v.* Medaris, 64 Tex. 92; Texas, etc., R. Co. *v.* Gains, (Civ. App. 1894) 26 S. W. 433; Gulf, etc., R. Co. *v.* Fields, 2 Tex. App. Civ. Cas. § 794; Ft. Worth, etc., R. Co. *v.* Ratliffe, 2 Tex. App. Civ. Cas. § 681.

West Virginia.— Snyder *v.* Pittsburgh, etc., R. Co., 11 W. Va. 14.

Wyoming.— Union Pac. R. Co. *v.* Gilland, 4 Wyo. 395, 34 Pac. 953.

See 41 Cent. Dig. tit. "Railroads," § 1675.

It is negligence as a matter of law for a railroad company to permit combustible material to grow and remain on its right of way where it is liable to be ignited by sparks from passing engines. Gulf, etc., R.

equipping with proper appliances, and in managing its engines is immaterial and does not relieve it from liability in case a fire started on its right of way by such an engine is communicated to adjoining property by reason of its negligence in permitting combustible material to accumulate along its roadway.[29]

4. Contributory Negligence[30] **— a. In General.** As a general rule an owner of property adjoining a railroad who has by his negligence contributed to the injury of such property by a fire caused by the railroad can have no redress against the railroad company,[31] if such negligence is the proximate cause of the injury.[32] This rule also applies in case of personal injuries caused by fire.[33]

b. Effect of Statutory Provisions. A railroad company's liability under statutes imposing an absolute liability upon it for damages caused by fire started by its engines,[34] and giving it an insurable interest in property along its right of way,[35] is generally not affected by any contributory negligence on the part of the injured property-owner,[36] although under some statutes an exception is made

Co. *v.* Rowland, (Tex. Civ. App. 1893) 23 S. W. 421.

29. *California.*— McMahon *v.* Hetchhetchy, etc., R. Co., 2 Cal. App. 400, 84 Pac. 350.

Illinois.— Illinois Cent. R. Co. *v.* Frazier, 64 Ill. 28; Chicago, etc., R. Co. *v.* Glenny, 70 Ill. App. 510 (holding that if the fire started on defendant's right of way, in consequence of dangerous combustible material left thereon, a clear case of negligence is made out, without reference to the condition of the engine); Toledo, etc., R. Co. *v.* Endres, 57 Ill. App. 69.

Indiana.— Louisville, etc., R. Co. *v.* Hart, 119 Ind. 273, 21 N. E. 753, 4 L. R. A. 549; Indiana, etc., R. Co. *v.* Overman, 110 Ind. 538, 10 N. E. 575; Chicago, etc., R. Co. *v.* Bailey, 19 Ind. App. 163, 46 N. E. 688; Lake Erie, etc., R. Co. *v.* Clark, 7 Ind. App. 155, 34 N. E. 587, 52 Am. St. Rep. 442.

New Jersey.— Delaware, etc., R. Co. *v.* Salmon, 39 N. J. L. 299, 23 Am. Rep. 214.

North Carolina.— North Fork Lumber Co. *v.* Southern R. Co., 143 N. C. 324, 55 S. E. 781; Williams *v.* Atlantic Coast Line R. Co., 140 N. C. 623, 53 S. E. 448.

North Dakota.— Gram *v.* Northern Pac. R. Co., 1 N. D. 252, 46 N. W. 972.

Oregon.— Hawley *v.* Sumpter R. Co., 49 Oreg. 509, 90 Pac. 1106, 12 L. R. A. N. S. 526.

Texas.— Gulf, etc., R. Co. *v.* Benson, 69 Tex. 407, 5 S. W. 822, 5 Am. St. Rep. 74; Gulf, etc., R. Co. *v.* Witte, 68 Tex. 295, 4 S. W. 490; International, etc., R. Co. *v.* Newman, (Civ. App. 1897) 40 S. W. 854; Galveston, etc., R. Co. *v.* Polk, (Civ. App. 1894) 28 S. W. 353; Texas, etc., R. Co. *v.* Ross, 7 Tex. Civ. App. 653, 27 S. W. 728.

Vermont.— Smith *v.* Central Vermont R. Co., 80 Vt. 208, 67 Atl. 535.

Virginia.— Tutwiler *v.* Chesapeake, etc., R. Co., 95 Va. 443, 28 S. E. 597; New York, etc., R. Co. *v.* Thomas, 92 Va. 606, 24 S. E. 264; Richmond, etc., R. Co. *v.* Medley, 75 Va. 499, 40 Am. Rep. 734.

Washington.— Fireman's Fund Ins. Co. *v.* Northern Pac. R. Co., 46 Wash. 635, 91 Pac. 13, holding that where property is burned by a fire originating on the right of way through sparks from a passing engine and spreading to adjoining property, it is immaterial as regards the company's liability whether the engine was improperly equipped, or whether the employees in charge of the engine were careful or negligent in operating it.

England.— Smith *v.* London, etc., R. Co., L. R. 5 C. P. 98, 39 L. J. C. P. 68, 21 L. T. Rep. N. S. 668, 18 Wkly. Rep. 343.

See 41 Cent. Dig. tit. "Railroads," § 1676.

30. **Imputed negligence** see Negligence, 29 Cyc. 542 *et seq.*

31. Marquette, etc., R. Co. *v.* Spear, 44 Mich. 169, 6 N. W. 202, 38 Am. Rep. 242, 49 Mich. 246, 13 N. W. 610; Doggett *v.* Richmond, etc., R. Co., 78 N. C. 305; St. Louis Southwestern R. Co. *v.* Crabb, (Tex. Civ. App. 1904) 80 S. W. 408; Allibone *v.* Texas, etc., R. Co., 2 Tex. App. Civ. Cas. § 64; Austin *v.* Chicago, etc., R. Co., 93 Wis. 496, 67 N. W. 1129.

Where plaintiff's negligence increased the loss, he may still recover for the damage done before his own negligence began to operate. Stebbins *v.* Central Vermont R. Co., 54 Vt. 464, 41 Am. Rep. 855.

Where plaintiff's property is burned in a warehouse, in which he had stored it, contributory negligence of the warehouse company cannot be charged to him. Alabama Great Southern R. Co. *v.* Clarke, 145 Ala. 459, 39 So. 816.

32. See *infra*, X, I, 4, g.

33. McTavish *v.* Great Northern R. Co., 8 N. D. 333, 79 N. W. 443, holding, however, that the fact that there was a safer place, which plaintiff had plenty of time to reach after he saw the fire coming, does not show contributory negligence, where there was nothing to show that he knew, or had any reason to believe, that there was a safer place.

34. See *supra*, X, I, 1, b, (I).

35. See *supra*, X, I, 1, b, (III).

36. Union Pac., etc., R. Co. *v.* Williams, 3 Colo. App. 526, 34 Pac. 731; Union Pac. R. Co. *v.* Arthur, 2 Colo. App. 159, 29 Pac. 1031; West *v.* Chicago, etc., R. Co., 77 Iowa 654, 35 N. W. 479, 42 N. W. 512 [*distinguishing* Small *v.* Chicago, etc., R. Co., 50 Iowa 338]; Peter *v.* Chicago, etc., R. Co., 121 Mich. 324, 80 N. W. 295, 80 Am. St. Rep. 500, 46 L. R. A. 224; Laird *v.* Connecticut, etc., R. Co., 62 N. H. 254, 13 Am. St. Rep. 564;

where the property-owner knowingly or purposely places his property where sparks would be liable to ignite it,[37] or where, being present, he permits it to remain in proximity to a fire in actual progress without making an effort to protect it,[38] or where otherwise his negligence is gross or such as amounts to fraud;[39] and under some an express exception is made where the owner is guilty of contributory negligence in its ordinary meaning.[40] But under statutes making the occurrence of such fire *prima facie* evidence of negligence on the part of the railroad company,[41] contributory negligence of the injured property-owner may be taken into consideration in determining the company's liability.[42]

c. Erecting Buildings or Placing Property Near Railroad — (i) *In General.* Where an owner of property erects and uses a building, or places other property for ordinary purposes on his land near a railroad track, he is not guilty of negligence *per se*, so as to preclude him from recovering for damages thereto by a fire caused by the railroad company's negligence.[43] The owner, however, assumes the risks incident to the position of his property and must use such care as ordinary prudence would dictate in view of the unavoidable perils to which it is exposed;[44] and if his property is destroyed by a fire from engines without any negligence on the part of the railroad company, he cannot recover.[45]

Rowell *v.* Railroad Co., 57 N. H. 132, 24 Am. Rep. 59.

37. Union Pac., etc., R. Co. *v.* Williams, 3 Colo. App. 526, 34 Pac. 731.

38. Union Pac., etc., R. Co. *v.* Williams, 3 Colo. App. 526, 34 Pac. 731; Denver, etc., R. Co. *v.* Morton, 3 Colo. App. 155, 32 Pac. 345.

39. Bowen *v.* Boston, etc., R. Co., 179 Mass. 524, 61 N. E. 141; Matthews *v.* Missouri Pac. R. Co., 142 Mo. 645, 44 S. W. 802; Mathews *v.* St. Louis, etc., R. Co., 121 Mo. 298, 24 S. W. 591, 25 L. R. A. 161 (holding this to be true under a statute giving the railroad company an insurable interest in the property along its right of way); Walker *v.* Missouri Pac. R. Co., 68 Mo. App. 465.

40. Hubbard *v.* New York, etc., R. Co., 72 Conn. 24, 43 Atl. 550.

41. See *supra*, I, I, 1, b, (I).

42. Ft. Scott, etc., R. Co. *v.* Tubbs, 47 Kan. 630, 28 Pac. 612, holding, however, that a property-owner is not chargeable with contributory negligence on a mere finding of failure to take precautions to protect his land from such fires.

43. *Florida.*— Jacksonville, etc., R. Co. *v.* Peninsular Land, etc., Co., 27 Fla. 1, 157, 9 So. 661, 17 L. R. A. 33, 65.

Indiana.— Cleveland, etc., R. Co. *v.* Scantland, 151 Ind. 488, 51 N. E. 1068; Indianapolis, etc., R. Co. *v.* Paramore, 31 Ind. 143.

Kentucky.— Cincinnati, etc., R. Co. *v.* Barker, 94 Ky. 71, 21 S. W. 347, 14 Ky. L. Rep. 750; Cincinnati, etc., R. Co. *v.* Cecil, 90 S. W. 585, 28 Ky. L. Rep. 830.

Maine.— Boston Excelsior Co. *v.* Bangor, etc., R. Co., 93 Me. 52, 44 Atl. 138, 47 L. R. A. 82.

Michigan.— Briant *v.* Detroit, etc., R. Co., 104 Mich. 307, 62 N. W. 365.

New York.— Cook *v.* Champlain Transp. Co., 1 Den. 91.

Tennessee.— Burke *v.* Louisville, etc., R. Co., 7 Heisk. 451, 19 Am. Rep. 618.

Texas.— St. Louis Southwestern R. Co. *v.* Miller, 27 Tex. Civ. App. 344, 66 S. W. 139; Rutherford *v.* Texas, etc., R. Co., (Civ. App. 1901) 61 S. W. 422, 28 Tex. Civ. App. 590, 68 S. W. 825.

Virginia.— Southern R. Co. *v.* Patterson, 105 Va. 6, 52 S. E. 694. *Compare* Norfolk, etc., R. Co. *v.* Perrow, 101 Va. 345, 43 S. E. 614, holding that the fact that the wall of a house is wrongfully on the right of way does not justify the wilful or negligent destruction of the house by the railroad company by fire.

See 41 Cent. Dig. tit. "Railroads," § 1679.

Where a party erects his building at a reasonably safe distance from the railroad track, he cannot be held guilty of negligence because his building is so situated as to be liable to be set on fire by another subsequently erected in dangerous proximity to the railroad track. Toledo, etc., R. Co. *v.* Maxfield, 72 Ill. 95.

44. St. Louis, etc., R. Co. *v.* Clements, 82 Ark. 3, 99 S. W. 1106 (holding that where a person places property on a depot platform, until a bill of lading is issued or it is received by some agent of the railroad company, it is such person's duty to care for the property in such a manner as a reasonably prudent person would do under similar circumstances); Chicago, etc., R. Co. *v.* Pennell, 94 Ill. 448; St. Louis, etc., R. Co. *v.* Stevens, 3 Kan. App. 176, 43 Pac. 434; Collins *v.* New York Cent., etc., R. Co., 5 Hun (N. Y.) 499. And see *infra*, X, I, 4, e. If an owner, knowing that the property in question is easily set on fire, places it in an unprotected condition nearer defendant's railroad tracks, where he knows it is daily operating trains, than a man of ordinary prudence would do, he is guilty of contributory negligence barring a recovery. Ft. Worth, etc., R. Co. *v.* Dial, 38 Tex. Civ. App. 260, 85 S. W. 22.

45. Indianapolis, etc., R. Co. *v.* Paramore, 31 Ind. 143; Briant *v.* Detroit, etc., R. Co., 104 Mich. 307, 62 N. W. 365.

(II) *ACQUIESCENCE OR CONSENT OF RAILROAD COMPANY.* An owner of property is guilty of contributory negligence where he places or allows his property to remain on the railroad company's right of way or other property near its tracks, without its authority or consent,[46] but not where he places or allows it to remain there with the express or implied consent of the railroad company,[47] or by reason of a custom in which the railroad company acquiesced.[48]

d. Combustibles Near Railroad. As a general rule an owner of land has a right to use it in the ordinary and usual way and is not bound to remove dry grass, weeds, leaves, or other combustible material from his land adjoining a railroad right of way, in anticipation of probable negligence on the part of the railroad company, and a failure to perform such acts will not make him guilty of contributory negligence so as to preclude a recovery for damages caused by a fire originating through the railroad company's negligence.[49]

46. Connelly *v.* Erie R. Co., 68 N. Y. App. Div. 542, 74 N. Y. Suppl. 277 (holding plaintiff guilty of contributory negligence for not removing dry grass and rubbish from around such property or not removing the property itself); Post *v.* Buffalo, etc., R. Co., 108 Pa. St. 585; Texas, etc., R. Co. *v.* Tankersley, 63 Tex. 57 (holding this to be true where bailees of cotton had, with the owner's knowledge, negligently allowed it to remain on a railroad platform where it was injured by fire); Fischer *v.* Bonner, (Tex. Civ. App. 1893) 22 S. W. 755. *Compare* Southern R. Co. *v.* Wilson, 138 Ala. 510, 35 So. 561, holding that plaintiff's placing and keeping his cotton on the station platform of defendant railroad company, although it had not been offered to defendant for transportation, cannot, as matter of law, be held negligence or the proximate cause of its destruction, he not having notice that defendant's locomotive was so constructed, equipped, and operated as to endanger the cotton.

47. *Indiana.*— Pennsylvania Co. *v.* Gallentine, 77 Ind. 322; Pittsburgh, etc., R. Co. *v.* Noel, 77 Ind. 110; Pittsburgh, etc., R. Co. *v.* Nelson, 51 Ind. 150.

Kansas.— Kansas City, etc., R. Co. *v.* Blaker, 68 Kan. 244, 75 Pac. 71, 64 L. R. A. 81 (erection of structures on the right of way with the consent of the company); Kansas City, etc., R. Co. *v.* Chamberlin, (1900) 60 Pac. 15.

Kentucky.— Louisville, etc., R. Co. *v.* Samuels, 57 S. W. 235, 22 Ky. L. Rep. 303, holding, however, that plaintiff is bound to use reasonable care to protect his property, to relieve him from liability for contributory negligence.

Maine.— Boston Excelsior Co. *v.* Bangor, etc., R. Co., 93 Me. 52, 44 Atl. 138, 47 L. R. A. 82; Sherman *v.* Maine Cent. R. Co., 86 Me. 422, 30 Atl. 69, holding that the fact that a building extends a few feet on to the location of a railroad, if placed there or permitted to remain by license of the railroad company, will not exempt the company from liability under Rev. St. c. 51, § 64, for injuries to the building or its contents by fire communicated by its engines.

Massachusetts.— Ingersoll *v.* Stockbridge, etc., R. Co., 8 Allen 438.

Texas.— San Antonio, etc., R. Co. *v.* Home Ins. Co., (Civ. App. 1902) 70 S. W. 999; Texas, etc., R. Co. *v.* Ross, 7 Tex. Civ. App. 653, 27 S. W. 728.

United States.— Cincinnati, etc., R. Co. *v.* South Fork Coal Co., 139 Fed. 528, 71 C. C. A. 316, 1 L. R. A. 533, holding that the measure of the railroad company's obligation to avoid a negligent destruction by fire of the property in such cases, is the same as if the property had been placed near to, but off, the premises.

Canada.— McLaren *v.* Canada Cent. R. Co., 32 U. C. C. P. 324 [*affirmed* in 8 Ont. App. 564].

See 41 Cent. Dig. tit. "Railroads," § 1680.

Where the property is placed on a platform near the railroad company's tracks but not controlled by the railroad company, there is no question of consent or acquiescence, and the fact that the railroad company by its act induced the property-owner to place his property where it was burned under the belief that it would be safe from the fire of passing engines, does not estop the railroad company from setting up contributory negligence. Martin *v.* Texas, etc., R. Co., 87 Tex. 117, 26 S. W. 1052.

48. Gulf, etc., R. Co. *v.* McLean, 74 Tex. 646, 12 S. W. 843.

49. *Alabama.*— Louisville, etc., R. Co. *v.* Marbury Lumber Co., 125 Ala. 237, 28 So. 438, 50 L. R. A. 620 (cotton piled near track); Louisville, etc., R. Co. *v.* Malone, 116 Ala. 600, 22 So. 897.

California.— Flynn *v.* San Francisco, etc., R. Co., 40 Cal. 14, 6 Am. Rep. 695.

Illinois.— Cleveland, etc., R. Co. *v.* Stephens, 173 Ill. 430, 51 N. E. 69 [*affirming* 74 Ill. App. 586] (construing Act (1869), § 1); Illinois Cent. R. Co. *v.* Almon, 100 Ill. App. 530; Lake Erie, etc., R. Co. *v.* Kirts, 29 Ill. App. 175. But see Chicago, etc., R. Co. *v.* Simonson, 54 Ill. 504, 5 Am. Rep. 155; Illinois Cent. R. Co. *v.* Frazier, 47 Ill. 505; Ohio, etc., R. Co. *v.* Shanefelt, 47 Ill. 497, 95 Am. Dec. 504.

Indiana.— Chicago, etc., R. Co. *v.* Burger, 124 Ind. 275, 24 N. E. 981; Louisville, etc., R. Co. *v.* Krinning, 87 Ind. 351; Pittsburgh, etc., R. Co. *v.* Jones, 86 Ind. 496, 44 Am. Rep. 334; Pittsburgh, etc., R. Co. *v.* Hixon, 79 Ind. 111; Chicago, etc., R. Co. *v.* Kern, 9 Ind. App. 505, 36 N. E. 381; Cnicago, etc., R. Co. *v.* Smith, 6 Ind. App. 262, 33 N. E. 241.

e. Precautions Against Communication of Fire. A person owning property near a railroad has a right to use his property in the ordinary and usual way and is not guilty of contributory negligence so as to preclude him from recovering damages for injury thereto by fire from the railroad, because he fails to guard against unusual dangers or negligence of the railroad company.[50] He is so negli-

Kansas.— Walker *v.* Chicago, etc., R. Co., 76 Kan. 32, 90 Pac. 772, 123 Am. St. Rep. 119, 12 L. R. A. N. S. 624; St. Joseph, etc., R. Co. *v.* Chase, 11 Kan. 47.

Kentucky.— Louisville, etc., R. Co. *v.* Beeler, 103 S. W. 300, 31 Ky. L. Rep. 750, 11 L. R. A. N. S. 930.

Michigan.— Kendrick *v.* Towle, 60 Mich. 363, 27 N. W. 567, 1 Am. St. Rep. 526.

Mississippi.— Alabama, etc., R. Co. *v.* Ætna Ins. Co., 82 Miss. 770, 35 So. 304.

Missouri.— Mathews *v.* St. Louis, etc., R. Co., 121 Mo. 298, 24 S. W. 591, 25 L. R. A. 161; Patton *v.* St. Louis, etc., R. Co., 87 Mo. 117, 56 Am. Rep. 446; Palmer *v.* Missouri Pac. R. Co., 76 Mo. 217; Fitch *v.* Pacific R. Co., 45 Mo. 322. *Compare* Coates *v.* Missouri, etc., R. Co., 61 Mo. 38.

New Jersey.— Salmon *v.* Delaware, etc., R. Co., 38 N. J. L. 5, 20 Am. Rep. 356, 39 N. J. L. 299, 23 Am. Rep. 214.

New York.— Kalbfleisch *v.* Long Island R. Co., 102 N. Y. 520, 7 N. E. 557, 55 Am. Rep. 832, holding that the taking out of inflammable benzine on one's own property near a railroad is not contributory negligence.

Pennsylvania.— Philadelphia, etc., R. Co. *v.* Schultz, 93 Pa. St. 341.

Tennessee.— Louisville, etc., R. Co. *v.* Short, 110 Tenn. 713, 77 S. W. 936, cotton on open platform fifty feet from track.

Texas.— Gulf, etc., R. Co. *v.* Fields, 2 Tex. App. Civ. Cas. § 794; Ft. Worth, etc., R. Co. *v.* Ratliffe, 2 Tex. App. Civ. Cas. § 681; Gulf, etc., R. Co. *v.* Lowe, 2 Tex. App. Civ. Cas. § 648; Houston, etc., R. Co. *v.* McDonough, 1 Tex. App. Civ. Cas. § 651.

Virginia.— Richmond, etc., R. Co. *v.* Medley, 75 Va. 499, 40 Am. Rep. 734.

West Virginia.— Snyder *v.* Pittsburgh, etc., R. Co., 11 W. Va. 14.

Wisconsin.— Caswell *v.* Chicago, etc., R. Co., 42 Wis. 193; Erd *v.* Chicago, etc., R. Co., 41 Wis. 65; Kellogg *v.* Chicago, etc., R. Co., 26 Wis. 223, 7 Am. Rep. 69.

England.— Vaughan *v.* Taff Vale R. Co., 3 H. & N. 743, 22 Jur. 1308, 28 L. J. Exch. 41, 32 L. T. Rep. N. S. 163, 7 Wkly. Rep. 120.

Canada.— Holmes *v.* Midland R. Co., 35 U. C. Q. B. 253.

See 41 Cent. Dig. tit. "Railroads," § 1681.

Although an owner of land owns the fee in the right of way of a railroad he is under no obligation to keep the grass cut on the right of way or to move rubbish or combustible material therefrom or from his land adjoining. Pittsburgh, etc., R. Co. *v.* Jones, 86 Ind. 496, 44 Am. Rep. 334.

50. *Alabama.*— Louisville, etc., R. Co. *v.* Sullivan Timber Co., 138 Ala. 379, 35 So. 327.

Florida.— Jacksonville, etc., R. Co. *v.* Peninsular Land, etc., Co., 27 Fla. 1, 157, 9 So. 661, 17 L. R. A. 33, 65.

Illinois.— American Strawboard Co. *v.* Chicago, etc., R. Co., 177 Ill. 513, 53 N. E. 97 [*reversing* 75 Ill. App. 420], 91 Ill. App. 635 [*affirmed* in 190 Ill. 268, 60 N. E. 518]; Cleveland, etc., R. Co. *v.* Tate, 104 Ill. App. 615 (holding that it shall not in any case be considered as negligence on the part of the owner or occupant of property injured that he has used the same in the manner or permitted the same to be used or remain in the condition it would have been used or remained had no railroad passed near the property injured); Toledo, etc., R. Co. *v.* Kingman, 49 Ill. App. 43. An Illinois statute (Hurd Rev. St. (1895) § 1206), providing that it shall not be considered negligence on the part of the owner to use property in the same manner, or permit it to remain in the same condition it would have been used or remained had no railroad passed through it, applies to uses and conditions arising after the construction of the railroad as well as before. Cleveland, etc., R. Co. *v.* Stephens, 74 Ill. App. 586 [*affirmed* in 173 Ill. 430, 51 N. E. 69].

Indiana.— Pittsburgh, etc., R. Co. *v.* Indiana Horseshoe Co., 154 Ind. 322, 56 N. E. 766; Cleveland, etc., R. Co. *v.* Scantland, 151 Ind. 488, 51 N. E. 1068; Cincinnati, etc., R. Co. *v.* Smock, 133 Ind. 411, 33 N. E. 108; Indiana Clay Co. *v.* Baltimore, etc., R. Co., 31 Ind. App. 258, 67 N. E. 704; New York, etc., R. Co. *v.* Grossman, 17 Ind. App. 652, 46 N. E. 546.

Kansas.— Walker *v.* Chicago, etc., R. Co., 76 Kan. 32, 90 Pac. 772, 123 Am. St. Rep. 119, 12 L. R. A. N. S. 624.

Minnesota.— Lindsay *v.* Winona, etc., R. Co., 29 Minn. 411, 13 N. W. 191, 43 Am. Rep. 228.

Mississippi.— Brister *v.* Illinois Cent. R. Co., 84 Miss. 33, 36 So. 142; Mississippi Home Ins. Co. *v.* Louisville, etc., R. Co., 70 Miss. 119, 12 So. 156.

Nebraska.— Union Pac. R. Co. *v.* Ray, 46 Nebr. 750, 65 N. W. 773 (holding that the fact that plaintiff permitted hay to lie on land in windrows, and that a firebreak plowed around the farm was insufficient, does not constitute contributory negligence as a matter of law); Omaha Fair, etc., Assoc. *v.* Missouri Pac. R. Co., 42 Nebr. 105, 60 N. W. 330.

New York.— Fero *v.* Buffalo, etc., R. Co., 22 N. Y. 209, 78 Am. Dec. 178.

North Carolina.— Phillips *v.* Durham, etc., R. Co., 138 N. C. 12, 50 S. E. 462.

Pennsylvania.— Philadelphia, etc., R. Co. *v.* Schulz, 93 Pa. St. 341; Philadelphia, etc., R. Co. *v.* Hendrickson, 80 Pa. St. 182, 21 Am. Rep. 97.

Texas.— St. Louis, etc., R. Co. *v.* Crabb, (Civ. App. 1904) 80 S. W. 408, holding that he need not discontinue the ordinary bene-

gent only where he fails to exercise reasonable prudence, under the circumstances, in guarding against the ordinary dangers incident to the operation of the railroad,[51] or in preventing the particular injury complained of.[52] Thus it has been held that a property-owner is not guilty of contributory negligence for failing to

ficial use of the property, although such use may increase to some extent the hazard from fire.

West Virginia.— Snyder *v.* Pittsburgh, etc., R. Co., 11 W. Va. 14.

Wisconsin.— Kellogg *v.* Chicago, etc., R. Co., 26 Wis. 223, 7 Am. Rep. 69.

Canada.— Jaffrey *v.* Toronto, etc., R. Co., 23 U. C. C. P. 553.

See 41 Cent. Dig. tit. "Railroads," § 1682.

One living on a prairie farm at some distance from a railroad, with intervening highways and cultivated farms, is not as a matter of law guilty of contributory negligence in not surrounding his premises with fire-guards. Union Pac. R. Co. *v.* McCollum, 2 Kan. App. 319, 43 Pac. 97.

Where a railroad company pays a certain amount of money for removing a barn out of danger from the fires of locomotives, but the one so paid neglects to do so, it is not such contributory negligence as will bar the owner's right of recovery for the loss of the barn by fire caused by the negligence of the company's employees. Jeffreis *v.* Philadelphia, etc., R. Co., 3 Houst. (Del.) 447.

Care under contract for construction of side-track.— Where defendant builds a siding to plaintiff's factory under a contract by which plaintiff agrees "to exercise the greatest care in the management of the siding herein provided for, also to use such means and care generally as will tend to avoid accidents of any kind," plaintiff is not liable for accumulations of rubbish beside the track through which fire is communicated to its building. Pittsburgh, etc., R. Co. *v.* Indiana Horseshoe Co., 154 Ind. 322, 56 N. E. 766. But where, under a contract for the construction of a side-track, by which plaintiff agrees to release defendant from any liability for loss by fire caused by defendant's negligence or otherwise, and also agrees to keep the premises in a safe condition, free from inflammable material, plaintiff's foreman, knowing that one of defendant's engines throws sparks, instructs the engineer to come upon the premises on a day when the wind is blowing almost a gale, and when the ground is littered with shavings, sawdust, and other combustible matter, merely requesting the engineer to be careful, and the engine, although defective, is properly managed, and communicates fire by means of flying sparks, which results in the destruction of a pile of lumber, the negligence, if any, is that of plaintiff and not of defendant. Mann *v.* Pere Marquette R. Co., 135 Mich. 210, 97 N. W. 721.

Where a child while in its parent's home is injured by fire escaping from a passing locomotive, and igniting its clothing, its parents cannot be held negligent for placing it in an exposed position, since they are not to be hampered in the use of their home by the fact of its being near a railroad. Gulf, etc., R. Co. *v.* Johnson, (Tex. Civ. App. 1899) 51 S. W. 531.

The owner of a warehouse near a railroad track is not required to keep a fire hose in the warehouse to guard against fires set by sparks from the engines of passing trains. Alabama Great Southern R. Co. *v.* Planters' Warehouse, etc., Co., (Ala. 1907) 45 So. 82.

51. *Kansas.*— St. Louis, etc., R. Co. *v.* Stevens, 3 Kan. App. 176, 43 Pac. 434.

Nebraska.— Omaha Fair, etc., Assoc. *v.* Missouri Pac. R. Co., 42 Nebr. 105, 60 N. W. 330.

New York.— Fero *v.* Buffalo, etc., R. Co., 22 N. Y. 209, 78 Am. Dec. 178.

Pennsylvania.— Haverly *v.* State Line, etc., R. Co., 135 Pa. St. 50, 19 Atl. 1013, 20 Am. St. Rep. 848.

Texas.— St. Louis Southwestern R. Co. *v.* Crabb, (Civ. App. 1904) 80 S. W. 408; Gulf, etc., R. Co. *v.* Jagoe, (Civ. App. 1895) 32 S. W. 717; Allibone *v.* Texas, etc., R. Co., 2 Tex. App. Civ. Cas. § 64.

Wisconsin.— Austin *v.* Chicago, etc., R. Co., 93 Wis. 496, 67 N. W. 1129; Ward *v.* Milwaukee, etc., R. Co., 29 Wis. 144.

United States.— Svea Ins. Co. *v.* Vicksburg, etc., R. Co., 153 Fed. 774.

See 41 Cent. Dig. tit. "Railroads," § 1682.

The condition of the owner's property, as where the roof of his barn is not secure (Philadelphia, etc., R. Co. *v.* Hendrickson, 80 Pa. St. 182, 21 Am. Rep. 97), or where a pane of glass is out of the window of his house (Wild *v.* Boston, etc., R. Co., 171 Mass. 245, 50 N. E. 533; Martin *v.* Western Union R. Co., 23 Wis. 437, 99 Am. Dec. 189), does not constitute contributory negligence.

52. Chicago, etc., R. Co. *v.* Willard, 111 Ill. App. 225 (failing to save cattle in attempting to save other property is not contributory negligence); Snyder *v.* Pittsburgh, etc., R. Co., 11 W. Va. 14; Austin *v.* Chicago, etc., R. Co., 93 Wis. 496, 67 N. W. 1129.

Contributory negligence which precludes a recovery in case of a railroad fire is where in the presence of a seen danger, as where the fire has been set, the property-owner omits to do what prudence requires to be done under the circumstances for the protection of his property, or does some act inconsistent with its preservation. Snyder *v.* Pittsburgh, etc., R. Co., 11 W. Va. 14; Kellogg *v.* Chicago, etc., R. Co., 26 Wis. 223, 7 Am. Rep. 69. If the danger is not seen, but is anticipated merely or dependent upon future events, the property-owner is not bound to guard against it by reverting from his usual course, being otherwise a prudent one, in the management of his property and business. Snyder *v.* Pittsburgh, etc., R. Co., 11 W. Va. 14; Kellogg *v.* Chicago, etc., R. Co., 26 Wis. 223, 7 Am. Rep. 69.

have fire-breaks plowed around his premises,[53] or to make fire-guards or plow around his hay or wheat stacks,[54] or in failing to keep his land free from grass.[55]

f. Extinguishment of Fire. Where a property-owner or his agent or servant seeing his property in danger from a fire started by a railroad in time to arrest its progress makes no effort to do so, he is guilty of contributory negligence precluding a recovery.[56] He is not bound, however, to use extraordinary means to extinguish or prevent the spread of the fire,[57] nor is he negligent in failing to attempt to extinguish the fire if his efforts would have been unavailing,[58] or if he makes a mistake of judgment as to the best method of extinguishing the fire,[59] or where the fire is of such a character as to impress a man of ordinary prudence with the belief that it does not immediately endanger his property.[60] Nor is he negligent if he uses reasonable and *bona fide* efforts to stay the fire but which under the circumstances are ineffectual.[61]

g. As Proximate Cause of Injury. The mere fact that the property-owner is guilty of negligence in respect to the fire which causes his injury does not necessarily preclude him from recovering therefor on the ground of contributory negligence; but it must also appear that such negligence is the proximate cause of the injury, or in other words, that he has done some act or omitted some duty which is the proximate cause of the injury, either by contributing to the setting of the fire or to the damages resulting therefrom.[62] Where the property-owner's negligence

53. Burlington, etc., R. Co. *v.* Westover, 4 Nebr. 268.

54. Union Pac. R. Co. *v.* Arthur, 2 Colo. App. 159, 29 Pac. 1031; Padgett *v.* Atchison, etc., R. Co., 7 Kan. App. 736, 52 Pac. 578 (one and a half and two and a half miles from railroad); Hoffman *v.* Chicago, etc., R. Co., 40 Minn. 60, 41 N. W. 301 (not negligence *per se*); Gulf, etc., R. Co. *v.* Johnson, 54 Fed. 474, 4 C. C. A. 447 (holding also that it is not contributory negligence to leave the land between the stack and the railroad track in its natural condition). *Compare* Kesee *v.* Chicago, etc., R. Co., 30 Iowa 78, 6 Am. Rep. 643; Kansas Pac. R. Co. *v.* Brady, 17 Kan. 380.

55. Louisville, etc., R. Co. *v.* Hart, 119 Ind. 273, 21 N. E. 753, 4 L. R. A. 549; Mobile, etc., R. Co. *v.* Stinson, 74 Miss. 453, 21 So. 522; Gulf, etc., R. Co. *v.* Johnson, 54 Fed. 474, 4 C. C. A. 447.

56. Tilley *v.* St. Louis, etc., R. Co., 49 Ark. 535, 6 S. W. 8; St. Louis, etc., R. Co. *v.* Hecht, 38 Ark. 357; Illinois Cent. R. Co. *v.* McClelland, 42 Ill. 355; Illinois Cent. R. Co. *v.* McKay, 69 Miss. 139, 12 So. 447; Hawley *v.* Sumpter R. Co., 49 Oreg. 509, 90 Pac. 1106, 12 L. R. A. N. S. 526; Eaton *v.* Oregon R., etc., Co., 19 Oreg. 391, 24 Pac. 415, 19 Oreg. 397, 24 Pac. 417.

If the owner or his agents or servants arrive after the property is on fire they must save what they can, or that omitted to be saved will go in mitigation of damages. St. Louis, etc., R. Co. *v.* Hecht, 38 Ark. 357.

Agents or employees of the owner in another business not connected with the property are under no legal obligation to protect it, and their omission to do so is not contributory negligence on the part of the owner. St. Louis, etc., R. Co. *v.* Hecht, 38 Ark. 357; San Antonio, etc., R. Co. *v.* Adams, (Tex. Civ. App. 1902) 66 S. W. 578, holding that where the fire was seen as it was starting by men who were digging a well for plaintiff, and could have been extinguished by them before it did much damage, their failure to do so did not preclude a recovery by plaintiff, the well diggers not being in his general employ.

57. Bevier *v.* Delaware, etc., Canal Co., 13 Hun (N. Y.) 254.

Where plaintiff is at the time engaged in work of an engrossing character, which requires his entire attention, it is not necessarily contributory negligence for him to fail to leave such work and attempt to extinguish the fire. Franey *v.* Illinois Cent. R. Co., 104 Ill. App. 499.

58. Tilley *v.* St. Louis, etc., R. Co., 49 Ark. 535, 6 S. W. 8; Sugarman *v.* Manhattan El. R. Co., 16 N. Y. Suppl. 533, holding that the fact that plaintiff who saw the fire became frightened and ran away without attempting to extinguish it will not render her guilty of contributory negligence where it is not shown that she could have prevented the loss.

59. Alabama Great Southern R. Co. *v.* Planters' Warehouse, etc., Co., (Ala. 1907) 45 So. 82.

60. Chicago, etc., R. Co. *v.* Bautsch, 129 Ill. App. 23 (holding that it is not necessary whenever a farmer sees smoke on the right of way by the side of his land, indicating that there is fire upon the right of way, for him to go upon the right of way and try to subdue the fire); Texas Pac. R. Co. *v.* Leon, etc., Land Co., (Tex. Civ. App. 1899) 49 S. W. 253.

61. Indiana Clay Co. *v.* Baltimore, etc., R. Co., 31 Ind. App. 258, 67 N. E. 704; Lake Erie, etc., R. Co. *v.* Keiser, 25 Ind. App. 417, 58 N. E. 505; Wabash R. Co. *v.* Miller, 18 Ind. App. 549, 48 N. E. 663; Perley *v.* Eastern R. Co., 98 Mass. 414, 96 Am. Dec. 645.

62. *Iowa.*— Liming *v.* Illinois Central R. Co., 81 Iowa 246, 47 N. W. 66.

is the proximate cause of the injury the law will not generally compare the degrees of negligence between him and the railroad company, if each party has been wanting in ordinary care and prudence;[63] but it has been held that although plaintiff is guilty of negligence which in some degree contributes to the injury, yet if defendant is guilty of greater negligence in the absence of which the injury might have been avoided, plaintiff may recover.[64]

5. Proximate Cause of Injury[65] — a. In General. A railroad company is liable for damages caused by fire escaping from its engines or right of way only where its negligence in permitting such fire to start or escape is the proximate cause of injury; or in other words where the injury is the natural and probable consequence of the railroad company's negligence, that is, a consequence so natural that a reasonable person might or should have foreseen that it was likely to result.[66] It is not liable where the fire is purely an unavoidable accident, caused by fire escaping from one of its engines,[67] or where some new agency not within the reasonable contemplation of the railroad company intervenes and brings about the injury.[68]

Kansas.— Union Pac. R. Co. *v.* Eddy, 2 Kan. App. 291, 42 Pac. 413.

Missouri.— Fitch *v.* Pacific R. Co., 45 Mo. 322; Reed *v.* Missouri Pac. R. Co., 50 Mo. App. 504.

New Jersey.— Wiley *v.* West Jersey R. Co., 44 N. J. L. 247.

North Carolina.— Doggett *v.* Richmond, etc., R. Co., 78 N. C. 305.

Pennsylvania.— Philadelphia, etc., R. Co. *v.* Hendrickson, 80 Pa. St. 182, 21 Am. Rep. 97.

Texas.— St. Louis Southwestern R. Co. *v.* Crabb, (Civ. App. 1904) 80 S. W. 408; Paris, etc., R. Co. *v.* Nesbitt, (Civ. App. 1896) 38 S. W. 243; Houston, etc., R. Co. *v.* McDonough, 1 Tex. App. Civ. Cas. § 651.

Wisconsin.— Gibbins *v.* Wisconsin Valley R. Co., 62 Wis. 546, 22 N. W. 533.

See 41 Cent. Dig. tit. "Railroads," § 1684.

63. Missouri Pac. R. Co. *v.* Haynes, 1 Kan. App. 586, 42 Pac. 259. *Compare* Chicago, etc., R. Co. *v.* Simonson, 54 Ill. 504, 5 Am. Rep. 155.

64. Great Western R. Co. *v.* Haworth, 39 Ill. 346; Edwards *v.* Bonner, 12 Tex. Civ. App. 236, 33 S. W. 761. But see Paris, etc., R. Co. *v.* Nesbitt, 11 Tex. Civ. App. 608, 33 S. W. 280.

65. **Contributory negligence as proximate cause of injury** see *supra*, X, I, 4, g.

Presumptions and burden of proof as to proximate cause see *infra*, X, I, 6, d, (I), (C).

Questions for jury as to proximate cause see *infra*, X, I, 6, f, (VII).

66. *Illinois.*— Illinois Cent. R. Co. *v.* Siler, 229 Ill. 390, 82 N. E. 362 (personal injury in trying to put out fire); Chicago, etc., R. Co. *v.* Pennell, 110 Ill. 435; Toledo, etc., R. Co. *v.* Muthersbaugh, 71 Ill. 572; Fent *v.* Toledo, etc., R. Co., 59 Ill. 349, 14 Am. Rep. 13; Illinois Cent. R. Co. *v.* Almon, 100 Ill. App. 530.

Indiana.— Chicago, etc., R. Co. *v.* Barnes, 2 Ind. App. 213, 28 N. E. 328.

Iowa.— Slosson *v.* Burlington, etc., R. Co., 51 Iowa 294, 1 N. W. 543.

Kansas.— St. Louis, etc., R. Co. *v.* League, 71 Kan. 79, 80 Pac. 46.

Maryland.— Ryan *v.* Gross, 68 Md. 377, 12 Atl. 115, 16 Atl. 302; Annapolis, etc., R. Co. *v.* Gantt, 39 Md. 115.

Mississippi.— Clisby *v.* Mobile, etc., R. Co., 78 Miss. 937, 29 So. 913.

North Carolina.— Doggett *v.* Richmond, etc., R. Co., 78 N. C. 305.

Pennsylvania.— Hoag *v.* Lake Shore, etc., R. Co., 85 Pa. St. 293, 27 Am. Rep. 653; Pennsylvania R. Co. *v.* Hope, 80 Pa. St. 373, 21 Am. Rep. 100; Oil Creek, etc., R. Co. *v.* Keighron, 74 Pa. St. 316.

Texas.— McFarland *v.* Gulf, etc., R. Co., (Civ. App. 1905) 88 S. W. 450.

Wisconsin.— Kellogg *v.* Chicago, etc., R. Co., 26 Wis. 223, 7 Am. Rep. 69.

See 41 Cent. Dig. tit. "Railroads," §§ 1687–1689.

A delay in furnishing transportation whereby certain property accumulated in sheds and adjacent streets and caught fire, which was communicated to plaintiff's warehouse, is in no legal sense the proximate cause of the fire. Martin *v.* St. Louis, etc., R. Co., 55 Ark. 510, 19 S. W. 314.

67. Butcher *v.* Vaca Valley, etc., R. Co., 67 Cal. 518, 8 Pac. 174; Slosson *v.* Burlington, etc., R. Co., 51 Iowa 294, 1 N. W. 543; Atchison, etc., R. Co. *v.* Dennis, 38 Kan. 424, 17 Pac. 153; Atchison, etc., R. Co. *v.* Riggs, 31 Kan. 622, 3 Pac. 305; Leavenworth, etc., R. Co. *v.* Cook, 18 Kan. 261; St. Louis, etc., R. Co. *v.* Hoover, 3 Kan. App. 577, 43 Pac. 854.

68. Ryan *v.* Gross, 68 Md. 377, 12 Atl. 115, 16 Atl. 302. And see *infra*, X, I, 5, b, (I).

Personal injuries.—Where a person is severely burned while attempting to save his property, the negligence of defendant in setting out the fire is not the proximate cause of such personal injuries. Logan *v.* Wabash R. Co., 96 Mo. App. 461, 70 S. W. 734; Seale *v.* Golf, etc., R. Co., 65 Tex. 274, 57 Am. Rep. 602, holding that where fire started by sparks from a locomotive spread to adjoining land and a landowner's daughter was burned to death in trying to put it out, an action was not maintainable against the railroad company, such attempt and not the company's negligence being the proximate cause of the child's death.

b. Spread of Fire — (1) *In General.* The maxim that the proximate and not the remote cause is to be considered is not controlled by time or distance, or by the succession of natural events.[69] If the injury is one which might reasonably have been anticipated from the negligent act of the railroad company in permitting the fire to start or escape, and the fire burns as one continuous fire without a break in the line of causation, and without the aid of any independent agency, the injury, if traceable to the first fire, is a proximate consequence of the fire notwithstanding the fire has passed through the land or property of others before causing such injury.[70] If, however, the fire spreads beyond its natural

The fact that there was a temporary arrest and cessation of the fire cannot be regarded as a new and independent cause, nor can it be said that the fire was outside of the bounds of reasonable anticipation as a result of the primary negligence. St. Louis, etc., R. Co. *v.* League, 71 Kan. 79, 80 Pac. 46.

69. Kellogg *v.* Chicago, etc., R. Co., 26 Wis. 223, 7 Am. Rep. 69.

70. *California.*—Henry *v.* Southern Pac. R. Co., 50 Cal. 176.

Connecticut.— Martin *v.* New York, etc., R. Co., 62 Conn. 331, 25 Atl. 239; Simmonds *v.* New York, etc., R. Co., 52 Conn. 264, 52 Am. Rep. 587.

Florida.—Jacksonville, etc., R. Co. *v.* Peninsular Land, etc., Co., 27 Fla. 1, 157, 9 So. 661, 17 L. R. A. 33, 65.

Georgia.— East Tennessee, etc., R. Co. *v.* Hesters, 90 Ga. 11, 15 S. E. 828.

Illinois.— Toledo, etc., R. Co. *v.* Muthersbaugh, 71 Ill. 572; Fent *v.* Toledo, etc., R. Co., 59 Ill. 349, 14 Am. Rep. 13; Illinois Cent. R. Co. *v.* Almon, 100 Ill. App. 530.

Indiana.— Chicago, etc., R. Co. *v.* Williams, 131 Ind. 30, 30 N. E. 696; Louisville, etc., R. Co. *v.* Nitsche, 126 Ind. 229, 26 N. E. 51, 22 Am. St. Rep. 582, 9 L. R. A. 750; Louisville, etc., R. Co. *v.* Krinning, 87 Ind. 351; Chicago, etc., R. Co. *v.* Ross, 24 Ind. App. 222, 56 N. E. 451; Chicago, etc., R. Co. *v.* Kreig, 22 Ind. App. 393, 53 N. E. 1033; Chicago, etc., R. Co. *v.* Luddington, 10 Ind. App. 636, 38 N. E. 342.

Iowa.— Small *v.* Chicago, etc., R. Co., 55 Iowa 582, 8 N. W. 437.

Kansas.— Atchison, etc., R. Co. *v.* Bales, 16 Kan. 252; Atchison, etc., R. Co. *v.* Stanford, 12 Kan. 354, 15 Am. Rep. 362.

Kentucky.— Cincinnati, etc., R. Co. *v.* Barker, 94 Ky. 71, 21 S. W. 347, 14 Ky. L. Rep. 750.

Maryland.— Baltimore, etc., R. Co. *v.* Shipley, 39 Md. 251; Philadelphia, etc., R. Co. *v.* Constable, 39 Md. 149; Annapolis, etc., R. Co. *v.* Gantt, 39 Md. 115.

Massachusetts.— Safford *v.* Boston, etc., R. Co., 103 Mass. 583; Perley *v.* Eastern R. Co., 98 Mass. 414, 96 Am. Dec. 645; Ingersoll *v.* Stockbridge, etc., R. Co., 8 Allen 438; Hart *v.* Western R. Corp., 13 Metc. 99, 46 Am. Dec. 719.

Minnesota.— Johnson *v.* Chicago, etc., R. Co., 31 Minn. 57, 16 N. W. 488.

Mississippi.— Alabama, etc., R. Co. *v.* Barrett, 78 Miss. 432, 28 So. 820.

Nebraska.—Burlington, etc., R. Co. *v.* Westover, 4 Nebr. 268.

New Hampshire.— Hooksett *v.* Concord R. Co., 38 N. H. 242, holding that, under Rev. St. c. 142, § 8, the railroad company is liable for the destruction of property by its locomotives, although not directly and immediately communicated from them.

New Jersey.— Delaware, etc., R. Co. *v.* Salmon, 39 N. J. L. 299, 23 Am. Rep. 214.

North Carolina.— North Fork Lumber Co. *v.* Southern R. Co., 143 N. C. 324, 55 S. E. 781 (holding that where a fire is set out by a spark from a defective locomotive, or one not having a proper spark arrester, or because the locomotive is operated in a careless manner, the company is liable whether the fire originates on or off the right of way); Knott *v.* Cape Fear, etc., R. Co., 142 N. C. 238, 55 S. E. 150; Phillips *v.* Durham, etc., R. Co., 138 N. C. 12, 50 S. E. 462; Troxler *v.* Richmond, etc., R. Co., 74 N. C. 377.

Texas.— Houston, etc., R. Co. *v.* McDonough, 1 Tex. App. Civ. Cas. § 651.

Utah.— Anderson *v.* Wasatch, etc., R. Co., 2 Utah 518, holding that where fire is carried from the engine by the wind to grass and weeds, and from thence to the property destroyed, there is such a "communication" of the fire from the engine as is contemplated by the statute.

Wisconsin.— Marvin *v.* Chicago, etc., R. Co., 79 Wis. 140, 47 N. W. 1123, 11 L. R. A. 506; Kellogg *v.* Chicago, etc., R. Co., 26 Wis. 223, 7 Am. Rep. 69.

United States.— Milwaukee, etc., R. Co. *v.* Kellogg, 94 U. S. 469, 24 L. ed. 256.

See 41 Cent. Dig. tit. "Railroads," § 1690.

In New York it is held that where a railroad company has negligently started a fire on its right of way, it is liable to the owner of premises immediately adjacent thereto for damages caused by the fire spreading to such premises (Ryan *v.* New York Cent. R. Co., 35 N. Y. 210, 21 Am. Dec. 49); but that it is not liable to an owner of premises not abutting on its premises for damages caused by a fire communicated through the abutting or intervening premises of a third person over which the railroad company has no control and without which the fire could not have extended (Van Inwegen *v.* Port Jervis, etc., R. Co., 165 N. Y. 625, 58 N. E. 878 [*reversing* 34 N. Y. App. Div. 95, 53 N. Y. Suppl. 1025]; Hoffman *v.* King, 160 N. Y. 618, 55 N. E. 401, 73 Am. St. Rep. 715, 46 L. R. A. 672 [*reversing* 30 N. Y. App. Div. 621, 52 N. Y. Suppl. 1143. and *distinguishing* O'Neill *v.* New York, etc., R. Co., 115 N. Y. 579, 22 N. E. 217, 5 L. R. A. 591]; Webb *v.* Rome, etc., R. Co., 49 N. Y.

limits by means of a new and independent agency the loss is a remote consequence for which the railroad company is not responsible.[71]

(II) *Fire Carried by Wind or Running Water.* Although in a few cases it has been held otherwise,[72] ordinarily the wind is not regarded as an independent intervening agency so as to relieve a railroad company from its liability on the ground that its negligence is not a proximate cause of the injury,[73] unless it is of such an extraordinary character that the railroad company could not reasonably have contemplated it.[74] Running water also is not an independent intervening agency which will relieve the railroad company from liability.[75]

(III) *Combustibles Near Railroad.* The fact that the fire which

420, 10 Am. Rep. 389 [*affirming* 3 Lans. 453]; McDonough *v.* New York Cent., etc., R. Co., 124 N. Y. App. Div. 38, 108 N. Y. Suppl. 270); but that if it negligently starts a fire on adjacent premises it is liable for damages caused by the fire to an owner whose premises abut on such adjacent premises (Phelps *v.* New York Cent., etc., R. Co., 48 Misc. 27, 96 N. Y. Suppl. 72).

In Pennsylvania the same rule as in New York applies. Pennsylvania R. Co. *v.* Kerr, 62 Pa. St. 353, 1 Am. Rep. 431.

An intervention of considerable space or of various physical objects or a diversity of ownership does not preclude a recovery by the party injured or affect the company's liability for its first negligent act. Cincinnati, etc., R. Co. *v.* Barker, 94 Ky. 71, 21 S. W. 347, 14 Ky. L. Rep. 750.

71. Fent *v.* Toledo, etc., R. Co., 59 Ill. 349, 14 Am. Rep. 13; Doggett *v.* Richmond, etc., R. Co., 78 N. C. 305; Marvin *v.* Chicago, etc., R. Co., 79 Wis. 140, 47 N. W. 1123, 11 L. R. A. 506.

Where a fire started by defendant's negligence meets a fire having no responsible origin, and after the union the fire sweeps on and destroys plaintiff's property, the fire started by defendant's negligence is the remote, and not the proximate, cause of the loss. Cook *v.* Minneapolis, etc., R. Co., 98 Wis. 624, 74 N. W. 561, 67 Am. St. Rep. 830, 40 L. R. A. 457.

72. Toledo, etc., R. Co. *v.* Muthersbaugh, 71 Ill. 572; Fent *v.* Toledo, etc., R. Co., 59 Ill. 349, 14 Am. Rep. 13; Marvin *v.* Chicago, etc., R. Co., 79 Wis. 140, 47 N. W. 1123, 11 L. R. A. 506, whirlwind.

73. *Alabama.*—Alabama Great Southern R. Co. *v.* Johnston, 128 Ala. 283, 29 So. 771.

Florida.—Florida East Coast R. Co. *v.* Welch, 53 Fla. 145, 44 So. 250.

Georgia.—East Tennessee, etc., R. Co. *v.* Hesters, 90 Ga. 11, 15 S. E. 828.

Illinois.—Indiana, etc., R. Co. *v.* Hawkins, 81 Ill. App. 570, holding that a strong gust of wind, coming from a direction opposite to that from which it had been blowing, which carries a fire from a railroad right of way across the track and on to the land of another, is not an "act of God," relieving the company from liability.

Indiana.—Chicago, etc., R. Co. *v.* Lesh, 158 Ind. 423, 63 N. E. 794 (ordinary wind); Chicago, etc., R. Co. *v.* Williams, 131 Ind. 30, 30 N. E. 696 [*disproving* on this point Pennsylvania R. Co. *v.* Whitlock, 99 Ind. 16, 50 Am. Rep. 71]; Louisville, etc., R. Co. *v.* Nitsche, 126 Ind. 229, 26 N. E. 51, 22 Am. St. Rep. 582, 9 L. R. A. 750.

Kansas.—Chicago, etc., R. Co. *v.* McBride, 54 Kan. 172, 37 Pac. 978; Union Pac. R. Co. *v.* McCollum, 2 Kan. App. 319, 43 Pac. 97, where the wind is not unusual. *Compare* Kansas Pac. R. Co. *v.* Butts, 7 Kan. 308.

Massachusetts.—Safford *v.* Boston, etc., R. Co., 103 Mass. 583; Hart *v.* Western R. Corp., 13 Metc. 99, 46 Am. Dec. 719.

Missouri.—Kenney *v.* Hannibal, etc., R. Co., 70 Mo. 252; Hightower *v.* Missouri, etc., R. Co., 67 Mo. 726; Poeppers *v.* Missouri, etc., R. Co., 67 Mo. 715, 29 Am. Rep. 518.

New York.—Martin *v.* New York, etc., R. Co., 62 Hun 181, 16 N. Y. Suppl. 499, holding also that it might be material if there were a change in the wind.

Texas.—See Missouri Pac. R. Co. *v.* Cullers, 81 Tex. 382, 17 S. W. 19, 13 L. R. A. 542.

Virginia.—Tyler *v.* Ricamore, 87 Va. 466, 12 S. E. 799.

Wisconsin.—Kellogg *v.* Chicago, etc., R. Co., 26 Wis. 223, 7 Am. Rep. 69. But see Marvin *v.* Chicago, etc., R. Co., 79 Wis. 140, 47 N. W. 1123, 11 L. R. A. 506, whirlwind.

United States.—Northern Pac. R. Co. *v.* Lewis, 51 Fed. 658, 2 C. C. A. 446, holding that a simple and not unusual change in the direction of the wind cannot be considered as disturbing the unbroken connection between the negligence of a railroad company and the destruction of the property by fire.

England.—See Smith *v.* London, etc., R. Co., L. R. 5 C. P. 98, 39 L. J. C. P. 68, 21 L. T. Rep. N. S. 668, 18 Wkly. Rep. 343.

See 41 Cent. Dig. tit. "Railroads," § 1692.

74. East Tennessee, etc., R. Co. *v.* Hesters, 90 Ga. 11, 15 S. E. 828; Union Pac. R. Co. *v.* McCollum, 2 Kan. App. 319, 43 Pac. 97; Poeppers *v.* Missouri, etc., R. Co., 67 Mo. 715, 29 Am. Rep. 518; Blue *v.* Aberdeen, etc., R. Co., 116 N. C. 955, 21 S. E. 299.

75. Kuhn *v.* Jewett, 32 N. J. Eq. 647, holding that where through the negligence of a railroad company a number of cars filled with petroleum were wrecked, and the oil spreading over the road came in contact with fire shaken from the locomotive, and bursting into a flame ran down an embankment into a small brook, and then running out was carried by this brook to a river and thus to the property destroyed, the railroad company's negligence was the proximate cause of the damage.

destroys the property is communicated from the engine of the railroad company by means of combustible matter situated on intervening land, whether plaintiff's or another's, is not such an intervening agency as to affect the liability of the company.[76]

6. Actions For Injuries by Fire — a. In General — (i) *Form of Action.* In the absence of statute, the form of action against a railroad company for damages by fire is governed by the general rules applicable to the forms of actions for negligence generally.[77]

(ii) *Notice of Claim.* Under some statutes notice of a claim for damages occasioned by fire set by a locomotive must be served on the railroad company within a prescribed time after the fire occasioning the damage has ceased.[78] Under other statutes, however, an action for such damages may be maintained without any prior notice or demand.[79]

(iii) *Parties.* As a general rule an action against a railroad company for damages by fire should be brought by the owner of the property injured;[80] but all persons interested in the property injured should be joined as plaintiffs.[81] If the property was insured and the insurance has been paid, but the value of the property destroyed exceeds the amount paid, the insured may sue the railroad company in his own name for the full amount of the loss,[82] but the insurance company, if it has taken an assignment of the insured's cause of action, may be properly joined as plaintiff.[83]

(iv) *Defenses.* The fact that the cause of action is barred by the statute of limitations applicable thereto is a good defense.[84] The fact that the property

76. *Kansas.*— St. Joseph, etc., R. Co. *v.* Chase, 11 Kan. 47.

Maryland.— Philadelphia, etc., R. Co. *v.* Constable, 39 Md. 149.

Minnesota.— Johnson *v.* Chicago, etc., R. Co., 31 Minn. 57, 16 N. W. 488, holding also that negligence of a neighboring landowner is a concurrent and not an interesting cause.

Missouri.— Coates *v.* Missouri, etc., R. Co., 61 Mo. 38; Clemens *v.* Hannibal, etc., R. Co., 53 Mo. 366, 14 Am. Rep. 460.

New York.— Webb *v.* Rome, etc., R. Co., 49 N. Y. 420, 10 Am. Rep. 389.

Pennsylvania.— Pennsylvania R. Co. *v.* Hope, 80 Pa. St. 373, 21 Am. Rep. 100.

Texas.— St. Louis Southwestern R. Co. *v.* Gentry, (Civ. App. 1904) 80 S. W. 844.

See 41 Cent. Dig. tit. "Railroads," § 1693.

77. See, generally, Case, Action on, 6 Cyc. 688; Negligence, 29 Cyc. 562.

An action of debt is authorized under some statutes. MacDonald *v.* New York, etc., R. Co., 23 R. I. 558, 51 Atl. 578.

78. Atkinson *v.* Chicago, etc., R. Co., 93 Wis. 362, 67 N. W. 703.

Sufficiency of notice.—The provision in Wis. Laws (1893), c. 202, that "such notice may be given in the manner required for the service of summons in courts of record," is permissive only, and a delivery of the notice to a general officer of the company, or any agent having a general authority to act for it in respect to the subject-matter to which the notice relates, is sufficient. Atkinson *v.* Chicago, etc., R. Co., 93 Wis. 362, 67 N. W. 703.

79. Stearns *v.* Atlantic, etc., R. Co., 46 Me. 95.

80. See *supra*, X, I, 1, f.

81. See Jacobs *v.* New York Cent., etc., R. Co., 107 N. Y. App. Div. 134, 94 N. Y. Suppl. 954 [*affirmed* in 186 N. Y. 586, 79 N. E. 1108].

A lessee of a railroad company is not a necessary party to an action by the lessee's subtenant who has not assumed the lessee's covenants against the company for damages by fire. Missouri, etc., R. Co. *v.* Keahy, 37 Tex. Civ. App. 330, 83 S. W. 1102.

82. Kansas City, etc., R. Co. *v.* Blaker, 68 Kan. 244, 75 Pac. 71, 64 L. R. A. 81.

83. Jacobs *v.* New York Cent., etc., R. Co., 107 N. Y. App. Div. 134, 94 N. Y. Suppl. 954 [*affirmed* in 186 N. Y. 586, 79 N. E. 1108], holding that under Code Civ. Proc. § 446, authorizing all persons having an interest in the subject of an action to be joined as plaintiffs, a property-owner and insurance companies which have paid their proportions of the loss on the property and have taken assignments of the property-owner's cause of action up to the amount paid by them, are properly joined as plaintiffs in an action against the wrong-doer for negligently setting fire to the property.

84. Peoria, etc., R. Co. *v.* U. S. Rolling Stock Co., 28 Ill. App. 79; McCallum *v.* Grand Trunk R. Co., 31 U. C. Q. B. 527 [*affirming* 30 U. C. Q. B. 122], six months. *Compare* Louisville, etc., R. Co. *v.* Springwater Distillery Co., 53 S. W. 275, 21 Ky. L. Rep. 769; North Shore R. Co. *v.* McWillie, 17 Can. Sup. Ct. 511; Prendergast *v.* Grand Trunk R. Co., 25 U. C. Q. B. 193.

Where there are separate causes of action arising at different times, the fact that one of them is barred by the statute of limitations does not affect plaintiff's right as to the others. Peoria, etc., R. Co. *v.* U. S. Rolling Stock Co., 28 Ill. App. 79.

was insured and that plaintiff has been paid the insurance is generally no defense to a railroad company in an action against it for negligently burning the same.[85]

(v) *JURISDICTION.* Under some statutes an action against a railroad company for damages by fire may be brought in any county through which the railroad runs.[86] Under other statutes an action for such an injury to real estate is properly brought in the county in which the real estate is situated,[87] and the fact that a claim for injury to personal property is joined with that for injury to real estate does not oust the jurisdiction of the court.[88]

(vi) *PROCESS.* In the absence of statute specially providing for the service of process upon a railroad company, the general rules or statutes governing service of process upon corporations generally apply in actions against a railroad company for damages by fire.[89]

b. Pleading[90] — (i) *COMPLAINT OR PETITION* — (A) *Form and Sufficiency in General.* In the absence of statute otherwise, a complaint or petition against a railroad company for damages by fire should allege that the injury was caused through the negligence of defendant company or its agents or employees,[91]

85. Hallermann *v.* Baltimore, etc., R. Co., 77 Ill. App. 404; Carlyle Canning Co. *v.* Baltimore, etc., R. Co., 77 Ill. App. 396; Texas, etc., R. Co. *v.* Levi, 59 Tex. 674. See also DAMAGES, 13 Cyc. 70. *Contra*, Allen *v.* Chicago, etc., R. Co., 94 Wis. 93, 68 N. W. 873, holding that such payment is in effect an assignment of the cause of action to the insurer.

86. Gulf, etc., R. Co. *v.* France, 2 Tex. App. Civ. Cas. § 701.

87. Indiana, etc., R. Co. *v.* Foster, 107 Ind. 430, 8 N. E. 264, holding this to be true under Rev. St. (1881) § 307, notwithstanding defendant had no agent or office for the transaction of business in such county; and also holding that the destruction of fences, growing pastures, and hay is an injury to real estate within the meaning of such statute.

88. Indiana, etc., R. Co. *v.* Foster, 107 Ind. 430, 8 N. E. 264.

89. Jordan *v.* Missouri, etc., R. Co., 61 Mo. 52, holding that, under Wagner St. p. 294, § 26, service should be made on the chief officer of the company, or by leaving a copy with its agent. See also, generally, PROCESS, 32 Cyc. 544.

90. Pleading generally see PLEADING, 31 Cyc. 1.

91. Southern R. Co. *v.* Wilson, 138 Ala. 510, 35 So. 561; Louisville, etc., R. Co. *v.* Marbury Lumber Co., 125 Ala. 237, 28 So. 438, 50 L. R. A. 620; Atlantic Coast Line R. Co. *v.* Benedict Pineapple Co., 52 Fla. 165, 42 So. 529 (holding that a count for damage to fruit by freezing, owing to the destruction by fire set by defendant's locomotive of its canvas covering, should allege facts to bring home to defendant the knowledge that such result might be reasonably expected to follow directly and naturally from the burning); Ohio, etc., R. Co. *v.* McCartney, 121 Ind. 385, 23 N. E. 258; Pittsburgh, etc., R. Co. *v.* Noel, 77 Ind. 110; Pittsburgh, etc., R. Co. *v.* Culver, 60 Ind. 469; Louisville, etc., R. Co. *v.* Palmer, 13 Ind. App. 161, 39 N. E. 881, 41 N. E. 400; Terre Haute, etc., R. Co. *v.* Walsh, 11 Ind. App. 13, 38 N. E. 534; Mayo *v.* Spartanburg, etc., R. Co., 40 S. C. 517, 19 S. E. 73 (holding that under Gen. St. § 1511, making a railroad company responsible for injuries by fire originating within its right of way through the act of its "authorized agents," a complaint alleging that defendant through "its agent" set fire on its right of way which was communicated to plaintiff's property causing the injury complained of is good).

Sufficiency of complaint.—Allegations in a complaint that defendant, its agents or employees, negligently set fire to and destroyed specified property belonging to plaintiff on plaintiff's premises in a named town and county is sufficient on demurrer. Alabama Great Southern R. Co. *v.* Planters' Warehouse, etc., Co., (Ala. 1907) 45 So. 82.

A general allegation at the close of a complaint that the injury was caused by the negligence of defendant is sufficient to characterize as negligence all that defendant has done or permitted. Louisville, etc., R. Co. *v.* Palmer, 13 Ind. App. 161, 39 N. E. 881, 41 N. E. 400.

Negligence of agents or employees.— It is not sufficient to allege the negligence as the negligence of the company's agents or employees (Louisville, etc., R. Co. *v.* Roberts, 13 Ind. App. 692, 42 N. E. 247; Louisville, etc., R. Co. *v.* Palmer, 13 Ind. App. 161, 39 N. E. 881, 41 N. E. 400), without alleging that they were engaged in the line of their employment (Louisville, etc., R. Co. *v.* Palmer, 13 Ind. App. 161, 39 N. E. 881, 41 N. E. 400. But see Louisville, etc., R. Co. *v.* Springwater Distillery Co., 53 S. W. 275, 21 Ky. L. Rep. 769, holding that it is sufficient to allege that defendant railroad company, by its servants and agents, carelessly and negligently set fire to certain property, and caused it to be burned, without alleging any fact showing that such servants and agents were acting within the scope of their employment). An allegation that the fire originated in consequence of the act of defendant railroad company is equivalent to an allegation that the fire "originated in consequence of the act of any of the defendant's authorized agents or employees" as prescribed by Code Laws (1902), § 2135. Brown *v.* Carolina Midland

and in some jurisdictions that plaintiff was without fault on his part.[92] It should also state with certainty and definiteness the injury sustained,[93] and the particular negligence relied upon as a basis for recovery,[94] as that defendant negligently started or set out the fire,[95] or negligently allowed combustible material on its right of way,[96] or was negligent in permitting the fire to escape or spread,[97] whereby the injury resulted. Plaintiff should also aver ownership of

R. Co., 67 S. C. 481, 46 S. E. 283, 100 Am. St. Rep. 756.

The allegation of defendant's duty is sufficiently stated to be "to so operate its road and its locomotive engines running thereon that fire shall not escape and be communicated therefrom." Baltimore, etc., R. Co. *v.* Tripp, 175 Ill. 251, 51 N. E. 833.

92. See *infra*, X, I, 6, b, (I), (E).

93. Missouri, etc., R. Co. *v.* Lycan, 57 Kan. 635, 47 Pac. 526, holding that a petition alleging that plaintiff owned certain lands, upon which were fruit, shade, and ornamental trees, also particularly described, and that defendant negligently permitted fire to escape from its locomotive, which spread and destroyed the trees, sufficiently alleges an injury to the freehold.

94. Alabama Great Southern, etc., R. Co. *v.* Taylor, 129 Ala. 238, 29 So. 673; Alabama Great Southern R. Co. *v.* Johnston, 128 Ala. 283, 29 So. 771; Louisville, etc., R. Co. *v.* Marbury Lumber Co., 125 Ala. 237, 28 So. 438, 50 L. R. A. 620; Southern Pine Co. *v.* Smith, 113 Ga. 629, 38 S. E. 960; Pittsburgh, etc., R. Co. *v.* Brough, 168 Ind. 378, 81 N. E. 57, 12 L. R. A. N. S. 401; Lake Erie, etc., R. Co. *v.* McFall, 165 Ind. 574, 76 N. E. 400, (Sup. 1904) 72 N. E. 552]; Chicago, etc., R. Co. *v.* Burger, 124 Ind. 275, 24 N. E. 981; Ohio, etc., R. Co. *v.* McCartney, 121 Ind. 385, 23 N. E. 258; Louisville, etc., R. Co. *v.* Parks, 97 Ind. 307; Pittsburgh, etc., R. Co. *v.* Noel, 77 Ind. 110; Chicago, etc., R. Co. *v.* Daily, 18 Ind. App. 308, 47 N. E. 1078; Terre Haute, etc., R. Co. *v.* Walsh, 11 Ind. App. 13, 38 N. E. 534.

For form of complaint held sufficient see Chicago, etc., R. Co. *v.* Burger, 124 Ind. 275, 24 N. E. 981; Pittsburgh, etc., R. Co. *v.* Jones, 86 Ind. 496, 44 Am. Rep. 334; and cases cited *supra*, this note.

Where several counts each contain some material additional facts, they are not obnoxious to the rule prohibiting additional counts containing merely facts already declared on, and plaintiff is not required to elect on which count he will proceed. Crissey, etc., Lumber Co. *v.* Denver, etc., R. Co., 17 Colo. App. 275, 68 Pac. 670.

Where defendant is entitled to know the exact date of the fire, in order to make his defense, he must by demurrer or motion call for particularity of dates. Southern R. Co. *v.* Puckett, 121 Ga. 322, 48 S. E. 968.

95. Alabama Great Southern R. Co. *v.* Planters' Warehouse, etc., Co., (Ala. 1907) 45 So. 82; Clark *v.* San Francisco, etc., R. Co., 142 Cal. 614, 76 Pac. 507; Louisville, etc., R. Co. *v.* Hanmann, 87 Ind. 422; Lake Erie, etc., R. Co. *v.* Miller, (Ind. App. 1900) 57 N. E. 596; Chicago, etc., R. Co. *v.* Long, 16 Ind. App. 401, 45 N. E. 484; Phelps *v.* New York Cent., etc., R. Co., 48 Misc. (N. Y.) 27, 96 N. Y. Suppl. 72.

Where the gist of the tort is suffering the fire to escape to plaintiff's land it is not necessary to allege negligence in starting the fire. Ohio, etc., R. Co. *v.* Trapp, 4 Ind. App. 69, 30 N. E. 812.

Alleging negligence only in the rate of speed is bad in a complaint for setting fires outside defendant's right of way. Lake Erie, etc., R. Co. *v.* McFall, 165 Ind. 574, 76 N. E. 400, (1904) 72 N. E. 552.

96. Pittsburgh, etc., R. Co. *v.* Wise, 36 Ind. App. 59, 74 N. E. 1107; Black *v.* Aberdeen, etc., R. Co., 115 N. C. 667, 20 S. E. 713, 909.

Sufficient allegation as to accumulation of combustible material on right of way as cause of injury see Buck *v.* Union Pac. R. Co., 59 Kan. 328, 52 Pac. 866. Allegations that defendant carelessly and negligently permitted grass and other combustible matter to accumulate on its right of way, and that sparks from a passing locomotive set fire to such matter, and the fire spread to plaintiff's building, are sufficient, without allegations that the locomotive was kept in an improper condition, and carelessly operated. Pittsburgh, etc., R. Co. *v.* Indiana Horseshoe Co., 154 Ind. 322, 56 N. E. 766. An allegation of personal injuries by reason of combustible material negligently left on the right of way and ignited from sparks from a locomotive held not to be bad because of 3 Starr & C. Annot. St. (1896) c. 114, par. 69, see Illinois Cent. R. Co. *v.* Siler, 229 Ill. 390, 82 N. E. 362.

Insufficient averment that defendant negligently permitted combustibles to accumulate on its right of way see Southern R. Co. *v.* Horine, 115 Ga. 664, 42 S. E. 52; Union Pac. R. Co. *v.* Lipprand, 5 Kan. App. 484, 47 Pac. 625; Union Pac. R. Co. *v.* Mills, 5 Kan. App. 478, 47 Pac. 623.

97. Clark *v.* San Francisco, etc., R. Co., 142 Cal. 614, 76 Pac. 507; Louisville, etc., R. Co. *v.* Ehlert, 87 Ind. 339; Louisville, etc., R. Co. *v.* Spenn, 87 Ind. 322; Wabash R. Co. *v.* Schultz, 30 Ind. App. 495, 64 N. E. 481; Lake Erie, etc., R. Co. *v.* Miller, 24 Ind. App. 662, 57 N. E. 596; Chicago, etc., R. Co. *v.* Long, 16 Ind. App. 401, 45 N. E. 484; Chicago, etc., R. Co. *v.* Burden, 14 Ind. App. 512, 43 N. E. 155; Louisville, etc., R. Co. *v.* Palmer, 13 Ind. App. 161, 39 N. E. 881, 41 N. E. 400 (holding that in an action for damages by fire started on defendant's right of way, the complaint must allege that defendant negligently permitted the fire to escape); Chicago, etc., R. Co. *v.* House, 10 Ind. App. 134, 37 N. E. 731 (complaint held sufficient on demurrer); Lake Erie, etc., R. Co. *v.* Griffin, 8 Ind. App. 47, 35 N. E. 396, 52

the railroad and engine by defendant,[98] and should describe,[99] and aver his ownership [1] of the property burned. But it is not necessary that he should allege in detail all the facts and circumstances from which negligence could be inferred,[2] or by what particular engine or train the fire was started; [3] nor need he allege what duty the law imposes upon defendant as to the protection of the property of others against fires caused by defectively constructed locomotives,[4] or negative matters of defense.[5] Plaintiff must not combine a common-law action for negligence with a cause of action under the statutes for injury done by fire communicated from defendant's locomotive.[6] The complaint or petition in such an action may be amended in accordance with the rules applicable in civil cases generally,[7]

Am. St. Rep. 465; Wise *v.* Joplin R. Co., 85 Mo. 178 (holding that the petition need only aver the substantive facts that the fire was negligently permitted to escape and burn plaintiff's property); McCallum *v.* Grand Trunk R. Co., 31 U. C. Q. B. 527 [*affirming* 30 U. C. Q. B. 122].

An averment that defendant negligently permitted fire to escape from its right of way is not objectionable as pleading negligence in general terms. Pittsburgh, etc., R. Co. *v.* Wise, 36 Ind. App. 59, 74 N. E. 1107.

Continuous burning.—A complaint alleging that defendant negligently permitted fire on its right of way to escape to the land of S, igniting it, and thence to plaintiff's adjoining land, is sufficient, without alleging negligence in permitting the fire to escape from the land of S, to that of plaintiff. Wabash, etc., R. Co. *v.* Lackey, 31 Ind. App. 103, 67 N. E. 278.

That sparks and coals of fire were emitted from defendant's engine and carried by wind from the engine to and against plaintiff's property is insufficient to charge negligence in permitting the fire to escape from its right of way. Lake Erie, etc., R. Co. *v.* McFall, 165 Ind. 574, 76 N. E. 400, (1904) 72 N. E. 552.

98. Sims *v.* Chicago, etc., R. Co., 83 Mo. App. 246, allegation of such ownership under Rev. St. (1889) § 2615, held sufficient.

99. Chicago, etc., R. Co. *v.* Barnes, 2 Ind. App. 213, 28 N. E. 328 (holding that where the complaint alleges that defendant negligently permitted the fire to enter on plaintiff's land and burn over two acres of the same, and that the fire burned the crops, turf, and soil off two acres of said land, it is sufficiently certain that the two acres alleged to have been burned over and rendered valueless were the same two acres upon which the fire was said to have entered); Gulf, etc., R. Co. *v.* Jagoe, (Tex. Civ. App. 1895) 32 S. W. 1061 (holding that a complaint which alleges the county in which the land was located, the number of acres in the tract, actual possession by one plaintiff under lease from the other, the owner in fee, and the operation of defendant's road over the land, sufficiently describes the land).

1. *Arkansas.*— St. Louis, etc., R. Co. *v.* Hecht, 38 Ark. 357.

Indiana.— Chicago, etc., R. Co. *v.* Williams, 131 Ind. 30, 30 N. E. 696.

Missouri.— Sims *v.* Chicago, etc., R. Co., 83 Mo. App. 246.

New York.—Adriance *v.* Lehigh Valley R. Co., 105 N. Y. App. Div. 33, 93 N. Y. Suppl. 473.

Rhode Island.— MacDonald *v.* New York, etc., R. Co., 23 R. I. 558, 51 Atl. 578, holding that allegations that plaintiff was seized and possessed and the occupant of the land injured by fire from defendant's engines, and designating such land as the premises of plaintiff, constitutes a sufficient averment of plaintiff's ownership.

Joint tenancy.—An allegation that plaintiffs were the owners and in actual possession of the land described is not necessarily an allegation that they owned as joint tenants or tenants in common. Western, etc., R. Co. *v.* Tate, 129 Ga. 526, 59 S. E. 266.

2. Chicago, etc., R. Co. *v.* Kreig, 22 Ind. App. 393, 53 N. E. 1033; Ohio, etc., R. Co. *v.* Wrape, 4 Ind. App. 100, 30 N. E. 428; Chicago, etc., R. Co. *v.* Barnes, 2 Ind. App. 213, 28 N. E. 328.

Where the complaint sets out facts from which defendant's duty arises, a general averment relative to what was negligently done or omitted is sufficient. Lake Erie, etc., R. Co. *v.* McFall, 165 Ind. 574, 76 N. E. 400, (1904) 72 N. E. 552.

An allegation that the injury was caused "wholly by the negligence of defendant" is good as against a demurrer for want of facts, notwithstanding its failure to state in detail the facts constituting the negligence. Pittsburgh, etc., R. Co. *v.* Wilson, 161 Ind. 701, 66 N. E. 899.

3. Pittsburgh, etc., R. Co. *v.* Noel, 77 Ind. 110; Chicago, etc., R. Co. *v.* Kreig, 22 Ind. App. 393, 53 N. E. 1033; Baltimore, etc., R. Co. *v.* Countryman, 16 Ind. App. 139, 44 N. E. 265, holding that a motion to make a complaint more specific by alleging what engine started the fire is properly overruled upon an averment that plaintiff cannot do so. But see Missouri Pac. R. Co. *v.* Merrill, 40 Kan. 404, 19 Pac. 793; Koontz *v.* Oregon R., etc., Co., 20 Oreg. 3, 23 Pac. 820.

4. Adriance *v.* Lehigh Valley R. Co., 105 N. Y. App. Div. 33, 93 N. Y. Suppl. 473.

5. Adriance *v.* Lehigh Valley R. Co., 105 N. Y. App. Div. 33, 93 N. Y. Suppl. 473.

6. Blackmore *v.* Missouri Pac. R. Co., 162 Mo. 455, 62 S. W. 993.

7. See, generally, PLEADING, 31 Cyc. 359.

Discretion of court.—A refusal to allow amendments, to a declaration for the destruction of property by fire communicated by a locomotive, after a demurrer to the declara-

as by adding a more specific description of the property burned, or an amplification of the facts constituting defendant's negligence.[8]

(B) *Under Statutes.* Under statutes imposing a liability upon a railroad company for all damages by fire that is set out or caused by the operation of its road, negligence will be presumed if it is alleged that the fire and injury were caused by the operation of the railroad, and it is not necessary for plaintiff to specifically allege negligence.[9]

(C) *Defects in and Management of Engines.* Where such ground of recovery is relied upon the complaint should allege with certainty and definiteness that the railroad company has been negligent in the construction, equipment, repair, or management of its engines, whereby the fire escaped and the injury was caused.[10]

tion has been sustained, is in the discretion of the court. Fay *v.* Boston, etc., R. Co., 196 Mass. 329, 82 N. E. 7.

8. Georgia Cent. R. Co. *v.* Inman, 129 Ga. 656, 59 S. E. 786; Georgia Cent. R. Co. *v.* Inman, 129 Ga. 652, 59 S. E. 784.

Where the petition is vague and indefinite as to the specific act of negligence, it may be amended in that respect, in order to meet a specific demurrer raising that objection. Southern R. Co. *v.* Ward, 110 Ga. 793, 36 S. E. 78. But such an amendment must not constitute a separate and distinct cause of action. St. Louis, etc., R. Co. *v.* Ludlum, 63 Kan. 719, 66 Pac. 1045.

9. *Iowa.*— Seska *v.* Chicago, etc., R. Co., 77 Iowa 137, 41 N. W. 596; Rose *v.* Chicago, etc., R. Co., 72 Iowa 625, 34 N. E. 450.

Kansas.—St. Louis, etc., R. Co. *v.* Snaveley, 47 Kan. 637, 28 Pac. 615, holding this to be true if the complaint alleges that the fire was caused by the operation of a railroad.

Maine.— Martin *v.* Grand Trunk R. Co., 87 Me. 411, 32 Atl. 976. See Stearns *v.* Atlantic, etc., R. Co., 46 Me. 95.

Missouri.— Wabash R. Co. *v.* Ordelheide, 172 Mo. 436, 72 S. W. 684; Campbell *v.* Missouri Pac. R. Co., 121 Mo. 340, 25 S. W. 936, 42 Am. St. Rep. 530, 25 L. R. A. 175.

Ohio.— Baltimore, etc., R. Co. *v.* Kreager, 61 Ohio St. 312, 56 N. E. 203, petition sufficient under 91 Ohio Laws, p. 187.

Rhode Island.— Macdonald *v.* New York, etc., R. Co., 23 R. I. 558, 51 Atl. 578.

That the petition alleges negligence on the part of the company does not render the action one at common law, and not under the statute (Rev. St. § 2615), imposing an absolute liability on railroad companies for injuries by fire, if there is sufficient alleged to bring the case within the statute. Walker *v.* Missouri Pac. R. Co., 68 Mo. App. 465.

Under a statute making defendant liable for loss or damage by fire originating on land belonging to it, or on adjacent land, and caused by sparks from an engine, an allegation that the sparks were emitted causing a fire on plaintiff's land and on land of defendant is sufficient. Lake Shore, etc., R. Co. *v.* Anderson, 27 Ohio Cir. Ct. 577.

10. Birmingham R., etc., Co. *v.* Hinton, 141 Ala. 606, 37 So. 635; Pittsburgh, etc., R. Co. *v.* Brough, 168 Ind. 378, 81 N. E. 57, 12 L. R. A. N. S. 401; Lake Erie, etc., R. Co. *v.* Ford, 167 Ind. 205, 78 N. E. 969; Smith *v.* Chicago, etc., R. Co., 4 S. D. 71, 55 N. W. 717; Haugen *v.* Chicago, etc., R. Co., 3 S. D. 394, 53 N. W. 769, holding that a complaint alleging that defendant so carelessly and negligently managed its engine and train as to set fire to dry grass on land adjoining its right of way, which, without negligence on plaintiff's part, spread and caused the damage complained of, charges actionable negligence against the company.

Allegations held sufficient to aver negligence relative to defects in and management of engine see Birmingham R., etc., Co. *v.* Martin, 148 Ala. 8, 42 So. 618; Toledo, etc., R. Co. *v.* Corn, 71 Ill. 493; Lake Erie, etc., R. Co. *v.* McFall, 165 Ind. 574, 76 N. E. 400, (1904) 72 N. E. 552; Pittsburgh, etc., R. Co. *v.* Wise, 36 Ind. App. 59, 74 N. E. 1107; Lake Erie, etc., R. Co. *v.* Gossard, 14 Ind. App. 244, 42 N. E. 818 (that defendant railroad company negligently permitted its engines to become out of repair and negligently permitted fire to escape therefrom and destroy plaintiff's property); Chicago, etc., R. Co. *v.* House, 10 Ind. App. 134, 37 N. E. 731 (that the engine was negligently constructed and managed; that it emitted large sparks and coals of fire which were carried by the wind and fell on plaintiff's land and caused the fire); Adriance *v.* Lehigh Valley R. Co., 105 N. Y. App. Div. 33, 93 N. Y. Suppl. 473; Smith *v.* Old Colony, etc., R. Co., 10 R. I. 22 (holding that an allegation that defendant while using its locomotive, engine, and other rolling stock, so carelessly and negligently managed the same that plaintiff's property was set on fire from sparks from the engine, states with sufficient accuracy that the injury was caused by the careless management of the fire in the engine).

Allegations held insufficient.—An allegation that "the servants, agents and employés, etc., of said defendant in operating and running its engine over said line or road near the premises of plaintiff in said county, negligently and carelessly permitted such engine to cast out sparks and coals of fire therefrom into the dry grass and other combustible material on defendant's right-of-way, and set fire thereto, which spread onto and over the land of plaintiff" is an insufficient allegation of defects in the engine. St. Louis, etc., R. Co. *v.* Fudge, 39 Kan. 543, 18 Pac. 720. As against a motion to make more definite, an allegation that defendant, through its em-

(D) *Proximate Cause of Injury.* In some jurisdictions it is held that it must be alleged that defendant company negligently caused or suffered the fire to be communicated to the property of plaintiff whether or not it was negligent in starting the fire,[11] and that the fire reached and burned the property by a continuous burning.[12] In other jurisdictions, however, it is held that if the complaint alleges negligence in starting the fire it is not necessary to also allege negligence in permitting it to escape or spread to complainant's injury.[13]

(E) *Negativing Contributory Negligence.* In some jurisdictions the complaint must also plainly negative contributory negligence.[14] In other jurisdictions, however, contributory negligence is regarded as a matter of defense and ordinarily need not be negatived in the complaint or petition.[15]

(II) *PLEA OR ANSWER.* As a general rule, in order that contributory negligence may be set up as a defense it must be pleaded.[16] The sufficiency of the

ployees in the use of the engine, was careless and negligent in the operation of its railway, is not sufficient to support a finding of negligence in the use of a defective spark arrester. Missouri, etc., R. Co. *v.* Garrison, 66 Kan. 625, 72 Pac. 225.

In Kentucky a petition to recover damages for the burning of property by sparks from a locomotive need not allege that defendant had failed to provide a spark arrester, as required by Ky. St. § 782, a compliance with that requirement being matter of defense. Louisville, etc., R. Co. *v.* Springwater Distillery Co., 53 S. W. 275, 21 Ky. L. Rep. 769.

The setting of fire outside the right of way by a locomotive being a positive wrong, the complaint must show a negligent management of the locomotive (Lake Erie, etc., R. Co. *v.* McFall, 165 Ind. 574, 76 N. E. 400, (1904) 72 N. E. 552); and a failure to allege in such case that the emission of sparks and coals was negligently done or suffered is bad, every possible presumption being in favor of the company (Lake Erie, etc., R. Co. *v.* McFall, *supra*). But where there is an averment of negligence in regard to the condition of a spark arrester on an engine, it is not necessary that the complaint should show that the railroad company had notice or knowledge of the existence of holes in such spark arrester. Lake Erie, etc., R. Co. *v.* Ford, 167 Ind. 205, 78 N. E. 969.

11. Indiana, etc., R. Co. *v.* Adamson, 90 Ind. 60 [*distinguishing* Louisville, etc., R. Co. *v.* Hanmann, 87 Ind. 422]; Louisville, etc., R. Co. *v.* Ehlert, 87 Ind. 339; Louisville, etc., R. Co. *v.* Spenn, 87 Ind. 322; Pittsburgh, etc., R. Co. *v.* Hixon, 79 Ind. 111; Pittsburgh, etc., R. Co. *v.* Culver, 60 Ind. 469; Lake Erie, etc., R. Co. *v.* Miller, 9 Ind. App. 192, 36 N. E. 428. See Pittsburgh, etc., R. Co. *v.* Iddings, 28 Ind. App. 504, 62 N. E. 112.

12. Chicago, etc., R. Co. *v.* Williams, 131 Ind. 30, 30 N. E. 696.

13. Haugen *v.* Chicago, etc., R. Co., 3 S. D. 394, 53 N. W. 769. See Phelps *v.* New York Cent., etc., R. Co., 48 Misc. (N. Y.) 27, 96 N. Y. Suppl. 72.

Personal injury.—A complaint which alleges that defendant negligently set fire to and burned the house in which plaintiff resided, that he was in the house when it was ignited, and was burned while escaping from it during the fire, sufficiently shows that defendant's negligence was the proximate cause of the injury. Birmingham R., etc., Co. *v.* Hinton, 141 Ala. 606, 37 So. 635.

14. Wabash, etc., R. Co. *v.* Johnson, 96 Ind. 40, 44, 62 (holding that an allegation that it happened without plaintiff's fault is not sufficient); Pittsburgh, etc., R. Co. *v.* Noel, 77 Ind. 110; Lake Erie, etc., R. Co. *v.* Muller, 24 Ind. App. 662, 57 N. E. 596; Chicago, etc., R. Co. *v.* Barnes, 2 Ind. App. 213, 28 N. E. 328.

An allegation that plaintiff was without any fault, blame, or negligence is a sufficient averment that the loss resulted without the negligence of plaintiff (Phenix Ins. Co. *v.* Pennsylvania R. Co., 134 Ind. 215, 33 N. E. 970, 20 L. R. A. 405; Indiana, etc., R. Co. *v.* Overman, 110 Ind. 538, 10 N. E. 575; Pittsburgh, etc., R. Co. *v.* Hixon, 110 Ind. 225, 11 N. E. 285; Lake Erie, etc., R. Co. *v.* Griffin, 8 Ind. App. 47, 35 N. E. 396, 52 Am. St. Rep. 465; Chicago, etc., R. Co. *v.* Smith, 6 Ind. App. 262, 33 N. E. 241); and it is not necessary to specify the precautions taken to avoid injury (Wabash R. Co. *v.* Schultz, 30 Ind. App. 495, 64 N. E. 481; Chicago, etc., R. Co. *v.* Barnes, 2 Ind. App. 213, 28 N. E. 328).

15. Birmingham R., etc., Co. *v.* Hinton, 141 Ala. 606, 37 So. 635; Aycock *v.* Raleigh, etc., R. Co., 89 N. C. 321 (holding that no contributory negligence can be imputed to a landowner whose timber is destroyed by a fire started by sparks from a locomotive and communicated to his land by the combustible material which the railroad company has allowed to remain near the track, and that plaintiff in an action for damage in such a case need not show that he was free from contributory negligence); Snyder *v.* Pittsburgh, etc., R. Co., 11 W. Va. 14 (holding that since contributory negligence is a matter of defense to be shown by defendant, plaintiff need not aver that he was not guilty of contributory negligence).

16. Union Pac. R. Co. *v.* Tracy, 19 Colo. 331, 35 Pac. 537. And see *supra*, X, F, 6, b, (I), (E).

Plea held sufficient to set up contributory negligence see Louisville, etc., R. Co. *v.* Sullivan Timber Co., 138 Ala. 379, 35 So. 327.

Pleas of contributory negligence as the proximate cause of the burning of plaintiff's property held insufficient on demurrer see

plea should be tested by demurrer,[17] except where another mode is provided by statute.[18] Defendant need not plead facts which are mere matters of evidence relevant to the question of its negligence.[19]

c. Issues, Proof, and Variance — (I) *In General.* In accordance with the general rule of pleading in civil actions that evidence in order to be admissible under a pleading in a civil case must correspond to the pleading,[20] such evidence only may be introduced in an action for damages caused by a railroad fire as corresponds with the pleadings and issues therein,[21] or tends to elucidate the

Alabama Great Southern R. Co. *v.* Planters' Warehouse, etc., Co., (Ala.) 1907) 45 So. 82.

The want of a plea of contributory negligence does not preclude the court from awarding a nonsuit, where plaintiff's evidence so conclusively shows contributory negligence that the court would grant a new trial in case of a verdict in favor of plaintiff. Brown *v.* Oregon R., etc., Co., 41 Wash. 688, 84 Pac. 400.

17. Alabama Great Southern R. Co. *v.* Clark, 136 Ala. 450, 34 So. 917.

18. Alabama Great Southern R. Co. *v.* Clark, 136 Ala. 450, 34 So. 917, holding that under Code (1896), § 3286, a motion to strike will be sustained where the pleading is unnecessarily prolix, irrelevant, or frivolous.

19. Louisville, etc., R. Co. *v.* Beeler, 103 S. W. 300, 31 Ky. L. Rep. 750, 11 L. R. A. N. S. 930, holding that in an action against a railroad company for negligently burning plaintiff's orchard, defendant is not required to show in its answer that its engine was screened as required by Ky. St. (1903) §§ 782, 790, since such fact is merely evidence relevant to the question of defendant's negligence.

20. See, generally, PLEADING, 31 Cyc. 680.

21. *Colorado.*— Crissey, etc., Lumber Co. *v.* Denver, etc., R. Co., 17 Colo. App. 275, 68 Pac. 670.

Georgia.— Southern R. Co. *v.* Puckett, 121 Ga. 322, 48 S. E. 968, holding that evidence that the fires occnrred Nov. 19, 1901, is admissible under allegations in the petition that they occurred "on or about October 27 and 28, 1901," and at various other dates during 1899, 1900, and 1901.

Illinois.— Lonisville, etc., Consol. R. Co. *v.* Spencer, 149 Ill. 97, 36 N. E. 91 [*affirming* 47 Ill. App. 503], holding that evidence to prove the value of land before and after the fire is admissible where the injury charged is the destruction of growing trees and bushes on plaintiff's land.

Indiana.— Pittsburgh, etc., R. Co. *v.* Indiana Horseshoe Co., 154 Ind. 322, 56 N. E. 766.

Minnesota.— Weber *v.* Winona, etc., R. Co., 63 Minn. 66, 65 N. W. 93.

Nebraska.— See Chicago, etc., R. Co. *v.* Beal, 6 Nebr. (Unoff.) 510, 94 N. W. 956.

North Dakota.— Gram *v.* Northern Pac. R. Co., 1 N. D. 252, 46 N. W. 972.

Oregon.— Norwich Ins. Soc. *v.* Oregon R. Co., 46 Oreg. 123, 78 Pac. 1025, holding that allegations that the engine which caused the fire "was unskillfully and improperly constructed, and improperly, carelessly, and negligently run and managed by said defendant and by its agents, servants, and employees, and, by reason of said improper, careless, and negligent, management, large quantities of sparks were emitted," etc., are sufficiently broad to let in proof of the character of the care and caution exercised by defendant's employees in managing the engine, and as to whether they were negligent in the performance of their duties.

South Carolina.— Brown *v.* Carolina Midland R. Co., 67 S. C. 481, 46 S. E. 283, 100 Am. St. Rep. 756 (holding that under an allegation that a fire was communicated to plaintiff's property from a depot, it is competent to prove that the stove in the depot was defective); Whitney Mfg. Co. *v.* Richmond, etc., R. Co., 38 S. C. 365, 17 S. E. 147, 37 Am. St. Rep. 767.

Texas.— Fleming *v.* Pullen, (Civ. App. 1906) 97 S. W. 109 (holding that an allegation that sparks from defendant's engine set fire to plaintiff's field and pasture fences does not limit plaintiff to proof that his fences were ignited directly by sparks from the engine, and prevent him from proving that the fire caused by such sparks spread to his fences); San Antonio, etc., R. Co. *v.* New York Home Ins. Co., (Civ. App. 1902) 70 S. W. 999; Gulf, etc., R. Co. *v.* Cannon, (Civ. App. 1895) 32 S. W. 342; Texas, etc., R. Co. *v.* Gains, (Civ. App. 1894) 26 S. W. 873.

Vermont.— Hoskinson *v.* Central Vermont R. Co., 66 Vt. 618, 30 Atl. 24, holding that under a complaint alleging the property destroyed by fire to have been "a dwelling house, sheds and barns, together with the contents thereof, consisting of household furniture, family wearing apparel . . . grain and fodder," evidence as to the destruction of personal property is admissible if it comes under any class of property therein named.

Washington.— Noland *v.* Great Northern R. Co., 31 Wash. 430, 71 Pac. 1098.

See 41 Cent. Dig. tit. "Railroads," § 1706.

Where a loss by fire occasioned by defendant's negligence in allowing fire to escape is the gravamen of the complaint plaintiff is not confined in his proof to the precise place where he alleged the fire originated (Illinois Cent. R. Co. *v.* McClelland, 42 Ill. 355); nor is it necessary for plaintiff to show that defendant omitted to adopt prudent means to prevent the escape of fire after it had started, but it is sufficient, under such averment, to show the accumulation of combustible material on the right of way, extending up to plaintiff's property, so that the communication of fire to plaintiff's property would be the natural and probable conse-

issues.[22] Thus evidence of one kind of negligence not alleged is not admissible under an allegation of negligence of a different kind.[23] Where the complaint describes and identifies a particular engine as the cause of the injury, the condition of that engine and its management are all that are to be considered, and evidence as to the construction and operation of other engines is inadmissible.[24]

quence of its burning on the right of way (Pittsburgh, etc., R. Co. *v.* Wise, 36 Ind. App. 59, 74 N. E. 1107).

Evidence of the negligence of the company in failing to provide safe engines and appliances thereon and in its method of operating them is admissible under a petition alleging generally that the fire was negligently allowed to escape and destroy plaintiff's property (Alabama Great Southern R. Co. *v.* Sanders, 145 Ala. 449, 40 So. 402; Wise *v.* Joplin R. Co., 85 Mo. 178); or under an allegation that defendant "so negligently and carelessly managed a fire which it intentionally kindled and maintained in a certain locomotive" that the fire came into and upon plaintiff's premises (Brush *v.* Long Island R. Co., 10 N. Y. App. Div. 535, 42 N. Y. Suppl. 103 [*affirmed* in 158 N. Y. 742, 52 N. E. 1123]. Testimony as to the condition of the grates of the engine on the day of the fire should be admitted under an allegation that the spark arrester was out of order and unfit for use, and that the engine was defective and dangerous, and, in consequence thereof, sparks and cinders were emitted in dangerous quantities. Brown *v.* Benson, 101 Ga. 753, 29 S. E. 215.

Where a complaint contains two counts, each alleging a single burning of plaintiff's property, proof of more than two fires may be given, although the court may afterward require plaintiff to elect upon which he will rely. Chicago, etc., R. Co. *v.* Smith, 10 Ill. App. 359.

Where the petition alleges that the fire was communicated by the negligent operation of defendant's locomotive, but does not allege defective appliances, plaintiff may show that the fire escaped through the spark arrester although such evidence tends to show that the spark arrester was defective. Kansas City, etc., R. Co. *v.* Chamberlin, (Kan. 1900) 60 Pac. 15.

Where the petition does not allege that the locomotive was defective, but defendant tries the case on the assumption that the existence of defects is an issuable fact, defendant cannot object to evidence introduced by plaintiff tending to show that the spark arrester on the engine was defective. Kansas City, etc., R. Co. *v.* Chamberlin, (Kan. 1900) 60 Pac. 15.

Under the general issue, in an action for fire set by sparks emitted from defendant's locomotive, defendant may prove that it was not guilty of the negligent acts charged, but that the fire was occasioned by persons over whom it had no control, or that plaintiff caused it, and may prove its acts of caution in guarding against the spread of fire, and that the fire, although negligently started, did not reach plaintiff's land, or that an independent cause intervened between its acts and the injury; but it cannot show that plaintiff was guilty of contributory negligence in suffering combustible material to remain on his property in close proximity to the track, or that plaintiff after the discovery of the fire negligently failed to make reasonable efforts to save his property, such acts not being available unless specially pleaded. Smith *v.* Ogden, etc., R. Co., 33 Utah 129, 93 Pac. 185.

22. Cincinnati, etc., R. Co. *v.* Barker, 94 Ky. 71, 21 S. W. 347, 14 Ky. L. Rep. 750, holding that evidence of facts tending to elucidate the issues as made by the pleadings is admissible, although not directly alleged.

Where the complaint after naming some of the items of property destroyed continued "and other personal property" and no effort was made by defendant by motion or otherwise to secure a specific statement as to the nature and character of the "other personal property," plaintiff's testimony that he lost a dog worth a certain amount elicited in answer to a general question to which no objection was made asking if anything else was destroyed by the fire is not objectionable. Birmingham R., etc., Co. *v.* Martin, 148 Ala. 8, 42 So. 618.

23. Miller *v.* Chicago, etc., R. Co., 66 Iowa 364, 23 N. W. 756; Carter *v.* Kansas City, etc., R. Co., 65 Iowa 287, 21 N. W. 607 (holding that evidence of defendant's negligence in allowing combustible material to accumulate on the right of way is not admissible under a petition alleging negligence in the management and operation of an engine); Riley *v.* St. Louis, etc., R. Co., 124 Mo. App. 278, 101 S. W. 156 (holding that where a complaint alleges that "the servants, agents and employees, did negligently set fire to brush and grass on the right of way," etc.; that "the said fire did extend," etc., "to the premises of plaintiff," etc., it is error to admit testimony that the fire was communicated by sparks from defendant's engine); Galveston, etc., R. Co. *v.* Rheiner, (Tex. Civ. App. 1894) 25 S. W. 971 (holding that evidence that the fire was caused by the use of inferior coal is inadmissible under an allegation that plaintiff's property was burned through defendant's failure to use proper spark arresters).

24. Inman *v.* Elberton Air-Line R. Co., 90 Ga. 663, 16 S. E. 958, 35 Am. St. Rep. 232 (holding that the refusal of the court to admit evidence that other engines of defendant, not shown to be of like construction, had at other times emitted sparks at or about the same place is not error); Koontz *v.* Oregon R., etc., Co., 20 Oreg. 3, 23 Pac. 820 (holding, however, that an allegation that the property was fired by an engine of defendant which passed at a time specified does

(11) *Matters to Be Proved.* As a general rule proof need be made only of negligence which is properly alleged,[25] and not of what is needlessly alleged;[26] and a recovery can be had only upon proof of the particular acts of negligence alleged,[27] except that if the complaint states several causes of action, a recovery may be had upon proof of either one of them.[28]

(111) *Variance.* There can be no recovery where there is a material variance between the proof and allegations;[29] but it is sufficient if the substance of the issue is proved and a variance merely in form or in regard to a matter which is immaterial or non-prejudicial will be disregarded.[30]

not so identify the engine as to limit plaintiff's evidence as to the origin of the fire from such engine); Erie R. Co. *v.* Decker, 78 Pa. St. 293.

25. Atchison, etc., R. Co. *v.* Ayres, 56 Kan. 176, 42 Pac. 722 (holding that where mismanagement of the engine which set the fire is the only negligence alleged, defendant is not obliged to prove the engine was in good condition); Mathews *v.* Great Northern R. Co., 7 N. D. 81, 72 N. W. 1085 (holding that if plaintiff narrows his averment to a charge of negligence in the operation of the engine, he can still make out a *prima facie* case by showing that the engine did in fact set the fire; but, so long as the pleading remains unamended, plaintiff can recover only for the negligence specified, and defendant is not required to rebut any other presumption of negligence as it would be under a complaint charging negligence generally).

Where negligence is charged in permitting combustible material to accumulate on the right of way, which was ignited by fire from the locomotive, plaintiff need not prove title or ownership of the *locus in quo* in defendant, but it is sufficient if he shows that defendant was using the gronnd as a part of its right of way. McTavish *v.* Great Northern R. Co., 8 N. D. 333, 79 N. W. 443.

26. Campbell *v.* Missouri Pac. R. Co., 121 Mo. 340, 25 S. W. 936, 42 Am. St. Rep. 530, 25 L. R. A. 175, holding that under Rev. St. (1889) § 2615, the fact that the petition needlessly avers negligence does not prevent a recovery without proof of negligence.

Proof of the act of negligence which was the proximate cause of the injury is sufficient, although other acts of negligence are also alleged. Indiana Clay Co. *v.* Baltimore, etc., R. Co., 31 Ind. App. 258, 67 N. E. 704; Reishus *v.* Willmar, etc., R. Co., 92 Minn. 371, 100 N. W. 1.

27. Southern R. Co. *v.* Thompson, 129 Ga. 367, 58 S. E. 1044; Union Pac. R. Co. *v.* Buck, 3 Kan. App. 371, 44 Pac. 904; Union Pac. R. Co. *v.* Mills, 5 Kan. App. 478, 47 Pac. 623, holding that under a petition charging the negligent setting out of a fire, it is error to allow a recovery for negligence in extinguishing a fire accidentally set out.

28. Baltimore, etc., R. Co. *v.* Countryman, 16 Ind. App. 139, 44 N. E. 265 (holding that where a complaint for negligently starting a fire on the right of way also charges negligence in allowing the fire to escape to plaintiff's premises, evidence showing the negligent escape of the fire is sufficient to support a verdict for plaintiff, although there is a conflict as to where the fire originated); Chicago, etc., R. Co. *v.* Smith, 6 Ind. App. 262, 33 N. E. 241; Martin *v.* Western Union R. Co., 23 Wis. 437, 99 Am. Dec. 189.

Where a complaint charges negligence both as to the machinery and appliances and as to the management of such machinery and appliances, the primary fact that defendant's train threw out the fire in question will of itself operate to make out a *prima facie* case of negligence. Johnson *v.* Northern Pac. R. Co., 1 N. D. 354, 48 N. W. 227.

29. Union Pac. R. Co. *v.* Buck, 3 Kan. App. 371, 44 Pac. 904, holding that where the petition alleges that the fire escaped from defendant's engine on to plaintiff's premises because of imperfect appliances and careless and negligent management of the train, a recovery is not warranted by proof of an accidental escape of fire from the engine without fault of the railway company, although fire so set out may have been communicated to plaintiff's premises because of the negligent manner in which the right of way was kept.

Under an allegation that by reason of carelessness and negligence in operating its train sparks were emitted from defendant's engine and caused the fire, hare proof that the fire was caused by sparks emitted from a passing engine is not sufficient to entitle plaintiff to recover. Tinney *v.* Georgia Cent. R. Co., 129 Ala. 523, 30 So. 623.

30. *Alabama.*— Louisville, etc., R. Co. *v.* Miller, 109 Ala. 500, 10 So. 989, holding that an allegation that plaintiff had been damaged by fire from engines of defendant railroad company caused by the negligence of defendant is supported by proof of either defective construction or negligent operation of the engines or of negligence in permitting combustible material to remain on its right of way.

Florida.— Florida East Coast R. Co. *v.* Welch, 53 Fla. 145, 44 So. 250, holding that there is no fatal variance between an allegation that defendant communicated fire to plaintiff's land from a locomotive which spread over and upon the land of plaintiff and injured trees thereon, and proof that the fire was not set by a locomotive directly on the lands of plaintiff but was negligently set on adjoining land and spread naturally to the lands of plaintiff.

Georgia.— Southern R. Co. *v.* Herrington, 128 Ga. 438, 55 S. E. 694, holding that where a petition alleges that plaintiff sustained injury from sparks from the locomotive

d. Evidence — (i) *Presumptions and Burden of Proof* **— (a)** *In General.* In an action against a railroad company for injuries to property caused by fire from the operation of its engines, trains, or road, the burden of proof in the first instance is upon plaintiff to show, by a preponderance of evidence, negligence on the part of defendant as alleged,[31] and that such negligence was the cause

through the carelessness of defendant's servants and employees, plaintiff may recover upon proof that the engine was negligently handled.

Indiana.— Terre Haute, etc., R. Co. *v.* Walsh, 11 Ind. App. 13, 38 N. E. 534.

Maryland.— Ryan *v.* Gross, 68 Md. 377, 12 Atl. 115, 13 Atl. 302, holding that where plaintiff charges that the fire was caused by sparks from a steam shovel plow or a steam engine proof that it was caused by sparks from a steam engine used in operating a shovel plow is not a fatal variance.

Missouri.— Wise *v.* Joplin R. Co., 85 Mo. 178 (holding that proof that the fire escaped from the smoke-stack and not from the fire-box or ash-pan as alleged is not a fatal variance it not appearing that the variance in that particular was prejudicial to defendant); Lester *v.* Kansas City, etc., R. Co., 60 Mo. 265 (variance held at most to be only such as would require an amendment of plaintiff's petition).

New York.— Brush *v.* Long Island R. Co., 10 N. Y. App. Div. 535, 42 N. Y. Suppl. 103 [*affirmed* in 158 N. Y. 742, 53 N. E. 1123], holding that, although a complaint alleging that defendant so negligently and carelessly managed a fire in a locomotive that it came upon plaintiff's premises does not refer to rubbish on the right of way as an agency in spreading the fire, recovery may be had for a fire communicated from the engine to the rubbish, and so spread to plaintiff's premises.

Rhode Island.— Smith *v.* Old Colony, etc., R. Co., 10 R. I. 22, holding that an allegation that defendant carelessly managed the locomotive is sustained by proof that it carelessly managed the fire in the locomotive.

See 41 Cent. Dig. tit. "Railroads," § 1708.

Proof that plaintiff's property was destroyed by a fire kindled on adjoining land by sparks from defendant's locomotive, which fire moved on to plaintiff's land, is not a material variance from an allegation that the destruction of plaintiff's property was caused by fire kindled on his land by sparks from defendant's locomotive. Butcher *v.* Baker Valley, etc., R. Co., (Cal. 1885) 5 Pac. 359, 67 Cal. 518, 8 Pac. 174. But see Toledo, etc., R. Co. *v.* Morgan, 72 Ill. 155.

31. *Delaware.*—Jefferis *v.* Philadelphia, etc., R. Co., 3 Houst. 447.

Indiana.— Toledo, etc., R. Co. *v.* Fenstermaker, 163 Ind. 534, 72 N. E. 561 (in using insufficient or defective spark arresters); Chicago, etc., R. Co. *v.* Ostrander, 116 Ind. 259, 15 N. E. 227, 19 N. E. 110; Pittsburgh, etc., R. Co. *v.* Hixon, 110 Ind. 225, 11 N. E. 285 [*criticizing* Pittsburgh, etc., R. Co. *v.* Hixon, 79 Ind. 111]; Indianapolis, etc., R. Co. *v.* Paramore, 31 Ind. 143.

Iowa.— McCummons *v.* Chicago, etc., R. Co., 33 Iowa 187.

Maine.— Lowney *v.* New Brunswick R. Co., 78 Me. 479, 7 Atl. 381.

Mississippi.— Louisville, etc., R. Co. *v.* Natchez, etc., R. Co., 67 Miss. 399, 7 So. 350.

Missouri.— Palmer *v.* Missouri Pac. R. Co., 76 Mo. 217; Smith *v.* Hannibal, etc., R. Co., 37 Mo. 287.

New York.— Peck *v.* New York Cent., etc., R. Co., 165 N. Y. 347, 59 N. E. 206 [*reversing* 37 N. Y. App. Div. 110, 55 N. Y. Suppl. 1121]; Flinn *v.* New York Cent., etc., R. Co., 142 N. Y. 11, 36 N. E. 1046; Brown *v.* Buffalo, etc., R. Co., 4 N. Y. App. Div. 465, 38 N. Y. Suppl. 655; Sheldon *v.* Hudson River R. Co., 29 Barb. 226 [*reversed* on other grounds in 14 N. Y. 218, 67 Am. Dec. 155].

Pennsylvania.— Pennsylvania Co. *v.* Watson, 81* Pa. St. 293; Stephenson *v.* Pennsylvania R. Co., 20 Pa. Super. Ct. 157.

South Dakota.— Mattoon *v.* Fremont, etc., R. Co., 6 S. D. 301, 60 N. W. 69.

Texas.— Ft. Worth, etc., R. Co. *v.* Tomlinson, (App. 1890) 16 S. W. 866; Gulf, etc., R. Co. *v.* Johnson, 3 Tex. App. Civ. Cas. § 123; Texas, etc., R. Co. *v.* Ervay, 3 Tex. App. Civ. Cas. § 47; Gulf, etc., R. Co. *v.* Holt, 1 Tex. App. Civ. Cas. § 835.

Virginia.— Kimball *v.* Borden, 95 Va. 203, 28 S. E. 207; Bernard *v.* Richmond, etc., R. Co., 85 Va. 792, 8 S. E. 785, 17 Am. St. Rep. 103.

West Virginia.— Snyder *v.* Pittsburgh, etc., R. Co., 11 W. Va. 14.

United States.— Garrett *v.* Southern R. Co., 101 Fed. 102, 41 C. C. A. 237, 49 L. R. A. 645.

Canada.— Oatman *v.* Michigan Cent. R. Co., 1 Can. R. Cas. 129, 1 Ont. L. Rep. 145 (holding that plaintiff must, in addition to giving evidence from which it may be inferred that the fire was caused as alleged, also give some evidence of negligence on the part of defendant); Moxley *v.* Canada Atlantic R. Co., 14 Ont. App. 309 [*affirmed* in 15 Can. Sup. Ct. 145].

See 41 Cent. Dig. tit. "Railroads," § 1709.

As to facts not peculiarly within the knowledge of defendant's employees the burden of proving negligence is on plaintiff. Edwards *v.* Bonner, 12 Tex. Civ. App. 236, 33 S. W. 761.

Presumption as to carefulness.—There is no legal presumption that a railroad company, while in the exercise of its lawful right to run its locomotives and trains over its road and to use fire in so doing, will not permit fire to escape from them. Palmer *v.* Missouri Pac. R. Co., 76 Mo. 217; Huff *v.* Missouri Pac. R. Co., 17 Mo. App. 356. So, while plaintiff has the burden of proving negligence, he has no legal presumption of

of the injury,[32] as that by reason of such negligence the fire was communicated to his property by sparks or cinders from an engine.[33] If plaintiff shows such negligence, or facts which raise an inference of negligence, the burden is then upon defendant to show that it used due care in the construction, equipment, repair, and management of its engines.[34] It is not necessary that plaintiff should prove either the specific defect in the engine or the particular act of misconduct in its management or operation constituting the negligence;[35] but it is sufficient if he proves facts and circumstances from which the jury might fairly infer that the engine was either defective or negligently operated,[36] or that the fire originated on the railroad right of way.[37]

carefulness to overcome. Palmer *v.* Missouri Pac. R. Co., *supra*.

The burden of showing the existence of combustible material on the right of way is on plaintiff. Indiana, etc., R. Co. *v.* Hawkins, 84 Ill. App. 139.

Where the fire is thrown from an engine by one apparently at work thereon, it will be presumed in the absence of any further testimony that the fireman or engineer threw the fire in the performance of his usual duties, and that it was not done wilfully. McCann *v.* New York Cent., etc., R. Co., 66 Barb. (N. Y.) 338.

32. *Delaware.*—Jefferis *v.* Philadelphia, etc., R. Co., 3 Houst. 447.

Florida.— Gracy *v.* Atlantic Coast Line R. Co., 53 Fla. 350, 42 So. 903.

Georgia.— Georgia R., etc., Co. *v.* Roberts, 114 Ga. 387, 40 S. E. 264.

Louisiana.— Edrington *v.* Louisville, etc., R. Co., 41 La. Ann. 96, 6 So. 10.

Maine.— Lowney *v.* New Brunswick R. Co., 78 Me. 479, 7 Atl. 381.

Michigan.— Osborne *v.* Chicago, etc., R. Co., 111 Mich. 15, 69 N. W. 86.

Nebraska.— Creighton *v.* Chicago, etc., R. Co., 68 Nebr. 456, 94 N. W. 527.

New York.— Sheldon *v.* Hudson River R. Co., 29 Barb. 226 [*reversed* on other grounds in 14 N. Y. 218, 67 Am. Dec. 155].

Canada.— Moxley *v.* Canada Atlantic R. Co., 14 Ont. App. 309 [*affirmed* in 15 Can. Sup. Ct. 145].

See 41 Cent. Dig. tit. "Railroads," § 1709.

Where an injury happens from two efficient causes the principle that plaintiff suing only one of the wrong-doers must show the particular part of the loss inflicted by defendant is inapplicable in an action against a railroad company which set the fire with its engines, where the evidence leaves it just as probable that the injury was the result of one cause as of the other. Alabama, etc., R. Co. *v.* Fried, 81 Miss. 314, 33 So. 74.

33. *Alabama.*— Louisville, etc., R. Co. *v.* Marbury Lumber Co., 132 Ala. 520, 32 So 745, 90 Am. St. Rep. 917.

Georgia.— Inman *v.* Elberton Air-Line R. Co., 90 Ga. 663, 16 S. E. 958, 35 Am. St. Rep. 232.

Louisiana.— Edrington *v.* Louisville, etc., R. Co., 41 La. Ann. 96, 6 So. 10.

Nebraska.— Union, etc., R. Co. *v.* Keller, 36 Nebr. 189, 54 N. W. 420.

New York.— White *v.* New York Cent., etc., R. Co., 90 N. Y. App. Div. 356, 85 N. Y. Suppl. 497 [*affirmed* in 181 N. Y. 577, 74 N. E. 1126].

North Carolina.— Moore *v.* Wilmington, etc., R. Co., 124 N. C. 338, 32 S. E. 710.

Pennsylvania.— Henderson *v.* Philadelphia, etc., R. Co., 144 Pa. St. 461, 22 Atl. 851, 27 Am. St. Rep. 652, 16 L. R. A. 299; Stephenson *v.* Pennsylvania R. Co., 20 Pa. Super. Ct. 157.

Texas.— Scott *v.* Texas, etc., R. Co., (Civ. App. 1900) 56 S. W. 97 [*reversed* on other grounds in 93 Tex. 625, 57 S. W. 801]; East Line, etc., R. Co. *v.* Hart, 2 Tex. App. Civ. Cas. § 419; Gulf, etc., R. Co. *v.* Holt, 1 Tex. App. Civ. Cas. § 835.

Virginia.— White *v.* New York, etc., R. Co., 99 Va. 357, 38 S. E. 180.

United States.— Garrett *v.* Southern R. Co., 101 Fed. 102, 41 C. C. A. 237, 49 L. R. A. 645; Niskern *v.* Chicago, etc., R. Co., 22 Fed. 811.

See 41 Cent. Dig. tit. "Railroads," § 1709.

That the railroad company's employees aided in putting out the fire raises no presumption that the company set the fire. Clarke *v.* New York, etc., R. Co., 26 R. I. 59, 58 Atl. 245.

34. Southern R. Co. *v.* Johnson, 141 Ala. 575, 37 So. 919; Field *v.* New York Cent., etc., R. Co., 32 N. Y. 339 [*affirming* 29 Barb. 176]; Scott *v.* Texas, etc., R. Co., (Tex. Civ. App. 1900) 56 S. W. 97 [*reversed* on other grounds in 93 Tex. 625, 57 S. W. 801], holding that the burden of showing care is not on defendant, where there is not a *prima facie* showing that the fire originated from the engine.

35. Walker *v.* Kendall, 7 Kan. App. 801, 54 Pac. 413 (holding that under Gen. St. (1897) c. 70, § 32, it is not necessary to prove specific allegations in the petition as to negligence); Peck *v.* New York Cent., etc., R. Co., 165 N. Y. 347, 59 N. E. 206 [*reversing* 37 N. Y. App. Div. 110, 55 N. Y. Suppl. 1121]; Field *v.* New York Cent., etc., R. Co., 32 N. Y. 339 [*affirming* 29 Barb. 176]. But see Brown *v.* Buffalo, etc., R. Co., 4 N. Y. App. Div. 465, 38 N. Y. Suppl. 655; Gibson *v.* South Eastern R. Co., 1 F. & F. 23.

36. Peck *v.* New York Cent., etc., R. Co., 165 N. Y. 347, 59 N. E. 206 [*reversing* 37 N. Y. App. Div. 110, 55 N. Y. Suppl. 1121]; Genung *v.* New York, etc., R. Co., 21 N. Y. Suppl. 97; Stephenson *v.* Pennsylvania R. Co., 20 Pa. Super. Ct. 157. And see *infra*, X, I, 6, d, (I), (D).

37. Atlantic Coast Line R. Co. *v.* Watkins,

(B) *After Proof of Injury* — (1) IN GENERAL — (a) BURDEN OF PROOF ON DEFENDANT. But although the above rule is the general rule as to proof of negligence in the first instance, it is the rule in many jurisdictions that where plaintiff has shown that the fire was caused by sparks or cinders from a locomotive of defendant company, or by the operation of its railroad, a *prima facie* case of negligence is thereby made out upon which plaintiff may recover unless defendant shows that it was free from negligence in the construction, equipment, or management of such locomotive,[38] or in causing the fire to spread by allowing combustible

104 Va. 154, 51 S. E. 172, holding, however, that the fact that a fire started from a spark from a locomotive does not alone justify such an inference.

38. *Alabama.*— Sherrell *v.* Louisville, etc., R. Co., (1905) 44 So. 153, 152 Ala. 213, 44 So. 631; Alabama Great Southern R. Co. *v.* Sanders, 145 Ala. 449, 40 So. 402; Louisville, etc., R. Co. *v.* Marbury Lumber Co., 132 Ala. 520, 32 So. 745, 90 Am. St. Rep. 917; Alabama, etc., R. Co. *v.* Taylor, 129 Ala. 238, 29 So. 673; Alabama, etc., R. Co. *v.* Johnston, 128 Ala. 283, 29 So. 771; Louisville, etc., R. Co. *v.* Marbury Lumber Co., 125 Ala. 237, 28 So. 438, 50 L. R. A. 620; Louisville, etc., R. Co. *v.* Reese, 85 Ala. 497, 5 So. 283, 7 Am. St. Rep. 66.

Georgia.— Southern R. Co. *v.* Elliott, 129 Ga. 705, 59 S. E. 786; Swindell *v.* Alabama Midland R. Co., 123 Ga. 311, 51 S. E. 386; Gainesville, etc., R. Co. *v.* Edmondson, 101 Ga. 747, 29 S. E. 213; East Tennessee, etc., R. Co. *v.* Hesters, 90 Ga. 11, 15 S. E. 828.

Illinois.— Illinois Cent. R. Co. *v.* Mills, 42 Ill. 407; St. Louis, etc., R. Co. *v.* Montgomery, 39 Ill. 335; Bass *v.* Chicago, etc., R. Co., 28 Ill. 9, 81 Am. Dec. 254; St. Louis, etc., R. Co. *v.* Strotz, 47 Ill. App. 342; Wabash R. Co. *v.* Smith, 42 Ill. App. 527.

Indian Territory.— St. Louis, etc., R. Co. *v.* Lawrence, 4 Indian Terr. 611, 76 S. W. 254.

Iowa.— Stewart *v.* Iowa Cent. R. Co., 136 Iowa 182, 113 N. W. 764; West Side Mut. F. Ins. Co. *v.* Chicago, etc., R. Co., (1903) 95 N. W. 193; Seska *v.* Chicago, etc., R. Co., 77 Iowa 137, 41 N. W. 596.

Maine.— Dyer *v.* Maine Cent. R. Co., 99 Me. 195, 58 Atl. 994, 67 L. R. A. 416.

Maryland.— Ryan *v.* Gross, 68 Md. 377, 12 Atl. 115, 16 Atl. 302; Green Ridge R. Co. *v.* Brinkman, 64 Md. 52, 20 Atl. 1024, 54 Am. Rep. 755.

Mississippi.— Alabama, etc., R. Co. *v.* Barrett, 78 Miss. 432, 28 So. 820; Mobile, etc., R. Co. *v.* Gray, 62 Miss. 385.

Missouri.— Wise *v.* Joplin R. Co., 85 Mo. 178; Kenney *v.* Hannibal, etc., R. Co., 70 Mo. 252; Coates *v.* Missouri, etc., R. Co., 61 Mo. 38; Coale *v.* Hannibal, etc., R. Co., 60 Mo. 227; Campbell *v.* St. Louis, etc., R. Co., 58 Mo. 498; Clemens *v.* Hannibal, etc., R. Co., 53 Mo. 366, 14 Am. Rep. 460; Bedford *v.* Hannibal, etc., R. Co., 46 Mo. 456; Reed *v.* Missouri Pac. R. Co., 50 Mo. App. 504; Polhans *v.* Atchison, etc., R. Co., 45 Mo. App. 153 [*affirmed* in 115 Mo. 535, 22 S. W. 478]; Logan *v.* Wabash Western R. Co., 43 Mo. App. 71; Crews *v.* Kansas City, etc., R. Co., 19 Mo. App. 302; Huff *v.* Missouri Pac. R. Co., 17 Mo. App. 356; Sappington *v.* Missouri Pac. R. Co., 14 Mo. App. 86; Brown *v.* Missouri Pac. R. Co., 13 Mo. App. 462. *Compare* Smith *v.* Hannibal, etc., R. Co., 37 Mo. 287.

Montana.— Diamond *v.* Northern Pac. R. Co., 6 Mont. 580, 13 Pac. 367, holding this rule to apply to chartered as well as to other railroads.

Nebraska.— Shipman *v.* Chicago, etc., R. Co., 78 Nebr. 43, 110 N. W. 535; Creighton *v.* Chicago, etc., R. Co., (1903) 94 N. W. 527; Rogers *v.* Kansas City, etc., R. Co., 52 Nebr. 86, 71 N. W. 977; Union Pac. R. Co. *v.* Keller, 36 Nebr. 189, 54 N. W. 420; Burlington, etc., R. Co. *v.* Westover, 4 Nebr. 268; Chicago, etc., R. Co. *v.* Beal, 4 Nebr. (Unoff.) 510, 94 N. W. 956.

Nevada.— Longabaugh *v.* Virginia City, etc., R. Co., 9 Nev. 271.

North Carolina.— North Fork Lumber Co. *v.* Southern R. Co., 143 N. C. 324, 55 S. E. 781; Phillips *v.* Durham, etc., R. Co., 138 N. C. 12, 50 S. E. 562; Raleigh Hosiery Co. *v.* Raleigh, etc., R. Co., 131 N. C. 238, 42 S. E. 602; Aycock *v.* Raleigh, etc., R. Co., 89 N. C. 321; Ellis *v.* Portsmouth, etc., R. Co., 24 N. C. 138.

Oregon.— Anderson *v.* Oregon R. Co., 45 Oreg. 211, 77 Pac. 119; Koontz *v.* Oregon R., etc., Co., 20 Oreg. 3, 23 Pac. 820.

South Carolina.— Brown *v.* Atlanta, etc., R. Co., 19 S. C. 39.

South Dakota.— Cronk *v.* Chicago, etc., R. Co., 3 S. D. 93, 52 N. W. 420; White *v.* Chicago, etc., R. Co., 1 S. D. 326, 47 N. W. 146, 9 L. R. A. 824; Kelsey *v.* Chicago, etc., R. Co., 1 S. D. 80, 45 N. W. 204.

Tennessee.— Simpson *v.* East Tennessee, etc., R. Co., 5 Lea 456; Burke *v.* Louisville, etc., R. Co., 7 Heisk. 451, 19 Am. Rep. 618.

Texas.— Gulf, etc., R. Co. *v.* Johnson, 92 Tex. 591, 50 S. W. 567; Texas, etc., R. Co. *v.* Levine, 87 Tex. 437, 29 S. W. 466; Galveston, etc., R. Co. *v.* Horne, 69 Tex. 643, 9 S. W. 440; Gulf, etc., R. Co. *v.* Benson, 69 Tex. 407, 5 S. W. 822, 5 Am. St. Rep. 74; International, etc., R. Co. *v.* Timmermann, 61 Tex. 660; Gulf, etc., R. Co. *v.* Blakeney-Stevens-Jackson Co., (Civ. App. 1908) 106 S. W. 1140; Texas Midland R. Co. *v.* Moore, (Civ. App. 1903) 74 S. W. 942; St. Louis Southwestern R. Co. *v.* Goodnight, 32 Tex. Civ. App. 256, 74 S. W. 583; Texas Southern R. Co. *v.* Hart, 32 Tex. Civ. App. 212, 73 S. W. 833; Highland *v.* Houston, etc., R. Co., (Civ. App. 1901) 65 S. W. 649; Texas, etc., R. Co. *v.* Hooten, 21 Tex. Civ. App. 139, 50 S. W. 499; Edwards *v.* Bonner, 12 Tex. Civ. App. 236, 33 S. W. 761; Missouri, etc., R. Co. *v.* Kelley, (Civ. App. 1895) 30 S. W. 488; International, etc.,

material to remain on its right of way,[39] or in allowing it to escape to adjoining premises,[40] or establishes such other facts as will excuse it from the consequences of the fire,[41] as that the fire was caused by some other agency.[42] In some jurisdictions this rule prevails by virtue of statute.[43] The burden of proof under

R. Co. *v.* Searight, 8 Tex. Civ. App. 593, 28 S. W. 30; Missouri, etc., R. Co. *v.* Pickryl, (Civ. App. 1894) 26 S. W. 855; Galveston, etc., R. Co. *v.* Dolores Land, etc., Co., (Civ. App. 1894) 26 S. W. 79; Galveston, etc., R. Co. *v.* Rheiner, (Civ. App. 1894) 25 S. W. 971; Texas, etc., R. Co. *v.* Ervay, 3 Tex. App. Civ. Cas. § 47; East Line, etc., R. Co. *v.* Hart, 2 Tex. App. Civ. Cas. § 419; Gulf, etc., R. Co. *v.* Holt, 1 Tex. App. Civ. Cas. § 835; Houston, etc., R. Co. *v.* McDonough, 1 Tex. App. Civ. Cas. § 651.

Vermont.— Cleaveland *v.* Grand Trunk R. Co., 42 Vt. 449.

Virginia.— Norfolk, etc., R. Co. *v.* Fritts, 103 Va. 687, 49 S. E. 971, 106 Am. St. Rep. 911, 68 L. R. A. 864; White *v.* New York, etc., R. Co., 99 Va. 357, 38 S. E., 180; Kimball *v.* Borden, 95 Va. 203, 28 S. E. 207; Patteson *v.* Chesapeake, etc., R. Co., 94 Va. 16, 26 S. E. 393.

Wisconsin.— Spaulding *v.* Chicago, etc., R. Co., 30 Wis. 110, 11 Am. Rep. 550, 33 Wis. 582.

United States.— Cincinnati, etc., R. Co. *v.* South Fork Coal Co., 139 Fed. 528, 1 L. R. A. N. S. 533; Great Northern R. Co. *v.* Coats, 115 Fed. 452, 53 C. C. A. 382; McCullen *v.* Chicago, etc., R. Co., 101 Fed. 66, 41 C. C. A. 365, 49 L. R. A. 642; Eddy *v.* Lafayette, 49 Fed. 807, 1 C. C. A. 441; Missouri Pac. R. Co. *v.* Texas, etc., R. Co., 33 Fed. 361; Musselwhite *v.* Receivers, 17 Fed. Cas. No. 9,972, 4 Hughes 166. See also Missouri Pac. R. Co. *v.* Texas, etc., R. Co., 31 Fed. 526.

England.— Piggot *v.* Eastern Counties R. Co., 3 C. B. 229, 10 Jur. 571, 15 L. J. C. P. 235, 54 E. C. L. 229.

See 41 Cent. Dig. tit. "Railroads," § 1710.

The reason for this rule is because the railroad company and its employees have possession and control of the engine and the means of knowing its condition while plaintiff has not. Texas, etc., R. Co. *v.* Hooten, 21 Tex. Civ. App. 139, 50 S. W. 499; Patteson *v.* Chesapeake, etc., R. Co., 94 Va. 16, 26 S. E. 393.

To raise the presumption of negligence so as to cast on defendant the burden of showing that it had suitable appliances and that the engine was properly managed, the jury must be reasonably satisfied from the evidence that the fire was caused by sparks emitted in unusual and dangerous quantities from defendant's engine, and evidence merely tending to prove such fact is not, as a matter of law, sufficient. Louisville, etc., R. Co. *v.* Malone, 109 Ala. 509, 20 So. 33.

Negligence will not be presumed where a fire was caused immediately after the passage of a locomotive equipped with proper appliances. Savannah F. & M. Ins. Co. *v.* Pelzer Mfg. Co., 60 Fed. 39.

The fact proven by plaintiff also stands as substantive evidence of the company's negligence. West Side Mut. F. Ins. Co. *v.* Chicago, etc., R. Co., (Iowa 1903) 95 N. W. 193.

39. Pittsburgh, etc., R. Co. *v.* Campbell, 86 Ill. 443 (holding that under Railroad Act, § 78, the fact that the fire has been communicated from a locomotive passing over the road is *prima facie* evidence of negligence as to compliance with section 38 requiring the way to be kept clear of combustibles); Missouri Pac. R. Co. *v.* Merrill, 40 Kan. 404, 19 Pac. 793; Jones *v.* Michigan Cent. R. Co., 59 Mich. 437, 26 N. W. 662. But see Gulf, etc., R. Co. *v.* Benson, 69 Tex. 407, 5 S. W. 822, 5 Am. St. Rep. 74; Kimball *v.* Borden, 95 Va. 203, 28 S. E. 207.

40. Clark *v.* Ellithorp, 7 Kan. App. 337, 51 Pac. 940, 9 Kan. App. 503, 59 Pac. 286, holding that a cause of action based upon the alleged carelessness of the railroad company in permitting fire to escape while burning the right of way comes under Gen. St. (1889) par. 1321, providing that in actions against a railway company for damages by fire caused by the operating of its road, proof that the fire was caused by operating the said railroad is *prima facie* evidence of negligence.

A fire set by section-men in burning the grass along the right of way is not set out or caused by operating the railway so as to cast the burden on defendant to show its freedom from negligence in allowing the fire to escape and in failing to put it out. Connors *v.* Chicago, etc., R. Co., 111 Iowa 384, 82 N. W. 953. *Contra*, Clark *v.* Ellithorpe, 7 Kan. App. 337, 51 Pac. 940, 9 Kan. App. 503, 59 Pac. 286.

41. Cleveland, etc., R. Co. *v.* Stephens, 74 Ill. App. 586.

42. Cleveland, etc., R. Co. *v.* Hornsby, 202 Ill. 138, 66 N. E. 1052 [*affirming* 105 Ill. App. 67]; Raleigh Hosiery Co. *v.* Raleigh, etc., R. Co., 131 N. C. 238, 42 S. E. 602.

43. *Arkansas.*— St. Louis, etc., R. Co. *v.* Dawson, 77 Ark. 434, 92 S. W. 27; St. Louis, etc., R. Co. *v.* Coombs, 76 Ark. 132, 88 S. W. 595; Tilley *v.* St. Louis, etc., R. Co., 49 Ark. 535, 6 S. W. 8.

Colorado.— Union Pac. R. Co. *v.* Arthur, 2 Colo. App. 159, 29 Pac. 1031.

Florida.— Florida East Coast R. Co. *v.* Welch, 53 Fla. 145, 44 So. 250, under Gen. St. (1906) § 3148. In this state the mere emission of sparks from a railroad locomotive or the mere setting out of fires thereby is not *per se* evidence of negligence on the part of the company; but the emission of sparks of unusual size or in unusual quantities is evidence sufficient to raise a presumption of negligence and throw upon the company the burden of removing the presumption. Jacksonville, etc., R. Co. *v.* Peninsular Land, etc., Co., 27 Fla. 1, 157, 9 So. 661, 17 L. R. A. 33, 65.

Georgia.— Southern R. Co. *v.* Thompson,

this rule, however, shifts only as to rebutting the presumption thus made, and

129 Ga. 367, 58 S. E. 1044 (construing Civ. Code (1895), § 2321); Southern R. Co. *v.* Puckett, 121 Ga. 322, 48 S. E. 968; East Tennessee, etc., R. Co. *v.* Hesters, 90 Ga. 11, 15 S. E. 828.

Illinois.—Cleveland, etc., R. Co. *v.* Hornsby, 202 Ill. 138, 66 N. E. 1052 [*affirming* 105 Ill. App. 67]; American Strawboard Co. *v.* Chicago, etc., R. Co., 177 Ill. 513, 53 N. E. 97 [*reversing* on other grounds 75 Ill. App. 420, 91 Ill. App. 635]; Baltimore, etc., R. Co. *v.* Tripp, 175 Ill. 251, 51 N. E. 833; Chicago, etc., R. Co. *v.* Glenny, 175 Ill. 238, 51 N. E. 896 [*affirming* 70 Ill. App. 510]; Louisville, etc., R. Co. *v.* Spencer, 149 Ill. 97, 36 N. E. 91; Chicago, etc., R. Co. *v.* Goyette, 133 Ill. 21, 24 N. E. 549; Chicago, etc., R. Co. *v.* Pennell, 110 Ill. 435; Pittsburgh, etc., R. Co. *v.* Campbell, 86 Ill. 443; St. Louis, etc., R. Co. *v.* Funk, 85 Ill. 460; Chicago, etc., R. Co. *v.* Clampit, 63 Ill. 95; Toledo, etc., R. Co. *v.* Larmon, 67 Ill. 68 (holding that an Illinois statute making the fact that a fire was occasioned by sparks from an engine "full *prima facie*" evidence of negligence on the part of the railroad company must not be construed to imply constructive rather than ordinary *prima facie* evidence); Chicago, etc., R. Co. *v.* Quaintance, 58 Ill. 389; Chicago, etc., R. Co. *v.* McCahill, 56 Ill. 28; Toledo, etc., R. Co. *v.* Valodin, 109 Ill. App. 132; Toledo, etc., R. Co. *v.* Needham, 105 Ill. App. 25; Cleveland, etc., R. Co. *v.* Tate, 104 Ill. App. 615; Franey *v.* Illinois Cent. R. Co., 104 Ill. App. 499; Indiana, etc., R. Co. *v.* Hawkins, 84 Ill. App. 39; Cleveland, etc., R. Co. *v.* Stephens, 74 Ill. App. 586; Callaway *v.* Sturgeon, 58 Ill. App. 159; Lake Erie, etc., R. Co. *v.* Holderman, 56 Ill. App. 144; Louisville, etc., R. Co. *v.* Black, 54 Ill. App. 82; Indiana, etc., R. Co. *v.* Craig, 14 Ill. App. 407.

Iowa.—Stewart *v.* Iowa Cent. R. Co., 136 Iowa 182, 113 N. W. 764 (under Code, § 2056); Kennedy *v.* Iowa State Ins. Co., 119 Iowa 29, 91 N. W. 831; Greenfield *v.* Chicago, etc., R. Co., 83 Iowa 270, 49 N. W. 95; Engle *v.* Chicago, etc., R. Co., 77 Iowa 661, 37 N. W. 6, 42 N. W. 512; Rose *v.* Chicago, etc., R. Co., 72 Iowa 625, 34 N. W. 450; Babcock *v.* Chicago, etc., R. Co., 62 Iowa 593, 13 N. W. 740, 17 N. W. 909; Small *v.* Chicago, etc., R. Co., 50 Iowa 338. For decisions otherwise prior to the statute see Garrett *v.* Chicago, etc., R. Co., 36 Iowa 121; McCummons *v.* Chicago, etc., R. Co., 33 Iowa 187; Jackson *v.* Chicago, etc., R. Co., 31 Iowa 176, 7 Am. Rep. 120; Gandy *v.* Chicago, etc., R. Co., 30 Iowa 420, 6 Am. Rep. 682.

Kansas.—Atchison, etc., R. Co. *v.* Geiser, 68 Kan. 281, 75 Pac. 68 (holding that under the Kansas statute the fact of the setting out of a fire by the operation of a railroad is evidence, not merely a presumption, of negligence, and must be overcome by evidence to the satisfaction of the jury); Ft. Scott, etc., R. Co. *v.* Tubbs, 47 Kan. 630, 28 Pac. 612; Ft. Scott, etc., R. Co. *v.* Karracher, 46 Kan. 44, 26 Pac. 1027; Atchison, etc., R. Co. *v.* Gibson, 42 Kan. 44, 21 Pac. 788; Missouri Pac. R. Co. *v.* Merrill, 40 Kan. 404, 19 Pac. 793 (holding that the rule prescribed in Laws (1885), c. 155, that the occurrence of a fire caused by the operation of a railroad is *prima facie* evidence of negligence on the part of the railroad company applies to all cases where the fire results from any step in the operation of the road; and the coupling of a charge of negligence in allowing combustible material to accumulate on the roadway with one that the fire was negligently permitted to escape from a passing locomotive will not take the case out of the application of statute); Walker *v.* Kendall, 7 Kan. App. 801, 54 Pac. 113.

Kentucky.—Cincinnati, etc., R. Co. *v.* Falconer, 97 S. W. 727, 30 Ky. L. Rep. 152, holding that under St. (1903) § 782, it is incumbent on defendant, in such a case, to show that its locomotives were equipped as the statute requires.

Maryland.—Annapolis, etc., R. Co. *v.* Gantt, 39 Md. 115; Baltimore, etc., R. Co. *v.* Dorsey, 37 Md. 19.

Michigan.—Jones *v.* Michigan Central R. Co., 59 Mich. 437, 26 N. W. 662.

Minnesota.—Continental Ins. Co. *v.* Chicago, etc., R. Co., 97 Minn. 467, 107 N. W. 548, 5 L. R. A. N. S. 99; Solum *v.* Great Northern R. Co., 63 Minn. 233, 65 N. W. 443; De Camp *v.* Chicago, etc., R. Co., 62 Minn. 207, 64 N. W. 392; Cantlon *v.* Eastern R. Co., 45 Minn. 481, 48 N. W. 22; Daly *v.* Chicago, etc., R. Co., 43 Minn. 319, 45 N. W. 611; Johnson *v.* Chicago, etc., R. Co., 31 Minn. 57, 16 N. W. 488; Sibilrud *v.* Minneapolis, etc., R. Co., 29 Minn. 58, 11 N. W. 146; Karsen *v.* Milwaukee, etc., R. Co., 29 Minn. 12, 11 N. W. 122.

Mississippi.—Louisville, etc., R. Co. *v.* Natchez, etc., R. Co., 67 Miss. 399, 7 So. 350.

New Hampshire.—Laird *v.* Connecticut, etc., R. Co., 62 N. H. 254, 13 Am. St. Rep. 564.

New Jersey.—Wiley *v.* West Jersey R. Co., 44 N. J. L. 247.

Ohio.—Lake Erie, etc., R. Co. *v.* Falk, 62 Ohio St. 297, 56 N. E. 1020; Lake Shore, etc., R. Co. *v.* Anderson, 27 Ohio Cir. Ct. 577; Toledo, etc., R. Co. *v.* Wales, 11 Ohio Cir. Ct. 371, 1 Ohio Cir. Dec. 168. *Compare* Ruffner *v.* Cincinnati, etc., R. Co., 34 Ohio St. 96 [*affirming* 3 Cinc. L. Bul. 267].

Utah.—Anderson *v.* Wasatch, etc., R. Co., 2 Utah 518.

Vermont.—Farrington *v.* Rutland R. Co., 72 Vt. 24, 47 Atl. 171.

United States.—Woodward *v.* Chicago, etc., R. Co., 145 Fed. 577, 75 C. C. A. 591 (under Minn. Gen. St. (1894) § 2700); Ann Arbor R. Co. *v.* Fox, 92 Fed. 494, 34 C. C. A. 497; Northern Pac. R. Co. *v.* Lewis, 51 Fed. 658, 2 C. C. A. 446; Niskern *v.* Chicago, etc., R. Co., 22 Fed. 811.

See 41 Cent. Dig. tit. "Railroads," § 1710.

A presumption of negligence is raised and the burden cast on defendant to show that its locomotive and appliances were properly con-

not on the whole case,[44] and although plaintiff may as a general rule rest his case when he has made out a *prima facie* case within this rule,[45] he cannot withhold evidence confirmatory of such *prima facie* case and offer it in rebuttal to disprove evidence given by defendant.[46] If defendant admits that the fire was caused by sparks from its locomotive and pleads facts indicating lack of negligence its plea is in effect a plea of confession and avoidance, and it therefore assumes the burden of proof.[47]

(b) BURDEN OF PROOF ON PLAINTIFF. In other jurisdictions, however, it is held that a presumption of negligence on the part of the railroad company does not arise from the mere fact that the fire was set by sparks or cinders from one of its locomotives, and that it is incumbent upon plaintiff to prove some act of negligence in the construction, equipment, or management of the locomotive.[48]

(2) REBUTTING PRESUMPTIONS. A presumption of negligence raised by proof of the injury caused by fire from an engine may be rebutted by proof of freedom from negligence on the part of the railroad company,[49] or that the injury was

structed and in good order where it has been shown that the fire was started by sparks from one of defendant's engines and that an engine when properly constructed and in good repair would not emit sparks. Cleveland, etc., R. Co. *v.* Fredenbur, 3 Ohio Cir. Ct. 23, 2 Ohio Cir. Dec. 15.

44. St. Louis, etc., R. Co. *v.* Moss, 37 Tex. Civ. App. 461, 84 S. W. 281; Galveston, etc., R. Co. *v.* Chittim, 31 Tex. Civ. App. 40, 71 S. W. 294; Gulf, etc., R. Co. *v.* Johnson, 28 Tex. Civ. App. 395, 67 S. W. 182, holding that defendant need only meet the presumption and need not show by a preponderance of evidence that it was not negligent.

Defendant is not required to produce a preponderance of the evidence bearing on the question of negligence in order to overcome such *prima facie* case, but it is sufficient if it produces enough to counter-balance that by which the *prima facie* case is made out. Toledo, etc., R. Co. *v.* Star Flouring Mills, 146 Fed. 953, 77 C. C. A. 208, construing Ohio Rev. St. (1906) §§ 3365, 3366.

45. Toledo, etc., R. Co. *v.* Wales, 11 Ohio Cir. Ct. 371, 1 Ohio Cir. Dec. 168.

46. Toledo, etc., R. Co. *v.* Wales, 11 Ohio Cir. Ct. 371, 1 Ohio Cir. Dec. 168.

47. Illinois Cent. R. Co. *v.* Barrett, 66 S. W. 9, 23 Ky. L. Rep. 1755.

48. Burroughs *v.* Housatonic R. Co., 15 Conn. 124, 38 Am. Dec. 64; Chicago, etc., R. Co. *v.* Ostrander, 116 Ind. 259, 15 N. E. 227, 19 N. E. 110; Pittsburgh, etc., R. Co. *v.* Hixon, 110 Ind. 225, 11 N. E. 285 [*criticizing* Pittsburgh, etc., R. Co. *v.* Hixon, 79 Ind. 111]; Indianapolis, etc., R. Co. *v.* Paramore, 31 Ind. 143; Baltimore, etc., R. Co. *v.* O'Brien, 38 Ind. App. 143, 77 N. E. 1131; Louisville, etc., R. Co. *v.* McCorkle, 12 Ind. App. 691, 40 N. E. 26; Peck *v.* New York Cent., etc., R. Co., 165 N. Y. 347, 59 N. E. 206 [*reversing* 37 N. Y. App. Div. 110, 55 N. Y. Suppl. 1121]; Field *v.* Northern Cent. R. Co., 32 N. Y. 339 [*affirming* 29 Barb. 176]; Sheldon *v.* Hudson River R. Co., 14 N. Y. 218, 67 Am. Dec. 155; Babbitt *v.* Erie R. Co., 108 N. Y. App. Div. 74, 95 N. Y. Suppl. 429; Collins *v.* New York Cent., etc., R. Co., 5 Hun (N. Y.) 503 [*affirmed* in 71 N. Y. 609]; Case *v.* Northern Cent. R. Co., 59 Barb. (N. Y.) 644; Genung *v.* New York, etc., R. Co., 21 N. Y. Suppl. 97; Henderson *v.* Philadelphia, etc., R. Co., 144 Pa. St. 461, 22 Atl. 851, 27 Am. St. Rep. 652, 16 L. R. A. 299; Albert *v.* Northern Cent. R. Co., 98 Pa. St. 316; Reading, etc., R. Co. *v.* Latshaw, 93 Pa. St. 449; Jennings *v.* Pennsylvania R. Co., 93 Pa. St. 337; Philadelphia, etc., R. Co. *v.* Yerger, 73 Pa. St. 121; Philadelphia, etc., R. Co. *v.* Yeiser, 8 Pa. St. 366; Glaser *v.* Lewis, 17 Phila. (Pa.) 345; Philadelphia, etc., R. Co. *v.* Kerst, 2 Walk. (Pa.) 480.

The most cogent reasons given for the support of this rule are, that a railroad company, which is authorized by law to operate its trains by steam, is not an insurer against accidents by fire, and is not liable for injuries caused by the use of fire in generating steam, if the right is exercised in a lawful manner, and with reasonable care and skill; that the owner of adjacent property assumes all risks incident to a lawful and proper use of the road; that negligence is the gist of the liability, without proof of which an action cannot be maintained; and that by the general rule, in actions founded on negligence, plaintiff must aver it, and the burden of proof rests upon him, and in no case does the mere fact of injury prove negligence. See Louisville, etc., R. Co. *v.* Reese, 85 Ala. 497, 5 So. 283, 7 Am. St. Rep. 66.

49. Southern R. Co. *v.* Thompson, 129 Ga. 367, 58 S. E. 1044; Lake Erie, etc., R. Co. *v.* Ericson, 80 Ill. App. 625; Small *v.* Chicago, etc., R. Co., 50 Iowa 338; Baltimore, etc., R. Co. *v.* Kreager, 61 Ohio St. 312, 56 N. E. 203.

Where it is shown that the same engine set out other fires elsewhere at about the same time, the jury may find that the *prima facie* case is not overcome by evidence of care on defendant's part. Seska *v.* Chicago, etc., R. Co., 77 Iowa 137, 41 N. W. 596.

Insufficient proof.— That the railroad company used the best spark arresters, and that the fire did not originate on the right of way, is insufficient to overcome the *prima facie* case. San Antonio, etc., R. Co. *v.* Adams, (Tex. Civ. App. 1902) 66 S. W. 578.

Evidence of care on defendant's part is not sufficient as a matter of law to rebut the pre-

caused by some other agency;[50] and such rebuttal may be shown by evidence introduced either by plaintiff or defendant.[51] To constitute such rebuttal, or in other words to exonerate the railroad company, it must be shown that at the time in question its engine was properly constructed and equipped with the most approved appliances and that they were in good repair or that reasonable care and caution had been taken to keep them in such repair,[52] and that it was properly managed and operated under the circumstances by an experienced and competent engineer and fireman;[53] and freedom from negligence in acts or omissions

sumption of negligence arising under Iowa Code, § 2056, from proof of loss or injury by a fire set out by defendant. Stewart *v.* Iowa Cent. R. Co., 136 Iowa 182, 113 N. W. 764.

50. Cleveland, etc., R. Co. *v.* Hornsby, 202 Ill. 138, 66 N. E. 1052 [*affirming* 105 Ill. App. 67]; Lake Erie, etc., R. Co. *v.* Ericson, 80 Ill. App. 625 (contributory negligence); Continental Ins. Co. *v.* Chicago, etc., R. Co., 97 Minn. 467, 107 N. W. 548, 5 L. R. A. N. S. 99; Lake Shore, etc., R. Co. *v.* Anderson, 27 Ohio Cir. Ct. 577.

51. Southern R. Co. *v.* Thompson, 129 Ga. 367, 58 S. E. 1044.

52. Gainesville, etc., R. Co. *v.* Edmondson, 101 Ga. 747, 29 S. E. 213 (holding that where the evidence only raises a suspicion that the fire was communicated by the passing engine, and the uncontradicted testimony is that the engine was in good order, and equipped with a proper spark arrester, in good condition, and no evidence appears that sparks were emitted therefrom at the time, before or after the fire, a legal recovery cannot be had); Chicago, etc., R. Co. *v.* Neilson, 118 Ill. App. 343; Toledo, etc., R. Co. *v.* Kingman, 49 Ill. App. 43 (holding that evidence that the engines were supplied with proper spark arresters without proof that such arresters were in good condition and repair at the time of the fire is insufficient to rebut the statutory presumption of negligence); Lake Shore, etc., R. Co. *v.* Anderson, 27 Ohio Cir. Ct. 577; Galveston, etc., R. Co. *v.* Horne, 69 Tex. 643, 9 S. W. 440; Ross *v.* St. Louis Southwestern R. Co., (Tex. Civ. App. 1907) 103 S. W. 708; Texas, etc., R. Co. *v.* Gains, (Tex. Civ. App. 1894) 26 S. W. 873.

That defendant had adopted the latest improvements in spark arresters is not sufficient in rebuttal if it does not appear that the engines were thus equipped at the time of the injury. Southern R. Co. *v.* Puckett, 121 Ga. 322, 48 S. E. 968.

That defendant must show to the satisfaction of the jury that the engines were in good condition requires too high a degree of certainty, and is erroneous if so given in an instruction. Gulf, etc., R. Co. *v.* Jordan, 25 Tex. Civ. App. 82, 60 S. W. 784.

53. *Alabama.*— Louisville, etc., R. Co. *v.* Marbury Lumber, etc., Co., 132 Ala. 520, 32 So. 745, 90 Am. St. Rep. 917; Alabama Great Southern R. Co. *v.* Taylor, 129 Ala. 238, 29 So. 673; Louisville, etc., R. Co. *v.* Marbury Lumber Co., 125 Ala. 237, 28 So. 438, 50 L. R. A. 620; Louisville, etc., R. Co. *v.* Malone, 109 Ala. 509, 20 So. 33, holding that the conclusion that an engine was not properly managed is not rebutted by the evidence of the engineer and fireman to the contrary.

Arkansas.— St. Louis, etc., R. Co. *v.* Ayres, 67 Ark. 371, 55 S. W. 159, holding that proof that the engine was in the hands of a competent engineer at the time of the fire is not sufficient.

Georgia.— Proof that the engine was equipped with an improved spark arrester, which was in good working order, and that the engine was properly handled is sufficient to overcome the presumption. Alabama Midland R. Co. *v.* Swindell, 117 Ga. 883, 45 S. E. 264; Southern R. Co. *v.* Pace, 114 Ga. 712, 40 S. E. 723; Southern R. Co. *v.* Myers, 108 Ga. 165, 33 S. E. 917.

Illinois.— Cleveland, etc., R. Co. *v.* Hornsby, 202 Ill. 138, 66 N. E. 1052 [*affirming* 105 Ill. App. 67]; Chicago, etc., R. Co. *v.* American Strawboard Co., 190 Ill. 268, 60 N. E. 518 [*affirming* 91 Ill. App. 635]; American Strawboard Co. *v.* Chicago, etc., R. Co., 177 Ill. 513, 53 N. E. 97 [*reversing* on other grounds 75 Ill. App. 420]; Chicago, etc., R. Co. *v.* Goyette, 133 Ill. 21, 24 N. E. 549; St. Louis, etc., R. Co. *v.* Funk, 85 Ill. 460; Chicago, etc., R. Co. *v.* Clampit, 63 Ill. 95; Chicago, etc., R. Co. *v.* Quaintance, 58 Ill. 389; Toledo, etc., R. Co. *v.* Needham, 116 Ill. App. 543; Toledo, etc., R. Co. *v.* Valodin, 109 Ill. App. 132; Cleveland, etc., R. Co. *v.* Case, 71 Ill. App. 459; Hoopeston First Nat. Bank *v.* Lake Erie, etc., R. Co., 65 Ill. App. 21; Indiana, etc., R. Co. *v.* Craig, 14 Ill. App. 407.

Kansas.— Ft. Scott, etc., R. Co. *v.* Karracker, 46 Kan. 511, 26 Pac. 1027; St. Louis, etc., R. Co. *v.* Ludlum, 6 Kan. App. 700, 50 Pac. 456.

Minnesota.— Continental Ins. Co. *v.* Chicago, etc., R. Co., 97 Minn. 467, 107 N. W. 548, 6 L. R. A. N. S. 99; Solum *v.* Great Northern R. Co., 63 Minn. 233, 65 N. W. 443 (holding that the presumption is not conclusively overcome by the fact that the engine was properly equipped and inspected and the testimony of the engineer and fireman that it was managed in the usual manner, so as to take the question whether the presumption was rebutted from the jury); De Camp *v.* Chicago, etc., R. Co., 62 Minn. 207, 64 N. W. 392 (presumption not rebutted); Cantlon *v.* Eastern R. Co., 45 Minn. 481, 48 N. W. 22; Daly *v.* Chicago, etc., R. Co., 43 Minn. 319, 45 N. W. 611; Sibilrud *v.* Minneapolis, etc., R. Co., 29 Minn. 58, 11 N. W. 146; Karsen *v.* Milwaukee, etc., R. Co., 29 Minn. 12, 11 N. W. 122.

Mississippi.— Drake *v.* Yazoo, etc., R. Co., 79 Miss. 84, 29 So. 788.

which might under the circumstances, reasonably or naturally, have caused the injury must also be shown,[54] as in keeping its right of way free from combustible material.[55] If the presumption of negligence is rebutted, a preponderance of evidence of actual negligence other than the mere fact that the fire was set by an engine is necessary to warrant a verdict for plaintiff.[56] But if the railroad

Missouri.— Palmer *v.* Missouri Pac. R. Co., 76 Mo. 217; Coates *v.* Missouri, etc., R. Co., 61 Mo. 38; Fitch *v.* Pacific R. Co., 45 Mo. 322; Huff *v.* Missouri Pac. R. Co., 17 Mo. App. 356.

North Dakota.— Johnson *v.* Northern Pac. R. Co., 1 N. D. 354, 48 N. W. 227.

Ohio.— Lake Shore, etc., R. Co. *v.* Anderson, 27 Ohio Cir. Ct. 577; Lake Shore, etc., R. Co. *v.* Wahlers, 24 Ohio Cir. Ct. 310.

Texas.— Galveston, etc., R. Co. *v.* Horne, 69 Tex. 643, 9 S. W. 440; Gulf, etc., R. Co. *v.* Benson, 69 Tex. 407, 5 S. W. 822, 5 Am. St. Rep. 74; Gulf, etc., R. Co. *v.* Blakeney-Stevens-Jackson Co., (Civ. App. 1908) 106 S. W. 1140; Texas Southern R. Co. *v.* Hart, 32 Tex. Civ. App. 212, 73 S. W. 833 (holding this to be true, although it is shown that there is no negligence in regard to the equipment); Smith *v.* Missouri, etc., R. Co., (Civ. App. 1903) 73 S. W. 22; Tyler Southeastern R. Co. *v.* Hitchins, (Civ. App. 1901) 63 S. W. 1069; Texas, etc., R. Co. *v.* Hooten, 21 Tex. Civ. App. 139, 50 S. W. 499; Galveston, etc., R. Co. *v.* Burnett, (Civ. App. 1896) 37 S. W. 779; Missouri, etc., R. Co. *v.* Goode, 7 Tex. Civ. App. 245, 26 S. W. 441; Gulf, etc., R. Co. *v.* Johnson, 3 Tex. App. Civ. Cas. § 123.

Utah.— Olmstead *v.* Oregon Short Line R. Co., 27 Utah 515, 76 Pac. 557.

Wisconsin.— Menominee River Sash, etc., Co. *v.* Milwaukee, etc., R. Co., 91 Wis. 447, 65 N. W. 176.

United States.— Woodward *v.* Chicago, etc., R. Co., 145 Fed. 577, 75 C. C. A. 591; Rosen *v.* Chicago Great Western R. Co., 83 Fed. 300, 27 C. C. A. 534; Missouri Pac. R. Co. *v.* Texas, etc., R. Co., 41 Fed. 917.

See 41 Cent. Dig. tit. "Railroads," § 1711.

The adequacy of defendant's rebuttal must be determined in view of any facts appearing in the testimony in addition to those sufficient to give rise to the statutory presumption which tend to show negligence. Continental Ins. Co. *v.* Chicago, etc., R. Co., 97 Minn. 467, 107 N. W. 548, 5 L. R. A. N. S. 99.

Customary manner.— It is not sufficient to disprove such negligence to show that the engine was of approved construction and was operated by a skilled fireman and engineer in the customary manner without also showing that the customary manner was a careful one. Woodson *v.* Milwaukee, etc., R. Co., 21 Minn. 60.

Uncontradicted testimony that the locomotive was provided with the best spark arrester yet discovered, that none has been invented that will arrest all sparks, and that the smoke-stack and arrester were daily inspected by competent mechanics and found to be in good condition and repair and that the engineer was competent is sufficient to rebut the presumption of negligence. Gulf, etc., R. Co. *v.* Benson, 69 Tex. 407, 5 S. W. 822, 5 Am. St. Rep. 74.

Where it appears that the fire originated by sparks from defendant's engine, it has been held that evidence that the engine was fully equipped with spark arresters, and that they were in good condition at the time of the fire, and that the engine was carefully managed, is not sufficient to relieve defendant from the charge of negligence. Lake Shore, etc., R. Co. *v.* Anderson, 27 Ohio Cir. Ct. 577.

Conclusiveness of evidence.— Where the evidence that there were no defects in the locomotive, or that the locomotive was operated with ordinary care, is so conclusive that an opposite finding is not sustainable, the statutory presumption of negligence (under Minn. Gen. St. (1894) § 2700) is overcome as a matter of law, and it is the duty of the court to instruct the jury to return a verdict for defendant. Woodward *v.* Chicago, etc., R. Co., 145 Fed. 577, 75 C. C. A. 591.

54. Engel *v.* Chicago, etc., R. Co., 77 Iowa 661, 37 N. W. 6, 42 N. W. 512; Nelson *v.* Chicago, etc., R. Co., 35 Minn. 170, 28 N. W. 215; Gulf, etc., R. Co. *v.* Blakeney-Stevens-Jackson Co., (Tex. Civ. App. 1908) 106 S. W. 1140 (holding that a railroad company in disproving negligence presumptively established by the setting out of fire by its locomotive must negative every fact the proof of which would justify a finding of negligence); East Line, etc., R. Co. *v.* Hart, 2 Tex. App. Civ. Cas. § 419.

55. Engel *v.* Chicago, etc., R. Co., 77 Iowa 661, 37 N. W. 6, 42 N. W. 512.

A railroad company need not appropriate one hundred feet on each side of the center of its track as a right of way in order to overcome the presumption of negligence arising from a communication of fire to grass ninety feet from the track. St. Louis, etc., R. Co. *v.* Lindley, (Tex. Civ. App. 1895) 29 S. W. 1101.

56. *Alabama.*— Louisville, etc., R. Co. *v.* Marbury Lumber Co., 132 Ala. 520, 32 So. 745, 90 Am. St. Rep. 917; Alabama Great Southern R. Co. *v.* Taylor, 129 Ala. 238, 29 So. 673; Louisville, etc., R. Co. *v.* Marbury Lumber Co., 125 Ala. 237, 28 So. 438, 50 L. R. A. 620.

Minnesota.— Daly *v.* Chicago, etc., R. Co., 43 Minn. 319, 45 N. W. 611.

Missouri.— Wise *v.* Joplin R. Co., 85 Mo. 178; Coates *v.* Missouri, etc., R. Co., 61 Mo. 38.

Oregon.— Koontz *v.* Oregon R., etc., Co., 20 Oreg. 3, 23 Pac. 820.

