inferior for injuries inflicted upon him through the negligence of his immediate superior, over whom he had no control: holding, in fact, that here the negligence of the agent was the negligence of the principal. But in the last case above cited, the court (Warden J. diss.) say "that the servant takes upon himself all the ordinary risks incident to the business, including liability to injury from the negligence of other servants employed with him by the common principal, but having no control over the business or the servant who receives the injury, we are quite ready to admit. In such case they stand to each other as equals, and are alone liable for the injuries they inflict."

So that, with some differences upon minor points, the principle of the rule at the head of this article, may perhaps be considered as established in this country.

RECENT AMERICAN DECISIONS.

In the Misisssippi Court of Errors and Appeals.

THE VICKSBURG AND JACKSON RAILROAD COMPANY *vs.* WM. L. PATTON.[1]

1. The common law of England is the law of this State only so far as it is adapted to our institutions, and the circumstances of our people, and is not repealed by statute, or varied by usages which by long custom have superseded it.

2. By the common law of England, the owner of cattle, horses, &c., is bound to keep them within a sufficient enclosure; and if he permit them to escape and run at large, and wander upon the premises of another, whether enclosed or not, he is liable for the trespass, and the cattle so trespassing may be distrained *damage fiasant*. But this rule of the common law is not adapted to the circumstances and condition of the people of this State, where the population is not dense, and there are large tracts of uncultivated and unenclosed lands fit for the pasturage of cattle; and, moreover, the people of the State have, from its earliest settlement, permitted their domestic animals to run at large in the "range," and depasture on unenclosed lands; and hence the rule is not in force here.

3. In this State, the owner of cattle, horses, &c., which are not of a dangerous character, may lawfully permit them to range at large on unenclosed commons;

[1] This case will be found reported 3 Miss. Rep. 2 George, 156. We are indebted to the learned Reporter, James Z. George, Esq., for the report of the case.—*Eds. Am. L. Reg.*

and if, in so doing, they wander upon the premises of another not enclosed by a lawful fence, he is not liable for the trespass, and they cannot be distrained *damage feasant.*

4. The owner of unenclosed land may prosecute his lawful business thereon, but in so doing he must exercise reasonable care and diligence to avoid injuring the cattle of others, which may have wandered on the premises.
5. A railroad company has the exclusive right to the use and possession and enjoyment of the land upon which their track is located, and they may run their engines and cars on the same at whatever time and with whatever speed they see proper, and not inconsistent with the safety of the persons and property committed to their charge; but this right over the land is no higher nor more extensive than that of its original owner; and hence if their track be unenclosed, they must run their engines and cars with reasonable care and prudence, so as to avoid injury to cattle which may be depasturing on the track; and if they fail to do so, they will be liable for the injury done.
6. A railroad company is bound by law to keep the road and machinery in good order, and to have a sufficient number of faithful and trustworthy employees to manage and control the running of their engines and cars; and if, by their failure in any of these respects, the cattle of another depasturing on their unenclosed track be injured or destroyed, they will be responsible to the owner in damages.
7. Though there be negligence or fault on the part of the plaintiff, remotely connected with the injury, yet if the defendants' fault or negligence was the immediate and proximate cause of the injury, the plaintiff may maintain his action for damages.
8. It is competent for a plaintiff, on the trial of an action against a railroad company for damages done by them to his property by the negligent and careless running of their engine and cars, to introduce evidence to show that the general character of the engineer in charge of the train when the injury was done, was that of a reckless and untrustworthy agent.
9. The jury may allow exemplary damages against a railroad company, if it appear that the property was destroyed or injured by the gross negligence or willful and wanton mischief of its agents.

In error from the Circuit Court of Rankin County. Hon. Jno. E. M'Nair, judge.

The defendant in error sued the plaintiff in error in the court below, for the recovery of damages, which he alleges he had sustained by reason of the killing of several horses belonging to him, through the negligent misconduct of the agents of the railroad company, in running their engines and cars over them.

The defendant below pleaded the general issue, and a trial was had, resulting in a verdict and judgment for the plaintiff.

The evidence on the trial is fully set out in the opinion of the court. The instructions on behalf of the plaintiff below were as follows:—

1. Under the laws of this State, the owner of unenclosed lands has not a right to kill or destroy the horses or mules of another found on such land; and railroad corporations in this State, unless under special provision of the charter conferring such right, are not exempt from this principle.

2. That corporations are liable for the tortious acts or negligence of their servants and agents in the same manner as individuals, unless released by their charters.

3. That the defendants in running their locomotives and trains over their road, are bound to exercise such reasonable care and caution as may be necessary at any point of their road to prevent injury to the property of other persons, and by reason of the want of such reasonable care and caution by defendants, or their agents or officers or servants, injury is inflicted by their trains upon the property of other persons, the defendants are liable in damages to the owner of such property so injured.

4. If they find, from the evidence, that at the time mentioned in the complaint the defendants were running their train over the road without the officers and machinery, or either, usual and necessary to prevent collision and injury to persons or property of others, and that by reason of such want of officers and machinery, or either, and without any fault of plaintiff in the present case, the horses and mules mentioned in the complaint were run over and killed or rendered useless to the plaintiff by the defendants' train, they should find for the plaintiff.

5. If they find from the evidence that the plaintiff's property mentioned in the complaint was destroyed on defendants' railroad track, in consequence of a want of reasonable care and diligence on the part of the defendants or their agents employed on the train at the time, and without any culpable neglect of the plaintiff directly causing the injury, they should find for the plaintiff.

6. That where there is mutual negligence between "the plaintiff and defendant, the plaintiff may still recover, if the negligence of

the defendant was the direct cause of the injury complained of, and the negligence of the plaintiff but the remote cause of such injury; and if they find in this cause, from the evidence, that there was such mutual negligence, and that the negligence of the plaintiff was the remote, and that of the defendant the direct cause of the injury complained of, they should find for the plaintiff."

It is not necessary to the understanding of the opinion of the court, that the instructions given in behalf of the defendant should be set out.

The opinion of the court was delivered by

HANDY, J.—This action was brought by the defendant in error against the plaintiff in error, to recover damages occasioned by the locomotive and cars of the railroad running over and killing or wounding several horses and a mule belonging to the defendant in error; which injury is alleged to have been caused by the negligence, mismanagement, and improper conduct of the railroad company or its agents.

It appears by the evidence in the record, that the injury was done in July, 1851, when the cars were on their usual morning trip from Brandon to Jackson; and that the slaves of Patton had ridden the horses to the place where they were at work in the woods, about a mile from the residence of Patton, and along a neighborhood road which crossed the track of the railroad, and which was the road used in going from Patton's residence to the place where his slaves were at work. The animals appeared to have been turned loose to pasture, their owner being in the habit of pasturing them upon unenclosed and uncultivated lands adjoining the railroad track, owned by other persons, and which had been used by the neighborhood generally for pasturage for a great number of years, without objection, such animals having been accustomed to run at large for pasture in the neighborhood since, at least the year 1829. About the time the injury occurred, one of the horses was seen by a witness, standing on the railroad track where the neighborhood road crosses it, and the others were standing near the intersection of the two roads. From that point to the place where the

horses were visible by persons on the cars coming from Brandon, it was not less than two hundred yards, and probably more; and from the same point to the culvert, where the collision took place, it was a further distance of about one hundred and forty yards, the track being for this latter distance, thickly set on both sides with bushes, and on an embankment four or five feet in height. On the morning of the occurrence, the cars were running with unusual rapidity, such as had never been seen before by a witness who lived near the road. This witness was in full view of the cars and of the animals, when the locomotive came within sight of the animals. The whistle was sounded before reaching the place of intersection where they were standing, but there was no change of speed perceived, nor any effort to stop the locomotive, by applying the *brake* or reversing the engine. When the locomotive approached within about one hundred yards of the place where the animals were standing, they turned and ran down the track until they reached the culvert, and being unable to go further or to escape from the track, they were there overtaken by the locomotive, and mangled or killed; and the locomotive thrown from the track down the embankment, a distance of some thirty or forty feet.

The train at the time consisted of the locomotive and tender, a negro car, a passenger car, and five freight cars; and the persons in charge of it were the engineer, the conductor, and a negro fireman. There was a grade on the track from the culvert to the point where the horses were first visible to the engineer, at the rate of twenty-four feet to the mile, by measurement, and a moderate curve in the track.

It was proved by an experienced engineer that the engine used on this road at the time, was in good condition—that such an engine, when running at the speed of twenty miles an hour, can be stopped in six hundred feet, by applying the *brakes*, which should be in the front and rear of every car, and worked by competent hands, and by reversing the engine in due time; and if there be sand boxes, to scatter sand upon the track, which is necessary in case it should be wet, he was of opinion that the engine could not have been stopped in six hundered feet upon this road, from his knowledge of

its condition and the train usually attached to it—that if it was wet at the time, the difficulty of stopping would have been thereby increased—but that if every thing had been in perfect order, six hundred feet is a sufficient distance for stopping the engine—that nine hundred feet would be necessary if the track was wet, and there was a grade of even two feet—that *brakes*, with a sufficient number of brakemen, and sand boxes filled with dry sand, are essential to the management of the train with safety.

There was testimony showing that there was much grass on the track at the time, and also testimony to the contrary; and it was shown, that with the track in that condition, it would have been difficult to stop the locomotive; and if the track was in that state, that it was in a very bad condition.

There was also some testimony showing that the track was wet at the time; but there is a clear preponderance of evidence to show to the contrary, that the weather was clear, hot and dry, and that there was no dew on the track at the time.

As to the character of the engineer, the testimony is conflicting. But while there is testimony to show that he was attentive and competent, the weight of evidence tends to show that he was not a careful and prudent man; that he was addicted to dissipation and drunkenness, and sometimes not sober when in the discharge of his duties as engineer; that it was often necessary to awake him in the morning for the cars, after he had been drinking; that there was a constant sounding of the whistle on the morning of this occurrence, and before reaching the point where the animals were found, so much so as to attract the observation of the neighbors at the unusual rapidity and noise of the cars; and that the engineer was in the habit of sounding the whistle when there were no cattle on the track, and when there was no occasion for it, and wantonly.

It was in proof by a witness, who was on the locomotive with the engineer at the time, that the engineer had been drinking liquor that morning, enough to feel it, but "was not drunk, but lively;" that when they first saw the animals, which was at a distance of about two hundred yards from the place where they were crossing the road, this witness remarked to the engineer that there was

danger, and that he replied, *he did not care, let them get out of the way;* that he did nothing to stop the train until the locomotive struck the first of the animals, and then the fireman sprang to the *brake* and witness helped him, but without effect; that about that time, the engineer reversed the engine; that no order was given to apply the *brake*, the fireman acting of his own accord, and the witness, to save himself.

The testimony of this witness is impeached by the production of a letter, testified by a witness to have been written, at his instance, shortly after the occurrence, to the president of the railroad company, exculpating the engineer from all blame; which letter he denied in his disposition that he ever wrote or authorized to be written. But in many material respects his testimony was sustained by the other witnesses; and the question of credibility was one which the jury had the right to determine, under all the circumstances.

It was further proved that the conductor, a lad of about seventeen years of age, was in the passenger car when the collision took place, and had been there for some time, reading a magazine or something of that kind, and paying no attention to the progress of the train; and that he knew nothing of the danger until he heard the sound of the whistle, when he looked out and saw the animals running; he sat down immediately and felt a sudden motion like that caused by reversing the engine. He then got out of the cars and found that the engine had run off the track, the negro car across the track, and the passenger car thrown nearly off the track, the animals lying dead or wounded upon the track. This witness proved that the cars started behind their usual time that morning from Brandon, and were running at the rate of eighteen or twenty miles an hour when the collision occurred.

It was further proved in behalf of the railroad company, by a witness, who was not an engineer, but had been superintendent of this railroad for many years, that he was at the place on the day after the occurrence, and was of opinion that if the engine was running at its usual speed and there was dew and grass on the track, it could not have been stopped, at the point where the acci-

dent occurred, in less than one thousand to fifteen hundred feet, with every appliance; that there was a curve and a grade descending towards the culvert, from Brandon, of thirty-two feet to the mile, as he judged by his eye; that there was much grass on the track, and he considered the road, and cars, and locomotive in good condition; that the grass would cause the wheels to slide, and render it difficult to stop the cars.

