CHAPTER 2.

OF THE FORMATION OF RAILROAD CORPORATIONS USING NARROW GUAGE.

§ **20.** *Narrow guage roads, how organized.*—Section five of chapter five hundred and sixty of the laws of eighteen hundred and fifty,* entitled "An act to authorize the formations of railroad corporations and to regulate the same, as amended by chapter one hundred and three of the laws of eighteen hundred and seventy-seven, is amended so as to read as follows: Corporations may be formed under the act entitled "An act to authorize the formation of railroad corporations and to regulate the same," passed April second, eighteen hundred and fifty, for the purpose of constructing and operating railroads for public use in transporting persons and property, of the guage of three feet and six inches or less, but not less than thirty inches within the rails; whenever capital stock of said corporation to the amount of one thousand dollars for every mile of such railroad proposed to be constructed and operated has been in good faith subscribed, and whenever one thousand dollars or more for every mile of such railroad proposed to be constructed shall be in like manner subscribed, and ten per cent thereon in good faith actually paid in cash to the directors named in the articles of association, and an affidavit made by at least three of said directors and indorsed on or annexed to said articles that the amount of stock hereby required has been so subscribed as aforesaid, and ten per cent thereon paid as aforesaid, and that it is intended in good faith to construct and operate such railroad, then said articles with such affidavit may be filed and recorded in the office of the secretary of state, provided said articles contain all the other facts required by law to be stated in articles of association made for organizing railroad corporations under said act entitled "An act to authorize the formation of railroad corporations and to regulate the same," passed April second, eighteen hundred and fifty, except the amount of the capital stock

* So in the original; should be 1871.

has not constructed its railroad, may construct a railroad of the gauge herein before mentioned, and may acquire title to lands necessary for the construction, maintenance and operating of such railroad on complying with the provisions of this act, and of all other provisions of law not inconsistent herewith. (*Laws* 1871, *chap.* 560, § 7.)

The previous legislation upon this subject was as follows:

Corporations may be formed under the act entitled "An act to authorize the formation of railroad corporations and to regulate the same," passed April second, eighteen hundred and fifty, for the purpose of constructing and operating railroads, for public use in transporting persons and property, of the guage of three feet and six inches or less, but not less than than thirty inches within the rails, whenever capital stock of said corporation to the amount of five thousand dollars for every mile of such railroad proposed to be constructed and operated has been in good faith subscribed; and whenever five thousand dollars or more for every mile of such railroad proposed to be constructed shall be in like manner subscribed, and ten per cent thereon in good faith actually paid in cash to the directors named in the articles of association, and an affidavit made by at least three of said directors, and indorsed on or annexed to said articles, that the amount of stock hereby required has been so subscribed as aforesaid, and ten per cent thereon paid as aforesaid, and that it is intended in good faith to construct and operate such railroad, then said articles with such affidavit may be filed and recorded in the office of the secretary of state; provided said articles contain all the other facts required by law to be stated in articles of association made for organizing railroad corporations under said act entitled "An act to authorize the formation of railroad corporations and to regulate the same," passed April second, eighteen hundred and fifty; and all of the provisions of said last mentioned act shall apply to corporations formed for the construction and operating of railroads of the guage herein above mentioned, except as herein provided or otherwise provided by law. (*Laws* 1871, *chap.* 560, § 5.)

Any railroad company duly organized according to law, when the guage of its proposed railroad shall be three feet and six inches or less, but not less than thirty inches within the rails, may, whenever six thousand dollars for every mile of its railroad proposed to be constructed in this State is in good faith subscribed toward its capital stock, and ten per cent thereon paid in good faith in cash, apply to the supreme court in the manner provided by law for the appointment of commissioners, and all subsequent proceedings may be had to obtain the title to lands necessary for the construction and maintenance and operating said railroad, to the same extent and in the same manner as if the whole amount of capital stock specified in its articles of association was in like manner subscribed, and ten per cent thereof in like manner paid in cash, and may lay upon such road, iron of a weight not less than forty pounds to the lineal yard, and may use in switches and turn-outs iron of not less than thirty pounds to the lineal yard. (*Laws* 1871, *chap.* 560, § 6.)

Section fifth of the act passed April nineteenth, eighteen hundred and seventy-one, entitled "An act to amend an act entitled 'An act to authorize the formation of railroad corporations and to regulate the same,'" passed April second, eighteen hundred and fifty, is hereby amended so as to read as follows:

§ 5. Corporations may be formed under the act entitled "An act to authorize the formation of railroad corporations and to regulate the same," passed April

second, eighteen hundred and fifty, for the purpose of constructing and operating railroads for public use in transporting persons and property, of the guage of three feet and six inches or less, but not less than thirty inches within the rails; whenever capital stock of said corporation to the amount of one thousand dollars for every mile of such railroad proposed to be constructed and operated has been in good faith subscribed, and whenever one thousand dollars or more for every mile of such railroad proposed to be constructed shall be in like manner subscribed, and ten per cent thereon in good faith actually paid in cash to the directors named in the articles of association, and an affidavit made by at least three of said directors, and indorsed on or annexed to said articles that the amount of stock hereby required has been so subscribed as aforesaid, and ten per cent thereon paid as aforesaid, and that it is intended in good faith to construct and operate such railroad, then said articles with such affidavit may be filed and recorded in the office of secretary of state, provided said articles contain all the other facts required by law to be stated in articles of association made for organizing railroad corporations under said act entitled "An act to authorize the formation of railroad corporations and to regulate the same," passed April second, eighteen hundred and fifty; and all the provisions of said last mentioned act shall apply to corporations formed for the construction and operating of railroads of the guage herein above mentioned, except as herein provided or otherwise provided by law. (*Laws* 1872, *chap.* 81, § 1.)

Section five of chapter five hundred and sixty of the laws of eighteen hundred and seventy-one, entitled "An act to amend an act entitled 'An act to authorize the formation of railroad corporations and to regulate the same,'" passed April second, eighteen hundred and fifty, is hereby amended so as to read as follows:

§ 5. Corporations may be formed under the act entitled "An act to authorize the formation of railroad corporations and to regulate the same," passed April second, eighteen hundred and fifty, for the purpose of constructing and operating railroads for public use in transporting persons and property, of the guage of three feet and six inches or less, but not less than thirty inches within the rails, whenever capital stock of said corporation to the amount of one thousand dollars for every mile of such railroad proposed to be constructed and operated has been in good faith subscribed; and whenever one thousand dollars or more for every mile of such railroad proposed to be constructed shall be in like manner subscribed, and ten per cent thereon in good faith actually paid in cash to the directors named in the articles of association, and an affidavit made by at least three of said directors, and indorsed on or annexed to said articles, that the amount of stock hereby required has been so subscribed, as aforesaid, and ten per cent thereon paid as aforesaid, and that it is intended in good faith to construct and operate such railroad, then said articles, with such affidavit, may be filed and recorded in the office of the secretary of state, provided said articles contain all the other facts required by law to be stated in articles of association made for organizing railroad corporations under said act entitled "An act to authorize the formation of railroad corporations and to regulate the same," passed April second, eighteen hundred and fifty, except that the amount of the capital stock of the company, stated in said articles, shall be not less than four thousand dollars for every mile of road constructed, or proposed to be constructed, and all of the provisions of said last-mentioned act shall apply to corporations formed for the construction and operating of railroads of the

guage hereinabove mentioned, by law. (*Laws* 1877, *chap.* 10

Section sixth of said act is h

§ 6. Any railroad company of its proposed railroad shall than thirty inches within the stock thereof has been in good in good faith, in cash, apply to law, for the appointment of co be had to obtain the title of l nance and operating said railr as if the whole amount of the tion was in like manner subs paid in cash, and may lay upo pounds to the lineal yard. S when its road is not more tha cents per mile; when its road miles in length not exceeding than forty miles in length not and his ordinary baggage transp to fares in this section shall ap any railroad now in operation be located in the county of Ki (*Laws* 1877, *chap.* 103, § 2; *ch* the text, *sub nomine, chap.* 560

guage hereinabove mentioned, except as herein provided or otherwise provided by law. (*Laws* 1877, *chap.* 103, § 1.)

Section sixth of said act is hereby amended so as to read as follows:

§ 6. Any railroad company duly organized according to law, when the guage of its proposed railroad shall be three feet and six inches or less, but not less than thirty inches within the rails, may whenever two-thirds of the capital stock thereof has been in good faith subscribed and ten per cent thereon paid in good faith, in cash, apply to the supreme court, in the manner provided by law, for the appointment of commissioners, and all subsequent proceedings may be had to obtain the title of lands necessary for the construction and maintenance and operating said railroad, to the same extent and in the same manner as if the whole amount of the capital stock specified in its articles of association was in like manner subscribed, and ten per cent thereof in like manner paid in cash, and may lay upon such road iron of a weight not less than forty pounds to the lineal yard. Such railroad company may charge and receive when its road is not more than twenty-five miles in length not exceeding five cents per mile; when its road is more than twenty-five and not more than forty miles in length not exceeding four cents per mile, and when its road is more than forty miles in length not exceeding three cents per mile, for each passenger and his ordinary baggage transported on said road, provided that nothing relating to fares in this section shall apply to railroad companies now incorporated or to any railroad now in operation, or to any railroad or part thereof located or to be located in the county of Kings or within the limits of any incorporated city. (*Laws* 1877, *chap.* 103, § 2; *chap.* 560, *Laws of* 1871, was amended as stated in the text, *sub nomine*, *chap.* 560, *Laws of* 1850.)

CHAPTER 3.

OF THE FORMATION OF RAILROAD CORPORATIONS, WHEN RAILWAY IS OPERATED BY ROPE OR CABLE ATTACHED TO STATIONARY POWER.

§ **23.** *Company organized for travel by means of propelling power.*—It shall be lawful for any number of persons, not less than ten, to form themselves into a company for constructing, maintaining, and operating a railway for public use, in the conveyance of persons and property, by means of a propelling rope or cable attached to stationary power, and upon compliance with the provisions of the first three sections of the act to which this is supplementary, they shall become a body corporate and politic, according to the provisions of said act; *Provided*, That the directors of any such company may be limited to any number not less than five, to be specified in the articles of association. (*Laws* 1866, *chap.* 697, § 1.

The act to which the above is supplementary is chapter 140, Laws of 1850 (see title to the act). The first two sections of the act above referred to, are embraced in sections 4, 5, 7, 8, 10, *ante*, and the third section of the act referred to relates simply to the evidence of the incorporation. (See § 30, *post*.)

§ **24.** *Name of the company.*—Any such company may style itself by the name of the inventor or patentee of the particular method of propulsion used, together with such local designation as the associates may deem desirable, and shall, by such name set forth in their articles of association, have and enjoy all the powers and privileges and be subject to the liabilities mentioned in the aforesaid act, passed April second, eighteen hundred and fifty, so far as the same are comprised in the first twenty-six sections and the twenty-eighth section thereof. (*Laws* 1866, *chap.* 697, § 2.)

(The act above referred to is the general railroad act, chap. 140, Laws 1850.)

§ **25.** *Rate of fare on such roads.*—Companies formed under the provisions of this supplementary act may fix and

collect rates of fare on their respective roads, not exceeding five cents for each mile or any fraction of a mile, for each passenger, and with right to a minimum fare of ten cents. (*Laws* 1866, *chap.* 697, § 3.)

§ **26.** *May operate road in other States.*—It shall be lawful for any company formed under this act to construct and operate and maintain a road or roads in any other State or country in which the same does not conflict with the laws of such state or country; provided the assent of inventors or patentees are first obtained in the same manner and extent as would be necessary within the United States. (*Laws* 1866, *chap.* 697, § 4.)

CHAPTER 4.

CERTAIN INDIVIDUALS AND CORPORATIONS MAY LAY DOWN RAILROAD TRACKS.

§ **27.** *Plank-road and turnpike companies authorized to lay down rails.*—Any plank-road or turnpike company shall have power and is authorized to lay iron rails on their road suitable for the use of wagons and vehicles drawn by horses going over its road, except in the counties of Cortland, Orleans, Kings, Oneida, New York and Steuben. (*Laws of* 1879, *chap.* 214, § 1.)

Nothing contained in this act shall permit or authorize the using of steam on any plank-road or turnpike. (*Idem*, § 2.)

§ **28.** *When individuals and corporations, etc., engaged in the manufacture of railroad cars, may lay down railroad tracks.*—Any individual, joint stock association or corporation now or hereafter engaged in the manufacture of railroad cars in this State may lay down and maintain such railroad tracks, not exceeding one mile in length, as shall be necessary to connect such manufacturing establishment with the tracks of any railroad now or hereafter operated in this State; provided they shall obtain the consent of the owners of one-half in value the property bounded on, and the consent also of the local authorities having the control of that portion of a street or highway upon which it is proposed to construct or operate such railroad be first obtained; or in case the consent of such property owners cannot be obtained, the general term of the Supreme Court in the district in which it is proposed to be constructed may, upon application, appoint three commissioners, who shall determine, after a hearing of all parties interested, whether such railroad ought to be constructed or operated, and their determination, confirmed by the court, may be taken in lieu of the consent of the property owners. (*Laws* 1880, *chap.* 267, § 1.)

The provisions of this act shall not apply to the counties of New York and Kings. (*Idem*, § 2.)

§ 29. *Corporations owning canals may construct and operate railroads along side of or in lieu thereof.*—It shall be lawful for any corporation of this State owning and operating a canal to construct and operate along or in lieu of such canal a railroad, and the exercise of the authority hereby conferred shall not be deemed to forfeit or impair its corporate rights under its charter or act of incorporation. (*Laws* 1881, *chap.* 452, § 1.)

Such company in the construction and maintenance of any such railroad under the authority of this act shall have, possess and enjoy all the powers and privileges contained in an act entitled "An act to authorize the formation of railroad corporations and to regulate the same," passed April second, eighteen hundred and fifty, and the several acts amending the same, and be subject to all the duties, liabilities and provisions so far as relates to any powers or privileges by this act upon said company conferred and hereafter exercised. (*Idem*, § 2.)

Nothing in this act contained shall authorize the construction of any railroad except upon or along such canal owned and operated by any such company, and not in any other locality. (*Idem*, § 3.)

CHAPTER 5.

OF THE CORPORATE EXISTENCE.

§ 30. *Evidence of incorporation.*—A copy of any articles of association filed and recorded in pursuance with this act (the general railroad law of 1850), or of the record thereof, with a copy of the affidavit aforesaid indorsed thereon or annexed thereto, and certified to be a copy by the secretary of this State, or his deputy, shall be presumptive evidence of the incorporation of such company, and of the facts therein stated. (*General Railroad Act, Laws* 1850, *chap.* 140, § 3.)

The certificate of the secretary of state to the articles of association, in accordance with the provisions of section three of the general railroad act, is evidence of the filing and recording, and of the time when these acts were done. (*Buffalo and Pittsburgh R. R. Co.* v. *Hatch*, 20 N. Y., 161.) All that a corporation is called upon to prove, to establish its existence, in a litigation with individuals dealing with it, is its charter and user under it. (*Wood* v. *Jefferson County Bank*, 9 Cow., 194; *Utica Ins. Co.* v. *Tillman*, 1 Wend., 555; *Same* v. *Cadwell*, 3 id., 296; *Fire Department of N. Y.* v. *Kip*, 10 id., 266; *McFarlan* v. *Triton Ins. Co.*, 4 Den., 392; *Jones* v. *Dana*, 24 Barb., 395.) In *Thomas* v. *Dakin*, 22 Wend., 9–112, and in *Warner* v. *Beers*, 23 id., 103–190, the question what is a corporation was discussed with exhaustive research. "We may, in short," said Nelson, C. J., in the former case (22 Wend., 71), "conclude by saying, with the most approved authorities at this day, that the essence of a corporation consists in capacity (1) to have perpetual succession under a special name and in an artificial form; (2) to take and grant property, contract obligations, sue and be sued by its corporate name as an individual; and (3) to receive and enjoy, in common, grants of privileges and immunities." In the same case (22 Wend., 91), Cowen J., summed up the incidents of a corporation mentioned by Blackstone, as follows: "These are, in short, the receiving of peculiar laws, and the making of by-laws for itself; perpetual succession both as to its privileges and property; the having one will, as collected from the power of the

majority to make by-laws ; and the being but one person in law,—a person that dies not, but continues the same individual though its parts may change." The definition of Kyd has been frequently quoted : "Though many things be incident to a corporation, yet, to form the complete idea of a corporation aggregate, it is sufficient to suppose it vested with the three following capacities : (1) To have perpetual succession under a special denomination, and under an artificial form ; (2) to take and grant property, to contract obligations, and to sue and be sued by its corporate name in the same manner as an individual ; (3) to receive grants of privileges and immunities, and to enjoy them in common. These alone are sufficient to the essence of a corporation." (1 Kyd on Corp. 70.) The definition of Marshall, C. J., in *Dartmouth College* v. *Woodward*, 4 Wheat., 636, is familiar : "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are *immortality* and, if the expression may be allowed, *individuality ;* properties by which a perpetual succession of many persons are considered as the same, and may act as a single individual." "A corporation aggregate is a collection of individuals united in one body under such a grant of privileges as secures the succession of members without changing the identity of the body, and constitutes the members for the time being one artificial person, or legal being, capable of transacting some kind of legal business like a natural person." (Bronson, J., in *The People* v. *The Assessors of Watertown*, 1 Hill, 620.) The Constitution of New York, art. 8, § 1, declares that corporations may be formed under general laws ; and by section 3 it declares that the term "corporation," as used in that article, shall be construed to include all associations or joint-stock companies having any of the powers or privileges not possessed by individuals or partnerships. The Legislature of that State, in 1849, and also in 1854, passed laws authorizing generally the formation of associations, or joint-stock companies, under the provisions of the constitution, and conferred on them many of the powers and privileges not possessed by individuals or partnerships. The act of 1854 closed with the declaration that "this act shall in no court be construed to give said associations any rights and privileges as corporations." This proviso was held in conflict with the constitution, and nugatory, and a company organized under these acts was a corporation for the purposes of taxation. (*Sandford* v. *Board of Supervisors*, 15 How. Pr., 172.) The fact that the Legislature has designated a given body as a corporation, or refused the application of such a designation, does not conclusively determine whether it is or is not to be deemed by the courts a corporation. (*Oliver* v. *Liverpool, etc., Co.*, 100 Mass., 531; S. C., *sub nom.*, *Liverpool Ins.* v. *Massachusetts*, 10 Wall., 566; *Thomas* v. *Dakin*, 22 Wend., 103.) In this last case, Cowen, J., said : "It has been impossible for me to see the force of the argument that because the Legislature have constantly avoided to call these associations, or any of their machinery, *a corporation*, then therefore we cannot adjudge them to be so. If they have the attributes of corporations, if they are so in the nature of things, we can no more refuse to regard them as such than we could refuse to acknowledge John or George to be natural persons because the Legislature may, in making provisions for their benefit, have been pleased to designate them as belonging to some other species. Should the Legislature expressly declare each

of them to be corporations, without giving them corporate succession or other artificial attributes, the declaration would not make them so. On the other hand, even an express legislative declaration that certain associations are not included in the definition of corporations would not change their character, provided they should in fact be clothed with all the essential powers of corporations." The writer ventures the opinion that for the purposes of substantial right the aggregate body of shareholders should be deemed to be the corporation. This is the view which the English courts appear to be now taking of the registered joint-stock companies of that country, formed under recent statutes, which do not differ in substance from American corporations. Those courts have, accordingly, held that fraudulent and *ultra vires* acts of the directors of a company, assented to by the members in general meeting, became the acts of the company itself. And the individual stockholder is for many purposes of substantial justice deemed to be, not a stranger to the corporation, but in privity with it. But by a fiction of law, resorted to, it is believed, merely for the convenient administration of justice, the corporation is deemed to be one person, whilst the stockholders—even the whole of them taken collectively—are other persons. This distinction is well illustrated and discussed by Lord Langdale, M. R., in the case of *The Society of Practical Knowledge* v. *Abbott*, 2 Beav., 559, where all the corporators, four in number, by mutual assent, divided the capital stock of the corporation among themselves without fully paying for it, and the corporation afterwards sustained a bill in equity against them to recover the deficiency. (Thompson on Liability of Stockholders, note to § 1.)

§ 31. *When corporate existence must be proved.*—In an action brought by or against a corporation the plaintiff need not prove upon the trial the existence of the corporation, unless the answer is verified and contains an affirmative allegation that the plaintiff or the defendant, as the case may be, is not a corporation. (*Code of Civil Procedure*, § 1776.)

The original provision was not applicable to a foreign corporation, which must prove its corporate existence if a general denial was interposed. (14 Barb., 182.)

The former provisions of the Revised Statutes, for which the above mentioned section of the Code of Civil Procedure is now a substitute, was as follows:

"In suits brought by or against a corporation created by or under any statute of this State, it shall not be necessary to prove on the trial of the cause the existence of such corporation, unless the defendant shall have alleged in the answer in the action that the plaintiffs or defendants, as the case may be, are not a corporation, nor unless the allegations in the answer that the defendant is not a corporation be verified under oath in the manner provided by law for the verification of pleadings in actions in courts of record." (2 *R. S.*, 458, § 3, *as amended by Laws* 1864, *chap.* 422, *and by Laws* 1875, *chap.* 508.)

Section 3 above was excepted from the repealing act chapter 417, Laws of 1877, but was repealed by chapter 245 of the Laws of 1880.

In the *Bank of Genesee* v. *The Patchin Bank*, 13 N. Y., 313, it was said the defendant has not pleaded in such manner as to oblige the plaintiff to prove its corporate existence. The answer is a general denial of all the allegations in the complaint, and, but for the statute to be presently mentioned, would put in issue the plaintiff's corporate character. A section of the Revised Statutes

declares that in suits brought by a corporation it shall not be necessary on the trial to prove the existence of such corporation, unless the defendant shall have pleaded in abatement or bar that the plaintiff is not a corporation. (2 *R. S.*, 458, § 3.) This provision was enacted to relieve the plaintiff from the expense and inconvenience of preparing in every case of an action by a corporation when the general issue was pleaded to prove its character. There is no inconsistency or repugnancy in applying the provision above referred to from the Revised Statutes to actions under the Code; it therefore remains in force. The rule is that a defendant who has contracted with a corporation *de facto* is never permitted to allege any defect in its organization as affecting its capacity to contract or sue, but that all such objections, if valid, are only available on behalf of the sovereign power of the state. (*Sands, Receiver*, v. *Hill*, 42 Barb., 654.) When it is a simple question of capacity to contract arising either on a question of regularity of organization or of powers conferred by the charter, a party who has had the benefit of the contract cannot be permitted in an action founded upon it to question its validity. (*Steam Navigation Co.* v. *Weed*, 17 Barb., 37, 38; *see also Palmer* v. *Lawrence*, 3 Sandf. 161; *Eaton* v. *Aspinwall*, 6 Duer, 176; S. C., 13 How. Pr., 184; S. C., 3 Abb. Pr., 417; *White* v. *Coventry*, 29 Barb , 305; *Hyatt* v. *Esmond*, 37 *id* , 601; *Cooper* v. *Shaver*, 41 *id.*, 151; *White* v. *Ross*, 15 Abb. Pr., 66.) That a defendant may set up that a franchise had been repealed or surrendered, see *Adams* v. *Beach*, 6 Hill, 273; *Peo.* v. *Manhattan Co.*, 9 Wend., 382; or that it had expired by its own limitation. (*Idem.*)

DEFENSE OF NO CORPORATION.—If a person, when sued by a corporation, pleads *nul tiel corporation*, the production of the certificate of incorporation which has been filed, and proof of *user*, and possibly proof of user alone, will be sufficient evidence *prima facie* of the fact that it is a corporate body in fact as well as in name. (Gray, J., in *Eaton* v. *Aspinwall*, 19 N. Y., 121; *Dutchess Cotton Man.* v. *Davis*, 14 Johns., 238, 245; *U. S. Bank* v. *Stearns*, 15 Wend., 315; *Utica Ins. Co.* v. *Tillman*, 1 Wend., 556; *M. E. Church* v. *Pickett*, 19 N. Y., 482.) The rule extends further: A person who has contracted with a body in writing, by a corporate name, when sued upon the instrument in the same name, is estopped to deny that the payee or obligee is such a corporation. (14 Johns., 238-245.) There is a saying that it is a poor rule which will not work both ways; but this rule is not obnoxious to such a criticism. When the stockholders in a body which has acted and held itself out as a corporation are proceeded against by creditors, they are equally estopped by their own conduct from denying that they are a corporation; for it would be palpably wrong to permit a defendant, who is one of the owners of the capital stock of a *de facto* corporation, which operates and sues for his benefit, to set up a failure of its organizers to perform a duty initiatory to its legal existence, when the plaintiff, if sued by the corporation for the defendant's benefit, could not set up the same fact as a defense to the suit. (Thompson's Liability of Stockholders, § 407; *Eaton* v. *Aspinwall*, 19 N. Y., 121; *Mead* v. *Keeler*, 24 Barb., 20; *Abbott* v. *Aspinwall*, 26 Barb., 202.

§ **32.** *When corporate existence to cease by non-user.*—If any corporation formed under an act entitled "An act to authorize the formation of railroad corporations, and to regulate the same," passed April second, eighteen hundred and fifty, shall not, within five years after its articles of

association are filed and recorded in the office of the secretary of state, begin the construction of its road, and expend thereon ten per cent on the amount of its capital, or shall not finish its road and put it in operation in ten years from the time of filing its articles of association, as aforesaid, its corporate existence and powers shall cease. (*Chap.* 775, *Laws* 1867, § 1.)

PREVIOUS LEGISLATION.—The legislation upon this subject was, first, the enactment of section 47 of the general railroad act, then its amendment by chapter 582, § 5, of the Laws of 1864, then the passage of the above act (chap. 775, Laws of 1867). The old statutes are as follows: If any corporation formed under this act (*i. e.*, the general railroad act), shall not, within two years after its articles of association are filed and recorded in the office of the secretary of state, begin the construction of its road, and expend thereon ten per cent on the amount of its capital or shall not finish the road and put it in operation in five years from the time of filing its articles of association as aforesaid, its corporate existence and power shall cease. (*Laws* 1850, *chap.* 140, § 47.)

Section forty-seven of chapter one hundred and forty of the Laws of 1850, is hereby amended so as to read as follows:

§ 47. If any corporation formed under this act shall not, within five years after its articles of association are filed and recorded in the office of the secretary of state, begin the construction of its road, and expend thereon ten per cent on the amount of its capital, or shall not finish its road and put it in operation in seven years from the time of filing its articles of association as aforesaid, its corporate existence and powers shall cease.

This extension of time shall apply to all corporations whose articles of association have been filed within five years before the passage of this act. (*Laws of* 1864, *chap.* 582, § 5.)

A forfeiture of the charter of a corporation cannot be alleged, nor the question of forfeiture considered, upon a collateral proceeding. Even when the terms of the charter are that the corporation *shall be dissolved* on the non-performance of a condition, the mere failure to perform is not *ipso facto* a dissolution, but judicial proceedings on a judgment of ouster must be had to effect a dissolution. (*In the matter of the Ref'd Presby'n Church*, 7 How. Pr., 476; see, also, *Brooklyn Central R. Co.* v. *Brooklyn City R. Co.*, 32 Barb., 358; *People* v. *Manhattan Co.*, 9 Wend., 351; *Caryl* v. *McElrath*, 3 Sandf., 176.) A railroad corporation organized under the general act, cannot be compelled at the suit of the attorney-general, in the name of the people of the State in the nature of an action for specific performance, to reopen and operate a portion of their road, which they have abandoned. A franchise to maintain a railroad upon a fixed route, and between places named in the charter, is an entire thing, and can only be legally exercised by the corporation operating its entire road. But the only remedy for disusing a part of the road, is by an action to vacate the charter, or annul the existence of the corporation. (*Ct. of Appeals*, 1861, *People* v. *Albany and Vermont R. R. Co.*, 24 N. Y., 261.) The decision below here reversed, but which is agreeable to this on the merits, is reported in 11 Abbott's Pr., 136; S. C., 19 How. Pr., 523.) The cause of forfeiture cannot be enforced collaterally, or incidentally, or in any way but by a direct proceeding against the company, so that it may have an opportunity to answer. (*Towar* v. *Hale*, 46 Barb., 361.) The first act of incorporation had expired by its own provisions, the road

not having been completed within the prescribed time. A second act was passed declaring that the time should be extended, and proposing to amend the former act, and to repeal parts of it, held valid. (*Crochen* v. *Crane*, 21 Barb., 217.)

Under and by virtue of the provisions of the general railroad act (§ 47, chap. 140, Laws 1850, as amended by § 1, chap. 775, Laws of 1867), which declares that if any corporation organized under it shall not, within five years after its articles of association are filed and recorded, begin the construction of its road, etc., "its corporate existence and powers shall cease," a corporation failing to comply with said condition becomes, by reason thereof, extinct, and no action or judicial proceeding is needed to declare or complete a forfeiture of its charter and loss of corporate powers. (*In re Brooklyn* v. *N. Y. R. R. Co.*, 75 N. Y., 335.)

§ 33. *The charter may be altered, suspended or repealed.* The State Constitution, article 8, § 1, which grants authority to the Legislature to pass laws for the formation of corporations, declares that all general laws and special acts passed pursuant to that section may be altered from time to time or repealed, and the Revised Statutes (1 *R. S.*, 600, § 8, *6th ed. R. S., vol.* 2, *p.* 391) further provide that "the charter of every corporation that shall hereafter be granted by the Legislature shall be subject to alteration, suspension and repeal, in the discretion of the Legislature." (*See White* v. *Syracuse and Utica R. R. Co.*, 14 Barb., 559, as to the exercise of the power by the Legislature.)

Under the section of the Revised Statutes declaring that the charter of every corporation thereafter to be granted shall be subject to alteration, suspension and repeal in the discretion of the Legislature; the Legislature has power to alter and amend a railroad charter granted since the Revised Statutes, although there is no clause in the charter reserving to the Legislature the right to alter or amend it without the consent of the company. (*Suydam* v. *Moore and ano.*, 8 Barb., 358; *see also McFaren* v. *Pennington*, 1 Paige, 102, and *Buffalo, etc., R. R. Co.* v. *City of Buffalo*, 5 Hill, 209; *see also*, as to the presumptions of the power of the executive authority of a foreign government in this respect, *Lee* v. *American Canal Co.*, 3 Abb. Pr. N. S., 1.) When a charter is granted subject to a power reserved by the Legislature to amend or repeal it, a subsequent act authorizing the company to reduce the capital, on consent of a certain majority of the stockholders, is not unconstitutional, either as impairing the obligation of a contract or as altering the character or purpose of the corporation. (*Joslyn* v. *Pacific Mail Steamship Co.*, 12 Abb. Pr. N. S., 329.)

In general if a corporation procure an alteration to be made in its charter by which a new and different business is superadded to that originally contemplated, such of the stockholders as do not assent to the alteration would be absolved from liability on their subscriptions to the capital stock, especially if the alteration be one plainly prejudicial to their interests. (*The Hartford and New Haven R. R. Co.* v. *Croswell*, 5 Hill, 383.) In the above case, the corporation superadded to their original undertaking a new and different enterprise, viz., the purchase and holding of a number of steamboats to be run in connection with the railroad. In the *Schenectady and Saratoga Railroad Company* v. *Thatcher*,

11 N. Y , 102, it was said the Legislature had reserved no such power in that case, and the court accordingly held that when the defendant had subscribed to the stock of a corporation, and the company, by virtue of a subsequent act of the Legislature, without his consent, increased its capital and applied its funds to the construction of a branch road not authorized by its original organization, that he was not thereby released from his subscription. See this case explained in *Buffalo and N. Y. City R. R. Co.* v. *Dudley*, 14 N. Y. (4 Kern.), 336, as not turning on the question of prejudice to the stockholder. And in the latter case of *Buffalo and N. Y. City R R. Co.* v. *Dudley*, 14 N. Y., 336, the court held that an alteration by the Legislature of the company's charter, in pursuance of the powers reserved, by changing its name, increasing its capital and extending its road, did not discharge the defendant from liability on his subscription, and this whether such alteration was beneficial to him or not, there being no fraud on the part of the company. The court in the last cited case held the case of *Thatcher*, 11 N. Y., 102, *supra*, as decisive upon the question. (*See also Troy and Rutland R. R, Co.* v. *Kerr*, 17 Barb., 581) The Legislature may repeal and also amend the charter of a railroad corporation, but if the amendment go further than matters of police and those matters that immediately affect the public, there is no compulsory power and the corporation may decline to accept. Whether and when the charter may be declared forfeited by such nonacceptance or noncompliance are other questions. The corporators say we accept this charter, you reserving the power to amend it, but they do not agree to accept and use it after an amendment, no matter how injurious to their interests. (*Troy and Rutland R. R. Co* v. *Kerr*, *supra*; *see also N. R R. Co.* v. *Miller*, 10 Barb., 260, as to nonrelief of stockholders for their subscriptions in case of amendment not prejudicial to them although they were not consulted) A member of a corporation whose charter the Legislature has reserved the power to repeal or modify, holds his stock subject to such liability as may attach to him in consequence of an extension or renewal of the charter without his application or consent. (*Baily, adm'r*, v. *Hollister, adm'x*, 26 N. Y,, 113.)

Where the right to alter the charter is reserved to the Legislature, the meaning is, that it shall be exercised by the body of men who answer that description at the time that the alteration is to be made, governed by the rules which shall, at *that time*, be prescribed by the fundamental law of the State. Even if the then existing constitution was contemplated by the parties, it must also have been contemplated by them that the sovereign power of the State might change the fundamental law at any time. And it would necessarily become a part of the contract that any future Legislature might alter the charter of the company, provided that it did not violate any provision of the constitution in force at the time of the alteration. (*Supreme Ct.*, 1853, *White* v. *Syracuse and Utica R. R. Co.*, 14 Barb., 559.) The provision in a charter, reserving to the Legislature the right to alter or repeal it, is not void as repugnant to the grant. It is not a repugnant condition, but only a limitation. (*Chancery*. 1828, *McLaren* v. *Pennington*, 1 Paige, 102.) The repealing law may appoint trustees to close the affairs of the corporation. (*Ib.*)

Where the charter of a corporation reserves to the Legislature the power to alter or repeal it, and the directors apply for and obtain an alteration of it not prejudicial to the stockholders, a subscriber for stock, though not consulted, is not released from his subscription. (*Supreme Ct.*, 1851, *Northern R. R. Co.* v. *Miller*, 10 Barb., 260.)

As to the extent to which the reserved power to alter the charter may be exercised without consent of the corporation, see *White* v. *Syracuse and Utica R. R. Co.*, 14 Barb., 559; *Poughkeepsie and Salt Point Plank-road Co.* v. *Griffin*, 21 id., 454; *Troy and Rutland R. R. Co.* v. *Kerr*, 17 id., 581; *Hyatt* v. *McMahon*, 25 id., 457.

The original charter is the fundamental law of the association, the constitution which prescribes limits to the directors, officers and agents of the company not only, but to the action of the corporate body itself; and no radical change or alteration can be made or allowed, by which new and additional objects are to be accomplished or responsibilities incurred by the company, so as to bind the individuals composing it, without their assent.

So *held*, where the subscription was to stock under a charter for the purpose of establishing a railroad, and the amendment was the substitution of a steamboat line. (*Supreme Ct.*, 1843, *Hartford and New Haven R. R. Co.* v. *Croswell*, 5 Hill: 383; commented on as an extreme case, *Schenectady and Saratoga Plank-road Co.* v. *Thatcher*, 11 N. Y. [1 Kern.], 102; and doubted, *Buffalo and N. Y. City R. R. Co.* v. *Dudley*, 14 N. Y. [4 Kern.], 336.)

The provision of the Revised Statutes—that the charter of every corporation that shall hereafter be granted by the Legislature shall be subject to alteration, suspension, and repeal, in the discretion of the Legislature—applies to corporations formed under general laws providing that they shall be subject to the provisions of the Revised Statutes—*e. g.*, the plank-road companies act. Hence, the corporate property of a corporation organized under such law is subject to the power of the Legislature; and a subscriber for stock cannot object that the corporation accepted authority from the Legislature to construct branches to their road to which the subscriber never assented. So *held*, where it did not appear that the subscriber was prejudiced by the alteration. (*Ct. of Appeals*, 1854, *Schenectady and Saratoga Plank-road Co.* v. *Thatcher*, 11 N. Y. [1 Kern.], 102.)

§ **34.** *Notice of application to alter, amend, or extend charter.*—Every association intending to apply to the Legislature for an act of incorporation, and every corporation intending to apply for an alteration, amendment or extension of its charter, shall cause the like notice (*i. e., by advertisement, to be published for at least six weeks successively immediately before such application or before the first day of the session at which the same is to be made*) of such application to be published in the State paper, and also in a newspaper published in the county in which such corporation is intended to be or should have been established. (1 R. S., 156, § 2, *et* 1.)

If no newspaper be printed in a county in which any notice is required to be published, such notice shall be published in like manner in the place nearest thereto in which a newspaper shall be published. (*Idem*, § 3.)

If the application be for an act of incorporation, the notice shall specify the amount of the capital stock required to carry the objects of such incorporation into effect, and if the application be for the alteration in any charter already granted, the notice shall state specifically the alteration intended to be applied for. (*Idem*, § 4.)

§ 35. *Corporate existence, how extended.*—Chapter five hundred and ninety-eight of the laws of eighteen hundred and seventy-five, entitled "An act in relation to railroad corporations," is hereby amended so as to read as follows: Any existing railroad company heretofore organized or incorporated under the laws of this State, except such as may have been organized for the purpose of constructing or operating a railroad in the city of New York, which may be unable from any cause to construct its railroad within the time specified by its charter or articles of association, shall hereby have the time for the completion of the railroad it was authorized to construct extended for a further term of two years beyond the time heretofore limited; and failure to construct its railroad within the time heretofore limited shall not cause a forfeiture of its corporate powers, but nothing herein contained shall have the effect to revive any corporation whose corporate power has been forfeited from any cause. (*Laws* 1879, *chap.* 350.)