Texas.— Gulf, etc., R. Co. *v.* Blakeney-Stevens-Jackson Co., (Civ. App. 1908) 106 S. W. 1140; Smith *v.* Missouri, etc., R. Co., (Civ. App. 1903) 73 S. W. 22; Missouri, etc., R. Co. *v.* Stafford, (Civ. App. 1895) 31 S. W. 319.

company fails to rebut such presumption plaintiff is entitled to recover,[57] unless the railroad company proves that plaintiff himself was guilty of contributory negligence.[58]

(c) *Cause of Injury.* To establish a charge of negligence on the part of defendant company it is not enough for plaintiff to show a possibility or even a probability that the fire was communicated to the property by sparks from defendant s locomotive;[59] but he must prove by a preponderance of affirmative evidence that it did so originate,[60] although it is not required that his preliminary evidence should exclude all possibility of another origin of the fire,[61] or that it be undisputed.[62] Nor is he required to prove which one of defendant's engines set the fire.[63]

(d) *Defects in and Management of Engine.*[64] Negligence in the equipment, repair, or operation of an engine may be inferred from the fact that the engine habitually scatters sparks to such an extent as to endanger combustible material all along the line of the road,[65] or that it emits a stream of sparks along its way setting fire to many things,[66] or that it emits sparks unusual in quantity or character;[67] but it cannot be inferred from the fact that some time after the fire the appliances for arresting sparks were out of repair.[68] Nor is there a presumption of law that an engine inspected before starting on its trip and found in good condition remained in such condition during the trip.[69] Where it is shown that the appliances used by the railroad company have been in use many years and found sufficient to protect its own and other property, the burden of proof is upon plaintiff to show by positive, strong, and convincing evidence,[70] that the

Utah.— Olmstead *v.* Oregon Short Line R. Co., 27 Utah 515, 76 Pac. 557.

Wisconsin. — Menominee River Sash, etc., Co. *v.* Milwaukee, etc., R. Co., 91 Wis. 447, 65 N. W. 176.

See 41 Cent. Dig. tit. "Railroads," § 1711.

That the locomotive at the time the fire originated was emitting an unusual volume of sparks is sufficient to overcome direct evidence that the locomotive was in good repair or was skilfully managed. Chicago, etc., R. Co. *v.* McCahill, 56 Ill. 28.

57. Alabama, etc., R. Co. *v.* Johnston, 128 Ala. 283, 29 So. 771; Louisville, etc., R. Co. *v.* Black, 54 Ill. App. 82; Wolff *v.* Chicago, etc., R. Co., 34 Minn. 215, 25 N. W. 63; Niskern *v.* Chicago, etc., R. Co., 22 Fed. 811.

58. Niskern *v.* Chicago, etc., R. Co., 22 Fed. 811.

59. Sheldon *v.* Hudson River R. Co., 29 Barb. (N. Y.) 226 [*reversed* on other grounds in 14 N. Y. 218, 67 Am. Dec. 155]; White *v.* Chicago, etc., R. Co., 1 S. D. 326, 47 N. W. 146, 9 L. R. A. 824. But see Sheldon *v.* Hudson River R. Co., 14 N. Y. 218, 67 Am. Dec. 155, holding that after other probable causes of fire have been refuted the onus is on the company to prove that the fire was not communicated by the engine of a particular train.

60. Osborne *v.* Chicago, etc., R. Co., 111 Mich. 15, 69 N. W. 86; White *v.* Chicago, etc., R. Co., 1 S. D. 326, 47 N. W. 146, 9 L. R. A. 824.

A presumption that the fire was caused by the engine sufficient to put the burden of proof on defendant company has been held to arise from evidence that the fire sprang up immediately upon the passing of a train and that there was no fire on the premises before, and no other apparent cause for the fire. St. Louis, etc., R. Co. *v.* Coombs, 76 Ark. 132, 88 S. W. 595; Union Pac. R. Co. *v.* De Busk, 12 Colo. 294, 20 Pac. 752, 13 Am. St. Rep. 221, 3 L. R. A. 350; Richmond *v.* McNeill, 31 Oreg. 242, 49 Pac. 879; Gulf, etc., R. Co. *v.* Blakeney-Stevens-Jackson Co., (Tex. Civ. App. 1908) 106 S. W. 1140. And in the absence of contrary proof it has been held that the presumption is that a fire adjacent to the railroad track was occasioned by a locomotive on the track. Gibbons *v.* Wisconsin Valley R. Co., 66 Wis. 161, 28 N. W. 170.

61. Baltimore, etc., R. Co. *v.* Shipley, 39 Md. 251; Annapolis, etc., R. Co. *v.* Gantt, 39 Md. 115; Crist *v.* Erie R. Co., 58 N. Y. 638 [*affirming* 1 Thomps. & C. 435].

62. Crist *v.* Erie R. Co., 58 N. Y. 638 [*affirming* 1 Thomps. & C. 435].

63. Bevier *v.* Delaware, etc., Canal Co., 13 Hun (N. Y.) 254.

64. Presumption of negligence as to defects in or management of engines see *supra*, X, I, 6, d, (I), (B), (1), (a).

65. Green Ridge R. Co. *v.* Brinkman, 64 Md. 52, 20 Atl. 1024, 54 Am. Rep. 755.

66. Pennsylvania Co. *v.* Watson, 81* Pa. St. 293, holding that such facts are evidence upon which a jury may infer the use of an imperfect spark catcher, and from this fact negligence.

67. Peck *v.* New York Cent., etc., R. Co., 165 N. Y. 347, 59 N. E. 206 [*reversing* 37 N. Y. App. Div. 110, 55 N. Y. Suppl. 1121].

68. Peck *v.* New York Cent., etc., R. Co., 37 N. Y. App. Div. 110, 55 N. Y. Suppl. 1121 [*reversed* on other grounds in 165 N. Y. 347, 59 N. E. 206].

69. Louisville, etc., R. Co. *v.* Malone, 109 Ala. 509, 20 So. 33.

70. Meyer *v.* Vicksburg, etc., R. Co., 41 La. Ann. 639, 6 So. 218, 17 Am. St. Rep. 408.

appliances were defective or were improperly or negligently used,[71] or were less safe in the matter of sparks than a newer pattern of engine known and in use at the time.[72] It is also a legitimate conclusion that a heavily loaded train laboring up a grade will throw out sparks.[73]

(E) *Contributory Negligence.* The burden of proving that plaintiff was guilty of contributory negligence rests on defendant,[74] unless such negligence appears from plaintiff's own evidence, or may be fairly inferred from the circumstances.[75] But the burden of showing want of contributory negligence, either active or passive, is on plaintiff.[76]

(II) *ADMISSIBILITY* [77] — (A) *In General.* The general rules of evidence governing the admissibili'y of evidence in civil cases [78] apply to the admissibility of evidence in actions against a railroad company for injuries caused by fire from the operation of its road.[79] Subject to these rules, in the absence of direct evidence, circumstantial evidence is admissible for the purpose of showing [80] or

71. Gumbel *v.* Illinois Cent. R. Co., 48 La. Ann. 1180, 20 So. 703; Meyer *v.* Vicksburg, etc., R. Co., 41 La. Ann. 639, 6 So. 218, 17 Am. St. Rep. 408.

72. Babcock *v.* Fitchburg R. Co., 140 N. Y. 308, 35 N. E. 596 [*reversing* 67 Hun 469, 22 N. Y. Suppl. 449].

73. Brooks *v.* Missouri Pac. R. Co., 98 Mo. App. 166, 71 S. W. 1083.

74. *Arkansas.*— St. Louis, etc., R. Co. *v.* Clements, 82 Ark. 3, 99 S. W. 1106.

Illinois.—American Strawboard Co. *v.* Chicago, etc., R. Co., 177 Ill. 513, 53 N. E. 97 [*reversing* 75 Ill. App. 420].

South Dakota.— Smith *v.* Chicago, etc., R. Co., 4 S. D. 71, 55 N. W. 717.

Virginia.— Southern R. Co. *v.* Patterson, 105 Va. 6, 52 S. E. 694.

United States.— Clark *v.* Kansas City, etc., R. Co., 129 Fed. 341, 64 C. C. A. 19; Northern Pac. R. Co. *v.* Lewis, 51 Fed. 658, 2 C. C. A. 446, holding that it is incumbent upon the railroad company to prove contributory negligence by a preponderance of evidence.

Where there is no evidence on the subject it is the duty of the court to assume that plaintiff was not guilty of such contributory negligence and to so instruct. Smith *v.* Chicago, etc., R. Co., 4 S. D. 71, 55 N. W. 717.

Evidence of a failure of plaintiff to clear combustible material out of an open draw through which the fire was communicated to the wood which was burned does not shift the burden of proof as he was under no obligation to clear the ground around his woodpile. Northern Pac. R. Co. *v.* Lewis, 51 Fed. 658, 2 C. C. A. 446.

75. Smith *v.* Chicago, etc., R. Co., 4 S. D. 71, 55 N. W. 717; Southern R. Co. *v.* Patterson, 105 Va. 6, 52 S. E. 694.

76. Louisville, etc., R. Co. *v.* Carmon, (Ind. App. 1898) 48 N. E. 1047; Wabash R. Co. *v.* Miller, 18 Ind. App. 549, 48 N. E. 663. See Louisville, etc., R. Co. *v.* Natchez, etc., R. Co., 67 Miss. 399, 7 So. 350.

Where such burden of proof rests on plaintiff he must show whether he had knowledge of the fire during its progress; and where lack of knowledge is not shown he must show that reasonable efforts were made by him to prevent the damage. Wabash R. Co. *v.* Miller, 18 Ind. App. 549, 48 N. E. 663.

77. **Admissibility of evidence on questions of negligence** generally see NEGLIGENCE, 29 Cyc. 606 *et seq.*

Evidence admissible under pleadings see *supra*, X, I, 6, c.

78. see, generally, EVIDENCE, 16 Cyc. 821.

79. See Gram *v.* Northern Pac. R. Co., 1 N. D. 252, 46 N. W. 972; Marande *v.* Texas, etc., R. Co., 124 Fed. 42, 59 C. C. A. 562, evidence held irrelevant and immaterial.

The record of proceedings to assess damages in plaintiff's favor in which the jury were directed to view the premises and estimate the quality and quantity of land occupied by the road "and all other inconveniences which may be likely to result to the owner of the land" is admissible in evidence; and this whether the damages were assessed in those proceedings for the inconveniences likely to result from sparks or not. Philadelphia, etc., R. Co. *v.* Yeiser, 8 Pa. St. 366.

That plaintiff recovered insurance on the property burned is not admissible in evidence by defendant, unless in support of the defense that plaintiff burned the property himself. Hallemann *v.* Baltimore, etc., R. Co., 77 Ill. App. 404; Carlyle Canning Co. *v.* Baltimore, etc., R. Co., 77 Ill. App. 396; Missouri, etc., R. Co. *v.* Jordan, (Tex. Civ. App. 1904) 82 S. W. 791.

80. *Iowa.*— Babcock *v.* Chicago, etc., R. Co., 62 Iowa 593, 13 N. W. 740, 17 N. W. 909; Gandy *v.* Chicago, etc., R. Co., 30 Iowa 420, 6 Am. Rep. 682.

Maine.— Dunning *v.* Maine Cent. R. Co., 91 Me. 87, 39 Atl. 352, 64 Am. St. Rep. 208, holding that testimony that the witness saw a fire beside the railroad track soon after a locomotive had passed is admissible, although he also testifies that he did not know how the fire caught or how long it had been burning.

Mississippi.— Alabama, etc., R. Co. *v.* Barrett, 78 Miss. 432, 28 So. 820.

New Jersey.— Rollins *v.* Atlantic City R. Co., 73 N. J. L. 64, 62 Atl. 929.

New York.— Babcock *v.* Fitchburg R. Co., 19 N. Y. Suppl. 774.

Pennsylvania.— Henderson *v.* Philadelphia, etc., R. Co., 144 Pa. St. 461, 22 Atl. 851, 27 Am. St. Rep. 652, 16 L. R. A. 299.

refuting[81] negligence on the part of defendant, such as evidence of the dryness of the season,[82] the inflammable character of the surface of the intervening country,[83] its connection with plaintiff's land,[84] the strength and direction of the wind,[85] and the speed of the train at the time and place in question.[86] Circumstantial evidence is also admissible to show the origin of the fire,[87] and its

Texas.— Ft. Worth, etc., R. Co. *v.* Ratliffe, 2 Tex. App. Civ. Cas. § 681.

Wisconsin.— Marvin *v.* Chicago, etc., R. Co., 79 Wis. 140, 47 N. W. 1123, 11 L. R. A. 506; Brusberg *v.* Milwaukee, etc., R. Co., 55 Wis. 106, 12 N. W. 416, holding that evidence that immediately after the train passed large sized fresh coals were seen on the track and in the snow beside it and that stumps were on fire near the property burned is admissible.

See 41 Cent. Dig. tit. "Railroads," § 1717.

Time and distance.— The length of time the fire has been burning, and the distance to the property from the right of way, while not determinative, may be considered in determining if the negligence of the company was the proximate cause of the injury. Alabama, etc., R. Co. *v.* Barrett, 78 Miss. 432, 28 So. 820.

81. Philadelphia, etc., R. Co. *v.* Yeiser, 8 Pa. St. 366 (holding that evidence of the fact that plaintiff whose fence was destroyed by fire constructed it inside of the space for which damages were awarded should be admitted in favor of the company as bearing on the question of negligence); Canada Atlantic R. Co. *v.* Moxley, 15 Can. Sup. Ct. 145. Evidence that an engine cannot be operated without small cinders escaping from the smoke-stack is admissible. German Ins. Co. *v.* Chicago, etc., R. Co., 128 Iowa 386, 104 N. W. 361.

82. Louisville, etc., R. Co. *v.* Marbury Lumber Co., 132 Ala. 520, 32 So. 745, 90 Am. St. Rep. 917; Smith *v.* Vermont Cent. R. Co., 80 Vt. 208, 67 Atl. 535; Marvin *v.* Chicago, etc., R. Co., 79 Wis. 140, 47 N. W. 1123, 11 L. R. A. 506.

83. Marvin *v.* Chicago, etc., R. Co., 79 Wis. 140, 47 N. W. 1123, 11 L. R. A. 506. But see Lake Erie, etc., R. Co. *v.* Miller, 24 Ind. App. 662, 57 N. E. 596, holding that evidence as to the condition of the grass at or near where subsequent fires occurred is inadmissible to show that defendant was negligent in permitting fire to escape from its right of way.

84. Marvin *v.* Chicago, etc., R. Co., 79 Wis. 140, 47 N. W. 1123, 11 L. R. A. 506.

85. Clark *v.* Ellithorp, 9 Kan. App. 503, 59 Pac. 286; Marvin *v.* Chicago, etc., R. Co., 79 Wis. 140, 47 N. W. 1123, 11 L. R. A. 506.

To show the force and direction of the wind and the dryness of the surface of the ground, evidence is admissible that three days after the fire partly burned shingles were found from six hundred feet to nearly one quarter of a mile from the burned buildings, although the witness did not personally know where they came from; it being otherwise shown that burning shingles were carried in that direction and that the fire was in fact carried there by the wind. Smith *v.* Vermont Cent. R. Co., 80 Vt. 208, 67 Atl. 535. See also Knight *v.* Chicago, etc., R. Co., 81 Iowa 310, 46 N. W. 1112, holding that in order to show that the wind was strong enough to carry fire from the engine to the house burned, it was competent to show that after the house burned, and on the same day, charred shingles were found a quarter of a mile beyond the house.

86. Norfolk, etc., R. Co. *v.* Briggs, 103 Va. 105, 48 S. E. 521, holding, however, that evidence of the speed of the train at a point remote from the scene of the fire is inadmissible. See also Alabama Great Southern R. Co. *v.* Clark, 145 Ala. 459, 39 So. 816.

An ordinance limiting the speed of trains in a city is admissible where it is shown that the fire was caused by sparks from a locomotive while running through the city at a high rate of speed and that such rate of speed was apt to cause more sparks to be emitted, a violation of the ordinance being alleged in the declaration. Lake Erie, etc., R. Co. *v.* Middlecoff, 150 Ill. 27, 37 N. E. 660. But see Louisville, etc., R. Co. *v.* Dalton, 102 Ky. 290, 43 S. W. 431, 19 Ky. L. Rep. 1318.

87. Kansas City, etc., R. Co. *v.* Blaker, 68 Kan. 244, 75 Pac. 71, 64 L. R. A. 81; Kansas City, etc., R. Co. *v.* Perry, 65 Kan. 792, 70 Pac. 876; Ireland *v.* Cincinnati, etc., R. Co., 79 Mich. 163, 44 N. W. 426 (holding that where there is no direct and positive proof as to the origin of the fire, it is competent for defendant to introduce evidence that it was of incendiary origin); Fields *v.* Missouri Pac. R. Co., 113 Mo. App. 642, 88 S. W. 134 (particular evidence to show that fire started from some other source held incompetent); Missouri, etc., R. Co. *v.* Jordan, (Tex. Civ. App. 1904) 82 S. W. 791 (holding that evidence that a few minutes before the fire a person having an interest in the contents of the building was seen running from the premises is admissible).

Evidence that an engine pulling a train up a heavy grade threw sparks of sufficient size to set fire to adjoining property is admissible. Gibbs *v.* St. Louis, etc., R. Co., 104 Mo. App. 276, 78 S. W. 835.

Evidence that some of defendant's own land had been burned over is admissible as to the cause of the fire burning plaintiff's property. MacDonald *v.* New York, etc., R. Co., 25 R. I. 40, 54 Atl. 795.

Testimony which is mere assumption and conjecture that a fire which originated on defendant's right of way was the same that destroyed plaintiff's property is inadmissible. Montague *v.* Minneapolis, etc., R. Co., 96 Wis. 633, 72 N. W. 41.

To show the place where the fire started it is admissible for a witness to state that fourteen months later at the place pointed out to him as the point where the fire started there were embers, remains of burned wood, and cinders; the evidence tending to show

extent.[88] To show that plaintiff did not own all of the property destroyed, evidence that he raised the property on land rented on shares is admissible.[89] In an action to recover for fencing destroyed by fire, a written agreement between plaintiff and another company to which the evidence tends to show that defendant succeeded, containing statements inconsistent with plaintiff's testimony both as to the ownership and location of the fencing is admissible.[90]

(B) *Customary Methods and Acts.*[91] As a general rule evidence of a general custom or usage as to the act causing the fire is inadmissible to show whether or not the railroad company was negligent on a particular occasion,[92] or to show that the fire originated from some other source,[93] although it has been held that evidence of the railroad company's custom or habit as to the particular act is admissible as tending to show the condition or management of the engine at the time of the fire.[94]

that the fire started there being all circumstantial. Smith *v.* Vermont Cent. R. Co., 80 Vt. 208, 67 Atl. 535.

Identification of engine.— Evidence that immediately after defendant's south-bound train passed witness saw smoke in his own woods is sufficiently definite to identify the train, the locomotive of which caused the fire in witness' woods, where he states that he saw the smoke arising from plaintiff's premises just before he saw the smoke in his own woods. Whitehurst *v.* Atlantic Coast Line R. Co., 146 N. C. 588, 60 S. E. 648. Plaintiff's testimony that "the whistle he knew as Captain Taylor's" was the one which was on the engine which passed his premises the day his property was burned is not objectionable on the ground of indefiniteness as not necessarily relating to the train which was alleged to have passed just before the fire. Whitehurst *v.* Atlantic Coast Line R. Co., 146 N. C. 588, 60 S. E. 648.

88. Cleveland, etc., R. Co. *v.* Hayes, 167 Ind. 454, 79 N. E. 448, holding that in an action against a railroad company for damages for the destruction of a house and barn by a fire in which it is claimed that the barn was set on fire by sparks from the engine and the fire communicated from the barn to the house, evidence as to how far the sparks were carried from the burning barn is admissible as part of the evidence tending to show the extent of the fire.

89. Ormond *v.* Central Iowa R. Co., 58 Iowa 742, 13 N. W. 54.

90. Southern R. Co. *v.* Dickens, 152 Ala. 210, 44 So. 402.

91. **Customary methods or acts as tending to show or refute contributory negligence** see *infra*, X, I, 6, d, (II), (J).

92. *Iowa.*— Metzgar *v.* Chicago, etc., R. Co., 76 Iowa 387, 41 N. W. 49, 14 Am. St. Rep. 224.

Maine.— Pulsifer *v.* Berry, 87 Me. 405, 32 Atl. 986.

Maryland.— Baltimore, etc., R. Co. *v.* Shipley, 39 Md. 251, holding that evidence of the usage of defendant in regard to the construction and condition of its engines is inadmissible.

Minnesota.— Continental Ins. Co. *v.* Chicago, etc., R. Co., 97 Minn. 467, 107 N. W. 548, 5 L. R. A. N. S. 99.

Ohio.— See Lake Side, etc., R. Co. *v.* Kelly, 10 Ohio Cir. Ct. 322, 6 Ohio Cir. Dec. 555.

United States.— Grand Trunk R. Co. *v.* Richardson, 91 U. S. 454, 23 L. ed. 356.

Canada.— Robinson *v.* New Brunswick R. Co., 23 N. Brunsw. 323, custom as to kind of fuel used on other railroads.

See 41 Cent. Dig. tit. "Railroads," § 1718.

A rule of defendant requiring its employees to exercise every precaution to guard against the setting out of fire is inadmissible. Alabama Great Southern R. Co. *v.* Clark, 136 Ala. 450, 34 So. 917.

A book of rules of defendant containing private rules regulating the conduct of its business is inadmissible. Continental Ins. Co. *v.* Chicago, etc., R. Co., 97 Minn. 467, 107 N. W. 548, 5 L. R. A. N. S. 99.

93. Green Ridge R. Co. *v.* Brankman, 64 Md. 52, 20 Atl. 1024, 54 Am. Rep. 755, holding that it is inadmissible for defendant to show, as tending to prove that the fire did not originate from sparks dropped from its engine, that it had been the custom for years among farmers in the vicinity to set fire to the underbrush about that season.

94. Chicago, etc., R. Co. *v.* Quaintance, 58 Ill. 389; Watt *v.* Nevada Cent. R. Co., 23 Nev. 154, 44 Pac. 423, 46 Pac. 52, 726, 62 Am. St. Rep. 772, holding that testimony of a former engineer that he kept both dampers of the ash-pan open except when going over a bridge, and that other engineers for whom he had fired did the same, is admissible to show the habit on defendant's road of running the engine with both dampers open.

Evidence that defendant habitually burned wood in its coal-burning engines, and that to burn wood in such an engine is more dangerous than to burn coal, is admissible. St. Joseph, etc., R. Co. *v.* Chase, 11 Kan. 47.

Inspection.— Evidence that for a number of years the firemen had been required, and it had been their custom, to inspect the dampers, ash-pans, and dump grates of the locomotives before they started on their trips, and had been required to report what, if anything, was needed, is competent on the question of negligence of the railroad company. Woodward *v.* Chicago, etc., R. Co., 145 Fed. 577, 75 C. C. A. 591.

(c) *Similar Facts and Transactions* — (1) IN GENERAL. As tending to show negligence on the part of the company, or a probability that one of its engines caused the fire, evidence that defendant's trains were usually run past the place where the fire originated at an unlawful rate of speed is admissible.[95] So evidence that the right of way and track at points other than that at which the fire in question was set out, but in the immediate neighborhood, were encumbered with combustible material, is admissible as tending to show negligence in failing to keep the track and right of way clear of such materials at the point where the fire started.[96] But evidence that defendant paid other persons for losses from the same fire is inadmissible as tending to show that defendant is liable to plaintiff.[97]

(2) EVIDENCE OF OTHER FIRES. In the absence of direct evidence, evidence that other fires originated from defendant's engines under like conditions at or about the same time, either before or after the fire in question, is generally admissible as tending to show a negligent habit on the part of defendant company in the construction, equipment, and management of its engines and therefore as tending to show such negligence in the particular case,[98] or as tending to show the possibility and consequent probability that the fire was set by an engine of defendant,[99] especially where the particular engine which caused the fire is not

95. Bennett *v.* Missouri, etc., R. Co., 11 Tex. Civ. App. 423, 32 S. W. 834.

96. Wabash R. Co. *v.* Miller, 158 Ind. 174, 61 N. E. 1005; Northern Pac. R. Co. *v.* Lewis, 51 Fed. 658, 2 C. C. A. 446.

Evidence of the cutting and management of weeds along the road in other years and the proper time for burning the same is inadmissible. Bryant *v.* Central Vermont R. Co., 56 Vt. 710.

97. Louisville, etc., R. Co. *v.* Roberts, 13 Ind. App. 692, 42 N. E. 247. But see Galveston, etc., R. Co. *v.* Hertzig, 3 Tex. Civ. App. 296, 22 S. W. 1013.

Evidence of an assignment by a third person of a cause of action against defendant of a similar nature is immaterial. Woodward *v.* Northern Pac. R. Co., (N. D. 1907) 111 N. W. 627.

98. *Alabama.*— Birmingham R., etc., Co. *v.* Martin, 148 Ala. 8, 42 So. 618.

California.— Butcher *v.* Vaca Valley, etc., R. Co., (1885) 5 Pac. 359.

Indiana.— Louisville, etc., R. Co. *v.* Lange, 13 Ind. App. 337, 41 N. E. 609; Evansville, etc., R. Co. *v.* Keith, 8 Ind. App. 57, 35 N. E. 296.

Indian Territory.— St. Louis, etc., R. Co. *v.* Lawrence, 4 Indian Terr. 611, 76 S. W. 254.

Kansas.— St. Joseph, etc., R. Co. *v.* Chase, 11 Kan. 47.

Kentucky.— Kentucky Cent. R. Co. *v.* Barrow, 89 Ky. 638, 20 S. W. 165, 5 Ky. L. Rep. 518; Chesapeake, etc., R. Co. *v.* Richardson, 99 S. W. 642, 30 Ky. L. Rep. 786; Illinois Cent. R. Co. *v.* Scheible, 72 S. W. 325, 24 Ky. L. Rep. 1708.

Missouri.— Hoover *v.* Missouri Pac. R. Co., (1891) 16 S. W. 480 [*overruling* Lester *v.* Kansas City R. Co., 60 Mo. 265; Coale *v.* Hannibal, etc., R. Co., 60 Mo. 227]; Big River Lead Co. *v.* St. Louis, etc., R. Co., 123 Mo. App. 394, 101 S. W. 636.

Nevada.— Longabaugh *v.* Virginia City, etc., R. Co., 9 Nev. 271.

New York.— Westfall *v.* Erie R. Co., 5 Hun 75.

Pennsylvania.— Shelly *v.* Philadelphia, etc., R. Co., 211 Pa. St. 160, 165, 60 Atl. 581, 582.

Rhode Island.— In this state it is held that evidence that previous fires on the line of a railroad have originated from sparks from defendant's locomotive is admissible to show whether defendant in view of the previous fires exercised due care at the time of the fire in question; but evidence of subsequent fires is not admissible unless the possibility of setting fire by sparks is disputed, in which case it is admissible solely for the purpose of proving such possibility. Smith *v.* Old Colony, etc., R. Co., 10 R. I. 22.

Tennessee.— Louisville, etc., R. Co. *v.* Short, 110 Tenn. 713, 77 S. W. 936.

Texas.— Missouri Pac. R. Co. *v.* Donaldson, 73 Tex. 124, 11 S. W. 163; Texas, etc., R. Co. *v.* Rutherford, 28 Tex. Civ. App. 590, 68 S. W. 825; Wilson *v.* Pecos, etc., R. Co., 23 Tex. Civ. App. 706, 58 S. W. 183; International, etc., R. Co. *v.* Newman, (Civ. App. 1897) 40 S. W. 854; Galveston, etc., R. Co. *v.* Hertzig, 3 Tex. Civ. App. 296, 22 S. W. 1013; Texas, etc., R. Co. *v.* Land, 3 Tex. App. Civ. Cas. § 50; Ft. Worth, etc., R. Co. *v.* Ratliffe, 2 Tex. App. Civ. Cas. § 681.

Virginia.— New York, etc., R. Co. *v.* Thomas, 92 Va. 606, 24 S. E. 264.

United States.— Texas, etc., R. Co. *v.* Watson, 190 U. S. 287, 23 S. Ct. 681, 47 L. ed. 1057 [*affirming* 112 Fed. 402, 50 C. C. A. 230]; Gulf, etc., R. Co. *v.* Johnson, 54 Fed. 474, 4 C. C. A. 447.

England.— Piggot *v.* Eastern Counties R. Co., 3 C. B. 229, 10 Jur. 571, 15 L. J. C. P. 235, 54 E. C. L. 229.

Canada.— Robinson *v.* New Brunswick R. Co., 23 N. Brunsw. 323.

See 41 Cent. Dig. tit. "Railroads," § 1719.

But see Bell *v.* Chicago, etc., R. Co., 64 Iowa 321, 20 N. W. 456.

99. *Alabama.*— Louisville, etc., R. Co. *v.* Malone, 109 Ala. 509, 20 So. 33.

California.— Butcher *v.* Vaca Valley, etc., R. Co., (1885) 5 Pac. 359; McMahon *v.*

identified.[1] This class of testimony, however, should be confined to other fires that occurred at or near the place of the fire complained of,[2] at or about the same time,[3] and which began on defendant's roadway,[4] or were caused by defendant's engines;[5] and it should also appear that the engines used by defendant when such

Hetchhetchy, etc., R. Co., 2 Cal. App. 400, 84 Pac. 350.

Kentucky.— Kentucky Cent. R. Co. *v.* Barrow, 89 Ky. 638, 20 S. W. 165, 5 Ky. L. Rep. 518; Mills *v.* Louisville, etc., R. Co., 76 S. W. 29, 25 Ky. L. Rep. 488.

Maine.— Dunning *v.* Maine Cent. R. Co., 91 Me. 87, 39 Atl. 352, 64 Am. St. Rep. 208; Thatcher *v.* Maine Cent. R. Co., 85 Me. 503, 27 Atl. 519.

Massachusetts.—McGinn *v.* Platt, 177 Mass. 125, 58 N. E. 175; Ross *v.* Boston, etc., R. Co., 6 Allen 87.

Michigan.— See Ireland *v.* Cincinnati, etc., R. Co., 79 Mich. 163, 44 N. W. 426.

Missouri.— Campbell *v.* Missouri Pac. R. Co., 121 Mo. 340, 25 S. W. 936, 42 Am. St. Rep. 530, 25 L. R. A. 175.

Nevada.— Longabaugh *v.* Virginia City, etc., R. Co., 9 Nev. 271.

New Hampshire.— Smith *v.* Boston, etc., R. Co., 63 N. H. 25; Boyce *v.* Cheshire R. Co., 42 N. H. 97, 43 N. H. 627.

Oregon.— Manchester Assur. Co. *v.* Oregon R. Co., 46 Oreg. 162, 79 Pac. 60, 114 Am. St. Rep. 863, 69 L. R. A. 475.

Pennsylvania.— Shelly *v.* Philadelphia, etc., R. Co., 211 Pa. St. 160, 165, 60 Atl. 581, 582; Henderson *v.* Philadelphia, etc., R. Co., 144 Pa. St. 461, 22 Atl. 851, 27 Am. St. Rep. 652, 16 L. R. A. 299; Pennsylvania R. Co. *v.* Stranahan, 79 Pa. St. 405.

Rhode Island.— MacDonald *v.* New York, etc., R. Co., 25 R. I. 40, 54 Atl. 795; Smith *v.* Old Colony, etc., R. Co., 10 R. I. 22.

Tennessee.— Louisville, etc., R. Co. *v.* Fort, 112 Tenn. 432, 80 S. W. 429.

Texas.— Texas, etc., R. Co. *v.* Land, 3 Tex. App. Civ. Cas. § 50; Ft. Worth, etc., R. Co. *v.* Ratliffe, 2 Tex. App. Civ. Cas. § 681.

Vermont.— Smith *v.* Central Vermont R. Co., 80 Vt. 208, 67 Atl. 535; Hoskinson *v.* Central Vermont R. Co., 66 Vt. 618, 30 Atl. 24.

Virginia.— Kimball *v.* Borden, 95 Va. 203, 28 S. E. 207.

Washington.— Noland *v.* Great Northern R. Co., 31 Wash. 430, 71 Pac. 1098.

United States.— Texas, etc., R. Co. *v.* Watson, 190 U. S. 287, 23 S. Ct. 681, 47 L. ed. 1057 [*affirming* 112 Fed. 402, 50 C. C. A. 230]; Grand Trunk R. Co. *v.* Richardson, 91 U. S. 454, 23 L. ed. 356; Lesser Cotton Co. *v.* St. Louis, etc., R. Co., 114 Fed. 133, 52 C. C. A. 95; Gulf, etc., R. Co. *v.* Johnson, 54 Fed. 474, 4 C. C. A. 447; Northern Pac. R. Co. *v.* Lewis, 51 Fed. 658, 2 C. C. A. 446.

See 41 Cent. Dig. tit. "Railroads," §§ 1719, 1722.

In rebuttal of evidence that other similar engines on other roads did not emit sparks that would set fire to buildings, evidence that such engines upon one of such roads have emitted sparks which set fire to objects is

[X, I, 6, d, (II), (C), (2)]

admissible. Ross *v.* Boston, etc., R. Co., 6 Allen (Mass.) 87.

Stationary engine near property.— Where a stationary boiler with a smoke-stack that had no spark arrester on it was near the property burned, and there was no positive evidence that the fire was set out by defendant's engine, evidence that some time after the fire a spark from this smoke-stack fell on a witness and burned his clothes is admissible to show that sparks emitted from this smoke-stack were alive. Ireland *v.* Cincinnati, etc., R. Co., 79 Mich. 163, 44 N. W. 426.

1. Evansville, etc., R. Co. *v.* Keith, 8 Ind. App. 57, 35 N. E. 296.

2. Louisville, etc., R. Co. *v.* Miller, 109 Ala. 500, 19 So. 989. And see cases cited in preceding notes.

3. *Alabama.*— Louisville, etc., R. Co. *v.* Miller, 109 Ala. 500, 19 So. 989.

Minnesota.— Davidson *v.* St. Paul, etc., R. Co., 34 Minn. 51, 24 N. W. 324.

Nevada.— Longabaugh *v.* Virginia City, etc., R. Co., 9 Nev. 271, holding that evidence that a fire occurred in plaintiff's woodpile previous to the building of the railroad is irrelevant.

Pennsylvania.— Henderson *v.* Philadelphia, etc., R. Co., 144 Pa. St. 461, 22 Atl. 851, 27 Am. St. Rep. 652, 16 L. R. A. 299.

Texas.— Missouri Pac. R. Co. *v.* Donaldson, 73 Tex. 124, 11 S. W. 163; Fleming *v.* Pullen, (Civ. App. 1906) 97 S. W. 109 (holding that evidence of fires at other times near the train is not admissible); Galveston, etc., R. Co. *v.* Rheiner, (Civ. App. 1894) 25 S. W. 971 (evidence as to other fires caused seven years before inadmissible); Dillingham *v.* Whitaker, (Civ. App. 1894) 25 S. W. 723.

See 41 Cent. Dig. tit. "Railroads," §§ 1719, 1722.

Evidence of a "negligent habit" on the part of the railroad company as to the construction and handling of its engines must be limited to show the prevalence of such a habit at or about the time of the fire complained of. Davidson *v.* St. Paul, etc., R. Co., 34 Minn. 51, 24 N. W. 324.

4. Louisville, etc., R. Co. *v.* Miller, 109 Ala. 500, 19 So. 989; Babcock *v.* Chicago, etc., R. Co., 62 Iowa 593, 13 N. W. 740, 17 N. W. 909.

5. *Alabama.*— Louisville, etc., R. Co. *v.* Miller, 109 Ala. 500, 19 So. 989.

Arkansas.— St. Louis, etc., R. Co. *v.* Jones, 59 Ark. 105, 26 S. W. 595.

Minnesota.— Davidson *v.* St. Paul, etc., R. Co., 34 Minn. 51, 34 N. W. 324.

North Carolina.—Johnson *v.* Atlantic Coast Line R. Co., 140 N. C. 574, 581, 53 S. E. 362.

Oregon.— Hawley *v.* Sumpter R. Co., 49 Oreg. 509, 90 Pac. 1106, 12 L. R. A. N. S. 526.

fires occurred were of the same construction, used in the same manner, and in the same state of repair as the engine used at the time of the fire complained of.[6] Evidence of other fires on defendant's right of way is also admissible to show negligence in allowing combustible material to accumulate on the right of way;[7] but it is inadmissible to show negligence in permitting fire caused by defendant to escape from its right of way.[8]

(3) EVIDENCE OF CONDITION OF OTHER ENGINES. Where the engine alleged to have caused the fire is not clearly or satisfactorily identified, evidence as to the general condition of other engines of defendant of the same general appearance and construction and under similar conditions, at about the same time and place, in respect to throwing sparks or coals capable of setting fire is admissible as tending to show a negligent habit on the part of defendant as to the construction, equipment, and management of its engines and therefore as tending to show negligence in that respect in the particular case,[9] and as tending to show a probability that the fire originated from an engine of defendant.[10] But such evidence

Texas.— Missouri Pac. R. Co. *v.* Donaldson, 73 Tex. 124, 11 S. W. 963.

See 41 Cent. Dig. tit. "Railroads," § 1719.

6. Louisville, etc., R. Co. *v.* Miller, 109 Ala. 500, 19 So. 989; Chesapeake, etc., R. Co. *v.* Richardson, 99 S. W. 642, 30 Ky. L. Rep. 786; Boyce *v.* Cheshire R. Co., 42 N. H. 97, 43 N. H. 627.

7. Wabash R. Co. *v.* Miller, 158 Ind. 174, 61 N. E. 1005; Pittsburgh, etc., R. Co. *v.* Indiana Horseshoe Co., 154 Ind. 322, 56 N. E. 766; Texas, etc., R. Co. *v.* Rutherford, 28 Tex. Civ. App. 590, 68 S. W. 825; International, etc., R. Co. *v.* Newman, (Tex. Civ. App. 1897) 40 S. W. 854; Abrams *v.* Seattle, etc., R. Co., 27 Wash. 507, 68 Pac. 78; Snyder *v.* Pittsburgh, etc., R. Co., 11 W. Va. 17.

8. Lake Erie, etc., R. Co. *v.* Miller, 24 Ind. App. 662, 57 N. E. 596.

9. *Illinois.*— Illinois Cent. R. Co. *v.* McClelland, 42 Ill. 355; Lake Erie, etc., R. Co. *v.* Cruzen, 29 Ill. App. 212.

Indiana.— Evansville, etc., R. Co. *v.* Keith, 8 Ind. App. 57, 35 N. E. 296.

Indian Territory.— St. Louis, etc., R. Co. *v.* Lawrence, 4 Indian Terr. 611, 76 S. W. 254.

Iowa.— Black *v.* Minneapolis, etc., R. Co., 122 Iowa 32, 96 N. W. 984.

Kentucky.— Kentucky Cent. R. Co. *v.* Barrow, 89 Ky. 638, 20 S. W. 165, 5 Ky. L. Rep. 518.

Maryland.—Annapolis, etc., R. Co. *v.* Gantt, 39 Md. 115.

Missouri.— Haley *v.* St. Louis, etc., R. Co., 69 Mo. 614.

New York.— Jacobs *v.* New York Cent., etc., R. Co., 107 N. Y. App. Div. 134, 94 N. Y. Suppl. 954 [*affirmed* in 186 N. Y. 586, 79 N. E. 1108]; White *v.* New York Cent., etc., R. Co., 90 N. Y. App. Div. 356, 85 N. Y. Suppl. 497 [*affirmed* in 181 N. Y. 577, 74 N. E. 1126].

Ohio.— Pennsylvania Co. *v.* Rossman, 13 Ohio Cir. Ct. 111, 7 Ohio Cir. Dec. 119 (holding that such evidence is incompetent unless limited and confined to a time and place not remote from that of the fire in question); Martz *v.* Cincinnati, etc., R. Co., 12 Ohio Cir. Ct. 144, 5 Ohio Cir. Dec. 451; Lake Side, etc., R. Co. *v.* Kelly, 10 Ohio Cir. Ct. 322, 6 Ohio Dec. 555.

Oregon.— Koontz *v.* Oregon Nav., etc., Co., 20 Oreg. 3, 23 Pac. 820.

Pennsylvania.— Shelly *v.* Philadelphia, etc., R. Co., 211 Pa. St. 160, 165, 60 Atl. 581, 582; Henderson *v.* Philadelphia, etc., R. Co., 144 Pa. St. 461, 22 Atl. 851, 27 Am. St. Rep. 652, 16 L. R. A. 299; Glaser *v.* Lewis, 17 Phila. 345; Gowen *v.* Glaser, 2 Pa. Cas. 250, 10 Atl. 417.

Texas.— Missouri, etc., R. Co. *v.* Carter, 95 Tex. 461, 68 S. W. 159; Galveston, etc., R. Co. *v.* Chittim, 31 Tex. Civ. App. 40, 71 S. W. 294.

Vermont.— Smith *v.* Central Vermont R. Co., 80 Vt. 208, 67 Atl. 535; Hoskinson *v.* Central Vermont R. Co., 66 Vt. 618, 30 Atl. 24.

England.— Piggot *v.* Eastern Counties R. Co., 3 C. B. 229, 15 L. J. C. P. 235, 10 Jur. 571, 54 E. C. L. 229.

See 41 Cent. Dig. tit. "Railroads," § 1720.

Evidence of the falling of cinders on plaintiff's premises after the fire occurred, although remote, is competent as tending to show that too much fire was thrown for a well-equipped engine. Lake Erie, etc., R. Co. *v.* Kirts, 29 Ill. App. 175; Smith *v.* Central Vermont R. Co., 80 Vt. 208, 67 Atl. 535.

10. *Alabama.*—Alabama Great Southern R. Co. *v.* Clark, 136 Ala. 450, 34 So. 917; Alabama Great Southern R. Co. *v.* Johnston, 128 Ala. 283, 29 So. 771.

California.— McMahon *v.* Hetchhetchy, etc., R. Co., 2 Cal. App. 400, 84 Pac. 350.

Florida.— Florida East Coast R. Co. *v.* Welch, 53 Fla. 145, 44 So. 250.

Maine.— Dunning *v.* Maine Cent. R. Co., 91 Me. 87, 39 Atl. 352, 64 Am. St. Rep. 208.

Massachusetts.— Bowen *v.* Boston, etc., R. Co., 179 Mass. 524, 61 N. E. 141.

Mississippi.—Alabama, etc., R. Co. *v.* Ætna Ins. Co., 82 Miss. 770, 35 So. 304.

Missouri.— Matthews *v.* Missouri Pac. R. Co., 142 Mo. 645, 44 S. W. 802.

Montana.— Diamond *v.* Northern Pac. R. Co., 6 Mont. 580, 3 Pac. 367, holding that plaintiff may show that, about the time the fire took place, fire was scattered by other engines of defendant passing the spot with-

is inadmissible until plaintiff first gives evidence tending to exclude the probability that the fire was communicated by any other means,[11] and showing that such other engines were of a similar construction and working under similar conditions.[12] So as tending to show negligence of defendant in not providing the best appliances for arresting sparks, evidence as to certain devices used at the time on other roads is admissible.[13] On the other hand it is admissible for defendant to show that all the engines which passed plaintiff's place at the time of the fire were in good order, well supplied with proper appliances, and properly operated;[14] but it is not admissible for it to show, although it is shown that the type of spark arrester with which the engine was equipped was in general use and approved by experience, that on another railroad using the same kind of appliances at the same time fires occurred from sparks emitted from the smoke-stack.[15]

(4) WHERE PARTICULAR ENGINE IS IDENTIFIED. Where it is alleged or shown that the fire was set out by a particular engine or from the nature of the case could only have been caused by such engine, evidence is admissible, as tending to show that the particular engine was improperly constructed, equipped, or managed, that the same engine had on other occasions at or about the same time and place, set other fires,[16] or emitted sparks or coals capable of causing

out showing that they were in charge of the same driver or were of the same construction as the one claimed to have caused the damages.

Nevada.— Longabaugh *v.* Virginia City, etc., R. Co., 9 Nev. 271.

New Hampshire.— Boyce *v.* Cheshire, 42 N. H. 97, 43 N. H. 627.

New York.— Crist *v.* Erie R. Co., 58 N. Y. 638 [*affirming* 1 Thomps. & C. 435] (holding that evidence that defendant's engines passing on other occasions emitted sparks and coal which fell further from the track than the building destroyed is admissible for such purpose); Field *v.* New York Cent. R. Co., 32 N. Y. 339 [*affirming* 29 Barb. 176]; Sheldon *v.* Hudson River Co., 14 N. Y. 218, 67 Am. Dec. 155 (holding that it is competent to show that at about the time of the fire sparks were so thrown by defendant's engines as to be likely to set on fire objects not more remote than plaintiff's building); O'Reilly *v.* Erie R. Co., 72 N. Y. App. Div. 228, 76 N. Y. Suppl. 171; Home Ins. Co. *v.* Pennsylvania R. Co., 11 Hun 182.

Oregon.— Manchester Assur. Co. *v.* Oregon R. Co., 46 Oreg. 162, 79 Pac. 60, 114 Am. St. Rep. 882, 69 L. R. A. 475.

Rhode Island.— Gorham Mfg. Co. *v.* New York, etc., R. Co., 27 R. I. 35, 60 Atl. 638; MacDonald *v.* New York, etc., R. Co., 25 R. I. 40, 54 Atl. 795.

Tennessee.— Louisville, etc., R. Co. *v.* Short, 110 Tenn. 713, 77 S. W. 936.

Texas.— Galveston, etc., R. Co. *v.* Chittim, 31 Tex. Civ. App. 40, 71 S. W. 294.

United States.— Grand Trunk R. Co. *v.* Richardson, 91 U. S. 454, 23 L. ed. 356; Lesser Cotton Co. *v.* St. Louis, etc., R. Co., 114 Fed. 133, 52 C. C. A. 95; Chicago, etc., R. Co. *v.* Gilbert, 52 Fed. 711, 3 C. C. A. 264.

See 41 Cent. Dig. tit. "Railroads," §§ 1720, 1722.

Evidence of the distance to which sparks have been borne on previous occasions is admissible to show the force with which engines expelled sparks, thereby illustrating the character and degree of the danger to be guarded against. Burke *v.* Louisville, etc., R. Co., 7 Heisk. (Tenn.) 451, 19 Am. Rep. 618.

11. Pennsylvania Co. *v.* Rossman, 13 Ohio Cir. Ct. 111, 7 Ohio Cir. Dec. 119.

12. O'Reilly *v.* Erie R. Co., 72 N. Y. App. Div. 228, 76 N. Y. Suppl. 171; Louisville, etc., R. Co. *v.* Sport, 110 Tenn. 713, 77 S. W. 936. But see Diamond *v.* Northern Pac. R. Co., 6 Mont. 580, 3 Pac. 367.

Where the proper construction and repair of the locomotives in question is conceded, and there is no evidence as to sparks emitted by them, evidence is inadmissible that shortly before and after the fire other engines scattered fire, when it does not appear whether the other locomotives were properly constructed, or in good order, or whether the scattered fire came from the smoke-stack, or was caused by the engineer or fireman shaking out the ash-pan, or was due to some other cause. O'Reilly *v.* King, 72 N. Y. App. Div. 357, 11 N. Y. Suppl. 515, 11 N. Y. Annot. Cas. 75.

13. Evansville, etc., R. Co. *v.* Keith, 8 Ind. App. 57, 35 N. E. 296, holding that in such a case it is not error to admit evidence of an expert in the employ of another railroad company that at the time of the fires in question a certain device to prevent the emission of sparks was in use on his road and that with proper use and handling he had never known of a fire caused by an engine so equipped. But see Cleveland, etc., R. Co. *v.* McKelvey, 12 Ohio Cir. Ct. 426, 5 Ohio Cir. Dec. 561.

14. Biering *v.* Gulf, etc., R. Co., 79 Tex. 584, 15 S. W. 576, holding also that it is not necessary for defendant in such case to show which engine caused the fire.

15. Cincinnati, etc., R. Co. *v.* Fredenlin, 3 Ohio Cir. Ct. 23, 2 Ohio Cir. Dec. 15.

16. *California.*— Butcher *v.* Vaca Valley, etc., R. Co., 67 Cal. 518, 8 Pac. 174 (evidence of other fire two weeks afterward admissible);

fire;[17] but it must be shown that such other fires or sparks,[18] and the fire in ques-

Henry *v.* Southern Pac. R. Co., 50 Cal. 176.

Florida.—Jacksonville, etc., R. Co. *v.* Peninsular Land, etc., Co., 27 Fla. 1, 104, 9 So. 661, 17 L. R. A. 33, 65.

Georgia.— Hendricks *v.* Southern R. Co., 123 Ga. 342, 51 S. E. 415; Brown *v.* Benson, 101 Ga. 753, 29 S. E. 215. See Akins *v.* Georgia R., etc., Co., 111 Ga. 815, 35 S. E. 671.

Illinois.— Baltimore, etc., R. Co. *v.* Tripp, 175 Ill. 251, 51 N. E. 833; Lake Erie, etc., R. Co. *v.* Middlecoff, 150 Ill. 127, 37 N. E. 660; Lake Erie, etc., R. Co. *v.* Kirts, 29 Ill. App. 175.

Indiana.— Chicago, etc., R. Co. *v.* Kreig, 22 Ind. App. 393, 53 N. E. 1033; Lake Erie, etc., R. Co. *v.* Gould, 18 Ind. App. 275, 47 N. E. 941.

Iowa.— Tyler *v.* Chicago, etc., R. Co., 102 Iowa 632, 71 N. W. 536; Lanning *v.* Chicago, etc., R. Co., 68 Iowa 502, 27 N. W. 478; Slossen *v.* Burlington, etc., R. Co., 60 Iowa 214, 14 N. W. 244, (1881) 10 N. W. 860.

Massachusetts.— Loring *v.* Worcester, etc., R. Co., 131 Mass. 469.

Missouri.— Patton *v.* St. Louis, etc., R. Co., 87 Mo. 115, 56 Am. Rep. 446.

New Hampshire.— Haseltine *v.* Concord R. Co., 64 N. H. 545, 18 Atl. 143.

New York.— Jacobs *v.* New York Cent., etc., R. Co., 107 N. Y. App. Div. 134, 94 N. Y. Suppl. 954 [*affirmed* in 186 N. Y. 586, 79 N. E. 1108].

North Carolina.— Whitehurst *v.* Atlantic Coast Line R. Co., 146 N. C. 588, 60 S. E. 648; Cheek *v.* Oak Grove Lumber Co., 134 N. C. 225, 46 S. E. 488, 47 S. E. 400, holding, however, that evidence that the same engine one year after set a fire is inadmissible unless the same conditions as in case of the fire in question are shown to have existed.

Pennsylvania.— Henderson *v.* Philadelphia, etc., R. Co., 144 Pa. St. 461, 22 Atl. 851, 27 Am. St. Rep. 652, 16 L. R. A. 299.

South Dakota.— Smith *v.* Chicago, etc., R. Co., 4 S. D. 71, 55 N. W. 717.

Texas.— Texas, etc., R. Co. *v.* Scottish Union Nat. Ins. Co., 32 Tex. Civ. App. 82, 73 S. W. 1088; Missouri, etc., R. Co. *v.* Pfluger, (Civ. App. 1894) 25 S. W. 792.

Virginia.— Norfolk, etc., R. Co. *v.* Briggs, 103 Va. 105, 48 S. E. 521; Brighthope R. Co. *v.* Rogers, 76 Va. 443.

Wisconsin.— Menominee River Sash, etc., Co. *v.* Milwaukee, etc., R. Co., 91 Wis. 447, 65 N. W. 176, holding, however, that it is proper to exclude evidence that the engine threw sparks two or three months afterward.

United States.— Toledo, etc., R. Co. *v.* Star Flouring Mills Co., 146 Fed. 953, 77 C. C. A. 208.

See 41 Cent. Dig. tit. "Railroads," § 1721.

But see Baltimore, etc., R. Co. *v.* Woodruff, 4 Md. 242, 59 Am. Dec. 72.

Evidence that smoke was seen along the line of the road after the engine in question had passed but not on plaintiff's premises is admissible. Lake Erie, etc., R. Co. *v.* Helmerick, 29 Ill. App. 270.

Where the engine is repaired between the time at which the former fires occurred and that at which the fire in question is set evidence as to such other fires is inadmissible. Menominee River Sash, etc., Co. *v.* Milwaukee, etc., R. Co., 91 Wis. 447, 65 N. W. 176.

Identification.— The mere fact that an engine was attached to a certain train on a certain occasion does not constitute a specific identification of the engine. The train is sufficiently identified but not its constituent parts. Evansville, etc., R. Co. *v.* Keith, 8 Ind. App. 57, 35 N. E. 296.

Time.— In an action for a loss by fire set out by sparks from a locomotive on or about April 4, 1904, evidence that witnesses had seen sparks flowing from the smoke-stack of the same locomotive between February and April which set fire on the right of way near where plaintiff's property was situated is admissible as bearing on the actual condition of the locomotive and showing that it was defective. Knott *v.* Cape Fear, etc., R. Co., 142 N. C. 238, 55 S. E. 150.

17. *Alabama.*—Alabama Great Southern R. Co. *v.* Clark, 136 Ala. 450, 34 So. 917, 145 Ala. 459, 39 So. 816, holding that evidence showing the volume of sparks emitted by such engine, and the height to which they were thrown near the place at or about the time the fire occurred, is admissible.

Kentucky.— Taylor *v.* Louisville, etc., R. Co., 41 S. W. 551, 19 Ky. L. Rep. 717.

New York.— Webb *v.* Rome, etc., R. Co., 49 N. Y. 420, 10 Am. Rep. 389 [*affirming* 3 Lans. 453].

North Carolina.— Whitehurst *v.* Atlantic Coast Line R. Co., 146 N. C. 588, 60 S. E. 648 (that it had emitted sparks on a previous day of the week immediately preceding the time of the fire complained of); Johnson *v.* Atlantic Coast Line R. Co., 140 N. C. 574, 581, 53 S. E. 362.

Pennsylvania.— Pennsylvania R. Co. *v.* Watson, 33 Leg. Int. 329.

Texas.— Fleming *v.* Pullen, (Civ. App. 1906) 97 S. W. 109.

Wisconsin.—Brusberg *v.* Milwaukee, etc., R. Co., 55 Wis. 106, 12 N. W. 416, holding that evidence is admissible to show how the fire emitted by the engine on the occasion in question compared with the fire emitted by engines on the road at other times.

See 41 Cent. Dig. tit. "Railroads," § 1721.

Where the defense is that no burning sparks could reach so far as to set fire to the property, evidence is competent to show that the same engine, using similar fuel, has emitted burning sparks which have fallen at as great a distance. Ross *v.* Boston, etc., R. Co., 6 Allen (Mass.) 87.

18. McFarland *v.* Gulf, etc., R. Co., (Tex. Civ. App. 1905) 88 S. W. 450; Norfolk, etc., R. Co. *v.* Briggs, 103 Va. 105, 48 S. E. 521. And see cases cited *supra*, notes 16, 17.

[X, I, 6, d, (II), (C), (4)]

tion,[19] were caused by the same particular engine. In such cases evidence is generally inadmissible that other engines had set fires or emitted such coals or sparks,[20] or been carelessly managed,[21] even though such other engines had the same kind of appliances as the engine in question.[22] But it has been held that such evidence is admissible upon proof that such other engines were in the same condition and operated in the same way as was the engine in question when the fire occurred;[23] and that evidence that other engines passed the same place under like conditions

19. Chicago, etc., R. Co. *v.* Ross, 24 Ind. App. 222, 56 N. E. 451.

Where there is no evidence that the same locomotive had run on the day in question evidence that some locomotive of the company had previously caused fires is inadmissible. Akins *v.* Georgia R., etc., Co., 111 Ga. 815, 35 S. E. 671.

20. *Arkansas.*— St. Louis, etc., R. Co. *v.* Jones, 59 Ark. 105, 26 S. W. 595.

Colorado.— Crissey Lumber Co. *v.* Denver, etc., R. Co., 17 Colo. App. 275, 68 Pac. 670.

Florida.— Jacksonville, etc., R. Co. *v.* Peninsular Land, etc., Co., 27 Fla. 1, 157, 9 So. 661, 17 L. R. A. 33, 65.

Illinois.— Illinois Cent. R. Co. *v.* Bailey, 222 Ill. 480, 78 N. E. 833 [*affirming* 127 Ill. App. 41]; Hoopeston First Nat. Bank *v.* Lake Erie, etc., R. Co., 174 Ill. 36, 50 N. E. 1023 [*affirming* 65 Ill. App. 21].

Indiana.— Cleveland, etc., R. Co. *v.* Loos, 38 Ind. App. 1, 77 N. E. 948; Chicago, etc., R. Co. *v.* Gilmore, 22 Ind. App. 466, 53 N. E. 1078, holding also that where such evidence is admitted it is error to refuse to charge the jury to disregard it.

Indian Territory.— Missouri, etc., R. Co. *v.* Wilder, 3 Indian Terr. 85, 53 S. W. 490.

Kansas.— Sprague *v.* Atchison, etc., R. Co., 70 Kan. 359, 78 Pac. 828; Atchison, etc., R. Co. *v.* Osborn, 58 Kan. 768, 51 Pac. 286.

Michigan.— Ireland *v.* Cincinnati, etc., R. Co., 79 Mich. 163, 44 N. W. 426.

Missouri.— Lester *v.* Kansas City, etc., R. Co., 60 Mo. 265; Coale *v.* Hannibal, etc., R. Co., 60 Mo. 227.

North Carolina.— Hygienic Plate Ice Mfg. Co. *v.* Raleigh, etc., R. Co., 126 N. C. 797, 36 S. E. 279.

Pennsylvania.— Shelly *v.* Philadelphia, etc., R. Co., 211 Pa. St. 160, 60 Atl. 581, 211 Pa. St. 165, 60 Atl. 582; Glaser *v.* Lewis, 17 Phila. 345.

Texas.— McFarland *v.* Gulf, etc., R. Co., (Civ. App. 1905) 88 S. W. 450; San Antonio, etc., R. Co. *v.* Home Ins. Co., (Civ. App. 1902) 70 S. W. 999. See also Gulf, etc., R. Co. *v.* Johnson, 28 Tex. Civ. App. 395, 67 S. W. 182.

Virginia.— Norfolk, etc., R. Co. *v.* Briggs, 103 Va. 105, 48 S. E. 521.

Wisconsin.—Allard *v.* Chicago, etc., R. Co., 73 Wis. 165, 40 N. W. 685; Gibbons *v.* Wisconsin Valley R. Co., 58 Wis. 335, 17 N. W. 132.

United States.— Lesser Cotton Co. *v.* St. Louis, etc., R. Co., 114 Fed. 133, 52 C. C. A. 95.

See 41 Cent. Dig. tit. "Railroads," § 1721.

But see Sheldon *v.* Hudson River R. Co., 14 N. Y. 218, 67 Am. Dec. 155.

Reason for rule.— Evidence of former fires caused by the same engine is admissible as tending to prove its defective condition or construction, or improper management, and evidence of fires caused by other engines is excluded because they are matters collateral to the issue, and not evidence of the imperfect condition or bad management of the particular locomotive. Jacksonville, etc., R. Co. *v.* Peninsular Land, etc., Co., 27 Fla. 1, 157, 9 So. 661, 17 L. R. A. 33, 65.

Where it is shown with reasonable certainty that one of two locomotives communicated the fire, it is immaterial that it cannot be proved which one of them did so; but the inquiry should be confined to the equipment and management of the two locomotives and evidence that at other times other engines had emitted sparks and caused fires is inadmissible. Tribette *v.* Illinois Cent. R. Co., 71 Miss. 212, 13 So. 899; Phœnix Ins. Co. *v.* New York Cent., etc., R. Co., 75 Hun (N. Y.) 216, 26 N. Y. Suppl. 1102; Albert *v.* Northern Cent. R. Co., 98 Pa. St. 316; Gibbons *v.* Wisconsin Valley R. Co., 58 Wis. 335, 17 N. W. 132.

Evidence too remote.—Evidence that during the previous winter the spark arresters on defendant's engines were in a defective condition is inadmissible as being too remote. Toledo, etc., R. Co. *v.* Needham, 105 Ill. App. 25.

To show possibility of fire.— Testimony as to other fires caused by passing engines of defendant is admissible to show at what distance from the right of way sparks from the engines had fallen for the purpose of contradicting the testimony of defendant's experts that it was impossible for cinders from the smoke-stack of the engine to have fallen so far from the track as to have caused the fire on plaintiff's premises. Whitehurst *v.* Atlantic Coast Line R. Co., 146 N. C. 588, 60 S. E. 648.

21. Atchison, etc., R. Co. *v.* Osborn, 58 Kan. 768, 51 Pac. 286; Shelly *v.* Philadelphia, etc., R. Co., 211 Pa. St. 160, 165, 60 Atl. 581, 582.

Evidence that engineers were accustomed to punch holes in spark arresters is inadmissible where the particular engine is identified. Lesser Cotton Co. *v.* St. Louis, etc., R. Co., 114 Fed. 133, 52 C. C. A. 95.

22. Hoopeston First Nat. Bank *v.* Lake Erie, etc., R. Co., 174 Ill. 36, 50 N. E. 1023 [*affirming* 65 Ill. App. 21]; Lesser Cotton Co. *v.* St. Louis, etc., R. Co., 114 Fed. 133, 52 C. C. A. 95.

23. Boyce *v.* Cheshire R. Co., 42 N. H. 97, 43 N. H. 627. See Tapley *v.* St. Louis, etc., R. Co., 129 Mo. App. 88, 107 S. W. 470.

of wind and weather without causing fire at or near the place is admissible as tending to show that the engine complained of was not in good condition or was improperly managed.[24]

(D) *Subsequent Repairs or Precautions.* In some jurisdictions it is held that evidence of subsequent repairs to a locomotive which is alleged to have caused the injury,[25] or to the right of way,[26] or of additional precautions, as in the employment of more men,[27] is admissible on the question of antecedent negligence of defendant. In other jurisdictions, however, it is held that since acts which follow the injury cannot be proven to establish antecedent negligence,[28] the mere fact that an engine alleged to have set a fire is subsequently repaired cannot be considered in determining whether it was defective or not at the time the fire was set;[29] nor can the fact that employees of the railroad ompany materially assisted in putting out the fire be considered.[30]

(E) *Competency and Qualification of Employees.* As tending to show that defendant's engine was operated in a careful and prudent manner at the time of the fire, evidence is admissible to show that defendant's fireman and engineer in charge of the engine alleged to have caused the fire were careful and prudent men,[31] for which purpose testimony of a member of the board of examiners may be material and relevant.[32] But it is held that expert testimony as to the character of defendant's employees for care and prudence is inadmissible.[33]

(F) *Nature and Extent of Damages.* In order to show the nature and extent of the damages to property burned, if such property was entirely destroyed, evidence is admissible to show its value at the time it was destroyed,[34] or to show

24. Louisville, etc., R. Co. *v.* Sherrell, (Ala. 1905) 152 Ala. 213, 44 So. 153, 44 So. 631; Alabama Great Southern R. Co. *v.* Clark, 136 Ala. 450, 34 So. 917 (in rebuttal of evidence that the engine alleged to have set the fire was in good condition); Atchison, etc., R. Co. *v.* Stanford, 12 Kan. 354, 15 Am. Rep. 362 (holding also that it is not necessary that the conditions of wind and weather and other things connected with the passage of the engines should be exactly like the conditions that existed when the engine complained of set the fire).

25. Butcher *v.* Vaca Valley, etc., R. Co., 67 Cal. 518, 8 Pac. 174.

Where there is evidence that certain appliances were in a defective condition at the time of the fire evidence that when such appliances were changed after the damage was done the dangerous emission of sparks ceased is admissible. Alpern *v.* Churchill, 53 Mich. 607, 19 N. W. 549.

26. Young *v.* Great Northern R. Co., 8 N. D. 345, 79 N. W. 448, holding that evidence that after the fire defendant caused fire-breaks to be constructed on both sides of its track, as the statute requires, is admissible to show what right of way had been in use by defendant.

27. Westfall *v.* Erie R. Co., 5 Hun (N. Y.) 75, holding that evidence to show the employment of more men by defendant after the fire than before, the necessity of having some men to walk the track being conceded, is properly allowed to go to the jury upon the question whether too few or incompetent men had been previously employed.

28. Denver, etc., R. Co. *v.* Morton, 3 Colo. App. 155, 32 Pac. 345.

29. Louisville, etc., R. Co. *v.* Malone, 109 Ala. 509, 20 S. W. 33.

30. Denver, etc., R. Co. *v.* Morton, 3 Colo. App. 155, 32 Pac. 345.

31. Patton *v.* St. Louis, etc., R. Co., 87 Mo. 117, 56 Am. Rep. 446; Kenney *v.* Hannibal, etc., R. Co., 70 Mo. 243. *Compare* McFarland *v.* Gulf, etc., R. Co., (Tex. Civ. App. 1905) 88 S. W. 450, competency not in issue.

Education.— Where a fireman on an engine alleged to have set the fire testified that he was subsequently promoted to the position of engineer, but read no books on engineering or on the construction of locomotives, he cannot further be questioned as to what education he had received in reference to his position as engineer, since such inquiry is immaterial to the issue. Ireland *v.* Cincinnati, etc., R. Co., 79 Mich. 163, 44 N. W. 426.

32. Flynn *v.* Manhattan R. Co., 1 Misc. (N. Y.) 188, 20 N. Y. Suppl. 652.

33. Bryant *v.* Central Vermont R. Co., 56 Vt. 710, holding that testimony by defendant's road-master as an expert that the section-man in charge of the place where the fire originated, was a careful, prudent, and attentive man is inadmissible.

34. Terre Haute, etc., R. Co. *v.* Walsh, 11 Ind. App. 13, 38 N. E. 534; Krejci *v.* Chicago, etc., R. Co., 117 Iowa 344, 90 N. W. 708; Tyler *v.* Chicago, etc., R. Co., 102 Iowa 632, 71 N. W. 536; Rowe *v.* Chicago, etc., R. Co., 102 Iowa 286, 71 N. W. 409 (holding that evidence of the income from the orchard destroyed by fire for several years prior to the fire is admissible); Houston, etc., R. Co. *v.* Smith, (Tex. Civ. App. 1898) 46 S. W. 1046; Galveston, etc., R. Co. *v.* Rheiner, (Tex. Civ. App. 1894) 25 S. W. 971 (value of grass for grazing); Gulf, etc., R. Co. *v.* Matthews, 3 Tex. Civ. App. 493, 23 S. W. 90 (value of grass as hay, as well as for pasturage).

the cost or difficulty of replacing it,[35] or if it is only partially destroyed to show its value before and after the fire,[36] such as the difference in yield, other conditions being the same, between the portion of land burned and the portion not burned,[37] the rental value of the property after the fire,[38] the probability that the land would have increased in value,[39] or to show plaintiff's interest in the property.[40] If the property destroyed has no market value witnesses

The value of the thing destroyed as part of the realty may be shown by plaintiff, although his recovery is limited to the actual diminution in the value of the realty. Atchison, etc., R. Co. *v.* Hays, 8 Kan. App. 545, 54 Pac. 322.

Men qualified by experience may give their opinions as to the value of the grass for pasturage or for use in the winter. Galveston, etc., R. Co. *v.* Rheiner, (Tex. Civ. App. 1894) 25 S. W. 971.

In an action for the destruction of fruit trees by fire it is competent to show the value of the trees destroyed independent of the value to the freehold. St. Louis, etc., R. Co. *v.* Noland, 75 Kan. 691, 90 Pac. 273.

35. Leiber *v.* Chicago, etc., R. Co., 84 Iowa 97, 50 N. W. 547, holding that where certain trees have been destroyed evidence that it will be difficult by reason of the shade of other trees to grow trees in the place of those destroyed is admissible.

Evidence of the cost of building new houses of the kind burned, although not the criterion by which to measure the damages caused by their destruction, is relevant as tending to show what was the value of the property at the time of the fire. Alabama Great Southern R. Co. *v.* Johnston, 128 Ala. 283, 29 So. 771 (holding also that the diagrams of the plan by which the houses were constructed, in connection with proof that such diagrams were correct, are admissible); Cleveland, etc., R. Co. *v.* McKelvey, 12 Ohio Cir. Ct. 426, 5 Ohio Cir. Dec. 561.

36. Toledo, etc., R. Co. *v.* Fenstermaker, 163 Ind. 534, 72 N. E. 561; Chicago, etc., R. Co. *v.* Kern, 9 Ind. App. 505, 36 N. E. 381 (holding that where fruit trees are killed or damaged and fruit destroyed it is admissible to show what part of the orchard, if any, bore fruit after the fire); Hamilton *v.* Des Moines, etc., R. Co., 84 Iowa 131, 50 N. W. 567; St. Louis, etc., R. Co. *v.* Noland, 75 Kan. 691, 90 Pac. 273; Clark *v.* Ellithorp, 7 Kan. App. 337, 51 Pac. 940 (holding, however, that it is error to admit the testimony of a witness who is not qualified to testify to the value of such land); Cleveland, etc., R. Co. *v.* McKelvey, 12 Ohio Cir. Ct. 426, 5 Ohio Cir. Dec. 561.

Where growing grass is destroyed by fire, evidence that another crop of a certain value might be grown on the land during the same growing period of the average yield and market price of like crops, the ordinary expense of harvesting and marketing the same and of the condition of the particular crop before the fire is admissible. Ward *v.* Chicago, etc., R. Co., 61 Minn. 449, 63 N. W. 1104. It is also admissible to show what effect the burning of grass at the time and in the condition the grass in question was generally has on sod (Gulf, etc., R. Co. *v.* Jagoe, (Tex. Civ. App. 1895) 32 S. W. 1061), and to show that the same land had previously been burned off and that the turf and roots were damaged thereby (Gulf, etc., R. Co. *v.* Sadler, 8 Tex. Civ. App. 300, 27 S. W. 904).

What the land burned off previously produced may be shown. Donovan *v.* Chicago, etc., R. Co., 93 Wis. 373, 67 N. W. 721.

Evidence as to injury to other property near by under the same conditions is admissible. Bradley *v.* Iowa Cent. R. Co., 111 Iowa 562, 82 N. W. 996.

In an action for injuries to property from smoke and cinders, a witness familiar with the property may describe the effects thereon produced by smoke, gas, vapors, etc. Baltimore Belt R. Co. *v.* Sattler, 102 Md. 595, 62 Atl. 1125, 64 Atl. 507.

Evidence of what plaintiff paid for the land is inadmissible. MacDonald *v.* New York, etc., R. Co., 25 R. I. 40, 54 Atl. 795.

Opinions of witnesses as to the effect of flames on a hedge and meadow are admissible, when they have shown themselves qualified to express an opinion. Bradley *v.* Iowa Cent. R. Co., 111 Iowa 562, 82 N. W. 996.

37. Lake Erie, etc., R. Co. *v.* Holderman, 56 Ill. App. 144; San Antonio, etc., R. Co. *v.* Stone, (Tex. Civ. App. 1901) 60 S. W. 461, evidence of injury to turf as affecting next year's crop of grass.

38. St. Louis, etc., R. Co. *v.* Ayres, 67 Ark. 371, 55 S. W. 159, holding that where the property injured is held for renting only, evidence of the rental value of the lands after the fire is admissible for the purpose of showing the extent to which the consequences of the fire might have been avoided by plaintiff.

Where the cost of restoring a meadow destroyed by fire is in issue, evidence that plaintiff had rented it for a certain sum per acre before he began to remake is inadmissible. Bradley *v.* Iowa Cent. R. Co., 111 Iowa 562, 82 N. W. 996.

39. Terre Haute, etc., R. Co. *v.* Walsh, 11 Ind. App. 13, 38 N. E. 535 (holding that where the damage is to a certain meadow, it is proper to admit evidence that as the meadow became older the quantity and quality of the hay became better on land of that character and to show how long the meadow would have continued to so improve); Moore *v.* Chicago, etc., R. Co., 78 Wis. 120, 47 N. W. 273 (holding that where the fire destroyed a cranberry marsh, evidence as to its natural advantages favorable to the accumulation of water from adjoining lands, rendering the marsh more productive, is admissible).

40. Pennsylvania Co. *v.* Hunsley, 23 Ind. App. 37, 54 N. E. 1071, holding that where plaintiff has disclosed the fact that he is

who show that they have some knowledge of the value of such property may be allowed to state what they consider that the property destroyed was worth.[41] But evidence of matters occurring subsequent to the fire is not admissible;[42] nor where it does not appear that the conditions in both cases were the same, can another person whose land had been previously burned off testify as to the amount of the loss;[43] nor can defendant show that it would have been more profitable for plaintiff to have raised some other crop than the one burned,[44] or than the one raised after the fire.[45]

(G) *Defects in and Management of Engines.*[46] As tending to show that the engine causing the fire was negligently constructed, equipped, or managed, plaintiff may show the condition of the locomotive, at the time of the fire and at other times,[47] as that the sparks emitted at the time were unusual in quantity and size,[48] and that the train it was hauling was a short one;[49] but he cannot show the size

joint plaintiff in another suit pending against defendant for the same fire, it is proper to ask him the amount of his claim, as showing an interest not limited to the amount involved in this trial.

41. Lanning *v.* Chicago, etc., R. Co., 68 Iowa 502, 27 N. W. 478 (a vine and hedge); Baltimore Belt R. Co. *v.* Sattler, 102 Md. 595, 62 Atl. 1125, 64 Atl. 507; Baltimore, etc., R. Co. *v.* Shipley, 39 Md. 251 (holding that such witness cannot base his estimate upon the representations of others).

Evidence as to the cost of a hedge and injury to the ornamental appearance of the land on which it stood is admissible on the question of damages. Muldrow *v.* Missouri, etc., R. Co., 62 Mo. App. 431.

42. Ward *v.* Chicago, etc., R. Co., 61 Minn. 449, 63 N. W. 1104.

Where the claim for damages is limited to the institution of the suit, testimony as to the condition of the property at the time the witness is called to testify is inadmissible. Baltimore Belt R. Co. *v.* Sattler, 102 Md. 595, 62 Atl. 1125, 64 Atl. 507.

43. Lake Erie, etc., R. Co. *v.* Cruzen, 29 Ill. App. 212. *Compare* Castner *v.* Chicago, etc., R. Co., 126 Iowa 581, 102 N. W. 499, holding that testimony of a witness who owned land some miles distant, which had been burned over at about the same time of the year, and under similar circumstances, that it was not injured by such burning, is admissible, although the land is not shown to be similarly situated.

44. Bradley *v.* Iowa Cent. R. Co., 111 Iowa 562, 82 N. W. 996.

45. Toledo, etc., R. Co., *v.* Kingman, 49 Ill. App. 43.

46. **Admissibility of similar facts and transactions** see *supra*, X, I, 6, d, (II), (C), (4).

47. Brown *v.* Benson, 101 Ga. 753, 29 S. E. 215; Hockstedler *v.* Duhuque, etc., R. Co., 88 Iowa 286, 55 N. W. 74 (holding this to be true where there is evidence that the engine was in perfect condition for some time before and after the fire); Woodward *v.* Chicago, etc., R. Co., 145 Fed. 577, 75 C. C. A. 591.

Evidence of an examination of an engine which is claimed to have passed where the fire originated a few minutes before its discovery, made a week or two after the fire, is admissible. Crissey, etc., Lumber Co. *v.* Denver, etc., R. Co., 17 Colo. App. 275, 68 Pac. 670.

Where an engineer testifying for plaintiff has described the screens in ordinary use, and has identified such a screen, and it is put in evidence, he may state, from his own observation, whether, if an engine is "properly constructed," certain cinders in evidence could be emitted; the context showing that by "properly constructed" was meant provided with such a screen as had just been identified, and it being contended by defendant that heated cinders are often forced through meshes that they could not pass through when cold. Brush *v.* Long Island R. Co., 10 N. Y. App. Div. 535, 42 N. Y. Suppl. 103 [*affirmed* in 158 N. Y. 742, 53 N. E. 1123].

Testimony by witness conversant with that class of business is competent to show defects in the mode in which the netting of the spark arrester was attached and secured around the exhaust pipe, as to the effect of sparks and their vitality, and the distance to which they could be carried and still start a fire. Cleveland, etc., R. Co. *v.* McKelvey, 12 Ohio Cir. Ct. 426, 5 Ohio Cir. Dec. 561.

Specimens of wire netting used upon spark arresters by and procured from defendant's shops are inadmissible where there is no proof that this kind was used upon the engines at the time, and the wire netting was procured two or three years after the fire. Cleveland, etc., R. Co. *v.* McKelvey, 12 Ohio Cir. Ct. 426, 5 Ohio Cir. Dec. 561.

Sparks picked up and produced are admissible in evidence when it is clearly established that they came from the engine. Cleveland, etc., R. Co. *v.* McKelvey, 12 Ohio Cir. Ct. 426, 5 Ohio Cir. Dec. 561. See also Cincinnati, etc., R. Co. *v.* Cecil, 90 S. W. 585, 28 Ky. L. Rep. 830.

48. Birmingham R., etc., Co. *v.* Hinton, 141 Ala. 606, 37 So. 635; Louisville, etc., R. Co. *v.* Marbury Lumber Co., 132 Ala. 520, 32 So. 745, 90 Am. St. Rep. 917; Anderson *v.* Oregon R. Co., 45 Oreg. 211, 77 Pac. 119.

The quantity of sparks thrown by the engine at the time as compared with that thrown by other engines along the road may be testified to. Orient Ins. Co. *v.* Northern Pac. R. Co., 31 Mont. 502, 78 Pac. 1036.

49. Louisville, etc., R. Co. *v.* Marbury Lum-

of sparks emitted from the engine some time after the fire without first showing that the construction of the arrester was clearly defective in the first place,[50] or that the engine and arrester were in the same condition of repair as at the time of the fire;[51] nor can he introduce evidence which can serve no purpose but to inflame and prejudice the minds of the jury.[52] As tending to refute such negligence defendant may introduce evidence comparing the appliances in use at the time of the fire with those used on other roads, where there is evidence as to such other appliances,[53] or to show what effect the use of different appliances on the engine would have,[54] or to show that the grade of the road at the place of the fire was steep and that engines drawing trains up such a grade are obliged to labor hard and therefore emit more sparks.[55]

(H) *Combustibles on Railroad Property.* Evidence that a railroad company has allowed dry grass, weeds, or other combustible material to accummulate on its right of way is admissible in an action against it for burning property along its road,[56] except where there is uncontradicted evidence that the fire was set on plaintiff's land and not on the right of way.[57]

(I) *Contributory Negligence.* For the purpose of refuting contributory negligence plaintiff may show that he acted with prudence and due care to protect his property,[58] or, if he has failed to perform a certain act, that performance would not have afforded him adequate protection in the particular case.[59] As tending to show or refute contributory negligence it is not permissible to introduce evidence of the custom of other persons in the neighborhood,[60] but it is permissible to

ber Co., 132 Ala. 520, 32 So. 745, 90 Am. St. Rep. 917.

50. Collins *v.* New York Cent., etc., R. Co., 109 N. Y. 243, 16 N. E. 50.

51. Collins *v.* New York Cent., etc., R. Co., 109 N. Y. 243, 16 N. E. 50.

52. Kenney *v.* Hannibal, etc., R. Co., 70 Mo. 243 (holding that plaintiff cannot exhibit to the jury an old, worn spark arrester shown to have been found on the company's right of way a month before the fire, but which could not have been in use at that time); Pennsylvania R. Co. *v.* Page, 9 Pa. Cas. 445, 12 Atl. 662 (holding that evidence that defendant was in the habit of refusing to adopt certain appliances to modify the discharge of smoke from its locomotives on account of the cost until after the patents on them had expired is improperly admitted).

53. Collins *v.* New York Cent., etc., R. Co., 109 N. Y. 243, 16 N. E. 50 (holding that where the negligence alleged is the use of a defective spark arrester, it is error not to allow the engineer to testify, there being evidence that an engine on another road with a different spark arrester had passed near the property a short time before the fire, as to which kind of spark arrester used on the two engines from his observation allowed the more and larger sparks to escape); Cleveland, etc., R. Co. *v.* McKelvey, 12 Ohio Cir. Ct. 426, 5 Ohio Cir. Dec. 429.

54. Carter *v.* Kansas City, etc., R. Co., 65 Iowa 287, 21 N. W. 607, holding that where it is proved that the railroad company used netting wire of a certain kind to prevent the escape of sparks, it should be allowed to prove that a finer netting would affect the draft of the engine.

55. Frier *v.* Delaware, etc., Canal Co., 86 Hun (N. Y.) 464, 23 N. Y. Suppl. 886.

56. St. Louis, etc., R. Co. *v.* Richardson, 47 Kan. 517, 28 Pac. 183; Cantlon *v.* Eastern R. Co., 45 Minn. 481, 48 N. W. 22, holding that such evidence is admissible as bearing upon the degree of care necessary in operating the locomotive. And see *supra*, X, I, 3, a, (II), (III).

Combustibles at different points on right of way see *supra*, X, I, 6, d, (II), (C), (1).

Other fires on right of way as evidence of combustibles thereon see *supra*, X, I, 6, d, (II), (C), (2).

57. Missouri, etc., R. Co. *v.* Stafford, (Tex. Civ. App. 1895) 31 S. W. 319.

58. Gram *v.* Northern Pac. R. Co., 1 N. D. 252, 46 N. W. 972, holding that he may prove that he had established a fire break around the property damaged.

Evidence that defendant had induced plaintiff to rebuild the property burned by offering to haul lumber for such purpose at half-rates is admissible as tending to show that the site was reasonably suitable and safe. Toledo, etc., R. Co. *v.* Oswald, 41 Ill. App. 590.

59. Lewis *v.* Chicago, etc., R. Co., 57 Iowa 127, 10 N. W. 336, holding that in an action to recover for the loss of certain stacks of hay burned by sparks from defendant's engine plaintiff may show that certain other stacks around which he had plowed as a protection were also burned as tending to rebut the inference of contributory negligence from his failure to plow around the stacks in question.

60. Slossen *v.* Burlington, etc., R. Co., 60 Iowa 214, 14 N. W. 244 (holding that testimony that ordinarily prudent farmers who had stacks in their fields adjoining the railroad had not up to the time of the fire plowed around them is not competent to show want of contributory negligence by plaintiff); Ormond *v.* Central Iowa R. Co., 58 Iowa 742, 13 N. W. 54.

show that similar property of other persons placed in similar proximity to the track had not been set on fire.[61]

(III) *WEIGHT AND SUFFICIENCY* — (A) *In General.* The general rules of evidence governing the weight and sufficiency of evidence in civil cases[62] apply in actions against a railroad company for damages by fire.[63] So plaintiff must show by a preponderance of evidence and to the satisfaction of the jury that the fire causing the injury originated or spread through the negligence of defendant,[64] and that the fire was communicated to the property injured by an engine passing over defendant's railway,[65] although it need not be shown that any particular engine was at fault.[66] This evidence of defendant's negligence may be either direct or circumstantial, or both,[67] whether offered in rebuttal or in chief,[68] such as evidence that it was possible for fire to reach plaintiff's property from defendant's engines,[69] and that it probably originated from that cause and no other.[70]

(B) *Origin or Cause of Fire.* To show that the fire causing the injury was originated or caused by defendant, circumstantial as well as direct evidence showing that it originated from defendant's property,[71] or was communicated from

61. Bennett *v.* Missouri, etc., R. Co., 11 Tex. Civ. App. 423, 32 S. W. 834, holding that on the issue whether the owner of cotton destroyed by fire escaping from defendant's locomotive was negligent in placing the cotton near the railroad track, evidence that defendant's train frequently passed cotton in open cars near the track without setting fire thereto is admissible.

62. See, generally, EVIDENCE, 17 Cyc. 753 *et seq.*

63. See Baltimore, etc., R. Co. *v.* Shipley, 39 Md. 251; Jaffrey *v.* Toronto, etc., R. Co., 24 U. C. C. P. 271.

Sufficiency of evidence to raise question for jury see *infra*, X, I, 6, f.

Sufficiency of evidence to raise prima facie case of negligence see *supra*, X, I, 6, d, (I), (B), (1).

Sufficiency of evidence to rebut presumption of negligence see *supra*, X, I, 6, d, (I), (B), (2).

Contributory negligence.— Evidence held insufficient to show negligence of plaintiff or his employees in charge of the property destroyed by fire based on a failure to save the property from destruction after the discovery of the fire and its advance toward the property (Smith *v.* Ogden, etc., R. Co., 33 Utah 129, 93 Pac. 185); or on a failure to watch and protect the property (St. Louis, etc., R. Co. *v.* Clements, 82 Ark. 3, 99 S. W. 1106; Hawley *v.* Sumpter R. Co., 49 Oreg. 509, 90 Pac. 1106, 12 L. R. A. N. S. 526).

Evidence held sufficient: To sustain a judgment for plaintiff. Cleveland, etc., R. Co. *v.* Hayes, 167 Ind. 454, 79 N. E. 448. To support a finding that plaintiff owned the premises described in the petition. St. Louis, etc., R. Co. *v.* Noland, 75 Kan. 691, 90 Pac. 273.

64. Union Pac. R. Co. *v.* Keller, 36 Nebr. 189, 54 N. W. 420; McCaig *v.* Erie R. Co., 8 Hun (N. Y.) 599 (holding that if the jury cannot find in the evidence any rational ground on which to impute negligence to defendant, they should render their verdict in its favor); Allibone *v.* Texas, etc., R. Co., 2 Tex. App. Civ. Cas. § 64.

Plaintiff is not bound to prove negligence beyond a reasonable doubt, although he must prove to the satisfaction of the jury that the fire was occasioned by the negligence of defendant. Baltimore, etc., R. Co. *v.* Shipley, 39 Md. 251.

65. Union Pac. R. Co. *v.* Keller, 36 Nebr. 189, 54 N. W. 420; Martin *v.* Missouri Pac. R. Co., 3 Tex. Civ. App. 133, 22 S. W. 195, holding that if plaintiff fails to show by a preponderance of evidence that the fire originated from sparks or cinders he is not entitled to recover whether free from contributory negligence or not. And see *infra*, X, I, 6, d, (III), (B).

Evidence held sufficient to justify a judgment for plaintiff in an action for damages caused by fire set by defendant's locomotive see Southern R. Co. *v.* Herrington, 128 Ga. 438, 57 S. E. 694; Firemen's Fund Ins. Co. *v.* Northern Pac. R. Co., 46 Wash. 635, 91 Pac. 13.

66. Union Pac. R. Co. *v.* Keller, 36 Nebr. 189, 54 N. W. 420.

67. Pittsburgh, etc., R. Co. *v.* Wilson, 161 Ind. 701, 66 N. E. 899; Tapley *v.* St. Louis, etc., R. Co., 129 Mo. App. 88, 107 S. W. 470; Union Pac. R. Co. *v.* Keller, 36 Nebr. 189, 54 N. W. 420; Donovan *v.* Chicago, etc., R. Co., 93 Wis. 373, 67 N. W. 721; Henley *v.* Canadian Pac. R. Co., 21 Can. L. T. Occ. Notes 394.

68. Babcock *v.* Chicago, etc., R. Co., 62 Iowa 593, 13 N. W. 740, 17 N. W. 909.

69. Union Pac. R. Co. *v.* Keller, 36 Nebr. 189, 54 N. W. 420.

70. Union Pac. R. Co. *v.* Keller, 36 Nebr. 189, 54 N. W. 420. And see *infra*, X, I, 6, d, (III), (B).

71. Lake Erie, etc., R. Co. *v.* Murray, 86 Ill. App. 461; Baltimore, etc., R. Co. *v.* O'Brien, 38 Ind. App. 143, 77 N. E. 1131; Kearney County *v.* Chicago, etc., R. Co., 76 Nebr. 861, 108 N. W. 131; Union Pac. R. Co. *v.* Fickenscher, 74 Nebr. 497, 105 N. W. 39, 110 N. W. 561; Briggs *v.* New York Cent., etc., R. Co., 72 N. Y. 26 [*overruling* Briggs *v.* New York Cent., etc., R. Co., 1 Sheld. 433] (fire from stove in switch-house); Frace *v.* New York, etc., R. Co., 68 Hun (N. Y.) 325, 22 N. Y. Suppl. 958 [*reversed* on other grounds in 143 N. Y. 182, 38 N. E. 102].

one of defendant's engines,[72] is sufficient. Thus such evidence may be sufficient where it shows that there was no probable cause for the fire except the company's locomotive,[73] as where it shows that the fire started immediately or soon after one of defendant's engines had passed, and that there was no other fire in the

Communication from buildings on right of way.— Evidence held sufficient see Briggs *v.* New York Cent., etc., R. Co., 72 N. Y. 26 [*overruling* Briggs *v.* New York Cent., etc., R. Co., 1 Sheld. 433]; Van Fleet *v.* New York Cent., etc., R. Co., 7 N. Y. Suppl. 636. But the mere fact that a kerosene lamp was left burning near an open window of defendant's telegraph office, which was separated only by a thin partition from the building in which plaintiff's property was stored, is not sufficient to show that the fire was caused by such lamp. Wood *v.* Chicago, etc., R. Co., 51 Wis. 196, 8 N. W. 214.

Evidence held insufficient to trace, identify, and connect the fire which destroyed the property with that set out on defendant's right of way and relied upon as the origin of the injury see Brennan Lumber Co. *v.* Great Northern R. Co., 77 Minn. 360, 79 N. W. 1032, 80 Minn. 205, 83 N. W. 137; Baxter *v.* Great Northern R. Co., 73 Minn. 189, 75 N. W. 1114; Union Pac. R. Co. *v.* Fickenscher, 72 Nebr. 187, 100 N. W. 207.

72. *Kansas.*— Atchison, etc., R. Co. *v.* Hutchison, 8 Kan. App. 605, 56 Pac. 144.

Kentucky.— Taylor *v.* Louisville, etc., R. Co., 41 S. W. 551, 19 Ky. L. Rep. 717, holding that evidence which authorizes such a conclusion is sufficient, although the testimony does not certainly establish that the property was fired by sparks from the engine.

Missouri.— Tapley *v.* St. Louis, etc., R. Co., 129 Mo. App. 88, 107 S. W. 470, holding that plaintiff can establish his case by circumstantial evidence and will not be defeated for lack of positive testimony if he proves facts authorizing an inference that coals or sparks from an engine of defendant were the source of his loss.

Pennsylvania.— Philadelphia, etc., R. Co. *v.* Hendrickson, 80 Pa. St. 182, 21 Am. Rep. 97.

Texas.— Fleming *v.* Pullen, (Civ. App. 1906) 97 S. W. 109.

Canada.— Grand Trunk R. Co. *v.* Rainville, 29 Can. Sup. Ct. 201 [*affirming* 25 Ont. App. 242 (*affirming* 28 Ont. 625)].

See 41 Cent. Dig. tit. "Railroads," § 1731.

Evidence held sufficient to show that the fire was communicated from one of defendant's engines see Southern R. Co. *v.* Elliott, 129 Ga. 705, 59 S. E. 786; Chicago, etc., R. Co. *v.* Williams, 131 Ind. 30, 30 N. E. 696; St. Louis, etc., R. Co. *v.* Noland, 75 Kan. 691, 90 Pac. 273; Reishus *v.* Willmar, etc., R. Co., 92 Minn. 371, 100 N. W. 1; Big River Lead Co. *v.* St. Louis, etc., R. Co., 123 Mo. App. 394, 101 S. W. 636 (sparks); England *v.* Wabash R. Co., 114 Mo. App. 546, 90 S. W. 111; Chicago, etc., R. Co. *v.* Beal, 4 Nebr. (Unoff.) 510, 94 N. W. 956; Babbitt *v.* Erie R. Co., 108 N. Y. App. Div. 74, 95 N. Y. Suppl. 429; Jacobs *v.* New York Cent., etc., R. Co., 107 N. Y. App. Div. 134, 94 N. Y. Suppl. 954 [*affirmed* in 186 N. Y. 586, 79 N. E. 1108]; Munson *v.* New York Cent., etc., R. Co., 55 N. Y. App. Div. 523, 66 N. Y. Suppl. 973; Texas, etc., R. Co. *v.* Prude, 39 Tex. Civ. App. 144, 86 S. W. 1046; San Antonio, etc., R. Co. *v.* New York Home Ins. Co., (Tex. Civ. App. 1902) 70 S. W. 999; San Antonio, etc., R. Co. *v.* Oakes, (Tex. Civ. App. 1894) 26 S. W. 1116; Smith *v.* Central Vermont R. Co., 80 Vt. 208, 67 Atl. 535; Southern R. Co. *v.* Patterson, 105 Va. 6, 52 S. E. 694.

Evidence held insufficient to show that the fire was caused by an engine see Denver, etc., R. Co. *v.* De Graff, 2 Colo. App. 42, 49 Pac. 664; Brown *v.* Benson, 101 Ga. 753, 29 S. E. 215; Bates County Bank *v.* Missouri Pac. R. Co., 98 Mo. App. 330, 73 S. W. 286; Peffer *v.* Missouri Pac. R. Co., 98 Mo. App. 291, 71 S. W. 1073; International, etc., R. Co. *v.* Morgan, 28 Tex. Civ. App. 348, 67 S. W. 425.

Negligence in the emission of fire from an engine is not essential to proof as to the origin of the fire. Indiana Clay Co. *v.* Baltimore, etc., R. Co., 31 Ind. App. 258, 67 N. E. 704.

Burning property at distance.— Where the evidence as to whether the fire set by defendant's locomotive extended three and one-half miles from the point where it originated to plaintiff's premises is that the wind was blowing in the direction in which plaintiff's premises lay from the point where the fire started, that there was a burned tract between the starting point and plaintiff's premises, that the premises were burned on the day of the fire set by the locomotive and that there was no other such fire on that day, it warrants a finding in the affirmative. Yankton F. Ins. Co. *v.* Fremont, etc., R. Co., 7 S. D. 428, 64 N. W. 514. But evidence that a fire started some distance from the right of way, and not on land adjacent thereto, and that a passing engine, claimed to have caused the same, threw out a spark or cinder which ignited property just off the right of way about two miles away from where the fire in question started, does not establish negligence, or show that the fire was caused by the engine in question. Armstrong *v.* Wilmington, etc., R. Co., 130 N. C. 64, 40 S. E. 856.

Testimony of defendant's train despatchers that no train went out over the road without their orders, that there was no order for any train to go out between the hours when plaintiff's barn was claimed to have been set on fire, and that neither their records nor the books kept by the conductor showed any such train, is not conclusive that no train went out. Brooks *v.* Missouri Pac. R. Co., 98 Mo. App. 166, 71 S. W. 1083.

73. Chicago, etc., R. Co. *v.* Esten, 178 Ill. 192, 52 N. E. 954 [*affirming* 78 Ill. App. 326]; Tapley *v.* St. Louis, etc., R. Co., 129 Mo. App. 88, 107 S. W. 470; Wiley *v.* West Jersey R. Co., 44 N. J. L. 247.

vicinity before, and there was no other apparent cause for the fire,[74] especially when taken together with other circumstances tending to strengthen the probability that the fire so originated,[75] such as evidence of other fires from defendant's engines about the same place and time,[76] the scattering of sparks or coals on the

74. *Alabama.*— Louisville, etc., R. Co. *v.* Miller, 109 Ala. 500, 19 So. 989.

Arkansas.— Monte Ne R. Co. *v.* Phillips, 80 Ark. 292, 96 S. W. 1060; St. Louis, etc., R. Co. *v.* Dawson, 77 Ark. 434, 92 S. W. 27.

Colorado.— Union Pac. R. Co. *v.* De Busk, 12 Colo. 294, 20 Pac. 752, 13 Am. St. Rep. 221, 3 L. R. A. 350; Burlington, etc., R. Co. *v.* Burch, 17 Colo. App. 491, 69 Pac. 6.

Georgia.— Georgia Cent. R. Co. *v.* Trammell, 114 Ga. 312, 40 S. E. 259; Southern R. Co. *v.* Williams, 113 Ga. 335, 38 S. E. 744; Brown *v.* Benson, 98 Ga. 372, 25 S. E. 455.

Illinois.— Chicago, etc., R. Co. *v.* Esten, 178 Ill. 192, 52 N. E. 954 [*affirming* 78 Ill. App. 326]; Lake Erie, etc., R. Co. *v.* Ericson, 80 Ill. App. 625; Illinois Cent. R. Co. *v.* Schenk, 64 Ill. App. 24.

Indiana.— Toledo, etc., R. Co. *v.* Parks, 163 Ind. 592, 72 N. E. 636; Toledo, etc., R. Co. *v.* Fenstermaker, 163 Ind. 534, 72 N. E. 561; Baltimore, etc., R. Co. *v.* O'Brien, 38 Ind. App. 143, 77 N. E. 1131; McDoel *v.* Gill, 23 Ind. App. 95, 53 N. E. 956; Chicago, etc., R. Co. *v.* Zimmerman, 12 Ind. App. 504, 40 N. E. 703.

Iowa.— Black *v.* Minneapolis, etc., R. Co., 122 Iowa 32, 96 N. W. 984; Greenfield *v.* Chicago, etc., R. Co., 83 Iowa 270, 49 N. W. 95; Johnson *v.* Chicago, etc., R. Co., 77 Iowa 666, 42 N. W. 512.

Kansas.— Kansas City, etc., R. Co. *v.* Perry, 65 Kan. 792, 70 Pac. 876 (holding that such evidence is sufficient without it further appearing that the engine emitted live cinders or was put to special exertion); Clark *v.* Ellithorp, 9 Kan. App. 503, 59 Pac. 286; Clark *v.* Ellithorpe, 7 Kan. App. 337, 51 Pac. 940; St. Louis, etc., R. Co. *v.* Stevens, 3 Kan. App. 176, 43 Pac. 434.

Massachusetts.— Bowen *v.* Boston, etc., R. Co., 179 Mass. 524, 61 N. E. 141; McGinn *v.* Platt, 177 Mass. 125, 58 N. E. 175; Wild *v.* Boston, etc., R. Co., 171 Mass. 245, 50 N. E. 533.

Minnesota.— Hoffman *v.* Chicago, etc., R. Co., 40 Minn. 60, 41 N. W. 301; Dean *v.* Chicago, etc., R. Co., 39 Minn. 413, 40 N. W. 270, 12 Am. St. Rep. 659; Karsen *v.* Milwaukee, etc., R. Co., 29 Minn. 12, 11 N. W. 122; Woodson *v.* Milwaukee, etc., R. Co., 21 Minn. 60.

Mississippi.— Tribette *v.* Illinois Cent. R. Co., 71 Miss. 212, 13 So. 899.

Missouri.— Redmond *v.* Chicago, etc., R. Co., 76 Mo. 550; Kenney *v.* Hannibal, etc., R. Co., 70 Mo. 243 (holding that such evidence is sufficient without direct proof that any sparks escaped from the engine); Fields *v.* Missouri Pac. R. Co., 113 Mo. App. 642, 88 S. W. 134; Wright *v.* Chicago, etc., R. Co., 107 Mo. App. 209, 80 S. W. 927.

Nebraska.— Kearney County *v.* Chicago, etc., R. Co., 76 Nebr. 861, 108 N. W. 131; Union Pac. R. Co. *v.* Murphy, 76 Nebr. 545, 107 N. W. 757.

Nevada.— Watt *v.* Nevada Cent. R. Co., 23 Nev. 154, 44 Pac. 423, 46 Pac. 52, 726, 62 Am. St. Rep. 772.

New York.— Jacobs *v.* New York Cent., etc., R. Co., 107 N. Y. App. Div. 134, 94 N. Y. Suppl. 954 [*affirmed* in 186 N. Y. 586, 79 N. E. 1108]; Jamieson *v.* New York, etc., R. Co., 11 N. Y. App. Div. 50, 42 N. Y. Suppl. 915 [*affirmed* in 162 N. Y. 630, 57 N. E. 1113]; Genung *v.* New York, etc., R. Co., 21 N. Y. Suppl. 97; Billings *v.* Fitchburgh R. Co., 11 N. Y. Suppl. 837 [*affirmed* in 128 N. Y. 644, 29 N. E. 147]; Collins *v.* New York Cent., etc., R. Co., 11 N. Y. Suppl. 303 [*affirmed* in 132 N. Y. 603, 30 N. E. 1152].

North Carolina.— Hygienic Plate Ice Mfg. Co. *v.* Raleigh, etc., R. Co., 122 N. C. 881, 29 S. E. 575.

North Dakota.— Gram *v.* Northern Pac. R. Co., 1 N. D. 252, 46 N. W. 972.

Ohio.— Lake Side, etc., R. Co. *v.* Kelly, 10 Ohio Cir. Ct. 322, 6 Ohio Cir. Dec. 555.

Pennsylvania.— Elder Tp. School Dist. *v.* Pennsylvania R. Co., 26 Pa. Super. Ct. 112.

South Dakota.— Kelsey *v.* Chicago, etc., R. Co., 1 S. D. 80, 45 N. W. 204.

Texas.— San Antonio, etc., R. Co. *v.* Home Ins. Co., (Civ. App. 1902) 70 S. W. 999; San Antonio, etc., R. Co. *v.* Adams, (Civ. App. 1902) 66 S. W. 578.

Virginia.— Tutwiler *v.* Chesapeake, etc., R. Co., 95 Va. 443, 28 S. E. 597; Norfolk, etc., R. Co. *v.* Bohannon, 85 Va. 293, 7 S. E. 236.

Washington.— Abrams *v.* Seattle, etc., R. Co., 27 Wash. 507, 68 Pac. 78.

Wisconsin.— Beggs *v.* Chicago, etc., R. Co., 75 Wis. 444, 44 N. W. 633.

England.— Smith *v.* London, etc., R. Co., L. R. 6 C. P. 14, 40 L. J. C. P. 21, 23 L. T. Rep. N. S. 678, 19 Wkly. Rep. 230.

See 41 Cent. Dig. tit. "Railroads," § 1731.

The probability that the fire originated from some other source need not be excluded by direct preliminary proof, where the evidence is such as to raise a presumption that at the time no fire or light would be used in the premises burned and that a fire originating from the dropping or using of a match in the building would not have started at the point at which the fire in question started. Wheeler *v.* New York Cent., etc., R. Co., 67 Hun (N. Y.) 639, 22 N. Y. Suppl. 561.

75. See Beggs *v.* Chicago, etc., R. Co., 75 Wis. 444, 44 N. W. 633.

76. *Georgia.*— Brown *v.* Benson, 98 Ga. 372, 25 S. E. 455.

Indiana.— Chicago, etc., R. Co. *v.* Zimmerman, 12 Ind. App. 504, 40 N. E. 703.

Kansas.— Missouri Pac. R. Co. *v.* Chamberlain, 4 Kan. App. 232, 45 Pac. 967.

Nevada.— Watt *v.* Nevada Cent. R. Co., 23 Nev. 154, 44 Pac. 423, 46 Pac. 52, 726, 62 Am. St. Rep. 772.

same or other occasions,[77] combustible material on the right of way,[78] the direction of the wind at the time from the engine toward the property burned,[79] and that the property burned was located near the railroad track.[80] But such evidence will not be sufficient where there is other positive and uncontradicted evidence tending to exclude the probability that the fire was caused by such engine;[81] or

New York.— Collins *v.* New York Cent., etc., R. Co., 11 N. Y. Suppl. 308 [*affirmed* in 132 N. Y. 603, 30 N. E. 1152].

Texas.— San Antonio, etc., R. Co. *v.* Adams, (Civ. App. 1902) 66 S. W. 578.

See 41 Cent. Dig. tit. "Railroads," § 1731.

That the fire was set by a particular engine is sufficiently shown by evidence that it was discovered immediately after the train passed, and that the same engine set fires on other days at about the same time. Louisville, etc., R. Co. *v.* McCorkle, 12 Ind. App. 691, 40 N. E. 26; Philadelphia, etc., R. Co. *v.* Schultz, 93 Pa. St. 341.

77. *Georgia.*—Georgia Cent. R. Co. *v.* Trammell, 114 Ga. 312, 40 S. E. 259; Southern R. Co. *v.* Williams, 113 Ga. 335, 38 S. E. 744.

Massachusetts.— Wild *v.* Boston, etc., R. Co., 171 Mass. 245, 50 N. E. 533.

Nevada.— Watt *v.* Nevada Cent. R. Co., 23 Nev. 154, 44 Pac. 423, 46 Pac. 52, 726, 62 Am. St. Rep. 772.

New York.— Munson *v.* New York Cent., etc., R. Co., 55 N. Y. App. Div. 523, 66 N. Y. Suppl. 973; Jamieson *v.* New York, etc., R. Co., 11 N. Y. App. Div. 50, 42 N. Y. Suppl. 915 [*affirmed* in 162 N. Y. 630, 57 N. E. 1113]; Collins *v.* New York Cent., etc., R. Co., 11 N. Y. Suppl. 308 [*affirmed* in 132 N. Y. 603, 30 N. E. 1152].

North Carolina.— Hygienic Plate Ice Mfg. Co. *v.* Raleigh, etc., R. Co., 122 N. C. 881, 29 S. E. 575.

Pennsylvania.— Pennsylvania Co. *v.* Watson, 81* Pa. St. 293.

Virginia.— Tutwiler *v.* Chesapeake, etc., R. Co., 95 Va. 443, 28 S. E. 597; Norfolk, etc., R. Co. *v.* Bohannon, 85 Va. 293, 7 S. E. 236.

See 41 Cent. Dig. tit. "Railroads," § 1731.

78. *Georgia.*—Brown *v.* Benson, 98 Ga. 372, 25 S. E. 455.

New York.— Genung *v.* New York, etc., R. Co., 21 N. Y. Suppl. 97.

Oregon.— Hawley *v.* Sumpter R. Co., 49 Oreg. 509, 90 Pac. 1106, 12 L. R. A. N. S. 526, evidence held to authorize a finding that sparks set fire to combustible material allowed to accumulate on the company's right of way and escaped therefrom to the property destroyed.

Virginia.— Tutwiler *v.* Chesapeake, etc., R. Co., 95 Va. 443, 28 S. E. 597.

Washington.— Abrams *v.* Seattle, etc., R. Co., 27 Wash. 507, 68 Pac. 78.

Wisconsin.— Beggs *v.* Chicago, etc., R. Co., 75 Wis. 444, 44 N. W. 633.

England.— Smith *v.* London, etc., R. Co., L. R. 6 C. P. 14, 40 L. J. C. P. 21, 23 L. T. Rep. N. S. 678, 19 Wkly. Rep. 230.

See 41 Cent. Dig. tit. "Railroads," § 1731.

79. *Georgia.*— Brown *v.* Benson, 98 Ga. 372, 25 S. E. 455.

Illinois.— Chicago, etc., R. Co. *v.* Esten, 178 Ill. 192, 52 N. E. 954 [*affirming* 78 Ill. App. 326]; Lake Erie, etc., R. Co. *v.* Ericson, 80 Ill. App. 625.

Indiana.— Toledo, etc., R. Co. *v.* Fenstermaker, 163 Ind. 534, 72 N. E. 561; Baltimore, etc., R. Co. *v.* O'Brien, 38 Ind. App. 143, 77 N. E. 1131; McDoel *v.* Gill, 23 Ind. App. 95, 53 N. E. 956.

Iowa.— Black *v.* Minneapolis, etc., R. Co., 122 Iowa 32, 96 N. W. 984.

Kansas.— St. Louis, etc., R. Co. *v.* Stevens, 3 Kan. App. 176, 43 Pac. 434.

Minnesota.— Dean *v.* Chicago, etc., R. Co., 39 Minn. 413, 40 N. W. 270, 12 Am. St. Rep. 659; Karsen *v.* Milwaukee, etc., R. Co., 29 Minn. 12, 11 N. W. 122.

Missouri.— Redmond *v.* Chicago, etc., R. Co., 76 Mo. 550; Fields *v.* Missouri Pac. R. Co., 113 Mo. App. 642, 88 S. W. 134; Wright *v.* Chicago, etc., R. Co., 107 Mo. App. 209, 80 S. W. 927.

Nevada.— Watt *v.* Nevada Cent. R. Co., 23 Nev. 154, 44 Pac. 423, 46 Pac. 52, 726, 62 Am. St. Rep. 772.

New York.— Jacobs *v.* New York Cent., etc., R. Co., 107 N. Y. App. Div. 134, 94 N. Y. Suppl. 954 [*affirmed* in 186 N. Y. 586, 79 N. E. 1108].

North Carolina.— Hygienic Plate Ice Mfg. Co. *v.* Raleigh, etc., R. Co., 122 N. C. 881, 29 S. E. 575.

Pennsylvania.— Elder Tp. School Dist. *v.* Pennsylvania R. Co., 26 Pa. Super. Ct. 112.

South Dakota.— Kelsey *v.* Chicago, etc., R. Co., 1 S. D. 80, 45 N. W. 204.

Texas.—San Antonio, etc., R. Co. *v.* Adams, (Civ. App. 1902) 66 S. W. 578.

Virginia.— Tutwiler *v.* Chesapeake, etc., R. Co., 95 Va. 443, 28 S. E. 597.

Wisconsin.— Beggs *v.* Chicago, etc., R. Co., 75 Wis. 444, 44 N. W. 633.

England.— Smith *v.* London, etc., R. Co., L. R. 6 C. P. 14, 40 L. J. C. P. 21, 23 L. T. Rep. N. S. 678, 19 Wkly. Rep. 230.

See 41 Cent. Dig. tit. "Railroads," § 1731.

That a slight wind was blowing away from the property burned does not necessarily show that the sparks were not the cause of the fire, it appearing that there was combustible material from the track to such property, as the momentum of the engine may have been sufficient to offset the effect of the wind. Brooks *v.* Missouri Pac. R. Co., 98 Mo. App. 166, 71 S. W. 1083.

80. Southern R. Co. *v.* Williams, 113 Ga. 335, 38 S. E. 744.

81. *Georgia.*— Inman *v.* Elberton Air-Line R. Co., 90 Ga. 663, 16 S. E. 958, 35 Am. St. Rep. 232.

Indiana.— Lake Erie, etc., R. Co. *v.* Gossard, 14 Ind. App. 244, 42 N. E. 818.

Kentucky.— Louisville, etc., R. Co. *v.* Mitchell, 29 S. W. 860, 17 Ky. L. Rep. 977.

where the evidence is such that it is a mere conjecture whether or not defendant caused the fire.[82] Such evidence, if circumstantial, should be sufficient to justify a reasonable and well-grounded inference by reasonable men that the fire was of railroad origin,[83] and such as to rebut the probability of the fire having originated in any other manner,[84] or which will at least tend to establish the relation of cause and effect between the operation of the railroad and the breaking out of the fire; [85] although it need not be of such weight as to exclude every possibility of another cause.[86]

(c) *Setting Out and Preventing Spread of Fire.* Negligence on the part of defendant in setting out and allowing the fire to escape from its right of way cannot be inferred from the mere fact that at the time of the fire the employees whose duty it was to keep the road where the fire occurred in repair were absent; [87] but

Nebraska.— Louis *v.* Union Pac. R. Co., 48 Nebr. 151, 66 N. W. 1133.

New York.— Van Nostrand *v.* New York, etc., R. Co., 78 Hun 549, 29 N. Y. Suppl. 625.

Texas.— Missouri Pac. R. Co. *v.* Cullers, 81 Tex. 382, 17 S. W. 19, 13 L. R. A. 542.

Virginia.— Bernard *v.* Richmond, etc., R. Co., 85 Va. 792, 8 S. E. 785, 17 Am. St. Rep. 103.

Wisconsin.— Finkelston *v.* Chicago, etc., R. Co., 94 Wis. 270, 68 N. W. 1005.

United States.— Ragsdale *v.* Southern R. Co., 121 Fed. 924.

See 41 Cent. Dig. tit. "Railroads," § 1731.

The bare uncontradicted evidence that the apparatus was in good order and was properly managed and that the fireman and engineer were competent and skilful does not establish the fact that the fire did not originate by sparks from a locomotive in the absence of proof that it could have originated in some other way. Hagan *v.* Chicago, etc., R. Co., 86 Mich. 615, 49 N. W. 509.

82. *Missouri.*— Big River Lead Co. *v.* St. Louis, etc., R. Co., 123 Mo. App. 394, 101 S. W. 636; Funk *v.* Quincy, etc., R. Co., 123 Mo. App. 169, 100 S. W. 504 (holding that where plaintiff sues for injury to his meadow by fire and there is no evidence connecting the fire with defendant's railroad, except that when plaintiff's son returned from a near-by town he found the meadow burned off and that the fire appeared to have burned from the direction of the railroad, plaintiff is not entitled to recover); Peck *v.* Missouri Pac. R. Co., 31 Mo. App. 123.

Nebraska.— Union Pac. R. Co. *v.* Fickenscher, 72 Nebr. 187, 100 N. W. 207.

New York.— Babcock *v.* Fitchburg, etc., R. Co., 140 N. Y. 308, 35 N. E. 596 [*reversing* 67 Hun 469, 22 N. Y. Suppl. 449].

Virginia.— Chesapeake, etc., R. Co. *v.* Heath, 103 Va. 64, 48 S. E. 508.

Wisconsin.— Megow *v.* Chicago, etc., R. Co., 86 Wis. 466, 56 N. W. 1099.

United States.— Ragsdale *v.* Southern R. Co., 121 Fed. 924.

See 41 Cent. Dig. tit. "Railroads," § 1731.

Inferences.— Where the inference that the fire was not communicated from a passing locomotive is as strong as the inference that it was so caused, plaintiff is not entitled to recover. Bates County Bank *v.* Missouri Pac. R. Co., 98 Mo. App. 330, 73 S. W. 286.

83. Cyle *v.* Denver, etc., R. Co., 37 Colo. 298, 86 Pac. 1010; Crissey, etc., Lumber Co. *v.* Denver, etc., R. Co., 17 Colo. App. 275, 68 Pac. 670; Atchison, etc., R. Co. *v.* Matthews, 58 Kan. 447, 49 Pac. 602; Atchison, etc., R. Co. *v.* Hutchison, 8 Kan. App. 605, 56 Pac. 144; Baltimore, etc., R. Co. *v.* Shipley, 39 Md. 251; Wick *v.* Tacoma Eastern R. Co., 40 Wash. 408, 82 Pac. 711 (holding that the origin of the fire must be established by reasonable affirmative evidence, and to a reasonable certainty); Sheldon *v.* Hudson River R. Co., 29 Barb. (N. Y.) 226 [*reversed* on other grounds in 14 N. Y. 218, 67 Am. Dec. 155] (holding that the proof must be such as to leave no reasonable doubt of the existence of the fact that the fire was communicated by one of defendant's engines).

84. Monte Ne R. Co. *v.* Phillips, 80 Ark. 292, 96 S. W. 1069; Cyle *v.* Denver, etc., R. Co., 37 Colo. 298, 86 Pac. 1010; Stratton *v.* Union Pac. R. Co., 7 Colo. App. 126, 42 Pac. 602 (holding that there must be either direct proof connecting the fire with the engine, or the circumstances must be such as to preclude all probability of the fire having originated in any other manner); Denver, etc., R. Co. *v.* De Graff, 2 Colo. App. 42, 29 Pac. 654; Sheldon *v.* Hudson River R. Co., 29 Barb. (N. Y.) 226 [*reversed* on other grounds in 14 N. Y. 218, 67 Am. Dec. 155]; Senesac *v.* Central Vermont R. Co., 26 Can. Sup. Ct. 641 [*affirming* 9 Quebec Super. Ct. 319].

Plaintiff must trace the fire from the place of its origin and identify it with the fire originated by defendant, and where the evidence shows several fires of different origins, each originating several miles from the place of damage, it is not sufficient to show that it is more probable that the fire started by defendant was the one that caused the damage. Union Pac. R. Co. *v.* Fosberg, 77 Nebr. 609, 110 N. W. 567; Union Pac. R. Co. *v.* Fickenscher, 74 Nebr. 497, 105 N. W. 39, 110 N. W. 561; Union Pac. R. Co. *v.* Westlund, 72 Nebr. 733, 101 N. W. 1134, 110 N. W. 567.

85. Denver, etc., R. Co. *v.* Morton, 3 Colo. App. 135, 32 Pac. 664.

86. Monte Ne R. Co. *v.* Phillips, 80 Ark. 292, 96 S. W. 1060; Crissey, etc., Lumber Co. *v.* Denver, etc., R. Co., 17 Colo. App. 275, 68 Pac. 670; Kansas City, etc., R. Co. *v.* Perry, 65 Kan. 792, 70 Pac. 876.

87. Baltimore, etc., R. Co. *v.* Shipley, 39 Md. 251.

where the fire is shown to have been set out on defendant's right of way, evidence that its employees did not use proper precautions in setting out and guarding the fire may be sufficient to sustain a verdict for plaintiff.[88]

(D) *Existence of Defect or Happening of Injury.* In some jurisdictions evidence which shows that the fire in question was caused by sparks from defendant's locomotive establishes a *prima facie* case of negligence against the company,[89] although the fact that the fire was communicated from an engine is controverted;[90] and in some jurisdictions can be overcome only by a preponderance of the evidence.[91] As a general rule, however, the mere fact that the property was fired by sparks from one of defendant's engines,[92] or that the fire started on defendant's right of way,[93] is not of itself sufficient to establish negligence on the part of defendant; but the evidence should also show that this result was not probable in the ordinary working of an engine,[94] or that the appliances for arresting fire were defective,[95] or that defendant had not adopted the most approved appliances,[96] or that the engine was improperly operated.[97]

88. Townley *v.* Fall Brook Coal Co., 12 N. Y. Suppl. 649; Clune *v.* Milwaukee, etc., R. Co., 75 Wis. 532, 44 N. W. 843; Grant *v.* Canadian Pac. R. Co., 36 N. Brunsw. 528.

Evidence held sufficient to show that plaintiff's property was burned through the negligence of defendant's servants in burning ties see St. Louis, etc., R. Co. *v.* Clements, 82 Ark. 3, 99 S. W. 1106.

Evidence held insufficient to show negligence on the part of defendant in allowing fire to escape from the right of way causing the damage see Lake Erie, etc., R. Co. *v.* Naron, 18 Ind. App. 193, 47 N. E. 691; Kalz *v.* Winona, etc., R. Co., 76 Minn. 351, 79 N. W. 310; Baxter *v.* Great Northern R. Co., 73 Minn. 189, 75 N. W. 1114.

That section-men burned rubbish during the ordinary hours of labor, as was ordinarily done by them at that time of year, is sufficient, in the absence of any rebutting evidence, to justify a finding that they were acting within the scope of their employment. Baxter *v.* Great Northern R. Co., 73 Minn. 189, 75 N. W. 1114.

89. Illinois Cent. R. Co. *v.* Bailey, 222 Ill. 480, 78 N. W. 833 [*affirming* 127 Ill. App. 41]. And see *supra*, X, I, 6, d, (I), (B).

Evidence held sufficient to establish a *prima facie* case entitling plaintiff to judgment unless it should be overcome by the evidence of defendant see Illinois Cent. R. Co. *v.* Bailey, 222 Ill. 480, 78 N. E. 843 [*affirming* 127 Ill. App. 41].

90. Illinois Cent. R. Co. *v.* Bailey, 222 Ill. 480, 78 N. W. 833 [*affirming* 127 Ill. App. 41]; Atchison, etc., R. Co. *v.* Campbell, 16 Kan. 200, holding that negligence may be imputed to a railroad company whose locomotive sets on fire adjacent property so as to sustain a verdict against it therefor, notwithstanding it is shown in defense that a very strong wind was blowing at the time; that several competent witnesses who examined the engine at or shortly after the fire testify that it was in perfect order and supplied with the best appliance for the escape of fire; that the engineer was competent and careful and used all possible care to prevent the escape of sparks and fire; and that there was no direct testimony contradicting these witnesses and that it was impossible for any one from the testimony to point out in what respect, if at all, the engine was defective or out of order or the engineer guilty of negligence.

91. Stewart *v.* Iowa Cent. R. Co., 136 Iowa 182, 113 N. W. 764. And see *supra*, X, I, 6, d, (I), (B). But see St. Louis, etc., R. Co. *v.* Hooser, 44 Tex. Civ. App. 229, 97 S. W. 708.

92. Toledo, etc., R. Co. *v.* Parks, 163 Ind. 592, 72 N. E. 636 (holding this to be true where the engine is shown to have been equipped with one of the best and most approved spark arresters and operated in a careful manner by competent employees, and there is also uncontradicted testimony that the spark arrester after the fire was in good condition); Peck *v.* New York Cent., etc., R. Co., 37 N. Y. App. Div. 110, 55 N. Y. Suppl. 1121 [*reversed* on other grounds in 165 N. Y. 347, 59 N. E. 206]; McCaig *v.* Erie R. Co., 8 Hun (N. Y.) 599; Henderson *v.* Philadelphia, etc., R. Co., 144 Pa. St. 461, 22 Atl. 851, 27 Am. St. Rep. 652, 16 L. R. A. 299; Gulf, etc., R. Co. *v.* Johnson, 3 Tex. App. Civ. Cas. § 123 (holding this to be true where it is shown that by the use of the best appliances and the exercise of the greatest caution for the operation of engines fire could not be prevented from escaping therefrom).

93. Taylor *v.* Pennsylvania, etc., R. Co., 174 Pa. St. 171, 34 Atl. 457. *Compare* Louisville, etc., R. Co. *v.* Miller, 109 Ala. 500, 19 So. 989.

94. Henry *v.* Southern Pac. R. Co., 50 Cal. 176; Hull *v.* Sacramento Valley R. Co., 14 Cal. 387, 73 Am. Dec. 656.

95. Peck *v.* New York Cent., etc., R. Co., 37 N. Y. App. Div. 110, 55 N. Y. Suppl. 1121 [*reversed* on other grounds in 165 N. Y. 347, 59 N. E. 206]; Henderson *v.* Philadelphia, etc., R. Co., 144 Pa. St. 461, 22 Atl. 851, 27 Am. St. Rep. 652, 16 L. R. A. 299.

96. Henderson *v.* Philadelphia, etc., R. Co., 144 Pa. St. 461, 22 Atl. 851, 27 Am. St. Rep. 652, 16 L. R. A. 299.

97. Peck *v.* New York Cent., etc., R. Co., 37 N. Y. App. Div. 110, 55 N. Y. Suppl. 1121 [*reversed* on other grounds in 165 N. Y. 347, 59 N. E. 206].

(E) *Defects in and Management of Engines.* That defendant was negligent in causing the fire by reason of its negligently constructing, equipping, repairing,[98] or operating[99] its engines may be shown wholly by circumstantial evi-

98. Hockstedler *v.* Dubuque, etc., R. Co., 88 Iowa 236, 55 N. W. 74 (holding that evidence that the fire was set outside the right of way while a strong wind was blowing and while the locomotive was working at its full capacity to get a train over a grade is sufficient to justify a finding that the locomotive was defective); Louisville, etc., R. Co. *v.* Taylor, 92 Ky. 55, 17 S. W. 198, 13 Ky. L. Rep. 373.

Evidence held sufficient to show that defendant was negligent in the construction, equipment, or repair of its engines see Alabama Great Southern R. Co. *v.* Sanders, 145 Ala. 449, 40 So. 402; Cleveland, etc., R. Co. *v.* Scantland, 151 Ind. 488, 51 N. E. 1068 (evidence that the spark arrester was not properly fitted or secured, leaving spaces in the nettings, and that a number of the wires had become burned or worn off, so that large sparks were emitted); Chesapeake, etc., R. Co. *v.* Richardson, 99 S. W. 642, 30 Ky. L. Rep. 786; Cincinnati, etc., R. Co. *v.* Falconer, 97 S. W. 727, 30 Ky. L. Rep. 152 (evidence held sufficient to support a verdict for plaintiff, although defendant's witnesses swear positively to the good condition of the spark arresters on all locomotives passing the place); Babbitt *v.* Erie R. Co., 108 N. Y. App. Div. 74, 95 N. Y. Suppl. 429; Munson *v.* New York Cent., etc., R. Co., 55 N. Y. App. Div. 523, 66 N. Y. Suppl. 973.

Evidence held insufficient to charge defendant with negligence in the construction, equipment, or repair of its engine see St. Louis, etc., R. Co. *v.* Blakeley, 6 Kan. App. 814, 49 Pac. 752; Flinn *v.* New York Cent., etc., R. Co., 142 N. Y. 11, 36 N. E. 1046 (evidence that on three occasions a hole was made in the spark arrester of an engine of defendant, it not being shown that plaintiff's building was damaged by sparks from an engine the spark arrester of which had been thus broken); White *v.* New York Cent., etc., R. Co., 90 N. Y. App. Div. 356, 85 N. Y. Suppl. 497 [*affirmed* in 181 N. Y. 577, 74 N. E. 1126]; Weeks *v.* Erie R. Co., 57 N. Y. App. Div. 192, 68 N. Y. Suppl. 182 (evidence that there was a curve in the road at the point where the fire was kindled, and that the engine pulled hard there and threw sparks, there being no evidence that the throwing of sparks was peculiar to that particular engine, or that it threw an unusual quantity, but on the contrary that other engines pulled hard there and threw sparks); Dougherty *v.* King, 22 N. Y. App. Div. 610, 48 N. Y. Suppl. 110 (evidence not showing that the sparks emitted were of unusual size, or greater in quantity than well-constructed spark arresters will emit, and showing that the fire started near where the engine was starting on a curve); Frier *v.* Delaware, etc., Canal Co., 86 Hun (N. Y.) 464, 33 N. Y. Suppl. 886; Wheeler *v.* New York Cent., etc., R. Co., 67 Hun (N. Y.) 639, 22 N. Y. Suppl. 561 (evidence of the emission of one large spark from defendant's engine three days after the fire); Polacsek *v.* Manhattan R. Co., 84 N. Y. Suppl. 140.

Where defendant relies upon the perfect condition of the spark arrester it is not required that the evidence by which it proves that fact be undisputed. St. Louis, etc., R. Co. *v.* Lindley, (Tex. Civ. App. 1895) 29 S. W. 1101.

Where plaintiff identifies the engine that caused the fire, proof that large cinders were found on the track and on plaintiff's premises at the time of the fire does not show that the engine was not in good repair, in the absence of evidence showing that the cinders came therefrom or that it is of similar construction, state of repair, or management to those shown to have emitted the cinders. Wheeler *v.* New York Cent., etc., R. Co., 67 Hun (N. Y.) 639, 22 N. Y. Suppl. 561.

Where plaintiff is unable to identify the engine that set the fire by name or number or by any other designation, it is sufficient if he proves either by the manner in which it was operated or the extent to which it scattered fire that it was so far out of repair as to charge the company with negligence. Bevier *v.* Delaware, etc., Canal Co., 13 Hun (N. Y.) 254.

Affidavits of defendant's master-mechanic as to the condition of certain locomotives at the time, but which do not show whether these were the engines by which the fire was caused, are insufficient to disprove negligence. Missouri Pac. R. Co. *v.* Texas, etc., R. Co., 33 Fed. 360.

99. *Illinois.*— Illinois Cent. R. Co. *v.* Schenk, 64 Ill. App. 24, throwing out sparks by slipping on rails.

Iowa.— Hockstedler *v.* Dubuque, etc., R. Co., 88 Iowa 236, 5 N. W. 74.

Kansas.— St. Louis, etc., R. Co. *v.* Blakeley, 6 Kan. App. 814, 49 Pac. 752.

Kentucky.— Southern R. Co. *v.* McGeoughey, 102 S. W. 270, 31 Ky. L. Rep. 291, evidence held to warrant a finding that the fire was caused either by the negligent operation of the engine or by the defective condition of a spark arrester.

Minnesota.— Hayes *v.* Chicago, etc., R. Co., 45 Minn. 17, 47 N. W. 260.

New York.— Babbitt *v.* Erie R. Co., 108 N. Y. App. Div. 74, 95 N. Y. Suppl. 429; Frace *v.* New York, etc., R. Co., 68 Hun 325, 22 N. Y. Suppl. 958 [*reversed* on other grounds in 143 N. Y. 182, 38 N. E. 102].

Texas.— Gulf, etc., R. Co. *v.* Blakeney-Stevens-Jackson Co., (Civ. App. 1908) 106 S. W. 1140; Texas, etc., R. Co. *v.* Rutherford, 28 Tex. Civ. App. 590, 68 S. W. 825.

United States.— Svea Ins. Co. *v.* Vicksburg, etc., R. Co., 153 Fed. 774.

Canada.— North Shore R. Co. *v.* McWillie, 17 Can. Sup. Ct. 511 [*affirming* 5 Montreal Q. B. 122]; Fournier *v.* Canadian Pac. R. Co., 33 N. Brunsw. 565, evidence insufficient.

See 41 Cent. Dig. tit. "Railroads," § 1735.

dence.[1] Such negligence may be sufficiently proved, at least to warrant an inference that the fire was caused by such negligence, by evidence, together with other circumstances, that about or soon before the time at which the fire occurred a passing engine emitted sparks or coals of an unusual quantity or size,[2] or that the engine had emitted fire for a considerable time,[3] and had started other fires,[4] and that an engine in good repair and equipment would not have caused fire in the manner, or at the place, in which the one in question was caused.[5]

Usual carelessness or negligence of employees in charge of the engine which caused the fire warrants a reasonable conclusion that they were negligent at the time of the fire in question. Norwich Ins. Soc. *v.* Oregon R. Co., 46 Oreg. 123, 78 Pac. 1025.

A conflict in the evidence as to the proper equipment and handling of a locomotive, where, after plaintiff had made a *prima facie* case of the setting of a fire thereby, raising the presumption of negligence, defendant gave full proof of such equipment and handling, is not raised by evidence that a quarter of a mile from the place of the fire the locomotive while going up grade emitted a "great deal" of sparks, and that several fires during several years had been occasioned by sparks from defendant's engines. Farley *v.* Mobile, etc., R. Co., 149 Ala. 557, 42 So. 747.

1. Swanson *v.* Keokuk, etc., R. Co., 116 Iowa 304, 89 N. W. 1088 (evidence held sufficient to support verdict finding defendant guilty of negligence); Missouri Pac. R. Co. *v.* Kincaid, 29 Kan. 654; Atchison, etc., R. Co. *v.* Bales, 16 Kan. 252; Atchison, etc., R. Co. *v.* Stanford, 12 Kan. 354, 15 Am. St. Rep. 362; St. Joseph, etc., R. Co. *v.* Chase, 11 Kan. 47. And see cases cited *supra*, notes, 98, 99.

The statement of witnesses that the engine was in good order and carefully operated need not be accepted by the jury as conclusive, although they are not contradicted, but they may consider all the evidence bearing on the condition of the engine and the mode of operating it, and the circumstances under which the fire occurred. St. Louis, etc., R. Co. *v.* Coombs, 76 Ark. 132, 88 S. W. 595.

Where plaintiff relies on the negligent operation of a locomotive consisting of the use of too much steam he must show the connection between the use of too much steam and the escape of the sparks by which the fire was communicated to the property; and he does not do this by mere evidence of other fires set by the locomotive. Louisville, etc., R. Co. *v.* Howard, 39 Ind. App. 703, 79 N. E. 1119; Louisville, etc., R. Co. *v.* Vinyard, 39 Ind. App. 628, 79 N. E. 384.

2. *Indiana.*— Cincinnati, etc., R. Co. *v.* Smock, 133 Ind. 411, 33 N. E. 108.

Iowa.— Knight *v.* Chicago, etc., R. Co., 81 Iowa 310, 46 N. W. 1112.

Kentucky.— Louisville, etc., R. Co. *v.* Taylor, 92 Ky. 55, 17 S. W. 198, 13 Ky. L. Rep. 373; Cincinnati, etc., R. Co. *v.* Caskey, 74 S. W. 201, 24 Ky. L. Rep. 2392.

Missouri.— Hoover *v.* Missouri Pac. R. Co., (1891) 16 S. W. 480.

New York.— O'Neill *v.* New York, etc., R. Co., 115 N. Y. 579, 22 N. E. 217, 5 L. R. A. 591 (holding that such evidence is sufficient, although it does not appear that the engine was not properly provided with a spark arrester or that it was out of order or mismanaged); Bedell *v.* Long Island R. Co., 44 N. Y. 367, 4 Am. Rep. 688 (holding also that the fact that the screen which formerly covered the smoke-stack had been removed furnishes additional proof of negligence); Coolidge *v.* Rome, etc., R. Co., 52 Hun 613, 5 N. Y. Suppl. 301; McCaig *v.* Erie R. Co., 8 Hun 599.

Pennsylvania.— Pennsylvania Co. *v.* Watson, 81* Pa. St. 293; Philadelphia, etc., R. Co. *v.* Kerst, 2 Walk. 480.

Texas.— Texas, etc., R. Co. *v.* Wever, 3 Tex. App. Civ. Cas. § 61.

Wisconsin.— Brusberg *v.* Milwaukee, etc., R. Co., 55 Wis. 106, 12 N. W. 416, holding that such evidence is sufficient to go to the jury, although defendant's evidence is conclusive that the engine was furnished with the most approved appliance for preventing the escape of sparks, coals, and cinders.

See 41 Cent. Dig. tit. "Railroads," § 1735.

The emission of sparks in unusual quantity and size from a passing locomotive without proof that they caused the fire to adjacent property merely tends to show negligence. Sherrell *v.* Louisville, etc., R. Co., (Ala. 1905) 44 So. 153.

3. Louisville, etc., R. Co. *v.* McCorkle, 12 Ind. App. 691, 40 N. E. 26.

4. *Indiana.*— Louisville, etc., R. Co. *v.* McCorkle, 12 Ind. App. 691, 40 N. E. 26.

Kansas.— Missouri Pac. R. Co. *v.* Chamberlain, 4 Kan. App. 232, 45 Pac. 967.

Kentucky.— Louisville, etc., R. Co. *v.* Taylor, 92 Ky. 55, 17 S. W. 198.

Pennsylvania.— Thomas *v.* New York, etc., R. Co., 182 Pa. St. 538, 38 Atl. 413.

Wisconsin.— Stertz *v.* Stewart, 74 Wis. 160, 42 N. W. 214.

See 41 Cent. Dig. tit. "Railroads," § 1735.

5. *Iowa.*— Knight *v.* Chicago, etc., R. Co., 81 Iowa 310, 46 N. W. 1112; Johnson *v.* Chicago, etc., R. Co., 77 Iowa 666, 42 N. W. 512, holding that the fact that an engine in good repair could not throw fire from the track to the place where the fire caught justifies the jury in finding that the engine was in bad repair.

Kansas.— Missouri Pac. R. Co. *v.* Chamberlain, 4 Kan. App. 232, 45 Pac. 967.

Kentucky.— Southern R. Co. *v.* Hanna, 53 S. W. 1, 21 Ky. L. Rep. 850, evidence that sparks could not have been emitted from the locomotive if the spark arrester had been in proper condition.

Minnesota.— Dean *v.* Chicago, etc., R. Co., 39 Minn. 413, 40 N. W. 270, 12 Am. St. Rep.

(F) *Combustibles on Railroad Property.* That the fire was caused by defendant's negligence may also be sufficiently shown by evidence, together with other circumstances, that it permitted dry grass, weeds, or other combustible material to accumulate on its right of way, in which the fire started,[6] and that fires had previously been set therein by passing locomotives.[7]

e. Damages[8] — (I) *In General.* As a general rule the measure of damages for property injured or destroyed by fire caused by a railroad company is such an amount as will compensate plaintiff for his loss or restore him to the same or as good a condition in respect to his property as he occupied before the fire.[9]

(II) *Real Property.* It is ordinarily held that for an injury to the land the measure of damages is the difference between the market value of the land

659, holding that expert testimony that with the appliances in use to prevent such accidents the fire could not have been caused unless the engine had been out of repair, considered in connection with the statutory presumption of negligence, justifies a verdict against defendant, although other evidence tends to show that the engine was provided with the best appliances, that it was in good order, and that the engineer and fireman were competent.

Missouri.— Hoover *v.* Missouri Pac. R. Co., (1891) 16 S. W. 480.

Pennsylvania.— Thomas *v.* New York, etc., R. Co., 182 Pa. St. 538, 38 Atl. 413.

See 41 Cent. Dig. tit. "Railroads," § 1735.

6. *Alabama.*— Louisville, etc., R. Co. *v.* Miller, 109 Ala. 500, 19 So. 989.

Indiana.— Terre Haute, etc., R. Co. *v.* Walsh, 11 Ind. App. 13, 38 N. E. 534.

New York.— Billings *v.* Fitchburgh R. Co., 11 N. Y. Suppl. 837 [*affirmed* in 128 N. Y. 644, 29 N. E. 147], evidence held sufficient to show such accumulation.

South Dakota.— Kelsey *v.* Chicago, etc., R. Co., 1 S. D. 80, 45 N. W. 204.

Texas.— Texas, etc., R. Co. *v.* Rutherford, 28 Tex. Civ. App. 590, 68 S. W. 825.

Wisconsin.— Moore *v.* Chicago, etc., R. Co., 78 Wis. 120, 47 N. W. 273.

England.— Smith *v.* London, etc., R. Co., L. R. 6 C. P. 14, 40 L. J. C. P. 21, 23 L. T. Rep. N. S. 678, 19 Wkly. Rep. 230.

See also *supra*, X, I, 3, a, (II), (III).

But see Taylor *v.* Pennsylvania, etc., R. Co., 174 Pa. St. 171, 34 Atl. 457.

Evidence sufficient.— That there was an accumulation of combustible material on defendant's right of way opposite plaintiff's property; that there was a steep grade at such point, so that defendant's engines in passing put on steam and emitted sparks and coals, which frequently ignited the rubbish on the right of way; that on the day of the fire the wind was blowing over the right of way toward plaintiff's property. Pittsburgh, etc., R. Co. *v.* Indiana Horseshoe Co., 154 Ind. 322, 56 N. E. 766. That combustible material was allowed to accumulate on the right of way; that it was an exceedingly dry time; that there was a brisk wind blowing from the right of way toward plaintiff's property; that sparks from a passing engine set fire to said material; and that defendant negligently permitted it to escape to plaintiff's property. New York, etc., R. Co. *v.* Grossman, 17 Ind. App. 652, 46 N. E. 546. Evidence held to authorize a finding that the railroad company was negligent in failing to keep its right of way reasonably free of combustible matter see Hawley *v.* Sumpter R. Co., 49 Oreg. 509, 90 Pac. 1106, 12 L. R. A. N. S. 526.

Evidence held insufficient to show that defendant had carelessly and negligently allowed its right of way to become foul with dry grass and other inflammable matter see McCoy *v.* Carolina Cent. R. Co., 142 N. C. 383, 55 S. E. 270.

7. Moore *v.* Chicago, etc., R. Co., 78 Wis. 120, 47 N. W. 273.

8. Damages generally see DAMAGES, 13 Cyc. 1.

9. Jacksonville, etc., R. Co. *v.* Peninsular Land, etc., Co., 27 Fla. 1, 157, 9 So. 661, 17 L. R. A. 33, 65; Tyler, etc., R. Co. *v.* Hitchins, 26 Tex. Civ. App. 400, 63 S. W. 1069. See also Gibson *v.* South Eastern R. Co., 1 F. & F. 23.

Labor and services rendered in assisting to check or put out the fire as an element of damages see Southern R. Co. *v.* Ward, 110 Ga. 793, 36 S. E. 78.

The damages may be assessed as a whole whether the fire originated by sparks cast on plaintiff's premises or by igniting combustibles on defendant's right of way. Norfolk, etc., R. Co. *v.* Bohannon, 85 Va. 293, 7 S. E. 236.

That exemplary damages as allowed by statute cannot be recovered under the evidence does not preclude a recovery for actual damages where the evidence is sufficient to sustain a recovery under the common law cause of action for actual damages. Clark *v.* San Francisco, etc., R. Co., 142 Cal. 614, 76 Pac. 507.

For leaves and trash which the fire consumed, there can be a recovery to the extent that the owner could have used or disposed of the same in supplying any demand then existing or near at hand, the measure being the value of the raw material as it lay on the ground, not including in the quantity to be paid for any of the material which could not have been used or sold to supply the demand then existing or which arose soon thereafter. For material which, had it not been destroyed, would have been mere waste in the woods, there can be no recovery.

immediately before the fire and its value immediately thereafter;[10] and in some jurisdictions it is held that where grass, growing timber, fences, meadows, and the like are injured or destroyed, they are so closely connected with the land on which they stand or to which they are attached that they have no accurate value separate and independent of the land, and that the above rule is the proper method of arriving at the measure of damages for their injury or destruction.[11] In

Central R., etc., Co. *v.* Murray, 93 Ga. 256, 20 S. E. 129.

10. *Illinois.*— Illinois Cent. R. Co. *v.* Almon, 100 Ill. App. 530; Baltimore, etc., R. Co. *v.* Irwin, 97 Ill. App. 337; Baltimore, etc., R. Co. *v.* Perryman, 95 Ill. App. 199.

Indiana.— Baltimore, etc., R. Co. *v.* Countryman, 16 Ind. App. 139, 44 N. E. 265; Chicago, etc., R. Co. *v.* Smith, 6 Ind. App. 262, 33 N. E. 241.

Iowa.— Krejci *v.* Chicago, etc., R. Co., 117 Iowa 344, 90 N. W. 708.

Kansas.— Ft. Scott, etc., R. Co. *v.* Tubbs, 47 Kan. 630, 28 Pac. 612; Atchison, etc., R. Co. *v.* Hays, 8 Kan. App. 545, 54 Pac. 322; Atchison, etc., R. Co. *v.* Briggs, 2 Kan. App. 154, 43 Pac. 289.

South Carolina.— Dent *v.* South-Bound R. Co., 61 S. C. 329, 39 S. E. 527, holding that this difference in value may be shown by proof of the value of trees, turpentine boxes, vegetable matter, undergrowth, and litter destroyed.

Texas.— Ft. Worth, etc., R. Co. *v.* Wallace, 74 Tex. 581, 12 S. W. 227; Galveston, etc., R. Co. *v.* Horne, 69 Tex. 643, 9 S. W. 440; Jackson *v.* Missouri, etc., R. Co., (Civ. App. 1904) 78 S. W. 724. See also Gulf, etc., R. Co. *v.* Jagoe, (Civ. App. 1895) 32 S. W. 1061.

See 41 Cent. Dig. tit. "Railroads," § 1737; and, generally, DAMAGES, 13 Cyc. 150, 152.

11. *Arkansas.*— St. Louis, etc., R. Co. *v.* Ayres, 67 Ark. 371, 55 S. W. 159, growing trees.

Illinois.— Louisville, etc., R. Co. *v.* Spencer, 149 Ill. 67, 36 N. E. 91; Illinois Cent. R. Co. *v.* Almon, 100 Ill. App. 530 (orchard and meadow); Chicago, etc., R. Co. *v.* Davis, 74 Ill. App. 595; Cleveland, etc., R. Co. *v.* Stephens, 74 Ill. App. 586.

Indiana.— Pennsylvania Co. *v.* Hunsley, 23 Ind. App. 37, 54 N. E. 1071; Baltimore, etc., R. Co. *v.* Countryman, 16 Ind. App. 139, 44 N. E. 265; Terre Haute, etc., R. Co. *v.* Walsh, 11 Ind. App. 13, 38 N. E. 534.

Iowa.— Krejci *v.* Chicago, etc., R. Co., 117 Iowa 344, 90 N. W. 708; Rowe *v.* Chicago, etc., R. Co., 102 Iowa 286, 71 N. W. 409 (holding that the measure of damages is the difference between the fair market value of the farm not including the grass or fences destroyed, before the fire and immediately after the fire); Brooks *v.* Chicago, etc., R. Co., 73 Iowa 179, 34 N. W. 805. A distinction is made in this jurisdiction between the destruction of growing trees and the destruction of meadow, the measure of damages in the former case being the difference between the value of the land before and after the fire, and in the latter case the cost of reseeding and the rental value until restored. Bradley *v.* Iowa Cent. R. Co., 111 Iowa 562, 82 N. W. 996.

Kansas.— St. Louis, etc., R. Co. *v.* Hoover, 3 Kan. App. 577, 43 Pac. 854 (orchard); Missouri Pac. R. Co. *v.* Haynes, 1 Kan. App. 586, 42 Pac. 259 (orchard).

Minnesota.— Ward *v.* Chicago, etc., R. Co., 61 Minn. 449, 63 N. W. 1104 (growing grass); Hayes *v.* Chicago, etc., R. Co., 45 Minn. 17, 47 N. W. 260; Carner *v.* Chicago, etc., R. Co., 43 Minn. 375, 45 N. W. 713. See Lommeland *v.* St. Paul, etc., R. Co., 35 Minn. 412, 29 N. W. 119.

Missouri.— Shannon *v.* Hannibal, etc., R. Co., 54 Mo. App. 223. See Atkinson *v.* Atlantic, etc., R. Co., 63 Mo. 367.

New York.— Dwight *v.* Elmira, etc., R. Co., 132 N. Y. 199, 30 N. E. 398, 28 Am. St. Rep. 563, 15 L. R. A. 612 [*distinguishing* Whitbeck *v.* New York Cent. R. Co., 36 Barb. 644].

See 41 Cent. Dig. tit. "Railroads," § 1737.

Where a hedge is destroyed by fire the measure of damages is the difference between what the property was worth with the hedge and what it is worth without it. Swanson *v.* Keokuk, etc., R. Co., 116 Iowa 304, 89 N. W. 1088; Bradley *v.* Iowa Cent. R. Co., 111 Iowa 562, 82 N. W. 996.

Where growing trees suitable for cord wood and other timber are burned the measure of damages is the difference between the value of the timber land just before and just after the fire, and not the value of the burned timber for cord wood. Greenfield *v.* Chicago, etc., R. Co., 83 Iowa 270, 49 N. W. 95.

The increased cost of cutting timber as of the time suit is brought owing to the blowing down of trees whose roots were burned should be considered in determining the measure of damages to timber land, although the action is not brought until two years after the fire. Gordon *v.* Grand Rapids, etc., R. Co., 103 Mich. 379, 61 N. W. 549.

The damage to a meadow destroyed by fire is measured by the cost of reseeding it and its rental value from the time of its destruction until it is restored. St. Louis, etc., R. Co. *v.* Jones, 59 Ark. 105, 26 S. W. 595; Pittsburgh, etc., R. Co. *v.* Hixon, 110 Ind. 225, 11 N. E. 285; Black *v.* Minneapolis, etc., R. Co., 122 Iowa 32, 96 N. W. 984; Krejci *v.* Chicago, etc., R. Co., 117 Iowa 344, 90 N. W. 708; Bradley *v.* Iowa Cent. R. Co., 111 Iowa 562, 82 N. W. 996; Vermilya *v.* Chicago, etc., R. Co., 66 Iowa 606, 24 N. W. 234, 55 Am. Rep. 279. See also Knight *v.* Chicago, etc., R. Co., 122 Mo. App. 38, 98 S. W. 81, holding that plaintiff is entitled, where reseeding is required, to recover the value of the grass destroyed, and the rental value of the land for the succeeding year, but not the loss of a meadow crop and pasturage for the next year.

other jurisdictions, however, it is held that where such species of property is capable of valuation separate from the soil the proper measure of damages in such cases is the value of such property at the time of the fire, if it is wholly destroyed,[12] or if it is only partially destroyed the difference between its market value before the fire and its value after the fire,[13] and in addition thereto if the soil is injured the difference between the value of the land before the fire exclusive of the value of the grass, timber, etc., and its value thereafter.[14] Where the property burned has no market value or the market value is inadequate the proper measure of damages is its reasonable value at the time and place of destruction for the uses to which the owner was then putting it or might have put it,[15] taking into account, in some jurisdictions, the original cost and the cost of replacing the property after allowance for depreciation from use and age.[16] Where buildings are injured or destroyed it is ordinarily held that they are capable of a separate

With regard to timber the rule is stated to be that if the value of the land is diminished by the negligent firing and destruction of timber thereon, the measure of damages is the diminution in the value of the premises resulting from the injury caused by the fire; but that if there is no diminution in the market value of the land by reason of the burning of the timber, the measure of damages is the proved value of the timber destroyed. Western, etc., R. Co. *v.* Tate, 129 Ga. 526, 59 S. E. 266; Central R., etc., Co. *v.* Murray, 93 Ga. 256, 20 S. E. 129.

Where growing timber destroyed is immature, so that there is no depreciation in the market value of the land, the measure of damages is the value of the timber destroyed. Western, etc., R. Co. *v.* Tate, 129 Ga. 526, 59 S. E. 266.

12 Ft. Worth, etc., R. Co. *v.* Hogsett, 67 Tex. 685, 4 S. W. 365; Texas, etc., R. Co. *v.* Prude, 39 Tex. Civ. App. 144, 86 S. W. 1046; Texas Midland R. Co. *v.* Moore, (Tex. Civ. App. 1903) 74 S. W. 942; Texas, etc., R. Co. *v.* Rice, 24 Tex. Civ. App. 374, 59 S. W. 833; International, etc., R. Co. *v.* McIver, (Tex. Civ. App. 1897) 40 S. W. 438; Gulf, etc., R. Co. *v.* Reagan, (Tex. Civ. App. 1895) 32 S. W. 846; Missouri, etc., R. Co. *v.* Goode, 7 Tex. Civ. App. 245, 26 S. W. 441; Galveston, etc., R. Co. *v.* Rheiner, (Tex. Civ. App. 1894) 25 S. W. 971; Missouri, etc., R. Co. *v.* Pfluger, (Tex. Civ. App. 1894) 25 S. W. 792; Gulf, etc., R. Co. *v.* Matthews, 3 Tex. Civ. App. 493, 23 S. W. 90; Norfolk, etc., R. Co. *v.* Bohannon, 85 Va. 293, 7 S. E. 236. See also Parrott *v.* Housatonic R. Co., 47 Conn. 575; Baltimore, etc., R. Co. *v.* Shipley, 39 Md. 251. But see International, etc., R. Co. *v.* McIver, (Tex. Civ. App. 1897) 40 S. W. 438, as to fences destroyed.

For practical illustrations as to when the damages should be measured by the diminution in the value of the land and when by the separate value of the thing destroyed see Dwight *v.* Elmira, etc., R. Co., 132 N. Y. 199, 30 N. E. 398, 28 Am. St. Rep. 563, 15 L. R. A. 612.

13. Union Pac. R. Co. *v.* Murphy, 76 Nebr. 545, 107 N. W. 757; Kansas City, etc., R. Co. *v.* Rogers, 48 Nebr. 653, 67 N. W. 602; Fremont, etc., R. Co. *v.* Crum, 30 Nebr. 70, 46 N. W. 217.

14. Galveston, etc., R. Co. *v.* Horne, 69 Tex. 643, 9 S. W. 440; Missouri Pac. R. Co. *v.* Ayers, (Tex. 1888) 8 S. W. 538; Texas, etc., R. Co. *v.* Prude, 39 Tex. Civ. App. 144, 86 S. W. 1046; Texas Midland R. Co. *v.* Moore, (Tex. Civ. App. 1903) 74 S. W. 942; Texas, etc., R. Co. *v.* Rice, 24 Tex. Civ. App. 374, 59 S. W. 833; International, etc., R. Co. *v.* McIver, (Tex. Civ. App. 1897) 40 S. W. 438; Gulf, etc., R. Co. *v.* Reagan, (Tex. Civ. App. 1895) 32 S. W. 846; Missouri, etc., R. Co. *v.* Fulmore, (Tex. Civ. App. 1895) 29 S. W. 688; Missouri, etc., R. Co. *v.* Goode, 7 Tex. Civ. App. 245, 26 S. W. 441; Missouri, etc., R. Co. *v.* Pfluger, (Tex. Civ. App. 1894) 25 S. W. 792; Gulf, etc., R. Co. *v.* Hendricks, (Tex. Civ. App. 1894) 25 S. W. 433; Gulf, etc., R. Co. *v.* Matthews, 3 Tex. Civ. App. 493, 23 S. W. 90.

Where fire destroys standing grass in a leased pasture, and injures the sod, the owner can recover for the injury to the sod, and for the value of the grass in the condition it would have been, but for the fire, at the time the owner would have been entitled to resume possession. Missouri, etc., R. Co. *v.* Fulmore, (Tex. Civ. App. 1894) 26 S. W. 238.

Where fences and ornamental trees are burned the measure of damages is the diminution in the value of the premises. Louisville, etc., R. Co. *v.* Kohlruss, 124 Ga. 250, 52 S. E. 166. See also Southern R. Co. *v.* Ward, 110 Ga. 793, 36 S. E. 78.

15. Cleveland, etc., R. Co. *v.* McKelvey, 12 Ohio Cir. Ct. 426, 5 Ohio Cir. Dec. 561; Texas, etc., R. Co. *v.* Prude, 39 Tex. Civ. App. 144, 86 S. W. 1046; Tyler Southeastern R. Co. *v.* Hitchins, 26 Tex. Civ. App. 400, 63 S. W. 1069 (intrinsic or reasonable cash value as affected by the consequence of the fire); San Antonio, etc., R. Co. *v.* Stone, (Tex. Civ. App. 1901) 60 S. W. 461; International, etc., R. Co. *v.* Searight, 8 Tex. Civ. App. 593, 28 S. W. 39.

16. Wall *v.* Platt, 169 Mass. 398, 48 N. E. 207. But see Cleveland, etc., R. Co. *v.* McKelvey, 12 Ohio Cir. Ct. 426, 5 Ohio Cir. Dec. 561.

Where fencing is destroyed the measure of damages is the cost of restoring it to a condition as good as before. Central R., etc., Co. *v.* Murray, 93 Ga. 256, 20 S. E. 129;

valuation and that the measure of damages is the value of the property at the time of its destruction.[17]

(III) *PERSONAL PROPERTY.* Where personal property is injured or destroyed by a railroad fire the measure of damages for the property so destroyed is its market value at the time and place of destruction,[18] and not the cost of replacing it.[19] If it is only partially destroyed the measure of damage is the difference between its market value before and its value after the fire.[20]

(IV) *INTEREST.* In many jurisdictions it is held that the jury may add interest to the amount of the damages from the time they were sustained as an element of such damages.[21]

(V) *ATTORNEY'S FEES.* In some jurisdictions plaintiff is entitled by statute to recover, in addition to his actual damages, his reasonable attorney's fees,[22]

Gulf, etc., R. Co. *v.* Wallace, 14 Tex. Civ. App. 386, 37 S. W. 382.

17. Central R., etc., Co. *v.* Murray, 93 Ga. 256, 20 S. E. 129; Atchison, etc., R. Co. *v.* Huitt, 1 Kan. App. 788, 41 Pac. 1051; Matthews *v.* Missouri Pac. R. Co., 142 Mo. 645, 44 S. W. 802. See also Highland *v.* Houston, etc., R. Co., (Tex. Civ. App. 1901) 65 S. W. 649.

The cost of replacing a building is the measure of damages for its destruction, although there is no demand or market for such building at the place where destroyed. Cincinnati, etc., R. Co. *v.* Falconer, 97 S. W. 727, 30 Ky. L. Rep. 152.

18. Baltimore, etc., R. Co. *v.* Irwin, 97 Ill. App. 337; Chicago Great Western R. Co. *v.* Gitchell, 95 Ill. App. 1; Atchison, etc., R. Co. *v.* Briggs, 2 Kan. App. 154, 43 Pac. 289; Flannery *v.* St. Louis, etc., R. Co., 44 Mo. App. 396; Huff *v.* Missouri Pac. R. Co., 17 Mo. App. 356; Burke *v.* Louisville, etc., R. Co., 7 Heisk. (Tenn.) 451, 19 Am. Rep. 618.

Where there is no local market at the place where the property was destroyed, the measure of damages is its value at the nearest market less the cost of transportation thereto. Watt *v.* Nevada Cent. R. Co., 23 Nev. 154, 44 Pac. 423, 46 Pac. 52, 726, 62 Am. St. Rep. 772.

The cost of personal property destroyed is insufficient standing alone to furnish the jury a basis for a verdict, although it is admissible in evidence as a circumstance tending to show the value at the time of the destruction. St. Louis Southwestern R. Co. *v.* Moss, 37 Tex. Civ. App. 461, 84 S. W. 281.

The measure of damages for cord wood burned by fire negligently set by a railroad company is the value of the wood in the place where it was at the time of the fire and not the value of the wood standing, plus the cost of cutting. Hart *v.* Atlantic Coast Line R. Co., 144 N. C. 91, 56 S. E. 559.

19. Burke *v.* Louisville, etc., R. Co., 7 Heisk. (Tenn.) 451, 19 Am. Rep. 618.

20. Hubbard *v.* New York, etc., R. Co., 70 Conn. 563, 40 Atl. 533; Flannery *v.* St. Louis, etc., R. Co., 44 Mo. App. 396; Texas, etc., R. Co. *v.* Levi, 59 Tex. 674.

The cost of putting the property in marketable condition may be considered in estimating damages. Texas, etc., R. Co. *v.* Levi, 59 Tex. 674.

21. *Connecticut.*— Parrott *v.* Housatonic R. Co., 47 Conn. 575.

Florida.— Jacksonville, etc., R. Co. *v.* Peninsular Land, etc., Co., 27 Fla. 1, 9 So. 661, 17 L. R. A. 33, 65.

Iowa.— Black *v.* Minneapolis, etc., R. Co., 122 Iowa 32, 96 N. W. 984.

South Carolina.— Wilson *v.* Atlanta, etc., Airline R. Co., 16 S. C. 587.

Tennessee.— Louisville, etc., R. Co. *v.* Fort, 112 Tenn. 432, 80 S. W. 429.

Texas.— Galveston, etc., R. Co. *v.* Horne, 69 Tex. 643, 9 S. W. 440; Texas, etc., R. Co. *v.* Tankersley, 63 Tex. 57; Gulf, etc., R. Co. *v.* Sheperd, (Civ. App. 1903) 76 S. W. 800; Missouri, etc., R. Co. *v.* Pfluger, (Civ. App. 1894) 25 S. W. 792.

Wisconsin.— See Chapman *v.* Chicago, etc., R. Co., 26 Wis. 295, 7 Am. Rep. 81, allowing interest from the commencement of the action.

Contra.— Atkinson *v.* Atlantic, etc., R. Co., 63 Mo. 367; Flannery *v.* St. Louis, etc., R. Co., 44 Mo. App. 396.

Computation by court.— Where the verdict is for plaintiff in a certain sum, the value of the property destroyed, and interest, the action of the trial judge in computing and including interest in the judgment is proper. Louisville, etc., R. Co. *v.* Fort, 112 Tenn. 432, 80 S. W. 429.

22. Cleveland, etc., R. Co. *v.* Vickery, 116 Ill. App. 293 (holding that such fees may be allowed notwithstanding the declaration fails to follow the language of the statute, if the case is tried upon the theory of, and the proof brings it within, the language of the statute); Cleveland, etc., R. Co. *v.* Sellers, 60 Ill. App. 81; Chicago, etc., R. Co. *v.* Spring Hill Cemetery Assoc., (Kan. App. 1899) 57 Pac. 252 (holding that Laws (1885), c. 155, § 2, providing for attorney's fees in actions against railroad companies for damages, is constitutional); St. Louis, etc., R. Co. *v.* Hoover, 3 Kan. App. 577, 43 Pac. 854.

The statutory right to attorney's fees is not a distinct and independent cause of action, but depends upon the right of plaintiff to recover on his general cause of action for damages. St. Louis, etc., R. Co. *v.* Ludlum, 63 Kan. 719, 66 Pac. 1045.

Where the cause is twice tried in the district court, plaintiff is only entitled to recover his reasonable attorney's fee for the

provided he demands such fees in his petition and submits the question to the court or jury together with the other facts in the case.[23]

(VI) *REDUCTION OR MITIGATION OF DAMAGES.*[24] The general rule that it is the legal duty of one who is apt to be injured by the wrongful conduct of another to exercise reasonable diligence to avoid or minimize the results of the injury, and that if he negligently fails to do so he cannot recover of the wrong-doer for such damages as he could have thus escaped,[25] applies to cases of injury caused by the negligent setting of fires by a railroad company;[26] and plaintiff cannot recover damages where the fire proves a benefit rather than an injury to his property.[27] But defendant is not entitled to a reduction of damages to the extent of insurance on the property paid by an insurance company to plaintiff,[28] unless such reduction is permitted by statute.[29] Nor is it entitled to a reduction on

one successful prosecution of the cause. Clark *v.* Ellithorp, 9 Kan. App. 503, 59 Pac. 286.

Joining as plaintiff an insurance company which paid the loss does not preclude the owner from recovering attorney's fees prescribed by statute, and the inclusion thereof in the judgment rendered in his favor, where the only relief asked by the insurance company is subrogation to the owner's rights under the judgment. Atchison, etc., R. Co. *v.* Huitt, 1 Kan. App. 788, 41 Pac. 1051.

23. Fort Scott, etc., R. Co. *v.* Tubbs, 47 Kan. 630, 28 Pac. 612; Ft. Scott, etc., R. Co. *v.* Karracker, 46 Kan. 511, 26 Pac. 1027.

What is a reasonable attorney's fee is a question of fact for the jury. Missouri Pac. R. Co. *v.* Lea, 47 Kan. 268, 27 Pac. 987.

24. Mitigation of damages generally see DAMAGES, 13 Cyc. 66.

25. See, generally, DAMAGES, 13 Cyc. 71.

26. Louisville, etc., R. Co. *v.* Sullivan Timber Co., 138 Ala. 379, 35 So. 327; O'Neill *v.* New York, etc., R. Co., 45 Hun (N. Y.) 458 [*affirmed* in 115 N. Y. 579, 22 N. E. 217, 5 L. R. A. 591], holding, however, that plaintiff may show that it was impossible for him to do certain acts to reduce the damages.

27. Bossu *v.* New Orleans, etc., R. Co., 49 La. Ann. 1593, 22 So. 809.

28. *Connecticut.*— Regan *v.* New York, etc., R. Co., 60 Conn. 124, 22 Atl. 503, 25 Am. St. Rep. 306, holding that under Gen. St. § 3581, making a railroad company liable for loss caused by fire communicated from one of its locomotives whether it was negligent or not, defendant is not entitled to a reduction of damages to the extent of insurance paid.

Missouri.— Mathews *v.* St. Louis, etc., R. Co., 121 Mo. 298, 24 So. 591, 25 L. R. A. 161, holding this to be true, although the statute (Rev. St. (1889) § 2615) gives the railroad company an insurable interest in property along its right of way, where the company has not so insured.

New Hampshire.— Rolfe *v.* Boston, etc., R. Co., 69 N. H. 476, 45 Atl. 251. See also Smith *v.* Boston, etc., R. Co., 63 N. H. 25, holding that no reduction should be made where no part of the insurance has been paid.

New Jersey.— Weber *v.* Morris, etc., R. Co., 35 N. J. L. 409, 10 Am. Rep. 253, holding also that after recovery plaintiff will hold for the insurance company such portion of the amount recovered as it has paid him.

New York.— Collins *v.* New York Cent., etc., R. Co., 5 Hun 503 [*affirmed* in 71 N. Y. 609].

Ohio.— Lake Erie, etc., R. Co. *v.* Falk, 62 Ohio St. 297, 56 N. E. 1020.

Virginia.— Norfolk, etc., R. Co. *v.* Perrow, 101 Va. 345, 43 S. E. 614, holding this to be true where it appears that the action, to this extent, is being prosecuted for the benefit of the insurance company.

The right of the property-owner as against the railroad company and the insurer is limited to indemnity for his loss. Lake Erie, etc., R. Co. *v.* Falk, 62 Ohio St. 297, 56 N. E. 1020.

29. Dyer *v.* Maine Cent. R. Co., 99 Me. 195, 58 Atl. 994, 67 L. R. A. 416 (holding, however, that that part of the statute (Rev. St. (1883) c. 51, § 64, as amended by Pub. Laws (1895), p. 77, c. 79), giving a railroad company the benefit of any insurance on property injured, is limited to those cases in which the liability of the railroad company is created by that section and not by its own negligence); Boston Excelsior Co. *v.* Bangor, etc., R. Co., 93 Me. 52, 44 Atl. 138, 47 L. R. A. 82; Lyons *v.* Boston, etc., R. Co., 181 Mass. 551, 64 N. E. 404 (holding that under Pub. St. c. 112, § 214, as amended by St. (1895) c. 293, providing that when the railroad company is held responsible for destruction of property by fire, it shall be entitled to the benefit of any insurance effected on the property by the owner less the cost of premium and expense of recovery, the railroad company is entitled to have the amount of any insurance on the property deducted from the damages found for its destruction less the cost of premium and expenses of recovery, although the insurance was issued before the statute was amended).