There was not more than one *brake* to the train, no brakemen, and no sand-boxes, and the track was not fenced in or enclosed.

This appears to be the substance of the evidence, and it is here stated so much at length, in order that some of the questions presented in the case, and depending upon it, may be properly comprehended.

The value of the property destroyed, or injured, was proved to be $550 or $600, and some further damage is shown to have resulted from the injury. The jury found a verdict of $1,211 90, which exceeded the value of the property and actual damage proved; and the defendant below moved for a new trial. First, because the verdict was contrary to law and evidence; and second, because the damages were excessive. This motion was overruled, and the case is brought here for alleged error in that, and in the ruling of the court upon the trial, to which exceptions were taken.

Several questions of great importance, and of the gravest public interest, are here presented for the first time for the determination of this court. Fortunately these questions, though new in this court, have engaged the attention of the most learned courts in this country and in Englaod; and in the consideration of them, in addition to the aid of the able arguments of the counsel for the respective parties, we have had the benefit of numerous adjudications of other judicial tribunals, involving the same or similar questions. By such aids, we were enabled to come to conclusions satisfactory to our minds, upon a subject, of such profound importance in its direct and collateral bearings, and will proceed to state the views we take of the various questions presented for decision.

It is insisted in behalf of the railroad company, that by their charter, they had the absolute and exclusive right to the land

covered by their track, with the privilege of running their engines and cars at whatever times and at whatever speed they saw proper, without obstruction; that they were not required by their charter nor by any other law, to fence their track; that the exclusive property in it being in the company, it was a wrong on the part of the owner of these animals to suffer them to be upon the track; that it was his duty to keep them within his own enclosure, or upon his own premises, and that if injury occurred to them, in consequence of being suffered to go at large and where they might be upon the railroad track, and thereby interfere with the legal and proper business of the railroad, it was by the plaintiff's own wrong, for which he is entitled to no redress; that being on the road wrongfully, and in derogation of the lawful business of the company, they were not bound to pay any attention to them, and might lawfully run their engines and cars in their proper business, without regard to them, and without responsibility for their destruction.

The first point of inquiry, therefore, is, what are the rights and duties of the railroad company, in the use of their road, with reference to the rights of others?

It is certainly true, that they have the absolute and exclusive right to run their engines and cars upon their track in furtherance of the objects of their charter, without interference by others; and that no one else has any right whatever to the use or occupancy of their track. But this right is to be exercised in subordination to the general laws and policy of the State, unless where the company is, expressly or by necessary implication, excepted from their operation. And while their duties to those immediately connected with them in the objects of their business, are faithfully to be preformed, the rights of others collaterally interested in their operations, are not to be disregarded. The highest of these duties is that which arises from a proper regard for the safety *of persons* who entrust their lives to the care and skill which are bound to be employed in the use of vehicles of so much hazard and danger. In this respect, the law imposes upon such companies the greatest strictness in providing all things necessary to the safety of passengers, which

care, skill and foresight require; and that their agents should be faithful and vigilant, and in all respects competent and trustworthy of the great responsibilities committed to them. Without an implied guaranty by such companies, for fidelity in these respects, the dangerous power given to them could never have been granted.

The relations of the company with other persons, growing out of the use of their franchise, are also governed by the general rules of law, from which, for the most part, they are not exempted by their charter. Their right of exclusive use and enjoyment of their track, confers no power to violate the rights of others with which the exercise of their right may come in conflict; but must be exercised so as not to injure the rights of others. It is no greater than the owner of the land, in fee simple, had before it was acquired by the company; and if such owner had no right, in carrying on his lawful business upon his own unenclosed land, to destroy his neighbor's beasts found upon it, neither could this company, in conducting their business, justifiably destroy such animals, unless the act was unavoidable, after the exercise of all due skill, prudence and care, by the company and its agents. For the rights and powers of the original proprietor, with regard to the land, were at least as high as those of the railroad company, and the rights of the owner of the animals, whatever they were, were as much under the protection of the law as those of the company. The idea is wholly inadmissible, that in giving the company the use of the land covered by their track, for the purpose of running their engines and cars, it was intended to confer upon the corporation privileges and immunities in the land, which the original owner, who had the full and absolute dominion over the same property, to all intents and purposes, did not possess; and it is manifest, that no immunity being provided in their charter, they hold the land subject to the laws and general policy of the State, with no power, as to dominion over it, superior to that of the original proprietor.

Let us, then, test the rights and duties of the parties to this controversy, by the same rules of law applicable to the relations of the proprietor of the land before it was granted to this company, and the owner of the animals, the subject of this suit.

Suppose such proprietor, not having enclosed his land, had had upon it works, in which dangerous machinery was employed in carrying on his lawful business; or suppose he had had a railroad upon it, and in full operation, performing all the business of such a work, for his individual benefit and profit, but with no safeguards to protect his works against injury from the cattle of his neighbors; what is the rule by which, under such circumstances, he must be governed in the use of his property, in the way he had seen proper to use it, with reference to the encroachment of his neighbors' beasts upon his land, and their interference with his business? It is clear, that there was no *right* in his neighbors *to permit their cattle to encroach upon his property.* But if they had a right to suffer their cattle to go at large in a neighboring range or common pasture, ordinary prudence would dictate, that the proprietor of the land and works should take proper means, by fences or otherwise, to prevent intrusions which would in all probability be made by them upon his property, and to the injury of his business; and if he omitted to do so, and without such precautions, continued to pursue his business, and use his property, regardless of the fact that the cattle were in the way, and, without the necessary care and prudence to avoid injury to them at the time, and the cattle should be destroyed, he would be responsible; unless under our laws the cattle would be trespassers, and liable to be distrained *damage feasant.*

The question, then, is, whether by our laws and policy a man is compelled to keep up his cattle, so as to prevent depredations upon his neighbor's unfenced and unenclosed premises; or whether a man is not justified in suffering his cattle to go at large in the range or common pasture, without liability to those on whose premises, not being lawfully fenced, they may go; and whether it is not required that the owner of lands before he can justify an injury done to his neighbor's beasts, which have come upon his lands, must not show that the trespass was done notwithstanding he had such a fence as is required by law, or that the injury was unavoidable, and such as could not have been prevented by due care and prudence.

It is urged in behalf of the railroad company, that by the rule

of the common law, the owner of the cattle was bound to keep them within his own enclosure; that the owner of lands was not required to guard against their intrusion upon his premises, but that the owner of cattle was bound to prevent them from entering upon the premises of others, whether fenced or not; that this rule of the common law prevails here, and that it is unlawful to permit cattle to graze in a neighboring range or common, or unenclosed pasture, from which they may go upon the premises of individuals to their injury; and consequently, that the act of the plaintiff, in permitting his animals to go at large, being unlawful, he is not entitled to any redress for their loss, which resulted from his own wrong.

These positions are sustained by decisions of the Supreme Courts of New York, Vermont, Pennsylvania, and Michigan, founded on the reason, that the rule of the common law prevailed in those States, which compelled persons to keep their cattle off their neighbor's lands, and holding that that principle is applicable to cattle suffered to go at large and found upon railroad tracks, where they were destroyed. On the contrary, a different rule is held in Connecticut, Indiana, Ohio, South Carolina, and Alabama; *Stadwell* vs. *Ritch*, 14 Conn. 293; *Seeley* vs. *Peters*, 5 Gilman, 130; *Kerwhaker*, vs. *Cleveland Railroad Company*, 3 Ohio State R. 172; *Fripp* vs. *Hasell, et al.*, 1 Strob. Law R. 176; *Nash. and Chatt. Railroad* vs. *Peacock*, 25 Alabama, 232; and the rule of the common law is held not to prevail, because it is inapplicable to the condition and circumstances of the people of those States, and repugnant to the custom and understanding of the people, from their first settlement down the present time.

It cannot be denied that the common law of England is the law of this State only so far as it is adapted to our institutions and the circumstances of the people, and is not repealed by statutes, or varied by usages which, by long custom, have superseded it; and that where the reason of it ceases, the rule itself is inapplicable. In a densely populated country like England, with small farms and but few cattle, the reason of the rule that every man shall prevent his cattle from going at large, is apparent; and the rule prevails, because it is suited to the condition of that country. The policy

of the common law, therefore, was, that it was more convenient that a man should be bound to *fence his cattle in*, than that he shall *fence his neighbors' out.* The same reason may render it applicable in many of the States of this Union, and in those where this rule has been held to prevail.

But the circumstances of our people are widely different from those of such communities. This State is comparatively new, and for the most part sparsely populated, with large bodies of woodlands and prairies, which have never been enclosed, lying in the neighborhoods of the plantations of our citizens, and which, by common consent, have been understood, from the early settlement of the State, to be a common of pasture, or, in the phrase of the people, the "*range,*" to which large numbers of cattle, hogs, and other animals in the neighborhood, not of a dangerous or unlawful character, have been permitted to resort. These large numbers of cattle and other animals are necessary to the wants and business of the people, whose great interest is in agriculture; and the large and extensive tracks of land suitable for the pasture of stock, are most generally not required by the owner for his exclusive use. If so required, no one questions his right to fence them in, and to appropriate them accordingly. But until he does so, by the universal understanding and usage of the people they are regarded as commons of pasture, for the range of cattle and other stock of the neighborhood.

This policy is sanctioned by strong reasons of public convenience, growing out of the condition of the people. The greater part of the lands of the State have been comparatively but recently brought into cultivation. When purchased and taken possession of by their owners, they were wild. The timber had to be cleared, buildings erected, and as much land as could be, brought into speedy cultivation. The settler had but little time to enclose his lands, and therefore he made enclosures only as his necessities and convenience required. He turned his cattle into the range, because it was more convenient to do so than to build fences and keep them within his own enclosures. His neighbors did the same thing; and the practice became genral, and thus the usage has established the general rule among the people, that *it is more convenient to make fences to*

keep the cattle of others out from lands not intended to be used for pasture, *than to fence their own cattle within their enclosures.* And by this custom a large amount of pasture, which would otherwise be lost, becomes useful and valuable, in rearing great numbers of cattle and stock of various kinds, contributing greatly to the convenience and emolument of our people. It is also highly convenient in rendering a man safe in pasturing his own cattle on his own unenclosed lands, which he could not do with safety if the common law rule prevailed; because his cattle, when pasturing upon his own unfenced lands, would be liable to intrude upon his neighbor, and be subjected to the common law rule arising from the trespass. He would, therefore, be compelled to enclose his own pasture-lands before he could safely use them as such; and such a necessity in the condition of the lands of this State, would be a great public grievance.

For these considerations, the custom has grown up among the people, and is well settled by universal acceptation, that a man is entitled to permit his cattle and other stock to go at large in the neighborhood range, and is not liable as a trespasser for the damage done by them to the premises of his neighbor, which are not enclosed by a lawful fence. This being the condition of the people from the first settlement of the State, and the same reasons of convenience still prevailing, it is manifest that the rule of the common law is wholly unsuited to our circumstances, and, upon well settled doctrine, cannot be held to be applicable here.

If there could be a reasonable doubt upon this point, it must be removed by the provisions of our statutes. These provisions are utterly irreconcilable with the rule of the common law, and are made with reference to the contrary policy which has existed here.

The twelfth section of the Act of 1822, Hutch. Code, 276, which was a re-enactment of an Act passed in the early history of the State, provides that "it shall not be lawful for any person to drive any horses, mules, cattle, hogs, or sheep, *from the range to which the same may belong.*" The next section provides penalties for the violation of that provision. The fourteenth section prohibits animals of a particular character from being suffered *to run at large in the*

woods, or in any *enclosed* range. Other sections make it the duty of each owner of horses, or other stock, to have a *brand* and *ear-mark*, and to have the same recorded; the object of which was, that the stock of each owner in the range might be known and designated. And the seventeenth section prohibits the owner from sending or permitting any slave or Indian to go "*into any of the woods or ranges of this State*," to mark or brand any cattle, &c.

These provisions clearly recognize the right of any owner of horses, cattle, or other stock, to put them in the *range*, which means the unfenced wood lands, or other pasture lands in the neighborhood.