This act, previous to its amendment, was as follows: "Any existing railroad company heretofore organized or incorporated under the laws of this State, except such as may have been organized for the purpose of constructing or operating a railroad in the city of New York, which may have been unable from any cause to construct its railroad within the time specified by its charter or articles of association, shall hereby have the time for the completion of the railroad it was authorized to construct extended for a further term of two years beyond the time heretofore limited, and failure to construct its railroad heretofore shall not cause a forfeiture of its corporate powers; but nothing herein contained shall have the effect to revive any corporation whose corporate power has been forfeited from any cause." (*Laws* 1875, *chap.* 598, § 1.)

§ 35(*a*). *The same.*—Section five of chapter six hundred and ninety-seven of the laws of eighteen hundred and sixty-six, entitled "An act supplementary to the act entitled 'An act to authorize the formation of railroad corporations and to regulate the same,'" passed April second, eighteen hundred and fifty, is hereby amended so as to read as follows:

§ 5. The continuance of any railroad corporation now existing, or hereafter to be formed under the laws of this State, may be extended beyond the time named for that purpose in its act or acts of incorporation, or in the articles of association of such corporation, by the filing in the office of the secretary of state a certificate of consent to such extension, signed by the holders of two-thirds in amount of the stock held by the stockholders of such corporation, and in every case where such consent has been or shall be so filed, the term of existence of such corporation is hereby extended and declared to be extended for the period designated in such certificate, and each such corporation shall, during the period named in such certificate, possess and enjoy all the rights, privileges and franchises enjoyed or

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PREVIOUS LEGISLATION.—The legislation upon this subject has been as follows (laws 1866, chap. 697, § 5): Amended by chapter 843, laws of 1872; amended by chapter 240 of the laws of 1874. The several acts are given below:

Any company heretofore formed, or hereafter to be formed under the provisions of the act entitled "An act to authorize the formation of railroad corporations, and to regulate the same," passed April second, eighteen hundred and fifty, or the acts amendatory thereof, may extend the time for the continuance of such company beyond the time mentioned in the original articles of association for such purpose, by the consent of two-thirds in amount of the stock held by the stockholders of said company in a certificate to be signed and proved or acknowledged by the stockholders signing the same, so as to entitle it to be recorded, which certificate shall be filed in the office of the secretary of state, who shall, upon such filing, record the same in the book kept in his office for the record of articles of association of railroad companies under said act, and make a memorandum of such record in the margin of the original articles of association in such book; and thereupon the time of the existence of such company shall be extended as designated in such certificate. (*Laws* 1866, *chap.* 697, § 5.)

Section five of chapter six hundred and ninety-seven of the laws of eighteen hundred and sixty-six, is hereby amended to read as follows:

"§ 5. Any railroad corporation now existing or hereafter to be formed under the laws of this State may extend the time for the continuance of such corporation, beyond the time named for that purpose in the original act of incorporation or articles of association of such corporation, by the consent of the holders of two-thirds in amount of the stock of such corporation, in a certificate to be signed and proved, or acknowledged by the stockholders signing the same, so as to entitle it to be recorded in the office of the secretary of state, in the book kept in said office for the record of articles of association of railroad companies; and thereupon the time of the existence of such corporation shall be extended for the period designated in such certificate, and such corporation shall, from that time during its existence so extended, possess all the rights, privileges and franchises at that time enjoyed or exercised by such corporation." (*Laws* 1872, *chap.* 843, § 1.)

§ 36. *The same.*—Any company or corporation heretofore formed under any general law of this State, at any time within three years of the expiration of its term of existence,

may extend the term of existence of such company or corporation beyond the time mentioned in the original articles of association or certificate of incorporation, by the consent of the stockholders owning two-thirds in amount of the capital stock of such company or corporation, in and by a certificate to be signed by such stockholders, and acknowledged or proved, so as to enable them to be recorded, which certificate shall be filed in the office of the secretary of state and in the office of the county in which its original certificate or articles of association, if any, are filed or recorded; and the said secretary of state and the clerk of such county shall, upon such filing, record the same in the books kept in their respective offices for the record of articles of association, and make a memorandum of such record in the margin of the original articles of association, in such book, and thereupon the time of existence of such company shall be extended, as designated in such certificate, for a term not exceeding the term for which said company or corporation was organized in the first instance. (*Laws* 1867, *chap.* 937, § 1.)

The above statutory provision is, by its terms, applicable only to such corporations as were formed and in existence at the time of the passage of the act.

§ **37.** *Certain provisions of the Revised Statutes in regard to forfeiture of charter, not applicable to railrovd corporations.*—The seventh section of title third of chapter eighteen of the first part of the Revised Statutes provides "that if any corporation thereafter created by the Legislature shall not organize and commence the transaction of its business within one year from the date of its incorporation its corporate powers shall cease" (1 R. S., 600, § 7; 6th ed. R. S., vol. 2, page 391.) It was further enacted (*Laws* 1846, *chap.* 155, § 1) that the foregoing seventh section should not be so construed as to apply to any act for incorporating a railroad company which has or shall have in its own provisions the terms and the time in which it shall be forfeited for non-user. The general railroad act (*Laws* 1850, *chap.* 140, § 1) also contained a clause that railroad corporations organized under that act should not be subject to the provisions contained in the above cited seventh section of the Revised Statutes.

(See 44 Barb., 631; 30 id., 26; 3 Barb. Ch., 237.)

§ **38.** *Act of incorporation, how pleaded.*—In an action brought by or against a corporation the complaint must aver that the plaintiff or the defendant, as the case may be, is a corporation, must state whether it is a domestic corporation or a foreign corporation, and, if the latter, the State, county or government by or under whose laws it was created. But the plaintiff need not set forth or specifically refer to any act or proceeding by or under which the corporation was created. (*Code of Civil Proc.*, § 1775.)

The old provision of the Revised Statutes was as follows:

"In actions by or against any corporation created by or under any law of this State, it shall not be necessary to recite the act or acts of incorporation or the proceedings by which such corporation was created or to set forth the substance thereof, but the same may be pleaded by reciting the title of the act and the date of its passage." (2 *R. S.*, 459, § 13; *6th ed. R. S., vol.* 3, *p.* 741.)

Section 13, *ante,* was excepted from the provisions of the repealing act, chapter 417, Laws 1877, passed in connection with the first chapters of the Code of Civil Procedure, but was subsequently repealed by chapter 245, Laws of 1880.

§ **39.** *Legislature may dissolve corporation.*—The Legislature may at any time annul or dissolve any incorporation formed under this act; but such dissolution shall not take away or impair any remedy given against any such corporation, its stockholders or officers, for any liability which shall have been previously incurred. (*Laws* 1850, *chap.* 140, § 48.)

(*See chapters* 35 *and* 36, *post, in regard to judicial proceedings to annul and dissolve a corporation; see also proceedings for the voluntary dissolution of a corporation, chap.* 38, *post.*)

No corporation can be dissolved by a mere resolution of its members or stockholders. It can only be dissolved by a judicial sentence or by a surrender of its charter, accepted by the State. (*N. Y. Superior Ct.*, 1855; *N. Y. Marbled Iron Works* v. *Smith*, 4 *Duer*, 362.)

A decree by which an act of incorporation is annulled and the corporation dissolved "*except* for certain purposes," and which declares that the corporation should only continue in existence for purposes specified, and that persons shall be appointed receivers to take the assets and carry on its business, does not operate to extinguish the existence of the corporation in any such sense that it cannot be revived by repeal of the decree or by other governmental act recognizing the corporation as existent. (*Lea* v. *The American and Pacific Canal Co.*, 3 Abb. Pr. N. S. 1.) See the above case for the rules of the common law relative to the dissolution of corporations and the distinction between the dissolution of a corporation and the suspension of its franchises, and between an original charter and the charter of revival. Upon the dissolution of the company, unless other persons are appointed by the Legislature, the directors are to be the trustees of the creditors and stockholders (1 *R. S.*, 600, § 9); but the repealing law may appoint trustees to close the affairs of the corporation. (*McLaren* v. *Pennington*, 1 Paige, 102.)

A corporation cannot be dissolved upon a mere resolution of its members or stockholders; it can only be dissolved by a judicial sentence or by a surrender of the charter, accepted by the State. (*N. Y. Marbled Works* v. *Smith*, 4 Duer, 662.)

Although the more recent railroad companies have mostly been reorganized under the general railroad laws, many of the older companies derive their existence from special acts of the Legislature or charters of incorporation. In the passage of a charter there is no particular form of words requisite to create a corporation. (*Chancery*, 1817, *Denton* v. *Jackson*, 2 Johns. Ch., 320.) Corporations are sometimes created *ipso facto et eo instanti* by the mere passage of a statute, but more frequently the statute declares and points out the mode in

which the legal body may thereafter be brought into existence. (*Southhold* v. *Horton*, 6 Hill, 501.) A charter of incorporation, like a contract between individuals, is to be construed according to its spirit and meaning, as well as its letter. (*Supreme Ct.*, 1853, *White* v. *Syracuse and Utica R. R. Co.*, 14 Barb., 559.)

WHO CANNOT QUESTION CORPORATE EXISTENCE.—A defect in the proceedings to organize a corporation, is no defense to a stockholder sued to enforce his individual liability, who has participated in its acts of user as a corporation *de facto*, and appeared as a shareholder upon its books when the debt for which he is sued was contracted. (5 Bing., 521; 7 id., 110; 9 Barn. & Cr., 356; *Ct. of Appeals*, 1859, *Eaton* v. *Aspinwall*, 19 N. Y. [5 Smith], 119; affirming S. C., 6 Duer, 176; S. C., 3 Abbott's Pr., 417; S. C., 13 How. Pr., 184; to the same effect is *Abbott* v. *Aspinwall* [Supreme Ct., 1857], 26 Barb., 202.)

Neither a stockholder who has acted as a director, nor a party incurring a debt to a company, can set up as a defense an irregularity which might show that the corporation never existed, or that it had incurred a forfeiture. (4 Den., 392; 1 Kern., 108; 1 Hall, 191; 3 Sandf., 170.) Upon the same principle, one who has openly avowed himself a stockholder of the company, has registered himself as such upon its books, and as a stockholder has taken part in its management, cannot be allowed as against third persons to prove that the corporation was never lawfully created. *So held*, where the defect was an omission of an act to be proved by testimony, not of a prerequisite to be publicly declared and recorded before incorporation. (*N. Y. Superior Ct.*, 1856, *Eaton* v. *Aspinwall*, 6 Duer, 176; S. C., 3 Abbott's Pr., 417; S. C., 13 How. Pr., 184.)

A defendant who has contracted with a corporation *de facto*, is never permitted to allege any defect in its organization as affecting its capacity to contract or sue; but all such objections, if valid, are only available on behalf of the sovereign power of State. It would be in the highest degree inequitable and unjust to permit him to rescind a contract, the fruits of which he retains, and never be compelled to restore. (*N. Y. Superior Ct.*, 1849, *Palmer* v. *Lawrence*, 3 Sandf., 161; to the same effect was *Brower* v. *Hill*, 1 id., 629; approved, *Steam Navigation Co.* v. *Weed*, 17 Barb., 378.)

One who enters into a contract with a corporation, is estopped from setting up in an action upon such contract that the corporation was not legally formed. (3 Sandf., 170; 17 Barb., 378; 17 Ohio, 497; *Supreme Ct.*, 1859, *White* v. *Coventry*, 29 Barb., 305; to the same effect, *Ct. of Appeals*, 1860, *White* v. *Ross*, 15 Abbott's Pr., 66; *Supreme Ct.*, 1862, *Hyatt* v. *Esmond*, 37 Barb., 601; *Hyatt* v. *Whippie*, id., 595.)

A defendant who has contracted with a corporation *de facto* is never permitted to allege any defect in its organization, as affecting its capacity to contract or sue. Such objections, if valid, are only available on behalf of the sovereign power of the State. (3 Sandf., 170; 29 Barb., 305; 37 id., 601; 41 id., 151; 15 Abb. Pr., 66; *Supreme Ct.*, 1865, *Sands* v. *Hill*, 42 Barb., 651.)

A subscriber to stock, in a corporation, by his subscription admits the legal existence of the corporation, and cannot question their capacity to appear on the record. (2 Ld. Raym., 1535; *Supreme Ct.*, 1817; *Dutchess Cotton Manufactory* v. *Davis*, 14 Johns., 238; *Circuit*, 1850, *Oswego and Syracuse Plank-road Co.* v. *Rust*, 5 How. Pr., 390; doubted, in *Welland Canal Co.* v. *Hathaway*, 8 Wend., 480.)

The members of a corporation cannot defend actions upon their obligations to it, by questioning its legal existence. (21 Barb., 224; 9 Wend., 351; Ang. &

A., Corp., § 777; *Cooper* v. *Shaver*, 41 Barb., 151; *Sands* v. *Hill*, 42 id., 651.) The defendant accepted from the plaintiffs, who were acting as a corporation, the appointment of treasurer, and served as such for several years, and received, in his official capacity, the money sued for—*Held*, that he could not deny the plaintiffs' corporate existence. (14 Johns., 238; *N. Y. Superior Ct.*, 1828, *All Saints' Church* v. *Lovett*, 1 Hall, 191.)

Formal defects in proceedings to organize a corporation are not available to defeat an action brought by the corporation for a trespass in wrongfully taking property out of their possession. (*N. Y. Superior Ct.*, 1863, *Persse & Brooks Paper Works* v. *Willett*, 1 Robt., 131.

RENEWAL OR REVIVAL OF CHARTER.—Where a corporation was dissolved by a decree of the State, and a subsequent decree contained a complete recognition of the corporation as existing, and by a new name—*Held*, that the latter decree should be considered as reviving the corporation under its old charter, and subject, though under a new name, to its debts and liabilities incurred under the old name. Even if it could be called a new charter, it ought not to be regarded as creating a new corporation, but as reviving and confirming, and somewhat modifying the old one—at least as to foreign creditors of the old one. (*Supreme Ct. Chambers*, 1867, *Lea* v. *American, Atlantic and Pacific Canal Co.*, 3 Abb. Pr. [N. S.], 1.

A charter, which had expired by default of the corporation—*Held*, revived by a statute respecting the corporation, enlarging the time for the act in which they had made default, and amending part and repealing part of their charter. (*Crocker* v. *Crane*, 21 Wend., 211.)

CHAPTER 6.

THE BOAD OF DIRECTORS, THEIR POWERS AND LIABILITIES, AND OF THEIR ELECTION.

§ 40. *Number of directors.*—There shall be a board of thirteen directors of every corporation formed under this

act, to manage its affairs. (§ 5 *of General Railroad Act, Laws* 1850, *chap.* 140, *as amended by chap.* 282 *of Laws of* 1854.)

The first directors are to be named in the articles of association. (See § 5, *ante.*) The subsequent directors are chosen in the manner hereafter mentioned in this chapter.

The corporation exercises its powers and functions through a board of directors. When a charter invests a board with the power to mortgage the concerns of a corporation, the power is exclusive in its character. The corporators have no right to interfere with it, and the courts will not, even on a petition of a majority, compel the board to do or act contrary to its judgment. The stockholders, as such, in their collective capacity, can do no corporate act. The directors are their representatives, and alone authorized to act. It is one of the fundamental conditions of the contract into which the corporators have entered by becoming members of the corporation, that its concerns should be managed in the manner provided by the act of incorporation, and from this no essential departure can be made. (*McCullough* v. *Moss*, 5 Denio, 575; see Angell & Ames on Corp., 121–123, 151–164.) The relation between directors of a corporation and its stockholders, is that of trustee and *cestui que trust.* (*Supreme Ct.*, 1862, *Butts* v. *Wood*, 38 Barb., 181.)

Although the charter of a corporation declares that its powers "shall be exercised by a board of directors" consisting of a specified number, yet the board may delegate its powers to agents, or to a quorum composed of less than a majority of the number. A by-law, therefore, declaring that the ordinary business of a corporation may be transacted by a quorum of five directors, the whole number being twenty, that is a valid regulation. A by-law of a corporation declared that five directors should be a quorum for the transaction of "ordinary business"—*Held*, that the general business of a corporation was embraced in the authority thus delegated, including, as an incident thereto, the power of pledging or assigning assets of the corporation for the purpose of securing a debt. (*Hoyt* v. *Thompson's Executor*, 19 N. Y., 207; *Cooper ex parte Williams*, 7 Cow., 401; see § 45, *post.*)

An action may be brought by a director against one or more directors, managers or other officers of the company, to procure a judgment in the cases specified in section 1781 of the Code of Civil Procedure, with the exceptions of subdivisions third and fourth of that section. (Code Civil Proc., § 1782.) For the purposes for which the action may be brought by a director under that section of the Code of Civil Procedure, see chapter 34, *post*, entitled "Of the judicial supervision of a corporation, and of the officers and members thereof." They are liable criminally for certain violations of the penal Code; which, see *post.* They are liable to the subsequent as well as to the immediate purchaser in good faith of spurious stock, for damages sustained thereby. (*Bruff* v. *Mali*, 36 N. Y., 200; S. C., 34 How. Pr., 338; *Cazeau* v. *Mali*, 25 Barb., 578; S. C., *sub nom. Meade* v. *Mali*, 15 How. Pr., 347; *Bell* v. *Mali*, 11 id., 254; *Wells* v. *Jewett*, id,, 242; *Crook* v. *Jewett*, 12 id., 19.)

In an action against the officers of an incorporated company for selling to plaintiff certificates of stock, representing stock which had been fraudulently issued to them, to entitle the plaintiff to recover he must prove to the satisfaction of the jury that the certificates purchased by him did not represent genuine stock. Where the plaintiff had proved that the whole amount of stock which

the defendants were authorized to issue had been issued prior to the issuing of his certificates, the burden of proof is thrown upon defendants to show definitely that the certificates sold plaintiff represented genuine stock. (*Bruff* v. *Mali*, 36 N. Y., 200; see *N. Y. & N. H. R. R. Co.* v. *Schuyler*, 34 id., 30)

Upon the dissolution of the company by a decree of the court or otherwise, unless other persons are appointed by the Legislature, or by a court of competent authority, they become trustees of the creditors and stockholders of the corporation dissolved, with power to settle the affairs of the corporation, collect and pay outstanding debts, and divide among the stockholders the moneys and other property that shall remain after the payment of debts and necessary expenses (1 R. S.. 600, § 9). They have authority to sue for and recover the debts and property of the dissolved corporation, by the name of the trustees of such corporation, describing it by its corporate name, and are jointly and severally liable to the creditors and stockholders of such corporation, to the extent of its property and effects that shall come into their hands (1 R. S., § 10).

Upon neglect of a stockholder to pay installments on the stock held by him, when so required, they have power to forfeit his stock, together with all previous payments thereon, for the use of the company. (*Laws* 1850, *chap.* 140, § 7).

They have power, by a two-thirds vote of their whole number, at any time, to alter the route or any part of the route of the railroad (*Laws* 1850, *chap.* 140, § 23; as amended by *chap.* 77, *Laws of* 1876; see, also, *Laws* 1851, *chap.* 19, § 2); and with the consent of the canal commissioners, may lay out a new line of road for the purpose of crossing a canal on a more favorable grade. (*Laws* 1854, *chap.* 282, § 17; see, also, *Laws* 1855, *chap.* 478, § 1.)

The acts or declarations of a director, which are not authorized by some special agency relative to the subject-matter, or within the lawful exercise of his authority as such officer, do not bind or affect the corporation. (*Soper* v. *Buffalo, etc., R. R. Co.*, 19 Barb., 310; *Buffalo and N. Y. City R. R. Co.* v. *Dudley*, 14 N. Y., 336).

The directors may ratify acts which are within the corporate powers, but performed by an agent beyond the scope of his authority (*Hoyt* v. *Thompson*, 19 N. Y., 207; *Kennedy* v. *Cotton*, 28 Barb., 59). A ratification cannot be inferred from a mere acquiesence in such acts. (*Idem.*)

A contract for the use of undue personal influence with the directors of a corporation, is void as contrary to morality and public policy. (*Davison* v. *Seymour*, 1 Bosw., 88.)

The liabilities imposed on the directors for the debts of the company, by the Laws of 1845 (chap. 230, § 1), were repealed by the act of 1854. (*Laws* 1854, *chap.* 232, § 16; amending, § 10 of the General act of 1850, *Rochester* v. *Barnes*, 26 Barb., 657; for the act which was repealed, see note to § 69, *post.*)

They are authorized to adopt regulations to convert principal sum of bonds into corporate stock. (*Chap.* 133, § 10, *Laws of* 1880.) They have no power, however, to bind the company to pay to themselves a consideration for the transfer of a franchise to the company, which franchise they allege was, previous to the transfer thereof, granted to them individually. (*Coleman* v. *Second Ave. R. R. Co.*, 38 N. Y., 201; affirming S. C., 48 Barb., 371.) They may exchange preferred stock for common stock. (*Laws* 1880, *chap.* 225.)

For the regulations concerning railroads held under lease, and railroad cor-

porations which have been reorganized after sales under mortgage foreclosures, see the subsequent chapters affecting those subjects.

The declarations or acts of a director in a corporation will not bind, or in any manner affect, the corporation, unless they are within the scope of his ordinary powers, or some special agency relative to the subject-matter. (*Supreme Ct.*, 1855, *Soper* v. *Buffalo and Rochester R. R. Co.*, 19 Barb., 310; see Code Civil Proc., § 839.)

The authority necessary to act in a class of cases may be conferred by a single resolution of the directors, as well as by a separate resolution for each case (3 N. Y., 290; 1 Den., 520; 7 Hill, 91; *Supreme Ct.*, 1861, *Elwell* v. *Dodge*, 33 Barb., 336.)

For the damage sustained by a stockholder from illegal and fraudulent acts of directors and officers of a company, an action may be sustained by the stockholder against the officers and directors. (*Supreme Ct., Sp. T.*, 1854, *Crook* v. *Jewett*, 12 How. Pr., 19.)

As to what is sufficient dissent from appointment as a director or committeeman, to prevent one from being liable as such. (*Fulton Bank* v. *N. Y. and Sharon Canal Co.*, 4 Paige, 127.)

Where a personal liability for the debts of a corporation is imposed upon its *officers* for their failure to perform a duty with which they are charged by the charter, such liability is in the nature of a penalty (1 N. Y., 47; 17 id., 458; 13 Abb. Pr., 225; 3 Dutch. [N. J.], 166). Hence, if the charter be a foreign law, the courts of this State cannot entertain an action to enforce the liability. (*N. Y. Superior Ct.*, 1863, *Bird* v. *Hayden*, 2 Abb. Pr. [N. S.]. 61.)

The personal liability of stockholders, where they are made liable, is an original liability; and an action against them is upon their contract, made by them in a qualified corporate capacity; but where the corporate capacity is not thus qualified, and the members or officers are not liable as original or principal debtors, but by reason of something imposed on them by the statute, the action must be upon the statute, to recover a debt in the nature of a forfeiture. (*Ib.*)

§ **41.** *When board of directors may consist of seven stockholders.*—Any railroad company whose main route of road does not exceed fifteen miles, may elect seven of its stockholders as a board of directors to manage its affairs at any annual election after the passage of this act. (*Laws* 1864, *chap.* 582, § 3.)

Any joint-stock company or corporation, with a capital of less than one hundred thousand dollars, organized under a special act of the Legislature, having more than seven trustees, may reduce the number of its trustees to not less than seven, to be elected annually at the time appointed in its articles of incorporation, provided that a majority of the stockholders of such joint-stock company shall so determine, at a meeting to be held at the usual place of meeting of the trustees; of such joint-stock company or corporation, on thirty days' previous notice, in writing, to each stockholder of record. Such notice shall be signed by not less than five stockholders, and shall be delivered in person or deposited in the post-office, directed to each stockholder, at his last known address; and upon the election of the trustees as herein provided, the term of office of the trustees in office, at the time of such election, shall cease and determine. (*Laws* 1881, *chap.* 599.)

§ **42.** *Directors of railroads, operated by rope or cable attached to stationary power, may be limited to five in number.*—The directors of any such company may be limited to any number, not less than five, to be specified in the articles of association. (*Chap.* 697, *Laws of* 1866.)

§ **43.** *Increase of number of directors of elevated railroad.*—Any corporation having the power to construct or operate an elevated railroad, shall have authority, at any meeting of the stockholders, to increase the number of its directors to any number not exceeding thirteen. (*Laws* 1879, *chap.* 395.)

§ **44.** *Qualification of directors.*—No person shall be a director unless he shall be a stockholder, owning stock absolutely in his own right, and qualified to vote for directors at the election at which he shall be chosen (§ 5, *Gen'l R. R. act, Laws* 1850, *chap.* 140, *as amended by chap.* 282 *of Laws of* 1854).

THE RESTRICTION IN REGARD TO DIRECTORS OF CERTAIN RAILROAD CORPORATIONS.—But no stockholder, director or officer of either of the New York Central Railroad Company, the Hudson River Railroad Company, or the Harlem Railroad company, shall be a director or officer of the Erie Railway Company; and no stockholder, director or officer of the latter company shall be a director or officer in either of the three first-named companies. The board of directors in each of the said companies may so classify the members of such board, by lot or otherwise, that as nearly as may be, one-fifth of their number shall go out of office at each annual election; and at the next election of directors in each of said companies, directors shall be voted for only in place of those whose terms shall then expire under the classification aforesaid, (*Laws* 1868, *chap.* 278, § 3; *am'd Laws* 1869, *chap.* 916, § 1), has been repealed by section three of chapter 586 of the Laws of 1875.

Inspectors of a corporate election may be candidates for directorship. (See N. B. to case *Ex parte Wilcox*, 7 Cow., 402.)

§ **45.** *When majority of directors to constitute a quorum.*—When the corporate powers of any corporation are directed by its charter to be exercised by any particular body, or number of persons, a majority of such body, or persons, if it be not otherwise provided in the charter, shall be a sufficient number to form a board for the transaction of business; and every decision of a majority of the persons duly assembled as such board, shall be valid as a corporate act. (1 *R. S.*, 600, § 6.)

Although the charter of a corporation declares that its powers shall be exercised by a board of directors, consisting of a specified number, the board may, under their power to make by-laws, delegate their authority to a quorum composed of less than a majority of the number. (*Ct. of Appeals*, 1859, *Hoyt* v.

Thompson, 19 N. Y. [5 Smith], 207; see this case in note to § 40, *ante*.) The powers vested in the directors cannot be exercised by the stockholders. (*McCullough* v. *Moss*, 5 Den., 567.)

The charter fixed the number of directors, and declared that the affairs of the company should be conducted by them, and that a majority present at a regular meeting should be competent to decide on all business. *Held*, that this did not amount to declaring a minority, however small, might act as a board. (*Supreme Ct.*, 1827, *Exp. Willcocks*, 7 Cow., 402.)

The general rule is, that to make a quorum of a select and definite body of men possessing the power to elect, a majority at least must be present; and then a majority of the quorum may decide. (*Idem.*)

§ 46. *Directors, how chosen.*—Said directors shall be chosen annually, by a majority of the votes of the stockholders voting at such election, in such manner as may be prescribed in the by-laws of the corporation, and they may and shall continue to be directors until others are elected in their places (§ 5 *Gen'l R. R. Act, Laws* 1850, *as amended by chap.* 282 *of Laws of* 1854).

It being provided by the by-laws and stated in the notice of the annual meeting for the election of directors that the polls would be open at twelve, and continue open until after one o'clock, and the fact that the poll was not open until after twelve o'clock and continued open until after one o'clock, does not invalidate the election. (*People* v. *Alb. and Susq. R. R. Co.*, 1 Lans., 308; 55 Barb., 344; 7 Abb. P. [N. S.], 265; 38 How. Pr. R., 228.)

A person who is not a stockholder is sufficiently authorized to call a meeting of stockholders to order when he holds a proxy and is requested to call the meeting to order and act for him and such call is recognized by the stockholders present. (*Idem.*)

Surprise and fraud upon a part of the electors is ground for avoiding an election, and all acts done by portions of the corporators which bear the appearance of trick, secrecy or fraud will be held invalid. (*Idem.*)

Accordingly, if a portion of the stockholders meet and organize before the hour named in the by-laws and notice for the annual meeting, and afterward, when the hour actually arrives, without any actual change in the organization, pass resolutions previously prepared that the meeting proceed with the election of directors, and with the same chairman and secretary, and also that the annual election of directors and inspectors proceed with the inspectors first chosen, the organization of the first meeting is obviously a surprise and fraud upon many of the stockholders entitled to attend and take part in it, and the re-organized meeting in fact and legal effect but a continuance of the first meeting and irregular and void as against such stockholders as do not participate in it, and such meeting as to its effect on the validity of another meeting duly organized soon after the proper hour must be regarded in law as if it had been never held. (*Idem.*)

The service on inspectors of election, chosen at the last annual meeting, of an injunction restraining them from acting, and the service of an order of arrest on the president of a railroad company within half an hour of the time fixed for the annual meeting—*Held*, under the circumstances an obvious and designed

surprise upon the great body of stockholders, and intended to hinder and embarrass them. (*Idem.*)

The preoccupation of the directors room before the hour fixed for an election by a large number of persons specially imported for the purpose, and furnished with proxies that they might participate in the stockholders meeting and the election—*Held*, a gross perversion and abuse of the right to vote by proxy, and a clear infringement of the rights of *bona fide* stockholders. (*Idem.*)

The choice of a certain set of directors procured through a preconceived scheme, combination or conspiracy to carry their election by the use and abuse of legal process and proceedings, and by efforts and contrivances to prevent a fair election of inspectors adjudged invalid, and another set of directors chosen at another meeting of the stockholders held at the same time and place, held to be duly elected. (*Idem.*)

Where it appears that those claiming to have been elected would not have been, if illegal votes—*e. g.*, votes on stock belonging to the corporation—had been rejected, and that others, in fact, received a clear majority of the legal votes, the court will vacate the election of the former, and declare the latter elected. A new election is unnecessary. (*Supreme Ct.*, 1828, *Matter of Desdoity*, 1 Wend., 98.)

If votes have been improperly rejected, the court can only set aside the election; but cannot declare the ticket elected for which it is alleged they would have been cast. (*Supreme Ct.*, 1837, *Matter of Long Island R. R. Co.*, 19 Wend., 37.)

Though where the irregularity is a rejection of lawful votes, and a part of those claiming to have been elected were on both tickets, the court might confine their order for a new election to the others; yet where the whole proceeding was irregular—*e. g.*, for want of notice—the whole must be set aside. (*Supreme Ct.*, 1837, *Matter of Long Island R. R. Co.*, 19 Wend., 37.)

Where the inspectors chosen, are restrained by injunction from qualifying and performing their duties as such officers, the stockholders may proceed to choose other persons as inspectors. (*People* v. *Albany and Susquehanna R. R. Co.*, 55 Barb., 344; 1 Lans., 308; 38 How. Pr. R., 228; 7 Abb. Pr. R. [N. S.], 265.)

Inspectors of an election are not bound to close the polls at the end of an hour. Although by the resolution of the board, from which they derive their authority, the election is limited to one hour, they may exercise a reasonable discretion in the matter. (*In the Matter of the election of the Directors of the Mohawk and Hudson R. R. Co.*, 19 Wend., 135.)

If, at a meeting of a corporation for election of officers, two parties each assume to organize the meeting, and rival chairmen are elected, the first regular and formal proceeding for organization will be recognized by the law as valid. The redress of any persons aggrieved by such organization is to be sought through the courts, not by disorder in attempting to carry on two elections at once. (*Supreme Ct.*, 1864, *Matter of Pioneer Paper Co.*, 36 How. Pr., 105.)

Those who participate in such a course, refusing to vote in the regular election, cannot have the election set aside on the ground that it was made by a minority. (22 Wend., 591). (*Ib.*)

In what way a meeting of stockholders of a corporation, to elect trustees, should be organized, and a chairman elected. (*Ib.*)

So where the proceedings are strictly and technically irregular, the election will be vacated. (Id.; *Exparte Willcocks*, 7 Cow., 402.)

Ballots which contain less than the full number of directors required to be elected, are not therefore void. (9 Wend., 333.) Those who vote for a part of the directors only, virtually acquiesce as to the residue, in what was done by the other stockholders. (2 Burr., 1017; *Supreme Ct.*, 1840, *Matter of Union Ins. Co.*, 22 Wend., 591.)

In an emergency in which the forms of procedure prescribed by the charter in respect to elections, fail to accomplish the purposes contemplated, so that the necessary offices are vacated, it is competent for the corporators themselves to exercise the power of election, and provide for the appointment of inspectors for that purpose. (*Matter of Wheeler*, 2 Abb. Pr. [N. S.], 361.)

Where no particular mode of proceeding in the election of officers of a corporation is prescribed by law, an election conducted in good faith ought not to be set aside for informality. (*Chancery*, 1829, *Philips* v. *Wickham*, 1 Page, 590.)

Form of a rule vacating an election and appointing a new one. (*Ex parte Holmes*, 5 Cow., 426; *Ex parte Willcocks*, 7 id., 402.

The reception of spurious votes does not necessarily vitiate an election. To warrant setting it aside, it must appear affirmatively that the successful ticket received illegal votes, the rejection of which would have brought it down to a minority. (*Supreme Ct.*, 1827, *Ex parte Murphy*, 7 Cow., 153; *Matter of Desdoity*, 1 Wend., 98.) Where, in addition to such facts, it is also shown that others than those claiming to be elected, received a clear majority of the legal votes cast, the court will set aside the election, and declare the persons receiving such lawful majority elected. (*Matter of Desdoity, supra.*)

A subscriber to the stock in a proposed company, who is present at the first election and is there elected a director, and acts as such, will not afterwards be permitted, in a suit against him by the company for a call, to deny the validity of its organization on the ground that no notice of such election was given, and that some of the subscribers did not attend. (*Schenectady, etc., Co.* v. *Thatcher*, 11 N. Y., 102.)

§ 47. *Vacancies in board of directors, how filled.*—Vacancies in the board of directors shall be filled in such manner as shall be prescribed by the by-laws of the corporation (§ 5 *of Gen'l R. R. Act, Laws* 1850, *chap.* 140, *as amended chap.* 282, *Laws of* 1854).

See section 1781, Code of Civil Procedure, subdivision 4, authorizing an action to be brought for a judgment directing a new election to fill vacancy created by removal, and when all the directors are removed directing the removal to be referred to the governor to fill the vacancy. The section of the code above referred to will be found in chapter 34, *post.*

§ 48. *Inspectors of first election of directors.*—The inspectors of election of directors shall be appointed by the board of directors named in the articles of association (§ 5 *of Gen'l R. R. Act, Laws* 1850, *as amended by chap.* 282 *of Laws of* 1854).

Of the appointment and qualification and powers of the inspectors of election, see *Matter of Mohawk and Hudson R. R. R. Co.*, 19 Wend., 135.

§ **49.** *Postponement of election of directors, when had.*—When the time for holding the annual election for the directors of any railroad company is now fixed by any law, charter or by-law for a time, within three months before the thirtieth day of September in any year, the directors of such company may by resolution, to be published at least thirty days before the time now established for such election, postpone such election to a time not more than two months after the thirtieth day of September then next ensuing, and thereafter the annual election of such company shall be held in each year on the day so designated, and the term of office of the directors of such company, in office when such change is made, shall be extended to the day thus fixed for the next election of directors, and the election of their successors. (*Chap.* 586, *Laws of* 1875, § 1.)

§ **50.** *Change, in certain cases, of the time for holding elections.*—Any railroad company, the time for the annual election of directors in which is now fixed for any day in the month of June, may by a vote of a majority of the stock, either in person or by proxy, thereof to that effect, and filing in the office of the secretary of state a copy of such proceedings, certified by the secretary of the company under its corporate seal, change the time of holding such annual election to any day in the month of April; provided, however, that the first election held under such resolution shall be held in the month of April which shall precede the time at which such election would otherwise have been held. (*Laws* 1881, *chap.* 317, § 1.)

§ **51.** *By-laws respecting elections, publication of.*—No by-law of the directors and managers of any incorporated company, regulating the election of directors or officers of such company, shall be valid, unless the same shall have been published for at least two weeks in some newspaper in the county where such election shall be held, at least thirty days before such election. (1 R. S., 603, § 6.)

(19 Wend., 38, 135.)

When the charter of an incorporated company declares that the election of directors shall be conducted in the manner prescribed in the by-law of the company, and the by-laws fix a time and place for the election of directors and require notice of the same to be given, but omit to specify the length of notice and the mode of giving it; notice must be given for the time and in the manner prescribed by the general statute relating to corporations. (*In the Matter of the election of the directors of the Long Island R. R. Co.*, 19 Wend., 36.)

A by-law merely fixing the time and place when and where an election shall be held, is a by-law "regulating the election" within 1 R. S., 603, § 6; and by that section is void unless published two weeks previous to thirty days before

the election. (*Idem*) The provision for long notice to the stockholders should be liberally construed. (*Idem.*) That the directors cannot restrict the choice of inspectors by a by-law. (*People* v. *Alb. and Susq. R. R. Co.*, 50 Barb., 344; S. C.,, 1 Lans., 308; S. C., 7 Abb. Pr. N. S., 265; S. C., 38 How. Pr., 228.)

§ **52.** *Directors, how voted for by stockholders* – In the election of directors, each stockholder shall be entitled to one vote, personally or by proxy, on every share held by him thirty days previous to any such election (§ 5 *Gen'l R. R. Act, Laws* 1850, *chap.* 140, *as amended by chap.* 282 *of Laws of* 1854).

See *ex parte Willcocks*, 7 Cow., 401; and see also the next two sections.

§ **53.** *Right to vote.*—It shall not be lawful for any person to vote, or to issue a proxy to any other person or persons to vote at any meeting of stockholders or bondholders, or of stockholders and bondholders of any railroad corporation in this State for the election of directors, or for any other purpose, upon any stock or bonds where the certificates for said stock or the said bonds shall not be in the possession or under the control of the person on whose behalf the vote is to be given, and such last-mentioned person shall have ceased to retain the title to the stock represented by such certificates or the said bonds as owner in his own right, or in his capacity of executor, administrator, trustee, committee, guardian or otherwise, notwithstanding said stock or bonds may still stand in his name on the books of said corporation. (*Laws* 1880, *chap.* 510, § 2.) [See the next section.]

