THE
AMERICAN LAW REGISTER

FOUNDED 1852.

UNIVERSITY OF PENNSYLVANIA

DEPARTMENT OF LAW

SUBSCRIPTION PRICE, $3.00 PER ANNUM. SINGLE COPIES, 35 CENTS.

Published Monthly for the Department of Law by DANIEL S. DOREY, at 115 South Sixth Street, Philadelphia, Pa. Address all literary communications to the EDITOR-IN-CHIEF; all business communications to the TREASURER.

MANDAMUS; DUTY OF RAILROADS TO RUN TRAINS FOR PASSENGERS ONLY. *People ex rel. Cantrell* v. *St. Louis, A. & T. H. R. Co.*, 52 Northeastern Reporter, 292. This case came before the Supreme Court of Illinois on an appeal from the Circuit Court of Franklin county, which had refused to issue a writ of mandamus commanding the railroad company to operate a daily passenger train from East St. Louis to Eldorado. The Supreme Court reversed the decision of the lower court on the ground that the right of the people to insist on the running of a separate passenger train is implied from the charter obligation to equip and operate the road. "It cannot be said that the carriage of passengers in a car attached to a freight train is a suitable and proper operation of a

railroad. The transportation of passengers on a mixed train is subordinate to the transportation of freight. Railroad corporations are bound to the exercise of the highest degree of care and diligence in the conduct of their business. But there are necessary differences between passenger and freight trains; and, although a limited discretion may be exercised as to what rolling stock and equipment are necessary for the suitable and proper operation of a railroad carrying passengers, the legitimate exercise of this discretion begins only when the mode of carrying passengers is distinct from the mode of carrying freight." In this last sentence we have the gist of the decision, and the court skilfully led up to it with the statements about the charter obligation to operate the road suitably and properly, in order to avoid the general rule that the court will not interfere with the management of railways in these respects except where the act sought to be enforced is specific, and the right to its performance in the manner proposed clear and undoubted.

A new duty is hereby imposed upon railroad companies—one which, if they are rigorously obliged to fulfil it, will put some of them to great inconvenience. The Illinois court qualified their decision by declaring that the expense of running a train especially for passengers should be justified by the amount of business done on the particular line of road over which the daily passenger train is to be run. This qualification, however, is shorn of much of its effect by the court's refusal to give weight to the allegation that the Eldorado line, considered separately, did not earn enough to justify the expense of running a daily passenger train. The court remarked: "The appellee operates its main road and its leased branches [one of which was the Eldorado line] as one system, and, as thus operated, the main road and its branches yield the net yearly income of about $600,000." "The whole business of the various parts operated as one line should be taken into consideration." Therefore, "a small part of the continuous line, which happens to run through a section of country where the freight is not so much and the passengers are not so many as on some other parts of the line," cannot be taken by itself and the train service regulated accordingly.

This decision may be justified by the conditions of transportation in Illinois and Missouri, but we doubt whether it is applicable throughout the whole country. The reasonableness of the requirement should be scrutinized in each particular case, and to determine judicially that a daily passenger train is the minimum of service that a railroad company may provide for those who ride on its line seems likely to result sometimes in injustice to the company, and ultimately to harm some sections of the people. Prosperous railroad companies will be slower to extend their branches into untapped country districts if they are to be forced to operate according to a rule of law which fails to take into account the circumstances of the case and the comparative necessity of transportation facilities.

There are few cases at all like the one under consideration, but their very rarity shows the reluctance of the courts to issue a writ of mandamus prescribing the performance of certain actions to quasi-public corporations. They hardly ever take any steps before requiring the clearest proof that it was intended by the legislature to make the corporation actively perform the alleged duty. *In re The New Brunswick and Canada R. Co.*, 17 New Brunswick (1 Pugsley & Burbidge) 667 (1878), is a case frequently cited as deciding that a railroad company can be compelled to run daily trains over its line. This duty, however, was especially imposed by the statute under which the Canadian Railway was incorporated, and, besides, from what appears in the report, the company was held to comply with this express stipulation by running daily over its line a mixed train, just as the Missouri Company was doing before the writ of mandamus issued against it. The case of *The Ohio & Mississippi Railway Company* v. *The People*, 120 Ill. 200 (1887), while somewhat different in its facts, is against the position now taken by the Supreme Court of Illinois. The statement in that case, that "a company running a daily passenger train each way over an unprofitable road certainly does fully as much as the law requires of it, so far as passenger trains are concerned," should not be taken, as it is by the present Supreme Court, to hold affirmatively that a daily passenger train is always required to be run. For in the case decided in 1887 the railroad was running already a daily passenger train, and the court was merely stating that the railroad was furnishing sufficient service—not that it was furnishing too little or just enough to pass muster. It is to be remarked, also, that the mandamus was refused in the former case, and that the court then used the following language: "It is believed no case can be found which, in the absence of a statutory requirement, has gone to the length of holding that a railway company may be compelled by mandamus to increase the number of trains on its road, or to run daily a particular number of trains over its road; and we are satisfied there is no common law authority for making such an order." Now, since the same remarks apply equally to a mandamus to run a daily train for passengers only over a railroad line, we are inclined to think that the reasonableness of the requirement of passenger service may be seriously questioned.

STATUTE OF LIMITATIONS; ACTION FOR CONSEQUENTIAL DAMAGES; CONTRACT FOR THE BENEFIT OF THIRD PERSONS. In *Kuhl* v. *Chicago & Northwestern Ry. Co.*, 77 N. W. 155 (Wisconsin, Nov. 1, 1898), a railroad company with proper authority, having constructed its track on a public street, afterwards sold out to another company, which agreed to pay all its existing debts, liabilities and obligations. A property owner along the line of the road, entitled to damages because of the obstruction to the street, instituted suit against the second company. It was pleaded in defence that the statutory period had elapsed during which the action

might have been maintained. The agreement of the company to assume, among other responsibilities, the liability of the original company to the plaintiff, was, however, held to constitute a new and independent contract for his benefit, which the running of the statute against the former company could not defeat.