Again. The Act of 1822, Hutch. Code, 278, 279, which is a transcript of the Territorial Act of 1807, provides that, "if any horses, &c., shall break into any grounds enclosed with a strong and sound fence, five feet high, well staked and ridered, or sufficiently locked, and so close that the beasts breaking into the same could not creep through, *which shall be deemed a lawful fence*," the owner shall be liable to the party injured, for damages. This provision is altogether useless, if the owner was bound to keep his cattle within his own enclosure; for by that rule he was liable for damages to the party injured by the trespass of his cattle, whether his premises were fenced or not. But it is plain that it was the object of this statute to change the rule of the common law, and to provide that the party whose cattle should intrude upon the premises of another, should not be liable for damages, unless the party injured kept a lawful fence. This intention clearly appears from the third section of the same Act, which prohibits "*any person injured for want of such sufficient fence*," under a heavy penalty, from wounding or killing any horses, mules, or other stock, trespassing upon their premises.

The policy upon which these enactments are founded, and the acts themselves, clearly establish two principles—first, *that the owner of cattle may rightfully suffer them to go at large for pasture upon the neighboring range; and*, secondly, *that the owner of lands is bound to keep them fenced with a lawful fence, if he would prevent the intrusion of cattle upon them, and, otherwise, that he can-*

not complain that the intrusion is unlawful. And it has been held by this court, that under these provisions, when cattle break through an insufficient fence into the premises of a party, he has no right of action for damages, and cannot distrain *damage feasant*, which were clear rights at the common law; thus conclusively settling that the rules of the common law are not in force here. *Dickson* vs. *Parker*, 3 How. 220.

It is to be observed, that the cases above adverted to, holding that cattle found upon a railroad track may lawfully be destroyed, in the prosecution of the business of the company, are founded upon the reason, that the owner was compelled by the rule of the common law to keep them up, and that it was by the violation of that common law duty that the cattle were at large and upon the road; and, therefore, that the owner, having been guilty of a wrong, is entitled to no redress against the company. Having shown that this rule of the common law does not prevail here, the argument founded upon it fails; and the conclusion follows, that the plaintiff cannot be considered as a wrong-doer in suffering his animals to go at large for pasture, and that the animals were not unlawfully on the railroad track so as to justify the company in destroying them, without using all due care, prudence and skill, to avoid their destruction.

But it is contended that the railroad company, having the exclusive use of their track, the plaintiff's cattle were improperly there, interfering with the lawful business of the company to the hazard of the lives of their passengers, and impeding the speed which, from the very nature of their business, they were authorized to use in running their engines upon their track, and, therefore, that the injury was done without wrong on the part of the company.

This position is met with so much clearness and force by the Supreme Court of Ohio, in the case above cited, as to justify our adoption of the views of the subject there taken. The court say, "The defendant's right to the exclusive and unmolested use of its railroad track, is undeniable. And it must be conceded that the plaintiff had no *right* to have his hogs on the track, and that they were there improperly. But how came they there? If the plain-

tiff had placed them there, or knowing them to be there, had omitted to drive them off, he would have been, perhaps, precluded from all claim to compensation, But it would appear that, in the exercise of the ordinary privilege of allowing these animals to be at large, by the plaintiff, they accidentally, and without his knowledge, wandered upon the railroad track. The right of the defendant to the free, exclusive, and unmolested use of its railroad, is nothing more than the right of every other land proprietor in the actual occupancy and use of his lands, and does not exempt it from the duty enjoined by law upon every person so to use his own property as not to do any unnecessary and avoidable injury to another. Finding the animals upon the track, it was the right, and indeed the duty, of the agents of the company to drive them off, but not to injure or destroy them by unnecessary violence. The owner of a freehold estate in lands, enclosed by a lawful fence, has the right to expel trespassing animals which have broken through his enclosure; but in doing so, he would become liable in damages to the owner of the animals, if they be injured by the use of unnecessary and improper means, although the latter would be bound to make reparation for the injury done to the former, by the trespassing animals. It is not pretended that the railroad of the defendant was under enclosure, through which the plaintiff's creatures had broken. It is true, that there is no law here *requiring* railroad companies to fence their road. But when they leave their roads open and unfenced, they take the risk of intrusions from animals running at large, as do other proprietors who leave their lands unenclosed. If a farmer undertake to cultivate his ground in corn without enclosing it, he would be doubtless troubled by the destructive intrusions of cattle running at large; but without a sufficient fence, he could not maintain an action against the owner of the animals for the trespass. The defendant constructed its railroad with a knowledge that it was the common custom of the country to allow domestic animals to run at large upon the unenclosed ground of the neighborhood; and without the precaution of enclosing its railroad, the company could not sustain an action against the owner of such animals at large, as might happen to wander upon the track of the road. The owner of

the animals, in allowing them to run at large, takes the risk of the loss or injury to them by unavoidable accident; and the company, in leaving its road unprotected by enclosure, runs the risk of the occasional intrusions of such animals upon its road, without any remedy against the owner."

It is a sound and revered maxim of the law, that though a man may do a lawful thing, yet if damage thereby befall another, he shall be answerable for it, if he could have avoided it. Broom, Legal Maxims, 275; *Aldridge* vs. *Great Western R. R. Co.*, 4 Scott, N. R. 156. This principle is entirely at war with the doctrine apparently sanctioned by some of the cases cited in behalf of the plaintiff in error, that the nature of their business required them to use great speed, and therefore, that they were justified in running their engines regardless of cattle upon the road, with whatever speed they might think fit, without liability to the owner of the cattle thereby destroyed. Such a doctrine is unfounded in sound law, and would be dangerous and mischievous in the extreme, both to the lives of passengers of the company, and to persons whose rights may be collaterally involved in their operations. For such a rule, while it would give to conductors and engineers upon such road, a free license wantonly to destroy cattle which might casually be upon their track, and in any way impede their progress, would greatly endanger the safety of travellers on the road, by subjecting their lives to the capricious exercise of this liberty by the agents of such companies. These mischiefs would almost necessarily result from such a principle, if sanctioned; and the consequence would be, that all confidence in such works would be destroyed; and, instead of being sources of public convenience, as they would be under the salutary restraints of law which bind the citizen, they would be converted into instruments of private oppression and public calamity.

Again, it is said that the destruction of the plaintiff's animals was in consequence of his suffering them to be in a situation exposed to destruction, and of which he was bound to take notice; and that the rule is, that where the injury has resulted from the fault or negligence of the plaintiff, or from the fault or negligence of both

parties, without any intentional wrong on the part of the defendant, there can be no recovery.

It is already shown, that it was not unlawful in the plaintiff to suffer his animals to go at large in the neighborhood of the railroad, and as that was the remote cause of the injury, it cannot be said to be a wrong or gross negligence. It is true, the highest degree of prudence might have induced him not to suffer his cattle to be at large near the track, and exposed to its dangers. But was he bound to use such precaution? He is to be presumed to have acted with a knowledge of the relative legal rights and liabilities of himself and the company. In suffering his cattle to range, exposed to the dangers of the railroad, he subjected himself to the hazard of all that the company might legally do in destroying them, but to nothing further. And they were justified in destroying them only in the necessary prosecution of their business, and when the act should become unavoidable, after the use of such care, prudence and skill, as a discreet man would employ to prevent it. He had the right to act, and must be presumed to have acted, on this rule; and if he suffered by it, but without any violation of it by the company, he would be without redress. But he was not bound to lose his right to range his cattle near the railroad and keep them enclosed, upon the assumption that they would be illegally destroyed by the company, if suffered to go at large near the road. He had as high a right to range his cattle in the neighborhood of the road, as the company had to run its engines and cars along their track; a right prior in time to that of the company, and one equally entitled to be noticed and respected by the company. If the plaintiff was bound to respect their right to run their cars and engines, by keeping his cattle enclosed, in order to prevent their exposure to the dangers of the road and damage to the company, by parity of reason was it the duty of the company to respect his prior right of range, by keeping fences to protect their road from incursions of his cattle, and to save him from injury by their destruction. The road was under no legal obligation to fence its track, nor was the plaintiff bound by law to keep his animals enclosed, in order to prevent their exposure to the dangers of the road; and so far the legal obligations are equal.

But the same rule of prudence that would require the plaintiff to enclose his cattle, in order to avoid the danger of destruction by the railroad, would also demand of the company, as a matter of protection to its property and of safety to the lives of its passengers, to fence its track. If there is any difference in the degrees of duty, it would appear that the latter was much the higher and more imperative, and the delinquency on the part of the company in neglecting it, would, of course, be greater.

It is, therefore, manifest, that the injury cannot be ascribed to the fault or negligence of the plaintiff, in which the defendant is not inculpated. And the most favorable point of view in which it can be regarded for the defendant is, that both parties were mutually in fault, and both the immediate cause of the injury. In such a case, unless the injury be malicious and wanton, the party injured cannot maintain an action, because the injury has been caused by his own wrong.

But this rule is subject to several qualifications which render it inapplicable to the facts of this case.

1. It does not apply where the party committing the injury might have avoided it by the use of common and ordinary caution; and this is the rule, even where the remote cause of the injury is the *unlawful act* of the party complaining. This is held by numerous authorities. In *The Mayor of Colchester* vs. *Brooke*, 7 Q. B., 53 Eng. Com. Law Rep. 339, the plaintiff had deposited and kept a bed of oysters in the channel of a navigable stream, thereby creating a public nuisance; yet the defendant was held liable for running his vessel upon the bed of oysters, greatly injuring them, there being room to pass in the stream without it, because the injury could have been avoided by the use of reasonable care and diligence. In *Bird* vs. *Holbrook*, 4 Bing. 628; 13 E. C. L. R., the defendant had set a spring-gun upon his walled garden, to protect his property from being stolen, and the plaintiff, in climbing over the wall in pursuit of a stray fowl, was shot by the gun; it was held that the plaintiff was entitled to recover damages, although he brought the injury upon himself by a trespass upon the defendant's enclosure. In the case of *Deane* vs. *Clayton*, 7 Taunt. 489; 2 E. C. L. R., it

is said that the rule "that you shall *do no more than the necessity of the case requires*, when the excess may in any way be injurious to another, is a principle which pervades every part of the law of England, criminal as well as civil, and, indeed, belongs to all law that is founded on reason and natural equity." The same rule is held in *Lynch* vs. *Nurden*, 41 Ib. 422; *Butterfield* vs. *Forrester*, 11 East, 58; *Vere* vs. *Lord Cawdor*, Ib. 467; *Vaughan* vs. *Menlove*, 32 Eng. Com. Law Rep. 211; *New Haven S. and T. Co.* vs. *Vanderbilt*, 16 Conn. R. 421; *Beers* vs. *Hous. Railroad Co.*, 19 Ib. 556, and is involved in *Parker* vs. *Dickson*, 3 How. 219.

Another qualification to the general rule, that there is no liability upon the defendant when the plaintiff has contributed to the injury, exists when, though both parties be in fault, the defendant has been the *immediate* and *proximate* cause of the injury. This is well settled by authority. *Davies* vs. *Mann*, 10 Mees. & Wells. 545; *Trow* vs. *Vermont Cent. R. R. Co.*, 24 Vermont Rep. 494, and cases cited; 3 Ohio State Rep. 194; Broom, Leg. Max. 283.

It may, therefore, be considered as settled law, that though there be negligence or fault on the part of the plaintiff remotely connected with the injury, yet, if at the time the injury was done, it might have been avoided by the exercise of reasonable care, prudence and skill, on the part of the defendant, the plaintiff may maintain his action for the injury.

It follows from these views of the case, that the instructions granted on the trial in behalf of the plaintiff were correct; and that the 2d, 3d, 4th, 5th, 6th, 7th, 8th, 10th, 14th, and 16th instructions in behalf of the defendant were erroneously granted, and the 13th instruction is questionable. And though the verdict was contrary to the instructions given in behalf of the defendant, it should not for that reason be set aside; because those instructions were erroneous, and should not have been given.