Me. St. (1895) c. 79, limiting the liability of a railroad to the excess of the damage suffered by the property-owner over the net amount of insurance recovered, if received before the damages are assessed, and providing that, if the insurance is not so received, the policy shall be assigned to the railroad corporation, which may sue thereon, applies to cases in which property was destroyed by fire after the act took effect, although the property was insured by policies taken out before. Leavitt *v.* Canadian Pac. R. Co., 90 Me. 153, 37 Atl. 886, 38 L. R. A. 152.

the ground that if it had not destroyed the property plaintiff would have subsequently lost a portion of it from other causes.[30]

f. Questions For Court and Jury — (i) *In General.* Where the evidence in an action against a railroad company for damages by fire is uncontradicted and unconflicting, or where there is no evidence, the question of negligence is generally one for the court to decide, and it should do so.[31] But where the evidence is conflicting or is otherwise sufficient to warrant its submission to the jury,[32] it must be submitted and it is then a question for the jury to determine as to what weight or credit shall be given to such evidence,[33] and to determine therefrom, under proper instructions from the court, the question of negligence,[34] or any other issuable fact.[35] The construction of a contract between plaintiff

30. Hubbard *v.* New York, etc., R. Co., 70 Conn. 563, 40 Atl. 533, burning an icehouse and contents.

31. Central Branch Union Pac. R. Co. *v.* Hotham, 22 Kan. 41; Union Pac. R. Co. *v.* Lippraud, 5 Kan. App. 484, 47 Pac. 625; Continental Ins. Co. *v.* Chicago, etc., R. Co., 97 Minn. 467, 107 N. W. 548, 5 L. R. A. N. S. 99; Williams *v.* Southern R. Co., 130 N. C. 116, 40 S. E. 979; McCullen *v.* Chicago, etc., R. Co., 101 Fed. 66, 41 C. C. A. 365, 49 L. R. A. 642.

Where the evidence if believed is insufficient to sustain plaintiff's case, the jury should find for defendant, and the court should so charge. Alabama Great Southern R. Co. *v.* Taylor, 129 Ala. 238, 29 So. 673.

Where there is no evidence that plaintiff suffered the damages alleged a verdict for defendant may be properly directed. Meyn *v.* Chicago Great Western R. Co., (Iowa 1906) 109 N. W. 1096.

32. Van Steuben *v.* New Jersey Cent. R. Co., 178 Pa. St. 367, 35 Atl. 992, 34 L. R. A. 577.

Evidence held sufficient to warrant submission to the jury of the question of defendant's negligence see Cincinnati, etc., R. Co. *v.* Cecil, 90 S. W. 585, 28 Ky. L. Rep. 830; Craft *v.* Albemarle Timber Co., 132 N. C. 151, 43 S. E. 597 (evidence that defendant permitted tree tops which were very inflammable to remain so near the tract as to be easily ignited by sparks and coals, there being no evidence that the engine was furnished with spark arresters); Lackawanna, etc., R. Co. *v.* Doak, 52 Pa. St. 379, 91 Am. Dec. 166 (where building on the railroad was found to be on fire while a train drawn by an engine without a spark catcher was passing, although there was no direct evidence that sparks had come from the engine); McCready *v.* South Carolina R. Co., 2 Strobh. (S. C.) 356 (holding that where the fact of damage by fire is shown, and it appears that the fire was communicated from plaintiff's engine, the question of negligence is for the jury, although defendant has not shown that it was in the exercise of due care in the management of the engine).

When the facts proven are such that reasonable men may fairly differ upon the question as to whether there was negligence or not the determination of that issue is for the jury. McCullen *v.* Chicago, etc., R. Co., 101 Fed. 66, 41 C. C. A. 365, 49 L. R. A. 642.

The mere fact that the fire started some distance from the track is not sufficient in itself to warrant a submission of the question of negligence to the jury. Smith *v.* Northern Pac. R. Co., 3 N. D. 17, 53 N. W. 173.

33. Dunning *v.* Maine Cent. R. Co., 91 Me. 87, 39 Atl. 352, 64 Am. St. Rep. 208; Van Steuben *v.* New Jersey Cent. R. Co., 178 Pa. St. 367, 35 Atl. 992, 34 L. R. A. 577.

Where both direct and circumstantial evidence is introduced it is a question for the jury to determine which evidence is entitled to the greater credit. Atchison, etc., R. Co. *v.* Bales, 16 Kan. 252.

34. *Alabama.*—Alabama Great Southern R. Co. *v.* Taylor, 129 Ala. 238, 29 So. 673.

Illinois.— Chicago, etc., R. Co. *v.* Pennell, 94 Ill. 448.

Kansas.— Missouri Pac. R. Co. *v.* Kincaid, 29 Kan. 654; Central Branch Union Pac. R. Co. *v.* Hotham, 22 Kan. 41; Padgett *v.* Atchison, etc., R. Co., 7 Kan. App. 736, 52 Pac. 578; Union Pac. R. Co. *v.* Lipprand, 5 Kan. App. 484, 47 Pac. 625.

Minnesota.— Continental Ins. Co. *v.* Chicago, etc., R. Co., 97 Minn. 467, 107 N. W. 548, 5 L. R. A. N. S. 99.

North Carolina.— Williams *v.* Southern R. Co., 130 N. C. 116, 40 S. E. 979.

Pennsylvania.— Van Steuben *v.* New Jersey Cent. R. Co., 178 Pa. St. 367, 35 Atl. 992, 34 L. R. A. 577.

South Carolina.— McCready *v.* South Carolina R. Co., 2 Strobh. 356.

Tennessee.— Louisville, etc., R. Co. *v.* Fort, 112 Tenn. 432, 80 S. W. 429.

Canada.— Canada Southern R. Co. *v.* Phelps, 14 Can. Sup. Ct. 132; McGibbon *v.* Northern R. Co., 14 Ont. App. 91 [*reversing* 11 Ont. 307].

See 41 Cent. Dig. tit. "Railroads," § 1740.

Where the evidence sufficiently establishes that the fire was caused by sparks from a passing engine, and thus creates a presumption of negligence on the part of defendant, the case should be submitted to the jury, unless the rebutting evidence as to due care is so clear and circumstantial that no reasonable person could doubt its verity. McCullen *v.* Chicago, etc., R. Co., 101 Fed. 66, 41 C. C. A. 365, 49 L. R. A. 642.

Whether a certain fire guard along a railroad right of way is reasonably sufficient to prevent the escape of fire from passing locomotives is a question of fact for the jury. Buck *v.* Union Pac. R. Co., 59 Kan. 328, 52 Pac. 866.

35. Ft. Scott, etc., R. Co. *v.* Tubbs, 47 Kan.

and defendant, exempting the latter from liability for loss by fire, is for the court, and should not be left to the jury.[36]

(II) *REBUTTING PRESUMPTION OF NEGLIGENCE.* The question as to whether the *prima facie* case of negligence arising from proof of the communication of the fire by an engine[37] is overcome by defendant's evidence tending to show that the engine was supplied with proper appliances and was in good repair and that it was carefully managed is in general one of fact for the jury.[38] But it is held that since this presumption of negligence is one of law, it is for the court and not the jury, where there is no conflict in the testimony, to determine the amount and character of the proof necessary to overcome it.[39]

(III) *ORIGIN OF FIRE.* Where there is no direct proof that the fire was communicated from defendant's right of way or by sparks from an engine,[40] but there is circumstantial evidence tending to show a probability that the fire in question was communicated from a fire started on defendant's right of way,[41] or from one of its engines,[42] and where the evidence on such point is conflicting and indeci-

630, 28 Pac. 612, reasonableness of attorney's fees.

36. Mann *v.* Pere Marquette R. Co., 136 Mich. 210, 97 N. W. 721, holding that it is error to instruct the jury that it is for them to determine whether the loss came within the contract, and not to instruct them that the contract relieved defendant from liability.

Construction of contracts generally as question for court see CONTRACTS, 9 Cyc. 591.

Whether the property destroyed was in the "vicinity" of defendants' tracks, within the meaning of such a contract, should be declared by the court as a matter of law and not left to the jury to determine. Mann *v.* Pere Marquette R. Co., 135 Mich. 210, 97 N. W. 721.

37. See *supra*, X, I, 6, d, (I), (B).

38. *Illinois.*— Illinois Cent. R. Co. *v.* Bailey, 222 Ill. 480, 76 N. E. 833 [*affirming* 127 Ill. App. 41]; Baltimore, etc., R. Co. *v.* Tripp, 175 Ill. 251, 51 N. E. 833; Callaway *v.* Sturgeon, 58 Ill. App. 159; Lake Erie, etc., R. Co. *v.* Holderman, 56 Ill. App. 144.

Iowa.— Greenfield *v.* Chicago, etc., R. Co., 83 Iowa 270, 49 N. W. 95.

Kansas.—Atchison, etc., R. Co. *v.* Geiser, 68 Kan. 281, 75 Pac. 68.

Minnesota.— Solum *v.* Great Northern R. Co., 63 Minn. 233, 65 N. W. 443; Burud *v.* Great Northern R. Co., 62 Minn. 243, 64 N. W. 562; Hoffman *v.* Chicago, etc., R. Co., 43 Minn. 334, 45 N. W. 608; Sibley *v.* Northern Pac. R. Co., 32 Minn. 526, 21 N. W. 732; Johnson *v.* Chicago, etc., R. Co., 31 Minn. 57, 16 N. W. 488.

Missouri.— Sappington *v.* Missouri Pac. R. Co., 14 Mo. App. 86; Brown *v.* Missouri Pac. R. Co., 13 Mo. App. 462.

Utah.— Preece *v.* Rio Grande Western R. Co., 27 Utah 493, 68 Pac. 413.

United States.— Great Northern R. Co. *v.* Coats, 115 Fed. 452, 53 C. C. A. 382.

See 41 Cent. Dig. tit. "Railroads," § 1741.

39. Louisville, etc., R. Co. *v.* Marbury Lumber Co., 125 Ala. 237, 28 So. 438, 50 L. R. A. 620; Smith *v.* Great Northern R. Co., 3 N. D. 17, 53 N. W. 173; Menominee River Sash, etc., Co. *v.* Milwaukee, etc., R. Co., 91 Wis. 447, 65 N. W. 176; Spaulding *v.* Chicago, etc., R. Co., 33 Wis. 582, holding also that if the testimony in relation to the construction of the engines had been conflicting the question would have been one for the jury.

40. Philadelphia, etc., R. Co. *v.* Hendrickson, 80 Pa. St. 182, 21 Am. Rep. 97.

41. Cole *v.* Lake Shore, etc., R. Co., 105 Mich. 549, 63 N. W. 647; Brown *v.* Carolina Midland R. Co., 64 S. C. 365, 42 S. E. 178.

Evidence held insufficient to justify a submission to the jury of the question whether the fire originated on the right of way see Atlantic Coast Line R. Co. *v.* Watkins, 104 Va. 154, 51 S. E. 172.

Special interrogatory.— Where the issue is as to whether the fire originated on the right of way, it is error to refuse to submit a special interrogatory as to whether at that time and place there was a short green growth of grass upon the right of way. Pennsylvania Co. *v.* Hunsley, 23 Ind. App. 37, 54 N. E. 1071.

42. *Alabama.*—Alabama Great Southern R. Co. *v.* Clarke, 145 Ala. 459, 39 So. 816; Southern R. Co. *v.* Johnson, 141 Ala. 575, 37 So. 919.

Colorado.— Colorado Midland R. Co. *v.* Snider, 38 Colo. 351, 88 Pac. 453; Burlington, etc., R. Co. *v.* Burch, 17 Colo. App. 491, 69 Pac. 6.

Illinois.— Illinois Cent. R. Co. *v.* Schenck, 64 Ill. App. 24.

Kentucky.—Cincinnati, etc., R. Co. *v.* Cecil, 90 S. W. 585, 28 Ky. L. Rep. 830, question whether it was a physical impossibility for the sparks from the engine to have ignited the property.

Michigan.— Clark *v.* Grand Trunk Western R. Co., 149 Mich. 400, 112 N. W. 1121.

Mississippi.— Bonner *v.* New Orleans, etc., R. Co., (1906) 40 So. 65.

Missouri.— Kenney *v.* Hannibal, etc., R. Co., 70 Mo. 243; Brooks *v.* Missouri Pac. R. Co., 98 Mo. App. 166, 71 S. W. 1083; Torpey *v.* Missouri Pac. R. Co., 64 Mo. App. 382.

New York.— Smith *v.* Long Island R. Co., 79 N. Y. App. Div. 171, 80 N. Y. Suppl. 4; Flinn *v.* New York Cent., etc., R. Co., 67 Hun 631, 22 N. Y. Suppl. 473 [*reversed* on the facts in 142 N. Y. 11, 36 N. E. 1046];

sive,[43] the question whether or not it was so communicated is a question of fact which should be submitted to the jury. But where there is no evidence of such probability it is proper to sustain a demurrer to the evidence and to withdraw the case from the jury.[44] So where the evidence at most shows a mere possibility or conjecture that the fire was scattered by one of defendant's engines, it is insufficient to require submission of that issue to the jury.[45]

(IV) *DEFECTS IN AND MANAGEMENT OF ENGINES.* Where the evidence is conflicting or indecisive, the question as to whether or not defendant company was negligent in the construction, equipment, and operation of its engines is one of fact which should be submitted to the jury.[46] But it is error to submit such question to the jury where defendant's uncontradicted testimony shows

Babcock *v.* Fitchburg R. Co., 19 N. Y. Suppl. 774; Billings *v.* Fitchburgh R. Co., 11 N. Y. Suppl. 837 [*affirmed* in 128 N. Y. 644, 29 N. E. 147].

North Carolina.— Williams *v.* Atlantic Coast Line R. Co., 140 N. C. 623, 53 S. E. 448; McMillan *v.* Wilmington, etc., R. Co., 126 N. C. 725, 36 S. E. 129, holding that evidence that the fire was seen on the right of way soon after a train had passed, and that, although the engine had an improved spark arrester, it was known that sparks could escape, is sufficient to present the question to the jury.

Pennsylvania.— Philadelphia, etc., R. Co. *v.* Hendrickson, 80 Pa. St. 182, 21 Am. Rep. 97; Philadelphia, etc., R. Co. *v.* Kerst, 2 Walk. 480; Gowen *v.* Glaser, 2 Pa. Cas. 250, 10 Atl. 417.

Texas.— Gulf, etc., R. Co. *v.* Holt, 1 Tex. App. Civ. Cas. § 835.

Virginia.— Patteson *v.* Chesapeake, etc., R. Co., 94 Va. 16, 26 S. E. 393.

United States.— Carter *v.* Pennsylvania R. Co., 120 Fed. 663, 57 C. C. A. 125. See Musselwhite *v.* Receivers, 17 Fed. Cas. No. 9,972, 4 Hughes 166, holding that there is nothing to submit to the jury where there is no positive testimony tending to show that sparks from the engine caused the fire which for aught that appeared might have been caused otherwise.

Canada.— McGibbon *v.* Northern R. Co., 14 Ont. App. 91 [*reversing* 11 Ont. 307].

See 41 Cent. Dig. tit. "Railroads," § 1742.

Nonsuit.— Where the evidence, although circumstantial, authorizes a finding that the fire was communicated by an engine it is error to grant a nonsuit. Swindell *v.* Alabama Midland R. Co., 123 Ga. 311, 51 S. E. 386.

43. Wilson *v.* Northern Pac. R. Co., 43 Minn. 519, 45 N. W. 1132; Tanner *v.* New York Cent., etc., R. Co., 108 N. Y. 623, 15 N. E. 379; Seeley *v.* New York Cent., etc., R. Co., 102 N. Y. 719, 7 N. E. 734; Shepp *v.* New York Cent., etc., R. Co., 4 N. Y. Suppl. 951; Matthews *v.* Pittsburg, etc., R. Co., 18 Pa. Super. Ct. 10; McCullen *v.* Chicago, etc., R. Co., 101 Fed. 66, 41 C. C. A. 365, 49 L. R. A. 642; Minneapolis, etc., R. Co. *v.* Emerson, 80 Fed. 993, 26 C. C. A. 296.

44. Alexander *v.* Missouri Pac. R. Co., 37 Mo. App. 609.

45. Minneapolis Sash, etc., Co. *v.* Great Northern R. Co., 83 Minn. 370, 86 N. W. 451.

46. *Alabama.*— Louisville, etc., R. Co. *v.* Sherrell, (1905) 44 So. 153, 152 Ala. 213, 44 So. 631.

Georgia.— Wilcox *v.* Evans, 127 Ga. 580, 56 S. E. 635.

Illinois.— Cleveland, etc., R. Co. *v.* Hornsby, 202 Ill. 138, 66 N. E. 1052 [*affirming* 105 Ill. App. 67].

Iowa.— Glanz *v.* Chicago, etc., R. Co., 119 Iowa 611, 93 N. W. 575; Thompson *v.* Keokuk, etc., R. Co., 116 Iowa 215, 89 N. W. 975; Hemmi *v.* Chicago Great Western R. Co., 102 Iowa 25, 70 N. W. 746; Babcock *v.* Chicago, etc., R. Co., 62 Iowa 593, 13 N. W. 740, 17 N. W. 909.

Kentucky.— Louisville, etc., R. Co. *v.* Beeler, 103 S. W. 300, 31 Ky. L. Rep. 750, 11 L. R. A. N. S. 930; Illinois Cent. R. Co. *v.* Scheible, 72 S. W. 325, 24 Ky. L. Rep. 1708; Illinois Cent. R. Co. *v.* Barret, 66 S. W. 9, 23 Ky. L. Rep. 1755; Louisville, etc., R. Co. *v.* Samuels, 57 S. W. 235, 22 Ky. L. Rep. 303, holding that evidence that the locomotive in question and other locomotives passing on the same part of the road emitted sparks and cinders in considerable quantities is sufficient to authorize a submission to the jury of the question whether the spark arrester was out of order.

Michigan.— Clark *v.* Grand Trunk Western R. Co., 149 Mich. 400, 112 N. W. 1121; Hagan *v.* Chicago, etc., R. Co., 86 Mich. 615, 49 N. W. 509, evidence held to raise a question for the jury, although the company's evidence was not expressly contradicted.

Minnesota.— Hoy *v.* Chicago, etc., R. Co., 46 Minn. 269, 48 N. W. 1117.

Mississippi.— Tribette *v.* Illinois Cent., etc., R. Co., 71 Miss. 212, 13 So. 899.

Nebraska.— Union Pac. R. Co. *v.* Ray, 46 Nebr. 750, 65 N. W. 773.

New York.— Flinn *v.* New York Cent., etc., R. Co., 67 Hun 631, 22 N. Y. Suppl. 473 [*distinguishing* Steinweg *v.* Erie R. Co., 43 N. Y. 123, 3 Am. Rep. 673]; Douglass *v.* Rome, etc., R. Co., 1 Silv. Sup. 210, 5 N. Y. Suppl. 214; Babcock *v.* Fitchburg R. Co., 19 N. Y. Suppl. 774; Bradshaw *v.* Rome, etc., R. Co., 1 N. Y. Suppl. 691.

North Carolina.— Whitehurst *v.* Atlantic Coast Line R. Co., 146 N. C. 588, 60 S. E. 648.

North Dakota.— McTavish *v.* Great Northern R. Co., 8 N. D. 333, 79 N. W. 443.

Pennsylvania.— Philadelphia, etc., R. Co. *v.* Schultz, 93 Pa. St. 341; Lehigh Valley R.

that the engine was properly constructed, equipped, and managed,[47] or where the evidence is insufficient to warrant a finding by the jury on that issue.[48]

(v) *COMBUSTIBLES ON RAILROAD PROPERTY.* Whether the railroad company has been negligent in allowing combustible material to accumulate on its right of way near its tracks by means of which fire may be communicated to the property of others is ordinarily a question of fact to be determined by the jury,[49] in view of the extent to which such material has been allowed to accumulate in the particular locality, the season of the year, and all circumstances affecting the liability of fire to be communicated thereby.[50]

(vi) *CONTRIBUTORY NEGLIGENCE.* Where the evidence as to contributory negligence is sufficient to warrant its submission to the jury,[51] the question whether

Co. *v.* McKeen, 90 Pa. St. 922, 35 Am. Rep. 644; Huyett *v.* Philadelphia, etc., R. Co., 23 Pa. St. 373; Stephenson *v.* Pennsylvania R. Co., 20 Pa. Super. Ct. 157.

South Dakota.— Smith *v.* Chicago, etc., R. Co., 4 S. D. 71, 55 N. W. 717.

Texas.— Gulf, etc., R. Co. *v.* Baugh, (Civ. App. 1897) 43 S. W. 557.

Utah.— Olmstead *v.* Oregon Short Line R. Co., 27 Utah 515, 76 Pac. 557.

Vermont.— Farrington *v.* Rutland R. Co., 72 Vt. 24, 47 Atl. 171.

Virginia.— Norfolk, etc., R. Co. *v.* Perrow, 101 Va. 345, 43 S. E. 615; Patteson *v.* Chesapeake, etc., R. Co., 94 Va. 16, 26 S. W. 393.

Wisconsin.— Stacy *v.* Milwaukee, etc., R. Co., 85 Wis. 225, 54 N. W. 779; Kurz, etc., Ice Co. *v.* Milwaukee, etc., R. Co., 84 Wis. 171, 53 N. W. 850; Mills *v.* Chicago, etc., R. Co., 76 Wis. 422, 45 N. W. 255.

United States.— Richmond *v.* Oregon R., etc., Co., 137 Fed. 848, 70 C. C. A. 378; Great Northern R. Co. *v.* Coats, 115 Fed. 452, 53 C. C. A. 382; Norris *v.* Baltimore, etc., R. Co., 109 Fed. 591, 48 C. C. A. 561.

England.— Fremantle *v.* London, etc., R. Co., 10 C. B. N. S. 89, 31 L. J. C. P. 12, 9 Wkly. Rep. 611, 100 E. C. L. 89; Dimmock *v.* North Staffordshire R. Co., 4 F. & F. 1058.

See 41 Cent. Dig. tit. "Railroads," § 1743.

That the train was running at an excessive speed on an up grade, an unusual quantity of sparks emitted, the property destroyed near the track, the season dry, a strong wind blowing, and it not being shown that the speed adopted was necessary, requires that the question whether the company was guilty of actionable negligence should be submitted to the jury. Norfolk, etc., R. Co. *v.* Fritts, 103 Va. 687, 49 S. E. 971, 106 Am. St. Rep. 911, 68 L. R. A. 864.

Whether a particular rate of speed in passing through corporate limits of a town or city is negligence is a question for the jury, in the absence of a statute or ordinance limiting the rate of speed. Toledo, etc., R. Co. *v.* Smart, 116 Ill. App. 523.

47. Dolph *v.* Lake Shore, etc., R. Co., 149 Mich. 278, 112 N. W. 981 (under Comp. Laws, § 6295); Gibbons *v.* Wisconsin Valley R. Co., 62 Wis. 546, 22 N. W. 533. See Williams *v.* Southern R. Co., 130 N. C. 116, 40 S. E. 979.

Where the uncontradicted evidence shows that defendant used a spark arrester as good as any known, it is error to submit the question of defendant's negligence **in using such** arrester to the jury. **Frace** *v.* **New York,** etc., R. Co., 143 N. Y. 182, 38 N. E. 102 [*reversing* 68 Hun 325, 22 N. Y. Suppl. 958].

48. Philadelphia, etc., R. Co. *v.* Yerger, 73 Pa. St. 121; Brusberg *v.* Milwaukee, etc., R. Co., 50 Wis. 231, 6 N. W. 821.

49. *California.*— Perry *v.* Southern Pac. R. Co., 50 Cal. 578.

Illinois.— Illinois Cent. R. Co. *v.* Siler, 229 Ill. 390, 82 N. E. 362; Illinois Cent. R. Co. *v.* Nunn, 51 Ill. 78; Illinois Cent. R. Co. *v.* Mills, 42 Ill. 407.

Indiana.— Chicago, etc., R. Co. *v.* Bailey, 19 Ind. App. 163, 46 N. E. 688.

Kansas.— White *v.* Missouri Pac. R. Co., 31 Kan. 280, 1 Pac. 611.

Michigan.— Jones *v.* Michigan Cent. R. Co., 59 Mich. 437, 26 N. W. 662.

Minnesota.— Bowen *v.* St. Paul, etc., R. Co., 36 Minn. 522, 32 N. W. 751.

New York.— Webb *v.* Rome, etc., R. Co., 49 N. Y. 420, 10 Am. Rep. 389; Brown *v.* Buffalo, etc., R. Co., 4 N. Y. App. Div. 465, 38 N. Y. Suppl. 655; Van Nostrand *v.* Walkill Valley R. Co., 19 N. Y. Suppl. 621.

North Carolina.— Williams *v.* Atlantic Coast Line R. Co., 140 N. C. 623, 53 S. E. 448; Simpson *v.* Enfield Lumber Co., 133 N. C. 95, 45 S. E. 469, 131 N. C. 518, 42 S. E. 939; Livermon *v.* Roanoke, etc., R. Co., 131 N. C. 527, 42 S. E. 942.

Pennsylvania.—Stephenson *v.* Pennsylvania R. Co., 20 Pa. Super. Ct. 157.

Wisconsin.— Knickel *v.* Chicago, etc., R. Co., 123 Wis. 327, 101 N. W. 690; Gibbons *v.* Wisconsin Valley R. Co., 66 Wis. 161, 28 N. W. 170; Gibbons *v.* Wisconsin Valley R. Co., 58 Wis. 335, 17 N. W. 132; Kellogg *v.* Chicago, etc., R. Co., 26 Wis. 223, 7 Am. Rep. 69.

See 41 Cent. Dig. tit. "Railroads," § 1744.

50. Illinois Cent. R. Co. *v.* Mills, 42 Ill. 407. And see cases cited *supra*, note 49.

51. **Evidence held sufficient** to warrant its submission to the jury on the question of contributory negligence see Missouri Pac. R. Co. *v.* Cornell, 30 Kan. 35, 1 Pac. 312; Omaha Fair, etc., Assoc. *v.* Missouri Pac. R. Co., 42 Nebr. 105, 60 N. W. 330; Collins *v.* New York Cent., etc., R. Co., 5 Hun (N. Y.) 499; Austin *v.* Chicago, etc., R. Co., 93 Wis. 496, 67 N. W. 1129.

Evidence held insufficient to warrant a submission to the jury on such question see

or not plaintiff was guilty of contributory negligence so as to preclude him from recovering is ordinarily a question of fact for the jury.[52]

(VII) *PROXIMATE CAUSE OF INJURY.* It is also ordinarily a question of fact for the jury to determine whether an injury caused by a fire started by a railroad company was the direct and natural consequence of the original negligence or firing or whether it was the direct result of another and independent cause.[53]

g. Instructions — (I) *IN GENERAL.* The general rules governing instructions in civil cases apply in actions against a railroad company for damages caused by fire.[54] The parties are entitled to instructions which clearly and correctly state the law applicable to the case.[55] Such instructions must as in other civil

McFarland *v.* Gulf, etc., R. Co., (Tex. Civ. App. 1905) 88 S. W. 450.

52. *California.*— Liverpool, etc., Ins. Co. *v.* Southern Pac. Co., 125 Cal. 434, 58 Pac. 55.

Illinois.— Great Western R. Co. *v.* Haworth, 39 Ill. 346.

Iowa.— Slossen *v.* Burlington, etc., R. Co., 60 Iowa 214, 14 N. W. 244, (1881) 10 N. W. 860.

Kansas.— St. Louis, etc., R. Co. *v.* League, 71 Kan. 79, 80 Pac. 46; Atchison, etc., R. Co. *v.* Ireton, (1901) 66 Pac. 987; Missouri Pac. R. Co. *v.* Kincaid, 29 Kan. 654; St. Joseph, etc., R. Co. *v.* Chase, 11 Kan. 47.

Minnesota.— Hoffman *v.* Chicago, etc., R. Co., 40 Minn. 60, 41 N. W. 301; Karsen *v.* Milwaukee, etc., R. Co., 29 Minn. 12, 11 N. W. 122.

Mississippi.—Alabama, etc., R. Co. *v.* Fried, 81 Miss. 314, 33 So. 74.

Nebraska.— Omaha Fair, etc., Assoc. *v.* Missouri Pac. R. Co., 42 Nebr. 105, 60 N. W. 330.

New York.—Fero *v.* Buffalo, etc., R. Co., 22 N. Y. 209, 78 Am. Dec. 178; Bevier *v.* Delaware, etc., Canal Co., 13 Hun 254.

Oregon.— Richmond *v.* McNeill, 31 Oreg. 342, 49 Pac. 879.

Pennsylvania.— Confer *v.* New York, etc., R. Co., 146 Pa. St. 31, 23 Atl. 202; Haverly *v.* State Line, etc., R. Co., 135 Pa. St. 50, 19 Atl. 1013, 20 Am. St. Rep. 848.

Texas.— Gulf, etc., R. Co. *v.* McLean, 74 Tex. 646, 12 S. W. 843; St. Louis Southwestern R. Co. *v.* Crabb, (Civ. App. 1904) 80 S. W. 408.

Virginia.— Southern R. Co. *v.* Patterson, 105 Va. 6, 52 S. E. 694; Kimball *v.* Borden, 97 Va. 477, 34 S. E. 45.

Wisconsin.— Mills *v.* Chicago, etc., R. Co., 76 Wis. 422, 45 N. W. 225; Gibbons *v.* Wisconsin Valley R. Co., 66 Wis. 161, 28 N. W. 170; Murphy *v.* Chicago, etc., R. Co., 45 Wis. 222, 30 Am. Rep. 721.

United States.— Clark *v.* Kansas City, etc., R. Co., 129 Fed. 341, 64 C. C. A. 19.

See 41 Cent. Dig. tit. "Railroads," § 1745.

Whether a failure to plow around stacks so as to prevent fire from reaching them is contributory negligence is a question for the jury. Slossen *v.* Burlington, etc., R. Co., 60 Iowa 214, 14 N. W. 244, (1881) 10 N. W. 860; Hoffman *v.* Chicago, etc., R. Co., 40 Minn. 60, 41 N. W. 301; Karsen *v.* Milwaukee, etc., R. Co., 29 Minn. 12, 11 N. W. 122.

53. *California.*— Perry *v.* Southern Pac. R. Co., 50 Cal. 578; Henry *v.* Southern Pac. R. Co., 50 Cal. 176.

Illinois.— Fent *v.* Toledo, etc., R. Co., 59 Ill. 349, 14 Am. Rep. 13.

Kansas.—Atchison, etc., R. Co. *v.* Bales, 16 Kan. 252.

Maryland.— Green Ridge R. Co. *v.* Brinkman, 64 Md. 52, 20 Atl. 1024, 54 Am. Rep. 755.

New Jersey.— Delaware, etc., R. Co. *v.* Salmon, 39 N. J. L. 299, 23 Am. Rep. 214, holding that it is a question for the jury whether the damage was a result which might reasonably have been expected, although not in fact anticipated, from defendant's negligence.

New York.— Frace *v.* New York, etc., R. Co., 143 N. Y. 182, 38 N. E. 102 [*affirming* 68 Hun 325, 22 N. Y. Suppl. 958]; Webb *v.* Rome, etc., R. Co., 49 N. Y. 420, 10 Am. Rep. 389.

North Carolina.— Phillips *v.* Durham, etc., R. Co., 138 N. C. 12, 50 S. E. 462.

North Dakota.— Gram *v.* Northern Pac. R. Co., 1 N. D. 252, 46 N. W. 972.

Pennsylvania.— Haverly *v.* State Line, etc., R. Co., 135 Pa. St. 50, 19 Atl. 1013, 20 Am. St. Rep. 848; Lehigh Valley R. Co. *v.* McKeen, 90 Pa. St. 122, 35 Am. Rep. 644; Pennsylvania, etc., Canal, etc., Co. *v.* Lacey, 89 Pa. St. 458; Pennsylvania R. Co. *v.* Hope, 80 Pa. St. 373, 21 Am. Rep. 100; Stephenson *v.* Pennsylvania R. Co., 20 Pa. Super. Ct. 157.

Wisconsin.— Gibbons *v.* Wisconsin Valley R. Co., 66 Wis. 161, 28 N. W. 170.

See 41 Cent. Dig. tit. "Railroads," § 1746.

54. See, generally, TRIAL.

55. *Alabama.*—Alabama Great Southern R. Co. *v.* Clarke, 145 Ala. 459, 39 So. 816.

Iowa.— German Ins. Co. *v.* Chicago, etc., R. Co., 128 Iowa 386, 104 N. W. 361, holding that an instruction that if the fire was started by sparks emitted from one of defendant's engines, defendant is liable unless at the time it used on such engine the best appliances for preventing the setting out of fire, and such engine was properly handled, is not objectionable as eliminating defendant's duty to keep the engine in repair.

Kansas.— Central Branch Union Pac. R. Co. *v.* Hotham, 22 Kan. 41; Atchison, etc., R. Co. *v.* Huitt, 1 Kan. App. 781, 41 Pac. 1049; Missouri Pac. R. Co. *v.* Haynes, 1 Kan. App. 586, 42 Pac. 259.

Missouri.— McFarland *v.* Mississippi River, etc., R. Co., 175 Mo. 422, 75 S. W. 152.

Montana.— Spencer *v.* Montana Cent. R. Co., 11 Mont. 164, 27 Pac. 681.

actions conform to the pleadings and issues,[56] and to the evidence,[57] and the different instructions must be consistent;[58] and they must not be misleading,[59]

Texas.— Jackson *v.* Missouri, etc., R. Co., (Civ. App. 1904) 78 S. W. 724; Paris, etc., R. Co. *v.* Nesbitt, (Civ. App. 1896) 38 S. W. 243.

See 41 Cent. Dig. tit. "Railroads," § 1747.

Contributory negligence.— A charge to find for defendant if plaintiff was guilty of negligence in leaving the windows of his barn filled with combustible material open, and such negligence was the proximate cause of said fire "or contributed thereto," is erroneous in failing to contain the word "proximately" in connection with the word "contributed." St. Louis Southwestern R. Co. *v.* Crabb, (Tex. Civ. App. 1904) 80 S. W. 408. And an instruction which ignores the doctrine of contributory negligence is erroneous. Chicago, etc., R. Co. *v.* Simonson, 54 Ill. 504, 5 Am. Rep. 155.

Instructions held erroneous, as being too general and indefinite, see Baltimore Belt R. Co. *v.* Sattler, 102 Md. 595, 62 Atl. 1125, 64 Atl. 507.

56. See *infra*, X, I, 6, g, (III).

57. *Alabama.*— Louisville, etc., R. Co. *v.* Malone, 109 Ala. 509, 20 So. 33.

Illinois.— Lake Erie, etc., R. Co. *v.* Helmerick, 29 Ill. App. 270.

Iowa.— West *v.* Chicago, etc., R. Co., 77 Iowa 654, 35 N. W. 479, 42 N. W. 512, holding that where the evidence tends to show that the fire started on the right of way as alleged, an instruction submitting the question as to where it started and whether the company negligently allowed combustible matter to accumulate on its right of way is warranted.

Oregon.— Anderson *v.* Oregon R. Co., 45 Oreg. 211, 77 Pac. 119.

Texas.— Missouri Pac. R. Co. *v.* Donaldson, 73 Tex. 124, 11 S. W. 163; Ft. Worth, etc., R. Co. *v.* Wooldridge, (Civ. App. 1907) 105 S. W. 845 [*affirmed* in (1908) 108 S. W. 1159] (holding that an instruction imposing upon defendant the duty of using ordinary care to equip its engines "with the best apparatus for the arrest of sparks," instead of "with the most approved apparatus in use," is not erroneous, where it submits the issue in strict accordance with defendant's testimony, which is to the effect that the best apparatus was used); St. Louis Southwestern R. Co. *v.* Kemper, (Civ. App. 1907) 101 S. W. 813.

Utah.— Smith *v.* Ogden, etc., R. Co., 33 Utah 129, 93 Pac. 185.

United States.— Great Northern R. Co. *v.* Coats, 115 Fed. 452, 53 C. C. A. 382.

See 41 Cent. Dig. tit. "Railroads," § 1747.

Where the evidence shows that plaintiff's real estate had no market value a charge that the measure of damages for the destruction of his barn by fire is the difference between the market value of the real estate immediately before the fire and its value immediately after the fire is erroneous. Highland *v.* Houston, etc., R. Co., (Tex. Civ. App. 1901) 65 S. W. 649.

An instruction upon a theory as to which there is no evidence is properly refused or if given is erroneous. Louisville, etc., R. Co. *v.* Sullivan Timber Co., 138 Ala. 379, 35 So. 327; Leland *v.* Chicago, etc., R. Co., (Iowa 1885) 23 N. W. 390; St. Louis, etc., R. Co. *v.* Hoover, 3 Kan. App. 577, 43 Pac. 854; Miller *v.* New York Cent., etc., R. Co., 92 Hun (N. Y.) 282, 36 N. Y. Suppl. 719; Johnson *v.* Northern Pac. R. Co., 1 N. D. 354, 48 N. W. 227; Gulf, etc., R. Co. *v.* Courtney, (Tex. Civ. App. 1893) 23 S. W. 226; Snyder *v.* Pittsburgh, etc., R. Co., 11 W. Va. 14.

An instruction which ignores phases of the evidence bearing on material matters is erroneous and properly refused. Alabama Great Southern R. Co. *v.* Clarke, 145 Ala. 459, 39 So. 816; Louisville, etc., R. Co. *v.* Sullivan Timber Co., 138 Ala. 379, 35 So. 327; Georgia, etc., R. Co. *v.* Rawson, 112 Ga. 471, 37 S. E. 712; Brister *v.* Illinois Cent. R. Co., 84 Miss. 33, 36 So. 142; Eddy *v.* Lafayette, 49 Fed. 807, 1 C. C. A. 441. Where there is evidence that the fire was set by sparks from defendant's engine an instruction that it must be found that the escape of sparks was "the result of negligence on the part of defendant in respect to the appliances used to prevent the escape of sparks," is erroneous as excluding the right to recover because of negligence of defendant's servants in handling the engine. Scott *v.* Texas, etc., R. Co., 93 Tex. 625, 57 S. W. 801 [*reversing* (Civ. App. 1900) 56 S. W. 97].

58. Western, etc., R. Co. *v.* Tate, 129 Ga. 526, 59 S. E. 266 (instructions held not contradictory on the question of measure of damages); Texas Midland R. Co. *v.* Hooten, 21 Tex. Civ. App. 139, 50 S. W. 499.

59. *Alabama.*— Louisville, etc., R. Co. *v.* Sullivan Timber Co., 138 Ala. 369, 35 So. 327.

Dakota.— Pielke *v.* Chicago, etc., R. Co., 5 Dak. 444, 41 N. W. 669.

Georgia.— Western, etc., R. Co. *v.* Tate, 129 Ga. 526, 59 S. E. 266, instruction held not misleading, as to the care required of defendant to keep its right of way clear of combustible matter.

Illinois.— American Strawboard Co. *v.* Chicago, etc., R. Co., 177 Ill. 513, 53 N. E. 97 [*reversing* 75 Ill. App. 420].

Indiana.— Lake Erie, etc., R. Co. *v.* Ford, 167 Ind. 205, 78 N. E. 969; Indiana Clay Co. *v.* Baltimore, etc., R. Co., 31 Ind. App. 258, 67 N. E. 704.

Iowa.— Fish *v.* Chicago, etc., R. Co., 81 Iowa 280, 46 N. W. 998.

Michigan.— Cole *v.* Lake Shore, etc., R. Co., 105 Mich. 549, 63 N. W. 647; Michigan Cent. R. Co. *v.* Anderson, 20 Mich. 244.

Minnesota.— Flanaghan *v.* Chicago, etc., R. Co., 65 Minn. 112, 67 N. W. 794, as to origin of fire.

Texas.— Biering *v.* Gulf, etc., R. Co., 79 Tex. 584, 15 S. W. 576; St. Louis Southwestern R. Co. *v.* Miller, 27 Tex. Civ. App. 344, 66 S. W. 139, as to burden of proof.

argumentative,[60] or abstract,[61] or invade the province of the jury in commenting upon the evidence,[62] or authorize a determination of questions from a mere conjecture or surmise on the part of the jury.[63] An instruction that covers the case generally and fairly submits the question in issue is ordinarily sufficient in the absence of a request for further instructions in detail.[64] It is proper to refuse a requested instruction on matters fully covered by instructions already given,[65] or on immaterial matters;[66] but it is error to refuse a requested instruction on a material issue not covered by other instructions given.[67]

(11) *CONSTRUCTION.* The instructions are to be construed as a whole and the fact that one portion considered separately might be open to objection does not constitute error if the charge is correct in its entirety.[68]

Washington.—Columbia, etc., R. Co. *v.* Farrington, 1 Wash. 202, 23 Pac. 413.

See 41 Cent. Dig. tit. "Railroads," § 1747 *et seq.*

Illustrations of instructions held misleading: That the fact that the fire was discovered soon after the passage of defendant's engine raises no presumption that it was because of sparks from said engine; where the evidence tended to show that sparks were escaping from defendant's engine in unusual and dangerous quantities near plaintiff's dwelling. Louisville, etc., R. Co. *v.* Malone, 109 Ala. 509, 20 So. 33. That the mere fact of the fire originating from sparks from an engine does not show negligence; where the evidence showed that the fire originated sixty-three feet from defendant's engine, that sparks were emitted therefrom in unusual and dangerous quantities, and that an engine with suitable appliances and properly managed could not possibly have caused the fire. Louisville, etc., R. Co. *v.* Malone, *supra.* That it was the jury's duty not to consider any fact which they might have observed while examining a screen as evidence; since they might properly have considered the facts so disclosed in considering other testimony. Cleveland, etc., R. Co. *v.* Scantland, 151 Ind. 488, 51 N. E. 1068. That it was the duty of defendant to provide its locomotive with a spark arrester "most approved by those who, from experience and business are most competent to judge and determine;" as the law only requires the best and most effectual appliance in general use. Louisville, etc., R. Co. *v.* Samuels, 57 S. W. 235, 22 Ky. L. Rep. 303. It is misleading to charge unqualifiedly that it is the duty of the company in the operation of its road to so construct its machinery and so conduct its road and care for its right of way as not to damage the property of people living along the right of way. St. Louis, etc., R. Co. *v.* Hoover, 3 Kan. App. 577, 43 Pac. 854.

Instructions held not misleading see Port Royal, etc., R. Co. *v.* Griffin, 86 Ga. 172, 12 S. E. 303; Hart *v.* Atlantic Coast Line R. Co., 144 N. C. 91, 56 S. E. 559; Anderson *v.* Oregon R. Co., 45 Oreg. 211, 77 Pac. 119 (as to defect in engine); Abbot *v.* Gore, 74 Wis. 509, 43 N. W. 365.

60. Alabama Great Southern R. Co. *v.* Sanders, 145 Ala. 449, 40 So. 402; Louisville, etc., R. Co. *v.* Sullivan Timber Co., 138 Ala. 379, 35 So. 327; Louisville, etc., R. Co. *v.* Malone, 109 Ala. 509, 20 So. 33; Missouri, etc., R. Co. *v.* Carter, 95 Tex. 461, 68 S. W. 159.

61. Louisville, etc., R. Co. *v.* Sullivan Timber Co., 138 Ala. 379, 35 So. 327; Louisville, etc., R. Co. *v.* Malone, 109 Ala. 509, 20 So. 33; Monte Ne R. Co. *v.* Phillips, 80 Ark. 292, 92 S. W. 1060.

62. Hutchins *v.* Missouri Pac. R. Co., 97 Mo. App. 548, 71 S. W. 473. And see *infra*, X, I, 6, g, (IV).

63. Liverpool, etc., Ins. Co. *v.* Southern Pac. Co., 125 Cal. 434, 58 Pac. 55, holding, however, that a charge that if the jury believe it more probable that the fire was caused by the engine than by any other cause they should find accordingly upon this point is not erroneous as submitting the question to a mere conjecture or surmise of the jury.

64. Louisville, etc., R. Co. *v.* Shuck, 62 S. W. 259, 23 Ky. L. Rep. 25; Great Northern R. Co. *v.* Coats, 115 Fed. 452, 53 C. C. A. 382; Texas, etc., R. Co. *v.* Watson, 112 Fed. 402, 50 C. C. A. 230 [*affirmed* in 190 U. S. 287, 23 S. Ct. 681, 47 L. ed. 1057].

65. *Massachusetts.*— Ross *v.* Boston, etc., R. Co., 6 Allen 87.

North Carolina.— Firemen's Ins. Co. *v.* Seaboard Air Line R. Co., 138 N. C. 42, 50 S. E. 452, 107 Am. St. Rep. 517.

Tennessee.— Nashville, etc., R. Co. *v.* Heikens, 112 Tenn. 378, 79 N. W. 1038, 65 L. R. A. 298.

Texas.— Texas, etc., R. Co. *v.* Scottish Union Nat. Ins. Co., 32 Tex. Civ. App. 82, 73 S. W. 1088; Tyler Southeastern R. Co. *v.* Hitchens, 26 Tex. Civ. App. 400, 63 S. W. 1069.

Wisconsin.— Clifford *v.* Minneapolis, etc., R. Co., 105 Wis. 618, 81 N. W. 143.

See 41 Cent. Dig. tit. "Railroads," § 1747 *et seq.*

66. Georgia Cent. R. Co. *v.* Trammell, 114 Ga. 312, 40 S. E. 259; American Strawboard Co. *v.* Chicago, etc., R. Co., 177 Ill. 513, 53 N. E. 97 [*reversing* 75 Ill. App. 420].

67. St. Louis Southwestern R. Co. *v.* Connally, (Tex. Civ. App. 1906) 93 S. W. 206; St. Louis Southwestern R. Co. *v.* Knight, 20 Tex. Civ. App. 477, 49 S. W. 250; East Line, etc., R. Co. *v.* Hart, 2 Tex. App. Civ. Cas. § 419.

68. *Illinois.*— Cleveland, etc., R. Co. *v.* Hornsby, 202 Ill. 138, 66 N. E. 1052 [*affirming* 105 Ill. App. 67].

(III) *CONFORMITY TO PLEADINGS AND ISSUES.* The instructions should conform to the pleadings and issues in the case.[69] Thus an instruction is erroneous if given, or properly refused if asked, where it charges on matters of negligence which are not pleaded or in issue.[70] So also it is equally erroneous if the court

Indiana.— Lake Erie, etc., R. Co. *v.* McFall, (1904) 72 N. E. 552.

Iowa.— German Ins. Co. *v.* Chicago, etc., R. Co., 128 Iowa 386, 104 N. W. 361; Hamilton *v.* Des Moines, etc., R. Co., 84 Iowa 131, 50 N. W. 567; Fish *v.* Chicago, etc., R. Co., 81 Iowa 280, 46 N. W. 998; Engle *v.* Chicago, etc., R. Co., 77 Iowa 661, 37 N. W. 6, 42 N. W. 512.

Texas.— Womack *v.* International, etc., R. Co., (Civ. App. 1907) 102 S. W. 936; Missouri, etc., R. Co. *v.* Florence, (Civ. App. 1903) 74 S. W. 802.

Washington.— Fireman's Fund Ins. Co. *v.* Northern Pac. R. Co., 46 Wash. 635, 91 Pac. 13; Wick *v.* Tacoma Eastern R. Co., 40 Wash. 408, 82 Pac. 711.

United States.— Chicago, etc., R. Co. *v.* Gilbert, 52 Fed. 711, 3 C. C. A. 264.

A correct instruction does not cure an error in another unless as a series the instructions state the law correctly. American Strawboard Co. *v.* Chicago, etc., R. Co., 177 Ill. 513, 53 N. E. 97 [*reversing* 75 Ill. App. 420].

69. *California.*— Steele *v.* Pacific Coast R. Co., 74 Cal. 323, 15 Pac. 851.

Florida.— Jacksonville, etc., R. Co. *v.* Neff, 28 Fla. 373, 9 So. 653.

Georgia.— Southern R. Co. *v.* Thompson, 129 Ga. 367, 58 S. E. 1044.

Missouri.—Big River Lead Co. *v.* St. Louis, etc., R. Co., 123 Mo. App. 394, 101 S. W. 636.

South Carolina.— Wilson *v.* Southern R. Co., 65 S. C. 421, 43 S. E. 964.

Texas.— Missouri Pac. R. Co. *v.* Bartlett, 69 Tex. 79, 6 S. W. 549; Houston, etc., R. Co. *v.* Smith, (Civ. App. 1898) 46 S. W. 1046.

Washington.— Abrams *v.* Seattle, etc., R. Co., 27 Wash. 507, 68 Pac. 78.

United States.— Texas, etc., R. Co. *v.* Watson, 190 U. S. 287, 23 S. Ct. 681, 47 L. ed. 1057 [*affirming* 112 Fed. 402, 50 C. C. A. 230].

See 41 Cent. Dig. tit. "Railroads," § 1749.

Where negligence is alleged generally, an instruction that the jury, in order to find for defendant, must find that the engine was properly equipped, that defendants' servants in charge were competent and skilful, and that the engine was properly operated is proper. Bulless *v.* Chicago, etc., R. Co., 76 Iowa 680, 39 N. W. 245.

70. *Arkansas.*— Monte Ne R. Co. *v.* Phillips, 80 Ark. 292, 92 S. W. 1060.

California.— Jacksonville, etc., R. Co. *v.* Neff, 28 Fla. 373, 9 So. 653.

Indiana.— Pittsburgh, etc., R. Co. *v.* Wise, 36 Ind. App. 59, 74 N. E. 1107.

Iowa.— Borland *v.* Chicago, etc., R. Co., 78 Iowa 94, 42 N. W. 590.

Kansas.— Atchison, etc., R. Co. *v.* Sprague, 74 Kan. 574, 87 Pac. 733.

Kentucky.— Mobile, etc., R. Co. *v.* Caldwell, 106 S. W. 236, 32 Ky. L. Rep. 447.

Texas.— St. Louis, etc., R. Co. *v.* Moss, 37 Tex. Civ. App. 461, 84 S. W. 281 (holding that where the negligence of defendant in failing to provide and keep spark arresters on its engine is the question in issue, it is error to submit the question of defendant's negligence in overloading and handling the engine alleged to have caused the fire); Duckworth *v.* Fort Worth, etc., R. Co., 33 Tex. Civ. App. 66, 75 S. W. 913; Texas, etc., R. Co. *v.* Scottish Union Nat. Ins. Co., 32 Tex. Civ. App. 82, 73 S. W. 1088; Gulf, etc., R. Co. *v.* Pool, 10 Tex. Civ. App. 682, 31 S. W. 688.

Washington.— Noland *v.* Great Northern R. Co., 31 Wash. 430, 71 Pac. 1098.

See 41 Cent. Dig. tit. "Railroads," § 1749.

Illustrations of instructions erroneous or properly refused.— An instruction not to find for defendant under certain circumstances unless it is also found that the persons in charge of the locomotive were competent is erroneous where the incompetency of such persons is not alleged as negligence. Gulf, etc., R. Co. *v.* Johnson, 28 Tex. Civ. App. 395, 67 S. W. 182. Where the declaration alleges that the fire was caused by a spark from defendants' engine, an instruction to find for plaintiff if the fire was caused by defendants' negligence in leaving near plaintiff's property a box car filled with hay which was set on fire is erroneous. Jacksonville, etc., R. Co. *v.* Neff, 28 Fla. 373, 9 So. 653. Where the complaint alleges that defendant permitted the engine to be out of repair and carelessly and negligently used, an instruction that if defendant employed an unskilful or careless engineer or fireman it is liable is erroneous. Babcock *v.* Chicago, etc., R. Co., 72 Iowa 197, 28 N. W. 644, 33 N. W. 628. An instruction that if the jury find that "the fire was caused through the negligence of the defendant in the construction or management of the engine concerning the prevention of escaping coals and sparks . . . they should allow plaintiff" damages is erroneous where the petition does not allege that defendant was negligent as to the construction of the engine, or that the engine was negligently or improperly constructed. Miller *v.* Chicago, etc., R. Co., 76 Iowa 318, 41 N. W. 28. Where no charge of negligence in permitting dry grass to accumulate on the right of way is made by the pleading, it is error to submit the case to the jury upon that issue. Louisville, etc., R. Co. *v.* Sullivan Timber Co., 138 Ala. 379, 35 So. 327; Melvin *v.* St. Louis, etc., R. Co., 89 Mo. 106, 1 S. W. 286; Comes *v.* Chicago, etc., R. Co., 78 Iowa 391, 43 N. W. 235. An instruction that plaintiff cannot recover unless the injury was permanent in its nature is properly refused, where the complaint does not allege that the land was permanently

in its instructions ignores material matters affecting the cause of action or defense which are in issue.[71]

(iv) *Invading Province of Jury.* Since the question of negligence, where the evidence is conflicting, is generally one of fact for the jury,[72] it is generally erroneous for the court to invade the province of the jury by assuming that a certain specified state of facts exists, and instructing that they do or do not constitute negligence on the part of defendant,[73] or contributory negligence on the part of plaintiff.[74] But where the facts are shown by the evidence and are so unequivocal as to allow no conclusion but that they do or do not constitute negligence, the court may so instruct.[75] So where the evidence is insufficient to establish a certain fact, proof of which is necessary to support a verdict, the court should take the case from the jury by peremptory instruction,[76] although it is not required to give such instruction where the insufficiency of evidence is on an immaterial matter.[77] Nor is it erroneous for the court to refer to the existence of certain facts if it leaves the question of their sufficiency to the jury.[78]

damaged. Ft. Scott, etc., R. Co. *v.* Tubbs, 47 Kan. 630, 28 Pac. 612. An omission to charge as to the negligence of employees in not using proper efforts to put out the fire, although seeing it soon after the train passed, is not error where no such charge is requested, and the only negligence charged in the petition is a failure to provide proper appliances, permitting an accumulation of dry material, and inefficiency of the servants operating the engine. Rost *v.* Missouri Pac. R. Co., 76 Tex. 168, 12 S. W. 1131. The question of the negligent construction or defective condition of a locomotive cannot be submitted where the only ground of negligence charged in the complaint is in its management and operation. Bell *v.* Alabama Midland R. Co., 108 Ala. 286, 19 So. 316. An instruction that the measure of damages is the difference between the market value of the land immediately before and immediately after the fire, making no mention of possible depreciation from any other cause, is not erroneous where there is no contention that any other factor had intervened to affect the value. Chicago, etc., R. Co. *v.* Brown, 157 Ind. 544, 60 N. E. 346.

71. Steele *v.* Pacific Coast R. Co., 74 Cal. 323, 15 Pac. 851; Cleveland, etc., R. Co. *v.* Hayes, 167 Ind. 454, 79 N. E. 448; Missouri, etc., R. Co. *v.* Carter, 95 Tex. 461, 68 S. W. 159.

72. See *supra*, X, I, 6, f,(I).

73. *Alabama.*— Louisville, etc., R. Co. *v.* Sullivan Timber Co., 138 Ala. 379, 35 So. 327.

Illinois.— Chicago, etc., R. Co. *v.* Pennell, 94 Ill. 448.

Indian Territory.— St. Louis, etc., R. Co. *v.* Lawrence, 4 Indian Terr. 611, 76 S. W. 254.

Pennsylvania.— Lackawanna, etc., R. Co. *v.* Doak, 52 Pa. St. 379, 91 Am. Dec. 166.

Texas.— Missouri, etc., R. Co. *v.* Florence, (Civ. App. 1903) 74 S. W. 802; Gulf, etc., R. Co. *v.* Jordan, 25 Tex. Civ. App. 82, 60 S. W. 784; St. Louis Southwestern R. Co. *v.* Knight, (Civ. App. 1897) 41 S. W. 416; Missouri, etc., R. Co. *v.* Sparks, (Civ. App. 1896) 35 S. W. 745; Paris, etc., R. Co. *v.* Nesbitt, 11 Tex. Civ. App. 608, 33 S. W. 280; Galveston, etc., R. Co. *v.* Knippa, (Civ. App. 1894) 27 S. W. 730; Campbell *v.* Goodwin, (Civ. App. 1894) 26 S. W. 864 [*distinguishing* Ft. Worth, etc., R. Co. *v.* Wallace, 74 Tex. 581, 12 S. W. 227]; Ft. Worth, etc., R. Co. *v.* Tomlinson, (Civ. App. 1890) 16 S. W. 866.

Wisconsin.— Clifford *v.* Minneapolis, etc., R. Co., 105 Wis. 618, 81 N. W. 143; Stacy *v.* Milwaukee, etc., R. Co., 85 Wis. 225, 54 N. W. 779; Moore *v.* Chicago, etc., R. Co., 78 Wis. 120, 47 N. W. 273.

See 41 Cent. Dig. tit. "Railroads," § 1748.

Where it does not appear from the pleadings or evidence that the property destroyed was real property, it is not error for the court in an instruction as to the measure of damages to assume that such property was personalty. Walker *v.* Monohan, (Kan. App. 1899) 58 Pac. 567.

74. Bevier *v.* Delaware, etc., Canal Co., 13 Hun (N. Y.) 254; Texas, etc., R. Co. *v.* Levi, 59 Tex. 674.

75. Chicago, etc., R. Co. *v.* Glenny, 175 Ill. 238, 51 N. E. 896 [*affirming* 70 Ill. App. 510]; Ross *v.* Boston, etc., R. Co., 6 Allen (Mass.) 87; Campbell *v.* Goodwin, 87 Tex. 273, 28 S. W. 273; Gulf, etc., R. Co. *v.* Rowland, (Tex. Civ. App. 1893) 23 S. W. 421 (holding that a railroad company which permits combustible material to grow and remain on its right of way, where it is liable to be ignited by sparks from passing engines, is guilty of negligence as matter of law, and an instruction to this effect is not objectionable as being on the evidence); Woodward *v.* Chicago, etc., R. Co., 145 Fed. 577, 75 C. C. A. 591. See also Ft. Worth, etc., R. Co. *v.* Wallace, 74 Tex. 581, 12 S. W. 227.

76. St. Louis, etc., R. Co. *v.* Lawrence, 4 Indian Terr. 611, 76 S. W. 254.

77. St. Louis, etc., R. Co. *v.* Lawrence, 4 Indian Terr. 611, 76 S. W. 254.

78. Liverpool, etc., Ins. Co. *v.* Southern Pac. R. Co., 125 Cal. 434, 58 Pac. 55; Brush *v.* Long Island R. Co., 10 N. Y. App. Div. 535, 42 N. Y. Suppl. 103 [*affirmed* in 158 N. Y. 742, 53 N. E. 1123]; St. Louis Southwestern R. Co. *v.* Connally, (Tex. Civ. App. 1906) 93 S. W. 206; Texas, etc., R. Co. *v.* Wooldridge, (Tex. Civ. App. 1901) 63 S. W. 905; Gulf, etc., R. Co. *v.* Jordan, 25 Tex. Civ. App. 82, 60 S. W. 784.

h. Verdict and Findings. The rules applicable to verdicts in civil actions generally [79] govern general,[80] and special,[81] verdicts and findings in actions against railroad companies for damages by fire. Thus a special finding must be supported by the evidence,[82] and should find and state all facts [83] essential to a recovery under the issues.[84] Such findings, however, must be considered together, and if correct as a whole are sufficient, although some particular finding taken separately might be objectionable.[85] A special finding should be consistent with the general verdict; [86] but unless the conflict between them is irreconcilable it will not be sufficient to override the general verdict, and entitle defendant to a judgment on the special finding notwithstanding the verdict.[87]

i. Judgment. The general rules governing judgments in civil actions [88] apply in actions against railroad companies for damages by fire.[89]

j. Appeal and Error — (i) *In General.* Questions of appeal and error in actions against a railroad company for damages caused by fire [90] are generally

79. See, generally, TRIAL.

80. See Denver, etc., R. Co. *v.* Morton, 3 Colo. App. 155, 32 Pac. 345.

General verdict must be consistent with special findings.— Denver, etc., R. Co. *v.* Morton, 3 Colo. App. 155, 32 Pac. 345, holding that where the jury determine by a special finding that plaintiff was guilty of negligence in leaving a wagon near the fire so that it was consumed, it is error for them to apportion the loss and make defendant liable for two thirds of the value of the wagon.

81. See Tien *v.* Louisville, etc., R. Co., 15 Ind. App. 304, 44 N. E. 45.

Attorney's fees allowed by statute in an action to recover damages caused by fire are a part of the judgment in favor of plaintiff and need not be found separately by the jury except in answering a special interrogatory. Missouri Pac. R. Co. *v.* Henning, 48 Kan. 465, 29 Pac. 597.

82. Cronk *v.* Chicago, etc., R. Co., 3 S. D. 93, 52 N. W. 420; Jackson *v.* Grand Trunk R. Co., 32 Can. Sup. Ct. 245, 1 Can. R. Cas. 156 [*affirming* 1 Can. R. Cas. 141, 2 Ont. L. Rep. 689].

83. A special verdict should find only facts and not conclusions of law. Baltimore, etc., R. Co. *v.* Does, 20 Ind. App. 680, 51 N. E. 568; Wabash, etc., R. Co. *v.* Miller, 18 Ind. App. 549, 48 N. E. 663; Tien *v.* Louisville R. Co., 15 Ind. App. 304, 44 N. E. 45.

84. Pennsylvania Co. *v.* Mandeville, 22 Ind. App. 679, 53 N. E. 489; Ft. Scott, etc., R. Co. *v.* Tubbs, 47 Kan. 630, 28 Pac. 612 [*distinguishing* St. Louis, etc., R. Co. *v.* Fudge, 39 Kan. 543, 18 Pac. 720].

A special finding in respect to negligence is sufficiently specific if it states generally of what the negligence consisted without pointing out in detail the precise act or thing which constituted the negligence. Lake Erie, etc., R. Co. *v.* McFall, (Ind. 1904) 72 N. E. 552; Pittsburgh, etc., R. Co. *v.* Indiana Horseshoe Co., 154 Ind. 322, 56 N. E. 766; Caswell *v.* Chicago, etc., R. Co., 42 Wis. 193.

A special verdict stating that plaintiff was free from contributory negligence without finding any facts supporting such a conclusion will not support a verdict thereon. Baltimore, etc., R. Co. *v.* Does, 20 Ind. App. 680, 51 N. E. 368; Louisville, etc., R. Co. *v.* Carmon, (Ind. App. 1898) 48 N. E. 1047; Chicago, etc., R. Co. *v.* Bailey, 19 Ind. App. 163, 46 N. E. 688; Louisville, etc., R. Co. *v.* Porter, 16 Ind. App. 266, 44 N. E. 1112. But a finding that plaintiff expended labor in suppressing the fire shows sufficient effort to save his property. New York, etc., R. Co. *v.* Grossman, 17 Ind. App. 652, 46 N. E. 546. Likewise a finding that plaintiff, who was a resident of another state, was not present at the time of the fire, shows freedom from contributory negligence. Tien *v.* Louisville, etc., R. Co., 15 Ind. App. 340, 44 N. E. 45.

A special verdict which shows that the land burned was plaintiff's, and describes the land as described in the complaint, sufficiently shows that the land burned was the land described in the complaint. Tien *v.* Louisville, etc., R. Co., 15 Ind. App. 304, 44 N. E. 45.

85. Kansas City, etc., R. Co. *v.* Chamberlin, (Kan. 1900) 60 Pac. 15; Missouri, etc., R. Co. *v.* Lycan, 57 Kan. 635, 47 Pac. 526; Abbot *v.* Core, 74 Wis. 509, 43 N. W. 365.

86. Pittsburgh, etc., R. Co. *v.* Wilson, 161 Ind. 701, 66 N. E. 899; Chicago, etc., R. Co. *v.* McCoy, 24 Ind. App. 651, 55 N. E. 869; Chicago, etc., R. Co. *v.* Gilmore, (Ind. App. 1899) 53 N. E. 1078 (holding that a special finding that a spark arrester was of the most approved kind is not inconsistent with a general verdict for plaintiff, where other answers show that the verdict was based on its defectiveness for want of repair); McDoel *v.* Gill, 23 Ind. App. 95, 53 N. E. 956.

87. Pittsburgh, etc., R. Co. *v.* Brough, 168 Ind. 378, 81 N. E. 57, 12 L. R. A. N. S. 401; Cincinnati, etc., R. Co. *v.* Smock, 133 Ind. 411, 33 N. E. 108; Louisville, etc., R. Co. *v.* Richardson, 66 Ind. 43, 32 Am. Rep. 94; Chicago, etc., R. Co. *v.* Zimmerman, 12 Ind. App. 504, 40 N. E. 703; Atchison, etc., R. Co. *v.* Bishop, 75 Kan. 401, 89 Pac. 668; St. Louis, etc., R. Co. *v.* Richardson, 47 Kan. 517, 28 Pac. 183.

88. See, generally, JUDGMENTS, 23 Cyc. 623.

89. See Gulf, etc., R. Co. *v.* Thompson, (Tex. Civ. App. 1890) 16 S. W. 174, holding that a judgment for excessive damages must be reversed.

90. See Richmond *v.* Oregon R., etc., Co.,

governed by the rules applicable to appeal and error in other civil actions.[91] A theory of the cause not raised in the lower court cannot be reviewed on appeal.[92] A mere uncertainty or ambiguity in the pleading cannot be taken advantage of for the first time on appeal,[93] unless it is of such a character as to justify a discarding of the pleading altogether.[94] Since it is the province of the jury to pass upon the evidence where it is conflicting, a verdict or finding by the jury as to the fact of negligence which has been properly submitted to them and of which there is some evidence will not in general be disturbed on appeal; [95] nor will a similar finding by the court be disturbed.[96]

(II) *HARMLESS ERROR.*[97] A judgment in an action against a railroad company for damages by fire will not be reversed for an error on the trial which resulted in no prejudice to the party seeking to take advantage of it.[98]

137 Fed. 848, 70 C. C. A. 378; and cases cited *infra*, notes 92–96.

91. See, generally, APPEAL AND ERROR, 2 Cyc. 474.

92. Richmond *v.* Oregon, etc., Co., 137 Fed. 848, 70 C. C. A. 378, holding, however, that where plaintiff's counsel, on being asked which of the two engines he claimed set the fire, replied that it was one of two engines attached to a certain train and defendant introduced evidence concerning the spark-arresting equipment of both of such engines, it was not entitled to claim on appeal that the question of negligence with reference to one of the engines was not in issue.

93. Spencer *v.* Montana Cent. R. Co., 11 Mont. 164, 27 Pac. 681.

94. Spencer *v.* Montana Cent. R. Co., 11 Mont. 164, 27 Pac. 681.

95. *Florida.*— Jacksonville, etc., R. Co. *v.* Peninsular Land, etc., Co., 27 Fla. 1, 157, 9 So. 661, 17 L. R. A. 33, 65.

Illinois.— Baltimore, etc., R. Co. *v.* Tripp, 175 Ill. 251, 51 N. E. 833; Louisville, etc., R. Co. *v.* Spencer, 149 Ill. 97, 36 N. E. 91.

Indiana.— Louisville, etc., R. Co. *v.* Stevens, 87 Ind. 198.

Texas.— Missouri Pac. R. Co. *v.* Platzer, (1891) 15 S. W. 577.

Utah.— Preece *v.* Rio Grande Western R. Co., 24 Utah 493, 68 Pac. 413.

Canada.— Grand Trunk R. Co. *v.* Rainville, 29 Can. Sup. Ct. 201 [*affirming* 25 Ont. App. 242 (*affirming* 28 Ont. 625)]; Senesac *v.* Central Vermont R. Co., 26 Can. Sup. Ct. 641 [*affirming* 9 Quebec Super. Ct. 319]; Canadian Atlantic R. Co. *v.* Moxley, 15 Can. Sup. Ct. 145 [*affirming* 14 Ont. App. 309]; Flannigan *v.* Canadian Pac. R. Co., 17 Ont. 6. *Compare* Jackson *v.* Grand Trunk R. Co., 1 Can. R. Cas. 141, 2 Ont. L. Rep. 689 [*affirmed* in 32 Can. Sup. Ct. 245, 1 Can. R. Cas. 156].

See 41 Cent. Dig. tit. "Railroads," §§ 1759, 1760.

96. Missouri Pac. R. Co. *v.* Ayers, (Tex. 1888) 8 S. W. 538.

97. See, generally, APPEAL AND ERROR, 3 Cyc. 383.

98. *Arkansas.*— Martin *v.* St. Louis, etc., R. Co., 55 Ark. 510, 19 S. W. 314.

Georgia.— Taylor *v.* Central R., etc., Co., 79 Ga. 330, 58 S. E. 114, refusal to admit testimony.

Indiana.— Pittsburgh, etc., R. Co. *v.* Indiana Horseshoe Co., 154 Ind. 322, 56 N. E. 766; Chicago, etc., R. Co. *v.* Kreig, 22 Ind. App. 393, 53 N. E. 1033; Chicago, etc., R. Co. *v.* Long, 16 Ind. App. 401, 45 N. E. 484.

Iowa.— Tyler *v.* Chicago, etc., R. Co., 102 Iowa 632, 71 N. W. 536 (holding that where an inspector of engines on defendant's railway testifies positively as to the condition of an engine on a certain day defendant is not prejudiced by the exclusion of entries made by witness of the facts he has already testified to); Engle *v.* Chicago, etc., R. Co., 77 Iowa 661, 37 N. W. 6, 42 N. W. 512 (non-prejudicial instruction as to contributory negligence under Iowa Code (1873), § 1289).

Kansas.— Chicago, etc., R. Co. *v.* Spring Mill Cemetery Assoc., (App. 1899) 57 Pac. 252; Atchison, etc., R. Co. *v.* Huitt, 1 Kan. App. 781, 41 Pac. 1049.

Texas.— Ft. Worth, etc., R. Co. *v.* Wallace, 74 Tex. 581, 12 S. W. 227; Missouri, etc., R. Co. *v.* Keahy, 37 Tex. Civ. App. 330, 83 S. W. 1102; Missouri, etc., R. Co. *v.* Goode, 7 Tex. Civ. App. 245, 26 S. W. 441.

Washington.— Wick *v.* Tacoma Eastern R. Co., 40 Wash. 408, 82 Pac. 711.

Wisconsin.— Donovan *v.* Chicago, etc., R. Co., 93 Wis. 373, 67 N. W. 721.

See 41 Cent. Dig. tit. "Railroads," § 1761.

An instruction which does not materially affect the substantial rights of defendant is not a prejudicial error. Krejci *v.* Chicago, etc., R. Co., 117 Iowa 344, 90 N. W. 708; Johnson *v.* Northern Pac. R. Co., 1 N. D. 354, 48 N. W. 227.

Illustrations of harmless error.— Omission of the word "dangerous" before the word "combustible" in an instruction that it was defendant's duty to keep its right of way clear of dry weeds and combustible material. Chicago, etc., R. Co. *v.* Coyette, 133 Ill. 21, 24 N. E. 549 [*affirming* 32 Ill. App. 574]. Exclusion of the trip report of the engineer of the locomotive alleged to have started the fire when such engineer testified orally to all that it contained bearing upon the case. Chicago, etc., R. Co. *v.* Shenk, 131 Ill. 283, 23 N. E. 436 [*reversing* on other grounds 30 Ill. App. 586]. Refusal to compel the jury to answer special questions relating to other items of negligence, where the jury find that the railroad company was only negligent in allowing an accumulation of combustible material upon its right of way. Atchison, etc.,

RAILROAD SECURITIES. See RAILROADS, *ante*, p. 442.

RAILROAD SHOP. A term which has been construed as including not only the shop buildings but also all the tracks and grounds set apart for shop purposes.[1] (See SHOP.)

RAILROAD STATION. See RAILWAY STATION, *post*, p. 1408.

RAILROAD SUPERINTENDENT. See EMPLOYEE, 15 Cyc. 1033 text and note 59.

RAILROAD TICKET. A receipt, or voucher, having more the character of personal property than of a negotiable instrument;[2] nothing more than a mere voucher that the party to whom it is given and in whose possession it is has paid his fare and is entitled to be carried a certain distance;[3] merely a voucher that the person in whose possession it is has paid his fare;[4] a convenient symbol to represent the fact that the bearer has paid to the company the agreed price for his conveyance upon the road to the place designated;[5] merely the evidence of the contract of the carrier to transport the holder between the points, and on the conditions therein named;[6] a mere token or voucher showing that the holder has paid his fare and is entitled to passage as thereon indicated,[7] subject to conflict whether or not it constitutes a contract.[8] (See CARRIERS, 6 Cyc. 570; PASSAGE, 30 Cyc. 800 note 18; PASSENGER, 30 Cyc. 801 note 26.)

R. Co. *v.* Hays, 8 Kan. App. 545, 54 Pac. 322. Failure to require a more definite statement by plaintiff in his petition as to the train from which, and the time when, the fire escaped where no prejudice results thereby to defendant. Missouri Pac. R. Co. *v.* Merrill, 40 Kan. 404, 19 Pac. 793. Where there is direct testimony that all the engines on a line are equipped with spark arresters it is harmless error to exclude evidence, the only purpose of which would be to lay a foundation for the identification of the engine charged with setting the fire, and in order to prove that it was so equipped. Gulf, etc., R. Co. *v.* Baugh, (Tex. Civ. App. 1897) 43 S. W. 557. Error in the admission of testimony as to how the engine from which the fire originated was operated is not prejudicial to defendant where the jury find that it was properly operated and managed. Abbott *v.* Gore, 74 Wis. 509, 43 N. W. 365.

Admitting evidence of the direction of the wind at a point five miles distant from the fire does not afford defendant good ground of exception unless the jury were misled as to the direction at the time and place of the fire. Pierce *v.* Worcester, etc., R. Co., 105 Mass. 199.

In an action for the destruction of plaintiff's dwelling by fire, the admission of evidence that he expected to move the house away from that track soon is harmless error, since the measure of damages for such destruction is the value of the house itself and not the decrease in value of the land on which it stood by reason of the destruction of the house. White *v.* Chicago, etc., R. Co., 1 S. D. 326, 47 N. W. 146, 9 L. R. A. 824.

Permitting an amendment of the complaint demanding damages for injuries to a tract of land not included in plaintiff's notice of claim of damages, served under the statute (Laws (1893), c. 202) is cured by setting aside the verdict on motion for a new trial so far as the damages to that particular tract is concerned. Donovan *v.* Chicago, etc., R. Co., 93 Wis. 373, 67 N. W. 721.

In an action against a railroad company by a subtenant of its lessee for loss of a stock of goods by fire, the exclusion of evidence that plaintiff had notice of the stipulations of the lease between defendant and the lessee, by which the lessee covenanted to keep the building and contents insured, is not ground for reversal. Missouri, etc., R. Co. *v.* Keahy, 37 Tex. Civ. App. 330, 83 S. W. 1102.

1. See Chicago, etc., R. Co. *v.* Denver, etc., R. Co., 45 Fed. 304, 314 [*affirmed* in 143 U. S. 596, 12 S. Ct. 479, 36 L. ed. 277], where the term is so construed with reference to a contract for joint use by two companies, excluding from its operation certain "shops"; and it is further said: "It is obvious that the term 'railroad shops' includes much more than would be included in the term 'shoe shop' or 'tailor shop.'"

2. Frank *v.* Ingalls, 41 Ohio St. 560, 564.

3. Lawson Contr. Carr. § 106, p. 116 [*quoted* in Frank *v.* Ingalls, 41 Ohio St. 560, 564].

4. Baltimore, etc., R. Co. *v.* Campbell, 36 Ohio St. 647, 658, 38 Am. Rep. 617 [*quoted* in Frank *v.* Ingalls, 41 Ohio St. 560, 563], holding that such a ticket is not a contract, and that mere words thereon intended to acknowledge the carrier's liability for loss of baggage are unavailing, unless knowledge and consent of the passenger to such limitation be proved.

5. Cleveland, etc., R. Co. *v.* Bartram, 11 Ohio St. 457, 462 [*quoted* in Frank *v.* Ingalls, 41 Ohio St. 560, 563].

6. State *v.* Corbett, 57 Minn. 345, 350, 59 N. W. 317, 24 L. R. A. 498, holding also that "while a 'railroad ticket' is, in one sense, 'property,' yet it is not merchandise or a chattel."

7. Elmore *v.* Sands, 54 N. Y. 512, 515, 13 Am. Rep. 617.

8. See CARRIERS, 6 Cyc. 570.

"**Ordinary local tickets do not generally** contain any terms of contract, and are not intended to do so. They are mere tokens to

RAILROAD or RAILWAY TRACK. In the ordinary sense, two continuous lines of rails on which railway cars run,[9] forming, together with the ties, ballast, switches, etc., the permanent way,[10] merely that part of the right of way on which the rails and ties are laid.[11] As generally understood, only a track on which steam is used as the motive power.[12] Under the Illinois Revenue Law,[13] for the purposes of taxation, the right of way, including the superstructures of main, side, or second track and turn-outs, and the station and improvement of the railroad company on such right of way.[14] Under the Indiana Revenue

the passenger and vouchers for the conductor, adopted for convenience to show that the passenger has paid his fare from one place to another, very much in the nature of baggage checks." Louisville, etc., R. Co. *v.* Turner, 100 Tenn. 213, 224, 47 S. W. 223, 43 L. R. A. 140 [*cited* in Louisville, etc., R. Co. *v.* Turner, 100 Tenn. 213, 47 S. W. 223, 43 L. R. A. 140; Watson *v.* Louisville, etc., R. Co., 104 Tenn. 194, 195, 52 S. W. 1024, 49 L. R. A. 454].

9. Century Dict. [*quoted* in Reid *v.* Klein, 138 Ind. 484, 494, 37 N. E. 967; Atchison, etc., R. Co. *v.* Kansas City, etc., R. Co., 67 Kan. 569, 574, 70 Pac. 939, 73 Pac. 899].

10. Century Dict. [*quoted* in Reid *v.* Klein, 138 Ind. 484, 494, 37 N. E. 967].

"Not merely the rails and ties upon which cars are run, but it is the 'road, course, way' (Webster), and includes all that enters into and composes the road, the course and way." Gates *v.* Chicago, etc., R. Co., 82 Iowa 518, 527, 48 N. W. 1040.

Embankment included.— Within the meaning of Iowa Code, § 464, concerning damages to abutting premises of construction of railroads, the embankment upon which the rails and ties are laid is a part of the whole that makes the railroad track. Gates *v.* Chicago, etc., R. Co., 82 Iowa 518, 527, 48 N. W. 1040.

Road-bed included.— As used in Ill. St. (1893) c. 20 (St. (1898) § 1816, subd. 1), providing for recovery by employee for defect in track, the word includes the road-bed upon which the track rests. Crouse *v.* Chicago, etc., R. Co., 102 Wis. 196, 209, 78 N. W. 446, 778.

Not synonymous with "right of way" see Reid *v.* Klein, 138 Ind. 484, 494, 37 N. E. 967.

Tracks in yard.— In a condemnation petition, "tracks" applies to those devoted to the purposes of a railroad yard. See Chicago, etc., R. Co. *v.* Pontiac, 169 Ill. 155, 161, 48 N. E. 485.

As used in Illinois City and Village Act (St. (1872) art. 5, § 1, par. 89), authorizing the condemnation of a railroad track by eminent domain for highway crossings, the term includes tracks used for switch purposes and devoted to the storage of cars. Chicago, etc., R. Co. *v.* Chicago, 151 Ill. 348, 357, 37 N. E. 842.

"North line of the railroad track," describing a boundary, in a deed, means the north line of the rails. Reid *v.* Klein, 138 Ind. 484, 488, 37 N. E. 967.

A "structure" within the meaning of Conn. Gen. St. § 2673, providing that, for injury upon a highway, "caused by a structure legally placed on such road by a railroad company," the latter shall be liable. New York, etc., R. Co. *v.* New Haven, 70 Conn. 390, 396, 39 Atl. 597.

11. Drainage Com'rs Dist. No. 3 *v.* Illinois Cent. R. Co., 158 Ill. 353, 361, 41 N. E. 1073, so defining "track" as used in an instrument relating to assessments as affected by the question of benefit to the track, and distinguishing the use of the word in the Revenue Act (2 Starr & C. St. Ill. p. 2402, § 42).

12. Freiday *v.* Sioux City Rapid Transit Co., 92 Iowa 191, 194, 60 N. W. 656, 26 L. R. A. 246; Sears *v.* Marshalltown St. R. Co., 65 Iowa 742, 744, 23 N. W. 150, in each of which cases it was presumed that the words were used by the legislature in that sense in providing for compensation to abutting owners, where a railway track is laid in a street and did not include a horse railway.

13. Starr & C. St. Ill. c. 120, § 42 (Rev. St. (1874) p. 185).

14. Chicago, etc., R. Co. *v.* People, 195 Ill. 184, 189, 62 N. E. 869; Quincy, etc., R. Co. *v.* People, 156 Ill. 437, 442, 41 N. E. 162; Chicago, etc., R. Co. *v.* People, 129 Ill. 571, 576, 22 N. E. 864, 25 N. E. 5; Peoria, etc., R. Co. *v.* Goar, 118 Ill. 134, 136, 137, 8 N. E. 682 [*cited* in Oregon Short Line R. Co. *v.* Yeates, 2 Ida. (Hasb.) 397, 402, 17 Pac. 457]; Anderson *v.* Chicago, etc., R. Co., 117 Ill. 26, 28, 29, 7 N. E. 129; People *v.* Chicago, etc., R. Co., 116 Ill. 181, 183, 4 N. E. 480; Chicago, etc., R. Co. *v.* Miller, 72 Ill. 144, 146.

Embraces main track, side-track, right of way, and improvements thereon (Cairo, etc., R. Co. *v.* Mathews, 152 Ill. 153, 158, 38 N. E. 623); a right of way one hundred feet wide and track thereon, used to carry stone, necessary in keeping the road in repair, from a quarry to the main track (Chicago, etc., R. Co. *v.* People, 129 Ill. 571, 22 N. E. 864, 25 N. E. 5); the east half of the "Burlington bridge" across the Mississippi between Illinois and Iowa (Anderson *v.* Chicago, etc., R. Co., 117 Ill. 26, 27, 7 N. E. 129); town or city lots used by the company as right of way (Chicago, etc., R. Co. *v.* Miller, 72 Ill. 144, 146); "not merely the main and side-tracks and turn-outs, but also the stations, and improvements thereon" (Chicago, etc., R. Co. *v.* People, 4 Ill. App. 468, 471).

Does not embrace a separate piece of land containing track five hundred feet in length, in a sheep yard, entirely surrounded by a fence and shut off from the right of way by a gate when not in use (Chicago, etc., R. Co. *v.* People, 195 Ill. 184, 187, 189, 62 N. E. 869); or lots owned by a railroad but never appropriated as a part of the right of way, whatever may be the intention concerning

Law,[15] the right of way, including a superstructure, main track, side or second tracks, and turnouts, turn-tables, telegraph poles, wires, instruments, and other appliances, and the stations or improvements of the railroad company on the right of way, except machinery, stationary and other engines, which shall be considered personal property; that is, the right of way, with whatever is upon it in the shape of improvements.[16] Under certain New York statutes, the entire roadway and not merely the iron or railway, including switches or other contrivances for passing cars from one line of rails to another,[17] limited, however, to the track used for public traffic.[18]

RAILROAD YARD. A tract of ground upon which are railroad tracks, used for the purpose of receiving and storing cars when not in use, or used for the purpose of switching, in the distribution of cars and engines to other places, and in the making up of trains;[19] a place for the deposit of cars and the making up of trains;[20] consisting of side tracks upon either side of the main tracks, and adjacent to some principal station or depot grounds, where cars are placed for deposit, and where arriving trains are separated and departing trains made up; the place where such switching is done as is essential to the proper placing of cars either for deposit or for departure.[21]

RAILS. A word which as used in a statute providing for assessment has been construed to mean simply the rails in place on the road-bed.[22] (See RAILROAD TRACK, *ante*, p. 1406.)

RAILWAY. A structure which consists of the bed or foundation, which may be of earth, stone, or trestle work, on which are laid the ties or rails.[23] (See RAILROADS, *ante*, p. 33.)

RAILWAY ACCIDENT. A term which, as used in a policy of insurance, has been construed to mean an accident occurring in the course of traveling and arising out of the journey; not necessarily dependent on any accident to the railway or machinery connected with it.[24] (Railway Accident: As Cause of

their future use (Chicago, etc., R. Co. *v.* People, 136 Ill. 660, 665, 27 N. E. 200).

To be assessable as "railroad track," property must not only be used therefor, but must be the property of a railroad company (Chicago, etc., R. Co. *v.* People, 153 Ill. 409, 413, 38 N. E. 1075, 29 L. R. A. 69); "it is not necessary the road should be constructed, but if it shall be 'located' and in process of construction" it is to be returned for taxation as "railroad track" (People *v.* Chicago, etc., R. Co., 116 Ill. 181, 183, 4 N. E. 480).

15. Ind. Rev. St. § 6362.

16. Pfaff *v.* Terre Haute, etc., R. Co., 108 Ind. 144, 147, 9 N. E. 93 [*cited* in Oregon Short Line R. Co. *v.* Yeates, 2 Ida. (Hasb.) 397, 402, 17 Pac. 457], adding: "If a depot building, round-house, machine shop, coal or wood sheds, or water-tank, is upon the right of way, they become a part of the 'railroad track.'"

17. Delaware, etc., Canal Co. *v.* Whitehall, 90 N. Y. 21, 24 [*cited* in Matter of Folts St., 18 N. Y. App. Div. 568, 573, 46 N. Y. Suppl. 43], construing the term as used in General Railroad Act (St. (1850) c. 40), § 24; and in St. (1863) c. 62, relating to crossings.

18. Boston, etc., R. Co. *v.* Greenbush, 52 N. Y. 510, 511 [*quoted* in People *v.* New York Cent., etc., R. Co., 156 N. Y. 570, 578, 51 N. E. 312, and *approved* in Delaware, etc., Canal Co. *v.* Whitehall, 90 N. Y. 21, 24, 25], where it is said: "The 'track' specified in the act may include one or more single tracks, but should . . . be limited to the track used for public traffic, whether composed of one or more, including turn-outs and switches, or, in other words, what may fairly be regarded as the roadway."

Does not include grounds upon which tracks are laid for storing cars or exclusively for making up trains. Boston, etc., R. Co. *v.* Greenbush, 52 N. Y. 510, 511 [*quoted* in People *v.* New York Cent., etc., R. Co., 156 N. Y. 570, 578, 51 N. E. 312].

19. Chicago, etc., R. Co. *v.* Chicago, 151 Ill. 348, 357, 37 N. E. 842.

Applied to a mere collection of tracks see Illinois Cent. R. Co. *v.* Chicago, 141 Ill. 586, 604, 30 N. E. 1044, 17 L. R. A. 530.

Synonymous with "switch yard" see Baltimore, etc., R. Co. *v.* Little, 149 Ind. 167, 173, 48 N. E. 862.

20. See Philadelphia, etc., R. Co. *v.* Burkhardt, 83 Md. 516, 521, 34 Atl. 1010, specifying in the particular instance "freight trains."

21. Harley *v.* Louisville, etc., R. Co., 57 Fed. 144, 145 [*quoted* in Baltimore, etc., R. Co. *v.* Little, 149 Ind. 167, 173, 48 N. E. 862].

22. San Francisco, etc., R. Co. *v.* Stockton, 149 Cal. 83, 87, 84 Pac. 771.

23. Giant Powder Co. *v.* Oregon Pac. R. Co., 42 Fed. 470, 473, 8 L. R. A. 700, holding that a railway is "literally and technically a 'structure,'" within the meaning of a lien law.

24. Theobald *v.* Railway Pass. Assur. Co., 10 Exch. 45, 58, 18 Jur. 583, 23 L. J. Exch. 249, 2 Wkly. Rep. 1034, 26 Eng. L. & Eq. 432.

Death or Injury to Person see ACCIDENT INSURANCE, 1 Cyc. 230; LIFE INSURANCE, 25 Cyc. 687; NEGLIGENCE, 29 Cyc. 400.)

RAILWAY CROSSING. An intersection of railway tracks.[25] (See RAILROADS, *ante*, p. 920; STREETS AND HIGHWAYS.)

RAILWAY CUT. A term said to have a certain and definite meaning and to comprise as well the sloping sides as the deepest part of the excavation.[26] (See, generally, RAILROADS, *ante*, p. 1 *et seq.*)

RAILWAY EMPLOYEE. A person employed to work on and about a railroad; one whose employer operates a railroad.[27] (See EMPLOYEE, 15 Cyc. 1031; RAILROADS, *ante*, p. 1 *et seq.*; and, generally, MASTER AND SERVANT, 26 Cyc. 941.)

RAILWAY or RAILROAD STATION. A halting place, intermediate between the termini of a railway where passengers are taken up and let down; also, though less appropriately, a railway terminus;[28] a place where passengers are received upon and discharged from railroad trains.[29] (See, generally, CARRIERS, 6 Cyc. 533.)

RAILWAY TRACK. See RAILROAD TRACK, *ante*, p. 1406.

RAINES LAW HOTELS. See INTOXICATING LIQUORS, 23 Cyc. 118 note 54.

RAINY. Abounding in rain, showery, wet.[30]

RAISE. Used of money, in its ordinary sense, simply, to procure;[31] to realize by subscription, by loan, or otherwise;[32] to take up by aggregation or collection, procure an amount or supply or bring together for use or possession;[33] to bring

25. Century Dict. [*quoted* in Atchison, etc., R. Co. *v.* Kansas City, etc., R. Co., 67 Kan. 569, 574, 70 Pac. 939, 73 Pac. 899].

26. Newton *v.* Louisville, etc., R. Co., 110 Ala. 474, 477, 19 So. 19.

27. Yancy *v.* Ætna L. Ins. Co., 108 Ga. 349, 351, 33 S. E. 979, where it is held that such is the meaning of the term as used in an accident policy providing that the policy shall not cover injuries received while walking or being on any railroad bridge or road-bed (railway employees excepted).

28. Imperial Dict. tit. "Station" [*quoted* in Carroll *v.* Casemore, 20 Grant Ch. (U. C.) 16, 21].

29. St. Louis, etc., R. Co. *v.* Neal, 66 Ark. 543, 544, 51 S. W. 1060.

The various places along the line of railway where carriages stop for taking up or depositing goods or passengers are termed stations, with the prefix of goods or passengers as they are allotted to the one or the other, and they are termed road stations when they occur at the crossing of a public road where goods or passengers are transferred to other kinds of conveyance. Imp. Dict. *sub verb.* "Railway" [*quoted* in Carroll *v.* Casemore, 20 Grant Ch. (U. C.) 16, 21].

The ordinary acceptation of the term as applied to railways would appear to be "passenger station." It cannot properly mean the railway grounds, and in legal phraseology, a different signification is not given to the word. Carroll *v.* Casemore, 20 Grant Ch. (U. C.) 16, 22.

30. Webster Dict.: Worcester Dict. [both *quoted* in Balfour *v.* Wilkins, 2 Fed. Cas. No. 807, 5 Sawy. 429, 434].

"Rainy day" is a phrase which has no definite and certain meaning and may be understood in many senses; literally, nothing less than a day of rain — a day on which rain falls every moment of the period; colloquially the term may be often used to describe a day upon which at least a moderate rainfall occurs during the greater portion of the time; altogether indefinite and uncertain when used without regard to the surrounding circumstances; and capable of being used in different senses according to the nature of the subject-matter concerning which it is applied, therefore to be explained by usage where usage exists. Balfour *v.* Wilkins, 2 Fed. Cas. No. 807, 5 Sawy. 429, 434, 437 [*cited* in 20 Alb. L. J. 161], where it is said: "To say simply that a day is a rainy one is almost as vague an expression as that a thing is as big as a piece of chalk or as long as a string. A contract to plow, ditch or cut wood, 'rainy days' excepted, would not be understood or construed as would a contract to harvest grain, 'rainy days' excepted. Reference being had to the subject-matter, it would be manifest that the parties had not the same degree of rain-fall in view in making the last contract as the others, because they could be conveniently performed in weather in which the moisture would make it unsafe and unfit to harvest;" and held (p. 437) that as used in a charter party excepting rainy days from the time given for loading, it means "a day on which cargo could not be safely and conveniently loaded at this port." See DAY, 13 Cyc. 262.

Rainy weather no excuse for failure to demand payment of due note see COMMERCIAL PAPER, 7 Cyc. 1113 note 89.

31. New York, etc., Cement Co. *v.* Keator, 62 N. Y. App. Div. 577, 580, 71 N. Y. Suppl. 185 [*quoted* and *affirmed* in New York, etc., Cement Co. *v.* Davis, 173 N. Y. 235, 239, 66 N. E. 9].

32. See Black L. Dict. [*quoted* in New York, etc., Cement Co. *v.* Davis, 173 N. Y. 235, 66 N. E. 9].

33. Century Dict. [*quoted* in Childs *v.* Hillsborough Electric Light, etc., Co., 70 N. H. 318, 320, 47 Atl. 271].

together, to collect, to levy, to get together for use or service;[34] to levy, to collect;[35] and the term may allow various methods,[36] such as sale;[37] borrowing;[38] taxation;[39] actual receipt,[40] or *bona fide* subscription.[41] In case of a fund, to create or produce.[42] Used of a structure, to increase height.[43] Used of living

34. Webster Dict. [*quoted* in Perry County *v.* Selma, etc., R. Co., 58 Ala. 546, 557, holding that the precise meaning in a constitutional revision, declaring that all bills for raising revenue shall originate in the house of representatives is to levy a tax as a means of collecting revenue, and does not imply increase of revenue], adding "as to raise money, troops, and the like."

"Collect, the synonym given in the dictionaries," is the construction of the word as used in a letter promising the president of a college a sum of money if he can "raise" an equal sum. Bates College *v.* Bates, 135 Mass. 487, 488.

35. Webster Dict. [*quoted* in Childs *v.* Hillsborough Electric Light, etc., Co., 70 N. H. 318, 320, 324, 47 Atl. 271], where it is said: "To 'raise' money, as the word is ordinarily understood, is to collect or procure a supply of money for use, as, in the case of a municipal corporation, by taxation or perhaps loan. Money cannot be actually given or appropriated before it is raised. A promise to give or appropriate money may be made before the money is actually procured; but in such case the promise binds the promisor to have the money on hand when it becomes due, and so, in a sense, the money is raised by the promise. As authority to grant money includes authority to promise a grant of it, so an exception in respect to raising money includes an exception of a promise by which money must be raised."

36. See New York, etc., Cement Co. *v.* Keator, 62 N. Y. App. Div. 577, 580, 71 N. Y. Suppl. 185 [*quoted* and *affirmed* in New York, etc., Cement Co. *v.* Davis, 173 N. Y. 235, 239, 66 N. E. 9], where it is said: "When applied to an individual or a business corporation, it means the procuring of money in any of the usual methods, by note, mortgage or other obligation. As applied to municipal corporations, its ordinary import is the procuring of money by taxation or by the obligations of the corporation. . . . Where a statute authorizes the borrowing of money, the words 'to raise money' are equally apt to signify raising by taxation or by municipal obligation."

37. See Hand *v.* Stapleton, 140 Ala. 555, 562, 37 So. 362, holding that the term "'raising' money" contemplates a sale of property for money or a borrowing on engagements to pay in the future.

May imply power of sale — as where executors are directed to raise a sum out of certain lands. Bateman *v.* Bateman, 1 Atk. 421, 26 Eng. Reprint 268. See also Green *v.* Belchier, 1 Atk. 505, 506, 26 Eng. Reprint 319.

38. See Hand *v.* Stapleton, 140 Ala. 555, 562, 37 So. 362; Brown *v.* Newport Bd. of Education, 108 Ky. 783, 788, 57 S. W. 612, 22 Ky. L. Rep. 483, holding that the term may be construed "borrow" as used in Ky. Const. § 184, providing that "no sum shall be raised or collected for education other than in common schools," without submission of the question of taxation to voters and a majority in favor thereof.

"Raised by the pledge or hypothecation . . . is . . . 'borrowing.'" Baltimore *v.* Gill, 31 Md. 375, 388.

39. Schneewind *v.* Niles, 103 Mich. 301, 306, 61 N. W. 498, holding that the word, used in fiscal statutes, means raised by taxation. See also Dickinson County *v.* Warren, 98 Mich. 144, 146, 56 N. W. 1111, where the word is said to be "frequently employed in grants of authority to provide the necessary funds for public use in cases where the intent to prescribe the method in which the power is to be exercised, viz., by taxation, is so clearly obvious that the word may be said to have acquired a clearly defined meaning when used in that connection."

Raised by taxation — not borrowed; in a provision that electors at a town meeting shall have power "to direct such sum to be raised," etc. Wells *v.* Salina, 119 N. Y. 280, 288, 23 N. E. 870, 7 L. R. A. 759 [*distinguished* in Birge *v.* Berlin Iron Bridge Co., 133 N. Y. 477, 486, 31 N. E. 609; New York, etc., Cement Co. *v.* Keator, 62 N. Y. App. Div. 577, 580, 71 N. Y. Suppl. 185].

40. See Opinion of Justices, 7 Me. 502, 504, holding that "raised," in a statute providing for the compensation allowed to managers of lotteries, not exceeding twenty-five per cent on the sum raised, means actually produced and realized in cash.

41. See New London Literary, etc., Inst. *v.* Prescott, 40 N. H. 330, 333, holding that in a condition that a certain amount be "raised" before a certain subscription should be paid may mean "subscribed" or "paid," but the amount must at least be subscribed in good faith; a subscription without intent to pay does not fill the requirement.

42. Opinion of Justices, 7 Me. 502, 504.

43. See Smith *v.* Moodus Water Power Co., 35 Conn. 392, 399 (holding that the expression "raise the dam," in a lease and contract, implies that there is a dam in existence which may be raised, and applies to the whole dam, to one part of it as well as to another); Colwell *v.* May's Landing Water Power Co., 19 N. J. Eq. 245, 249 (where a statute authorizing a mill owner to "raise" the dam and waterworks to the height of the natural surface of the water was construed as authorizing the raising of the water of the dam to that height and not to authorize the raising of the structure of the dam so that the water would be made to flow back on another's land); State *v.* Suttle, 115 N. C. 784, 787, 20 S. E. 725 (holding that a reservation in a deed of the right of raising and rebuilding reserves the right to raise as well as to rebuild, or according to the charge to the jury, to raise high if necessary).

things, animal or vegetable, to bring to maturity.[44] (See COLLECT, 7 Cyc. 280; LEVY, 25 Cyc. 206; PROCURE, 32 Cyc. 573.)

RAISED BOTTOMS. A term whose application to raw copper has been held not to subject the article to duty under that name.[45]

RAISED CHECK. See BANKS AND BANKING, 5 Cyc. 544; FORGERY, 19 Cyc. 1367.

RAKE OFF. A phrase which plainly suggests the figure of one passing a rake over something and scraping or clearing off and gathering up part of it; when stated as the act of an official towards public moneys it becomes a statement of fraud or theft whose meaning, without innuendo, the court is bound to notice judicially and pronounce libelous.[46]

RAM. A male sheep as distinguished from a wether;[47] a swinging appliance for striking heavy blows.[48] (See ANIMALS, 2 Cyc. 380 note 75.)

RANCHMAN. A word which, as used in a lien law to describe a class of persons entitled to a lien for payment for feeding, herding, and pasturing animals applies only to one who takes care of the animals intrusted to him upon his own land, and does not include one who works for wages off his own land.[49]

RANDOM. In its popular meaning, done at hazard, or without any settled aim, purpose or direction; left to chance, or casual, or haphazard.[50]

RANGE. As used by ranchmen, sparsely populated and uninclosed prairie over which stock growers have been allowed to let cattle, horses, and other animals owned by them or in their charge, roam and feed without restraint.[51] In mining, crevice, lode, or vein.[52] In the public land system, a row or line of townships lying between two successive meridian lines six miles apart.[53] (Range: Levy, see EXECUTIONS, 17 Cyc. 1088.)

RANGE LEVY. See EXECUTIONS, 17 Cyc. 1088.

RANK. As an adjective, in English law, excessive; too large in amount.[54]

44. See cases cited *infra*, this note.

Children may be regarded as "raised" when they are twenty-one years of age. Shoemaker *v.* Stobaugh, 59 Ind. 598, 600, so construing a will, where the "raising" of the children was made the purpose of a legacy and the period of a disposition.

"Crops raised by the mortgagor . . . for the term of three years" does not mean crops raised before the execution of the mortgage in which the phrase occurs. The participle "raise" in such use does not of itself convey the idea of positive time when the time is fixed by the context. Muir *v.* Blake, (Iowa 1881) 9 N. W. 345, 346.

45. See U. S. *v.* Potts, 5 Cranch (U. S.) 284, 286, 3 L. ed. 102.

46. Com. *v.* Root, 15 Pa. Dist. 441, 443.

47. State *v.* Royster, 65 N. C. 539.

48. Creamer *v.* Moran Bros. Co., 41 Wash. 636, 84 Pac. 592, 593, where a certain "ram" is described as "a heavy piece of iron about a foot in diameter and two or three feet long, with a long narrow handle projecting several feet beyond" which could be raised by means of block and tackle to a position for striking.

49. See Hooker *v.* McAllister, 12 Wash. 46, 49, 40 Pac. 617.

50. Webster Dict. [*quoted* in Com. *v.* Bynum, 50 S. W. 843, 20 Ky. L. Rep. 1982].

"When the phrase 'at random' is used, it is applied only to anything done at haphazard or chance." See Encyclopedic Dict. [*cited* in Com. *v.* Bynum, 50 S. W. 843, 20 Ky. L. Rep. 1982, holding that one who shot at a dog intentionally on the highway was **not** guilty of shooting at random].

51. Miller *v.* Lewis, 17 S. D. 448, 451, 97 N. W. 364, 365.

The word is a "matter of local description, and, unlike a generic term requiring the species to be stated, it admits of proof under the general allegation without defining by averment the limits of the 'range.'" So held of the terms "range," or "accustomed range," as used in Tex. Pen. Code, art. 776*a*, 776*d*. State *v.* Thompson, 40 Tex. 515, 519 [*quoted* in Foster *v.* State, 21 Tex. App. 80, 86, 17 S. W. 548 (*overruled* on other grounds in Long *v.* State, 39 Tex. Cr. 461, 463, 466, 46 S. W. 821, 73 Am. St. Rep. 954)].

"These cattle ranges are usually uninclosed, and have no definite or fixed boundaries, but include a large section of country, many square miles in extent." Holcomb *v.* Keliher, 5 S. D. 438, 441, 59 N. W. 227.

52. See Raisbeck *v.* Anthony, 73 Wis. 572, 586, 41 N. W. 72, in the words "a lode or vein (which we understand to be the equivalent of a range or crevice, as those terms are employed in this case)." See CREVICE, 12 Cyc. 67; MINES AND MINERALS, 27 Cyc. 525.

53. Webster Int. Dict.

Sometimes abbreviated "R" see Kile *v.* Yellowhead, 80 Ill. 208, 210; Hunt *v.* Smith, 9 Kan. 137, 153.

54. Black L. Dict.

Example, "The 'modus' must not be too large, which is called a 'rank modus.'" 2 Blackstone Comm. 30 [*cited* in Black L. Dict.].

As a noun, the order or place in which certain officers are placed in the army or navy in relation to others;[55] social position, station.[56] As a verb, to range in any particular class, order, or distinction; to class; also to dispose methodically, to place in suitable classes or order, to classify.[57] (Rank: Of Officers of Army and Navy, see ARMY AND NAVY, 3 Cyc. 820.)

RANSOM. As a noun, a redemption for money or other consideration, of that which is taken in war;[58] a severe fine.[59] As a verb, a synonym of REDEEM,[60] *q. v.* (Ransom: Bills, Under Admiralty Jurisdiction, see ADMIRALTY, 1 Cyc. 838.)

55. Black L. Dict.

"Often used to express something different from office."— It then becomes a designation or title of honor, dignity, or distinction conferred upon an officer in order to fix his relative position with reference to other officers in matters of privilege, precedence, and sometimes of command, or by which to determine his pay and emoluments." Wood *v.* U. S., 15 Ct. Cl. 151, 159, where it is pointed out that the rank and actual office of an officer may differ.

56. See Thill *v.* Pohlman, 76 Iowa 638, 640, 641, 41 N. W. 385, where it is said: "How could it be said that in fixing the obligations of a husband for the support of his wife her social position in society, which is the synonym of 'rank' or 'station,' should not be considered? . . . The terms 'rank' and 'station' seem to be of like import."

57. Webster Int. Dict.

Does not necessarily imply identity of the thing ranked with the class in which it is ranked. Verdier *v.* Roach, 96 Cal. 467, 475, 31 Pac. 554, where it is said: "The first two examples given by Mr. Webster of authorized uses of the verb 'to rank' are as follows: 'Poets were "ranked" in the class of philosophers'; 'Heresy is "ranked" with idolatry and witchcraft.' The first does not necessarily mean nor imply that poets are philosophers; nor the second that heresy is idolatry or witchcraft. Nor does the requirement that an allowed claim shall be ranked 'among' debts exclude from the ranks all claims which may not properly be termed legal debts;" and held that Cal. Code Civ. Proc. § 1497, requiring claims against a decedent's estate to be filed in court and "ranked among the acknowledged debts of the estate, to be paid in due course of administration," does not exclude claims not properly legal debts.

58. Havelock *v.* Rockwood, 8 T. R. 268, 277.

Distinguished from "sale."— "The plaintiff's ship, after being captured by the enemy, but before she was condemned as prize, was put up to auction, and sold to the plaintiff, or at least delivered to him, for which he paid a sum of money. Then it was redeemed by him: there could not be any sale of the ship, because there was no sentence of condemnation; without which no property could be transferred to a purchaser. . . . It was a redemption, or ransom." Havelock *v.* Rockwood, 8 T. R. 268, 277.

59. U. S. *v.* Griffin, 6 D. C. 53, 57, where in construing St. 5 Rich. II, it is said: "The language of the statute forbids the act of forcible entry, &c., 'under pain of imprisonment and ransom.' The word ransom means not only a fine, but a severe fine."

60. Havelock *v.* Rockwood, 8 T. R. 268, 276.

RAPE

By Needham Y. Gulley
Dean of Law Department of Wake Forest College, North Carolina

CROSS-REFERENCES

For Matters Relating to:

Abduction, see ABDUCTION, 1 Cyc. 140.

Conspiracy to Commit, see CONSPIRACY, 8 Cyc. 627.

Defilement of Female in Custody, Care or Employment of Accused, see SEDUCTION.

Detention of Female For Purpose of Intercourse, see ABDUCTION, 1 Cyc. 140.

Indecent Assault, see ASSAULT AND BATTERY, 3 Cyc. 1027.

Intercourse Accomplished by Persuasion, see SEDUCTION.

Murder in Commission of Rape, see HOMICIDE, 21 Cyc. 718, 722.

Seduction, see SEDUCTION.

For General Matters Relating to Criminal Law and Criminal Procedure, see CRIMINAL LAW, 12 Cyc. 70.

I. OFFENSES AND RESPONSIBILITY THEREFOR.

A. Rape — 1. DEFINITION — a. At Common Law. Rape at common law is the unlawful carnal knowledge of a woman over the age of ten years forcibly and without her consent,[1] or, as it is otherwise expressed, by force, or forcibly, and against her will,[2] or, under an early English statute which is a part of our

1. Hooper *v.* State, 106 Ala. 41, 43, 17 So. 679; Felton *v.* State, 139 Ind. 531, 541, 39 N. E. 228; Payne *v.* Com., 110 S. W. 311, 312, 33 Ky. L. Rep. 229; Clark Cr. L. (2d ed.) 215. And see Whidby *v.* State, 121 Ga. 588, 49 S. E. 811.

2. 4 Blackstone Comm. 210; 1 East P. C. 434; 1 Hale P. C. 628; 1 Hawkins P. C. c. 41, § 1. And see Hooper *v.* State, 106 Ala. 41, 43, 17 So. 679; Maxey *v.* State, 66 Ark. 523, 526, 52 S. W. 2; Harvey *v.* State, 53 Ark. 425, 427, 14 S. W. 645, 22 Am. St. Rep. 229; Charles *v.* State, 11 Ark. 389, 409; State *v.* Truitt, 5 Pennew. (Del.) 466, 62 Atl. 790; State *v.* Smith, 9 Houst. (Del.) 588, 593, 33 Atl. 441; Stephen *v.* State, 11 Ga. 225, 238; State *v.* Canada, 68 Iowa 397, 399, 27 N. W. 288; White *v.* Com., 96 Ky. 180, 185, 28 S. W. 340, 16 Ky. L. Rep. 421; Lowry *v.* Com., 65 S. W. 434, 435, 23 Ky. L. Rep. 1553; People *v.* Murphy, 145 Mich. 524, 108 N. W. 1009; People *v.* Crego, 70 Mich. 319, 320, 321, 38 N. W. 281; People *v.* Crosswell, 13 Mich. 427, 432, 87 Am. Dec. 774; State *v.* Montgomery, 63 Mo. 296, 298; Richards *v.* State, 36 Nebr. 17, 23, 53 N. W. 1027; State

common law, such knowledge of a female child under the age of ten years, either with or without her consent.[3] A distinction has sometimes been suggested between the words "against her will" and the words "without her consent" in the definitions of rape;[4] but according to the better opinion they mean exactly the same thing.[5]

b. By Statute. In some states rape is now or has been defined by statute substantially as at common law.[6] In others it is punished *eo nomine*, without being defined, in which case the common-law definition applies.[7] In other states the statutory definition either differs from the common-law definition or specifies circumstances under which the act will constitute rap where there was some doubt under the common law.[8] In some states the statute raises the age at which

v. Pickett, 11 Nev. 255, 257, 21 Am. Rep. 754; State *v.* Brooks, 76 N. C. 1, 3; Williams *v.* State, 14 Ohio 222, 226, 45 Am. Dec. 536; Sowers *v.* Territory, 6 Okla. 436, 447, 50 Pac. 257; Walton *v.* State, 29 Tex. App. 163, 166, 15 S. W. 646; Croghan *v.* State, 22 Wis. 444, 445; Reg. *v.* Bedere, 21 Ont. 189, 193.

3. 1 Hale P. C. 628. And see State *v.* Worden, 46 Conn. 349, 33 Am. Rep. 27; State *v.* Smith, 9 Houst. (Del.) 588, 593, 33 Atl. 441; Stephen *v.* State, 11 Ga. 225, 238; Com. *v.* Roosnell, 143 Mass. 32, 8 N. E. 747; People *v.* Crosswell, 13 Mich. 427, 432, 87 Am. Dec. 774; People *v.* McDonald, 9 Mich. 150. See *infra*, I, A, 2, f, (II).

4. See Reg. *v.* Fletcher, Bell C. C. 63, 8 Cox C. C. 131, 5 Jur. N. S. 179, 28 L. J. M. C. 85, 7 Wkly. Rep. 204.

5. Com. *v.* Burke, 105 Mass. 376, 7 Am. Rep. 511.

6. **Carnal knowledge of a female by force or against her** will see Beard *v.* State, 79 Ark. 293, 298, 95 S. W. 995, 97 S. W. 667; Harvey *v.* State, 53 Ark. 425, 427, 14 S. W. 645, 22 Am. St. Rep. 229; People *v.* Ah Yek, 29 Cal. 575, 576; Gibbs *v.* People, 36 Colo. 452, 453, 85 Pac. 425; Barker *v.* State, 40 Fla. 178, 188, 24 So. 69; Vanderford *v.* State, 126 Ga. 753, 759, 55 S. E. 1025; Addison *v.* People, 193 Ill. 405, 417, 62 N. E. 235; Hanes *v.* State, 155 Ind. 112, 120, 57 N. E. 704; Pomeroy *v.* State, 94 Ind. 96, 100, 48 Am. Rep. 146; State *v.* Canada, 68 Iowa 397, 399, 27 N. W. 288; People *v.* Crosswell, 13 Mich. 427, 432, 87 Am. Dec. 774; State *v.* Pickett, 11 Nev. 255, 257, 21 Am. Rep. 754; State *v.* Johnston, 76 N. C. 209, 210; Vickers *v.* U. S., (Okla. 1908) 98 Pac. 467, 469; Wyatt *v.* State, 2 Swan (Tenn.) 394, 397; State *v.* Mueller, 85 Wis. 203, 205, 55 N. W. 165; Ross *v.* State, 16 Wyo. 285, 93 Pac. 299, 94 Pac. 217.

Carnal knowledge of a female child under the age of ten see State *v.* Gaul, 50 Conn. 578; Barker *v.* State, 40 Fla. 178, 188, 24 So. 69; People *v.* Crosswell, 13 Mich. 427, 432, 87 Am. Dec. 774; State *v.* Johnston, 76 N. C. 209, 211; Anschicks *v.* State, 6 Tex. App. 524, 535; State *v.* Erickson, 45 Wis. 86, 89.

7. Payne *v.* Com., 110 S. W. 311, 33 Ky. L. Rep. 229. See CRIMINAL LAW, 12 Cyc. 141.

8. In California it is provided as follows: "Rape is an act of sexual intercourse, accomplished with a female not the wife of the perpetrator, under either of the following circumstances: 1. Where the female is under the age of sixteen years; 2. Where she is incapable, through lunacy or other unsoundness of mind, whether temporary or permanent, of giving legal consent; 3. Where she resists, but her resistance is overcome by force or violence; 4. Where she is prevented from resisting by threats of great and immediate bodily harm, accompanied by apparent power of execution, or by any intoxicating narcotic, or anæsthetic substance, administered by or with the privity of the accused; 5. Where she is at the time unconscious of the nature of the act, and this is known to the accused; 6. Where she submits under the belief that the person committing the act is her husband, and this belief is induced by any artifice, pretense, or concealment practiced by the accused, with intent to induce such belief." Cal. Pen. Code, § 261. See People *v.* Snyder, 75 Cal. 323, 17 Pac. 208.

In New York it is provided: "A person who perpetrates an act of sexual intercourse with a female not his wife, against her will or without her consent, or 1. When through idiocy, imbecility or any unsoundness of mind, either temporary or permanent, she is incapable of giving consent, or by reason of mental or physical weakness, or immaturity, or any bodily ailment, she does not offer resistance; or, 2. When her resistance is forcibly overcome; or, 3. When her resistance is prevented by fear of immediate and great bodily harm, which she has reasonable cause to believe will be inflicted upon her; or, 4. When her resistance is prevented by stupor, or weakness of mind produced by an intoxicating, or narcotic, or anæsthetic agent; or, when she is known by the defendant to be in such state of stupor or weakness of mind from any cause; or, 5. When she is, at the time, unconscious of the act, and this is known to the defendant, or when she is in custody of the law, or of any officer thereof, or in any place of lawful detention, temporary or permanent, is guilty of rape in the first degree and punishable by imprisonment for not more than twenty years. A person who perpetrates an act of sexual intercourse with a female, not his wife, under the age

a female can consent to sexual intercourse, so as to prevent the act from being rape.[9] In a few states the statute divides the crime, like murder, into degrees

of eighteen years, under circumstances not amounting to rape in the first degree, is guilty of rape in the second degree, and punishable with imprisonment for not more than ten years." Pen. Code, § 278.

In Oklahoma it is provided: "Rape is an act of sexual intercourse, accomplished with a female not the wife of the perpetrator, under either of the following circumstances: First. Where the female is under the age of fourteen years. Second. Where she is incapable through lunacy or any other unsoundness of mind, whether temporary or permanent, of giving legal consent. Third. Where she resists, but her resistance is overcome by force or violence. Fourth. Where she is prevented from resisting by threats of immediate and great bodily harm, accompanied by apparent power of execution. Fifth. Where she is prevented from resisting by any intoxicating, narcotic or anæsthetic agent, administered by or with the privity of the accused. Sixth. Where she is at the time unconscious of the nature of the act and this is known to the accused. Seventh. Where she submits under a belief that the person committing the act is her husband, and this belief is induced by artifice, pretense or concealment practiced by the accused, with intent to induce such belief." Okla. St. (1893) c. 25, art. 26, § 1. See Parker *v.* Territory, 9 Okla. 109, 59 Pac. 9; Asher *v.* Territory, 7 Okla. 188, 54 Pac. 445; Sowers *v.* Territory, 6 Okla. 436, 50 Pac. 257.

In Texas it is provided as follows: "Rape is the carnal knowledge of a woman without her consent, obtained by force, threats, or fraud, or the carnal knowledge of a woman other than the wife of the person having such carnal knowledge with or without consent, and with or without use of force, threats, or fraud, such woman being so mentally diseased at the time as to have no will to oppose the act of carnal knowledge, the person having carnal knowledge of her knowing her to be so mentally diseased; or the carnal knowledge of a female under the age of fifteen years, other than the wife of the person, with or without her consent, and with or without the use of force, threats, or fraud." Pen. Code, art. 633. "The definition of 'force,' as applicable to assault and battery, applies also to the crime of rape, and it must have been such as might reasonably be supposed sufficient to overcome resistance, taking into consideration the relative strength of the parties, and other circumstances of the case." Pen. Code, art. 634. "The 'threat' must be such as might reasonably create a just fear of death, or great bodily harm, in view of the relative condition of the parties as to health, strength, and all other circumstances of the case." Pen. Code, art. 635. "The 'fraud' must consist in the use of some stratagem by which the woman is induced to believe the offender is her husband, or in administering, without her knowledge or consent, some substance producing unnatural sexual desire, or such stupor as prevents or weakens resistance, and committing the offense while she is under the influence of such substance. It is a presumption of law, which cannot be rebutted by testimony, that no consent was given under the circumstances mentioned in this article." Pen. Code, art. 636. See Railsback *v.* State, 53 Tex. Cr. 542, 110 S. W. 916; Hardin *v.* State, 39 Tex. Cr. 426, 46 S. W. 803; Reagan *v.* State, 28 Tex. App. 227, 12 S. W. 601, 19 Am. St. Rep. 833; Jones *v.* State, 18 Tex. App. 485; Burk *v.* State, 8 Tex. App. 336; Mayo *v.* State, 7 Tex. App. 342; Anschicks *v.* State, 6 Tex. App. 524; White *v.* State, 1 Tex. App. 211; Williams *v.* State, 1 Tex. App. 90, 28 Am. Rep. 399.

9. *Colorado.*— Gibbs *v.* People, 36 Colo. 452, 85 Pac. 425, eighteen years.

Illinois.—Addison *v.* People, 193 Ill. 405, 417, 62 N. E. 235, fourteen years.

Indiana.— Hanes *v.* State, 155 Ind. 112, 57 N. E. 704, fourteen years.

Kansas.— State *v.* Crawford, 39 Kan. 257, 18 Pac. 184, eighteen years.

Kentucky.— White *v.* Com., 96 Ky. 180, 191, 28 S. W. 340, 16 Ky. L. Rep. 421 (twelve years); Payne *v.* Com., 110 S. W. 311, 33 Ky. L. Rep. 229.

Louisiana.— State *v.* Mehojovich, 118 La. 1013, 43 So. 660, twelve years.

Michigan.— People *v.* Chamblin, 149 Mich. 653, 113 N. W. 27, sixteen years.

Missouri.— State *v.* Knock, 142 Mo. 515, 44 S. W. 235 (between fourteen and eighteen years if of previous chaste character); State *v.* Lacey, 111 Mo. 513, 20 S. W. 238 (fourteen years).

Montana.— State *v.* Mahoney, 24 Mont. 281, 61 Pac. 647, sixteen years.

Nebraska.— Baxter *v.* State, 80 Nebr. 840, 115 N. W. 534, fifteen years, or, if the female was not previously unchaste, eighteen years.

Oregon.— State *v.* Knighten, 39 Oreg. 63, 64 Pac. 866, 87 Am. St. Rep. 647 (sixteen years); State *v.* Jarvis, 18 Oreg. 360, 23 Pac. 251 (formerly fourteen years).

Tennessee.— Jamison *v.* State, 117 Tenn. 58, 94 S. W. 675, eighteen years except, in the case of a female between the ages of twelve and eighteen, where she is a bawd, lewd, or kept female.

Texas.— Robertson *v.* State, 51 Tex. Cr. 493, 102 S. W. 1130, fifteen years.

Virginia.— Givens *v.* Com., 29 Gratt. 830, twelve years.

Washington.— State *v.* Adams, 41 Wash. 552, 83 Pac. 1108, eighteen years.

Wisconsin.— State *v.* Mueller, 85 Wis. 203, 55 N. W. 165, twelve years.

Wyoming.— Ross *v.* State, 16 Wyo. 285, 93 Pac. 299, 94 Pac. 217, eighteen years.

And see *infra*, I, A, 2, f, (II).

Under La. Acts (1896), p. 165, No. 115, making the carnal knowledge of an unmarried female between twelve and sixteen years

according to the circumstances under which it was committed.[10] In some jurisdictions it is held that a statute punishing for rape any person who shall have carnal knowledge of any woman forcibly and against her will, or any person who shall carnally know or abuse any female under a certain age with her consent, defines but one crime and not two distinct crimes;[11] but in others the statute is construed as defining two distinct crimes.[12]

2. Nature and Elements of Offense — a. Felony or Misdemeanor. There is some doubt as to whether rape was a felony under the ancient common law, but it was made so by an early English statute,[13] and it is a felony with us either by express statutory provision or because it is punishable by imprisonment in the state prison.[14]

b. Distinguished From Other Offenses. Rape is distinguished from seduction in that it is committed by force and without the consent of the female, or upon a female incapable of consenting, while in seduction the female is induced to consent, and also in that rape may, while seduction cannot, be committed upon a married woman, nor, as a rule, upon a woman of previous unchaste character.[15] In some states rape is also distinguished from incest in that the concurring assent of both parties is a necessary ingredient of incest;[16] but in other states it is held that the consent of the female is not necessary to the crime of incest, and that the same act therefore may be both rape and incest.[17] Rape is distinguished from adultery and fornication in that force and want of consent on the part of the woman is necessary in rape, but not in adultery or fornication; but it is generally held that the fact that the man accomplishes the act by force and without the woman's consent will not prevent his act from being adultery or fornication, although he is also guilty of rape.[18]

old with her consent a felony, the carnal knowledge of a child under twelve years old constitutes rape. State *v.* Mehojovich, 118 La. 1013, 43 So. 660.

10. In Oklahoma, for example, rape committed upon a female under the age of fourteen years, or incapable, through lunacy, or any other unsoundness of mind, of giving legal consent, or accomplished by means of force overcoming her resistance, is rape in the first degree. In all other cases rape is of the second degree. Okla. St. (1893) c. 25, art. 26, §§ 4, 5, as amended by Laws (1895), p. 105. See Sowers *v.* Territory, 6 Okla. 436, 50 Pac. 257. See also State *v.* Hayes, 17 S. D. 128, 95 N. W. 296. And see the New York statute quoted *supra*, note 8.

11. Hubert *v.* State, 74 Nebr. 220, 104 N. W. 276, 106 N. W. 774.

12. Hubert *v.* State, 74 Nebr. 220, 104 N. W. 276, 106 N. W. 774; Edwards *v.* State, 69 Nebr. 386, 95 N. W. 1038; State *v.* Pickett, 11 Nev. 255, 21 Am. Rep. 754.

13. 1 East P. C. 434; 1 Hale P. C. 627; 1 Hawkins P. C. c. 41. *Compare* U. S. *v.* Coppersmith, 4 Fed. 198, 2 Flipp. 546.

14. Territory *v.* Godfrey, 6 Dak. 46, 50 N. W. 481; State *v.* Davidson, 71 Kan. 494, 80 Pac. 945. And see Criminal Law, 12 Cyc. 132. *Compare* Nathan *v.* State, 8 Mo. 631.

15. Hall *v.* State, 134 Ala. 90, 32 So. 750. See also *infra*, I, A, 2, d; and, generally, Seduction.

16. *Georgia.*— Whidby *v.* State, 121 Ga. 588, 49 S. E. 811; Yother *v.* State, 120 Ga. 204, 47 S. E. 555; Taylor *v.* State, 110 Ga. 150, 35 S. E. 161.

Michigan.— People *v.* Burwell, 106 Mich. 27, 63 N. W. 986; De Groat *v.* People, 39 Mich. 124.

Missouri.— State *v.* Eding, 141 Mo. 281, 42 S. W. 935; State *v.* Ellis, 74 Mo. 385, 41 Am. Rep. 321.

Nebraska.— Yeoman *v.* State, 21 Nebr. 171, 31 N. W. 669.

New York.— People *v.* Harriden, 1 Park. Cr. 344.

Ohio.— Noble *v.* State, 22 Ohio St. 541.

Oregon.— State *v.* Jarvis, 20 Oreg. 437, 26 Pac. 302, 23 Am. St. Rep. 141.

And see Incest, 22 Cyc. 47.

17. *Alabama.*— Smith *v.* State, 108 Ala. 1, 19 So. 306, 54 Am. St. Rep. 140.

California.— People *v.* Stratton, 141 Cal. 604, 75 Pac. 166; People *v.* Kaiser, 119 Cal. 456, 51 Pac. 702, female under the age of consent.

Illinois.— Davis *v.* People, 204 Ill. 479, 68 N. E. 540.

Indiana.— Norton *v.* State, 106 Ind. 163, 6 N. E. 126.

Iowa.— State *v.* Rennick, 127 Iowa 294, 103 N. W. 159; State *v.* Hurd, 101 Iowa 391, 70 N. W. 613 [*distinguishing* State *v.* Thomas, 53 Iowa 214, 4 N. W. 908]; State *v.* Chambers, 87 Iowa 1, 53 N. W. 1090, 43 Am. St. Rep. 349.

Texas.— Schoenfeldt *v.* State, 30 Tex. App. 695, 18 S. W. 640; Mercer *v.* State, 17 Tex. App. 452.

Washington.— State *v.* Nugent, 20 Wash. 522, 56 Pac. 25, 72 Am. St. Rep. 133.

And see Incest, 22 Cyc. 48.

18. State *v.* Donovan, 61 Iowa 278, 16 N. W. 130; State *v.* Sanders, 30 Iowa 582;

c. By Whom the Offense May Be Committed.[19] Any male person of sufficient mental capacity to be criminally responsible for his acts[20] may commit the crime of rape if he has sufficient physical capacity to perform the act of sexual intercourse, but not otherwise.[21] Of course the crime cannot be committed by a woman as principal in the first degree;[22] nor can it be committed by a husband on his wife,[23] or by an impotent person.[24] At common law a male under fourteen years of age was conclusively presumed incapable of committing rape, and he could not be convicted as principal in the first degree.[25] The common-law rule has been followed in some of the United States,[26] but in other states the rule has been modified, and want of age is merely *prima facie* evidence of physical incapacity, and may be rebutted, the burden being on the state.[27] Some of the stat-

Com. *v.* Brakeman, 131 Mass. 577, 41 Am. Rep. 248 (woman drugged); Alonzo *v.* State, 15 Tex. App. 378, 49 Am. Rep. 207. *Contra,* Whidby *v.* State, 121 Ga. 588, 49 S. E. 811; Mathews *v.* State, 101 Ga. 547, 29 S. E. 424; De Groat *v.* People, 39 Mich. 124, holding that fornication differs from rape in that both parties must assent. See also ADULTERY, 1 Cyc. 954; FORNICATION, 19 Cyc. 1434.

19. Attempt or assault with intent to rape see *infra,* I, B, 2, b.

20. See CRIMINAL LAW, 12 Cyc. 164; INFANTS, 22 Cyc. 622.

21. Nugent *v.* State, 18 Ala. 521; State *v.* Handy, 4 Harr. (Del.) 566; Blair *v.* Com., 7 Bush (Ky.) 227 (negro); State *v.* Peter, 53 N. C. 19 (slave).

"Man."— Under Pub. St. (1901) c. 278, § 15, providing that, if any man shall unlawfully and carnally know any woman child under the age of sixteen years, he shall be imprisoned, etc., the word "man" includes persons of the male sex who are capable of committing rape, and is not limited to adult males. State *v.* Burt, 75 N. H. 64, 71 Atl. 30.

22. See State *v.* Williamson, 22 Utah 248, 62 Pac. 1022, 83 Am. St. Rep. 780.

23. It is usually stated that a man who has sexual intercourse with his wife without her consent is not guilty of rape, because the intercourse is not unlawful (State *v.* Haines, 51 La. Ann. 731, 25 So. 372, 44 L. R. A. 837; Frazier *v.* State, 48 Tex. Cr. 142, 86 S. W. 754, 122 Am. St. Rep. 738. And see State *v.* Williamson, 22 Utah 248, 62 Pac. 1022, 83 Am. St. Rep. 780); but if he aids another to do so he is guilty, because such intercourse is unlawful (State *v.* Dowell, 106 N. C. 722, 11 S. E. 525, 19 Am. St. Rep. 568, 8 L. R. A. 297; Audley's Case, 3 How. St. Tr. 401; *infra,* I, C). The better theory is that by marriage the wife consents to the intercourse with her husband, which consent she cannot withdraw, but she does not consent to intercourse with another, hence it is a question of consent rather than the unlawfulness of the intercourse. 1 Hale P. C. 629. And see State *v.* Haines, 51 La. Ann. 731, 25 So. 372, 44 L. R. A. 837.

24. Nugent *v.* State, 18 Ala. 521; Jeffers *v.* State, 20 Ohio Cir. Ct. 294.

Want of power of emission, although there may be power of penetration, is impotency in some jurisdictions. Hiltabiddle *v.* State, 35 Ohio St. 52, 35 Am. Rep. 592. But in most jurisdictions penetration without emission is sufficient to constitute the offense. See *infra,* I, A, 2, e, (II), (III).

Drunkenness of defendant is of itself no defense against a charge of rape. See *infra,* I, D. But the fact that he was drunk or that he was in a greatly debilitated condition by reason of a debauch may be considered in determining whether he was physically capable of committing the offense. Nugent *v.* State, 18 Ala. 521; Jeffers *v.* State, 20 Ohio Cir. Ct. 294, 10 Ohio Cir. Dec. 832.

25. Reg. *v.* Williams, [1893] 1 Q. B. 320, 62 L. J. M. C. 69, 5 Reports 186, 41 Wkly. Rep. 332; Reg. *v.* Waite, [1892] 2 Q. B. 600, 17 Cox C. C. 554, 61 L. J. M. C. 187, 67 L. T. Rep. N. S. 300, 41 Wkly. Rep. 80; Reg. *v.* Brimilow, 9 C. & P. 366, 2 Moody C. C. 122, 38 E. C. L. 219; Reg. *v.* Jordan, 9 C. & P. 118, 38 E. C. L. 80; Reg. *v.* Philips, 8 C. & P. 736, 34 E. C. L. 991; Rex *v.* Groombridge, 7 C. & P. 582, 32 E. C. L. 770; Rex *v.* Eldershaw, 3 C. & P. 396, 14 E. C. L. 628; 4 Blackstone Comm. 212; 1 Hale P. C. 630.

26. *Delaware.*— State *v.* Handy, 4 Harr. 566.

Florida.— Chism *v.* State, 42 Fla. 232, 28 So. 399; McKinny *v.* State, 29 Fla. 565, 10 So. 732, 30 Am. St. Rep. 140; Williams *v.* State, 20 Fla. 777.

Massachusetts.— See Com. *v.* Green, 2 Pick. 380.

North Carolina.— State *v.* Sam, 60 N. C. 293, where the jury found by special verdict that defendant was under the age of fourteen, but that there had been emission, and it was held that the presumption of physical incapacity was irrebuttable. And see State *v.* McNair, 93 N. C. 628.

Oregon.— State *v.* Knighten, 39 Oreg. 63, 64 Pac. 866, 87 Am. St. Rep. 647.

Pennsylvania.— See Com. *v.* Hummel, 21 Pa. Co. Ct. 445.

Virginia.— Foster *v.* Com., 96 Va. 306, 31 S. E. 503, 70 Am. St. Rep. 846, 42 L. R. A. 589.

See 42 Cent. Dig. tit. "Rape," §§ 3, 16, 46, 47.

27. *Georgia.*— Gordon *v.* State, 93 Ga. 531, 21 S. E. 54, 44 Am. St. Rep. 189. And see Bird *v.* State, 110 Ga. 315, 35 S. E. 156.

Kentucky.— Heilman *v.* Com., 84 Ky. 457, 1 S. W. 731, 8 Ky. L. Rep. 451, 4 Am. St.

utes punishing carnal knowledge of females under a certain age whether they consent or not apply in terms only to males over a certain age.[28] A woman, a husband, an impotent person, or a boy under fourteen years of age may, as we shall see, be guilty as principal in the second degree or accessary before the fact.[29]

d. Upon Whom the Offense May Be Committed.[30] Rape may be committed on a female under the age of puberty, or on one so young as to be incapable of giving her consent.[31] And it may be committed on a woman who is insane or idiotic, drugged, intoxicated, or asleep.[32] If a man by force and without her consent has carnal knowledge of a woman who is unchaste he is guilty of rape. Want of chastity may be shown as bearing on the question of consent,[33] but is neither a defense nor mitigation.[34] If a woman is under the age of consent, want of chastity is no defense, unless so provided by statute;[35] but some stat-

Rep. 207. And see Davidson *v.* Com., 47 S. W. 213, 20 Ky. L. Rep. 540.

Louisiana.— State *v.* Jones, 39 La. Ann. 935, 3 So. 57.

New York.— People *v.* Randolph, 2 Park. Cr. 174.

North Dakota.— State *v.* Fisk, 15 N. D. 589, 108 N. W. 485.

Ohio.— Hiltabiddle *v.* State, 35 Ohio St. 52, 35 Am. Rep. 592; Williams *v.* State, 14 Ohio 222, 45 Am. Dec. 536.

South Carolina.—State *v.* Coleman, 54 S. C. 162, 31 S. E. 866.

Tennessee.— Wagoner *v.* State, 5 Lea 352, 40 Am. Rep. 36.

See 42 Cent. Dig. tit. "Rape," §§ 3, 16, 46, 47.

In New York, by statute, "no conviction for rape can be had against one who was under the age of fourteen years, at the time of the act alleged, unless his physical ability to accomplish penetration is proved as an independent fact, beyond a reasonable doubt." Pen. Code, § 279.

A boy over fourteen years of age is presumed capable of committing rape. State *v.* Handy, 4 Harr. (Del.) 566; Payne *v.* Com., 110 S. W. 311, 33 Ky. L. Rep. 229; Com. *v.* Hummel, 21 Pa. Co. Ct. 445.

28. *California.*— People *v.* Ah Yek, 29 Cal. 575, fourteen years or over.

Illinois.— Schramm *v.* People, 220 Ill. 16, 77 N. E. 117 (sixteen or upward); Wistrand *v.* People, 213 Ill. 72, 72 N. E. 748; Johnson *v.* People, 202 Ill. 53, 66 N. E. 877.

Missouri.— State *v.* Hall, 164 Mo. 528, 65 S. W. 248, over sixteen years.

Oregon.— State *v.* Knighten, 39 Oreg. 63, 64 Pac. 866 (over sixteen years); State *v.* Huffman, 39 Oreg. 48, 63 Pac. 1.

Pennsylvania.— Com. *v.* Walker, 33 Pa. Super. Ct. 167 (sixteen years or over); Com. *v.* Goodhead, 23 Pa. Co. Ct. 651; Com. *v.* Hummel, 21 Pa. Co. Ct. 445.

Vermont.— State *v.* Sullivan, 68 Vt. 540, 35 Atl. 479, over sixteen.

29. See infra, I, C.

30. On wife by husband see *supra*, I, A, 2, c.

31. Dawson *v.* State, 29 Ark. 116; Stephen *v.* State, 11 Ga. 225; Com. *v.* Roosnell, 143 Mass. 32, 8 N. E. 747; 1 Hale P. C. 630.

Female under age of consent see *supra*, I, A, 1, a, b; *infra*, I, A, 2, f, (II).

Marriage.— In a prosecution for rape upon a child, it is immaterial whether she had been married; it being sufficient that she was under the age of consent, and not accused's wife. People *v.* Sheffield, (Cal. App. 1908) 98 Pac. 67.

32. State *v.* Crow, 1 Ohio Dec. (Reprint) 586, 10 West. L. J. 501. And see *infra*, I, A, 2, f, (III).

33. See *infra*, II, B, 2, s, (I).

34. *Arkansas.*— Pleasant *v.* State, 15 Ark. 624, 13 Ark. 360. And see Renfroe *v.* State, 84 Ark. 16, 104 S. W. 542.

California.— People *v.* Hartman, 103 Cal. 242, 37 Pac. 153, 42 Am. St. Rep. 108.

Connecticut.— State *v.* Shields, 45 Conn. 256.

Illinois.— Johnson *v.* People, 197 Ill. 48, 64 N. E. 286.

Indiana.— Carney *v.* State, 118 Ind. 525, 21 N. E. 48; Anderson *v.* State, 104 Ind. 467, 4 N. E. 63, 5 N. E. 711; Richie *v.* State, 58 Ind. 355.

Iowa.— State *v.* Fernald, 88 Iowa 553, 55 N. W. 534.

Kentucky.— Neace *v.* Com., 62 S. W. 733, 23 Ky. L. Rep. 125.

Michigan.— People *v.* Crego, 70 Mich. 319, 38 N. W. 281.

New York.— Higgins *v.* People, 1 Hun 307 [*affirmed* in 58 N. Y. 377].

North Carolina.— State *v.* Jefferson, 28 N. C. 305. And see State *v.* Long, 93 N. C. 542, holding that one might be guilty of rape on a woman who offered to permit the intercourse for ten cents.

Tennessee.— Wright *v.* State, 4 Humphr. 194.

Texas.— Pefferling *v.* State, 40 Tex. 486; Jenkins *v.* State, 1 Tex. App. 346.

Utah.— State *v.* McCune, 16 Utah 170, 51 Pac. 818.

Virginia.— Fry *v.* Com., 82 Va. 334.

See 42 Cent. Dig. tit. "Rape," §§ 4, 20.

35. *Arkansas.*— Renfroe *v.* State, 84 Ark. 16, 104 S. W. 542.

California.— People *v.* Johnson, 106 Cal. 289, 39 Pac. 622.

Florida.— Holton *v.* State, 28 Fla. 303, 9 So. 716.

Iowa.— State *v.* Blackburn, 136 Iowa 743, 114 N. W. 531.

Kentucky.— Pugh *v.* Com., 7 S. W. 541, 8 S. W. 340, 10 Ky. L. Rep. 64.

utes in punishing carnal knowledge of a female under a certain age, whether with or without her consent, expressly require that she shall have been previously chaste or of good repute.[36]

e. The Carnal Knowledge — (1) *In General.* It is of course essential to the crime of rape that the man shall have actual carnal knowledge of the woman, and this must be shown either by direct or circumstantial evidence.[37] Carnal knowledge is also necessary, as a rule, under the statutes punishing carnal abuse of female children.[38] In such statutes carnal "abuse" means abuse of the sexual organs by intercourse or the attempt to have the same.[39]

Michigan.— People *v.* Abbott, 97 Mich. 484, 56 N. W. 862, 37 Am. St. Rep. 360; People *v.* Glover, 71 Mich. 303, 38 N. W. 874.

Missouri.— State *v.* Duffey, 128 Mo. 549, 31 S. W. 98.

Nebraska.— Harris *v.* State, 80 Nebr. 195, 114 N. W. 168.

Pennsylvania.— Com. *v.* Goodhead, 23 Pa. Co. Ct. 651.

South Dakota.— State *v.* Smith, 18 S. D. 341, 100 N. W. 740.

Utah.— State *v.* Williamson, 22 Utah 248, 62 Pac. 1022, 83 Am. St. Rep. 780; State *v.* Hilberg, 22 Utah 27, 61 Pac. 215.

36. *Michigan.*— People *v.* Mills, 94 Mich. 630, 54 N. W. 488.

Missouri.— State *v.* Knock, 142 Mo. 515, 44 S. W. 235.

Nebraska.— Burk *v.* State, 79 Nebr. 241, 112 N. W. 573; George *v.* State, 61 Nebr. 669, 85 N. W. 840; Bailey *v.* State, 57 Nebr. 706, 78 N. W. 284, 73 Am. St. Rep. 540.

Oklahoma.— Young *v.* Territory, 8 Okla. 525, 58 Pac. 724.

Pennsylvania.— Com. *v.* Allen, 135 Pa. St. 483, 19 Atl. 957.

Tennessee.— Jamison *v.* State, 117 Tenn. 58, 94 S. W. 675.

In Nebraska previous unchastity is a defense where the girl was over fifteen and under eighteen, but is immaterial where she was under fifteen. Harris *v.* State, 80 Nebr. 195, 114 N. W. 168; Burk *v.* State, 79 Nebr. 241, 112 N. W. 573; Hubert *v.* State, 74 Nebr. 220, 104 N. W. 276, 106 N. W. 774; George *v.* State, 61 Nebr. 669, 85 N. W. 840.

What constitutes previous chastity.—A girl of fifteen who has led a virtuous life for six or seven years is, notwithstanding possible unchastity before that time, within a statute (Mich. Laws (1887), No. 143), punishing any one who shall carnally know a girl of that age "theretofore chaste." People *v.* Mills, 94 Mich. 630, 54 N. W. 488. Previous unchastity is no bar to a conviction if the female had reformed and was chaste at the time of the act. Jamison *v.* State, 117 Tenn. 58, 94 S. W. 675.

A woman not "previously unchaste," within the meaning of Nebr. Cr. Code, c. 4, § 12, is one who has never had unlawful intercourse with a male prior to the intercourse with which the prisoner stands indicted. The object of the statute is to protect virtuous maidens, to protect those girls who are undefiled virgins; and a female under eighteen years of age and over fifteen years of age who has been guilty of unlawful sexual intercourse with a male is not within the act. Bailey *v.* State, 57 Nebr. 706, 78 N. W. 284, 73 Am. St. Rep. 540.

The phrase "good repute" in the proviso of Pa. Act, May 19, 1887 (Pamphl. Laws 128), which reduces the crime of carnal knowledge of a woman child under the age of sixteen who is not of good repute from rape to fornication, means the general reputation of the girl for chastity in the community in which she lives. Com. *v.* Howe, 35 Pa. Super. Ct. 554. *Compare* Com. *v.* Allen, 135 Pa. St. 483, 19 Atl. 957; Com. *v.* Davis, 3 Pa. Dist. 271; Com. *v.* Goodhead, 23 Pa. Co. Ct. 651.

In Tenn. Acts (1901), p. 29, c. 19, which, after prohibiting carnal knowledge of a female over twelve and under eighteen years of age, declares that nothing contained in the act shall authorize a conviction when the female is at the time or before the carnal knowledge a bawd, lewd, or kept female, the offense is predicated on the "character" rather than the "reputation" of the female for chastity, and "lewdness," as used therein, includes private as well as notorious unchastity. Jamison *v.* State, 117 Tenn. 58, 94 S. W. 675.

Unchaste conduct after the girl was debauched by defendant is immaterial. State *v.* Knock, 142 Mo. 515, 44 S. W. 235.

37. Wesley *v.* State, 65 Ga. 731; White *v.* Com., 96 Ky. 180, 28 S. W. 340, 16 Ky. L. Rep. 421; State *v.* Welch, (Oreg. 1902) 68 Pac. 808. And see Shirwin *v.* People, 69 Ill. 55.

Sufficiency of evidence see *infra*, II, B, 3, b.

38. Williams *v.* State, 53 Fla. 84, 43 So. 431; White *v.* Com., 96 Ky. 180, 28 S. W. 340, 16 Ky. L. Rep. 421.

39. Sims *v.* State, 146 Ala. 109, 41 So. 413; Castleberry *v.* State, 135 Ala. 24, 33 So. 431; Dawkins *v.* State, 58 Ala. 376, 29 Am. Rep. 754; Chambers *v.* State, 46 Nebr. 447, 64 N. W. 1078. Under Nebr. Cr. Code, § 12, punishing as rape any male person of the age of eighteen years or upward who shall "carnally know or abuse" any female child under the age of fifteen years with her consent, it was held that it was error to charge that such abuse did not necessarily mean abuse by sexual intercourse attempted or accomplished, as the word "abuse" was used as synonymous with ravish. Chambers *v.* State, *supra*. And see Palin *v.* State, 38 Nebr. 862, 57 N. W. 743. In Alabama, under a statute punishing any person who "has carnal knowledge of any female under the

(II) *PENETRATION.*[40] There can be no carnal knowledge without penetration.[41] Mere actual contact of the sexual organs is not sufficient,[42] and if the female is not sufficiently developed to admit of the slightest penetration there can be no carnal knowledge.[43] The slightest penetration, however, of the body of the female by the sexual organ of the male is sufficient; it is not necessary that the penetration should be perfect;[44] nor that there should be an entering of the vagina or rupturing of the hymen; the entering of the vulva or labia is sufficient.[45]

(III) *EMISSION.* In 1781 it was held in England that the offense of rape was not complete without emission.[46] This decision was followed for some years by the English courts,[47] and by the courts of some of the United States.[48] Prior

age of ten years, or abuses such female in the attempt to have carnal knowledge of her," it was held that the term "abuse" must be limited in its meaning to injuries to the genital organs in the attempt at carnal knowledge falling short of actual penetration. Dawkins *v.* State, *supra.* Defendant may be convicted of carnal abuse without penetration, as it differs from carnal knowledge in that particular. State *v.* Hummer, 72 N. J. L. 328, 65 Atl. 249 [*affirmed* in 73 N. J. L. 714, 67 Atl. 294].

"Carnal knowledge" includes what is meant by "carnal abuse," if not synonymous therewith, as used in Conn. Gen. St. (1902) § 1148, directed against a person who shall carnally know and abuse a female under sixteen, and to "abuse," within the meaning of that section, is not to injure the genital organs of the female, and to an extent not naturally resulting from an act of normal intercourse with a fully developed female. State *v.* Sebastian, 81 Conn. 1, 69 Atl. 1054. See also State *v.* Ferris, 81 Conn. 97, 70 Atl. 587.

40. Sufficiency of evidence see *infra,* II, B, 3, h.

41. *Alabama.*— Waller *v.* State, 40 Ala. 325.

California.— People *v.* Howard, 143 Cal. 316, 75 Pac. 1116.

Connecticut.— State *v.* Shields, 45 Conn. 256.

Delaware.— State *v.* Burton, 1 Houst. Cr. Cas. 363.

Florida.— Williams *v.* State, 53 Fla. 84, 43 So. 431.

Georgia.— Wesley *v.* State, 65 Ga. 731.

Kansas.— State *v.* Grubbs, 55 Kan. 678, 41 Pac. 951.

Kentucky.— White *v.* Com., 96 Ky. 180, 28 S. W. 340, 16 Ky. L. Rep. 421.

Ohio.— Williams *v.* State, 14 Ohio 222, 45 Am. Dec. 536.

Texas.— Davis *v.* State, 43 Tex. 189; Davis *v.* State, 42 Tex. 226; Rodgers *v.* State, 30 Tex. App. 510, 17 S. W. 1077; Word *v.* State, 12 Tex. App. 174.

Wisconsin.— Hardkte *v.* State, 67 Wis. 552, 30 N. W. 723.

England.— Reg. *v.* Jordan, 9 C. & P. 118, 38 E. C. L. 80; Reg. *v.* Allen, 9 C. & P. 31, 38 E. C. L. 30; 1 Hale P. C. 628.

Canada.— Reg. *v.* Bedere, 21 Ont. 189.

See 42 Cent. Dig. tit. "Rape," § 7.

42. State *v.* Grubb, 55 Kan. 678, 41 Pac. 951.

43. White *v.* Com., 96 Ky. 180, 28 S. W. 340, 16 Ky. L. Rep. 421. And see Williams *v.* State, 53 Fla. 84, 43 So. 431.

Carnal "abuse" of child see *supra,* I, A, 2, e, (I) note 39.

44. *Alabama.*— Waller *v.* State, 40 Ala. 325.

Connecticut.— State *v.* Shields, 45 Conn. 256.

Delaware.— State *v.* Burton, Houst. Cr. Cas. 363.

Indiana.— Taylor *v.* State, 111 Ind. 279, 12 N. E. 400.

Iowa.— State *v.* Tarr, 28 Iowa 397.

Kansas.— State *v.* Grubb, 55 Kan. 678, 41 Pac. 951; State *v.* Frazier, 54 Kan. 719, 39 Pac. 819.

Michigan.—People *v.* Rivers, 147 Mich. 643, 111 N. W. 201; People *v.* Courier, 79 Mich. 366, 44 N. W. 571.

New York.— People *v.* Crowley, 102 N. Y. 234, 6 N. E. 384.

North Carolina.— State *v.* Hargrave, 65 N. C. 466.

South Carolina.— State *v.* Le Blanc, 3 Brev. 339, 1 Treadw. 354.

Texas.— Kenny *v.* State, (Cr. App. 1903) 79 S. W. 817, 65 L. R. A. 316; Rodgers *v.* State, 30 Tex. App. 510, 17 S. W. 1077.

Wisconsin.—Murphy *v.* State, 108 Wis. 111, 83 N. W. 1112; Hardtke *v.* State, 67 Wis 552, 30 N. W. 725; Brauer *v.* State, 25 Wis. 413.

England.— Reg. *v.* Hughes, 9 C. & P. 752, 2 Moody C. C. 190, 38 E. C. L. 435; Reg. *v.* Jordan, 9 C. & P. 118, 38 E. C. L. 80; Reg. *v.* McRue, 8 C. & P. 641, 34 E. C. L. 937; Reg. *v.* Lines, 1 C. & K. 393, 47 E. C. L. 393; Rex *v.* Russen, 1 East P. C. 438.

Canada.— Reg. *v.* Bedere, 21 Ont. 189.

See 42 Cent. Dig. tit. "Rape," § 7.

Cal. Pen. Code, § 263, making sexual penetration, however slight, sufficient to complete rape, is applicable to all the subdivisions of section 261, defining the offense. People *v.* Sheffield (Cal. App. 1908) 98 Pac. 67.

45. Morris *v.* State, 54 Ga. 440. And see State *v.* Hargrave, 65 N. C. 466.

46. Hill's Case, 1 East P. C. 439.

47. Rex *v.* Cozins, 6 C. & P. 351, 25 E. C. L. 469; Rex *v.* Cox, 5 C. & P. 297, 24 E. C. L. 574; Rex *v.* Jennings, 4 C. & P. 249, 1 Lew. C. C. 93, 19 E. C. L. 499; Cave's Case, 1 East P. C. 438; Rex *v.* Reekspear, 1 Moody C. C. 342; Brook's Case, 2 Lew. C. C. 267; Rex *v.* Burrows, R. & R. 386; Hawkins P. C. c. 16, s. 3.

48. State *v.* Hargrove, 65 N. C. 466; State

to this decision it was held in England not to be necessary to prove emission.[49] It is not now necessary in any jurisdiction to prove emission at all,[50] and it is so provided by statute in England [51] and many of the United States.[52]

f. Want of Consent; Force, Threats, and Fraud — (i) *CONSENT IN GENERAL.* To constitute rape the act must be done without the consent of the female, or, as it is otherwise expressed, forcibly and against her will.[53] If a woman is capable in the eye of the law of consenting to sexual intercourse,[54] carnal knowledge of her with her consent is not rape,[55] provided her consent is not extorted by threats and fear of immediate bodily harm,[56] or, in some jurisdictions and under some circumstances, obtained by fraud.[57] Mere copulation coupled with passive

v. Gray, 53 N. C. 170; Noble *v.* State, 22 Ohio St. 541; Blackburn *v.* State, 22 Ohio St. 102; Williams *v.* State, 14 Ohio 222, 45 Am. Dec. 536.

49. Rex *v.* Russen, 1 East P. C. 438; 1 Hale P. C. 628.

50. *Alabama.*— Waller *v.* State, 40 Ala. 325.

Connecticut.— State *v.* Shields, 45 Conn. 256.

Florida.— Williams *v.* State, 53 Fla. 84, 43 So. 431; Barker *v.* State, 40 Fla. 178, 24 So. 69.

Louisiana.— State *v.* Turner, 25 La. Ann. 573.

Nebraska.— Comstock *v.* State, 14 Nebr. 205, 15 N. W. 355.

New York.— People *v.* Crowley, 102 N. Y. 234, 6 N. E. 384.

North Carolina.— State *v.* Monds, 130 N. C. 697, 41 S. E. 789; State *v.* Storkey, 63 N. C. 7.

Ohio.— Blackburn *v.* State, 22 Ohio St. 102.

Pennsylvania.— Com. *v.* Sullivan, Add. 143; Com. *v.* Childs, 2 Pittsb. 391.

Virginia.— Com. *v.* Thomas, 1 Va. Cas. 307.

Wisconsin.— Osgood *v.* State, 64 Wis. 472, 25 N. W. 529.

England.— Reg. *v.* Marsden, [1891] 2 Q. B. 149, 17 Cox C. C. 297, 60 L. J. M. C. 171, 39 Wkly. Rep. 703; Reg. *v.* Allen, 9 C. & P. 31, 38 E. C. L. 30; Rex *v.* Jennings, 4 C. & P. 249, 1 Lew. C. C. 93, 19 E. C. L. 499; Rex *v.* Russen, 1 East P. C. 438; Rex *v.* Reekspear, 1 Moody C. C. 342; 1 Hale P. C. 628.

Canada.— Reg. *v.* Bedere, 21 Ont. 189.

See 42 Cent. Dig. tit. "Rape," § 7.

51. St. 9 Geo. IV, c. 31.

52. See the statutes of the several states.

53. See *supra*, I, A, 1.

54. Female under age of consent see *infra*, I, A, 2, f, (II).

Female insane, imbecile, drugged, intoxicated, or asleep see *infra*, I, A, 2, f, (III).

55. *Alabama.*— Allen *v.* State, 87 Ala. 107, 6 So. 370; McQuirk *v.* State, 84 Ala. 435, 4 So. 775, 5 Am. St. Rep. 381; Lewis *v.* State, 30 Ala. 56; State *v.* Murphy, 6 Ala. 765, 41 Am. Dec. 79.

Arkansas.— Bradley *v.* State, 32 Ark. 704; Pleasant *v.* State, 13 Ark. 360; Charles *v.* State, 11 Ark. 389.

California.— People *v.* Royal, 53 Cal. 62; People *v.* Brown, 47 Cal. 447.

Connecticut.— State *v.* Shields, 45 Conn. 256.

Florida.— Hollis *v.* State, 27 Fla. 387, 9 So. 67.

Georgia.— Mathews *v.* State, 101 Ga. 547, 29 S. E. 424; Taylor *v.* State, 50 Ga. 79.

Illinois.— Bean *v.* People, 124 Ill. 576, 16 N. E. 656.

Indiana.— Rahke *v.* People, 168 Ind. 615, 81 N. E. 584; Huber *v.* State, 126 Ind. 185, 25 N. E. 904; Anderson *v.* State, 104 Ind. 467, 4 N. E. 63, 5 N. E. 711; Eyler *v.* State, 71 Ind. 49; Mills *v.* State, 52 Ind. 187; Whitney *v.* State, 35 Ind. 503.

Iowa.— State *v.* Whimpey, (1908) 118 N. W. 281; State *v.* Cassidy, 85 Iowa 145, 52 N. W. 1; State *v.* McCaffrey, 63 Iowa 479, 19 N. W. 331; Pollard *v.* State, 2 Iowa 567.

Massachusetts.— Com. *v.* McDonald, 110 Mass. 405; Com. *v.* Burke, 105 Mass. 376, 7 Am. Rep. 531.

Michigan.— Don Moran *v.* People, 25 Mich. 356, 12 Am. Rep. 283; Strang *v.* People, 24 Mich. 1.

Missouri.— State *v.* Patrick, 107 Mo. 147, 17 S. W. 666; State *v.* Cunningham, 100 Mo. 382, 12 S. W. 376; State *v.* Burgdorf, 53 Mo. 65; State *v.* Perkins, 11 Mo. App. 82.

Nebraska.— Richards *v.* State, 36 Nebr. 17, 53 N. W. 1027; Reynolds *v.* State, 27 Nebr. 90, 42 N. W. 903, 20 Am. St. Rep. 659; Mathews *v.* State, 19 Nebr. 330, 27 N. W. 234; Oleson *v.* State, 11 Nebr. 276, 9 N. W. 38, 38 Am. Rep. 366.

New York.— People *v.* Dohring, 59 N. Y. 374, 17 Am. Rep. 349; Walter *v.* People, 50 Barb. 144; People *v.* Morrison, 1 Park. Cr. 625; Woodin *v.* People, 1 Park. Cr. 464.

South Carolina.— State *v.* Sudduth, 52 S. C. 488, 30 S. E. 408.

Texas.— Hooker *v.* State, 29 Tex. App. 327, 15 S. W. 285.

Virginia.— Brown *v.* Com., 82 Va. 653.

Wisconsin.— O'Boyle *v.* State, 100 Wis. 296, 75 N. W. 989; Whittaker *v.* State, 50 Wis. 518, 7 N. W. 431, 36 Am. Rep. 856; Conners *v.* State, 47 Wis. 523, 2 N. W. 1143.

England.— Reg. *v.* Barrow, L. R. 1 C. C. 156, 11 Cox C. C. 191, 38 L. J. M. C. 20, 17 L. T. Rep. N. S. 293, 17 Wkly. Rep. 102; Reg. *v.* Hallett, 9 C. & P. 748, 38 E. C. L. 433.

See 42 Cent. Dig. tit. "Rape," §§ 8 *et seq.*, 74.

56. Threats and fear see *infra*, I, A, 2, f, (V).

57. Fraud see *infra*, I, A, 2, f, (VI).

acquiescence is not rape.[58] Consent of the woman, however reluctantly given, or if accompanied with mere verbal protests and refusals, at any time during the intercourse prevents the act from being rape.[59] If a man lays hold of a woman against her will and she afterward consents to intercourse before the act is committed, it is not rape, but merely assault with intent to commit rape.[60] If consent is given by the woman but withdrawn before penetration, and the act is accomplished by force, it is rape.[61] If a woman offers to allow a man to have intercourse with her upon certain conditions precedent, and he refuses to comply with the conditions, but accomplishes the act without her consent, he is guilty of rape.[62] Consent or condonation after the act is no defense.[63]

(II) *Female Under Age of Consent.* It was held in some of the early cases that under the common law it was not rape to have sexual intercourse with a female child, however young, if she consented;[64] but Sir Matthew Hale was of the opinion that sexual intercourse with a girl under twelve years of age was rape, that being the age of female discretion at common law.[65] When the punishment for rape was mitigated by statute in England females under twelve years of age were considered incapable of consent;[66] but the punishment was again increased by the statute of Elizabeth and made to apply to all sexual intercourse with girls under ten years of age, whether with or without their consent;[67] and this statute has been regarded as a part of our common law.[68] Most states, however, have enacted statutes on the subject, some of them fixing the age of consent at ten years, some at twelve, and others at fourteen, fifteen, sixteen, and even as high as eighteen years.[69] Some of the statutes apply to females between certain ages, as, for example, between twelve, fourteen, fifteen, or sixteen and eighteen, only where the female was of previous chaste character or repute.[70] Intercourse with a female under the age of consent at common law, or as thus fixed by the statute of the state in which the offense occurs, is rape, whether she consents or not, as she is in law incapable of consent.[71] It makes no difference

58. Mathews *v.* State, 101 Ga. 547, 29 S. E. 424; State *v.* Burgdorf, 53 Mo. 65; Richards *v.* State, 36 Nebr. 17, 53 N. W. 1027; Perez *v.* State, 50 Tex. Cr. 34, 94 S. W. 1036; Jenkins *v.* State, 1 Tex. App. 346.

59. *Arizona.*— Territory *v.* Potter, 1 Ariz. 421, 25 Pac. 529.

Georgia.— Taylor *v.* State, 110 Ga. 150, 35 S. E. 161; Mathews *v.* State, 101 Ga. 547, 29 S. E. 424; Jones *v.* State, 90 Ga. 616, 16 S. E. 380.

Indiana.— Huber *v.* State, 126 Ind. 185, 25 N. E. 904.

Massachusetts.— Com. *v.* McDonald, 110 Mass. 405.

Missouri.— State *v.* Burgdorf, 53 Mo. 65.

Nebraska.— Richards *v.* State, 36 Nebr. 17, 53 N. W. 1027.

New York.— People *v.* Hulse, 3 Hill 309.

Texas.— Jenkins *v.* State, 1 Tex. App. 346.

Wisconsin.— Brown *v.* State, 127 Wis. 193, 106 N. W. 536.

60. *Georgia.*— Tiller *v.* State, 101 Ga. 782, 29 S. E. 424.

Iowa.— State *v.* Atherton, 50 Iowa 189, 32 Am. Rep. 134; State *v.* Cross, 12 Iowa 66, 79 Am. Dec. 519.

Michigan.— People *v.* Marrs, 125 Mich. 376, 84 N. W. 284.

Missouri.— State *v.* Cunningham, 100 Mo. 382, 12 S. W. 376.

Vermont.— State *v.* Hartigan, 32 Vt. 607.

England.— Reg. *v.* Hallett, 9 C. & P. 748, 38 E. C. L. 433.

And see *infra*, I, B, 2, f, (IV).

61. State *v.* McCaffrey, 63 Iowa 479, 19 N. W. 331; Wright *v.* State, 4 Humphr. (Tenn.) 194.

62. State *v.* Long, 93 N. C. 542.

63. See *infra*, I, D.

64. Reg. *v.* Read, 2 C. & K. 957, 3 Cox C. C. 266, 1 Den. C. C. 377, 13 Jur. 68, 18 L. J. M. C. 88, 3 New Sess. Cas. 405, T. & M. 52, 61 E. C. L. 957; Reg. *v.* Martin, 9 C. & P. 213, 2 Moody C. C. 123, 38 E. C. L. 133; Reg. *v.* Meredith, 8 C. & P. 589, 34 E. C. L. 907; Reg. *v.* Webb, 2 C. & P. 933, 61 E. C. L. 933.

65. 1 Hale P. C. 631. And see State *v.* Pierson, 44 Ark. 265; State *v.* Tilman, 30 La. Ann. 1249, 31 Am. Rep. 236.

66. St. 3 Edw. I, Westminster I, c, 13.

67. 18 Eliz. c. 7, § 4.

68. See *supra*, I, A, 1, a.

69. See *supra*, I, A, 1, b.

70. See *supra*, I, A, 2, b, note 15; d, text and note 36.

71. *Alabama.*— Oakley *v.* State, 135 Ala. 29, 33 So. 693.

Arkansas.— Henson *v.* State, 76 Ark. 267, 88 S. W. 965; Carothers *v.* State, 75 Ark. 574, 88 S. W. 585; Coates *v.* State, 50 Ark. 330, 7 S. W. 304; Dawson *v.* State, 29 Ark. 116; Charles *v.* State, 11 Ark. 389.

California.— People *v.* Harlan, 133 Cal. 16, 65 Pac. 9.

Colorado.— Gibbs *v.* People, 36 Colo. 452, 85 Pac. 425.

whether the female has passed the age of puberty or not; if she is under the age limit fixed by statute, consent is immaterial and all sexual intercourse is rape.[72] Carnal knowledge of a woman under the age of consent is rape, even though she

Connecticut.— State *v.* Gaul, 50 Conn. 578; State *v.* Worden, 46 Conn. 349, 33 Am. Rep. 27.

Dakota.— Territory *v.* Keyes, 5 Dak. 244, 38 N. W. 440.

Delaware.— State *v.* Cunningham, 5 Pennew. 294, 63 Atl. 30; State *v.* Barrett, 5 Pennew. 147, 59 Atl. 45; State *v.* Smith, 9 Houst. 588, 33 Atl. 441.

Florida.— Schang *v.* State, 43 Fla. 561, 31 So. 346.

Georgia.— Stephen *v.* State, 11 Ga. 225.

Illinois.—Addison *v.* People, 193 Ill. 405, 62 N. E. 235.

Indiana.— Hanes *v.* State, 155 Ind. 112, 57 N. E. 704.

Iowa.— State *v.* Blackburn, (1907) 110 N. W. 275; State *v.* Bebb, 125 Iowa 494, 96 N. W. 714; State *v.* Cross, 12 Iowa 66, 79 Am. Dec. 519.

Kansas.— State *v.* Daugherty, 63 Kan. 473, 65 Pac. 695; State *v.* Frazier, 54 Kan. 719, 39 Pac. 819; State *v.* Woods, 49 Kan. 237; 30 Pac. 520; State *v.* Eberline, 47 Kan. 155, 27 Pac. 839; State *v.* Crawford, 39 Kan. 257, 18 Pac. 184.