The following decisions were made prior to the passage of the above-mentioned act: The owner of stock in an incorporated company, which stands in his name on the transfer book, may vote on it though such stock be, at the time, hypothecated by him. (*Ex parte Willcocks and others*, 7 Cow., 401; see, also, *Matter of Long Island R. R. Co.*, 19 Wend., 37; *Matter of Barker*, 6 id., 509.)

A person has a right to vote on stock standing in his name as trustee for another. (*Supreme Ct.*, 1830, *Matter of Barker*, 6 Wend., 509.)

That when stock in a corporation is owned by two persons jointly, and they disagree as to the vote to be cast upon the shares at an election for trustees, the vote upon such stock may be rejected. (See *Matter of Pioneer Paper Co.*, 36 How. Pr., 111.]

A stockholder may revoke his proxy, authorizing another to vote, though it was given for value, if necessary to prevent a fraudulent use of it. (*Chancery*, 1837, *Reed* v. *Bank of Newburgh*, 6 Paige, 337.)

Where stock stands in the name of A., "cashier," the latter word is mere description; and B. is not entitled to vote thereon on proof that he is A.'s successor as such cashier. (6 Wend., 509; *Supreme Ct.*, 1838, *Matter of Mohawk and Hudson R. R. Co.*, 19 id., 135.)

The inspectors in determining the right of a claimant to vote, cannot go be-

hind the transfer book. Thus they cannot try the genuineness of a proxy, apparently executed by a stockholder—they are bound to accept it (*Matter of Cecil*, 36 How. Pr., 477); and if such proxy be invalid, redress must be sought from the courts after election, nor can they require an affidavit that the stock is not hypothecated. (*Matter of Long Island R. R. Co.*, 19 Wend., 37.)

Of the right of stockholders to shares in issues of new stock, and of the right of voting in corporations on stock irregularly issued. (*Matter of Wheeler*, 2 Abb. Pr. [N. S.], 361.)

Where the act of incorporation provides that each stockholder shall be entitled to one vote on each share of the stock which he shall have held in his own name at least fourteen days previous to the time of voting, a by-law authorizing the inspectors to inquire into the question whether one who holds stock is the real owner, is void. (*Supreme Ct.*, 1822, *People* v. *Kip*, 4 Cow., 382, *note*; S. C., U. S. Law Jour., 286; approved and followed, 1825, *People* v. *Tibbets*, 4 Cow., 358.)

That in judging of a claimant's right to vote, the inspectors are not, in general, to inquire beyond the transfer book. (*Ex parte Willcocks*, 7 Cow., 402; *Matter of Long Island R. R. Co.*, 19 Wend., 37.)

Stock held for the company itself, by a trustee, cannot be voted upon. (*Supreme Ct.*, 1826, *ex parte Holmes*, 5 Cow., 426; as explained, *Matter of Barker*, 6 Wend., 509; and see *ex parte Desdoity*, 1 id., 98.)

Executors and administrators of stockholders, holding in trust, entitled to vote. (*Matter of North Shore S. I. Ferry Co.*, 63 Barb., 556.)

§ **54.** *Evidence of right to vote.*—"In all cases where the right of voting upon any share or shares of the stock of any incorporated company of this State, shall be questioned, it shall be the duty of the inspectors of the election to require the transfer books of said company as evidence of stock held in the said company; and all such shares as may appear standing thereon in the name of any person or persons, shall be voted on by such person or persons, directly by themselves, or by proxy, subject to the provisions of the act of incorporation." (1 R. S., 603, § 6. See the preceding section.)

(5 N. Y., 562; 11 Abb. [N. S.], 16, 328.)

Stock held for the company itself, by a trustee, cannot be voted on. (*Ex parte Holmes*, 5 Cow., 426.) Not so, however, of stock held by a trustee for the benefit of a *cestui que trust*. (*Matter of Barker*, 6 Wend., 509.)

Where two persons hold certain shares of stock jointly, and they cannot agree upon the vote to be cast thereon, their vote on such stock may be rejected. (*Matter of Pioneer Paper Co.*, 36 How. Pr., 105.)

Inspectors of a corporate election have no right to reject a vote offered by proxy, upon the ground that the written proxy is not acknowledged or proved by a subscribing witness. If the proxy is regular in its form and apparently the act of the stockholder, the inspectors should receive it. (*Supreme Ct., Sp. T.*, 1869, *Matter of Cecil*, 36 How. Pr., 477.)

The right of voting by proxy is not a general right of corporators, and the party who claims it must show a special authority. (*Chancery*, 1829, *Phillips* v. *Wickham*, 1 Paige, 590.)

It seems, that where the charter provides that each stockholder, being a citizen, may vote by proxy, an alien is excluded. (*Matter of Barker*, 6 Wend., 509.)

§ 55. *Stock register to be open thirty days previous to election of directors.*—The book or books of any incorporated company in this State, in which the transfer of stock in any such company shall be registered, and the books containing the names of the stockholders in any such company, shall, at all reasonable times during the usual hours of transacting business, be open to the examination of every stockholder of such company, for thirty days previous to any election of directors; and if any officer having charge of such books, shall, upon demand by any stockholder as aforesaid, refuse or neglect to exhibit such books, or submit them to examination as aforesaid, he shall for every such offence, forfeit the sum of two hundred and fifty dollars, the one moiety thereof to the use of the people of this State, and the other moiety to him who will sue for the same, to be recovered by action of debt in any court of record, together with the costs of such suit. (1 R. S., marg. p. 601, § 1.)

Under 1 R. S., 601, § 1—providing that the transfer books, and books containing the names of the stockholders, of any incorporated company, shall, at all reasonable times during the usual business hours, be open for the examination of every stockholder, for thirty days previous to the election of directors—the stockholder has a right, not only to inspect the books, but also make any memorandum or a list of the stockholders therefrom; and if the officer having charge of the books refuses to permit him to exercise this right, he subjects himself to the statute penalty. The officer in charge of the books is not the judge of the motives of the stockholder applying for such examination. (*Ct. of Appeals*, 1851, *Cotheal* v. *Brower*, 5 N. Y. [1 Seld.], 562; affirming S. C., 10 Barb., 216; S. C., 5 N. Y. Leg. Obs., 175.)

§ 56. *Books and papers to be exhibited at election of directors.*—At every election of directors, the books and papers of such company shall be exhibited to the meeting, if a majority of the stockholders present shall require it (§ 5 *of Gen'l R. R. Act, Laws* 1850, *chap.* 140, *as amended by chap.* 282 *of Laws of* 1854).

Since the amendment in 1854 to the General Railroad Law which provides § 5 (as above quoted), a party challenging votes is not entitled to a production of the books, although a prior by-law of the company authorize them to demand it. (*Peo.* v. *Alb. and Susq. R. R. Co.*, 1 Lans., 309; 55 Barb., 344; 7 Abb. Pr., 265; 38 How. Pr., 228.)

If such by-law were in force it would be only directory, and the omission to comply with it would not invalidate an otherwise valid election, but would cast on the parties claiming under it the burden of showing that the voters so

challenged would appear by the transfer book when closed to be actually stockholders in the company for the number of votes so voted. (*Idem.*)

§ **57.** *Inspectors of election to be sworn.*—Before entering upon his duties each inspector of election at a meeting of the stockholders of any railroad company of this State for the purpose of electing directors thereof, or for any other purpose, shall take and subscribe, before some officer authorized to administer oaths, an oath or affirmation that he will well and truly do and perform the duties of the office of an inspector at such election, according to the best of his ability, which oath or affirmation shall be immediately filed in the office of the clerk of the county in which such election shall be held, together with a certificate of the result of the vote taken at such meeting or election. (*Laws* 1880, *chap.* 510, § 1.)

To following provision of the Revised Statutes is unrepealed, although it is in effect superseded, so far as railroad corporations are concerned, by chapter 510 of the Laws of 1880 cited above: The inspectors who may be appointed to conduct any election of directors or any other officer of any incorporated company of this State, shall be required before entering on the duties of their appointment, to take or subscribe the following oath or affirmation: "I, A. B., do solemnly swear (or affirm, as the case may be), that I will execute the duties of an inspector for the election now to be held, with strict impartiality, and according to the best of my ability." (1 R. S., 604, § 7.)

An election will not be vacated because the inspectors did not take the precise oath prescribed by the statute. (1 R. S., 604, § 7.) If they are regularly appointed, they are inspectors *de facto*. (*Supreme Ct.*, 1838, *Matter of Mohawk and Hudson R. R. Co.*, 19 Wend., 135; 1839, *Matter of Chenango County Mutual Ins. Co.*, 19 ib., 635.)

§ **58.** *Form of oath of person offering to vote.*—Any person offering to vote upon stock or bonds registered or standing in his name shall, if required by any inspector of election, take and subscribe the following oath or affirmation: "I do solemnly swear (or affirm) that in voting at this election I have not, either directly or impliedly, received any promise or any sum of money, or any thing of value whatever, to influence the giving of my vote, or votes, at this election; and that I have not sold or otherwise disposed of my interest in or title to any shares or bonds in respect to which I offer to vote at this election, but that all such shares and bonds still remain in my possession or subject to my control." And any person offering to vote as agent, attorney or proxy for any other person shall, if required by inspector of election, take and subscribe the following oath (or affirmation): "I do solemnly swear (or affirm) that the title

to the stock or bonds upon which I now offer to vote is, to the best of my knowledge and belief, truly and in good faith vested in the persons in whose name they now stand, and that the said persons still retain control of the said shares and bonds, and that I have not, either directly or indirectly or impliedly, given any promise or any sum of money, or any thing of value whatever to induce the giving of authority to vote upon such stock or bonds to me." The inspectors at any such election are authorized to administer the aforesaid oath or affirmation, and said oath and said proxies shall be filed in the office of said corporation. Any person who knowingly or willfully shall swear or affirm falsely in taking the oath or affirmation prescribed by this act shall be guilty of perjury. Any person violating any of the other provisions of this act shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished by imprisonment not exceeding one year, or by a fine not exceeding five thousand dollars, or by both such fine and imprisonment. (*Laws* 1880, *chap.* 510, § 2.)

§ **59.** *Married woman stockholder may vote at election.* —It shall be lawful for any married woman, being a stockholder or member of any bank, insurance company (other than mutual fire insurance companies), manufacturing companies, or other institution incorporated under laws of this State, to vote at any election for directors or trustees by proxy or otherwise, in such company of which she may be a stockholder or member. (*Laws* 1851, *chap.* 321.)

§ **60.** *Stockholder prohibited from selling vote or proxy.* —No person having the right to vote upon stock or bonds shall sell his vote or issue a proxy to vote upon such stock or bonds to any person for any sum of money, or any thing of value whatever. (*Laws* 1880, *chap* 510, § 2.

§ **61.** *Power of Supreme Court respecting elections.*— It shall be the duty of the Supreme Court, upon the application of any person or persons or body corporate, that may be aggrieved by, or may complain of, any election, or any proceeding, act, or matter, in or touching the same (reasonable notice having been given to the adverse party, or to those who are to be affected thereby, of such intended application), to proceed forthwith and in a summary way, to hear the affidavits, proofs and allegations of the parties, or otherwise inquire into the matters or causes of complaint, and thereupon to establish the election so complained of, or to order a new election, or to make such order and give such relief in the premises, as right and justice may appear

to the said Supreme Court to require: *Provided*, That the said Supreme Court may, if the case shall appear to require it, either order an issue or issues to be made up in such manner and form as the Supreme Court may direct, in order to try the respective rights of the parties who may claim the same. to the office or offices, or franchise in question; or may give leave to exhibit, or direct the attorney-general to exhibit, one or more information or informations in the nature of a *quo warranto* in the premises. (1 R. S., 603, § 5.)

(19 Wend., 135; 11 Paige, 124; 36 How. Pr. R., 112; 12 Abb. Pr. R. [N. S.], 394.)

On a motion to set aside a corporate election under 1 Rev. Stat., 693, § 5, the corporation should be a party on the record as well as the trustees. (*Supreme Ct., Sp. T.*, 1863, *Matter of Pioneer Paper Co.*, 36 How. Pr., 102.)

The mere fact that there being four trustees, the votes of the trustees were a tie, is not necessarily ground for setting aside their election. (*Ib.*)

It seems, that in proceedings to vacate an election under 1 Rev. Stat., 603, § 5, the court should not notice formal objections, which might have been obviated if taken at the time, from any persons but those whose names appear on the notice of the application to it, nor from persons who were not present at the election in person or by proxy. (*Matter of Mohawk and Hudson R. R. Co.*, 19 Wend., 135.)

A corporation may apply to the Supreme Court, under 1 Rev. Stat., 603, § 5, to have an election of trustees set aside and a new election ordered. (*Supreme Ct.*, 1865, *Matter of Pioneer Paper Co.*, 36 How. Pr., 111.)

The fact that the trustees in question join in the application, forms no objection to granting the relief. (*Ib.*)

The statute giving proceedings to set aside corporate elections—is not restricted to moneyed corporations. (*Supreme Ct., Sp. T.*, 1869, *Matter of Cecil*, 36 How. Pr., 477.)

Though the court are to give such order as right and justice appear to require (act of 1825, § 9; similar provisions, 1 Rev. Stat., 603, § 5), if the election is strictly and technically irregular, they should vacate it. (*Supreme Ct.*, 1827, *ex parte Willcocks*, 7 Cow., 402.)

That oral proofs may be received upon a proceeding to set aside an election of corporate trustees (see *Matter of Pioneer Paper Co.*, 36 How. Pr., 104).

An election of directors of a corporation is not invalid or to be set aside as irregular, because the oath actually administered to the inspectors was not subscribed by them. (*Supreme Ct.*, 1866, *Matter of Wheeler*, 2 Abb. Pr. [N. S.], 361.)

The decisions of inspectors of elections; how far they may be inquired into, in an action in the nature of *quo warranto*. (*People ex rel. Smith* v. *Pease*, 30 Barb., 558.)

Where the complaint claimed compensation, in damages, for an alleged wrongful withholding of the certificate of election of the plaintiffs, as trustees of a religious corporation, and keeping the plaintiffs out of office; and also claimed that the certificate given to the defendants, who claimed the office, be declared null and void—*Held*, that the complaint must be dismissed. The

question of title should be tried by an action or proceeding in the nature of *quo warranto*. (*Supreme Ct., Sp. T.*, 1861, *Hartt* v. *Harvey*, 13 Abb. Pr., 332; S. C., 21 How. Pr., 382.)

For the proper remedy to try the title to a corporate office to which there are several claimants (*H. R. R. West Shore Co.* v. *Kay*, 14 Abb. Pr. [N. S.], 191; *People* v. *Albany and Susquehanna R. R. Co.*, 57 N. Y., 161; reversing, in part, 5 Lans., 25; see Code Civil Proc., § 1781.)

§ **62.** *Proceedings in case of failure to hold election.*—If, at any time hereafter, the election for any bank or other incorporated company of this State, shall not be duly held on the day designated and appointed by the act incorporating such bank or other incorporated company, it shall be the duty of the president and directors of such bank or other incorporated company to notify and cause an election for directors to be held within sixty days immediately thereafter. (1 R. S., 604, § 8.)

The effect of a neglect to hold an election, discussed. (*Philips* v. *Wickham*, 1 Paige, 590; *People* v. *Runkel*, 9 Johns., 147.)

§ **63.** *Who are entitled to vote on such subsequent day.*—And in all cases no share or shares shall be voted upon, except by such person or persons who may have appeared on the transfer books of said company, to have had the right to vote thereon on the day when, by the act of incorporation of such company, the election ought to have been held, which said right so to vote shall be exercised by the person so appearing as aforesaid upon the transfer books of such company, on any day when such election may be held. (1 R. S., 604, § 8.)

§ **64.** *Directors to appoint officers and agents of the corporation.*—The directors shall appoint one of their number president; they may also appoint a treasurer and secretary, and such other officers and agents as shall be prescribed by the by-laws. (*Gen'l R. R. Act, Laws* 1850, *chap.* 140, § 6.)

The directors are not imperatively required to appoint a treasurer and secretary, but the provisions of this section simply give them authority to do so. (*People* v. *Hills*, 1 Lans., 202.) The secretary and treasurer of the company being simply servants, and holding their offices at the will of the directors, cannot be subject to an action in the nature of a *quo waranto* under section 432 of the Code. (Ib.) The president, by virtue of his office, has authority to collect subscriptions to the capital stock. (*East N. Y. R. Co.* v. *Lighthall*, 5 Abb. Pr. N. S., 458; S. C., 6 Robt., 407.) He is, however, under no obligation nor has he a right to produce, in a suit against the company, its books or papers, even though served with a subpœna *duces tecum* requiring him to do so. (*Bank of Utica* v. *Hilliard*, 5 Cow., 153; *Same* v. *Same*, id., 419.) The president of a corporation, unless authorized by its charter or by-laws, has not authority to indorse

and negotiate notes belonging to it. (7 Wend., 31; *N. Y. Superior Ct.*, 1858, *Marine Bk.* v. *Clements*, 3 Bosw., 600.) Though the election of an officer—*e. g.*, a treasurer—is irregular, if he afterwards acts, and is recognized by the company as such, his acts as such, within the scope of his authority, are binding on the company. (*Supreme Ct.*, 1857, *Partridge* v. *Badger*, 25 Barb., 146.) The duty of the treasurer is to keep the moneys of his principal distinct from his own, unless it is otherwise agreed, and to pay any balance due, on demand. (*Supreme Ct.*, 1857, *Second Av. R. R. Co.* v. *Coleman*, 24 Barb., 300.)

No formal resolution of the board of directors of a corporation is required to appoint an agent or define his powers. A contract may be implied against a corporation, and it may affirm the acts of an assumed agent, and thus be bound by them. (22 Wend., 348; 20 ib., 91; 4 Cow., 645; 2 Kent's Com., 288; Ang. & A., 172, §§ 7, 8; *Supreme Ct.*, 1844, *Bank of Lyons* v. *Demmon*, Hill & D. Supp., 398.) Where a corporation has power to do some act, and, as incident to that act, to render itself liable for representations made in and about the doing of that act, it can appoint an agent to do the act; and from the mere fact of such appointment the same powers will flow to the agent as if he had been appointed by an individual, provided only that the powers so flowing could have been exercised by the corporation itself. (*Supreme Ct.*, 1863, *Sharp* v. *Mayor, &c., of N. Y.*, 40 Barb., 256; S. C., less fully, 25 How. Pr., 389.) A body corporate can act only in the mode prescribed by the law creating it. To enable its agents to bind the company, they must act pursuant to the requisites of the incorporating act. (2 Cranch, 166; *Supreme Ct.*, 1807, *Beatty* v. *Marine Ins. Co.*, 2 Johns., 109; and see *People* v. *Utica Ins. Co.*, id., 358, 383; 1824, *N. Y. Firem. Ins. Co.* v. *Ely*, 2 Cow., 678, 699; 1830, *Hosack* v. *Col. of Physicians, etc., of N. Y.*, 5 Wend., 547.) That the directors may ratify unauthorized acts of an agent which are within the corporate powers, and that such ratification may be inferred from acquiescence merely. (*Hoyt* v. *Thompson*, 19 N. Y. [5 Smith], 207.) A corporation cannot, by a subsequent ratification, make good an act of its agent which it could not have directly empowered him to do. (*Supreme Ct.*, 1846, *Hodges* v. *City of Buffalo*, 2 Den., 110; and see *McCulloch* v. *Moss*, 5 ib., 567.) A corporation is not liable for a malicious and willful trespass committed by their servant and approved by their general agent. (1 Hill, 480; 19 Wend., 343; *Ct. of Appeals*, 1849, *Vanderbilt* v. *Richmond Turnpike Co.*, 2 N. Y. [2 Comst.], 479.) If the directors of a company, no matter whether through inattention or otherwise, suffer its subordinate officers to pursue a particular line of conduct for a considerable period without objection, they are as much bound to those who are not aware of any want of authority, as if the requisite power had been directly conferred. (*Supreme Ct.*, 1852, *Beers* v. *Phœnix Glass Co.*, 14 Barb., 358.)

The agents of a corporation cannot, in their individual capacities, be compelled to discover the books of the corporation; and on a motion to require them to do so, the court will not enter into the question whether the incorporation is fictitious. (*Supreme Ct., Sp. T.*, 1864, *Opdyke* A. *Marble*, 18 Abb. Pr., 266; S. C., 44 Barb., 64.) A by-law of a railroad company empowering the general freight agent to negotiate contracts for the transportation of freight, with the approval of the president—*Held*, not to require an express approval of every contract, but merely to authorize the president to interpose. (*Supreme Ct.*, 1858, *Medbury* v. *N. Y. and Erie R. R. Co.*, 26 Barb., 564.) A "railroad superintendent" vested with control over every thing connected with the running of the road, but having no control over the treasury, nor any share in the direc-

tion, has no implied authority to bind the company by engaging a physician to attend a person run over by one of the company's trains. (*N. Y. Superior Ct.*, 1853, *Stephenson* v. *N. Y. and Harlem R. R. Co.*, 2 Duer, 341.) General agent of company authorized to purchase lands, may have implied authority to enter into arbitration as to price of lands. (*Ct. of Appeals*, 1853, *Wood* v. *Auburn and Rochester R. R. Co.*, 8 N. Y. [4 Seld.], 160.) Persons who have been misled by the acts or negligence of the officers of a corporation, and have advanced money in consequence thereof—*e. g.*, persons who have advanced money upon transfers of spurious stock by the transfer agent, without notice of the fraud—are entitled to recover damages against the corporation in a proper action. (*Supreme Ct., Sp. T.*, 1860, *N. Y. and New Haven R. R. Co.* v. *Schuyler*, 38 Barb., 534.) A corporation having permitted its agents to sell stock covered by certificates, when there was stock standing to their credit sufficient to cover such certificates, is bound to make good such certificates to the extent of any shares owned by the company, within the capital stock of the company; and the shares of the company unsold should be applied to the satisfaction of the oldest outstanding certificate of that character. (*Ib.*)

It is not necessary, in order to charge a corporation for services rendered, that the directors, at a formal meeting, should either have formally authorized or ratified the employment. For many purposes, the officers and agents of the corporation may employ persons to perform services for it, and such employment, being within the scope of the agent or officer's duty, binds the corporation. In other cases, if an officer employs a person to perform a service for the corporation, and it is performed with the knowledge of the directors, and they receive the benefit of such service without objection, the corporation is liable upon an implied assumpsit. (12 Johns., 227; 14 id., 118; 6 N. Y. Leg. Obs., 160; 15 Barb., 328; 7 Cow., 540; 9 Paige, 496; 17 N. Y., 449; 22 Wend., 348; 20 id., 91; 4 Cow., 645; Angel & Ames on Corp., §§ 7, 8; *N. Y. Ct. of Appeals*, 1864, *Hooker* v. *Eagle Bank of Rochester*, 30 N. Y., 83.)

The directors of a railroad corporation relinquished the management of the road for a period of years to the president, allowing him to buy property for the use of the corporation, and to give the notes of the corporation for the price; and when, at the end of the three years, the managers again resumed the discharge of their appropriate duties, they took possession of the road and of all the property thus procured by the president, and continued to use such property for several years, without question as to the manner in which it had been obtained—*Held*, that under such circumstances, the acts of the assumed agent could not be repudiated. The powers of an agent of a corporation are such as he is allowed by the directors or managers of the corporation to exercise within the limits of the charter; and the silent acquiescence of the directors or managers may be as effectual to clothe the agent with power as an express letter of attorney. (12 Wheat., 64; 5 Cush., 175; 32 Barb., 18; 4 Cow., 645, 659, 661; 19 N. Y., 208, 219; Ang. & Ames on Corp., 3 ed., 269; *Ct. of Appeals*, 1863, *Olcott* v. *Tioga R. R. Co*, 27 N. Y., 546; affirming S. C., 40 Barb., 179.)

The possession by the transfer agent of a corporation, of the transfer books of its stock, and his authority to allow them to be used, do not constitute the *indicia* of an authority to make representations as to the ownership of stock, so as to render the company liable for the falsity of such representations made by him. (3 Kern., 599; *N. Y. Superior Ct.*, 1862, *Henning* v. *N. Y. and New Haven R. R. Co.*, 9 Bosw., 283.)

The officers of a corporation authorized to issue certificates to the stockholders, as evidence of title to stock, are liable not only to the immediate purchasers from them of spurious stock, falsely and fraudulently certified by them, but also to any subsequent purchaser buying them upon the faith of the false certificate, and sustaining damage thereby. (*Supreme Ct.*, 1862, *Shotwell* v. *Mali*, 38 Barb., 445.)

The purchaser's right of action against the officers of a corporation concerned in issuing certificates of spurious stock is complete upon the purchase. And that right will not be affected by any subsequent action of other directors of the corporation, in turning out other property to him to an amount exceeding the sum paid by him for the false certificates. (*Ib.*)

Authority of officers to make permanent contract. (*Queen* v. *Second Avenue R. R. Co.*, 35 Supr. Ct. [3 J. & S.], 154.) Corporation, when bound by act of officer in excess of authority. (*Booth* v. *Farmers' Bank*, 50 N. Y., 396; reversing, 4 Lans., 301.)

Ratification of act of committee exceeding its authority. (*Union Bridge Co.* v. *T. and L. R. R. Co.*, 7 Lans., 240.) Officers, when held liable for deceit. (*Wakeman* v. *Daly*, 51 N. Y., 27; *Arthur* v. *Griswold*, 55 id., 400.)

A corporation is liable to the same extent and under the same circumstances as a natural person for the consequences of its wrongful acts, and will be held to respond in a civil action at the suit of an injured party for every grade and description of forcible, malicious, or negligent tort or wrong which it commits, however foreign to its nature or beyond its granted powers the wrongful transaction or act may be. (7 Wend., 31; Angell on Corp., §§ 382, 388, 391; 2 Maryl. Dec., 169; 22 Conn., 541; 22 N. Y., 305; 1 Wend. Blackst. [*note*], 476; 7 C. B. [N. S.], 290; 24 Me., 490; 21 How. [U. S.], 209; *Ct. of Appeals*, 1865, *N. Y. and N. H. R. R. Co.* v. *Schuyler*, 34 N. Y., 30.)

But a corporation is, from its nature, incapable of doing any act, except through agents to whom is given, by its fundamental law or in pursuance of it, every power of action it is capable of possessing or exercising. Hence the rule is that a corporation is responsible for the acts or negligence of its agents while engaged in the business of the agency, to the same extent and under the same circumstances that a natural person is chargeable with the acts or negligence of his agent. (*Ib.*)

Thus, if a corporation itself issues false certificates of stock, and permits the fraudulent transfer of spurious stock, it is liable to the party directly deceived and injured by that transaction. The incapacity to create the spurious stock would be no defense to an action for damages for the injury. On the contrary, that very incapacity, since it would render the certificate or transfer a fraud and deceit, would itself be the cause of the injury and the basis of recovery. No court would hear the corporation assert that its wrongful act was beyond its chartered powers, and therefore ineffective to charge it with the injurious consequences of the fraud. (*Ib.*)

Wherever a corporation is acting within the scope of the legitimate objects of its institution, all parol contracts made by its authorized agents are express promises by the corporation; and all duties imposed upon them by law, and all benefits conferred at their request, raise implied promises, for the enforcement of which an action will lie. (12 Johns, 227; *Supreme Ct.*, 1817, *Dunn* v. *Rector of St. Andrew's*, 14 Johns., 118.)

That corporations, like natural persons, have capacity to do wrong; and when, in their contracts and dealings, they break over the restraints imposed

upon them, an exemption from liability cannot be claimed on the mere ground that they have no power thus to act. (*Bissell* v. *Mich. S. and N. W. R. R. Co.*, 22 N. Y., 258.)

§ **65.** *Directors prohibited from concealing notice of application for injunction of receiver.*—Any director or other officer of a corporation, upon whom shall be served any notice of an application for an injunction restraining or affecting the business of such corporation or joint-stock association, or for a receiver of its property or effects, or any part thereof, or who shall conceal from or omit to disclose to the other directors, trustees, managers and officers thereof the fact of such service, and the time and place at which such application is to be made, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by fine or imprisonment, or both such fine and imprisonment, and shall be liable in a civil action to the corporation or joint-stock association for all damage which shall be sustained by it by reason of such proceedings. (*Laws* 1870, *chapter* 151, § 4.)

The first three sections of this act were repealed by chapter 245, Laws of 1880.

§ **66.** *To whom last section is made applicable.*—* The provisions of this act shall extend and apply to all corporations and joint-stock associations created or existing by the laws of this or any other State or government doing business within this State, or having a business or fiscal agency, or an agency for the transfer of its stock therein, and to the directors, trustees, managers and other officers of such foreign corporation or joint-stock association, and to all proceedings by the attorney-general in the name of the people of this State, under the laws regulating proceedings against corporations, except that it shall not apply to savings banks or to corporations or associations having banking powers, or powers to make insurance, or to such as shall be organized under the general manufacturing laws of this State. (*Laws of* 1870, *chap.* 151, § 5, *as amended by chap.* 428 *of the Laws of* 1875.)

§ **67.** *Failure of director upon whom application for injunction is served, etc., a misdemeanor.*—A director, trustee or other officer of a joint-stock association or corporation, upon whom a notice of application for an injunc-

* The amendment of 1875 consisted in the insertion of the words "Savings Banks or to." The amendatory act of 1875, viz., chapter 428, cited above, was repealed by chapter 245 of Laws of 1880, and under the authority of the People ex rel. The Canajoharie National Bank *v.* The Board of Supervisors of Montgomery County, 67 N. Y., 109, it seems that the following section has been repealed.

tion affecting the property or business of such joint-stock association or corporation is served, who omits to disclose to the other directors, officers or managers thereof the fact of such service, and the time and place of such application, is guilty of a misdemeanor. (*Penal Code*, § 612.)

§ **68.** *Certain transfers of property prohibited by directors.*—Whenever any incorporated company shall have refused the payment of any of its notes, or other evidences of debt, in specie, or lawful money of the United States, it shall not be lawful for such company or any of its officers, to assign or transfer any of the property or choses in action of such company, to any officer or stockholder of such company, directly or indirectly, for the payment of any debt; and it shall not be lawful to make any transfer or assignment in contemplation of the insolvency of such company to any person or persons whatever; and every such transfer and assignment to such officer, stockholder or other person, or in trust for them or their benefit, shall be utterly void. (1 R. S., marg. p. 603, § 4.)

The 18th section of the act incorporating the New York and Erie Railroad Company, though it expressly refers to and adopts the provisions of title 3, chapter 18, part 1 of the Revised Statutes, is not to be construed as exempting the company from the provisions contained in title 4 of the same chapter. See Laws 1850, chapter 140, section 28, giving companies formed under the general railroad act the same powers. (Chap. 9, *post.*) Accordingly, if such company assign any of its property in contemplation of insolvency the assignment will be void. (*Bowen* v. *Lease*, 5 Hill, 221.) So also an assignment made by an incorporated company of all its property to a trustee in trust for the payment of its creditors rateably made in contemplation of insolvency is absolutely void by statute. (*Harris* v. *Thompson*, 15 Barb., 62.) A general assignment by the directors of a corporation of all its property is fraudulent and void as against the stockholders not consenting thereto whether the company be solvent or not. (*N. Y. Com. Pl*, *Chambers*, 1864, *Smith* v. *N. Y. Consolidated Stage Co.*, 18 Abb. Pr., 419.)

The above provisions do not apply to moneyed corporations, religious societies. (1 R. S., 604, § 11; *Ct. of Appeals*, 1850, *De Ruyter* v. *St Peter's Church*, 3 N. Y. [3 Comst.), 238; affirming S. C., 3 Barb. Ch., 119. To the same effect, *Supreme Ct.*, 1855 [citing, also, 16 Barb., 280; 1 Am. Lead. Cas., 89, note], is *Hurlburt* v. *Carter*, 21 Barb., 221; *Supreme Ct*, 1853, *Hill* v. *Reed*, 16 Barb., 280.)

Under an interpretation of the former statute the following decision in conflict with that cited above was made: The sixth section of the act to prevent fraudulent bankruptcies by incorporated companies (Statutes, vol. 7, 450, *a*)—prohibiting an assignment of any property to any officer or stockholder for the payment of any debt, and any assignment to any person, in contemplation of insolvency—intended to prevent an assignment which should give a preference to the officers or stockholders, and that a fair dividend should be made among the *bona fide* creditors—an assignment made not in contemplation of insol-

vency, and made to assignees who are not officers or stockholders of the corporation, in trust for the payment of all its debts pro rata is valid. (*Supreme Ct.*, 1829, *Haxtun* v. *Bishop*, 3 Wend., 13.)

The remaining portion of sec. 4, cited above, viz.: "and whenever any incorporated company shall have remained insolvent for one whole year, or for one year shall have neglected or refused to redeem its notes or other evidences of debt, in specie, or other lawful money of the United States, or shall for one year have suspended the ordinary business of such incorporation, such company shall thereupon be deemed and adjudged to have surrendered the rights, privileges, and franchises granted by any act of incorporation, and shall be deemed to be dissolved," was repealed by chapter 245 of the Laws of 1880.

As to what is a transfer in contemplation of insolvency, see *Dutcher* v. *I. & T. N. Banks*, 59 N. Y., 5.)

§ **69.** *Directors, etc., liable for contracting excessive debts.*—No debt or debts shall be contracted or incurred by or on behalf of any incorporated railroad company, beyond or exceeding its available means in its possession, under its control, and belonging to it, including its *bona fide* and available stock subscriptions, and exclusive of its real estate, at the time the same shall be contracted or incurred, to pay and discharge the same and all its debts previously contracted or incurred; and every officer, agent or stockholder of said company who shall knowingly assent to, or have any agency in contracting or incurring any debt, in violation of the provisions of this section, shall be personally liable to pay such debt; and shall also be liable to arrest and imprisonment in any action for the same, and on any execution issued on any judgment obtained for the same, in the same manner as defendants in actions of trespass are now liable; and shall also be deemed guilty of a misdemeanor; but the debts contracted in violation of the provisions of this section shall not be deemed invalid as against said company by reason thereof: Provided that nothing herein contained shall apply to any loan, which any company shall be expressly authorized by law to make over and above the available means aforesaid. (*Laws of* 1845, *chap.* 230.)

This statute and the other provisions of the Revised Statutes stated in the next two sections of the text, are given as a part of what is considered the existing law of the State; but the parts thereof which make the stockholders, officers or agents of the corporation individually liable for the debts or liabilities of the corporation have been repealed by section 16, chapter 282 of the Laws of 1854, and such liability is now provided for by the provisions of the general railroad act and the amendments thereto. The other provisions of this and the two following sections are unrepealed, and although they have been substantially re-enacted by the provisions of the penal code of 1881, they were not repealed for the reason that the repealing act of that year, which was

drawn for enactment in conjunction with the penal code, failed to receive the signature of the governor in time to become a law. The act of 1845 was passed before the general railroad act of 1850 (chap. 140), and there was thought to be some uncertainty whether it was still in force; and by section 28, subdivision 10 of that act, as amended by Laws of 1880, chap. 133, power is given to railroad companies "to borrow such sums of money as may be necessary for completing, finishing and operating the railroads," so far this section is abrogated. The Legislature of 1881, by the enactment of sections 607, 608, of the penal code, has recognized the existence of its principles as applicable to railroad corporations, and provided therein for such loans as the company is expressly authorized to make. (See the next two following sections, 72 and 73.)

However, in *Rochester and others* v. *Barnes*, 26 Barb., 657, it was held that the foregoing act of May 13, 1845 (chap. 290, § 71 of the text), "in relation to the contracts of railroad companies," had no application to railroad corporations formed under the general railroad acts of 1848 and 1850. That the constitution of 1846 plainly designed to abolish the former mode or system of creating corporations, and to adopt an entire new system under which, by general and uniform rules, the individual liability of corporators for all debts of their respective corporations should be regulated and prescribed; and the Legislature, in passing the acts of 1848 and 1850, intended to carry out this intention of the constitution, and by those acts to prescribe the *only* rules which should govern as to corporations formed under them, and the individual liability of their respective corporators. If the act of 1845 was not wholly repealed by the acts of 1848 and 1850 (the general railroad acts,) its application and operation were, by plain and necessary implication, restricted and limited to corporations previously existing. (*Rochester et al.* v. *Barnes et al.*, *supra*.)

In the above cited case, it is stated in the opinion of the court that the above mentioned act of 1845 was expressly repealed in 1854. An examination of the session laws of 1854 fails to disclose an act expressly repealing it, by reference thereto, in terms naming the act, and the compilers of the 6th edition of the Revised Statutes (vol. II, p. 544, * 7) have inserted it in that edition as a part of the existing laws of the State, with a foot note questioning its abrogation. The opinion of the court in the Rochester case, *supra*, may have been based upon the finding of the referee to that effect (see the opinion), and the referee may have established his finding by implication, based upon the authority of section 16, chapter 282 of the Laws of 1854, which states at the end of that section that all laws whereby the stockholders, officers and agents of any railroad corporation are made individually liable for the debts or liabilities of such corporation, beyond the provisions contained in the act entitled "An act to authorize the formation of railroad corporations, and to regulate the same, passed April 2, 1850, and the acts amending the same, are hereby repealed."

§ 70. *Directors, when liable for debts in excess of the capital stock.*—The total amount of the debts which any incorporated company shall at any time owe, whether for deposits, or by bond, bill, note, or other contract, over and above the actual deposits with the said company, shall not at any time exceed three times the amount of the capital stock actually paid in; and in case of any excess, the di-

rectors under whose administration the same may have happened, except those who may have caused their dissent therefrom to be entered at large on the minutes of the said directors at the time, and except those who were not present when the same did happen, shall, in their individual and private capacities, jointly and severally be liable for such excess to the said corporation, and in the event of its dissolution, to any of the creditors thereof, to the full amount of such excess, with legal interest from the time such liability accrued; and no statute of limitations shall be a bar to any suit at law or in equity, against such directors, for any sums of money for which they are made liable by this section. (1 R. S., marg. p. 602, § 3.)

(See note to section 69, *ante*, as to whether applicable to corporations formed under the general railroad act; and also see *post*, as to provisions of penal code in respect to violations of the provisions of the act. Their liability under this statute is repealed by chapter 282 of Laws of 1854.) (See note to preceding section.)