We will next consider the objections taken to the admissibility of certain evidence in behalf of the plaintiff. This testimony tended to show that the engineer on duty at the time this injury was done, had previously been in the habit of sounding the whistle when there was no occasion for it, to frighten animals and to annoy the neighbors

on the road. There was testimony showing him to be a man of dissipated habits; and the object of the testimony objected to, with other evidence to the same point not objected to, was to show his character to be that of a reckless and untrustworthy agent. It is not denied that it was competent to show the character of the agent, and his unfitness for the responsible trust reposed in him. It is the imperative duty of such companies to provide skilful, competent, and trustworthy agents, and they are responsible upon their failure to do so, for the consequences of their neglect of duty. *Stokes* vs. *Saltonstall*, 13 Peters, 181; 14 How. 468. Upon a question involving his character and fitness for his trust, and the consequent responsibility of the company for his delinquency in these respects, it is not only competent but necessary to inquire into his previous habits and conduct, in order to show that the alleged misconduct at the time of the injury was in keeping with his general character. Frequently it may be out of the power of a party to show positively the reasons of the particular delinquency of such an agent; and in such cases it is proper and necessary to show his general character in order to explain his conduct at the time.

The counsel for the plaintiff in error place their objection on the ground that this testimony tended to create a prejudice against the Company, and thereby increase the damage. This may be true, though it does not appear to have been offered for that purpose; but if the testimony was competent to show that the Company had employed a reckless and incompetent engineer, as it clearly was, that being a material point involved in the suit, it cannot be said that it should have been excluded. Being competent upon the issue, it is not to be presumed that it was perverted to an improper purpose before the jury.

The last objection urged against the judgment is, that the damages assessed by the jury were excessive. The amount of the verdict considerably exceeded the value of the animals actually proved, though there was evidence which might have justified the jury in somewhat exceeding that value. But it is plain that the jury gave exemplary damages, in some amount; and the question is whether the case justified a verdict of that character.

The evidence was sufficient to justify the jury in believing that the railroad track was in an improper condition, and unfit for the exigencies which may often arise in running such dangerous engines; being covered with grass, so as to prevent their prompt stoppage, when necessary—that the cars were not supplied with the *brakes* and fixtures necessary to their safe running and speedy stoppage; and the injury here complained of is excused on these grounds—that the conductor was a lad of seventeen years of age, and giving no attention to his duties when the collision took place; that the engineer was a man of intemperate habits, reckless and unfit for the responsible trust confided to him; that either by his wanton conduct, or by the improper manner in which the cars were furnished with the necessary appliances for prompt stopping, (either or both of which the jury had the right to believe from the evidence,) the locomotive was not stopped, as it could and ought to have been on a properly fitted and well-conducted railroad; that no proper exertion was made to stop the locomotive in time to avoid the injury, and that the engineer appeared reckless of the stock. No fault is imputed to the plaintiff, except that he did not keep his stock from the track, where they casually were without his knowledge.

Upon the evidence conducing to show this state of things, the court, by the consent of both parties, instructed the jury as follows:

"Every man in the management of his own affairs, shall so conduct them as not to injure others; this duty was a mutual one, binding alike on the plaintiff and defendants; and if the plaintiff has failed to observe this duty, and the defendants be guilty of a like breach, the plaintiff has no right to complain, and cannot recover, unless, notwithstanding the conduct of the plaintiff, the injury would not have happened had it not been for the wanton and wilful negligence and misconduct of the defendants."

The question of gross negligence and wanton misconduct was thus fully presented to the consideration of the jury.

Let us see what are the rules of law governing the conduct of the defendants in the prosecution of their business.

In the first place, the company is responsible for the tortious acts of its agent, whether the act was one of omission or commission, whether

negligent, fraudulent, or deceitful. *Philadelphia and Reading Railroad Co.* vs. *Derby*, 14 How. 486. And the same doctrine is held by the same court, in *Stokes* vs. *Saltinstall*, 13 Peters, and is applied to an incompetent or careless agent. *Railroad Co.* vs. *Keary*, 3 Ohio, 206.

In the case first cited, the Supreme Court of the United States say, in a case involving the liability of a railroad for an injury, by the neglect of their agent: "Where carriers undertake to carry persons by the powerful and dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance or the negligence of careless agents. Any negligence in such cases, may well deserve the epithet of *gross*." 14 How. 486. And again: "Nothing but the most stringent enforcement of discipline, and the most exact and perfect obedience to every rule and order emanating from a superior, can insure safety to life and property. The entrusting such a powerful and dangerous engine as a locomotive, to one who will not submit to control and render implicit obedience to orders, is itself an act of negligence, the '*causa causans*' of the mischief. * * * * Any relaxation of the stringent policy and principles of the law affecting such cases, would be highly detrimental to the public safety." Ib. 487.

Again, it was the duty of the company to provide engines properly constructed and in good order, with suitable fixtures for preventing injuries likely to occur from the nature of their business; and to use "such care and diligence in using their locomotive upon the road as would be exercised by a skilful, prudent, and discreet person, having a proper desire to avoid injury to property along the road;" *Baltimore and Susquehanna R. R. Co.* vs. *Woodruff*, 4 Maryland, R. 257; to provide a safe track, a safe engine and cars, and a suitable number of competent and faithful men to carry on the work. *Hegeman* vs. *Western R. R. Co.*, 16 Barb. 356; 2 Denio, 441; 3 Ohio R. 206; 2 Cushing, 540.

Again, it is a well settled rule of law and highly applicable to

engines and locomotives on railroads, that persons having charge of instruments of great danger, are bound to manage them *with the utmost care*. *Dixon* vs. *Bell*, 5 M. & S. 198; *Lynch* vs. *Nurdin*, 1 Q. B. 29; 41 E. C. L. R. It is well said by the Supreme Court of Ohio, that "No one has the right to put in operation forces calculated to endanger life and property, without placing them under the control of a competent and ever active superintending intelligence. Whether he undertakes it or procures another to represent him, the obligation remains the same, and a failure to comply with it in either case, imposes the duty of making reparation for any injury that may ensue." 3 Ohio State R. 209.

And in this, as in all other cases of agency, the rule is, that "*the principal holds out his agent as competent and fit to be trusted, and thereby he, in effect, warrants his fidelity and good conduct, in all matters within the scope of the agency.*" Story on Agency, 452.

The question of gross negligence or wanton mischief was distinctly submitted to the jury, and was a material part of the case; and whether we consider it with respect to the bad condition of the track, and the absence of appliances and fence necessary for its safe operation, or the unfitness and recklessness of the engineer, it is plain that the jury were at liberty from the evidence, to find that the injury was occasioned either by the gross neglect of the company, or the wanton mischief of the engineer. That was a question which they had the right to determine, and their verdict cannot be disturbed on that ground, when the evidence conduces to support it in any fair view in which it can be taken, especially when the testimony is conflicting, and the credit of witnesses is involved. Under such circumstances, their finding settles the fact. 14 How. 486; *Lynch* vs. *Nurdin*, 1 Q. B. 29; 41 E. C. L. R.; *Beers* vs. *Housatonic R. R. Co.*, 19 Conn. 566. Lord Denman says, in *Lynch* vs. *Nurdin*, "It is a matter strictly within the province of a jury deciding on the circumstances of each case."

And it is immaterial whether the jury thought there was gross neglect or willful mischief. The rules above stated apply equally to either state of the case, and would warrant the jury in finding

exemplary damages, if the circumstances of neglect or aggravation tended to justify it, and they thought fit to award it. In the last case cited, Lord Denman says, "Between willful mischief and gross negligence the boundary line is hard to trace: I should rather say, impossible. The law runs them into each other; considering such a degree of negligence as some proof of malice." *Lynch* vs. *Nurdin*. And upon the same principle, the numerous cases, whether of gross negligence or wanton wrong have proceeded, in which exemplary damages have been awarded. For it matters but little to a party injured, whether the wrong be done with a malicious intent, or by gross violation or neglect of duty.

It must be taken, then, that the verdict of the jury settles the question, that there were circumstances of aggravation tending to show gross negligence, or a wanton and reckless disposition to injure or destroy the plaintff's property. And it is well settled, that if the property was destroyed under such circumstances, exemplary damages may be awarded. Sedgwick on Dam. 42 *et seq.*; Ib. 488, 489; 3 Graham & Wat. on New Trials, 1121 *et seq.*, and cases there cited. And the damages allowed in this case do not appear to be enormous.

Upon a careful consideration of the whole case, in view of its great importance to the community, we are of opinion that the judgment is correct; and it is accordingly affirmed.

A re-argument was asked on so much of the opinion as relates to vindictive damages, but it was refused.

In the Supreme Court of Pennsylvania, February 11, 1858.

HOLMES *vs.* PAUL.

1. It is no defence to a suit by a holder against the maker of a promissory note, that the plaintiff is not the owner of the note and gave no value for it, and that when he took it he knew that it was an accommodation note, and that defendant had received no value for it.
2. There is no difference between business paper and accommodation paper negotiated.
3. A promissory note procured by an incorporated company for its accommodation under the terms that the company would provide for its payment at maturity, may lawfully be purchased or discounted by one who is a director of the company

and a member of its finance committee, though he knew of these terms when he took the note.

4. Such a person (unless he was the agent of the company for the sale of the note,) takes a good title to it; and another person who is not the owner of the note, but who received it without value from the owner, (viz: from the director, &c.,) may maintain an action on it against the maker.

This was an action brought in the District Court for the city and county of Philadelphia by J. W. Paul against J. Holmes, on a promissory note of the latter for $2,500, payable to his own order, and by him endorsed. Affidavits of defence were filed; the material facts stated in them were, that the real owner of the note on which suit was brought was not James W. Paul, the plaintiff below, but John Rodman Paul; and that plaintiff below took the same without value or consideration; that both the Pauls knew at the time when each took the note, the circumstances and terms on which it was given by Holmes, viz: that it was an accommodation note given by him to the Union Canal Company of Pennsylvania, on the terms that that company would provide for and pay the same when it should fall due, and that Holmes would not be required to provide for the payment of it. The affidavits further set forth that John Rodman Paul, when he took it, was a Manager and one of the Finance Committee of the Company.

The District Court entered a judgment, notwithstanding the affidavits of defence, and the case was taken by writ of error to the Supreme Court.

On the part of the plaintiff in error, (defendant below,) it was contended, 1st, that plaintiff below could not recover, because he was not the owner of the note, and that he held without value, whilst defendant below received no value, of which fact plaintiff below was informed when he took the note; citing *Mifflin* vs. *Roberts*, 1 Esp. 261; *Harrisburg Bank* vs. *Meyer*, 6 S. & R. 537; Story on Prom. Notes, § 190; Chitty's Prac. 261, note i, 260, note g. 2d. That J. Rodman Paul could not recover in this suit, though the real owner of the note, but that his recourse must be to the Union Canal Company, for the accommodation of which company the note was given and which was bound to provide for it at its maturity, because when he took the note he was a manager or director of that Company

and a member of its finance committee; that in the absence of proof to the contrary, the action of the Company in not providing for the payment of the note at its maturity, is to be taken to have been with the concurrence of J. R. Paul, who is also chargeable (in common with the other managers and members of the committee) with having procured the note on the terms referred to, and he will not be permitted to take advantage of his own wrong. His legal position is the same as if the maker of the note had given it to a mercantile firm for their accommodation, and a member of that firm having full knowledge, had individually discounted the note. If payment of the note at maturity should not be provided for by the firm, the individual holder being a member of the firm, could not recover against the maker, because it was by his default as well as that of his co-partners that the note was not taken up by them. 1 Saunder's Pl. and Ev. 587; *Sparrow* vs. *Chisman*, Chitty on Bills, 71, note q, &c.; *Thompson* vs. *Clubley*, 1 Mee. & W. 212.

That it is contrary to the policy of the law to permit an officer, manager or agent of an incorporated company, and especially one to whom its financial interests are entrusted, to buy, discount or speculate in accommodation or other paper belonging to the company; because if permitted, there would be a temptation to such official agents to keep the finances of the company embarrassed in order that they might have an opportunity to make profit of its necessities. That this temptation was particularly strong in the case of the Union Canal Company because the lenders of money to that Company were exempted by special enactment from the penalties prescribed for a violation of the usury laws, (Act of Assembly 14th April, 1846, § 2, P. L. 334; Act of 28th April, 1854, P. L. 511); *Michaud* vs. *Girod*, 4 Howard, 553–5; Parsons on Mercantile Law, 167; Story on Agency, § 211, 212, &c.; Paley on Agency, 33 to 36; *Bartholomew* vs. *Leeck*, 7 Watts, 472; *Lazarus* vs. *Bryson*, 3 Binney, 54; *Campbell* vs. *Penna. Life Insurance Co.*, 2 Whart. 53–74.