Kentucky.— White *v.* Com., 96 Ky. 180, 28 S. W. 340, 16 Ky. L. Rep. 421; Payne *v.* Com., 110 S. W. 311, 33 Ky. L. Rep. 229.

Louisiana.— State *v.* Mehojovitch, 118 La. 1013, 43 So. 660; State *v.* Miller, 42 La. Ann. 1186, 8 So. 309, 21 Am. St. Rep. 418; State *v.* Tilman, 30 La. Ann. 1249, 31 Am. Rep. 236.

Massachusetts.—Com. *v.* Murphy, 165 Mass. 66, 42 N. E. 504, 30 L. R. A. 734, 52 Am. St. Rep. 496; Com. *v.* Roosnell, 143 Mass. 32, 8 N. E. 747.

Michigan.— People *v.* Chamblin, 149 Mich. 653, 113 N. W. 27; People *v.* Smith, 122 Mich. 284, 81 N. W. 107; People *v.* Schoonmaker, 117 Mich. 190, 75 N. W. 439, 72 Am. St. Rep. 560; People *v.* Goulette, 82 Mich. 36, 45 N. W. 1124; People *v.* Courier, 79 Mich. 366, 44 N. W. 571; People *v.* Crosswell, 13 Mich. 427, 87 Am. Dec. 774; People *v.* McDonald, 9 Mich. 150.

Minnesota.— State *v.* Rollins, 80 Minn. 216, 83 N. W. 141.

Mississippi.— Williams *v.* State, 47 Miss. 609.

Missouri.— State *v.* Day, 188 Mo. 359, 87 S. W. 465; State *v.* Allen, 174 Mo. 689, 74 S. W. 839; State *v.* Ernest, 150 Mo. 347, 51 S. W. 688; State *v.* Knock, 142 Mo. 515, 44 S. W. 235; State *v.* Lacey, 111 Mo. 513, 20 S. W. 238; State *v.* Houx, 109 Mo. 654, 19 S. W. 35, 32 Am. St. Rep. 686. And see State *v.* George, 214 Mo. 262, 113 S. W. 1116.

Montana.— State *v.* Mahoney, 24 Mont. 281, 61 Pac. 647; State *v.* Bowser, 21 Mont. 133, 53 Pac. 179.

Nebraska.— Baxter *v.* State, 80 Nebr. 840, 115 N. W. 534; Liebscher *v.* State, 69 Nebr. 395, 95 N. W. 870; Myers *v.* State, 54 Nebr. 297, 74 N. W. 605; Hall *v.* State, 40 Nebr. 320, 58 N. W. 929; State *v.* Wright, 25 Nebr. 38, 40 N. W. 596. And see Hubert *v.* State, 74 Nebr. 220, 104 N. W. 276, 106 N. W. 774.

New Jersey.— Farrell *v.* State, 54 N. J. L. 416, 24 Atl. 723.

North Carolina.— State *v.* Johnston. 76 N. C. 209.

Oregon.— State *v.* Knighton, 39 Oreg. 63, 64 Pac. 866, 87 Am. St. Rep. 647; State *v.* Horne, 20 Oreg. 485, 26 Pac. 665; State *v.* Jarvis, 18 Oreg. 360, 23 Pac. 251.

Pennsylvania.— Com. *v.* Howe, 35 Pa. Super. Ct. 554.

Tennessee.— Jamison *v.* State, 117 Tenn. 58, 94 S. W. 675.

Texas.— Davis *v.* State, 42 Tex. 226; Robertson *v.* State, 51 Tex. Cr. 493, 102 S. W. 1130; Donley *v.* State, 44 Tex. Cr. 428, 71 S. W. 958; Buchanan *v.* State, 41 Tex. Cr. 127, 52 S. W. 769; Exon *v.* State, (Cr. App.) 33 S. W. 336; Comer *v.* State, (Cr. App. 1892) 20 S. W. 547; Rodgers *v.* State, 30 Tex. App. 516, 17 S. W. 1077; Mayo *v.* State, 7 Tex. App. 342. And see Fields *v.* State, 39 Tex. Cr. 488, 46 S. W. 814.

Virginia.— Lawrence *v.* Com., 30 Gratt. 845; Givens *v.* Com., 29 Gratt. 830; Com. *v.* Bennet, 2 Va. Cas. 235.

Washington.— State *v.* Adams, 41 Wash. 552, 83 Pac. 1108; State *v.* Fetterly, 33 Wash. 599, 74 Pac. 810; State *v.* Roller, 30 Wash. 692, 71 Pac. 718.

Wisconsin.— Loose *v.* State, 120 Wis. 115, 97 N. W. 526; Proper *v.* State, 85 Wis. 615, 55 N. W. 1135; State *v.* Mueller, 85 Wis. 203, 55 N. W. 165.

Wyoming.— Ross *v.* State, 16 Wyo. 285, 93 Pac. 299, 94 Pac. 217.

England.— Reg. *v.* Beale, L. R. 1 C. C. 10, 10 Cox C. C. 157, 12 Jur. N. S. 12, 35 L. J. M. C. 60, 13 L. T. Rep. N. S. 335, 14 Wkly. Rep. 57; Reg. *v.* Banks, 8 C. & P. 574, 34 E. C. L. 899; 4 Blackstone Comm. 212; 1 Hale P. C. 628. And see Reg. *v.* Neale, 1 C. & K. 591, 1 Den. C. C. 36, 47 E. C. L. 591.

See 42 Cent. Dig. tit. "Rape," §§ 2, 12.

The carnal knowledge or abuse under such statutes see *supra*, I, A, 2, e, (I).

72. *Arkansas.*— State *v.* Pierson, 44 Ark. 265.

Iowa.— State *v.* Bailor, 104 Iowa 1, 73 N. W. 344, holding that where prosecutrix was under age as fixed hy statute it was immaterial that she was large for her age, physically strong, and of a romping disposition, as defendant was guilty of rape whether she consented or not.

Michigan.— People *v.* Miller, 96 Mich. 119, 55 N. W. 675.

Missouri.— State *v.* Houx, 109 Mo. 654, 19 S. W. 35, 32 Am. St. Rep. 686.

Nebraska.— State *v.* Wright, 25 Nebr. 38, 40 N. W. 596.

Texas.— Smith *v.* State, (Cr. App. 1906) 74 S. W. 556.

be a married woman, if she is not the wife of the accused.[73] Nor is it a matter of defense that defendant was informed and believed that the female was above the age of consent, if in fact she was under such age.[74] A female who is over the age of consent, but still a child in mental and physical development, is not capable of giving consent.[75] Statutes making sexual intercourse with females under a given age rape are constitutional and a valid exercise of legislative power;[76] nor are they invalid because defendant might have been indicted under some other statute for the same act;[77] nor is there any conflict between such statutes and those allowing females to marry under the age of consent.[78] There must be strict proof of age, place, and all other restrictions imposed by such statutes.[79] Carnal knowledge of a woman by force is none the less rape as at common law, because of the passage of statutes fixing the age of consent.[80]

(III) *Female Insane, Imbecile, Drugged, Intoxicated, or Asleep.* By statute in some states, and at common law when there is no such statute, a man who has sexual intercourse with a woman mentally incapable of consent because of insanity or imbecility is guilty of rape, although she does not resist and no force is used; but the woman must be so imbecile or insane as not to know the nature of the act; if she has sufficient intellect to know the nature of the act and yields to gratify her own lust it is not rape.[81] The fact that defendant did not know that the woman was incapable of giving consent is no defense,[82] unless made so by statute.[83] So, if ability to resist is taken away by administering drugs,

See 42 Cent. Dig. tit. "Rape," § 8.

Compare Blackburn *v.* State, 22 Ohio St. 102.

73. Smith *v.* State, (Tex. Cr. App. 1903) 74 S. W. 556.

74. Defendant's ignorance or mistake as to the girl's age is immaterial see *infra*, I, D.

75. Jones *v.* State, 106 Ga. 365, 34 S. E. 174; Stephen *v.* State, 11 Ga. 225; State *v.* Cross, 12 Iowa 66, 79 Am. Dec. 519; Anschick *v.* State, 6 Tex. App. 524; Reg. *v.* Day, 9 C. & P. 722, 38 E. C. L. 419.

76. State *v.* Rollins, 80 Minn. 216, 83 N. W. 141; State *v.* Hunter, 171 Mo. 435, 71 S. W. 675; State *v.* Phelps, 22 Wash. 181, 60 Pac. 134.

77. Johnson *v.* People, 202 Ill. 53, 66 N. E. 877; Chapman *v.* State, 61 Nebr. 888, 86 N. W. 907; Loose *v.* State, 120 Wis. 115, 97 N. W. 526.

78. Plunkett *v.* State, 72 Ark. 409, 82 S. W. 845; State *v.* Rollins, 80 Minn. 216, 83 N. W. 141.

79. State *v.* Pucca, 4 Pennew. (Del.) 71, 55 Atl. 831; State *v.* Deputy, 3 Pennew. (Del.) 19, 50 Atl. 176; Hubert *v.* State, 74 Nebr. 220, 104 N. W. 276, 106 N. W. 774; George *v.* State, 61 Nebr. 669, 85 N. W. 840; Com. *v.* Allen, 135 Pa. St. 483, 19 Atl. 957; Com. *v.* Davis, 3 Pa. Dist. 271; Com. *v.* Goodhead, 23 Pa. Co. Ct. 651; Jamison *v.* State, 117 Tenn. 58, 94 S. W. 675. And see *infra*, II, B, 1, h, 3, i.

80. State *v.* Knock, 142 Mo. 515, 44 S. W. 235; State *v.* Haddon, 49 S. C. 308, 27 S. E. 194.

81. *Alabama.*— McQuirk *v.* State, 84 Ala. 435, 4 So. 775, 5 Am. St. Rep. 381.

Arkansas.— Harvey *v.* State, 53 Ark. 425, 14 S. W. 645, 22 Am. St. Rep. 229.

California.— People *v.* Griffin, 117 Cal. 583, 49 Pac. 711, 59 Am. St. Rep. 216, by statute.

Georgia.— Gore *v.* State, 119 Ga. 418, 46 S. E. 671, 100 Am. St. Rep. 182.

Iowa.— State *v.* Atherton, 50 Iowa 189, 32 Am. Rep. 134; State *v.* Tarr, 28 Iowa 397.

Massachusetts.— Com. *v.* Burke, 105 Mass. 376, 7 Am. Rep. 531.

Michigan.— People *v.* Crosswell, 13 Mich. 427, 87 Am. Dec. 774, holding that a man who has sexual intercourse with a woman of good size and strength and of mature age, but who is shown to have been in a state of dementia, not idiotic, but approaching toward it, no fraud or force having been used, is not guilty of rape.

Missouri.— State *v.* Williams, 149 Mo. 496, 51 S. W. 88; State *v.* Cunningham, 100 Mo. 382, 12 S. W. 376.

New York.— Walter *v.* People, 50 Barb. 144.

Ohio.— State *v.* Crow, 1 Ohio Dec. (Reprint) 586, 10 West. L. J. 501.

Tennessee.— Bloodworth *v.* State, 6 Baxt. 614, 32 Am. Rep. 546.

Texas.— Caruth *v.* State, (Cr. App. 1894) 25 S. W. 778; Rodriguez *v.* State, 20 Tex. App. 542; Baldwin *v.* State, 15 Tex. App. 275.

England.— Reg. *v.* Barratt, L. R. 2 C. C. 81, 12 Cox C. C. 498, 43 L. J. M. C. 7, 29 L. T. Rep. N. S. 409, 22 Wkly. Rep. 136; Reg. *v.* Fletcher, Bell C. C. 63, 8 Cox C. C. 131, 5 Jur. N. S. 179, 28 L. J. M. C. 85, 7 Wkly. Rep. 204; Reg. *v.* Mayers, 12 Cox C. C. 311; Reg. *v.* Ryan, 2 Cox C. C. 115.

See 42 Cent. Dig. tit. "Rape," § 11.

82. People *v.* Griffin, 117 Cal. 583, 49 Pac. 711, 59 Am. St. Rep. 216. *Compare*, however, State *v.* Cunningham, 100 Mo. 382, 12 S. W. 376.

83. See Caruth *v.* State, (Tex. Cr. App. 1894) 25 S. W. 778; Tex. Pen. Code, art. 633.

even though the woman may be conscious, sexual intercourse with her is rape.[84] If a drug is administered for a lawful purpose, and wrongful intent is formed afterward, carnal knowledge of the woman while in a state of stupefaction is rape.[85] And if the woman is intoxicated to the extent of being unable to resist, the act is without her consent and is rape.[86] In like manner carnal knowledge of a woman who is asleep is without her consent and is rape;[87] but if a woman is awakened by the act and makes no resistance it is not rape.[88]

(IV) *FORCE AND RESISTANCE.* In the absence of threats, or other things which make resistance impossible, there must be not only an entire absence of mental consent or assent, but there must be the most vehement exercise of every physical means or faculty within the woman's power to resist penetration, and a persistence in such resistance until the offense is consummated.[89] The term "rape" imports not only force and violence on the part of the man but resistance on the part of the woman.[90] There must be force, actual or constructive, and resistance.[91] In the absence of proof of resistance consent is presumed.[92] Mere general statements of prosecutrix that she resisted are not sufficient, but the specific acts of resistance must be shown.[93] The dissent and repulsion must be shown beyond a reasonable doubt.[94] It is said in some of the cases that there must be the utmost reluctance and the utmost resistance,[95] but this rule is repudi-

84. State *v.* Green, 2 Ohio Dec. (Reprint) 255, 2 West. L. Month. 183, chloroform rendering the woman incapable of resistance, although she was not unconscious.

Cantharides cannot overcome a woman's mental or physical power to resist. State *v.* Lung, 21 Nev. 209, 28 Pac. 235, 37 Am. St. Rep. 505.

85. Harlan *v.* People, 32 Colo. 397, 76 Pac. 792.

86. Territory *v.* Edie, 6 N. M. 555, 30 Pac. 851 (by statute); State *v.* Hairston, 121 N. C. 579, 28 S. E. 492. Where defendant gave a woman liquor for the purpose of exciting her so that she would consent, and after she became insensible had sexual intercourse with her, he was held guilty of rape. Reg. *v.* Camplin, 1 C. & K. 746, 1 Cox C. C. 220, 1 Den. C. C. 89, 47 E. C. L. 746. *Contra*, under the New York statute see People *v.* Quin, 50 Barb. (N. Y.) 128.

87. *Arkansas.*— Maupin *v.* State, (1890) 14 S. W. 924; Harvey *v.* State, 53 Ark. 425, 14 S. W. 645, 22 Am. St. Rep. 229 [*overruling* Charles *v.* State, 11 Ark. 389].

Massachusetts.— Com. *v.* Burke, 105 Mass. 376, 7 Am. Rep. 531.

Missouri.— State *v.* Welch, 191 Mo. 179, 89 S. W. 945.

New York.— People *v.* Bartow, 1 Wheel. Cr. 378.

Texas.— Payne *v.* State, 40 Tex. Cr. 202, 49 S. W. 604, 76 Am. St. Rep. 712. The case of Mooney *v.* State, 29 Tex. App. 257, 15 S. W. 724, is cited sometimes as in conflict with Payne *v.* State, *supra*, and is cited in the latter case as authority for the position taken there, but there was doubt about the woman being asleep, and the indictment was for fraudulently personating her husband, and what was said about the crime when the woman is asleep is *dictum*.

England.— Reg. *v.* Barrow, L. R. 1 C. C. 156, 11 Cox C. C. 191, 38 L. J. M. C. 20, 17 L. T. Rep. N. S. 293, 17 Wkly. Rep. 102; Reg. *v.* Young, 14 Cox C. C. 114, 38 L. T. Rep. N. S. 540; Reg. *v.* Flattery, 13 Cox C. C. 388, 2 Q. B. D. 410, 46 L. J. M. C. 130, 36 L. T. Rep. N. S. 32, 25 Wkly. Rep. 398; Rex *v.* Mayers, 12 Cox C. C. 311.

Compare, however, Com. *v.* Fields, 4 Leigh (Va.) 648.

88. Pollard *v.* State, 2 Iowa 567.

89. *Georgia.*— Mathews *v.* State, 101 Ga. 547, 29 S. E. 424.

Indiana.— Rahke *v.* State, 168 Ind. 615, 81 N. E. 584; Mills *v.* State, 52 Ind. 187.

Iowa.— State *v.* Whimpey, (1908) 118 N. W. 281.

Nebraska.— Richards *v.* State, 36 Nebr. 17, 53 N. W. 1027.

New York.— People *v.* Dohring, 59 N. Y. 374, 17 Am. Rep. 349.

Texas.— Price *v.* State, 36 Tex. Cr. 143, 35 S. W. 988.

Wisconsin.— Brown *v.* State, 127 Wis. 193, 106 N. W. 536; O'Boyle *v.* State, 100 Wis. 296, 75 N. W. 989.

90. Rookey *v.* State, 70 Conn. 104, 38 Atl. 911; Huber *v.* State, 126 Ind. 185, 25 N. E. 904; Mills *v.* State, 52 Ind. 187; Perez *v.* State, 50 Tex. Cr. 34, 94 S. W. 1036; Jenkins *v.* State, 1 Tex. App. 346.

91. McNair *v.* State, 53 Ala. 453; Bradley *v.* State, 32 Ark. 704; Rucker *v.* People, 224 Ill. 131, 79 N. E. 606; Wyatt *v.* State, 2 Swan (Tenn.) 394. And see Payne *v.* Com., 110 S. W. 311, 33 Ky. L. Rep. 229; Sowers *v.* Territory, 6 Okla. 436, 50 Pac. 257.

92. Perez *v.* State, 50 Tex. Cr. 34, 94 S. W. 1036.

93. State *v.* Cowing, 99 Minn. 123, 108 N. W. 851; Brown *v.* State, 127 Wis. 193, 106 N. W. 536.

94. McQuirk *v.* State, 84 Ala. 435, 4 So. 775, 5 Am. St. Rep. 381; Huber *v.* State, 126 Ind. 185, 25 N. E. 904; Anderson *v.* State, 104 Ind. 467, 4 N. E. 63, 5 N. E. 711; Pollard *v.* State, 2 Iowa 567; State *v.* Perkins, 11 Mo. App. 82. See *infra*, II, B. 3, g.

95. *Georgia.*— Mathews *v.* State, 101 Ga. 547, 29 S. E. 424.

ated in other jurisdictions.[96] The true rule is that the amount of resistance necessary will depend on the circumstances, such as the relative strength of the parties, the age and condition of the female, the uselessness of resistance, and the degree of force manifested.[97] It is not necessary that the force should be such as to create a reasonable apprehension of death.[98] If such violence is used as to render the woman unconscious this is rape by force and not of an unconscious woman.[99] Where there is no resistance from incapacity the mere force of penetration is sufficient.[1]

(v) *THREATS AND FEAR.* It is not always necessary that actual physical force be used, or that there be physical resistance, even where the female is capable of consenting. If she yields through fear caused by threats of great bodily injury, there is constructive force and the intercourse is rape.[2] The threats must be made before the act, and must be of bodily harm to the woman.[3]

(vi) *FRAUD AND SURPRISE.* Although there are some cases to the con-

Michigan.— Don Moran *v.* People, 25 Mich. 356, 12 Am. Rep. 283; Strang *v.* People, 24 Mich. 1.

Missouri.— State *v.* Burgdorf, 53 Mo. 65.

New Mexico.— Mares *v.* Territory, 10 N. M. 770, 65 Pac. 165.

New York.— People *v.* Abbot, 19 Wend. 192; People *v.* Morrison, 1 Park. Cr. 625.

96. State *v.* Shields, 45 Conn. 256; State *v.* Sudduth, 52 S. C. 488, 30 S. E. 408.

97. *Connecticut.*—State *v.* Shields, 45 Conn. 256.

Delaware.— State *v.* Riggs, Houst. Cr. Cas. 120.

Indiana.— Rahke *v.* State, 168 Ind. 615, 81 N. E. 584; Huber *v.* State, 126 Ind. 185, 25 N. E. 904; Anderson *v.* State, 104 Ind. 467, 4 N. E. 63, 5 N. E. 711; Pomeroy *v.* State, 94 Ind. 96, 48 Am. Rep. 146; Ledley *v.* State, 4 Ind. 580.

Iowa.— State *v.* Ward, 73 Iowa 532, 35 N. W. 617; State *v.* Cross, 12 Iowa 66, 79 Am. Dec. 519; Pollard *v.* State, 2 Iowa 567.

Massachusetts.— Com. *v.* McDonald, 110 Mass. 405.

Missouri.— State *v.* Cunningham, 100 Mo. 382, 12 S. W. 376; State *v.* Perkins, 11 Mo. App. 82.

Nebraska.— Vaughn *v.* State, 78 Nebr. 317, 110 N. W. 992.

New Mexico.— Mares *v.* Territory, 10 N. M. 770, 65 Pac. 165.

New York.— People *v.* Dohring, 59 N. Y. 374, 17 Am. Rep. 349; People *v.* Clemons, 37 Hun 580. And see Dean *v.* Raplee, 75 Hun 389, 27 N. Y. Suppl. 438 [*affirmed* in 145 N. Y. 319, 39 N. Y. Suppl. 952].

Oklahoma.— Sowers *v.* Territory, 6 Okla. 436, 50 Pac. 257.

Texas.— Jenkins *v.* State, 1 Tex. App. 346.

Utah.— State *v.* McCune, 16 Utah 170, 51 Pac. 818.

See 42 Cent. Dig. tit. "Rape," §§ 6, 13.

98. Waller *v.* State, 40 Ala. 325.

99. State *v.* Reid, 39 Minn. 277, 39 N. W. 796.

1. Gore *v.* State, 119 Ga. 418, 46 S. E. 671, 100 Am. St. Rep. 182; Rahke *v.* State, 168 Ind. 615, 81 N. E. 584. See *supra*, I, A, 2, f, (III).

2. *Alabama.*— Shepherd *v.* State, 135 Ala. 9, 33 So. 266; Hooper *v.* State, 106 Ala. 41, 17 So. 679.

Arkansas.— Pleasant *v.* State, 13 Ark. 360.

Connecticut.— State *v.* Shields, 45 Conn. 256.

Florida.— Doyle *v.* State, 39 Fla. 155, 22 So. 272, 63 Am. St. Rep. 159; Rice *v.* State, 35 Fla. 236, 17 So. 286, 48 Am. St. Rep. 245.

Georgia.— Vanderford *v.* State, 126 Ga. 753, 55 S. E. 1025.

Illinois.— Huston *v.* People, 121 Ill. 497, 13 N. E. 538.

Indiana.— Rahke *v.* State, 168 Ind. 615, 81 N. E. 584; Felton *v.* State, 139 Ind. 531, 39 N. E. 228.

Iowa.— State *v.* Ward, 73 Iowa 532, 35 N. W. 617.

Kansas.— State *v.* Ruth, 21 Kan. 583.

Kentucky.— Smith *v.* Com., 119 Ky. 280, 83 S. W. 647, 26 Ky. L. Rep. 1229; Clymer *v.* Com., 64 S. W. 409, 23 Ky. L. Rep. 1041.

Michigan.—Turner *v.* People, 33 Mich. 363; Don Moran *v.* People, 25 Mich. 356, 12 Am. Rep. 283; Strang *v.* People, 24 Mich. 1.

Missouri.— State *v.* Cunningham, 100 Mo. 382, 12 S. W. 376.

New Mexico.— Territory *v.* Edie, 6 N. M. 555, 30 Pac. 851.

Oklahoma.— Sowers *v.* Territory of Okla. 436, 50 Pac. 257.

Tennessee.— Wright *v.* State, 4 Humphr. 194.

Texas.— Perez *v.* State, 50 Tex. Cr. 34, 94 S. W. 1036; Sharp *v.* State, 15 Tex. App. 171.

West Virginia.— State *v.* Grove, 61 W. Va. 697, 57 S. E. 296, holding that an instruction in a prosecution for rape, to the effect that a consent through fear of anything other than death or great bodily harm will prevent conviction was properly refused.

Wisconsin.— Whittaker *v.* State, 50 Wis. 518, 7 N. W. 431, 36 Am. Rep. 856.

England.— Reg. *v.* Woodhurst, 12 Cox C. C. 443; Reg. *v.* Hallett, 9 C. & P. 748, 38 E. C. L. 433; Reg. *v.* Jones, 4 L. T. Rep. N. S. 154.

See 42 Cent. Dig. tit. "Rape," § 10.

3. Darrell *v.* Com., 88 S. W. 1060, 28 Ky. L. Rep. 27, holding that where, immediately after the act, the accused told the woman that he would kill her father if she told him, this did not constitute rape.

trary,[4] it is very generally held, in the absence of a statute, that where a woman is capable of consenting and does consent to sexual intercourse, the man is not guilty of rape, although her consent was obtained by fraud or surprise.[5] But if she is deceived by fraud as to the act perpetrated on her, it is rape, although she makes no resistance.[6] Thus if a woman consents to sexual intercourse with a man under the belief that she is legally married to him, being misled by his false statements, the marriage being a mere sham, the act is not rape.[7] So, if a physician falsely represents to a woman that sexual intercourse is necessary as a part of treatment, and she, believing such representations, consents, it is not rape;[8] but if the woman is induced by fraud to submit to sexual intercourse when she does not understand the nature of the act it is rape.[9] And by the weight of authority, in the absence of a statute, sexual intercourse with a female with her consent does not constitute rape, although her consent is obtained by fraudulent personation of her husband.[10] Statutes have been enacted, however, in England and in some of the United States making it rape to have intercourse with a woman by falsely personating her husband.[11]

B. Attempts and Assaults With Intent to Rape — 1. In General. It is a crime at common law to attempt to commit rape[12] or to assault a woman with

4. See the *contra* cases cited *infra*, this section, notes 7, 10.

5. *Alabama.*— State *v.* Murphy, 6 Ala. 765, 41 Am. Dec. 79.

Arkansas.— Pleasant *v.* State, 13 Ark. 360.

California.— People *v.* Royal, 53 Cal. 62.

Indiana.— Pomeroy *v.* State, 94 Ind. 96, 48 Am. Rep. 146.

Michigan.— Don Moran *v.* People, 25 Mich. 356, 12 Am. Rep. 283.

New York.— Walter *v.* People, 50 Barb. 144.

North Carolina.— State *v.* Brooks, 76 N. C. 1.

Tennessee.— Bloodworth *v.* State, 6 Baxt. 614, 32 Am. Rep. 546.

Virginia.— Com. *v.* Fields, 4 Leigh 648.

Wisconsin.— Whittaker *v.* State, 50 Wis. 518, 7 N. W. 431, 36 Am. Rep. 856.

England.— Reg. *v.* Barrow, L. R. 1 C. C. 156, 11 Cox C. C. 191, 38 L. J. M. C. 20, 17 L. T. Rep. N. S. 293, 17 Wkly. Rep. 102; Reg. *v.* Stanton, 1 C. & K. 415, 47 E. C. L. 415.

See 42 Cent. Dig. tit. "Rape," § 9.

6. Pomeroy *v.* State, 94 Ind. 96, 48 Am. Rep. 146.

7. State *v.* Murphy, 6 Ala. 765, 41 Am. Dec. 79; Bloodworth *v.* State, 6 Baxt. (Tenn.) 614, 32 Am. Rep. 546. *Contra*, under the Texas statute, see Lee *v.* State, 44 Tex. Cr. 354, 72 S. W. 1005, 61 L. R. A. 904.

8. Pomeroy *v.* State, 94 Ind. 96, 48 Am. Rep. 146; Don Moran *v.* People, 25 Mich. 356, 12 Am. Rep. 283; Walter *v.* People, 50 Barb. (N. Y.) 144.

9. Pomeroy *v.* State, 94 Ind. 96, 48 Am. Rep. 146, holding that where a physician made an examination of a girl nineteen years old in her mother's presence and said that she was suffering from a womb disease, and afterward, under pretense of making a further examination, took her into a private room, where, under the same pretense, he succeeded in having connection with her without her making any outcry, he was guilty of rape. See also Eberhardt *v.* State, 134 Ind. 651, 34 N. E. 637; State *v.* Nash, 109 N. C. 824, 13 S. E. 874; Reg. *v.* Flattery, 2 Q. B. D. 410, 13 Cox C. C. 388, 46 L. J. M. C. 130, 36 L. T. Rep. N. S. 32, 25 Wkly. Rep. 398; Reg. *v.* Stanton, 1 C. & K. 415, 47 E. C. L. 415; Reg. *v.* Camplin, 1 C. & K. 746, 1 Cox C. C. 220, 1 Den. C. C. 89, 47 E. C. L. 746; Reg. *v.* Case, 4 Cox C. C. 220.

10. *Alabama.*— Lewis *v.* State, 30 Ala. 54, 68 Am. Dec. 113.

Michigan.— Don Moran *v.* People, 25 Mich. 356, 12 Am. Rep. 283.

North Carolina.—State *v.* Brooks, 76 N. C. 1.

Tennessee.— Wyatt *v.* State, 2 Swan 394.

Texas.— Payne *v.* State, 38 Tex. Cr. 494, 43 S. W. 515, 70 Am. St. Rep. 757; Mooney *v.* State, 29 Tex. App. 257, 15 S. W. 724.

England.— Reg. *v.* Barratt, L. R. 2 C. C. 81, 12 Cox C. C. 498, 43 L. J. M. C. 7, 29 L. T. Rep. N. S. 409, 22 Wkly. Rep. 136; Reg. *v.* Barrow, L. R. 1 C. C. 156, 11 Cox C. C. 191, 38 L. J. M. C. 20, 17 L. T. Rep. N. S. 293, 17 Wkly. Rep. 102; Reg. *v.* Fletcher, L. R. 1 C. C. 39, 10 Cox C. C. 248, 12 Jur. N. S. 505, 35 L. J. M. C. 172, 14 L. T. Rep. N. S. 573, 14 Wkly. Rep. 774; Reg. *v.* Clarke, 3 C. L. R. 86, 6 Cox C. C. 412, Dears. C. C. 397, 18 Jur. 1059, 24 L. J. M. C. 25, 3 Wkly. Rep. 20; Reg. *v.* Sweenie, 8 Cox C. C. 223; Reg. *v.* Williams, 8 C. & P. 286, 34 E. C. L. 737; Reg. *v.* Saunders, 8 C. & P. 265, 34 E. C. L. 725; Rex *v.* Jackson, R. & R. 361.

Contra.— State *v.* Shepard, 7 Conn. 54; People *v.* Bartow, 1 Wheel. Cr. (N. Y.) 378; Reg. *v.* Dee, L. R. 14 Ir. 468, 15 Cox C. C. 579; Reg. *v.* Young, 14 Cox C. C. 114, 38 L. T. Rep. N. S. 540.

11. State *v.* Williams, 128 N. C. 573, 37 S. E. 952; Mooney *v.* State, 29 Tex. App. 257, 15 S. W. 724; 48 & 49 Vict. c. 69, § 4. And see the statutes referred to *supra*, I, A, 1, b, note 8.

12. See Criminal Law, 12 Cyc. 176. And see State *v.* Pickett, 11 Nev. 255, 21 Am. Rep. 754; Glover *v.* Com., 86 Va. 382, 10 S. E. 420.

intent to rape her.[13] In some states these offenses are punished by statute.[14] According to the better opinion, attempt to rape differs from assault with intent to ravish. The word "attempt" in its largest signification means a trial or physical effort to do a thing. The intent in the mind covers the thing in full, the act covers it only in part.[15] In some jurisdictions the distinction is observed, and attempt to ravish is defined as an ineffectual offer by force to have carnal connection.[16] Elsewhere it has been held that the two offenses are the same.[17] It is sometimes said that assault with intent to commit rape cannot be made without the use of violence, but an attempt to commit rape includes attempts by fraud, or threats, or with a female under age, or by other means than actual force, as where one attempts rape by the use of chloroform,[18] or attempts to personate a husband,[19] or attempts to have intercourse with a woman while she is asleep;[20] but there can be no such offense as an attempt to commit an assault with intent to commit a rape.[21]

2. Nature and Elements of Offense — a. Felony or Misdemeanor. An attempt to commit rape or an assault with intent to rape is merely a misdemeanor at common law and under some statutes,[22] but they are now felonies in most jurisdictions either by express statutory provision or because they are made punishable by confinement in the state prison.[23]

b. By Whom the Offense May Be Committed. By the weight of authority a boy who is so young as to be incapable of committing rape[24] cannot be guilty of an attempt or an assault with intent to rape.[25] The same is true, according to

But in Ohio it was held that an attempt to commit rape on a female under ten years of age was not a crime, as it was not punished by any statute and there were no common-law crimes in that state. Smith *v.* State, 12 Ohio St. 466, 80 Am. Dec. 355.

13. It is punished as an aggravated assault. See Assault and Battery, 3 Cyc. 1026. And see Rookey *v.* State, 70 Conn. 104, 38 Atl. 911.

14. See the statutes of the several states. And see Lewis *v.* State, 35 Ala. 380; People *v.* Gardner, 98 Cal. 127, 32 Pac. 880; *In re* Lloyd, 51 Kan. 501, 33 Pac. 307; State *v.* Hearsey, 50 La. Ann. 373, 23 So. 372; State *v.* Martin, 14 N. C. 329.

15. Lewis *v.* State, 35 Ala. 380; State *v.* Martin, 14 N. C. 329. And see Ross *v.* State, 16 Wyo. 285, 93 Pac. 299, 302, 94 Pac. 217, where it is said: "A distinction is made and carried into the decisions between attempts to commit and an assault with intent to commit a felony. In the former the question of assault is not necessarily involved, while in the latter it is an essential element of the crime charged, and as such must be proven."

16. *California.*— People *v.* Gardner, 98 Cal. 127, 32 Pac. 880.

Louisiana.— State *v.* Hearsey, 50 La. Ann. 373, 23 So. 372.

Missouri.— State *v.* Smith, 80 Mo. 516.

Nevada.— State *v.* Pickett, 11 Nev. 255, 21 Am. Rep. 754.

Pennsylvania.— Kelly *v.* Com., 1 Grant 484.

Texas.— In order to convict of an attempt to commit rape it must be shown that at the time of the alleged attempt it was the intent of the party to use the same degree and character of force as would make him guilty of rape or of an assault with intent to commit rape, but that in the actual attempt, carried beyond the mere preparation, he fell short of such degree of force. Moon *v.* State, (Cr. App. 1898) 45 S. W. 806; McAdoo *v.* State, 35 Tex. Cr. 603, 34 S. W. 955, 60 Am. St. Rep. 61; Melton *v.* State, 24 Tex. App. 284, 6 S. W. 39.

Virginia.— Glover *v.* Com., 86 Va. 382, 10 S. E. 420.

See 42 Cent. Dig. tit. "Rape," §§ 14, 15.

17. Rookey *v.* State, 70 Conn. 104, 38 Atl. 911.

18. Milton *v.* State, 23 Tex. App. 204, 4 S. W. 574; Brown *v.* State, 27 Tex. App. 330, 11 S. W. 412.

19. Franklin *v.* State, 34 Tex. Cr. 203, 29 S. W. 1088. And see State *v.* Smith, 80 Mo. 516.

20. Maupin *v.* State, (Ark. 1890) 14 S. W. 924; Harvey *v.* State, 53 Ark. 425, 14 S. W. 645, 22 Am. St. Rep. 229. *Contra*, in Texas. King *v.* State, 22 Tex. App. 650, 3 S. W. 342; Saddler *v.* State, 12 Tex. App. 194. See *infra*, I, B, 2, h.

21. Brown *v.* State, 7 Tex. App. 569.

22. See Assault and Battery, 3 Cyc. 1020, 1063; Criminal Law, 12 Cyc. 132, 176. And see Payne *v.* Com., 110 S. W. 311, 33 Ky. L. Rep. 229; State *v.* Jones, 83 N. C. 605, 35 Am. Rep. 586; State *v.* Perkins, 82 N. C. 681.

23. See Criminal Law, 12 Cyc. 132. And see Territory *v.* Godfrey, 6 Dak. 46, 50 N. W. 481; Payne *v.* Com., 110 S. W. 411, 33 Ky. L. Rep. 229.

24. See *supra*, I, A, 2, c.

25. *Delaware.*— State *v.* Handy, 4 Harr. 566.

Florida.— McKinney *v.* State, 29 Fla. 565, 10 So. 732, 30 Am. St. Rep. 140.

Georgia.— Bird *v.* State, 110 Ga. 315, 35 S. E. 156.

the better opinion, of an impotent adult,[26] although it has been held that impotency is no defense, at least unless there is proof that the accused knew that he was impotent.[27]

c. Upon Whom the Offense May Be Committed. Any female may be the subject of an attempt or an assault with intent to rape, whether she has reached the age of puberty or not,[28] and whether she is chaste or unchaste character.[29]

d. The Overt Act — (I) *In Attempt.* To constitute an attempt to rape, there must be something more than mere preparation; there must be some overt act with intent to commit the crime,[30] coupled with an actual or apparent present ability to complete the crime.[31] Mere indecent advances, solicitations, or importunities do not amount to an attempt.[32]

(II) *In Assault With Intent to Rape.* To constitute an assault with intent to rape there must of course be some overt act amounting to an assault

New York.— People *v.* Randolph, 2 Park. Cr. 213.

North Carolina.— State *v.* Sam, 60 N. C. 293.

North Dakota.— State *v.* Fisk, 15 N. D. 589, 108 N. W. 485.

Pennsylvania.— Com. *v.* Hummel, 7 Pa. Dist. 715, 21 Pa. Co. Ct. 445.

Virginia.— Foster *v.* Com., 96 Va. 306, 31 S. E. 503, 70 Am. St. Rep. 846, 42 L. R. A. 589.

England.— Rex *v.* Eldershaw, 3 C. & P. 396, 14 E. C. L. 628.

See 42 Cent. Dig. tit. "Rape," § 16.

Contra.— Com. *v.* Green, 2 Pick. (Mass.) 380.

26. Nugent *v.* State, 18 Ala. 521; Jeffers *v.* State, 20 Ohio Cir. Ct. 294, 10 Ohio Cir. Dec. 832.

27. Territory *v.* Keyes, 5 Dak. 244, 38 N. W. 440; State *v.* Bartlett, 127 Iowa 689, 154 N. W. 285.

28. See *supra*, I, A, 2, d.

Female under age of consent see *infra*, I, B, 2, g.

29. People *v.* Johnson, 106 Cal. 289, 39 Pac. 622; People *v.* Hartman, 103 Cal. 242, 37 Pac. 153, 42 Am. St. Rep. 108. See *supra*, I, A, 2, d.

30. See CRIMINAL LAW, 12 Cyc. 177. And see the following cases:

Alabama.— Lewis *v.* State, 35 Ala. 380, holding that if a man, intending to have carnal knowledge of a girl by force and against her will, manifests his purpose by outward acts so far as to put her in terror and render flight on her part necessary to escape, he is guilty of an attempt to commit rape.

Kansas.— *In re* Lloyd, 51 Kan. 501, 33 Pac. 307.

Kentucky.— Payne *v.* Com., 110 S. W. 311, 33 Ky. L. Rep. 229, the overt act need not amount to a technical trespass.

Missouri.— State *v.* Harney, 101 Mo. 470, 14 S. W. 657, actual attempt necessary.

Nevada.— State *v.* Lung, 21 Nev. 209, 28 Pac. 235, 37 Am. St. Rep. 505, holding that the attempted administration of cantharides to a woman for the purpose of having sexual intercourse with her, but without any offer or effort at sexual connection, is mere preparation.

Pennsylvania.— Kelly *v.* Com., 1 Grant. 484.

Virginia.— Glover *v.* Com., 86 Va. 382, 10 S. E. 420, holding that a man was guilty of attempt to rape in taking a girl under the age of consent into a barn, raising her clothes, and getting on top of her.

"An attempt in criminal law," said the Virginia court, "is an apparent unfinished crime, and hence is compounded of two elements, viz: (1) The intent to commit a crime; and (2) a direct act done towards its commission, but falling short of the execution of the ultimate design. It need not, therefore, be the last proximate act to the consummation of the crime in contemplation, but is sufficient if it be an act apparently adopted to produce the result intended. It must be something more than mere preparation." Glover *v.* Com., 86 Va. 382, 385, 10 S. E. 420, sustaining a conviction of attempt to rape.

An assault is not necessarily involved in an attempt to commit rape (Ross *v.* State, 16 Wyo. 285, 93 Pac. 299, 94 Pac. 217; and *supra*, I, B, 1), although essential to the crime of assault with intent to commit rape (see *infra*, I, B, 2, d, (II)).

31. State *v.* Montgomery, 63 Mo. 296, 298, where it is said of an attempt to rape: "An attempt is a deliberate crime which is begun, but, through circumstances independent of the will, the action is left unfinished. It is such an intentional, preliminary, guilty act, as will apparently result, in the usual course of natural events, if not hindered by causes outside of the actor's will, in a deliberate crime. . . . If the means are apparently adapted to the end, and there is an apparent physical ability to complete the attempt on the part of the attempter, then the case may be fairly made out."

It is an attempt to commit rape to lay hands on a woman and attempt to drag her away with intent to have intercourse with her against her will. State *v.* Montgomery, 63 Mo. 296.

32. Lewis *v.* State, 35 Ala. 380; *In re* Lloyd, 51 Kan. 501, 33 Pac. 307; State *v.* Harney, 101 Mo. 470, 14 S. W. 657, holding that mere verbal solicitation of a female child under the age of consent to permit sexual intercourse is not an attempt to commit rape. And see *infra*, I, B, 2, g.

upon the woman;[33] but to constitute an assault it is not essential that there shall be a direct attempt at violence.[34] An assault for this as for other purposes is an attempt with force or violence to do corporal injury to another,[35] and may consist of any act tending to such injury accompanied with circumstances denoting an intent, coupled with a present ability, to use violence against the person, whether there is any battery or not,[36] for there may be an assault with intent to commit rape without any battery.[37] Statutes sometimes punish the assaulting of a female with a deadly weapon or by other means or force likely to produce death or great bodily harm with intent to ravish, and to convict under such a statute the assault must have been so made as to come within the statute.[38]

e. The Intent. The specific intent to commit rape is an essential element both of attempt to rape[39] and of assault with intent to rape.[40] Therefore, to convict of either of these offenses, it must be shown that the accused intended to have intercourse with the female by force and against her will, that, in case

33. Gaskin *v.* State, 105 Ga. 631, 31 S. E. 740, holding therefore that it was error to charge the jury that if defendant formed the intent and design in his heart to have carnal knowledge of the female alleged to have been assaulted, forcibly and against her will, and in the accomplishment of that evil design and intent, slipped into her room and secreted himself there, awaiting an opportune moment to carry his evil design into execution, and being detected, fled and made his escape, that would make such a case that the necessary element of assault would be in it, and they would be authorized to find defendant guilty of assault with intent to rape. And see Rahke *v.* State, 168 Ind. 615, 81 N. E. 584; People *v.* Dowell, 136 Mich. 306, 99 N. W. 23; Garrison *v.* People, 6 Nebr. 274; State *v.* Jeffreys, 117 N. C. 743, 23 S. E. 175; Hudson *v.* State, 49 Tex. Cr. 24, 90 S. W. 177; Carter *v.* State, 44 Tex. Cr. 312, 70 S. W. 971; Burney *v.* State, 21 Tex. App. 565, 1 S. W. 458; Ross *v.* State, 16 Wyo. 285, 93 Pac. 299, 94 Pac. 217.

Mere solicitation is not enough. People *v.* Dowell, 136 Mich. 306, 99 N. W. 23. And see Clark *v.* State((Fla. 1908) 47 So. 481.

The slightest touching of the person is sufficient. McAvoy *v.* State, 41 Tex. Cr. 56, 51 S. W. 928.

34. State *v.* Smith, 80 Mo. 516; Hays *v.* People, 1 Hill (N. Y.) 351.

35. State *v.* Truitt, 5 Pennew. (Del.) 466, 62 Atl. 790; Hays *v.* People, 1 Hill (N. Y.) 351. See ASSAULT AND BATTERY, 3 Cyc. 1020.

36. *Alabama.*— Norris *v.* State, 87 Ala. 85, 6 So. 371, holding that where defendant put his arms around the prosecutrix and forcibly held and pressed her, making indecent proposals, and only released her on her threats to call assistance, this was sufficient to support a conviction.

Delaware.— State *v.* Smith, 9 Houst. 588, 33 Atl. 441.

Georgia.— Goldin *v.* State, 104 Ga. 549, 30 S. E. 749; Jackson *v.* State, 91 Ga. 322, 18 S. E. 132, 44 Am. St. Rep. 25 (holding that where a man, under the incitement of lust, and with the intention of gratifying it by force, enters the bedroom of a virtuous woman at a late hour in the night and gets upon the bed in which she is sleeping, within reach of her person, for the purpose of ravishing her, he commits an assault upon her, although he may not actually touch her, being prevented from so doing by her outcry and by the interposition of an occupant of the adjoining room); Watkins *v.* State, 68 Ga. 832 (holding that where a man hailed a woman walking along a pathway, and holding something in his hand and saying he had plenty of money, told her to go into a gully, and on her retreating, drew a pistol, and advancing upon her, ordered her to turn back, and she escaped by flight, a verdict of assault with intent to rape was warranted).

Iowa.— State *v.* Sherman, 106 Iowa 684, 77 N. W. 461, holding that where defendant caused a female under the age of consent to lie on the ground and unbutton her clothing for the purpose and with the intent of having sexual intercourse with her, it was an assault with intent to commit rape.

Massachusetts.— Com. *v.* Thompson, 116 Mass. 346.

Missouri.— State *v.* Smith, 80 Mo. 516.

New York.— Hays *v.* People, 1 Hill 351, holding that where defendant decoyed a female under ten years of age into a building for the purpose of ravishing her, and was there detected while standing within a few feet of her in a state of indecent exposure, he was properly convicted of an assault with intent to commit rape, although there was no evidence of his having actually touched her.

Impossibility to accomplish purpose.—A man may be convicted of assault upon a female child with intent to carnally know and abuse her, although in making the assault he threw her into such a position that it was impossible to accomplish his purpose of ravishing her. Com. *v.* Shaw, 134 Mass. 221.

37. Goldin *v.* State, 104 Ga. 549, 30 S. E. 749; Com. *v.* Thompson, 116 Mass. 346; and other cases cited in the preceding note.

38. Humphries *v.* State, 5 Mo. 203, holding that an indictment under such a statute was not sustained by proof of an assault upon a female child under ten years of age, without any proof of violence.

39. See CRIMINAL LAW, 12 Cyc. 179.

40. See ASSAULT AND BATTERY, 3 Cyc. 1026 *et seq.*

of assault, he not only used force, but used it with the intention of having intercourse notwithstanding any resistance on the part of the female,[41] unless she was unconscious, insane, or of such an age that she was incapable of consenting.[42] Such intent, however, may be inferred from the circumstances.[43] If a man lays violent hands on a woman with intent, not to ravish her, but to seduce her, he is guilty of simple assault and battery.[44]

f. Want of Consent, Force, and Resistance in General. There can be neither an attempt to commit rape nor an assault with intent to rape where the female consents,[45] if she is in law capable of consenting.[46] There must be force, or an attempt to use force, actual or constructive, and resistance on the part of the woman, whenever this is necessary under the circumstances to constitute rape.[47]

41. *Alabama.*— Pumphrey *v.* State, (1908) 47 So. 156; Jones *v.* State, 90 Ala. 628, 8 So. 383, 24 Am. St. Rep. 850; Norris *v.* State, 87 Ala. 85, 6 So. 371; Lewis *v.* State, 35 Ala. 380.

Arizona.— Daggs *v.* Territory, (1908) 94 Pac. 1106.

Arkansas.— Charles *v.* State, 11 Ark. 389.

California.— People *v.* Fleming, 94 Cal. 308, 29 Pac. 647; People *v.* Manchego, 80 Cal. 306, 22 Pac. 223; People *v.* Collins, 5 Cal. App. 654, 91 Pac. 158.

Delaware.— State *v.* Truitt, 5 Pennew. 466, 62 Atl. 790; State *v.* Smith, 9 Houst. 588, 33 Atl. 441.

Georgia.— Johnson *v.* State, 63 Ga. 355; Joice *v.* State, 53 Ga. 50; Taylor *v.* State, 50 Ga. 79; Fields *v.* State, 2 Ga. App. 41, 58 S. E. 327.

Idaho.— State *v.* Niel, 13 Ida. 539, 90 Pac. 860, 91 Pac. 318.

Illinois.— Stevens *v.* People, 158 Ill. 111, 41 N. E. 856; Barr *v.* People, 113 Ill. 471.

Indiana.— Rahke *v.* State, 168 Ind. 615, 81 N. E. 584; White *v.* State, 136 Ind. 308, 36 N. E. 274.

Iowa.— State *v.* Kendall, 73 Iowa 255, 34 N. W. 843, 5 Am. St. Rep. 679; State *v.* Canada, 68 Iowa 397, 27 N. W. 288; State *v.* Hagerman, 47 Iowa 151.

Kentucky.— Bowman *v.* Com., 104 S. W. 263, 31 Ky. L. Rep. 828.

Michigan.— People *v.* Dowell, 136 Mich. 306, 99 N. W. 23.

Missouri.— State *v.* Espenschied, 212 Mo. 215, 110 S. W. 1072; State *v.* Hayden, 141 Mo. 311, 42 S. W. 826; State *v.* Whitsett, 111 Mo. 202, 19 S. W. 1097; State *v.* Owsley, 102 Mo. 678, 15 S. W. 137.

Nebraska.— Garrison *v.* People, 6 Nebr. 274.

Nevada.— State *v.* Lung, 21 Nev. 209, 28 Pac. 235, 37 Am. St. Rep. 505.

New York.— People *v.* Quin, 50 Barb. 128; People *v.* Kirwan, 22 N. Y. Suppl. 160; Reynolds *v.* People, 41 How. Pr. 179.

North Carolina.— State *v.* Jeffreys, 117 N. C. 743, 23 S. E. 175; State *v.* Massey, 86 N. C. 658, 41 Am. Rep. 478; State *v.* Brooks, 76 N. C. 1; State *v.* Martin, 14 N. C. 329.

Texas.— Thompson *v.* State, 43 Tex. 583; Freeman *v.* State, 52 Tex. Cr. 500, 107 S. W. 1127; Collins *v.* State, 52 Tex. Cr. 455, 107 S. W. 852; Cotton *v.* State, 52 Tex. Cr. 55, 105 S. W. 185; Warren *v.* State, 51 Tex. Cr. 598, 103 S. W. 888; Scott *v.* State, 51 Tex. Cr. 5, 100 S. W. 159; Fewox *v.* State, 49 Tex. Cr. 172, 90 S. W. 178; Mason *v.* State, 47 Tex. Cr. 403, 83 S. W. 689; Reagan *v.* State, 28 Tex. App. 227, 12 S. W. 601, 19 Am. St. Rep. 833; Brown *v.* State, 27 Tex. App. 330, 11 S. W. 412; Carroll *v.* State, 24 Tex. App. 366, 6 S. W. 190; McGee *v.* State, 21 Tex. App. 670, 2 S. W. 89; Thomas *v.* State, 16 Tex. App. 535; Peterson *v.* State, 14 Tex. App. 162; Sanford *v.* State, 12 Tex. App. 196; Saddler *v.* State, 12 Tex. App. 194. And see Eiley *v.* State, (Cr. App. 1908) 114 S. W. 793; Holloway *v.* State, (Cr. App. 1908) 113 S. W. 928.

Utah.— State *v.* McCune, 16 Utah 170, 51 Pac. 818.

Virginia.— Woodson *v.* Com., 107 Va. 895, 59 S. E. 1097; Glover *v.* Com., 86 Va. 382, 10 S. E. 420.

England.— Rex *v.* Lloyd, 7 C. & P. 318, 32 E. C. L. 633; Reg. *v.* Wright, 4 F. & F. 967.

See 42 Cent. Dig. tit. "Rape," § 14 *et seq.*

42. See *infra*, I, B, 2, g, h.

43. See *infra*, II, B, 3, l.

44. People *v.* Manchego, 80 Cal. 306, 22 Pac. 223.

45. *Indiana.*— Rahke *v.* State, 168 Ind. 615, 81 N. E. 584.

New York.— People *v.* Bransby, 32 N. Y. 525.

Ohio.— Smith *v.* State, 12 Ohio St. 466, 80 Am. Dec. 355; Martin *v.* State, 13 Ohio Cir. Ct. 604, 7 Ohio Cir. Dec. 564.

Texas.— Freeman *v.* State, 52 Tex. Cr. 500, 107 S. W. 1127; Cotton *v.* State, 52 Tex. Cr. 55, 105 S. W. 185.

Utah.— State *v.* McCune, 16 Utah 170, 51 Pac. 818.

Wyoming.— Ross *v.* State, 16 Wyo. 285, 93 Pac. 299, 94 Pac. 217.

England.— Reg. *v.* Meredith, 8 C. & P. 589, 34 E. C. L. 907; Reg. *v.* Banks, 8 C. & P. 574, 34 E. C. L. 899.

And see *supra*, I, A, 2, f, (I); I, B, 2, e.

46. See *infra*, I, B, 2, g, h.

47. Barnett *v.* State, 42 Tex. Cr. 302, 62 S. W. 765, where it is said that on a trial for assault with intent to commit rape, resistance by force on the part of the prosecutrix to the utmost of her efforts to prevent defendant from accomplishing his purpose is a criterion by which consent *vel non* on her part is to be tested; for, if there is no such resistance to the attempted carnal act used

If the woman resists for a time but finally consents, the man is guilty of assault with intent to commit rape.[48] If she merely consents to familiarities with her person and requests for sexual intercourse an attempt to force her constitutes the crime.[49]

g. Female Under Age of Consent. One who attempts to have intercourse with a female under the age of consent is guilty of an attempt to rape notwithstanding her actual consent.[50] It has also been held in most jurisdictions that there may be an assault with intent to rape upon a consenting female where she is under the age of consent, on the ground that in law she cannot consent to such an assault.[51] Other courts, however, making a distinction between attempts and assaults with intent to rape, hold that an assault implies force and resistance,

by her, the presumption obtains that she consented. And see Rahke *v.* State, 168 Ind. 615, 81 N. E. 584; Collins *v.* State, 52 Tex. Cr. 455, 107 S. W. 852; Cotton *v.* State, 52 Tex. Cr. 55, 105 S. W. 185; Woodson *v.* Com., 107 Va. 895, 59 S. E. 1097. See also *supra*, I, A, 2, f, (IV).

48. *Georgia.*— Mathews *v.* State, 101 Ga. 547, 29 S. E. 424.

Iowa.— State *v.* Atherton, 50 Iowa 189, 32 Am. Rep. 134; State *v.* Cross, 12 Iowa 66, 79 Am. Dec. 519.

Michigan.— People *v.* Marrs, 125 Mich. 376, 84 N. W. 284.

Minnesota.— State *v.* Bagan, 41 Minn. 285, 43 N. W. 5.

Missouri.— State *v.* Cunningham, 100 Mo. 382, 12 S. W. 376.

Vermont.— State *v.* Hartigan, 32 Vt. 607, 78 Am. Dec. 609.

England.— Reg. *v.* Hallett, 9 C. & P. 748, 38 E. C. L. 433.

And see *supra*, I, A, 2, f, (I).

49. Johnson *v.* People, 197 Ill. 48, 64 N. E. 286.

50. *Iowa.*— State *v.* Grossheim, 79 Iowa 75, 44 N. W. 541.

Kansas.— *In re* Lloyd, 51 Kan. 501, 33 Pac. 307.

Kentucky.— Payne *v.* Com., 110 S. W. 311, 33 Ky. L. Rep. 229.

Nevada.— State *v.* Pickett, 11 Nev. 255, 21 Am. Rep. 754.

England.— Reg. *v.* Beale, L. R. 1 C. C. 10, 10 Cox C. C. 157, 12 Jur. N. S. 12, 35 L. J. M. C. 60, 13 L. T. Rep. N. S. 335, 14 Wkly. Rep. 57; Reg. *v.* Ryland, 11 Cox C. C. 101, 18 L. T. Rep. N. S. 538, 16 Wkly. Rep. 941; Reg. *v.* Martin, 9 C. & P. 213, 2 Moody C. C. 123, 38 E. C. L. 133.

51. *California.*— People *v.* Johnson, 131 Cal. 511, 63 Pac. 842; People *v.* Vann, 129 Cal. 118, 61 Pac. 776; People *v.* Lourintz, 114 Cal. 628, 46 Pac. 613; People *v.* Verdegreen, 106 Cal. 211, 39 Pac. 607, 46 Am. St. Rep. 234; People *v.* Gordon, 70 Cal. 467, 11 Pac. 762. And see People *v.* Roach, 129 Cal. 33, 61 Pac. 574.

Colorado.— Gibbs *v.* People, 36 Colo. 452, 85 Pac. 425.

Dakota.— Territory *v.* Keyes, 5 Dak. 244, 38 N. W. 440.

Florida.— Schang *v.* State, 43 Fla. 561, 31 So. 346.

Georgia.— Stephen *v.* State, 11 Ga. 225.

Indiana.— Hanes *v.* State, 155 Ind. 112, 57 N. E. 704; Murphy *v.* State, 120 Ind. 115, 22 N. E. 106 [*overruling* Stephens *v.* State, 107 Ind. 185, 8 N. E. 94].

Iowa.— State *v.* Johnson, 133 Iowa 38, 110 N. W. 170; State *v.* Sherman, 106 Iowa 684, 77 N. W. 461; State *v.* Carnagy, 106 Iowa 483, 76 N. W. 805; State *v.* Grossheim, 79 Iowa 75, 44 N. W. 541; State *v.* McCaffrey, 63 Iowa 479, 19 N. W. 331.

Massachusetts.—Com. *v.* Roosnell, 143 Mass. 32, 8 N. E. 747.

Michigan.— People *v.* Chamblin, 149 Mich. 653, 113 N. W. 27; People *v.* Goulette, 82 Mich. 36, 45 N. W. 1124; People *v.* Courier, 79 Mich. 366, 44 N. W. 571; People *v.* McDonald, 9 Mich. 150.

Missouri.— State *v.* Wray, 109 Mo. 594, 19 S. W. 86; McComas *v.* State, 11 Mo. 116.

Nebraska.— Liebscher *v.* State, 69 Nebr. 395, 95 N. W. 870; Wood *v.* State, 46 Nebr. 58, 64 N. W. 355; Head *v.* State, 43 Nebr. 30, 61 N. W. 494; Davis *v.* State, 31 Nebr. 247, 47 N. W. 854.

New Jersey.— State *v.* Jackson, 65 N. J. L. 105, 46 Atl. 764; Cliver *v.* State, 45 N. J. L. 46.

New York.— Singer *v.* People, 13 Hun 418 [*affirmed* in 75 N. Y. 608]; Hays *v.* People, 1 Hill 351.

North Carolina.— State *v.* Dancy, 83 N. C. 608; State *v.* Johnston, 76 N. C. 209.

Oregon.— State *v.* Sargent, 32 Oreg. 110, 49 Pac. 889.

Texas.— Croomes *v.* State, 40 Tex. Cr. 672, 51 S. W. 924, 53 S. W. 882 [*overruling* Hardin *v.* State, 39 Tex. Cr. 426, 46 S. W. 803]; Callison *v.* State, 37 Tex. Cr. 211, 39 S. W. 300; Allen *v.* State, 36 Tex. Cr. 381, 37 S. W. 429; Comer *v.* State, (Cr. App. 1892) 20 S. W. 547; Moore *v.* State, 20 Tex. App. 275. And see Sanders *v.* State, (Cr. App. 1908) 112 S. W. 938.

Vermont.— State *v.* Clark, 77 Vt. 10, 58 Atl. 796; State *v.* Sullivan, 68 Vt. 540, 35 Atl. 479.

Virginia.— Glover *v.* Com., 86 Va. 382, 10 S. E. 420; Givens *v.* Com., 29 Gratt. 830.

Washington.— State *v.* Hunter, 18 Wash. 670, 52 Pac. 247 [*overruling* Whitcher *v.* State, 2 Wash. 286, 26 Pac. 268].

Wisconsin.— Loose *v.* State, 120 Wis. 115, 97 N. W. 526; Proper *v.* State, 85 Wis. 615, 55 N. W. 1035.

Wyoming.— Ross *v.* State, 16 Wyo. 285, 93 Pac. 299, 94 Pac. 217.

See 42 Cent. Dig. tit. "Rape," § 17.

and therefore there can be no assault with intent to rape on a consenting female, even where she is under the age of consent, although there may be rape or attempt to rape notwithstanding her consent.[52] To constitute an assault with intent to rape on a female under the age of consent, there must of course, as in other cases, be some overt act amounting to assault.[53] Mere solicitation is not sufficient to constitute either an attempt or an assault with intent to rape.[54] It is also necessary that there shall be an intent to have intercourse with the girl, and not merely to take indecent liberties with her person;[55] and the assault and intent must concur as to time.[56] It is no defense that the accused did not know that the female was under the age of consent.[57]

h. Female Insane, Imbecile, Drugged, Intoxicated, or Asleep. An attempt or assault with intent to have intercourse with a woman who is insane, imbecile, drugged, intoxicated, or asleep is an attempt to rape, or an assault with intent to rape, if the consummated act would be rape,[58] as elsewhere explained;[59] but not otherwise.[60]

By statute in Manitoba see Reg. *v.* Brice, 7 Manitoba 627.

Attempt to commit violent injury.— To have carnal knowledge of a female under the age of consent is unlawful, and has been held to constitute a violent injury within Rev. St. (1899) § 4957, punishing one who having the present ability to do so attempts to commit a violent injury on the person of another. Ross *v.* State, 16 Wyo. 285, 93 Pac. 299, 94 Pac. 217.

52. State *v.* Pickett, 11 Nev. 255, 21 Am. Rep. 754; Smith *v.* State, 12 Ohio St. 466, 80 Am. Dec. 355; Reg. *v.* Read, 2 C. & K. 957, 3 Cox C. C. 266, 1 Den. C. C. 377, 13 Jur. 68, 18 L. J. M. C. 88, 3 New Sess. Cas. 405, T. & M. 52, 61 E. C. L. 957; Reg. *v.* Roadley, 14 Cox C. C. 463, 49 L. J. M. C. 88, 42 L. T. Rep. N. S. 515; Reg. *v.* Johnson, 10 Cox C C. 114, 11 Jur. N. S. 532, L. & C. 632, 34 L. J. M. C. 192, 12 L. T. Rep. N. S. 503, 13 Wkly. Rep. 815; Reg. *v.* Mehegan, 7 Cox C. C. 145; Reg. *v.* Cockburn, 3 Cox C. C. 543; Reg. *v.* Martin, 9 C. & P. 213, 2 Moody 123, 38 E. C. L. 133; Reg. *v.* Meredith, 8 C. & P. 589, 34 E. C. L. 907; Reg. *v.* Banks, 8 C. & P. 574, 34 E. C. L. 899. And see Reg. *v.* Day, 9 C. & P. 722, 38 E. C. L. 419; Reg. *v.* Brice, 7 Manitoba 627.

In Tennessee it was held that a statute (Act (1829), c. 23, § 53 (Code, § 4615)), providing that any person guilty of committing an assault and battery upon any female, with an intent, forcibly and against her will, to have unlawful carnal knowledge of her, should, on conviction, be imprisoned in the penitentiary not less than two years or more than ten years, had reference only to cases where, if the intent was carried out, the offense would be rape; and this would not be so if the female was under ten. Rhodes *v.* State, 1 Coldw. 351.

53. People *v.* Dowell, 136 Mich. 306, 99 N. W. 23; State *v.* Riseling, 186 Mo. 521, 85 S. W. 372; Hays *v.* People, 1 Hill (N. Y.) 351; Hudson *v.* State, 49 Tex. Cr. 24, 90 S. W. 177; Carter *v.* State, 44 Tex. Cr. 312, 70 S. W. 971; McAvoy *v.* State, 41 Tex. Cr. 56, 51 S. W. 928. And see *supra*, I, B, 2, d, (II).

The slightest touching of the person with intent to have intercourse is sufficient. McAvoy *v.* State, 41 Tex. Cr. 56, 51 S. W. 928.

54. People *v.* Dowell, 136 Mich. 306, 99 N. W. 23; State *v.* Riseling, 186 Mo. 521, 85 S. W. 372; State *v.* Harney, 101 Mo. 470, 14 S. W. 657; Carter *v.* State, 44 Tex. Cr. 312, 70 S. W. 971. See *supra*, I, B, 2, d, (I), (II).

55. People *v.* Dowell, 136 Mich. 306, 99 N. W. 23; Hudson *v.* State, 49 Tex. Cr. 24, 90 S. W. 177; Carter *v.* State, 44 Tex. Cr. 312, 70 S. W. 971. And see *supra*, I, B, 2, e.

56. Hudson *v.* State, 49 Tex. Cr. 24, 90 S. W. 177.

57. See *infra*, I, D.

58. State *v.* Austin, 109 Iowa 118, 80 N. W. 303 (holding that if the woman is too imbecile to resist, any attempt to have carnal knowledge of her is an assault with intent to commit rape); State *v.* Lung, 21 Nev. 209, 28 Pac. 235, 37 Am. St. Rep. 505 (holding that to constitute the crime of attempt to commit rape by the use of constructive force, the accused must have intended to either destroy the woman's power of resistance by the administration of liquors or drugs, or else to take advantage of the fact that she was already in a condition in which either the mental or physical ability to resist was wanting); State *v.* Crow, 1 Ohio Dec. (Reprint) 586, 10 West. L. J. 501 (insane or idiotic female). See *supra*, I, A, 2, f, (III).

Woman drugged.— Under the Texas statute to attempt to have intercourse with a woman by administering without her consent any substance producing unnatural sexual desire, or such stupor as prevents or weakens resistance, is an attempt to rape by fraud, and not an assault with intent to rape, which can only be committed by force or attempted force; and it is not competent to indict in such case for assault with intent to rape and convict of attempt to rape by fraud. Ford *v.* State, 41 Tex. Cr. 270, 53 S. W. 846, 96 Am. St. Rep. 787 (administering chloroform); Milton *v.* State, 23 Tex. App. 204, 4 S. W. 574 (chloroform).

59. See *supra*, I, A, 2, f, (III).

60. People *v.* Quin, 50 Barb. (N. Y.) 128, holding that, since having carnal connection

i. Threats and Fear. An assault with intent to commit rape cannot be made by mere threats, without any force or attempted force amounting to an assault; [61] but an attempt to commit rape may be made by threats.[62]

j. Fraud. An attempt to have intercourse with a woman by fraud, or an assault with such intent, is an attempt or, in most jurisdictions, an assault with intent to rape, provided that the circumstances are such that the intercourse would constitute rape,[63] but not otherwise.[64]

k. Abandonment of Purpose. If the accused had at any time during the assault the actual intent to accomplish his purpose in defiance of any resistance the woman might make he is guilty of assault with intent to commit rape, and the subsequent abandonment of his purpose is no defense.[65] Voluntary abandonment of purpose may be shown and considered, however, as bearing on his intent.[66]

C. Principals and Accessaries. All persons present aiding and abetting

with a woman intoxicated to the point of insensibility was not rape under the New York statute, one who administered liquor to a woman, which produced a stupor and insensibility, intending to have intercourse with her in such condition, could not be convicted of assault with intent to rape.

Administering cantharides to excite a woman's sexual desire and thus induce her to consent to intercourse is not an attempt to rape. State *v.* Lung, 21 Nev. 209, 28 Pac. 235, 37 Am. St. Rep. 505. See also Bechtelheimer *v.* State, 54 Ind. 128.

Woman asleep.— By the weight of authority it is rape to have sexual intercourse with a woman while she is asleep, since the act is without her consent, and an attempt to have intercourse with a woman asleep is therefore an attempt to rape or assault with intent to rape. Maupin *v.* State, (Ark. 1890) 14 S. W. 924; Harvey *v.* State, 53 Ark. 425, 14 S. W. 645, 22 Am. St. Rep. 229 [*overruling* Charles *v.* State, 11 Ark. 389] (a case, however, of burglary with intent to rape); Reg. *v.* Mayers, 12 Cox C. C. 311. And see *supra*, I, A, 2, f, (III). *Contra*, Com. *v.* Fields, 4 Leigh (Va.) 648, not assault with intent to rape. Under the Texas statute, however, where an assault with intent to rape can only be committed by force or attempted force, it seems that to attempt to have intercourse with a woman asleep is not an assault with intent to rape, where there is no intent to use force to overcome resistance. Saddler *v.* State, 12 Tex. App. 194. And see King *v.* State, 22 Tex. App. 650, 3 S. W. 342. But an attempt to have intercourse with a woman while she is asleep is punishable as an attempt to rape. See Payne *v.* State, 40 Tex. Cr. 202, 49 S. W. 604, 76 Am. St. Rep. 712; Pen. Code, art. 640.

61. Cox *v.* State, (Tex. Cr. App. 1898) 44 S. W. 157; Burney *v.* State, 21 Tex. App. 565, 1 S. W. 458.

62. Burney *v.* State, 21 Tex. App. 565, 1 S. W. 458. See *supra*, I, A, 2, f, (V).

63. See State *v.* Nash, 109 N. C. 824, 13 S. E. 874; Reg. *v.* Rosinski, 1 Moody C. C. 19; and *supra*, I, A, 2, f, (VI).

Under the Texas statute, however, an attempt to have intercourse with a woman by administering any substance producing unnatural sexual desire or such stupor as prevents or weakens resistance, like cantharides or chloroform, is an attempt to rape by fraud, but not an assault with intent to rape, which can only be committed by force or attempted force. Ford *v.* State, 41 Tex. Cr. 270, 53 S. W. 846, 96 Am. St. Rep. 787; Milton *v.* State, 23 Tex. App. 204, 4 S. W. 574; Burney *v.* State, 21 Tex. App. 565, 1 S. W. 458.

64. State *v.* Lung, 21 Nev. 209, 28 Pac. 235, 37 Am. St. Rep. 505 (holding that an attempt to have sexual intercourse with a woman by fraud inducing her consent to the intercourse, as by administering cantharides to excite her sexual desire, is not an attempt to rape); State *v.* Brooks, 76 N. C. 1 (holding that having connection with a woman by personating her husband was not rape, and therefore that one attempting to do so could not be convicted of assault with intent to commit rape).

If a physician with intent to procure sexual intercourse with a female patient without her knowing the nature of the act, but thinking he is treating her professionally, takes steps toward securing such intercourse he is guilty of an attempt to rape, or, if an assault is committed, of an assault with intent to commit rape; but if he merely takes indecent liberties with a woman attempting to get her consent he is guilty of simple assault only. State *v.* Nash, 109 N. C. 824, 13 S. E. 874; Reg. *v.* Rosinski, 1 Moody C. C. 19.

65. *Alabama.*— Lewis *v.* State, 35 Ala. 380.

California.— People *v.* Johnson, 131 Cal. 511, 63 Pac. 842; People *v.* Stewart, 97 Cal. 238, 32 Pac. 8.

Delaware.— State *v.* Smith, 9 Houst. 588, 33 Atl. 441.

Georgia.— Taylor *v.* State, 50 Ga. 79.

North Carolina.— State *v.* Mehaffey, 132 N. C. 1062, 44 S. E. 107; State *v.* Williams, 121 N. C. 628, 28 S. E. 405.

Virginia.— Glover *v.* Com., 86 Va. 382, 10 S. E. 420.

66. Lewis *v.* State, 35 Ala. 380.

another in the commission of rape are guilty as principals in the second degree and punishable equally with the actual perpetrator of the crime.[67] One who assists, procures, or counsels another to commit rape and is absent when it is committed is guilty as an accessary before the fact.[68] A husband who aids, abets, procures, or counsels another to commit rape on his wife may be convicted of rape as principal in the second degree or accessary before the fact, according to the circumstances,[69] although he could not be guilty as principal in the first degree.[70] In like manner a woman may be guilty if she procures, counsels, or aids a man to commit rape on another woman;[71] and a boy who is too young to commit rape may be convicted as principal in the second degree.[72] One who assists, procures, counsels, aids, or abets another to attempt to commit rape, or to commit an assault with intent to rape, is a principal in the second degree if present, or accessary before the fact if absent, where the attempt or assault is a felony.[73] If it is a misdemeanor only, as at common law, he or she is guilty as principal, whether

67. *Arkansas.*—Dennis *v.* State, 5 Ark. 230.
Illinois.— Ackerson *v.* People, 124 Ill. 563, 16 N. E. 847.
Iowa.— State *v.* McIntire, 66 Iowa 339, 23 N. W. 735.
Kentucky.— Kessler *v.* Com., 12 Bush 18; Clymer *v.* Com., 64 S. W. 409, 23 Ky. L. Rep. 1041.
Louisiana.— State *v.* Williams, 32 La. Ann. 335, 36 Am. Rep. 272.
Michigan.— People *v.* Flynn, 96 Mich. 276, 65 N. W. 834; Strange *v.* People, 24 Mich. 1.
Missouri.— State *v.* Sykes, 191 Mo. 62, 89 S. W. 851; State *v.* Harris, 150 Mo. 56, 51 S. W. 481; State *v.* Duffy, 124 Mo. 1, 27 S. W. 358.
New York.— People *v.* Batterson, 50 Hun 44, 2 N. Y. Suppl. 376, 6 N. Y. Cr. 173. See also People *v.* Satterlee, 5 Hun 167; People *v.* Bowles, 3 N. Y. Cr. 447.
North Carolina.— State *v.* Jordan, 110 N. C. 491, 14 S. E. 752; State *v.* Jones, 83 N. C. 605, 35 Am. Rep. 586.
Texas.— Caruth *v.* State, (Cr. App. 1894) 25 S. W. 778, 28 S. W. 532.
Virginia.— Law *v.* Com., 75 Va. 885, 40 Am. Rep. 750.
United States.— Keenan *v.* U. S., 30 Fed. Cas. No. 18,305, 2 Hayw. & H. 341.
See 42 Cent. Dig. tit. "Rape," § 22.
Insane female.— One who knows that a woman is insane and who aids one who does not know of her insanity to commit rape on her is guilty of rape although, under this statute, the actual perpetrator is not guilty. Caruth *v.* State, (Tex. Cr. App. 1894) 25 S. W. 778, 28 S. W. 532.
The aiding and abetting.— To render one guilty he must do something to aid or abet. A person who stands by, when an attempt is made by others to commit a rape, but does no act to aid, assist, or abet its commission, is not guilty of an attempt to commit a rape. People *v.* Woodward, 45 Cal. 293, 13 Am. Rep. 176. See also Caruth *v.* State, (Tex. Cr. App. 1894) 28 S. W. 532. In a late Missouri case it was said that where one who is unknown to a woman and to a third person merely stands by and sees such third person ravish the woman without attempting to prevent it, he is guilty of rape as a principal in the second degree. State *v.* Sykes, 191 Mo. 62, 89 S. W. 851. This *dictum*, however, is not the law. People *v.* Woodward, *supra*. And see CRIMINAL LAW, 12 Cyc. 187.

68. State *v.* Comstock, 46 Iowa 265; Rex *v.* Lord Baltimore, 4 Burr. 2179. And see CRIMINAL LAW, 12 Cyc. 190. In State *v.* Sykes, 191 Mo. 62, 82, 89 S. W. 851, a person who was present was spoken of as an accessary before the fact, but this is clearly erroneous. If he was present he was a principal in the second degree, not an accessary. See Rex *v.* Lord Baltimore, *supra*; and CRIMINAL LAW, 12 Cyc. 185, 190.

69. *Iowa.*— State *v.* Comstock, 46 Iowa 265.
Louisiana.— State *v.* Haines, 51 La. Ann. 731, 25 So. 372, 44 L. R. A. 837.
Massachusetts.— Com. *v.* Murphy, 2 Allen 163; Com. *v.* Fogerty, 8 Gray 489, 69 Am. Dec. 264.
Michigan.— People *v.* Chapman, 62 Mich. 280, 28 N. W. 896, 4 Am. St. Rep. 857; Strang *v.* People, 24 Mich. 1.
North Carolina.—State *v.* Dowell, 106 N. C. 722, 11 S. E. 525, 19 Am. St. Rep. 568, 8 L. R. A. 297.
England.— Reg. *v.* Crisham, 1 C. & M. 187, 41 E. C. L. 106; Rex *v.* Gray, 7 C. & P. 164, 32 E. C. L. 553; Audley's Case, 3 How. St. Tr. 401, 1 Hale P. C. 629.

70. See *supra*, I, A, 2, c.

71. Kessler *v.* Com., 12 Bush (Ky.) 18; State *v.* Williams, 32 La. Ann. 335, 36 Am. Rep. 272; State *v.* Hairston, 121 N. C. 579, 28 S. E. 492; State *v.* Jones, 83 N. C. 605, 35 Am. Rep. 586; Rex *v.* Lord Baltimore, 4 Burr. 2179; Reg. *v.* Ram, 17 Cox C. C. 609.
A female under the age of consent who incites or solicits a male to have intercourse with her cannot be convicted as aiding and abetting. Reg. *v.* Tyrrell, [1894] 1 Q. B. 710, 17 Cox C. C. 716, 63 L. J. M. C. 58, 70 L. T. Rep. N. S. 41, 10 Reports 82, 42 Wkly. Rep. 255.

72. Law *v.* Com., 75 Va. 885, 40 Am. Rep. 750. And see Reg. *v.* Eldershaw, 3 C. & P. 396, 14 E. C. L. 628.

73. State *v.* McIntire, 66 Iowa 339, 23 N. W. 735; Law *v.* Com., 75 Va. 885, 40 Am. Rep. 750.
Mere presence without any aiding or abetting is not enough to render one liable. Peo-

present or absent, since all who participate in misdemeanors are principals.[74] If a husband aids another in an attempt to ravish his wife he is guilty of assault with intent to commit rape.[75]

D. Miscellaneous Defenses.[76] On a prosecution for rape it is no defense that the female consented after penetration, or that she has since condoned the offense or settled with the accused,[77] or that she has married him.[78] Nor, in a prosecution for carnal knowledge of a female under the age of consent, is it any defense that the accused did not know that she was under such age, or that he had been informed by her or others and believed that she was over such age.[79] Drunkenness of the accused is no defense in an indictment for rape if it was in fact committed;[80] but it may be shown and considered in determining whether he was impotent,[81] or, on a prosecution for attempt or assault with intent to rape, in determining whether he was capable of entertaining the necessary specific intent.[82]

ple *v.* Woodward, 45 Cal. 293, 13 Am. Rep. 176; and *supra*, note 67.

A woman who acts as procuress and furnishes a room where a man and a girl under the age of consent may indulge in sexual intercourse may no doubt be convicted as principal in the second degree or accessary before the fact if the intercourse takes place; but it has been held that where the girl refuses to submit to intercourse and the man, against her will, takes liberties with her person, the woman cannot be convicted with him of an assault, if she was not present aiding and abetting the assault, and did not know that the man would attempt to gratify his desire upon the person of the girl against her will. State *v.* Jackson, 65 N. J. L. 105, 46 Atl. 764. The soundness of this decision is at least doubtful in view of the principle that an accessary is liable for any criminal act which, in the ordinary course of things, was the natural or probable consequence of the crime he advised or counseled, although such consequence may not have been intended by him. See CRIMINAL LAW, 12 Cyc. 191.

74. State *v.* Jones, 83 N. C. 605, 35 Am. Rep. 586.

75. State *v.* Boyland, 24 Kan. 186; State *v.* Dowell, 106 N. C. 722, 11 S. E. 525, 19 Am. St. Rep. 568, 8 L. R. A. 297.

76. Ignorance of insanity or imbecility see *supra*, I, A, 2, f, (III).

77. *Idaho.*— State *v.* Fowler, 13 Ida. 317, 89 Pac. 757.

Kansas.— State *v.* Newcomer, 59 Kan. 668, 54 Pac. 685.

Massachusetts.— Com. *v.* Slattery, 147 Mass. 423, 18 N. E. 399.

Missouri.— State *v.* Welch, 191 Mo. 179, 89 S. W. 945; State *v.* Harris, 150 Mo. 56, 51 S. W. 481; State *v.* Hammond, 77 Mo. 157.

Texas.— Smith *v.* State, 44 Tex. Cr. 137, 68 S. W. 995, 100 Am. St. Rep. 849, 73 S. W. 401.

And see CRIMINAL LAW, 12 Cyc. 161.

78. State *v.* Newcomer, 59 Kan. 668, 54 Pac. 685. See State *v.* Evans, 138 Mo. 116, 39 S. W. 462, 60 Am. St. Rep. 549.

79. *California.*— People *v.* Ratz, 115 Cal. 132, 46 Pac. 915.

Iowa.— State *v.* Sherman, 106 Iowa 684, 77 N. W. 461; State *v.* Newton, 44 Iowa 45.

Massachusetts.— Com. *v.* Murphy, 165 Mass. 66, 42 N. E. 504, 52 Am. St. Rep. 496, 30 L. R. A. 734.

Texas.— Robertson *v.* State, 51 Tex. Cr. 493, 102 S. W. 1130; Smith *v.* State, (Cr. App. 1903) 73 S. W. 401, 44 Tex. Cr. 137, 68 S. W. 995, 100 Am. St. Rep. 849. It is no defense that defendant used reasonable care to ascertain her age and was informed that she was of age. Manning *v.* State, 43 Tex. Cr. 302, 65 S. W. 920, 96 Am. St. Rep. 873. It is no defense if accused was told by his victim that she was above the required age. Davis *v.* State, 42 Tex. 226; Eden *v.* State, (Cr. App. 1897) 43 S. W. 89.

Virginia.— Lawrence *v.* Com., 30 Gratt. 845.

80. Nugent *v.* State, 18 Ala. 521; State *v.* Truitt, 5 Pennew. (Del.) 466, 62 Atl. 790; State *v.* Murphy, 118 Mo. 7, 25 S. W. 95. And see CRIMINAL LAW, 12 Cyc. 170. *Compare* People *v.* Murray, 72 Mich. 10, 40 N. W. 29, holding that, while the intoxicated condition of the accused at the time of the commission of an alleged rape cannot furnish any legal excuse for what he did, it has an important bearing upon his turpitude and the quality of his crime, and should have an important influence in determining the extent of the punishment to be inflicted.

81. See *supra*, I, A, 2, c, note 24.

82. *Alabama.*— Whitten *v.* State, 115 Ala. 72, 22 So. 483.

Delaware.— State *v.* Truitt, 5 Pennew. 466, 62 Atl. 790.

Iowa.— State *v.* Donovan, 61 Iowa 369, 16 N. W. 206.

Nebraska.— Head *v.* State, 43 Nebr. 30, 61 N. W. 494.

Texas.— Reagan *v.* State, 28 Tex. App. 227, 12 S. W. 601, 19 Am. St. Rep. 833.

And see CRIMINAL LAW, 12 Cyc. 172.

Contra, under the present statute in Texas, see Crew *v.* State, (Tex. Cr. App. 1893) 23 S. W. 14; Pen. Code, art. 41.

When no defense.— Where defendant, at the time of the commission of an alleged assault with intent to commit rape, knew what he was doing, and was able to appreciate the character of his act, and knew

II. PROSECUTION AND PUNISHMENT.

A. Indictment and Information — 1. NAME AND DESCRIPTION OF DEFENDANT. An indictment or information for rape, or for attempt or assault with intent to rape, is subject to the general rules as to the description of the accused.[83] It need not allege his sex;[84] nor, as a rule, is it necessary to allege his age or physical capacity to commit the crime, as want of age and capacity is a matter of defense.[85] In some states where the age of the male is fixed by the statute making all intercourse with a female under a certain age rape it is held necessary to allege and prove the age of the accused,[86] while in others such allegation is held to be unnecessary.[87] If defendant is called by two names he may be indicted in either.[88]

2. NAME AND DESCRIPTION OF FEMALE[89] — a. In General. According to well settled principles which govern criminal pleadings, the indictment or information must correctly state the christian name and surname of the female raped or assaulted, or show that they are unknown.[90] If the essentials of the offense are charged it is sufficient without repetition of the name of the female in the latter part of the charge.[91] The indictment or information need not allege that the female raped or assaulted was of the human species,[92] that she was a person in being,[93] that she was a female child or woman, if the other words show the sex,[94]

that it was unlawful and wrongful, his drunkenness was no defense. State *v.* Truitt, 5 Pennew. (Del.) 466, 62 Atl. 790.

83. See INDICTMENTS AND INFORMATIONS, 22 Cyc. 322.

84. *Arkansas.*— Warner *v.* State, 54 Ark. 660, 17 S. W. 6.

California.— People *v.* Wessell, 98 Cal. 352, 33 Pac. 216.

Mississippi.— Brown *v.* State, 72 Miss. 997, 17 So. 278.

North Carolina.— State *v.* Tom, 47 N. C. 414.

Texas.— Taylor *v.* State, 50 Tex. Cr. 362, 97 S. W. 94, 123 Am. St. Rep. 844; Cornelius *v.* State, 13 Tex. App. 349; Greenlee *v.* State, 4 Tex. App. 345.

Utah.— State *v.* Williamson, 22 Utah 248, 62 Pac. 1022, 83 Am. St. Rep. 780.

See 42 Cent. Dig. tit. "Rape," §§ 25, 39.

85. *California.*— People *v.* Wessel, 98 Cal. 352, 33 Pac. 216; People *v.* Ah Yek, 29 Cal. 575.

Illinois.— Johnson *v.* People, 202 Ill. 53, 66 N. E. 877; Sutton *v.* People, 145 Ill. 279, 34 N. E. 420.

Massachusetts.— Com. *v.* Scannel, 11 Cush. 547.

Minnesota.— State *v.* Ward, 35 Minn. 182, 28 N. W. 192.

Nebraska.— Hall *v.* State, 40 Nebr. 320, 58 N. W. 929.

Oregon.— State *v.* Knighten, 39 Oreg. 63, 64 Pac. 866, 87 Am. St. Rep. 647.

Texas.— Davis *v.* State, 42 Tex. 226; Word *v.* State, 12 Tex. App. 174.

Washington.— State *v.* Dunlap, 25 Wash. 292, 65 Pac. 544.

See 42 Cent. Dig. tit. "Rape," §§ 25, 39.

86. Schramm *v.* People, 220 Ill. 16, 77 N. E. 117 [*distinguishing* Johnson *v.* People, 202 Ill. 53, 66 N. E. 877; Sutton *v.* People, 145 Ill. 279, 34 N. E. 420]; Wistrand *v.* People, 213 Ill. 72, 72 N. E. 748; Hubert *v.* State, 74 Nebr. 220, 104 N. W. 276, 106 N. W. 774. And see State *v.* Hall, 164 Mo. 528, 65 S. W. 248.

87. State *v.* Knighten, 39 Oreg. 63, 64 Pac. 866, 87 Am. St. Rep. 647; State *v.* Sullivan, 68 Vt. 540, 35 Atl. 479.

In Indiana, under Burns' Annot. St. (1908) § 2250, punishing one who has carnal knowledge of a female child under sixteen years of age, and punishing one being over seventeen years of age who has carnal knowledge of an insane woman, etc., an indictment for rape on a female child under sixteen years is not bad for failing to allege that accused was over the age of seventeen. Cheek *v.* State, (Ind. 1908) 85 N. E. 779.

88. Taylor *v.* Com., 20 Gratt. (Va.) 825. See INDICTMENTS AND INFORMATIONS, 22 Cyc. 322.

89. Chastity see *infra*, II, A, 3, a, (VI).

Surplusage see *infra*, II, A, 3, b, (III), 4.

90. State *v.* Johnson, 67 N. C. 55. See INDICTMENTS AND INFORMATIONS, 22 Cyc. 348.

The name by which she is usually known is sufficient. State *v.* Johnson, 67 N. C. 55. See INDICTMENTS AND INFORMATIONS, 22 Cyc. 350.

Christian names usually considered the equivalent of each other may be used interchangeably. Wilkey *v.* Com., 104 Ky. 325, 47 S. W. 219, 20 Ky. L. Rep. 578 ("Jennie" and "Jane"); State *v.* Johnson, 67 N. C. 55 ("Susan" and "Susannah").

91. Proctor *v.* Com., 20 S. W. 213, 14 Ky. L. Rep. 248; Com. *v.* Hunt, 4 Pick. (Mass.) 252; Whitcher *v.* State, 2 Wash. 286, 26 Pac. 268. But see Toulet *v.* State, 100 Ala. 72, 14 So. 403; Nugent *v.* State, 19 Ala. 540.

92. Anderson *v.* State, 34 Ark. 257; State *v.* Ward, 35 Minn. 182, 28 N. W. 192; State *v.* Tom, 47 N. C. 414.

93. Greenlee *v.* State, 4 Tex. App. 345.

94. *Arkansas.*— Warner *v.* State, 54 Ark. 660, 17 S. W. 6.

Georgia.— Joice *v.* State, 53 Ga. 50.

or that she was a married woman.[95] Nor, as a rule, is it necessary to allege in express terms that the woman was not the wife of the accused.[96] Where, however, the statute expressly makes it part of the offense that the female is not the wife of the accused, it is held in some states that the indictment or information must allege that she was not his wife.[97] Whether it is necessary to negative the relationship of daughter or sister depends upon the statute.[98]

Iowa.— State *v.* Hussey, 7 Iowa 409.
Kansas.— Tillson *v.* State, 29 Kan. 452.
Missouri.— State *v.* Warner, 74 Mo. 83.
North Carolina.— State *v.* Farmer, 26 N. C. 224.
Texas.— Robertson *v.* State, 31 Tex. 36; Battle *v.* State, 4 Tex. App. 595, 30 Am. Rep. 169.
West Virginia.— State *v.* Barrick, 60 W. Va. 576, 55 S. E. 652.
See 42 Cent. Dig. tit. "Rape," §§ 26, 39.

Use of word "she" or "her."— If the name of the person alleged to have been ravished is that of a female person, the pronoun "she" or "her" used in further identification sufficiently alleges that the person is a woman. Warner *v.* State, 54 Ark. 660, 17 S. W. 6; Barker *v.* State, 40 Fla. 178, 24 So. 69; State *v.* Hussey, 7 Iowa 409; State *v.* Miller, 191 Mo. 587, 90 S. W. 767; State *v.* Armstrong, 167 Mo. 257, 66 S. W. 961; State *v.* Hammond, 77 Mo. 157; State *v.* Warner, 74 Mo. 83; State *v.* Farmer, 26 N. C. 224; State *v.* Terry, 20 N. C. 289; Hill *v.* State, 3 Heisk. (Tenn.) 317; Taylor *v.* Com., 20 Gratt. (Va.) 825. See 42 Cent. Dig. tit. "Rape," § 26.

If she is described as a female, it is clearly sufficient. Myers *v.* State, 84 Ala. 11, 4 So. 291; Gibson *v.* State, 17 Tex. App. 574; O'Rourke *v.* State, 8 Tex. App. 70.

An indictment for carnally knowing and abusing a "female" child under the age of ten, instead of a "woman" child, as in the statute, is not bad after verdict. Com. *v.* Bennet, 2 Va. Cas. 235.

95. State *v.* Hooks, 69 Wis. 182, 33 N. W. 57, 2 Am. St. Rep. 728.

96. *Arkansas.*— Hust *v.* State, 77 Ark. 146, 91 S. W. 8; Garner *v.* State, 73 Ark. 487, 84 S. W. 623.
California.— People *v.* Estrada, 53 Cal. 600.
Kansas.— State *v.* White, 44 Kan. 514, 25 Pac. 33.
Kentucky.— Com. *v.* Landis, 112 S. W. 581, 33 Ky. L. Rep. 983.
Massachusetts.— Com. *v.* Murphy, 2 Allen 163; Com. *v.* Fogerty, 8 Gray 489, 69 Am. Dec. 264; Com. *v.* Scannel, 11 Cush. 547.
Montana.— State *v.* Williams, 9 Mont. 179, 23 Pac. 335.
Ohio.— Williams *v.* State, Wright 42.
Texas.— Belcher *v.* State, 39 Tex. Cr. 121, 44 S. W. 519; Caidenas *v.* State, (Cr. App. 1897) 40 S. W. 980.
Utah.— State *v.* Williamson, 22 Utah 248, 62 Pac. 1022, 83 Am. St. Rep. 780.
Washington.— State *v.* Halbert, 14 Wash. 306, 44 Pac. 538.
See 42 Cent. Dig. tit. "Rape," §§ 26, 39.

97. Parker *v.* Territory, 9 Okla. 109, 59 Pac. 9; Young *v.* Territory, 8 Okla. 525, 58 Pac. 724; Dudley *v.* State, 37 Tex. Cr. 543, 40 S. W. 269; Edwards *v.* State, 37 Tex. Cr. 242, 38 S. W. 996, 39 S. W. 368; Bice *v.* State, 37 Tex. Cr. 38, 38 S. W. 803; Rice *v.* State, 37 Tex. Cr. 36, 38 S. W. 801. *Contra,* State *v.* Williams, 9 Mont. 179, 23 Pac. 335. *Compare* Rex *v.* Wright, 11 Can. Cr. Cas. 221, 39 Nova Scotia 103, holding that if such an allegation was necessary its omission could have been remedied under the statute by amendment, and the defect was waived by failure to object before pleading to the indictment.

In Texas an indictment for rape on a female over fifteen years of age and not mentally diseased need not allege that she was not the wife of the accused. Belcher *v.* State, 39 Tex. Cr. 121, 44 S. W. 1106; Caidenas *v.* State, (Cr. App. 1897) 40 S. W. 980. But such allegation is necessary where she was under that age or mentally diseased. See the cases cited *supra,* this note.

Sufficient allegation.—An indictment alleging that defendant on a certain day had intercourse with H, a female under sixteen years of age, "and not the wife of defendant," unequivocally alleges that the female was not the wife of defendant at the time of the commission of the offense. People *v.* Miller, (Cal. 1904) 78 Pac. 227.

98. In Nebraska, the criminal code describes three distinct crimes. Section 11 makes it a crime for any person to have carnal knowledge of his daughter or sister forcibly and against her will. Section 12, by the first clause, punishes the act of having forcible carnal knowledge of any woman or female child other than a daughter or sister, and by the second clause punishes sexual intercourse with a female under eighteen years of age without force and with her consent. It is held that in charging the offense under said second clause it is not necessary to allege that the female was not the daughter or sister of the accused, as the crime is committed whether she is or is not. Edwards *v.* State, 69 Nebr. 386, 95 N. W. 1038; George *v.* State, 61 Nebr. 669, 85 N. W. 840.

In Ohio it was held that the crime of having "carnal knowledge of his daughter or sister, forcibly and against her will," as defined in section 4 of the act of March 7, 1835, and the crime of having "carnal knowledge of any other woman or female child than his daughter or sister, as aforesaid, forcibly and against her will," as defined in section 5 were distinct crimes, and that in charging the latter crime it was necessary to allege that the female was not the daughter or sister of the accused. Howard *v.* State, 11 Ohio St. 328. But under the present statute (Rev. St. § 6816) de-

b. Age. An indictment for carnal knowledge of a female under the age of consent must show that she was under such age;[99] but when force or want of consent is alleged, it is not necessary to allege or prove that the female was over the age of consent.[1]

3. Description of Offense[2] **— a. Rape — (I)** *In General.* An indictment or information for rape is subject of course to all the rules governing indictments and informations generally, which have been fully treated elsewhere.[3] It must allege with certainty every fact and circumstance necessary to constitute the offense charged.[4] An indictment for statutory rape is sufficient if it describes the offense in the language of the statute,[5] provided the statute states all the essential elements, but not otherwise.[6] But failure to follow the language of the statute is not fatal, if equivalent language is used.[7] If a form of indictment is

claring guilty of rape any person who "has carnal knowledge of a female person forcibly and against her will; or being eighteen years of age, carnally knows and abuses a female child under fourteen years of age with her consent," such an allegation is held unnecessary, although section 6817 prescribes a higher punishment when the rape is committed upon a daughter or sister than when it is committed upon a woman not so related. Jones *v.* State, 54 Ohio St. 1, 42 N. E. 699. See also Williams *v.* State, Wright 42.

99. See *infra*, II, A, 3, a, (VI).

1. *Connecticut.*— State *v.* Gaul, 50 Conn. 578.

Kentucky.— Jones *v.* Com., 124 Ky. 26, 97 S. W. 1118, 30 Ky. L. Rep. 288; Webb *v.* Com., 99 S. W. 909, 30 Ky. L. Rep. 841; McLaughlin *v.* Com., 35 S. W. 1030, 18 Ky. L. Rep. 205.

Massachusetts.—Com. *v.* Sugland, 4 Gray 7.

Mississippi.—Mobley *v.* State, 46 Miss. 501.

Missouri.— State *v.* Houx, 109 Mo. 654, 19 S. W. 35, 32 Am. St. Rep. 686.

New York.— People *v.* Draper, 28 Hun 1.

North Carolina.— State *v.* Storkey, 63 N. C. 7; State *v.* Farmer, 26 N. C. 224.

South Carolina.— State *v.* Haddon, 49 S. C. 308, 27 S. E. 194.

See 42 Cent. Dig. tit. "Rape," § 27.

2. Form of indictment or information for rape by force see People *v.* Snyder, 75 Cal. 323, 17 Pac. 208; Barker *v.* State, 40 Fla. 178, 179, 24 So. 69; Com. *v.* Sugland, 4 Gray (Mass.) 7; State *v.* Harris, 150 Mo. 56, 60, 51 S. W. 481; State *v.* Johnson, 100 N. C. 494, 495, 6 S. E. 61; Cornelius *v.* State, 13 Tex. App. 349, 352.

Indictment or information for rape by force held sufficient see State *v.* Braden, 111 La. 91, 35 So. 405; State *v.* Goodale, 210 Mo. 275, 109 S. W. 9; State *v.* Harris, 150 Mo. 56, 51 S. W. 481; Cornelius *v.* State, 13 Tex. App. 349.

3. See Indictments and Informations, 22 Cyc. 157.

4. *Alabama.*— Sims *v.* State, 146 Ala. 109, 41 So. 413.

Arizona.— Trimble *v.* Territory, 8 Ariz. 281, 71 Pac. 934.

Louisiana.— State *v.* Porter, 48 La. Ann. 1539, 21 So. 125.

Minnesota.— State *v.* Vorey, 41 Minn. 134, 43 N. W. 324.

Nebraska.— Huhert *v.* State, 74 Nebr. 220, 104 N. W. 276, 106 N. W. 774.

North Carolina.— State *v.* Marsh, 132 N. C. 1000, 43 S. E. 828, 67 L. R. A. 179; State *v.* Jim, 12 N. C. 142.

Texas.— Brinster *v.* State, 12 Tex. App. 612, "did rape" insufficient.

See Indictments and Informations, 22 Cyc. 326.

Charging principal in second degree.—An indictment charging that defendant, a woman, made an assault on one S, "and did aid, abet, and assist one W T to unlawfully and feloniously ravish and carnally know her, the said S, and to unlawfully and feloniously accomplish an act of sexual intercourse with said S, she not being his wife," was held insufficient, on the ground that it failed to allege that W in fact committed the crime of rape. Trimble *v.* Territory, 8 Ariz. 281, 71 Pac. 934.

5. *Arkansas.*— Pleasant *v.* State, 13 Ark. 360.

California.— People *v.* Rangod, 112 Cal. 669, 44 Pac. 1071; People *v.* Girr, 53 Cal. 629; People *v.* Burke, 34 Cal. 661.

Florida.— Holton *v.* State, 28 Fla. 303, 9 So. 716.

Kansas.— State *v.* White, 44 Kan. 514, 25 Pac. 33.

Minnesota.— State *v.* Ward, 35 Minn. 182, 28 N. W. 192.

Missouri.— State *v.* Meinhart, 73 Mo. 562.

New York.— People *v.* Flaherty, 79 Hun 48, 29 N. Y. Suppl. 641 [*affirmed* in 145 N. Y. 597, 40 N. E. 164].

Utah.— State *v.* Williamson, 22 Utah 248, 62 Pac. 1022, 83 Am. St. Rep. 768.

Virginia.— Smith *v.* Com., 85 Va. 924, 9 S. E. 148.

Wyoming.— Tway *v.* State, 7 Wyo. 74, 50 Pac. 188.

See Indictments and Informations, 22 Cyc. 339.

6. State *v.* Williamson, 22 Utah 248, 62 Pac. 1022, 83 Am. St. Rep. 780. See Indictments and Informations, 22 Cyc. 339.

7. *California.*— People *v.* Girr, 53 Cal. 629.

Connecticut.— State *v.* Gaul, 50 Conn. 578.

Indiana.— Weinzorpflin *v.* State, 7 Blackf. 186.

Texas.— Williams *v.* State, 1 Tex. App. 90, 28 Am. Rep. 399.

given by statute it is sufficient to follow it, if the facts necessary to constitute the offense are thereby charged;[8] otherwise not.[9] Where an indictment for rape follows the usual form and is in substance sufficiently specific to put defendant fairly on trial for the offense charged, it is good.[10] If all essential facts are charged mere technical and grammatical or clerical errors which cannot prejudice defendant will not be fatal, and mere surplusage will be ignored.[11]

(II) *ASSAULT.* It has been held that in an indictment for rape it is not necessary to allege an assault,[12] but such an allegation is usual and proper, and without it there can be no conviction of assault with intent to rape.[13]

(III) *CARNAL KNOWLEDGE OR ABUSE.* An indictment for rape, or for carnal knowledge and abuse of a female under the age of consent, must allege carnal knowledge by the use of those words or their equivalent.[14] An indictment charging that defendant had carnal knowledge of the female forcibly and against her will is not bad for failure to specify more fully the particular manner in which such carnal knowledge was had.[15]

(IV) *"RAVISH;" FORCE AND WANT OF CONSENT.* Although it is now otherwise in some states,[16] it was necessary at common law, and is still necessary in some states, that an indictment for rape use the word "ravish"[17] and the words

Utah.— State *v.* Delvecchio, 25 Utah 18, 69 Pac. 58.

Wisconsin.—Barnard *v.* State, 88 Wis. 656, 60 N. W. 1058; State *v.* Mueller, 85 Wis. 203, 55 N. W. 165.

See INDICTMENTS AND INFORMATIONS, 22 Cyc. 336.

Equivalent language must be used. State *v.* Martin, 14 N. C. 329.

8. McGuff *v.* State, 88 Ala. 147, 7 So. 35, 16 Am. St. Rep. 25; Beason *v.* State, 72 Ala. 191; Bradford *v.* State, 54 Ala. 230; Johnson *v.* State, 50 Ala. 456; Leoni *v.* State, 44 Ala. 110; O'Connell *v.* State, 6 Minn. 279; Cooper *v.* State, 22 Tex. App. 419, 3 S. W. 334. See INDICTMENTS AND INFORMATIONS, 22 Cyc. 285.

9. Brinster *v.* State, 12 Tex. App. 612. *Compare* O'Connell *v.* State, 6 Minn. 279. See INDICTMENTS AND INFORMATIONS, 22 Cyc. 285.

10. Mitchell *v.* Com., 89 Va. 826, 17 S. E. 480.

11. *Arkansas.*— Downs *v.* State, 60 Ark. 521, 31 S. W. 149, "upon" used once too often.

Indiana.— Whitney *v.* State, 35 Ind. 503, "did" not repeated before the words "ravish and carnally know."

Iowa.— State *v.* Pennell, 56 Iowa 29, 8 N. W. 686, holding that an indictment for rape charging that defendant "did then and there ravish and carnally know, forcibly against her will, the said E.," etc., was sufficient, as there was no reasonable doubt as to its meaning, although, as punctuated, the words "ravish" and "know" might seem to have no object.

Missouri.— State *v.* Meinhart, 73 Mo. 562.

New York.— People *v.* Flaherty, 79 Hun 48, 29 N. Y. Suppl. 641 [*affirmed* in 145 N. Y. 597, 40 N. E. 164].

South Dakota.— State *v.* Hayes, 17 S. D. 128, 95 N. W. 296.

Texas.— Williams *v.* State, 1 Tex. App. 90, 28 Am. Rep. 399.

See INDICTMENTS AND INFORMATIONS, 22 Cyc. 291.

12. O'Connell *v.* State, 6 Minn. 279; Reg. *v.* Allen, 9 C. & P. 521, 2 Moody C. C. 179, 38 E. C. L. 307.

13. Farrell *v.* State, 54 N. J. L. 416, 24 Atl. 723. And see *infra*, II, A, 3, b.

14. Trimble *v.* Territory, 8 Ariz. 281, 71 Pac. 934; Vickers *v.* U. S., (Okla. Cr. App. 1908) 98 Pac. 467; Fields *v.* State, 39 Tex. Cr. 488, 46 S. W. 814.

Indictment sufficient.—An indictment charging that defendant "did then and there have . . . carnal knowledge of and abuse" the prosecutrix, instead of alleging that he "did carnally know and abuse" her, is sufficient. State *v.* Hunter, 171 Mo. 435, 71 S. W. 675.

"Ravish" equivalent to carnal knowledge. — In defining rape the Texas statute uses the words "carnal knowledge," but where an indictment charged that defendant "did then and there ravish and have carnal of the said A. R.," omitting the word "knowledge" after the word "carnal," it was held that the word "ravish" was equivalent in meaning to "carnal knowledge," and the indictment was sufficient. Fields *v.* State, 39 Tex. Cr. 488, 46 S. W. 814.

15. McMath *v.* State, 55 Ga. 303.

16. See the cases referred to in the notes following.

17. Gouglemann *v.* People, 3 Park. Cr. (N. Y.) 15; State *v.* Marsh, 132 N. C. 1000, 43 S. E. 828, 67 L. R. A. 179; Davis *v.* State, 42 Tex. 226; Gibson *v.* State, 17 Tex. App. 574; Christian *v.* Com., 23 Gratt. (Va.) 954. And see Fields *v.* State, 39 Tex. Cr. 488, 46 S. W. 814; Ross *v.* State, 16 Wyo. 285, 93 Pac. 299, 94 Pac. 217. *Contra*, under statutes see Wilkey *v.* Com., 104 Ky. 325, 47 S. W. 219, 20 Ky. L. Rep. 578; State *v.* Meinhart, 73 Mo. 562; State *v.* Hayes, 17 S. D. 128, 95 N. W. 296; Tway *v.* State, 7 Wyo. 74, 50 Pac. 188.

"Did rape," instead of "did ravish" was

"forcibly and against her will" or their equivalent,[18] except in the case of threats or fraud[19] and where the female was under the age of consent.[20] An allegation that the act was committed by force and violence and against the will of the female is equivalent to stating that she resisted and that her resistance was overcome by violence.[21] The character of the force used need not be specified.[22]

(v) *"Feloniously;" "Unlawfully."* At common law it was necessary for an indictment for rape to allege that the act was committed "feloniously," and this is still necessary in some states;[23] but in other states a statute ren-

held insufficient in Texas. Davis *v.* State, 42 Tex. 226; Hewitt *v.* State, 15 Tex. App. 80.

18. *Maine.*— State *v.* Blake, 39 Me. 322.

Massachusetts.— Com. *v.* Fogarty, 74 Mass. 489, 69 Am. Dec. 264.

Nebraska.— Hubert *v.* State, 74 Nebr. 220, 104 N. W. 276, 106 N. W. 774.

New York.— People *v.* Maxon, 57 Hun 367, 10 N. Y. Suppl. 593.

North Carolina.—State *v.* Marsh, 132 N. C. 1000, 43 S. E. 828, 67 L. R. A. 179; State *v.* Powell, 106 N. C. 635, 11 S. E. 191; State *v.* Johnson, 67 N. C. 55; State *v.* Jim, 12 N. C. 142, "feloniously ravished" not enough.

Oklahoma.— Vickers *v.* U. S., (Cr. App. 1908) 98 Pac. 467.

Pennsylvania.— Mears *v.* Com., 2 Grant 385.

Texas.— Elschlep *v.* State, 11 Tex. App. 301.

"Ravish" as implying force.— In Harman *v.* Com., 12 Serg. & R. (Pa.) 69, it was held sufficient to charge that defendant "feloniously did ravish and carnally know" the female, instead of alleging that the act was committed "forcibly and against her will," as the word "ravish" implies that the act was against her will. And see to the same effect Gibson *v.* State, 17 Tex. App. 574; Walling *v.* State, 7 Tex. App. 625; Williams *v.* State, 1 Tex. App. 90, 28 Am. Rep. 399. See also Fields *v.* State, 39 Tex. Cr. 488, 46 S. W. 814. Other cases, however, are to the contrary. State *v.* Marsh, 132 N. C. 1000, 43 S. E. 828, 67 L. R. A. 179; State *v.* Jim, 12 N. C. 142.

"Violently," instead of "by force" or "forcibly" was held insufficient in Maine. State *v.* Blake, 39 Me. 322. But in other states it has been held equivalent and sufficient. State *v.* Rohn, (Iowa 1909) 119 N. W. 88; State *v.* Williams, 32 La. Ann. 335, 36 Am. Rep. 272; Com. *v.* Fogerty, 8 Gray (Mass.) 489, 69 Am. Dec. 264 ("violently and against her will feloniously did ravish and carnally know," etc., held sufficient); Gutierrez *v.* State, 44 Tex. 587; Walling *v.* State, 7 Tex. App. 625; State *v.* Mueller, 85 Wis. 203, 55 N. W. 165. See also State *v.* Johnson, 67 N. C. 55, holding sufficient an indictment for rape which charged that the assault was violent and felonious, and that the ravishing was felonious and against the will of the female.

"Violently, and by force and threats, and against her will, did ravish and carnally know," etc., was held sufficient. Cornelius *v.* State, 13 Tex. App. 349.

"Forcibly ravished" was held sufficient under the Alabama statute prescribing such form of allegation, without also alleging that the carnal knowledge of the female was "against her will." Leoni *v.* State, 44 Ala. 110.

"With force and arms" is not a necessary averment in Massachusetts since enactment of Rev. St. c. 137, § 14. Com. *v.* Scannel, 11 Cush. (Mass.) 547.

"Against her will" is equivalent to the words "against her will and consent" in a statute, and is sufficient. State *v.* Gaul, 50 Conn. 578.

19. See *infra*, II, A, 3 a, (IX), (X).

20. See *infra*, II, A, 3, a, (VI).

21. People *v.* Pacheco, 70 Cal. 473, 11 Pac. 761; Harmon *v.* Territory, 5 Okla. 368, 49 Pac. 55; State *v.* Delvecchio, 25 Utah 18, 69 Pac. 58.

Allegation of resistance.— An information for rape, alleging that defendant "on and upon . . . did violently and feloniously make an assault, and her . . . did violently and feloniously ravish and carnally know . . . she having resisted his said assault, and said resistance having been then and there overcome by the force and violence" of defendant, sufficiently alleged resistance on the part of prosecutrix, overcome by force or violence, to the act of defendant both in assaulting and in ravishing her. People *v.* Jailles, 146 Cal. 301, 305, 79 Pac. 965.

22. Cooper *v.* State, 22 Tex. App. 419, 3 S. W. 334; Cornelius *v.* State, 13 Tex. App. 349.

23. Wilkey *v.* Com., 104 Ky. 325, 47 S. W. 219, 20 Ky. L. Rep. 578; Reed *v.* Com., 76 S. W. 838, 25 Ky. L. Rep. 1029; Hall *v.* Com., 26 S. W. 8, 15 Ky. L. Rep. 856; State *v.* Porter, 48 La. Ann. 1539, 21 So. 125; State *v.* Marsh, 132 N. C. 1000, 43 S. E. 828, 67 L. R. A. 179; Mears *v.* Com., 2 Grant (Pa.) 385.

And see INDICTMENTS AND INFORMATIONS, 22 Cyc. 331.

"Feloniously" used as to the assault only. — In State *v.* Casford, 76 Iowa 330, 41 N. W. 32, it was held that where an indictment for rape charged that defendant "feloniously" made an assault upon the prosecutrix, and did then and there ravish and carnally know her, forcibly and against the will of the prosecutrix, the consummation of the offense was sufficiently charged, although the word "feloniously" was not repeated in connection with the charge of ravishing and carnally knowing. In other states, however, there are decisions directly to the contrary.

ders it unnecessary.[24] It need not be alleged that the act was committed "unlawfully."[25]

(VI) *FEMALE UNDER AGE OF CONSENT.*[26] In an indictment for carnal knowledge and abuse or rape of a female child under the age of consent it is generally sufficient to substantially follow the language of the statute.[27] It is not necessary to allege an assault.[28] So also it is not necessary that the indictment allege that the act was committed forcibly and against her will, or without her consent, and if this is alleged, it is mere surplusage and need not be proved.[29] Nor is it necessary to allege that the act was committed with her consent,[30]

State *v.* Porter, 48 La. Ann. 1539, 21 So. 125; Hays *v.* State, 57 Miss. 783.

24. Territory *v.* Godfrey, 6 Dak. 46, 50 N. W. 481; Com. *v.* Scannel, 11 Cush. (Mass.) 547; Asher *v.* Territory, 7 Okla. 188, 54 Pac. 445. And see INDICTMENTS AND INFORMATIONS, 22 Cyc. 331.

25. Weinzorpflin *v.* State, 7 Blackf. (Ind.) 186. And see Com. *v.* Bennet, 2 Va. Cas. 235. An information for the offense described in Wis. Rev. St. § 4382, providing that "any person who shall unlawfully and carnally know and abuse any female under the age of twelve years, shall be punished," etc., need not charge that the act was done unlawfully, it being a crime at common law and manifestly illegal. Barnard *v.* State, 88 Wis. 656, 60 N. W. 1058. The word "feloniously" in an information for such an offense is fairly equivalent to the word "unlawfully." Barnard *v.* State, *supra*. *Compare* State *v.* Hoskinson, (Kan. 1908) 96 Pac. 138.

26. Form of indictment or information see People *v.* Mills, 17 Cal. 276; State *v.* Houx, 109 Mo. 654, 658, 19 S. W. 35, 32 Am. St. Rep. 686; State *v.* Meinhart, 73 Mo. 562, 563; State *v.* Williams, 9 Mont. 179, 23 Pac. 335; Farrell *v.* State, 54 N. J. L. 416, 417, 24 Atl. 723.

Indictment or information held sufficient see People *v.* Mills, 17 Cal. 276; McClure *v.* State, 116 Ind. 169, 18 N. E. 615; State *v.* Houx, 109 Mo. 654, 19 S. W. 35, 32 Am. St. Rep. 686; State *v.* Meinhart, 73 Mo. 562; Farrell *v.* State, 54 N. J. L. 416, 24 Atl. 723; State *v.* Horne, 20 Oreg. 485, 26 Pac. 665.

Description of female see *supra*, II, A, 2.

27. *California.*—People *v.* Rangod, 112 Cal. 669, 44 Pac. 1071; People *v.* Mills, 17 Cal. 276.

Florida.— Holton *v.* State, 28 Fla. 303, 9 So. 716.

Kansas.— State *v.* Hoskinson, (1908) 96 Pac. 138; State *v.* White, 44 Kan. 514, 25 Pac. 33.

Maine.— State *v.* Black, 63 Me. 210.

Missouri.— State *v.* Hall, 164 Mo. 528, 65 S. W. 248; State *v.* Dalton, 106 Mo. 463, 17 S. W. 700.

Rhode Island.— State *v.* Tourjee, 26 R. I. 234, 58 Atl. 767.

Utah.— State *v.* Williamson, 22 Utah 248, 62 Pac. 1022, 83 Am. St. Rep. 780.

Virginia.— Smith *v.* Com., 85 Va. 924, 9 S. E. 148.

Washington.— State *v.* Phelps, 22 Wash. 181, 60 Pac. 134.

See INDICTMENTS AND INFORMATIONS, 22 Cyc. 339; and *supra*, II, A, 3, a, (I).

Form prescribed by statute held sufficient see McGuff *v.* State, 88 Ala. 147, 7 So. 35, 16 Am. St. Rep. 25.

An indictment for the statutory offense of carnal abuse of a woman child under the age of sixteen years is not vitiated by adding to the words, "did unlawfully and carnally abuse," the words, "and then and there did unlawfully have carnal knowledge of the body," of the said child; they may be rejected as surplusage. State *v.* Cannon, 72 N. J. L. 46, 60 Atl. 177.

Female child "under the age of puberty."— Under a statute punishing carnal knowledge of "a female child under the age of puberty," an indictment for carnally knowing "a female child of the age of twelve years and under the age of puberty" was held contradictory and bad, as twelve years is the age of puberty where the common-law rule has not been changed by statute. State *v.* Pierson, 44 Ark. 265.

28. State *v.* McCullough, 171 Mo. 571, 71 S. W. 1002.

29. *California.*— People *v.* Bailey, 142 Cal. 434, 76 Pac. 49; People *v.* Rangod, 112 Cal. 669, 44 Pac. 1071.

Florida.— Holton *v.* State, 28 Fla. 303, 9 So. 716.

Iowa.— State *v.* Scroggs, 123 Iowa 649, 96 N. W. 723.

Kansas.— State *v.* Woods, 49 Kan. 237, 30 Pac. 520.

Maine.— State *v.* Black, 63 Me. 210.

Missouri.— State *v.* McCullough, 171 Mo. 571, 71 S. W. 1002; State *v.* Wray, 109 Mo. 594, 19 S. W. 86.

Montana.— State *v.* Jones, 32 Mont. 442, 80 Pac. 1095.

New Jersey.— State *v.* Cannon, 72 N. J. L. 46, 60 Atl. 177; Farrell *v.* State, 54 N. J. L. 416, 24 Atl. 723.

Oregon.— State *v.* Horne, 20 Oreg. 485, 26 Pac. 665.

Texas.— Davis *v.* State, 42 Tex. 226.

Virginia.— Com. *v.* Bennet, 2 Va. Cas. 235.

Washington.— State *v.* Fetterly, 33 Wash. 599, 74 Pac. 810.

See 42 Cent. Dig. tit. "Rape," §§ 31, 34; and *supra*, I, A, 2, f, (II).

"Against her will and consent" is equivalent to the averment "without her consent" so as to admit testimony that the female was under the consenting age. State *v.* Jackson, (La. 1894) 15 So. 402.

30. Reinoehl *v.* State, 62 Nebr. 619, 87

or to use the word "ravish" or "rape," [31] or to allege that the act was committed unlawfully,[32] or knowingly or wilfully,[33] or feloniously;[34] nor need it follow other purely technical requirements of common-law indictments.[35] It must be alleged that the female was under the age of consent, which is sufficiently done by alleging that she was under the age specified in the statute, without specifically alleging her age, or by alleging her age specifically, without any general averment that such age was under the age of consent.[36] It is also held necessary in some states to allege the age of defendant [37] and the previous chastity of the female,[38] where the statute makes such facts elements of the offense.[39]

(VII) *FEMALE IMBECILE.*[40] If the indictment alleges that the woman was so imbecile as to be incapable of consenting or resisting it is sufficient without alleging the act to have been against her will, or to have been accomplished by force, and such allegations, if made, may be treated as mere surplusage.[41] It is proper to allege an assault.[42]

(VIII) *FEMALE DRUGGED.* An indictment charging felonious intercourse with a female while she was insensible or incapable of exercising her will in consequence of a drug having been administered to her is sufficient, and it need not allege that defendant knew she was incapable of consent, or specify the particular kind of drug.[43]

N. W. 355; George *v.* State, 61 Nebr. 669, 85 N. W. 840; Farrell *v.* State, 54 N. J. L. 416, 24 Atl. 723.

31. *Michigan.*—People *v.* McDonald, 9 Mich. 150.

Missouri.— State *v.* Meinhart 73 Mo. 562.

New York.— People *v.* Flaherty, 79 Hun 48, 29 N. Y. Suppl. 641 [*affirmed* in 145 N. Y. 597, 40 N. E. 164].

North Carolina.— State *v.* Smith, 61 N. C. 302.

South Dakota.— State *v.* Hayes, 17 S. D. 128, 95 N. W. 296.

Washington.— State *v.* Phelps, 22 Wash. 181, 60 Pac. 134.

Wyoming.— Ross *v.* State, 16 Wyo. 285, 93 Pac. 299, 94 Pac. 217.

32. Com. *v.* Bennet, 2 Va. Cas. 235; Barnard *v.* State, 88 Wis. 656, 60 N. W. 1058. An information for rape on a female under age is sufficient, although the word "unlawfully" does not appear in immediate connection with the word "carnally," as it appears in the statute. State *v.* Hoskinson, (Kan. 1908) 96 Pac. 138.

33. Holton *v.* State, 28 Fla. 303, 9 So. 716.

34. Asher *v.* Territory, 7 Okla. 188, 54 Pac. 445; State *v.* Tourjee, 26 R. I. 234, 58 Atl. 767.

35. Com. *v.* Sullivan, 6 Gray (Mass.) 477; State *v.* Terry, 20 N. C. 289; State *v.* Mueller, 85 Wis. 203, 55 N. W. 165; Fizell *v.* State, 25 Wis. 364.

36. *Alabama.*— Sims *v.* State, 146 Ala. 109, 41 So. 413; Oakley *v.* State, 135 Ala. 15, 33 So. 23.

Arkansas.— Inman *v.* State, 65 Ark. 508, 47 S. W. 558.

California.— People *v.* Totman, 135 Cal. 133, 67 Pac. 51; People *v.* Mills, 17 Cal. 276.

Indiana.— McClure *v.* State, 116 Ind. 169, 18 N. E. 615.

Minnesota.— State *v.* Erickson, 81 Minn. 134, 83 N. W. 512.

Missouri.— State *v.* McCullough, 171 Mo. 571, 71 S. W. 1002; State *v.* Miller, 111 Mo. 542, 20 S. W. 243; State *v.* Houx, 109 Mo. 654, 19 S. W. 35, 32 Am. St. Rep. 686; State *v.* Wray, 109 Mo. 594, 19 S. W. 86; State *v.* Meinhart, 73 Mo. 562.

Montana.— State *v.* Jones, 32 Mont. 442, 80 Pac. 1095.

Nebraska.— Hubert *v.* State, 74 Nebr. 220, 104 N. W. 276, 106 N. W. 774.

New Hampshire.— State *v.* Burt, 75 N. H. 64, 71 Atl. 30.

New York.— People *v.* Robertson, 88 N. Y. App. Div. 198, 84 N. Y. Suppl. 401; People *v.* Flaherty, 79 Hun 48, 29 N. Y. Suppl. 641 [*affirmed* in 145 N. Y. 597, 40 N. E. 164].

Washington.— State *v.* Falsetta, 43 Wash. 159, 86 Pac. 168; State *v.* Fetterly, 33 Wash. 599, 74 Pac. 810.

See 42 Cent. Dig. tit. "Rape," §§ 27, 31.

37. See *supra*, II, A, 1.

38. Hubert *v.* State, 74 Nebr. 220, 104 N. W. 276, 106 N. W. 774. And see State *v.* Hall, 164 Mo. 528, 65 S. W. 248.

39. See *supra*, I, A, 2, c, d.

40. **Forms** of indictment or information for the rape of an imbecile female see State *v.* Enright, 90 Iowa 520, 58 N. W. 901; State *v.* Hann, 73 Minn. 140, 141, 76 N. W. 33; Caruth *v.* State, (Tex. Cr. App. 1894) 25 S. W. 778.

41. State *v.* Crouch, 130 Iowa 478, 107 N. W. 173; State *v.* Austin, 109 Iowa 118, 80 N. W. 303; State *v.* Enright, 90 Iowa 520, 58 N. W. 901; State *v.* Hann, 73 Minn. 140, 76 N. W. 33; Caruth *v.* State, (Tex. Cr. App. 1894) 25 S. W. 778.

42. State *v.* Crouch, 130 Iowa 478, 107 N. W. 173; and other cases in the preceding note.

43. People *v.* O'Brien, 130 Cal. 1, 62 Pac. 297; Com. *v.* Lowe, 116 Ky. 335, 76 S. W. 119, 25 Ky. L. Rep. 534.

(IX) *THREATS AND FEAR.*[44] An indictment for rape by threats must allege the use of threats but need not specify them.[45] An allegation that the act was committed by force and against the will of the female is equivalent to stating that she was prevented from resisting by threats of immediate and great bodily harm.[46]

(X) *FRAUD.*[47] In Texas an indictment which charges rape by fraud by personating the female's husband must allege that the female was a married woman, and not the wife of defendant.[48]

b. Attempts or Assaults With Intent to Rape[49] — (I) *IN GENERAL.* To maintain a prosecution for attempt or assault with intent to commit rape, the indictment may of course be directly for the attempt or assault, without charging rape.[50] Mere technical or grammatical errors will be disregarded if all essential elements of the offense are alleged.[51]

(II) *THE OVERT ACT.* An indictment or information for attempt or assault with intent to rape must allege some overt act constituting the attempt or assault.[52]

44. Form of indictment or information see Cornelius *v.* State, 13 Tex. App. 349, 352.

45. Cooper *v.* State, 22 Tex. App. 419, 3 S. W. 334; Cornelius *v.* State, 13 Tex. App. 349.

46. People *v.* Pacheco, 70 Cal. 473, 11 Pac. 761; State *v.* Delvecchio, 25 Utah 18, 69 Pac. 58.

47. Form of indictment or information see Franklin *v.* State, 34 Tex. Cr. 203, 204, 29 S. W. 1088.

48. Payne *v.* State, 38 Tex. Cr. 494, 43 S. W. 515, 70 Am. St. Rep. 757.

49. Form of complaint see Tillson *v.* State, 29 Kan. 452, 453; People *v.* Lynch, 29 Mich. 274, 275.

Forms of indictment or information: For assault with intent to rape see Skaggs *v.* State, 108 Ind. 53, 54, 8 N. E. 695; State *v.* Payne, 194 Mo. 442, 443, 92 S. W. 461; Harmon *v.* Territory, 5 Okla. 368, 369, 49 Pac. 55. For attempt to rape. Hairston *v.* Com., 97 Va. 754, 32 S. E. 797.

Indictment or information held sufficient see People *v.* Collins, 5 Cal. App. 654, 91 Pac. 158; Robinson *v.* State, 118 Ga. 32, 44 S. E. 814; State *v.* Neil, 13 Ida. 539, 90 Pac. 860, 91 Pac. 318; People *v.* Horchler, 231 Ill. 566, 83 N. E. 428; Polson *v.* State, 137 Ind. 519, 35 N. E. 907; Dooley *v.* State, 28 Ind. 239; State *v.* Johnson, 114 Iowa 430, 87 N. W. 279; State *v.* Langford, 45 La. Ann. 1177, 14 So. 181, 40 Am. St. Rep. 277; State *v.* Ward, 35 Minn. 182, 28 N. W. 192; State *v.* Payne, 194 Mo. 442, 92 S. W. 461; Hall *v.* State, 40 Nebr. 320, 58 N. W. 929; State *v.* Mosier, 73 N. Y. App. Div. 5, 76 N. Y. Suppl. 65; Westerman *v.* State, 53 Tex. Cr. 109, 111 S. W. 655; Ross *v.* State, 16 Wyo. 285, 93 Pac. 299, 94 Pac. 217.

50. West *v.* State, (Tex. Cr. App. 1893) 21 S. W. 686; Reagan *v.* State, 28 Tex. App. 227, 12 S. W. 601, 19 Am. St. Rep. 833.

51. Proctor *v.* Com., 20 S. W. 213, 14 Ky. L. Rep. 248, holding that an indictment charging that the accused "with force and arms, unlawfully, maliciously, and feloniously did make an assault" upon a certain female "under the age of twelve years, then and there . . . against her will and consent, did attempt to ravish and carnally know," etc., is sufficient, notwithstanding the omission of the name of the female, or of the pronoun "her," in the latter part of the charge, and notwithstanding the position of the word "force," which does not refer alone to the assault, but also to the attempt. And see *supra*, II, A, 3, a, (I).

52. *Florida.*— Hogan *v.* State, 50 Fla. 86, 39 So. 464, holding that an indictment charging that the accused did by force unlawfully attempt to commit rape by then and there unlawfully and by force attempting to have sexual intercourse was fatally defective in not alleging an overt act.

Georgia.— Robinson *v.* State, 118 Ga. 32, 44 S. E. 814, holding an indictment for assault with intent to rape sufficient.

Kansas.— State *v.* Russell, 64 Kan. 798, 68 Pac. 615 (holding that in an information for assault with intent to commit rape on a female under the age of consent the specific act or acts done toward the commission of the offense must be alleged); State *v.* Frazier, 53 Kan. 87, 36 Pac. 58, 42 Am. St. Rep. 274 (holding the same as to an information for attempt to rape, and that an averment that defendant "unlawfully and feloniously did attempt to commit a rape, by then and there attempting to carnally and unlawfully know," etc., was insufficient).

Oklahoma.— Young *v.* Territory, 8 Okla. 525, 58 Pac. 724.

Virginia.— Cunningham *v.* Com., 88 Va. 37, 13 S. E. 309.

Indictments for assaults generally see ASSAULT AND BATTERY, 3 Cyc. 1035.

Indictments for attempts generally see INDICTMENTS AND INFORMATIONS, 22 Cyc. 363.

Assault and battery.—Under Shannon Code Tenn. § 6459, which punishes the commission of an assault and battery with intent to commit rape, an indictment which charges that defendant, with such intent, committed an assault upon a female, and her did "ill-treat," but charges no battery, is insufficient. Wilson *v.* State, 103 Tenn. 87, 52 S. W. 869.

Alleging assault upon prosecutrix.— An indictment which charges that defendant did unlawfully make an assault with intent to commit rape upon one K, a woman, by then

It is generally enough to allege that defendant "made an assault," without specifying the manner, means, or mode in or by which it was made.[53] An allegation of an "attempt" to rape is not an allegation of an "assault" with intent to rape.[54]

(III) *The Intent; Force and Want of Consent.* The facts constituting the assault or attempt must be so stated as to show that the crime of rape would have been committed if defendant's purpose had been accomplished.[55] It must be alleged therefore that the attempt was made, or that the assault was with the intent, forcibly and against her will, to ravish and carnally know the female, by the use of these or equivalent words,[56] unless the female is alleged to

and there attempting to have carnal knowledge of the said K, is not insufficient in failing to charge an assault upon any particular person. Myers *v.* State, 51 Tex. Cr. 463, 103 S. W. 859.

53. *California.*— People *v.* Collins, 5 Cal. App. 654, 91 Pac. 158.

Connecticut.— State *v.* Wells, 31 Conn. 210.

Iowa.— State *v.* Johnson, 114 Iowa 430, 87 N. W. 279.

Minnesota.— State *v.* Ward, 35 Minn. 182, 28 N. W. 192.

Missouri.— State *v.* Payne, 194 Mo. 442, 92 S. W. 461; State *v.* Neal, 178 Mo. 63, 76 S. W. 958.

Vermont.— State *v.* Hanlon, 62 Vt. 334, 19 Atl. 773.

Virginia.— Cunningham *v.* Com., 88 Va. 37, 13 S. E. 309.

But *compare* State *v.* Russell, 64 Kan. 798, 68 Pac. 615, referred to in the preceding note.

"The word 'assault' has a well-defined legal meaning, and, in and by itself, is a statement of an act, without the necessity of further detail." State *v.* Ward, 35 Minn. 182, 183, 28 N. W. 192.

Where an assault and battery is properly charged it is not necessary to otherwise charge an assault. McGuire *v.* State, 50 Ind. 284.

"Actual violence."— Under a statute providing that every person who should "with actual violence make an assault upon the body of any female with intent to commit a rape" should suffer imprisonment, etc., an information charging that defendant "with force and arms did an assault make on A. W. a single woman, and did her then and there beat, wound and illtreat, with an intent violently and against her will, her feloniously to ravish and carnally know," was held not to be defective in not charging in terms that the assault was made with actual violence. Any language, it was said, charging the accused with the exercise of physical force upon the person assaulted was sufficient. State *v.* Wells, 31 Conn. 210.

"Malice aforethought."—An indictment for assault with intent to rape need not aver that the assault was committed with malice aforethought, either at common law or under Sandels & H. Dig. Ark. § 1866, providing that whoever shall feloniously "and with malice aforethought" assault any person with intent to commit rape shall be punished, etc. Bevers *v.* State, 72 Ark. 129, 78 S. W. 748.

54. Sullivant *v.* State, 8 Ark. 400.

Under Wyo. Rev. St. (1899) § 4957, declaring that "whoever having the present ability to do so, unlawfully attempts to commit a violent injury on the person of another, is guilty of an assault," it was held that an assault with intent to commit rape was charged by an information alleging that defendant did "unlawfully and feloniously attempt to commit a violent injury on the person of" a female child under the age of consent, "having then and there the present ability so to do, with intent then and there and thereby unlawfully and feloniously to ravish and carnally know," etc. Ross *v.* State, 16 Wyo. 285, 93 Pac. 299, 94 Pac. 217.

In Texas, by the terms of Pen. Code, art. 640, the definition of an attempt to rape excludes the question of assault; and where the indictment for that offense charges that it was made by assault and by means of this assault an attempt was made to ravish and have carnal knowledge of the female, it charges an assault with intent, and not an attempt, to commit rape. Taylor *v.* State, 44 Tex. Cr. 153, 69 S. W. 149.

55. Hall *v.* State, 40 Nebr. 320, 58 N. W. 929.

56. *Arizona.*— Daggs *v.* Territory, (1908) 94 Pac. 1106.

Arkansas.— Sullivant *v.* State, 8 Ark. 400.

California.— People *v.* Mesa, 93 Cal. 580, 29 Pac. 116; People *v.* O'Neil, 48 Cal. 257, holding that an indictment charging that defendant feloniously assaulted a female by throwing her on her back, and attempting to have sexual intercourse with her, with intent to outrage her person, did not charge an assault with intent to commit rape.

Maine.— State *v.* Blake, 39 Me. 322, "violently" instead of "forcibly" not enough.

Massachusetts.— Com. *v.* McCarty, 165 Mass. 37, 42 N. E. 336; Com. *v.* Kennedy, 131 Mass. 584.

Missouri.— State *v.* Little, 67 Mo. 624, "ravish" held unnecessary.

New York.— State *v.* Mosier, 73 N. Y. App. Div. 5, 76 N. Y. Suppl. 65.

North Carolina.— State *v.* Powell, 106 N. C. 635, 11 S. E. 191; State *v.* Goldston, 103 N. C. 323, 9 S. E. 580; State *v.* Tom, 47 N. C. 414; State *v.* Martin, 14 N. C. 329.

Oklahoma.— Rector *v.* Territory, 9 Okla. 530, 60 Pac. 275; Young *v.* Territory, 8 Okla. 525, 58 Pac. 724.

Oregon.— State *v.* Ryan, 15 Oreg. 572, 16 Pac. 417.

Texas.— Langan *v.* State, 27 Tex. App. 498,

have been under the age of consent.[57] In charging the intent it is generally sufficient to follow the language of the statute defining the crime;[58] but this is not necessary provided words conveying the same meaning are employed.[59] In charging assault with intent to rape the word "intent" or an equivalent must be used.[60] An indictment for attempt to rape averring that defendant feloniously assaulted the female and attempted to have intercourse with her sufficiently avers an intent to do the act.[61] Where intent to accomplish the purpose by force and against the will of the female is alleged, it is not necessary to allege her age, and if her age is alleged it may be rejected as surplusage.[62]

11 S. W. 521; Hewitt *v.* State, 15 Tex. App. 80, intent "to rape" insufficient.

Virginia.— Christian *v.* Com., 23 Gratt. 954.

See 42 Cent. Dig. tit. "Rape," §§ 36, 38, 40, 41.

Under a statute punishing "assault with intent to commit rape," that specific intent must be alleged; and it is not sufficient to charge that defendant made an assault and "then and there did attempt to ravish." State *v.* Martin, 14 N. C. 329.

Resistance.— Where the statute is so worded, an indictment for assault with intent to rape by force should contain the averment that defendant intended to have intercourse with the female by force or violence sufficient to overcome any resistance she might make. Rector *v.* Territory, 9 Okla. 530, 60 Pac. 275; Young *v.* Territory, 8 Okla. 525, 58 Pac. 724. And see Daggs *v.* Territory, (Ariz. 1908) 94 Pac. 1106.

Allegations held sufficient.— It has been held that an indictment for assault with intent to commit rape need not contain the word "forcibly," if equivalent words are used. State *v.* Peak, 130 N. C. 711, 41 S. E. 887. A charge that defendant "did feloniously assault and attempt . . . to ravish and carnally know" the female alleged to have been assaulted necessarily implies that the act was done forcibly. Jackson *v.* State, 114 Ga. 861, 40 S. E. 989. "Violently" instead of "forcibly" has been held sufficient. State *v.* Daly, 16 Oreg. 240, 18 Pac. 357. *Compare supra*, II, A, 3, a, (IV).

Naming intended crime.— An indictment averring that defendant in and upon one S, she, the said S, then and there not being his wife, did then and there, by forcibly overcoming her resistance, and against her will and without her consent, attempt to perpetrate an act of sexual intercourse, sufficiently charges attempted rape, although the crime is not, technically speaking, correctly named. People *v.* Mosier, 73 N. Y. App. Div. 5, 76 N. Y. Suppl. 65.

Person upon whom rape intended.—An information charging that defendant did unlawfully, feloniously, with force and violence, assault a person named and described as a female child under fourteen years of age, with intent to commit rape, and without her consent and against her will, sufficiently shows upon whom the rape was intended to be committed; and the failure specifically to allege an intent to commit rape upon the person named is not ground for setting aside the information. People *v.* Mesa, 93 Cal. 580, 29 Pac. 116. But see Com. *v.* Kennedy, 131 Mass. 584.

57. See *infra*, II, A, 3, b, (V).

58. Dooley *v.* State, 28 Ind. 239 ("with the intent then and thereby wilfully, forcibly and feloniously, and against her will, to have carnal knowledge of said woman"); Smith *v.* State, 41 Tex. 352; State *v.* Hanlon, 62 Vt. 334, 19 Atl. 773 (sufficient to allege an assault "with intent violently and feloniously to commit on her, the said A, a rape," without further describing the intended crime). See *supra*, II, A, 3, a, (I).

59. People *v.* Girr, 53 Cal. 629. See *supra*, II, A, 3, a, (I).

60. State *v.* Ross, 25 Mo. 426; State *v.* Goldston, 103 N. C. 323, 9 S. E. 580.

"Intention" is equivalent to intent. State *v.* Tom, 47 N. C. 414.

"Intent" and "attempt."— According to the better opinion "attempt" is not equivalent to "intent"; and therefore an indictment charging that defendant did make an assault upon a female under or over the age of consent, and did unlawfully "attempt" to carnally know her, etc., does not sufficiently charge an assault with intent to rape. State *v.* Goldston, 103 N. C. 323, 9 S. E. 580. And see Sullivant *v.* State, 8 Ark. 400; State *v.* Ross, 25 Mo. 426. But see People *v.* Horchler, 231 Ill. 566, 83 N. E. 428. In Texas, where, by the terms of Pen. Code, art. 640, the definition of an attempt to rape excludes the question of assault, it was held that where an indictment for that offense charges that it was made by assault and by means of this assault an attempt was made to ravish and have carnal knowledge of the female, it charges an assault with intent, and not an attempt, to commit rape. Taylor *v.* State, 44 Tex. Cr. 153, 69 S. W. 149. The code, in defining this offense, uses the words "intent" and "attempt" interchangeably; in view of which, and of other provisions, it is held that an indictment may sufficiently charge the offense without using the word "intent." Curry *v.* State, 4 Tex. App. 574. And in Washington an information charging defendant with "an assault with intent to commit rape," made on a certain day, by feloniously "attempting" to carnally know and abuse a female child under the age of consent, was held sufficient. State *v.* Smith, 19 Wash. 376, 53 Pac. 338.

61. People *v.* Mosier, 73 N. Y. App. Div. 5, 76 N. Y. Suppl. 65.

62. Hall *v.* State, 40 Nebr. 320, 58 N. W.

(iv) "*Unlawfully*" and "*Feloniously*." In some states the term "unlawfully" or "feloniously," or both, must be used in charging the intent.[63] In others "feloniously" must be used.[64] In some jurisdictions the assault must also be alleged to have been "feloniously" made,[65] unless it is merely a misdemeanor;[66] but in other jurisdictions this is not necessary.[67]

(v) *Female Under Age of Consent*.[68] An indictment for assault with intent to commit rape upon a female under the age of consent or attempt to have carnal knowledge of a female under such age need not allege force or want of consent, and if it does the allegation may be rejected as surplusage.[69] If intent to use force is not alleged the indictment must allege that the female was under the age of consent and any other facts necessary to bring the case within the statute.[70] If a statute fixing the age of consent makes it apply only to chaste females such chastity must be alleged.[71] The indictment need not set out the manner or means of the assault,[72] or technically describe the intended crime as rape.[73]

(vi) *Threats and Fear*. In an indictment charging that an attempt was made by threats to have carnal knowledge of a woman it is not necessary to allege that the threats were directed against her person.[74]

(vii) *Fraud*. An indictment charging an attempt to rape by personating the woman's husband need not set out the husband's name, or the facts constituting the fraud.[75]

c. Joinder of Parties. Where two or more commit a rape successively, each aiding and abetting the other, or where one commits a rape and another aids and abets or is accessary, they may be joined in the same indictment; and the same is true of attempt or assault with intent to rape.[76]

929; O'Meara *v.* State, 17 Ohio St. 515; Bowles *v.* State, 7 Ohio, Pt. II, 243.

63. McGuire *v.* State, 50 Ind. 284; Greer *v.* State, 50 Ind. 267, 19 Am. Rep. 709.

64. Sullivant *v.* State, 8 Ark. 400; State *v.* Langford, 45 La. Ann. 1177, 14 So. 181, 40 Am. St. Rep. 277; Mears *v.* Com., 2 Grant (Pa.) 385. *Contra*, Territory *v.* Godfrey, 6 Dak. 46, 50 N. W. 481; Stout *v.* Com., 11 Serg. & R. (Pa.) 177. See *supra*, II, A, 3, a, (v).

65. State *v.* Jesse, 19 N. C. 297; Williams *v.* State, 8 Humphr. (Tenn.) 585.

66. Stout *v.* Com., 11 Serg. & R. (Pa.) 177.

67. Polson *v.* State, 137 Ind. 519, 35 N. E. 907; Jones *v.* State, 3 Heisk. (Tenn.) 445 [*distinguishing* Williams *v.* State, 8 Humphr. (Tenn.) 585; and *overruling* Nevills *v.* State, 7 Coldw. (Tenn.) 78].

68. Forms of indictment or information see People *v.* Mesa, 93 Cal. 580, 583, 29 Pac. 116; People *v.* Collins, 5 Cal. App. 654, 655, 91 Pac. 158; Polson *v.* State, 137 Ind. 519, 520, 35 N. E. 907; People *v.* McDonald, 9 Mich. 150; State *v.* Riseling, 186 Mo. 521, 523, 85 S. W. 372; State *v.* Prather, 136 Mo. 20, 23, 37 S. W. 805; State *v.* Meinhart, 73 Mo. 562, 563; Ross *v.* State, 16 Wyo. 285, 93 Pac. 299, 301, 94 Pac. 217.

Description of female see *supra*, II, A, 2.

69. *Alabama.*—King *v.* State, 120 Ala. 329, 25 So. 178.

Illinois.— Porter *v.* People, 158 Ill. 370, 41 N. E. 886.

Iowa.— State *v.* Scroggs, 123 Iowa 649, 96 N. W. 723; State *v.* Grossheim, 79 Iowa 75, 44 N. W. 541.

Kansas.— State *v.* Hart, 33 Kan. 218, 6 Pac. 288.

Missouri.— State *v.* Riseling, 186 Mo. 521, 85 S. W. 372; State *v.* Prather, 136 Mo. 20, 37 S. W. 805; State *v.* Wray, 109 Mo. 594, 19 S. W. 86; McComas *v.* State, 11 Mo. 116.

Tennessee.— Hardwick *v.* State, 6 Lea 103.

Texas.— McAvoy *v.* State, 41 Tex. Cr. 56, 51 S. W. 928. *Compare* Morgan *v.* State, (Cr. App. 1899) 50 S. W. 718; Jones *v.* State, (Cr. App. 1898) 46 S. W. 813; Tarver *v.* State, (Cr. App. 1898) 46 S. W. 813.

Wyoming.— Ross *v.* State, 16 Wyo. 285, 93 Pac. 299, 94 Pac. 217.

The word "ravish" is unnecessary. Ross *v.* State, 16 Wyo. 285, 93 Pac. 299, 94 Pac. 217. And see *supra*, II, A, 3, a, (vi).

70. See Hall *v.* State, 40 Nebr. 320, 58 N. W. 929; State *v.* Wheat, 63 Vt. 673, 22 Atl. 720. And see *supra*, II, A, 3, a, (vi). *Contra*, under some statutes see State *v.* Staton, 88 N. C. 654; State *v.* Johnston, 76 N. C. 209.

71. Bailey *v.* State, 57 Nebr. 706, 78 N. W. 284, 73 Am. St. Rep. 540; Young *v.* Territory, 8 Okla. 525, 58 Pac. 724.

72. People *v.* Collins, 5 Cal. App. 654, 91 Pac. 158; Territory *v.* Keyes, 5 Dak. 244, 38 N. W. 440. See *supra*, II, A, 3, b, (ii).

73. State *v.* Hart, 33 Kan. 218, 6 Pac. 288; People *v.* McDonald, 9 Mich. 150; State *v.* Meinhart, 73 Mo. 562. And see Ross *v.* State, 16 Wyo. 285, 93 Pac. 299, 94 Pac. 217.

74. Reagan *v.* State, 28 Tex. App. 227, 12 S. W. 601, 19 Am. St. Rep. 833.

75. Franklin *v.* State, 34 Tex. Cr. 203, 29 S. W. 1088.

76. *Arkansas.*—Dennis *v.* State, 5 Ark. 230.

d. Joinder of Offenses — (I) *SEPARATE COUNTS.*[77] An indictment may properly consist of several counts charging rape or assault with intent to rape in different ways or at different times to meet the evidence,[78] and may join counts for rape and attempt to rape or assault with intent to rape,[79] for rape and assault and battery,[80] for rape and fornication,[81] for rape and incest,[82] or for rape, assault with intent to rape, assault and battery, and bastardy.[83] A general verdict of guilty will be applied to the count for rape.[84] A count charging a man with rape as principal in the first degree and another as principal in the second degree may be joined with another count charging the latter as principal in the first degree, and the former as principal in the second degree.[85]

(II) *DUPLICITY.* Two or more distinct offenses cannot be joined in the same count of an indictment or information for rape; [86] but a count is not objec-

Illinois.—Ackerson *v.* People, 124 Ill. 563, 16 N. E. 847.

Iowa.— State *v.* McIntire, 66 Iowa 339, 23 N. W. 735; State *v.* Comstock, 46 Iowa 265.

Kentucky.— Kessler *v.* Com., 12 Bush 18; Clymer *v.* Com., 64 S. W. 409, 23 Ky. L. Rep. 1041.

Michigan.— Strang *v.* People, 24 Mich. 1.

Missouri.— State *v.* Sykes, 191 Mo. 62, 89 S. W. 851; State *v.* Harris, 150 Mo. 56, 51 S. W. 481; State *v.* Duffy, 124 Mo. 1, 27 S. W. 358.

New York.— People *v.* Batterson, 50 Hun 44, 2 N. Y. Suppl. 376; People *v.* Satterlee, 5 Hun 167.

North Carolina.— State *v.* Jordan, 110 N. C. 491, 14 S. E. 752.

England.— Reg. *v.* Crisham, C. & M. 187, 41 E. C. L. 106; Reg. *v.* Ram, 17 Cox C. C. 609; Rex *v.* Gray, 7 C. & P. 164, 32 E. C. L. 553.

Charging principal in second degree see *supra*, II, A, 3, a, (I), note 4.

An unknown person may be charged as principal in the first degree. State *v.* Williams, 32 La. Ann. 335, 36 Am. Rep. 272.

77. See also INDICTMENTS AND INFORMATIONS, 22 Cyc. 389 *et seq.*

78. *California.*— People *v.* Jailles, 146 Cal. 301, 79 Pac. 965.

Connecticut.— State *v.* Sebastian, 81 Conn. 1, 69 Atl. 1054, alleging same offense at different times.

Iowa.— State *v.* Trusty, 122 Iowa 82, 97 N. W. 989, carnal knowledge of female under age of consent and of idiot.

Massachusetts.— Com. *v.* Hackett, 170 Mass. 194, 48 N. E. 1087.

Missouri.— State *v.* Houx, 109 Mo. 654, 19 S. W. 35, 32 Am. St. Rep. 686, rape by force and rape of female under age of consent.

Nebraska.— Blair *v.* State, 72 Nebr. 501, 101 N. W. 17, discretion of court to compel the state to elect.

Texas.— McAvoy *v.* State, 41 Tex. Cr. 56, 51 S. W. 928; Thompson *v.* State, 33 Tex. Cr. 472, 26 S. W. 987, rape by force and fraud and rape of female mentally diseased.

Rape and carnal knowledge or abuse of female under age of consent.—Grimes *v.* State, 105 Ala. 86, 17 So. 184; Beason *v.* State, 72 Ala. 191; People *v.* Jailles, 146 Cal. 301, 79 Pac. 965; Bigcraft *v.* People, 30 Colo. 298, 70 Pac. 417; State *v.* Houx, 109 Mo. 654, 19 S. W. 35, 32 Am. St. Rep. 656; State *v.* Dalton, 106 Mo. 463, 17 S. W. 700; Wright *v.* State, 4 Humphr. (Tenn.) 194; Com. *v.* Bennet, 2 Va. Cas. 235; Jackson *v.* State, 91 Wis. 253, 64 N. W. 838. But see State *v.* Cheny, 1 Swan (Tenn.) 160.

Dismissal of one count as acquittal on another.— Where, in an indictment for rape, the first count is in the ordinary form of one for rape of a female over thirteen years of age, except that prosecutrix is described as a "female child," and the second count is for carnally knowing a female child under the age of thirteen years, the same female being named in each count, the counts do not each charge the same offense, so as to render a dismissal of the first an acquittal of the second. State *v.* Gaston, 96 Iowa 505, 65 N. W. 415.

79. *California.*— People *v.* Tyler, 35 Cal. 553.

Georgia.— Stephen *v.* State, 11 Ga. 225.

Maryland.— Stevens *v.* State, 66 Md. 202, 7 Atl. 254; State *v.* Sutton, 4 Gill 494; Burk *v.* State, 2 Harr. & J. 426.

Massachusetts.—Com. *v.* Hackett, 170 Mass. 194, 48 N. E. 1087.

Nebraska.— Garrison *v.* People, 6 Nebr. 274.

New Jersey.— Cook *v.* State, 24 N. J. L. 843.

New York.— People *v.* Satterlee, 5 Hun 167.

80. Harman *v.* Com., 12 Serg. & R. (Pa.) 69.

81. Jackson *v.* State, 91 Wis. 253, 64 N. W. 838.

82. State *v.* Goodale, 210 Mo. 275, 109 S. W. 9; Wiggins *v.* State, 47 Tex. Cr. 538, 84 S. W. 821; Porath *v.* State, 90 Wis. 527, 63 N. W. 1061, 48 Am. St. Rep. 954. *Contra*, under a statute. State *v.* Thomas, 53 Iowa 214, 4 N. W. 908.

83. Com. *v.* Lewis, 140 Pa. St. 561, 21 Atl. 501.

84. Cook *v.* State, 24 N. J. L. 843; Harman *v.* Com., 12 Serg. & R. (Pa.) 69.

85. Rex *v.* Gray, 7 C. & P. 164, 32 E. C. L. 553.

86. State *v.* Lee, 33 Oreg. 506, 56 Pac. 415, holding, however, that the objection was waived by failure to demur. See INDICTMENTS AND INFORMATIONS, 22 Cyc. 376.

tionable for duplicity where the facts charged constitute but a single offense, as where the acts alleged constitute component parts of, or represent preliminary stages of, or different ways of committing, a single offense.[87] Thus an indictment is not bad because it charges in a single count an assault and rape or carnal knowledge of a female under the age of consent,[88] or attempt to rape and assault and battery,[89] or rape and fornication or bastardy,[90] or rape and that the woman was gotten with child,[91] or forcible defilement and rape.[92] Nor is an indictment duplicitous because it charges both forcible ravishment and carnal knowledge of a child under the age of consent,[93] or forcible ravishment and that the female was imbecile and incapable of consenting;[94] or because it charges an assault with intent to commit rape and closes with a charge of attempt,[95] or also charges a battery.[96]

4. Issues, Proof, and Variance — a. Matters to Be Proved. Indictments for rape and for attempt or assault with intent to rape are subject of course to the general rules that all material allegations must be proved,[97] but it is not necessary to prove allegations which were unnecessary and may be rejected as mere surplusage.[98]

b. Variance Between Allegations and Proof — (i) *In General.* Unless the

87. Mills *v.* State, 52 Ind. 187; State *v.* Hann, 73 Minn. 140, 76 N. W. 33. See Indictments and Informations, 22 Cyc. 378.

88. *Indiana.*— Mills *v.* State, 52 Ind. 187.

Iowa.— State *v.* Peterson, 110 Iowa 647, 82 N. W. 329.

Massachusetts.— Com. *v.* Hackett, 170 Mass. 194, 48 N. E. 1087.

New Jersey.— Farrell *v.* State, 54 N. J. L. 416, 24 Atl. 723.

New York.— People *v.* Draper, 28 Hun 1.

Tennessee.— De Berry *v.* State, 99 Tenn. 207, 42 S. W. 31.

Texas.— Gray *v.* State, 43 Tex. Cr. 300, 65 S. W. 375.

Washington.— State *v.* Priest, 32 Wash. 74, 72 Pac. 1024; State *v.* Elswood, 15 Wash. 453, 46 Pac. 727.

England.— Reg. *v.* Guthrie, L. R. 1 C. C. 241, 11 Cox C. C. 522, 39 L. J. M. C. 95, 22 L. T. Rep. N. S. 485, 18 Wkly. Rep. 792.

Canada.— Reg. *v.* Brice, 7 Manitoba 627; Reg. *v.* Chisholm, 7 Manitoba 613.

89. Green *v.* State, 23 Miss. 509.

90. Com. *v.* Lewis, 140 Pa. St. 561, 21 Atl. 501. And see Com. *v.* Parker, 146 Pa. St. 343, 23 Atl. 323.

91. U. S. *v.* Dickinson, 25 Fed. Cas. No. 14, 957*a*, Hempst. 1.

92. State *v.* Montgomery, 79 Iowa 737, 45 N. W. 292.

93. Blanks *v.* Com., 105 Ky. 41, 48 S. W. 161, 20 Ky. L. Rep. 1037 (holding that in an indictment for rape an allegation that the prosecutrix was under the age of consent did not charge an additional statutory offense, so as to render the indictment duplicitous); Buchanan *v.* State, 41 Tex. Cr. 127, 52 S. W. 769 (holding that an indictment charging that defendant did "ravish and have carnal knowledge of" a female under the age of consent was not duplicitous, but merely charged rape with and without force). And see Reg. *v.* Chisholm, 7 Manitoba 613.

Contra, under a statute see State *v.* Lee, 33 Oreg. 506, 56 Pac. 415, holding that an indictment alleging that defendant, being over sixteen years of age, did unlawfully and feloniously forcibly ravish and have carnal intercourse with a female under the age of sixteen, was duplicitous, as it charged common law as well as statutory rape.

94. State *v.* Hann, 73 Minn. 140, 76 N. W. 33.

95. McAvoy *v.* State, 41 Tex. Cr. 56, 51 S. W. 928; Oxsheer *v.* State, 38 Tex. Cr. 499, 43 S. W. 335; State *v.* Smith, 19 Wash. 376, 53 S. W. 338.

96. State *v.* Fontenette, 38 La. Ann. 61; Com. *v.* Thompson, 116 Mass. 346.

97. Pleasant *v.* State, 13 Ark. 360 (that the female was a white woman, on indictment of a negro); Mosely *v.* State, 9 Tex. App. 137 (that female was under ten years of age). See also *infra*, II, A, 4, b, (I); and, generally, Indictments and Informations, 22 Cyc. 445.

Presumptions and burden of proof see *infra*, II, B, 1.

Sufficiency of evidence see *infra*, II, B, 3.

Age and identity of defendant.— On the trial of an indictment for statutory rape of a female under sixteen years of age, by a male sixteen years of age or upwards, where the commonwealth rests without offering any evidence of the age of the prisoner or as to his identity as the person indicted, and without offering his appearance in evidence, it is reversible error for the court to submit the age of the prisoner to the jury on his appearance, without more. Com. *v.* Walker, 33 Pa. Super. Ct. 167.

98. Sutton *v.* People, 145 Ill. 279, 34 N. E. 420 (age of defendant); Mobley *v.* State, 46 Miss. 501 (that the female was over ten years of age); Peter *v.* State, 5 Humphr. (Tenn.) 436; State *v.* Hooks, 69 Wis. 182, 33 N. W. 57, 2 Am. St. Rep. 728 (that the female was a married woman). See also *infra*, II, A, 4, b, (I); and, generally, Indictments and Informations, 22 Cyc. 448.

objection may be and is cured by statute,[99] any variance between the averments of the indictment and the proof in a matter which is legally essential to the charge is fatal and entitles defendant to an acquittal;[1] but a variance as to an allegation which may be rejected as mere surplusage is immaterial.[2] Under an indictment charging a particular offense a conviction cannot be had upon proof of another and distinct offense.[3] If the indictment charges rape, or attempt or assault with intent to rape, by force and against the will of the female, not alleging that she was under the age of consent, there can be no conviction on proof that the female was under the age of consent unless there is also proof of force and want of consent, where the statute makes rape by force and carnal knowledge of a female under the age of consent distinct offenses;[4] but it has been held otherwise where the statute does not make them distinct offenses.[5] Where an indictment charges rape by force, or assault with intent to rape by force, upon a female under the age of consent, and the evidence shows that no force was used, the allegation of force may be rejected as surplusage and there is no material variance.[6] Where an indictment for rape charges it to have been committed by force, evidence of threats is admissible.[7]

(II) *NAME OF FEMALE.* A variance between the indictment and proof as to the name of the female is fatal unless the defect is cured by statute;[8] but there is no variance where the names are *idem sonans*, or, as is generally held, where they are taken as the same in common use.[9]

99. See INDICTMENTS AND INFORMATIONS, 22 Cyc. 451.

1. State *v.* Vorey, 41 Minn. 134, 43 N. W. 324; Bonner *v.* State, 65 Miss. 293, 3 So. 663. See, generally, INDICTMENTS AND INFORMATIONS, 22 Cyc. 450 *et seq.*

Woman intoxicated or drugged.— Under an information for rape, which alleged that the defendant committed the offense "by force and violence," and against the will of the prosecutrix, and did "feloniously ravish" her, evidence is admissible that the offense was committed by means of an intoxicating or narcotic substance given her by defendant. People *v.* Snyder, 75 Cal. 323, 17 Pac. 208.

2. State *v.* Scroggs, 123 Iowa 649, 96 N. W. 723; Peter *v.* State, 5 Humphr. (Tenn.) 436; Nicholas *v.* State, 23 Tex. App. 317, 5 S. W. 239; State *v.* Hooks, 69 Wis. 182, 33 N. W. 57, 2 Am. St. Rep. 728. See *supra*, II, A, 4, a; *infra*, this section; and, generally, INDICTMENTS AND INFORMATIONS, 22 Cyc. 450 *et seq.*

3. Greer *v.* State, 50 Ind. 267, 19 Am. Rep. 709; State *v.* Vorey, 41 Minn. 134, 43 N. W. 324 (holding that in a prosecution for rape, where the indictment is drawn under the third subdivision of Pen. Code, § 235, for rape committed by preventing the resistance of the female by threats and fear, defendant cannot be convicted, under the second subdivision, of rape committed by overcoming resistance by force); Barton *v.* State, (Miss. 1908) 47 So. 521; Alfred *v.* State, (1902) 32 So. 54; State *v.* Hamey, 168 Mo. 167, 67 S. W. 620, 57 L. R. A. 846; Bonner *v.* State, 65 Miss. 293, 3 So. 663. See INDICTMENTS AND INFORMATIONS, 22 Cyc. 455.

4. *Alabama.*— Vasser *v.* State, 55 Ala. 264.

Arkansas.— Warner *v.* State, 54 Ark. 660, 17 S. W. 6.

Mississippi.—Bonner *v.* State, 65 Miss. 293, 3 So. 663.

North Carolina.— State *v.* Johnson, 100 N. C. 494, 6 S. E. 61. But *compare* State *v.* Staton, 88 N. C. 654; State *v.* Johnson, 76 N. C. 209.

Texas.— Munoz *v.* State, 47 Tex. Cr. 577, 85 S. W. 11; Morgan *v.* State, (Cr. App. 1899) 50 S. W. 718; Jenkins *v.* State, 34 Tex. Cr. 201, 29 S. W. 1078; Rodgers *v.* State, 30 Tex. App. 510, 17 S. W. 1077; Walton *v.* State, 29 Tex. App. 163, 15 S. W. 646; Moore *v.* State, 20 Tex. App. 275; Craig *v.* State, 18 Tex. App. 321.

Vermont.— State *v.* Wheat, 63 Vt. 673, 22 Atl. 720.

See 42 Cent. Dig. tit. "Rape," § 42 *et seq.*

5. State *v.* Smith, 9 Houst. (Del.) 588, 33 Atl. 441; McMath *v.* State, 55 Ga. 303; State *v.* Jackson, (La. 1894) 15 So. 402; State *v.* Staton, 88 N. C. 654; State *v.* Johnston, 76 N. C. 209.

6. *California.*— People *v.* Rangod, 112 Cal. 669, 44 Pac. 1071.

Iowa.— State *v.* Sheets, 127 Iowa 73, 102 N. W. 415; State *v.* Anderson, 125 Iowa 501, 101 N. W. 201; State *v.* Scroggs, 123 Iowa 649, 96 N. W. 723.

Missouri.— McComas *v.* State, 11 Mo. 116.

Nebraska.— Baxter *v.* State, 80 Nebr. 840, 115 N. W. 534; Hubert *v.* State, 74 Nebr. 220, 104 N. W. 276, 106 N. W. 774.

Oregon.— State *v.* Horne, 20 Oreg. 485, 26 Pac. 665.

Texas.— Davis *v.* State, 42 Tex. 226; McAvoy *v.* State, 41 Tex. Cr. 56, 51 S. W. 928.

Wisconsin.— State *v.* Erickson, 45 Wis. 86.

See 42 Cent. Dig. tit. "Rape," § 42 *et seq.* And see *supra*, II, A, 3, a, (VI), b, (V).

7. Bass *v.* State, 16 Tex. App. 62.

8. McFarland *v.* State, 154 Ind. 442, 56 N. E. 910; Vance *v.* State, 65 Ind. 460, "Dellia" and "Della." See INDICTMENTS AND INFORMATIONS, 22 Cyc. 458.

9. State *v.* Johnson, 67 N. C. 55, "Susan"

(III) *TIME.* Time is not a material and essential element in rape or assault with intent to commit rape, and proof of the offense on any day within the period of limitation is sufficient.[10]

5. CONVICTION OF OFFENSES INCLUDED IN CHARGE. Indictments for rape are within the rule that when an indictment charges an offense which includes another less offense, defendant may be acquitted of the higher offense and acquitted of the less.[11] Thus on an indictment for rape there may, where there are proper allegations, be a conviction of attempt, simple assault, felonious assault, assault with intent to rape, assault and battery, carnal knowledge of a child or imbecile female, adultery, incest, fornication, or bastardy, etc.[12] And on an indictment for assault with intent to rape there may be a conviction of simple assault or, where a battery is alleged, of assault and battery.[13] On an indictment charging an assault on a female under the age of consent and carnal knowledge and abuse of her, there may be a conviction of indecent assault.[14]

B. Evidence — 1. PRESUMPTIONS AND BURDEN OF PROOF — a. In General. A prosecution for rape, or for attempt or assault with intent to rape, is subject of course to the general rule that in a criminal prosecution every man is presumed to be innocent until his guilt is proved beyond a reasonable doubt, and the burden is on the state to prove every fact and circumstance which is essential to the guilt of the accused.[15] At the same time the exceptions and apparent exceptions to this rule also apply.[16] In such prosecutions the burden is on the state to prove force and want of consent,[17] unless the female was under the age of consent,[18] and to prove the intent to use force and commit rape or circumstances from which it may be presumed.[19]

b. Female Under Age of Consent. If the female was under the age of consent

and "Susanna." And see State *v.* Emeigh, 18 Iowa 122, "May" and "Mary."