§ 71. *Directors prohibited in certain cases from making dividends and reducing capital stock, etc.*—It shall not be lawful for the directors or managers of any incorporated company in this State to make dividends, excepting from the surplus profits arising from the business of such corporation; and it shall not be lawful for the directors of any such company to divide, withdraw, or in any way pay to the stockholders, or any of them, any part of the capital stock of such company, or to reduce the said capital stock, without the consent of the Legislature; and it shall not be lawful for the directors of such company to discount or receive any note, or other evidence of debt, in payment of any instalment actually called in and required to be paid, or any part thereof, due or to become due on any stock in the said company; nor shall it be lawful for such directors to receive or discount any note, or other evidence of debt, with the intent of enabling any stockholder in such company to withdraw any part of the money paid in by him on his stock, and in case of any violation of the provisions of this section, the directors under whose administration the same may have happened, except those who may have caused their dissent therefrom to be entered at large on the minutes of the said directors at the time, or were not present when the same did happen, shall, in their individual and private capacities, jointly and severally be liable to the said corporation, and to the creditors thereof in the event of its dissolution, to the full amount of the capital stock of the said company so divided, withdrawn, paid out, or reduced, and to the full amount of the notes or other evi-

dences of debt so taken or discounted in payment of any stock, and to the full amount of any notes or other evidences of debt so discounted with the intent aforesaid, with legal interest on the said respective sums from the time such liability accrued; and no statute of limitations shall be a bar to any suit at law or in equity, against such directors for any sums for which they are made liable by this section; provided that this section shall not be construed to prevent a division and distribution of the capital stock of such company, which shall remain after the payment of all its debts, upon the dissolution of such company, or the expiration of its charter. (1 R. S., marg. p. 601, § 2.)

(See note to section 69, *ante*, as to whether applicable to corporations formed under the general railroad act [26 Barb., 657], and section 594, *post*, as to provisions of penal code, making violation of the above provisions a misdemeanor. Also, see the statutes, *post*, allowing reduction of capital stock, and see note to section 69 as to the repeal of liabilities of directors, etc.)

The officers of a corporation, when they undertake to declare a dividend, are bound to make it equal and just among all those who are interested. If they attempt to make an unjust discrimination, giving one class of stockholders an unfair advantage over another, a court of equity has power to interfere to correct the wrong. (*Supreme Ct., Sp. T.*, 1865, *Isuling* v. *Atlantic Mutual Ins. Co.*, 45 Barb., 510; S. C., 30 How. Pr., 69.)

A dividend adjusted upon an inequitable basis, decreed to be readjusted upon a different and a more equitable footing. (*Ib.*)

Unless the resolution declaring the dividend, otherwise directs the officers, they must pay the dividend to the persons holding stock on the books of the company at the date when the dividend is declared. (*Supreme Ct.*, 1859, *Jones* v. *Terre Haute and Richmond R. R. Co.*, 17 How. Pr., 529.)

Plaintiff became a stockholder on December 3d, and a dividend of surplus earnings, ending on November 30th, was declared on December 17th, payable January 6th—*Held*, that plaintiff being a stockholder at the time the dividend was declared, was entitled to his share thereof. (*Ib.*)

Whether a dividend can be limited to persons holding stock at a given time, to the exclusion of others who acquire stock afterwards, but before the dividend—*query?* (*Ib.*)

Upon a sale of stock, deliverable at a future day, at the option of the seller, a dividend declared before the sale, but not payable until after the day fixed for the delivery of the stock, belongs to the seller, and does not pass to the buyer, under the contract. (*N. Y. Superior Ct.*, 1865, *Spear* v. *Hart*, 3 Robt., 420.)

After an issue of spurious stock by an officer of a corporation, the corporation may be enjoined, at suit of a genuine stockholder, from paying a dividend, declared by them, to any stockholders, except such as can be ascertained to hold none of the spurious stock, and from making any future dividend on the stock, until it be established who are the genuine stockholders. (*Supreme Ct., Sp. T.*, 1859, *Underwood* v. *N. Y. and New Haven R. R. Co.*, 17 How. Pr., 537.)

An action cannot be maintained against a corporation by one of its stockholders to compel it to declare and pay a dividend, from funds on hand. (*Su-*

preme Ct., Sp. T., 1867, *Karnes* v. *Rochester and Genesee Valley R. R.*, 4 Abb. Pr. [N. S.], 107.)

A demand before suit is necessary in order to enable a stockholder to recover dividends. A letter of mere inquiry is not enough. (*Supreme Ct.*, 1868, Scott v. *Central R. R. and B. Co.*, 52 Barb., 45.)

The rights to dividends do not arise from the stock, but are profits earned and distributed by the corporation to those who are recognized as owners of the stock on the books of the company. The dividends may be sold or assigned without parting with the stock, and they do not pass to the purchaser under an executory contract, in the absence of an express clause to that effect. A mere provision, whereby the purchaser agrees to pay interest from the date of the contract, does not have such effect, and is wholly insufficient to entitle the purchaser to the dividends declared while the contract remains executory. (*N. Y. Superior Ct.*, 1869, *Currie* v. *White*, 37 How. Pr. R., 330, 384; S. C., 6 Abb. Pr. [N. S.], 352.)

For the same reasons, additional stock issued by a company follows the title recognized by the company, and does not pass to the purchaser under an executory contract, in the absence of an express stipulation to that effect.

The facts that deposits are made by the purchaser as security for the performance of the contract on his part, makes no difference in this respect. Even if payments are made on account as earnest money to bind the bargain, the contract is not changed thereby; for the true legal effect of earnest money is simply to afford conclusive evidence that a bargain was actually completed, with mutual intention that it should be binding on both contracting parties; but the inquiry whether the title to the property has passed, is to be tested not by the fact that earnest was given, but by the true nature of the contract, concluded by the giving of earnest. (*Ib.*)

An injunction should not be granted to restrain directors of a corporation, which has earned a surplus, from issuing new stock in lieu of dividend, if they have power, by law, to increase their capital. Nor is a mere declaration of policy on the part of the board not to take such a course a ground for enjoining a subsequent board from so doing. (*Supreme Ct., Sp. T.*, 1868, *Howell* v. *Chicago, etc., Railw. Co.*, 51 Barb., 378.)

§ **72.** *Officers, etc., of a railroad company contracting excessive debt guilty of a misdemeanor.*—An officer, stockholder or agent of any railway corporation in this State, who knowingly incurs or assents to, or has any agency in contracting or incurring a debt, by or on behalf of such corporation, exceeding its means, available for the payment thereof and of all its debts previously contracted or incurred, then in possession or under its control and belonging to it, including its stock subscriptions, taken in good faith and available, and exclusive of its real estate, is guilty of a misdemeanor. (*Penal Code*, § 607.)

§ **73.** *Last section limited.*—The provisions of the last section do not apply to any loan, which an incorporated railway company in this State is expressly authorized by

law to make, over and above its available means. Debts, incurred or contracted in violation of the last section, are not to be deemed invalid as against such corporation by reason thereof. (*Penal Code*, § 608.)

§ **74.** *Misconduct of directors of stock corporations.*—A director of a stock corporation, who concurs in any vote or act of the directors of such corporation, or any of them, by which it is intended,

1. To make a dividend, except from the surplus profits arising from the business of the corporation, and in the cases and manner allowed by law; or

2. To divide, withdraw, or in any manner pay to the stockholders, or any of them, any part of the capital stock of the corporation; or to reduce such capital stock without the consent of the Legislature; or

3. To discount or receive any note or other evidence of debt in payment of an installment of capital stock actually called in, and required to be paid, or with intent to provide the means of making such payment; or

4. To receive or discount any note or other evidence of debt with intent to enable any stockholder to withdraw any part of the money paid in by him on his stock; or

5. To apply any portion of the funds of such corporation, except surplus profits, directly or indirectly, to the purchase of shares of its own stock; or

6. To receive any such shares in payment or satisfaction of a debt due to such corporation; or

7. To receive in exchange for the shares, notes, bonds, or other evidences of debt of such corporation, shares of the capital stock or notes, bonds or other evidences of debt issued by any other stock corporation,

Is guilty of a misdemeanor. (*Penal Code*, § 594.)

§ **75.** *Frauds in keeping accounts, etc.*—A director, officer or agent of any corporation or joint-stock association, who knowingly receives or possesses himself of any property of such corporation or association, otherwise than in payment of a just demand, and with intent to defraud, omits to make, or to cause or direct to be made, a full and true entry thereof, in the books or accounts of such corporation or association; and a director, officer, agent or member of any corporation or joint-stock association, who, with intent to defraud, destroys, alters, mutilates or falsifies any of the books, papers, writings or securities belonging to such corporation or association, or makes or concurs in making any false entry, or omits or concurs in omitting to make any material entry in any book of accounts, or other record or

document kept by such corporation or association, is punishable by imprisonment in a State prison not exceeding ten years, and not less than three years, or by imprisonment in a county jail not exceeding one year, or by a fine not exceeding five hundred dollars, or by both such fine and imprisonment. (*Penal Code*, § 602.)

§ **76.** *Officer of corporation publishing false reports of its condition.*—A director, officer or agent of any corporation or joint-stock association, who knowingly concurs in making or publishing any written report, exhibit or statement of its affairs or pecuniary condition, containing any material statement which is false other than such as are elsewhere, by this Code, specially made punishable, is guilty of a misdemeanor. (*Penal Code*, § 603.)

(*Cross* v. *Sackett*, 6 Abb. Pr., 247; *Harper* v. *Chamberlain*, 11 ib., 234.)

§ **77.** *Directors of corporation presumed to have knowledge.*—A director of a corporation, or joint-stock association, must be deemed to have such a knowledge of the affairs of the corporation or association, as to enable him to determine whether any act, proceeding or omission of its directors, is a violation of this chapter. (*Penal Code*, § 609.)

Refers to chapter 11 of title 15 of the Penal Code.

§ **78.** *Directors present at meeting, when presumed to have assented.*—A director of a corporation, or joint-stock association, who is present at a meeting of the directors, at which any act, proceeding or omission of such directors in violation of this chapter occurs, must be deemed to have concurred therein, unless he at the time causes, or in writing requires, his dissent therefrom to be entered in the minutes of the directors. (*Penal Code*, § 610.)

Refers to chpter 11 of title 15 of the Penal Code.

§ **79.** *Id.; absent from meeting.*—A director of a corporation, or joint-stock association, although not present at a meeting of the directors, at which any act, proceeding or omission of such directors, in violation of this chapter, occurs, must be deemed to have concurred therein, if the facts constituting such violation appear on the record or minutes of the proceedings of the board of directors, and he remains a director of the same company for six months thereafter, without causing, or in writing requiring, his dissent from such illegality to be entered in the minutes of the directors. (*Penal Code*, § 611.)

Refers to chapter 11 of title 15 of the Penal Code.

§ 80. *Foreign corporations* —It is no defense to a prosecution for a violation of the provisions of this chapter, that the corporation was one created by the laws of another state, government or country, if it carried on business, or kept an office therefor, within this State. (*Penal Code*, § 613.)

Refers to chapter 11, title 15 of the Penal Code.

§ 81. "*Director*" *defined.*—The term "director," as used in this chapter, embraces any of the persons having by law the direction or management of the affairs of a corporation, by whatever name such persons are described in its charter, or are known in law. (*Penal Code*, § 614.)

Refers to chapter 11, title 15 of the Penal Code.

Section five of the general railroad act (chap. 140, Laws 1850), provided for the board of directors of railroad corporations, their election and qualifications. This section was amended by chapter 282 of the Laws of 1854, and subsequently by chapter 586 of the Laws of 1875; and chapter 510 of the Laws of 1880, also regulates the voting by railroad stock and bondholders.

The following is the original of section 5 of the general railroad act, as it existed previous to the amendment: "There shall be a board of thirteen directors of every corporation formed under this act, to manage its affairs. Said directors shall be chosen annually, by a majority of the votes of the stockholders voting at such election, in such manner as may be prescribed in the by-laws of the corporation, and they may and shall continue to be directors until others are elected in their places. In the election of directors, each stockholder shall be entitled to one vote for each share of stock held by him. Vacancies in the board of directors shall be filled in such manner as shall be prescribed by the by-laws of the corporation. Every corporation formed under this act shall be subject to the regulations concerning the election of directors of moneyed corporations, contained in article second of the second title of the eighteenth chapter of the first part of the Revised Statutes. The inspectors of the first election of directors shall be appointed by the board of directors named in the articles of association. No person shall be a director, unless he shall be a stockholder, owning stock absolutely in his own right, and qualified to vote for directors at the election at which he shall be chosen. At every election of directors, the books and papers of such company shall be exhibited to the meeting, provided a majority of the stockholders present shall require it." (*Laws*, 1850, *chap.* 140, § 5.)

The amendments of 1854 consist of a clause declaring the holding of stock for thirty days previous to an election a prerogative to the right to vote, and the omission of the clause subjecting railroad corporations to the provisions of the regulations concerning the elections of directors of moneyed corporations, which are contained in article second of the second title of the eighteenth chapter of the first part of the Revised Statutes.

The provisions of the Revised Statutes applicable to election of directors in moneyed corporations, which were, by the original act, made also applicable to railroad corporations, having been omitted from the act of 1854 (chap. 282), it

is to be presumed that each separate corporation is now at liberty to prescribe, by its own by-laws, the method and manner of conducting its election, subject, however, to the provisions of chapter 510 of the Laws of 1880, entitled "An act to regulate voting by stock and bondholders of railroad corporations," and subject also to the other general provisions of the statute which are hereinbefore given in the text.

The provisions of the statute which still regulate the conduct of "elections of moneyed corporations cited above are found at marginal page 596, *et seq.*, of the first part of the Revised Statutes, and are given below for the reason that although the railroad statutes no longer declare them to be obligatory upon railroad corporations, yet they offer many valuable suggestions to those who may have occasion to frame by-laws upon this subject. They are as follows:

[Sec. 32.] At every election for directors in any moneyed corporation three persons shall be chosen by the persons entitled to vote for directors as inspectors at the next succeeding election, whose duty it shall be to act as such, and any two of whom shall be competent to act. Each acting inspector shall be entitled to a reasonable compensation for his services, to be paid by the corporation for which he is chosen.

[Sec. 33.] The directors of the corporation shall supply any vacancy that may occur by the death or removal from the city or county where the corporation shall be situated, of any such inspector, or by his refusal to serve, or neglect to attend on the day of election.

[Sec. 34.] No person shall be chosen or appointed an inspector of an election of directors in a corporation of which he shall be a director or officer.

[Sec. 35.] Every such inspector, before he shall enter on the duties of his office, shall take and subscribe the following oath, before any officer authorized by law to administer oaths: "I do solemnly swear that I will execute the duties of an inspector of the election now to be held, with strict impartiality, and according to the best of my ability."

[Sec. 36.] At every election for directors, the transfer books of the corporation shall be produced, to test the qualifications of the voters; and no person shall be admitted to vote, directly or by proxy, except those in whose names the shares of the stock of the corporation shall stand on such books, and shall have so stood for at least thirty days previous to the election.

[Sec. 37.] No person shall be admitted to vote on any shares of stock belonging, or hypothecated to the corporation in which the election is held, nor shall any person be admitted to vote on any shares of stock which shall then be hypothecated, or pledged, as a collateral security, to any person or company.

[Sec. 38.] No person shall be admitted to vote on any shares which shall have been transferred to him, for the sole purpose of enabling him to vote thereon, at the election then to be held; nor upon any shares which he shall have previously contracted to sell or transfer after the election, upon any condition, agreement or understanding, in relation to his manner of voting at such election. (6 Wen., 509; 22 ib., 592.)

[Sec. 39.] Every person offering to vote, may be challenged by any other person authorized to vote at the same election; and to every person so challenged, one of the inspectors shall administer the following oath: "You do swear (or affirm as the case may be) that the shares on which you now offer to vote do not belong, and are not hypothecated to the (naming the corporation for which the election is held), and that they are not hypothecated or pledged to any other corporation or person whatever; that such shares have not been transferred to you for the

purpose of enabling you to vote thereon at this election, and that you have not contracted to sell or transfer them, upon any condition, agreement or understanding, in relation to your manner of voting at this election."

[Sec. 40.] No person shall be permitted to vote upon the proxy of a stockholder, unless he shall produce, annexed to his proxy an affidavit of such stockholder, stating the same facts to which the oath of such stockholder might have been required, upon a challenge, had he offered to vote in person, on the shares mentioned in the proxy. (19 Wend., 635.)

[Sec. 41.] If any person offering to vote upon a proxy, shall be challenged by an elector, he shall be required to take the following oath, to be administered to him by one of the inspectors: "You do swear (or affirm) that the facts stated in the affidavit annexed to the proxy, upon which you now offer to vote, are true according to your belief, and that you have made no contract or agreement whatever, for the purchase or transfer of the shares, or any portion of the shares, mentioned in such proxy."

[Sec. 42.] If any person duly challenged, shall refuse to take the proper oath, his vote shall be rejected, and shall not be afterwards received at the same election; if he shall take the oath, his vote shall be received.

[Sec. 43.] If an election for directors in any such corporation, shall not be held on the day appointed by law, it shall be the duty of the directors to notify, and cause such election to be held, within sixty days after the day so appointed; and on the day so notified, no person shall be admitted to vote, except those who would have been entitled, had the election taken place on the day when, by law, it ought to have been held.

[Sec. 44.] No by-law of any such corporation, regulating the election of its directors, shall be valid, unless it shall be made at least sixty days before the day appointed by law for the election to be held, and shall have been published for at least two weeks in succession, immediately following its enactment, in some newspaper in the city and county where the corporation is situated.

[Sec. 45.] Every such corporation shall keep a book, in which the transfer of shares of its stock shall be registered; and another book, containing the names of its stockholders; which books shall at all times during the usual hours of transacting business, for thirty days previous to an election of directors, be open to the examination of the stockholders.

[Sec. 46.] If any officer having charge of such books, shall upon the demand of a stockholder, refuse or neglect to exhibit and submit them to examination, he shall for each offense forfeit the sum of two hundred and fifty dollars.

[Sec. 47.] If any person shall conceive himself aggrieved by an election, or any proceeding concerning an election of directors or officers in any such corporation, he may apply to the Supreme Court for redress, giving a reasonable notice of his intended application, to the party to be affected thereby. (6 Hill, 371.)

[Sec. 48.] It shall be the duty of the Supreme Court, upon such application, to proceed forthwith in a summary way, to hear the proofs and allegations of the parties, or otherwise to inquire into the causes of complaint, and thereupon to make such order, and grant such relief, as the circumstances and justice of the case shall seem to require. If the election complained of shall be set aside, the Supreme Court may order a new election at such time and place as they shall appoint (22 Wend., 593.)

[Sec. 49.] The Supreme court, if they cannot otherwise arrive at a satisfactory result, may order an issue between the parties to be made in such manner and

form, and to be tried in such court as they shall select, or may permit or direct the attorney-general to file an information in the nature of a *quo warranto*, if the case be one in which the proceeding would be competent and effectual.

[Sec. 50.] If any such issue shall be ordered, or information permitted or directed to be filed, it shall be the duty of the Supreme Court to make such further orders in relation to the time and mode of pleading, the examination of witnesses or the parties, the production of books and papers, and the time and place of trial or hearing as shall, in their judgment, be effectual for expediting the proceedings, saving expense to the parties, and causing a final determination to be had with as little delay as the nature of the controversy will permit.

It will be seen, by reference to the preceding pages, that although that provision of the railroad statutes which declared that railroad corporations should be subject to the above-quoted regulations concerning the election of directors of moneyed corporations have been expunged from the general railroad act, yet, nevertheless, there will will be found other general statutes of the State applicable to corporations in general, which are unrepealed, and which still preserve many of the provisions contained in the regulations which are above-quoted as having been repealed as stated above.

CHAPTER 7.

OF THE CAPITAL STOCK.

§ 82. ***Amount of the capital stock.*****—The amount of the capital stock of the company shall not be less than ten thousand dollars for every mile of the road constructed or proposed to be constructed.**

(*Laws* 1850, *ch.* 140, § 1; *see* § 5, *ante.*)

In case of the organization of companies using the narrow guage, the amount of the capital stock required to be stated in the articles of association shall not be less than three thousand dollars for every mile of road constructed or proposed to be constructed. (*Chap.* 293, *Laws* 1879, § 1, *amending* § 5 *of chap.* 560 *of the Laws of* 1871, *erroneously stated to be of* 1850.)

The capital stock is created by naming its amount in the original articles of association (Laws 1850, chap. 140, § 1). It is apportioned among the original

corporators by their subscriptions, either to the original articles of association or to the books of subscription opened after the articles of association have been filed and the corporate existence established. After incorporation the capital stock may, under the different provisions of the statute, be increased or diminished beyond its original amount. Those who subscribe to the capital stock of the company, in the books opened to receive such subscriptions, become stockholders in the company to the same extent as those who have subscribed to the articles of association. (*Troy and Boston R. R. Co.* v. *Tibbitts*, 18 Barb., 297; *Ogdensburgh, etc., R. R. Co.* v. *Frost*, 21 id., 541; *Erie and N. Y. City R. R. Co.* v. *Owen*, 32 id., 616.) When the stock is once all taken the corporation has no more at its disposal, unless it regains a portion of that so taken by forfeiture; and no person can become a stockholder except by purchase from one of the original subscribers, or his assignee, and by assignment of stock. (*Lathrop* v. *Knesland*, 46 Barb., 432.)

The shares in an incorporated company were not at the common law strictly speaking *chattels*, and it was considered that they have a greater resemblance to *choses in action*, or in other words that they were mere evidences of property. They were said to be mere demands of the dividends as they became due, and differed from moveable property, which is capable of possession and manual apprehension; but when *certificates* of shares are given to a purchaser the case is more analagous to the sales of chattels and the transfer may be considered complete. (See Angell and Ames on Corporations, chap. 16, § 2.) As such choses in action they were not formerly the subject of a levy under execution, but under sections 646, 647, 708, 1411 of the Code of Civil Procedure (see also sec. 234 of the old Code of Procedure for which 647 of the present code is a substitute) shares in the stock of a corporation, and the sum remaining unpaid upon the subscription to the capital stock of a corporation, and the negotiable bonds issued by a corporation, may now be levied upon and sold, and the sheriff's certificate of sale thereof entitles the purchaser to the same rights and privileges with respect thereto which the defendant had when attached or levied upon. The general railroad act has declared (Laws 1850, chap. 140, sec 1) that the stock of every company formed under that act should be deemed personal estate, but that provision relates only to the nature or character of the property which the stockholders are deemed to have in the several shares of stock of the company as individuals, and not to the character of the property held by the company in its corporate capacity for the benefit of such stockholders. (*Mohawk and Hudson R. R. R. Co.*, 4 Paige Ch. R., 392.)

The capital stock of an incorporated company is personal property; it has not nor has the certificate or other evidence of vote or ownership any of the qualities of commercial or negotiable paper. As a rule the purchaser or assignee of shares of stock to a corporation acquire no other or better title than the seller or assignor has, and takes it subject to the legal and equitable rights of third persons. The owner cannot be divested of his property except by his own voluntary act and consent or by some act which would be effectual to give title as against him to other moveable property and choses in action. (*Weaver* v. *Barden*, 49 N. Y., 286.) See the above cited case for a collection of authorities as to who is a *bona fide* holder of stock.

§ 83. *Number of shares of the capital stock.*—The number of shares of which the capital stock of the company is

to consist shall be stated in the original articles of association. (*Laws* 1850, *chap.* 140, § 1.)

(*See* § 5, *ante.*)

§ **84.** *Original subscriptions to the capital stock* —Each subscriber to the articles of association shall subscribe thereto his name, place of residence and the number of shares of stock he agrees to take in the company. (*Laws* 1850, *chap.* 140, § 1.)

(*See* § 7, *ante, and notes to the same.*)

§ **85.** *Certain amount of capital stock to be subscribed and paid before articles of association can be filed.*—At least one thousand dollars of stock for every mile of railroad proposed to be made must be subscribed to the articles of association, and ten per cent paid thereon in good faith, and in cash, to the directors named in the articles of association, and therein must be indorsed thereon, or annexed thereto, an affidavit, made by at least three of the directors named in said articles, that the amount of stock required by this section has been in good faith subscribed, and ten per cent paid in cash thereon as aforesaid, and that it is intended, in good faith, to construct or to maintain and operate the road mentioned in said articles of association, which affidavit shall be recorded with the articles of association as aforesaid. (*Laws of* 1850, *chap.* 140, § 2.)

(*See* 10, *ante, and notes to the same.*)

A similar provision exists in regard to narrow guage roads. (*Vide, chap.* 293, § 1, *Laws of* 1879.)

§ **86.** *Of subscription to the capital stock, subsequent to the signing of the articles of association.*—When such articles of association and affidavit are filed and recorded in the office of the secretary of state, the directors named in said articles of association may, in case the whole of the capital stock is not before subscribed, open books of subscription to fill up the capital stock of the company, in such places and after giving such notice as they may deem expedient, and may continue to receive subscriptions until the whole capital stock is subscribed. At the time of subscribing, every subscriber shall pay to the directors ten per cent on the amount subscribed by him, in money; and no subscription shall be received or taken without such payment. (*General Railroad Act, Laws* 1850, *chap.* 140, § 4.)

(For the filing of the articles of association and affidavit above referred to, see §§ 10 and 85, *ante*.. For rights and liabilities of stockholders, see, also, § 7, *ante*, and § 105, *post.*)

Though the statute require books to be opened, the use of subscription-papers, instead of a book, does not make the subscriptions void. (*Supreme Ct.*, 1849, *Hamilton and Deansville Plankroad Co.* v. *Rice*, 7 Barb., 157.) By subscribing to the capital stock of a corporation, and paying the amount of his subscription, the subscriber acquires an interest in the company and a right to a certificate, which is a sufficient consideration for his promise. (*N. Y. Superior Ct.*, 1829, *Harlem Canal Co.* v. *Seixas*, 2 Hall, 504.) That the debt created by a subscription is entire; the calls made by the company merely ascertaining the amount and the times when the instalments of that debt should be paid. (See *Small* v. *Herkimer Manuf'g Co.*, 2 N. Y. [2 Comst.], 330.)

Payment of ten per cent of the subscription.

The fourth section of the general railroad act requiring every subscriber to pay the ten per cent in money, and forbidding the reception of any subscription until such payment, relates exclusively to proceedings for fiilling the stock by means of new subscription after the articles have been filed and the company has assumed an authorized corporate existence. (*Ogdensburgh, Rome and Clayton R. R.* v. *Frost*, 21 Barb., 541.) That section contemplates and provides for a state of things after the articles have been filed and the company have assumed an authorized corporate existence. They are then allowed, if it be necessary to fill up the stock, to open books of subscription, and receive subscribers thereto until the whole capital is secured. It is in connection with this proceeding, and at this subsequent stage in the progress of the enterprise, that the requirement is made that every subscriber shall pay ten per cent in money, and forbidding the reception of any subscription without such payment. (*Idem.*)

One cannot become a member of a railroad company under the act of 1850 without payment of ten per cent on his subscription. (*Troy and Rutland R. R. Co.* v. *Kerr*, 17 Barb., 581.) Where one subscribed for stock in a railroad company upon the understanding that the ten per cent should be paid in services, and he subsequently presented an account, charging for the services rendered, and crediting the ten per cent, and the company paid him the balance—*Held*, this was a sufficient payment of the ten per cent required by the statute to render the subscription obligatory. (Ib.; *Beach* v. *Smith*, 30 N. Y., 116.) Where the subscriber did not, at the time of subscribing for the stock, pay the ten per cent referred to, but subsequently paid forty per cent thereon, it was held that the subscription was rendered obligatory. (*Black River and Utica R. R. Co.* v. *Clarke*, 25 N. Y., 208; *Same* v. *Barnard*, 31 Barb., 258.) In *B. R. and U. R. R.* v. *Clarke, supra*, the court said the intent of this section doubtless was that no subscription should be valid until ten per cent was paid thereon and not that it should be invalid if a short interval occur between the actual subscription and the payment of the money. The subscription and the payment of the ten per cent must both concur to make a valid subscription. The subscription one day with the payment the next would satisfy the statute, and so would actual payment at anv period after subscription with intent to effectuate and complete the subscription. The writing of the name in the subscription book should be deemed but part of the transaction and provisional or conditional till the ten per cent is paid. (See also *Same* v. *Barnard*, 31 Barb., 258; *Black* v. *South*, 30 N. Y., 116; *Same* v. *Same*, 28 Barb, 254; *Ogdensburgh R. R.* v. *Wolley*, 1 Keyes, 118; 34 How Pr. R., 54.) Where the subscriber gave his notes for the ten per cent of his subscription, and at maturity the note was paid, the subscription was

thereby made valid. (*Ogdensburgh R. R.* v. *Wolley, supra.*) By a payment subsequent to the subscription, the party making it will be deemed to have waived the condition, and will be liable as a stockholder on his subscription. (*Idem.*) Under the statute, if both the subscription and the actual cash payment of ten per cent have been made, the contract is binding although the acts were not simultaneous. (*Idem.*) The intent of the section of the general railroad act (Laws of 1850, chap. 140, sec. 4), requiring ten per cent to be paid in, at the time of subscribing for the stock, was that no subscription should be valid until ten per cent was paid thereon, and not that it should be invalid if a short interval should occur between the actual subscription and the payment of the money. (25 N. Y., 208.) The subscription and the payment of the ten per cent must both concur to make a valid subscription. But actual payment at any period after subscription with intent to complete the subscription satisfies the statute. (*Ct. of Appeals*, 1864, *Beach* v. *Smith*, 30 N. Y., 116; see *infra.*)

Whether the payment of deposit is necessary.

Mr. Thompson, in his Liability of Stockholders, sec. 107, says: It was early held in New York that where there is a statute requiring the subscriber to do a certain act at the time of his subscription, the corporation cannot maintain an action on the contract of subscription without alleging the doing of the act. Thus, where the statute provided that "every subscriber shall, at the time of subscribing, pay unto either of the commissioners five dollars per share for each share so subscribed," it was held that a declaration on the contract must allege the payment of five dollars on each share. (*Highland Turnpike Co.* v. *McKean*, 11 Johns., 98; *s. p., Goshen Turpike Co.* v. *Hurtin*, 9 Johns., 217.) No sense, however, is perceived in this ruling. A subscription will operate just as effectively to deceive the public into subscribing for other shares, or giving credit to the corporation, whether the statutory earnest-money is paid or not; and this rule, which simply enables a party to repudiate his contract by pleading his own default, has been denied in subsequent cases in the same State. (*Lake Ontario, etc., Co.* v. *Mason*, 16 N. Y., 451; *Rensselaer, etc., Co.* v. *Barton*, 16 N. Y., 457, note; *Spear* v. *Crawford*, 14 Wend., 20.) And it seems now firmly settled that a person cannot discharge himself of the responsibilities of a stockholder by showing that he never paid the deposit or first installment required of every subscriber by the charter, the articles of association, the deed of settlement, or the general law. A person will not be thus permitted to take advantage of his own default, to the prejudice of others. (*Beach* v. *Smith*, 28 Barb., 254; *Black River, etc.*, v. *Clark*, 25 N. Y., 208; see *Beach* v. *Smith, supra.*) But see *N. Y. and Oswego Midland R. R. Co.*, 57 N. Y., 473, where it is distinctly held that a subscription made under the section of the statute to the capital stock of a railroad corporation is invalid where the ten per cent of the amount has not been paid.

Subscription to capital stock.

It was held no objection to the validity of a subscription to the capital stock of a plank-road company that it was made upon a separate paper which only a portion of the stockholders had subscribed, there having been several similar papers, and in lieu of the *books* required by the act to be opened in convenient places for subscriptions. (*Hamilton and Dovesville Plank-road Co.* v. *Rice*, 7 Barb., 157.) Where the whole capital stock is previously subscribed for and taken, no one can become a stockholder by inscribing his name with a certain number of shares thereto annexed, on the books of the company. (*Lathrop* v.

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Kneeland, 46 Barb., 432.) The title of the several subscribers to the number of shares respectively taken by them becomes perfect the moment the books are closed, and the certificates of stock are merely evidences of title. (*Buffalo and N. Y. City R. R. Co.* v. *Dudley*, 14 N. Y., 336.)

Party estopped from denying himself a stockholder.

If a person purchases stock, and suffers his name to appear upon the books of the association, he will not be heard to impeach his own title He will not be allowed to accept the benefits without shouldering the burdens. This principle has been well set forth in a case arising under the New York banking law: "No doubt a person may show, in exoneration of himself, that his name has been placed on the books without his consent. But if a party makes an actual purchase of shares, whether from the bank or an individual holder, and voluntarily allows himself, in this manner, to be represented to the world as a stockholder, he must take the responsibilities of that situation. He comes within the terms and policy of the act. His title may be imperfect. Equities may exist between him and other parties; the shares may be in dispute; they may be claimed by some one else, in hostility to his own right. The statute has no regard to such questions. The person who has caused or allowed his title to be registered on the books cannot deny the truth of that representation, and disavow the ownership when it ceases to be a benefit and comes to be a burden." (Thompson on Liability of Stockholders, § 161; *Matter of Reciprocity Bank*, 22 N. Y., 17, *per* Comstock, C. J.)

Subscription in the name of a fictitious person.

The subscribing for shares in the name of a fictitious or non-existent person is an obvious fraud upon the rights of creditors and other shareholders; since, if such a proceeding were sanctioned, it would result that there would always be a person ready to share the profits in the event of prosperity, but, in the event of disaster, no one at hand to respond to creditors or to share the losses with honest shareholders. The courts defeat such roguish devices, by discovering the name of the real subscriber and putting him on the list of contributories. (Thompson on Liability of Stockholders, § 182.) That stock standing in the name of a fictitious person is liable for the debt of the true owner. (*Stebbins* v. *Phœnix Fire Ins. Co.*, 3 Paige, 350.)

Subscriptions obtained by fraud.

The Supreme Court of the United States has several times adjudged that in a suit brought by creditors, or by a person representing them—such as an assignee in bankruptcy—against stockholders, to recover the amount of their unpaid subscriptions, it is no defense that the shareholder was induced to become such by false and fraudulent representations made by the corporation or by its agent. (*Ogilvie* v. *Knox Ins. Co.*, 22 How., 380; *Upton* v. *Tribilcock*, 91 U. S., 45; *Chubb* v. *Upton*, 95 id., 667; *s. p.*, *Payson* v. *Withers*, 5 Biss, 269.)

Subscription after all stock taken.

A corporation cannot increase its stock at will, in any manner or to any extent, unless it is authorized to do so by its charter or by the governing statute, and then only in the manner prescribed. When a corporation has issued valid shares to the full extent of all the shares which by its constitution or by the general law it is empowered to issue, no court can order it to issue others, because in that respect its powers have been exhausted. When all the stock of a cor-

poration is once subscribed for and taken, the corporation cannot issue any more unless it shall get back a portion of that which has been taken, by forfeiture or otherwise; and no person can then become a shareholder, except by purchase from the original, or his assignee, and by having the stock transferred to him. It was hence held, where all the stock of a corporation was subscribed for and taken at the time the articles of incorporation were filed, and the certificate of incorporation, made and filed as required by law, specified the names of all the stockholders, and there was no evidence that the corporation had come into possesion of any of its stock by forfeiture or otherwise, that no subsequent subscribers, by merely writing their names in the corporation book and affixing a number of shares to their respective names, could acquire a right to any share of its stock, or become by such act stockholders of the corporation, and, as such, liable for its debts. Nor does such a subscription for stock, where there is none to issue, *estop* the subscriber, when proceeded against by creditors of the corporation, from denying the relation of stockholder. (Thompson on Liability of Stockholders, § 115; see *Lathrop* v. *Kneeland*, 46 Barb., 432; *Erie, etc., R. R. Co.* v. *Patrick*, 2 Keyes, 256; *Mechanics' Bank* v. *N. Y. and New Haven R. R. Co.*, 13 N. Y., 599.) The statute says the directors shall continue to receive subscriptions until the whole capital stock is subscribed.

Effect of unconditional subscription.

It may be stated as a general rule, applicable to all the charters and statutory schemes of incorporation in vogue in this country, that whoever subscribes to an unconditional agreement to take a given number of shares becomes thereby a stockholder, subject to the conditions named in the subscription paper and to those imposed by the charter or by the general law. The act of subscribing for shares fixes the subscribers liability to creditors as a shareholder, although he has not paid in any part of his subscription, or done any act whatever as such. (Thompson on Liability of stockholders, § 105; *Union Turnpike Co.* v. *Jenkins*, 1 Caines, 380; *Goshen Turnpike Co.* v. *Hurtin*, 9 Johns., 217; *Dutchess Cotton Man. Co.* v. *Davis*, 14 id., 237; *Spear* v. *Crawford*, 14 Wend., 20; *Highland Turnpike Co.* v. *McKean*, 11 Johns., 98; *Strong* v. *Wheaton*, 38 Barb., 616; *Burr* v. *Wilcox*, 22 N. Y.; 551: *Buffalo, etc., R. R. Co.* v. *Dudley*, 14 id., 336; *Seymour* v. *Sturgess*, 26 id., 134; *Dayton* v. *Borst*, 31 id., 435; *Rensselaer, etc., Co.* v. *Barton*, 16 id., 457; *Lake Ontario, etc., Co.* v. *Mason*, 16 id., 451; *Hartford, etc., R. R. Co.* v. *Croswell*, 5 Hill, 383; *Northern R. R. Co.* v. *Miller*, 10 Barb., 260; *Cole* v. *Ryan*, 52 id., 168; *Sagory* v. *Dubois*, 3 Sandf. Ch., 466; but see *Beach* v. *Smith*, *supra*.)

§ 87. *Subscriptions of stock, how and when made payable and of the forfeiture thereof for its nonpayment.*—The directors may require the subscribers to the capital stock of the company to pay the amount by them respectively subscribed, in such manner and in such installments as they may deem proper. If any stockholder shall neglect to pay any installment as required by a resolution of the board of directors, the said board shall be authorized to declare his stock, and all previous payments thereon, forfeited for the use of the company; but they shall not declare it so forfeited, until they shall have caused a notice in writing to be

served on him personally, or by depositing the same in the post-office, properly directed to him at the post-office nearest his usual place of residence, stating that he is required to make such payment at the time and place specified in said notice; and that if he fails to make the same, his stock, and all previous payments thereon, will be forfeited for the use of the company; which notice shall be served as aforesaid, at least sixty days previous to the day on which such payment is required to be made. (*Gen'l R. R. act, Laws* 1850, *chap.* 140, § 7.)