The opinion of the court was delivered by

THOMPSON, J.—Assuming the facts stated in the affidavit to be proved, would they amount to a defence? It has been repeatedly decided by this court, and in two cases at this term, *Dornan* vs. *The*

Miners' Life Ins. Co., and *Moore* vs. *Baird*, that there is no distinction between business paper and accommodation paper negotiated. The paper in suit was of the latter kind, and this is an immaterial matter to a purchaser of it. That J. R. Paul was a member of the Union Canal Co's Board of Directors was a fact that did not lead him individually to perform their contracts as a corporation, much less was he bound to know that the Company would not fulfill their engagement in regard to the paper, if any existed, as he became the purchaser of it before maturity, as stated in the affidavit of defence, nor was there anything wrong, or in contravention of public policy or good faith in his purchasing, simply because he was a member of the Board of Directors, or one of the Finance Committee, as it is not alleged in the affidavit that he was the agent of the Company to sell the note and then became the purchaser of it. As we see no error in the judgment it must be affirmed.

In the Circuit Court of the United States for the District of Maryland, April, 1858.

JOHN S. WRIGHT *vs.* THE SUN MUTUAL INSURANCE COMPANY OF NEW YORK.
SAME *vs.* THE ORIENT MUTUAL INSURANCE COMPANY OF NEW YORK.[1]

1. Where an insurance company incorporated by the State of New York, having their principal office in New York, and there executing policies of insurance which were transmitted to agents in Baltimore who had authority to receive applications for policies and to receive and transmit notes for the premiums, and through whom the company paid losses to parties in Baltimore, underwrote a policy and sent it to parties residing at Baltimore, it was held that the contract of insurance was a New York and not a Maryland contract.
2. Where the policy contained this clause, "to add an additional premium if by vessels rating lower than A2," and the cargo was shipped in a schooner rating lower than A2, and no fixed sum as additional premium agreed upon, held that the assured, in case of loss, could recover the value agreed in the policy, less such additional premium beyond the agreed per cent. as in the opinion of the underwriters might be deemed adequate for the increased risk of a cargo shipped in a vessel rating below A2.

[1] We are indebted for this report to the Baltimore "Daily Exchange."—*Eds. A. L. Reg.*

Coram GILES, J.

Attachment on policies of insurance, issued in the Superior Court for the city of Baltimore, and removed into the Circuit Court of the United States for this district, under the act of Congress.

These two cases were tried together, and were commenced on Thursday, 16th April, and terminated on Wednesday, the 21st April, by a verdict in each case for the plaintiff for the sum of $17,365 13—under the direction and instruction of the court. They were very fully and ably argued before the court on the prayers of R. J. Brent for the plaintiff, and Messrs. Cutting (of New York) and Nelson for the defendants. Judge Giles' opinion fully reviewed all the facts in the case and the authorities cited by the counsel; but as his opinion was not in writing, we are only able to give our readers an abstract of the principal points decided. The judge remarked in the commencement of his opinion, that the principal point in these cases was one deeply interesting to the commercial community, among whom these running policies were so frequently used. The defendants were insurance companies incorporated by the State of New York, and their offices were located in the city of New York. They had agents residing in this city, who received and forwarded them all applications for insurance; and received and transmitted to them the notes given for the premiums from time to time, and through whom the said defendants made payments for losses on policies held by parties residing here. The policies on which these attachments were issued, had been executed by the defendants in the city of New York, and transmitted to their agents in this city, by whom they were delivered to the plaintiff. The plaintiff, in both cases, had given to the said agents his promissory notes for the premium mentioned in said policies, and in the case of the *Sun Mutual Ins. Co.* the notes had been paid by plaintiff; and in the case of the *Orient Mutual Ins. Co.* the money had been placed by him in the Union Bank of this city, (where said notes were payable,) to meet them, but that company had so far, declined to receive it. The first question in these cases is, are these policies of insurance to be considered as contracts made in the city of New York, or as made in the city of Baltimore? For, when you have ascertained at which place the contract is to be

considered as made, it is to be construed and interpreted by the law and the usages of that place, except where a contract is made in one place, and, by its terms, it is positively to be performed in another. The learned counsel for the plaintiff has contended that these policies were to be considered as Maryland contracts, and to be construed in reference to the usages and customs of underwriters in this city. Now this became an important question in the cases, because on the books of the insurance companies in New York, the schooner "Mary W." (whose loss had given rise to this controversy) was rated below A2, while on the books of underwriters and mercantile records in this city she was rated A2. The authorities referred to by plaintiff's counsel did not, in the opinion of the court, sustain the position he sought to maintain. In the case of the *Bank of Augusta* vs. *Earles, &c.*, 13 Peters, 519, the principal point decided was, that a bank chartered in Georgia could purchase a bill of exchange in Mobile.

In the case of *Cox & Dix* vs. *The United States*, 4 Peters, 170, the point decided was, that the official bond of the Navy Agent, although signed at New Orleans, was for his faithfully accounting at the proper department at Washington, and that therefore the liabilities of the sureties were to be governed by the principles of the common law, and not by the civil law of Louisiana. The case of *Zachary & Turner* vs. *Boyle*, in same volume, page 635, was one of a payment made in Louisiana by plaintiffs for Boyle, and by his sanction, to release his property there attached, and created a debt due there, and was not released by the subsequent discharge of Boyle under the insolvent laws of Maryland.

In the case of *Hazard's Administrators* vs. *The New England Marine Ins. Co.*, 8 Peters, 557, the point decided was that the letter, on application for insurance, written in New York, where Hazard resided, although addressed to the defendants, a company incorporated in Massachusetts, and having their office in Boston, was to be tested as to the truth of its representations by the custom as to the extent of coppering vessels in New York and not by the custom in Boston. Judge Story in his great work on "The Conflict of Laws," section 278, says: "A policy of insurance executed in

England on a French ship for the French owner, on a voyage from one French port to another, would be treated as an English contract, and in case of loss, the debt would be treated as an English debt." So in section 289, the same learned author says: "A merchant, resident in Ireland, sends to England certain bills of exchange, with blanks for the dates, the sums, the times of payment and the names of the drawees. These bills are signed by the merchant in Ireland, endorsed with his own name, and dated from a place in Ireland, and are transmitted to a correspondent in England, with authority to him to fill up the remaining parts of the instrument. The correspondent in England accordingly fills them up, dated at a place in Ireland. Are the bills, when thus filled up and issued, to be deemed English or Irish contracts? It has been held, that under such circumstances, they are to be deemed Irish contracts, and of course to be governed as to stamps and other legal requisitions by the law of Ireland;" and analogous principles have been recognized in the following cases: *Wolsey* vs. *Bailey*, 7 Foster, (N. H.) 217; *Smith* vs. *Smith*, ibid. 244; *Davis* vs. *Coleman*, 11 Iredell, 303. But this very question has been settled in two cases by the Court of Appeals of New York; and in one by the Superior Court in the same State, in the cases of *Hyde* vs. *Goodnow*, 3 Comstock, 264; *Western* vs. *The Genesee Mutual Ins. Co.*, 2 Keenan, 258; and *St. John* vs. *The American Mutual Life Ins. Co.*, 2 Duer, 419.

In this last case the policy was issued from the office of an agency of the company in New York, although the company was incorporated in Connecticut; and it was held that the construction and effect of this policy were to be governed by the law of Connecticut.

The case of *Hyde* vs. *Goodnow* was an action to recover the amount of two premium notes given on a policy of insurance. A mutual insurance company of New York had an agent residing in Ohio, authorized to receive applications for insurance. This agent received from a party residing in Ohio, the application with the premium notes, and transmitted them to the office of the company in New York, where they were received and approved, and where the policy was executed and transmitted to the applicant by mail.

It was held by the court that the contract was made in New York at the office of the company, and not in Ohio.

In the case of *Western* vs. *The Genesee Mutual Ins. Co.*—a mutual insurance company incorporated and located in New York—had an agent residing in Canada, who received the application for insurance, and sent it to the company in New York, who there signed the policy of insurance and forwarded it to their agent to be delivered to the applicant—it was held to be a New York contract, and its validity to depend upon the laws of that State.

The judge therefore held upon principle and upon authority that the policies of insurance in these cases now being tried, were to be considered New York contracts, and to be construed and interpreted as such, for by section 263 of "The Conflict of Laws," the rule is laid down, "that the law of the place of the contract is to govern, as to the nature, the obligation and the interpretation of the contract." In this case, therefore, as the evidence showed that the schooner "Mary W." was rated below A2, in New York, what is the true construction of these policies, in that view, and assuming that fact to be proved? These policies, although differing slightly in phraseology, are substantially the same, and the court treated of them together. Now, what are the principal provisions of the "Sun" policy? "The Sun Mutual Insurance Company do make insurance, and cause Jno. S. Wright to be insured, lost or not lost, at and from Rio de Janeiro to a port in the United States, one half of 5,000 bags of coffee, laden, or to be laden, on board the good vessel or vessels, &c. Beginning the adventure upon the said goods from and immediately following the loading thereof on board the said vessel, and shall so continue and endure until the goods shall be safely landed at ———, aforesaid. The said goods, hereby insured, are valued at $18 *per bag, as interest may appear,*" and the policy admits "that the company have been paid for this insurance by the assured, at and after the rate of *one and one-half per cent.: To return one-quarter of one per cent. if direct to an Atlantic port. To add an additional premium if by vessels rating lower than A2, or by foreign vessels:* subject to such addition or deduction as shall make the premiums conform to the established rate at

the time the return is made to the company." The words *italicised* are in *writing*, and not printed, as are the other provisions of the policy.

The other clauses of the policy are not material to this inquiry. On the back of this policy there was this endorsement, made by the defendant's agent in this city:—"1856, *August* 27. *Schooner 'Mary W.,' Rio de Janeiro to New Orleans, on half cargo,* 1,830 *bags coffee, valued at* $18 *per bag, not to attach if vessel be proved unseaworthy.*"—$16,470. Now, the counsel for the defendants contended that this coffee never was covered by the said policy, because it was loaded on board a vessel rating below A2, and the correspondence showed that no additional premium had been agreed upon between the parties, and that, by the true construction of the policy, the defendants had the right to fix the additional premium. Now, what are the rules for the construction of policies of insurance, as recognized and acted upon by courts of justice? The first one is common to the construction of all contracts; that you must from the written paper, ascertain, if possible, what was the true meaning and understanding of the parties in the language they have used, and to carry that into effect, if it violates no principle of law. The second rule is, that policies of insurance are always to be construed liberally, so as to insure the indemnity sought for, and that if there be any ambiguity in the words of an exception, they are to be construed most strongly against the party for whose benefit they are introduced. Another rule is, where the written and printed clauses of a policy are in conflict, the written ones are to be sustained and carried into effect. For these rules the court referred to the cases of *Palmer* vs. *Warren Ins. Co.*, 1 Story, 364; *Yeaton* vs. *Frey*, 5 Cranch, 335; *Grant* vs. *The Lexington Ins. Co.*, 5 Indiana, (Porter) 23; *Mobile Marine Dock and Ins. Co.* vs. *McMillan*, 27 Alabama, 77; *Saylor* vs. *The Northwestern Ins. Co.*, 2 Curtis, 610; and *Breasted and others* vs. *The Farmers' Loan and Trust Co.*, 2 Selden's Reports, 299.