What constitutes a variance as to names see INDICTMENTS AND INFORMATIONS, 22 Cyc. 456 *et seq.*

10. Palin *v.* State, 38 Nebr. 862, 57 N. W. 743; State *v.* Perkins, 70 N. H. 330, 47 Atl. 268; Robertson *v.* State, 51 Tex. Cr. 493, 102 S. W. 1130. And see State *v.* Ferris, 81 Conn. 97, 70 Atl. 587; State *v.* Cunningham, 5 Pennew. (Del.) 294, 63 Atl. 30; State *v.* Willett, 78 Vt. 157, 62 Atl. 48; State *v.* Osborne, 39 Wash. 548, 81 Pac. 1096. *Compare* Snurr *v.* State, 4 Ohio Cir. Ct. 393, 2 Ohio Cir. Dec. 614. See INDICTMENTS AND INFORMATIONS, 22 Cyc. 451.

Where, however, on an indictment under Minn. Pen. Code, § 236, for carnally knowing and abusing a female child under the age of ten years, the state proved the commission of the offense on the day laid in the indictment, but it was shown that the child was ten years old on that day, it was held that the state could not then abandon the prosecution as to that offense and proceed to introduce evidence of a similar offense committed on a previous day, although, under Gen. St. (1878) c. 108, § 7, it might in the first instance have shown its commission on a day other than that laid in the indictment. State *v.* Masteller, 45 Minn. 128, 47 N. W. 541.

Election between acts proved see *infra*, II, C, 2, a.

11. See INDICTMENTS AND INFORMATIONS, 22 Cyc. 468 *et seq.*

12. Mills *v.* State, 52 Ind. 187; Com. *v.* Parker, 146 Pa. St. 343, 23 Atl. 323; Com. *v.* Lewis, 140 Pa. St. 561, 21 Atl. 501; De Berry *v.* State, 99 Tenn. 207, 42 S. W. 31; Glover *v.* Com., 86 Va. 382, 10 S. E. 420. See also *infra*, II, D; and INCEST, 22 Cyc. 52; INDICTMENTS AND INFORMATIONS, 22 Cyc. 470, 471, 480.

Conviction of less offense a proof of rape see *infra*, II, D.

13. People *v.* Bradbury, 151 Cal. 675, 91 Pac. 497; Duggan *v.* State, 116 Ga. 846, 43 S. E. 253; State *v.* Walters, 45 Iowa 389; People *v.* McDonald, 9 Mich. 150. See generally INDICTMENTS AND INFORMATIONS, 22 Cyc. 475.

14. State *v.* West, 39 Minn. 321, 40 N. W. 249; Reg. *v.* Brice, 7 Manitoba 627.

15. Jeffers *v.* State, 20 Ohio Cir. Ct. 294, 10 Ohio Cir. Dec. 832. And see CRIMINAL LAW, 12 Cyc. 379.

16. See, generally, CRIMINAL LAW, 12 Cyc. 380 *et seq.*

17. State *v.* Neil, 13 Ida. 539, 90 Pac. 860, 91 Pac. 318; State *v.* Fowler, 13 Ida. 317, 89 Pac. 757; People *v.* McDonald, 9 Mich. 150; State *v.* Taylor, 57 S. C. 483, 35 S. E. 729, 76 Am. St. Rep. 575. See *supra*, I, A, 2, f; *infra*, II, B, 3, g.

18. See *infra*, II, B, 1, b.

19. Territory *v.* Keyes, 5 Dak. 244, 38 N. W. 440 (intent presumed from circumstances); State *v.* Neil, 13 Ida. 539, 90 Pac. 860, 91 Pac. 318; Warren *v.* State, 51 Tex. Cr. 598, 103 S. W. 888; Scott *v.* State, 51 Tex. Cr. 5, 100 S. W. 159. See *supra*, I, B, 2, e, f; *infra*, II, B, 3, l, (I). And see CRIMINAL LAW, 12 Cyc. 379 note 93.

force and want of consent is conclusively presumed;[20] but the burden is on the state to prove that she was under that age.[21] It has been held that where the chastity or good repute of the female is material, it need not be shown by the state, but defendant must show her unchastity or bad repute;[22] but in another state it has been held that the state must prove that the accused was over eighteen and the female under that age, and, if she was over fifteen, her previous chastity, these elements being necessary under the statute.[23]

c. Capacity of Accused. In some states it is conclusively presumed that the accused, if under fourteen years of age, was incapable of committing rape, while in others the presumption may be rebutted, the burden of proof being on the state.[24] The accused has the burden of proof as to his age when he sets up that he was under fourteen years of age.[25] It has been held, however, that where defendant introduces evidence of impotency the burden is on the state to prove potency.[26]

2. Admissibility of Evidence — a. In General. Of course the general principles as to the admissibility of evidence apply to prosecutions for rape or for attempt or assault with intent to rape.[27] The state may introduce any competent evidence tending to corroborate the testimony of the prosecutrix or others as to the commission of the act by the accused, and the accused may introduce any competent evidence in rebuttal.[28] The testimony of the prosecutrix as to the

20. State *v.* Smith, 9 Houst. (Del.) 588, 33 Atl. 441; People *v.* McDonald, 9 Mich. 150. *Compare* People *v.* Stamford, 2 Wheel. Cr. (N. Y.) 152, non-consent presumed in assault with intent to rape. See *supra*, I, A, 2, f, (II); *infra*, II, B, 3, i.

21. State *v.* Pucca, 4 Pennew. (Del.) 71, 55 Atl. 831; State *v.* Deputy, 3 Pennew. (Del.) 19, 50 Atl. 176; State *v.* Houx, 109 Mo. 654, 19 S. W. 35, 32 Am. St. Rep. 686.

22. Com. *v.* Allen, 135 Pa. St. 483, 19 Atl. 957; Com. *v.* Howe, 35 Pa. Super. Ct. 554.

23. Hubert *v.* State, 74 Nebr. 220, 104 N. W. 276, 106 N. W. 774; George *v.* State, 61 Nebr. 669, 85 N. W. 840.

24. *Georgia.*— Bird *v.* State, 110 Ga. 315, 35 S. E. 156; Gordon *v.* State, 93 Ga. 531, 21 S. E. 54, 44 Am. St. Rep. 189.

Kentucky.— Heilman *v.* Com., 84 Ky. 457, 1 S. W. 731, 8 Ky. L. Rep. 451, 4 Am. St. Rep. 207; Payne *v.* Com., 110 S. W. 311, 33 Ky. L. Rep. 229.

New York.— People *v.* Randolph, 2 Park. Cr. 174.

Ohio.— Hiltabiddle *v.* State, 35 Ohio St. 52, 35 Am. Rep. 592; Williams *v.* State, 14 Ohio 222, 45 Am. Dec. 536.

Tennessee.— Wagoner *v.* State, 5 Lea 352, 40 Am. Rep. 36.

See 42 Cent. Dig. tit. "Rape," §§ 46, 47; and *supra*, I, A, 2, c; I, B, 2, h.

25. State *v.* McNair, 93 N. C. 628.

26. Jeffers *v.* State, 20 Ohio Cir. Ct. 294, 10 Ohio Cir. Dec. 832, impotency by reason of drunkenness. *Compare*, however, People *v.* Row, 135 Mich. 505, 98 N. W. 13.

27. See Criminal Law, 12 Cyc. 390 *et seq.*; Evidence, 16 Cyc. 821, 17 Cyc. 1.

Hearsay inadmissible see Holloway *v.* State, (Tex. Cr. App. 1908) 113 S. W. 928.

Res inter alios acta see People *v.* Corey, (Cal. App. 1908) 97 Pac. 907; Holloway *v.* State, (Tex. Cr. App. 1908) 113 S. W. 928.

28. *Alabama.*— Griffin *v.* State, (1908) 46 So. 481; Roberts *v.* State, 122 Ala. 47, 25 So. 238.

Iowa.— State *v.* Cassidy, 85 Iowa 145, 52 N. W. 1.

Minnesota.— State *v.* Connelly, 57 Minn. 482, 59 N. W. 479.

Missouri.— State *v.* Armstrong, 167 Mo. 257, 66 S. W. 961, holding that evidence of the finding of a hair ornament of the prosecutrix at the place of the alleged assault was admissible.

North Carolina.— State *v.* Huhh, 136 N. C. 679, 49 S. E. 339.

Texas.— Warren *v.* State, (Cr. App. 1908) 114 S. W. 380; Knowles *v.* State, 44 Tex. Cr. 322, 72 S. W. 398, holding that testimony of the prosecutrix's father that on the night of the alleged rape he searched for her in town, and could not find her, was admissible to corroborate her testimony, where she located the place of the crime outside of the town.

See 42 Cent. Dig. tit. "Rape," § 48 *et seq.*; and cases cited in the notes following.

Tracks and signs of struggle.— Evidence of tracks and of signs of a struggle at the place of the alleged offense, or of the absence of such signs, is admissible, if the locality is sufficiently identified (Roberts *v.* State, 122 Ala. 47, 25 So. 238, identification of locality held sufficient to admit evidence; Barnes *v.* State, 88 Ala. 204, 7 So. 38, 16 Am. St. Rep. 48, evidence held inadmissible for want of identification of place; Tyler *v.* State, 46 Tex. Cr. 10, 79 S. W. 558, where evidence of condition of ground on the next day held admissible); unless such evidence is inadmissible on the ground of remoteness (Ulrich *v.* People, 39 Mich. 245, where, in a prosecution for an assault with intent to ravish in a field of growing wheat, evidence that five or six weeks afterward, and also after harvest, an examination was made, and no sign of a struggle found, was held properly excluded for remoteness).

facts and circumstances of the transaction may be considered.[29] Defendant may introduce any competent evidence, direct or circumstantial, to show that the charge against him was concocted by the prosecutrix or others.[30] Facts or circumstances which tend to show the motive or bias of any witness who has testified, or the motive of the prosecutrix in making the charge, or to affect her credibility, are admissible;[31] but such evidence is generally confined to bias or motive of one

Noises indicating distress.— In a prosecution for rape, it was held error to permit witnesses who had lived near defendant's home to testify that they had heard noises indicating distress at or near the house, when they could not testify as to who made the noises, or what they were about. Baker *v.* State, 82 Miss. 84, 33 So. 716.

Motive of prosecutrix in examining house.— In a prosecution for assault with intent to rape, defendant's question of prosecutrix as to her motive in examining the house to see if he had stolen anything was properly excluded. State *v.* Neal, 178 Mo. 63, 76 S. W. 958.

Proof that offense could not have been committed on day alleged.— Where, in a prosecution for using a female child for the purpose of sexual intercourse, the indictment alleged that the offense was committed on a certain day in June, and the evidence showed that it was committed "early in June," evidence that the offense could not have been committed on the day alleged was not admissible, inasmuch as the state was not required to establish that the offense was committed on such day. State *v.* Cunningham, 5 Pennew. (Del.) 294, 63 Atl. 30.

29. State *v.* Carpenter, 124 Iowa 5, 98 N. W. 775, in order to determine whether or not there is other evidence tending to connect defendant with the commission of the offense.

30. Curby *v.* Territory, 4 Ariz. 371, 42 Pac. 953; People *v.* Knight, (Cal. 1895) 43 Pac. 6; and other cases cited in the note following.

Previous charges by prosecutrix.— On trial for rape by the accused upon his own daughter, who is the only witness for the people, defendant may show, by the evidence of other witnesses, that the daughter has made similar charges falsely against other men, even though the daughter has denied, on cross-examination, that she made such charges; the question, under the circumstances, not being collateral to the main issue. People *v.* Evans, 72 Mich. 367, 40 N. W. 473. But on the trial of a prosecution for taking and using a female child for the purpose of prostitution, it was held that whether the prosecutrix had previously charged defendant with assault and battery was immaterial. State *v.* Barrett, 5 Pennew. (Del.) 147, 59 Atl. 45.

Desire or offer to settle matter or discontinue prosecution.— It has been held that in a prosecution for rape evidence that the prosecutrix had desired, from the beginning, to settle the matter is admissible (Huff *v.* State, 106 Ga. 432, 32 S. E. 348); and that it is error to exclude evidence that the mother of the girl alleged to have been violated, who is a witness on the trial, agreed to drop the prosecution for a money consideration (McMath *v.* State, 55 Ga. 303). But in a prosecution for assault with intent to commit rape it was held not error to reject testimony tending to show that the prosecuting witness and her father had offered to discontinue the case for one hundred dollars, in the absence of any evidence showing an attempt at extortion. State *v.* McDevitt, 69 Iowa 549, 29 N. W. 459. And a letter of the mother of the prosecutrix to defendant, offering to hush up the matter for a consideration, was held *res inter alios* and not admissible on his trial. State *v.* Knock, 142 Mo. 515, 44 S. W. 235.

Opposition of father of prosecutrix to prosecution.— On a prosecution for rape, evidence, on cross-examination of the prosecutrix, that her father was opposed to the prosecution was held inadmissible. Welborn *v.* State, 116 Ga. 522, 42 S. E. 773.

Institution of civil actions.— Evidence that civil suits for damages had been brought against defendant, charged with rape by the prosecutrix and her mother, is inadmissible in the absence of anything to show that they had ever stated or insinuated that defendant was innocent, or that they were desirous of extorting blackmail. Reg. *v.* Riendeau, 9 Quebec Q. B. 147 [*affirmed* in 10 Quebec Q. B. 584].

31. *Alabama.*— Shepherd *v.* State, 135 Ala. 9, 33 So. 266.

Arizona.— Curby *v.* Territory, 4 Ariz. 371, 42 Pac. 953, holding that on a trial for rape alleged to have been committed by a father upon his daughter it is competent to show that complainant's motive in charging defendant was to shield a lover, whose attentions were paid to her against the father's will.

California.— People *v.* Lambert, 120 Cal. 170, 52 Pac. 307 (holding that the prosecutrix might be cross-examined, for the purpose of laying a foundation for impeachment, as to whether she had not stated that another brother, a sister, and herself were putting up jobs on their father, defendant, meaning to get him into prison so that she could live with her sister, where the theory of the defense was that the charge was a made-up story of the prosecutrix for the purpose of getting away from her father's control); People *v.* Knight, (1895) 43 Pac. 6 (holding that where defendant claimed that the charge was concocted by his wife, it was error to exclude circumstantial evidence to support that claim); People *v.* Fong Chung, 5 Cal. App. 587, 91 Pac. 105 (holding that on a prosecution for raping a child under age it was error to exclude evidence that no one

who has testified as a witness.[32] The jury may consider the mental capacity of the prosecutrix, her age, and her demeanor, as exhibited during the trial.[33] The prosecutrix need not be first examined before introduction of corroborative evidence.[34]

b. Personal Relations and Situation of Parties. Evidence is admissible to show the relationship, if any, between defendant and the prosecutrix, as that he was her father, stepfather, brother, etc., even though such evidence may show the crime of incest.[35] It is also competent for the state or defendant to introduce

was permitted to see the prosecutrix except the authorities after she was placed in jail).

Georgia.— Huff *v.* State, 106 Ga. 432, 32 S. E. 348; McMath *v.* State, 55 Ga. 303.

Illinois.— Shirwin *v.* People, 69 Ill. 55, holding that upon the proper foundation being laid, evidence that the prosecutrix had declared that the accused was not guilty, and that the prosecution was carried on to extort money from him or his friends was material and properly admissible in defense.

Michigan.— People *v.* Evans, 72 Mich. 367, 40 N. W. 473; Rogers *v.* People, 34 Mich. 345, holding that where a rape case depended almost wholly on the evidence of the female, and the proof was not very decided on the fact of assent, it was error not to permit defendant to ask her on cross-examination whether she voluntarily made statements of the matter soon after it occurred, and whether she prosecuted defendant voluntarily or at the instigation of others.

Ohio.— McFarland *v.* State, 24 Ohio St. 329, holding that the exclusion of testimony showing that, between the time of the alleged offense and the time of the complaint, the prosecutrix had been informed that the alleged act of sexual intercourse had been witnessed by other persons was error.

Oregon.— State *v.* Birchard, 35 Oreg. 484, 59 Pac. 468.

Wisconsin.— Hardtke *v.* State, 67 Wis. 552, 30 N. W. 723, holding that it was error to exclude questions asked the prosecutrix as to whether the wife of defendant had not promised to give her presents if she would swear against him, and had told her to walk lame, and taught her to assume lameness, as such evidence was competent to show that defendant's wife was influencing the prosecutrix to testify strongly against him and would affect her credibility. It was also held in this case that where it appeared that the wife of defendant had advised the prosecution, and told the prosecutrix to swear against defendant, questions asked a witness as to whether defendant's wife ever told him anything about arresting defendant, and whether she told witness that she was going to get rid of defendant, were competent as showing the defendant's wife's motives for advising the prosecutrix; and also that it was error to strike out testimony of a witness tending to show the motive of defendant's wife in attempting to influence the prosecutrix to testify to certain facts against defendant.

Canada.— Rex *v.* Finnessey, 10 Can. Cr. Cas. 347, 11 Ont. L. Rep. 338, 7 Ont. Wkly. Rep. 383.

See 42 Cent. Dig. tit. "Rape," §§ 48, 50.

But see State *v.* Symens, 138 Iowa 113, 115 N. W. 878, holding that on a trial of accused for the rape of his sister-in-law, a question asked the wife of accused testifying as a witness as to whether or not her mother had at any time made any threats against accused was improper, in the absence of a proper foundation for the introduction of such testimony.

Seduction of a woman by witness.— Evidence that one of the witnesses for the prosecution had seduced a woman, which is in no way connected with the case on trial, is inadmissible. State *v.* Durr, 39 La. Ann. 751, 2 So. 546.

32. State *v.* Barrett, 5 Pennew. (Del.) 147, 59 Atl. 45 (holding that evidence as to whether the father of the prosecutrix caused her to make the complaint against defendant was inadmissible); State *v.* Birchard, 35 Oreg. 484, 59 Pac. 468 (holding that refusal to permit defendant, on prosecution for rape of his daughter, to testify concerning the relations existing between him and the members of his family who had not testified against him, was not error, where it did not appear that prosecutrix was a person of feeble intellect, and that she was dominated by some person hostile to him; evidence to show bias being limited to witnesses giving evidence adverse to the party); Callison *v.* State, 37 Tex. Cr. 211, 39 S. W. 300 (holding that on trial of a man for attempt to rape his daughter, evidence that another daughter confessed to her husband that she had had intercourse with defendant before her marriage, offered to show a conspiracy instigated by her husband to cause defendant's conviction in order to save her reputation, was irrelevant, the husband not being a witness).

Conduct of husband of prosecuting witness.— In a prosecution for rape, after evidence was introduced that the husband of the prosecuting witness wrote defendant, who was the father of the witness, demanding a conveyance of all his property, and that he leave the country, evidence by the state that when he signed the letter he was very much agitated and excited is inadmissible, as defendant had a right to draw any inference he could from the letter. Smith *v.* State, 5 Tex. Cr. 137, 100 S. W. 924.

33. State *v.* Philpot, 97 Iowa 365, 66 N. W. 730.

34. Proctor *v.* Com., 20 S. W. 213, 14 Ky. L. Rep. 248.

35. *Alabama.*— Oakley *v.* State, 135 Ala. 15, 33 So. 23.

evidence of the relations existing between defendant and prosecutrix and their situation, in so far as such evidence has any bearing on the guilt or innocence of defendant.[36] But immaterial evidence along this line is inadmissible.[37]

California.— People *v.* Mayes, 66 Cal. 597, 6 Pac. 691, 56 Am. Rep. 126.

Michigan.— Strang *v.* People, 24 Mich. 1.

Montana.— State *v.* Bowser, 21 Mont. 133, 53 Pac. 179.

Texas.— Smith *v.* State, 51 Tex. Cr. 137, 100 S. W. 924; Barra *v.* State, 50 Tex. Cr. 359, 97 S. W. 94.

36. *Alabama.*— Oakley *v.* State, 135 Ala. 15, 33 So. 23 (holding that evidence that defendant and prosecutrix lived together as members of the same family was relevant and material); Shepherd *v.* State, 135 Ala. 9, 33 So. 266 (holding that on a prosecution for rape on the twelve-year-old stepdaughter of accused, who lived with him, it was proper to admit evidence as to the death of the girl's mother, to show the situation of the parties).

California.— People *v.* Mayes, 66 Cal. 597, 6 Pac. 691, 56 Am. Rep. 126, holding that where defendant was a brother-in-law of the prosecutrix, the jury might consider the relations between them, as tending in some degree to show that the prosecutrix had a right to trust herself to defendant without fear of molestation or harm from him.

Iowa.— State *v.* Waters, 132 Iowa 481, 109 N. W. 1013 (holding that on a prosecution for statutory rape, defendant having been twenty-seven years of age and prosecutrix a little over fourteen, evidence that he paid special attention to her, stopped to converse with her while passing through her room late at night, and that they were once found about eleven o'clock at night sitting close together on a banister was competent as corroborative evidence); State *v.* Forsythe, 99 Iowa 1, 68 N. W. 446 (holding admissible evidence of subsequent intimacy between defendant and the prosecutrix, a girl under the age of consent). And see State *v.* Norris, 127 Iowa 683, 104 N. W. 282, evidence of the relations existing between defendant and prosecutrix, his daughter, extending over several years.

Michigan.— People *v.* Murphy, 145 Mich. 524, 108 N. W. 1009 (holding that the prosecutrix testified that her husband had left her a few months prior to the alleged offense, it was not error to permit her to testify that she supported herself after her husband went away by keeping boarders and working out); People *v.* Elco, 131 Mich. 519, 91 N. W. 755, 94 N. W. 1069 (subsequent intimacy); People *v.* Mills, 94 Mich. 630, 54 N. W. 488; Hall *v.* People, 47 Mich. 636, 11 N. W. 414 (holding that defendant has a right to show that his previous relations with the prosecutrix were of a friendly character, even though the testimony has no tendency to show that they were improper or that her general character or reputation was bad; and therefore the court erred in excluding evidence that prosecutrix had casually invited defendant to her house); Maillet *v.* People, 42 Mich. 262, 3 N. W. 854.

Missouri.— State *v.* Shouse, 188 Mo. 473, 87 S. W. 480, holding that where prosecutrix testified that she left defendant's home and never had any communication with him after the morning of March 30, 1904, it was error to refuse to permit a witness to testify that the prosecutrix was playing April fool with defendant three days afterward.

Nebraska.— Reinoehl *v.* State, 62 Nebr. 619, 87 N. W. 355.

Texas.— Denton *v.* State, 46 Tex. Cr. 193, 79 S. W. 560 (holding that it was competent for the state to attempt to prove by prosecutrix that she felt friendly toward accused, and did not wish to have him indicted); Simpson *v.* State, 45 Tex. Cr. 320, 77 S. W. 819 (holding that on a prosecution for rape of a female under the age of consent, it was proper to prove that defendant had promised to marry prosecutrix, and had assured her that he was not a married man, as showing the purpose and intent of defendant, and giving a reason for consent on the part of prosecutrix). In a prosecution for rape, evidence that defendant was a married man and uncle of prosecutrix by marriage; that he took prosecutrix buggy riding several times, returning usually late; that one night he returned before sundown; that prosecutrix, as defendant at one time was trying to hug and kiss her, saw a certain person who was a witness for the state; and that a few days thereafter defendant and prosecutrix were again riding together — were admissible as showing intimacy, continued association, and undue familiarity between the parties. Battles *v.* State, 53 Tex. Cr. 202, 109 S. W. 195. On a trial for assault with intent to rape, the testimony of prosecutrix that on accused coming to her house after the commission of the offense, and inviting her to a party, she asked him to leave, was admissible. Warren *v.* State, (Cr. App. 1908) 114 S. W. 380.

Vermont.— State *v.* Hollenbeck, 67 Vt. 34, 30 Atl. 696, holding that it was proper to ask prosecutrix whether before and after the alleged offense her relations with defendant were not cordial.

Wisconsin.— Bannen *v.* State, 115 Wis. 317, 91 N. W. 107, 965.

37. *Arkansas.*— Hust *v.* State, 77 Ark. 146, 91 S. W. 8, holding that on a prosecution for statutory rape on defendant's stepdaughter, testimony of a witness that he had visited defendant's house and saw nothing incriminating was immaterial.

Kentucky.— Clymer *v.* Com., 64 S. W. 409, 23 Ky. L. Rep. 1041, holding that evidence that the mother of the prosecuting witness had, about two weeks before the time of the alleged offense, invited defendant to come to her house, was immaterial.

New York.— Haulish *v.* Boller, 72 N. Y. App. Div. 559, 75 N. Y. Suppl. 992, 11 N. Y. Annot. Cas. 18, holding that testimony that

c. Declarations, Admissions, and Conduct of Accused.[38] The state may introduce evidence of prior or subsequent declarations, admissions, or conduct of the accused constituting part of the *res gestæ* or tending to show that he committed the crime charged.[39] But such evidence is not admissible if the declarations

defendant was living apart from his wife was not admissible.

North Carolina.—State *v.* Parish, 104 N. C. 679, 10 S. E. 457, holding that on prosecution of a father for rape of his daughter evidence that defendant and his wife lived together amicably and peaceably after the offense was not admissible, having no tendency to prove defendant's guilt or innocence of the crime charged.

Texas.— Smith *v.* State, (Cr. App. 1903) 74 S. W. 556 (holding that on a prosecution for rape, it was not permissible to show that defendant was married); Smith *v.* State, 44 Tex. Cr. 137, 68 S. W. 995, 100 Am. St. Rep. 849 (holding that it was not competent to show that defendant was a married man with two children).

38. **Proof of other acts** see *infra*, II, B, 2, t.

39. *Alabama.*— Oakley *v.* State, 135 Ala. 15, 33 So. 23 (holding that the state may prove as a part of the *res gestæ* that when the girl alleged to have been ravished was being assaulted she cried and called to her mother, and that the latter went to her and was struck by defendant; but that further evidence that the mother was badly hurt and disabled by the blow was irrelevant and inadmissible); Barnes *v.* State, 88 Ala. 204, 7 So. 38, 16 Am. St. Rep. 48 (holding that statements made by defendant several months before the offense was committed, tending to show his carnal passion for prosecutrix, and his belief that she would not yield to his desire, were admissible).

California.— People *v.* Scalamiero, 143 Cal. 343, 76 Pac. 1098 (conflicting statements after offense); People *v.* Roach, 129 Cal. 33, 61 Pac. 574 (declaration of defendant made shortly after assault, tending to show his intent); People *v.* Mayes, 66 Cal. 597, 6 Pac. 691, 56 Am. Rep. 126 (holding that the absence of defendant, and the fact that search was made for him and that he had fled from his home, were admissible as tending to show guilt); People *v.* Davis, 6 Cal. App. 229, 91 Pac. 810 (holding that it was not error to permit prosecutrix to state defendant's declarations to her at the time with reference to his conduct with other girls whom he knew); People *v.* Ah Lung, 2 Cal. App. 278, 83 Pac. 296.

Connecticut.— State *v.* Sebastian, 81 Conn. 1, 69 Atl. 1054, procurement of abortion.

Georgia.— McMath *v.* State, 55 Ga. 303, holding that it was competent to show that defendant offered the mother of the girl alleged to have been violated money to stop the prosecution.

Iowa.— State *v.* Norris, 127 Iowa 683, 104 N. W. 282 (holding that evidence of opportunity, if made by defendant's deliberate act, in connection with evidence that he was doing the things which usually lead to sexual intercourse, such as improperly handling the person of the prosecutrix, and the like, is admissible as tending to connect defendant with the crime); State *v.* Peterson, 110 Iowa 647, 82 N. W. 329.

Massachusetts.— Com. *v.* Bean, 137 Mass. 570, holding that on trial for assault with intent to rape, evidence that defendant, a month before the assault, invited the girl to walk in certain woods, and five weeks after the assault followed her at night, was admissible in the judge's discretion.

Mississippi.— Dickey *v.* State, 82 Miss. 525, 38 So. 776 (flight of defendant); Hogan *v.* State, 46 Miss. 274.

Missouri.— State *v.* Pollard, 174 Mo. 607, 74 S. W. 969 (holding that testimony of a witness that after she went from prosecutrix's room to where defendant was he offered her money and she accepted it not to tell his wife what had occurred was competent); State *v.* Harris, 150 Mo. 56, 51 S. W. 481 (holding that testimony of a conversation with defendant several days before the rape, in which he distinctly avowed his intention to commit it, was admissible).

Nebraska.— Leedom *v.* State, 81 Nebr. 585, 116 N. W. 496; Woodruff *v.* State, 72 Nebr. 815, 101 N. W. 1114 (holding admissible evidence of subsequent acts of intercourse and of an attempt to have an abortion committed upon prosecutrix); Reinoehl *v.* State, 62 Nebr. 619, 87 N. W. 355 (holding that on a prosecution for carnally knowing a female child, evidence of statements by accused to her, some months prior to the alleged crime, tending to show that he was desirous of being alone with her and at such times spoke to her of indecent things, calculated to familiarize her with and to obtain her acquiescence in the acts of which he was accused, was admissible as showing the accused's intention toward her).

New York.— Conkey *v.* People, 1 Abb. Dec. 418, 5 Park. Cr. 31 (holding that evidence of violent conduct of defendant in the presence of the prosecutrix and immediately after the alleged rape was admissible); People *v.* Flaherty, 27 N. Y. App. Div. 535, 50 N. Y. Suppl. 574 [*reversed* on other grounds in 162 N. Y. 532, 57 N. E. 73] (holding that on a prosecution for sexual intercourse with a female under the age of consent it was competent to show that defendant altered a parish register so as to make it appear that the girl was over such age, and that, after she became pregnant, he attempted to obtain custody of her by means of a forged letter).

Texas.— Smith *v.* State, 52 Tex. Cr. 344, 106 S. W. 1161 (holding that it was proper to permit the state to prove what defendant said to the prosecutrix after the completion of the offense as to the means that she should take to prevent conception);

or conduct are too remote in point of time, or if they are of such a character that they have no tendency to prove the crime charged.[40] Defendant cannot intro-

Ricks *v.* State, 48 Tex. Cr. 229, 87 S. W. 345 (subsequent declaration of accused); Lee *v.* State, 44 Tex. Cr. 354, 72 S. W. 1005, 61 L. R. A. 904 (holding that, on a prosecution for rape by means of a sham marriage, evidence that nine months later defendant married another woman was admissible as showing that he had no purpose or motive at the time of the alleged rape to consummate the marriage); Massey *v.* State, 31 Tex. Cr. 371, 20 S. W. 758 (holding that evidence that defendant, on the day before the offense was committed, used obscene language, indicating a determination to have intercourse with girls that night, if he had to kill the girls, was competent, although the intended victim was not named). And see Holloway *v.* State, (Cr. App. 1908) 113 S. W. 928.

Utah.— State *v.* Neel, 23 Utah 541, 65 Pac. 494, admissions of defendant as to the paternity of a child of the prosecutrix.

Washington.— State *v.* Winnett, 48 Wash. 93, 92 Pac. 904, holding that a statement made by defendant to a witness before the alleged crime was admissible, where it showed his intention to commit the crime.

Letters written by accused.— On a prosecution for rape letters written by defendant after being placed in jail, to the person assaulted and her mother, in which he refers to the commission of the offense by him, are admissible in evidence. Oakley *v.* State, 135 Ala. 15, 33 So. 23. On a prosecution for illicit intercourse with a female under the age of consent, letters written by defendant to prosecutrix at a time when he was keeping her in a hospital, awaiting her confinement, in which he spoke of her pregnancy and acknowledged himself the author of her condition, although not referring specifically to the act of intercourse on or about the day charged, were properly admitted as tending to corroborate her testimony of such act. Leedom *v.* State, 81 Nebr. 585, 116 N. W. 496. See also Dickey *v.* State, 86 Miss. 525, 38 So. 776 (letter from defendant to physician offering money if he would swear to facts stated); Warren *v.* State, (Tex. Cr. App. 1908) 114 S. W. 380 (letter showing engagement to marry).

Evidence of previous solicitations by defendant is admissible to show the existence of a motive or passion. State *v.* Knapp, 45 N. H. 148. And see State *v.* Campbell, 210 Mo. 202, 109 S. W. 706.

Ill-treatment by defendant of prosecutrix and other members of family.— In People *v.* Taylor, 36 Cal. 255, it was held that on a prosecution for rape upon a girl living with defendant's family, evidence that he had at various times beaten and harshly treated her was irrelevant and inadmissible. And in Smith *v.* State, 51 Tex. Cr. 137, 100 S. W. 924, it was held that on a prosecution for rape of a female under the age of consent, the daughter of defendant, it was prejudicial error to admit evidence that defendant was always quarreling with and slapping the prosecutrix. But in People *v.* Lenou, 79 Cal. 625, 631, 21 Pac. 967, it was held that where a stepfather was accused of rape upon his stepdaughter between ten and eleven years of age, who testified that defendant was in the habit of cruelly beating her, and thus keeping her in constant fear and terror, under which she submitted to him, the testimony of a neighbor that she heard the stepfather whipping and beating the prosecutrix was admissible in corroboration of her statement as to cruel treatment and fear; and that the fact that the beating testified to by the neighbor occurred a year before the alleged rape went only to the weight and not to the admissibility of the testimony. And in People *v.* Burwell, 106 Mich. 27, 63 N. W. 986, it was held that in the prosecution of a father for rape upon his seventeen-year-old daughter, evidence that he had beaten her before, and that he was abusive to his wife and other children, and of the language used on such occasions, was admissible as tending to show that the prosecutrix yielded through fear. See also Sharp *v.* State, 15 Tex. App. 171. *Compare* Baker *v.* State, 82 Miss. 84, 33 So. 716.

40. *California.*— People *v.* O'Brien, 130 Cal. 1, 62 Pac. 297, holding that on a trial for rape, the admission of evidence that three or four days after the alleged crime, at a meeting between defendant, prosecutrix, and her brother and uncle, a pistol was taken from defendant, and the introduction of the pistol as an exhibit, was improper.

Illinois.— Dalton *v.* People, 224 Ill. 333, 79 N. E. 669.

Kentucky.— Darrell *v.* Com., 82 S. W. 289, 26 Ky. L. Rep. 541, holding that where defendant admitted the intercourse, and the only question was that of consent, evidence that he tried to procure an abortion was not admissible.

Mississippi.— Baker *v.* State, 82 Miss. 84, 33 So. 716, holding that on a prosecution for rape committed by defendant on his stepdaughter, it was error to permit testimony showing defendant's ill-treatment of members of his household, who knew nothing of the alleged crime, it not tending to explain the delay in prosecution; and also that it was error to permit a witness, not called by the defense, to testify that defendant had told her that she would have to swear to some lies to help him out.

Missouri.— State *v.* Campbell, 210 Mo. 202, 109 S. W. 706 (holding that on a prosecution for rape, evidence that on a prior occasion, when prosecutrix went with defendant to haul water, he asked her why it was she was becoming lonesome, and if it was because she could not be with him, to which she replied in the negative, was inadmissible, as it was neither an improper act nor solicit-

duce evidence of his own self-serving acts or declarations not constituting part of the *res gestæ*.[41] Evidence on behalf of defendant that he took the girl to a physician for examination as soon as he learned that he was charged with raping her, and that the physician refused to make an examination, is inadmissible.[42]

d. Declarations and Conduct of Third Persons. As a general rule, evidence of declarations or conduct of third persons, not in the presence or hearing of defendant, is not admissible either for or against him,[43] unless they were so connected with the offense as to constitute a part of the *res gestæ*,[44] or unless the

ation of sexual intercourse); State *v.* Shouse, 188 Mo. 473, 87 S. W. 480 (holding that on a prosecution for rape alleged to have been committed by defendant on his stepdaughter, a divorce petition filed against defendant by his wife on other grounds in a suit then undetermined was irrelevant).

New York.— People *v.* Page, 162 N. Y. 272, 56 N. E. 750, 14 N. Y. Cr. 513 [*reversing* 20 N. Y. App. Div. 637, 47 N. Y. Suppl. 1145], holding that it was error to submit to the jury evidence that defendant had admitted he "insulted the girl," as corroborative of prosecutrix's testimony, since there was no necessary legal connection between an insult and a felony.

Ohio.— State *v.* Lawrence, 74 Ohio St. 38, 77 N. E. 266, holding inadmissible evidence of defendant's admission of other acts of intercourse with the prosecutrix more than two years after the offense charged, and after she had reached the age of consent.

Texas.— Shults *v.* State, 49 Tex. Cr. 351, 91 S. W. 786 (holding that on a prosecution for rape, evidence that in the winter or spring preceding the birth of prosecutrix's baby the accused proposed to furnish witness a woman with whom he could have intercourse, but refused to divulge her name unless the witness would have intercourse with her, was inadmissible); Lee *v.* State, 44 Tex. Cr. 354, 72 S. W. 1005, 61 L. R. A. 954 (holding that on a prosecution for rape alleged to have been committed by means of a sham marriage, it was not competent to show that when defendant was married, nine months later, he obtained his wife by abduction); Smith *v.* State, 44 Tex. Cr. 137, 68 S. W. 995, 100 Am. St. Rep. 849, (Cr. App. 1903) 73 S. W. 401 (holding that it was error to admit a conversation relative to marriage, had between prosecutrix and defendant subsequent to the commission of the alleged crime); Owens *v.* State, 39 Tex. Cr. 391, 46 S. W. 240 (holding that on a prosecution for a rape committed by defendant on his daughter, it was error to permit a witness to testify that defendant had told him that he did not care if witness had intercourse with her); Tomlin *v.* State, 25 Tex. App. 676, 8 S. W. 931 (holding that it was prejudicial error to admit evidence that defendant had said five years before that he had a drug that would cause any woman who took it to yield to his desire).

Failure to deny charge.— The mere failure of defendant to deny the declaration of the prosecutrix, made out of court, charging him with the crime, when repeated to him, cannot be shown as an admission corroborative of the testimony of the prosecutrix. People *v.* Page, 162 N. Y. 272, 56 N. E. 750, 14 N. Y. Cr. 513 [*reversing* 20 N. Y. App. Div. 637, 47 N. Y. Suppl. 1145].

41. State *v.* Jefferson, 28 N. C. 305; Wood *v.* State, 28 Tex. App. 61, 12 S. W. 405. See CRIMINAL LAW, 12 Cyc. 426; EVIDENCE, 16 Cyc. 1202.

42. Com. *v.* Allen, 135 Pa. St. 483, 19 Atl. 957.

43. See CRIMINAL LAW, 12 Cyc. 432; and the following cases: State *v.* Carpenter, 124 Iowa 5, 98 N. W. 775 (holding that where defendant did not propose to show any improper conduct between prosecutrix and another young man, it was proper for the court to refuse to permit defendant to ask prosecutrix concerning such young man, who was alleged to have come to her father's house over her parents' objection); People *v.* Duncan, 104 Mich. 460, 62 N. W. 556; State *v.* Harris, 150 Mo. 56, 51 S. W. 481; State *v.* Knock, 142 Mo. 515, 44 S. W. 235; Shults *v.* State, 49 Tex. Cr. 351, 91 S. W. 786; Neill *v.* State, 49 Tex. Cr. 219, 91 S. W. 791 (holding that on a prosecution for rape, evidence that prosecutrix's mother was an opium fiend was inadmissible, in the absence of anything to show the connection of such fact with the case; and also that testimony that a companion of defendant had previously been convicted of seduction was inadmissible); Henard *v.* State, 47 Tex. Cr. 168, 82 S. W. 655 (holding that on a trial for statutory rape, evidence to support a theory that a person other than defendant was guilty was properly excluded as immaterial where there was nothing in the case to pertinently connect such third person with the offense); Wells *v.* State, 43 Tex. Cr. 451, 67 S. W. 1020 (holding that evidence that the husband of the prosecutrix assaulted defendant shortly after the alleged outrage was not admissible as tending to show that the husband believed that he had found the man who committed the offense); Collison *v.* State, 37 Tex. Cr. 211, 39 S. W. 300 (holding that it was irrelevant that a sister of prosecutrix, who testified for the state, had said that she (declarant) had had intercourse with no one but a person other than her father, her testimony not being in conflict therewith); Hardtke *v.* State, 67 Wis. 552, 30 N. W. 723.

Declarations of third persons in the presence of defendant and his conduct in relation thereto are admissible. People *v.* Ah Lung, 2 Cal. App. 278, 83 Pac. 296.

44. See CRIMINAL LAW, 12 Cyc. 432. And see State *v.* Huff, 136 N. C. 679, 49 S. E.

third person was a participant with defendant in the commission of the offense, and the conduct or declaration was sufficiently connected therewith,[45] or unless the evidence is introduced to affect credibility as a witness,[46] or is admissible to contradict the prosecutrix or corroborate defendant's testimony.[47]

e. Force, Resistance, and Consent in General. The use of force by defendant and resistance and want of consent on the part of the woman may be shown by the testimony of witnesses present at the time, or by statements of the prosecutrix made in the presence of defendant.[48] Force and resistance may be shown by direct testimony or circumstantial evidence and all the circumstances attending the commission of the act are admissible;[49] and consent of the woman may be shown by her prior, contemporaneous, or subsequent manner and conduct.[50] The reason why prosecutrix came to the place of the alleged offense may be shown for the purpose of rebutting any presumption of consent;[51] and on the other hand defendant may, on cross-examination, ask her for what purpose she went there.[52] The prosecutrix may be asked by the state, or by defendant on cross-examina-

339. Where the prosecution claims that defendant and his accomplice started to take prosecutrix and another girl, E, home from a dance, and that E jumped from the buggy and escaped, defendants afterward ravishing prosecutrix, there was no error in allowing E to testify that after jumping from the buggy she was at police headquarters awhile, where nothing was said as to what happened there. People *v.* Flynn, 96 Mich. 276, 55 N. W. 834.

45. See CRIMINAL LAW, 12 Cyc. 435. In a prosecution for rape, where it was shown that defendant and another man had been together, talking to each other, before defendant went to the room of prosecutrix, evidence of the actions of the other man and the woman that he was with at that time was admissible. Simpson *v.* State, 45 Tex. Cr. 320, 77 S. W. 819. See also People *v.* Ah Lung, 2 Cal. App. 278, 83 Pac. 296; State *v.* Duffy, 124 Mo. 1, 27 S. W. 358.

46. See CRIMINAL LAW, 12 Cyc. 433. On the trial of one indicted for assault with intent to rape, when the father of the alleged victim, as a witness for the state, had testified to facts tending to show that he had discovered and intercepted defendant while making such assault on his daughter, it was error to reject testimony, offered by defendant, showing that he was arrested under a warrant sworn out the day following the alleged crime, not by the father but by the uncle of the girl alleged to have been assaulted, since tending to show conduct of the father inconsistent with the truth of his testimony. Merritt *v.* State, 107 Ga. 675, 34 S. E. 361. See also *supra*, II, B, 2, a.

47. Where, in a prosecution for assault with intent to rape, defendant contended that prosecutrix consented to all that was done, it was held that testimony of a witness who was not more than sixty-five feet from prosecutrix at the time of the alleged assault that he called to her in a loud voice for the purpose of attracting her attention, together with the conversation had between the witness and his wife at the time with reference to what they saw and did in consequence thereof, was admissible for the purpose of contradicting prosecutrix and corroborating defendant's testimony. State *v.* Huff, 136 N. C. 679, 49 S. E. 339.

48. *Michigan.*— People *v.* Flynn, 96 Mich. 276, 55 N. W. 834.

Missouri.— State *v.* Hammond, 77 Mo. 157.

New York.— Woodin *v.* People, 1 Park. Cr. 464.

South Carolina.— State *v.* Taylor, 57 S. C. 483, 35 S. E. 729, 76 Am. St. Rep. 575; State *v.* Sudduth, 52 S. C. 488, 30 S. E. 408.

Wisconsin.— Brown *v.* State, 127 Wis. 193, 106 N. W. 536.

See 42 Cent. Dig. tit. "Rape," § 49.

49. See Griffin *v.* State, (Ala. 1908) 46 So. 481.

Condition of clothing see *infra*, II, B, 2, h, (III)

Physical condition of prosecutrix see *infra*, II, B, 2, h.

50. Adams *v.* People, 179 Ill. 633, 54 N. E. 296; Shirwin *v.* People, 69 Ill. 55 (holding that defendant may show that the prosecutrix was in the habit of following him about the house); State *v.* Huff, 136 N. C. 679, 49 S. E. 339. Evidence that the prosecutrix on a trial for rape insulted and assaulted her mother, on an attempt by the latter to make her leave the defendant and go into the house on a certain occasion some time after the alleged offense was committed, is admissible on the question of consent, and to contradict a positive statement of the prosecutrix that no familiarity had taken place between her and the defendant after the commission of the crime. Rex *v.* Riendeau, 10 Quebec Q. B. 584.

Character and habits of prosecutrix see *infra*, II, B, 2, s.

Complaint and want of complaint by prosecutrix see *infra*, II, B, 2, g, (III), (IV).

Declarations of prosecutrix see *infra*, II, B, 2, g.

51. Stevens *v.* Com., 45 S. W. 76, 20 Ky. L. Rep. 48, holding that it was competent to show, as a matter of inducement, how the prosecutrix came to be in a lonely spot, where the assault was committed, after night, and in the company of her alleged assailants, although defendant was not then present, for the purpose of rebutting any presumption of consent.

52. State *v.* Hartnett, 75 Mo. 251.

tion, whether the treatment complained of was with her consent or against her will.[53]

f. Threats and Fear. Antecedent threats and violent conduct before and after the act, together with the effect such threats produced on the mind of the prosecutrix, may be proved to show rape by threats and fear.[54] Where the theory of the prosecution is that the rape was committed by threats and fear, the prosecutrix may be examined as to the threats and as to the effect upon her.[55] It is proper to ask her why she did not struggle against defendant.[56] On the prosecution of a man for rape of his daughter or other girl living as a member of his family, evidence of abusive treatment by him of the girl and of other members of the family is admissible to show that the prosecutrix yielded from fear of him.[57] It may be shown that the prosecutrix, defendant's daughter, made no outcry because she was afraid he would whip her.[58]

g. Declarations, Complaint, Want of Complaint, and Conduct of Prosecutrix — (i) *Declarations in General.* The defendant may introduce evidence of declarations of the prosecutrix, upon the proper foundation being laid, to impeach her testimony;[59] but her statements, not part of the *res gestæ*, are not admissible in behalf of defendant, except by way of impeachment and after the proper foundation has been laid.[60] Nor as a rule are her declarations admissible as proof of the crime charged, or as corroborating evidence, unless they are part of the *res gestæ*,[61] or unless they are admissible under the rules in the particular

53. Jones *v.* State, 104 Ala. 30, 16 So. 135; Woodin *v.* People, 1 Park. Cr. (N. Y.) 464; Brown *v.* State, 127 Wis. 193, 106 N. W. 536.

54. People *v.* Burwell, 106 Mich. 27, 63 N. W. 986; People *v.* Flynn, 96 Mich. 276, 55 N. W. 834; Coukey *v.* People, 1 Abb. Dec. (N. Y.) 418, 5 Park. Cr. 31; Bass *v.* State, 16 Tex. App. 62; Sharp *v.* State, 15 Tex. App. 171; and other cases in the notes following.

55. People *v.* Flynn, 96 Mich. 276, 55 N. W. 834, holding that where the theory of the prosecution is that defendant and his accomplice committed the rape by threats of personal violence, it is proper to ask the prosecuting witness whether she believed they intended to kill her. See also Strang *v.* People, 24 Mich. 1.

56. People *v.* Flynn, 96 Mich. 276, 55 N. W. 834; Strang *v.* People, 24 Mich. 1.

57. People *v.* Lenon, 79 Cal. 625, 631, 21 Pac. 967; People *v.* Burwell, 106 Mich. 27, 63 N. W. 986; Sharp *v.* State, 15 Tex. App. 171. But see People *v.* Taylor, 36 Cal. 255; Baker *v.* State, 82 Miss. 84, 33 So. 716; Smith *v.* State, (Tex. Cr. App. 1907) 100 S. W. 924. And see *supra*, II, B, 2, h.

58. Smith *v.* State, 52 Tex. Cr. 344, 106 S. W. 1161.

59. Austine *v.* People, 110 Ill. 248; Shirwin *v.* People, 69 Ill. 55 (holding that upon the proper foundation being laid, evidence that the prosecutrix had declared that the accused was not guilty, and that the prosecution was carried on to extort money from him or his friends, was admissible); Kennedy *v.* People, 44 Ill. 283; King *v.* Com., 20 S. W. 224, 14 Ky. L. Rep. 254. See, generally, Witnesses; and *infra*, II, B, 2, g, (III), (A).

60. *Iowa.*— State *v.* Emeigh, 18 Iowa 122.

Missouri.— State *v.* Yocum, 117 Mo. 622, 23 S. W. 765.

New Jersey.— State *v.* Brady, 71 N. J. L. 360, 59 Atl. 6, holding that on a prosecution for carnal abuse of a girl, her declaration, contradictory of her testimony, is not competent as an admission, the state, not she, being the party, but is competent only to impeach her, and for such purpose can be introduced only after her attention has been called to it.

South Carolina.— State *v.* Sudduth, 52 S. C. 488, 30 S. E. 408, holding that testimony of a witness in a prosecution for rape that prosecutrix stated to him that she did not use any force to prevent the outrage is not admissible except to contradict her own statement on the stand that she did not make the statement to the witness.

Wisconsin.— Brown *v.* State, 127 Wis. 193, 106 N. W. 536, holding that an admission made by the prosecutrix to a physician the day after the alleged rape that she made no resistance was inadmissible.

But *compare* Kennedy *v.* People, 44 Ill. 283.

61. *Alabama.*— Griffin *v.* State, 76 Ala. 29; Leoni *v.* State, 44 Ala. 110.

Georgia.— Canida *v.* State, 130 Ga. 15, 60 S. E. 104 (holding that testimony of a witness that prosecutrix said someone had attempted to assault her was not evidence authorizing a charge on the law of assault, as it was merely hearsay, and of no probative value); Lowe *v.* State, 97 Ga. 792, 25 S. E. 676.

Illinois.— Stevens *v.* People, 158 Ill. 111, 41 N. E. 856.

Iowa.— State *v.* Hussey, 7 Iowa 409.

Missouri.— State *v.* Ballard, 174 Mo. 607, 74 S. W. 969.

jurisdiction as to the admissibility of complaints.[62] But her declarations immediately after the outrage are admissible as part of the *res gestæ*;[63] and all statements made by her in the presence of defendant are admissible.[64]

(II) *DYING DECLARATIONS.* Dying declarations of the prosecutrix identifying the accused as the perpetrator of the crime are not admissible, such declarations being admissible only in cases of homicide.[65]

(III) *COMPLAINT* — (A) *In General.* It is admissible to show by the testimony of the prosecutrix or other witnesses, in corroboration of her testimony, that complaint was made shortly after the commission of the alleged offense, and when, where, and to whom it was made,[66] but by the weight of authority the evidence

New Jersey.— State *v.* Ivins, 36 N. J. L. 233.

New York.— People *v.* McGee, 1 Den. 19.

Texas.— McGee *v.* State, 21 Tex. App. 670, 2 S. W. 890; Johnson *v.* State, 21 Tex. App. 368, 17 S. W. 252.

See 42 Cent. Dig. tit. "Rape," § 67 *et seq.*; and *infra*, II, B, 2, g, (III), (A).

Prior declarations showing relations of parties.— But where, in a rape case, the accused testified to acts of intimacy between himself and the prosecutrix prior to the alleged rape, and sought to maintain this by testimony of other witnesses that she was encouraging him in his attentions as far as the outside world could ascertain, and the prosecutrix testified that he was forcing himself upon her, and that she rejected his attentions, and that she had advised with friends in regard to it, it was held that evidence of friends of prosecutrix as to complaints made by her to them in regard to accused forcing his company upon her was admissible. Brown *v.* State, 52 Tex. Cr. 267, 106 S. W. 368. See also *supra*, II, B, 2, b.

62. See *infra*, II, B, 2, g, (III).

63. Barnes *v.* State, 88 Ala. 204, 7 So. 38, 16 Am. St. Rep. 48; People *v.* Weston, 236 Ill. 104, 86 N. E. 188; State *v.* Fitzsimon, 18 R. I. 236, 27 Atl. 446, 49 Am. St. Rep. 766; Wells *v.* State, 43 Tex. Cr. 451, 67 S. W. 1020; Castillo *v.* State, 31 Tex. Cr. 145, 19 S. W. 892, 37 Am. St. Rep. 794. See *infra*, II, B, 2, g, (III), (A), text and note 70. Statements and conversations with the prosecutrix in a prosecution for carnal knowledge, in order to be admissible in evidence as *res gestæ*, must be contemporaneous with the defilement or be so closely connected with it as to form a part of it. State *v.* Pollard, 174 Mo. 607, 74 S. W. 969. Where a physician who examined prosecutrix on the next day was examined as a witness with reference to such examination, evidence of a statement made to him by prosecutrix during such examination that she had made no resistance or fight was not admissible as *res gestæ*. Brown *v.* State, 127 Wis. 193, 106 N. W. 536.

64. Jesting *v.* State, 68 Ga. 824 (statements admitted by defendant at the time); State *v.* Jerome, 82 Iowa 749, 48 N. W. 722; Cardwell *v.* State, 60 Nebr. 480, 83 N. W. 665. *Contra*, where the child is incompetent to testify see People *v.* Quong Kun, 34 N. Y. Suppl. 260.

65. Johnson *v.* State, 50 Ala. 456.

66. *Alabama.*— Posey *v.* State, 143 Ala. 54, 38 So. 1019; Oakley *v.* State, 135 Ala. 15, 33 So. 23; Bray *v.* State, 131 Ala. 46, 31 So. 107; Barnes *v.* State, 88 Ala. 204, 7 So. 38, 16 Am. St. Rep. 48; Barnett *v.* State, 83 Ala. 40, 3 So. 612; Griffin *v.* State, 76 Ala. 29; Smith *v.* State, 47 Ala. 540; Lacy *v.* State, 45 Ala. 80; Leoni *v.* State, 44 Ala. 110.

Arizona.— Trimble *v.* Territory, 8 Ariz. 273, 71 Pac. 932; Territory *v.* Kirby, 3 Ariz. 288, 28 Pac. 1134.

Arkansas.— Williams *v.* State, 66 Ark. 264, 50 S. W. 517. And see Skaggs *v.* State, (1908) 113 S. W. 346.

California.— People *v.* Scalamiero, 143 Cal. 343, 76 Pac. 1098; People *v.* Keith, 141 Cal. 686, 75 Pac. 304; People *v.* Wilmot, 139 Cal. 103, 72 Pac. 838; People *v.* Figueroa, 134 Cal. 159, 66 Pac. 202; People *v.* Baldwin, 117 Cal. 244, 49 Pac. 186; People *v.* Barney, 114 Cal. 554, 47 Pac. 41; People *v.* Stewart, 97 Cal. 238, 32 Pac. 8; People *v.* Mayes, 66 Cal. 597, 6 Pac. 691, 56 Am. Rep. 126.

Connecticut.— State *v.* Sebastian, 81 Conn. 1, 69 Atl. 1054; State *v.* Kinney, 44 Conn. 153, 26 Am. Rep. 436.

Dakota.— Territory *v.* Godfrey, 6 Dak. 46, 50 N. W. 481.

Florida.— Ellis *v.* State, 25 Fla. 702, 6 So. 768.

Georgia.— Stephen *v.* State, 11 Ga. 225.

Hawaii.— Territory *v.* Schilling, 17 Hawaii 249.

Idaho.— State *v.* Neil, 13 Ida. 539, 90 Pac. 860, 91 Pac. 318; State *v.* Fowler, 13 Ida. 317, 89 Pac. 757.

Illinois.— Stevens *v.* People, 158 Ill. 111, 41 N. E. 856. And see People *v.* Weston, 236 Ill. 104, 86 N. E. 188.

Indiana.— Polson *v.* State, 137 Ind. 519, 35 N. E. 907; Thompson *v.* State, 38 Ind. 39.

Iowa.— State *v.* Symens, 138 Iowa 113, 115 N. W. 878; State *v.* Bebb, 125 Iowa 494, 101 N. W. 189; State *v.* Carpenter, 124 Iowa 5, 98 N. W. 775; State *v.* Snider, 119 Iowa 15, 91 N. W. 762; State *v.* Peterson, 110 Iowa 647, 82 N. W. 329; State *v.* Hutchinson, 95 Iowa 566, 64 N. W. 610; State *v.* Cook, 92 Iowa 483, 61 N. W. 185; State *v.* Watson, 81 Iowa 380, 46 N. W. 868; State *v.* Clark, 69 Iowa 294, 28 N. W. 606; State *v.* Mitchell, 68 Iowa 116, 26 N. W. 44; State *v.* Richards, 33 Iowa 420.

Kansas.— State *v.* Hoskinson, (1908) 96

must be confined to the bare fact that complaint was made; the details or particulars of the complaint not being admissible as substantive testimony unless the statement is part of the *res gestæ*.[67] The particulars of the complaint are com-

Pac. 138; State *v.* Daugherty, 63 Kan. 473, 65 Pac. 695.

Maine.— State *v.* Mulkern, 85 Me. 106, 26 Atl. 1017.

Massachusetts.— Com. *v.* Cleary, 172 Mass. 175, 51 N. E. 746.

Michigan.— People *v.* Marrs, 125 Mich. 376, 84 N. W. 284; People *v.* Bernor, 115 Mich. 692, 74 N. W. 184; People *v.* Gage, 62 Mich. 271, 28 N. W. 835, 4 Am. St. Rep. 854; Maillet *v.* People, 42 Mich. 262, 3 N. W. 854; Brown *v.* People, 36 Mich. 203.

Minnesota.— State *v.* Reid, 39 Minn. 277, 39 N. W. 796; State *v.* Shettleworth, 18 Minn. 208.

Mississippi.— Dickey *v.* State, 86 Miss. 525, 38 So. 776; Anderson *v.* State, 82 Miss. 784, 35 So. 202; Ashford *v.* State, 81 Miss. 414, 33 So. 174.

Missouri.— State *v.* Warner, 74 Mo. 83.

Nebraska.— Welsh *v.* State, 60 Nebr. 101, 82 N. W. 368.

New Jersey.— State *v.* Ivins, 36 N. J. L. 233.

New Mexico.— Territory *v.* Maldonado, 9 N. M. 629, 58 Pac. 350.

New York.— People *v.* Garner, 64 N. Y. App. Div. 410, 72 N. Y. Suppl. 66 [*affirmed* in 169 N. Y. 585, 62 N. E. 1099]; Baccio *v.* People, 41 N. Y. 265.

North Carolina.— State *v.* Stines, 138 N. C. 686, 50 S. E. 851.

North Dakota.— State *v.* Werner, 16 N. D. 83, 112 N. W. 60.

Oklahoma.— Harmon *v.* Territory, 9 Okla. 313, 60 Pac. 115.

Oregon.— State *v.* Ogden, 39 Oreg. 195, 65 Pac. 449; State *v.* Sargent, 32 Oreg. 110, 49 Pac. 889.

South Carolina.— State *v.* Sudduth, 52 S. C. 488, 30 S. E. 408.

Texas.—Adams *v.* State, 52 Tex. Cr. 13, 105 S. W. 197; Wells *v.* State, 43 Tex. Cr. 451, 67 S. W. 1020; Roberson *v.* State, (Cr. App. 1898) 49 S. W. 398; Reddick *v.* State, 35 Tex. Cr. 463, 34 S. W. 274, 60 Am. St. Rep. 56; Sentell *v.* State, 34 Tex. Cr. 260, 30 S. W. 226.

Utah.— State *v.* Neel, 21 Utah 151, 60 Pac. 510.

Vermont.— State *v.* Carroll, 67 Vt. 477, 32 Atl. 235; State *v.* Niles, 47 Vt. 82.

Washington.— State *v.* Hunter, 18 Wash. 670, 52 Pac. 247.

Wisconsin.— Bannen *v.* State, 115 Wis. 317, 91 N. W. 107, 965; Lee *v.* State, 74 Wis. 45, 41 N. W. 960; Hannon *v.* State, 70 Wis. 448, 36 N. W. 1.

England.— Rex *v.* Osborne, [1905] 1 K. B. 551, 69 J. P. 189, 74 L. J. K. B. 311, 92 L. T. Rep. N. S. 393, 21 T. L. R. 288, 53 Wkly. Rep. 494; Reg. *v.* Megson, 9 C. & P. 420, 38 E. C. L. 250; Reg. *v.* Osborne, C. & M. 622, 41 E. C. L. 338; Reg. *v.* Mercer, 6 Jur. 243; Reg. *v.* Walker, 2 M. & Rob. 212; Rex *v.* Clarke, 2 Stark. 241, 3 E. C. L. 393.

Canada.— Rex *v.* Riendeau, 10 Quebec Q. B. 584.

See 42 Cent. Dig. tit. "Rape," §§ 67, 68; and other cases cited in the note following.

Reasons for the rule see State *v.* Werner, 16 N. D. 83, 112 N. W. 60.

67. *Alabama.*— Sanders *v.* State, 148 Ala. 603, 41 So. 466; Posey *v.* State, 143 Ala. 54, 38 So. 1019; Oakley *v.* State, 135 Ala. 15, 33 So. 23; Bray *v.* State, 131 Ala. 46, 31 So. 107; Griffin *v.* State, 76 Ala. 29; Lacy *v.* State, 45 Ala. 80; Leoni *v.* State, 44 Ala. 110.

Arizona.— Territory *v.* Kirby, 3 Ariz. 288, 28 Pac. 1134.

Arkansas.— Williams *v.* State, 66 Ark. 264, 50 S. W. 517; Pleasant *v.* State, 15 Ark. 624. And see Skaggs *v.* State, (1908) 113 S. W. 346.

California.— People *v.* Scalamiero, 143 Cal. 343, 76 Pac. 1098; People *v.* Wilmot, 139 Cal. 103, 72 Pac. 838; People *v.* Figueroa, 134 Cal. 159, 66 Pac. 202; People *v.* Lambert, 120 Cal. 170, 52 Pac. 307; People *v.* Stewart, 97 Cal. 238, 32 Pac. 8; People *v.* Tierney, 67 Cal. 54, 7 Pac. 37; People *v.* Mayes, 66 Cal. 597, 6 Pac. 691, 56 Am. Rep. 126; People *v.* Graham, 21 Cal. 261; People *v.* Gonzalez, 6 Cal. App. 255, 91 Pac. 1013.

Florida.— Ellis *v.* State, 25 Fla. 702, 6 So. 768.

Georgia.— Lowe *v.* State, 97 Ga. 792, 25 S. E. 676; Stephen *v.* State, 11 Ga. 225.

Idaho.— State *v.* Fowler, 13 Ida. 317, 89 Pac. 757; State *v.* Harness, 10 Ida. 18, 76 Pac. 788.

Illinois.— Stevens *v.* People, 158 Ill. 111, 41 N. E. 856; Bean *v.* People, 124 Ill. 576, 16 N. E. 656. And see People *v.* Weston, 236 Ill. 104, 86 N. E. 188.

Indiana.— Thompson *v.* State, 38 Ind. 39; Weldon *v.* State, 32 Ind. 81.

Iowa.— State *v.* Symens, 138 Iowa 113, 115 N. W. 878; State *v.* Barkley, 129 Iowa 484, 105 N. W. 506; State *v.* Baker, 106 Iowa 99, 76 N. W. 509; State *v.* Clark, 69 Iowa 294, 28 N. W. 606; State *v.* Richards, 33 Iowa 420.

Kansas.— State *v.* Haskinson, (1908) 96 Pac. 138; State *v.* Daugherty, 63 Kan. 473, 63 Pac. 695.

Louisiana.—State *v.* Langford, 45 La. Ann. 1177, 14 So. 181, 40 Am. St. Rep. 277; State *v.* Robertson, 38 La. Ann. 618, 58 Am. Rep. 201.

Maine.— State *v.* Mulkern, 85 Me. 106, 26 Atl. 1017.

Michigan.— People *v.* Marrs, 125 Mich. 376, 84 N. W. 284; People *v.* Hicks, 98 Mich. 86, 56 N. W. 1102. But see Brown *v.* People, 36 Mich. 203.

Minnesota.— State *v.* Reid, 39 Minn. 277, 39 N. W. 796; State *v.* Shettleworth, 18 Minn. 208.

Mississippi.— Jeffries *v.* State, 89 Miss.

petent, however, by way of corroboration of the prosecutrix when her testimony has been impeached, or they may be brought out by defendant on cross-examina-

643, 42 So. 801; Dickey *v.* State, 86 Miss. 525, 38 So. 776; Anderson *v.* State, 82 Miss. 784, 35 So. 202; Ashford *v.* State, 81 Miss. 414, 33 So. 174.

Missouri.— State *v.* Bateman, 198 Mo. 212, 94 S. W. 843; State *v.* Warner, 74 Mo. 83; State *v.* Jones, 61 Mo. 232. And see State *v.* Pollard, 174 Mo. 607, 74 S. W. 969.

Nebraska.— State *v.* Meyers, 46 Nebr. 152, 64 N. W. 697, 37 L. R. A. 423; Wood *v.* State, 46 Nebr. 58, 64 N. W. 355; Oleson *v.* State, 11 Nebr. 276, 9 N. W. 38, 38 Am. Rep. 366.

Nevada.— State *v.* Campbell, 20 Nev. 122, 17 Pac. 620.

New Jersey.— State *v.* Ivins, 36 N. J. L. 233.

New Mexico.— Territory *v.* Maldonado, 9 N. M. 629, 58 Pac. 350.

New York.— Baccio *v.* People, 41 N. Y. 265; People *v.* McGee, 1 Den. 19.

North Carolina.— State *v.* Freeman, 100 N. C. 429, 5 S. E. 921.

North Dakota.— State *v.* Werner, 16 N. D. 83, 112 N. W. 60.

Oklahoma.— Harmon *v.* Territory, 5 Okla. 368, 49 Pac. 55.

Oregon.— State *v.* Sargent, 32 Oreg. 110, 49 Pac. 889.

Texas.— Pefferling *v.* State, 40 Tex. 486; Cowles *v.* State, 51 Tex. Cr. 498, 102 S. W. 1128; Kearse *v.* State, (Cr. App. 1905) 88 S. W. 363; Reddick *v.* State, 35 Tex. Cr. 463, 34 S. W. 274, 60 Am. St. Rep. 56 [*overruling* Candle *v.* State, 34 Tex. Cr. 26, 28 S. W. 810; Bruce *v.* State, 31 Tex. Cr. 590, 21 S. W. 681; Rippey *v.* State, 29 Tex. App. 37, 14 S. W. 448; Fulcher *v.* State, 28 Tex. App. 465, 13 S. W. 750; Ruston *v.* State, 4 Tex. App. 432; Holst *v.* State, 23 Tex. App. 1, 3 S. W. 757, 59 Am. Rep. 770; McGee *v.* State, 21 Tex. App. 670, 2 S. W. 890; Johnson *v.* State, 21 Tex. App. 368, 17 S. W. 252.

Utah.— State *v.* Neel, 21 Utah 151, 60 Pac. 510.

Vermont.— State *v.* Willett, 78 Vt. 157, 62 Atl. 48; State *v.* Carroll, 67 Vt. 477, 32 Atl. 235; State *v.* Niles, 47 Vt. 82.

Washington.— State *v.* Griffin, 43 Wash. 591, 86 Pac. 951; State *v.* Hunter, 18 Wash. 670, 52 Pac. 247.

Wisconsin.— Lee *v.* State, 74 Wis. 45, 41 N. W. 960. But *compare* Proper *v.* State, 85 Wis. 615, 55 N. W. 1035.

England.— Reg. *v.* Lillyman, [1896] 2 Q. B. 167, 18 Cox C. C. 346, 60 J. P. 536, 65 L. J. M. C. 195, 74 L. T. Rep. N. S. 730, 44 Wkly. Rep. 654; Reg. *v.* Osborne, C. & M. 622, 41 E. C. L. 338; Reg. *v.* Guttridges, 9 C. & P. 471, 38 E. C. L. 279; Reg. *v.* Megson, 9 C. & P. 418, 38 E. C. L. 249; Reg. *v.* Rowland, 62 J. P. 459; Reg. *v.* Mercer, 6 Jur. 243; Reg. *v.* Walker, 2 M. & Rob. 212; Rex *v.* Clarke, 2 Stark. 241, 3 E. C. L. 393. The case of Reg. *v.* Wood, 14 Cox C. C. 46, is cited as contrary to the rule stated above in that it allows the statements made by the woman to be proved as substantive testimony. This case is based on the rule laid down, it states, in the case of Reg. *v.* Eyre, 2 F. & F. 579. An examination of this latter case shows that the statements of the woman admitted were made almost immediately after the act and might have been admitted as part of the *res gestæ*, although not so stated in the case.

Canada.— Reg. *v.* Graham, 31 Ont. 77. *Contra*, Rex *v.* Riendeau, 10 Quebec Q. B. 584.

See 42 Cent. Dig. tit. "Rape," § 68.

Contra.— In a few jurisdictions, however, the courts permit the particulars of such statements to be given in evidence in the first instance for the purpose of corroborating the testimony of the prosecutrix, even though her credibility has not been attacked by defendant or her testimony in any manner impeached. State *v.* Byrne, 47 Conn. 465; State *v.* Kinney, 44 Conn. 153, 26 Am. Rep. 436; Territory *v.* Schilling, 17 Hawaii 249; Hornbeck *v.* State, 35 Ohio St. 277, 35 Am. Rep. 608; McCombs *v.* State, 8 Ohio St. 643; Laughlin *v.* State, 18 Ohio 99, 51 Am. Dec. 444; Johnson *v.* State, 17 Ohio 593; Hill *v.* State, 5 Lea (Tenn.) 725; Phillips *v.* State, 9 Humphr. (Tenn.) 246, 49 Am. Dec. 709; Rex *v.* Riendeau, 10 Quebec Q. B. 584. See also State *v.* Sebastian, 81 Conn. 1, 69 Atl. 1054.

A letter of the prosecutrix in which she details the facts of the alleged offense is not admissible. State *v.* Clark, 69 Iowa 294, 28 N. W. 606.

The circumstances under which the complaint was made may be shown. Barnes *v.* State, 88 Ala. 204, 7 So. 38, 16 Am. St. Rep. 48.

The nature of the complaint may be shown, although it involves to some extent the particulars. State *v.* Symens, 138 Iowa 113, 115 N. W. 878; Reg. *v.* Mercer, 6 Jur. 243.

Identification of defendant.— Some courts hold that evidence is admissible that the prosecutrix stated that defendant was the person who assaulted or ravished her, describing him. State *v.* Sebastian, 81 Conn. 1, 69 Atl. 1054; Ellis *v.* State, 25 Fla. 702, 6 So. 768; State *v.* Symens, 138 Iowa 113, 115 N. W. 878; State *v.* Barkley, 129 Iowa 484, 105 N. W. 506; State *v.* Peterson, 110 Iowa 647, 82 N. W. 329; State *v.* Hutchinson, 95 Iowa 566, 64 N. W. 610; State *v.* Cook, 92 Iowa 483, 61 N. W. 185; State *v.* Watson, 81 Iowa 380, 46 N. W. 868; State *v.* Mitchell, 68 Iowa 116, 26 N. W. 44; Brown *v.* People, 36 Mich. 203; Welsh *v.* State, 60 Nebr. 101, 82 N. W. 368; Burt *v.* State, 23 Ohio St. 394; State *v.* Carroll, 67 Vt. 477, 32 Atl. 235; Rex *v.* Riendeau, 10 Quebec Q. B. 584. The weight of authority, however, is that this is a detail which cannot be proved. Posey *v.* State, 143 Ala. 54, 38 So. 1019; Oakley *v.* State, 135 Ala. 15. 33

tion;[68] and if defendant, on cross-examination, brings out a portion of the particulars, the rest may be brought out by the state.[69] So also if the statements are made immediately after the commission of crime, they are admissible as part of the *res gestæ*.[70] Some courts hold that the particulars of the complaint are

So. 23; Bray *v.* State, 131 Ala. 46, 31 So. 107; Griffin *v.* State, 76 Ala. 29; Stephen *v.* State, 11 Ga. 225; State *v.* Fowler, 13 Ida. 317, 89 Pac. 757; People *v.* Weston, 236 Ill. 104, 86 N. E. 188; Stevens *v.* People, 158 Ill. 111, 41 N. E. 856; Thompson *v.* State, 38 Ind. 39; State *v.* Hoskinson, (Kan. 1908) 96 Pac. 138; State *v.* Daugherty, 63 Kan. 473, 65 Pac. 695; State *v.* Robertson, 38 La. Ann. 618, 58 Am. Rep. 201; State *v.* Shettleworth, 18 Minn. 208; Jeffries *v.* State, 89 Miss. 643, 42 So. 801; Anderson *v.* State, 82 Miss. 784, 35 So. 202; Ashford *v.* State, 81 Miss. 414, 33 So. 174; People *v.* Clemons, 37 Hun (N. Y.) 580; Reddick *v.* State, 35 Tex. Cr. 463, 34 S. W. 274, 60 Am. St. Rep. 56; Sentill *v.* State, 34 Tex. Cr. 260, 30 S. W. 226; Johnson *v.* State, 21 Tex. App. 368, 17 S. W. 252; State *v.* Niles, 47 Vt. 82; State *v.* Griffin, 43 Wash. 591, 86 Pac. 951; Reg. *v.* Megson, 9 C. & P. 420, 38 E. C. L. 250; Reg. *v.* Osborne, C. & M. 622, 41 E. C. L. 338. *Compare* State *v.* Willett, 78 Vt. 157, 62 Atl. 48.

Force and want of consent.— It has also been held that the statement of the prosecutrix that the intercourse was by force and against her will is admissible. State *v.* Symens, 138 Iowa 113, 115 N. W. 878; State *v.* Barkley, 129 Iowa 484, 105 N. W. 506; State *v.* Peterson, 110 Iowa 647, 82 N. W. 329; State *v.* Hutchinson, 95 Iowa 566, 64 N. W. 610; State *v.* Cook, 92 Iowa 483, 61 N. W. 185; State *v.* Mitchell, 68 Iowa 116, 26 N. W. 44; Brown *v.* People, 36 Mich. 203.

Statement as to place of commission of crime inadmissible see Reg. *v.* Mercer, 6 Jur. 243.

Harmless error in admission of such evidence see Williams *v.* State, 66 Ark. 264, 50 S. W. 517; Dickey *v.* State, 86 Miss. 525, 38 So. 776; State *v.* Bateman, 198 Mo. 212, 94 S. W. 843. The testimony of a witness that the subject of the rape "told her the whole circumstance," but not relating the circumstances, is error without prejudice. State *v.* Watson, 81 Iowa 380, 46 N. W. 868.

68. *Alabama.*— Barnett *v.* State, 83 Ala. 40, 3 So. 612; Griffin *v.* State, 76 Ala. 29.

Arkansas.—Williams *v.* State, 66 Ark. 264, 50 S. W. 517; Pleasants *v.* State, 15 Ark. 624.

California.— People *v.* Mayes, 66 Cal. 597, 6 Pac. 691, 56 Am. Rep. 126.

Connecticut.— State *v.* Kinney, 44 Conn. 153, 26 Am. Rep. 436, 954; State *v.* De Wolf, 8 Conn. 93, 20 Am. Dec. 90.

Illinois.— Stevens *v.* People, 158 Ill. 111, 41 N. E. 856.

Indiana.— Thompson *v.* State, 38 Ind. 39.

Iowa.— State *v.* Peterson, 110 Iowa 647, 82 N. W. 329; State *v.* Hutchinson, 95 Iowa 566, 64 N. W. 610; State *v.* Clark, 69 Iowa 294, 28 N. W. 606.

Louisiana.— State *v.* McCoy, 109 La. 682, 33 So. 730. See also State *v.* Langford, 45 La. Ann. 1177, 14 So. 181, 40 Am. St. Rep. 277.

Missouri.— State *v.* Bateman, 198 Mo. 212, 94 S. W. 843; State *v.* Hatfield, 72 Mo. 518; State *v.* Jones, 61 Mo. 232.

Nebraska.— Wood *v.* State, 46 Nebr. 58, 64 N. W. 355; Oleson *v.* State, 11 Nebr. 276, 9 N. W. 38, 38 Am. Rep. 366.

Nevada.— State *v.* Campbell, 20 Nev. 122, 17 Pac. 620.

New Mexico.— Territory *v.* Maldonado, 9 N. M. 629, 58 Pac. 350.

New York.— Baccio *v.* People, 41 N. Y. 265; Conkey *v.* People, 1 Abb. Dec. 418, 5 Park. Cr. 31; People *v.* McGee, 1 Den. 19; Woodin *v.* People, 1 Park. Cr. 464.

North Carolina.— State *v.* Brown, 125 N. C. 606, 34 S. E. 105; State *v.* Freeman, 100 N. C. 429, 5 S. E. 921; State *v.* Laxton, 78 N. C. 564.

North Dakota.— State *v.* Werner, 16 N. D. 83, 112 N. W. 60.

Pennsylvania.— Com. *v.* Sallager, 4 Pa. L. J. 511, 3 Pa. L. J. Rep. 127.

Texas.— Pefferling *v.* State, 40 Tex. 486; Cox *v.* State, (Cr. App. 1898) 44 S. W. 157; Reddick *v.* State, 35 Tex. Cr. 463, 34 S. W. 274, 60 Am. St. Rep. 56; Sentell *v.* State, 34 Tex. Cr. 260, 30 S. W. 226; Caudle *v.* State, 34 Tex. Cr. 26, 28 S. W. 810; Holst *v.* State, 23 Tex. App. 1, 3 S. W. 757, 59 Am. Rep. 770; Johnson *v.* State, 21 Tex. App. 368, 17 S. W. 252.

Utah.— State *v.* Imlay, 22 Utah 156, 61 Pac. 557; State *v.* Neel, 21 Utah 151, 60 Pac. 510.

Wisconsin.— Proper *v.* State, 85 Wis. 615, 55 N. W. 1035.

England.— Rex *v.* Osborne, [1905] 1 K. B. 551, 69 J. P. 189, 74 L. J. K. B. 311, 92 L. T. Rep. N. S. 393, 21 T. L. R. 288, 53 Wkly. Rep. 494; Reg. *v.* Lillyman, [1896] 2 Q. B. 167, 18 Cox C. C. 346, 60 J. P. 536, 65 L. J. M. C. 195, 74 L. T. Rep. N. S. 730, 44 Wkly. Rep. 654; Reg. *v.* Guttridges, 9 C. & P. 471, 38 E. C. L. 279; Reg. *v.* Megson, 9 C. & P. 420, 38 E. C. L. 250; Reg. *v.* Walker, 2 M. & Rob. 212.

Canada.— Rex *v.* Reindeau, 10 Quebec Q. B. 584 [*affirming* 9 Quebec Q. B. 147].

69. Barnett *v.* State, 83 Ala. 40, 3 So. 612; Thompson *v.* State, 38 Ind. 39; State *v.* Werner, 16 N. D. 83, 112 N. W. 60; State *v.* Neel, 21 Utah 151, 60 Pac. 510.

70. *Alabama.*— Barnes *v.* State, 88 Ala. 204, 7 So. 38, 16 Am. St. Rep. 48.

Arkansas.—Williams *v.* State, 66 Ark. 264, 50 S. W. 517.

California.— People *v.* Brianchino, 5 Cal. App. 633, 91 Pac. 112.

District of Columbia.— Snowden *v.* U. S., 2 App. Cas. 89.

Georgia.— McMath *v.* State, 55 Ga. 303.

admissible where the prosecutrix is of tender years;[71] but the weight of authority is to the contrary.[72] Evidence of expressions or complaints of pain by the prosecutrix, and of where she located the pain, is admissible.[73] The force of the testimony as corroboration does not depend entirely on the lapse of time between the commission of the crime and the complaint, but the jury should consider it in connection with surrounding circumstances, such as intimidation by threats or lack of opportunity;[74] but if the complaint is long delayed and no reason for the delay is shown, the particulars of the complaint lose all force as corroboration and are not admissible.[75] As a rule statements made in answer to questions

Idaho.— State *v.* Harness, 10 Ida. 18, 76 Pac. 788.

Iowa.— State *v.* Andrews, 130 Iowa 609, 105 N. W. 215; State *v.* Cook, 92 Iowa 483, 61 N. W. 185; McMurrin *v.* Rigby, 80 Iowa 322, 45 N. W. 877.

Kentucky.— Philpot *v.* Com., 5 Ky. L. Rep. 862.

Louisiana.— State *v.* Peter, 14 La. Ann. 521.

Michigan.— People *v.* Rich, 133 Mich. 14, 94 N. W. 375; People *v.* Marrs, 125 Mich. 376, 84 N. W. 284; People *v.* Goulette, 82 Mich. 36, 45 N. W. 1124; People *v.* Glover, 71 Mich. 303, 38 N. W. 874; People *v.* Gage, 62 Mich. 271, 28 N. W. 835, 4 Am. St. Rep. 854; People *v.* Brown, 53 Mich. 531, 19 N. W. 172.

Missouri.— State *v.* Pollard, 174 Mo. 607, 74 S. W. 969.

North Dakota.— State *v.* Werner, 16 N. D. 83, 112 N. W. 60.

Rhode Island.— State *v.* Fitzsimon, 18 R. I. 236, 27 Atl. 446, 49 Am. St. Rep. 766.

Texas.— Thomas *v.* State, 47 Tex. Cr. 534, 84 S. W. 823, 122 Am. St. Rep. 675; Croomes *v.* State, 40 Tex. Cr. 672, 51 S. W. 924, 53 S. W. 882; Sentell *v.* State, 34 Tex. Cr. 260, 30 S. W. 226; Castillo *v.* State, 31 Tex. Cr. 145, 19 S. W. 892, 37 Am. St. Rep. 794.

Utah.— State *v.* Imlay, 22 Utah 156, 61 Pac. 557; State *v.* Neel, 21 Utah 151, 60 Pac. 510.

England.— Reg. *v.* Eyre, 2 F. & F. 579.

Canada.— Reg. *v.* Riendeau, 9 Quebec Q. B. 147 [*affirmed* in 10 Quebec Q. B. 584].

See 42 Cent. Dig. tit. "Rape," § 68.

Complaints not part of res gestæ see McGee *v.* State, 21 Tex. App. 670, 2 S. W. 890; Johnson *v.* State, 21 Tex. App. 368, 17 S. W. 252.

71. People *v.* Marrs, 125 Mich. 376, 84 N. W. 284; People *v.* Glover, 71 Mich. 303, 38 N. W. 874; People *v.* Gage, 62 Mich. 271, 28 N. W. 835, 4 Am. St. Rep. 854. See also Bannen *v.* State, 115 Wis. 317, 91 N. W. 107, 965; Proper *v.* State, 85 Wis. 615, 55 N. W. 1035.

72. *California.*— People *v.* Wilmot, 139 Cal. 103, 72 Pac. 838; People *v.* Gonzalaz, 6 Cal. App. 255, 91 Pac. 1013.

Indiana.— Weldon *v.* State, 32 Ind. 81.

Kansas.— State *v.* Daugherty, 63 Kan. 473, 65 Pac. 695. The statement of the child, made several days afterward, giving details of the alleged offense, in response to inquiries made by an officer for the purpose of formulating a complaint for defendant's arrest, and which are not the spontaneous or natural expressions of injured sensibilities, should not be admitted. State *v.* Hoskinson, (1908) 96 Pac. 138.

New York.— People *v.* McGee, 1 Den. 19.

Oregon.— State *v.* Sargent, 32 Oreg. 110, 49 Pac. 889.

England.— Reg. *v.* Guttridges, 9 C. & P. 471, 38 E. C. L. 279.

73. *Dakota.*— Territory *v.* Godfrey, 6 Dak. 46, 50 N. W. 481.

Indiana.— Polson *v.* State, 137 Ind. 519, 35 N. E. 907.

Iowa.— State *v.* Baker, 106 Iowa 99, 76 N. W. 509; State *v.* Hutchinson, 95 Iowa 566, 64 N. W. 610.

Nebraska.— Dunn *v.* State, 58 Nebr. 807, 79 N. W. 719.

South Carolina.— State *v.* Sudduth, 52 S. C. 488, 30 S. E. 408.

Texas.— Adams *v.* State, 53 Tex. Cr. 13, 105 S. W. 197.

Vermont.— State *v.* Bedard, 65 Vt. 278, 26 Atl. 719.

Wisconsin.— Hannon *v.* State, 70 Wis. 448, 36 N. W. 1.

74. *Arizona.*— Trimble *v.* Territory, 8 Ariz. 273, 71 Pac. 932.

Iowa.— State *v.* Bebb, 125 Iowa 494, 101 N. W. 189; State *v.* Peterson, 110 Iowa 647, 82 N. W. 329.

Louisiana.— State *v.* McCoy, 109 La. 682, 33 So. 730.

Maine.— State *v.* Mulkern, 85 Me. 106, 26 Atl. 1017.

Massachusetts.— Com. *v.* Cleary, 172 Mass. 175, 51 N. E. 746.

Minnesota.— State *v.* Reid, 39 Minn. 277, 39 N. W. 796.

Montana.— State *v.* Peres, 27 Mont. 358, 71 Pac. 162.

New York.— Higgins *v.* People, 58 N. Y. 377.

Tennessee.— Hill *v.* State, 5 Lea 725.

Texas.— Sentell *v.* State, 34 Tex. Cr. 260, 30 S. W. 226.

Vermont.— State *v.* Niles, 47 Vt. 82.

England.— Reg. *v.* Rush, 60 J. P. 777.

See 42 Cent. Dig. tit. "Rape," § 67 *et seq.*

75. *California.*— People *v.* Lambert, 120 Cal. 170, 52 Pac. 307; People *v.* Corey, (App. 1908) 97 Pac. 907.

Colorado.— Bigcraft *v.* People, 30 Colo. 298, 70 Pac. 417.

District of Columbia.— Lyles *v.* U. S., 20 App. Cas. 559.

Georgia.— Lowe *v.* State, 97 Ga. 792, 25 S. E. 676.

or otherwise involuntarily elicited do not constitute such complaint as is admissible under the rules above stated.[76]

(B) *Incapacity or Failure of Prosecutrix to Testify.* Failure of the prosecutrix to testify is no ground for excluding evidence that she made complaint where, by reason of youth or imbecility, she is incompetent to testify.[77] But where the particulars of such complaint are regarded as admissible in corroboration of the prosecutrix, it has been held that they are not admissible where she is incompetent to testify.[78] On the other hand her incapacity or failure to testify does not render such particulars admissible in those jurisdictions in which they are otherwise held inadmissible.[79]

(IV) *Failure to Complain and Delay.*[80] Failure of prosecutrix to make complaint promptly in the case of rape by force may be proved, as it tends to show consent, but such failure affects only the credibility of her evidence as to force and resistance;[81] and when a female is under the age of consent failure to make

Iowa.— State *v.* Hussey, 7 Iowa 409.

Michigan.— People *v.* Duncan, 104 Mich. 460, 62 N. W. 556.

Nebraska.— Richards *v.* State, 36 Nebr. 17, 53 N. W. 1027.

New Mexico.— Mares *v.* Territory, 10 N. M. 770, 65 Pac. 165.

New York.— People *v.* Flaherty, 162 N. Y. 532, 57 N. E. 73; People *v.* Loftus, 11 N. Y. Suppl. 905. And see Baccio *v.* People, 41 N. Y. 265. On the trial of an indictment against a priest for rape, alleged to have been committed upon his domestic servant, evidence of a disclosure made by the servant to another priest eleven months after the occurrence, the only excuse for the delay in making the disclosure being that defendant told her that it was a sin to tell on a priest, and that she would go to hell or purgatory if she did, is not admissible in confirmation of her testimony on the trial. People *v.* O'Sullivan, 104 N. Y. 481, 10 N. E. 880, 58 Am. Rep. 530.

Ohio.— Dunn *v.* State, 45 Ohio St. 249, 12 N. E. 826.

Washington.— State *v.* Griffin, 43 Wash. 591, 86 Pac. 951.

See 42 Cent. Dig. tit. "Rape," § 70.

76. *California.*—People *v.* Wilmot, 139 Cal. 103, 72 Pac. 838.

Illinois.— Cunningham *v.* People, 210 Ill. 410, 71 N. E. 389.

Iowa.— State *v.* Bebb, 125 Iowa 494, 101 N. W. 189.

Maryland.— Parker *v.* State, 67 Md. 329, 10 Atl. 219, 1 Am. St. Rep. 387.

Missouri.— See State *v.* Pollard, 174 Mo. 607, 74 S. W. 969.

Montana.— State *v.* Peres, 27 Mont. 358, 71 Pac. 162.

England.— Reg. *v.* Merry, 19 Cox C. C. 442.

The mere fact that a complaint was made in answer to a question does not of itself make it inadmissible as a complaint. If the circumstances indicate that but for the questioning there would probably have been no voluntary complaint, the answer is inadmissible. If the question merely anticipates a statement which the complainant is about to make, as where a mother asks her daughter what is the matter, etc., it is not rendered inadmissible by the fact that the questioner happened to speak first. Rex *v.* Osborne, [1905] 1 K. B. 551, 69 J. P. 189, 74 L. J. K. B. 311, 92 L. T. Rep. N. S. 393, 21 T. L. R. 288, 53 Wkly. Rep. 494.

77. People *v.* Figueroa, 134 Cal. 159, 66 Pac. 202; People *v.* Bianchino, 5 Cal. App. 633, 91 Pac. 112. And see Territory *v.* Godfrey, 6 Dak. 46, 50 N. W. 481; Philpot *v.* Com., 5 Ky. L. Rep. 862.

78. Hornbeck *v.* State, 35 Ohio St. 277, 35 Am. Rep. 608. And see State *v.* Meyers, 46 Nebr. 152, 64 N. W. 697, 37 L. R. A. 423; People *v.* Quong Kun, 34 N. Y. Suppl. 260; Smith *v.* State, 41 Tex. 352; Reg. *v.* Guttridges, 9 C. & P. 471, 38 E. C. L. 279; Brazier's Case, 1 East P. C. 443.

79. People *v.* Graham, 21 Cal. 261; Weldon *v.* State, 32 Ind. 81; State *v.* Meyers, 46 Nebr. 152, 64 N. W. 697, 37 L. R. A. 423; People *v.* McGee, 1 Den. (N. Y.) 19. But see Philpot *v.* Com., 5 Ky. L. Rep. 862.

80. Delay as affecting admissibility of complaint see *supra*, II, B, 2, g, (III), (A).

81. *Arizona.*— Curby *v.* Territory, 4 Ariz. 371, 42 Pac. 953.

Georgia.— Bennett *v.* State, 102 Ga. 656, 29 S. E. 918.

Iowa.— State *v.* Icenbice, 126 Iowa 16, 101 N. W. 273; State *v.* Bebb, 125 Iowa 494, 101 N. W. 189; State *v.* Wolf, 118 Iowa 564, 92 N. W. 673; State *v.* Cross, 12 Iowa 66, 79 Am. Dec. 519.

Kansas.— State *v.* Brown, 54 Kan. 71, 37 Pac. 996.

Kentucky.— Darrell *v.* Com., 82 S. W. 289, 26 Ky. L. Rep. 541.

Missouri.— State *v.* Miller, 191 Mo. 587, 90 S. W. 767. And see State *v.* Goodale, 210 Mo. 275, 109 S. W. 9.

New York.—Walter *v.* People, 50 Barb. 144.

North Carolina.— State *v.* Peter, 53 N. C. 19.

Texas.— Hill *v.* State, (Cr. App. 1903) 77 S. W. 808; Price *v.* State, 36 Tex. Cr. 143, 35 S. W. 988; Thompson *v.* State, 33 Tex. Cr. 472, 26 S. W. 987.

Utah.— State *v.* Halford, 17 Utah 475, 54 Pac. 819.

Canada.— Reg. *v.* Riendeau, 9 Quebec Q. B. 147 [*affirmed* in 10 Quebec Q. B. 584].

No presumption of law.— The inference arising against the truth of a charge of rape,

complaint is not material, complaint being only proof of non-consent, and this being supplied by the statute.[82] Failure to make complaint does not show innocence of defendant.[83] Failure of the prosecutrix to complain or delay in making complaint may be explained.[84] The rule as to delay in making complaint does not apply to delay on the part of a person to whom complaint is made in informing others or causing legal proceedings to be instituted.[85]

(v) *Conduct of Prosecutrix.*[86] Evidence of the conduct of the prosecutrix before and immediately after the outrage is admissible as part of the *res gestæ*;[87] but the state cannot introduce evidence in detail of the conduct and exhibition of the feelings of the prosecutrix a considerable time after the alleged rape.[88] That the prosecutrix made outcry at the time of the alleged offense is a fact to be considered as corroborating her testimony as to want of consent;[89] and on the other hand her failure to make outcry may be shown and considered as affecting her credibility;[90]

from a long silence on the part of the female, is not a presumption amounting to a rule of law, but is a matter of fact, to be passed on by the jury. State *v.* Peter, 53 N. C. 19. And see State *v.* Miller, 191 Mo. 587, 90 S. W. 767.

82. State *v.* Oswalt, 72 Kan. 84, 82 Pac. 586; State *v.* Peres, 27 Mont. 358, 71 Pac. 162; Loose *v.* State, 120 Wis. 115, 97 N. W. 526.

83. State *v.* Wolf, 118 Iowa 564, 92 N. W. 673; State *v.* Miller, 191 Mo. 587, 90 S. W. 767; and other cases cited in the preceding note.

84. *Arizona.*— Trimble *v.* Territory, 8 Ariz. 273, 71 Pac. 932.

California.— People *v.* Keith, 141 Cal. 686, 75 Pac. 304; People *v.* Knight, (1895) 43 Pac. 6; People *v.* Mayes, 66 Cal. 597, 6 Pac. 691, 56 Am. Rep. 126.

Indiana.— Polson *v.* State, 137 Ind. 519, 35 N. E. 907.

Iowa.— State *v.* Icenbice, 126 Iowa 16, 101 N. W. 273; State *v.* Bebb, 125 Iowa 494, 101 N. W. 189; State *v.* Bebb, (1903) 96 N. W. 714; State *v.* Paterson, 110 Iowa 647, 82 N. W. 329, strangers present at house where prosecutrix was working.

Louisiana.— State *v.* McCoy, 109 La. 682, 33 So. 730.

Maryland.— Legore *v.* State, 87 Md. 735, 41 Atl. 60.

Massachusetts.— Com. *v.* Fitzgerald, 123 Mass. 408.

Michigan.— People *v.* Marrs, 125 Mich. 376, 84 N. W. 284; People *v.* Ezzo, 104 Mich. 341, 62 N. W. 407; People *v.* Glover, 71 Mich. 303, 38 N. W. 874, fear that mother would whip her.

Minnesota.— State *v.* Reid, 39 Minn. 277, 39 N. W. 796; State *v.* Shettleworth, 18 Minn. 208.

Missouri.— State *v.* Miller, 191 Mo. 587, 90 S. W. 767; State *v.* Wertz, 191 Mo. 569, 90 S. W. 838.

Montana.— State *v.* Peres, 27 Mont. 358, 71 Pac. 162.

Nebraska.— Cardwell *v.* State, 60 Nebr. 480, 83 N. W. 665; Murphy *v.* State, 15 Nebr. 383, 19 N. W. 489.

New Hampshire.— State *v.* Knapp, 45 N. H. 148.

New York.— Higgins *v.* People, 58 N. Y. 377; People *v.* Terwilliger, 74 Hun 310, 26 N. Y. Suppl. 674 [*affirmed* in 142 N. Y. 629, 37 N. E. 565]; People *v.* Croucher, 2 Wheel. Cr. 42. *Compare* Baccio *v.* People, 41 N. Y. 265.

Tennessee.— Hill *v.* State, 5 Lea 725.

Vermont.— State *v.* Wilkins, 66 Vt. 1, 28 Atl. 323; State *v.* Niles, 47 Vt. 82.

See 42 Cent. Dig. tit. "Rape," §§ 70, 75.

Cross-examination.— Where prosecutrix testified that the reason she did not complain until several days after the offense was committed was because defendant had made her afraid of him by throwing things at her and scolding her, she could be cross-examined as to whether defendant ever said anything to her about having intercourse with her. People *v.* Knight, (Cal. 1895) 43 Pac. 6.

Sufficiency of evidence see *infra*, II, B, 3, g, (II).

85. Loose *v.* State, 120 Wis. 115, 97 N. W. 526.

86. See also *supra*, II, B, 2, a.

Character and habits see *infra*, II, B, 2, s.

Complaint and want of complaint see *supra*, II, B, 2, g, (III), (IV).

Conduct on identification of defendant see *infra*, II, B, 2, q.

Personal relations of parties see *supra*, II, B, 2, h.

Physical and mental condition see *infra*, II, B, 2, h.

87. Warren *v.* State, (Tex. Cr. App. 1908) 114 S. W. 380; Wells *v.* State, 43 Tex. Cr. 451, 67 S. W. 1020.

88. Cowles *v.* State, 51 Tex. Cr. 498, 102 S. W. 1128.

89. State *v.* Halford, 17 Utah 475, 54 Pac. 819.

90. *California.*— People *v.* Kuches, 120 Cal. 566, 52 Pac. 1002; People *v.* Fong Chung, 5 Cal. App. 587, 91 Pac. 105. In a trial for raping a child under the age of consent, it was error to exclude testimony that she made no outcry, and that no one was permitted to see her except the authorities after she was placed in jail, since it affected her credibility. People *v.* Fong Chung, *supra*.

Iowa.— State *v.* Cross, 12 Iowa 66, 79 Am. Dec. 519.

Kansas.— State *v.* Brown, 54 Kan. 71, 37 Pac. 996.

but failure to make outcry may be explained.[91] While the physical condition of the woman at or near the time is admissible,[92] it is error to admit evidence of a threat to commit suicide made some days after.[93]

h. Physical and Mental Condition of Prosecutrix — (i) *Before and at Time of Offense.*[94] Evidence of the physical and mental condition of the prosecutrix at the time immediately prior to the offense is admissible as bearing on the question of consent and her ability to resist.[95] Proof may be made of want of physical and mental development whether she was over or under the age of consent.[96] Her schooling and mental ability may be shown.[97] And of course competent evidence is admissible to show that the prosecutrix was insane or imbecile, and therefore incapable of consenting.[98] It has been held under the Texas statute that if the state introduces the prosecutrix as a witness it vouches for her mental competency at the time of the act.[99]

(ii) *After Offense.*[1] Evidence of the physical and mental condition and demeanor of the prosecutrix after the alleged offense is admissible.[2] Prosecutrix

Missouri.— State *v.* Wertz, 191 Mo. 569, 90 S. W. 838. And see State *v.* Goodale, 210 Mo. 275, 109 S. W. 9.

New York.— Walter *v.* People, 50 Barb. 144.

Texas.— Warren *v.* State, (Cr. App. 1908) 114 S. W. 380; Rogers *v.* State, 1 Tex. App. 187.

Utah.— State *v.* Holford, 17 Utah 475, 54 Pac. 819.

91. *Iowa.*— State *v.* Cross, 12 Iowa 66, 79 Am. Dec. 519. Where, on a trial for rape, the fact that the prosecutrix did not scream while accused was assaulting her was brought out on her cross-examination, it was proper to permit the state, on her redirect examination, to ask her to state why she did not scream. State *v.* Symens, 138 Iowa 113, 115 N. W. 878.

Minnesota.— State *v.* Reid, 39 Minn. 277, 39 N. W. 796.

Missouri.— State *v.* Miller, 191 Mo. 587, 90 S. W. 767.

Nebraska.— Murphy *v.* State, 15 Nebr. 383, 19 N. W. 489.

New York.— Higgins *v.* People, 58 N. Y. 377.

Texas.— Warren *v.* State, (Cr. App. 1908) 114 S. W. 380.

92. See *infra*, II, B, 2, h, (I).

93. People *v.* Batterson, 50 Hun (N. Y.) 44, 2 N. Y. Suppl. 376, 6 N. Y. Cr. 173.

94. Venereal diseases see *supra*, II, B, 2, o.

95. *California.*— People *v.* Griffin, 117 Cal. 583, 49 Pac. 711, 59 Am. St. Rep. 216.

Iowa.— State *v.* Carpenter, 124 Iowa 5, 98 N. W. 775 (weight and condition of health); State *v.* McDonough, 104 Iowa 6, 73 N. W. 357; State *v.* McCaffrey, 63 Iowa 479, 19 N. W. 331 (lack of physical development on question of capacity and judgment to anticipate the nature of the act).

Michigan.— People *v.* Marrs, 125 Mich. 376, 84 N. W. 284.

Nebraska.— Welsh *v.* State, 60 Nebr. 101, 82 N. W. 368; Thompson *v.* State, 44 Nebr. 366, 62 N. W. 1060; Richards *v.* State, 36 Nebr. 17, 53 N. W. 1027, want of a hand.

New Hampshire.— State *v.* Knapp, 45 N. H. 148.

New York.— Woodin *v.* People, 1 Park. Cr. 464.

Texas.— Scgrest *v.* State, (Cr. App. 1900) 57 S. W. 845.

See 42 Cent. Dig. tit. "Rape," § 62.

96. State *v.* McCaffrey, 63 Iowa 479, 19 N. W. 331; Dickey *v.* State, 86 Miss. 525, 38 So. 776; O'Meara *v.* State, 17 Ohio St. 515.

97. State *v.* Peterson, 110 Iowa 647, 82 N. W. 329.

98. People *v.* Griffin, 117 Cal. 583, 49 Pac. 711, 59 Am. St. Rep. 216; State *v.* McDonough, 104 Iowa 6, 73 N. W. 357. Where the mental infirmity of the female sought to be shown by the state is of long standing, evidence of its past, present, and continued existence is admissible as hearing upon her state of mind at the time of the act complained of, and where she is shown to have been feeble-minded from infancy, testimony of the medical superintendent of the state home for the feeble-minded that she was at the time of trial, six months after the alleged offense, an inmate of that institution, and was then feeble-minded, is admissible, as throwing light upon her condition at the time of the offense. People *v.* Griffin, *supra*.

Non-expert witnesses.— It is competent to show the appearance, condition, and actions of the prosecutrix at and for some time prior to the time of the commission of the offense, to prove mental capacity, by non-expert witnesses. State *v.* McDonough, 104 Iowa 6, 73 N. W. 357.

99. Thompson *v.* State, 33 Tex. Cr. 472, 26 S. W. 987.

1. Pregnancy and miscarriage or birth of child see *infra*, II, B, 2, p.

Venereal disease see *infra*, II, B, 2, o.

2. *Alabama.*— Sims *v.* State, 146 Ala. 109, 41 So. 413 (testimony of the mother that the child seemed excited and looked as if she had been crying); Scott *v.* State, 48 Ala. 420.

Arkansas.— Skaggs *v.* State, (1908) 113 S. W. 346.

California.— People *v.* Keith, 141 Cal. 686, 75 Pac. 304; People *v.* Benc, 130 Cal. 159, 62 Pac. 404; People *v.* Baldwin, 117 Cal. 244, 49 Pac. 186; People *v.* Barney, 114 Cal.

may not be required to state whether she was examined by any person,[3] but her condition may be shown by defendant to contradict her as to want of consent.[4] Physicians may testify to the physical condition of prosecutrix upon examination made after the crime was committed, but the remoteness of such examination from the time of the offense affects its probative force.[5] When the examination

554, 47 Pac. 41 (absence of hymen); People *v.* Stewart, 97 Cal. 238, 32 Pac. 8 (unconsciousness).

Idaho.— State *v.* Neil, 13 Ida. 539, 90 Pac. 860, 91 Pac. 318.

Indiana.— Polson *v.* State, 137 Ind. 519, 35 N. E. 907.

Iowa.— State *v.* Symens, 138 Iowa 113, 115 N. W. 878; State *v.* Snider, 119 Iowa 15, 91 N. W. 762; State *v.* Steffens, 116 Iowa 227, 89 N. W. 974; State *v.* Baker, 106 Iowa 99, 76 N. W. 509; State *v.* Mitchell, 68 Iowa 116, 26 N. W. 44 (marks of violence); State *v.* McLaughlin, 44 Iowa 82 (bruises two or three weeks after the offense).

Louisiana.— State *v.* Robertson, 38 La. Ann. 618, 58 Am. Rep. 201, condition of prosecutrix when making complaint.

Minnesota.— State *v.* Teipner, 36 Minn. 535, 32 N. W. 678; State *v.* Shettleworth, 18 Minn. 208, marks of violence upon her person.

Missouri.— State *v.* Sanford, 124 Mo. 484, 27 S. W. 1099; State *v.* Murphy, 118 Mo. 7, 25 S. W. 95. The testimony of a witness to the effect that the prosecutrix was very sick at her stomach and vomited for several hours after the rape is proper testimony. State *v.* Harris, 150 Mo. 56, 51 S. W. 481.

Nebraska.— Dunn *v.* State, 58 Nebr. 807, 79 N. W. 719.

Oregon.— State *v.* Sargent, 32 Oreg. 110, 49 Pac. 889.

South Carolina.— State *v.* Sudduth, 52 S. C. 488, 30 S. E. 408.

Texas.—Adams *v.* State, 52 Tex. Cr. 13, 105 S. W. 197; Turman *v.* State, 50 Tex. Cr. 7, 95 S. W. 533; Kearse *v.* State, (Cr. App. 1905) 88 S. W. 363; Sentell *v.* State, 34 Tex. Cr. 260, 30 S. W. 226; Lights *v.* State, 21 Tex. App. 308, 17 S. W. 428. On a prosecution for rape, it was proper to permit a witness who had married her after the alleged crime to testify that he had discovered that she was not a virgin. Smith *v.* State, 52 Tex. Cr. 344, 106 S. W. 1161.

Vermont.— State *v.* Bedard, 65 Vt. 278, 26 Atl. 719.

Wisconsin.—Bannen *v.* State, 115 Wis. 317, 91 N. W. 107, 965 (nervousness); Proper *v.* State, 85 Wis. 615, 55 N. W. 1035; Hannon *v.* State, 70 Wis. 448, 36 N. W. 1 (marks of violence).

England.— Reg. *v.* Clarke, 2 Stark. 241, 3 E. C. L. 393.

See 42 Cent. Dig. tit. "Rape," § 65.

Opinion evidence see *infra*, II, B, 2, m.

Cross-examination.— On a trial for rape under an indictment alleging several acts of intercourse with one who lived with defendant and his wife, after prosecutrix testified that she was compelled by threats of the wife to tell her of the offenses, and that the wife suspected it from finding her trembling, she could be cross-examined as to whether the wife saw her trembling after the first offense, or after the last, or how many times she saw her thus. People *v.* Knight, (Cal. 1895) 43 Pac. 6.

Res gestæ.— Where the prosecutrix in a rape case testifies that defendant, after ravishing her, tied her to a tree and left her, evidence of others that, shortly after the crime was alleged to have been committed, she went to them to untie her hands, is admissible as part of the *res gestæ*. Brown *v.* State, 72 Miss. 997, 17 So. 278.

Threat to commit suicide see *supra*, II, B, 2, g, (v).

3. State *v.* Ogden, 39 Oreg. 195, 65 Pac. 449.

4. State *v.* Harness, 10 Ida. 18, 76 Pac. 788; People *v.* Duncan, 104 Mich. 460, 62 N. W. 556; People *v.* Flynn, 96 Mich. 276, 55 N. W. 844; Hardtke *v.* State, 67 Wis. 552, 30 N. W. 723.

5. *Alabama.*— Myers *v.* State, 84 Ala. 11, 4 So. 291.

California.— On a prosecution for rape, testimony of a physician as to the condition of the sexual organs of the prosecutrix, four to six days after the alleged rape, was not immaterial on the ground of remoteness, since the remoteness of the evidence went merely to its probative force, and not to its competency. People *v.* Benc, 130 Cal. 159, 62 Pac. 404.

District of Columbia.— Testimony of a physician who has examined the prosecuting witness, an unmarried woman, in a prosecution for rape, more than four weeks after the alleged crime, that he then found her hymen ruptured or penetrated, and that she was pregnant, is admissible against the accused. Lyles *v.* U. S., 20 App. Cas. 559.

Illinois.— In a trial for rape upon a young girl, evidence of a physician to the effect that, five or six months after the alleged rape, he examined the girl, and found her hymen somewhat ruptured, is admissible on the part of the prosecution. Gifford *v.* People, 148 Ill. 173, 35 N. E. 754.

Indiana.— Polson *v.* State, 137 Ind. 519, 35 N. E. 907.

Iowa.— State *v.* King, 117 Iowa 484, 91 N. W. 768; State *v.* Watson, 81 Iowa 380, 46 N. W. 868.

Minnesota.— State *v.* Teipner, 36 Minn. 535, 32 N. W. 678.

Missouri.— State *v.* Scott, 172 Mo. 536, 72 S. W. 897.

Pennsylvania.— The evidence of a physician who examined the girl about a year and a half after the commission of the offense is admissible, although not of much force. Com. *v.* Allen, 135 Pa. St. 483, 19 Atl. 957.

is made at a distant time and acts of intercourse with others may have taken place, it is too remote and such evidence is not admissible.[6] The jury may consider the age, appearance, and demeanor of the prosecutrix during the trial as bearing on the question of consent.[7]

(III) *Condition of Clothing.* Evidence of the condition of the clothing of the prosecutrix shortly after the alleged offense, as that it was torn, disarranged, or bloody, is admissible, and the clothing itself, after proper identification, may be exhibited as evidence;[8] but the clothing must be properly identified as that worn at the time of the crime.[9] Condition of clothing may be proved by any person who saw it.[10] It may be shown that blood on her clothing was the result of her monthly periods.[11]

i. Age of Prosecutrix. It may be shown that the female was under the age of consent, so as to make the offense rape notwithstanding her consent,[12] and this, as a rule, although her age is not alleged in the indictment.[13] And the age of the

Texas.— Pless *v.* State, 23 Tex. App. 73, 3 S. W. 576.

Washington.— In a prosecution for rape on a female under the age of consent, testimony of a physician that prosecutrix, subsequent to the alleged rape, but within the period of gestation, had suffered a miscarriage, was competent both as evidence of the crime and in corroboration of the prosecutrix's testimony that defendant was the guilty party. State *v.* Fetterly, 33 Wash. 599, 74 Pac. 810.

See 42 Cent. Dig. tit. "Rape," § 65.

Pregnancy and birth of child or miscarriage see *infra*, II, B, 2, p.

Venereal disease see *infra*, II, B, 2, o.

Rebutting evidence.— Where a contested point in a rape case was the question of actual penetration, prosecutrix's testimony being explicit that there was such penetration, and a physician sworn for defendant testified that the hymen was intact, and gave evidence as to the probable length of time since the injury, it being a theory of the defense that the prosecution was the result of conspiracy, and that the injury was a part of the plan, and of more recent date than the alleged assault, it was held that the testimony of physicians introduced during the rebuttal as to the condition of the hymen, and as to the probable length of time between the injury and examination, and which was to quite an extent contradictory to that of defendant's witness, was proper rebutting evidence. State *v.* Watson, 81 Iowa 380, 46 N. W. 868.

Ordering of examination by court.— Where, on a prosecution for using a female child of the age of twelve years for the purpose of sexual intercourse, a police surgeon, on behalf of the state, made an examination of the child, and found her condition to be not inconsistent with her statements as to defendant having had intercourse with her, it was held that the court, on defendant's motion, would order an examination of the child by a competent physician, and under such circumstances as would insure entire fairness. State *v.* Pucca, 4 Pennew. (Del.) 71, 55 Atl. 831.

Expert testimony see *infra*, II, B, 2, m.

6. State *v.* Evans, 138 Mo. 116, 39 S. W. 462, 60 Am. St. Rep. 549; People *v.* Butler, 55 N. Y. App. Div. 361, 66 N. Y. Suppl. 851; People *v.* Cornelius, 36 N. Y. App. Div. 565, 55 N. Y. Suppl. 723.

7. State *v.* Philpot, 97 Iowa 365, 66 N. W. 730.

8. *California.*— People *v.* Figueroa, 134 Cal. 159, 66 Pac. 202.

Indiana.— Ransbottom *v.* State, 144 Ind. 250, 43 N. E. 218.

Iowa.— State *v.* Peterson, 110 Iowa 647, 82 N. W. 329; State *v.* Montgomery, 79 Iowa 737, 45 N. W. 292.

Missouri.— State *v.* Brannan, 206 Mo. 636, 105 S. W. 602; State *v.* Murphy, 118 Mo. 7, 25 S. W. 95.

Texas.— Long *v.* State, (Cr. App. 1898) 46 S. W. 640; Grimmett *v.* State, 22 Tex. App. 36, 2 S. W. 631, 58 Am. Rep. 630.

Washington.— State *v.* Hunter, 18 Wash. 670, 52 Pac. 247.

Wisconsin.— Bannen *v.* State, 115 Wis. 317, 91 N. W. 107, 965.

See 42 Cent. Dig. tit. "Rape," § 65.

That her clothing was uninjured in the struggle with defendant may be considered on the question of consent and resistance, but is not conclusive. State *v.* Cross, 12 Iowa 66, 79 Am. Dec. 519.

9. Gonzales *v.* States, 32 Tex. Cr. 611, 25 S. W. 781.

10. People *v.* Figueroa, 134 Cal. 159, 66 Pac. 202; State *v.* Peterson, 110 Iowa 647, 82 N. W. 329; State *v.* Montgomery, 79 Iowa 737, 45 N. W. 292; Grimmett *v.* State, 22 Tex. App. 36, 2 S. W. 631, 58 Am. Rep. 630; Bannen *v.* State, 115 Wis. 317, 91 N. W. 107, 965.

11. People *v.* Flynn, 96 Mich. 276, 55 N. W. 834.

12. *California.*— People *v.* Harlan, 133 Cal. 16, 65 Pac. 9.

Delaware.— State *v.* Smith, 9 Houst. 588, 33 Atl. 441.

Georgia.— McMath *v.* State, 55 Ga. 303.

Louisiana.— State *v.* Jackson, (1894) 15 So. 402.

South Carolina.— State *v.* Haddon, 49 S. C. 308, 27 S. E. 194.

England.— Reg. *v.* Neale, 1 C. & K. 591, 1 Den. C. C. 8, 47 E. C. L. 591.

And see *supra*, I, A, 2, f, (II); I, B, 2, *g*.

13. See *supra*, II, A, 4, b, (I).

prosecutrix may be shown on the question of consent, even where she was over the age of consent.[14] Defendant of course may show that the female is above the age of consent, but he cannot give her declaration to another, nor state how old he took her to be.[15] The age of the female may be shown by a certificate of birth, or entry in the family bible, or family reputation,[16] or by the testimony of the prosecutrix herself,[17] or by her father or mother or any other person who knows her age,[18] or it may be shown by the opinion of non-expert witnesses after a proper showing as to their means of knowledge and the basis of their opinion.[19] The

14. Dickey *v.* State, 86 Miss. 525, 38 So. 776. And see State *v.* McCaffrey, 63 Iowa 479, 19 N. W. 331; O'Meara *v.* State, 17 Ohio St. 515.

15. State *v.* Deputy, 3 Pennew. (Del.) 19, 50 Atl. 176; State *v.* Basket, 111 Mo. 271, 19 S. W. 1097; People *v.* Morris, 12 N. Y. Suppl. 492; Donley *v.* State, 44 Tex. Cr. 428, 71 S. W. 958. See *supra*, I, D. On a prosecution for carnally knowing a female under sixteen years of age, evidence that prosecutrix had stated that she was over sixteen was inadmissible. Renfroe *v.* State, 84 Ark. 16, 104 S. W. 542.

Occurrence of monthly sicknesses.— Where, on the trial of an indictment for carnally knowing a female under the age of sixteen years, the evidence of the age of the prosecutrix was conflicting, it was held that evidence that the monthly sickness of prosecutrix had regularly occurred for five years preceding the alleged offense was admissible to show that prosecutrix was over sixteen years of age at the time of the commission of the offense. Howerton *v.* Com., 112 S. W. 606, 33 Ky. L. Rep. 1008.

16. Clark *v.* Com., 92 S. W. 573, 29 Ky. L. Rep. 154; Com. *v.* Hollis, 170 Mass. 433, 49 N. E. 632; People *v.* Dickerson, 58 N. Y. App. Div. 202, 68 N. Y. Suppl. 715; Reg. *v.* Weaver, L. R. 2 C. C. 85, 12 Cox C. C. 527, 43 L. J. M. C. 13, 29 L. T. Rep. N. S. 544, 22 Wkly. Rep. 190; Reg. *v.* Hayes, 2 Cox C. C. 226. But see State *v.* Scroggs, 123 Iowa 649, 96 N. W. 623 (where a certificate of baptism seems to have been regarded as inadmissible); State *v.* Miller, 71 Kan. 200, 80 Pac. 51 (holding that an entry in a family record of the age of the girl, made by or at the instance of her father, was not admissible in evidence, where he was alive and was a witness in the case); State *v.* Menard, 110 La. 1098, 35 So. 360 (where it was held that after a father had testified to the age of the child from his own independent recollection, it was error to allow the state to introduce in evidence, over defendant's objection, a record of the births of his children not made contemporaneously, but copied from one made at the time of the births, and it was said to be of questionable value even for the purpose of refreshing the memory of the witness). See also EVIDENCE, 17 Cyc. 311, 312, 405.

17. *Iowa.*— State *v.* Scroggs, 123 Iowa 649, 96 N. W. 723.

Kansas.— State *v.* Miller, 71 Kan. 200, 80 Pac. 51; State *v.* McClain, 49 Kan. 730, 31 Pac. 790.

Massachusetts.— Com. *v.* Hollis, 170 Mass. 433, 49 N. E. 632.

Montana.— State *v.* Bowser, 21 Mont. 133, 53 Pac. 179.

Texas.— Johnson *v.* State, 42 Tex. Cr. 298, 59 S. W. 898.

Wisconsin.— Loose *v.* State, 120 Wis. 115, 97 N. W. 526; Dodge *v.* State, 100 Wis. 294, 75 N. W. 954.

See EVIDENCE, 16 Cyc. 1123.

18. Clark *v.* Com., 92 S. W. 573, 29 Ky. L. Rep. 154; State *v.* Menard, 110 La. 1098, 35 So. 360; Dickey *v.* State, 86 Miss. 525, 38 So. 776; Neill *v.* State, 49 Tex. Cr. 219, 91 S. W. 791. See EVIDENCE, 16 Cyc. 1124.

The physician who attended prosecutrix's mother at the time of prosecutrix's birth may testify to her age as shown by his memorandum in medical accounts made at the time. Neill *v.* State, 49 Tex. Cr. 219, 91 S. W. 791. Where, in proving a girl's age at the time defendant made an assault to commit rape on her, a physician testified that he attended the mother when the girl was born, it was not error to allow him to refresh his memory by referring to the entry of the date of such attendance in his cash book. People *v.* Vann, 129 Cal. 118, 61 Pac. 776.

Incompetency of wife of accused.— In a prosecution for using a female child for the purpose of sexual intercourse, the wife of defendant and mother of the prosecuting witness is not a competent witness to prove the age of the prosecuting witness. State *v.* Deputy, 3 Pennew. (Del.) 19, 50 Atl. 176.

Hearsay.— In a trial for rape, where the age of the prosecutrix was in issue, the statement as to what a brother of prosecutrix told the witness as to the age of the prosecutrix was not admissible unless the brother was dead at the time of the trial. Donley *v.* State, 44 Tex. Cr. 428, 71 S. W. 958.

Evidence in rebuttal.— In a trial for rape, where the age of prosecutrix was in issue, evidence was admissible that eight years before prosecutrix was larger and looked much older than another girl who was eight years old. Donley *v.* State, 44 Tex. Cr. 428, 71 S. W. 958.

Estoppel to discredit witness.— Where the mother of a prosecutrix under the age of consent testified to her age, and the prosecution refrained from offering further evidence of the fact on the assurance of defendant's counsel that no question was made that she was under the age of consent, it was held that the exclusion of evidence to discredit the mother was not ground for reversal. People *v.* Morris, 12 N. Y. Suppl. 492.

19. State *v.* Gruhb, 55 Kan. 678, 41 Pac. 95, 98; Donley *v.* State, 44 Tex. Cr. 428, 71 S. W. 958. And see EVIDENCE, 17 Cyc. 98.

mode of proving age has been generally treated elsewhere.[20] The jury may consider the appearance of the girl in determining her age;[21] and evidence of defendant's admissions that she was under age is admissible.[22]

j. Physical and Mental Condition of Accused[23] — (i) *In General.* Evidence of the condition of the accused at the time of the crime is admissible as part of the *res gestæ*.[24] Whenever it is material on the question of force and resistance it is competent to show the size and strength of the accused.[25] Such evidence may also be material on the question whether the accused could have committed the act in view of the prosecutrix's condition.[26]

(ii) *Impotency.* In a prosecution for rape evidence is of course admissible to prove that the accused was impotent or to rebut evidence of impotency;[27] but it has been held that impotency is no defense on a prosecution for assault with intent to rape, and evidence thereof is inadmissible.[28] Impotency or potency may be proved by expert testimony.[29] It is not error to refuse to permit the jury during the trial to privately examine the private parts of the accused.[30]

(iii) *Intoxication.* Where intoxication is not urged as a defense in a prosecution for rape or assault with intent to rape,[31] it is error to allow the state to introduce evidence that the accused was intoxicated at the time of the alleged commission of the crime.[32] But it is competent for the accused to show that he was in such a debilitated condition from a previous debauch as to be physically incapable of committing the offense.[33]

k. Clothing of Accused. Articles of clothing taken from the accused are admissible against him.[34]

20. Proof of age generally see Evidence, 16 Cyc. 1123, 17 Cyc. 98, 294, 311, 312, 405.

21. People *v.* Elco, 131 Mich. 519, 91 N. W. 755, 94 N. W. 1069. See also Evidence, 17 Cyc. 294; and *infra*, II, B, 2, l.

22. People *v.* Elco, 131 Mich. 519, 91 N. W. 755, 94 N. W. 1069.

23. Venereal disease see *infra*, II, B, 2, o.

24. People *v.* Hosmer, 66 N. Y. App. Div. 616, 72 N. Y. Suppl. 480.

25. State *v.* Knapp, 45 N. H. 148. And see State *v.* Armstrong, 167 Mo. 257, 66 S. W. 961.

26. Thus where, on an indictment for rape, several physicians testified that they were unable to find a bruise on the prosecutrix's person, or any irritation of the sexual organs, or blood on her clothing, but that it would have been possible for a man of ordinary parts to have intercourse with her, and a physician of great experience testified that he was unable to insert his finger in her parts without causing pain, it was held error to exclude evidence that defendant was a man of more than ordinary parts. Conners *v.* State, 47 Wis. 523, 2 N. W. 1143.

27. See *supra*, I, A, 2, c. Where, in a prosecution for rape, defendant claimed that at the time of the offense he was physically incapable of committing the same by reason of paralysis, and that he had been under treatment by a physician, who told him he had paralysis, and the physician testified that he treated defendant for rheumatism, and not for paralysis, and denied having made statements to several persons, whose names and the times and places were called to his attention, that defendant had paralysis, testimony of such persons that the physician had made such statements to them for the purpose of impeaching his testimony was not objectionable on the ground that it related to a collateral inquiry. People *v.* Row, 135 Mich. 505, 98 N. W. 13.

Effect of drunkenness see *infra*, II, B, 2, j, (iii).

28. State *v.* Bartlett, 127 Iowa 689, 104 N. W. 285. And see *supra*, I, B, 2, b.

29. State *v.* Walke, 69 Kan. 183, 76 Pac. 408.

30. Where, in a prosecution for rape, accused testified that he had been injured in his private parts, and had had his side crushed, and that as a result he was without sexual desire, and incapable of having sexual intercourse, it was held not error for the court to refuse to permit the jury during the trial to privately examine the private parts of accused. State *v.* Stevens, 133 Iowa 684, 110 N. W. 1037. See, generally, Evidence, 17 Cyc. 290.

31. See *supra*, I, D.

32. Addison *v.* People, 193 Ill. 405, 62 N. E. 235.

33. Nugent *v.* State, 18 Ala. 521. And see *supra*, I, A, 2, c, note 24.

34. State *v.* Duffy, 124 Mo. 1, 27 S. W. 358. In a prosecution for assault with intent to rape, defendant's hat, worn on the occasion of the crime, is admissible. State *v.* Neal, 178 Mo. 63, 76 S. W. 958.

Blood.— The single fact that a stain upon defendant's shirt sleeve was blood, it not being shown to be human blood, and it appearing that it may have been deposited there for six months or a year, was too remote and of no probative force in establishing the identity of defendant as the guilty party. State *v.* Alton, 105 Minn. 410, 117 N. W. 617.

l. Age of Accused.[35] It is always competent to show age, as well as the size, of the accused and the knowledge of the witnesses in respect thereto, and particularly is this true when the evidence bears directly upon his capacity to commit the crime charged.[36] The necessity to prove the age of the accused, and the presumption and burden of proof as to his age, are elsewhere treated.[37] It has been held that it is competent for the jury to look at him and draw reasonable inferences as to his age from his appearance and growth.[38]

m. Expert and Opinion Evidence.[39] A physician and surgeon may testify as to the results of a medical and surgical examination of the prosecutrix after the alleged offense, and may give his opinion thereon as an expert.[40] He may also testify as to the physical possibility of the sexual organ of defendant entering that of the female;[41] and that the female's condition might have been produced by disease, or means other than that testified to by her.[42] Some of the courts hold that a physician may testify that it would be physicially impossible to commit the act as testified to by the prosecutrix;[43] but the better opinion is to the contrary on the ground that to permit such evidence would allow the witness to assume the functions of the jury, and the matter is not properly the subject of expert testimony.[44] He cannot as an expert testify that in his opinion the condition of the sexual organs of the female was produced by rape,[45] or that no girl would have voluntarily submitted to the suffering necessary to bring about the result shown by his examination.[46] Witnesses other than experts, if they have the requisite knowledge, may testify as to the appearance and the mental and physical condition of the prosecutrix.[47] A hypothetical question assuming facts not proven is properly excluded.[48]

n. Penetration in General. The fact of penetration may be proved by either direct or circumstantial evidence.[49] It is proper to ask the prosecuting witness

35. **Proof of age** generally see EVIDENCE, 16 Cyc. 1123; 17 Cyc. 98, 294, 311, 312, 405. And see *supra*, II, B, 2, i.

36. State *v.* Armstrong, 167 Mo. 257, 66 S. W. 961. See *supra*, I, A, 2, c; I, B, 2, b.

37. See *supra*, II, B, 1.

38. State *v.* McNair, 93 N. C. 628. And see State *v.* Sullivan, 68 Vt. 540, 35 Atl. 479. See also EVIDENCE, 17 Cyc. 294; and *infra*, II, B, 2, i, text and note 21.

39. See also EVIDENCE, 17 Cyc. 25 *et seq.*

As to age see *supra*, II, B, 2, i.

Opinion inadmissible.— People *v.* Carey, (Cal. App. 1908) 97 Pac. 907; State *v.* Rohn, (Iowa 1909) 119 N. W. 88.

40. Polson *v.* State, 137 Ind. 519, 35 N. E. 907; State *v.* Teipner, 36 Minn. 535, 32 N. W. 679. See *supra*, II, B, 2, h, (II), where many other cases are cited. A physician who made a special examination of the prosecutrix on the day after the offense may testify that "she looked pale and nervous, and even tremhled, and when she put out her tongue it shook like a leaf, showing that her nervous system was, for some cause, disturbed." Bannen *v.* State, 115 Wis. 317, 91 N. W. 107, 965.

41. Hardtke *v.* State, 67 Wis. 552, 30 N. W. 723; Conners *v.* State, 47 Wis. 522, 2 N. W. 1143.

42. People *v.* Baldwin, 117 Cal. 244, 49 Pac. 186.

43. People *v.* Baldwin, 117 Cal. 244, 49 Pac. 186, prosecutrix, a child of nine, standing up in the middle of the floor, and defendant kneeling down. And see People *v.* Clark, 33 Mich. 112.

44. State *v.* Peterson, 110 Iowa 647, 82 N. W. 329, holding that questions asked medical experts, in a prosecution for rape, which tend to show that the crime could not be committed on an ordinary, matured female, were properly excluded. And see State *v.* Teipner, 36 Minn. 535, 32 N. W. 679; Cook *v.* State, 24 N. J. L. 853; Woodin *v.* People, 1 Park. Cr. (N. Y.) 464. See also EVIDENCE, 17 Cyc. 25 *et seq.*

45. State *v.* Hull, 45 W. Va. 767, 32 S. E. 240; Noonan *v.* State, 55 Wis. 258, 12 N. W. 379.

46. State *v.* Hull, 45 W. Va. 767, 32 S. E. 240.

47. People *v.* Barney, 114 Cal. 554, 47 Pac. 41 (absence of hymen); Bolson *v.* State, 137 Ind. 519, 35 N. E. 907. One who is not examined as an expert in a rape case, but who was present three days after the outrage, when a physician examined the victim, may testify as to the appearance of the victim's body. State *v.* Sudduth, 52 S. C. 488, 30 S. E. 408. On a trial for rape, it was not error to permit the assistant county attorney who was present when a physician examined prosecutrix shortly after the commission of the offense to detail the appearance of the limbs and genital organs of the prosecutrix. State *v.* Symens, 138 Iowa 113, 115 N. W. 878. And see the other cases cited *supra*, II, B, 2, h.

48. People *v.* Scalamiero, 143 Cal. 343, 76 Pac. 1098; People *v.* Graham, 21 Cal. 261. See EVIDENCE, 17 Cyc. 242.

49. **Sufficiency of evidence as to penetration** see *infra*, II, B, 3, b.

whether the intercourse caused her pain,[50] and where, on a prosecution for rape of a young girl, she testifies that she never before had intercourse, that it did not hurt her, that no blood followed, and that she was not sore the next day, it is error to refuse to allow defendant to show that the natural result of intercourse with a girl of prosecutrix's age would be pain, followed by blood and soreness.[51]

o. Venereal Disease.[52] It may be shown that the female became infected with a venereal disease as the result of the rape, and it may then be shown that defendant had the same disease.[53] On the other hand it is error to exclude testimony that the prosecutrix had a contagious venereal disease when the rape is alleged to have been committed, it appearing that she had such disease shortly thereafter, and that defendant had never had it.[54]

p. Pregnancy and Miscarriage, or Birth, Parentage, and Disposition of Child. The general rule is that in case of statutory rape of a female under the age of consent, pregnancy, or pregnancy and miscarriage or birth of a child, may be shown as evidence of the sexual intercourse,[55] and there is no reason why such evidence should not be admissible where the woman was over the age of consent. Of course in either case it could not be evidence that defendant committed the crime, or, if he had intercourse with the prosecutrix, that he did so by force or its

50. People *v.* Flynn, 96 Mich. 276, 55 N. W. 834.

51. People *v.* Duncan, 104 Mich. 460, 62 N. W. 556.

But on a prosecution for carnally knowing a female under the age of consent fixed by Code, § 4756, the consent of the female being immaterial, evidence that the penetration did not bruise or lacerate her, that it was not painful, and, in the opinion of a physician, this showed that she had had intercourse with males more than twice, was immaterial. State *v.* Bricker, 135 Iowa 343, 112 N. W. 645.

52. As bearing on character of prosecutrix see *infra*, II, B, 2, s, (I).

53. People *v.* Glover, 71 Mich. 303, 38 N. W. 874 (testimony of physicians who have examined defendant); State *v.* Marcks, 140 Mo. 656, 41 S. W. 973, 43 S. W. 1095; People *v.* Flinn, 1 Wheel. Cr. Cas. (N. Y.) 74. See also Lam Yee *v.* State, 132 Wis. 527, 112 N. W. 425. Where defendant testifies in his own behalf, denying the rape, and also that he had at that time any venereal disease, it is proper, on cross-examination, to inquire as to his physical condition with reference to such disease, and as to why he had certain bottles of medicine which he used in jail, shortly after his arrest. People *v.* Glover, *supra*. But in a prosecution for rape alleged to have been committed on Oct. 8, 1905, it was held error to permit a physician to testify as a witness for the prosecution that he examined prosecutrix on October 24 and found that she had venereal chancroids, which appeared to be about twelve days old, for the purpose of showing that the venereal disease was contracted by prosecutrix from defendant. People *v.* Ah Lean, 7 Cal. App. 626, 95 Pac. 380.

Cross-examination.— Where it appears that defendant had a venereal disease, and the mother of the prosecutrix testifies that the prosecutrix had such disease after the alleged offense, it is proper to ask on cross-examination whether the prosecutrix suffered from such disease prior to that time. State *v.* Otey, 7 Kan. 69.

54. People *v.* Fong Chung, 5 Cal. App. 587, 91 Pac. 105.

55. *Connecticut.*— State *v.* Sebastian, 81 Conn. 1, 69 Atl. 1054, miscarriage.

Iowa.— State *v.* Blackburn, 136 Iowa 743, 114 N. W. 531; State *v.* Blackburn, (1907) 110 N. W. 275.

Kansas.— State *v.* Miller, 71 Kan. 200, 80 Pac. 51; State *v.* Walke, 69 Kan. 183, 76 Pac. 408.

Missouri.— State *v.* Palmberg, 199 Mo. 233, 97 S. W. 566, 116 Am. St. Rep. 476.

Nebraska.— Woodruff *v.* State, 72 Nebr. 815, 101 N. W. 1114.

New Hampshire.— State *v.* Danforth, 73 N. H. 215, 60 Atl. 839, 111 Am. St. Rep. 600.

New York.— People *v.* Flaherty, 27 N. Y. App. Div. 535, 50 N. Y. Suppl. 574 [*reversed* on other grounds in 162 N. Y. 532, 57 N. E. 73].

Oregon.— State *v.* Robinson, 32 Oreg. 43, 48 Pac. 357.

Utah.— State *v.* Neel, 23 Utah 541, 65 Pac. 494.

Washington.— State *v.* Fetterly, 33 Wash. 599, 74 Pac. 810, miscarriage.

Period of gestation.— The fact that a child was born two hundred and ninety-two days after prosecutrix testified that defendant had intercourse with her does not discredit her testimony, although the ordinary period of gestation is from two hundred and seventy to two hundred and ninety days, where she testified to another act of intercourse within two hundred and eighty days of the birth. People *v.* Flaherty, 27 N. Y. App. Div. 535, 50 N. Y. Suppl. 574 [*reversed* in 162 N. Y. 532, 57 N. E. 73]. Where, in a trial for rape, it appeared that prosecutrix bore a child two hundred and ninety-nine days after the alleged offense, evidence of physicians that, as the alleged intercourse occurred during the menstrual period, the time of gestation did not exceed two hundred and eighty days, and could not have been two hundred and ninety-nine days, was admissible on the issue as to whether the intercourse happened at the date

equivalent.[56] Where evidence of the birth of a child is admitted, the prosecutrix may testify that defendant is the father.[57] It has also been held that the child may be exhibited to the jury for their consideration of any resemblance to defendant;[58] but on this question the better opinion is to the contrary.[59] The state may prove admissions by defendant as to the paternity of the child.[60] What became of the child is immaterial unless defendant is connected with its disposition.[61]

q. Identification of Accused. Defendant may be identified by the prosecutrix or other witnesses and anything that tends to such identification may be proved.[62] The prosecutrix may testify as to the identity of the accused as the person who committed the rape, but descriptions of the accused given by her to other people are not admissible unless brought out on cross-examination, or by way of corroboration.[63] It may be shown that prosecutrix pointed out defendant among a number before her as the guilty party.[64]

r. Character and Habits of Accused.[65] Evidence of the good character of defendant is admissible as it tends to show improbability that he would commit such a crime;[66] but if his guilt is established, his former good character cannot

testified to by prosecutrix. State *v.* Blackburn, 136 Iowa 743, 114 N. W. 531; State *v.* Blackburn, (Iowa 1907) 110 N. W. 275.

56. Lyles *v.* U. S., 20 App. Cas. (D. C.) 559; State *v.* Blackburn, 136 Iowa 743, 114 N. W. 531; State *v.* Danforth, 48 Iowa 43, 30 Am. Rep. 387; People *v.* Robertson, 88 N. Y. App. Div. 198, 84 N. Y. Suppl. 401; People *v.* Flaherty, 27 N. Y. App. Div. 535, 50 N. Y. Suppl. 574 [*reversed* on other grounds in 162 N. Y. 532, 57 N. E. 73]; People *v.* Loftus, 58 Hun (N. Y.) 606, 11 N. Y. Suppl. 905; Gray *v.* State, 43 Tex. Cr. 300, 65 S. W. 375. *Compare infra*, II, B, 3, d, g.

57. State *v.* Miller, 71 Kan. 200, 80 Pac. 51.

58. State *v.* Danforth, 73 N. H. 215, 60 Atl. 839, 111 Am. St. Rep. 600.

59. State *v.* Danforth, 48 Iowa 43, 30 Am. Rep. 387; Gray *v.* State, 43 Tex. Cr. 300, 65 S. W. 375; State *v.* Neel, 23 Utah 541, 65 Pac. 494. *Compare* State *v.* Palmberg, 199 Mo. 233, 97 S. W. 566, 116 Am. St. Rep. 476.

60. State *v.* Neel, 23 Utah 541, 65 Pac. 494. See *supra*, II, B, 2, c.

61. People *v.* Duncan, 104 Mich. 460, 62 N. W. 556.

62. Dudley *v.* State, 121 Ala. 4, 25 So. 742 (holding that where prosecutrix and another witness, in the room at the time of an alleged assault with intent to commit rape, committed in the night-time, had identified accused, evidence that an electric light on the outside shone into the room was admissible to show their ability to do so); State *v.* Washington, 104 La. 57, 28 So. 904, 81 Am. St. Rep. 141 (holding that a witness in a prosecution for attempted rape may testify that she knows defendant, without giving ground for the objection that defendant should be identified by the one on whom the attempt was made); State *v.* Neal, 178 Mo. 63, 76 S. W. 958 (holding that on a prosecution for assault with intent to rape, defendant's hat, worn on the occasion of the crime, is admissible). And see Holloway *v.* State, (Tex. Cr. App. 1908) 113 S. W. 928.

Incompetent evidence.— Where the prosecutrix had stated that she was assaulted by a negro, but had been unable to identify defendant, evidence that there was no strange negro in the county was held not admissible as tending to identify defendant as the guilty person. Oxsheer *v.* State, 38 Tex. Cr. 499, 43 S. W. 335.

Blood stains on clothing see *supra*, II, B, 2, k, note 34.

63. Brogy *v.* Com., 10 Gratt. (Va.) 722; Smith *v.* State, 51 Wis. 615, 8 N. W. 410, 37 Am. Rep. 845. Where on a prosecution for rape, the principal witness has stated on cross-examination that one B told her he thought it was the accused who committed the act, there is no error in permitting her then to testify that she had described to B the man who did the act before B told her he thought it was the accused. Smith *v.* State, *supra*.

64. Cotton *v.* State, 87 Ala. 75, 6 So. 396; State *v.* Bedard, 65 Vt. 278, 26 Atl. 719; Reg. *v.* Jenkins, 1 C. & K. 536, 47 E. C. L. 536. *Contra*, Reddick *v.* State, 35 Tex. Cr. 463, 34 S. W. 274, 60 Am. St. Rep. 56 [*overruling* Bruce *v.* State, 31 Tex. Cr. 590, 21 S. W. 681].

65. Proof of other acts see *infra*, II, B, 2, t.

66. *Georgia.*— Seymour *v.* State, 102 Ga. 803, 30 S. E. 263.

Kentucky.— Lake *v.* Com., 104 S. W. 1003, 31 Ky. L. Rep. 1232.

Mississippi.— Horton *v.* State, 84 Miss. 473, 36 So. 1033.

Montana.— State *v.* Jones, 32 Mont. 442, 80 Pac. 1095.

New Hampshire.— State *v.* Knapp, 45 N. H. 148.

New Jersey.— State *v.* Sprague, 64 N. J. L. 419, 45 Atl. 788.

Texas.— Lincecum *v.* State, 29 Tex. App. 328, 15 S. W. 818, 25 Am. St. Rep. 727; Johnson *v.* State, 17 Tex. App. 565.

Wisconsin.— Hardtke *v.* State, 67 Wis. 552, 30 N. W. 723; Conners *v.* State, 47 Wis. 523, 2 N. W. 1143.

See 42 Cent. Dig. tit. "Rape," § 61; and

be a refutation or excuse.[67] The state cannot prove his bad character unless, and to the extent that, he puts his character in issue.[68] As a rule it is not competent for the state to introduce evidence of defendant's habits or of his conduct with other females.[69] Evidence that the prosecutrix knew of the bad character of defendant is immaterial.[70] Evidence that defendant and his wife lived together amicably and peaceably has no tendency to prove his guilt or innocence and is inadmissible.[71]

s. Character and Habits of Prosecutrix — (I) *Chastity in General.* The general reputation of the prosecutrix for want of chastity is admissible, where she was of the age of consent, not as a matter of justification, but as showing the probability of consent;[72] but evidence of such reputation must be confined

Criminal Law, 12 Cyc. 412 *et seq.*; Evidence, 16 Cyc. 1266 *et seq.*

General reputation for peace or violence has been held admissible. Horton *v.* State, 84 Miss. 473, 36 So. 1033; State *v.* Sprague, 64 N. J. L. 419, 45 Atl. 788; Johnson *v.* State, 17 Tex. App. 565; Conners *v.* State, 47 Wis. 523, 2 N. W. 1143. *Contra*, Wistrand *v.* People, 218 Ill. 323, 75 N. E. 891.

67. State *v.* Jones, 32 Mont. 442, 80 Pac. 1095; Richards *v.* State, 65 Nebr. 808, 91 N. W. 878.

68. State *v.* Jerome, 33 Conn. 265; State *v.* Ogden, 39 Oreg. 195, 65 Pac. 449. See Criminal Law, 12 Cyc. 413; Evidence, 16 Cyc. 1266. In a prosecution for assault with intent to commit rape, where the defendant introduced evidence that his reputation was good as a "peaceable negro, and one who was always polite to white people, especially to ladies," it was held error to permit the state to show that his reputation as "a law-abiding man" was bad. Johnson *v.* State, 17 Tex. App. 565. But where defendant introduced evidence of his reputation for morality as well as chastity, it was held competent on cross-examination for the state to inquire as to his reputation for selling liquor without a license. State *v.* Knapp, 45 N. H. 148.

69. People *v.* Stewart, 85 Cal. 174, 24 Pac. 722; People *v.* Bowen, 49 Cal. 654; Janzen *v.* People, 159 Ill. 440, 42 N. E. 862. *Contra*, Proper *v.* State, 85 Wis. 615, 55 N. W. 1035.

Proof of other acts see *infra*, II, B, 2, t.

70. State *v.* Porter, 57 Iowa 691, 11 N. W. 644.

71. State *v.* Parish, 104 N. C. 679, 10 S. E. 457.

72. *Alabama.*— McQuirk *v.* State, 84 Ala. 435, 4 So. 775, 5 Am. St. Rep. 381; Boddie *v.* State, 52 Ala. 395.

Arkansas.— Maxey *v.* State, 66 Ark. 523, 52 S. W. 2; Pleasant *v.* State, 15 Ark. 624.

California.— People *v.* Shea, 125 Cal. 151, 57 Pac. 885.

Georgia.— Black *v.* State, 119 Ga. 746, 47 S. E. 370; Seals *v.* State, 114 Ga. 518, 40 S. E. 731, 88 Am. St. Rep. 33; Camp *v.* State, 3 Ga. 417.

Indiana.— Carney *v.* State, 118 Ind. 525, 21 N. E. 48; Anderson *v.* State, 104 Ind. 467, 4 N. E. 63, 5 N. E. 711.

Iowa.— State *v.* McDonough, 104 Iowa 6, 73 N. W. 357.

Kansas.— State *v.* Brown, 55 Kan. 766, 42 Pac. 363.

Kentucky.— Brown *v.* Com., 102 Ky. 227, 43 S. W. 214, 19 Ky. L. Rep. 1174; Lake *v.* Com., 104 S. W. 1003, 31 Ky. L. Rep. 1232; Neace *v.* Com., 62 S. W. 733, 23 Ky. L. Rep. 125.

Massachusetts.— Com. *v.* Harris, 131 Mass. 336.

Michigan.— People *v.* Ryno, 148 Mich. 137, 111 N. W. 740.

Mississippi.— Brown *v.* State, 72 Miss. 997, 17 So. 278.

Missouri.— State *v.* White, 35 Mo. 500.

New Hampshire.— State *v.* Knapp, 45 N. H. 148; State *v.* Forshner, 43 N. H. 89, 80 Am. Dec. 132.

New Jersey.—O'Blenis *v.* State, 47 N. J. L. 279.

New Mexico.— Territory *v.* Pino, 9 N. M. 598, 58 Pac. 393.

New York.— Woods *v.* People, 55 N. Y. 515, 14 Am. Rep. 309 [*reversing* on other grounds 1 Thomps. & C. 610]; Brennan *v.* People, 7 Hun 171. And see Conkey *v.* People, 1 Abb. Dec. 418, 5 Park. Cr. 31; People *v.* Jackson, 3 Park. Cr. 391; People *v.* Abbot, 19 Wend. 192.

North Carolina.— State *v.* Hairston, 121 N. C. 579, 28 S. E. 492; State *v.* Long, 93 N. C. 542; State *v.* Daniel, 87 N. C. 507; State *v.* Jefferson, 28 N. C. 305.

Ohio.— McCombs *v.* State, 8 Ohio St. 643.

Oregon.— State *v.* Ogden, 39 Oreg. 195, 65 Pac. 449.

Rhode Island.— State *v.* Fitzsimon, 18 R. I. 236, 27 Atl. 446, 49 Am. St. Rep. 766.

Texas.— Shields *v.* State, 32 Tex. Cr. 498, 23 S. W. 893; Favors *v.* State, 20 Tex. App. 155; Rogers *v.* State, 1 Tex. App. 187; Dorsey *v.* State, 1 Tex. App. 33.

West Virginia.— State *v.* Detwiler, 60 W. Va. 583, 55 S. E. 654.

England.— Reg. *v.* Clay, 5 Cox C. C. 146; Rex *v.* Tissington, 1 Cox C. C. 48; Rex *v.* Clarke, 2 Stark. 241, 3 E. C. L. 393.

See 42 Cent. Dig. tit. "Rape," § 55 *et seq.*

Character for "virtue."— It has been held that, while a witness as to character may, of his own motion, say in what respect the character of the person asked about is good or bad, the party introducing him can only interrogate him as to the general character of such person; hence defendants charged with rape cannot prove by their witness as to character of prosecutrix that such character was bad for virtue. State *v.* Hairston, 121 N. C. 579, 28 S. E. 492.

to the time prior to the alleged rape.[73] In some states it is held that on the question of character specific acts of intercourse with others may be shown, and that the prosecutrix may be compelled to answer on cross-examination as to whether she had intercourse with another at or about or before the time;[74] but according to the weight of authority want of chastity must be shown by general reputation and not by proof of specific acts,[75] except that individual acts with defendant

General moral character.— In a trial for rape, testimony of the general moral character of the prosecutrix at the time of the alleged offense is inadmissible. State *v.* Blackburn, (Iowa 1907) 110 N. W. 275.

73. *Iowa.*— State *v.* McDonough, 104 Iowa 6, 73 N. W. 357; State *v.* Ward, 73 Iowa 532, 35 N. W. 617.

Missouri.— State *v.* Day, 188 Mo. 359, 87 S. W. 465.

New Hampshire.— State *v.* Forshner, 43 N. H. 89, 80 Am. Dec. 132.

Ohio.— Pratt *v.* State, 19 Ohio St. 277.

South Carolina.— State *v.* Taylor, 57 S. C. 483, 35 S. E. 729, 76 Am. St. Rep. 575.

West Virginia.—State *v.* Barrick, 60 W. Va. 576, 55 S. E. 652.

See 42 Cent. Dig. tit. "Rape," § 55.

74. *California.*— People *v.* Shea, 125 Cal. 151, 57 Pac. 885. Where the prosecutrix is the only witness, evidence that she had committed acts of lewdness with other men is admissible, as tending to disprove the allegation of force and total want of assent on her part. People *v.* Benson, 6 Cal. 221, 65 Am. Dec. 506. And see People *v.* Kuches, 120 Cal. 566, 52 Pac. 1002.

Kentucky.— Brown *v.* Com., 102 Ky. 227, 43 S. W. 214, 19 Ky. L. Rep. 1174. But see Cargill *v.* Com., 93 Ky. 578, 20 S. W. 782, 14 Ky. L. Rep. 517.

Missouri.— State *v.* Patterson, 88 Mo. 88, 57 Am. Rep. 374. But see State *v.* White, 35 Mo. 500.

New York.— People *v.* Abbot, 19 Wend. 192, where, on cross-examination, the prosecutrix testified that she did not go with a man to a liquor shop, and afterward accompany him to a lumber yard, and endeavor to get him to have carnal intercourse with her, it was held error to exclude evidence contradicting her and establishing such facts. Brennan *v.* People, 7 Hun 171.

Tennessee.— Benstine *v.* State, 2 Lea 169, 31 Am. Rep. 593; Titus *v.* State, 7 Baxt. 132.

Vermont.— State *v.* Hollenbeck, 67 Vt. 34, 30 Atl. 696; State *v.* Reed, 39 Vt. 417, 94 Am. Dec. 337; State *v.* Johnson, 28 Vt. 512.

See 42 Cent. Dig. tit. "Rape," § 55 *et seq.*

75. *Alabama.*— Griffin *v.* State, (1908) 46 So. 481; McQuirk *v.* State, 84 Ala. 435, 4 So. 775, 5 Am. St. Rep. 381; Boddie *v.* State, 52 Ala. 395.

Arkansas.— Pleasant *v.* State, 15 Ark. 624.

Delaware.— State *v.* Turner, Houst. Cr. Cas. 76.

Florida.— Rice *v.* State, 35 Fla. 236, 17 So. 286, 48 Am. St. Rep. 245.

Georgia.— Black *v.* State, 119 Ga. 746, 47 S. E. 370; Camp *v.* State, 3 Ga. 417.

Indiana.— Richie *v.* State, 58 Ind. 355.

Iowa.— State *v.* Blackburn, (1907) 110 N. W. 275; State *v.* McDonough, 104 Iowa 6, 73 N. W. 357; State *v.* Porter, 57 Iowa 691, 11 N. W. 644. There was *dictum* to the contrary in State *v.* Sutherland, 30 Iowa 570, 572.

Kansas.— State *v.* Brown, 55 Kan. 766, 42 Pac. 363.

Maryland.— Shartzer *v.* State, 63 Md. 149, 52 Am. Rep. 501.

Massachusetts.— Com. *v.* Harris, 131 Mass. 336; Com. *v.* Regan, 105 Mass. 593.

Michigan.— People *v.* McLean, 71 Mich. 309, 38 N. W. 917, 15 Am. St. Rep. 263. *Compare* Strang *v.* People, 24 Mich. 1.

Mississippi.— Brown *v.* State, 72 Miss. 997, 17 So. 278.

Nevada.— State *v.* Campbell, 20 Nev. 122, 17 Pac. 620.

New Hampshire.—State *v.* Knapp, 45 N. H. 148; State *v.* Forshner, 43 N. H. 89, 80 Am. Dec. 132.

New Mexico.— Territory *v.* Pino, 9 N. M. 598, 58 Pac. 393.

New York.— Conkey *v.* People, 1 Abb. Dec. 418, 5 Park. Cr. 31; People *v.* Jackson, 3 Park. Cr. 391.

North Carolina.— State *v.* Hairston, 121 N. C. 579, 28 S. E. 492; State *v.* Jefferson, 28 N. C. 305. But see State *v.* Murray, 63 N. C. 31.

Ohio.— McDermott *v.* State, 13 Ohio St. 332, 82 Am. Dec. 444; McCombs *v.* State, 8 Ohio St. 643. Where, in the course of an inquiry into the general character of the prosecutrix for chastity, some of the witnsses for the accused speak of specific reports of sexual intercourse between her and another individual, no objection having been made to proof of such specific reports, it is not competent for the state, by way of rebuttal, to prove that no such improper intercourse ever in fact existed. The issue in such cases is, not whether the reputation for unchastity is deserved, but whether it was generally accredited. McDermott *v.* State, *supra.*

Oregon.— State *v.* Ogden, 39 Oreg. 195, 65 Pac. 449.

Rhode Island.— State *v.* Fitzsimon, 18 R. I. 236, 27 Atl. 446, 49 Am. St. Rep. 766.

Texas.—Wilson *v.* State, 17 Tex. App. 525; Dorsey *v.* State, 1 Tex. App. 33.

Utah.— State *v.* Hilberg, 22 Utah 27, 61 Pac. 215.

Virginia.— Fry *v.* Com., 82 Va. 334, holding that defendant cannot ask the prosecutrix on cross-examination if she had not been a person of unchaste character.

West Virginia.— State *v.* Detwiler, 60 W. Va. 583, 55 S. E. 654.

England.— Rex *v.* Hodgson, R. & R. 158. And see Rex *v.* Barker, 3 C. & P. 589, 14

prior to the alleged crime may be proved as it tends to show consent.[76] Nor are the declarations or admissions of the prosecutrix as to specific acts with others than defendant admissible.[77] But it has been held that general immoral habits and character of the prosecutrix may be shown, as by showing that she was a common prostitute, etc.[78] Specific acts with others than defendant may be

E. C. L. 730. *Contra*, Reg. *v.* Mercer, 6 Jur. 243. If prosecutrix is asked on cross-examination if she had formerly had intercourse with others and denies it her answer is final and such persons cannot be called to contradict her. Reg. *v.* Holmes, L. R. 1 C. C. 334, 12 Cox C. C. 137, 41 L. J. M. C. 12, 25 L. T. Rep. N. S. 669, 20 Wkly. Rep. 122; Reg. *v.* Cockcroft, 11 Cox C. C. 410; Reg. *v.* Dean, 6 Cox C. C. 23. But where the woman was asked about her association with lewd women and denied it, a witness was allowed to contradict her, as it showed general character. Rex *v.* Barker, 3 C. & P. 589, 14 E. C. L. 730.

See 42 Cent. Dig. tit. "Rape," § 55 *et seq.*

Personal knowledge of witness.— A witness cannot be asked whether he knows that the prosecutrix is a bad and lewd woman, without any reference to her reputation in the community. Pleasant *v.* State, 15 Ark. 624. A witness cannot testify to the moral character of the prosecutrix as known to him by reason of his knowledge of specific acts, but the testimony must be confined to her reputation in the community. State *v.* Blackburn, (Iowa 1907) 110 N. W. 275.

Belief of a witness that the prosecutrix was unchaste is not admissible. State *v.* Porter, 57 Iowa 691, 11 N. W. 644.

Venereal disease.— In a rape case evidence that the prosecutrix, seven years before the alleged crime, contracted a venereal disease by promiscuous sexual intercourse is improper. Brown *v.* State, 72 Miss. 997, 17 So. 278. See also State *v.* Smith, 18 S. D. 341, 100 N. W. 740.

76. *Alabama.*— McQuirk *v.* State, 84 Ala. 435, 4 So. 775, 5 Am. St. Rep. 381.

Arkansas.— Pleasant *v.* State, 15 Ark. 624.

California.— People *v.* Mathews, 139 Cal. 527, 73 Pac. 416.

Florida.— Rice *v.* State, 35 Fla. 236, 17 So. 286, 48 Am. St. Rep. 245.

Indiana.— Bedgood *v.* State, 115 Ind. 275, 17 N. E. 621, with one of several defendants.

Iowa.— State *v.* Cook, 65 Iowa 560, 22 N. W. 675, declarations of prosecutrix admissible. On an indictment for rape alleged to have been committed where defendant was at work, the testimony of defendant's wife that complainant, during three days' visit at her house, was very immodest, refused to go home when told, and boasted that she used to go to defendant's place of work, and "play" with him, and "use" him, whenever she chose, was admissible. State *v.* Cassidy, 85 Iowa 145, 52 N. W. 1.

Minnesota.— Where on a trial for rape, alleged to have been committed at defendant's house, defendant offered evidence that on a date after the commission of the alleged offense, when reproved for going to defendant's house, the prosecutrix answered: "I will. I am my own boss, and will go there when I please;" and that on another occasion she asked another girl to go with her to defendant's house, accompanying the request with the remark, "Isn't he a nice man?" it was held that the evidence was not impeaching, and could be introduced without first calling prosecutrix's attention to it. State *v.* Connelly, 57 Minn. 482, 59 N. W. 479.

Nebraska.— Bailey *v.* State, 57 Nebr. 706, 78 N. W. 284, 73 Am. St. Rep. 540.

New Hampshire.— State *v.* Forshner, 43 N. H. 89, 80 Am. Dec. 132.

New York.— Woods *v.* People, 55 N. Y. 515, 14 Am. Rep. 309; People *v.* Abbot, 19 Wend. 192.

North Carolina.— State *v.* Jefferson, 28 N. C. 305.

Oregon.— State *v.* Ogden, 39 Oreg. 195, 65 Pac. 449.

Texas.— Wilson *v.* State, 17 Tex. App. 525.

Utah.— State *v.* Neel, 23 Utah 541, 65 Pac. 494.

Wisconsin.— Hardtke *v.* State, 67 Wis. 552, 30 N. W. 723.

England.— Rex *v.* Martin, 6 C. & P. 562, 25 E. C. L. 575; Rex *v.* Hodgson, R. & R. 158.

See 42 Cent. Dig. tit. "Rape," § 56.

Evidence that prosecutrix's husband was jealous of her, or jealous of her and defendant, or objected to prosecutrix's being with defendant or other men, is inadmissible to support defendant's claim of prior intimacy with her, it being merely conjectural as to that fact. Barnes *v.* State, 88 Ala. 204, 7 So. 38, 16 Am. St. Rep. 48.

77. Com. *v.* Regan, 105 Mass. 593 (holding that defendant cannot show, either by cross-examination of the woman or by other evidence, that she declared herself pregnant by other men); People *v.* McLean, 71 Mich. 309, 38 N. W. 917, 15 Am. St. Rep. 263.

A magistrate before whom a complaint for rape is made cannot be called to state what the prosecuting witness stated to him as to her connection with other men, unless the inquiry is made for the purpose of showing a discrepancy in her testimony. People *v.* Abbot, 19 Wend. (N. Y.) 192.

78. *Arkansas.*— Maxey *v.* State, 66 Ark. 523, 52 S. W. 2.

Georgia.— Camp *v.* State, 3 Ga. 417.

Mississippi.— Brown *v.* State, 72 Miss. 997, 17 So. 278, holding that it was error not to permit a witness to testify to a continuous course of prostitution on the part of prosecutrix by reference to separate acts of sexual intercourse.

New York.— Woods *v.* People, 55 N. Y. 515, 14 Am. Rep. 309 [*reversing* 1 Thomps. & C. 610], holding that evidence that defendant was in the habit of receiving men

shown to rebut corroborating circumstances, as when the woman is pregnant or has miscarried or given birth to a child,[79] or where she was infected with venereal disease,[80] or where a physician has testified that the hymen was ruptured.[81] In cases of carnal knowledge of a female under the age of consent, her want of chastity cannot be shown to show consent, since she is incapable of consenting;[82] but

at her house for the purpose of promiscuous intercourse with them, but not deciding whether evidence of particular acts of intercourse was admissible.

Tennessee.— Titus *v.* State, 7 Baxt. 132.

West Virginia.— State *v.* Detwiler, 60 W. Va. 583, 55 S. E. 654.

Drunken and dissipated habits.— It has been held that evidence that the prosecutrix is a woman of drunken and dissipated habits, sleeping in hallways and accustomed to go in at two or three o'clock in the morning, is admissible as evidence of general immoral character. Brennan *v.* People, 7 Hun (N. Y.) 171. But it has been held that even if defendant, on a prosecution for carnally knowing a female under the age of twelve years, may show the bad character of the child, evidence that she had been seen on the streets at night drinking is not competent. Clark *v.* Com., 92 S. W. 573, 29 Ky. L. Rep. 154.

79. *Iowa.*— On a prosecution for rape, it appearing that prosecutrix was pregnant, defendant, for the purpose only of counteracting any sympathy with her by reason thereof, should be allowed to show intercourse by her with others, from which this might have resulted. State *v.* Bebb, 125 Iowa 494, 101 N. W. 189. In a trial for rape, it was not error to limit evidence as to intercourse had with prosecutrix by others than defendant to such connection as might have resulted in the conception of the child, the paternity of which was imputed to the defendant as the result of the offense, although she testified she had never had intercourse with any man except defendant, since contradiction on that point would have been impeachment on an immaterial matter. State *v.* Blackburn, (1907) 110 N. W. 275.

Kansas.— State *v.* Gereke, 74 Kan. 196, 86 Pac. 160, 87 Pac. 759.

New York.— People *v.* Flaherty, 79 Hun 48, 29 N. Y. Suppl. 641 [*affirmed* in 145 N. Y. 597, 40 N. E. 164].

Texas.— Knowles *v.* State, 44 Tex. Cr. 322, 72 S. W. 398; Bice *v.* State, 37 Tex. Cr. 38, 38 S. W. 803.

Washington.— State *v.* Mobley, 44 Wash. 549, 87 Pac. 815.

Contra, where the female was under the age of consent. State *v.* Whitesell, 142 Mo. 467, 44 S. W. 332.

80. Nugent *v.* State, 18 Ala. 521; State *v.* Height, 117 Iowa 650, 91 N. W. 935, 59 L. R. A. 437; State *v.* Otey, 7 Kan. 69. In a trial for raping a girl under age, it was error to exclude testimony that she had had intercourse with Chinamen other than defendant prior to the alleged offense; the evidence being admissible to repel an inference that he had conveyed a loathsome disease to her, to show that perhaps she was mistaken in defendant's identity, and as tending to affect her credibility. People *v.* Fong Chung, 5 Cal. App. 587, 91 Pac. 105. *Compare* People *v.* Glover, 71 Mich. 303, 38 N. W. 874, holding that defendant could not show specific acts of lewdness between prosecutrix and small boys, as this did not tend to disprove the fact that she had contracted a venereal disease from defendant.

81. Where the prosecutrix testified that she was unconscious, and did not know whether the accused committed the rape or not, and the prosecution proved by a physician, who examined her three weeks afterward, that she did not then bear the physical evidences of virginity, and gave it as his opinion that she had had carnal connection with a man at some time before, it was held that it was competent to rebut the inference sought to be drawn from this evidence, by showing either a previous voluntary connection with the accused, or particular instances of unchastity with any other man, as well as to show by other medical testimony that the theory of the doctor testifying was unreliable. Shirwin *v.* People, 69 Ill. 55. And see People *v.* Knight, (Cal. 1895) 43 Pac. 6; People *v.* Betsinger, 11 N. Y. Suppl. 916.

82. *Arkansas.*— Renfroe *v.* State, 84 Ark. 16, 104 S. W. 542; Plunkett *v.* State, 72 Ark. 409, 82 S. W. 845.

California.— People *v.* Mathews, 139 Cal. 527, 73 Pac. 416; People *v.* Wilmot, 139 Cal. 103, 72 Pac. 838; People *v.* Johnson, 106 Cal. 289, 39 Pac. 622.

Iowa.— State *v.* Blackburn, 136 Iowa 743, 114 N. W. 531.

Kansas.— State *v.* Eberline, 47 Kan. 155, 27 Pac. 839.

Michigan.— People *v.* Abbott, 97 Mich. 484, 56 N. W. 862, 37 Am. St. Rep. 360; People *v.* Glover, 71 Mich. 303, 38 N. W. 874.

Missouri.— State *v.* Whitesell, 142 Mo. 467, 44 S. W. 332; State *v.* Duffey, 128 Mo. 549, 31 S. W. 98.

Nebraska.— Harris *v.* State, 80 Nebr. 195, 114 N. W. 168.