Calls for payments upon the capital stock.

The debt created by the subscription is certain. The calls made by the company merely ascertain the amount and the times when the installment of that debt should be paid. (*Small* v. *The Herkimer Manf'g Co.*, 2 Cow., 335.) No notice is necessary to a subscriber who neglects to pay for his stock or the installments due thereon. The statute declares that the directors may require the subscribers to the capital stock to pay the amount of their subscriptions in such manner and in such installments as they may deem proper. (*Lake Ontario, etc., R. R.* v. *Marvin*, 16 N. Y., 464.) Notices of calls for the payment of the subscription is only necessary for the purpose of authorizing a forfeiture of the stock. It is not required to support an action upon a subscription which embraces no condition or time of payment. (*Lake Ontario, etc., R. R. Co.* v. *Mason*, 16 N. Y., 45.)

"The capital stock of a moneyed corporation," said Mr. Justice Hunt, in *Upton* v. *Tribilcock*, 91 U. S., 47, "is a fund for the payment of its debts. It is a trust fund, of which the directors are the trustees. It is a trust fund to be managed for the benefit of its shareholders during its life, and for the benefit of its creditors in the event of its dissolution. This duty is a sacred one, and cannot be disregarded. Its violation will not be undertaken by any just-minded man, and will not be permitted by the courts. The idea that the capital of a corporation is a foot-ball to be thrown into the market for the purposes of speculation, that its value may be elevated or depressed to advance the interests of its managers, is a modern and wicked invention. Equally unsound is the opinion that the obligation of a subscriber to pay his subscription may be released or surrendered to him by the trustees of a company. This has been often attempted, but never successfully. The capital paid in, and promised to be paid in, is a fund which the trustees cannot squander or give away. They are bound to call in what is unpaid, and carefully to husband it when received." Defendant was a director, and was present and voted for a resolution to call in an installment, and acted in distributing the notices to other subscribers. *Held*, that he could not object to payment of the installment due from him on the ground that he had not had the notice required by the statute. (*Ct. of Appeals*, 1854, *Schenectady and Saratoga Plank-road Co.* v. *Thatcher*, 11 N. Y. [1 Kern.], 102).

Remedies for nonpayment of stock.

The section quoted in the text embraces two distinct methods of procedure against delinquent subscribers to the capital stock. The company may make its calls for the unpaid stock, and in case of refusal or omission by the subscriber to pay, they may proceed by action to enforce the payment or may declare a forfeiture and sequestration of the stock and all previous payments made thereon

to the use of the company. The corporation is not deprived of the remedy by action to recover the amount subscribed, because the power to forfeit the stock for nonpayment is conferred upon the directors; that is a cumulative remedy merely. The corporation may lose the right of action by first resorting to remedy by forfeiture, for the reason that forfeiture operates as a rescession of the contract, and the contract being evidence no foundation remains for a cause of action to rest upon But as long as the contract remains in force an action to recover for the amount of stock taken may be maintained by the corporation against a subscriber. (*Buffalo and N. Y. City R. R. Co.* v. *Dudley*, 14 N. Y., 347; see also *Troy Turnpike and R. R. Co.* v. *McChesney*, 21 Wend., 296; *Ogdensburgh, etc., R. R. Co.* v. *Frost*, 21 Barb., 541; *Troy and Boston R. R. Co.* v. *Tibbits*, 18 id., 297; *Northern R. R. Co.* v. *Miller*, 10 id., 260; *Troy and Rutland R. R. Co.* v. *Kerr*, 17 id., 581; see also *Mann* v. *Currie*, 2 id., 294; *Rensselaer, etc., Plank-road Co.* v. *Barton*, 16 N. Y., 457, note; *Dutchess, etc., Manuf'g Co.* v. *Davis*, 14 Johns., 238.) The interest acquired on the incorporation of the company by a subscriber to its stock is a good consideration to support his implied promise to pay for such stock and raises a sufficient mutuality of contract between him and the company to render the contract binding on him. (*B. and N. Y. City R. R. Co.* v. *Dudley, supra.*) In such an action it is not necessary to prove that the number of shares subscribed for by the defendant had been allotted to him. The company's charter provided for a distribution of the stock in case of an excess of subscriptions over the amount of capital stock, but no excess being shown the presumption is that the subscription books were closed as soon as the stock was all taken. The title of the several subscribers to the number of shares respectively taken by them became perfect the moment the books were closed, and their certificates of stock are merely evidences of title. (*Idem.*)

The provision of the statute that, on default in payment of calls, the company forfeit the stock with previous payments, does not take away the right of action on the subscription, but confers a cumulative remedy; and though the subscription promise upon pain of forfeiture, etc., the company may sue as upon an absolute promise. (*Supreme Ct.*, 1839, *Troy Turnpike and R. R. Co.* v. *McChesney*, 21 Wend., 296.) A stockholder is liable in assumpsit on his subscription to the stock, notwithstanding a remedy by forfeiture of the stock is given to the corporation by the charter. (*Supreme Ct.*, 1803, *Union Turnpike Co.* v. *Jenkins*, 1 Cai., 381: to the same effect [citing, also, 5 Tyng, 80: 2 Hall's L. Journ., 231; 1 Binn., 70], *Goshen Turnpike Co.* v. *Hurtin*, 9 Johns., 217; followed, 1817, *Dutchess Cotton Manufactory* v. *Davis*, 14 Johns., 238: *The Union Turnpike Co.* v. *Jenkins*, was reversed, 1 Cai. Cas., 86, but on other grounds; see 9 Johns., 217; 14 id., 238.)

Where a party subscribes for stock upon condition that the corporation may, if he omits to pay the instalments as they are called for and become due, forfeit the stock and all previous payments, it is left optional with the corporation whether they will prosecute on the subscription, or forfeit the stock and previous payments. But if they elect to forfeit and take back their stock, they cannot also collect the price agreed to be paid, or any part thereof. In that case, they take back the whole consideration for the subscriber's promise, with the right to retain whatever may have been paid. It would, after that, be inequitable to permit them to retain the stock and still prosecute. And it can make no difference that the instalments for which the suit is brought became due before the forfeiture was declared. (13 Johns., 54.) The provision for for-

feiture is not in the nature of a mortgage to secure the whole subscription; but the transaction is rather a conditional sale of the stock by the company to the subscriber. (*Ct. of Appeals*, 1849, *Small* v. *Herkimer Manuf'g Co.*, 2 N. Y. [2 Comst.], 330; reversing S. C., 2 Hill, 127; and overruling S. C., 21 Wend., 273.)

An action for calls will lie against a subscriber to the capital stock, on an express promise to pay, although the corporation has also power to forfeit his stock for non-payment. (*Supreme Ct.*, 1854, *Troy and Rutland R. R. Co.* v. *Kerr*, 17 Barb., 581; and see *Fort Edward and Fort Miller Plank-road Co.* v. *Payne*, id., 567; reversed, S. C., 15 N. Y. [1 Smith], 583; *Troy and Boston R. R. Co.* v. *Tibbits*, 18 Barb., 297; *Rensselaer and W. Plank-road Co.* v. *Barton*, 16 N. Y. [2 Smith], 457, *note*.) A subscriber to the stock of a corporation, whether his promise to pay be express or implied, is liable to an action for the subscription, though the charter authorizes the directors to forfeit the stock and previous payments, upon non-payment of an instalment, provided the forfeiture has not been declared. The mere existence in the charter of authority to declare a forfeiture, affords no objection to an action at law. (1 Cai., 381; 1 Cai. Cas., 95; 9 Johns., 217; 14 id., 238; 11 id., 98; 14 Wend., 20; 2 Hall, 504; 5 Mass., 80; 1 Bin., 70; 2 Bibb, 577; 3 Hawks, 520; 12 Conn., 499; 12 id., 530; 2 Barb., 294; *Supreme Ct.*, 1851, *Northern R. R. Co.* v. *Miller*, 10 Barb., 260.)

Forfeiture of shares releases stockholder.

The fact that the charter or statute under which a corporation is organized gives the corporation the right to declare the shares of a stockholder forfeited for non-payment of the assessments due thereon does not, in most of the States, deprive the corporation of the right to maintain an action against the stockholder on the contract of subscription; nor, after the insolvency of the corporation, is the existence of such a right a valid defense on the part of the stockholder against creditors, the power thus given to forfeit shares being merely a cumulative remedy. In such cases the corporation has an election between two remedies: it may either declare a forfeiture, or it may bring an action at law for the amount due. If it declares a forfeiture, the relation between the shareholder and the corporation is thereby terminated and his contract of subscription cancelled; and neither the corporation nor its creditors can proceed against him for the remaining instalments due under such contract. The rule that a forfeiture of shares terminates a stockholder's liability to creditors has been carried so far, in New York, as to hold that after forfeiture a stockholder is not liable for debts contracted while he was a stockholder. (Thompson on Liability of Stockholders, § 193; see, also, *Mann* v. *Currie*, 2 Barb., 294; *McDonough* v. *Phelps*, 15 How. Pr., 372; *Highland Turnpike Co.* v. *McKean*, 11 Johns., 98; *Dutchess Cotton Man. Co.* v. *Davis*, 14 id., 238; *Herkimer Man. Co.* v. *Small*, 21 Wend., 273; *Troy Turnpike Co.* v. *McChesney*, 21 id., 296; *Goshen Turnpike Co.* v. *Hurtin*, 9 Johns., 217; *Troy, etc., R. R. Co.* v. *Kerr*, 17 Barb., 581; see, also, *Small* v. *Herkimer Manuf'g Co.*, 2 N. Y., 330; overruling, 21 Wend., 273.)

Liability of subscriber in action to enforce payment of calls.

An alteration by the Legislature of the company's charter, in pursuance of powers reserved, by changing its name, increasing its capital, and extending its road, does not discharge the defendant from liability on his subscription; and this, whether such alteration is beneficial to the defendant or not, the alteration having been duly made and without any fraud on the part of the company. (*Buffalo and N. Y. City R. R. Co.* v. *Dudley*, 14 N. Y., 336.) Neither will any fraudulent representations made by one of the company's officers at a public

meeting, and in the presence of a majority of the board of directors, but not made in pursuance of any authority from or resolution of the board, discharge the defendant. (*Idem.*) The defendant subscribed to the capital stock of a railroad company. Subsequently the articles of association were amended under the general railroad law, the capital stock was reduced, the northern *terminus* of the road was changed so as to shorten it nearly one-half of the distance named in the original articles. The company also transferred a part of the remainder of the road, and leased the rest to another corporation, during the continuance of its charter. The defendant on being called upon for the payment of calls upon his stock refused to pay them. In an action by the company for the amount of the calls, *held*, that the plaintiffs were entitled to recover. (*Troy and Rutland R. R. Co.* v. *Kerr*, 17 Barb., 581.) When there is no fraud, one who signs the articles of association to organize a railroad corporation cannot, in an action for the calls, show that the road is, in fact, longer than the distance stated in the articles. (*Idem.*) A subscription to the capital stock of a railroad corporation, whereby the subscriber promises to take five shares of the stock subject to the conditions, requirements, liabilities and benefits of the act of incorporation, is equivalent to an express promise to pay for the stock as it shall be called for by the directors. Where the charter of a railroad corporation contains a clause authorizing the Legislature to repeal or alter it, the alteration of the charter by the Legislature, made on the application of the directors, without consulting the stock subscribers, does not absolve the latter from their subscription. (*The Northern R. R. Co.* v. *Miller*, 10 Barb., 261.) A subscription to the full amount named in the articles as the capital stock of the company, is not a condition precedent to the right of recovery upon a subscription. (*Rensselaer and Washington Plank-road Co.* v. *Wetsel*, 21 Barb., 56.) And in an action to recover the amount of calls to the subscription, it is no defense that that the name of one of the original stockholders was erased before the articles of association were filed. Where it appears that the erasure was made with the knowledge of the defendants and of all the directors, and at the request of the person whose name was erased, and without any fraudulent intent. (*Idem.*) The defendant was held liable for his subscription to the stock of a plank-road company, although, after calls were made, and before they were payable, he assigned his stock to a responsible party, and had it transferred to an account opened with him on the books of the company. (*Schenectady and Saratoga Plank-road Co.* v. *Thatcher*, 11 N. Y., 102.) A subscription for stock made before the incorporation of the company is obligatory upon the subscriber. Although he made no cash payment whatever, the right of membership is a sufficient consideration for the subscribers liability, and he cannot revoke the subscription. (*Lake Ontario, Auburn and N. Y. R. R. Co.* v. *Mason*, 16 N. Y., 451.) Where the company recovered only a part of the unpaid subscription, the balance being barred by the statute of limitations—*Held*, that upon payment of the amount recovered, the subscriber was entitled to a certificate of the stock. *Johnson* v. *Albany and Susquehanna R. R. Co.*, 40 How. Pr., 193.)

Upon the granting of an order of sequestration and for the appointment of a receiver of an insolvent railroad corporation in an action brought in behalf of all of its creditors, the right of action against its stockholders for the amount of their unpaid suqscriptions to its capital vests in the receiver. (*Rankine, Receiver*, v. *Elliott*, 16 N. Y., 377.) Notice, though necessary to the subscriber on proceeding under the charter to forfeit the stock for non-payment, is not necessary to render him liable to an action. (*Ct. of Appeals*, 1857, *Lake Ontario, etc.*,

R. R. Co. v. *Mason*, 16 N. Y. [2 Smith], 451.) Subscription on condition that road be located and built through a certain village—*Held*, not a subscription. (*L. O., etc., R. R. Co.* v. *Curtiss*, 80 N. Y., 219.)

Forfeiture of stock for non-payment of calls.

After a corporation, pursuant to a provision in its charter, has forfeited the stock of a subscriber for non-payment of an installment due upon his subscription, it cannot maintain an action to recover any part of such subscription. (*Small* v. *Manuf'g Co.*, 2 N. Y., 330.) And when an action had been commenced to recover certain installments of the subscription which had been duly called for, and then a further call was made and the stock forfeited for non-payment thereof—*Held*, that the subscriber might plead such forfeiture in bar of the further maintenance of the suit. (*Idem.*) The right of a corporation to forfeit the shares of a subscriber for non-payment of the calls made upon him is not in the nature of a pledge or mortgage of the stock, and the exercise of such right does not leave any further remedy to recover the debt. The execution of the forfeiture operates as a rescession of the contract. (*Idem.*) When a corporation under such circumstances exercises its right to forfeit the stock, and the stock is of greater value than the whole amount due on the subscription, the subscriber cannot recover the surplus. (*Idem.*) Upon forfeiture, the stock becomes the absolute property of the company, and may be sold at its value and a proper stock certificate issued to such purchaser without any re-subscription. (*Idem; City Bank of Columbus* v. *Bruce*, 17 N. Y., 507; *Otter* v. *Brevoort Petroleum Co.*, 50 Barb., 247; *People* v. *Alb. and Susq. R. R. Co.*, 55 id., 344; S. C., 1 Lans., 308; S. C., 7 Abb. Pr. N. S., 265; S. C., 38 How. Pr., 228.) A general resolution forfeiting stock is void unless it specifies the stock forfeited. (*Johnson* v. *Alb. and Susq. R. R. Co.*, 49 How. Pr., 193.)

Collusive forfeiture.

When the shares of a member of a corporation are forfeited for any cause, unless the statute or other governing instrument makes the forfeiture take the shape of the foreclosure of a mortgage or the sale of a pledge, they fall back into the general property of the corporation and become merged therein, so that the corporation is at liberty to issue and sell new shares in their stead. It is obvious that if the company is prosperous and its stock at par, a forfeiture of shares, although, as just seen, it has the effect to release the delinquent shareholder from liability to creditors, does not impair its available assets; since new shares may be sold in their place, and the company also gains what the delinquent member had paid on the old. But if the company is in failing circumstances, so that by reason of want of credit it is unable to sell shares issued in place of those forfeited every forfeiture of shares impairs the security available for the satisfaction of creditors, since it releases the shareholder from the obligation of paying future assessments. It necessarily follows that a forfeiture of shares, made in a condition of insolvency or of impaired credit, ought not to release the shareholder from the obligation to make good the amount which he has subscribed to the joint stock or common fund on which the company has obtained credit. (Thompson on Liability of Stockholders, § 194; see *Slee* v. *Bloom et al.*, 19 Johns., 457, as a leading case on this question.)

§ 88. *Capital stock, how transferred.*—The stock of every company formed under this act shall be deemed per-

sonal estate, and shall be transferable in the manner prescribed by the by-laws of the company, but no share shall be transferable until all previous calls thereon shall have been fully paid in; and it shall not be lawful for such company to use any of its funds in the purchase of any stock in its own, or in any other corporation. (*General Railroad Act, Laws* 1850, *chap.* 140, § 8.)

(See chap. 151, Laws 1873, "An act for the relief of stockholders, whose certificates of stock have been lost or discharged, *post.*)

Transfer of stock.

In the case of the *N. Y. and New Haven R. R. Co.* v. *Schuyler et al.*, 34 N. Y., 78, *et seq.*, Schuyler transferred to Surget a certificate for 75 shares of stock issued to him (Schuyler), with the proper and duly executed power of attorney. The stock represented by the certificates was genuine, and no question was made affecting the propriety or authority of the officer in issuing the certificates. Surget did not transfer the stock on the books but retained the certificates in his possession, and his loans to Schuyler, for which the stock was transferred, remained unpaid. Afterwards Schuyler transferred on the books all his stock to other parties, who were purchasers in good faith, and the outstanding certificates held by Surget were not surrendered or accounted for. Then Surget presented his certificates at the transfer office of the company, and offered to surrender them, and requested permission to transfer the stock represented by them, but the company refused to receive the surrender or accept the transfer, on the allegation that the certificates did not represent genuine stock. The board of directors had, previously to the occurrence of the facts above stated, established by by-laws adopted by them, a system concerning the transfer of stock of the company and the issuing of certificates therefor, according to which stocks were *transferable only on the books of the company* by the shareholder, or his attorney, duly appointed, and on the surrender of the certificate held by him when any certificate had been issued. There was printed upon the back of the certificates of stock a reassignment in blank, to be filled out upon a transfer thereof, in which it was stated that the stock was transferrable only at the company's office in the city of New York. The certificates were printed, and bound in books with margins for entering the date of issuing the certificate, the number of shares, and of the certificate and to whom issued, which margins remained in the books after the certificates were cut out and issued. The company also kept a stock ledger, in which each stockholder was credited with shares transferred to him, and debited with those transferred by him. The principal questions which presented themselves were:

First—Whether the subsequent purchasers in good faith, of the stock acquired by the transfers on the books of the company, a title superior to Surget's under the certificates held by him; and,

Second—If they did, whether the company was liable to him for permitting the transfers to be made without the production and surrender of the outstanding certificates, the court said that the law, as stated by authority touching the first of these questions, is this: When the stock of a corporation is, by the terms of its charter or by-laws, transferable only on its books, the purchaser who receives a certificate with power of attorney gets the entire title, legal and equitable, as between himself and the seller, with all the rights the latter possessed;

but as between himself and the corporation he acquires only an equitable title which they are bound to recognize and permit to be ripened into a legal title, when he presents himself, before any effective transfer on the books has been made, to do the acts required by the charter or by-laws in order to make a transfer. Until those acts be done he is but a stockholder and has no choice to act as such, but possesses, as between himself and the corporation, by virtue of the certificate and power, the right to make himself or whosoever he chooses a stockholder by the prescribed transfer. The stock not being barred by the delivery of the certificate and power of attorney, the legal title remains in the seller, so far as affects the company and subsequent *bona fide* purchasers who take by transfer duly made on the books. And hence a buyer in good faith of the person in whose name the stock stands on the books, who takes a transfer in conformity to the charter or by-laws, becomes vested with a complete title to the stock and cuts off all the rights and equities of the holder of the certificate to the *stock itself*. It follows therefore that the stock represented by the certificates in Surget's hands passed to the subsequent *bona fide* transferrees and the company had neither the power or right to permit it to be transferred to Surget on his subsequent demand.

In regard to the other question, *i. e.*, whether the company were liable for permitting the tranfers to be made without the production and cancellation of the outstanding certificates, whereby Surget's equitable rights to the stock were cut off and lost, the court ruled that all duties imposed upon a corporation by law were an implied promise of performance, and held that if the corporation permitted the transfer of the stock of which Surget was the equitable owner, in violation of its undertaking to protect his rights, the law gives him a remedy to the extent of his injury, upon the implied promise to do no such act to his prejudice. (See this case for forms for certificate of transfer and power of attorney and method of keeping stock ledger.)

A corporation innocently permitted a transfer upon its books of plaintiff's stock, upon a forged power of attorney, canceling the certificates, and issuing new ones. *Held*, that is was bound to transfer an equal quantity of its stock to the plaintiff or pay its value. (*Ct. of Appeals*, 1852, *Pollock* v. *National Bank*, 7 N. Y. [3 Seld.], 274.) The holder writing his name and affixing his seal on a certificate of stock, and delivering it with intent to be filled up by one who should purchase the stock, is a valid transfer of the stock (1 Anst., 229; 4 Johns., 54; 6 Cow., 60; 8 id., 118; 13 Wend., 587); and a subsequent hold r may write over them an assignment and power to transfer. (*Ct. of Errors*, 1839, *Commercial Bank of Buffalo* v. *Kortright*, 22 Wend., 348, affirming S. C., 20 ib., 91.) In *Dunn* v. *Com Bank of Buffalo*, 11 Barb., 580, this case was explained as turning on the fact that there an agreement and consideration were proved, and as not an authority that mere possession of the certificates and blank assignment and power of attorney is evidence of title.

But when by the terms of the charter of a bank, and of the certificates of stock issued by the bank, its stock can only be transferred on the books of the bank by the stockholder, or his attorney, the bank is under no obligation to permit a transfer to be made to a person claiming to be the assignor of a certificate on the presentation of such certificate with an assignment and power of attorney, exempting the original holder in blank, no person being named as the assignee or attorney. The person purchasing stock and taking an assignment of the certificate executed in blank, is authorized to write in his own name as assignee of the stock, and such name as he chooses as the attorney to make the

transfers; but the naked possession of the certificate and blank assignment and power of attorney is no evidence of title. (*Dunn* v. *The Commercial Bank of Buffalo*, 11 Barb., 580; explaining *Commercial Bank of Buffalo* v. *Kortright*, *supra*.) Such holder is, however, presumptively the legal owner. (*Leavitt* v. *Fisher*, 4 Duer, 1; see, also, *Fatman* v. *Lobach*,, 1 id., 354.)

A power of attorney indorsed by the owner on a certificate of stock, in blank as to the attorney's name expressed to be for value received, and irrevocably authorizing him to sell and transfer the stock to any person, and to substitute one or more persons with like power, is *prima facie* evidence of an equitable ownership in the holder, and renders the stock transferable by the delivery of the certificate; and the holder may insert his own name and execute the power, and thus obtain the legal title whenever entitled to do so by the contract under which he received the stock. (*N. Y. Superior Ct.*, 1852, *Fatman* v. *Lobach*, 1 Duer, 354; see this case questioned in *Mechanics' Bank* v. *N. Y. and New Haven R. R. Co.*, 13 N. Y. [3 Kern.], 599, 625.)

Certificates of stock are not, like bills and promissory notes, transferable by mere indorsement and delivery. The party claiming under transfer by indorsement in blank, must prove the contract or consideration. (8 Johns., 29; 11 id., 121; 12 id., 159; 13 id., 175; 14 id., 349; *Supreme Court*, 1852, *Dunn* v. *Commercial Bank of Buffalo*, 11 Barb., 580; see *Weaver* v. *Barden*, 49 N. Y., 286.) The title to stock held by an officer of the company, and standing in his name, with the addition of his office, on the books of the company, is not, upon his resignation and the appointment of his successor, vested in the latter without a regular assignment or transfer. (*Matter of the Mohawk, etc., R. R. Co.*, 19 Wend., 135.)

In *Bank of Buffalo* v. *Kortright* (*supra*), it was held that a transfer of stock in a monied corporation, although not registered on the transfer books of the corporation, was good as between the vendor and the purchaser, notwithstanding a statutory provision that no transfer shall be valid unless so registered. Such a provision does not interfere with the rights of ownership as between the person in whose name the stock may stand and his vendee or pledgee. The title might be perfect as between them, and yet not valid as to any other liability or right which was meant to be precluded by the legal evidence of transfer on the books. (This same question arose in the *Bank of Utica* v. *Smally*, 2 Cow., 770; and it was held that a similar provision in the act of incorporation of the Bank of Utica was intended exclusively for the benefit and protection of the bank.) (See, also, *Gilbert* v. *Manchester Iron Manuf'g Co.*, 11 Wend., 627.) It is the duty of the company, upon the surrender of such certificate, to make the transfer; and, in case of refusal, it is liable in damages to the full value of the stock. (*Commercial Bank of Buffalo* v. *Kortright*, 22 Wend., 348; 20 id., *supra*.) The chancellor, in a dissenting opinion, held that the utmost extent of the plaintiff's claim would be for the depreciation in the value of the stock. A buyer, when the transfer is permitted by the corporation to be made on the books by one to whose credit the stock is standing, has a right to presume that no certificate has been issued, or, if one has, that his vendor has duly surrendered it for cancelation. (*N. Y. and N. H. R. R. Co* v. *Schuyler*, *supra*.)

The provision in a charter that a transfer of stock shall not be valid until registered in a book of the corporation, is intended merely for the benefit and protection of the corporation. If A. transfer stock to B., without registry, the transfer is good as between them. (*Supreme Ct.*, 1824, *Bank of Utica* v. *Smalley*, 2 Cow., 770; *Ct. of Errors*, 1839, *Commercial Bank of Buffalo* v. *Kortright*, 22 Wend., 348; affirming S. C., *sub nom. Kortright* v. *Buffalo Commercial Bank*,

20 id., 91.; *The Bank* v. *Smalley* was affirmed, 8 Cow., 397.) A similar provision in the by-laws has only a similar effect. (*Supreme Ct.*, 1834, *Gilbert* v. *Manchester Iron Co.*, 11 Wend., 627.) *Held*, that when the required evidence was produced, the corporation was bound to permit the transfer, and was liable in damages to the full value of the stock for refusing. (*Ct. of Errors*, 1839, *Commercial Bank of Buffalo* v. *Kortright*, 22 Wend., 348; affirming S. C., 20 id., 91.)

When a certificate of stock and an irrevocable power from the owner to transfer it, with a blank for the name of the attorney, are in the hands of a third person, such owner is presumably the equitable owner, and when he is shown to be an owner for value and without notice, his title as such owner cannot be impeached. (*Leaveti* v. *Fisher*, 4 Duer, 1.) An assignee of a certificate cannot thereby acquire any rights against the corporation superior to those possessed by the assignor. He is to be deemed an assignee of a thing in action not negotiable, and as succeeding merely to the rights and equities of the assignor. (*Ct. of Appeals*, 1856, *Mechanics' Bank* v. *N. Y. and New Haven R. R. Co.*, 13 N. Y. [3 Kern.], 599; *N. Y. Superior Ct*, 1857, *McCready* v. *Rumsey*, 6 Duer, 574.) Hence, if the corporation have, under their charter and by-laws, a lien against the stock for a debt of the holder, one who takes an outside transfer of the certificate is not entitled to require the corporation to tranfer the stock except on terms of his satisfying the lien. (*McCready* v. *Rumsey*, *supra*.)

The identity of a given number of shares is not changed by the surrender of the certificates representing them, and taking out new ones in another name. (4 Johns. Ch., 490; 3 Hill, 593; 7 ib., 497; 19 N. Y., 170; *Ct. of Appeals*, 1859, *Ketchum* v, *Bank of Commerce*, 19 N. Y. [5 Smith], 499.) One who becomes a stockholder by a transfer to him of stock by an original subscriber, adopts his contract with the company, and becomes substituted in his place, both as regards rights and liabilities. (*Supreme Ct., Sp. T.*, 1848, *Mann* v. *Currie*, 2 Barb., 294.) A corporation is bound to exercise, in respect to permitting issue and transfer of its stock, such ordinary care and skill as affords to dealers a safe and reliable mode of acquiring title to its shares; and this obligation exists not only toward existing shareholders, but toward the public generally, and all who enter upon dealings in their stock. If the transfer agent is guilty of frauds in the issue of stock, which by ordinary care and diligence might have been detected, the corporation is liable to a party injured for his damages. Such a case does not present the question, which of two innocent parties must suffer; the question is between an innocent and a culpable party. (*Ct. of Appeals*, 1865, *N. Y. and N. H. R. R. Co.* v. *Schuyler*, 34 N. Y., 30.) The general principles governing the transfer of stock, the rights of dealers in it and the liability of the corporation for acts of their transfer agent—explained. (*Idem.*)

Stock when not transferable.

The plaintiff was assignee for value of a certificate for twenty shares of the capital stock of the defendant's bank. The certificate was in the name of one Jenkins, and the shares stood in his name upon the books of the bank. The by-laws of the bank provided that no shareholder should be permitted to transfer his shares while any debt which shall become due thereon shall remain unpaid, and that every transfer to be valid shall be made on the books. The plaintiff demanded a transfer of the shares to himself and a new certificate in his name therefor. The president of the association refused to make the transfer, alleging that Jenkins' original subscription for the shares was unpaid, and

the plaintiff brought action to recover damages for such refusal. It was held that the plaintiff, as an assignee, had no other rights than would have belonged to Jenkins had he not parted with his certificate, and that he had no right to demand a transfer of the shares without paying to the bank the sum then due from Jenkins thereon. (*McCready* v. *Rumsey, President, etc.*, 6 Duer, 574.) Such certificates do not partake of the character of negotiable instruments, and the *bona fide* assignee, with power to transfer the stock, takes the certificate, subject to the equities which existed against his assignor. (*Mechanics' Bank* v. *N. Y. and N. H. R. R. Co.*, 13 N. Y., 600; *McCready* v. *Rumsey, Prest., supra.*) Where, by the charter of a corporation, or its by-laws thereby authorized, its stock is transferable only on its books, and the charter declares that a stockholder who is indebted to the company shall have no right to sell or transfer his stock until he pays or secures the debt to the satisfaction of the company—the assignee of stock, without a transfer on the corporate books, takes it subject to the equity of the company. (*Chancery*, 1832, *Stebbins* v. *Phœnix Fire Ins. Co.*, 3 Paige, 350; see this case commented on in *McCready* v. *Rumsey*, 6 Duer, 574.)

Purchase and reissue of stock by company.

Where a corporation is not authorized by statute to purchase their own stock, their agreement to do so is void against public policy. (*Supreme Ct.*, 1854, *Barton* v. *Port Jackson Plank-road Co.*, 17 Barb., 397.) A provision that the corporation shall have the power to hold, purchase and convey such real and personal estate as the purposes of the corporation shall require, not exceeding the amount limited in their charter, does not authorize it to purchase its own stock, although, they might, perhaps, be authorized to take it in payment of a debt due them. (*Id.*) In the absence of any statute restriction, a corporation may purchase shares of their own stock, hold them unextinguished, and reissue the same (6 Ohio, 83); and such reissue may be in the form of issuing new stock upon a new subscription without reference to the requirements of the charter as to the terms of original subscription. (*Ct. of Appeals*, 1858, *City Bank of Columbus* v. *Bruce*, 17 N. Y. [3 Smith], 507.) An agreement by an incorporated company, to sell shares of its own stock for less than par, is valid on the face of it, binding the company to deliver the stock. If it does not appear how the company acquired the stock—whether it was issued for property acquired subsequently by the company, or was stock forfeited for the non-payment of the subscription price—it cannot be inferred, in favor of the company, that the stock was not fully paid up, and afterwards acquired by the company. (*Supreme Ct.*, 1867, *Otter* v. *Brevoort Petroleum Co.*, 50 Barb., 247; S. C., 36 How. Pr., 330.)

The facts in the case of *The City Bank of Columbus* v. *Bruce*, *supra*, were these: An insurance company doing business under the laws of Ohio, being in full operation, with a capital of $300,000, the amount authorized by its charter, resolved, through its board of directors, that any stockholder indebted to the company on stock notes might have the privilege of paying any part or all of such indebtedness in the capital stock of the company, at a rate specified in the resolution. The Court of Appeals of New York held this transaction was valid. The court was not aware of any common-law principle which forbids it, nor was it shown to be in contravention of any provision of the charter of the company, or of any other statute of Ohio. Taking this case in connection with that of *Barton* v. *Plank-road Co.*, *supra*, that a corporation may take its own stock in payment of debts owing to it, and may hold and sell stock thus

acquired, would seem to indicate that a surrender of shares of the capital stock might be made to the company in payment of the indebtedness for the stock subscription.

Mr. Thompson in his Liability of Stockholders, section 237 commenting upon the Bank of Columbus case, says: This decision is not only against the weight of authority, but it is incapable of vindication upon sound principles. We have already seen that the debts due a corporation by its stockholders on their stock subscriptions are as much a part of the capital stock, which constitutes a *trust fund* for the security and benefit of creditors, as its tangible assets. It follows, and has been decided in almost every variety of situation, that any arrangement or manipulation which disperses this fund, or even converts it into common assets, is void as against creditors who have given credit on the faith of it. And while a court of justice will probably uphold a compromise by which a company, solvent and paying dividends, receives its own stock in payment of a debt which it would otherwise lose, yet an arrangement by which a company receives its own stock in discharge of notes given for stock subscription scatters this trust fund into air. In case the subscriber to the capital stock had given his notes in payment, then the transfer of the stock to the company would be in contravention of section 8 of the general railroad act, that the company should not use any of its funds in the purchase of its own stock. (See sections 71 and 74, *ante*, R. S. and penal code, prohibiting corporations from purchasing shares of its own stock, except from surplus profits.)

Unregistered transfers.

A transfer of shares, not perfected as required by the charter, statute, articles of association, or deed of settlement governing the corporation or company, though valid between the parties, does not, in general, divest the transferor of his liability as a stockholder to creditors. (Thompson on Liability of Stockholders, § 217; see *Johnson* v. *Underhill*, 52 N. Y., 203; *Shellington* v. *Howland*, 53 id., 371; *Worrall* v. *Johnson*, 5 Barb., 210.)

Right to transfer shares.

The leading difference between a corporation or joint-stock company and a simple partnership discovers itself in the fact that the members of the former may freely transfer their shares to strangers, introducing the latter in their stead; whereas, if a member of a simple partnership sells out his interest, this amounts to a dissolution of the firm. It has been doubted, where the charter was silent as to the time and manner in which stock might be transferred, whether a member could, by transferring his stock, discharge himself of liability to the company or to creditors. But the general rule is that shares of stock are personal property, and may be transferred like any other property, unless the transfer is restrained by the charter or articles of association, and that a *bona fide* transfer terminates the liability of the transferor either to the company or to creditors. The transferee succeeds, not only to rights, but also to the liabilities of the transferor; he is bound to pay the unpaid purchase-money of the stock as it shall be called for by the directors, and, in the event of the insolvency of the corporation, he is liable to contribute to the payment of its debts, in like manner as if he were an original subscriber. (Thompson on Liability of Stockholders, § 210.)

Fraudulent transfer of shares.

The general right of a shareholder to transfer his shares is subject to this limitation: that a fraudulent transfer, made with a view to avoid his liability

to the company or to creditors, is void and still renders him liable. (Idem. § 211, citing a large number of authorities.)

The English courts have drawn the the dividing line between an out and out transfer of shares to a person incapable of responding as a shareholder, made for the purpose of cheating creditors and co-shareholders, which is valid, and a transfer made to a like man of straw, with a like corrupt motive, but which is void because made upon a secret agreement between the fraudulent transferor and the fraudulent man of straw that the latter is to hold as trustee for the former. The following are English cases illustrative of these doctrines, each depending upon the particular facts of their own cases—cases in which the transfer was held good because out and out: *Jessup's Case*, 2 DeG. & J., 638; *De Pass' Case*, 4 DeG. & J., 544; *Weston's Case*, L. R. 4 Ch., 20; *Harmson's Case*, L. R. E. Ch., 286; *King's Case*, L. R. 6 Ch., 196; *Master's Case*, , L. R. 7 Ch., 292; *Hackim's Case*, L. R 7 Ch., 296, note; *Bishop's Case*, L. R. 7 Ch., 296, note; *Williams' Case*, 1 Ch. Div., 576. Cases in which the transfer void because a sham: *Chinnock's Case*, Johns. (Eng. Ch.), 714; *Hyane's Case*, 2 De G. F. & I., 75; *Cortello's Case*, 2 De G. F. & I., 302; *Budd's Case*, 3 idem, 297; *Poyne's Case*, L. R. 9 Eq., 223; *Ex parte Kintrea*, L. R. 5 Ch., 95; *Gilbert's Case*, L. R. 5 Ch., 559.

Mr. Thompson (Liability of Stockholders, § 215) says: I think the American doctrine on this subject may fairly be summed up as follows: A transfer of shares in a failing corporation, made by the transferor with the purpose of escaping his liability as a shareholder, to a person who, from any cause, is incapable of responding in respect of such liability, is void as to creditors of the company and as to other shareholders, although as between the transferor and the transferee the transfer may have been out and out. This conclusion necessarily results from the American doctrine that the capital stock of a corporation is a trust fund for the security and benefit of creditors. This fund consisting not only of money which has been paid in on account of stock subscriptions, but also of money which subscribers have agreed to pay in, it is obvious that a court of equity will not allow that portion of it which consists of upaid subscriptions to be frittered away by the transfer of shares from solvent to insolvent persons, with the mere purpose of escaping the obligations arising out of the contract of subscription and accrueing to creditors. (See *Nothen* v. *Whitlock*, 3 Edw. Ch. 215; affirmed on appeal, 9 Paige, 152.)

Transferees holding stock as collateral security.