This last case was peculiar. It was decided by the Court of Appeals of New York, that in a life policy insurance, a provision "*that it should be void if the assured should die by his own hand*" had

reference to an act of criminal self-destruction, and not to one committed "while the party was insane." By these rules let this policy be construed. And can it be successfully contended for one moment, that when the assured procured this policy, he had no intention of covering any of his coffee that might be sent to him in vessels rating below A2, until he and the company should agree upon the *additional premium* to be charged in such cases? What were the reasons for his procuring this policy, and paying the premium on so large amount in advance? Because he did not know at what time and by what vessels his correspondents in Rio might send him the 5,000 bags of coffee he had directed them to purchase on his account, and he therefore wished his property to be thus covered by insurance whenever it was afloat on the ocean, for it might well be, that he might never hear of the shipment of his coffee until its safe arrival or loss. This necessity of the mercantile world has given rise to these running policies, which cover annually property to the value of millions of dollars. But if the view of these insurance companies is to prevail, that the property is not covered until the *additional premium* is fixed by them, or agreed upon between the parties, then a very speedy termination would be put to this kind of policy, and the defendants might as well close their agencies in this city. But such the court held not to be the true construction of this policy. The policy meant this, and nothing more: that the defendants would insure the coffee of plaintiff, in its transit from Rio to a port in the United States, at 1½ per cent. premium *by whatever vessel carried*, but if carried in a vessel rating below A2, or by a foreign vessel, *an additional premium* should be paid them. *Additional to what?* Why, to the 1½ per cent. *already paid*, and such additional premium as, in the opinion of underwriters, would be equal to the increased risk to such a cargo in vessels rating below A2, or in foreign vessels. And this seems to have been the view taken by the Sun Mutual Insurance Company itself in its correspondence with its agent in this city; for although, in their letter of August 25th, 1856, they take the ground "that the assured had no right to have this risk on the Mary W. covered on this policy," they subsequently recede from this position, and in

their letter of the 30th August, "*they admit he had the right*, but that the fixing of the premium rested solely with them." The court thought the latter position as untenable as the former. As something had been said in the course of the argument, in reference to the endorsement on the policy of the 27th August, the court remarked that they considered this endorsement fully warranted by the defendants' letter to their agent, of that date; and that, indeed, the agent, with that letter in his hand, could have made no other endorsement. The plaintiff presented the two prayers, and the defendants presented three prayers. The court remarked that they agreed with the propositions of law contained in defendants' 1st and 2d prayers, and plaintiff's second prayer, and only rejected them because they were substantially embraced in the instruction which the court would give to the jury, but they rejected the plaintiff's 1st prayer and the defendants' 3d prayer as in conflict with their view of the law of the case; and the court then gave to the jury the following instruction:

"If the jury shall find from the evidence, that the defendants executed the policy of the 27th July, 1855, and received from the plaintiff the premium therein mentioned; and that their duly authorized agent in this city made the endorsements on the said policy, which have been offered in evidence, and shall further find that 1,830 bags of coffee, belonging to plaintiff, were shipped on the 12th of July, 1856, at Rio, on board the schooner Mary W., to be carried to New Orleans, and that when said schooner left Rio she was seaworthy and in good condition; and shall further find, that the said vessel and cargo were subsequently on said voyage totally lost by one of the perils insured against; and that said schooner was rated lower in New York than A2, then the plaintiff is entitled to recover for one half the value of said coffee so lost, at $18 per bag, less such additional premium beyond the 1½ per cent., as in the opinion of the underwriters may be deemed adequate for the increased risk to a cargo of coffee shipped in a vessel rating below A2, with interest from thirty days after such time as the jury may find the defendants were furnished by plaintiff with the preliminary proofs of his said loss; and there is no evidence in this case that the said schooner

at any period during the running of this policy rated as high as A2 in any of the insurance offices in New York."

Hon. *Henry May*, *Robert J. Brent* and *Vivian Brent*, Esqrs., for the plaintiff.

Hon. *John Nelson* and Messrs. *Brown & Brune*, of Baltimore, and Hon. *F. B. Cutting* and *Alexander Hamilton, Jr.*, Esq., of New York, for the defendants.

In the Superior Court of Cincinnati.

EDWIN LUDLOW *vs.* EDWARD HURD ET AL.

1. Under the Ohio statute regulating railroads, a chartered railroad corporation is fully authorized to execute a mortgage as security for money borrowed upon bond.
2. Where the mortgage described the property as "the right of way and land occupied thereby, together with &c.," enumerating every kind of property attached to and used by a railroad, and added "and other property then owned by or thereafter to be acquired and owned by the said company," it was held, that in equity, furniture contained in the company's business office, if necessary for the operation of the road, was within the language of the mortgage, and that an execution levied on it must be postponed to the lien of the mortgagee.
3. Although at common law an assignment will not convey a chattel unless it is in esse at the time of the transfer, it is otherwise in equity.
4. It is settled at common law, that a franchise is not subject to levy on execution; it can only be reached in Chancery.

The opinion of the court was delivered by

STORER, J.—The plaintiff claims that he is the mortgagee, in trust, for certain holders of bonds issued by the Cincinnati and Marietta Railroad Company. The conveyance is in due form, properly executed and recorded in the Recorder's office of Hamilton county, dated March 1, 1857, to secure the payment of fifteen hundred bonds for $1,000 each, which are to become due on the 1st of September, 1880, with seven per cent. interest, payable semi-annually. The property described in the deeds is "the right of way and the land occupied thereby, together with the superstructure

and the track thereon, and all bridges, &c., depot grounds and buildings thereon, and all other appurtenances belonging thereto, and all franchises, rights and privileges of the Company, in and to the same; also, all locomotives, tenders, cars, machinery, tools, implements, fixtures, wood, fuel, oil, waste and other property then owned by, or *thereafter to be acquired and owned by said Company*, for the purpose of using or repairing said cars, or any other of the property of the Company with power on the part of the Company to dispose of any of the property not necessary to be retained for its roadway, depot grounds or stations, not required for the construction or convenient use of the road."

That five hundred of the bonds described in the instrument of the mortgage have been negotiated by the Company, and are a subsisting charge upon the property mortgaged.

That the defendant Hurd, having recovered a judgment for $275 33 against the company, before competent authority, has caused execution to be issued, and levied upon "the furniture contained in five several rooms of the Company's business office in Cincinnati, situated on Third street," which is particularly described in the complainant's petition; also the furniture contained in another business office of the company in Cincinnati, in one of the rooms of the Burnet House. It is alleged that the property is advertised for sale by the officer who levied the execution, and will be sold unless this court interfere; that the above offices "are attached, belong to, and form a part of the railroad and its appurtenances, and were established and fitted up and furnished by the company for the purpose of transacting and carrying on their business on the said road, they being necessary therefor, and are now used for that purpose; that the same are indispensable to the full enjoyment of the use of the road, and are a part and parcel of the property conveyed to the plaintiff by the deed of the company." It is further stated that the sale of the property would produce great injury to the plaintiff and the bondholders, by depriving the company of the use of the same, thereby also lessening the business and earnings of the company, and thus preventing the payment of the interest and principal of the bonds, which business and earnings are not now more than sufficient

to pay said interest. It is further stated that the property levied on was acquired by the company subsequent to the execution of the mortgage.

To this petition the defendant, Hurd has demurred.

Two questions are presented upon the pleadings—

First, The authority of the railroad company to borrow money, and mortgage their property to secure it.

Second, What property passed by the conveyance to Ludlow?

The thirteenth section of the law of February 11, 1848, "regulating railroad companies," gives express power to every such corporation "to borrow money, not exceeding its authorized capital stock, at a rate of interest not exceeding seven per cent. per annum, and execute bonds or promissory notes therefor, and, to secure the payment thereof, may pledge the property and income of such company."

This provision, so fully conferring a right to borrow money, to issue bonds, and secure their payment by a mortgage upon the property and income of the company, dispenses with the necessity of discussing the question of corporate power, upon general principles. However doubtful it may have been regarded by courts of high authority, we are saved the labor of examining conflicting opinions, as well as the effort to reconcile them.

We must hold the company was fully authorized to execute the mortgage referred to in the petition.

The second question involves the inquiry: "What property passed by the description in the deed?"

In ordinary cases this is to be determined by the intention of the parties, as indicated by their contract; and where, after a general grant of the principal thing, its incidents or appurtenances, are not expressly reserved or excluded, the transfer will be held to cover the subject specifically granted, and all that is connected with it, as naturally dependent upon it, or that may be properly regarded as essential to its full enjoyment.

This is the rule affirmed in Whitler's case, 10 Co. 64 and 65, which is followed in all the modern cases, as in 6 Greenleaf, 436, *Blake* vs. *Clark;* 1 Sumner, 492, *United States* vs. *Appleton;*

11 Conn. 525, *Parsons* vs. *Camp;* 18 Wendell, 157, *Van Wyck* vs. *Wright;* and in 20 Ohio, 401, *Morgan* vs. *Mason*, where it is said: "Whatever is actually enjoyed with the thing granted as a beneficial privilege at the time of the grant, passes as parcel of it. Therefore, everything belonging to the estate conveyed, as an incident or appurtenance, passes by the grant, and to this end the law gives, in all cases, a reasonable intendment to the grant."

The principle thus established is of universal application in the transfer of real property; and though its origin dates back to a very remote period, when the alienation of land was guarded with great jealousy, and then necessarily confined to a class of estates to which but few, if any of the appurtenances of modern times were incident, its application is none the less just or equitable.

The improvements in mechanics have introduced new modes by which the business of the world is not only performed, in its various departments, but essentially controlled in its results. Hence, the adaptation of steam power to locomotion includes not only the enjoyment of rights of way, but the construction of road beds, and the consequent use of the various materials necessary to their fabric; the ownership, also, of engines, with their various appendages, rail cars, baggage and freight cars, are alike indispensable. It is equally necessary, to the full enjoyment of the franchise conferred upon a railroad company, that the corporation should hold depots and depot grounds, machine shops, and other establishments for the manufacturing, as well as the repair of their engines and cars. The same power must be given, either expressly or by necessary implication, to own or rent suitable buildings to accommodate their different employees in the transaction of their daily duties, as bookkeepers, clerks, and cashiers, as well as furnishing a proper place for the directors to hold their meetings.

It must follow, from the power thus given, that the company may provide furniture proper for their different offices, and which may well be included in, and pass by the name of corporate property, and which, though practically separate from, and forming no immediate part of the railroad, its appurtenances, franchises, or machinery, are still so closely connected with the proper manage-

ment of the road, and the interest of the stockholders, as well as the creditors, that they cannot be dispensed with and the purposes of the railroad be accomplished.

A corporate body whose daily business is the transportation of passengers and freight, in whose capital stock large amounts are invested by every class, should be held to the strictest accuracy in their accounts. Their receipts and expenditures can only be known when this duty is fulfilled to the letter; hence, the power to employ the most competent clerks, and the duty to provide all the necessary accommodations to enable them to have an intelligent and careful supervision of the various transactions of every day. On no other theory can frauds be prevented, or, if committed, detected.

It is very clear, then, we must regard as appurtenant to, and necessary for the working of a railroad, that all the species of property to which we have referred, should become a part of the road itself; essential, indeed, to its use, and, if denied, destructive to the purpose for which it was built.

There may be, unless we carefully look at the relations the several departments of a railroad bear to each other, no clear apprehension of their real identity, when the rights of the corporation are questioned. We may separate the appurtenance from the subject when real estate is conveyed, and there yet be a thing to be enjoyed, while its measure or extent only is impaired or restricted; but, in a case like that before us, if one of the incidents essential to the successful operation of the road is withheld, the consequence may be irreparable injury to all concerned in the prosperity of the enterprise.

It was, without doubt, the intention of the company to pledge their whole available property, all they could legally call their own, of which they were then possessed, or might afterwards lawfully acquire, for the security of the bondholders, on the terms stated in the deed of trust; and if they could not, as a corporate body, be the owners of any other property than that connected with, incident to, or necessarily attached to the proper operation of the road, it would seem to follow that every portion of it they might lawfully possess, they might lawfully pledge.

At common law, it is said an assignment will not convey title to chattels, except those "in esse" at the time of the transfer. This doctrine had its origin, we are told, in the determination, on the part of the courts, at an early period, "to prevent maintenance and the multiplication of contentions and suits, so that no possibility, right, title, or any other thing, not in possession, could be granted or assigned to strangers;" and so strictly was it applied, that a grant of land, where the vendor was out of the possession, was void. Co. Litt. 265, a. n. l., *Mogg* vs. *Baker*, 3 Mees. & Welsb. 197; *Robinson et al.* vs. *Sharp*, 5 Maule & Sel. 228; *Gale* vs. *Burnel*, 7 Adol. & Ellis, 850.