South Dakota.— State *v.* Smith, 18 S. D. 341, 100 N. W. 740.

Texas.— Price *v.* State, 44 Tex. Cr. 304, 70 S. W. 966; Steinke *v.* State, 33 Tex. Cr. 65, 24 S. W. 909, 25 S. W. 287.

Utah.— State *v.* Williamson, 22 Utah 248, 62 Pac. 1022, 83 Am. St. Rep. 780; State *v.* Hilberg, 22 Utah 27, 61 Pac. 215.

See 42 Cent. Dig. tit. "Rape," § 59.

With defendant.— Where the prosecutrix was under the age of consent evidence that defendant had had previous connection with her was incompetent. People *v.* Harris, 103 Mich. 473, 61 N. W. 871.

it has been held that want of chastity may be shown as affecting credibility of the prosecutrix as a witness, although it would not be a defense if the act was admitted,[83] or to show the adulterous disposition of the parties.[84] When the statute makes carnal knowledge of a female of previous chaste character under a specified age rape, chastity is presumed until the contrary is proved,[85] and want of chastity in such cases must be shown by specific acts and not by general reputation.[86] In all cases when the reputation of the woman is attacked proof of her good character is admissible on behalf of the state, but not before it is attacked.[87] Evidence of unchaste character or acts of prosecutrix after the offense is inadmissible, even on her cross-examination and after she has testified without objection to her chastity before the offense.[88]

(II) *Indecency of Speech or Conduct.* Evidence that prosecutrix commonly indulged in indecency of speech or conduct is not admissible on the question of want of resistance and consent, when it does not appear that such conversation or conduct accompanied or invited lewdness of behavior.[89]

(III) *Character of Domicile, Family, or Associates of Prosecutrix.* As a rule defendant cannot show the general bad reputation for chastity of the house where the prosecutrix lived,[90] or of her parents or associates.[91] On a prosecution of a negro for assault with intent to rape a white girl, evidence that the girl, her family, or her companions associated with negroes is inadmissible.[92]

83. State *v.* Duffey, 128 Mo. 549, 31 S. W. 98, holding that, although the fact that prosecutrix's reputation for chastity was bad is no defense, in a prosecution for rape, where she was under fourteen years of age, as her consent to the act was immaterial; but the evidence of such reputation is admissible as affecting her credibility. *Contra*, State *v.* Eberline, 47 Kan. 455, 27 Pac. 839.

84. Blair *v.* State, 72 Nebr. 501, 101 N. W. 17. And see People *v.* Mathews, 139 Cal. 527, 73 Pac. 416.

85. State *v.* Kelley, 191 Mo. 680, 90 S. W. 834.

86. State *v.* Kelley, 191 Mo. 680, 90 S. W. 834; State *v.* Knock, 142 Mo. 515, 44 S. W. 235; Woodruff *v.* State, 72 Nebr. 815, 101 N. W. 1114.

Unchaste character after offense.—Evidence of the unchaste conduct of prosecutrix after she was debauched is not competent. State *v.* Knock, 142 Mo. 515, 44 S. W. 235.

87. *California.*—People *v.* O'Brien, 130 Cal. 1, 62 Pac. 297; People *v.* Kuches, 120 Cal. 566, 52 Pac. 1002; People *v.* Tyler, 36 Cal. 522.

Iowa.— State *v.* Case, 96 Iowa 264, 65 N. W. 149.

Mississippi.— Baker *v.* State, 82 Miss. 84, 33 So. 716; Turney *v.* State, 8 Sm. & M. 104, 47 Am. Dec. 74.

Nebraska.— Where, on a trial for illicit intercourse with a female under eighteen, not previously unchaste, defendant offers evidence assailing prosecutrix's character and tending to establish an act of lewdness on her part, evidence of her previous good character for chastity may be introduced to discredit such testimony, although inadmissible in the first instance. Leedom *v.* State, 81 Nebr. 585, 116 N. W. 496.

New York.— People *v.* Hulse, 3 Hill 309.

Texas.— Warren *v.* State, (Cr. App. 1908) 114 S. W. 380; Tyler *v.* State, 46 Tex. Cr. 10, 79 S. W. 558.

Virginia.— Coleman *v.* Com., 84 Va. 1, 3 S. E. 878.

88. Griffin *v.* State, (Ala. 1908) 46 So. 481; State *v.* Knock, 142 Mo. 515, 44 S. W. 235.

89. People *v.* Kuches, 120 Cal. 566, 52 Pac. 1002. Evidence that the prosecutrix of a negro slave for an assault with intent to ravish had made an indecent exposure of her person to the other slaves belonging to the same owner, but which was not known to the accused at the time of the alleged offense, was held not to be admissible. State *v.* Henry, 50 N. C. 65. On a prosecution for assault with intent to rape, there is no error in refusing to permit a witness to testify to having kissed prosecutrix. Kearse *v.* State, (Tex. Cr. App. 1905) 88 S. W. 363.

90. Territory *v.* Richmond, 2 Ariz. 68, 10 Pac. 368 (where the prosecutrix was thirteen years old and lived alone with her mother); State *v.* Duffy, 124 Mo. 1, 27 S. W. 358 (holding that testimony of the character of the place where prosecutrix and her husband had put up for the night before the alleged assault was inadmissible); State *v.* Taylor, 57 S. C. 483, 35 S. E. 729, 76 Am. St. Rep. 575; James *v.* State, 124 Wis. 130, 102 N. W. 320; and cases in the note following.

91. State *v.* Anderson, 19 Mo. 241. Evidence that the mother of prosecutrix kept a house of ill-fame is not admissible. Smith *v.* State, 44 Tex. Cr. 137, 68 S. W. 995, 100 Am. St. Rep. 849; Manning *v.* State, 43 Tex. Cr. 302, 65 S. W. 920, 96 Am. St. Rep. 873. To prove the previous unchastity of a prosecutrix in a charge of statutory rape of a female previously chaste, it is not permissible to put in evidence the general reputation of one with whom she has associated, as to the latter being a person of unchaste character. Woodruff *v.* State, 72 Nebr. 815, 101 N. W. 1114.

92. State *v.* Finger, 131 N. C. 781, 42 S. E. 820.

t. Proof of Other Acts. As a general rule proof of other acts than that charged is inadmissible,[93] unless they are part of the *res gestæ* or come within some other exception to the rule excluding evidence of other offenses.[94] In prosecutions for statutory rape on a female under the age of consent, or on a woman imbecile, it is generally held that proof of acts prior to that alleged in the indictment is admissible,[95] unless they are too remote in point of time.[96] Subsequent acts are not admissible in some jurisdictions,[97] unless they are part of the *res*

93. See CRIMINAL LAW, 12 Cyc. 405 *et seq.* And see Janzen *v.* People, 159 Ill. 440, 42 N. E. 862; Parkinson *v.* People, 135 Ill. 401, 25 N. E. 764, 10 L. R. A. 91; People *v.* Elter, 81 Mich. 570, 45 N. W. 1109; People *v.* Freeman, 25 N. Y. App. Div. 583, 50 N. Y. Suppl. 984 [*affirmed* in 156 N. Y. 694, 50 N. E. 1120]; Vickers *v.* U. S., (Okla. Cr. App. 1908) 98 Pac. 467; Sykes *v.* State, 112 Tenn. 572, 82 S. W. 185, 105 Am. St. Rep. 972; Henard *v.* State, 46 Tex. Cr. 90, 79 S. W. 810, 47 Tex. Cr. 168, 82 S. W. 655.

94. Renfroe *v.* State, 84 Ark. 16, 104 S. W. 542; State *v.* Taylor, (Mo. 1891) 22 S. W. 806, 118 Mo. 153, 24 S. W. 449 (robbery of prosecutrix's escort); Reg. *v.* Rearden, 4 F. & F. 76; and CRIMINAL LAW, 12 Cyc. 407. Where a person is on trial under indictment for a particular offense, and a complete detached narrative of that offense by the witnesses involves a recital of another offense, it is not error to permit them to complete the detailed narrative of the offense for which the party is indicted, notwithstanding the recital of an offense for which he was not indicted. Parkinson *v.* People, 135 Ill. 401, 35 N. E. 764, 10 L. R. A. 91. In a prosecution for rape it is competent for the state to prove, for the purpose of showing a motive for the crime of rape, that the place to which defendant took the prosecuting witness was a house of prostitution kept by him. Cross *v.* State, 138 Ind. 254, 37 N. E. 790.

Seduction.— In a prosecution for statutory rape of a female under the age of consent, evidence that at the time of the commission of the offense accused promised to marry the prosecutrix if any trouble arose is admissible, even though tending to prove the crime of seduction. Woodruff *v.* State, 72 Nebr. 815, 101 N. W. 1114.

Burglary.— On a prosecution for assault with intent to rape, it was not error to permit a witness to testify that the house of witness where the crime was committed was closed when witness left it in the morning, although such testimony might suggest that the accused had committed burglary. Turman *v.* State, 50 Tex. Cr. 7, 95 S. W. 533.

Abortion.— In a prosecution for statutory rape, an attempt by accused to have an abortion committed upon the prosecutrix, or the actual procuring of an abortion, may be considered against defendant. State *v.* Sebastian, 81 Conn. 1, 69 Atl. 1054; Woodruff *v.* State, 72 Nebr. 815, 101 N. W. 1114. See *supra*, II, B, 2, c.

95. *California.*— People *v.* Castro, 133 Cal. 11, 65 Pac. 13; People *v.* Fultz, 109 Cal. 258, 41 Pac. 1040; People *v.* Lenon, 79 Cal. 625, 631, 21 Pac. 967, 1327; People *v.* Morris, 3 Cal. App. 1, 84 Pac. 463. But *compare* People *v.* Ah Lean, 7 Cal. App. 626, 95 Pac. 380.

Colorado.— Mitchell *v.* People, 24 Colo. 532, 52 Pac. 671.

Iowa.— State *v.* Crouch, 130 Iowa 478, 107 N. W. 173; State *v.* Trusty, 122 Iowa 82, 97 N. W. 989; State *v.* Forsythe, 99 Iowa 1, 68 N. W. 446; State *v.* Gaston, 96 Iowa 505, 65 N. W. 415; State *v.* Walters, 45 Iowa 389.

Kansas.— State *v.* Borchert, 68 Kan. 360, 74 Pac. 1108. *Compare* State *v.* Bonsor, 49 Kan. 758, 31 Pac. 736.

Michigan.— People *v.* Abbott, 97 Mich. 484, 56 N. W. 862, 37 Am. St. Rep. 360. *Contra*, People *v.* Harris, 103 Mich. 473, 61 N. W. 871.

Montana.— State *v.* Peres, 27 Mont. 358, 71 Pac. 162.

New Jersey.— State *v.* Cannon, 72 N. J. L. 46, 60 Atl. 177.

New York.—People *v.* O'Sullivan, 104 N. Y. 481, 10 N. E. 880, 58 Am. Rep. 530; People *v.* Flaherty, 27 N. Y. App. Div. 535, 50 N. Y. Suppl. 574 [*reversed* on other grounds in 162 N. Y. 532, 57 N. E. 73]; People *v.* Grauer, 12 N. Y. App. Div. 464, 42 N. Y. Suppl. 721.

North Carolina.—State *v.* Parish, 104 N. C. 679, 10 S. E. 457.

Oregon.— State *v.* Robinson, 32 Oreg. 43, 48 Pac. 357.

Tennessee.— Sykes *v.* State, 112 Tenn. 572, 82 S. W. 185, 105 Am. St. Rep. 972.

Texas.— Alcorn *v.* State, (Cr. App. 1905) 94 S. W. 468; Manning *v.* State, 43 Tex. Cr. 302, 65 S. W. 920, 96 Am. St. Rep. 873; Hamilton *v.* State, 36 Tex. Cr. 372, 37 S. W. 431.

Utah.— State *v.* Neel, 23 Utah 541, 65 Pac. 494; State *v.* Hilberg, 22 Utah 27, 61 Pac. 215.

Washington.— State *v.* Fetterly, 33 Wash. 599, 74 Pac. 810.

See 42 Cent. Dig. tit. "Rape," § 64.

But see Parkinson *v.* People, 135 Ill. 401, 25 N. E. 764, 10 L. R. A. 91; Snurr *v.* State, 4 Ohio Cir. Ct. 393, 2 Ohio Cir. Dec. 614.

96. People *v.* Freeman, 25 N. Y. App. Div. 583, 50 N. Y. Suppl. 984 [*affirmed* in 156 N. Y. 694, 50 N. E. 1120]; Snurr *v.* State, 4 Ohio Cir. Ct. 393, 2 Ohio Cir. Dec. 614.

97. People *v.* Brown, 142 Mich. 622, 106 N. W. 149; People *v.* Etter, 81 Mich. 570, 45 N. W. 1109; People *v.* Robertson, 88 N. Y. App. Div. 198, 84 N. Y. Suppl. 401; People *v.* Freeman, 25 N. Y. App. Div. 583, 50 N. Y. Suppl. 984 [*affirmed* in 156 N. Y. 694, 50 N. E. 1120]; Henard *v.* State, 46 Tex. Cr. 90, 79 S. W. 810, 47 Tex. Cr. 168, 82 S. W. 655; Smith *v.* State, 44 Tex. Cr. 137, 68

gestæ;[98] but in other jurisdictions it is held that proof of subsequent acts is admissible by way of corroboration or explanation of the act on which the indictment is based,[99] unless such subsequent acts are too remote.[1] In some states it has been held that on an indictment for rape by force or threats, it is competent to prove an attempt at some prior time, not too distant, to commit the same offense or the actual commission thereof;[2] but it is generally held that in prosecutions for rape by force proof of other acts committed on the prosecutrix or others is not admissible.[3] In prosecutions for assault with intent to rape proof of other acts or assaults is admitted to prove intent or motive.[4] Proof of acts by defendant with others than the prosecutrix is not admissible, unless they are part of the *res gestæ*.[5]

S. W. 995, 100 Am. St. Rep. 849; State *v.* Neel, 23 Utah 541, 65 Pac. 494; State *v.* Hilberg, 22 Utah 27, 61 Pac. 215. On a trial for carnally knowing and abusing a female under sixteen years of age with her consent, confessions or admissions of the accused of acts of sexual intercourse committed with the prosecutrix more than two years after the time of the alleged commission of the offense for which he is being tried, and after prosecutrix had attained the age of sixteen years, are not competent to be given in evidence against him as tending to prove the crime charged in the indictment. State *v.* Lawrence, 74 Ohio St. 38, 77 N. E. 266. And see Shults *v.* State, (Tex. Cr. App. 1906) 91 S. W. 786, holding that in a prosecution for rape, the state should not be permitted to examine prosecutrix as to other acts of intercourse between her and defendant than that charged; and even where defendant partially opened up that line of evidence, so that the state had the right to prove other acts, their details were not admissible.

98. Where the accused indicted for one offense also committed another on the same night and as part of the same transaction, evidence of the other offense was held admissible. Renfroe *v.* State, 84 Ark. 16, 104 S. W. 542.

99. *California.*— People *v.* Castro, 133 Cal. 11, 65 Pac. 13; People *v.* Morris, 3 Cal. App. 1, 84 Pac. 463.

Connecticut.— State *v.* Sebastian, 81 Conn. 1, 69 Atl. 1054.

Iowa.— State *v.* Forsyth, 99 Iowa 1, 68 N. W. 446.

Kansas.— State *v.* Stone, 74 Kan. 189, 85 Pac. 808.

Nebraska.— Woodruff *v.* State, 72 Nebr. 815, 101 N. W. 1114. On a trial for illicit intercourse with a female under the age of eighteen not previously unchaste, evidence of other acts of sexual intercourse between defendant and prosecutrix related in time and subsequent to the act specifically charged is admissible as tending to corroborate her testimony of such act. Leedom *v.* State, 81 Nebr. 585, 116 N. W. 496.

Oregon.— State *v.* Robinson, 32 Oreg. 43, 48 Pac. 357.

Tennessee.— Sykes *v.* State, 112 Tenn. 572, 82 S. W. 185, 105 Am. St. Rep. 972.

England.— Reg. *v.* Rearden, 4 F. & F. 76.

1. See People *v.* Morris, 3 Cal. App. 1, 84 Pac. 463.

2. Strang *v.* People, 24 Mich. 1; State *v.* Scott, 172 Mo. 536, 72 S. W. 897; People *v.* O'Sullivan, 104 N. Y. 481, 10 N. E. 880, 58 Am. Rep. 530; State *v.* Parish, 104 N. C. 679, 10 S. E. 457.

3. Janzen *v.* People, 159 Ill. 440, 42 N. E. 862; Parkinson *v.* People, 135 Ill. 401, 25 N. E. 764, 10 L. R. A. 91; State *v.* Stevens, 56 Kan. 720, 44 Pac. 992; Smith *v.* State, 44 Tex. Cr. 137, 68 S. W. 995, 100 Am. St. Rep. 849, (1903) 73 S. W. 401.

4. *Iowa.*— State *v.* Carpenter, 124 Iowa 5, 98 N. W. 775; State *v.* Trusty, 122 Iowa 82, 97 N. W. 989; State *v.* Walters, 45 Iowa 389.

Maine.— State *v.* Acheson, 91 Me. 240, 39 Atl. 570.

Missouri.— State *v.* Patrick, 107 Mo. 147, 17 S. W. 666.

Tennessee.— Williams *v.* State, 8 Humphr. 585.

Texas.— On a trial for assault and battery on a married woman, where it was charged that defendant took hold of her, and attempted to have carnal knowledge of her against her consent, with intent to wound her feelings, the prosecutrix, to disprove the intent charged, could be required to state whether there had been previous acts of illicit intercourse between herself and defendant. Donaldson *v.* State, 10 Tex. App. 307.

Wisconsin.— Proper *v.* State, 85 Wis. 615, 55 N. W. 1035.

England.— Reg. *v.* Riley, 18 Q. B. D. 481, 16 Cox C. C. 191, 56 L. J. M. C. 52, 56 L. T. Rep. N. S. 371, 35 Wkly. Rep. 382.

5. People *v.* Stewart, 85 Cal. 174, 24 Pac. 722; People *v.* Bowen, 49 Cal. 654; State *v.* Durr, 39 La. Ann. 751, 2 So. 546. In a prosecution for raping his daughter, it is error to admit testimony showing an assault committed by defendant on one of his children, without showing that it was done in the presence of prosecutrix, or that she knew of it when the rape was committed. Owens *v.* State, 39 Tex. Cr. 391, 46 S. W. 240. But see Proper *v.* State, 85 Wis. 615, 55 N. W. 1035, holding that in a prosecution for assault with intent to commit rape evidence was admissible, as tending to render more credible the testimony of the prosecuting witness, to show that prior to the alleged assault, while the prosecutrix was sleeping with another girl in defendant's house, defendant got into the bed and had sexual intercourse with the other girl.

u. Intent.[6] On a prosecution for attempt or assault with intent to commit rape, the intent to have sexual intercourse with the female without her consent, or to have sexual intercourse where the female is under the age of consent, is an essential element in the crime and must be proved beyond a reasonable doubt,[7] and this may be done by proof of any facts or circumstances tending to show such intent.[8] It is not necessary to show that defendant intended that his act should be rape.[9]

3. Weight and Sufficiency of Evidence — a. In General. The courts have repeatedly approved Sir Matthew Hale's statements in regard to the crime of rape, that "it must be remembered, that it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, though never so innocent;" [10] and that we should "be the more cautious upon trials of offenses of this nature, wherein the court and jury may with so much ease be imposed upon without great care and vigilance; the heinousness of the offense many times transporting the judge and jury with so much indignation that they are over hastily carried to the conviction of the person accused thereof by the confident testimony, sometimes of malicious and false witnesses." [11] The state

6. Evidence as to: Character and habits of accused see *supra*, II, B, 2, r. Character and habits of prosecutrix see *supra*, II, B, 2, s. Declarations, admissions, and conduct of accused see *supra*, II, B, 2, c. Declarations, complaint, want of complaint, and conduct of prosecutrix see *supra*, II, B, 2, g. Personal relations and situation of parties see *supra*, II, B, 2, b. Physical and mental condition of accused see *supra*, II, B, 2, j. Physical and mental condition of prosecutrix see *supra*, II, B, 2, h. Proof of other acts see *supra*, II, B, 2, t.

7. See *supra*, I, B, 2, e, g.

8. *Alabama.*— Dudley *v.* State, 121 Ala. 4, 25 So. 742, holding that on a prosecution for assault with intent to commit rape, alleged to have been committed in the night-time in a room in which prosecutrix was sleeping, to which accused gained access by climbing through a window, evidence that there was no curtain on the window, and that an electric light on the outside shone into it, so as to enable prosecutrix to be seen from the outside, was admissible as tending to show the intent with which the accused entered the room.

California.— People *v.* Roach, 129 Cal. 33, 61 Pac. 574.

Georgia.— Dorsey *v.* State, 108 Ga. 477, 34 S. E. 135; Jackson *v.* State, 91 Ga. 322, 18 S. E. 132, 44 Am. St. Rep. 25; Taylor *v.* State, 50 Ga. 79. The fact that the accused was a negro and the woman white may be considered by the jury on the question of whether the assault was committed with intent to rape, it appearing that the woman's room was entered late at night, and there being nothing to indicate that the entry was by permission or due to any encouragement held out by her to a hope or expectation of consent. Jackson *v.* State, *supra*. On trial of an indictment for assault with intent to commit rape, evidence that, upon the woman's crying out, defendant immediately relinquished his effort and fled, was competent on the question of intent. Taylor *v.* State, *supra*.

Hawaii.— Territory *v.* Schilling, 17 Hawaii 249.

Illinois.— On a prosecution for assault with intent to commit rape the intent may be shown by the declarations of the accused, or may be inferred from his acts and conduct at the time. Newman *v.* People, 223 Ill. 324, 79 N. E. 80.

Iowa.— State *v.* Sheets, 127 Iowa 73, 102 N. W. 415; State *v.* Walters, 45 Iowa 389. A man's chasing a woman, who is alone, in a private place, creates no inference of an intent to rape, but may be considered in connection with other circumstances, in ascertaining what the intent really was. State *v.* Donovan, 61 Iowa 369, 16 N. W. 206.

Michigan.— People *v.* Courier, 79 Mich. 366, 44 N. W. 571.

Missouri.— On a prosecution for assault with intent to rape a female under fourteen years of age, the intent may be found from the nature and character of the assault. State *v.* Riseling, 186 Mo. 521, 85 S. W. 372.

Ohio.— On a prosecution for assault with intent to commit rape, the accused's intent to use whatever force might be necessary to overcome any resistance to accomplish his purpose may be shown by the conduct and acts of the accused in his efforts to attain his purpose; and whatever these may have been at the time of the occurrence, or immediately thereafter, they are proper to be considered to determine whether such intent existed in his mind at the time the perpetration of the offense charged was attempted. Patterson *v.* State, 11 Ohio Cir. Dec. 602.

Tennessee.— Williams *v.* State, 2 Humphr. 585.

England.— Rex *v.* Lloyd, 7 C. & P. 318, 32 E. C. L. 633; Reg. *v.* Wright, 4 F. & F. 967.

9. Jacobi *v.* State, 133 Ala. 1, 32 So. 158.

10. 1 Hale P. C. 635.

11. 1 Hale P. C. 636. See Barnett *v.* State, 83 Ala. 40, 45, 3 So. 612; Davis *v.* State, 120 Ga. 433, 436, 48 S. E. 180; Black *v.* State, 119 Ga. 746, 749, 47 S. E. 370: Smith *v.* State, 77

must prove beyond a reasonable doubt that defendant committed the act charged, and that he did so under such circumstances that every element of the offense existed.[12] Defendant may be convicted on the testimony of a very young child, one over four years of age, if there are corroborating circumstances;[13] but if the testimony of the child is procured by promises or requests and not on her voluntary complaint the evidence is insufficient to convict.[14] There may be a conviction without the testimony of the female injured.[15]

b. The Carnal Knowledge. On a prosecution for rape the fact of penetration must be proved beyond a reasonable doubt.[16] Proof of penetration, however,

Ga. 705, 711; Crockett *v.* State, 49 Ga. 185, 188; State *v.* Tomlinson, 11 Iowa 401, 405; State *v.* Connelly, 57 Minn. 482, 485, 59 N. W. 479; State *v.* Burgdorf, 53 Mo. 65, 67; Mathews *v.* State, 19 Nebr. 330, 335, 27 N. W. 234; Conners *v.* State, 47 Wis. 523, 2 N. W. 1143.

12. *Colorado.*— Bueno *v.* People, 1 Colo. App. 232, 28 Pac. 248.

Florida.— Hollis *v.* State, 27 Fla. 387, 9 So. 67.

Georgia.— Wesley *v.* State, 65 Ga. 731.

Illinois.— Stevens *v.* People, 158 Ill. 111, 41 N. E. 856; Gifford *v.* People, 87 Ill. 210; Barney *v.* People, 22 Ill. 160.

Indiana.— Hutchins *v.* State, 140 Ind. 78, 39 N. E. 243; Eyler *v.* State, 71 Ind. 49.

Iowa.— State *v.* Cassidy, 85 Iowa 145, 52 N. W. 1; Pollard *v.* State, 2 Iowa 567.

Kansas.— State *v.* Crawford, 39 Kan. 257, 18 Pac. 184.

Minnesota.— State *v.* Connelly, 57 Minn. 482, 485, 59 N. W. 479.

Mississippi.— Monroe *v.* State, 71 Miss. 196, 13 So. 884.

Missouri.— State *v.* Patrick, 107 Mo. 147, 17 S. W. 666, (1891) 15 S. W. 290; State *v.* Dalton, 106 Mo. 463, 17 S. W. 700; State *v.* Witten, 100 Mo. 525, 13 S. W. 871.

Nebraska.— Mathews *v.* State, 19 Nebr. 330, 27 N. W. 234; Oleson *v.* State, 11 Nebr. 276, 9 N. W. 38, 38 Am. Rep. 366.

Texas.— Davis *v.* State, 43 Tex. 189; Dickey *v.* State, 21 Tex. App. 430, 2 S. W. 809.

Virginia.— Brown *v.* Com., 82 Va. 653; Boxley *v.* Com., 24 Gratt. 649.

West Virginia.— State *v.* Perry, 41 W. Va. 641, 24 S. E. 634.

Wisconsin.— State *v.* Hooks, 69 Wis. 182, 33 N. W. 57, 2 Am. St. Rep. 728.

See 42 Cent. Dig. tit. "Rape," § 71 *et seq.*; and cases cited under the following sections.

Character of evidence.— In cases of rape, the question of guilt or innocence should not be measured arbitrarily by the character of the evidence, whether positive or negative, direct or circumstantial. It should be decided by the weight of the evidence, and all the facts should be submitted to the jury under the charge of the court. Innis *v.* State, 42 Ga. 473.

Evidence held sufficient to support conviction of rape see People *v.* Caulfield, 7 Cal. App. 656, 95 Pac. 666; Canida *v.* State, 130 Ga. 15, 60 S. E. 104; Johnson *v.* State, 128 Ga. 102, 57 S. E. 353; Smith *v.* State, 91 Ga. 10, 16 S. E. 378; People *v.* Benson, 236 Ill. 104, 86 N. E. 188; Bean *v.* People, 124 Ill. 576, 16 N. E. 656; Ransbottom *v.* State, 144 Ind. 250, 43 N. E. 218; Smith *v.* Com., 119 Ky. 280, 83 S. W. 647, 26 Ky. L. Rep. 1229; People *v.* Randall, 133 Mich. 516, 95 N. W. 551; State *v.* Zempel, 103 Minn. 428, 115 N. W. 275; State *v.* Reid, 39 Minn. 277, 39 N. W. 796; State *v.* Campbell, 210 Mo. 202, 109 S. W. 706; State *v.* Smith, 203 Mo. 695, 102 S. W. 526; State *v.* De Witt, 186 Mo. 61, 84 S. W. 956; Younger *v.* State, 80 Nebr. 201, 114 N. W. 170; Murphy *v.* State, 15 Nebr. 383, 19 N. W. 489; Pierce *v.* State, (Tex. Cr. App. 1908) 113 S. W. 148; Rusk *v.* State, 53 Tex. Cr. 338, 110 S. W. 58; Brown *v.* State, 52 Tex. Cr. 267, 106 S. W. 368; Dove *v.* State, 36 Tex. Cr. 105, 35 S. W. 648; Shepard *v.* State, 34 Tex. Cr. 35, 28 S. W. 816; Thomas *v.* Com., 106 Va. 855, 56 S. E. 705; Fry *v.* Com., 82 Va. 334; State *v.* Bailey, 31 Wash. 89, 71 Pac. 715; State *v.* Roller, 30 Wash. 692, 71 Pac. 718. See 42 Cent. Dig. tit. "Rape," § 71 *et seq.*

Evidence held insufficient to support conviction of rape see Curby *v.* Territory, 4 Ariz. 371, 42 Pac. 953; Bueno *v.* People, 1 Colo. App. 232, 28 Pac. 248; Hutchins *v.* State, 140 Ind. 78, 39 N. E. 243; Adams *v.* State, (Miss. 1908) 47 So. 787; Allen *v.* State, (Miss. 1908) 45 So. 833; Monroe *v.* State, 71 Miss. 196, 13 So. 848; State *v.* Goodale, 210 Mo. 275, 109 S. W. 9; Oleson *v.* State, 11 Nebr. 276, 9 N. W. 38, 38 Am. Rep. 366; Cowles *v.* State, 51 Tex. Cr. 498, 102 S. W. 1128; Skeen *v.* State, 51 Tex. Cr. 39, 100 S. W. 770; Mooney *v.* State, 29 Tex. App. 257, 15 S. W. 724; Nicholas *v.* State, 23 Tex. App. 317, 5 S. W. 239; Dickey *v.* State, 21 Tex. App. 430, 2 S. W. 809; Lawson *v.* State, 17 Tex. App. 292; Brown *v.* Com., 82 Va. 653; Boxley *v.* Com., 24 Gratt. (Va.) 649; Lam Yee *v.* State, 132 Wis. 527, 112 N. W. 425. See 42 Cent. Dig. tit. "Rape," § 71 *et seq.*

13. People *v.* Cesena, 90 Cal. 381, 27 Pac. 300; State *v.* Johnson, 133 Iowa 38, 110 N. W. 170; State *v.* Juneau, 88 Wis. 180, 59 N. W. 580, 43 Am. St. Rep. 877, 24 L. R. A. 857.

14. People *v.* Beech, 129 Mich. 622, 89 N. W. 363; Elam *v.* State, (Tex. Cr. App. 1892) 20 S. W. 710.

15. People *v.* Bates, 2 Park. Cr. (N. Y.) 27.

16. Williams *v.* State, 53 Fla. 84, 43 So. 431; Wesley *v.* State, 65 Ga. 731; Davis *v.* State, 43 Tex. 189; Skeen *v.* State, 51 Tex. Cr. 39, 100 S. W. 770; Blair *v.* State, (Tex.

need not be in any particular form of words;[17] it may be shown by direct or circumstantial evidence,[18] and the slightest proof of actual penetration is sufficient to go to the jury.[19] If penetration is the only inference comportable with the evidence it is sufficient.[20] The admissions of defendant are sufficient proof of sexual intercourse.[21] It is not necessary to prove emission.[22]

c. Impotency. Where there is a conflict of testimony impotency is a question for the jury.[23]

d. Identification of Defendant. The evidence must be sufficient to show beyond a reasonable doubt that defendant is the person who committed the offense.[24] The identification may be either by direct or circumstantial evidence.[25] It is sufficient if prosecutrix identify defendant, especially if there are corroborating circumstances, notwithstanding he may offer contradictory evidence.[26] The con-

Cr. App. 1900) 56 S. W. 622; Wood *v.* State, 12 Tex. App. 174. See *supra*, I, A, 2, e, (II).

Evidence held insufficient see People *v.* Howard, 143 Cal. 316, 76 Pac. 1116; Wesley *v.* State, 65 Ga. 731; State *v.* Crawford, 39 Kan. 257, 18 Pac. 184; State *v.* Dalton, 106 Mo. 463, 17 S. W. 700; People *v.* Tench, 167 N. Y. 520, 60 N. E. 737, 15 N. Y. Cr. 501; Davis *v.* State, 43 Tex. 189.

Contradictory testimony of prosecutrix.— A conviction of rape cannot be based on contradictory testimony of the prosecuting witness as to whether there was penetration. State *v.* Forshee, 199 Mo. 142, 97 S. W. 933; Vickers *v.* U. S., (Okla. Cr. App. 1908) 98 Pac. 467.

17. People *v.* Bernor, 115 Mich. 692, 74 N. W. 184; State *v.* Hodges, 61 N. C. 231; Reg. *v.* Bedere, 21 Ont. 189.

18. *California.*— People *v.* Howard, 143 Cal. 316, 76 Pac. 1116; People *v.* Mayes, 66 Cal. 797, 6 Pac. 691, 56 Am. Rep. 126.

Georgia.— Collins *v.* State, 73 Ga. 76.

Indiana.— Taylor *v.* State, 111 Ind. 279, 12 N. E. 400.

Iowa.— State *v.* Carnagy, 106 Iowa 483, 76 N. W. 805; State *v.* Enright, 90 Iowa 520, 58 N. W. 901.

Kentucky.— White *v.* Com., 96 Ky. 180, 28 S. W. 340, 16 Ky. L. Rep. 421.

Michigan.— People *v.* Scouten, 130 Mich. 620, 90 N. W. 332.

Nevada.— State *v.* Depoister, 21 Nev. 107, 25 Pac. 1000.

New York.— People *v.* Tench, 167 N. Y. 520, 60 N. E. 737, 15 N. Y. Cr. 501.

Pennsylvania.— Com. *v.* Senak, 9 Kulp 558.

Texas.— Word *v.* State, 12 Tex. App. 174.

Wisconsin.— Brauer *v.* State, 25 Wis. 413.

Canada.— Reg. *v.* Bedere, 21 Ont. 189.

See 42 Cent. Dig. tit. "Rape," § 73.

Evidence held sufficient see State *v.* Enright, 90 Iowa 520, 58 N. W. 901; State *v.* Duffey, 128 Mo. 549, 31 S. W. 98; Comstock *v.* State, 14 Nebr. 205, 15 N. W. 355; Wood *v.* State, 12 Tex. App. 174.

19. People *v.* Courier, 79 Mich. 366, 44 N. W. 571; State *v.* Depoister, 21 Nev. 107, 25 Pac. 1000.

20. *Indiana.*— Bradburn *v.* State, 162 Ind. 689, 71 N. E. 133, holding that a conviction may be upheld, although the answer of the prosecuting witness to a question as to penetration did not declare in unambiguous terms that there was penetration, but the inference that there was was the only one comportable with the evidence.

Iowa.— State *v.* Carnagy, 106 Iowa 483, 76 N. W. 805.

Minnesota.— State *v.* Newman, 93 Minn. 393, 101 N. W. 499.

Nebraska.— Comstock *v.* State, 14 Nebr. 205, 15 N. W. 355.

Texas.— Duckworth *v.* State, 42 Tex. Cr. 74, 57 S. W. 665; Rodgers *v.* State, 30 Tex. App. 510, 17 S. W. 1077.

21. State *v.* Enright, 90 Iowa 520, 58 N. W. 901; State *v.* Duffey, 128 Mo. 549, 31 S. W. 98.

22. See *supra*, I, A, 2, e, (III).

23. Where, in a prosecution for rape, defendant testified positively that he was impotent, and a physician introduced by defendant testified that he could not say that he was impotent from any physical appearances, the question was for the jury. State *v.* Bailey, 31 Wash. 89, 71 Pac. 715.

24. Boxley *v.* Com., 24 Gratt. (Va.) 649.

25. See Bill *v.* State, 5 Humphr. (Tenn.) 155; Jones *v.* State, 1 Tex. App. 87.

26. *Georgia.*— Johnson *v.* State, 128 Ga. 102, 57 S. E. 353.

Illinois.— People *v.* Probst, 237 Ill. 390, 86 N. E. 588 (evidence held sufficient); Lathrop *v.* People, 197 Ill. 169, 64 N. E. 385; Ackerson *v.* People, 124 Ill. 563, 16 N. E. 847; Lander *v.* People, 104 Ill. 248.

Indiana.— Sutherlin *v.* State, 150 Ind. 154, 49 N. E. 947.

Iowa.— State *v.* Baker, 106 Iowa 99, 76 N. W. 509; State *v.* Hatfield, 75 Iowa 592, 39 N. W. 910.

Kentucky.— Smith *v.* Com., 33 S. W. 825, 17 Ky. L. Rep. 1162.

Mississippi.— Alexander *v.* State, (1897) 21 So. 923.

New York.— People *v.* McGuinness, 15 N. Y. Suppl. 230.

Oregon.— State *v.* Lee, 33 Oreg. 506, 56 Pac. 415.

Texas.— Sawyer *v.* State, 39 Tex. Cr. 557, 47 S. W. 650; Dove *v.* State, 36 Tex. Cr. 105, 35 S. W. 648; Doyle *v.* State, 5 Tex. App. 442, holding that proof of injury to the person of the child, and identification of defendant by another child, a witness to the transaction, is sufficient to sustain a

fessions or admissions of defendant are sufficient identification.[27] The sufficiency of the identification is a question for the jury if there is any evidence of identity.[28]

e. Age of Defendant. On the trial of an indictment for statutory rape of a female under the age of consent, where the commonwealth rests without offering any evidence of the age of the prisoner or as to his identity as the person indicted, and without offering his appearance in evidence, it is reversible error for the court to submit the age of the prisoner to the jury on his appearance, without more.[29] If there is evidence of age, and the jury find that defendant was of sufficient age, the verdict will not be disturbed.[30]

f. Married Women; Husband and Wife. On an indictment under a statute punishing the rape of a married woman, not the wife of defendant, it must be proved that the prosecutrix was a married woman and that she was not defendant's wife.[31] Where, on a trial for rape, there is ample opportunity for the state to prove directly that the accused and the prosecutrix were not husband and wife, indirect evidence of that fact will not suffice.[32]

g. Want of Consent, Force, and Resistance — (1) *In General.* To justify a conviction of rape or assault with intent to rape, where the prosecutrix was over the age of consent and otherwise capable of consenting, the evidence must show beyond a reasonable doubt force and want of consent or the equivalent.[33] The

conviction of assault with intent to commit a rape on a child five years old, notwithstanding positive testimony in support of an alibi.

Virginia.— Thomas *v.* Com., 106 Va. 855, 56 S. E. 705; Cunningham *v.* Com., 88 Va. 37, 13 S. E. 309.

Wisconsin.— Roszczyniala *v.* State, 125 Wis. 414, 104 N. W. 113.

Uncorroborated identification.— Under Va. Rev. Code, § 3484, providing that the evidence, on a motion to set aside a verdict as contrary to the evidence, shall be considered on appeal as on a demurrer to the evidence, the identification of defendant by prosecutrix, although uncorroborated, is not insufficient to support a conviction. Thomas *v.* Com., 106 Va. 855, 56 S. E. 705.

27. State *v.* Icenbice, 126 Iowa 16, 101 N. W. 273. Where, in a prosecution for statutory rape, the *corpus delicti* was established by independent evidence, defendant's admissions, including a statement that he could go to prosecutrix's bedroom and have intercourse there with her at any time without her parents hearing him or having knowledge of the fact, were sufficient to sustain a conviction. People *v.* Darr, 3 Cal. App. 50, 84 Pac. 457.

28. State *v.* Lee, 33 Oreg. 506, 56 Pac. 415 (holding that where prosecutrix testified that she knew it was defendant who ravished her, it was sufficient to take the question of identity to the jury, although on cross-examination she said she told her mother it might have been defendant's cousin, for she did not think it looked like defendant); Roszczyniala *v.* State, 125 Wis. 414, 104 N. W. 113.

29. Com. *v.* Walker, 33 Pa. Super. Ct. 167.

30. Davidson *v.* Com., 47 S. W. 213, 20 Ky. L. Rep. 540; Wilcox *v.* State, 33 Tex. Cr. 392, 26 N. W. 989.

31. On a trial for rape upon a married woman, where the prosecuting witness testified, without objection on the part of the accused, that she was at the time of the alleged offense the wife of one C, and other witnesses referred to her as being C's wife at that time, it was held that she was a competent witness to the fact of marriage, and that this evidence was sufficient to support a finding of the jury that she was a married woman, and not the wife of defendant at the date of the offense. State *v.* Hooks, 69 Wis. 182, 33 N. W. 57, 2 Am. St. Rep. 728.

32. People *v.* Gonzales, 6 Cal. App. 255, 91 Pac. 1013.

33. *California.*— People *v.* Howard, 143 Cal. 316, 76 Pac. 1116.

Colorado.—Bigcraft *v.* People, 30 Colo. 298, 70 Pac. 417; Bueno *v.* People, 1 Colo. App. 232, 28 Pac. 248.

Florida.— Hollis *v.* State, 27 Fla. 387, 9 So. 67.

Georgia.— Cheney *v.* State, 109 Ga. 503, 35 S. E. 153; Simmons *v.* State, 99 Ga. 699, 27 S. E. 755.

Illinois.— Rucker *v.* People, 224 Ill. 131, 79 N. E. 606.

Minnesota.— State *v.* Iago, 66 Minn. 231, 68 N. W. 909.

Mississippi.— Alfred *v.* State, (1902) 32 So. 54; Monroe *v.* State, 71 Miss. 196, 13 So. 884.

Missouri.— State *v.* Hamey, 168 Mo. 167, 68 S. W. 620, 57 L. R. A. 846, (1901) 65 S. W. 946; State *v.* Patrick, 107 Mo. 147, 17 S. W. 666, 15 S. W. 290.

New York.— People *v.* Bransby, 32 N. Y. 525; People *v.* Feldman, 77 N. Y. App. Div. 639, 79 N. Y. Suppl. 115.

Texas.— Ship *v.* State, (Cr. App. 1898) 45 S. W. 909; Edmonson *v.* State, (Cr. App. 1898) 44 S. W. 154; Kennon *v.* State, (Cr. App. 1897) 42 S. W. 376; Tittle *v.* State, (Cr. App. 1896) 38 S. W. 202; West *v.* State, (Cr. App. 1893) 21 S. W. 686; Hooker *v.* State, 29 Tex. App. 327, 15 S. W. 285;

sufficiency of proof of force and resistance depends upon the surrounding circumstances.[34] If there is evidence that the female resisted to the extent of her existing ability it is sufficient to warrant conviction notwithstanding there may be contradictory evidence.[35] Consent on the part of the woman may be sufficiently indicated by her manner and conduct.[36] On the other hand evidence of the physical condition of the female, especially in the case of young children, is sufficient to show that the crime has been committed;[37] and evidence of the condition of the clothing when coupled with other facts is sufficient for conviction.[38] Mere general statements of prosecutrix that she did her utmost to resist, etc., without a statement of the acts constituting such resistance, is insufficient to show absence of assent.[39] Evidence that the prosecutrix received money from defendant after the alleged rape does not of itself establish consent.[40]

(II) *OUTCRY AND COMPLAINT.* The failure of the prosecutrix to make outcry or complaint where she had an opportunity so to do raises a strong presumption of consent, particularly if coupled with other circumstances tending to show consent,[41] but if there is other evidence of resistance the mere failure to

Nicholas *v.* State, 23 Tex. App. 317, 5 S. W. 239; Dickey *v.* State, 21 Tex. App. 430, 2 S. W. 809; Lawson *v.* State, 17 Tex. App. 292.

Wisconsin.— Devoy *v.* State, 122 Wis. 148, 99 N. W. 455; O'Boyle *v.* State, 100 Wis. 296, 75 N. W. 989; Bohlmann *v.* State, 98 Wis. 617, 74 N. W. 343.

Wyoming.— Tway *v.* State, 7 Wyo. 74, 50 Pac. 188.

See 42 Cent. Dig. tit. "Rape," § 74; and *supra*, I, A, 2, f.

Evidence held insufficient see Curby *v.* Territory, 4 Ariz. 371, 42 Pac. 953; Bueno *v.* People, 1 Colo. App. 232, 28 Pac. 248; Hollis *v.* State, 27 Fla. 387, 9 So. 67; Eyler *v.* State, 71 Ind. 49; State *v.* Cassidy, 85 Iowa 145, 52 N. W. 1; Pollard *v.* State, 2 Iowa 567; State *v.* Iago, 66 Minn. 231, 68 N. W. 969; Adams *v.* People, (Miss. 1908) 47 So. 787; Monroe *v.* State, 71 Miss. 196, 13 So. 884; State *v.* Smith, 203 Mo. 695, 102 S. W. 526; State *v.* Patrick, 107 Mo. 147, 17 S. W. 666, (1891) 15 S. W. 290; Mathews *v.* State, 19 Nebr. 330, 27 N. W. 234; Oleson *v.* State, 11 Nebr. 276, 9 N. W. 38, 38 Am. Rep. 366; Walter *v.* People, 50 Barb. (N. Y.) 144; State *v.* Rhoades, (N. D. 1908) 118 N. W. 233; *Ex p.* Black, (Tex. Cr. App. 1908) 113 S. W. 534; Cowles *v.* State, 51 Tex. Cr. 498, 102 S. W. 1128; Rhea *v.* State, 30 Tex. App. 483, 17 S. W. 931; Hooker *v.* State, 29 Tex. App. 327, 15 S. W. 285; Lawson *v.* State, 17 Tex. App. 292; Brown *v.* Com., 82 Va. 653; Boxley *v.* Com., 24 Gratt. (Va.) 649.

34. Hawkins *v.* State, 136 Ind. 630, 36 N. E. 419; State *v.* Ward, 73 Iowa 532, 35 N. W. 617.

35. *Arizona.*— Trimble *v.* Territory, 8 Ariz. 273, 71 Pac. 932.

Florida.— Barker *v.* State, 40 Fla. 178, 24 So. 69.

Indiana.— Dickerson *v.* State, 141 Ind. 703, 40 N. E. 667.

Iowa.— State *v.* Carpenter, 124 Iowa 5, 98 N. W. 775; State *v.* Montgomery, 79 Iowa 737, 45 N. W. 292; State *v.* Mitchell, 68 Iowa 116, 26 N. W. 44.

Michigan.—People *v.* Marrs, 125 Mich. 376, 84 N. W. 284.

Missouri.— State *v.* Bowman, 161 Mo. 88, 62 S. W. 996.

Nebraska.— Spaulding *v.* State, 61 Nebr. 289, 85 N. W. 80; Cardwell *v.* State, 60 Nebr. 480, 83 N. W. 665.

New Mexico.— Territory *v.* Edie, 6 N. M. 555, 30 Pac. 851.

New York.— People *v.* Connor, 126 N. Y. 278, 27 N. E. 252 [*affirming* 9 N. Y. Suppl. 674].

Texas.— Johnson *v.* Com., 26 Tex. App. 399, 9 S. W. 762.

Virginia.— Bailey *v.* Com., 82 Va. 107, 3 Am. St. Rep. 87.

See 42 Cent. Dig. tit. "Rape," § 71 *et seq.*

Evidence held sufficient see Dickerson *v.* State, 141 Ind. 703, 40 N. E. 667; Felton *v.* State, 139 Ind. 531, 39 N. E. 228; Hawkins *v.* State, 136 Ind. 630, 36 N. E. 419; State *v.* Harlan, 98 Iowa 458, 67 N. W. 381; State *v.* Montgomery, 79 Iowa 737, 45 N. W. 292; State *v.* Ward, 73 Iowa 532, 35 N. W. 617; State *v.* Mitchell, 68 Iowa 116, 26 N. W. 44; State *v.* Zempel, 103 Minn. 428, 115 N. W. 275; State *v.* Cunningham, 100 Mo. 382, 12 S. W. 376; State *v.* Hert, 89 Mo. 590, 1 S. W. 830; People *v.* Connor, 126 N. Y. 278, 27 N. E. 252 [*affirming* 9 N. Y. Suppl. 674]; Johnson *v.* State, 26 Tex. App. 399, 9 S. W. 762; Bailey *v.* Com., 82 Va. 107, 3 Am. St. Rep. 87.

36. Adams *v.* People, 179 Ill. 633, 54 N. E. 296.

37. State *v.* Jerome, 82 Iowa 749, 48 N. W. 722; State *v.* Carter, 98 Mo. 176, 11 S. W. 624; People *v.* O'Connell, 12 N. Y. Suppl. 477; De Berry *v.* State, 99 Tenn. 207, 42 S. W. 31.

38. State *v.* Jerome, 82 Iowa 749, 48 N. W. 722; State *v.* Carter, 98 Mo. 176, 11 S. W. 624.

39. Brown *v.* State, 127 Wis. 193, 106 N. W. 536.

40. State *v.* Fowler, 13 Ida. 317, 89 Pac. 757.

41. *Arizona.*— Curby *v.* Territory, 4 Ariz. 371, 42 Pac. 953.

Georgia.— Smith *v.* State, 77 Ga. 705.

make outcry or complaint is not sufficient ground for setting aside the verdict;[42] and in all cases there may be a conviction notwithstanding the prosecutrix failed to make outcry, or failed or delayed to complain after the outrage, where such failure or delay is sufficiently explained.[43]

h. Threats and Fear.[44] If there is evidence of sexual intercourse, and the display of weapons or other incriminating circumstances, and the prosecutrix testifies that she yielded through fear and on account of threats, it is sufficient to warrant conviction.[45]

Illinois.— Gifford *v.* People, 87 Ill. 210; Barney *v.* People, 22 Ill. 160.

Indiana.— Hutchins *v.* State, 140 Ind. 78, 39 N. E. 243; Eyler *v.* State, 71 Ind. 49.

Iowa.— State *v.* Cassidy, 85 Iowa 145, 52 N. W. 1.

Missouri.— State *v.* Patrick, 107 Mo. 147, 17 S. W. 666, (1891) 15 S. W. 290; State *v.* Witten, 100 Mo. 525, 13 S. W. 871. And see State *v.* Goodale, 210 Mo. 275, 109 S. W. 9.

Nebraska.— Baer *v.* State, 59 Nebr. 655, 81 N. W. 856; Johnson *v.* State, 27 Nebr. 687, 43 N. W. 425; Mathews *v.* State, 19 Nebr. 330, 27 N. W. 234; Oleson *v.* State, 11 Nebr. 276, 9 N. W. 38, 38 Am. Rep. 366; Fisk *v.* State, 9 Nebr. 62, 2 N. W. 381.

New York.— Walter *v.* People, 50 Barb. 144.

Texas.—Arnett *v.* State, 40 Tex. Cr. 617, 51 S. W. 385; Price *v.* State, 36 Tex. Cr. 143, 35 S. W. 988; Thompson *v.* State, 33 Tex. Cr. 472, 26 S. W. 987; Rhea *v.* State, 30 Tex. App. 483, 17 S. W. 931; Gazley *v.* State, 17 Tex. App. 267. See also Warren *v.* State, (Cr. App. 1908) 114 S. W. 380. Evidence that, while a woman was waiting to get into a vacant house, which she had been hired to clean, defendant entered by the rear, opened the door, led her upstairs, took hold of both her hands, took her pocketbook and handkerchief and a bundle of work clothes from her, and threw them on the bed, and felt of her bosom, and then released her; that she then went to inquire for the owner of the house of a sister of his living in the neighborhood, but told her nothing of what had happened, and, on being told that her services were no longer needed, returned to the house to get her things; that defendant then put her on the bed, and held her on it, and began to feel of her person and tear her clothes, and was on her, on the bed, when the owner came in, to whom she said nothing, will not support a verdict of assault with intent to rape. Laco *v.* State, (Cr. App. 1896) 38 S. W. 176.

Virginia.— Brown *v.* Com., 82 Va. 653; Boxley *v.* Com., 24 Gratt. 649.

Wisconsin.— Wilcox *v.* State, 102 Wis. 650, 78 N. W. 763.

See 42 Cent. Dig. tit. "Rape," § 71 *et seq.*

42. *California.*—People *v.* Kuches, 120 Cal. 566, 52 Pac. 1002.

Hawaii.— Rex *v.* Erickson, 5 Hawaii 159.

Illinois.— Bean *v.* People, 124 Ill. 576, 16 N. E. 656.

Indiana.— Felton *v.* State, 139 Ind. 531, 39 N. E. 228; Eberhart *v.* State, 134 Ind. 651, 34 N. E. 637.

Iowa.— State *v.* Cross, 12 Iowa 66, 79 Am. Dec. 519.

Kansas.— State *v.* Brown, 54 Kan. 71, 37 Pac. 996.

Minnesota.— State *v.* Reid, 39 Minn. 277, 39 N. W. 796.

Missouri.— State *v.* Marcks, 140 Mo. 656, 41 S. W. 973, 43 S. W. 1095; State *v.* Witten, 100 Mo. 525, 13 S. W. 871.

43. *California.*—People *v.* Kuches, 120 Cal. 566, 52 Pac. 1002.

Hawaii.— Rex *v.* Erickson, 5 Hawaii 159.

Indiana.— Felton *v.* State, 139 Ind. 531, 39 N. E. 228; Eberhart *v.* State, 134 Ind. 651, 34 N. E. 637.

Iowa.— State *v.* Cross, 12 Iowa 66, 79 Am. Dec. 519.

Kansas.— State *v.* Brown, 54 Kan. 71, 37 Pac. 996.

Minnesota.— State *v.* Reid, 39 Minn. 277, 39 N. W. 796.

Missouri.— State *v.* Goodale, 210 Mo. 275, 109 S. W. 9.

Nebraska.— Murphy *v.* State, 15 Nebr. 383, 19 N. W. 489.

New York.— People *v.* Connor, 126 N. Y. 278, 27 N. E. 252 [*affirming* 9 N. Y. Suppl. 674]; Higgins *v.* People, 58 N. Y. 377; People *v.* Terwilliger, 74 Hun 310, 26 N. Y. Suppl. 674 [*affirmed* in 142 N. Y. 629, 37 N. E. 565].

Virginia.— Bailey *v.* Com., 82 Va. 107, 3 Am. St. Rep. 87.

See 42 Cent. Dig. tit. "Rape," § 75; and *supra*, II, B, 2, g, (IV), (V).

Insufficient explanation of such failure or delay see Curby *v.* Territory, 4 Ariz. 371, 42 Pac. 953; State *v.* Cassidy, 85 Iowa 145, 52 N. W. 1; State *v.* Patrick, 107 Mo. 147, 17 S. W. 666, (1891) 15 S. W. 290; State *v.* Witten, 100 Mo. 525, 13 S. W. 871; Walter *v.* People, 50 Barb. (N. Y.) 144; Price *v.* State, 36 Tex. Cr. 143, 35 S. W. 988; Thompson *v.* State, 33 Tex. Cr. 472, 26 S. W. 987. Where prosecutrix was a girl of fourteen or fifteen, weighing one hundred and fifty-one pounds, and defendant was a youth weighing one hundred and fifteen pounds, and she testified that he had intercourse with her by force, while she was sitting on the top step of a steep stairway; that she made no outcry because she was sick, and made no efforts to push him down the steps, it was held that a verdict of guilty was not justified by the evidence. Brown *v.* Com., 82 Va. 653.

44. Assault with intent to rape see *infra*, II, B, 3, l, (I).

45. *Arkansas.*— Pleasant *v.* State, 13 Ark. 360.

i. Female Under Age of Consent.[46] To sustain a conviction for carnal knowledge, without force, of a female under the age of consent, the prosecution must prove beyond a reasonable doubt that the prosecutrix was under such age.[47] This is sufficiently done when the prosecutrix or other witnesses testify positively to her age,[48] but where the evidence is indefinite as to age conviction is unwarranted.[49] The prosecution must also prove the fact of intercourse with defendant,[50] and that it occurred while she was under the age of consent.[51] The testimony of the prosecutrix as to the sexual intercourse with other testimony or circumstances tending to show the same is sufficient,[52] but if the evidence of the prosecutrix is contradictory, and other evidence of its falsity is offered, a conviction is not warranted.[53] Where the prosecutrix was over a certain age, previous chaste character must be shown under some statutes.[54] It is not necessary to prove

Florida.— Rice *v.* State, 35 Fla. 236, 17 So. 286, 48 Am. St. Rep. 245.

Indiana.— Ransbottom *v.* State, 144 Ind. 250, 43 N. E. 218; Felton *v.* State, 139 Ind. 531, 39 N. E. 228.

Iowa.— State *v.* Harlan, 98 Iowa 458, 67 N. W. 381; State *v.* Fernald, 88 Iowa 553, 55 N. W. 534; State *v.* Ward, 73 Iowa 532, 35 N. W. 617.

Kansas.— State *v.* Ruth, 21 Kan. 583.

New Mexico.— Territory *v.* Edie, 6 N. M. 555, 30 Pac. 851.

Tennessee.— Wright *v.* State, 4 Humphr. 194.

Texas.— Myers *v.* State, (Cr. App. 1901) 62 S. W. 750; Sharp *v.* State, 15 Tex. App. 171.

Virginia.— Fry *v.* Com., 82 Va. 334.

See *supra*, I, A, 2, f, (v).

Evidence held insufficient see Territory *v.* Potter, 1 Ariz. 421, 25 Pac. 529.

46. Assault with intent to rape and attempt see *infra*, II, B, 3, l, (II).

47. State *v.* Houx, 109 Mo. 654, 19 S. W. 35, 32 Am. St. Rep. 686; and other cases in the notes following.

48. *California.*— People *v.* Harlan, 133 Cal. 16, 65 Pac. 9.

Michigan.— People *v.* Elco, 131 Mich. 519, 91 N. W. 755, 94 N. W. 1069; People *v.* Bernor, 115 Mich. 692, 74 N. W. 184.

Missouri.— State *v.* Day, 188 Mo. 359, 87 S. W. 465; State *v.* Duffey, 128 Mo. 549, 31 S. W. 98.

South Dakota.—State *v.* Callahan, 18 S. D. 150, 99 N. W. 1100.

Texas.— Blackwell *v.* State, 51 Tex. Cr. 24, 100 S. W. 774; Curry *v.* State, 50 Tex. Cr. 158, 94 S. W. 1058; Rodgers *v.* State, 47 Tex. Cr. 195, 82 S. W. 1041.

Washington.— State *v.* Phelps, 22 Wash. 181, 60 Pac. 134.

England.— Reg. *v.* Nicholls, 10 Cox C. C. 476, 16 L. T. Rep. N. S. 466, 15 Wkly. Rep. 795.

49. Duckworth *v.* State, 42 Tex. Cr. 74, 57 S. W. 665; Parnell *v.* State, (Tex. Cr. App. 1897) 42 S. W. 563; Lawrence *v.* State, 35 Tex. Cr. 114, 32 S. W. 530; Rex *v.* Wedge, 5 C. & P. 298, 24 E. C. L. 574.

50. Proof of intercourse see *supra*, II, B, 3, b.

51. Where prosecutrix attained the age of consent June 9, 1897, and she testified that defendant, with her consent, had intercourse with her in the spring of 1897, "about cotton chopping time"; that the nights were cool; that it was in June or July when the first act of intercourse occurred, and that she did not know the order of the months, it was held that a conviction was not authorized. Parnell *v.* State, (Tex. Cr. App. 1897) 42 S. W. 563.

Evidence held sufficient see State *v.* Mathews, 202 Mo. 143, 100 S. W. 420.

Confession of defendant sufficiently corroborated see Austin *v.* State, 51 Tex. Cr. 327, 101 S. W. 1162.

52. *Georgia.*— Smith *v.* State, 91 Ga. 10, 16 S. E. 378.

Kansas.— State *v.* Thomas, 58 Kan. 805, 51 Pac. 228.

Michigan.— People *v.* Ten Elshof, 92 Mich. 167, 52 N. W. 297.

Missouri.— State *v.* Kelley, 191 Mo. 680, 90 S. W. 834; State *v.* De Witt, 186 Mo. 61, 84 S. W. 956; State *v.* Hunter, 171 Mo. 435, 71 S. W. 675.

Montana.— State *v.* Peres, 27 Mont. 358, 71 Pac. 162.

Nebraska.— Blair *v.* State, 72 Nebr. 501, 101 N. W. 17; Reinoehl *v.* State, 62 Nebr. 619, 87 N. W. 355.

North Dakota.— State *v.* Werner, 16 N. D. 83, 112 N. W. 60.

Texas.— Rodgers *v.* State, 47 Tex. Cr. 195, 82 S. W. 1041; Price *v.* State, 44 Tex. Cr. 304, 70 S. W. 966.

Washington.— State *v.* Phelps, 22 Wash. 181, 60 Pac. 134.

Evidence held sufficient see State *v.* George, 214 Mo. 262, 113 S. W. 1116; Innocente *v.* State, (Tex. Cr. App. 1908) 110 S. W. 61; Freeney *v.* State, (Tex. Cr. App. 1907) 102 S. W. 113; Ricks *v.* State, 48 Tex. Cr. 229, 87 S. W. 345; Bartlett *v.* State, (Tex. Cr. App. 1899) 51 S. W. 918; State *v.* Katon, 47 Wash. 1, 91 Pac. 250, notwithstanding impeachment of prosecutrix by her own conduct and admissions and by the testimony of other witnesses.

53. People *v.* Tarbox, 115 Cal. 57, 46 Pac. 896; State *v.* Huff, 161 Mo. 459, 61 S. W. 900, 1104; State *v.* McMillan, 20 Mont. 407, 51 Pac. 827; Duckworth *v.* State, 42 Tex. Cr. 74, 57 S. W. 665.

54. Burk *v.* State, 79 Nebr. 241, 112 N. W. 573. See *supra*, I, A, 2, d; II, B, 1.

want of consent or force or resistance in a prosecution for carnal knowledge of a female under the age of consent.[55]

j. Female Imbecile, Drugged, Intoxicated, or Asleep. Proof that the woman was so imbecile or insane as to be incapable of consenting is sufficient without proof of force and resistance.[56] Evidence of mere weakness of mind alone is not sufficient to convict,[57] but in case of mental weakness less evidence of want of consent is necessary than where the female is of sound mind.[58] So there may be a conviction of rape on proof of intercourse with a female who was insensible from drugs.[59] And where defendant gave the woman liquor and made her drunk, and she testified that while she was unconscious he had sexual intercourse with her, this was held sufficient to convict.[60] Evidence that defendant entered the room where the female was asleep, and moved her clothing, or bedclothes, or touched her person is usually held sufficient to convict of assault with intent to commit rape.[61]

k. Fraud. Intercourse with a woman through fraud in personating her husband is not generally considered as rape,[62] but in Texas the statute makes it rape if any trick or artifice is used; and in such cases it is sufficient if she is induced to submit by any sham or trick used to deceive her.[63] In Texas, by statute, a man may be convicted of rape by fraud, if the evidence shows that he administered to the prosecutrix, without her knowledge or consent, a substance producing unnatural sexual desire, or such stupor as prevented or weakened resistance, and committed the offense while she was under the influence of such substance.[64] Evidence showing an attempt to rape by fraud is not sufficient to convict of assault with intent to commit rape.[65] Proof of an attempt to have intercourse with a married woman by personating her husband is not sufficient to convict of assault with intent to commit rape,[66] but may be sufficient to convict of attempt to rape by fraud under the Texas statute.[67] A physician may, in some jurisdictions,

Evidence held sufficient see Leedom *v.* State, 81 Nebr. 585, 116 N. W. 496.

55. See *supra*, I, A, 2, f, (II).

56. State *v.* Enright, 90 Iowa 520, 58 N. W. 901; State *v.* Tarr, 28 Iowa 397; State *v.* Crow, 1 Ohio Dec. (Reprint) 586, 10 West. L. J. 501. See *supra*, I, A, 2, f, (III).

57. McQuirk *v.* State, 84 Ala. 435, 4 So. 775, 5 Am. St. Rep. 381; People *v.* Croswell, 13 Mich. 427, 87 Am. Dec. 774; Lee *v.* State, 43 Tex. Cr. 285, 64 S. W. 1047; Thompson *v.* State, 33 Tex. Cr. 472, 26 S. W. 987.

58. Gore *v.* State, 119 Ga. 418, 46 S. E. 671, 100 Am. St. Rep. 182; State *v.* Enright, 90 Iowa 520, 58 N. W. 901; State *v.* Cunningham, 100 Mo. 382, 12 S. W. 376; Fredericson *v.* State, 44 Tex. Cr. 288, 70 S. W. 754.

59. Com. *v.* Burke, 105 Mass. 376, 7 Am. Rep. 531. See *supra*, I, A, 2, f, (III).

Evidence held insufficient see State *v.* Perry, 41 W. Va. 641, 24 S. E. 634, holding that where expert medical evidence established the probability that a charge of rape preferred by a female patient against a physician was the result of hallucination while under the influence of chloroform and ether, and such charge depended entirely upon the uncorroborated and contradicted testimony of the patient, there should be an acquittal.

60. People *v.* O'Brien, 130 Cal. 1, 62 Pac. 297; Territory *v.* Edie, 6 N. M. 555, 30 Pac. 851. See *supra*, I, A, 2, f, (III).

61. Sullivant *v.* State, 8 Ark. 400; Darden *v.* State, 97 Ga. 407, 25 S. E. 676; Jackson *v.* State, 91 Ga. 322, 18 S. E. 132, 44 Am. St. Rep. 25; Carter *v.* State, 35 Ga. 263; State *v.* Shroyer, 104 Mo. 441, 16 S. W. 286, 24 Am. St. Rep. 344; Edwards *v.* State, 37 Tex. Cr. 242, 38 S. W. 996, 39 S. W. 368; Dibrell *v.* State, 3 Tex. App. 456. *Compare*, however, Charles *v.* State, 11 Ark. 389; Johnson *v.* State, 63 Ga. 355; Hancock *v.* State, (Tex. Cr. App. 1898) 47 S. W. 465. And see *supra*, I, A, 2, f, (III).

62. See *supra*, I, A, 2, f, (VI).

63. Huffman *v.* State, 46 Tex. Cr. 428, 80 S. W. 625; Payne *v.* State, 40 Tex. Cr. 202, 49 S. W. 604, 76 Am. St. Rep. 712; King *v.* State, 22 Tex. App. 650, 3 S. W. 342.

Evidence held sufficient see Payne *v.* State, 40 Tex. Cr. 202, 49 S. W. 604, 76 Am. St. Rep. 712.

Evidence held insufficient see Huffman *v.* State, 46 Tex. Cr. 428, 80 S. W. 625; Mooney *v.* State, 29 Tex. App. 257, 15 S. W. 724.

64. Tex. Pen. Code, art. 636. See Milton *v.* State, 23 Tex. App. 204, 4 S. W. 574.

Administering cantharides see Baldridge *v.* State, 45 Tex. Cr. 193, 74 S. W. 916, holding the evidence insufficient to support a conviction.

65. Milton *v.* State, 23 Tex. App. 204, 4 S. W. 574.

66. State *v.* Brooks, 76 N. C. 1.

67. Stout *v.* State, 22 Tex. App. 339, 3 S. W. 231, where it was said that while it would ordinarily appear exceedingly improbable that a man should attempt to ravish a mar-

commit a rape by having intercourse with a female patient under representation that it is medical treatment, if she is ignorant of the nature of the act.[68] Proof of indecent liberties taken with the person of a female by a physician under pretext of professional duty is not sufficient to convict of assault with intent to commit rape.[69]

l. Attempt and Assault With Intent to Rape — (i) *In General.* The evidence does not justify a conviction of attempt to rape or assault with intent to rape, unless it shows beyond a reasonable doubt, not only the identity of the accused,[70] but also that he committed an overt act amounting to an attempt or assault, as the case may be,[71] and that he did so with intent to have intercourse with the prosecutrix by force and against her will,[72] unless, in some jurisdictions,

ried woman in bed with her husband, such a crime is by no means impossible, and it is for the jury to decide the question upon the evidence adduced. Stout *v.* State, 22 Tex. App. 339, 3 S. W. 231.

Evidence sufficient to show attempt see Franklin *v.* State, 34 Tex. Cr. 203, 29 S. W. 1088.

68. Pomeroy *v.* State, 94 Ind. 96, 48 Am. Rep. 146. *Contra*, Don Moran *v.* People, 25 Mich. 356, 12 Am. Rep. 283. See *supra*, I, A, 2, f, (VI).

Evidence held insufficient see Walter *v.* People, 50 Barb. (N. Y.) 144.

69. Nichols *v.* State, 72 Ga. 191; State *v.* Nash, 109 N. C. 824, 13 S. E. 874.

70. See *supra*, II, B, 3, d.

71. Dorsey *v.* State, 108 Ga. 477, 34 S. E. 135. And see *supra*, I, B, 2, d.

Evidence sufficient see People *v.* Stewart, 90 Cal. 212, 27 Pac. 200; Jackson *v.* State, 91 Ga. 322, 18 S. E. 132, 44 Am. St. Rep. 25; State *v.* Rudd, 97 Iowa 389, 66 N. W. 748; Payne *v.* Com., 110 S. W. 311, 33 Ky. L. Rep. 229; State *v.* Shroyer, 104 Mo. 441, 16 S. W. 286, 24 Am. St. Rep. 344; State *v.* Carter, 98 Mo. 176, 11 S. W. 624; Shepard *v.* State, 34 Tex. Cr. 35, 28 S. W. 816; Dibrell *v.* State, 3 Tex. App. 456.

Evidence insufficient see Clark *v.* State, (Fla. 1908) 47 So. 481; Jacques *v.* People, 66 Ill. 84; Harvey *v.* State, (Miss. 1900) 26 So. 931; Johnson *v.* State, 27 Nebr. 687, 43 N. W. 425; Fisk *v.* State, 9 Nebr. 62, 2 N. W. 381; State *v.* Jeffreys, 117 N. C. 743, 23 S. E. 175; Bozeman *v.* State, 34 Tex. Cr. 503, 31 S. W. 389; West *v.* State, (Tex. Cr. App. 1893) 21 S. W. 686; Elam *v.* State, (Tex. Cr. App. 1892) 20 S. W. 710.

Attempt to rape by fraud in personating husband see Franklin *v.* State, 34 Tex. Cr. 203, 29 S. W. 1088, where the evidence was held sufficient.

Venereal disease.—No presumption in favor of defendant's innocence of an assault with intent to commit rape can be drawn from the facts that the prosecutrix was shown to have a venereal disease prior to and at the time of the alleged assault, and that defendant was shown by examination of a physician not to have it. Comer *v.* State, (Tex. Cr. App. 1892) 20 S. W. 547.

72. *Alabama.*— Pumphrey *v.* State, (1908) 47 So. 156; Jones *v.* State, 90 Ala. 628, 8 So. 383, 34 Am. St. Rep. 850.

Arkansas.— Williams *v.* State, (1908) 113 S. W. 799; Charles *v.* State, 11 Ark. 389.

California.— People *v.* Fleming, 94 Cal. 308, 29 Pac. 647.

Florida.— Clark *v.* State, (1908) 47 So. 481.

Georgia.— Dorsey *v.* State, 108 Ga. 477, 34 S. E. 135; Johnson *v.* State, 63 Ga. 355; Joice *v.* State, 53 Ga. 50.

Illinois.— Newman *v.* People, 223 Ill. 324, 79 N. E. 80; Franey *v.* People, 210 Ill. 206, 71 N. E. 443; Stevens *v.* People, 158 Ill. 111, 41 N. E. 856; Barr *v.* People, 113 Ill. 471.

Indiana.— Hollister *v.* State, 156 Ind. 255, 59 N. E. 847; White *v.* State, 136 Ind. 308, 36 N. E. 274.

Iowa.— State *v.* Canada, 68 Iowa 397, 27 N. W. 288.

Massachusetts.— Com. *v.* Merrill, 14 Gray 415, 77 Am. Dec. 336.

Mississippi.— Harvey *v.* State, (1900) 26 So. 931; Green *v.* State, 67 Miss. 356, 7 So. 326.

Missouri.— State *v.* Scholl, 130 Mo. 396, 32 S. W. 968; State *v.* Whitsett, 111 Mo. 202, 19 S. W. 1097; State *v.* Owsley, 102 Mo. 678, 15 S. W. 137; State *v.* Priestley, 74 Mo. 24.

Nebraska.— Dunn *v.* State, 58 Nebr. 807, 79 N. W. 719; Krum *v.* State, 19 Nebr. 728, 28 N. W. 278; Garrison *v.* People, 6 Nebr. 274.

New York.— People *v.* Kirwan, 22 N. Y. Suppl. 160.

Texas.— Outlaw *v.* State, 35 Tex. 481; Collins *v.* State, 52 Tex. Cr. 455, 107 S. W. 852; Cotton *v.* State, 52 Tex. Cr. 55, 105 S. W. 185; Warren *v.* State, 51 Tex. Cr. 598, 103 S. W. 888; Washington *v.* State, 51 Tex. Cr. 542, 103 S. W. 879; Scott *v.* State, 51 Tex. Cr. 5, 100 S. W. 159; Hudson *v.* State, 49 Tex. Cr. 24, 90 S. W. 177; Dina *v.* State, 46 Tex. Cr. 402, 78 S. W. 229; McCullough *v.* State, (Cr. App. 1898) 47 S. W. 990; McAdoo *v.* State, 35 Tex. Cr. 603, 34 S. W. 955; Dockery *v.* State, 35 Tex. Cr. 487, 34 S. W. 281; Peterson *v.* State, 14 Tex. App. 162; House *v.* State, 9 Tex. App. 567; Robertson *v.* State, 30 Tex. App. 498, 17 S. W. 1068; Irving *v.* State, 9 Tex. App. 66. And see Eiley *v.* State, (Cr. App. 1908) 114 S. W. 793.

Utah.— State *v.* McCune, 16 Utah 170, 51 Pac. 818.

she was under the age of consent.[73] Defendant may be guilty of improprieties both in speech and in act, even amounting to aggravated assault, but if there is not evidence of intent to overcome resistance with force it is insufficient to sustain a verdict.[74] Solicitation, taking hold of and fondling a female, indecent exposure of the person, and other facts of a similar nature, in the absence of proof of any intent to use force, are not sufficient to convict.[75] Such intent, however, may be inferred from the conduct of the parties and the other circumstances.[76] A request for

England.— Rex *v.* Lloyd, 7 C. & P. 318, 32 E. C. L. 633; Reg. *v.* Wright, 4 F. & F. 967.

See 42 Cent. Dig. tit. "Rape," § 79 *et seq.*; and other cases cited in the notes following.

73. **Female under age of consent** see *infra*, II, B, 3, l, (II).

74. *Alabama.*— Jones *v.* State, 90 Ala. 628, 8 So. 383, 24 Am. St. Rep. 850.

Arkansas.— Anderson *v.* State, 77 Ark. 37, 90 S. W. 846; Quinn *v.* State, (1905) 84 S. W. 505; Pleasant *v.* State, 13 Ark. 360; Charles *v.* State, 11 Ark. 389.

California.— People *v.* Fleming, 94 Cal. 308, 29 Pac. 647.

Georgia.— Horseford *v.* State, 124 Ga. 784, 53 S. E. 322; Dorsey *v.* State, 108 Ga. 477, 34 S. E. 135; Tiller *v.* State, 101 Ga. 782, 29 S. E. 424; Johnson *v.* State, 63 Ga. 355.

Illinois.— Franey *v.* People, 210 Ill. 206, 71 N. E. 443.

Massachusetts.— Com. *v.* Merrill, 14 Gray 415, 77 Am. Dec. 336.

Mississippi.— Ashford *v.* State, (1904) 35 So. 569; Green *v.* State, 67 Miss. 356, 7 So. 326.

Missouri.— State *v.* Hahn, 189 Mo. 241, 87 S. W. 1006; State *v.* Riseling, 186 Mo. 521, 85 S. W. 372; State *v.* Scholl, 130 Mo. 396, 32 S. W. 968; State *v.* Owsley, 102 Mo. 678, 15 S. W. 137.

New York.— People *v.* Kirwan, 22 N. Y. Suppl. 160.

North Carolina.— State *v.* Smith, 136 N. C. 684, 49 S. E. 336; State *v.* Massey, 86 N. C. 658, 41 Am. Rep. 478 [*overruling* State *v.* Neely, 74 N. C. 425, 21 Am. Rep. 496].

Ohio.— Patterson *v.* State, 11 Ohio Cir. Dec. 602.

Texas.— Ross *v.* State, (Cr. App. 1904) 78 S. W. 503; Dina *v.* State, 46 Tex. Cr. 402, 78 S. W. 229; Coffee *v.* State, (Cr. App. 1903) 76 S. W. 761; Sirmons *v.* State, 44 Tex. Cr. 488, 72 S. W. 395; Caddell *v.* State, 44 Tex. Cr. 213, 70 S. W. 91; Fields *v.* State, 39 Tex. Cr. 488, 46 S. W. 814; O'Brien *v.* State, (Cr. App. 1897) 40 S. W. 969; Ellenberg *v.* State, 36 Tex. Cr. 139, 35 S. W. 989; Mathews *v.* State, 34 Tex. Cr. 479, 31 S. W. 381; Steinke *v.* State, 33 Tex. Cr. 65, 24 S. W. 909, 25 S. W. 287; Carson *v.* State, (Cr. App. 1893) 24 S. W. 409; Power *v.* State, 30 Tex. App. 662, 18 S. W. 552; Carroll *v.* State, 24 Tex. App. 366, 6 S. W. 190; Jones *v.* State, 18 Tex. App. 485; House *v.* State, 9 Tex. App. 53.

Virginia.— Woodson *v.* Com., 107 Va. 895, 59 S. E. 1097.

Wisconsin.— Ford *v.* Schliessman. 107 Wis. 479, 83 N. W. 761; Moore *v.* State, 79 Wis. 546, 48 N. W. 653.

See 42 Cent. Dig. tit. "Rape," § 79 *et seq.*

75. *Georgia.*— Jackson *v.* State, 114 Ga. 861, 40 S. E. 989.

Indiana.— Hollister *v.* State, 156 Ind. 255, 59 N. E. 847.

Iowa.— State *v.* Biggs, 93 Iowa 125, 61 N. W. 417; State *v.* Pilkington, 92 Iowa 92, 60 N. W. 502; State *v.* Chapman, 88 Iowa 254, 55 N. W. 489; State *v.* Kendall, 73 Iowa 255, 34 N. W. 843, 5 Am. St. Rep. 679.

Mississippi.— Tynes *v.* State, (1901) 29 So. 91.

Nebraska.— Skinner *v.* State, 28 Nebr. 814, 45 N. W. 53.

North Carolina.— State *v.* Jeffreys, 117 N. C. 743, 23 S. E. 175.

Ohio.— Blannett *v.* State, 8 Ohio Cir. Ct. 313, 4 Ohio Cir. Dec. 32.

Texas.— Thompson *v.* State, 43 Tex. 583; Wood *v.* State, (Cr. App. 1901) 61 S. W. 308; Graybill *v.* State, 41 Tex. Cr. 286, 53 S. W. 851; Clark *v.* State, 39 Tex. Cr. 152, 45 S. W. 696; Bozeman *v.* State, 34 Tex. Cr. 503, 31 S. W. 389; Marthall *v.* State, 34 Tex. Cr. 22, 36 S. W. 1062; Passmore *v.* State, 29 Tex. App. 241, 15 S. W. 286.

Virginia.— Hairston *v.* Com., 97 Va. 754, 32 S. E. 797.

76. *Alabama.*— Pumphrey *v.* State, (1908) 47 So. 156; Brown *v.* State, 121 Ala. 9, 25 So. 744; Dudley *v.* State, 121 Ala. 4, 25 So. 742.

California.— People *v.* Kuches, 120 Cal. 566, 52 Pac. 1002; People *v.* Bowman, 6 Cal. App. 749, 93 Pac. 198; People *v.* Collins, 5 Cal. App. 654, 91 Pac. 158.

Colorado.— Harlan *v.* People, 32 Colo. 397, 76 Pac. 792.

Georgia.— Jackson *v.* State, 91 Ga. 322, 18 S. E. 132, 44 Am. St. Rep. 25; Reuben *v.* State, 69 Ga. 770; Ware *v.* State, 67 Ga. 349; Carter *v.* State. 35 Ga. 263; Parker *v.* State, 3 Ga. App. 336, 59 S. E. 823.

Idaho.— State *v.* Neil, 13 Ida. 539, 90 Pac. 860, 91 Pac. 318.

Illinois.— Lathrop *v.* People, 197 Ill. 169, 64 N. E. 385.

Indiana.— Shular *v.* State, 160 Ind. 300, 66 N. E. 746; Hanes *v.* State, 155 Ind. 112, 57 N. E. 704.

Iowa.— State *v.* Barkley, 129 Iowa 484, 105 N. W. 506; State *v.* Miller, 124 Iowa 429, 100 N. W. 334; State *v.* Urie, 101 Iowa 411, 70 N. W. 603; State *v.* Rudd, 97 Iowa 389, 66 N. W. 748; State *v.* Delong, 96 Iowa 471, 65 N. W. 402; State *v.* Grossheim, 79 Iowa 75, 44 N. W. 541.

Kentucky.— Gibson *v.* Com., 104 S. W. 351, 31 Ky. L. Rep. 945; Bowman *v.* Com., 104 S. W. 263, 31 Ky. L. Rep. 828; McComb *v.* Com., 12 S. W. 382, 11 Ky. L. Rep. 508.

intercourse, with a threat to injure if refused, but where no force is used, is not sufficient to convict of assault with intent to rape.[77] If defendant makes an assault with intent to rape and the woman resists at first but finally consents to intercourse, this is sufficient to convict of assault with intent to rape but not of rape.[78]

(II) *Female Under Age of Consent.* On a prosecution for attempt, or assault with intent, to rape a female under the age of consent the evidence must show the attempt or assault and an intent on the part of defendant to have intercourse with her.[79] In some jurisdictions the rule that a female under the age of consent is incapable of consenting to intercourse is not applied to indictments for attempt or assault with intent to commit rape, and proof of want of age alone, in the absence of proof of intent to use force, is not sufficient to convict;[80] but in most jurisdictions the rule is otherwise, and proof of intent to use force is not necessary.[81]

m. Corroboration of Prosecutrix — (I) *In Absence of a Statute.* In the absence of a statute requiring corroboration the unsupported testimony of the

Massachusetts.— Com. *v.* Thompson, 116 Mass. 346.

Michigan.— People *v.* Toutant, 133 Mich. 520, 95 N. W. 541.

Missouri.— State *v.* Espenschied, 212 Mo. 215, 110 S. W. 1072; State *v.* Platner, 196 Mo. 128, 93 S. W. 403; State *v.* Urspruch, 191 Mo. 43, 90 S. W. 451; State *v.* Neal, 178 Mo. 63, 76 S. W. 958; State *v.* Huff, 161 Mo. 459, 61 S. W. 900, 1104; State *v.* Edie, 147 Mo. 535, 49 S. W. 563; State *v.* Alcorn, 137 Mo. 121, 38 S. W. 548; State *v.* Shroyer, 104 Mo. 441, 16 S. W. 286, 24 Am. St. Rep. 344; State *v.* Carter, 98 Mo. 176, 11 S. W. 624; State *v.* Smith, 80 Mo. 516.

Nebraska.— Strong *v.* State, 63 Nebr. 440, 88 N. W. 772.

North Carolina.— State *v.* Arnold, 146 N. C. 602, 60 S. E. 504; State *v.* Mehaffey, 132 N. C. 1062, 44 S. E. 107; State *v.* Garner, 129 N. C. 536, 40 S. E. 6; State *v.* Page, 127 N. C. 512, 37 S. E. 66; State *v.* Deberry, 123 N. C. 703, 31 S. E. 272; State *v.* Williams, 121 N. C. 628, 28 S. E. 405; State *v.* Mitchell, 89 N. C. 521.

Oregon.— State *v.* Daly, 16 Oreg. 240, 18 Pac. 357.

Pennsylvania.— Com. *v.* Bell, 13 Pa. Super. Ct. 576.

Texas.— Railsback *v.* State, 53 Tex. Cr. 542, 110 S. W. 916; Bourland *v.* State, 49 Tex. Cr. 197, 93 S. W. 115; Castle *v.* State, 49 Tex. Cr. 1, 90 S. W. 32; Perkins *v.* State, (Cr. App. 1904) 80 S. W. 619; Riddling *v.* State, (Cr. App. 1903) 77 S. W. 805; Berry *v.* State, 44 Tex. Cr. 395, 72 S. W. 170; McCullough *v.* State, (Cr. App. 1898) 47 S. W. 990; Farmer *v.* State, (Cr. App. 1898) 45 S. W. 701; Crew *v.* State, (Cr. App. 1893) 22 S. W. 973; Dibrell *v.* State, 3 Tex. App. 456.

Vermont.— State *v.* Clark, 77 Vt. 10, 58 Atl. 796.

Virginia.— Cunningham *v.* Com., 88 Va. 37, 13 S. E. 309.

Wisconsin.— Bannen *v.* State, 115 Wis. 317, 91 N. W. 107, 965.

Wyoming.— Ross *v.* State, 16 Wyo. 285, 93 Pac. 299, 94 Pac. 217.

See 42 Cent. Dig. tit. "Rape," § 79 *et seq.*

77. Ross *v.* State, (Tex. Cr. App. 1904) 78 S. W. 514; Taylor *v.* State, 22 Tex. App. 529, 3 S. W. 753, 58 Am. Rep. 656.

78. Pratt *v.* State, 51 Ark. 167, 10 S. W. 233; State *v.* Delong, 96 Iowa 471, 65 N. W. 402; State *v.* Atherton, 50 Iowa 189, 32 Am. Rep. 134; State *v.* Cross, 12 Iowa 66, 79 Am. Dec. 519; State *v.* Bagan, 41 Minn. 285, 43 N. W. 5.

79. See *supra*, I, B, 2, d, g.

Evidence sufficient see Tuttle *v.* State, 83 Ark. 379, 104 S. W. 135; Territory *v.* Keyes, 5 Dak. 244, 38 N. W. 440; Boyd *v.* State, 74 Ga. 356; Hanes *v.* State, 155 Ind. 112, 57 N. E. 704; State *v.* Jerome, 82 Iowa 749, 48 N. W. 722; State *v.* Prather, 136 Mo. 20, 37 S. W. 805; Head *v.* State, 43 Nebr. 30, 61 N. W. 494; Wilson *v.* State, (Tex. Cr. App. 1903) 73 S. W. 16; Glover *v.* Com., 86 Va. 382, 10 S. E. 420.

Evidence insufficient see Draper *v.* State, (Tex. Cr. App. 1900) 57 S. W. 655.

Testimony of very young child.— A conviction of an indecent assault on a child may be sustained on the testimony, with some corroboration, of a five-year-old child, who was under the age of five years when the offense was alleged to have been committed. State *v.* Juneau, 88 Wis. 180, 59 N. W. 580, 43 Am. St. Rep. 877, 24 L. R. A. 857.

80. Toulet *v.* State, 100 Ala. 72, 14 So. 403; People *v.* Stamford, 2 Wheel. Cr. (N. Y.) 152.

81. *Arkansas.*— Tuttle *v.* State, 83 Ark. 379, 104 S. W. 135.

California.— People *v.* Collins, 5 Cal. App. 654, 91 Pac. 158.

Dakota.— Territory *v.* Keyes, 5 Dak. 244, 38 N. W. 440.

Indiana.— Hanes *v.* State, 155 Ind. 112, 57 N. E. 704.

Nebraska.— Head *v.* State, 43 Nebr. 30, 61 N. W. 494.

Texas.— Blair *v.* State, (Cr. App. 1900) 60 S. W. 879; Croomes *v.* State, 40 Tex. Cr. 672, 51 S. W. 924, 53 S. W. 882 [*overruling* Hardin *v.* State, 39 Tex. Cr. 426, 46 S. W. 803].

Virginia.— Glover *v.* Com., 86 Va. 382, 10 S. E. 420.

prosecutrix, if believed by the jury, is sufficient to convict of rape or of attempt or assault with intent to rape,[82] even though she is of ill-fame for chastity,[83] or is under the age of consent and consents to the intercourse,[84] or is a young child.[85]

Washington.— State *v.* Marselle, 43 Wash. 273, 86 Pac. 586.

See *supra*, I, B, 2, g.

82. *Alabama.*— Barnett *v.* State, 83 Ala. 40, 3 So. 612; Boddie *v.* State, 52 Ala. 395.

Arizona.— Trimble *v.* Territory, 8 Ariz. 273, 71 Pac. 932; Curby *v.* Territory, 4 Ariz. 371, 42 Pac. 953.

Arkansas.— Bond *v.* State, 63 Ark. 504, 39 S. W. 554, 58 Am. St. Rep. 65; Frazier *v.* State, 56 Ark. 242, 19 S. W. 838.

California.— People *v.* Benc, 130 Cal. 159, 62 Pac. 404; People *v.* Logan, 123 Cal. 414, 56 Pac. 56; People *v.* Wessel, 98 Cal. 352, 33 Pac. 216; People *v.* Gardner, 98 Cal. 127, 32 Pac. 880; People *v.* Stewart, 97 Cal. 238, 32 Pac. 8; People *v.* Fleming, 94 Cal. 308, 29 Pac. 647; People *v.* Mesa, 93 Cal. 580, 29 Pac. 116; People *v.* Stewart, 90 Cal. 212, 27 Pac. 200; People *v.* Mayes, 66 Cal. 597, 6 Pac. 691, 56 Am. Rep. 126; People *v.* Ah Lung, 2 Cal. App. 278, 83 Pac. 296. And see People *v.* Corey, (App. 1908) 97 Pac. 907.

Colorado.— Peckham *v.* People, 32 Colo. 140, 75 Pac. 422.

Connecticut.— State *v.* Lattin, 29 Conn. 389.

Florida.— Doyle *v.* State, 39 Fla. 155, 22 So. 272, 63 Am. St. Rep. 159.

Georgia.— Assault with intent to rape. Scott *v.* State, 3 Ga. App. 479, 60 S. E. 112; Parker *v.* State, 3 Ga. App. 336, 59 S. E. 823; Fields *v.* State, 2 Ga. App. 41, 58 S. E. 327. But see as to rape Davis *v.* State, 120 Ga. 433, 48 S. E. 180.

Idaho.— State *v.* Anderson, 6 Ida. 706, 59 Pac. 180.

Illinois.— Crocker *v.* People, 213 Ill. 287, 72 N. E. 743; Johnson *v.* People, 197 Ill. 48, 64 N. E. 286.

Kansas.— State *v.* Tinkler, 72 Kan. 262, 83 Pac. 830.

Kentucky.— Lynn *v.* Com., 13 S. W. 74, 11 Ky. L. Rep. 772.

Michigan.— People *v.* Bates, 70 Mich. 234, 38 N. W. 231.

Mississippi.— Monroe *v.* State, 71 Miss. 196, 13 So. 884.

Missouri.— State *v.* Dilts, 191 Mo. 665, 90 S. W. 782; State *v.* Miller, 191 Mo. 587, 90 S. W. 767; State *v.* Wertz, 191 Mo. 569, 90 S. W. 838; State *v.* Welch, 191 Mo. 179, 89 S. W. 945; State *v.* Day, 188 Mo. 359, 87 S. W. 465; State *v.* Pollard, 174 Mo. 607, 74 S. W. 969; State *v.* Armstrong, 167 Mo. 257, 66 S. W. 961; State *v.* Harris, 150 Mo. 56, 51 S. W. 481; State *v.* Marcks, 140 Mo. 656, 41 S. W. 973, 43 S. W. 1095; State *v.* Dusenberry, 112 Mo. 277, 20 S. W. 461; State *v.* Wilcox, 111 Mo. 569, 20 S. W. 314, 33 Am. St. Rep. 551.

Montana.— State *v.* Jones, 32 Mont. 442, 80 Pac. 1095; State *v.* Peres, 27 Mont. 358, 71 Pac. 162.

Nebraska.— Hammond *v.* State, 39 Nebr. 252, 58 N. W. 92; Fager *v.* State, 22 Nebr. 332, 35 N. W. 195; Garrison *v.* People, 6 Nebr. 274.

Oklahoma.— Brenton *v.* Territory, 15 Okla. 6, 78 Pac. 83. And see Harmon *v.* Territory, 15 Okla. 147, 79 Pac. 765.

Oregon.— State *v.* Knighten, 39 Oreg. 63, 64 Pac. 866, 87 Am. St. Rep. 647.

Texas.— Wallace *v.* State, 48 Tex. Cr. 548, 89 S. W. 827; Hamilton *v.* State, 41 Tex. Cr. 599, 58 S. W. 93; Hill *v.* State, (Cr. App. 1903) 77 S. W. 808; Keith *v.* State, (Cr. 1900) 56 S. W. 628.

Utah.— State *v.* Hillberg, 22 Utah 27, 61 Pac. 215.

Virginia.— Thomas *v.* Com., 106 Va. 855, 56 S. E. 705; Givens *v.* Com., 29 Gratt. 830.

Washington.— State *v.* Conlin, 45 Wash. 478, 88 Pac. 932; State *v.* Fetterly, 33 Wash. 599, 74 Pac. 810; State *v.* Roller, 30 Wash. 692, 71 Pac. 718.

Wisconsin.— Brown *v.* State, 127 Wis. 193, 106 N. W. 536; Lanphere *v.* State, 114 Wis. 193, 89 N. W. 128.

Wyoming.— Tway *v.* State, 7 Wyo. 74, 50 Pac. 188.

England.— Anon., 3 Russ. C. & M. 654.

See 42 Cent. Dig. tit. "Rape," §§ 83, 84.

Physical examination or medical testimony is not necessary to convict. Barnett *v.* State, 83 Ala. 40, 3 So. 612; Frazier *v.* State, 56 Ark. 242, 19 S. W. 838; State *v.* Lattin, 29 Conn. 389; State *v.* Bateman, 198 Mo. 213, 94 S. W. 843; Harmon *v.* Territory, 15 Okla. 147, 79 Pac. 765.

Chastity of female.— On a trial for illicit intercourse with a female under the age of eighteen, not previously unchaste, it is sufficient if the jury be satisfied beyond a reasonable doubt that prosecutrix was not previously unchaste, and her evidence that she was not previously unchaste is not required to be corroborated. Leedom *v.* State, 81 Nebr. 585, 116 N. W. 496.

83. Barnett *v.* State, 83 Ala. 40, 3 So. 612; Boddie *v.* State, 52 Ala. 395. *Compare*, however, State *v.* Anderson, 6 Ida. 706, 59 Pac. 180.

84. This does not make her an accomplice of defendant so as to render corroboration of her testimony necessary. Bond *v.* State, 63 Ark. 504, 39 S. W. 554, 58 Am. St. Rep. 129; State *v.* Tuttle, 67 Ohio St. 446, 66 N. E. 524, 93 Am. St. Rep. 689; State *v.* Knighten, 39 Oreg. 63, 64 Pac. 866, 87 Am. St. Rep. 647; Hamilton *v.* State, 36 Tex. Cr. 372, 37 S. W. 431; State *v.* Hilberg, 22 Utah 27, 61 Pac. 215; State *v.* Mobley, 44 Wash. 549, 87 Pac. 815. And see Reg. *v.* Tyrrell, [1894] 1 Q. B. 710, holding that the girl was not indictable as an aider and abetter.

85. People *v.* Stewart, 90 Cal. 212, 27 Pac. 200 (twelve years); State *v.* Lattin, 29 Conn. 389 (nine years); Givens *v.* Com., 29 Gratt. (Va.) 830 (eleven years).

Corroboration sufficient see State *v.* Le

But defendant should not be convicted without corroboration where the testimony of the prosecutrix bears on its face indications of unreliability or improbability, and particularly when it is contradicted by other evidence;[86] and where the evidence preponderates in favor of defendant, or the verdict appears to have been influenced by passion or prejudice, it should always be set aside unless there is corroboration of prosecutrix.[87] The mere fact that defendant testifies in his own behalf and positively denies his guilt does not, by the weight of authority, render corroboration of the prosecutrix necessary.[88]

Blanc, 3 Brev. (S. C.) 339; State *v.* Blythe, 20 Utah 379, 58 Pac. 1108.

Physical examination or medical testimony in confirmation of the child's testimony is not necessary. State *v.* Lattin, 29 Conn. 389.

86. *California.*— People *v.* Ardaga, 51 Cal. 371; People *v.* Benson, 6 Cal. 221, 65 Am. Dec. 506.

Georgia.— Ryals *v.* State, 125 Ga. 266, 54 S. E. 168; Davis *v.* State, 120 Ga. 433, 48 S. E. 180; Smith *v.* State, 77 Ga. 705.

Idaho.— State *v.* Baker, 6 Ida. 496, 56 Pac. 81.

Illinois.— Newman *v.* People, 223 Ill. 324, 79 N. E. 80.

Minnesota.— State *v.* Connelly, 57 Minn. 482, 59 N. W. 479.

Mississippi.—Allen *v.* State, (1908) 45 So. 833; Monroe *v.* State, 71 Miss. 196, 13 So. 884.

Missouri.— State *v.* Patrick, 107 Mo. 147, 17 S. W. 666, (1891) 15 S. W. 290. While it is the law that a conviction for rape may be sustained upon the uncorroborated evidence of the outraged female, it is nevertheless equally well settled that the appellate court will closely scrutinize the testimony upon which the conviction was obtained, and if it appears incredible and too unsubstantial will reverse the judgment. State *v.* Goodale, 210 Mo. 275, 109 S. W. 9.

Nebraska.— Maxfield *v.* State, 54 Nebr. 44, 74 N. W. 491; Richards *v.* State, 36 Nebr. 17, 53 N. W. 1027; Mathews *v.* State, 19 Nebr. 330, 27 N. W. 234.

New Mexico.— Mares *v.* Territory, 10 N. M. 770, 65 Pac. 165.

Oklahoma.— Sowers *v.* Territory, 6 Okla. 436, 50 Pac. 257.

Texas.— Topolanek *v.* State, 40 Tex. 160; Montresser *v.* State, 19 Tex. App. 281.

West Virginia.— State *v.* Perry, 41 W. Va. 641, 24 S. E. 634.

Wisconsin.— O'Boyle *v.* State, 100 Wis. 296, 75 N. W. 989.

Wyoming.— Tway *v.* State, 7 Wyo. 74, 50 Pac. 188.

See 42 Cent. Dig. tit. "Rape," §§ 83, 84.

Refusal of prosecutrix to submit to a medical examination does not, as a matter of law, so discredit her as to require her testimony to be corroborated. Barnett *v.* State, 83 Ala. 40, 3 So. 612.

Corroboration sufficient see People *v.* Rangod, 112 Cal. 669, 44 Pac. 1071 (evidence that defendant was seen coming from prosecutrix's room at five o'clock in the morning); Peckham *v.* People, 32 Colo. 140, 75 Pac. 422; Black *v.* State, 119 Ga. 746, 47 S. E. 370; Smith *v.* Com., 83 S. W. 647, 26 Ky. L. Rep. 1229; State *v.* De Witt, 186 Mo. 61, 84 S. W. 956; State *v.* Hert, 89 Mo. 590, 1 S. W. 830; Loar *v.* State, 76 Nebr. 148, 107 N. W. 229; Dunn *v.* State, 58 Nebr. 807, 79 N. W. 719; Fager *v.* State, 22 Nebr. 332, 35 N. W. 195; Territory *v.* Edie, 6 N. M. 555, 30 Pac. 851; Keith *v.* State, (Tex. Cr. App. 1900) 56 S. W. 628; McIntyre *v.* State, (Tex. Cr. App. 1897) 43 S. W. 104; State *v.* Roller, 30 Wash. 692, 71 Pac. 718; Hannon *v.* State, 70 Wis. 448, 36 N. W. 1. The evidence corroborative of the prosecutrix need not tend directly to connect defendant with the offense charged. People *v.* Ah Lung, 2 Cal. App. 278, 83 Pac. 296.

87. *Illinois.*— Cunningham *v.* People, 210 Ill. 410, 71 N. E. 389; Keller *v.* People, 204 Ill. 604, 68 N. E. 512.

Minnesota.— State *v.* Cowing, 99 Minn. 123, 108 N. W. 851.

Nebraska.— Klawitter *v.* State, 76 Nebr. 49, 107 N. W. 121; Livinghouse *v.* State, 76 Nebr. 491, 107 N. W. 854.

Texas.— Rushing *v.* State, (Cr. App. 1904) 80 S. W. 527; Donoghue *v.* State, (Cr. App. 1904) 79 S. W. 309; Adkins *v.* State, (Cr. App. 1901) 65 S. W. 924; Kee *v.* State, (Cr. App. 1901) 65 S. W. 517; Arnett *v.* State, 40 Tex. Cr. 617, 51 S. W. 385.

Virginia.— Harvey *v.* Com., 103 Va. 850, 49 S. E. 481.

Wyoming.— Tway *v.* State, 7 Wyo. 74, 50 Pac. 188.

88. Johnson *v.* People, 197 Ill. 48, 64 N. E. 286; People *v.* Randall, 133 Mich. 516, 95 N. W. 551; State *v.* Marcks, 140 Mo. 656, 41 S. W. 973, 43 S. W. 1095 [*overruling* in part State *v.* Patrick, 107 Mo. 147, 17 S. W. 666]; State *v.* Dusenberry, 112 Mo. 277, 20 S. W. 461; State *v.* Wilcox, 111 Mo. 569, 20 S. W. 314, 33 Am. St. Rep. 551; Harmon *v.* Territory, 15 Okla. 147, 79 Pac. 765 [*overruling* Sowers *v.* Territory, 6 Okla. 436, 50 Pac. 257]. And see People *v.* Miller, 96 Mich. 119, 55 N. W. 675; Tway *v.* State, 7 Wyo. 74, 50 Pac. 188. *Contra*, Harris *v.* State, 80 Nebr. 195, 114 N. W. 168; Burk *v.* State, 79 Nebr. 241, 112 N. W. 573; Fitzgerald *v.* State, 78 Nebr. 1, 110 N. W. 676; Mathews *v.* State, 19 Nebr. 330, 27 N. W. 234; Mares *v.* Territory, 10 N. M. 770, 65 Pac. 165, holding also that a disclosure of the offense by the prosecutrix for the first time four months after its occurrence has no value whatever as a corroborating circumstance.

Corroboration sufficient see Richards *v.* State, 65 Nebr. 808, 91 N. W. 878; George *v.* State, 61 Nebr. 669, 85 N. W. 840; Dunn

(II) *UNDER STATUTES.* In some states it is provided by statute that there can be no conviction of rape upon the testimony of the female "unsupported by other evidence," [89] or unless she is corroborated by other evidence "tending to connect the defendant with the commission of the offense," [90] or "by such other evidence as tends to convict the defendant of the commission of the offense." [91] Where there is any corroborating evidence, its sufficiency is for the jury,[92] but

v. State, 58 Nebr. 807, 79 N. W. 719; Hammond *v.* State, 39 Nebr. 252, 58 N. W. 92; Fager *v.* State, 22 Nebr. 332, 35 N. W. 195.

Evidence insufficient see Tway *v.* State, 7 Wyo. 74, 50 Pac. 188. Evidence that accused was frequently with prosecuting witness is insufficient to corroborate her testimony. Fitzgerald *v.* State, 78 Nebr. 1, 110 N. W. 676.

89. N. Y. Pen. Code, § 283.

Sufficient corroboration.— It is not necessary that the prosecutrix should be corroborated upon all the material points of her testimony. People *v.* Terwilliger, 74 Hun (N. Y.) 310, 26 N. Y. Suppl. 674 [*affirmed* in 142 N. Y. 629, 37 N. E. 565]. The corroborating evidence need not include testimony of an eye-witness of the act itself, or extend to everything said or done. People *v.* Adams, 72 N. Y. App. Div. 166, 76 N. Y. Suppl. 361. It may be by circumstantial evidence. People *v.* Grauer, 12 N. Y. App. Div. 464, 42 N. Y. Suppl. 721. Corroboration held sufficient see People *v.* Biglizen, 112 N. Y. App. Div. 225, 98 N. Y. Suppl. 361; People *v.* Hosmer, 66 N. Y. App. Div. 616, 72 N. Y. Suppl. 480; People *v.* Terwilliger, *supra*; People *v.* McKeon, 64 Hun (N. Y.) 504, 19 N. Y. Suppl. 486; People *v.* Cullen, 53 Hun (N. Y.) 629, 5 N. Y. Suppl. 886; People *v.* Morris, 12 N. Y. Suppl. 492.

Insufficient corroboration.— There must be corroborating evidence fairly tending to prove that the crime was committed, and that it was committed by defendant. People *v.* Terwilliger, 74 Hun (N. Y.) 310, 26 N. Y. Suppl. 674 [*affirmed* in 142 N. Y. 629, 37 N. E. 565]. "The corroborative evidence, whether consisting of acts or admissions, must at least be of such a character and quality as tends to prove the guilt of the accused by connecting him with the crime. . . . The corroboration must extend to every material fact essential to constitute the crime." People *v.* Page, 162 N. Y. 272, 274, 56 N. E. 750 [*reversing* 20 N. Y. App. Div. 637, 47 N. Y. Suppl. 1145]. Corroboration held insufficient see People *v.* Page, *supra* (evidence that defendant did not deny prosecutrix's declaration, made out of court, charging him with the crime, when repeated to him by a witness, and his admission to another witness that he had "insulted the girl," where it did not appear when, where, or how the insult was given); People *v.* Green, 103 N. Y. App. Div. 79, 92 N. Y. Suppl. 508; People *v.* Robertson, 88 N. Y. App. Div. 198, 84 N. Y. Suppl. 401; People *v.* Haischer, 81 N. Y. App. Div. 559, 81 N. Y. Suppl. 79; People *v.* Butler, 55 N. Y. App. Div. 361, 66 N. Y. Suppl. 851 (testimony of physician who examined prosecutrix twenty months after the alleged crime, that at the time of such examination she was not a virgin).

90. Iowa Code (1897), § 5488.

Corpus delicti.— Under this provision the *corpus delicti* — the fact that the crime has been committed by someone — may be established by the testimony of the prosecutrix alone, without corroboration. State *v.* Ralston, (Iowa 1908) 116 N. W. 1058; State *v.* Cassidy, 85 Iowa 145, 52 N. W. 1; State *v.* McLaughlin, 44 Iowa 82.

Connecting defendant with crime.— But there must be corroborating evidence tending to connect defendant with the commission of the crime. State *v.* McLaughlin, 44 Iowa 82; and other cases cited *infra*, this note.

Sufficient corroboration.— It is sufficient if the corroborating evidence tends to strengthen and corroborate the prosecutrix in connecting defendant with the commission of the offense. State *v.* French, 96 Iowa 255, 65 N. W. 156. Corroboration held sufficient see State *v.* Ralston, (Iowa 1908) 116 N. W. 1058; State *v.* McCausland, 137 Iowa 354, 113 N. W. 852; State *v.* Stevens, 133 Iowa 684, 110 N. W. 1037; State *v.* Waters, 132 Iowa 481, 109 N. W. 1013; State *v.* Crouch, 130 Iowa 478, 107 N. W. 173; State *v.* Norris, 127 Iowa 683, 104 N. W. 282; State *v.* Forsythe, 99 Iowa 1, 68 N. W. 446 (defendant's admissions of intercourse); State *v.* Cook, 92 Iowa 483, 61 N. W. 185; State *v.* Sigg, 86 Iowa 746, 53 N. W. 261; State *v.* Cassidy, 85 Iowa 145, 52 N. W. 1 (defendant's admission of fact of sexual intercourse); State *v.* Watson, 81 Iowa 380, 46 N. W. 868; State *v.* Mitchell, 68 Iowa 116, 26 N. W. 44; State *v.* Comstock, 46 Iowa 265. Where there is other corroborating evidence connecting accused with the commission of a rape, and there is evidence of flight, the latter may be considered as furnishing additional corroboration. State *v.* Ralston, *supra*.

Insufficent corroboration see State *v.* Egbert, 125 Iowa 443, 101 N. W. 191; State *v.* Kunhi, 119 Iowa 461, 93 N. W. 342; State *v.* Wheeler, 116 Iowa 212, 89 N. W. 978 (mere opportunity, bruises on prosecutrix, and the fact that she made complaint, insufficient); State *v.* Chapman, 88 Iowa 254, 55 N. W. 489; State *v.* Stowell, 60 Iowa 535, 15 N. W. 417.

91. Wash. Laws (1907), p. 396, c. 170.

Sufficient corroboration see State *v.* Jonas, 48 Wash. 133, 92 Pac. 899.

92. State *v.* Bricker, 135 Iowa 343, 112 N. W. 645; State *v.* Waters, 132 Iowa 481, 109 N. W. 1013; State *v.* Crouch, 130 Iowa

whether there is any corroborating evidence is a question of law for the court, and it is error to submit such question to the jury.[93] Where the statute in terms applies to rape only, it does not require corroboration to convict of attempt or assault with intent to rape.[94]

C. Trial — 1. In General. Of course the rules in relation to trials in criminal cases generally which have been elsewhere stated apply in prosecutions for rape and in prosecutions for attempt to rape or for assault with intent to rape;[95] including the rules governing the reception of evidence,[96] objections to evidence and motions to strike out,[97] remarks and conduct of the judge,[98] argument and

478, 107 N. W. 173; State *v.* Norris, 127 Iowa 683, 104 N. W. 282; State *v.* McLaughlin, 44 Iowa 82; State *v.* Bailey, 50 La. Ann. 533, 23 So. 603; People *v.* Cullen, 1 Silv. Sup. (N. Y.) 424, 5 N. Y. Suppl. 886.

93. State *v.* Bricker, 135 Iowa 343, 112 N. W. 645; State *v.* Crouch, 130 Iowa 478, 107 N. W. 173; People *v.* Page, 162 N. Y. 272, 56 N. E. 750 [*reversing* 20 N. Y. App. Div. 637, 47 N. Y. Suppl. 1145].

94. State *v.* Cook, 92 Iowa 483, 61 N. W. 185; State *v.* Montgomery, 79 Iowa 737, 45 N. W. 292; State *v.* Grossheim, 79 Iowa 75, 44 N. W. 541; State *v.* Hatfield, 75 Iowa 592, 39 N. W. 910 [*explaining* State *v.* Stowell, 60 Iowa 535, 15 N. W. 417]; People *v.* Kirwan, 22 N. Y. Suppl. 160. And see Fields *v.* State, 2 Ga. App. 41, 58 S. E. 327.

In Iowa the rule is now extended by statute to prosecutions for assault with intent to commit rape. Iowa Code (1897), § 5488.

95. See Criminal Law, 12 Cyc. 504 *et seq.*

96. See Criminal Law, 12 Cyc. 543 *et seq.* On trial for rape it was not error for the court to allow the prosecutrix, after she had stated facts brought out on cross-examination by the defense to show consent, to be questioned in rebuttal by the state as to whether or not she consented to the sexual intercourse with defendant. Jones *v.* State, 104 Ala. 30, 16 So. 135. Where, upon trial of an indictment for rape, the prosecutrix stated the substance of the vulgar language used by defendant in making his assault upon her, and another witness stated the exact words, and the court refused to compel the prosecutrix to state the exact words, it was held no error. State *v.* Hatfield, 72 Mo. 518.

Order of proof see Criminal Law, 12 Cyc. 555. It is not reversible error for the court after examination of the evidence, and after the argument on both sides is closed, to permit the prosecution to prove where the offense was committed. Harker *v.* State, 8 Blackf. (Ind.) 540. It is not an abuse of discretion for the court to permit the prosecution, after both parties have rested, to recall the prosecutrix to testify that defendant never had sexual intercourse with her with her consent, especially where defendant has testified that he had a few days before the alleged rape was committed. State *v.* Case, 96 Iowa 264, 65 N. W. 149. It is not necessary that a woman who has been criminally assaulted should first be examined on an indictment against her assailant, before corroborative evidence can be introduced. Proctor *v.* Com., 20 S. W. 213, 14 Ky. L. Rep. 248.

Compelling calling of witnesses see Criminal Law, 12 Cyc. 548. Where the principal contest is over the age of the prosecutrix, the prosecuting attorney has no right to refuse to call as a witness one of two persons present at her birth because the testimony of such person will contradict that of the other witnesses for the prosecution. People *v.* Etter, 81 Mich. 570, 45 N. W. 1109. And the prosecuting attorney should call as a witness a physician who examined the person of the prosecutrix after the alleged rape. Donaldson *v.* Com., 95 Pa. St. 21. But where the prosecutrix was defendant's eight-year-old sister, it was held that the court's refusal to compel the state to make her its witness was not error. Bozeman *v.* State, 34 Tex. Cr. 503, 31 S. W. 389.

Permitting relative to sit by prosecuting witness.— On the trial of an indictment for rape, it was held not error for the judge to permit an aunt of the prosecutrix, who was a girl under ten years of age, to sit by her during her examination as a witness, warning the aunt not to speak to or prompt her, which warning was in no manner violated. Rodgers *v.* State, 30 Tex. App. 510, 17 S. W. 1077.

97. See Criminal Law, 12 Cyc. 561 *et seq.*; and People *v.* Moore, 86 Mich. 134, 48 N. W. 693 (insufficient objection to evidence); Turney *v.* State, 8 Sm. & M. (Miss.) 104, 47 Am. Dec. 74 (evidence admissible in part).

Dictation by parent.— In a prosecution for raping a child, where she stated on cross-examination that her mother had told her to say everything that defendant had done to her, and that she had not told on the previous day what he had done to her, because her mother had not told her to, it was held not to justify a motion to strike her evidence, as being what her mother told her, as it merely showed that she instructed her to make a full disclosure of what happened. State *v.* Steffens, 116 Iowa 227, 89 N. W. 974.

98. See Criminal Law, 12 Cyc. 538 *et seq.*; Senior *v.* State, 97 Ga. 185, 22 S. E. 404; Shirwin *v.* People, 69 Ill. 55; State *v.* Philpot, 97 Iowa 365, 66 N. W. 730; State *v.* Hatfield, 75 Iowa 592, 39 N. W. 910; State *v.* Donovan, 61 Iowa 369, 16 N. W. 206.

conduct of the prosecuting attorney,[99] custody and conduct of the jury,[1] remarks and applause of bystanders,[2] etc.

2. Election Between Acts — a. In General. Where the indictment charges but a single act and two or more are disclosed by the evidence, the prosecution should be compelled, on motion of defendant, to elect on which one it will rely,[3] and when an election is made it is error not to exclude from the jury all testimony with reference to other acts which does not tend directly to prove the particular act relied on.[4] When evidence is introduced tending directly to the proof of one act and for the purpose of procuring a conviction upon it, an election is regarded

99. See Criminal Law, 12 Cyc. 568 *et seq.*; and People *v.* Duncan, 104 Mich. 460, 62 N. W. 556; State *v.* Robertson, 26 S. C. 117, 1 S. E. 443; Thompson *v.* State, 33 Tex. Cr. 472, 26 S. W. 987; Exon *v.* State, 33 Tex. Cr. 461, 26 S. W. 1088.

Offer and presentation of evidence see Criminal Law, 12 Cyc. 571. A conviction of assault with intent to rape will not be reversed because the prosecuting attorney offered to show that defendant on several occasions before the commission of the offense charged had committed similar acts, where the court refused to permit him to do so. People *v.* Ricketts, 108 Mich. 584, 66 N. W. 483. But where, on a trial for rape, the prosecuting attorney, on cross-examination, asked defendant "if, on the day succeeding that on which it was alleged he committed the crime, he did not go to the residence of one B. and there finding Miss B. the daughter of B. alone, did not attempt to drag her to a lounge," etc., and then stated to the court, in the presence of the jury, "We intend to follow this matter up and show that he went right over to B.'s, and there tried to kiss and hug Miss B. and drag her to the lounge," Miss B. having been summoned as a witness by the state, and being then present in court, it was held that such conduct of the prosecuting attorney was unwarranted and prejudicial to the accused. Leahy *v.* State, 31 Nebr. 566, 48 N. W. 390.

Pointing out defendant before identification. — Where the prosecutrix identified defendant as her assailant, the fact that the prosecuting attorney pointed him out to her before she was asked whether she could see him in the court-room is not such misconduct as to require reversal of a conviction, although it may weaken the credit to be given her testimony. State *v.* Blunt, 59 Iowa 468, 13 N. W. 427.

Kissing child of prosecutrix. — In a prosecution for rape the act of counsel for the state in kissing, in the presence of the jury, a child born to prosecutrix, had no tendency to prove that defendant was the father of the child — the point in controversy — or that counsel thought so, and as evidence was clearly immaterial. State *v.* Danforth, 73 N. H. 215, 60 Atl. 839, 111 Am. St. Rep. 600.

1. See Criminal Law, 12 Cyc. 668, 688 *et seq.*; and People *v.* Cullen, 1 Silv. Sup. (N. Y.) 424, 5 N. Y. Suppl. 886; Mitchell *v.* Com., 89 Va. 826, 17 S. E. 480.

2. See Criminal Law, 12 Cyc. 522; and State *v.* Dusenberry, 112 Mo. 277, 20 S. W. 461; Brake *v.* State, 4 Baxt. (Tenn.) 361.

3. *California.* — People *v.* Williams, 133 Cal. 165, 65 Pac. 323; People *v.* Castro, 133 Cal. 11, 65 Pac. 13.

Iowa. — State *v.* King, 117 Iowa 484, 91 N. W. 768; State *v.* Brown, 58 Iowa 298, 12 N. W. 318.

Kansas. — State *v.* Bonsor, 49 Kan. 758, 31 Pac. 736.

Maine. — State *v.* Acheson, 91 Me. 240, 39 Atl. 570.

Minnesota. — State *v.* Masteller, 45 Minn. 128, 47 N. W. 541.

New York. — People *v.* Flaherty, 162 N. Y. 532, 57 N. E. 73 [*reversing* 27 N. Y. App. Div. 535, 50 N. Y. Suppl. 574].

North Carolina. — State *v.* Parish, 104 N. C. 679, 10 S. E. 457.

Texas. — Stone *v.* State, 45 Tex. Cr. 91, 73 S. W. 956.

Utah. — State *v.* Hilberg, 22 Utah 27, 61 Pac. 215.

See, generally, Indictments and Informations, 22 Cyc. 406.

Compare, however, State *v.* Scott, 172 Mo. 536, 72 S. W. 897.

Election sufficient see Leedom *v.* State, 81 Nebr. 585, 116 N. W. 496.

Failure to move for election. — Where different acts of intercourse are introduced without objection and no motion is made to compel the prosecution to elect, defendant cannot complain on appeal because no actual election was made. In such case the prosecution has a right to select from the acts proved, all being within the period of limitations, the particular one upon which it will rely for conviction, and in the absence of any express election from the record, it will be presumed that the prosecution elected to stand by the offense it first introduced evidence to establish, and that evidence of other acts was introduced, not to prove substantive offenses, but in corroboration and explanation of the evidence of the act charged. Mitchell *v.* People, 24 Colo. 532, 52 Pac. 671.

4. State *v.* Bonsor, 49 Kan. 758, 31 Pac. 736; Stone *v.* State, 45 Tex. Cr. 91, 73 S. W. 956. And see *infra*, II, C, 4, a.

Other acts tending directly to prove the act relied on may be considered. People *v.* Williams, 133 Cal. 165, 65 Pac. 323; People *v.* Castro, 133 Cal. 11, 65 Pac. 13; State *v.* Scott, 172 Mo. 536, 72 S. W. 897, previous attempts. See *supra*, II, B, 2, t.

as made of that act.[5] Where, however, the indictment contains several counts the court may in its discretion refuse to compel the prosecution to elect between them, if defendant will not be prejudiced.[6] And where an indictment charges in one count an assault and battery and rape, the state cannot be compelled to elect between the assault and battery and the rape.[7]

b. Time of Election. Some of the courts hold that the election should be made as soon as the evidence discloses more than one act,[8] while others hold that the court may in its discretion permit proof of several acts before requiring an election.[9] But an election must be made before defendant is required to introduce his evidence.[10]

3. Questions of Law and Fact. The rules in criminal prosecutions generally as to questions of law and fact and the respective province of court and jury apply to prosecutions for rape, questions of law being for the court and questions of fact for the jury.[11]

4. Instructions — a. In General. The general rules as to instructions in criminal cases apply in prosecutions for rape.[12] The instructions of the court

5. People *v.* Williams, 133 Cal. 165, 65 Pac. 323; State *v.* Acheson, 91 Me. 240, 39 Atl. 570; State *v.* Hilberg, 22 Utah 27, 61 Pac. 215. See Indictments and Informations, 22 Cyc. 408, 409.

Abandonment as to act first proved.— On an indictment for carnally knowing and abusing a child under the age of ten years, where the state has proved the commission of the offense on the day laid in the indictment, but it is shown that the child was ten years old on that day, the state cannot then abandon the prosecution as to that offense, and proceed to introduce evidence of a similar offense committed on a previous day, although it might, in the first instance, show its commission on a day other than that laid in the indictment. State *v.* Mastel'er, 45 Minn. 128, 47 N. W. 541.

Duty to restrict jury.— Where, after evidence of other assaults independent of the one charged had been admitted, the jury were instructed that, if they were satisfied that on any date while the complainant lived in defendant's house he was guilty of the charge, it was their duty to convict him, it was held error. State *v.* Acheson, 91 Me. 240, 39 Atl. 570; Henderson *v.* State, 49 Tex. Cr. 511, 93 S. W. 550.

6. People *v.* Walker, 113 Mich. 367, 71 N. W. 641; State *v.* Parish, 104 N. C. 679, 10 S. E. 457; State *v.* Fitzsimon, 18 R. I. 236, 27 Atl. 446, 49 Am. St. Rep. 766. See Indictments and Informations, 22 Cyc. 405; and *supra*, II, A, 3, d. But where a defendant was indicted for rape, and on a separate count for assault with intent to ravish, and an election was made by the prosecution at defendant's request to go to trial on the greater charge, it was held that the court would not permit a conviction for a simple assault, or for the less offense. Com. *v.* Bass, 4 Kulp (Pa.) 76.

Failure to require election not prejudicial. —Where an indictment contained two counts, one charging rape in the second degree, and the other assault in the second degree, and defendant was convicted of rape, which was proven, the refusal to compel an election between the two counts was not prejudicial to defendant. People *v.* Garner, 64 N. Y. App. Div. 410, 72 N. Y. Suppl. 66 [*affirmed* in 169 N. Y. 585, 62 N. E. 1099].

Misdemeanors charged in separate counts see Reg. *v.* Davies, 5 Cox C. C. 328, where separate counts charged distinct assaults with intent to ravish.

Principals in first degree and aiders and abetters see Rex *v.* Folkes, 1 Moody C. C. 354.

7. Mills *v.* State, 52 Ind. 187. See *supra*, II, A, 5; and Indictments and Informations, 22 Cyc. 470.

8. People *v.* Williams, 133 Cal. 165, 65 Pac. 323; People *v.* Flaherty, 162 N. Y. 532, 57 N. E. 73 [*reversing* 27 N. Y. App. Div. 535, 50 N. Y. Suppl. 574].

9. State *v.* Acheson, 91 Me. 240, 39 Atl. 570; State *v.* Parish, 104 N. C. 679, 10 S. E. 457. See Indictments and Informations, 22 Cyc. 408.

10. See Indictments and Informations, 22 Cyc. 408.

11. See Criminal Law, 12 Cyc. 587 *et seq.*; and State *v.* Sigg, 86 Iowa 746, 53 N. W. 261; State *v.* Mylor, 46 Iowa 192 (impeachment of witness); State *v.* McLaughlin, 44 Iowa 82; People *v.* Courier, 79 Mich. 366, 44 N. W. 571 (intent); State *v.* Peter, 53 N. C. 19 (effect of long silence on part of prosecutrix); Stout *v.* State, 22 Tex. App. 339, 3 S. W. 231.

Corroboration of prosecutrix see *supra*, II, B, 3, m, (II).

12. See Criminal Law, 12 Cyc. 611 *et seq.*

Assumption of facts see Hawkins *v.* State, 136 Ind. 630, 36 N. E. 419 (age of prosecutrix); Newton *v.* State, (Miss. 1893) 12 So. 560 (commission of offense). It is error to refer in the charge to the prosecutrix as having been "raped" or to the alleged crime as having been committed. Brown *v.* State, 72 Miss. 997, 17 So. 278. See Criminal Law, 12 Cyc. 601.

As to admissions and confessions see Hogan *v.* State, 46 Miss. 274; and Criminal Law, 12 Cyc. 600, 628.

must apply to the case as made by the evidence.[13] They should not be given on abstract propositions of law without evidence to make them applicable to the case at bar.[14] If there is any phase of the evidence consistent with the innocence of defendant the court should instruct the jury with reference thereto.[15] It is not

As to alibi see State *v.* Ferris, 81 Conn. 97, 70 Atl. 587.

As to credibility of witnesses see Richie *v.* State, 58 Ind. 355; Barnard *v.* State, 88 Wis. 656, 60 N. W. 1058; and CRIMINAL LAW, 12 Cyc. 604, 636.

As to credibility of defendant see Chambers *v.* People, 105 Ill. 409; and CRIMINAL LAW, 12 Cyc. 608, 637.

As to inference from evidence see State *v.* Smalls, 24 S. C. 591.

As to presumptions and burden of proof see People *v.* Crowl, (Cal. 1893) 34 Pac. 860; People *v.* McWhorter, 93 Mich. 641, 53 N. W. 780; and CRIMINAL LAW, 12 Cyc. 609, 621.

As to purpose and effect of impeaching evidence see State *v.* Gaston, 96 Iowa 505, 65 N. W. 415; and CRIMINAL LAW, 12 Cyc. 607, 631, 637.

Undue prominence to particular matters see Coon *v.* People, 99 Ill. 368, 39 Am. Rep. 28; and CRIMINAL LAW, 12 Cyc. 649.

13. *Alabama.*— Barnett *v.* State, 83 Ala. 40, 3 So. 612, holding that an instruction, omitting parts of the evidence bearing on the question, that the fact, if proven, that the clothes of the prosecutrix were not soiled, and that she was not hurt, are circumstances from which the jury can infer her consent, was properly refused.

Georgia.— Bryant *v.* State, 114 Ga. 861, 40 S. E. 995.

Iowa.— State *v.* Sheets, 127 Iowa 73, 102 N. W. 415; State *v.* McDonough, 104 Iowa 6, 73 N. W. 357.

Kentucky.— Paynter *v.* Com., 55 S. W. 687, 21 Ky. L. Rep. 1562. Since, under St. (1903) § 1154, providing that whoever unlawfully carnally knows a female of and above twelve years of age, against her will and consent, or by force, or whilst she is insensible, shall be guilty of rape, the crime may be committed by any one of the enumerated modes, it is not error to omit from an instruction the word "forcibly," it embracing the other modes, and being based on the indictment and evidence. Webb *v.* Com., 99 S. W. 909, 30 Ky. L. Rep. 841.

Texas.— Fulcher *v.* State, 41 Tex. 233; Henderson *v.* State, 49 Tex. Cr. 511, 93 S. W. 550; Herbert *v.* State, 49 Tex. Cr. 72, 90 S. W. 653; Suggs *v.* State, 46 Tex. Cr. 151, 79 S. W. 307; Serio *v.* State, 22 Tex. App. 633, 3 S. W. 784; Cooper *v.* State, 22 Tex. App. 419, 3 S. W. 334.

Wisconsin.— Bannen *v.* State, 115 Wis. 317, 91 N. W. 107, 965.

14. *Alabama.*— Shepherd *v.* State, 135 Ala. 9, 33 So. 268; Dryman *v.* State, 102 Ala. 130, 15 So. 433; Richardson *v.* State, 54 Ala. 158.

Arkansas.— Meisenheimer *v.* State, 73 Ark. 407, 84 S. W. 494.

California.— People *v.* Jailles, 146 Cal. 301, 79 Pac. 965.

Colorado.— Donaldson *v.* People, 33 Colo. 333, 80 Pac. 906; Wortman *v.* People, 25 Colo. 270, 53 Pac. 1053.

Georgia.— Coney *v.* State, 108 Ga. 773, 36 S. E. 907.

Illinois.— Chambers *v.* People, 105 Ill. 409.

Iowa.— State *v.* Steffens, 116 Iowa 227, 89 N. W. 974.

Michigan.— Brown *v.* People, 36 Mich. 203.

Missouri.— State *v.* Harris, 150 Mo. 56, 51 S. W. 481.

New York.— Higgins *v.* People, 58 N. Y. 377.

North Carolina.— State *v.* Finger, 131 N. C. 781, 42 S. E. 820.

Oregon.— State *v.* Birchard, 35 Oreg. 484, 59 Pac. 468.

Texas.— Halsell *v.* State, 53 Tex. Cr. 510, 110 S. W. 441; Baldridge *v.* State, 45 Tex. Cr. 193, 74 S. W. 916; Smith *v.* State, 44 Tex. Cr. 137, 68 S. W. 995, 100 Am. St. Rep. 849, 44 Tex. Cr. 606, 73 S. W. 400; Thomas *v.* State, (Cr. App. 1902) 70 S. W. 93; McIntyre *v.* State, (Cr. App. 1897) 43 S. W. 104; Caruth *v.* State, (Cr. App. 1894) 28 S. W. 532. *Compare* Railsback *v.* State, 53 Tex. Cr. 542, 110 S. W. 916.

Vermont.— State *v.* Wilkins, 66 Vt. 1, 28 Atl. 323.

15. *Michigan.*— Where there is evidence to show that respondent never committed any assault upon the prosecutrix, and that her whole story is a fabrication, it is error for the judge to ignore this defense in his charge, and to proceed upon the assumption that respondent's theory of the case was that the assault did not constitute rape because the girl did not make sufficient resistance. People *v.* Evans, 72 Mich. 367, 40 S. W. 473.

Mississippi.— On a prosecution for rape, the court should have given a requested instruction to the effect that if the jury believed that there might be some person who committed the crime, and the name of that person had not been disclosed by the evidence, it was not required of the defendant to show the name of any such person. Jeffries *v.* State, 89 Miss. 643, 42 So. 801.

Missouri.— The court erred in refusing an instruction that the continuation by prosecutrix of friendly intercourse with defendant, after the alleged rape, was inconsistent with defendant's guilt, and rendered her charge improbable. State *v.* Patrick, 107 Mo. 147, 17 S. W. 666.

New York.— People *v.* Flaherty, 162 N. Y. 532, 57 N. E. 73.

Texas.— On indictment for the rape of a female alleged in one count to have been under ten years, and in the other above that age, the evidence as to her age was conflicting, and a preponderance of evidence showed

proper for the court to select one circumstance to the exclusion of all others in the evidence and charge the jury to acquit or convict on that alone.[16] Where there is evidence of other acts than that charged and relied upon for conviction, the court should instruct the jury as to the purpose of such evidence and properly restrict them to the act charged.[17] The absence of the female injured from the trial is not such a circumstance as to show that no crime has been committed,[18] nor should the jury be instructed that the failure of the husband of the prosecutrix to kill defendant on first sight discredits his testimony.[19]

b. Charging as to Less Offense. In most jurisdictions defendant indicted for rape or assault with intent to rape may be convicted for that offense or for any less offense embraced therein, as attempt to rape, assault with intent to commit rape, aggravated assault, or assault and battery, etc., and the court should so charge the jury;[20] but as a rule if the evidence shows that defendant was

consent and non-penetration. The court instructed the jury that if they believed that there was no such penetration, but that defendant made an assault upon the prosecuting witness, not to commit rape upon her, but with intent to have sexual intercourse with her, with her consent, then they should find defendant guilty of an aggravated assault. This was held error, as only presenting the question whether accused intended to have sexual intercourse with the female's consent, and not directing an acquittal if the jury found that she was over ten years of age and consented. Taylor *v.* State, 24 Tex. App. 299, 6 S. W. 42.

Washington.— State *v.* Griffin, 43 Wash. 591, 86 Pac. 951.

Wisconsin.— Lanphere *v.* State, 114 Wis. 193, 89 N. W. 128.

16. *Alabama.*— Where on a criminal prosecution the evidence as to the commission of the offense was in conflict, defendant's testimony showing him not guilty, it was proper to refuse to instruct that if the jury believed defendant's evidence they should acquit. Shepherd *v.* State, 135 Ala. 9, 33 So. 266.

Arkansas.— Pratt *v.* State, 51 Ark. 167, 10 S. W. 233.

California.— People *v.* Benc, 130 Cal. 159, 62 Pac. 404; People *v.* Mayes, 66 Cal. 597, 6 Pac. 691, 56 Am. Rep. 126.

Michigan.— On a prosecution for rape, the failure to refer in the charge to a quarrel between prosecutrix and defendant, which occurred after the commission of the offense, and before the making of the complaint, is not ground for reversal, in the absence of a request by defendant, when the court charged the jury to carefully weigh prosecutrix's testimony, her appearance and manner of testifying, and all other things bearing upon her testimony and credibility, and to consider the evidence of defendant, and all the evidence. People *v.* Harris, 103 Mich. 473, 61 N. W. 871.

Vermont.— State *v.* Willett, 78 Vt. 157, 62 Atl. 48.

Instructions properly refused as incomplete see Hooper *v.* State, 106 Ala. 41, 17 So. 679.

17. State *v.* Acheson, 91 Me. 240, 39 Atl. 570; Henderson *v.* State, 49 Tex. Cr. 511, 93 S. W. 550; Cox *v.* State, (Tex. Cr. App. 1898) 44 S. W. 157. In a prosecution for statutory rape, evidence of subsequent acts of illicit intercourse and that the accused attempted to have an abortion committed upon prosecutrix were properly limited by instructions to purposes of corroboration. Woodruff *v.* State, 72 Nebr. 815, 101 N. W. 1114. In a prosecution for rape, an instruction that if it appears that prosecutrix was under the age of sixteen and was not the wife of defendant when the intercourse took place, and that "such intercourse was had at any time within five years prior to the filing of the information in this case," then defendant was guilty, is not erroneous as allowing conviction for an act of intercourse occurring after the date of the alleged offense and before the date of filing the information, although prosecutrix might have attained the age of sixteen, and the act taken place after she reached that age and before the date of filing, or for any act occurring within the five years prior to the filing of the information, since the words "such intercourse" relate to the act of intercourse described in the information. State *v.* Connors, 37 Mont. 15, 94 Pac. 199. Such instruction is not erroneous, as the appeal being from the judgment, and the evidence not being brought up, the evidence must be presumed to relate to only one act of intercourse, and, in the absence of the evidence, the instructions are presumed to be applicable to the case made. State *v.* Connors, *supra*.

In case of election see *supra*, II, C, 2, a.

18. Coleman *v.* State, 111 Ind. 563, 13 N. E. 100.

19. Miles *v.* State, 93 Ga. 117, 19 S. E. 805, 44 Am. St. Rep. 140.

20. *Alabama.*— Smith *v.* State, 129 Ala. 89, 29 So. 699, 87 Am. St. Rep. 47.

Georgia.— Sutton *v.* State, 123 Ga. 125, 51 S. E. 316; Tiller *v.* State, 101 Ga. 530, 29 S. E. 424; Fields *v.* State, 2 Ga. App. 41, 58 S. E. 327.

Indiana.— Richie *v.* State, 58 Ind. 355.

Iowa.— State *v.* Blackburn, (1908) 114 N. W. 531; State *v.* Johnson, 133 Iowa 38, 110 N. W. 170; State *v.* Snider, 119 Iowa 15, 91 N. W. 762; State *v.* Wolf, 118 Iowa 564, 92 N. W. 673, 112 Iowa 458, 84 N. W. 536; State *v.* Trusty, 118 Iowa 498, 92 N. W.

guilty of the higher offense or nothing the court should not instruct as to the less offense.[21]

c. Penetration. In a prosecution for rape, the court must properly charge as to the necessity for penetration.[22] It is error to charge that penetration only

677; State *v.* Rudd, 97 Iowa 389, 66 N. W. 748; State *v.* Jerome, 82 Iowa 749, 48 N. W. 722; State *v.* Vinsant, 49 Iowa 241. Where the court instructs the jury that if the evidence showed that the accused was guilty either of rape, or assault with intent to commit rape, or assault and battery, or simple assault, he might be convicted of such offense, it is error not to further charge that if they had any reasonable doubt as to the degree of the offense of which he was guilty they should convict only of the lesser offense. State *v.* Neis, 68 Iowa 469, 27 N. W. 460 [*following* State *v.* Walters, 45 Iowa 389].

Kansas.— State *v.* Grubb, 55 Kan. 678, 41 Pac. 951.

Kentucky.— Bethel *v.* Com., 80 Ky. 256; Reed *v.* Com., 76 S. W. 838, 25 Ky. L. Rep. 1029.

Michigan.— People *v.* Ryno, 148 Mich. 137, 111 N. W. 740; People *v.* Courier, 79 Mich. 366, 44 N. W. 571.

Minnesota.— State *v.* Bagan, 41 Minn. 285, 43 N. W. 5.

North Carolina.— State *v.* Garner, 129 N. C. 536, 40 S. E. 6.

Oklahoma.— Vickers *v.* U. S., (Cr. App. 1908) 98 Pac. 467.

Texas.— Taylor *v.* State, 50 Tex. Cr. 362, 97 S. W. 94, 123 Am. St. Rep. 844; Neill *v.* State, 49 Tex. Cr. 219, 91 S. W. 791; Bartlett *v.* State, (Cr. App. 1899) 51 S. W. 918; Freeman *v.* State, 52 Tex. Cr. 500, 107 S. W. 1127; Washington *v.* State, 51 Tex. Cr. 542, 103 S. W. 879; Lee *v.* State, 47 Tex. Cr. 612, 85 S. W. 798; Amunsden *v.* State, (Cr. App. 1902) 67 S. W. 418; McAvoy *v.* Sate, 41 Tex. Cr. 56, 51 S. W. 928; Long *v.* State, (Cr. App. 1898) 46 S. W. 640; Cox *v.* State, (Cr. App. 1898) 44 S. W. 157; Shell *v.* State, (Cr. App. 1896) 38 S. W. 207; Russell *v.* State, 33 Tex. Cr. 424, 26 S. W. 990; Porter *v.* State, 33 Tex. Cr. 385, 26 S. W. 626; Shields *v.* State, 32 Tex. Cr. 498, 23 S. W. 893; Robertson *v.* State, 30 Tex. App. 498, 17 S. W. 1068; McGee *v.* State, 21 Tex. App. 670, 2 S. W. 890; Curry *v.* State, 4 Tex. App. 574. Where, on a trial for rape on a female eleven years of age, the prosecutrix testified that accused raped her, and the evidence indicated that it was done with her consent, and circumstances showed a lack of penetration, it was proper to charge an assault with intent to rape. Taylor *v.* State, *supra.*

Virginia.— Glover *v.* Com., 86 Va. 382, 10 S. E. 420.

Wisconsin.— Conners *v.* State, 47 Wis. 523, 2 N. W. 1143.

See 42 Cent. Dig. tit. "Rape." § 99.

21. *California.*— People *v.* Bailey, 142 Cal. 434, 76 Pac. 49; People *v.* Keith, 141 Cal. 686, 75 Pac. 304; People *v.* Baldwin, 117 Cal. 244, 49 Pac. 186.

Georgia.— Canida *v.* State, 130 Ga. 15, 60 S. E. 104; Bryant *v.* State, 114 Ga. 861, 40 S. E. 995; Harris *v.* State, 101 Ga. 530, 29 S. E. 423; Berry *v.* State, 87 Ga. 579, 13 S. E. 690; Johnson *v.* State, 73 Ga. 107.

Iowa.— State *v.* Stevens, 133 Iowa 684, 110 N. W. 1037; State *v.* King, 117 Iowa 484, 91 N. W. 768; State *v.* Steffens, 116 Iowa 227, 89 N. W. 974; State *v.* McDonough, 104 Iowa 6, 73 N. W. 357; State *v.* Beabout, 100 Iowa 155, 69 N. W. 429; State *v.* Casford, 76 Iowa 330, 41 N. W. 32.

Kentucky.— Webb *v.* Com., 99 S. W. 909, 30 Ky. L. Rep. 841; McLaughlin *v.* Com., 35 S. W. 1030, 18 Ky. L. Rep. 205. Under an indictment charging defendant with detaining a woman against her will with intent to have carnal knowledge with her, punishable under St. § 1158, it was not error to fail to instruct the jury as to assault, where there is no testimony tending to show an assault committed with any other intention than to have carnal knowledge with the prosecuting witness. Paynter *v.* Com., 55 S. W. 687, 21 Ky. L. Rep. 1562.

Michigan.— People *v.* Harris, 103 Mich. 473, 61 N. W. 871.

Missouri.— The rule requiring the court to instruct as to the law relating to a lesser degree of the crime charged, where the evidence is not conclusive as to defendant's guilt of the higher degree (State *v.* Branstetter, 65 Mo. 149), does not apply, in a case of rape, of which crime there are no degrees. State *v.* Johnson, 91 Mo. 439, 3 S. W. 868.

Pennsylvania.— Com. *v.* Peach, 170 Pa. St. 173, 32 Atl. 582.

Texas.— Halsell *v.* State, 53 Tex. Cr. 510, 110 S. W. 441; Holman *v.* State, (Cr. App. 1908) 106 S. W. 1165; Henderson *v.* State, 49 Tex. Cr. 511, 93 S. W. 550; Herbert *v.* State, 49 Tex. Cr. 72, 90 S. W. 653; Dusek *v.* State, 48 Tex. Cr. 517, 89 S. W. 271; Ricks *v.* State, 48 Tex. Cr. 229, 87 S. W. 345; Brown *v.* State, 48 Tex. Cr. 158, 87 S. W. 159; Bryant *v.* State, 46 Tex. Cr. 126, 79 S. W. 554; Hill *v.* State, (Cr. App. 1903) 77 S. W. 808; Taylor *v.* State, 44 Tex. Cr. 153, 69 S. W. 149; Taylor *v.* State, 24 Tex. App. 299, 6 S. W. 42.

Washington.— State *v.* Bailey, 31 Wash. 89, 71 Pac. 715.

Wisconsin.— Murphy *v.* State, 108 Wis. 111, 83 N. W. 1112.

Wyoming.— Ross *v.* State, 16 Wyo. 285, 93 Pac. 299, 94 Pac. 217.

See 42 Cent. Dig. tit. "Rape," § 99.

22. See *supra*, I, A, 2, e. (II). In a prosecution for assault on a female child, and for carnally knowing and abusing her, it was not error to refuse to charge that, while the slightest penetration of the female organ is sufficient to constitute rape, yet it must appear that the male organ actually pene-

is necessary to constitute the offense, since the other elements of the crime are also necessary;[23] but the other elements being present it is proper to charge that any sexual penetration however slight is sufficient.[24] The word "sexual" need not be used in describing penetration where the other parts of the charge show that sexual penetration is meant.[25] Where the court charges that actual penetration is sufficient it is proper to refuse to charge that defendant must have had sexual intercourse.[26] A charge that penetration may be shown by circumstantial evidence is correct.[27] Where sexual intercourse is admitted it is harmless error to charge that actual contact of the sexual organs constitutes sexual intercourse.[28]

d. Want of Consent, Force, and Resistance. Where the evidence raises an issue as to consent the court should properly charge the jury that force on the part of defendant and resistance on the part of the prosecutrix are essential to constitute the crime, and consent of prosecutrix however reluctantly given prevents the act being rape.[29] The jury should be instructed that mere non-consent

trated the genitals of the female, and the burden of proving what part of the female sexual organs constitutes the genitals is on the state. Williams *v.* State, 53 Fla. 84, 43 So. 431. See Banton *v.* State, 53 Tex. Cr. 251, 109 S. W. 159, holding that the charge did not authorize a conviction, although there was no evidence of penetration, or a reasonable doubt as to that fact.

23. Johnson *v.* State, 27 Tex. App. 163, 11 S. W. 106; Serio *v.* State, 22 Tex. App. 633, 3 S. W. 784.

24. *California.*— People *v.* Harlan, 133 Cal. 16, 65 Pac. 9.

Florida.— Ellis *v.* State, 25 Fla. 702, 6 So. 768.

Illinois.— Bean *v.* People, 124 Ill. 576, 16 N. E. 656.

New Mexico.— Territory *v.* Edie, 6 N. M. 555, 30 Pac. 851.

Texas.— Lujano *v.* State, 32 Tex. Cr. 414, 24 S. W. 97.

25. People *v.* Rangod, 112 Cal. 669, 44 Pac. 1071; People *v.* Sheffield, (Cal. App. 1908) 98 Pac. 67.

26. Since actual penetration by force without more is sufficient to sustain a conviction of rape, as provided by Code (1896), § 5445, a requested instruction that the jury must be convinced beyond a reasonable doubt that the defendant had "sexual intercourse" with prosecutrix, and that the act was committed by force, etc., was properly refused. Posey *v.* State, 143 Ala. 54, 38 So. 1019.

27. Hanes *v.* State, 155 Ind. 112, 57 N. E. 704; State *v.* Armstrong, 167 Mo. 257, 66 S. W. 961; State *v.* Welch, 41 Oreg. 35, 68 Pac. 808; Belcher *v.* State, 39 Tex. Cr. 121, 44 S. W. 1106. See *supra*, II, B, 3, h.

28. Territory *v.* Edie, 6 N. M. 555, 30 Pac. 851.

29. *Arkansas.*— Where the court charged that, to authorize conviction of rape, the jury must believe that accused had intercourse with prosecutrix forcibly and against her will, and that she did not yield consent during any part of the act, and that her will must have been overcome by force, violence, or fear, refusal to charge that her failure to prevent the offense by kicking, biting, striking, or outcry was a circumstance to be considered in determining whether the crime was actually committed, was not error. Maxey *v.* State, 66 Ark. 523, 52 S. W. 2.

Florida.— Cato *v.* State, 9 Fla. 163.

Illinois.— An instruction to the effect that if the jury believe, beyond a reasonable doubt, that defendant had sexual intercourse with the prosecutrix, yet if they further believe from the evidence that she consented thereto, although reluctantly, then they should acquit the defendant, although objectionable in permitting the inference that the prosecution was only required to prove the act of sexual intercourse beyond a reasonable doubt, is not misleading, when accompanied by another instruction to the effect that the jury should acquit the defendant if the prosecution failed to prove, beyond a reasonable doubt, not only the fact of sexual intercourse, but that such intercourse was forcible on defendant's part, and against the will of the prosecutrix. Sutton *v.* People, 145 Ill. 279, 34 N. E. 420.

Iowa.— State *v.* Philpot, 97 Iowa 365, 66 N. W. 730. A charge that, if the jury find that the prosecutrix did not consent to the act of intercourse, directly or by inference, they will be justified in finding that it was by force, while not to be approved, may not constitute prejudicial error when considered with the other charges. State *v.* Beabout, 100 Iowa 155, 69 N. W. 429. A charge that, to convict, the jury must be satisfied beyond a reasonable doubt that accused had carnal knowledge of prosecutrix forcibly and against her will, and that she did not yield her consent during any part of the act, was not objectionable as not exacting the utmost resistance of the female. State *v.* Whimpey, (1908) 118 N. W. 281.

Kentucky.— Brown *v.* Com., 102 Ky. 227, 43 S. W. 214, 19 Ky. L. Rep. 1174; Clymer *v.* Com., 64 S. W. 409, 23 Ky. L. Rep. 1041.

Michigan.— People *v.* Crego, 70 Mich. 319, 38 N. W. 281. An instruction on a trial for rape that to constitute rape it must be found that accused had intercourse with the prosecutrix by force and against her will, and that she did everything she could under the circumstances to prevent accused from accomplishing his purpose, and that accused could not be found guilty of an assault with intent to rape unless he intended

is not resistance,[30] or if the conduct of the woman was such as to create a belief in the mind of defendant that she was willing to have sexual intercourse with him they should acquit.[31] In reference to the degree of resistance required the jury should be instructed that it is necessary not that the prosecutrix should have made the uttermost resistance, but that she should have made such resistance as she was capable of making at the time;[32] and in this connection the jury may

to use the force necessary to accomplish his purpose, and that, if he touched the person of the prosecutrix in a rude and insolent manner, he was guilty of an assault and battery, was sufficiently explicit, in the absence of a request for further instructions. People *v.* Murphy, 145 Mich. 524, 108 N. W. 1009. To convict of rape, the jury must be satisfied beyond a reasonable doubt that the prosecutrix did not consent during any part of the sexual act; and a charge that, if she resisted as far as she was able under the circumstances, they should convict, even though she at last yielded, is misleading, and warrants a reversal, for "yielded" may be understood as meaning assented. Brown *v.* People, 36 Mich. 203.

Minnesota.—A charge on a trial for rape that there must have been force and violence on the part of the man, and actual resistance and opposition on the part of the woman to the full extent of her ability, although not specifically stating that the force must have been sufficient to overcome the resistance of the woman necessarily implied it, and must have been so understood by the jury. State *v.* Zempel, 103 Minn. 428, 115 N. W. 275.

Nebraska.— In a prosecution for rape, where there is a conflict in the testimony as to the resistance of the prosecutrix, and also as to the resort to force by the accused, it is error to refuse an instruction in substance cautioning the jury against prejudice which was liable to be aroused against the accused because of the heinous nature of the charge, and to call their attention to difficulty of defending against the accusation; and that if the carnal knowledge while she had the power to resist was with the voluntary consent of the woman, no matter how tardily given or how much force had previously been employed, it was no rape. Reynolds *v.* State, 27 Nebr. 90, 42 N. W. 903, 20 Am. St. Rep. 659.

Oklahoma.— Harmon *v.* Territory, 15 Okla. 147, 79 Pac. 765.

Oregon.— On a prosecution for rape, an instruction that prosecutrix must have at no time consented to the act, and that there must have been honest, actual, *bona fide* resistance, and that she must have used force to have prevented the act, as best she could, was not subject to the criticism that it did not state the degree of resistance required. State *v.* Colestock, 41 Oreg. 9, 67 Pac. 418.

South Carolina.— State *v.* Sudduth, 52 S. C. 488, 30 S. E. 408.

Texas.— Clark *v.* State, 30 Tex. 448; Perez *v.* State, 48 Tex. Cr. 225, 87 S. W. 350; Tyler *v.* State, 46 Tex. Cr. 10, 79 S. W. 558; Segrest *v.* State, (Cr. App. 1900) 57 S. W. 845; Fields *v.* State, 39 Tex. Cr. 488, 46 S. W. 814; Jones *v.* State, 10 Tex. App. 552; Jenkins *v.* State, 1 Tex. App. 346.

Wisconsin.— In a prosecution for rape the court instructed the jury as follows: "First. The element of force forms a material ingredient of the offense of rape, by which the resistance of the woman violated is overcome, or her consent induced by threats of personal violence, duress, or fraud; for unless the consent of the woman to the unlawful intercourse is freely and voluntarily given the offense of rape is complete. Second. If the circumstances show that the consent was obtained by the use of force, and the woman's will was overcome by fear of personal injury, then the crime is rape. Third. If the woman ultimately consented to the intercourse, such consent not being freely or voluntarily given, but being obtained through fear, threats, duress, or fraud, or partly by fear and partly by force, then the offense is rape." It was held that such instructions, so far as they related to consent, were calculated to mislead the jury. Whittaker *v.* State, 50 Wis. 518, 7 N. W. 431, 36 Am. Rep. 856.

See 42 Cent. Dig. tit. "Rape." § 94.

30. An instruction that defendant was guilty if he forcibly and against the will of prosecutrix carnally knew her, whether she made any active resistance or not, amounts to saying that passive resistance, silent objection, is enough, which is not true where resistance is not overcome by drugs or similar means. Anderson *v.* State, 82 Miss. 784, 35 So. 202. Where a woman is in possession of her natural mental and physical powers, and not terrified by threats, nor in such a position that resistance would be useless, her failure to resist intercourse amounts to consent; therefore a charge that, "if there is nonconsent of the woman, the force incident to the act" of intercourse is all the force that is necessary to constitute rape, is error, for omission to state the kind of non-consent the law requires. Mills *v.* U. S., 164 U. S. 644, 17 S. Ct. 210, 41 L. ed. 584.

31. Allen *v.* State, 87 Ala. 107, 6 So. 370; McQuirk *v.* State, 84 Ala. 435, 4 So. 775, 5 Am. St. Rep. 381.

32. *Arkansas.*—An instruction that force, as a necessary element in rape, is to be taken in its ordinary acceptation; that it is common physical force; that acts of violence by which the woman is so much in fear of death or bodily harm that she is unable to resist is equivalent to force; and that the resistance must be in good faith, and not a mere pretense, is sufficient, rendering unnecessary a further instruction that the woman must make the "uttermost resist-

properly be instructed to consider all attending acts and circumstances.[33] Where the female is over the statutory age of consent, but immature mentally and physically, the court should charge that if the jury are satisfied beyond a reasonable doubt that she is too young to feel desire or to be capable of physical consent they should convict, but if not so satisfied they should acquit defendant.[34]

e. Assault or Attempt and Intent. On a prosecution for attempt or assault with intent to rape, the court should instruct both as to the act necessary to constitute an attempt or assault and as to the intent.[35] It should charge the jury that unless they are satisfied beyond a reasonable doubt that defendant intended to have sexual intercourse with the prosecutrix and intended to use force sufficient to overcome all resistance on her part they should not convict him of attempt or assault with intent to commit rape,[36] unless, in most jurisdictions, the child

ance," or must "resist to the last extreme." Davis *v.* State, 63 Ark. 470, 39 S. W. 356.

Michigan.— People *v.* Lambert, 144 Mich. 578, 108 N. W. 345.

Mississippi.— Newton *v.* State, (1893) 12 So. 560.

Missouri.— State *v.* Dilts, 191 Mo. 665, 90 S. W. 782; State *v.* Harris, 150 Mo. 56, 51 S. W. 481; State *v.* Murphy, 118 Mo. 7, 25 S. W. 95; State *v.* Yocum, 117 Mo. 622, 23 S. W. 765.

Oregon.— State *v.* Colestock, 41 Oreg. 9, 67 Pac. 418.

Texas.— Payne *v.* State, 40 Tex. Cr. 202, 49 S. W. 604, 76 Am. St. Rep. 712.

33. *Illinois.*—An instruction that, in determining whether sexual intercourse was had against the will of complaining witness, the jury should take into consideration all the surrounding circumstances, the acquaintanceship of the parties, their relative physical strength, etc., is not erroneous as enumerating or giving undue prominence to immaterial circumstances; the jury being told to determine that question from all the facts in the case. Bean *v.* People, 124 Ill. 576, 16 N. E. 656.

Indiana.— Hawkins *v.* State, 136 Ind. 630, 36 N. E. 419.

Iowa.— State *v.* McDevitt, 69 Iowa 549, 29 N. W. 459.

Nebraska.— Welsh *v.* State, 60 Nebr. 101, 82 N. W. 368; Dunn *v.* State, 58 Nebr. 807, 79 N. W. 719; Hammond *v.* State, 39 Nebr. 252, 58 N. W. 92. On a trial of defendant for rape on his daughter, fourteen years of age, it was proper to charge the jury that "the amount of struggle and resistance necessary to be shown is not the same in all cases. A strong, able-bodied woman could protect herself when a child could not, and a father could overcome and subdue the will of his child, when a stranger could not." Hammond *v.* State, *supra.*

New York.— People *v.* Monnais, 17 Abb. Pr. 345.

Texas.— Kennon *v.* State, (Cr. App. 1897) 42 S. W. 376; Sharp *v.* State, 15 Tex. App. 171.

Virginia.— Mings *v.* Com., 85 Va. 638, 8 S. E. 474.

34. On a trial for rape on a child between ten and eleven years of age, where a charge was given that, if the child was incapable of consenting, defendant was guilty, a failure to charge that he was not guilty if she was capable was reversible error. Pounds *v.* State, 95 Ga. 475, 20 S. E. 247. Upon trial of an indictment for rape upon a girl eleven years and three months old, an instruction substantially that it was for the jury to determine from her age and appearance, and from the fact, if they believed it, that she was too young to feel desire and consent, whether or not she did consent, was held not to be erroneous; and one asked to the effect that, being over ten years of age, if she was mentally, although not physically, capable of consenting, it was no rape, to be properly refused. Joiner *v.* State, 62 Ga. 560. Where the female is nearly fourteen years old, but is shown by the evidence to be much below the average in physical and sexual development, it is not error to charge that the jury may take these facts into consideration on the questions of consent and resistance. People *v.* Lynch, 29 Mich. 274.

35. See *supra*, I, B, 2, d, e; and Rahke *v.* State, 168 Ind. 615, 81 N. E. 584; State *v.* Snider, 119 Iowa 15, 91 N. W. 762; State *v.* Garner, 129 N. C. 536, 40 S. E. 6. An instruction, on a trial for assault with intent to rape a female under the age of consent, that an attempt of a man to carnally know a female under the age of six years, whether with or without her consent, is an attempt to do a violent injury to her, states but one of the elements of assault as charged in the information alleging that accused attempted to commit a violent injury on the person of a female under the age of eighteen years, with intent to carnally know her, and is not objectionable as defining an attempt to commit a felony, or defining an offense unknown to the law. Ross *v.* State, 16 Wyo. 285, 93 Pac. 299, 94 Pac. 217.

36. *Illinois.*— Where the purpose of a requested instruction in a prosecution for an assault with intent to rape was to advise the jury that they might consider whether the "manner and conduct" of the prosecutrix encouraged defendant to make approaches and advances looking toward sexual intercourse, it was error to modify it so as to ignore the view that the prosecutrix's consent might be indicated by her "manner and conduct." Adams *v.* People, 179 Ill. 633, 54 N. E. 296.

is under the age of consent.[37] If the woman consents to the acts of defendant he is not guilty and the jury should be so instructed.[38] So if the jury believe he put his hands on the woman merely attempting to persuade her to consent they should be instructed that this would not constitute the crime.[39] The court should charge

Indiana.— Where, in a prosecution for assault to rape, the court charged that the state must establish beyond a reasonable doubt that defendant put his hands on prosecutrix's person with an intent to induce her thereby to submit against her will to sexual intercourse with him, and that he intended to have intercourse with her at the time he so laid or put his hands on her person, it was held that, the instruction being objectionable as eliminating the element of force, the phrase "against her will" did not cure the defect, but rendered the instruction misleading, ambiguous, and uncertain. Rahke *v.* State, 168 Ind. 615, 81 N. E. 584. An instruction that a woman assaulted with intent to rape was not required to resist with all violent means in her power, and was not required to do more than her age, strength, and all attendant circumstances made it reasonable for her to do, in order to manifest her opposition, provided the resistance was in good faith, was not objectionable, as misleading the jury to infer that, if defendant attempted to have intercourse with prosecutrix, and she did not consent expressly in words, that alone would warrant a conviction. Rahke *v.* State, *supra.*

Iowa.— State *v.* Snider, 119 Iowa 15, 91 N. W. 762; State *v.* Jerome, 82 Iowa 749, 48 N. W. 722; State *v.* McIntire, 66 Iowa 339, 23 N. W. 735; State *v.* Warner, 25 Iowa 200. An instruction, on a trial for rape, resulting in a conviction of accused for assault with intent to rape, that, if the jury should find that accused did not commit rape because prosecutrix consented to the sexual intercourse, yet, if they believed that such consent was not given until after accused had assaulted her with intent to rape, accused was guilty of assault with intent to rape, was not objectionable as permitting a conviction for assault with intent to rape, although prosecutrix consented to the assault. State *v.* Symens, 138 Iowa 113, 115 N. W. 878.

North Carolina.— State *v.* Garner, 129 N. C. 536, 40 S. E. 6.

Oregon.— State *v.* Chaims, 25 Oreg. 221, 35 Pac. 450.

Texas.— Freeman *v.* State, 52 Tex. Cr. 500, 107 S. W. 1127; Bawcom *v.* State, 49 Tex. Cr. 417, 94 S. W. 462; Hudson *v.* State, 49 Tex. Cr. 24, 90 S. W. 177; Lee *v.* State, 47 Tex. Cr. 612, 85 S. W. 798; Caddell *v.* State, 44 Tex. Cr. 213, 70 S. W. 91; Shell *v.* State, (Tex. Cr. App. 1896) 38 S. W. 207; Porter *v.* State, 33 Tex. Cr. 385, 26 S. W. 626; Williams *v.* State, (Tex. App. 1890) 13 S. W. 609; McCleavland *v.* State, 24 Tex. App. 202, 5 S. W. 664; Lights *v.* State, 21 Tex. App. 308, 17 S. W. 428; McGee *v.* State, 21 Tex. App. 670, 2 S. W. 890. Where, on a trial for assault with intent to rape, the evidence showed that accused caught prosecutrix, seventeen years old, and told her, on her beginning to scream, not to make a noise, and then began to beat and choke her and knocked her down twice, and that accused, on persons arriving on the scene, fled, an instruction that before the jury could convict they must believe that he entertained at the time the specific intent, and that, if he did not entertain the specific intent, the case should be tried on the question of an aggravated assault, properly submitted to the jury the question whether accused had some other intent. Washington *v.* State, 51 Tex. Cr. 542, 103 S. W. 879.

Washington.— State *v.* Courtemarch, 11 Wash. 446, 39 Pac. 955.

37. See *supra*, I, B, 2, g. On a trial for assault with intent to rape a child under the age of consent, an instruction that in determining whether the state proved the intent beyond a reasonable doubt, the jury must be satisfied that accused intended to gratify his passions on the person of the child, notwithstanding any resistance on her part, was properly refused, since it is the intent to carnally know a female under the age of eighteen years with or without her consent, coupled with an assault, which constitutes the offense. Ross *v.* State, 16 Wyo. 285, 93 Pac. 299, 94 Pac. 217.

38. Addison *v.* People, 193 Ill. 405, 62 N. E. 235; Adams *v.* People, 179 Ill. 633, 54 N. E. 296; Sunnafrank *v.* State, 64 Kan. 886, 67 Pac. 1103. It is error to charge that it is immaterial whether the prosecutrix consented or not; the consent referred to being voluntary. Hull *v.* State, 22 Wis. 580. Where, on a prosecution for assault with intent to rape, there was evidence of intimacy between the parties such as might lead defendant to believe his advances would not be objectionable, it was error to refuse an instruction that if defendant kissed and hugged prosecutrix, thinking it would not be objectionable, there was no assault. Kearse *v.* State, (Tex. Cr. App. 1905) 88 S. W. 363.

39. *Florida.*— On a prosecution for an assault with intent to commit rape, where there is evidence to justify it, it is error to refuse defendant's request to charge that "the request of the defendant to the prosecutrix to consent to an improper intercourse may be taken in consideration by the jury to disprove the fact that the defendant intended to commit rape." Hunter *v.* State, 29 Fla. 486, 10 So. 730.

Iowa.— State *v.* Canada, 68 Iowa 397, 27 N. W. 288.

North Carolina.— On a prosecution of a physician for assault with intent to rape on a girl seventeen years of age, in that he took improper liberties with her person, an instruction that if he acted in good faith as a physician, and did what he did as such, he is not guilty, "otherwise he is guilty," is

the jury that the assault must be made with such force as to indicate the intention to have sexual intercourse regardless of resistance, and that everything short of such degree of force is insufficient.[40]

f. Threats and Fear. The court should charge the jury that if resistance is precluded by threats and fear of personal violence the crime is complete.[41]

g. Woman Imbecile, Drugged, or Intoxicated. On a prosecution for rape, the court should instruct the jury that if the woman was so imbecile as to be incapable of giving consent, or if she was mentally or physically unable to resist as the result of drugs or intoxicants, rape could be committed without the use of physical force.[42] And they should be instructed that if the woman did not have sufficient intellect to consent any attempt to have sexual intercourse with her constituted assault with intent to commit rape.[43]

h. Female Under Age of Consent. It is proper to instruct the jury that carnal knowledge of a female under the age of consent is rape, and no particular words are necessary.[44] The question of consent, force, and resistance is immaterial,

erroneous, as, if she consented to the taking of the liberties, understanding that he was not acting in good faith as a physician, then he was not guilty. State *v.* Nash, 109 N. C. 824, 13 S. E. 874.

Texas.— Lee *v.* State, 47 Tex. Cr. 612, 85 S. W. 798.

Wisconsin.— Bannen *v.* State, 115 Wis. 317, 91 N. W. 107, 965.

But see Dryman *v.* State, 102 Ala. 130, 15 So. 433, holding that an instruction that embracing a woman against her will is not an assault if she indicates that it is agreeable to her is improper.

40. *Florida.*— Hunter *v.* State, 29 Fla. 486, 10 So. 730.