It is well settled that one to whom stock has been transferred in pledge, or as collateral security for money loaned, and who appears on the register of the corporation as the owner of the stock, is, in the event of insolvency of the corporation, chargeable as a stockholder for the benefit of creditors. The reason why the courts so hold, briefly, is that a man cannot become the legal owner of stock, receive dividends, vote at elections, and enjoy all other rights appertaining to the ownership of it, without shouldering the liabilities attaching to such a position. Another good reason is that he will not be suffered to hold himself out to the public as the owner of stock and afterwards deny that relation. (Thompson on Liability of Stockholders, § 223; see *Adderly* v. *Storm*, 6 Hill, 624; *Roscvelt* v. *Brown*, 11 N. Y., 148; *Matter of Empire City Bank*, 18 id., 199, 223.]

§ 89. *Increase of capital stock, how made.*—In case the capital stock of any company formed under this act is

found to be insufficient for constructing and operating its road, such company may, with the concurrence of two-thirds in amount of all its stockholders, and the written approval of the state engineer and surveyor, until such time as there shall be appointed a board of railroad commissioners, and after that, with the written approval of said board, increase its capital stock from time to time to any amount required for the purposes aforesaid. Such increase must be sanctioned by a vote, in person or by proxy, of two-thirds in amount of all the stockholders of the company, at a meeting of such stockholders, called by the directors of the company for that purpose by a notice in writing to each stockholder, to be served on him personally, or by depositing the same, properly folded and directed to him at the post-office nearest his usual place of residence, in the post-office, at least twenty days prior to such meeting. Such notice must state the time and place of the meeting, and its object, and the amount to which it is proposed to increase the capital stock. The proceedings of such meeting must be entered on the minutes of the proceedings of the company, and thereupon the capital stock of the company may be increased to the amount sanctioned by a vote of two-thirds in amount of all the stockholders of the company as aforesaid. A copy of such notice shall also be published within the county where the main office of such corporation shall be located, once a week for four weeks prior to such meeting, in a newspaper to be designated by the state engineer and surveyor, until such time as a board of railroad commissioners shall be appointed, and after that time by such board, and in no case, and under no circumstances, shall any railroad company of this State increase its stock except upon the notice and with the approval herein provided. Any officer or director of any railroad company violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment not less than six months and by fine not exceeding one thousand dollars. (*Laws* 1850, *chap.* 140, § 9, *as amended by Laws* 1880, *chap.* 133, § 1.) [*See the next chapter.*]

The ninth section of the general railroad act, before its amendment, was as follows: In case the capital stock of any company formed under this act, is found to be insufficient for constructing and operating its road, such company may, with the concurrence of two-thirds in amount of all its stockholders, increase its capital stock from time to time, to any amount required for the purposes aforesaid. Such increase must be sanctioned by a vote in person, or by proxy, of two-thirds in amount of all the stockholders of the company, at a meeting of such stockholders, called by the directors of the company for that purpose, by a notice in writing to each stockholder, to be served on him personally, or

by depositing the same, properly folded and directed to him, at the post-office nearest his usual place of residence, in the post-office, at least twenty days prior to such meeting. Such notice must state the time and place of the meeting, and its object, and the amount to which it is proposed to increase the capital stock. The proceedings of such meeting must be entered on the minutes of the proceedings of the company, and thereupon the capital stock of the company may be increased to the amount sanctioned by a vote of two-thirds in amount of all the stockholders of the company as aforesaid. (*General R. R. Act, Laws* 1850, *chap.* 140, § 9.)

The following acts were passed prior to the general railroad acts of 1848 and 1850, and they do not seem to have been repealed unless by implication: Any railroad company whose track is now laid in whole or in part with the flat bar rail, on which steam power is used in propelling cars, are hereby authorized to increase their capital stock, or to borrow on the security of said road, its appurtenaces and franchises, as the directors of such company may determine, subject, however, to all previous incumbrances to the State or individuals, an amount sufficient to enable such company to substitute upon their track or tracks the heavy iron rail, every lineal yard of which shall weigh at least fifty-six pounds, for the flat iron rail now in use: But nothing herein contained shall be construed to authorize the borrowing of money, or the increase of the capital stock of any railroad company for any other purpose than that of substituting the heavy iron rail for the flat bar rail as aforesaid, and the erection of such superstructure as may be necessary or proper to receive such heavy rail, nor shall be necessary or proper to receive such heavy rail, nor shall it be used for any other purpose; and provided, also, that no increase of capital or indebtedness on the part of such railroad company shall exceed in the aggregate the sum of ten thousand dollars per mile for each mile of the entire length of the said railroad. (*Laws* 1847, *chap.* 272, § 1.)

Every railroad company embraced within the provisions of the first section of chapter two hundred and seventy-two of the Laws of eighteen hundred and forty-seven, is hereby authorized to increase its capital stock or to borrow money on the security of its railroad franchises as the directors of such company may determine, subject, however, to all previous incumbrances, and debts in favor of this State, and of individuals, to such an amount, subject to the limitation hereinafter expressed, as may be sufficient for the purpose of putting so much of its railroad as such directors shall deem expedient, in a proper condition to receive a second track, of procuring iron for such track and of laying the same with an iron rail, weighing not less than fifty-six pounds to the lineal yard; but nothing herein contained shall be construed to authorize such an increase of stock or borrowing of money by such company for any other than the aforesaid purposes, nor shall such money or stock be used for or applied to any other purpose, nor shall the increase of stock or the money borrowed by virtue of this section exceed, in the aggregate, the sum of ten thousand dollars for each mile of the railroad of such company, which it shall so put in a condition to receive such second track for which it shall procure the iron for such track, and on which it shall lay such second track with a heavy rail as aforesaid. (*Laws* 1847, *chap.* 405.) Of the right of stockholders to a distribution of new stock created. (*Miller* v. *Illinois Central R. R. Co.*, 24 Barb., 312.)

§ **90.** *Increase of capital stock to meet the conversion of bonds.*—Every railroad company has power, from time to time, to borrow such sums of money as may be necessary for completing and finishing or operating their railroad, and to issue and dispose of their bonds for any amount so borrowed, and to mortgage their corporate property and franchises to secure the payment of any debt contracted by the company for the purposes aforesaid; and the directors of the company may confer on any holder of any bond issued for money borrowed as aforesaid, the right to convert the principal due or owing thereon, into stock of said company, at any time not less than two nor more than twelve years from the date of the bond, under such regulation as the directors may see fit to adopt; provided, however, that if the already authorized capital stock of such corporation at the time such bonds may be issued shall not be sufficient to meet such conversion when made, the stockholders shall before such issue and in the manner hereinfore provided (*see the last preceding section*), authorize an increase of capital stock to an extent sufficient to meet the deficiency. (*Laws* 1850, *chap.* 140, § 28, *sub.* 10, *as amended by chap.* 133 *of the Laws of* 1880.)

§ **91.** *When capital stock insufficient, how company may increase the same to carry out plan or agreement for reorganization.*—Whenever the maximum amount of capital stock, mentioned in the certificate of incorporation of any railroad or railway company on file in the office of the secretary of state, shall be insufficient to carry out any plan or agreement of reorganization set forth in such certificate of incorporation, it shall be lawful for the directors, or a majority of the directors of said company, to file an additional certificate with the secretary of state, which shall set forth the fact of such insufficiency and the additional amount of capital stock required to carry out such plan or agreement of reorganization, and thereupon, with the approval of the state engineer and surveyor, said company shall be authorized to issue such capital stock as fully as if the same had been mentioned or set forth in the original certificate of incorporation. Said additional certificate shall be filed in the office of the secretary of state within two months after the passage of this act. (*Laws* 1880, *chap.* 155, § 1.)

§ **92.** *Diminution of capital stock—corporation may diminish capital stock.*—Any corporation or company organized under general or a special law of this State, and now existing or which may hereafter be organized under such general or special law, may diminish its capital stock by

complying with the provisions of this act, to any amount which may be deemed sufficient and proper for the purposes of the corporation. But nothing in this act shall be so construed as to relieve any holder or owner of stock in such corporation from any personal liability existing prior to such reduction; provided that nothing in this act contained shall be construed to in any manner interfere with or affect any law now in existence authorizing any corporation heretofore organized to reduce its capital stock. (*Chap.* 264, *Laws of* 1878, § 1.)

§ **92**(*a*). *Notice of meeting to reduce stock.*—Whenever any company shall desire to call a meeting of its stockholders for the purpose of diminishing the amount of its capital stock, it shall be the duty of the trustees or directors to publish a notice, signed by at least a majority of them, in a newspaper in the county in which the business of the company is carried on or its principal office is located, if any shall be published therein, at least three successive weeks, and to deposit a written or printed copy thereof in the post-office, addressed to each stockholder at his usual place of residence, at least three weeks previous to the day fixed upon for holding such meeting, specifying the object of the meeting, the time and place when and where such meeting shall be held, and the amount to which it shall be proposed to diminish the capital, and a vote of at least two-thirds of all the shares of stock shall be necessary for a diminution of the amount of its capital stock. (*Idem*, § 2.)

§ **92**(*b*). *Stock, how reduced.*—If, at the time and place specified in the notice provided for in the preceding section of this act, the stockholders shall appear, in person or by proxy, in numbers representing not less than two-thirds of all the shares of stock of the corporation, they shall organize by choosing one of the trustees chairman of the meeting, and also a suitable person for secretary, and proceed to a vote of those present in person or by proxy; and if in canvassing the votes it shall be found that a sufficient number of votes has been given in favor of diminishing the amount of capital, a certificate of the proceedings, showing a compliance with the provisions of this act, the amount of capital actually paid in, the whole amount of debts and liabilities of the company, and the amount to which the capital stock shall be diminished, shall be made, signed and verified by the chairman; and such certificate shall be acknowledged by the chairman, and filed in the office of the clerk of the county in which the business of the company shall be car-

ried on, and a duplicate thereof in the office of the secretary of state, with the approval of the comptroller indorsed thereon, to the effect that the reduced capital is sufficient for the proper purposes of the company, and is in excess of all debts and liabilities of the company, exclusive of the debts secured by trust mortgages, and that the actual market value of the stock of the company, prior to the reduction of the capital, was less than the par value of the same, and, when so filed, the capital stock of such corporation shall be reduced to the amount specified in such certificate. (§ 3; *chap.* 264, *Laws* 1878.)

§ **93.** *Reduction of capital stock in cases where the articles of association have been amended by one railroad intersecting with another road.*—Whenever two railroad companies shall, for a portion of their respective lines, embrace the same location of line, they may by agreement provide for the construction of so much of said line as is common to both of them by one of the companies, and for the manner and terms upon which the business thereon shall be performed. Upon the making of such agreement, the company that is not to construct the part of the line which is common to both, may alter and amend its articles of association so as to terminate its line at the point of intersection, and may reduce its capital to a sum not less than ten thousand dollars for each mile of the road proposed to be constructed in such amended articles of association. (*Chap.* 19, *Laws of* 1851, § 1.)

Whenever two railroad companies shall, for a portion of their respective lines, embrace the same location of line, or whenever by the connection of two or more railroads, the same points of termination are reached by railroad communication, any two such railroads may, by agreement, provide for the construction of so much of said line as is common to both of them by one of the companies, and for the manner and terms upon which the business thereon shall be performed. Any road so connecting may alter and amend its articles of association, so as to terminate at the point of intersection, and may reduce its capital to a sum not less than ten thousand dollars for each mile of the road constructed, or proposed to be constructed in such amended articles of association. This section shall not be so construed as to apply to any railroad company or companies, so far as its or their line of road or roads are within the bounds of any incorporated city of this State. (*Chap.* 282, *Laws* 1854, § 13.)

§ **94.** *Reduction of capital stock where part of line of road is constructed in an adjoining State.*—Whenever after due examination it shall be ascertained by the directors of any railroad company organized under the act entitled "An act to authorize the formation of railroad corporations and to regulate the same," passed March 26, 1848, or under the act entitled "An act to authorize the formation of railroad corporations and to regulate the same," passed April 2, 1850, that a part of the line of their railroad proposed to be made between any two points in this State ought to be located and constructed in an adjoining State, it may be so located and constructed by a vote of two-thirds of all the directors, and the sections of said railroad within this State shall be deemed a connected line according to the articles of association, and the directors may reduce the capital stock specified in their articles of association to such amount as may be deemed proper, but not less than the amount required by law for the number of miles of railroad to be actually constructed in this State. (*Laws* 1851, *chap.* 19, § 2.)

§ **95.** *Fraudulent issue of stock.*—Every officer and every agent of any incorporated company or corporation formed or existing under or by virtue of the laws of any of the United States who shall, within this State, willfully and designedly sign or procure to be signed, with intent to issue, sell or pledge or cause to be issued, sold or pledged, or shall willfully and designedly issue, sell or pledge or cause to be issued, sold or pledged, any false or fraudulent certificate or other evidence of the ownership or transfer of any share or shares of the capital stock of such incorporated company or corporation, or any false or fraudulent bond or evidence of debt of such incorporated company or corporation, or any certificate or other evidence of the ownership or transfer of any share or shares in such incorporated company or corporation, or any instrument purporting to be a certificate or other evidence of ownership or transfer of such share or shares, or purporting to be such bond or evidence of debt, the signing, issuing, selling or pledging of which shall not be authorized by the charter and by-laws of such incorporated company or corporation or some amendment thereof, shall be deemed guilty of a felony and shall be punished by a fine not exceeding three thousand dollars and imprisonment in the State prison for a term not less than three nor more than seven years. (*Laws* 1855, *chap.* 155, § 1.)

The president of a corporation, who was authorized to issue new certificates of stock, on a transfer of stock and surrender of old certificates, issued spuri-

ous certificates, not based on any transfer of genuine stock. They were issued in a large amount, which, together with genuine stock, far exceeded the number of shares limited by the charter. Some were held by parties who took with knowledge of the fraud, a part passed into the hands of innocent purchasers for value, and a part were surrendered by holders from time to time on transfers of stock, and new certificates, representing in part spurious and in part genuine stock, were regularly issued by the company therefor. *Held*, that the corporation could maintain an action against all persons who claimed stock under the spurious issues, to have the certificates representing such issue declared void. The fact that the various holders in such a case are very numerous, and claim under different instruments, does not render it improper to proceed against all in one action. (*Ct. of Appeals*, 1858, *N. Y. and New Haven R. R. Co.* v. *Schuyler*, 7 Abb. Pr., 41; S. C., 17 N. Y. [3 Smith], 592; reversing S. C., 1 Abb. Pr., 417; 34 N. Y., 30.)

A corporation whose capital is, by its charter, limited, either in amount or in number of shares, cannot issue valid certificates in excess of the limit. (*Ct. of Appeals*, 1856, *Mechanics' Bank* v. *N. Y. and New Haven R. R. Co.*, 13 N. Y. [3 Kern.], 599. By the act creating a corporation, its capital stock was limited to $3,000,000, and divided into shares of $100 each, transferable in such manner as the company should direct. The entire stock was taken and certificates issued therefor to the owners, and the by-laws of the company permitted that transfers of the stock should be made on the transfer books of the company, and required the certificates of ownership to be surrendered prior to the making of such transfer and the issue of a new certificate. The company established a transfer agency and appointed its president transfer agent, who was authorized and accustomed on the transfer of stock on the books in his charge, and the surrender of the certificate therefor, to execute and deliver to the transferee the usual certificate, stating that he was entitled to the number of shares of stock specified therein, transferable on the books of the company by him or his attorney on the surrender of the certificate. The agent fraudulently gave to one Kyle a certificate, in the usual form, for eighty-five shares of stock, when, in fact, the latter owned no stock; none stood on the books in his name, and no certificate for such stock had been surrendered. The plaintiff in good faith, and relying upon the certificate as regularly issued and valid, made a loan to Kyle, receiving from him the certificate with an assignment of the stock and a power of attorney to transfer the same. In an action by the plaintiffs against the corporation for refusing to permit the stock represented by the certificate to be transferred—*Held*, that the certificate was void, and that the plaintiff did not thereby acquire a right, legal or equitable, to any stock; and *held*, further, that the corporation was not responsible to the plaintiffs for damage sustained by dealings upon the faith of the certificate. (*Id.*)

Officers of a corporation who issue spurious stock, are liable in an action by an individual stockholder to recover the amount of the depreciation in the market value of the stock resulting from the disclosure of the over-issue. (*Supreme Ct.*, 1857, *Cazeaux* v. *Mali*, 25 Barb., 578; S. C., *sub nom. Mead* v. *Mali*, 15 How. Pr., 347; see, also, *Wells* v. *Jewett*, 11 id., 242; *Bell* v. *Mali*, id,. 254.) They are also liable to persons who have purchased spurious stock from third parties, to whom it was issued (*Id.*; *Shotwell* v. *Mali*, 38 Barb., 445; *Bruff* v. *Mali*, 36 N. Y., 200; S. C., 34 How. Pr., 338.) And also to a stockholder of the company, for the damage sustained by him, by reason of the depreciation in the market value of the stock resulting from the disclosure of the over

issue. (*Cazeaux* v. *Mali, supra; Bell* v. *Mali*, 11 How. Pr., 254; *Wells* v. *Jewett*, id., 242; *Crook* v. *Jewett*, 12 id., 19.) Fraudulent certificates which have been over issued, do not partake of the character of negotiable instruments; and the *bona fide* assignee, with power to transfer the stock, takes the certificate aubject to the equities which existed against his assignor. (*Mechanics' Bank* v. *N. Y. and N. H. R. R., supra.*)

§ **96.** *Fraudulent issue of stock, scrip, etc., a misdemeanor.*—An officer, agent or other person in the service of any joint-stock company, or corporation formed or existing under the laws of this State, or of the United States, or of any State or territory thereof, or of any foreign government or country, who willfully and knowingly with intent to defraud; either

1. Sells, pledges or issues, or causes to be sold, pledged, or issued, or signs or executes, or causes to be signed or executed, with intent to sell, pledge or issue, or to cause to be sold, pledged or issued, any certificate or instrument purporting to be a certificate or evidence of the ownership of any share or shares of such company or corporation, or any bond or evidence of debt, or writing purporting to be a bond or evidence of debt of such company or corporation, without being first thereto duly authorized by such company or corporation, or contrary to the charter or laws under which such corporation or company exists, or in excess of the power of such company or corporation, or of the limit imposed by law or otherwise upon its power to create or issue stock or evidences of debt; or

2. Reissues, sells, pledges or disposes of, or causes to be reissued, sold, pledged or disposed of, any surrendered or canceled certificates, or other evidence of the transfer or ownership of any such share or shares;

Is punishable by imprisonment for not less than three years nor more than seven years, or by a fine not exceeding three thousand dollars, or by both. (*Penal Code*, § 591.)

§ **97.** *Officer of corporation selling, etc., shares, when a misdemeanor.*—An officer agent or other person employed by any company or corporation existing under the laws of this State, or of any other State or territory of the United States, or of any foreign government, who willfully and with a design to defraud, sells, pledges or issues, or causes to be sold, pledged or issued, or signs or procures to be signed with intent to sell, pledge or issue, or to be sold, pledged or issued, a false, forged or fraudulent paper, writing or instrument, being or purporting to be a scrip, certificate or other evidence of the ownership or transfer of any share or shares of the capital stock of such company or cor-

poration, or a bond or other evidence of debt of such company or corporation, or a certificate or other evidence of the ownership or of the transfer of any such bond or other evidence of debt, is guilty of forgery in the third degree, and upon conviction, in addition to the punishment prescribed in this title for that offense, may also be sentenced to pay a fine not exceeding three thousand dollars. (*Penal Code*, § 518.)

§ **98.** *Unauthorized issue of stock.*—Every officer and agent of every incorporated company, joint-stock company or corporation formed or existing under or by virtue of the laws of any of the United States who shall, within this State, knowingly, willfully and designedly sign or procure to be signed, with intent to issue, sell or pledge or cause to be issued, sold or pledged, or who shall knowingly, willfully and designedly issue, sell or pledge or cause to be issued, sold or pledged any certificate or other evidence of the ownership or transfer of any share or shares of the capital stock of such incorporated company, joint-stock company or corporation, or any bond or evidence of debt of such incorporated company, joint-stock company or corporation or any instrument purporting to be a certificate or other evidence of ownership or transfer of such share or shares or purporting to be such bond or evidence of debt, without being thereunto first authorized and empowered by such incorporated company, joint stock company or corporation, and every such officer and agent who shall reissue, sell, pledge or dispose of or who cause to be reissued, sold, pledged or disposed of any surrendered or canceled certificate or other evidence of the ownership or transfer of any such share or shares or of any right or interest therein, with the intent of defrauding any such corporation or any person or persons, shall be deemed guilty of a felony and shall be punished by a fine not exceeding three thousand dollars and imprisonment in the State prison not less than three nor more than seven years. (*Laws* 1855, *chap.* 155, § 2.)

That making a certificate and mailing it to a stockholder is the issuing of it. (*Jones* v. *Terre Haute and Richmond R. R. Co.*, 17 How. Pr., 529; affirmed in effect, *Jones* v. *Terre Haute R. R. Co.*, 57 N. Y., 196.) In the absence of any provision of law or by-law, the delivery of certificates of stock to subscribers is not necessary. The stock is issued fully and effectually by placing it in the name of the subscriber on the books. (*A. V. Chan. Ct.*, 1844, *Thorp* v. *Woodhull*, 1 Sandf. Ch., 411.) The directors may act through their officers or agents in issuing stock. (*Lohman* v. *N. Y. Erie R. R.*, 2 Sandf., 39.) Officers continued to issue stock in exchange for the debt of the company for more than two years after the rescission of the resolution empowering them to do so—*Held*, that this long usage implied an authority as effectually as an express resolution

would have given it. (*N. Y. Superior Ct.*, 1848, *Lohman* v. *N. Y. & Erie R. R. Co.*, *supra.*)

§ **99.** *President, treasurer and secretary of railroad company may issue certificates of stock in certain cases after a foreclosure and sale of the property and franchises of the corporation.*—The president, treasurer and secretary of any railroad company organized under the laws of this State, or either of them, whose property and franchises have been sold under a foreclosure of any mortgage given to secure the payment of any bond or bonds issued by such company, are hereby authorized and required after such foreclosure and sale upon demand of any individual or any duly authorized officers of any corporation, town, county or city entitled thereto, to issue certificates of stock in said railroad company, provided, when any such individual or proper officers of any corporation, county, town or city duly authorized so to do, have subscribed to the stock of such railroad company and paid the amount of such subscription to the officers of such railroad company, either in money or bonds before the date of such foreclosure and sale, and a certificate of stock through the neglect of such railroad company or of any individual or the officers of any town, county, city or corporation has not been issued and delivered to said subscriber or the officers of any corporation, town, county or city for the amount of money or both so subscribed and paid. (*Laws* 1880, *chap.* 5, § 1.)

All certificates of stock issued under the authority of the first section of this act shall have all the force and effect, and shall give the holder all the rights which would pertain thereto as if said stock had been issued at the date and payment of the subscription thereto. (*Laws* 1880, *chap.* 5, § 2.)

§ **100.** *In relation to capital stock of railroads held under lease.*—Any railroad corporation created by the laws of this State, or its successors, now being the lessee of the road of any other railroad corporation, may take, surrender, or transfer of the capital stock of the stockholders, or any of them, in the corporation whose road is held under lease, and issue in exchange therefor the like additional amount of its own capital stock at par, or on such other terms and conditions as may be agreed upon between the two corporations; and whenever the greater part of the capital stock of any such corporation shall have been so surrendered or transferred, the directors of the corporations taking such surrender or transfer, shall thereafter, on a resolution electing so to do, to be entered on their minutes, become *ex officio* the directors of the corporation whose road is so held under

lease, and shall manage and conduct the affairs thereof, as provided by law; and whenever the whole of the said capital stock shall have been so surrendered or transferred, and a certificate thereof filed in the office of the secretary of state, under the common seal of the corporation to whom such surrender or transfer shall have been made, the estate, property, rights, privileges and franchises of the said corporation, whose stock shall have been so surrendered or transferred, shall thereupon vest in, and be held and enjoyed by the said corporation to whom such surrender or transfer shall have been made, as fully and entirely, and without charge or diminution, as the same were before held and enjoyed, and be managed and controlled by the board of directors of the said corporation to whom such surrender or transfer of the said stock shall have been made, and in the corporate name of such corporation. The rights of any stockholder, not so surrendering or transferring his stock, shall not be in any way affected thereby; nor shall existing liabilities, or the rights of creditors of the corporation, whose stock shall have been so surrendered, be in any way affected or impaired by this act. (*Laws* 1855, *chap.* 302, § 1.)

This act shall not be construed as applying to or embracing the Rochester and Genesee Valley railroad, nor any part thereof, and said road is hereby expressly excepted from the operation of the same. (*Laws* 1855, *chap.* 302, § 2.)

See also Laws of 1867, chapter 254, as amended by Laws 1879, chapter 503, *post*, under chapter entitled "Of railroads held under lease."

401. *The sale of stocks on time legalized.*—No contract, written or verbal, hereafter made for the purchase, sale, transfer or delivery of any certificate or other evidence of debt, due by or from the United States, or any separate State, or of any share or interest in the stock of any bank, or of any company incorporated under any law of the United States, or of any individual State, shall be void or voidable for any want of consideration, or because of the non-payment of any consideration, or because the vendor, at the time of making such contract, is not the owner or possessor of the certificate or certificates or other evidence of such debt, share or interest. (*Chap.* 134, *Laws* 1858, § 1.)

Sections six, seven and eight of chapter twenty, title nineteen, article two of the Revised Statutes, entitled "Of brokerage, stock jobbing and pawn brokers, are hereby repealed." (*Id.*, § 2.)

(5 Sandf., 411; 4 Rob., 403; 9 N. Y., 520; 28 Barb., 27.)

§ **102.** *Id.; Frauds in procuring organization, or increase of capital.*—An officer, agent or clerk of a corporation, or of persons proposing to organize a corporation, or to increase the capital stock of a corporation, who knowingly exhibits a false, forged or altered book, paper, voucher, security or other instrument of evidence to any public officer or board authorized by law to examine the organization of such corporation, or to investigate its affairs, or to allow an increase of its capital, with intent to deceive such officer or board in respect thereto, is punishable by imprisonment in a State prison not exceeding ten years and not less than three years. (*Penal Code*, § 592.)

§ **103.** *Frauds in subscription for stock of corporations.*—A person who signs the name of a fictitious person to any subscription for, or agreement to take, stock in any corporation, existing or proposed; and a person who signs, to any subscription or agreement, the name of any person, knowing that such person does not intend in good faith to comply with the terms thereof, or under any understanding or agreement, that the terms of such subscription or agreement are not to be complied with or enforced, is guilty of a misdemeanor. (*Penal Code*, § 590.)

(*Palmer* v. *Lawrence*, 3 Sandf., 161; 5 N. Y., 189.)

§ **104.** *When company may purchase, hold and transfer stock in company organized in another State to secure fuel.*—Any railroad company organized under the laws of this State, may purchase, hold and convey lands or any interest in lands in another State through which any part of its railroad is operated, or may purchase, hold and transfer stock in any company organized in another State, owning lands as aforesaid, for the purpose of securing for such railroad in this State a permanent supply of fuel for its use. (*Laws* 1875, *chap.* 586, § 2.)

§ **104**(*a*). *Exchange of preferred stock of the company for common stock.*—Every corporation organized under the laws of this State which has heretofore issued, or may hereafter issue, both preferred and common stock forming part of the capital stock of such corporation, is hereby authorized whenever the directors of such corporation shall, by vote of two-thirds of their number, declare it for the interest of the corporation so to do; and the holder of any such preferred stock may request, in writing, the exchange of the same for the common stock, to exchange the preferred stock of such holder for common stock, and

to issue certificates of common stock therefor, share for share, or upon such other valuation as may have been agreed upon in the scheme for organization of such company, or the issue of such preferred stock; provided, however, that the total amount of the capital stock of such company shall not be increased thereby. (*Laws* 1880, *chap.* 225.)

CHAPTER 8.

OF THE STOCKHOLDERS.

§ **105.** *Liabilities of stockholders.*—The tenth section of the act entitled "An act to authorize the formation of railroad corporations, and to regulate the same," passed, April 2, 1850, is hereby amended to read as follows:

§ 10. Each stockholder of any company formed under this act shall be individually liable to the creditors of such company, to an amount equal to the amount unpaid on the stock held by him, for all the debts and liabilities of such company, until the whole amount of the capital stock so held by him shall have been paid to the company, and all the stockholders of any such company shall be jointly and severally liable for the debts due or owing to any of its laborers and servants, other than contractors, for personal services for thirty days' service performed for such company, but shall not be liable to an action therefor before an execution shall be returned unsatisfied in whole or in part against the corporation, and the amount due on such executions shall be the amount recoverable, with costs, against such stockholders; before such laborer or servant shall charge such stockholder for such thirty days' service, he shall give him notice in writing within twenty days after the performance of such service, that he intends so to hold him liable, and shall commence such action therefor within thirty days after the return of such execution unsatisfied, as above mentioned; and every such stockholder against whom any such recovery by such laborer or servant shall have been had, shall have a right to recover the same of the other stockholders in said corporation, in ratable proportion to the amount of the stock they shall respectively hold

with himself; and all laws whereby the stockholders, officers and agents of any railroad corporation are made individually liable for the debts or liabilities of such corporation beyond the provisions contained in the act entitled "An act to authorize the formation of railroad corporations, and to regulate the same," passed April 2, 1850, and the acts amending the same, are hereby repealed. (*Chap.* 282, *Laws of* 1854, § 16, *amending section* 10 *of the General Railroad Act, Laws* 1850, *chap.* 140.)

[See the next section extended to ninety days' services.)

For the rights and liabilities of stockholders by reason of their subscription to the capital stock of the corporation, see, also, notes to sections seven and eight, *ante.*

Section 10 the general railroad act (Laws of 1850, chap. 140), previous to its amendment as above, read as follows: Each stockholder of any company formed under this act, shall be individually liable to the creditors of such company, to an amount equal to the amount unpaid on the stock held by him, for all the debts and liabilities of such company, until the whole amount of the capital stock so held by him shall have been paid to the company; and all the stockholders of every such company shall be jointly and severally liable for all the debts due or owing to any of its laborers and servants, for services performed for such corporation; but shall not be liable to an action therefor, before an execution shall be returned unsatisfied in whole or in part against the corporation; and then the amount due on such execution shall be the amount recoverable, with costs, against such stockholders.

The liabilities imposed on the stockholders for the debts of the company, by the Laws of 1845 (Laws 1845, chap. 230, § 1), were repealed by this tenth section of the general act, as amended by the Laws of 1854. (*Rochester* v. *Barnes*, 26 Barb., 657.) The provisions of such former act was as follows:

"No debt or-debts shall be contracted or incurred by, or on behalf of any incorporated railroad company, beyond or exceeding its available means in its possession, under its control and belonging to it, including its *bona fide* and available stock subscription, and exclusive of its real estate, at the time the same shall be contracted or incurred, to pay and discharge the same and all its debts previously contracted or incurred, and every officer, agent, or stockholder of said company who shall knowingly assent to, or have any agency in contracting or incurring any debt in violation of the provisions of this section, shall be personally and individually liable to pay such debt; and shall also be liable to arrest and imprisonment in any action for the same, and on any execution issued on any judgment obtained for the same, in the same manner as defendants in actions of trespass are now liable; and shall be deemed guilty of a misdemeanor; but the debts contracted in violation of the provisions of this section shall not be deemed invalid as against said company, by reason thereof. Provided, that nothing herein contained shall apply to any loan, which any company shall be expressly authorized by law to make, over and above the available means aforesaid." (Laws 1845, chap. 230, § 1. See § 69 and note *ante.* See rights and liabilities of stockholders in leased railroads, chap. 26, *post*, "Of railroads held under lease.)

There are two classes of liabilities imposed upon the stockholders under this section of the statute: one to the general creditors of the corporation, and the

other for debts due and owing to any of its laborers and servants, other than contractors. In either case the remedy of the creditor against the company by judgment against it and the return of an unsatisfied execution in whole or in part should be first exhausted by the creditor before the action is to be commenced against the stockholder. The stockholder should have been such at the time of the contracting of the debt. In the case of a general creditor, whether the proof of judgment against the company is sufficient evidence of the debt from the company is a matter of doubt, while in the case of a laborer or servant the decisions are that such a creditor should go behind the judgment and show that it was one of the kind named in the statute. There is also another section of the general railroad act (§ 12 of chap. 140 of the Laws of 1850, as amended by Laws of 1871, chap. 669, § 2) which provides for the payment of laborers employed by contractors, as distinguished from section 10 of the text, which is designed as a means of proceeding for the payment of the immediate servants and employees of the company. (See *Gallagher* v. *Ashley*, 26 Barb., 143.) Section 12, as amended, will be found *post* § 207. For a proper distinction between "laborers" and "contractors," see *Warner* v. *Hudson R. R. Co.*, 5 How. Pr., 456.)

The stockholders of the corporation are those who subscribe the original articles of association and by such act state the number of shares of stock they agree to take in the company (see § 5, *ante*); those who, after the articles of association and affidavit have been filed and recorded in the office of the secretary of state, subscribe the books of subscription to fill up the capital stock of the company which had not been subscribed to the orginal articles of association (see § 86, *ante*); or those other persons who by assignment and transfer of shares of the capital stock from the original stockholders have succeeded to their rights and interests as such.

It was held in the *Troy and Boston R. R. Co.* v. *Tibbits* (18 Barb., 297), that where the defendant merely signed a *preliminary* subscription paper, previous to the incorporation of the company, whereby he agreed to take the amount of capital stock placed opposite his name, but did not subsequently subscribe either to the articles of association or to the capital stock in the books opened by the directors after incorporation (Laws 1850, chap. 140, § 4), that he did not become a stockholder and was not liable on the preliminary subscription.

In the Tibbits case above cited, the cases of *Stanton* v. *Wilson* (2 Hill, 153) and *Hamilton and Dansville Plank-road Co.* v. *Rice* (7 Barb., 157) were stated not to be in conflict with the views above expressed. In *Stanton* v. *Wilson* the defendant had signed the articles of association and at the foot of which he subscribed for fifty shares of stock. The articles, although dated and subscribed before, declared in terms that the association should not commence until January 1st, 1839, and that the subscribers, the defendant and others, had assented according to the statute. All that the case decided was that in legal effect the contract of the defendant was made on the 1st of January. In the *Hamilton and Dansville Plank-road Co.* v. *Rice*, a controlling feature of the decision was, that the defendant, though subscribing before, after the organization of the company had received from the plaintifis and accepted a certificate of stock. The Tibbits case was decided at the Albany general term in 1854.

In *Poughkeepsie and Salt Point Plank Road Co.* (21 Barb., 454, Dutchess general term, 1856), the Tibbits case was doubted and disapproved of. (Compare the *Buffalo and N. Y. City R. R. Co.* v. *Dudley*, 14 N. Y., 336, and the *Eastern Plank R. Co.* v. *Vaughan*, 14 N. Y., 546.) From the *Ponghkeepsie, etc., Plank-road*

case it seems that the plan of organizing a plank-road differs by statute from that of a railroad corporation inasmuch as the plank road act provides that when the stock shall be subscribed and the per centage paid then the subscribers may elect the directors and *thereupon* they shall subscribe the articles of association. The Poughkeepsie case was however reversed in 24 N. Y., 150, the Court of Appeals there saying that in the Tibbits case the Supreme Court sitting in the third district held, after great consideration, that the preliminary subscription under that act did not entitle him to the stock or bind him to the payment of the price. The court further said it could not see how it was possible that one who has stopped short before signing the articles can be a corporator or be entitled to any stock. It was looked upon as preliminary and inchoate and of no legal significancy except to bring the parties who were to act together on the formation of the company in correspondence with each other. (See also *T. and B. R. R. Co.* v. *Warren*, 18 Barb., 310.) The general railroad act explicitly defines who are corporators or stockholders. The only mode provided by statute for becoming a corporator and stockholder in a railroad company is originally subscribing the articles of association or after the company is incorporated by the filing of the articles, by subscribing to the capical stock in the books opened by the directors. (*T. and B. R. R. Co.* v. *Tibbits, supra.*) Those who subscribe to the capital stock of the company in the books opened to receive such subscriptions become stockholders in the company to the same extent as those who have subscribed to the articles of association. (*Idem. Erie and N. Y. City R. R. Co.* v. *Owen*, 32 Barb., 616; *Ogdensburgh R. R. Co.* v. *Fort*, 21 Barb., 541.)

Liability attached to those only who were stockholders when debt was contracted.

The test of liability is, whether the stockholder was such *at the time the debt was contracted.* (*Moss* v. *Oakley*, 2 Hill, 265; *Judson* v. *Rossie Galena Co.*, 9 Paige, 598; *Tracy* v. *Yeates*, 18 Barb. 152; *Adderly* v. *Storm*, 6 Hill, 624; *Harger* v. *McCullough*, 2 Denio, 119; *Freeland* v. *McCullough*, 1 id., 414; *McCullough* v. *Moss*, 5 id., 567.) The case of *Roveselt* v. *Brown*, 11 N. Y., 151, was governed by a statute which provided that "for all debts which shall be owing by the company at the time of its dissolution the persons *then composing* such company shall be individually responsible to the extent of their respective shares of stock in said company." This, of course, exacted a different rule from that in *Moss* v. *Oakley*. The reader should also be careful to note that, although in *McCullough* v. *Moss*, 5 Denio, 567, the court for the correction of errors reversed the court below (5 Hill, 137), yet there was another question involved in the case, on which it probably turned, and that four senators, Lott, Van Schoonhoven, Barlow and Talcott, were of opinion that liability attached only to those who were shareholders at the time the debt was contracted, while Senator Putnam alone is reported to have expressed a contrary opinion. The fifth and sixth paragraphs of the reporter's head-note are, therefore, essentially erroneous; and this, probably, led Judge Wagner, in *McClaren* v. *Franciscus*, 43 Mo., 464, into the erroneous statement that the New York Court for the Correction of Errors had disapproved the doctrine of the Supreme Court that liability attached only to those who were members when the debt was contracted (Note to § 94, Thompson on Liability of Stockholders.)