The English courts still adhere, as it will be seen in the cases already cited, with many qualifications, to the ancient maxim, and have been followed by American judges, who, while they admit the power of precedent, and feel bound to follow what is believed to be established, nevertheless interpose very significant exceptions to its full application.

Thus, in *Tappfield* vs. *Hellman, et al.*, 6 Man. & Grang. 247, Chief Justice Tindal said: "It would have been very easy to have so framed the power of entry as to make it extended to all effects found on the premises at the time the power should be enforced; and Coltman and Maule, justices, clearly admit that, as between the parties, there may be a valid transfer of such property. In 10 Metcalf, 481, *Jones* vs. *Richardson*; and in 13 id. 29, *Moody* vs. *Wright*, it is said that "one cannot mortgage property of which he is not possessed, and to which he has no title at the time; and this doctrine is affirmed in 2 Cushing, 294, *Bernard* vs. *Eaton*, and in 3 id. 306, *Codman* vs. *Freeman*; so in 3 Gilman, 455, *Rhines* vs. *Phelps, et al.;* 14 Conn. 581, *Griswold* vs. *Sheldon.*

But in the latter case, as well as in 7 Shepley, 408, *Abbot* vs. *Gordon*, it was admitted that a mortgage lien will cover chattels purchased after the deed is executed, with the proceeds of those actually mortgaged; and where there was a right to sell reserved to the mortgagor, it must have been the intention of the parties that the proceeds of all property sold should be subjected; and this is the principle upon which the cases, also, of *Jenkes' Adm'r* vs.

Goffe, 1 R. Island, 511, and *Southwell* vs. *Isham*, 4 Sandford, 449, were decided.

How far, upon these adjudications, the rights of intermediate creditors, or mortgagees, are affected at law, is matter of grave consideration. We suppose the better rule to adopt is, that which prevails where a mortgage is given to secure subsequent advances. In such cases our own courts have decided that the security cannot be extended to exclude the property from the levy, or seizure of an intervening creditor. 15 Ohio, 253, 260, *Kramer* vs. *F. and M. Bank;* 17 Ohio, 391, *Spader* vs. *Lawler*; 6 Conn. 37, *Shepherd* vs. *Shepherd.*

We have remarked that, at law, the principle to which we have referred seems to be mainly applied. In equity, it is greatly mitigated if not for many purposes denied.

Lord Eldon *In re* Ship Warre, 8 Price, 269, decided that the future earnings of a ship would pass, though the transfer of the vessel was made while she was at sea. "I take it to be clear," says he, "that if there be an assignment made of the earnings and freight of an existing voyage, it is valid; and if that be so of a voyage *in esse*, why not one in immediate *posse?*"

So, in *Wellesley* vs. *Wellesley*, 4 Myl. & Cr. 560, Lord Cottenham held "that a covenant to secure an annuity, by a charge upon freehold estates, or by an investment in the funds, or by the best means in his power, will create a lien upon any property to which the covenantor becomes entitled, between the date of the covenant and the time for its performance;" and, again, in 6 Simons, 224, *Metcalfe* vs. *The Archbishop of York*, the same Chancellor said: "There can be no doubt that a covenant to charge, or dispose of, or affect lands hereafter to be acquired, operates, in equity, upon lands so afterward acquired, against the party creating the charge."

The question is very ably discussed in *Langton* vs. *Horton*, 1 Hare, 556, and the same conclusion adopted. It was here decided "that the mortgage of a ship, then on a whaling voyage, with all cargo which might be caught and brought home in the vessel, was, as against the assignor, a valid assignment in equity, as well of the

future cargo to be taken during the particular voyage, as of that, if any, which existed at the time of the assignment."

If we regard this equitable doctrine in the case before us, we may very readily conclude that, by its proper application, we shall subserve the purposes of justice, and carry out the intentions of the parties to the contract.

Where a railroad company is authorized by law to mortgage its whole corporate property, which includes not merely its road bed, and the structures connected with it, but all its rights and franchises in addition, a conveyance, by such terms, must comprehend the power to reconstruct or repair the road, by all the means necessary to accomplish the purpose. Whatever is added to the original structure becomes a part of it, and cannot be severed from it; and if the security by the mortgage is to continue to be of any value during the period that must transpire before the bonds become due, it must depend upon the implied covenant of the company to keep it in running order, and thus earn the necessary sums to discharge the accruing interest, and eventually indemnify the creditors for the principal debt.

By the transfer to the plaintiff, we must hold, then, that a paramount right to all additions made to the railroad subsequent to the date of the deed was vested; that the plaintiff could at any time, when interest was unpaid, take possession of the subject, which will include every species of property then owned by the company, as attached to or incident to the road itself. If the right to the possession exists, then the right to protect the property from sale necessarily follows; and the plaintiff may ask us to aid him by injunction. The question in such a case is, "Who has the better right, in equity, to call for the legal estate, or the legal possession?' And if the equitable owner of the incumbrance has done enough to perfect his equitable title, he has the better right. *Langton* vs. *Horton*, 1 Hare, 560, 562; *Newland* vs. *Paynter*, 4 Myl. & Cr. 408.

The Supreme Court of New Hampshire, in 32 N. H. 484, *Pierce* vs. *Emery*, have decided the direct question before us, though the case is somewhat involved. In New Jersey, 3 Green Chy. 377, *Willick* vs. *Morris Canal and Banking Company*, it was held that

a transfer of the canal property carried with it all subsequent additions to the subject.

In the late case of *Phillips et al.* vs. *Winston*, not yet reported, but of the opinion in which a copy has been furnished to us, the Court of Errors of Kentucky have adopted the same rule, and decreed a perpetual injunction against the intervening creditor, who had levied upon property acquired by the company subsequent to their mortgage; and a similar construction is given by Judge McLean, in the case of *Coe, Trustee*, vs. *Pennock and others*, decided at the July term of the Circuit Court for this District, reported in 6 Am. Law Register, p. 27.

We have been referred to a clause in the deed of trust which authorizes the mortgagors to dispose of any part of the property that may not be necessary to the use of the road; and it is urged upon us that this power thus reserved is inconsistent with the estate granted by the deed itself, and must, therefore, defeat it.

It may, in many cases, be a very suspicious circumstance, when such a permission is given by the mortgagee; as, for instance, where a stock of goods, or articles of ordinary consumption are pledged absolutely, and the title is consequently vested in the mortgagee, the liberty reserved to the mortgagor to sell might well furnish, if unexplained, an implication of fraud in the contract; but where, from the nature of the property pledged, it is indipensable that many portions of it should, from time to time, be repaired, reconstructed or renewed, there can be no impropriety in permitting the party who is bound to keep up the road, and to provide all things necessary to its use, to dispose of the old material, either in part payment of new appliances, or for its general preservation.

By this permission no one can be defrauded, and no rule of law is violated. The recording of the mortgage advises the public that the company have pledged their property, and it seems to us that the license to sell it, as limited in the deed, confers no greater right than the mortgagors would have had if no such clause were inserted. A broken locomotive, a worn out rail, the timber necessary to repair the road-bed, require to be protected from injury, and made available for the purposes of the pledge; hence the mortgagor may

well be the agent of the parties interested in the security, to see that their property, however useless, is not totally lost, and a power to sell, if necessary to effect that object, might be inferred from the relation of the parties to each other.

The question how far the property and franchise of a railroad company, or any similar corporate body, may be subject to sale by execution, has been frequently discussed and determined of late years, both in England and the United States. It is settled, we suppose, definitely, that the franchise, which includes the right of toll, cannot be levied on and sold, unless the Legislature who granted it assent to the transfer. This was decided in *The State* vs. *Rives*, 5 Iredell, 267.

It is the rule adopted by the Supreme Court of Pennsylvania in *Ammant* vs. *The New Alexandria and Pittsburg Turnpike Road*, 13 Serg. & Rawle, 212; in *Seeden* vs. *Plymouth R. R. Co.*, 5 Watts & Serg. 266; and in *Susquehanna Canal Co.* vs. *Bonham*, 9 id. 27; in Massachusetts, in *Tippetts* vs. *Walker*, 4 Mass. 596; in Kentucky, in *Winchester and Lexington Turnpike Co.* vs. *Vimont*, 5 B. Monroe, 1.

In Ohio the point was fully examined and decided in *Seymour* vs. *Milf. and Chillicothe Turnpike Co.*, 10 Ohio, 476.

The result is very clearly stated in the very accurate and learned treatise on the Law of Sheriffs and Coroners, by Mr. Gwynne, page 341. "The right of taking toll is a franchise, and is not, at common law, nor by the statute of Ohio regulating judgment and executions, subject to levy on execution; it may be reached in chancery."

And the rule thus established is not confined to the franchise merely; it covers every case where it is attempted to separate the structure of a railway or turnpike road, in parts, by a seizure on execution. The whole work is regarded as an entire thing, and each portion so dependent upon every other that the integrity of the fabric, from its commencement to its terminus, will be preserved.

Thus it is said, in 13 Serg. & Rawle, 212, already cited, "The inconvenience would be excessive if the right of the company could be cut up into an indefinite number of small parts, and vested in

individuals." Such a course would defeat the object of the incorporation, both as respects the stockholders, and the public, also, who have at last a very material interest in the preservation of every important thoroughfare, as they derive daily benefit from its use. We must regard, then, not among the least of the considerations which very properly press upon us in examining a question like this, the public right and the public advantage. So long as a highway similar to the present can be kept up, it is required by the public interest that it should be. When, however, the corporate body becomes so involved in debt that it cannot longer fulfill the object for which it was created, a court of equity should interfere, take possession of the whole property and wind up the concern.

This is not only the course indicated in kindred cases, but it is peculiarly fit where creditors and debtors, with their varied interests in a common fund, are to be protected by an equal division of the assets, according to the priority of their liens.

We have referred to this view of the case to illustrate more fully the rule we should adopt in examining the questions submitted by the pleadings.

We cannot now determine whether the property levied on is essential to the business of the company, upon the principles we have laid down. It may be that there has been extravagant expenditures in the furnishing of the apartments occupied as offices; it may be that economy has been ignored, and the fashion of the day, in the outlay of money, has been adopted; it may be that the old rule, "*sic utere tuo ut alienum non lædas,*" has been forgotten; and it is our duty, if either the one or the other of these conditions exist, to see that the evil, for it is one, is corrected.

No company has the right to permit its agents to pervert the corporate funds from their legitimate purpose, by providing unnecessary or costly offices, or office furniture for their subordinates. Such an assumption is equally improper, as would be the lavish expenditure of their income in the payment of salaries disproportionate to the labor performed, or distributing it among an army of attachees and dependents, who may be all the while consuming the substance of

the corporation at the expense of those who have paid up their stock or loaned money upon their bonds.

There must be a reference to a master to examine the property levied on, and report, immediately, whether the same, on the principle indicated by the court, is necessary to the operation of the road; and if any part thereof can be disposed of without injury to the company, to describe it.

Until the coming in of the report no further order will be made.

Taft & Perry, for plaintiff.

Kittridge, for defendants.

In the Circuit Court of the United States, Massachusetts District, May Term, 1857.

THE SALMON FALLS MANUFACTURING COMPANY *vs.* THE BARK TANGIER.[1]

1. To constitute a delivery by the master, of goods brought in a vessel from a port in another State to the port of Boston, under the ordinary bill of lading, mere unlivery of the goods and landing them on the wharf is not sufficient; there must also be reasonable notice to the consignee, allowing him time to make the usual and necessary preparations to receive the goods. And it is no delivery to unlade the goods at an unusual time. Thus, where, by the usage of a port, consignees are not in the habit of receiving goods on the day of the annual fast, a notice by the master to the consignee that he shall unload the goods on that day, will not bind the consignee to receive them; and where goods were so unladen, and not accepted or received by the consignee, and were, on the same day, destroyed by fire on the wharf: *Held*, that the loss must fall upon the carrier.
2. Fire, occurring on the wharf, after goods are landed, is not within the exception of damages of the seas, in the ordinary bill of lading.
3. Nor is such a fire within the Act of Congress of March 3d, 1851, relieving ship owners from liability for damage by fire to goods on board of vessels, in certain cases.