Illinois.— Johnson *v.* People, 197 Ill. 48, 64 N. E. 286.

Iowa.— State *v.* Wolf, 118 Iowa 564, 92 N. W. 673; 112 Iowa 458, 84 N. W. 536.

Kansas.— In the absence of a request for a fuller definition, it was sufficient to charge, on a prosecution for assault on a girl under the age of consent, with intent to rape, that if defendant "caught hold of her, and used force or violence and threats, with intent to carnally know her," it constituted the crime, although he "failed to accomplish his purpose." State *v.* Kendall, 56 Kan. 238, 42 Pac. 711.

Kentucky.— Polly *v.* Com., 27 S. W. 862, 16 Ky. L. Rep. 203.

Texas.— Davis *v.* State, (Cr. App. 1902) 69 S. W. 502; Shields *v.* State, 32 Tex. Cr. 498, 23 S. W. 893; Walton *v.* State, 29 Tex. App. 163, 15 S. W. 646.

41. *Alabama.*— Posey *v.* State, 143 Ala. 54, 38 So. 1019; Shepherd *v.* State, 135 Ala. 9, 33 So. 266.

Connecticut.— State *v.* Long, 72 Conn. 39, 43 Atl. 493.

Florida.— In a prosecution for rape, where the evidence tends to show that the commission of the offense was accompanied by an exhibition of weapons and threats on the part of defendant, calculated to produce in the mind of the woman a reasonable fear of death or great bodily harm in case of refusal or resistance on her part, it is not error to refuse to charge the jury that they must acquit the accused, unless satisfied beyond a reasonable doubt that the woman did not, during any part of the act, yield her consent. Doyle *v.* State, 39 Fla. 155, 22 So. 272; 63 Am. St. Rep. 159.

Illinois.— Huston *v.* People, 121 Ill. 497, 13 N. E. 538.

Iowa.— An instruction that rape is the carnal knowledge of a female, forcibly and against her will, "and where threats of personal violence are made to overcome her will, and she believes that her person is in danger from said threats, and [he] has sexual intercourse with her, the law considers such carnal knowledge as having been forcibly had," etc., is not ambiguous or misleading. State *v.* Urie, 101 Iowa 411, 70 N. W. 603.

Kentucky.— King *v.* Com., 20 S. W. 224, 14 Ky. L. Rep. 254.

Michigan.— Turner *v.* People, 33 Mich. 363.

Texas.— Where the jury were charged that "rape is the carnal knowledge of a woman, obtained by force or threats," and that, if defendant, at the time and place charged in the indictment, "did by force or threats have carnal knowledge of [prosecutrix], a woman, without her consent," etc., they would find defendant guilty of rape, it was held that the jury could not have been misled by the failure to include the want of consent in the definition of rape. Pettiway *v.* State, (Cr. App. 1896) 37 S. W. 860.

42. *Alabama.*— Posey *v.* State, 143 Ala. 54, 38 So. 1019; Shepherd *v.* State, 135 Ala. 9, 33 So. 266.

Iowa.— State *v.* Atherton, 50 Iowa 189, 32 Am. Rep. 134.

Missouri.— State *v.* Huff, 161 Mo. 459, 61 S. W. 900, 1104; 164 Mo. 480, 65 S. W. 256.

New Mexico.— Territory *v.* Edie, 6 N. M. 555, 30 Pac. 851.

Texas.— Segrest *v.* State, (Cr. App. 1900) 57 S. W. 845. Mar 620

43. State *v.* Huff, 161 Mo. 459, 61 S. W. 900, 1104, 164 Mo. 480, 65 S. W. 256.

44. State *v.* De Witt, 186 Mo. 61, 84 S. W. 956; Gonzales *v.* State, (Tex. Cr. App. 1901) 62 S. W. 1066; Burk *v.* State, 8 Tex. App. 336.

and failing to charge or charging in reference thereto is not error.[45] The court should instruct the jury on an indictment for carnal knowledge of a female under the age of consent that the essential elements of the crime are lack of age and intercourse.[46] In some jurisdictions it is held that if the indictment charges rape by force the jury should be instructed to acquit if she assented,[47] but this is not the general rule.[48] It is ordinarily error for the court in its instructions to assume that the female is under the age of consent;[49] but where there is no conflict in the evidence as to any fact it is not error for the court to assume such fact as true.[50] Where the evidence would support a conviction of a less offense the jury should be so instructed.[51] The jury should be instructed that it is not necessary to show age from the record in a bible or elsewhere, but that prosecutrix may testify as to her own age, or it may be proved by others,[52] and that the jury may consider her appearance in determining her age;[53] but the court must not in the charge assume that a mother knows the age of her child where there is contradictory evidence.[54] Since it is immaterial whether the child consented or not it is error to charge that she should have made outcry or complaint as this is important only on the question of consent.[55] In cases of statutory rape the jury may be instructed to con-

45. Bryant *v.* State, 46 Tex. Cr. 126, 79 S. W. 554; Fields *v.* State, 39 Tex. Cr. 488, 46 S. W. 814; Gonzales *v.* State, (Tex. Cr. App. 1895) 31 S. W. 371; Rodgers *v.* State, 30 Tex. App. 510, 17 S. W. 1077.

46. State *v.* Scroggs, 123 Iowa 649, 96 N. W. 723; State *v.* Fountain, 110 Iowa 15, 81 N. W. 162; State *v.* Casford, 76 Iowa 330, 41 N. W. 32; State *v.* Mahoney, 24 Mont. 281, 61 Pac. 647; Simpson *v.* State, 46 Tex. Cr. 551, 81 S. W. 320; Smith *v.* State, 44 Tex. Cr. 137, 68 S. W. 995, 100 Am. St. Rep. 849. On a prosecution for statutory rape, the court charged, requiring the jury to believe beyond a reasonable doubt the essentials constituting rape, and that prosecutrix was under fifteen years of age, and then charged "that if you believe that at the time defendant had sexual intercourse with prosecutrix, as alleged, she was of the age of fifteen years or over, then you will find defendant not guilty; or, if you have a reasonable doubt of the fact that she was under the age of fifteen years, you will give defendant the benefit of such doubt, and find him not guilty." It was held that the charge did not impose on accused the burden of proving that prosecutrix was over the age of consent. Curry *v.* State, 50 Tex. Cr. 158, 94 S. W. 1058.

47. State *v.* Johnson, 100 N. C. 494, 6 S. E. 61.

48. See *supra*, II, A, 4, b, (I).

49. People *v.* Webster, 111 Cal. 381, 43 Pac. 1114.

50. On a trial for rape upon a female under the age of consent, the court was justified in referring to prosecutrix's age in his charge; defendant having made no attempt to refute the state's evidence in respect thereto. People *v.* Baldwin, 117 Cal. 244, 49 Pac. 186. See also State *v.* Haddon, 49 S. C. 308, 27 S. E. 194.

51. See *supra*, II, C, 4, b. Where, on a prosecution for raping a child under twelve years of age, there is evidence that the child kept the crime a secret for several days, and then only told on being threatened with punishment; that there was no outcry at the time; and that defendant continued to live in the family — the failure to instruct as to the punishment prescribed by St. § 1155, for carnally knowing a child under twelve years of age, with her consent, is ground for reversing a conviction imposing the death sentence, as the latter offense is included in the crime of rape, and the evidence would have warranted a conviction for the lesser crime. Young *v.* Com., 96 Ky. 573, 29 S. W. 439, 16 Ky. L. Rep. 496.

52. State *v.* Scroggs, 123 Iowa 649, 96 N. W. 723. And see *supra*, II, B, 2, i.

53. People *v.* Dickerson, 58 N. Y. App. Div. 202, 68 N. Y. Suppl. 715. And see *supra*, II, B, 2, i. On a prosecution for statutory rape, an instruction that the female was competent to testify as to her age did not indicate to the jury that her appearance and apparent maturity might not be considered on such question. State *v.* Scroggs, 123 Iowa 649, 96 N. W. 723.

54. Where the mother of the prosecuting witness on a trial for rape testified to the age of the witness, admitting that she had testified differently on preliminary hearing, but explained that she had since obtained a certificate of her daughter's birth, it was error for the court to instruct that, "You have the direct testimony of her mother. . . . A mother surely knows, of her own knowledge, the age of her child," since the evidence showed that the mother did not know the age without the certificate. People *v.* Dickerson, 58 N. Y. App. Div. 202, 68 N. Y. Suppl. 715.

55. People *v.* Knight, (Cal. 1895) 43 Pac. 6; State *v.* Birchard, 35 Oreg. 484, 59 Pac. 468. See *supra*, II, B, 3, g, (II). An instruction, on a trial for rape on a female under fourteen years of age, that it was the duty of the prosecutrix to complain of the offense as soon as opportunity was afforded her, and a failure to make such complaint rendered the charge improbable, was properly refused, because applicable only to cases where, to constitute rape, the act of inter-

sider other acts in determining whether there has been carnal knowledge.[56] On a prosecution for assault with intent to have intercourse with a female under the age of consent, where it is shown that she is under the age of consent and no force was used, the court should instruct the jury as to the distinction between assault with intent to have sexual intercourse and the taking of improper liberties with the person of the child without such intent;[57] but if defendant intended to have sexual intercourse, although no force was used, he would be guilty.[58] In such prosecutions rape is properly defined as carnally and unlawfully knowing a female child under the age of consent.[59]

i. Chastity of Prosecutrix. The reputation of the woman for chastity affects only her credibility on the question of consent, and the jury should be so instructed.[60] It is not error to charge that it matters not what the previous character of the woman is.[61] But the presumption of the woman's chastity will not be allowed to control the presumption of defendant's innocence in those states where the statutes make former chastity material.[62]

course must be accomplished by force and violence and against the will of the female. State *v.* Palmberg, 199 Mo. 233, 97 S. W. 566, 116 Am. St. Rep. 476. Where it appeared that the prosecutrix was under the age of consent; that she was ruined by defendant, who was her father, and with whom she lived without any female companion; that she was wholly under his domination; and that he had threatened to kill her if she should tell on him; and her testimony was corroborated, it was held that the court properly refused to charge the jury to take her failure to make an early complaint "into consideration, with all the other evidence, in determining the guilt or innocence of the accused." State *v.* Baker, 136 Mo. 74, 37 S. W. 810.

56. *Arkansas.*— Plunkett *v.* State, 72 Ark. 409, 82 S. W. 845.

California.— In a prosecution for rape, an instruction authorizing the jury to consider previous acts of intercourse between the parties, for the purpose of showing defendant's adulterous disposition and as tending to render the commission of the act charged more probable, was proper. People *v.* Mathews, 139 Cal. 527, 73 Pac. 416.

Colorado.— Peckham *v.* People, 32 Colo. 140, 75 Pac. 422.

Missouri.— State *v.* Evans, 138 Mo. 116, 39 S. W. 462, 60 Am. St. Rep. 549.

Texas.— Henard *v.* State, 47 Tex. Cr. 168, 82 S. W. 655. Where, in a prosecution for rape on a girl under the age of fifteen years, she testifies fully to the intercourse, that it occurred frequently, and that a child was the result of that intercourse, it is not error for the court to fail to submit directly the issue of penetration. Proctor *v.* State (Cr. App. 1901) 65 S. W. 368.

57. On a prosecution for an assault on a female under the age of consent, with intent to rape, an instruction that the prosecutrix could not give consent, although she solicited intercourse, and, if defendant sought to have intercourse with her, he would be guilty, was misleading, as leading the jury to infer that it would be sufficient if defendant merely solicited intercourse with the prosecutrix. People *v.* Powell, 136 Mich. 306, 99 N. W. 23. On a prosecution for carnally knowing and abusing a female child under the age of fourteen years, a request to instruct that if the proof showed that defendant took indecent liberties with the child, and did not intend to have sexual intercourse with her, he is not guilty of the charge, is properly refused, as he still would be guilty of an assault with intent to commit the crime specifically charged. People *v.* Courier, 79 Mich. 366, 44 N. W. 571.

58. Addison *v.* People, 193 Ill. 405, 62 N. E. 235.

59. State *v.* Riseling, 186 Mo. 521, 85 S. W. 372.

60. Dryman *v.* State, 102 Ala. 130, 15 So. 433; Barnett *v.* State, 83 Ala. 40, 3 So. 612. Where the only evidence of the moral character of the prosecutrix on a trial for rape related to the time prior to the alleged offense, defendant could not object to an instruction that the question of the good moral character of the prosecutrix before the alleged offense was immaterial, except as it bore upon her credibility as a witness. State *v.* Blackburn, (Iowa 1907) 110 N. W. 275. In a prosecution for an assault with intent to rape, it was error to charge that testimony of illicit intercourse between defendant and prosecutrix and of the latter's reputation for virtue was admitted, not in justification, but on the issues of the credibility of prosecutrix as a witness, and as to whether it was necessary that she should be forced to the embraces of defendant, since evidence impeaching the general reputation of a prosecutrix for chastity is always admissible, to raise a presumption of her consent, and as bearing upon defendant's intent. Freeman *v.* State, 52 Tex. Cr. 500, 107 S. W. 1127.

61. Johnson *v.* People, 197 Ill. 48, 64 N. E. 286.

62. Where there was evidence tending to prove that the prosecutrix, in a prosecution for rape, had been unchaste, and also tending to prove specific acts of unchastity, an instruction that the law presumes a woman to be chaste until the contrary is shown, and that on this presumption they might find the prosecutrix of chaste character, even against the declarations of any number of witnesses

j. Corroboration of Prosecutrix. A charge that no corroboration of the prosecutrix is necessary is correct in the absence of a statute or rule of law requiring corroboration.[63] But where a statute or rule of law requires corroboration the court should instruct the jury that corroboration is necessary, and of course it is error to charge the contrary.[64] The jury should be instructed as to what facts may be considered in corroboration, and the nature and effect of such evidence.[65] The jury should be instructed that there is no rule of law requiring them to receive with more than ordinary scrutiny the evidence of the prosecutrix;[66] nor is it necessary or even proper to charge "that rape is easily charged, hard to prove, and harder still to be defended by the accused,"[67] but the charge must not make

which did not produce conviction in their minds, was improper, since, while the jury might infer her chastity as a matter of fact, a presumption of law to that effect conflicts with the controlling presumption of defendant's innocence. People *v.* O'Brien, 130 Cal. 1, 62 Pac. 297.

63. Lynn *v.* Com., (Ky. 1890) 13 S. W. 74; State *v.* Patchen, 37 Wash. 24, 79 Pac. 479. See *supra*, II, B, 3, m, (I).

64. State *v.* Blackburn, (Iowa 1907) 110 N. W. 275; State *v.* Carnagy, 106 Iowa 483, 76 N. W. 805; McConnell *v.* State, 77 Nebr. 773, 110 N. W. 666; People *v.* Biglizen, 112 N. Y. App. Div. 225, 98 N. Y. Suppl. 361 [*affirmed* in 185 N. Y. 616, 78 N. E. 1108]. See *supra*, II, B, 3, m, (II). In a trial for rape, the court instructed that, if defendant had connection with prosecutrix as alleged, it was immaterial whether or not defendant was the father of the child born to her, except as bearing on the question of the credibility of prosecutrix; and in another instruction defined corroboration as evidence strengthening, sustaining, and corroborating the evidence of prosecutrix, and charged that, as bearing on that question, the jury should consider the testimony of other witnesses, together with all the facts and circumstances shown on the trial and tending to connect defendant with the commission of the offense. It was held that the instructions did not obviate the necessity for charging that the fact that a child was born to prosecutrix was not corroborative of her testimony that defendant had sexual intercourse with her. State *v.* Blackburn, 136 Iowa 743, 114 N. W. 531.

65. State *v.* Whimpey, (Iowa 1908) 118 N. W. 281; State *v.* Carpenter, 124 Iowa 5, 98 N. W. 775; State *v.* Fountain, 110 Iowa 15, 81 N. W. 162; State *v.* French, 96 Iowa 255, 65 N. W. 156; People *v.* Bates, 70 Mich. 234, 38 N. W. 231. In a prosecution for rape, the court should have charged as to the nature and meaning of corroborative evidence, and not have merely called attention to the argument and contention of the state's counsel as to the effect of such evidence, without instructing the jury as to whether such contention properly stated the law. State *v.* Parker, 134 N. C. 209, 46 S. E. 511.

Instructions sustained.— Sanders *v.* State, 148 Ala. 603, 41 So. 466; State *v.* Norris, 127 Iowa 683, 104 N. W. 282; State *v.* Sigg, 86 Iowa 746, 53 N. W. 261. An instruction that, in determining whether or not a rape had been committed, the jury should consider the prosecutrix's demeanor, condition, and declarations immediately after the alleged commission, does not conflict with an instruction that, in case they found the crime had been committed, they should not consider the prosecutrix's conduct, declarations, or condition in determining whether or not she was corroborated in charging defendant with it. State *v.* Bailor, 104 Iowa 1, 73 N. W. 344. An instruction that the prosecuting witness was corroborated to some extent if the jury believed the testimony of her husband and a medical witness as to the existence of bruises on her person, and that of her husband as to the condition of her clothing and the bed, was not error. Hannon *v.* State, 70 Wis. 448, 36 N. W. 1.

66. *Arizona.*— Trimble *v.* Territory, 8 Ariz. 273, 71 Pac. 932.

California.— People *v.* Rangod, 112 Cal. 669, 44 Pac. 1071.

Florida.— Doyle *v.* State, 39 Fla. 155, 22 So. 272, 63 Am. St. Rep. 159.

Ohio.— State *v.* Tuttle, 67 Ohio St. 440, 66 N. E. 524, 93 Am. St. Rep. 689.

Texas.— Hamilton *v.* State, 41 Tex. Cr. 599, 58 S. W. 93.

Washington.— In a prosecution for rape, an instruction that the relation of the prosecutrix to the crime is analogous to that of an accomplice, and that the jury ought not to convict on her testimony alone, unless, after a careful examination, they are satisfied of its truth beyond a reasonable doubt, is properly refused. State *v.* Mobley, 44 Wash. 549, 87 Pac. 815.

Wisconsin.— The suggestion customarily made to juries in prosecutions for rape that they should view the evidence of prosecuting witness with great care, and be on their guard against being moved by sympathy to give undue weight to the state's evidence, does not apply to a case where there was consent in fact. Loose *v.* State, 120 Wis. 115, 97 N. W. 526.

67. *Florida.*— It is not a rule of law that the jury must view the offense of rape as one well calculated to create strong prejudice against the accused; nor that rape is an accusation easy to make and hard to be defended by an accused, although he be ever so innocent; nor is it a rule of law that the attention of the jury be specially directed to the difficulty growing out of the usual circumstances of the crime in defending against rape. These are merely arguments to be addressed to the jury by counsel, and the court

defendant's guilt depend entirely upon the credibility of the prosecutrix irrespective of other evidence in the case.[68]

k. Outcry or Complaint by Prosecutrix. It is proper to instruct the jury that the failure to make outcry at the time or complaint promptly thereafter, unless excuse for delay is shown, is a circumstance that affects only the credibility of the prosecutrix, and the jury should determine the sufficiency of the matter of excuse for the delay, and the effect of such failure to make complaint.[69]

commits no error in refusing to give them in the shape of instructions. Doyle *v.* State, 39 Fla. 155, 22 So. 272, 63 Am. St. Rep. 159.

Georgia.— Black *v.* State, 119 Ga. 746, 47 S. E. 370.

Michigan.— People *v.* Lambert, 144 Mich. 578, 108 N. W. 345.

Oregon.— State *v.* Birchard, 35 Oreg. 484, 59 Pac. 468.

Virginia.— Crump *v.* Com., 98 Va. 833, 23 S. E. 760.

68. People *v.* Keith, 141 Cal. 686, 75 Pac. 304; People *v.* Wessel, 98 Cal. 352, 33 Pac. 216. On a trial for rape it is error to charge that if the jury credit the testimony of the injured female they must find the defendant guilty. Such a charge is in effect a decision by the judge of the whole case, except the credibility of the witness. Giles *v.* State, 83 Ga. 367, 9 S. E. 783. If the prosecutrix, in a trial for rape, is shown to be unchaste, and of bad character generally, a charge to the jury that, "if the testimony of the prosecutrix as to the guilt of the prisoner is sufficiently clear and explicit to convince your minds beyond a reasonable doubt of the prisoner's guilt, then you would be authorized to convict upon her testimony alone; but, if you have any doubt of the prisoner's guilt upon her evidence, then you must inquire whether her evidence has any support"— is unfair, calculated to mislead, and apparently intended to rest the case wholly upon the testimony of the prosecutrix. Such a charge is good ground for a new trial. Leoni *v.* State, 44 Ala. 110. But where the court said to the jury, of the testimony of the prosecuting witness: "Is it true or false? . . . It is your plain duty, if you believe this woman fabricated this story, to find, if you can, the motive for such a course on her part," it was held that defendant was not prejudiced by this instruction, and it was not error to give it. Hannon *v.* State, 70 Wis. 448, 36 N. W. 1.

69. *California.*— People *v.* Totman, 135 Cal. 133, 67 Pac. 51; People *v.* Lee, 119 Cal. 84, 51 Pac. 22.

Illinois.— Sutton *v.* People, 145 Ill. 279, 34 N. E. 420; Austine *v.* People, 110 Ill. 248.

Iowa.— State *v.* Wolf, 118 Iowa 564, 92 N. W. 673; State *v.* Hagerman, 47 Iowa 151.

Kentucky.— Brown *v.* Com., 102 Ky. 227, 43 S. W. 214, 19 Ky. L. Rep. 1174.

Michigan.— In a prosecution for rape an instruction that the time at which the victim made complaint of the outrage is a relevant circumstance, "as tending to prove the truth of the charge, for the reason that it is natural for the woman ravished to make complaint as soon as possible," cannot be objected to on the ground that it makes the time of complaint a circumstance to corroborate the accusation, but not to militate against it. Maillet *v.* People, 42 Mich. 262, 3 N. W. 854.

Missouri.— Where a girl seventeen years old did not disclose the rape to her parents, and took no steps against defendant, although he continued in her father's employ for several days, and lived in the neighborhood for five months after the alleged outrage, defendant is entitled to have the jury instructed that the fact that the girl "made no complaint at the time, or within a reasonable time thereafter, and that pregnancy followed a single sexual connection," are legitimate subjects of inquiry in determining the question of force or consent; and the addition, "in connection with the other testimony," was calculated to mislead the jury. State *v.* Wilson, 91 Mo. 410, 3 S. W. 870.

Nebraska.— Vaughn *v.* State, 78 Nebr. 317, 110 N. W. 992.

New Mexico.— Territory *v.* Edie, 6 N. M. 555, 30 Pac. 851.

New York.— On a prosecution for rape the court refused to charge that, if the jury believed the prosecutrix failed to make prompt disclosure of the crime, it was a circumstance against her, and tended to disprove the truth of her charge, but charged that whether or not she made prompt disclosure was a matter for the consideration of the jury. This was held not error. People *v.* Estell, 106 N. Y. App. Div. 516, 94 N. Y. Suppl. 748.

North Carolina.— State *v.* Cone, 46 N. C. 18. On a trial for rape, it was held not to be error to refuse an instruction that, inasmuch as the prosecuting witness "did not disclose the fact to the first person whom she saw after the occurrence, her testimony was to be disregarded altogether," although she was nearly fourteen years old, and such first person was her aunt. State *v.* Marshall, 61 N. C. 49.

Pennsylvania.— Com. *v.* Mtynarczyk, 34 Pa. Super. Ct. 256.

Vermont.— Where the court charged that the weight which should be given to prosecutrix's failure to complain was for the jury; that usually such failure bore on the question of consent; that the jury should say whether there was evidence of consent; that, if so, it would seem that she was false in saying that she was held, and that she was struggling, it was held that, while her failure to disclose was a circumstance which bore on the credibility of her testimony, it might well have been understood that it was rele-

l. Age of Defendant. The jury may be instructed that they may find from the appearance of defendant that he is over the prescribed age,[70] but when the age is fixed by statute the jury must be instructed that the burden is on the state to prove defendant over that age.[71]

m. Drunkenness of Defendant. The jury should be instructed generally that inability to commit the crime must be shown by defendant, but where defendant offers testimony of inability from drunkenness the rule is otherwise.[72] In the case of assault with intent to rape intoxication is a defense only where it is shown to such extent as to show inability to have the intent. If defendant's acts show intent drunkenness is no defense and the court should so charge.[73]

n. Character of Defendant. While good character can be no defense to a charge of rape, the jury should be instructed to consider it in determining the guilt of defendant.[74]

o. Identification of Defendant. The court may instruct the jury to consider the condition and surroundings of the prosecutrix when she identified defendant.[75] A charge that it must be proven beyond a reasonable doubt that the crime was committed by the prisoner, and that his absence, if shown, would be a full defense, is a sufficient charge, notwithstanding a subsequent instruction that the burden of proving an alibi is upon the one setting it up.[76]

vant only to the question of consent, as to which there was no evidence, the defense being an alibi. State *v.* Wilkins, 66 Vt. 1, 28 Atl. 323.

Compare, however, Thomas *v.* State, (Tex. Cr. App. 1902) 70 S. W. 93; Ramsey *v.* State, (Tex. Cr. App. 1901) 63 S. W. 875.

70. An instruction in a rape case, where it is necessary that the jury be satisfied that defendant is over sixteen years old, that the state need produce no evidence, defendant being present and being evidence of his age, of which the jury are judges, cannot be held error; his appearance being evidence of his age, and there being nothing in the record to show that it was not sufficient. State *v.* Huffman, 39 Oreg. 48, 63 Pac. 1. See *supra*, II, B, 2, l.

71. Thompson *v.* State, 45 Tex. Cr. 397, 74 S. W. 914; McIntyre *v.* State, (Tex. Cr. App. 1897) 43 S. W. 104.

72. Where a defendant charged with rape offered testimony tending to show that, by reason of drunkenness at the time, he was physically incapable of committing the crime, it was error to instruct the jury that the burden was on him to show such incapacity, since it shifted the burden on him of proving that he did not commit the crime. Jeffers *v.* State, 20 Ohio Cir. Ct. 294, 10 Ohio Cir. Dec. 832.

73. State *v.* Hanlon, 62 Vt. 334, 19 Atl. 773.

74. State *v.* Jones, 32 Mont. 442, 80 Pac. 1095; Thomas *v.* State, (Tex. Cr. App. 1902) 70 S. W. 93. Where, upon the prosecution of an old man for rape upon a child of tender years, the only evidence upon behalf of the accused was proof that he was, and all his life had been, a man of most excellent character, and the judge, in his instructions, made no reference whatever to the law relating to good character until he was about to conclude his charge, when, upon having his attention called to the matter, he, in most general terms, charged upon this subject, it was held that the supreme court would order a new trial; since even if, in a strict and technical sense, no error was committed, the case was one which should be treated as special and peculiar. Seymour *v.* State, 102 Ga. 803, 30 S. E. 263. And where, on a trial for rape, the positive testimony of prosecutrix that defendant ravished her was discredited by the facts that they were together longer than she testified; that there was no indication of a struggle; that there were no bruises upon her person, nor irritation of her sexual organs soon after the alleged rape; and that defendant had previously borne a good reputation, it was held error not to caution the jury against prejudice, and instruct them that it was difficult to defend against an accusation of rape; that, if she voluntarily yielded, no matter how much force had been employed, it was not rape; and that defendant's previous good character was entitled to some weight. Connors *v.* State, 47 Wis. 523, 2 N. W. 1143.

75. On a prosecution for assault on a female at night, it was shown that immediately after the assault she had made a mistaken identification of her assailant, but that at the time she was nervous, excited, and in a hysterical condition. The court charged that in weighing her testimony the jury might consider that before she identified defendant she had identified another person as the guilty one, but that, if she did so identify such other person, the jury could consider her condition, surroundings, and all the facts shown to exist at the time she made such identification. It was held that the charge was not erroneous as attempting to excuse prosecutrix's mistake, or as making too prominent, as an excuse for the mistaken identity, her alleged hysterical condition. Shular *v.* State, 160 Ind. 300, 66 N. E. 746.

76. State *v.* Freeman, 100 N. C. 429, 5 S. E. 921.

p. Presumption of Innocence. The court should charge that defendant is presumed to be innocent and that they must be satisfied of his guilt beyond a reasonable doubt.[77]

q. Statute of Limitation. When a statute of limitation to the indictment exists the jury must be instructed to find beyond a reasonable doubt that the act was committed within the prescribed time.[78]

D. Verdict. The rules governing verdicts in criminal cases generally apply to verdicts in prosecutions for rape and for attempt or assault with intent to rape.[79] The verdict must indicate with certainty the crime of which defendant is found guilty, but the indictment, the instructions, the issues, and the verdict must all be considered together to ascertain whether it is sufficiently certain.[80] Under an indictment for rape, a verdict of "guilty of assault with attempt to commit rape" is responsive to the charge of assault contained in the charge of rape, and is, in consequence, a good verdict for assault, as the words "with attempt to commit rape" are mere surplusage.[81] The verdict must be responsive to the indictment so as to show with certainty of what offense the jury find defendant guilty.[82] A special verdict which fails to find every element of the

Instructions sustained.— Where the defense was an alibi, the court instructed that it was not essential to a conviction that the criminal act be committed on the exact date charged in the information, a substantial compliance being sufficient, and thereafter the defense of alibi and the evidence were fully called to the jury's attention. Defendant claimed that as the state had offered evidence to prove that the crime was committed on July 2d, as charged, and there was no evidence that it was committed on any other date, and as defendant had offered evidence of an alibi on the date charged the first part of the court's instruction was erroneous. It was held that the jury could not have placed defendant's construction upon the instruction so as to disregard the defense of alibi, and the instruction was not erroneous in that respect. State *v.* Ferris, 81 Conn. 97, 70 Atl. 587.

77. State *v.* Freeman, 100 N. C. 429, 5 S. E. 921. On a prosecution for rape, an instruction authorizing conviction if the jury believed beyond a reasonable doubt that defendant had unlawful carnal knowledge of prosecutrix by force and against her will, and, further, that the law presumes defendant to be innocent, and, unless the jury believe him guilty beyond a reasonable doubt, they should find him not guilty, properly declares the law of the case. Lowry *v.* Com., 65 S. W. 434, 23 Ky. L. Rep. 1553.

78. Gonzales *v.* State, (Tex. Cr. App. 1907) 62 S. W. 1060.

79. See CRIMINAL LAW, 12 Cyc. 686 *et seq.*

80. *Alabama.*—Under an indictment, charging in the same count, in the disjunctive, that defendant committed one or the other of two offenses, or different grades of the same offense, for example, that he "did carnally know, or abuse in the attempt to carnally know," a female child under ten years of age (Rev. Code, § 3663), a verdict of "guilty" is sufficient, and not ground of error, or of motion in arrest of judgment. Johnson *v.* State, 50 Ala. 456. See also McGuff *v.* State, 88 Ala. 147, 7 So. 35, 16 Am. St. Rep. 25.

Connecticut.— A verdict finding accused "guilty of the crime of attempt at rape" is sufficiently clear and certain in designating the crime of which accused is found guilty, under an information for rape. Rookey *v.* State, 70 Conn. 104, 38 Atl. 911.

Georgia.— Upon an indictment against a slave for a rape on a free white female, a verdict in these words, "We, the jury, find the prisoner guilty of an attempt to commit a rape," was held to be sufficiently full, and that it need not negative the charge of a rape; that being the legal effect of the findings. Neither was it necessary to add the words "on a free white female," as, that being the issue submitted, the verdict was coextensive with it. Stephen *v.* State, 11 Ga. 225.

Kentucky.— Where the only offense charged is that of rape, and the evidence and instructions are all in relation to that offense, a verdict, "We, the jury, find the defendant guilty, and fix his punishment at death," is sufficient in form. Smith *v.* Com., 33 S. W. 825, 17 Ky. L. Rep. 1162.

Louisiana.— State *v.* Love, 106 La. 452, 31 So. 45.

South Dakota.— State *v.* Hayes, 17 S. D. 128, 95 N. W. 296.

Tennessee.— Where one count of an indictment charges rape, and another assault with intent, etc., a verdict that defendant "is guilty as charged in the indictment," and that he "for his offense aforesaid shall suffer death by hanging," is valid. Kelly *v.* State, 7 Baxt. 84.

Wisconsin.— James *v.* State, 124 Wis. 130, 102 N. W. 320.

See 42 Cent. Dig. tit. "Rape," § 101.

81. State *v.* Love, 106 La. 452, 31 So. 45.

82. *Illinois.*— Donovan *v.* People, 215 Ill. 520, 74 N. E. 772.

Kansas.— State *v.* Hart, 33 Kan. 218, 6 Pac. 288.

Texas.— A verdict reciting, "We, the jury, find the defendant guilty of an assault with

offense is insufficient.[83] If the verdict is inconsistent the one part with another it will be set aside.[84] Guilty of attempt to commit rape, and assault with intent to commit rape in some jurisdictions means the same,[85] but in other jurisdictions it is otherwise.[86] If an indictment contains more than one count a general verdict of guilty is uncertain.[87] In most jurisdictions under an indictment for rape the jury, if the evidence warrants it, may acquit of rape, and convict of any less offense included in the crime charged, and the issue as to guilt of such less crime should be submitted.[88] In some jurisdictions when the evidence shows that rape has been committed defendant cannot be convicted of a less offense,[89] but in other jurisdictions it is held otherwise.[90]

E. New Trial and Appeal and Error.[91] The granting of new trials on prosecutions for rape or assault with intent to rape is governed by the rules relating to new trials in criminal prosecutions generally.[92] Any intimation by the court as to its opinion on the questions of fact is generally ground for new trial.[93] If there is evidence to support the verdict a new trial will not be granted on the

intent to rape, as charged in the indictment, and assess his punishment at four years in the penitentiary," is not vague or uncertain. Barnes *v.* State, (Cr. App. 1895) 32 S. W. 896.

Virginia.— Hairston *v.* Com., 97 Va. 754, 32 S. E. 797.

England.— Rex *v.* Powell, 2 B. & Ad. 75, 9 L. J. M. C. O. S. 71, 22 L. C. L. 41.

83. A special verdict failing to find that prosecutrix was of previous chaste character is insufficient to support a conviction of a violation of Mo. Act, April 8, 1895 (Laws (1895), p. 149), making it a felony for any person over the age of sixteen years to have carnal knowledge of an unmarried female of previous chaste character between the ages of fourteen and eighteen years. State *v.* De Witt, 186 Mo. 61, 84 S. W. 956.

84. Moon *v.* State, (Tex. Cr. App. 1898) 45 S. W. 806.

85. Prince *v.* State, 35 Ala. 367; McDougal *v.* State, 5 Baxt. (Tenn.) 660.

86. Taylor *v.* State, 44 Tex. Cr. 153, 69 S. W. 149.

87. Shell *v.* State, (Tex. Cr. App. 1896) 38 S. W. 207. See CRIMINAL LAW, 12 Cyc. 692.

"Guilty of charge in first count."— But where an indictment contains two counts, the first charging the commission of rape, and the second charging an assault with intent to commit rape, and the jury finds defendant "guilty of the charge in the first count," without passing upon the second count, the verdict is sufficient, the minor offense being merged in the greater. Stevens *v.* State, 66 Md. 202, 7 Atl. 254.

88. State *v.* Barkley, 129 Iowa 484, 105 N. W. 506; State *v.* Erickson, 81 Minn. 134, 83 N. W. 512; Reg. *v.* Guthrie, L. R. 1 C. C. 522, 11 Cox C. C. 522, 39 L. J. M. C. 95, 22 L. T. Rep. N. S. 485, 18 Wkly. Rep. 792; Reg. *v.* Ryland, 11 Cox C. C. 101, 18 L. T. Rep. N. S. 538, 16 Wkly. Rep. 941; Reg. *v.* Folkes, 2 M. & Rob. 460; Reg. *v.* Dawson, 3 Stark. 62, 3 E. C. L. 595. See *supra*, II, A, 5.

89. *California.*— People *v.* Chavez, 103 Cal. 407, 37 Pac. 389.

Georgia.— Welborn *v.* State, 116 Ga. 522, 42 S. E. 773; Jones *v.* State, 68 Ga. 760; Kelsey *v.* State, 62 Ga. 558.

Kansas.— State *v.* Mitchell, 54 Kan. 516, 38 Pac. 810.

Missouri.— State *v.* Bell, 194 Mo. 264, 91 S. W. 698; State *v.* Lacey, 111 Mo. 513, 20 S. W. 238; State *v.* White, 35 Mo. 500.

North Carolina.— State *v.* Parish, 104 N. C. 679, 10 S. E. 457.

Texas.— Waire *v.* State, (Cr. App. 1901) 64 S. W. 1061.

England.— Reg. *v.* Hapgood, L. R. 1 C. C. 221, 11 Cox C. C. 471, 39 L. J. M. C. 82, 21 L. T. Rep. N. S. 678, 18 Wkly. Rep. 356; Harmwood's Case, 1 East P. C. 411. This rule was changed by 14 & 15 Vict. c. 100, § 12.

See 42 Cent. Dig. tit. "Rape," § 82.

90. *Connecticut.*— State *v.* Shepard, 7 Conn. 54.

Indiana.— Hanes *v.* State, 155 Ind. 112, 57 N. E. 704; Polson *v.* State, 137 Ind. 519, 35 N. E. 907.

Massachusetts.— Com. *v.* Creadon, 162 Mass. 466, 38 N. E. 1119.

New Hampshire.— State *v.* Archer, 54 N. H. 465.

Vermont.— State *v.* Smith, 43 Vt. 324.

91. Excessive punishment see *infra*, II, F.

92. See CRIMINAL LAW, 12 Cyc. 701 *et seq.*, 792 *et seq.*

Newly discovered evidence.— Where, in a prosecution for rape on a girl under fifteen years of age, a new trial was applied for on the ground of newly discovered evidence tending to show that prosecutrix was over the age of fifteen at the time of the commission of the offense, and there was no evidence tending to show resistance, and it appeared that prosecutrix's reputation for chastity, truth, and veracity was bad, an order denying the motion was erroneous. Walters *v.* State, (Tex. Cr. App. 1904) 79 S. W. 539.

93. People *v.* Barker, 137 Cal. 557, 70 Pac. 617; People *v.* Ricketts, 108 Mich. 584, 66 N. W. 483; People *v.* Blute, 20 N. Y. Suppl. 455; Owens *v.* State, 39 Tex. Cr. 391, 46 S. W. 240. Where the circumstances in a prosecution for assault with intent to rape were such that the slightest intimation of the opinion of the court as to whether the prosecutrix resisted at all, which was a matter in dispute, might have had undue weight

ground of insufficiency of the evidence;[94] but if the whole testimony is not inconsistent with the innocence of defendant the verdict should be set aside.[95] In the absence of anything to the contrary in the record it will be presumed that the prosecutrix resisted.[96] Where it appears that defendant was surprised by untrue testimony a new trial may be granted.[97] There is no ground for new trial on appeal if it appears that defendant could not have been injured by the error of which he complains.[98] Matters in the discretion of the court are not reviewable.[99] An

with the jury, it was error to advise them that they might consider "whether she made all the resistance at the time she was reasonably capable of under the circumstances surrounding her, considering the relative strength of the parties," thus apparently implying that the court was of the opinion that she made some resistance. Adams v. People, 179 Ill. 633, 54 N. E. 296.

94. *Idaho.*— State v. Beard, 6 Ida. 614, 57 Pac. 867.

Michigan.— People v. Toutant, 133 Mich. 520, 95 N. W. 541.

Missouri.— State v. Hibler, 149 Mo. 478, 51 S. W. 85.

New York.— People v. Crowley, 102 N. Y. 234, 6 N. E. 384.

Texas.— Leach v. State, (Cr. App. 1903) 77 S. W. 220; Hill v. State, (Cr. App. 1896) 34 S. W. 750.

Virginia.— Mings v. Com., 85 Va. 638, 8 S. E. 474.

Sufficiency of evidence see *supra*, II, B, 3.

95. State v. Mitchell, 54 Kan. 516, 38 Pac. 810.

96. Holloway v. State, (Tex. Cr. App. 1898) 44 S. W. 825.

97. When it clearly appears by affidavit that the defendant was surprised at the testimony of the prosecutrix, and that much of her testimony was untrue, a new trial will be granted. State v. Halford, 17 Utah 475, 54 Pac. 819.

98. *Arkansas.*— Pratt v. State, 51 Ark. 167, 10 S. W. 233.

California.— People v. Barney, 114 Cal. 554, 47 Pac. 41.

Illinois.— Sutton v. People, 145 Ill. 279, 34 N. E. 420.

Iowa.— State v. Taylor, 103 Iowa 22, 72 N. W. 417; State v. Urie, 101 Iowa 411, 70 N. W. 603; State v. Casford, 76 Iowa 330, 41 N. W. 32. On a trial for "assault with intent to commit rape," where the defense was an alibi, an instruction that "the defense of alibi is one easily manufactured, and jurors are generally and properly advised by the courts to scan the proofs of an alibi with care and caution," is not prejudicial to defendant, when in another part of the instructions the jury were advised that a charge of this crime was one easily made, hard to be proved, but still harder to be defended, even by the innocent, and they "should not suffer their indignant feelings to control or influence their judgment when considering such cases, but they should bring to the consideration of the evidence in the case their cool, deliberate, dispassionate judgment alone." State v. Blunt, 59 Iowa 468, 13 N. W. 427.

Michigan.— People v. Walker, 113 Mich. 367, 71 N. W. 641.

Minnesota.— State v. Vadnais, 21 Minn. 382.

Missouri.— State v. Houx, 109 Mo. 654, 19 S. W. 35, 32 Am. St. Rep. 686. In a prosecution for rape, the admission of inducements by a woman to prosecutrix to accompany her and defendant on a trip was not prejudicial to defendant, where, before any overt act was taken pursuant to the woman's solicitations, defendant met the prosecutrix and added his solicitations to those of the woman, and told prosecutrix that the woman had told him about the proposed trip. State v. Miller, 191 Mo. 587, 90 S. W. 767.

New Mexico.— Territory v. Edie, 6 N. M. 555, 30 Pac. 851.

New York.— Upon a trial for rape, the judge refused to charge that defendant must have "accomplished his purpose in spite of the utmost reluctance and resistance on her part." The defendant was convicted of an assault with intent to rape. On writ of error, it was held that as the refusal to charge, even if it were error, did not in any way affect the crime of which defendant was convicted, but only that of which he was acquitted, it furnished no ground for reversal. Myer v. People, 8 Hun 528.

North Carolina.— State v. Garner, 129 N. C. 536, 40 S. E. 6.

Texas.— Wilcox v. State, 33 Tex. Cr. 392, 26 S. W. 989; Massey v. State, 31 Tex. Cr. 371, 20 S. W. 758; Jenkins v. State, 1 Tex. App. 346. In a prosecution for rape, the fact that the prosecutrix held the baby, the fruit of the alleged crime, in her arms while she was on the witness stand, did not constitute reversible error, where the baby was removed from the court-room the moment the objection was made by defendant. Alcorn v. State, (Cr. App. 1905) 94 S. W. 468.

Washington.— State v. Courtemarch, 11 Wash. 446, 39 Pac. 955.

Wisconsin.— Jackson v. State, 91 Wis. 253, 64 N. W. 838. Where accused was convicted of assault with intent to rape, alleged error in instructions and admission of evidence bearing on rape will not be considered. Bannen v. State, 115 Wis. 317, 91 N. W. 107, 965.

See 42 Cent. Dig. tit. "Rape," § 104.

99. If courts have power to compel a personal examination of the prosecutrix in prosecutions for rape, it is a matter of judicial discretion, not reviewable on appeal. McGuff v. State, 88 Ala. 147, 7 So. 35, 16 Am. St. Rep. 25.

order for a new trial applies to the whole case, and defendant may be tried again for all the charges in the indictment.[1]

F. Punishment — 1. Rape. The punishment for rape is fixed by statute. In some jurisdictions it is death;[2] while in others it is a capital offense unless the jury fix the punishment by imprisonment in the state prison,[3] and in others imprisonment in the penitentiary alone is provided.[4] In England the punish-

1. Where, under an indictment substantially charging the accused with assault and battery and rape committed upon a female as one and the same transaction, thereby charging only one substantive offense, that of rape, the charge of assault and battery being necessarily included in the substantive offense, the court improperly required the prosecuting attorney to elect whether to put defendant on trial for rape or for an assault and battery, and such attorney elected to put him on trial for rape, which trial resulted in a verdict of guilty of an assault and battery, the accused, by moving for and obtaining a new trial, took such new trial as to the whole case, and it was error to sustain his objection to being tried thereon for rape, and to put him on trial for an assault and battery. Mills *v.* State, 52 Ind. 187.

2. It is so in Arkansas (St. Dig. 1884) § 1570), Delaware (Rev. Code (1893), c. 77, § 10), Mississippi (Code (1906), § 1358), and North Carolina (Rev. (1905) § 3637).

3. *Alabama.*— Death or imprisonment in penitentiary not less than ten years at discretion of jury. Cr. Code (1896), § 5444.

Florida.— Death or imprisonment for life. Rev. St. (1892) § 2396.

Georgia.— Death unless the jury recommend mercy, then imprisonment for not less than one or more than twenty years. Code, § 4350.

Kentucky.— Imprisonment in the penitentiary for not less than ten or more than twenty years, or death at the discretion of the jury. Gen. St. p. 322, art. 4, § 5.

Maryland.— Death, or imprisonment for not less than eighteen months or more than twenty-one years. Code, art. 30, § 161.

Missouri.— Death, or imprisonment for not less than five years at the discretion of the jury. Rev. St. (1899) § 1837.

Oklahoma.— Under Act Cong. Jan. 15, 1897, c. 29, § 1, 29 St. 487 (U. S. Comp. St. (1901) p. 3620), providing that in all cases where the accused is found guilty of rape the jury may qualify their verdict by adding thereto "without capital punishment," it has been held that a verdict of guilty without capital punishment may be returned, although there are no mitigating circumstances. Vickers *v.* U. S., (Okla. Cr. App. 1908) 98 Pac. 467.

South Carolina.— Death, but the jury by special verdict may recommend the mercy of the court, in which case he shall be imprisoned for life. Code of Laws, Cr. Code, § 114.

Tennessee.— Death, but jury may commute to imprisonment for not less than ten years, and may imprison for life. Shannon Code (1896), § 6452.

Texas.— Death, or imprisonment for not less than five years in the discretion of the jury. Rev. St. (1895) art. 639.

Virginia.— Death, or imprisonment for not less than five nor more than twenty years, in the discretion of the jury. Code (1904), § 3680.

West Virginia.— Death, but upon recommendation of the jury may be imprisoned for not less than seven nor more than twenty years. Code (1899), c. 144, § 15.

4. *Arizona.*— Imprisonment in territorial prison for life or for a term of years not less than five. Pen. Code (1901), § 233.

California.—Imprisonment in state's prison not less than five years. Deering Code, § 264.

Colorado.— Imprisonment for not less than five years; may be for life. Sess. Laws (1907), c. 165, § 4.

Connecticut.— Imprisonment not less than three years, may be for life. Gen. St. (1888) § 1406.

District of Columbia.— First offense, imprisonment not less than ten nor more than thirty years, second offense, imprisonment for life. Abert & L. Comp. St. (1894) p. 160, § 22.

Idaho.— Imprisonment not less than five years, may be for life. Pen. Code (1901), § 4914.

Illinois.— Imprisonment not less than one year, may extend to life. Starr & C. Annot. St. § 293.

Indiana.— Imprisonment not more than twenty-one nor less than five years. Rev. St. (1881) § 1917.

Iowa.— Imprisonment for life or any term of years. Iowa Code (1897), § 4756.

Kansas.— Imprisonment not less than five nor more than twenty-one years. Gen. St. (1901) § 2016.

Maine.— Imprisonment for life. Rev. St. (1840) c. 154, § 17.

Massachusetts.— Imprisonment for life or for a term of years. Pub. St. Sup. (1888) p. 785.

Michigan.— Imprisonment for life or less term. Comp. Laws (1897), § 11489.

Montana.—Imprisonment not less than five years. Codes (1895), § 453.

Nebraska.— If prosecutrix is the daughter or sister of defendant, imprisonment for life; in other cases not less than three or more than twenty years. Comp. St. (1903) § 7643.

Nevada.— Imprisonment not less than five years, may be for life. Comp. Laws, § 4698.

New Jersey.— Imprisonment not exceeding fifteen years, or fine not exceeding one thousand dollars, or both. Gen. St. p. 1096.

New Mexico.— Imprisonment not less than

ment was originally death, but this was afterward changed to castration and loss of eyes, and then the felon might be executed at the king's suit, unless the woman, if single, chose him for her husband and he consented. By 3 Edw. I, c. 13, it was changed, if at the king's suit to imprisonment and ransom, but if the injured party within forty days brought suit, the former punishment of castration and loss of eyes might be inflicted.[5] In the reign of Elizabeth it was again made punishable with death without the benefit of clergy.[6] In some jurisdictions the appellate court has power to review the judgment of the lower courts and to modify the same where the punishment is considered excessive. Imprisonment for long terms,[7] or for life,[8] and even the death penalty,[9] have been held not excessive punishments for rape. On the other hand the supreme court of Iowa reduced a sentence of fifteen years to five years, because under the mitigating circumstances it was considered excessive,[10] and a life sentence was reduced to a term of

five nor more than twenty years; if female under ten may be imprisoned for life. Comp. Laws (1897), § 1095.

New York.— If female under sixteen and no force is used, imprisonment not more than ten years; all cases where force is used, not more than twenty years. Laws (1892), c. 325.

North Dakota.— Carnal knowledge of female between age of ten and eighteen when no force is used is rape in second degree and punished by imprisonment not less than five years. Rev. Code (1905), § 8896. All other rape is first degree and punished by imprisonment not less than ten years. Rev. Code (1905), § 8895.

Ohio.— Rape of daughter or sister or child under twelve years of age is punished by imprisonment for life; all other cases by imprisonment not more than twenty nor less than three years. Rev. St. (1880) § 6817.

Oregon.— Rape upon sister of whole or half blood, or daughter or daughter of his wife shall be punished by imprisonment not less than twenty years and may be for life (Ballinger & C. Annot. Code, § 1761), and all other rape may be punished by imprisonment not less than three or more than twenty years (Ballinger & C. Annot. Code, § 1760).

Rhode Island.—Imprisonment not less than ten years, may be for life. Pub. St. p. 667, § 1, subs. 5.

South Dakota.— Sexual intercourse with female under ten, or imbecile, or by force is punishable by imprisonment for not less than ten years; all other rape by imprisonment not less than five years. Rev. Codes (1903), §§ 330, 331.

Utah.— Imprisonment not less than five years. Rev. St. (1898) § 4220.

Vermont.— Imprisonment for not more than twenty years or fine of not more than two thousand dollars, or both. Vt. St. § 4908.

Washington.— Imprisonment for life or any terms less. Hill St. (1891) § 28.

Wisconsin.— Carnal knowledge of female under fourteen, imprisonment from five to thirty-five years; rape by force of woman unchaste, imprisonment from one to seven years; if previously chaste, from ten to thirty years. Sanborn & B. Annot. Code (1898), § 4381.

Wyoming.— Imprisonment not less than one year and may be for life. Rev. St. (1899) § 4964.

5. 1 Hale P. C. 626, 627.

6. St. 18 Eliz. c. 7, § 4.

7. *Illinois.*— Sutton *v.* People, 145 Ill. 279, 34 N. E. 420.

Iowa.— State *v.* Johnson, 133 Iowa 38, 110 N. W. 170. Where accused was convicted of raping his unmarried adult sister, and there was evidence that accused had attempted to rape her at different times during the year preceding the commission of the offense, and that she had successfully resisted, it was held that imprisonment for twenty years was not excessive. State *v.* Ralston, (1908) 116 N. W. 1058.

Missouri.—Thirty years in the penitentiary is not an excessive punishment for raping a female under fourteen years of age. State *v.* Baskett, 111 Mo. 271, 19 S. W. 1097.

Oklahoma.—Asher *v.* Territory, 7 Okla. 188, 54 Pac. 445.

Texas.— Confinement in the penitentiary for ninety-nine years is not an excessive punishment for rape on a female nine years old. Moore *v.* State, 49 Tex. Cr. 449, 96 S. W. 327.

Wisconsin.— Murphy *v.* State, 108 Wis. 111, 83 N. W. 1112.

8. State *v.* Andrews, 130 Iowa 609, 105 N. W. 215.

9. Where defendant was convicted of rape of a child seven years old, the evidence showing that she was frightfully lacerated and injured, the death penalty was not out of proportion to the offense proven. Reyna *v.* State, (Tex. Cr. App. 1903) 75 S. W. 25. In a prosecution for rape it was shown that defendant met his victim on the railroad, beat her into insensibility, perpetrated the crime, and left her in an unconscious state on the railroad track. Her injuries were of a very serious character, and her life imperiled. It was held that the jury properly inflicted the highest penalty known to the law. Mischer *v.* State, 41 Tex. Cr. 212, 53 S. W. 627, 96 Am. St. Rep. 780.

10. Defendant, a young man, pleaded guilty to rape on a female under the age of fifteen years. The act of sexual intercourse was consented to by the female. She went with plaintiff expecting that sexual inter-

years.[11] If an offense is more highly punishable when committed on one class of persons than when committed on another, and if the indictment fails to specify to which class the person belongs, only the milder punishment can be inflicted,[12] but if the penalty is the same as to both classes it makes no difference.[13]

2. Attempt and Assault with Intent to Rape. Attempt and assault with intent to commit rape is punished with imprisonment, the term being fixed by statute in each state.[14] Where defendant is tried for rape and convicted of assault with intent to commit rape he may be punished for this offense, although the court does not have original jurisdiction of the less offense;[15] but the higher court can inflict no greater punishment than might have been inflicted in the lower court for the same offense.[16] Whether the punishment is excessive depends on the circumstances. Terms of great length have been sustained,[17] but in some cases they have been reduced.[18]

course would be proposed, and the act was no more the procurement of defendant than of herself. It was held that a sentence to fifteen years' imprisonment was excessive, and would be reduced to five years. State *v.* Spears, 130 Iowa 294, 106 N. W. 746.

11. State *v.* Norris, 127 Iowa 683, 104 N. W. 282; State *v.* Steffens, 116 Iowa 227, 89 N. W. 974.

12. State *v.* Fielding, 32 Me. 585.

13. Schang *v.* State, 43 Fla. 561, 31 So. 346.

14. *Delaware.*— If any person shall with violence assault any female with intent to commit rape, such person shall be deemed guilty of felony and shall be fined not less than two hundred dollars or more than five hundred dollars, shall stand one hour in the pillory, shall be whipped with thirty lashes, and shall be imprisoned not exceeding ten years. Rev. Code (1893), c. 77, § 11.

Minnesota.— O'Connell *v.* State, 6 Minn. 279.

Missouri.— State *v.* Scholl, 130 Mo. 396, 32 S. W. 968.

Tennessee.— A verdict of ten years' imprisonment for assault with intent to commit rape, when the indictment states no battery, is not sustainable under Shannon Code, § 6471, which prescribes that any person indicted for an assault with intent to commit any felony, where no other punishment is fixed, shall receive, as a maximum, five years in the penitentiary. Wilson *v.* State, 103 Tenn. 87, 52 S. W. 869.

Virginia.— Givens *v.* Com., 29 Gratt. 830.

Washington.—State *v.* Berzaman, 10 Wash. 277, 38 Pac. 1037.

15. The circuit court, having jurisdiction of the capital offense of rape, may impose the penalty for an assault with intent to commit rape when the jury acquits of the higher, but returns a verdict of guilty of the lesser, offense. Barker *v.* State, 40 Fla. 178, 24 So. 69.

16. Under Code, § 987, providing that where no deadly weapon has been used, and no serious damage done, the punishment in cases of assault shall not exceed a fine of fifty dollars or thirty days' imprisonment, provided that this shall not apply to cases of assault with intent to commit rape, on a conviction of a simple assault, where there is no evidence of bodily pain, there can be no greater punishment than therein prescribed, although the indictment was for assault with intent to commit rape. State *v.* Nash, 109 N. C. 824, 13 S. E. 874.

17. *California.*— Under Pen. Code, §§ 264, 671, rape may be punished by life imprisonment, or by not less than five years; and section 664 provides that an attempt to commit an offense may be punished by imprisonment not exceeding one half the longest term prescribed upon a conviction of the offense. Under this statute punishment of attempt to rape by imprisonment for five years cannot be objected to on the ground that the term of half a life cannot be calculated, and that the statute therefore prescribes no punishment for attempt to rape. People *v.* Gardner, 98 Cal. 127, 32 Pac. 880.

Georgia.— A sentence of twenty years upon conviction of assault with intent to rape, being within the limit prescribed by the statute, will not be disturbed as excessive. Dykes v. State, 64 Ga. 437.

Iowa.— State *v.* Bartlett, 127 Iowa 689, 104 N. W. 285.

Missouri.— State *v.* Hilsabeck, 132 Mo. 348, 34 S. W. 38.

Washington.— State *v.* Berzaman, 10 Wash. 277, 38 Pac. 1037.

18. Defendant, while riding with prosecutrix, a young lady twenty-two years of age, with whom he was but slightly acquainted, solicited sexual intercourse, and, on being refused, endeavored to compel her to submit by force. She, however, successfully resisted his attempts, after which prosecutrix remained on the wagon until she was driven to a house near by, where she arranged her toilet and walked to town, when she disclosed the occurrence for the first time to her aunt. Defendant did not deny the assault, but claimed that he had no intention of debauching prosecutrix against her will, and that when he discovered that she was determined in her refusal he voluntarily desisted in his efforts. It was held that a sentence of eight years' imprisonment on conviction of assault with intent to commit rape was excessive, and should be reduced to five years. State *v.* Miller, 124 Iowa 429, 100 N. W. 334. See also State *v.* Young, 135 Iowa 554, 113

III. CIVIL LIABILITY.

A. Right of Action in General. A female upon whom a rape is committed may maintain an action to recover damages for the injury sustained; the right of action not being merged in the felony.[19] *A fortiori* an action may be maintained for an assault with intent to rape.[20] And in a proper case an action for loss of services may be maintained by the father or master of the female.[21] In such actions by the female the maxim "*Volenti non fit injuria*" applies, and an action will not lie if plaintiff consented;[22] but conduct of plaintiff short of consent is no justification,[23] and if force was used to overcome the resistance of plaintiff and she finally consented to intercourse, although not in consequence of the violence, defendant is still liable for damages for the assault.[24] Where one upon whom a rape has been consummated obtains a judgment for the attempt or assault, it bars a subsequent action for the rape.[25]

B. Pleading. An allegation "that the defendant made an indecent assault upon the plaintiff and then and there debauched and carnally knew her" is sufficient in a civil action for rape;[26] and in an action for assault with intent to rape no particular form of words is necessary to designate the offense; it is sufficient if it be alleged in general terms.[27] Where a declaration contains a count charging

N. W. 325; State *v.* Blunt, 77 Iowa 106, 41 N. W. 586.

19. Koenig *v.* Nott, 2 Hilt. (N. Y.) 323, 8 Abb. Pr. 384. See ACTIONS, 1 Cyc. 681.

20. Dickey *v.* McDonnell, 41 Ill. 62; Alexander *v.* Blodgett, 44 Vt. 476. See, generally, ASSAULT AND BATTERY, 3 Cyc. 1066.

Touching of the person not necessary.— In an action of trespass for an assault with intent to ravish, an exposure of defendant's person and movements indicating an intention to have intercourse with plaintiff, and which caused her to fear that such was his purpose, constitutes an assault, without any touching of her person. Alexander *v.* Blodgett, 44 Vt. 476.

Action for attempt or assault where rape was committed.—Although Mo. Rev. St. (1899) § 2361 [Annot. St. (1906) p. 1454], provides that no person shall be convicted of an assault with an intent to commit a crime or of any other attempt to commit any other offense, when it shall appear that the crime intended or the offense attempted was perpetrated by such person at the time of such assault or in pursuance of such an attempt, one upon whom a rape is committed may maintain a civil action for the attempt; the fact that the lesser crime was merged in the greater being no bar to the action. Linville *v.* Green, 125 Mo. App. 289, 102 S. W. 67.

Simple assault.— If the declaration or complaint is sufficient, plaintiff may recover damages for common assault. Wolff *v.* Van Housen, 55 Ill. App. 295. See *infra*, III, B.

21. Palmer *v.* Baum, 123 Ill. App. 584; Nyman *v.* Lynde, 93 Minn. 257, 101 N. W. 163.

Action by master or parent for debauching servant or daughter see MASTER AND SERVANT, 26 Cyc. 1580; PARENT AND CHILD, 29 Cyc. 1637; SEDUCTION.

22. Robinson *v.* Musser, 78 Mo. 153. And see Beseler *v.* Stephani, 71 Ill. 400; Dickey *v.* McDonnell, 41 Ill. 62; Champagne *v.* Hamey, 189 Mo. 709, 88 S. W. 92; Koenig *v.* Nott, 2 Hilt. (N. Y.) 323, 8 Abb. Pr. 384. To maintain an action for rape, plaintiff must satisfy the jury that the criminal connection was accomplished with the intent on defendant's part to effect his purpose in defiance of all resistance, and that it took place without her consent, against her will, and that she resisted to the best of her ability, under all the circumstances. Dean *v.* Raplee, 145 N. Y. 319, 39 N. E. 952 [*affirming* 75 Hun 389, 27 N. Y. Suppl. 438].

Action for seduction see SEDUCTION.

23. Palmer *v.* Baum, 123 Ill. App. 584.

24. Dickey *v.* McDonnell, 41 Ill. 62, holding that where brutal violence is used for the purpose of overcoming the resistance of a female, and her ultimate consent to sexual intercourse is obtained, although not in consequence of such violence, a right of action for the previous violence clearly remains. Contra, Linville *v.* Green, 125 Mo. App. 289, 102 S. W. 67, holding that where one commits an assault on a woman with intent to rape, but, during the assault, she consents, such consent condones the assault, and prevents any action therefor.

25. Linville *v.* Green, 125 Mo. App. 289, 102 S. W. 67.

26. Koenig *v.* Nott, 2 Hilt. (N. Y.) 323, 8 Abb. Pr. 384.

27. Bormouth *v.* Beyer, 10 Ohio Cir. Ct. 291, 6 Ohio Cir. Dec. 548.

Sufficient complaint or petition.— In an action by a female to recover damages for a criminal assault, a petition which alleges, in a general way, that defendant assaulted plaintiff with criminal intent, thereby frightening, humiliating, and injuring her, to her damage, is good as against a general demurrer. Bormuth *v.* Beyer, 10 Ohio Cir. Ct. 291, 6 Ohio Cir. Dec. 548. The words, in the petition in an action for damages for an indecent assault, "did then and there assault plaintiff with foul and indecent purpose to

rape and one charging an attempt at rape, plaintiff may recover damages for a common assault.[28]

C. Evidence — 1. Burden of Proof. In an action for rape the burden is on plaintiff not only to show the fact of intercourse, but also to satisfy the jury that it was accomplished by force and against her will.[29]

2. Admissibility — a. In General. Since, if the woman consented no action for damages will lie, any evidence tending to show consent or want of it is admissible.[30] Evidence of attending circumstances which tend to show the guilt or innocence of defendant or to corroborate plaintiff are admissible,[31] but not remote declarations of defendant.[32] Any circumstance that will corroborate plaintiff or will tend to contradict her may be proved.[33] The acts and conduct of the parties and appearance of plaintiff after the alleged assault and injury are admissible as touching the matter of consent.[34] It may be shown on the question of consent that plaintiff continued on friendly terms with defendant after the alleged outrage.[35] Clothing identified as that worn at the time may be shown to prove use of force.[36] Testimony of a physician as to the condition of plaintiff before and after the alleged assault, tending to show the commission of the act, is admissible; [37] but it is not competent, in an action for rape, for a physician to

do violence to her person, and by force and intimidation to criminally know her, the said plaintiff," etc., are sufficient after verdict. Atkins *v.* Gladwish, 27 Nebr. 841, 44 N. W. 37. See also Linville *v.* Green, 125 Mo. App. 289, 102 S. W. 67, petition sufficient after judgment.

28. Wollf *v.* Van Housen, 55 Ill. App. 295.

29. Dean *v.* Raplee, 145 N. Y. 319, 39 N. E. 952 [*affirming* 75 Hun 389, 27 N. Y. Suppl. 438].

30. Beseler *v.* Stephani, 71 Ill. 400; Robinson *v.* Musser, 78 Mo. 153; Dean *v.* Raplee, 145 N. Y. 319, 39 N. E. 952 [*affirming* 75 Hun 389, 27 N. Y. Suppl. 438]. See *supra*, III, A.

31. Stratton *v.* Nichols, 20 Conn. 327 (holding that in trespass for assault upon a woman with intent to have illicit intercourse with her, exclamations by her to defendant at the time of the alleged assault, "Let me go!" "Keep your distance!" "Keep your hands off of me!" to which defendant made no reply, were admissible in evidence against defendant); Fay *v.* Swan, 44 Mich. 544, 7 N. W. 215 (holding that where in an action for an assault with intent to ravish, occurring at a hotel to which plaintiff had been induced to go, plaintiff testified that it would be of no use for her to make any noise, as he was in the habit of going to the house in question with women, and that the landlord expected him, it was admissible to show by another witness that defendant had tried to induce her (witness) to go to the same house with him, and had told her at the time that he was in the habit of taking girls there, and that all was arranged, such testimony tending to corroborate plaintiff).

Similar charges by plaintiff against others. — In an action for assault with intent to rape, evidence that plaintiff had made similar charges against other men, and obtained money by compromise is inadmissible. Ogle *v.* Brooks, 87 Ind. 600, 44 Am. Rep. 778.

32. Atkins *v.* Gladwish, 25 Nebr. 390, 41 N. W. 347, holding that in a civil action for an assault with intent to have carnal intercourse, statements made by defendant concerning plaintiff derogatory to her character, before and after the alleged assault, and too remote therefrom to be deemed a part of the *res gestæ*, are inadmissible.

33. In an action for damages for ravishing plaintiff, where she has testified that the intercourse, effected by defendant with force, was the first occasion of the kind in her life, and that it resulted in the birth of a child, evidence of a physician that pregnancy would not probably result from such an act is competent. Young *v.* Johnson, 46 Hun (N. Y.) 164 [*affirmed* in 123 N. Y. 226, 25 N. E. 363].

34. Mallett *v.* Beale, 66 Iowa 70, 23 N. W. 269; Schenk *v.* Dunkelow, 70 Mich. 89, 37 N. W. 886; Young *v.* Johnson, 123 N. Y. 226, 25 N. E. 363 [*affirming* 46 Hun 164.

35. Schuek *v.* Hagar, 24 Minn. 339; Champagne *v.* Hamey, 189 Mo. 709, 88 S. W. 92; Young *v.* Johnson, 123 N. Y. 226, 25 N. E. 363 [*affirming* 46 Hun 164].

36. McMurrin *v.* Rigby, 80 Iowa 322, 45 N. W. 877, holding that underclothing worn by plaintiff at the time of the alleged rape, although it has been since washed, and alleged bloodstains removed therefrom, is admissible in evidence in an action for the rape as tending to show, by its torn condition, that defendant used violence. See also *supra*, II, B, 2, b. (III).

37. Fay *v.* Swan, 44 Mich. 544, 7 N. W. 215, holding that in an action for an assault with intent to ravish, it was not error to permit a physician, who was called in immediately after the assault, to testify that he had treated plaintiff for several years for a certain disease, and that, on the occasion in question, he found her in a condition which was unexpected, and for which he could not account until he was informed of the assault, and that he was satisfied that, if true, it would account for her changed state.

testify as to the result of experiments made by him for the purpose of ascertaining whether sexual intercourse could have been accomplished in the position which plaintiff has testified she and defendant occupied, where it is not shown that such experiments were made under such conditions as to size of persons as would necessarily show possibility or impossibility to have intercourse.[38] Testimony that defendant was living apart from his wife is not admissible, in an action for an assault with intent to rape, as tending to establish the offense.[39]

b. Complaint and Outcry, and Failure to Complain.[40] It is competent to prove that complaint of the outrage was made by plaintiff immediately or shortly afterward;[41] but the particulars of the complaint, unless part of the *res gestæ*, are not admissible.[42] Failure or delay of the woman to make outcry or complaint is admissible, and is a strong circumstance to show consent and want of resistance,[43] but such failure or delay may be accounted for by proof of circumstances which excuse such delay.[44]

c. Character of Plaintiff. The reputation of the woman for chastity may be shown as tending to show consent and absence of force, and as bearing on the question of damages, but the evidence must be confined to acts prior to the one complained of.[45] Evidence of specific acts of lewdness or unchastity has also been held admissible.[46] Plaintiff cannot introduce evidence of her good moral char-

38. McMurrin *v.* Rigby, 80 Iowa 322, 45 N. W. 877. It is not error to refuse to allow the physician to testify as to such experiments, where he has been permitted to testify as an expert that sexual intercourse, under the conditions described by plaintiff, was impossible. McMurrin *v.* Rigby, *supra*.

39. Haulish *v.* Boller, 72 N. Y. App. Div. 559, 75 N. Y. Suppl. 992, 11 N. Y. Annot. Cas. 18.

40. See also *supra*, II, B, 2, g, (III), (IV).

41. McMurrin *v.* Rigby, 80 Iowa 322, 45 N. W. 877 (holding that in an action for rape, where plaintiff has testified as to the ravishment, it is competent to allow a witness to testify that she stated to her, after the offense was committed, that she had been "hurt in the most brutal way any one could be hurt," since that was evidence of a complaint made by her of the injury done her, and not of the particulars of the rape); Gardner *v.* Kellogg, 23 Minn. 463.

Evidence of complaint inadmissible.— But it was held that the testimony of plaintiff's mother that plaintiff had, two weeks after the alleged rape, during which time she had continued at her work, and while she was not under treatment by a physician, complained that she had pains in her back and side, was inadmissible, since such declarations were not the natural result and expression of suffering, nor made to a physician for the purpose of treatment. McMurrin *v.* Rigby, 80 Iowa 322, 45 N. W. 877. And in an action for damages for a series of indecent assaults, with rape, alleged to have been committed on the person of plaintiff during a period of eighteen months, while she was living in defendant's family, where it appeared that the acts complained of were committed in one of defendant's barns, which was within easy hearing distance from defendant's house and the house of plaintiff's relatives, which was her home; that there was no outcry at the time, and no complaint to any one during the continuance of the outrages, it was held that evidence of disclosures by plaintiff, made more than three years after the last of the acts complained of, and after plaintiff had lived with relatives in another state, was inadmissible as corroborative evidence. Dean *v.* Raplee, 64 Hun (N. Y.) 537, 19 N. Y. Suppl. 463.

42. Morrissey *v.* Ingham, 111 Mass. 63, holding that in an action for carnally knowing plaintiff, a girl ten years old, by force, and giving her a venereal disease, evidence of her statement to the physician who was treating her for the disease that defendant had had connection with her three months before was inadmissible.

43. Lind *v.* Closs, 88 Cal. 6, 25 Pac. 972; Champagne *v.* Hamey, 189 Mo. 709, 88 S. W. 92; Young *v.* Johnson, 123 N. Y. 226, 25 N. E. 363 [*affirming* 46 Hun 164].

44. Starnes *v.* Stevenson, (Iowa 1904) 98 N. W. 312; Schenk *v.* Dunkelow, 70 Mich. 89, 37 N. W. 886 (holding that in an action of trespass, brought by a woman for assault accompanied with ravishment, her sense of shame, and her fear of defendant, if proved, should be taken into consideration by the jury, to rebut any unfavorable inference arising from her not making outcry at the time, and her silence in regard to the matter afterward); Linville *v.* Green, 125 Mo. App. 289, 102 S. W. 67; Dean *v.* Raplee, 145 N. Y. 319, 39 N. E. 952 [*affirming* 75 Hun 389, 27 N. Y. Suppl. 438].

45. Nyman *v.* Lynde, 93 Minn. 257, 101 N. W. 163. *Compare*, however, Harris *v.* Neal, 153 Mich. 57, 116 N. W. 535, holding that in a civil action by a married female for rape, evidence that her reputation for chastity was bad was inadmissible as bearing on the improbability of her testimony; and, it having been admitted only to mitigate damages, it could not be considered for any other purpose.

46. Young *v.* Johnson, 46 Hun (N. Y.)

acter as part of her case, where no evidence attacking her character has been introduced;[47] nor is evidence of her good reputation admissible in rebuttal, where her general character has not been assailed, although defendant has shown specific instances of unchastity.[48]

d. Character of Defendant. Evidence of the good character of defendant is admissible;[49] but general reputation as to chastity is not admissible,[50] nor is his reputation as a quiet and peaceable citizen.[51]

e. Other Acts. Evidence of similar acts by defendant with others is not admissible.[52]

3. Sufficiency. The sufficiency of the evidence is generally a matter for the jury,[53] but if the evidence does not show an assault or rape, or shows consent on the part of the woman, a verdict against defendant must be set aside.[54] A preponderance of evidence is all that plaintiff is required to produce.[55] It is not

164 [*affirmed* in 123 N. Y. 226, 25 N. E. 363]; Gulerette *v.* McKinley, 27 Hun (N. Y.) 320; Watry *v.* Ferber, 18 Wis. 500, 86 Am. Dec. 789. In an action for damages for ravishing plaintiff, evidence is admissible of dangerously familiar and imprudent conduct by plaintiff with other young men living in the same house with her, at about the time when, from the date of the birth of her child, she must have become pregnant. Young *v.* Johnson, 123 N. Y. 226, 25 N. E. 363 [*affirming* 46 Hun 164]. In a civil action for assault with intent to ravish, every species of evidence showing previous lascivious conduct on the part of plaintiff in the presence of defendant, or in her intercourse with him, designed or adapted to incite him to take liberties with her person, or induce him to believe that such advances on his part would not be unacceptable, are admissible. Crossman *v.* Bradley, 53 Barb. (N. Y.) 125. In an action for assault with intent to ravish, evidence that plaintiff was in the habit of making indecent exposure of her person, and indulging in obscene language with men, is admissible in mitigation of damages, as showing that she had no modesty to be shocked by the act complained of. Parker *v.* Coture, 63 Vt. 155, 21 Atl. 494, 25 Am. St. Rep. 750.

47. Young *v.* Johnson, 46 Hun (N. Y.) 164 [*affirmed* in 123 N. Y. 226, 25 N. E. 363].

48. Young *v.* Johnson, 123 N. Y. 226, 25 N. E. 363 [*affirming* 46 Hun 164]; Schaeffer *v.* Oppenheimer, 9 N. Y. St. 688.

49. Schuck *v.* Hagar, 24 Minn. 339.

50. Kinneberg *v.* Kinneberg, 8 N. D. 311, 79 N. W. 337.

51. Ryan *v.* Sayen, 5 Ohio S. & C. Pl. Dec. 165, 7 Ohio N. P. 389.

52. Sutton *v.* Johnson, 62 Ill. 209; Ogle *v.* Brooks, 87 Ind. 600, 44 Am. Rep. 778.

53. Starnes *v.* Stevenson, (Iowa 1904) 98 N. W. 312. Whether or not it was possible for defendant, under the circumstances, to assault the plaintiff, and overcome her resistance, and commit rape upon her, was a matter for the jury. Wright *v.* Grant, 6 N. Y. St. 362. In an action for assault and battery by throwing down and ravishing plaintiff, who was then fifteen years old, and had lived with defendant and his wife as a member of the family for about a year, it appeared that plaintiff was delicate, while defendant was strong and vigorous. Plaintiff made no outcry, although persons were within hearing, and she did not speak of the matter to her female relations until long afterward. She testified that she tried to prevent the intercourse, and that defendant told her that it would be worse for her if she told any one. It was held that whether or not plaintiff submitted voluntarily was a question for the jury. Dean *v.* Raplee, 75 Hun (N. Y.) 389, 27 N. Y. Suppl. 438 [*affirmed* in 145 N. Y. 319, 39 N. E. 952].

Evidence held sufficient see Starnes *v.* Stevenson, (Iowa 1904) 98 N. W. 312; Linville *v.* Green, 125 Mo. App. 289, 102 S. W. 67.

Failure to make outcry or complaint.— In an action for a rape committed on plaintiff by defendant, the fact that plaintiff for a considerable period of time failed to disclose the crime did not conclusively discredit her testimony, but was merely a circumstance to go to the jury. Linville *v.* Green, 125 Mo. App. 289, 102 S. W. 67. See also Schenk *v.* Dunkelow, 70 Mich. 89, 37 N. W. 886. A judgment for plaintiff in an action for assault will not be set aside where there is evidence that defendant threw plaintiff down and ravished her, she being a delicate girl of fifteen years, and in his employ, although she made no outcry at the time, nor complained for a long time afterward. Dean *v.* Raplee, 145 N. Y. 319, 39 N. E. 952 [*affirming* 75 Hun 389, 27 N. Y. Suppl. 438].

54. Lind *v.* Closs, 88 Cal. 6, 25 Pac. 972; Champagne *v.* Hamey, 189 Mo. 709, 88 S. W. 92. In an action for unlawfully entering plaintiff's dwelling-house, the evidence was that defendant came to plaintiff's house one night and asked if he could come in; that plaintiff answered that he could not, but defendant came right in, and began "fussing with his clothes,— fussing with his pants"; that defendant said nothing while in the house, but walked up to the bedroom door; that plaintiff ordered him to go out, and he passed through the house and went out at the front door. This was held insufficient to sustain a finding that defendant made an assault on plaintiff for the purpose of having a carnal connection with her. Ford *v.* Schliessman, 107 Wis. 479, 83 N. W. 761.

55. Dean *v.* Raplee, 145 N. Y. 319, 39

necessary that plaintiff be corroborated, even when this is required in a criminal prosecution.[56]

D. Instructions. In actions for rape and assault with intent to rape, the court should properly instruct the jury as to the effect of consent and want of force and resistance, and as to the effect of plaintiff's failure to make outcry or complaint.[57] In an action for assault, where the declaration in the first count charges rape, in the second an attempt at rape, and in the third common assault, it is error to charge that plaintiff must show, not only that defendant committed an assault on her, but that he did so with intent to compel her by force and against her will to have intercourse with him.[58] It is not error to refuse special instructions as to matters covered by the general charge.[59]

E. Damages.[60] In actions for rape or assault with intent to rape, damages may be allowed for mental anguish[61] and for physical suffering and disgrace,[62] but not for loss of reputation.[63] Exemplary damages may be allowed.[64]

N. E. 952 [*affirming* 75 Hun 389, 27 N. Y. Suppl. 438]; Wright *v.* Grant, 6 N. Y. St. 362. In an action by a woman for damages for an assault and battery, accompanied with ravishment that resulted in the birth of a child, plaintiff need not show that the assault was committed with such force and violence as to constitute the crime of rape, or to establish any fact in her case by more than a preponderance of the evidence. Schenk *v.* Dunkelow, 70 Mich. 89, 37 N. W. 886.

56. Starnes *v.* Stevenson, (Iowa 1904) 98 N. W. 312; Rogers *v.* Winch, 76 Iowa 546, 41 N. W. 214; Champagne *v.* Hamey, 189 Mo. 709, 88 S. W. 92.

57. Beseler *v.* Stephani, 71 Ill. 400.

Instructions sustained.— In an action of trespass, the injury complained of was an assault by defendant upon plaintiff, and having sexual intercourse with her against her will. The defense interposed was that the intercourse was with her consent. The evidence showed that plaintiff and defendant had such intercourse on frequent occasions, and that the result was the birth of a child. It was held that it was proper to instruct the jury that plaintiff was not entitled to recover for sexual commerce with defendant, or its consequences, if had with her consent. Beseler *v.* Stephani, 71 Ill. 400. In an action for damages owing to plaintiff's having been ravished by defendant and caused to become a mother, it was error to refuse to instruct that if at the time of the assault or within a reasonable time thereafter plaintiff had an opportunity to make an outcry and she did not do so, and did not do so as soon as an opportunity offered, or at any time prior to the birth of her child she did not complain of the assault, and that she continued on friendly relations with defendant, the jury should take such facts into the case in determining whether the defendant did have carnal knowledge with plaintiff by force, and that if the defendant did not have sexual intercourse with plaintiff, or even if he did with her consent, he was not liable. Champagne *v.* Hamey, 189 Mo. 709, 88 S. W. 92. It was proper to charge that plaintiff's failure to disclose the outrage committed against her within a reasonable time after opportunity to do so was a sufficient reason for impeaching the veracity of her story. Young *v.* Johnson, 123 N. Y. 226, 25 N. E. 363 [*affirming* 46 Hun 164].

Instruction not sustained.—In an action of trespass in assaulting plaintiff and having sexual intercourse with her against her will, defended on the ground that the intercourse was with her consent, it is improper in an instruction to define the crime of rape, and to direct the jury to find specially whether defendant did or did not commit a rape on plaintiff, since for the purposes of a civil suit the alleged acts of defendant constitute only trespasses. Beseler *v.* Stephani, 71 Ill. 400.

58. Wollf *v.* Van Housen, 55 Ill. App. 295.

59. Mallett *v.* Beale, 66 Iowa 70, 23 N. W. 269, holding that where, in a civil action for an assault with intent to commit rape, it is shown that the parties had had some correspondence and talks after the assault, and the court instructs the jury that, in determining the character of the assault, they shall consider the conduct of the parties afterward, there is no error in refusing special instructions on this subject.

60. Recovery of damages for common assault see *supra*, III, B.

61. Leach *v.* Leach, 11 Tex. Civ. App. 699, 33 S. W. 703.

62. Fay *v.* Swan, 44 Mich. 544, 7 N. W. 215.

63. In an action for indecent assault, an instruction that in case the jury find for plaintiff they may include, in their assessment of damages, compensation for "loss of good name, honor, and reputation," is error. Atkins *v.* Gladwish, 25 Nebr. 390, 41 N. W. 347.

64. Where debauchment is accomplished by means of force and arms, exemplary damages are recoverable, as in the case of seduction. Mohelsky *v.* Hartmeister, 68 Mo. App. 318. Exemplary damages may be awarded in a civil action for assault with intent to rape committed on a young married woman, and continued after she had resisted, declared herself, and cried out for help, the assault being accompanied by profane and lewd language. Haulish *v.* Boller, 72 N. Y. App. Div. 559, 75 N. Y. Suppl. 992, 11 N. Y. Annot. Cas. 18.

IV. CRIMES BY NEGROES, SLAVES, ETC.

In many of the southern states, prior to the abolition of slavery, the punishment of slaves, negroes, mulattoes, etc., for crimes against white women was by statute made different from that of white men guilty of the same offense. This, however, is interesting now only as a matter of history.[65]

RAPIDLY. A word to be construed in the light of the circumstances of the particular situation.[1]

RAPID TRANSIT COMMISSIONERS. See MUNICIPAL CORPORATIONS, 28 Cyc. 573.

RAPPER. In criminal slang, complainant.[2]

RARE. A definition of "extraordinary."[3]

RASCAL. A word which may convey an idea of moral turpitude.[4]

RASING. Of a deed or writing, scraping out by some knife or other instrument.[5] (See ERASE, 16 Cyc. 534; ERASURE, 16 Cyc. 534; RAZURE.)

RATABLE. Made at a proportionate rate;[6] on one rule of proportion applicable to all alike.[7] (See RATABLY; RATE; RATING.)

Excessive damages.— In an action for personal injury to a married woman, where the declaration alleged an attempt to ravish, but the evidence showed no persistent attempt, nor any actual injury, but only a gross insult, a verdict for two thousand five hundred dollars damages was held excessive. Timmons *v.* Broyles, 47 Ill. 92.

65. See the following cases:

Alabama.— Witherby *v.* State, 39 Ala. 702; Lewis *v.* State, 35 Ala. 380; Thurman *v.* State, 18 Ala. 276.

Arkansas.— Pleasant *v.* State, 15 Ark. 624, 13 Ark. 360; Charles *v.* State, 11 Ark. 389; Dennis *v.* State, 5 Ark. 230.

Mississippi.—George *v.* State, 37 Miss. 316; Wash *v.* State, 14 Sm. & M. 120.

Missouri.— State *v.* Anderson, 19 Mo. 241.

North Carolina.— State *v.* Peter, 53 N. C. 19; State *v.* Elick, 52 N. C. 68; State *v.* Jesse, 19 N. C. 297; State *v.* Jim, 12 N. C. 142.

Tennessee.—Peter *v.* State, 5 Humphr. 436; Henry *v.* State, 4 Humphr. 270; Sydney *v.* State, 3 Humphr. 478; Grandison *v.* State, 2 Humphr. 451.

Virginia.— Com. *v.* Watts, 4 Leigh 672; Com. *v.* Fields, 4 Leigh 648; Young *v.* Com., 2 Va. Cas. 328; Com. *v.* Bennet, 2 Va. Cas. 235; Com. *v.* Mann, 2 Va. Cas. 210.

United States.— U. S. *v.* Patrick, 27 Fed. Cas. No. 16,006, 2 Cranch C. C. 66.

1. Vessels *v.* Metropolitan St. R. Co., 129 Mo. App. 708, 712, 108 S. W. 578, holding that a car, run at usual speed, and without effort to lower speed, under dangerous conditions was, under the circumstances, run rapidly.

2. People *v.* Madden, 120 N. Y. App. Div. 338, 340, 105 N. Y. Suppl. 554, where it was so defined by a police witness as used by the defendant, and said that defendant's familiarity with the use of the word as used in criminal circles rendered evidence of admission of his guilt highly probable.

3. See 19 Cyc. 101 text and note 11.

4. See Brown *v.* Mims, 2 Mill (S. C.) 235, 236, where it is said: "'That he was a damned rascal,' although a vulgar expression, is, perhaps, the strongest in use, to convey our ideas of moral turpitude."

5. Rex *v.* Bigg, 3 P. Wms. 420, 433, 24 Eng. Reprint 1127.

Not applicable either to blotting or expunging with liquid see Rex *v.* Bigg, 3 P. Wms. 420, 433, 24 Eng. Reprint 1127. *Compare*, however, ERASE, 16 Cyc. 534; ERASURE, 16 Cyc. 534.

Radere nomen signifies to scrape out a name. Rex *v.* Bigg, 3 P. Wms. 420, 433, 24 Eng. Reprint 1127.

6. Webster Int. Dict. [*cited* in State *v.* Corning State Sav. Bank, 127 Iowa 198, 203, 103 N. W. 97].

7. Merrill *v.* Jacksonville Nat. Bank, 173 U. S. 131, 143, 19 S. Ct. 360, 371, 43 L. ed. 640.

"Ratable distribution" is one which is made at proportionate rates. State *v.* Corning State Sav. Bank, 127 Iowa 198, 203, 103 N. W. 97, where it is said: "It may be conceded that, standing alone, the provision for ratable distribution among the creditors of the bank would require that all creditors be placed upon an equality, each receiving as much as the other, in proportion to the amount of his approved claim. But a 'ratable distribution of the assets among creditors, giving preference in payment to depositors,' is an altogether different proposition. Under the unqualified provision first mentioned, all creditors are placed in a single class; but under the statute as it stands they are separated into two classes, one of which is given preference over the other in the distribution of the assets. The distribution is still 'ratable,' although the classes may participate only in a stated order of priority." See DISTRIBUTION, 14 Cyc. 524.

"Ratable estate," within the meaning of a tax law, is a taxable estate (Anderson L. Dict. [*quoted* in State *v.* Camp Sing, 18

RATABLY. Proportionally;[8] equivalent to PRO RATA,[9] *q. v.* (See RATABLE; RATE.)

RATE. A fixed measure of estimation;[10] proportion or standard;[11] ratio; percentage; proportion; degree;[12] relative proportion;[13] a sum assessed as a tax; in England, a local tax, as the county, the borough, the poor rate;[14] price;

Mont. 128, 145, 44 Pac. 516, 56 Am. St. Rep. 551, 32 L. R. A. 635]; Marshfield *v.* Middlesex, 55 Vt. 545, 546); the real and personal property that the legislature designates as taxable (Marshfield *v.* Middlesex, *supra*, adding: "It is not questioned that the Legislature may declare what property shall be taxed. . . . Farms, horses, and money obligations are 'ratable estate,' merely because the Legislature has ordained that such property shall be taxed"); estate in its quality and nature capable of being rated; that is, appraised or assessed (Coventry Co. *v.* Coventry Tax Assessors, 16 R. I. 240, 241, 14 Atl. 877). It is not strictly "liable to taxation," so as to exclude property which, although taxable in its nature, is not taxable under the circumstances, as personalty when liabilities exceed assets. Coventry Co. *v.* Coventry Tax Assessors, 16 R. I. 240, 241, 14 Atl. 577. See ESTATES, 16 Cyc. 599; PROPERTY, 32 Cyc. 639.

"**Ratable value**" of stock is the actual value, appraised, or assessed value. Darrow *v.* Langdon, 20 Conn. 288, 295, so defining the term as used in a statute providing for forfeiture of one per cent of ratable value of stock of any bank transferred with intent to evade tax law.

"**Ratable polls,**" within the meaning of the Massachusetts constitution, is a term said to include polls of male aliens above the age of sixteen years (Opinion of Justices, 7 Mass. 523, 529); within the meaning of the New Hampshire constitution, taxable polls of the age of twenty-one years (Opinion of Justices, 8 N. H. 573, where in construing a constitutional provision basing the number of a town's representatives on its number of ratable polls, it is said: "The constitution does not designate what polls are to be deemed rateable; but the ordinary import of the terms would seem to include all polls, of the age of twenty-one years, that may by law be taxed, within the description of rateable polls"). See POLL, 31 Cyc. 909.

"'**Rateable' property**" is property in its quality and nature capable of being rated; that is, appraised or assessed. Reg. *v.* Malden, L. R. 4 Q. B. 326, 329, 10 B. & S. 323, 38 L. J. M. C. 125 [*quoted* in Coventry Co. *v.* Coventry Tax Assessors, 16 R. I. 240, 241, 14 Atl. 877].

8. U. S. *v.* Knox, 111 U. S. 784, 786, 4 S. Ct. 686, 28 L. ed. 603 [*quoted* in Merrill *v.* Jacksonville Nat. Bank, 173 U. S. 131, 144, 19 S. Ct. 360, 43 L. ed. 640], where it is said: "Dividends are to be paid to all creditors ratably, that is to say, proportionally. To be proportionate they must be made by some uniform rule."

9. Brombacher *v.* Berking, 56 N. J. Eq. 251, 254, 39 Atl. 134, construing the word as used in a will providing that in case any child should die without issue then his or her share should go "ratably" to the surviving children.

10. Hilburn *v.* St. Paul, etc., R. Co., 23 Mont. 229, 240, 58 Pac. 551, 811.

Certain in its sense see McWhorter *v.* Benson, Hopk. (N. Y.) 32, 42.

"**Going rate**" see Barrett *v.* The Wacousta, 2 Fed. Cas. No. 1,050, 1 Flipp. 517, 519–520; 20 Cyc. 1255.

"**Joint through rates**" see Burlington, etc., R. Co. *v.* Dey, 82 Iowa 312, 48 N. W. 98, 31 Am. St. Rep. 477, 12 L. R. A. 436; 23 Cyc. 496.

"**Regular rates,**" as used in a parol contract for telephone services, found, as a conclusion of fact, to mean, at least for the purpose of that contract, the rates charged in the neighboring town. Martinsburg Bank *v.* Central Pennsylvania Tel., etc., Co., 150 Pa. St. 36, 39, 24 Atl. 754.

"**Tariff**" **and** "**commercial.**"—"Tariff rate," as used in Tex. Rev. St. art. 4560*d*, providing for redemption of unused portions of railway tickets, is contrasted with commercial rate which is special, not fixed by law, to point out the rate fixed by law. Ft. Worth, etc., R. Co. *v.* Cushman, 92 Tex. 623, 624, 58 S. W. 1009.

Unreasonable or unjust rates.— Under the Railroad Commission Law (Tex. Rev. St. (1895) art. 4565, 4566), giving shippers an action against the commission to secure reduction of rates unreasonably high, the same construction should be given to the phrase "unreasonable and unjust," etc., that would have obtained in a suit to recover from the carrier excess of charges paid, wherein, at common law, the terms "unreasonable and unjust" meant that the rate charged was more than a fair compensation for the services rendered, or that the difference in rate constituted an unjust discrimination against the complainant. Railroad Commission *v.* Weld, 96 Tex. 394, 405, 73 S. W. 529.

"**Usual rates**" of commissions, as basis of charge for customs duties, see Hutton *v.* Schell, 12 Fed. Cas. No. 6,961, 6 Blatchf. 48, 52.

"**At same rates**" see LANDLORD AND TENANT, 24 Cyc. 1010 note 10.

11. Chase *v.* New York Cent. R. Co., 26 N. Y. 523, 526, where "proportion" is said to be the primary meaning of the word.

12. See Webster Dict.; Worcester Dict. [both *cited* in People *v.* Dolan, 36 N. Y. 59, 67, 1 Transcr. App. 118].

13. See Burlington, etc., R. Co. *v.* Lancaster Co., 4 Nebr. 293, 304–305, holding that in a provision for a land tax in any rate not exceeding four dollars to a quarter section, the word does not mean a percentage or valuation, but a proportion relative to the ratio between a quarter section and the tax thereon.

14. Anderson L. Dict. [*quoted* in State *v.*

value;[15] price; amount; sum;[16] the price or amount stated or fixed on anything;[17] a valuation of every man's estate;[18] a percentage upon the valuation of the land.[19] A term which may apply either to percentage of taxation or to the valuation of property[20] may relate to charges fixed for transporting property and the conveyance of persons.[21] As used in interstate commerce law, the net cost to the shipper of the transportation of his property, that is to say, the net amount the carrier receives from the shipper and retains.[22] (Rate: In Relation to Particular Subjects, see Special Titles. See also RATABLE, and Cross-References Thereunder; RATE OF EXCHANGE; RATE OF INTEREST; RATEPAYER; RATING; WATER RATE.)

RATE OF EXCHANGE. In commercial law, the actual price at which a bill drawn in one country upon another country can be bought or obtained in the former country at any given time.[23] (See CURRENT RATE OF EXCHANGE, 12 Cyc. 999; EXCHANGE, 17 Cyc. 828; RATE.)

RATE OF INTEREST. A phrase which in common acceptation refers to the percentage or amount of interest and not to the manner of computing.[24] (See INTEREST, 22 Cyc. 1459; RATE; USURY.)

RATEPAYER. One who pays rates or taxes.[25] (See RATE.)

RATIFICATION. The act of giving sanction and validity to something done

Camp Sing, 18 Mont. 128, 145, 44 Pac. 516, 56 Am. St. Rep. 551, 32 L. R. A. 635].

Public, as distinguished from private and local rates, are "those which are levied and taken out of the property of the person assessed, for some public or general use or purpose, in which he has no direct, immediate and peculiar interest; being exactions from him toward the expense of carrying on the government, either directly and in general, that of the whole commonwealth, or more mediately and particularly, through the intervention of municipal corporations," while "those charges and impositions which are laid directly upon the property in a circumscribed locality, to effect some work of local convenience which in its results is of peculiar advantage and importance to the property especially assessed for the expense of it, are not public, but are local and private." Buffalo City Cemetery *v.* Buffalo, 46 N. Y. 506, 510 [*quoted* in Batterman *v.* New York, 65 N. Y. App. Div. 576, 578–579, 73 N. Y. Suppl. 44], so holding with reference to the use of the terms in St. (1847) c. 133, § 10.

15. Barrett *v.* The Wacousta, 2 Fed. Cas. No. 1,050, 1 Flipp. 517, 519.

"Nothing more than the word 'price,'" as used in Mass. Pub. St. c. 87, § 31, providing for a change in "rates" of board to lunatics and paupers. Gould *v.* Lawrence, 160 Mass. 232, 233, 35 N. E. 462.

"'Rates as favorable' mean, no more than 'prices as low,'—and that simply, irrespective of any circumstances or conditions"—as used in an ordinance requiring a company to furnish gas "at rates as favorable" as another. Decatur Gas-Light Co. *v.* Decatur, 120 Ill. 67, 70, 11 N. E. 406.

16. Chase *v.* New York Cent. R. Co., 26 N. Y. 523, 525, construing the phrase "rate of fare."

Distinguished from "amount" see Hilburn *v.* St. Paul, etc., R. Co., 23 Mont. 229, 240, 58 Pac. 551, 811.

17. Webster Dict. [*quoted* in Raun *v.* Reynolds, 11 Cal. 14, 19].

18. Cunningham L. Dict. [*quoted* in State *v.* Utter, 34 N. J. L. 489, 494].

19. Burlington, etc., R. Co. *v.* Lancaster County, 4 Nebr. 293, 304, where it is said that in many places in the Revenue Act the word is used in that sense, and that where such is the case an *ad valorem* assessment or levy is imperatively required.

20. Anderson L. Dict. [*quoted* in State *v.* Camp Sing, 18 Mont. 128, 145, 44 Pac. 516, 56 Am. St. Rep. 551, 32 L. R. A. 635]. See State *v.* Utter, 34 N. J. L. 489, 494 [*quoted* in Crawford *v.* Linn County, 11 Oreg. 482, 484, 5 Pac. 738, where in construing the clause "the legislative assembly shall provide by law for uniform and equal rate of assessment and taxation," it is said "the word 'rate' is used in a somewhat different sense when applied to the assessment from that when applied to taxation," and after the quotation from State *v.* Utter, *supra*, is added: "It is applied in this clause in each sense—in the former sense to the taxation—and in the latter to the assessment."]

21. Georgia R., etc., Co. *v.* Maddox, 116 Ga. 64, 71, 42 S. E. 315, so holding where a company had power to lease its road subject to certain "rates."

22. U. S. *v.* Chicago, etc., R. Co., 148 Fed. 646, 647 [*affirmed* in 156 Fed. 558].

"In determining this net amount in a given case, all money transactions of every kind or character having a bearing on, or relation to, that particular instance of transportation whereby the cost to the shipper is directly or indirectly enhanced or reduced must be taken into consideration." U. S. *v.* Chicago, etc., R. Co., 148 Fed. 646, 647 [*affirmed* in 156 Fed. 558].

23. Black L. Dict.

24. Raun *v.* Reynolds, 11 Cal. 14, 19.

25. Webster Int. Dict.

Defined by the English Public Library Act of 1877 (40 & 41 Vict. 254), § 3, "every inhabitant who would have to pay the free library assessment in event of the Act being adopted." Atty.-Gen. *v.* Croydon, 42 Ch. D.

by another;[26] the adoption by a person as binding upon himself of an act done in such relations that he may claim it as done for his benefit, although done under such circumstances as would not bind him but for his subsequent assent;[27] the approval by act, word, or conduct, of that which was attempted (of accomplishment) but which was improperly or unauthorizedly performed in the first instance;[28] the confirmation of a previous act done either by the party himself or by another; the confirmation of a voidable act;[29] a definition of establish.[30] (Ratification: As Question of Fact or Law, see ALTERATIONS OF INSTRUMENTS, 2 Cyc. 257 note 99; FACTORS AND BROKERS, 19 Cyc. 287 note 79. By Acceptance of Benefits, see COMMERCIAL PAPER, 7 Cyc. 784 note 81; FACTORS AND BROKERS, 19 Cyc. 220–221 text and notes 67, 68; HUSBAND AND WIFE, 21 Cyc. 1301 note 4; INSURANCE, 22 Cyc. 1434–1435 text and notes 15–17; JOINT STOCK COMPANIES, 23 Cyc. 471 text and note 33; JUDGMENTS, 23 Cyc. 698 text and note 76; LANDLORD AND TENANT, 24 Cyc. 911–912 text and notes 47–50; MORTGAGES, 27 Cyc. 1504–1505 text and note 64. In Relation to: Accord and Satisfaction, see ACCORD AND SATISFACTION, 1 Cyc. 317. Accounts, Ratification—Of Admission of Correctness, see ACCOUNTS AND ACCOUNTING, 1 Cyc. 374; Of Violation of Instructions, see ACCOUNTS AND ACCOUNTING, 1 Cyc. 457. Acknowledgment, Ratification of Acknowledgment of Married Woman After Coming of Age, see ACKNOWLEDGMENTS, 1 Cyc. 543 note 65. Agency, see PRINCIPAL AND AGENT, 31 Cyc. 1245. Alterations of Instruments, see ALTERATIONS OF INSTRUMENTS, 2 Cyc. 172, 187 note 30, 232, 257 note 99. Arbitration and Award, see ARBITRATION AND AWARD, 3 Cyc. 689 text and note 92; 718. Attachment, Ratification—Of Attachment of Debtor Against Himself For Creditor's Benefit, see ATTACHMENT, 4 Cyc. 407 note 44; Of Bond For Release, see ATTACHMENT, 4 Cyc. 682 note 96; Of Issuance of Writ, see ATTACHMENT, 4 Cyc. 466 note 47. Attorneys, Ratification—By Creditor of Assignment of Judgment, see ATTORNEY AND CLIENT, 4 Cyc. 942 note 52; Of Attorney's Act by Client, see ATTORNEY AND CLIENT, 4 Cyc. 951. Bonds, Ratifica-

178, 184, 53 J. P. 726, 58 L. J. Ch. 527, 61 L. T. Rep. N. S. 291, 37 Wkly. Rep. 648.

26. Webster Dict. [*quoted* in Carter *v.* Pomeroy, 30 Ind. 438, 441].

By remainderman receiving benefit of sale by life-tenant see Ansonia *v.* Cooper, 66 Conn. 184, 191, 33 Atl. 905; Ansonia *v.* Cooper, 64 Conn. 536, 544, 30 Atl. 760.

27. Ansonia *v.* Cooper, 64 Conn. 536, 544, 30 Atl. 760 [*quoted* in Ansonia *v.* Cooper, 66 Conn. 184, 191, 33 Atl. 905].

28. Hartman *v.* Hornsby, 142 Mo. 368, 375, 44 S. W. 242.

"The acceptance of the results of the act with an intent to ratify, and with full knowledge of all the material circumstances, is a ratification." Ansonia *v.* Cooper, 64 Conn. 536, 544, 30 Atl. 760 [*quoted* in Ansonia *v.* Cooper, 66 Conn. 184, 191, 33 Atl. 905].

Involves intention.—"Ordinarily, ratification like a contract, includes within it an intention. An indispensable element of a contract is a meeting of the minds upon the subject of the contract. A ratification is the adoption of a previously formed contract." Gallup *v.* Fox, 64 Conn. 491, 495, 30 Atl. 756.

Ratification by trustee in insolvency, of note given for vendee of personalty claiming a purchase in good faith prior to insolvency proceedings is not necessarily a ratification of such sale estopping the trustee from suing for the property or its value. The question is one of fact. Gallup *v.* Fox, 64 Conn. 491, 495, 30 Atl. 756.

29. Burrill L. Dict. [*quoted* in Ft. Scott First Nat. Bank *v.* Drake, 29 Kan. 311, 324, 44 Am. Rep. 646].

It is not strictly a branch of the doctrine of principal and agent, since it may, as in case of an adult's ratification of his act done during minority, be the confirmation of one's own voidable act. Ft. Scott First Nat. Bank *v.* Drake, 29 Kan. 311, 323–324, 44 Am. Rep. 646.

"Ratification is itself a fact."—It may be "the act itself, and not a conclusion drawn from other acts or circumstances." Carter *v.* Pomeroy, 30 Ind. 438, 441, in reply to the contention that a pleading was insufficient in not stating the facts of an alleged ratification.

"Long acquiescence," with a full knowledge of the situation, amounts to a ratification, and bars the right to recover. Egan *v.* Grece, 79 Mich. 629, 641, 45 N. W. 74.

Mere silence in relation to a libel published over one's signature, and a failure to disavow it to the injured party within a reasonable time after the knowledge of the publication, does not amount to a ratification as a matter of law, but is at most evidence to be considered in connection with other facts. Dawson *v.* Holt, 11 Lea (Tenn.) 583, 587, 47 Am. Rep. 312.

Distinguished from estoppel see Steffens *v.* Nelson, 94 Minn. 365, 368, 102 N. W. 871. And see ESCROWS, 16 Cyc. 582 text and note 32.

30. See 16 Cyc. 592 text and note 40.

tion — Of Bonds in General, see BONDS, 5 Cyc. 735 note 49; Of Municipal Bonds, see MUNICIPAL CORPORATIONS, 28 Cyc. 1604. Bridges, Ratification of Contract For Construction, see BRIDGES, 5 Cyc. 1068. Brokers, Ratification — Of Acts of Broker see FACTORS AND BROKERS, 19 Cyc. 202, 220, 256, 287 note 79, 296; Of Transaction Through Broker as Agent For Both Parties, see FACTORS AND BROKERS, 19 Cyc. 227 note 8. Cancellation of Instruments, see CANCELLATION OF INSTRUMENTS, 6 Cyc. 297. Chattel Mortgages, Ratification — Of Chattel Mortgage, see CHATTEL MORTGAGES, 6 Cyc. 1009 note 56, 1051, 1100 note 71; Of Execution of Affidavit of Good Faith, see CHATTEL MORTGAGES, 6 Cyc. 1005 note 25; Of Recording, see CHATTEL MORTGAGES, 6 Cyc. 1008 note 48; Of Substitution of Property, see CHATTEL MORTGAGES, 6 Cyc. 1035 note 71. Club, Ratification of Act of Committee in Obtaining Loan, see CLUBS, 7 Cyc. 261 note 23. Commercial Paper, Ratification — Of Extension of Time For Payment, see COMMERCIAL PAPER, 7 Cyc. 904 note 6; Of Paper Given by Agent, see COMMERCIAL PAPER, 7 Cyc. 550 note 30; Of Payment to Other Than Owner, see COMMERCIAL PAPER, 7 Cyc. 1032; Of Transfer, see COMMERCIAL PAPER, 7 Cyc. 784 note 81. Compromise, see COMPROMISE AND SETTLEMENT, 8 Cyc. 503 note 7. Constitutions, Ratification of Constitution or Amendment, see CONSTITUTIONAL LAW, 8 Cyc. 744. Contracts, Ratification of Contracts — In General, see CONTRACTS, 9 Cyc. 387, 436; By Person Legally Compellable to Do an Act, of That Act Done by Another, see CONTRACTS, 9 Cyc. 365 note 32; Executed on Sunday, see SUNDAY; Relating to Particular Matters, see *infra*, and see the Special Titles. Corporations, Ratification — By Corporations, in General, see CORPORATIONS, 10 Cyc. 1069; Of Acts Affecting Shareholders' Rights, by Shareholders, see CORPORATIONS, 10 Cyc. 972; Of Acts of Board at Meeting Without Quorum, see CORPORATIONS, 10 Cyc. 777; Of Acts of Less Than Quorum, see CORPORATIONS, 10 Cyc. 780; Of Acts of President, see CORPORATIONS, 10 Cyc. 913; Of Assignment by Directors, see CORPORATIONS, 10 Cyc. 1241, 1242; Of Assignment For Creditors, see CORPORATIONS, 10 Cyc. 551 note 52; Of Breaches of Trust by Directors, see CORPORATIONS, 10 Cyc. 821; Of Consolidation, by Legislature, see CORPORATIONS, 10 Cyc. 316 text and notes 88–90; Of Contracts Between Corporations Having Joint Directors, see CORPORATIONS, 10 Cyc. 820; Of Contracts of Directors to Their Own Benefit, see CORPORATIONS, 10 Cyc. 795; Of Contracts of Directors With the Corporation, see CORPORATIONS, 10 Cyc. 811; Of County Proceedings in Aid of Corporations, see COUNTIES, 11 Cyc. 391 note 59; Of Giving Away Assets of Corporation, see CORPORATIONS, 10 Cyc. 800 note 61; Of Incorporation, by Legislature, see CORPORATIONS, 10 Cyc. 242 text and note 23; Of Loans Made Without Formal Vote, see CORPORATIONS, 10 Cyc. 1161; Of Mortgages, see CORPORATIONS, 10 Cyc. 1196, 1202; Of Promoter's Engagements, see CORPORATIONS, 10 Cyc. 263 note 72; Of Sale of All Corporate Assets, see CORPORATIONS, 10 Cyc. 1269; Of Statutes Granting Incorporation and Franchises, see CORPORATIONS, 10 Cyc. 1093; Of Stock-Purchasing Agreements, see CORPORATIONS, 10 Cyc. 388 note 11, 425, 468 note 46, 535, 538 text and notes 58, 59, 711; Of Tortious Acts as Ground of Liability, see CORPORATIONS, 10 Cyc. 1208; Of Transfer of Stock Subscription Made to New Company by Old on Consolidation, see CORPORATIONS, 10 Cyc. 300 note 73; Of Ultra Vires Acts of Committees, see CORPORATIONS, 10 Cyc. 774; Of Unlawful Declaration of Dividend, see CORPORATIONS, 10 Cyc. 554; Of Unsealed Corporate Obligations, see CORPORATIONS, 10 Cyc. 1010. Counties, Ratification — By County Boards, of Expenditures, see COUNTIES, 11 Cyc. 397; By County Courts,[31] of Contracts Made by Individual Members, see COUNTIES, 11 Cyc. 391 note 59. By County, of Bonds, see COUNTIES, 11 Cyc. 569; By County, of Bridge Contracts, see BRIDGES, 5 Cyc. 1068; By County, of Contracts in General, see COUNTIES, 11 Cyc. 478; By Legislature, of County Proceedings in Aid of Corporations, see COUNTIES, 11 Cyc. 521. Decedents' Estates — Confirmation by Court of Sales,

31. See W. Va. Code, c. 37 [*cited* in COUNTIES, 11 Cyc. 391 note 59], as to ratification by county court of contracts by members as individuals.

see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 787–795; Ratification by Heirs of Sales, see CLERKS OF COURTS, 7 Cyc. 236 note 5; EXECUTORS AND ADMINISTRATORS, 18 Cyc. 799. Deeds, Ratification — Of Defective Deeds, see DEEDS, 13 Cyc. 553; Of Delivery, see DEEDS, 13 Cyc. 565; Of Fraudulent Filing of Deed For Record, see CORPORATIONS, 10 Cyc. 229; Of Voidable Deeds, see DEEDS, 13 Cyc. 591. Ecclesiastical Law, Ratification by Archbishop of Election of Bishop, see CONFIRMATION, 8 Cyc. 656 text and note 20. Escrows, Ratification of Unauthorized Delivery, see ESCROWS, 16 Cyc. 582 text and notes 30–33. Estoppel, see ESTOPPEL, 16 Cyc. 791–795 text and notes 87–98. Factors, Ratification of Acts of Factors, see FACTORS AND BROKERS, 19 Cyc. 142. Frauds, Statute of Ratification of Parol — Contract of Hiring From a Future Day For More Than a Year, see FRAUDS, STATUTE OF, 20 Cyc. 208 note 45; Guaranty by Copartner, see FRAUDS, STATUTE OF, 20 Cyc. 275 note 9. Fraudulent Conveyances, Ratification by Person Unconsciously Made Party, see FRAUDULENT CONVEYANCES, 20 Cyc. 836 note 33. Gifts, see GIFTS, 20 Cyc. 1209. Grand Juries, Ratification by Court of Selection of Foreman, see GRAND JURIES, 20 Cyc. 1319 note 55. Guaranty, Ratification — Of Change in Guaranty, see GUARANTY, 20 Cyc. 1445; Of Guaranty, see FRAUDS, STATUTE OF, 20 Cyc. 275 note 9. Guardian and Ward, Ratification — Of Acts of Married Woman's Guardian in Dealing with Her Property, see GUARDIAN AND WARD, 21 Cyc. 106 text and notes 80, 81; Of Contracts and Expenditures For Benefit of Ward, see GUARDIAN AND WARD, 21 Cyc. 106; Of Investment by Guardian of Ward's Money, see GUARDIAN AND WARD, 21 Cyc. 92 note 55; Of Judicial Sale of Ward's Property, see GUARDIAN AND WARD, 21 Cyc. 140. Health, Ratification by Board of Health of Contracts of Subordinate Officers, see HEALTH, 21 Cyc. 393. Highways, see STREETS AND HIGHWAYS. Homesteads, Ratification of One Party's Attempted Conveyance of Joint Homestead, see HOMESTEADS, 21 Cyc. 540 note 82. Husband and Wife, Ratification — By Either Spouse of Acts of Other, as Subject of Evidence, see HUSBAND AND WIFE, 21 Cyc. 1571 text and note 33; By Husband of Acts of Wife's Guardian in Dealing with Wife's Property, see GUARDIAN AND WARD, 21 Cyc. 106 text and notes 80, 81; By Husband of His Own Invalid Note to Wife After Enactment of Statute Permitting Contracts Between Them, see HUSBAND AND WIFE, 21 Cyc. 1281 note 35; By Husband of Wife's Act as His Agent, see HUSBAND AND WIFE, 21 Cyc. 1237; By Husband of Wife's Invalid Contracts, see HUSBAND AND WIFE, 21 Cyc. 1326; By Husband of Wife's Purchase of Necessaries, see HUSBAND AND WIFE, 21 Cyc. 1228; By Statute of Wife's Defective Deed, see HUSBAND AND WIFE, 21 Cyc. 1332; By Widow as Administratrix, of Husband's Disposal of Her Note, see HUSBAND AND WIFE, 21 Cyc. 1670 note 74; By Widow of Her Obligation Made During Coverture to Pay Husband's Debts, see HUSBAND AND WIFE, 21 Cyc. 1675 note 6; By Wife After Dissolution of Marriage, of Contracts Made by Her During Coverture, see HUSBAND AND WIFE, 21 Cyc. 1326; By Wife of Deed Invalid For Want of Compliance With Statute, see HUSBAND AND WIFE, 21 Cyc. 1332; By Wife of Deed Procured Through Duress, see HUSBAND AND WIFE, 21 Cyc. 1333 note 8; By Wife of Husband's Acts as Her Agent, see HUSBAND AND WIFE, 21 Cyc. 1239, 1423; By Wife of Husband's Application of Her Money, see HUSBAND AND WIFE, 21 Cyc. 1349 note 62; By Wife of Husband's Contract For Improvements on Her Separate Property, see HUSBAND AND WIFE, 21 Cyc. 1442; By Wife of Husband's Contracts Relating to Her Separate Property, see HUSBAND AND WIFE, 21 Cyc. 1442, 1509 text and notes 73, 74; By Wife of Husband's Mortgages, see MORTGAGES, 27 Cyc. 1171 note 37; By Wife of Release Made by Counsel in Divorce, see HUSBAND AND WIFE, 21 Cyc. 1301 note 4; By Wife of Sale of Her Property, see HUSBAND AND WIFE, 21 Cyc. 1417, 1509 text and notes 74, 75; Of Donation *Propter Nuptias*, see HUSBAND AND WIFE, 21 Cyc. 1637 note 95; Of Wife's Deeds, see HUSBAND AND WIFE, 21 Cyc. 1332, 1333 note 6, 1509. Infants, Ratification — After Coming of Age, How Far Necessary to Infant's Acts and Contracts in General, see INFANTS, 22 Cyc. 602; Of Acceptance of Note by Infant Legatee, From Executor, in Satisfaction, see INFANTS, 22 Cyc.

528 note 57; Of Acknowledgment of Deed by Minor Married Woman, see INFANTS, 22 Cyc. 534 note 99; Of Agency For Parent, see PARENT AND CHILD, 29 Cyc. 1665 text and note 99; Of Bond and Warrant of Attorney of Infant, see INFANTS, 22 Cyc. 515 note 24; Of Contract of Infant, see INFANTS, 22 Cyc. 600, 684, 686; Of Enlistment of Minor, see ARMY AND NAVY, 3 Cyc. 838 note 94; Of Sales of Infants' Land, see INFANTS, 22 Cyc. 576 note 22; Of Sales of Property Without Order of Court, see INFANTS, 22 Cyc. 573 note 79; Of Transaction by Infant Affecting His Property, see INFANTS, 22 Cyc. 538. Injunction Prevented by Requirement of Ratification by Town of Contract Sought to Be Enjoined, see INJUNCTIONS, 22 Cyc. 894 note 73. Insane Persons, Ratification — Of Acts of the Insane, in General, see INSANE PERSONS, 22 Cyc. 1209; Of Contracts of Insane Persons, see INSANE PERSONS, 22 Cyc. 1198 note 78; Of Deeds of Insane Persons, see INSANE PERSONS, 22 Cyc. 1174 text and notes 84–88; Of Purchase Made by Guardian of Lunatic, see INSANE PERSONS, 22 Cyc. 1187 text and note 68; Of Sale Made by Committee Without Order of Court, by Court, see INSANE PERSONS, 22 Cyc. 1186 note 67. Insurance, Ratification — Of Acts of Agents in General, see INSURANCE, 22 Cyc. 1434; Of Cancellation of Policy, see FIRE INSURANCE, 19 Cyc. 643 note 17; Of Contract For Insurance, see FIRE INSURANCE, 19 Cyc. 627; Of Contract For Insurance After Loss, by Agent, see FIRE INSURANCE, 19 Cyc. 595 note 92; Of Contract Made Through Agent Acting For Both Parties, see INSURANCE, 22 Cyc. 1445 note 37; Of Delegated Act, by Agent, see FIRE INSURANCE, 19 Cyc. 782 note 38; Of Plan of Insurance Company For Equitable Distribution of Surplus and Profits, see LIFE INSURANCE, 25 Cyc. 790 text and note 75; Of Policy, see FIRE INSURANCE, 19 Cyc. 643 note 17, 645 text and notes 30, 31; Of Waiver by Agent, of Condition as to Health, see LIFE INSURANCE, 25 Cyc. 721 note 33; Of Waiver of Forfeiture and Renewal Made by Agent, see LIFE INSURANCE, 25 Cyc. 861 note 37. Joint Stock Companies, Ratification of Unauthorized Contracts, see JOINT STOCK COMPANIES, 23 Cyc. 471. Judgments, Ratification — Of Confession of Judgment, see JUDGMENTS, 23 Cyc. 703; Of Void Judgments, see JUDGMENTS, 23 Cyc. 698, 703. Judicial Sales, see GUARDIAN AND WARD, 21 Cyc. 140; JUDICIAL SALES, 24 Cyc. 37, 70 text and note 29. Landlord and Tenant, Ratification — Of Lease, see LANDLORD AND TENANT, 24 Cyc. 910; Of Sale of Property Subject to Lien For Rent, see LANDLORD AND TENANT, 24 Cyc. 1266. Marriage, see MARRIAGE, 26 Cyc. 866. Master and Servant, Ratification — By Contractee, of Acts of Contractor or Contractor's Servants, see MASTER AND SERVANT, 26 Cyc. 1566; By Master, of Servant's Tortious Act, see MASTER AND SERVANT, 26 Cyc. 1518. Mechanics' Liens, Ratification — By Claimant, of Unauthorized Statement of Lien, see MECHANICS' LIENS, 27 Cyc. 193 note 27; By Landlord of Tenant's Act in Erecting Buildings, see MECHANICS' LIENS, 27 Cyc. 57 note 31; By Owner, of Acts Subjecting Property to Lien, see MECHANICS' LIENS, 27 Cyc. 74. Mines, Ratification of Mining Location Made by Agent, see MINES AND MINERALS, 27 Cyc. 552 text and note 23. Money Paid, Ratification of Payment as Essential to Action, see MONEY PAID, 27 Cyc. 837, text and notes 23–25. Mortgages, Ratification — Of Assumption of Mortgage on Part of Grantee, see MORTGAGES, 27 Cyc. 1346; Of Execution of Mortgage, see MORTGAGES, 27 Cyc. 1107; Of Mortgage, see MORTGAGES, 27 Cyc. 1132, 1171 note 37; Of Mortgage Given by Corporation, see CORPORATIONS, 10 Cyc. 1196, 1202; Of Mortgage Made by Husband, by Wife, see MORTGAGES, 27 Cyc. 1171 note 37; Of Sale at Foreclosure, see MORTGAGES, 27 Cyc. 1504. Municipal Corporations, Ratification — Of Bonds, see MUNICIPAL CORPORATIONS, 28 Cyc. 1604; Of Contract, in General, see MUNICIPAL CORPORATIONS, 28 Cyc. 675; Of Contract For Erection of Bridges, see BRIDGES, 5 Cyc. 1068; Of Contract For Public Improvements, see MUNICIPAL CORPORATIONS, 28 Cyc. 1044; Of Conveyance of Property, see MUNICIPAL CORPORATIONS, 28 Cyc. 627; Of Debts or Expenditures, see MUNICIPAL CORPORATIONS, 28 Cyc. 1561; Of Employment in Behalf of Municipality, see MUNICIPAL CORPORATIONS, 28 Cyc. 592; Of Municipal Acts, see MUNICIPAL CORPORATIONS, 28 Cyc. 308 text and note 74; Of Payment Made by Officials, see MUNICIPAL

CORPORATIONS, 28 Cyc. 469 note 74; Of Tortious Acts, see MUNICIPAL CORPORATIONS, 28 Cyc. 1279. Parent and Child, Ratification of Child's Agency For Parent, see PARENT AND CHILD, 29 Cyc. 1665 text and note 99. Partition, see PARTITION, 30 Cyc. 164. Partnership, Ratification — Of Individual Partner's Acts by Firm, see PARTNERSHIP, 30 Cyc. 528; Of Negotiable Instrument Made, Indorsed or Renewed, by Copartner After Dissolution, see PARTNERSHIP, 30 Cyc. 669 text and note 19. Pledges, see PLEDGES, 31 Cyc. 795. Principal and Agent, Ratification of Agent's Act, see PRINCIPAL AND AGENT, 31 Cyc. 1245. Releases, see RELEASE. Sales, Ratification, of Sale — In General, see SALES; VENDOR AND PURCHASER; At Foreclosure, see MORTGAGES, 27 Cyc. 1504; Judicial, see GUARDIAN AND WARD, 21 Cyc. 140; JUDICIAL SALES, 24 Cyc. 37, 70 text and note 29; Of Decedent's Property, Confirmation by Court, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 787–795; Of Decedent's Property, Ratification by Heirs, see CLERKS OF COURTS, 7 Cyc. 236 note 5; EXECUTORS AND ADMINISTRATORS, 18 Cyc. 799; HUSBAND AND WIFE, 21 Cyc. 1702 note 10; Of Husband's Property by Wife, see HUSBAND AND WIFE, 21 Cyc. 1237; Of Infant's Property, see INFANTS, 22 Cyc. 573 note 59, 576 note 22; Of Insane Person's Property by Committee, see INSANE PERSONS, 22 Cyc. 1186 note 67; Of Property Subject to Lien For Rent, see LANDLORD AND TENANT, 24 Cyc. 1266; Of Ward's Property, see GUARDIAN AND WARD, 21 Cyc. 140; Of Wife's Property, see HUSBAND AND WIFE, 21 Cyc. 1417, 1509 text and notes 74, 75. Streets and Highways, see STREETS AND HIGHWAYS. Treaties, see TREATIES. Trusts, see TRUSTS. See also ACQUIESCENCE, 1 Cyc. 630; CONFIRMATION, 8 Cyc. 566; RATIFY.)

RATIFY. To make valid, to confirm;[32] to sanction an act already done;[33] to give sanction and validity to something done without authority;[34] to give validity to the act of another;[35] to make valid, to confirm; to sanction; in legal phrase, usually, to approve or confirm by a principal what has been done by an agent or one assuming to act for another;[36] a definition of establish.[37] (See RATIFICATION, and Cross-References Thereunder. See also CONFIRM, 8 Cyc. 565.)

RATIHABITIO. In Roman law, the act of assenting to what has been done by another in my name.[38]

32. Austin *v.* Jones, (Ala. 1906) 41 So. 408, 411.

Implies appropriate precedent action capable of ratification. Revere Water Co. *v.* Winthrop, 192 Mass. 455, 462, 78 N. E. 497.

Imports the confirmation of acts already done, not the authorization of new proceedings in the future. Barker *v.* Chesterfield, 102 Mass. 127, 128.

Distinguished from "acquiesce" see Austin *v.* Jones, (Ala. 1906) 41 So. 408, 411.

"Ratified and approved" applied to a statute, in a constitutional amendment, may, where the context clearly requires it, imply the adoption of the statute into the constitution, although "ratify" and "approve," in their abstract meaning, are not the equivalents of such terms as "to make part of" or "to incorporate into." State *v.* Kohnke, 109 La. 838, 860, 33 So. 793.

"Ratified and confirmed" see CONFIRMATION, 8 Cyc. 566 note 25.

33. Stevens *v.* Melcher, 80 Hun (N. Y.) 514, 545, 30 N. Y. Suppl. 625.

34. Evans Agency 48 [*quoted* in Heyn *v.* O'Hagen, 60 Mich. 150, 156, 26 N. W. 861, adding: "By one individual on behalf of another"]; Steffens *v.* Nelson, 94 Minn. 365, 369, 102 N. W. 871.

Need of real or assumed agency.—"Adopted and ratified" — "These terms are properly applicable only to contracts made by a party acting or assuming to act for another. The latter may then adopt or ratify the act of the former, however unauthorized. To adoption and ratification there must be some relation, actual or assumed, of principal and agent." Ellison *v.* Jackson Water Co., 12 Cal. 542, 551 [*quoted* in Shepardson *v.* Gillette, 133 Ind. 125, 128, 31 N. E. 788]. *Compare*, however, as to ratification of one's own act, RATIFICATION, *ante*, p. 1528.

35. McCracken *v.* San Francisco, 16 Cal. 591, 623 [*quoted* in (and erroneously cited as 16 Cal. 23); Nashville *v.* Hagan, 9 Baxt. (Tenn.) 495, 505]; Norton *v.* Shelby County, 118 U. S. 425, 451, 6 S. Ct. 1121, 30 L. ed. 178.

Implies power.—"To ratify . . . implies that the person or body ratifying has at the time power to do the act ratified." Norton *v.* Shelby County, 118 U. S. 425, 451, 6 S. Ct. 1121, 30 L. ed. 178.

36. Lexington *v.* Lafayette County Bank, 165 Mo. 671, 683, 65 S. W. 943.

"In a legal sense, it means that a party having knowledge of a defect in an act done, and of his right to ratify or reject it, concluded to confirm it." Stevens *v.* Melcher, 80 Hun (N. Y.) 514, 545, 30 N. Y. Suppl. 625.

37. See 16 Cyc. 592 text and note 40.

38. Broome Leg. Max. 883 (7th Eng. ed.) 657 [*quoted* in Saltmarsh *v.* Candia, 51 N. H. 71, 77].

RATIHABITIO PRIORI MANDATO ÆQUIPARATUR. A maxim meaning "A subsequent ratification is equivalent to a prior authority." [39]

RATIHABITIO RETROTRAHITUR ET MANDATO ÆQUIPARATUR. A maxim meaning "Ratification relates back and is equal to a command." [40]

RATING. Of vessels in insurance policies, the determination of their relative state or condition in regard to their insurable qualities.[41] (Rating: In General, see RATE. Commercial, see EVIDENCE, 17 Cyc. 405 text and note 56; MERCANTILE AGENCIES, 27 Cyc. 473, text and note 2.)

RATIO. Relative amount; proportion; the relation between two numbers or two magnitudes of the same kind; especially the relation expressed by indicating the division of one quantity by the other; or by the factor that, multiplied into one, will produce the other; [42] the relation between two similar magnitudes in respect to quantity; the relation between two similar quantities in respect to how many times one makes so many times the other; [43] (See PROPORTION, 32 Cyc. 681.)

RATIO DECIDENDI. The ground of decision; the point in a case which determines the judgment.[44]

RATIO EST FORMALIS CAUSA CONSUETUDINIS. A maxim meaning "Reason is the formal cause of custom." [45]

RATIO EST RADIUS DIVINI LUMINIS. A maxim meaning "Reason is a ray of the divine light." [46]

RATIO ET AUCTORITAS, DUO CLARISSIMA MUNDI LUMINA. A maxim meaning "Reason and authority, the two brightest lights of the world." [47]

RATIO IMPERTINENS. An impertinent reason, an argument not pertaining to the question.[48]

RATIO IN JURE ÆQUITAS INTEGRA. A maxim meaning "Reason in law is perfect equity." [49]

RATIO LEGIS EST ANIMA LEGIS. A maxim meaning "The reason of law is the soul of law." [50]

RATIO LEGIS EST ANIMA LEGIS; MUTATA LEGIS RATIONE, MUTATUR ET LEX. A maxim meaning "The reason of the law is the soul of the law; the reason of law being changed, the law is also changed." [51]

39. Palmer *v.* Yates, 3 Sandf. (N. Y.) 137, 151, adding, "i. e. gives the same validity to an act that upon the ground of a want of authority is sought to be impeached," and describing the maxim as "the sound and most reasonable maxim of the common law . . . borrowed from the Roman law, and now an element in the jurisprudence of every civilized nation."

40. Hewes *v.* Parkman, 20 Pick. (Mass.) 90, 95.

Shorter forms are: *Ratihabatio mandato æquiparatur*, meaning "Ratification is equal to a command" (Peloubet Leg. Max.). *Ratihabitio mandato comparatur* with a like meaning (see Broome Leg. Max. 656). See also OMNIS RATIHABITIO, etc., 29 Cyc. 1483.

41. Orient Mut. Ins. Co. *v.* Wright, 1 Wall. (U. S.) 456, 472, 17 L. ed. 505.

The rate of a vessel in the absence of any fixed rating may be established by general evidence. Orient Mut. Ins. Co. *v.* Wright, 1 Wall. (U. S.) 456, 482, 17 L. ed. 505.

42. Standard Dict. [*quoted* in Matter of Klock, 30 N. Y. App. Div. 24, 41, 51 N. Y. Suppl. 897]. See also Worcester Dict. [*cited* in Matter of Klock, *supra*].

Proportion.—"In said ratio," used in a will to describe a mode of payment, "imports a payment to certain persons in certain proportions," to be ascertained from the context preceding the phrase. Shattuck *v.* Balcom, 170 Mass. 245, 251, 49 N. E. 87.

In election districts.—The ratios upon which is based the number of senators and representatives of a district (in the absence of express ratios) are the number of the inhabitants of the state divided by the number of senators, and such number divided by the number of representatives. State *v.* Schnitzer, (Wyo. 1908) 95 Pac. 699, 703.

43. Century Dict. [*quoted* in Matter of Klock, 30 N. Y. App. Div. 24, 41, 51 N. Y. Suppl. 897].

44. Black L. Dict.

45. Peloubet Leg. Max.

46. Black L. Dict.

Applied in Coke Litt. 232*b*.

47. Black L. Dict.

48. Wilmington, etc., R. Co. *v.* North Carolina R. Com'rs, 90 Fed. 33, 34.

49. Bouvier L. Dict.

50. Black L. Dict.

Cited in Diehl *v.* Rodgers, 36 Wkly. Notes Cas. (Pa.) 447, 449.

51. See Peloubet Leg. Max., where, however, the translation is rendered as being "reason is the soul of law," etc. See also Bouvier L. Dict.; Morgan Leg. Max., in each of which the maxim is rendered as beginning "*Ratio est legis anima*," etc., and (in that form) properly translated "Reason is the

RATIONAL. Having reason, faculty of reasoning; endowed with reason and understanding; agreeable to reason; not absurd, preposterous, extravagant, foolish, fanciful, or the like; wise, judicious;[52] a synonym of sane.[53] (See IRRATIONAL, 23 Cyc. 354; RATIONAL DOUBT; RATIONAL INTENT; RATIONAL INTERPRETATION; RATIONAL STATE OF MIND; REASONABLE. See, generally, INSANE PERSONS, 22 Cyc. 1104.)

RATIONAL DOUBT. In criminal law, a doubt as to all or any one of the constituent elements essential to legal responsibility or punishable guilt.[54] (See DOUBT, 14 Cyc. 869; REASONABLE DOUBT.)

RATIONAL INTENT. One founded on reason, as a faculty of the mind, opposed to an irrational purpose.[55] (See INTENT, 22 Cyc. 1454.)

RATIONAL INTERPRETATION. That which is used where the words do not perfectly express the intention of the writer, but either exceed or fall short of it, so that it is to be collected from probable or rational conjectures only.[56] (See INTERPRETATION, 23 Cyc. 37.)

RATIONAL STATE OF MIND. The natural state of every man.[57]

RATIONE CESSANTE, CESSAT IPSA LEX. A maxim meaning "The reason ceasing, the law itself ceases;"[58] that is, that no law can survive the reasons on which it is founded.[59]

RATIONE IMPOTENTIÆ. Literally "on account of inability." A ground of qualified property in some animals *ferœ naturœ*; as in the young ones, while they are unable to fly or run.[60] (See ANIMALS, 2 Cyc. 308 text and note 20, 309 text and note 26.)

RATIONE MATERIÆ. By reason of the matter involved; in consequence of, or from the nature of, the subject-matter.[61] (Ratione Materiæ: Jurisdiction of Subject-Matter, see COURTS, 11 Cyc. 669.)

RATIONE PERSONÆ. By reason of the person concerned; from the character of the person.[62] (Ratione Personæ: Jurisdiction of the Person, see COURTS, 11 Cyc. 666.)

soul," etc.; the maxim being a derivation, by all three authorities, from Milborn's Case, 7 Coke 6*b*, 7*a*, 77 Eng. Reprint 420, where it is applied in the form given in Pelouhet Leg. Max. with the difference of "*et*" between "*anima legis*" and "*mutata.*"

52. Webster Dict. [*quoted* in Bottom *v.* Bottom, 106 S. W. 216, 217, 32 Ky. L. Rep. 494].

Rational man; rational survey.— "When we speak of a rational man, we mean a sensible man, a man of good mind. To make a man competent to take a rational survey of his estate, he must be able to know its character and value." Bottom *v.* Bottom, 106 S. W. 216, 217, 32 Ky. L. Rep. 494.

Has no legal or technical meaning.— Bottom *v.* Bottom, 106 S. W. 216, 217, 32 Ky. L. Rep. 494.

53. See Webster Dict. [*cited* in State *v.* Leehman, 2 S. D. 171, 179, 49 N. W. 3].

54. Smith *v.* Com., 1 Duv. (Ky.) 224, 228, defining such douht of guilt as demands acquittal.

55. Supreme Lodge O. M. P. *v.* Gelbke, 198 Ill. 365, 370, 64 N. E. 1058.

56. See 2 Rutherford Inst. 314 [*cited* in Tallman *v.* Tallman, 3 Misc. (N. Y.) 465, 478, 23 N. Y. Suppl. 734, adding: "This doctrine seems to use 'rational interpretation' in substantially the same sense as the 'construction' of Dr. Lieber's definition"] (for which definition see CONSTRUCTION, 8 Cyc. 1141 text and note 16).

57. Lee *v.* Lee, 4 McCord (S. C.) 183, 196, 17 Am. Dec. 722, adding: "And until there is full proof of insanity, the law presumes that every man is in a rational state when he does any act either civil or criminal."

58. Applied in State *v.* Briggs, 1 Cow. Cr. (N. Y.) 165, 169, where the quotation follows the words: "It might be argued that the case is not within the rule . . . as it is not within the reason of the rule." See also People *v.* Bennet, 37 N. Y. 117, 120, 93 Am. Dec. 551, 4 Transcr. App. 32, 35, 4 Abb. Pr. N. S. 89, 92, 1 Cow. Cr. 1, 3, 553, the form used in 37 N. Y. and 93 Am. Dec., *supra*, being "*Cessante ratione, cessat ipsa lex*," and that used in the other reports of the case, *supra*, being "*Ratione cessante, lex ipsa cessat.*"

The more usual form see "CESSANTE RATIONE LEGIS, CESSAT IPSA LEX," 6 Cyc. 844.

Other forms are: *Ratione cessante, cessat etiam lex*" (i. e., "Ceases also the law"). Gustin *v.* Brattle, Kirby (Conn.) 299, 310.

Ratione cessante, lex cessat. Mack *v.* Mack, 5 Thomps. & C. (N. Y.) 528, 530.

Ratione cessante, cessat lex. Ritter *v.* Ritter, 3 Phila. (Pa.) 27, 29.

59. Beardsley *v.* Hartford, 50 Conn. 529, 542, 47 Am. Rep. 677, where the maxim is rendered. *Cessante ratione, cesset ipsa lex.*

60. Black L. Dict.

61. Black L. Dict.

62. Black L. Dict.

RATIONE PRIVILEGII. A term which describes a species of property in wild animals, which consists in the right which, by a peculiar franchise anciently granted by the English crown, by virtue of its prerogative, one man may have of killing and taking such animals on the land of another.[63] (See ANIMALS, 2 Cyc. 308 text and note 21, 309 text and notes 23, 27.)

RATIONE SOLI. See ANIMALS, 2 Cyc. 308, 309 text and notes 23, 28.

RATIO NON CLAUDITUR LOCO. A maxim meaning "Reason is not confined to any place."[64]

RATIO PERTINENS. A pertinent reason; that is, a reason pertaining to the question.[65]

RATIO POTEST ALLEGARI DEFICIENTE LEGE, SED VERA ET LEGALIS ET NON APPARENS. A maxim meaning "Reason may be alleged when the law is defective, but it must be true and legal reason, and not merely apparent."[66]

RATIS. A Latin word which answers properly to our word "raft."[67] (See RAFT, 32 Cyc. 1470.)

RATTENING. An offense punishable by fine or imprisonment which exists where the members of a trade union cause the tools, clothes, or other property of a workman to be taken away or hidden, in order to compel him to join the union or cease working.[68]

RATTOONS.[69] Shoots which spring up from roots from which sugar cane has been cut.[70]

RATUM QUIS HABERE NON POTEST, QUOD IPSIUS NOMINE NON EST GESTUM. A maxim meaning "One cannot hold ratified that which has not been done in his own name."[71]

RAVINE. A long, deep, and narrow hollow worn by a stream or torrent of water; a long, deep, and narrow hollow or pass through mountains.[72]

RAVISH. To constuprate, to deflour by violence;[72a] to have carnal knowledge of a woman by force and against her consent.[72b] (See, generally, RAPE, post, 1412.)

63. Black L. Dict.

64. Bouvier L. Dict.

65. Wilmington, etc., R. Co. *v.* North Carolina R. Com'rs, 90 Fed. 33, 34.

66. Peloubet Leg. Max.

Applied in Coke Litt. 191*a*, last paragraph.

67. Raft of Cypress Logs, 20 Fed. Cas. No. 11,527, 1 Flipp. 543, 544, 14 Alb. L. J. (N. Y.) 319.

68. See Black L. Dict.

69. Derived from "*rejetons*" see Viterbo *v.* Friedlander, 120 U. S. 707, 734, 7 S. Ct. 962, 30 L. ed. 776.

70. See Viterbo *v.* Friedlander, 120 U. S. 707, 734, 7 S. Ct. 962, 30 L. ed. 776, where it appears also that the "rattoons" are cut for sugar the first two years after the cutting of the cane.

71. Wilson *v.* Tumman, 6 M. & G. 236, 239 note, 6 Scott N. R. 894, 46 E. C. L. 236 [*quoted* in Story Agency 251*a* (*quoted* in Saltmarsh *v.* Candia, 51 N. H. 71, 77)].

Quoted as a maxim of the canon law in Watson *v.* Swann, 11 C. B. N. S. 756, 766, 31 L. J. C. P. 210, 103 E. C. L. 756.

72. Long *v.* Boone County, 36 Iowa 60, 65, where it is said that the presence of water, at least occasionally, is almost inseparable from the idea of a ravine, and it is held that a statute authorizing the building of bridges over streams may apply to the case of a ravine in which water exists so often and in such abundance as to render a bridge essential to its safe and convenient passage.

72a. Johnson Dict. [*quoted* in Harper *v.* Delp, 3 Ind. 225, 230].

72b. Webster Dict. [*quoted* in Reg. *v.* Bedere, 21 Ont. 189, 193].

In common parlance a word synonymous with "rape." McComas *v.* State, 11 Mo. 116, 117, where it is said that the only difference in the statute between the two species of the offense, is that the latter contemplated force, while the former may consist in the act of sexual intercourse alone, irrespective of actual violence or consent.

Equal to, and having the same import with, having carnal knowledge with force. Elschlep *v.* State, 11 Tex. App. 301, 303; Williams *v.* State, 1 Tex. App. 90, 92, 28 Am. Rep. 399.

Term imports force and violence in the man and want of consent and resistance on the part of the woman. Rookey *v.* State, 70 Conn. 104, 111, 38 Atl. 911; Com. *v.* Fogerty, 8 Gray (Mass.) 489, 490, 69 Am. Dec. 264; O'Connell *v.* State, 6 Minn. 279; Harman *v.* Com., 12 Serg. & R. (Pa.) 69, 70; Gibson *v.* State, 17 Tex. App. 574, 577; Williams *v.* State, 1 Tex. App. 90, 92, 28 Am. Rep. 399.

"Feloniously did ravish and carnally know" implies that the act was done forcibly and against the will of the woman. Bouvier L. Dict. [*quoted* in People *v.* Quinn, 1 Cow. Cr. (N. Y.) 301, 303].

"Ravishing" is compelling to submit to carnal intercourse. Webster Dict. [*quoted* in Harper *v.* Delp, 3 Ind. 225, 230].

"Forcibly ravishing" as used in a statute

RAW. A word used to denote the absence of certain processes such as would change the nature of the thing so described.[73]

RAZOR. An instrument or implement pertaining to the toilet or shop, having a well-known and specific use to which it is ordinarily applied.[74] (Razor: As Weapon, see HOMICIDE, 21 Cyc. 783 note 69; WEAPONS.)

RAZURE. The act of scraping or shaving.[75] (See ERASE, 16 Cyc. 534; ERASURE, 16 Cyc. 534, and Cross-References Thereunder; RASING; RASURE.)

RE. In the matter of; in the case of; a term of frequent use in designating judicial proceedings in which there is only one party.[76]

REACHED. Stretched out or forth; extended; without reference to direction.[77]

REACKNOWLEDGMENT. (Reacknowledgment: In General, see ACKNOWLEDGMENTS, 1 Cyc. 608. By Wife After Death of Husband, see ACKNOWLEDGMENTS, 1 Cyc. 560 note 82, 609. New Promise and Acknowledgment of Debt, see LIMITATIONS OF ACTIONS, 25 Cyc. 1325. Of Appeal-Bond, see ACKNOWLEDGMENTS, 1 Cyc. 609 note 42.)

was said to be doubtlessly used in accordance with the generally understood and accepted definition of rape, which was the carnal knowledge of a woman by a man forcibly, against her will. People *v.* Quinn, 1 Cow. Cr. (N. Y.) 301, 303.

"Ravishing a cow" spoken of a man in an appropriate context imputes the crime of bestiality and buggery with the cow, although the word has other meanings. Harper *v.* Delp, 3 Ind. 225, 230.

73. See cases cited *infra*, this note.

"Raw or unmanufactured article not enumerated," as used in the McKinley Act, U. S. St. (1890) § 4, imposing duty on such articles, does not include natural gas, it being a "crude mineral" under par. 651. U. S. *v.* Buffalo Natural Gas Fuel Co., 78 Fed. 110, 112, 24 C. C. A. 4. "Raw or unmanufactured articles" as used in U. S. Rev. St. (1878) § 2516, includes hay. "Many articles are properly called raw which have undergone some manipulation. Cotton is picked from the bolls, and cleaned by ginning, and baled. Yet it is raw cotton in the bale. Wheat is cut, and the grains are threshed out, and then subjected to a cleaning machine, and then bagged. Yet it is raw wheat in the bag. So with other grains. The cotton and the grains undergo such change and preparation as exposure to light, and natural or artificial heat, and air, and the manipulation they receive, produce or allow, be it more or less. Yet neither the cotton nor the grains would be said to be manufactured. Salt and sugar are new articles. Cotton and grains are the same articles they were when on the plant with its roots in the earth. So hay is the same article it was when it was stalks of grass with roots in the earth. It is dried, to be sure; but the drying and any conversion of starch into sugar" (i. e. in the substance of the hay) "are mere incidents of the necessary cutting to enable it to be stored for food. . . . Dried apples would not be called a manufactured article, though the apple is peeled and cored and sliced, and dried by exposure to the sun and manipulation. The substance of dried apples is still apples. The substance of dried grass or hay is still grass. Change of name and manipulation do not necessarily constitute manufacture, within the meaning of section 2516. Each case must be decided according to its own circumstances." Frazee *v.* Moffitt, 18 Fed. 584, 587. 20 Blatchf. 267.

In contradistinction to "tanned" or "dressed" when applied to hides, as used in Game Protection Act (1895), § 7, see Reg. *v.* Strauss, 1 Can. Cr. Cas. 103, 106.

Raw material includes ore, clay, and coal. See Hicks *v.* Consolidation Coal Co., 77 Md. 86, 89–91, 25 Atl. 979. Does not include "straight whiskies" that is to say, those produced by distilling and refined by age into perfected; marketable, drinkable whiskey. Block *v.* Lewis, 5 Ohio S. & C. Pl. Dec. 370, 5 Ohio N. P. 392.

"Raw prairie land" as used in a representation, for purposes of trade, concerning lands in Kansas, construed to have meant "nothing less, under the circumstances, than a tract of treeless land covered with coarse grass, and a fertile soil in its natural or uncultivated state." Gardner *v.* Mann, 36 Ind. App. 694, 76 N. E. 417, 418.

74. State *v.* Page, 15 S. D. 613, 617, 91 N. W. 313.

75. Johnson Dict. [*quoted* in Cloud *v.* Hewitt, 5 Fed. Cas. No. 2,904, 3 Cranch C. C. 199].

76. Black L. Dict., adding: "Thus, '*Re* Vivian' signifies 'In the matter of Vivian,' or in 'Vivian's Case.'".

77. Wells *v.* C., etc., R. Co., 17 Ohio Cir. Ct. 201, 205, 9 Ohio Cir. Dec. 527, holding that the word as used in Ohio Rev. St. § 3374, providing that railroad fares shall be "that multiple of five, nearest reached by multiplying the rate by the distance," indicates the object in closest proximity, closest to reach by the least extension or stretching forth without reference to direction.

"The next port reached," as used in a ticket contract providing for the landing of a passenger thereat, in case he could not "be safely landed at the port of destination," clearly means the port beyond the place of destination reasonably near on the line of voyage, and the contract does intend that one may be landed at some intermediate port and that such landing would be a com-

READ. To pronounce aloud, or acquire by actual inspection, a knowledge of the contents of a writing or of a printed document.[78] Also used in a passive sense.[79] (See READING.)

READILY. Quickly; speedily; easily;[80] at hand; immediately available, convenient, handy.[81]

READILY SEEN. A term equivalent to "patent" or "obvious."[82] (See OBVIOUS, 29 Cyc. 1340; PATENT, 30 Cyc. 802 text and note 40.)

READINESS TO PAY. A phrase which, in connection with a plea of tender, describes a fact involving at least the keeping of the money ready for payment, but which has been open to discussion as to whether it permits of use and profit of the money on the part of the person so holding it.[83] (See COMMERCIAL PAPER, 8 Cyc. 180. See also PAY, 30 Cyc. 1171; READY; and, generally, PAYMENT, 30 Cyc. 1173.)

READING. The act of making known the contents of a writing, or of a printed

pliance. Bullock *v.* White Star Steamship Co., 30 Wash. 448, 456, 70 Pac. 1106.

78. See Bouvier L. Dict. *sub verb.* "Reading" there similarly defined, *mutatis mutandis.*

"Read" is not the equivalent of "fully explained," and a certificate of a married woman's acknowledgment stating that a deed was "read" to her does not show a compliance with a statute requiring that it be fully explained. Watson *v.* Michael, 21 W. Va. 568, 571, 574.

Ability to read and write as jury qualification refers to English only see JURIES, 24 Cyc. 198 note 81.

Applied to bills for acts pending before legislative bodies, the word has not acquired an exclusively technical meaning, and, in the absence of anything to the contrary in context or custom, is to be considered in its ordinary sense as "read at length" and is not satisfied by a partial reading. Weill *v.* Kenfield, 54 Cal. 111, 112, 114, where it is pointed out that statements in Cushing Law and Practice of Legislative Assemblies, § 2141, and Bentham Essay on Political Tactics, as to the custom in the House of Commons, of reading the title and first words of a bill, are not authority for the proposition that custom has given a technical sense to the word, but that they refer to such partial reading as merely "nominal" or "substitutional," "satisfying the rule"; where also it is held that the word as used in Cal. Const. art. 4, § 15, providing that no bill shall become a law unless the same shall be read on "three several days," is to be taken in its ordinary sense, and demands that the bill be read at length upon each occasion. *Contra,* Saunders *v.* Board of Liquidation, etc., 110 La. 313, 330, 34 So. 457, where it is held that Const. art. 321, requiring that statutory amendments proposed be read in the respective houses on three separate days, does not require reading in full, and said: "We do not understand that a constitutional requirement which simply declares in general terms that a 'bill' should be 'read' twice or three times in each house before it can be enacted into a law, would carry with it the necessity of reading over each section of the bill at each reading, though the word 'bill' in its meaning covers 'the proposed legislation in its entirety.'" *Compare* Black Const. L. 326 [*quoted* in Saunders *v.* Board of Liquidation, etc., 110 La. 313, 330, 34 So. 457], where it is said: "The Constitutions of many of the states require that a bill . . . shall be read a certain number of times. . . . In respect to the manner of such reading the provision is considered merely directory, but not with respect to the fact itself. . . . Where the requirement is that the bill shall be read three times, it is the usual practice of legislative bodies to have it read twice by title merely, and once at length."

"Read law" among lawyers means to take up the study of the law with the purpose of being admitted to the bar and practising the profession; including also the reading of cases and text-books of which every lawyer does more or less after his admission. Benson's Estate, 169 Pa. St. 602, 604, 605, 32 Atl. 654, adding: "It certainly does not mean to read law books casually, for amusement or general instruction," and holding that the phrase in the expression "my nephews who may read law," in a will, meant "become lawyers."

79. See cases cited *infra,* this note.

"To read as follows," applied, in an amendment to the amended act, indicates a substitution of the new provision for the old. Helena *v.* Rogan, 27 Mont. 135, 138, 69 Pac. 709; Cortesy *v.* Territory, 7 N. M. 89, 93, 32 Pac. 504. Any portion of the matter so amended not found in the new act is repealed. State *v.* Ingersoll, 17 Wis. 651, 654 [*cited* (as 17 Wis. 631) in Goodno *v.* Oshkosh, 31 Wis. 127, 129]; U. S. *v.* Barr, 24 Fed. Cas. No. 14,527, 4 Sawy. 254, 256, 15 Alb. L. J. (N. Y.) 472.

80. Century Dict. [*quoted* in Western Coal, etc., Co. *v.* Berberich, 94 Fed. 329, 334, 36 C. C. A. 364].

81. Standard Dict. [*quoted* in Western Coal, etc., Co. *v.* Berberich, 94 Fed. 329, 334, 36 C. C. A. 364].

82. Missouri, etc., R. Co. *v.* Johnson, (Tex. Civ. App. 1901) 67 S. W. 769, 771, construing the word as used, in connection with actions for negligence, concerning dangerous places or obstructions.

83. See Shields *v.* Lozear, 22 N. J. Eq. 447, 452.

document.[84] (Reading: By Party as Affecting — Contract, see CONTRACTS, 390–392 text and notes 58–66; Deed, see DEEDS, 13 Cyc. 578 text and note 23; Will, see WILLS. Notice, Not Service, see DEPOSITIONS, 13 Cyc. 911; NOTICE, 29 Cyc. 1119 note 59. Process, Upon Serving, see PROCESS. To Jury — By Counsel, Books and Writings, see CRIMINAL LAW, 12 Cyc. 573; By Court, Statutes and Text-Books, see CRIMINAL LAW, 12 Cyc. 614. See also READ.)

READJUSTED LUMBER. Veneering, cut with a knife instead of being cut with one of the many kinds of saws used in sawmills.[85]

READY. Prepared at the moment; not behindhand or backward when called upon; causing no delay for lack of being fitted or furnished; prepared in mind or disposition; not reluctant; willing; free; inclined; disposed.[86] (Ready: To Perform — Contract, see SPECIFIC PERFORMANCE; Promise to Marry, see BREACH OF PROMISE TO MARRY, 5 Cyc. 997. See also READINESS TO PAY.)

READY MONEY. A phrase which may usually differ in meaning from the

84. Bouvier L. Dict. [*quoted* in New Orleans *v.* Brooks, 36 La. Ann. 641, 642].

85. Talbot *v.* Fear, 89 Fed. 197, 200, 32 C. C. A. 186.

86. Webster Dict. [*quoted* in State *v.* Gooch, 105 Mo. 392, 398, 16 S. W. 892].

"Ready and willing to perform" is a phrase which, describing plaintiffs in an action for breach of a contract, means that the non-completion of the contract was not the fault of the plaintiffs, and that they were disposed and able to complete it had it not been renounced by the defendants. See Cort *v.* Ambergate, 17 Q. B. 126, 144, 15 Jur. 877, 20 L. J. Q. B. 460, 79 E. C. L. 126.

"Ready for cargo" as applied in a charter-party, in terms, to a steamer, refers to the condition of the ship itself and is satisfied by actual readiness on the part of the ship to receive cargo. Gill *v.* Browne, 53 Fed. 394, 397, 3 C. C. A. 573.

"Ready for occupancy" means ready to be taken possession of by the tenants. See Gerry *v.* Siebrecht, 88 N. Y. Suppl. 1034, 1035, where the phrase was so construed with reference to the context of a lease in which it occurred. "Whether the phrase 'to finish said house ready for occupancy' was one which would require the building of a water-closet depended upon certain extrinsic facts" to be found by the jury. Cunningham *v.* Washburn, 119 Mass. 224, 227.

"Ready for sea."—A ship is not ready for sea until she has everything ready for the performance of her voyage including the whole crew on board (Graham *v.* Barras, 5 B. & Ad. 1011, 1022, 3 N. & M. 125, 27 E. C. L. 424); nor when, although under sail, she has still to take on ballast (Pittegrew *v.* Pringle, 3 B. & Ad. 514, 522, 23 E. C. L. 229).

"Ready for use at all times in case of fire," as applied to buckets of water in a promissory warranty by insured in a fire policy, is open to a reasonable construction and does not require the performance of a thing impossible, such as the keeping of buckets of water at hand at all times in a cold mill where fires were not allowed in winter. Aurora F. Ins. Co. *v.* Eddy, 49 Ill. 106, 107.

"Ready in court to be produced."—An allegation in a declaration as follows: "As by the said letters patent and specification, all in due form of law, ready in court to be produced, will fully appear," is equivalent to a profert in the most formal and ample terms. Wilder *v.* McCormick, 29 Fed. Cas. No. 17,650, 2 Blatchf. 31, 35, 1 Fish Pat. Rep. 128.

Ready made clothing.—A note payable in ready made clothing does not give the payee a right to demand a specific garment made for a customer, and in the shop of the promisor at the time of demand. Vance *v.* Bloomer, 20 Wend. (N. Y.) 196, 200.

Ready section of the day calendar in New York practice see Herbert Land Co. *v.* Lorenzen, 113 N. Y. App. Div. 802, 803, 99 N. Y. Suppl. 937.

"Ready to discharge" applied in a bill of lading to a vessel, in relation to cargo, means ready to make a proper discharge and does not justify landing goods under circumstances that result in their destruction. The Aline, 19 Fed. 875, 876.

"Ready 'to pay.'"—A plea that one was "ready to pay" and that demand was not made does not constitute or take the place of a plea of tender. Mitchell *v.* Gregory, 1 Bibb (Ky.) 449, 452, 4 Am. Dec. 655.

"Ready to receive cargo."—A shipmaster cannot report himself in those terms until he is permitted to receive cargo by the revenue laws of the port. Pierson *v.* Ogden, 19 Fed. Cas. No. 11,160.

"Ready to unload" in a charter-party providing that lay days for unloading shall commence when steamer is ready to unload and written notice given, "whether in berth or not," means "actually ready to discharge, so far as the vessel can be made ready by those controlling her," so that the lay days do not begin until the vessel has come to the wharf, or as near it as she can get, with hatches off, winches ready, etc., and are not to be reckoned from the notification given to the charterer just after the vessel has come to anchor in the lower harbor. New Ruperra Steamship Co. *v.* 2,000 Tons of Coal, 124 Fed. 937, 938 [*affirmed* in 142 Fed. 402, 73 C. C. A. 502, 5 L. R. A. N. S. 126].

Reports of masters in chancery are "ready" when written, within a rule of court providing for their return as soon as ready. Hatch *v.* Indianapolis, etc., R. Co., 9 Fed. 856, 859, 11 Biss. 138.

word " money," and has been held to include money at all times subject to call in the hands of a depositary; [87] cash; [88] a definition of " money in hand." [89]

REAL. A term which at common law relates to land as distinguished from personal property and is applied to lands, tenements, and hereditaments; but in civil law refers to a thing movable or immovable as distinguished from the person.[90] Also a definition of " actual." [91] (Real: Action, see REAL ACTIONS, *post*, p. 1541. Assets, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 180. Chattel, see CHATTELS REAL, 7 Cyc. 123; FIXTURES, 19 Cyc. 1033; LANDLORD AND TENANT, 24 Cyc. 895 note 65; PROPERTY, 32 Cyc. 658 text and note 25. Contract, see SPECIFIC PERFORMANCE; VENDOR AND PURCHASER. Covenant, see COVENANTS, 11 Cyc. 1052, 1095. Estate, see PROPERTY, 32 Cyc. 655, 661. Estate Agent or Broker, see FACTORS AND BROKERS, 19 Cyc. 196. Party in Interest, see PARTIES, 30 Cyc. 44. Property, see PROPERTY, 32 Cyc. 655, 661.)

87. See Smith *v.* Burch, 92 N. Y. 228, 230, 231 [*reversing* 28 Hun 331], where a bequest from wife to husband, in the form, "All the ready money I may have, either in bank or elsewhere," was held to include the amount of money collected for her with her knowledge by her husband and expended for her by him while she was in an imbecile condition; and the husband being sued by her executor to recover such money so spent set up the legacy as a defense.

Includes balance at banker's, in the ordinary use of language. Parker *v.* Marchant, 6 Jur. 292, 295, 11 L. J. Ch. 223, 1 Y. & Coll. 290, 20 Eng. Ch. 290, 62 Eng. Reprint 893 [*affirmed* in 7 Jur. 457, 12 L. J. Ch. 314, 1 Phil. 356, 19 Eng. Ch. 356, 41 Eng. Reprint 667, 2 Y. & Coll. 279, 21 Eng. Ch. 279, 63 Eng. Reprint 123]; Taylor *v.* Taylor, 1 Jur. 401; Fryer *v.* Rank, 9 L. J. Ch. 337, 11 Sim. 55, 34 Eng. Ch. 55, 59 Eng. Reprint 794.

88. See Cox *v.* Palmer, 60 Miss. 793, 797, 798 (holding that an assignment for creditors directing a sale for all " ready money " did not authorize a sale upon credit but only for " ready cash "); CASH, 6 Cyc. 699 text and note 10 (where the term is given as one definition).

89. See 27 Cyc. 824 text and note 22.

90. See Black L. Dict.

In the phrase " as well real as personal," following an enumeration, in terms applicable only to chattels, in a deed, the word " real " does not pass land but may embrace chattels real. Ingell *v.* Nooney, 2 Pick. (Mass.) 362, 366, 13 Am. Dec. 434 [*criticizing* Hogan *v.* Jackson, Cowp. 299, 308, 309, in which case it was held that " all effects, ' real ' and ' personal ' " in a will should be construed in the light of the context to include land].

91. See 1 Cyc. 761.

REAL ACTIONS

By Alexander Karst

Cross-References

For Matters Relating to:

Actions For Recovery of Specific Real Property Based on:
Forcible Entry and Detainer, see Forcible Entry and Detainer, 19 Cyc. 1123.
Right of Possession and Damages For Detention, see Ejectment, 15 Cyc. 1.
Adverse Possession in General, see Adverse Possession, 1 Cyc. 968.
Assumpsit to Try Title to Realty, see Assumpsit, Action of, 4 Cyc. 321.
Conveyance of Land Held Adversely, see Champerty and Maintenance, 6 Cyc. 867.
Recovery By or Against:
Devisee, see Wills.
Tenant, see Landlord and Tenant, 24 Cyc. 845.
Recovery of Dower, see Dower, 14 Cyc. 871.
Review of Actions in Which Title to Land Is Involved, see Appeal and Error, 2 Cyc. 552.
Writ of:
Entry, see Entry, Writ of, 15 Cyc. 1057.
Nuisance, see Nuisances, 29 Cyc. 1214

I. DEFINITION AND HISTORICAL DEVELOPMENT.

Real actions are those brought for the specific recovery of lands, tenements, or hereditaments,[1] the essential and distinguishing feature of which is that they seek to recover specifically the land and its possession.[2] The two most important forms of real actions were the writ of right,[3] and the writ of formedon.[4] These actions have long been in disuse in England and were formally abolished[5] there by 3 & 4 Wm. IV.[6] In the United States the action has been supplanted in a majority of the states by the action of ejectment which, although formerly a possessory action, is now used also to try title,[7] or by a statutory real action in the nature of ejectment,[8] while in a few states a statutory writ of entry serves the purpose of the ancient real action.[9] In Louisiana recovery of title to real property is by a petitory action.[10]

II. WRIT OF RIGHT.

A. Definition and Nature. A writ of right was one of the forms of real actions, and was the remedy appropriate to the case where the party claimed the specific recovery of corporeal hereditaments in fee simple, founding his title on the right of property or mere right, arising either from his own seizin or the seizin of his ancestor or predecessor.[11]

B. Title to Support Writ. In order to maintain a writ of right, there must be an actual seizin of a freehold estate in demandant,[12] or in his ancestor,[13]

1. Hall *v.* Decker, 48 Me. 255; 1 Petersdorf Abr. 170 [*quoted* in Linscott *v.* Fuller, 57 Me. 406, 408].

Other definitions are: "Actions are for the specific recovery of real property only, and in which the plaintiff, then called the demandant, claims title to lands, tenements or hereditaments." 1 Chitty Pl. 109 [*quoted* in Doe *v.* Waterloo Min. Co., 43 Fed. 219, 220].

"Those which concern the realty only, by which the demandant claims title to have any lands or tenements, rents or other hereditaments, in fee simple, fee tail or for term of life." Kidder *v.* Blaisdell, 45 Me. 461, 466.

2. Hall *v.* Decker, 48 Me. 255.

3. See *infra*, II.

4. See *infra*, III.

5. Davies *v.* Lowndes, 2 D. & L. 272, 12 L. J. Exch. 506, 6 M. & G. 471, 7 Scott N. R. 141, 46 E. C. L. 471, holding that a real action commenced subsequent to this statute is a nullity.

6. St. 3 & 4 Wm. IV, c. 27, §§ 36,37.

7. See EJECTMENT, 15 Cyc. 12 *et seq.*

8. See the statutes of the several states. And see Betz *v.* Mullin, 62 Ala. 365; Morris *v.* Beebe, 54 Ala. 300; Craton *v.* Wright, 16 Iowa 133; Farley *v.* Goocher, 11 Iowa 570; Newell *v.* Sanford, 10 Iowa 396; Kilbourne *v.* Lockman, 8 Iowa 380; Cavender *v.* Smith, 8 Iowa 360; Dunn *v.* Starkweather, 6 Iowa 466; Gillis *v.* Black, 6 Iowa 439; Wright *v.* Stevens, 3 Greene (Iowa) 63; Hughes *v.* Holliday, 3 Greene (Iowa) 30; Olive *v.* Daugherty, 2 Greene (Iowa) 393; Kerr *v.* Leighton, 2 Greene (Iowa) 196; Wilford *v.* Miller, Morr. (Iowa) 405; Fulwider *v.* Wilford, Morr. (Iowa) 323; Doolittle *v.* Harrington, Morr. (Iowa) 226.

9. See ENTRY, WRIT OF, 15 Cyc. 1057. And see Cote *v.* Leterneau, 100 Me. 572, 62 Atl. 734; Rollins *v.* Blackden, 99 Me. 21, 58 Atl. 69; Milliken *v.* Houghton, 97 Me. 447, 54 Atl. 1075; Kimball *v.* Hilton, 92 Me. 214, 42 Atl. 394.