The following is from the opinion of Bronson, J., in *Moss* v. *Oakley*, 2 Hill, 268. "I do not intend, however, to lay much stress upon the particular wording of the section, for it must be admitted that the statute may be so construed,

without doing any violence to the language, as to make it apply to those persons who are stockholders at the time the suit is commenced. But if we look at the nature of the case and the general scope of the act, it will go far to confirm that interpretation which fixes the personal liability upon those who were stockholders at the time the debt was contracted. Certain persons who are about to engage in the hazardous business of mining apply to the Legislature for an act of incorporation; and the response is, We will give you and your associates a corporate capacity, for the purpose of facilitating the transaction of business, but it must be without the usual exemption of the stockholders from personal liability for the debts of the company. If the corporation in whose name the business will be transacted contract debts, you must be personally liable for the payment of those debts, in the same manner as though you had gone on with the business as a voluntary association or partnership. And as there may be a great number of associates, and creditors may be embarrassed in bringing their actions, we will make the case, in one respect, more onerous than a common partnership, by allowing the creditor to sue any one, as well as all, of the stockholders—'the stockholders shall be jointly and *severally* personally liable.' Upon this construction, the statute will, I think, best answer the end which the Legislature had in view. In *Allen* v. *Sewall*, 2 Wend., 327, the words of the statute were that 'the members of the company shall be liable individually;' and Savage, C. J., said: 'It was the intention of the Legislature to put the defendants [stockholders] upon the same footing, as to liability, *as if they had not been incorporated. Individual* liability, in the act, must be understood in contradistinction to *corporate* liability; and the defendant must therefore be held responsible *to the same extent*, and in the same manner, *as if there was no act of incorporation.*' Judgment was rendered in accordance with the opinion of the chief justice, and although that judgment was afterwards reversed (6 Wend., 335), it was upon a ground which did not touch the doctrine we have been considering. If the stockholders may be charged as partners, or, what is the same thing, as though there was no act of incorporation, it follows, of course, that those, and those only, are liable who were members of the company at the time the debt was contracted. The construction which charges them is the one best calculated to render exact justice to both parties. A man who purchases stock and comes into a corporation after it has been engaged in business, may often be deceived in relation to the numbers and magnitude of its debts. But while he is a stockholder he can know something about the extent of the obligation contracted by the company, and is not wholly without the means of exerting an influence over those who manage its concerns. And as to those who may deal with the corporation, they bestow their labor or part with their property on the credit of those who are known to be stockholders; and it may be ruinous to the creditor to turn him over to a remedy against persons with whom he did not deal, and who have come into the corporation at a subsequent period. It is true that a member who makes a fraudulent transfer of his shares, for the purpose of avoiding his liability, may still be treated as a stockholder. (*Marcy* v. *Clark*, 17 Mass., 330. But the burden of showing the fraud lies on the creditor; and he will find that no easy task at the present day, when all our sympathies are expended upon the debtor and those who kindly aid him to live above the law. And, besides, shares may be transferred, without fraud, to persons who are much less able to respond to creditors than were those who owned the stock at the time the debt was contracted." (See, also,

Judson v. *Rossie Galena Co.*, 9 Paige, 598; *Young* v. *New York and Liverpool Steamship Co.*, 15 Abb. Pr., 69; *Tracy* v. *Yates*, 18 Barb., 152.)

Whether suit against stockholder is upon judgment or original demand.

In New York, where the rule is that the liability of a stockholder is in a qualified sense that of a partner, it has been held that, although the statute requires that a judgment shall have been obtained against the company before an action can be prosecuted against a stockholder, yet the action against the stockholder is on the original demand, and not on the judgment. The uniform practice in that State seems to have conformed to this view, and under the recent rulings in that State that the judgment is not even *prima facie* evidence of the existence of a debt of the corporation, this is necessarily so. (Thompson on the Liability of Stockholders, § 336, citing *Bailey* v. *Bancker*, 3 Hill, 188; *Moss* v. *McCullough*, 5 id., 131; *Moss* v. *Averell*, 10 N. Y., 449; *Belmont* v. *Coleman*, 21 id., 93; *Conant* v. *Van Schaick*, 24 Barb., 87.) Where the charter of an incorporated company provides that the stockholders shall be liable for its debts, and that a creditor may, after judgment obtained against the corporation, and execution returned unsatisfied, sue any stockholder and recover any demand, such stockholders are liable, in an original and primary sense, like partners or members of an incorporated association. Their liability is not *created* by the statute of incorporation. (*Ct. of Appeals*, 1847, *Corning* v. *McCullough*, 1 N. Y. [1 Comst.], 47; overruling *Freeland* v. *McCullough*, 1 Den., 414; see, also, *Worrall* v. *Judson*, 5 Barb., 210; *Abbott* v. *Aspinwall*, 26 id., 202.)

Remedies against company to be first exhausted.

A provision in an act of incorporation first to obtain judgment against the corporation for the demand and to cause execution to be issued thereon, which has to be returned unsatisfied in whole or in part before the creditor commenced a suit therefor against the stockholder upon his personal liability, does not affect the right of the creditor to the personal liability of the stockholder for his debt, nor the obligation of the stockholder to pay the same; nor does it prevent the liability of the stockholder from attaching and becoming perfect on the consummation of the contract of the creditor with the corporation. It simply defers the remedy by action upon that responsibility until the remedy at law against the corporation shall be exhausted. The intention of it is to secure the stockholder from an immediate recourse to him upon his personal liability. When the corporation may be solvent and able to pay the debt and the creditor may have an effectual remedy against the corporate body for his demand, the personal liability of the stockholder for the payment of the debt is immediate and absolute the moment the debt is consummated or incurred by the company, but the recourse of the creditor by suit to the stockholder upon his personal liability is deferred until he shall have first exhausted his remedy at law against the corporation; so held upon the construction of the charter of an incorporated company which contained a similar provision, prior to the passage of the general railroad acts. (*Corning & Horner* v. *McCollough*, 1 N. Y., 47; overruling *Freeland* v. *McCollough*, 1 Den., 414; see also *Worrall* v. *Judson*, 5 Barb., 210, and *Abbott* v. *Aspinwall*, 26 id., 202.)

The text of the general railroad act and its amendments expressly declare that the stockholders of companies formed under that act shall not be made liable in an action against them as such stockholders until the creditor has first exhausted his remedy by judgment and return of execution unsatisfied against the corpo-

ration. Many of the railroad corporations which have been created by special enactment of the Legislature contain a similar provision, either by express language or by necessary implication. In some of the general acts for the creation of corporations other than railroad companies the stockholders are made absolutely liable without any proceedings being first taken against the company, and the provisions of the acts for the incorporation of certain other corporations fail to contain a clause expressly exempting stockholders from liability until a judgment has been first obtained against the company and execution thereon returned unsatisfied. Under the construction of the latter class of acts it has been held that action would not lie against the stockholder until the creditor has first exhausted his remedy against the company. (See *Lindsley* v. *Simmonds*, 2 Abb. Pr. N. S., 69.)

Under the former statutes of Great Britain and under the statutory schemes of nearly all the States, it is made a condition precedent to the right of a creditor to proceed against a stockholder that he must first have exhausted his remedy against the company. This rule is applied even under those statutes where the liability of the stockholder is primary, like that of an original contractor or partner. Here, although under many statutes it is tolerated to have an execution against a stockholder upon a judgment against the corporation, yet no instance has been found where this has been allowed without a previous return of *nulla bona* as to the corporation, or other equivalent evidence of corporate insolvency. The doctrine of these cases is something like this: although here is a partnership, a creditor must first exhaust the partnership funds, or proceed till he finds none, before he can attach the separate property of the several members. (Thompson on Liability of Stockholders, § 312; see *Perkins* v. *Church*, 31 Barb., 84, a case which Mr. Thompson says ought never to have been reported.) The statute is complied with when one execution has been issued. It is enough that a fair and reasonable effort has been made to collect the judgment by execution. (*Maher* v. *Carmen*, 38 N. Y., 25.)

Whether judgment against the corporation is conclusive against stockholder.

In 21 N. Y., 90 (*Belmont* v. *Coleman*), the question was discussed whether a judgment recovered against a corporation was any evidence of its indebtedness in an action against a stockholder to enforce his individual liability. In *Moss* v. *McCullough*, 7 Barb., 279; *Moss* v. *Oakley*, 2 Hill, 265, and *Moss* v. *McCullough*, 5 id., 131, this question had already arisen; and in the latter case it was expressly held that the original indebtedness of the company must be strictly proved, and that the judgment recovered against the corporation was not conclusive nor even *prima facie* evidence of the validity of the debt. In *Belmont* v. *Coleman*, Bacon, J., said an opportunity was fairly presented to reaffirm the law as declared nearly forty years ago by the highest legal tribunal in the State, and which remained unquestioned for over twenty years, or now to declare the rule henceforth to be that a judgment, recovered in any manner against a corporation, is not, in the least degree, evidence of any indebtedness against the corporation; and the court, in the last mentioned case, adhered to the original rule which, it stated, stood upon the highest authority, and could be fairly vindicated upon principle, and accordingly held that all that was necessary for the creditor to do was to prove the existence of the debt, that judgment had been obtained and execution issued and returned as the statute requires. (See *Slee* v. *Bloom*, 20 John., 669; 5 Denio, 567; 7 Barb., 279; *Moss* v. *Averill*, 6 Seld., 449; 9 How. Pr., 436.

The law upon this question is still in an unsatisfactory state. A decision on the subject, pronounced by the Commission of Appeals (*McMahon* v. *Macy*, 51 N. Y., 155–162), presents a conflict of opinion among the members of the commission, four of them holding that, in an action to charge stockholders for the debts of the corporation, a judgment against the corporation is neither conclusive nor *prima facie* evidence of the existence of the debt against the company, and three of them dissenting. Contemporaneously with this decision of the Commission of Appeals, the Court of Appeals held that in an action to charge the trustees of a manufacturing corporation under a statute with a debt of the corporation, for failing to file and publish an annual report, proof of the recovery of a judgment against the corporation for the debt was neither conclusive nor *prima facie* evidence of its validity. (*Miller* v. *White*, 50 N. Y., 137.) See authorities on this question collected and discussed by Gray, J., in *McMahon* v. *Macy*, *supra*.

In *McMahon* v. *Macy*, 51 N. Y., 155, Commissioner Gray in a dissenting opinion gives a history of the conflict in the decisions upon this question. He says: "Whether a judgment against a company is, in a separate action against a stockholder for the recovery of the same debt, evidence of the debt sued upon, presents a question which has been much litigated in this State, and yet never decided in any of its courts of last resort. As early as 1822, Spencer, C. J., as a member of the court for the correction of errors, without alluding to the fact that the liability of stockholders, when sued separately, was remote, and dependent upon the contingency of the ability of the creditor to collect his debt by execution against the company, or the relation of the stockholder, when thus sued, to the company, *held*, that as the debt against the company was also a debt against the stockholder individually, and because the company itself was concluded by the judgment, the stockholder, when sued alone, was equally concluded. (*Slee* v. *Bloom*, 20 Johns., 669, 684. This opinion was afterwards rererred to with apparent approbation in *Moss* v. *Oakley*, 2 Hill, 265, 267, the decision of the question not being regarded as necessary to the decision of the cases to which I have referred, but simply as the individual expression of a single judge in each case, was again presented in *Moss* v. *McCullough*, 5 Hill, 131, in which, after a full review of all the cases, and a discussion of the principle involved by Justices Cowen and Bronson, the court held, Nelson, J., concurring, that a judgment against the company was not, as against a stockholder when sued separately for the same debt, even *prima facie* evidence of the debt sued upon. The case went back and was re-tried, and, upon the same facts appearing, the plaintiff was nonsuited. Then, after the change wrought in our judicial system by the Constitution of 1846, the same case was brought before the general term of the fourth judicial district, where a motion for a new trial prevailed, the court holding, among other things, that the judgment against the company was, in a separate action against stockholders, *prima facie* evidence of the debt sued upon. (7 Barb., 279, 296.) Whether a new trial was had, or what was the ultimate disposition of the case, does not appear from the reports. The question, continuing to be unsettled, came up in the Court of Appeals in March, 1860. (*Belmont* v. *Coleman*, 21 N. Y., 96.) So far as appears from the report of that case, seven only of the eight judges, of which it was then composed, were present. Other questions were involved. Bacon, J., who delivered the opinion of the court, held that the judgment against the company was, in a suit against a stockholder for the same debt, *prima facie* evi-

dence of the debt; in this view two of his associates concurred, and four 'refused to commit themselves to the doctrine that a judgment against the corporation was even *prima facie* evidence against a stockholder' (*Id.*, 102), and the case was disposed of upon other grounds. In July, 1861, the question was again presented to the Supreme Court, of which Justice Bacon was at the time the presiding justice, and it was then, by the unanimous judgment of the court, held that a judgment against the company was not even *prima facie* evidence in a suit against a stockholder for the recovery of the same debt (*Strong* v *Wheaton*, 38 Barb., 616, 621.) If, therefore, the defendant is not sustained by the weight of authority, he is certainly not so prejudiced by adjudged cases as to prevent the question presented from being considered as if it was now presented for the first time. In cases where, as the plaintiff in this case assumes it to be indispensable to his right to recover against a stockholder that he should first recover judgment against the company for the same debt, after establishing the organization of the company, and that the defendant is a stockholder, three other things must be established by him, viz.: the existence of the debt, the recovery of the judgment, and the issuing and return of execution unsatisfied. The failure of either would defeat the action. Neither of these facts are by statute made evidence of the existence of either of the other facts. In order, therefore, to determine whether, at common law, the judgment against the company was evidence as against the defendant, a stockholder, in this separate action against him for the same debt, it becomes necessary to ascertain the relation which the stockholder, when thus separately sued, bears to the company. The right of the plaintiff and the liability of the defendant, when separately sued, is, in brief, this: if his debt against the company could have been collected by execution upon his judgment, the defendants are not liable; but if it could not, they are. To get more clearly at the relation between the company and its stockholders, let us carry out a case suggested by Cowen, J., in *Moss* v. *McCullough*, and suppose the statute to be silent on the subject of the individual liability of the stockholders, and, instead of a liability thus created, it had been created by contract, commencing with a recital. 'That whereas the defendant is a stockholder in the company, and desirous of giving it credit; and in consideration thereof, and that the plaintiff will render services and furnish materials for the use of the company, he agreed that, in case of the failure of the plaintiff to collect of the company the sum for which he should give it credit, by judgment and execution, he would, in that event, pay the debt or any deficiency that should remain, after the return of execution, to the amount of the stock held by him in the company,' it would amount to the same thing. The fact that one liability is created by statute and the other by contract is quite immaterial; both being subject to the same rules of interpretation, leave the parties bearing the same relation to each other as they would if both had been created by contract; and that relation is manifestly that of a mere guarantor that the debt is collectable of the company. Holding that relation, the judgment against the company was not even *prima facie* evidence in this separate suit against the defendant. (*Jackson* v. *Griswold*, 4 Hill, 522, 529, 530.) The only purpose for which the judgment could be used as evidence would be, after the existence of the debt had been established, to prove that it had been prosecuted to judgment against the company as one step requisite to establish the defendant's liability. If the judgment is even *prima facie* evidence, not having been made so by statute, I am unable to understand why it is not, like a judgment in any other case, conclusive. But assume it to be

prima facie evidence of what it contains, leaving the defendant to show that the plaintiff was not in law entitled to such recovery, the judgment itself, as stated in the report of the referee, being for an inseparable part of its amount for labor and services, not performed by the plaintiff himself, furnished, as the Court of Appeals have held (*Atcherson* v. *Troy, etc., R. R. Co.*, 6 Abb. Pr. [N. S.], 329; S. C., 1 Abb. App. Dec., 13), a valid objection to the recovery, had the defendant had his day in court to make it, and hence the judgment should be reversed." (*McMahon* v. *Macy*, 51 N. Y., 155, 162.)

In *Stephens* v. *Fox*, 83 N. Y., 313, which was an action against a stockholder of a railroad corporation by a creditor thereof under the provisions of the general railroad act (sec. 10, chap. 149, Laws of 1850, as amended by chap. 282, Laws of 1854), it was held that the record of a judgment against the corporation is competent evidence of plaintiff's *status* as a creditor and of the amount due. The cases of *Miller* v. *White* (50 N. Y., 137) and *McMahon* v. *Macy* (51 id., 155), were distinguished; and Rapello, J., in delivering the opinion of the court in *Stephens* v. *Fox*, said that the statute simply conferred upon the creditor of the corporation the right to pursue, for the satisfaction of his claim, the indebtedness of the stockholder to the corporation for his unpaid subscription to the capital stock (citing *Mills* v. *Stewart*, 41 N. Y., 389). That the liability of the stockholder was not created or enlarged by the statute, and that the creditor was simply subrogated to the claim of the corporation against its debtor, and that the judgment against the corporation was the highest evidence against it. The cases of *Miller* v. *White* and *McMahon* v. *Macy* were said to depend upon an entirely different principle; that in those cases the defendant was not pursued as a debtor to the corporation, or for any pre-existing liability of his own, but upon an original liability credited by statute, and it was not in the power of the corporation to admit away his case, or suffer a recovery which should be binding upon him, and create, as against him, a liability to which he was not previously subject. (See *Hastings* v. *Drew*, 76 N. Y., 9.) as sustaining the case of *Stephens* v. *Fox*, *supra*, and in the Hastings case, it was said the Miller and McMahon cases were brought to enforce a liability under a statute penal in its nature, and that the rule there laid down did not apply.

Creditor, when laborer or servant, to offer proof beyond the judgment against the company.

Whatever the law may be in this respect so far as a general creditor of the corporation is concerned, it seems that a creditor, who is a laborer or servant, seeking to render the stockholder liable should offer proof of the original indebtedness of the company to him thus: the responsibility of the stockholder of a railroad company for the debts of the company under the tenth section of the general railroad act of 1850 was an original responsibility and was that of general partners. Like the responsibility of partners, it entered into the essence of every credit given to the company and was a part of the contract by which the debt was incurred. And the credit was given and the creditor trusted as well to the personal liability of the stockholder as to the responsibility of the corporation. But it was the intention of the Legislature, by the 16th section of the act of 1854, amending the act of 1850, to repeal the provisions of the 10th section of the act amended; and as respects debts contracted since the passage of the amendment the stockholders are *corporators* merely and not *partners*; and as to all such debts an action cannot be maintained against them by a creditor after the return of an execution issued against the company unsatisfied to render

them personally liable. In an action by a judgment creditor of a railroad company against stockholders to enforce their personal liability the mere proof that a judgment has been obtained by the plaintiff against the company and an execution returned unsatisfied is not enough. The plaintiff must prove that the debt for which the judgment was recovered was one of the sort named in the statute, and when this is done the amount due on the execution is the rule of damages. (*Conant* v. *Van Schaick*, 24 Barb., 87; see *Story* v. *Wheaton*, 38 id., 616; *Story* v. *Furman*, 25 N. Y., 223.) The complaint in such an action against the stockholder must allege specifically that the plaintiff or his assignor, was a servant or laborer of the company, and that the claim accrued to him in that capacity. A demurrer to the complaint will be sustained where it is merely set forth that the plaintiff performed work and labor for the company (*Boutwell* v. *Townsend*, 37 Barb., 205), since no cause of action is established unless the party seeking to recover brings his case clearly within the statute. (*Coffin* v. *Reynolds*, *supra.*)

Where the stockholder is liable only for a particular class of debts.

If the stockholder is made liable only for a particular class of debts, or only for debts due to a particular class of persons, then it is necessary, under either of the foregoing rules, to go behind the judgment so far as to prove that the debt then recovered upon belonged to the class embraced in the state. It has been so held under a class embraced in the statute. It has been so held under a statute making the stockholders of a railway company jointly and severally liable for moneys due by the corporation to their servants for their wages. So, where the statute made the stockholder liable for all debts except loans, the stockholder could, after judgment against the company, contest his liability, on the ground that the debt recovered upon was for money loaned. So, where the stockholder is liable only for debts of the corporation contracted at a given period, and the record of the judgment against the corporation does not show at what period the debt therein recovered upon was contracted, evidence *aliunde* is necessary to fix such date; and without such evidence the judgment is not effective to charge a stockholder. (Thompson on Liability of Stockholders, § 334.)

Judgment creditor restrained from prosecuting action after the appointment of a receiver.

Where final judgment for a sum of money has been rendered against a corporation created by or under the laws of the State, and an execution issued thereon to the sheriff of the county where the corporation transacts its general business or where its principal office is located has been returned wholly or partly unsatisfied the judgment creditor may maintain an action to procure a judgment sequestrating the property of the corporation and providing for a distribution thereof as prescribed in section 1793 of the Code of Civil Procedure. (Code of Civil Procedure, § 1784.) And a judgment creditor of the corporation will be restrained from prosecuting an action against a stockholder commenced by him after the granting of an order of sequestration and the appointment of a receiver of an insolvent railroad corporation in an action brought in behalf of all of its creditors and before the appointment of a receiver over it was perfected. (*Rankins, Receiver*, v. *Elliott*, 16 N. Y., 377.) It is evident that the stockholders are not liable both to the receiver and also to the creditors of the corporation for the amount unpaid on the stock or at least that a recovery in favor of each cannot be had. (*Idem.*)

Although a creditor may maintain in his own name a suit to enforce the liability of stockholders in respect of their unpaid subscriptions, yet, if a receiver has been appointed, suit should be prosecuted in his name, unless some sufficient excuse is given why it is not; for, he standing in the place of the directors, the duty devolves upon him of calling in the unpaid subscriptions for the benefit of creditors. (Thompson on Liability of Stockholders, § 340, citing *Rankins* v. *Elliott, supra; contra, Mann* v. *Pentz*, 3 N. Y., 415; see *Nothen* v. *Whitlock*, 9 Paige, 152.)

Jointly and severally liable.

A charter which made the stockholders "jointly and severally personally liable for all debts or demands contracted by the said corporation," but which also provided that "they cannot be sued until a judgment has been recovered against the corporation, and an execution has been returned unsatisfied," has been held to attach to the stockholders, as between themselves, the character of partners, and to leave them, in their relations to the creditors of the company, upon the same footing as though they were an unincorporated association or partnership. In one respect, say the court, this charter imposes on the stockholders a burden more onerous than though they had gone on without a charter; it makes them *severally* as well as jointly liable; but, on the other hand, while they are answerable to the creditors as principal debtors, the creditor has no remedy against them until he has first exhausted his remedy against the corporation. (*Harger* v. *McCullough*, 2 Denio, 119; *Corning* v. *McCullough*, 1 N. Y., 47; *Moss* v. *Averell*, 10 id., 459; *Moss* v. *Oakley*, 2 Hill, 265.) Section 10 of the general railroad act of New York, adopted in 1850, provided that "all the the stockholders of every such company shall be jointly and severally liable for all the debts due or owing to any of its laborers and servants for services performed for such corporation; but shall not be liable to an action therefor before an execution shall be returned unsatisfied, in whole or in part, against the corporation; and then the amount due on such execution shall be the amount recoverable, with costs, against such stockholders." It was held, on the authority of *Corning* v. *McCullough*, 1 N. Y., 47, that the purpose of this proviso was to leave the corporators liable as partners at common law. (*Conant* v. *Van Schaick*, 24 Barb., 87.)

Priority of creditor first suing stockholder.

By analogy to the rule which has been declared in case of a creditor's bill, where separate actions are tolerated, the creditor of a corporation first suing a stockholder in respect of his individual liability acquires by the bringing of suit a preference over other creditors, which neither they nor the stockholders can defeat, unless possibly by bringing a general winding-up bill. Such a suit may be said to be an equitable attachment of the stockholder's liability, to the extent of the plaintiff creditor's claim. It follows that the stockholder cannot, after notice of such a suit, defeat the suing creditor by paying the claims of other creditors so far as to exhaust his liability. If such a power existed, the stockholder could use it as a weapon to defeat creditors altogether. (Thompson on Liability of Stockholders, § 424.)

Contribution.

A stockholder who has been compelled to pay the debt of his corporation, may have an action for contribution against the remaining stockholders, who were originally liable with him for the same (*Aspinwall* v. *Torrance*, 1 Lans.,

381; see *Stover* v. *Flack*, 30 N. Y., 64); and where one is not only a stockholder, but also a judgment creditor of the company, to an amount exceeding his liability as such stockholder, he may bring an action against the company, its stockholders and creditors, to fix their respective rights and liabilities, and that his judgment may be set off against his liability. The complaint in such action should set forth the times when different stockholders acquired their stock; the times when the demands of the creditors who are made parties accrued, and the fact that during the times last mentioned the plaintiff was a stockholder. *Geery* v. *N. Y. and Liverpool, etc., Steamship Co.*, 12 Abb. Pr., 268; see *Young* v. *N. Y., etc.*, 15 Abb., 69.)

The case of *Aspinwall* v. *Torrance, supra*, holds that the stockholders who were such *at the time of contracting the debt*, are bound to contribute proportionally to the amount of their stock. (See, also, *Young* v. *Liverpool and U. S. Mail Steamship Co.*, 15 Abb., 69; *Slee* v. *Bloom*, 19 Johns., 456; *Briggs* v. *Penniman*, 8 Cow., 387.) That stockholders are entitled to contribution as between themselves. (*Judson* v. *Rossie Galena Co.*, 9 Paige, 598.)

Costs of judgment against corporation recovered from stockholders.

In *Bailey* v. *Boucher*, 3 Hill, 188, it was held that the action against the stockholders was based on the original demand and not on the judgment, so that the creditor could not recover from the stockholder the costs against the company; but in *Wetherhead* v. *Allen*, 28 Barb., 661, the case of *Baily* v. *Boucher* was limited to the special statute in that case, and it was held that the costs of putting the debt into a judgment may be recovered of the stockholder in addition to the original debt. If a stockholder is severally liable to pay the debts of the corporation to a certain amount, say $10,000, and a creditor has proceeded against him and obtained a judgment for this amount, can he oblige him to pay the costs of the proceeding? It has been held that he can; and the ruling is put on the plain ground that it was the duty of the stockholder to discharge himself of the amount for which he was liable, by paying it to the creditor, without putting him to the expense of a suit. (Thompson on Liability of Stockholders, § 375.)

Defenses by stockholders.

A defect in the proceedings to organize a corporation is no defense to a stockholder sued to enforce his individual liability, who has participated in its acts of user as a corporation *de facto*, and appeared as a shareholder upon its books when the debt was contracted. (*Eaton* v. *Aspinwall*, 19 N. Y., 119.) The stockholder is liable for the debts of the company to the nominal amount of the stock subscribed by him, although he has not paid any part of his subscription, or done any act whatever as a shareholder of the company. (*Spear* v. *Crawford*, 14 Wend., 20.) He cannot allege an illegality in the acts of the company in bar of a recovery against himself (*Id.*), but he may plead that the plaintiff was also a shareholder. (*Wait* v. *Ferguson*, 14 Abb. Pr., 379.) In the last cited case it was said that in an action by a creditor of a corporation, to recover the amount of his debt from stockholders under a statute provision making the stockholders jointly and severally liable for the debts of the corporation until the cash capital is paid in, it is a good defense that such creditor himself, at the time of acquiring his demand against the corporation, was a stockholder therein. Under such a statute, the personal liability of members is to be regarded as that of partners until complete compliance with the statute; and subject, upon prosecuting each other, to all the provisions of law attach-

ing to that relation; one of those rules being that one member of a partnership cannot maintain an action against his copartners for a debt due from all. (Story on Part., §§ 220, 221; *N. Y. Com. Pl., Sp. T.*, 1862, *Wait* v. *Ferguson*, 14 Abb. Pr., 379.)

Payment.

The liability of a stockholder, though sometimes joint and several, like that of a partner, is, in general, several, and not joint. And, although in most of the statutes, and in the loose language of the judicial decisions, the limited statutory liability of the stockholder is said to be joint and several, yet it is clear that this means that the liability is joint only in the sense that several may be proceeded against at once, and that if any one is, in any event, compelled to pay more than his share, he may have contribution from the others. Accurately speaking, this liability is several, whether it consists of unpaid instalments due upon stock held, or whether it be the superadded liability created by statute. In either case, the amount for which each stockholder is liable depends upon the amount of stock held by him; and, although for convenience of litigation all or many are joined in one proceeding, the liability of each is separately ascertained, and a *several* judgment or decree is rendered against each. Each stockholder, then, unless his position is that of a mere partner under some exceptional statute or charter, is liable to pay, towards liquidating the debts of the company, a given amount, and no more. If he has paid this amount to a creditor or creditors entitled to call upon him to make such payment, his liability is at an end, and he may successfully plead such a payment when proceeded against by any other shareholder. But he must be careful not to make payment to one creditor where another has a prior right to, or lien upon, the sum which he is liable to pay. Such a payment will be deemed to have been made in his own wrong, and he will be compelled, notwithstanding it, to make payment to the creditor having the prior right. (Thompson on Liability of Stockholders, § 380; citing *Ganison* v. *Howe*, 17 N. Y., 458.)

Set-off, in case of individual liability.

But while a stockholder may discharge himself, by paying to a creditor entitled to claim it the amount for which he is individually liable in excess of his liability for calls, he cannot do so by paying this amount *to the corporation*. Nor can he, in a proceeding against him by or on behalf of a creditor or creditors, set off a debt due to him by the corporation. (*Matter of Empire City Bank*, 18 N. Y., 199–227; *Lawrence* v. *Nelson*, 21 N. Y., 158.) The same rule obtains, denying the right of set-off, where the liability of the stockholder is for a percentage unpaid on account of his stock, and where the company is insolvent. (Thompson on Liability of Stockholders, § 382.)

Whether voluntary payment of corporate debts a defense.

Unless there is a statute providing otherwise, there is some authority for stating that a *voluntary* payment of corporate debts cannot be successfully pleaded by a stockholder when afterwards sought to be charged with liability by a creditor of the corporation. (*Idem*, § 391.)

Prior judgment.

If a judgment has already been rendered against a stockholder, in a suit brought by or on behalf of a creditor or creditors, to the extent of his liability, he may plead such judgment as a defense to a subsequent action brought to charge him in respect of the same liability. (*Woodruff & Beach Iron Works* v. *Chittenden*, 4 Bosw., 406.)

Defense of ultra vires.

To consider how far a shareholder, when proceeded against by a creditor of the corporation, can defend by showing a want of power on the part of the corporation or its agents to contract the particular debt, would involve questions outside of the scope of this essay. If the defense is simply that the contracting of the debt was *ultra vires* the agent of the company, then the case does not present so much difficulty; for, unless the stockholders in general meeting have promptly disaffirmed, and unless the benefits received under the *ultra vires* contract have been tendered back, then, upon well-settled principles obtaining in the law of agency, a *ratification* will be presumed. But if the contract was *ultra vires* the corporation itself—if the act done was one which the whole body of stockholders, voting unanimously in general meeting, were incompetent to do, because beyond their granted powers or prohibited to them by positive law—then the grounds on which a court will deny its aid in enforcing it are plain. But the tendency manifestly is to hold corporations and their members estopped from urging defenses of this kind. (Thompson on Liability of Stockholders, § 405, citing *Moss* v. *Averill*, 10 N. Y., 449; *Frost* v. *Saratoga Mutual Ins. Co.*, 5 Denio, 154.) However, whenever the suit to charge the stockholders is upon the original contract with the corporation this defense has sometimes been set up. (*Vide Moss* v. *Averill, supra.*)

Defense of unappropriated or misappropriated assets.

If the corporation has other assets capable of being called in, sufficient to satisfy all its creditors, it is a fair inference that its shareholders ought not to be charged with its debts, whether in respect of unpaid stock or of a superadded statutory liability. In other words, the liability of the shareholder being secondary, he cannot be proceeded against while the creditor has an adequate remedy against the corporation. But where a stockholder, proceeded against at law, sets up such a defense, he must, in his plea, point out specifically the property of the corporation which remains available for the satisfaction of creditors. A plea that the plaintiff was not entitled to his action at the time it was brought, because the bank was not at the time insolvent, but had property and assets which had not been exhausted, has been held bad for uncertainty. (Thompson on the Liability of Stockholders, § 401.)

Defense of violation of corporate duty.

A stockholder cannot, in general, allege illegality in the acts of the corporation of which he is a member, as a bar to a recovery when sued by a creditor. (*Idem*, § 404.) Defendant subscribed for stock in a railroad company, organized in 1849, with a capital of $1,500,000. Under the general act of 1851 the articles of association were amended, and the capital reduced to $325,000; one terminus was changed so as to shorten the road nearly one-half of the original distance; and the company then transferred a part of the road and leased the rest to another corporation during the continuance of their charter. *Held*, that these facts did not exonerate the defendant from his subscription. (*Supreme Ct.*, 1854, *Troy and Rutland R. R. Co.* v. *Kerr*, 17 Barb., 581.)

Rights and liabilties of stockholders.

That an action may be sustained by a stockholder to enjoin the payment of a dividend when the directors are about to misapply the funds of the corporation in paying such dividend, there being in fact no money earned for such purpose. (See *Carpenter* v. *N. Y. N. H. R. R. Co.*, 5 Abb. Pr. R., 277.) And after a

dividend has been declared the right of each stockholder in the dividend payable to him as separate and independent of that coming to other stockholders, and he cannot file a bill in behalf of such others to restrain the payment of the dividend. (*Idem.*) That a stockholder can only claim the intervention of the court to protect the corporate property from the acts of the corporate officers in cases where it is threatened with waste or misapplication. (*Idem.*)

That no stockholder can compel the company to declare and pay a dividend from funds on hand. (*Kames* v. *Rochester, etc., R. R. Co.*, 4 Abb. Pr. N. S., 107.) A stockholder may maintain an injunction to restrain the company from paying a dividend declared by the directors, on the ground that among the persons who are designated as stockholders in the company there are persons holding fraudulent and spurious stock. (*Underwood* v. *N. Y. and N. H. R. R. Co.*, 17 How. Pr., 537.) Where the company has power to increase its capital, the stockholders cannot enjoin the directors from issuing new stock in lieu of a dividend. (*Howell* v. *Chicago, etc., R. Co.*, 51 Barb., 378.) Whatever may be the form or language of a subscription to the stock of an incorporated company, every person who in any manner becomes a subscriber for or engages to take any portion of the stock of such company, thereby assumes to pay for the same according to the conditions of the charter. An express promise to pay, in terms, is not necessary. (14 Wend., 20; 12 Conn., 500; 5 Hill, 383; 10 Barb., 260.) (*Ct. of Appeals*, 1857, *Rens. and Wash'n Plank-road Co.* v. *Barton*, 16 N. Y. [2 Smith], 457, note; and see *Buf. and N. Y. City R. R. Co.* v. *Dudley*, 14 N. Y. [4 Kern.], 336.)

The stockholder on the books at the time a dividend is declared is entitled to his share thereof. (*Jones* v. *Terre Haute and R. R R. Co.*, 17 How. Pr., 529; see also *Currie* v. *White*, 37 How. Pr., 330; reversed, on other grounds, 45 N. Y., 822.) The board of directors, in making a dividend, cannot limit it to persons holding stock at any given time, to the exclusion of others who subsequently acquire stock. (*Jones* v. *Terre Haute and R. R. R. Co., supra.*) Stock standing in the name of a fictitious person is liable for the debt of the true owner. (*Stebbins* v. *Phœnix Fire Ins. Co.*, 3 Paige, 350.) They are not parties to the action, or persons for whose immediate benefit the action is prosecuted, within the meaning of § 829 of the Code of Civil Procedure, excusing parties from testifying. (*Montgomery Co. Bank* v. *Marsh*, 7 N. Y., 485, and cases there cited.)

A corporation expired by its own limitation, and a new corporation, of the same name, was formed by the stockholders of the old one, or a part of them, and took a transfer of all the property, and continued the business; and a judgment was obtained against the new company for a debt of the old company. *Held*, that the property of the new company, and the personal liability of its stockholders, constituted the primary fund for the payment of the judgment, and must be exhausted before the personal liability of the stockholders in the old company could be resorted to. The stockholders of the old company, if liable at all, are liable rather as sureties. (*Supreme Ct., Sp. T.*, 1848, *Cushman* v. *Shepard*, 4 Barb., 113.) *It seems*, that if the statute authorizes the directors to require payment of the sums subscribed, not specifying the stockholders as the persons from whom it may be required, and the subscription is to pay the sum subscribed when called for by the directors, the subscriber is liable, though, before the call, his stock is transferred to another. (*Schenectady and Saratoga Plank-road Co.* v. *Thatcher*, 11 N. Y. [1 Kern.], 102.)

One who subscribes for stock is a stockholder within a provision of the

charter making stockholders individually liable for its debts, though he has paid nothing on his subscription, and received no certificate of stock. As long as the relations subsisting between subscribers and the corporation are such that the corporation can compel them to pay for their stock, the policy of the act requires that they should be considered stockholders. (*Supreme Ct.*, 1835, *Spear* v. *Crawford*, 14 Wend., 20.) The liability of the subscribers to the corporation is a part of the corporate property, and enforceable for the benefit of creditors; and a provision of the statute that each stockholder shall be liable for debts to the extent of his respective shares, gives an additional liability, and to the extent of the amount of stock held, not merely to the amount they have paid in. (*Ct. of Errors*, 1826, *Briggs* v. *Penniman*, 8 Cow., 387; affirming S. C., Hopk., 300.)

Individual liability for corporate debts.

One who had subscribed for stock in a manufacturing corporation, under a verbal agreement that one-half of it should belong to and be paid for by another person—*Held*, liable as a stockholder to the full amount; but entitled to recover half of his payment from his co-owner. (*Ct. of Appeals*, 1864, *Stover* v. *Flack*, 30 N. Y., 64; affirming S. C., 41 Barb., 162.) A subscription by one of several heirs, as follows: "Estate of N. W., 100 shares, $10,000," not binding either upon himself or his co-heirs. (*Supreme Ct.*, 1854, *Troy and Boston R. R. Co.* v. *Warren*, 18 Barb., 310.)

Under a charter authorizing absolute subscriptions for stock in a corporation for the construction of a public highway, subscriptions, conditioned on the adoption of a particular locality or terminus, are void as against public policy. (*Supreme Ct.*, 1841, *Butternuts and Oxford Turnpike Co.* v. *North*, 1 Hill, 518; *Ct. of Appeals*, 1857, *Fort Edward and Fort Miller Plank-road Co.* v. *Payne*, 15 N. Y. [1 Smith], 583.) *So held*, also, of subscriptions conditioned on payment of dividends, and imposing restraints on the power of the directors to call in stock. (*Supreme Ct.*, 1854, *Troy and Boston R. R. Co.* v. *Tibbitts*, 18 Barb., 297.)