The facts of the case fully appear in the opinion by

CURTIS, J.—This is an appeal from a decree of the District Court, in a suit *in rem* founded on a bill of lading in the usual form,

[1] We are indebted to our excellent contemporary, the Monthly Law Reporter for May, 1858, for this case.—*Eds. Am. Law Reg.*

signed by the master of the Tangier, at Apalachicola, on the 3d day of March, 1856, for one hundred bales of cotton, to be delivered at the port of Boston, (the dangers of the seas only excepted,) unto John Aiken, the Treasurer of the Salmon Falls Company, to which corporation the cotton belonged.

The District Court decreed in favor of the claimants, and the libellants appealed.

The material facts, which are not in dispute, are, that the bark arrived in the port of Boston on Sunday, the 6th day of April, 1856. On Monday, at the request of Goddard & Pritchard, who were the consignees of the larger part of the cargo, the bark was hauled to Lewis Wharf, and the unlading was begun. At some time between the hours of ten, A. M., and three, P. M., notice was given to Aiken's clerk, at his counting room, that the Tangier had hauled to the north side of Lewis Wharf, and had commenced discharging. The work of discharging was begun between two and three o'clock, P. M., and continued about two hours. On Tuesday, it was further continued until one o'clock, P. M., when it ceased, because there was not room on the wharf to receive more cargo. It was not resumed on Wednesday for the same reason. On Thursday, which was the day fixed by the proclamation of the Governor of Massachusetts for the annual Fast-day, the work was resumed at seven o'clock, A. M., and prosecuted till one o'clock; at which time the cotton belonging to the different consignees was all out of the vessel, and such of it as had not previously been removed by the consignees, had been separated into lots, according to the various marks, and was ready for delivery. Immediately afterwards, an accidental fire broke out on the wharf, and the cotton was burned. Pursuant to the notice received by the libellants on Monday afternoon, they sent men and teams to the wharf on Tuesday morning, and by one o'clock had removed thirty-five bales, which was all that could be found on the wharf belonging to the libellants. On Wednesday morning, the same men and teams were again sent to the wharf, but only one bale of the libellant's cotton could then be found, and the person in charge of the teams was informed by the mate of the bark that no cotton had been discharged

since one o'clock, the previous day, for want of room on the wharf, and he did not know when they should recommence discharging. So that, down to Thursday, there was no want of diligence on the part of the libellants, in acting on the notice given them, and being in readiness to receive all that was in readiness to be delivered.

Sixty-five of their bales of cotton were burned, and the question is, whether it was at their risk, or that of the bark, at the time of the fire.

The bill of lading in this case imports an obligation to carry and *to deliver* the goods, qualified only by the exception of danger of the seas. Fire, occurring on the wharf, after the goods are landed, is not within the exception. *Oliver* vs. *The Memphis Ins. Co.* 19 How. 312; *Airey* vs. *Merrill*, 2 Curtis's C. C. R. 8.

So that, for the purposes of this case, there was one entire and absolute contract to carry and deliver; and the question is whether it had been performed when the goods were destroyed.

Actual delivery can be made by a carrier only to the consignee, or some one representing him, and who assents to and does receive the goods. But, inasmuch as the liability of the carrier, as such, cannot be protracted by the neglect or refusal of the consignee to receive the goods, an offer to deliver them at such a time and place, and in such a manner, as is required by the contract, accompanied by a present ability so to deliver them, is so far equivalent to an actual delivery, that it terminates the liability of the carrier, as carrier, though a duty of custody and care may, under some circumstances, then arise.

The questions, at what time and place, and in what manner, the delivery may be offered, and how the offer may be made, depend on the usage of the business in which the particular transaction occurs. Stated generally, it may be said to be the usage of the business in which this transaction occurred, for the vessel to be placed at some suitable wharf, and notice given to the consignees of the cargo, of the place where the vessel lies, and that the cargo is about to be discharged. It is then landed and made ready for delivery. The consignees, after receiving such notice, are expected to take notice of the fact that their consignments are made ready

for delivery; and as soon as they are so, they are, in judgment of law, delivered, and the carrier's peculiar liability is ended.

Such is the usage in point of fact, and like many other settled usages of commerce, it is recognized by the law, and has become a rule which courts of justice take notice of and enforce. But this rule has several important qualifications. In the first place, it is necessary that the notice to the consignee should be a reasonable notice. By which I understand that it must not so long precede the readiness to deliver, as to impose on the consignee an unusual and unnecessary burden of keeping in readiness to receive and transport his goods; nor, on the other hand, that it should fail to allow the consignee reasonably sufficient time to make usual and necessary preparations to receive and transport them. In the next place, the goods must not only be placed on the wharf—they must be made ready for delivery.

The mere discharge of a cargo is not equivalent to a delivery of the cargo. On the contrary, important rights and interests, both of the ship-owner and the consignees of the cargo, depend upon the preservation of the distinction between unlading and delivery. This is well illustrated by the case of *Certain Logs of Mahogany*, reported in 2 Sumner, 589. In that case, the cargo was libelled for freight due under a charter-party, which made the freight payable "in five days after the brig's return to *and discharge in* Boston." It was insisted that this displaced the lien; because it showed that a credit was to be given after the cargo should be delivered. Mr. Justice Story held otherwise. He considered that not only were discharge and delivery distinct from each other, but that the consignee had a right to have his goods landed, and so placed that he could ascertain their condition before he made himself liable for the freight; and that the master had the right to unliver the cargo, and still retain it in his own possession, until the freight should be paid. Such is the maritime law of England and France, as well as of this country. See also *Ostrander* vs. *Brown*, 15 Johns. 39; where it is expressly laid down that landing on a wharf is not delivery.

If we consider the grounds upon which the law terminates the liability of the carrier without an actual delivery, it will be apparent

that mere unlivery is not sufficient. Those grounds are, readiness to deliver, accompanied by such an offer to deliver as the consignee is bound to act upon. If the carrier is not ready to deliver, it is of no importance from what cause such want of readiness proceeds. Whether it be because the goods are still in the vessel, or because they are so mixed with others on the wharf that they are not accessible, or because the master intends to insist on his lien for freight, or for an average bond, is immaterial.

If he is not ready to deliver, the law does not deem the delivery made, and he must be ready to deliver at such a time as the consignee is bound to receive his goods. The law does not allow the carrier's liability to be protracted by the neglect or refusal of the consignee to receive his goods. But until there is some neglect, the principle does not apply. All will agree that if the master be ready to deliver on Sunday, or in the night time, such readiness cannot avail; for there is no duty incumbent on the consignee to receive goods at such times, and consequently no neglect on his part.

These principles, when applied to the facts shown in evidence, are sufficient to determine this case.

The sixty-five bales of cotton belonging to the libellants, which were destroyed, were made ready for delivery on Thursday, the tenth of April. That was the day of the annual Fast. The evidence is decisive that it was not usual for consignees to receive goods on that day. A large number of merchants, custom-house officers, wharfingers, and port-wardens, have been examined; their testimony covers a period of more than twenty years, and embraces an ample amount of knowledge of the business in which this transaction occurred. And it clearly shows that the annual Fast, during the entire period, has been a day when merchants do not receive consignments of goods.

It is also proved that in frequent instances, when the discharge of a vessel has been left incomplete, it has been completed on the Fast-day; though this practice seems to be limited to goods not perishable; and the reason assigned for not landing perishable goods on that day is, that consignees do not take away their goods on that day.

There is no inconsistency in these courses of business, nor any conflict of rights growing out of them. The time when the cargo is discharged is at the will of the master. He may unlade it and make it ready for delivery on the Fourth of July, or in the night-time, if he chooses so to do. And he may unlade it without notice to the consignee. But such an unlading and preparation to deliver, are not equivalent to a delivery, because there is not such reasonable opportunity for the consignee to receive his goods, and such neglect of that opportunity, as the law puts in place of an actual delivery.

The practice to complete the discharge of vessels on the Fast-day, may satisfactorily show that it is a reasonable and proper act. It may justify the master as between him and the owners of the vessel. And so, many emergencies might justify him in discharging in the night-time, or even on Sunday. In the absence of all other evidence, proof of a usage to complete discharge on the Fast-day, might also be sufficient to show that it was a usual and reasonable time to make delivery; because the reception of goods usually takes place on the day when they are discharged. But the proof is direct and clear that the Fast-day is not a usual time for the delivery of the goods.

Taking the entire evidence into view, it comes to this: The master, may, if he please, discharge on the Fast-day; but he does so with the knowledge that there will be no delivery of them till the next day; because a discharge and readiness to deliver are not a delivery, and do not become so, until some usual time arrives for the consignee to attend for the purpose of receiving his goods.

It was strongly urged that the observance of the Fast-day is purely voluntary; that there is no legal obligation to observe it; and that to deprive the master of the power to offer a delivery on that day, would compel him to observe the day, and thus trench on his legal right to work on that day, if he choose to do so. But the same argument would apply to the Fourth of July, which I believe is universally kept as a holiday. And the answer to it in that case, as well as in the case at bar would be, that all who engage in a particular business must conform to the reasonable and lawful usages of that business; that what is usual in respect to times and places and modes of doing business, in the absence of any rule of law to

the contrary, becomes a rule which all concerned are understood to assent to when they engage in that business; and that, for a master to insist that a consignee should not observe a particular day, usually observed by consignees, would deprive the consignee of a right of choice, secured to him by the usage, and by the implied consent of the master himself.

After the fullest consideration, I am of opinion that these goods were destroyed before the time had arrived for the consignee to receive them; that consequently there was no delivery in point of law, and the vessel is liable for their value, unless relieved by the first section of the act of Congress, of March 3rd, 1851, 9 Statutes at Large, 635.

This section is copied from the second section of the Act of 26 Geo. 3, c. 86, which received a judicial interpretation by the Court of Queen's Bench, in *Morewood* vs. *Pollok*, 18 Eng. Law & Eq. 341. It was there held that the Act did not extend to the case of a fire occurring on board a lighter, in which cotton was being conveyed from the vessel to the shore. This decision is in conformity with the language of the act, which limits its operation to fire happening to or on board of the vessel. Without a departure from the plain meaning of the words of the act, I cannot extend it to a fire happening on shore.

The result is, that the decree of the District Court must be reversed, and a decree entered in favor of the libellants for the value of the cotton, and costs.

In the United States District Court, Southern District of New York, December, 1857.

JUSTI PON AND OTHERS *vs.* THE PROCEEDS OF THE BRIG ARBUSTCI.[1]

Where, in the Admiralty, two claims are made upon the fund in the registry of the court, one arising from a mortgage given at a foreign port, and entered upon the vessel's register, for outfit and supplies for the voyage, and the other upon a bill of lading executed by the master for the voyage, for specie received on board and never delivered; *held*, that the latter has priority over the former in the distribution of the fund.

The brig Arbustci having been libelled for seamen's wages, and for a bottomry bond, and having been sold by process of the court, and those claims satisfied, there remained remnants and surplus in the registry of the court. Two classes of petitioners contested their priority of right to the fund, the demands of each exceeding its entire amount. Fairbanks & Co. held a mortgage, executed in Nova Scotia, to secure a debt incurred there for her outfit and supplies for the voyage, notice of which mortgage was entered on her register. The libellants held a bill of lading, executed by the master during that voyage, for specie shipped on board and never delivered.

The opinion of the court was delivered by

BETTS, J.—That the claim of the libellants was a clear maritime lien upon the vessel. That the mortgagees have a competent legal authority to litigate their right to the fund representing the vessel, although the court could give them no direct remedy against the vessel by way of foreclosure of the mortgage, or otherwise. That the libellants having a lien upon the vessel, have a priority over the mortgagees. That the principle is not changed by the fact that the foundation of the mortgage was a debt of a maritime character, accruing for labor and materials furnished by the mortgagees to the vessel. They could claim no priority over, if, indeed, their position was as advantageous as that of an unsecured material man, as by

[1] We are indebted to Hunt's Merchants' Magazine for this case.—*Eds. Am. Law Register.*