10. See *infra*, IV.

11. Bouvier L. Dict.

It was a writ which lay for one who had the right of property against another who had the right of possession and the actual occupation. The writ properly lay only to recover corporeal hereditaments for an estate in fee simple; but there were other writs, said to be "in the nature of a writ of right," available for the recovery of incorporeal hereditaments or of lands for a less estate than a fee simple. Black L. Dict.

12. Gaines *v.* Conn., 2 J. J. Marsh. (Ky.) 104; Smith *v.* Lockridge, 3 Litt. (Ky.) 19; Speed *v.* Buford, 3 Bibb (Ky.) 57; Leonard *v.* Leonard, 10 Mass. 281 (where the facts were held not to constitute sufficient seizin to maintain the writ); Fosgate *v.* Herkimer Mfg., etc., Co., 9 Barb. (N. Y.) 287.

A disseizor might maintain a writ of right against a stranger. Hunt *v.* Hunt, 3 Metc. (Mass.) 175, 37 Am. Dec. 130; Bolling *v.* Petersburg, 3 Rand. (Va.) 563.

A tenant by the curtesy could not maintain the writ. Lacatt *v.* Merchants' Ins. Co., 16 Ala. 177, 50 Am. Dec. 169.

13. Copp *v.* Lamb, 12 Me. 312 (holding, however, that, although a writ of right was usually brought upon the seizin of an ancestor, it was not an ancestral action and demandant might count as well upon his own seizin as upon that of his ancestor); Fosgate *v.* Herkimer Mfg., etc., Co., 9 Barb. (N. Y.) 287; Williams *v.* Woodard, 7 Wend. (N. Y.) 250. And see Knox *v.* Kellock, 14 Mass. 400; Wolcott *v.* Knight, 6 Mass. 418, both holding that in a writ of right, where

within the time limited by law.[14] The seizin might, however, be a constructive actual seizin, such as a patent of vacant lands,[15] and where the land was vacant and unoccupied, it was not necessary to prove an actual entry under title or an actual taking of *esplees*[16] in order to support the writ.[17] While it has been held broadly that a writ could not be sustained by a devisee upon the seizin of his testator,[18] this would seem to be more properly limited to the case of a devisee of occupied lands,[19] for it was generally held that the devisee of vacant and unoccupied land had by operation of law such a seizin as would enable him to maintain the writ.[20] Demandant in a writ of right was forced to recover on the strength of his own title and could not rely upon a defective title in his adversary.[21]

C. Against Whom Writ Lay. The writ lay only against the holder of a freehold estate.[22]

D. Defenses. In a writ of right, where demandant proved an actual seizin in deed, or *pedis possessio*, the tenant could not defend himself by showing a better outstanding title in another;[23] but where demandant relied upon a constructive seizin, the tenant might show an elder patent or better title in another,[24] and

demandant counted on the seizin of the ancestor, and the tenant proved that the ancestor had parted with the land in his lifetime, but it appeared that the ancestor was disseized at the time of the conveyance, nothing passed by the deed, and demandant was therefore entitled to judgment.

An alienee might maintain a writ of right on the actual seizin of his alienor, although the alienee was himself never actually seized. Conn *v.* Manifee, 2 A. K. Marsh. (Ky.) 396, 12 Am. Dec. 417.

14. Bedinger *v.* Rickets, 2 A. K. Marsh. (Ky.) 34; Gaines *v.* Conn, 2 J. J. Marsh. (Ky.) 104; Mason *v.* Walker, 14 Me. 163; Ellis *v.* Murray, 28 Miss. 129; Fosgate *v.* Herkimer Mfg., etc., Co., 9 Barb. (N. Y.) 287; Bradstreet *v.* Clarke, 12 Wend. (N. Y.) 602.

15. Taylor *v.* Burnsides, 1 Gratt. (Va.) 165 (holding that demandants in a writ of right claiming title to the land under a patent from the commonwealth were entitled to recover the land, although neither they nor those under whom they claimed had entered and held actual possession under their grant, in the absence of a sufficient legal defense on the part of the tenant); Green *v.* Watkins, 7 Wheat. (U. S.) 27, 5 L. ed. 388; Green *v.* Liter, 8 Cranch (U. S.) 229, 3 L. ed. 545. But see Smith *v.* Lockridge, 3 Litt. (Ky.) 19, holding that where a person settled on land for which he held a bond describing it by metes and bounds, he acquired an actual possession which was not divested by an adversary patentee entering upon another part of the land, consequently the entry gave the second patentee no seizin in the lands so held adversely.

16. **Esplees** defined see 16 Cyc. 590.

17. Ward *v.* Fuller, 15 Pick. (Mass.) 185 (holding that a writ of right might be maintained without proof of an actual perception of profits); Wells *v.* Prince, 4 Mass. 64; Fosgate *v.* Herkimer Mfg., etc., Co., 9 Barb. (N. Y.) 287 (holding that an actual possession by taking the *esplees* was not necessary, and that it was sufficient if demandant showed a possession by his servant or his tenant); Bradstreet *v.* Clarke, 12 Wend. (N. Y.) 602; Green *v.* Watkins, 7 Wheat. (U. S.) 27, 5 L. ed. 388; Green *v.* Liter, 8 Cranch (U. S.) 229, 3 L. ed. 545. But see Williams *v.* Woodard, 7 Wend. (N. Y.) 250.

18. Williams *v.* Woodard, 7 Wend. (N. Y.) 250.

19. Wells *v.* Prince, 4 Mass. 64.

20. Ward *v.* Fuller, 15 Pick. (Mass.) 185; Wells *v.* Prince, 4 Mass. 64; Williams *v.* Woodard, 7 Wend. (N. Y.) 250.

In Virginia a writ of right could be maintained by a devisee upon possession or seizin of his testator, the words of the statute of wills that every person should have power to devise all the estate, right, title, and interest he has in lands being construed to embrace the right of entry. Taylor *v.* Rightmire, 8 Leigh 468.

21. Bradstreet *v.* Clarke, 12 Wend. (N. Y.) 602.

22. Lyon *v.* Mottuse, 19 Ala. 463; Bradstreet *v.* Clarke, 12 Wend. (N. Y.) 602 (holding that the writ did not lay for the recovery of any estate less than the fee simple and had nothing to do with equitable interests); Gains *v.* Conn, 2 J. J. Marsh. (Ky.) 104; Holyoke *v.* Haskins, 5 Pick. (Mass.) 20, 16 Am. Dec. 372; Green *v.* Liter, 8 Cranch (U. S.) 229, 3 L. ed. 545.

23. Bolling *v.* Petersburg, 3 Rand. (Va.) 563. And see Green *v.* Liter, 8 Cranch (U. S.) 229, 3 L. ed. 545.

24. Inglis *v.* Sailor's Snug Harbor, 3 Pet. (U. S.) 99, 7 L. ed. 617; Breathed *v.* Smith, 1 Patt. & H. (Va.) 301 (holding, however, that evidence of a previous patent to others was not conclusive, but must be weighed by the jury); Green *v.* Watkins, 7 Wheat. (U. S.) 27, 5 L. ed. 388 (holding that where demandant in a writ of right relies for proof of seizin upon a constructive actual seizin, in virtue of a patent from the state, the tenant may show that the land had been previously granted by patent by the state). But see Green *v.* Liter, 8 Cranch (U. S.) 229, 3 L. ed. 545, holding broadly that a better subsisting adverse title in a third person

defendant could always defend on the ground that the demandant had been divested of his title.[25] It was no defense to a writ of right that, in an action between the same parties in which the right of possession of demandant's premises was put in issue, this right depended entirely upon the mere right of property, and that the question was submitted to the jury and decided against demandant, and that judgment was rendered thereon;[26] nor was it a defense that there had been a judgment on a petition for partition between the same parties in favor of the tenant upon an issue joined therein, on the sole seizin of demandant.[27]

E. Proceedings and Relief — 1. Joinder of Parties. If there were several tenants claiming parcels of land by distinct title they could not be lawfully joined in one writ, and if they were they might plead in abatement of the writ.[28]

2. Process. In New York the action was begun by personal service of writ of summons,[29] or by proclamation of summons,[30] and where the return on either was defective an alias summons went,[31] or the return might be amended.[32]

3. Pleading — a. The Writ. The pleadings in a writ of right were required to be in writing; [33] but a high degree of technical accuracy in describing the land or boundaries was not required.[34] It was necessary to allege in the writ a seizin

was no defense in a writ of right. This case, however, was explained in Green *v.* Watkins, *supra*, to be limited to a case in which demandant proves an actual seizin in deed or *pedis possessio*, and in Inglis *v.* Sailor's Snug Harbor, *supra*, the court remarks that if anything in the case of Green *v.* Liter could be supposed to give countenance to the doctrine that a better subsisting adverse title in a third person could not be shown, where demandant showed a constructive actual seizin, its effect was nullified by the explanation of the court in Green *v.* Watkins, *supra*.

25. Sanders *v.* Buskirk, 1 Dana (Ky.) 410, holding, however, that demandant might show that the sale and deed purporting to divest him of title was collusive, fraudulent, and void.

26. Arnold *v.* Arnold, 17 Pick. (Mass.) 4.

27. Mallett *v.* Foxcroft, 16 Fed. Cas. No. 8,989, 1 Story 474 [*affirmed* in 45 U. S. 353, 11 L. ed. 1008].

28. Green *v.* Liter, 8 Cranch (U. S.) 229, 3 L. ed. 545, holding also that the prevailing statutes in Kentucky did not change the common-law rule.

29. Malcom *v.* Rogers, 1 Cow. (N. Y.) 2 (holding that the manner of service of a writ of right should be plainly expressed in the return, which could not be aided by intendment); Scofield *v.* Loder, 2 Johns. Cas. (N. Y.) 75.

Jurisdiction in New York.— In 1786 a statute (1 Greenleaf Laws, p. 50) was passed in New York regulating writs of right, under which the court of common pleas had no jurisdiction, the sole jurisdiction in such suits being in the court of common pleas. People *v.* New York Ct. of C. Pl., 4 Wend. 215.

30. Malcom *v.* Gardner, 1 Cow. (N. Y.) 13 (holding that under 1 Rev. Laws, p. 88, requiring that a proclamation in a real action shall be made in the nearest church in the town or place, a proclamation must appear to have been made at the church in the ward nearest the land; and, if there was no church in the ward in which the land lies, such fact must be stated in the return to warrant the proclamation out of the ward); Malcom *v.* Rogers, 1 Cow. (N. Y.) 2.

Old New York practice relating to return of process and imparlances see Swift *v.* Livingston, 2 Johns. Cas. 112; Haines *v.* Budd, 1 Johns. Cas. 335; Sacket *v.* Swift, Col. Cas. 124, Col. & C. Cas. 73; Sacket *v.* Lothrop, Col. Cas. 94, Col. & C. Cas. 55.

31. Malcom *v.* Rogers, 1 Cow. (N. Y.) 2. And see Scofield *v.* Loder, 2 Johns. Cas. (N. Y.) 75, holding that where the tenant on a writ of right vouched, and a writ of summons issued which was irregular in its return, an alias summons could be granted against the vouchee.

32. Malcom *v.* Rogers, 1 Cow. (N. Y.) 2.

33. Taylors *v.* Huston, 2 Hen. & M. (Va.) 161.

34. Snapp *v.* Spengler, 2 Leigh (Va.) 1 (holding that where a count in a writ of right demanded "a certain tenement consisting of the one stone house and its appurtenances," it was a demand of the land on which the house stood, and was certain enough); Norvell *v.* Camm, 2 Rand. (Va.) 68 (holding that if any portion of the land described in the count in a writ of right was included in the patent under which demandant claimed, it was sufficiently identified); Turberville *v.* Long, 3 Hen. & M. (Va.) 309 (holding that a count on a writ of right, referring to boundaries "as by a survey made in the cause," sufficiently described the boundaries of the land in dispute).

After the tenant joined the mise he could not complain of a defect in the setting out of the boundaries of the land. Bolling *v.* Petersburg, 3 Rand. (Va.) 563.

Where the demandant omitted to set forth the boundaries the judgment was erroneous. Beverley *v.* Fogg, 1 Call (Va.) 484.

A special imparlance saved the right of the party in real actions, and after a special imparlance the tenant might vouch to war-

either in demandant or his ancestors through whom he claimed;[35] but a writ containing two counts for the same land, one alleging demandant's own seizin and the other the seizin of his predecessors, was abatable.[36] Although it has been held broadly that it was necessary to allege the taking of *esplees* or profits,[37] this allegation would seem not to have been necessary where a constructive actual seizin was relied upon.[38]

b. Plea or Answer. Non-tenure,[39] joint tenure,[40] sole tenure or several tenure,[41] and *darrein* seizin,[42] were good pleas to a writ of right; and although it was generally held that these pleas were available only as pleas in abatement,[43] other cases held that they might be pleaded in bar as well as in abatement.[44] Where the tenant in a writ of right had a right of way merely in the land he should disclaim all title to it and possession of the land, except his right of using it for a way, and a plea averring seizin to be in the tenant for the purpose of enjoying the easement was bad;[45] but a plea of special non-tenure alleging that the predecessor under whom the tenant held was seized of the demanded premises was sufficient without stating of what estate he was seized.[46] Accord and satisfaction was not a good plea in a real action, where the inheritance or freehold was to be recovered, although the satisfaction was of as high a nature as the right of freehold.[47]

ranty. Whitbeck *v.* Shoefelt, 9 Johns. (N. Y.) 265.

35. Lyon *v.* Mottuse, 19 Ala. 463 (holding that a count which did not allege a seizin in fee simple, either in demandant or in the ancestor from whom he claims, was defective as a count in a writ of right, although it alleged the disseizin of demandant's ancestor); Payne *v.* Treadwell, 5 Cal. 310; Plummer *v.* Walker, 24 Me. 14. And see cases cited *supra*, II, B.

36. Boston Overseers of Poor *v.* Otis, 20 Pick. (Mass.) 38.

37. Payne *v.* Treadwell, 5 Cal. 310; Plummer *v.* Walker, 24 Me. 14.

38. See *supra*, II, B.

39. Sanders *v.* Buskirk, 1 Dana (Ky.) 410; Dewey *v.* Brown, 5 Pick. (Mass.) 238 (holding also that where non-tenure was pleaded in abatement to a writ of right, the plea must be filed before the impaneling of the jury at the return-term); Green *v.* Liter, 8 Cranch (U. S.) 229, 3 L. ed. 545 (holding also that where several tenants claiming several parcels of land by distinct title were joined in one writ and demandant demanded against any tenant more land than he held, he might plead non-tenure as to the parcel not holden, but the writ should abate only as to the parcel whereof non-tenure was pleaded and admitted or proved).

40. Briscoe *v.* McGee, 2 J. J. Marsh. (Ky.) 370; Green *v.* Liter, 8 Cranch (U. S.) 229, 3 L. ed. 545.

41. Green *v.* Liter, 8 Cranch (U. S.) 229, 3 L. ed. 545.

42. Hunt *v.* Hunt, 3 Metc. (Mass.) 175, 37 Am. Dec. 130, holding, however, that defendants in this case had failed to make out the defense.

43. Sanders *v.* Buskirk, 1 Dana (Ky.) 410; Bolling *v.* Petersburg, 3 Rand. (Va.) 563; Green *v.* Liter, 8 Cranch (U. S.) 229, 3 L. ed. 545, holding that at common law non-tenure, joint tenure, sole tenure, and several tenure were good pleas only in abatement, for the tenant by joining in the mise or pleading in bar admitted himself to be tenant of the freehold, and that he had capacity to defend the suit. See also Liter *v.* Green, 2 Wheat. (U. S.) 306, 4 L. ed. 246, holding that in a writ of right, where the demandant described the land by metes and bounds, and counted against the tenants jointly the tenants, by pleading in bar, admitted their joint tenancy and lost the opportunity of pleading the several joint tenancy.

In Maine, under the statute of 1846, non-tenure could be pleaded in abatement only. Hazen *v.* Wright, 85 Me. 314, 27 Atl. 181 (holding also that pleas of non-tenure and disclaimer being under the statute pleas in abatement only, if not pleaded within the first two days of the return-term, are no defense); Warren *v.* Miller, 33 Me. 220 (holding also that such a plea must, except by leave of court, be filed at the return-term of the writ, and that, although the action was continued, the necessity of filing such plea at the first term was not removed by an order of the court obtained on motion that demandant should file an abstract of his title by the middle of vacation).

The Virginia act of 1786, reforming the method of proceeding in writs of right did not vary the rights or legal situation of parties to writs of right as they existed at common law, and it did not therefore change the nature and effect of the pleadings or take away from the tenant the full benefit of the ordinary pleas in abatement, and the tenant might at his election plead any special matter in bar or give it in evidence on the mise joined. Green *v.* Liter, 8 Cranch (U. S.) 229, 3 L. ed. 545.

44. Dewey *v.* Brown, 5 Pick. (Mass.) 238; Hyers *v.* Wood, 2 Call (Va.) 574.

45. Miller *v.* Miller, 4 Pick. (Mass.) 244; Alden *v.* Murdock, 13 Mass. 256.

46. Dewey *v.* Brown, 5 Pick. (Mass.) 238.

47. Peytoe's Case, 9 Coke 77*b*, 77 Eng. Reprint 847; Vernon's Case, 4 Coke 1*a*, 76 Eng. Reprint 845.

c. Amendment. Leave to amend writs of right was allowed under the same circumstances and upon the same terms as in other writs.[48]

d. Tender of Demi-mark. The tender of a demi-mark, which was a small sum of money, six shillings and eight pence, tendered and paid into court in certain cases on the trial of a writ of right by the grand assize, more usually by the tenant to obtain an inquiry by the grand assize into the time of demandant's seizin, and which compelled demandant to begin,[49] was unknown in American practice and vitiated the plea to which it was added.[50]

e. Joinder of the Mise, Proof, and Variance. Joinder of the mise, which was equivalent to the general issue in a writ of right,[51] put in issue the whole title,[52] including the statute of limitations,[53] which need not be specially pleaded,[54] and every special matter might be given in evidence thereunder, except collateral warranty;[55] but where defendant tendered the mise and no replication was filed, this was not joinder of the mise justifying a judgment by default against demandant.[56] The general rule that proof must conform to the allegations in the pleadings[57] applied to writs of right.[58]

4. EVIDENCE. The rules regulating the admissibility, weight, and sufficiency of evidence in common-law actions generally[59] applied to writs of right.[60] Posses-

48. Means *v.* Wells, 12 Metc. (Mass.) 356 (holding that a writ of right in which demandant counted on the seizin of D might be amended by counting on the seizin of E, who was last seized, and from whom the estate descended to demandant); Boston *v.* Otis, 20 Pick. (Mass.) 38 (where a plea in abatement to a writ of right was sustained on the ground that it contained two counts for the same land on two distinct seizins, and demandants were allowed to amend); Holmes *v.* Holmes, 2 Pick. (Mass.) 23 (holding demandant in a writ of right, having counted on his own seizin within forty years, might amend by substituting thirty); Williams *v.* Woodard, 7 Wend. (N. Y.) 250; Dumsday *v.* Hughes, 3 B. & P. 453; Scott *v.* Perry, 3 Wils. C. P. 206; Goore *v.* Goore [*cited* in Roscoe Real Act. 179].

49. Bouvier L. Dict.

50. Bradstreet *v.* Oneida County, 13 Wend. (N. Y.) 546; Ten Eyck *v.* Waterbury, 7 Cow. (N. Y.) 51.

51. Bouvier L. Dict.

Mise is the issue of a writ of right. Black L. Dict.

52. Ten Eyck *v.* Waterbury, 7 Cow. (N. Y.) 51; Bell *v.* Snyder, 10 Gratt. (Va.) 350; Bolling *v.* Petersburg, 3 Rand. (Va.) 563; Inglis *v.* Sailors' Snug Harbor, 3 Pet. (U. S.) 99, 7 L. ed. 617; Green *v.* Watkins, 7 Wheat. (U. S.) 27, 5 L. ed. 388; Tiffen *v.* Clarke, 3 Wils. C. P. 419.

A plea including special matter with the mise is bad as requiring different means of trial, since special plea in a writ of right is triable by a common jury but the mise is triable by the grand assizes. Ten Eyck *v.* Waterbury, 7 Cow. (N. Y.) 51.

53. Ten Eyck *v.* Waterbury, 7 Cow. (N. Y.) 51, holding also that where a plea after the mise denied the seizin of the ancestor within twenty-five years, it was bad on special demurrer as amounting to the mise.

54. Boston *v.* Sears, 22 Pick. (Mass.) 122, holding, however, that if it appears on the face of the record that the action is not brought within the time limited by law, a tenant may avail himself of it by general demurrer.

55. Poor *v.* Robinson, 10 Mass. 131 (holding that on the general issue in a writ of right a release given to the tenant by some of demandants after the commencement of the suit was admissible for the tenant); Ten Eyck *v.* Waterbury, 7 Cow. (N. Y.) 51; Hyers *v.* Wood, 2 Call (Va.) 574.

56. Phillips *v.* Tibbat, 3 A. K. Marsh. (Ky.) 16.

57. See PLEADING, 31 Cyc. 680 *et seq.*

58. Scott *v.* Widdington, 21 Fed. Cas. No. 12,547, 1 McLean 193, holding that an allegation by several demandants as equally interested was not supported by proof of different estates. See also Linton *v.* Bartly, 9 Leigh (Va.) 444, holding that where a writ of right was brought by demandants, who claimed as heirs, and the mise was joined on the mere right, evidence that there was another heir besides those named in the writ and count could not be given at the trial; that fact being pleadable in abatement only.

59. See EVIDENCE, 16 Cyc. 821.

60. Bell *v.* Snyder, 10 Gratt. (Va.) 350 (holding that where, in a writ of right, defendants claimed as heirs of B, the patentee of the land, and also claimed under seizin of their ancestors, the fact that in the pleadings and verdict demandants were spoken of as the heirs of B was not proof that they were the heirs of B, nor was the fact that the report of the surveyor, who surveyed the land in controversy under order of the court, spoke of one of demandants as heir of B, evidence that he was such heir). See Davis *v.* Teays, 3 Gratt. (Va.) 283 (holding that Supp. Rev. Code, pp. 159, 160, authorizing defendant in an ejectment or writ of right to set up an equitable title as a defense, limits that defense to cases where the whole contract relied on and its precise terms is manifested by plain written evidence; and hence the written

sion of land, accompanied with a claim of the fee, was *prima facie* evidence of ownership and seizin of the inheritance uncontrollable by a stranger.[61]

5. Trial, Verdict, Judgment, and New Trial. In an action on a writ of right, the tenants were entitled to a view of the premises as a matter of right in all cases except those in which it was restrained by statute;[62] and where a tenant demanded a view, it was the duty of demandant to sue out the writ of view, and, if he did not, he was nonsuited.[63] The jury might find a special verdict,[64] and demandant might recover to such extent as he showed title, although it was less than his writ demanded.[65] A recovery in a writ of right did not affect any claim of the tenant to an easement in the land.[66] A new trial was granted in a writ of right, when the verdict was against the law and the evidence;[67] but a verdict or judgment substantially right, although not in exact legal form, would not be disturbed.[68]

6. Damages and Costs. The successful claimant in a writ of right was entitled to damages for mesne profits;[69] and where demandant in a writ of right entered

contract itself must be produced before the jury, and parol evidence of its contents is inadmissible, although it may have been lost or destroyed); Taylor *v.* Burnsides, 1 Gratt. (Va.) 165 (holding that on the trial of a writ of right, preparatory to proof of entry on the land by an agent, a power of attorney from demandant to the agent, duly authenticated, and giving him authority over the land, was proper evidence); Robinett *v.* Preston, 2 Rob. (Va.) 273 (holding that where on a trial of the mise joined in a writ of right after demandants had introduced a grant to their ancestor embracing the land demanded, the tenant introduced an earlier grant of the land in two grantees, and offered to give in evidence a deed from one of these grantees, conveying by metes and bounds a particular part of the land to the person under whom the tenant claimed, the conveyance was admissible in evidence).

Evidence held insufficient to show seizin in demandant see Dawson *v.* Watkins, 2 Rob. (Va.) 259.

Evidence held sufficient to show seizin in defendant see Marsh *v.* Brooks, 8 How. (U. S.) 223, 12 L. ed. 1056.

61. Rickard *v.* Williams, 7 Wheat. (U. S.) 59, 5 L. ed. 398.

62. Haines *v.* Budd, 1 Johns. Cas. (N. Y.) 335; Gravesend *v.* Voorhis, 1 Johns. Cas. (N. Y.) 237.

63. Scofield *v.* Lodie, 1 Johns. Cas. (N. Y.) 395.

64. See cases cited *infra*, this note.

Where the defense is the statute of limitations, a special verdict in a writ of right must find either an actual disseizin or ouster of demandants, or those under whom they claim, or facts which in law constitute such actual disseizin or ouster. Purcell *v.* Wilson, 4 Gratt. (Va.) 16.

A verdict for plaintiff in a sum mentioned was equivalent to a finding that plaintiff was entitled to possession of the premises. Daniels *v.* Chicago, etc., R. Co., 35 Iowa 129, 14 Am. Rep. 490.

65. Shaefer *v.* Gates, 2 B. Mon. (Ky.) 453, 38 Am. Dec. 164; Inglis *v.* Sailor's Snug Harbor, 3 Pet. (U. S.) 99, 7 L. ed. 617; Green *v.* Liter, 8 Cranch (U. S.) 229, 3 L. ed. 545.

66. Thompson *v.* Androscoggin Bridge Proprietors, 5 Me. 62.

67. Bradstreet *v.* Clarke, 12 Wend. (N. Y.) 602.

Erroneous judgment set aside.— Where the declaration in a writ of right was in behalf of two demandants, and the plea was defective, in that it answered the claim of one without mentioning that of the other, and there was no replication to the plea, a judgment for demandants was held erroneous and set aside. Chichester *v.* Boggess, 5 Munf. (Va.) 98.

68. Garrard *v.* Henry, 6 Rand. (Va.) 110 (holding that where, in a writ of right, brought by several demandants, the mise was joined on the mere right, and the jury found for the demandants, with the addition of these facts — that one of demandants was dead before the institution of this suit, leaving children, and that one of demandants was tenant in common with the others, these matters could not he given in evidence nor found by the jury upon the mise joined, but that they might be rejected as surplusage, and the remainder of the verdict received); Tuberville *v.* Long, 3 Hen. & M. (Va.) 309 (holding that the statute of jeofails extends to writs of right).

69. Purcell *v.* Wilson, 4 Gratt. (Va.) 16 (holding that Va. Rev. Code, p. 468, c. 118, § 1, authorizing the recovery of damages in writs of right, intended such damages as might be recovered in actions of trespass for mesne profits; and demandant's recovery of mesne profits would be for five years next before the bringing of the writ of right, and continuing down to the recovery of possession); Shaw *v.* Clements, 1 Call (Va.) 429 (holding that in a writ of right the jury might assess damages); Green *v.* Biddle, 8 Wheat. (U. S.) 1, 5 L. ed. 547 (holding that, according to the common law, the statute law of Virginia, the principles of equity, and those of the civil law, the successful claimant of land was entitled to an account of the mesne profits; and the common law recognized no distinction on this subject between a *bona fide* possessor and a holder *mala fide*). And see King *v.* Fowler, 14 Pick. (Mass.) 238, holding that where a grantee of a party who recovered in a writ of entry, being in pos-

into a stipulation to try the case or be nonsuited, he must pay the costs of the last circuit or sittings in the same manner as plaintiffs in other causes for not proceeding to trial.[70]

III. WRIT OF FORMEDON.

A. Definition, Origin, and Nature. The writ of formedon was an ancient writ in English law which was available for one who had a right to lands or tenements by virtue of a gift in tail. It was in the nature of a writ of right, and was the highest action that a tenant in tail could have; for he could not have an absolute writ of right, that being confined to such as claimed in fee simple,[71] and for that reason this writ of formedon was granted to him by the statute *de donis*,[72] and was emphatically called "his" writ of right.[73] The writ was distinguished into three kinds: (1) A formedon in the descender, which lay where a gift in tail was made and the tenant in tail aliened the lands entailed, or was disseized of them and died, in which case his heir in tail could have the writ; (2) a formedon in the remainder, which lay where a person gave lands to another for life or in tail with remainder to a third person in tail or in fee, and he who had a particular estate died without issue inheritable, and a stranger intruded upon him in remainder and kept him out of possession, in which case the remainder-man could have the writ; and (3) a formedon in the reverter, which lay where there was a gift in tail and afterward by the death of the donee or his heirs without issue of his body the reversion fell in upon the donor, his heirs or assigns, in which case the reversioner could have the writ.[74] This writ was abolished in England by the statute which abolished the ancient real action,[75] and is found in the United States only in the earlier cases.[76] As a deed of bargain and sale by a tenant in tail conveyed nothing but his life-estate to the buyer, it did not work a discontinuance against the heir in tail, or pass any of his estate, so that upon determination of the life-estate he might enter and was not put to his action of formedon.[77] Where the statute of limitations had run for twenty years against an heir in tail, no formedon could afterward be maintained.[78]

B. Pleading and Proof. A declaration in formedon in remainder must set out the gift, the seizin of the first donee, and the demandant's title to the estate, and that, on the death of the tenant for life, the right to the estate remained in him; and the seizin of the first donee must also be proved, and where the demandant in a writ of formedon in remainder claimed as devisee, declaring on his own seizin, he must prove his own seizin, as it was not in law to be presumed from the fact that the testator died seized.[79] A plea of non-tenure in a writ of formedon in remainder without disclaimer was sufficient.[80]

IV. PETITORY ACTION.

A. Definition and Nature. A petitory action is an action in which the mere title to the property is litigated, and sought to be enforced, independently of any possession, which has previously accompanied or sanctioned that title,[81]

session of the land, sowed it during the pendency of a writ of right against him, and demandant in the writ of right recovered judgment and obtained seizin and possession before the crop was severed, demandant was entitled to the crop.

70. Philips *v.* Peck, 2 Johns. Cas. (N. Y.) 104.

71. See *supra*, II, B.

72. St. Westminster 2 (13 Edw. I, c. 1).

73. Black L. Dict.

74. 3 Blackstone Comm. 191, 192.

75. St. 3 & 4 Wm. IV, c. 27, §§ 36, 37.

76. See cases cited *infra*, this section.

77. Gilliam *v.* Jacocks, 11 N. C. 310.

78. Dow *v.* Warren, 6 Mass. 328.

79. Wells *v.* Prince, 4 Mass. 64.

80. Prout *v.* Libby, 14 Mass. 151; Hunt *v.* Sprague, 3 Mass. 312; Fales *v.* Thompson, 1 Mass. 134.

Non devisavit, pleaded to a writ of formedon, was a special issue. Dudley *v.* Sumner, 5 Mass. 438.

81. The Tilton, 23 Fed. Cas. No. 14,054, 5 Mason 465, 468.

Statutory definition.— "The petitory action is that by which he who has the property of a real estate, or of a right upon or growing out of it, proceeds against the person having the possession, in order to obtain the posses-

and is to be distinguished from a possessory action, which seeks to restore to the owner the possession of which he had been unjustly deprived, when that possession has followed a legal title, or, as it is sometimes phrased, when there has been a possession under a claim of title with a *constat* of property.[82]

B. Title to Support Action. To recover in a petitory action as against a possessor in good faith, plaintiff must show a good legal title in himself in all respects,[83] which can be traced back to an author who had in himself the right

sion of the immovable property, or the enjoyment of the rights upon it, to which he is entitled." Garland Rev. Code Pr. La. p. 3; La. Code Pr. § 5.

Actions held to be petitory actions.—Where a judgment creditor sues for a recovery of his debtor's property in the hands of a third person, in order to make it liable for his debt, such suit is not a revocatory action, but in the nature of a petitory action. Spencer *v.* Goodman, 33 La. Ann. 898. Where plaintiff represents that he is the owner or proprietor of a certain square of ground, and describes its location and boundaries, and further alleges that he has always been in possession and enjoyment of the whole of said square, and prays that his title thereto, with all the buildings and improvements thereon, may be recognized, and that he be put in possession thereof, the action is a petitory one. Millaudon *v.* Ranney, 18 La. Ann. 196.

Action held not to be petitory.— Where plaintiff alleges that he himself is the owner of certain property, and was then and had been in possession of the same for over ten years under title, and that defendant had trespassed and was still trespassing upon the same by cutting down and hauling off timber thereon under claim of an absolutely null tax title, which he had spread upon the record and prays that he be quieted in his own ownership and possession of the property, that he recover damages from the defendant for his trespass, and that the tax title be declared null and void, his action is not a petitory action. Gilmore *v.* Schenck, 115 La. 386, 39 So. 40.

82. The Tilton, 23 Fed. Cas. No. 14,054, 5 Mason 465, 468.

83. Glover *v.* Haley, 118 La. 649, 43 So. 265; Lyons *v.* Lawrence, 118 La. 461, 43 So. 51 (holding that where plaintiff in a petitory action traces her title to her father as her author, and the evidence shows that he purchased the property in his own behalf at a time when the daughter was a minor, and that he sold the property before she arrived at her majority, and it passed into the hands of a third person, no title in the daughter is shown); Walker *v.* Levy, 118 La. 196, 42 So. 771 (holding that where the evidence shows that defendant has been in possession of the premises in controversy for a number of years under title translative of property, and there is no evidence to show how the rights of plaintiff ever covered the property in possession of defendant, judgment for defendant should be rendered); Wilson *v.* Ober, 109 La. 718, 33 So. 744 (holding that where plaintiff alleges that defendant is in possession claiming as owner, but discloses no title in himself, he cannot recover); Hargrave *v.* Mouton, 109 La. 533, 33 So. 590; Boyle *v.* West, 107 La. 347, 31 So. 794 (holding that an act of donation, null and void, cannot be made the basis of a petitory action); Frere *v.* Derouen, 104 La. 777, 29 So. 330 (holding that where plaintiff claims a small tract of land, which, as a fact, forms a part of a large plantation, and appears to have been so considered for nearly thirty years, during which the plantation has changed hands several times, such plaintiff, in order to recover, must identify the tract claimed by him, and must show affirmatively that it could not reasonably have been included in the description whereby the plantation was sold); Worden *v.* Fischer, 52 La. Ann. 576, 27 So. 83 (holding that in order to obtain a judgment by course of law against one in possession plaintiff must show a title as valid as any title defendant can plead, whether it be his own or that of someone else); Willet *v.* Andrews, 51 La. Ann. 486, 25 So. 391; Parish Bd. School Directors *v.* Rollins, 33 La. Ann. 424 (holding that where a board of school directors sued to recover a lot of land claimed to have been set aside by the United States for educational purposes, and it did not satisfactorily appear that the land was ever selected as such under act of congress, a judgment of nonsuit should be entered); Cronan *v.* Cochran, 27 La. Ann. 120; Sulstrang *v.* Betz, 24 La. Ann. 295 (holding that as real property in the name of a married woman belongs to the community, she cannot maintain a petitory action to recover it, without alleging and showing that she has acquired the community interest in the property since its dissolution); Caze *v.* Robertson, 14 La. Ann. 232; Hemken *v.* Brittain, 12 Rob. (La.) 46; D'Orgenoy *v.* Droz, 13 La. 389; Baudin *v.* Roliff, 8 Mart. N. S. (La.) 98; Murray *v.* Boissier, 10 Mart. (La.) 293; Gilmer *v.* Poindexter, 10 How. (U. S.) 257, 13 L. ed. 411. But see Winter *v.* Atkinson, 28 La. Ann. 650, holding that in a petitory action it is not necessary for plaintiff to show title to all the property in a suit to recover his share thereof, since the question as to the validity or extent of his title will arise on the merits.

One who has allowed his lands to be sold to pay his debts cannot afterward maintain a petitory action for the recovery of the land against the purchaser at the judicial sale. Tregre *v.* Baudry, 23 La. Ann. 18.

The formal probate of a will cannot be disregarded by parties claiming as heirs of the testator, but never in possession, and they

of property,[84] and if he bases his claim on a complete legal title, he must prevail, unless defendant shows a better title.[85] But plaintiff can recover on no other title than that on which he declares,[86] nor more property than he demanded,[87] and must recover on the strength of his own title, and not on the weakness of that of his adversary.[88] To recover against a mere trespasser, however, who

cannot institute a petitory action without seeking to annul such probate. Deslondes *v.* New Orleans, 14 La. Ann. 552.

The regular patent from the United States gives a perfect legal title, which cannot be affected by an alleged error or mistake in the description of the land entered and patented to defendant's authors. Foster *v.* Meyers, 117 La. 216, 41 So. 551.

A receiver's receipt is sufficient evidence of title from the United States to support a petitory action. Beaumont *v.* Covington, 6 Rob. (La.) 189; Lott *v.* Prudhomme, 3 Rob. (La.) 293; Guidry *v.* Woods, 19 La. 334, 36 Am. Dec. 677; Lefebvre *v.* Comeau, 11 La. 321; Newport *v.* Cooper, 10 La. 155; Herriot *v.* Broussard, 4 Mart. N. S. (La.) 260.

A certificate of entry issued under the United States homestead law vests in the holder a sufficient title to support a petitory action (Broussard *v.* Broussard, 43 La. Ann. 921, 9 So. 910); but abstracts of certificates of entry, attested by the register as on file and agreeing with the registry of sales and records of his office, even if admissible, are insufficient (Basseron *v.* McRae, 9 La. Ann. 281).

A confirmation by an act of congress is a title on which claimant can maintain a petitory action. Morrough *v.* Moss, 5 La. Ann. 601.

An act of sale, containing a stipulation whereby the vendee binds himself to retransfer the land to the vendor when the timber shall have been removed, or after fifty years, although the timber be not removed, vests an imperfect ownership, and affords sufficient basis for a petitory action. Ruddock Cypress Co. *v.* Peyret, 111 La. 1019, 36 So. 105.

A widow in community and the heir of age have the legal capacity to institute a petitory action to recover property which the husband owned, and which is claimed by others, although twenty-three years have elapsed since a succession sale of part of the property, where the heir was a minor at the time of the sale and of the administration of the estate, and where no debts appear to be due by the succession, and no administration was provoked by creditors. Messick *v.* Mayer, 52 La. Ann. 1161, 27 So. 815.

84. Gatlin *v.* Hutchinson, 36 La. Ann. 350 (holding that in a petitory action, based on a title derived from the state to property claimed to have been forfeited to the state, it is not enough for plaintiff to prove his deed and its registry, but he must show that the state had acquired a valid title to the property); Brown *v.* Brown, 15 La. Ann. 169. But see Tucker *v.* Burris, 13 La. Ann. 614, holding that where one claims from the confirmee of a grant, it is not necessary to trace title to the original claimant, it being sufficient if it is traced to the confirmee, whose existence is not contested.

85. Marmion *v.* McPeak, 51 La. Ann. 1631, 26 So. 376; Dupre *v.* Helm, 23 La. Ann. 145 (holding that if plaintiff shows a title translative of property, and defendant shows none, plaintiff will recover); Brooks *v.* Wortman, 22 La. Ann. 491 (holding that where plaintiff shows a good and valid title, and defendant holds under a title translative of property, but it is shown that the title of his vendor is defective, plaintiff is entitled to recovery).

The adjudicatee of property at a judicial sale to effect a partition thereof among the heirs of a deceased person, and having received an authentic act thereto, is the holder of a just and translative title, and entitled to judgment in a petitory action against a possessor without title. Brinkman *v.* Huyghe, 42 La. Ann. 109, 7 So. 76.

86. Barbier *v.* Nagel, 121 La. 979, 46 So. 941 (holding that where plaintiff in a petitory action relies on the title describing totally different property from that sued for, and the evidence makes it probable that it was the intent of his author to sell the property described, there can be no recovery); West *v.* Negrotto, 48 La. Ann. 922, 19 So. 819.

87. Conway *v.* Winter, 9 La. 271.

88. Trellieu Cypress Lumber Co. *v.* Albert Hansen Lumber Co., 121 La. 700, 46 So. 699; Teddlie *v.* Riser, 121 La. 666, 46 So. 688; Walker *v.* Levy, 118 La. 196, 42 So. 771; Booksh *v.* New Iberia Sugar Co., 115 La. 516, 39 So. 545; Worden *v.* Fisher, 52 La. Ann. 576, 27 So. 83; Willett *v.* Andrews, 51 La. Ann. 486, 25 So. 391; Chachere *v.* Block, 46 La. Ann. 1386, 16 So. 176; Lambert *v.* Craig, 45 La. Ann. 1109, 13 So. 701; Ferrière *v.* New Orleans, 35 La. Ann. 209; Young *v.* Chamberlin, 15 La. Ann. 454; Peck *v.* Bemiss, 10 La. Ann. 160; Hiestand *v.* Forsyth, 12 Rob. (La.) 371; Williams *v.* Riddle, 10 Rob. (La.) 505; Carraby *v.* Le Breton, 1 Rob. (La.) 242; Bailly *v.* Percy, 14 La. 14; Sprigg *v.* Hooper, 10 La. 350; De Armas *v.* New Orleans, 5 La. 132; Phillips *v.* Flint, 3 La. 146; Compton *v.* Mathews, 3 La. 128, 22 Am. Dec. 167; Harper *v.* Destrehan, 12 Mart. (La.) 31; Sassman *v.* Aime, 9 Mart. (La.) 257.

A mere admission of plaintiff's title is not sufficient ground upon which to base a judgment against defendant without proof connecting defendant with the land claimed. Girard *v.* New Orleans, 13 La. Ann. 295.

No relative nullities in the title of either plaintiff or defendant can be inquired into, even though there has been fraud. Devall *v.* Choppin, 15 La. 566.

Defendant who shows a better title than plaintiff is entitled to a final judgment, and

sets up no title in himself, plaintiff need not show a title perfect in all respects against the whole world; one apparently good will suffice;[89] but, even against a naked possessor, plaintiff is bound to produce a title anterior in date to the possession of defendant, in order to establish ownership in himself and repel the presumption of ownership in defendant resulting from his possession.[90] A defendant, sued for disturbance, cannot bring a petitory action until after judgment in the possessory one, and, if condemned, not until he has satisfied the judgment.[91]

C. Against Whom Action May Be Maintained. A petitory action can be brought only against a party in actual possession of the property in dispute.[92] Where a farmer or lessee is sued in a petitory action, he must declare to plaintiff the name and residence of the lessor or owner who shall be made a party to the suit, if he resides in the state or is represented therein, and such lessor must then defend in place of the tenant, in default of which nothing but the right of possession can be tried in the suit,[93] and where the lessor is brought in he is the real

not merely one of nonsuit. Guidry *v.* Woods, 19 La. 334, 36 Am. Dec. 677.

Defendant's title need not be considered where the action fails on account of the weakness of plaintiff's showing of title. Willett *v.* Andrews, 51 La. Ann. 486, 25 So. 391.

89. Slattery *v.* Heilperin, 110 La. 86, 34 So. 139; Kernan *v.* Baham, 45 La. Ann. 799, 13 So. 155; Jamison *v.* Smith, 35 La. Ann. 609; Zeringue *v.* Williams, 15 La. Ann. 76 (holding that, although, in a petitory action, plaintiff must recover on the strength of his own title, yet, when defendant has no title at all, he cannot, as a trespasser, take advantage of any defect in the muniments of title shown by plaintiff); Coussy *v.* Cummings, 12 La. Ann. 748; Doles *v.* Cockrell, 10 La. Ann. 540 (holding that, to sustain a petitory action against a mere possessor, it is sufficient for plaintiff to show a title translative of the property sued for, together with the receiver's certificate, showing that the land was located by the person making the title); Stephenson *v.* Goff, 10 Rob. (La.) 99, 43 Am. Dec. 171; Bonis *v.* James, 7 Rob. (La.) 149; Fanchonette *v.* Grangé, 5 Rob. (La.) 510; Baillio *v.* Burney, 3 Rob. (La.) 317; Thomas *v.* Turnley, 3 Rob. (La.) 206.

If defendant, although alleging title, does not state its character or derivation, he is considered but a mere trespasser against whom plaintiff need show only an apparent title. Broughton *v.* King, 9 Rob. (La.) 215.

An order of survey, although not a positive grant, will prevail against a possessor without title. King *v.* Martin, 5 Mart. (La.) 197.

A joint heir, joint proprietor, or coparcener may maintain the action against a mere possessor without title for the whole undivided succession or property. Mays *v.* Witkowski, 46 La. Ann. 1475, 16 So. 478; Gordon *v.* Fahrenberg, 26 La. Ann. 366; Compton *v.* Mathews, 3 La. 128, 22 Am. Dec. 167.

The personal representative of the heir of the original locator of lands may maintain the action against one in possession without title. Gordon *v.* Fahrenberg, 26 La. Ann. 366.

90. Young *v.* Chamberlin, 15 La. Ann. 454; Dugas *v.* Truxillo, 15 La. Ann. 116; Bedford *v.* Urquhart, 8 La. 241, holding that plaintiff must produce a title as owner *causa idonea ad transferendum dominium,* to repel the presumption of ownership resulting from mere possession, and the date of his title must be anterior to defendant's possession; but that he is not bound to show title in himself good against the whole world.

91. D'Orgenoy *v.* Droz, 13 La. 389.

92. Ledoux *v.* Kornbacher, 118 La. 652, 43 So. 266 (holding that on proof that the property is not in his possession defendant is entitled to have the suit dismissed as of nonsuit); Millaudon *v.* Ranney, 18 La. Ann. 196 (holding that petitory actions must be brought against the person who is in actual possession of the immovables, although he be only the farmer or lessee); Girard *v.* New Orleans, 13 La. Ann. 295; Dreux *v.* Kennedy, 12 Rob. (La.) 489 (holding that under Code Pr. art. 43, requiring petitory actions to be brought against the party in possession, defendant need not have the right to possess, it being sufficient that he have possession); Barnes *v.* Gaines, 5 Rob. (La.) 314 (holding, however, that the word "actual," in Code Pr. art. 43, which requires that a petitory action must be brought against the person in actual possession of the immovable, does not mean strictly a natural or corporeal possession, in the sense of articles 3391, 3393, Civ. Code, but applies as well to a civil possession, where defendant pretends to possess as owner; and hence defendant's civil possession, preceded by an actual corporeal detention of the property, will suffice); Delogny *v.* Dixon, 5 La. 356.

93. Adams *v.* Drews, 110 La. 456, 34 So. 602 (holding that where an action is brought to recover real estate and for the value of timber alleged to have been removed therefrom, if the actual possessor disclaims title, and discloses the name of the owner, who is made party defendant, there is nothing left of the suit but the claim for the value of the timber, which, being segregated from the claim against the owner, should be asserted by a personal action brought at his domicile); Millaudon *v.* Ranney, 18 La. Ann. 196; Young *v.* Chamberlin, 15 La. Ann. 454; Young *v.* Chamberlin, 14 La. Ann. 687 (holding also that the lessee cannot defend the suit by calling in warranty his lessor's vendor, with-

defendant;[94] but if such owner or lessor do not live in the state or is not represented therein,[95] or in the United States, against which no direct action can be brought,[96] lessee must defend. Plaintiff in a petitory action has no right to call his vendor in warranty, and the court in which such action is brought has no authority to compel the warrantor who does not reside within its jurisdiction to litigate in response to such call, and prohibition will issue to stay the exercise of such authority.[97] One may intervene in a petitory action, and try his title to the land, provided he calls no parties in warranty and in no way delays the suit.[98] Where, by the act of defendant and the acquiescence of plaintiff, an action of boundary is changed to a petitory action, defendant in the original suit becomes the plaintiff in the petitory action.[99]

D. Defenses. In a petitory action defendant may avail himself, in defense, of any defect in the title opposed to his,[1] and is entitled to show a better subsisting legal title in a third person;[2] but where an outstanding title in a third person is set up, and plaintiff produces a title from that person himself, defendant cannot attack it for relative nullities, but it must stand until set aside by a proper proceeding between the parties in interest themselves.[3] Defendant can attack the validity of the proceeding under which plaintiff acquired his title,[4] or can show that plaintiff's title has been divested by judicial proceedings;[5] but if defend-

out making the lessor a party, or entering an appearance for him).

Jurisdiction.— The court in which a petitory action is brought, if the possessor disclaims title and cite his lessor to defend, has jurisdiction, although the lessor reside in another parish. Fusilier *v.* Hennen, 5 Mart. N. S. (La.) 71.

94. Jewell *v.* De Blanc, 110 La. 810, 34 So. 787.

95. Dreux *v.* Kennedy, 12 Rob. (La.) 489; Plummer *v.* Schlatre, 4 Rob. (La.) 29.

96. Dreux *v.* Kennedy, 12 Rob. (La.) 489, holding that an exception that the property is in possession of the United States, a branch mint having been erected thereon; that defendants are merely officers of the mint, not in possession, and without authority to represent the United States; and that the action is an attempt to effect indirectly what plaintiffs could not do directly will be overruled.

97. Foote *v.* Pharr, 115 La. 35, 38 So. 885.

98. Haydel *v.* Bateman, 2 La. Ann. 755.

In a petitory action against the lessee of a decedent, the executor of the lessor may properly come in and defend. Davidson *v.* Davidson, 28 La. Ann. 269.

Parties without titles, occupying lands, may be joined as defendants in a suit for the lands by plaintiff asserting ownership. Vicksburg, etc., R. Co. *v.* Elmore, 46 La. Ann. 1237, 15 So. 701.

99. Blanc *v.* Cousin, 8 La. Ann. 71.

1. Worden *v.* Fisher, 52 La. Ann. 576, 27 So. 83; Hart *v.* Foley, 1 Rob. (La.) 378, holding that defendant may urge, by way of exception to plaintiff's title, whatever he could plead in a direct action of nullity. But see Coucy *v.* Cummings, 12 La. Ann. 748, holding that a mere trespasser, who is defendant in a petitory action, cannot defeat a *prima facie* title made out by plaintiff on the ground of the non-registry of such title.

Inconsistent defenses.— The defenses to a petitory action that the land was acquired as alluvion or as relicted land, and that it was acquired as dry land within the boundaries of the original purchase, are conflicting, and cannot stand together. Hall *v.* Bossier Levee Dist., 111 La. 913, 35 So. 976.

2. Shreveport *v.* Marks, 117 La. 143, 41 So. 444; Slattery *v.* Heilperin, 110 La. 86, 34 So. 139 (holding that where, on the trial of a petitory action, it appears that the title to the land in dispute is apparently in a third person, rather than in plaintiff, the latter will be nonsuited); West *v.* Negrotto, 52 La. Ann. 381, 27 So. 75 (holding, however, that the outstanding title must be a valid, legal, subsisting title, better than that of plaintiff); Choppin *v.* Michel, 11 Rob. (La.) 233; Williams *v.* Riddle, 10 Rob. (La.) 505; Thomas *v.* Turnley, 3 Rob. (La.) 206. But see Leathem, etc., Lumber Co. *v.* Nalty, 109 La. 325, 33 So. 354, holding that defendant in a petitory action cannot attack the title of the actual owner, which plaintiff advances as his own, on grounds which concern the parties to that title alone, and which they themselves do not urge.

3. Adolph *v.* Richardson, 52 La. Ann. 1156, 27 So. 665; West *v.* Negrotto, 52 La. Ann. 381, 27 So. 75.

4. Cronnan *v.* Cochran, 27 La. Ann. 120; Surgi *v.* Colmer, 22 La. Ann. 20, holding that the party assailed may inquire into the regularity of the proceedings under an order of seizure and sale, by which the attacking party acquired title to the property; and, if the formalities required by law have not been observed in making the sale under the order, the title of the sheriff is a nullity. But see Stille *v.* Shull, 41 La. Ann. 816, 6 So. 634, holding that where a tax deed, under which plaintiff in a petitory action claimed, was executed forty years before the commencement of the action, was valid in form, and there were no irregularities or defects on its face, defendant, who was a trespasser, could not show any defects in the title of plaintiff.

5. Beland *v.* Gebelin, 46 La. Ann. 326, 14 So. 843, holding, however, that before an ex-

ant obtained possession under title from plaintiff, he cannot throw it aside, and, setting up possession, plead prescription;[6] nor can he invoke prescription under a defective title in a third person,[7] and if the parties trace their titles to the same source, neither can attack the title of their common author;[8] but he who is prior in time will prevail.[9] An offer by plaintiff to buy defendant's claim against the property is not such a recognition of defendant's title as will prevent plaintiff from recovering.[10]

E. Pleading. A high degree of technical accuracy is not required in the petition in describing the property demanded,[11] and if the land had not been properly described, the petition may be amended so as to supply the defect or correct the error,[12] and although the petition insufficiently describes the property, defendant by subsequently filing an amended answer waives the defect.[13] A plea, in

ception of a defendant that plaintiff's title has been divested by judicial proceedings is sustained, his legal interest to take such exception must appear.

6. Broughton *v.* King, 9 Rob. (La.) 215 (holding, however, that if defendant did not obtain possession under a title from plaintiff, plaintiff cannot force the title on him against his will); Crane *v.* Marshal, 1 Mart. N. S. (La.) 577.

7. Mays *v.* Witkowski, 46 La. Ann. 1475, 16 So. 478.

8. Pecot *v.* Prevost, 117 La. 765, 42 So. 263; Randolph *v.* Laysard, 36 La. Ann. 402, holding, however, that where plaintiff claims under title which he asserts was warranted by the authority of defendant's title, and that defendant is thereby estopped from setting up his title against him, the fact of warranty must be clearly established, and may he disproved by evidence showing a distinct and continued acknowledgment of the title of defendants, offered by those from whom or through whom plaintiff claims. Girault *v.* Zuntz, 15 La. Ann. 684; Loyd *v.* Mortee, 14 La. Ann. 107; Bedford *v.* Urquhart, 8 La. 234, 28 Am. Dec. 137; Trahan *v.* McMannus, 2 La. 209. See also Bedford *v.* Urquhart, 8 La. 234, 28 Am. Dec. 137, holding that when the last warrantor cited sets up no title, but pleads a general denial, plaintiff may show that the former derives his title from the same common source, and is forbidden to attack it.

If plaintiff claims under two titles and defendant claims under the first, he may plead the nullity of the second title. Granger *v.* Sallier, 110 La. 250, 34 So. 431.

Where defendant does not set up title, but pleads the general issue, plaintiff is not relieved from proving a legal title by showing that defendant's emanates from the same source, and so has the same defect. Sassman *v.* Aime, 9 Mart. (La.) 257.

9. Fortier *v.* Roane, 104 La. 90, 28 So. 994; Worden *v.* Fisher, 52 La. Ann. 576, 27 So. 83, where plaintiff claimed title to the land in question by reason of a certificate of entry and a patent confirming such certificate, both issued by the state at a date later than a sale by the state to defendant, and a decree confirming the title in the state, on which such sale was based, and it was held that plaintiff could not recover. But see Culliver *v.* Garic, 11 La. 88, holding that plaintiff in a petitory action, showing a sale from a government agent prior to defendant's patent, but no authority in the agent, will be nonsuited.

10. Ernst *v.* Montigudo, 21 La. Ann. 169.

11. Louis *v.* Giroir, 38 La. Ann. 723 (holding that the rule that that is certain which can be made certain applies to a description of the disputed lands in a petitory action by section and township in reference to United States surveys); Chavanne *v.* Frizola, 25 La. Ann. 76 (holding that where plaintiff claims property by inheritance as sole heir of his father, and appends to his petition an order of the proper court recognizing him as such and decreeing that he be put in possession of his father's estate, and his petition further alleges that his father had a just and legal title to the property at the time of his death, and was in possession at that time, such allegations are sufficiently clear to enable him to maintain a petitory action for the land so claimed); Lea *v.* Terry, 15 La. Ann. 159 (holding that it is not necessary that the description of property demanded in a petitory or rescissory action should be so certain that the sheriff or any other person could find the same without aid).

12. Hunt *v.* Graves, 27 La. Ann. 195 (holding that where land was sold as the property of one G, and his legal representative was cited to answer a petitory action by the purchaser at sheriff's sale to recover the land, and an amended petition having been filed, giving a correct description of the land, which had been erroneously described in the sheriff's deed, the legal representative answered both petitions, and issue was joined as to him, a judgment for the land according to the corrected description was proper); Bry *v.* Fouche, 11 La. Ann. 665.

13. Bry *v.* Fouche, 11 La. Ann. 665, holding that where plaintiff in a petitory action gives no description of his title, whether by patent, or French or Spanish grant, or whether he is the orginal or derivative grantee, an exception that his title is not sufficiently set forth is well taken, and the petition, if not amended, will be dismissed, but if, instead of relying on his exception, defendant afterward file an amended answer, in which he describes and specially attacks plaintiff's title, the exception is waived.

a petitory action, that defendant has a better title to the land claimed, does not impair the effect of the general issue.[14] In a petitory action, when defendant urges pleas of estoppel, and incorporates therein an exception of the want of proper parties defendant, which pleas and exceptions are repeated by warrantors, who appear when cited, these should be referred to the merits to stand as parts of the answer of the warrantors.[15] Plaintiff may plead the absolute nullity of any antecedent judicial proceeding under which his title has been divested without cumulating with the petitory action a direct action of nullity to set aside the proceedings,[16] and has the right to meet the title opposed to him, even a tax-sale,[17] by all means of attack as though specially pleaded.[18]

F. Evidence. In a petitory action documentary evidence is admissible to show the title claimed,[19] and upon the question of the location of the land in dispute the only authorized evidence is a survey made by proper authority.[20] Where plaintiff alleges that defendants and those under whom they claim hold illegal possession, defendants' titles are admissible to rebut the allegation of illegal possession.[21]

G. Recovery of Rents and Revenues. A trespasser or possessor in bad faith is liable for the rents and revenues of the property during his occupancy.[22] A *bona fide* possessor is, however, liable only from the moment that defects in his title are made known to him, or are declared to him by a suit instituted for the

14. Murray *v.* Boissier, 10 Mart. (La.) 293.

15. Dauterive *v.* Opera House Assoc., 46 La. Ann. 1316, 16 So. 170.

16. Doucet *v.* Fenelon, 120 La. 18, 44 So. 908; Bankston *v.* Owl Bayou Cypress Co., 117 La. 1053, 42 So. 500 (holding, however, that if the proceedings are not void he is thrown back on his original remedies); Callahan *v.* Fluker, 47 La. Ann. 427, 16 So. 943; Mays *v.* Witkowski, 46 La. Ann. 1475, 16 So. 478; Dauterive *v.* Opera House Assoc., 46 La. Ann. 1316, 16 So. 170; Beland *v.* Gebelin, 46 La. Ann. 326, 14 So. 843. See also McCall *v.* Irion, 40 La. Ann. 690, 4 So. 859, holding that defendant in possession under an apparent judicial title cannot force plaintiff to a trial on the issue that he must first sue to annul the judicial proceedings on which defendant relies for title, but the evidence of such title should be given in a trial on the merits. *Compare* Barbee *v.* Perkins, 23 La. Ann. 331, holding that a sale of real property belonging to the succession under the decree of a competent court will not be held to be an absolute nullity, on account of irregularities in the mortuary proceedings which led to granting the order, so as to entitle plaintiff in a petitory action to be the owner of such land; but such claimant must first cause the sale to be annulled by direct action.

17. Willis *v.* Ruddock Cypress Co., 108 La. 255, 32 So. 386; Telle *v.* Fish, 34 La. Ann. 1243.

18. Willis *v.* Ruddock Cypress Co., 108 La. 255, 32 So. 386; Telle *v.* Fish, 34 La. Ann. 1243; Hickman *v.* Dawson, 33 La. Ann. 438; McMaster *v.* Seward, 11 La. Ann. 546; Maillot *v.* Wesley, 11 La. Ann. 467.

19. Jenkins *v.* Salmen Brick, etc., Co., 120 La. 549, 45 So. 435, holding that it is not proper to refuse to admit a document in evidence that is needful to show in some extent and in some way the title claimed, although it only shows that plaintiff had a right to a part of the property claimed.

Plaintiff alleging title under a sheriff's deed, and referring to the suit under the execution in which the sale was made, is entitled to offer in evidence the mortgage act, the basis of the judgment of such suit, and the sheriff's return on the execution (Thompson *v.* Whitbeck, 47 La. Ann. 49, 16 So. 570), and where a petitory action has been brought to recover land sold under execution, defendants should offer in evidence the record and judgment in the suit under which the execution issued (Delespare *v.* Warner, 14 La. Ann. 413).

20. Edwards *v.* Ballard, 14 La. Ann. 362.

21. Kellar *v.* Parish, 11 La. Ann. 111.

22. Dohan *v.* Murdock, 41 La. Ann. 494, 6 So. 131; Brooks *v.* Wortman, 22 La. Ann. 491 (holding, however, that where defendant holds under a title translative of property irregular in form, and was not aware of the defects in his title at the time he purchased the land, he is not a possessor in bad faith and cannot therefore be condemned to pay rents).

The purchaser of minor's property by private contract is a possessor in bad faith; but not his vendee, unless actual knowledge be shown on his part of the nature of the vendor's title, a recital in his act referring to which is not proof in itself of such knowledge. Fletcher *v.* Cavalier, 4 La. 274.

The rents and revenues are to be measured by the value of the property for ordinary purposes, and cannot be augmented by adding thereto the additional revenue resulting from the use of the property by a municipal corporation as a public market (Ball *v.* New Orleans, 52 La. Ann. 1550, 28 So. 109); and where the rental value of property which plaintiff recovers in a petitory action has been established up to the date of the trial, it will be taken as the continuing value of the

recovery of the property,[23] and is entitled to the same judgment for rents and revenues against his warrantor that plaintiff obtains against him.[24] Where, in a petitory action, a demand by way of reconvention is cumulated with defendant's defense, damages in reconvention are properly allowed.[25]

H. Allowance For Improvements. Where, in a petitory action, there is a judgment for plaintiff, defendants who are possessors of the land in good faith are entitled to the excess in value of valuable improvements, repairs, and taxes over the fruits received since the commencement of the suit,[26] and are entitled to be maintained in possession of the whole property until the value of the useful improvements be paid by the evictors in proportion to the part they have recovered,[27] and to have an execution for the sum allowed;[28] but a defendant who knew he held without the title cannot claim for improvements on the property.[29] On a judgment for plaintiff, improvements made by defendant partly on plaintiff's

same up to the date of the delivery to plaintiff and judgment for future rent will be given on that basis (Welsch *v.* Augusti, 52 La. Ann. 1949, 28 So. 363).

23. Pecot *v.* Prevost, 117 La. 765, 42 So. 263; Fortier *v.* Roane, 104 La. 90, 28 So. 994; Ball *v.* New Orleans, 52 La. Ann. 1550, 28 So. 106 (holding that where a person, believing himself to be entitled thereto, demands and holds possession of property by virtue of a construction placed by him on a contract concerning the same, and on the acts of those claiming adversely, who acquiesce in such demand and yield such possession, it cannot be said that the possession thus acquired and held is in bad faith, so as to charge him with the rents and revenues of the property during his possession); Durbridge *v.* Crowley, 44 La. Ann. 74, 10 So. 402 (holding also that where there is a judgment for plaintiff and there is no proof of enhanced value of the property resulting from defendant's expenditures thereon beyond the amount of the expenditures themselves, the allowance in their favor of such expenditures satisfies their right); Montgomery *v.* Whitfield, 41 La. Ann. 649, 6 So. 224; Dohan *v.* Murdock, 41 La. Ann. 494, 6 So. 131 (holding, however, that under the circumstances of this case defendant was not a *bona fide* possessor); French *v.* Bach, 26 La. Ann. 731.

24. Pecot *v.* Prevost, 117 La. 765, 42 So. 263.

25. Barfield *v.* Saunders, 116 La. 136, 40 So. 593.

26. Foster *v.* Meyers, 117 La. 216, 41 So. 551 (holding that the evicted possessor in good faith is entitled to the value of his useful improvements under Rev. Civ. Code, art. 508, unless plaintiff elect to pay and show by evidence the enhanced value of the soil); Durbridge *v.* Crowley, 44 La. Ann. 74, 10 So. 402 (holding, however, that he cannot claim taxes paid by the author of his invalid title, who had the enjoyment of property); Montgomery *v.* Whitfield, 41 La. Ann. 649, 6 So. 24; Williams *v.* Booker, 12 Rob. (La.) 253; Kellam *v.* Rippey, 3 Rob. (La.) 138. But see Le Bleu *v.* North American Land, etc., Co., 46 La. Ann. 1465, 16 So. 501, holding that where defendant, who has been in exclusive possession, reconvenes against plaintiff who seeks simply to be recognized as a joint owner with him in the property, for the price of the improvement he claims to have been placed on the property while having such possession, he will be remitted for the ascertainment of his rights to an action of partition.

Where plaintiff has in the petition fixed the time for which he asked the judgment for revenues against defendant, the supreme court will not go back of that date for an amendment of the judgment on defendant's appeal, but will reduce a demand for moneys expended by defendant for repairs, where the rents received by him prior to such date were more than sufficient to cover the bill. Jewell *v.* De Blanc, 110 La. 810, 34 So. 787.

27. Fletcher *v.* Cavelier, 10 La. 116, holding also that defendant in such case is not bound to remain in a state of indecision with the evictors and kept in suspense as to his ultimate rights and recourse in warranty for an indefinite time, but is entitled to a fixed period when payment and adjustment may be coerced.

28. Milliken *v.* Rowley, 3 Rob. (La.) 253, holding that where the judgment gives plaintiff possession of the land sued for on paying defendant a certain sum for his improvements, the latter may have execution for such sum, if not paid within a certain time.

29. Stille *v.* Shull, 41 La. Ann. 816, 6 So. 434; Herriott *v.* Broussard, 4 Mart. N. S. (La.) 260. But see Sigur *v.* Burguieres, 111 La. 711, 35 So. 823, holding that, where the evidence in a petitory action shows that defendants were trespassers, they may yet claim reimbursement for clearing the land, whereby it is brought into cultivation, when to cultivate it is its chief value.

A verdict setting off the fruits raised on the land against the claim for improvements by a possessor in bad faith will not be disturbed. Vicksburg, etc., R. Co. *v.* Elmore, 46 La. Ann. 1237, 15 So. 701.

A judgment which is silent as to the rents and profits prayed for in plaintiff's petition but decrees the litigated property to plaintiff will be held as an absolute rejection of the demand, where it appears that evidence was introduced on the demand. Villars *v.* Faivre, 36 La. Ann. 398.

land and partly on his own cannot be retained by plaintiff without paying defendant the cost of construction.[30]

REAL AND PERSONAL EFFECTS. A term which has been held to embrace all a man's property.[1] (See PERSONAL EFFECTS, 30 Cyc. 1531, and Cross-References Thereunder; REAL, *ante*, p. 1540; REAL ESTATE, *post*, p. 1556; REALTY, *post*, p. 1559; and, generally, PROPERTY, 32 Cyc. 639.

REAL AND PERSONAL ESTATE. Distinguished, see CONVERSION, 9 Cyc. 826 note 3. Estate, Defined, see ESTATES, 16 Cyc. 599. See PERSONAL, 30 Cyc. 1529; REAL, *ante*, p. 1540. See also CHATTELS, 7 Cyc. 122; REAL ESTATE, *post*, p. 1556; REALTY, *post*, p. 1559; and, generally, PROPERTY, 32 Cyc. 639.

REAL AND PERSONAL PROPERTY. In General, see REAL AND PERSONAL ESTATE, and Cross-References Thereunder. Covered by Same Mortgage, see CHATTEL MORTGAGES, 6 Cyc. 983 note 2, 999 note 68.

REAL ASSETS. Lands or real estate in the hands of an heir, chargeable with the payment of the debts of the ancestor.[2] (See ASSETS, 3 Cyc. 1111, and Cross-References Thereunder; REAL, *ante*, p. 1540.)

REAL BURDEN. A burden of a specific sum under which the right to lands is expressly granted, either upon the lands themselves, or resulting in a nullity of the right if the sum be not paid, the amount and the name of the creditor being discoverable from the record.[3]

REAL CHATTELS. Such as concern or savor of the realty;[4] such chattel interests as devolve after the manner of realty.[5] (See CHATTELS REAL, 7 Cyc. 123.)

REAL CONTRACT. In civil law, a contract in which the obligation arose from the thing (*ex re*) itself, which was the subject of it; one in which besides the consent of the parties the delivery of some thing was necessary to complete the obligation.[6] In common law, a contract respecting real estate, as a lease of land for years.[7] (Real Contract: In General, see CONTRACTS, 9 Cyc. 240. Of Lease, see LANDLORD AND TENANT, 24 Cyc. 845. Of Sale, see VENDOR AND PURCHASER. Specific Performance of, see SPECIFIC PERFORMANCE.)

REAL COST. The true and real price paid for goods upon a genuine *bona fide* purchase;[8] actual cost;[9] prime cost.[10] (See COSTS, 10 Cyc. 1369; REAL, *ante*, p. 1540.)

REAL COVENANT. As to Use of Real Property, see COVENANTS, 11 Cyc. 1077. Of Title, see COVENANTS, 11 Cyc. 1063. Running With the Land, see COVENANTS, 11 Cyc. 1080. See also REAL, *ante*, p. 1540.

REAL DANGER. Such danger as is manifest to the physical senses.[11] (See DANGER, 13 Cyc. 256.)

REAL EFFECTS. See CHATTELS REAL, 7 Cyc. 123; PROPERTY, 32 Cyc. 668. See also PERSONAL EFFECTS, 30 Cyc. 1531.

REAL ESTATE. Landed property, including all estates and interests in lands which are held for life or for some greater estate, and whether such lands be of

30. Gordon *v.* Fahrenberg, 26 La. Ann. 366, holding also that defendant cannot plead in reconvention for the value of the buildings erected by him, but must be allowed to remove that part of them erected on plaintiff's land.

1. See Hogan *v.* Jackson, Cowp. 299, 308 [*cited* in The Alpena, 7 Fed. 361, 362; *criticized* see REAL, *ante*, p. 1540].

2. Black L. Dict.

3. See Black L. Dict.

4. 2 Blackstone Comm. 386 [*quoted* in Black L. Dict.].

Such as leasehold estates; interests issuing out of, or annexed to, real estate. Black L. Dict.

5. Black L. Dict.

6. See Black L. Dict.

7. Black L. Dict.

Distinguished from personal contract see Walker's Case, 3 Coke 22*a*, 76 Eng. Reprint 676.

8. So interpreted as used in the Revenue Act of 1799. U. S. *v.* Sixteen Packages, 27 Fed. Cas. No. 16,303, 2 Mason 48, 53.

9. U. S. *v.* Sixteen Packages, 27 Fed. Cas. No. 16,303, 2 Mason 48, 53.

10. U. S. *v.* Sixteen Packages, 27 Fed. Cas. No. 16,303, 2 Mason 48, 53. See also U. S. *v.* Twenty-Six Cases of Rubber Boots, 28 Fed. Cas. No. 16,571, 1 Cliff. 580, 590, where it is said that the three terms "actual cost," "prime cost," and "real cost" are used as expressive of value.

11. Allen *v.* State, 24 Tex. App. 216, 225, 6 S. W. 187.

freehold or copyhold tenure.[12] (See ESTATES, 16 Cyc. 599; and, generally, PROPERTY, 32 Cyc. 662, and Cross-References Thereunder. See also REAL, *ante*, p. 1540.)

REAL ESTATE AGENT or BROKER. One employed to negotiate the purchase or sale of real property;[13] one who buys and sells lands, and obtains loans, etc., upon mortgages;[14] one who negotiates the sale or purchase of real property;[15] one who negotiates the sales of real property;[16] a person who is, generally speaking, engaged in the business of procuring purchases or sales of lands for third persons upon a commission contingent upon success.[17] (See FACTORS AND BROKERS, 19 Cyc. 196.)

REAL ESTATE BUSINESS. A term which seems to apply more properly to brokerage than to the business of operating or speculating in real estate.[18] (See BUSINESS, 6 Cyc. 259; REAL ESTATE AGENT.)

REAL EVIDENCE. All evidence of which any object belonging to the class of things is the source, persons also included in respect of such properties as belong to them in common with things.[19] (See, generally, EVIDENCE, 16 Cyc. 821; 17 Cyc. 1.)

REAL INJURY. In the civil law, an injury arising from an unlawful act, as distinguished from a verbal injury which was done by words.[20] (See INJURY, 22 Cyc. 1064.)

REAL ISSUE. See ISSUE, 23 Cyc. 309 text and note 74. See also PLEADING, 31 Cyc. 570.

REALITY OF LAWS. A term by which foreign jurists generally mean all laws which concern property or things.[21] (See LAW, 25 Cyc. 163.)

REALITY OF THE CLAIM MADE. A phrase held to mean that the claimant shall assert his claim in good faith believing that it is real.[22] (See CLAIM, 7 Cyc. 180.)

Distinguished from "reasonable danger" see Allen *v.* State, 24 Tex. App. 216, 225, 6 S. W. 187.

12. Wharton L. Lex. [*quoted* in Black L. Dict.].

13. Brauckman *v.* Leighton, 60 Mo. App. 38, 42, defining "Real Estate Broker."

14. Webster Dict. [*quoted* in Little Rock *v.* Barton, 33 Ark. 436, 447], defining "Real Estate Broker."

By a Chicago ordinance "Real Estate Broker" is defined as "one who, for commission or other compensation, is engaged in the selling of or who negotiates sales of real estate belonging to others, or obtains or places loans for others on real estate." Ord. June 11, 1897, § 215 [*quoted* in Banta *v.* Chicago, 172 Ill. 204, 212, 50 N. E. 233, 40 L. R. A. 611]. Another Chicago ordinance containing a definition identical except that "negotiating" is substituted for "who negotiates" is quoted in O'Neill *v.* Sinclair, 153 Ill. 525, 527, 39 N. E. 124. Another, also of Chicago, substantially the same except that it omits the part concerning loans, is quoted in Buckley *v.* Humason, 50 Minn. 195, 198, 52 N. W. 385, 36 Am. St. Rep. 637, 16 L. R. A. 423.

15. See Bouvier L. Dict. 224 [*quoted* in Little Rock *v.* Barton, 33 Ark. 436, 446], defining "Real Estate Brokers" and adding: "They are a numerous class, and in addition to the above duty, sometimes procure loans on mortgage security, collect rents, and attend to the letting and leasing of houses and lands."

"Broker or real estate agent, selling lands on account of the owner," may apply to one acting in a single transaction, although not regularly in the business. See Stout *v.* Humphrey, 69 N. J. L. 436, 439, 55 Atl. 281.

16. Halsey *v.* Monteiro, 92 Va. 581, 583, 24 S. E. 258 [*quoted* in McCullogh *v.* Hitchcock, 71 Conn. 401, 404, 42 Atl. 81 (*quoted* in Brown *v.* Gilpin, 75 Kan. 773, 780, 90 Pac. 267); Larson *v.* O'Hara, 98 Minn. 71, 73, 107 N. W. 821, 116 Am. St. Rep. 342; Brandrup *v.* Britton, 11 N. D. 376, 379, 92 N. W. 453], adding: "His business generally is only to find a purchaser who is willing to buy the land upon the terms fixed by the owner. He has no authority to bind his principal by signing a contract of sale."

17. Carstens *v.* McReavy, 1 Wash. 359, 362, 25 Pac. 471 [*quoted* in Donnan *v.* Adams, 30 Tex. Civ. App. 615, 617, 71 S. W. 580], defining "Real Estate Agent" and adding: "He owes no affirmative duty to his client, is not liable to him for negligence or failure, and may recede from his employment at will, without notice."

18. See Davis *v.* Darling, 80 Hun (N. Y.) 299, 300, 20 N. Y. Suppl. 321, discussing the term "regular real estate business."

19. Best Ev. § 28 [*quoted* and *cited* (as "26") in Black L. Dict.].

20. Black L. Dict.

21. See Story Confl. Laws, § 16 [*cited* in Black L. Dict. *sub verb.* "Reality"].

22. Rue *v.* Meirs, 43 N. J. Eq. 377, 380, 12 Atl. 369.

REALIZATION. Applied to shares, a term properly used to describe the condition that exists when the share of an investing member in a company is fully paid up.[23] (See REALIZE.)

REALIZE. To bring into actual possession; a term ordinarily used in contrast to "hope" or "anticipation;"[24] to give effect to;[25] to reduce to actual cash in hand;[26] to render tangible for the purpose of division.[27] (See REALIZATION.)

REALM. State or sovereignty;[28] territory.[29] (See OUT OF THE REALM, 29 Cyc. 1545.)

REAL OWNER. A term which does not necessarily mean the sole beneficiary; but may include an owner of part interest and trustee for the balance, or a trustee for the whole.[30] (See OWNER, 29 Cyc. 1549.)

REAL PARTY IN INTEREST. In statutes requiring suits to be brought in the name of such party, the person who is actually and substantially interested in the subject-matter, as distinguished from one who has only a formal or technical interest in it, or connection with it;[31] the party who is to be benefited or injured by the judgment in the case.[32] (See PARTIES, 30 Cyc. 44.)

REAL PRIVILEGE. In English law, a privilege granted to, or concerning, a particular place or locality.[33] (See PRIVILEGE, 32 Cyc. 388; REAL.)

REAL PROBABLE DANGER. Probable danger as an actual fact, as distinct from one solely imaginary or apprehended.[34]

REAL PROPERTY. See PROPERTY, 32 Cyc. 662, and Cross-References Thereunder; REAL ESTATE.

REAL RELEASE. That which takes place where the creditor declares that he considers the debt as acquitted.[35] (See RELEASE.)

23. *In re* West Riding of Yorkshire Permanent Ben. Bldg. Soc., 43 Ch. D. 407, 414, 59 L. J. Ch. 197, 62 L. T. Rep. N. S. 486, 38 Wkly. Rep. 376.

24. Lorillard *v.* Silver, 36 N. Y. 578, 579, 3 Transcr. App. 143.

To incur a counter-debt is not to "realize" on commercial paper. Hall *v.* Henderson, 84 Ill. 611, 612.

To obtain a mere right by executory contract is not to "realize" the proceeds of benefits. Stanford *v.* Greene County, 18 Iowa 218, 221.

"Estimated" distinguished from "realized" see *In re* Oxford Ben. Bldg. Soc., 35 Ch. D. 502, 510, 56 L. J. Ch. 98, 55 L. T. Rep. N. S. 598, 35 Wkly. Rep. 116.

25. Com. *v.* Johnson, 33 Gratt. (Va.) 294, 301, where it is said: "To 'realize the preferred liens of the State,' evidently means to give effect to them."

"Compromise" may be included in the meaning of the term. Bittiner *v.* Gomprecht, 28 Misc. (N. Y.) 218, 222, 58 N. Y. Suppl. 1011.

26. *In re* Oxford Ben. Bldg., etc., Soc., 35 Ch. D. 502, 510, 56 L. J. Ch. 98, 55 L. T. Rep. N. S. 598, 35 Wkly. Rep. 116.

27. *In re* Oxford Ben. Bldg., etc., Soc., 35 Ch. D. 502, 510, 56 L. J. Ch. 98, 55 L. T. Rep. N. S. 598, 35 Wkly. Rep. 116.

28. See Carr *v.* Lewis Coal Co., 96 Mo. 149, 156, 8 S. W. 907, 9 Am. St. Rep. 328, where, in reference to the words, "for it is presumed that legal proceedings, during their continuance, are publicly known throughout the 'realm'" (Adams Equity 157), it is said: "By this term realm is meant the 'state' or 'sovereignty' where the property is, as is explained in a note by the writer just cited."

Departing the realm as an act of bankruptcy in England has been held not impossible to a natural born subject, who is not domiciled in England. William *v.* Nunn, 1 Taunt. 270, 272, 278.

29. Reg. *v.* Keyn, 2 Ex. D. 63, 197, 13 Cox C. C. 403, 46 L. J. M. C. 17.

Some confusion arises from the term "realm" being used in more than one sense. — Sometimes it is used, as in the statute of Richard II, to mean the land of England, and the internal sea within it, sometimes as meaning whatever the sovereignty of the Crown of England extended, or was supposed to extend, over. Reg. *v.* Keyn, 2 Ex. D. 63, 197, 13 Cox C. C. 403, 46 L. J. M. C. 17.

30. Coombs *v.* Harford, 99 Me. 426, 432, 59 Atl. 529, where the term is used in the opinion "as contra distinguished from colorable assignee, one who is made assignee solely for the purpose of bringing suit in his own name."

31. Black L. Dict. [*quoted* in Stewart *v.* Price, 64 Kan. 191, 199, 67 Pac. 553, 64 L. R. A. 581; Dickey *v.* Porter, 203 Mo. 1, 26, 101 S. W. 586].

32. Bliss Code Pl. § 45, note 3 [*quoted* in Stewart *v.* Price, 64 Kan. 191, 199, 67 Pac. 553, 64 L. R. A. 581; Dickey *v.* Porter, 203 Mo. 1, 26, 101 S. W. 586].

33. Black L. Dict.

34. Paducah *v.* Allen, 111 Ky. 361, 373, 63 S. W. 981, 98 Am. St. Rep. 422.

35. Booth *v.* Kinsey, 8 Gratt. (Va.) 560, 568, adding: "It is equivalent to a payment, and renders the thing no longer due;

REAL REPRESENTATIVE. He who represents or stands in the place of another, with respect to his real property;[36] the heir or devisee of real property of a deceased person.[37] (See LEGAL REPRESENTATIVE, 25 Cyc. 175; REAL, *ante*, p. 1540; REPRESENTATIVE. See also HEIR, 21 Cyc. 408.)

REAL SECURITY. Security on property, as distinguished from personal security;[38] the security of mortgages or other liens or encumbrances upon land.[39] (See REAL, *ante*, p. 1540; SECURITY; and, generally, LIENS, 25 Cyc. 655; MECHANICS' LIENS, 27 Cyc. 1; MORTGAGES, 27 Cyc. 916.)

REAL SERVICE. A term of the civil law naming a species of easement, consisting in a service which one estate owes to another, or the right of doing something, or of having a privilege in one man's estate for the advantage and convenience of the owner of another estate.[40] (See REAL SERVITUDE, and Cross-References Thereunder.)

REAL SERVITUDE. In the civil law, a right which one estate or piece of land (*prædium*) owes to another estate.[41] (See REAL SERVICE. See also PRÆDIUM DOMINANS, 31 Cyc. 1154; PRÆDIUM SERVIENS, 31 Cyc. 1154; and, generally, EASEMENTS, 14 Cyc. 1134.)

REAL STATUTE. As distinguished from personal, one which regulates property within the limits of the state where it is in force;[42] one which controls things and does not extend beyond the limits of the country from which it derives its authority;[43] one which affects principally things, although it may relate to persons;[44] one which treats of immovables.[45] (See PERSONAL STATUTE, 30 Cyc. 1532; and, generally, STATUTES.)

REAL THINGS. Such as are permanent, fixed, and immovable, that cannot be carried out of their place, as lands and tenements;[46] things substantial and immovable, and the rights and profits annexed to or issuing out of them.[47] (See REAL, *ante*, p. 1540.)

REALTY. A brief term for real property; also for anything which partakes of the nature of real property.[48] (See PROPERTY, 32 Cyc. 649, and Cross-References Thereunder; REAL ESTATE, *ante*, p. 1556.)

REAL WARRANTY. That which arises in real or hypothecary actions.[49]

REAL WRONG. In old English law, an injury to the freehold.[50] (See, generally, TRESPASS. See also PERSONAL WRONG, 30 Cyc. 1533.)

'consequently it liberates all the debtors of it as there can be no debtors without something due.'"

Distinguished from "personal discharge" see Booth *v.* Kinsey, 8 Gratt. (Va.) 560, 568.

36. Black L. Dict., distinguishing the term from "personal representative," and adding: "Thus the heir is the real representative of his deceased ancestor."

37. Louisville Trust Co. *v.* Kentucky Nat. Bank, 87 Fed. 143, 145.

Representatives of a deceased person are real or personal; the former being the heirs at law, and the latter, ordinarily, the executors or administrators. The term "representative" includes both classes. Lee *v.* Dill, 39 Barb. (N. Y.) 516, 520.

38. See Sweet L. Dict. *sub verb.* "Security" [*cited* in the dissenting opinion in Merrill *v.* Jacksonville Nat. Bank, 173 U. S. 131, 158, 19 S. Ct. 360, 43 L. ed. 640].

39. Black L. Dict.

40. See Angell Watercourses 142 [*quoted* in Morgan *v.* Mason, 20 Ohio 401, 410, 55 Am. Dec. 464].

41. Black L. Dict.

42. Saul *v.* His Creditors, 5 Mart. N. S. (La.) 569, 16 Am. Dec. 212.

Another definition see PERSONAL STATUTE, 30 Cyc. 1532 note 70.

43. Saul *v.* His Creditors, 5 Mart. N. S. (La.) 569, 586, 16 Am. Dec. 212, where the definition is said to be according to the jurists of Holland and France.

44. Voet [*cited* in Saul *v.* His Creditors, 5 Mart. N. S. (La.) 569, 592, 16 Am. Dec. 212].

45. D'Argentre [*cited* in Saul *v.* His Creditors, 5 Mart. N. S. (La.) 569, 591, 16 Am. Dec. 212, where it is said that this definition does not seem to have been so generally adopted as others, though followed by Burgundus, Rodenburgh, and Stockmans, and is attacked by Boulenois]. See also Prats *v.* His Creditors, 2 Rob. (La.) 501, 507.

46. 2 Blackstone Comm. 16 [*quoted* in Black L. Dict.].

47. Black L. Dict. [*citing* 1 Stephen Comm. 156].

48. Black L. Dict.

49. Hardy *v.* Pecot, 104 La. 136, 140, 28 So. 936, distinguishing "personal warranty."

50. Black L. Dict.

REAPPRAISEMENT. See CUSTOMS DUTIES, 12 Cyc. 1145; HOMESTEADS, 21 Cyc. 628; LANDLORD AND TENANT, 24 Cyc. 1169; MORTGAGES, 27 Cyc. 1688.

REAR. As a noun, the back, or hindmost part; that which is behind or last in order.[51] As an adjective, at or near the rear.[52]

REARREST. See ARREST, 3 Cyc. 897, 974; BAIL, 5 Cyc. 50, 116, 128.

REASON. A faculty of the mind by which it distinguishes truth from falsehood, good from evil, and which enables the possessor to deduce inferences from facts or from propositions.[53] (See MEMORY, 27 Cyc. 470; MIND, 27 Cyc. 514.)

REASONABLE. A generic term difficult of adequate definition;[54] a relative term,[55] to be determined according to the circumstances of the case.[56] The

51. Webster Int. Dict.

"In the rear" of certain premises may, under sufficient identifying circumstances, apply to a lot extending partly in the rear of adjoining premises, although alone such description of a lot so situated would lack certainty. Read *v.* Clarke, 109 Mass. 82, 83.

"The rear of the said lot" see Keening *v.* Ayling, 126 Mass. 404, 406.

52. See Erb *v.* Eggleston, 41 Nebr. 860, 861, 60 N. W. 98, where "rear brakeman" is construed "brakeman posted at or near the rear of the train."

53. Webster Dict. [*quoted* in Black L. Dict.].

"Mere glimmering of reason" see Terry *v.* Buffington, 11 Ga. 337, 345, 56 Am. Dec. 423; Patts *v.* Hause, 6 Ga. 324, 352, 50 Am. Dec. 329.

Reason to believe on the part of one assailed that he is in great danger of life or limb is not equivalent to "reasonable belief," and a refusal to charge that it is a justification for assault and battery without retreat is correct. Howard *v.* State, 110 Ala. 92, 95, 20 So. 365. "Good reason to believe" on the part of a plaintiff that he has just cause of action is not equivalent to probable cause, and an averment thereof not sufficient in an affidavit where "probable cause" supported by oath or affirmation is required as the basis of a warrant. Meddaugh *v.* Williams, 48 Mich. 172, 174, 12 N. W. 34 [*following* De Long *v.* Briggs, 47 Mich. 624, 625, 11 N. W. 412]. The assertion that one had "reason to believe" that another committed a crime is equivalent in slander to the charge that he had committed it. Miller *v.* Miller, 8 Johns. (N. Y.) 74, 75, 76 [*followed* in Miller *v.* Miller, 8 Johns. (N. Y.) 77].

"Good and lawful reasons," as used in a statement in the order of a presiding judge, of his cause for declining to preside at a trial may be taken, in the absence of anything to the contrary, to include some one or more of the statutory causes permitting such action in the discretion of the judge. Leonard *v.* Blair, 59 Ind. 510, 514.

"Reason to doubt" is not the equivalent of "a reasonable doubt" in the mind of a jury. "There may be a reason to doubt, which does not justify a reasonable doubt or the inference of probable innocence." Peagler *v.* State, 110 Ala. 11, 13, 20 So. 363.

"Reason to know."—Where the jury has been instructed that it is a duty to use ordinary care, a further instruction that one is liable who "knew or 'had reason to know'" of an injurious defect is proper, for the duty is a reason. Moulton *v.* Phillips, 10 R. I. 218, 223, 14 Am. Rep. 663.

54. People *v.* Butts, 121 N. Y. App. Div. 226, 227, 105 N. Y. Suppl. 677.

Almost if not quite synonymous with natural in the phrase "natural and reasonable result" see The Argentino, 13 P. D. 191, 198.

Compared with "tolerably."—Dictionaries not always reliable.—In an instruction to the jury, "reasonable" was defined: "In a reasonable manner, consistent with reason, in a moderate degree, tolerably." In the opinion on appeal it was suggested that the definition might be objectionable and said: "The definition seems to have been taken from the dictionaries, which are not always reliable when used in a court of law. It is true 'tolerably' is treated by such authors as synonymous with 'reasonable.'" But it is not always, if ever, so understood. As used by the people it does not mean "reasonable," but on the contrary to indicate a different condition or state. York *v.* Everton, 121 Mo. App. 640, 647, 97 S. W. 604.

As used with reference to claims for services in behalf of poor persons, in 24 Kan. Gen. St. 626, the word means "reasonable in fact," not merely within the discretion of the county overseers. Pottawatomie County *v.* Morrall, 19 Kan. 141, 144.

"Reasonable agreement" is "too vague and indefinite to base the judgment of a court upon" when used as a description material to an allegation in an application for mandamus. State *v.* Associated Press, 159 Mo. 410, 422, 60 S. W. 91, 81 Am. St. Rep. 368, 51 L. R. A. 151.

"The line between what is reasonable and what is not, marking the boundary of constitutional authority of the legislature is one often difficult of ascertainment, rendering it very necessary, in all doubtful cases for the judiciary to defer to the wisdom of the legislature." Bonnett *v.* Vallier, 136 Wis. 193, 202, 116 N. W. 885, 17 L. R. A. N. S. 486.

55. Brunswick, etc., Water Dist. *v.* Maine Water Co., 99 Me. 371, 379, 59 Atl. 537; *In re* Nice, 123 Fed. 987, 988.

56. See Brunswick, etc., Water Dist. *v.* Maine Water Co., 99 Me. 371, 379, 59 Atl. 537 (where it is said: "What is reasonable depends upon many varying circumstances"); Haley *v.* Colcord, 59 N. H. 7, 8, 47 Am. Rep. 176 (where in defining "reasonable necessity" it is said to be "determined

term has been variously defined in different connections. It is defined as agreeable

by the application of reason to the circumstances of the case, and not prescribed as an arbitrary, verbal formula"); *In re* Nice, 123 Fed. 987, 988 (where it is said: "And the facts of the particular controversy must be considered before the question [i. e. what is a reasonable delay] can be determined").

Reasonable attorney's fee.— As allowed by Iowa Code, § 2961, to defendant in attachment issued on a ground not true the term does not include fees for the whole case but only for the auxiliary proceeding of attachment. Porter *v.* Knight, 63 Iowa 365, 372, 19 N. W. 282. As used in Kan. St. (1874) c. 94, providing that a reasonable attorney's fee may be recovered from a railway company by the owner of stock killed, the term means a fee reasonable considering all the elements of the particular case, which affect the proper amount of the attorney's compensation, and includes fees for the entire prosecution from the commencement until its final termination in the district court, so that one unsuccessful at the trial before the justice but successful on appeal may recover fees for the trial. Missouri River, etc., Co. *v.* Shirley, 20 Kan. 660, 662. As authorized by an assignment for creditors to be paid out of the fund, and the balance by the creditors, the term means such attorney's fees as the trustee is allowed by law to charge and does not admit of a charge for his own services as attorney. Commonwealth Nat. Bank *v.* Stone, 93 Ky. 623, 626, 20 S. W. 1040, 14 Ky. L. Rep. 645. Reasonable allowance to plaintiff for petitioner, for counsel fees in common pleas and orphans' court of Pennsylvania, "does not include expenses of adversary proceedings, resulting from a defence to the plaintiff's demand for partition or from any other cause." Fidelity Ins., etc., Co.'s Appeal, 108 Pa. St. 339, 343. In bankruptcy what is a reasonable fee to the attorney for petitioning creditors must be governed to a large extent by the amount of the estate and must be controlled by the general policy of the law which requires such estates to be administered with severe economy. *In re* Goldville Mfg. Co., 123 Fed. 579, 584.

Reasonable distance.— Water commissioners of a city, required by statute to furnish water to inhabitants of a town living "within a reasonable distance from the line of main pipes," by furnishing water for over eight years to all inhabitants of the town who complied with certain conditions, have put a construction on the term "reasonable distance" and cannot thereafter limit its meaning to a narrower construction. West Hartford *v.* Hartford Water Com'rs, 68 Conn. 323, 334, 36 Atl. 786.

"Reasonable expenses" which may be incurred by a board of health, under R. S. N. S. 4th ser. c. 29, § 12, are defined by statute 37 Vict. N. S. c. 6, § 1, to be services performed and bestowed, and medicines supplied by physicians and made a charge on the municipality. A physician having been employed by the county brought an action for wrongful dismissal, and recovered on a basis of salary. On appeal three judges affirmed the judgment; three were of opinion that a claim for damages for dismissal was not for "reasonable expenses," and that the municipality having no power to incur other expenses was not liable. The division being equal the appeal was dismissed. Cape Breton County *v.* McKay, 18 Can. Sup. Ct. 639, 648, 651, 665. Reasonable and necessary expenses as taxable costs see COSTS, 11 Cyc. 125.

"Reasonable promptness," as used in a contract providing for a test therewith of gas pipes, does not admit of a delay of months after the pipes are laid. Tasker *v.* Crane, 55 Fed. 449, 451.

Reasonable rates.— "An equivalent to the prevailing rate of interest might be a reasonable return, and it might not. It might be too high or might be too low. It might be reasonable, owing to peculiar hazards or difficulties in one place to receive greater returns there, than it would in another upon the same investment. Then, their reasonableness relates to both the company and the customer. Rates must be reasonable to both, and if they cannot be to both, they must be to the customer. . . . Just what is reasonable in a given case . . . must . . . be left to the good judgment of the tribunal which passes upon each particular case." Brunswick, etc., Water Dist. *v.* Maine Water Co., 99 Me. 371, 380, 59 Atl. 537.

"Reasonable reward" as the consideration for a contract to pass a boat through a canal within a reasonable time cannot be construed by implication to mean a greater or less amount than the tolls which the canal company has a right to charge, or if it was greater, and the company could not enforce it, that fact would not release them from their undertaking. Muir *v.* Louisville, etc., Canal Co., 8 Dana (Ky.) 161, 162.

Reasonable time for removal of standing timber by grantee see Hoit *v.* Stratton Mills, 54 N. H. 119.

"Reasonable satisfaction."— An instruction to jury to find for plaintiff if they find certain facts to their "reasonable satisfaction" is not prejudicial to the defendant, being open only to the criticism, if any, that it calls for too much rather than too little proof on the part of plaintiff. O'Neill *v.* Blase, 94 Mo. App. 648, 663, 68 S. W. 764.

"Reasonable state of usefulness" applied in a finding to the condition of a highway where crossed by a railroad was held to mean "such a state as not to have unnecessarily impaired its usefulness," the latter being the condition to be required by the writ of mandamus sought in the application. People *v.* Delaware, etc., Co., 177 N. Y. 337, 340, 69 N. E. 651.

A tax is presumed to be reasonable if laid by authority with discretion on the subject. By unreasonableness the courts do not mean simply that the tax must not be larger than the judges may think wise. *Ex p.* Miranda, 73 Cal. 365, 374, 14 Pac. 888. Reasonable taxes, as authorized by the New Hampshire

to reason; just; proper; ordinary or usual;[57] equitable; just;[58] just, proper, fair, or equitable.[59] As applied to legislative measures, within proper limits, fit and appropriate to the end in view.[60] The word is often used in connection with other words;[61] among the many phrases in which it has been employed and has been judicially interpreted are the following: "Reasonable accommodations;"[62] "reasonable act;"[63] "reasonable agreement;"[64] "reasonable and competent support;"[65] "reasonable and just;"[66] "reasonable and probable cause;"[67]

constitution, are just taxes. Opinion of Justices, 4 N. H. 564, 567, 569.

Reasonable to prosecute by indictment.— In the provision of Greater New York Charter, § 1406, that the court of special sessions shall be divested of jurisdiction to hear and determine a charge of misdemeanor on proper notice "that it is reasonable that such charge shall be prosecuted by indictment," the reason so acted upon must be "something more than the mere preference of the defendant for a jury trial." Exceptional circumstances must be shown which render trial by jury rather than at special sessions desirable and proper. People *v.* Levy, 24 Misc. (N. Y.) 469, 470, 53 N. Y. Suppl. 693 [*cited* in People *v.* Cornyn, 16 N. Y. Cr. 101, 102].

57. Black L. Dict.

Reasonable accommodations.— In a statute requiring railroad companies to furnish reasonable accommodations for the convenience and safety of passengers, the term was intended "to have a broad meaning and application," namely, "reasonable as distinguished from extreme luxury or scantiness; that is, not excessive nor meager, but sufficient or sufficing for all reasonable purposes." Anderson *v.* South Carolina, etc., R. Co., 81 S. C. 1, 6, 61 S. E. 1096.

"Reasonable and proper" synonymous with "fit" as used in a power of lease see Mostyn *v.* Lancaster, 23 Ch. D. 583, 619, 52 L. J. Ch. 848, 48 L. T. Rep. N. S. 715, 31 Wkly. Rep. 686.

Reasonable costs, taxable against plaintiff on discontinuance of nonsuit under Vt. St. p. 1403, and Vt. Gen. St. p. 267, § 42, was held to cover such costs as had accrued to defendant before the suit was discontinued (Fullan *v.* Ives, 37 Vt. 659, 660 [*quoted* in Woods *v.* Darling, 71 Vt. 348, 353, 43 Atl. 750]); though before the return-day; such as costs for the summoning of witnesses or taking a deposition (Woods *v.* Darling, *supra*); but on a motion to dismiss for want of jurisdiction on which defendant prevailed in the supreme court after pleading to the issue, and a verdict against him, reasonable costs were held to include only costs in the supreme court (Chadwick *v.* Batchelder, 46 Vt. 724, 728).

Reasonable maximum rate.— Under Mich. Const., as amended in 1870, art. 19*a*, § 1, conferring on the legislature the power to establish reasonable maximum rates of charges for the transportation of passengers and freight on different railroads, the question what is "reasonable" is for the legislature and not for the courts to determine. Wellman *v.* Chicago, etc., R. Co., 83 Mich. 592, 625, 47 N. W. 489 [*affirmed* in 143 U. S. 339, 12 S. Ct. 400, 36 L. ed. 176].

58. Webster Dict. [*cited* in Thompson *v.* Beacon Valley Rubber Co., 56 Conn. 493, 498, 16 Atl. 554].

"Just" when applied to a tax see *supra*, note 56.

Practically synonymous with "impartial" see Thompson *v.* Beacon Valley R. Co., 56 Conn. 493, 498, 16 Atl. 554.

59. People *v.* Butts, 121 N. Y. App. Div. 226, 227, 105 N. Y. Suppl. 677, so defining the term with reference to the power of certain judges to certify "that it is reasonable" that a charge of misdemeanor should be prosecuted by indictment.

60. See State *v.* Vandersluis, 42 Minn. 129, 131, 43 N. W. 789, 6 L. R. A. 119, where in considering a legislative power to prescribe "reasonable conditions" it was said: "Whether they are reasonable,— that is, whether the legislature has gone beyond the proper limits of its power,— the courts must judge. By the term 'reasonable' we do not mean expedient, nor do we mean that the conditions must be such as the court would impose. . . . They are to be deemed reasonable where, although perhaps not the wisest and best that might be adopted, they are fit and appropriate to the end in view, to wit, the protection of the public, and are manifestly adopted in good faith for that purpose."

Not "expedient" see State *v.* Vandersluis, 42 Minn. 129, 131, 43 N. W. 789, 6 L. R. A. 119. Not synonymous with "expediency" see Bonnett *v.* Vallier, 136 Wis. 193, 203, 116 N. W. 885, 17 L. R. A. N. S. 486.

Not necessarily the best or the only method, but one fairly appropriate, at least under all the circumstances, is suggested by the term as applied to a means to a legitimate end. Bonnett *v.* Vallier, 136 Wis. 193, 203, 110 N. W. 885, 17 L. R. A. N. S. 486.

61. See *infra*, text and notes 62–25.

"Natural and reasonable" see The Argentino, 13 P. D. 191, 197.

62. Anderson *v.* South Carolina, etc., R. Co., 81 S. C. 1, 6, 61 S. E. 1096.

63. "Reasonable act" is such an act as the law requires (Bouvier L. Dict. [*quoted* in McCarty *v.* Natural Carbonic Gas Co., 189 N. Y. 40, 54, 81 N. E. 549, 13 L. R. A. N. S. 465]), or permits (McCarty *v.* Natural Carbonic Gas Co., *supra*); one conformable or agreeable to reason (McCarty *v.* Natural Carbonic Gas Co., *supra*). See Act, 1 Cyc. 632.

64. State *v.* Associated Press, 159 Mo. 410, 422, 60 S. W. 91, 81 Am. St. Rep. 368, 51 L. R. A. 151.

65. Ellerbe *v.* Ellerbe, Speers Eq. (S. C.) 328, 335, 40 Am. Dec. 623.

66. Sweet *v.* Rechel, 159 U. S. 380, 400, 16 S. Ct. 43, 40 L. ed. 188.

67. See *post*, p. 1565.

"reasonable and probable damage;"[68] "reasonable and proper;"[69] "reasonable attorney fees;"[70] "reasonable care;"[71] "reasonable care and diligence;"[72] "reasonable care and skill;"[73] "reasonable cause;"[74] "reasonable cause to believe;"[75] "reasonable certainty;"[76] "reasonable compensation;"[77] "reasonable costs;"[78] "reasonable creature;"[79] "reasonable danger;"[80] "reasonable diligence;"[81] "reasonable distance;"[82] "reasonable doubt;"[83] "reasonable effort;"[84] "reasonable excuse;"[85] "reasonable expectation;"[86]

68. Chicago, etc., R. Co. *v.* Bowman, 122 Ill. 595, 606, 13 N. E. 814.

69. Mostyn *v.* Lancaster, 23 Ch. D. 583, 619, 52 L. J. Ch. 848, 48 L. T. Rep. N. S. 715, 31 Wkly. Rep. 686.

70. Porter *v.* Knight, 63 Iowa 365, 372, 19 N. W. 282; Missouri River, etc., Co. *v.* Shirley, 20 Kan. 660, 662; Kentucky Nat. Bank *v.* Stone, 93 Ky. 623, 626, 20 S. W. 1040, 14 Ky. L. Rep. 645; Fidelity Ins., etc., Co.'s Appeal, 108 Pa. St. 339, 343; *In re* Goldville Mfg. Co., 123 Fed. 579, 584.

71. See REASONABLE CARE, *post*, p. 1566.

72. "Reasonable care and diligence," in the sale of property on commission, such care and diligence as an ordinarily prudent and diligent man would exercise in the same circumstances, with reference to his own property, taking into consideration the usage of trade, the state of the market, and the situation of the property. Rice *v.* Brook, 20 Fed. 611, 614. See REASONABLE CARE, *post*, p. 1566, and Cross-References Thereunder; REASONABLE DILIGENCE, *post*, p. 1566.

73. Askridge *v.* Noble, 114 Ga. 949, 957, 41 S. E. 78.

74. See REASONABLE CAUSE, *post*, p. 1566.

75. Daniels *v.* Zumbrota Bank, 35 Minn. 351, 29 N. W. 165; Daniels *v.* Palmer, 35 Minn. 347, 351, 29 N. W. 162.

76. "Reasonable certainty" is that which on a fair and reasonable construction may be called certain without resorting to possible facts which do not appear (Thomas Coke Litt. 288 [*quoted* in Hollingsworth *v.* Holshousen, 17 Tex. 41, 44]); the being free from reasonable doubt (State *v.* Shaw, 49 N. C. 440, 443, sustaining a charge to the jury that they "ought to be satisfied, to a reasonable certainty," the term being used in contradistinction to "absolute certainty"). See CERTAINTY, 6 Cyc. 727, and Cross-References Thereunder.

77. See Norcross *v.* Cambridge, 166 Mass. 508, 511, 513, 44 N. E. 615, 33 L. R. A. 843.

"Reasonable compensation" is such as will fairly compensate when the character, effectiveness, and ability entering into the service are considered (Powell *v.* Foster, 71 Vt. 160, 164, 44 Atl. 96, defining the term in relation to the compensation of a special administrator); a legal compensation, such compensation as that fixed by the law for the performance of the duties imposed and the services rendered (Campbell *v.* Woodworth, 24 N. Y. 304, 306, so construing the term as used in an assignment for creditors providing for payment of the assignee). See COMPENSATION, 8 Cyc. 501, and Cross-References Thereunder.

For physical and mental suffering to be ascertained by the jury under the facts in each particular case see Larkin *v.* Chicago, etc., R. Co., 118 Iowa 652, 654, 92 N. W. 891.

For sale and negotiation of municipal bonds, the term does not include a commission to purchasers, which would be practically allowing purchase below par; but only compensation to agents who sell at or above par. Whelen's Appeal, 108 Pa. St. 162, 197–200, 1 Atl. 88.

78. Woods *v.* Darling, 71 Vt. 348, 353, 43 Atl. 750; Chadwick *v.* Batchelder, 46 Vt. 724, 728; Fullam *v.* Ives, 37 Vt. 659, 660.

79. "Reasonable creature" is a term which, describing the subject of murder under the common-law rule, means a human being, including idiot, lunatic, or unborn child, or slave. State *v.* Jones, Walk. (Miss.) 83, 85. See CREATURE, 11 Cyc. 1188.

80. "Reasonable danger," as material to the plea of self-defense, is danger to be judged of by an exercise of reason and judgment, exercised upon acts which require consideration to render their meaning apparent. Allen *v.* State, 24 Tex. App. 216, 225, 6 S. W. 187. See DANGER, 13 Cyc. 256, and Cross-References Thereunder; DANGEROUS, 13 Cyc. 256, and Cross-References Thereunder.

Distinguished from "'real' danger" see Allen *v.* State, 24 Tex. App. 216, 225, 6 S. W. 187.

81. See REASONABLE DILIGENCE, *post*, p. 1566.

82. West Hartford *v.* Hartford Water Com'rs, 68 Conn. 323, 334, 36 Atl. 786.

83. See REASONABLE DOUBT, *post*, p. 1567.

84. "Reasonable effort" is such effort as "men ordinarily would exercise in their own business to protect their rights and interests." Springett *v.* Colerick, 67 Mich. 362, 369, 34 N. W. 683, where it was so used in speaking of the reasonable effort required to be made by an officer in the service of an attachment.

85. "Reasonable excuse" is a term said to be synonymous with "reasonable cause." Synge *v.* Synge, [1900] P. 180, 193, 64 J. P. 454, 69 L. J. P. D. & Adm. 106, 83 L. T. Rep. N. S. 224, 16 T. L. R. 388, 402.

86. "Reasonable expectation" is an expectation that some such disaster as that under investigation will occur 'on the long run' from a series of such negligences as those with which the defendant is charged. Wharton Negl. §§ 77, 78 [*quoted* in Clifford *v.* Denver, etc., R. Co., 9 Colo. 333, 338, 12 Pac. 219, where it was said to be so used in the law of negligence].

An expectation based only upon assets and credit, and that utterly ignores the general financial condition of the person, no matter how stringent or pressing it may be, is not necessarily a reasonable expectation. Edel-

"reasonable expenses;"[87] "reasonable facilities;"[88] "reasonable fitness;"[89] "reasonable grounds;"[90] "reasonable hours;"[91] "reasonable in fact;"[92] "reasonable inquiry;"[93] "reasonable inspection;"[94] "reasonable line of credit;"[95] "reasonable man;"[96] "reasonable mind;"[97] "reasonable necessity;"[98] "reasonable notice;"[99] "reasonable person;"[1] "reasonable portion;"[2] "reasonable possibility;"[3] "reasonable precaution;"[4] "reasonable price;"[5] "reasonable promptness;"[6] "reasonable provocation;"[7] "reasonable pru-

hoff *v.* Horner-Miller Mfg. Co., 86 Md. 595, 614, 39 Atl. 314.

"Reasonable or probable ground of expectation" see *Ex p.* White, 14 Q. B. D. 600, 603, 54 L. J. Q. B. 384, 2 Morr. Bankr. Cas. 42, 33 Wkly. Rep. 670.

87. Cape Breton County *v.* McKay, 18 Can. Sup. Ct. 639, 648. See DIVORCE, 14 Cyc. 761; GUARDIAN AND WARD, 21 Cyc. 176; PAUPERS, 30 Cyc. 1122.

88. Reg. *v.* Railway Com'rs, 22 Q. B. D. 642, 650, 53 J. P. 533, 58 L. J. Q. B. 233, 60 L. T. Rep. N. S. 606, 6 R. & Can. Tr. Cas. 108, 37 Wkly. Rep. 446. See RAILROADS, 33 Cyc. 1.

89. Garnett *v.* Phœnix Bridge Co., 98 Fed. 192, 195.

90. **"Reasonable grounds"** are such grounds as would induce a person of ordinary prudence to believe a thing under the circumstances. Hovins *v.* Cincinnati, etc., R. Co., 107 S. W. 214, 216, 32 Ky. L. Rep. 786. See, generally, ARREST, 3 Cyc. 878; FALSE IMPRISONMENT, 19 Cyc. 351.

91. See COMMERCIAL PAPER, 7 Cyc. 981.

92. Pottawatomie County *v.* Morrall, 19 Kan. 141, 144.

93. See MARRIAGE, 26 Cyc. 853.

94. See RAILROADS, 33 Cyc. 1.

95. **"Reasonable line of credit"** is a phrase to be construed as applicable to quantity or amount of credit, rather than length of credit. American Button-Hole, etc., Mach. Co. *v.* Gurnee, 44 Wis. 49, 62, adding "especially in this contract, in which a fixed limit to the credit [i. e. as to time] is prescribed in the same part of the contract." See CREDIT, 11 Cyc. 1189, and Cross-References Thereunder. Line of Credit see LINE, 25 Cyc. 1441 text and note 13.

96. State *v.* Cain, 20 W. Va. 679, 705. See, generally, NEGLIGENCE, 29 Cyc. 428, 512.

"Reasonable men" are those who think and reason intelligently. Patterson *v.* Nutter, 78 Me. 509, 513, 7 Atl. 273, 57 Am. Rep. 818. The use of the term "reasonable men," instead of "prudent men," in an instruction that ordinary care is the care which reasonable men exercise under ordinary circumstances, held not erroneous. Overman Wheel Co. *v.* Griffin, 67 Fed. 659, 662, 14 C. C. A. 609.

97. **"Reasonable mind"** is a sensible one, fairly judicious in its action, and at least somewhat cautious in reaching its conclusions. Brewer *v.* Jacobs, 22 Fed. 217, 229. See also Farr *v.* Thompson, 1 Speers (S. C.) 93, 107, where it is said that to make a valid will, "testator must have a 'reasonable mind'; that is, he must be capable of reasoning upon, and comparing, by means of his own recollection, (conception and reflection,) the facts perceived and remembered, so as to come to the rational conclusion which constitutes the mental and moral will of every dispassionate and unbiggoted man, as drawn by his own induction from known facts."

98. Haley *v.* Colcord, 59 N. H. 7, 8, 47 Am. Rep. 176.

99. See REASONABLE NOTICE, *post*, p. 1567.

1. **"Reasonable person"** is a term said to be synonymous with the words "ordinarily cautious person." Billingsley *v.* Maas, 93 Wis. 176, 180, 67 N. W. 49, where it is so used in describing the degree of care that should be exercised in instituting criminal proceedings to avoid the charge of malicious prosecution.

2. Edgeworth *v.* Edgeworth, Beatty 328.

3. Bonner *v.* State, 107 Ala. 97, 107, 18 So. 226.

4. **"Reasonable precaution"** is a term said to be synonymous with "reasonable care." Knott *v.* Dubuque, etc., R. Co., 84 Iowa 462, 471, 51 N. W. 57, where it was so used in an instruction to a jury that a railroad company is bound to use all reasonable precaution for the safety of its employees. See, generally, NEGLIGENCE, 29 Cyc. 424.

5. **"Reasonable price,"** in contracts of sale, such a price as the jury, upon the trial of the cause, shall, under all the circumstances, decide to be reasonable. Acebal *v.* Levy, 10 Bing. 376, 383, 3 L. J. C. P. 98, 4 Moore & S. 217, 25 E. C. L. 180, adding: "This price may, or may not, agree with the current price of the commodity at the port of shipment, at the precise time when such shipment was made. The current price of the day may be highly unreasonable from accidental circumstances, as on account of the commodity having been purposely kept back by the vendor himself, or with reference to the price at other ports in the immediate vicinity, or from various other causes." See PRICE, 31 Cyc. 1171, and Cross-References Thereunder.

6. Tasker *v.* Crane Co., 55 Fed. 449, 451.

7. **"Reasonable provocation"** are words said to be synonymous with "legal," "lawful," or "adequate" provocation. State *v.* Bulling, 105 Mo. 204, 225, 15 S. W. 367, 16 S. W. 830, where in a prosecution for murder it was held that "it takes an assault or personal violence to constitute this provocation."

Used in the definition of manslaughter as the killing of a person when acting upon a sudden passion, and engendered by reasonable provocation, is used interchangeably with the words "adequate," "sufficient," "lawful" and "legal." State *v.* Ellis, 74 Mo. 207, 217. See also State *v.* Kotovsky, 74 Mo. 247, 251.

dence;"[8] "reasonable question;"[9] "reasonable rates;"[10] "reasonable regulations;"[11] "reasonable reward;"[12] "reasonable right of way;"[13] "reasonable safety;"[14] "reasonable satisfaction;"[15] "reasonable skill;"[16] "reasonable speed;"[17] "reasonable state of usefulness;"[18] "reasonable support;"[19] "reasonable suspicion;"[20] "reasonable tax;"[21] "reasonable time;"[22] "reasonable use;"[23] "reasonable wear and tear;"[24] "reasonable worth."[25] (See REASONABLY, *post*, p. 1568.)

REASONABLE AND PROBABLE CAUSE. For prosecution, the existence of such circumstances as would excite in the mind of a reasonable man the belief of guilt;[26] a fixed belief in the guilt of the accused, based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to a conclusion that the

8. Crooker *v.* Pacific Lounge, etc., Co., 29 Wash. 30, 37, 69 Pac. 359; Grand Trunk R. Co. *v.* Ives, 144 U. S. 408, 417, 12 S. Ct. 679, 36 L. ed. 485; Sommer *v.* Carbon Hill Coal Co., 89 Fed. 54, 59, 32 C. C. A. 156. See, generally, NEGLIGENCE, 29 Cyc. 427.

"Reasonable prudence" is a term which as applied to the conduct and affairs of men has a relative significance and cannot be arbitrarily defined. Southern R. Co. *v.* McGowan, 149 Ala. 440, 451, 43 So. 378; Fisher *v.* Chesapeake, etc., R. Co., 104 Va. 635, 639, 52 S. E. 373, 2 L. R. A. N. S. 954; Swift *v.* Sandy, 165 Fed. 622, 623; Klutt *v.* Philadelphia, etc., R. Co., 142 Fed. 394, 396, 73 C. C. A. 494.

9. Harding *v.* Long, 103 N. C. 1, 5, 9 S. E. 445, 14 Am. St. Rep. 775.

10. Brunswick, etc., Water Dist. *v.* Maine Water Co., 99 Me. 371, 379, 59 Atl. 537.

"'Reasonable' maximum rate" see Wellman *v.* Chicago, etc., R. Co., 83 Mich. 592, 625, 47 N. W. 489.

11. Saginaw Gas-Light Co. *v.* Saginaw, 28 Fed. 529, 535.

12. Muir *v.* Louisville, etc., Canal Co., 8 Dana (Ky.) 161, 162.

13. Sizer *v.* Quinlan, 82 Wis. 390, 391, 52 N. W. 590, 33 Am. St. Rep. 55, 16 L. R. A. 512.

14. "Reasonable safety" is a term said to mean safe according to the usages, habits, and ordinary risks of the business. Sawyer *v.* J. M. Arnold Shoe Co., 90 Me. 369, 371, 38 Atl. 333. See, generally, NEGLIGENCE, 29 Cyc. 400.

15. O'Neill *v.* Blase, 94 Mo. App. 648, 663, 68 S. W. 764.

16. See REASONABLE SKILL, *post*, p. 1567.

17. "Reasonable speed" is the average rate of carriages used to convey passengers by horse power. Adolph *v.* Central Park, etc., R. Co., 76 N. Y. 530, 537, where it was said that it is a lawful speed in the absence of statute or ordinance on the subject, where used with regard to horse cars.

18. People *v.* Delaware, etc., Co., 177 N. Y. 337, 341, 69 N. E. 651.

19. "Reasonable support" is not a bare subsistence, but an amount depending upon circumstances of demand and supply in the particular case. See Thill *v.* Pohlman, 76 Iowa 638, 639, 41 N. W. 385 (holding that such support, required to be furnished by a husband to his wife, is not merely a bare subsistence but includes those comforts and surroundings reasonable and necessary for her enjoyment in the society in which she lives); Thompson *v.* Carmichael, 3 Sandf. Ch. (N. Y.) 120, 130 (holding that the term as used in a provision by will for the widow is not to be determined by the amount necessary for her bare subsistence, but with reference to the extent and income of the estate, and to enable her to live with and provide for her small children); Ellerbe *v.* Ellerbe, Speers Eq. (S. C.) 328, 341, 40 Am. Dec. 623 (holding that "reasonable and competent support," as provided for in the will for wife and daughter, "does not mean merely the food and clothing necessary to sustain life, nor any other fixed quantity or allowance, but must . . . depend on circumstances and exigencies"). See SUPPORT, and Cross-References Thereunder.

20. "Reasonable suspicion" is a term said to be convertible with "probable cause." State *v.* Grant, 79 Mo. 113, 135, 49 Am. Rep. 218, where it is said to be so used in civil actions for malicious prosecution.

21. *Ex p.* Mirande, 73 Cal. 365, 374, 14 Pac. 888; Opinion of Justices, 4 N. H. 564, 567.

22. See REASONABLE TIME, *post*, p. 1567.

23. Pearson *v.* Rolfe, 76 Me. 380, 384.

"Reasonable use" is a term whereof it has been said: "A reasonable use by one of his own property is a conclusion derived from reason or the intellectual process of argument" (McCarty *v.* Natural Carbonic Gas Co., 189 N. Y. 40, 54, 81 N. E. 549, 13 L. R. A. N. S. 465); that which does not unreasonably prejudice the rights of others (Rindge *v.* Sargent, 64 N. H. 294, 9 Atl. 723).

Reasonable use and management of property with regard to rights of others is a mixed question of law and fact to be submitted to the jury under the instruction of the court. Bassett *v.* Salisbury Mfg. Co., 43 N. H. 569, 578, 82 Am. Dec. 179.

24. See REASONABLE WEAR AND TEAR, *post*, p. 1568.

25. "Reasonable worth" is what may be obtained by one under no pressure or compulsion to sell until he can seek and find a purchaser desiring to purchase. Rosenheimer *v.* Krenn, 126 Wis. 617, 631, 106 N. W. 20, 5 L. R. A. N. S. 395. See MARKET PRICE OR VALUE, 26 Cyc. 819.

26. Webber *v.* McLeod, 16 Ont. 609, 616.

person charged was probably guilty of the crime imputed.[27] (Reasonable and Probable Cause: In General, see PROBABLE CAUSE, 32 Cyc. 902, and Cross-References Thereunder. To Believe in Insolvency, as Resulting in Dissolution of Lien, see BANKRUPTCY, 5 Cyc. 367 text and note 48.)

REASONABLE CARE. A term convertible with ordinary care.[28] (Reasonable Care: As Ordinary Care, see NEGLIGENCE, 29 Cyc. 512.)

REASONABLE CAUSE. To know, evidence having a tendency, and generally a strong tendency, to prove that the party in question did know; but not the same thing as knowledge.[29] To believe the fact of insolvency, more than a mere suspicion; such a knowledge of facts as to induce a reasonable belief of the debtor's insolvency;[30] knowledge of facts or circumstances which would put an ordinarily prudent man upon inquiry as to whether his debtor was then insolvent.[31] For desertion of spouse, a term equivalent to "cause" or "reasonable excuse."[32] For seizure, a term not substantially different from probable cause.[33] (See REASONABLE AND PROBABLE CAUSE, and Cross-References Thereunder.)

REASONABLE DILIGENCE. A phrase so far incapable of exact definition that it has only a relative signification;[34] reasonable attention to busi-

27. Hicks *v.* Faulkner, 8 Q. B. D. 167, 171, 46 J. P. 420, 51 L. J. Q. B. 268, 46 L. T. Rep. N. S. 127, 30 Wkly. Rep. 545 [*quoted* in McGill *v.* Walton, 15 Ont. 389, 393].

28. See NEGLIGENCE, 29 Cyc. 427.

Other definitions see MASTER AND SERVANT, 26 Cyc. 1231 text and note 38; NEGLIGENCE, 29 Cyc. 428 note 74.

29. Carroll *v.* Hayward, 124 Mass. 120, 122.

30. See Grant *v.* Monmouth First Nat. Bank, 97 U. S. 80, 81, 24 L. ed. 971 [*quoted* in Morey *v.* Milliken, 86 Me. 464, 475, 30 Atl. 102; King *v.* Storer, 75 Me. 62, 63, and *cited* in Daniels *v.* Zumbrota Bank, 35 Minn. 351, 352, 29 N. W. 165], holding that in order to invalidate a security given by the insolvent debtor it "is not enough that a creditor has some cause to suspect the insolvency of his debtor; but he must have such a knowledge of facts as to induce a reasonable belief of his debtor's insolvency."

"Reasonable cause to suspect" distinguished from "reasonable cause to believe" see Grant *v.* Monmouth First Nat. Bank, 97 U. S. 80, 81, 24 L. ed. 971 [*cited* in Morey *v.* Milliken, 86 Me. 464, 475, 30 Atl. 102; King *v.* Storer, 75 Me. 62, 63].

31. Walker *v.* Tenison Bros. Saddlery Co., (Tex. Civ. App. 1906) 94 S. W. 166, 168.

32. See Oldroyd *v.* Oldroyd, [1896] P. 175, 182, 65 L. J. P. D. & Adm. 113, 75 L. T. Rep. N. S. 281 [*cited* in Synge *v.* Synge, [1900] P. 180, 193, 64 J. P. 454, 69 L. J. P. D. & Adm. 106, 83 L. T. Rep. N. S. 224, 16 T. L. R. 388, 402]. See also Eshbach *v.* Eshbach, 23 Pa. St. 343, 345.

Same cause as for divorce.— "The reasonable cause which will justify wife or husband in quitting and abandoning each other, is that, and only that which would entitle the party so separating him or herself to a divorce." Butler *v.* Butler, 1 Pars. Eq. Cas. (Pa.) 329, 337.

33. U. S. *v.* One Sorrel Horse, 27 Fed. Cas. No. 15,953, 22 Vt. 655, 657; Stacey *v.* Emery, 97 U. S. 642, 646, 24 L. ed. 1035; U. S. *v.* 83 Sacks of Wool, etc., 147 Fed. 747, 749.

34. Hopkins *v.* Seattle Scandinavian Fish Co., 32 Wash. 513, 517, 73 Pac. 495, holding that "before a person should be held in damages for an alleged failure to exercise reasonable diligence, it should be so far clear from the evidence that there had been such want of diligence that reasonable minds will not reasonably differ as to the fact."

In serving process "what is reasonable diligence depends upon the particular facts in connection with the duty." Guiterman *v.* Sharvey, 46 Minn. 183, 184, 48 N. W. 780, 24 Am. St. Rep. 218, holding that while in the absence of special instructions it could hardly be claimed that a delay from four o'clock of one day to the forenoon of the next would constitute negligence, the question of unreasonable delay is a mixed question of law and fact, and in view of instructions to proceed at once, and facts communicated to the officer showing need for immediate service, a finding of negligence and unreasonable delay was justifiable.

As duty, to be founded on some reason.— "There are very few facts which diligence cannot discover, but there must be some reason to awaken inquiry and direct diligence in the channel in which it would be successful." Maul *v.* Rider, 59 Pa. St. 167, 171, 172, holding, in relation to the use of the term in Pa. St. (1856) § 6, that "there must be some act — some declaration from an authentic source — which a person would be careless if he disregarded, which is necessary to put a party on inquiry, and call for the exercise of reasonable diligence."

In presenting paper.— In regard to the rule that presentment must be on the day on which a bill becomes due, when it is not in the power of the holder, by the use of reasonable diligence to present it, it is said: "On the question . . . whether there was negligence on his part, or a want of reasonable diligence, no absolute or positive rule can, from the nature of the case, be laid down, which shall apply under all circumstances. . . . And that diligence must be measured by the general convenience of the commercial world, and the practicability of accomplishing the end required, by ordinary skill, caution and effort." Windham Bank *v.* Norton, 22 Conn. 213, 220, 221, 56 Am. Dec. 397.

ness;[35] such diligence as a prudent man could exercise or employ in a doubt as to his own affairs;[36] such diligence as an ordinarily prudent and diligent person would exercise under similar circumstances;[37] that diligence which would be deemed reasonable by reasonable and prudent men under the circumstances.[38] By a purchaser in ascertaining title, the diligence exercised by ordinary men generally.[39] On the part of a discharged employee to secure work before suing for discharge, such diligence as a man of ordinary care and prudence desiring work would make under the circumstances surrounding plaintiff at such place to get it; in other words, such care or diligence as such a man at such a place would ordinarily and reasonably make to get it.[40] (See DILIGENCE, 14 Cyc. 289, and Cross-References Thereunder.)

REASONABLE DOUBT. Of Guilt — In General, see CRIMINAL LAW, 12 Cyc. 622; In Conspiracy, see CONSPIRACY, 8 Cyc. 688; In Homicide, see HOMICIDE, 21 Cyc. 1031; In Larceny, see LARCENY, 25 Cyc. 137. Of Wife's Separate Ownership, see HUSBAND AND WIFE, 21 Cyc. 1301 note 98.

REASONABLE NOTICE. Such notice or information of a fact as may be expected or required in the particular circumstances.[41] (Reasonable Notice: In General, see NOTICE, 29 Cyc. 1110. Of Defects in Street and Highways, see MUNICIPAL CORPORATIONS, 28 Cyc. 1384. Of Lunacy Proceedings, see INSANE PERSONS, 22 Cyc. 1124. To Landowner of Construction of Townway, see STREETS AND HIGHWAYS.)

REASONABLE SKILL. Such skill as is ordinarily possessed and exercised by persons of common capacity engaged in the same business or employment.[42] (Reasonable Skill: Required of — Agent, see PRINCIPAL AND AGENT, 31 Cyc. 1456; Attorney, see ATTORNEY AND CLIENT, 4 Cyc. 964; Broker, see FACTORS AND BROKERS, 19 Cyc. 204; Factor, see FACTORS AND BROKERS, 19 Cyc. 118; Physician or Surgeon, see PHYSICIANS AND SURGEONS, 30 Cyc. 1570; Pilot, see PILOTS, 30 Cyc. 1622; Servant, see MASTER AND SERVANT, 26 Cyc. 1019.)

REASONABLE TIME. A reasonable time, looking at all the circumstances of the case;[43] a reasonable time under ordinary circumstances;[44] as soon as circumstances will permit;[45] so much time as is necessary under the circumstances, conveniently to do what the contract requires should be done;[46] some more protracted space than "directly";[47] such length of time as may fairly, and properly, and reasonably be allowed or required, having regard to the nature of

In seeking absent debtors for purposes of service "reasonable diligence" requires that the plaintiff should at least take some steps from time to time to ascertain whether the debtors can be reached or not. Dukes *v.* Collins, 7 Houst. (Del.) 3, 6, 30 Atl. 639.

35. Bodkin *v.* Rollyson, 48 W. Va. 453, 455, 37 S. E. 617, holding that a person who settles a store account and waits more than five years to exercise it cannot have the settlement reopened on an alleged discovery of mistake, such not being reasonable attention to business.

36. Glassey *v.* Sligo Furnace Co., 120 Mo. App. 24, 29, 96 S. W. 310, defining the term as used in an agreement to keep a fence in repair, in a contract to pasture another's cattle.

37. Missouri, etc., R. Co. *v.* Gist, 31 Tex. Civ. App. 662, 663, 73 S. W. 857, defining the diligence due from a carrier in providing for the safety of passengers.

38. Bacon *v.* Casco Bay Steamboat Co., 90 Me. 46, 48, 37 Atl. 328, construing the phrase in connection with the duty of a carrier to passengers.

39. Latta *v.* Clifford, 47 Fed. 614, 620, where it is also said to be "not the diligence or skill that would be employed by a practiced conveyancer, or an acute or skillful attorney."

40. Gillespie *v.* Ashford, 125 Iowa 729, 733, 101 N. W. 649.

41. Black L. Dict. [*quoted* in Sterling Mfg. Co. *v.* Hough, 49 Nebr. 618, 621, 68 N. W. 1019].

42. Mechanics' Bank *v.* Merchants' Bank, 6 Metc. (Mass.) 13, 26.

43. Empire Transp. Co. *v.* Philadelphia, etc., Co., 77 Fed. 919, 924, 23 C. C. A. 564, 35 L. R. A. 623.

44. Hick *v.* Raymond, [1893] A. C. 22, 36, 7 Aspin. 233, 62 L. J. Q. B. 98, 68 L. T. Rep. N. S. 175, 1 Reports 125, 41 Wkly. Rep. 384.

45. Lund *v.* St. Paul, etc., R. Co., 31 Wash. 286, 292, 71 Pac. 1032, 96 Am. St. Rep. 906, 61 L. R. A. 506.

46. Chapman *v.* Dennison Paper Mfg. Co., 77 Me. 205, 211; Saunders *v.* Curtis, 75 Me. 493, 496; Bowen *v.* Detroit City R. Co., 54 Mich. 496, 501, 20 N. W. 559, 52 Am. Rep. 822; Wells Law & F. p. 136, § 151 [*quoted* in Hinds *v.* Kellogg, 13 N. Y. Suppl. 922].

47. Sentenne *v.* Kelly, 59 Hun (N. Y.) 512, 515, 13 N. Y. Suppl. 529; Lewis *v.* Hojer, 16 N. Y. Suppl. 534, 536; Duncan *v.* Topham, 8 C. B. 225, 230, 18 L. J. C. P.

the act or duty and to the attending circumstances;[48] such promptitude as the situation of the parties and the circumstances of the case will allow;[49] such time that the party notified will have ample time to prepare himself and be able to be present at the time and place of hearing;[50] that time which, as rational men, the parties to a contract ought to have understood each other to have in mind;[51] that time which preserves to each party the rights and advantages he possesses, and protects each party from losses that he ought not to suffer;[52] the time which persons of ordinary care and prudence take to do a certain thing;[53] what was reasonable time under the circumstances.[54] (Reasonable Time: For Acceptance of — Bill or Note, see COMMERCIAL PAPER, 7 Cyc. 754; Contract, see CONTRACTS, 9 Cyc. 266 text and note 25; SALES; VENDOR AND PURCHASER. For Entry of Stock Transfer on Books, see CORPORATIONS, 10 Cyc. 604. For Notice of Dishonor of Bill or Note, see COMMERCIAL PAPER, 7 Cyc. 1082. For Payment of Note on Demand, see COMMERCIAL PAPER, 7 Cyc. 847. For Performance of Contracts, in General, see CONTRACTS, 9 Cyc. 613; SALES; VENDOR AND PURCHASER. For Presentment of Bill or Note Payable on Demand, see COMMERCIAL PAPER, 7 Cyc. 975. For Ratification of Corporate Acts by Neglect, see CORPORATIONS, 10 Cyc. 1077. For Taking Possession of Mortgaged Property, see CHATTEL MORTGAGES, 6 Cyc. 1058 note 84. On Agreement to Forbear to Issue on Bill or Note, see COMMERCIAL PAPER, 7 Cyc. 723 note 93.)

REASONABLE WEAR AND TEAR. A phrase which in covenants to return property in as good condition as received has been held not to apply to total loss, either to exonerate the covenantor[55] or, when made the only exception, to render him liable for such loss occurring without his fault.[56] (See NATURAL WEAR AND TEAR, 29 Cyc. 283. Ordinary Wear and Tear, see ORDINARY, 29 Cyc. 1525 text and note 60.)

REASONABLY. A word said sometimes to mean tolerably or moderately;[57] in a reasonable manner · consistently with reason; not extravagantly or excessively; tolerably; moderately; in a moderate degree; fairly;[58] in a moderate degree; not fully; moderately; tolerably;[59] in a reasonable manner; in consistency with reason;[60] in a reasonable manner; in consistency with reason; in a moderate degree; not fully; moderately; tolerably;[61] moderately or tolerably.[62] This word

310, 65 E. C. L. 225, where this expression was so contrued in a contract to purchase goods to be put on board a ship directly.

48. Houston, etc., R. Co. *v.* Roberts, (Tex. Civ. App. 1908) 109 S. W. 982, 983, where such a definition was held not erroneous in an instruction, and where the court also said that the expression was one that needed no definition, as the average juror is supposed to know what is meant by the same.

49. Frech *v.* Lewis, 218 Pa. St. 141, 144, 67 Atl. 45, 11 L. R. A. N. S. 948.

50. Sterling Mfg. Co. *v.* Hough, 49 Nebr. 618, 621, 68 N. W. 1019, where this phrase was so used with reference to notice of a motion.

51. Moxley *v.* Moxley, 2 Metc. (Ky.) 309, 311.

52. Scannell *v.* American Soda Fountain Co., 161 Mo. 606, 621, 61 S. W. 889.

53. Atlantic City R. Co. *v.* Kiefer, 75 N. J. L. 54, 57, 66 Atl. 930, 932, where the expression was used with reference to alighting from a street car.

54. Postlethwaite *v.* Freeland, 5 App. Cas. 559, 621, 7 Aspin. 302, 49 L. J. Exch. 630, 42 L. T. Rep. N. S. 845, 28 Wkly. Rep. 833.

For presentation of a bill or note the question has been held identical with that of "due diligence." Foley *v.* Emerald, etc., Brewing Co., 61 N. J. L. 428, 430, 39 Atl. 650.

55. See Anglin *v.* Henderson, 21 U. C. Q. B. 27, 29, 31, where the charterer of a vessel was held liable for the total loss of an anchor and chain, as not coming within the exception.

56. Chamberlen *v.* Trenouth, 23 U. C. C. P. 497, 502, 503, holding that a lessee did not, by a promise to return property in good condition, "reasonable wear and tear only excepted," guarantee the continued existence of the goods; that the exception did not operate to waive the usual rule that the lessee is not chargeable with total loss occurring without his fault.

"Natural and reasonable wear and tear" see Green *v.* Kelly, 20 N. J. L. 544, 550.

57. Hunt *v.* Metropolitan St. R. Co., 126 Mo. App. 79, 83, 103 S. W. 1088.

58. Horn *v.* Territory, 8 Okla. 52, 57, 56 Pac. 846.

59. Webster Dict. [*quoted* in Warren *v.* Wright, 3 Ill. App. 602, 610].

60. Webster Dict. [*quoted* in Stevenson *v.* State, 17 Tex. App. 618, 634].

61. Webster Dict. [*quoted* in Smith *v.* Brunswick, 61 Mo. App. 578, 581].

62. Webster Dict. [*quoted* in Tompkins *v.* Com., 117 Ky. 138, 145, 77 S. W. 712, 25 Ky. L. Rep. 1254].

has been employed in connection with other words in many phrases,[63] some of which have received judicial interpretation, such as "reasonably accessible;"[64] "reasonably accurate description;"[65] "reasonably certain;"[66] "reasonably convinced;"[67] "reasonably convincing;"[68] "reasonably foreseen;"[69] "reasonably free from fault;"[70] "reasonably necessary;"[71] "reasonably practicable;"[72] "reasonably prudent man;"[73] "reasonably prudent person;"[74] "reasonably safe;"[75] "reasonably satisfied."[76] (See REASONABLE, *ante*, p. 1560.)

REASSESSMENT. A renewed or second assessment.[77] (See INTERNAL REVENUE, 22 Cyc. 1666; MUNICIPAL CORPORATIONS, 28 Cyc. 1191, 1197; TAXATION.)

REASSIGNMENT. The act of reassigning.[78] (Reassignment: In General, see ASSIGNMENTS, 4 Cyc. 59. Of Lease, Effect of, see LANDLORD AND TENANT, 24 Cyc. 1182. Of Mortgage, see MORTGAGES, 27 Cyc. 1333. Of Tontine Policy, see LIFE INSURANCE, 25 Cyc. 772 note 46.)

REASSURANCE or **REINSURANCE.** A contract, where an insurer procures the whole or a part of the same which he has insured (i. e. contracted to pay in case of loss, death, etc.) to be insured again to him by another person.[79] (See, gen-

63. See *infra*, text and notes 64–76.

64. *In re* Long Island R. Co., 21 N. Y. Suppl. 489.

65. Chicago, etc., R. Co. *v.* Pontiac, 169 Ill. 155, 162, 48 N. E. 485.

66. **"Reasonably certain"** is an expression said to be equivalent to "beyond a reasonable doubt." St. Louis, etc., R. Co. *v.* Burns, 71 Tex. 479, 481, 9 S. W. 467.

As used in an instruction that damages for future consequences of an injury cannot be assessed, unless it be "reasonably certain" that such consequences will ensue, "means that the jury should be satisfied of their occurrence beyond a reasonable doubt." Gulf, etc., R. Co. *v.* Harriett, 80 Tex. 73, 82, 83, 15 S. W. 556.

67. **"Reasonably convinced"** means "moderately convinced," "fairly convinced," or "convinced in a moderate degree." Horn *v.* Territory, 8 Okla. 52, 57, 56 Pac. 846.

68. Choctaw, etc., R. Co. *v.* Newton, 140 Fed. 225, 234, 71 C. C. A. 655.

69. Burns *v.* Merchants', etc., Oil Co., 26 Tex. Civ. App. 223, 226, 63 S. W. 1061.

70. Crawford *v.* State, 112 Ala. 1, 29, 21 So. 214; Baldwin *v.* State, 111 Ala. 11, 15, 20 So. 528.

71. Berry *v.* Turner, 77 Ga. 58, 60.

72. Wales *v.* Thomas, 16 Q. B. D. 340, 347, 16 Cox C. C. 128, 50 J. P. 516, 55 L. J. M. C. 57, 55 L. T. Rep. N. S. 400.

73. **"Reasonably prudent man"** is an expression said to mean the same as "ordinarily prudent person." Missouri, etc., R. Co. *v.* Hannig, 91 Tex. 347, 350, 43 S. W. 508. See ORDINARILY, 29 Cyc. 1523; REASONABLE MEN, *ante*, p. 1567.

74. **"Reasonably prudent person"** is an expression said to be interchangeable with "ordinarily prudent person." St. Louis, etc., R. Co. *v.* Brown, 30 Tex. Civ. App. 57, 59, 69 S. W. 1010. See ORDINARILY, 29 Cyc. 1523.

75. **"Reasonably safe"** means safe according to the ordinary risks of the business (Geno *v.* Fall Mountain Paper Co., 68 Vt. 568, 571, 35 Atl. 475, where it is so used in reference to the duty of an employer to furnish appliances of ordinary character and reasonably safe); safe according to the usages, habits, and ordinary risks of the business (Chrisimer *v.* Bell Tel. Co., 194 Mo. 189, 209, 92 S. W. 378, 6 L. R. A. N. S. 492; Morton *v.* William Barr Dry Goods Co., 126 Mo. App. 377, 388, 103 S. W. 588; McManus *v.* Oregon Short Line R. Co., 118 Mo. App. 152, 158, 94 S. W. 743; Cunningham *v.* Ft. Pitt Bridge Works, 197 Pa. St. 625, 630, 47 Atl. 846; Titus *v.* Bradford, etc., R. Co., 136 Pa. St. 618, 626, 20 Atl. 517, 20 Am. St. Rep. 944; McGeeghan *v.* Hughes, 15 Pa. Dist. 249, where this expression is used with regard to the duty of the master to supply reasonably safe appliances for the use of the servant); whatever is according to the general and ordinary course adopted by those in the same business (Cunningham *v.* Journal Co., 95 Mo. App. 47, 51, 68 S. W. 592; Reed *v.* Missouri, etc., R. Co., 94 Mo. App. 371, 379, 68 S. W. 364).

76. **"Reasonably satisfied"** means satisfied beyond a reasonable doubt. People *v.* Kernaghan, 72 Cal. 609, 611, 14 Pac. 566, where it is said to be a very "unfortunate expression" to use in an instruction on reasonable doubt in a prosecution for homicide.

To reasonably satisfy the jury, it requires the plaintiff to fairly set at rest the truth of every material fact necessary to prove his cause of action. Ball *v.* Marquis, (Iowa 1902) 92 N. W. 691, 692. See also Ball *v.* Marquis, 122 Iowa 665, 666, 98 N. W. 496.

77. Webster Int. Dict.

78. Webster Int. Dict.

As used in N. Y. Laws (1897), p. 404, c. 378, § 1117, the term means something more than the simple transfer of a teacher from one school to another, without affecting the grade. It indicates a reassignment to a lower grade after an appointment to the higher. People *v.* New York Bd. of Education, 174 N. Y. 169, 176, 66 N. E. 674.

"Reassigned."— See Parsons *v.* Crabb, 31 U. C. Q. B. 434, 457, where this word has been said not to show, in the absence of express averment, that the property assigned came back to the same person.

79. Black L. Dict. [*citing* Sweet].

erally, FIRE INSURANCE, 19 Cyc. 638; LIFE INSURANCE, 25 Cyc. 781; MARINE INSURANCE, 26 Cyc. 711.)

REBATE. As a noun, deduction; abatement.[80] As a verb, to abate or deduct from; to make a discount from for prompt payment.[81] (Rebate: From Freight Charge, see CARRIERS, 6 Cyc. 498, 500. From Insurance Premium, see LIFE INSURANCE, 25 Cyc. 752. On Surrender of Liquor Tax Certificate, see INTOXICATING LIQUORS, 23 Cyc. 153.)

REBELLION. A term said to be synonymous with "insurrection";[82] an insurrection of large extent and long duration;[83] such an insurrection against lawful authority as is void of all appearance of justice.[84] (Rebellion: In General, see INSURRECTION, 22 Cyc. 1451; WAR. Limitations as Affected by, see LIMITATIONS OF ACTIONS, 25 Cyc. 1287. Municipal Bonds in Aid of, see MUNICIPAL CORPORATIONS, 28 Cyc. 1577. Participation in as Disqualification to Hold Office, see OFFICERS, 29 Cyc. 1385. Recognition of Belligerency, and Accession of New Government, see INTERNATIONAL LAW, 22 Cyc. 1709.)

REBILLING RATE. One in which goods received in unbroken carload lots over one line of railway can be rebilled over the same or another line, completing one continuous trip of the same commodity.[85]

REBUILD. To build up again, to build or construct after having been demolished.[86] (Rebuild: Option to Restore or Repair, see FIRE INSURANCE, 19 Cyc. 888. Right to, see LANDLORD AND TENANT, 24 Cyc. 1091.)

80. Webster Int. Dict. See also Hydraulic Press Brick Co. *v.* McTaggart, 76 Mo. App. 347, 354 [*citing* Bouvier L. Dict.; Century Dict.; Worcester Dict.], where it is said that "a debtor is not entitled to a promised rebate until he has paid or tendered the price of the thing sold. This is the true import of the term . . . arising both from the sense given to it in the ordinary use, and in the definitions of the lexicographers."

In insurance rebates are deductions from stipulated premiums allowed in pursuance of antecedent contract. State *v.* Hibernia Ins. Co., 38 La. Ann. 465, 467.

Rebate of interest is a discount or abatement of interest on sums of money not yet due and payable. It is not a payment back of interest due and which has been paid. Hamor *v.* Eastern R. Co., 133 Mass. 315, 320.

81. Webster Dict. [*quoted* in State *v.* Schwarzschild, 83 Me. 261, 265, 22 Atl. 164].

82. State *v.* McDonald, 4 Port. (Ala.) 449, 456.

83. Martin *v.* Horton, 1 Bush (Ky.) 629, 633.

84. Hubbard *v.* Harnden Express Co., 10 R. I. 244, 247.

Used in a publication alleging that a British subject in Brazil participated in a rebellion there does not necessarily have the signification which would be attributed to it if that word were applied in connection with acts done in the United States, or in a place in which the person accused of participating in the rebellion would be brought within the peril of the English law, so that such statement is not libelous, as charging a crime. Crashley *v.* Press Pub. Co., 74 N. Y. App. Div. 118, 122, 77 N. Y. Suppl. 711.

Rebellious mob.— See Harris *v.* York Mut. Ins. Co., 50 Pa. St. 341, 350, where it is said: "The difference between a rebellious mob and a common mob is, that the first is high treason, the latter a riot; the mob wants a universality of purpose to make it a rebellious mob, or treason."

85. Alabama, etc., R. Co. *v.* Railroad Com'rs, 86 Miss. 667, 710, 38 So. 356, where it is said that this is done by "simply changing the consignee and altering the destination of the identical shipment, without unloading or handling of freight."

86. Century Dict. [*quoted* in Bath Tp. Bd. of Education *v.* Townsend, 63 Ohio St. 514, 522, 59 N. E. 223, 52 L. R. A. 868].

"Rebuilding" may mean putting in thorough and perfect repair. Johnson Dict. [*quoted* in Doe *v.* Withers, 2 B. & Ad. 896, 900, 1 L. J. K. B. 38, 22 E. C. L. 375].

"Effectually rebuilding and repairing" has been said to mean more than "effectually repairing." The first might be understood to mean repairing those parts which merely needed repair and rebuilding those which were not otherwise repairable; the other might imply merely putting the whole in the best state which its then condition allowed of. Doe *v.* Withers, 2 B. & A. 896, 901, 1 L. J. K. B. 38, 22 E. C. L. 375.

Rebuilding or repairing a highway in one town by apportioning the expense to other towns benefited thereby fairly means keeping a highway in repair, in view of its continuing interests and the continuing duty of the town benefited by it, and therefore rebuilding or repairing is not to be construed as limited to one point of time, but as including the future as well as the present. Campton *v.* Plymouth, 64 N. H. 304, 308, 8 Atl. 824.

"Rebuilt" on another site, used in reference to a bridge, is said not to be strictly accurate; for a new bridge in another place cannot strictly be said to be the old one rebuilt. But the meaning is clear, and "replaced by," or any equivalent phrase, would express it correctly. Seabolt *v.* Northumberland County, 187 Pa. St. 318, 324, 41 Atl. 22.

REBUTTABLE PRESUMPTION. A presumption which may be rebutted by evidence; a species of legal presumption which holds good until disproved.[87] (See PRESUMPTION, 31 Cyc. 1169.)

REBUTTAL. The introduction of rebutting evidence; the stage of the trial at which such evidence may be introduced; also the rebutting evidence itself.[88] (Rebuttal: Admissibility of Evidence in — Civil Action in General, see TRIAL; Criminal Prosecution, see CRIMINAL LAW, 12 Cyc. 555. Affidavit in, see INJUNCTIONS, 22 Cyc. 944. Burden of Proof, see EVIDENCE, 16 Cyc. 926. Of Evidence — In Justification in Action For Libel or Slander, see LIBEL AND SLANDER, 25 Cyc. 514, 519; In Mitigation in Action For Libel or Slander, see LIBEL AND SLANDER, 25 Cyc. 519; Of Malice in Action For Libel or Slander, see LIBEL AND SLANDER, 25 Cyc. 500; Of Threats, see HOMICIDE, 21 Cyc. 968. Of Inference of Malice From Want of Probable Cause For Prosecution, see MALICIOUS PROSECUTION, 26 Cyc. 53. Of Presumption of — Fact, see EVIDENCE, 16 Cyc. 1070; Fraud, see FRAUDULENT CONVEYANCES, 20 Cyc. 453; Malice, see HOMICIDE, 21 Cyc. 880; Marriage, see MARRIAGE, 26 Cyc. 889; Payment From Lapse of Time, see JUDGMENTS, 23 Cyc. 1469; MORTGAGES, 27 Cyc. 1401. Order of Proof in — Civil Action, see TRIAL; Criminal Prosecution, see CRIMINAL LAW, 12 Cyc. 555. To Disprove Written Instruments Produced in Evidence, see EVIDENCE, 17 Cyc. 724.)

REBUTTER. A defendant's answer of fact to a plaintiff's surrejoinder; the third pleading in the series on the part of the defendant.[89]

REBUTTING EVIDENCE. A term particularly applied to that evidence given by plaintiff to explain or repel the evidence given by defendant;[90] evidence adduced to rebut a presumption of fact or of law, that is, to avoid its effect; and evidence adduced to destroy the effect of prior evidence, whether by explanation or direct denial;[91] evidence in denial of some affirmative fact which the answering party is endeavoring to prove;[92] that evidence which has become relevant or important only as an effect of some evidence introduced by the other side;[93] that evidence which is given by a party in a case to counteract or disprove facts given in evidence by the other side;[94] that evidence which is given to explain, repel, counteract, or disprove facts given in evidence by the adverse party;[95] that evidence which repels or counteracts the effect of evidence which has preceded it;[96] not merely evidence which contradicts the witnesses on the opposite side and corroborates those of the party who began, but evidence in denial of some affirmative fact which the answering party has endeavored to prove.[97] (See REBUTTAL, *ante*, p. 1571.)

RECALLING WITNESS. See WITNESSES.

RECAPTION. A species of remedy by the mere act of the party injured.[98] (See ANIMALS, 2 Cyc. 407 text and note 46; ASSAULT AND BATTERY, 3 Cyc. 1053, 1078. See also RESCUE; TRESPASS; TROVER AND CONVERSION.)

87. Black L. Dict. [*citing* Best Pres. § 25; 1 Greenleaf Ev. § 33].

88. Black L. Dict.

89. Black L. Dict. See also Reinhalter *v.* Hutchins, 26 R. I. 586, 60 Atl. 234; PLEADING, 31 Cyc. 269.

90. Toledo, etc., R. Co. *v.* Wales, 11 Ohio Cir. Ct. 371, 376, 5 Ohio Cir. Dec. 168.

91. Toledo, etc., R. Co. *v.* Wales, 11 Ohio Cir. Ct. 371, 376, 5 Ohio Cir. Dec. 168 [*citing* Best Ev. 785].

92. Rice Ev. [*quoted* in State *v.* Fourchy, 51 La. Ann. 228, 240, 25 So. 109].

93. State *v.* Smith, 120 La. 530, 532, 45 So. 415.

94. Bouvier L. Dict. [*quoted* in Toledo, etc., R. Co. *v.* Wales, 11 Ohio Cir. Ct. 371, 376, 5 Ohio Cir. Dec. 168, 170].

95. People *v.* Page, 1 Ida. 189, 194.

96. Davis *v.* Hamblin, 51 Md. 525, 539.

97. Marshall *v.* Davies, 78 N. Y. 414, 420. "Rebutting" has a two-fold signification, both in common and legal parlance. It sometimes means contradictory evidence only; at other times conclusive or overcoming testimony. Fain *v.* Cornett, 25 Ga. 184, 186.

Rebutting testimony is said to be addressed to evidence produced by the opposite party, not to his pleading. Lux *v.* Haggin, 69 Cal. 255, 414, 10 Pac. 674, 4 Pac. 919.

98. 3 Blackstone Comm. 4 [*quoted* in Prigg *v.* Pennsylvania, 16 Pet. (U. S.) 539, 613, 10 L. ed. 1060, where it is said: "This happens, when any one hath deprived another of his property in goods or chattels personal, or wrongfully detains one's wife, child or servant; in which case, the owner of the goods, and the husband, parent or master, may lawfully claim and retake them, wherever he happens to find them, so it be not in a riotous manner, or attended with a breach of the peace"].

RECAPTURE. The act of retaking or recovering by capture.[99] (Recapture: Of Prisoner, see PRISONS, 32 Cyc. 341. Of Vessel, see WAR.)

RECEDITUR A PLACITIS JURIS POTIUS QUAM INJURIÆ ET DELICTA MANEANT IMPUNITA. A maxim meaning "Positive rules of law will be receded from, rather than crimes and wrongs should remain unpunished."[1]

RECEIPT. An acknowledgment of payment or delivery;[2] an acknowledgment of the fact of payment or other settlement between debtor and creditor;[3] a written acknowledgment of something received as of right by the party writing;[4] a written admission made by the party signing it, of the fact which it recites;[5] a written admission of the fact of payment and receipt of money;[6] such a written acknowledgment by one person of his having received money from another as will be *prima facie* evidence of that fact in a court of law;[7] the written acknowledgment of the receipt of money or a thing of value,[8] synonymous with "DISCHARGE,"[9] *q. v.* (Receipt: Admissibility as Evidence — In General, see EVIDENCE, 17 Cyc. 494, 699; PAYMENT, 30 Cyc. 1288; RELEASE; In Action By or Against Executor or Administrator, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 1027; In Action on Account, see ACCOUNTS AND ACCOUNTING, 1 Cyc. 349; In Action on Note, see COMMERCIAL PAPER, 8 Cyc. 248. Alteration of, see ALTERATIONS OF INSTRUMENTS, 2 Cyc. 152. As Accord and Satisfaction, see ACCORD AND SATISFACTION, 1 Cyc. 322. As Contract of Insurance, see FIRE INSURANCE, 19 Cyc. 595. As Conveyance of Land, see ADVERSE POSSESSION, 1 Cyc. 1098. As Evidence of — Payment, see PAYMENT, 30 Cyc. 1288; Settlement and Satisfaction, see LIFE INSURANCE, 25 Cyc. 903; Title to Public Lands, see PUBLIC LANDS, 32 Cyc. 855. As Release, see RELEASE. As Subject of Forgery, see FORGERY, 19 Cyc. 1384. As Writing Required by Statute of Frauds, see FRAUDS, STATUTE OF, 20 Cyc. 349. Cancellation of, by General Land-Office, see PUBLIC LANDS, 32 Cyc. 1012. Effect of — As Estoppel, see ESTOPPEL, 16 Cyc. 755; As to Accord and Satisfaction, see ACCORD AND SATISFACTION, 1 Cyc. 322; In Action on Note, see COMMERCIAL PAPER, 8 Cyc. 248; To Show Payment in General, see PAYMENT, 30 Cyc. 1288. Failure to Record, see LICENSES, 25 Cyc. 636. Final, see MINES AND MINERALS, 27 Cyc. 617. For Purchase-Price of Public Land, see PUBLIC LANDS, 32 Cyc. 887. For Rent, see LANDLORD AND TENANT, 24 Cyc. 1191. Insur-

99. Webster Int. Dict.

1. Peloubet Leg. Max.

2. The Missouri *v.* Webb, 9 Mo. 193, 195.

3. Dobbin *v.* Perry, 1 Rich. (S. C.) 32, 33.

4. Reg. *v.* White, 1 Den. C. C. 208, 214.

5. Pendexter *v.* Carleton, 16 N. H. 482, 489.

6. Thompson *v.* Layman, 41 Minn. 295, 296, 42 N. W. 1061.

7. Kegg *v.* State, 10 Ohio 75, 79.

8. Krutz *v.* Craig, 53 Ind. 561, 574.

9. State *v.* Shelters, 51 Vt. 102, 104, 31 Am. Rep. 679.

Release distinguished. See Equitable Securities Co. *v.* Talbert, 49 La. Ann. 1393, 1404, 22 So. 762. See also Crane *v.* Alling, 15 N. J. L. 423, 425.

Accountable receipts are receipts for money to be accounted for. People *v.* Bradley, 4 Park. Cr. (N. Y.) 245, 247.

A receipt for money on deposit is a contract in writing for payment of money. Noble School Furniture Co. *v.* Washington School Tp., 4 Ind. App. 270, 29 N. E. 935, 937.

Shipping receipt is the written acknowledgment of the mate receiving cargo, acknowledging the receipt of goods on board the vessel, describing them by the marks upon them or the packages. People *v.* Bradley, 4 Park. Cr. (N. Y.) 245, 247.

Nature of, as admission, acknowledgment, or contract.—"An admission only" see State *v.* Branch, 112 Mo. 661, 669, 20 S. W. 693. "A mere admission of payment" see Martin *v.* Northern Pac. Express Co., 10 Manitoba 595, 609. "May be a mere acknowledgment of payment of a certain sum of money, or it may also contain a contract" see Cummings *v.* Baars, 36 Minn. 350, 353, 31 N. W. 449. "May be either mere acknowledgments of payment or delivery, or they may also contain a contract to do something in relation to the thing delivered" see Thompson *v.* Williams, 30 Kan. 114, 115, 1 Pac. 47. "May mean an acknowledgment of the absolute payment of the debt, or the conditional payment of the debt" see Kahl *v.* Love, 37 N. J. L. 5, 11. "Not a contract. 'It is a mere declaration or admission in writing'" see Cass *v.* Brown, 68 N. H. 85, 87, 44 Atl. 86; Ryan *v.* Ward, 48 N. Y. 204, 208, 8 Am. Rep. 539; Serat *v.* Smith, 61 Hun (N. Y.) 36, 44, 15 N. Y. Suppl. 330. "Not a contract, but merely evidence of the performance of a contract" see Hildreth *v.* O'Brien, 10 Allen (Mass.) 104. "Not a contract; it is usually but the evidence of a fact, as for instance, the payment of money — the delivery of property — the settlement of accounts, etc.." see Stewart *v.* Phœnix Ins. Co., 9 Lea (Tenn.) 104, 108.

ance Renewal Receipt, see FIRE INSURANCE, 19 Cyc. 801. Limitation of Actions on, see LIMITATIONS OF ACTIONS, 25 Cyc. 1041. Of Married Woman, see HUSBAND AND WIFE, 21 Cyc. 1322. On Distribution of Decedent's Estate, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 609. Parol Evidence Affecting, see EVIDENCE, 17 Cyc. 656. Provision in Carrier's Receipt Limiting Its Liability, see CARRIERS, 6 Cyc. 663. Shipping Receipt by Carriers, see CARRIERS, 6 Cyc. 416; SHIPPING. Stamps on, see INTERNAL REVENUE, 22 Cyc. 1624. Subject of — Forgery, see FORGERY, 19 Cyc. 1384; Larceny, see LARCENY, 25 Cyc. 15. Taxation of, see MUNICIPAL CORPORATIONS, 28 Cyc. 1683. Warehouse Receipt — In General, see WAREHOUSEMEN; Pledge Thereof, see PLEDGES, 31 Cyc. 802.)

RECEIPTOR. A name given in some of the states to a person who receives from the sheriff goods which the latter has seized under process of garnishment, on giving to the sheriff a bond conditioned to have the property forthcoming when demanded or when execution issues.[10] (See, generally, ATTACHMENT, 4 Cyc. 660; EXECUTIONS, 17 Cyc. 1123.)

RECEIVE. To get by a transfer;[11] to take, as a thing offered; to accept.[12]

10. Black L. Dict. [*citing* Story Bailm. § 124].

11. Hallenbeck *v.* Getz, 63 Conn. 385, 388, 28 Atl. 519, where the word is distinguished from "take."

In construing a statute providing that an action of account may be brought and maintained by one joint tenant and tenant in common against the other, for "receiving" more than comes to his just share or proportion, Parke, B., holds that this statute applies only to the case of a tenant receiving money or something else, where another pays it, which the co-tenants are entitled to in proportion to their interests as such, and that the statute does not apply to the case of a co-tenant receiving more than his share of the rent. In this connection he draws a distinction between the words "receives" and "takes" (Henderson *v.* Eason, 17 Q. B. 701, 719, 16 Jur. 518, 21 L. J. Q. B. 82. 79 E. C. L. 701); but the reasoning of Parke, B., is disapproved in Early *v.* Friend, 16 Gratt. (Va.) 21, 47, 78 Am. Dec. 649. See also West *v.* Weyer, 46 Ohio St. 66, 71, 18 N. E. 537, 15 Am. St. Rep. 552.

"There is 'receiving'" whenever there is a change of possession — when one parts with the control of the product and another takes and accepts it. Reese *v.* State, 73 Ala. 18, 20.

12. Shuttleworth *v.* State, 35 Ala. 415, 417.

Distinguished from "accept." — Webster Dict. [*quoted* in Comptoir de'Escompte, etc. *v.* Dresbach, 78 Cal. 15, 30, 20 Pac. 28, dissenting opinion]. See also Hall *v.* Los Angeles County, 74 Cal. 502, 506, 16 Pac. 313.

The term implies "consent." — State *v.* Wynne, 118 N. C. 1206, 1207, 24 S. E. 216.

May mean "approve." — Mills *v.* Scott, 62 Miss. 525, 529. See also Grayson *v.* Richardson, 65 Miss. 222, 226, 3 So. 579; Wolfe *v.* Murphy, 60 Miss. 1, 15.

Not a synonym of "collect" see Maloney *v.* Iroquois Brewing Co., 63 N. Y. App. Div. 454, 459, 71 N. Y. Suppl. 1098.

In reference to devises of fee simple estates see Thompson *v.* Marshall, 73 Conn. 89, 94, 46 Atl. 825; Johnes *v.* Beers, 57 Conn. 296, 304, 18 Atl. 100, 14 Am. St. Rep. 101. See also Cook *v.* McDowell, 52 N. J. Eq. 351, 353, 30 Atl. 24.

Power to "receive" and hold a donation see White School House *v.* Post, 31 Conn. 240, 257.

"Receive and transmit" messages see Connell *v.* Western Union Tel. Co., 108 Mo. 459, 463, 18 S. W. 883.

"Receive, hear, and determine" see U. S. *v.* Wonson, 28 Fed. Cas. No. 16,750, 1 Gall. 5.

"Receives or agrees to receive" a bribe. — People *v.* Jaehne, 103 N. Y. 182, 193, 8 N. E. 374.

The term means "to have" under a statute providing that a purchaser at a foreclosure sale shall, during the redemption period, be entitled to receive the rents or value of the use and occupation thereof, from a tenant holding under an unexpired lease. Knipe *v.* Austin, 13 Wash. 189, 191, 43 Pac. 25, 44 Pac. 531. See also Baker *v.* Keiser, 75 Md. 332, 339, 23 Atl. 735.

To receive for discount and sale see Selden *v.* Equitable Trust Co., 94 U. S. 419, 422, 24 L. ed. 249.

"Funds received and paid out" see Demarest *v.* New Barbadoes Tp., 40 N. J. L. 604, 606.

"Received" as relating to past occurrence. — "Received" a certain sum refers to a past occurrence. Woodward *v.* Davis, 127 Ind. 172, 173, 26 N. E. 687. But as used in a guarantee in the following form, "I guaranty the sum of 200*l.* for iron received," the phrase "for iron received" means for goods already supplied, or for goods which may hereafter be supplied. Colbourn *v.* Dawson, 10 C. B. 765, 774, 15 Jur. 680, 20 L. J. C. P. 154, 70 E. C. L. 765.

"Received into record" see Pawlet *v.* Sandgate, 17 Vt. 619, 621.

"Received" meaning "bought." — In an instrument stating that a person had "received" certain goods, specifying the number and price of each kind and total value, and signed by the party to be charged, the term is of the same effect as "bought." Schultz *v.* Coon, 51 Wis. 416, 418, 8 N. W. 285, 37 Am. Rep. 839.