With due respect to the learned judges who are responsible for the above decision, there seems to be no authority for their position. A person whose property has been injured in the exercise of eminent domain has the right to proceed under the special statutes giving him a remedy, or by the common law action of trespass; if the injury is one within its application. In either case the wrong is not a breach of contract.

The measure of damages is the difference between the value of the land immediately before such construction and immediately after its substantial completion: *Railroad Co.* v. *Burson*, 61 Pa. 369 (1869). Upon such completion the damages are at once recoverable, and must all be recovered in one action: *Railroad Co.* v. *McAuley*, 121 Ill. 160 (1887); *Lyles* v. *Railroad Co.*, 73 Tex. 95 (1889); *Lohr* v. *Railroad Co.* 10 N. E. (N. Y.) 528 (1887). The English cases have confined the exceptions to the rule that no person can become entitled to any rights under, or demand the performance of, a contract to which he is not a party to its narrowest limits. See Pollock on Contracts, 196 *et seq.*, and Anson on Contracts, 212 *et seq.* The broadest accepted statement of the rule in this country is, that a party may maintain *assumpsit* on a parol promise made to another for his benefit. Judge Bigelow (on whose statement of the principle in *Brewer* v. *Dyer*, 7 Cush. 337 (1851), the court seems to have relied), in his book on Torts, p. 619, upon the cases of telegraphic dispatches, contends that the action is not *ex-contractu*, but founded on the wrong of which the contract is the occasion. An examination of the authorities, however, fails to disclose any decisions which may be regarded as sustaining a broader proposition than that which extends the right to all actions where assumpsit may be maintained.

In *Brewer* v. *Dyer*, 7 Cush. 337 (1851), Bigelow, J., said: "Upon the principle of law, long recognized and clearly established in this commonwealth, that where one person, for a valuable consideration, engages with another, by simple contract, to do some act for the benefit of a third, the latter, who would enjoy the benefit of the act, may maintain an action for the breach of such engagement. In the case of *Carnegie* v. *Morrison*, 2 Met. 381, all the authorities are fully reviewed in the opinion of the court, and the rule of law clearly vindicated and established. It does not rest upon the ground of any actual or supposed relationship between the parties, as some of the cases would seem to indicate, nor upon the reason that the defendant, by entering into such an agreement, has impliedly made himself the agent of the plaintiff, but upon the broader and more satisfactory basis that the law, operating on the act of the parties, creates the duty, estab-

lishes the priority, and implies the promise and the obligation on which the action is founded." The facts were that the plaintiff had leased his premises to one who subsequently surrendered them to a third person, who thereupon agreed with his vendor to pay the rent to the landlord, and it was held that the landlord, who acquiesced in his possession, was entitled to recover on this promise.

In the case under discussion the contract was not the occasion of the injury, and the telegraphic dispatch cases are not relevant. "Where an action rests upon a promise, a new promise or acknowledgment of indebtedness so absolute that from it a promise to pay may be implied, will start the statute of limitations afresh. But in case of a tort, an admission that it was committed within six years cannot make the party guilty of committing it afresh:" 13 Am. & Eng. Ency. of Law, 749; *Oothout* v. *Thompson*, 20 Johns (N.Y.) 277 (1823); *Goodwyn* v. *Goodwyn*, 16 Ga. 114 (1854); *Gallagher* v. *Hollingsworth*, 3 H. & M. (Md.) 122 (1793); *Brand* v. *Longstreth*, 15 N. Y. 325 (1857); *Fritz* v. *Shade*, 9 Hun. (N.Y.) 145 (1876); *Armstrong* v. *Swan*, 109 Pa. 177 (1885); *Ott* v. *Whitworth*, 8 Hump. (Tenn.) 494 (1847); *Hurst* v. *Parker*, 1 B. & Ald. 92 (1818); *Taeevur* v. *Stuart*, 6 B. & C. 303 (1827); *Morton* v. *Chandler*, 8 Me. 9 (1831); *Whitehead* v. *Howard*, 2 B. & B. 372 (1823); *Short* v. *McCarthy*, 3 B. & Ald. 626 (1820).

In *Hurst* v. *Parker*, 1 B. & Ald. 92 (1818), cited with approval in *Oothout* v. *Thompson*, 20 Johns (N. Y.) 279 (1823), "in trespass for breaking and entering coal mines and taking away coal," there was a plea of the statute of limitations and replication thereto in the affirmative. At the trial no evidence was given to show that the trespass was actually committed within six years. It was held that evidence of a promise to make compensation by the defendant before the commencement of the action, and when he was threatened with an action for taking away coal, was not sufficient to support this issue, by which the plaintiff was bound to prove the affirmative that he had a good cause of action within six years of the commencement of the suit. It has, nevertheless, been held, in an action founded in tort, that a distinct promise to pay, provided plaintiff would not bring suit, might operate by way of estoppel, but not to revive the dead tort: *Armstrong* v. *Levan*, 109 Pa. 177 (1885).

The present case must also be distinguished from one where the railroad company had executed its bond to the injured property owner. By the acceptance of the bond the acts of such company are made lawful, and the property owner is relegated to an action upon the bond: *Keller* v. *Railroad Co.*, 151 Pa. 67 (1892). A change in ownership of the railroad property neither revives the old nor creates a new cause of action: *Frankle* v. *Jackson, Receiver*, 30 Fed. 398.