The charter required that the capital stock, property, and concerns of the corporation should be managed by five directors, who should be stockholders, and the corporation was subject to the provisions of 1 Rev. Stat., 595, 605, title 3, 4. *Held*, that the company could do no act except through its directors. When the charter prescribes the mode of action, its injunctions must be rigidly pursued. (8 Wheat., 358; Ang. & A. on Corp., 207.) The stockholders had no power to make a lease of the whole property of the corporation, or do any other administrative act in the management of affairs. If such a lease could be made at all, it could be executed only in pursuance of the act of the directors, who are the body appointed by the charter for the management of its affairs. It is no answer that the individual stockholders who were present at the meeting when the lease was ordered, were also directors, if they did not meet or act as directors, but as stockholders. (4 Burr., 2515, 2521; *Supreme Ct.*, 1851, *Conro* v. *Port Henry Iron Co.*, 12 Barb., 27; to similar effect are *McCullough* v. *Moss*, 5 Den., 567; *Cammeyer* v. *United German Lutheran Churches*, 2 Sandf. Ch., 186.) That the stockholders cannot exercise powers which, by the charter, are vested in the directors. (*McCullough* v. *Moss*, 5 Den, 567.)

§ 106. *Stockholder's liability for debts due laborers and servants of the corporation.*—Each and all the stockholders of such [*railroad*] corporation shall be jointly and severally

liable for the debts due or owing to any of its laborers or servants, other than contractors, for personal service for ninety days service or less than ninety days service performed for such corporation, but shall not be liable to an action therefor before an execution shall be returned unsatisfied in whole or in part against the corporation, and the amount due on such execution shall be the amount recoverable with costs against such stockholders. Before such laborer or servant shall charge such stockholder for such ninety days service or less than ninety days service he shall give notice in writing within twenty days after the performance of such service that he intends to so hold him liable, and shall commence such action therefor within thirty days after the return of such execution unsatisfied as above mentioned, and every such stockholder against whom any such recovery by such laborer or servant shall have been had shall have the right to recover the same of the other stock holders in such corporation in ratable proportion to the amount of the stock they shall respectively hold with himself. (*Chap.* 392, *Laws of* 1875, § 8.)

(*See* § 105, *ante.*)

This section extends the services of the laborer or servant for which the stockholder is made liable to ninety days instead of thirty, and is a substitute for section 16 of the Laws of 1854, although not so stated in the act, neither has the preceding section in the text, § 105, been repealed. The engineer, the master mechanic and the conductor is as fairly entitled to the benefit of the statute as is the man who shovels gravel. The latter is in law no more nor no less a servant of the company than either one of the foremen; there is no middle ground between restricting it to day laborers and applying it to all persons employed in the service of the company who have not a different, proper and distinctive appellation, such as officers and agents of the company, than the servant who employs and pays the man who works with him, is fully entitled to the benefit of the maxim, *qui facit per alium facit per se.* (*Conant* v. *Van Schaick*, 24 Barb., 99.) A consulting engineer is not within the spirit or words of the act; his services are professional as distinguished from manual, and the statute was intended to protect men who work with their hands rather than their heads. (*Everson* v. *Brown*, 38 Barb., 390.)

A contractor with a railroad company for the construction of a part of its road, is not a "laborer" or "servant" within the provision of the general railroad act, rendering stockholders of the company liable for debts due to its laborers and servants. The intention of the Legislature was to throw a special protection around that class of persons who should actually perform the manual labor of the company. (*Ct. of Appeals*, 1862, *Akin* v. *Wasson*, 24 N. Y., 482; *Supreme Ct.*, 1860, *Boutwell* v. *Townsend*, 37 Barb., 205.) Neither does the act apply to a secretary of the company. Although, in a certain sense, he is a servant of the company, he is not so within the meaning of the statute. (*Coffin* v. *Reynolds*, 37 N. Y., 646.) The design of the statute was to afford protection to a class of employees known as laborers and servants, and not as officers and agents of the company. It was deemed proper by the Legislature

to leave the latter class to their remedy against the company only. The former are occupied with their labor and have no means of knowing anything of the pecuniary condition of the company, while the latter are generally better acquainted with that than the general creditors, and there is no reason why the officers should have any additional security for their services than the general creditors. (*Id.*, and the other cases above cited; see *Warner* v. *H. R. R. Co.*, 5 How. Pr., 456.) The part of section 10—which makes the stockholders of every company jointly and severally liable for all debts due and owing to any of its laborers and servants for services performed for such corporation—provides for the payment of the immediate servants, laborers and employees of the company itself, in contradistinction to the laborers employed by contractors in the construction of the railroad, or of any part of the work. Section 12 makes provision for this latter class of laborers. (*Supreme Ct.*, 1860, *Gallaghe.* v. *Ashby*, 26 Barb., 143.)

Section 10 of the act of 1850 (Laws of 1850, 211, ch. 140)—which provides that stockholders in railroad corporations shall be individually liable for debts of their corporation in an action brought after judgment and execution unsatisfied against the corporation—places all judgment-creditors, whose judgments were not recovered for services rendered, upon an equal footing, without discrimination, in respect to the times the debts were contracted, or the judgments therefor recovered. (*Supreme Ct.*, 1856, *Rankin* v. *Elliott*, 14 How. Pr., 339; affirmed, *Ct. of Appeals*, 1857, 16 N. Y. [2 Smith], 377.)

After a receiver of an insolvent railroad corporation has been appointed, and an order made restraining proceedings against the company by any creditor, a creditor cannot bring an action under section 10 of the general railroad act, against a stockholder whose subscription is unpaid, to enforce his personal liability. The right of action for unpaid subscriptions is transferred to the receiver by his appointment, and an action thereon by a creditor is, in effect, an action against the company. (*Ct. of Appeals*, 1857, *Rankine* v. *Elliott*, 16 N. Y. [2 Smith], 377; affirming S. C., 14 How. Pr., 339.)

§ **107.** *Stockholders liability when whole capital stock not paid in.*—Where the whole capital of a corporation shall not have been paid in, and the capital paid shall be insufficient to satisfy the claims of its creditors, each stockholder shall be bound to pay on each share held by him the sum necessary to complete the amount of such share, as fixed by the charter of the company, or such proportion of that sum as shall be required to satisfy the debts of the company." (1 R. S., 600, § 5.)

Section 1 of chapter 140, Laws 1850, makes railroad corporations, in direct terms, subject to the foregoing provisions of the Revised Statutes. But see section 16, chapter 282, Laws 1854, and note to section 69, *ante*, and *Rochester* v. *Barnes*, 26 Barb., 651, as to whether section 16, chapter 282, Laws 1854 (§ 105, *ante*), has not repealed the liability created by the above provisions of the Revised Statutes.

§ **108.** *Stock held by executors, trustees, etc.*—No person holding stock in any such company, as executor, administrator, guardian or trustee, and no person holding such

stock as collateral security, shall be personally subject to any liability as stockholder of such company; but the person pledging such stock shall be considered as holding the same, and shall be liable as a stockholder accordingly; and the estates and funds in the hands of such executor, administrator, guardian or trustee, shall be liable in like manner, and to the same extent as the testator, or intestate, or the ward or person interested in such trust fund would have been if he had been living and competent to act, and held the same stock in his own name. (*General Railroad Act, Laws* 1850, *chap.* 140, § 11.)

If one person assumes a liability for another by subscribing to stock in his own name, but in their joint account, and on the subsequent insolvency of the corporation he is compelled to pay a sum equal to the amount of the stock by virtue of his individual liability as a stockholder, he may recover back a moiety thereof of the original subscription from the other party as money paid to his use. (*Stover* v. *Flack*, 30 N. Y., *64.) If one person subscribe for stock in his own name, but for the benefit of another, he is not exempted from individual liability as a trustee. So held, upon a construction of Laws of 1848, chap 40, §§ 16, 24, which was like unto the provisions of the general railroad law given in the text. (*Stover* v. *Flack, supra.*) A party who subscribes for a certain number of shares of stock is liable for the debts of the company, although he has paid nothing on his subscription and received no certificate of stock. (*Spear* v. *Crawford*, 14 Wend., 30.) His name appearing as stockholder on the corporate books, is presumptive evidence of the existence of such relationship between himself and the company, and the burden of proving the contrary is thrown upon him. (*Hoagland* v. *Bell*, 36 Barb., 57.)

§ **109.** *Relief of stockholders whose certificates of stock have been lost or destroyed.—When stockholders may apply for issue of duplicate certificate.*—Whenever any company, incorporated under the laws of this State, shall have refused to issue a new certificate of stock, in place of one theretofore issued by it, but which is alleged to have been lost or destroyed, the owner of such lost or destroyed certificate, or his legal representatives, may apply to the Supreme Court, at any special term thereof appointed to be held in the judicial district where such owner resides, for an order requiring such corporation to show cause why it should not be required to issue a new certificate of stock in place of the one so lost or destroyed. (*Laws* 1873, *chap.* 151, § 1.)

Application to be by petition.—Such application shall be by petition, duly verified by the owner, in which shall be stated the name of the corporation, the number and date of the certificate if known or can be ascertained by the petitioner, the number of shares of stock named therein and to whom issued, and as particular a statement of the

circumstances attending such loss or destruction as such petitioner shall be able to give. (*Idem*, § 1.)

Owner to show cause.—Upon the presentation of said petition, said court shall make an order requiring said corporation to show cause, at a time and place therein mentioned, why it should not be required to issue a new certificate of stock, in place of the one described in said petition. (*Idem*, § 1.)

Copy petition and order, how served.—A copy of said petition and of said order shall be served upon the president or other head of such corporation, or on the cashier, secretary or treasurer thereof, personally at least ten days before the time designated in said order for showing cause. (*Idem*, § 1.)

Court to summarily inquire into facts.—At the time and place specified in said order, and on proof of due service thereof, the said court shall proceed in a summary manner, and in such mode as it may deem advisable, to inquire into the truth of the facts stated in the petition, and shall hear such proofs and allegations as may be offered by or in behalf of the petitioner, or by or in behalf of said corporation or other party, relative to the subject matter of said inquiry. (*Idem*, § 2.)

When to make order that duplicate certificates be issued.—And if, upon such inquiry, the said court shall be satisfied that such petitioner is the lawful owner of the number of shares of the capital stock, or any part thereof, described in said petition, and that the certificate thereof has been lost or destroyed, and cannot after due diligence be found, and that no sufficient cause has been shown why a new certificate should not be issued in place thereof, it shall make an order requiring said corporation or other party, within such time as shall be therein designated, to issue and deliver to such petitioner a new certificate for the number of shares of the capital stock of said corporation which shall be specified in said order as owned by said petitioner, and the certificate for which shall have been lost or destroyed. (*Idem*, § 2.)

Petitioner to give security.—In making such order, the court shall direct that said petitioner deposit such security, or file such a bond in such form and with such sureties, as to the court shall appear sufficient to indemnify any person other than the petitioner who shall thereafter appear to be the lawful owner of such certificate stated to be lost or stolen; and the court may also direct the publication of such notice, either preceding or succeeding the making of such final order, as it shall deem proper. (*Idem*, § 2.)

Recourse to indemnity.—Any person or persons who shall thereafter claim any rights under said certificate so

alleged to have been lost or destroyed shall have recourse to said indemnity, and the said corporation shall be discharged of and from all liability to such person or persons, by reason of compliance with the order aforesaid and obedience to said order, may be enforced by the said court by attachments against the officer or officers of said corporation, on proof of his or their refusal to comply with the same. (*Idem*, § 2, *chap.* 151, *Laws of* 1873.)

§ **110.** *Actions against stockholders, who named as defendants.*—In any such action against the stockholders of any corporation or joint-stock company which shall have been organized under the laws of this State, it shall be sufficient to name as defendants the persons appearing as stockholders on the stock books of said corporation or company by the name or names there appearing; but the court in which such action is pending may, at any time before final judgment, permit the process, pleadings, and proceedings in any such action to be amended on motion of either party by striking out the name of any deceased stockholder, or the name of any person wrongfully inserted, and by inserting the proper name of the party intended, or the name or names of the proper heir, executor, administrator or personal representatives of any deceased party, and such amendment may be allowed by the court at any time without costs and without prejudice to the previous proceedings had in any such action. (*Laws* 1869, *chap.* 157, § 2.)

Section 1 of said act was repealed by chapter 416, Laws 1877.

§ **111.** *Service of process on stockholders by publication.*—Chapter 157, section 1, of the Laws of 1869, originally provided for the service of process, by publication, upon stockholders of corporations. This was repealed by the repealing act (chap. 417 of the Laws of 1877) passed in connection with the Code of Civil Procedure, and this matter is now regulated by subdivision 7 of section 438 of the Code of Civil Procedure, which provides that an order directing the service of a summons upon a defendant out of the State, or by publication, may be made when the action is against the stockholders of a corporation or joint-stock company, and is authorized by a law of the State, and the defendant is a stockholder thereof.

§ **112.** *Stockholders admission not evidence against corporation.*—The admission of a member of an aggregate corporation shall not be received as evidence against the corporation, unless it was made concerning and while engaged in

a transaction in which he was the authorized agent of the corporation. (*Code Civil Proc.*, § 839.)

§ **112**(*a*). *Transfer agents of foreign corporations to exhibit lists of stockholders thereof.*—The transfer agent in this State of any moneyed or other corporation, existing beyond the jurisdiction of this State (whether such agent shall be a corporation or a natural person), shall, at all reasonable times during the usual hours of transacting business, exhibit to any stockholder of such foreign corporation, when required by him, the transfer book of such foreign corporation, and also a list of the stockholders thereof (if in their power so to do). (*Laws* 1842, *chap.* 165, § 1.)

In case such transfer agent, or any clerk or officer of such agent, shall refuse to exhibit such transfer book, or a list of the stockholders of such foreign corporation as aforesaid, he shall, for every such offense, forfeit the sum of two hundred and fifty dollars, to be recovered by the person to whom such refusal was made. (*Laws* 1842, *chap.* 165, § 2.)

CHAPTER 9.

OF THE POWERS OF THE CORPORATION.

§ **113.** *General powers of the corporation under the general railroad act and its amendments.* —Every corporation formed under this act (*the General Railroad Act, chap.* 140, *Laws of* 1850) shall, in addition to the powers conferred on corporations in the third title of the eighteenth chapter of the first part of the Revised Statutes, have power

1. To cause such examination and surveys for its proposed railroad to be made as may be necessary to the selection of the most advantageous route; and for such purpose, by its officers or agents and servants, to enter upon the lands or waters of any person, but subject to the responsibility for all damages which shall be done thereto.

2. To take and hold such voluntary grants of real estate and other property as shall be made to it, to aid in the construction, maintenance and accommodation of its railroad; but the real estate received by voluntary grants shall be held and used for the purpose of such grant only.

3. To purchase, hold and use all such real estate and other property as may be necessary for the construction and maintenance of its railroad, and the stations and other accommodations necessary to accomplish the objects of its incorporation; but nothing herein contained shall be held as repealing, or in any way affecting, the act entitled "An act authorizing the construction of railroads upon Indian lands," passed May twelfth, eighteen hundred and thirty-six.

4. To lay out its road not exceeding six rods in width, and to construct the same; and for the purpose of cuttings and embankments, to take as much more land as may be necessary for the proper construction and security of the road; and to cut down any standing trees that may be in danger of falling on the road, making compensation therefor as provided in this act for lands taken for the use of the company.

5. To construct their road across, along or upon any

stream of water, water-course, street, highway, plank-road, turnpike, or across any of the canals of this State, which the route of its road shall intersect or touch; but the company shall restore the stream or water-course, street, highway, plank-road and turnpike thus intersected or touched to its former state, or to such state as not unnecessarily to have impaired its usefulness. Every company formed under this act shall be subject to the power vested in the canal commissioners by the seventeenth section of chapter two hundred and seventy-six of the session laws of eighteen hundred and thirty-four. Nothing in this act contained shall be construed to authorize the erection of any bridge, or any other obstructions across, in or over any stream or lake navigated by steam or sail boats, at the place where any bridge or other obstructions may be proposed to be placed; nor to authorize the construction of any railroad not already located in, upon or across any streets in any city, without the assent of the corporation of such city; nor to authorize any such railroad company to construct its road upon and along any highway, without the order of the Supreme Court of the judicial district in which said highway is situated, made at a special term of said court, after at least ten days' notice in writing of the intention to make application for said order shall have been given to the commissioner of highways of the town in which said highway is situated.

6. To cross, intersect, join and unite its railroad with any other railroad before constructed at any point on its route, and upon the ground of such other railroad company, with the necessary turnouts, sidings and switches, and other conveniences in furtherance of the objects of its connection. And every company whose railroad is or hereafter shall be intersected by any new railroad, shall unite with the owners of such new railroad in forming such intersections and connections and grant the facilities aforesaid; and if the two corporations cannot agree upon the amount of compensation to be made therefor, or the line or lines, the grade or grades, points and manner of such crossings and connections, the same shall be ascertained and determined by commissioners, one of whom must be a practical civil engineer, to be appointed by the courts, as is provided in this act in respect to acquiring title to real estate; and the said commissioners shall have full power to determine whether the crossing or crossings of any railroad before constructed shall be beneath, at, or above the existing grade of any such railroad and upon the route designated on the map of the company seeking the crossing required to be filed by section twenty-two of this act (Laws 1850, chap. 140), or otherwise. And all

companies whose railroads are or shall hereafter be crossed, intersected or joined as aforesaid, shall receive from each other and forward to their destination all goods, merchandise and other property intended for points on their respective roads, with the same dispatch and at a rate of freight not exceeding the local tariff rate charged for similar goods, merchandise and other property received at and forwarded from the same point for individual and other corporations.

7. To take and convey persons and property on their railroad by the power or force of steam or of animals, or by any mechanical power and to receive compensation therefor.

8. To erect and maintain all necessary and convenient buildings, stations, fixtures and machinery for the accommodation and use of their passengers, freights and business.

9. To regulate the time and manner in which passengers and property shall be transported, and the compensation to be paid therefor; but such compensation for any passenger and his ordinary baggage shall not exceed three cents per mile. The re-enactment of this provision shall not be construed as increasing the rate of passenger fare which any railroad of this State is now authorized to charge.

10. From time to time to borrow such sums of money as may be necessary for completing and finishing or operating their railroad, and to issue and dispose of their bonds for any amount so borrowed, and to mortgage their corporate property and franchises to secure the payment of any debt contracted by the company for the purpose aforesaid; and the directors of the company may confer on any holder of any bond issued for money borrowed as aforesaid, the right to convert the principal due or owing thereon into stock of said company, at any time not less than two nor more than twelve years from the date of the bond, under such regulations as the directors may see fit to adopt; provided, however, that if the already authorized capital stock of such corporation, at the time such bonds may be issued, shall not be sufficient to meet such conversion when made, the stockholders shall, before such issue, and in the manner hereinbefore provided, authorize an increase of capital stock to an extent sufficient to meet the deficiency. (*Laws* 1850, *chap.* 140, § 28, *as amended by Laws* 1864, *chap.* 582; *as amended by Laws* 1872, *chap.* 350; *as amended by Laws* 1880, *chap.* 133; *as amended by Laws* 1880, *chap.* 583, § 2.)

These general powers conferred by the preceding sections of the statute will be taken up and considered separately in the succeeding chapters, and the notes in regard to the same will be found collated as each power is separately considered hereafter.

The text, as given above, is section 28 of the general railroad act (*chap.* 140, *Laws of* 1850), as amended by the Laws of 1880 (*chap.* 133, § 2 *of the Laws of*

1880), which embraced a general amendment of the whole of section 28 as given above, except that subdivision 6 of § 28 was subsequently amended as given above by chapter 583 of the Laws of 1880.

Previous legislation.

The original section 28 of the general railroad act, with its amendments as they existed previous to chapter 133 of the Laws of 1880, was as follows:

§ 28. Every corporation formed under this act shall, in addition to the powers conferred on corporations in the third title of the eighteenth chapter of the first part of the Revised Statutes, have power:

1. To cause such examination and surveys for its proposed railroad to be made, as may be necessary to the selection of the most advantageous route; and for such purpose, by its officers or agents and servants, to enter upon the lands or waters of any person, but subject to responsibility for all damages which shall be done thereto.

2. To take and hold such voluntary grants of real estate and other property as shall be made to it, to aid in the construction, maintenance and accommodation of its railroad; but the real estate received by voluntary grant shall be held and used for the purposes of such grant only.

3. To purchase, hold and use all such real estate and other property as may be necessary for the construction and maintenance of its railroad, and the stations and other accommodations necessary to accomplish the objects of its incorporation; but nothing herein contained shall be held as repealing, or in any way affecting the act entitled "An act authorizing the construction of railroads upon Indian lands," passed May 12, 1836.

3. To lay out its road not exceeding six rods in width, and to construct the same; and for the purposes of cuttings and embankments, to take as much more land as may be necessary for the proper construction and security of the road, and to cut down any standing trees that may be in danger of falling on the road, making compensation therefor as provided in this act for lands taken for the use of the company.

5. To construct their road across, along, or upon any stream of water, watercourse, street, highway, plank-road, turnpike or canal, which the route of its road shall intersect or touch; but the company shall restore the stream or watercourse, street, highway, plank-road and turnpike thus intersected or touched, to its former state, or to such state as not unnecessarily to have impaired its usefulness. Every company formed under this act shall be subject to the power vested in the canal commissioners by the seventeenth section of chapter two hundred and seventy-six of the Session Laws of eighteen hundred and thirty-four. Nothing in this act contained shall be construed to authorize the erection of any bridge, or any other obstructions across, in or over any stream or lake navigated by steam or sail boats, at the place where any bridge or other obstructions may be proposed to be placed; nor to authorize the construction of any railroad not already located in, upon or across any streets in any city, without the assent of the corporation of said city.

Subdivision 5 was amended by chapter 582 of the Laws of 1864 by adding thereto the following: Nor to authorize any such railroad company to construct its road upon and along any highway, without the order of the Supreme Court of the judicial district in which said highway is situated, made at a special term of said court, after at least ten days' notice in writing of the intention to make

application for said order shall have been given to the commissioners of highways of the town in which said highway is situated.

6. To cross, intersect, join and unite its railroad with any other railroad before constructed, at any point on its route, and upon the grounds of such other railroad company, with the necessary turnouts, sidings and switches, and other conveniences in furtherance of the objects of its connections. And every company whose railroad is or shall be hereafter intersected by any new railroad, shall unite with the owners of such new railroad in forming such intersections and connections, and grant the facilities aforesaid; and if the two corporations cannot agree upon the amount of compensation to be made therefor, or the points and manner of such crossings and connections, the same shall be ascertained and determined by commissioners, to be appointed by the court as is provided in this act in respect to acquiring title to real estate.

Subdivision 6 was amended by chapter 350 of the Laws of 1872, by adding thereto the following:

"And all companies whose railroads are or shall hereafter be crossed, intersected or joined as aforesaid, shall receive from each other and forward to their destination all goods, merchandize, and other property intended for points on their respective roads, with the same dispatch and at a rate of freight not exceeding the local tariff rate charged for similar goods, merchandize and other property received and forwarded from the same point for individuals and other corporations."

And was subsequently further amended by chapter 133, section 2, of the Laws of 1880, as follows:

6. To cross, intersect, join and unite its railroad with any other railroad before constructed, at any point on its route, and upon the grounds of such other railroad company, with the necessary turnouts, siding and switches and other conveniences in furtherance of the objects of its connections. And every company whose railroad is or shall be hereafter intersected by any new railroad, shall unite with the owners of such new railroad in forming such intersections and connections, and grant the facilities aforesaid; and if the two corporations cannot agree upon the amount of compensation to be made therefor, or the points and manner of such crossings and connections, the same shall be ascertained and determined by commissioners to be appointed by the court as is provided in this act in respect to acquiring title to real estate; and all companies whose railroads are or shall hereafter be crossed, intersected or joined as aforesaid, shall receive from each other, and forward to their destination, all goods, merchandize and other property intended for points on their respective roads, with the same despatch, and at a rate of freight not exceeding the local tariff rate charged for similar goods, merchandize and other property received at and forwarded from the same points for individuals and other corporations.

And was subsequently amended by chapter 583, Laws of 1880, as given in the text.

7. To take and convey persons and property on their railroad by the power or force of steam or of animals, or by any mechanical power, and to receive compensation therefor.

8. To erect and maintain all necessary and convenient buildings, stations, fixtures and machinery for the accommodation and use of their passengers, freights and business.

9. To regulate the time and manner in which passengers and property shall be transported, and the compensation to be paid therefor; but such compensation, for any passenger and his ordinary baggage, shall not exceed three cents per mile.

10. From time to time to borrow such sums of money as may be necessary for completing and finishing or operating their railroad, and to issue and dispose of their bonds for any amount so borrowed, and to mortgage their corporate property and franchises to secure the payment of any debt contracted by the company for the purposes aforesaid; and the directors of the company may confer on any holder of any bond issued for money borrowed as aforesaid, the right to convert the principal due or owing thereon into stock of said company, at any time not exceeding ten years from the date of the bond, under such regulations as the directors may see fit to adopt.

§ **114.** *General powers conferred by the Revised Statutes.* (*See* §§ 8 *and* 113, *ante.*)

The following are the provisions of the third title of chapter 18, 1 R. S., referred to in the preceding section:

§ 1. Every corporation, as such, has power,

1. To have succession by its corporate name, for the period limited in its charter; and when no period is limited, perpetually;

2. To sue and be sued, complain and defend, in any court of law and equity;

3. To make use of a common seal, and alter the same at pleasure;

4. To hold, purchase and convey such real and personal estate as the purposes of the corporation shall require, not exceeding the amount limited in its charter;

5. To appoint such subordinate officers and agents as the business of the corporation shall require, and to allow them a suitable compensation;

6. To make by-laws not inconsistent with any existing law, for the management of its property, the regulation of its affairs, and for the transfer of its stock. (1 R. S., marg. p. 599, § 1.)

§ 2. The powers enumerated in the preceding section, shall vest in every corporation that shall hereafter be created, although they may not be specified in its charter, or in the act under which it shall be incorporated. 1 R. S., marg. p. 600, § 2.)

§ 3. In addition to the powers enumerated in the first section of this title, and to those expressly given in its charter, or in the act under which it is or shall be incorporated, no corporation shall possess or exercise any corporate powers, except such as shall be necessary to the exercise of the powers so enumerated and given. (1 R. S., marg. p. 600, § 3.)

§ 4. No corporation created, or to be created, and not expressly incorporated for banking purposes, shall by any

implication or construction, be deemed to possess the power of discounting bills, notes, or other evidences of debt, of receiving deposits, of buying gold and silver, bullion, or foreign coins, of buying and selling bills of exchange, or of issuing bills, notes, or other evidences of debt, upon loan, or for circulation as money. (1 R. S., marg. p. 600, § 6.)

§ 5. Where the whole capital of a corporation shall not have been paid in, and the capital paid, shall be insufficient to satisfy the claims of its creditors, each stockholder shall be bound to pay on each share held by him, the sum necessary to complete the amount of such share, as fixed by the charter of the company, or such proportion of that sum as shall be required to satisfy the debts of the company. (1 R. S., marg. p. 600, § 5.)

§ 6. When the corporate powers of any corporation are directed by its charter to be exercised by any particular body, or number of persons, a majority of such body, or persons, if it be not otherwise provided in the charter, shall be a sufficient number to form a board for the transaction of business; and every decision of a majority of the persons duly assembled as a board, shall be valid as a corporate act. (1 R. S., marg. p. 600, § 6.)

§ 8. The charter of every corporation that shall hereafter be granted by the Legislature shall be subject to alteration, suspension and repeal in the discretion of the Legislature. (1 R. S., marg. p. 600, § 8.)

§ 9. Upon the dissolution of any corporation created or to be created, and unless other persons shall be appointed by the Legislature, or by some court of competent authority, the directors or managers of the affairs of such corporation at the time of its dissolution, by whatever name they may be known in law, shall be the trustees of the creditors and stockholders of the corporation dissolved, and shall have full power to settle the affairs of the corporation, collect and pay the outstanding debts, and divide among the stockholders the moneys and other property that shall remain after the payment of debts and necessary expenses. (1 R. S., marg. p. 600, § 9.)

§ 10. The persons so constituted trustees, shall have authority to sue for and recover the debts and property of the dissolved corporation, by the name of the trustees of such corporation, describing it by its corporate name; and shall be jointly and severally responsible to the creditors and stockholders of such corporation, to the extent of its property and effects that shall come into their hands. (1 R. S., marg. p. 601, § 10.)

The seventh section of title 3, chapter 18, part 1 of the Revised Statutes, which is omitted above, reads as follows:

"§ 7. If any corporation hereafter created by the Legislature, shall not organize and commence the transaction of its business within one year from the date of its incorporation, its corporate powers shall cease."

Chapter 155 of the Laws of 1846, which was previous to the passage of the general railroad act, provided that the above section should not be so construed as to apply to any act for incorporating a railroad company which has, or shall have, in its own provisions, the terms and the time in which it shall be forfeited by non-user. The general railroad act (Laws 1850, chap. 140, § 1, *ante*, § 8), also exempts corporations formed under that act from subjection to the provisions of section seven. The above cited (§ 8, *ante*), *i. e.*, section 1, chapter 140, Laws 1850, provides that railroad corporations formed under that act shall possess all the powers and privileges granted to corporations, and be subject to the provisions contained in title three of chapter eighteen of the first part of the Revised Statute, except the provisions contained in the seventh section of the said title. These powers given by the provisions of the statute cited in the text, do not very essentially differ from those belonging to corporations at common law. (*Bowen* v. *Lease*, 5 Hill, 224.) For a discussion of the exercise of the powers which corporations had at common law, reference is made to Kyd, Potter, Angill & Ames, Hill, Fields and other authors upon corporations.

A provision in a charter, that the corporation shall be subject to the provisions of title 3, chapter 18, part 1 of the Revised Statutes, does not, by implication, exempt it from the operation of title four of the same chapter. (*Supreme Ct.*, 1843, *Bowen* v. *Lease*, 5 Hill, 221.) The objects of the several titles of that chapter discussed. (*Id.*) A corporation, though not in terms thereto empowered, may issue negotiable paper for a debt legitimately contracted. (*Supreme Ct.*, 1829, *Barker* v. *Mechanics' Fire Ins. Co.*, 3 Wend., 94; 1843, *Kelley* v. *Mayor of Brooklyn*, 4 Hill, 263.) A corporation may, by its agent, make a promissory note; but the authority of the agent, and that the note was given in the legitimate business of the company, must be proven. (*Ct. of Errors*, 1846, *McCullough* v. *Moss*, 5 Denio, 567; but see *Dubois* v. *N. Y. and Harlem R. R. Co.*, 1 N. Y. Leg. Obs., 362.) As to what is to be deemed settled by this case, see *Moss* v. *McCullough*, 7 Barb., 279; where, also, the substance of the opinion of Gardner, J., is stated. A corporation may, without special authority, make a note or draft, or accept a draft for a debt contracted in its legitimate business. (3 Wend., 94; 1 Cow., 513; 2 Hill, 265; 4 id., 263; 5 Denio, 567; 5 Barb., 218; 3 Comst., 430; *Supreme Ct.*, 1857, *Partridge* v. *Badger*, 25 Barb., 146.) Although a corporation can only enforce such contracts as it is, by its charter, authorized to make, yet where other persons have become interested, having dealt with the company in good faith believing in their power to contract, every presumption and intendment is made in favor of such power and its appropriate exercise. (*N. Y. Superior Ct.*, 1864, *Hope Mutual Life Ins. Co.* v. *Taylor*, 2 Rob., 278.) That a corporation is presumed capable of making every contract which a natural person could make—see *Feeny* v. *People's Fire Ins. Co.*, 2 Robt., 599.

§ 1. Sub. 2. That a corporation is capable of suing and being sued, notwithstanding its insolvency and a consequent transfer of all its assets to trustees. (*Willitts* v. *Waite*, 25 N. Y., 577.)

§ 1. Sub. 3. Where a seal of a public officer, or of a corporation, is authorized or required by law, it may be impressed directly on the paper. (Code Civil Proc., § 960, as amended 1877.)

§ 1. Sub. 4. Every corporation, as such, has, at common law, the capacity to take and grant property, and to contract obligations, in the same manner as an individual, so far as necessary and usual in the course of the business it transacts, as means to enable it to effect the object of incorporation, unless expressly prohibited by law or the provisions of its charter. And, with this limitation, it may deal precisely as if it were an individual, to attain its legitimate objects. (*A. V. Chan. Ct.*, 1844, *Barry* v. *Merchants' Exchange Co.*, 1 Sandf. Ch., 280; commented on in *Curtis* v. *Leavitt*, 15 N. Y. [1 Smith], 9, 62, 219, 262.)

§ 1. Sub. 5. See sec. 64, *ante*.

§ 1. Sub. 6. See sec. 51, *ante*. (For form of by-laws of a corporation, see the forms in the appendix.)

All corporations have the power to make by-laws, which are considered as private statutes for the government of the corporate body. (Angel & Ames on Corp., 65; 1 Kyd., 69; 1 Black. Com., 476.)

This power is usually conferred by express terms in the charter; when not, it is left to implication.

The following are the general rules in relation to by-laws:

1. If given by the charter they must strictly pursue the power given and not exceed it.

2. They must not be contrary to the constitution or laws of the United States or the State.

3. The power to make by-laws, when not declared to the contrary, must be exercised by a majority.

4. All by-laws must be reasonable, and this is a question for the court solely. (3 Pick., 426.)

5. They are binding on none but their own members. (19 Johns., 115.)

6. They may enforce their by-laws by pecuniary penalties. (2 Kyd., 156; Angel & Ames, 302.)

7. To be proved, they must be produced. (8 N. H. R., 35; 1 Har. & Gill [Md.], 324.)

A by-law of a corporation or board of officers, enacted under express authority of an act of the Legislature, and being in conformity to the power conferred, has the same force as though it were enacted by the Legislature. (4 Wheat., 652; *Supreme Ct.*, 1826, *Brick Presb. Church.* v. *Mayor, etc., of N. Y.*, 5 Cow., 538; *Sp. T.*, 1857, *McDermott* v. *Board of Police*, 5 Abb. Pr., 422.) It is the general law, that where the mode of electing officers is not prescribed by charter or immemorial usage, it may be wholly ordained by by-laws. (*Newlin* v. *Francis*, 3 T. R., 189; *Rex* v. *Passmore*, 3 id., 199.) A deed of the corporation executed pursuant to the direction of a quorum of the directors, no objection being taken at the time nor afterwards by any member of the board, must be considered as the corporate act, whether the meeting was duly convened or not under the by-laws. (*V. Chan. Ct.*, 1843, *Leavitt* v. *Yates*, 4 Edw., 134.) Power to make by-laws does not extend to creating lien on stock. (*Driscoll* v. *West Broadway, etc., Co.*, 59 N. Y., 69.)

§ 5. As to whether section five has become inoperative by reason of section 16, chapter 282, Laws of 1854, see note to § 69, *ante*.

§ 6. In regard to what constitutes a quorum, see § 45, *ante*.

§ 8. In regard to effect of alteration of charter, etc., see § 33, *ante*.

§ 115. *Limitation to powers of corporation.*—In addition to the powers enumerated in the first section of this title

[title 3, chapter 18 of part 1 of the Revised Statutes, *ante*, § 114] and to those expressly given in its charter or in the act under which it is or shall be incorporated, no corporation shall possess or exercise any corporate powers except such as shall be necessary to the exercise of the powers so enumerated and given. (1 R. S., 600, § 3.)

Extent of powers.

A corporation has no other powers than such as are specifically granted or are necessary to carry into effect the powers expressly granted. (*Supreme Ct.*, 1818, *People* v. *Utica Ins. Co.*, 15 Johns., 358; to the same effect, *Ct of Appeals*, 1850, is *Halstead* v. *Mayor, etc., of N. Y.*, 3 N. Y. [3 Comst.], 430; approved in *McMasters* v. *Reed*, 1 Grant [Penn.] Cas., 86.)

§ 116. *All existing railroad corporations to possess the powers and privileges contained in general railroad act.*—All existing railroad corporations within this State shall respectively have and possess all the powers and privileges contained in this act; and they shall be subject to all the duties, liabilities and provisions not inconsistent with the provisions of their charter, contained in sections nine, thirteen, fourteen, fifteen, sixteen, seventeen, eighteen, nineteen, twenty, twenty-one, twenty-three, twenty-four, twenty-five, twenty-six, twenty-seven, twenty-eight (except subdivision nine), thirty, thirty-one, thirty-two, thirty-three, thirty-four, thirty-five, thirty-six, thirty-seven, thirty-eight, thirty-nine, forty, forty-one, forty-two, forty-three, forty-four, forty-five, forty-six, of this act. (*Laws* 1850, *chap.* 140, § 49.)

Section nine relates to increase of stock; sections thirteen, fourteen, fifteen, sixteen, seventeen, eighteen, nineteen, twenty, twenty-one, relate to the acquisition of lands; twenty-three to change of route; twenty-four to crossing of highways and intersections; twenty-five to acquisition of State lands; twenty-six to acquiring title from trustees, etc.; twenty-eight to the powers conferred on corporations (subdivision nine of this section relates to regulation of trains and fares); thirty to employees wearing badges, etc.; thirty-one to annual reports; thirty-two to penalty for not making such reports; thirty-three to alteration of freight fares by Legislature; thirty-four to transportation of mails; thirty-five to refusals to pay fare; thirty-six to arrivals and departure of cars; thirty-seven to baggage arrangements; thirty-eight to formation of passenger trains; thirty-nine to sounding of bells and steam whistles; forty to sign-boards at road crossings; forty-one to intoxicated engineers or conductors; forty-two to willful injuries to railroad property; forty-three to collection of penalties imposed by railroad act; forty-four to fencing; forty-five to filing of maps; forty-six to duties of passengers riding on trains.